CONSOLIDATED DIGEST OF CASE LAWS (JANUARY 2013 TO DECEMBER 2013)

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

(Our research team has digested 3576 cases and an attempt has been made to digest important cases laws of the year 2013, section wise. The cases are digested in the descending order of hierarchy of judicial bodies i.e. the Supreme Court, High Courts, Tribunals and Advance Rulings. Important case laws on allied laws are also digested. There are separate chapters on reference to circulars, notifications and articles which are also arranged section wise and subject wise.)

Income-tax Act, 1961

S.2(1A) : Agricultural income – Tea manufacture – Composite income before apportionment. [S. 28(iiia)/(iiic), Rule 8 of the Income-tax Rules, 1962]
When an income shall be chargeable to tax under head of 'profits and gains derived from business', it would be wholly impermissible for Assessing Officer to treat income which fell within ambit of clause (iiia) and clause (iiic) of section 28, as income which was not composite income. Amount received from premium on import licence, sale of scrap, miscellaneous garden income and excise duty had direct nexus with assessee's activities of growing, manufacturing and selling of tea, same should be treated as composite income of assessee before apportionment. (AY. 2004-05)
McLeod Russel India Ltd. v. CIT (2013) 218 Taxman 139 (Mag.)(Gau.)(HC)

S.2(1A) : Agricultural income – Ownership of land is not a prerequisite – Firm can also claim exemption in respect of agricultural income derived from agricultural activity. [S. 2(23)]
Assessee firm claimed exemption in respect of its agricultural income. The AO rejected assessee's claim on two grounds one is assessee was not the owner of the land and secondly being an artificial person, created by law; it could not be an agriculturist, conducting any of the agricultural activities of its own. The CIT(A) allowed assessee's claim. On revenue's appeal in Tribunal, Tribunal dismissed the appeal of the revenue and held that in order to come within the ambit of the Act, the person has to be an agriculturist and it was sufficient if revenue was derived from agricultural activities conducted on a land situated in India. Tribunal further held that a cultivator may be the owner but it is not necessary that he has to be the owner. The revenue was derived from land or from agricultural operations only. Relationship between MSFC Ltd. and the assessee firm could be described as that of the landlord and a tenant. The assessee firm had to make the payment of a fixed sum of Rs. 70 lakhs every year to "M' during the subsistence of the agreement regardless of production from the agricultural farm. Therefore, AO was not correct in taking such a view. (A.Ys. 2002-03 & 2003-04)
ITO v. Gajanan Agro Farms (2013) 142 ITD 571 / 156 TTJ 679 / 92 DTR 141 (Pune)(Trib.)

S.2(1A) : Agricultural Income – Assessee filing a letter explaining ownership of agricultural land purchased in 1986-87 and disclosing capital gains on sale thereof in subsequent year – Seized material not suggesting inflation of agricultural income – Income not to be treated as income from other sources. [S. 153A]

The Assessing Officer made an addition on the ground that no agricultural lands were recorded in the balance-sheet and the assessee had not shown any documentary evidence in support of his claim. He accordingly treated the income claimed as not agricultural income but as income from other sources. Before the Commissioner (Appeals) the assessee contended that complete details of agricultural holdings were filed before the Assessing Officer and that he had also offered capital gains to tax on sale of agricultural lands in the financial year 2005-06, which was accepted by the Assessing Officer. The Commissioner (Appeals) held that this sort of addition could not be made in an assessment completed under section 153A without any reference to the seized material and that it was also not the case of the Assessing Officer that the seized material, if any, suggested inflation of agricultural income. The Commissioner (Appeals) treated the income as agricultural income and not as income from other sources as the assessee had filed a letter explaining that the ownership of the agricultural land purchased in the year 1986-87 by way of proper evidence and the requirement of using material being found during the course of search operation was not of any relevance and that it was not the case of the Assessing Officer that the seized material, if any, suggested inflation of agricultural income. On appeal: Held, that the order of the Commissioner (Appeals) was correct. (AYs. 2002-03 to 2008-09)
ACIT v. Mir Mazharuddin (2013) 22 ITR 314 / 59 SOT 9 (URO) (Hyd.)(Trib.)

S.2(14) : Capital asset – Agricultural land – Urban land – Distance from municipality – Different States – Assessable as capital gains [S. 45]
Land within specified distance from Panchkula municipality fell in the State of Haryana while the land was in the State of Punjab. Thus, the land was urban land for the purpose of the definition of "capital asset". The concept of municipality as a unit of State or the fact that a State has no jurisdiction to make law beyond its territory have no relevance for the purpose of determining whether a particular land was "capital asset"' or not for the purpose of taxing capital gains. Even if the municipality and the land fall in different States, the land will continue to be urban land and gains on sale of agricultural is assessable as capital gains. (AY. 1997-98)
CIT v. Anjana Sehgal (Smt.) (2013) 355 ITR 294 / (2014) 220 Taxman 204 (P&H)(HC)

S.2(14) : Capital asset – Paintings – Personal effects – Gains from transfer of paintings is not assessable as capital gains [S. 45]
Capital gains tax on sale of paintings is liable only with effect from 1-4-2008 in respect of the assessment year 2008-09 onwards and not in respect of earlier assessment years. (AY. 2005-06)
CIT v. Kuruvilla Abraham (2013) 215 Taxman 644 / 356 ITR 519 / 88 DTR 291 (Mad.)(HC)
Editorial: Finance Act, 2007, with effect from April 1, 2008, Law is amended, which is applicable to Asst year 2008-09 and onwards.

S.2(14) : Capital asset – Agricultural land – Land situated beyond 8 kms of municipal limit – Not liable to capital gains tax – No substantial question of law [S. 260A]
The assessee sold different plots of land, which were claimed to be agricultural land, situated at distance of more than 8 kms. from municipal limits. In support the assessee furnished certificate of Tahsildar and letter of District Town Planning stating that the land was situated beyond 8 kms. from outer limits of the municipal corporation. Assessing Officer disallowed the claim. On appeal Commissioner (Appeals) decided in issue in favour of assessee. Appeal of the department was dismissed by Tribunal. On appeal by revenue the court held that a question of law can be raised only if it arises from facts as found by Income-tax authorities. Therefore, where the Tribunal did not consider a question raised by revenue that land in question was not agricultural land as the Assessing Officer had not doubted such fact, order of Tribunal did not call for any interference. (A.Ys. 2008-09, 2009-10)
CIT v. Nirmal Bansal (2013) 215 Taxman 639 / (2014) 99 DTR 173 (Delhi)(HC)
CIT v. Manju Bansal (2013) 215 Taxman 639 / (2014) 99 DTR 173 (Delhi)(HC)

S.2(14) : Capital asset – Rural agricultural land – Distance of 5 km is held to be capital asset and liable to be assessed as capital gain

The Central Government has published a notification dated 6-1-1994 contemplating that the area up to a distance of 5 km from the municipal limits of Panchkula in all directions shall not be an agricultural land. Since the impugned land fell outside the 5 km limit, it was held to be capital asset. The expression 'Municipality' in section 2(14) of the Act is very wide. It is not restricted to a Municipality constituted under the relevant Municipal Laws such as Haryana Municipal Act, but it would include any other area known by any other name. Sub-clause (a) of clause (iii) of section 2(14) deals with an area which falls within the jurisdiction of a Municipality, whereas clause (b) enable the Central Government to declare an area situated within 8 kms from the local limits of any Municipality referred to in clause (a) to notify having regard to extent and scope for urbanization of that area. The Notification dated 6-1-1994 takes into its ambit an area within 5 kms of the Municipality in the expression 'capital asset'. Therefore, the urban area developed by the Authority forms part of a Municipality. The expression 'by any other name' appearing in item (a) of clause (iii) of Section 2(14) has to be read *ejusdemgeneris* with the earlier expressions i.e. municipal corporation, notified area committee, town area committee, town committee. In view of the above, it is held that the land, subject matter of acquisition, is a capital asset falling within the scope of clause (iii) of section 2(14). (AY. 2004-05)

CIT v. Rani Tara Devi (Smt.) (2013) 355 ITR 457 / 214 Taxman 321 / 85 DTR 374 / 258 CTR 225 (P&H)(HC)

CIT v. Shakuntla Devi (Smt.) (2013) 258 CTR 225 (P&H)(HC)

S.2(14) : Capital asset – Personal effect – Inherited assets – Sale consideration is not liable to capital gain tax [S. 45]

Assessee sold certain items such as furniture, carpets, paintings, watches and crystal items inherited from his father in assessment year in question, said items being in nature of 'personal effects,' The Court held that the assessee was not liable to pay capital gain tax on sale of those items. Amendment to section 2(14), which has been brought about by the Finance Act, 2007 with, effect from 1-4-2008 and which alters the clause pertaining to 'personal effects,' has prospective application. With effect from 1-4-2008 even paintings, sculptures, works of art, archaeological collections and drawings, in addition to jewellery, have been excluded from the expression 'personal effects' which would be applicable from 1-4-2008. (AY. 2002-03)

Faiz Murtaza Ali v. CIT (2013) 214 Taxman 30 / 85 DTR 33 / (2014) 360 ITR 200 (Delhi)(HC)

S.2(14) : Capital asset – Pattadar passbook – Agricultural land Capital gain on acquisition of land was held to be exempt [S. 10(37)]

It was noted that as per copy of pattadar pass book, assessee was an agriculturist. Further, returns of income for earlier assessment years had been furnished to submit that agricultural income from said land had been declared for two years immediately preceding date of transfer. Held, on facts, assessee satisfied requirements of section 10(37) and, thus, capital gain, if any, received by assessee on acquisition of land was exempt from tax. (AY. 2005-06)

Vinumoorthy Varalaxmi (Smt.) v. ITO (2013) 59 SOT 216 (Hyd.)(Trib.)

S.2(14) : Capital asset – Part of business undertaking – Right in property – Assessable as capital gain and not as business income [Ss. 2(47), 28(i), 45]

Right over a property, which is part and parcel of business undertaking of assessee, constitutes capital asset as per section 2(14), and relinquishment of right over such property is transfer of capital asset under section 2(47). Therefore, where the assessee, engaged in property development, had entered into agreement for purchase of property for setting up corporate office, gain on relinquishment of right in such property was taxable as capital gain and not as business income. (AY. 2008-09)

SSPDL Ltd. v. DCIT (2013) 59 SOT 68 (URO)(Hyd.)(Trib.)

S.2(14) : Capital asset – Agricultural land – Municipal limit – Date of notification is relevant for assessing capital gains [Ss. 45, 54F]
Agricultural land, though located beyond 8 kms. from municipal limits of Jaipur municipality as on date of impugned CBDT notification No. 9447 dated 6-1-1994, but subsequently fell within distance of 8 kms from municipal limits due to expansion of municipal limits would still be regarded as agricultural land not falling in definition of capital asset in terms of section 2(14)(iii)(b). (AY. 2008-09)
Subha Tripathi (Smt.)(Dr.) v. DCIT (2013) 58 SOT 139 (Jaipur)(Trib.)

S.2(14) : Capital asset – Agricultural land – Situated within 8 km
Since the land in question was situated within 8 km from local limits of Hyderabad Municipal Corporation which was notified area, it cannot be treated as agricultural land. (AY. 2007-2008)
Syed Nawab Hussain v. ACIT (2013) 24 ITR 180 / (2014) 61 SOT 18 (URO)(Hyd.)(Trib.)

S.2(14) : Capital asset – Agricultural land – Municipality – Local authority Hyderabad Airport Development Authority – Sale of land beyond 8 Kms of Municipality limits is not liable to capital gain tax. [S. 10(20), Constitution of India – Articles 243 P(e) & 243R – General Clauses Act. S. 3(21)]
The assessee sold the agricultural land. The assessee claimed that the capital gain tax is not leviable. The Assessing Officer held that the land is within the limits of HADA which is Government notified local authority and was a municipality within the meaning of section 2(14)(iii)(a), therefore, the land sold by the assessee was non-agricultural land. The Government of Andhra Pradesh issued a land acquisition notification dated 16-5-2007 for the acquisition of the above land of the assessee to develop into an integrated township. On appeal the Tribunal held that the Hyderabad Airport Development Authority had been constituted under provisions of Andhra Pradesh Urban Areas (Development) Act, 1975 as a Special Area Development Authority by State Government, it cannot be treated as a municipality for purposes of provisions of section 2(14) of the Act. In the revenue records the land is classified as agricultural land and has not been changed from agricultural land to non agricultural land at the time when the land was sold by the assessee. The land in question is brought in special Zone cannot be a determining factor by itself to say that the land was converted into use for non-agricultural purposes. As the agricultural land of assessee is outside the municipality and also 8 kms away from the outer limits of the Municipality, assessee's land does not come within the purview of section 2(14)(iii) either under clause (a) or (b), hence, cannot be considered as 'capital asset' within the meaning section, hence capital gain tax cannot be charged on sale of the said land. (AY. 2008-09)
T. Urmila (Smt.) v. ITO (2013) 57 SOT 90 (URO)(Hyd.)(Trib.)

S.2(14) : Capital asset – Agricultural land situated beyond 8 kms from municipal limits and beyond 19 kms from centre of city – Not a capital asset – Land shown in revenue records as agricultural compensation is not assessable as capital gains [S. 45]
The assessee's lands were acquired by Reliance Projects Engineering Association Ltd. through the Government of Gujarat and the assessee received compensation. He claimed the same as the agricultural income considering its agricultural nature. The Assessing Officer rejected the claim holding, that the assessee failed to provide proof that the land was agricultural and did not substantiate that the land was outside the purview of the definition of "capital asset" under section 2(14) of the Act, and treated the income as long-term capital gains. The Commissioner (Appeals) held that the land was located in a village which was 19.34 kms away from the main city. Further, the Commissioner (Appeals) opined that the Assessing Officer invoked the powers conferred by the Act and have obtained the Government records from the Land Revenue Department for ascertaining

whether the land fell within the boundaries of 8 kms from the municipal limits or not. Accordingly, the Commissioner (Appeals) held that the land was located outside the village, which was located at a distance of more than 19 kms away from city and granted relief to the assessee. On appeal by the Department :

Held, dismissing the appeal, that the land was located beyond 8 kms of the Municipal limits of the Jamnagar and was also located beyond 19 kms from the centre of the city of Jamnagar. On this issue, the definition of capital asset provided in section 2(14)(iii) was not met. There was no notification issued by the Central Government regarding the same being a capital asset. Therefore, the land held by the assessee was agricultural land. It was borne out from the records of the Revenue Department that the lands were described by the District Collector, Jamnagar, as agricultural lands. There was no material in the possession of the Assessing Officer to hold that the land was a capital asset within the meaning of section 2(14) of the Act. The decision of the Commissioner (Appeals) did not call for any interference (AY. 2007-08).

ITO v. Amrutilal B. Shah (2013) 22 ITR 668 / 58 SOT 144 (URO)(Mum.)(Trib.)

S.2(15) : Charitable purpose – Registration and annual fee – Nominal profit – Benefit of registration could not be denied [Ss. 10(23C), 11, 12, 12A]

Profit motive is determinative and critical factor to discern whether an activity is business, trade or commerce. However, charging a nominal fee to use coding system and to avail advantages and benefits therein was neither reflective of business aptitude nor indicative of profit oriented intent. Thus, the contention of revenue that petitioner charged fee, and therefore, was carrying on business, had to be rejected. Benefit of registrations could not be denied. Society is entitled registration under section 10(23C)(iv). (AY. 1996-97 to 2008-09)

GS1 India v. DGIT (2013) 262 CTR 585 / 219 Taxman 205 / 94 DTR 105 / (2014) 360 ITR 138 (Delhi)(HC)

S.2(15) : Charitable purpose – General public utility – Even if some profit in activity carried on by trust, dominant object to be seen [S. 11, 12A]

After 1-4-1984, even if there is some profit in activity carried on by trust / institution, so long as dominant object is of general public utility, trust / institution would be considered as established for charitable purpose.

CIT v. State Urban Development Agency (Suda) (2013) 218 Taxman 146 / 95 DTR 363 (All.)(HC)

S.2(15) : Charitable purpose – Conducting coaching classes and campus placements for a fee by the Institute of Chartered Accountants of India cannot be held as business, entitled exemption u/s. 2(15). [Ss. 10(23C)(vi), 11, 13]

The assessee institute was constituted under the ICAI Act, to regulate the profession of Chartered Accountants in India. Its activities included imparting education in the field of accountancy and conducting coaching classes. Assessee also charged fees for holding interviews with respect to campus placements. The assessee applied for registration u/s. 10(23C)(vi), which was rejected by the DGIT (Exemption) on ground that assessee was charging fees for holding coaching classes and campus placements, which amounted to carrying on business. As the assessee had not maintained separate books of account with respect to the activity of coaching students, the AO denied assessee's claim u/s. 11 of the Act. On appeal, the matter was remanded back to the DGIT (Exemptions) to consider the submissions of the assessee that its expenses were greater than the income from providing coaching to the students. The DGIT (Exemptions) once again rejected assessee's claim.

On a writ petition to the High Court it was *inter alia* held that:–

a. Indisputably, substantial activity of the assessee revolves around providing education to students for the purposes of feeding the profession of Chartered Accountancy in India.

b. The conduct of the courses by the assessee cannot be equated or categorized as coaching classes conducted by private institutions for students to appear in entrance examination or for pre-admission in examinations being conducted by universities and other Institutions.
c. The reasoning of the DGIT(E) that holding interviews for a fee for the purposes of campus placement of its students amount to carrying on a business, is not acceptable. Campus placement is only a small incidental activity carried on by the assessee institute like several other universities for placement of their students in gainful employment. This too is an activity ancillary to the educational programme being conducted by the assessee institute and cannot be considered as a business being carried on by a placement agency. The object of the assessee institute is not to carry on such business, but to assist its students in securing employment. In this case, the object with which the activity of campus placement is carried on would determine its nature and the same is not business, trade or commerce.
d. Although, it is not essential that an activity be carried on for profit motive in order to be considered as business, but existence of profit motive would be a vital indicator in determining whether an organisation is carrying on business or not. The functions performed by the assessee institute are in the nature of public welfare and not for any private gain or profit and in this view, it cannot be said that the assessee is involved in carrying on any business, trade or commerce.

Accordingly, the High Court allowing the Writ Petitions directed the DGIT(E) to recognise the assessee as eligible u/s. 10(23C)(iv) as an institution established for charitable purposes having regard to its object. (AYs. 2006-07 to 2011-12)
Institute Of Chartered Accountants of India v. DGIT (2013) 217 Taxman 152 / 260 CTR 1 / 358 ITR 91 (Delhi)(HC)

S.2(15) : Charitable purpose – Society formed with an object to provide accommodation and facilities for marriages and other auspicious functions to members of a particular community – Cannot be regarded as society formed with charitable purpose [S. 12AA]
The assessee a society, registered under the Tamil Nadu Societies Registration Act, 1975, filed an application for registration u/s. 12AA. The DIT (Exemptions) observed that the assessee-society was formed to benefit only a particular community and did not fall within the purview of section 2(15). The Tribunal confirmed the decision of the DIT(E).
On appeal by the assessee, the High Court observed that the Scheme Award which contained the objects of the assessee society was pending before the District Court and hence it could not claim to be a society formed with charitable purpose. The contention of the assessee that the Tribunal had erroneously reached the conclusion that the objects are targeted towards a particular choultry alone was not accepted by the High Court, since as per the Scheme Award, it was clear that choultry and the assessee-society i.e. Gowri Ashram are one and the same. Accordingly, the High Court confirmed the Order of the Tribunal for not granting registration u/s. 12AA and dismissed the assessee's appeal, however, the High Court gave an opportunity to the assessee-society to renew its application once its objects are approved by the District Court.
Gowri Ashram v. DIT (Exemptions) (2013) 356 ITR 328 / 217 Taxman 97 / (2014) 265 CTR 272 (Mad.)(HC)

S.2(15) : Charitable purpose – "Advancement of any other object of public utility" – First proviso to s. 2(15) amended by Finance (No. 2) Act, 2009
First proviso to section 2(15) amended by Finance (No. 2) Act, 2009 is applicable in cases where an assessee claims that it is carrying on charitable purpose covered by residuary clause i.e., 'advancement of any other object of public utility', and proviso is not applicable in case an assessee or institution claims that it is carrying on charitable purposes like relief to poor, education, medical relief etc., i.e., purposes which have been specifically enumerated and stated in earlier part of section 2(15). Where question of application of income, quantum of surplus available or whether activities undertaken by third party to whom more than 85 per cent surplus was donated could be treated as

charitable activity under section 2(15) had not been examined while rejecting registration under section 10(23C)(iv), matter was to be remitted to decide issue afresh. (AY. 2004-05)
Hamdard Laboratories India v. DGIT (2013) 216 Taxman 201 / 87 DTR 16 (Delhi)(HC)

S.2(15) : Charitable purpose – Education – For publishing of magazines exemption cannot be denied [S. 11, 13]
The assessee-trust was running educational institutions. To aid spreading of education and update syllabus and other related educational aspects, two magazines were started its sister concern in which it made an investment. The Assessing Officer denied exemption u/s. 11 to the assessee on the ground that by publishing magazines, the assessee infringed s. 13(1)(c). Held the assessee was entitled to benefit u/s 11. (AYs. 1986-87, 1987-88)
CIT v. Vijaya Vani Educational Trust (2013) 215 Taxman 137 (Mag.)(AP)(HC)

S.2(15) : Charitable purpose – Trade business or commerce – Public utility – Activity of evolving, prescribing, standards Activities cannot be termed as business activity – Exemption was granted [S. 10(23C)]
The Bureau of Indian Standards (BIS), a sovereign entity created under the Bureau of Indian Standards Act, 1986, had been granted exemption under section 10(23C).
The Director of Income-tax (Exemption) withdrew the said exemption on the ground that activities of BIS were in the nature of business and hence, covered by the proviso to section 2(15). The assessee challenged the said order by way of Writ to the High Court, wherein it was held that, activities of Bureau of Indian Standards (BIS) in prescribing of standards of goods/articles and enforcing those standards through accreditation and continuing supervision through inspection, etc., cannot be considered as trade, business or commercial activity merely because testing procedures involves charging of fees. Accordingly allowing the Petition the DIG was directed to issue the exemption certificate under section 10(23C) of the Act.
Bureau of Indian Standards v. DGIT (E) (2013) 212 Taxman 210 / 89 DTR 93 / 260 CTR 39 / 358 ITR 78 (Delhi)(HC)

S.2(15) : Charitable purpose – Cancellation of registration – Letting out of Auditorium to outsiders – Promotion of educational activities [S. 12AA]
Auditorium incidentally let out to outsiders for commercial purpose will not fall in the category of "advancement of any other object of general public utility". Hence, cancellation of registration was not justified. (AY. 2009-10)
Lala Lajpatrai Memorial Trust v. DIT (Exemption) (2013) 28 ITR 546 (Mum.)(Trib.)

S.2(15) : Charitable purpose – Education – Yoga training through well structured yoga camps falls under category of imparting education [S. 11]
Imparting of yoga training through well structured yoga camps falls under category of imparting education which is one of charitable objects defined under section 2(15) and, such an activity is not hit by proviso to section 2(15). (AY. 2009-10)
Divya Yog Mandir Trust v. JCIT (2013) 60 SOT 154 (URO)(Delhi)(Trib.)

S.2(15) : Charitable purpose – Blood bank – Neither an educational institution, nor hospital or medical institution – Sale of fresh frozen plasma (FFP) with its associated concern – Not entitled to exemption [S. 11, 12, 13]
Assessee, registered under section 12AA, was engaged in running a blood bank. During year, it had entered into transaction of sale of fresh frozen plasma (FFP) with its associated concern. Assessing Officer held that the assessee had supplied FFP to patients at higher price and held that assessee was not eligible for deduction under section 11 as it had granted concessional benefit to its associated concern. Since assessee was not an educational institution and it also could not be said to be a hospital

or medical institution as it was not engaged in dispensing medical facility, assessee was not entitled to exemption under section 11. (AY. 2009-10)
Advance Transfusion Medicine Research Foundation v. ADIT(E) (2013) 28 ITR 566 / 60 SOT 276 (Ahd.)(Trib.)

S.2(15) : Charitable purpose – Educational – Nursing institution – Directed to grant registration [S. 12AA]
The assessee was running general nursery and mid wifery institution importing G.N.M. in nursing. It filed for registration under section 12AA. The Commissioner held assessee charging high fees, hence with profit motive and also the assessee was running a hostel, therefore the assessee not within the ambit of section 2(15). On appeal, the Tribunal deciding in favour of assessee held that from records it was found that after meeting expenditure on importing education only a small amount of surplus was left and thus there was no profit motive of the assessee. The provision of hostel facility for its students was only incidental to the aims and objects of assessee. The Commissioner was directed to grant registration to assessee trust. (AY. 2010-11)
Society for Advance Health Education v. CIT (2013) 145 ITD 257 / 28 ITR 706 (Agra)(Trib.)

S.2(15) : Charitable purpose – Objects of general public utility – Animal welfare cause [S. 12AA]
Advancement of animal welfare directed towards prevention and suppression of cruelty to animals or prevention or relief of suffering by animal is nothing but charity and society engaged in such activity falls within definition of general public utility as stated in section 2(15). (AY. 2010-11)
Retired Race Horse Welfare Society v. DIT (2013) 59 SOT 209 (Hyd.)(Trib.)

S.2(15) : Charitable purpose – Association of medical practitioners – Promotion of sale of nutritional medicine [S. 12AA]
The assessee was an association of medical practitioners and its object was only to provide services to medical professionals who were practicing in nutritional medicines; and that academic and research activity in environmental and nutritional medicine was only for purpose of promoting nutritional medicine and not for purpose of preservation of environment. The assessee could not be considered as a charitable institution and was not entitled for registration under section 12AA as it is not established for charitable purpose but for the purpose of promoting sale of nutritional medicine and promotion of medical practice in nutritional medicine.
Indian Nutritional Medical Association v. CIT (2013) 59 SOT 39 (URO)(Cochin)(Trib.)

S.2(15) : Charitable purpose – Teachings, ideals etc. of spiritual leaders with special emphasis on vegetarianism is charitable objects [S. 80G]
The assessee-trust engaged in the activities of propagating messages, teachings, ideals and philosophy of all religious and spiritual reformers, prophets and leading figures of world including Sikh Gurus with special emphasis on vegetarianism was entitled to renewal of exemption under section 80G(5) (AYs. 2008-09 to 2010-11)
Kuka Martyrs Memorial Trust v. CIT (2013) 59 SOT 41 (URO) (Chd.)(Trib.)

S.2(15) : Charitable purpose – Running of coaching classes – Not eligible for registration as charitable institution under section 12AA [S. 12AA]
Running of coaching classes cannot be treated as a charitable institution as provided in section 2(15) of the Act and therefore, not eligible for registration under section 12AA of the Act.
M. Star Charitable Society v. CIT (2013) 142 ITD 153 (Cochin)(Trib.)

S.2(15) : Charitable purpose – Object of general public utility – Charging service fee from customers for obtaining approval of competent authorities, such activity could not be

considered charitable in nature within meaning of section 2(15) and consequently, assessee could not be entitled to registration under section 12A [S. 12A]
Assessee society was engaged in providing services to the public to facilitate them in obtaining different kinds of licences, permission and registrations like birth, death, marriage certificates, driving licences, ration cards, arms licences senior citizen card, etc., by charging a fee for each type of services. The Tribunal held that, as assessee-society was charging service fee from customers for obtaining approval of competent authorities over and above prescribed amount, such activity could not be considered charitable in nature within meaning of section 2(15) and consequently, assessee could not entitled to registration under section 12A.
Sukhmani Society for Citizen Services v. CIT (2013) 36 taxmann.com 326 / 144 ITD 381 (Asr.)(Trib.)

S. 2(15) : Charitable purpose – Intention to make profit – Denial of exemption was held to be not justified [S. 11,12A]
Profit earned by sale of milk, fodder and other items by gaushala established by Mahatma Gandhi to breed and keep cows, to improve quality of cows and oxen, to produce and sell cow's milk and its various preparations was entitled to exemption. Held, intention to make profit was essential to attract disqualification and that some profit incidentally earned, is not sufficient. (AY. 2009-10)
Sabarmati Ashram Gaushala Trust v. Addl. DIT (E) (2013) 25 ITR 701 / 144 ITD 280 / 95 DTR 409 / (2014) 159 TTJ 553 (Ahd.)(Trib.)

S.2(15) : Charitable purpose – Objects of general public utility – Entitled for registration [S. 12A]
The assessee trust was established with a predominant purpose of development of urban areas, on application for registration under section 12A, CIT rejected on grounds that there was a profit motive in carrying the objectives. On appeal the Tribunal held the objects of the assessee are in the nature of general public utility and hence it was entitled for registration under section 12A. (AYs. 2003-04 to 2007-08)
Urban Improvement Trust v. CIT (2013) 142 ITD 313 / 24 ITR 622 / 152 TTJ 507 / 33 taxmann.com 58 (Jodh.)(Trib.)

S.2(15) : Charitable purpose – Society formed by State Government – Providing single window assistance, especially to foreign entrepreneurs is not eligible for exemption under section 11 [S. 11]
The assessee society provided single window clearance to entrepreneurs for a fee. Assessing Officer thereby denied exemption under section 11 as he held that the activity carried out is not charitable purpose as defined under section 2(15). On appeal CIT(A) upheld the order of the Assessing Officer on appeal to the Tribunal held, dismissing assessee appeal:
The assessee is providing single window clearance to foreign entrepreneurs for a fee in lieu of services rendered, which cannot be termed as a charitable activity and the assessee is held to be a service provider. (AY. 2009-10)
Tamil Nadu Industrial Guidance & Export Promotion Bureau v. ADIT (2013) 142 ITD 192/ 23 ITR 385 / 91 DTR 267 / 32 taxmann.com 319 (Chennai)(Trib.)

S.2(15) : Charitable purpose – Proviso attracted if activities carried are similar to trade, commerce or business. Use, application or retention of consideration received is irrelevant. Proviso will also apply to a regulatory body or a body incorporated by State Government or Central Government. All services rendered by the assessee were for consideration hence could not be regarded to have been established for charitable purpose. [S. 12A]
The main objects of the trust/society registered under section 12A was *inter alia* holding international film festival of India, advising the Indian Government on various policies and issues relating to entertainment industry in Goa, to build multiplexes, cinema halls, auditoriums, etc. The

CIT cancelled the registration under section 12A as he was of the opinion that the assessee could no longer be said to be carrying on charitable activities in view of the amended definition to section 2(15) of the Act. The Tribunal held that the receipts received were from the carrying on activity in the nature of trade, commerce or business or from the activity of rendering any service in relation to commerce or business. The Tribunal also held that the proviso to section 2(15) will also apply to a regulatory body or a body incorporated by Government as the section does not provide any exception under the proviso and accordingly the CIT had rightly cancelled the registration granted under section 12A of the Act. (AY. 2009-10)
Entertainment Society of Goa v. CIT (2013) 23 ITR 549 / 59 SOT 101 (URO)(Mum.)(Trib.)

S.2(15) : Charitable purpose – Imparting of educational activities are charitable in nature – Entitled to registration [S. 12A]
The assessee-society was formed with the main object of imparting education. It had made an application for registration under section 12A of the Act. The CIT rejected the application of the assessee-society for registration under section 12AA of the Act. On appeal by the assessee to the Hon'ble Income Tax Appellate Tribunal, Delhi held allowing the appeal:
Proviso to section 2(15) does not apply in the case of educational activities and where the purpose of a trust or institution is to impart education, it constitutes 'charitable purpose' even if it incidentally involves carrying on of commercial activities; assessee-society having been formed with the main object to impart education, it is entitled to registration under section 12A of the Act.
Shri Gian Ganga Vocational & Educational Society v. CIT (2013) 154 TTJ 74 / 85 DTR 66 / 143 ITD 297 (Delhi)(Trib.)

S.2(15) : Charitable purpose – Object of general public utility – Control of game of cricket is business activity – Cancellation of registration was justified [S. 12AA]
Since the assessee was carrying on revenue earning exercise by arranging international matches, IPL matches, etc. in such a way that maximum advertisement revenue was derived from any type of match, its activities did not come within conceptual framework of charity vis-à-vis activity of general public utility envisaged in s. 2(15). Cancellation of registration was justified. (AY. 2009-10)
Tamil Nadu Cricket Association v. DIT (2013) 22 ITR 473 / 57 SOT 439 / 22 ITR 673 (Chennai)(Trib.)

S.2(22)(e) : Deemed dividend – Loans and advances – Failure to offer explanation – Shareholder in companies – Deposits retained in firm – Assessed as deemed dividend [S. 28(iv)]
Amounts which had been collected from depositors on behalf of group companies was retained in the firm, in which assessee was partner. Since the amount so collected by the firm on behalf of group companies was supposed to be sent to the company promptly and also firm had showed the same on liability side in balance sheet, it was held to be a loan for the firm. Since assessee had failed to explain for what reason heavy deposits made by investors were retained by assessee in firm for a long period, it was a case of deemed income as assessee was a share holder in all companies. (AY. 1997-98)
CIT v. Subrata Roy (2013) 219 Taxman 133 / 38 taxmann.com 324 / (2014) 99 DTR 177 (All.)(HC)

S.2(22)(e) : Deemed dividend – Accumulated profit – Liabilities reduced from accumulated profits there was no profits – Could not be regarded as 'deemed dividend'
'Deemed dividend' taken together in hands of all persons cannot exceed accumulated profits of company. Since, in instant case, both the companies in question were having tax or excise liability during assessment year under consideration and as a result there were no accumulated profits in their hands in beginning of year, amount of loan taken by assessee from said companies could not be regarded as 'deemed dividend'. (AY. 1989-90)
CIT v. Vikram M. Kothari (2013) 37 taxmann.com 331 / 218 Taxman 59 (Mag)(All.)(HC)

S.2(22)(e) : Deemed dividend – Loan to shareholder – Sum received as advance on sale of land – Not assessable as deemed dividend

Sum received by assessee as advance for sale of land is not loan or advance, and hence, not taxable as deemed dividend. (AY. 2004-05)

CIT v. Om Prakash Suri (No.2) (2013) 359 ITR 41 (MP)(HC)

S.2(22)(e) : Deemed dividend – Loan – Common share holder – Not share holder in lending company – Cannot be treated as deemed dividend.

Loan advanced to the assessee cannot be treated as dividend in terms of section 2(22)(e), if the assessee is not a share holder of the lending company. (AYs. 2003-04, 2004-05)

CIT v. G.T.Z. Securities Ltd. (2013) 359 ITR 345 (J&K)(HC)

S. 2(22)(e) : Deemed dividend – Loans and advances – Genuineness of trust – Trust deed was created four years before search and notorised – Assessee had no beneficial interest – Addition cannot be made.

The assessee had taken loan from a company "C" in which he was having shareholding and voting power exceeding 10 per cent. The assessee contended that section 2(22)(e) was not applicable since all shares of said company had been settled in a trust resulting in no beneficial interest in said company. This explanation was rejected by the Assessing Officer and the Commissioner (Appeals). The Tribunal allowed assessee's claim after examination of trust deed and carrying out of all relevant enquiries. Held, where the Tribunal came to conclusion that trust was genuine, view of revenue that shares were not settled in said trust since there was no financial transaction in name of trust and trust deed was not found at time of search was not acceptable and therefore, loan could not be held as deemed dividend. (AY. 2006-07)

CIT v. Krupeshbhai N. Patel (2013) 359 ITR 504 / 216 Taxman 61 / 34 taxmann.com 245 (Guj.)(HC)

S.2(22)(e) : Deemed dividend – Loans or advances to share holder – Condition precedent.

Where assessee share holder had already divested his interest in shares of a company in favour of a trust, assessee could no more be said to be beneficial owner of those shares and, thus, any sum advanced by company to assessee subsequently could not be treated as deemed dividend. (AY. 2006-07)

CIT v. Navinbhai N. Patel (2013) 35 taxmann.com. 312 / 216 Taxman 137 (Mag.)(Guj.)(HC)

S.2(22)(e) : Deemed dividend – Loans or advances – Goods sold to sister concern provision of section 2(22)(e) cannot be made applicable

During the assessment proceedings, the Assessing Officer found that assessee had given certain amount as advance to its sister concern. The assessee's explanation was that said amount was not a loan or advance rather it represented value of goods sold to sister concern which the Assessing Officer rejected and made addition u/s. 2(22)(e). The Commissioner (Appeals) as well as Tribunal finding that assessee had in fact sold goods to its sister concern, set aside addition made by the Assessing Officer. Court held that since the amount in question involved business transaction and it could not be categorised as loan or advance, question of application of section 2(22)(e) did not arise. (AY. 2006-07)

CIT v. Shripad Concrete (P.) Ltd. (2013) 33 taxmann.com 614 / 215 Taxman 143 (Mag.)(Guj.)(HC)

S.2(22)(e) : Deemed dividend – Loan to company – Piercing of corporate veil

The two common share holders of the assessee and the other company, held 50% shares in that company but they held only 1.07% share capital of the assessee. Therefore, they did not satisfy the test of holding substantial interest in the assessee. (AY. 2006-07)

Source Hub India P. Ltd. v. ACIT (2013) 27 ITR 470 / (2014) 61 SOT 111 (Bang.)(Trib.)

S.2(22)(e) : Deemed dividend – Loans or advances – Trade advances – Provision is not applicable

Trade advances, which are in nature of money transacted to give effect to commercial transaction, would not fall within ambit of section 2(22)(e). (AY. 2008-09)

ACIT v. Pravin C. Pandya (2013) 60 SOT 133 (URO)(Indore)(Trib.)

S.2(22)(e) : Deemed dividend – Loan or advances – Amount received from dealers for onward remittances cannot be assessed as deemed dividend

Assessee received payments from its dealers on behalf of HHFL, in which assessee held 30 % shares, and remitted same to HHFL in 2-3 days. Assessing Officer held that amount received by assessee from dealers as loan/advance given by HHFL to assessee and deemed same as dividend under section 2(22)(e). Tribunal held that where there was no privity of contract between assessee and HHFL and there was no positive act of granting loan or advance given by HHFL to assessee. Assessee had not used funds for its own purposes, therefore amount received from dealers for remittance to HHFL could not be deemed as dividend. (AY. 2007-08)

Hero Motor Corp Ltd. v. ACIT (2013) 60 SOT 25 (URO) / 36 taxmann.com 103 / 156 TTJ 139 (Delhi)(Trib.)

S. 2(22)(e) : Deemed dividend – Inter-corporate deposits ("ICDs") are not "loans and advances" and are not assessable to tax as "deemed dividend"

The assessee received an inter-corporate deposit of ` 11.20 cr. from IFB Automotive Pvt. Ltd, a company in which it held 18% of the shares. The Assessing Officer and CIT(A) held that the said ICD constituted "loans and advances" and was assessable as "deemed dividend" in the assessee's hands u/s 2(22)(e). On appeal by the assessee to the Tribunal.

Tribunal held that inter corporate deposits cannot be treated as loan falling within the purview of section 2(22)(e) of the Act. (AY. 2009-10)

IFB Agro Industries Ltd. v. JCIT (2014) 42 taxmann.com 246 (Kol.)(Trib.)

S.2(22)(e) : Deemed dividend – Loans and advances – Commercial transaction – Provision is not applicable [S. 56]

The assessee, having a cold storage, held more than 10% shares of a company 'B', where public was not substantially interested. He received a sum of ` one crore from 'B' in advance against transaction of sale of cold storage claimed to be on account of commercial transaction. The assessee furnished copy of board meeting of company 'B', wherein a director of company was authorized to purchase cold storage of assessee up to maximum amount of ` 2 crores. Since the assessee had *prima facie* discharged burden in establishing that amount received by him was on account of commercial transaction, the provisions of section 2(22)(e) were not applicable to transaction in question. (AY. 2008-09)

Krishan Murari Lal Agarwal v. DCIT (2013) 59 SOT 136 (URO)(Agra)(Trib.)

S.2(22)(e) : Deemed dividend – Advance to Director for purchase of land on behalf of company – Provision does not attract

Advance granted to the director to purchase land in the name of the director but in which the company would be having beneficial interest does not attract section 2(22)(e).(AY. 2006-07) (ITA no 447 dt.26-12-2012)

ACIT v. C. V. Reddy (2013)-TIOL-168 (Bang.)(Trib.)

S.2(22)(e) : Deemed dividend – Accumulated profits do not include current years business profits since it accrues only at the end of year – Deemed dividend assessable should be reduced from the accumulated profits

For purpose of section 2(22)(e), accumulated profits do not include current year's business profit. It accrues only at end of year. Deemed dividend assessable in any of earlier years has to be reduced from accumulated profits even if it was not assessed in that year. Amount of accumulated profit has to be determined on date on which loans were given by company and not at end of year. (AY. 2007-08)
P. Satya Prasad v. ITO (2013) 141 ITD 403 / 155 TTJ 221 (Visakhapatnam)(Trib.)

S.2(22)(e) : Deemed dividend – Share application money – Colourable device – Not "loan or advance", cannot be assessed as deemed dividend
The assessee was a beneficial share holder of three companies named Kingston Properties P Ltd. (KPPL), New Dimensions Consultants P Ltd (NDCPL) & R. S. Estate Developers P Ltd. (RSEDPL). NDCPL & RESEDPL advanced various sums of money to KPPL towards "share application money". However, some of the advances were returned by KPPL while some were adjusted towards allotment of shares. The AO held that the transaction was a "colourable device" and a "loan and advance" which fell within the ambit of s. 2(22) (e). The said "loan and advance" was assessed as "deemed dividend" in the hands of the assessee – beneficial share holder. Following Universal Medicare Pvt. Ltd. (2010) 324 ITR 263 (Bom.) the CIT(A) reversed the AO. On appeal by the department to the Tribunal HELD dismissing the appeal:
Share application money or share application advance is distinct from 'loan or advance'. Although share application money is one kind of advance given with the intention to obtain the allotment of shares/equity/preference shares etc., such advances are different from the normal loan or advances specified both in section 269SS or 2(22)(e) of the Act. Unless the *mala fide* is demonstrated by the Assessing Officer with evidence, the book entries or resolution of the Board of the assessee become relevant and credible, which should not be dismissed without bringing any adverse material to demonstrate the contrary. It is also evident that share application money when partly returned without any allotment of shares, such refunds should not be classified as 'loan or advance' merely because share application advance is returned without allotment of share. In the instant case, the refund of the amount was done for commercial reasons and also in the best interest of the prospective share applicant. Further, it is self-explanatory that the assessee being a 'beneficial share holder', derives no benefit whatsoever, when the impugned 'share application money/advance' is finally returned without any allotment of shares for commercial reasons. In this kind of situations, the books entries become really relevant as they show the initial intentions of the parties into the transactions. It is undisputed that the books entries suggest clearly the 'share application' nature of the advance and not the 'loan or advance'. As such the revenue has merely suspected the transactions without containing any material to support the suspicion. Therefore, the share application money may be an advance but they are not advances which are referred to in section 2(22)(e) of the Act. Such advances, when returned without any allotment or part allotment of shares to the applicant/subscriber, will not take a nature of the loan merely because the same is repaid or returned or refunded in the same year or later years after keeping the money for some time with the company. So long as the original intention of payment of share application money is towards the allotment of shares of any kind, the same cannot be deemed as 'loan or advance' unless the *mala fide* intentions are exposed by the Assessing Officer with evidence. (AY. 2002-03 to 2007-08)
DCIT v. Vikas Oberoi (2013) 37 taxmann.com 46 (Mum.)(Trib.) www.itatonline.org.

S.2(22)(e) : Deemed dividend – Loans and advances – Legal fiction does not extend to broaden the concept of shareholder to make tax loans or advances as deemed dividend in the hands of deemed share holder (Companies Act, S. 153, 187C)
During search various papers relating to share holding pattern of Amod Stampings Pvt. Ltd. were seized. It was found that said company had granted loans to various companies wherein share holdings and voting power exceeded 10 per cent. It was explained that on creation of Trust a part of said company were settled in favour of Trust and after excluding of shares the assessee did not have more than 10 percent voting power and the assessee had no beneficial interest in the said Trust. The Assessing

Officer held that creation of Trust was an after thought and taxed the amount as deemed dividend. Before Commissioner (Appeals) it was contended that as per section 153 of the Companies Act a company is not permitted to include the name of the trust in the register of members. It was also contended that the provision of section 187C have been made ineffective w.e.f. 13th December, 2000 and therefore there is no requirement at present to declare beneficial interest etc., therefore such beneficial interest is not declared in the register of the Company or with the Registrar of Companies. However, Commissioner (Appeals) up held the addition. On appeal the Tribunal held that since the said Company was not permitted to include name of Trust in its register, name which was earlier noted as share holders remained same, however through a Board meeting it was resolved to acknowledge change in vesting of shares. Hence, in view of the facts deemed dividend could not be taxed in hands of assessee. Legal fiction created under section 2(22)(e) does not extend further for broadening concept of share holder so as to tax loans or advances as 'deemed dividend' in hands of a 'deeming share holder'. (AY. 2006-07)
Krupeshbhai N. Patel v. Dy. CIT (2013) 140 ITD 176 (Ahd.)(Trib.)
Editorial: Affirmed by High Court in CIT v. Krupeshbahi N. Patel (2014) 99 DTR 209 (Guj.)(HC)

S.2(22)(e) : Deemed dividend – Credit balance in Capital account – Non-encashment of cheque the amount is credited back to company's account cannot be assessed as deemed dividend
The assessee is running a proprietorship concern which was converted into private limited company. There was credit balance in capital account of the assessee in proprietorship concern against which payment was made by proprietorship concern to the assessee. However, because of conversion, cheque could not be encashed and same was returned to company which was credited to the assessee's account by company. Subsequently money was withdrawn by the assessee. It was held that the said amount could not be treated as deemed dividend. (AY. 2008-09)
DCIT v. Radhe Shyam Jain (2013) 140 ITD 244 / 86 DTR 42 / 154 TTJ 642 (Chandigarh)(Trib.)

S.2(22)(e) : Deemed dividend – Accumulated profits – Share premium account does not partake nature of commercial profit hence not be treated as accumulated profit
Share premium account would not partake nature of commercial profits and thus cannot be treated as accumulated profit. (AY. 2008-09)
DCIT v. Radhe Shyam Jain (2013) 140 ITD 244 / 86 DTR 42 / 154 TTJ 642 (Chandigarh)(Trib.)

S.2(22)(e) : Deemed dividend – Advance given to company in which assessee holds substantial stake is held to be deemed dividend
Assessing Officer treated advance taken by assessee from a company in which having substantial stake as deemed dividend. It was case of the assessee that since they had mortgaged their properties with bank to enable company to avail finance facilities from bank, advance by company was not a gratuitous loan or advance but in return for an advantage which company had already availed on account of mortgaging of properties done by assessee. However, it was a fact on record that assessee had not produced any documents to prove fact that personal properties of assessee were actually mortgaged with the bank for sake of availing loans by company. Assessee had also not produced any correspondence made either with bank or with company towards release of properties mortgaged. Thus, revenue rightly considered advances given by company to assessee as deemed dividend. (AYs. 2002-03, 2003-04 & 2006-07)
DCIT v. B. Dhanunjaya Rao (2013) 140 ITD 443 / 156 TTJ 562 (Hyd.)(Trib.)
DCIT v. B. Seeta Ratnam (2013) 156 TTJ 562 (Hyd.)(Trib.)

S.2(22)(e) : Deemed dividend – Advance towards Sale of Property – Matter remanded
The assessee is engaged in real estate development. The assessee received advance towards sale of property. The Assessing Officer treated the said amount as deemed dividend. Commissioner (Appeals) deleted the addition. On appeal by department the Tribunal set aside the order of

Commissioner (Appeals) as he failed to pass a speaking order. Matter remanded. (AYs. 2006-07, 2007-08)
ITO v. Nam Estates P. Ltd. (2013) 141 ITD 659 / 21 ITR 109 / 91 DTR 425 (Bang.)(Trib.)

S.2(22)(e) : Deemed dividend – Loans and advances – Business of finance – Loans would not be regarded as deemed dividend
The company from whom the assessee had obtained loan was engaged in the business of finance and hence it was contended that the loan transaction from the company fell in the exclusionary clause and the amount of loan was out of the purview of section 2(22)(e). The Department's contention was that financing was not a 'major' part of the business of the company and hence the assessee could not take shelter under the exclusionary clause. Before the Tribunal the assessee relied upon the decision of the Hon'ble Bombay High Court in *CIT v. Parle Plastics Ltd. (2011) 332 ITR 63 (Bom.)* (HC) wherein it was held that the said expression "substantial part of the business" in section 2(22)(e), clause (ii), does not connote an idea of being the "major part" or the part that constitutes majority of the whole. It was further explained by the Hon'ble Bombay High Court that any business of a company which the company does not regard as small, trivial or inconsequential as compared to the whole of the business is substantial business and various factors and circumstances would be required to be looked into while considering whether a part of the business of a company is its substantial business. It was held that sometimes a portion which contributes a substantial part of the turnover, though it contributes relatively small portion of the profit, would be a substantial part of the business. Similarly, a portion which is relatively small as compared to the total turnover, but generates a large portion, say more than 50% of the total profit of the company would also be a substantial part of his business. In view of the said decision of the Hon'ble Bombay High Court, it was held that the assessee's case fell in the exclusionary clause and hence section 2(22)(e) was not applicable. (AY. 2006-07)
Jayant H. Modi v. JCIT (2013) 56 SOT 84 (Mum.)(Trib.)

S.2(24) : Income – Interest on loan – Resolution not to charge interest – Mercantile system of accounting [S. 145]
The assessee company passed a resolution not to charge interest in view of financial difficulties of borrowing companies. However, in the year under consideration, it was found that the borrowing companies were in sound financial position. Therefore, the addition of interest was held to be justified. (AY. 2007-08)
CIT v. Brahmaputra Capital and Financial Services Ltd. (2013) 357 ITR 241 / 219 Taxman 68 (Delhi)(HC)

S.2(24) : Income – Lottery – Prize – Contessa car – Draw of lots under the incentive scheme of the National Savings Scheme was not lottery and was not liable to tax
The assessee was allotted a Contessa car as the first prize under the National Savings Scheme. The Assessing Officer treated the prize as winnings from lotteries within the meaning of section 2(24)(ix), subject to the special rates envisaged under section 115BB. Held that the car won by the assessee on draw of lots under the incentive scheme of the National Savings Scheme was not a lottery and was not liable to tax.
CIT v. S. P. Suguna Seelan (Dr.) (2013) 353 ITR 391 / 216 Taxman 149 (Mag.)(Mad.)(HC)

S.2(24) : Income – Gift – Prizes – Rewards – Received by non-professional sportsman shall not be income chargeable to tax [S. 4, 10(17A), 56(2)]
The assessee was a shooter who won medals international events including a gold medal in Olympic Games. Assessing Officer held that prize money received are liable to be taxed on the ground that Circular No. 447 dated 22-1-1986, is not applicable due to amendment in section 10(17A) and insertion of section 56(2)(v). On appeal Commissioner(Appeals) enhanced the Income and held that awards / rewards received from various Governments are also liable to be taxed. On appeal Tribunal

relying on the Circular No. 447 dt. 22-1-1986 held that the CBDT has distinguished a sportsman who is professional and who is non professional. In the case of a professional sportsman, the award received by him will be in the nature of benefit in exercise of his profession and therefore, will be liable to tax. But in the case of a non-professional, the award the award received by him will be in the nature of gift or personal testimonial and it will not be liable to be taxed. Since in the present case, the assessee is a non-professional sportsman, the rewards and awards received by him is not liable to be taxed. (AY. 2009-10)
Abhinav Bindra v. DCIT (2013) 35 taxmann.com 575 / 59 SOT 87 / 157 TTJ 696 / 94 DTR 45 / 28 ITR 376 (Delhi)(Trib.)

S.2(24) : Income – Tax reimbursement
The assessee company was engaged in the generation and distribution of power. It supplied power to GEB & ESC, under an agreement that tax payable by assessee company was to be reimbursed by both companies. The Assessing Officer held that such reimbursement would be added to assessee total income. The CIT(A) upheld Assessing Officer's order. The Tribunal held that such guise of payment of tax was actually the part of tariff charges receivable to the assessee and hence without any deduction, the same is liable for taxation.
Essar Power Ltd. v. Addl. CIT (2013) 142 ITD 251 / 32 taxmann.com 346 (Mum.)(Trib.)

S.2(24) : Income – Carbon credit – Capital or revenue – Income earned on sale of carbon credits is capital receipt and not revenue receipt liable to tax [S. 28(i), 45, 56]
The assessee company was generating power through biomass power generation unit. During the year, it had received CERs (Carbon Emission Reduction certificates) and sold CERs to a foreign company. The Assessing Officer held that the sale of CERs was a revenue receipt since they are a tradable and even quoted in stock exchange. The CIT(A) upheld the addition. The Tribunal deleted the addition by holding that carbon credit was in the nature of "an entitlement" received *inter alia* to improve world atmosphere heat and gas emissions. The entitlement is to be regarded as a capital receipt and cannot be taxed as a revenue receipt as it is not generated or created due to carrying on business but it is accrued due to "world concern" and "environment". The amount received for carbon credits does not have any element of profit and hence not liable for tax in terms of sections 2(24), 28, 45 and 56. (AY. 2007-08)
My Home Power Ltd. v. Dy. CIT (2013) 21 ITR 186 / 81 DTR 173 / 151 TTJ 616 (Hyd.)(Trib.)

S.2(24)(ix) : Income – Lottery – Car won as a prize in incentive scheme under NSS
The car won by the assessee on draw of lots under the incentive scheme of the National Savings Scheme was not a lottery and was not liable to tax.
CIT v. S. P. Suguna Seelan (Dr.) (2013) 353 ITR 391 / 216 Taxman 149 (Mad.)(HC)

S.2(28A) : Interest – Discount charges – Deduction at source – Business income hence not liable to deduct tax at source [S. 40(a)(i)]
The Court held that discount charges earned by assessee-financial service provider by way of discounting bill of exchange and promissory notes in favour of Indian companies is to be treated as business income, and not as interest income. (AYs. 2005-06 to 2007-08)
DIT (IT) v. Cargil TSF PTE Ltd. (2013) 212 Taxman 16 / (2012) 28 taxmann.com 227 (Delhi)(HC)

S.2(29A) : Long-term capital asset – Short-term capital gain – Conversion of leasehold rights into freehold rights – Gain would be long term capital gain [Ss. 2(42A), 2(42B), 2(29A), 2(29B), 2(4), 45]
The assessee purchased certain lease hold property on July 7, 1984. The assessee applied for free hold rights, which was granted by the Collector on March 29, 2004. She sold property on March 31, 2004 and declared long-term capital gains on the transfer. The Assessing Officer held that since the

property was sold within three days on March 31, 2004, the capital gains would amount to short term capital gains. The Tribunal held gain would be long-term. On appeal by the revenue the court held that, conversion of property into freehold property was nothing but improvement of the title over the property, as the assessee was the owner even prior to conversion. Therefore, it would not have any effect on the taxability of gain from such property, in so far as the period over which the property was held. Gain was rightly held as long-term. (AY. 2004-05)
CIT v. Rama Rani Kalia (Smt.) (2013) 358 ITR 499 / (2014) 221 Taxman 72 (All.)(HC)

S.2(29B) : Capital gains – Short-term or long-term – Purchase of property by tenant was held to be long term [S. 2(42A), 45]
Assessee bought the property of which she was one of the tenants. All the tenants entered into an agreement on 10th June 1999 and formed a co-operative society. The old building was demolished and a new building was constructed thereon. The tenants got possession in AY. 2002-03. Assessee sold her property on 17th September, 2004. Held that the agreement dated 10th June, 1999 itself gave interest and right in the impugned property to the assessee along with other tenants, the transaction clearly involved long-term capital gains. (AY. 2005-06)
Nila V. Shah (Mrs.) v. ITO (2013) 83 DTR 218 (Mum.)(Trib.)

S.2(31) : Person – Registered society for charitable purposes is artificial juridical person [S. 10(23C)]
Once the society is formed, it would become a juridical person as opposed to natural persons. (AYs. 2001-02 to 2006-07)
CIT v. Children's Education Society (2013) 358 ITR 373 / 92 DTR 158 / (2014) 264 CTR 389 (Karn.)(HC)

S.2(42A) : Short-term capital asset – Period of holding – Period for which asset held by previous owner.
Period for which asset was held by previous owner has to be added to period of holding of assessee and once period of holding of previous owner is added and period of holding becomes more than three years, then asset has to be treated as long-term capital asset. (AY. 2007-08)
Lalitha Rathnam (Mrs.) v. ITO (2013) 153 TTJ 59 / 59 SOT 2 (URO)(Chd.)(Trib.)

S.2(47) : Transfer – Capital gains – Transfer to AOP – Transfer to ultimate purchaser – Capital gains assessable in the hand of assessee and not in the hands of AOP. [S. 45, 53A of the Transfer of Property Act, 1882]
The assessee had an agricultural land which was declared as industrial estate. He and other landowners within that industrial estate formed an AOP and transferred their lands to it and the AOP sold land to the ultimate purchaser. Held, since there was no agreement between the assessee and AOP nor contention by AOP that in part performance thereof, that it was in possession of land, transaction would not amount to transfer. Assessing the capital gains in the hands of assessee was held to be justified. (AY. 2008-09)
Rajesh Kumar Agarwal v. ITO (2013) 218 Taxman 60 / 37 taxmann.com 442 (Mag.)(Uttarakhand)(HC)

S.2(47) : Transfer – Capital gains – Sale consideration as confirming party was held to be assessable as capital gains and not as professional income. [S. 28(i), 45, S. 53A of Transfer of Property Act, 1882]
The agreement stated that the assessee, an advocate would undertake the job of obtaining patta and layout of the properties and for the services rendered, the owners agreed to transfer 3 grounds of land to the assessee. In pursuance of the agreement, possession of the property was handed over to the assessee and general power of attorney was executed in favour of assessee. Sale agreement was

entered into in respect of said property for sale consideration of Rs.1.5 crores, out of which, the assessee received the consideration of Rs. 90 lakhs as "confirming party". The assessee claimed the sale consideration as capital gains. CIT(A) and Tribunal held that the said amount was assessable as capital gains. On appeal by revenue the Court held that the Assessing Officer was not justified in rejecting the claim of the assessee to tax the amount so received as capital gains and treating it as income from professional services. (AY. 2006-07)
CIT v. J. Mahalingam (2013) 218 Taxman 157 / 37 taxmann.com 38 (Mad.)(HC)

S.2(47) : Transfer – Capital gains – Land – Converted into stock-in-trade – No activities were carried on intervening period stock in Conversion in to stock-in-trade cannot be doubted [S. 28(i), 45]
In year 1992, assessee decided to convert its factory land at Goregaon into stock-in-trade for the purpose of engaging in business of real estate development. Assessee sought permission to shift its factory as well as to convert factory land from industrial zone land to residential zone land. It also obtained an NOC from BMC for change of user of factory land in October, 1993. It also made various efforts with Urban Land Ceiling (ULC) authorities, seeking permission for development under section 22 of ULC Act, 1976. Necessary permission was obtained in October 1999. Assessing Officer on basis that there was no activity on factory land since 1992 to 1999 concluded that factory land had not been converted into stock-in-trade. Commissioner (Appeals) and Tribunal arrived at finding of fact that factory land was converted into stock-in-trade during assessment year 1992-93. On appeal the Court upheld the order of Tribunal. (AY. 2000-01)
CIT v. Eastern Ceramics Ltd. (2013) 219 Taxman 66 / 38 taxmann.com 68 (Mag.)(Bom.)(HC)

S.2(47) : Transfer – Capital gains – Firm – Reduction of share of partners –Reconstitution of firm cannot be considered as transfer [S. 45(3), 45(4)]
It cannot be said that the land owned by a firm was transferred when firm was reconstituted and new partners were admitted and there was reduction in the shares of erstwhile partners. Capital gains did not arise on reduction of share of partners. (AY. 1996-97)
CIT v. P. N. Panjawani (2013) 356 ITR 676 (Karn.)(HC)
CIT v. Usha K. Panjawani (2013) 356 ITR 676 (Karn.)(HC)

S.2(47) : Transfer – Capital gains – General power of attorney – Circular of Registrar not to register conveyance of immovable property based on General Power of attorney was set aside. [S. 45]
The petitioner company entered in to a collaboration agreement with owner of immoveable property, who executed a General Power of Attorney (GPA) in favour of assessee. The GPA was duly registered and stamped. The Divisional Commissioner, Government of NCT of Delhi issued a circular directing all Regsitrars and sub-Registrar not to register any conveyance vis-a-vis an immoveable property which is based on GPA. The petitioner challenged the said circular which is contrary to the observation of Supreme Court Judgment in *Suraj Lamp & Industries (P) Ltd. v. State of Haryana (2012) 340 ITR 1 (SC).* Allowing the petition the Court held that, circular directing Registrars not to register conveyance of immovable property based on a General Power of Attorney was contrary to the observation of the Supreme Court and was liable to be set aside. Such conveyance of immovable property by a GPA constituted transfer of capital asset as per section 2(47).
Pace Developers & Promoters (P.) Ltd. v. Government of NCT (2013) 215 Taxman 554 / 33 taxmann.com 99 (Delhi)(HC)

S.2(47) : Transfer – Shares pledged with group company – A transaction in respect of transfer of share pledged with a bank to a group company can be regarded as "Transfer" for income-tax purpose so far as requirement of S. 2(47) are complied with – Loss suffered is allowable

A transaction in respect of sale of shares pledged with a bank to a group company cannot be said to be a colorable device merely on the grounds that such a transaction resulted into loss to the assessee and that the requirements of section 108 of the Companies Act, 1956 regarding registration of transfer of shares have not been complied with since the share were in possession of a bank owing to which such shares could not have been said to be transferred. So far as the requirements of section 2(47) of the Act are complied with the transaction is to be regarded as "Transfer" for the income-tax purposes. There is no restriction that such a transaction cannot be effected with a group company. Also it is not open for the revenue to doubt the loss suffered by the assessee unless it doubts the sale prices of the shares.
ACIT v. Biraj Investment Pvt. Ltd. (2013) 86 DTR 69 / (2012) 210 Taxman 418 (Guj.)(HC)

S.2(47) : Transfer – Capital gains – Joint venture agreement – Handing over of possession – Development agreement – Irrevocable general power of attorney leading to overall control of property in hands of developer would constitute transfer under section 2(47)(v). [Ss. 45, 53A of the Transfer of Property Act, 1882]
The assessee was a member of a housing society which entered into a joint development agreement with two developers, whereby each member was entitled to monetary consideration and a flat in lieu of existing plot. An irrevocable power of attorney was also executed and registered in favour of developers. Held, an irrevocable general power of attorney leading to overall control of property in hands of developer would constitute transfer under section 2(47)(v), even if developer did not have exclusive possession.
Also, non-registration of joint development agreement cannot be reason for non-applicability of section 2(47)(v), and where developers were vigorously pursuing issue of permission / sanction for executing agreement, requirement under section 53A of Transfer of Property Act, regarding willingness of transferee to perform contract, was also fulfilled. Therefore, capital gain tax had to be paid on total consideration arising on transfer, including consideration already received as well as consideration due and to be received later. (AY. 2008-09)
Binder Khokher (Smt.) v. ACIT (2013) 59 SOT 141 / 36 taxmann.com 503 (URO)(Chd.)(Trib.)

S.2(47) : Transfer – Capital gains – Handing over of possession and on the date of agreement where a small portion of consideration was received. [S. 45, 53A of the Transfer of Property Act, 1882]
Where the assessee-housing society entered into Development Rights Agreement with a developer, transfer of property could be said to have taken place only when possession was handed over to developer, and not on date of agreement, when only a small portion of consideration had been received. (AY. 2009-10)
Bhatia Nagar Premises, Co-operative Society Ltd. v. ITO (2013) 59 SOT 134 / 37 taxmann.com 9 (URO)(Mum.)(Trib.)
S.2(47) : Transfer – Capital gains – Relinquishment, in case of family settlement by instrument of release is liable to capital gains tax [S. 45]
Release / relinquishment of right over family property against receipt of a sum would be covered by definition of 'transfer' in section 2(47)(i) and where share in property is released against receipt of cash, instrument of release cannot be called a family settlement and would be covered by term 'transfer' and exigible to capital gains tax. (AY. 2007-08)
Lalitha Rathnam (Mrs.) v. ITO (2013) 153 TTJ 59 / 59 SOT 2 (URO)(Chd.)(Trib.)

S.2(47) : Transfer – Capital gains – Accrual – Consideration received in installments of four years – Capital Gains assessable in the year transfer took place [S. 45]
The assessee having parted with the possession of the property in January, 2006 and received part consideration during the year ending 31-3-2006, the capital gains arising on the sale of the lands was

assessable in AY. 2006-07 only, notwithstanding the fact that the consideration was received in installments covering a period of four years. (AY. 2008-09 & 2009-10)
Anwar Sadath & Ors. v. ACIT (2013) 90 DTR 362/(2014) 165 TTJ 491 (Coch.)(Trib.)

S.2(47) : Transfer – Date of transfer – Transfer of possession of property and not on date of sale agreement. [Ss. 45, 54EC, Transfer of Property Act, S. 53A]
Assessee entered into sale agreement on 16-3-2005, but transferred possession of property on 20-9-2005. Assessee claimed that the capital gain is taxable in the assessment year 2006-07 and claimed deduction under section 54EC for investment made in December, 2005. The Assessing Officer held that transfer took place on date of agreement and therefore, disallowed deduction under section 54EC as amount was not invested within six months from date of transfer. However Assessing Officer taxed capital gain in assessment year 2006-07. Commissioner (Appeals) upheld the order of Assessing Officer. The ITAT held that Transfer of property under section 2(47) took place on date of transfer of possession of property and not on date of sale agreement and therefore deduction under section 54EC was allowable. (AY. 2006-07)
Azad Zabarchand Bhandari v. ACIT (2013) 58 SOT 347 / 35 taxmann.com 69 (Mum.)(Trib.)

S.2(47) : Transfer – Year of transfer – Capital gains – Development Agreement – Joint venture – No transfer as commencement of construction activity was not started [S. 2(47)(v), 45, Transfer of Property, Act, 1882, S. 53A]
Tribunal held that during the previous year only an agreement to develop the property was entered into, whereby assigned his landed property in favour of joint venture between him and developer, without commencement of construction activity. Tribunal held that there is no transfer, as there is no extinguishment of rights or receipt of consideration, it could not be said that developer had performed its obligations as envisaged in section 53A of Transfer of Property Act, and therefore there was no transfer as per section 2(47) so as to attract capital gain tax. (ITA No. 290/292 & 336 /Hyd/ Bench' dt. 7-06-2013 (AY. 2006-07).
S. Ranjit Reddy v. Dy. CIT (Hyd.)(Trib.)(Unreported)

S.2(47) : Transfer – Capital gains – Accrual [Ss. 45, 292B]
Assessee having entered into development agreement with developer in respect of his vacant land on 14th April, 2002 with stipulation that developer after obtaining necessary approvals shall commence construction within 30 days and also executed a registered general power of attorney in favour of developer on the same date, 'transfer' took place on 14th April, 2002, hence capital gains became chargeable in AssessmentYear 2003-04 notwithstanding the fact that there was a clause in the agreement that possession of vacant land will be handed over on the date the developer will hand over possession of assessee's portion of constructed area to the assessee which event happened after 21st April, 2004. (AY. 2003-04)
G. Sreenivasan v. Dy. CIT (2013) 86 DTR 34 / 140 ITD 235 / 153 TTJ 640 (Cochin)(Trib.)

S.2(47) : Transfer – Capital gains is assessable in the year of handing over of possession and not on the date of registration [S. 45, 50C]
Assessee having handed over the possession of the land to the purchaser on the date of execution of sale deed itself i.e., 09th July, 2001, the Capital Gains was assessable in AY. 2002-03 and not in AY. 2004-05 notwithstanding the fact that the said deed was registered on 30th July, 2003. (AY. 2004-05)
Sandhyaben A. Purohit (Smt.) v. ITO (2013) 87 DTR 42 / 154 TTJ 514 / 59 SOT 1 (URO)(Ahd.)(Trib.)

S.2(47) : Transfer – Capital gains – Handing over of possession – Year of transfer.[S. 2(47)(v), 45, The Transfer of property Act, 1882, S. 53A]
Even if some part of consideration remains to be paid, the transaction shall not affect the liability to capital gains tax so as to postpone it indefinitely. What is meant in clause (v) is the "transfer"

which involves allowing possession so as to allow developer to undertake development work on the site. It is a general control over the property in part performance of the contract. The date of that transaction determines the date of transfer. It is enough if the transferee has, by virtue of the transaction, a right to enter upon and exercise the act of possession effectively and such an act amounts to legal possession over the property. The completion of "transfer" of an immovable property under general law was not required for the applicability of the provisions of sub clause (v) of section 2(47). Capital gain is assessable on handing over of possession. (AY. 2005-06)
Durdana Khatoon (Mrs.) v. ACIT (2013) 24 ITR 55 / 58 SOT 1 (Hyd.)(Trib.)

S.2(47) : Transfer – Capital gains – Agreement for sale – Incomplete transaction [S. 45]
The assessee entered into agreement for sale of land for consideration of `Rs.2.24 crore out of which it received Rs. 8 lakh. The assessee was still owner of property and had not parted with possession of same. Hence, the transaction could be treated as transfer. (AY. 2008-09)
Mali Florex Ltd. v. DCIT (2013) 57 SOT 37 (URO) / (2012) 19 ITR 791 (Hyd.)(Trib.)

S.2(47) : Transfer – Capital gains – Surrender of tenancy rights – Income from other sources – Consent given by landlord for transfer of tenancy rights would not result in transfer of any capital asset exemption under section 54EC is not eligible [Ss. 45, 54EC, 56]
The assessee was owner of a property, which was partly occupied by him and partly rented to 'V'. As per the tripartite agreement between the assessee, 'V' and new tenant, the tenancy rights and possession of the said property was surrendered in favour of new tenants. The assessee claimed that the amount so received by it in respect of the surrender was capital receipt. He claimed exemption under section 54EC by investing the amount in NABARD Bonds. The Assessing Officer rejected the assessee's claim of exemption under section 54EC on grounds that 'V' had surrendered the tenancy rights in favour of new tenants and not in favour of assessee. Therefore, the amount received was not a capital receipt and consequently the claim of exemption under section 54EC did not arise, instead the amount was chargeable to tax under the head 'Income from other sources'.
Held that there is no evidence to infer that the house is in vacant possession of the assessee even after the alleged end of the tenancy of 'V' and, therefore, it can be stated that the assessee has never got the property in vacant condition. The consideration for consent implies no transfer of any capital asset by the landlord to the new tenant. Further, the agreement rules out that the impugned consideration for consent is for the rent or towards the rental advance. Further also, considering the rent-oriented terms and conditions specified in the tripartite agreement, it cannot be inferred that the new tenant received merely rental rights and there is no transfer of any capital rights to the new tenant by the landlord. Therefore the consideration received by the assessee is neither a capital receipt nor a rental receipt. Hence, the action of the Assessing Officer was sustained. (AY. 2006-07)
Vinod V. Chhapia v. ITO (2013) 56 SOT 465 / 31 taxmann.com 415 (Mum.)(Trib.)

S.2(47)(v) : Transfer – Capital gains – Development agreement – A development agreement by which possession is transferred to developer is not a "transfer" for capital gains purposes if developer's willingness to perform his part of the contract is not ascertainable with certainty. [S. 2(14)(iii), 45, Transfer of Property Act, S. 53A]
The assessee entered into a Development Agreement-cum-GPA with MAK Projects on 15.12.2006 (AY. 2007-08). The agreement provided the MAK would construct a villa township in 30 months and that the assessee was entitled was entitled to a certain portion (16 villas) of the developed area as consideration for the transfer of the land. Though possession of the property was handed over to the developer, the assessee claimed that the transaction did not give rise to capital gains in AY. 2007-08 on the basis that (a) the consideration was neither received nor quantified, (b) the project was at the conception stage and even the building plan approvals were not received & (c) the developer had not incurred any expenditure on the project. The Assessing Officer & CIT(A) relied on *Chaturbhuj Dwarakadas Kapadia v. CIT (2003) 260 ITR 491 (Bom.)* where it was held that the execution of a

development agreement amounted to a transfer under section 2(47)(v) and gave rise to capital gains. On appeal by the assessee to the Tribunal HELD allowing the appeal:
S. 2(47)(v) provides that the term 'transfer' includes "any transaction involving the allowing of, the possession of any immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act". In order to be "of the nature referred to in section 53A of the Transfer of Property Act", the necessary precondition is that the transferee should be willing to perform his part of the contract. The "willingness" has to be absolute and unconditional. If willingness is studded with a condition, it is no more than an offer and cannot be termed as willingness. On facts, the "willingness" of the developer to perform his part of the obligations is not ascertainable in AY. 2007-08 because (a) the consideration was not paid to the assessee, (b) the building plans had not been approved, (c) there was no progress with regard to development in the AY, (d) there was no investment by the developer in the construction activity during the AY. It is not possible to say whether the developer is prepared to carry out those parts of the agreement to their logical end. The fact that the assessee has given possession is not relevant. Consequently, section 2(47)(v) does not apply and the capital gains is not assessable to tax (*Chaturbhuj Dwarakadas Kapadia v. CIT (2003) 260 ITR 491 (Bom.)* explained / distinguished) (ITA No. 477/Hyd/2013, dt. 3-1-2014) (AY. 2007-08)
Fibars Infratech Pvt. Ltd. v. ITO (2014) 98 DTR 281 / 162 TTJ 228 (Hyd.)(Trib.)

S.4 : Charge of income-tax – Notional addition – Interest – Current account – Addition cannot be made

Since money was kept in current account of bank, there was no question to earn interest and, thus, notional addition was to be deleted. (AY. 2002-03)
CIT v. U. P. Rajya Vidyut Utpadan Nigam Ltd. (2013) 218 Taxman 153 / 37 taxmann.com 164 (All.)(HC)

S.4 : Charge of income-tax – Association of persons – Double Taxation – Protective assessment – Substantive assessment was confirmed – Protective assessment was not sustainable [S. 143(3)]

In course of assessment, Assessing Officer noted that assessee sold plots of land on heavy premium which was not disclosed in its books of account. He thus added certain amount to assessee's income on protective basis. Simultaneously, substantive assessment of said amount was also made in case of AOP on ground that AOP consisting of nine persons including assessee had actually received premium and appropriated same to themselves. Commissioner (Appeals) as well as Tribunal took a view that when amount of premium had been added to income of AOP on substantive basis, protective assessment of same in hands of assessee was not sustainable. High Court confirmed the order of Tribunal. (AY. 1987-88)
CIT v. Teachers Housing Co-operative Society (2013) 219 Taxman 68 / 38 taxmann.com 394 (Mag.)(All.)(HC)

S.4 : Charge of income-tax – Capital or revenue – Non-compete fee – Sale of profitable business is capital receipt – Not taxable [S. 28(i)]

The assessee sold a profitable running retail business to a new company. The amount received as non-compete fee prohibiting assessee from carrying on competing business in retail capital receipt. (AY. 2000-01)
CIT v. Spencers and Co. Ltd. (No.1) (2013) 359 ITR 612 (Mad.)(HC)

S.4 : Charge of income-tax – Subsidy – Capital receipt [S. 28(i)]

From the subsidy scheme, it emerged that subsidy though computed in terms of sales tax deferment or waiver, in essence was meant for capital outlay expended by assessee for set up of unit in case of a new industrial unit and for expansion and diversification of an existing unit. Also, it was available

only to a new industrial unit or to a unit undertaking expansion or diversification. Therefore, the same was a capital receipt.
DCIT v. Munjal Auto Industries Ltd. (2013) 218 Taxman 135 / 37 taxmann.com 115 (Guj.)(HC)

S.4 : Charge of income-tax – Deposit – Levy of sales tax – Amount is not trading receipt [Ss. 2(24), 28(i)]
The deposits were received by the assessee were neither collected 'as sales tax" nor were they collected 'by way of tax". They were towards possible levy of sales tax on packaging charges and freight. Amounts to be returned if sale tax were not levied .Deposit cannot be assessed as trading receipt. (AY. 1985-86)
Dalmia Cement (Bharat) Ltd. v. CIT (2013) 357 ITR 419 / 263 CTR 308 / 218 Taxman 327 (Delhi)(HC)

S.4 : Charge of income-tax – Dharmada receipt – Capital or revenue – Reference to Full Bench is uncalled for
Held, that the Division Bench did not decide the issue nor did it lay down any law in respect of the issue of Dharmada but simply stated that the finding of the Tribunal and the issue raised before it was a question of fact and no question of law arose for decision. In other words, the court did not lay down any law or take any decision which could be said to be contrary to or in derogation of the law laid down by the Supreme Court. Thus, the reference made to the Full Bench was uncalled for. (AYs. 1981-82, 1984-85, 1985-86, 1986-87)
Lilasons Breweries Ltd. v. CIT (2013) 356 ITR 671 / 218 Taxman 411 / 260 CTR 51 (FB)(MP)(HC)

S.4 : Charge of income-tax – Excise duty refund which is not a production or operational incentive is a capital receipt not chargeable to tax
The High Court following its own decision in the case of *Shree Balaji Alloys v. CIT (2011) 333 ITR 335*, dismissed the departmental appeal and held that where the excise duty was refunded for creation of industrial atmosphere and environment, which would provide additional source of employment, such incentive designed to achieve public purpose could not be construed as production or operational incentive but was a capital receipt not chargeable to tax.
CIT v. Tripti Menthol Industries (2013) 217 Taxman 102 / 35 taxmann.com 515 (Guj.)(HC)

S.4 : Charge of income-tax – Inherited – Sale proceeds of agricultural land as per will of late father is not assessable as income
Sale proceeds of agricultural land received by assessee from her brother in accordance with direction given by her late father in his will could not be treated as income of assessee. (AY. 2006-07)
CIT v. Neera Bhandari (2013) 216 Taxman 88 / 34 taxmann.com 185 (Mag.)(Delhi)(HC)

S.4 : Charge of income-tax – Waiver of loan – Loan used for acquisition of capital asset – Capital receipt cannot be subject to tax
Where the loan taken was utilised for acquiring a capital asset, waiver of payment of such loan being in nature of capital receipt could not be subjected to tax. (AY. 2001-02)
CIT v. Softworks Computers (P.) Ltd. (2013) 216 Taxman 219 / 35 taxmann.com 610 (Mag.)(Bom.)(HC)

S.4 : Charge of income-tax – Accrual of income – Retention money cannot be said to be accrued [S. 5]
Amount retained to ensure satisfactory performance of contract cannot be held to accrue. Retention money could not be said to have accrued to assessee, and therefore, this amount did not represent assessee's accrued income. (AY. 2003-04)
DIT (IT) v. Ballast Nedam International (2013) 355 ITR 300 / 216 Taxman 69 (Guj.)(HC)

S.4 : Charge of income-tax – Subsidy – Where object of entertainment duty subsidy was to promote construction of multiplex theatre complexes, receipt of subsidy would be on capital account

Purposes for which subsidy is given is relevant factor and if object of subsidy is to enable assessee to set up a new unit then receipt of subsidy will be on capital account. Thus, where object of entertainment duty subsidy was to promote construction of multiplex theatre complexes, receipt of subsidy would be on capital account.

CIT v. Chaphalkar Brothers (2013) 351 ITR 309 / 215 Taxman 145 (Mag.)(Bom.)(HC)

S.4 : Charge of income-tax – Compensation on land acquisition – Hindu Undivided Family – Amount belong to family members cannot be taxed in the hands of individual

A land belonging to the assessee was acquired by the State Electricity Board for which compensation was paid. The acquisition notification was issued in the name of the assessee. The consideration was invested in fixed deposits in name of assessee, his wife and children on various dates. The Assessing Officer taxed the amount of consideration in the individual capacity. The Commissioner (Appeals) and the Tribunal, however, held that said amount belonged to joint family and its members. Held that the question as to whether compensation amount exclusively belonged to assessee or it belonged to joint family and its members, was purely a question of fact and no substantial question of law arose there from.

ACIT v. Sureschandra Mahagoankar (2013) 33 taxmann.com 614 / 215 Taxman 143 (Mag.)(Karn.)(HC)

S.4 : Charge of income-tax – Hindu Undivided Family – Property distributed amongst members of assessee's family on oral partition – Joint property – Consideration received was held to be taxable as joint property and not in individual capacity

'L' got a property on taking his share in joint family properties. The assessee, L's adopted son, distributed the property in favour of his wife and children. The consideration received from developer in respect of said property was treated as joint family property income by assessee. However, the Assessing Officer treated it as the individual income of assessee and his wife. Held since the property was not self acquired by assessee, it belonged to the HUF and since it was given without a registered document, which is permissible only if it was HUF property, the consideration received from developer was taxable as joint family property income. (AYs. 1995-96 to 1998-99)

CIT v. D. L. Nandagopala Reddy (Indl) (2013) 215 Taxman 636 / (2014) 360 ITR 377 (Karn.)(HC)

S.4 : Charge of income-tax – Subsidy – Deferred sales tax scheme – Capital receipt [S. 2(24)]

To determine the character of subsidy in hands of recipient, whether revenue or capital, the purpose of the subsidy is to be considered and the source of fund and mechanism of giving subsidy are immaterial. Incentive, in form of sales tax waiver/deferment was not meant to give any benefit on day-to-day functioning of business or to make it more profitable; but was principally aimed to cover capital outlay of assessee for undertaking modernization of existing industry, it was capital in nature, and thus, not taxable. (AYs.1991-92 to 1993-94)

CIT v. Birla VXL Ltd. (2013) 215 Taxman 117 / 90 DTR 376 (Guj.)(HC)

S.4 : Charge of income-tax – Accrual – Interest on arbitration award – When arbitration award is alive and is pending income does not accrue [S. 5, 197]

The Court held that so long as the challenge to the arbitral award is alive and is pending, and the legality of the arbitral award has not attained finality, the amount which has been awarded has not attained finality, the amount which has been awarded does not represent income which has accrued; no interest income can also be said to accrue; the Assessing Officer was directed to issue the certificate under section 197. (AY. 2012-13)

DSL Enterprises (P) Ltd v. N. C. Chandratre (Mrs.) ITO (2013) 258 CTR 156 (Bom.)(HC)

S.4 : Charge of income-tax – Accrual – Interest on loan – Debtor declared sick company – No material to substantiate the claim – Interest accrued and assessable as income [Ss. 2(24), 5]
The material on record showed that the company court ordered winding up of the debtor company based on the recommendation of the BIFR. However, the debtor company went on appeal before the Division Bench, wherein it was contended that the order of winding up based on the recommendation of the BIFR was bad in law. In that event, in the absence of any material to substantiate that the interest on the borrowed amount could not be recovered and, hence, had not accrued. Thus, interest was held to have accrued and was assessable. (AY. 1992-93)
CIT v. Peria Karamalai Tea and Produce Co. Ltd. (2013) 353 ITR 22 / 216 Taxman 150 (Mag.)(Mad.)(HC)

S.4 : Charge of income-tax – Mercantile system – Accrual – Interest on non-performing assets – Non-banking financial company – Characterisation as non-performing assets alone not sufficient – Uncertainty in realisation of income or interest to be proved – Matter remanded [Ss. 5, 145]
The assessee has to prove in each case that interest not recognised or not taken into account was in fact due to uncertainty in collection of interest and it is for the Assessing Officer to examine the facts of each individual case. Mere characterisation of an account as a non-performing asset would not by itself be sufficient to say that there is uncertainty as regards realisability of income or interest thereon. Accrual of interest is a matter of fact to be decided separately for each case on the basis of examination of the facts and circumstances. The system of accounting followed only recognises it, bringing the income into the books. The adopted accounting policy, i.e., recognising income on the non-performing assets accounts only subject to realisation does not serve as a standard category. Since, the Assessing Officer had not recorded findings whether there was any uncertainty in collection of income and that there was nothing to indicate that the interest was non-recoverable, the matter was remitted to the Assessing Officer to decide issue afresh. (AYs. 1999-2000, 2000-2001)
CIT v. Sakthi Finance Ltd. (2013) 352 ITR 102 / 86 DTR 59 / 258 CTR 433 / 214 Taxman 21 (Mad.)(HC)

S.4 : Charge of income-tax – Association of persons – Joining of resources – Co-inheritors – Assessable as individuals [Ss. 2(13), 167B]
Five persons including assessee were co-owners of agricultural land inherited from their forefathers. They executed a general power of attorney in favour of assessee appointing him to construct plinths on their joint agricultural land in names of all owners and to further lease out such open plinths to any party on their behalf. An agreement was executed by co-owners leasing out plinths to ‘P’ Ltd. Assessee filed his return showing rental income and also paid tax accordingly. Similar returns were filed in cases of other co-owners wherever they were taxable. Assessing Officer, however, assessed co-owners as an association of persons treating entire income from plinths as income from other sources. Whether in order to assess individuals as ‘association of persons’, individual co-owners should have joined their resources and thereafter acquired property in name of association of persons and property should have been commonly managed, since co-owners had inherited property from their ancestors and there was nothing to show that they had acted as association of persons, income was to be assessed in status of ‘individual’, therefore, impugned order passed by Assessing Officer framing assessment in status of association of persons was not sustainable. Once it is held that the income was to be assessed as individual and not an ‘association of persons’, therefore, section 167B is not attracted.
Sudhir Nagpal v. ITO (2013) 214 Taxman 13(Mag.)/ 84 DTR 110 / 257 CTR 253 / 349 ITR 636 (P&H)(HC)

S.4 : Charge of income-tax – Addition – Income disclosed in the return different from the amount reflected in the TDS certificate, addition was held to be justified

All authorities below arrived at similar conclusion that the assessee claimed higher credit for TDS by annexing TDS certificates but had not reflected the income as shown in the TDS Certificates in its return. Held that Tribunal was justified in concluding that no useful purpose would be served by remanding the matter back to the AO. (AY. 1998-99)

Laxmi Ventures (Bombay) (P) Ltd. v. Dy. CIT (2013) 83 DTR 36 / 257 CTR 232(Bom.)(HC)

S.4 : Charge of income-tax – Capital or revenue – Sale of trees is held to be capital receipt

Assessee, an agriculturist, cut and sold trees to the forest department. Trees were cut in a manner such that they would not regenerate in near future as the species had no spontaneous growth. The receipts from the transaction were held to be in the nature of capital receipt. (AY. 1994-95)

CIT v. Mahendra Karma (2013) 83 DTR 153 (Chhattisgarh)(HC)

S.4 : Charge of income-tax – Interest earned on behalf of Government – If an assessee company cannot allot share immediately in favour of State Government against investment made by it in Assessee Company, then interest earned on deposits made out of such funds shall belong to the State Govt. and shall not be taxed in the hands of assessee

The assessee company received certain funds from Govt. of Gujarat as contribution toward its equity share capital. Till the time the assessee company allotted shares to Govt. of Gujarat, the said funds were parked in short term deposits with a schedule bank on which it earned certain interest. The assessee company and Govt. of Gujarat had entered into as arrangement according to which the said interest should belong to and be received on behalf of Govt. of Gujarat. It was held by the Hon'ble High Court that during the pendency of allotment of shares, the funds received toward equity share capital were held by the assessee company in trust for and on behalf of Govt. of Gujarat and hence, any interest accrued by investment of such funds must belong to the Govt. of Gujarat and till it remained in the hands of the assessee company, it must be treated to have been held in trust. (AY.1992-93)

Gujarat Power Corporation Ltd. v. ITO (2013) 354 ITR 201 / (2012) 210 Taxman 366 (Guj.)(HC)
Editorial: The Supreme Court has dismissed the special leave petition filed by the Department against this judgment. ITO v. Gujarat Power Corporation Ltd. (2013) 354 ITR 82(St)

S.4 : Charge of income-tax – Subsidy – Entertainment tax – Capital receipt – Held to be capital in nature

The question raised before the Court on behalf of the revenue was the benefit of exemption from entertainment tax was available to assessee only once the multiplex was in operation and it is revenue receipt. High Court followed the Judgment of Bombay High Court in *CIT v. Chaphalkar Brothers, (2013) 351 ITR 392 (Bom)(HC)*, and held that such exemption of entertainment tax was of capital receipt. Appeal of revenue was dismissed. (AY. 2003-04)

DCIT v. Inox Leisure Ltd. (2013) 351 ITR 314 / 213 Taxman 160 / 85 DTR 103 (Guj.)(HC)

S. 4 : Charge of income-tax – Non-compete fee – Assessable as capital receipt

Payment received by assessee as non-compete fee under a negative covenant is a capital receipt not taxable under Act (AY. 2001-02)

CIT v. Real Image (P.) Ltd. (2013)359 ITR 606 / 213 Taxman 169 (Mad.)(HC)

S.4 : Charge of income-tax – Compensation for loss of source of income – Capital receipt – Compensation to CA Firm for loss of referral work is a non-taxable capital receipt

The assessee, a firm of Chartered Accountants, was one of the "associate members" of Deloitte Haskins & Sells for 13 years pursuant to which it was entitled to practice in that name. Deloitte desired to merge all the associate members into one firm. As this was not acceptable to the assessee, it withdrew from the membership and received consideration of Rs. 1.15 crores from Deloitte. The said amount was credited to the partners' capital accounts & claimed to be a non-taxable capital receipt by the assessee. The AO rejected the claim. The CIT (A) reversed the order of AO. The Tribunal reversed the CIT (A) order. On appeal by the assessee to the High Court, reversing the Tribunal order held that :

(i) There is a distinction between the compensation received for injury to trading operations arising from breach of contract and compensation received as solatium for loss of office. The compensation received for loss of an asset of enduring value would be regarded as capital. If the receipt represents compensation for the loss of a source of income, it would be capital and it matters little that the assessee continues to be in receipt of income from its other similar operations (*Kettlewell Bullen and Co. Ltd. v. CIT (1964) 53 ITR 261 (SC) & Oberoi Hotel (P) Ltd. v. CIT (1999) 236 ITR 903 (SC)* followed);

(ii) On facts, the compensation was for loss of a source of income, namely referred work from Deloitte because it is somewhat difficult to conceive of a professional firm of chartered accountants entering into such arrangements with international firms of CAs, as the assessee in the present case had done, with the same frequency and regularity with which companies carrying on business take agencies, simultaneously running the risk of such agencies being terminated with the strong possibility of fresh agencies being taken. In a firm of chartered accountants there could be separate sources of professional income such as tax work, audit work, certification work, opinion work as also referred work. Under the arrangement with DHS there was a regular inflow of referred work from DHS through the Calcutta firm in respect of clients based in Delhi and nearby areas. There is no evidence that the assessee had entered into similar arrangements with other international firms of chartered accountants. The arrangement with DHS was in vogue for a fairly long period of time – 13 years – and had acquired a kind of permanency as a source of income. When that source was unexpectedly terminated, it amounted to the impairment of the profit-making structure or apparatus of the assessee. It is for that loss of the source of income that the compensation was calculated and paid to the assessee. The compensation was thus a substitute for the source and the Tribunal was wrong in treating the receipt as being revenue in nature (*CIT v. Best & Co (1966) 60 ITR 11 (SC)* distinguished). (AY.1997-98)

Khanna and Annadhanam v. CIT (2013) 351 ITR 110 / 213 Taxman 347 / 258 CTR 72 / 85 DTR 164 (Delhi)(HC).

S.4 : Charge of income-tax – Income or capital – Power subsidy received from State Government – Subsidy given year after year on actual power consumption is revenue receipt

The power subsidy was granted after the commencement of production, and it was to the extent of 10 per cent. or 12.5 per cent, as the case may be. This was given on actual power consumption and had nothing to do with the investment subsidy given for establishment of industries or expanding industries in backward areas. The power subsidy given as part of an incentive scheme, after commencement of production, should be treated as subsidy linked to production, and therefore, a revenue receipt.

(AY. 1983-1984 to 1990-1991)

CIT v. Rassi Cements Ltd. (2013) 351 ITR 169 / 215 Taxman 144 (Mag.)(AP)(HC)

CIT v. Deccan Cements Ltd. (2013) 351 ITR 169 (AP)(HC)

S.4 : Charge of income-tax – Mutuality – Clubs – Interest on fixed deposit – Concept of mutuality cannot be extended

Assessee, a club, received interest on fixed deposit with banks. It claimed that principle of mutuality applied in instant case and, hence, interest income was not taxable. In instant case, contributors/members of assessee made contributions, which had been kept in fixed deposit with third party banks and those third party banks had contributed to members fund, since members' fund had been expended not by contributors/members but by a third party, interest income could not be said to have been derived from any activity based on principle of mutuality. In order to be an income derived from activities based on principle of mutuality, it must be shown that contributions have been made by contributors and same can only be expanded or returned to contributors. In favour of revenue. (AY.1999-2000)

CIT v. Dehradun Club Ltd. (2013) 212 Taxman 269 / 258 CTR 443 / 86 DTR 86 (Uttaranchal)(HC)

S.4 : Charge of income-tax – Hindu undivided family – Individual – Income from agricultural land which was received on partition assessable as HUF income and income from remaining agricultural land assessable as an individual

Assessee filed return in his capacity as karta of HUF. He claimed that he owned 20.88 acres of agricultural land in the status of HUF and the entire income earned from agricultural land was income from HUF property. Assessing Officer rejected the claim of assessee and assessed the entire income from the agricultural lands in the status as individual. He also made protective assessment at the hands of the assessee in the capacity of HUF. In appeal Commissioner (Appeals) held that inclusion of the income from the land in the individual assessment of the assessee was not correct. He also held that the assessment made in the hands of HUF as protective assessment should be treated as a substantive assessment. In appeal by revenue the Tribunal reversed the finding of Commissioner (Appeals). On appeal to High Court, it was held that Agricultural land to an extent of 4.63 acres was originally joint family property and vide partition deed dated 24-2-1981 executed between assessee, his brother and their father same was allotted to assessee. No material on record to show that balance 16.25 acres of land was in fact HUF property of assessee. Only agricultural income earned from 4.63 acres of land was assessable at hands of assessee in status of HUF and remaining agricultural income earned from balance 16.25 acres of land was assessable at individual hands of assessee. (AY. 1984-85, 1985-86)

K. P. Nachimuthu v. CIT (2013) 212 Taxman 584 / 29 taxmann.com 285 (Mad.)(HC)

S.4 : Charge of income-tax – Accrual – Stock broker – Diversion by overriding title – Amount paid on behalf of public sector companies cannot be included as income of assessee [S. 37(1)]

Assessee a registered stockbroker he claimed to be a broker of Indian bank which purchased securities of different public sector undertakings (PSUs) at a particular rate quoted by Indian Bank and sold them to said bank through Bank of Madura, which acted as routing bank and charged service charges. Assessee was paid commission for transaction. Assessee claimed that his role was only of a conduit for taking demand drafts of Rs.14.79 crores favouring PSUs in respect of additional interest payable by bank to PSUs on deposits kept by them. This claim was confirmed by Indian Bank. The Assessing Officer found that neither public sector orgainsations nor Indian Bank had any agreement with the assessee. Out of 8 Public sector companies only 3 had confirmed receipt of demand drafts. The Assessee also took alternative plea that the amount may be treated as business expenditure under section 37(1). The Assessing Officer included the amount in the assessee's income holding that the payments made to the public sector undertakings were not falling under the category of diversion of income by overriding title at source. On appeal Commissioner (Appeals) accepted the claim of assessee. In the meantime, the criminal prosecution was laid against the assessee and the Bank Chairman. The CBI acquitted them as the charges had not been proved beyond reasonable doubt. In appeal before the Tribunal the Tribunal set aside the order of Commissioner (Appeals) on the ground that the criminal Court's decision was not binding on the Tribunal and had no relevance in deciding the issue. On appeal by assessee the Court held that question with reference to status of assessee as a broker had been clearly spoken to by witnesses who were officers of bank, who had understood role of assessee and, accordingly, instructed assessee to act. Court held that since evidence recorded clearly proved status of assessee as a broker only, even going by theory of preponderance of probabilities, assessee could not be mulcted with any liability as regards sum of Rs.14.79 crores as his income. In favour of assessee. (AY. 1991-92, 1992-93, 1993-94)

T. Jayachandran v. Dy. CIT (2013) 212 Taxman 620 / 87 DTR 73 / 263 CTR 629 (Mad) (HC)

S.4 : Income chargeable to tax – Capital or revenue – Realisation of carbon credit – Capital receipt

Realisation of carbon credit was to be considered as capital receipt. Therefore the addition was deleted. (AY. 2009-2010)

Ambika Cotton Mills Ltd. v. DCIT (2013) 27 ITR 44 (Chennai)(Trib.) Sri Velayudhaswamy Spinning Mills P. Ltd. v. DCIT (2013) 27 ITR 106 (Chennai)(Trib.)

S.4 : Charge of income-tax – Capital or revenue – Compensation paid for breach of agreement – Capital receipt. [Ss.2(47), 10(33), 45, 115JA]

Compensation received by assessee for breach of agreement is capital receipt and not capital gains or casual and non-recurring receipt. S. 115JA was held not applicable to capital receipts. (AY. 1998-99)

Parle Soft Drinks P. Ltd. v. JCIT (2013) 27 ITR 663 (Mum.)(Trib.)

S.4 : Charge of income tax – Subsidy – Revenue receipt

The Tribunal held that subsidy received by assessee on account of exemption from Sales tax, entry tax and electricity duty would be revenue receipt and not capital receipt. (AY. 2004-05)

ACIT v. Jindal Steel & Power Ltd. (2013) 145 ITD 277 / 38 taxmann.com 132 (Delhi)(Trib.)

S.4 : Charge of income-tax – Exemption to International Bodies – International Finance Corporation – Matter remanded [S.40(a)(i)]

Since the lower authorities had considered claim of assessee *vis-à-vis* United Nations (Privileges and Immunity) Act, 1947, whereas, enactment which had to be applied was International Finance Corporation (Status, Immunities and Privileges) Act, 1958,the matter required a fresh look by Assessing Officer, and hence, was sent back. (AY. 2006-07)

Redington (India) Ltd. v. ACIT (2013) 59 SOT 152 (URO) / 34 taxmann.com 279 (Chennai)(Trib.)

S.4 : Charge of income-tax – Gifts received by amateur cricketer – Not assessable as income.

Tribunal held that in subsequent year the Assessing Officer himself has accepted that the assessee is an amateur cricketer and not a professional cricketer, there was no justification to hold that during the years relevant to AYs. 1992-93 and 1993-94 the assessee was a professional cricketer. In case of other cricketers the appellate authorities and the courts have decided the issue in favour of assessees. Tribunal directed the Assessing Officer to allow exemption to the assessee as per circular No. 447 dated

22-1-1986. Tribunal followed the decision of Bangalore Bench of Tribunal in the case of *G. R. Vishwanath v. ITO (1989) 29 ITD 142 (Bang.)* and decision of Delhi Bench of Tribunal in the case of Manoj Prabhakar in ITA No. 564 and others/Delhi/2004 and the circular No. 447 dated 22-1-1986. (AYs. 1992-93, 1993-94)

ACIT v. Kapil Dev (2013) 157 TTJ 686 / 94 DTR 35 (Delhi)(Trib.)

S.4 : Charge of income-tax – Mutual concern – Miscellaneous expenses and meeting expenses were incurred in pursuit of objects – No third party benefited, status of mutuality could not be denied

The Tribunal held that where miscellaneous expenses were incurred by assessee-association in pursuit of its objects and it could not be said that some third parties were benefited by incurring these expenses by assessee, status of mutuality could not be denied to assessee. (A.Ys. 2000-01 & 2003-04)

Tiruchirapalli District Bus Operators Association v. Dy. CIT (2013) 144 ITD 382 / 24 ITR 242 (Chennai)(Trib.)

S.4 : Charge of income-tax – Diversion of sale proceeds of property held as stock-in-trade towards discharge of loan liability – Loan borrowed on capital account – neither can be claimed as deduction nor can be allowed as revenue expenditure [Ss.28(i), 37(1)]
Repayment of loan amount is application of income as loan is on capital account and therefore, amount diverted by the assessee out of sale proceeds of a property held as stock-in-trade for discharging the loan liability in lieu of its obligation to transfer the said property under the terms of the consent decree was application of income to the extent of the principal amount of loan, and the same can neither be claimed as deduction in the computation of profits and gains from business nor can be allowed as revenue expenditure.
Swan Energy Ltd. v. Addl. CIT (2013) 90 DTR 261 (Mum.)(Trib.)

S.4 : Charge of income-tax – Nodal agency – Disbursement of funds for development – Interest earned cannot be assessed as income
Assessee was a State Government Undertaking and was only acting as nodal agency for receiving funds from Central as well as State Governments and disbursement of funds for development and infrastructure projects as per directions of Government from time to time. The assessee earned interest on funds so advanced for projects and such interest was again invested in various development projects as per Government instructions. For relevant assessment year, the Assessing Officer added the accrued interest on the funds lent by the assessee on soft terms to local bodies and Mega City/IDSMT funds programme to the assessee's income. On appeal, CIT(A) deleted the addition holding that interest on IDSMT fund would not be taxable income. The ITAT held that Interest earned is again utilised for implementation of the mega-city scheme, the same cannot be treated as income of the assessee. (AY. 2003-04)
Tamil Nadu Urban Finance & Infrastructure Development Corporation Ltd. v. ACIT (2013) 58 SOT 53 (URO) / 33 taxmann.com 612 (Chennai)(Trib.)

S.4 : Charge of income-tax – Mutuality – Housing societies – TDR of members could not be taxed as dividend in hands of assessee
Money received by assessee from society under an agreement entered into between developer, society and members as consideration was payable to members by developer for transfer of respective entitlements of TDR of members could not be taxed as dividend in hands of assessee on the grounds of 'principle of mutuality' between society and its members. (AY.2005-06)
ACIT v. IGE India Ltd. (2013) 58 SOT 62 / 22 ITR 365 (Mum.)(Trib.)

S.4 : Charge of income-tax – Capital or revenue – Transfer of business undertaking – Merchant banking business – Capital receipt [Ss.45, 48, 50B]
Assessee company received a sum of Rs. 25 crore from transfer of its intangible assets of merchant banking business. It claimed that amount so received was capital receipt. Assessing Officer treated said receipt as revenue in nature and taxed same as business income. It was noted from records that assessee had received sale consideration for transfer of its business of merchant banking in form of employees, contracts in form of customer and client relationship, a list of ten largest clients and certain know-how related to merchant banking business of assessee. Subject matter of transfer resulted in loss of enduring trading assets and, therefore, amount received in respect of same was to be treated as capital receipt not chargeable to tax. (AY. 2001-02)
IGFT Ltd. v. ITO [2013] 144 ITD 57 / 36 taxmann.com 241 / 95 DTR 181 / 158 TTJ 572 (Mum)(Trib.)

S.4 : Charge of income-tax – Capital or revenue – Non-compete fee – Capital receipt
The sole and main business or revenue earner i.e. merchant banking has been discontinued. And Amount received by assessee as non-compete fee for not carrying on merchant banking activities for

a period of three years was to be regarded as capital receipt and thus same was not liable to tax. (AY. 2001–02)

IGFT Ltd. v. ITO (2013) 144 ITD 57 / 36 taxmann.com 241 / 95 DTR 181 / 158 TTJ 572 (Mum.)(Trib.)

S.4 : Charge of income-tax – Mutual concern – Co-operative Hsg. Society – Mutuality – A Co-op Hsg. Society is not a mutual association because its members can earn income from its property. The transfer fee and TDR premium charged by the Society from its members is a commercial transaction and not eligible for exemption on grounds of mutuality – For deduction of expenditure burden on assessee to show correlation with income [Ss. 2(24)(v), 28(iii)]

The assessee, a co-operative housing society, received transfer fee and TDR premium from its members which it claimed was exempt on the ground of mutuality. This stand was upheld by the Tribunal for the earlier years relying on the judgements in *Sind Co-op Housing Society v. ITO (2009) 317 ITR 47 (Bom), Mittal Court Premises Co-op Society Ltd. v. ITO (2010) 320 ITR 414 (Bom) & CIT v. Jai Hind CHS Ltd. (2012) 349 ITR 541 (Bom.).* In the present year, the Department argued that this view was not correct and that the transfer fee and TDR premium were not exempt on the ground of mutuality. HELD by the Tribunal upholding the Department's plea:

(i) The three perquisites which form the essential conditions for mutuality are (a) complete identity between contributors and participants, (b) the actions of the participants must be in furtherance of the mandate of the society as determined from the memorandum and articles of association & rules & (c) there must be no scope of profiteering by the contributors from the fund made by them, which could only be expended on or returned to them. The principle or the notion of mutuality cannot be extended to a cooperative housing society, be it a flat owner's society or a plot owner's society;

(ii) There are three objections to treating a co-op housing society as a mutual concern. The first objection is that while a mutual concern cannot lead to any profit for the members, a member of a co-op housing society can earn income from the property such as by letting. The contributors, by virtue of their membership, obtain a valuable capital asset in their own hands, i.e., the leasehold right in the plots allotted to them, as well as the interest in the super structure. They may encash or capitalize on or even trade on the property. Such valuable rights that inure to the members are separate and distinct from the rights that vest in them as a part of the class of contributors and militates against the very notion of mutuality, which in its concept and operation cannot yield any income to them in their individual capacity. The second objection is that the assessee's activities of charging premium at one half the amount of the premium received by the transferor-member from the transferee-member is a commercial transaction. As such, not only does the arrangement lead to creation and holding of wealth/property by the individual-members, it allows them to encash or otherwise exploit it, paying the society its share. That is, the society also partakes of the profit arising on the subsequent transfer by a member, to the extent of 50% thereof. The third objection is that the policy of allowing the individual members to purchase TDRs from outside and load them on to their existing structures and of allowing non-members residing in the flats built by the members on their plots to have access to and enjoy the common facilities means that there is a break-down in the identity between the contributors and participants and violates another basic condition of mutuality that there must be no dealings with the non-members;

(iii) Apart from that, transfer fees cannot be considered as tax-exempt because the income arises from the exercise of commercial rights, which is akin to a sale. The judgment in Sind CHS cannot be followed because the decision in *CIT v. Presidency Co-op. Housing Society Ltd. (1995) 216 ITR 321 (Bom)* would prevail. Sind CHS was based on the fact that the amount there was reasonable and based on the bye-laws. The decision in Mittal Court PCS Ltd. does not apply as it is in respect of non-occupancy charges. The TDR Premium is also not governed by the principle of mutuality. The judgment in Jai Hind CHS Ltd. holding TDR premium to be exempt does not apply because the question whether commerciality is involved, or the transaction is guided by profit motive, is a matter of fact. The assessee's charter as well as its' operations have been found to be imbued with commerciality and common facilities are being enjoyed by the non-members. (AY. 1996- 1997 & 2000 to 2008.)

Hatkesh Co-op Housing Society Ltd. v. ACIT (2013) 27 ITR 494 (Mum.)(Trib.)

S.4 : Charge of income-tax – Mutual concern – Investment of surplus in Bank – Interest/return on such investment not 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. (AY. 1996-97)

Dy. DIT v. Societe International De Telecommunication (2012) 139 ITD 328 / (2013) 153 TTJ55 / 23 ITR 714 / 84 DTR 219 (Mum)(Trib.)

S.4 : Charge of income-tax – Mutual Concern – 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. (AY. 1996-97)

Dy. DIT v. Societe International De Telecommunication (2012) 139 ITD 328 / (2013) 153 TTJ 55 / 23 ITR 714 / 84 DTR 219 (Mum.)(Trib.)

S.4 : Charge of income-tax – Subsidy – Special incentive for boosting mega investment is capital receipt

Subsidy received under a scheme clearly mentioning that it was given as special incentive for boosting mega investments in the state was a capital receipt. (AY. 2007-08)

Ford India P. Ltd. v. DCIT (2013) 25 ITR 456 / 59 SOT 221 / 156 TTJ 1 / 90 DTR 154 (Chennai)(Trib.)

S.4 : Charge of income-tax – Capital or revenue – Unmatured foreign exchange contracts credited to profit and loss account on last day of accounting year is taxable as income [S.5.]

The Tribunal held that when deduction has been allowed on account of loss arising on revaluation of investments in earlier years ,the subsequent write back of the same is assessable, however the AO must ensure that the same amount is not taxed twice. Accordingly the benefit on account of unmatured foreign exchange contracts as on the last day of the accounting year credited to the profit and loss account for the year is taxable. (AY.2001-02)

Credit Lynonnais (Through their successor: Calyon Bank) v. ADIT (2013) 26 ITR 51 / 144 ITD 644 / 96 DTR 261 / 158 TTJ 826 (Mum.)(Trib.)

S.4 : Charge of income-tax – AIR information – Income offered to and taxed in the hands of the HUF cannot be once again taxed in the hands of the individual

On the basis of the AIR information, the Assessing Officer noted that the assessee has made investment in FDR, mutual fund and has entered into an agreement for sale of a property for which he had received an advance, which was invested in mutual funds. It was submitted before the Assessing Officer that the assessee has disclosed the income in the hands of the HUF as the same belongs to HUF. The Assessing Officer did not accept the contention of the assessee and treated the capital gain as well as interest in the hands of the individual. The CIT(A) upheld the findings of the Assessing Officer. On appeal by the assessee the Tribunal allowing the appeal held:

Since the income shown by the HUF has been accepted by the department, the same cannot be assessed in the individual capacity. (AY. 2008-09)

Jyotindra Natwarlal Naik v. ITO (2013) 21 ITR 252 / 57 SOT 114 (Mum.)(Trib.)

S.4 : Charge of income-tax – *Mesne* profits – *Mesne* profits received for unauthorised occupation of the premises constitute capital receipts

During the year the assessee received *mesne* profits for unauthorized occupation of the premises from Central Bank of India who was in possession of rented premises belonging to the assessee. The assessee regarded the said receipt as capital in nature. Assessing Officer relying on the case of P. Marippa Gounder (1984) 147 ITR 676 (Mad.)(HC), assessed the receipts as chargeable to tax. On appeal the Commissioner (Appeals) held that the case before the Madras High Court was year of taxability. Tribunal relying on the ratio of the decision in Special Bench in the case of *Narang Overseas P. Ltd. v. ACIT (2008) 111 ITD 1*, appeal against which was dismissed by Bombay High Court *vide* order dt. 25-06-2009 (ITA No. 1791 of 2008), the Commissioner (Appeals) allowed the appeal of assessee. On appeal by revenue the Tribunal confirmed the order of Commissioner (Appeals) (AY.2008-09) (ITA No.8185/Mum/2011 dated 19-6-2011 Bench G)

ACIT v. Good will Theaters Pvt. Ltd. (2013) BCAJ–August–P. 34 (Mum.)(Trib.)

S.4 : Charge of income-tax – Non-resident – Banking company – Receipts from head office – Payment to self – Cannot be assessed as income [S.5]

The assessee a non-resident banking company did not offer the interest received by it from its Head Office and other foreign branches to tax on the ground that these were receipts from self. The Assessing Officer and the CIT(A) taxed the same as income. On appeal the Tribunal following the decision of the Special Bench in the case of *Oman International Bank S.A.O.G. v. ACIT* reported in (2012) 136 ITD 66 held that interest received by assessee from its head office and overseas branches was not taxable. (AY. 1999-2000, 2000-01)

Dy. DIT v. Dresdner Bank AG (2013) 22 ITR 500 / 57 SOT 203 (Mum.)(Trib.)

S.4 : Charge of income-tax – Mutuality – Income of tenants' association looking after members' common interest – Exempt on the ground of mutuality [S. 28(iii)]

The assessee institution was formed to work for the common interests of its members. The assessee claimed exemption from the tax on the ground of mutuality. The Assessing Officer denied the same for the reason that the assessee has not been able to demonstrate that it is working only for its members and the members have deducted tax at source while making payment to the assessee, therefore, the provisions of section 28(iii) is applicable to the assessee. The CIT(A) confirmed the view of the Assessing Officer. The Tribunal decided the issue in favour of assessee following the ratio of *CIT v. Bankipur Club Ltd. (1997) 226 ITR 97 (SC)* and held that income of tenants' association looking after members' common interest is exempt from tax on the ground of mutuality. (AY. 2006-07)

Belvedere Estates Tenants Association v. ITO (2013) 86 DTR 129 / 154 TTJ 764 / 139 ITD 675 (Kol.)(Trib.)

S.4 : Charge of income-tax – Mutuality – Sports club – No disputes as to identities of contributors and participators, principle of mutuality is applicable [S.12A]

During the financial year relevant to the assessment year the assessee-club claimed exemption on the principle of mutuality. The Assessing Officer held that the club premises were allowed to be used by private parties and the assessee had no control on the receipts which were directly made by the contractors or professionals and that the amount collected at the rate of 20 per cent was directly enjoyed by the members of the club, that in order to get the benefit of the principle of mutuality the assessee should confine its activities only among the members. Therefore he rejected the claim of the assessee that its income was exempt on the ground of principle of mutuality and treated the total receipts of the assessee as income from business activities and taxed them accordingly. On appeal the Commissioner (Appeals) held that the club was registered under section 12A of the Income-tax Act, 1961, that the Assessing Officer in the earlier years had not questioned the applicability of the principles of mutuality. On appeal, the Tribunal held that there was no dispute as to the identities of

the contributors and the participators of the club. Further, the Assessing Officer did not dispute the fact that only the members and their families and guests were allowed to participate in club activities. Because some professionals were engaged in organising the club activities from whom the club derived commission, it could not be said that the club was not eligible for exemption on principle of mutuality. Therefore, the order of the Commissioner (Appeals) was correct. (AY.2007-08, 2008-09)
ITO v. Kamala Vihar Sports Club (2013) 23 ITR 104 / 59 SOT 3 (URO) (Mum.)(Trib.)

S.4 : Charge of income-tax – Accrual – Bank – Guarantee commission – If refundable on revocation of guarantee, commission to be spread over period of guarantee
The Tribunal held that if the guarantee commission is refundable on the revocation of guarantee, it cannot be said that the absolute right to the commission has accrued to the assessee at the time of execution of the contract for furnishing the guarantee, and the commission is to be spread over the period for which the guarantee is given. In all other cases, the amount is to be taxed in the year in which the guarantee has actually been given irrespective of the period of guarantee. (AY. 1998-99 to 2003-04)
Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606 / 57 SOT 101 (Mum.)(Trib.)

S.4 : Charge of income-tax – Mutuality – Interest paid to head office or overseas branches not considered as expenditure in hands of Indian branch – Interest received is also not to be considered as income in hands of head office or overseas branches
The assessee received interest from its head office or overseas branches, which was not offered for taxation the Tribunal held that on the principle of mutuality the interest income received by the assessee from its head office or overseas branches was not chargeable to tax and interest paid to the head office or other overseas branches was not deductible.(AY. 1998-99 to 2003-04)
Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606 / 57 SOT 101 (Mum.)(Trib.)

S.4 : Charge of income-tax – Mutuality – Non-Government organisations managing self-help groups of villagers and their families principle of mutuality is applicable income is not liable to tax
An all India national apex body called the Association of Sarva Seva Farms, a national level trust, formed for the upliftment of poor villagers who had received in the past, parcels of land distributed by the Boodhan movement but were not in a position to raise resources to carry on agricultural and other related activities in the land allotted to them, arranged for funds for distribution among the Boodhan land allottees, on the security of the Boodhan land. The national apex body was a charitable institution and a non-profit organisation. The assessee-trusts were non-Government organisations registered in Tamil Nadu, to manage self-help groups of villagers and their families and undertaking programmes to generate income for the benefit of the members of that self-help group. The assessee-trusts were under a common umbrella micro financing company, which obtained loans from statutory corporations and nationalised banks and distributed them to the assessees. The assessees, in turn, lent the money to the self-help groups under them. The umbrella company charged interest at the rate of 12 per cent on the net balance method for the amount advanced by it to the assessees. The assessees, in turn, advanced these loans to their self-help groups at a flat rate of 12 per cent. This differential method generated surplus income in the hands of the assessees. The bye-laws of the assessee-trusts provided that 95 per cent of such surplus would be distributed among the members of the self-help groups working under them and 5 per cent of the surplus retained by the assessee-trusts for their own maintenance and other administrative overheads. Field organisations like the umbrella company, the assessee-trusts and individual self-help groups worked under the overall guidance and policy formulation of the national apex body. In the course of the assessments of these assessee-trusts, the Assessing Officer held that because the distribution of 95 per cent made by the assessee-trusts to member self-help groups was not determinate with reference to individual recipients 95 per cent of surplus distributed by the assessee-trusts to their member self-help groups had to be treated as income

of the respective trusts. Tribunal held that monies obtained by assessee-trusts from umbrella micro financing organisation lent to self-help groups under them – 95 per cent of surplus income of assessees distributed among members of self-help groups. Details of every member belonging to self-help group available on record. Details of loans availed of by various self-help groups properly recorded. Distribution of funds by self-help groups to individual members properly documented. Tribunal held that finding that share of every self-help group or share of every individual member indeterminate without any basis. Distribution by assessee trusts to self-help groups under them was assessable as income of those self-help groups themselves. Assessee is governed by principles of mutuality hence is not taxable income. (AY. 2007-08, 2008-09)
ITO v. Sarvodaya Mutual Benefit Trust (2013) 22 ITR 277 / 56 SOT 507 (Chennai)(Trib.)

S.4 : Charge of income-tax – Capital or revenue – Refund of excise duty is capital receipt hence not chargeable to tax [S.28(i)]
The question before the Special Bench was "whether in the facts and circumstances of the case, the excise duty refund set off is a capital receipt." "If the excise duty refund /set off is held to be revenue receipt, whether the said amount is to be included in the business profits for the purpose of deduction under section 80IB of the Income-tax Act."The Special Bench held that refund of excise duty is to be treated as capital receipt in the hands of the assessee, which is not chargeable to tax. As the first question is decided in favour of assessee the second question was not decided. (AY. 2006-07)
Vinod Kumar Jain v. ITO (2013) 140 ITD 1 / 83 DTR 258 / 152 TTJ 445 / 22 ITR 567 (SB)(Asr.)(Trib.)
Balaji Rosin Industries v. ITO (2013) 140 ITD 1 / 83 DTR 258 / 152 TTJ 445 (SB) (Asr.) (Trib.)
S.5 : Scope of total income – Interest – Accrual of interest on enhanced compensation was assessable on year to year basis
Accrual of interest on enhanced compensation on compulsory acquisition of assessee's land would be determined on year to year basis.
CIT v. Tapeshwari Devi (Smt.) (2013) 38 taxmann.com 48 / 218 Taxman 91 (Mag.)(All.) (HC)

S.5 : Scope of total income – Accrual – Grant was to be spread over five years – Cannot be taxed in one year. [S. 145, Accounting Standard–12]
When grant was given to assessee for operational expenses of four aircrafts and assessee was utilising said grant over a period of five years, and had followed AS-12, only a proportional amount of grant would be taxed in relevant year and not entire amount in one year. (AY. 2003-04)
CIT v. Airline Allied Services Ltd. (2013) 218 Taxman 396 / 37 taxmann.com 450 (Delhi)(HC)

S.5 : Scope of total income – Accrual – Interest – Deletion of order merely relying on earlier order was held to be not justified when facts were different [S.145]
Assessee was a non-banking finance company registered with Reserve Bank of India. Assessee claimed that it was not assessable in respect of interest on loans advanced to certain companies having regard to financial difficulties in which said debtor companies were placed. Assessee further submitted that its claim had been accepted by Tribunal in earlier years. Assessing Officer, however, found that companies to whom assessee had advanced loans were financially well off. He also noticed from balance sheets of those companies that they were making profit during year under appeal. Assessing Officer, therefore, concluded that assessee was no longer justified in not charging interest on loans granted to said companies. Commissioner (Appeals) upheld order of Assessing Officer. Tribunal, however, relying upon order passed by it in earlier years, allowed assessee's claim. Court held that since, in year under appeal, facts were different and this had been brought out well both in assessment order and in first appellate order, in such a situation, impugned order of Tribunal allowing assessee's claim merely on basis of order passed in earlier years was not sustainable.
CIT v. Brahmaputra Capital & Financial Services Ltd. (2013) 219 Taxman 68 (Mag.) / 357 ITR 241 (Delhi)(HC)

S.5 : Scope of total income – No interest bearing funds given as interest free advances to sister concerns, no addition on account of notional interest income warranted

The assessee made interest free advances to its sister concerns. The AO added notional interest on the advances made to the assessee's total income. The CIT(A) deleted the addition on the ground that no interest bearing borrowed funds were used to make such interest free advances to its sister concerns. He also observed that no interest expense has been claimed in the profit and loss account. The Tribunal confirmed the order of the CIT(A) relying on the decision of Guwahati High Court in the case of *B & A Plantations & Industries Ltd. v. CIT (2000) 242 ITR 22*. On appeal by the department, the High Court dismissed the departmental appeal observing that there was no substantial question of law. (AY. 2005-06).

CIT v. Arihant Avenue & Credit Ltd. (2013) 36 taxmann.com 14 / 217 Taxman 105 (Guj.)(HC)

S.5 : Scope of total income – Accrual – Retention money

In view of decision of Gujarat High Court in case of *Anup Engineering Ltd. v. CIT [2001] 247 ITR 457 / 114 Taxman 584* retention money could not be said to have accrued to assessee and therefore, this amount did not represent assessee's accrued income. (AY. 2002-03)

DIT v. Ballast Nedam International (2013) 215 Taxman 254 / 33 taxmann.com 139 (Guj.) (HC)

S.5 : Scope of total income – Accrual – Guarantee commission – Cancellation before expiry period – Income has not accrued

The assessee received commission on guarantee provided to its client. The said commission, to extent attributable to period ended 31-3-2001 was offered by assessee to tax in AY 2001-02 on accrual basis and balance amount attributable to financial year ended 31-3-2002 was offered in AY 2002-03. The Assessing Officer brought to tax, the entire guarantee commission in hands of assessee for AY 2001-02. The Commissioner (Appeals) and the Tribunal found that guarantee which had been issued for a certain period of time was cancelled by client before expiry of tenure of guarantee resulting into assessee returning to its client part of guarantee commission attributable to unexpired period of guarantee. Hence, the order of the Assessing Officer was not sustainable. On appeal High Court also confirmed the order of Tribunal. (AY. 2002-03)

DIT v. BNP Paribas SA (2013) 214 Taxman 548 (Bom.)(HC)

S.5 : Scope of total income – Mercantile system of accounting – Accrual of disputed payments – Amount received taxable as revenue receipt [S.145]

The assessee was maintaining mercantile system of accounts. In earlier years it supplied rectified spirit to various retail vendors on behalf of Government. Consequent to a government order, the amount to be received by the assessee stood enhanced. The assessee had shown said amount as outstanding liability in balance-sheet filed along with return for assessment year 1993-94 and was continued to be shown as liability even during assessment year 1997-98. A public interest litigation was filed challenging the aforesaid Government order and High Court allowed writ petition. There upon, the Government vide its order dated 18-9-2000 had withdrawn its earlier order of enhancement. The assessee challenged the withdrawal order of Government and the matter was pending in writ appeal. Held, since the aforesaid amount paid to assessee was definite and ascertained amount, it was in the nature of revenue receipt and was chargeable to tax in hands of assessee in AY 1993-94. (AY. 1993-94)

CIT v. Sapthagiri Enterprises (2013) 214 Taxman 458 / 93 DTR 109 (Karn.)(HC)

S.5 : Scope of total income – Accrual – Interest – Certificate of deposit – Interest received on maturity is taxable in the year of maturity

Assessee-company purchased three certificates of deposit from three banks on 31-3-1997. Certificates of deposit issued by respective banks showed period of deposit as 92 days. In

return filed for assessment year 1997-98, assessee offered a sum of Rs.3.37 lakhs as interest relatable to 31-3-1997, i.e., date of purchase of certificates of deposit, and balance interest of Rs.3.07 crores was offered in next assessment year 1998-99. Assessing Officer assessed entire interest income, i.e., Rs.3.10 crores in assessment year 1997-98 itself. The Court held that since assessee received interest only on maturity date, i.e., on 1-7-1997, Assessing Officer would be entitled to assess a sum of Rs. 3.37 lakhs alone for assessment year 1997-98 and balance amount of Rs. 3.07 crores had to be assessed in next assessment year 1998-99. In favour of assessee. (AY. 1997-98)
Infrastructure Development Finance Co. Ltd. v. Jt. CIT (2013) 213 Taxman 28 (Mag.) / 28 taxmann.com 221 (Mad.)(HC)

S.5 : Scope of total income – Accrual – Consistency
The assessee charged interest recoverable from customers on day-to-day basis and if any difference of interest recoverable was traced later, that was shown in the following year. The AO made an addition as interest was charged from the customers at a lower rate. Held that the assessee was consistently following the practice since the beginning that any interest extra charged or lesser charged was adjusted in the next year. In the facts and circumstances, the right to receive had accrued only in the following year and it had been charged in the following year itself. The charge could not be made during the relevant assessment year. (AY. 2007-08)
Fazilka Central Co-op. Bank Ltd. v. DCIT (2013) 27 ITR 326 (Amritsar)(Trib.)

S.5 : Scope of total income – Accrual – Revised return – Subsequent cancellation of agreement – Income which has not accrued to assessee from sale of immovable property which could not be brought to tax [S.139(5)]
It is a settled principle that when a revised return is filed by the assessee, the original return is totally substituted and the revised return alone has to be taken into consideration in completing the assessment. earlier return, after a revised return has been furnished, cannot form the basis of assessment. For the purpose of assessment of income, the effective return thus is the revised return filed by the assessee ultimate.
There is no bar on the appellate authorities to consider the claim of the assessee on merit even in the absence of revised return filed by him making such claim. (AY.2007-08)
Lok Housing & Constructions Ltd. v. ACT (2013) 60 SOT 15 (URO) / (2012) 27 taxmann.com 15 (Mum.)(Trib.)

S.5 : Scope of total income – Accrual – Surcharge on belated payment of bill being not accrued is not liable to be assessed
Held, that part of the amount of surcharge on belated payment of bill that was subject to waiver/protest and was not mandatorily enforceable at time of payment of bills. Amount of surcharge not realised, did not amount to accrued receipt taxable as income as it was hypothetical in nature. (AY. 2007-08)
ACIT v. Dakshin Haryana Bijli Vitran Nigam Ltd. (2013) 59 SOT 133 (URO) / 35 taxmann.com 486 (Delhi)(Trib.)

S.5 : Scope of total income – Accrual – Derivates – Stock in Trade – Futures and options (F&O) contracts – Taxable in the year of its actual realization
Notional gains from derivates held as stock-in-trade is taxable in the year of its actual realization. The notional loss is allowable as no contingencies are attached. (AY. 2008-09)
Urudavan Invt. & Tdg. (P.) Ltd. v. Addl. CIT (2013) 56 SOT 69 / 29 taxmann.com 312 (Mum.)(Trib.)

S.5 : Scope of total income – Accrual – Release of retention money in respect of ongoing project against bank guarantee is not taxable

Tribunal held that the project was ongoing, so the release of retention money against bank guarantee was not assessable during the relevant year. Tribunal & CIT(A) both followed the decision of Hon'ble Bombay High Court in the case of *CIT v. Associated Cables (P) Ltd. (2006) 286 ITR 596 (Bom.)* (AY. 2003-04)
Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

S.5 : Scope of total income – Accrual – Advisory fee/commission in connection with grant of loans
The Tribunal held that the entire fee / commission accrued in this year and no part of it can be spread to next year. The CIT(A) was not justified in directing the spread over of the advisory fee over the period of loan. (AY. 2000-01)
Dy. DIT v. Toronto Dominion Bank Ltd. (2013) 153 TTJ 303 / 84 DTR 377 (Mum.)(Trib.)

S.5 : Scope of total income – Non-resident – Salary income – Accrual of Income from employment could not be taxed in India-DTAA-India-UK [S.90, Art.16]
Where assessee, a NRI, received salary income in India against employment exercised in U.K. and offered same for taxation in U.K. in pursuance of article 16, it could not be taxed in India as per DTAA between India and U.K. (AY.2006-07)
ITO v. Sri Sunil Chitranjan Muncif (2013) 58 SOT 356 (Ahd.)(Trib.)

S.5 : Scope of total income – Method of accounting – Revenue recognition – When work did not commence mere raising the invoice did not constitute income. [S 145]
Where only an invoice had been raised and work had not even commenced, it did not constitute income for that year since revenue recognition on completion of certain milestone of work is an accepted method in mercantile system of accounting. (AY. 2008-09)
Davis Langdon & Seah Consulting India (P.) Ltd. v. DCIT (2013) 58 SOT 124 / 33 taxmann.com 264 (Bang.)(Trib.)

S.5 : Scope of total income – Accrual – Membership fee – 60% as income in the first year and balance 40% as income in remaining 24 years.[S.145]
Assessee is engaged in business of running holiday homes on time share basis. It provided holiday home facility to its members for a period of 25 years. In a 25 years plan, 60 per cent membership fees was treated as income of assessee of first year and balance 40 per cent was treated as income of remaining 24 years on a pro rata basis. Assessing Officer treated hundred per cent of membership collection as income liable for taxation for impugned assessment year. On appeal following the Special Bench in *ACIT v. Mahindra Holiday & Resorts (India) Ltd (2010) 39 SOT 438(SB)(Chennai)(Trib.)*, The Tribunal held that the assessee was justified in treating only 60 per cent of its membership fee collection as its income. (AY. 2006-07)
Mahindra Holidays and Resorts India Ltd. v. Dy. CIT (2012) 19 ITR 811 / (2013) 141 ITD 363 (Chennai)(Trib.)

S.5 : Scope of total income – Interest on securities – Accrued but not due should not be treated as income
For year ending on 31-3-1999, it had credited income from interest on securities on day-to-day accrual basis. However, it did not offer said interest for taxation and claimed that interest which had not become due for payment during previous year should not be treated as income. Held, in view of judgment of Bombay High Court rendered in case of *DIT (International Taxation) v. Credit Suisse First Baston (Cyprus) Ltd. [2012] 209 Taxman 234*, the interest in question did not constitute income of assessee for assessment year under consideration as the same was not due. (AY. 1999-2000)
Dresdner Bank AG v. ACIT (2013) 57 SOT 203 / 22 ITR 500 (Mum.)(Trib.)

S.5 : Scope of total income – Accrual – Retention money – Accrues on performance of conditions in the agreement

Customer retained money in respect of a completed contract for satisfactory performance of contract, for which due diligence was undertaken. Only on demonstration of satisfactory performance of contract, money was to be released finally to assessee, otherwise it had to repair fault or pay liquidated damages. Tribunal held that such retention money did not accrue as income to assessee on raising bill after completion of project, income arose on performance of conditionalities of agreement and, thus, it did not accrue as income in current year. (AY. 2009-10)

Dy. CIT v. Angelique International Ltd. (2013) 55 SOT 226 / (2012) 28 taxmann.com 219 (Delhi)(Trib.)

S.5 : Scope of total income – Accrual – Revenue for services – Unused prepaid cards sold to users of telecom services is assessable in the year when talk time is actually used.

Talk time charges received by the assessee, a telecom service provider, on the sale of prepaid cards are to be recognised as income of the relevant year only to the extent the talk time has been actually used by the customers, and the amount referable to the unused talk time is to be recognized as income in the subsequent year when the talk time is actually used.

ACIT v. Shyam Telelink Ltd. (2013) 141 ITD 416 / 81 DTR 269 / 151 TTJ 464 (Delhi)(Trib.)

S.5 : Scope of total income – Amount payable to foreign entity did not constitute the income of foreign entity in the absence of permission obtained from RBI as required by FERA

The assesse, M/s. Broz Allen & Hamilton (BAH) India, is a foreign partnership firm and it has a branch office in India through which it renders management and technical consultancy services. BAH India has availed the services from various group entities and made the payments for the same. According to Assessing Officer, the payments made by BAH India to the group entities abroad were chargeable to tax as 'fees for technical services'. The Assessing Officer completed assessments under section 143(3) r.w.s. 148 treating BAH India as agent of group entities and the amount paid were taxable as fees for technical services. The CIT(A) upheld the validity of assessments made by the Assessing Officer.

The Tribunal held that the amounts payable by BAH India to three group entities in Germany, India and Panama (SE Asia) did not constitute their income chargeable to tax in the year under consideration as there was no accrual of income in the absence of permission obtained from RBI as required by FERA. Tribunal followed the two decisions of Hon'ble Bombay High Court namely, *1. CIT v. Kirloskar Tractors Ltd. (1998) 231 ITR 849 (Bom.) 2. CIT v. John Fowler (I) Ltd., (1999) 239 ITR 312 (Bom.)*. (AY. 1998-99)

Booz Allen & Hamilton (India) Ltd. v. ADIT (2013) 152 TTJ 497 / 83 DTR 305 / 56 SOT 96 (Mum.)(Trib.)

S.5 : Scope of total income – Liability has accrued – Mere fact that it is not quantified by way of raising of bills – would not alter fact that such liability is accrued and allowable liability

The AO disallowed CISF security expenses appearing in the 'miscellaneous expenses' as the same was only a provision. The assessee submitted that they were required to make such provision as per approval from the Department of Atomic Energy. The AO disallowed the same holding it to be contingent in nature. The CIT(A) on observing that certain bills had not been received, partially confirmed the disallowance.

On appeal to the Tribunal, it was held that the liability to pay security expenses was a defined and accrued liability and the mere fact that it was not quantified during the year by way of raising of bills could not alter the fact that such liability even though on an estimated basis was an accrued and allowable liability. The Tribunal relying on the decision in the case of the assessee for the earlier year and also on the decision of the Supreme Court in the case of *Rotork Control India (P.) Ltd. v. CIT (2009) 314 ITR 62* deleted the disallowance. (AY. 2007-08)

Electronics Corpn. of India Ltd. v. ACIT (2013) 140 ITD 221 / 89 DTR 190 / 155 TTJ 748 (2014) 29 ITR 637 (Hyd.)(Trib.)

S.5 : Scope of total income – Accrual – Interest on securities – Method of accounting [S.145]
Assessee though in profit and loss account ,interest on securities are credited on day to day basis, for the purpose of computation of total income under the Income-tax Act , interest on Government securities is taxable on due basis and not on day to day accrual basis as assesse has no right to receive income before fixed date.(AY. 1996-97)
State Bank of India v. Dy. CIT (2014) 148 ITD 71 (Mum.)(Trib.)

S.5(2) : Scope of total income – Accrual – Interest on foreign currency convertible bonds paid to non-resident investors [Ss. 9(1)(v), 196C]
The assessee paid interest to non-resident investors on FCCB. The Assessing Officer held that the interest income has accrued or arisen in India on the basis that the payer is an Indian company and the Assessing Officer has totally ignored this aspect of the matter as to where the money lending transaction has taken place. It is admitted factual position that money lending transaction has taken place outside India and the same was utilised for the overseas business of the assessee. The Tribunal held that interest payment by the assessee to non-resident investors cannot be said to have accrued or arisen in India and it also cannot be said that this interest income can be deemed to have accrued or arisen in India. Therefore, no TDS is to be deducted by the assessee from this payment. The Tribunal confirmed the order of CIT(A) and decided the issue in favour of assessee. The assessee had filed cross objection which was dismissed by the Tribunal as no TDS was deductible from interest paid to non-resident bond holders. (AY. 2009-10)
Addl. DIT (IT) v. Adani Enterprises Ltd. (2013) 153 TTJ 476 / 85 DTR 33 (Ahd.)(Trib.)

S.6(1) : Residence in India – Individual – Conditions cumulative – Individual residing in India for more than 365 days in immediately preceding four years but residing for less than 182 days in previous year is not a resident
Section 6(1)(a) makes it clear that an individual would be a resident of India in any previous year if he was in India in that year for a period or periods amounting in all to 182 days or more. Section 6(1)(c) applies to citizens of India as well as to persons of Indian origin. In the case of citizens of India, the length of stay in India in a particular year has been extended to 182 days as compared to 60 days for foreigners.
Although the assessee had in the preceding 4 years stayed in India for a period in excess of 365 days, in none of the years had he been in India for a period in excess of 182 days. Therefore, the assessee was not a resident of India (AY. 2001-02 to 2003-04).
CIT v. Suresh Nanda (2013) 352 ITR 611 / 90 DTR 283 / 260 CTR 140 / 216 Taxman 185 (Delhi)(HC)

S.6(6) : Residence in India – Not-ordinarily resident – Accrual of Income – Assessee has to prove that income had accrued or arisen outside India [S. 5(1)(c)]
The court held that for availing benefits of proviso to section 5(1)(c), mere claim that assessee is a person 'not ordinarily resident in India, is not sufficient. In absence of any proof that income that had accrued or arisen outside India was not on account of any business interest or trade in India, benefits of proviso to section 5(1)(c) could not be taken advantage of by a person 'not ordinarily resident' in India. (B.P. 1986-87 to 1996-97)
Kumari Kanagam (Mrs) v. CIT (2013) 213 Taxman 154 / 261 CTR 84 / 91 DTR 57 (Mad.) (HC)

S.9(1) : Income deemed to accrue or arise in India – Business connection – Fee split arrangement – Fee remitted to head office cannot be taxed in India – DTAA-India-Germany [Article 7]

The assessee-company and its head office in Germany followed a fee split arrangement, according to which assessee claimed that fee retained or remitted to head office could not be taxed in India. The Revenue contended that since the assessee and its head office were part of the same organisation, question of splitting up of fee did not arise. Where the assessee followed a well-defined system of payment, revenue allocated to head office, earned from activities carried on with it could not be taxed in India where fee split arrangement was fully backed by India-Germany DTAA. (AY. 2007-08)
Germanischer Lloyd A.G. v. DCIT (2013) 59 SOT 130 (URO) / 35 taxmann.com 347 (Mum.)(Trib.)

S.9(1) : Income deemed to accrue or arise in India – Business connection – Subscription/membership fee paid by CA firm – No element of income hence not liable to deduct tax at source. [S.40(a)(i), 195]
Where subscription/membership fee paid by CA firm to BTI in England, whose membership was restricted to professional firms word wide, practicing profession of accountancy. BTI in UK being a non-profit, non-business organisation did not involve any income element in its hands, amount was not taxable in India, and no tax was required to be deducted at source. (AYs. 2005-06 to 2007-08)
K. S. Aiyar & Co v. ACIT (2013) 59 SOT 144 (URO) / 36 taxmann.com 317 (Mum)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Reimbursement of expenses could not be treated as taxable income. [S.5]
Assessee, non-resident company, entered into a contract with an Indian company, 'E', for supply of a compressor. Since compressor was found to be in damaged condition, assessee deputed two technicians from Germany to establishment of 'E'. 'E' reimbursed expenses for air tickets for travel between Germany and India to the assessee. Held, reimbursement of expenses in question could not be treated as part of taxable income of assessee. (AY. 1998-99)
DIT v. Krupp Udhe GmbH (2013) 219 Taxman 138 (Mag.) / 354 ITR 173 (Bom.)(HC)

S.9(1)(i) : Income deemed to accrue or arise in India – Set off of branch losses – Taxability – DTAA-India-Sweden [Article 7]
The assessee set off its loss from Sweden branch against its other business income taxable in India. Revenue's case was that as per Article 7, profits attributable to Sweden branch was taxable in Sweden and, therefore, losses incurred by Sweden branch could not be set off against other income. Following its decision rendered in earlier assessment years with respect to India-Japan DTAA, the Tribunal allowed the claim of the assessee. Since nothing had been brought on record to show that clauses of DTAA between India-Sweden were different from that in DTAA between India-Japan in respect of present issue, the Tribunal's order was justified. (AY. 2002-03)
CIT v. Patni Computer Systems Ltd. (2013) 215 Taxman 108 / 33 taxmann.com 3 (Bom.) (HC)
Editorial : Patni Computer Systems Ltd v. Dy. CIT (2012) 135 ITD 398 (Pune)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Liaison office – No income is attributable to Liaison Office's activity of sourcing manufactured products from India even if fee for service is received from overseas buyer. Income earned outside India under a contract with a buyer which is entered outside India, no part of such income can be taxed in India either under section 5 or section 9(1)(i). [S.5(2)]
The assessee, a USA company, set up a liaison office in India whose main activity was to liaise with Indian manufacturers for purchase of apparels from India by the assessee's HO and overseas subsidiaries. It employed a large variety of staff whose task was to create awareness amongst the Indian manufacturers of the need to maintain quality control and adhere to standards. The price for each apparel was negotiated with the manufacturer and the samples were forwarded to the US office. The liaison office gave its opinion about the reasonableness of the price and all related issues etc. The US office decided about the price, quality, quantity, to whom to be shipped and billed. The liaison office kept a close watch on the progress, quality, time schedule etc. at the manufacturing workshop.

The AO held that the activities of the assessee of identifying exclusive manufacturers, designing the products, supervising the manufacture and quality of the and marketing the products were beyond that required by a liaison office and resulted in income accruing or arising in India u/s 5(2) read with s. 9(1)(i). He accordingly held that 5% of the export value of the goods was attributable to India operations and was chargeable to tax. This was upheld by the CIT(A). On appeal, the Tribunal *(G.G. Dhi (Dr.) v. ACIT (2010) 125 ITD 35 (Bang)* held that the activity of the liaison office was merely that of purchasing goods for the purpose of exports as the agent of the buyer and that under Explanation (1)(b) to s. 9, no income can be said to be derived by the assessee in India through the operations of the liaison office. On appeal by the department to the High Court, HELD dismissing the appeal:

(i) U/s 9(1)(i) income accruing or arising from any "business connection" in India is deemed to accrue or arise in India. The expression "business connection" is defined in Explanation 2 to s. 9 to include any business activities carried out by a person who is habitually acting on behalf of the non-resident in India. However, this does not include an authority to conclude contracts on behalf of the non-resident if the activities are limited to the purchase of the goods or merchandise for the non-resident. Under Explanation 1(b) to s. 9(1)(e) a non-resident is not liable to tax in India on any income attributable to operations confined to purchase of goods in India for export, even if the non-resident has an office or agency in India for that purpose and the goods are subjected by him to any manufacturing process before being exported from India. The result is that no income is deemed to accrue or arise in India to a non-resident, whether directly or indirectly through or from any "business connection", if the activities are confined for the purpose of export.

(ii) On facts, the assessee is not carrying any business in India. The object of the liaison office is to identify manufacturers, give them technical know-how and see that they manufacture goods according to the assessee's specification which would be sold to the assessee's affiliates. The person who purchases the goods pays money to manufacturer and in the said income, the assessee has no right. The said income cannot be said to be a income arising or accruing in India vis-a-vis the assessee. As the entire operations are confined to the purchase of goods in India for the purpose of export, the income derived therefrom cannot be deemed to accrue or arise in India. The non-resident buyer may in turn pay some consideration to the assessee outside India but as that contract between the assessee and the buyer is entered outside India, that income arises or accrues to the assessee outside India and is not chargeable to tax in India. (AYs. 1999-2000 to 2006-07)

CIT v. Nike Inc (2013) 217 Taxman 1 / 96 DTR 40 / (2014) 264 CTR 508 (Karn.)(HC)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Offshore supply equipment – Despite retrospective amendment to section 9(1) with effect from 1-6-1976 assessee would not be liable to tax under Explanation to said section. DTAA-India-Japan [S.9(vii), 90 Article 7]

As per earlier Supreme Court decision in assessee's own case in Ishikawajima Harima Heavy Industries Co. Ltd. (2007) 288 ITR 408(SC), amount receivable by assessee in respect of offshore supply of equipment and offshore services was not liable to tax in view of article 7 of DTAA between India and Japan. Court held that, despite retrospective amendment to section 9(1) with effect from 1-6-1976 assessee would not be liable to tax in respect of such amount under Explanation to said section. In favour of assessee. (AY. 2003-04)

DIT(IT) v. Ishikawjima Harima Heavy Inds. Co. Ltd. (2013) 212 Taxman 273 / 258 CTR 335 / 86 DTR 330 (Bom.)(HC)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Reimbursement of expenses – Onus to prove

The assessee received line charges, installation charges, service charges and other expenses from the subsidiary company and claimed them as reimbursement of expenses. Held, on facts, there was

insufficient material to show that the receipt was reimbursement of expenses and this claim was liable to be dismissed. (AY. 2004-2005)
Abacus International P. Ltd. v. DDIT(IT) (2013) 27 ITR 49/34 taxmann.com 21 / 155 TTJ 550 / 89 DTR 235 / 144 ITD 36 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Indian subsidiary – No authority to negotiate or conclude contract – No profit could be taxed in India-DTAA-India-USA [Art.5]
Where Indian subsidiary only assisted in sale of products in India and did not have any authority to negotiate terms of sales or conclude a contract on behalf of foreign assessee company, it could not be considered as an agency Permanent Establishment in India under Article 5 of DTAA between India and USA and, therefore, no profit could be taxed in India (AYs. 2004-05, 2005-06 & 2008-09).
Lubrizol Corporation USA v. ADIT (2013) 60 SOT 118 (URO) / 33 taxmann.com 424 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Commission – Where assessee paid commission to non-resident agent outside India for services provided in foreign countries, in absence of PE of non-resident agent in India said payment would not be chargeable to tax in India hence, no disallowance can be made [S.40(a)(i), 195]
The assessee paid commission to non-resident agents for rendering services in respect of procuring export orders from various countries. The A.O. invoked the provisions of section 40(a)(i) and disallowed the commission expenses claimed by the assessee on grounds that the assessee had not remitted the amount after deducting the tax at source. During the CIT(A) proceedings assessee contended that the non-resident agents did not have any business connection in India thus, tax was not required to be deducted. CIT(A) in AY. 2007-08 confirmed the disallowance whereas in AY. 2008-09 deleted the disallowance.
Tribunal held that in the absence of permanent establishment in India, the income of the said agents cannot be subjected to tax in India and hence the assessee was not liable to deduct tax on payments made to the said agents. Therefore the provisions of section 40(a)(i) not applicable. (AYs. 2007-08 to 2008-09)
Gujarat Reclaim & Rubber Products Ltd. v. Addl. CIT (2013) 60 SOT 22 / 35 taxmann.com 587 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Export commission to foreign agent – Did not accrue or arise in India as no services were rendered in India [Ss. 40(a)(i), 195]
Tribunal held that export commission paid to foreign agent for procuring order and pursuing payment from foreign buyer did not accrue or arise in India as no services were rendered in India. (AY. 2008-09)
Allied Nippon Ltd. v. Dy. CIT (2013) 145 ITD 81 (Delhi.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Capital gains – Sale of mutual funds – Mutual funds not to be considered as shares of companies – DTAA-India-Swiss [S. 45, Article 13]
The assessee, an NRI based in Switzerland received capital gain from sale of mutual fund units and he claimed that the same was not taxable in India under the Art. 13(6) of the Indo-Swiss treaty. The A.O. treated the units of mutual fund as shares of Indian Company and held the gain taxable in India. The CIT (A) deleted the order of the A.O. on appeal, the Tribunal held, in absence of any specific provision to deem the unit as shares, it could not be considered so and thus the capital gains could not be taxed in India. (AY. 2004-05)
ITO v. Satish Beharilal Raheja (2013) 145 ITD 29 / (2014) 98 DTR 204 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Constitution of offshore platform and pipelines – Installation PE in India – Contracts divisible in nature-DTAA-India-South Korea [Article 7]

The assessee company was incorporated and a tax resident of South Korea. Assessee was engaged in business of offshore platform construction and laying of pipelines. It had PE in India. The assessee contended a portion of activities carried outside India was not taxable here. The A.O. held the contracts indivisible and thus taxable. The Tribunal held in assessee's favour that receipts pertaining to designing, fabrication and supply of materials carried outside India before date of arrival of structure would not be taxable in India. (AY. 2008-09)

Hyundai Heavy Industries Co. Ltd. v. ADIT (2013) 145 ITD 158 (Delhi)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Interest – Deposit was out of surplus earned by PE – DTAA-India and South Korea [Article 12]

The assessee company was incorporated and a tax resident of South Korea. Assessee questioned action on authorities below in bringing to tax interests earned from its bank in Chennai at Maximum Marginal Rate under Article 12(5) of DTAA. Decision of authorities below on this issue remained that interest on deposit in said Chennai Bank was out of Surplus earned by PE and therefore, effectively connected with PE and was to be taxed at normal rate applicable to profits of business of a foreign company. The Tribunal held in favour of the revenue that in absence of rebuttal of this finding of authorities by assessee, there should be no interference. (AY. 2008-09)

Hyundai Heavy Industries Co. Ltd. v. ADIT (2013) 145 ITD 158 (Delhi)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – permanent establishment – Purchase of space on website from parent company on principal to principal basis – Assessee company was not an agency PE as per article 5 of India-USA DTAA of its holding company-DTAA-India-USA. [S.5,.40(a)(ia), Article 5]

The Tribunal held that where foreign holding company sold online advertisement space to assessee-company at cost plus profit, neither party acted or did business on behalf of other. It cannot be said that the assessee is an agency PE of holding company.

ITO v. Pubmatic India (P) Ltd. (2013) 95 DTR 89 / 60 SOT 54 URO) (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Shipping business–Place of effective management-Income was not taxable in India-DTAA-India-Cyprus. [Ss.5(2)(a), 90, 44BB, Articles 7, 8]

In view of Article 8 of DTAA between India and Cyprus, income from shipping business of a non-resident whose effective management was in Cyprus was not liable to be taxed in India. (AY. 2003-2004)

Bengal Tiger Line Ltd. v. DCIT (2013) 58 SOT 134 / 33 taxmann.com 307 (Chennai)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Business of operation of ships – Shipping inland waterways transport and air transport – Inland haulage charges - DTAA-India-Belgium. [Art.8]

Inland transportation is not only incidental but also closely connected with direct operations of ships; and, therefore, inland haulage charges being income from operation of ships in international traffic, is exempt under Article 8. (AY.2008-09)

DCIT v. Safmarine Container Lines NV (2013) 58 SOT 222 / 33 taxmann.com 619 (Mum.) (Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Sale proceeds of tickets being remitted to it by Indian agent was not liable to tax in India

On the basis of decisions taken in earlier similar appeals, claim of the non-resident assessee, who was engaged in canvassing business of travel and tour related services, that sale proceeds of tickets being remitted to it by Indian agent was not liable to tax in India could be allowed in relevant assessment year (AY.2007-08)
Star Cruise Management Ltd. v. DCIT (2013) 58 SOT 3 (URO) / 33 taxmann.com 477 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Deduction of tax at source – Additional evidence – DTAA-India-UK – Indirect transfer – Capital gains – Matter set aside [Ss.195, 201, Article 13]
The assessee, an Indian resident company, acquired 100% stake in a foreign company and, consequently, got acquisition over Indian subsidiary of said foreign company in which the foreign company was holding 49% equity shares. The AO observed that the 49% stake in the Indian subsidiary had got transferred from the foreign company to the assessee-company, on which capital gains tax was payable. Since assessee did not deduct tax at source from said payment, it was liable to be treated as assessee-in-default under section 201 and made addition to income of the assessee. Before the Commissioner (Appeals), the assessee submitted additional evidence on basis of which the Commissioner (Appeals) deleted said addition. Held, since the Commissioner (Appeals) entertained additional evidence and deleted the liability of deducting tax at source by relying on such additional evidence without confronting it to the Assessing Officer, his order cannot be sustained and matter was set aside to the AO. (AY.2006-07)
ITO v. Infomedia India Ltd. (2013) 58 SOT 31 (URO) (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Air transport business – Ground handling services' and 'technical handling services' is not taxable in India – DTAA-India-Netherland [S.44BBA, Article 8]
So long as the decision of earlier year is not modified or reversed by the High Court, ordinarily, the same should be followed by the subsequent Coordinate Bench. Merely because the Revenue is not satisfied with the decision of the ITAT in earlier year would not be a sufficient ground for referring the matter to the Larger Bench. In view of the above, respectfully following the decision of ITAT, it is held that the income from ground handling and technical handling services is not taxable in India. (AY.2008-09)
KLM Royal Dutch Airlines v. DCIT (2013) 58 SOT 207 / 33 taxmann.com 373 (Delhi)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Interest from overseas branches was not liable to be included in total income – DTAA-India-Belgium. [S.90, Article 7]
Interest received by assessee from overseas branches/head office was not liable to be included in its total income, on the ground that same being a payment received from self could not be treated as income. (AY.2000-01)
KBC Bank N.v. v. JDIT (2013) 58 SOT 235 / 34 taxmann.com 26 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Taxation of branch of foreign company – Head office incurred loss – Permanent establishment – DTAA-India-USA. [S.90, Article 5(1), 7(3), Income-tax Rules, 1962, R.10]
The assessee, an American company, engaged in the business of medical transcription and software development related to health care, opened a branch in India after obtaining permission from the Reserve Bank of India. The Assessing Officer was of the view that the branch office, engaged in software development, software product enhancements, customer care and medical transcription services for its head office was a permanent establishment in India under Article 5(1) of the Double Taxation Avoidance Agreement between India and the USA and came to the conclusion that the assessee's income had to be estimated at cost plus 15% mark up. The Commissioner (Appeals)

reduced the profit mark up to 10%. Held that the branch was a permanent establishment in India and the contention that the head office had suffered loss and hence there could not be any profit to the branch office was held to be unacceptable as profit of the branch office had to be computed in accordance with the income earned by it. Tribunal held that Article 7(3) has two parts. The first part relates to commercial and business activities carried on by a PE whereas second part relates to certain specified non-commercial services performed by PE for its Head Office. While commercial and business services are taxable, if HO assigns some non-commercial activities to its BO, income from such activities would not be taxable in terms of Article 7(3) of the India –USA DTAA. In the present case BO provided customer care and medical transcription services to the HO. These were commercial services outsourced by the HO, hence consideration for such services was taxable in India. Since the assessee has not at all provided any basis of computation of profit, estimation of profit at 10 per cent was held to be reasonable. (AY.2006-07)
Wellinx Inc. v. ADIT(IT) (2013) 25 ITR 671 / 143 ITD 749 / 35 taxmann.com 420 / 96 DTR 299 / 158 TTJ 900 (Hyd.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Liaison office- Profit attributable to the liaison period was deleted.
The taxpayer had set up a liaison office in India with the permission of the Reserve Bank of India. Role of liaison office was limited to co-ordinate market survey; support services to new clients; etc. At later date, the taxpayer set up a Branch office and closed its Liaison office. The Assessing authority held that taxpayer was involved in business activity and was liable in respect of profits earned by head office as also USCO. The Tribunal held that there was a clear distinction between the liaison activities and the branch activity and the taxpayer was not involved in business activity when they were only permitted to do liaison activity by the Reserve Bank of India and accordingly the profit attributable to the liaison period was deleted (AY. 1999-2000, 2000-01 dated 5-6-2013)
St. Jude Medical (Hong Kong) Limited (2013) BCAJ-August – P. 35 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Permanent establishment – DTAA – India-UK [Article 5]
The Tribunal held that liaison offices and project offices form part of one single entity and need not be subject to different tax audits & returns as no benefit was accruing separately to the head office through the liaison office. (AY. 2005-06 & 2007-08)
ADIT v. Rolls Royce Industrial Power India Ltd. (2013) 142 ITD 585 (Delhi)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Systematic research service falls under technical services – Payment of FTS in cases where no PE in India, tax to be deducted at source – DTAA-India-Italy [S.40(a)(ia), 195, Article 13]
The assessee company paid its overseas agent to provide systematic research service without deducting tax at source. The Assessing Officer disallowed the same under 40(a)(ia). Assessee' contention payee did not have PE & services rendered outside India & systematic research not technical service. The CIT(A) deleted the addition. The Tribunal restoring the Assessing Officer's order held that systematic research service falls under the technical service and as per provisions of section 9(1)(vii) it is not necessary for non-resident to have residence or place of business or business connection in India for taxing fees for technical services in India. (AY. 2009-10)
ACIT v. Evolv Clothing Co. (P). Ltd. (2013) 142 ITD 618 / 26 ITR 71(Chennai)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Permanent establishment – "Force of attraction rule" – DTAA-India-USA-Australia-Italy [Article 5 & 7]
The Assessee entered into a distribution & representation agreement with the 5 Group Companies of its parent company. The assessee carried out two types of sales a) Indirect Sales of analytical lab

instruments, & b) direct sales of spares for the same. The A.O. held that the assessee was a dependent company & by virtue of "Force of Attraction Rule" under Article 7(1) of the respective DTAA, the profits of the Varian Group of Companies (VGCs) was taxable in India. The CIT(A) upheld the order of the A.O. On appeal, the Tribunal, held, in favour of the assessee:
Under Article 5(4), an agent is deemed to be PE if (a) he independently concludes contracts, (b) Maintains Stocks, (c) Secures order; and none being fulfilled by the assessee and similarly also under para 38 of the OECD an agent is dependent if (a) Has authority to conclude contracts, & (b) Is ready to bear entrepreneurial risk; and the above conditions are also not being fulfilled by the assessee. The Tribunal held that the assessee held only obligations of pre sale and post sale, none regarding the actual sale. Since the assessee is not a dependent agent & thus not a PE, hence "Force of attraction rule" will not apply. (AYs. 2002-03 to 2006-07).
Varian India (P.) Ltd. v. ADIT (2013) 142 ITD 692 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Without proper examination of facts and giving chance of cross examination – Determination of profit attributable to PE in India – Not justified-DTAA-India-Singapore. [Article 5]
Assessing Officer determined profit attributable to PE in India @ 90% of business profits as entire income earned by assessee. Singapore Company was from operations in India. Assessee claimed that Indian company was appropriately remunerated at arm's length by rebates and incentives directly from vendors. Assessee alleged that it was not allowed to cross examine individuals who records statements against it. Tribunal restored the matter back to the Assessing Officer for fresh examination and directed the Assessing Officer to give an opportunity assessee for cross examining persons whose statements are used against the assessee. The statements have been recorded from the Indian personnel and management have been examined with reference to the Indian company. The Assessing Officer was directed to allow the assessee to cross examine the individuals whose statements were recorded & were relied upon by the Revenue so that the assessee can contest / justify / accept the statements. (AY. 2008-09)
Ingram Micro (India) Experts (P) Ltd. v. Dy. CIT (2013) 56 SOT 273 / 31 taxmann.com 2 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Short term capital gain – Forward exchange contract/hedging mechanism – DTAA-India-Spain-Additional evidence-Matter set aside-DTAA-India-Spain. [Art. 14, 23]
The assessee-company was a resident of Spain and registered as FII with SEBI. It claimed the profit on foreign exchange transactions as short-term capital gain and hence exempt under India-Spain DTAA. Since the assessee filed additional evidence before the Tribunal, the matter was to be restored to the Assessing Officer for fresh decision. (AY. 2005-06)
Merrill Lynch Capital Markets Espana SA v. DCIT (2013) 57 SOT 435 / 33 taxmann.com 183 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Capital gains – DTAA-India-UAE. [Articles 4, 13]
The assessee is held to be not entitled to the benefit of India-UAE DTAA and income from capital gains was charged to tax, on the ground that individuals are not taxable in UAE. The Tribunal in assessee's own case in the immediately preceding year held that assessee was entitled to benefits of DTAA thereby granting exemption from capital gain. Since the facts of the instant appeal were similar to those of immediately preceding year, the benefit of the DTAA was to be granted. (AY. 2008-09)
ITO v. Chandersen Jatwani (2013) 57 SOT 437 / 33 taxmann.com 215 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Interest – Income-tax refund – DTAA-India-Denmark [Art.9(4), 12(6)]

Interest on income-tax refund was taxable in India as per Article 12(6) of DTAA between India and Denmark. Interest cannot be considered as business income. (AY. 2005-06)

A.P. Moller Maersk v. DCIT (2013) 57 SOT 267 / 33 taxmann.com 44 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Strategic consultancy services to clients – Assessable as business income – DTAA-India- Indonesia. [Ss.9(1)(vi), 56, 57, Articles 7, 12, 22]

Assessee is a foreign company which is engaged in business of providing strategic consultancy services to clients. It provided its Indian group company various information as required. Assessee claimed that the charges received from Indian group company was to be assessed as business profits. The Assessing Officer held that the fees received by the assessee fell in the category of 'Royalty' in terms of article 12 of the DTAA. The DRP held that provisions of Article 22(3) of DTA treaty were applicable and the receipt in question was to be taxed as other income. The Tribunal held that information supplied was in nature of data and did not arise out of exploitation of know-how generated by skills and innovation of persons who possessed such talent. Amount received by assessee from Indian group company did not fall in category of royalty. The Tribunal also held that income can be taxed under any other Article, provisions of Article 22 will not be applicable. The Article 22 residuary Article similar to provisions of sections 56 and 57 of the Income-tax Act 1961 i.e. Income from other sources. Held that the income received by the assessee from Indian company has to be assessed as business income as per Article 7 of the DTAA (AY. 2007-08)

P.T. McKinsey Indonesia v. Dy. CIT (2013) 141 ITD 357 / 88 DTR 324 / 25 ITR 52 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business income – Amount received for testing solutions is assessable as business income and not as fees for technical services-DTAA-India-Singapore. [S. 9(1)(vii), Article 12]

Assessee a Singaporean company provided services to an Indian company rendering services relating to testing solutions, sample analytical testing of food and feed samples. It claimed that receipt therefrom was taxable as business income and thus not taxable in India. The Assessing Officer held that the amount received was taxable as technical services as per Article 12(4) between India and Singapore. Tribunal held that services provided by assessee could not be said to 'make available' any technical knowledge, experience, skill, know-how or processes to assessee. The receipts of the assessee would not amount to be fees for technical services. (AY.2005-06)

Romer Labs Singapore Pte. Ltd. v. ADIT (2013) 141 ITD 50 / 22 ITR 224 / 30 taxmann.com 362 (Delhi)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Interest Permanent establishment – DTAA-India-France. [Art.5]

Assessee, a foreign company incorporated in France was engaged in business of operation of ships in India. It filed its return of income claiming tax and interest payable at 'nil' on ground that it was entitled to benefit under DTAA. Assessing Officer held that business of assessee in India was carried out through a fixed place through its agent in India and agent of assessee in India was dependent on assessee and hence such dependent agent constituted a PE of assessee in India. Tribunal in assessee's own case for the assessment year 2006-07 held that since there was no negative finding that transactions between assessee and agent were not made under at arm's length condition, agent was of independent status, stand of Assessing Officer with regard to existence of PE was not sustainable in law. Tribunal held that assessee had no PE in India, and hence, not liable to tax. Followed earlier year order. (AY. 2007-08)

Delmas France S.A. v. ADIT (2013) 141 ITD 67 / 86 DTR 145 / 154 TTJ 561 (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Directly or indirectly attributable to permanent establishment-DTAA-India-UK-Taxation of foreign professional firms & concept of "force of attraction" under India-UK DTAA explained. Linklaters LLP (2010) 40 SOT 51 (Mum) held to be not good law – Income attributable to services rendered outside India is not taxable in India – Explanation to section 9(1) of the Income-tax Act, 1961, was amended by the Finance Act, 2010 with retrospective effect from June 1, 1976 is applicable in the case of income of a non-resident covered by clause (v) or clause (vii) of sub-section (1) of section 9. [Articles 5, 7, 15]

The assessee, a U.K. partnership firm of Solicitors, provided legal consultancy services in connection with different projects in India and claimed that the taxability of the income arising therefrom had to be processed under Article 15 ("independent professional services") of the India-UK DTAA. The AO rejected the claim regarding applicability of Article 15 and held that as the assessee had a PE in India as per Article 5 and as the services had been rendered in India, the entire income was chargeable to tax in India under Article 7. In AY 1996-97, the Tribunal {*Clifford Chance,United Kingdom v. Dy. CIT (2002) 82 ITD 106 (Mum)*} accepted the claim of the assessee that if the aggregate period of stay of the employees/ partners did not exceed 90 days, the income was not taxable under Article 15 of the DTAA and if it exceeded that period, then only the Indian activity was taxable u/s 9(i). The said verdict was affirmed by the Bombay High Court in 176 Taxman 485. Later, another Bench in *Linklaters LLP v. ITO (2010) 40 SOT 51 (Mum)* held that as the aforesaid verdicts of the Tribunal & High Court in Clifford Chance turned on the basis that fees for technical services rendered outside India were not chargeable to tax u/s 9(1)(vii) and that they were not good law in view of the retrospective amendment to s. 9(1) by the Finance Act, 2010 w.e.f. 1-6-1976 which provided that "fees for technical services" would be taxable in India even if they were rendered outside India. In Linklaters LLP it was also held that the expression "directly or indirectly attributable" in Article 7(1) triggered the "force of attraction" rule and that the entire earnings relatable to the projects in India would be chargeable to tax in India. As there was doubt as to the correctness of the view in Linklaters, the Special Bench was constituted to consider two issues (i) whether the verdict of the High Court in Clifford Chance was good law after the retrospective amendment to s. 9 & (ii) whether the expression "directly or indirectly attributable to the PE" in Article 7(1) meant that the consideration attributable to the services rendered in the State of residence is taxable in the source State. HELD by the Special Bench:

(i) The view taken by the Tribunal and the High Court in Clifford Chance was that if Article 15 of the India-UK Treaty is not applicable because the stay of the partner exceeded 90 days, then the taxability of the income would be determined by s. 9(1)(i) of the Act. It was held that for determination of income u/s 9(1)(i), the territorial nexus doctrine plays an important part and if the income arises out of operations in more than one jurisdiction, it would not be correct to contend that the entire income accrues or arises in each of the jurisdictions. The High Court applied the law laid down by the Supreme Court in the context of s. 9(1)(i) that if all the operations are not carried out in the taxable territories, the profits and gains of business deemed to accrue in India through and from business connection in India shall be only such profits and gains as are reasonably attributable to the operations carried out in the taxable territories. Accordingly, the view expressed in Linklaters LLP that the judgment of the Bombay High Court is based on the premise of s. 9(1)(vii) and that the said premise no longer holds good in view of the retrospective amendment is not correct. The law laid down by the High Court continues to be good law;

(ii) As regards the rule of "force of attraction", Article 7(1) provides that the profits of the UK enterprise "directly or indirectly attributable to the PE" may be assessed in India. The connotation of what is "directly attributable to the PE" is set out in Article 7(2) while the connotation of what is "indirectly attributable to the PE" is set out in Article 7(3). When the connotation of "profits indirectly attributable" to the PE is defined specifically in Article 7(3), one cannot refer to Article 7(1) of the UN Model Convention which is materially different from

Articles 7(1) & 7(3) of the India-UK DTAA. The reliance placed in Linklater on the UN Model Convention to come to the conclusion that the connotation of “profits indirectly attributable to PE” in Article 7(1) incorporates the “force of attraction” rule thereby bringing an enterprise having a PE in another country within the fiscal jurisdiction of that another country to such a degree that such another country can properly tax all profits that the enterprise derives from that country, whether the transactions are routed and performed through their PE or not, is clearly misplaced and not acceptable. (AY. 1998-99 to 2003-04)

ADIT(IT) v. Clifford Chance (2013) 143 ITD 1 / 24 ITR 1 / 87 DTR 210 / 154 TTJ 537 (SB) (Mum.)(Trib.)

S.9(1)(i) : Income deemed to accrue to or arise – Business connection – Supply of imported equipment and materials from Germany and supervision of erection, start-up and commissioning of power project – Income be taxed as business profit – DTAA- India-Germany [Ss. 44D, 115A, Article 7]

The assessee a company was awarded a contract by State Government for renovation, modernisation and upgradation of a power house. The scope of work included supply of imported equipment and materials from Germany and supervision of erection, start-up and commissioning of power project. The assessee offered the amount for taxation at the rate of 10% of contract value as per section 44BB of the Income-tax Act. The revenue taxed the consideration in respect of these activities as Business Profit. It was held that there was neither any other contrary view nor the assessee brought on record any material controverting the findings of the AO. Thus, the consideration had to be taxed under Article 7 of DTAA r.w.s. 44D and S. 115A. Accordingly the appeal of assessee was dismissed. (AY. 2007-08)

Voith Seimens Hydro Kraftwerkstechnik GmbH & Co. KG (2013) 140 ITD 216 (Delhi.) (Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Service rendered abroad – Deduction at source – Business profit – Assessee was not liable to deduct tax at source from said payments and Assessing Officer was not liable to deduct tax at source, hence the assessee cannot be treated as in default under section 201- DTAA-India-UK-Poland-Brazil-Canada-Australia [S.9(1) (vii), 195, 201]

Assessee company was engaged in business of production of films, shooting of which was often done outside India. For shooting films outside India, its production unit used to go abroad and services required in connection with work of shooting abroad were availed from various overseas providers. The assessee made payment to five such overseas service providers for services availed in connection with shooting of different films. It was held that the services rendered by overseas service providers would not fall within ambit of technical services as given in Explanation 2 to section 9(1)(vii) instead they were in nature of commercial services and amount received for such services constituted business profit. (AY. 2005-06 & 2006-07)

Yash Raj Films P. Ltd. v. ITO (IT) (2013) 140 ITD 625 / 23 ITR 125 (Mum.)(Trib.)

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

Assessee paid commission to foreign agents for services rendered by them in connection with effectuating export sales. Assessing Officer observed that such foreign agents were paid by way of telegraphic transfer obtained from banks in India and formed an opinion that banks in India acted as agents of foreign agents and received payment on their behalf in India. Assessing Officer on such facts held commission so paid to be deemed to have been received in India and charged tax thereupon. Tribunal held that merely because commission were paid to foreign agents in their bank accounts by telegraphic transfer through banks in India, it could not be said that income were deemed to have been arisen to such foreign agents in India when there was no material on record to show that

such foreign agents had rendered any part of services in India or had a permanent establishment and business connection in India. (AY.2005-06)
ACIT v. Avon Organics Ltd. (2013) 55 SOT 260 / (2012) 28 taxmann.com 170 (Hyd.)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Deduction at source – OECD Model Tax Convention – Commission paid outside India is not liable to deduct tax at source. [Ss.40(a) (ia), 195].
In the course of its export business activities, the assessee paid commission to its foreign agents for their services. The assessee submitted that the agents operated out of India and provided their services outside India and none of them had any office or place of profit or any other business connection in India. Thus, no part of the income of the foreign agents arose in India and, consequently, no tax was to be deducted from the commission payments. The Assessing Officer held that the exporter utilises the information, data and know how, as gathered by the agent, to further his business activities and thus, there was an element of consultancy, technical and managerial services for which the commission in question was paid for services rendered regarding the nature of products and inspection, timing and prices of products and detailed technical and other formalities; that thus, the provisions of section 9 would come into play. Since the assessee had not deducted tax at source under section 195, the Assessing Officer disallowed the amount of commission paid under section 40(a)(ia). On appeal, the Commissioner (Appeals), following the first appellate order for the assessment year 2008-09 in favour of the assessee, deleted the addition of Rs 37,87, 26,158 made by the Assessing Officer. On appeal by revenue, the Tribunal held that where the export commission paid to a non-resident agent for services rendered outside India is not chargeable to tax in India. (AY.2009-10)
Dy. CIT v. Angelique International Ltd. (2013) 55 SOT 226 / (2012) 28 taxmann.com 219 (Delhi)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Production of programmes for purpose of broadcasting and telecasting shall be specifically characterised as 'work-' – Payment is not taxable in India hence no liability to deduct tax at source [S.9(1)(vii), 194C, 195]
In view of CBDT's Circular No. 715, dated 8-8-1995, services rendered by Non resident for production of programmes for purpose of broadcasting and telecasting shall be specifically characterised as 'work' for the purpose of section 194C, the income there from would be treated as 'business income'. Therefore, payment to a non-resident for production of programmes for the purpose of broadcasting and telecasting cannot be treated as 'Fees for Technical Service'. Payment made to non-resident company is also not chargeable to tax as per the provision of section 9(1)(i) as the services are rendered and utilised outside India and the said company has no PE in India (AY. 2012-13)(A.A.R. No 1083 of 2011 dt 13-12-2013).
Endemol India (P.) Ltd., In re (2013) 40 taxmann.com 340 / (2014) 97 DTR 51/361 ITR 361 (AAR)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Any part of business relating to offshore supplies not carried out in India – Income received from offshore supplies not deemed to be taxable in India even if assessee has business connection in India [Ss.2(31), 90(2)]
The assessee a Hong Kong company was awarded a project by Petronet to develop a terminal for the receipt and storage of liquefied natural gas at Kochi – for which it formed a consortium with CINDA, an Indian company. As per the terms of the contract, the assessee is responsible for offshore supplies and services and CINDA is responsible for onshore supplies and services. Based on the facts, the assessee sought an advance ruling on taxability of the income received/receivable by it for offshore supplies from Petronet in India.

The AAR ruled that the revenue's contention that the consortium of CINDA and CTCI to carry out the project awarded by Petronet forms an AOP u/s. 2(31) of the Act is valid, but that alone does not govern the taxability of the amounts received by the assessee.
In the absence of there being a Double Taxation Avoidance Agreement between India and Hong Kong, the assessee is excluded from the relief under section 90(2), and the fiscal jurisdiction to tax the offshore supplies would be governed under the Act. Although the assessee has a business connection in India, it has not carried out any part of the business relating to offshore supplies in India. Income has not arisen in India as the right, title, payments, etc., in the supplies have passed on to Petronet outside India and the assessee is not the owner of the supplies in India. Therefore, the amount received/receivable by applicant from Petronet for offshore supplies in terms of the contract is not affected by the deeming provisions of section 9(1) and not liable to tax in India.
CTCI Overseas Corporation Ltd., In Re (2013) 217 Taxman 128 (AAR)

S.9(1)(ii) : Income deemed to accrue or arise in India – Salaries – Dependent personal services – In view of provisions of Treaty between India and Denmark, remuneration paid to Danish nationals was taxable in Denmark and not in India – DTAA-India-Denmark [S. 5(2), Article 16]
Assessee was a non-resident company engaged in certain businesses in India. In respect of those businesses it employed certain Danish nationals for doing work in India and remunerated them for doing such work. Each of those Danish nationals was remunerated in respect of employment in India for a period not exceeding 183 days in concerned fiscal year and that remuneration was paid by or on behalf of an employer, who was not a resident of country and, in any event, remuneration was not borne by a permanent establishment or a fixed base, which employer had in India. In view of provisions of Treaty between India and Denmark, remuneration paid to Danish nationals was taxable in Denmark and not in India. The court held that where Danish nationals were remunerated in respect of employment in India for a period not exceeding 183 days in concerned fiscal year and such remuneration was paid by or on behalf of an employer, who was not a resident of country and, in any event, remuneration was not borne by a permanent establishment or a fixed base, which employer had in India, said remuneration would be taxable in Denmark and not in India.
DIT (IT) v. Maersk Co. Ltd.(2013) 351 ITR 366 / 215 Taxman 258 (Uttarakhand)(HC)

S.9(1)(ii) : Income deemed to accrue or arise in India – Salaries – Perquisite – Expatriate employee – Stock options – ESOP to expatriate employee of foreign company not chargeable for period he was outside India even if ESOP was vested and exercised in India [S. 17(2)]
The assessee, an employee of M/s UTIO, USA, was granted "employee stock options" of 34000 shares on 9-1-2004 when he was outside India. The assessee was deputed to the India liaison office on 1-4-2006 and the stock options vested on 9-1-2007 when he was in India. The assessee exercised the stock options on 1-2-2007, when he was still in India. The AO held that as the assessee was in India on the date of vesting and exercise of the stock options, the entire benefit thereof was assessable as a perquisite in his hands. However, the CIT(A) held that as the employee had been in India for only for a part of the time of the vesting period, only a proportionate stock option benefit, which is attributable to the period spent in India accrued to the employee and was chargeable to tax in India. On appeal by the department to the Tribunal HELD:
If a part of the activity done by the assessee-employee has no relation to any India specific job or activity it is not chargeable to tax in India. On facts, the assessee was in India only for a short period i.e. 1-4-2006 onwards. Prior to that, he has not done any service connected with any activity in India. Accordingly, as the assessee has not rendered service in India for the whole grant period, only such proportion of the ESOP perquisite as is relatable to the service rendered by the assessee in India is taxable in India (AY. 2007-08)
ACIT v. Robert Arthur Keltz (2013) 59 SOT 203 / 35 taxmann.com 424 (Delhi)(Trib.)

S.9(1)(v): Income deemed to accrue or arise in India – Interest – Receipt of income outside India – Interest on income-tax refund-DTAA-India-Singapore [S.115A, Art.11, 24]

The condition for availing of the benefit of Article 11 of the India-Singapore DTAA is that the income must have been remitted to or received in Singapore. Unless it is positively shown that the income was received in Singapore, the benefit of Article 11 cannot be made available. This burden not discharged and therefore, interest on income-tax refund was taxable at 20% u/s 115A. (AY.2004-2005)

Abacus International P. Ltd. v. DDIT (IT) (2013) 27 ITR 49 / 34 taxmann.com 21 / 155 TTJ 550 / 89 DTR 235 / 144 ITD 36 (Mum.)(Trib.)

S.9(1)(v) : Income deemed to accrue or arise in India – Interest – Additional amount received by assessee, an FII on account of delay in process of buyback of shares – Not to be treated as interest income – Part of sale consideration – Capital Gain-DTAA- Indo – Mauritius [Ss.90, 115AD, Article 13]

The assessee, a Mauritius based Company, held shares of Castrol India for which an open offer for acquisition of 20% issued Capital was made by Castrol UK. The assessee tendered equity shares held by it under open offer and received additional amount as there was a delay in completing the process of buyback. The A.O. taxed the same as interest income in the hands of the assessee, the CIT(A) upheld the order of the A.O. On appeal by the assessee to the Tribunal, held in favour of the assessee:

The interest received by the assessee is for the period prior to tendering and acceptance of shares, the interest relates to the delay in completing the buyback. It is not an interest received after the transaction of purchase and the sale is over. The interest relates to a period prior to tendering and acceptance of shares and this falls within the ambit of consideration and forms part of the sale consideration and hence, will be treated as part of Capital gain and not income from interest. (AY. 2002-03)

Genius Indian Investment Co. Ltd. v. CIT (2013) 145 ITD 1 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Copy right –Customized software – Non-exclusive & non-transferable license to use customised software not taxable as "royalty" under Article 12 – DTAA-India-USA [Art 12,Copy right Act, 1857, S. 14(1).]

The assessee, a USA company, set up a branch office in India for the supply of software called "MX". The software was customised for the requirements of the customer (not "shrink wrap"). The Indian branch imported the software package in the form of floppy disks or CDs and delivered it to the customer. It also installed the software and trained the customers. The AO & CIT(A) held that the software was a "copyright" and the income from its licence was assessable as "royalty" under Article 12 of the India-USA DTAA. On appeal by the assessee, the Tribunal held, following Motorola 270 ITR (AT) (SB) 62, that the income from licence of software was not taxable as "royalty". Before the High Court, the Department argued that in view of *CIT v. Samsung Electronics Co. Ltd. (2012) 345 ITR 494 (Kar)*, the right to make a copy of the software and storing it amounted to copyright work u/s 14(1) of the Copyright Act and payment made for the grant of a licence for the said purpose would constitute royalty. HELD by the High Court dismissing the appeal:

In order to qualify as a royalty payment under Article 12(3) of the India-USA DTAA, it is necessary to establish that there is a transfer of all or any rights (including the granting of any licence) in respect of a copyright of a literary, artistic or scientific work. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted

product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the licensee/customer is what is contemplated by the Treaty. Merely authorising or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/ transferor who divests himself of the rights he possesses *pro tanto*. The licence granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by Article 12 because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do. Consequently there is no transfer of any right in respect of copyright by the assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income-tax Act or under the DTAA (ITA No. 1034 of 2009 dt. 22-11-2013.)
DIT v. Infrasoft Ltd (2013) 39 taxmann.com. 88 / (2014) 220 Taxman 273 / 264 CTR 329 (Delhi)(HC)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Bare-boat charter of a shipping vessel from a foreign party – Equipment rental is taxable as "royalty" even if payer does not have control. The retrospective insertion of Explanation 5 to s. 9(1)(vi) is purely clarificatory – DTAA – India-Austtralia-Cyprus. [Ss.43(3), 90, 115V(a), 163, 195, 201, Article 7, 12. 3(h), 8,12].
The High Court had to consider the following issues in the context of a bare-boat charter of a shipping vessel from a foreign party, the income whereof was held assessable as "royalty" u/s 9(1)(vi) & Article 12 in the hands of the foreign party: (i) whether the expression 'use or right to use' in clause (iva) of Explanation 2 to s. 9(1)(vi) & Article 12 of the DTAA requires that there should be a "transfer of effective control for use" in favour of the lessee?, (ii) what is the impact of the retrospective insertion of Explanation 5 to s. 9(1)(vi) on the taxability of equipment royalty?, (ii) whether a ship can be regarded as "equipment"?, (iii) whether if the ship is used for plying between coastal waters, it can be said to be used for "international traffic"?, (iv) whether the two berths reserved for the ships chartered by the assessee can be said to be a "permanent establishment" of the foreign owner? & (v) whether a person who is treated as an "agent" u/s 163 can also be proceeded against u/s 201 for failure to deduct TDS? HELD by the High Court:
(i) The assessee's argument that in a case where physical possession is not with the transferee or the lessee or the hirer, the payment made for the use of or right to use of equipment would not constitute 'royalty' is not acceptable. Under clause (iva) of Explanation 2 to s. 9(1)(vi) 'royalty' means the consideration paid for "the use or right to use". Irrespective of whether there is any transfer or not, the consideration paid for use or right to use *simpliciter* is sufficient for the consideration being called as 'royalty'. The presence or absence of possession, effective/general control and custody with the assessee, even though may be matters of agreement, are not of any relevance to decide the character of payment. The same result applies under Article 12 of the DTAA *(UOI v. Gosalia Shipping (P) Ltd. (1978) 113 ITR 307 (SC)*, OECD Commentary referred);
(ii) Explanation 5, inserted by Finance Act, 2012, w.r.e.f. 1-6-1976 clarifies that irrespective of control or possession or use or location in India such right, property or information with the payer; the payment is taxable as royalty. The Revenue does not need the assistance of Explanation 5 because even if the possession of the ship is with the owner, he has parted with

the “right to use” the ship and the consideration thereof constitutes “royalty” even without Explanation 5;

(iii) The assessee’s argument that ship is not an “equipment” for purposes of s. 9(1)(vi) is not acceptable. The word ‘any’ preceeding an equipment clearly points out the need for construing ‘equipment’ widely so as to embrace every article employed by the employer for the purposes of his business. A ship is “plant” u/s 43(3). “Plant” includes ‘all equipment’ used by a business man for carrying on his business. As a ship is used to carry on business, it is “equipment”;

(iv) The argument that a ship used for plying between coastal lines on the Indian shore is used in “international traffic” is not acceptable in view of the OECD Commentary;

(v) On the question of permanent establishment, a moving ship is a place of business in the place where the ship is docked. The fact that the ship moved from one point to another is the result of the nature of business contract and the movement is an integrated one having business and geographical coherence. Accordingly, the foreign enterprise has a permanent establishment in India when its ships are in India and the berths are reserved for it. However, the royalties paid are not “effectively connected” or attributable to such permanent establishment. Accordingly, the payment falls for consideration only under Article 12 and not under Article 7;

(vi) The assessee’s argument that a person who is treated as an “agent” u/s 163 cannot be proceeded against u/s 201 for failure to deduct TDS is not correct because the two provisions operate in different spheres. S. 195 casts an obligation on TDS on any person responsible for paying, whereas s. 163 is for assessment purposes. Proceedings u/s 201 has nothing to do with the status of the assessee as an agent u/s 160 and 163 which would assume significance only for assessment purposes.

(vii) Dealing with operation of ships, since the movement of the vessel was only along with coastal lines of the Indian shore, it was engaged in ‘international traffic’ and Article 8(1) of the Indo-Cyprus DTAA did not apply and therefore, the receipts are taxable only in India.

(AY.2002-03 to 2006-07)

Poompuhar Shipping Corporation Ltd. v. ITO (2013) 95 DTR 161 / 263 CTR 377 / (2014) 220 Taxman 58 / 360 ITR 257(Mad.)(HC)

West Asia Maritime Ltd v. ITO (2013) 95 DTR 161 / 263 CTR 377 / (2014) 220 taxmann.Com. 58 / 360 ITR 257 (Mad.)(HC)

S.9(1)(vi) : Income deemed to accrue or arise in India – Subscription charges – Royalty – Deduction at source – DTAA-India-USA [S.195, 201(1), (1A), Article 12]

Payments to foreign publishing house for subscription to web-based foreign publishing house constitute royalty from which tax is deductible at source. (AY. 2001-2002, 2003-2004)

CIT v. Wipro Ltd. (2013) 355 ITR 284 (Karn.)(HC)

Editorial: Decision in Wipro Ltd v. ITO (2005) 278 ITR 57(AT) (Bang.)(Trib.) is reversed.

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Reimbursement of lease line charges – Force of attraction rule – Marketing and management services – DTAA-India-UK [Article 5]

The amount received by assessee as reimbursement of lease line charges and would not classify either as royalty or as income attributed to a permanent establishment. Lower authorities held that fees received by assessee for providing marketing and management services outside India could not be subjected to tax in India, as same was not attributable to Permanent Establishment (PE) in India. Revenue contended before the Court that income-in-question was attributable to a Permanent Establishment-in-India by virtue of force of attraction rules, since revenue had not canvassed force of attraction rules before authorities and decision of lower authorities being based on finding of fact, it did not warrant any interference. (AY.2004-05)

DIT v. WNS Global Services (UK) Ltd. (2013) 214 Taxman 317 / 88 DTR 177 (Bom.)(HC)

S.9(1)(vi) : Income deemed to accrue or arise in India – Beneficial owner – Royalty – DTAA-India-Netherlands. [Art. 12]

Assessee, a company incorporated under laws of Netherlands, claimed benefit of article 12 of DTAA between India and Netherlands and sought to pay tax at concessional rate in respect of royalty income received from an Indian company. Assessing Officer denied benefit of Article 12 of DTAA on ground that assessee was not beneficial owner of musical tracks in respect of which royalty income was earned. Tribunal on basis of certificates issued by revenue authorities of Netherlands held that assessee was beneficial owner of royalty received in respect of musical tracks given to aforesaid company and, therefore, it was entitled to benefit of article 12 of DTAA The Court held that the decision of Tribunal being based on a finding of fact deserved to be upheld.

DIT v. Universal International Music B.V (2013) 214 Taxman 19 / 31 taxmann.com 223 (Bom.)(HC)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Services of grading diamonds/ inscription on diamonds – DTAA-India-UK. [S. 115A(1)(b)(BB), Art. 13(3)]

The assessee earned "grading fees" for services of grading diamonds based on colour, clarity, carat and cut, under an agreement. The agreement also enabled rendering of "inscription services" (providing inscription of "trade mark" on the diamonds). During the assessment proceedings, the assessee categorically submitted that the earnings had nothing to do with the "inscription" services as these earnings were separately accounted and offered to tax as income from business or profession. The assessment order was set aside and the matter was remanded for fresh adjudication after considering the additional evidence and the decision of the Bombay High Court in the case of *Diamond Services International P. Ltd. v. Union of India [2008] 304 ITR 201 (Bom)*, wherein it was held that the grading fees paid by the assessee to Gemological Institute of America for the activity of certification and grading of diamonds, did not fall within the expression "royalty" under Article 12 of DTAA.(AY.2009-10)

De Beers UK Ltd. v. ADIT (IT) (2013) 27 ITR 1 / 60 SOT 224 / 37 taxmann.com 296 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Since word used in DTAA is 'paid' or 'received', royalty amount cannot be taxed on accrual basis – DTAA-India-USA. [Article 12]

The assessee is a tax resident of USA deriving income mainly on royalty. The assessee was claiming benefits under India-USA, DTAA. Paying party maintained accounts on mercantile basis and assessee on cash basis. Tribunal held the words used in Article 12(1) of DTAA between India and USA was 'paid' to a resident of other contracting State' The term 'royalties' also means 'payment of any kind received'. Since word used in DTAA is 'paid' or 'received', royalty amount cannot be taxed on accrual basis. (AY. 2004-05).

Johnson & Johnson v. ACIT (2013) 60 SOT 109 (URO) / 32 taxmann.com 102 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Concessional rate of tax at 10 per cent was held applicable – DTAA-India-UK. [Article 13, S.115A]

Assessee-company, a tax resident of UK, was involved in selling rough diamonds to worldwide sightholders. AO treated value added services (VAS) receipts, grading receipts, DTC accredited business services as royalty under Article 13 of DTAA and taxed same at rate of 15 per cent. Tribunal held concessional rate of tax at 10 per cent as per provisions of sub-clause (bb) of clause (b) of section 115A(1) being beneficial to assessee to be applied on above receipts. (AY.2009-10)

De Beers UK Ltd. v. ADIT (2013) 60 SOT 224 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – DTAA-India-UK – Matter remanded [Article 13]

Assessee a tax resident of UK, was engaged in selling rough diamonds and providing various value added service to worldwide sightholders. As per agreement, assessee offered to its accredited business

partners to contact the DTC to discuss commercial and industry matters of public nature and for this members got an opportunity to attend business meetings once a year; to call themselves as accredited DTC business. AO held that services rendered under above agreement constituted an extension of VAS and, hence, receipt received for providing said services was taxable as royalty under article 13 of DTAA. Assessee claimed that AO and DRP had not analysed details of services offered by assessee in a correct perspective and they had mechanically treated these services as 'extended services of VAS' to non-members of Sightholders list. Tribunal remanded the matter to decide the issue *de novo*. (AY.2009-10)
De Beers UK Ltd. v. ADIT (2013) 60 SOT 224 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Rendering services of grading diamonds based on colour, clarity, carat and cut (4-C's) DTAA-India-UK-Matter remanded. [Article 13]
Assessee, a tax resident of UK, was engaged in selling rough diamonds and providing related services to worldwide sightholders. It entered into an agreement with sightholders for rendering services of grading diamonds based on colour, clarity, carat and cut (4-C's). Grading fees received for providing said grading services were treated as royalty by AO on ground that assessee also rendered services of inscription on graded diamond items and it involved transfer of intellectual property rights/trademark. The assessee contended that inscription services rendered were distinctly different from grading services and such inscription fees received from inscription services were separately accounted and offered as taxable income. As per the assessee, mere issue of a 'certification' about the 4C's, no 'trademark' rights was made available to customers and also produced additional evidence to demonstrate above facts. Tribunal held that considering additional evidence which would enable AO to go into facts in right perspective as to whether grading services include inscription services or not, matter was remanded back to file of AO. (AY.2009-10)
De Beers UK Ltd. v. ADIT (2013) 60 SOT 224 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Subscriptions to Indian subscribers – Taxable as royalty – Liable to deduct tax at source DTAA – India-Ireland [S.195, Article 12]
The assessee company is incorporated in Ireland and it was engaged in the business of distributing research products in the form of subscription. The assessee company sold subscription to its Indian customers / subscribers by providing them access to its products over the internet from its data server which was located outside India against the subscription / access fee. Said fee was claimed to be not taxable in India because of absence of any permanent establishment in India. AO. held that the said amount was in the nature of 'Royalty' as per Article 12 of DTAA. The Tribunal following the Karnataka High Court in *CIT v. Wipro Ltd (2011) 203 Taxman 621 (Karn.)(HC)*, held that payment to the assessee was in the nature of 'royalty', liable for deduction of tax at source under section 195. (AY. 2007-08)
Gartner Ireland Ltd. v. ADIT (2013) 60 SOT 43 / 37 taxmann.com 16 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Sponsorship of various sports events – Payments were not in the nature of royalty – Not liable to deduct tax at source – DTAA-India-Singapore. [S.195 and 40(a)(i), Article 12]
Assessee company made payments to GCC Singapore and 'N', Singapore in relation to sponsorship of various sports events organised by ICC. The A.O. held that the payments were in nature of royalty as per Article 12 of India-Singapore DTAA, and disallowed the amount u/s. 40(a)(i) for non-deduction of tax at source u/s. 195. The ITAT held that the payment was purely for advertisement and publicity of the brand name of the assessee and for promotion of its product during the Cricketing events of ICC, and not the payment of royalty as defined in para 3 of Article 12 of DTAA between India and Singapore. The proprietary trademark or logo of ICC put alongside the assessee's logo, is

only incidental to the main services obtained by the assessee. Thus, the amount in question paid to 'N' and GCC, Singapore is not royalty as the payment was not for use of any trademark, brand name. As both these organisations do not have any P/E in India, the income is not taxable in India and consequently there is no requirement of deduction of tax at source. (AY. 2007-08)
Hero Moto Corp Ltd. v. Addl. CIT (2013) 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Income deemed to accrue or arise in India – Royalty – Remittance for procuring commercial information for onward transmission not a technical service and does not amount to royalty-DTAA-India-Srilanka [S.195, Articles 12 & 7]
The assessee had entered into a master clinical services agreement with its Associate Enterprise for clinical trials and the assessee had arrangement with CSPL to provide information on clinical trial test. The Assessee applied for Certificate for non deduction of holding tax for remittances to CSPL. The A.O. held that the payment was in the nature of royalty and was liable to be taxed. The CIT(A) decided in the favour of the assessee and the Tribunal upheld the order of the CIT(A). The Tribunal held that the assessee is making remittance for procurement of commercial information for onward transmission to the principal, it is viewed that the remittance is not for availing technical services and does not amount to royalty and is not liable for withholding taxes as held by the A.O. (AY. 2008-09)
ITO v. Kendle India (P) Ltd. (2013) 145 ITD 83 / 37 taxmann.con 140 (Delhi)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Consistency
Where an amount in question was assessed as royalty in hands of a related company and not in hands of assessee for a previous assessment year, same was to be followed in current year also. (AY. 2008-09)
Microsoft Regional Sales Corporation, USA v. ACIT (2013) 59 SOT 126 (URO) (Delhi)(Trib.)

S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Non-resident company entered into software supply agreement – No deputation of any personnel to India – No inference of existence of a PE – No PE in India can be said to exist – DTAA-India-USA [Article 5]
The assessee has entered into an agreement for selling of certain software for the purpose of operation of wireless telecommunication network. Considering the agreements entered into by the assessee the AO was of the opinion that there existed an Agency PE and held that if the assessee's income is not taxable as royalty, the business profits have to be worked out in view of it having a PE in India. The AO *inter-alia* observed that the Indian entity of group carried out substantive functions of negotiations, entering into contract, stocking of goods or merchandising and ultimately concluded that there existed an agency PE. The DRP confirmed the stand of the AO.
On appeal the Tribunal agreed with the assessee's arguments that Lucent India was acting independently and that the assessee has no agency agreement or no business connection in India except for supply of software. It was also observed that no service personnel of the assessee came to India so as to come under Service PE. Further, it was held that mere existence of a group company does not lead to a finding that the assessee also as a PE in India. The agreement entered is an independent agreement, entered on principal to principal basis and nowhere Lucent Indian is authorised or has undertaken any responsibility of the Lucent USA. Accordingly, the Tribunal held that agency PE does not exist.
Lucent Technologies GRL LLC v. ADIT (2014) 29 ITR 132 / 99 DTR 66 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Consideration for supply of software which is not embedded in equipment is taxable as "royalty"- DTAA-India-USA. [Art 12(3)]

The assessee, Reliance Infocomm Ltd., wanting to establish a wireless telecommunications network in India, entered into a contract with Lucent Technologies for supply of software required for the telecom network. The assessee claimed, that amount paid by it to Lucent for acquiring the software was for purchase of a "copyrighted article" and "goods" and that it was not assessable to tax as "royalty" u/s.9(1)(vi) or Article 12(3) of the India-USA DTAA. The claim was upheld by the CIT(A). On appeal by the department to the Tribunal HELD allowing the appeal:
There is a distinction between a case where the software is supplied along with hardware as part of the equipment and there is no separate sale of the software and a case where the software is sold separately. Where the software is an integral part of the supply of equipment, the consideration for that is not assessable as "royalty". However, in a case where the software is sold separately, the consideration for it is assessable as "royalty". On facts, the assessee had acquired the software independent of the equipment. It had received a licence to use the copyright in the software belonging to the non-resident. The non-resident supplier continued to be the owner of the copyright and all other intellectual property rights. As there was a transfer of the right to use the copyright, the payment made by Reliance to Lucent was "for the use of or the right to use copyright" and constituted "royalty" under s. 9(1)(vi) and Article 12(3) of the India-USA DTAA (AY. 2003-04 to 2007-08)
DDIT v. Reliance Infocom Ltd. (2014) 29 ITR 132 / 98 DTR 66 / (2014) 64 SOT 137(URO) (Mum.)(Trib.)
DDIT v. Lucent Technologies (2014) 29 ITR 132 / 98 DTR 66 / (2014) 64 SOT 137(URO) (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Right to use any property in existence at the time of use – DTAA-India-Netherland. [S. 90, Articles 7, 12(4)]
The assessee is a tax resident of Netherlands. The tax payer had entered in to a Franchise agreement with a hotel in India for providing sales, marketing publicity and promotion services outside India. The Indian hotel was also to participate in the hotel system of the taxpayer. The assessee contended that the payment was purely reimbursement of expenses on sales promotion and marketing and hence was not "royalties". The Tribunal held that to cover any amount within the purview of Article 12(4) of India-Netherlands DTAA, the payment should be received as consideration 'for use of right to use' any defined property (i.e. copyright, patent, trademark, etc). Thus, a payment would be "royalties" if it is made for defined property existing at the time of use and not for creation of defined property. Even if the payment contributed towards brand building, it would not be for use of the brand and hence cannot be characterised as "royalties". The Tribunal also held that the contribution, being a percentage of gross revenue, was reimbursement of actual expenses on itemized basis and no material was placed on record to demonstrate that actual expenses were equal to the reimbursed amount. Therefore, the AO should decide on the taxability of the amounts under Article 7 of India-Netherlands DTAA. (AY. 2004-05)
DDIT v. Marriott International Licencing Company BV (2013) 144 ITD 333 / 35 taxmann.com 400 / 93 DTR 338 / 158 TTJ 297 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Value of software sold in equipment not to be treated as Royalty – DTAA–India-Germany. [Art. 13]
The Assessee was engaged in the business of sale of equipment. The Assessing Officer held that the value of embedded software in the equipment supplied was to be treated as Royalty. The CIT(A) held that it can't be treated as Royalty. The Tribunal dismissing the appeal upheld the order of CIT(A) that amount received by assessee towards supply of software could not be segregated from supply of equipment and hence it cannot be considered as Royalty.
ADIT v. Siemens Aktiengesellschaft (2013) 142 ITD 614 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Payment made for buying space for advertisement on website is in the nature of business profit and not royalty [Ss.40(a)(i), 195]

Amount paid by the assessee to foreign company for the services rendered for uploading and display of banner advertisement on its portal was in the nature of business profits and not royalty on which no tax was deductible at source since the same was not chargeable to tax in India in the absence of any PE of such foreign company in India and therefore disallowance under section 40(a)(i) was not sustainable. (AY.2006-07)

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

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Fees for technical services-Shipping business – DTAA – India-Denmark. [S.9(1)(vii), Articles 9, 13]

Amounts received by shipping company on account of shared cost of global tracking system was linked to shipping income as per Article 9(1) of DTAA between India and Denmark and was not taxable in India. (AY. 2005-06)

A.P. Moller Maersk v. DCIT (2013) 57 SOT 267 / 33 taxmann.com 44 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Marketing and managerial services is not taxable as per article 12 – DTAA-India-USA. [Article 12]

Assessee a US company entered into agreement with WNS India for providing marketing and sales services. Assessing Officer held that assessee's personnel visited WNS India to provide managerial services which amounted to rendering of expertise and technical knowledge for conduct of Indian concern, therefore, marketing and management services rendered by assessee were in nature of technical services as per section 9(1)(vii) same would not become FIS as per Indo-US DTAA. DRP upheld the order of Assessing Officer. Tribunal held that assessee in the instant case has not made available any technical knowledge, experience, skill etc. to WNS India, the same cannot be subjected to tax as per section 9(1)(vi). As the provisions of Article 12(4)(b) shall apply which is more beneficial to assessee which shall apply supersession of section 9(1)(vi) of the Act. It is therefore held that the marketing and managerial services rendered by the assessee to WNS India were not chargeable to tax as FIS under the Article 12 of the DTAA. (AY. 2006-07)

WNS North America Inc. v. ACIT (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 – Business profits – Reimbursement of lease line charges is not taxable – DTAA – India-USA. [S.9(1)(i), Article 7, 12]

Assessee a US company received reimbursement of lease line charges from WNS India. WNS India was in business of providing software and IT enabled services to clients located outside India. transmitting data from unit of WNS India to customers located outside India. Assessing Officer treated payment received towards reimbursement of international telecom connectivity charges as royalty taxable as per Article 12 of Indo-US DTAA. Assessee was not owner or lessor of equipments, amount received not be regarded as 'royalty' within meaning of section 9(1)(vi). Tribunal held that Lease line charges recovered by assessee from WNS India were without any mark up or profit element and said amount could not be taxed even as business profits under Article 7 of DTAA. (AY. 2006-07)

WNS North America Inc. v. ACIT (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 – Live telecast of cricket matches-Business profit – DTAA-India-Singapore [S.9(1)(i), 195, Art. 12]

Assessee entered into an agreement with a foreign company for obtaining licence for live telecast right of cricket series to be played outside India. Assessee sought for a certificate of nil deduction of TDS on ground that fees for live coverage would not be in the nature of royalty. However, the

Assessing Officer held that payment of fees for live telecasting was in the nature of royalty and assessee was liable to deduct tax at source. Held, that the procedure of live telecasting, does not give birth to a 'work' capable of copyright and any consideration for live broadcasting cannot be considered as 'royalty'. Where a non-resident only allows a resident to exploit some rights vested in it on commercial basis, it cannot be said that non-resident has carried out any business activity in India. Non-resident only allows a resident to exploit some vested in it on commercial basis, it cannot be said that non-resident has carried out any business activity in India. (AY. 2009-10)
DCIT v. Nimbus Communications Ltd. (2013) 57 SOT 92 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Reimbursement of expenses – Copy righted article – Income not liable to tax – What constitutes a PE and how to attribute profits to a PE explained – DTAA-India-USA [S.90, 195, 234B, Articles 5(4), 5(5), 12]
The Tribunal had to consider the following legal issues: (i) whether the assessee could be said to have a PE in terms of Articles 5(1) and 5(2) of the DTAA? (ii) what is the correct method to allocate profits to the PE? (iii) whether fees for software is assessable as royalty after the retrospective amendment to s. 9(1)(vi) and (iv) whether the payment for link charges is taxable as 'equipment royalty'? HELD by the Tribunal:

(i) The assessee's argument that it does not have a PE under Article 5(1) cannot be accepted because its employees frequently visited the premises of CIS to provide supervision, direction and control over the operations of CIS and such employees had a fixed place of business at their disposal. CIS was practically the projection of assessee's business in India and carried out its business under the control and guidance of the assessee and without assuming any significant risk in relation to such functions. Besides the assessee has also provided certain hardware and software assets on free of cost basis to CIS. However, it does not constitute a dependent agent PE in terms of Articles 5(4) and 5(5) of the DTAA;

(ii) The correct approach to arrive at the profits attributable to the PE should. be as under: (i) compute the Global operating Income percentage of the customer care business as per annual report of the company, (ii) this percentage should be applied to the end-customer revenue with regard to contracts/projects where services were procured from CIS. The amount arrived at is the Operating Income from Indian operations, (iii) the operating income from India operations is to be reduced by the profit before tax of CIS. This residual is now attributable between US and India, (iv) the profit attributable to the PE should be estimated on residual profits as determined under Step 3 above;

(iii) As regards the taxability of software licence fees, the retrospective amendment to s. 9(1)(vi) by the Finance Act, 2012 widens the scope of the term "royalty" but does not impact the provisions of the DTAA in any manner. Consequently, the purchase of software falls within the category of copyrighted article and not towards acquisition of any copyright in the software and hence the consideration is not assessable as Royalty. Even otherwise, as the payment is in the nature of reimbursement of expenses, it is not taxable in the hands of the assessee (B4U International Holding & Nokia Networks OY followed);

(iv) As regards the payment of link charges as equipment royalty, there is no transfer of the right to use, either to the assessee or to CIS. The assessee has merely procured a service and provided the same to CIS, no part of equipment was leased out to CIS. Even otherwise, the payment is in the nature of reimbursement of expenses and accordingly not taxable in the hands of the assessee. Frequent visits of employees of FCo to premises of Indian subsidiary (IndCo), their having "fixed place" at their disposal and their occupying key positions in Indco constituted PE of FCo's in India. On facts, profits to be attributed to Indian PE was to be calculated based on formulary apportionment. Income being assessed in the hands of assessee, a US company, not being income liable to TDS under section 195, assessee is liable to pay interest under section 234B (AY. 2006-07 & 2008-09)

Convergys Customer Management Group Inc v. ADIT (2013) 58 SOT 69 (URO) / 96 DTR 73 / 26 ITR 443 / (2014) 159 TTJ 42 (Delhi)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Deduction at source – Right for satellite broadcasting – Purchase and sale of rights in satellite and movies is liable to deduct tax at source [Ss.40(a)(ia), 194J]
Assessee is engaged in purchase and sale of rights in satellite and movies. Assessee had debited in its account a sum for purchasing satellite rights of films and programs. Since assessee did not purchase cinematographic films as such rather it had only received right for satellite broadcasting, in such a case, amount paid for acquiring said right would fall within definition of 'royalty' in view of Explanation 2 to section 9(1)(vi),therefore, assessee was liable to deduct tax at source under section 194J on payments effected. However, the additional ground raised by the assessee that the rigours of section 40(a)(ia) are attracted only on amounts standing payable at the end of the year, is justified in view of the decision of Special Bench of Tribunal in the case of *Merilyn Shipping & Transports v. Addl. CIT (2012) 136 ITD 23 / 20 taxmann.com 244 (Visakha) (SB)*. In the result, the appeal of revenue is allowed but at the same time, the issue is remitted back to the file of the Assessing Officer for applying section 40(a)(ia) as per law. (AY.2008-09)
ACIT v. Shri Balaji Communications (2013) 140 ITD 687 / 30 taxmann.com 100 (Chennai) (Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Software services – DTAA-India-USA. [S.195, Article 12]
Assessee engaged 'I', USA to provide software services in relation to certain accounting systems of assessee for which it made payments without deducting tax at source. Assessing Officer was of view that payments made for services rendered by 'I' USA amounted to fees for technical services as it fulfilled conditions contemplated in Article 12(4) of India-USA DTAA and was therefore, taxable in India. On appeal, it was noted that in assessment proceedings issue was confined to holding as to whether payment was taxable in India under Article 12 of India-USA DTAA, however, there was no determination as to whether or not payment made to consultant 'I', USA, for services rendered was in nature of royalty as contemplated by provisions of section 9(1)(vii) thereby attracting provisions of TDS. In view of above, impugned order was to be set aside and, matter was to be remanded back for disposal afresh. (AY.2007-08)
Goldman Sachs Services (P.) Ltd. v. Dy. DIT (2013) 140 ITD 434 / 29 taxmann.com 245 (Bang.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Royalty earned by non-resident from another non-resident is not taxable in India even if payer uses the know-how for sale of products to India.
The assessee, a USA based company, held patents to the CDMA mobile technology which it licenced to various unrelated wireless Original Equipment Manufacturers (OEMs) located outside India. The OEMs used the assessee's technology to manufacture CDMA handsets outside India which were sold to telecom companies in India (e.g. Reliance Com). The Indian telecom companies sold the handsets to Indian consumers. The AO and CIT (A) held that as the OEMs sold the handsets to customers in India, they were "carrying on a business in India" or had a "source of income in India" and so the royalty paid by them to the assessee was taxable in India u/s 9(1)(vii)(c). On appeal by the assessee to the Tribunal, held by the Tribunal allowing the appeal:
(i) U/s 9(1)(vi)(c) royalty payable by a person who is a non-resident is deemed to arise in India where the royalty is payable in respect of any right etc. utilised for the purposes of a business carried on by such person in India or for the purposes of earning any income from any source in India. S. 9(1)(vi)(c) is a deeming provision and the burden is on the Revenue to prove that the payer has a business/ source of income in India. What is important for s. 9(1) (vi) (c) is not

whether the right to property is used "in" or "for the purpose of" a business, but to determine whether such business is "carried on by such person in India";

(ii) The first question is whether the OEMs have carried on business in India and used the assessee's patents for that purpose. The mere fact that the products manufactured by the OEMs outside India were sold to parties in India does not mean that the OEM's carried on business in India. For a business to be carried out in India there should be some activity carried out in India. A mere purchase and sale with an Indian party is not sufficient. The fact that the OEMs customized the handsets so as lock them to a specific operator and included Hindi and regional languages, etc. was irrelevant as such customization was not connected with the assessee's patents. There was no customization of the hand set *qua* the CDMA technology. Further, even if the OEM customized the handsets to Indian specifications that did not mean that the OEM was "carrying on business in India". The assessee's role ended when it licensed its patents to the OEMs and the OEMs role ended when they sold the handset to the Indian customer. The sale was of a chattel as a chattel and though the product is a combination of hardware and technology, the revenue's attempt to break down the sale into various components is not supported by the terms of the agreement and the facts and it cannot be said that every item other than software was sold and that the embedded software has been separately licensed. There is also no evidence on record to show that title to the handsets passed in India or that certain further activity was done by the OEMs in India after the sale. On the other hand, title to the equipment passed to the Indian customer on high seas and the profits made by the OEMs would not be chargeable to tax in India. The taxability of the assessee directly depends on the taxability of the OEMs and if the OEM is not taxable, the assessee cannot be made taxable (Ericsson AB 246 CTR 433 (Del), Skoda Export, Nokia Net Works followed). Even otherwise, the mere passing of title in imported goods in India does not mean that the OEM is carrying on business in India. It is "business with India" and not "business in India";

(iii) The second question is whether the OEMs have used the asssessee's technology to earn or make income from a "source" in India. A "source of income" is the activity that gives rise to income. The source of the royalty income for the assessee is the activity of manufacturing by the OEMs, which is carried out outside India (Rhodesia Metals 9 ITR (Suppl) 45 & Havells India followed). The department's argument that the assessee had made available the CDMA technology (software) to the OEMs in the form of chip sets and that OEMs have inserted these chip sets into the handsets manufactured by them and that these in turn have been licensed to Indian operators for which OEMs have received a consideration and hence they have a source of income in India is contrary to the facts. It is also not the basis on which the assessment was made by the AO & CIT(A). What was brought to tax was the royalty earned from the licensing of patents and not royalty earned on software embedded in the chip sets. (AYs. 2000-01 to 2004-05)

Qualcomm Incorporated v. ADIT (2013) 23 ITR 239 / 85 DTR 156 / 153 TTJ 513 / 56 SOT 72(URO) / 58 SOT 97 (URO) (Delhi)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Fees for technical services – Permanent establishment – DTAA-India-USA - Creative fees and Database cost is held as Fees for Included Services and client coordination fees is held as business profit could not be taxed in India [Article 7, 12]

Assessee, USA based company, acted as a communication interface between its group concerns and group concerns and multinational clients. The assessee provided services to one of its group concern and received fees as creative fees, database cost and client coordination fees. It was held that fees under the head creative fees and database cost amounted to Fees for included services as per Article 12 of DTAA and chargeable at the rate of 15%. However, client coordination fees which was taxed as business profit,could not be taxed in India, due to non-existence of PE. (AY. 2010-11)

DDIT (IT) v. Euro RSCG Worldwide Inc. (2013) 140 ITD 210 / 84 DTR 29 / 153 TTJ 378 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Consideration received for supply of shrink wrap software is not royalty-DTAA-India-USA [Article 12(3)]
Amount received for supply of shrink wrap software was not royalty within the meaning of Article 12(3) of the DTAA between India and USA. Tribunal held that the receipt would constitute business receipts in the hands of assessee and the assessee who is non-resident does not have a PE. Therefore, business income of the assessee cannot be taxed in India in the absence of PE. (AY. 2006-07)
Dy. DIT (IT) v. Solid Works Corporation (2013) 152 TTJ 570 / 82 DTR 316 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Computer software – Right to use computer software is not royalty – Amount not to be disallowed for failure to deduct tax at source [S.40(a)(ia)]
Payment made for use of computer software does not amount to royalty under Explanation 2 to section 9(1) (vi) and thus section 40(a) (i) does not apply to such payment. (AY. 2007-08)
SKOL Breweries Ltd v. ACIT (2013) 142 ITD 49 / 84 DTR 271 / 153 TTJ 257 / 28 ITR 465 (Mum.)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Advice for investments to be carried out side India-DTAA-Inda-France. [Ss.40(a)(i), 195, Article 13]
Assessee enterered in to an agreement with a French Firm to provide investment advice and data for the investment to be carried outside India. The assessee had paid fees for services rendered. AO held that payment was in the nature of royalty, as the assessee has not deducted the TDS the payment was disallowed by applying the provisions of section 40(a)(i). The CIT(A) upheld the order of AO. On appeal Tribunal held that the payments made to Fund Quest are not in the nature of 'Royalty' and the services were rendered abroad, no part of income had acccured or arisen in India. The assessee is not liable to deduct tax at source on the payments made. (AY. 2008-09)
Sundram Asset Management Co Ltd v. Dy. CIT (2013) 145 ITD 17 (Chennai)(Trib.)

S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty/Fees for technical services – Payment for Teaching – DTAA-India-Singapore [Art. 12, 5]
The applicant-company, engaged in business of providing high quality executive education programmes to Indian corporates and other participants, entered into a Programme Partnership Agreement with INSEAD, a Singaporean business school. As per agreement, INSEAD was obliged to conduct teaching intervention in form of training, in-class teaching and on-line teaching during education programmes conducted by applicant and the applicant shall compensate INSEAD for cost involved in teaching. Held, on facts, INSEAD did not have a permanent establishment in India. Also, payment made by applicant to INSEAD for services rendered under terms of Agreement is not in nature of 'Fees for Technical Services' as it falls under exclusive clause of Article 12(5)(c) of DTAA. Hence, the amounts were not taxable in India.
Eruditus Education (P.) Ltd., In re (2013) 218 Taxman 207 / 262 CTR 113 / 218 Taxman 207 (AAR)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Deduction at source – Make available clause – Overriding effect – DTAA-India-France-USA. [Ss.90, 115, 195, 201(1), Art.12, 13]
Favourable clauses in DTAA override provisions of Income-tax Act, in matter of ascertainment of chargeability to income-tax and ascertainment of total income, to the extent of inconsistency with terms of DTAA. Where both American as well as French company did not make available or transfer any technology to assessee with respect to launching and tracking of assessee's satellites respectively, payments for same could not be taxed as fees for technical services. Assessee was not liable to deduct tax at source. (AYs. 1989-90 to 2004-05)
CIT v. ISRO Satellite Centre (2013) 218 Taxman 74 / 263 CTR 549 / 35 taxmann.com 352 (Kar.)(HC)

S.9(1)(vii) : Income – Deemed to accrue or arise in India-Fees for technical services-Commission – Discount – Not liable to deduct tax at source – Withdrawal of circular afterwards has no bearing for the relevant year. [Ss.40(a)(i), 195]

Assessee paid commission/discount on export orders to non-residents who did not have any PE in India. Assessing Officer held that commission paid by assessee was chargeable to tax under section 9(1)(vii), accordingly he disallowed the same on the ground that assessee had not deducted TDS from such payment. Court held that under Circular Nos. 23 dated 23-7-1969, 163 dated 29-5-1975 and 786 dated 7-2-2000, payments made in form of a commission or discount to foreign party was not chargeable to tax in India under section 9(1)(vii). Since payment were made prior to applicability of Circular No. 7/2009 by which aforesaid circulars were subsequently withdrawn, addition made by Assessing Officer under section 40(a)(i) was to be deleted. (AY.2009-10)

CIT v. Angelique International Ltd. (2013) 359 ITR 9 / 219 Taxman 104 / 38 taxmann.com 425 (Delhi)(HC)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Commission paid to non-resident – Effect of withdrawal of circular – Deduction of tax at source – Not liable to deduct tax at source [Ss.37(1), 40(a)(ia), 195]

Circular No.7 of 2009, dated October 22, 2009, withdrawing Circular No. 23 of 1969, 163 of 1975 and 786 of 2000 was operative only from October 22, 2009, and not prior to that date and had no bearing for AY 2007-08. There was no obligation to deduct tax at source under section 195 on the commission paid to a non-resident recipient, who was not liable to pay tax in India. Commission payment cannot be disallowed. (AY. 2007-08)

CIT v. Model Exims (2013) 358 ITR 72 / 219 Taxman 289 / 38 taxmann.com 319 (All.)(HC)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Royalty and fees for technical services cannot be taxed under residual Article 22 of India-Thailand DTAA, unless item of income does not fall under any other express provisions of DTAA-DTAA-India-Thailand [Article 22]

The assessee, a non-resident company of Thailand, entered into technical assistance know-how agreement and India Company for transfer of technology know-how. The assessee received technical know-how fees for five years, which was treated as not taxable as per Article 12 of DTAA between India and Thailand. The Assessing Officer took a view that what was transferred was sharing of knowledge and not know-how, and therefore, consideration received was not covered by definition of royalty under Article 12 of DTAA. Therefore, he held that consideration could be taxed only or in the contracting State where the income arose under the residual clause that is Article 22 of DTAA. On appeal High Court held that residual clause of Article 22 of DTAA had no relevance as far as royalty and fees for technical services were contemplated as it would come into play only when item of income did not fall for consideration under any express provisions of DTAA. (AYs. 1991-92 to 1995-96)

Bangkok Glass Industry Co. Ltd. v. ACIT (2013) 82 DTR 326 / 215 Taxman 116 (Mag.) (Mad.)(HC)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Deduction at source – Non-resident – Meaning of source of income. [S.40(a)(ia), 195]

Assessee manufactured products in India. Payments were made to US company for obtaining certification facilitating exports. Testings were carried outside India. Payments were also made outside India. Held that source of income within India and therefore, section 9(1)(vii) became applicable. Since question of liability under DTAA was not considered, matter was remanded back to the Tribunal. (AY. 2005-06)

CIT v. Havells India Ltd. (2013) 352 ITR 376 / (2012) 253 CTR 271 / 208 Taxman 114 (Delhi)(HC)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Royalty – Software licence-Right to use said confidential information in form of computer programme software would itself constitute royalty and attract tax. DTAA-India-Ireland [Article 12]

Assessee granted a non-exclusive non-transferable software licence without right of sub-licence. Licencee might make a reasonable number of copies of licensed software for backup and /or archival purposes only, even if it was not transfer of exclusive right in copyright, right to use confidential information embedded in software in terms of aforesaid licence which makes it abundantly clear that there was transfer of certain rights which owner of copyright possessed in said computer software/programme in respect of copyright owned. Therefore in terms of DTAA consideration paid for use or right to use said confidential information in form of computer programme software would itself constitute royalty and attract tax. Court held that it is not necessary that there should be a transfer of exclusive right in copyright and where consideration paid was for rights in respect of copyright and for user of confidential information embedded in software/computer programme, it would fall within mischief of Explanation (2) of section 9(1) (vi) and there would be a liability to pay tax. (AYs. 2001-02 to 2003-04)

CIT v. Synopsis International Old Ltd. (2013) 212 Taxman 454 / (2012) 28 taxmann.com 162 (Karn.)(HC)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – DTAA-India-UK-Matter remanded [Art 13]

Assessee, a non-resident company, was engaged in selling rough diamonds and also providing various value added services to sight holders. It entered into supply planning services (SPS) agreement with sight holders. Prior to said SPS agreement, VAS agreement was in force which included services including core services and growth services. AO relying upon VAS agreement treated SPS receipts as fees for technical services and taxed same at rate of 15 per cent in terms of article 13 of DTAA. Assessee claimed that said VAS agreement had expired and same was not applicable in year under consideration; since some services provided under SPS agreement were not akin to services provided under VAS agreements, AO wrongly relied on VAS agreement. Tribunal held that since lower authorities had considered only expired VAS agreement and there was no discussion either in order of AO or in the directions of DRP to nature of impugned SPS services or homologous nature of these services to VAS services, matter was to be remanded back for deciding issue afresh. (AY.2009-10)

De Beers UK Ltd. v. ADIT (2013) 60 SOT 224 / 27 ITR 1 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Higher rate in DTAA – DTAA-India-UK [S. 115A(1)(b)(BB), Article 13(3)]

AO is bound to apply concessional tax rate prescribed under the Act not the higher rate under DTAA. (AY.2009-2010)

De Beers UK Ltd. v. ADIT (IT) (2013) 60 SOT 225 / 27 ITR 1 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Training to assessee's employees – DTAA-India-USA. [S. 40(a)(ia), Art. 12(4)(b)]

Assessee made use of assistance rendered by foreign company in its decision making process for management. Foreign company was also giving training to assessee's employees. Held, service falls under definition of technical services and tax was deductible at source. (AY. 2007-08)

US Technology Resources P. Ltd. v. ACIT (2013) 28 ITR 26 / (2014) 161 SOT 191 (Cochin)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Reimbursement of salaries – Secondment of employees – DTAA-India-Singapore [S.40(a)(ia), 192, 195, Article 12 (4)(b)]

For rendering services, the Singapore company, which was the holding company of the assessee, paid the assessee a mark-up of 21%, besides reimbursement of certain expenses like cost of salary etc. on actual basis. The AO disallowed the sums claimed to be reimbursement of salaries of the seconded

employees on which the Singapore company had deducted tax u/s 192 for failure by the assessee to deduct tax thereon. Held, there was no requirement for deducting the tax at the time of reimbursement, when already tax had been deducted at the time of payment of salary.(AYs. 2007-08, 2008-09)
Temasek Holdings Advisors (I) P. Ltd. v. DCIT (2013) 27 ITR 125/ 60 SOT 134(URO) (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Business of computerised reservation system – Earlier year's orders
The assessee, a non-resident company, was engaged in the business of computerised reservation system. The assessee claimed that its receipts from its activity of providing airline reservations were neither royalty nor fees for technical services and hence not taxable in India. Following Tribunal's order in assessee's own case for earlier years, it was held that 15% of receipts would be attributed as income accruing or arising in India and since 25% of receipts were paid to subsidiary company of the assessee in India as marketing fees, there was no income chargeable to tax. (AY.2004-05)
Abacus International P. Ltd. v. DDIT(IT) (2013) 27 ITR 49 / 34 taxmann.com 21 / 155 TTJ 550 / 89 DTR 235 / 144 ITD 36 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Offshore design contract – Taxable in India-Provisions of DTAA was not considered by lower authorities – Matter remanded – DTAA-India-Japan [Article 12]
Assessee, tax resident of Japan, executed offshore design contract awarded by Indian companies in India. Since assessee had rendered services which were technical in nature, revenue earned by assessee was in nature of fees for technical services. On facts, fees for technical services were payable by persons who were resident in India, income of fees for technical services in question was taxable in India as per section 9. however, since lower authorities had not considered Article 12 of DTAA in light of terms and conditions of contract to arrive at finding that income in question was taxable even under Indo-Japan DTAA, this issue was to be remitted to record of AO. Rendering of service is not a pre-condition for attracting section 9(1)(vii) when fees for technical services are payable by a person who is resident in India. (AYs.1996-97 to 2002-03)
Toyo Engineering Corporation v. DCIT (2013) 60 SOT 241 / 37 taxmann.com 448 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Rendering consultancy for power sectors – preparation of technical designs included in technical services – DTAA-India-USA. [S.90, Article 12]
The assessee a tax resident of USA, a consulting firm, providing diverse services to power industry. The assessee received a sum of Rs.2.22 Crores from L&T in relation to designs & plans for ultra mega power projects. The A.O. held the amount covered under fees for technical services. The DRP upheld the order of the A.O. The Tribunal upheld the A.O.'s order holding that the assessee was "making available" technical services which L&T would utilise in the future and thus covered under Art. 12 of India-US DTAA. (AY.2007-08)
Sargent & Lundy LLC, USA .v. Addl.CIT (2013) 145 ITD 85 / 94 DTR 412 / 158 TTJ 453 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services–Make available of technical services to be examined-DTAA-India – Netherlands.[S. 90, Art. 12]
The assessee provided services related to carrying on branches of Petroleum, natural gas, coal and chemical industry under an agreement. The A.O. held that the services were in the nature of fees for technical services. On appeal, the CIT(A) confirmed the A.O.'s order. The Tribunal held that the A.O. did not examine whether commercial support, logistic support and human resources provided by assessee foreign company were in nature of make available of technical services and thus restored back to the stage of A.O. (AYs. 2003-04 & 2005-06)

Shell International B.V. v. ITO (2013) 145 ITD 81 / 37 taxmann.com 135 (Ahd.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – If the contract falls u/s. 44BB, incidental technical services are not assessable as "fees for technical services" u/s. 9(1)(vii). Verdict in Alcatel Lucent (Del) on liability of foreign company to pay s.234B interest cannot be followed in Mumbai [Ss.44BB, 234B]

The Tribunal had to consider two questions of law (i) whether a part of the consideration paid for a project involving installation, assembly or the like in connection with the prospecting for, or extraction or production of, mineral oils can be assessed as "fees for technical services" u/s. 9(1)(vii) or the entire consideration has to be assessed only u/s 44BB and (ii) whether in view of the verdict of the Delhi High Court in Alcatel Lucent a foreign company can be held liable for advance-tax and consequent payment of interest u/s 234B? HELD by the Tribunal:

(i) The contract was a composite one and its main purpose was to install offshore pipelines, etc. To achieve this main purpose, the assessee had undertaken various activities which were listed down in the various articles of the contract. Those activities were incidental to the main job and were an integral part of the contract to ensure that all the pipelines were successfully installed, commissioned, tested and complied with the standards set out in the contract. The argument of the department that the activity relating to providing technical services should be assessed as "Fees for Technical Services" u/s. 9(1)(vii) is not acceptable. When a contract consists of a number of terms and conditions, each condition does not form a separate contract. The contract has to be read as a whole. The entire consideration is assessable only u/s 44BB and no part of it is assessable as fees for technical services u/s 9(1)(vii)

(ii) The argument of the department based on Alcatel Lucent USA (Del) that even a foreign company is liable to pay advance tax and consequential interest u/s 234B is not acceptable in view of the contrary decision of the jurisdictional High Court in *DIT (international Taxation) v. NGC Network (2009) 313 ITR 187 (Bom)*. (AY. 2005-06)

ADIT v. Valentine Maritime (Gulf) LLC (2014) 159 TTJ 706 / 97 DTR 417 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services –Foreign consultancy and commission-ascertainment of nature of amount paid. [S.40(a)(i)]

Where assessee paid foreign consultancy and commission charges to a non-resident, disallowance under section 40(a)(i) could not be made for non-deduction of tax at source, without ascertaining nature and taxability of such payment as per section 9(1)(vii). (AY. 2008-09)

Snowdrop Trading (P.) Ltd. v. ACIT (2013) 59 SOT 127 (URO) / 37 Taxmann.com 20 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Reimbursement of expenses cannot be treated as fees for technical services.

The tribunal held that the payment being made for the reimbursement of the permission granted to the assessee for using trade mark, such payment cannot be said to be fee for technical services. Even otherwise, such reimbursement of expenses are not subject to TDS, no disallowance is warranted. (AY. 2005-06)

Obeetee (P) Ltd. v. Addl. CIT (2013) 142 ITD 104 (All.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Leather testing charges – Deduction at source – An assessee cannot be penalized for not performing the impossible task of deducting TDS in accordance with the law which was brought in subsequently. Disallowance u/s. 40(a)(i) cannot be made as the amount has been made taxable by the retrospective amendment to S.9 is acceptable – DTAA-India-Germany [Ss.40(a)(ia), 90, Art 12]

The assessee, a manufacturer and exporter of leather goods, made remittances to a Germany based company in respect of leather testing charges, without deducting tax at source on the ground that the testing operations were not carried out by the German company in India and the income could not be said to accrue or arise in India. The AO rejected assessee's explanation and disallowed payments of testing charges under section 40(a)(i). The CIT(A) confirmed the order of AO.
On appeal by the assessee, the Tribunal observed that the assessee's contention that source of income being outside India, the exception u/s. 9(1)(vii)(b) will come into play, cannot be accepted because even if it is a 100% EOU, it is still a business carried on in India and since testing charges were in nature of fees for technical services, tax ought to be deducted on the same. However, in this case since the amendment in s. 9(1) was by virtue of Finance Act, 2010, wherein the testing fees were held to be taxable in India, in view of the Supreme Court's judgment in the case of *Ishikawajma-Harima Heavy Industries Ltd. v. DIT (2007) 288 ITR 408* it is held that the disallowance u/s. 40(a)(i) cannot be invoked for the AY 2008-09 which as before the amendment. (AY. 2008-09)
Metro & Metro v. ACIT (2013) 95 DTR 149 / 158 TTJ 308 / (2014) 29 ITR 772 (Agra)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Commission paid to non-residents was not taxable in India, therefore assessee was not required to deduct tax at source [Ss.40(a)(i), 195]
Assessee company, engaged in business of manufacture and export of shoe uppers and leather shoes, paid certain commission to non-residents for procuring export orders. Since assessee did not deduct tax at source while making said payments, Assessing Officer disallowed same under section 40(a)(i). It was noted that non-residents were only procuring orders for assessee and following up payments and apart from that no other services were being rendered. Held, since non-residents were not providing any technical services to assessee, payments made to them did not fall under category of royalty or fee for technical services under section 9(1)(vi).Even otherwise, since commission paid to non-residents was not taxable in India, assessee was not required to deduct tax at source while making said payments. Hence, the impugned disallowance was to be deleted. (AY.2009-10)
ITO v. Faizan Shoes (P.) Ltd. (2013) 58 SOT 245 / 34 taxmann.com 79 (Chennai)(Trib.)

S.9(1)(vii): Income deemed to accrue or arise in India – Fees for technical services – Supply of technical data – DTAA-India-Danish-Matter remanded [Art.13]
Assessee a Chemical Technology Company in Denmark received certain sum from its Indian client for supply of technical data to meet requirement of plant supplied. Assessee company claimed that receipt was exempt from tax on ground that fees for technical data formed an integral part of price of equipment. Assessing Officer and DRP disallowed claim and treated sum as fees for technical services on ground that separate agreements was entered into for supply of technical know-how and equipment. Tribunal held that certain crucial aspects, facts relating to two separate agreements and provisions of DTAA had not been properly examined, therefore in interest of justice matter was remitted back to Assessing Officer for deciding issue. (AY. 2007-08 & 2008-09)
Haldor Topsoe v. Add.CIT (2013) 58 SOT 88 (URO) / 34 taxmann.com 271 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Training fee to service provider – Make available – Training fee is not taxable as fees for technical services under article 13(4)(b) – DTAA-India-UK [S.90, Art.13(4)(c)]
The assessee made certain payments to a UK service provider for providing 'market awareness and development training' to its employees. Tribunal held that unless the technical service provided by the UK company resulted in transfer of technology, the 'make available' condition was not satisfied. To 'make available' clause, the onus is on the tax authority to demonstrate that the training services involved transfer of technology. This onus was not discharged. The training services provided were

general in nature and did not involve transfer of technology. Therefore, the fees paid for the same could not be covered under Article 13(4) of India-UK DTAA. (AY. 2008-09)
ITO v. Veeda Clinical Research Pvt. Ltd. (2013) 144 ITD 297 / 35 taxmann.com 577 / 156 TTJ 115 / 90 DTR 324 (Ahd.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Sub-arranger fee paid to non-resident does not amount to fees for technical services. Doing small parts of overall activity cannot be regarded as rendering managerial services [S.40(a)(i), 195]
The assessee was appointed as arranger by an Indian Bank for mobilising deposits from NRI customers and collecting bank for receiving and handling application forms under "India Millennium Deposit" scheme. The assessee in turn appointed sub-arrangers for mobilizing IMDS both in and outside India. The sub-arrangers work was in the nature of soliciting NRI customers for IMD of Indian banks and then to remit the amount received by them to the designated banks. Tax authorities disallowed the payments of sub-arranger fees on the grounds that such payments to non-residents were in the nature of FTS on which tax was required to be with held under the Act. On appeal the Tribunal held that from the nature and scope of services rendered by the sub-arrangers, it was clear that no technical knowledge, expertise or qualification was required. Convincing potential customers and helping them to fill requisite forms and coordinating transfer of funds, cannot be considered as a "technical services". The services rendered by the sub-arranger were only a small part of the management of the IMD issue. Sub-arrangers were not involved in the "management" of MID issue. The assessee was simply acting as commission agent or broker for which it was entitled to a particular rate of commission. Sub-arranger obligation was a part of overall obligation of IMDs and hence services cannot be regarded as fees for managerial services. (AY. 2001-02)
Credit Lynonnais (Through their successor: Calyon Bank) v. ADIT (2013) 26 ITR 51 / 144 ITD 644 / 96 DTR 261 / 158 TTJ 826(Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Works contract for operation and maintenance of power plant – DTAA-India-UK [S.44AD, Article 13]
The Tribunal held that no technical service ensued and that assessee could not be taxed on gross basis & section 44AD has no application & Article 13(4)(c) read with Article 26 of DTAA does not permit to discriminate vis-à-vis domestic company. (AYs. 2005-06, 2007-08, & 2008-09)
ADIT v. Rolls Royce Industrial Power India Ltd. (2013) 142 ITD 585 (Delhi)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Fees paid to non-resident divers [Ss. 40(a)(i), 195]
The assessee was in the business of providing underwater diving services in Saudi Arabia under a contract and paid fees to non-resident divers outside India. The Assessing Officer held that the services rendered by the divers were technical services falling under section 9(1)(vii) of the Act and therefore, was liable for deduction of tax at source which the assessee had not deducted and therefore, the provisions of section 40(a)(i) were applicable. The CIT(A) upheld the disallowance made by the Assessing Officer. On appeal by the assessee, the Tribunal allowing the appeal held that the services of non-residents to whom the technical fee was paid by the assessee were utilized for the business which was carried on outside India for earning income from a source outside India and therefore section 195 does not apply hence the amount cannot be disallowed under section 40(a)(i). (AY. 2008-09)
Aqua Omega Services P. Ltd v. ACIT (2013) 141 ITD 434 / 23 ITR 191 (Chennai)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – IT support services to its group companies – Not taxable in India-DTAA-India-Australia. [S.5(2), 9(1)(vi), 90, Art 12]

Assessee an Australian company, it was providing the IT support services to its group companies in the Asia Pacific region. The services provided by the assessee were in the nature of help desk, administrative and maintenance IT support. It received certain amount from two Indian group companies for providing IT support services and claimed that in view of the Treaty between India and Australia, as no technical services were made available to its group companies in India, the payment was exempt. The Assessing Officer rejected the assessee's claim and held that the payment received by assessee was taxable under section 9(1)(vii) as the assessee could not get the benefit even under the Treaty. As per direction of DRP the Assessing Officer passed the assessment order bringing to tax entire amount received by the assessee from its two affiliates in India. On appeal the Tribunal held that assessee had not made available any technical knowledge or expertise to Indian company. Services rendered by assessee company to its Indian group company though were in nature of technical services, but were not covered by para (3)(g) of article 12 of India Australia Treaty. Hence, same were not taxable in India. (AY. 2007-08)
Sandvik Australia Pty. Ltd. v. Dy. CIT (2013) 141 ITD 598 / 151 TTJ 93 / 88 DTR 38 (Pune)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Repair of machinery – Analyzing and solving technical problem and preventive maintenance is liable to deduct tax at source-Permanent account number – Grossing up – DTAA-India-Germany. [Ss. 195, 195A, 206AA, Article 12]
Assessee availed services of repairs of its machinery from non-residents which included assistance for preventive maintenance. Assessee made payment of repair charges without deducting tax at source. Assessing Officer held that the payments amounted to 'fees for technical services' hence the assessee was held liable deduct tax at source. The Assessing Officer also held that since non-resident recipients did not furnish its PAN to assessee – deductor, tax at source was required to be deducted at higher rate under section 206AA. Commissioner (Appeals) up held the order of Assessing Officer. On appeal the Tribunal held that, services in question were not mere repairs but were towards preventive maintenance German company was providing technical assistance and services, payments made for said services amounted to 'fee for technical services' Assessee was liable to deduct tax at source while making payments to non-resident. Tribunal also held that the provisions of section 206AA are applicable and the assessee is liable to deduct tax at the higher rate prescribed under section 206AA ie 20%. As regards the grossing up is concerned the Tribunal held that the grossing up of the amount is to be done at the rates in force for the financial year in which such income is payable and not at 20 per cent as specified under section 206AA. (AY.2011-12)
Bosch Ltd. v. ITO (2013) 141 ITD 38 / 155 TTJ 354 / 88 DTR 311 (Bang.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Developing printers – Deduction at source – Liable to be taxed at 15% – DTAA – India-UK [S.115A, Art.13]
Assessee Company had entered into agreement with 'X', a UK based company for developing printers. Assessee was to pay £ 25000 as start up fees. Assessing Officer held that payment was in nature of fees for technical services as intellectual property developed was owned by assessee, to be taxed accordingly in terms of Indo-UK treaty. On appeal Commissioner (Appeals) held that the assessee was liable to deduct tax at source treating the said payment as royalty/fees for technical services under section 9(1)(vi) and article 13 of the India-UK treaty. On appeal the Tribunal held that after going through the agreement it is to be opined that it was not about purchase of printer alone . The Assessee company had purchased a particular technology from "X' and had exclusive right over it, impugned agreement was not for purchase of machine but had purchased technology also, said payment was liable to deduction at source. As regards the additional grounds regarding lower rate of tax the matter was set aside to the Assessing Officer for limited purpose for deciding the question of applicability of lower rate of tax (AY. 2008-09)

Bajaj Holdings & Investments Ltd. v. ADIT (2013) 141 ITD 62 / 87 DTR 61 / 157 TTJ 137 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Both non-residents did not have PE in India, amount paid to them was not taxable in India, in view of above, assessee was not liable to deduct tax at source while making payments to non-residents [S. 40(a)(i), 195]

Assessee had two proprietary concerns. One of said concern was engaged in supplying building material to resorts in Maldives. For said purpose, an agent i.e. 'M' Ltd. was appointed in Maldives who received material, got it cleared from customs and delivered it to purchasers. Second proprietary concern of assessee also appointed an agent i.e. 'H' in Maldives who received clients on assessee's behalf and left them in resorts or hotels for which he was paid commission. On facts, services rendered by non-residents could not be said to be technical services under section 9(1)(vii) and thus, amount paid for rendering said services was to be taxed as business income. Since both non-residents did not have PE in India, amount paid to them was not taxable in India, in view of above, assessee was not liable to deduct tax at source while making payments to non-residents. (AY. 2008-09)
Sri Subbaraman Subramanian v. ACIT (2013) 140 ITD 707 / 30 taxmann.com 236 (Bang.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Payments to non-resident derives under contract for provision of underwater services in Saudi Arabia – Technical fee paid to carry out business outside India for earning income from a source outside India – Assessee not liable to deduct tax at source [S.40(a)(ia)]

The assessee was in the business of providing underwater diving services in Saudi Arabia under a contract with M and K and paid divers fees outside India. It claimed that this amount was paid in connection with the business of underwater diving services provided outside India and therefore, fell within the exception of section 9(1)(vii)(b) of the Act and was not taxable in India. The Assessing Officer disallowed the deduction on account of professional charges paid to divers and held that the services were technical services and fell under section 9(1)(vii) of the Act and the assessee having failed to deduct tax deducted at source, the provisions of section 40(a)(i) were applicable. The Commissioner (Appeals) held that the assessee did not have any branch or permanent establishment outside India and therefore, since the payments were made to non-residents from India the business could not be said to be carried on outside India so as to fall within the ambit of exceptions provided in section 9(1)(vii)(b) of the Act. He, therefore, upheld the order of the Assessing Officer. On appeal the Tribunal held that services were provided by the assessee outside India and for this business underwater diving services of non-residents were utilised to whom technical fee was paid. Therefore, the services of non-residents to whom the technical fee was paid by the assessee were utilised for the business which was carried out outside India for earning income from a source outside India. The assessee was not liable to deduct tax deducted at source on such payments. (AY.2008-09)
Aqua Omega Services P. Ltd. v. ACIT (2013) 23 ITR 191 (Chennai)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Dependent agent – Market supportive services – DTAA-India-Switzerland – In the absence of Permanent Establishment, Article 7 pertaining to business profits would cease to operate in assessee's case hence not liable to tax [Ss. 90, 115A, Article 5, 7]

Assessee, a Swiss company, operated India specific websites. For this purpose, it entered into Marketing Support Agreement with two group companies in India. Assessee claimed that though it earned revenue from its websites in India, same was not taxable as business profits as it did not have PE in India. The Indian group companies at no stage negotiated or entered into contract for or on behalf of assessee. They simply provided marketing services to assessee or making collection from customer and forwarding same to assessee. Indian group companies were not required to manufacture or process goods or merchandise on behalf of foreign assessee. Further goods or merchandize were delivered by seller to buyer directly who enter into contract through assessee's website. It was held that though group companies were dependent agents as per article 5(6) because they exclusively assisted assessee in carrying on business in India, they could not be considered as 'Dependent agent PE' because they did not perform any function specified in clauses (i) to (iii) of Article 5(5). Thus, in absence of PE, Article 7 pertaining to taxing business profits would cease to operate in assessee's case.

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

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Services rendered by machines is not "fees for technical services" – DTAA-India-Germany [S.90, 195, Art 7, 12.]

The assessee made payment to a laboratory in Germany for carrying out certain tests on circuit breakers manufactured by the assessee and to certify that the said circuit breakers met with international standards. The assessee claimed that as the said tests were carried out by sophisticated machines without human intervention, the services did not constitute "fees for technical services" as defined in s. 9(1) (vii) of the Act. The AO & CIT (A) rejected the claim on the ground that the services were "technical" in nature and that even assuming human intervention was necessary, the same was present in the form of humans observing the process, preparing the report, issuance of certificate and monitoring the machines. On appeal by the assessee to the Tribunal, HELD allowing the appeal:

(i) Explanation 2 to s. 9(1) (vii) defines the expression "fees for technical services" to mean "any consideration for the rendering of any managerial, technical or consultancy services". The word "technical" is preceded by the word "managerial" and succeeded by the word "consultancy". Applying the principle of *noscitur a sociis*, as the words "managerial and consultancy" have a definite involvement of a human element, the word "technical" has to be construed in the same sense involving direct human involvement. If services are provided using an equipment or sophisticated machine or standard facility, it cannot be characterised as "technical services" so as to fall within s. 9(1) (vii) (*CIT v. Bharati Cellular Ltd. (2009) 319 ITR 139 (Del) & Skycell Communications Ltd. v. Dy. CIT (2001) 251 ITR 53 (Mad.)* followed; fact that Bharati Cellular has been set aside by the SC in Bharat Cellular Ltd 330 ITR 239 (SC) does not affect this principle);

(ii) On facts, the services provided by the German laboratory for testing the circuit breakers was a standard service done automatically by machines and not requiring human intervention. The fact that humans are required for observing the process, preparing the report, issuance of certificate and for monitoring of machines is not a relevant criterion. The test is whether the services are rendered by a human or by a machine. If a human renders the technical services with the aid of a machine, the services are "technical services". But if the services are rendered by a machine without human interface or intervention, then it is not "technical services" as defined. The mere fact that certificates have been provided by humans after the test is carried out by the machines does not mean that services have been provided by human skills.

Siemens Limited v. CIT (2013)142 ITD 1/ 23 ITR 86 /84 DTR 1 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Buying agency service commission – Procurement and incidental services rendered is not managerial or technical services, Commission is not taxable in India

The assessee is a tax resident of Hong Kong. Its sourcing division provided buying agency services to various customers including an Indian company, an associate enterprise. For such services the assessee entered into a "buying agency services agreement" with the Indian company for sourcing of merchandise in respect to which the assessee received buying commission at 8.25 per cent of the value of merchandise. The assessee provided services which included centralised media and advertisement planning, market research, public relations, sports marketing and other marketing

services such as catalogue production, development of retail shop systems, etc. Another division of the assessee's group, provided certain regional marketing and administrative support services to the group's Asia-Pacific distribution entities (including the Indian company). Under the buying agency services agreement, the assessee was required to provide services to the Indian company in relation to purchase of goods from outside India, for and on behalf of the Indian company in accordance with the terms of the agreement. For the year under consideration, the assessee received remuneration in the form of buying commission at 8.25 per cent of the invoice amount of the merchandise. During the course of the assessment proceedings, the Assessing Officer held that the buying commission income received by the assessee was in the nature of fees for technical services and should be taxable in India in the hands of the assessee. Accordingly, it considered to be taxable on gross basis at 30 per cent on the ground that the agreement for providing such services was entered into on June 18, 1999. The Dispute Resolution Panel confirmed the view of the Assessing Officer. On appeal to the Tribunal, held, that the assessee was to receive commission for procuring the products for the Indian company and rendering incidental services for purchases. The services rendered by the assessee in this case were purely in the nature of procurement services and could not be characterised as "managerial", "technical" or "consultancy" services. Accordingly, the consideration received by the assessee was appropriately classified as "commission" as against "fees for technical services". It was not taxable in India. (AY. 2007-08)
Adidas Sourcing Ltd. v. ADIT (2013) 21 ITR 697 / 55 SOT 245 / (2012) 150 TTJ 801 / 80 DTR 396 (Delhi)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Effective management – DTAA-India-Denmark – Payment for procuring a global telecommunications facility is not for fees for technical services [Ss.28(i), 115A]
Assessee a Denmark company was engaged in shipping business. It had procured a global telecommunication facility. It claimed that without this facility assessee could not conduct international shipping business nor would its agent be able to act as agent to the assessee. Since the assessee was recovering a share of total cost incurred for setting up system from its Indian agents, assessee contended that said amount just represented 'cost sharing arrangement' and hence payment so received was in nature of reimbursement of expenses. In light of judgment *Dampskibsselskabet v. ADIT (IT) (2011) 130 ITD 59 (Mum.)*, where it was held that such payment was only reimbursement of cost for shipping and not in business of providing any technical services, it was held that payment so made by assessee was not FTS. Issue was decided in favour of assessee. Assessee raised alternative plea to consider payments received from Indian agents for sharing assesse's global telecommunications facility as income from business of shipping is not chargeable to tax in India by virtue of Article 9. Following the judgment in *Dampskibsselskabet v. ADIT (IT) (2011) 130 ITD 59 (Mum)*, the Tribunal held that amount received from Indian agents was part of income from shipping and hence not taxable in India as per Article 9 since place of effective management of assessee company was situated in Denmark. Accordingly the addition was deleted.(AY. 2001-02 to 2004-05)
Aktieselskabet Dampskibsselskabet Svendborg v. ADIT (IT) (2013) 140 ITD 515 / (2012) 25 Taxman 199 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Testing of dog food and similar products – No technical knowledge is made available, payments received by assessee not fees for technical services – DTAA-India-Singapore (Article 12(4)
The assessee-company, incorporated under the laws of Singapore, is engaged in the business of rendering services relating to testing solutions, sample analyses and analytical testing of food and feed samples. During the year, the assessee provided services to Indian companies for testing of dog food and similar products. After testing, the test reports were sent to the Indian companies and the assessee received service fee therefor. The assessee claimed that these receipts were its business income. The Assessing Officer held that the assessee had made available technical knowledge, skill

or know-how to the Indian customer and the payments made to it were in the nature of fees for technical services as defined under Article 12(4) of the Double Taxation Avoidance Agreement between India and Singapore. The Commissioner (Appeals) confirmed this. On appeal the Tribunal held that, the assessee provided testing services and issued test reports. These reports could not be said to make available any technical knowledge, experience, skill, knowhow or processes which enabled the Indian company to acquire the services to apply the technology contained therein. Therefore, these receipts would not amount to fees for technical services under the "make available" clause in article 12(4) of the Double Taxation Avoidance Agreement between India and Singapore. (AY. 2005-06)
Romer Labs Singapore Pte. Ltd v. ADIT (IT) (2013)141 ITD 50 / 22 ITR 224 (Delhi)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Deduction at source – Fabric design – Design supplied by consultant becoming property of assessee, payment is fees for technical service, assessee is liable to deduct tax at source DTAA-India-UK [S.195, Article 13(4)(c)]
The assessee entered into an agreement with a consultant in the U.K., which was required to deliver 9,000 fabric designs for cotton shirting to the assessee every quarter. The consultant was also required to show or make available all documents and reports in respect of the transaction relating to this agreement and to provide detailed quantity report in writing to the assessee, along with specific or new design developed by the consultant. The compensation was payable by the assessee to the consultant for each design supplied by the consultant. On expiry or termination of this agreement, the consultant was required to return all the documents and other internal documents of the assessee but there was no clause in the agreement to say that the client, i.e., the assessee is required to return the designs supplied by the consultant. On the question whether the payment to be made to the consultant was covered by the definition of the term "fees for technical services" under Article 13 of the Double Taxation Avoidance Agreement between India and the U.K. and hence is taxable in India and accordingly tax is required to be deducted at source under section 195 of the Act : On appeal by assessee Tribunal held that the design supplied by the consultant to the assessee became the property of the assessee and could be used by the assessee for its own business and be sold by the assessee to any outsider for consideration. The services rendered by the consultant to the assessee-company fell within Article 13(4)(c) of the Double Taxation Avoidance Agreement and, therefore, the payment was fees for technical services. According to the memorandum of understanding between India and the U.S.A., it was provided that there will be no fees for technical services if technology is not made available to the person acquiring the services. It was also specified that technology will be considered "made available" when the person acquiring the services is enabled to apply the technology. In the present case, fabric design was made available to the assessee and the assessee could apply such fabric design to process and produce garments and it could also sell and transfer such fabric design to outsiders for consideration and there was no restriction on the assessee in this regard in the agreement between the assessee and the consultant. Considering all these facts, the services received by the assessee and provided by the consultant were nothing but technical services and hence, tax was deductible by the assessee from the payments made by the assessee, to the consultant. (AYs. 2009-10, 2010-11)
Sintex Industries Ltd. v. ADIT (IT) (2013) 141 ITD 98 / 22 ITR 182 (Ahd.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Royalty – Television news services – DTAA-India-UK – Matter remanded. [Art 13]
Assessee, a tax resident of UK, is engaged in business of providing television news services including audio-visual feed together with textural scripting information, desktop library services, etc. Assessee received certain amount for rendering 'location special' service to customers in India. According to assessee 'location special' was a service wherein a customer requested assessee to film a particular event, meeting, etc., and, thus, payment was in respect of services for producing a

television film – Which did not qualify as royalty or fees for technical services under Article 13 of Indo-UK treaty. Assessing Officer, however, took a view that amount received for rendering said service was covered as ‘fees for technical services’ under section 9(1) (vii) (b) read with Explanation 2. Tribunal held that in absence of relevant material as well as agreement on record in terms of which assessee had rendered services and received payment, it was not possible to determine real nature of activity carried out/services rendered by assessee. Therefore, matter was to be remanded back for disposal afresh. (AY. 2001-02)
Dy. CIT (IT) v. Reuters Television Ltd. (2013) 55 SOT 235 / 82 DTR 27 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Website-Payment for subscription made by garment manufacturer to an online fashion store is royalty matter remanded back to Commissioner (Appeals) – DTAA-India – United Kingdom. [Ss.90, 195, Articles 7, 13]
Assessee, a resident, was engaged in business of fashionable ready to wear garments. In order to get international trend analysis and other information relating to fashion design and style, it subscribed to internet site of a company located in United Kingdom and paid subscription charges of £ 17,000. Assessee sought certificate for payment without deduction of tax at source under section 195. Assessing Officer rejected application and directed deduction of tax at 15.30 per cent holding said payment as royalty. It was held that subscription made by garment manufacturer to online fashion website is royalty or not, to be decided in light of judgment of Karnataka High Court in *CIT (International Taxation) v. Wipro Ltd. [2011] 203 Taxman 621 / 16 taxmann.com 275*. Matter remanded to Commissioner (Appeals) for a specific finding on point of transfer of right to use copy right in the light of Karnataka High Court’s decision.(AY 2005-06)
ADIT v. Globus Stores P. Ltd. (2013) 140 ITD 103 / 81 DTR 225 / 153 TTJ 248 (Mum.) (Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Absence of permission *vis-à-vis* amount payable to overseas group entities. [S.5]
Income on account of the amount payable by the assessee to the overseas group entities would accrue to the said entities only on receipt of the required approval from RBI; as such approval was not received during the year under consideration, the amount could not be taxed as income in the relevant year. (AY. 2005-06)
Welspun Zuchhi Textiles Ltd. v. ACIT (2013) 83 DTR 293 / 23 ITR 53 / 56 SOT 444 / 153 TTJ 153 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Amount not paid during relevant year are not liable to tax in India – Absence of permission of RBI – Amount payable to overseas group entities. [S.5]
Amounts not paid during the relevant year are not liable to tax in India as fees for technical services. Additions made by the Assessing Officer and confirmed by the CIT (A) on account of the amounts payable by BAH India to the three overseas group entities in Germany, Singapore and UK were deleted by the Tribunal. Tribunal held that the amounts could not be brought to tax in India during the year under consideration as fees for technical services as per the relevant provisions of DTAAs. Since the same had not been paid to the said entities, Tribunal followed three decisions namely *1. DIT (Intl. Taxation) v. Siemens Aktionqesell Schaft (IT Appeal No. 124 of 2010 dt. 22-10-2012, High Court of Bombay) 2. CIT v. UHDE GmbH (1996) 54 TTJ 355 (Mum.) (Trib.) 3. CSC Technology Singapore P. Ltd. v. ADIT (2012) 50 SOT 399 (Delhi).* (A. Y. 1998-99)
Booz Allen & Hamilton (India) Ltd. v. ADIT (2013) 152 TTJ 497/83 DTR 305/56 SOT 96 (Mum.)(Trib.)

S.9(1)(i)(vi) : Income deemed to accrue or arise in India – Royalty – Since assessee did not have any PE in India, income arising could not be taxed in India. DTAA-India-USA. [Art.5, 7, 12]

Assessee is a non-resident company incorporated in USA, entered into collaboration agreements with Indian companies, wherein it was required to provide various services to these three parties. During year the assessee company received certain amounts from these parties and claimed as receipts were not taxable in India in absence of PE in terms of Article 5 read with Article 7 of DTAA between India and USA. It also claimed that receipts in question were neither in nature of 'fees for included services' [FIS] nor as 'royalty'. It submitted that it had provided healthcare related services in pursuance of terms and conditions of respective service agreements. The Tribunal following the earlier year order held that, since assessee did not have any PE in India, income arising could not be taxed in India. (AY.2004-05)
Harvard Medical International Inc. v. Dy. CIT (2013) 58 SOT 329 / 33 taxmann.com 50 (Mum.)(Trib.)

S.9(1)(i)(vi) : Income deemed to accrue or arise in India – Royalty – Deduction of tax at source-Down loading licenced software – DTAA-India-USA [S.195, 201]
Assessee made payments to foreign companies for downloading their licensed software. A.O. opined that said payments were in nature of royalty and assessee's failure to deduct tax at source attracted liability under sections 201(1) and 201(1A). Commissioner (Appeals) upheld said order. By following the order passed by jurisdictional High Court in case of *CIT, International Taxation v. Samsung Electronics Co. Ltd. [2011] 203 Taxman 477 / 16 taxmann.com 141 (Kar.)* The honorable ITAT held that impugned order passed by authorities below was to be upheld. (A.Ys. 2007-08 to 2010–11).
Cosmic Circuits (P.) Ltd. .v. ITO (2013) 58 SOT 364 / 35 Taxmann.com 154 (Bang.)(Trib.)

S.9(1)(i)(vii) : Income deemed to accrue or arise in India – Fees for included services – Merely facilitation services will not fall within the definition of "FIS" – DTAA-India-USA. [Art. 12]
Assessee received payment from Wockhardt Hospitals Ltd. for services rendered in terms of new Wockhardt Award's agreement entered into by it with 'WHL'. Services provided by assessee to 'WHL' were merely facilitation services with regard to selection of awardees for Wockhardt Award and 'WHL' had not gained any technical knowledge from such services. The ITAT held that assessee was not providing any service which fell within definition of 'FIS' as contemplated in Article 12(4) of DTAA between India and USA. Deletion by the Commissioner (Appeals was held to be justified.(AY.2004-05)
Harvard Medical International Inc. v. Dy. CIT (2013) 58 SOT 329 / 33 taxmann.com 50 (Mum.)(Trib.)

S.9(1)(i)(vii) : Income deemed to accrue or arise in India – Fees for technical services – DTAA provisions beneficial – DTAA-India-Japan. [S.90(2), Art.9, 12]
Income from offshore services, though chargeable under section 9(1)(vii) but exempt under DTAA, could not be charged to tax in light of section 90(2). (AY 2009-10)
IHI Corporation v. Addtl.CIT (2013) 58 SOT 225 / 155 TTJ 4 (Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – When 'make-available' clause is not satisfied the sum paid for technical services shall not be taxable as FTS under Article 12- DTAA – DTAA-India-Netherland. [S.195, Art.12]
Consideration paid for various services by non-resident holding company to the applicant, which relates to (a) general management (b) international operations (c) legal advisory (d) tax advisory (e) controlling and accounting and reporting (f) corporate communications (g) human resources and (h) corporate development, mergers and acquisitions constituted fees for technical services, however there is no material to suggest that the technical knowhow, skill knowledge and expertise are transferred to the applicant so as to enable the applicant to apply this technical knowhow etc., independently and therefore requirement of the 'make-available' clause is not satisfied the sum paid

for technical services hall not be taxable as FTS under Article 12 of India-Netherland DTAA. (A.A.R.no 1075 of 2011 dt 6-12-2013.
Endemol India (P.) Ltd., In re (No.1) (2013) 40 taxmann.com 345 / (2014) 97 DTR 33 /361 ITR 340 / 264 CTR 117 (AAR)

S.10(1) : Capital asset – Agricultural land – Agricultural income – Certificate of Agricultural Officer and Village Officer/ Report of the Inspector of Income-tax [S.2(14)]
The assessee furnished documents in support of his claim that he carried on agricultural operations in these lands. The Assessing Officer contended that the certificates given by the Agricultural Officer and Village Officer did not show that the assessee carried on agricultural activities thereon. The Assessing Officer as well as the Commissioner (Appeals) relied on the report of the Inspector of Income-tax and the development work carried out by the purchaser of land. Therefore, the order of the Commissioner (Appeals) was to be set aside and the matter remitted to the file of the Assessing Officer with direction to examine the case of the assessee and decide the issue afresh in accordance with law. (AY. 2007-08)
Mampilly Antony (Dr.) v. DDIT (IT) (2013) 25 ITR 91 / 144 ITD 665 (Cochin)(Trib.)

S.10(2A) : Share from partnership – Not includible in total income
Amount credited in capital account of assessee was verifiable from bank account of firm. Hence, share of profits received by partner from firm not taxable. (AY. 2005-06)
ACIT v. Ashok Doshi (2013) 28 ITR 389 (Jodhpur)(Trib.)

S.10(5) : Travel Concession or assistance – Foreign Travel – Exemption is not available [Rule 2B]
The Assessee employee availed leave travel concession for leave travel package covering Malaysia and Singapore. The A.O. disallowed the same under section 10(5) as tour was undertaken for travel overseas. In appeal the Tribunal held that leave travel concession is exempt under section 10(5), read with rule 2B, only if assessee-employee undertakes journey to any place in India. S. 10(5) r.w. rule 2B no way provides that assessee is at liberty to claim exemption out of his total ticket package spent on his overseas travel and part of journey within India. Accordingly the claim of assessee for exemption was rejected. (AY.2007-08)
Om Parkash Gupta v. ITO (2013) 58 SOT 304 / 33 taxmann.com 169 (Chd.)(Trib.)

S.10(6A) : Foreign company – Contract approved by Indian Government – Income of foreign companies by way of royalty/fees for technical services – Income exempt [S.9(1)(vi), 9(1)(vii)]
Assessee, a tax resident of Japan, was awarded offshore designing contract by Indian companies. Since contract with said Indian companies were approved by Central Government, tax paid by such Indian concern on behalf of assessee was exempt under section 10(6A) (AYs. 1996-97 to 2002-03).
Toyo Engineering Corporation v. DCIT (2013) 60 SOT 241 / 37 taxmann.com 448 (Mum.)(Trib.)

S.10(10) : Gratuity – Applicability of benefit of gratuity & Leave encashment – Governed By definition [S.10AA]
During assessment proceedings, the Assessing Officer included basic pay plus Dearness Allowance and applied the formula as applicable to the gratuity and leave encashment for the purpose of working out the eligible amount of gratuity and leave encashment. The CIT(A) confirmed the order of the Assessing Officer. On appeal the Tribunal dismissed the appeal of assessee and held that the computation of the benefit of gratuity & Leave Cash encashment as contemplated under sections 10(10) & 10(AA) are to be governed by the definition of "salary" contained in the Explanation of section 10(AA) *vis-a-vis* clause (h) of Rule 2 of Part of 4th Schedule and not by any agreement, as contained in 8th Bipartite Settlement on wage revision & other similar conditions between Indian Banks Association & their workmen. The Tribunal further held that the definition of salary is specifically covered by definition of section 10 & section 10(AA) of the IT Act. (AY. 2008-09)

Gurmit Singh v. ITO (2013) 56 SOT 91 / 29 taxmann.com 382 (Chd.)(Trib.)

S.10(10C) : Salary – Perquisites – Tax paid by employer to be excluded – Rent free accommodation – Multiple stage grossing up is not applicable. [Ss.17, 195A, Rule 3)
Whenever tax is deposited in respect of a non-monetary perquisite, the provision of section 10(10CC) applies, thus excluding multiple stage grossing up. Taxes were to be excluded while computing the perquisite value of rent-free accommodation provided to an employee, in view of Rule 3 of the Income-tax Rules, 1962.
Yoshio Kubo v. CIT (2013) 357 ITR 452 / 92 DTR 70 / 218 Taxman 164 (Delhi)(HC)

S.10(10C) : Public sector companies – Voluntary retirement scheme – Ex gratia payments is exempt
Ex gratia payments received under voluntary retirement scheme of State Bank of India is exempt. In view of decision in *Bikram Jit Passi v. Dy. CIT* [IT Appeal No. 925(Chd.) of 2011, dated 9-11-2011]. (AY.2007-08)
Om Parkash Gupta v. ITO (2013) 58 SOT 304 / 33 taxmann.com 169 (Chd.)(Trib.)

S.10(10D) : Life insurance policy – After assignment of a keyman insurance policy it changes its character from that of a keyman insurance policy to that of an ordinary policy hence proceeds received would not be subject to tax.
Keyman Insurance Policies were taken by employer of assessee in name of assessee. After making some payments on account of premium, said policies were assigned in favour of assessee. Thereafter assessee paid subsequent premiums. AO made addition of maturity proceeds received by assessee treating said policies as Keyman insurance policies. Tribunal held that since after assignment of policies in name of assessee, they became ordinary insurance policies, AO was not justified in making said addition.(AYs.2007-08 to 2009-10)
Dy. CIT v. Rajan Nanda (2013) 60 SOT 49 (URO) / 37 taxmann.com 335 (Delhi)(Trib.)

S.10(11) : Provident fund – Interest on Provident funds
The assessee in the return of income filed, which was revised on two occasions, as well as in the two revised returns filed by him, offered for taxation under the head income from other sources, ` 3,81,565 being interest on PPF. The Assessing Officer (AO) completed the scrutiny assessment by accepting the returned income. In an appeal to CIT (A), the assessee contended that he should be allowed exemption in respect of interest on PPF deposit u/s. 10(11) of the Act. The CIT(A), relying on the decision of the Apex Court in the case of Goetze India Ltd (284 ITR 323) held that no fresh claim can be made by the assessee. He dismissed the appeal filed by the assessee. ITAT can consider a new deduction which, inadvertently, was not claimed in the return filed by the assessee. Assessee is entitled to claim interest on PPF to be exempt even though the same was not claimed in the income tax return. (AY.2008-09) (ITA No. 7314/M/2011, dated on 17-10-2012)
Shri Rumi K. Pali v. Dy. CIT (2013) - BCAJ Pg. 19, Vol. 44-B Part 4, January 2013(Mum.) (Trib.)

S.10(13A) : House rent allowance – Master and servant – Exemption to be allowed
In return of income, assessee disclosed salary received from 'S' - Assessee claimed deduction under section 10(13A) on basis of rent paid by him which had been debited from his salary directly. Assessing Officer rejected assessee's claim taking a view that income received by assessee was not taxable under head 'salary' but under head 'income from other sources'. Court held that since it was not case of the Assessing Officer that relationship between 'S' and assessee was not that of a master and servant, impugned order passed by him was to be set aside and, assessee's claim for deduction was to be allowed. In favour of assessee. (AY.2001-02)
CIT v. UK Bose (2013) 212 Taxman 399 / 91 DTR 36 / 29 taxmann.com 219 (Delhi) (HC)

S.10(13A) : House rent allowance – Payment of rent to his wife – Entitled to exemption satisfied the condition of occupation and payment.
Assessee's claim for exemption under section 10(13A) was disallowed on ground that rent was paid by assessee as tenant to his wife who was landlord and both were living together. Tribunal held that since house was owned by wife of assessee and assessee had paid rent to her through bank transfer entry, assessee had fulfilled twin requirements of section 10(13), i.e., occupation of house and payment of rent and, thus, would be entitled to exemption under section 10(13A).(AY.2009-10)
Bajrang Prasad Ramdharani v. ACIT (2013) 60 SOT 66 (URO) / 37 taxmann.com 186 (Ahd.)(Trib.)

S.10(15) : Specified securities – RBI Bonds – Exempt income – Discretionary trust – Individuals – Exemption is available to trust [Ss.2(31), 164]
Assessment of income in hands of trust has to be made in same manner and to same extent as it would have been made in hands of beneficiaries. Representative of assessee in case of a discretionary trust has to be regarded as individuals, and therefore, the trust would be entitled for exemption of interest income on RBI relief bonds under section 10(15). (AY. 2006-07)
Jehan Trust v. ITO (2013) 59 SOT 194 / 36 taxmann.com 71 (Mum.)(Trib.)

S.10(22) : Educational institution – Educational purpose – To be considered each year separately – Matter remanded to consider the benefit of section 11 [S.11]
Because of the unexplained payment made, it would be presumed that, during the relevant years, the activities of the assessee were not being carried on solely for educational. During the relevant years, the assessee was not entitled to the benefit of section 10(22). The matter was remanded to the Commissioner (Appeals) for consideration of the case of the assessee for the benefit under section 11 for AY 2000-01. (AYs. 1998-1999, 1999-2000, 2000-2001)
Cambrian Hall Educational Trust v. CIT (2013) 359 ITR 401 /(2014) 224 Taxman 133(Mag.) (Uttarakhand)(HC)

S.10(22) : Educational institution – Denial of exemption – Right of cross examination – Department disputing genuineness of transaction – Contributor to assessee denying transaction – Opportunity should be given to assessee to cross-examine disputant – Matter setaside [S.68, 148]
For the assessment year 1998-99, the Assessing Officer made additions denying the exemption under section 10(22). For the assessment year 2000-01, an addition was made in respect of the loan. The Commissioner (Appeals) upheld the additions. The Tribunal held that the assessee did not have the right to cross-examine the witness who made the adverse report, especially when the records did not indicate that the assessee had made any attempt to produce witnesses. On appeals by the assessee the Court held that, when the authorities entertained a doubt about the genuineness of the transaction, the Tribunal ought to have afforded the assessee an opportunity to cross-examine the disputant. The Revenue had not accepted the explanation given by the assessee. The assessee would not have expected one of the contributors to have denied the *factum* of contribution. This view was inevitable because but for this the assessee would not have opted to cross-examine the contributor. Therefore, when there was unexpected change of facts, the party should not be deprived of the opportunity to cross-examine the witness branded as the assessee's witness. The Evidence Act also permits a party to cross-examine his own witness under stated circumstances. Unless it is proved that the income derived was covered under section 10(22) it could not be decided whether the addition under section 68 was possible or not. Therefore, the matter was remitted to the Assessing Officer for further consideration in the light of the legal position. (AY. 1998-1999, 2000-2001)
Sri Krishna Educational and Social Trust v. ITO (2013) 351 ITR 178 (Mad.)(HC)

S.10(22) : Educational institution – Commercial operations [Ss. 11, 13]

Where education is imparted by an institution with purpose of profit, that is, purely on commercial basis, such institution would not be entitled to exemption under section 10(22) but it can claim exemption under section 11 if it applies 75 per cent of its income for charitable purposes and surplus, if any, has been invested in specified bonds and, further, provisions of section 13 are not violated. (AY. 2012-13)
Saivani Educational Society v. DIT (2013) 57 SOT 84 (Hyd.)(Trib.)

S.10(22) : Educational institution – Purpose of profit
An employee of the assessee had gained personal benefit from the operations of the assessee. It was held that merely because the employee has gained personal benefit, it cannot change the character of the institution as a whole from non-profit institution to a profit making institution. Exemption could not be disallowed. (AYs. 1997-98, 1998-99)
ACIT v. Jamia Urdu (2013) 56 SOT 517 / (2012) 150 TTJ 59 (Agra)(Trib.)

S.10(23C) : Educational institution – Registration – Grounds for rejection – Matter set aside
Mere possibility that society in future might pursue activities, which were not charitable or closely connected with education for making profit, would not constitute grounds to reject approval u/s 10(23C)(vi). Since assessee was not granted reasonable time to produce audit report, impugned order was to be set aside and Commissioner was to be directed to decide application again confined to enquiry on second proviso to s. 10(23C).
C.P. Vidya Niketan Inter College Shikshan Society v. UOI (2013) 359 ITR 322 / 219 Taxman 139(Mag.) (AP)(HC)

S.10(23C) : Educational institution – Non-maintenance of books – Denial of exemption was not justified [S.145]
Exemption u/s 10(23C) does not depend upon books of account but it depends upon relevant provisions of Act. Denial of exemption u/s 10(23C) to assessee on account of non-maintenance of books of account is not justified. (AY. 2005-06)
CIT v. Sweta Kalyan Samiti (2013) 219 Taxman 115 (Mag.) / 39 taxmann.com 21 (All.)(HC)

S.10(23C) : Educational institution – Breach of conditions – Matter was set aside to AO for re adjudication. [S.11]
The CBDT order granting exemption to the assessee revealed that it was a conditional approval dependent upon assessee applying its income towards charitable objects. Since two fact-finding authorities viz. the AO and the CIT (A) had recorded that assessee had violated section 11, Tribunal order holding that exclusive jurisdiction to decide infringement of section 11 was with Board cannot be sustained. Order of Tribunal was set aside and the matter was set aside to AO for readjudication. (AY. 2001-02)
CIT v. Manipal Academy of Higher Education (MAHE) (2013) 218 Taxman 1 / 357 ITR 114 / 36 taxmann.com 81 (Karn.)(HC)

S.10(23C) : Educational institution – Registration – Relevance of who makes the application. [R. 2CA of Income-tax Rules, 1962]
Application for approval cannot be rejected merely because it was filed by the assessee-society which was running the educational institution and not by the educational institution itself.
Neeraj Janhitkari Gramin Sewa Sansthan v. CCIT (2013) 218 Taxman 61 / 360 ITR 168/ 261 CTR 180 (All.)(HC)

S.10(23C) : Educational institution – Premature application – Competent authority was directed to consider the application on merits.

For relevant assessment year, assessee's application under section 10(23C)(vi) for approval of its institution as an educational institution existing solely for educational purposes and not for purpose of profit was rejected on ground that said application was premature. It was noted that application was filed on 28-3-2012 though it should have been filed only after 30-4-2012, however, said application reached to competent authority only in May, 2012, i.e., before 30-9-2012, which was prescribed period of limitation. In view of above, impugned order passed by competent authority was to be set aside and, matter was to be remanded back with a direction to respondent to consider assessee's application on merits. (AY. 2012-13)
Lokmanya Shiksha Samiti v. ITO (2013) 359 ITR 361 / 219 Taxman 109 (MP)(HC)

S.10(23C) : Educational institution – Running and maintaining educational institutions – Matter remanded [Rule 16CC]
The society was also registered with the Income-tax Department as an association of persons and had been granted a registration certificate under section 12A. The Chief Commissioner rejected the application for approval under section 10(23C)(vi) on the ground that the society had many activities that appeared to be other than educational such as to make appropriate efforts for upliftment of public in social and cultural fields, and the society had not filed the mandatory audit report under Rule 16CC (Form 10BB). Held, that as of now the society did not have any activity other than running and maintaining educational institutions. There were adequate safeguards, that if activities other than educational activities were undertaken, the exemption may be withdrawn but in the absence of any such allegation it could not be said merely on the enumeration of the activities, which were all primarily connected with education and charity that the society did not exist solely for the purpose of imparting education.
C.P. Vidya Niketan Inter College Shikshan Society v. UOI (2013) 359 ITR 322 / 219 Taxman 139(Mag.) (AP)(HC)

S.10(23C) : Educational institution – Time limit for application – Rejection of application as either delayed or premature was held to be not justified
The application filed by the assessee under section 10(23C)(vi) was rejected on the ground that the application for the year 2011-12 was not filed after April 1, 2011, but was filed on March 28, 2012, and for the year 2012-13, it was filed on March 28, 2012, whereas it ought to have been filed only after April 30, 2012. Held, the application filed on behalf of the assessee was not for the awarding exemption for the assessment year 2011-12 but for the year 2012-13. As the application reached the competent authority within time, September 30, 2012, it was held filed within time. Rejection of application as either delayed or premature was held to be not justified. The authorities were directed to consider the application filed by the assessee for seeking exemption. (AYs. 2011-12, 2012-13)
Lokmanya Shiksha Samiti v. ITO (OSD) (2013) 359 ITR 361 (MP)(HC)
Lokmanya Shiksha Samiti v. ITO (2013) 359 ITR 361 / 219 Taxman 109 (MP)(HC)

S.10(23C) : Educational institution – Charitable purpose – Objects of general public utility – Registration fee – Registration cannot be denied [Ss.2(15), 11, 12]
Petitioner is registered as a charitable society. It had acquired intellectual property rights *qua* bar coding system from 'A' and charged registration and annual fees from third parties to permit use of coding system. Petitioner applied for registration under section 10(23C)(iv). Director General (Exemption) denied approval of same, on ground that activity of petitioner was in nature of trade, commerce or business and that petitioner had not maintained separate books of account for business activity. The Hon'ble Court held that, charging a nominal fees by assessee-society from beneficiaries to use coding system and to avail advantages and benefits therein was neither reflective of business aptitude nor indicative of profit oriented intent and thus assessee could not be denied registration under section 10(23C)(iv) on ground that activity of assessee was in nature of trade, commerce or business.

GSI India v. DIT (E) (2013) 262 CTR 585 / 219 Taxman 205 / 94 DTR 105 / 260 ITR 138 (Delhi)(HC)

S.10(23C) : Educational institution – Society was pursuing only educational objects and no other activity, then application by such a society for grant of approval under section 10(23C)(vi) could not be rejected on ground that its aims and objects contained several other objects apart from educational – Matter remanded. [Income-tax Rules, 1961, Rule 2CA]

Assessee, a society, was running a degree college. It made an application for approval under section 10(23C)(vi) for assessment year 2009-10 onwards. Commissioner rejected said application on grounds that (i) approval under section 10(23C)(vi) was available only to an educational institution existing solely for educational purposes while memorandum of assessee stipulated other objects as well, and (ii) application for approval should have been filed by educational institution while it had been made by society. Whether application filed by assessee-society could not be rejected merely on ground that it was not at instance of educational institution as referred to under section 10(23C)(vi) and rule 2CA. The court held that where a society was pursuing only educational objects and no other activity, then application by such a society for grant of approval under section 10(23C)(vi) could not be rejected on ground that its aims and objects contained several other objects apart from educational The Court remanded that matter. (AY. 2009-10].

Neeraj Janhitkari Gramin Sewa Sansthan v. CCIT (2013) 91 DTR 150 / 261 CTR 180 / 218 Taxman 61 / (2014) 360 ITR 168 (All.)(HC)

S.10(23C) : Educational institution – Application – Profits earned cannot be the basis for rejection of application

The application under section 10(23C) was rejected on the ground that the educational institutions run by the assessee were generating surplus out of their gross receipts year after year. Held, the rejection of the application solely on the ground that there had been some profit was not justified. (AYs. 2006-07 to 2008-09)

Baptist Educational Society v. Chief CIT (2013) 353 ITR 320 (Delhi)(HC)

St. Lawrence Educational Society (Regd.) v. CIT (2013) 353 ITR 320 / (2011) 197 Taxman 504 (Delhi)(HC)

S.10(23C) : Educational institution – Application – Surplus generated cannot be the only ground for rejection of application – Matter remanded

The Chief Commissioner declined to approve the assessee under section 10(23C)(vi) on the ground it had accumulated huge income during the financial years 2003-04 to 2006-07 and it generated profit. Generating surplus and accumulation of income will not disqualify an institution to the benefits of section 10(23C). Surplus is to be understood in contradistinction to generation of income with the sole motive of profit if one has to properly understand the legislative intent of section 10(23C)(vi). There were certain questions of fact which had to be gone into by the Chief Commissioner and hence, the matter was remitted to him for fresh consideration.

Maa Saraswati Educational Trust v. UOI (2013) 353 ITR 312 / 236 CTR 400 (HP)(HC)

S.10(23C) : Educational institution – Application for approval – Conditions precedent – Admission procedure undertaken by institution is not a relevant consideration

The sanction under section 10(23) was to be granted within the parameters laid down under that section which are relevant and not the admission procedure undertaken by the assessee. The nexus between the profit motive and the alleged illegal admission was too remote and could not be presumed without any other adverse material on record against the assessee, for drawing such adverse inference. If the alleged illegal admissions made by the assessee in the year 2008-09 could be a valid criteria or relevant consideration for denying the approval under section 10(23C), such alleged illegal admissions continued in the subsequent years also as those students continued to be in the college for

subsequent years also and the same authority on the same set of facts, subsequently granted such approval for the subsequent years. This ground alone as such could not be relevant and a valid basis for refusing the approval under section 10(23C) to the assessee especially since the matter was still pending before the Supreme Court. The authority was free to decide afresh the proceedings for the assessment year 2008-09 and onwards till the assessment year 2010-11 by a fresh speaking order under section 10(23C) after affording opportunity of hearing to the assessee. (A.Ys. 2008-2009 to 2010-11)
Geetanjali University Trust v. CCIT (2013) 352 ITR 427 / 257 CTR 239 / 84 DTR 337 (Raj)(HC)

S.10(23C) : Educational institution – Application for approval – Institution solely for educational purpose and not for profit – Defect in admission procedure, Assessee will not lose character as entity existing solely for purpose of education
The assessee-trust, for the assessment year 2008-09, filed an application seeking exemption of its income under section 10(23C)(vi) of the Income-tax Act, 1961. The application of the assessee was rejected on the ground that the assessee did not satisfy the essential conditions for exemption under section 10(23C). For the assessment year 2010-11 and onwards, the assessee was granted approval under section 10(23C)(vi). On a writ petition the single judge set aside the order passed by the Chief Commissioner under section 10(23C) and directed the authority to decide afresh the proceedings for the assessment year 2008-09 and onwards till the assessment year 2010-11 by passing a fresh speaking order after affording opportunity of hearing to the assessee. On appeal held, dismissing the appeal, that under sections 10(23C)(vi) and (via), what is required for the purpose of seeking approval is that the university or other educational institution should exist "solely for educational purposes and not for purposes of profit". It was nowhere the case or the finding of the Chief Commissioner that on account of the defect in the admission procedure, the assessee ceased to exist solely for educational purposes or it existed for the purposes of profit. Further, it was not the case of the Revenue that the students who were admitted were not imparted education in the college in which they were admitted or the admissions granted were fake or non-existent or that the income generated by admitting the students was not used for the purpose of the assessee. The emphasis on the part of the Chief Commissioner that the purpose of education would not be served if the education is for students who have been illegally admitted and the purpose of education as contemplated in the section would be served only if the students have been legally admitted and not otherwise, went beyond the requirements of the section. Of course, the requirement of an educational institution to provide admissions strictly in accordance with the prescribed rules, regulations and statute needs to be adhered to in letter and spirit, but violation could not lead to its losing the character as an entity existing solely for the purpose of education. Therefore, there was no interference with the order of the single judge. (AYs. 2008-09, 2009-10, 2010-11)
Chief CIT v. Geetanjali University Trust (2013) 352 ITR 433 / 214 Taxman 11 (Raj.)(HC)

S.10(23C) : Educational institution – Incidental surplus – Profit motive – Upgrading facilities of college including for purchase of library books and improvement of infrastructure cannot be a ground for denial of exemption.
The Chief Commissioner denied the benefit of the exemption under sub-clause (vi) of section 10(23C) on the ground that the assessee was in receipt of the Government grants which formed a substantial part of the total receipts and, consequently, the case of the assessee would not fall within the purview of section 10(23C) (vi) for the reason that an institution which is wholly or substantially financed by the Government falls within the ambit of sub-clause (iiiab). Sub-clause (vi) applies to those institutions which do not fall within the ambit of sub-clause (iiiab) or sub-clause (iiiad). He was of the view that an institution which was in receipt of substantial grants from the Government would consequently not fall within the ambit of sub-clause (vi). The Chief Commissioner held that the fees which were collected by the assessee for the year ending on March 31, 2011, would indicate that the assessee did not exist solely for educational purposes. The Chief Commissioner had also noted that

the assessee had collected from student's utility fees, project work fees, industrial visit fee and a magazine fee from which it was sought to be deduced that the assessee did not exist solely for educational purposes. Moreover, there was an increase in the asset base with a generation of surplus which indicated that the activities of the assessee were not devoted solely for educational purposes. The Chief Commissioner held on that basis that the assessee existed for the purposes of profit. On a writ petition, allowing the petition the court held that, though the Chief Commissioner inquired into the question for the purposes of his determination under sub-clause (vi) of section 10(23C), the requirement that an institution must exist solely for educational purposes and not for the purposes of profit is common both to sub-clause (iiiab) as well as sub-clause (iiiad). Hence, the grievance of the assessee was that while on the one hand the Chief Commissioner had held that sub-clause (vi) would not be applicable to an institution which was in receipt of substantial grants from the Government (such an institution being governed by sub-clause (iiiab), at the same time, the finding that the assessee did not exist solely for educational purposes and not for the purposes of profit would, in effect, not merely lead to the rejection of the exemption under sub-clause (vi) but would also affect the claim of the assessee to the grant of an exemption under sub-clause (iiiab) as well. The sole and dominant nature of the activity was education and the assessee existed solely for the purposes of imparting education. An incidental surplus which was generated, and which had resulted in additions to the fixed assets was utilised as the balance-sheet would indicate towards upgrading the facilities of the college including for the purchase of library books and the improvement of infrastructure. With the advancement of technology, no college or institution can afford to remain stagnant. The assessee was entitled to exemption under section 10(23C(vi). (AY. 2011-12)
Tolani Education Society v. Dy. DIT (E) (2013) 351 ITR 184 / 214 Taxman 58 / 85 DTR 1/ 259 CTR 26 (Bom.)(HC)

S.10(23C) : Educational institution – Registration – Cancellation – Held to be not valid. [S. 11, 12A, 12AA]
Assessee was granted registration under section 12A being a charitable institution. Chief Commissioner disallowed assessee's claim of exemption under section 10(23C) (vi) on ground that it had not solely been established for educational purposes. Commissioner relying on said order cancelled registration granted to assessee under section 12A.Tribunal restored registration. High Court held that since (i) exemption under section 10(23C)(vi) could be claimed by an assessee without applying for registration under section 12A, and (ii) in order of Commissioner there was no whisper that assessee had not fulfilled any of conditions of section 11, Tribunal had rightly restored registration. (AYs. 2004-05, 2006-07)
CIT v. Jeevan Deep Charitable Trust (2013) 212 Taxman 19 / 28 taxmann.com 242 / (2014) 361 ITR 143 (All.)(HC)

S.10(23C) : Educational institution – Object of general public utility – Petitioner had not rendered its services directly to farmers but was rendering its services directly to its clients/agents who were engaged in trading hence rejection of exemption was valid.[S.2(15)]
Petitioner is registered under Andhra Pradesh (Telangana Area) Public Societies Registration Act, 1350 Fasli. It was carrying on functions of certification agency under Seeds Act, 1966. Seed growers were entering into contract with a society/agent, which approached petitioner for certification of seeds and after securing certification, they were selling certified seeds to farmers at a market price determined by them. Petitioner was also collecting fee for providing certification. Its application for approval under section 10(23C) (iv) was rejected by Chief Commissioner. The court held that the petitioner had not rendered its services directly to farmers but was rendering its services directly to its clients/agents who were engaged in trading of certified seeds with profit motive and, therefore, its activities were not for 'advancement of any other object of general public utility' and hence not for 'charitable purpose' in view of second limb of first proviso to section 2(15). Therefore, its application for approval under section 10(23C)(iv) was rightly rejected. (AY. 2010-11)

Andhra Pradesh State Seed Certification Agency v. CCIT (2013) 356 ITR 360 / 212 Taxman 493 / 83 DTR 23 / 256 CTR 380 (AP)(HC)

S.10(23C) : Educational institution – Delay in filing Form 10

Funds to be accumulated for purpose of construction of school building were deposited with nationalised bank. The resolution for such accumulation was passed during year. Hence, delay in filing Form 10 was condoned and exemption to be allowed. (AY.2006-07)

JCIT v. Sewa Education Trust (2013) 27 ITR 292 / (2014) 61 SOT 4 (URO)(Agra)(Trib.)

S.10(23C) : Educational institution – Formed by State Act – Neither financed nor controlled by State Government – Surplus on sale of books – Exemption is not available

Assessee, a State Board of school education claimed exemption under section 10(23C)(iiiab). The assessee was not directly controlled by State Government. It was formed under a State Act. It was also not financed/aided by State Government. Assessee was generating its own income from sale of books and on account of registration; thus, earning huge profit giving rise to surplus. Assessee had failed to satisfy requirement of section 10(23C)(iiiab) and, hence, claim of assessee for exemption was to be rejected (AY. 2006-07)

Himachal Pradesh Board of School Education v. ITO (2013) 60 SOT 270 / 38 taxmann.com 197 (Chd.)(Trib.)

S.10(23C) : Educational institution – Government aid – Substantial interest – Receipts of individual institution are to be considered, and not aggregate gross receipts of various institutions run by society

Tribunal held that percentage of grant if considered individually for each institution run by assessee society came out within range of 41 to 82 of gross aggregate receipts. If percentage was considered for society as a whole even then percentage would come out at 44.52% and 45.15% in relevant two years, therefore in view of definition of 'substantial interest', assessee should be held to be substantially financed/aided by Government and, hence, would be eligible for exemption under section 10(23C)(iiiab). For purpose of applying provisions of section 10(23C), receipts of individual institution are to be considered, and not aggregate gross receipts of various institutions run by society. (AYs. 2006-07, 2007-08)

Jat Education Society v. ITO (2013) 60 SOT 50 (URO) / 37 taxmann.com 187 (Delhi)(Trib.)

S.10(23C) : Educational institution – Hospital treating illness, mental defectiveness, convalescence, for philanthropic & non-profit purposes – Maternity Hospital cannot be granted deduction [Ss.2(15), 11, 12A]

The assessee, a maternity hospital claimed deduction u/s. 10(23C)(iiiae). The A.O. rejected the claim and the CIT(A) upheld the order of the A.O. On appeal by the assessee, the Tribunal held, dismissing the appeal:

Maternity is a natural process and could not be termed as illness or disease which is the primary ingredient envisaged u/s. 10(23C)(iiiae) and that being not fulfilled, the claim is to be disallowed. On departments appeal against the CIT(A) order wherein the learned CIT(A) held that investment of surplus fund in the FDR's to earn interest income on idle funds is directly incidental activity. The Tribunal held that earning of interest does not change the charitable spirit of the assessee. (AY. 2009-10)

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

S.10(23C) : Educational institution – Contribution to Lions Club – Being social club, exemption is not allowable

The assessee-trust was running an educational institution for women. Contributions towards Lions Club and Fine Arts Academy were claimed for exemption under section 10(23C)(iiiab). Held, Lions

Club might be undertaking some charitable activities, but by and large it was a social club and could not be construed a social organisation for undertaking social work as envisaged in the study curriculum. No explanation was furnished by the assessee why contributions were made to the Fine Arts Academy. The only plausible reason for making contributions to the two organisations was that secretary-cum-correspondent of the assessee was the office bearer of the organisations. Therefore, the assessee was not entitled to exemption under section 10(23C)(iiiab). (AY.2009-10)
Ganapathy Educational Trust v. ADIT (E) (2013) 25 ITR 231 / 144 ITD 509 (Chennai)(Trib.)

S.10(23C) : Medical institution – Wholly or substantially funded by Government of India or State Government, exemption is automatic [S.10(23C)(iiiac)]
The assessee-society, an association of persons, was formed by the Government of Karnataka for charitable purposes. The Government of India implemented its public health, family welfare, child welfare and various diseases control objectives through the assessee. Held the purpose of establishing State and district level health societies was to act as nodal agency for implementation of the Central Government's programme of the National Rural Health Mission and, thus, there could be no profit motivation. The assessee-society had been recognised as a Government established or sponsored entity, as affirmed by the Ministry of Finance. Therefore, exemption was automatic for entities which were wholly or substantially funded by the Government of India or a State Government under s. 10(23C)(iiiac). (AY. 2008-09, 2009-10)
The District Health and Family Welfare Society v. DCIT (2013) 24 ITR 604 / 61 SOT 41 (Bang.)(Trib.)

S.10(23C) : Educational institution – Earned profit more than crores, exemption was denied [Income-tax Rules, 1962 – Rule 2BC]
Assessee is a Registered Society formed by State Govt. for promotion and development of open school system in State. Relevant assessment years assessee filed return declaring NIL income after claiming exemption under section 10(23C)(iiiab). Assessing Officer held that assessee was generating profit and therefore it was not existing for benefit of public at large, accordingly the claim was rejected. The Commissioner (Appeals) affirmed the view of Assessing Officer. On appeal Tribunal held that the assessee earned huge profits exceeding monetary limits prescribed by rule 2BC. In terms of rule 2B the amount prescribed is Rs. 1 crore whereas the surplus generated by the assessee is in crores. As the assessee has not complied with two essential conditions as stipulated in the Act, therefore there is no infirmity in the conclusion drawn in the impugned order. Accordingly the order of Assessing Officer was upheld.(AY. 2003-04 to 2008-09)
M.P. Rajya Open School, Bhopal v. Dy. CIT (2013) 141 ITD 721 / 89 DTR 71 / 155 TTJ 239 (Indore)(Trib.)

S.10(23C) : Educational institution – Registration is condition precedent. [Ss.11, 12AA]
Assessee-institution was formed to provide education to weaker sections of society. It claimed exemption under section 10(23C)(iiiad) in respect of donations received from various parties. It was noted that assessee did not exist solely for educational purpose and, moreover, amount of donations exceeded prescribed limit of Rs.1 crore, further, there was neither any registration under section 12AA nor any evidence on record showing that donations were received with a specific direction that it would form part of corpus of assessee-institution. Tribunal held that in view of above, assessee's claim for exemption could not be allowed. (AY.2007-08)
Manas Sewa Samiti v. Add. CIT (2013) 55 SOT 217 / (2012) 28 taxmann.com 265 (Agra)(Trib.)

S.10(23C) : Educational institution – Annual receipts is to be taken into consideration and not total income of society
The assessee society is running school activities. The Assessing Officer held that the annual receipts of the assessee including interest exceeded ` 1 crore, but the assessee had not obtained prior approval

of Chief Commissioner under section 10(23C)(vi). He accordingly the rejected the claim under section 10(23C)(iiid). Commissioner (Appeals) upheld the order of Assessing Officer. On appeal, the Tribunal held that, in terms of provisions of section 10(23C) (iiiad), annual receipts of school or university may be taken into consideration and not total income of society running that school or university. However, income from interest on FDRs is an additional income of the society and it cannot be considered to be part of annual receipts of the school. Accordingly the appeal of assessee was allowed. (AY. 2006-07)
Param Hans Swami Uma Bharti Mission v. ACIT (2013) 140 ITD 429 / 154 TTJ 531 / 87 DTR 204 (Delhi)(Trib.)

S.10(23FB) : Venture Capital Fund – Violation of provisions of section 12, Chapter III of SEBI (Venture Capital Funds) Regulations, 1996 – Registration was not cancelled – Exemption cannot be denied
Assessee was a contributory trust under Indian Trust Act, 1882, registered with SEBI (Venture Capital Funds) Regulations, 1996. Assessing Officer had denied claim of exemption under section 10(23FB) on ground that assessee had violated provisions of section 12, Chapter III of SEBI (Venture Capital Funds) Regulations, 1996, which prescribe investment conditions and restrictions regarding investments. CIT (Appeals) held that the assessee had been making a regular quarterly filing with SEBI since its inception and had a valid and existing certificate of registration, as on date, held that until registration granted by SEBI after taking a particular view of facts of assessee's case was withdrawn, and any final view regarding alleged contraventions of conditions was expressed by SEBI, assessee was to be considered as eligible for exemption under section 10(23FB).Tribunal held that CIT (A) was justified in holding that assessee was eligible for exemption under section 10(23FB).(AYs. 2006-07 & 2007-08)
ACIT v. Small is Beautiful (2013) 60 SOT 153 (URO) / 26 ITR 41 / 38 taxmann.com 310 (Hyd.)(Trib.)

S.10(23G) : Infrastructure capital fund – CBDT approval is mandatory
Where assessee had not obtained approval from CBDT for purpose of claiming exemption under section 10(23G), it could not be allowed exemption under section 10(23G). (A.Ys. 2003-04, 2005-06 to 2007-08)
Tamil Nadu Urban Finance & Infrastructure Development Corporation Ltd. v. ACIT (2013) 58 SOT 53 (URO) / 33 taxmann.com 612 (Chennai)(Trib.)

S.10(23G) : Infrastructure capital fund – Capital gains – Sale of shares – Interest income – DTAA-India-Netherlands. [Ss. 2(47), 5, 9(1)(v)(c), 80IA, 269UA(d), Articles 13(1), 13(5)]
Sale of shares of an Indian company by a Netherlands company to a Singapore company not taxable under the Act or India-Netherlands DTAA. Shares in the Indian company engaged in the infrastructure activity is not "immovable property", so as to be taxed under Article 13(1) of Netherlands DTAA. Interest for delay in payment of sale consideration by the Netherlands company which was received outside India, did not accrue or arise in India and cannot be taxed under section 9 of the Act. Since the Indian company was already approved as an infrastructural company and was allowed deduction under section 80IA and at the time of sale the conditions as provided under section 10(23G) were satisfied, the gain on sale of shares of an infrastructural company were eligible for exemption as provided under section 10(23G). (AY. 2005-06)
Vanenburg Facilities B.V. v. ADIT (2013) 26 ITR 114 (Hyd.)(Trib.)

S.10(26) : Member of Scheduled Tribe – Reside in area specified in the provision
Members of the Scheduled Tribe residing in other parts of the country other than the one specified under section 10(26) are not entitled to the benefit of section 10(26).
Amal Shyam v. UOI (2013) 359 ITR 440 (Tripura)(HC)

S.10(26AAB) : Agricultural Produce Market Committee – Supply of essential commodities for general public – Similar issue in last year [S. 143]

Since no order of Appellate Tribunal had been passed for earlier assessment year on similar issue of deduction under s. 10(26AAB), proceedings pertaining to assessment year 2010-11 should be kept in abeyance, till disposal of appeal filed by department before Tribunal. (AY.2010-11)

U.P. State Food & Essential Commodities Corpn. Ltd. v. CCIT (2013) 216 Taxman 89 (Mag.) / (2013) 35 taxmann.com 47 (All.)(HC)

S.10(34) : Dividends – Shares held in subsidiary company as investment – Dividend is exempt [S.115O]

Tribunal held that assessee was entitled to exemption under section 10(34) in respect of dividend received on shares held in subsidiary company and reflected in balance sheet under the head 'investments'. (AY. 2007-08)

Dy. CIT v. Auto Ltd. (2013) 144 ITD 1 / 157 TTJ 119 / 34 taxmann.com 296 (TM)(Rajkot)(Trib.)

S.10(38) : Long term capital gains from equities – Scheme of sale of land through sale of shares of shell company is valid – Tax planning is not colourable if it is legal.[S.4,45]

The assessee held 98.73% shares in Bhoruka Financial Services Limited (BFSL). In AY 2005-06 BFSL purchased a plot of land from a group sick company called Bhoruka Steels Ltd for Rs.3.75 crores which was accepted to be the prevailing market price u/s 50C. BFSL was a shell company with no assets other than the said land. In AY 2006-07 the assessee sold its shareholding in BFSL to DLF Commercial Developers Ltd. for a net consideration of Rs. 20 crore. As the sale of shares was executed through the Magadh Stock Exchange and STT was paid, the assessee claimed that the gain on sale of shares was exempt u/s 10(38). The AO, CIT(A) and Tribunal rejected the assessee's claim on the basis that the assessee, BFSL and Bhoruka Steels were all controlled by common shareholders and that the scheme to first sell the land to BFSL and then to sell the shares of BFSL was devised with the sole purpose of avoiding tax on the capital gains which would have arisen if the land had been sold directly. It was held that the formalities of the transaction and the legal nature of the corporate bodies had to be ignored by lifting the corporate veil and the transaction had to be taxed as a sale of the land. On appeal by the assessee to the High Court, HELD allowing the appeal:

Though BFSL was a shell company with no asset other than the land and by buying the shares of BFSL, DLF in effect purchased the land, the transaction cannot be said to a sham or an unreal one. In coming to the conclusion that the transaction is a colourable device, the authorities have been carried away by the fact that the assessee was able to avoid payment of income tax. The assessee did resort to tax planning and took advantage of the law/ loopholes in the law. After seeing how the loophole was exploited within the four corners of the law, it is open to Parliament to amend the law plugging the loophole. However it cannot be done by judicial interpretation. S.10(38) of the Act is unambiguous. If the share holder chooses to transfer the lands through a transfer of the shares of the company owning the land, it would be a valid legal transaction in law and cannot be said to be a colourable devise or a sham merely because tax is avoided thereby (AY.2006-07)

Bhoruka Engineering Industries Ltd. v. Dy. CIT (2013) 356 ITR 25 / 90 DTR 209 / 261 CTR 287 / 218 Taxman 259 (Karn.)(HC)

S.10(38) : Long term capital gains from equities – Sale was found genuine when enquiries from stock exchange directly – Denial of exemption on the ground that purchaser was engaged in the fraudulent billing activities was not justified

Assessee-HUF derived long-term capital gain from sale of shares of two companies and such capital gains was claimed as exempt under section 10(38). During the assessment proceedings the assessee filed all the details. The AO being highly suspicious, enquired from BSE regarding genuineness of purchases of these shares through M/s Vijay Bhagwan Das and BSE *vide* letter dt. 16th April, 2010 informed that no such transaction of purchases as mentioned in the said bill was made through BSE.

Accordingly, the AO finally held that transactions made through Mukesh Choksi via his concern namely, M/s Alliance Intermediatories were accommodating entry in lieu of bogus long term capital gain. The AO proceeded to reject the claim of exemption made under s. 10(38) of the Act, and added the income as income from other sources. The Tribunal held that since entire proof of purchase and sale of these shares were found in books of account of assessee and sale of shares was found genuine when Assessing Officer made enquiries from stock exchange directly, addition on account of undisclosed income and denial of exemption under section 10(38) could not be sustained. (AY.2008–09)

Ramesh Kumar Jain (HUF) v. DCIT [2013] 36 taxmann.com 524 / 144 ITD 383 / 155 TTJ 184 (Jodh.)(Trib.)

S.10A : Free trade zone – Computation of profits – Unabsorbed depreciation and business loss of same unit brought forward from earlier years have to be set off against the profits before computing exempt profits. [S.10B]

The assessee set up a 100% EOU in AY 1988-89. For want of profits it did not claim benefits u/s 10B in AYs 1988-89 to 1990-91. From AY 1992-93 it claimed the said benefits for a connective period of 5 years. In AY 1994-95, the assessee computed the profits of the EOU without adjusting the brought forward unabsorbed depreciation of AY 1988-89. It claimed that as s. 10B conferred "exemption" for the profits of the EOU, the said brought forward depreciation could not be set-off from the profits of the EOU but was available to be set-off against income from other sources. It was also claimed that the profits had to be computed on a "commercial" basis. The AO accepted the claim though the CIT revised his order u/s 263 and directed that the exemption be computed after set-off. On appeal by the assessee, the Tribunal reversed the CIT. On appeal by the department, the High Court (*CIT v. Himatasingike Seide Ltd. (2006) 286 ITR 255 (Kar)*) reversed the Tribunal and held that the brought forward depreciation had to be adjusted against the profits of the EOU before computing the exemption allowable u/s 10B. On appeal by the assessee to the Supreme Court HELD dismissing the appeal:

Having perused the records and in view of the facts and circumstances of the case, we are of the opinion that the Civil Appeal being devoid of any merit deserves to be dismissed and is dismissed accordingly (19th September, 2013)(AY.1994-95)

Himatasingike Seide Ltd. v. CIT (2014) 266 CTR 141 / 100 DTR 37 (SC)

S.10A : Free trade zone – Transfer of business – Transferee is entitlement to exemption. [S.10B, 80HHE]

The assessee originally claimed relief under section 10B and alternative relief was claimed under section 10A. The Court held that what is prohibited in section 10A(2)(iii) is the transfer of used machinery and plant to a new business undertaking and forming of an industrial undertaking by splitting or reconstruction of the existing industrial undertaking. There is no specific prohibition or even inference to an industrial unit formed by transfer of the entire business.

In 2001, KGISL, which enjoyed exemption under section 10A, transferred the entire undertaking engaged in the export business of medical transcription along with all transcriptions contracts, books, records, all rights, all permits, all warrants, including computer software to the assessee. The transfer was recognised and allowed by the Software Technology Park of India. By reason of the transfer of the entire business, the employees of the transferor company engaged in medical transcription were also transferred and employed by the assessee. Held, the assessee was entitled to exemption u/s 10A. As the relief was granted under section 10A, the assessee was not entitled to the relief under section 80HHE. (AY.2004-05)

CIT v. Heartland KG Information Ltd. (2013) 359 ITR 1 / 219 Taxman 155 (Mag.)/ (2014) 100 DTR 18 (Mad.)(HC)

S.10A : Free trade zone – Conversion of domestic tariff area unit into a Software Technology Parks of India Unit – Registration – No export was made before registration – Unit entitled to exemption

Since no export was made prior to date of registration under Software Technology Parks of India even though manufacture commenced before registration, the unit was entitled to deduction. (AY. 2005-06)

CIT v. Expert Outsource P. Ltd. (2013) 358 ITR 518 (Karn.)(HC)

S.10A : Free trade zone – Existing unit – Exemption cannot be denied on the ground of transfer of plant and machinery previously used to export unit

The assessee was in business right from 1999-2000 and got its registration as a software technology park industry on March 27, 2002, the Department accepted the claim of the assessee for two AY. 2003-04 and 2004-05 and the assessments had become final. It was not as though the Department did not know the facts relating to the assessee's existence prior to its registration on March 27, 2002, and by mistake allowed the benefit for the AY 2003-04 and 2004-05. In the circumstances, there was no justifiable ground for the Department to question the claim of the assessee from the AY 2005-06. Denial of benefit on the ground that the assessee got registration only on March 27, 2002, whereas, it had commenced production in the financial year 1999-2000 itself, that the assessee unit was an existing unit, the assessee had transferred the plant and machinery previously used to the software technology park unit and the assessee had not registered ever since it commenced production in the financial year 1999-2000, was not justified. (AY.2005-06, 2006-07, 2007-08 2008-09)

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

S.10A : Free trade zone – Software developed transmitted to foreign countries through internet cannot be treated as bogus transaction

The assessee started new venture of software development and claimed profit of software division under section 10A. The Assessing Officer was not convinced from contemporaneous record that software was developed by assessee or that same was transmitted to foreign countries through internet and rejected the claim of the assessee treating the said transaction as bogus and sham. The Commissioner (Appeals) and the Tribunal, taking into consideration report of audit, agreement with STPI, certificate in respect of custom, boarding arrangement of assessee and payment received from various parties through channel of banks, concluded that transaction was genuine, allowed the assessee's claim. Held, since the order passed by the appellate authorities was based on appreciation of material on record, no substantial question of law arose therefrom.(AY. 2003-04)

CIT v. Nova Petrochemicals Ltd. (2013) 215 Taxman 82(Mag.) (Guj.)(HC)

S.10A : Free trade zone – New unit – Approval letter issued by authority of Software Technology Park

The assessee established three units and claimed deduction u/s. 10A. The Revenue denied the deduction on basis of approval letter issued by authority of Software Technology Park stating that, these units were to be considered as part of existing units. On other hand, Tribunal found that all three units had fulfilled conditions u/s.10A, and therefore, allowed deduction holding those units as separate and independent production units, and not as mere expansion of existing unit. Since the decision of the Tribunal was based on finding of fact, no interference was required. (AY. 2002-03)

CIT v. Patni Computer Systems Ltd. (2013) 215 Taxman 108 / 33 taxmann.com 31 (Bom.)(HC)
Editorial: Patni Computer Systems Ltd. v. Dy. CIT (2012) 135 ITD 398 (Pune)(Trib.)

S.10A : Free trade zone – Condition precedent – Approval granted by director of the Software Technology Parks of India would be deemed approval of the inter-ministerial standing committee

The Assessing Officer rejected the registration issued by the Software Technology Parks of India (STPI) in support of the assessee's claim under S. 10A on the ground that the approval by a Director of STPI was not a valid approval from a specified authority. Tribunal decided the issue in favour of assessee. On appeal by revenue the Court held that the view taken by the Assessing Officer was that only the inter-ministerial standing committee was competent to grant approval to units functioning within STPI. Held, it was apparent from the CBDT Instruction No. 1/06, dated 31-3-2006 that it had been decided by the Board that the claim of deduction under S. 10A should not be denied to the Software Technology Park units only on the ground that the approval/registration to such units had been granted by Directors of the Software Technology Parks. The Court held that approval granted by director of the Software Technology Parks of India would be deemed approval of the inter-ministerial standing committee and, therefore, the condition stipulated under section 10A(2) would stand complied with. Hence, the assessee was entitled to deduction. (AY. 2003-04)
CIT v. Technovate E Solutions (P) Ltd. (2013) 214 Taxman 125 (Mag.) (Delhi)(HC)

S.10A : Free trade zone – Export turnover – Total turnover – Expenditure incurred by assessee not forming part of export turnover is excludible from total turnover
Court held that when computing the relief under section 10A of the Income-tax Act, 1961, the expenditure incurred by the assessee should be excluded from the total turnover if they are reduced from the export turnover. *CIT v. Tata Elxsi Ltd. [2012] 349 ITR 98 (Karn)* followed. (AY. 2005-06)
CIT v. Samsung Electronics Co. Ltd. (2013) 350 ITR 65 / (2012) 204 Taxman 166 (Mag.)(Karn.) (HC)
Editorial: The Supreme Court has granted special leave to the Department to appeal against this judgment : (2013) 350 ITR (St.) 3 / (2013) 216 Taxman 207 (Mag.)(SC)

S.10A : Free trade zone – Foreign exchange fluctuation is not to be reduced from business profits for working out deduction under section 10A
Foreign exchange fluctuation is not to be reduced from business profits for working out deduction under section 10A.
Infotech Enterprises Ltd. v. (2014) 63 SOT 23 (Hyd.)(Trib)

S.10A : Free trade zone – Export turnover – Communication charges
Expenditure incurred on communication charges was excludible from export turnover and total turnover. (AYs. 2007-08, 2008-09)
Cognizant Technology Services P. Ltd. v. ACIT (2013) 28 ITR 125 (Hyd.)(Trib.)

S.10A : Free trade zone – Export turnover – Additional ground – Enhanced business income
Where the assessee raised an additional ground before the Appellate Tribunal claiming exemption for the enhanced business income under section 10A, held that the additional ground raised by the assessee before the Tribunal was to be admitted as there was a reasonable cause for not raising the issue before the lower authorities. The issue related to treatment of disallowance by the Assessing Officer while computing the income to be considered for exemption under section 10A and those additions made by the Assessing Officer would form part of the assessed income. The inflated business income on account of disallowance of expenditure qualified for deduction under section 10A. (AYs. 2004-05, 2005-06)
Brigade Global Services P. Ltd. v. ITO (2013) 143 ITD 59 / 28 ITR 411/ 33 taxmann.com 618 (Hyd.)(Trib.)

S.10A : Free trade zone – Deduction to be allowed before set off of brought forward unabsorbed losses from earlier years against the current year profits of the unit eligible for deduction under section 10A of the Act

In the present case there was no dispute on facts that the Appellant had claimed deduction under section 10A of the Act before set off of brought forward unabsorbed losses from earlier years against the current year profits of the unit eligible for deduction under section 10A of the Act. The Tribunal following the decision of the Hon'ble Bombay High Court in the case of Black and Veatch consulting Private Limited held that the deduction under section 10A of the Act was to be allowed before set off of brought forward unabsorbed losses of earlier years.
The Tribunal also held that when there is no nexus between the interest income and income derived by the undertaking, then same is to be treated as income from other sources not eligible for deduction under section 10A of the Act. (AY. 2006-07)
Medusind Solutions India (P) Limited v. ACIT (2013) 56 SOT 177 / 28 taxmann.com 222 (Mum.)(Trib.)

S.10A : Free trade zone – Principles of consistency – Unfinished handicraft goods and applied various processes and producing finished handicrafts – Eligible for exemption
Assessee purchased unfinished handicraft goods and applied various processes i.e cutting, polishing, repairing, remaking etc. by incurring substantial amount of labour charges & electricity expenses to produce finished handicraft goods. During the year under assessment, assessee claimed section 10A deduction which was disallowed by Assessing Officer because according to him the assessee's unit was not set up in Special Economic Zone (SEZ). Further held that the assessee had exported the articles and things which was not manufactured by it. Accordingly partial exemption which was claimed by the assessee was disallowed to the extent of profit from export of trading goods. On an appeal before CIT (A), CIT (A) relying on earlier Assessment years wherein deduction was allowed and held that since there was no change in the facts, it was allowed by CIT (A). On further appeal in Tribunal, Tribunal held that fact that the assessee is engaged in manufacturing activities is also established by various certificates issued by Governmental & other authorities which were issued only to concerns engaged in manufacturing activities. Further, similar deduction u/s 10AA was allowed in the preceding Assessment years while passing Assessment order u/s 143(3). Therefore section 10AA was allowed on the principles of consistency since there was no change in the facts with this Assessment year. (AY. 2009-10)
ITO v. Makers Mart (2013) 94 DTR 385 / (2014) 29 ITR 444 (Jd.)(Trib.)

S.10A : Free trade zone – Export turnover – Export of computer software – Travelling expenses, internet charges not recovered to be included
Held issue was covered by decision of Tribunal in ITA No. 354/Hyd/2006 for AY. 2000-01. Agreement, invoices and turnover showed that assessee did not recover travelling expenses and internet charges ; there was no scope of exclusion of such expenses from the export turnover. Appeal was dismissed applying principles of consistency. (AY. 2006-07)
Patni Telecom Solutions P. Ltd.; ITO v. (2013) 23 ITR 534 (Hyd.)(Trib.)

S.10A : Free trade zone – Export of computer software – Foreign exchange fluctuation gain – ECB loan – Does not qualify for deduction
Foreign exchange fluctuation gain arising on ECB loan raised by the assessee is not derived from the business of exports of computer software and therefore, does not qualify for deduction u/s. 10A. (AY. 2007-08)
Qualcomm India (P) Ltd. v. Dy. CIT (2013) 87 DTR 259 / 155 TTJ 23 (Delhi)(Trib.)

S.10A : Free trade zone – Export – Total turnover – Expenses incurred in foreign currency are to be excluded both from export as well as total turnover for purpose of computing deduction under section 10A

The Tribunal held that the expenses incurred in foreign currency are to be excluded both from export as well as total turnover for purpose of computing deduction under section 10A.
Timken Engineering & Research India (P) Ltd. v. Dy. CIT (2012) 21 taxmann.com 160 / (2013) 56 SOT 78 (Bang.)(Trib.)
Editorial: The Tribunal relied on the decision in the case of CIT v. Tata Elxsi Ltd. [2012] 349 ITR 98 (Karn)(HC), and Bombay High Court in the case of CIT v. Gem Plus Jewellery India Ltd. [2011] 330 ITR 175 (Bom)(HC).

S.10A : Free trade zone – Freight telecommunication or insurance expenses when reduced from Export turnover – Equally needs to be reduced from total turnover for claiming deduction.
Assessee claimed 10A deduction by reducing Freight Telecommunication or Insurance Expenses not only from Export Turnover but also from Total Turnover. Assessing Officer disallowed the claim by taking a view that Export Turnover means that the consideration in respect of Export by undertaking of articles or things or computer software received in or brought into India by the assessee in convertible Foreign exchange in accordance with sub-sec. (3), but does not include Freight, telecommunication charges or insurance attributable to the delivery of the article or thing or computer software outside India or expenses, if any incurred in foreign exchange in providing the technical services outside India. It was also held that use of telephone & internet–continuously is necessary in this line of business & it cannot be said that only 5% of internet expenses is related to the delivery of the software. The Assessing Officer held that the communication expenses of Rs. 1,79,10,869/- should be reduced from export turnover for calculation of deduction u/s 10A of the Act. The Dispute Resolution Panel (DRP) on this issue rejected assessee's contention and upheld the findings of the Assessing Officer. On appeal to the Tribunal, the Tribunal held that not only the issue was covered by earlier year & subsequent year but also relied on the Special Bench decision of *ITO v. Sak Soft Ltd. (2009) 30 SOT 55(SB) (Chennai)(Trib) & Apex Court decision in the case of CIT v. Laxmi Machine Works, (2007) 290 ITR 667 (SC)*. The Tribunal held that Freight, Telecommunication or Insurance Charges during the year that are reduced from export turnover, then such turnover of the company also needs to the reduced from Total Turnover of the company for the purpose of computation of deduction u/s. 10A of the Act. (AY. 2006-07)
Global Logic India (P) Ltd. v. DCIT (2013) 56 SOT 373 / 31 taxmann.com 81 (Delhi)(Trib.)

S.10A : Free trade zone – Foreign currency expenditure – Onsite development – Export turnover. [S.80HHE]
Foreign currency expenditure incurred on software development is to be excluded from export turnover while computing deduction under sections 10A and 80HHE. Foreign currency expenses which are not related to onsite software development cannot be excluded from export turnover for purpose of computing deduction under sections 10A and 80HHE. (AY. 2004-05, 2005-06)
Polaris Software Lab v. Add. CIT (2013) 58 SOT 81 (URO) / 31 taxmann.com 357 (Chennai)(Trib.)

S.10A : Free trade zone – Interest income – Assessable as income from other sources – Exemption is not available [S.56]
Where assessee had kept deposits with Bank and earned some interest income which has nothing to do with business of assessee, same was to be treated as income from 'other sources', and benefit of deduction under section 10A could not be given to interest income. (AYs. 2004-05, 2005-06)
Polaris Software Lab v. Ad. CIT (2013) 58 SOT 81 (URO) / 31 taxmann.com 357 (Chennai) (Trib.)

S.10A : Free trade zone – Exchange fluctuation from export activity is eligible for exemption
Excess sale proceeds received by assessee due to exchange rate fluctuation in foreign currency is income from export activity and is eligible for exemption under section 10A.(AYs. 2005-06, 2006-07)

ITO v. Electronic Controls & Discharge Systems (P.) Ltd. (2013) 58 SOT 59 (URO) / 33 taxmann.com 519 (Cochin)(Trib.)

S.10A : Free trade zone – Deemed export – Deemed export to another Special Economic Zone is not entitled to exemption

Assessee is not entitled to exemption under section 10A in respect of deemed export to another Special Economic Zone. (AYs. 2005-06, 2006-07)

ITO v. Electronic Controls & Discharge Systems (P.) Ltd. (2013) 58 SOT 59 (URO) / 33 taxmann.com 519 (Cochin)(Trib.)

S.10A : Free trade zone – Software Technology Park – Relief travels with undertaking – Export turnover – Total turnover – Foreign currency expenses

Where whole business, along with assets and liabilities, was taken over by assessee as a going concern, deduction under section 10A could not be denied on ground that undertaking was not formed a new, but by transfer of used plant and machinery. Where foreign currency expenses had been excluded from export turnover while computing deduction under section 10A, same was also to be reduced from total turnover to maintain parity between numerator and denominator (AY.2007-08)

NDS Services Pay-TV Technology (P.) Ltd. v. Addl. CIT (2013) 58 SOT 24 (URO) / 33 taxmann.com 414 (Bang.)(Trib.)

S.10A : Free trade zone – Computation of deduction – Communication charges – Export turnover – Total turnover

While computing exemption under section 10A of the Act, communication charges were to be excluded from the export turnover as well as the total turnover. (AY. 2007-08)

Zavata India P. Ltd. v. DCIT (2013) 25 ITR 504 / 35 taxmann.com 423 (Hyd.)(Trib.)

S.10A : Free trade zone – Manufacture – Blending and packing of tea

Blending and packing of tea amounts to manufacture and assessee eligible for deduction u/s. 10A. (AY. 2004-05 to 2006-07)

AL Gayathri Trading Co. (P.) Ltd. v. Dy. CIT (2013) 142 ITD 675 / 22 ITR 214 (Kochi)(Trib.)

S.10A : Free trade zone – Amounts disallowed treated as "business income" eligible for exemption [S.43B]

The assessee claimed a deduction for payments made after due date to employees' provident fund. Alternatively, it claimed that even if the amount was disallowed, the sum has to be treated as a part of its business income which is eligible for exemption under section 10A of the Act. The Assessing Officer held that the employees' contribution of provident fund was paid after the due date and hence treated it as deemed income of the assessee. The stand of the Assessing Officer was confirmed by the CIT(A). The Tribunal allowing the appeal of the assessee held that the addition could not be made under section 43B of the Act if the actual payment was made by the assessee before the due date of filing of return. Further, the Tribunal following the decision of the Bombay High Court in the case of *CIT v. Gem Plus Jewellery India P. Ltd. (2011) 330 ITR 175*, also held that if the amount was disallowed the sum was to be treated as part of the business income of the assessee eligible for exemption under section 10A of the Act (AY. 2006-07)

ITO v. Patni Telecom Solutions P. Ltd. (2013) 23 ITR 534 / 58 SOT 146 (URO)(Hyd.)(Trib.)

S.10A : Free trade zone – Consistency – Computation – Export turnover – Expenditure do not pertain to delivery of goods out of India are not deductible from export turnover

Where the assessee followed head count method of accounting for computing deduction u/s 10A, which had been accepted by revenue in earlier years, it could not be disallowed in relevant assessment year. The expenditure towards insurance, freight and communication incurred in foreign exchange, which do not pertain

to delivery of goods out of India and satellite link charges and technical service fee are not deductible from export turnover. (AY. 2007-08)
Willis Processing Services (I) (P) Ltd. Dy. CIT (2013) 57 SOT 339 / 30 taxmann.com 350 (Mum.)(Trib.)

S.10A : Free trade zone – Deemed export is not eligible for exemption
The assessee software company carried out deemed exports by raising bills on local parties and received sale proceeds in convertible foreign exchange thereby claimed deduction on same under section 10A. On ground that deemed exports are exports as per EXIM policy. On appeal Tribunal held that that deduction under section 10A is to be allowed only when foreign exchange is received on export of software and EXIM policy cannot overrule Income-tax Act which is a separate code in itself. In view of same claim of assessee could not be allowed. (AY. 2005-06)
Wipro Ltd. v. Dy. CIT (2013) 143 ITD 1 / 33 taxmann.com 263 (Bang.)(Trib.)

S.10A : Free trade zone – Export turnover – Total turnover – Foreign tax (VAT/GST) collected from customers is to be excluded
Assessing Officer excluded foreign tax (VAT/GST) collected from customers from export turnover as well as from total turnover, thereby, granting lower deduction under section 10A to assessee a STP unit, on ground that tax collected was subsequently remitted to government. The Tribunal held that once this sum is not included in export turnover then the same cannot be included in the total turnover. (AY. 2005-06)
Wipro Ltd. v. Dy. CIT (2013) 143 ITD 1 / 33 taxmann.com 263 (Bang.)(Trib.)

S.10A : Free trade zone – Computation – Export turnover – Total turnover – Parity between numerator and denominator
Expenses reduced from export turnover were also to be reduced from total turnover to maintain parity between numerator and denominator while calculating deduction u/s 10A. (AY. 2007-08)
Bearing Point Business Consulting (P.) Ltd. v. DCIT (2013) 57 SOT 244 (Bang.)(Trib.)

S.10A : Free trade zone – Transfer pricing – Operational efficiency of an assessee can be considered as earning of super profits [Ss. 80-IA, 92C(7)]
Assessee a Software Technology Park unit providing back office services to US Associated Enterprise. Claimed 10A exemptions on its profits, Gross receipts were shared in ratio 85:15. Transfer Pricing Officer accepted assessee's value of international transactions to be at arm's length. A.O. invoked the section 10A(7) read with section 80-IA(10) and denied the deduction of the assessee u/s. 10A on ground that assessee had earned more profit than ordinary profit. On appeal the Commissioner (Appeals) confirmed the order of the Assessing Officer on the ground that the risk & responsibility of company to its AE was minimal & substantially lower. The Tribunal held that operational efficiency of an assessee can be considered as earning of super profits. where there was no passing of profits by parent company to assessee to avoid tax, and receipts were also at arm's length so denying section 10A exemption was not justified. (AY.2004-05)
Zavata India (P.) Ltd. v. ITO (2013) 141 ITD 456 / 154 TTJ 96 / 86 DTR 10 (Hyd.)(Trib.)

S.10A : Free trade zone – Expenses incurred – Export turnover – Total turnover.
Telecommunication expenses and travelling expenses were excluded from export turnover, corresponding reduction from total turnover should be made for purpose of computation of deduction under section 10A. (AYs. 2004-05, 2006-07)
GE India Technology Centre (P.) Ltd. v. Dy. CIT (2013) 141 ITD 245 / 30 taxmann.com 249 (Bang.)(Trib.)

S.10A : Free trade zone – Computation of profits – Losses of non 10A units cannot be set off against profits of 10A unit.
Losses of non 10A units cannot be set off against profits of 10A unit and brought forward losses of 10A units for previous assessment years cannot be set off against current years 10A profits but can be set off against profits of post tax holiday period. (AY. 2004-05)
GE India Technology Centre (P.) Ltd. v. Dy. CIT (2013) 141 ITD 245 / 30 taxmann.com 249 (Bang.)(Trib.)

S.10A : Free trade zone – Deduction u/s.10A is allowed from current business income prior to setting of brought forward losses and unabsorbed depreciation. [S.70, 71,72]
The assessee an 100 per cent export oriented STPI unit claimed deduction under section 10A from the total income, before setting off brought forward losses. Assessing officer rejected the claim, which was confirmed by Commissioner (Appeals). On appeal Tribunal held that deduction u/s. 10A is allowed from current business income prior to setting of brought forward losses and unabsorbed depreciation. (AY. 2007-08)
Valueprocess Technologies (I) (P.) Ltd. v. ITO (2013) 141 ITD 447 / 31 taxmann.com 152 (Mum.)(Trib.)

S.10A : Free trade zone – Export business – Computer software – Deduction under section 80HHE was claimed in second year of production – For subsequent year exemption under section 10A is allowable [S.80HHE]
The assessee set up a unit in an export processing zone and started its commercial operations in the previous year relevant to the assessment year 1997-98, but it suffered losses it did not claim exemption in that year. In the previous year relevant to the assessment year 1998-99 (second year of operation) the assessee claimed deduction under section 80HHE of the Act. From previous year relevant to the assessment year 1999-2000, the assessee claimed and allowed exemption under section 10A of the Act .For the assessment year 2002-03, the assessee was denied the exemption under section 10A of the Act on the ground that since assessment year 1998-99 the assessee had claimed and was allowed deduction under section 80HHE, the assessee was not entitled to claim exemption 10A of the Act. Commissioner (Appeals) upheld the claim of assessee for deduction under section 10A of the Act. On appeal the Tribunal held that subsequent years the claim of deduction under section 10A was upheld by Tribunal. Tribunal order was upheld by the High Court, claim of the assessee for exemption under section 10A of the Act was allowable. (AYs. 2006-07, 2008-09)
Interra Information Technologies (India) P. Ltd. v. DCIT (2013) 24 ITR 140 / 55 SOT 585/ 81 DTR 70 (Delhi)(Trib.)

S.10A : Free trade zone – Claim under revised return – Original return in time, claim under revised return is valid. [Ss.139(1), 139(5)]
Assessee is 100 percent EOU registered with STP, was exporting software. For relevant assessment year assessee filed its return within due date claiming deduction under section 10B. Subsequently, on finding that it was entitled for deduction under section 10A, assessee filed revised return under section 139(5). Assessing Officer disallowed said claim on ground that proviso to section 10A requires said deduction to be claimed in return filed under section 139(1). Commissioner (Appeals) upheld the decision of Assessing Officer. On appeal Tribunal held that, reading of the aforesaid proviso made it clear that requirement for claiming deduction under section 10A was filing of a return of income on or before the due date specified under sub-section (1) of section 139. In the instant case, the assessee had filed a return of income under section 139(1) within the due date claiming deduction under section 10B. Therefore, the reasoning of the Commissioner (Appeals) that the proviso to section 10A operated as a bar in allowing deduction claimed in the revised return was not a correct interpretation. It was a fact on record that the assessee up to the assessment year 2006-07 was claiming deduction under section 10B and the department was allowing the same even

under scrutiny assessments. Keeping in view the orders of the Tribunal for the earlier assessment years 2006-07 and 2007-08, directing the Assessing Officer to consider assessee's claim for deduction under section 10A, matter sent back to the file of the Assessing Officer directing him to consider assessee's claim of deduction under section 10A. (AY. 2008-09)
VNS Makro Technologies (P.) Ltd. v. Dy. CIT (2012) 24 taxmann.com 207 / (2013) 140 ITD 714 (Hyd.)(Trib.)

S.10A : Free trade zone – Blending of tea – is manufacture.
Deduction under section 10A was denied on the ground that blending and packing of tea was not "manufacture". The Commissioner (Appeals) allowed the claim. On appeal by the revenue, the Tribunal held that the Commissioner (Appeals) had rightly allowed the claim of the assessee under section 10A. (AYs. 2004-05 to 2006-07)
Al-Gayathri Trading Co. P. Ltd. v. Dy. CIT (2013) 22 ITR 214 / 142 ITD 675 (Cochin) (Trib.)

S.10A : Free trade zone – Export of computer software is entitled to deduction
The assessee-company provided computer system consultancy services to private sector, public sector, Government and other organisations, undertaking studies on matters relating to feasibility of computerisation, evaluating and selecting appropriate hardware and software, installing and assisting in using mainframe, mini and microcomputers, etc. Tribunal held that the assessee-company is entitled to the benefit of deduction available under section 10A of the Act. (AY. 2003-04, 2004-05)
ACIT v. SRA Systems Ltd. (2013) 22 ITR 205 (Chennai)(Trib.)

S.10A : Free trade zone – Export turnover
Tribunal held that whatever is excluded from export turnover has to be excluded from total turnover also while computing deduction under section 10A. (AY.2004-05)
SITEL India (P.) Ltd. v. ACIT (2013) 55 SOT 541 / 29 taxmann.com 166 (Mum.)(Trib.)

S.10A : Free trade zone – Foreign exchange gain and amounts written off is eligible for exemption under section 10A
Tribunal held that foreign exchange fluctuation gain in respect of export proceeds was to be included in income eligible for deduction under section 10A. Excess provision made in relation to export proceeds in earlier years and written back in relevant assessment year was also includible in total income eligible for deduction under section 10A. (AY. 2007-08)
Headstrong Services India (P.) Ltd. v. ACIT (2012) 25 taxmann.com 333 / (2013) 55 SOT 481 (Delhi)(Trib.)

S.10A : Free trade zone – Apportionment of income and Expenditure – Method consistently Accepted by Department – Satellite charges not telecommunication charges to be excluded from export turnover
Assessee had two units, one of which qualified for exemption. There was apportionment of income and expenditure on basis of head-count of employees in two units. This method consistently used and accepted by department and is not to be disturbed. UK company was providing training to employees of assessee in India. Payment for services rendered by UK company. Technical services are not provided outside India. Expenses relating to technical services are not to be deducted. Satellite charges not telecommunication charges to be excluded from export turnover. (AY. 2006-07)
Wills Processing Services (India) P. Ltd. v. Dy. CIT (2013) 21 ITR 1 / 151 TTJ 555 / 81 DTR 353 / 57 SOT 34 (URO) (Mum.)(Trib.)

S.10A : Free trade zone – Interest income – Finder fees – Marketing fees – Foreign currency in total turnover

Interest income to be considered as income from other sources therefore not eligible exemption. Inclusion of finder fees and marketing fees in the total turnover for purposes of section 10A of the Act was proper. The inclusion of expenditure incurred in foreign currency in the total turnover was not justified. (AY. 2006-07)
Onward Technologies Ltd. v. Dy. CIT (2013) 89 DTR 311 / 155 TTJ 439 / 26 ITR 734 (Mum.)(Trib.)

S.10B : Export oriented undertaking – Manufacture – Books [S.147, 263]
Assessee was an export oriented undertaking engaged in printing and export of books. After receipt of manuscripts from abroad, assessee had to do typesetting, make/process/print on paper and then bind printed pages into books. Held, "books" are articles or things and the process involved by assessee was certainly production, if not manufacture, for purpose of deduction under section 10B. (AY. 2006-07)
Replika Press (P.) Ltd. v. DCIT (2013) 218 Taxman 399 / 37 taxmann.com 417 (Delhi) (HC)

S.10B : Export oriented undertaking – Exemption granted in earlier years – No change in facts-Exemption cannot be denied
The orders of the lower authorities were based on the order passed by the Tribunal for the AY 1994-95 and there were no materials placed before the court to contend that the assessee had violated the conditions of licence, thereby disentitling the assessee to the benefit of deduction under section 10B. Hence, the assessee was entitled to the exemption under section 10B for all the four assessment years. (AYs.1993-1994 to 1997-1998)
CIT v. Relco P. Ltd (2013) 359 ITR 291 (Mad.)(HC)

S.10B : Export oriented undertaking – Splitting up or reconstruction – Some of the partners are directors in closely held company – Firm cannot be said to be mere splitting up of business of company – Exemption cannot be denied
Some members of partnership firm were director of a closely held company and some workmen working in assessee's firm deal were also working in said company. Though both were engaged in similar line of export, while company dealt with low end products, assessee firm dealt with high end products. Further firm was constituted with capital contribution by partner's personal fund . On the facts the court held that it could not be said that assessee-firm was a mere splitting up of business of company and, thus, relief under section 10B could not be denied. (AYs. 2004-05, 2006-07, 2008-09)
CIT v. Deco De Trend (2013) 217 Taxman 179 / 37 taxmann.com 33 / (2014) 264 CTR 78 (Mad.)(HC)

S.10B : Export oriented undertaking – Derived from unit – Training fees is not entitled to exemption
The condition precedent for exemption is that the profits should be derived from unit. Hence, the training fees not entitled to exemption. (AY. 1996-97)
Penta Media Graphics Ltd. v. ACIT (2013) 357 ITR 403 / (2014) 264 CTR 543 (Mad.)(HC)

S.10B : Export oriented undertaking – Exemption cannot be allowed on training fees received from professionals, who were neither employees nor in any way associated with business
The assessee claimed exemption u/s. 10B on the income received by it by way of training fees – training being imparted to professional who were not associated with the business of the assessee. The AO disallowed the claim on ground that training was given to outsiders who were neither employees nor were associated with the business of manufacture or production of any article or thing of assessee. The CIT(A) allowed the claim of the assessee, which claim was subsequently rejected by the Tribunal.

On appeal by the assessee, the High Court while rejecting the claim of the assessee observed that though the objectives of the Software Technology Park Scheme seeks training of professionals as one of the objects; yet, training to outside professionals would not qualify for exemption. The argument of assessee that at times the trained personnel are employed by it cannot be considered. (AYs. 1996-97, 1997-98, 1999-2000)
Penta Media Graphics Ltd. v. ACIT (2013) 217 Taxman 117 / 91 DTR 273 (Mad.)(HC)

S.10B : Export oriented undertaking – Manufacture – Handicraft – Splitting up or reconstruction – Mere presence of 3 directors of the earlier company as partners by itself would not make the assessee-firm as being split up or reconstructed out of the company
Assessee purchased raw material and handicraft items of dried flowers and parts of plants. It was an admitted fact that what was purchased by the assessee as raw material, and what was ultimately exported, were commercially known as different products. Assessee therefore claimed that it was engaged in manufacture and export. The assessee's claim u/s 10B was denied by the AO on the ground that assessee was not engaged in manufacture, and further on the ground that the assessee firm was formed by merely splitting up or reconstructing business of an existing company. The assessee's claim was upheld by the Tribunal. On appeal, held, dismissing the appeal:
The word 'manufacture' has to be understood in common parlance. Given the admitted fact that what was purchased by the assessee as raw material, and what was ultimately exported, were commercially known as different products, the Tribunal was right in holding that the assessee was engaged in manufacture. Further, the CIT(A) and Tribunal after looking into the facts had come to the conclusion that mere presence of 3 directors of the earlier company as partners by itself would not make the assessee-firm as being split up or reconstructed out of the company. The company and the firm dealt with differently graded products. The firm was constituted with capital contribution of partners from their personal funds. On these factual findings, the order of the Tribunal was upheld. (AYs. 2004-05 to 2006-07, and 2008-09)
CIT v. Deco De Trend [2013] 217 Taxman 179 (Mag.) / 94 DTR 73 / (2014) 264 CTR 78(Mad.)(HC)

S.10B : Export oriented undertaking – Export is more than 75 per cent of total sales, satisfies condition
Where export is more than 75 per cent of total sale, it satisfies condition prescribed for availing relief under s. 10B. (AYs. 1995-96 and 1997-98)
CIT v. WTI Advanced Technology Ltd. (2013) 216 Taxman 179 (Mag.)/82 DTR 361 (Mad.)(HC)

S.10B : Export-oriented undertaking – Deduction to be allowed without setting off unabsorbed depreciation and brought forward business losses
Deduction under s. 10B is to be allowed on profits of current year without setting off unabsorbed depreciation and brought forward business losses. (AY. 2007-08)
CIT v. Ganesh Polychem Ltd. (2013) 216 Taxman 179 (Mag.) / 35 taxmann.com 446 (Bom.)(HC)

S.10B : Export oriented undertaking – Local sales – Not eligible for exemption under section 10B
Assessee is engaged in business of purchase of textile material, stitching and exporting garments. Apart from export receipts, it received certain amount by way of stitching charges. It claimed exemption under section 10B in respect of receipts of stitching charges. It submitted that whenever stitching machines were relatively free, same were utilised for purpose of undertaking job work for outsiders. Assessing Officer disallowed claim of exemption. Tribunal treated receipts of stitching charges as local sales and held that since said receipts were less than 25 per cent of total sales, assessee was entitled to exemption under section 10B. On appeal by revenue the Court held that in view of provisions of second proviso to section 10B(1) and

section 10B(4) Tribunal committed error in treating receipts of stitching charges as amounting to local sales for purpose of granting exemption. (AY. 2001-02)
CIT v. First Garments Mfg. Co. India (P.) Ltd. (2013) 81 DTR 372 / 212 Taxman 142 (Mag.) / 256 CTR 212 (Mad.)(HC)

S.10B : Export oriented undertaking – Manufacture – Blending of iron ore – New unit – Eligible exemption [S.2(29BA)]
Assessee-company was engaged in blending of iron ore and carried out processes to make crude ore useable to Ispat industries, which had a different appearance, use, name and chemical composition, it amounted to manufacture as per section 2(29BA), and therefore, deduction under section 10B could not be denied on ground that no manufacturing activity was carried on by assessee. Where assessee had infused new capital in existing units and value of existing plant was much below threshold limit of 20 per cent required for substantial investment for setting up of new unit for purpose of section 10B, deduction could not be denied on ground that assessee had not set up a new unit. (AY. 2009-10)
Sesa Goa Ltd. v. JCIT (2013) 60 SOT 121(URO) / 38 taxmann.com 34 (Panaji)(Trib.)

S.10B : Export oriented undertaking – Interest on capital and remuneration to partners is to be reduced from the overall business profits. [S40(b)]
Assessee is a partnership firm engaged in the business of manufacture and export of brass items. It claimed 100 per cent export oriented undertaking. Assessee has not provided any interest or remuneration to partners. Considering the deed of partnership AO excluded the interest and remuneration from overall profits of business to work out profit eligible for exemption under section 10B. CIT(A) held that as per the partnership deed it was not mandatory to provide interest and remuneration decided the issue in favour of assessee. Appeal by revenue the Tribunal held that since the clauses of partnership deed did not violate prescription of section 40(b), interest on capital and remuneration payable to partners were admissible for deduction and were to be considered for computing profits eligible for exemption under section 10B, therefore AO correctly excluded interest on capital and remuneration to partners from overall profits of business. (AYs. 2006-07 & 2009-10)
ACIT v. Meridian Impex (2013) 60 SOT 47 / [2013] 37 taxmann.com 22 (Rajkot)(Trib.)

S.10B : Export oriented undertaking – Splitting up or reconstruction – Takeover of business of undertaking on slump sale cannot be considered as reconstruction of business and concerned department has not deleted the undertaking the from the category of 100 percent EOU
A part of business of MSSL comprising an undertaking which was engaged in manufacturing metal and plastic from rubber was split from rest of business of MSSL and was sold to assessee. The assessee-company took over business of said undertaking on slump sale basis. The said undertaking was already registered as 100% Export Oriented Unit and was eligible for benefit under section 10B. The assessee, while filing returns of income for years under consideration, continued to claim benefit of section 10B which was rejected by the Assessing Officer on three grounds, firstly, business of assessee was set up by splitting existing business of MSSL, secondly, assessee company derived domestic turnover from articles or things produced by the undertaking and, therefore, it was not a 100% EOU and, thirdly, pre-used machinery received by assessee from MSSL far exceeded allowable limit of 20% of total value of plant and machinery used in business of undertaking. It was noticed from records that whole undertaking consisting of all assets and liabilities as a going concern was acquired by assessee-company and, thus, it could not be concluded that undertaking had been formed by re-construction of business already in existence or assessee-company carried on business with transferred machinery or plant previously used by another person. Also, the mere fact that some part of sale was effected in domestic area would not disentitle assessee from claiming exemption under section 10B unless undertaking was deleted from category of 100% EOU by concerned Department.

Therefore, the impugned order passed by Assessing Officer was to be set aside and assessee's claim for deduction was to be allowed. (AYs. 2005-06 to 2008-09)
Woco Motherson Elastomer Ltd. v. DCIT (2013) 59 SOT 147 (URO) / 36 taxmann.com 534 (Delhi)(Trib.)

S.10B : Export oriented undertaking – Total turnover
Deduction was claimed by assessee on branch sales. CIT(A) and ITAT had denied deduction to assessee. Assessee claimed that branch sales be considered as head office sales and should be considered as exports. The Tribunal held that, section 10B speaks only of exports out of India, irrespective of the purchases. Term "exports out of India" was not defined in Act and it means transfer of goods physically out of territory of India. Concept of 'deemed exports' as claimed by assessee in export policy, cannot be imported into IT Act unless Act specifically says so. Assessee goods was not physically exported out of India. Condition precedent for claiming deduction u/s 10B was not satisfied by assessee. (AY. 2005-06)
Seven Hills Business Solutions v. ACIT (2013) 56 SOT 32 / 29 taxmann.com 318 (Hyd.)(Trib.)

S.10B : Export oriented undertaking – Manufacture of plants – Assembled machines partially disassembled for proper packaging for export, transportation and installation – Entitled to deduction
Held, plants were supplied in the form of sub-assemblies and components after manufacturing them or after getting them manufactured in accordance with the prescribed specifications. These sub-assemblies and components were manufactured outside and transported to the exports processing zone and thereafter, certain operations were carried out and disassembling was done prior to export of the subassemblies and components to the ultimate destination. This process was required for containerisation and packing of these items on account of their size which was a necessary process for transportation and installation. The assessee was engaged in the manufacturing and assembling the plants which were disassembled for export. Hence, the assessee was entitled to deduction under s. 10B. (AYs. 2007-08, 2008-09)
Aar Ess Exim P. Ltd. v. ITO (2013) 25 ITR 14 / 157 TTJ 98 / (2014) 61 SOT 37 (URO)(Delhi.)(Trib.)

S.10B : Export oriented undertaking – Certificate produced first time before Commissioner (Appeals) – Matter set aside
The Assessee Company is engaged in the business of software development, filed its return of income for the year declaring a total income of ` 4,36,600. Subsequently, the assessee filed revised return on March 31, 2005, declaring ` nil income after claiming deduction under section 10B. The assessment was completed by the Assessing Officer under section 143(3) read with section 147 determining the total income at ` nil. A. O. disallowed the claim of the Assessee. Before the Commissioner of Income-tax (Appeals), the authorised representative for the assessee submitted that the assessee had got a clarification from the Joint Director, Software Technology Park of India, Hyderabad, where they have clearly mentioned that they have the power to grant approval and their approval is eligible to get exemption under section 10B of the Act. on that basis CIT(A) allowed claim of assessee. Where assessee did not produce necessary material before Assessing Officer for consideration on having identical issue, it was just and proper to set aside order of Commissioner (Appeals) and remit matter back to Assessing Officer for passing a *de novo* order. (AYs. 2005-06 and 2008-09)
ITO v. Singularity Software (India) (P.) Ltd. (2013) 143 ITD 483 / 34 taxmann.com 198 (Hyd.)(Trib.)

S.10B : Export oriented undertaking – Foreign currency – Export turnover – Total turnover
In the present case, the expenditure incurred in foreign currency which were excluded from export turnover should also be excluded from total turnover in order to grant benefit under section 10B of the Act. (AY. 2005-06)
ACIT v. Charon Tec (P) Ltd. (2012) 20 ITR 487 / (2013) 56 SOT 65 (UO)(Chennai)(Trib.)

S.10B : Export oriented undertaking – Initial year – Assessee has to prove its eligibility in initial year of production only and not in every year of claim

The Assessing Officer rejected the assessee's claim holding that the assessee had employed used machinery value of which exceeded 20% of total value of machinery employed by assessee. It was noted from records that the claim u/s 10B was allowed in the past and the year under consideration was found to be 5th year of claim. There was no evidence on record establishing that assessee had purchased used machinery during relevant assessment year. Held in order to claim exemption u/s 10B, assessee has to prove its eligibility in initial year of production only and not in every year of claim. (AY. 2003-04 to 2004-05)

DCIT v. Tyco Valves & Control India (P.) Ltd. (2013) 57 SOT 138 (URO) / 81 DTR 48 (Ahd.)(Trib.)

S.10B : Export-oriented undertaking – Manufacture – Food products, like paratha, samosa, dhokla, etc.

Assessee is a 100 per cent EOU engaged in business of manufacturing and export of various food products, like paratha, samosa, dhokla, etc. Deduction under section 10B was denied to assessee on ground that foodstuffs prepared by assessee was not manufacturing. Production was done by a particular set process and various raw materials when consumed lost their individual and independent identity. Manufacturing of said eatables constituted manufacturing activity and assessee was eligible for deduction under section 10B. (AY. 2008-09)

Deepkiran Foods (P.) Ltd. v. ACIT (2013) 141 ITD 85 / 88 DTR 52 (Ahd.)(Trib.)

S.10B : Export oriented undertaking – Profits derived from undertakings – Interest – Sales tax refund – Excise duty drawback – Sale of scrap – Fine from workers – Discount – Scrap sale forms total turnover – Sales tax refund and excise duty draw back do not constitute profits derived from eligible business – Interest on FD and surplus funds cannot be derived from assessee's business for purpose of section 10B

(i) Interest on fixed deposits and bank accounts on surplus funds not derived from assessee's business and to be excluded.

(ii) That sales tax refund and excise duty drawback for an earlier period were to provide an incentive to the export business by making it more competitive in the international market, by reducing the input cost and would, thus, have to be regarded as an eligible receipt of the eligible business. However, it was not the business of the undertaking per se but the relevant policy of the Government that led to a different treatment of the assessees engaged in exports vis-a-vis those in domestic business and, thus, responsible for the profit. The sums in question were not "derived" from such business, as the word "of" in the expression of "profits of the business of the undertaking" as signifies a relationship of first degree, i.e., flowing from the economic activity comprising the business of the undertaking, but from a Government policy.

(iii) That scrap arose out of the manufacturing operations, and went to reduce the cost of production. Thus, the assessee's business was itself the direct source of the profit from scrap sales. It was not necessary that every credit or receipt of the export business must arise directly from the export itself, for it to qualify for inclusion, and it would be suffice that it arises in the course of the assessee's business. The very fact that section 10B(4) provides for an apportionment in the ratio of export turnover to total turnover implies that receipts other than those comprised in export turnover are contemplated for inclusion in total turnover. They are eligible and would go to form part of the total turnover. The scrap sales formed part of the receipt of the assessee's export business, so that the profits were derived from such business.

(iv) That "canteen recovery" or "fine from the workers" could not be considered as forming an integral part of the assessee's business. However, the assessee's contention was that the credit did not constitute an income *per se*, but only represented recovery out of canteen expenses already debited and reduced in arriving at the eligible profits. The Assessing Officer was to verify this, and allow relief to the extent the amount went to reduce expenditure already claimed and allowed. No case for allowing the fine from workers was, however, made out.

(v) That the amount claimed, it comprised ` 1.04 lakhs received by way of a one per cent. discount on purchases from a supplier against purchase of raw material therefrom, it was not an independent receipt but only reduces the purchase cost to that extent, though accounted for separately. The assessee's claim, where found to be so, would be a part of the profits derived from the eligible business. (AY. 2005-06)

Tessitura Monti India P. Ltd. v. ITO (2013) 141 ITD 531 / 22 ITR 329 / 89 DTR 142 (Mum.) (Trib.)

S.10B : Export oriented undertaking – Registered with Software Technology Park of India – Ratification of Board of approval required to obtain benefit under section 10B

The Assessing Officer disallowed the assessee's claim for deduction under section 10B, on the ground that it had failed to obtain ratification from the Board of approval as envisaged under section 10B and that it had also failed to submit the ratification by the Development Commissioner as envisaged in the Instruction File No. 178/19/2008-ITA01 dated March 9, 2009, in support of its claim under section 10B of the Act. The Commissioner (Appeals) allowed the exemption on the ground that the approval of 100 per cent export-oriented undertaking by the Board and by the Software Technology Park of India was one and the same. On appeal by the Department, the Tribunal held that before the Commissioner (Appeals), the assessee produced the registration form the Software Technology Park of India which had been notified by the Ministry of Commerce, Government of India by Notification No. 33/(RE)/92-97 dated March 22, 1994. The notification stated that the Software Technology Park Scheme was a 100 per cent export-oriented scheme. The assessee had also produced copy of the order of the Tribunal in another case. The Assessing Officer had no opportunity to consider these documents and the order. The matter was to be remitted back to the file of the Assessing Officer for passing a *de novo* order in the light of the material produced by the assessee. (AY. 2008-09)

ITO v. Selectsys India P. Ltd. (2013) 22 ITR 493 / 58 SOT 58 (URO)(Hyd.)(Trib.)

S.10B : Export-oriented undertaking – Computation of profits – Set off of loss – Losses of eligible units during tax holiday period is not to be allowed to be set-off against income of non-eligible units [Ss.2 (45), 10A]

Assessee had three units, two were section 10B eligible units and one was non-eligible unit. There were losses incurred in eligible units during the year which were sought to be set-off from profits of non-eligible unit. It was held that losses of eligible units during tax holiday period could not be allowed to be set-off against income of non-eligible units as per provisions of S. 10B(6). Such losses to be kept in suspense to be set-off only after tax holiday period is over. Therefore the claim of set off made by assessee was disallowed. Appeal of assessee was dismissed. (AY. 2008-09)

Karle International (P.) Ltd. v. ACIT (2013) 140 ITD 261 (Bang.)(Trib.)

S.10B : Export oriented undertaking – Computation of profits – Set off of loss – Loss in one unit – Set off of loss – Provision is not attracted in case of unit suffering loss [S.10B, 14A, 70]

Provisions of section 14A are not attracted in the case of the unit suffering losses eligible for deduction under section 10B and further the assessee is entitled to set off of loss of STP unit under section 10B against other business income. (AY. 2008-09)

Sandoz P. Ltd. v. DCIT (2013) 25 ITR 347 / 145 ITD 551 / 96 DTR 401 (Mum.)(Trib.)

S.11 : Property held for charitable purposes – Accumulation of income – Denial of exemption was held to be justified as the assessee failed to furnish Form No 10 before completion of assessment [Rule 17, Form No. 10]

In order to claim benefit of s. 11, it is mandatory to give intimation to assessing authority in Form 10 at any time before finalisation of assessment proceedings. Since the assessee failed to furnish Form

No. 10 before completion of assessment, benefit under provisions of s. 11 for accumulation of profits was rightly denied by authorities below. (AY. 2004-05)
Haryana Labour Welfare Board v. CIT (2013) 219 Taxman 158 (Mag.) / 39 taxmann.com 161 (P&H.)(HC)

S.11 : Property held for charitable purposes – Exemption u/s. 10(23C) – Independent provisions [Ss. 10(23C), 12A]
Both section 10(23C) and section 11 are independent sections and as assessee was registered under section 12A, as such, it was entitled to benefit under section 11. (AY. 2001-02)
CIT v. Indian Institute of Engineering Society (2013) 218 Taxman 151 (Mag.) / 38 taxmann.com 227 (All.)(HC)

S.11 : Property held for charitable purposes – Depreciation – Cost allowed as deduction as application of income [Ss.2(15), 12, 32]
Deduction of depreciation on fixed assets of whose cost has already been claimed as application of income is permissible.
CIT v. Devi Sakuntala Tharal Charitable Foundation (2013) 358 ITR 452 (MP) (HC)
CIT v. Bhopal Campion School Society (2013) 358 ITR 452 (MP)(HC)
CIT v. Shri Satya Sai Trust (2013) 358 ITR 452 (MP)(HC)
CIT v. Shrinivas Education Society (2013) 358 ITR 452 (MP)(HC)

S.11 : Property held for charitable purposes – Business held in trust – Insurance business [S.13]
Even if business of insurance was carried out by assessee-society for carrying on primary purpose of charitable activities in accordance with aims and objects of trust, assessee would still be entitled to exemption. (AY. 1977-78)
CIT v. Modi Charitable Fund Society (2013) 216 Taxman 140 (Mag.) / 35 taxmann.com 407 (All.)(HC)

S.11 : Property held for charitable purposes – Intention of donor. [S.80G]
The voluntary contribution made to a trust is without any specific direction to treat the same as corpus, if the intention of the donor is to give the money to a trust and they will keep the same in trust account and the income from the same thing will be utilised for carrying trust activities, then the donation should be treated as corpus and the same should be entitled for the benefit under section 11(1)(d).
DIT (E) v. Ramakrishna Seva Ashrama (2012) 205 Taxman 26 / (2013) 357 ITR 731 / 258 CTR 201 (Karn.)(HC)

S.11 : Property held for charitable purposes – Investment in immovable property – Rent was used for the charitable purpose, registration cannot be refused [S. 12A]
The assessee was entitled u/s 11(5)(x) to invest its surplus funds in immovable property and in absence of any evidence on part of department that assessee had applied rent received from commercial property for non-charitable purpose, registration u/s 12A could not have been cancelled.(AY. 2005-06)
DIT(E) v. Abul Kalam Azad Islamic Awakening (2013) 215 Taxman 148 (Mag.) / 33 taxmann.com 364 (Delhi)(HC)

S.11 : Property held for charitable purposes – Approval of Charity Commissioner – Violation in earlier years – Exemption cannot be denied [Bombay Public Trust Act, 1950. S. 32(3)]
The assessee-trust, engaged in charitable activities, claimed exemption under S. 11. However, said claim was disallowed on ground that assessee had raised unsecured loans without taking prior approval of Charity Commissioner and, thus, had violated S. 32(3) of the Trust Act. Held, there was

no bar in trust deed to raise unsecured loans. Further, alleged violation took place in earlier year but no proceedings were initiated. Therefore, the trust was entitled to exemption. (AY. 2007-08)
DIT v. G.K.R. Charities (2013) 214 Taxman 555 (Bom.)(HC)

S.11 : Property held for charitable purposes – Business held by trust – There being no connection between the carrying on of the business and the object of the trust, the Assessee is not entitled to exemption under section 11
Where business was commenced by the trustees after formation of the trust with the financial aid and assistance from relatives and banks, it cannot be said to be held under trust and the business also cannot be incidental to the attainment of objects of the trust which are directed towards promotion of education, running hospitals, etc. and the assessee is not entitle to exemption under section 11 of the Act. (AYs. 1992-93 to 94-95, 01-02 and 2005-06 to 2007-08)
CIT v. Mehta Charitable Prajnalay Trust (2013) 357 ITR 560 / 81 DTR 104 / 214 Taxman 88 / 255 CTR 232 (Delhi)(HC)

S.11 : Property held for charitable purposes – Business held in trust – Trust entitled to exemption which was created for mainly educational and charitable purposes
Assessee-trust was created mainly for educational and charitable purposes. Founders gifted land and running business with a stipulation that said business shall be run by trustees and income therefrom shall be utilised for charitable objects. Assessee claimed exemption under section 11 in respect of income earned from aforesaid business. Assessing Officer denied exemption on plea that there was no evidence to hold that business carried on by trust was in course of actual carrying on of primary objects. The court held that since Assessing Officer had also recorded a finding of fact in assessment order that primary objects of trust were charitable in nature, he was wrong in denying exemption. (AYs. 1990-91, 1991-92)
CIT v. Janakiammal Ayyanadar Charitable Trust (2013) 212 Taxman 274 / 87 DTR 134 (Mad.)(HC)

S.11 : Property held for charitable purposes – Accumulation of income – Form No 10 can be filed in the course of assessment proceedings. [S.147, Income-tax Rules, 1962, Rule 17, Form No. 10]
The Tribunal rejected the assessee's claim for accumulation of income on the ground that Form No. 10 had not been furnished along with the return but was filed during the course of reassessment proceedings. The Court held that Form No. 10 could be furnished by assessee-trust for purposes of section 11(2), i.e., for accumulation of income, during reassessment proceedings. (AYs. 1998-99, 2000-01, 2001-02)
Association of Corporation & Apex Societies of Handlooms v. ADTI (2013) / 351 ITR 286 / 213 Taxman 15 / 90 DTR 413 (Delhi)(HC)

S.11 : Property held for charitable purposes – Business held in trust – Trust is entitled to exemption. [S.13(1)(bb)]
Assessee-trust was formed to aid and assist in establishment, maintenance of hospitals, educational institutions, houses for poor, to conduct poor feeding, etc. Subsequently, a unit dealing in safety matches got settled in favour of assessee through a trust deed. Trust deed enabled assessee to exploit proprietary trademark 'camel' which was a well-known brand of safety matches. Subsequently, assessee leased out said business. It claimed exemption under section 11. Assessing Officer viewed that even though trust had as its object relief of poor, education, medical relief and advancement of general public utility, assessee's activities in exploiting trade constituted business income and hence, claim of assessee was hit by provisions under section 13(1)(bb); consequently, it was not entitled to deduction. Court held that since primary purpose of trust was to afford relief to poor, education and medical relief, means employed by exploiting its assets to earn income to achieve objects, could not

in any manner, defeat claim of assessee under section 11. (AYs. 1981-82 to 1983-84, 1989-90, 1992-93, 1995-96).
CIT v. P. Iya Nadar Charitable Trust (2013) 213 Taxman 48 / 87 DTR 118 (Mad.)(HC)

S.11 : Property held for charitable purposes – Registration – Maintenance of Public lavatories is incidental to object which is eligible for exemption [Ss.2(15), 12, 13]
Object of society is construction of public lavatories. Maintenance of public lavatories being incidental to object of society, amounts spent on such maintenance is entitled to exemption. As there was no evidence of diversion of funds to the founder of society, section 13 is not applicable. Hence, the Society is entitled for registration.(AY. 2006-07)
Dy. CIT v. Sulabh International Social Service Organisation (2013) 350 ITR 189 / (2011) 242 CTR 70 / 57 DTR 8 (Patna)(HC)

S.11 : Property held for charitable purposes – Exemption of income from property treated as business – Income is exempt if there is no profit motive. [Ss.2(15), 28(iii)]
Receipts derived by a Chamber of Commerce and industry for performing specific services to its members, though treated as business income, would still be entitled to exemption under section 11, provided there is no profit motive. (AYs. 2006-07, 2007-08)
PHD Chamber of Commerce and Industry v. DIT (2013) 357 ITR 296 / 212 Taxman 194 / 95 DTR 112/265 CTR 318 (Delhi)(HC)

S.11 : Property held for charitable purposes – Subsidising rates of blood – Corporate entity distributing it to patients at much higher rates
The assessee subsidised rates of blood components in favour of corporate entity which was its associate company. The associate company was distributing it to patients at much higher rates. Held, assessee was not entitled to exemption as this was not a charitable activity. (AY. 2009-2010)
Advance Transfusion Medicine Research Foundation v. ADIT (E) (2013) 28 ITR 566 / 60 SOT 276 (Ahd.)(Trib.)

S.11 : Property held for charitable purposes – Provide medical relief through yoga, ayurved, acupressure and naturopathy and to impart education in field of yoga for purpose of alleviating all kinds of disease – Business held in trust – Charitable trust can carry on business and utilise its profits therefrom for charitable purposes but it cannot have its purpose, an activity that involves buying and selling of goods and making profits – Entitled exemption [2(15), 12A]
Assessee was a public charitable trust registered under section 12A. Main objective of assessee-trust was to provide medical relief through yoga, ayurved, acupressure and naturopathy and to impart education in field of yoga for purpose of alleviating all kinds of disease. In order to achieve aforesaid objectives, assessee had set-up ayurvedic hospitals, ayurvedic pharmaceutical units and yog sadhna kendras. During relevant assessment year, assessee filed its return claiming exemption of income under section 11. Revenue authorities opined that activities undertaken by assessee fell under sixth limb of definition of 'charitable purpose' given under section 2(15), i.e., advancement of any other object of general public utility. Authorities below thus applying proviso to section 2(15) concluded that assessee's transactions were in nature of business and commerce which were not eligible for exemption under section 11. Tribunal held that all business activities including business of pharmacy were incidential to attainment of main object, i.e., propagation of yoga, which was undoubtedly charitable in nature. It was also apparent that profits from business were applied for charitable objects and separate books of account were maintained in respect of those business activities. On facts, assessee satisfied conditions prescribed in section 11(4)/11(4A) and, thus, its claim for exemption of income was to be allowed. Tribunal also held that there is no bar in charitable trust/institution carrying on business provided conditions prescribed in section 11(4)/11(4A) are satisfied. Where a charitable trust can carry on business and utilize its profits therefrom for charitable purposes but it

cannot have its purpose, an activity that involves buying and selling of goods and making profits Entitled exemption.(AY. 2009-10)
Divya Yog Mandir Trust v. Jt. CIT (2013) 60 SOT 154 (URO) (Delhi)(Trib.)

S.11 : Property held for charitable purposes – While computing income of a trust, deduction under section 24 from income from property held for charitable or religious purposes cannot be allowed [S.24]
Where a charitable or religious trust has income from different sources and a part of such income comes within ambit of taxation, it will not be possible to earmark any part of such income to a particular head and such income has to be computed in a normal commercial manner; therefore, question of allowing any statutory deductions as contemplated by different provisions of Act dealing with different heads of income cannot arise while deciding percentage of application or accumulation under section 11. While computing income of a trust, deduction under section 24 from income from property held for charitable or religious purposes cannot be allowed. (AY. 2007-08)
DCIT v. Cutchi Memon Union (2013) 60 SOT 260 (Bang.)(Trib.)

S.11 : Property held for charitable purposes – Depreciation – Allowable
Since income for purposes of section 11(1) has to be computed in normal commercial manner, amount of depreciation debited in books is deductible while computing such income.(AY. 2007-08)
DCIT v. Cutchi Memon Union (2013) 60 SOT 260 (Bang.)(Trib.)

S.11 : Property held for charitable purposes – Voluntary donations as "anonymous donations" – Cash credits – Does not apply as the assessee has maintained a record of the identity indicating the name and address of the person making the contribution. [S.68, 115BBC]
The assessee, a charitable institution, received donations of ` 3.55 crore. It maintained a record indicating the name and address of the donor. It claimed that the said donations had been applied for charitable purposes as per s. 11 and nothing was assessable. The AO conducted a test check by sending letters to the donors. To the extent of donations aggregating ` 1.96 crore, the letters came back undelivered or were not replied to. The AO held that as the confirmations were not received, the said donations were "anonymous donations" and assessable to tax u/s 115BBC. He held that alternatively, the said sum was assessable as a "cash credit" u/s 68 as the identity, genuineness and credit worthiness of the alleged donors was not proved. On appeal, the CIT(A) held that the said donations could not be treated as "anonymous" u/s. 115BBC though he upheld the AO's stand that the said sum was assessable as a "cash credit" u/s 68. On further appeal by the assessee to the Tribunal HELD allowing the appeal:
(i) S. 115BBC which assesses "anonymous donations" does not apply because the assessee has maintained a record of the identity indicating the name and address of the person making the contribution;
(ii) S. 68 seeks to assess cash credits as income. However, when the non-corpus voluntary donations are already disclosed as income and applied for charitable purposes, s. 68 has no application. The fact that the complete list of donors was not filed and the donors were not produced does not mean that the assessee was seeking to introduce unaccounted money into the trust;
(iii) U/s 12(1) voluntary donations received without a direction that they shall form part of the corpus are deemed to be income derived from property held for charitable purposes and have to be applied towards the objects of the trust to the extent of 85%. If that is done, the donations are not assessable as income (*DIT (Exemption) v. Keshav Social & Charitable Foundation (2005) 278 ITR 152 (Del.*) followed) (ITA No. 2428/Del/2011, Dt. 6-12-2013.(AY. 2007-08,)
Sunder Deep Educational Society v. ACIT (Delhi)(Trib.) www.itatonline.Org.

S.11 : Property held for charitable purposes – Accumulation of income – Denial of exemption was held to be not justified [Ss.12AA, 13]

Assessee's application seeking permission for accumulation of income in terms of section 11(2) had been approved by Director (Exemption) on being satisfied with purpose or object for which income was accumulated or set apart. Therefore, exemption could not be denied on ground that trust had not undertaken even a single activity as per objectives of trust during relevant financial year and only transaction of trust pertained to buying and selling of shares which was not covered by its objectives. Denial of exemption was held to be not justified. (AY. 2007-08)
Spandana Foundation v. ADIT (2013) 59 SOT 176 (Hyd.)(Trib.)

S.11 : Property held for charitable purposes – Delay in filing form – Technical default was condoned [Ss.12, Rule 17, Form No.10]
The assessee-society filed a letter conveying its intention of exercising option of carrying forward of unspent funds in next year and claimed exemption under section 11 which was disallowed on the ground of technical default of delay in filing the prescribed form. Where an amount of investment exceeded unspent amount within prescribed period in next year, irregularity and delay in filing prescribed form could be condoned and exemption could be allowed under section 11. Where the fact of assessee having spent significant amount in next year was not examined by Assessing Officer, matter was to be remitted back. (AY. 2008-09)
Moti Ram Gopi Chand Charitable Trust v. ACIT (2013) 59 SOT 197 (Delhi)(Trib.)

S.11 : Property held for charitable purposes – Accumulation of income – Liberal approach
The assessee trust exercised option for allowing accumulation of income under Explanation to section 11(1) on 22-9-2009. Subsequently, it revised its claim on ground that bonafidely wrong claim was made. However, the assessing authority held that the assessee had not exercised option within time as prescribed by law and, therefore, was not entitled for exemption. Held, since the requirement of exercising option is directory in nature, a liberal approach ought to have been adopted and the claim of the assessee ought to have been allowed, particularly when mistake in exercising option was committed by assessee bonafidely. (AY. 2009-10)
ACIT v. Industrial Extension Bureau (2013) 59 SOT 189 (Ahd.)(Trib.)

S.11 : Property held for charitable purposes – Disallowance of expenses – Held to be not valid [S.12A]
The Assessing Officer at the time of finalising the assessment made additions and disallowed travelling expenses, salary to technical staff, bad debts and telephone expenses and the CIT(A) has also confirmed the disallowances. The assessee has been granted registration by the competent authorities under section 12A. The Assessing Officer wrongly applied provisions of Chapter V while framing assessment of assessee trust without pointing out and finding any defects in the books of account. The Assessing Officer has arbitrarily disallowed the expenditure incurred for the purpose of trust, which were properly supported by vouchers. The Tribunal found that the expenditure was incurred in the interest of trust as well as for fulfilment of aims and objects of the trust, which is directly related to achievement of its main object. Thus, there was no justification on the lower authorities to apply maximum marginal tax rate, while assessing a trust which has been granted registration under section 12A by competent authority. The Tribunal allowed the appeal in favour of assessee.
Late Smt. Vidyawati Laburam Foundation for Science Research & Social Welfare v. ITO (2013) 157 TTJ 69 (UO) (Jd.)(Trib.)

S.11 : Property held for charitable purposes – Depreciation – Depreciation is allowable on assets which came into existence by application of income, which is exempt under section 11. [Ss.2(45), 12AA, 32(1)(ii)]
The assessee, charitable trust (society) registered under section 12AA, claimed depreciation in respect of capital assets, the total cost of which had already been claimed as an application of income under

section 11(1). The AO disallowed the claim holding that it would amount to double deduction. The CIT(A) upheld the action of the AO. The Tribunal held that the depreciation is allowable on capital assets from the income of the charitable trust for determining the quantum of funds which have to be applied for the purposes of the trust in terms of s.11. (AY.2008-09)
Chaman Vatika Educational Society v. Dy. CIT (2013) 145 ITD 105 / 91 DTR 387 / 156 TTJ 543 (Chd.)(Trib.)

S.11 : Property held for charitable purposes – Education – Practice of management and related objects – Conducting seminars, workshops and diploma courses are educational activities. Addition made by the AO in respect of corpus donation can not be sustained [S.2(15)]
Assessee an educational institution conducting various courses categorised as continuing education diploma and certificate programmes, management development programmes, seminars and workshops and conferences. 80% receipts were from continuing education programme. The A.O. was of the opinion that on going through the nature of courses and duration, the resultant surplus for each activity, the activity of the assessee is not educational and it was held by the A.O. that the assessee's activities are not educational and since the provisions of Section 2(15) are applicable and therefore the assessee is not entitled for exemption. In appeal CIT (A) also confirmed the view of A.O. On appeal the Tribunal held that the assessee is conducting various diploma courses, certificate programmes seminars, workshops etc all these programmes fulfilled systematic instruction and training test hence covered under section 2(15) as education hence eligible for exemption under section 11. (AY.2009-10)
Ahmedabad Management Association v. JDIT (Exemption) (2013) 143 ITD 476 / 93 DTR 161 / 157 TTJ 640 / 28 ITR 349 (Ahd.)(Trib.)

S.11 : Property held for charitable purposes – Exemption – Can be denied – In absence of production of details of expenditure [S.12AA]
Assessee trust being registered under section 12AA claimed exemption under section 11 of the Act. The Assessing Officer asked for details of various expenditure whereas assessee failed to submit the same. The Assessing Officer denied exemption under section 11 of the Act and taxed the amount as Income from business as the trust failed to achieve other activities required for exemption under section 11 of the Act. CIT(A) allowed the appeal of the assessee. Tribunal allowed the appeal of the Revenue and held that when the registration is granted, it does not debar the Assessing Officer from examining the details of various activities / work undertaken by the trust to achieve the object of the assessee trust. Secondly the Tribunal also held that the assessee trust has not proved its case for seeking exemption under section 11 by producing various details of expenditure incurred by the assessee Trusts on various activities undertaken to achieve its objects before any revenue authorities not even before the Tribunal in spite of asking to the counsel for the assessee trust. (AYs. 2006-07, 2007-08)
ACIT v. Amritsar Improvement Trust (2013) 153 TTJ 364 / 56 SOT 106 / 85 DTR 99 / 58 SOT 145 (URO)(Asr.)(Trib.)

S.11 : Property held for charitable purposes – Payment made to office bearers out of the corpus fund cannot be the basis to deny exemption under section 11 of the Act [S. 13(1)(c)]
The Assessing Officer denied the claim of exemption under section 11 of the Act on the ground that certain payment have been made to the founder members out of the corpus funds and hence, the same constitutes clear violation on the part of the assessee and hence, the consequences of provisions of section 13(1)(c) of the Act are attracted. The CIT(A) upheld the action of the Assessing Officer. The Tribunal allowed the appeal on the ground that assessee society cannot be denied exemption under section 11 where persons of prohibited category render services to the society and in turn, get some remuneration. The Tribunal remanded the matter to the file of

Assessing Officer with the direction to examine the situation which warranted the assessee to make payments to such members and decide the issue in accordance of law. (AYs. 2003-04, 2004-05)
Hyndavi Educational Society v. ADIT (E) (2012) 139 ITR 238 / (2013) 86 DTR 196 (Hyd.)(Trib.)

S.11 : Property held for charitable purposes – Subscription to Chit fund cannot be considered as investment, exemption cannot be denied [S.13]
Assessee Trust claiming exemption under s. 11. Assessing Officer noticed that assessee had invested certain amount with a chit fund. According to him it was not an approved investment under section 11(5), it resulted in violation of section 13(1)(d) and claim for exemption was rejected. The Tribunal held that subscription to chit funds utilized for only to prize a chit or participate in a draw of lots and it was not an investment or deposit of a money which was available as surplus with assessee. Tribunal held that Assessing Officer fell in error in concluding that such subscriptions were investments which violated modes specified under section 11(5). Claim for exemption was allowed. (AY. 2008-09)
Sethu Valliammal Educational Trust v. ITO (2013) 141 ITD 712 / 89 DTR 42 / 155 TTJ 249 (Chennai)(Trib.)

S.11 : Property held for charitable purposes – Objects – Merely on basis of one or two objects trust cannot be held purely religious trust. Exemption allowed for earlier years as the facts are same exemption cannot be denied for the relevant year. [S.13(1)(b)]
Assessing Officer denied the benefit of exemption under section 11 of the Act on the ground that the objects of the assessee-trust included propagation of the Islamic faith and promotion of religious activities of the Islamic faith, that the trust was a mixed trust and the provisions of section 13(1)(b) were applicable. On appeal, the Commissioner (Appeals) took the view that the objects of the trust did not reveal that the benefits were meant only for a particular religious community but were available to the general public at large and that the provisions of section 13(1)(b) were not applicable. On appeal : The Tribunal held that major expenses of Trust was on conducting peace conference and merely on the basis of one or two objects Trust cannot be held purely religious trust. Even if the assessee was a mixed trust, section 13(1)(b) could not be applied as it was applicable to a purely charitable trust therefore benefit of section 11 could not be denied to the assessee under section 13(1)(b). Exemption was allowed in earlier years the principle of consistency was also applicable. Accordingly the appeal of department was dismissed. (AY. 2008-09)
Add. DIT (E) v. Islamic Research Foundation (2013) 21 ITR 588 / 58 SOT 170 (Mum.)(Trib.)

S.11 : Property held for charitable purposes – Application of income – Capital expenditure – Depreciation is allowed [S.32]
Tribunal held that granting exemption in respect of capital expenditure as application of income under section 11 and claiming of depreciation under section 32 is valid. Appeal of revenue was dismissed. (ITA No 2658 /Ahd/2012 Bench A. dt 31-1-2013 (AY. 2009-10)
ADIT (E) v. Friends of WWB, India (2013) BCAJ – March – P. 604 (Ahd.)(Trib.)

S.12 : Voluntary contributions – Corpus donation is not taxable. [S.11]
Assessee-trust received donation of agricultural land from 'M'. Assessing Officer taking a view that donor had not made any specific stipulation in gift deed indicating that it would be towards corpus of trust, held that said gift was not entitled to exemption under section 11. Tribunal held that in view of fact that donation was made by donor in order to establish an engineering and management college in name of his grandfather, donation in question was a corpus donation and, it was not a taxable income in hands of assessee under section 12(1). (AY. 2008-09)
Add. CIT. v. Chaudhary Raghubir Singh Educational & Charitable Trust (2013) 55 SOT 211 (Delhi) (Trib.)

S.12A : Registration – Benefit of exemption was allowed in previous years – Denial of exemption in subsequent year was not proper. [Ss.10(23C), 11]

Where benefit of exemption/deduction u/s 11 was allowed to assessee in previous years, registration u/s 12A could not be cancelled on basis of denial of exemption u/s 10(23C) (vi) in subsequent year.

CIT v. Jeevan Deep Public School Society (2013) 219 Taxman 159 (Mag.) (All.)(HC)

S.12A : Registration – Objects of trust to be considered – Rejection of registration was not justified

Where the assessee-trust had approached the authority for registration within a span of eight months of its formation, the DIT(E) was not justified in rejecting the application on the ground that the objects of trust for which it was formed would have to be examined for one to be satisfied about its genuineness and activities of trust.

DIT(E) v. Meenakshi Amma Endowment Trust (2013) 219 Taxman 136 (Mag.) (Kar.)(HC)

S.12A : Registration – Government control – Non-maintenance of accounts cannot be the ground for denying registration [S.12AA]

Non-maintenance of accounts properly could not be a reason for denying registration under section 12A, particularly when accounts, management, control, etc., of assessee were fully controlled by State Government. Where a trust/institution fulfils all conditions mentioned in section 12A/12AA, registration cannot be denied on ground that some conditions of sections 11 and 12 are not fulfilled.

CIT v. State Urban Development Agency (SUDA) (2013) 218 Taxman 146 / 95 DTR 363 (All.)(HC)

S.12A : Registration – Cancellation – Non-utilisation of funds

Non-utilisation of fund and keeping in bank, would not attract cancellation of registration of society.

CIT v. State Urban Development Agency (SUDA) (2013) 218 Taxman 146 / 95 DTR 363 (All.)(HC)

S.12A : Registration – Genuineness of activities – Sufficient evidence was not furnished [S.12AA]

Where the list of donors submitted by assessee contained insufficient information and no proof had been adduced regarding specific direction with which donations were made towards corpus of trust, activities of trust could not be held as genuine, and therefore, registration under s. 12A could be declined.

CIT v. Savior Charitable Trust (2013) 216 Taxman 91 (Mag.) (P&H)(HC)

S.12A : Registration – Withdrawal of exemption – Registration granted cannot be withdrawn merely because exemption under section 10(23C)(vi) has been denied. [Ss.11, 12 10(23C)]

Proceeding u/s 10(23C)(vi), wherein exemption was denied on the ground that the assessee trust was not formed solely for educational purposes, was an independent proceeding and could not be sole ground for cancelling registration granted u/s 12A.(AY 2004-05 and 2006-07)

CIT v. Society of Advanced Management Studies (2013) 215 Taxman 146 (Mag.) / 260 CTR 199 / 352 ITR 269 / 88 DTR 182 (All.)(HC)

S.12A : Registration – Restoration of application – An application submitted for registration under section 12A once rejected, it cannot be restored

The assessee, an educational institution, submitted application for registration under section 12A. The Commissioner issued communication requiring the assessee to rectify the defects mentioned therein. For non-compliance he rejected the application. Thereafter the assessee submitted an application stating that the defects were rectified and requested for reconsideration of its application. The Commissioner issued communication requiring the assessee to cure the defects mentioned therein and also asked it to attend his office. Further, the Commissioner having noticed that the assessee had also filed an application for the benefit under section 10(23C)(vi) before the

Chief Commissioner, presumed that the assessee was not pursuing the application and on that basis, closed the said application as withdrawn. In the meanwhile, the assessee applied for registration under section 12A for the year 2010-11, which was granted. The assessee also filed a writ petition before the High Court contending that application was pending before the Commissioner. The High Court disposed of the writ petition. It held that the stand taken by the assessee regarding pendency of the application for registration under section 12A was not true and correct. Therefore, the relief sought for could not be granted. It having noticed that registration under section 12A had already been granted to the assessee on the basis of a subsequent application with effect from the assessment year 2010-11 onwards permitted the assessee to seek appropriate remedy for applying for registration under section 12A with respect to the periods prior to the assessment year 2010-11. Thereupon the assessee approached the Commissioner by submitting fresh application under section 12A. The Commissioner held that since application was not disposed of as provided under section 12(AA) (b) (ii), a fresh application was not maintainable. Thereafter the High Court by judgment modified its earlier judgment dated 28-1-2011 and permitted the assessee to seek appropriate remedy to restore application, if permissible under law. The assessee again approached the Commissioner. The Commissioner considered the matter afresh and passed order holding that application could not be restored in law. The court held that an application submitted for registration under section 12A once rejected, it cannot be restored.
Kadakkal Educational Trust v. CIT (2013) 213 Taxman 7 / 81 DTR 345 (Kerala)(HC)

S.12A : Registration – While granting the registration objects of Trust is only to be seen [S.12AA]
The Trust has made an application u/s 12A, as it is supposed to do the same within one year from the commencement of its activities. The Hon'ble court held that, under the provisions of s. 12AA, satisfaction regarding the genuineness of the activities of the trust is to be seen at the stage for application of income, that is, when the trust or institution files its return, and not at the commencement stage when the activities have not commenced in full, therefore held that the trust was not entitled to benefit of registration was not sustainable. Therefore, where the trust was in nascent stage and was yet to work towards its object, Commissioner could not deny registration on ground that it was not utilising its income for charitable purposes; at stage of granting registration, objects of trust only had to be considered by Commissioner.
CIT v. B.K.K. Memorial Trust (2013) 213 Taxman 1 / 82 DTR 299 / 256 CTR 424 (P&H) (HC)

S.12A : Registration – Cancellation of registration is held to be not justified [Ss.10 (23C), 11, 12AA]
Assessee was granted registration under section 12A being a charitable institution. Chief Commissioner disallowed assessee's claim of exemption under section 10(23C) (vi) on ground that it had not solely been established for educational purposes. Commissioner relying on said order cancelled registration granted to assessee under section 12A. Tribunal restored registration. On appeal by revenue the Court held that since (i) exemption under section 10(23C)(vi) could be claimed by an assessee without applying for registration under section 12A, and (ii) in order of Commissioner there was no whisper that assessee had not fulfilled any of conditions of section 11, Tribunal had rightly restored registration. Appeal of revenue was dismissed.
CIT v. Jeevan Deep Charitable Trust (2013) 212 Taxman 19 (All.)(HC)

S.12A : Registration – Corpus donation – Charitable trust [S.12AA]
Corpus donation was in the nature of a capital receipt and not taxable, irrespective of whether trust was registered under section 12AA or not. (AY. 2007-08)
ITO v. Gaudiya Granth Anuved Trust (2014) 65 SOT 137 / 48 taxmann.com 348 / (2013) 28 ITR 161 (Agra)(Trib.)

S.12A : Registration – Once registration is granted AO cannot question charitable character [S.2(15), 143(3)]

Once registration under section 12A has been granted by Commissioner, Assessing Officer cannot question charitable character of institution during course of assessment proceedings. (AY. 2009-10)
Divya Yog Mandir Trust v. Jt.CIT (2013) 60 SOT 154 (URO) (Delhi)(Trib.)

S.12A : Registration – Not justified in denying registration

The CIT not having brought on record any material to prove that the activities of the assessee society are not carried out in pursuance of the stated objects, is not justified in denying registration. (AY. 2012-13)
Malik Hasmullah Islamic Educational & Welfare Society v. CIT (2013) 153 TTJ 635 / 85 DTR 302 (Luck.)(Trib.)

S.12A : Registration – Promotion of entrepreneurship – Holding of conferences abroad would not make the activities of the assessee being carried outside India – Registration cannot be refused

The Tribunal applied the decision of Supreme Court in the case of *Addl. CIT v. Surat Art Silk Cloth Manufacturers' Association (1980) 121 ITR 1 (SC)* and held that the main object of the assessee was providing networking facilities to the CEOs and promotion of entrepreneurship and the same was object of public utility. Therefore, the assessee was entitled to registration under section 12A, holding of conferences abroad would not make the activities of the assessee being carried outside India.
CEO Clubs India v. DIT (E) (2013) 153 TTJ 66 (UO)(Mum.)(Trib.)

S.12A : Registration – Setting up school was application for charitable purpose – Commissioner was to be directed to pass consequential order granting registration under section 12AA to assessee [S.2(15), 12AA]

Assessee-trust was created with objects to run any school and to purchase land for running educational institution. Assessee's application for registration under section 12A was rejected by the Commissioner. On appeal, the Tribunal held that activities of purchasing land and constructing building for setting up school was application for charitable purpose and, therefore, assessee was entitled for registration under section 12A, and accordingly, the Tribunal set aside matter to file of Commissioner to consider case of assessee in accordance with decision of High Court in Pinegrove International Charitable Trust. However, the Commissioner once again refused to grant registration observing that assessee was only engaged in leasing out building to third party, and no educational activities were provided by assessee. In view of the aforesaid finding of the Tribunal, Commissioner was not right in relooking at issue i.e., activities of assessee trust, objects of entering into collaboration with a third party and, thereafter, holding that educational activities were not provided by trust. The assessee having fulfilled conditions for grant of registration under section 12A, Commissioner was to be directed to pass consequential order granting registration under section 12AA to assessee.
Sandhya Educational Trust v. CIT (2012) 80 DTR 369 / 150 TTJ 877 / (2013) 58 SOT 5 (URO) (Chd.)(Trib.)

S.12A : Registration – Amendment in object clause – Amended clause to be considered – Matter remanded

Since the denial of registration was based on the pre-amended clause, the registration application was to be considered in light of the amended clause.
Vyapari Vyavasayi Ekopana Samithi Welfare Society v. CIT (2013) 24 ITR 528 / (2014) 61 SOT 46 (URO) / 95 DTR 363 (Cochin)(Trib.)

S.12A : Registration – Delay of 1660 days – Wrong advice

There was delay of 1660 days in filing the appeal before the Tribunal.

The Tribunal found reasonable cause and condoned the delay on the basis that the assessee was wrongly advised and also the persons who were managing the institution were ignorant of law. It further held that:

The Registration has to be deemed to have been granted to the assessee-institution from the date of its inception as claimed and not from a later date where the CIT has passed the order under section 12A(a) beyond six months from the date of receipt of application in Form No. 10A.

Nosegay Public School, Managing Committee v. CIT (2013) 153 TTJ 1 (UO) / 58 SOT 185 (Jodhpur)(Trib.)

S.12A : Registration – Commercial activity

Tribunal held that in view of commercial activities with profit motive, the registration granted could be cancelled but cancellation of registration shall not date back to the date of signing of the agreement but shall be effective from 1st June, 2010, in view of introduction of sub-section (3) of section 12AA w.e.f. 1-6-2010.

Mumbai Cricket Association v. DIT (E) (2013) 138 ITD 388 / 153 TTJ 166 / 84 DTR 162 (Mum.)(Trib.)

S.12A : Registration – Objects of trust [Ss. 2(15), 12AA]

The Tribunal found that the learned CIT(A) has not raised any objection against the objects of the assessee-society. The main object of the assessee society is education which, undeniably, is of charitable nature, in line with the provisions of section 2(15) of the Act. The CIT(A) has no jurisdiction and competence to examine an issue under the RTE Act obviously lies with authorities mentioned therein. CBDT circular No. 11 of 2008 dated 19th Dec., 2008 (2009) 221 CTR (St) 1 clearly states, *inter alia*, that the proviso to section 2(15) does not apply in the case of education, it will constitute ‘charitable purpose’ even if it incidentally involves carrying on of commercial activities. The Tribunal directed the CIT to grant registration to the society on verifying the original documents of establishment of the assessee trust.

Shri Gian Ganga Vocational & Educational Society v. CIT (2013) 143 ITD 297 / 154 TTJ 74 / 85 DTR 66 (Delhi)(Trib.)

S.12A : Registration – Maintain and develop existing gaushala and live stocks – Conversion of sole proprietorship into trust – Registration cannot be denied [Ss. 2(15), 12AA]

Assessee-trust was formed on basis of transferring of assets of sole proprietorship concern of one ‘M’, ‘M’ was managing trustee. The Objects of trust were to maintain and develop existing gaushala and live stocks received from ‘M’ and to do all such acts and things for development and maintenance of animal welfare, other gaushala. Assessee applied for registration u/s. 12A. Commissioner refused to grant registration on the ground that the trust was not carrying on any charitable activities. On appeal Tribunal restored the matter for granting the matter according to law. The Commissioner once again held that the activities of the assessee that maintenance of live stock did not come under the definition of charitable purpose and also did not come within the meaning of any other objects of general public utility, as regular business of selling of milk for maintenance of gaushala was being carried on by assessee. He again denied the registration under section 12AA. On appeal Tribunal held that it is immaterial that the trust had been formed on basis of transferring of assets of sole proprietorship concern of ‘M’ and this fact no way interfered with granting of registration. The assessee trust was eligible for 12A registration.

Sri Gomandir Seva Trust v. CIT (2012) 20 ITR 608 / 150 TTJ 48 / (2013) 141 ITD 472 (Cuttack)(Trib.)

S.12A : Registration – Denial of registration – It was premature for Commissioner to judge its activities and deny registration by glancing through its statement of accounts of a very short period [Ss.12AA, 80G(5)]

The assessee trust was created for purpose of spreading education and had applied for registration u/s 12AA. The assessee had given details regarding school and had submitted account statements of trust. The Commissioner rejected the application as genuineness of charitable activities carried out in accordance with trust deed had not been established. The Commissioner prejudged the activities of the trust and the school, run by it. However, no questions regarding objects of trust were raised. Tribunal held that since assessee trust was yet to work towards its objects, rejection of registration by judging its activities was premature. As per the Board's Circular No. 11/2008, dated 19-12-2008, where the purpose of the trust or institution is relief of the poor, education or medical relief, it will constitute charitable purposes even if it incidentally involves commercial activities. Thus, the object of providing education is charitable activity even if consequent to carrying on of such activity the trust earns any benefit out of it. A perusal of the order passed under section 12AA shows that the Commissioner had not commented on the objects of the Trust. The Commissioner, after examining, the statement of accounts formed an opinion that since no expenditure towards any charitable activity was shown in the statement of accounts, therefore, carrying out of genuine charitable activities was absent in this case. It would be relevant to mention here that the trust was formed on 11-1-2012, the application for registration under section 12AA was submitted by the appellant on 27-3-2012, i.e., within a period of three months of its creation. The school activities started in June, 2012. The appellant submitted its books of account up to September, 2012 before the Commissioner. The Commissioner, after examining the statement of accounts, for such a short period formed its opinion that the activities of trust were not charitable in nature. The Commissioner did not raise any objection on the objects of the trust. It was premature for the Commissioner to judge the activities of the trust by just glancing through the statement of accounts of the trust of such a short period.

Therefore, the Commissioner is directed to grant registration to the assessee trust under section 12AA. Consequent to the registration under section 12AA, the Commissioner is further directed to consider the application of the assessee for grant of initial certificate of exemption under section 80G(5).

A.V.S. Educational Trust v. ITO (2013) 140 ITD 681 (Chennai)(Trib.)

S.12A : Registration – Assessee collecting subscription fee and providing opportunities for students of an institute to seek employment – Not charitable activity – Trust is not entitled to registration [S.2(15),80G]

The assessee trust was created to provide opportunities for the students of the Department of Economics, Delhi School of Economics to seek employment. It collected fees from enrolled students as well as companies who appeared for campus recruitment. It filed two applications for seeking registration and exemption under sections 12A and 80G. The Commissioner held that the public at large was neither eligible to become members nor were provided any benefit of the trust activities, as all its activities were for the members enrolled. Moreover, the activities could not be classified as charitable in nature. Further apart from administrative heads of expenditure, no other expenses were shown to have been incurred on any charitable activity. In the absence of documentary evidence, it could not be held that the activities were charitable in nature. Accordingly, he rejected the registration and exemption on appeal.

DSE-Economics Placement Cell v. DIT (E) (2013) 23 ITR 121 / 59 SOT 56 (URO)(Delhi)(Trib.)

S.12A : Registration – Cancellation – Amendment of section 2(15) barring exemption where receipts exceed ` 10 lakhs is not sufficient reason for cancellation of registration [2(15), 11, 12AA]

The objects of the assessee-club, a registered society, were to promote sports related to motor car and motor cycle and conduct motor races, competitions, etc. For the assessment year 2009-10, the Assessing Officer recommended cancellation of registration granted to the assessee under section 12A(a) of the Income-tax Act, 1961. The Director of Income-tax (Exemptions) held that the motor sports were for the purpose of promotion of business of sponsors. The sponsorship proceeds were commercial receipts in the hands of the assessee. Therefore, the assessee was hit by the proviso to section 2(15) inserted from April 1, 2009. Accordingly, the objects and activities of the assessee could not be considered charitable in nature. Therefore, he cancelled registration granted to the assessee. On appeal the Tribunal held that the order of the Director (Exemptions) mentioned that the assessee's objects were in the nature of advancement of object of general public utility coming within the ambit of section 2(15) of the Act. The Director (Exemptions) cancelled registration on the ground that receipts exceeded `10 lakhs. If the receipts exceeded ` 10 lakhs under the second proviso to section 2(15) of the Act, the Assessing Officer would be justified in denying exemption under sections 11 and 12 of the Act; however, this would not be sufficient reason for cancelling the registration granted to the assessee under section 12A(a) of the Act. If in the very next year, the assessee's receipts were less than ` 10 lakhs, it would have to be granted the exemption under sections 11 and 12 of the Act, if other conditions were satisfied. In other words, the nature of the objects of the assessee could not fluctuate in tandem with the quantum of receipts mentioned in the first proviso. Therefore, the Director (Exemptions) fell in error in cancelling the registration granted to the assessee under section 12A(a) of the Act. (AY. 2009-10)

Madras Motor Sports Club v. DIT (E) (2013)/141 ITD 1/ 22 ITR 175 / 90 DTR 197 / 156 TTJ 673 (Chennai)(Trib.)

S.12A : Registration – Trust of primary purpose of public welfare is predominant then the trust is entitled for registration [S.2(15)]

The assessee trust was established under the Rajasthan Urban Improvement Act, 1959 with the main object to construct roads, provide water and electricity facilities, construct drainage system, improve gardens and open spaces and to provide housing facilities by allotting the residential plots. The Tribunal held that the primary purpose of public welfare was predominant object of the assessee, therefore, the assessee was entitled for registration under section 12A. (AYs. 2003-04 to 2007-08)

Urban Improvement Trust v. CIT (2013) 142 ITD 313 / 152 TTJ 507 / 83 DTR 282 / 24 ITR 622 (Jodh.)(Trib.)

S.12A : Registration – Cancellation of registration under section 12AA(3) [Ss.12AA(3), 13(1)(c)

Tribunal held that a mere finding that the objects of the appellant have been altered without the consent of the department would not be sufficient to exercise the power under section 12AA(3) without giving a finding that the objects of the trust are no longer charitable. On this score the impugned order is liable to be set aside. None of the reasons given in order under section 12AA(3) can be the basis to cancel the registration already granted to the assessee. Assessee was already granted registration under section 12A, it shows that the revenue was satisfied that the objects of the assessee trust was charitable, the amendment in the deed makes it clear that the benefits of the trust is open to all caste, creed and religion. One fails to see how the amendment will make the assessee not existing for the purpose of education or not existing for charitable purpose. Thus, the assessee is entitled to registration under section 12A and it cannot be cancelled under section 12AA(3) without giving a finding that the objects are no longer charitable. (AY. 2009-10)

Krupanidhi Educational Trust v. DIT(E) (2012) 139 ITD 228 / (2013) 152 TTJ 673 / 84 DTR 120 / 21 ITR 373 (Pune)(Trib.)

S.12AA : Procedure for registration – Deemed registration – Non disposal of registration within six months would not result in to deemed registration – Question referred to larger Bench [Ss.11, 12, 12A]

The question whether non-disposal of application for registration by granting or refusing registration before expiry of six months as provided in s. 12AA(2) would result in deemed grant of registration referred to larger bench. Following questions referred.

"(i) whether non-disposal of application for registration by granting or refusing registration before expiry of six months as provided under section 12AA(2) of the Income-tax Act, 1961 would result in deemed grant of registration"

(ii) whether the Division Bench Judgment of this court in the case of *Society for the Promotion of Education, Adventure Sports and Conservation of Environment v. CIT (2008) 171 Taxman 113 (All)(HC)* holding that effect of non-consideration of the application for registration within time fixed by section 12AA(2) would be deemed grant of registration is legally correct". (AY. 2004-05)

CIT v. Muzafar Nagar Development Authority (2013) 219 Taxman 318 (All.)(HC)

S.12AA : Procedure for registration – Object of trust is genuine and registration cannot be refused

Assessee was declined registration under section 12AA on ground that funds were surplus and were not utilised for charitable purpose. Tribunal reversed order relying upon an earlier decision wherein it was held that object of section 12AA is to examine genuineness of objects of trust, but not application of income of trust for charitable or religious purposes. Order of Tribunal was upheld. (AY. 2008-09)
CIT v. Janki Ji Education Society (2013) 219 Taxman 69(Mag) (P & H)(HC)

S.12AA : Procedure for registration – Education – Body corporate established for cause of education was held to be allowable eligible for registration

University, a body corporate and established for cause of education, is eligible for registration within meaning of section 12AA.
CIT v. O. P. Jindal Global University (2013) 219 Taxman 70 (Mag.) (P&H)(HC)

S.12AA : Procedure for registration – Cancellation of registration – Without recording the finding that activities of trust are not genuine is bad in law

Before cancelling registration under section 12AA, a Commissioner is required to record a finding that activities of trust are not genuine or are not being carried out in accordance with objects of trust.
CIT v. Ved Niketan Dham, Public Charitable Trust (2013) 219 Taxman 115 / (2014) 360 ITR 175 (P&H)(HC)

S.12AA : Procedure for registration – Donation to charitable institution – Refusal to grant registration was not justified [S. 80G(5)]

Once registration to the assessee under section 12AA was granted, it subsisted and had not been withdrawn or revoked. Since there was no discussion in the order of the DIT regarding non-compliance with the conditions, refusal to grant registration was not justified.
DIT v. Neel Gagan Charitable Trust (2013) 357 ITR 86 / 219 Taxman 39 (Mag.) (Delhi) (HC)

S.12AA : Procedure for registration – Utilisation of corpus donations – Merely on the basis of show cause notice writ petition is premature. [Ss.2(15), 12A, 80G, Constitution of India, Article 226]

The objects of the assessee-trust were to construct, establish, maintain and support charitable hospitals, nursing homes and dispensaries. It claimed to be running a charitable homeopathic clinic from two rooms on the ground floor of the premises. These rooms were made available free of cost to the assessee by its owner, a trust. The assessee was registered under section 12A of the Income-tax Act, 1961. It was also granted exemption under section 80G. The Commissioner observed that only a meagre sum had been applied for charitable purposes, while a major part of the corpus donations had been spent in constructing the commercial complex. He refused to extend the exemption under

section 80G and rejected the application. On the same date, he issued a notice under section 12AA(3) calling upon the assessee to show cause why registration granted to it under section 12A should not be cancelled.
Held, although a huge amount had been received as donation by the assessee during the previous year the amount spent for charitable purposes were meagre. Therefore, the Commissioner was fully justified in holding that the activities being carried on by the assessee could not be said to be for charitable purpose and had rightly withdrawn the exemption granted under section 80G. Also, held that the notice under section 12AA(3) was merely a show cause notice and challenge to the notice at this stage was premature.
Vishal Khanna Public Charitable Trust v. UOI (2013) 356 ITR 442 / 218 Taxman 149(Mag.) (All)(HC)

S.12AA : Procedure for registration – Denial of registration was not justified only because the Trust has not commenced the activities [S.12A]
Where there was no material to conclude that objects of trust or activities of trust were not genuine or any doubt arose in respect of genuineness of activities, registration under s. 12AA could not be denied.
Only because trust has not commenced activities, Commissioner would have no authority to *ipso facto* reject application made under s. 12A for registration under s. 12AA.
DIT v. Pannalalbhai Foundation (2013) 216 Taxman 148 (Guj.)(HC)

S.12AA : Procedure for registration – Genuineness of trust [Ss.10(22), 10(23C) 11, 12]
The principles laid down for excluding the income from consideration under s. 10(22) [now 10(23C)] or s. 11/ 12 are not applicable while considering the application for registration under s. 12AA. S. 12AA requires satisfaction in respect of the genuineness of the activities of the trust, which includes the activities which the trust is undertaking at present and also which it may contemplate or undertake. The stage for application of income arise when it files its return. Appeal of revenue was dismissed.
CIT v. Surya Educational and Charitable Trust (2011) 203 Taxman 53 / (2013) 355 ITR 280 (P&H)(HC)
CIT v. Bahara Educational and Charitable Society (2013) 355 ITR 280 (P&H)(HC)

S.12AA : Procedure for registration – Period of six months – Directory – Non- consideration of application within said period does not result in deemed registration.
There is no automatic or deemed registration if the application filed under section 12AA is not disposed of within the stipulated period of six months as the time frame fixed under the provision is only directory. Matter remitted to the Commissioner for consideration of the matter a fresh.
CIT v. Sheela Christian Charitable Trust (2013) 354 ITR 478 / 262 CTR 100 (Mad.)(HC)

S.12AA : Procedure for registration – Order lodging the application – Not sustainable – Deemed registration – Time to be reckoned from the end of month in which the application was filed – Matter remanded to Commissioner
The assessee filed an application before the Commissioner on 28th January, 2009 for seeking registration under section 12AA and for grant of approval under section 80G. The Commissioner held that the activities of the assessee could not be called charitable. Accordingly he lodged the application of assessee. On appeal Tribunal held that since the application was filed by the assessee on 28th January, 2009 and the Commissioner passed the order on July 31, 2009, by virtue of section 12AA, the six month period has expired and therefore application should be deemed to have been granted recognising the status of assessee as ‘Charitable Trust’. Tribunal also held that sale of books, hiring of utensils and rental income would not make the activities of the assessee a commercial venture. On appeal the court held that the application was dated

January 28, 2009 and calculating the six months' period from the end of the said month, it could not be said that the six months' period would expire by July 31, 2009. Therefore, the order passed by the Commissioner on July 31, 2009, could not be held to have been passed in violation of section 12AA. The conclusion of the Tribunal that the registration was deemed to have been granted, could not be sustained, inasmuch it was found that the order of the Director of Income-tax was passed within a period of six months stipulated in section 12AA(2). However, it was held that the Commissioner should have either granted or rejected the application and was not expected to merely lodge the application, which would only leave the assessee in a suspended animation. There could not be any order in between like lodging the application. Thus, the matter was remitted to the Commissioner for fresh disposal on the merits.
DIT (E) v. Anjuman-e-Khyrkhah-e-Aam (2013) 354 ITR 474 (Mad.)(HC)

S.12AA : Procedure for registration – Period of disposal of application within period of six months is directory – It cannot be presumed that the deemed registration was granted
Held, that the period of six months provided in S.12AA(2) for disposal of application seeking registration is only directory and, therefore, not passing an order within said period would not automatically result in granting registration to trust. Matter was set aside to decide the issue on merits.
CIT v. Karimangalam Onriya Pengal Semipu Amaipu Ltd. (2013) 354 ITR 483 / 214 Taxman 665 / 362 CTR 104 (Mad.)(HC)

S.12AA : Procedure for registration – Commencement of charitable activity – Only genuineness of objects to be tested – Refusal for registration
Where a trust, set up to achieve its objects of establishing educational institution, is in process of establishing such institutions, and receives donations, registration under section 12AA cannot be refused, on ground that trust has not yet commenced charitable or religious activity. Held, that the enquiry of Commissioner at such preliminary stage should be restricted to genuineness of objects and not activities, unless such activities have commenced. (AY. 2011-12)
Hardayal Charitable & Educational Trust v. CIT (2013) 214 Taxman 655 / 355 ITR 534 / 92 DTR 320 (All.)(HC)

S.12AA : Procedure for registration – Commissioner was not justified in refusing registration when activities of the Trust have not commenced [S.12A]
Assessee made an application for registration under section 12A(1)(a). Commissioner noted from trust deed that objectives of trust were mainly religious. Commissioner called upon assessee to produce evidence regarding expenses incurred towards objects of organization. On failure of assessee to bring on record any such evidence, Commissioner rejected assessee's application for registration. Tribunal, however, granted registration to assessee-trust.
On appeal the court held that even though Commissioner has power to call for such documents or information from trust as he thinks necessary, yet it does not mean that if activities of trust have not commenced, Commissioner has authority to reject its application for registration on ground that trust failed to convince him about genuineness of activities. Therefore, the Tribunal was justified in setting aside impugned order of Commissioner.
CIT v. Kutchi Dasa Oswal Moto Pariwar Ambama Trust (2013) 212 Taxman 435 / 89 DTR 293 (Guj.)(HC)

S.12AA : Procedure for registration – Condonation of delay – Mistake of chartered accountant delay was condoned [S.12A, 80G]
Assessee, a charitable institution, filed an application seeking registration under section 12A with delay. Assessee attributed delay in filing registration application to its erstwhile treasurer 'S', who was a chartered accountant. DIT (Exemption) rejected assessee's application. Tribunal found that it was because of irregularities, illegalities and mis-representations of 'S' that assessee-society was led

to believe that appropriate applications under Act were already filed with revenue authorities for registration. Tribunal further found that as soon as assessee-society came to know about irregularities on a complaint from donor and on further enquiry conducted by governing body, it hastened to take remedial action by filing applications for registration both under sections 12A and 80G. Tribunal thus condoned delay in filing registration application and granted registration to assessee-society. On appeal by revenue the Court held that on facts, impugned order passed by Tribunal granting registration did not require any interference.
DIT. v. Vishwa Jagriti Mission (2013) 213 Taxman 65 / 83 DTR 47 (Delhi)(HC)

S.12AA : Procedure for registration – Object being sale and services – Sale of medicines
Object of society to provide services to medical professionals and to promote sale of nutritional medicines was held to be not charitable activity, and hence, assessee was not entitled to registration.
Indian Nutritional Medical Association v. CIT (2013) 27 ITR 322 / 59 SOT 39 (URO) (Cochin)(Trib.)

S.12AA : Procedure for registration – Commissioner has to satisfy himself about objects and genuineness of activities of assessee-trust or institution; other conditions are not relevant at stage of grant of registration
Commissioner declined to grant registration to assessee-trust under section 12AA on grounds that assessee had not yet commenced charitable activities, that assessee had not established identity of donors and, that assessee had spent less than 85 per cent donation received. Tribunal held that most of objections raised by Commissioner in impugned order was not relevant for purpose of grant of registration under section 12AA. Since objects of assessee were charitable and educational in nature and assessee was at stage of setting up educational institution, registration under section 12AA was to be granted to assessee. Before grant of registration under section 12AA, Commissioner has to satisfy himself about objects and genuineness of activities of assessee-trust or institution; other conditions are not relevant at stage of grant of registration.
Babu Ram Education Society v. CIT (2013) 60 SOT 152 (URO) / 92 DTR 103 / 156 TTJ 422 / 26 ITR 351 (Agra)(Trib.)

S.12AA : Procedure for registration – Furnishing of accounts – Affidavit of counsel [S.288, Rules 49 to 57]
Commissioner rejected application of registration on ground that on date fixed for hearing counsel for assessee did not produce any books of account, etc. to justify claim. The Counsel argued before the Tribunal that on date of hearing before Commissioner, books of account, bills and vouchers, audit report and evidences of activities of assessee were furnished. He also filed his personal affidavit, in which he had confirmed to have produced books of account and all other supporting documents before Commissioner on date of hearing. On facts, the Commissioner was to be directed to decide registration application of assessee afresh.
Samagra Vikas Mahila Samiti v. CIT (2013) 59 SOT 293 (Agra)(Trib.)

S.12AA : Procedure for registration – Effect of failure to dispose of application within six months – Registration deemed to have been allowed
Tribunal held that the period of six months from the date of application has passed and no order has been passed by the CIT, therefore for this short reason alone, the registration under section 12A should be deemed to have been granted. The Tribunal upheld the grievance of the assessee and directed the CIT to grant registration under section 12A. (A. Y. 2009-10)
Pravat v. CIT (2013) 142 ITD 654 / 26 ITR 294 / 157 TTJ 777 / 93 DTR 349 (Kol.)(Trib.)
Editorial: Tribunal followed the decision of Bhagwad Swamp Shri Shri Devraha Baba Memorial Shri Hari Parmath Dhar Trust v. CIT (2007) 111 TTJ 424 (SB)(Delhi)

S.12AA : Procedure for registration – Income of charitable institution-used for benefit of those persons specified in section 13(3), such a trust or institution shall forfeit exclusion of section 11 [S.13]

Where assessee trust did not function independently but had been used as a tool of another organisation and paid licence fee to prohibited persons specified in section 13(3), registration could not be granted to it.

Operation Eyesight Universal v. DIT (2013) 142 ITD 641 / 26 ITR 268 / 158 TTJ 597 / 94 DTR 420 (Hyd.)(Trib.)

S.12AA : Procedure for registration – It is for Commissioner to dispose of application for registration – an application for registration cannot be disposed of by any other authority to which such powers may have been delegated

An application made to a statutory authority, for his exercise of powers vested in him by the statute, can only be disposed of by him and not by any other person to whom he may like to delegate such an authority. A statutory power vested in an authority cannot be delegated by the authority to any other authority, unless there is a specific enabling provision to that effect in the statute itself. It is, therefore, beyond much controversy and debate that it was for the Commissioner to dispose of the application for registration, and the order thereon could not be passed by any other authority to which such powers may have been delegated.

Pravat v. CIT (2013) 142 ITD 654 / 26 ITR 294 / 157 TTJ 777 / 93 DTR 349 (Kol.)(Trib.)

S.12AA : Procedure for registration – Cancellation of registration – without specifying how the activities of the trust is not genuine or not carried out in accordance of law – not justified [S.80G]

Where Director (Exemption) nowhere in the order specified how activities of trust/institution were not genuine or not being carried out in accordance with objects of trust, cancellation of registration on reason that assessee's activities were in violation of objects of society could not be considered as a valid ground for cancellation of registration in terms of section 12AA(3).

Project Management Institute v. DIT (2013) 142 ITD 239 (Hyd.)(Trib.)

S.12AA : Procedure for registration – Without recording that the activities of the trust are not genuine and are not being carried out in accordance with the objects of the trust cancellation of registration was not justified [S.12A]

In the absence of any evidence on record to establish that the activities carried on by the assessee-trust were not genuine or that it is not carrying on its activities in accordance with its objects, registration granted to the assessee-trust could not be cancelled by invoking s.12AA(3) on the ground that supplementary trust deed has been executed without obtaining prior approval, when the supplementary trust deed is nothing but the combination of all the clauses of the earlier two trust deeds and the aims and objects in all the deeds remain the same.

Durga Indiramani Foundation v. CIT (2013) 92 DTR 178 (Chd.)(Trib.)

S.12AA : Procedure for registration – Amendment to section 2(15) by introducing Proviso fixing monetary limit-cannot be a reason to cancel registration in exercise of power under section 12AA(3) [S.2(15), 11, 12 & 13]

Registration under s.12AA can be cancelled only if the CIT is satisfied that the object of the trust is not genuine or the activity of the trust was not carried out in accordance with the object. However, amendment to section 2(15) by introducing Proviso fixing monetary limit in respect of public utility services cannot be a reason to cancel registration in exercise of power under section 12AA(3) (AY. 2011-12).

Mahatma Gandhi Charitable Society v. CIT (2013) 91 DTR 443 (2012) 142 ITD 565 / 156 TTJ 537 (Coch.)(Trib.)

S.12AA : Procedure for registration – Without recording that the activities of the trust are not genuine and are not being carried out in accordance with the objects of the trust cancellation of registration was not justified [S.12A]

In the absence of any evidence on record to establish that the activities carried on by the assessee-trust were not genuine or that it is not carrying on its activities in accordance with its objects, registration granted to the assessee-trust could not be cancelled by invoking s.12AA(3) on the ground that supplementary trust deed has been executed without obtaining prior approval, when the supplementary trust deed is nothing but the combination of all the clauses of the earlier two trust deeds and the aims and objects in all the deeds remain the same.

Satkrit Service Trust v. CIT (2013) 92 DTR 178 (Chd.)(Trib.)

S.12AA : Procedure for registration – Mere generation of surplus in a particular year cannot be a ground for denial of registration [S.80G]

The assessee society was engaged in providing education by running educational institution. It filed an application for seeking registration u/s. 12A. The Commissioner rejected assessee's application for registration since the assessee society earned surplus from its activities in the F.Y.: 2006-07 to 2008-09. On an appeal, the Tribunal allowed the appeal of the assessee and held that nothing was brought on record by the revenue authorities except surplus generated during F.Y. 2006-07 to 2008-09, that the assessee was ever engaged in the activities other than generation of surplus / profit in a particular year cannot be a ground for denial of registration u/s 12AA and also grant of approval for exemption u/s. 80G of the Act. (AY. 2006-07 to 2008-09)

Kanchan Singh Bhuli Devi Shisksha Prasar Samiti v. CIT (2013) 142 ITD 343 (Luck.)(Trib.)

S.12AA : Procedure for registration – No genuineness of activities of assessee's trust – liable for cancellation of registration [S.2(15)]

The assessee Trust was engaged to purchase undeveloped land to develop land by providing some basic facilities and cutting it into plots, to advertise for sale off plots and to sell off plots through auction. It was charging fees & fines from selling of farms, land enhancement fees, building plan fees, road cutting fees, transfer fees, fines and penalties and non-construction charges. It was granted registration u/s. 12AA w.e.f 12-6-2003. Commissioner relying on the decision of definition of charitable purpose in S. 2(15) as amended by the Finance issued cause notice u/s.12AA(3) dated 1/6/2009 for cancelling registration w.e.f 12-6-2003 and thereafter passed the order u/s.12AA(3) of the Act. On appeal Tribunal confirmed the order of the CIT & held that the assessee-trust objects clearly constituted activities in the nature of trade, commerce or business, which were contrary to provisions of S. 2(15). (AYs. 2008-09 to 2010-11)

Improvement Trust v. CIT (2013) 56 SOT 106 (Amritsar)(Trib.)

S.12AA : Procedure for registration – Religion – Members of particular church – Registration – Matter remanded [Ss.2(15), 12A]

The assessee trust sought registration under section 12AA. One of the objects of the trust restricted the benefits to members of a particular religion, to the members of a particular church. The CIT held that the activity of the trust was not of charitable nature and, thus he denied registration under section 12AA of the trust. The ITAT observed that Registration under section 12A, it is not necessary that object of trust should be to benefit whole of mankind or all persons in a country or State and it is sufficient if intention is to be benefit a section of public as distinguished from a specified individual. Therefore, where benefit of assessee trust was restricted to a particular religion, who were members of a particular church, trust would be a charitable institution under section 2(15), where assessee trust did not appear to do any charitable activity as it collected money from members of church, deposited it in bank and refunded it to lady members along with interest at time of marriage and details of collection and meeting of day-to-day expenses were not available, further examination was required

before granting registration under section 12A. The ITAT set aside and the issue of registration under section 12AA is restored for reconsideration and re-examination on the basis of judgment of Apex Court and High Courts.
Fathima Matha Charitable Trust v. CIT (2013) 58 SOT 299 (Cochin)(Trib.)

S.12AA : Procedure for registration – Where activities of institution were genuine and were being carried out in accordance with objects of trust, registration granted could not be withdrawn in view of amended provisions of section 2(15) [Ss.2(15), 12A]
Where objects of institution could no longer be regarded as toward a 'charitable purpose' in view of amended law, registration granted under section 12A could not be reviewed and withdrawn, since there is no stipulation in section 12AA(3) regarding continuing satisfaction. Therefore, where activities of institution were genuine and were being carried out in accordance with objects of trust, registration granted could not be withdrawn in view of amended provisions of section 2(15). (AY. 2009-10)
Maharashtra Housing & Area Development Authority v. ADIT (2013) 58 SOT 196 (Mum.)(Trib.)

S.12AA : Procedure for registration – Cancellation
First trust deed along with its objects was executed by the settlor and thereafter a second trust deed was executed with two new clauses covering the events of dissolution of the trust and stating that in case of any changes or amendments to the clauses of the trust deed, prior approval of the authorities would be taken. Assessee trust came into existence by the supplementary trust deed, which was passed after combining the clauses of the earlier two trust deeds. Supplementary trust deed was registered u/s 12AA by the CIT. Subsequently, CIT cancelled the registration under S.12AA(3) as the assessee had executed supplementary trust deed without obtaining prior approval. The Tribunal held that the CIT is empowered to cancel the registration already granted to a trust or institution by invoking s. 12AA(3) where it comes to the knowledge of the CIT that the activities of the said trust are not genuine and are not being carried out in accordance with the objects of the trust or institution. It is not the case of the Revenue that the activities carried on by the assessee were not genuine or that it is not carrying on its activities in accordance with its objects. Assessee has given donations to other charitable institutions in line with one of its objects. Supplementary trust deed is nothing but the combination of all the clauses of the earlier two trust deeds and the aims and objects in all the deeds remain the same. Merely because the settlor of the trust has claimed deduction u/s 80G in respect of the donations made to the assessee-trust, registration granted to the trust cannot be cancelled. Further, there is no merit in the objections raised by the A.O. that the assessee-trust was carrying on its activities from the same address at which another trust (second assessee) and a concern were operating. Therefore, order u/s. 12AA(3) passed by the CIT is reversed.
Satkrit Service Trust v. CIT (2013) 92 DTR 178 / 157 TTJ 112 (Chd.)(Trib.)

S.12AA : Procedure for registration – Education – Since assessee was yet to commence its activities and as on date there was neither institution nor any coaching classes, in such circumstances, impugned order denying registration was to be set aside and matter was to be remanded back for disposal afresh [S.2(15)]
In view of amended provisions of section 2(15), education for commercial purpose itself in principle does not constitute 'non charitable purpose' rather it depends upon quantity of aggregate receipts of trust. Therefore, denial of registration under section 12AA is not proper when assessee-trust is yet to start its educational activities. Assessee trust was formed to establish, set up, acquire, run, operate, maintain and manage schools, colleges, academies including tutorial or coaching classes. It filed an application seeking registration under section 12AA. Director (Exemption) noticed that trust deed provided for objects for establishing and management of tutorials/coaching classes which constituted commercial activity and, thus, provisions of section 2(15) did not apply. He, thus, denied registration to assessee-trust. Since assessee was yet to commence its activities and as on date there was neither

institution nor any coaching classes, in such circumstances, impugned order denying registration was to be set aside and matter was to be remanded back for disposal afresh.
Samria Charitable Trust v. DIT (E)(2013) 36 Taxmann.com 427 / 144 ITD 313 (Mum.)(Trib.)

S.12AA : Procedure for registration – Not passing of order even after six months from receipt of Tribunal's order remitting the matter to him will be deemed to have been granted [S.80G]
Tribunal had passed the order on 12th December 2008 remitting the matter to Commissioner to decide fresh in accordance with law. Commissioner passed the order on 28th October 2011 refusing to grant the registration. On appeal Tribunal held that where Commissioner does not pass any order even after six months from receipt of Tribunal's order remitting the matter to him, the registration will be deemed to have been granted. Approval under section 80G having been denied for want of registration under section 12AA, now that registration under section 12AA is granted, very foundation for denial of approval under section 80G ceases to hold good in law, Commissioner was directed to grant approval under section 80G also.
Harshit Foundation v. CIT (2013) 156 TTJ 422 / 92 DTR 103 / 60 SOT 147(URO) (Lucknow)(Trib.)

S.12AA : Procedure for registration – Cancellation – Registration was restored [S.2(15)]
The Trust was granted registration under section 12A(a), since 1984. AO held that the trust is carrying on activities in the nature of trade, commerce or business & the registration granted was cancelled or withdrawn w.ef. AY. 2009-10 on the ground that sale of liquor at ` 1.45 crores, canteen compensation etc. are in nature of business income & therefore proviso of section 2(15) which came in to effect from AY. 2009-10 is applicable. Before Tribunal the assessee relied on the order of earlier year of ITAT. The Tribunal held that the department has nowhere mentioned that "social intercourse among members" was not one of the objects of the Trust when it was originally formed on 04-10-1934. Further earlier order of Tribunal is in favour of assessee. Following the earlier year order cancellation of registration was held to be incorrect and registration was restored. [ITA No.373/Mum/2012 dt. 10-7-2013. Bench "A"]
Khar Gymkhana v. DIT (E)(2013) BCAJ-September-P. 27 (Mum.)(Trib.)

S.12AA : Procedure for registration – Object to takeover school for better administration is not charitable in nature, hence refusal of registration was justified [Ss. 2(15), 12A, Form No 10A]
Assessee Society had filed an application under section 12AA. Commissioner made certain enquiries in order to verify genuineness of the objects and activities of assessee society. The assessee stated that their trustees were already running schools and it proposed to take over one of such school for better administration. Commissioner observed that activities proposed to be undertaken were not charitable in nature and no activities were yet being carried out by assessee society hence refused registration. On appeal the Tribunal held that, objects of assessee society were found to be varied and were not in any particular direction of imparting education or for relief of poor since assessee-society had not initiated any activity, there was no material to verify genuineness of its object and activities and thus order of Commissioner refusing to grant registration was to be upheld.
Suchinta Educational Society v. CIT (2013) 143 ITD 487 / 92 DTR 441 / 27 ITR 27 / 157 TTJ 494 (Chd.)(Trib.)

S.12AA : Procedure for registration – Charging huge fees [S.2(15)]
Application for registration was liable to be rejected since the society was charging huge fees from public in addition to prescribed fee of Punjab Government.
Sukhmani Society for Citizen Services v. CIT (2013) 24 ITR 443 / 144 ITD 381 (Amritsar) (Trib.)

S.12AA : Procedure for registration – Scope of Enquiry – CIT not entitled to examine compliance of conditions of section 11 – Section 13 – Mere earning of surplus income does not render charitable activity non-genuine [Ss.2(15), 12A]

The assessee was a society engaged in carrying on activities in relation to healthcare and education. The CIT did not allow registration under section 12A of the Income Tax Act, 1961 as the assessee allegedly had earned surplus income in violation of amended definition of charitable purposes in section 2(15), and had not complied with certain conditions in section 11 and section 13. On appeal, held, allowing the appeal:

It is incumbent upon the CIT, while considering granting of registration under section 12AA of the Act that he should satisfy himself only about genuineness of activities of the trust, in accordance with its objects and not about credential, capacity and qualification etc. of trust. The satisfaction of statutory conditions of Sections 11, 12 and 13 of the Act, for the purpose of grant of registration under sections 12A and 12AA, are not relevant. CIT erred in heavily relying on the issue of corpus fund and secured loans raised by the appellant society, in concluding the activities of the appellant as non-genuine. The same considerations were not relevant at the stage of registration under section 12AA.

PIMS Medical and Education Charitable Society v. CIT (2012) 80 DTR 383 / 150 TTJ 891 / (2013) 56 SOT 522 (Chd.)(Trib.)

S.12AA : Procedure for registration – Religious purpose – Denial of exemption was held to be not justified [S.13(1)(b)]

The Commissioner rejected assessee’s application on the ground that the object clause of trust deed included an object of religious nature. The only prohibition in this regard was contained in S. 13(1)(b), which excludes a trust or institution created or established for benefit of any particular religious community or caste. Since the aforesaid prohibition did not apply to assessee’s case, impugned order denying registration to assessee-trust was to be set aside.

Radhika Seva Sansthan v. CIT (2013) 57 SOT 121 (URO) (Jaipur)(Trib.)

S.12AA : Procedure for registration – Promotion of sports – Charitable purpose – Entitled to registration [S. 2(15)]

The Assessee-society is registered under the Society Registration Act, 1860. The founder-members of the society were professional golfers. The assessee filed an application seeking registration under section 12AA. The Commissioner rejected the application of registration. The Tribunal held that Society’s Object are charitable in nature, all the object and aims of the assessee are contained in clause (3) of its Memorandum of Association, Promotion of sports and games has to be considered as ‘charitable purpose’ within meaning of section 2(15). Assessee society formed to promote interest in game of golf in general and professional golfers in particular was entitled to registration under section 12AA of the Act.

Professional Golf Tour of India v. CIT (2013) 143 ITD 165 / 155 TTJ 17 (UO)(Chandigarh)(Trib.)

S.12AA : Procedure for registration – Bachelor degree course in the field of architecture – Genuineness of objects and activities of Trust [Ss.2(15), 12]

The assessee trust had started a bachelor degree in the field of architecture. The college was affiliated to the University of Nagpur and the fee structure of the applicant –trust was decided and monitored by a Central Government department and admission to the course was through a common Entrance Examination. The Trust made an application for registration under section 12A. The Commissioner observed that there are some accounting irregularities and held that institution was not being operated wholly for educational purpose and rejected application for registration. On appeal the Tribunal held that to grant registration to a charitable trust, Commissioner is only to examine genuineness of objects and activities of trust and not application of income for charitable purposes. Section 12AA, does not speak anywhere that the Commissioner, while considering application for registration, shall also see that income derived by Trust or institution is either not being spent for charitable purposes or such institution is earning profits. Registration was allowed.

Swargiya Jagannath Jattewar Shikshan Sanstha v. CIT (2013) 141 ITD 543 / 155 TTJ 104 / 89 DTR 51 (Nag.)(Trib.)

S.12AA : Procedure for registration – Power to cancel registration under section 12AA(3) having been brought on statute with effect from 1-6-2010 prospectively, cancellation made with effect from assessment year 2009-10 would be invalid and not in accordance with law [Ss. 2(15, 12A]

The assessee was granted registration under section 12A, with effect from 1-04-2003. Till 31-3-2003 the assessee was claiming exemption under section 10(20A) which had been omitted by the Finance Act, 2002 with effect from 1-4-2003. In order to examine the case of the assessee in the light of change in definition of 'charitable purpose' under section 2(15), notice for cancellation of registration with effect from assessment year 2009-10 was issued to the assessee on 6-3-2002 under section 12AA(3) and thereafter commissioner cancelled the registration under section 12A with effect from assessment year 2009-10 by holding that the assessee was rendering service in relation to trade, commerce or business for a cess, fee or any other consideration. On appeal to Tribunal, the Tribunal held that, power to cancel registration under section 12AA(3) having been brought on statute with effect from 1-6-2010 prospectively, cancellation made with effect from assessment year 2009-10 would be invalid and not in accordance with law. (AY. 2009-10)

Agra Development Authority v. CIT (2013) 141 ITD 336 / 85 DTR 296 (Agra)(Trib.)

S.12AA : Procedure for registration – Profit element – Enquiry regarding activities.[Ss. 11, 12, 13]

Where application for grant of registration is made after commencement of activities by assessee trust, Director of Income-tax (Exemption) justified to enquire about its activities. Merely because some profit has been earned by an educational institution, registration under section 12AA cannot be denied so long as provisions of sections 11, 12 and 12AA are complied with and its income has been applied for purpose of education in terms of section 11(2) and there is no violation of section 13. (AY. 2012-13)

Saivani Educational Society v. DIT (2013) 57 SOT 84 (Hyd.)(Trib.)

S.12AA : Procedure for registration – Degree course in field of architecture [Ss. 2(15), 12]

Assessee Trust had started a bachelor degree course in field of architecture. It filed an application for registration u/s. 12AA, None of objects of trust was against public policy and its main activity was to provide education to student. Institution was covered by provisions of section 2(15), registration u/s. 12A was allowed.

Swargiya Jagannath Jattewar Shikshan Sanstha v. CIT (2013) 141 ITD 543 / 155 TTJ 104 / 89 DTR 51 (Nag.)(Trib.)

S.12AA : Procedure for registration – Retrospective amendment – Rental income from letting out of the kalyana mandapa could not be regarded as business income – Even if receipts were from commercial activities, they would be considered as charitable if they below Rs.25 lakhs – Cancellation of certificate was not valid [S. 2(15), 12A]

The retrospective amendments was made to section 2(15) that advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business. In view of the same, the DIT (E) found that the assessee was carrying on commercial activity and he, by invoking section 12AA(3), cancelled registration granted to the assessee. It was held that if the receipts are below Rs.25 lakhs, it will still be considered as 'charitable purpose'. Also, it is not open to DIT(E) in an action under section 12AA(3) to examine the objects of the trust to see if the same were charitable in nature. That has already been done when registration was granted to the assessee under section 12AA(1). (AY. 2009-10)

Kodava Samaja v. DIT (2013) 57 SOT 73 / 28 ITR 224 / 158 TTJ 376 (Bang.)(Trib.)

S.12AA : Procedure for registration – Cancellation of registration Authorities under Income-tax Act cannot presume to sit in judgment over authorities empowered to implement policies – Cancellation of registration for failure to implement Government policy is not sustainable hence registration restored [S. (2(15), 12A]

The assessee-society was formed to establish progressive schools or other educational institutions in Delhi or outside Delhi open to children of officers of All India and Central Services. It was granted registration under section 12A. The Director of Income-tax (Exemptions) was of the view that though the objects of the trust were charitable, the registration deserved to be cancelled on the grounds that the activities resulted in (a) violation of conditions imposed by the Government; (b) promotion of a high cost educational institution excluding the students from the economically weaker section category and that such activities would not form a part of charitable activity, as defined in section 2(15) of the Income-tax Act, 1961. On appeal against cancellation of registration from the assessment year 2008-09 onwards : Held, allowing the appeal, There was not a single evidence of denial to any student seeking admission belonging to the economically weaker section category. There was no evidence on record that the Directorate of Education had taken any action against the assessee for not implementing the Government policy or that it had informed the land allotting authority to proceed against the assessee-school for violation of the terms of the land lease agreement. There was no whisper of an allegation by the Department in regard to any violation of the terms and conditions set out neither in the allotment letter issued by Ministry of Urban Development nor by the monitoring authority in regard to the Government policy namely by the Department of Education, Government of National Capital Territory of Delhi. There was sufficient evidence available on record that the objects of the society were charitable in nature and a finding to that effect had been given in the order itself. Where there was no alleged violation of any of the requirements either of the Ministry of Urban Development or of the Directorate of Education the authorities under the Income-tax Act could not presume to sit in judgment over the judgment of the authorities empowered to implement the policies. The Director of Income-tax (Exemptions) in the facts of the peculiar case could not cancel registration for the reasons set out in the order as that amounted to usurping the role of an authority constituted to implement Government policy. Only when there was any instance of violation of terms and conditions pointed out by the Directorate of Education or the Ministry of Urban Development on the information of derecognition of the school by the Directorate of Education could the tax authorities take notice. The cancellation of the registration of the assessee was to be set aside and registration under section 12A restored. (AY. 2008-09)

The Civil Services Society v. DIT (E) (2013) 22 ITR 627 / 157 TTJ 578 / 93 DTR 314 (Delhi)(Trib.)

S.12AA : Procedure for registration – Assessee formed for promotion of cricket – Carrying activities of commercial nature and generating huge revenues cancellation was held to be justified [S. 2(15)]

The assessee society was to maintain a general control of the game of cricket in the State of Tamil Nadu and in the Union Territory of Puducherry and give its decision on all matters concerning the game either when referred to or *suo motu.* The Assessing Officer held that the assessee had deviated from its declared objects and that at present it was carrying on activities of commercial nature and there was no justification in continuing the registration granted u/s. 12AA. Therefore, he submitted a proposal to the Director of Income-tax (Exemptions) for cancellation of registration under section 12AA(3) of the Act. The Director of Income-tax (Exemptions) held that the assessee was not pursuing objects of general public utility, but was carrying on activities in the nature of business, resulting in huge turnover year after year and, therefore, the object of the assessee no longer fell under the definition of "charitable purpose" explained in section 2(15) with effect from April, 1, 2009. He accordingly cancelled the registration under section 12AA(3) of the Income-tax Act, 1961. On appeal: Held, dismissing the appeal, that the case of the assessee was covered by both limbs stated in section 12AA(3) of the Act. The entire income of the assessee was generated out of activities of commercial nature towards earning hyper profits. The genuineness of the activities carried on by the assessee

stopped with the physical aspects of the game. The object of the assessee was to carry on an activity for advancement of an object of general public utility by promoting the cricket game. But, it had deviated from the stated objective by carrying out the game as an entertainment industry, generating huge revenue. Therefore, the Director of Income-tax (Exemptions) had rightly cancelled the registration under section 12AA of the Act.
Tamil Nadu Cricket Association v. DIT(E) (2013) 22 ITR 673 / 57 SOT 439 (Chennai)(Trib.)

S.12AA : Procedure for registration – Institution incorporated under section 25 of Companies Act and engaged in facilitating literacy programmes, rejection of application based on assumption, order set aside with direction to grant registration. [S. 2(15)].
The objects of the assessee-company were providing education and facilitating social and economic empowerment, economic development programs, literacy programs, training programs for villagers and downtrodden people. It applied for registration under section 12AA of the Act. The Director of Income-tax (Exemptions) rejected the application on the ground that the objects and activities of the assessee were not inconformity with the definition of charitable purpose under section 2(15) and hence did not qualify for registration under section 12AA of the Act. On appeal,the Tribunal held that rejection of registration by the Director of Income-tax (Exemptions) was based on assumption. The fact that the assessee had been incorporated under section 25 of the Companies Act, 1956 showed that it had been formed for promoting charity or any other useful object and intended to apply its profits, if any or other income in promoting its objects. In other words, it was a non-profit earning organisation. Therefore, the order of the Director of Income-tax (Exemptions) was to be set aside with a direction to grant registration to the assessee under section 12AA.
Social Pedia Knowledge Foundation v. DIT(E) (2013) 141 ITD 398 / 22 ITR 238 / 154 TTJ 780 / 87 DTR 412 (Chennai)(Trib.)

S.12AA : Procedure for registration – Registration is condition precedent for claiming exemption [Ss.10(23C), 11]
Tribunal held that grant of registration under section 12AA is a condition precedent for claiming exemption under section 11. (AY. 2007-08)
Manas Sewa Samiti v. Add. CIT (2013) 55 SOT 217 (Agra)(Trib.)

S.13 : Denial of exemption – Personal benefit – Separate accounts [S.11]
Assessing Officer denied exemption on the grounds that expenses of office rent and electricity bills paid by Trust was for personal benefit of President/Secretary of Trust. It was found that the President and Secretary of the Trust were providing voluntary services to trust for which they did not charge any fee/remuneration and office at same premises of resident saved expenditure on conveyance. Furthermore, electricity charge was meagre. Since separate account had been maintained for paying genuine rent and electricity charges, deduction was to be allowed on said expenditures and exemption was to be granted to trust. (AY.2002-03)
CIT v. Foundation For Social Care (2013) 218 Taxman 392 / 94 DTR 298 / 37 Taxmann.com 389 (All.)(HC)

S.13 : Denial of exemption – Interest-free loans – Violation of conditions [S.12AA]
Where assessee-society provided interest-free loans to its associate societies, which were registered under section 12AA, providing of such loan did not violate provisions of section 13(3), and, thus, exemption under section 11 could not be denied to assessee.(AY. 2006-07)
CIT v. Maa Vaishnav Education Society (2013) 91 DTR 166 / 218 Taxman 152 (Mag.) (MP)(HC)

S.13 : Denial of exemption – Leasehold property – Lessee constructing the property – Denial of exemption was not justified on the presumptions that the trustees may be benefited after expiry of lease period of 29 years

Assessee-trust was running an educational institution. It took land on lease which belonged to two of its trustees. A registered lease deed was executed for a period of 29 years on monthly rent of ` 1000. Assessing Officer noted that assessee had incurred huge expenditure on construction of a building on said leasehold property. According to Assessing Officer, after expiry of period of lease, assessee might choose not to remove constructions which would directly benefit lessors who were two trustees. He, thus, did not grant exemption to assessee-trust and brought to tax entire income. Tribunal opined that expenditure made on construction of building was to be treated as application of income of trust and thus, section 13(1) did not apply. Whether since in registered lease deed, there was no stipulation that construction made on leased land would become property of lessor after expiry of term of period of lease and it was always open to assessee to remove constructions, no benefit would directly enure to trustees. Therefore, impugned order of Tribunal was to be upheld.
CIT v. Shri Nathji Education & Cultural Trust (2013) 219 Taxman 71 (Mag.) (All.)(HC)

S.13 : Denial of exemption – If Revenue is not able to establish that the payment made to related person / concern mentioned in section 13 is excessive or unreasonable – Exemption under section 11 cannot be denied [S.11]
Where the assessee took on lease premises belonging to a associate / related concern wherein the concern also transferred to the assessee its students and also the teaching staff, on assessee agreeing to pay rent as per the lease agreement and royalty for using the name of the related concern being 20% of the total fees received from the students on roll. There was no finding that the amount paid by the assessee was excessive / unreasonable. Exemption under section 11 cannot be denied to the assessee invoking provisions of section 13(1)(c) of the Act. (AYs. 1998-99 to 2002-03)
Chirec Education Society v. ADIT(E) (2013) 92 DTR 39 / 219 Taxman 133 (Mag) (AP)(HC)

S.13 : Denial of exemption-Investment restrictions r.w.s. 12A – Registration – Trust or institution – No finding that funds of society were misappropriated or were not utilized for its objects – Exemption cannot be denied. [Ss.11, 12A, 80G(5)]
The assessee society is registered u/s. 12A and u/s.80G(5) as well as recognised as an institution established for charitable purposes u/s. 10(23C)(iv). The AO denied exemption u/s. 11 on the grounds that (i) the assessee had filed audit report in Form No. 10 belatedly (ii) the President and Treasurer of the assessee had occupied a building, which was owned by the assessee's sister concern at a nominal rent (iii) the Secretary of the assessee was enjoying car and telephone facilities at the cost of the said sister concern, and (iv) the assessee was passing on its huge fund to the sister concern every year. The CIT(A) confirmed the denial. However, the Tribunal held that the assessee is entitled to exemption u/s. 11.
On appeal by the department the High Court observed that there was no basis for assuming that the amounts passed on to other organizations were in nature of donations/grants of which the members of the assessee would be beneficiaries. The establishment expenditure incurred at the head office was only a fraction of the total of such expenditure, a major portion of which had been incurred on the units carrying on charitable activities. Further the beneficiaries, i.e., the President and the Treasurer of the assessee, who got the accommodation, were also the office bearer of the sister concerns. Thus if at all there is a case of providing benefit to the persons of prohibited category, then it should be invoked in the case of the sister concern and certainly not in the case of the assessee. The High Court also observed that the registration of the assessee was not cancelled. Accordingly, the High Court dismissed the departmental appeal.(AYs. 1994-95 to 1998-99).
CIT v. Bharat Sewa Sansthan (2013) 217 Taxman 337 / 96 DTR 467 (All.)(HC)

S.13 : Denial of exemption – Investment restrictions – Interest – Free loan to associate societies. [Ss.11, 12AA]

The assessee-society provided interest-free loans to its associate societies, which were registered under section 12AA. The Court held that, providing of such loan did not violate provisions of section 13(3), and, thus, exemption under section 11 could not be denied to assessee. The Court also considered that where interest-free loans provided by assessee-societies to its associate societies did not violate provisions of section 13(3), exemption under section 11 could not be denied to assessee society. (AY.2006-07)
CIT v. Maa Vaishnav Education Society (2013) 91 DTR 166 (MP)(HC)

S.13 : Denial of exemption – Investment restrictions – Reimbursement of expenses on mobile & telephone by trust there is no violation [Ss.11, 13(1)(c)]
The assessee made the payment on account of telephone expenses and in fact it was reimbursement of expenses incurred for the purposes of trust. The Tribunal held that in absence of any contrary material brought on record, we find no infirmity in the order of CIT(A) deleting the disallowance on account of telephone and mobile expenses. Since expenses are allowed, there is no violation of provisions of S.13(1)(c) of the Act.
Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 / (2014) 61 SOT 47 (Pune)(Trib.)

S.13 : Denial of exemption – Investment restrictions – Expenditure on mercedez car and depreciation on mercedez car cannot be held to be violation of provision of section 13(1)(c) [S.11]
In earlier and later years, no disallowance of expenditure and depreciation on mercedez car has been made by the Assessing Officer. The Tribunal held that in view of rule of consistency and in absence of any adverse material before the Assessing Officer to take a contrary view we find no justification on the part of Assessing Officer and CIT(A) to hold that there is violation of provision of section 13(1)(c) and the Tribunal directed the Assessing Officer to allow the expenditure claimed and hold that there is no violation of provision of section 13(1)(c).
Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 / (2014) 61 SOT 47 (Pune)(Trib.)

S.13 : Denial of exemption-Investment restrictions – Advertisement expenses no violation of provision of section [S.11]
Tribunal held that similar expenses were allowed in the past and no part of the advertisement expenses should have been disallowed especially when there is no dispute about the genuineness of expenditure. There is no violation of provision of 13(1)(c) and Tribunal directed the Assessing Officer to allow the entire amount of advertisement expenditure as allowable expenditure.
Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 / (2014) 61 SOT 47 (Pune)(Trib.)

S.13 : Denial of exemption – Investment restrictions – Maintenance expenses of flats there is no violation of provision of 13(1)(c) [S.11]
Tribunal held that the Department has accepted the same expenditure on maintenance of flats from A.Ys. 2000-01 to 2002-03. Thus disallowance of expenses on maintenance of flats could not be made in view of rule of consistency alone. The expenditure would have been much more if the guests had stayed in hotel and in the absence of any material brought to our notice against the order of CIT(A) we find no infirmity in the order of CIT(A) and accordingly uphold the same. (AY. 2006-07)
Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 (Pune)(Trib.)

S.13: Denial of exemption-Investment restrictions- Advancing interest free loan to Dr. D.Y. Patil Education Society is no violation of provisions of 13(1)(d) [S.11]

Tribunal held that advancing loan by the assessee trust to another charitable trust is neither a deposit nor an investment and therefore there is no violation of provisions of S.13(1)(d) of the Act.
Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 / (2014) 61 SOT 47 (Pune)(Trib.)

S.13 : Denial of exemption – Investment restrictions – Remuneration to trustees and relatives – Disallowance under section 40A(2)(b) was deleted-there is violation of provision of 13(1)(c) [S.11]
The assessee paid remuneration to trustees and their relatives. The Tribunal held that in past also such type of payments were made and it was accepted by the Department from A.Ys. 2000-01 to 2002-03 and in the absence of any contrary material brought to our notice against the finding given by the CIT(A), we do not find any infirmity in the order of learned CIT(A) deleting the disallowance made by the Assessing Officer under section 40A(2)(b). Since the disallowance has been deleted by us, therefore, we hold that there is no violation of provision of 13(1)(c) of the Act.
Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 / (2014) 61 SOT 47 (Pune)(Trib.)

S.13 : Denial of exemption – Investment restrictions – Inflated cost of construction of building. [S.142A]
The assessee had constructed a building, for which the Assessing Officer referred to DVO to estimate the cost of construction. The Assessing Officer considered difference in amount claimed and estimated to have been siphoned out & thereby violating section 13(1)(c). The Assessing Officer withdrew exemptions under section 11 & 12. The CIT(A) upheld the order of the Assessing Officer. The Tribunal allowing the appeal of the assessee held:
The revenue could not bring on record any cogent evidence indicating that amount in construction had been availed by the managing trustee for his personal benefit. The Tribunal held that as there was no violation of Section 13, the Assessing Officer's order was to be set aside. (AY. 2006-07 to 2008-09).
Shri Amol Chand Varshney Sewa Sansthan v. Addl. CIT (2013) 142 ITD 658 / 25 ITR 211 / 95 DTR 72 (Agra)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – No expenditure earned – Material to establish – Disallowance was not justified. [Rule 8D]
Since AO instead of proceeding to collect material or evidence to determine expenditure incurred by assessee, relied upon rule 8D, and applied it as a formula, disallowance was to be deleted when the assessee had claimed that he had not made any expenditure on earning dividend income. Officer substituting application of Rule 8D for section 14A(2) is not permissible. A.Y. 2007-08, to 2009-10)
CIT v. Deepak Mittal (2013) 219 Taxman 314 / (2014) 361 ITR 131 (P&H)(HC)
CIT v. Amrit Sagar Mittal (2013) 219 Taxman 314 / (2014) 361 ITR 131 (P&H)(HC)

S.14A : Disallowance of expenditure – Exempt income – Interest bearing funds – Failure of Revenue to establish – No addition could be made [S. 10(34)]
Since it was found that assessee had not used interest bearing borrowed funds for purpose of investment in equity shares as interest-free funds were available with assessee and since revenue could not establish that assessee had incurred any expenses for earning dividend income from amount borrowed, no addition could be made invoking provision of section 14A. (AY.2004-05)
CIT v. Gujarat Industrial Development Corporation Ltd. (2013) 218 Taxman 142 (Guj.)(HC)

S.14A : Disallowance of expenditure – Exempt income – Expenditure on acquiring shares out of "commercial expediency" & to earn taxable income cannot be disallowed [Rule 8D]

The assessee borrowed funds and invested ` 6 crore in shares of subsidiary companies. It claimed that the said subsidiaries were Special Purpose Vehicles (SPVs) formed out of “commercial expediency” in order to obtain contracts from the NHAI and that the SPVs so formed engaged the assessee as contractor to execute the works awarded to them (i.e. SPVs) by the NHAI. It was pointed that the turnover from the execution of the contracts was shown in the P&L A/c. It was claimed that the interest attributable to the investments made by the assessee in the SPVs could not be disallowed u/s.14A read with Rule 8D because it could not be termed as expense / interest incurred for earning exempted income. The CIT(A) and Tribunal (order attached) upheld that assessee’s claim and held that as the investments in the shares were made out of “commercial expediency” the expenditure incurred for that purpose could not be disallowed u/s 14A and Rule 8D. On appeal by the department to the High Court HELD dismissing the appeal:
This is merely a question of fact and does not involve any question of law much less a substantial question of law, as the Tribunal held that the expenses which have been claimed by the assessee were not towards the exempted income.
CIT v. Oriental Structural Engineers Pvt. Ltd. (2013) 35 taxmann.com 2010 / 216 Taxman 92 (Mag.) (Delhi)(HC)

S.14A : Disallowance of expenditure – Exempt income – Sufficiency of own funds –Estimated disallowance of 5 lakh was held reasonable [Ss.10(33), R.8D]
When the assessee had sufficient funds which were more than amount invested for earning dividend, disallowance in respect of interest expenditure was not permissible. Where on facts section 14A was not applicable, there is no question of determining expenditure on reasonable basis. Assessee’s agreement to disallowance of 5 lakhs for administrative expenses was held reasonable. (AY. 2004-05)
CIT v. Gujarat State Fertilizers and Chemicals Ltd. (2013) 358 ITR 323 / 217 Taxman 343 / (2014) 101 DTR 175 (Guj.)(HC)

S.14A : Disallowance of expenditure – Exempt income – No discrepancy in assessee’s working – No error in not remitting the matter to AO [R.8D]
The assessee offered substantial amount of expenses for earning non-taxable income and no error or discrepancy was pointed out before Tribunal for making disallowance. Hence, there was no error by the Tribunal in not remitting matter to Assessing Officer for fresh consideration. (AY. 2007-2008)
CIT v. Consolidated Photo and Finvest Ltd. (2012) 211 Taxman 184 / (2013) 358 ITR 310 (Delhi)(HC)

S.14A : Disallowance of expenditure – Exempt income – Expenditure not connected with exempt income disallowance cannot be made
The Tribunal held that expenses which had been claimed by assessee were not towards exempted income. Held in view of factual finding recorded by Tribunal, disallowance was to be limited.(AY.2008-09)
CIT v. Oriental Structural Engineers (P.) Ltd. (2013) 216 Taxman 92 (Mag)(Delhi)(HC)

S.14A : Disallowance of expenditure – Exempt income – Bifurcation of expenses –Proportionate disallowance is permissible [Income-tax Rules,1962, Rule 8D]
Assessee had exempt income arising out of Mutual Fund investment. Since no bifurcation was made the Assessing Officer disallowed the total expenditure under section 14A. Tribunal held that in the absence of rule 8D, no disallowance can be made. On appeal the Court held that as the amount involved was not very large, issue was not considered on merits, however it could not be said that in absence of rule 8D, no disallowance can be made u/s.14A by proportionate bifurcation of expenditure for taxable income and exempt income.
CIT v. Sintex Industries Ltd. (2013) 215 Taxman 148 (Mag.)(Guj.)(HC)

S.14A : Disallowance of expenditure – Exempt income – Sufficient interest free funds – Presumption

Where the assessee had sufficient interest free funds to meet its tax free investments yielding exempt income, it could be presumed that such investments were made from interest free funds and not loaned funds and, thus no disallowance u/s.14A being warranted. Ratio in case of *CIT .v. Reliance Utilities & Power Ltd (2009) 313 ITR 340 (Bom.)(HC)* is followed. (AY. 2003-04)

CIT v. UTI Bank Ltd. (2013) 215 Taxman 8 (Mag.)(Guj.)(HC)

S.14A : Disallowance of expenditure – Exempt income – Dividend from foreign subsidiaries – Indian subsidiaries – Interest free funds are more – Disallowance cannot be made

Where investment was made by the assessee in foreign subsidiaries, disallowance of interest expenditure under section 14A was not justified since dividend income from foreign subsidiaries, is taxable in India. Where the assessee had own interest free funds many times over the investment made in Indian subsidiaries and further, there was no direct nexus between interest bearing borrowed funds and such investment, no disallowance of interest expenditure could be made under section 14A.(AY. 2005-06, 2006-07)

CIT v. Suzlon Energy Ltd. (2013) 215 Taxman 272/93 DTR 50 (Guj.)(HC)

Editorial: Tribunal order in Suzlon Energy Ltd v. Dy. CIT 20 ITR 391(Ahd.)(Trib) is affirmed.

S.14A : Disallowance of expenditure – Exempt income – Investment from own funds – No disallowance

The CIT(A) recorded a finding of fact that dividend earned on shares by assessee was from its investments in shares out of its own funds and consequently question of invoking S. 14A to disallow expenditure would not arise. Since the revenue did not challenge this finding of fact before the Tribunal, no question of law arose for consideration before High Court. (AY. 2002-03)

DIT v. BNP Paribas SA (2013) 214 Taxman 548 (Bom.)(HC)

S.14A : Disallowance of expenditure – Exempt income – No expenditure was incurred for earning exempt income, disallowance cannot be made.

High court up held the view of Tribunal wherein the finding has been recorded that no expenditure was incurred by the assessee to earn the dividend income, hence the disallowance under section 14A was not justified. (AY. 2001-02)

CIT v. Glenmark Pharmaceutical Ltd. (2013) 351 ITR 359 / 85 DTR 169 (Bom.)(HC)

S.14A : Disallowance of expenditure – Exempt income – Assessee using own funds for investments in shares and using borrowed funds entirely for its business purposes – No expenditure by way of interest was incurred in respect of investments disallowance was not justified.

Held, dismissing the appeal, that the assessee had sufficiently explained that the loan was obtained when majority of its investment in tax-free securities were already made. The assessee had demonstrated that it had other sources of investment and that, therefore, no part of the borrowed funds could be stated to have been diverted to earn tax-free income. When the Commissioner (Appeals) and the Tribunal had on the facts found that the assessee did not invest the borrowed funds for earning the tax-free income, the invocation of the provisions of section 14A for taxing such interest was not justified.

CIT v. Gujarat Power Corporation Ltd. (2013) 352 ITR 583 (Guj.)(HC)

S.14A : Disallowance of expenditure – Exempt income – Financing of working capital.

Matter was remanded with a direction to exclude bank loans dedicated towards financing working capital for the purpose of s. 14A disallowance. (AY. 2007-08)

Kunal Corporation v. ACIT (2013) 28 ITR 277 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Dividend – Not recording of satisfaction – No disallowance can be made [R. 8D]

Where Assessing Officer neither pointed out proximate connection of administrative or other expenses not apportioned by assessee for earning of exempt dividend income, nor recorded any satisfaction with regard to accounts of assessee that claim of expenditure incurred in relation was exempt income was incorrect, no disallowance could be made under section 14A, read with rule 8D, in excess of amount already disallowed by assessee (AY. 2009-10)

Sesa Goa Ltd. v. JCIT (2013) 60 SOT 121(URO) / 38 taxmann.com 34 (Panaji)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Without recording reasons disallowance of claim was not valid [R.8D]

Where claim of assessee that only Rs. 15000 was incurred for earning exempt income of Rs. 1.58 crores, was rejected by AO without recording any reason as to why same was not found satisfactory, excess disallowance was not justified. (AY.2008-09)

Shriram Properties (P.) Ltd. v. ACIT (2013) 60 SOT 75 (URO) (Chennai)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Interest – Remitted back for reconsideration [R.8D]

Initial onus to state its case regarding disallowance under section 14A is on assessee. Since expenditure is independent of income, disallowing 10 per cent of dividend income, only because it was accepted in previous years, was not acceptable. Rule 8D could not be uniformly applied without referring to accounts of assessee. Where assessee's balance sheet revealed that there was complete absorption of borrowed funds for specified purposes, issue of disallowance under section 14A was to be remitted back for reconsideration. (AY.2008-09).

AF L (P.) Ltd. v. ACIT (2013) 60 SOT 63 (URO) (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Disallowance at 0.5 per cent towards expenses other than interest – Held to be justified [Rule 8D]

Assessee received exempt dividend income but he did not claim any expenses to be attributable to earn said income. Assessing Officer invoked provisions of rule 8D and made disallowance at 0.5 per cent towards expenses other than interest. Since disallowance had been computed as per mandate of rule 8D,disallowance was sustainable. (AY. 2008-09)

ITO v. RBK Share Broking (P.) Ltd. (2013) 60 SOT 61(URO) / 37 taxmann.com 128 / (2014) 97 DTR 27 / 159 TTJ 16 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Disallowance applies to tax – Free securities held as stock-in-trade [Rule 8D]

The assessee claimed that as it was engaged in the business of trading in shares, its main object is to earn profit on purchase and sale of shares and not to earn dividend income from such shares. It claimed that the accrual of tax-free dividend on such shares was merely incidental to the holding of shares as stock-in-trade and that no disallowance could be made u/s 14A and Rule 8D. It also claimed that though the assessee had not incurred any direct or indirect expenditure to earn the said dividend, the AO had made the disallowance on a presumptive basis. The Division Bench referred the dispute to a Third Member in view of the difference of opinion between the Benches. Before the Third Member, the assessee relied on CCI Ltd. 71 DTR (Kar) 141, India Advantage Securities, Yatish Trading etc in which the law had been laid down that s. 14A & Rule 8D does not apply to securities held as stock-in-trade. The department relied on *Godrej & Boyce Manufacturing Co. v. Dy. CIT (2010) 328 ITR 81 (Bom.)* (where it was held that Rule 8D is mandatory) and *ITO v. Daga Capital Management (P) Ltd. (2009) 117 ITD 169 (Mum) (SB)* (where it was held that s. 14A applies to stock-in-trade). HELD by the Third Member:

It is accepted by both parties that the assessee is a dealer in shares and that the shares were held by it as stock-in-trade. The issue under appeal is squarely covered by the principles laid down in *Godrej & Boyce, Dhanuka & Sons v. CIT (2011) 339 ITR 319 (Cal), American Express Bank and Damani Estates & Finance* in which the issue has been elaborately considered. The argument that the judgement of the Karnataka High Court in CCI Ltd is the solitary High Court judgement on the point and it should be followed is not correct because the issue has also been considered by the Calcutta High Court in Dhanuka & Sons. Also, while CCI Ltd. has not considered the jurisdictional High Court judgement in Godrej & Boyce, Dhanuka & Sons has duly considered Godrej & Boyce in taking the view that s. 14A/ Rule 8D applies to shares held as stock-in-trade. Accordingly, disallowance u/s. 14A can be made in conformity with law even where dividend income has been earned on shares held as stock-in-trade. (AY. 2008-09)
D.H. Securities Pvt. Ltd. v. DCIT (2014) 146 ITD 1/99 DTR 298 / 160 TTJ 393 / 31 ITR 381 (TM)(Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Onus is on AO to show how assessee's claim is incorrect. AO has to show direct nexus between expenditure & exempt income. Disallowance cannot be made on presumptions [Rule 8D]
In AY 2009-10 the AO made a disallowance of ` 58 lakhs u/s.14A read with Rule 8D. The assessee claimed that the disallowance was not permissible on the grounds that (i) the AO had not recorded any satisfaction as to the correctness of the assessee's claim that it had not incurred expenditure of more than 2% of the dividend income earned, (ii) it had not made any fresh investment during the year and the dividend was received from an unlisted company out of an investment made in an earlier year & (iii) the AO had not pointed out any direct nexus between the interest expenditure incurred and the exempt income earned during the year. The CIT(A) accepted the claim & restricted the disallowance to ` 50,000 On appeal by the department to the Tribunal HELD dismissing the appeal:
(i) A disallowance u/s 14A read with Rule 8D cannot be made without recording satisfaction as to how the assessee's calculation of s. 14A disallowance is incorrect. It is a prerequisite that before invoking Rule 8D, the AO must record his satisfaction on how the assessee's calculation is incorrect. The AO cannot apply Rule 8D without pointing out any inaccuracy in the method of apportionment or allocation of expenses. Further, the onus is on the AO to show that expenditure has been incurred by the assessee for earning tax-free income. Without discharging the onus, the AO is not entitled to make an ad hoc disallowance. A clear finding of incurring of expenditure is necessary. No disallowance can be made on the basis of presumptions, (ii) the mere fact that some interest expenses were incurred cannot be the reason for disallowance unless the nexus between the expense and the exempt income is established, (iii) the assessee did not make any fresh investment during the year which could generate exempt income in forthcoming years, (iii) the exempt income earned during the year comprised of dividend received from an investment made in an earlier year, (iv) the interest expenditure of the year is not directly related to the earning of exempt income & (v) the AO has not pointed out any direct nexus between the interest expenditure incurred and the exempt income earned during the year. (ITA No. 305/Mds/2013 dt. 7-11-2013. (AY. 2009-10,)
DCIT v. Allied Investment Housing P. Ltd. (Chennai)(Trib.) www.itatonline.org

S.14A : Disallowance of expenditure – Exempt income – Interest on borrowed amounts – Disallowance on notional basis was not justified [R. 8D of Income-tax Rules, 1962]
In the absence of establishment of clear cut nexus between the amount advanced to sister concerns and the interest incurred on borrowed amounts, disallowance of notional interest on ground of non-utilization for purpose of business is not justified. [AY. 2008-09]
SSPDL Ltd. v. DCIT (2013) 59 SOT 68(URO) (Hyd.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Export – oriented undertakings – Loss in one unit – Set off of loss – Provision is not attracted in case of unit suffering loss [Ss.10B, 70]

Provisions of section 14A are not attracted in the case of the unit suffering losses eligible for deduction under section 10B and further the assessee is entitled to set off of loss of STP unit under section 10B against other business income. (AY.2008-09)
Sandoz P. Ltd. v. DCIT (2013) 25 ITR 347 / 145 ITD 551 / 96 DTR 401 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Investment in shares of foreign company – No disallowance can be made [S.2(22A)]
Tribunal held that definition of domestic company as per section 2(22A) does not extend to foreign company. Therefore, interest in relation to investment in shares of foreign companies could not be disallowed under section 14A. (AY. 2001-02)
ITO v. Strides Arcolab Ltd. (2012) 138 ITD 323 / (2013) 153 TTJ 181 / 85 DTR 128 (Mum.)(Trib.)

S.14A : Disallowance of Expenditure – Exempt income – Matter remanded [Rule 8D]
The A.O. disallowed ` 5.83 crores being proportionate expenditure on exempted income under section 14A of the Act. Commissioner (Appeals) has directed the A. O. to work out the disallowance under section 14A in terms of rule 8D of the Income-tax Rules. The Honorable ITAT held that the Assessment Year for appeal is 2007-08 and hence the provision of Rule 8D will not be applicable to the same Assessment Year. (AY. 2007-08)
State Bank of Hyderabad v. Dy. CIT (2013) 58 SOT 278 (Hyd.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Recording of satisfaction is mandatory – Matter restored [Rule 8D]
Where A.O. was not satisfied with correctness of claim made by assessee that no expenditure was incurred in relation to such income which did not form part of total income, he could invoke section 14A only after recording satisfaction on that issue with regard to accounts of assessee. Disallowance u/s. 14A r.w. Rule 8D(2)(iii) can be computed only by taking into consideration average value of investment appearing in balance sheet as on first and last day of previous year from which income not falling within total income has been earned. A.O. had taken into consideration entire investment made by assessee during relevant year for calculation of disallowance under rule 8D, matter was to be restored for re computation. (AY.2008-09)
REI Agro Ltd. v. Dy. CIT (2013) 144 ITD 141 / 35 Taxmann.com 404 (Kol.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Share application money
Assessee-company was engaged in business of investment in shares and securities earned dividend income, which was exempt. Assessee had itself made a disallowance u/s.14A. Authorities below worked out disallowance in terms of rule 8D and included amount of 'share application money' as a part of investments yielding tax-free income. The Tribunal held that, 'share application money', only represents amount/s paid by way of application for allotment of shares. Cannot be regarded as an investment in shares, or an asset (or asset class) yielding tax-free income, and neither is it capable of yielding any tax-free income. Share application money to be excluded in working out disallowance u/r. 8D. Matter remitted to AO to verify assessee's claim. (AY. 2008-09)
Rainy Investments Pvt. Ltd. v. ACIT (2013) 56 SOT 61(URO) (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Reasonable disallowance – Income from tax-free and infrastructure bonds and dividend
Disallowance of 2% of expenditure following reasonable computation method was held to be justified. (AY. 1999-2000, 2000-01, 2001-02, 2004-05, 2005-06, 2006-07)
Karur Vysya Bank Ltd. v. ACIT (2013) 25 ITR 731 / 60 SOT 148 (URO) (Chennai)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Shipping company – Tonnage tax scheme – AO has to exam one accounts of assessee first and then if he is not satisfied with

correctness of claim, only he can invoke rule 8D – Satisfaction is mandatory – When no expenditure was incurred for earning exempted income-Disallowance can not be made [S.10(34), 115VA, Rule 8D]

Since the AO embarked upon computing disallowance under rule 8D without considering the assessee's claim, the disallowance under section 14A could not stand. The assessee had not directly incurred any expenditure for earning the exempt income and the Assessing Officer had not recorded any satisfaction with reference to the accounts of the assessee or claim that no expenditure was incurred. The assessee offered most of the income under the tonnage tax scheme and the remaining expenditure was for earning taxable non-tonnage tax income. Therefore, the question of invocation of rule 8D for disallowing the expenditure under section 14A on presumptive basis does not arise. (AY. 2008-09)

Raj Shipping Agencies Ltd. v. Add. CIT (2013) 24 ITR 249 / (2014) 146 ITD 277 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – 2% of exempt income to be disallowed towards operating expenses [S. 10(15)(iv)(h)]

Capital and free reserves are far in excess of amount invested in interest free securities. No disallowance on account of interest paid for making investment in such securities. 2% of exempt income to be disallowed towards operating expenses. (AY.2001-02)

Credit Lynonnais (Through their successor: Calyon Bank) v. ADIT (2013) 26 ITR 51 / 144 ITD 644 / 96 DTR 261 / 158 TTJ 826 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Short term gain – Rule 8D does not apply to short-term investments gains from which is taxable [Rule 8D]

Some of the investments made by the assessee are short term. Since assessee is paying capital gains tax on short term investments, Rule 8D will not apply on them and the AO is directed to recompute disallowance u/s 14A read with Rule 8D after excluding short term investments. (AY.2008-09)

Sundaram Asset Management Co. Ltd v. DCIT (2013) 145 ITD 17 (Chennai)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Interest – Interest on loans for specific taxable purposes to be excluded [Rule 8D]

In AY 2009-10, the assessee contended that in computing the disallowance to be made u/s 14A and Rule 8D(2)(ii), the interest on bank loans and term loans taken for specific taxable purposes had to be excluded. The AO rejected the claim though the CIT(A) accepted it. On appeal by the department to the Tribunal, HELD:

Rule 8D(2)(ii) refers to expenditure by way of interest which is not directly attributable to any particular income or receipt. If loans have been sanctioned for specific projects/expansion and have been utilized towards the same, then obviously they could not have been utilized for making any investments having tax-free incomes and have to be excluded from the calculation to determine the disallowance under Rule 8D(2)(ii) (Champion Commercial Co. Ltd (ITAT Kol.) followed) (AY. 2009-10)

ACIT v. Best & Crompton Engineering Ltd. (2013) 60 SOT 53 (URO) (Chennai)(Trib.) www.itatonline.org.

S.14A : Disallowance of expenditure – Exempt income – Shares held as stock-in-trade – In arriving at the disallowance u/r.8D, the amount as per Rule 8D(2)(ii) qua shares held as stock-in-trade would be restricted to 20% thereof. [Rule 8D]

In AY 2008-09, the assessee, a trader cum investor in shares, offered ` 10 lakhs as disallowance u/s. 14A. It claimed that the amount invested in shares was funded by its own, non-interest bearing funds and that there was no direct expenditure relatable to the investments. The AO applied Rule 8D and computed the disallowance at Rs. 1.40 crore. On appeal, the CIT(A) upheld the stand of the assessee as to the quantum of the disallowance. On appeal by the department, the Tribunal had to consider (i) whether s.14A applies to shares held as stock-in-trade?, (ii) whether it could be said that the expenditure having been incurred for the share trading business, no expenditure can be said to be in relation to the dividend income?, (iii) whether it can be argued that the investment in tax-free securities is made out of own funds and no disallowance of interest on borrowed funds can be made?, (iv) whether Rule 8D(2)(ii) which deals with interest expenditure not directly attributable to any particular income or receipt requires modification if the dominant purpose is to earn share trading income?, (v) Whether Rule 8D(2)(iii) which prescribes the ratio in respect of indirect expenditure can be modified if the dominant purpose is to earn share trading income? & (vi) whether the allowance for depreciation u/s 32 has to be excluded in computing the disallowance? HELD by the Tribunal:

(i) S. 14A gets attracted on incurring of expenditure in relation to tax-exempt income. The purpose for which the shares are purchased and held would not impact the applicability of s. 14A. S. 14A comes into play irrespective of the head of income (on account of it arising qua a trading asset) under which the income is assessable. The fact that the share trading business yields both taxable income in the form of share trading profit and tax-exempt income by way of dividend income makes no difference to the applicability of s.14A. Accordingly, s.14A applies to shares held as stock-in-trade;

(ii) The argument that all expenditure has been incurred for the share trading business and that there is no additional expenditure incurred for earning dividend is not acceptable because though the expenditure is incurred for the purpose of the business of share trading, the said business yields taxable and non-taxable income. It is the integral activity of purchase and holding the shares which generates two separate streams of income. Accordingly, some of the expenditure has to be attributed to the dividend income;

(iii) The argument that investment in shares yielding tax-free dividend income has been made out of own funds and so no interest expenditure has been incurred in relation to the dividend income is not acceptable. No presumption of investment of own funds, on ground of its sufficiency, on the basis of *CIT v. Reliance Utilities and Power Ltd. (2009) 313 ITR 340 (Bom.)* can be drawn;

(iv) If Rule 8D(2)(ii) which quantifies the interest on the investments, income from which is not taxable, on a proportionate basis, is applied literally, it will lead to absurd results because then the entire interest relatable to the average share holding will be attributed to the tax exempt dividend income even though the shares are bought and held primarily for share trading income. Rule 8D(2)(ii) needs to be scaled down by bifurcating the expenditure so arrived at between the tax-free and the taxable incomes. Given that the dominant objective of the share holding is to earn share trading income, an ad hoc ratio of 20% toward tax-exempt dividend income will be reasonable. Accordingly, in arriving at the disallowance u/r 8D, the amount as per Rule 8D(2)(ii) qua shares held as stock-in-trade would be restricted to 20% thereof;

(v) Rule 8D(2)(iii) which prescribes the ratio of indirect expenditure required to support an investment need not be modified because though the expenditure prescribed for disallowance is based only on one variable, i.e. the average value of investments, the prescribed allocation ratio of 0.5% of the investment value qua indirect expenditure is very nominal and not harsh;

(vi) Depreciation – an economic and accounting concept – statutorily recognized and provided, is only a charge on capital account, i.e., a capital expenditure. It has to be excluded in computing the s. 14A disallowance. (AY. 2008-09)

DCIT v. Damani Estates and Finance P.Ltd.(2013) 25 ITR 683 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Interest expenditure has to be netted against interest income and only the difference, if any, can be considered for disallowance [Rule 8D]

In AY 2008-09, the assessee invested Rs. 95 lakhs in shares on which it earned Rs.300 as dividend. The AO applied Rule 8D and made a disallowance of Rs. 15 lakhs. The assessee claimed that no expenditure had been incurred to earn the dividend income on the basis that while the interest expense was Rs. 1.83 crore, the interest income was Rs. 1.86 crore and there was a net surplus interest income of Rs. 3.79 lakh. The CIT(A) held that the AO had not established a nexus between the expenditure

incurred and the tax free income and that as the assessee had net positive interest income, there could be no disallowance of the interest expenditure u/s 14A read with Rule 8D. He sustained the disallowance at 0.5% of the average investment. On appeal by the department HELD dismissing the appeal:
No nexus has been established by the AO between the expenditure incurred by the assessee and the tax free income earned by him. Further, as the interest income was more than interest expense and the assessee was having net positive interest income, the interest expenditure cannot be considered for disallowance u/s 14A and Rule 8D (Trade Apartment (ITAT Kol.) & Morgan Stanley (ITAT Mum)(ITA No. 2282/Ahd/2012, dt. 30-3-2012 (AY.2008-09)
ITO v. Karnavati Petrochmem Pvt. Ltd. (Ahd.)(Trib.) www.itatonline.org.

S.14A : Disallowance of expenditure – Exempt income – Stock-in-trade – Disallowance of interest expenses was not justified – Some administrative expenses had to be allocated.
Tribunal held that in view of the fact that shares in which the borrowed money was invested are trading shares, disallowance of interest under section 14A cannot be made in relation to stock-in-trade but the authorized representative conceded that in respect of investment in shares, some administrative expenses have been incurred by the assessee. Therefore, the disallowance was restricted to 25% of the dividend income. (AY. 2007-08)
Oasis Securities Ltd. v. Dy. CIT (2013) 154 TTJ 17 (UO) / 59 SOT 302 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Disallowance under section 14A cannot be made if satisfaction not recorded with reference to A/cs. Under Rule 8D(2)(ii) loans for specific business purposes cannot be included. Under Rule 8D(2)(ii) & (iii) investments which have not yielded income cannot be included. [Income-tax Rules, 1962, Rule 8D]
In AY 2008-09, the assessee invested Rs.103 crores in shares on which it earned tax-free dividends of Rs.1.3 lakhs. The assessee claimed that though its borrowings had increased by Rs.122 crores, the said investments were funded out of own funds like capital and profits. It claimed that no expenditure had been incurred to earn the dividends and no disallowance u/s 14A could be made. The Assessing Officer applied Rule 8D and computed the disallowance at Rs. 4 crore. On appeal by the assessee, the Commissioner (Appeals) reduced the disallowance to Rs. 26 lakh. On cross appeals, HELD by the Tribunal:

(i) When the Assessing Officer does not accept the assessee's claim regarding the non-applicability/ quantum of disallowance u/s 14A, he has to record satisfaction on that issue. This satisfaction cannot be a plain satisfaction or a simple note. It has is to be done with regard to the accounts of the assessee. On facts, as there is no satisfaction by the Assessing Officer, no disallowance u/s 14A can be made [*Balarampur Chini Mills Ltd. v. Dy. CIT (2011) 140 TTJ 73 (Kol.)(Trib.)*] followed;
(ii) Rule 8D(2)(ii) is a computation provision in respect of expenditure incurred by way of interest which is not directly attributable to any particular income or receipt. This clearly means that interest expenditure which is directly relatable to any particular income or receipt is not to be considered under rule 8D(2)(ii). The AO has to show that the interest is not directly attributable to any particular income or receipt. In the assessee's case, the interest has been paid on loans taken from banks for business purpose. There is no allegation that the loan funds have been diverted for making investment in shares or for non-business purposes. The loans are for specific business purposes and no bank would permit the loan given for one purpose to be used for making any investment in shares. Also, the assessee has substantial capital & reserves. Accordingly, the interest on the loans cannot be included in Rule 8D(2)(ii);
(iii) Further, in Rule 8D(2)(ii), the words used in numerator B are "the average value of the investment, income from which does not form or shall not form part of the total income as appearing in the balance-sheet as on the first day and in the last day of the previous year". The Assessing Officer was wrong in taking into consideration the investment of ` 103 crores made

during the year which has not earned any dividend or exempt income. It is only the average of the value of the investment from which the income has been earned which is not falling within the part of the total income that is to be considered. Thus, it is not the total investment at the beginning of the year and at the end of the year, which is to be considered but it is the average of the value of investments which has given rise to the income which does not form part of the total income which is to be considered. The term "average of the value of investment" is used to take care of cases where there is the issue of dividend striping;

(iv) Under Rule 8D(2)(iii), what is disallowable is an amount equal to ½ percentage of the average value of investment the income from which does not or shall not form part of the total income. Thus, under sub-clause (iii), what is disallowed is ½ percentage of the numerator B in Rule 8D(2)(ii). This has to be calculated on the same lines as mentioned earlier in respect of Numerator B in rule 8D(2)(ii). Thus, not all investments become the subject-matter of consideration when computing disallowance u/s 14A read with rule 8D. The disallowance u/s 14A read with Rule 8D is to be in relation to the income which does not form part of the total income and this can be done only by taking into consideration the investment which has given rise to this income which does not form part of the total income. (A.Y. 2008-09)

REI Agro Ltd v. DCIT (2013) 144 ITD 141 / (2014) 98 DTR 339 (Kol.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Onus on assessee to prove that he had not incurred any expenses relating to income not forming part of total income [Income-tax Rules, 1962, Rule 8D]

Assessing Officer had disallowed a sum of Rs.3,05,423/- by applying provisions of section 14A read with rule 8D. On Appeal the Commissioner (Appeals) reduced the disallowance to Rs. 1 lakh on the ground that there is no precise finding given by the Assessing Officer. On appeal Tribunal held that onus lay on assessee to prove that he had not incurred any expenses relating to income not forming part of total income. Since assessee did not file any details of expenditure incurred by him, the order of Commissioner (Appeals) was set aside and that of Assessing Officer restored. (AY.2009-10)

ACIT v. Joe Marcelinho Mathias (2013) 143 ITD 132 / 92 DTR 331 / 156 TTJ 777 (Panji)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Disallowance on reasonable basis to be made [Income-tax Rules, 1962, Rule 8D]

During relevant assessment year assessee had neither invested in securities fetching exempt income nor was any exempt income earned. Assessing Officer, relying on prescription of section 14A read with rule 8D, computed disallowance. Disallowance under section 14A is warranted even if there is no exempt income, disallowance was required on some reasonable basis and not as per rule 8D. (AY. 2006-07)

Stream International Services (P.) Ltd. v. ACIT (2013) 141 ITD 492 / 152 TTJ 553 / 23 ITR 70 / 83 DTR 394 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Applicability of provision was not challenged (Income-tax Rules, 1962, Rule 8D)

Assessee earned exempt dividend income. Assessing Officer invoked section 14A. Once the assessee itself computed the disallowance, instead of challenging the applicability of the provisions, there is no force in the cross-objections. It could not object to its addition to income. (AY. 2009-10)

Dy. CIT v. Vinbros & Co. (2013) 141 ITD 626 (Chennai)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Tribunal order in assessee's own case [S. 10(33)]

The assessee had shown dividend income which was claimed as exempt under section 10(33). The AO, by invoking section 14A, disallowed five per cent of dividend income. Held, since in subsequent

assessment years, the Tribunal, on identical facts, had estimated disallowance at Rs. 2 lakhs, for relevant assessment year also, disallowance was to be restricted to ` 2 lakhs. (AY. 2002-03)
HSBC Securities & Capital Markets (India) (P.) Ltd. v. ACIT (2013) 57 SOT 194 / 21 ITR 445 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Rule 8D disallowance without showing how assessee is wrong is not permissible
In AY 2009-10, the assessee earned tax-free dividend of Rs.32 lakhs on investments that had been made in earlier years. The assessee claimed that as he had not incurred any expenditure to earn the dividend income, no disallowance u/s.14A was permissible. The AO rejected the claim and made a disallowance by applying Rule 8D. The CIT(A) deleted the disallowance on the ground that the AO had mechanically applied Rule 8D to compute the disallowance. On appeal by the department to the Tribunal, HELD dismissing the appeal:
The AO has not brought on record anything which proves that there is any expenditure incurred towards earning of dividend income. The AO has not examined the accounts of the assessee and there is no satisfaction recorded by the AO about the correctness of the claim of the assessee and without the same he invoked Rule 8D. While rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, in relation to exempted income, the AO has to indicate cogent reasons for the same. The AO has not considered the claim of the assessee and straight away embarked upon computing disallowance under Rule 8D of the Rules on presuming the average value of investment at ½% of the total value. This is not permissible (J. K. Investors (Bombay)(followed) (AY.2009-10)
DCIT v. Ashish Jhunjhunwala (Kol.)(Trib.) www.itatonline.org

S.14A : Disallowance of expenditure – Exempt income – Rule 8D cannot be invoked without showing how assessee's claim is wrong
In AY 2008-09, the assessee had PMS investments in shares of Rs.202 crores and other investments on which it earned dividends of Rs.8.14 crores. The assessee claimed that the dividends were received only on a few scrips and computed s. 14A disallowance by identifying specific expenditure at Rs.1.55 crores. The AO, without showing how the assessee's method was wrong, invoked Rule 8D and made a disallowance of Rs. 2.39 crores. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal, HELD reversing the AO & CIT(A):
The condition precedent for the AO to invoke Rule 8D is that he first must examine the accounts of assessee and then record by giving cogent reasons why he is not satisfied with the correctness of the assessee's claim. In the absence of an examination of accounts and the recording of satisfaction, Rule 8D cannot be invoked. On facts, the assessee had itself disallowed interest, Demat charges and administrative expenses. The AO had not examined the accounts or given a finding how the assessee's computation was wrong. Consequently, the invocation of Rule 8D was improper and the disallowance was not permissible (*Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT (2010) 328 ITR 81 (Bom), Maxopp Investment Ltd. & Ors. v. CIT (2012) 247 CTR 162 (Del), Walfort Share and Stock Brokers P. Ltd. (2010) 326 ITR 1 (SC), CIT v. Hero Cycles Ltd. (2010) 323 ITR 518 (P&H), Justice Sam P Bharucha & Pawan Kumar Parameshwar Lal* followed)(AY. 2008-09)
JK Investors (Bombay) Ltd. v. ACIT (Mum.)(Trib.) www.itatonline.org

S.14A : Disallowance of expenditure – Exempt income – For years prior to introduction of rule 8D disallowance of expenses to be on some reasonable basis
The assessee had made investments in past years and no fresh investment in securities was made in the current year, relevant to the assessment year 2006-07 yielding income which was exempt. Tribunal held that expenditure to be disallowed on some reasonable basis. Matter remanded. (AY. 2006-2007)

Stream International Services P. Ltd. v. ADIT (IT) (2013) 23 ITR 70 / 152 TTJ 553 / 141 ITD 492 / 83 DTR 394 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Interest on borrowed capital-Shares not purchased with intention of earning dividends – Interest on money borrowed cannot be disallowed under section 14A – Not disallowable under section 36(1)(iii) [S. 36(1)(iii)]
The Assessing Officer was of the opinion that interest on borrowed funds in so far as it was utilised for acquiring shares and giving share application money could not be considered as business expenditure. A *pro rata* disallowance was made. The Assessing Officer also found from the profit and loss account that the assessee had received dividend income, which was exempt from tax. According to the Assessing Officer, applied the rule. The assessment was completed accordingly. This was confirmed by the Commissioner (Appeals). On appeal to the Tribunal:
Held, that the assessee was in the business of dealing in shares and investment consultancy. When shares held by it as investments were sold, it had admitted capital gains also. Against an investment for equity share in SCPL and share application money placed with the same company, the total dividend earned was a miniscule amount. There was no finding whether even this dividend had come from such shareholding. Thus, the facts indicated that the assessee had not acquired or purchased the shares with an intention of earning any dividend. Disallowance under section 14A was not warranted. The acquisition of shares and placing share application money were in the course of business of the assessee and a disallowance under section 36(1)(iii) of the Act also could not have been made. Interest paid on loans also could not be considered as capital nature, since it was not in the nature of any pre-incorporation or pre-operative expenses. The disallowance made had to be deleted. The interest was deductible. (AY. 2008-09)
MSA Securities Services P. Ltd. v. ACIT (2013) 22 ITR 400 / 58 SOT 44 (URO)(Chennai) (Trib.)
NMS Consultancy P. Ltd. v. Dy. CIT (2013) 22 ITR 400 (Chennai)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Dividend and interest on tax-free bonds claimed exempt
Year prior to introduction of rule 8D – Expenses to be disallowed to be quantified by adopting reasonable method. (AY. 2002-2003)
Kansai Nerolac Paints Ltd. v. Dy. CIT (2013) 22 ITR 424 / 57 SOT 10 (URO)(Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Effect of Rule 8D
Aassessee to prove it had sufficient funds to finance tax-exempt investments and that no disallowance would arise on basis of general pool of funds hypothesis. Matter remanded to Assessing Officer to allow assessee opportunity to show why disallowance under section 14A(1) should not be worked out following, proportionate method.(AY. 2005-06 to 2008-09)
Hercules Hoists Ltd. v. ACIT (2013) 22 ITR 527/59 SOT 43 (URO)(Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income-Interest on borrowed capital – Investment in shares – Investment out of own funds – Borrowed capital used for purposes of business – Disallowance cannot be made under section 14A
The Assessing Officer noted that the assessee had made an investment in shares to the extent of Rs. 2.37 crores, from which dividend was earned. Further, the Assessing Officer noticed from the balance-sheet that the assessee's own funds were to the extent of Rs. 96.15 crores and borrowed funds were Rs. 3.48 crores, whereas total interest expenses debited in the profit and loss account were Rs. 2.73 crores. In response to the Assessing Officer's proposal to make disallowance under section 14A, the assessee's submission was that during the year, additional investments of Rs.27.2 lakhs alone had been made and all other investments of Rs. 209.96 lakhs had been made in the earlier years. The Assessing Officer held that the provisions of section 14A(2) were attracted and made disallowance under section 14A read with Rule 8D. The assessee carried the matter in appeal before the

Commissioner (Appeals) who had confirmed the same. The Tribunal held that no disallowance was called for under section 14A out of interest expenditure because the assessee's own funds were many times more than the amount invested in shares and no direct nexus was established by the Assessing Officer between investment and interest-bearing borrowed funds. But some disallowance was justified out of administrative expenses. A disallowance of Rs. 1 lakh would meet the ends of justice. (AY. 2007-08)
Eimco Elecon (India) Ltd. v. Add.CIT (2013) 22 ITR 380 / 58 SOT 14 (URO) (Ahd.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Taxable income – Expense specifically relatable to taxable income cannot be disallowed. [Rule 8D]
For AY 2008-09, the AO computed the s. 14A disallowance under Rule 8D by excluding from the total general expenditure of Rs.1,16,94,912, an amount of Rs.19,96, 228 being expenses related to house property income, interest expenditure and demat charges. The balance expenses were allocated as relating to tax exempt income in the ratio of tax exempt receipts to total receipts. On this basis, 46.68% of the balance expenditure was disallowed u/s 14A read with Rule 8D. In appeal before the CIT (A), the assessee claimed that an amount of Rs. 57,14,450 was incurred exclusively on building maintenance and service expenses and as no part of these expenses could be attributed to tax exempt income, it had to be taken out of computation of 14A disallowance. This was upheld by the CIT(A). On appeal by the department to the Tribunal, HELD dismissing the appeal:
Once it is found that an expense is specifically relatable to a taxable income, no portion of such an expense can be disallowed u/s 14A. The allocation of general expenses vis-à-vis tax exempt income and taxable income can only be made in respect of expenditure which cannot either be wholly allocated to taxable income, then or which cannot be wholly allocated to tax exempt income; the allocation can be made, even on the basis of formula set out in Rule 8D (iii) (should be Rule 8D (2) (iii), in respect of such expenses which do not fall within any of these categories. (AY. 2008-09)
JCIT v. Pilani Investment & Industries Corpn. Ltd (Kol.)(Trib.) www.itatonline.org

S.14A : Disallowance of expenditure – Exempt income – Stock in trade – Shares – Rule 8D(2)(ii) & (iii) do not apply to shares held as stock-in-trade – Estimate of 10% dividend earned was held to be proper.
For AY 2008-09, the assessee, a dealer in shares, received dividend of Rs. 18.91 lakhs but did not offer any disallowance u/s 14A and Rule 8D on the ground that they were not applicable to shares held as stock-in-trade. The AO rejected the claim and computed the disallowance under Rule 8D at Rs.21.45 lakhs. On appeal, the CIT(A) held that even if Rule 8D was not applicable to shares held as stock-in-trade, a disallowance had still to be made u/s 14A and this was estimated at Rs. 1.89 lakhs. On appeal by the department to the Tribunal HELD dismissing the appeal:
Though s. 14A applies to shares held as stock-in-trade, Rule 8D(2)(ii) & (iii) cannot apply if the shares are held as stock-in-trade because one of the variables on the basis of which disallowance under Rules 8D(2)(ii) & (iii) is to be computed is the value of "investments, income from which does not or shall not form part of total income". If there are no such "investments", the rule cannot have any application. When no amount can be computed under the formula given in rule 8 D(ii) and (iii), no disallowance can be made under rule 8D (2) (ii) & (iii) either. As held in *CIT v. B. C. Srinivas Shetty (1981) 128 ITR 294 (SC)*, when the computation provisions fail, the charging provisions cannot be applied, and by the same logic, when the computation provisions under rule 8D(2)(ii) and (iii) fail, disallowance there under cannot be made either as the said provision is rendered unworkable. However, this does not exclude the application of rule 8D(2)(i) which refers to the "amount of expenditure directly relating to income which does not form part of total income". Accordingly, in a case where shares are held as stock-in-trade and not as investments, the disallowance even under Rule 8D is restricted to the expenditure directly relatable to earning of exempt income. The result is that the scope of disallowance under Rule 8D is narrower than that of S.14A. (AY. 2008-09)

DCIT v. Gulshan Investment Co Ltd. (2013) 142 ITD 89 / 154 TTJ 273 / 86 DTR 262 / 26 ITR 674 (Kol.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Bank – Interest on tax-free securities Interest-free funds available with assessee as capital and reserves in excess of amount invested in bonds hence no disallowance of interest, however administrative and other expenses to be disallowable on reasonable basis [S 10(15)(iv)(h)]

The assessee earned interest on tax-free securities which it claimed as exempt under section 10(15)(iv)(h) of the Act on gross basis. The Assessing Officer held that the gross interest from tax-free securities was not eligible for exemption under section 10. He computed the amount of net interest applying rate of 20.61 per cent after taking into account the income after reducing interest cost but before indirect expenses. This led to restriction of the exemption under section 10(15). On appeal the Commissioner (Appeals) held that the investments in the tax-free bonds being much less than the available capital and reserve, the Assessing Officer failed to establish nexus between investments in deposits and deployment of interest bearing funds. He, therefore, set aside the action of the Assessing Officer restricting the amount of exemption under section 10(15)(iv)(h). On appeal by the revenue the Tribunal held that the Commissioner (Appeals) had recorded a categorical finding that the interest-free funds available with the assessee in the shape of capital and reserves were far in excess of the amount invested in bonds. In that view of the matter there could be no disallowance of any interest under section 14A. However, the administrative and other expenses were required to be disallowed under section 14A on some reasonable basis. Appeal of revenue was partly allowed. (AY.1998-99) (AY. 1998-99 to 2003-04)

Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606 / 57 SOT 101 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Quantum of disallowance – Restricted to 2.5%

Assessee earned exempt income from its investment in shares and mutual funds to tune of Rs 3.24 crore and Rs.8.51 crore respectively. Assessee quantified disallowance of Rs. 82.80 lakh under section 14A as expenditure incurred to earn such exempt income on basis of time spent by staff for managing said investments. Assessing Officer found that assessee’s reserves and surplus stood at Rs. 6135.60 crore and its investment stood at Rs. 3459.50 crore; and on such fact Assessing Officer opined that management would have certainly devoted more time to safeguard earnings deployed in investments. Accordingly Assessing Officer estimated 5 per cent of exempt income as expenditure disallowable under section 14A. Tribunal held that estimation made by Assessing Officer was to be upheld but quantum of disallowance was to be restricted to 2.5 per cent, 5 per cent being on higher side. (AY. 2006-07)

Wipro Ltd. v. Add. CIT (2013) 55 SOT 3 (URO) (Bang.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – No dividend income – NO disallowance [Income-tax Rules, 1962, R. 8D]

Tribunal held that as no dividend income was declared by assessee during the relevant assessment year hence disallowance held to be not proper. (AY.2008-09)

Gurudas Mann v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Banking business – Interest expenditure [S. 10(15)]

Assessee, carrying on banking business, was maintaining nostro accounts for receipt and payment of money in foreign currency. Interest earned from overseas branches chargeable hence no disallowance of interest expenditure paid by assessee. Interest on foreign currency loans was allowable on gross interest and not on net interest. Assessee was utilising interest-free funds at its disposal for investment in interest-free securities. No disallowance qua the investment in tax-free securities. (AY.1997-98)

ADIT (IT) v. Credit Agricole Indosuez (2013) 21 ITR 345 / 58 SOT 97 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Rule 8D is applicable only from AY. 2007-08 [Rule 8D]
Disallowance u/s. 14A for the years prior to AY. 2007-08 has to be made by adopting some reasonable method. Impugned order of the CIT (A) was set aside and the matter was restored to the AO with a direction to recompute the disallowance of expenses to be made u/s. 14A by applying some reasonable method. (AY. 2005-06)
Welspun Zuchhi Textiles Ltd. v. ACIT (2013) 83 DTR 293 / 23 ITR 53 / 56 SOT 444 / 153 TTJ 153 (Mum.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Interest free funds are more no disallowance can be made – No disallowance of administrative expenses unless the Officer identifies
If the interest free funds available with assessee are more than the impugned investments then no disallowance can be made under section 14A of the Act. The Tribunal held that no disallowance could be made out of interest, management or administrative cost as the Assessing Officer has not identified any expenditure which has been actually incurred by the assessee for earning the exempt income. (AY. 2002-03)
Dy. CIT v. Jammu and Kashmir Bank Ltd. (2013) 152 TTJ 522 / 142 ITD 553 / 83 DTR 187 (Asr.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Interest on borrowings has to be treated as business expenditure, it cannot be disallowed under section 14A, even though the dividend earned from the unit is exempt under section [Ss.10(33), 36(1) (iii)].
The assessee has incurred interest expenses for purchase of shares and units of mutual fund and the borrowed funds, have been used for acquisition of units are not in dispute. The Assessing Officer has held that the assessee is in business of purchase and sale of shares and also while framing the assessment under section 143(3), the loss incurred on the sale / purchase of units has been treated as business loss. The Tribunal held that once the purchase and sale of shares is held to be a business activity, the interest paid thereon has to be treated as business expenses and no disallowance can be made under section 14A. (AY. 2004-05)
Zaveri Virjibhai Mandalia v. ACIT (2013) 152 TTJ 20 (UO)(Ahd.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Shares held as stock-in-trade [Rule 8D]
The assessee received exempt income in the form of dividend from personal investments and also from shares held for trading. It also received tax free interest from relief bonds. The assessee maintained separate accounts including separate bank accounts and balance sheets for personal investments and trading activities in which expenses relating to those two activities were shown separately. The Tribunal held that no disallowance can be made in respect of expenses in relation to dividend received from trading in shares. In view of the judgment of Karnataka High Court in the case of *CCI Ltd v. JCIT*, the decision of the Special Bench of the Tribunal in the case of Daga Capital Management P. Ltd. cannot be followed. (AY. 2008-09) ('F' ITA No. 6332/M/11, dated 11-1-2013)
Vivek Mehrotra v. ACIT (2013) BCAJ Pg. 17, Vol. 44-B Part 6, March 2013 (Mum.) (Trib.)

S.14A : Disallowance of expenditure – Exempt income – Rule 8D is not applicable [Rule 8D]
The Assessing Officer allocated expenses relating to exempt income on proportionate basis. In appeal before the CIT(A), the CIT(A) directed the Assessing Officer to recompute the disallowance by applying Rule 8D of Income Tax Rules. On appeal, the Tribunal held that Rule 8D is applicable only from AY. 2008-09 and the disallowance had to be made on reasonable basis after hearing the assessee

fresh in the light of the decision of Hon'ble Bombay High Court in case of *Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT (2010) 328 ITR 81 (Bom.)* (AY. 2004-05)
Forever Diamonds (P) Ltd. v. Dy. CIT (2013) 152 TTJ 682 / 83 DTR 411 / 57 SOT 113 (URO)(Mum.) (Trib.)

S.14A : Disallowance of expenditure – Exempt income – No exempt income was earned in the relevant year, disallowance to be made on some reasonable basis [Rule 8D]
The Assessing Officer made disallowances under section 14A towards expenditure on investment by applying Rule 8D. The Tribunal upheld the action of Assessing Officer on the point that disallowance under section 14A can be made in the absence of any exempt income but sent the matter back to the file of Assessing Officer to compute the disallowance on some reasonable basis not as per Rule 8D. (AY. 2006-07)
Stream International Services v. ADIT (2013) 152 TTJ 553 / 141 ITD 492 / 23 ITR 70 / 83 DTR 394 (Mum.)(Trib.)

S.15 : Salaries – Development officer of LIC receiving incentive bonus prior to 1-4-1989 is to be treated as salary – Only entitled to permissible deductions under s. 16. [Ss.2(24), 10(4), 16, 17]
The assessee was a development officer of LIC and prior to 1-4-1989, he received incentive bonus from LIC. He claimed a deduction of 40% of the said bonus, on the basis that he had incurred expenditure to the extent of 40% for canvassing business. The High Court held that the claim could not be allowed. On appeal, held, dismissing the appeal:
Incentive bonus received by Development Officer of LIC prior to 1-4-1989 is to be treated as 'salary'. Compartmentalisation of income under various heads and computation thereof has to be done strictly in accordance with the statutory scheme. Accordingly, the assessee is only entitled to the deductions specified under s. 16, and the general claim regarding business expenses was correctly disallowed by the High Court.
T. K. Ginarajan v. CIT (2013) 356 ITR 618 / 217 Taxman 323 / 261 CTR 121 / 91 DTR 161 (SC)
Editorial: The decision of the Gujarat High Court in CIT v. Kiranbhai H. Shelat (1999) 235 ITR 635 (Guj)(HC) is no longer good law, in view of the decision of the Supreme Court. For incentive bonus received after 1-4-1989, LIC itself has clarified that Development Officers will be able to claim reimbursement to the extent of 30% of incentive bonus. After 1-4-1989, only that part of the incentive bonus after reimbursing the expenses to the extent of 30% will appear in salary certificate. The dispute before the Supreme Court was confined to incentive bonus received before the said date.

S.15 : Salaries – Resident but not ordinarily resident – Amount of tax not reimbursed cannot be assessed as salary income
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%, came to Rs. 35 lakhs. Assessee included Rs. 35 lakhs to his salary income of Rs. 77 lakhs and offered Rs.113 lakhs to tax. Total tax liability was Rs. 50 lakhs which assessee paid. Revenue sought to include Rs. 50 lakhs of total tax with salary income of Rs. 77 lakhs to arrive at total income. The High Court held that tax amounting to Rs. 15 lakhs paid by assessee which was not reimbursed by company, could not be added to income of assessee. (AY. 1994-95)
CIT v. Jaydev H. Raheja (2013) 357 ITR 243 / 92 DTR 68 / 211 Taxman 188 (Bom.)(HC)

S.16 : Deductions from salaries – Director of the Company – No Employer employee relationship – Claim of standard deduction under section 16 (i) rightly denied

A director of the company holds office under the company, but, as a director he is not a servant or employee of the Company and being so the assessing officer had rightly disallowed the assessee's claim of standard deduction under section 16(i) of the Act. (AY. 1993-94 to 1997-98)
Sandeep Kohli v. CIT (2013) 81 DTR 307 (All.)(HC)
Vishel Kholi (Dead) through LRs v. CIT (2013) 81 DTR 307 (All.)(HC)

S.17(1) : Perquisite – Salary – Non compete fee – Non compete commission received from employer is Liable to be taxed as Salary [S.28(va)]
Non Compete commission received by the employee for not competing with the employer is liable to be taxed under the inclusive definition of salary under section 17 of the Act. Even otherwise the amount was liable to be taxed under section 28 (va) of the Act. (AY. 2003-04)
CIT v. Kanwaljit Singh (2013) 81 DTR 208 (Delhi) (HC)

S.17(2) : Perquisite – Salary – Not drawing salary – Rent free accommodation – Value based on the letting value of house in neighborhood was held to be justified [R.3]
The Tribunal held that assessee was not drawing any salary and other directors of company were paid salary of Rs. 10,000 per month. The Tribunal thus took notional salary payable to assessee at Rs. 15,000 per month and value of perquisites was determined at Rs. 18,000 per year. Since there was nothing on record to show that annual letting value of house in neighbourhood was higher than what had been fixed for house provided by company to assessee, in such a situation, valuation of rent free accommodation determined by Tribunal was to be confirmed. (AY. 1990-91)
CIT v. Balwant Rai Dewan (2013) 219 Taxman 159(Mag.) (All.)(HC)

S.17(2) : Perquisite – Salary – Sweeper, gardener, watchman, rent free accommodation – Official purposes – Since there was no office in residence of assessee same could not be considered to be used for official purposes – Taxable as perquisite [S. 28(iv)]
Carrying of official work from residence and maintaining office were two different aspects. Since there was no office in residence of assessee, perquisite value pertaining to sweeper, gardner, watchman, rent free accommodation, etc. received by assessee from company in which he was director could not be considered to be used for official purposes. Therefore, the same was taxable in hands of the assessee as perquisite. (AY. 1997-98)
CIT v. Subrata Roy (2013) 219 Taxman 133 / (2014) 99 DTR 177 (All.)(HC)

S.17(2) : Perquisite – Salary – Tax – Where employees' tax liability was borne by employer, tax refunds in respect of same could not be taxed in hands of employee, as such amount never belonged to employee [S.10(10CC)]
Assessees were employees of a foreign company, working in India. Tax arising in India on income of employees was borne by foreign employer. It was held that amounts paid directly by employer to discharge employees' income-tax liability, falls within included category of monetary benefits exempt under section 10(10CC). It was further held that social security, pension and medical insurance contributions by employer are not taxable as perquisites, as assessee does not get a vested right at time of contribution to fund by employer, which continues to remain invested till assessee becomes entitled to receive it. Where tax is deposited in respect of non-monetary perquisite, it is exempt under section 10(10CC) and multiple stage grossing up is not applicable. Where employees' tax liability was borne by employer, tax refunds in respect of same could not be taxed in hands of employee, as such amount never belonged to employee.
Yoshio Kubo v. CIT (2013) 357 ITR 452 / 92 DTR 70 / 218 Taxman 164 (Delhi)(HC)

S.17(2) : Perquisite – Salary – Rent free accommodation – As the assessee was not provided with any accommodation by his employer, that no furniture or security guards or cooks were

provided to him and that telephone was provided in name of firm in which assessee was a partner addition on the basis of estimation was deleted
Assessee was an employee of one 'S' Ltd. In assessment proceedings, Assessing Officer noticed that assessee was provided with several perquisites by his employer. He thus made certain addition to assessee's income. Commissioner (Appeals) deleted addition on ground that it was made on hypothetical and estimated basis. Tribunal noted that assessee was not provided with any accommodation by his employer, that no furniture or security guards or cooks were provided to him and that telephone was provided in name of firm in which assessee was a partner. Tribunal thus held that Commissioner (Appeals) rightly deleted perquisites brought to assessment. Court held that since there was no material to show that finding of fact recorded by Tribunal was contrary to record or was untenable, impugned order passed by Tribunal was to be upheld. (AY. 2000-01)
CIT v. UK Bose (2013) 212 Taxman 399 / 91 DTR 36 (Delhi)(HC)

S.17(2) : Perquisite – Salary – Rent free accommodation – Government employees – Deduction of tax at source – Not liable for interest. [S. 201, Rule 3 of the Income-tax Rules, 1962]
In view of the special statutory status given to assessee, which was working under overall supervision and control of Central Government, its employees were to treated as Government Employees and not "other employees" as per section 17(2), read with rule 3(1)(ii). Therefore, value of perquisite of rent free accommodation to its employees would be equal to license fee determined for Government employees, and not 7.5% of salary, as in case of "other employees". (AY. 2006-07 to 2008-09)
ITO v. Supdtt. Engineer (2013) 59 SOT 128 (URO) (Chd.)(Trib.)

S.17(2) : Perquisite – Salary – Reimbursement of conveyance and maintenance expenses – Fringe benefit tax paid – No obligation to deduct tax at source [S.115WB(2)(e)]
The assessee reimbursed conveyance and maintenance expenses to its employees and paid fringe benefit tax on same. This expenditure was neither incurred to fulfill any statutory obligation or to mitigate occupational hazards nor did it fall in any other exclusion as specified in Explanation to section 115WB(2)(e). There was no liability on assessee to deduct tax at source. (AY. 2009-10)
Oil & Natural Gas Corpn. Ltd. v. ACIT (2013) 59 SOT 160 (URO) / 22 ITR 587 / 143 ITD 159 (Ahd)(Trib.)

S.17(2) : Perquisite – Salary – Benefit to Director – Purchase of flats less than market price – Since the market price was not considered the matter was set aside [S.2(24)(iv), Rule 3(7)(ix)]
Assessee worked as working Director in company who sold flats to assessee. Assessee purchased six flats from M/s. SMRL and purchase price of two flats was lower vis-a-vis purchase price of other four flats. AO was of view that M/s. SMRL granted or passed on some benefit or perquisite to assessee, employee by way of concession. Considering lower purchase price in respect of two flats, AO invoked provisions of section 17(2) relating to 'perquisites' and proposed to tax different amounts and accordingly, made addition to income returned by assessee. Held, similar concessions offered to Director attract provision of section 2(24)(iv). Tribunal confirmed fact of benefit in purchasing properties at a lesser value than they would have been sold in open market. Provisions of section 2(24)(iv) r.w.s. 17(2) allow difference in value of asset between purchase price and fair market value of property or flats. Assessee's attempt to compare value of flats with that of flat no.201, was not proper considering differences. Lower authorities have not explored applicability of provisions of section 2(24)(iv) and market value of flats in question. So far as employer – employee relationship is concerned that it is a settled issue that there exists such relationship between Director and company. Therefore, for want of market rate of impugned flats i.e, all six flats and corresponding construction cost of said flats in hands of developer, ground should be set aside to file of AO for examining issue afresh. AO directed to grant a reasonable opportunity of being heard to assessee. Grounds raised by assessee were allowed for statistical purposes (AY. 2009-2010)
Sarita S. Mantri v. ACIT (2013) 142 ITD 145 / 89 DTR 261(Mum.)(Trib.)

S.17(3)(iii) : Profits in lieu of salary – Dearness relief received by retired High Court Judge.
Dearness relief received by a retired High Court Judge constitutes profits in lieu of salary u/s. 17(3) (iii). (AY. 1998-99)
Justice G.K. Mathur (Retd.) v. CIT (2012) 210 Taxman 54 / (2013) 83 DTR 178 (All.)(HC)

S.22 : Income from house property – Commercial complex – Annual value – Income from lease rent – Income from business [S. 28, 148]
The only income of the assessee was from the lease of a commercial complex owned and developed by it. Before finalization of the return filed by the assessee and passing of the assessment order, the assessee was issued a notice under section 148. The assessee objected that the notice under section 148 could not be issued even when the return filed by it was still to be processed and assessed, but the Assessing Officer passed the assessment order u/s. 143 read with section 147(3) overlooking the objection and assessed the assessee in the status of the firm and treating the income as from house property, as against the claim of the assessee that it should be assessed under the head "Business income. The Tribunal partly allowed the appeal of the assessee upholding the assessment of the income under the head "House property" but remitting to the Assessing Officer the question whether there could have been reopening.
However, the assessee filed an appeal before the HC on the ground of reopening of assessment. The HC held that when the question did not arise for consideration from the order of the Tribunal, it was not necessary to go into it for examination of the question as for academic purpose. (AY. 2005-06)
Mahesh Investments v. ACIT (2013) 357 ITR 42 (Karn.)(HC)

S.22 : Income from house property – Commercial complex – Rental income assessed as income house property and not as business income. [S. 28(i), 147]
Assessee, a partnership firm, filed its return declaring rental income as income from business which was assessed accordingly. Subsequently, the Assessing Officer initiated reassessment proceedings, taking a view that income was coming from letting out of commercial complex and it was only income of assessee-firm, thus it was to be assessed under heading 'income from house property'. The Commissioner (Appeals) as well as Tribunal confirmed said order. Held no substantial question of law arose for consideration (AY.2003-04)
Mahesh Investments v. ACIT (2013) 216 Taxman 93 (Mag.) (Karn.)(HC)

S.22 : Income from house property – Business income – Un sold flat – Rental income from unsold flat which were shown as stock in trade is assessable as income from house property [S.28(i)]
The Court held that rental income from unsold flats in the hands of builder/developer, which are shown as 'business assets' should be assessed under the head Income from house property and not as business income. (AYs. 2004-04, 2008-09, 2009-10)
New Delhi Hotels Ltd. v. ACIT (2013) 218 Taxman 61 (Mag) / (2014) 360 ITR 187 (Delhi)(HC)

S.22 : Income from house property – Business income – Rental income from unsold flats – Assessable as income from house property [S.28(i)]
The sections of the Act are all specific and mutually exclusive and deal with various heads in which an item of income of an assessee falls. Where an item of income falls specifically under one head, it has to be charged under that head and no other. The income by way of rent from unsold flats held by the assessee, a property developer and builder, was taxable under the head house property and not under the head profits and gains of business and profession. (AY. 1998-99)
Azimganj Estate Pvt. Ltd. v. CIT (2012) 206 Taxman 308 / 251 CTR 48 / 72 DTR 341 / (2013) 352 ITR 82 (Cal.)(HC)

S.22 : Income from house property – Annual value – Unsold flats held as stock in trade – Annual value of unsold flats to taxed as income from house property.

Assessee is in construction business. Some flats constructed by assessee were lying unsold. Assessing Officer assessed ALV of those flats as income from house property. Assessee contended that said flats were its stock-in-trade and, therefore, ALV of flats could not be brought to tax under head 'Income from house property'. Assessing Officer did not accept stand of assessee. Commissioner (Appeals) has deleted the addition, which was confirmed by Tribunal. On appeal to High Court by revenue, the Court held that levy of income tax in case of one holding house property is premised not on whether assessee carries on business as landlord, but on ownership. The incidence of charge is because of fact of ownership, therefore, Assessing Officer rightly brought ALV of unsold flats to tax as income from house property.

CIT v. Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 / 213 Taxman 143 / 88 DTR 227 (Delhi)(HC)

CIT v. Ansal Properties and Industries Ltd. (2013) 354 ITR 180 / 88 DTR 227 (Delhi)(HC)

CIT v. Ansal Housing and Construction Ltd. (2013) 354 ITR 180 / 88 DTR 227 (Delhi)(HC)

Editorial: The Supreme Court has granted the special leave to the assessee against this judgment on this point. Ansal Properties and Industries Ltd. v. CIT (2013) 354 ITR 81 (St)

S.22 : Income from house property – Business income – Rental income is assessable under income from house property [S. 28(i)]

Following the judgment in *CIT v. Ansal Housing Finance and leasing Co Ltd. (2013) 354 ITR 180 (Delhi)*, the Court held that rental income should be assessed under the head 'income from house property and not as business income. (AYs. 2006-07, 2007-08)

CIT v. Discovery Estates (P) Ltd. (2013) 356 ITR 159 / 215 Taxman 74 (Mag.) / 88 DTR 298 (Delhi)(HC)

CIT v. Discovery Holdings Pvt Ltd. (2013) 356 ITR 159 / 215 Taxman 74 (Mag.) / 88 DTR 298 (Delhi)(HC)

S.22 : Income from house property – Business income – Depreciation – Rental income was to be treated as income from house property [S.28(i), 32]

Assessee, a hundred per cent subsidiary, constructed a factory shed with funds borrowed from holding company. Same was let out to holding company immediately after construction. Assessee neither paid any interest to holding company, nor used shed for its own business purpose. Assessee showed rental income as business income and claimed depreciation. Since business asset was created by assessee was only for purpose of holding company and not for use of assessee itself, it could not be said that business asset was given on rent for exploitation by way of commercial activities and, hence, rental income was to be treated as income from house property.(AYs. 2003-04 to 2006-07)

Perfect Scale Company (P.) Ltd. v. Dy. CIT (2013) 60 SOT 255 (Mum.)(Trib.)

S.22 : Income from house property – Business income – Property used by firm in which assessee-owner is partner is not used for assessee's business & not entitled for exemption [S.28(i)]

The assessee, a partner in a firm, was the owner of a house property. He claimed that the house property was used by the employees of a firm in which he was a partner and that it should be considered to have been used for a business carried on by him. The assessee relied on *CIT v. Rasiklal Balabhai (1979) 119 ITR 303 (Guj.)* where it was held that the annual letting value (ALV) of a godown owned by the assessee and used for the business carried on by him in partnership was not liable to be included in his total income u/s 22. However, the AO & CIT(A) relied on the contrary judgment in *Prodip Kumar Bothra v. CIT (2011) 244 CTR 366 (Cal.)* where it was held that house property income is not taxable only if the property is used for the assessee's own business and is not exempt if used for the business of the firm in which the assessee is a partner. On appeal by the assessee to the Tribunal, HELD dismissing the appeal:

(i) Though the jurisdictional High Court in *CIT v. Rasiklal Balabhai (1979) 119 ITR 303* held that the annual letting value of house property owned by the assessee and used for the business carried on by him in partnership was not liable to be included in his total income u/s 22, the Calcutta High Court has dissented from this view in *Prodip Kumar Bothra v. CIT (2011) 244 CTR 366 (Cal.)* and held that the exemption in respect of house property cannot be allowed to assessee if the property is used by the partnership firm because the owner of the house property and the occupier of the property must be the same person. The Karnataka High Court in *CIT K.N. Guruswamy (1984)146 ITR 34 (Kar.)* and the Allahabad High Court in *CIT v. Shiv Mohan Lal (1993) 202 ITR 60 (All) & CIT v. Mustafa Khan (2005) 276 ITR 602 (All*) has taken the same view as the Calcutta High Court that user by a partnership firm/ HUF is not user by the assessee-owner for business purposes. In view of the divergent views expressed by the High Courts, the thumb rule that the latest decision of the High Court is required to be followed to maintain judicial discipline. As the judgement of the (jurisdictional) Gujarat High Court is earlier in point of time and the judgement of the (non-jurisdictional) Calcutta and other High Courts is later in point of time, the view expressed by the Revenue Authorities has to be affirmed and the assessee's ground dismissed. (AY.2009-10)

Prakash Vasantbhai Golwala v. ACIT (2014) 146 ITD 355 (Ahd.)(Trib.)

S.22 : Income from house property – Lease hold rights – Acquiring leasehold rights in property and construction of building thereon – Rental income from the buildings assessable as Income from house property and not as business income [S.28(i)]

Assessee firm was engaged in construction of residential and commercial complex. Assessee took a piece of land on lease basis from its partner and constructed building thereon. As per the agreement between its partner, a portion of said building was let out to various tenants. Assessee claimed that rental income received from the said building was assessable as business income. The Assessing officer held that whatever be the principal object of the firm, rental income from house property would start to be assessed as per the provisions of the Act i.e. u/s 22 i.e. as Income from House property. Therefore rental income from the house property, including the leasehold building was assessable u/s 22 as Income from house property. (AY. 2008-09)

J.B. Estates v. ITO (2013) 142 ITD 355 (Hyd.)(Trib.)

S.22 : Income from house property – Business income – Business service centre – Renting of office premises to a single party was assessable as income from house property [S.28(i)]

The assessee company purchased an office which was used as its registered office. However, due to scaling down of business operations, it commercially exploited the said office premises as business service centre. The assessee company prepared a consolidated profit and loss account, debiting the entire expenditure on the maintenance of office, and claimed the same as deductible business expenditure. It claimed entire receipts as business income The A.O. rejected the same, assessing the entire claimed business receipt as 'income from house property. where concept of business centre is generally operational and workable for 'temporary' offices, for conducting meetings outside regular place / time, income received by assessee from renting of office premises to a single party was assessable as income from house property. where rent receipt included cost of providing electricity, only net amount was to be taxed after reduction of electricity cost. (AY. 2007-08)

Anik Financial Services (P.) Ltd. v. ITO (2013) 144 ITD 151 / 35 taxmann.com 430 (Mum.)(Trib.)

S.22 : Income from house property – Firm – Partner – Partner would qualify for exemption provided under section 22

Property let out to partnership firm where the assessee was partner, income from house property which was used in the business carried out in partnership firm which the assessee was a partner would

qualify for the exemption provided under section 22. Tribunal relied on *CIT v. Rabindranth Bhol (1995) 211 ITR 799 (Orissa)(HC)*(ITA no 4032/Mum/2009 dt 25-5-2012 Bench "F'). (AY. 2006-07)
Bhawanji Kunverji Haria v. DCIT (2013) BCAJ – September-P. 28 (Mum.)(Trib.)

S.22 : Income from house property – Annual letting value – Vacancy allowance – Valuation to be on basis of sum for which property may be let – Assessing Officer fixing annual letting value based on rent fetched up to April, 2004 – Reasonable. [S.23(1)(c)]
The assessee did not return any income under the head "Income from house property" in respect of its property lying vacant, the lease in respect thereof having expired in April, 2004. The premises had been continuously let out since the year 1997. They claimed a notional amount to tax as annual letting value of the said property and in the alternative that the annual letting value could only be computed in terms of section 23(1)(a) of the Act, so that the standard rent under the rent control had to be applied in determining the rent at which property may reasonably be expected to be let out from year to year. The Assessing Officer rejected both contentions in view of the provision of section 23(1)(a), and determined the income assuming the annual letting at ` 18,58,116. On appeal, Commissioner (Appeals) affirmed this. On appeal :
Held, (i) that the assessee's claim of the property being used for the purposes of its business was not only not borne out by the record, and was advanced for the first time without any material and was also contrary to the assessee's consistent stand throughout that the property was vacant since April, 2004 as it could not find a suitable tenant.
(ii) That the vacancy allowance under section 23(1)(c), which is in-built in the working of the annual letting value, is only in respect of a property the value of which would otherwise stand to be brought to tax under section 23(1)(b), i.e., on the basis of actual letting and, further, at a rent higher than the fair market rent, and not under section 23(1)(a), i.e., on the basis of notional letting. The provision of section 23(1)(a), i.e., of the annual letting being determined on the basis of notional letting, is applicable even where the property is actually let, though only where it is at a rent lower than the fair rent. If the concept of vacancy were to be incorporated in the concept of notional letting, the latter would stand defeated and incapable of being applied. It being the admitted position that the property was not let for the relevant year, there was no question of application of section 23(1)(b) and, consequently, section 23(1)(c), and the annual letting value would have to necessarily be determined only with reference to section 23(1)(a).
(iii) That what was relevant was the rent for which the property may reasonably be let from year to year. There was no evidence to support the annual letting value based on the municipal rateable value on the basis that the property was subject to rent control legislation. The assessee's argument that the property being not actually let, the notional rent could not be brought to tax was not sustainable. The property was let at an annual rent of `18,58,116 continuously from the year 1997 to 2004. There was nothing on record to show or infer that the property, which, as late as April, 2004, yielded a rent to the tune of ` 18 lakhs per annum, became incapable of fetching as much and, rather, plummeted to about 1 per cent. thereof. The Assessing Officer had kept the annual letting value at ` 13,00,681, i.e., net of standard deduction at 30 per cent., constant for all the years, i.e., up to assessment year 2008-09, and was reasonable. (AY.2005-06 to 2008-09)
Hercules Hoists Ltd. v. ACIT (2013) 22 ITR 527/59 SOT 43 (URO)(Mum.)(Trib.)

S.22 : Income from house property – Business income – Leasing of hotel – Assessable as property income [S.28(i)]
As assessee is incurring losses in hotel business run by it, it gave hotel along with furnishings and fittings on license basis for seven years. This period of seven years was to stand automatically extended in a certain contingency. Assessee's claim that licence fee received by it was assessable as business income was rejected by Assessing Officer who assessed it as property income. Tribunal held that intention of parties had to be considered to decide whether lease/rental income was assessable as house property income or business income. On facts though it was mentioned in agreement that operation of hotel was leased out, it was only leasing out of hotel building along with furniture,

fittings etc. therefore license fee was rightly assessable as property income rather than as business income. In favour of revenue. (AY. 2005-06)
ACIT v. Palmshore Hotels (P.) Ltd. (2013) 55 SOT 198 (Cochin.)(Trib.)

S.22 : Income from house property – Rental income from lease hold premises – Income from other sources [Ss. 27(iiib), 28(i), 56.]
The assessee had taken property on lease for a period of 3 yrs. The assessee is neither owner nor a deemed owner within the meaning of section 27(iiib). The Tribunal held that the rental income derived by subletting property cannot be charged to tax under the head income from house property or as business income. It is assessable under the head income from other sources. (AY. 2006-07)
Stream International Services v. ADIT (2013) 152 TTJ 553 / 141 ITD 492 / 23 ITR 70 / 83 DTR 394 (Mum.) (Trib.)

S.23 : Income from house property – Annual Value – Notional interest on security deposit cannot be added [S.22]
It is open to the Assessing authority to take note of the amount of advance paid which gives an indication of fair rent of property that it fetches in market. However, the addition of notional interest on the interest-free security deposit to the rent agreed upon is not permissible in law. (AY. 1997-98, 1998-99)
CIT v. Shastha Pharma Laboratories P. Ltd (2013) 355 ITR 316 / 216 Taxman 73 / 88 DTR 115 / 262 CTR 352 (Karn.)(HC)

S.23 : Income from house property – Annual value – Business assets – Notional value could not be computed
From business assets being factory sheds rental income was received in earlier years. Factory shed remained unused during relevant years. AO. assessed accrued income at rate of Rs. 6 lakhs in each year as annual letting value. Tribunal held that provisions of section 23(1) are not applicable to business asset and, thus, no notional income could be computed. (AYs.2007-08 to 2009-10)
Perfect Scale Company (P.) Ltd. v. Dy. CIT (2013) 60 SOT 255 (Mum.)(Trib.)

S.23 : Income from house property – Annual value – Interest free deposits – Municipal valuation was less than value of rent received – Matter remanded [S.22]
Assessee had let out its two properties and received rent. From same lessees assessee had also received interest free deposits. A O held that actual rent charged by assessee was concessional rent in view of interest free deposit and, thus, notional interest on interest free deposits had to be added in rental income because same was embedded in rent negotiated. CIT(A) has confirmed the addition. Before the Tribunal the assessee contended that Municipal valuation of both properties which was filed first time before the Tribunal was less than value of actual rent received. Tribunal held that since the said documents were very vital documents and were not available before A.O. or CIT(A),the matter was restore back for reconsideration. (AY. 2004-05)
Sushre Trading Ltd. v. ITO (2013) 60 SOT 55 (Mum.)(Trib.)

S.23 : Income from house property – Annual value – Notional Interest – When despite directions from CIT(A), the A.O. did not choose to determine market rental value of property, rental income offered by assessee was to be treated as Annual letting Value of property
The A.O. being not satisfied with rental income shown by assessee, deputed an Inspector to determine market rate of rent, who reported a higher rent. Without giving assessee opportunity to cross examine inspector, the A.O. determined higher rent by adding notional interest on the security deposit. The CIT(A) directed A.O. to conduct inquiry, but he reported that there was no requirement in his remand

report. The Tribunal held notional interest on interest free Security deposit cannot be a determining factor to arrive at fair rent. When despite directions from CIT(A), the A.O. did not choose to determine market rental value of property, rental income offered by assessee was to be treated as Annual letting Value of property. (AY. 2005-06)
Dy. CIT v. Diven Dembla (2013) 145 ITD 377 (Mum.)(Trib.)

S.23 : Income from house property – Notional rent – Property let out from April 2006 – Income cannot be estimated on notion basis for the year ending 31-3-2005
Assessee received the possession of property in December 2005. Assessee took three months to complete the furniture work and the property was let out from April 2006. AO held that as the property was in possession of the assessee, the provisions of section 23(1) were attracted and annual value of the property was deemed to be the income of the assessee. Tribunal held that where on account of interior work being carried out during the year the property could only be leased out from the next financial year , no notional rent could be added as the income of the assessee in the current year.(ITA no 4032/Mum/2009 dt 25-5-2012 Bench "F').(AY. 2006-07)
Bhawanji Kunverji Haria v. DCIT (2013) BCAJ–September-P. 28 (Mum.)(Trib.)

S.24 : Income from house property – Interest – Prepayment charges for closure of loan is allowable as deduction [Ss.2(28A), 24(b)]
The Assessing Officer disallowed the assessee's claim for deduction of amount paid as prepayment charges for closure of loan account which was taken for acquisition of property fetching the extant house property income. The ITAT observed that the definition of interest under section 2(28A) makes it manifest that it has basically two components, viz., firstly, the amount with nomenclature of interest for moneys borrowed and secondly, the amount paid by whatever name called in respect of the money borrowed or debt incurred. The second category may also encompass any charge paid for not utilizing the credit facility. Incorporating the definition of 'interest' in section 24(b), the position emerges that not only the amount paid designated as interest but also any other amount paid, by whatever name called in relation to such debt incurred, also qualifies for deduction, early repayment of loan, the assessee managed to wipe out its interest liability in respect of the loan, which would have otherwise qualified for deduction under section 24(b) during the continuation of loan. Pre payment charges have live and direct link with the obtaining of loan which was availed for acquisition of property. The payment of such 'prepayment charges' cannot be considered as de hors the loan obtained for acquisition or construction or repair, etc., of the property on which interest is deductible under section 24(b). The direct interest and prepayment charges, are species of the term 'interest'. Therefore, deduction claimed by the assessee is allowable as deduction u/s. 24(b). (AY. 2006-07)
Windermere Properties (P.) Ltd. v. Dy. CIT (2013) 58 SOT 167 / 155 TTJ 1 / 88 DTR 150 (Mum.)(Trib.)

S.24 : Income from house property – Interest on borrowed capital utilised for purchase of flats to be allowed in equal proportions in hands of assessee and her husband
The assessee claimed deduction against the rental income of ` 10,49,604 on account of interest paid to the bank on borrowed capital, under the head "Income from house property". The Assessing Officer disallowed the claim. The Commissioner (Appeals) upheld this. On appeal, the Tribunal held that admittedly, the total interest paid by the assessee with her husband on the borrowed loans during the year under consideration was ` 10,39,604 out of which deduction of ` 5,14,802 had been allowed in the hands of the husband. When the rental income from the individual flats owned by the assessee and her husband had been included in their respective hands, deduction on account of the interest paid on borrowed capital utilised for the purchase of the flat was to be allowed in equal proportions in the hands of the assessee and her husband. (AY. 2006-07)
Gurudas Mann v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

Manjit Mann (Smt) v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.24 : Income from house property – Expenditure on repairs of lodge.
Assessing Officer disallowed the claim for deduction stating that the expenditure on repairs could not be allowed from estimated income. Tribunal held that claim of repairs cannot be denied in so far as specific repairs were carried out on the lodge. The assessee is entitled to deduction of expenditure on repairs of lodge under section 24(a) from the estimated income from the lodge.
Dinesh Chandra Das v. ACIT (2013) 152 TTJ 25 (UO) / 143 ITD 691 (Ctk.)(Trib.)

S.28(i): Business income – Lease rent – Exploitation of property – Assessable as business income.
When property was given on lease, assessee-company was declared as sick industrial unit and even rehabilitation scheme was under preparation and office premises was leased out just to exploit assets for business purposes, lease rent had to be treated as business income of assessee. (AY.1996-97)
CIT v. Vallabh Glass Works Ltd. (2013) 218 Taxman 152(Mag.) (Guj.)(HC)

S.28(i) : Business income – Composite agreement – Provision of services and renting out buildings – Assessable as business income and not as income from house property or income from other sources [Ss.22, 56]
Agreements for letting out of specialised buildings in STP and provision of comprehensive services to IT industry entered into contemporaneously with object of enjoying entire property as a whole, which was necessary for carrying on business, income could not be separated on basis of separate agreements. Income from letting out was assessable as business income and not as income from house property or income from other sources. (AY.2005-06)
CIT v. Velankani Information Systems (P.) Ltd. (2013) 218 Taxman 88 / 94 DTR 357 / (2014) 265 CTR 250 (Kar.)(HC)

S.28(i) : Business income – Interest – Advance to sister concern is assessable as business income [S.56]
Where assessee advanced loan to sister concern out of funds available with it, other than borrowed capital, interest income thereon would be treated as 'business income' instead of 'income from other sources'. (AY.1993-94).
CIT v. Radico Khaitan Ltd. (2013) 219 Taxman 84 (Mag.) / (2014) 360 ITR 462 (All.)(HC)

S.28(i) : Business income – Notional income – Notional value of benefits towards allotment of car parking spaces is not income and notional addition on account of provision of air-conditioning does not arise
The developer entered into an agreement for providing for allotment of specified car parking spaces to assessee and provision of air-conditioning equipment free of cost. Held, since car parking spaces not included in sanctioned built-up area and not included in saleable area, there can be no sale or transfer of car parking spaces to assessee. Also, the assessee was allowed to park cars in open space against refundable security deposits. The notional value of benefits towards allotment of car parking spaces is not income.
Since developer failed to provide air-conditioning equipment free of cost till transfer of property to the assessee, notional addition on account of provision of air-conditioning does not arise. (AY. 2003-04)
CIT v. Spencers and Co. Ltd. (No.3) (2013) 359 ITR 644 (Mad.)(HC)

S.28(i) : Business income – Labour receipts was held to be business income and not as income from undisclosed source [S.68]

The Assessee was engaged in giving machinery for labour work produced bills of labour receipts and claimed labour income as business income. The AO, on finding labour receipts as not genuine, held said amount to be income from undisclosed sources. The Tribunal allowed claim of assessee on ground that assessee was engaged in said business since long as evidenced by earlier assessment orders. On appeal by the department the High Court, held that the Labour income received by assessee from commercial exploitation of machinery was treated as business income in earlier assessment years, same was to be followed in current assessment year. The Appeal filed by the department is dismissed.
CIT v. Jayantkumar Motichand Doshi (2013) 217 Taxman 247 (Guj.)(HC)

S.28(i) : Business income – Income from house property – Exploitation of immovable property by way of complex commercial activities, must be held as business income [S.22]
The assessee-company was a real estate developer, providing comprehensive facilities to IT industry including letting out of specialised buildings and office premises in a Software Technology Park (STP) built to cater to the special requirements of the IT industry. The assessee claimed that income received from letting out of such buildings was business income. However, the Assessing Officer held that since there were two separate agreements for letting out of buildings and for provision of amenities, income arising from letting out of buildings constituted 'Income from house property' and income for providing services constituted 'Income from other sources.' On appeal, the Commissioner (Appeals) and the Tribunal held that the income from letting out of specialised building and provision of amenities in Software Technology Park set-up by it was to be assessed as business income. The High Court held that, the doctrine of inseparability of income earned from letting out of buildings and plant, machinery or furniture finds a place in section 56(2)(iii). The inseparability referred to in the said provision is arising from the intention of the parties. The intention of the parties in entering into the lease transaction is to be determined. It is not the number of agreements entered into between the parties, which is decisive in determining the nature of transaction. What is the object of entering into more than one said transactions is to be looked into. However, if for enjoyment of lease, the subject matter of all the agreements is necessary, then notwithstanding the fact that there are more than one agreement or one lease deed, the transaction is one. As all the agreements are entered into contemporaneously and the object is to enjoy the entire property viz.: building, furniture and the accessories as a whole, which is necessary for carrying on the business, then the income derived there from cannot be separated, based on the separate agreement entered into between the parties. The primary object of the assessee while exploiting the property is to be seen. If it is found applying such principle that the intention is for letting out the property or any portion thereof, the same may be considered as rental income or income from properties. In case, if it is found that the main intention is to exploit immovable property by way of complex commercial activities, in that event it must be held as business income. [AY. 2005-06]
CIT v. Velankani Information Systems (P.) Ltd. (2013) 218 Taxman 88 / 94 DTR 357 / (2014) 265 CTR 250 (Kar.)(HC)
CIT v. Golfink Software Park (P.) Ltd. (2013) 218 Taxman 88 / 94 DTR 357 / (2014) 265 CTR 250 (Kar.)(HC)

S.28(i) : Business income – Income from other sources – Survey – Amount surrendered assessed as business income and set off loss is permissible [Ss. 56, 133A]
No perversity had been pointed out in finding of Commissioner (Appeals) as well as Tribunal to extent that surrendered amount was an income of assessee from business and not from other sources as held by Assessing Officer. Therefore, set off was permitted against the amount of Rs. 1.75 crores surrendered during survey under s. 133A. (AY. 2003-04)
CIT v. Ram Gopal Manda (2013) 359 ITR 389 / 216 Taxman 95 (Mag.) / 89 DTR 49/261 CTR 631 (Raj.)(HC)

S.28(i) : Business income – Income from house property – Rented property – Assured return in lieu of profit/loss [S.22]

The assessee had not only rented out property but had allowed its use thereof for purpose of joint venture business and in addition to space with proper infrastructural facilities, it also provided other facilities to be used for purpose of diamond processing. Thus, it could not be said that the assessee was not in business through joint venture of processing of diamonds, and merely because agreement envisaged assured return to assessee, in lieu of either profit or loss to be shared from joint venture would not take away fact that assessee was engaged in business. (AY.2006-07)

CIT v. Tirupati Organisers (P.) Ltd. (2013) 216 Taxman 84 (Guj.)(HC)

S.28(i) : Business income – Set up of business – Commencement of business – Previous year – First year of business – Participation in an auction to acquire land [Ss.3,57(iii)]

The assessee obtained loan from its holding company and deposited same as earnest money to acquire land. However, it could not succeed in auction and paid interest on borrowed fund and received interest on earnest money. It claimed differential between interest as loss and claimed for carry forward of said loss. However, the Assessing Officer found that current year was first year of existence of assessee and since it failed to acquire land, it could not be said that business was set up in relevant year and disallowed the said claim. The Tribunal held that acts of applying for participation in tender, borrowing of monies on interest from holding company and deposit of borrowed monies on same day as earnest money clearly established that business had been set-up. Held the finding returned by Tribunal, being a finding of fact, no question of law arose. (AY.2006-07)

CIT v. Dhoomketu Builders & Development (P.) Ltd. (2013) 216 Taxman 76/87 DTR 249 (Delhi)(HC)

S.28(i) : Business income – Construction and sale of commercial complex with a view to earn profit is to be assessable as business income and not as income from other sources [S. 56]

The assessee, a co-operative society, engaged in the business of purchase and sale of agricultural implement, etc. demolished its office and godown and constructed shops at that site and sold such shops to individual purchasers, after permission of Registrar. The Assessing Officer treated the profit earned on sale of shops as income from other sources as against business income claimed by the assessee. Held that the construction and sale of shops was only with a view to earn profit by assessee and, accordingly, concluded that income in question should be treated as business income.(AY. 2006-07, 2007-08)

CIT v. Sabarkantha District Co-op. Purchase and Sales Union Ltd. (2013) 215 Taxman 149 (Mag.) (Guj.)(HC)

S.28(i) : Business income – Grant in aid for research activities is capital receipt [S.41, 263]

The grant in aid for a specific purpose of conducting research in the field of telecommunications, so that the benefit thereof would benefit the Nation and for carrying on day to day business of the assessee was a capital receipt. Order under section 263 was held to be bad in law. The question referred to High Court was on merit. High Court confirmed the order of Tribunal. (AY. 1989-90)

CIT v. India Telephone Industries Ltd. (2013) 215 Taxman 82 / 88 DTR 65 (Karn.)(HC)

S.28(i) : Business income – Adventure in the nature of trade – Sale of land after plotting and development was rightly assessed as business income [Ss.2(13), 45(2).]

Assessee partly inherited from his father, land in urban area for which Zamindari was abolished on 1st July 1961 and the remaining part of the land was purchased by him between 16th December 1958 and 16th May 1959. He sold the land between 1984 to 1991. Held that the income tax authorities rightly concluded that capital asset was converted into stock-in-trade and sale of plots would be treated as business activity; s. 45(2) was rightly invoked. (AY. 1989-90, 1990-91 1991-92)

Rajendra Kumar Dwivedi v. CIT (2013) 83 DTR 65 / 257 CTR 263 (All.)(HC)

S.28(i) : Business income – Joint venture – Addition without any additional evidence was deleted

Assessee and one, KM, agreed to form a joint venture and make investment in 60:40 ratio for carrying out construction work jointly undertaken by them. Out of their relation and in view of robust nature of undertaking, receipts were divided in ratio which was not strictly in 60:40 ratio. The Court held that same cannot be a ground for any addition in hands of assessee, that too without any additional material evidencing that assessee had actually received additional payments not reflected in books.

CIT v. G.K. Patel & Co (2013) 213 Taxman 44 (Mag.) (Guj.)(HC)

S.28(i) : Business income – Estate business – Purchase and sale agricultural land as per memorandum of understanding is assessable as business income.

Assessees, engaged in real estate business, had entered into an Memorandum of Understanding (MOU) with N for acquiring and delivering agricultural land of 63 acres at rate of Rs. 4 lakhs per acre - Assessees purchased 39.9 acres land at rate of Rs. 1,61,000 per acre and as part performance of said MoU, delivered it to 'N' at rate of 4 lakh per acre - 'N' confirmed completion of transaction. The court held that the difference in purchase and sale price would be assessable as assessee's income from real estate business, since for remaining portion of land to be acquired, there was no evidence that any advance was made, said sum could not be treated as assessee's income. (AY. 1996-97)

CIT v. Krishnappa (2013) 213 Taxman 137 (Karn.)(HC)

S.28(i) : Business income – Income from house property – Construction of software technology park – Company – Rental income – Assessable as business income [S.22, 56]

When assessee-company had taken land on lease with objects of constructing IT company with all infrastructural facilities and same was according to objects of Memorandum of Association, income received by assessee by way of lease rentals would be assessable as business income. (AY. 1995-96, 1996, 97, 2001-02)

CIT v. Elnet Technologies Ltd. (2013) 213 Taxman 129 / 89 DTR 442 (Mad.)(HC)

S.28(i) : Business income – Share dealings – Derivatives and F&O – Entries in books of account were found incredible – Repetition of scrips – Stock turnover ratio – Short term capital gains were assessed as business income [S.45]

The assessee was engaged in the business of dealing in derivatives and F & O. During the year she has shown the short term capital gains on sale of shares. AO treated the gain as business income. On appeal CIT(A) accepted the gain as short term capital gains. On appeal by revenue the Tribunal held that, the facts about the entries in the books of account are inconclusive considering the number of scrips, and stock turnover ratio with 1:16, reflected assessee's intention to quickly realize profits and not to wait for dividend or capital appreciation, hence the income was assessed as business income and confirmed the order of AO. (AY. 2008-09)

ACIT v. Veena S. Kalra (2013) 60 SOT 209 / 37 Taxmann.com 208 / (2014) 146 ITD 381(2014) 165 TTJ 460 (Mum.)(Trib.)

S.28(i) : Business income – Capital gains – Share dealings – Shares held beyond period of one year is assessable as business income as the assessee failed to demonstrate that the shares were held as investment [S.10(38), 45]

Assessee was engaged in share trading business. Assessee claimed that some shares purchased were its capital assets on premise that same were sold beyond period of one year from their purchase. Revenue assessed same to be business income. Tribunal held that where assessee, engaged in share trading business, claimed exemption under section 10(38), onus to establish that certain such shares were held as investment was only on assessee. On facts the assessee did not demonstrate that shares

were held as investment, hence the income from same was to be assessable as business income. (AY.2008-09)
Karan R. Bahl v. ITO (2013) 60 SOT 63 (Mum.)(Trib.)

S.28(i) : Business income – Chargeable as Real Estate Developer – Variance in price of flats sold [Ss. 43CA, 50C & 56]
The Assessee was engaged in the business of selling flats after construction. The A.O. noticed variation in price charged by the assessee from various customers. The A.O. despite having received explanation from the assessee for difference in charge of flats, made addition by applying rate of flat sold at a higher price. The CIT(A) held market value ought to have been considered instead of actual sale. The Tribunal held, conclusion of CIT(A) had no legal legs to stand on and since assessee tendered an explanation in support of charging lower rates for some flats, A.O. failed to controvert. Addition in entirety was to be deleted. (AY. 2009-10)
Neelkamal Realtors & Erectors India (P.) Ltd. v. Dy. CIT (2013) 145 ITD 217 / (2014) 159 TTJ 471 (Mum.)(Trib.)

S.28(i) : Business income – Chargeable as Real Estate Developer – Stock-in-trade – Redevelopment
The Assessee, a builder and developer, redeveloped a property in lieu of tenements having area of 225 sq. ft each aggregating to 1797 sq. mtrs. The assessee could not hand over the said built up constructed area of 1797 sq. mtrs, therefore, built up area to such an extent could not be considered as Stock-in-trade, as assessee was under obligation to hand over the 1797 sq. mtrs of built up area. (AY. 2009-10)
Neelkamal Realtors & Erectors India (P.) Ltd. v. Dy. CIT (2013) 145 ITD 217 / (2014) 159 TTJ 471 (Mum.)(Trib.)

S.28(i) : Business income – Capital gains – Share dealings – Trading in systematic and organised manner – Assessable as business income [S. 45]
Assessee was engaged in business of trading in Futures & Options as well as allied stock market operations. He declared profit from such share transactions under head 'Short Term Capital Gains'. The Tribunal held the assessee's transactions were not occasional but systematic and organized, thus profits arising from transactions of purchase and sale of shares was chargeable to tax in hands of assessee under head 'Profits and Gains of Business or Profession' and not under head 'Capital Gain' as claimed by assessee. (AY. 2008-09)
Rajan R. Bahl v. JCIT (2013) 145 ITD 339 (Mum.)(Trib.)

S.28(1) : Business income – Transactions of purchases – Party confirmed addition not justified.[S. 143, 133A, 68)
The assessee firm was engaged in business of trading of ghee. For assessment assessee declared NIL income. The A.O. issued on assessee a notice, and for which during proceedings assessee produced only purchase bills. The competent authority conducted survey at assessee's business premises during which assessee voluntarily surrendered credits of Rs. 28.20 Lakhs. Further, assessee filed revised return and disclosed the aforesaid amount for taxation. Revised return had been regularized by issue of notice u/s. 148. Subsequently, the A.O. on basis of original return completed assessment and made addition of Rs. 36.39 Lakhs which were purchases from "S" and also added further amount of Rs.` 28.20 Lakhs as unexplained cash credits u/s. 68. The Tribunal held that since "S" on enquiries by A.O. confirmed purchase by assessee, the impugned addition of Rs. 36.39 Lakhs was not justified. (AY. 2006-07)
ACIT v. Uday Bhagwan Industries (2013) 145 ITD 401 (Agra)(Trib.)

S.28(i) : Business income – Stock broking – Interest on fixed deposit which was kept as margin money is assessable as business income. [S.56]
Assessee engaged in business of stock broking, earned bank interest on account of 50% of margin money given in form of fixed deposits to obtain bank guarantee in favour of National Stock Exchange so that assessee could have trading limits in cash market segments of NSE. Since assessee was in business of stock broking and said interest income on fixed deposits was connected with business of assessee, such interest income was to be treated as business income. (AY. 2009-10)
Oasis Securities Ltd. v. DCIT (2013) 59 SOT 302 (Mum.)(Trib.)

S.28(i) : Business income – Income from house property – Income from property let out to a director to be taxed as business income in the hands of the company. [S. 22]
Building owned and occupied by the director of the company has to be treated as used for business and income derived has to be assessed as business income.
Woodland Associates (P) Ltd. v. ITO (2013) 56 SOT 56 (Mum.)(Trib.)

S.28(i) : Business income – IT Park – Rental income from business centre is assessable as business income – Deduction under section 80IA(iii) is allowable [Ss.22, 80IA(iii)]
AO treated rental income derived by assessee from business centre (I.T. Park) as income from house property. Tribunal following the earlier year order treated as business income and also held that once the income in question is treated as business Income, assesee’s claim for deduction u/s. 80IA(iii) in respect of said income was to be allowed. (AY.2006-07)
Krishna Land Developers (P) Ltd. v. ACIT (2013) 142 ITD 481 (Mum.)(Trib.)

S.28(i) : Business income – Advance – Expenditure claimed by payer – Receipt is treated as revenue receipt
Assessee had received from its clients a sum for advertising services which was treated as advance for services. However, in payer’s book said sum was reflected as expenditure incurred during year. Held, that the receipt could not be treated as advance and to be treated as revenue receipt in hands of assessee. (AY. 2008-09)
Cheil India (P.) Ltd. v. DCIT (2013) 58 SOT 11 (URO) (Delhi)(Trib.)

S.28(i): Business income – Idle funds – Interest earned on investment of idle funds assessable as business income [S.56]
Assessee set up as joint venture with Government to consult on transport delivery systems Interest earned on investment of idle funds was not income from other sources but business income. (AY. 2007-2008)
Urban Mass Transit Company Ltd. v. ACIT (2013) 24 ITR 741 / (2014) 61 SOT 51 (Delhi) (Trib.)

S.28(i) : Business income – Agricultural and non-agricultural income – Apportionment [Income-Tax Rules, 1962, Rule 8]
The assessee was engaged in the business of growing, manufacturing and selling tea. For the purpose of apportionment between agricultural income and business income in the ratio of 60:40, interest on investment is not to be regarded as income from sale of tea and hence, liable to be excluded for purpose of apportionment. (AY.2007-08)
DCIT v. Mcleod Russel India Ltd. (2013) 24 ITR 262 (Kol.)(Trib.)

S.28(i) : Business income – Income from other sources – Interest on fixed deposit with the bank [S. 56]
Assessee has put the fixed deposits as margin money to obtain bank guarantees in favour of NSE. The CIT(A) enhanced the interest income and treated as income from other sources. The Tribunal held that the interest income had been considered in preceeding assessment years as well as subsequent

assessment years as business income. Therefore, such income has rightly been considered by the Assessing Officer as business income.
Oasis Securities Ltd. v. Dy. CIT (2013) 154 TTJ 17(UO) (Mum.)(Trib.)

S.28(i) : Business income – Share dealings – Capital gains – Purchase and sale on regular basis assessable as business income [S.45]
Board's resolution authorised the assessee-company to set apart a corpus of ` 100 crores for trading in shares which represented intention to carry out activities of purchase and sale of shares on business lines. Further, the purchase and sale transactions in shares were entered into on regular and systematic basis with profit motive which only constituted business. The long-term capital gain was a small amount as against short-term capital gain which was a strong indicator as to shares being not intended to be held by way of investments. Held, the income had to be taxed as business income. (AY. 2007-08)
Mafatlal Fabrics (P.) Ltd. v. Add. CIT (2013) 57 SOT 425 (Mum.)(Trib.)

S.28(i) : Business income – Income from house property – Lease rent, licence fee from letting out said premises to IT companies is held to be assessable as business income.[S. 22]
Assessee is engaged in construction business. It had constructed a premises in Cyber City consisted of IT Park, commercial complexes, schools and residential complexes, etc. IT Park had been for use to various software/other companies and it was recognised/sanctioned under section 80-IA. IT Park was shown as business assets in schedule of fixed assets. Assessee received lease rent, licence fee from letting out said premises to IT companies and offered rental income to tax as income from business. Assessing Officer, held that rent was predominantly for space and prime intention was to let out property on a monthly rent and there was no complex commercial activity involved in this letting out. Held, that intention and object of assessee was to develop IT Park as a systematic commercial activity to earn profit and not just earning of rental income. Income derived from letting out of premises was to be assessed as business income. (AY. 2007-08)
Dy. CIT v. Magarpatta Township Development & Construction Co. (2012) 79 DTR 150 / 150 TTJ 590 / (2013) 141 ITD 682 (Pune)(Trib.)

S.28(i) : Business income – Entertainment tax – Subsidy – Nature of subsidy to be seen in light of policies of respective State Governments
The assessee collected total entertainment tax in respect of its various multiplexes. The assessee got subsidy from State Governments by way of exemption from payment of entertainment tax and it had been granted exemption from payment of entertainment tax in respect of multiplexes at three places. The entire amount of entertainment tax collected by the assessee was included in the profit and loss account, but the assessee claimed that the entertainment tax incentive/subsidy was wrongly offered to tax because it was a capital receipt not chargeable to tax. The Commissioner (Appeals) did not allow the assessee to raise this ground because the issue had not been deliberated upon by the Assessing Officer. Held, that the respective State Government Policies and the orders required to be examined to determine whether the contentions of the assessee were correct. The matter was to be remanded for examination of the facts. (AY. 2005-06)
E-City Entertainment (India) Pvt. Ltd. v. ACIT (2013) 24 ITR 73 / (2014) 61 SOT 105 (URO) (Mum.)(Trib.)

S.28(i) : Business income – Capital gains – Sale of plots – Agricultural land [S.2(13), 45]
The assessee sold plots of agricultural land and the surplus arising thereon was taxed under head 'capital gain'. The Assessing Officer held that the assessee was regularly trading in agricultural land with an intention not to hold such land but to reap benefit when the price of land was at peak and, therefore, sale proceeds were to be taxed as adventure in the nature of trade under section 2(13). It was observed that the Assessing Officer had not produced any evidence that assessee was purchasing

and selling plots of land in subsequent and earlier assessment years. Furthermore, having accepted the capital gains in respect of certain lands during the previous year under consideration, the Assessing Officer should not have taken a different view in respect of other plots of agricultural lands. (AY. 2007-08)
ACIT v. Bhopindersingh R. Arneja (2013) 57 SOT 225 (Nagpur)(Trib.)

S.28(i) : Business income – Share dealings – Capital gains [S. 45]
Income from purchase and sale of shares would be assessed as business income if intention of assessee behind their purchase and sale is to quickly realise profits. However, if intention of assessee behind purchasing and holding shares is to earn dividend and not to realise profit by turning over shares as it is done in course of business, profit arising on sale of shares would be assessable as capital gains. Stock turnover ratio of assessee was 1:16 and capital turnover ratio was 1:14 which is normally found in business and not in investment. Dividend as percentage of average capital worked out to 0.05 per cent. Considering all these factors, the income was taxable as business income. (AY. 2008-09)
DCIT v. Mukeshbhai Babulal Shah (2013) 57 SOT 45 (Rajkot)(Trib.)

S.28(i) : Business income – Trading – Investment – Shares – Purchase of shares in initial public offer and sale thereof within few days after allotment, profits to be treated as business profits not short-term capital gains [S.45]
The assessee earned short-term capital gains on sale of shares, which the Assessing Officer treated it as business income of the assessee rejecting the assessee's claim that similar transactions carried out by the assessee in earlier years were held to be taxable under the head "Capital gains". On appeal, the Commissioner (Appeals) found that the assessee had applied for and was allotted shares in 40 companies and these shares were immediately sold on allotment after an average period of holding of 3-4 days, that the intention of the assessee was not to hold the allotted shares but to sell them on allotment to take advantage of market imperfections and that the Assessing Officer was right in holding that this was a business asset and treating the short-term capital gains as business profit. On Tribunal also confirmed the order of lower authorities. (AY. 2006-07)
Shreyas M. Jhaveri v. ITO (2013) 21 ITR 644 / 58 SOT 286 (Mum.) (Trib.)

S.28(i) : Business income – Capital gains – Sale of shares – No material considered to verify whether shares held as investment or stock-in-trade – Matter remanded. [S.45]
The assessee sold certain shares and offered for taxation the resultant profit twice, that is, a sum of Rs. 66.57 lakhs as business income and long-term capital gains at Rs. 63.10 lakhs. The Assessing Officer deleted the long-term capital gains from inclusion in the total income allowing as business income to continue. The claim of the assessee was that the converse should be done. The Commissioner (Appeals) upheld the assessment order observing that no material was placed before the Assessing Officer or him to prove that the assessee's claim was on account of investment in shares resulting in long-term capital gains and not business income. On appeal the Tribunal held that no material had been considered or referred to verify whether such shares were held as investment or stock-in-trade. The matter was to be restored to the file of the Assessing Officer to determine whether such shares were held by the assessee as stock-in-trade or investment. If such verification showed that the shares were held as investment, the income from their transfer should be considered under the head "Capital gains", if not as "Business income". (AYs. 2003-04, 2004-05)
Bayer Material Science P. Ltd. v. ACIT (2013) 142 ITD 22 / 22 ITR 287 / 90 DTR 133 / 155 TTJ 564 (Mum.)(Trib.)

S.28(i) : Business income – Amount claimed in compensation suit, cannot be treated as income
The assessee, manufacturer and domestic seller of grey fabric, filed its return of income for the AY 2008-09 declaring a loss of Rs. 31,31,568/- in the course of assessment proceedings, the AO noticed

that the assessee had acquired a 1250 MW windmill, from M/s. Suzlon Energy, for captive consumption. The purchase order contained compensation clause, which provided that the assessee was entitled to compensation in case of any loss of generation on account of non availability of the machine below 95% @ 3.67/ KWH or as per the TNEB tariff during the warranty period. He also noticed that the generation of power unit did not touch the assured level of 37 lakh units. The assessee had filed a compensation case before the Jurisdictional High Court raising claim of Rs.17,58,014 up to 15-9-2007 for shortfall in generation of power. Since the other party had not accepted the assessee's claim for compensation and also the case was pending before the Court, the assessee had not declared the amount claimed as its income. The AO held that, since the assessee was entitled to compensation as per the agreement, he taxed the sum of Rs.17,58,014 as the income of the assessee. The Tribunal held that merely by initiating the compensation suit, the amount claimed therein cannot be treated as assessee's income unless the other party admits the liability to pay compensation or there is a decree in favour of the assessee. AY 08-09 (Chennai 'A' Bench, ITA No.1169/Mds/12, dated 17-12-2012)(AY.2009-09)
ACIT v. Trident Textile Mills Ltd. (2013) BCAJ P. 17, Vol. 44-B Part 6, March 2013(Chennai) (Trib.)

S.28(i) : Business income – Business expenditure – General principle Section 28 does not itself provide for expenditure [Ss. 37(1), 29 30 to 43D, 40(a) (ia)]
The Assessing Officer disallowed the interest by applying the provisions of section 40(a) (ia). On appeal the Commissioner (Appeals) held that interest expenses in the hands of the assessee trusts are deductible under section 28 itself and therefore, section 40(a) (ia) does not apply as that section covers only the expenses claimed by assessee under sections 30 to 38. He accordingly deleted those disallowances made by the Assessing officer under section 40(a)(ia). On appeal by revenue, the Tribunal did not agree with legal proposition of Commissioner (Appeals). Tribunal held that, section 28 is an explanatory section which describes various types of receipts of income which are to be included under the head "Profits and gains of business or profession". Apart from this general description, section 28 does not provide for deduction of any expenditure incurred by an assessee in earning profits and gains of business or profession. Section 29 provides that the income referred to in section 28 shall be computed in accordance with the provisions contained in sections 30 to 43D. Law has provided a comprehensive system for deciding what are profits and gains of business or profession and how profits and gains of business or profession will be computed. When such an exhaustive provision is made in the Act, it is not possible to hold that section 28 itself provides for expenditure and, therefore, the assessee can claim the expenditure of interest payment as an expenditure deductible at source itself under section 28. However the Tribunal deleted the disallowance on principle of mutuality. (AYs. 2007-08, 2008-09)
ITO v. Sarvodaya Mutual Benefit Trust (2013) 22 ITR 277 / 56 SOT 507 (Chennai)(Trib.)

S.28(i) : Business income – Capital gains – Share dealing – Held as business income. [S.45]
Where assessee has made several transactions of purchase of shares during year under consideration, and if there is high volume, frequency and regularity of activity carried on by assessee in a systematic manner, it would partake character of business activities carried on by assessee in shares. Appeal revenue was allowed. (AY. 2007-08)
ACIT v. Anil Kumar Jain (2013) 55 SOT 77 (Hyd.)(Trib.)

S.28(i) : Business income – Capital gain – Capital asset – Real estate business – Sale of agricultural land held to be business income. [Ss.2(14) (iii), 45]
Assessee was engaged in real estate business. It had made purchase of lands at frequent intervals during the earlier years. Subsequently, in the return the assessee has declared profit of Rs. 69,00,224 on sale of agricultural lands and claimed the same as exempt from tax. The Assessing Officer noted that purchase of lands at frequent intervals during the earlier years points to the intention of the assessee of engaging in business activity. He stated that such purchases made by the assessee, were

with a motive to earn profit from sale of such lands at a later date. The said lands purchased by the assessee were dry lands and from mere declaration of lease rental from the same during the earlier years at Rs. 15,000, it could not be said that the assessee was actually having agricultural income from such lands. He further, noted that the intention of the assessee at the time of purchase of said lands was to earn profit by selling them subsequently and it was a fact that real estate activity being carried out in the vicinity of the said lands. The Assessing Officer held that the profit from sale of those lands, had to be taxed as business income. Accordingly, he rejected the claim of the assessee for exemption of such profit from tax. After adding the said amount of ` 69,00,224 treating the same as income from business, to the returned income of the assessee, he completed the assessment on a total income of Rs. 75, 21,624. On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. Tribunal held that though assessee had taken plea that land was leased for agricultural operations, evidence brought on record did not suggest that agricultural operation was actually carried on said land, instead facts of case suggested that intention of assessee was to deal in land and earn profit and therefore, income arising out of this activity was nothing but business income and it had to be taxed accordingly. Principle of res judicata does not apply in income tax proceedings. (AY. 2007-08).
G.K. Properties (P.) Ltd. v. ITO (2013) 55 SOT 86 (Hyd.)(Trib.)

S.28(i) : Business income – Capital gains – Share dealing – Shares sold after a short duration of holding – Assessed as business income [S.45]
Assessee declared income arising from sale of shares as short-term capital gain. Assessing Officer finding that number of transactions was very large with high frequency, opined that assessee was engaged in trading of shares. Accordingly, Assessing Officer treated short-term capital gain declared by assessee as business income. Tribunal noted that in most of cases shares had been sold on very date of purchase which showed that sales had been made even without taking delivery. In fact, assessee while giving details of transactions had himself mentioned 'Speculative Short-term Capital Gain' - Besides, other shares had also been sold after a short duration of holding. Tribunal held that aforesaid pattern of transactions clearly showed that assessee was trading in shares and was not an investor. Therefore, the impugned order passed by Assessing Officer was to be upheld assessing the income as business income. (AY. 2007-08)
Devji Nenshi Palani v. ITO (2013) 55 SOT 192 (Mum.)(Trib.)

S.28(i) : Business income – Interest – Broken period
Interest received for broken period should be brought to tax while interest payment of broken period is to be allowed as deduction. (AY. 1996-97)
State Bank of India v. Dy. CIT (2014) 148 ITD 71 (Mum.)(Trib.)

S.28(i) : Business income – Commission – Deferred guarantee commission
Income from deferred guarantee commission does not accrue or arise in year in which guarantee agreements were entered into and same should be spread over period to which guarantee commission relates and should be assessed proportionately. (AY. 1996-97)
State Bank of India v. Dy. CIT (2014) 148 ITD 71 (Mum.)(Trib.)

S.28(i) : Business income – Interest – Credited to interest suspense account
Where interest credited to 'interest suspense account' was not taxed in year of credit, amount recovered thereform during current year out on interest credited in suspense account of earlier year would be taxable in current year. (AY. 1996-97)
State Bank of India v. Dy. CIT (2014) 148 ITD 71 (Mum.)(Trib.)

S.28(i) : Business loss – Loss on sale of raw material – Held allowable

Where there was no evidence to rebut assessee's claim of loss on sale of raw materials, it could not be disallowed.
CIT v. Shree Rama Multi Tech Ltd. (2013) 219 Taxman 162 (Mag.) (Guj.)(HC)

S.28(i) : Business loss – Share trading – Future and option losses – Accounting treatment – Merely because entries were not routed share trading account through audited account – Loss cannot be disallowed [Ss.43(5), 44B, 145]
Since the transactions were not under the cast of shadow or doubt and there was no dispute over quantum of loss computed by the assessee as he had substantiated entire transaction by furnishing valid and statutorily accepted documents, merely debiting future and option losses and share trading in capital account instead of profit and loss account and not routed share trading accounts through audited account u/s 44AB, could not be ground to disregard legally acceptable claim of assessee.
CIT v. Naishad I. Parikh (2013) 219 Taxman 365 (Guj.)(HC)

S.28(i) : Business loss – Securities – Valuation as per RBI guidelines – Loss is allowable
Where assessee bank valued unquoted Government securities as per yield to maturity method of valuation, in terms of RBI Guidelines, resulting loss so computed could not be disallowed. (AY. 1999-2000)
CIT v. Dhanalakshmi Bank Ltd. (2013) 219 Taxman 130(Mag.) (Ker.)(HC)

S.28(i) : Business loss – Irrecoverable advance – Purpose of advance – Not allowable as revenue loss [S.36(1)(vii)]
Since amount advanced for the purpose of acquiring profit earning apparatus had become irrecoverable, same was not allowable as revenue loss. (AY.1998-99)
Kwality Fun Foods and Restaurants (P.) Ltd. v. DCIT (2013) 218 Taxman 143 (Mag.) (Mad.)(HC)

S.28(i) : Business loss – Sale of shares – Loss incurred in the course of business was allowable
The assessee produced copies of bills, contract notes, receipts for sale consideration and share particulars. The Tribunal found that the transaction was genuine. Hence, the loss occurred in course of business was allowable.
CIT v. Spencers and Co. Ltd. (No.3) (2013) 359 ITR 644 (Mad.)(HC)

S.28(i) : Business loss – Banking company – Loss on revaluation of securities is not allowable as deduction [S.45]
Loss on revaluation of securities described as permanent assets was not loss on stock- in-trade and hence, not allowable as deduction. (AY. 1993-94)
CIT v. ING Vysya Bank Ltd. (2013) 356 ITR 532 / 263 CTR 276 (Karn.)(HC)

S.28(i) : Business loss – Stock-in-trade – Confiscation of goods by Customs and Border Protection Force was held to be allowable as business loss
The assessee, the proprietor of a pharmaceutical company, exported bulk drugs to Mexico through San Diego Port, California, USA. The goods were cleared by the Indian customs authorities and reached California, USA. During the transit from California to Mexico, the goods were seized by the Customs and Border Protection Force of the USA for some statutory violations. The assessee claimed business loss before the Assessing Officer as a bad debt and alternatively loss of stock-in-trade. Held, the amount was deductible as business loss. (AY.2005-06)
CIT v. T. C. Reddy (2013) 356 ITR 516 / 218 Taxman 142 (Mag.) (AP)(HC)

S.28(i) : Business loss – Share transactions – Loss on sale of shares transaction is to be set off against profit

The assessee sold three sets of shares, realised profit from one while loss from others. The Assessing Officer held that loss was intentional to set off gain and found that shares were not quoted shares and valuation of shares both at time of purchase as well as at time of sale of said shares was made on net worth basis which had not been challenged by Revenue. Further, the Revenue was unable to produce any evidence to dispel credibility of the prices. Held, the prices arrived at on basis of net worth would have to be accepted and, thus, no addition could be made as transactions are in order. (AY. 2005-06)
CIT v. Bhushan Capital & Credits Services (P.) Ltd. (2013) 216 Taxman 94 (Mag.)(Delhi)(HC)

S.28(i) : Business loss – In the name of firm – Foreign currency transactions – Not allowable in the assessment of partner. [Partnership Act, 1932 S.13]
The Appellant entered into foreign currency transactions on behalf of firm from its account. Both the assessee–partner and firm claimed such loss as deduction in their respective income. The Tribunal disallowed the claim on both. On separate order High Court admitted appeal of the partnership firm. In appeal it was contended that the transactions were entered in to without the knowledge of other partners and therefore should be treated as his personal loss. The Court held that section 13 of the Partnership Act provides, *inter alia*, that subject to the contract between, partnership firm shall indemnify the partner in respect of the payment made and liabilities incurred by firm in the ordinary and proper conduct of business and in doing such act, in an emergency for the purpose of protecting the firm from loss as, would be done by a person of ordinary prudence, in his own case, under similar circumstances. In the result these transactions resulted in loss and could not be allowed as deduction in individual capacity of assessee-partner, when the same claim is made by firm under examination.(AY. 2007-08)
Pravinbhai Mohanbhai Kheni v. ACIT (2013) 215 Taxman 83 (Mag.) (Guj.)(HC)

S.28(i) : Business loss – Loss on sale of raw material – Held as allowable
Held, in absence of any evidence led by revenue to rebut factum of assessee having sustained loss on sale of raw materials, addition made on account of disallowance of loss on sale of raw material was rightly deleted by Tribunal.
CIT v. Shree Rama Multi Tech Ltd. (2013) 214 Taxman 129(Mag.) (Guj.)(HC)

S.28(1) : Business loss – Bad Debt – Inter-corporate deposit – Main business of the assessee, telecom venture – Deduction of amount non recoverable inter corporate deposit not trade debt or part of any money lending business – Not allowable as bad debts or business loss. [S.36(1)(vii)]
Where the assessee was engaged in telecom business, and not engaged in money lending business, loss of inter corporate deposit due to non-recovery of some amounts, did not fall within parameters of provisions of section 36(1)(vii) therefore not allowed as bad debts nor allowable as business loss.
Bharti Televentures Ltd. v. Addl. CIT (2013) 81 DTR 225 / 213 Taxman 320 (Delhi)(HC)

S.28(i) : Business loss – Deletion of addition merely on the ground that revenue has not filed an appeal in the case of wife was held to be not valid, each case has to be decided taking into consideration its own facts – Appeal of revenue was allowed.[S.254(1)]
The Assessee entered into joint venture agreement under which land was taken over for purpose of construction under name and style of Z Pvt. Ltd. The AO was disallowing deduction on account of fair market value from business income of assessee and made addition. The CIT(A) reversed action of AO on ground that identical issue was decided in case of appellant’s wife. The Tribunal upheld order of CIT(A) holding that revenue had not filed any appeal against decision of CIT (A) in case of appellant’s wife. On appeal by the department the High Court, held that each case has to be decided taking into consideration its own facts. Thus, the appeal filed by the department is allowed.
CIT v. Kamal Kumar Bansal (2013) 359 ITR 406 / 217 Taxman 238 (Cal.)(HC)

S.28(i) : Business loss – Capital loss – Loss on revaluation of Government securities – Loss was held to be not allowable

The assessee was a public limited banking company carrying on the activities of banking. The assessee had invested certain amount in securities for the purpose of complying with the RBI Instructions to the effect that a minimum percentage of its total deposits to be invested in such securities, in the wake of deposits that it had received from its customers as part of its business activity. The assessee had indicated such investment as a permanent asset and had claimed that it was held as stock-in-trade, being a part of the trading asset. The assessee claimed that though none of these securities had been actually transferred resulting in a loss, the loss was being computed on the premise that on valuing securities at market value on the last date of the Financial year, the market value of the assets having gone down, the assessee had incurred a loss of Rs. 1,09,10,252 as the market value of the securities was less than the cost of acquisition. The said loss was claimed as business loss. The Assessing Officer opined that the assets in the nature of investments in securities could not be termed as stock-in-trade as it was an investment to fulfil the RBI Instructions and Guidelines. He, therefore, held it as investments and not as part of the business asset of the assessee, valued for trading. Nevertheless, the claim of the assessee had been allowed to an extent of 30 per cent based on the RBI circular relating to the investments in securities, allowing a bank to treat 30 per cent of the investments as current investment whereas 70 per cent of the investment should be in the nature of permanent investments. The view of the assessing authority was affirmed by the Commissioner (Appeals). The Tribunal, however, allowed the assessee's claim in full. The Court held that the Assessee, as per its own admission, holding the investment in securities in terms of RBI Instructions as permanent investment, cannot treat the same as part of stock-in-trade, hence cannot claim loss by way of revaluation on the last day of accounting year as allowable revenue loss. No assessee can claim an investment of lasting nature, to be part of its trading asset or as an asset held by way of stock in trade. Question as to whether an asset is an trading asset or is an asset in the nature of a lasting asset investment held as part of investment made by the banking company is a question which has to be answered in each case and not either based on the RBI circular or guidelines or even a circular issued by the Board in general. Tribunal was, therefore, not justified in allowing the loss as claimed by the assessee. (AY. 1993-1994]

CIT v. ING Vysya Bank Ltd. (2013) 94 DTR 425 / 24 taxmann.com 51 (Karn.)(HC)

S.28(i) : Business loss – Capital loss – Depreciation on investments – Matter remanded back to the A.O. to ascertain the true character of the securities on the basis of material produced to arrive at a finding as to whether this can be treated as 'investment' or 'stock-in-trade'

The assessee claimed deduction for relevant assessment years on account of depreciation on 'investments'. It was submitted by the assessee that being an authorised bank, it was governed by the Banking Regulation Act and the balance sheet was required to be maintained in the statutory format. The current investments were shown in the balance sheet as 'investments', whereas these were in the nature of 'stock-in-trade' as it was open to the applicant to value the same at cost or market value, whichever was lower. The Assessing Officer as well as the Commissioner made disallowance on ground that it was a case of notional loss. The Tribunal also rejected the assessee'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. The High Court held that in so far as the books of account are concerned, namely, the balance sheet, the assessee was supposed to follow the mandate of the RBI and, therefore, that by itself would not be a ground to label the securities as 'investments'. One will have to see the real nature of these securities. Irrespective of the treatment given to this transaction in the balance sheet by virtue of RBI directions, one is to discern the true character of the securities. Matter was remanded back to the A.O. to ascertain the true character of the securities on the basis of material produced to arrive at a finding as to whether this can be treated as 'investment' or 'stock-in-trade'. (AYs.1996–97 & 1997–98)

Punjab & Sind Bank v. CIT (2013) 94 DTR 440 (2012) 26 taxmann.com 355 (Delhi)(HC).

S.28(i) : Business loss – Shares dealing – Loss on off market transaction cannot be treated as sham where off market transactions were found to be at market rates and payment was made or received through banking channel

The Assessee Company, as part of its business made huge purchase and sale of shares through the Stock Exchange on day-to-day basis. During assessment, the A.O. noticed that the assessee had also carried out 'off market transactions' for sale and purchase of shares with some sister concerns as well as others, resulting in huge losses. Assessing Officer disallowed loss holding off market transactions as a sham. On appeal, the Commissioner (Appeals) allowed the loss as the Assessing Officer had considered the profit earned on the off-market transactions and only disallowed the loss incurred on such transactions.

Where off market transactions were found to be at market rates and payment was made or received through banking channel on a consolidated basis, loss on such transactions could not be disallowed holding them as sham transactions. (AY. 2002-03 to 2005-06)

ACIT v. Hina Nitin Parikh (2013) 144 ITD 157/ 35 taxmann.com 416 (Ahd.)(Trib.)

S.28(i) : Business loss – Capital loss – Loss of refundable deposit with sister concern is capital loss and not allowable as business loss or bad debt. [S. 36(1)(vii)]

Where the assessee had given deposit/advance to subsidiary company for taking premises on lease, there was no business transaction with subsidiary company and element of commercial expediency did not exist. Hence, loss of such refundable deposit would be capital loss. (AY. 2004-05)

APL India (P.) Ltd. v. Addl. CIT (2013) 58 SOT 41 (URO)(Mum)(Trib.)

S.28(i) : Business loss – Irrecoverable amount on sale of leased asset allowable as business loss

The assessee has given plant and machinery to the on lease. On expiry of the lease term the assessee has sold the plant and machinery to the same parties on 31-3-1999. Since the amount has become irrecoverable, so the assessee wrote off the amount in the books of account. Since these debts are on sale of leased assets i.e. in the course of business the same should be allowed as a business loss. Assessee's claim for deduction in respect of amount written off as business loss was rejected. On appeal the Hon'ble ITAT decided the issue as debts in question were on sale of leased assets, i.e., in course of business. assessee's claim of business loss was allowable. (AY. 2001-02)

IGFT Ltd. v. ITO (2013) 144 ITD 57 / 36 taxmann.com 241 / 95 DTR 181 / 158 TTJ 572 (Mum.)(Trib.)

S.28(i) : Business loss – Bad debt – Provision towards doubtful advances – Mere provision is not allowable [S.36(1)(vii)]

Held, mere provision in accounts was not equivalent to write-off. Addition was rightly made for provision towards doubtful advances written off as irrecoverable when there was nothing to prove actual write-off. (AY. 2007-08)

Ford India P. Ltd. v. DCIT (2013) 25 ITR 456 / 59 SOT 221 / 156 TTJ 1 / 90 DTR 154 (Chennai)(Trib.)

S.28(i) : Business loss – Percentage completion method Expected loss is not allowable [S.37(I)]

Assessee is a contractor recognising revenue based on percentage completion method. It claimed expected loss on grounds that contracts had no escalation clause and price of steel and cost of wages and spares had increased manifold. Tribunal held that booking of expected loss when, circumstances are adverse, might be warranted in terms of Accounting Standards, as a matter of conservatism, but for tax purposes it is a cardinal principle that only expenses incurred or losses suffered could be allowed. Assessee based on percentage completion method claimed expected loss. There was no legal right on any person for claiming a cost which was still to be incurred, said loss could not have been allowed. (AY. 2004-05)

EDAC Engineering Ltd. v. Dy. CIT (2013) 141 ITD 231 (Chennai)(Trib.)

S.28(i) : Business loss – Bad debts – Advances to suppliers is allowable as business loss. [S.36(1)(vii)]

Since bad debts arising from advances to suppliers cannot be allowed under section 36(1) (vii), same can alternatively be allowed as business loss. (AY. 2003-04)

Greaves Cotton Ltd. v. ITO (2013) 57 SOT 158 (Mum.)(Trib.)

S.28(i) : Business loss – Loss on sale of securities shown as investment consistently in the Balance Sheet cannot be treated as business loss [S. 45]

During the year the assessee a co-operative bank incurred loss on sale of Government securities and debited the same in profit & loss account. The assessee claimed the said loss as business loss. During the course of the assessment proceedings the Assessing Officer sought an explanation of the business loss incurred by the assessee. In reply to the same the assessee explained that as per the provisions of section 6 read with section 5(b) and (c) of Banking Regulation Act, the transaction of securities forms part of the banking business and bank can purchase and sell securities. The assessee also relied on the CBDT Circular No. 599 dated 24-4-1991 reported in [(1991) 94 CTR 65 (St.)] wherein it was clarified that the claim of loss on securities, if debited in the books of accounts would be given the same treatment as is normally given to stock-in-trade. However, the Assessing Officer disallowed the claim of the assessee and treated the loss suffered on sale of Government securities as “long-term capital loss”. On appeal, the CIT(A) reversed the order of the Assessing Officer and held that the loss suffered on sale of Government securities is allowable as business loss only. The department carried the matter further in appeal before the Income Tax Appellate Tribunal. The Tribunal reversed the order of the CIT(A) by holding that the assessee consistently treats Government securities held by it as “investment” and not “stock-in-trade” and valuing them “at cost” in its balance sheet as also in its IT return, loss from sale thereof cannot be treated as business loss. (AY. 2007-08)

Dy. CIT v. Co-op. Bank Mehsana Ltd. (2013) 86 DTR 247 / 154 TTJ 522 (Ahd.)(Trib.)

S.28(i) : Business loss – Obsolete stock – Disallowance of claim at 25% of cost was held to be justified.

The assessee wrote off in the books of account stores / spares which are of obsolete having zero value. The Assessing Officer disallowed the claim. In appeal Commissioner (Appeals) considered the scrap value of such obsolete items at 25% of cost and disallowed the assessee’s claim to the extent of 25% of cost of stores/spares. On appeal by revenue and assessee the Tribunal affirmed the order of Commissioner (Appeals). The Tribunal also held that the scrap value of stock has to be considered as opening stock in the year of sale. (AY. 2001-02 to 2002-03)

Gujarat Mineral Development Corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.)(Trib.)

S.28(i) : Business loss – Writing of interest on share loan to staff allowable as business loss.

Assessee company gave share loan to staff members for subscribing 200 shares of company. It offered interest charged on such loan for tax in earlier years. Subsequently on representation made by employees in current year had written off such interest and debited same to profit and loss account. Lower authorities disallowed the said interest written off. On appeal to Tribunal the Tribunal held that once the interest on such loan was offered to tax by assessee in earlier year and same was written off in current year, the disallowance was not justified. (AY. 2001-02 to 2002-03)

Gujarat Mineral Development Corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.)(Trib.)

S.28(i) : Business loss – Foreign currency – Forward contract – Loss on account of revaluation of contract on last date of accounting period is allowableas deduction

The Tribunal held that the forward contract is entered into by the assessee to buy or sell foreign currency at an agreed price at a future date falling beyond the last date of the accounting period, the

loss incurred by the assessee on account of revaluation of the contract on the last date of the relevant accounting period is an allowable deduction. (AY. 1998-99 to 2003-04)
Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606 / 57 SOT 101 (Mum.)(Trib.)

S.28(i) : Business loss – Transfer of business – Slump sale – Year of taxability –Transaction of transfer of business took place in previous year relevant to assessment year 2003-04 and income from transfer to be considered in that year – Additions cannot be made on presumption
The assessee sold a part of its business to S on September 30, 2002 for a lump sum consideration of Rs. 7,12,41,450 resulting in loss of Rs. 2,10,26,593. Pending certain legal formalities, the assessee agreed to carry out the business on behalf of the buyer S, as its custodian in India with the clear understanding that any loss/profit arising out of the operations would belong to the buyer. It contended that the loss of Rs. 2.10 crores should be allowed under the head "Profit and gains of business or profession". The Assessing Officer held that the transaction was not a slump sale transaction. From the total sale consideration of Rs. 7.12 crores towards the business, the Assessing Officer reduced a sum of Rs. 5.97 crores, being the consideration for transfer of all other items of assets at their book value. He worked out that the inventory valuing Rs. 3.24 crores was transferred to the transferee only at Rs. 1.18 crores, that the closing stock was required to be valued at the market rate. Considering the gross profit rate of 36.50 per cent as declared by the assessee for the year in question, the Assessing Officer computed the market value of inventories at Rs. 4.43 crores compared with the actual value of transfer of inventories at Rs. 1.18 crores, and held that the assessee suppressed the income of Rs. 3.28 crores. Taking into consideration the fact that the business was transferred on September 30, 2002 and thereafter it was carried on by the assessee as a custodian of the transferee, the Assessing Officer held that the income of Rs. 3.28 crores was required to be included in the total income for the assessment year 2003-04. He, therefore, disallowed the assessee's claim of loss of Rs. 2.10 crores in the year under consideration and initiated reassessment proceedings for the assessment year 2003-04 and completed the assessment accordingly. When the appeals for both the years came up before the Commissioner (Appeals), he upheld the action of the Assessing Officer. On appeal the Tribunal held that admittedly, the assessee's business was transferred to S on September 30, 2002. The assessee in fact, carried out business on behalf of S as its custodian in India from October 1, 2002 till March 31, 2004 and transferred profit/loss arising out of such operations to the buyer. The assessee could not be considered simultaneously as agent of the buyer and also the owner of the business between October 1, 2002 to March 31, 2004. The transaction of transfer of business took place in the previous year relevant to the assessment year 2003-04 and accordingly income from such transfer of business was to be considered in that year alone. The business of the unit with all its assets including stock-in-trade was transferred by the assessee to S, an altogether different concern. The assessee discontinued the business of the unit, thereby necessitating the valuation of stock at market price. The assessee agreed to sell the assets of its unit including stock-in-trade for a total sum of Rs.7.12 crores. The Assessing Officer computed the market value of stock in the assessment order for the assessment year 2004-05 applying the gross profit rate of 36.50 per cent for that year. He, however, made addition in the year relevant to the assessment year 2003-04 holding that the transaction of transfer of stock-in-trade of the business along with assets took place in such earlier year. The transaction of transfer of the business including stock-in-trade actually took place on September 30, 2002, which was relevant to the assessment year 2003-04. The calculation of market value of the stock at Rs. 4.43 crores on the date of transfer of such stock was not correct.
That even if such a value was presumed to be correct, the authorities had nowhere held that such value of stock actually realised by the assessee did not represent its true market price or that the market value of stock was more than what was actually realised from the buyer of the business. The transferor and transferee companies were unrelated to each other. In such circumstances, the only logical conclusion was that the assessee transferred its stock at the market value recorded in the agreement at ` 1.18 crores. When the transferee company had paid a total sale consideration of Rs.

7.12 crores, which included a sum of Rs. 1.18 crores towards the value of inventories, the Assessing Officer could not presume the market value of such inventories at Rs. 4.43 crores without any cogent reason.
That it was not possible to make addition of Rs. 3.28 crores by taking the market value of stock transferred as on the date of transfer without considering the second part of the transaction, being the transfer of stock at actual price realised at Rs. 1.18 crores, which event also took place in the relevant year. There was a net loss as claimed by the assessee on the composite transaction of firstly valuing the stock at market price on September 30, 2002 and then its sale during the year. The Assessing Officer considered only the first part of the transaction overlooking the second part, which also ought to have been considered. Therefore, the Assessing Officer's computation of income of Rs. 3.28 crores was to be reversed.
The assessee claimed that the profit or loss from the transaction of transfer of stock of the business was to be considered under the head "Profits and gains of business or profession" as against the Commissioner (Appeals) and the Assessing Officer including it under the head "Capital gains". The Assessing Officer took the item wise value of assets (both fixed and current) of the business. He considered all other assets of the business as having been transferred by the assessee at book value. In that view of the matter, he held that no chargeable income arose from the transfer of other assets. Thereafter, he computed income from the transfer of stock-in-trade by assigning some market value to it. The resultant profit was held to be chargeable to tax as capital gain. On appeal
Held, that profit or gain chargeable under Chapter IV-E can arise only on the transfer of capital asset. Stock-in-trade is not a "capital asset". Resultantly, no profit or gain from the transfer of stock could be charged to tax under the head "Capital gains". The loss from the transfer of stock amounting to Rs. 2.10 crores was deductible under the head "Profits and gains of business or profession" in relation to the assessment year 2003-04. (AYs. 2003-04, 2004-05)
Bayer Material Science P. Ltd. v. ACIT (2013) 142 ITD 22 / 22 ITR 287 / 90 DTR 133 / 155 TTJ 564 (Mum.)Trib.)

S:28(i) : Business loss – Foreign exchange forward contracts – Loss on revaluation of unmatured forex contracts – Held to be allowable
Assessee claimed deduction of Rs.7.14 crore on account of loss on revaluation of unmatured foreign exchange forward contracts on basis of valuing such contracts at rate of exchange prevailing at end of year. Assessing Officer denied deduction on ground of it being contingent in nature. The Tribunal held that in view of decision of Tribunal in *Dy. CIT (IT) v. Bank of Bahrain & Kuwait [2010] 41 SOT 290 (Mum.) (SB)* deduction so claimed by assessee was allowable, however, with a rider that loss so allowed should not be allowed again in succeeding assessment year. (AY. 1988-89)
Dy. CIT v. Banque Indosuez (Known as Credit Agricole Indosuez) (2012) 19 ITR 463 / (2013) 55 SOT 38 (Mum.)(Trib.)

S.28(i) : Business loss – Bad debts – Expenses on behalf of principal was held to be business loss [S.36(1)(vii)]
Assessee incurred exhibition expenses on behalf of its principal. On failure of assessee to recover said amount from principal, it was written-off as bad debt. Assessing Officer rejected assessee's claim. Tribunal held that the Assessing Officer rightly concluded that exhibition expenses could not be allowed as bad debt under section 36(1)(vii), however having regard to fact that exhibition expenditure was incurred by assessee on behalf of its principal in ordinary course of business, non-recovery of same could be allowed as business loss. (AY. 2003-04)
A.T.E. Enterprises (P.) Ltd. v. Dy. CIT (2013) 55 SOT 175 (Mum.)(Trib.)

S.28(i) : Business loss – Capital or revenue – Foreign exchange loss – Loss on cancellation of forward contract for acquiring company was held to be capital loss [S.37(1)]

The assessee company has given a loan in foreign exchange to its subsidiary for the purpose of acquiring a company in South Africa, the loss suffered by the assessee by settling the forward contract in the process of acquiring of a capital asset and therefore it is a capital loss. (AY. 2006-07)
Apollo Tyres Ltd v. Dy. CIT (2013) 90 DTR 35 / 155 TTJ 470 / 60 SOT 1 (Cochin)(Trib.)

S.28(i) : Business loss – Advances to agents in the course of business [S.37(1)]
Advances made to agents in the course of business which was not recoverable is allowable as business loss. (AY. 2006-07)
Apollo Tyres Ltd. v. Dy. CIT (2013) 90 DTR 35 / 155 TTJ 470 / 60 SOT 1 (Cochin)(Trib.)

S.28(i) : Business loss – Derivatives – Futures and options – Stock in trade – Mark to market loss – Normal rules of valuation of stock will apply
Where derivatives are held as stock-in-trade, whatever rules apply to stock-in-trade, would be applied to their valuation also. Therefore, the assessee had rightly claimed mark-to-market loss on such derivatives. (AY. 2008-09)
DCIT v. Kotak Mahindra Investment Ltd. (2013) 59 SOT 4 (Mum.)(Trib.)

S.28(i) : Business loss – Anticipated loss on repurchase transactions is allowable as business loss
Anticipated loss in outstanding repurchase transactions is actual and real and not a notional loss and is not dependent on happening or non-happening of a future event and, thus, cannot be said to be contingent in nature. Therefore, the claim of loss on account of securities for outstanding repurchase transactions cannot be disallowed on ground that same was merely a provision and not an actual loss. (AY. 2004-05)
ITO v. SBI DHFL Ltd. (2013) 59 SOT 1 (Mum.)(Trib.)

S.28(i) : Business loss – Loss on revaluation of investment – Banking company – Stock- in-trade
In case of banking business permanent category investment represents stock in trade and loss on revaluation thereof is allowable as deduction. (AY. 1996-97)
State Bank of India v. Dy. CIT (2014) 148 ITD 71 (Mum.)(Trib.)

S.28(i) : Business loss – Jewellery business – Normal wastage
Loss on account of wastage to the extent of 5% of gold and silver was held to be within permissible limits, and hence, allowed as deduction. (AYs. 2004-05, 2009-10)
DCIT v. Sanghi Jewellers P. Ltd (2013) 27 ITR 317 / (2014) 61 SOT 50 (Hyd.)(Trib.)

S.28(i) : Business loss – Loss of stock – Insurance claim
Disallowance to extent of insurance claim not accepted by insurance company for loss of stock was not proper as claim was not found to be bogus. (AYs. 2006-07, 2007-08)
GE India Industrial P. Ltd. v. DCIT (2013) 27 ITR 543 (Ahd.)(Trib.)

S.28(i) : Business loss – Forfeiture of advances – Advance for purchase of capital asset – Capital loss
Assessee advanced certain sum against contracts for purchase of some machineries, however, it rescinded said contracts. Consequently, advances were forfeited by suppliers and assessee incurred loss. It claimed deduction treating said loss to be business loss which was denied holding said loss is on capital field. Tribunal held that since loss suffered by assessee was due to its decision rescinding contracts for purchase of capital asset and, consequently by allowing amounts paid to be forfeited, it was reducing loss on capital account loss was a capital loss and not allowable as business loss. (AY.2006-07)
Integrated Technology Solutions (P.) Ltd. v. ITO (2013) 60 SOT 202 (Mum.)(Trib.)

S.28(i) : Business loss – Irrecoverable advances to employees who left the service – Allowable as business loss

Assessee claimed deduction on account of advances paid to employees who had left their services and produced requisite details, same was deductible as business loss. (AY.2006-07)

Integrated Technology Solutions (P.) Ltd. v. ITO (2013) 60 SOT 202 (Mum.)(Trib.)

S.28(iv) : Business income – Export business – Value of any benefit or perquisite-Entitlement – Accrual – Res-Judicator – Year of taxability – Acceptance of view in earlier year- Income has accrued must be considered from a realistic & practical angle (ii) If Dept has accepted adverse verdict in some years, it cannot be allowed to challenge verdict in other years (iii) disputes as to the year of taxability with no/ minor tax effect should not be raised by Dept. [S.4, 5]

Pursuant to the import-export policy of the Government, the assessee was entitled to make duty free imports of raw materials in respect of the exports made by it. The assessee accounted for the benefit of the entitlement to make duty free imports in the year of export but claimed that the benefit was not chargeable to income-tax in the year in which the exports were made but it was chargeable to tax only in the year in which the imports were availed of and the raw materials consumed. The AO rejected the contention and held that as the assessee was following the mercantile system of accounting, the right to receive the benefit accrued as soon as the export obligation was fulfilled and it was chargeable to tax in that year u/s 28(iv). On appeal, the CIT(A), Tribunal and High Court upheld the assessee's stand. On appeal by the department to the Supreme Court, HELD dismissing the appeal:

(i) Three tests have been laid down by various decisions of the Supreme Court to determine when income can be said to have accrued: (a) whether the income is real or hypothetical; (b) whether there is a corresponding liability of the other party to pay the amount to the assessee & (c) the probability or improbability of realisation of the income by the assessee has to be considered from a realistic and practical point of view. Applying these tests, on facts, even if it is assumed that the assessee was entitled to the benefits under the advance licences as well as under the duty entitlement pass book, there was no corresponding liability on the customs authorities to pass on the benefit of duty free imports to the assessee until the goods are actually imported and made available for clearance. The benefits represent, at best, a hypothetical income which may or may not materialise and its money value is therefore not the income of the assessee. Also, from a realistic and practical point of view (the assessee may not have made imports), no real income accrued to the assessee in the year of exports and s. 28(iv) would be inapplicable. Essentially, the AO is required to be pragmatic and not pedantic. (ii) Further, as in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further, it cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the taxpayers' money in pursuing litigation for the sake of it.

(iii) Further, as the dispute was only as to the year of taxability and as the rate of tax remained the same the dispute raised by the Revenue is entirely academic or at best may have a minor tax effect. There was, therefore, no need for the Revenue to continue with this litigation when it was quite clear that not only was it fruitless (on merits) but also that it may not have added anything much to the public coffers. It is hoped that the Revenue implements its litigation policy a little more practically and a little more seriously. (AY. 2001-02)

CIT v. Excel Industries Ltd. (2013) 262 CTR 261 / 358 ITR 295 / 93 DTR 469 / 219 Taxman 379 (SC)

CIT v. Mafatlal Industries Ltd. (2013) 262 CTR 261 / 358 ITR 295 / 93 DTR 469(SC)

S.28(iv): Business income – Value of benefits or perquisite – Waiver of loan – Did not amount to benefit or perquisite [Ss.28(i), 41(1)]

Assessee is not carrying on moneylending business and earlier loan did not give a benefit arising out of business then the remission can not be taxed under section 41(1) of the Act or under section 28(iv). On facts the Court held that waiver of loan did not amount to benefit or perquisite under section 28(iv). (AY. 2004-05)

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

S.28(iv) : Business income – Value of benefits or perquisite – Forfeited liability –Credited to capital account – Taxable as income

Assessee forfeited liability of ` 10 lakhs and credited said amount to capital amount. This was held to be taxable by the Assessing Officer. (AY. 2008-09) & affirmed by the Tribunal.
Krishan Murari Lal Agarwal v. DCIT (2013) 59 SOT 136 (URO) (Agra)(Trib.)

S.28(iv) : Business income – Value of any benefit or perquisites – Capital reserve on amalgamation cannot be taxed as value of any benefits or perquisite

The assessee company showed capital reserve in its balance sheet on account of amalgamation. The Assessing Officer treated the capital reserve as income of the assessee company under section 28(iv), holding amalgamation as an adventure in the nature of trade and the capital reserve as a benefit accruing by way of amalgamation. The Commissioner (Appeals) held that the capital reserve on account of amalgamation was of capital nature, not taxable under section 28(iv), and that amalgamation was not an adventure in the nature of trade. On appeal Tribunal held that capital reserve arising on amalgamation cannot be taxed as a benefit or perquisite arising from business under section 28(iv) under head 'Profits and gains of business or profession'. (AY. 2008-09)
ITO v. Shreyans Investments (P.) Ltd. (2013) 141 ITD 672 / 87 DTR 1 / 154 TTJ 469 (Kol.)(Trib.)

S.28(va) : Business income – Cash or kind – Non-compete fees – Consideration received without any agreement or restrictive covenant preventing from carrying on business – Taxable as business income

The tribunal held that prior to 1-4-2003, in absence of transfer of any asset for consideration, any agreement between assessee and payer or any restrictive covenant preventing assessee to carry on business, non-compete fee received by assessee was not capital in nature, and was taxable as business income. (AY. 2000-01).
Mitsu Ltd. v. ACIT (2013) 142 ITD 157 / 87 DTR 305 / 154 TTJ 175 (Ahd.)(Trib.)

S.28(va) : Business income – Slump sale – Consideration received on account of slump sales – Addition was deleted [S.2(42C)]

The Tribunal held that the addition made by the Assessing Officer by bringing to tax the consideration received for slump transfer of the hospitality business under section 28(va) of the Act and in denying the exemption is erroneous. Tribunal deleted the addition.
Marudhar Hotel (P) Ltd. v. JCIT (2013) 156 TTJ 697 / 92 DTR 33 / (2014) 61 SOT 27 (URO)(Jodh.)(Trib.)

S.28(va) : Business income – Sale of units – Non-compete fee – Non-compete fees received taxable under the head. Profits and gains of business or profession – Law applicable – Section 28(va) inserted w. e. f. 1-4-2003 – Non-compete fee taxable for period after amendment [S.54EC]

The assessee company was engaged in manufacturing various types of equipments, sold one of its units to a company. It entered into an agreement with the said company for not carrying out any similar business against payment of a sum of Rs. 5 crores for a period of 4 years. It treated the said sum as a long term capital gain and claimed exemption under section 54EC of the Act. Assessing Officer held that the non-complete fee was clearly taxable under section 28(va) and treated the said receipt under the head 'Profit and gain from business or profession.
The CIT(A) also confirmed the Assessing Officer's order on appeal. The Tribunal held that past amendment, a perusal of amended section 28(va) clearly shows that any sum received in cash or kind under any agreement for non-carrying out any activity in relation to any business shall be taxed under

the head ‘Profits and gains of business’. Hence the Tribunal upheld the CIT(A)’s order and held the non-complete fees received taxable under the head, Profits and gains of business or profession under section 28(va) of the Act. (AY. 2009-10)
Anurag Toshniwal v. Dy. CIT (2013) 56 SOT 62 (URO) / 23 ITR 112 (Mum.)(Trib.)
Arun Toshniwala v. Dy. CIT (2013) (2013) 56 SOT 62 (URO) / 23 ITR 112

S.28(va) : Business income – Non-compete fees – Taxability – DTAA-India-France [Article 7]
Compensation received from foreign company in lieu of an undertaking by the assessee for not competing with Foreign company in India and for not using trade mark, designs, logo of said foreign collaborator, post settlement would be taxable in India. (AY. 2004-05)
Control & Switchgear Contractors Ltd. v. DCIT (2013) 57 SOT 127 (URO) (Delhi)(Trib.)

S.30 : Rent rates, taxes, repairs and insurance for buildings – Renewal and installation – Expenditure for laying/fixing marble flooring was not covered under ‘current repair’.
Renewal and installation of entire flooring in the entire building with new flooring, would be a case of complete replacement and change with view to make distinct improvement or upgrade appearance and ambince and was not necessary for maintaining or preserving building. Therefore, the Tribunal was justified in holding that expenditure for laying/fixing marble flooring was not covered under ‘current repair’. (AY.2007-08)
Surinder Madan v. ACIT (2013) 218 Taxman 461 / 94 DTR 185 (Delhi)(HC)

S.30 : Rent rates, taxes, repairs and insurance for buildings – Leasehold premises – Design, layout, material construction and fabrication work is revenue expenditure
The assessee was only a lessee in respect of the premises in which it was setting up its office. Lease period was 30 months. The assessee incurred expenditure mainly towards charges for design, layout, material construction and fabrication work. The assessee was required to incur such expenditure for providing partitions, vinyl flooring and interior decoration in order to provide business ambience and achieve functional utility. Assessing Officer treated the said expenditure as capital in nature. The CIT(A) held that the expenditure made by the assessee to make the premises more useful and enhance its functional utility, would not come under the purview of capital expenditure except in respect of a sum paid for carrying out air conditioning work like providing ducts for split type air conditioner, etc., as those things are of enduring nature. Tribunal concurred with the view of the Commissioner (Appeals). On appeal High Court held that the expenditure on designing, lay out and other temporary constructions, to make functional was allowable as repair and maintenance, and not capital in nature. (AY. 2004-05)
CIT v. Armour Consultants (P.) Ltd. (2013) 214 Taxman 444 / 355 ITR 418 (Mad.) (HC)

S.31 : Repairs – Replacement of broken AC sheets, wall plaster, tools and dies – Allowable as revenue expenditure
Findings recorded by the Tribunal that expenses were incurred for replacement of broken AC Sheets, replacement of factory wall plaster, repair of workshop floor, replacement of ceramic tiles in factory and replacement of tools and dies of plant and machinery, were pure findings of fact, no substantial question of law arose therefrom. (AY. 2003-04)
CIT v. Manohar Lal Hira Lal Ltd. (2013) 219 Taxman 161(Mag.) (All.)(HC)

S.31 : Repairs – *Res judicata* – Allowed as revenue in earlier years – Same was allowable
Where machinery repair expenses were allowed by both Commissioner (Appeals) and Tribunal for earlier assessment year, on similar facts, the same was allowable in year under consideration also.
CIT v. Shree Rama Multi Tech Ltd. (2013) 219 Taxman 162 (Mag.) (Guj.)(HC)

S.31: Repairs – Replacement of part of machinery – New data was produced, the matter remanded to decide afresh

Held, 'replacement' and 'current repairs' do not go hand in hand and, therefore, replacement expenditure cannot be said to be 'current repairs'. Where the assessee, in support of its claim for deduction of 'current repairs' brought certain new data on record which was not available before authorities below, in such a situation matter was to be remanded back for disposal afresh on basis of entire material available on record.(AY. 2005-06)

Super Spinning Mills Ltd. v. ACIT (2013) 357 ITR 720 / 93 DTR 264 / 218 Taxman 125 (Mad.)(HC)

S.31 : Repairs – Expenses to increase in life of existing assets cannot be treated as capital in nature [S.37(1)]

It was held that increase in life of existing assets beyond their original estimated economic life by repairs and maintenance could not be taken as ground for treating such expense as capital in nature.

CIT v. Vishal Paper Industries (2013) 351 ITR 478 / 94 DTR 175 / 217 Taxman 245 / 36 taxmann.com 19 (P & H)(HC)

Editorial: Vishal Paper Industries v. JCIT (2013) 21 ITR 220 (Chandigarh)(Trib.) is affirmed.

S.31 : Repairs – Current repairs – Replacement of integral part of machinery will come within the meaning of current repairs

Chamber assembly is one of the integral parts of intermix machine and, therefore, expenditure incurred by assessee for replacing chamber assembly would come within meaning of 'current repairs'. (AYs. 2006-07 & 2007-08)

Midas Rubber (P.) Ltd. v. ACIT (2012) 20 ITR 6 / (2013) 58 SOT 7 (URO) (Cochin)(Trib.)

S.31 : Repairs – Replacement of crucial components of a machine could not be considered as current repairs. [S. 37(1)]

Replacement of crucial components of a machine which resulted in a new or fresh advantage or obtaining of enduring benefit could not be considered as current repairs expenditure and would not be allowable as deduction u/s 31(1) or u/s 37(1). (AY.1999-2000)

DCIT v. Printers (Mysore) (P.) Ltd. (2013) 57 SOT 117 (URO) (Bang.)(Trib.)

S.32 : Depreciation – Ownership of asset – No requirement of usage by assessee himself – Registration in the name of lessee-A "Financier" satisfies the "ownership"and "user" test for depreciation [Motor Vehicles Act, 1988 S. 2(30),2 (13), 2(24)]

The assessee, a NBFC, bought vehicles and leased it out to its customers. The vehicles were registered in the names of the customers. The AO held that as the vehicles were registered in the names of the customers and were used by them, the assessee was not eligible for depreciation u/s 32 as it was not the "owner" of the vehicles nor had it "used" the vehicles for purposes of business. The CIT(A) & Tribunal allowed the assessee's claim. However, the High Court reversed the Tribunal on the ground that the assessee was only a "financier" and not the "owner" of the vehicles and so was not eligible to claim depreciation. On appeal by the assessee to the Supreme Court, held reversing the High Court:

(i) S.32 requires that the asset must be "owned, wholly or partly, by the assessee and used for the purposes of the business". The Department's argument that the assessee is not the "owner" of the vehicles is not acceptable because the lease agreement specifically provided that the assessee was the exclusive owner of the vehicle at all points of time and that it was empowered to repossess the vehicle (and not merely recover money) if the lessee committed a default. At the conclusion of the lease period, the lessee was obliged to return the vehicle to the assessee. Also, the assessee had the right of inspection of the vehicle at all times. As the assessee has a right to retain the legal title of the vehicle against the rest of the world, it would be the owner of the vehicle in the eyes of law. The fact that at

the end of the lease period, the ownership of the vehicle is transferred to the lessee at a nominal value not exceeding 1% of the original cost of the vehicle does not make a difference. Also the fact that the Motor Vehicles Act deems the lessee to be the "owner" has no relevance;
(ii) The Department's argument that the assessee had not "used" the vehicles is also not acceptable because the vehicle was "used" by the assessee in its business of leasing. Once it is held that leasing out of the vehicles is one mode of doing business by the assessee and the income derived from leasing out is treated as business income it would be contradictory, in terms, to say that the vehicles are not used wholly for the purpose of the assessee's business. The physical user of the vehicles is not necessary (*CIT v. Shaan Finance (P) Ltd. (1998) 231 ITR 308 (SC)* followed) (AY. 1991-92 to 1996-97)
I. C. D. S. Ltd. v. CIT (2013) 350 ITR 527 / 212 Taxman 550 / 255 CTR 449 / 82 DTR 33 / AIR 2013 SC 3037 (SC)

S.32 : Depreciation – Rate – Leasing business – Higher rate for vehicles used in business of hire
Assessee in business of leasing vehicles is entitled to depreciation at higher rate. (AY. 1991-92 to 1996-97)
I.C.D.S. Ltd. v. CIT (2013) 350 ITR 527 / 212 Taxman 550 / 255 CTR 449 / 82 DTR 33 (SC)

S.32 : Depreciation – Intangible asset – Software – Allowable
Claim of depreciation on intangible asset, being software, was allowable on the basis of assessee's own case.
CIT v. Shree Rama Multi Tech Ltd. (2013) 219 Taxman 162 (Mag.) (Guj.)(HC)

S.32 : Depreciation – Rate – Airplane – Aeroengine – Eligible 40% depreciation
In depreciation table, 'airplane-aeroengine' which is entitled to 40% depreciation, cannot be given a restrictive interpretation so as to include aeroengine only; it will also include 'aircraft' which gives a broader description which includes all manner of craft or means of transport aided by flights such as balloons, planes, etc.
CIT v. SRC Aviation (P.) Ltd. (2013) 218 Taxman 62 (Mag.) (Delhi)(HC)

S.32 : Depreciation – Sale and lease back – Genuineness of transaction – Transaction is not against law – Depreciation is allowable
The very fact that sale was accepted as between assessee and Electricity Board and after settlement of lease amount, assessee would continue to retain its ownership in no uncertain terms stipulated in agreement, and when such a transaction was not against law, there was no reason to doubt transaction. Therefore, depreciation claimed by assessee was to be allowed. (AY. 2001-02)
First Leasing Co. of India Ltd. v. ACIT (2013) 218 Taxman 144 (Mag.) (Mad.)(HC)

S.32 : Depreciation – Leased vehicles – Depreciation was allowable at 40%
Since assessee was owner of vehicles leased out, its claim for depreciation was rightly allowed.
CIT v. Baid Leasing & Finance Co. Ltd. (2013) 359 ITR 413 / 262 CTR 553 / 93 DTR 388 / 218 Taxman 243 (Raj.)(HC)

S.32 : Depreciation – Ready to use – Civil construction business – Shuttering material – Entitled 100% depreciation
Assessee engaged in business of civil construction work would be entitled to 100% depreciation on shuttering material which was ready to use but remained unused.(AY.1995-96)
CIT v. U.P. State Bridge Corporation Ltd. (2013) 218 Taxman 92 (Mag.) (All.)(HC)

S.32 : Depreciation – Rate – Textile Industry – Entitled higher rate of depreciation at 50%

Machinery purchased under Textile Upgradation Fund Scheme (TUFS) and used for embroidery purpose on grey cloth used in textile industry is eligible for higher depreciation of 50%. (AY.2006-07)
CIT v. S.S. Embroiders (2013) 218 Taxman 237 / 92 DTR 16 (P&H)(HC)

S.32 : Depreciation – Allowance – Spare parts – Depreciation was held to be allowable
Since spare parts were supplied along with equipments to keep them in workable condition, and they could not be utilised independently, depreciation was allowable to assessee.(AY.2002-03)
CIT v. U.P. Rajya Vidyut Utpadan Nigam Ltd. (2013) 218 Taxman 153 (All.)(HC)

S.32 : Depreciation – Obsolescence – Discarding of building after expiry of lease – Loss was deductible [S.28(i)]
Discarding of building upon the expiry of lease of land on which it was constructed was allowable as business loss. (AY 2001-02 to 2006-07)
CIT v. Children's Education Society (2013) 358 ITR 373 / 92 DTR 158 / (2014) 264 CTR 389 (Karn.)(HC)

S.32 : Depreciation – Machineries ready to use but not used – Depreciation was allowable
The business of the assessee is a going one and the machinery is ready for use but due to certain extraneous circumstances, the machinery could not be put to use, the fact would not stand in the way of granting relief under section 32. (AY. 1998-1999)
CIT v. Chennai Petroleum Corporation Ltd. (2013) 358 ITR 314 / 94 DTR 195 / 262 CTR 664 / 218 Taxman 228 / 37 taxmann.com 332 (Mad.)(HC)

S.32 : Depreciation – Computer accessories and peripherals is entitled to higher rate of depreciation of 60 per cent
Computer accessories and peripherals such as printers, scanners and server form an integral part of the computer system. In fact, the computer accessories and peripherals cannot be used without the computer. Consequently, as they are part of the computer system, they are entitled to depreciation at the higher rate of 60 per cent. (AY.2004-05)
CIT v. BSES Yamuna Powers Ltd. (2013) 358 ITR 47 (Delhi)(HC)

S.32 : Depreciation – Test of ownership – Lease – Lessor is entitled to depreciation
As the assessee, in the instant case, is the lessor, it is the owner thereof, it is consequentially entitled to depreciation on its assets leased out during the currency of its business. (AY. 1997-98)
CIT v. Baid Leasing & Finance Company (2013) 359 ITR 413 / 262 CTR 553 / 93 DTR 388 / 218 Taxman 243 (Raj.)(HC)

S.32 : Depreciation – Imported cars – Bar on depreciation does not apply – Depreciation was allowable [S.43(1)]
The assessee had acquired the imported cars after the cut-off date, i.e., April 1, 2001, and, therefore, was entitled to depreciation and the bar in clause (a) to the proviso to section 32(1), which provides that no deduction towards depreciation can be allowed in respect of a motor car manufactured outside India where such car was acquired by the assessee after February 28, 1975, but before April 1, 2001, would not apply. (AYs. 2005-06, 2006-07, 2007-08, 2008-09)
CIT v. Mira Exim Ltd. (2013) 359 ITR 70 / 262 CTR 441 / 94 DTR 41 / (2014) 220 Taxman 156 (Delhi)(HC)

S.32 : Depreciation – User of assets – Non-availability of raw material, plant was not put to use during whole of pervious year – Plant got ready for use – Entitle depreciation

Assessee had built up a plant in previous year relevant to assessment year 1997-98 - Assessing Officer had allowed depreciation on plant for assessment year 1997-98 - For subsequent assessment year 1998-99, assessee also claimed depreciation on plant. On account of non-availability of raw material, plant was not put to use during whole of pervious year. Assessing Officer rejected claim for depreciation on plea that when plant had never been put to use for purposes of business during whole of previous year, grant of relief could not be maintained. The Court held that so long as assessee's business was a going concern and plant got ready for use but due to certain extraneous circumstances it could not be put to use, said fact could not stand in way of granting relief under section 32. Therefore, assessee was entitled to depreciation on plant. (AY. 1998-99)
CIT v. Chennai Petroleum Corporation Ltd. (2013) 358 ITR 314 / 94 DTR 195 / 262 CTR 664 / 37 taxmann.com 332 (Mad.)(HC)

S.32 : Depreciation – Imported car (Foreign made cars) – Concerns purchased foreign made car before 31-3-2001 – Merged with the assessee company with effect from 1-4-2004 – Accordingly, the foreign cars became the property of the assessee from 1-4-2004 – Held assessee was entitled for depreciation on foreign cars and the prohibition in clause (a) to proviso to section 32 (1) was not applicable
Three concerns had acquired foreign made cars between 1975 and March 2001. All the concerns were merged with the assessee Company with effect from 1st April 2004 as per the order of the High Court. The A.O. disallowed the assessee's claim for deprecation on the foreign cars as the same were acquired by the merged entities before 1st April, 2001 when depreciation was not allowable on foreign (imported) cars.
On appeal High Court held that all the merged entities who had purchased foreign cars before 1st April 2001 merged with the assessee company with effect from 1-4-2004. Thus, it is clear that the assessee had acquired the asset (imported cars) after 1-4-2004 and, therefore, assessee was entitled for depreciation on foreign cars. (AYs. 2005-06 to 2008-09)
CIT v. Mira Exim Ltd. (2013) 359 ITR 70 / 262 CTR 441 / 94 DTR 41 / (2014) 220 Taxman 156 (Delhi)(HC)

S.32 : Depreciation – Explanation 5 added to section 32 with effect from 1-4-2002 could not unsettle assessment orders for earlier years which are final and accepted both by revenue as well as assessee
During the course of assessment, the AO disallowed the claim of depreciation on the ground that in the earlier assessment years, depreciation though not claimed was thrust upon the assessee. Consequently, the written down value of the plant & machinery was supposed to be lower and the depreciation to be allowable was also lower in the current assessment year. The CIT(A) as well as the Tribunal had set aside the depreciation matter for the earlier assessment years following the decision of the Apex Court in the case of *CIT v. Mahendra Mills [2000] 243 ITR 56*. For the current assessment year, the CIT(A) once again decided in favour of assessee. Tribunal was in agreement with the CIT(A) and held that the earlier assessment was final and need not be reopened in view of explanation 5 to section 32 of the Act.
On appeal by the department, the High Court dismissing the appeal of the revenue held that without disturbing the written down value of the plant & machinery for the earlier years, it would not be possible to change the opening written down value for the subject Assessment Years. The High Court also held that the Explanation 5 added to Section 32 of the Act would be applicable w.e.f. 1st April, 2002 and could not unsettle the Assessment Orders for earlier years which are final and accepted both by the revenue as well as the assessee(AY. 2003-04 to 2005-06).
CIT v. Silvassa Industries Ltd. (2013) 217 Taxman 116 (Bom.)(HC)

S.32 : Depreciation – Exempt from tax till 1-4-2003 – Notional depreciation – Assessee had to claim notional depreciation in its books of accounts and depreciation for current year is to be allowed by adopting written down value. [S.10(29)]
The assessee claimed depreciation on straight line basis, on the reasoning that in earlier years, as income was exempt, no depreciation had been claimed. Hence, it was contended by the assessee that depreciation should be allowed on straight line basis on original cost, and not on written down value. The Tribunal allowed the assessee's claim on the basis that assessees which were covered under s. 10(29), of the Act were not required to compute depreciation on the basis of written down value only. On appeal, held, remanding the matter to the AO:
Depreciation has to be allowed on year-to-year basis, i.e. by taking notional depreciation for the earlier years and computing written down value accordingly. Assessee's calculation based on straight line method could not be accepted. (AY. 2003-04)
CIT v. U. P. State Warehousing Corporation (2013) 357 ITR 487 / 217 Taxman 252 / 96 DTR 454 (All.)(HC)

S.32 : Depreciation – Lease hold properties – On long-term leasehold properties, including lease for perpetuity depreciation is not allowable
The assessee had claimed depreciation in respect of long-term leasehold properties including lease for perpetuity. It was held that the Tribunal was right in declining assessee's claim of depreciation in respect of long-term leasehold properties including lease for perpetuity. Similar view had been taken by the High Court in the assessee's own case for earlier AY., and no reasons for taking a different view existed. (AY. 1995-96)
Peerless General Finance and Investment Co v. CIT (2013) 217 Taxman 251 (Cal.)(HC)

S.32 : Depreciation – Intangible asset – Trade mark – Software development – Held to be allowable
The Assessing Officer disallowed the claim of depreciation on software for want of details regarding valuation and nature of software. The relevant details were furnished by the assessee before the Commissioner (Appeals) and Revenue had not doubted them. Held the Commissioner (Appeals) was justified in deleting the addition.(AY.2003-04 to 2008-09)
CIT v. Net 4 Nuts Ltd. (2013) 216 Taxman 99 (Mag.) / 358 ITR 535 (Guj)(HC)

S.32 : Depreciation – Lease – Use by third party – Business of leasing of vehicles
For claiming depreciation usage of asset by assessee is not mandatory, as long as asset is utilized for purpose of its business. Where assessee leased out vehicles to customers, vehicles were assets of its business and thus, depreciation on same was allowable.
PKF Finance Ltd. v. CIT (2013) 216 Taxman 141 (Mag.) (P&H)(HC)

S.32 : Depreciation – Construction of building – Disallowance of depreciation and interest – Disallowance cannot be made on account of procedural irregularities [S. 36(1)(iii) 145]
Where the appellate authorities allowed expenses after analysing material on record and ground realities, as well as, inconsistencies in order of Assessing Officer, it could not be said that order of appellate authorities suffered from any perversity. No defects were pointed out in the books of account. Disallowance of depreciation and interest was held to be not justified. (AY.2005-06)
CIT v. Bohra Industries Ltd. (2013)83 DTR 113/ 216 Taxman 143 (Mag.) (Raj.)(HC)

S.32 : Depreciation – Cost of asset exempted – Explanation 5
Entire expenditure incurred towards purchase of certain fixed assets had already been exempted in its entirety in current year or in earlier year. However, in view of specific provision as contained in

Explanation 5 to s.32(1), depreciation in respect of such assets would be allowable in hands of assessee.
CIT v. Krishi Upaj Mandi Samiti, Timarni (2013) 216 Taxman 172 (Mag.) (MP)(HC)

S.32 : Depreciation – Hospital building – Plant and machinery
Where nursing home was equipped with scientific instruments, same would be treated as plant and machinery and depreciation should be allowed on it accordingly. (AY. 1995-96)
Shri Shashi Nursing Home Ltd. (2013) 216 Taxman 97 (Mag.)(All.)(HC)

S.32 : Depreciation – Income from undisclosed source – Existence of Crane was proved, disallowance of depreciation was not justified [S. 69]
Assessee proved purchase and existence of crane and the cost of crane was not claimed in return in the profit and loss account. Hence, no addition could be made in respect of the purchase price. Since there was no material to show that the crane was not in existence, depreciation was not disallowable. (AY.1997-98)
CIT v. Vijay M. Mistry Construction Ltd. (2013) 355 ITR 498 / 219 Taxman 145 (Mag.)(Guj.)(HC)

S.32 : Depreciation – Explanation 5 is prospective
Explanation 5 to s. 32 introduced with effect from 1-4-2002 which contemplates compulsory deduction of depreciation in those cases where no depreciation has been claimed is only prospective and it has no application to assessment year 1998-99. (AY. 1998-99)
CIT v. Mysore Cements Ltd. (2013) 215 Taxman 151 (Mag.) (Karn.)(HC)

S.32 : Depreciation – Intangible asset – Goodwill – Depreciation is allowable on revalued amount of good will
The assessee purchased rights of distance learning division from another company and the amount paid of ` 51.63 crore was reflected in sale agreement. The assessee revalued price of such rights at ` 98.73 crore and claimed depreciation on revalued rights. Assessing Officer held that excess consideration paid over value of net assets was in the nature of goodwill paid for future profits and allowed depreciation only on value mentioned in agreement. The Court held that Supreme Court in *CIT v. SMIFS Securities Ltd. (2012) 24 taxmann.com 222* has held that goodwill is an asset under Explanation 3(b) to section 32(1) and therefore, depreciation is allowable even on goodwill. Following the ratio the court held that depreciation was to be allowed on revalued rights as well. (A.Y. 2003-04)
CIT v. Manipal Universal Learning (P.) Ltd. (2013)359 ITR 369 / 215 Taxman 151 (Mag.) (Karn.)(HC)

S.32 : Depreciation – Finance – Lessor – Rule of consistency depreciation is allowable
Where the assessee was a financer-lessor and revenue could not prove that assessee did not have any interest in assets, depreciation claim was allowable following rule of consistency.
DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Guj.)(HC)

S.32 : Depreciation – Set off – Unabsorbed depreciation – Carry forward and set off permitted till final set off – Reassessment was held to be not valid [S.147, 148]
The provisions of section 32(2), as amended by the Finance Act, 2001, would allow the unabsorbed depreciation allowance available in the assessment years 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years and if any unabsorbed depreciation or part thereof could not be set off till the assessment year 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years, without any limit what so ever. The order of reassessment was held to be not valid. (AY. 2006-07)
General Motors India P. Ltd. v. DCIT (2013) 354 ITR 244 / 257 CTR 123 / 82 DTR 304 (Guj.)(HC)

S.32 : Depreciation – Software – Held allowable
Depreciation would be allowable on Software developed and installed by assessee.
CIT v. Shree Rama Multi Tech Ltd. (2013) 214 Taxman 130 (Mag.) (Guj.) (HC)

S.32 : Depreciation – Brand – Royalty – Held allowable.
Payment of royalty for acquisition of brand paid to LLB Ltd. was a part of the acquisition of brand, therefore form part of cost of assets namely brand hence the assessee is entitled to depreciation on the amount of royalty. (AY. 2001-02)
CIT v. Glenmark Pharmaceutical Ltd. (2013) 351 ITR 359 / 85 DTR 169 / 213 Taxman 315 (Bom.)(HC)

S.32 : Depreciation – Leased vehicles – Non-registration – Commercial permit – Vehicle was ready to use depreciation was allowable
The moment the assessee entered into the agreement with the lessees for leasing the vehicles to them and transferred possession for that purpose to the lessees, the assessee would be deemed to have utilized those vehicles for the purposes of its business, which was leasing of vehicles. Provisions of the Motor Vehicles Act, 1988 need not be referred because it is not the assessee's business who is plying those vehicles. Depreciation was held to be allowable. (AY. 1989-90 to 1993-94)
CIT v. K and Co. (2013) 214 Taxman 1 / 88 DTR 166 / 259 CTR 398 (Delhi)(HC)

S.32 : Depreciation – Owner – Finding being not perverse – Depreciation is not allowable.
The Tribunal after examining the factual matrix on preponderance of probabilities had held that the assessee was not the owner. The finding was a finding of fact, which was not under challenge. It was not a finding which was perverse. Hence, the assessee was not entitled to depreciation. (AY. 1995-96)
Sai Industries Ltd. v. ACIT (2012) 204 Taxman 630 / (2013) 353 ITR 213 (Delhi)(HC)

S.32 : Depreciation – Motor cars used outside India for business and commercial activities – Expenses for upkeep of vehicles, depreciation is allowable
Expenses incurred for the upkeep of the vehicles, was business expense. Depreciation, therefore, was directly relatable to business rather than the use of foreign or luxury cars by executives of the assessee. Thus, the depreciation claimed on motor cars purchased and used in foreign country was allowable to the assessee. (AY. 1987-88, 1988-89)
CIT v. Ansal Properties and Industries Ltd. (2013) 352 ITR 637 / 87 DTR 360 / 216 Taxman 103 (Mag.) (Delhi)(HC)

S.32 : Depreciation – Motor cars used outside India for business and commercial activities – Expenses for upkeep of vehicles, depreciation is allowable
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CIT v. Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 / 213 Taxman 143 / 88 DTR 227 (Delhi)(HC)
CIT v. Ansal Properties and Industries Ltd. (2013)354 ITR 180 / 88 DTR 227 (Delhi)(HC)
CIT v. Ansal Housing and Construction Ltd. (2013) 354 ITR 180 / 88 DTR 227 (Delhi)(HC)

S.32 : Depreciation – Scaffoldingand shuttering - Construction business - 100% depreciation is allowable
The assessee claimed 100 per cent .depreciation in respect of each section of tabular scaffolding, used in its construction business. The Assessing Officer allowed 33 percent, holding that each section did

not qualify for plant and entire scaffolding and shuttering had to be taken as plant for the purpose of 100 per cent depreciation only if its cost was below Rs. 5000. The Commissioner(Appeals) and Tribunal reversed the view of the Assessing Officer. On appeal, dismissing the appeal of revenue the court held that the value of the shuttering would have been written off with in a couple of years. Therefore, the assessee was entitled to 100 percent depreciation on shuttering and scaffolding, for purchase of parts or sections of such equipment.
CIT v. Ansal Housing Finance & Leasing Co. Ltd. (2013)354 ITR 180/ 213 Taxman 143/88 DTR 227 (Delhi) (HC)
CIT v. Ansal Properties and Industries Ltd (2013) 354 ITR 180 / 88 DTR 227 (Delhi) (HC)
CIT v. Ansal Housing and Construction Ltd (2013) 354 ITR 180 / 88 DTR 227 / 213 Taxman 143 (Delhi) (HC)

S.32 : Depreciation – Block of assets – Once the assets are put to use in earlier years and form part of block of assets, depreciation can be claimed on the same in subsequent years even if all the items in block are not used simultaneously [S.2(11)]
Once the assets have been put to use in earlier years, such assets form part of block of assets and depreciation thereon has been allowed in the past then depreciation on the assets can’t be restricted or disallowed in subsequent years on the pretext that only a portion thereof has been put to use. Items falling within the block of assets cannot be segregated for the purpose of granting or restricting depreciation. Once the assets are used for business, it is not necessary that all the items falling within the concerned block have to be simultaneously used for being entitled to depreciation. (T.A No. 84 of 200, dated 19-6-2012)
S. K. Patel Family Trust. (2012) 251 CTR 427 / 74 DTR 317 (Guj.)(HC)

S.32 : Depreciation – Lease back – Purchase of electric meters from RSEB and leasing back the same to RSEB is genuine transaction and depreciation can be claimed on such electric meters
The assessee bought eclectic meters from Rajasthan State Electricity board (RSEB) and leased them back to RSED on hire purchase basis. The Department didn’t allow assessee’s claim of depreciation on the said electric meters as it was of the view that the said transaction was a sham transaction in light of the ratio laid down in *McDowell & Co Ltd. v. GTO (1985)154 ITR 148(SC)*. It was held by the Hon’ble High Court that the said transaction was a genuine transaction and the assessee was eligible for depreciation on the said electric meters. (T.A. No. 166 of 2000, dt. 17/07/12)
Dy. CIT v. Parampount Pollution Control Ltd. (2012) BCAJ -November-P. 399) (Guj.)(HC)

S.32 : Depreciation – Lease transactions – LPG Cylinders – Finance – Assessee could not prove purchases of cylinders – Directly purchased by the lessee, hence depreciation could not be allowed
Assessee claimed depreciation on LPG Cylinders, Air Jet Spindle Assembly and Positar Disc which were claimed to have been leased out. Assessing Officer disallowed depreciation forming a view that assessee did not purchase said assets, but merely financed their purchase. It was held that in case of LPG cylinders, transaction was only a financing transaction and not a lease, with no material to show that assessee became owner of cylinders and leased them. In case of air jet spindles and Positar Disc, the very existence of assets and genuineness of purchase of assets by assessee was not proved, and, therefore, assessee was not entitled to depreciation. (AY.1995-96)
CIT v. Ganapati Finance Ltd. (2013) 212 Taxman 278 / 82 DTR 49 (Delhi)(HC)

S.32 : Depreciation – Succession of business – Written down value – Block of assets – Transfer to subsidiary – Number of days of predecessor and successor was to be taken [Ss.43(6), 170]
Assessee-company had two units viz. unit A and unit B. It transferred unit B to its 100 per cent subsidiary company with all assets and liabilities at book value on 1-11-1996. It claimed depreciation on written down value of assets of unit B proportionately for period from 1-4-1996 to 31-10-1996.

Tribunal rejected claim of assessee. Court held that the assessee was entitled to depreciation as provided for in fourth proviso to section 32(1), in working out depreciation number of days for which assets were used by predecessor and successor was to be taken into consideration and apportionment was to be worked out based on number of days for which assets were used by predecessor and successor company respectively. (AY. 1997-98)
Sree Jayajothi & Co. Ltd. v. CIT (2013) 212 Taxman 238 / 87 DTR 205 (Mad.)(HC)

S.32 : Depreciation – Higher rate – Moulds – Moulding tools – Matter remanded
Assessee is engaged in manufacture of electrical equipment used in power generation. It claimed depreciation at rate of 40 per cent as per rule 5 in respect of moulds and moulding tools used in manufacture of plastic covers, seals, shrouds, etc. Said claim was disallowed on ground that no material was produced to show that assessee had a separate unit to manufacture plastic parts when it was manufacturing heavy electrical equipment. Assessee submitted that it had separate unit and it had also applied for recognition of its unit before Government. In earlier year, Commissioner (Appeals) had allowed depreciation finding that though assessee did not have rubber or plastic goods factory, but it had a unit where moulds were installed. In interest of justice, matter be remitted back to find out whether recognition had been granted to assessee as separate unit. (AYs. 1995-96 to 1998-99)
Areva T & D India Ltd. v. Jt. CIT (2013) 212 Taxman 429(Mad) (HC)

S.32 : Depreciation – Leased assets – Purchase not disputed hence depreciation to be allowed
Assessee purchased machinery and leased back same to ‘B’ Ltd. Assessee’s claim for depreciation was rejected by revenue authorities on ground that there were discrepancies in payment of rental by lessee and received by assessee. Court held that when revenue had not disputed purchase by assessee from ‘B’ Ltd., in such a case, mere discrepancy in lease rental payment per se did not negate claim of assessee as owner of machinery. Therefore, assessee’s claim for depreciation was to be allowed. (AY.1996-97)
Dy. CIT v. First Leasing Co. of India Ltd. (2013) 212 Taxman 417 (Mad.)(HC)

S.32 : Depreciation – Owner – Lease back – Finance lease – Matter remanded
Assessee purchased and leased back MPP Shut Capacitors to ‘A’ Ltd. which was engaged in manufacturing of capacitors - ‘A’ Ltd. sub leased those capacitors to MSEB. Assessing Officer rejected assessee’s claim of depreciation on capacitors holding that it was merely a financial transaction. Tribunal pointed out that to claim ownership of assets, assessee should produce purchase invoice and mere furnishing of insurance certificate was not sufficient. Accordingly, Tribunal upheld order of Assessing Officer. On instant appeal, documents produced before Court in form of purchase invoice showed installation and commission of capacitors in lessee’s premises, which were given for use by MSEB, in view of above, there was no justifiable ground to reject case of assessee on ground that purchase invoice was not filed before authorities below. Therefore, matter was to be remanded back to Assessing Officer so as to enable assessee to produce other evidence on record for purpose of satisfying him as regards ownership of machinery. (AY.1996-97)
Dy. CIT v. First Leasing Co. of India Ltd. (2013) 212 Taxman 417 (Mad.)(HC)

S.32 : Depreciation – Method of accounting – Duty of tax officials – Claim of depreciation against interest income held to be allowable [S.145]
Assessee claimed set-off of depreciation on assets used for construction of National Highway against interest income. Assessing Officer found that assessee itself had capitalized all expenditures incurred on construction of Highway and in audited profit and loss account, no expenditure or depreciation had been claimed by assessee; he, thus, disallowed assessee’s claim under section 145(3). Section 145(3) had no manner of application as uniform accounting system was followed by assessee, therefore depreciation was allowable. While making assessment of any returns, if any deduction is sought for, it

is duty of revenue official to examine not only account but also substantive right of claiming deduction under Act. (AY. 2003-04).
Mapex Infrastructure (P.) Ltd. v. CIT (2013) 212 Taxman 23 / 81 Taxman 202 / 255 CTR 272 (Cal.)(HC)

S.32 : Depreciation – Tankers and tippers – For giving on hire
Tankers and tippers were not plant and machinery for assessee engaged in the business of mining who gives these assets on hire. Depreciation at 40% was allowable.(AY. 2005-2006)
ACIT v. Ashok Doshi (2013) 28 ITR 389 (Jodh.)(Trib.)

S.32 : Depreciation – Two cars – Personal use
Assessee already having Maruti van, purchased a Tavera car for undertaking supervision at mine site for which Maruti van was not suitable. In the absence of material to substantiate personal use, depreciation to extent of 50%was allowable. (AY. 2005-06)
ACIT v. Ashok Doshi (2013) 28 ITR 389 (Jodh.)(Trib.)

S.32 : Depreciation – Ready for use – Eligibility
Mining equipment and consumables which were kept ready for use when machines of sub-contractor broke down, can be said to be in use and assessee was entitled to depreciation. (AY. 2005-2006)
ACIT v. Ashok Doshi (2013) 28 ITR 389 (Jodh.)(Trib.)

S.32 : Depreciation – Amalgamation – Depreciation actually allowed
Assets were taken over in scheme of amalgamation and the transferor company did not claim depreciation for earlier assessment years. Written down value was to be arrived at after reducing depreciation actually allowed. Held, allowance cannot be thrust upon assessee in the absence of claim as Explanation 5 in s.32 was applicable only from AY 2002-03 onwards. (AY. 1998-99)
Addl. CIT v. Nicholas Piramal India Ltd. (2013) 27 ITR 182 / (2014) 147 ITD 675 (Mum.)(Trib.)

S.32 : Depreciation – Business not commenced – Use of asset
Assessee purchased equipment to start business of FM broadcasting. However, the licence was obtained only in following year. Therefore, business could not be commenced in year in question. In the absence of material to show that programmes were prepared during the year, depreciation on assets was not allowed. (AY. 2007-08)
Malayala Manorama Co. Ltd. v. ACIT (2013) 28 ITR 144 (Cochin)(Trib.)

S.32 : Depreciation – Additional depreciation – Business of FM broadcasting
Additional depreciation was not allowable on assets used in the business of broadcasting as the same was available only for assets used for purpose of manufacture. (AY. 2007-08)
Malayala Manorama Co. Ltd. v. ACIT (2013) 28 ITR 144 (Cochin)(Trib.)

S.32 : Depreciation – Sale of bottles – Block of assets
Assessee, engaged in the business of manufacturing, bottling and distribution of soft drinks and beverages under several popular brands showed sale of bottles from the block of assets, comprising bottles on which depreciation at 50% was admissible. The Assessing Officer rejected the assessee's submissions on the ground that up to assessment year 1995-96, the assessee had claimed the expenditure on the purchase of bottles and crates as revenue expenditure being of value less than Rs. 5,000 and in this year, the assessee had failed to prove such bottles and crates sold this year were purchased after March 31, 1995. Accordingly, he added Rs. 84,67,666 on account of sale of bottles and crates as revenue receipts. Held, sale proceeds on a capital asset could not be held to be revenue receipt and after the sale, the block of assets having been reduced, depreciation had to be allowed in accordance with the provisions of law on whatever was there in the block of assets. (AY. 1998-99)

Parle Soft Drinks P. Ltd. v. JCIT (2013) 27 ITR 663 (Mum.)(Trib.)

S.32 : Depreciation – Asset used for less than 180 days – Proportionate depreciation
Since motor car was used for less than 180 days, full depreciation was not allowable. Depreciation was allowable at rate of 50% of the prescribed rate. (AYs. 2004-05, 2009-10)
DCIT v. Sanghi Jewellers P. Ltd (2013) 27 ITR 317 / (2014) 61 SOT 50 (Hyd.)(Trib.)

S.32 : Depreciation – Hiring and leasing of vehicles to third parties – Higher rate of depreciation
Assessee, being the owner of vehicle and engaged in the business of hiring and leasing of vehicles to third parties was entitled to charge higher rate of depreciation. (AY. 1998-99)
Parle Soft Drinks P. Ltd. v. JCIT (2013) 27 ITR 663 (Mum.)(Trib.)

S.32 : Depreciation – Assets seized by bank – Notional depreciation was not warranted [S. 50]
Assessee must own asset and use the asset for the purpose of business in order to claim depreciation. Since assessee was not able to claim depreciation due to seizure of assets by bank, notional depreciation cannot be attributed. Hence, it was directed that grant of notional depreciation from the year 2003 for calculation of written down value as on April 1, 2006 was not warranted and computation of capital gains by assessee u/s 50 confirmed. (AY. 2007-08)
KLN Agrotechs P. Ltd. v. ITO (2013) 27 ITR 648 (Bang.)(Trib.)

S.32 : Depreciation – UPS and printer – Rate of depreciation
Uninterrupted power supply system (UPS) and printer were eligible for higher rate of depreciation at 60%. (AY. 2008-09)
Ray Ban Sun Optics India Ltd v. DCIT (2013) 27 ITR 440 (Delhi)(Trib.)

S.32 : Depreciation – Additional depreciation – Extraction of iron ore and its processing – Held allowable
Assessee-company was engaged in extraction of iron ore and its processing, and had installed new plant and machinery, additional depreciation was to be allowed on same. (AY. 2009-10)
Sesa Goa Ltd. v. JCIT (2013) 60 SOT 121 (URO) / 38 taxmann.com 34 (Panaji)(Trib.)

S.32 : Depreciation – Wind mill – Additional depreciation is allowable – Manufacturing activity of core business is not requirement [Sale of Goods Act, 1930]
Electricity falls within definition of Sale of Goods Act, 1930 and process of generation of electricity is akin to manufacture or production of an ‘article’ or ‘thing’. Use of electricity in manufacturing activity of core business of assessee is not a precondition for grant of additional depreciation under statute. Additional depreciation on windmill cannot be denied for want of use of such electricity in manufacturing of core business of assessee (AY. 2008-09)
DCIT v. Hutti Gold Mines Co. Ltd. (2013) 60 SOT 147(URO) (Bang.)(Trib.)

S.32 : Depreciation – Rate of – Power evacuation facilities and transmission and distribution lines is entitled higher rate of depreciation at 80% as applicable to wind mills – One time payment to electricity Board to earn right to use power evaluation facilities is eligible depreciation as the assessee being beneficial owner
Where electricity could not be generated by windmill without power evacuation facilities and transmission and distribution lines, depreciation was to be allowed on same at higher rate of 80 per cent applicable to wind mills, and not at normal rate. Any part of plant, being an integral part of a capital asset eligible for higher depreciation, even if such part is otherwise eligible for normal depreciation, would be entitled to such higher rate of depreciation. One time payment to electricity

board to earn right to use power evacuation facilities, assessee was beneficial owner, and depreciation could not be disallowed on ground that assessee was not real owner of capital asset.(AY.2008-09)
ACIT v. Rakesh Gupta (2013) 60 SOT 81 (Chd.)(Trib.)

S.32 : Depreciation – Additional depreciation – Inadmissible, claim of depreciation could not be allowed merely on ground that assessee had reversed same in succeeding year – Computer installed in supervisory offices of factory compound – Could not prove dedicated to supervision of manufacturing activity – Additional depreciation was not allowable [S 32(1)(iia)]
The DRP had given a direction to the AO to disallow the claim of the Assessee in regard to the depreciation which was a incorrect, In the books of account of the relevant year, the assessee claimed additional depreciation in accordance with accounting norms, which was not admissible deduction from taxable income under the provisions of the Act. The Assessee had submitted that the claim was incorrect but inadvertently it remains to be added back in the computation/return of income. Further submitted that when the mistake came to the notice of the assessee it reversed while filing the return for AY. 09-10 and the amount of deduction claimed in AY 07-08 was offered for taxation in AY 09-10. ITAT held that the reversal of the claim by offering the depreciation for taxation in A.Y 09-10 appears to circumvent the legal consequences of making a wrong claim in A.Y 07-08. So the assessee was not eligible for the same allowance of its claim for depreciation. Therefore the amount of depreciation was added to the income of the Assessee. Tribunal also held that Computer installed in supervisory offices of factory compound was not eligible additional depreciation as the assessee could not prove that the comport was dedicated to supervision of manufacturing activity and constituted integral part of factory. Additional depreciation was held to be not allowable. (AY. 2007-08)
Hero Moto Corp Ltd. v. ACIT (2013) 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.32 : Depreciation – Allowance for Charitable Trust – Assets on existence from exempt income [S.11, 12AA]
The assessee, a Charitable trust registered u/s. 12AA, claimed depreciation in respect of capital assets, the total cost of which had already been claimed as an application of income u/s. 11(1). The A.O. disallowed the claim. The CIT(A) upheld the order of the A.O. The Tribunal held that the depreciation could be allowed to assessee society on assets which came into existence by application of income, which was exempt u/s. 11 (AY. 2008-09)
Chaman Vatika Educational Society v. Dy. CIT (2013) 145 ITD 105 / 91 DTR 387 / 156 TTJ 543 (Chd.)(Trib.)

S.32 : Depreciation – Allowance for Plant & Machinery – Greenhouse – Part of Plant and Machinery
The Assessee company was engaged in the business of tissue culture activities and open fill activities relating to agriculture projects. The assessee had constructed a greenhouse and claimed depreciation at the rate of 25 per cent. The A.O. held that ‘greenhouse’ was in the nature of factory building and could not be considered as plant & machinery and thereby granted depreciation of 10 per cent. The CIT(A) upheld the A.O.’s order. The Tribunal held in favour of the assessee that greenhouse performs a manufacturing process (hardening) and is an integral part of assessee’s business process and it can’t be considered as a simple building. The Assessee was right in considering greenhouse as part of plant & machinery and claiming depreciation at rate of 25 per cent. (AYs. 2004-05 to 2007-08)
Gujarat Green Revolution Co. Ltd. v. ACIT (2013) 145 ITD 161 / 26 ITR 567 (Ahd.)(Trib.)

S.32 : Depreciation – Acquisition of client base be considered as an intangible asset – Depreciation is allowable
The assessee company was engaged in business of micro financial lending services to woman in rural areas. Another company “S” was also in the business of micro finance with 1.10 lakh existing clients. Assessee acquired entire business of “S” in a slump sale. The assessee paid a sum of Rs. 3.97 crores

to “S” for acquisition of client base. Assessee claimed depreciation on client’s creation cost contending it was an intangible asset. The A.O. disallowed the claim. The CIT(A) upheld the order of the A.O. The Tribunal held that client acquisition cost paid by the assessee was towards acquiring an intangible asset and thus eligible for depreciation u/s. 32(1)(ii). (AYs. 2006-07 to 2008-09)
SKS Microfinance Ltd. v. Dy. CIT (2013) 145 ITD 111 / (2014) 98 DTR 321 (Hyd.)(Trib.)

S.32 : Depreciation – Tenancy Rights – Not Intangible Asset – Depreciation is not allowable
The assessee claimed depreciation on tenancy rights. The A.O. rejected the assessee’s claim. The CIT(A) upheld the order of the A.O. The Tribunal upheld the order of the CIT(A), tenancy rights cannot be construed as “intangible assets” falling within meaning of Explanation 3 to Sec. 32(1) and hence no depreciation can be granted on said rights,
Dabur India Ltd. v. ACIT (2013) 145 ITD 175 / (2014) 159 TTJ 563 (Mum.)(Trib.)

S.32 : Depreciation – Straight line method v. Written Down Value method
The A.O. held that assessee was entitled to depreciation on basis of straight line method on basis of assessment for earlier years and not on WDV basis as claimed by assessee. The Tribunal held in favour of assessee following decision of Tribunal in assessee’s own case in *Jindal Steel & Power Ltd. v. Addll. CIT (2006) 10 SOT 106 (Delhi),* assessee could be allowed depreciation on WDV basis. (AY. 2004-05)
ACIT v. Jindal Steel & Power Ltd. (2013) 145 ITD 277 (Delhi)(Trib.)

S.32 : Depreciation – Build operate – Road constructed on Build – Operate – Transfer (“BOT”) terms is eligible for depreciation even though assessee is not the legal owner of the road
The assessee, a SPV, was awarded a contract by the NHAI for widening, rehabilitation and maintenance of an existing two lane highway into a four lane one on the Tada-Nellore section of NH-5 on BOT basis. The entire cost of construction of Rs. 714 crore was borne by the assessee. The construction was completed during the FY 2004-05 after which the highway was opened to traffic for use and the assessee started claiming depreciation from AY 2005-06 onwards. The AO rejected the claim on the ground that the assessee had no ownership, leasehold or tenancy rights for the asset in question, i.e., the roads. On appeal, the CIT(A) reversed the AO. On appeal by the department to the Tribunal HELD dismissing the appeal:
Though the NHAI remains legal owner of the site with full powers to hold, dispose of and deal with the site consistent with the provisions of the agreement, the assessee had been granted not merely possession but also right to enjoyment of the site and NHAI was obliged to defend this right and the assessee has the power to exclude others. The very concept of depreciation suggests that the tax benefit on account of depreciation belongs to one who has invested in the capital asset, is utilizing the capital asset and thereby losing gradually investment cost by wear and tear and would need to replace the same by having lost its value fully over a period of time. The term “owned” as occurring in s. 32 (1) of the Act must be assigned a wider meaning. Anyone in possession of property in his own title exercising such dominion over the property as would enable others being excluded there from and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings, though a formal deed of title may not have been executed and registered *(Mysore Minerals Ltd. v. CIT (1999) 239 ITR 775 (SC), CIT v. Noida Toll Bridge Co. Ltd.(2013) 213 Taxman 333* etc referred) (ITA No. 1184/Hyd/2013, A. Y. 2005-06 to 2010-11)
DCIT v. Swarna Tollway Pvt. Ltd. (2014) 30 ITR 171 / 150 ITD 26 (Hyd.)(Trib.)

S.32 : Depreciation – Lease hold rights – Any right (including leasehold rights) which enables carrying on business effectively and profitably is an “intangible asset” & eligible for depreciation.
The assessee paid a sum of ` 60 lakhs to acquire leasehold rights to premises. The assessee claimed that the said leasehold rights were an “intangible asset” and eligible for depreciation u/s 32(1)(ii). The

AO & CIT(A) rejected the claim of the assessee. On appeal by the assessee to the Tribunal HELD allowing the appeal:
S.32(1)(ii) allows depreciation on "business or commercial rights" The expression "business or commercial rights" means rights obtained for effectively carrying on business or commerce. Commerce is a wider term which encompasses business in its fold. Therefore, any right which is obtained for carrying on business effectively and profitably has to fall within the meaning of the term "intangible asset" (ITA No.37/Hyd/2012, dt. 28-6-2013.(AY. 2008-09)
Tirumala Music Center (P) Ltd v. ACIT (2013) 26 ITR 309 / (2014) 61 SOT 101 (URO) / 157 TTJ 1 (UO) (Hyd.)(Trib.)

S.32 : Depreciation – Higher rate of depreciation on windmills – Exercise of option for higher claim – Return filed on last date is also eligible for higher depreciation [S.139(1), Rule 5(IA)]
The assessee claimed higher rate of depreciation on windmills in return of income which the Assessing Officer disallowed holding that assessee had not exercised option of claiming higher rate of depreciation under rule 5(1A) before due date of filing return under section 139(1). Held, since there is no specific form or method prescribed for exercising said option, claim of higher rate of depreciation made in return of income and reflected in books of account and audit report filed with return of income, constitutes exercise of option under second proviso to rule 5(1A).Therefore, return of income, in which claim for higher depreciation is made, filed on last day, cannot be held as not filed before due date of filing return under section 139(1).(AY. 2004-05)
ACIT v. G.V.D Textiles (P) Ltd. (2013) 59 SOT 12 (Chennai)(Trib.)

S.32 : Depreciation – Higher rate of depreciation – Bill of entry of machinery was stamped by custom department on 11-04-2005, hence machinery was acquired only after 11-04-2005 – Eligible for higher rate of depreciation
Machinery on which assessee becomes eligible for additional depreciation is required not only to be acquired but also to be installed after specified date of 31-3-2005. Since the new machinery was purchased from Japanese company through 'Letter of Credit' opened in January 2005, Bill of entry of machine was stamped by Customs Department on 11-4-2005. The only possible conclusion was that machine was acquired only after 11-4-2005 and, therefore, assessee was entitled to additional depreciation under section 32(1)(iia).(AY. 2006-07)
Lakra Fabrics (P.) Ltd. v. ACIT (2013) 59 SOT 16 (Chd.)(Trib.)

S.32 : Depreciation – Depreciation on computer peripherals
The Tribunal followed the decision of the Delhi High Court in case of *CIT v. BSES Yamuna Power Ltd. (2010) TIOL 636 HC-Del*. and allowed the depreciation on computer peripherals claimed by the assessee. (AY. 2008-09)
Lumax Industries Ltd. v. ACIT (2013) 157 TTJ 412 (Delhi)(Trib.)

S.32 : Depreciation – Machine put to use – Depreciation was held to be allowable
The cross objection was filed for disallowing depreciation on the basis that the machine was not put to use. The Tribunal held on the basis of evidence that the machine was put to use during the previous year and directed that the depreciation as claimed by the assessee should be allowed. (AY. 2005-06)
ACIT v. Nayan L. Mepani (2012) 49 SOT 641 / (2013) 156 TTJ 768 (Mum.)(Trib.)

S.32 : Depreciation – Unabsorbed depreciation – Within period of eight years is allowed to be set of
During the relevant Assessment year, assessee claimed set off of amounts of unabsorbed depreciation pertaining to Assessment years: 1990-91 to 1992-93. AO was of the view that in view of amendment in S/32(2) carried out by Finance Act (No.2) Act, 1996 rejected assessee's claim of set off of unabsorbed depreciation holding that period of eight years had already expired. On appeal before CIT

(A), CIT(A) allowed the appeal by relying on the Circular No. 762 Dt 18/2/98 & opined that unabsorbed depreciation relating to AY. 1990-91 to 1992-93, by cascading effect would become part of allowance of AY.: 1997-98 & since instant Assessment year fell within period of eight years from AY. 1997-98, assessee's claim for set off of unabsorbed depreciation was to be allowed. Tribunal confirmed the view of CIT (A).(AY.2002-03)
ACIT v. ECIL Ltd. (2013) 56 SOT 237 (Hyd.)(Trib.)

S.32 : Depreciation – Set off of unabsorbed depreciation – Short term capital gains.
Assessee was entitled to set off of unabsorbed depreciation pertaining to assessment years up to 1996-97, against short term capital gains. (AY. 1999-2000)
DCIT v. Bisleri Sales Ltd. (2013) 58 SOT 73/81 DTR 197 (Mum.)(Trib.)

S.32 : Depreciation – Additional depreciation – Year in which machinery is first put to use.
In terms of clause (iia) of section 32(1), additional depreciation is available in the year in which machinery is new and first put to use and not for any succeeding year. (AY. 2007-08)
CRI Pumps (P.) Ltd. v. ACIT (2013) 58 SOT 154 (Chennai)(Trib.)

S.32 : Depreciation – Unabsorbed depreciation for the asst years 1997-98 and 1999-2000 cannot be Set off any other head of income other than 'income from business in the A.Ys. 2003-04 & 2004-05. [S.32(2)]
Assessee claimed set off of unabsorbed depreciation relating to assessment years 1996-97 and 1998-99 against income of relevant assessment year. Unabsorbed Depreciation relating to assessment years 1997-98 to 1999-2000 was to be dealt with in accordance with provisions of section 32(2) as applicable to those assessment year and, therefore, assessee could not claim set off of unabsorbed depreciation relating to those assessment years under any head of income other than 'income from business or profession' in assessment years 2003-04 and 2004-05. The Honorable ITAT had rejected the claimed of the assessee. (AY. 2007-08)
Dharti Dredging & Infrastructure Ltd. v. Addl. CIT (2013) 144 ITD 120 / 35 taxmann.com 563 (Hyd.)(Trib.)

S.32 : Depreciation – Trust – Business income – Depreciation cannot be denied-Matter required re adjudication. [Ss. 2(15), 12A, 44AB]
The assessee-trust was registered under section 12A, it did not claim exemption under sections 11 and 12 in view of insertion of first proviso to section 2(15). Assessee itself determined income in computation of income under head 'Profits and Gains of Business or Profession and not in terms of provisions of sections 11 and 12. The Assessing Officer disallowed claim for depreciation while the Commissioner (Appeals) allowed it relying only upon decisions cited by assessee. Held, in none of those decisions, embargo stipulated in first proviso to section 2(15) had been considered nor even Commissioner (Appeals) recorded his specific findings on facts pointed out by Assessing Officer in light of first proviso to section 2(15) and its impact (AY.2009-10)
ADIT(E) v. Automotive Component Manufacturers Association of India (2013) 58 SOT 159 (Delhi)(Trib.)

S.32 : Depreciation – Revised claim – Assessing Officer was directed to allow the claim
Assessee in return of income had claimed depreciation at lower amount. However, same was rightly quantified in Tax Audit Report in Form No. 3CD. Upon realisation, assessee claimed differential in depreciation. However, Assessing Officer did not allow same on ground that said fresh claim was not made in revised return of income, and, in view of *Goetze (India) Ltd. v. CIT [2006] 284 ITR 323 / 157 Taxman 1 (SC)*, Assessing Officer could not consider fresh claim. Commissioner (Appeals) sustained said order. Since Supreme Court's decision bars only Assessing Officer but not appellate

authorities to entertain fresh/new, claim, Assessing Officer was directed to allow differential in depreciation to assessee. (AY. 2009-10)
Riddhi Steel & Tubes (P.) Ltd. v. ACIT (2013) 36 taxmann.com 369 / 144 ITD 397 (Ahd.)(Trib.)

S.32 : Depreciation – Rate of 60% – Computer peripherals
The assessee was eligible for depreciation at 60% on computer accessories and peripherals. (AY. 2007-08, 2008-09)
Hughes Systique India P. Ltd. v. ACIT (2013) 25 ITR 556 (Delhi)(Trib.)

S.32 : Depreciation – Sale and lease – Banks – Sale & lease transactions by banks are genuine and eligible for depreciation
The assessee, a Bank, purchased windmills worth Rs. 27 crore in a sale-and-lease-back transaction and claimed depreciation thereon. The AO & CIT(A) rejected the claim and held that the transaction was not one of purchase but was a finance transaction in which the windmills were received as security on the basis that (a) under the Banking Regulation Act, 1949, the assessee was not permitted to engage in any business other than banking, (b) the lease rentals were fixed on the basis of interest on advances and other charges receivable by the assessee as a financier and were not co-related to the projected income on the capacity of each wind energy generator, (c) the assessee was not entitled for surplus income on excess generation of power and was not to suffer any loss owing to lesser production or any other contingencies, (d) the return of the assessee on financing was granted by taking interest-free deposit, (e) the assessee had no responsibility of labour, repairs, taxes etc in running of the project and (f) though the purchase of wind energy generators was in the assessee’s name, the land and power purchase agreements with the Electricity Boards were not in its name. On appeal by the assessee to the Tribunal HELD allowing the appeal:
S.32 allows depreciation if the asset is “owned, wholly or partly, by the assessee and used for the purposes of the business“. There is no requirement that the asset must be used by the assessee himself. It is sufficient if the asset is utilized for the purpose of business of the assessee. The argument, relying on *McDowell and co. Ltd. v. CTO (1985) 154 ITR 148 (SC)*, that Sale & Lease Back transactions are a devise for lowering the tax effect cannot be accepted. Sale & Lease Back transactions are genuine and cannot be considered to be sham.(ITA No. 2572,2737/A/2006, 4386,4388/A/2007,236,238/A/2000, 790/A/2012, (AY. 2002-03, 2004-05 & 2007-08)
UTI Bank Limited v. ACIT (Ahd.)(Trib.) www.itatonline.org

S.32 : Depreciation – Lease – Banks – Lease transactions by Banks are in the nature of loans/advances. Transaction of sale & lease back of railway assets cannot be treated as genuine, it is a nature of finance transaction
The assessee, a Bank, entered into a sale and lease back transaction with Konkan Railway Corporation pursuant to which it bought assets like railway tracks, rails, sleepers etc. for a consideration of Rs. 25 crore and leased it back for a period of 84 months for a monthly lease rental. The AO & CIT(A) disallowed the claim for depreciation on the ground that the sale and lease back transaction was in the nature of a financial transaction and that it was given the shape of a lease transaction only in order to enable the assessee-bank to claim depreciation and reduce its taxable income. On appeal by the assessee to the Tribunal HELD dismissing the appeal:
The real object of the entering into the sale and lease back transaction so far as Konkan Railway is concerned is to raise funds. The transaction of sale of the asset to the assessee bank and its lease back to Konkan Railway cannot be separated. It was not possible for Konkan Railway to sell out the railway system. Thus, the sale transaction was merely on paper and to facilitate the financial arrangement by the assessee to Konkan Railway without involving any real intention of transfer of the assets. The terms of the lease agreement are only to secure the interest of the bank till the recovery of the full amount along with the interest. The assessee cannot exercise the real and actual ownership over the asset keeping in view the facts and circumstances and nature of the asset in question. Further,

under the Banking Regulation Act, 1949 read with RBI circular dated 19-2-1994, banking companies can undertake the activities of equipment leasing but these are required to be treated on par with loans and advances. Therefore, the activity of equipment leasing permitted by the RBI is only in the nature of finance lease. The terms and conditions specified by the RBI for income recognition of lease transactions are also on par with the manner in which a loan transaction is treated. In view of the said circular, there is no scope for treating the instant lease agreement as that of an operating lease.(AY.1996-97)
State Bank of India v. DCIT (2014) 148 ITD 71(Mum.)(Trib.)

S.32 : Depreciation – Finance lease – A finance lease designed as a sale-and-lease back has to be treated as a sham transaction [Indian Contract Act, S. 23, Sale of Goods Act, 1930, S. 4,18,23 Transfer of Property Act, 1882, S. 105]
The assessee, an investment company, bought electric meters from the Gujarat State Electricity Board (GSEB) which were leased back to GSEB simultaneously. The assessee claimed 100% depreciation on the purchase cost of the meters. The AO and CIT(A) rejected the claim on the ground that the circumstances like no physical possession of the meters given etc showed that the transaction of 'sale and lease-back' was a "sham" and that it was one merely of giving finance and that the assets were held as a security for the finance given. On appeal by the assessee to the Tribunal HELD:
A distinction between an 'operating lease' and a 'finance lease' has been made by the Special Bench in *IndusInd Bank limited v. Add. CIT (2012) 135 ITD 165 (Mum) (SB)* on the basis of which it can be said that a 'finance lease' is a 'sale' which is given the colour of a 'lease' by the parties for their mutual benefit and to avoid tax. In such transactions, it has to be seen whether the sale transaction is a real transaction or a sham transaction with the object of enabling the alleged purchaser to claim himself as the owner of the goods, which are further claimed to be leased back to the original owner of the goods. In a sham transaction of sale and lease back the ownership of the goods is not transferred to the alleged lessor, but is shown to be done, so as to enable the purchaser to claim ownership for the goods for the purpose of tax relief. On facts, the 'sale and lease back' transaction is a sham transaction done with the object to facilitate the benefits of depreciation to a person who otherwise is not eligible to claim the same. The intention of the parties was not that of sale or lease but was a loan transaction. The rates of interest/ rental have been fixed taking into consideration that the equipments are eligible for 100% depreciation and it is provided that if the claim of depreciation is changed, the rental in the shape of interest will accordingly change. Such clauses cannot be a part of any lease agreement but finance agreement only because in a normal lease agreement, the lessee is not concerned as to what benefits are available to the owner/lessor under the Income-tax Act. The contention that as the transaction is with a State Government undertaking, it would be highly improper to impute any collusiveness or colourable nature of the transaction is misconceived. The argument that there is no bar for the assessee for making tax planning so as to reduce its taxes, provided it is within the framework of the law, is also not acceptable as u/s 23 of the Indian Contract Act, even if the consideration or object of an agreement may not be expressly forbidden by law, but if it is of such a nature that, if permitted, it would defeat the provisions of law, the same will not be lawful. Engaging in sham transactions with the object of reducing tax liability cannot be said to be a case of tax avoidance but is one of tax evasion.(ITA No.4069 & 2406/Mum/2001 dt. 7-8-2013) (AY.1994-95)
Hathway Investments Pvt. Ltd. v. ACIT (2013) 38 taxmann.com 389 (2014) 146 ITD 605 (Mum.)(Trib.)

S.32 : Depreciation – Premises in a society – Cost of land and superstructure-Entitled depreciation on super structure only
Assessee was a member of Society. It purchased office premises in a society. It claimed depreciation on said premises. AO took the view that amount paid by assessee for purchase of premises included cost of land and superstructure. AO accordingly estimated cost of superstructure at certain amount

and allowed depreciation thereon on the ground that land in question vested with society itself. Tribunal held that assessee being a member of society could be considered as part owner in land in proportion to its share holding in superstructure over it and therefore, it was entitled to depreciation on valuation of superstructure only. (AY.1994-95)
Hathway Investments Pvt. Ltd. v. ACIT (2013) 38 taxmann.com 389 (2014) 146 ITD 605 (Mum.)(Trib.)

S.32 : Depreciation – Computers, Accessories and peripherals – Rate of depreciation at 60%
The assessee was eligible to claim depreciation at 60% on computers, accessories and peripherals. (AY. 2006-07, 2007-08, 2008-09)
Canon India P. Ltd. v. DCIT (2013) 24 ITR 694 / (2014) 160 TTJ 172 / 99 DTR 82 (Delhi)(Trib.)

S.32 : Depreciation – Computer peripherals – Rate of depreciation at 60%
The assessee was entitled to depreciation in regard to the computer peripherals at 60%. (AY. 2007-08, 2008-09)
Sojitz India P. Ltd. v. DCIT (2013) 24 ITR 474 (Delhi)(Trib.)

S.32 : Depreciation – Block of assets – Put to use – Claim of depreciation in subsequent years [S.2(11)]
Held there was no basis for working out the utilised and unutilised areas as was done by the Assessing Officer when the entire multiplex was put to use. The assessee had started operation in only three places and the other projects were under various stages of construction. Therefore, what the assessee claimed was depreciation of projects under operation and repairs and maintenance thereof. Once the entire project had commenced business operations, just because part of it was not leased out or commercially exploited that could not be a basis for disallowing depreciation and expenditure. Once an asset has entered into "block of assets" and depreciation has been granted on it, depreciation cannot be denied in subsequent years. (AY. 2005-06)
E-City Entertainment (India) Pvt. Ltd. v. Add.CIT (2013) 24 ITR 73 / (2014) 61 SOT 105 (URO) (Mum.) (Trib.)

S.32 : Depreciation – Software purchase – Treated as capital expenditure [S.37(1)]
Depreciation was to be allowed on software purchases where the same was treated as capital expenditure. (AY. 2008-09)
Sandoz P. Ltd. v. DCIT (2013) 25 ITR 347 / 145 ITD 551 / 96 DTR 401 (Mum.)(Trib.)

S.32 : Depreciation – Use of vehicle contravention of rules of Transport department – Depreciation is allowable
AO did not allow the depreciation on the ground that assessee did not have a certificate and permission from the authorities to transport the goods and transporting goods on a chassis without a body was in violation of law. On appeal Tribunal held that to allow depreciation, the assessee has only to prove that he has put the vehicle to use before the relevant date. If the vehicle is used in contravention of the rules provided by the respective transportation department, AO cannot disallow the depreciation. (AY.2005-06)
R. Viswanath v. ITO (2013) 59 SOT 22 (Hyd.)(Trib.)

S.32 : Depreciation – Intangible assets – Payment to erstwhile share holders – Non-compete fee – Depreciation is not allowable
The assessee company paid certain sums to its erstwhile shareholders for giving up their right to carry on peroxide business in India for five years. The said payment was treated as an intangible asset and depreciation was claimed thereon. Following the decision of the tribunal

in *Sharp Business Systems (India) Ltd. v. Dy. CIT (2011) 133 ITD 275*, depreciation on non-compete fee could not be allowed. (AY. 2003-04)
Arkema Peroxides India (P) Ltd. v. ACIT (2013) 56 SOT 64 (UO) (Chennai)(Trib.)

S.32 : Depreciation – Rate permitted in building, which is partly let out
The assessee claimed depreciation on building which was disallowed by Assessing Officer on ground that it was let out. The assessee claimed only part of it was let out; the rest was used for business purpose of assessee. The Tribunal remanding the matter held depreciation could be denied only to the extent let out.
AI Gayathri Trading Co. (P.) Ltd. v. Dy. CIT (2013) 142 ITD 675 / 22 ITR 214 (Cochin)(Trib.)

S.32 : Depreciation – Block of assets – Discontinued business [S. 2(11)]
The assessee claimed depreciation on its edible oil refinery. The auditor had noted that the refinery had been discontinued during the year and management has not planned any refinery activity. The Assessing Officer therefore held that the refinery was not used for the purpose of business and was discontinued and the assessee had no intention to utilise it in the future and therefore held that it is not entitled to depreciation. The CIT(A) confirmed the disallowance. On appeal the Tribunal allowing the ground of the assessee held that once the concept of block of assets had been brought into the picture, the identity of any new asset merges into the block. Therefore, even if some of the assets in the block are functioning, the entire block gets depreciation. (AY. 2005-06 to 2007-08)
Sonic Biochem Extractions P. Ltd. v. ITO (2013) 23 ITR 447 / 59 SOT 4 (URO)(Mum.)(Trib.)

S.32 : Depreciation – Windmills – Higher rate of depreciation – Captive consumption
The assessee was engaged in manufacture of cotton yarn and power generation for captive consumption through windmills. It claimed depreciation at the rate of 80% on the windmills. This claim of 80% was denied by the AO. The CIT(A) held that the assessee was entitled to claim depreciation on the windmill at 80%. On appeal by the department, the Tribunal following the decision of the coordinate bench in the case of *K. K. S. K. Leather Processors P. Ltd. v. ITO (2011) 9 ITR 758 (Trib.)(Chennai)* held that the assessee is entitled to claim depreciation at the rate of 80%. The Tribunal also held that the fact that the Department had not accepted the order of the co-ordinate Bench and had preferred an appeal before the High Court, was not a valid ground to take a different view especially without any distinguishing features being pointed out by the Department. (AY. 2004-05)
ACIT v. Rajave Textile P. Ltd. (2013) 22 ITR 475 / 60 SOT 96 (Chennai)(Trib.)

S.32 : Depreciation – Additional depreciation – Plant and machinery – Less than 180 days
Where the plant and machineries were put to use for less than 180 days in the year of installation assessee claimed only 50% of additional depreciation and balance amount was claimed in the next year. Assessing Officer and Commissioner (Appeals) has not allowed the claim. On appeal Tribunal held that additional benefit was intended to give impetus to industrialisation, hence the assessee was entitled to the balance 50% of the depreciation in the subsequent year.(AY. 2009-10)(ITA no 2789/Mum/2012 dt 13-05-2013)
MITC Rolling Mills P. Ltd v. ACIT (2013) BCAJ-July P.55(Mum.)(Trib.)

S.32 : Depreciation – Licence to collect toll – Road on BOT basis – Intangible asset – Depreciation is allowable
The assessee is engaged in the business of construction, operation and maintenance of infrastructure facilities. The assessee was awarded an infrastructure work of development, operation and maintenance of infrastructure project of a road on build, operation and transfer basis. It was required to develop construct maintain the road at its own cost for a specified period. On expiry of the specified period the, infrastructural facility was to be transferred to the State Government free of

charge. In consideration the assessee was given a right to collect toll from the motorists using the road during specified period. On the amount spent by the assessee it has capitalized the costs incurred on development and construction and claimed depreciation being an intangible asset within the meaning of section 32 (1)(ii). The Assessing Officer held that the right to collect toll was neither a license nor a valuable commercial or business right covered in the expression intangible asset for the purpose of section 32(1)(ii) and accordingly disallowed the depreciation. On appeal Tribunal held that the right to collect toll is emerged as a result of the costs incurred by the assessee on development, construction and maintenance of the infrastructure facility. Such a right has to be in the nature of 'intangible asset' falling within the purview of section 32(1)(ii) and is eligible for depreciation under section 32 of the Act. (AY. 2006-07, 2007-08)
ACIT v. Ashoka Infraways (P) Ltd (2013) 58 SOT 147(Pune)(Trib.)

S.32 : Depreciation – Charitable or religious trust – Application of income and depreciation is permissible [S.11, 12A]
Assessee a charitable trust registered under section 12A made investment in building, on which it claimed benefit under section 11 in the form of application of funds as well as depreciation under section 32. Assessing Officer disallowed depreciation on ground that it amounted to double deduction. Commissioner (Appeals) allowed the depreciation. On appeal the Tribunal confirmed the view of Commissioner (Appeals). (AY. 2007-08, 2008-09)
ACIT v. Shri Adichunchanagiri Shikshana Trust (2012) 19 ITR 828 / (2013) 141 ITD 575 (Bang.)(Trib.)

S.32 : Depreciation – Fly ash handling system – Eligible 100% depreciation. [Income-tax Rules 1962, Rule 5]
Assessee a manufacturer of asbestos sheets using fly ash as raw material for manufacturing the asbestos sheets. According to assessee, it had set up a 'fly ash Handling system' for the purpose of processing fly ash in the manufacture of asbestos sheets. In Appendix-I provided under Rule 5 of Income-tax Rules, 1962, where under depreciation schedule is provided, there is a special rate of depreciation of 100 percent for items coming under 'AIR pollution control equipment'. Air pollution control equipment also included 'fly ash handling system and evacuation system'. On the above premises, the assessee claimed depreciation at 100% on its fly ash handling system. The Assessing Officer did not agree with the contention of assessee and allowed only 15% on said system like other items of plant and machinery .Commissioner (Appeal) allowed 100% depreciation. On appeal Tribunal held that in case of assessee, a manufacturer of asbestos sheets using fly ash as raw material, a fly ash handing system was installed, said system was to be regarded as 'air pollution control equipment' for purpose of granting depreciation at higher rate of 100 per cent. (AY. 2005-06, 2006-07 & 2008-09)
Dy. CIT. v. UAL Industries Ltd. (2013) 141 ITD 1 / 87 DTR 247 / 154 TTJ 580 (TM)(Kol.) (Trib.)

S.32 : Depreciation – User of asset – As machineries were not put to use during the relevant year depreciation was not allowable
Assessee purchased a new machine for an expansion and diversification project and got it installed in 1996-97. Due to various reasons the, said project could not take off. Assessee claimed 100 per cent depreciation on said machine. Tribunal held that there is nothing on record to suggest that machine was ever put to use during year hence no depreciation was allowable. Project was abandoned later. (AY.1998-99)
Superfil Products Ltd. v. ACIT (2012) 20 ITR 171 / (2013) 141 ITD 567 / 157 TTJ 343 (Chennai)(Trib.)

S.32 : Depreciation – UPS – 60% rate of depreciation

UPS forms part of computer system and, therefore, entitled to 60 per cent depreciation. (AY. 2007-08)
American Express Services India Ltd. v. DCIT (2013) 57 SOT 22 (URO) 82 DTR 1 (Delhi)(Trib.)

S.32 : Depreciation – Test run – Earth station depreciation is allowable
Where assessee had successfully test run earth station before close of relevant financial year, depreciation was allowable on such assets. (AY. 1998-99)
TATA Communications Ltd. v. JCIT (2013) 57 SOT 1 / 81 DTR 36 / 151 TTJ 273 (Mum.) (Trib.)

S.32 : Depreciation – Part ownership – Cable net work depreciation is allowable
The assessee had acquired part ownership of optical fibre cable pursuant to capacity sales agreement and claimed depreciation on the same. The Assessing Officer disallowed claim on ground that assessee was not complete owner of asset in question. Tribunal held that the words 'wholly' or 'partly' have been inserted in section 32 w.e.f. 14-4-1997 and hence, the assessee was eligible to claim depreciation on cable network even though the entire network was not owned by it. (AY. 1998-99)
TATA Communications Ltd. v. JCIT (2013) 57 SOT 1 / 81 DTR 36 / 151 TTJ 273(Mum.)(Trib.)

S.32 : Depreciation – Ownership – As per the terms of sale agreement the assessee being not owner of the dredger either wholly or partly depreciation was not allowable
The agreement for sale of dredger indicated that the seller had not parted with its right of ownership of the dredger in favour of the assessee as the agreement made it very clear that in case of failure on the part of the assessee as per the terms of the agreement or if bank guarantee is not extended, the seller has right to terminate the agreement, take possession of the dredger and forfeit the amount already paid. Until the last instalment was paid, the seller shall have exclusive charge over the dredger. 'Effective date' as defined in the additional clause is clear enough to indicate that the parties to the agreement intended the date of approval by the RBI to be the effective date of agreement. Clause (2) of Circular No. 9 dated 23-3-1943, on which the assessee relied makes it explicit that the circular is applicable to such hire purchase agreement under which the ownership of the subject is at once transferred to the lessee which in other words means that the lessor obtains a right to sue for failure in payment of instalments but no right to recovery of the asset. However, the sale agreement of the assessee confers a right on the seller to terminate the agreement and take back possession of the dredgers and forfeit the payments already made in case of violation of the conditions of payment and failure to extend the bank guarantee. In view of this, the circular No. 9 does not apply to the facts of the instant case. Hence, the claim of depreciation was not available. (AY. 2008-09)
Dharti Dredgers & Infrastructure Ltd. v. ACIT (2013) 57 SOT 31 / 24 ITR 538 (Hyd.)(Trib.)

S.32 : Depreciation – Put to use – Bifurcation of area put to use – Capital or revenue – Repair and maintenance [S. 37(1)]
The Assessing Officer worked out an area of 53,589 sq.ft. as unutilised space and disallowed depreciation on the corresponding percentage of plant and machinery at 14.53 per cent on the ground that this area was not put to business use. Held, there was no basis for working out the utilised and unutilised areas as was done by the Assessing Officer when the entire multiplex was put to use. Once the entire project had commenced business operations, just because part of it was not leased out or commercially exploited that could not be a basis for disallowing depreciation and expenditure. Similarly, the Assessing Officer was wrong in disallowing the claim of revenue expenditure on repairs and maintenance on un utilised area. (AY. 2005-2006)
E-City Entertainment (India) Pvt. Ltd. v. ACIT (2013) 24 ITR 73 / (2014) 61 SOT 105 (URO) (Mum.)(Trib.)

S.32 : Depreciation – Manufacturing activity – Assets used on manufacturing activity

Assessing Officer disallowed depreciation on building, roads and culverts, water system, office appliance etc. on ground that assessee had not undertaken any manufacturing activity during relevant years. In previous assessment year 2004-05, Assessing Officer had allowed depreciation on assets in question. Since facts of assessment years in question were identical to those of assessment year 2004-05, Assessing Officer was to be directed to allow depreciation on such assets. (AY. 2007-08, 2008-09)
ACIT v. Hindustan Fertiliser Corpn. Ltd. (2013) 140 ITD 719 (Delhi)(Trib.)

S.32 : Depreciation – Block of assets – Discontinue of business of one unit [S. 2(11)]
Operations of manufacture discontinued at one factory. Assets of unit having already entered block of assets of assessee, depreciation not to be disallowed on ground of non-user. (AY. 2002-03)
Kansai Nerolac Paints Ltd. v. Dy. CIT (2013) 22 ITR 424 / 57 SOT 10 (URO) (Mum.)(Trib.)

S.32 : Depreciation – Deduction at source – Capital expenses – Acquisition of brand from non-resident amount was capitalised – Depreciation can not be denied for failure to deduct tax at source on payment. [S. 40(a) (i), 195, 200]
During the relevant year the assessee made payments to a foreign company for acquiring its trade name. The amount so paid was capitalized and depreciation was claimed in respect of it. The Assessing Officer held that the said payment attracted the provisions of section 195 read with section 200. Since the assessee failed to deduct tax at source while making said payment said payment, it was disallowed under section 40(a) (ia). The DRP also confirmed the said disallowance. On appeal the Tribunal held that the depreciation is a statutory deduction and not an outgoing expenditure therefore provisions of section 40(a) (ia) are not attracted on such deduction. (AY.2007-08)
SKOL Breweries Ltd. v. A CIT (2013)142 ITD 49 / 84 DTR 271 / 153 TTJ 257 / 28 ITR 465 (Mum.)(Trib.)

S.32 : Depreciation-Sale and lease back – Special Bench verdicts on Sale & Lease Back & lease finance are not good law – Assessee entitled for depreciation
The assessee, a Bank, bought assets from its customers and leased it back to them ("sale and lease back"). It also purchased assets identified by its customers and leased it to them ("finance lease"). The assessee claimed depreciation on the assets on the ground that it was the owner and had used the assets for business purposes. The AO, relying on *MidEast Portfolio Management Ltd. v. Dy. CIT (2003) 87 ITD 537 (Mum) (SB)* and *IndusInd Bank Ltd. v. Add. CIT (2012) 135 ITD 165 (Mum) (SB)*, disallowed depreciation on the ground that the transactions were an "eyewash" and "colourable device". The CIT (A) partly confirmed the disallowance. On appeal by the assessee to the Tribunal, HELD allowing the claim:
The issue of whether the lessor is entitled to claim depreciation in the case of a "sale and lease back" transaction as well as in a "finance lease" have been laid to rest by the judgements in *ICDS v. CIT (2013) 350 ITR 527 (SC)*, *CIT v. Kotak Mahindra Finance (2009) 317 ITR 236 (Bom)* and *CIT v. Cosmo Films Ltd. (2011) 338 ITR 266 (Del.)* where it was held that the lessor is eligible to claim depreciation. The judgments of the Special Bench in *MidEast Portfolio Management Ltd. v. Dy. CIT (2003) 87 ITD 537 (Mum.) (SB)* and *IndusInd Bank Ltd. v. Add. CIT (2012) 135 ITD 165 (Mum) (SB)* are impliedly overruled. (AY. 96-97)
Development Credit Bank Ltd. v. DCIT (2013) 26 ITR 209 / 61 SOT 53 (Mum.)(Trib.)

S.32 : Depreciation – Windmills – Rate of depreciation
Following the judgment of Tribunal in *K. Ravi v. ACIT (2010) 2 ITR 752 (Chennai) (Trib.)* the Tribunal held that the Assessee is entitled to depreciation at higher rate. (AY. 2005-06, 2008-09)
ABT Ltd. v. ACIT (2013) 21 ITR 634 / 152 TTJ 791 / 83 DTR 178 / 56 SOT 42 (Chennai) (Trib.)

S.32 : Depreciation – Buildings – Business – Leased

Depreciation in respect buildings used for purpose of business to be allowedand depreciation pertaining to portion let out alone to be disallowed. Depreciation in respect of flats given to directors for purpose of business to be re-examined, matter remanded. (AY. 2004-05 to 2006-07)
Al-Gayathri Trading Co. P. Ltd. v. Dy. CIT (2013) 22 ITR 214 / 142 ITD 675 (Cochin)(Trib.)

S.32 : Depreciation – Office – Depreciation is to be allowed.
The authorities below disallowed depreciation in the hands of the assessee on the ground that the office was not being utilised for business purpose, as it was given for re-development. The claim of the assessee was that the re-development agreement was signed on January 18, 2010 and re-development started in the assessment year 2009-10. The assessee claimed to have utilised the office during the year under consideration. On appeal the Tribunal held that the claim of depreciation was to be allowed to the assessee. (AY.2006-07)
Manjit Mann (Mrs) v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.32 : Depreciation – Cinema hall – Income shown on estimate basis – depreciation is allowable.
Depreciation is a charge on an asset, it has to be granted in accordance with the provisions of the Act. Depreciation is allowable irrespective of the fact that the assessee has shown estimated income which is less than the amount of depreciation. Depreciation is held to be allowable on cinema hall owned by the assessee. (AY. 2009-10)
Dinesh Chandra Das v. ACIT (2013) 152 TTJ 25 (UO) / 143 ITD 691 (Ctk.)(Trib.)

S.32 : Depreciation – Non compete fee – Non-Compete Fee not eligible for depreciation or amortization.
The assessee acquired the business of manufacture of glass from Piramal Enterprises Ltd. It also entered into a non-compete agreement with Piramal Enterprises whereby it agreed to pay Rs. 18 crores for the seller agreeing not to carry on a competing business for a period of 18 years. The assessee claimed the said payment as a revenue deduction and in the alternate as a depreciable asset. The AO rejected both claims. The CIT(A) held that though the non-compete fee was not a depreciable asset, the amount paid for it was entitled to be amortized over the period of the agreement. The assessee filed an appeal before the Tribunal challenging the non-grant of depreciation while the department filed an appeal challenging the grant of amortization. In the first round, the Tribunal rejected the assessee's plea by relying on the Third Member verdict in Paper Products. However, as this verdict was not put to the assessee, the matter was reposted for hearing. In the second round, the assessee relied on *CIT v. Smifs Securities Ltd. (2012) 348 ITR 302 (SC)* where goodwill was held to be eligible for depreciation and several other judgments. HELD by the Tribunal rejecting the plea:
The expression "any other business or commercial rights of similar nature" in the definition of "intangible asset" in s. 32 (1) (ii) shows that the initial part, i.e. know how, patents, copyrights, trademarks, license, franchises, has been disjointed by the conjunction 'or'. The use of the disjunction 'or' has a very relevant role, because, the legislature accepts the difference and distinction of intangibles and rights. The legislature has used 'or' in the provision for explaining the distinction of application of like nature with that of the unlike nature, which is an accepted principle i.e. doctrine of ejusdem generis. Taking note of the word 'or', used as a disjunction is essential to carve out a meaningful genus. The argument whether non compete rights constitute is a right in rem or a right in personam is a matter to be decided by an appropriate higher judicial forum. The judgment of the Supreme Court in *CIT v. Smifs Securities Ltd. (2012) 348 ITR 302 (SC)* that goodwill is an intangible asset eligible for depreciation is not applicable to a non-compete right. Non-compete fee does not fall within the ambit of any other commercial or business rights. As regards the claim of amortization, since the payment of ` 18 crores is a capital expenditure, it cannot be allowed as an expense and also can(not) be amortized (*Sharp Business System v. CIT (2012) 254 CTR 233(Del) followed. ACIT v. Real Image Tech (P.) Ltd. (2009) 120 TTJ 983) (Che), ITO v. Medicorp Technologies India Ltd. (2009) 30 SOT 506 (Che), Bunge Agribusiness (India) (P) Ltd. v. DCIT (2011) 132 lTD 549 (Mum),*

Serum Institute of India Ltd. v. Add. CIT (2012) 135 ITD 69 (Pune) treated as not good law). (AY. 1999-00)
Gujarat Glass Private Limited v. ACIT (Mum.)(Trib.) www.itatonline.org

S.32 : Depreciation – UPS – Entitled to 80% depreciation
UPS being energy saving device is entitled for higher depreciation @ 80 percent. (AY. 2006-07, 2007-2008) ('G' ITA No.7682/M/10 and ITA No.8549/M/10, Dated 22-10-2012)
Godfrey Phillips India Ltd. v. Addl. CIT (2013) BCAJ Pg. 25, Vol. 44-B Part 5, February 2013 (Mum.)(Trib.)

S.32 : Depreciation – Goodwill – Retail clientele – On amount paid to purchase clientele, depreciation is allowable
The assessee, a share broker purchased clientele business of one party; the said party assigned all its clients to the assessee for a consideration of Rs. 2.50 crores. The assessee treated this purchase consideration as 'purchase of goodwill' and claimed depreciation. The AO as well as the CIT (A) disallowed the same on the ground that the payment of Rs. 2.50 crores was not for goodwill but for purchase of clientele business. The Hon'ble Tribunal held that the assessee was entitled to depreciation, by virtue of sec. 32 (1) (ii), under which an asset in the nature of"any other business or commercial rights of similar nature" was entitled for depreciation. The said expression "any other business or commercial rights of similar nature" would include all kinds of commercial rights and the principle of 'Ejusdem generis' ought to be applied while interpreting the said expression. Mere fact that the assessee had treated the said amount as 'goodwill' in its books, does not disentitle the assessee from claiming depreciation. (AY.2006-07).
India Capital Markets (P.) Ltd. v. DCIT (2013) 56 SOT 32 (Mum.)(Trib.)

S.32 : Depreciation – Additional depreciation on plant and machinery acquired during relevant period but installed during the subsequent period [S.32(iia)]
The assessee had claimed additional depreciation on plant and machinery which were acquired in year relevant to AY. 2005-06, but its installation was completed on 31-1-2006. The AO and the CIT(A) held that the assessee was ineligible for claiming additional depreciation since the asset was not 'installed' and the mandate of s.32(iia) is that the asset should be both 'acquired' and 'installed' during the relevant period. On Appeal before the Tribunal, the Hon'ble Tribunal held that the requirement of s.32(iia) was that both the conditions had to be satisfied viz. acquired as well as installed. Since the machinery was not acquired after 31-3-2005, the assessee was not entitled for additional depreciation u/s. 32(iia). (AY. 2006-07)
International Cars & Motors Ltd. (2013) 56 SOT 50 (Delhi.) (Trib.)

S.32 : Depreciation – Additional depreciation can be claimed only on acquisition & installation of new machinery or plant after 31-3-2005
The assessee claimed additional depreciation on plant and machinery which was acquired in AY.2005-06, whereas the installation of the said Plant & machinery was completed on 31-3-2006 i.e. in the year under consideration. The Assessing Officer denied the claim as the Plant and machinery was acquired in the AY. 2005-06 i.e., before 31-3-2005 and as per section 32(1)(iia) of the act, additional depreciation is allowed in respect of new plant and machinery installed after 31-3-2005. CIT(A) confirmed the order of the Assessing Officer. On appeal in Tribunal, the Tribunal upheld the order of the CIT(A) and held that for the purpose of the word 'acquisition' and 'installation' may be different but both the conditions were required to be fulfilled only after 31-3-2005. During the year, for claiming additional depreciation there was specific conditions prescribed under section 32(1)(iia) of the act. As the new machinery or plants were not acquired after 31-3-2005, the authorities below were justified in denying the additional depreciation under the said provisions. (AY. 2006-07)
International Cars & Motors Ltd. v. ITO (2013) 56 SOT 50 (Delhi)(Trib.)

S.32 : Depreciation – Web portal – Depreciation is allowable

Depreciation on web portal is an intangible asset and depreciation is allowable.(AY. 2008-09)
Social Media Ltd v. ACIT (2013) 28 ITR 212 / (2014) 148 ITD 222 (Hyd.)(Trib.)

S.32(1)(iia) : Depreciation – Additional depreciation

Assessee engaged in the business of transport of spirit and Molasses acquired a new wind mill during the previous year and claimed deprecation. Assessee also claimed additional depreciation u/s 32(1)(iia) on such wind mill. However, AO was of the opinion that such additional depreciation could not be allowed since wind energy undertaking of the assessee could not be treated as an undertaking engaged in manufacture of article or thing. Further, as per the AO original business of the assessee was not manufacturing or producing any article or thing, but only transporting spirit and molasses. In this view of the matter, he denied additional depreciation claimed by the assessee. The Tribunal held that, Assessee necessarily had to have a line of manufacturing or production, though operational connectivity was not required. In the present case, the assessee was not into any business of manufacture or production but only transportation of molasses and spirit. Thus, the first condition in the enacting provision, that assessee has to be engaged in the business of manufacture or production of an article or thing is not satisfied. The progress stops there. The application stops there. Assessee was not eligible for claiming additional depreciation u/s.32(1)(iia) of the Act. Lower authorities were correct in taking this view. (AY. 2005-06)
Shiva Cargo Movers Ltd. v. DCIT (2012) 53 SOT 44 / 82 DTR 246 / 152 TTJ 74 (Chennai)(Trib.)

S.32(2) : Depreciation – Unabsorbed depreciation – Set-off – Set off against income from other sources – Section 72(2) does not control operation of section 32(2) to have set off of unabsorbed depreciation against income from other sources [S.72(2)]

The assessee had unabsorbed depreciation as well as unabsorbed loss. The Assessing Officer adjusted loss brought from earlier years against business income and arrived at the business income as NIL. The assessee sought for adjustment of carried forward unabsorbed depreciation in the income from other sources. The claim of the assessee was negatived by the Assessing Officer for reason that the assessee should have exhausted first the unabsorbed carried forward loss for earlier years before claiming any set off on unabsorbed depreciation. The Commissioner (Appeals) upheld the order of the Assessing Officer. The Tribunal held that the assessee was entitled to set off unabsorbed depreciation as against the income from other sources. On appeal High Court held that in cases where after having set off of business loss as against current year income from business, there existed no further business income, assessee was entitled to set off unabsorbed depreciation against income from other sources. The court held that section 72(2) does not controls operation of section 32(2) to have set off of unabsorbed depreciation against income from other sources. In favour of assessee. (AY.1998-99)
CIT v. SPEL Semi Conductor Ltd. (2013) 212 Taxman 506 / 90 DTR 436 (Mad.)(HC)

S.32(2) : Depreciation – Unabsorbed depreciation – Depreciation for Block of assessment year which could not have been set-off earlier is cannot be allowed in subsequent Assessment year

In view of amendment brought out in section 32(2) w.e.f. 1-4-1997 by Finance Act (No. 2) of 1996 and again on 1-4-2002 Finance Act, 2001 unabsorbed depreciation for block of assessment years 1997-98 to 2001-02 which could not have been set-off earlier, cannot be allowed to be set-off in subsequent AY. (AY. 2005-06)
Liberty Plywood (P.) Ltd. v. ACIT (2013) 140 ITD 490 / 87 DTR 293 / 154 TTJ 769 (Chd.) (Trib.)

S.32A : Investment allowance – Actual cost – Fluctuation in the currency rates [S.43A]

Assessee is entitled to investment allowance on account of the additional expenditure in the cost and machinery on account of fluctuations in the currency rate.

CIT v. Gujarat State Fertilizer Co. Ltd. (2013) 262 CTR 404 / 93 DTR 468 (SC)
Editorial: CIT v. Gujarat State Fertilizer Co Ltd (2013) 179 CTR 266 (FB)(Guj.)(HC)

S.32A : Investment allowance – Fluctuation in exchange rate – Enhanced cost – Allowable [S. 43A]
There was an increase in liability towards cost of machine purchased in 1987-88 due to fluctuation in rate of foreign currency. Investment allowance was to be granted on enhanced cost in AY 1993-94 as the assessee was following mercantile system of accounting. Also held, AY 1993-94, would be governed by the unamended provisions of section 43A. Investment allowance to be granted on enhanced cost. (AY. 1993-94)
CIT v. Punjab Anand Industries (2013) 359 ITR 300 / 219 Taxman 121 (Mag.)(P&H)(HC)

S.32A : Investment allowance – Manufacture or production – Machineries used for Manufacture of milk products is eligible for investment allowance [S.263]
The investment allowance on new machinery and plant would be available only when such machinery and plant, *inter alia*, are used for the purpose of business of manufacturing or production of any article or thing, not being an article or thing specified in the list in the Eleventh Schedule. The assessee was employing machinery for making milk products like ghee, flavoured milk, butter milk, rose milk and kova. When once the milk was subjected to the process, in its factory, new products emerged which were altogether different from milk itself. The assessee was entitled to investment allowance. (AY. 1983-84)
CIT v. Vizag District Milk Producers Co-op. Union Ltd. (2013) 356 ITR 612 / 219 Taxman 141 (Mag) (AP)(HC)

S.32A : Investment allowance – Manufacture of aerated water with synthetic essence is entitled investment allowance – Explanation to item 5 in Eleventh Schedule, w.e.f. 1-4-88 is not retrospective
Court held, that insertion of Explanation to item 5 in Eleventh Schedule w.e.f. 1-4-1988 is not retrospective and machinery used in the manufacture of aerated water with synthetic essence was entitled to investment allowance prior to 1-4-1988.(AY. 1982-83, 1985-86)
CIT v. Vijayawada Bottling Co. Ltd. (2013) 356 ITR 625 (AP)(HC)
CIT v. Sarvaraya Sugars Ltd. (2013) 356 ITR 625 (AP)(HC)

S.32AB : Investment deposit account – Computation of deduction – Interest on margin money assessable as business income and eligible for deduction
Where income is received from deposits made by the assessee, and deposits are inextricably linked to the business of the assessee, such income cannot be treated as income received from other sources. The assessee is eligible to deduction under section 32AB. (AY.1990-91)
CIT v. K and Co. (2013) 214 Taxman 1 / 259 CTR 398 / 82 DTR 166 (Delhi)(HC)

S.32AB : Investment deposit account – Interest – Construction business – Eligibility to claim benefit was not issue before Authorities hence deduction on interest was justified
The assessee claimed the benefit under section 32AB(1)(b) contending that it had utilized the amounts during the previous year for purchase of new machinery or plat. The Commissioner (Appeals) had allowed its claim and in some instances, the Tribunal did so, On appeal the Revenue contending that the assessee was not entitled to claim the benefit, since it did not carry on eligible business at the relevant time. The Court dismissing the appeal held that the approach of the tax authorities, as well as the Tribunal was to compute the benefit of set off, in the manner described. The eligibility or entitlement of the assessee to claim the benefit was never questioned in the proceedings before the lower authorities. Therefore, the deduction permitted to the assessee under section 32AB on interest was justified.

CIT v. Ansal Housing Finance & Leasing Co. Ltd. (2013) 354 ITR 180 / 213 Taxman 143 / 88 DTR 227 (Delhi)(HC)
CIT v. Ansal Properties and Industries Ltd. (2013) 354 ITR 180 / 88 DTR 227 (Delhi)(HC)
CIT v. Ansal Housing and Construction Ltd. (2013) 354 ITR 180 / 88 DTR 227 / 213 Taxman 143 (Delhi)(HC)

S.33AC : Shipping business – Reserves – Insurance claim – Matter remanded
Assessee claimed deduction under section 33AC on insurance claim amount received towards repairs carried out in respect of a vessel. Assessing Officer held that such insurance receipt could not be taken to be assessee's business income and, therefore, same was not eligible for deduction under section 33AC - Commissioner (Appeals) however allowed assessee's claim. Tribunal held that only if insurance claim was found to be assessee's profits derived from business operation of ships, amount so received shall be taken as an eligible profit for purpose of creating reserve and allowing deduction in terms of provision of section 33AC. (AY. 2003-04)
Dy. CIT v. Mercator Lines Ltd. (2013) 55 SOT 187 (Mum.)(Trib.)

S.35 : Scientific research – CBDT – For grant of approval to scientific research, CBDT can only refer matter to Central Government and cannot decide matter itself
The assessee is a scientific research association. Its application for grant of approval in terms of section 35(i)(ii) remained pending. In the meantime an amendment was made in the object clause. The CBDT rejected the application by holding that approval could not be given as the condition prescribed was not satisfied. It was held that for grant of approval to scientific research, CBDT can only refer matter to Central Government and cannot decide matter itself.
Shriram Scientific & Industrial Research Foundation v. CBDT (2012) 210 Taxman 77 / (2013) 258 CTR 267 / 84 DTR 329 (Delhi)(HC)

S.35 : Scientific research – Fresh assessment – Matter remanded
In view of the fact that it was not clear as to whether expenditure pertained to research and development and whether entire semi-finished products were made in that process, fresh assessment was directed to be made by the Assessing Officer. (AY.2001-02)
CIT v. Encore Software Ltd. (2013) 216 Taxman 144 (Mag.) (Karn.)(HC)

S.35 : Scientific research – Development of product – Continuous process – Expenses is allowable even if specific product is sold.
Research and development activities is a continuous process and even if a specific product has been sold at one stage, still development in product can be carried out and, thus, expenditure thereon is to be allowed. (AY. 2000-01)
CIT v. Essen Deinki (2013) 216 Taxman 100 (Mag.) (P&H)(HC)

S.35 : Scientific research – Explanation – Explanation to section 35(2AB)(1) does not require that expenses included in said Explanation are essentially to be incurred inside an approved in-house research facility
The assessee carried out scientific research in its facility approved by the prescribed authority. It incurred various expenditure including on clinical trials for developing its pharmaceutical products. These clinical trials were conducted outside the approved laboratory facility. The Assessing Officer denied deduction under section 35(2AB) of the Act as the expenditure on clinical trials were incurred outside the approved facility.
On appeal the High Court held that section 35(2AB) of the Act provides for deduction to a company engaged in business of bio-technology towards expenditure of scientific research development facility approved by the prescribed authority. Merely because the prescribed

authority segregated the expenditure into two parts, namely, those incurred within the in-house facility and those were incurred outside, by itself would not be sufficient to deny the benefit to the assessee under section 35(2AB) of the Act.
CIT v. Cadila Healthcare Ltd. (2013) 87 DTR 56 / 214 Taxman 672 / 263 CTR 686 (Guj.)(HC)

S.35 : Scientific research – Development of Telematics – Other institutions – Matter remanded
The Petitioner-Centre for Development of Telematics had been categorised as 'other institutions' partly engaged in scientific research. It claimed that it should be treated as scientific research association as its sole object was of undertaking research. The Respondent submitted that the Petitioner had been categorised as 'other institution' by the Central Government. However, the records did not indicate that any reference was made to Central Government to decide category of assessee. Held, the issue was to be considered by Central Government.
Centre for Development of Telematics v. Union of India (2013) 214 Taxman 653 / (2014) 360 ITR 184 (Delhi)(HC)

S.35 : Scientific research – Payment made by third party – Allowed as deduction
The Assessing Officer disallowed weighted deduction under S.35(1)(ii) as payment had been made by two other related companies, in whose names receipts were issued by donee initially and assessee had only made journal entries for crediting parties who made payment. The assessee claimed that it did not have sufficient funds and therefore, amount was paid by other companies. It was further claimed that by passing journal entries, liability was incurred by it and hence, it was eligible for deduction. The Commissioner (Appeals) and Tribunal allowed assessee's claim as other two companies had not claimed deduction for donation. Held, since actual payers had not claimed deduction, the assessee was eligible for deduction.(AY. 2004-05)
CIT v. Armour Consultants (P.) Ltd. (2013) 214 Taxman 444 / 355 ITR 418 (Mad.)(HC)

S.35 : Scientific research – Expenses incurred outside the approved R&D facility would also get weighted deduction
The issue raised before the High Court was whether the expenses incurred outside the approved R&D facility would also get weighted deduction based on the word under "on in house''. The High Court held that if such a restricted meaning is given would lead to completely diluting the deduction envisaged under sub-section (2AB) of section 35 and on the other making the explanation meaningless. The activities of obtaining approvals from the regulatory authority or in filing an application for grant of patent necessarily shall have to be outside the in-house research facility. The Court also observed that merely because the prescribed authority segregated the expenditure into two parts, viz. those incurred the in-house facility and those incurred outside, it would not by itself be sufficient to deny the benefit to the assessee under section 35(2B) of the Act. The Certificate issued as only for the purpose of listing the total expenditure under Rules. Therefore, Tribunal has not committed any error and no question of law arises.
CIT v. Cadila Healthcare Ltd. (2013) 214 Taxman 672 / 86 DTR 337 / (Guj.)(HC)

S.35 : Scientific research – Drug trial – Explanation does not require that the expenses are essentially to be incurred inside an in-house
Explanation to section 35(2AB)(1) does not require that the expenses are essentially to be incurred inside an in-house research facility because it is not possible to incur these expenses inside in-house research facility. Thus, expenditure on clinical drug trial, if incurred in relation to drug developed in an in-house research and development facility, the same become eligible for deduction under section 35(2AB)(1). (AY. 2007-08)
Cadila Healthcare Ltd. v. ACIT (2013) 56 SOT 89 (URO) (Ahd.)(Trib.)

S.35 : Scientific research – Capitalisation of expenditure

Assessee incurred certain expenses on scientific research which was shown in books of account as on 31-3-2003 waiting capitalisation. Assessing Officer disallowed claim of assessee on ground that assessee had not capitalized said expenditure in books of account and shown same as item waiting capitalization. Tribunal held that when Assessing Officer had found that expenditure incurred on research and development centre was allowable for deduction under section 35 in subsequent assessment, then expenditure incurred for assessment year under consideration could not be disallowed merely on ground that assessee had not capitalised same because research centre was not completed during year under consideration, therefore, impugned disallowance was to be deleted. (AY. 2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.35 : Scientific research – Weighted deduction – Figure cannot be tampered by Tribunal
Expenditure as approved by DSIR in certificate given by them in Form 3CL alone is to be granted weighted deduction. Once DSIR has certified quantum of eligible R&D expenditure for purposes of weighted deduction under section 35(2AB) figure cannot be tampered by Tribunal, even if there is a mistake in certificate issued by DSIR, same can only be rectified by DSIR and not by Tribunal in appellate proceedings. (AY.2007-08)
Electronics Corpn. of India Ltd. v. ACIT (2013) 140 ITD 221 / 89 DTR 190 / 155 TTJ 748 / (2014) 29 ITR 637 (Hyd.)(Trib.)

S.35 : Scientific research expenditure – Clinical trials – Capital expenditure on laboratory equipment and computer was held to be allowable – Capital expenditure on motor car matter set aside
Assessee being engaged in business of manufacturing of drugs and pharmaceuticals filed return claiming weighted deduction at 150 per cent as per section 35(2AB) on certain sum being capital expenditure on accounts of lab equipment, computer and motor car. AO relying on language used in section 35(2AB) read with section 35(2) held that assessee was not eligible for weighted deduction on capital expenditure. CIT (A) confirmed disallowances made by AO. The Tribunal, held that the capital assets namely laboratory equipment and computer were eligible for weighted deduction if assets in question were used in clinical trials in drug and pharmaceutical industry of assessee. Nomenclature of impugned assets indicated relationship of assets to activities relating to clinical trials. They were used only for clinical trials. Therefore, assessee was entitled to weighted deduction in accordance with provisions of section 35(2AB). (AY. 2008-09)
Sequent Scientific Ltd. v. ACIT (2013) 142 ITD 473 (Mum.)(Trib.)

S.35AB : Know-how – Depreciation – Acquired prior to 1-4-1998 – Allowable deduction. [S.32(1)(ii), 43(2)]
The assessee acquired the technical know-how from a foreign company as per the terms of Joint Venture Agreement dt. 25-11-1994. However, the payment for the same was made in installments during the periods 1998-99 to 2001-02. The assessee claimed deduction in respect of the know-how fee under S. 35AB. It was held that in view of harmonious interpretation of the provisions of S. 32(1)(ii) and section 35AB, in respect of technical know-how acquired prior to 1-4-1998, deduction u/s 35AB will be allowed even if payment is made after 1-4-1998. (AY. 2002-03 to 2004-05)
Hindustan Colas Ltd. v. ACIT (2013) 140 ITD 277 / 151 TTJ 421 / 81 DTR 296 (Mum.)(Trib.)

S.35AB : Know-how – Provision of S.35AB is not applicable to revenue expenditure
Provision of Section 35AB dealing with expenditure on know-how shall be applicable only if any such expenditure incurred is capital in nature. The revenue expenditure on know-how would be continued to be governed by the provision of S.37(1) of the Act. Provision of S. 35AB won't apply to revenue expenditure even if the same is in respect of know-how, (T.A. No. 326 of 2000, dt. 3-7-2012)

Sayaji Industries Ltd. (2012) BCAJ - November-P. 400/(2013) 81 DTR 418 (Guj.)(HC)

S.35B : Export markets development allowance – Insurance business – Reserve for export. [S.44, Sch. I, Rule 5]

Reserve for export market development allowance could not be added to the balance of profits disclosed by the annual accounts of assessee insurance company. *CIT v. Oriental Fire General Insurance Co. Ltd. (2007) 291 ITR 370 (SC)* applied. (AY. 1980-81 & 1981-82)

Oriental Insurance Co. Ltd. v. CIT (2013) 351 ITR 270 / 83 DTR 185 / 213 Taxman 498 (Delhi)(HC)

S.35D : Amortisation of preliminary expenses – Nexus with eligible projects – Following the rule of consistency claim was allowed

The Assessing Officer restricted the claim u/s 35D to the extent it had nexus with eligible projects. The Tribunal, however allowed claim holding that no such disallowance was made in last seven years and such claim could not be disallowed suddenly. Held, following rule of consistency, Tribunal correctly allowed claim of assessee.

DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Guj.)(HC)

S.35D: Amortisation of preliminary expenses – Share application money – Set off of interest

The Tribunal had allowed benefit of set off of interest income from share application money against public issue expenses. Court held that interest earned was inextricably linked with requirement of company to raise share capital and thus adjustable towards expenditures involved for share issue.

CIT v. Shree Rama Multi Tech Ltd. (2013) 214 Taxman 650 (Guj.)(HC)

S.35D : Amortisation of preliminary expenses – Expanding production capacity

Expenditure incurred by assessee-company for expanding production capacity of vehicles at two of its plants was eligible for deduction under section 35D, however, types of expenditure which would go for amortisation under section 35D, particularly with reference to sub-clause (c)(iv) of sub-section (2) of section 35D, would be only those expenditure which are specifically mentioned therein and nothing beyond. (AY. 1995-96)

CIT. v. Ashok Leyland Ltd. (2013) 213 Taxman 204 (Mad.)(HC)

S.35D : Amortisation of preliminary expenses – Foreign Currency Convertible Bonds (FCCB) – Expenses incurred for issue of FCCB was not allowable as revenue expenditure, amortisation of expenses was held to be justified. [S.37(1)]

Assessee company is engaged in business of broadcasting TV programmes. It issued Foreign Currency Convertible Bonds (FCCB) on 28-4-2004. The same bonds were convertible into shares any time on or after 8-6-2004 and before 22-4-2009. There was an option for redemption on or after 12-5-2006 and up to 24-2-2009. During previous year assessee incurred certain expenditure towards issue of FCCB and claimed same to be allowed as revenue expenditure. Assessing Officer concluded that assessee had incurred impugned expenditure in connection with expansion and extension of business in field of television and setting up of new channels. Since impugned expenditure would result in addition to existing profit earning apparatus giving advantage in capital field, it was capital in nature. And therefore, it had to be amortised under section 35D. (AY.2005-06)

Zee Telefilms Ltd. v. ACIT (2013) 58 SOT 36 (URO)(Mum.)(Trib.)

S.35D : Amortisation of preliminary expenses – Professional fees to lawyers

The assessee claimed one fifth of preliminary expense under section 35D. Assessing Officer disallowed holding it as capital in nature. The Tribunal held that the said fees were incurred for expansion of business and therefore one-fifth of it was allowable as preliminary expense. (AY. 2007-08)

Dy. CIT v. Columbia Asia Hospitals (P.) Ltd. (2013) 142 ITD 225 (Bang.)(Trib.)

S.35D : Amortisation of preliminary expenses – Right shares

Expenses incurred in relation to issue of rights shares. Deduction of one-tenth of expenditure allowable. (AY. 2002-03)

Kansai Nerolac Paints Ltd. v. Dy. CIT (2013) 22 ITR 424 / 57 SOT 10 (URO) (Mum.)(Trib.)

S.35D : Amortisation of preliminary expenses – Expenditure not for expansion of industrial undertaking or for setting up new industrial undertaking – Deduction is not available – Interpretation – General principles – Principle of consistency not applicable to perpetuate mistake

The assessee claimed deduction under section 35D of expenses comprising fee to Registrar of Companies, stamp fee and printing charges. The Assessing Officer held that fee paid to Registrar of Companies was not fee for extension of the company but for expansion of capital. The Assessing Officer held that the assessee had not fulfilled the requirement of sub-sections (1) and (2) of section 35D and therefore, the assessee was not eligible for deduction under section 35D. The Commissioner (Appeals) observed that the deduction under section 35D claimed in this year was in respect of expense incurred in the financial years 1994-95 and 2000-01 and the assessee was claiming amortisation of these expenses under section 35D and it was allowed in the assessment years 1995-96 and 2002-03 and, therefore, in the present year, there could not be any disallowance on this account. On this basis, the Commissioner (Appeals) deleted this disallowance in all the three years. On appeal, the Tribunal held that the Assessing Officer had given a specific finding that the assessee had not fulfilled the conditions under sub-sections (1) and (2) of section 35D and there was no finding given by the Commissioner (Appeals) in his order that the assessee fulfilled these conditions. The order of the Commissioner (Appeals) was on this basis that since the deduction was allowed in the earlier years, the same could not be disallowed in the present year. The assessment order for the assessment year 1995-96 was available in the paper book and there was no discussion in the assessment order on this aspect. Regarding the rule of consistency followed by the Commissioner (Appeals) in deleting this disallowance, if the view taken by the Assessing Officer in the earlier year was a possible view then there may be a case for taking the same view in the present year under the rule of consistency. But if the view taken in the earlier year was not a possible view then a mistake could not be perpetuated in the name of consistency. The Commissioner (Appeals) was not justified in deleting the disallowance made by the Assessing Officer under section 35D.(A Y. 2003-04 to 2006-07)

Gujarat Power Corporation Ltd. v. Add. CIT (2013) 21 ITR 683 / 58 SOT 9 (URO) (Ahd.)(Trib.)

S.35D : Amortisation of preliminary expenses – Financial institutions – Not allowable

A financial institution recognised by the RBI guidelines cannot be treated as an industrial undertaking. Words ‘industrial undertaking’ have a definite meaning in taxation, therefore a non-banking financial company cannot be treated as an industrial undertaking and it is not entitled to deduction under section 35D. (AY. 2005-06)

Instant Holdings Ltd v. Dy. CIT (2013) 81 DTR 1 / 151 TTJ 137 (Mum.)(Trib.)

S.35DDA : Amortisation of expenditure – Applicability of Rule 2BA is relevant only to employees for the purpose of claiming exemption under section 10(10C), no such compliance mandatory for claiming deduction in the hands of employer [S.10(10C), Rule 2BA]

The language of rule 2BA made it clear that the amount received is by the employee and for the purpose of claiming the benefit under section 10(10C). This has nothing to do with the employer’s claim, which is a different claim under section 35DDA. The Tribunal rightly took the view that rule 2BA is attracted and applicable only to a circumstance, where the benefit of section 10(10C) is sought for and not in a situation where the provisions of section 35DDA are called in aid. (AY. 2007-08)

CIT v. State Bank of Mysore (2013) 356 ITR 468 / 217 Taxman 357 / 96 DTR 52 / 263 CTR 666 (Karn.)(HC)

S.35DDA : Amortisation of expenditure – Voluntary retirement scheme – Only 1/5th of the payment made under VSS in the year under consideration is allowable [S.37(1)]

The assessee made a payment of certain sum under the Voluntary Separation Scheme (VSS). Entire payment was claimed as business expenditure. The Assessing Officer, following the provisions of section 35DDA, allowed 1/5th of the payment made under VSS in the year under consideration. The Commissioner (Appeals) directed the Assessing Officer to allow the entire payment on the ground that section 35DDA presupposes that there should be continuance and existence of business for the next five years and the scheme was not voluntary but compulsory.

Tribunal held that from the finding of the Commissioner (Appeals) it cannot be said that the scheme was not voluntary. If the scheme is compulsory, there is no question of any option to the employees. It may be a different thing that the Government persuaded or pressurised all the employees to accept the scheme giving threat of retrenchment. However, so far as the nature of scheme is concerned, it is voluntary because only when a scheme is voluntary, there is question of anybody opting to avail or not to avail. Therefore, the scheme was voluntary and condition No. (iii) for applicability of section 35DDA was duly fulfilled. From the perusal of section 35DDA, the Tribunal does not find any condition that there should be continuous existence of business for the next five years. In view of the above, on the facts of the assessee's case, section 35DDA is clearly applicable in respect of payment under VSS. Therefore, the order of the Commissioner (Appeals) on this point is reversed and the Assessing Officer is directed to allow deduction as per section 35DDA. (AY. 2007-08, 2008-09)

ACIT v. Hindustan Fertiliser Corpn. Ltd. (2013) 140 ITD 719 (Delhi)(Trib.)

S.36(1)(ii) : Bonus – No relation to shareholding – Paid for services rendered allowable as deduction [S.37(1)]

Bonus was paid to director as per board resolution and was not related to shareholding. The directors were rendering valuable services to company. Hence, the bonus was deductible. (AYs. 2004-05, 2005-06, 2006-07)

CIT v. Career Launcher India Ltd. (2012) 71 DTR 161 / 250 CTR 240 / 207 Taxman 28 / (2013) 358 ITR 179 (Delhi) (HC)

S.36(1)(iii) : Interest on borrowed capital – Interest free advances – Sufficiency of own funds – Disallowance of interest was not justified

Where assessee had sufficient funds available, interest could not be disallowed holding advances made to concerns, for purchase of raw material and plant-machinery, as diversion of interest bearing funds.

CIT v. Shree Rama Multi Tech Ltd. (2013) 219 Taxman 162 (Mag.) (Guj.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Investment in companies suffering heavy losses – Colourable device – Interest was not allowable as deduction

Since assessee had invested in companies suffering heavy losses and was aware about financial health of all companies of group, there was no possibility to receive any pecuniary benefit and thus, investment made by assessee could not be considered as "for the purpose of business". Held, interest paid by assessee on borrowed funds was not exclusively and wholly for purpose of business but was a colourable device for tax evasion. (AY. 1997-98)

CIT v. Subrata Roy (2013) 219 Taxman 133 / (2014) 99 DTR 177 (All.)(HC)

S.36(1)(iii) : Interest on borrowed capital – One time settlement – No details were produced – Apportionment of interest was held to be justified

Assessee having not produced any evidence to indicate apportionment of OTS amount of Rs. 91 Lakhs, i.e. Rs. 72 lakhs against principal and Rs. 19 lakhs against interest. Court held that the revenue authorities had taken a possible view and no question of law did arise therefrom. (AY. 1999-2000)

Akay Organics Ltd. v. ITO (2013) 218 Taxman 154(Mag.) (Bom.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Advance to sister concern – Matter remanded by Tribunal

The Tribunal, finding possibility of factual error, remanded issue of interest on advance to sister concern to Assessing Officer, to decide same after verification. Held on facts, the Tribunal had taken correct decision (AY. 2007-08)

CIT v. Rajesh J. Desai (2013) 218 Taxman 113 (Guj.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Distinction between setting up and commencement of business

Assessee company was incorporated in the period relevant to AY 2006-07. In May 2006, it entered into MoUs with third parties and subsequently, JV agreement was entered into in July 2006. Loan was taken by the assessee in May 2006. On the issue of whether the assessee was entitled to deduction in respect of the interest expenditures, held:

It is well-settled that there may be a distinction in the dates of setting up and commencement of business. Date of setting up business depends on the facts and the nature of business. A pragmatic and practical view has to be taken and interest has been allowed as an expenditure in AY. 2007-08.

CIT v. Arcane Developers (2013) 95 DTR 49 (Delhi)(HC)

S.36(1)(iii) : Interest on borrowed capital – Investment in shares from borrowed capital – Strategic business purposes – Interest allowable

The assessee paid interest on borrowed capital from which it made investment in shares for strategic business purposes. The companies promoted as special purpose companies strengthened and promoted assessee’s existing business by combining different business segments. Hence, the interest was held allowable. (AY.2003-04)

CIT v. Spencers and Co. Ltd. (No. 3) (2013) 359 ITR 644 (Mad.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Interest on instalment payment for purchase of land neither deductible under section 36(1)(iii) nor under section 37 as it was capital expenditure. borrowing. [S. 37(1)]

Interest payable due to instalment payment for purchase of land without any borrowing was not deductible u/s 36(1)(iii). Also, the same was not deductible u/s 37(1) as the same was capital expenditure. (AY. 2004-05, 2005-06, 2006-07)

CIT v. Career Launcher India Ltd. (2012) 71 DTR 161 / 250 CTR 240 / 207 Taxman 28 / (2013) 358 ITR 179 (Delhi)(HC)

S.36(1)(iii) : Interest on borrowed capital – Borrowed capital utilised for advancing loans to directors – Interest is not deductible

The assessee’s claim for deduction of interest on borrowed capital was disallowed because the Assessing Officer found that the borrowed capital had been utilized for advancing loans to directors of the assessee and this was upheld by the Tribunal. On appeal to the High Court also confirmed the order of Tribunal. (AY.2002-03)

A. Murali and Co. P. Ltd. v. ACIT (2013) 357 ITR 580 / 217 Taxman 258 (Mad.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Loan to subsidiary company – Not from borrowed capital – Interest was deductible

In light of a finding that loan to subsidiary was not from borrowed capital, interest was deductible u/s 36(1)(iii). (AY. 1982-1983, 1985-1986)

CIT v. Vijayawada Bottling Co. Ltd. (2013) 356 ITR 625 (AP)(HC)

CIT v. Sarvaraya Sugars Ltd. (2013) 356 ITR 625 (AP)(HC)

S.36(1)(iii) : Interest on borrowed capital – Borrowed funds utilised in advancing loans to directors instead of using same for business purpose – Interest cannot be allowed

The assessee declared certain loss in its return of income. On scrutiny, it was found that the assessee had advanced loan to the directors of Rs. 3.91 crores which amount was standing at Rs. 3.23 crores in earlier year. The AO observed that the funds borrowed for business purpose were diverted for advancing loans to Directors, thus disallowed the interest expense. The CIT(A) as well as the Tribunal upheld the order of the AO.

On appeal by the assessee, the High Court dismissing the appeal observed that it was undisputed that the advances given to the directors had increased from Rs.3.23 crores to Rs.3.91 crores without corresponding return thereof and with no better performance in the business of the assessee. Further, assessee had not showed any such nexus of the borrowed funds utilised in the business. Accordingly, it confirmed the decision of the Tribunal on basis of facts. (AY. 2002-03)

Murali & Co. (P.) Ltd. v. ACIT (2013) 217 Taxman 258 (Mad.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Expansion of business – Allowable as revenue in nature

It was held that where borrowed funds were exclusively utilised for purpose of expansion of existing business having common administration and common fund, which resulted enhancement of production by thrice, interest paid on loan borrowed was to be treated as revenue in nature and accordingly, same was allowable under section 36(1)(iii) (AY, 2000-01)

CIT v. U.P. Asbestos Ltd. (2013) 357 ITR 509 / 91 DTR 12 (All.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Details was not furnished interest is not allowable

Where the assessee had merely submitted details of income of borrowers same would not entitle assessee to claim interest paid on borrowed capital.

Vipin Gupta v. CIT (2013) 216 Taxman 101 (Mag.) (All.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Interest free loans – Directors who had advanced interest free loans to assessee were same as directors who were beneficiaries of interest free loans from assessee

Where it was not examined that directors who had advanced interest free loans to assessee were same as directors who were beneficiaries of interest free loans from assessee, issue of allowability of interest on loan taken from bank was to be remitted back for re-examination. (AY.1989-90)

CIT v. Southern Bottlers (P.) Ltd. (2013) 216 Taxman 145 (Mag) (P&H)(HC)

S.36(1)(iii) : Interest on borrowed capital – Year of deductibility – Mercantile system of accounting – All previous years expenses cannot be claimed in one relevant year

Having not accepted the condition regarding payment of interest on borrowings, assessee did not make any provision of interest on aforesaid loan in earlier years. However, in the previous year relevant to assessment year in question, it claimed deduction of entire amount of interest payable on loan amount. Since assessee had been following mercantile system of accounting, liability for payment of interest for all previous assessment years could not be claimed or allowed in relevant assessment year. (AY.1979-80)

U.P.S.I.C Ltd. v. CIT (2013) 216 Taxman 147 (Mag.)(All.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Investment in shares of related companies is not for the purpose of business proportionate interest was liable to be disallowed

Where the assessee was not engaged in business of investment in shares, interest bearing funds invested in shares of related company could not be said to have been utilised for purposes of business, and therefore, proportionate interest was liable to be disallowed under s. 36(1)(iii). (AY 2001-02)

CIT v. Deepak Agarwal (2013) 357 ITR 741 / 216 Taxman 153 (All.)(HC)

S.36(1)(iii) : Interest on borrowed capital- Expansion of business interest is allowable
Interest on amount borrowed for expansion of business for an existing plant is allowable u/s. 36(1)(iii).
DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Guj.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Diversion of funds – Nexus
The Assessing Officer disallowed the claim of assessee u/s. 36(1)(iii) on ground that it had diverted interest bearing funds for purpose of investment in shares and loans to sister concern. Held since sufficient interest free funds were available with assessee and there was no nexus between borrowed funds and funds lent, disallowance of interest expenditure was not permissible. (AY. 2005-06)
CIT v. R.L. Kalthia Engineering & Automobiles (P.) Ltd. (2013) 215 Taxman 9 (Mag.) (Guj.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Sufficient own funds – Common fund – No disallowance can be made
The assessee made investment in mutual funds from out of common fund comprising interest bearing as well as non-interest bearing funds (i.e. own funds) were sufficient to cover the investment in the mutual fund, a presumption arises in favour of the assessee that investment is made out of own (viz.non-interest bearing) funds and hence no disallowance can be made. Ratio in Reliance Utility and Powers Ltd. (2009) 313 ITR 340 (Bom.)(HC) is followed. (ITAXA No. 1978 of 2011 dt 10-6-2013)
CIT v. Mahanagar Gas Ltd. (2014) 221 Taxman 80 (Mag.) / 42 taxmann.com 40 (Bom.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Held allowable
Court held on facts, in view of decision of Supreme Court in case of *CIT v. Alom Extrusions Ltd. [2009] 319 ITR 306*, the Tribunal was right in deleting addition made on account of disallowance of interest under section 36(1)(iii).
CIT v. Shree Rama Multi Tech Ltd. (2013) 214 Taxman 130 (Mag.) (Guj.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Utilisation of borrowed money – No evidence that interest-free loans to sister concerns – Interest allowable
The Assessing Officer noticed that the assessee had incurred heavy interest expenses and, on the other hand, it had given interest-free loans to parties. The Commissioner (Appeals) set aside the order of the Assessing Officer and deleted the addition holding that the amounts advanced to the two parties were not given during the year under consideration, but in the earlier years. The Commissioner (Appeals) and the Tribunal had noted that the funds on which no interest liability had been incurred were in excess of the loans given. Therefore, the disallowance was deleted. The order was upheld by the High Court. (AY.2001-02)
CIT v. Raghuvir Synthetics Ltd. (2013) 354 ITR 222 / 217 Taxman 178 (Mag.)(Guj.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Assessee allowing its directors and family members to use funds for personal benefits – No attempt by directors to repay loan – Interest is not allowable
The assessee did not have its own capital but borrowed the funds from the market on interest at 20 per cent and paid heavy interest and the returns were filed by showing loss. On the other hand, the directors made no attempt to repay the loan used by them for personal use. Had they repaid the interest-free loans, proportionately, borrowing liability might have been reduced. The assessee had not acted as a prudent businessman. Nothing was available from the record that the loans without interest were ever given for business purposes. Hence, the interest amount was not allowable. (AY.1995-96, 1997-98)

CIT v. Sahu Enterprises Pvt. Ltd. (2013) 352 ITR 8 / 214 Taxman 225 / 87 DTR 221 / 261 CTR 319 (All.)(HC)

S.36(1)(iii) : Interest on borrowed capital – Expansion of existing business

Interest on loan taken for setting up new plant upon specific finding that new glass factory nothing but expansion of existing business was allowable.

Also, since entire investment in tax-free bonds was made by assessee out of its own funds and not by utilisation of borrowed funds, interest was allowable u/s. 36(1)(iii).(AY. 1998-99)

Addl. CIT v. Nicholas Piramal India Ltd. (2013) 27 ITR 182 / (2014) 147 ITD 675 (Mum.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest free advances – Onus on assessee

As the assessee failed to show that the amount was advanced out of interest free funds and in course of business, disallowance of interest to be upheld.(AY. 2002-03)

Hareshbhai Jagmohandas Mehta (HUF) v. ACIT (2013) 28 ITR 561(Ahd.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Commercial expediency – Loan from subsidiaries – Interest allowable

Assessee claimed interest on loans taken from subsidiaries. AO observed that assessee had also given loans to its subsidiaries. he disallowed proportionate interest. Tribunal held that that the assessee had more than sufficient funds of its own. Commercial interest of assessee was effectuated by business purpose of subsidiaries, hence interest on loans taken by assessee from subsidiary companies was allowable.(AYs. 2005-06, 2006-07)

Dy. CIT v. Vistas Wind Technology India (P.) Ltd. (2013) 60 SOT 10 (URO) / 31 taxmann.com 356 / (2012) 20 ITR 243 (Chennai)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Investment in associate concerns was from interest free fund available with assessee – Proportionate disallowance of interest was not justified

Assessee claimed interest and finance charges paid by it as allowable business expenditure. AO disallowed proportionate interest on interest free advances and investment made by assessee to its associate concern. Tribunal held that assessee's available capital and reserves was more than borrowed fund, it can be presumed that loan and investment in associate concern were made from interest free funds available with assessee and thus, proportionate interest cannot be disallowed as it had no nexus to other finance charges claimed by assessee.(AY. 2007-08)

Gujarat Reclaim & Rubber Products Ltd. v. Addl. CIT (2013) 60 SOT 22 (Mum.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest free loans to family members – Sufficient own funds [S. 56]

The Assessing Officer having noticed that assessee had given loan to family members without charging interest disallowed interest claim of assessee under section 36(1)(iii).The assessee was having sufficient own capital as against interest free loan given to family members. Therefore, no disallowance of interest paid by assessee could be made under section 36(1)(iii). (AY. 2008-09)

Krishan Murari Lal Agarwal v. DCIT (2013) 59 SOT 136 (URO) (Agra)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest on borrowed capital in his individual capacity for the purpose of money lending – Allowable deduction [S.37(1)]

The assessee was running finance business funds for enhancing the working capital for the purpose of money lending business & accordingly paid Interest & claimed interest on borrowed capital u/s.37(1). The Assessing Officer disallowed the interest u/s.36(1)(iii) & paid on deposit received outside the books of account in his individual capacity applying the provisions of s/37(1). CIT(A) allowed the appeal. On further appeal in Tribunal, Tribunal dismissed the appeal of revenue & held that s.37(1) is not applicable in respect of expenditure which falls within s.30 to 36. Interest on borrowed capital for

the purpose of business falls within the provision of s.36(1)(iii). Therefore any interest paid on capital borrowed for the purpose of business has to be allowed u/s 36(1)(iii). The payment of interest on borrowed capital falls within s.36(1)(iii) & hence the provisions of s/37(1) may not be applicable. Therefore it was immaterial whether the money was borrowed in his personal capacity or not. When an interest is allowable u/s 36(1)(iii), the explanation to s/37(1) was not applicable. (AY.2008-09)
ACIT v. Arun Thomas (2013) 157 TTJ 781 / 94 DTR 116 (Coch.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Advance payment for purchase of land – Sufficient self generated funds
The Tribunal held that the Assessing Officer has failed to bring on record any evidence to justify the disallowance under the proviso to section 36(1)(iii). The Assessing Officer has failed to refer to any borrowed funds utilised for the purposes of investment in fixed asset (Purchase of land) and in the absence of the same and in view of the facts of the present case where the assessee had sufficient self generated funds, the Tribunal dismissed the ground raised by the Revenue. (AY. 2006-07)
Amartex Industries Ltd. v. Addl. CIT (2013) 155 TTJ 43 (Chd.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Capital work-in-progress
Tribunal held that the Assessing Officer was justified in disallowing interest worked out on the monthly balances of capital work-in-progress by applying the proviso to section 36(1)(iii) on the basis that the assessee had utilised various loan funds in the creation of capital work-in-progress. (AYs. 2007-08, 2008-09)
Amartex industries Ltd. v. Addl. CIT (2013) 155 TTJ 43 (Chd.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest to financial institution
Tribunal held that the CIT(A) has given a factual finding according to which assessee trust had own funds amounting to Rs.54.34 crores whereas the account advanced to Dr. D. Y. Patil Education Society was Rs. 11.85 crores and there is no nexus of the funds advanced with the loan funds of the assessee. Therefore, the assessee is entitled to the deduction of interest.
Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 (Pune)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Burden is on revenue to prove that borrowed money was advanced to directors
Tribunal held that revenue has not proved that debit balance in the director's account represented advances out of borrowed funds, therefore, disallowance made by the Assessing Officer out of interest on borrowings cannot be sustained. (AYs. 2006-07 to 2008-09)
Marudhar Hotel (P) Ltd. v. ACIT (2013) 156 TTJ 697 / 92 DTR 33 / (2014) 61 SOT 27 (URO)(Jodh.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest free loan to related parties – Burden is on department
The Tribunal held that the Assessing Officer has not been able to bring any evidence on record to establish nexus between the funds borrowed and the amount of advances made to related parties. The disallowance of interest made by Assessing Officer and sustained by learned CIT(A) is contrary to the facts of this case accordingly we order deletion of this addition and allow the ground of this appeal.
Marudhar Hotel (P) Ltd. v. JCIT (2013) 156 TTJ 697 / 92 DTR 33 / (2014) 61 SOT 27 (URO)(Jodh.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest free advances – Disallowance was not justified
The AO disallowed interest in relation to interest-free advance to 100 per cent subsidiary of assessee. Since the disallowance was mostly on account of opening balance which had already been deleted by

Tribunal in AY 1998-99 and in the current year, advance given was easily explained from current profit, the disallowance was not justified. (AY. 1999-2000)
KEC International Ltd. v. DCIT (2012) 20 ITR 282 / (2013) 58 SOT 18 (URO) (Mum.) (Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest free advances to sister concern – Own funds in the shape of share capital – Interest on borrowed capital is to be allowed
Since assessee had its own funds in shape of share capital and share application money which was sufficient to meet amount advanced by it as interest free to its associate concerns, deduction claimed on interest paid on borrowed capital was to be allowed. (AY. 2005-06 and 2006-07)
Venus Records & Tapes (P.) Ltd. v. Addl. CIT (2013) 58 SOT 47 (URO) / 82 DTR 35 / 152 TTJ 1 (Mum.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest-free advances – Advances from own funds or borrowed funds – Matter set aside
The assessee claimed that the entire borrowed funds to the extent of ` 76.06 crores was invested as stock-in-trade, and hence, debited an amount of ` 7,14,80,735 towards interest and bank charges and interest on advance. The Assessing Officer disallowed proportionate interest on the borrowed funds on the ground that interest free advances were not given from the capital or current account of the proprietor but from interest bearing business funds. Held, if the assessee demonstrated that sufficient capital funds were available, there may not be any diversion of funds. However, it was for the assessee to demonstrate that sufficient capital funds were available in the books of account. The Assessing Officer was directed to examine the matter with regard to the available funds in the capital and current accounts of the proprietor and the nature of deposit. (AY. 2007-08)
P. A. Jose v. ACIT (2013) 25 ITR 1 / 59 SOT 77 / 158 TTJ 58 (UO) (Cochin)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Acquisition of capital assets
Borrowed funds were utilised for acquisition of capital assets and such assets were also not put to use, interest paid on such capital was not allowed as per proviso to section 36(1)(iii). (AY. 2007-08)
Vishal Paper Industries v. JCIT (2013) 21 ITR 220 / 58 SOT 133 (URO) (Chd.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest free advances
The assessee claimed deduction under section 36(1)(iii) on account of interest free amount advanced to a partnership firm, in which the directors of assessee have full interest, which was for development of in house software. The Assessing Officer disallowed part of the interest. The Tribunal on remanding the matter held that it needs to be examined whether the funds advanced were used for business of for personal needs.
AL Gayathri Trading Co. (P.) Ltd. v. Dy. CIT (2013) 142 ITD 675 / 22 ITR 214 (Cochin)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Maintenance of huge cash not a ground for disallowance of interest on borrowed fund
The partnership firm, a courier agent, claimed deduction of interest on borrowed fund and partners' capital. The Assessing Officer disallowed a portion of the interest under section 36(1)(iii) on the ground that the assessee failed to explain any utilisation of borrowed funds for business purpose. The CIT(A) upheld the disallowance made by the Assessing Officer. The Tribunal held that maintenance of huge cash in courier business should not be a ground for disallowance of interest on borrowed funds by placing reliance on a decision of the co-ordinate bench. The Tribunal remanded the matter to the CIT(A) as the decision was not available when the assessment order was passed. (AY. 2004-05)
Patel Vishnubhai Kantilal & Co. v. ITO (2013) 21 ITR 204 / 58 SOT 309 (Ahd.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest on bank loan utilized for placing margin money for investment in shares not an allowable deduction

The Assessing Officer disallowed the interest expenditure claimed by the assessee on the ground that the assessee failed to prove that borrowed capital is utilised for the purpose of business. The CIT(A) upheld the disallowance by observing that the assessee admitted that the bank loan has been utilised for margin deposits with stock brokers. On appeal by the assessee the Tribunal partly allowing the appeal held:

The entire interest should not have been disallowed by the Assessing Officer as interest can be disallowed only on the amount of ` 13.66 lakhs which was deposited with the share broker companies to make the investments in shares. (AY. 2008-09)

Prakash Narottam Das Gupta v. ITO (2013) 21 ITR 255 / 57 SOT 336 (Mum.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Trade advance – Disallowance of proportionate interest was not justified

During the year assessee incurred expenditure towards payment of interest. It had advanced huge amount to a proprietary concern 'A' who was a promoter of assessee company. No interest was charged by assessee on huge outstanding. Assessing Officer asked to explain why proportionate interest should not be disallowed under section 36(1)(iii). Assessee explained that advance to 'A' was in nature of trade advance. Assessing Officer rejected the explanation and made proportionate disallowance of interest. On appeal Commissioner (Appeals) held that since there was business consideration between parties and the advance made was towards purchases, the Assessing Officer was not justified in disallowing the proportionate interest. Tribunal held that Assessee had brought material on record to discharge onus cast upon it for proving that advance made by was purely a trade advance and for purposes of its business. Impugned disallowance made by Assessing Officer was not sustainable. (AY.2008-09)

Dy. CIT v. Agarwal Global Steels Ltd. (2013) 141 ITD 76 (Hyd.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Interest free advances to concern was not from borrowed capital – No disallowance can be made

Assessee firm claimed deduction on account of interest paid on loan. Assessing Officer disallowed the part of interest on the ground that interest free advances were made to its sister concern. In appeal Commissioner (Appeals) held that advances to sister concern was of old balances and brought forward and loan in question was raised subsequent to debit of said advances in account of sister concern and utilised towards addition to fixed assets. Accordingly deleted the addition. Tribunal held in absence of any nexus of borrowed funds with interest free advances to sister concern, Commissioner (Appeals) rightly deleted the addition of interest. (AY. 2008-09)

ACIT v. Anand & Anand (2012) 20 ITR 267 / (2013) 141 ITD 326 (Delhi)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Invest in shares for acquiring controlling interest – Common funds

The assessee made Investment in shares for acquiring controlling interest in subsidiary companies. Tribunal held that in case involving common funds, presumption that investments made from non-interest bearing funds. Interest paid to banks and on fixed deposits to be allowed. (AY. 2002-03)

Kansai Nerolac Paints Ltd. v. Dy. CIT (2013) 22 ITR 424 / 57 SOT 10(URO) (Mum.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Setting of new unit for production of new product, interest is not allowable

The borrowed funds were not used for setting of a new unit of existing running business, but it was setting up of a new unit for production of an existing business, but it was setting up a new unit for production of altogether new product, interest paid on borrowing was not allowable (AY. 2001-02 to 2002-03)

Gujarat Mineral Development Corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Firm

Funds were advanced to firm in which directors of assessee-company had interest matter remanded to verify whether funds used by firm for business or for personal needs of partners to be examined. (AY. 2004-05 to 2006-07)

Al-Gayathri Trading Co. P. Ltd. v. Dy. CIT (2013) 22 ITR 214 / 142 ITD 675 (Cochin)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Debit balance due to loss – Disallowance was not justified.

Tribunal held that, where outstanding debit balance in names of partners was on account of losses suffered by assessee-firm and not because of withdrawal of borrowed funds, Assessing Officer was not justified in disallowing assessee's claim of interest paid on borrowed capital. (AY.2006-07)

ACIT v. Meerut Rubber Factory (2013) 55 SOT 325 (Delhi)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Loan for specific purpose – Matter remanded

The Tribunal held that if loans relatable to specific purpose and not part of general pool of funds available to assessee, no disallowance of any part of interest relatable to such secured loans to be disallowed. Assessee was advancing interest-free loans. Matter remanded for finding on nature of secured loans raised by assessee. (AY. 2008-09)

Gurudas Mann v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.36(1)(iii) : Interest on borrowed capital – Proportionate interest is to be allowed

Assessee purchased Jetty for the purpose of business. Purchase consideration was paid partly out of own funds and partly out of loan taken for the purchase of refinery. Interest to be allowed in ratio of borrowed funds to own funds and proportionate interest to be allowed as deduction.(AY. 2004-05, 2005-06)

Essar Oil Ltd. v. Add. CIT (2013) 94 DTR 153 / 157 TTJ 785 / 28 ITR 609 (Mum.)(Trib.)

S.36(1)(iv) : Contribution to recognized provident fund – Contribution to deferred compensation plan held to be not allowable as business expenditure. [S.36(1)(v), 37(1), 40A(9)]

Assessee company constituted a deferred compensation plan for its whole time director (WTD) employed in US. Under said plan assessee contributed a proportion of basic salary of WTD to a grantor trust which accumulated to ` 12.15 crore. Said sum was released to WTD on his separation from assessee-company and such released sum of ` 12.15 crore was claimed as deduction under section 37(1). Tribunal held that since trust so formed did not fall under provisions of section 36(1)(iv)/(v) and specific prohibition contained in section 40A(9) attracted in instant case, contribution so released could not be allowed. Further, in view of principle of law that when there are specific provisions governing a deduction under section 40A(9) read with section 36(1) (iv)/(v), general deduction under section 37(1) cannot be invoked, and, hence, claim of assessee under section 37(1) could not be sustained. (AY.2006-07)

Wipro Ltd. v. Add. CIT (2013) 55 SOT 3(URO) (Bang.)(Trib.)

S.36(1)(v) : Contribution approved gratuity fund – LIC Group Gratuity Scheme – Though s. 36(1)(v) requires direct payment to the gratuity trust fund, payment to the LIC Group Gratuity Scheme is also allowable

The assessee set up a gratuity fund which was duly approved by the Commissioner. However, instead of making payment to the fund directly, the assessee paid an amount of Rs. 50 lakhs as initial contribution and an amount of Rs. 5 lakhs as annual premium to the Life Insurance Corporation ("LIC") pursuant to the Group Life Assurance Scheme framed by the LIC for the benefit of the employees of the assessee. The Assessing Officer disallowed the claim for deduction on the ground that payment towards the gratuity fund was not made to an approved gratuity fund and was not allowable u/s 36(1)(v). The Commissioner (Appeals), Tribunal and High Court (*CIT v. Taxtool Co.*

Ltd. (2002) 257 ITR 39 (Mad)) upheld the assessee's claim on the basis that the payment to LIC under the Group Life Assurance Scheme was for the exclusive benefit of the employees of the assessee under the policy issued by it and that the conditions stipulated in s. 36(1)(v) had not been violated. On appeal by the department to the Supreme Court, HELD dismissing the appeal:
While it is true that a fiscal statute has to be construed strictly and nothing should be added to or subtracted from it, yet a strict construction of a provision does not rule out the application of the principles of reasonable construction to give effect to the purpose and intention of any particular provision of the Act. From a bare reading of s. 36(1)(v), it is manifest that the real intention behind the provision is that the employer should not have any control over the funds of the irrevocable trust created exclusively for the benefit of the employees. On facts, it is evident that the assessee had absolutely no control over the fund created by the LIC for the benefit of the employees of the assessee and further all the contribution made by the assessee in the said fund ultimately came back to the Textool Employees Gratuity Fund, approved by the Commissioner. Thus, the conditions stipulated in s. 36(1)(v) were satisfied.
CIT v. Textool Co. Ltd (2013) 216 Taxman 327 / 263 CTR 257 (SC)

S.36(1)(va) : Any sum received from employees – Income – Employees' contribution to ESIC & PF – Payment before filing return is allowable [S. 2(24), 43B, 139(1)]
Contributions of Employees' State Insurance and Provident Fund deposited prior to filing return under section 139(1) is allowable. (AY.2003-04)
CIT v. Mark Auto Industries Ltd. (2013) 358 ITR 43 (P&H)(HC)

S.36(1)(va) : Any sum received from employees – Employees contribution of provident fund – Due date – Payment made before due date of filing return. [S. 43B]
The due date for payment of employees contribution of provident fund under section 36(1)(va) is same as contemplated under section 43B, and therefore, payment made before due date of filing return is allowable.
CIT v. Kichha Sugar Co. Ltd. (2013) 356 ITR 351 / 216 Taxman 90 (Uttarakhand) (HC)

S.36(1)(va) : Any sum received from employees – Deduction only on actual payment – Employee's Contribution – Provident fund and ESI contributions made before filing return held allowable. There is no reason to make any distinction between the employees' contribution or the employers's contribution (S 2(24)(x), 43B)
The Court held that the deletion of the second proviso to section 43B which specifically made a reference to section 36(1)(va) was curative in nature and, hence, would apply with retrospective effect from April 1, 1988. The second proviso to section 43B(b) specifically referred to the due date under section 36(1) (va) of the Act and as such, it cannot be urged that the provisions of section 43B and section 36(1)(va) should not be read together. The law was enacted to ensure that the payment of the contributions towards the provident funds, the ESI funds or other such welfare schemes must be made before furnishing the return of income under sub-section (1) of section 139. On a conjoint reading of section 36(1)(va) and section 43B it is obvious that earlier section 43B made reference to the due date as prescribed under section 36(1)(va). There was a conflict between the first and the second provisos and the second proviso was deleted. The benefit of this amendment must be extended to the employees' contribution also. Appeal of revenue was dismissed. (AY.2001-02).
CIT v. Nipso Polyfabriks Ltd. (2013) 350 ITR 327/84 DTR 424 / 258 CTR 216 / 213 Taxman 376 / 256 CTR 34 (HP)(HC)

S.36(1)(va) : Any sum received from employees – Deduction only on actual payment – Provident fund contribution – Deduction can be allowed in the year of payment. [S. 43B, 139(1)]
Both employer's and employees' contribution are allowable as deduction if the amount of provident fund was paid, though belatedly, but before the due date of filing of return. Conversely, if the

amounts were not paid before the due date, they could not be allowed as deduction in the relevant year. However the deduction would be available in the year of payment. (AY. 2007-08)
Euro Pratik Ispat P. Ltd. v. ACIT (2013) 27 ITR 432 (Mum.)(Trib.)

S.36(1)(va) : Any sum received from employees – Deduction only on actual payment – Employee's and employer's contribution to State Insurance and provident fund – Payments made before filing return is held to be allowable.[S.37(1)]
Following the ratio of *CIT v. AIMIL Ltd (2010) 321 ITR 508 (Delhi)(HC) and CIT v. Alom Extrucsions (2009) 319 ITR 306 (SC)* both the employer's and employees' contributions to the employees' provident fund the employees' State insurance made within the grace period or at best before the due date of filing the return under section 139(1) of the Act are allowable.(AY. 2006-07)
Onward Technologies Ltd. v. Dy. CIT (2013) 89 DTR 311 / 155 TTJ 439 / 26 ITR 734 (Mum.)(Trib.)

S.36(1)(vii) : Bad debt – Not establishing the recoverability of debt
For an assessee to claim deduction in relation to bad debts it is now no longer necessary for assessee to establish that debt had become irrecoverable; and it is sufficient if assessee forms such an opinion and writes off debt as irrecoverable in its accounts.(AY.2004-05)
CIT v. Samara India (P.) Ltd. (2013) 356 ITR 12 / 216 Taxman 93 (Delhi)(HC)

S.36(1)(vii) : Bad debt – Business loss – Loans given to employees co-operative – Recoverability – Allowed as business loss [S.28(i)]
When the Tribunal allowed the claim of bad debt on the ground that there was no hope of recovery, it was held that it did not commit any error in doing so, and no question of law arose.
CIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 218 Taxman 122 (Guj.)(HC)

S.36(1)(vii) : Bad debt – Onus on AO – Write off of deposits was held to be allowable as bad debt
Once assessee records debt as a bad debt in his books of account, that would *prima facie* establish that it was a bad debt unless Assessing Officer for good reasons holds otherwise. (AY. 2006-07)
CIT v. Sushila Mallick (Smt.) (2013) 218 Taxman 118 (All.)(HC)

S.36(1)(vii) : Bad debt – Bad debts could be written off even after closure of the accounting period
The assessee had originally filed its return of income u/s 139(1), but subsequently filed a revised return. In the revised return, certain debts were claimed as bad debts. The Assessing Officer held that the decision regarding the irrecoverability of the said debts was taken on 30-3-2005, and accordingly, the debts had to be written off in F.Y. 2004-05, and claimed in Asst. Year 2005-06. The CIT(A) upheld this reasoning, and upheld disallowance of claim u/s 36(1)(vii) in respect of AY 2004-05. The Tribunal however upheld the claim of the assessee. On appeal, held, dismissing the appeal:
The mandate of s. 36(1)(vii) is that the assessee must write off the bad debt in the accounts 'for' the previous year. The mandate is not that the write off itself must happen 'in' the previous year. The law requires the assessee to write off the bad debt in its accounts for the relevant year. There is no condition that the writing off itself should be done before the end of the financial year. (AY. 2004-05)
CIT v. U.P. Rajkiya Nirman Nigam Ltd. (2013) 217 Taxman 367 (All.)(HC)

S.36(1)(vii) : Bad debt – Write off in the books is sufficient – Stock-in-trade written off allowable
The assessee having written off bad debts in books of account, it was not necessary any further to establish that bad debt had in fact become bad. Windmills, treated as stock in trade, were seized by bank under the order of the High Court. Finding title of machines in doubt, the assessee was held to be justified in deciding to write off investment in the same.(AY. 2000-01)

CIT v. Sambhav Media Ltd. (2013) 216 Taxman 115 (Mag.) (Guj.)(HC)

S.36(1)(vii) : Bad debt – Amalgamation – Allowable in the hands of transferee company [S.72A]
Where the amalgamating company carried certain doubtful debts till date of amalgamation, subsequently, this debt was written off as bad debts by the transferee company, the claim for bad debts was allowable in hands of the transferee company. (AY. 2004-05)
CIT v. Sambhav Media Ltd. (2013) 215 Taxman 161 (Mag.)(Guj.)(HC)

S.36(1)(vii) : Bad debt – Provision for doubtful debt which is debited to profit and loss account is allowable as deduction [S.36(2)]
The assessee-company made provision for doubtful debt given to its group concern and claimed the same to be allowed as deduction u/s 36(1)(vii). It had debited the provision of doubtful debt to profit and loss account and correspondingly reduced assets by reducing amount of unsecured loans. Held the doubtful debt in question qualified for deduction u/s 36(1)(vii) read with s. 36(2).(AY. 2004-05)
CIT v. Tainwala Chemicals & Plastics India Ltd. (2013) 215 Taxman 153 (Mag.) (Bom.)(HC)

S.36(1)(vii) : Bad debt – Demerger – Relating to earlier years which was acquired from holding company
The assessee-company, consequent upon a scheme of demerger had acquired all assets and liabilities of two web based portals as a going concern, that were being operated by its holding company. In very first year of operation assessee had written off bad debts, which had been acquired from holding company, in its books. The Assessing Officer held that these bad debts related to earlier years and that assessee could not have written off same, as such act contravened section 36(1)(vii). He therefore, rejected the claim in respect of bad debts written off. Held that the assessee was entitled to write off bad debts in question and was not required to produce evidence to show that debts had in fact become bad. (AY. 2007-08)
CIT v. Times Business Solution Ltd. (2013) 354 ITR 25 / 215 Taxman 261 (Delhi)(HC)

S.36(1)(vii) : Bad debt – Business loss – Giving reasons is not necessary for bad debt – Part of goods were rejected as unfit for human consumption the loss is allowable as business loss (S.28(i)
The Assessing Officer recorded that no reasons were given for writing off the bad debt in the books of account. The Commissioner (Appeals) and the Tribunal found that under section 36(1)(vii) it was not necessary for the assessee to give reasons and writing off the amount itself was sufficient. In so far as the addition towards quality rejection of material was concerned, it was held that the correspondence between the assessee and R was part of the record and the authenticity of the debit note filed by the assessee was not questioned or challenged by the Assessing Officer. Even the rejection of material was not negated by the Assessing Officer. The documents filed by the assessee clearly showed that part of the material supplied was rejected by the authorities in Ukraine as being unfit for consumption. The claims of the assessee for bad debt and loss on goods were allowed. (AY. 2004-05 to 2006-07)
CIT v. Makpar Exports Pvt. Ltd. (2013) 352 ITR 401 / 216 Taxman 102 (Mag.)(MP)(HC)

S.36(1)(vii) : Bad debt – Insurance business – Provision for bad and doubtful debts [S.44]
Provision for bad and doubtful debts could not be added to the balance of profits disclosed by the annual accounts of the assessee insurance company. *CIT v. Oriental Fire General Insurance Co. Ltd. (2007) 291 ITR 370 (SC)* followed. (AY. 1980-81 & 1981-82)
Oriental Insurance Co. Ltd. v. CIT (2013) 351 ITR 270 / 83 DTR 185 (Delhi)(HC)

S.36(1)(vii) : Bad debt – Business loss – Contribution of assessee as a foreman in place of defaulting subscriber [S.28(i)]

Contribution of the assessee as a foreman in the place of a defaulting subscriber was deductible as a bad debt u/s. 36(1)(vii) or a business loss u/s. 28(i). (AY. 1992-93 to 1994-95)
CIT v. Shriram Chits & Investments Ltd. (2013) 83 DTR 208 (Mad.)(HC)

S.36(1)(vii) : Bad debt – Bad and doubtful debts – Actual amounts identified
The deduction claimed by the assessee on account of bad and doubtful debts was disallowed by the AO on the ground that creation of mere provision was not enough. Assessee's contention that specific amounts were identified as bad and doubtful debts and relevant entries made in the books of account was held sufficient to show that the bad debts were written off as required by the provisions of s. 36(1)(vii) subject to verification.(AY. 1998-99)
Addl. CIT v. Nicholas Piramal India Ltd. (2013) 27 ITR 182 / (2014) 147 ITD 675 (Mum.)(Trib.)

S.36(1)(vii) : Bad debt – Advances were written off – Liquidated damages – Matter remanded.
Advances were written off in profit and loss account. The required details like name of parties, purpose for which advance was granted, were not furnished. Amounts were mostly in the nature of liquidated damages and not bad debts. Details of liquidated damages were not furnished by assessee and no finding was given by AO. Hence, matter was remanded. (AY 2006-07, 2007-08)
GE India Industrial P. Ltd. v. DCIT (2013) 27 ITR 543 (Ahd.)(Trib.)

S.36(1)(vii) : Bad debt – Advances for bogus purchases – Not allowable as bad debt
Tribunal held that when assessee had admitted that claim of purchases from a distributor were all bogus, advance for such purchases could not be allowed as bad debt even if written off. (AYs. 2005-06, 2006-07)
Dy. CIT v. Vistas Wind Technology India (P.) Ltd. (2013) 60 SOT 10 / 31 taxmann.com 356 / (2012) 20 ITR 243 (Chennai)(Trib.)

S.36(1)(vii) : Bad debt – Unilateral write off – Advances in course of business
The assessee gave advance to labours and suppliers of material during the course of its business. Subsequently, the said amount became non-recoverable and was written off in books of account. Held, in view of the amended provisions of section 36(1)(vii), assessee was entitled to claim deduction in respect of amount in question written off unilaterally in its books of account.(AY. 2003-04 to 2006-07)
TRG Industries (P.) Ltd. v. DCIT (2013) 59 SOT 64 (URO) (Asr.)(Trib.)

S.36(1)(vii) : Bad debt – Accounts not written off in books in ordinary course of business. Claim of bad debt was made in the revised return filed u/s 153A. Bad debts claim not maintainable [Ss.139(1), 153A]
Assessee filed his Return of Income u/s 139(1) wherein no claim for bad debts was raised. Subsequently, a search was conducted in assessee's premises in course of which certain documents were seized. In response to notice issued u/s 153A, assessee filed a revised return disclosing interest from income from debtors. Assessee also made a claim for bad debts in said return. On appeal, the Tribunal held that it could not be concluded that assessee had written off bad debt as irrecoverable in accounts maintained for previous year in ordinary course of business. Further essential feature for claiming deduction on account of bad debt was that such bad debt is to written off as irrecoverable in accounts in ordinary course of business. Since condition of section 36(1)(vi) had not been satisfied in instant case, assessee's claim was rejected by authorities.(AY. 2001-02)
Gendmal Kothari v. DCIT (2012) 139 ITD 397 / (2013) 152 TTJ 652 / 84 DTR 57 (Jodh.)(Trib.)

S.36(1)(vii) : Bad debt – Provision for bad and doubtful debt – Suffice if amount had been reduced from debtors balance shown on asset side of balance-sheet at close of year

For allowability of deduction on account of bad debt, it was not necessary for assessee to close individual account of each debtor in its books and it would suffice if amount had been reduced from debtors balance shown on asset side of balance-sheet at close of year. (AY.1999-2000)
KEC International Ltd. v. DCIT (2012) 20 ITR 282 / (2013) 58 SOT 18 (URO) (Mum.) (Trib.)

S.36(1)(vii) : Bad debt – Dues from patients – Allowed as deduction
The assessee claimed small amounts due from patients as bad debts. The Assessing Officer held that it was premature to declare bad debts and disallowed the same. The Tribunal held that merely because it was second year of assessee operations and period between revenue recognition and write off of debt was short, amount claimed as bad debts could not be disallowed. (AY. 2008-09)
Dy. CIT v. Columbia Asia Hospitals (P.) Ltd. (2013) 142 ITD 225 (Bang.)(Trib.)

S.36(1)(vii) : Bad debt – To the extent of amount due
Assessee claimed a sum of Rs.3,47,419 as bad debt. Records showed that only an amount of Rs.1,65,794 was due from concerned party. Tribunal held sum to the extent recorded only could be allowed as bad debt. (AY. 2004-05)
EDAC Engineering Ltd. v. Dy. CIT (2013) 141 ITD 231 (Chennai)(Trib.)

S.36(1)(vii) : Bad debt – Written off in books – Allowability
The assessee claimed deduction of a certain sum as bad debts which was written off as irrecoverable in the books of account. The Assessing Officer rejected the claim. Held, since the assessee had written off the amount in its books of account since it was not recoverable, the addition made by the Assessing Officer was to be deleted. (AY. 2006-07)
Indian Research Manifestation Labs P. Ltd. v. ACIT (2013) 24 ITR 30 / 145 ITD 135 (Ahd.) (Trib.)

S.36(1)(vii) : Bad debt – Written off in accounts of assessee [S.36(2)]
Consequent to amendment to provisions of section 36(1)(vii), assessee is not required to establish that debt has become bad; it is enough if bad debt is written off as irrecoverable in accounts of assessee. Where amounts receivable from debtors were taken into account as income in earlier years and were written off as irrecoverable, such amount would be allowed as bad debt. In the stock broking business amounts payable to clients is considered as taken into account under provisions of section 36(2) and any non-recovery can be claimed as bad debt. (AY. 2002-03)
HSBC Securities & Capital Markets (India) (P.) Ltd. v. ACIT (2013) 57 SOT 194 / 21 ITR 445 (Mum.)(Trib.)

S.36(1)(vii) : Bad debt – Not allowable unless produced some relevant material [S. 36(2)]
Revenue authorities rejected assessee's claim pertaining to old debit balances written off on ground that assessee had not produced relevant material in support of its claim. Tribunal held that since assessee had not brought on record evidence showing that amount in question had already been included in income of assessee in earlier year, there was no compliance of mandatory condition prescribed under section 36(2) and, therefore, authorities below were justified in rejecting assessee's claim. (AY.2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.36(1)(vii) : Bad debt – Advances to employees not allowable as bad debt
Assessee gave certain amount as tour advance to its employees. Subsequently, said employees left company without settling their dues. Assessee thus wrote off amount of tour advance and claimed same as bad debt. Revenue authorities rejected assessee's claim. Tribunal held that since assessee could not bring any evidence on record showing that tour advance had gone into computation of its income, revenue authorities were justified in rejected assessee's claim. (AYs. 2005-06, 2006-07)
Natco Pharma Ltd. v. Dy. CIT (2013) 140 ITD 502 (Hyd.)(Trib.)

S.36(1)(vii) : Bad debt – Burden of proof – Assessee has to satisfy the genuineness of bad debt

Tribunal held that merely on the strength of amendment made to section 36(1)(vii) with effect from 1-4-1989, it cannot be said that an enquiry is not permissible to see and satisfy that there is some semblance of genuineness in entry which has been made to claim deduction in respect of bad debt. On the facts, the Assessing Officer as well as the appellate authority have examined the claim of the assessee and held that the assessee has failed to prove that the debt in question had actually become irrecoverable during the previous year in question. The assessee only furnished list of debts and the details called for by the authorities have not been furnished. The claim of the bad debts has been disallowed by considering the material on record by finding as a fact that the debt has not been proved as bad debt. In view of aforesaid, the revenue authorities were justified to rejecting assessee's claim. (AY.2005-06, 2006-07)

Natco Pharma Ltd. v. Dy. CIT (2013) 140 ITD 502 (Hyd.)(Trib.)

S.36(1)(vii) : Bad debt – After 1-4-1989 it is not necessary to establish that debt had in fact become irrecoverable in previous year. Amount written off in accounts allowable as deduction [S.36(2)]

Tribunal held that after April 1, 1989, it is not necessary for the assessee to establish that the debt in fact has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in accounts of the assessee. The amounts were deductible. (AY. 2002-03)

HSBC Securities and Capital Markets (India) P. Ltd. v. ACIT (2013) 57 SOT 194 / 21 ITR 445 (Mum.)(Trib.)

S.36(1)(vii) : Bad debt – After 1-4-1989 no requirement that assessee should establish debt to have become bad

The assessee-company derived income from carrying out the activity of designing advertisements. In the profit and loss account for the previous year relevant to the assessment year 2008-09, the assessee debited a certain sum as bad debts written off and claimed deduction thereof in computing its total income. The Assessing Officer disallowed the claim of the assessee on the ground that the assessee had not established that the debts had become bad. The Commissioner (Appeals) allowed the deduction. Held, dismissing the appeal, (i) that after April 1, 1989, it is not necessary for the assessee to establish that the debt, in fact, has become irrecoverable. It is enough if the bad debt is written off as irrecoverable in the accounts of the assessee. That the Assessing Officer was not justified in disallowing the claim for deduction on account of bad debts on the ground that the debts in question had not been established to have become bad. The assessee had given all the details and it was not the case of the Assessing Officer that any of the conditions for grant of deduction under section 36(1)(vii) of the Act, had not been satisfied. The order of the Commissioner (Appeals) called for no interference. (AY.2008-09)

Dy. CIT v. Ray Keshavan Design Associates P. Ltd. (2013) 22 ITR 259 (Bang.)(Trib.)

S.36(1)(vii) : Bad debt – Inter-corporate deposits – Resolution for writing off interest in May 2002,would relate back to accounting year relevant for assessment year 2002-03 – Interest assessed on basis of accrual in earlier years hence deductible. Inter-corporate deposits part of business of assessee hence loss on investment is allowable as business loss [S.28(i)]

The assessee had debited a sum of Rs.1,94,49,012, as interest receivable written off during the year under consideration. The Assessing Officer disallowed the claim and this was confirmed by the Commissioner (Appeals).The Assessing Officer further disallowed the claim for loss of inter-corporate deposits along with interest written off. This was also upheld by the Commissioner (Appeals). On appeal to the Tribunal, the Tribunal held that there is no condition in section 36(1)(vii) that the decision for treating a debt as bad or irrecoverable should be taken in the previous year itself. If the books of account are not closed and completed, it is permissible to

make adjustments before they are finally closed. The board resolution passed in May 2002, with regard to the approval of writing off the amount as irrecoverable in the accounts, would relate back to that previous year in which it was treated as irrecoverable. In the earlier years the assessee's interest income shown under the head "Business income", had been accepted by the Department. Thus, on these facts, once the interest income had been offered on accrual basis, which had been credited in the profit and loss account as business income in the earlier years and the sum had been written off as irrecoverable in the accounts in this year, the sum had to be allowed as bad debt. The assessee had shown accrued interest on inter-corporate deposits in the profit and loss account and had offered it for tax as business income. This had been accepted by the Department also. The corollary, therefore, was that interest was earned during the course of business. The interest which had been written off was deductible. Tribunal also held that investment in inter-corporate deposits was part of the business activities as the interest accrued there from had been treated as business income. The loss arising on such investment was thus consequently allowable as business loss and therefore, the sum of Rs. 32 lakhs was deductible as business loss. (AY. 2002-03)
Jindal Iron and Steel Co. Ltd. v. Dy. CIT (2013) 21 ITR 414 / 57 SOT 317 (Mum.)(Trib.)

S.36(1)(vii) : Bad debt – Settlement with debtor for payment of part amount – Allowable as bad debt in the year of write off [S.36(2)]
Assessee arrived at a settlement with its debtor for receiving lessor amount and written off the unrealized amount. AO disallowed the claim on the ground that transactions related to financial year 2002-03 and is less than one year time. On appeal Tribunal held that the amount written off has to be accepted as bad debt.(AY. 2004-05)
Essar Oil Ltd. v. Addl. CIT (2013) 94 DTR 153 / 157 TTJ 785 / 28 ITR 609 (Mum.)(Trib.)

S.36(1)(vii) : Bad debt – Advance to subsidiaries – In the course of business – Held allowable as deduction
The assessee advanced the loans and advances to its subsidiaries to support business and on account of commercial expediency. Since the subsidiaries could not repay loans and advances, assessee wrote off said advances in its books and claimed as deduction. CIT (A) following the earlier year order deleted the disallowances made by the AO. On appeal by revenue the Tribunal confirmed the order of CIT(A). (AY.2009-10)
ACIT v. Best & Crompton Engineering Ltd (2013)60 SOT 53 (URO)/ (Chennai)(Trib.) www.itatonline.org.

S.36(1)(viia) : Bad debt – Provision for bad and doubtful debt – Schedule bank [S. 36(1)(vii), 119]
Revenue contended that by virtue of proviso, claim of assessee-bank for deduction for debts written off, should be reduced by closing balance of assessee-bank in its account for provision of bad and doubtful debts. The assessee contended that such diminution should be limited to opening balance of such account. Court held that statutory provision is silent on precise method of working out deduction; however, CBDT clarified issue *vide* Instruction No. 17/2008, dated 26-11-2008, following same, assessee's contention was to be admitted. (AY. 1998-99)
CIT v. UTI Bank Ltd. (2013) 212 Taxman 296 / 82 DTR 168 / 256 CTR 76 (Guj.)(HC)

S.36(1)(viia) : Bad debt – Advances made by rural branches of bank – Net accretion to provisions – Matter remanded
Assessee, a co-operative bank, claimed deduction under section 36(1)(viia) in respect of provision made for bad and doubtful advances which included a sum advanced by rural branches of assessee. Assessing Officer disallowed claim relating to advances made by rural branches on reasoning that assessee did not have any rural branches in terms of section 36(1)(viia). Assessee took an alternative

plea that definition of 'rural branch' given under section 36(1)(viia) shall not apply to co-operative banks. Tribunal following the decision in case of *Kannur Distt. Co-op. Bank Ltd. v. ACIT (2012) 136 ITD 102 (Cochin)(Trib.)* upheld the disallowance made by AO. As regards quantum of deduction the tribunal held that only net accretion to provisions account of bad and doubtful debts made during year under consideration has to be considered for purpose of section 36(1)(viia) and asset net accretion has to be ascertained by analyzing quality of each asset. (AY. 2007-08)
Trichur District Co-operative Bank Ltd. v. ACIT (2013) 60 SOT 145 (URO) / 26 ITR 31 (Cochin)(Trib.)

S.36(1)(viia) : Bad debt – Provision for bad and doubtful debts – Schedule bank – Amount credited standard assets is not deductible
Amount credited by a bank to reserve for bad and doubtful debts towards standard assets is not deductible under section 36(1)(viia), as it is not akin to provision for bad and doubtful debts, which is a liability, whereas reserve is assessee's own fund.(AY. 2008-09)
Bharuch Dist. Central Co-op. Bank Ltd. v. ITO (2013) 59 SOT 150 (URO) (Ahd.)(Trib.)

S.36(1)(viia) : Bad debt – Provision for bad and doubtful debts – Schedule bank – No provision for bad & doubtful debts in its books of account, claim is not allowable
Assessee claimed deduction towards provisions for bad & doubtful advances u/s 36(1)(viia) at 7.5% of gross total income. Assessing Officer rejected assessee's claim because no provision was made as required u/s 36(1)(viia). CIT(A) upheld the order of the Assessing Officer. On appeal, the Tribunal dismissed the appeal of the assessee and held that deduction u/s.36(1)(viia) is to be allowed in respect of any provision for bad & doubtful debts made by the assessee. Hence, the condition for allowing deduction is the creation of any provision for bad & doubtful debts which can only be created in the books of account maintained by the assessee. Since the assessee has claimed the deduction without making any provision as stated in s/36(1)(viia), the tax authorities were justified in not allowing the same, (AY. 2007-08)
Kottakkal Co-op. Urban Bank Ltd v. ITO (2013) 142 ITD 123 (Coch.)(Trib.)

S.36(1)(viia) : Bad debt – Provision for bad and doubtful debts – Schedule bank – Allowance cannot be in excess of provision for bad debts actually made in accounts [S.36(1)(vii)]
The assessee bank claimed 10 per cent of the aggregate average rural branches advance amounting to Rs. 26.20 crores and sum of ` 50.18 crores being provision and doubtful debts at the rate of 7.5 per cent of the total income under section 36(1)(viia). Apart from this, assessee claimed an amount of Rs. 102.15 crores under section 36(1)(vii) being loans from non-rural branches actually written off. A.O. restricted the claim of Rs.276.39 crores under section 36(1)(viia) to Rs. 46 crores on the ground that the provision actually made by the assessee was to the extent of Rs. 46 crores only. Commissioner (Appeals) upheld the order of the A.O. ITAT held that allowance under section 36(1)(viia) cannot be in excess of provision for bad debts actually made in accounts. (AY. 2007-08)
State Bank of Hyderabad v. Dy. CIT (2013) 58 SOT 278 (Hyd.)(Trib.)

S.36(1)(viia) : Bad debt – Provisions for bad and doubtful debt – Schedule Bank – S.36(1)(viia) & S.36(1)(vii) separate independent provisions – Banks to maintain separate books for Rural and Urban advances
The assessee bank claimed deduction under section 36(1)(viia) considering first proviso to section 36(1)(viia). Assessee claimed additional deduction for five consecutive years in accordance with the guidelines issued by the Reserve Bank of India. The Assessing Officer rejected the claim and the CIT(A) upheld the order of the Assessing Officer. On appeal by the assessee the Tribunal, held, remanding the matter:
Section 36(1)(vii) and section 36 (1)(viia) are independent provisions and cannot be intermingled. The provisions of section 36(1)(vii) are subject to limitations contained in section 36(2). Similarly by

virtue of section 36(2)(v) any question of double benefit to arise from section 36(1)(viia) is put into check. The provisions were formulated to promote RURAL BANKING to assist in making adequate provisions for the risks in relation to RURAL ADVANCES. The Scheduled commercial bank would continue to get benefit of write off of irrecoverable debts under section 36(1)(vii) in addition to the benefit of deduction of the provision for bad and doubtful debts under section 36(1)(viia). Normally banks maintain separate books for rural and urban branches, wherein no such bifurcation or whether non-profit asset or loss asset had been worked out as per RBI guidelines was recorded. The Assessing Officer is directed to examine the claim afresh in the light of *Catholic Syrian Bank Ltd. v. CIT.* (AY. 2002-03, 2003-04)
State Bank of Indore v. ACIT (2013) 142 ITD 215 (Indore)(Trib.)

S.36(1)(viii) : Eligible business – Special reserve – Financial corporation – Profits and gains derived from business – Nexus with business – Expenditure is deductible
Processing fee, penal interest and other charges received by the assessee from debtors has a direct nexus with the business of long-term finance and form part of eligible profit for the purpose of deduction under section 36(1)(viii). (AY. 1998-99, 2000-01 & 2001-02)
CIT v. Weizmann Homes Ltd. (2013) 357 ITR 74 / 86 DTR 41 / 215 Taxman 264 / 263 CTR 121 (Karn.)(HC)

S.36(1)(viii) : Eligible business – Special reserve – Financial corporation – Interest on short-term deposits is not eligible for deduction [S.28(i)]
The assessee after receiving funds from the Central and State Governments used to park excess funds in the bank in short-term deposits. The interest earned on the said deposits was again utilised for advancing funds under the various schemes as per the instructions of the Government from time to time. The assessee claimed that such interest should be considered at par with the accrued interest from integrated development of small and medium town and mega-city projects and was eligible for deduction under section 36(1)(viii). The ITAT held that the income earned from deposits with the bank, etc., cannot be treated as income from business. The said interest income has to be treated as 'Income from other sources'. The income earned from interest on short-term deposits can be considered as part of business income, even if the same is utilized for advancing funds under the instructions from the Government. The deduction under section 36 is available only in respect of income computed under the head 'Profit and Gains of Business or Profession' under section 28. Interest from short-term deposits is not taken into consideration in computing the income referred to in section 28. Interest income on short-term deposits is not eligible for deduction under section 36(1)(viii). (AY. 2005-06 & 2006-07)
Tamil Nadu Urban Finance & Infrastructure Development Corpn. Ltd. v. ACIT (2013) 58 SOT 53 (URO) (Chennai)(Trib.)

S.36(1)(viii) : Eligible business – Special reserve – Financial corporation reserve created by Long-term finance – Interest income held not eligible – Lease income matter remanded
Assessee a Non-Banking Financial Company owned by the Tamil Nadu Government, it claimed deduction under section 36(1)(viii) on its lease income, hire charges as well as interest received on deposits in addition to its claim for similar deduction on interest on long-term finance given by it to various concerns. Assessing Officer rejected to consider the claim of deduction under section 36(1)(viii) as income derived from long-term finance. Interest on deposits will never fall within the definition of long-term finance given in Explanation (e) to section 36(1)(viii) and, therefore it is not eligible for deduction under section 36(1)(viii). On Appeal the Tribunal remitted back the issue with regard to the claim of the assessee for deduction under section 36(1)(viii). In fresh Assessment Proceedings, the assessee claimed that it was eligible for claiming deduction those amounts since the funding which gave rise to such income, fell within the definition of long-term finance given in Explanation (e) to section 36(1)(viii). Assessing Officer again disallowed the deduction claimed

holding that unless money was actually lent or advanced with a condition that it would be repaid along with interest. On appeal the Tribunal held that interest on deposits will never fall within definition of long-term finance given in Explanation (e) to section 36(1(viii), therefore not eligible for deduction. For deciding whether activities of lease and hire undertaken by assessee came within definition of long term finance given in Explanation (e) to section 36(1(viii), primary requirement is to see agreements based on which the assessee had provided such facilities to its customers. (AY. 2007-08)
Tamilnadu Power Finance & Infrastructure Development Corpn. Ltd. v. ACIT (2013) 143 ITD 147 (Chennai)(Trib.)

S.37(1) : Business expenditure – Commission – Breach of law – Not allowable as deduction. [Solvent, Raffinate & Shop (Acquisition, Safe, Storage & Prevention of Use in Automobiles) Order 2000, Essential Commodities Act, 1955, S.3]
As the assessee had no licence to legally import furnace oil as per extant rules, it approached its sister concern, who had said licence, to undertake and perform contractual obligations arising from said contract against payment of consideration and paid commission to it. Though the assessee got the contract executed through its sister concern, but subsequently purchased the impugned goods from sister concern in violation of the rules, Solvent, Raffinate & Shop (Acquisition, Safe, Storage & Prevention of Use in Automobiles) Order 2000, and section 3 of Essential Commodities Act, 1955, and thus, deduction u/s. 37(1) could not be allowed to assessee for said payment. (AY. 2004-05)
Overseas Trading & Shipping Co. (P.) Ltd. v. ACIT (2013) 219 Taxman 302 (Guj.)(HC)

S.37(1) : Business expenditure – Commencement – Setting up of business – All revenue expenditure after that date had to be allowed as deduction [S.28(i)]
Since one of the purposes of setting up Nigam was to supply water through canal and assessee had supplied water through its main canal, in peculiar facts of case it could be said that business of assessee had been set up during previous year relevant to assessment year under consideration (AY.2001-02)
CIT v. Sardar Sarovar Narmada Nigam Ltd. (2013) 218 Taxman 248 / (2014) 364 ITR 477 (Guj.)(HC)
Editorial: Sardar Sarovar Narmada Nigam Ltd v. ACIT (2012) 138 ITD 203 ((SB)(Ahd.) is affirmed.

S.37(1) : Business expenditure – Capital or revenue – Consumable tools and equipment – Allowable as revenue expenditure
The very nature of items and very process of consumption in ordinary course of manufacturing business, determine as to whether expenditure on it is revenue or capital in nature. Assessee, engaged in business of manufacturing of load cells and weigh module, claimed expenditure towards purchase of drills, tools and mills which were consumed during operation and these did not have a life of more than few days. The assessee did not consider these items as part of closing stock of inventory and had written off them in P & L account. Held, expenditure claimed as revenue expenditure was to be allowed. (AYs. 2007-08 to 2009-10)
CIT v. ADI Artech Transducers (P.) Ltd. (2013) 219 Taxman 310 (Guj.)(HC)

S.37(1) : Business expenditure – Set up date – Commencement date – Revenue expenses from the date of setting up of business till date of commencement of business are to be allowed as revenue expenditure [S.35D]
Running expenses from date of setting up of business till date of commencement of business/commercial operation cannot be said to be capital in nature, said expenses are to be allowed as revenue expenditure.

CIT v. Samsung India Electronics Ltd. (2013) 356 ITR 354 / 92 DTR 420 / 218 Taxman 66 (Mag.) (Delhi)(HC)

S.37(1) : Business expenditure – Sales promotion expenses – Incurring heavy losses – 10% of disallowance of expenses was held to be justified

On one hand assessee was returning heavy losses while on other, was claiming heavy expense under various heads like travelling, printing, advertising, etc., separately. In view of this fact that documentary evidence put forth by assessee had been evaluated by competent authority and affirmed by first appellate authority as also by Tribunal, Tribunal was right in disallowing 10% of expenses. (AY.1998-99)

Rajasthan Patrika (P.) Ltd. v. JCIT (2013) 218 Taxman 154(Mag.) (Raj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Club membership fees – Application software – Compensation – Held to be revenue expenditure

Entrance fees for membership of a club would be considered as revenue expenditure.[Followed *Otis Elevator Co India Ltd. v. CIT (1992 195 ITR 682 (Bom.)(HC)*]. Expenses incurred to obtain application software which has to be upgraded from time-to-time due to change in technology has to be allowed as revenue expenditure. Compensation paid by assessee for pre-closure of agreement to receive nitrogen gas would be allowable as revenue expenditure. (AY. 2004-05)

CIT v. Lubrizol India Ltd. (2013) 218 Taxman 69(Mag.) (Bom.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Share issue expenses – Analysis of nature of expenditure

The assessee claimed share issue expenses as revenue expenditure which were disallowed by the AO treating them as capital in nature. The CIT(A), subsequent to remand report from Assessing Officer, allowed claim of deduction except printing, advertisement expense and lead manager fees on ground that said expenses were capital in nature. The CIT(A) had given categorical finding that nature of rest of expenses was only revenue in nature, as those expenses were to meet out day-to -day transactions of business of assessee which was confirmed by the Tribunal. Held, since there was no contradiction in finding of Tribunal, same was to be upheld. (AY.1996-97)

CIT v. Kreon Financial Services Ltd. (2013) 218 Taxman 92 (Mag.) (Mad.)(HC)

S.37(1) : Business expenditure – Penalties – Redemption fine in lieu of confiscation of re-exported goods being compensatory in nature and not penal – Allowable as deduction

Where the assessee-importer paid redemption fine in lieu of confiscation of re-exported goods, it was compensatory in nature and not penal, and was therefore an allowable deduction under section 37(1).(AY.1985-86)

Usha Micro Process Controls Ltd. v. CIT (2013) 218 Taxman 68 (Mag.) (Delhi)(HC)

S.37(1) : Business expenditure – Provision for warranty – Scientific basis – Matching principle – Held to be allowable – Matter remanded

Provision for warranty made on basis of principle of matching can be allowed but amount claimed should have some rational and scientific basis and it cannot be on mere *ipsi dixit*. In respect of assessee's claim for deduction of provision for warranty expenses, matter was to be remanded back to Assessing Officer for disposal afresh after examining provision for warranty as claimed including actual warranty expenses incurred during relevant year. (AY. 2004-05)

Woodward Governor India Ltd. v. CIT (2013) 357 ITR 673 / 218 Taxman 226 (Delhi)(HC)

S.37(1) : Business expenditure – Privilege fee – Matter remanded. [S.263, S.24 of Karnataka Excise Act, 1965]

Since all aspects of the matter were left open by Tribunal and the Commissioner had to re-examine the allowability of privilege fee, and pass order afresh, appeal preferred by revenue was liable to be dismissed.(AY.2008-09)
CIT v. Karnataka State Beverages Corpn. Ltd. (2013) 218 Taxman 223 (Kar.)(HC)

S.37(1) : Business expenditure – Entertainment expenses – Estimation at 30% by the Tribunal was held to be reasonable [S.37(2A)]
Where Tribunal considering facts allowed 30% of entertainment expenses incurred by assessee, same needed no interference. (AY 1991-92)
CIT v. Modi Olivetti Ltd. (2013) 263 CTR 28 / 94 DTR 398 / 218 Taxman 193 (All.)(HC)

S.37(1) : Business expenditure – Making of road – Revenue expenditure [S. 35E, 45]
Expenditure incurred on road repairing, plot levelling and adjustment was neither capital expenditure nor it was an expenditure which could be covered by provision of section 35E but it was purely a revenue expenditure. (AYs.1985-86 and 1986-87)
CIT v. Pionior Minerals (2013) 218 Taxman 65 (Mag.) (Raj.)(HC)

S.37(1) : Business expenditure – Compensation – Breach of contract – Allowable as business expenditure
The assessee would be entitled to deduction of the amount recovered by contractee by encashing bank guarantee due to non-performance of contract by the assessee. (AY. 2006-07)
CIT v. Neo Structo Construction Ltd. (2013) 218 Taxman 24 (Guj.)(HC)

S.37(1) : Business expenditure – Bond issue expenditure – Revenue expenditure. [S. 35D]
Where funds were raised with issuance of secured redeemable non-convertible bonds, impugned expenditure incurred on account of issue of bonds was revenue in nature.(AY 2003-04)
CIT v. Instrumentation Ltd. (2013) 218 Taxman 64 (Mag.) (Raj.)(HC)

S.37(1) : Business expenditure – Contingent liability – Revenue expenditure – Question of law being admitted earlier year, appeal for the relevant year is also admitted [S.260A]
Assessee made provision for contractual obligation and claimed deduction for same. The claim was disallowed by Assessing Officer on ground that same was not allowable being contingent/unascertainable liability. Since the same issue relating to an earlier year was sub judice before the High Court, the appeal on this issue was to be admitted. (AY. 2003-04)
CIT v. Instrumentation Ltd. (2013) 218 Taxman 64 (Mag.) (Raj.)(HC)

S.37(1) : Business expenditure – Scholarship – Running coaching institute – Providing scholarship to attract more students was held to be allowable as business expenditure
Assessee-company was engaged in running coaching institute. It provided a scholarship to attract more student. As a result business had increased tremendously and there was higher receipt in subsequent years. Court held that providing scholarship could be considered as a business strategy and same was allowable as business expenditure. (AY.2004-05)
CIT v. Rubic's Rostram Coaching Institute (P.) Ltd. (2013) 219 Taxman 80 (Mag.) (All.)(HC)

S.37(1) : Business expenditure – Foreign travel expenses – 50% allowed is a question of fact
Assessee-trust claimed deduction of expenditure incurred on foreign travel of settlor 'K'. Assessing Officer rejected assessee's claim. Commissioner (Appeals) allowed 50 per cent of said expenditure taking a view that it was incurred for business purpose. Tribunal upheld order of Commissioner (Appeals). Question of allowability is a question of fact.(AY. 2001-02)
CIT v. Kamal Family Trust (2013) 219 Taxman 81 (Mag.) (P&H)(HC)

S.37(1) : Business expenditure – Illegal payments – Disallowance of interest paid by assessee in excess of maximum permissible limit as prescribed under Kerala Money Lenders Act – Held to be justified

Assessee was a financial enterprise engaged in accepting fixed deposits as loans for which it paid interest. Assessing Officer disallowed interest paid by assessee in excess of maximum permissible limit as prescribed under Kerala Money Lenders Act. Where expenditure was laid out for purpose which constitutes an offence or prohibited by law, same could not be treated as expenditure for which deduction could be claimed. Since amount of disallowance represented money paid in excess of limit which was prescribed under Kerala Money Lenders Act, expenditure was in teeth of Explanation to section 37(1) and was not to be allowed. (AY. 1996-97)

Muthoot Finance Corporation v. CIT (2013) 260 CTR 222 / 219 Taxman 82 (Mag.) (Ker.)(HC)

S.37(1) : Business expenditure – Firm – Partner – Goodwill payment to retiring partner was held to be not allowable as business expenditure

The assessee claimed the goodwill amount paid to retiring partner as allowable revenue expenditure. The Court held that assets and liabilities of the firm continued as such without any change including tangible and intangible. Partner who retired from the firm takes his initial investment and profit, if any payable to him. Similarly, if he is accountable for any loss in a particular assessment year, that would also be worked out at the time of retiring from partnership business. As there is no transfer of any interest and the money paid is only towards the share of the capital investment by that partner along with some profit, if any and nothing beyond that. Goodwill payment to retiring partner was held to be not allowable as business expenditure. (AYs.2004-05 to 2007-08)

Oberon Trading Corporation v. ITO (2013) 263 CTR 494 / 95 DTR 65 / (2014) 360 ITR 19 / 220 Taxman 350 (Ker.)(HC)

S.37(1) : Business expenditure – Commission – Held allowable as the same was accepted in subsequent year

The appellate authorities came to the conclusion as to the genuineness of the payment made to the agent while negotiating the sales and when the Department had accepted this for the subsequent year 2004-05, there was no other ground to disturb the order of the Tribunal for the assessment year 2003-04. The buyer's commission was deductible. (AY.2003-04)

CIT v. E. Ramachandran (2013) 359 ITR 671 (Mad.)(HC)

S.37(1) : Business expenditure – Bad debt – Nexus between assessee and subsidiary – Allowable.

In the presence of business nexus between the assessee and subsidiary companies, the amount written off as bad debts was allowable. (AY.2000-01)

CIT v. Spencers and Co. Ltd. (No.1) (2013) 359 ITR 612 (Mad.)(HC)

S.37(1) : Business expenditure – Service benefits from group resources company – Licence fee, legal expenses, retainer fee was held to be allowable

Payment of licence fee towards its share of actual expenses incurred by group company is allowable when valuable benefit for its business operations were derived by assessee. Legal expenses and retainer fee also held to be allowable. Expenses incurred to collect interest free deposit from tenants by initiation of legal proceedings was also held to be allowable. (AY. 2001-02)

CIT v. Spencers and Co. Ltd. (No.2) (2013) 359 ITR 630 (Mad.)(HC)

S.37(1) : Business expenditure – MODVAT credit – Additional customs duty paid on raw material is allowable [S.145]

Deduction of unutilized MODVAT credit was denied on the ground that credit in respect of MODVAT had accrued and was still available. The Commissioner (Appeals) observed that the assessee had received refund of the MODVAT credit in the subsequent assessment year 1996-97 but

it could not be ascertained whether the refund was against the MODVAT credit available as on March 31, 1995. Also, the refund received from the Excise Department of Rs.7.16 crores was offered for taxation in the assessment year 1996-97 by the assessee and was accordingly taxed. Held, there was no allegation or averment that the assessee was following the "gross method" and not the "net method" or was following two different methods at the time of purchase/opening stock and valuation of the stock in hand. The assessee was entitled to MODVAT credit on account of excess excise duty and additional customs duty paid by it on purchase of raw material. (AY. 1995-96)
CIT v. Samtel India Ltd. (2013) 359 ITR 62 (Delhi)(HC)

S.37(1) : Business expenditure – Provision for warranty based on relevant data is deductible
Estimated provision for warranty on account of shortfall in quality or defective equipment requiring repairs or replacement based on relevant data is deductible.(Followed *Rotork Controls India P. Ltd v. CIT (2009) 314 ITR 62 (SC)* (AY. 2003-04)
FL Smidth Minerals P. Ltd. v. DCIT (2013) 358 ITR 353 / 218 Taxman 29 / 95 DTR 245 (Mad.)(HC)

S.37(1) : Business expenditure – Capital expenditure – Share issue expenses – Registration, listing, stationery, travelling, meeting, bank charges, commission, dispatch and out of pocket expenses are allowable as revenue expenditure
The court held that share issue expenses such as, dispatch and out of pocket expenses, registration fees, listing fees, stationery expenses, travelling and meeting expenses, bank charges and commission and expenses on professional's certificate were allowable as revenue expenditure. (AY. 1996-97)
CIT v. Kreon Financial Services Ltd. (2013) 358 ITR 542 (Mad.)(HC)

S.37(1) : Business expenditure – Expenses for increase of share capital is capital expenditure
Expenditure was incurred for the purpose of increasing share capital to augment working capital. However, the purpose of public issue was not achieved on account of non-clearance from SEBI. Held, the expenditure was capital expenditure, and hence, not allowable. (AY. 1996-97)
Mascon Technical Services Ltd. v. CIT (2013) 358 ITR 545 / 218 Taxman 108 / (2014) 268 CTR 105 / 99 DTR 423 (Mad.)(HC)

S.37(1) : Business expenditure – Non-compete fees – Capital or revenue – Limited period is allowable as revenue expenditure [S.37(1)]
Non-compete fees paid for a limited time, whether in installments or as a lump sum payment was allowable as deduction. (AYs. 2004-05, 2005-06, 2006-07)
CIT v. Career Launcher India Ltd. (2012) 71 DTR 161 / 250 CTR 240 / 207 Taxman 28 / (2013) 358 ITR 179 (Delhi)(HC)

S.37(1) : Business expenditure – Subsidy paid by educational institution for hostel facilities is allowable as deduction
Subsidy paid by educational institution for provision of hostel facilities is deductible. (AYs. 2001-02 to 2006-07)
CIT v. Children's Education Society (2013) 358 ITR 373 / 92 DTR 158 / (2014) 264 CTR 389 (Karn.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Payment to professionals for corporate debt restructuring is allowable in the year it was incurred
Payment to financial consultants for professional services in connection with corporate debt restructuring by negotiating with banks and financial institutions was expenditure for purpose of business and allowable in entirety in year in which incurred. When the assessee itself spread the expenditure over six years, Department was not entitled to object. (AY. 2004-05)

CIT v. Gujarat State Fertilizers and Chemicals Ltd. (2013) 358 ITR 323 / 217 Taxman 343 / (2014) 101 DTR 175(Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Advertisement expenses was held to be revenue in nature

The assessee incurred expenditure for television advertisement film production and claimed deduction as revenue expenditure. The AO disallowed expenditure on ground that said expenditure amounts to enduring benefit and constitutes a capital expenditure. The CIT(A) affirmed findings of AO. The Tribunal set aside order of CIT(A) and allowed deduction. On appeal by the department the High Court, held that the test of enduring benefit enunciated by the Supreme Court in the *Assam Bengal Cement Co. Ltd. v. Commissioner reported in (1955) 27 ITR 34 (SC)* is not applicable to the facts of the present case. The expenditure incurred was dominantly for advertisement to promote the sales. If the contention of the Revenue is upheld, any expenditure incurred for marketing and promoting sales should have to be held as 'capital expenditure' and in no case, the deduction can be allowed. Such a contention is illogical and untenable. The appeal was dismissed. (AYs. 1998-99 to 2000-01)

CIT v. Indo Nissin Foods Ltd. (2013) 217 Taxman 95 / 91 DTR 223 (Karn.)(HC)

S.37(1) : Business expenditure – Assessee engaged in both speculative and non-speculative business – Bifurcation of the administrative expenses in ratio of the volume and profit of both activities justified

The assessee was engaged in the business of trading of shares, gold bullion and commodities. It filed its return of income declaring business income and speculation loss. It claimed deduction for administrative and other expenses. The AO noticed that the said expenses were relatable to both speculative and non-speculative activities and hence bifurcated the same in the ratio of 2:3 between speculative and non-speculative income. The CIT(A) and TRIBUNAL confirmed the action of the AO.

On appeal by the assessee, the High Court dismissing the appeal held that since there was no doubt that the assessee was engaged in both speculative as well as non-speculative activities, allocation of expenses was not only necessary but inevitable. (AY. 2007-08).

Anjalee Exim (P) Ltd. v. DCIT (2013) 217 Taxman 89 (Guj.)(HC)

S.37(1) : Business expenditure – Expenditure actually incurred by the assessee –Disallowance not permissible [S. 43B]

The assessee is a developer and had paid water connection charges, land use conversion charges, etc. The AO disallowed the expenses claimed on the ground that liability of the assessee had not crystallized during the year under consideration. The CIT(A) held that the concerned municipal corporation would raise the demand only on the owner of land, i.e., the contractee and the mere fact that the contractor, (assessee) was informed by the contractee regarding the liability after the expiry of the financial year would not make the ascertained liability as per agreement into a contingent liability u/s.43B. The CIT(A) therefore allowed the expenditure. The Tribunal while confirming the said allowance observed that as per the agreement any amount in excess of ` 100 per sq. yd. was to be borne by the assessee which amount had actually been paid by the assessee and this expense had neither been reimbursed by the contractee nor had been claimed by the contractee.

On appeal by the department, the High Court dismissing the appeal held that in view of the findings of the lower authorities confirming that the expenditure was actually incurred by the assessee, disallowance of the same under section 43B was not be permissible. It also observed that, the liability has crystallized on 1-3-2005 and therefore, the same cannot be termed a contingent liability. (AY. 2005-06)

CIT v. Bhagwati Corporation (2013) 217 Taxman 144 (Mag.) / 36 taxmann.com 516 (Guj.)(HC)

S.37(1) : Business expenditure – Provision made for warranty allowable as a deduction

The assessee made a provision for warranty of Rs. 1,60,62,016/- based on the warranty claims made by customers for the products sold to them during the year at 1.5% of total sales turnover, which after 2 years would be taxed as profit after meeting actual claims. During the year the assessee also reversed the provision made for meeting warranty claims for earlier financial year of Rs. 85,65,546/-, accordingly, the AO disallowed the balance provision of Rs. 74,56,682/- as it was without any actual claim or expenditure. The CIT(A) confirmed the said disallowance. The Tribunal deleted the said disallowance holding that such provision should be allowed as business expenditure.
On appeal by the department, the High Court following the decision of the Supreme Court in the case of *Rotork Controls India (P.) Ltd. v. CIT [2009] 314 ITR 62* held that such provision is allowable as a deduction, however, the matter was remanded back to the AO to determine the quantum of provision that can be allowed as provision for warranty in accordance with the guidelines contained in the said decision. (AY. 2004-05)
CIT v. Denso Kirloskar (2013) 217 Taxman 86 (Karn.)(HC)

S.37(1) : Business expenditure – Bad debt – Penal interest received from customers and accounted for as income – Subsequent reversal of such interest on settlement allowable as revenue expense or as bad debt [S.36(1)(vii)]
The assessee is a State Government owned company and is acting as development financial institution for assisting medium and large scale industries in the State of Gujarat. It follows mercantile system of accounting and the penal interest charged by it from its customers is reflected as income. Subsequently, on the settlement with the parties, the penal interest is either waived or reduced. The AO, however, added the write-offs of the penal interest to the income of the assessee. The addition was confirmed by the CIT(A). The Tribunal, however, deleted the said addition.
On appeal by the department, the High Court dismissing the appeal held that post 1-4-1989, it is not necessary for the assessee while claiming deduction to establish that the debt has become irrecoverable, what all it needs to establish is that it has written off such amount in its account as bad debt. Further, the High Court also observed that the AO is not required to examine as to whether such debt, in fact, has become irrecoverable.
CIT v. Gujarat Industrial Investment Co. Ltd. (2013) 217 Taxman 184 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Provision for interest payable on unspent amount received from Government department is allowable as a deduction
The assessee acted as a nodal agency for purchase of hardware and software of computers for Government departments of Gujarat for which it received money from the Department of Science and Technology. The assessee was required to pay interest @ 6% on any unspent amount as per the resolutions issued by the Department of Science and Technology. Accordingly, the assessee had created a provision for payment of interest on unspent amount @ 6%, which provision was disallowed by the AO on ground that the unspent amount was neither borrowed capital on which interest could be allowed, nor was the provision allowable u/s. 37(1) of the Act. The CIT(A) and Tribunal allowed the claim of the assessee.
On appeal by the department, the High Court observed that, the assessee needed to pay the specified amount of expenditure, being the interest amount @ 6%, to the Department of the science and Technology. The liability was necessarily ascertained for having come in a package, given to the assessee while disbursing the amount/grant as also by way of both government resolutions as discussed elaborately by both the CIT(A) and the Tribunal and, therefore, by no stretch of imagination it can be said that there was uncertain or undetermined liability. Accordingly, dismissing the departmental appeal, the High Court held that the CIT(A) and Tribunal were right in allowing the assessee’s claim and that the AO was not right in holding the provision was a contingent expenditure. (AYs. 2005-06, 2008-09)
CIT v. Gujarat Informatics Ltd. (2013) 217 Taxman 78 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Repairs and maintenance expenses – Increase of life by repairs and maintenance of the existing assets beyond their original estimated economic life cannot be a ground to return a finding that it was not a case of repairs [S. 31]

The assessee claimed certain expenses on account of repairs and maintenance as revenue expenditure. However, the same were held to be capital in nature. On First Appeal, the Commissioner (Appeals) found that the expenses had led to new identifiable assets and had increased life of assets beyond their original estimated life. Also, the profitability of the concern had substantially increased. Therefore, he dismissed assessee's appeal. On Second Appeal, the Tribunal set aside the findings of Commissioner (Appeals). On appeal by the revenue, the Court held that the increase of life by repairs and maintenance of the existing assets beyond their original estimated economic life cannot be a ground to return a finding that it was not a case of repairs. Repairs and maintenance are in fact necessary not only for achieving the optimum utilisation of machinery but also if possible to extend its economic life. Therefore, the fact that such installation has increased the life beyond their original economic life cannot be a ground to return a finding that the expenses incurred were not for repairs and maintenance. Similarly, the ground of increase in the profitability of concern is again totally alien to determine the nature of the repair and maintenance. Increase in profit would lead to increase in income, which would be separately taxable but could not be a ground for declining the expenses incurred by the assessee for repairs and maintenance. Though the finding returned is that new identifiable assets have been created the Tribunal has returned a finding that though each of the items is usable independently such items have been used for repairs and maintenance. With such finding, the expenditure was allowed.

CIT v. Vishal Paper Industries (2013) 351 ITR 478 / 217 Taxman 245 / 94 DTR 175 / 36 taxmann.com 19 / (2014) 267 CTR 295 (P& H)(HC)

Editorial : Order of Tribunal in Vishal Paper Industries v. JCIT (2013) 220 (Trib.) (Chandigarh)

S.37(1) : Business expenditure – Capital or revenue – Advertisement expenses for launching of a new product allowable as revenue expenditure

Assessee spent a sum towards advertisements in respect of launching of a new product. Assessing Officer disallowed such advertisement expenses on ground that assessee had treated same as 'deferred revenue expenditure' in its books of account. The court held that, neither the A.O. nor the CIT(A) has disputed the revenue nature of the advertisement expenses of Rs. 77,16,120/-. There is no dispute that such expenses are allowable expenditure. Merely because the assessee has firstly shown the entire amount in the books of accounts as deferred revenue expenditure and thereafter debited Rs. 29,51,909/- in the P & L A/c cannot be made a ground to disallow the advertisement expenses of Rs. 77,16,120/- when indisputably in the computation of income, the assessee has claimed the entire sum of Rs. 77,16,120/- after adding back Rs. 29,51,909/- to the profit as per P & L A/c. There is no error in the order of the Tribunal setting aside the addition made by A.O. on account of advertisement expenses. (AY.1991-92)

CIT v. Modi Olivetti Ltd. (2013) 94 DTR 398 / 37 taxmann.com 464 / 263 CTR 28 / 218 Taxman 193 (All.)(HC)

S.37(1) : Business expenditure – Provision for warranty liability – Allowable as revenue expenditure

Assessee company, engaged in manufacture of mini computers, provided one year warranty on each computer sold by it. It made provision for warranty at rate of 1.5 per cent of total cost of sales. Whatever provision had been made for a particular assessment year in excess of actual expenses incurred in subsequent assessment year, difference was again written back in subsequent assessment year. The Court held that, the Tribunal having found that liability on account of warranty was in present to be discharged at a future date and not a contingent one, was justified in allowing the deduction. (AY.1991-92)

CIT v. Modi Olivetti Ltd. (2013) 94 DTR 398 / 37 taxmann.com 464 / 263 CTR 28 / 218 Taxman 193 (All.)(HC)

S.37(1) : Business expenditure – Provision for warranty liability on scientific basis – Deductible
Provision for warranty based on scientific calculation is deductible. (AY. 1998-99)
CIT v. IBM India Ltd. (2013) 357 ITR 88 / 89 DTR 25 (Karn.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Acquisition of software is revenue in nature
Expenditure on acquiring software enabling the assessee to carry on business more efficiently is revenue expenditure. (AY.1998-99)
CIT v. IBM India Ltd. (2013) 357 ITR 88 / 89 DTR 25 (Karn.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Master copy of software – Expenditure on acquiring master copy of software subject to obsolescence is deductible as revenue expenditure
The assessee entered into a licence agreement with Oracle Corp under which it acquired a non-exclusive & non-assignable right to duplicate software products which were owned by Oracle Corp and to sub-licence the same to parties in India. The assessee paid recurring royalty of 30% for the said right. In addition to the royalty, the assessee periodically paid an amount towards “expenditure on import of software master copy”. The said master copy was used to replicate the software. The assessee claimed that the said master copies were versions of Oracle’s new product offerings which had very accelerated obsolescence and that at any point of time it was not possible to say whether the version will be current for one day or one month. The AO allowed a deduction for the recurring royalty but held that the expenditure for acquiring the software master copy was capital expenditure. On appeal, the CIT(A) reversed the AO on the ground that owing to obsolescence, there was no enduring benefit as there were frequent corrections and upgradation of the software. On appeal by the department, the Tribunal reversed the CIT(A) and held that the expenditure was capital in nature on the ground that the master copy was an asset of enduring benefit. On appeal by the assessee, HELD reversing the Tribunal:
The assessee’s claim that the master copies had high accelerated obsolescence and that even at the point of time of import it was difficult to say whether the version would be replaced by a new or updated version after one day or a month had not been disproved. Also the facts showed that there were periodical imports of the master copies and that the average price per copy was minimal. This was not a case where the master copies contained operating or system software, which normally did not require frequent upgradation or changes. It is also not the case of an assessee which is the end user of software. It is a case where the assessee is required to repeatedly pay for the master copy media in view of frequent newer or updated versions of the application software from time to time. Once newer or better version of the application software is available, the earlier version is not saleable and does not have any market value for the seller i.e. the assessee. Also, as per the “matching concept” in accountancy, while determining whether expenditure is capital or revenue in nature, the question whether the expenditure would create an asset which is of value in further assessment periods and should be amortised (i.e. depreciated) as long as it has value (subject to the statutory provisions) requires to be considered. If the expenditure does lead to creation of an asset but of a limited or short life, it has to be treated as a liability and not as a fixed asset. The said expenditure cannot be valued for price for future financial years.(Dt. 25th Nov. 2013.) (AYs. 1994-95 to 2004-05)
Oracle India Pvt. Ltd. v. CIT (2013) 96 DTR 249 / (2014) 264 CTR 144 / 221 Taxman 249 (Delhi)(HC)
Oracle Software India Ltd v. CIT (2013) 96 DTR 249 / (2014) 264 CTR 144 / 221 Taxman 249 (Delhi)(HC)

S.37(1) : Business expenditure – Making up charges – It is not necessary that every expenditure to be backed by confirmation letters

Assessee had claimed expenses under the head making up charges. The assessee could not furnish confirmatory letters to the extent of amount. Consequently, the A.O. disallowed the expenditure to the extent of that particular amount and added it to the income of the assessee. The Tribunal held that the expenditure on account of making up charges had to be allowed. Also held that it was not necessary that in every case expenses were to be allowed only upon confirmation letters being filed from the recipients of the amounts especially, when the expenditure was backed by considerable evidence, including the registers maintained as per the requirement of the central excise authorities. (ii) That the finding of the Tribunal with regard to the making up charges was a pure finding of fact. (AY. 1997-1998)

CIT v. Modern Terry Towels Ltd. (2013) 357 ITR 750 / 90 DTR 321 (Bom.)(HC)

S.37(1) : Business expenditure – Market fee – Disallowance was held to be justified

During the assessment year 1976-77, the assessee had claimed deduction for Rs. 6,72,294 being the liability for payment of market fee. According to the assessee, market fee was payable to the Government of Bihar on purchase of sugarcane and sale of sugar and molasses under the Bihar Agricultural Produce Markets Act, 1960. The Assessing Officer had observed that the assessee had not proved its claim. He had also noted that the liability for payment of the amount had not been admitted by the assessee. In the circumstances, he held that that liability was neither contingent nor real and he, therefore, disallowed the same. The Tribunal agreed with this view. The court held that the assessee had not been able to substantiate his case as to whether sugar and molasses had been notified under the provisions of the Bihar Agricultural Produce Market Act, 1960,on which any market fee was payable. In the absence of any such provision, the Tribunal was justified in holding that there was no liability for payment of market fee on the sale of sugar and molasses. Accordingly, disallowance of the assessee's claim justified. (AY.1976-77-1977-78)

CIT v. Moti Lal Padampat Udyog Ltd. (2013) 261 CTR 103 (All.)(HC)

S.37(1) : Business expenditure – Commission – On the basis of statement that no commission agent was involved disallowance of commission for the asst year 2005-06 was held to be justified – For the Assessment year 2006-07 there was no contrary evidence hence commission was held to be allowable

For AY 2005-06, there were seven buyers who had stated categorically before the Assessing Officer in their written responses that in the transactions of purchase made by them of the web offset printing machines from the assessee, no commission agent was involved. The assessee was confronted with this fact but no explanation had been tendered in this regard. The onus had shifted to the assessee but no explanation was tendered in this regard. Therefore, any amount paid by way of commission to persons in respect of the seven buyers could not be regarded as business expenditure under section 37. There was no evidence from the buyers indicating that there was no commission agent between them and the assessee. Thus, there was no material on record nor was there any other evidence which the Revenue could produce to indicate that the commission paid to the commission agents was not genuine. Consequently, the entire amount of commission paid to the commission agents in the year AY 2006-07 was allowable as business expenditure. (AYs. 2005-06, 2006-07)

CIT v. Printer House P. Ltd. (2013) 356 ITR 474 / 208 Taxman 9 (Delhi)(HC)

S.37(1) : Business expenditure – Claim made by assessee in respect of freight and octroi expenses could not be disallowed

The assessee had claimed certain expenditures on freight and octroi. The Assessing Officer disallowed the same. Under an agreement entered into by the assessee with its principal, the principal was to pay freight for raw material and for finished goods, while assessee had to bear expenditure in

respect of movement of casting, scrap, alloys etc. The Tribunal allowed the assessee's claim. Held, dismissing the appeal:
The AO had disallowed the claimed expenditure without pointing out specifically that the claim of the appellant was in respect of raw materials or finished goods, and not castings/alloys etc. In these circumstances, on the facts of the case, the claim made by the assessee could not be disallowed.
CIT v. Reclamation Welding (P.) Ltd. (2013) 217 Taxman 143(Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Foreign tour – Details were not furnished –Disallowance was held to be justified
Assessee claimed deduction of expenditure incurred on foreign tour claiming it to be undertaken for business purposes. However, it failed to furnish details of foreign visits and explain its justification to assessee's business. It was held that expenditure of foreign tour be disallowed in entirety. (AY. 1993-94)
Peerless General Finance & Investment Co. Ltd. v. CIT (2013) 88 DTR 26 (Cal.)(HC)

S.37(1) : Business expenditure – Compensation – Breach of contract
The Assessee could not fulfil contract with a party which filed suit before the High Court claiming compensation from assessee towards loss suffered by it. Assessee revised its return and claimed deduction of said amount. The Tribunal found issues as to whether payment was made, whether High Court had allowed such claim and whether assessee had made such a claim for any subsequent year were to be examined by the Assessing Officer and hence, remanded the matter back to the Assessing Officer. The Tribunal's order was to be upheld. (AY.2000-01)
CIT v. Sambhav Media Ltd. (2013) 216 Taxman 115(Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Consultancy charges – Study in products – Revenue expenditure
Expenditure incurred by assessee towards conducting study in products, marketing, etc. to carry on business more efficiently and profitability would be a revenue expenditure and not a capital expenditure. (AY.1996-97)
EL Forge Ltd. v. DCIT (2013) 216 Taxman 114 (Mag.) (Mad.)(HC)

S.37(1) : Business expenditure – Statutory contributions – Allowability as expenditure
Under rule 10 of Madhya Pradesh Krishi Upaj Mandi (State Marketing Development Fund) Rules, 2000, Krishi Upaj Mandi has to create a reserve fund, which is a statutory liability and aforesaid fund is to be created for payment of pension to members of Board. In view of statutory liability of Krishi Upaj Mandi, there was no fault in order of Tribunal allowing deduction of contribution towards pension fund.
CIT v. Krishi Upaj Mandi Samiti, Timarni (2013) 216 Taxman 172 (Mag.) (MP)(HC)

S.37(1) : Business expenditure – Ad hoc disallowance – Comparison with expenses in earlier years
The Assessing Officer held that excess deductions were claimed by the assessee by comparing expenses of earlier year. He, therefore, disallowed the same and made addition to assessee's income. Held, the Assessing Officer cannot make addition merely by comparing expenditure with preceding year's expenditure, and hence, said addition was to be deleted. (AY.2005-06)
CIT v. Symphony Comfort System Ltd. (2013) 216 Taxman 225 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Warranty provision – Actual expenditure exceeding provision
The Assessing Officer questioned the allowability of claim of warranty expenses on ground that the said liability was not expended in current year but was only a contingent liability. The assessee's case was that the provision was made at a bare 0.5 per cent of gross sale and actual warranty expenses

incurred during same period far exceeded amount of provision made. Since consistently, actual expenditure exceeded provision made and assessee produced various details of past working-out which formed basis for current year, deduction was to be allowed. (AY.2005-06)
CIT v. Eimco Elecon (India) Ltd. (2013) 216 Taxman 170 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Disallowance on the basis of assumption – Denial by Assessing Officer of exemption [Ss. 12, 12A]
Merely on the assumption that exemption claimed under s. 12A had been rightly denied, the Assessing Officer would not be permitted to disallow expenditure incurred by assessee. Further more, since the basis on which the Commissioner issued demand notice was untenable, direction so issued was perverse and would have to be set aside. (AY.2010-11)
Sai Ram Education Trust's v. ACIT (2013) 216 Taxman 182 (Mag.) (HP)(HC)

S.37(1) : Business expenditure – Res judicata – Assessment – Same facts as preceding year [Ss. 133A, 143(3)]
In the preceding year on same facts, Commissioner (Appeals) deleted disallowance on ground that trading additions had already been made in original assessment and this order was confirmed by the Tribunal. Held, where all relevant and material aspects equally applied to present appeal, following aforesaid decision in same terms, appeal for this year would also stand dismissed. (AY.2004-05)
CIT v. Suresn Sharma (Dr.) (2013) 216 Taxman 181 (Mag.) (Raj.)(HC)

S.37(1) : Business expenditure – Sales promotion expenditure – Payments to clients of repute [S. 68]
The Assessing Officer disallowed amount paid to various parties as sales promotion expenses on ground that payment made to those parties were not genuine. The Commissioner (Appeals) allowed appeal and held that assessee was dealing with organisations of repute and many of clients had reimbursed expenses to assessee. The Tribunal held that provisions of s. 68 cannot be invoked while considering expenditure on sales promotion as sought to be done by the Assessing Officer. Expenses were incurred for purpose of business and, therefore, allowable under s. 37(1).(AY. 2003-04 to 2006-07)
CIT v. Sankalp Consumer Products (P.) Ltd. (2013) 216 Taxman 184 (Mag.) (Bom.)(HC)

S.37(1) : Business expenditure – Sale to government department – Alleged bogus purchases – Sales not doubted, merely because suppliers not appeared before the Assessing Officer or Commissioner (Appeals), purchases cannot be disallowed [S.145]
Sales of purchased goods were not doubted and substantial amount of sales made by assessee was to Government department. Further, books of account of assessee had not been rejected. Held, merely because suppliers had not appeared before Assessing Officer or Commissioner (Appeals), it could not be concluded that purchases were not made by assessee. (AY. 2001-02)
CIT v. Nikunj Eximp Enterprises (P.) Ltd. (2013) 216 Taxman 171 (Mag.) (Bom.)(HC)

S.37(1) : Business expenditure – Penalty – Agreement mentions interest as "penal" in nature the said expenditure is allowable as interest
Merely because agreement referred to interest on delayed payment as penal interest, any such payment would not partake character of penalty. Also, since it was not case of revenue that amount paid by assessee was for payment of penalty rather it was *simpliciter* liability of interest on delayed payment of instalments, Tribunal was justified in allowing said payment as business expenditure.
CIT v. Gujarat State Financial Corporation (2013) 216 Taxman 183 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Lease rentals – Treating cost of leased asset as loan.

Lease rentals incurred by assessee were allowable as business expenditure in view of the decision in the cases of *CIT v. Shann Finance (P.) Ltd. [1998] 231 ITR 308 (SC)* and *Rajshree Roadway v. Union of India [2003] 263 ITR 206 (Raj.)* and not as interest, by treating cost of leased asset as loan amount. (AYs. 1996-97 to 2001-02)
CIT v. Banswara Synthetic Ltd. (2013) 216 Taxman 113(Mag.) (Raj.)(HC)

S.37(1) : Business expenditure – Matching principle – Mercantile system of accounting – Civil contractor
Since the assessee was maintaining books on mercantile basis, it had duly debited the impugned amounts of "maistries due" to profit and loss account. This was a finding of fact recorded by the Tribunal which could not be interfered with. The Assessing Officer was not justified in disallowing the expenses on the ground of absence of matching income in the profit and loss account. Since the Assessing Officer had not found anywhere in assessment order that expenses made by assessee towards 'maistry dues' was not supported by any material documents, it was only when matter was remitted from First Appellate Authority to Assessing Officer during pendency of appeal, assessee was not in a position to produce those vouchers, for which he had also given reason that vouchers were damaged during floods. Therefore, addition made by Assessing Officer was to be deleted (AY. 2002-03)
CIT v. T. Arivunidhi (2013) 356 ITR 218 / 216 Taxman 98 (Mad.)(HC)

S.37(1) : Business expenditure – Foreign travel of managers and their wives –Sponsoring programmes – Publicity expenses – Deductible
Held, it was customary in the European countries for the wives to accompany their husbands, and the travelling of the wives along with their husbands could not be said to be personal visits of the wives, but to be regarded as having been undertaken for the purpose of business of the company. The expenses on foreign travel were deductible.
Sponsoring programmes like Centenary Celebrations of Cotton College, State Level National Children Congress and programmes of club in which director was member leads to advertisement and wider acknowledgment of the assessee and its products. Such an expenditure could not but be regarded as having been incurred for the purpose of augmentation of the income of the company because the assessee's banners as sponsors of the events were displayed at the functions and hence, allowable. (AY.2002-03)
CIT v. Williamson Tea (Assam) Ltd. (2013) 355 ITR 323 / 94 DTR 384 / 263 CTR 96 (Gauhati)(HC)

S.37(1) : Business expenditure – Commission – When no defects were found in the books of account disallowance cannot be made only on the ground that percentage of commission paid was more in the relevant year
The assessee had claimed commission expenses. The Assessing Officer disallowed the same to tune of 20% on ground that in preceding year commission expenses was claimed only at 0.7% of gross turnover whereas in year under consideration it was 1.93% of the gross turnover. Held, in absence of any defect in maintenance of books of account, disallowance could not be made merely on ground that expenses incurred in current year were more than that in preceding year. (AY.2005-06)
CIT v. Shree Rama Multi Tech Ltd. (2013) 215 Taxman 157 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Expenditure on installation of new unit
Expenditure on installation of new unit allowed as revenue expenditure considering the facts that new unit constituted extension of existing business; there was intermingling and interlacing of funds; and there was common management. (AY. 2005-06)
CIT v. Havells India Ltd. (2012) 73 DTR 57 / 253 CTR 271 / (2013) 352 ITR 376 (Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – Expenditure on debenture issue

Expenditure in relation to issue of debenture subsequently to be converted into equity shares allowed as revenue expenditure. (AY. 2005-06)
CIT v. Havells India Ltd. (2012) 73 DTR 57 / 253 CTR 271 / (2013) 352 ITR 376 (Delhi)(HC)

S.37(1) : Business expenditure – Advertising expenses – Rasna-Brand value – Commercial expediency – Benefit to third party cannot be the ground for disallowance
The Assessing Officer disallowed the advertisement expenses on the ground that other parties were also benefited and an intangible asset was created, which was not even owned by the assessee. The court held that when the expenditure has been incurred by assessee for publicity or advertisement, it is not for department to consider what commercial expediency justifies such expenditure and the mere fact that on account of expenditure, incidentally some third party is also benefited is no ground to disallow any part of such expenditure. Disallowance was deleted.
CIT v. Khambhatta Family Trust (2013) 215 Taxman 602 (Guj.)(HC)
Editorial: S.L.P of revenue was dismissed. (2013) 359 ITR 2 (St).(S.L.P (C.) No 17051 of 2013 dt 29-4-2013)

S.37(1) : Business expenditure – Freight and transportation expenses – Ad hoc disallowance of 2% expenses – No question of law [S.260A]
The assessee is in the business of transport. The Assessing Officer disallowed the 2% of such expenses. Commissioner (Appeals) deleted the said disallowance. Tribunal upheld the order of Commissioner (Appeals). On appeal by revenue the court held that since the issue was based on factual matrix as regards incurring of freight and transportation expenses with no perversity in findings of appellate authorities, no question of law arose for consideration.
CIT v. Swaminarayan Vijay Carry Trade (P.) Ltd. (2013) 215 Taxman 610 (Guj.)(HC)

S.37(1) : Business expenditure – Chairman's perquisite – Salary paid to staff employed at Chairman's residence is allowable as deduction
The staff deployed at residence of Chairman, for purpose of looking after basic requirements like cleaning of house, attending to official guests, receiving telephones and other sundry responsibilities could be considered as expended wholly for purpose of business and allowed as revenue expenditure.
CIT v. Gujarat Mineral Development Corpn. Ltd. (2013) 215 Taxman 155 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Cash payments to drivers food and miscellaneous expenses is allowable as deduction – Disallowance at ad hoc 10% was not justified – No question of law [S. 260A]
The assessee which is in the business of transport made payments to drivers towards their food and miscellaneous expenses in cash and claimed deduction of such expenses. The Assessing Officer has disallowed 10 % & of such expenses. Commissioner (Appeals) deleted the said disallowance which was confirmed by Tribunal. On appeal by revenue the Court held that since the appellate authorities had dealt with issue of disallowance of expenses appropriately on basis of substantive material available in support thereof, no question of law arose for consideration. Held that since the Assessing Officer had failed to bring on record any evidence suggesting that any portion of such expenses was non-genuine or not for purpose of business, deletion of disallowance was justified.
CIT v. Swaminarayan Vijay Carry Trade (P.) Ltd. (2013) 215 Taxman 610 (Guj.)(HC)

S.37(1) : Business expenditure – Amortised in the books for five years – Premium on redemption of debentures allowable as revenue expenditure [S. 36(1)(iii)]
The assessee had paid premium on redemption of debentures which was spread over a period of 5 years which it claimed deduction of same proportionately either u/s.36(1)(iii)/37(1). Where the discounted amount paid over and above amount received for debentures was a liability incurred by

the company for purposes of business, same was allowable as revenue expenditure u/s 37(1) and not u/s 36(1)(iii).
DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 616 (Guj.)(HC)

S.37(1) : Business expenditure – Bank guarantee – Equity shares and fixed deposits – Written off on liquidation of bank is allowable as revenue expenditure
The assessee company deposited equity shares and fixed deposits with the bank for obtaining bank guarantee for securing government tender. RBI ordered liquidation of said bank. The assessee company wrote off the balance of fixed deposit and equity shares and claimed as business expenditure. Assessing Officer disallowed the claim. On appeal Commissioner (Appeals) allowed the claim. Order of Commissioner (Appeals) was affirmed by the Tribunal. On appeal by revenue the court held that, where equity shares and fixed deposits were deposited for obtaining a bank guarantee were written off on liquidation of bank, the same could be allowed as revenue expenditure.
CIT v. Rao Construction (P.) Ltd. (2013) 215 Taxman 159 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Bogus purchases – Search by Excise department – No adverse finding by Excise department for the relevant year – Addition was deleted
A search was carried out by Central Excise department prior to start of the financial year. However, nothing was brought on record by the income-tax authorities if any adverse findings were given by Central Excise authorities against assessee for assessment year under appeal. Addition only on basis of presumption and assumption that assessee would continue to receive bills without actual delivery, in absence of any material against assessee, such addition could not have been made. (AY. 2003-04)
CIT v. Shree Rama Multi Tech Ltd. (2013) 215 Taxman 158 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Clearing and forwarding – Incorrect understanding
The assessee is in the business of transport. The assessee claimed deduction in respect of clearing and forwarding expenses incurred by it. The Assessing Officer disallowed said expenses. Commissioner (Appeals) deleted the impugned disallowance. Tribunal affirmed the view of Commissioner(Appeals). On appeal by revenue the Court held that the claim of the assessee in respect of the clearing and forwarding expenses incurred by it disallowed by the Assessing Officer was allowed on the ground that the disallowance was based on incorrect understanding of financial transactions and supported by cogent reasons, the disallowance was not justified.
CIT v. Swaminarayan Vijay Carry Trade (P.) Ltd. (2013) 215 Taxman 610 (Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Expenses for registration in foreign countries are allowable as revenue expenditure
Expenses for registration in foreign countries for marketing assessee’s products in foreign countries and promoting sales are allowable as business expenditure. (AY. 1999-2000)
CIT v. Torrent Pharmaceuticals Ltd. (2013) 213 Taxman 297 / 87 DTR 54 / 263 CTR 683 (Guj.)(HC)

S.37(1) : Business expenditure – Expenditure on maintaining garden is allowable as revenue expenditure
Expenditure incurred by assessee on maintaining garden with the object of controlling pollution inside the factory premises is allowable as revenue expenditure. (AY. 1999-2000)
CIT v. Torrent Pharmaceuticals Ltd. (2013) 213 Taxman 297 / 87 DTR 54 / 263 CTR 683 (Guj.)(HC)

S.37(1) : Business expenditure – Sales commission – Services rendered
Where the assessee had paid sales commission, only such part was allowable in respect of which there was sufficient evidence; which were paid through cheques and were also reflected in income-tax return of payees.

CIT v. Suzlon Energy Ltd. (2013) 354 ITR 630 / 215 Taxman 272 / 93 DTR 50 (Guj.) (HC)
Editorial: Tribunal order in Suzlon Energy Ltd v. Dy. CIT 20 ITR 391 (Ahd)(Trib.) is affirmed.

S.37(1) : Business expenditure – Commission – Procuring orders was held to be allowable
The assessee-company paid commission to 'M' for procuring orders of medical equipments which was approved by its Board of directors. Also, the commission received by 'M' had been shown as income in return filed by 'M'. Hence, there remained no doubt as to genuineness of payment in question and, thus, assessee's claim in respect of same was to be allowed.
CIT v. Medical Technologies Ltd. (2013) 215 Taxman 10 (Mag.)(Guj.)(HC)

S.37(1) : Business expenditure – Commission – Steep rise in the amount – Disallowance was not justified
When there was no defect in maintenance of books of account on part of assessee, disallowance only on the ground that there was steep rise in said expenses as compared to earlier year, was not justified.
CIT v. Shree Rama Multi Tech Ltd. (2013) 215 Taxman 10 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Loan expenses for restructuring of loan is revenue expenditure
The assessee claimed deduction of a sum expended towards restructuring of a term loan. The Revenue taking a view that restructuring of such loan would earn enduring benefit to assessee, held it as capital expenditure. Held, where the loan was incidental to assessee's business, any expenditure incurred for restructuring of such loan or for securing borrowing on more advantageous conditions, could not be seen as resulting into benefit of enduring nature, so as to be categorised as capital expenditure.
DCIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 215 Taxman 72 / 356 ITR 460 (Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Software development expenditure is revenue expenditure
Software development and up gradation would include data administration services, information and technology support services, software asset management services, etc., which was in nature of maintenance, back up and support service to existing hardware and software and did not give any fresh or new benefit. Hence, the said expenditure was revenue in nature.(AY. 2008-09)
CIT v. N.J. India Invest (P.) Ltd. (2013) 215 Taxman 78 / 90 DTR 317 (Guj.)(HC)

S.37(1) : Business expenditure – Custodian charges – Custodian charges paid to NSDL is allowable as revenue expenditure
The assessee paid an amount of Rs. 44.43 lakhs to National Security Depository Limited (NSDL), which was a 'one time' custodian charges for shares to dematerialisation of shares. The said amount was claimed as revenue expenditure. The Assessing Officer held that the said amount was paid as good will measures and was capital in nature. The Court held that the test of enduring benefit is not conclusive. Without making payment the assessee could not have made any issue of shares /securities. An obligation was cast on assessee to enter into an agreement with the depository for dematerialization of securities and consequently to such custodian charges. As the expenditure was incurred in the normal course of business the same is allowable as revenue expenditure. Mere fact that share holders have also benefited from the payment will not disentitle the assessee from claiming the expenditure. (AY. 1998-99)
CIT v. Infosys Technologies Ltd. (2014) 360 ITR 714 (Karn.)(HC)

S.37(1) : Business expenditure – Repairs to machinery – Held to be allowable

Court held on facts, the addition made on account of disallowance of machinery repair expenses was rightly deleted by Tribunal.
CIT v. Shree Rama Multi Tech Ltd. (2013) 214 Taxman 129 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Compensation – Against withdrawal of claims against assessee is revenue expenditure
The assessee had contracted with a landlord to take premises on lease for opening its branch, but no formal agreement was entered into. The landlord started the construction of the premises as per assessee's requirements. However, before completion of construction, assessee came to know of the proposed construction of an overbridge over the said property which would cause hindrance to conduct its business and services. The assessee, therefore, terminated the understanding with the landlord and paid compensation to the landlord for the work done, in lieu of withdrawing all claims against the assessee and claimed such amount paid as revenue expenditure. Held, that in applying the test of commercial expediency for determining whether expenditure was wholly and exclusively laid out for the purpose of the business, reasonableness of the expenditure has to be adjudged from the point of view of the businessman and not of the IT department. The deduction was allowed. (AY. 2003-04)
CIT v. UTI Bank Ltd. (2013) 214 Taxman 124 (Mag.) (Guj.)(HC)

S.37(1) : Business expenditure – Provision for consultancy charges is allowable – Excess provision reversed in subsequent year
The assessee made provision for consultancy charges and professional fees in relevant assessment year, which was found to be in excess and reversed in subsequent year. The Assessing Officer disallowed provision, as it did not correlate to actual figures. The Assessee claimed that provision was made at year end when accounts were to be finalized, based on original claims of consultants/ professionals, as negotiations were still under way. Held, where consultant/professional fees were under negotiation at year end when accounts were to be finalised, provision made on basis of original claims were allowable, since, on amount being settled for lesser figure, excess provision had been reversed and offered to income in subsequent year. (AY.2004-05)
CIT v. Armour Consultants (P.) Ltd. (2013) 355 ITR 418 / 214 Taxman 444 / 85 DTR 361 (Mad.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Product registration – Trade mark registration – Revenue in nature
The issue before the High Court as whether the expenses made to Drug Regulation Authorities in various countries for product registration are revenue in nature. The Tribunal held that, such products were in existence and nothing new were acquired by the assessee, the expenditure only enabled the assessee to run the existing business smoothly hence the said expenses are revenue in nature. As regards the expenditure in respect of Trade mark and patent following the ratio of Supreme Court in *CIT v. Finlay Mills Limited (1951) 20 ITR 475 (SC)*, wherein it is observed that the advantage derived by the owner of the trade mark registration falls within this class of expenditure, which is revenue in nature. The fact that a trade mark after registration could be separately assigned and not as a part of the goodwill of the business only does not also make the expenditure for registration as a capital expenditure, that is only an additional and incidental facility given to the owner of the Trademark. It adds nothing to trademark itself. The appeal of revenue was dismissed.
CIT v. Cadaila Healthcare Ltd. (2013) 259 CTR 433 / 214 Taxman 672 / 86 DTR 337(Guj.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Non-compete fee – Matter remanded
High Court observed that Tribunal upheld that finding of the CIT(A) that the non-compete fees paid by the assessee was revenue expenditure without any discussion on the issue. Matter remanded to the Tribunal to pass a reasoned order. (AY.2001-02)

CIT v. Glenmark Pharmaceutical Ltd. (2013) 351 ITR 359 / 85 DTR 169 / 213 Taxman 315 (Bom.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Expenditure on marketing knowhow is revenue expenditure

Expenditure incurred for acquisition of marketing know-how which would lead to improvement in its existing business resulting in higher sales and consequently higher profitability as the knowledge acquired by the assessee would assist in improving the marketing strategy, expenses incurred were allowable as revenue expenditure. (AY.2001-02)

CIT v. Glenmark Pharmaceutical Ltd. (2013) 351 ITR 359 / 85 DTR 169 / 213 Taxman 315 (Bom.)(HC)

S.37(1) : Business expenditure – Unlawful purpose – Circular – Expenditure which is not in violation of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, then he may legitimately claim a deduction

The sum and substance of Circular No. 5 of 2012, dated August 1, 2012, issued by the CBDT is that any expenditure incurred by an assessee for any purpose which is prohibited by law shall not be deemed to have been incurred for the purpose of business or profession. Therefore, if the assessee satisfies the assessing authority that the expenditure is not in violation of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002, then he may legitimately claim a deduction, but it is for the assessee to satisfy the Assessing Officer that the expense is not in violation of the Regulations.

Confederation of Indian Pharmaceutical Industry (SSI) v. CBDT (2013) 353 ITR 388 / 258 CTR 332 / 86 DTR 34 (HP)(HC)

S.37(1) : Business expenditure – Foreign travel expenses disallowance of 20% expenses was justified

The Assessing Officer disallowed such foreign travel expenses on ground that these were not incurred for purpose of business. The Tribunal found that substantial expenditure on tour and travel had been incurred and allowed by revenue in earlier years as well as in subsequent year. However, since full details and evidence were not available to quantify as to how much expenditure had been incurred wholly and exclusively for purpose of business, the Tribunal disallowed twenty per cent of the said expenditure. Held, no substantial question of law arose. (AY. 2002-03)

CIT v. Superior Crafts (2013) 353 ITR 101 / 82 DTR 209 (Delhi)(HC)

S.37(1) : Business expenditure – Provision for installation and service charges payable under warranty in respect of office equipment – Provision not made on any scientific data and past experience the provision being *ad hoc* the same is not allowable

The provision for the service charges payable by the assessee by way of warranty provision was not made on any scientific data. The provision made was on ad hoc basis. Even though the warranty period was one year and the assessee had to make payment to the service provider as and when a demand was made, normally, such payment claim had to come during the period of warranty or within a reasonable time. Since more than 60 per cent of the provision remained unpaid even after more than two years since the date of sale, the assessee had not made the provision after taking stock of the situation properly. Thus, such an ad hoc provision made by the assessee would not be entitled to deduction. (AY. 1990-91 to 1997-98)

CIT v. Forbes Campbell Finance Ltd. (2013) 352 ITR 602 / 86 DTR 406 (Delhi)(HC)

S.37(1) : Business expenditure – Accounting – Provision for completed expenses and expenses incurred on completed project

Expenses claimed by the assessee under the heads provisions for completed expenses and expenses incurred on completed project were allowable. (AY.1987-88, 1988-89)
CIT v. Ansal Properties and Industries Ltd. (2013) 352 ITR 637 / 87 DTR 360 / 216 Taxman 103 (Mag.) (Delhi)(HC)

S.37(1) : Business expenditure – Commercial expediency – Volker Committee report-Fact that payment is used for 'illegal' purpose does not attract Explanation to s. 37(1), deduction was justified [S.260A]
The assessee exported tea to Iraq under the 'Oil for Food Program', as sanctioned by the United Nations. It paid commission of ` 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 AO, acting on the report, held that the commission paid by the assessee was "illegal" and not allowable under the Explanation to s. 37(1). This was reversed by the CIT(A). On appeal by the department, the Tribunal (72 DTR 425) upheld the stand of the assessee on the ground that even if the amounts paid to Alia were actually kickbacks to Iraqi regime, that fact *per se* would not attract Explanation to s. 37(1). It was pointed out that 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 and that there was no specific violation of law by the assessee. It was emphasized that what the recipient of the payment does is not important because the assessee has no control over the matter. The onus of demonstrating that the assessee was aware that the payments were intended for kickbacks is on the AO which has not been discharged. It was held that the "purpose" of the expenditure has to be seen and if the payment is for *bona fide* business purposes, the fact that they end up being used as illegal kickbacks, will not attract Explanation to s. 37(1). On appeal by the department to the High Court, HELD dismissing the appeal:
The department could not satisfy us as to why were the findings recorded by the CIT(A) and the Tribunal are incorrect either on factor in law. There is, as such, no reason why the appeal should be entertained. The appeal is, therefore, dismissed.
CIT v. Rajarani Exports Pvt. Ltd. (2013) 217 Taxman 84 / 92 DTR 305 / 262 CTR 92 /(2014) 361 ITR 152 (Cal)(HC)
Editorial: DCIT v. Rajarani Exports Pvt. Ltd. (2012) 72 DTR 425 / 147 TTJ 171 (Kol.)(Trib.) is affirmed.

S.37(1) : Business expenditure – Capital or revenue – Expenditure relating to voluntary retirement scheme in respect of two units – Expenditure incurred for purpose of restructuring to achieve modernization is allowable as revenue expenditure
The closure of two units had not resulted in closure of business. This was done for the purposes of restructuring so as to achieve modernisation. The voluntary retirement scheme offered due to labour problems or as part of the restructuring process would not make a difference. The incidental expenses incurred in restructuring the business had to be considered as expenditure incurred in the course of conducting the business and allowable under section 37(1). (AY.1999-2000)
CIT v. Foseco India Ltd. (2013) 352 ITR 320 / 216 Taxman 103 (Mag) (Bom.)(HC)

S.37(1) : Business expenditure – Distribution expenses – Failure to verify entries
The Assessing Officer himself had not verified the entries though he recorded a finding that the distribution expenses to the extent of Rs. 75 lakhs were genuine. Thus, there was no reason without verification of the record to decline the remaining amount of distribution expenses. Order of Tribunal was confirmed. (AY. 2007-08)
CIT v. Shree Krishna Enterprises (2013) 214 Taxman 221 (P&H)(HC)

S.37(1) : Business expenditure – Club membership fees – Corporate membership – Revenue expenditure

Corporate membership, for running the business with a view to produce profit, does not bring into existence an asset or an advantage for the enduring benefit of the business. It is expenditure incurred for the period of membership and is not long lasting. By subscribing to the membership of a club, no capital asset is created or comes into existence. Hence, expenditure was allowable as revenue expenditure.

CIT v. Groz Beckert Asia Ltd. (2013) 351 ITR 196 / 257 CTR 1 / 214 Taxman 205 / 84 DTR 1 (FB) (P&H)(HC)

S.37(1) : Business expenditure – Lease rent – Genuineness of lease – Lease rent was allowed as deduction

The assessee had no right to transfer the machinery in any form, was obliged to re-deliver the equipment upon termination of lease agreement, was not to part with possession and not to make alteration in the equipment with the stipulation that additions would belong to the lessor; and the lessor was entitled to claim depreciation during the lease period. Hence, lease rent was allowed as deduction. (AY. 2000-01)

CIT v. Banswara Syntex Ltd. (2013) 351 ITR 419 / 214 Taxman 214 / 84 DTR 127 (Raj.)(HC)

S.37(1) : Business expenditure – Rent – Paid to non-owner – Held not allowable as deduction

Assessee is engaged in manufacturing and exporting soya deoiled cake. It entered into agreement with CRL in terms of which CRL agreed to provide godown space at four places. As per said agreement, assessee was obliged to pay godown rent irrespective of whether such godowns were utilised or not. Assessee filed its return claiming deduction of godown rent. Assessing Officer finding that CRL was neither owner nor in possession of those godowns when rent agreement was made or at any time thereafter, rejected assessee's claim. Tribunal confirmed order of Assessing Officer. The Court held that the Tribunal also noted that assessee was to execute its export contracts latest by 15-2-1992. Assessee however, rented the godown for more than a full year thereafter, till 31-3-1993. The observations and conclusions of the Tribunal being purely factual in nature and also otherwise supported by documents and other evidence on record, there is no reason to interfere with the same. (AY.1992-93)

Gujarat Ambuja Protiens Ltd. v. ACIT (2013) 214 Taxman 310 (Guj.)(HC)

S.37(1) : Business expenditure – Method of accounting – Provision – Provision for completed expenses and expenses incurred on completed project is allowable [S.145]

The question raised before the court was the expenses claimed by the assessee under the head "provisions for completed expenses and expenses incurred on completed project" is allowable even though the Department has not accepted the system of accounting followed the assessee. Following the ratio in *CIT v. Ansal Properties and Industries (2013) 352 ITR 637 (Delhi)(HC)*, the issue is decided in favour of assessee.

CIT v. Ansal Housing Finance & Leasing Co. Ltd. (2013)354 ITR 180/ 213 Taxman 143 / 88 DTR 227 (Delhi)(HC)

CIT v. Ansal Properties and Industries Ltd. (2013) 354 ITR 180 / 88 DTR 227 (Delhi)(HC)

CIT v. Ansal Housing and Construction Ltd. (2013) 354 ITR 180 / 88 DTR 227 (Delhi)(HC)

S.37(1) : Business expenditure – Installation charges incurred for installation of plant and machinery are capital in nature

Installation charges and other charges necessary to bring an asset into existence and to put the machinery in a working condition would constitute capital expenditure. More so, when the amount is reflected in balance sheet under head 'Plant and machinery given on lease'.

Bharti Televentures Ltd. v. Addl. CIT (2013) 81 DTR 225 (Delhi)(HC)

S.37(1) : Business expenditure – Provision for Warranty allowable as deduction
Provision for warranty is allowable as deduction. (AY.1994-95 to 1996-97)
CIT v. Maruti Suzuki India Ltd. (2013) 212 Taxman 603 / 81 DTR 152 / 255 CTR 140 (Delhi)(HC)

S.37(1) : Business expenditure – Penalty, fine – Forfeiture of the bank guarantee is compensatory – No disallowance can be made by applying the Explanation to S. 37(1) in respect of compensatory payments
The assessee, a manufacturer of garments, was granted an entitlement by the Apparel Export Promotion Council (APEC) for export of garments and knit wares. In consideration for the export entitlement the assessee furnished a bank guarantee in support of its commitment that it shall abide by the terms and conditions and produce proof of shipment. It was also provided that failure to fulfil the export obligation would render the bank guarantee to being forfeited/encashed. The assessee did not utilise the export entitlement which led APEC to encash the bank guarantee. The assessee recorded the said payment as penalty in its books of account and claimed deduction u/s 37(1). The AO rejected the claim on the ground that as the payment was by way of "penalty" it could not be allowed under the Explanation to s. 37(1). However, the CIT(A) and ITAT allowed the claim. On appeal by the department to the High Court, dismissing the appeal, the High Court held that, the assessee took a business decision not to honour its commitment of fulfilling the export entitlement in view of loss being suffered by it. The genuineness of the claim of expenditure being for business purpose is not disputed. The assessee has not contravened any provision of law and the forfeiture of the bank guarantee is compensatory in nature and does not attract the Explanation to s. 37(1).(AY. 2004-05)
CIT v. Regalia Apparels Pvt. Ltd. (2013) 352 ITR 71 / 214 Taxman 123 (Mag.) / 88 DTR 151 / 260 CTR 416 (Bom.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Brand name – Royalty – Assessee allowed to use know-how and information royalty is deductible
For use of the brand name of MMB and for the technical assistance rendered by MMB to the assessee for manufacturing beer, the assessee paid royalty to MMB. The Assessing Officer, held that they were capital expenditure. The Commissioner (Appeals) and the Tribunal held that they were revenue expenditure. On appeal the Court held that in terms of the technical assistance agreement, the assessee was entitled to use the know-how supplied by MMB for the manufacture of the products. The know-how and the information received by the assessee directly or indirectly from MMB was to be kept strictly confidential. The assessee was entitled to use the trade mark Golden Eagle of MMB. The payment of royalty was, therefore, in the nature of expenditure incurred for carrying on business with the available know-how rather than for accretion to the capital base or gaining an advantage in the capital field of the assessee. Moreover, for assessment years 1980-81 to 1982-83, the Assessing Officer himself had come to the conclusion that the payment of royalty made by the assessee was in the nature of revenue expenditure. The payment of royalty was deductible in the assessment years 1983-84 to 1988-89. (AY. 1983-84 to 1988-89)
CIT v. Artos Breweries Ltd. (2013) 351 ITR 133 / 83 DTR 277 / 215 Taxman 80 (Mag.)(AP)(HC)

S.37(1) : Business expenditure – Bogus purchases – Estimation of profit – Tribunal applying twelve and half per cent held to be justified
The assessee is in the business of trading in iron and steel. During the reassessment proceedings, it was found that purchases worth Rs. 61.40 lakhs were not supported by sufficient evidence. Purchase of such goods from various suppliers was verified, but it was found that such parties had not supplied the goods as named by the assessee. The Assessing Officer made an addition of the entire amount of purchase of Rs. 61.40 lakhs. The Commissioner (Appeals) found that though the purchases were not made from the parties from whom the assessee claimed, there was complete quantitative tally of the materials purchased and sold. He was of the view that such materials were purchased from the open

market incurring cash payment and bills were procured from various sources. He added only the profit element and not the entire amount of the purchases, for the limited addition to 30 per cent of the total amount and reduced the amount to Rs. 18.42 lakhs. The Tribunal allowed further relief to the assessee and retained the addition to the level of twelve and half per cent in pursuance of the various purchases. On appeal, dismissing the appeal, the Court held that the assessee was a trader and the Tribunal having retained twelve and half per cent of the purchase towards its possible profit, there was no reason to interfere in the order of the Tribunal. (AY. 2003-04)
CIT v. Sathyanarayan P. Rathi (2013) 351 ITR 150 (Guj.)(HC)

S.37(1) : Business expenditure – Loss on account of change in rates of foreign exchange – Notional loss – Matter remanded to Assessing Officer to decide whether claim allowable
The assessee claimed deductions by way of loss in its business income, due to fluctuations in the rate of exchange on the outstanding dues payable in foreign exchange, which the assessee had raised for the purpose of buying its stock-in-trade. The Assessing Officer rejected the claim on the ground that it was notional loss and, therefore, not allowable. The Commissioner (Appeals) and the Tribunal held that the assessee could claim deduction on notional basis. On appeal:
Held, allowing the appeal, such claim would have to be examined in the light of the fulfillment of the conditions as indicated by the Supreme Court, for which purpose, the matter was remitted to the Assessing Officer, who had to apply the tests to the claim made by the assessee and then either admit the claim or reject it depending upon the assessee satisfying the conditions.
The Court held that the claim of notional can be entertained subject to the fulfilment of the six conditions that (i) the system of accounting followed by the assessee is the mercantile system; (ii) the same system is followed by the assessee from the very beginning and if there was a change in the system, the change was bona fide; (iii) the assessee has given the same treatment to losses claimed to have accrued and to the gains that may accrue to it ; (iv) the assessee has been consistent and definite in making entries in the account books in respect of losses and gains; (v) the method adopted by the assessee for making entries in the books both in respect of losses and gains is in accordance with nationally accepted accounting standards; and (vi) the system adopted by the assessee is fair and reasonable and not adopted only with a view to reducing the incidence of taxation. The ratio of *CIT v. Woodward Governor India Pvt. Ltd. (2009) 312 ITR 254 (SC)* applied. (AY. 2000-01)
CIT v. Wipro Finance Ltd. (2013) 351 ITR 153 / 213 Taxman 293 (Karn.)(HC)

S.37(1) : Business expenditure – Capital or revenue – Additions cannot be made only on the basis of statement of director – Matter remanded
Assessee-firm filed return claiming depreciation on iron rolls of machinery. Later on it filed revised return contending that during production rolls were used to avoid friction and such rolls suffer damage necessitating frequent replacement and hence, be treated as ‘current repairs. However, only on basis of no objection of managing partner to treat rolls as depreciable assets, Assessing Officer held same as capital expenditure. When a specific question was raised before Tribunal as regards nature of expenditure, Tribunal should have adverted to issues raised viz., to consider whether expenditure was, in fact, a ‘revenue’ or ‘capital expenditure’; it should not have based its decision on statement of managing partner. (AY.1992-93)
Chamundi Steel Rolling Mills v. ACIT (2013) 212 Taxman 30 (Mad.)(HC)

S.37(1) : Business expenditure – Sales promotion expenses – Held to be allowable
Amount paid by assessee to sales/field organisers who rendered specific services under sales agreements after sale of cement was decontrolled, was to be allowed as business expenditure. (AY. 1985-86)
CIT v. Dalmia Cement (Bharat) Ltd. (2013) 357 ITR 419 / 263 CTR 308 / 93 DTR 1 / 218 Taxman 327 (Delhi)(HC)

S.37(1) : Business expenditure – Pooja expenses – At temple located inside the factory is allowable

Expenditure incurred by assessee on Pooja performed at temple located inside factory premises was to be allowed as business expenditure. (AY. 1985-86)

CIT v. Dalmia Cement (Bharat) Ltd. (2013) 357 ITR 419 / 263 CTR 308 / 93 DTR 1 / 218 Taxman 327 (Delhi)(HC)

S.37(1) : Business expenditure – Capital or revenue – Operating license fee – PSTN charges – Dealers commission – After–Setting up of business – Before Commencement of business – Allowable as revenue expenses – Foreign tour Expenses – Revenue expenditure (S. 35ABB)

The Court held that the operating license fee for providing cellular mobile service paid by assessee to J.T. Mobiles Ltd. who had received telecom license from Government is allowable as business expenditure. The fact that the assessee had in its books of accounts spread over the expenditure over a period of 10 years would not change the nature of expenditure. Provisions of section 35ABB would not apply. Expenses incurred on account of PSTN charges and dealer's commission after setting up of a business and before the commencement of business is allowable as revenue expenditure. Expenditure on foreign travel did not give rise to any enduring benefits but only enabled the assessee to run its business to achieve higher profits and therefore the said expenditure is allowable as revenue expenditure. The appeal of revenue was dismissed. (AY. 1998-99)

CIT v. Evergrowth Telecom Ltd. (2013) 81 DTR 412 / 256 CTR 84 / 213 Taxman 299 (Bom.) (HC)

S.37(1) : Business expenditure – Capital or revenue – Repairs and renovation – Leased business premises – Revenue expenditure

The assessee is in occupation of leased premises, carried out renovation work by providing false ceiling and furniture modification spending Rs. 1.71 lakhs and Rs. 9.19 lakhs. The assessee claimed that the sums were eligible for depreciation at 100 per cent. However, this expenditure was treated as capital expenditure eligible for depreciation at 10 per cent. This was upheld by the Tribunal. On appeal to the High Court,held, that the temporary structure by means of false ceiling and office renovation had not resulted in any capital expenditure. (AY. 1995-96)

Thiru Arooran Sugars Ltd. v. Dy. CIT (2013) 350 ITR 324 / 213 Taxman 90 (Mad.)(HC)

S.37(1) : Business expenditure – No income generated – Disallowance was expenditure was justified [Rule 9B(4)]

Expenditure incurred by assessee, engaged in the business of printing and publishing of newspapers and magazines, on acquisition of distribution rights of feature films did not result in income being generated out of acquisition of film rights during the year. Hence, disallowance of expenditure was justified. (AY. 2007-08)

Malayala Manorama Co. Ltd. v. ACIT (2013) 28 ITR 144 / (2014) 62 SOT 145 (Cochin) (Trib.)

S.37(1) : Business expenditure – Commission and foreign travel – Burden of proof

Assessee failed to demonstrate nature and extent of service rendered by agent and proper evidence. Held, burden of proof on the assessee was not discharged. Hence, the disallowance was proper. (AY. 2008-09)

Kanu Kitchen Kulture P. Ltd v. DCIT (2014) 65 SOT 130 / 49 Taxmann.com 64 / (2013) 28 ITR 49 (Delhi)(Trib.)

S.37(1) : Business expenditure – Advantage of enduring nature – Payments under voluntary retirement schemes etc.

There was no creation of any asset or any advantage of enduring nature in payments under voluntary retirement schemes, gratuity payments and other terminal benefits. Hence, these payments were allowable. (AY. 1998-99)

Addl. CIT v. Nicholas Piramal India Ltd. (2013) 27 ITR 182 / (2014) 147 ITD 675 (Mum.)(Trib.)

S.37(1) : Business expenditure – Street lights, ambulance, public garden – Allowability of expenses
Expenses for providing street lights on road to assessee's factory, ambulance for medical emergencies for residents of village and cost of public garden was allowable as deduction. (AY. 1998-99)
Addl. CIT v. Nicholas Piramal India Ltd. (2013) 27 ITR 182 / (2014) 147 ITD 675 (Mum.)(Trib.)

S.37(1) : Business expenditure – Negotiations for settling dispute – Professional fees
Professional fees paid to individual who was instrumental in carrying out negotiations for settling dispute and receipt of compensation was to be allowed as deduction. (AY. 1998-99)
Parle Soft Drinks P. Ltd. v. JCIT (2013) 27 ITR 663 (Mum.)(Trib.)

S.37(1) : Business expenditure – Payment to sister concern – Onus on assessee [S.40A(2)(b)]
When no evidence was adduced by assessee to prove work charges paid to sister concern were reasonable and no comparable figures of job work rate prevailing in market were produced, disallowance was confirmed. (AYs. 2001-02, 2004-05)
Whiteline Chemicals v. ITO (2013) 28 ITR 523 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Deposits – Taxed in earlier years
Deposits received by assessee in respect of bottles and crates as trade deposits were taxed in earlier years as unexplained credit. In the current year, the assessee contended that it refunded the deposits. Matter was remanded to AO to verify whether deposits were taxed and refunded to customers.(AY. 1998-99)
Parle Soft Drinks P. Ltd. v. JCIT (2013) 27 ITR 663 (Mum.)(Trib.)

S.37(1) : Business expenditure – Prior period items – Year of allowability
The contention that amount allowable in this year was deducted in computing income upon denial of claim in following year was rejected since no details were provided by assessee to show how amount pertained to this year, claim was held to be not allowable. (AY. 1998-99)
Parle Soft Drinks P. Ltd. v. JCIT (2013) 27 ITR 663 (Mum.)(Trib.)

S.37(1) : Business expenditure – Leasehold expenses – Amortisation
Since the assessee had only right to use leasehold land for purpose of its business, expenses amortised over period of lease were deductible. (AY. 2006-07, 2007-08)
General Motors India P. Ltd. v. DCIT (2013) 27 ITR 373 / (2014) 146 ITD 559 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Customary gifts – Business expediency
Customary gifts to dealers, business associates, employees, etc., during festivals amounted to business expediency, and hence, allowable. (AY. 2006-07, 2007-08)
General Motors India P. Ltd. v. DCIT (2013) 27 ITR 373 / (2014) 146 ITD 559 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Provision – Warranty and replacement expenses
Since there was no finding with respect to the compliance with the guidelines of the Supreme Court by the assessee in the order of the AO or the DRP, the AO was to decide the issue afresh in the light of the decision in the case of *Rotork Controls India P. Ltd. v. CIT [2009] 314 ITR 62 (SC)* after giving a reasonable opportunity of hearing to the assessee. Matter was remanded. (AYs. 2006-07, 2007-08)
GE India Industrial P. Ltd. v. DCIT (2013) 27 ITR 543 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Identity of parties – Purpose of payment not disputed

The assessee had proved the identity of payee and the payee-parties had confirmed the payment made to them by account payee cheque and had given their permanent account number in confirmation thereof. The business purpose of commission payments was not disputed by the Department. Therefore, there was no case for disallowance. (AY. 2001-02, 2004-05)
Whiteline Chemicals v. ITO (2013) 28 ITR 523 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Trade discount – Business purpose
Trade discount allowed by assessee in normal course of business was allowable as deduction when business purpose of trade discount was not controverted by Department. (AYs. 2001-02, 2004-05)
Whiteline Chemicals v. ITO (2013) 28 ITR 523 (Trib.)(Ahd.)

S.37(1) : Business expenditure – Capital expenditure – Earlier year's appeal
In earlier year, expenditure was treated as capital in earlier year and depreciation was granted. The assessee claimed depreciation at 60% on the balance in current year. Held, if appeal for earlier year is decided in favour of the assessee, AO should rectify assessment for present year. (AYs. 2006-07, 2007-08)
GE India Industrial P. Ltd. v. DCIT (2013) 27 ITR 543 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Capital expenditure – Capital asset
Assessee, a co-operative society engaged in dairy development, incurred expenditure to construct a building for milk producers' co-operative societies. Held, the building facilitated carrying out of business objects more effectively, and hence, the expenditure was revenue. (AY. 2008-09)
ACIT v. Shimoga District Milk Producers Societies Union Ltd. (2013) 28 ITR 369 (Bang.)(Trib.)

S.37(1) : Business expenditure – Ad hoc disallowance – Documentary evidence
Expenditure under the head "workmen and staff welfare" from preceding year owing was on account of increase in employees' strength. *Ad hoc* disallowance of 10% was not proper in the absence of documentary evidence to suggest that *ad hoc* disallowance was warranted. (AYs. 2006-07, 2007-08)
General Motors India P. Ltd. v. DCIT (2013) 27 ITR 373 / (2014) 146 ITD 559 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Year of allowability – Year of raising of bill
Bill for services provided by foreign technicians was raised on April 1, 1997 and received by assessee in the year under consideration. Hence, the same was allowable. (AY. 1998-99)
Addl. CIT v. Nicholas Piramal India Ltd. (2013) 27 ITR 182 / (2014) 147 ITD 675 (Mum.)(Trib.)

S.37(1) : Business expenditure – Shifting of business – Closure of business
Assessee's plant was forced to close down as tablets manufactured did not conform to the prescribed specifications i.e. unit closed as business necessity arising out of statutory compulsion. Expenses incurred after closure were allowable as business was not discontinued but shifted to other places. (AY. 1998-99)
Addl. CIT v. Nicholas Piramal India Ltd. (2013) 27 ITR 182 / (2014) 147 ITD 675 (Mum.)(Trib.)

S.37(1) : Business expenditure – Research and development expenses – Expenses of revenue in nature allowable as normal business expenditure [S.35]
Assessee manufacturer of automobile parts claimed certain expenditure as research and development expenditure eligible for deduction under section 35 as 100% depreciation. AO allowed 25% depreciation treating the same as capital in nature. CIT(A) Confirmed the same. On appeal the Tribunal held that these expenditures were found to have been incurred on raw material, sub-contracting charges, power and fuel, salary and wages, bonus, PF, ESI, LWF, leave encashment, canteen, telephone expenses, printing and stationery, foreign travel expenses and interest. Tribunal held that none of these expenditure could be said to have formed a new asset. Tribunal also held that

since AO had admitted that these expenditure were relatable to business of assessee, then simply for reasons that these have given some enduring benefit to assessee, same could not be regarded as capital expenditure. Alternative claim of assessee under section 37(1) was allowed. (AY.2006-07).
Perfect Engineering Products Ltd. v. Addl.CIT (2013) 60 SOT 126 (Mum.)(Trib.)

S.37(1) : Business expenditure – Compensation paid to prospective buyers was held to be allowable as business expenditure
Assessee was dealing in real estate transactions. It received advance against booking of some flats from four parties. Since said deals could not be materialised, it returned said sum along with interest thereon to said parties. It claimed said payment as compensation in its return. AO held that assessee in garb of said transactions re-purchased plots from said parties and had paid purchase consideration, which had been claimed as compensation, it was not revenue expenditure. Tribunal held that since plots never left ownership and possession of assessee, it could not be said that those plots were repurchased by assessee, since payment of interest was made as a sound business policy and was in course of business of assessee-company to compensate prospective buyers, it was rightly claimed as business expenditure. (AY.2001-02)
Dy. CIT v. Vatika Town Ships (P.) Ltd. (2013) 60 SOT 115 (Delhi)(Trib.)

S.37(1) : Business expenditure – 15% of expenses was disallowed
Genuineness of the payments was established by the assessee. However, the inflation of expenditure by the assessee could not be ruled out and to meet the ends of justice, 15% of this payment was to be disallowed.
Regarding the disallowance of Rs.1,86,12,721 paid to other subcontractors, the Assessing Officer sent 750 letters to the sub-contractors, out of which 221 letters were returned undelivered and no reply was received from 414 sub-contractors. The payment in respect of the returned letters aggregated to Rs. 37,22,54,421. The assessee was held not able to prove the genuineness of the payment. Considering this, the Assessing Officer disallowed only 5% of Rs. 37,22,54,421 which was very reasonable and was to be confirmed. In respect of power and fuel expenses, which were not supported by proper vouchers and bills the Assessing Officer was to disallow 15% of this expenditure. (AY. 2008-09)
IJM (India) Infrastructure Ltd. v. ACIT (2013) 28 ITR 176 / (2014) 147 ITD 437 (Hyd.)(Trib.)

S.37(1) : Business expenditure – Developing new line of business – Revenue expenditure
Expenditure incurred for consultancy charges for developing new line of business is revenue expenditure. (AY 2006-07)
Agrani Telecom Ltd. v. ACIT (2013) 28 ITR 58 (Mum.)(Trib.)

S.37(1) : Business expenditure – Nexus with business – Loss
Assessee, a co-operative society of sugarcane producers, provided pesticides and seeds at subsidised rates and purchased sugarcane crop from its members. Sale was effected at reduced prices to farmers. This was a direct business purpose and loss to be allowed. (AY. 2004-05)
ACIT v. Shree Khedut Sahakari Khand Udhyog Mandli Ltd. (2013) 28 ITR 556 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Excessive or unreasonable payments – Books of Accounts not produced – 15% disallowance was proper
Held, that the assessee did not produce the books of account and bills and vouchers for verification before the Assessing Officer on the date of hearing and no justification was given for not producing them. Therefore, the remaining vouchers were doubted. Hence, disallowance of 15% expenditure was proper.(AYs. 2004-05, 2005-06)
Brigade Global Services P. Ltd. v. ITO (2013) 28 ITR 411 / 143 ITD 59 (Hyd.)(Trib.)

S.37(1) : Business expenditure – Retainership fee – Guest house expenses

Expenditure incurred on retainership fee and guest house expenses was allowable. (AY. 2005-2006)
ACIT v. Phillips Carbon Black Ltd. (2013) 28 ITR 603 (Kol.)(Trib.)

S.37(1) : Business expenditure – Expediency – Personal use
Assessee incurred expenditure on flying rights of aircraft. Held, Assessing Officer was not competent to decide business expediency of expenditure, and since assessee was a limited company, no disallowance of expenditure could be made on account of personal use by directors of company. (AY. 2005-06)
ACIT v. Phillips Carbon Black Ltd. (2013) 28 ITR 603 (Kol.)(Trib.)

S.37(1) : Business expenditure – Trusteeship and Management fees – Allowable expenditure
Assessing Officer disallowed expenses of being trusteeship and management fees on ground that assessee was not a true venture capital fund, and consequently, payments on this account were diversion of funds for non-business consideration. CIT(A), deleted disallowance of said expenses holding that in light of valid and existing registration granted by SEBI, assessee was to be considered as a venture capital fund. Tribunal held that since assessee had incurred expenditure as per terms of deed and Assessing Officer had not brought any material on record to prove that assessee had not incurred genuine expenditure, Commissioner (Appeals) was justified in deleting disallowance. (AY.2007-08)
ACIT v. Small is Beautiful (2013) 60 SOT 153 (URO) / 26 ITR 41 / 38 taxmann.com 310 (Hyd.)(Trib.)

S.37(1) : Business expenditure – Sales promotion expenses – Discount from IATA Airlines – Allowable as deduction
AO disallowed claim of deduction comprising of discount from IATA Airlines and others for reason that assessee had debited net amount to profit and loss account under head sales promotion expenses. CIT(A) after verifying sales promotion ledger account of assessee observed that sales promotion expenses debited in profit and loss account were expenses other than expenses claimed as deduction from commission income and therefore, there was no double claim of these expenses as observed by AO. He, accordingly, deleted disallowance .Tribunal confirmed the order.(AY.2007-08)
ACIT v. Caravan Travels (2013) 26 ITR 372 / 60 SOT 145 (URO) (Kol.)(Trib.)

S.37(1) : Business Expenditure – Not provided the bill for service rendered –Disallowance was held to be justified
Assessee claimed expenditure for services rendered by ‘P’. ‘P’ had shown that amount as advance from assessee. Tribunal held that the amount could not be allowed as revenue expenditure till assessee could produce invoices for full amount claimed.(AYs.2005-06, 2006-07)
Dy. CIT v. Vistas Wind Technology India (P.) Ltd. (2012) 20 ITR 243 / (2013) 60 SOT 10 (URO) / 31 taxmann.com 356 (Chennai)(Trib.)

S.37(1) : Business expenditure – Same Business – Film production – Consultancy fees for film production was held to be allowable [Rule 9A of the Rule, 1962]
The assessee company is engaged in the business of trading and investment in shares and debentures. During the relevant previous year, the assessee ventured into film production. AO disallowed deduction of consultancy fees paid on ground that it was not in connection with assessee’s existing business and it was a pre-commencement expenditure for business of film production. The AO. considered the applicability of rule 9A of the IT Rules, 1962. The CIT(A) allowed the deduction of the Consultancy fees by stating that rule 9A was not applicable to the assessee Company. On appeal by the revenue the ITAT held that although the assessee was engaged in the business of trading in investment and securities, there was complete unity of control and management, which has not been disputed even by the revenue and it was held that if there is common management and common control of the business, the new line of business constitutes expansion of the existing business. The

business relating to film production was set up in the year under consideration and the expenditure in question on payment of consultancy fees having incurred by the assessee in connection with the said business, the same was allowable as deduction even though the execution of the contract work for film production was not commenced during the year under consideration. Rule 9A is not application to consultation fees paid.(AY. 2003-04)
ACCC v. Ashwal Investment (P.) Ltd. (2013) 60 SOT 99 (Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Legal and professional fees – Development of software – Revenue in nature
The assessee claimed legal and professional expenses. The AO. held that the sum was spent for development of ERO software systems which results into the creation of assets, therefore treated the said expenditure as capital in nature and allowed depreciation at the rate of 60%. CIT(A) deleted the additions .Tribunal held that amount spent cannot be considered as capital in nature always unless an asset was created. Tribunal followed the ratio in the case of *CIT v. Raychem, RPG Ltd (2012) 346 ITR 138 (Bom.)(HC)*. AY. 2007-08)
Gujarat Reclaim & Rubber Products Ltd. v. Ad.CIT (2013) 60 SOT 22 (Mum.)(Trib.)

S.37(1) : Business expenditure – Construction of temporary jetty – Allowable as revenue expenditure – Matter remanded for verification
The assessee claimed allowance of a sum being compensation paid to local fishermen in connection with construction of a temporary Jetty. The AO. was of view that the said expenditure was prohibited by law. The payments were not contractual, the fishermen having no vested or secured rights in the coastal line. Tribunal held that the commercial expediency of the payments is manifest in as much as the co-operation of the local fishermen had necessarily to be secured if the Jetty had to be constructed. It is not necessary that a payment to be allowable u/s. 37(1) has necessarily to be contractual, and neither do we consider it as opposed to public policy, which could be so said only if the construction of the jetty was either prohibited by law or if the required permission for the same had not been obtained. The machineries were required to be transported partly by road and partly by barge, so that for the purpose of the latter a Ro-Ro jetty had to be erected. The Tribunal held that, the assessee demonstrating the building up of the jetty on the basis of the expenditure on its construction per its regular books of account and relevant records the said impugned expenditure gets established and the assessee was eligible for the deduction. (AY. 2008-09)
Urmila & Co. Ltd. v. Dy. CIT (2013) 60 SOT 1 (URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Opposed to public policy – Commission for obtaining bogus accommodation bills – Not allowable as business expenditure
Assessee claimed allowance of a sum paid on account of commission for obtaining bogus accommodation bills. Tribunal held that procuring 'bogus' bills do not represent any business transactions and same is definitely prohibited by law, therefore the Explanation to section 37(1) is applicable to the Assessee and the expenditure incurred by the assessee was not allowable.(AY. 2008-09)
Urmila & Co. Ltd. v. Dy. CIT (2013) 60 SOT 1(URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Foreign travelling expenses – *Per diem* allowance fixed by assessee-company – Held to be allowable
Tribunal held that *per diem* allowance fixed by assessee-company for foreign travel of employees and directors, as per grade was reasonable, but all vouchers could not be produced due to practical difficulties in submitting bills of petty expenses, amount of expenses could not be disallowed. (AY.2007-08)
Hero Moto Corp Ltd. v. ACIT (2013) 156 TTJ 139 / 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.37(1) : Business expenditure – software expenditure – Revenue expenditure
The assessee claimed expenses incurred towards software license as revenue expenditure. The A.O. disallowed claim of assessee. The CIT(A) allowed the claim of the assessee. The Tribunal dismissed Revenue's appeal and held that since license was valid for one year and did not confer any enduring benefit, expenses incurred by the assessee to acquire software license was revenue expenditure. (AY. 2008-09)
Dy. CIT v. Danfoss Industries (P.) Ltd. (2013) 145 ITD 160 (Chennai)(Trib.)

S.37(1) : Business expenditure – Software expenditure – Revenue expenditure
The A.O. treated software expenses claimed by the assessee as capital expenditure and made addition. In assessee' own case for AY. 2005-06, the Tribunal held that software expenses incurred were in nature of revenue expenditure. CIT(A) following same, deleted addition made by the A.O. Since no material had been brought on record to show that said decision of Tribunal was either modified or reversed by any Higher Court, no infirmity was found in order of CIT(A). (AY. 2007-08)
DCIT v. Danfoss Industries (P.) Ltd. (2013) 145 ITD 160 / 26 ITR 567 (Chennai)(Trib.)

S.37(1) : Business Expenditure – Preliminary expenses in aqua and agro project – Expansion of existing project and no new capital asset had come into existence by incurring of expenditure, impugned expenditure could not be considered to be of capital nature
The assessee company was engaged in business of tissue culture activities and open fill activities relating to agricultural projects. It proposed to set up aqua and agro project, which was expansion of existing project. During AY. 2001-02, it had incurred certain expenditure for preliminary survey and other related technical matters of aqua and agro project; however, it could not proceed with the said project. In return of income for AY. 2004-05, it claimed deduction of said expenditure as revenue expenditure. The A.O. held that expenditure incurred on project which was abandoned was capital in nature. The CIT(A) upheld the A.O.'s order. The Tribunal held in favour of the assessee that since the project in question was an expansion of existing project and no new capital asset had come into existence by incurring of expenditure, impugned expenditure could not be considered to be of capital nature. (AYs. 2004-05 to 2007-08)
Gujarat Green Revolution Co. Ltd. v. ACIT (2013) 145 ITD 161 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Expenditure incurred in the course of business, held to be allowable.
The assessee a UK based Consultancy Company engaged in providing technical consultancy service. Assessee had entered into agreement with REAPL to provide construction management services in Mumbai. In terms of agreement, various facilities were to be provided to assessee without bearing any cost. The A.O. disallowed salary & administrative expenses on ground that it ought to be removed from REAPL and there was no business compulsion on assessee to incur those expenses. The DRP rejected the objectives raised by the assessee. The Tribunal held the expenditure having been incurred for business purposes cannot be disallowed on *ipse dixit*, and if the assessee had something to recover from the clients, it may be taxed when it was received. (AY. 2007-08)
John Laing International Ltd. v. Dy. CIT (2013) 145 ITD 145 (Delhi)(Trib.)

S.37(1) : Business expenditure – Corporate membership fee – Disallowed for not providing any evidence
The Tribunal held corporate membership fee paid to the club could be allowed as business expenditure, in absence of any supporting evidence in respect of such payment. (AY. 2004-05)
ACIT v. Jindal Steel & Power Ltd. (2013) 145 ITD 277 (Delhi)(Trib.)

S.37(1) : Business Expenditure – Aircraft expenses – Disallowance was held to be justified as no evidence was produced to demonstrate the journey for the purpose of business

The assessee claimed aircraft expenses. The A.O. disallowed part of expenses related to journeys, which according to A.O. were not for business purpose. The assessee could not produce any evidence to claim that journeys pointed out by A.O. were undertaken for business purpose. The Tribunal held the disallowance by A.O. as justified. (AY. 2004-05)

ACIT v. Jindal Steel & Power Ltd. (2013) 145 ITD 277 (Delhi)(Trib.)

S.37(1) : Business expenditure – Setting up of business – Matter set-a-side for verification [Rule 29 of the Appellate Tribunal Rules, 1963]

The assessee company was incorporated for running business of maintaining database of client in electronic forms. It undertook KYC project of mutual funds industry. Assessee claimed net loss in returns. A.O. held that this expenditure could not be allowed as business loss, but has to be capitalized. The Tribunal held what is critical stage or point of time when project is or can be said to be complete, so that it is ready to be delivered or in an operable state, would need to be determined and all expenditure anterior to such date would necessarily from part of project cost and hence to be capitalized. (AY. 2007-08)

CDSL Ventures Ltd. v. Dy. CIT (2013) 145 ITD 416 (Mum.)(Trib.)

S.37(1) : Business expenditure – Unutilised export quota, write off – Facilitating trading operations is allowable as trading loss

The assessee purchased export quota which allowed it to manufacture and export readymade garments for a period of three years. During the relevant year, the period of quota expired and assessee wrote off the balance lying in the quota account. The Assessing Officer rejected assessee's claim in respect of amount written off treating it as a capital loss. Held, since the expenditure in question merely facilitated trading operations of assessee, it was to be regarded as revenue expenditure and, thus, assessee's claim in respect of write off of unutilised amount was to be allowed as deduction. (AY. 2004-05)

TRG Industries (P.) Ltd. v. DCIT (2013) 59 SOT 64(URO) (Asr.)(Trib.)

S.37(1) : Business expenditure – Professional fees on defending arrested directors – Nexus of expenditure with offence is held to be not allowable as business expenditure [NDPS Act, 1985]

Expenditure incurred on professional fees to defend directors of assessee-company who were arrested under NDPS Act, 1985 on being found guilty of offences under relevant sections of said Act could not be allowed being squarely covered within meaning of Explanation to section 37(1). Held, it does not make any difference that expenditure is direct or indirect; so long as there exists a nexus of expenditure with offence, it will continued to be hit by Explanation to section 37(1).(AY. 2008-09)

OPM International (P.) Ltd. v. DCIT (2013) 59 SOT 98 (Mum.)(Trib.)

S.37(1) : Business expenditure – Labour and cartage expenses – Rejection of books of account – Separate disallowances cannot be made [S.145]

Since on one hand Assessing Officer had rejected books of account and on other hand he had adopted same book results and disallowed expenses on estimate basis, separate disallowance made by Assessing Officer towards labour and cartage expenses was liable to be deleted. (AY. 2005- 06)

M.R. Corporation v. ITO (2013) 59 SOT 34 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Technical knowhow fees is revenue expenditure

Where terms of agreement clearly showed that know-how was provided to help in continued production having nothing to do with setting up of business of assessee; and it was paid as a percentage of sales, it could be held that payment of royalty was in nature of running royalty.

Therefore, such royalty was allowable as revenue expenditure and not capital expenditure as claimed by revenue.(AY. 2007-08)
Samsung India Electronics (P.) Ltd. v. ACIT (2013) 59 SOT 261 / 158 TTJ 201 / 95 DTR 373 (Delhi)(Trib.)

S.37(1) : Business expenditure – Land taken on lease for mining of iron ore–expenditure incurred to use said land for non-forest purposes – On the direction of Supreme Court – is revenue in nature
Payments to Government for diversion of forest land for non-forest purposes, amounts to compensation and is revenue in nature. (AY. 2004-05)
Mysore Minerals Ltd. v. ACIT (2013) 142 ITD 128 / 21 ITR 167 (Bang.)(Trib.)

S.37(1) : Business expenditure – Premium paid on the insurance Policies in the names of the Partners is allowable deduction [S.10(10D)]
Assessee a partnership firm purchased insurance policies in the names of the partners. Assessee firm was proposer therein and the partners were shown to be assured person. In the column relating to the payment of sum assured in the policies, it has been stated that the sum assured is payable to the proposer or assigns or nominee meaning thereby that the sum assured would be payable only to the assessee& not to the assured person. The AO disallowed the claim which was upheld by CIT(A). On further appeal in Tribunal, the Tribunal allowed the appeal & held that as per s/10(10D), the sum assured, received either by the employer or employee, forms part of the total Income & is assessable to tax in the hands of the recipient. Since the assured sum was chargeable to tax at the time of its receipt, the payment was revenue expenditure deductible u/s 37(1). The premium paid on the insurance policies in the names of the partners is allowable deduction u/s 37(1), subject to an undertaking to be furnished by the assessee to the LIC to the effect that the sum assured would form part of the total income of the assessee at the time of receipt thereof & no benefit of exemption u/s 10(10D) would be available to it. (AY.2008-09)
Reliance International v. ITO (2013) 157 TTJ 766 / 94 DTR 14 (Luck.)(Trib.)

S.37(1) : Business expenditure – Provision towards security expenses was held to be allowable
Cross appeals filed by assessee and revenue. The Tribunal held that the provision made for security expenses was an allowable deduction. The mere fact that it was not quantified during the year by way of raising of bills by NFC could not alter the fact that such liability even though on an estimated basis is an accrued and allowable liability. Tribunal followed two decisions of Apex Court 1) *Bharat Earth Moves v. CIT (2000) 245 ITR 428 (SC) 2) Rotrk Controls India (P) Ltd. v. CIT (2009) 314 ITR 62 (SC)* and also assessee's own case for the AY. 2004-05. (AY. 2007-08)
ACIT v. Electronic Corporation of India Ltd. (2013) 155 TTJ 748 / 140 ITD 221 / 89 DTR 190 / (2014) 29 ITR 637 (Hyd.)(Trib.)

S.37(1) : Business expenditure – Provision for wages was held to be allowable
Tribunal held that provision made by assessee towards arrears of salaries of employees was allowable deduction as per the accounting standard issued by CBDT under section 145 w.e.f. 1st Jan., 2007. Merely because the same was quantified later would not alter the fact that the amount is a crystallized liability.
Tribunal followed *Bhart Earth Moves v. CIT (2000) 245 ITR 428 (SC) and Rotrk Controls India (P) Ltd. v. CIT (2009) 314 ITR 62 (SC)*. (AY. 2007-08)
ACIT v. Electronic Corporation of India Ltd. (2013) 155 TTJ 748 / 140 ITD 221 / 89 DTR 190 / (2014) 29 ITR 637 (Hyd.)(Trib.)

S.37(1) : Business expenditure – Expenditure incurred on upgradation of machine

Expenditure incurred on purchase of upgradation kit to carry out the business by using advanced technology was the need of the time in the line of the business of the assessee. Therefore the expenditure incurred is allowable as revenue expenditure. (AY. 2002-03)
Dy. CIT v. Lasik Center (India) (P) Ltd. (2013) 143 ITD 258 / 22 ITR 462 / 156 TTJ 804 / 92 DTR 380 (Chennai)(Trib.)

S.37(1) : Business expenditure – Royalty payments is deductible
Tribunal held that assessee is not the owner of the technology even during the currency of the agreement. Therefore, the royalty payment is deductible as revenue expenditure. (AY. 2002-03)
ACIT v. Samsung India Electronics (P) Ltd. (2013) 156 TTJ 44 / 92 DTR 206 (Delhi)(Trib.)

S.37(1) : Business expenditure – Disallowance of salary was confirmed as no evidence was produced
Tribunal held that the assessee was unable to provide the details of employees whose salaries have been debited in profit & loss accounts. In the absence of any evidence in support of the claim the disallowance was confirmed.
Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

S.37(1) : Business expenditure – Disallowance of legal & professional charges was confirmed
The Tribunal held that in the absence of any details or evidence, we do not find any reason to interfear with the reasons and the conclusions drawn by the Assessing Officer & CIT(A). Disallowance is confirmed.
Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

S.37(1) : Business expenditure – Non-receipt of invoice for repairs of dredger
Tribunal held that the works were carried out during the year and the assessee has claimed the expenditure and expenditure has occurred and so the payment later cannot be a reason to disallow on the reason that assessee provided as a provision, since the genuineness of expenditure was not doubted, it is allowable as expenditure. (AY. 2003-04)
Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

S.37(1) : Business expenditure – Contribution towards celebration of annual event
The assessee participated in certain activities organised by the Indian Navy. The assessee contributed the amount to the function of naval staff which was necessary for the purpose of business being a contractor doing the work in the naval facility. The expenditure is allowable under section 37(1).
Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

S.37(1) : Business expenditure – Club Membership Fees paid by the assessee for its employee is allowable as business expenditure
Assessee paid a sum of ` 13,750 to Oberoi Grand, Kolkatta for the membership of its employee and claimed it as an expenditure. According to the Assessing Officer, the said expenditure was the personal expenditure of the employee & it was not allowable as deduction. Assessing Officer disallowed the deduction. CIT (A) confirmed the addition. On appeal in Tribunal, the Tribunal allowed the deduction relying on the decision of *CIT v. United Glass Mfg Co. Ltd.* (Civil Appeal No. 6447 of 2012) wherein the question raised was whether Club Membership fees for employees incurred by the assessee is a business expenditure, liable to deduction u/s 37 of the Act and the Apex Court held in favour of the assessee that it was pure business expenditure.
KPMG India (P) Ltd v. ACIT (2013) 142 ITD 628 (Mum.)(Trib.)

S.37(1) : Business expenditure – Opposed to public policy – Fee for compounding an offence cannot be incidental to business but if it is not an offence and is compensatory, then the claim has to be allowed – Matter remanded to consider specific scheme of the Act

The assessee was a builder engaged in the construction and sale of flats. It claimed deduction of compounding fee paid to Ghaziabad Development Authority (GDA) to regularize the extra construction as per the norms of the authority and permissible under the bye laws of the authority as per which subject to certain conditions extra construction could be regularized. The Assessing officer held that such expenditure would be hit by the Explanation to section 37(1), disallowed the assessee's claim. The Tribunal held that the finding arrived at in the impugned order that nothing was brought on record so as to establish that violation was merely in respect of slight deviations from original plan has not been assailed by the assessee as per the procedure mandated by law. In order to decide the issue, the specific scheme of the Act, which empowered the GDA to collect compounding fee necessarily, has to be seen. This aim has not been seen by the CIT(A). As such, the issue has to be restored back to the file of the CIT(A). The argument of business necessity and resultant consequences of regularizing the construction after payment of fees have no relevance. TO the extent the assessee is able to prove on the basis of the wording of the specific statute which created and empowered the GDA that the amount so paid is compensatory in nature, the assessee may have a case. However, the minute the payment is tainted with illegality, then as being against public policy itself, even if the specific statute permits the payments to regularize the sale, the payment would not be allowable as a deduction by virtue of Explanation attached to section 37(1). (AY. 2005-2006)

Shree Sidhi Vinayak Construction Co. v. ITO (2013) 143 ITD 509 / 35 taxmann.com 286 (Delhi)(Trib.)

S.37(1) : Business expenditure – Ad hoc disallowance was deleted – Vehicle running expenses and depreciation on car was estimated at 5% for personal expenses

A.O. made addition on account of various expenses and had disallowed 20 per cent of vehicle expenses and 20 per cent depreciation on car on account of personal use of vehicles by assessee. Commissioner (Appeals) held that disallowance had been made on ad hoc and lump sum basis without assigning any justification or reasoning. Tribunal held Commissioner (Appeals) had rightly deleted ad hoc additions, however the vehicle running expenses and depreciation on car had to be disallowed on account of personal use at a reasonable rate of 5 per cent. (AY. 2009-10)

Dy. CIT v. Subhash Chand Agrawal (2013) 58 SOT 122 (URO) (All.)(Trib.)

S.37(1) : Business expenditure – Securities held as stock in trade – Interest paid on purchase of securities is allowable as deduction

Assessee bank purchased and sold securities and same were held as stock in trade. The assessee bank paid interest in respect of securities purchased for broken period from preceding due date for payment of interest upto date of purchase. And also received interest in respect of securities sold by them for broken period from preceding due date for payment of interest upto date of sale. A.O. rejected the appellant's claim holding that the appellant's contention that the securities constituted stock in trade. It has not been accepted since it was found that the securities held in the category of held to maturity did not form part of the stock. Commissioner (Appeals) allowed the claim on the ground that the same was in stock-in-trade and hence the interest for the broken period is an allowable deduction. The honorable ITAT upheld the order of Commissioner (Appeal) that broken period interest paid by bank was an allowable deduction. (AY. 2007-08)

State Bank of Hyderabad v. Dy. CIT (2013) 58 SOT 278 (Hyd.)(Trib.)

S.37(1) : Business expenditure – License fee – Additional evidence – Matter remanded

When the assessee filed additional evidence before the Tribunal against the disallowance made by the AO on account of licence fee by holding that the same was not related to any actual services rendered

and that expenditure was not incurred wholly and exclusively for purpose of business, the matter was to be restored back to the AO. (AY.1999-2000)
KEC International Ltd. v. DCIT (2012) 20 ITR 282 / (2013) 58 SOT 18 (URO)(Mum.)(Trib.)

S.37(1) : Business expenditure – Pre-operative expenses – Foreign project – No income was offered, expenses was held to be allowable.
Assessee which is in the business of supply and erection of transmission towers,in view of Tribunal's decision for earlier year, assessee's claim of pre-operative expenses in relation to foreign project from which no income had been recognised, was allowable. (AY. 1999-2000)
KEC International Ltd. v. DCIT (2012) 20 ITR 282 / (2013) 58 SOT 18 (URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Professional fee – Merely because there is no formal agreement express cannot be disallowed
Assessee's claim which was of revenue in nature could not be disallowed only on ground that there were no agreements particularly when assessee had placed on record correspondence and report of consultant regarding various types of consulting assignment being handled by them which was an on-going arrangement. (AY. 1999-2000)
KEC International Ltd. v. DCIT (2012) 20 ITR 282 / (2013) 58 SOT 18 (URO) (Mum.) (Trib.)

S.37(1) : Business expenditure – Capital or revenue – Computer expenses are revenue – Expenses on printer, scanner and web camera are capital in nature
Parts like CD ROM drive, hard disk drive and RAM being spares of Central Processing Unit of computer cannot be considered as separate and independent machinery, thus, expenditure incurred on such parts is allowable as revenue expenditure. However, printer, scanner and web camera are independent and separate devices, therefore, expenditure incurred on such devices is capital in nature. (AY.2004-05)
APL India (P.) Ltd. v. Add.CIT (2013) 58 SOT 41 (URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Repairs – Expenses on making premises fit for business use is repairs – Expenditure on split AC is capital nature
Expenditure incurred by assessee to make office premises fit for business use without bringing any new capital asset into existence is allowable as revenue expenditure. Expenditure on split AC is capital in nature as assessee has brought into existence a new asset.(AY.2004-05)
APL India (P.) Ltd. v. Add. CIT (2013) 58 SOT 41 (URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Retirement compensation paid on closure of business was allowable as deduction
Retirement compensation paid to workmen, even where such expenditure was incurred upon closure of business, was revenue expenditure and was an allowable deduction.(AY.1999-2000)
DCIT v. Bisleri Sales Ltd. (2013) 58 SOT 73 / 81 DTR 197 / 151 TTJ 285 (Mum.)(Trib.)

S.37(1) : Business expenditure – Advertising expenses – Commission – Difference between actual amount received and TDS certificate – Matter remanded
Assessee, an advertising agent, acted as intermediary between clients and third party vendors to facilitate placement of advertisements. The AO found that the TDS certificates reflected higher income than disclosed by assessee. The assessee submitted that only commission was recognised as income and payments to vendors was treated as pass through cost and not reflected in profit and loss account. On investigation, some of vendors were not found at addresses given by assessee and those who were found had confirmed receipt of lower amount. However, the AO disallowed the entire sum as deemed income. The assessee pleaded that adequate opportunity was not given to it to substantiate

its claim regarding untraceable vendors. Hence, the matter was to be remitted back to consider said issue afresh. (AY.2008-09)
Cheil India (P.) Ltd. v. DCIT (2013) 58 SOT 11 (URO) (Delhi)(Trib.)

S.37(1) : Business expenditure – Method of accounting – Video rights – Copy rights – Cost of distribution-Exhibition rights – 100% cost of amount was to be allowed due to consistent accounting policy [S.145, Rule 9B]
The Assessing Officer concluded that the assessee was claiming 100% of the cost of video rights/other copy rights even in a case where small portion of the total bundle of rights was sold and even when small portion of the total period of rights were sold. The Assessing Officer held that only proportionate expenditure could be claimed, but he found that it was difficult to quantify such amount; therefore, he held assessee should be allowed expenditure only to the extent the amount received by the assessee as sale during the year and balance cost of acquisition should be taken as cost of acquisition or inventory of closing stock. Held, consistent method adopted by assessee could not be disturbed without adequate reason. Since expenditure was allowable, full amount of expenditure was to be allowed, and same could not be restricted to extent of revenue earned during year under consideration. (AYs. 2005-06 and 2006-07)
Venus Records & Tapes (P.) Ltd. v. Add. CIT (2013) 58 SOT 47 (URO) / 82 DTR 35 / 152 TTJ 1 (Mum.)(Trib.)

S.37(1) : Business expenditure – Broken period interest – Once the broken period interest was charged as income on broken period interest to be allowed as deduction [S.28(i)]
Once broken period interest received by assessee was charged to tax as business income under section 28, a deduction for payment made for broken period interest at time of purchase of those securities could not be denied when assessee's method of accounting did not result in loss of revenue for revenue authorities. (AY.2000-01)
KBC Bank N.V. v. JDIT (2013) 58 SOT 235 (Mum.)(Trib.)

S.37(1) : Business expenditure – VRS expenses – Revenue expenditure
Expenditure incurred on account of Voluntary Retirement Scheme are allowable as revenue expenditure. (AY. 1999-2000)
KEC International Ltd. v. DCIT (2013) 58 SOT 18 (URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Setting up of – Commencement of business – It is not necessary that all activities which go to make up business should have been started – Matter set aside
Assessee is engaged in business of engineering and construction work in India. Assessee entered into a contract with NHAI for improving and fourlaning a part of national highway. Assessee filed its return declaring loss. A.O. completed assessment at NIL income by disallowing assessee's claim of pre-commencement expenditure. On appeal, it was noted that assessee had not brought on record details regarding its EPC contract and thus it was not possible to determine actual date of commencement of business. The Honourable ITAT held that it is not necessary that all activities which go to make up business should have been started, however the matter was to be remanded back for disposal afresh with a direction to assessee to bring necessary details on record. (AY. 2002-03)
UE Development India (P.) Ltd. v. ACIT (2013) 144 ITD 112 / 35 taxmann.com 607 (Bang.)(Trib.)

S.37(1) : Business expenditure – Business discontinued – Expenditure is not allowable
Assessee debited certain amount in its profit and loss account in respect of prepaid payment for SEBI fees, insurance, repairs and maintenance etc. A.O. disallowed said amount because business of assessee had already been transferred. On appeal Tribunal held that as the business was transferred and discontinued disallowance of expenses was justified.(AY. 2001–02)
IGFT Ltd. v. ITO (2013) 144 ITD 57 / 95 DTR 181 / 158 TTJ 572 / 24 ITR 192 (Mum.)(Trib.)

S.37(1) : Business expenditure – Change method mandatory under revised accounting standard – Unascertained liability – Provision as per Accounting Standard – 15 is allowable [S.145]
The claim of post-retirement benefits, valued on the basis of AS-15, being based on the valuation of the actuary was both scientific and one of the recognised methods of accounting and quantifying the expenditure. Though actual and exact quantification may not be possible, the liability so recognised by the assessee could not be said to be unascertained and contingent. The assessee having followed the mercantile system of accounting was compulsorily required to account for the post-retirement medical benefits as they were quantified and had accrued during the year. The claim of the assessee was thus allowable. The fact that the assessee had made a provision in the books of account was not relevant. The way in which entries are made by the assessee in its books of account is not determinative of the question whether the assessee had earned any profit or suffered any loss.
Glaxo Smithkline Consumer Healthcare Ltd. v. Add. CIT (2013) 25 ITR 100 (Chandigarh)(Trib.)

S.37(1) : Business expenditure – Setting up of business – After registration is allowable
Assessee was not granted registration as vendor by the Ministry of Defence as supplier, and hence, no supply took place. Therefore, expenditure was rightly disallowed as business was not set up. However, expenditure incurred after obtaining registration was allowable. (AYs. 2002-03, 2003-04, 2005-06, 2007-08)
Russian Technology Centre P. Ltd. v. DCIT (2013) 25 ITR 521 / 145 ITD 88 / 155 TTJ 316 / 89 DTR 267 (Delhi)(Trib.)

S.37(1) : Business expenditure – Car expenses – Not allowed due to failure to produce log book
Expenses were not allowable as the assessee was unable to produce logbook or record to establish use of car for purposes of proprietary business. (AY. 2006-07)
Munish Gupta v. DCIT (2013) 25 ITR 29 / 144 ITD 524 (Chandigarh)(Trib.)

S.37(1) : Business expenditure – Employees stock option scheme – Discount on issue of options
"Expenditure" means not only "paying out" but also "incurring". Discount on issue of options under employees' stock option scheme is allowable as deduction. This discount is neither capital expenditure nor a contingent liability. (AY. 2003-04, 2004-05, 2005-06, 2007-08)
Biocon Ltd. v. DCIT (LTU) (2013) 25 ITR 602 / 144 ITD 21 / 155 TTJ 649 / 90 DTR 289 (SB)(Bang.)(Trib.)

S.37(1) : Business expenditure – Travelling expenses of wife – Qualification of wife – Allowable as business expenditure
The assessee had furnished on record a certificate of the diamonds institution showing that his wife had undergone a course in polished diamonds and held a diploma in jewellery technique. Further details of foreign travelling expenses undertake by the wife including the foreign exchange purchased by her were also shown. Held, the wife of the assessee was qualified and had visited different places for the purpose of the business undertaken by the proprietary concern of the husband. Therefore, the expenditure incurred for the purpose of business of the assessee was to be allowed as a deduction. (AY. 2006-07)
Munish Gupta v. DCIT (2013) 25 ITR 29 / 144 ITD 524 (Chandigarh)(Trib.)

S.37(1) : Business expenditure – Contributions to temples, churches, clubs, educational institutions and trade unions – Welfare of employees
In the absence of a claim that the expenditure was incurred for business purpose or for welfare of the employees, the contribution made by way of charity could not be allowed under section 37 as business expenditure. Moreover, the assessee had incurred ` 7,20,99,724 but the Assessing Officer has disallowed only ` 1 lakh. (AY.2007-08)

P. A. Jose v. ACIT (2013) 25 ITR 1 / 59 SOT 77 / 158 TTJ 58 (UO) (Cochin)(Trib.)

S.37(1) : Business expenditure – Compensation to vendors – Part of running stock – Revenue expenditure

Compensation paid to vendors for deficiency in lifting contracted quantum of raw material, which was to become a part of running stock of assessee, was revenue expenditure and allowable. (AY. 2007-08)

Ford India P. Ltd. v. DCIT (2013) 25 ITR 456 / 59 SOT 221 / 156 TTJ 1 / 90 DTR 154 (Chennai)(Trib.)

S.37(1) : Business expenditure – Payment to unapproved pension fund – Commercial expediency [S.36(1)(iv), R. 89 of Income-tax Rules, 1962]

On the ground that the assessee had not made the payment to any approved pension fund in compliance with rule 89 of the Income-tax Rules, 1962 the Assessing Officer disallowed the claim and this was confirmed by the Commissioner (Appeals).

Held, that the assessee was eligible in principle to deduction qua the direct payment of pension under section 37(1) of the Act. However, the aspect of the commercial expediency (on the parameters settled by the Supreme Court) had admittedly not been examined by the Assessing Officer, a perquisite for the allowance of a claim under section 37(1), and the onus to establish this was on the assessee especially as there was no subsisting employer-employee relationship between the assessee and its retired employees. There was no enumeration of the basic and relevant facts in the assessment order for this year or in the orders for earlier years. The allowance of deduction under section 36(1)(iv), was qua the contribution to the fund, and was no bar for the claim of deduction under section 37(1). However, it had to be on its merits, i.e., on a stand-alone basis. The Assessing Officer was to pass a fresh order in accordance with law after affording adequate opportunity of hearing to the assessee. (A.Ys. 1999-2000, 2000-01, 2001-02, 2004-05, 2005-06, 2006-07).

Karur Vysya Bank Ltd. v. ACIT (2013) 25 ITR 731 / 60 SOT 148(URO) (Chennai)(Trib.)

S.37(1) : Business expenditure – Capital expenditure – Purchase of software – No proof was furnished

Held merely by nomenclature, expenditure cannot be termed either revenue or capital expenditure. The assessee had to prove by leading cogent evidence that the software did not give any enduring benefit. No such explanation of the assessee was forthcoming. Hence, the disallowance of expenditure on software purchase was justified. (AY. 1999-2000, 2000-01, 2001-02, 2004-05, 2005-06, 2006-07)

Karur Vysya Bank Ltd. v. ACIT (2013) 25 ITR 731 / 60 SOT 148(URO) (Chennai)(Trib.)

S.37(1) : Business expenditure – Filing fees to Registrar – Increase in authorized capital is not allowable

Filing fees paid to the Registrar of Companies for the purpose of increasing authorised capital are not allowable as revenue expenditure. (AY. 1999-2000, 2000-01, 2001-02, 2004-05, 2005-06, 2006-07)

Karur Vysya Bank Ltd. v. ACIT (2013) 25 ITR 731 / 60 SOT 148 (URO) (Chennai)(Trib.)

S.37(1) : Business expenditure – Year of deductibility – Ascertainment of liability – Not in the accounting period

The fact that the memorandum of understanding between the workers and the banks was settled on March 11, 1999, in the accounting period, would not be sufficient to hold that the liability stood ascertained. The decision to enhance the wages was arrived at only in the months of December, 1999 and March, 2000, i. e., not in the accounting period of the assessment year. (AY.1999-2000)

Karur Vysya Bank Ltd. v. ACIT (2013) 25 ITR 731 / 60 SOT 148(URO) (Chennai)(Trib.)

S.37(1) : Business expenditure – Fines and penalties – Infringement of law – Central excise – Service tax – Not allowable – Explanation is applicable

There was nothing to show payments of penalty under Central excise and service tax law were not for infringement of law. Hence, the sums were rightly disallowed. (AY. 2007-08)

Ford India P. Ltd. v. DCIT (2013) 25 ITR 456 / 59 SOT 221 / 156 TTJ 1 / 90 DTR 154 (Chennai)(Trib.)

S.37(1) : Business expenditure – Commencement of business – Lull in business must not be considered as cessation of business

Assessee set up as joint venture with Government of India for business of consultancy for State Governments. Revenue was generated in two years following incorporation of assessee. Thereafter, lull in business must not to be considered as cessation of business and business ought to be considered as commenced on setting up. Hence, consultancy fees cannot be disallowed on the grounds that the business had ceased. (AY.2007-08)

Urban Mass Transit Company Ltd. v. ACIT (2013) 24 ITR 741 / (2014) 61 SOT 51 (URO) (Delhi)(Trib.)

S.37(1) : Business expenditure – "Return" paid on advance – Allowability

An amount was advanced by the Government by way of application for shares and due to non allotment of shares, the Government and the assessee ultimately agreed to treat it as advance eligible for compensation thereon and termed it as "return". Not returning the amount to Government would have cost the assessee its business prospects and its title over the business. In these circumstances, the assessee in order to protect its business interest and business propriety refunded the amount which was allowable to the assessee as business expenditure.(AY. 2007-08)

Urban Mass Transit Company Ltd. v. ACIT (2013) 24 ITR 741 / (2014) 61 SOT 51 (URO) (Delhi)(Trib.)

S.37(1) : Business expenditure – Artwork charges – Revenue expenditure

Considering the average life span of artwork, which was only less than six months, it could not be inferred that any capital apparatus had come into existence which could be the source of income generation for the assessee. The "artworks" was not capital expenditure. (AY.1998-99)

Parle Agro P. Ltd. v. ACIT (2013) 25 ITR 551 / 144 ITD 518 (Mum.)(Trib)

S.37(1) : Business expenditure – Pooja expenses is allowable

Pooja expenses were allowable as revenue expenditure. (AY. 2004-05)

Karur Vysya Bank Ltd. v. ACIT (2013) 25 ITR 731 / 60 SOT 148 (URO) (Chennai)(Trib.)

S.37(1) : Business expenditure – Gift – Special occasions – Allowable

Since the assessee's claim was mainly confined to making presents on special occasions and festivals for which it itself had disallowed 20%, the balance was to be allowed as deduction. (AY. 2004-05)

Karur Vysya Bank Ltd. v. ACIT (2013) 25 ITR 731 / 60 SOT 148 (URO) (Chennai)(Trib.)

S.37(1) : Business expenditure – Verification of vouchers – Petrol / diesel expenses

The AO held that the assessee failed to produce vouchers and substantiate the claim and disallowed 20% of petrol and diesel expenses. The Commissioner (Appeals) restricted the disallowance to 10%. Held, that one more opportunity be granted to the assessee to substantiate its claim by producing the vouchers and other details. Therefore, the Assessing Officer was directed to verify the details after affording the assessee a reasonable opportunity of being heard. (AY.2006-07)

Indian Research Manifestation Labs P. Ltd. v. ACIT (2013) 24 ITR 30 / 145 ITD 135 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Upgradation of computer hardware and software
Expenditure on upgrading computer hardware and software is revenue expenditure. (AY.2007-08)
DCIT v. Mcleod Russel India Ltd. (2013) 24 ITR 262 (Kol.)(Trib.)

S.37(1) : Business expenditure – Provision for service warranty is allowable expenditure
Provision for service warranty was an allowable expenditure. (AY. 2003-04)
ACIT v. LG Electronics India P. Ltd. (2013) 24 ITR 634 (Delhi)(Trib.)

S.37(1) : Business expenditure – Club expenses of director is allowable
Club expenses incurred by the assessee on behalf of its directors for networking and marketing were allowable. (AY.2006-07, 2007-08, 2008-09)
Canon India P. Ltd. v. DCIT (2013) 24 ITR 694 / (2014) 160 TTJ 172 / 99 DTR 82 (Delhi)(Trib.)

S.37(1) : Business expenditure – Provision for warranty claims – Scientific method consistently followed
Method for quantifying provision for warranty claims was consistently followed and was a scientific method based on past practice. Hence, the provision for warranty on accrual basis was an allowable deduction. (AY. 2006-07, 2007-08, 2008-09)
Canon India P. Ltd. v. DCIT (2013) 24 ITR 694 / (2014) 160 TTJ 172 / 99 DTR 82 (Delhi)(Trib.)

S.37(1) : Business expenditure – Head office expenditure – Allocation
The assessee owned multiplexes and was in the business of screening films. Some of the multiplexes were in operation and some in various stages of construction. Expenditure other than the interest of head office was allocated on the basis of capital cost of each project. The assessee allocated the expenditure at 67.16% to revenue and 32.84% to capital during the year. There was justification in the claim of the assessee as the newly operational projects also would require more attention and in some projects there was no activity except purchase of land. In the absence of any details of manpower allocation and time spent on each project, the only rational method adopted by the assessee was capital cost allocation. This could not be faulted as the Assessing Officer did not examine any other method to allocate expenditure, but estimated it at two-third capital and one-third revenue. (AY. 2005-06)
E-City Entertainment (India) Pvt. Ltd. v. ACIT (2013) 24 ITR 73 / (2014) 61 SOT 105 (URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Audit fee – Allowable in the year of payment
Assessee provided for audit fee of ` seven lakhs in books of account as on 31-3-2006 on basis of old rates fixed by Registrar of co-operative societies which was paid on 31-7-2006. By letter dated 17-8-2006, Registrar raised audit fee from Rs. 7 lakhs to Rs. 10 lakhs and Chief Auditor requested for depositing audit fee for year 2005-06 on new rate, i.e., Rs. 10 lakhs. The assessee debited Rs. 3 lakhs to profit and loss account for which provision was not made. The amount is allowable in relevant year. (AY. 2007-08, 2008-09)
ACIT v. Punjab State Co-op. Bank Ltd. (2013) 143 ITD 571 / 34 taxmann.com 128 (Chd.)(Trib.)

S.37(1) : Business expenditure – Illegal purposes – Explanation – Expenditure incurred for any illegal purpose or prohibited by law
Misuse charges. Assessee wrongly utilised certain residential premises for commercial purpose and for which a regularisation fee was paid to the civic authority which was styled as 'misuse charges'. The said charges were claimed as 'business expenditure'. Held the misuse charges were paid for violating the rules of use of premises and hence Explanation-1 to section 37 gets attracted. Misuse charges and interest on misuse charges not eligible for deduction.

ACIT v. Mohan Exports (P) Ltd. (2012) 138 ITD 108 / (2013) 82 DTR 110 / 151 TTJ 667 (Delhi)(Trib.)

S.37(1) : Business expenditure – Service charges
The payment made by the assessee to visa / Master Card international on account of their charges for services provided by them to the assessee was held as an allowable deduction under section 37 of the Act. (AY.2003-04, 2005-06)
ACIT v. Bobcards Limited (2013) 56 SOT 232 (Mum.)(Trib.)

S.37(1) : Business expenditure – Voluntary retirement scheme
Business expenditure relating to voluntary retirement scheme is of revenue nature and is an allowable deduction. Such expenditure cannot be disallowed on the ground that it was of capital nature since it was incurred upon closure of the business.
DCIT v. Bisleri Sales Ltd. & Ors. (2013) 81 DTR 197 / 58 SOT 73 / 151 TTJ 285 (Mum.)(Trib.).

S.37(1) : Business expenditure – Capital or revenue – Relocation of the office are 'revenue' in nature
Expenses incurred on relocation of the office are 'revenue' in nature as no benefit that can rightly be called as 'benefit of enduring nature' arises.
Transwitch India (P) Ltd v. Dy. CIT (2013) 81 DTR 233 / 151 TTJ 177(Delhi)(Trib.)

S.37(1) : Business Expenditure – Cannot be disallowed without pointing out defects in the accounts
The Tribunal held that the Assessing Officer cannot disallow expenses without pointing out defects in the accounts and explanations to those defects are to be sought. The Assessing Officer has to state failure of proving genuineness of the expenditure.
ACIT v. Ganpati Enterprises Ltd. (2013) 142 ITD 118 / 154 TTJ 1(UO) (Delhi)(Trib.)

S.37(1) : Business expenditure – Repairs – Civil work – Rented premises
The assessee incurred expenditure on repair of a rented building. Repair and construction work including roof work, plumbing, civil & carpentry work. Assessee claimed it as revenue expenditure. The A.O. held it as capital expenditure and he after allowing depreciation disallowed the balance amount. The CIT(A) upheld the Assessing Officer's order. The Tribunal allowing the assessee appeal held the expenditure as revenue expenditure. (AY. 2005-06)
Cymorza Art Gallery v. ACIT (2013) 142 ITD 799 / 21 ITR 262 (Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Registration charges of long lease-is revenue expenditure
The assessee claimed expenditure incurred towards registration of building taken on long lease. The Tribunal held that it was a business / revenue expenditure and not a capital expenditure. (AY. 2007-08)
Dy. CIT v. Columbia Asia Hospitals (P.) Ltd. (2013) 142 ITD 225 (Bang.)(Trib.)

S.37(1) : Business expenditure – Dealer Commission – Income deemed to accrue or arise in India [S. 9, Article 5 & 7]
The assessee, an Indian branch of an American Company was primarily engaged in the distribution of products of its parent company. The assessee followed mixed system of accounting, i.e. accrual of sales in one year and expenses debited at a later year, which was rejected by the Assessing Officer and Assessing Officer's order upheld by the CIT(A), on second appeal, the Tribunal held affirming the order of the CIT(A), that in absence of an agreement between the dealers and the assessee to the

effect that commission is payable only on execution of various formalities, the assessee cannot be allowed to follow mixed system of accounting.
Varian India (P.) Ltd. v. ADIT (2013) 142 ITD 692 (Mum.)(Trib.)

S.37(1) : Business expenditure – Expenditure on recruitment through manpower agencies
The assessee incurred expenditure for identification and recruitment of manpower. The Assessing Officer held that such an expense was non-recurring & is capital in nature. The CIT(A) held it as a revenue expenditure. The Tribunal held that it was allowable as a revenue expenditure. (AY. 2008-09)
Dy. CIT v. Columbia Asia Hospitals (P.) Ltd. (2013) 142 ITD 225 (Bang.)(Trib.)

S.37(1) : Business expenditure – ad hoc disallowance deleted
The Assessing Officer disallowed 15% of the repairs and maintenance and 20% of the vehicle expenses on the ground that the supporting evidence furnished was not verifiable as they were self-serving vouchers. The CIT(A) confirmed the disallowance made by the Assessing Officer. On appeal by the assessee the Tribunal allowing the ground held that if the Assessing Officer was not satisfied either about the maintenance of vouchers or the verifiable nature of the vouchers, he could have identified them and disallowed the entire amount, rather than resorting to ad hoc disallowance and that the reasons for disallowance were general without any specific mistakes being pointed out by the Assessing Officer. Accordingly, considering that the assessee was an agro-based chemical company and also a public limited company, it was not necessary to disallow the expenditure on ad hoc basis. (AY. 2005-06 to 2007-08)
Sonic Biochem Extractions P. Ltd. v. ITO (2013) 23 ITR 447 / 59 SOT 4(URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Keyman insurance premium
Tribunal held that the whole of the keyman insurance premium paid by the assessee firm on the life of its partners is business expenditure in view of circular No. 762 dated 18th Feb., 1998.(AY.2005-06)
ACIT v. Agrawal Enterprises (2013) 154 TTJ 12 (UO) / 59 SOT 17(URO)(Pune)(Trib.)

S.37(1) : Business Expenditure – Agency commission paid to agents
Tribunal held that the confirmations of all the agents have been filed alongwith their PAN before the CIT(A) and it was not the case of Assessing Officer that the confirmations furnished by the agents were false, the CIT(A) was fully justified in deleting the disallowance made by Assessing Officer. (AY. 2009-10)
Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1 / 86 DTR 49 (Jodh.)(Trib.)

S.37(1) : Business expenditure – Failure to produce bills for manufacturing and administrative expenses
Tribunal held that if an expenditure remains unsupported then in the absence of bill, vouchers, etc. the revenue department has no option but to disallow the same. The CIT(A) investigated the correctness if the expenditure and disallowed. The findings on facts given by CIT(A) are required to be affirmed.(AY. 2005-06)
B.M.S. Projects (P) Ltd v. Dy. CIT (2013) 143 ITD 645 / 153 TTJ 649 / 85 DTR 393 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Payment of commission to distributors
The Tribunal held that the purchases made by the distributors for their own consumption or sale to others was in fact sale in the hands of assessee and therefore, commission paid on such sales was a genuine expenditure for business purposes. The percentage of commission to sales for the year under consideration is lower as compared to preceding years which was accepted by the department, hence, it cannot be said that the assessee has inflated the commission expenses. The Tribunal deleted the disallowance made by the Assessing Officer and sustained by the CIT(A). (AY. 2009-10)

Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1 / 86 DTR 49 (Jodhpur)(Trib.)

S.37(1) : Business expenditure – Expenses incurred on Writer Relocations – Allowable
The assessee company incurred certain expenditure in connection with Writer Relocations under the head legal and professional charges. The Assessing Officer disallowed the same treating the same as personal expenditure and not connected with the business of the assessee-company. The Appellate Tribunal decided the issue in favour of the assessee-company by observing that CIT(A) having allowed the expenses incurred by the assessee company in connection with passenger baggage clearing in respect of its foreign employees on their return to their home countries in the preceding assessment year and the DRP having also allowed similar expenditure in the later year, impugned expenditure of similar nature cannot be disallowed in the relevant year. (AY. 2007-08)
Sumitomo Corporation India (P.) Ltd. v. Dy. CIT (2013) 153 TTJ 385 / 85 DTR 1 / 57 SOT 18 (URO) / 24 ITR 385 (Delhi)(Trib.)

S.37(1) : Business expenditure – Expenses for shifting of machinery – capital or revenue expenditure
In course of the assessment proceeding the Assessing Officer noticed that the assessee had claimed an amount of Rs. 1,31,06,000/- towards shifting expenditure under the had ‘other expenses’. The assessee had incurred expenditure towards relocation of plant and machinery, transportation charges, hamali charges, loading and unloading charges of machinery, stores and other office material, etc. The Assessing Officer held that as the assessee had shifted the plant and machinery to another unit and the expenditure incurred towards installation of plant and machinery in another unit including loading and unloading charges, transport charges, etc., are capital in nature. The CIT(A) held that shifting of existing asset from one location to another is revenue expenditure and has to be allowed. The Tribunal while dismissing the departmental ground of appeal held that the expenditure incurred was towards shifting existing plant, machinery equipments, records, etc. and that the incurring of expenditure did not result in any benefit of enduring nature to the assessee. (AY. 2007-08)
ACIT v. Praga Tools Ltd. (2013) 23 ITR 622 / 59 SOT 14(URO) (Hyd.)(Trib.)

S.37(1) : Business expenditure – Commission – Additional evidence – Matter set aside [Ss. 195, 40(a)(i)]
In course of appellate proceedings, assessee sought to produce certain additional evidence in support of its claim which was undisputedly not available with assessee during course of proceedings before Commissioner (Appeals). Hence, the impugned order was to be set aside and, matter was to be remanded back for disposal afresh in light of additional evidence adduced by assessee.(AY. 2006-07 & 2007-08)
Fibres & Fabrics International (P) Ltd. v. ACIT (2013) 57 SOT 88 (URO) (Bang.)(Trib.)

S.37(1) : Business expenditure – Termination of agreement – Damages paid is not allowable as business expenditure
When a third party, by its own, terminated an agreement without giving a timely notice to the assessee, then payment made by assessee to that party which violated terms and conditions of the agreement, could not be allowed u/s 37(1). (AY. 2006-07)
Dystar India (P.) Ltd. v. DCIT (2013) 57 SOT 304 (Mum.)(Trib.)

S.37(1) : Business expenditure – Payment for risk analysis is allowable as deduction
Expenditure for due diligence exercise undertaken was disallowed on the ground that it would create a reliable database for use in future, thereby providing enduring benefit to assessee. Held that the expenditure in question was incurred in normal course of assessee’s business and every due diligence undertaken in respect of potential target hotels might not result in actual business. Hence, the expenditure was allowed as deduction. (AY. 2007-08)

ACIT v. Intercontinental Hotels Group India (P.) Ltd. (2013) 57 SOT 120 (URO) (Delhi)(Trib.)

S.37(1) : Business expenditure – Advertisement expenses is allowable as deduction
Since there was no element of brand building or acquisition of brand by incurring advertisement expenses, the same was to allowed as deduction. (AY.2007-08)
ACIT v. Intercontinental Hotels Group India (P.) Ltd. (2013) 57 SOT 120 (URO) (Delhi)(Trib.)

S.37(1) : Business expenditure – Mercantile system of accounting – Prior period expenses is not allowable
Where the assessee followed mercantile system of accounting, prior period expenses relating to deductions/provision for previous years was not allowable in relevant assessment year. (AY. 2007-08)
Bearing Point Business Consulting (P.) Ltd. v. DCIT (2013) 57 SOT 244 (Bang.)(Trib.)

S.37(1) : Business expenditure – Civil contractor – Disallowance was restricted to 10 percent
The assessee is engaged in the business of civil contract, claimed expenditure towards labour charges of Rs. 8.12 crores. Assessee could not produce the books of account to verify the genuiness of transaction and also could not submit the confirmation. Assessing Officer disallowed 20 percentage of labour charges. On appeal Tribunal restricted the disallowance to 10 percent.(AY.2008-09)
Metalcity Constructions Kovai P. Ltd. v. ITO (2013) 24 ITR 424 / 144 ITD 388 (Chennai)(Trib.)

S.37(1) : Business expenditure – Commission paid to middle man to supply to Government department being Opposed to public policy is allowable
Supply to Government Department does also not require any middleman or agent as the Government Department is having sufficient infrastructure in this regard. It is not the case of the assessee that payment of such commission is as per prevailing practice of the trade. Hence, the expenditure, being opposed to public policy, was not allowed as expenditure.(AY. 2005-06)
ACIT v. Brijbasi Hi-tech Udyog Ltd. (2013) 57 SOT 11 (Agra)(Trib.)

S.37(1) : Business expenditure – Provision for salaries being not contingent allowable as deduction
The assessee, a public sector undertaking, made provision of salaries in view of impending pay revision of salary of its employees. However, the Assessing Officer disallowed said provision observing that liability was not determinable during relevant previous year and that such liability arose in June 1999 when Pay Commission submitted its report. Held, since the provision for salary was not a contingent liability, is allowable deduction.(AY. 1998-99)
TATA Communications Ltd. v. JCIT (2013) 57 SOT 1 / 81 DTR 36 / 151 TTJ 273 (Mum.)(Trib.)

S.37(1) : Business expenditure – Prior period expenses bills received during current financial year is allowable, as the liability crystallized during year
The assessee claimed deduction in respect of provision of optical fibre cable charges on account of payment to department of telecom. However, the Assessing Officer held that such provision pertained to prior period expenses and, therefore, same could not be allowed. The Tribunal held that since the bill was received during current financial year which meant that expenditure crystallized during year under consideration, the expenditure was allowable.(AY. 1998-99)
TATA Communications Ltd. v. JCIT (2013) 57 SOT 1 / 81 DTR 36 / 151 TTJ 273 (Mum.)(Trib.)

S.37(1) : Business expenditure – Travelling expenses of foreign national employee is allowable
Where company employed foreign nationals for its business, expense on return journey to their respective home countries on completion of assignment, was allowable.(AY. 2007-08)

Sumitomo Corporation India (P.) Ltd. v. DCIT (2013) 153 TTJ 385 / 85 DTR 1 / 57 SOT 18 (URO) / 24 ITR 385 (Delhi)(Trib.)

S.37(1) : Business expenditure – Penalty – Violation of bye laws of stock exchange is allowable as business expenditure
Payment made to stock exchange for violation of bye-laws of stock exchange cannot be considered as payment prohibited by law or in connection with an offence and is allowable as business expenditure. (AY. 2002-03)
HSBC Securities & Capital Markets (India) (P.) Ltd. v. ACIT (2013) 57 SOT 194 / 21 ITR 445 (Mum.)(Trib.)

S.37(1) : Business expenditure – Litigation expenses – Absence of bill
In absence of bill or receipt issued by advocate, the fees paid to advocate for defending acquisition proceedings of company's plot of factory land is not allowable as revenue expenditure. (AY. 2003-04)
Greaves Cotton Ltd. v. ITO (2013) 57 SOT 158 (Mum.)(Trib.)

S.37(1) : Business expenditure – Acquisition of software – Revenue expenditure
The assessee spent certain amount towards various license fees paid for acquiring software for running its computers and claimed same as revenue expenditure. Held, since no asset had been created by paying license fees for utilization of software, expenditure was allowable as revenue expenditure. (AY. 2002-03)
HSBC Securities & Capital Markets (India) (P.) Ltd. v. ACIT (2013) 57 SOT 194 / 21 ITR 445 (Mum.)(Trib.)

S.37(1) : Business expenditure – MOU-Sub-agent – Expenditure incurred wholly and exclusively for the purpose of business must be allowed though it was not stipulated in the memorandum of understanding
Held, where the assessee had incurred expenditure wholly and exclusively for purpose of business, it could not be disallowed on reason that it was not stipulated in memorandum of understanding. Furthermore, in the case of payments to sub-agents, the payments were not doubted by the revenue and the same was subjected to TDS, and sub-agents had filed their returns of income after payment of advance tax as applicable. Hence, the amounts could not be disallowed.(AY. 2008-09)
Mali Florex Ltd. v. DCIT (2012) 19 ITR 791 / (2013) 57 SOT 37 (URO) (Hyd.)(Trib.)

S.37(1) : Business expenditure – Architect's fees – Site plan etc.
The assessee, engaged in real estate business, claimed payment of architect fee in respect of land sold.It was observed that the expenditure was incurred towards consulting services provided by architect with regard to site plan, SEZ specific building plan, etc. Also, since the payment was made by cheque and also subjected to TDS, the expenditure was allowable as business expenditure.(AY. 2008-09)
Mali Florex Ltd. v. DCIT (2012) 19 ITR 791 / (2013) 57 SOT 37(URO) (Hyd.)(Trib.)

S. 37(1) : Business expenditure – Video surveillance charges allowable as business expenditure
The assessee, a real estate developer, claimed certain expenses towards video surveillance charges. The revenue authorities allowed part of expenses in proportion of land sold. Held, since the expenditure incurred by assessee was for the purpose of business, it had to be allowed in full though entire property was not sold by assessee in year under consideration.(AY. 2007-08, 2008-09)
Mali Florex Ltd. v. DCIT (2013) (2012) 19 ITR 791 / (2013) 57 SOT 37(URO) (Hyd.)(Trib.)

S.37(1) : Business expenditure – Maintenance of building and machinery – No enhancement in existing capacity – Allowable as revenue expenditure

The assessee claimed deduction of a certain sum under the head building and machinery repairs. The Assessing Officer disallowed the claim. The Commissioner (Appeals) held that these expenses appeared to have been incurred towards maintenance of building and machinery. Further, the Assessing Officer not brought on record any material to show that the expenditure had resulted in bringing into existence a new item or enhancement of the existing capacity of the assessee. Therefore, the disallowance was not justified. Held, that nothing had been brought on record by the Department to controvert the findings of the Commissioner (Appeals). Therefore, the order needed no interference. (AY.2006-07)

Indian Research Manifestation Labs P. Ltd. v. ACIT (2013) 24 ITR 30 / 145 ITD 135 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Exigency – Recipient not taxed

Litigation expenditure incurred by assessee on account of business and commercial exigencies for purpose of business could not be disallowed merely on ground of deletion of addition in hands of recipient. (AY. 2008-09)

Mali Florex Ltd. v. DCIT (2012) 19 ITR 791 / (2013) 57 SOT 37(URO) (Hyd.)(Trib.)

S.37(1) : Business expenditure – Setting up of business – Not allowable as business expenditure

After entering into memorandum of understanding with a third party, the assessee commenced its business activity of procuring land for the third party and in that process incurred administrative expenditure over past three years. The project got completed in June 2007 and the assessee claimed the expenditure in AY 2008-09. Held, the impugned expenditure was incurred not for carrying on business of assessee but for setting up business and accordingly it could not be considered as business expenditure to allow deduction.(AY. 2008-09)

Mali Florex Ltd. v. DCIT (2012) 19 ITR 791 / (2013) 57 SOT 37(URO) (Hyd.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Setting up and commencement – Business income – Commercial Production – Set up of business – Administrative expenses allowable [S.28(i)]

Assessee engaged in exploration, invested in requisite plant and machinery, employed skilled personnel, obtained necessary approvals and successfully procured Reconnaissance Permit (RP) from Government, but did not commence commercial production. Assessing Officer held that business could not be considered as set up and commenced till commercially viable block was identified and commercial production was started. He disallowed administrative expenses, holding it to be preoperative expenses. Tribunal held that, assessee had procured machinery, recruited personnel and obtained permit, but not commenced commercial production, business of exploration could be said to be set up and commenced. Administrative expenses were not preoperative expenses and were allowable. (AY.2005-06)

Deccan Goldmines Ltd. v. CIT (2013) 141 ITD 579 / 89 DTR 330 (Mum.)(Trib.)

S.37(1) : Business expenditure – Bifurcation between revenue and capital – Expenditure on head office

The assessee owned multiplexes and was in the business of screening films. Some of the multiplexes were in operation and some in various stages of construction. The assessee claimed 68 per cent of head office expenditure as revenue on the ground that it was in the process of construction of commercial complexes in more than four areas in addition to developing a gaming centre and that substantial time, resources and devotion of the personnel and other infrastructure in the head office was invariably devoted to the newer projects under implementation. However, Assessing Officer estimated the expenditure at two-third capital and one-third revenue. Held, there was justification in

the claim of the assessee as the newly operational projects also would require more attention and in some projects there was no activity except purchase of land. In the absence of any details of manpower allocation and time spent on each project, the only rational method adopted by the assessee was capital cost allocation. The allocation made by the Assessing Officer had no basis or logic. (AY. 2005-06)
E-City Entertainment (India) Pvt. Ltd. v. ACIT (2013) 24 ITR 73 / (2014) 61 SOT 105 (URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Prior period expenditure – Allowability – Expenditure crystalised during the year are to be allowed
The assessee had debited prior period expenditure to the profit and loss account. This included the difference on account of short provision of depreciation computed under the Companies Act in earlier years and depreciation written back. The assessee explained that the net amount was reduced from the total income in the computation as these were only notional entries to rectify depreciation wrongly calculated in the earlier years and had no tax implication as these were added/deducted from profit under books for computation of income. Hence the balance credit was offered for tax by the assessee. Other items in this category were professional fees and travelling expenses transferred by VSD with whom the assessee had a joint development agreement, on termination of the agreement. The Assessing Officer disallowed the expenses including depreciation holding that the assessee had not brought conclusive proof that these expenses crystallised during the year and disallowed it. The Commissioner (Appeals) held that the expenses claimed by the assessee were actually not prior period expenses but lump sum payments made by the assessee to VSD for the termination of the joint development, which were of capital nature and not allowable. Held, that the Assessing Officer had not examined the nature of expenditure in spite of the assessee having given the details. Otherwise, he would not have disallowed the depreciation which was actually disallowed by the assessee in its computation. Just because the income and expenditure were classified as prior period, they need not be excluded or disallowed. The Assessing Officer had to examine whether the expenditure crystallised during the year. Hence, the matter was remanded back to the Assessing Officer. (AY. 2005-06)
E-City Entertainment (India) Pvt. Ltd. v. ACIT (2013) 24 ITR 73 / (2014) 61 SOT 105 (URO) (Mum.)(Trib.)

S.37(1) : Business expenditure – Staff welfare expenses – Break-up of expenditure
Assessee incurred staff welfare expenditure and claimed deduction. Assessing Officer disallowed claim on ground that break-up of expenditure was not given. Tribunal held that the assessee had explained expenses and there was no finding of Assessing Officer that assessee had not recorded such expenditure in its books. Accordingly the tribunal held that Just because break up of expenditure had not been produced, disallowance could not have been made. Matter remanded to Assessing Officer. (AY. 2004-05)
EDAC Engineering Ltd. v. Dy. CIT (2013) 141 ITD 231 (Chennai)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Purchase of new transformer installed in lease premises is capital in nature
Assessee incurred expenses towards purchase of a new transformer installed in a premises taken on lease replacing the existing transformer. The assessee claimed the said expenditure as revenue in nature. The Assessing Officer treated the said expenditure as capital in nature and allowed the depreciation @ 15%.Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal the Tribunal held that for purpose of determination of nature of expenditure it should be assumed that premises belonged to assessee. Expenditure incurred towards purchase of altogether new transformer was definitely capital expenditure. (AY.2008-09)
ACIT v. Anand & Anand (2012) 20 ITR 267 / (2013) 141 ITD 326 (Delhi)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Furniture under construction
The assessee claimed the construction of furniture as revenue expenditure. Assessing Officer disallowed the said expenditure. On appeal Commissioner (Appeals) directed assessing Officer to verify expenditure incurred by assessee. On appeal by the revenue the Tribunal held that expenses incurred for procuring furniture could not be allowed as a deduction in nature of revenue expenditure and, therefore, direction of Commissioner (Appeals) was to be vacated. As the furniture was not used for the purpose of business for the relevant year even the depreciation was not allowable. (AY. 2006-07)
Mahindra Holidays and Resorts India Ltd. v. Dy. CIT (2012) 19 ITR 811 / (2013) 141 ITD 363 (Chennai)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Licence fee – Software for three years
Assessee had acquired licence to use software for a period of three years. Every year assessee was making payment as licenece fees. Since Assessee was having only a permissive right to use software and it was not enjoying any copyright, amount of licence fee would be allowed as Business expenditure. (AY. 2006-07)
Mahindra Holidays and Resorts India Ltd. v. Dy. CIT (2012) 19 ITR 811 / (2013) 141 ITD 363 (Chennai)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Market research expenses – Project abandoned – Capital in nature
Assessee incurred certain amount towards market research expenses for launching a new holiday concept 'zest.' Project did not take place and it was abandoned. Tribunal held that expenses were incurred in experimenting with a new venture, same were capital in nature. (AY. 2006-07)
Mahindra Holidays and Resorts India Ltd. v. Dy. CIT (2012) 19 ITR 811 / (2013) 141 ITD 363 (Chennai)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Abandoned project – Expansion of new project
Assessee a manufacturer claimed deduction on expenditure incurred towards expansion of a new project. Assessing Officer found that a part of expenditure was incurred in earlier year and disallowed expenditure to that extent. Since expenditure remanded for verification was incurred for expansion of a project which had to be abandoned, expenditure was capital in nature and it was not allowed. (AY. 1998-99)
Superfil Products Ltd. v. ACIT (2012) 20 ITR 171 / (2013) 141 ITD 567 / 157 TTJ 343 (Chennai)(Trib.)

S.37(1) : Business expenditure – Software – Depreciation – Software expenses depreciation is allowable at 60% [S. 32]
Assessee purchased a software programme for its specific business needs. It was undisputed that expenditure had been laid out for acquiring an intangible asset to be used by assessee for a number of years and, thus, same would have an enduring benefit. On facts, software expenses could not be allowed as revenue expenditure, however, since intangible asset i.e., software programme was part and parcel of computation of income, assessee was entitled to depreciation at rate of 60 per cent on expenditure in question. (AY. 2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.37(1) : Business expenditure – Pooja expenditure – The requirement of commercial expediency must be judged in the context of current socio economic thinking

Tribunal held that it is an undisputed fact that no business can be conducted in hostile, socio–economic environment. The expenses incurred on the activities which create a suitable environment and impression with reference to image and smooth functioning of the business activity of the assessee by gaining the trust of the employees as well as the local public in the affairs of the assessee company. Therefore expenses incurred by assessee in respect of pooja, donation for local festivals and other such local activities, were to be allowed as business expenditure. The requirement of commercial expediency must be judged in the context of current socio economic thinking.(AY. 2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.37(1) : Business expenditure – Arrears of wages – Allowable as per agreement though the final agreement was reached in latter year
Assessee entered into wage agreement for a period of 10 years from 1-1-1997 to 31-12-2006. Therefore, due date for revision of wages and salaries were from 1-1-2007. Workmen had submitted their charter of demands on 30-6-2006 during previous year relevant to assessment year under appeal. Even though final memorandum of settlement was reached on 24-9-2009 increase in salary was effective from 1-1-2007. Assessing Officer and Commissioner (Appeals) disallowed provision for wage revision arrears treating same as contingent liability. Tribunal held that enhanced salary was accrued and crystallized liability from 1-1-2007 to 31-3-2007 and would be an allowable deduction. (AY.2007-08)
Electronics Corporation of India Ltd. v. ACIT (2013) 140 ITD 221 / 89 DTR 190 / 155 TTJ 748 / (2014) 29 ITR 637 (Hyd.)(Trib.)

S.37(1) : Business expenditure – Accrual – Security expenses liability on estimate basis is allowable. [S.145]
Assessee's liability to pay security expenses to Nuclear Fuel Complex (NFC) accrued during relevant financial year and it was not contingent upon any other happening mere fact that it was not quantified during year by way of raising of bills by NFC could not alter fact that such liability even though on an estimated basis was an accrued and allowable liability. (AY.2007-08)
Electronics Corporation of India Ltd. v. ACIT (2013) 140 ITD 221 / 89 DTR 190 / 155 TTJ 748 / (2014) 29 ITR 637 (Hyd.)(Trib.)

S.37(1) : Business expenditure – Provision for expenses – Provisions for unascertained liabilities – Amount actually paid by club is allowable
The Assessing Officer disallowed a sum shown as provisional expenses. The Commissioner (Appeals) held that vouchers and copy of accounts showed that the amount was actually paid by the club. Therefore he deleted the addition. On appeal by the Department the Tribunal confirmed the order of Commissioner (Appeals). (AY. 2007-08, 2008-09)
ITO v. Kamala Vihar Sports Club (2013) 23 ITR 104 / 59 SOT 3 (URO) (Mum.)(Trib.)

S.37(1) Business expenditure – Capital or revenue – Liquidated damages paid for delay in delivery of goods supplied under contract is allowable as revenue expenditure
Liquidated damages paid by the assessee under a contractual obligation to the purchasers of electrical equipment, which was a day-to-day business activity of the assessee, and was not an expenditure of capital in nature. The contract between the assessee and its purchasers specifically mentioned that the payment of liquidated damages would not be considered as penalty. Admittedly, the assessee paid liquidated damages to the Railway department and other Government undertaking enterprises in accordance with the contract and due to the delay in completion of the supply contract. Therefore, this is an allowable expenditure. The finding of the Commissioner (Appeals) that the payment of liquidated damages was capital in nature was not sustainable. The Assessing Officer was to calculate

the amount of liquidated damages allowable for the year under consideration after verifying the quantum of claim of the assessee and allow the deduction. (AY. 2007-08)
Huber Suhner Electronics P. Ltd. v. Dy. CIT (2013) 22 ITR 596 / 59 SOT 59 (Delhi)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Amounts paid by assessee for purchase of master plate of audio songs with copyright is revenue expenditure
The assessee purchased copyright for mechanical reproduction of sound recordings of various films in the form of audio cassette tapes, compact discs or any other format. According to the agreement the assessee acquired a master plate containing the agreed sound track with copyright to commercially exploit it. The assessee claimed the cost of purchase of the master plate with copyright as revenue expenditure. The Assessing Officer rejected the claim and treated the cost of purchase of audio rights as capital expenditure. On appeal, the Commissioner (Appeals) held the said expenditure as revenue expenditure. On appeal by the Department, the order of commissioner (Appeal) was confirmed. (AY. 2004-05)
ITO v. Five Star Audio (2013) 22 ITR 707/143 ITD 288 (Chennai)(Trib.)

S.37(1) : Business expenditure – Discontinue of one unit – Expenses is allowable
The assessee-company is engaged in the manufacture of paints and varnishes. Assessing Officer disallowed expenses in relation to the assessee's factory at K on the ground that the assessee had discontinued its operation of pigment manufacturing at that factory. The Commissioner (Appeals) directed the Assessing Officer to allow the deduction claimed by the assessee in respect of the K unit in respect of power, fuel and electricity, rent, rates and taxes and watch and ward expenses, but disallowed the other expenses holding that the assets of the said unit were not utilised by the assessee for the purpose of its business. On appeal :Held, that expenses incurred to protect the business assets should be allowed as deduction. The disallowance of various expenses in relation to the K unit was to be reversed. (AY.2002-03)
Kansai Nerolac Paints Ltd. v. Dy. CIT (2013) 22 ITR 424 / 57 SOT 10 (URO)(Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Software licence fees – Software to enable business to be run more efficiently is deductible
The assessee paid Rs. 51.18 lakhs to GTL Ltd. towards licence fees for user of finance, purchasing, order management and manufacturing. The Assessing Officer observed that lump sum payment for purchase of Oracle licences, made for the first time could not be in the nature of revenue expenditure and even though the benefit derived by incurring such expenditure may not be for ever, it was spread over several years and it thus fell into the category of benefit of enduring nature. He disallowed the expenditure and this was upheld by the Commissioner (Appeals). On appeal to the Tribunal : That the assessee was in the business of manufacturing mining machinery and the software in question was for the purpose of finance, purchase order management and manufacturing. This software would help the assessee in increasing the efficiency and could not be treated as forming part of the profit-making apparatus of the assessee-company and, therefore, the expenditure on this software could not be treated as capital expenditure. Out of this total expenditure of Rs. 62,30,245 claimed by the assessee as revenue expenditure, the Assessing Officer had already allowed deduction of Rs. 51.18 lakhs being depreciation at 60 per cent. and disallowance was made amounting to Rs. 20.47 lakhs being the 40 per cent. of such expenditure and since it was not a capital expenditure, this disallowance had to be deleted. (AY. 2007-08)
Eimco Elecon (India) Ltd. v. Add. CIT (2013) 22 ITR 380 / 58 SOT 14 (URO)(Ahd)(Trib.)

S.37(1) : Business expenditure – Assessee failing to produce proper bills and vouchers for direct and indirect expenses – Assessing Officer was to restrict disallowance to 5 per cent of cash payments

The Assessing Officer disallowed expenses on the ground that the assessee could not produce proper bills and vouchers for most of the expenditure claimed and for the direct and indirect expenses incurred. He made an estimated disallowance for each of the assessment years. The Commissioner (Appeals) directed the Assessing Officer to restrict the disallowance to 8 per cent. of the cash expenses claimed and allow the balance of expenditure for all the years under appeal. The Revenue appealed against the restriction of the disallowance to 8 per cent. and the assessee appealed against the sustenance of the disallowance of 8 per cent. : Held, that since the issue under consideration was identical to that considered in the case of the company the Assessing Officer was to restrict the disallowance to 5 per cent. of the cash payments. (AY. 2002-03 to 2008-09)
ACIT v. Mir Mazharuddin (2013) 22 ITR 314 / 59 SOT 9 (URO) (Hyd.)(Trib.)

S.37(1) : Business expenditure – Catering business – Disallowance on ground of duplication of expenditure
In a statement recorded during the course of operations under section 132 of the Act, at the premises of a company of which the assessee was the managing director and at the residential premises of the assessee, one of the employees of the assessee admitted that the kitchen facilities of the company were utilized by the catering business of the assessee, which did not have a separate kitchen. For this reason, the Assessing Officer felt that there were duplication of expenditure claimed by the assessee in his catering business and disallowed payments of electricity meters in the name of the assessee, rent paid for administrative office, and expenditure on different heads. The Commissioner (Appeals) held that the finding of claim of duplication of expenses was not properly supported. On appeal :Held, that the Department did not bring any material to suggest that the same expenditure was claimed in the case of the company to establish that the assessee had made double claim of expenses. The assessee had also filed his return of income and had disclosed profit on catering services after claiming various expenses. Hence, the expenses claimed by the assessee had been incurred for the purpose of his catering business and there was no duplication of the expenses in the case of the assessee. (AY. 2002-03 to 2008-09)
ACIT v. Mir Mazharuddin (2013) 22 ITR 314 / 59 SOT 9 (URO) (Hyd.)(Trib.)

S.37(1) : Business expenditure – Professional charges – Director – Deduction at source – Salary – Once commercial expediency is accepted and tax deduction at source effected deduction to be allowed [S.40(a) (ia), 192, 194J]
The assessee made a certain payment as professional charges to director of the assessee-company, after deduction of tax at source under section 194J of the Act,treating the payment as a payment for professional services rendered. According to the Assessing Officer, the payment should have been considered as salary paid to an employee and that the assessee-company had misrepresented the salary as professional charges specifically to give an undue advantage to claim additional expenses in her return of income. He disallowed the sum. On appeal the Commissioner (Appeals) held that once the commercial expediency of a payment was not questioned, and the tax deduction at source was actually effected, the question of a perceived misapplication of the particular provision was academic and that the provisions of section 192 being outside the purview of section 40(a) (ia), the addition was unsustainable. On appeal by revenue the Tribunal held that once the commercial expediency of a payment was accepted and tax deduction at source had been effected, the deduction would have to be allowed. There was a consultancy agreement and the payment in question prima facie was a payment for professional services rendered. The payment could not be treated as a payment of salary. In any event, the disallowance of this legitimate business expenses in the hands of the assessee was without any basis and could not be sustained. (AY.2008-09)
Dy. CIT v. Ray Keshavan Design Associates P. Ltd. (2013) 22 ITR 259 (Bang.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Expenditure on entirely new line of business is held to be as capital expenditure

Assessee was engaged in the manufacture of lignite. It set up a new project and claimed deduction of expenditure incurred as revenue expenditure. The power project was a new line of assessee's business. The product manufactured in power project was an altogether new product. Hence the expenditure was not allowable as revenue expenditure. (AY. 2001-02 to 2002-03)
Gujarat Mineral Development Corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Salary paid to staff at residence of chairman was held to be allowable as business expenditure
Assessee claimed deduction of salary paid to staff appointed at residence of company's chairman. Lower authorities disallowed the claim on the ground that it was in violation of guidelines issued by Government of Gujarat dated 28-8-1998 and was also against article 192 of association of Corporation and thus Explanation to section 37(1) was attracted. The Tribunal held that the said expenditure was not for any purpose which was an offence and also did not tantamount to an expenditure which was prohibited by law, disallowance of same was not justified. (AY. 2001-02 to 2002-03)
Gujarat Mineral Development corp. Ltd. v. ACIT (2013) 140 ITD 603 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Software Licence fee is revenue
The assessee had spent a certain sum towards various licence fees paid for acquiring software for running its computers. The Assessing Officer was of the view that the software expenses gave an enduring benefit and were capital in nature. The Commissioner (Appeals) deleted part of the disallowance. On appeal to the Tribunal held that, even though the expenditure on software might give an enduring benefit, since no asset had been created by paying licence fees for utilisation of the software, the expenditure was allowable as revenue expenditure. Appeal of assessee was allowed. (AY. 2002-03)
HSBC Securities and Capital Markets (India) P. Ltd. v. ACIT (2013) 21 ITR 445 / 57 SOT 194 (Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Expenditure on acquiring software – Matter remanded
Assessee claimed the purchase of computer software as revenue expenditure. The Assessing Officer rejected the claim. The Commissioner (Appeals) held that the expenditure in relation to warranty module, sales module and parts module were revenue in nature while the expenditure in relation to the factory module was capital in nature. On appeal, the Tribunal held that there is no single definitive criterion which, by itself, is determinative whether a particular outlay is capital or revenue. The "once for all" payment test is also inconclusive. What is relevant is the purpose of the outlay and its intended object and effect, considered in a common-sense way having regard to the business realities. The Tribunal in *Amway India Enterprises v. Deputy CIT [2008] 301 ITR (AT) 1 (Delhi) [SB]* laid down the following tests: (a) where the assessee acquires a computer software or licence to use such software, the assessee acquires a tangible asset and becomes owner thereof; (b) where the life of computer software is shorter, it may be treated as revenue expenditure. Any software having its utility to the assessee beyond two years can be considered as accrual of benefit of enduring nature; (c) once the test of ownership and enduring benefit is satisfied, the question whether expenditure on computer software is capital or revenue is to be seen on a case to case basis from the point of view of its utility to a businessman and how important an economic or functional role it plays in his business. The licensing agreement in the instant case had not been placed before the Tribunal. The Commissioner (Appeals) had not examined as to how the assessee carried on its functions before acquiring the integrated software and nor even as to whether or not the software was part of infrastructure for commencing the business operations in India and whether or not each of the four modules could function independently in the light of the economic and functional test while confirmation dated

September 6, 2012 of H, Japan was not before the lower authorities. Matter remanded. (AY.1999-2000)

Dy. CIT v. Honda Siel Cars Ltd. (2013) 142 ITD 783 / 21 ITR 497 (Delhi)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Software – Maintenance of software is revenue expenditure

Assessing Officer disallowed the expenditure incurred on software. On appeal it was submitted by the assessee that the expenditure was not incurred for purchase of software but for maintenance of software and technical support services. The Commissioner (Appeals) set aside the disallowance. On appeal, the Tribunal held that the software expenses were revenue in nature and hence deductible (AY. 2007-08)

Dy. CIT v. Ovira Logistics P. Ltd. (2013) 21 ITR 436 / 57 SOT 185 (Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Renovation – Leas hold premises – Renovation expenses is capital expenditure and the assessee is entitle to depreciation. Expenditure on demolishing and dismantling is revenue in nature [S.32]

The assessee-company had a Maruti dealership and service station and for the purpose of setting up the service station took premises on lease throughout the State of Tamil Nadu. To make the buildings suitable according to its requirements, the assessee carried out renovations, interior decoration, new construction and repairs to the buildings taken on lease and claimed the entire expenditure incurred on the leased premises as revenue expenditure. The Assessing Officer treated the said expenditure as capital in nature and allowed depreciation at 10 per cent. In appeal, Commissioner (Appeals) partly confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that it could not be ascertained whether the assessee was getting an enduring benefit of a revenue nature from the additional structure or renovation/repairs undertaken by the assessee on the leased out premises. The case of the assessee fell within the ambit of Explanation 1 to section 32(1) of the Act. The Commissioner (Appeals) had rightly disallowed expenditure on construction of overhead tank, washing ramp, oil change, final inspection and wheel pit and extension of shed from the existing workshop for the front office. The expenditure on renovation of existing shed and new electrical fittings was capital in nature. The expenditure on demolition, dismantling etc. alone, was revenue. Therefore, the order of the Commissioner (Appeals) was to be modified to exclude expenditure incurred on renovation of existing shed and electrical fittings from revenue and treat it as capital in nature. (AY. 2005-06, 2008-09)

ABT Ltd. v. ACIT (2013) 21 ITR 634 / 152 TTJ 791 / 83 DTR 178 / 56 SOT 42 (Chennai) (Trib.)

S.37(1) : Business expenditure – Interest for broken-period received on Government securities charged to tax as business income – Interest for broken-period paid at time of purchase of securities allowable [S.28(1)]

The Tribunal held that once the broken-period interest received by the assessee-bank on Government securities was charged to tax as business income under section 28 of the Act, deduction for payment made for broken-period interest at the time of purchase of these securities could not be denied when the assessee's method of accounting does not result in loss of revenue for the Department. (AY.1998-99) (AY. 1998-99 to 2003-04)

Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606 / 57 SOT 101 (Mum.)(Trib.)

S.37(1) : Business expenditure – Commencement of business – Commercial production – Expenses incurred before commencement of business is not deductible [S.35D]

The assessee claimed deduction under section 35E of the Act. The Assessing Officer came to the conclusion that the assessee had not complied with the requirement of section 35E because, mining work was carried out by the Commissioner Geology and Mining in respect of lease granted in the year 1988 and the expenditure incurred on account of payment to this party had been shown under the

head “consultancy fee” towards project, pending allocation. He also observed that there was no evidence of commercial production and, therefore, held that the assessee was not eligible for deduction under section 35D of the Act. The assessee appealed before the Commissioner (Appeals) but without success. On appeal to the Tribunal it contended that even if the claim was not allowable under section 35D, it should be allowed under section 37 because the assessee proposed to sell the project and recover the expenses. The Tribunal held that the assessee claimed deduction under section 37 because the assessee proposed to sell the project and recover these expenses from the buyer. No evidence had been produced in support of this argument that the assessee had ultimately sold the project in a subsequent year and recovered these expenses from the buyer. Moreover, even if this was done, no deduction was allowable in the present year because even if the expenditure was to be debited in the profit and loss account, it had to be considered in the credit side of the profit and loss account also as the closing stock of work-in-progress and there could be no resultant deduction in the present year. The Tribunal also held that the land was purchased for the proposed joint venture power project and none of the power projects had commenced business. In the present case, the Assessing Officer had given this finding that the rates and taxes before commencement of production in a project were capital expenditure. The basis of the order of the Commissioner (Appeals) was that this expenditure did not enhance the value of the asset, i.e., the land in the present case. Even if it did not enhance the value of the land in question it could not be allowed as revenue expenditure because the business had not commenced and therefore, it was a pre-operational expenditure. It was not deductible.(AYs. 2003-04 to 2006-07)
Gujarat Power Corporation Ltd. v. Add. CIT (2013) 21 ITR 683 / 58 SOT 9 (URO)(Ahd.)(Trib.)

S.37(1) : Business expenditure – Advertisement – Disallowance merely on ground that instead of products, chairman was being promoted is not proper
The assessee incurred advertisement expenditure which the Assessing Officer considered high. The Assessing Officer disallowed the expenditure on the ground that an attempt has been made by the company to promote the chairman and not the product. The Assessing Officer therefore, disallowed 20 per cent. of the advertisement expenditure. Held not proper. (AYs. 2005-06 to 2007-08)
Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Expenditure on development of software is revenue
Tribunal held that the Commissioner (Appeals) had rightly allowed the claim to deduction of expenditure on development of software. (AY.2003-04, 2004-05)
ACIT v. SRA Systems Ltd. (2013) 22 ITR 205 (Chennai)(Trib.)

S. 37(1) : Business expenditure – Software expenses – Allowable as revenue expenditure
Assessee made payments for availing e-mail infrastructure, which was owned by its parent company. It was using e-mail infrastructure facilities for communication between its employees and outside business partners. It had debited said payments in profit and loss account under head ‘software expenses’ and claimed deduction for same. The said expenditure was purely revenue in nature and was allowable. (AY. 2007-08)
Evonik Degussa India (P) Ltd v. ACIT (2013) 55 SOT 566 / 151 TTJ 1 / 82 DTR 143 (Mum.) (Trib.)

S.37(1) : Business expenditure – Custom duty – Capital goods – Not allowable as business expenditure
Tribunal held that payment of custom duty for debonding of capital goods increases value of those goods and, therefore, same cannot be allowed as business expenditure. (AY. 2007-08)
Headstrong Services India (P.) Ltd. v. ACIT (2013) 55 SOT 481 (Delhi)(Trib.)

S.37(1) : Business expenditure – Electricity connection – Expenditure on initialization of electricity connection is capital in nature

Expenditure incurred on initialization of electricity connection granted benefit of enduring nature to assessee and, therefore, same was not allowable being capital in nature. (AY.2007-08)

Headstrong Services India (P.) Ltd. v. ACIT (2013) 55 SOT 481 (Delhi)(Trib.)

S.37(1) : Business expenditure – Warranty provision – Allowable as deduction

In course of assessment, assessee claimed deduction in respect of provision created for warranty support on products sold during relevant year. Assessing Officer disallowed provision treating it as an unascertained liability. It was noted from records that assessee took into account warranty liability for accounting period after bifurcating likely cost on account of labour, material etc. It was also apparent that wherever excess provision was made in an earlier year, same was reversed in subsequent period. Tribunal held that on facts, estimate made by assessee in respect of warranty liability was on scientific and reasonable basis and, thus, same was to be allowed as deduction. (AY.2006-07)

Textronix India (P.) Ltd. v. Dy. CIT (2013) 55 SOT 512 (Bang.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Selling of diamonds under the brand name – Expenditure not capital in nature as profit derived from selling of premier product, no right either on mark or in IPR or goodwill of mark

The assessee company is engaged in the business of licensing, manufacturing, distribution and selling of diamonds under the brand "Nakshatra". 'B', a Swiss-diamond manufacturer was owner of mark "Nakshatra" B' licensed said mark to 'D', who in turn, had sub-licensed to assessee. Assessee sold diamonds under brand name "Nakshatra". Assessee made payment to 'D' for its share on promotion of mark 'N' and claimed sales promotion expenses. Assessing Officer disallowed 20 per cent of payment holding same to be capital in nature. It was held that facts revealed that entire rights and goodwill through marketing campaign and advertisement would be owned by 'B' and 'D'; assessee had no right either on mark or in intellectual property right or goodwill of mark; and what assessee was enjoying was only profit from selling of premium products under said mark. Therefore, expenditure incurred was revenue in nature and was to be allowed. (AY. 2006-07)

Brightest Circle Jewellery (P.)Ltd. v. ACIT (2013) 140 ITD 11 / 154 TTJ 571 / 86 DTR 280 (Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Warranty expenditure – Deduction allowed if provision made on scientific basis

Assessee had acquired personal computer and laptops division of IBM India and continued business of trading and manufacture of PCs and MCs. It provided either 1 year or 3 years warranty on sale of PCs and laptops made to its customers in India. Assessee debited actual warranty expenditure incurred during year and also made additional provision on basis of assessment of warranty liability on sales made for unexpired period to profit and loss account and claimed it as deduction. It was held that since IBM was carrying on business in India in earlier assessment years and it was making provision for warranty on basis of its global data, assessee could use data used by IBM for past years for making estimation and if assessee had made provision on a scientific basis, it had to be allowed as deduction. (AY. 2006-07)

Lenovo India P. Ltd. v. ACIT (2012) 71 DTR 90 / 147 TTJ 102 / (2013) 140 ITD 127 (Bang.) (Trib.)

S.37(1) : Business expenditure – Capital or revenue – Fees for services rendered as per market support agreement – Payment for efficient running of business and deriving revenues there from,fees allowable as deduction

Assessee acquired personal computer business from IBM. As IBM had well-established enterprise sales force and established global sales infrastructure, such as client representation centre, etc., for

more than 52 years, assessee wanted to take support from IBM and for that purpose had entered into market support agreement with IBM. Assessee paid certain fees to IBM for services rendered under market support agreement. Assessing Officer treated same as payment for acquisition of goodwill and considered it to be in nature of capital expenditure not allowable under section 37. It was held that since support services were for purpose of sale of products manufactured by assessee, it was clearly established that it was for efficient running of business and deriving revenues therefrom and, therefore, fee paid by assessee for marketing support services rendered by IBM was allowable as deduction under section 37(1). (AY. 2006-07)
Lenovo India P. Ltd. v. ACIT (2012) 71 DTR 90 / 147 TTJ 102 / (2013) 140 ITD 127 (Bang.) (Trib.)

S.37(1) : Business expenditure – Capital or revenue – Payments made to maintain dealership/ business relationship revenue expenditure
Assessee acquired business of PCs and laptops division from IBM during previous year, and continued to carry on manufacturing and trading operations of PCs using same facility and same dealership network as used by IBM in its business prior to acquisition. Future billing adjustment reserve of certain amount was a liability towards various claims/special discounts payable to distributors/dealers of IBM India, whereas,the actual payout relating to period up to effective date of takeover was a much higher amount. Accordingly, the amount of difference was charged to profit and loss account and claimed as revenue expenditure. It was held that since assessee was to carry on business with said dealers in future, it was bound to make payments to maintain business relations with dealers and such payments had to be considered as business expenditure of assessee. (AY. 2006-07)
Lenovo India P. Ltd. v. ACIT (2012) 71 DTR 90 / 147 TTJ 102 / (2013) 140 ITD 127 (Bang.) (Trib.)

S.37(1) : Business expenditure – Capital or revenue – Duty free replenishment certificates (DFRC) written off as not utilized – Deduction allowable as assessee was in same line of business.
As part of personal computer business acquired by assessee from IBM, assessee had also taken over duty free replenishment certificates (DFRC) receivable from IBM India and same were available for utilisation against import of inputs used in manufacture of goods without payment of customs duty. However, Government of India *vide* Notification No. 24/2005 - Customs dated 1-3-2005 exempted custom duty on all imports of computer parts and, therefore, DFRC receivable was no longer utilisable and was, hence, written off and charged to profit and loss account as revenue expenditure, since assessee was also in same line of business, assessee was entitled to deduction of aforesaid expenditure as revenue expenditure. (AY. 2006-07)
Lenovo India P. Ltd. v. ACIT (2013) 140 ITD 127 (Bang.)(Trib.)

S.37(1) : Business expenditure – Sharing of expenses – Debit note from parent Company – In the absence of vouchers and bills 50% of disallowance is held to be justified
The Assessee claimed the expenditure on the basis of debit note received from its parent company without producing any evidence to establish that the said expenditure was incurred for the purpose of business. Considering the facts the Tribunal held that disallowance of 50% expenses justified. (AY. 2005-06)
Instant Holdings Ltd v. Dy. CIT (2013) 81 DTR 1 / 151 TTJ 137 (Mum.)(Trib.)

S.37(1) : Business expenditure – Provision – Assessee engaged in development and maintenance of roads – Provision for road renewal is held to be not deductible
The assessee-company is engaged in the business of development, operation and maintenance of toll roads. For the assessment year 2002-03, it claimed deduction of Rs. 1,61,37,960 being expenditure on road overlay or renewal. It was observed by the Assessing Officer that a certain sum was debited to the profit and loss account. When the details were called for the assessee explained it to be provision

made on a scientific basis. The Assessing Officer disallowed the claim and this was confirmed by the Commissioner (Appeals). On appeal to the Tribunal held that it was evident that the entire expenses claimed by the assessee were a provision made in the books of account and did not pertain to actual expenses incurred by the assessee during the year. The expenses were not deductible. (AY.2002-03, 2005-06)
Dy. CIT v. Gujarat Road and Infrastructure Co. Ltd. (2013) 141 ITD 642 / 21 ITR 88 (Ahd.) (Trib.)

S.37(1) : Business expenditure – Project completion method – Expenses and title registration expenses not attributable to common expenditure for running business held to be not allowable. [S.145]
The assessee is a film maker and an event manager. The assessee followed the project completion method, showed loss from film business and profit from music albums. In addition to this, the assessee showed receipts from old films, i. e., royalty, telecast rights of films, satellite rights of movies and corresponding expenditure in respect of each of her ventures separately. Over and above this the assessee claimed common expenditure under various heads like Diwali expenditure, printing and stationery, professional fee, conveyance, credit card charges, depreciation, dress and costume, interest on loan, miscellaneous expenses and telephone charges. The Assessing Officer held that the expenditure booked on account of professional fee, publicity, business promotion, dress and costume, etc. was not in any way linked to old film income and was not allowable. The Commissioner (Appeals) upheld the order of the Assessing Officer. On appeal, the Tribunal held that expenses and title registration expenses not attributable to common expenditure for running business and not allowable. (AY. 2006-07)
Gurudas Mann (Mrs) v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.37(1) : Business expenditure – Vehicle – Telephone – Conveyance – Personal use – Disallowance not proper
Tribunal held that vehicle related expenses and telephone expenses, disallowance of 20 per cent for personal use is proper. Conveyance, lodging and boarding, travelling staff welfare, business promotion and publicity expenses no disallowance can be made for personal use. (AY. 2008-09)
Manjit Mann (Mrs.) v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.37(1) : Business expenditure – Ad hoc disallowance – Not proper
The tribunal held that disallowance for bills and vouchers not verifiable made after discussion with assessee cannot be challenged. *Ad hoc* disallowance without pointing out nature of discrepancies and head to which expenditure related is not proper. (AY.2008-09).
Manjit Mann (Mrs.) v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.37(1) : Business expenditure – Foreign shows – Disallowance confirmed
The Tribunal held that the Assessee unable to explain nature of expenditure and date of incurrence of foreign show.- Expenditure booked by assessee on dates at variance with dates of foreign shows. Disallowance was confirmed. (AY. 2006-07)
Gurudas Mann (Mrs) v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Repair and maintenance – Not in nature of replacement is capital in nature
The Tribunal held that expenditure on purchase of new furniture not replacement hence capital expenditure, not allowable. The Tribunal also held that there was no material to show replacement of electric installation or nature of electric installation replaced hence deduction is not allowable. (AY.2007-08)
Gurudas Mann (Mrs) v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.37(1) : Business expenditure – Expenditure on levelling and fencing land – Expenses not verifiable – Disallowance of part of expenditure is held to be justified

Assessee engaged in real estate development. The Assessing Officer made an *ad hoc* disallowance of 25 per cent of the expenditure claimed on levelling and fencing charges. After examining details the Commissioner (Appeals) held that such expenses appeared to be genuine and were generally incurred in the course of the assessee's line of business. He also found that some of such expenses were supported only by self vouchers and cash receipts which were not verifiable, and therefore restricted the disallowance. On appeal to the Tribunal held that the assessee had not furnished any cogent evidence to establish that the expenses, which stood disallowed, were verifiable. The disallowance was justified. (AY.2006-07, 2007-08)

ITO v. Nam Estates P. Ltd (2013) 141 ITD 659 / 21 ITR 109 / 91 DTR 425 (Bang.)(Trib.)

S.37(1) : Business expenditure – Brokerage – Commission – TDS deducted allowable balance disallowance was confirmed

Assessee is engaged in real estate development. Out of the total expenses claimed under the head "Brokerage and commission", the Assessing Officer holding that in this line of business of land transactions the average percentage of commission and brokerage was one per cent., disallowed the balance. The Commissioner (Appeals) examined the matter in detail and came to the view that expenses on commission and brokerage charges, on which tax had been deducted at source and remitted to the treasury, were genuine according to the facts placed before him and accordingly allowed the assessee relief and confirmed the disallowance of Rs.4,44, 342. Tribunal confirmed the order of Commissioner (Appeals) and dismissed the cross appeal of assessee. (AY.2006-07, 2007-08)

ITO v. Nam Estates P. Ltd. (2013) 141 ITD 659 / 21 ITR 109 / 91 DTR 425 (Bang.)(Trib.)

S.37(1) : Business expenditure – Foreign tour expenses of accompanying spouse – Disallowance held to be proper.

The assessee claimed the foreign tour expenses of accompanying spouse of directors of assessee-company. As the assessee failed to provide any evidence disallowance of such expense, was held to be proper. (AY.2005-06)

Harinagar Sugar Mills Ltd. v. ACIT (2013) 21 ITR 383 / 57 SOT 145 (Mum.)(Trib.)

S.37(1) : Business expenditure – Club expenses – Allowable

Tribunal held that the disallowance under the head "club expenditure" was not justified. (AY. 2001-02)

Jindal Iron and Steel Co. Ltd. v. Dy. CIT (2013) 21 ITR 414 / 57 SOT 317 (Mum.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Repairs of flats or buildings

Expenditure incurred in connection with sofa, recreation central table, electrical fittings and design consultancy and supervision charges was in the nature of capital expenditure, while the remaining amount of the impugned expenditure was revenue in nature as it was incurred for maintenance / repairs of the fixed assets viz., buildings or structures. (AY. 2002-03)

Lintas India (P) Ltd. v. ACIT (2013) 83 DTR 263 / 152 TTJ 706 (Mum.)(Trib.)

S.37(1) : Business expenditure – Commission to dealers – Agreement and addendum not disputed, commission paid held to be allowable

The Assessing Officer disallowed the commission on the basis that the assessee had paid commission to its channel partner in excess of the slab rates mentioned in the agreement. In appeal, the Commissioner (Appeals) deleted the addition on the basis of addendum to the agreement which was filed as additional evidence before the Commissioner Appeals). Commissioner (Appeals) referred the additional evidence for the comments of Assessing Officer. On appeal to the Tribunal by revenue the Tribunal held that as the Assessing Officer has not disputed the veracity of the addendum to the

agreement between the assessee and its channel partner which was filed as additional evidence, order of Commissioner (Appeals) deleting the disallowance was held to be justified. (AY. 2003-04, 2004-05, 2006-07)
ACIT v. Shyam Telelink Ltd. (2013) 141 ITD 416 / 81 DTR 269 / 151 TTJ 464 (Delhi)(Trib.)

S.37(1) : Business expenditure – Repair and maintenance of machinery – Ad hoc disallowance was held to be not justified
The Assessing Officer made ad hoc disallowance of 20% of the expenditure incurred on repair and maintenance of machinery as capital expenditure. The Tribunal deleted the disallowance on the basis that similar disallowances for Asst. Years 2003-04 & 2004-05 were deleted by Tribunal. (AY. 2006-07)
Goodyear India Ltd. v. Dy. CIT (2013) 143 ITD 35 / 152 TTJ 458 / 83 DTR 233 (Delhi) (Trib.)

S.37(1) : Business expenditure – Provision for warranty is allowable as deduction
Tribunal held that courts have consistently held the view that liability for provision for warranty for replacement on account of manufacturing defects arises at the time of sale and is to be allowed as deduction in that year on the basis of rational / scientific estimate, notwithstanding that the exact amount of liability is ascertained at a later date. Tribunal followed the decision of Hon'ble Apex Court in the case of *Rotak Controls India P. Ltd. v. CIT (2009) 314 ITR 62 (SC)* and held that provision for warranty made by the assessee is allowable. (AY. 2006-07)
Goodyear India Ltd. v. Dy. CIT (2013) 143 ITD 35 / 152 TTJ 458 / 83 DTR 233 (Delhi) (Trib.)

S.37(1) : Business expenditure – Petty expenses – Ad hoc disallowance
Where expenses claimed by assessee were petty in nature for which supporting vouchers were not available. Genuineness of expenses were not doubted. *Ad hoc* disallowance was not justified.(AY. 2007-08)
ITO v. MGB Transport (2013) 23 ITR 391 / 143 ITD 564 (Kol.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – Dawing lay out – Legal and profession fees – Revenue expenditure
Professional fees paid for dawing lay out in respect of a capital asset i.e. Factory, building can not be held to be capital in nature.(AY.2002-03 to 2004-05)
Micro Inks Ltd v. ACIT (2013) 144 ITD 610 / 157 TTJ 289 / 92 DTR 186 (Ahd.)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – New project – Later abandoned – Capital in nature
Expenditure incurred on a new project which was later abandoned was capital in nature.(AY.1998–99)
Superfil Products Ltd. v. ACIT (2012) 20 ITR 171 / (2013) 141 ITD 567 / 157 TTJ 343 (Chennai)(Trib.)

S.37(1) : Business expenditure – Capital or revenue – New project – Activities for which expenditure incurred in furtherance of same line of business is allowable as revenue expenditure
Assessee was in process of setting up project for refining crude oil and for this purpose incurred expenditure on exploring sites, building of tenders travelling etc. Expenditure was treated as deferred expenditure in the book of account. Activities for which expenditure incurred in furtherance of same line of business is allowable as revenue expenditure.(AY. 2004-05, 2005-06)
Essar Oil Ltd v. Add. CIT (2013) 94 DTR 153 / 157 TTJ 785 / 28 ITR 609 (Mum.)(Trib.)

S.37(1) : Business expenditure – Year of allowability – Life of long term deposit –Allowed in the year of incurring without spreading over the term of deposit [S.145]

The assessee incurred expenses for raising loan/deposit for a period of five year. Expenditure has no relation with the life long term deposits received by the assessee bank SBI. Tribunal held that as the expenditure being revenue in nature and not deferred revenue expenditure , the same has to be allowed as deduction in entirety in the year of incurring itself without spreading it over the term deposit.

(AY.2001-02)

Credit Lynonnais (Through their successor: Calyon Bank) v. ADIT (2013) 26 ITR 51 / 144 ITD 644 / 96 DTR 261 / 158 TTJ 826 (Mum.)(Trib.)

S.37(1) : Business expenditure – Staff welfare expenses – Payments to schools

Payments made to some schools for reservation of seats for children of officers who were transferred periodically was held to be allowable.(1996-97)

State Bank of India v. Dy. CIT (2014) 148 ITD 71 (Mum.)(Trib.)

S.37(1) : Business expenditure – Interest [S. 215, 220(2), 234B]

Interest payment under section 234B, 220(2) and 215 is not an allowable deduction under section 36 or 37 as the payment of interest due to delay in payment of tax does not relate to earning of business income and therefore, same can not be allowable. (1996-97)

State Bank of India .v. Dy. CIT (2014) 148 ITD 71 (Mum.)(Trib.)

S.37(2) : Business expenditure – Entertainment expenditure – Disallowance of part of expenditure was held to be justified. [S.37(1)]

Expenditure incurred on employees who had accompanied visitors to the assessee concern constituted entertainment expenditure. But in the facts of the case, disallowance of part of expenditure was held to be justified. (AY. 1993-94)

CIT v. ING Vysya Bank Ltd. (2012) 208 Taxman 511 / (2013) 356 ITR 532 / 263 CTR 276 / 94 DTR 425 (Karn.)(HC)

S.37(3) : Business expenditure – Transit house – Not deductible [S. 37(4), 37(5)]

Following the ratio in *Britania Industries Ltd. v. CIT (2005) 278 ITR 546 (SC)*, the Court held that the expenditure on maintenance of a transit house was not deductible. (AYs. 1983-84 to 1990-91)

CIT v. Rassi Cements Ltd. (2013) 351 ITR 169 (AP)(HC)

CIT v. Deccan Cements Ltd. (2013) 351 ITR 169 (AP)(HC)

S.37(3A) : Business expenditure – Daily allowance paid to employees is of same character of hotel expenses of employees for the purpose of disallowances under section 37(3A) to (3D) [Ss. 37(1), 37(3A) to (3D), Rules 6D]

Held, that the Tribunal was correct in treating the daily allowance paid to employees of the assessee as having the same character as hotel expenses for the purpose of disallowance under section 37(3A) to (3D). (AY. 1985-86)

Novopan India Ltd. v. CIT (2013) 356 ITR 580 (AP)(HC)

S.37(3B) : Business expenditure – Advertisement and sales expenditure – Reimbursement. [S.37(3A)]

It is not necessary for assessee to maintain office for sales promotion himself. Assessee is entitled to deduction for reimbursement of advertisement and sales expenditure incurred on behalf of sales promotion for assessee by third person to whom advertising outsourced. Payment of 8% of the Sales realisaltion, to the Calcutta company to reimburse it for expenditure incurred by it on behalf of the

assessee in maintaining the sales promotion office and other infrastructure for advertising its product was allowable expenditure under section 37 (3B) (iv). (AYs. 1979-80, 1980-81)
CIT v. Dey's Medical Stores Manufacturing P. Ltd. (2013) 355 ITR 126 / 93 DTR 57 (All.)(HC)

S.37(4) : Business expenditure – Guest house – Expenses and depreciation would not be allowable under section 37(1) [S. 37(1)]
In case of guest house, expenses and depreciation would not be allowable under section 37(1) and in such a case provision of section 37(4) would be attracted (AY.1993-94)
CIT v. Radico Khaitan Ltd. (2013) 219 Taxman 84 (Mag.) / (2014) 360 ITR 462 (All.)(HC)

S.37(4) : Business expenditure – Guest house – Accommodation to workers in foreign country – Maintenance of accommodation for employees and executives for duration of projects outside India is not Guest house expenses – Such expenses are allowable
The assessee had to execute a project outside India. It had contracted for supply of labour services especially providing for temporary accommodation to its workers and employees. The intention of the assessee was not to provide "guest house" accommodation for those who visited the project site on "tour" or "visit". In other words, even though the accommodation provided was for the entire duration of the project, what was sought to be covered by sections 37(4) and 37(5), was the type of accommodation provided to the employee who merely used them on transitory or temporary basis and not in the circumstances of the assessee's case. Therefore, the expenses incurred by the assessee on the maintenance of accommodation provided to its employees and executives outside India was allowable. (AY. 1986-87).
CIT v. Ansal Properties and Industries Ltd. (2013) 352 ITR 637 / 87 DTR 360 / 216 Taxman 103 (Mag.)(Delhi)(HC)

S.37(4) : Business expenditure – Guest house – Insurance business – Expenditure on guest house. [S. 44, Sch. I, Rule 5]
Payment on account of expenditure on lease rent, taxes and repairs and maintenance of a guest house was not allowable. *Britannia Industries Ltd. v. CIT & Anr. (2005) 278 ITR 546 (SC)* followed. (AYs. 1980-81, 1981-82)
Oriental Insurance Co. Ltd. v. CIT (2013) 351 ITR 270 / 213 Taxman 498 / 83 DTR 185 (Delhi)(HC)

S.37(4) : Business expenditure – Guest house rent cannot be allowed as deduction
Rent of guest house paid cannot be allowed as deduction (AY. 1993–94)
CIT v. Forbas Ewart (P) Ltd. (2013) 81 DTR 436 (Ker.)(HC)

S.40(a)(i) : Amounts not deductible – Non-resident-Commission – Withdrawal of beneficial circular in October 2009 – Disallowance of payment was not justified
Circulars No. 23, dated July 23, 1969, No. 163, dated May 29, 1975, and No. 786, dated February 7, 2000 which clarified that payments in the form of commission or discount paid to a foreign party were not chargeable to tax in India were withdrawn by Circular No. 7 of 2009. Circular No. 7 of 2009 cannot be classified as explaining or clarifying the earlier circulars issued in 1969, 1975 and 2000. Hence, it did not have retrospective effect. Hence, in the relevant accounting year tax at source is not required to be deducted and no disallowance under section 40(a)(i) was justified on account of such non-deduction. (AY. 2009-2010)
CIT v. Angelique International Ltd. (2013) 359 ITR 9 / 219 Taxman 104 (Delhi)(HC)

S.40(a)(i) : Amounts not deductible – Deduction at source – Outside India – Non-resident – Royalty – Liability to pay royalty had accrued and was not contingent and while making

provision assessee had also made book entries in respect of tax deductible, such provision for royalty could not be disallowed

The assessee-company made a provision for royalty payable for period 1-1-1990 to 31-3-1991. The tax deductible on this royalty was duly shown in the books of account on 31-3-1991. Said royalty was paid in subsequent assessment year, i.e., 1992-93 and TDS on such payment was deposited. The Assessing Officer disallowed the said provision for royalty on the ground that the same was an unascertained liability. The Commissioner (Appeals) upheld the disallowance by invoking provisions of section 40(a)(i). The Tribunal deleted disallowance holding that while making provision the assessee had made book entries in respect of tax deductible and thus provisions of section 40(a) (i) could not be invoked. The court held that, out of two conditions as mentioned in section 40(a)(i), namely, 'tax has not been paid' or 'deducted', one condition, namely, 'not deducted' do not exist inasmuch as the tax has been deducted and therefore, the provision of section 40(a)(i) will not be attracted. The aforesaid interpretation is also supported by the proviso to section 40(a)(i) which provides that where the tax has been paid or deducted in any subsequent year then the amount of royalty shall be allowed as deduction in computing the income of previous year in which such tax has been paid or deducted. Thus, the use of two words, namely, 'paid' or 'deducted' do not carry the same meaning. Subsequent amendment by Finance (No.2) Act, 2004, making specific provision of deduction and payment thereof in the previous year or in the subsequent year was not available under section 40(a)(i) as it existed during the relevant assessment year i.e. assessment year 1991-92. Since liability to pay royalty had accrued and was not contingent and while making provision assessee had also made book entries in respect of tax deductible, such provision for royalty could not be disallowed. (AY. 1991-92)

CIT v. Modi Olivetti Ltd. (2013) 94 DTR 398 / 37 taxmann.com 464 / 263 CTR 28 / 218 Taxman 193 (All.)(HC)

S.40(a)(i) : Amounts not deductible – Deduction at source – Outside India – Non-resident – Interest – Discount charges is not interest [S. 2(28A)]

Discount charges earned by assessee-financial service provider by way of discounting bill of exchange and promissory notes in favour of Indian companies is to be treated as business income, and not as interest income, hence provisions of section 40(a) (i) cannot be applied. (AYs. 2005-06 to 2007-08)

DIT(IT) v. Cargil TSF PTE Ltd. (2013) 212 Taxman 16 (Delhi)(HC)

S.40(a)(i) : Amounts not deductible – Deduction at source – Fees for technical services – Training expenses of pilots was not taxable in India – Not liable to deduct tax at source – DTAA-India-USA [S. 9(1)(vii), Art. 12]

Assessee was engaged in business of charter hire of helicopters. During assessment proceeding AO held that assessee had not deducted tax at source while making payment towards training expenses paid to a US based company. AO opined that in view of Explanation 2 to section 9(1)(vii), payments made by assessee was 'fees for technical services' and, therefore, same was liable to be taxed in India. Accordingly, AO disallowed amounts paid by assessee on account of training expenses, by invoking provisions of section 40(a)(i). Tribunal held that the training was given to pilots and other staff as per requirement of DGCA Rules, therefore, it was only a part of eligibility of pilots and other staff for working in industry of aviation and such training would not fall under term 'service make available' as mentioned in para 4(b) of Article 12 of India - USA DTAA, in view of above, amount of training expenses was not taxable in India in hands of non-resident company and therefore, assessee was not required to deduct tax at source while making payment of said expenses. Consequently, disallowance was deleted. (AYs. 2006-07 & 2007-08)

United Helicharters (P.) Ltd. v. ACIT (2013) 60 SOT 58 (URO)(Mum.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Outside India – Fee for mobilising deposits is commission and not fees for technical services – Not liable to deduct tax at source [S. 9(1)(vii), 195]

Assessee bank received arrangers fee for mobilising deposits from State Bank of India, which it remitted to its head office/overseas branch in UAE. Tribunal held that such arrangers' fee was not in nature of fees for technical services under section 9(1)(vii), but merely commission, it was not taxable, and no tax was required to be deducted at source on same. (AY. 2001-02 to 2002-03)

DDIT(IT) v. Abu Dhabi Commercial Bank Ltd. (2013) 60 SOT 71 (Mum.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Outside India – Non-resident – Business connection – Royalty – TDS disallowance for amounts made taxable due to retrospective amendment. Also, concept of "business connection" u/s. 9(1)(i) & "fees for technical services" u/s 9(1)(vii) explained – DTAA-India-Netherlands. [S. 9(1)(i), 9(1)(vii), Article 12]

The assessee entered into an agreement with its associated enterprises (AEs) outside India pursuant to which it sub-contracted some of the work that it had obtained from its customers. The assessee incurred an expenditure of Rs.19 crore towards "technical consultancy charges" paid to the said AEs. The AO & DRP held that the assessee was "habitually securing orders" for the AEs from India and that there was a 'business connection' between the assessee and the AEs under Explanation 2 to s. 9(1)(i). Alternatively, it was held that the amount was assessable as "fees for technical services" u/s 9(1)(vii). As the assessee had not deducted TDS u/s 195, the expenditure was disallowed u/s 40(a)(i). On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) The facts show that the assessee secured orders from customers for its own benefit and only parceled out a portion of the work to the AEs. The Explanation to s. 9(1)(i) can be invoked only when the Indian company secures orders for the benefit of non-resident. As the assessee has not canvassed / secured any orders for its non resident subsidiaries, s. 9(1)(i) cannot be invoked. Also, the foreign subsidiaries do not work exclusively for the assessee and they obtain orders on their own from other foreign parties and also sub contract the work to the assessee depending on exigencies. Further, no operations have been undertaken by foreign subsidiaries in India and no engineers have been deputed by them to India and even they do not have permanent establishment in India. Even under the DTAA, no income is assessable to tax in India. CBDT Circular No. 29 dated 27-3-1969 is inapplicable to the present case;

(ii) As regards "fees for technical services", the payments made to the subsidiaries may be construed as "fees for technical services". However this is only due to the retrospective amendment by Finance Act 2010. Prior to that, Ishikawajima-Harima Heavy Industries 288 ITR 408 (SC) had held that s. 9(1)(vii) could be invoked only where the services were rendered in India and utilised in India. At the time of the payment Ishikawajima-Harima was the law of the land and the assessee was of the *bona fide* belief that TDS was not necessary on the said payments of fees for technical services. S. 40(a)(i) cannot apply to disallow payments which become taxable subsequently due to a retrospective legislation. Further, some of the payments do not satisfy the "make available" test in the DTAA as held in De Beers India Minerals (AYs. 2006-07, 2007-08)

Infotech Enterprises Limited v. ACIT (2014) 63 SOT 23 (Hyd.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Fee for master card international – Payment of tax by payee – No evidence was furnished to show that payee had paid taxes – Disallowance was justified – DTAA-India-USA [S. 9(1)(vi), Article 12]

Assessee claimed deduction for fees paid to Master Card International outside India which was disallowed on ground that no tax had been deducted at source. The assessee claimed that payee had paid tax on said payment and accordingly, deduction should be allowed. However, in the absence of any evidence that payee had paid taxes on amount received from assessee, deduction could not be allowed. (AY. 2000-01)

ACIT v. Bank of India (2013) 59 SOT 102 (Mum.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Interest – Disallowance of interest was not valid – DTAA-India-Singapore [Article 11]

The Tribunal held that disallowance of interest paid to Singapore Branch and taxing the interest received by Singapore branch is not proper by following the special bench order of the Tribunal in the case of *Sumitomo Mitsui Banking Corporation & Other v. Dy. CIT(A) (2012) 145 TTJ 649 (SB)(Mum.)*. The Tribunal held that neither the interest can be added under section 40(a)(i) nor it can be taxed as per Art. 11 of the DTAA. The order of CIT(A) was reversed by the Tribunal. (AYs. 2000-01, 2001-02)

Dy. DIT v. Toronto Dominion Bank Ltd. (2012) 138 ITD 506 / (2013) 153 TTJ 303 / 84 DTR 377 (Mum.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Professional fees and reimbursement of expenses – Outside India-Non-resident – Not necessary to pay tax in contracting State to a resident of contracting State. Mere right of contracting state to tax such person by reason of domicile, place of management or incorporation is sufficient – DTAA-India-UAE [S. 90, Article 14]

Professional fees to non–resident as no PE in India-services is not liable to tax India-DTAA-India-UAE, USA-UK [S. 9(1), 9(1)(vii), 195, Art. 4(1), 7, 12, 13, 15]

The asssessee made reimbursement of expenses to V of U.A.E. It claimed that "V "had not stayed in India for more than 183 days and did not have a fixed base in India. Therefore V's income was not chargeable to tax in India and therefore there was no need to deduct TDS u/s.40(a)(i) of the IT Act. The AO disallowed payments u/s.40(a)(i) for non - deduction of TDS as he was of the view that assessee could not be treated as a resident of UAE as per Article 4(1) of Indo UAE of DTAAA as he was not paying Tax in UAE. CIT(A) confirmed the disallowance. On further appeal in Tribunal, Tribunal allowed the appeal and held that as per Art 4(1) of Indo-UAE DTAA, it is not necessary to pay tax in contracting state to be a resident of contracting State. Mere right of contracting State to tax such person by reason of domicile, place of management or incorporation is sufficient. Therefore "V" was not chargeable to tax in India. Assesee paid professional Fees to various persons in USA, UK, and Malaysia in respect of training & professional services without deduction of tax. The asssessee claimed that the Professionals did not have any permanent establishment in India and services were not in nature of make available of technical knowledge, experience, skill, know how or process and therefore, in view of DTAA with US & UK, services were not taxable. Assessing officer disallowed payments u/s. 40(a)(i)for on-deduction of tax at source. CIT (A) allowed assessee's appeal. On appeal in Tribunal it was held that where Foreign professionals did not have any PE in India, nor were the services in nature of make available of technical knowledge, experience, skill, know-how or process, Professional fees not taxable in India in view of DTAA provision. (AY. 2004-05)

KPMG v. JCIT (2013) 142 ITD 323 / 157 TTJ 722 / 92 DTR 421 (Mum.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Transponder fee to non-resident – Royalty – Fees for technical services – Matter set aside to the CIT(A) to decide the issue whether the amount is taxable as business income [Ss. 9(1)(vi), 91(vii)]

Assessee company is engaged in business of broadcasting TV programmes under brand name, Zee TV, Zee cinema, etc. These channels were uplinked to satellite in foreign territory and through transponder on satellite uplinked programmes were transmitted over entire footprint of satellite. Assessee had taken space on transponder on Asiaset through its non-resident subsidiary company 'E' to enable transmission of uplinked programmes. It paid certain amount as transponder fee to 'E' and claimed deduction of same. 'E' had made payment to Asiasat for use of transponder bandwith. Assessing Officer held that nature of transponder fee was royalty as well as fees for technical services on which tax was required to be deducted, which assessee had failed to do so. Therefore, applied

provisions of section 40(a)(i) and disallowed transponder fee paid to 'E'. Commissioner (Appeals) confirmed order of Assessing Officer. Tribunal held that lower authorities had erred in applying provisions of section 40(a)(i) only on limited ground that nature of transponder fee was royalty / fees for technical services. Since dispute before Tribunal was regarding disallow ability of claim under section 40(a)(i), it was well within subject matter of appeal to consider if provisions of section 40(a) were attracted on some other ground. Therefore, matter was to be sent back to Commissioner (Appeals) for examination afresh from point of view of taxability of payment as business income in case of 'E'. (AY. 2005-06)
Zee Telefilms Ltd. v. ACIT (2013) 58 SOT 36 (URO)(Mum.)(Trib.)

S.40(a)(i) : Amounts not deductible – Amounts not allowable as deduction or treated as income of recipient – Applicability of provision [Ss. 44C, 90]
If a sum was neither allowable as deduction in the hands of Indian branch nor to be treated as income of the head office, the application of s. 40(a)(i) was not justified on such payments by branch to head office. (AY. 2002-03)
Lloyds Register v. DCIT (2013) 24 ITR 579 / 142 ITD 726 / 93 DTR 116 / 158 TTJ 680 (Mum.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Interest – Addition to total income more than once – Amount could not be added on three different accounts while determining tax liability – DTAA-India-USA-Singapore-UAE – Matter remanded [S. 40A(2), 37(1), 41(1), 195, Art. 12]
The assessee paid fees to foreign group companies without deduction of tax at source u/s 195, which was disallowed u/s. 40(a)(i). Also, since the assessee had not provided details of group companies, services provided, nature of transactions and basis of payment, the Assessing Officer disallowed said payment u/s. 37(1). Further, assessee had shown its group company as creditor for Rs.23.73 lakhs towards inspection charges, which were treated by the Assessing Officer as income of assessee u/s. 41(1). Held, the same amount could not be added on three different accounts while determining tax liability of the assessee. Matter remanded. (AY. 2006-07)
ITO v. ABS Industrial Verification India (P.) Ltd. (2013) 57 SOT 418 (Mum.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Payment by individual – Contractor – Disallowance was not justified [S. 194C]
The assessee is an individual carrying on the business of manufacturing the export of readymade garments. During the Assessment year assessee made payments for weaving, cloth processing and yarn processing to the third parties on job work basis. The Assessing Officer invoking the provisions of section 40(a)(ia) of the Act, disallowed the same on the ground that tax was not deducted at source as per section 194C of the Act. Disallowance was confirmed by Commissioner (Appeals). On appeal to the Tribunal the Tribunal held that provisions of section 194C(2) is not applicable to the facts of the assessee as the same is applicable for a payment made by a contractor to a sub-contractor. As far as section 194C(1) is concerned, the same is applicable to the individual from the subsequent assessment year. Hence the disallowance was not justified. (AY.2006-07) (ITA No. 1352/Mum/2012 dt. 13-3-2013).
John Alex Lobo v. ITO (2013) Chamber's Journal-April-P.142 (Mum.)(Trib.)
Editorial: Finance Act, 2007, with effect from 1-6-2007 (2007) 291 ITR 1(St)(45) extended the liability for deduction at source on payment to contractors by individuals and Hindu Undivided Families liable for tax audit. It has to be understood that it should apply to such contractors awarded in the course of business.

S.40(a)(i) : Amounts not deductible – Deduction at source – Outside India Fees for technical services – Income deemed to accrue or arise in India – Fees for technical services [Ss. 9(1)(vii)(b), 195]

Assessee is in business of providing underwater diving services in Saudi Arabia under a contract and paid fees to non-resident divers there. Business carried on outside India for earning income from a source outside India, no deduction at source liability would arise, hence disallowance under section 40(a)(i) could not be made. (AY. 2008-09)
Aqua Omega Services (P.) Ltd. v. ACIT (2013) 141 ITD 434 / 23 ITR 191 (Chennai)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Reimbursement of expenses routed through holding company to third party, provisions of withholding tax will apply, however reimbursement of expenses without any profit element cannot be charged to tax in the hands of recipient are there will be no question of deduction of tax at source – Matter remanded for verification [S. 195]
The Taxpayer, an Indian company, was a subsidiary of a company incorporated in Netherlands (Parent company). During the relevant assessment year, the Taxpayer made two types of payments to the parent company on which taxes were not with held on the ground that the same amounted to reimbursement, viz (1) Payment in respect of common expenses borne by the parent company for various group companies in respect of accounting services, legal and professional services, communication, R & D etc. These payments were incurred by the parent company on behalf of taxpayer and other group companies and the same were recovered. (ii) Payments in respect of expenses for training services availed by the tax payer from independent third party and for which the payment was routed through parent company. Such training services were arranged by the parent company which paid to third parties and later on received the amount from the tax payer on actual basis. The Assessing Officer held that the assessee was liable to deduct tax at source. The Commissioner (Appeals) up held the action of Assessing Officer. On appeal the Tribunal held that reimbursement of expenses to holding company is not an income under the Act and hence not chargeable to tax. Expenses routed through holding company for payment to third party not in the nature of reimbursement of expenses and liable to withholding by evaluating tax implications in the hands of the third party. (AY. 2006-07)
C.U. Inspections (I) Pvt Ltd v. DCIT (2013) 142 ITD 761 / 156 TTJ 690 / 90 DTR 152 (Mum.)(Trib.)

S.40(a)(i) : Amounts not deductible – Deduction at source – Interest – DTAA-India-USA – Payment of development expenses is not liable to deduct tax at source. [S. 195, Article 12(4)]
Assessee made payment of development expenses to 'D' Ltd., a US based company, without deducting tax at source. Assessing Officer thus, invoked provisions of section 40(a)(i) and disallowed development expenses claimed by assessee. Commissioner (Appeals) deleted said disallowance taking a view that since amount paid to non-resident company was not chargeable to tax in its hands in India, there was no obligation to deduct tax at source from amount in question. Commissioner (Appeals) also held that 'D' Ltd. was covered by Indo-US DTAA and as per article 12(4) of said treaty, technical and consultancy services were not taxable in India and thus, there was no obligation to deduct tax at source from payment of such technical and consultancy services. Tribunal held that in view of specific finding recorded by Commissioner (Appeals), there was no justification to interfere with impugned order deleting disallowance made under section 40(a)(i). (AY. 2004-05)
Dresser Rand India (P.) Ltd. v. Dy. CIT (2013) 55 SOT 167 (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Constitutional Validity – Petition challenging the constitutional validity of the Section is required to be transferred to the Supreme Court [Constitution of India Article 139(A)(1)]
The assessee had filed a writ petition before the Andhra Pradesh High Court questioning the constitutional validity of the amended provisions of s. 40(a)(ia). The Union of India filed a transfer petition under Article 139(A)(1) of the Constitution of India read with Order XXXVI-A of the Supreme Court Rules, 1966, for transferring the said writ petition to the Supreme Court. Held, allowing the transfer petition.

In view of the fact that the *vires* of the provisions of a Central Act are being questioned, the transfer petition was to be allowed, and the writ petition was ordered to be transferred from the Andhra Pradesh High Court to the Supreme Court of India.
UOI v. Maruthi Tubes (2013) 217 Taxman 329 (SC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Capital expenditure – Technical know-how – Depreciation – Expenditure not claimed as revenue, disallowance cannot be made for failure to deduct at source [Ss. 32, 35AB, 37(1)]
The provisions for disallowance for failure to deduct tax at source are not applicable to expenditure which are capitalized and not claimed as revenue expenditure. (AY. 2003-04)
CIT v. Mark Auto Industries Ltd. (2013) 358 ITR 43 (P&H)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Payment through agent – No disallowance can be made [Contract Act, S.185]
The Assessee had proved that M/s. Malhotra Global Eximp Pvt. Ltd. ("MGEPL") was acting as an agent. The question raised by the A.O. as to why should MGEPL act without any profit motive is answered by section 185 of the Contract Act. On appeal by the department the High Court, held that no disallowance can be made u/s. 40(a)(ia) on account of non deduction of TDS on the payment made by assessee to agent, who has in turn deducted and paid TDS before making payment to advertiser for advertising assessee-company.
CIT v. Harbanslal Malhotra & Sons (P.) Ltd. (2013) 217 Taxman 112 / 262 CTR 94 / 92 DTR 367 / (2014) 361 ITR 82 (Cal.)(HC)

S.40(a)(ia) : Amounts not deductible – Transportation charges and other charges – Agent – Principal – Reimbursement of expenses – Deduction at source by the agent sufficient – Assessee is not required to deduct tax at source
The assessee claimed deduction of Rs.6,93,372/- towards reimbursement of CHA charges paid to C&F agent and Rs. 76,00,509/- towards reimbursement of expenses towards consignment agents. The AO disallowed the expenses on the ground that the assessee has not deducted TDS on the aforesaid amounts. The CIT(A) allowed the assessees appeal observing that vis-à-vis the amount of Rs.6,93,372/-, the agent had already deducted and deposited TDS and hence there was no further liability of the assessee to deduct TDS and that the amount of Rs.76,00,509/- was towards reimbursement of expenses to the consignment agent incurred on behalf of the assessee and there was no profit element–and hence the assessee was not required to deduct TDS. The Tribunal affirmed the decision of the CIT(A) and observed that the expenses were incurred by the agent on behalf of the assessee for transportation and other charges, which has been spelt out in the bill itself including the commission to the agent so as far as the obligation to deduct tax at source from the payment is concerned, the same has been complied with by the agent and hence no disallowance is called for.
On appeal the High Court dismissing the departmental appeal held that no error has been committed by the Tribunal in confirming the order passed by the CIT(A) and that no question of law, much less substantial question of law, arises in the present appeal.
CIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 217 Taxman 114 / (2014) 361 ITR 192 (Guj.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Shortfall in deduction – Difference of opinion. [Ss. 194C(2), 194I, 201]
Any short fall in deduction of TDS due to difference of opinion, the TDS be deducted either at 1% u/s. 194C(2) or 10% u/s. 194I, provision of 40(a)(ia) cannot be invoked for the default of the Assessee is in default u/s. 201 of the Act.
CIT v. S.K. Tekriwal (2013) 260 CTR 73 / 90 DTR 26 (Cal.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Deducted last month – Paid before due date of return – Assessee cannot be penalised – Amendment by Finance Act 2010 permitting TDS payment till due date of ROI is retrospective-Machinery provisions which is intended the remedial or correction action has retrospective effect [S. 139(1)]

In 2007-2008 the assessee made professional payments for which TDS had not been paid by 31.3.2007 though it was paid before the due date for filing the return of income. The AO & CIT(A) disallowed the expenditure u/s 40(a)(ia) though the Tribunal deleted it by relying on Virgin Creations (Cal.) which held that the proviso to s. 40(a)(ia) amended by the Finance Act 2010 has retrospective effect. On appeal by the department to the High Court HELD dismissing the appeal:

The intention behind s. 40(a)(ia) is to ensure that TDS is deducted and paid. The object of introduction of s. 40(a)(ia) is to ensure that TDS provisions are scrupulously implemented without default in order to augment recoveries. It is not to penalise an assessee when payment has been made within the time stated. Failure to deduct TDS or deposit TDS results in loss of revenue and may deprive the Government of the tax due and payable. The provision should be interpreted in a fair, just and equitable manner. It should not be interpreted in a manner which results in injustice and creates tax liabilities when TDS has been deposited/ paid and the respondent who is following cash system of accountancy has made actual payment to the third party for services rendered. Also, s. 40(a)(ia), prior to the insertion of the proviso by the Finance Act 2010, was not free from interpretative difficulties and problems. The amended provisions are clear and free from any ambiguity and doubt and will help curtail litigation. The amended provision clearly support the view that the expression "said due date" used in clause A of proviso to the un-amended section refers to the time specified in s. 139(1) of the Act. The amended s. 40(a)(ia) expands and further liberalises the statute when it stipulates that deductions made in the first eleven months of the previous year but paid before the due date of filing of the return, will constitute sufficient compliance. Consequently, the proviso to s. 40(a)(ia) must be treated as retrospective in operation (Virgin Creations referred/ followed; *Bharati Shipyard Ltd. v. Dy. CIT (2011) 132 ITD 53 (Mum.)(SB)* disapproved). (AYs. 2007-08, 2008-09)

CIT v. Rajinder Kumar (2013) 260 CTR 113 / 90 DTR 297 / (2014) 220 Taxman 3 (Delhi)(HC)
CIT v. Naresh Kumar (2013) 94 DTR 48 / 262 CTR 389 / (2014) 362 ITR 256 (Delhi)(HC)
CIT v. Talbros (P) Ltd (2013) 94 DTR 48 / 262 CTR 389 (2014) 362 ITR 256 (Delhi)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Tax deducted at source from salaries of employees paid by another party on behalf of assessee – Assessee not required to deduct tax on reimbursements to that party – Disallowance applies only to amounts "payable" as of 31st March and not to amounts already "paid" during the year. Merilyn Shipping (SB) approved [S.192]

The assessee engaged Mercator Lines Ltd to perform ship management work on behalf of the assessee for which it paid an amount of ` 1.17 crore. The assessee claimed that the amount paid by it to Mercator was a 'reimbursement of salaries' and that as Mercator had deducted TDS on the payments made by it to the employees, the assessee was not required to deduct TDS. The AO disagreed and disallowed the entire payment u/s.40(a)(ia). The Tribunal upheld the assessee's claim and held that no TDS was required to be deducted on a reimbursement. It also relied on *Merilyn Shipping and Transport Ltd. v. Add. CIT (2012) 136 ITD 23 (Vishkhapatam)(SB)* where it was held that s. 40(a)(ia) applied only to amounts that were "payable" as at the end of the year and not to amounts that had already been "paid" during the year. On appeal by the department, HELD dismissing the appeal:

The revenue cannot take any benefit from the observations made by the Special Bench of the Tribunal in *Merilyn Shipping and Transport Ltd. v. CIT (2012) 136 ITD 23 (Vishakhapatnam) (SB)* to the effect that s. 40(a)(ia) was introduced by the Finance Act, 2004 w.e.f. 1-4-2005 with a view to augment the revenue through the mechanism of tax deduction at source. S. 40(a)(ia) was brought on

the statute to disallow the claim of even genuine and admissible expenses of the assessee under the head 'Income from Business and Profession' in case the assessee does not deduct TDS on such expenses. The default in deduction of TDS would result in disallowance of expenditure on which such TDS was deductible. On facts, tax was deducted as TDS from the salaries of the employees paid by Mercator Lines and the circumstances in which such salaries were paid by Mercator Lines for the assessee were sufficiently explained. It is to be noted that for disallowing expenses from business and profession on the ground that TDS has not been deducted, the amount should be payable and not which has been paid by the end of the year.(AY.2009-10)
CIT v. Vector Shipping Services (P) Ltd. (2013) 357 ITR 642 / 218 Taxman 93 (Mag.) / 262 CTR 545 / 94 DTR 101 (All.)(HC).
[Review Petition of the Department dismissed by the Hon'ble High Court vide order dated: 27-9-2013]
SLP of revenue was dismissed, SLP NO 8068 of 2014 dt 2-7-2014 www.itatonline.org.

S.40(a)(ia) : Amounts not deductible – Deduction of tax at source – Interest disallowance – "Paid" or "payable" – Question of law admitted – Pending for final disposal [S. 260A]
The decision of the Special Bench in the case of *Merilyn Shipping & Transports v. Addl. CIT (2012) 136 ITD 23(SB) (Visakhapatnam)(Trib.),* wherein it was held that s. 40(a)(ia) would apply only to expenditure which is payable as on 31st March of year under consideration and not to expenditure which had already been paid during year itself deals with an issue of recurring nature, ratio requires a serious consideration.
CIT v. Odedara Construction (2013) 34 taxmann.com 133 (Guj.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Transporter – Form No. 15 was filed before the Commissioner who had no jurisdiction of assessee, however the copy was filed before the Assessing Officer – Disallowance was not justified [S.194C, Form No.15J]
The assessee is a transporter who had taken services of various small truck owners. The freight charges were paid to them without deduction of tax at source. The assessee filed the form before the Assessing Officer, which was filed before the Commissioner II, Baroda. On appeal the Court held that Tribunal found that Form 15J was submitted by assessee with Commissioner II, though the jurisdiction was to file before Commissioner I, and that in assessment proceedings assessee had filed copy of said form with the Assessing Officer who had not doubted payment of freight charges as non-genuine. Hence, the disallowance on non-deduction of tax at source was rightly deleted.
CIT v. Gurvinder Transport (2013) 215 Taxman 593 (Guj.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Reimbursements of salary – Sister concern.
The Assessing Officer disallowed the amount paid by the assessee to its sister concern for payment of salaries to the latter's employees deputed to assessee, since assessee did not deduct tax at source while making said payment. It was not case of revenue that assessee had made any payment for consideration extraneous to cost of employees deputed to it nor was there any allegation that amount paid to its sister concerns was over and above salaries due to employees. Thus, the Tribunal concluded that expenditure was incurred for salaries and, there was no occasion to invoke S. 40(a)(ia). Since this was a finding of fact, no substantial question of law arose therefrom.
CIT v. OCB Engineers (2013) 32 taxmann.com 271(Bom.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Commission – Payable – Provision is applicable to such expenditure which became payable at any time during previous year and is actually paid with in previous year without making TDS – Special Bench verdict in Merilyn Shipping is not good law

The assessee incurred expenditure on which TDS ought to have been deducted but was not. The AO disallowed the expenditure u/s 40(a)(ia). On appeal, the Tribunal relied on *Merilyn Shipping & Transports v. Add. CIT (2012) 146 TTJ 1/136 ITD 23 (Visakhapatanam) (SB)* and held that the disallowance u/s. 40(a)(ia) could be made only for the expenditure that is "payable" as of 31st March and not for the amounts that have already been "paid" during the year. On appeal by the department to the High Court, HELD reversing the Special Bench:

The key words in s. 40(a)(ia) are "on which tax is deductible at source under Chapter XVII–B" and this makes it clear that it applies to all expenses. Nothing turns on the fact that the legislature used the word 'payable' and not 'paid or credited'. Unless any amount is payable, it can neither be paid nor credited. If an amount has neither been paid nor credited, there can be no occasion for claiming any deduction. The Special Bench was wrong in making a comparison between the draft Bill and the enacted law to determine the intention of the Legislature. A comparison is permissible only between the pre-amendment and post amendment law to ascertain the mischief sought to be remedied or the object sought to be achieved by the amendment. The fact that the impact of s. 40(a)(ia) is harsh is no ground to read the same in a manner which was not intended by the legislature. The law was deliberately made harsh to secure compliance of the provisions requiring deductions of tax at source. It is not the case of an inadvertent error. For the same reason, the second proviso sought to become effective from 1st April, 2013 cannot be held to have already become operative prior to the appointed date. Consequently, the majority view in Merilyn Shipping & Transports is not acceptable.

CIT v. Crescent Export Syndicate (2013) 216 Taxman 258 / 94 DTR 81 / 262 CTR 525 (Cal.)(HC)
CIT v. Park International (2013) 94 DTR 81 / 262 CTR 525 (Cal.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Commission – Payable – Provision would cover amounts payable at any time during the accounting year – Special Bench verdict in Merilyn Shipping is not good law.

The assessee, engaged in the business of transport contractor and commission agent, incurred expenditure of Rs. 8.74 crores on payment to contractors where no TDS was deducted. The AO & CIT(A) held that the expenditure had to be disallowed u/s. 40(a)(ia). On appeal, the Tribunal, relying on *Merilyn Shipping & Transports v. Add. CIT (2012) 146 TTJ 1 / 16 ITR 1 (Viz) (SB)* held that as the said amount had already been paid and was not "payable" as of 31st March, the disallowance u/s 40(a)(ia) could not be made. On appeal by the department to the High Court, HELD reversing the Tribunal:

In *Merilyn Shipping & Transports v. Add. CIT (2012) 146 TTJ 1 (Viz) (SB)* the majority held that as the Finance Bill proposed the words "amount credited or paid" and as the Finance Act used the words "amounts payable", s. 40(a)(ia) could only apply to amounts that are outstanding as of 31st March and not to amounts already paid during the year. This view is not correct for two reasons. Firstly, a strict reading of s. 40(a)(ia) shows that all that it requires is that there should be an amount payable of the nature described, which is such on which tax is deductible at source but such tax has not been deducted or if deducted not paid before the due date. The provision nowhere requires that the amount which is payable must remain so payable throughout during the year. If the assessee's interpretation is accepted, it would lead to a situation where the assessee who thought was required to deduct the tax at source but no such deduction was made or more flagrantly deduction though made is not paid to the Government, would escape the consequence only because the amount was already paid over before the end of the year in contrast to another assessee who would otherwise be in similar situation but in whose case the amount remained payable till the end of the year. There is no logic why the legislature would have desired to bring about such irreconcilable and diverse consequences. Secondly, the principle of deliberate or conscious omission is applied mainly when an existing provision is amended and a change is brought about. The Special Bench was wrong in comparing the language used in the draft bill to that used in the final enactment to assign a particular meaning to s. 40(a)(ia). Accordingly, Merilyn Shipping does not lay down correct law. The correct law is that s. 40(a)(ia)

covers not only to the amounts which are payable as on 31st March of a particular year but also which are payable at any time during the year. (AY. 2007-08)
CIT v. Sikandarkhan N. Tunvar (2013) 357 ITR 312 / 87 DTR 137 / 259 CTR 57 / (2014) 220 Taxman 256 (Guj.)(HC).

S.40(a)(ia) : Amounts not deductible – Deduction at source – Tax deducted but not paid – Tax deducted during March – Deduction was allowed – Amendment by Finance Act 2008 was held retrospective with effect from 1-4-2005
The assessee firm claimed deduction of the payment made to its contractors for Financial year 2004-05. The Assessing Officer found that the tax deducted at source was not paid within the stipulated period. He invoked provisions of section 40(a)(ia) and disallowed the claim. The Commissioner (Appeals) allowed the claim on the basis of amendment in section 40(a)(ia) by Finance Act, 2008 giving retrospective effect from 1-4-2005. The Tribunal held that as per the amendment, if tax deducted during the last month of previous year was paid on or before the due date specified in section 139(1) disallowance could not be made. He, therefore, upheld the order of Commissioner (Appeals). It is not in dispute that on the date the assessee deducted the tax, he had to pay/remit the money within seven days from that date and if the amount is actually paid when the credit is given, then the tax is payable within two months. In the instant case, assessee did not comply with the legal requirement; therefore, the Assessing Authority was justified in making the disallowance, but on the date the appeal was filed, the section came to be amended, giving retrospective benefit. Therefore, the appellate authority extended the benefit of the amended provision and held that the disallowance is paid and the order has been upheld by the Tribunal. By Finance Act, 2008 which is given retrospective effect from 1-4-2005, the benefit of that provision had been extended to the assessee, though no fault was found with the assessment order passed initially. With change of law, when the effect of the amendment is to give benefit to the assessee, the appellate authority and the Tribunal were justified in extending the said benefit. Thus, order passed by the Tribunal is in accordance with law and does not call for interference. Therefore, the substantial question of law is answered in favour of the assessee. (AY.2005-06)
ITO v. Anil Kumar & Co. (2013) 354 ITR 170 / 214 Taxman 202 (Karn.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Amount paid during the year – Freight charges – Special Bench verdict in Merilyn Shipping is not good law [S.194C]
The assessee incurred expenditure of Rs. 31 lakhs on freight but did not deduct TDS thereon u/s 194C. The AO held that as there was a failure to deduct TDS, the expenditure could not be allowed as a deduction u/s 40(a) (ia). However, the CIT (A) allowed the claim on the ground that the freight charge was a part of the price of the goods and there was no contract between the assessee and the transporter. On appeal by the department, the Tribunal dismissed the appeal by relying on the Special Bench verdict in Merilyn Shipping & Transports Ltd. (2012) 146 TTJ 1 (Viz.) (SB) where it was held (by a majority) that s. 40(a) (ia) had no application to amounts that were already "paid" during the year but it was confined to amounts remaining "payable" as at the end of the year. On further appeal by the department, HELD reversing the Tribunal:
We already have delivered a judgment on 3rd April, 2013 in ITAT No. 20 of 2013, G.A. No. 190 of 2013 *(CIT, Kolkata-XI v. Crescent Export Syndicates)* holding that the views expressed in the case of Merilyn Shipping & Transports (ITA.477/Viz./2008 dated 20-3-2012) were not acceptable. That is one reason why the matter should be remanded to the Tribunal. Another reason for remanding the matter to the Tribunal is that the finding of facts recorded by the CIT (Appeal) was not tested by the Tribunal. For the aforesaid reasons, the order under challenge is set aside and the matter is remanded to the Tribunal for a decision de novo.
CIT v. Md. Jakir Hossain Mondal (2013) 33 taxmann.com 123 (Cal.)(HC) itatonline.org

S.40(a)(ia) : Amounts not deductible – Deduction at source – lower rate – Interest paid – Disallowance was not justified. [Ss.194A, 194C, 197]

The AO. has made disallowance being the proportionate amount attributable to short deduction of tax in respect of the parties on the grounds that the assessee has deducted tax at source @ 11.22% being the rate of TDS applicable to a non-corporate recipient under section 194A, whereas the said recipients are corporate assessee and, therefore, the assessee should have deducted tax at source @ 22.44%, being the rate applicable to a corporate recipient.

The Assessee submits that the parties to whom the payments were made were non corporate assessee, the assessee deducted tax at source that the correct rate applicable to non corporate assesses, further submitted that the payment made to the parties in respect of the passport scheme of the assessee was not in a lieu of any profession or technical services obtained but was in lieu of contract for carrying out work which falls within the ambit of section 194C of the Act and the AO has wrongly applied the TDS provision of section 194J of the Act. Tribunal held that where the assessee deducted at source at lower rate, amount could not be disallowed on ground that payment exceeded exemption limit specified under certificate. (AY.2007-08)

Hero MotoCorp Ltd. v. ACIT (2013) 156 TTJ 139 / 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Sponsorship payment – On the basis of certificate – Being bonafide no disallowance can be made [S.197]

Assessee company made payment for sponsorship without deducting tax at source,on basis of payee's certificate for non-deduction of tax u/s. 197. AO held that certificate u/s. 197 did not exempt advertisement payments and disallowed amount for non-deduction of tax at source. Tribunal held that where certificate under section 197 had been issued, assessee could claim that it had a bona fide belief that tax was not required to be deducted on basis of such certificate. Disallowance was not justified. (AY.2007-08)

Hero MotoCorp Ltd. v. ACIT (2013) 156 TTJ 139 / 60 SOT 25 (URO) 36 taxmann.com 103 (Delhi)(Trib.)

S.40(a)(ia) : Amounts not deductible –Deduction at source- Income deemed to accrue or arise in India – Business connection – Reimbursed demurrage charges – No disallowance could be made [Ss. 9(1)(i), 172, 194C, 195]

Assessee-company reimbursed demurrage charges for delayed loading, payable by foreign buyers to ship owners, as assessee had to export goods on FOB basis, which was disallowed under section 40(a)(ia) for non-deduction of tax at source. Tribunal held that such payment was in nature of expenditure incurred for sales in view of contract with foreign buyer, since Explanation 1(b) to section 9(1)(i) provides that no income shall be deemed to accrue or arise in India to a non-resident, through or from operations confined to purchase of goods in India for export, amount of demurrage could not be deemed as income in hands of foreign buyer, and no disallowance could be made under section 40(a)(ia). (AY. 2009-10)

Sesa Goa Ltd. v. JCIT (2013) 60 SOT 121(URO) (Panaji)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source- Deposit of tax – Due date of return

No disallowance under section 40(a)(ia) could be made when assessee, a transport contractor, deposited tax deducted amount before the due date for filing the return. (AY. 2005-06)

Madineni Mohan v. ITO (2013) 28 ITR 157 (Hyd.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source - Additional evidence – TDS return [Rule 46A]

Payments were subject to tax deduction at source. The assessee produced additional evidence before the Commissioner (Appeals) in form of revised tax deduction at source return filed subsequent to

assessment. Held, the Assessing Officer should be granted opportunity to examine additional evidence. Hence, matter was remanded.(AY. 2008-09)
ACIT v. Shimoga District Milk Producers Societies Union Ltd. (2013) 28 ITR 369 (Bang.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Tax deducted at source paid before due date of filing of return-No disallowance [S.139(1)]
Amendment to section 40(a)(ia) by Finance Act, 2010 is retrospective and, therefore, when assessee has paid to Government account tax deducted at source before due date of filing of return of income under section 139(1), disallowance of expenditure by invoking provisions of section 40(a)(ia) is not called for.(AY.2009-10)
S. S. Warad v. ACIT (2012) 19 ITR 35 / (2013) 60 SOT 144 (URO) (Bang.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Income – Accrual – Permanent / Establishment – Internet advertising – Principal to principal – Reimbursement of expenses – Not liable to deduct tax at source – DTAA-India-USA. [Ss. 5, 9(i), 195, Art. 5, 7]
Assessee-company, was providing services of internet advertising, purchased online advertisement space from its holding company in USA. Where holding company sold online advertisement space at cost plus profit, neither party acted or did business on behalf of other, and therefore, activity of purchase of space on website from parent company was on principal to principal basis, therefore assessee company was not an agency PE as per article 5 of India-USA DTAA of its holding company. Accordingly remittance towards purchase of advertisement space fell under Article 7 of India-USA DTAA, and in absence of a PE of holding company in India, profit was not taxable in India. Where assessee company reimbursed expenses to holding company for use of software licence, real nature of payment was to be ascertained to determine taxability and requirement to withhold tax. Issue require verification hence matter was remitted to the AO. (AY. 2008-09).
ITO v. Pubmatic India (P) Ltd. (2013) 158 TTJ 398 / 60 SOT 54 (URO) / 95 DTR 89 (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Amendment to provisions retrospective from 1-4-2005 – Deposited tax deducted at source before due date for filing of income, impugned disallowance to be deleted [S. 139(1)]
The assessee was carrying on business as transport contractor and deducted tax at source on payment of lorry charges as well as rent, but had remitted after end of previous year. The A.O. disallowed payment on ground that tax ought to have been deposited on or before last day of previous year. The CIT(A) deleted the addition made by A.O. On revenue's appeal, the Tribunal dismissing the appeal held, where tax deducted at source during previous year relevant to and from assessment year 2005-06 was paid to Government on or before due date of filing of return of income, no deadlines u/s. 40(a)(ia) could be made. Since the assessee deposited tax deducted at source before due date for filing of income, impugned disallowance to be deleted. (AY. 2009-10)
ACIT v. Vimala S. Warad (2013) 145 ITD 165 (Bang.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Paid and payable – Interest – Commission – TDS Disallowance: View in favour of the assessee should be followed
The assessee paid an amount without deducting TDS. The AO held that as there was no TDS, the deduction for the amount could not be allowed u/s. 40(a)(ia). However, the CIT(A) reversed the AO on the ground that the word "payable" in s. 40(a)(ia) did not apply to amounts that had already been "paid" during the year. On appeal by the department to the Tribunal HELD dismissing the appeal:
There is a judicial controversy on whether s. 40(a)(ia) applies to amounts that have already been "paid" or it is confined to amounts that are "payable" as at the end of the year. The Special Bench in Merilyn Shipping and Transports 16 ITR (Trib) 1 (Vizag) and the Allahabad High Court in Vector Shipping Services have taken the view that s. 40(a)(ia) applies only to amounts remaining "payable" at the end of the previous year and does not apply to amounts already "paid" before the close of the relevant previous

year. However, the Calcutta High Court in Crescent Export Syndicates & Md. Jakir Hossain Mondal and the Gujarat High Court in Sikandar khan N. Tunvar have taken a contrary view that even amounts already "paid" have to be disallowed u/s 40(a)(ia). In such circumstances, the rule of Judicial Precedence demands that the view favourable to the assessee must be adopted as held by the Supreme Court in *CIT v. Vegetable Products Ltd 88 ITR 192*. Following the said fundamental rule declared by the Supreme Court, the judgment of the Allahabad High Court in Vector Shipping which is in favour of the assessee has to be followed and it has to be held that disallowance u/s. 40(a)(ia) applies only to amounts "payable" and not to amounts "paid".(ITA No. 2076/Mds/012, C.O. No. 155/Mds./2013). (AY. 2009-10)
ITO v. Theekathir Press (Chennai)(Trib.) www.itatonline.org

S.40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Sub-contractor – If Declaration in Form 15-I were found to be correct no disallowance u/s.40 (a)(ia)-Provisions of s.40A(3) are distinct & separate from provisions of disallowance contained in s/40(a)(ia) [S.40A(3), Rule 6DD, Form 15I]
Assessee filed declarations in Form 15-I furnished by transporters to whom transport charges were paid. The AO noticed that the assessee has claimed an amount towards transport charges paid but no TDS was deducted. He made disallowance u/s. 40(a)(ia). On appeal before CIT(A), the assessee furnished declaration in Form 15–I obtained from the transporter to whom transport charges had been paid. CIT(A) deleted the disallowance made u/s 40(a)(ia) and made disallowance u/s.40A(3) without providing opportunity to the assessee. On appeal to Tribunal, the Tribunal set aside the appeal of the revenue and restored to the file of the Assessing officer and held that the CIT(A) was not justified in observing that section 40A(3) is automatically attracted once the disallowance u/s 40(a)(ia) is deleted, since the provisions contained in S.40(a)(ia) & 40 A(3) are distinct and separate provisions operating in their own field. Disallowance under one provision does not depend on the other. Addition u/s.40A(3) depends on various circumstances and cannot be invoked without examining each of the payments made keeping in view the circumstances as mentioned in Rule 6DD. Tribunal also held that CIT(A) has not given any opportunity to assessee to explain as to whether cash payments made would come within any of exceptions to s.40A(3), enumerated under rule 6DD of rules, assessee was to explain as to whether cash payments made would come within any of exceptions to s.40A(3), enumerated under rule 6DD of rules, assessment was to be reframed. (AY. 2008-09)
ITO v. Garlapati Chalapathi Reddy (2013) 142 ITD 683 / 158 TTJ 368 / 95 DTR 141 (Hyd.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction of tax at source – Rejection of books of account – Freight charges – When books of account are rejected and income is estimated for failure to deduct at source disallowance can be made by invoking section 40(a)(ia) [Ss.40A(1), 40A(3), 144, 194C]
The assessee is a partnership firm engaged in the business of undertaking and execution of civil contract works. During assessment proceedings the assessee could not produce full set of books of account bills vouchers etc. The AO rejected the books of account and estimated the net profit at 8% of contract receipts. The AO noticed that the assessee has not deducted the tax at source in respect of freight charges paid as per the provisions of section 194C. Accordingly the payment of freight charges was disallowed invoking provisions of section 40(a)(ia). In appeal Commissioner (Appeals) confirmed the disallowance. On appeal to Tribunal the Tribunal held that disallowance can be made under section 40(a)(ia) independently, even if business income is estimated after rejecting book results. Disallowance cannot be equated with other disallowance prescribed under section 40A(1), 40A(3) etc. they are absolute disallowances, which are not allowed as expenses at allin computing business income. (AY. 2005-06)
K. Venkataraju Vemagiri v. Add. CIT (2013) 58 SOT 33(URO) (Visakhapatnam)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – No disallowance can be made on presumptions

The assessee had made provisions on account of TDS payable to contractor, but it could produce challan of lower amount. The Assessing Officer worked out expenditure on reverse working mechanism, i.e., (` 3,863/2 per cent) and disallowed the same under section 40(a)(ia) for non-deposition of tax deducted at source. The Commissioner (Appeals) also sustained the disallowance made by the Assessing Officer. The Tribunal held that the Assessing Officer had not brought on record any such instance of expenditure, on which tax was not deducted or deducted but not paid so, in the absence of which disallowance cannot be made under section 40(a)(ia). Further, assessee submitted that on each and every expenditure for contractor's payment, tax had been deducted at source and paid wherever it was applicable. If expenditure has been subject matter of tax deduction at source and if compliance to Chapter XVII-B has been made, then no disallowance can be made under section 40(a)(ia) on presumption basis. Therefore, in the interest of justice, the issue was set aside to the file of Assessing Officer. (AY. 2009-10)

Riddhi Steel & Tubes (P.) Ltd. v. ACIT (2013) 36 taxmann.com 369 / 144 ITD 397 (Ahd.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Amendment to section 40(a)(ia) by Finance, Act, 2010 giving relaxation applies retrospectively

Assessee engaged in business of civil contractor made payment to subcontractor. AO allowed assessee's claim. CIT(A) invoked jurisdiction u/s 263 set aside order of AO, directing him to complete assessment examining assessee's claim of deduction u/s 40(a)(ia). AO held that assessee was not entitled to benefit of amended section 40(a)(ia), holding that assessee was required to deducted and deposited TDS by 31-3-2006, but deposited payment on 5-10-2006. CIT(A) dismissed assessee's appeal. The Tribunal held that, the provisions of section 40(a)(ia) as they existed at that time stipulated not only deduction of tax at source but also its deposit with the Government within the same year. The rigours of section 40(a)(ia) were relaxed by the Finance Act, 2010 w.e.f. 1-4-2010 to enable an assessee to pay the tax deducted by him at source under Chapter XVII-B of the Income-tax Act on or before the due date specified in sub-section (1) of section 139. Relaxation introduced by the Finance Act 2010 w.e.f. 1-4-2010 would be available in earlier years also. Disallowance u/s 40(a)(ia) would not be called for where the assessee has deducted the tax at source in conformity with Chapter XVII-B of the Income-tax Act and paid over the same to the Government on or before the due date specified in sub-section (1) of section 139. Scheme of Chapter XVII-B shows that it mandates the person responsible for paying any sum out of which tax is required to be deducted at source to deduct the requisite amount of tax at source out of the amounts paid/credited by him. Though it is stated by the AO that tax has been deducted at source in the present case, it does not come out from his order whether such tax was deducted at source out of the amounts paid / credited by the assessee. Issue restored to the file of the AO with the direction to verify as to whether the assessee has deducted the tax at source out of payments made to the deductee. (AY. 2006-07)

Rana Builders v. ITO (2013) 142 ITD 205 (Rajkot)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction of tax at source – Fees for professional or technical services – Payment towards VSAT – Transaction charges – Matter set aside to verify the *bona fide*. [S.194J]

The assessee-company, engaged in the business of share-trading and stock broking, debited certain amount towards transaction charges, VSAT charges and lease line charges but had not deducted tax at source thereon. Held, that the Assessing Officer was to verify whether the return for the current year was filed by the assessee before the completion of assessment proceedings for the AY 2006-07 and whether the assessee was of the *bona fide* belief, in view of assessment made for the earlier years, that it was not liable to deduct tax from transaction charges under section 194J, and if so, to allow the deduction of the transaction charges after providing a proper opportunity to the assessee to present its case. (AY.2007-08)

ACIT v. Twenty First Century Shares and Securities Ltd. (2013) 25 ITR 63 / (2014) 61 SOT 17 (URO) (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source- Payments to contractors – Labour payments – Prescribed limit – Labour sardar – Less than Rs. 50,000 each – No disallowance can be made [S.194C]

The contractors who were owed payments according to the opening balance indicated by the assessee continued to receive payments in the assessment year whereby the actual amount paid without deducting tax at source under section 194C during the assessment year was treated as allowable under section 40(a)(ia) by the Commissioner (Appeals). There was no cause for invoking the provisions of section 194C for the purpose of disallowance under section 40(a)(ia). The labour charges paid by the assessee claimed at Rs. 24,57,947 were considered specifically for the sardars, who were to identify the labourers being paid less than ` 50,000 each. The sum could not be considered for disallowance under section 40(a)(ia), in so far as it could not be said that the sardars were to be subjected to deduction of tax at source only on that part of their payments meant for the labourers whom they had identified. (AY.2008-09)

Aristocon Engineers Co-operative Society Ltd. v. DCIT (2013) 24 ITR 42 / 144 ITD 453 (Kol.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Interest – No disallowance can be made merely on the ground of non filing of Form 15G/15H to Commissioner as prescribed in Rule 29C [Rule 29C, Form 15G, 15H]

The Assessing Officer disallowed interest paid to various parties on the ground that the assessee had not filed Form 15H/15G to Commissioner as prescribed under Rule 29C,which was confirmed by Commissioner (Appeals). On appeal Tribunal held that No disallowance can be made merely on the ground of non filing of Form 15H/15G to Commissioner as prescribed in Rule 29C. Tribunal relied on *Vipin P. Mehta v. ITO (2011)(11 taxmann.com 342 (Mum.)(Trib.).* (AY. 2008-09)

Karwat Steel Traders v. ITO (2013) 145 ITD 370 (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Provision do not apply where there is shortfall in deduction of tax at source [S.194C, 194I]

In some cases the assessee treated the payment to be covered under section 194C of the Act, where as the authorities treated the same payment being covered under section 194I of the Act, thereby resulting in short deduction of tax at source. Following the ratio of various judgments the Tribunal held that provisions of section 40(a)(ia) do not apply to a case where there is shortfall in deduction of tax at source. (AY.2007-08)

Cinetek Telefilms P. Ltd. v. ACIT (2013) TIOL-641-(Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Business disallowance – Paid without deduction of tax at source [Form 15I]

The assessee was a transport contractor who whenever there was a requirement hired truck from truck owners on payment basis for which the truck owners furnished declaration for non-deduction of tax at source in Form 15I. The Assessing Officer held that there was a contract between the assessee and truck owner & disallowed amount paid to truck owner. The CIT(A) affirmed the order of the Assessing Officer. The Tribunal allowing assessee appeal held that assessee could not be treated in default for non-deducting tax from truck owners and hence no TDS liability arose in hands of assessee. (AY. 2009-10)

Govind Ram Gupta v. JCIT (2013) 142 ITD 776 / 24 ITR 776 (Cuttack)(Trib.)

S.40(a)(ia) : Amounts not deductible – Software – Deduction at source – Income deemed to accrue or arise in India – Royalty – No TDS on software purchased along with hardware and hence no disallowance permissible under S. 40(a)(ia). [S.9(1)(vi), 194J]

The assessee purchased software, capitalised the payment to the computers account as the software came along with the hardware of computers and claimed depreciation. The Assessing Officer invoking the provisions of section 40(a)(ia) disallowed the expenditure on the ground that tax had not been deducted at source under section 194J of the Act. The disallowance was confirmed by the CIT(A). On appeal by the assessee, the Tribunal allowing the ground held: That mere purchase of software, a copyrighted article, for utilisation of computers cannot be considered as purchase of copyright and royalty. The assessee did not acquire any rights for making copies, selling or acquiring which generally could be considered within the definition of "royalty". Explanation 2 to section 9(1)(vi) cannot be applied to purchase of a copyrighted software, which does not involve any commercial exploitation thereof. The assessee simply purchased software delivered along with computer hardware for utilisation in the day-to-day business.
That there was no intangible asset involved in this and the assessee's claim of depreciation could not be disallowed u/s. 40(a)(ia). Under section 40(a)(ia) if at all applicable, disallowance is only with reference to the claim made in the profit and loss account towards revenue expenditure. Purchase of an asset and consequent claim of depreciation cannot be considered under that section. The Assessing Officer was to allow the depreciation as claimed. (AYS. 2005-06 to 2007-08)
Sonic Biochem Extractions P. Ltd. v. ITO (2013) 23 ITR 447 / 59 SOT 4(URO) (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Sub-contract – Deposited before the due date of filing of the return [S. 194C]
Tribunal held that of TDS is deposited before the due date of filing of the return the provisions of section 40(a)(ia) cannot be invoked.(AY. 2005-06)
B.M.S. Projects (P) Ltd. v. Dy. CIT (2013) 143 ITD 645 / 153 TTJ 649 / 85 DTR 293 (Ahd.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Disallowance of expenses on proportionate basis
The Assessing Officer made proportionate disallowance on the TDS made by the assessee under section 40(a)(ia) as the TDS made by the assessee was at the rate of 2.25% against required rate of 11.33% on commission. The Tribunal sent the matter back to the file of Assessing Officer to verify as to whether the assessee obtained the certificate for deducting TDS at lower rate from the competent IT authority and if certificates were in order and in accordance with law then no disallowance to be made. (AY. 2009-10)
Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1 / 86 DTR 49 (Jodh.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Provisions of section 194J applicable on settlement and custody fees paid [S.194J]
During the assessment proceedings, the Assessing Officer noticed that the assessee has claimed a deduction for 'settlement and custody fees' on which tax was not deducted at source. The Assessing Officer disallowed the said expenses under section 40(a)(ia) of the Act, since in his view tax was deductible at source thereon under section 194J of the Act. The CIT(A) allowed the appeal of the assessee. On appeal by the department the Tribunal reversed the decision of the CIT(A) by following the decision of the Bombay High Court in the case of *CIT v. Kotak Securities Ltd. (2011) 203 Taxman 86 / (2012) 340 ITR 333 (Bom)(HC)* and holding that the assessee is availing managerial services for which the assessee paid the fees in question. (AY. 2008-09).
ACIT v. Karvy Computershare P. Ltd. (2013) 23 ITR 599 / 59 SOT 26 (URO)(Hyd.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Fees for professional or technical services – Internet services from VSNL – Tax to be deducted at source [S.194J]
The assessee is a company engaged in providing back office processing services. During relevant previous year assessee company utilised internet services from VSNL and made payment towards same. Assessee claimed that sophisticated equipments were used and connection of internet was

through satellite link and it could not be said that it was a technical services. Since assessee did not deduct tax at source while making said payments. Assessing Officer disallowed same under section 40(a)(ia) that amount paid by the assessee for using internet services amounted for fees for technical services. In view of fact that technical personnel were involved in providing internet connection and incidental services, payment made by assessee to service provider had to be treated as 'fees for technical services' and hence, assessee was under obligation to deduct tax at source from same. On appeal Commissioner (Appeals) held that the Assessing Officer was justified in making impugned disallowance on the ground that for availing such facility from VSNL, there is involvement of human skill, efforts of technical personnel involve in availing internet connection. The Tribunal also upheld the order and held that the assessee was liable to deduct tax at source. (AYs. 2004-05 & 2005-06)
Brigade Global Services (P.) Ltd. v. ITO (2013) 28 ITR 411 / 143 ITD 59 (Hyd.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Co-operative societies are exempt from provisions of section 194A [S. 2(19), 194A]
The Assessing Officer disallowed the interest for failure to deduct tax at source under section 194A, which was confirmed by the Commissioner (Appeals). On appeal to Tribunal, the assessee contended that being agricultural co-operative societies, the provisions of section 194A are not applicable. Department contended that the assessee paid interest to members as well as non-members hence liable to deduct tax at source on interest payment. Tribunal held that the assessee is registered under the Kerala State Co-Opeartive Societies' Act and no approval was obtained from the RBI for carrying out banking activities. Therefore for all practical purposes, the assessee have to be treated as primary agricultural co-operative societies within the meaning of section 2(19) of the Income-tax Act. Following the jurisdictional High Court in *ITO v. Thodupuzha Urban Co-operative Bank (2003) 264 ITR 36 (Ker)(HC)*, the assessee is exempt from deduction of tax at source under section 194A. Order of lower authorities were set aside and addition under section 40(a)(ia) is deleted. (AY. 2009-10).
Kadachira Service Co-op. Bank Ltd. v. ITO (2013) 141 ITD 270 / 153 TTJ 129 / 84 DTR 177 (Cochin)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Air freight paid to foreign Airlines – DTAA-India-Singapore-UAE / Switzerland / Bahrain / Qatar / UK / China – Matter remanded [Ss.90, 195, 197, Article 8]
Assessee firm is engaged in business of export of gift articles and promotional items. It made payments of air fare to freight agents located abroad without deducting tax at source. Assessing Officer disallowed said payments, on the ground that the payments were not made directly by the assessee to airlines but then same was made to different parties who acted as freight agents. The Assessing officer also held that said parties had also not furnished any certificate issued under section 197 for non deduction of tax at source. He disallowed the freight charges under section 40(a)(ia). Commissioner (Appeals) relying on Circular No. 723 dated 19-9-1995 and article 8 of concerned DTAAs, held that said payments were exempt from tax and assessee was not obliged to deduct tax at source. On appeal the Tribunal held that since Commissioner (Appeals) did not show as to how payment in question were exempt either under relevant tax treaties or Board's circular, impugned order was set aside and, matter was to be remanded back for disposal fresh. (AY. 2006-07)
ACIT v. S.R. Brothers (2013) 141 ITD 194 (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Software web charges – Paid to residents – Reimbursement of expenses [S.194J]
Assessee firm paid certain sum to a company towards software/web charges. Since no tax was deducted on said payment, Assessing Officer disallowed expenses invoking section 40(a)(ia). The assessee contended that said payment was made by another person through credit card on behalf of assessee and since assessee had just reimbursed said payment, no tax was required to be deducted.

Tribunal held that mode of payment is immaterial and since the provision of section 194J were attracted on said payment, disallowance under section 40(a)(ia) was justified. (AY. 2008-09)
ACIT v. Anand & Anand (2013) (2012) 20 ITR 267 / 141 ITD 326 (Delhi)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source. For default of short-deduction of deduction at source no disallowance can be made [S.201(IA)]
The assessee made payments to various contractors. Though tax was deducted at source, it was at a rate lower than that prescribed under the Act. The Assessing Officer and CIT(A) held that as there was a default by the assessee, the expenditure had to be disallowed u/s 40(a)(ia). On appeal by the assessee to the Tribunal, HELD allowing the appeal:
A combined reading of s. 201(1A) and s. 40(a)(ia) shows that while a case of short-deduction of TDS is covered by s. 201(1A), it is not covered by s. 40(a)(ia). There is an obvious omission to include short deduction / lesser deduction in s. 40(a)(ia). Therefore, in case of short /lesser deduction of tax, the entire expenditure whose genuineness was not doubted by the Assessing Officer, cannot be disallowed (AY.2006-07)
Apollo Tyres Ltd v. DCIT (2013) 90 DTR 35 / 155 TTJ 470 / 60 SOT 1 (Cochin)(Trib.)
Editorial: Decision of Tribunal in Dy. CIT v. S.K.K. Tekiwal (2011) 48 SOT 515 (Kol)(Trib.) is approved by Calcutta High Court CIT v. S.K. Tekriwal (ITA No. 183 of 2012 GA no 2069 of 2012 dt 3-12-2012)(2013) 260 CTR 73(Cal.)(HC)

S.40(a)(ia) : Amounts not deductible – Deduction at source – DTAA-India-Ireland – Online advertisement charges on website – Advertisement charges paid to Google & Yahoo is not chargeable to tax in India [S.5(2)(b), 9(1)(i), 90, 195, Art. 12]
The assessee, a florist, paid a sum of Rs.30.44 lakhs to Google Ireland Ltd and Yahoo USA for online advertising. The AO held that the assessee ought to have deducted TDS and since there was a failure, the expenditure was not allowable u/s 40(a) (i). This was deleted by the CIT(A) on the ground that Google and Yahoo did not have a PE in India. On appeal by the department to the Tribunal, HELD dismissing the appeal:
U/s 5(2) (b), income accruing or arising in India is chargeable to tax in India. A website does not constitute a 'permanent establishment' unless the servers on which websites are hosted are also located in the same jurisdiction. As the servers of Google and Yahoo are not located in India, there is no PE in India. As regards the second limb of s. 5(2) (b) of "income deemed to accrue or arise in India", one has to consider s. 9. S. 9(1) (i) does not apply as there is no "business connection" in India nor are the online advertising revenues generated in India serviced by any entity based in India. As regards s. 9(1) (vi), it is held in Yahoo India (P) Ltd. (2011) 140 TTJ 195 (Mum) and Pinstorm Technologies (P) Ltd. (2012) 54 SOT 78 (Mum) that the advertising revenues are not assessable as "royalty". As regards s. 9(1) (vii), the services are not "managerial" or "consultancy" in nature as both these words involve a human element. Applying the rule of *noscitur a sociis*, even the word "technical" in Explanation 2 to s. 9 (1) (vii) would have to be construed as involving a human element. If there is no human intervention in a technical service, it cannot be treated as a technical service u/s 9(1) (vii). On facts, the service rendered by Google & Yahoo is generation of certain text on the search engine result page. This is a wholly automated process. In the services rendered by the search engines, which provide these advertising opportunities, there is no human touch at all. The results are completely automated. Consequently, the whole process of actual advertising service provided by Google & Yahoo, even if it be a technical service, is not covered by the limited scope of s. 9(1) (vii). Consequently, the receipts in respect of online advertising on Google and Yahoo cannot be brought to tax in India under the provisions of the Act or the India US and India Ireland tax treaty.(AY. 2005-06)
ITO v. Right Florists Pvt. Ltd. (2013) 86 DTR 165 / 154 TTJ 142 / 143 ITD 445 / 25 ITR 639 (Kol.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Dumper hire charges – Contractor – Special Bench verdict binding despite suspension by High Court [S.194C]

The assessee paid dumper hire charges of ` 36.37 lakhs and claimed it as a deduction. The AO disallowed the claim u/s 40(a) (ia) on the ground that the assessee had not deducted TDS thereon u/s 194C. Before the Tribunal, the assessee argued that it was not liable to deduct TDS u/s 194C as there was only no "contractual agreement". In the alternative, it was argued that in accordance with the Special Bench judgement in *Merilyn Shipping& Transports v. Add. CIT (2012) 136 ITD 23 (SB)*, the disallowance u/s 40(a)(ia) had to be confined to the amounts "payable" as at the end of the year and it did not apply to the amounts already paid during the year. The assessee also argued that though the Andhra Pradesh High Court had granted an "interim suspension" against the said judgment of the Special Bench, it was still binding. Held by the Tribunal:

The argument that s. 194C does not apply in the absence of a written contractual agreement is not acceptable. Even a verbal contract is sufficient. As regards the judgement of the Special Bench in *Merilyn Shipping & Transports v. Add. CIT (2012) 136 ITD 23 (SB)* where the view was taken that s. 40(a) (ia) can apply only to the amounts remaining payable as at the end of the year and not to the amounts paid during the year, though the Andhra Pradesh High Court has granted "interim suspension" of the said judgment, the said stay/ suspension applies only to the parties to that proceeding and does not destroy the binding effect of the judgment of the Special Bench. There is a difference between "stay of operation" of an order and "quashing of an order". While, in the case of a "quashing", the order of the lower court ceases to exist, in the case of a "stay", the order of the lower court continues to operate and have binding effect. Accordingly, the judgment of the Special Bench in Merilyn Shipping still holds ground and the TDS provisions will apply, for purposes of invocation of s. 40(a)(ia), only on the amounts remaining payable at the end of the year and not on the amounts paid (AY. 2007-08)

ITO v. MGB Transport (2013) 23 ITR 391 / 143 ITD 564 (Kol.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Transportation charges paid before end of financial year relevant to assessment year – Disallowance of charges for failure to deduct tax at source not proper [S.194C]

The assessee claimed deduction of expenditure towards transportation charges. The Assessing Officer disallowed the transportation charges paid under section 40(a)(ia) of the Act, as no tax was deducted at source while making the payment. The Commissioner (Appeals) set aside the Assessing Officer's order. On appeal by the Department the Tribunal held that the entire expenditure in respect of transportation charges was paid during the financial year relevant to the assessment year under consideration. The balance sheet as on March 31, 2007 indicated that there were no liabilities which meant that the assessee had paid the transportation charges before the end of the financial year relevant to the assessment year under consideration. Therefore, there was no justification in making the disallowance by the Assessing Officer under section 40(a) (ia) of the Act. *Merilyn Shipping and Transports v. Addl. CIT [2012] 16 ITR (Trib) 1 (Visakhapatnam) [SB]* followed. (AY.2007-08)

ITO v. Vinod Datta (2013) 22 ITR 243 / 58 SOT 35 (URO) (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Rent – Form No 15G was filed hence no disallowance can be made [S.194-I, 197A, Form No. 15G]

Assessee paid rent to land lady, which was below taxable limit, without deduction of tax at source under section 194-I. It filed form No. 15G being given by land lady. Assessing Officer having found that there were infirmity in Form No. 15G disallowed rent paid by applying section 40(a) (ia). Tribunal held that since assessee had reason for non-deduction of tax at source, disallowance under section 40(a)(ia) of rent paid was unjustified. In favour of assessee. (AY.2008-09)

Pareek Electricals v. ACIT (2013) 55 SOT 338 / 81 DTR 342 / 151 TTJ 526 (Cuttack)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Matter remanded

The tribunal following the judgment of Special Bench in *Merilyn Shipping and Transports v. Addl. CIT (2012) 16 ITR 1 (Trib.) (SB)* held that if the amounts paid during the year under consideration, no disallowance warranted. Matter remanded. (AYs.2006-07 to 2008-09)
Gurudas Mann v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Royalty – Satellite link charges – Not liable to deduction of tax at source [S.201]
Payments for satellite link charges for use of standard facility is not royalty hence not liable to deduction of tax at source. Tribunal holding in favour of assessee in proceedings arising out of section 201 proceedings same is followed in proceedings arising out of assessment. (AY.2006-07)
Wills Processing Services (India) P. Ltd. v. Dy. CIT (2013) 21 ITR 1 / 151 TTJ 555 / 57 SOT 34 (URO) / 81 DTR 353 (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Royalty – Payment for purchase of software – Assessee is not liable to deduct tax at source [S.9(1) (vi)]
Assessee is engaged in the business of purchase and sale of software. While computing its income from business the assessee had claimed expenditures on account of service charges paid to SSC (Sonata Software Ltd.) and deputation charges in respect of personnel deputed by SSC (Sonata Software Ltd.). Book expenses were allowed by Tribunal by following the Tribunal decision in assessee's own case for earlier years. The assessee made payment for purchase of software from persons who are resident in India. The assessee did not deduct tax at source while making payment towards such purchases. The Assessing Officer treated the payment as royalty on the basis that the assessee as a purchaser of the software had a right to use the software. The CIT(A) deleted the addition made by Assessing Officer. The Tribunal held that the payment made by assessee for purchase of software from various resident entities was not in nature of royalty and therefore, there was no obligation on the part of assessee to deduct tax at source from such payment and consequently no disallowance of the payments can be made under section 40(a)(ia) for non deduction of tax at source. (AY. 2007-08)
ACIT v. Sonata Information Technology Ltd. (2012) 17 ITR 533 / (2013) 152 TTJ 590 / 55 SOT 455 / 82 DTR 337 (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible – Deduction at source – Payable at the end of previous year
Tribunal held that section 40(a)(ia) could be applied only to amounts standing payable at the end of previous year; matter remanded for reconsideration.(AY 2005-06)
Dy. CIT. v. Macro Marvel Projects Ltd. (2013) 140 ITD 472 / 154 TTJ 242 / 87 DTR 234 (Chennai)(Trib.)

S.40(a)(ii) : Amounts not deductible – Rates or tax – Education cess and Secondary and Higher Education Cess – Not allowable
Education cess and secondary and higher education cess are not in nature of a fee, as assessee gets no direct benefit or services by making such payment, but is an integral part of direct tax collection. Therefore education cess and secondary and higher education cess are not allowable as deduction by virtue of section 40(a)(ii) (AY. 2009-10)
Sesa Goa Ltd. v. JCIT (2013) 60 SOT 121(URO) (Panaji)(Trib.)

S.40(a)(ii) : Amounts not deductible – Deduction at source – Rates or tax – Dividend tax – Interest for delay in remitting tax deducted at source – Expenses incurred for delay in UTI dividend payments is not deductible [Ss.2(43, 37(1)]
The Tribunal held that the delay charges attributable to dividend tax partook of the character of dividend tax itself. Dividend tax as such is not deductible. Therefore the delay charges also were

not deductible. The same was the case in respect of interest for delay in remitting tax deducted at source. There cannot be a different view on expenses incurred for delay in UTI dividend payments. Therefore, these expenses claimed by the assessee were not deductible in computing its income. (AY. 2003-04, 2004-05)
ACIT v. SRA Systems Ltd. (2013) 22 ITR 205 (Chennai)(Trib.)

S.40(a)(iii) : Amounts not deductible – Deduction at source – Salary payable outside India – Tax paid before due date of fling of return cannot be disallowed [S.139(1)]
Where tax deducted at source on salary payable outside India is paid on or before due date for filing return specified under section 139(1), it cannot be disallowed under section 40(a)(iii). Where tax deducted at source is paid after due date specified under section 139(1), such sum shall be allowed as deduction in previous year in which such tax has been paid. (AY.2007-08)
Tianjin Tianshi India (P.) Ltd. v. ITO (2013) 59 SOT 111 (Delhi)(Trib.)

S.40(b) : Amounts not deductible – Interest – Book profit – Calculation of partners' remuneration.
Interest income earned by assessee-firm from fixed deposit receipts which was assessed as business income could not be ignored for purpose of working out book profit to ascertain ceiling of partners' remuneration. Whether only business income and no other income to be taken into for the purpose of calculation was not considered.(AY.2004-05)
CIT v. J. J. Industries (2013) 216 Taxman 162 / 358 ITR 531 (Guj.)(HC).

S.40(b) : Amounts not deductible – Partner – Remuneration – Partnership deed specifically providing for payment of remuneration to working partners, remuneration paid to partners were within statutory fixed limit hence no disallowance on ground of expenditure excessive [S. 40A(2)]
While considering the provisions of section 40(b)(v) read with section 40A(2)(a), the Court held that the Assessing Officer is only required to see whether the partners are the working partners mentioned in the partnership deed, the terms and conditions of the partnership deed provide for payment of remuneration to the working partners and whether the remuneration provided is within the limits prescribed under section 40(b) (v). If all the conditions are fulfilled he cannot disallow any part of the remuneration on the ground that it is excessive. (AY. 2005-06)
CIT v. Great City Manufacturing Co. (2013) 351 ITR 156 / 256 CTR 420 / 83 DTR 13 / 217 Taxman 109 (All.)(HC)
Editorial: ACIT v. Great City Mfg.Co (2009) 33 SOT 31(URO) (Delhi)(Trib.) is affirmed.

S.40(b) : Amounts not deductible – Partner – Interest – Depreciation – Revenue cannot insist on depreciation being charge on profit has to be deducted first before considering any interest payment on the capital of the firm
The assessee claimed deduction under section 40(b) towards the payment of interest to the partners on the balances in the capital accounts in terms of the partnership deed. The Assessing Officer held that since the depreciation is a charge on the profit of the company, charging of interest has to be on the book profit of the firm. View of the Assessing Officer was affirmed by the Commissioner (Appeals) and Tribunal. On appeal the Court held that there being no restriction on the working of interest before working out depreciation as has been provided in case of salary that payment of salary to partners for purpose of deduction has to be worked out on percentage of book profit, revenue cannot insist that depreciation being a charge on profit, had to be deducted first before considering any interest payment on capital of firm. Order of Tribunal was set aside. (AYs. 1996-97 to 2000-01)
Sri Venkateswara Photo Studio v. ACIT (2013) 256 CTR 95 / 215 Taxman (Mag.) 119 (Mad.)(HC)

S.40(b) : Amounts not deductible – Partner – Salary – Held to be allowable

The assessee firm claimed salary of ` 2.20 lakhs paid to its full time working partner, who was 47 years age and graduate. The Assessing Officer allowed ` 36,000 and the Commissioner (Appeals) allowed ` 1,20,000. The statement of partner was recorded under section 131 proved that the partner knew the operation of business. Tribunal held that partner's salary could not be estimated without considering any comparative case or laying foundation for such estimation. Deduction of salary paid to a partner was restricted to lower amount on ground of age factor and qualification. She was full time working partner, she knew operations of firm's business, amount paid as salary was allowable. (AY. 2005-06)
S.B. Agencies v. ACIT (2012) 20 ITR 507 / (2013) 141 ITD 669 (Cal.)(Trib.)

S.40(b) : Amounts not deductible – Firm – Book profit – Income from Other Source included in P & L A/c – Cannot be discarded *qua* book profit for computation of remuneration payable to partners
The assessee-firm derived its income from profession as an advocate. In the profit and loss account, the assessee-firm credited certain amount received as licence fee and compensation for use of shared facilities. In the course of assessment, the Assessing Officer opined that since the aforesaid income was not a professional income, the same could not form part of 'book profit' for computation of allowable remuneration to partners under section 40(b). It was held that Income from other sources included in profit and loss account to ascertain net profit cannot be discarded *qua* book profit for computation of remuneration payable to partners. The Tribunal allowed the appeal of assessee. (AY. 2005-06)
Suresh A. Shroff & Co. v. JCIT (2013) 140 ITD 1 / 153 TTJ 666 / 85 DTR 446 (Mum.)(Trib.)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Purchase of electricity – Reason for differential pricing
After considering rates at which assessee's sister concern sold electricity to various parties came to the conclusion that out of total ten instances, excluding assessee's, only in two cases, rates were lower. It also held that the sister concern had reasons for charging different rates for sale of electricity. Held on peculiarity of these facts, no substantive question of law arose for admitting instant appeal. (AY. 2008-09)
CIT v. OPG Metals (P.) Ltd. (2013) 358 ITR 144 / 92 DTR 348 / 218 Taxman 471 (Mad.)(HC)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Consistency – Accepted in earlier years – No disallowance could be made
In earlier assessment year, interest at rate of 23% to sister concern was accepted by department when loan was raised by assessee and during assessment years under consideration, no fresh loan was taken from sister concern. On these facts, no part of interest paid to sister concern could be disallowed. (AYs. 2000-01 and 2001-02)
CIT v. Northern Electronics System (P.) Ltd. (2013) 218 Taxman 155 (Mag.) (All.)(HC)

S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable payments – Sale to sister concern at lesser price – Provisions could not be invoked.
Where assessee had charged less sale price from sister concern as compared to non-sister concerns, provisions of section 40A could not be invoked as no payment had been made to sister concern for any item of expenditure, which assessee might have claimed as revenue expenditure. (AY. 2006-07)
CIT v. Rajnish Ahuja (2013) 219 Taxman 85 (Mag.) (P&H)(HC)

S.40A(2) : Expenses or payments not deductible – Commission paid to son of partner – Disallowance of part of expenditure was justified
There was an agreement for payment of commission to the son of partner stating that it was for looking after labour, production and dispatch. There was no evidence to support the claim that the

twenty year old son had expertise in the matter. On facts, held that the disallowance of part commission was justified. (AY. 1977-78)
S. M. Haq v. CIT (2013) 358 ITR 246 (All)(HC)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Interest paid to relative at a rate higher than market rate – Addition justified
The assessee paid interest @ 18.25% on the credit balance of Smt. Shakuntala Devi, who is the mother of Karta of the HUF and as such is a specified person within the meaning of section 40A(2)(b). Since the rate of interest was higher than the prevalent market rate of interest of 15%, the AO disallowed the excess interest paid. The assessee submitted that the loan was taken on long term basis without giving any security. The plea of the assessee was rejected. The CIT(A) and Tribunal confirmed the addition.
On appeal by the assessee, the High Court held that in absence of any plausible explanation by the assessee, addition made by applying provisions of section 40A(2)(b) was justified (AY. 2007-08).
Ramesh Chand (HUF) v. CIT (2013) 217 Taxman 75 (P&H)(HC)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Payment made by holding company to its subsidiary could not be subjected to disallowance under section 40(A)(2)(b). Provision is not applicable to payment to subsidiary [Ss.37(1), 40A(2)(b)]
S.40A(2)(b) is not applicable for payment to subsidiary company. Merely because the subsidiary could not complete its part of the contract with the assessee due to labour problems did not warrant disallowance. A subsidiary of an assessee-company is not a related person within meaning of s.40A(2)(b)(ii), and thus, payment made by assessee to its subsidiary cannot be disallowed by invoking provisions of this section. (AY.1995-96)
CIT v. Raman Boards Ltd. (2013) 355 ITR 305 / 216 Taxman 103 / 94 DTR 132 (Karn.)(HC)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Purchasing at prevailing market price – Question of fact – No substantial question of law [S.37(1), 260A]
When the Tribunal gave a finding that assessee did purchase at prevailing market rates and seller incurred certain expenditure in engaging personnel in office and other operations, s. 40A(2) did not have application. (AY.1997-98)
CIT v. Vijay M. Mistry Construction Ltd. (2011) 55 DTR 33 / (2013) 355 ITR 498/219 Taxman 145(Mag.) (Guj.)(HC)

S.40A(2) : Expenses or payments not deductible – Directors remuneration comparing with job profile is held to be allowable
The job profile was of one of the directors was client management whereas the job profile of another was that of media consultant. Therefore, these cases were not comparable. The assessee was in the business of advertising and media. In such a business, the role of a media consultant was much more important than the role of a client management. Thus, the disallowance made was thus to be deleted (AY.2005-06)
Hive Communications P. Ltd. v. CIT (2013) 353 ITR 200 (Delhi)(HC)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Payment to sister concern – As no investigation is done, disallowance was not sustainable
In the instant case the AO held that the assessee had made payments to its sister concern without citing any cogent reasons. The High Court held that the AO had not carried out any investigation as to if the payments made to the sister concern were excessive with reference to third parties or fair market charges payable for similar nature of work. In the absence of the same, disallowance cannot be sustained. (AY. 2002-03)
CIT v. Superior Crafts (2013) 353 ITR 101 / 82 DTR 209 (Delhi)(HC)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Payments of commission – Held allowable

The assessee paid commission to a company. The A.O. disallowed payment on basis of finding that payee was not found in existence. CIT(A) remitted matter to A.O. for reconciliation after *prima facie* finding existence of payee and also that payments were made in view of agreement, terms and conditions of which duly spelt out services to be rendered by payee and commission to be paid to it. Payee concern was registered with Sales Tax Department and was liable to pay local taxes. The Tribunal held that the assessee had discharged its onus of proving genuineness of transaction and therefore, payment being for legitimate business purpose was allowable. (AY. 2004-05)

ACIT v. Jindal Steel & Power Ltd. (2013) 145 ITD 277 (Delhi)(Trib.)

S.40A(2) : Expenses or payments not deductible – Excessive or unreasonable payments – Onus is on revenue to prove payment was in excess of fair market value – *Ad hoc* disallowance could not be made – Mere discrepancy in audit report cannot be the basis for disallowance

Mere discrepancy in figures of tax audit report and document of assessee alone cannot be basis for making disallowance under section 40A(2). For making disallowance under section 40(A)(2), Assessing Officer must ascertain fair market price of goods, services or facilities and then make disallowance for amount which is in excess of fair market value. Where Assessing Officer had not discharged onus of proving that payments made to parties were excessive or unreasonable, *ad hoc* disallowance of 5 per cent of payments could not be made. (AYs. 2005-06, 2006-07)

ACIT v. Ashok J. Patel (2013) 59 SOT 53 (Ahd.)(Trib.)

S.40A(2) : Expenses or payments not deductible – Business disallowance – Excessive or unreasonable payments – Interest payments at 18% on unsecured loan held to be reasonable

Assessee had taken loans from his wife, sons and his own HUF and paid interest at the rate of 18 per cent on same. Assessing Officer considered rate of interest at 12 per cent as reasonable and disallowed 6 per cent of remaining interest by invoking provisions contained in section 40A(2). Assessing Officer could not cite any instance wherein assessee on unsecured loan account, other than his relatives account, who had paid interest at less than 18 per cent per annum. Interest paid by assessee at the rate of 18 per cent per annum on unsecured loans during relevant period could not said to be excessive or unreasonable. In facts of case Commissioner (Appeals) was justified in deleting impugned disallowance made by Assessing Officer under section 40A(2). On Second Appeal, the only issue in dispute is regarding the disallowance of interest paid on loans to family members of the assessee under section 40A(2), assessee has taken the loans and is paying interest at the rate of 18 per cent on the same. The interest paid at the rate of 18 % per annum on unsecured loan cannot be said that it was excessive or unreasonable. (AY.2008-09)

ACIT v. Shirish Maganlal Ravani (2013) 143 ITD 25 / 35 taxmann.com 195 / 91 DTR 289 / 156 TTJ 407 (TM) (Rajkot)(Trib.)

S.40A(2) : Expenses or payments not deductible – Excessive and unreasonable payments – Payments to sister concern

The rate paid to the sister concern was found reasonable after considering the transportation charges which the assessee would have to incur in case of purchases made from outside. Hence, the disallowance was not warranted. (AY.2006-07)

DCIT v. Raj Rani Steel Casting P. Ltd. (2013) 24 ITR 678 / 60 SOT 143 (URO)(Pune)(Trib.)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Remuneration to Directors

Disallowance under section 40A(2) by linking remuneration to directors with assessee's turnover or profit earned by the assessee was not proper. The only thing is to be seen is as to whether the remuneration was excessive.
The Assessing Officer did not doubt the payment of remuneration to the directors and it was not the case of that the services were not rendered. The Tribunal deleted the addition made by Assessing Officer and sustained by the learned CIT(A) on the basis that the directors who were well experienced and having proper qualification rendered the services to the assessee company.
Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1 / 86 DTR 49 (Jodh.)(Trib.)

S.40A(2) : Expenses or payments not deductible – Reasonableness of expenditure – No ad hoc disallowance can be made
In the ROI, the assessee claimed that certain resources like staff, office premises, etc., had been used commonly both by the assessee company and its parent company and expenses relating to these resourced had been shared. The Revenue authorities held that since assessee failed to prove that expenses incurred through associate companies were reasonable and at arm's length, considering services rendered by assessee, a part of said expenses was to be disallowed. Held, since it was apparent from records that arrangement of expenses was correct and *bona fide* and was in accordance with terms of agreement between both parties, no *ad hoc* disallowance of any amount was called for (AY. 2007-08)
Global Innovsource Search Solutions (P.) Ltd. v. ITO (2013) 57 SOT 139 (Mum.)(Trib.)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Directors remuneration allowed which was based on board resolution
Where payments were made by assessee-company to its directors was supported by a Board resolution which authorised payment being in appreciation of directors' services and encouraging operational results of company, deduction should be allowed to assessee. Appeal of revenue was dismissed. (AY.2001-02)
ACIT v. Bhiwadi Cylinders (P.) Ltd. (2013) 55 SOT 32(URO) (JP)(Trib.)

S.40A(2) : Expenses or payments not deductible – Excess or unreasonable – Commission – Disallowance made by the Assessing Officer was deleted
Assessee is carrying on business of job work and sale of ceramic catalyst items. It paid sales commission to a partnership firm 'R' in which assessee was also a partner. According to assessee, marketing services rendered by 'R' included obtaining orders, visiting parties, collection of payment etc. Assessing Officer took a view that receipt of job work by assessee was a repetitive process and, in such a case, third party services were not required. He thus disallowed payment of sales commission by invoking provision of section 40A(2)(b). Tribunal held that, it was undisputed that sales promotion commission paid to 'R' was allowed in earlier years. Moreover, revenue failed to bring on record evidence showing that expenses incurred were excessive or unreasonable, in view of above, impugned disallowance made under section 40A(2)(b) was to be deleted. In favour of assessee. (AY. 2006-07)
Dy. CIT v. Ravi Ceramics. (2013) 55 SOT 160 (Ahd.)(Trib.)

S.40A(3) : Amounts not deductible – Cash payments exceeding prescribed limits – Payment to statutory bodies – Airport Authority – No disallowance can be made. [Rule 6DD(k)]
Where assessee had to make payment in cash exceeding prescribed limit in respect of route navigational and parking charge for aircraft as required by Airport Authority which is a statutory body, same would be allowable.
CIT v. SRC Aviation (P.) Ltd. (2013) 218 Taxman 62 (Mag.) (Delhi)(HC)

S.40A(3) : Amounts not deductible – Cash payment exceeding prescribed limits – Payment to Government concern (Railways) – Disallowance was not justified

Assessee a scrap dealer, purchased scrap from Railway by making payment in cash in excess of Rs. 20,000. Court held that since Railway is concern of Union of India, such payment in cash had to be considered as a legal tender, and, therefore, same could not be disallowed.(AY. 2008-09)

CIT v. Devendrappa M. Kalal (2013) 219 Taxman 122 (Kar.)(HC)

S.40A(3) : Amounts not deductible – Cash payment exceeding prescribed limit – Purchase of food grains from farmers – Disallowance was not justified. [Rule 6DD(e)(k)]

Assessee, engaged in trading of food grains on commission basis, purchased grains from farmers by making cash payments exceeding ` 20,000. Assessing Officer held that said payments attracted disallowance under section 40A(3). Since said payments were made in commission agency business and assessee was maintaining all books of account and also accounts on all statutory forms required under U.P. Krishi Utpadan Mandi Adhiniyam, 1962, rules 6DD(e) and (k) were clearly attracted in instant case and, therefore, disallowance was to be deleted (AY.2006-07)

CIT v. Sunil Kumar Agrawal (2013) 219 Taxman 118 (All.)(HC)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Exceptional or unavoidable circumstances – No proof of such unavoidable circumstances disallowance was held to be justified [R. 6DD(j)]

The assessee carried on the business of purchase and sale of suit cases. Most of his supplies were received from vendors in Hyderabad. According to the assessee he used to make payment for the purchases in cash. The Tribunal held that the suppliers of the assessee who were delivering the goods to him, invariably insisted on spot payment of cash to the lorry drivers, hence disallowance was not justified. On appeal the High Court held that there was no evidence that the suppliers insisted on cash payments. The Tribunal had proceeded entirely on conjectures and surmises, which were not warranted from any material on record. The assessee had not made out any case of exceptional or unavoidable circumstances as postulated by rule 6DD (j) of the Rules. The disallowance of expenditure was justified. (AY. 1995-96)

CIT v. Singamsetty Subba Rao (2013) 357 ITR 529 (AP)(HC)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Payment by cheque for part not proved – Addition on account of cash payment exceeding limit justified

The assessee purchased wheat for Rs.39,25,680/-. Out of the said amount Rs. 8,44,934/- was found to have been paid though cheques. The AO found that the payment of Rs.30,80,746/- was made by assessee otherwise by account payee cheque and disallowed 20% of the amount for violation of section 40A(3) of the Act. The CIT(A) as well as Tribunal confirmed the disallowance.

On appeal by the assessee, the High Court observed that the failure of the appellant to give evidence during the course of assessment proceedings or in appeal before the Commissioner of Income Tax or the Tribunal is sufficient to confirm the findings of fact recorded by the authorities under the Act for the reason of failure of the appellant to produce the proof of payment through the account payee cheques before the authorities (AY. 2007-08).

Ramesh Chand (HUF) v. CIT (2013) 217 Taxman 75 (P&H)(HC)

S.40A(3) : Expenses or payments not deductible – Cash payments – Agent-No disallowance could be made [R.6DD(i)]

Returns of the payees showed receipts from agriculturists as cotton commission receipts and receipts from bidders as merchant commission. All these parties had charged commission to the assessee, it could not be said that they were not acting on behalf of the assessee. Thus, payments made through

the agents were clearly covered by the provisions of rule 6DD(i) and addition should not have been made in respect of those payments. (AY. 1998-99)
CIT v. Sri Shanmuga Ginning Factory (2013) 355 ITR 96 / 218 Taxman 76 (Mag.) (Mad.)(HC)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Test of circumstances [Rule 6DD(k)]
Assessee a railway catering contractor engaged in respect of two trains to supply food articles, soft drink and basic commodities to the passengers wherein his business income was primarily on cash basis. In the peculiar circumstances under Rule 6DD(k) the case of the Assessee gets protected and no disallowance under section 40A(3) could be made. (AY. 2008-09)
RC Goel v. CIT (2013) 259 CTR 15 / 213 Taxman 305 / 84 DTR 432 (Delhi)(HC)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Salary – Exceeding prescribed limit – Disallowance was held to be justified [S.147]
Return of assessee-company was processed under section 143(1) - Subsequently, Assessing Officer having found that assessee had paid salary to its managing director in cash exceeding Rs.20,000 and also claimed non-business expenses initiated reassessment proceedings and thereafter disallowed said expenses. Tribunal upheld finding of Assessing Officer. Court held that no substantial question of law arose out of order of Tribunal. In favour of revenue. (AY.2002-03)
Rajasthan Telematics Ltd. v. ACIT (2013) 213 Taxman 44(Mag.) (Raj.)(HC)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Assessee purchasing goods and depositing amount in bank account of seller – No disallowance in hands of assessee. [Income-tax Rules, 1962, R. 6DD]
The Assessing Officer made an addition of Rs.60,19,000, on the ground that the assessee had violated the provisions of section 40A(3) of the Income-tax Act, 1961. The Tribunal partly allowed the appeal by the assessee. On appeal by revenue High Court, dismissing the appeal, held that the Tribunal categorically held that the amount in question was directly deposited in the bank account of the seller. The Tribunal had considered the factor that the assessee was only an agent of the seller and held that no disallowance could be made in the hands of the assessee. The findings had not been shown to be perverse. Therefore, the addition was not justified. (AY. 2008-09)
CIT v. Shelly Passi (Smt.) (2013) 350 ITR 227 / 86 DTR 78 / 213 Taxman 213 / 261 CTR 422 (P&H)(HC)

S.40A(3) : Expenses or payments not deductible – Payment to one party – Payment in one day
In the assessee's case, though the aggregate payment on a particular date paid by the assessee in cash exceeded Rs. 20,000, each payment in cash to each such party did not exceed Rs. 20,000. Therefore, there was no contravention of the provisions of section 40A(3). (AY. 2008-09)
Kailash Chandra Sahoo v. ITO (2013) 28 ITR 530 (Cuttack)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – The onus is on the assessee to prove that the payments were made at places which were not served by any banking facilities
The assessee had made payments towards purchase of land in the Devanahalli taluk of Bangalore District out of which certain amounts were found to have been paid in cash in contravention of the provisions of section 40A(3). The reason for making payment in cash was that the payments were made at places which were not served by any banking facilities. The AO rejected the contention of the assessee for the reason that Devanahalli taluk was well developed suburb of Bangalore having a large number of banks. The AO thus held that the provisions of section 40A(3) was applicable in the present case and consequently he disallowed 20 per cent of the amount paid in cash. The CIT(A) upheld the action of the AO. The Tribunal held that in view of failure of assessee to prove that

payment for purchase of property was made in cash because there were no banking facilities available at said place, disallowance made under section 40A(3) was to be confirmed. (AYs. 2006-07, 2007-08)
ITO v. Nam Estates (P.) Ltd. (2013) 141 ITD 659 / 21 ITR 109 / 91 DTR 425 (Bang.)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Cash payments for purchase of land to landowners before Sub-Registrar for lack of banking facilities – Covered under second proviso to section 40A(3) and rule 6DD(h) – Disallowance unsustainable [R.6DD(h)]
Assessee made cash payment to various landowners with village and agricultural background and the payments were made at villages where banking facilities did not exist and therefore, no disallowance under s.40A(3) r/w r. 6DD(h) is called for. (AY. 2006-07)
Saraswati Housing & Developers v. Addl. CIT (2013)142 ITD 198 / 27 ITR 175 / 91 DTR 313 (Delhi)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Cash Payments of Rs. 20,000/- and above [Rule 6DD]
The Tribunal held that once the exemptions provided in Rule 6DD are not fulfilled, the conclusion drawn by the Assessing Officer was confirmed. (AYs. 2002-03 & 2003-04)
Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

S.40A(3) : Expenses or payments not deductible – Genuineness – Labour charges was not established – Disallowance was held to be justified
Since no evidence was furnished to establish the genuineness of labourers who were paid labour charges for land development and the assessee failed to produce vouchers for payment to supervisor and not showing veracity of payment, disallowance was justified. (AY. 2008-09)
Metalcity Constructions Kovai P. Ltd. v. ITO (2013) 24 ITR 424 / 144 ITD 388 (Chennai)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limit – Agricultural produce – Kachcha Arahtia – No disallowance can be made [Income-tax Rules 1962, Rule 6DD(e), 6DD(k)]
Assessee acted as Pakka Arahtia and made cash purchases of agricultural produce through Kachcha Arahtias who in order to facilitate, sale of agricultural produce, with farmers brought to Mandi, had taken commission from Pakka Arathia. i.e. Assessee. Kachcha Arahtias had filed affidavits that cash payments were made at their insistence as they did not maintain any bank accounts. Further they had to make payments to farmers in cash. Tribunal held that the case of assessee was clearly covered by exceptions provided under rule 6DD no disallowance could be made under section 40A(3) (AY. 2006-07)
ITO v. Sunil Kumar Agarwal (2013) 141 ITD 309 / 88 DTR 209 / 158 TTJ 271 (Agra)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payment – Purchase consideration – Self made vouchers disallowance was justified
Assessee engaged in reality business, purchased a property by making cash payment. It claimed that payments were made in parts and each payment was either less than or of Rs. 20000. Assessee also contended that payments were made at different hours of same day and on a different dates. The Assessing Officer held that provisions of section 40A(3) is applicable as there was neither any business exigency nor any reasonable cause was shown. Commissioner (Appeals) confirmed the addition. On appeal the Tribunal held that vouchers were self made to come out of clutches of section 40(A)(3) and assessee had failed to substantiate its claim, disallowance made by the Assessing Officer was justified. (AY. 2007-08)
Raman Mahajan HUF v. ITO (2013) 141 ITD 485 (Asr.)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Best judgment – No disallowance under section 40(A)(3) [Ss.144, 145]

The assessee derived income from newspaper agency sales and purchases of commission. He filed his return on March 31, 2010. The Assessing Officer observed that the assessee made sales in cash and while making the best judgment assessment accepted the sales showed by the assessee but applied a higher gross profit rate and made addition in respect of income from newspaper business. He also made trading addition under section 40A(3) of the Act, on the ground that the assessee made cash payments to the newspaper company. The Commissioner (Appeals) deleted the addition on the ground that when income was assessed by estimating the profit after rejection of the books of account no disallowance could be made separately under section 40A(3) of the Act. On appeal by the Department the Tribunal held, that the Commissioner (Appeals) rightly deleted the separate addition made by the Assessing Officer under section 40A(3) of the Act. (AY. 2009-10)

ITO v. Nardev Kumar Gupta (2013) 142 ITD 303 / 22 ITR 273 (Jaipur)(Trib.)

S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Cash payments – Held proper.

The tribunal held that the assessee has not produced any material to controvert finding of Assessing Officer that no cash payment was made above over and above Rs 20,000/- by way of a single payment or aggregate of payments in a single day. As no evidence to establish claim that no single payment in cash made was below of Rs. 20,000 disallowance was held to be proper. (AY. 2008-09)

Gurdas Mann (Mrs.) v. Dy. CIT (2013) 21 ITR 57 / 57 SOT 55 (Chandigarh)(Trib.)

S.40A(7) : Expenses or payments not deductible – Gratuity – Impossible to have made provision for gratuity in books – Liability having accrued in very year itself, was to be allowed in corresponding year.

The assessee, a company engaged in textile manufacturing claimed ` Rs.1,67,34,000/- on account of liability for gratuity of employees in respect of their services up to 31-3-1973. Out of the total claim of Rs. 1,67,34,000 only a sum of ` Rs.32,92,000 was debited to the profit and loss account as a provision for gratuity. The AO, therefore considered only Rs. 32,92,000 to be admissible deduction under section 40A(7). In the first round, the CIT(A) had decided the issue in favour of the assessee, however, the Tribunal had restored the matter to the AO for fresh determination. In the remand, the AO once again allowed only a sum of Rs. 32,92,000, which findings of the AO were confirmed by the CIT(A). The Tribunal held that under the special circumstances of the case, it was not practicable, rather it was impossible, to have made a provision for gratuity in the previous year relevant to assessment year 1973-74, accounts of the assessee having been closed but was the liability accrued in the year itself, it was to be allowed in this very year.

On appeal by the department, the High Court following its own Order in the assessees own case and in light of the law laid down by the Supreme Court in *Shree Sajjan Mills Ltd. v. CIT (1985) 135 ITR 585* held that the assessment year in question i.e. 1973-74 is squarely covered by the expression provided under sub-clause (ii) of clause (b) of section 40A(7) and concluded that the Tribunal has rightly held that the amount of gratuity was allowable.

CIT v. Swadeshi Cotton Mills Co. Ltd. (2013) 217 Taxman 51 (Mag.) (All.)(HC)

S.40A(7) : Expenses or payments not deductible – Provision for gratuity – Actual payment

Employees of the assessee were promoted to position of manager. They ceased to be the employees of the assessee and became employees of its apex body. The amounts paid by the assessee on account of gratuity to its apex body for promoted employees was held not a provision, and hence, allowable. (AY. 2007-08)

Fazilka Central Co-op. Bank Ltd. v. DCIT (2013) 27 ITR 326 (Amritsar)(Trib.)

S.40A(8) : Expenses or payments not deductible – Interest on deposits – Fixed deposits – Interest cannot be disallowed under section 40(A)(8)
Fixed deposits secured by a floating charge on specific assets of company amounts to secured fixed deposits and, therefore, interest paid on them cannot be disallowed under section 40A(8). In favour of assessee. (AY.1985-86)
CIT v. Dalmia Cement (Bharat) Ltd. (2013) 212 Taxman 126 (Mag.) (Delhi)(HC)

S.40A(9) : Expenses or payments not deductible – Non-statutory funds – Evidence
Where the contribution to employees' welfare trust etc. being non-statutory funds were claimed to have been made as per agreement with workers' union under Industrial Disputes Act, 1947, but there was no evidence of such agreement, amount of contributions were not allowable. (AY. 2003-04)
Greaves Cotton Ltd. v. ITO (2013) 57 SOT 158 (Mum.)(Trib.)

S.41(1): Profits chargeable to tax – Remission or cessation of trading liability – No claim of loss of trading liability – Principal amount of loan on account of capital – Not assessable as trading liability
Assessee, a State Industrial Investment Corporation, suffered huge loss. State Government, being the only share holder of the assessee-corporation, converted interest bearing loan given to it into non-refundable interest free unsecured loan. The Assessing Officer opined that since assessee-corporation, had utilised said loan in business activity, corresponding amount so converted would have to be treated as revenue receipt as such conversion would amount to remission of a trading liability. Held, since no claim of loss of trading liability in respect of said loan was made by assessee and further, loan was on capital account and after conversion, it remained as a part of capital account in balance sheet of assessee, section 41(1) could not said to be applicable. (AY.2002-03)
CIT v. Pradeshiya Industrial & Investment Corp. U.P. (Picup) (2013) 218 Taxman 322 / 95 DTR 421 (All.)(HC)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability –Remission of interest – Interest in earlier years – Return for earlier years has been treated as non est – Interest waived could not be subsequently taxed under section 41(1) [S. 139(9), 140A]
Since return for years, to which interest waived was related, had been treated as non est, interest was to be held as not allowed, and therefore, interest waived could not be subsequently taxed under section 41(1). (AY.2001-02)
CIT v. Rayala Corporation (P.) Ltd. (2013) 218 Taxman 11 / 92 DTR 33 (Mad.)(HC)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – One time settlement – Amount stood waived off resulted in cessation of liability and it could not be treated as revenue receipt [S.28(iv)]
Assessee was engaged in manufacture of medical devices. Operations of assessee were suspended during May, 2002 and its factory was taken over by IFCI for unpaid dues. Thereafter assessee opted for one time settlement under which Rs. 4.93 crore was waived off. Tribunal held that amount stood waived off resulted in cessation of liability and it could not be treated as revenue receipt under section 41(1). In view of *Iskraemeco Regent Ltd. v. CIT [2011] 331 ITR 317 (Mad.)(HC)* it was to be held that neither did waiver amount to a benefit arising out of business nor was it a remission of liability, which could attract section 41(1) and, hence, revenue's appeal was to be dismissed. (AY.2006-07)
CIT v. Innvol Medical India Ltd. (2013) 219 Taxman 123 (Mad.)(HC)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability –Liability not proved at the end of the year can be added
The assessee had purchased goods from one "T". Due to a dispute with the said "T" the assessee failed to make payment to "T", which amount was reflected in the Balance Sheet as a sundry creditor.

Since the assessee failed to submit a confirmation from the said "T" the AO issued a notice u/s. 133 (6) to "T". The AO observing that no such entity existed on the address given made addition u/s. 41 (1). The Tribunal held that if the liability is not proved can be added to the income of the assessee and remitted the matter to the AO to verify the discharge of the liability till the date of fresh assessment and if the assessee failed to produce the creditor or unable to give exact address, the AO would be free to add back the same as per law.
On appeal by the assessee, the High Court in light of the findings of the Tribunal observed that no question of law arises and hence dismissed the appeal of the assessee (AY. 2007-08).
Rama Steel Rolling Mills & General Engg. Works v. ITO (2013) 34 taxmann.com 262 (Raj.)(HC)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – No deduction was allowed in earlier year, provision has no application
Since no allowance or deduction was made in the assessment of assessee in any earlier year, section 41(1) has no application. (AY.2007-08)
CIT v. Shivali Construction Pvt. Ltd. (2013) 355 ITR 218 / 217 Taxman 60(Mag.) (Delhi)(HC)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Writing back of gratuity allowed as trading liability in assessment year 1972-73 – No remission or cessation of liability
A unilateral act of the assessee in writing back the amount of gratuity of Rs. 32,39,929 which was allowed as expenditure in the assessment year 1972-73 could not be treated as remission or cessation of the trading liability so as to attract the provisions of section 41(1). The said amount could not be taxed in the Asst Year 1976-77. (AY.1976-77)
CIT v. Elgin Mill Co. Ltd. (2013) 352 ITR 153 / 213 Taxman 311 (All.)(HC)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Since there was no declaration by assessee that it did not intend to honour its liabilities nor was there any discharge of debt, provisions of section 41 (1) could not be invoked
Assessing Officer finding that assessee had not paid money to many of creditors for years together added same as income under provisions of section 41(1). Court held that since there was no declaration by assessee that it did not intend to honour its liabilities nor was there any discharge of debt, provisions of section 41(1) could not be invoked. Cessation of liability has to be either by reason of operation of law, i.e., on liability becoming unenforceable at law by creditor and debtor declaring unequivocally his intention not to honour his liability when payment is demanded by creditor, or a contract between parties, or by discharge of debt. In favour of assessee. (AY.2006-07)
CIT v. G.K. Patel & Co. (2013) 212 Taxman 384 (Guj.)(HC)

S.41(1) : Profits chargeable to tax – Purchase return – Settling of accounts
Since the assessee had acknowledged the liability throughout and such liability in subsequent years was either settled by returning the goods or by making payment by account payee cheques there was sufficient evidence to hold that the liability had not ceased and hence addition under section 41(1) of the Act was not warranted. (AY. 2002-2003)
Hareshbhai Jagmohandas Mehta (HUF) v. ACIT (2013) 28 ITR 561 (Ahd.)(Trib.)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Liability outstanding for long period of time is assessable as income (despite no write-back in A/cs) if assessee is unable to prove genuineness of liability
The assessee, engaged in the business of civil construction and labour contractor, had an amount of Rs. 86.25 lakhs shown as outstanding labour charges in his balance sheet that had remained unpaid for more than three years. The AO held that the fact that the amount was outstanding for so many years was abnormal. As the assessee was unable to give the addresses and labour bills of the

labourers, he held that the assessee had failed to prove the genuineness of the liability and that it had ceased to exist. He therefore assessed the said sum as income u/s 41(1). On appeal, the CIT(A) reversed the AO on the ground that the fact that the amount was outstanding for a long period and that the assessee was unable to furnish confirmations did not mean that there was a remission or cessation of liability during the assessment year so as to attract s. 41(1). On appeal by the department to the Tribunal HELD allowing the appeal:
It is very improbable that payments to labour can remain outstanding for more than three years. The assessee has not been able to produce the records relating to the name, addresses and bills of the labour etc to prove that the liability continues to exist. It is accordingly a case of cessation of liability. The assessee has just continued the entry of the same in his books of account without any intention to pay back the same. The view that such sums shown as liability is assessable to tax is sanctioned by Chipsoft Technology 210 Taxman 173 (Del) where the view was taken that it would be illogical to say that a debtor or an employer, holding on to unpaid dues, should be given the benefit of his showing the amount as a liability, even though he would be entitled in law to say that a claim for its recovery is time barred, and continue to enjoy the amount. This view is not contrary to the view taken in *CIT v. Vardhaman Overseas Ltd (2012) 343 ITR 408 (Del)* where the law was laid down that s. 41(1) does not apply if the amount of liability is not written back in the accounts. If both judgments are read in harmony, it can be observed that the assessee cannot be allowed to show an amount as a liability even though he has no intention to pay it back but to enjoy the same for an unlimited period without being added to his income only on the excuse that he has not written off the same in his books of account. However, if the facts of the case establish that the liability has been genuinely shown by the assessee and his subsequent conduct shows that he has paid back the said credits and his intention was not to enjoy the amount for unlimited period without any intention to pay back the same, then it cannot be said to be a case of cessation of liability. On facts, not only is the existence of outstanding liability of labour charges for so many years improbable in the normal course of business but the assessee has also failed to give any evidence regarding the identity & genuineness of the creditors. Accordingly it is a case of cessation of liability and s. 41(1) applies (ITA No. 7012/M/2010., dt. 11-12-2013.) (A Y. 2007-08)
ITO v. Shailesh D. Shah (Mum.)(Trib.) www.itatonline.org.
Yusuf R. Tanwas v. ITO (Mum.)(Trib.) www.itatonline.org

S.41(1) : Profits chargeable to tax – Waiver of interest – Benefit in kind – Interest waived by bank which was not allowed as deduction cannot be taxed either under section 41(1) or under section 28(iv) [S. 28(iv)]
Where interest payable to bank had not been allowed as deduction in earlier assessment, it could not be made taxable under section 41(1) on its waiver. Section 28(iv) can be invoked only when benefit or perquisite received is only in kind and not in cash. Therefore, interest waived by bank was held to be not chargeable to tax. (AY. 2005-06)
ACIT v. Spel Semiconductor Ltd. (2013) 59 SOT 114 (Chennai)(Trib.)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability –S. 41(1) cannot be invoked in a situation where there is a loss [S.72]
If assessee claims expenditure but ultimately if there is a loss and such loss cannot be set off under section 72, in such a situation section 41(1) cannot be invoked.
The Mula Pravara Electric Co-operative Society Ltd. v. Dy. CIT (2013) 91 DTR 434 / 156 TTJ 517 (Pune)(Trib.)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability
The assessee, a electric co-operative society established in the State of Maharashtra by the Government of India, was entrusted with distribution of the electrical energy exclusively in 183 villages of Shrirampur, Rahuri Taluka fully and Newasa and Sangamner, Rahata Taluka partly. The

rates for the electricity purchases from MSEB and selling to ultimate consumers are controlled by the Government of Maharashtra through MSEB and hence it consistently incurred losses due to disparity in the purchase price and sales price of the electricity. The Govt. of Maharashtra accepted the representation made by the assessee society to the MSEB for determining viable tariff and a notification to that effect was issued in the Gazette on 21-5-1999 determining the viable tariff. In compliance to the Govt. notification MSEB *vide* letter dated 13-5-2001 informed the assessee that the tariff payable by the assessee to the MSEB was reviewed from April 1977 to April 2000. As a result of the said review, the arrears of MSEB were substantially reduced. The MSEB after recalculating the viable tariff *vide* letter dated 13-5-2001 has allowed rebate to the extent of ` 541.80 crores in the price payable by the assessee to the MSEB. The rebate allowed to the extent of Rs.541.80 crores had been treated as cession of liability within the meaning of sec. 41(1) of the Act by the Assessing Officer as well as the Ld. CIT(A) and the same amount is added in the income of the assessee in the AY. 2002-03. The Tribunal held that, the first part of sec. 41(1) contemplates loss, expenditure or trading liability in some former years in which allowance or deduction has been made and the second part of the said section contemplates recoupment of such loss or expenditure or benefit in respect of "such" trading liability by way of remission or cessation in some subsequent years. The word "such" appearing in the second part of sub-section (1) of sec. 41 is significant in the context that the word "such" signifies that the recoupment or benefit must be in respect of loss or expenditure or trading liability mentioned in the first part of the said sub-section. The argument of the Learned counsel was that to extent of the losses from the AYs. 1978-79 to 1992-93 aggregating to Rs.140,46,06,586/-, section 41(1) cannot be applied being it is a deeming provision as the assessee has not got any benefit in tax liability under the charging provisions. The Tribunal observed that in sec. 41(1), the Legislature has used the words "loss" also. If the assessee claims expenditure but ultimately if there is a "loss" and such "loss" cannot be set off u/s 72 of the Act, in such a situation, in our opinion, section 41(1) of the Act cannot be invoked. In the present case the entire rebate is treated as cessation of liability to the extent of Rs.541.80 crores and the addition is made in the AY. 2002-03. The assessee could get the benefit of the brought forward business losses from the AY. 1993-94 as well as depreciation allowance and the tax liability of the assessee is reduced. So far as these fifteen assessment years are concerned, even if the rebate relates to the tariff which is debited to the P & L a/c in the respective assessment years but the fact remains that the losses which were worked out after debiting the said tariff had lapsed. Both the parties have not brought to our notice any direct decision on this crucial issue but to our conscious, considering the intention of the Parliament to enact sec. 41(1) creating fiction is not to put any extra burden of tax on the assessee but to take away the benefit which is enjoyed by the assessee by reducing the tax liability under the charging provisions of the Act. Hence the said amount cannot be taxed u/s 41(1) (AY. 2002-03)
The Mula Pravara Electric Co-operative Society Ltd. v. Dy. CIT (2013) 91 DTR 434 / 156 TTJ 517 (Pune)(Trib.)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Adjustment of liabilities – Addition was deleted

Assessee imported goods from IMC, a US company on credit. Assessee also rendered some services to IMC for commission. However, IMC withheld said commission payable. Assessing Officer found that no confirmation regarding credit was given by IMC and concluded that assessee had adjusted amount payable by it towards goods against commission receivable and made addition under section 41(1). Tribunal held that no confirmation was filed from IMC could not lead to conclusion that there was a cessation or remission of liability of assessee to IMC warranting invocation of provisions of section 41 (1). Since no evidence was forthcoming to show that any such adjustment was made by assessee, addition made by Assessing Officer was deleted. In favour of assessee. (AY. 2008-09)
Victoria Roberts (Smt.) v. ACIT (2013) 55 SOT 130 (Bang.)(Trib.)

S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Unclaimed liability – Entire credit cannot be brought to tax

Assessee consistently followed a method of accounting whereby it is maintaining provision for unclaimed liabilities and offering the unclaimed amounts to tax after the end of the three-year limitation period, entire credit in the said account cannot be brought to tax as income of the relevant year. (AY. 2002-03)

Lintas India (P) Ltd. v. ACIT (2013) 83 DTR 263 / 152 TTJ 706 (Mum.)(Trib.)

S.41(4) : Profits chargeable to tax – Bad debt

The Tribunal held that where doubtful doubts had not been allowed as deduction in previous years, same could not be taxed as income when they were recovered, as it would lead to double disallowance. (AYs. 2005-06, 2007-08, 2008-09)

ADIT v. Rolls Royce Industrial Power India Ltd. (2013) 142 ITD 585 (Delhi)(Trib.)

S.42 : Business of prospecting, etc. – Oversight – Not mentioning of section 42 in the contract – Deduction is not allowable

The tender given by the petitioner did not specifically stipulate or include any clause with regard to the benefit under section 42 of the Act. Written production sharing contracts were signed and executed between the petitioner and the Ministry of Petroleum and Natural Gas. There was no letter or correspondence written by the petitioner from 1995 onwards stipulating that, by mistake or due to oversight, section 42 benefit was not mentioned in the written production sharing contracts. The letter written by the Desk Officer, Ministry of Petroleum and Natural Gas referring to section 42 and the requirement to table the contract in both Houses of Parliament was written as a matter of routine and by itself or even with other letters, etc., did not justify the claim of the petitioner. In these circumstances, the contention of the petitioner that the benefit under section 42 of the Act was inadvertently missed out, or due to an oversight, not included in the written contract,was not tenable. (AYs. 2001-02, 2005-06)

Joshi Technologies International Inc. v. UOI (2013) 353 ITR 86 (Delhi)(HC)

S.43(1) : Actual cost – Customs duty – Depreciation – Custom duty paid to be considered as part of actual cost for the purpose of allowing depreciation [S.32]

Assessee purchased machinery from a company located in USA. It claimed depreciation at rate of 25 per cent on actual cost of machinery worth ` one crore. Assessing Officer pointed out that written down value of machinery in books of account of assessee was Rs. 75.73 lakhs, which was to be taken as actual cost for purpose of granting depreciation. Tribunal upheld order of Assessing Officer. On appeal, assessee furnished copies of invoices and pointed out that Assessing Officer had omitted to take note of payment of *ad valorem* custom duty which was to be included in actual cost of machinery for purpose of allowing depreciation. On facts, total cost claimed by assessee as ` one crore stood explained and, therefore, assessee's claim was to be allowed. In favour of assessee. (AY.1996-97)

Dy. CIT v. First Leasing Co. of India Ltd. (2013) 212 Taxman 417 (Mad.)(HC)

S.43(1) : Actual cost – Depreciation – On cost of wind mills – Fair market value – Cost paid by the assessee should be considered [S.32]

Assessee purchased 3 wind mills from V, of which one was purchased on 30-3-2004. S had returned the wind mills to V at a cost of Rs. 10.23 crores being the amount outstanding as on 31-8-2003 and had offered short term capital gain on the difference between sale price and the WD.V. WDV in the books of S was at Rs. 26.50 lakhs as on 31-3-2003. Further according to AO, it was not possible to install and commission machinery purchased a day before end of previous year. AO disallowed depreciation claimed in respect of wind mills purchased on 30-3-2004. CIT(A) upheld order of AO following *ACIT v. Aurangabad Holiday Resorts Pvt. Ltd., 111 TTJ 741 (Pune).*

Held, s. 43(1), Expln. 3 is applicable if an assessee claim enhanced cost as actual cost and AO is able to show that cost claimed by assessee is more than market value of asset. Burden to prove fair market value and that assessee has paid higher price is on AO. If it is not discharged, Expln. 3 cannot be invoked. Therefore, actual cost paid by assessee to V for 3 wind mills should be considered as cost price for allowing depreciation to assessee. (AY.2004-05)
Navlakha Translines v. ITO (2013) 81 DTR 103 / 151 TTJ 227 / 58 SOT 55 (URO) (Pune)(Trib.)

S.43(5) : Speculative transaction – Derivatives – Carry forward of loss from trading in derivatives – Derivative loss was treated as speculative loss [S.73]
The assessee incurred certain loss in trading derivatives. It claimed that the said loss was not speculative and could not be disallowed as speculative loss. AO treated the said loss as speculative and could not be adjusted against business income. Tribunal decided in favour of assessee. On appeal the court held that, definition of 'speculative transaction' as indicated in section 43(5) is restricted in its application to sections 28 to 41 only. Since all accounts derivatives were based on stocks and shares, which fall squarely within Explanation to section 73, loss from sale-purchase of such derivative would be speculative loss, which could not be permitted to be carried forward. High Court affirmed the view of the Assessing Officer.
CIT v. DLF Commercial Developers Ltd. (2013) 218 Taxman 45 / 261 CTR 127 (Delhi)(HC)

S.43(5) : Speculative transaction – Guard against loss/adverse price fluctuation – Part of contract – Neither payment was made nor delivery was taken – Transaction was held to be non genuine – Loss cannot be set off against long-term capital gains
Section 43(5) is not restricted to a contract where settlement is only in respect of entire contract; words 'periodically' or 'ultimately' make it clear that provisions of section 43(5) are applicable where a part of contract or entire contract has been settled otherwise than by actual delivery of goods. The only condition, which should be satisfied for a contract to be considered as a speculative transaction, is that it must have been entered into to guard against loss due to adverse price fluctuations of shares in respect of which he might have entered into contracts of sale by actual delivery. Where neither any payment was made nor any delivery was taken by assessee at any point of time, transaction could not be held genuine. Loss cannot be set off against long term capital gains. (AY.1997-98)
Commercial Motors Ltd. v. DCIT (2013) 218 Taxman 69 (All.)(HC)

S.43(5) : Speculative transaction – Transactions in derivatives – Delay in notification of stock exchanges – Notification in January 2006 has retrospective effect – Loss was not speculative [S.73, Rs.6DDA, 6DDB]
Rules prescribing conditions for notification of stock exchanges were framed with effect from July 1, 2005 and proviso (d) to section 43(5) was inserted w.e.f. 1-4-2006. However, the notification of stock exchanges was only in January 2006. Held, the delay was occasioned as procedure and formalities have to be complied with. This should not disentitle and deprive an assessee, specially, when the transactions were carried through a notified stock exchange. Notification has retrospective effect. Derivative transactions between July 2005 and September, 2005 cannot be regarded as speculative. (AY. 2006-07)
CIT v. NASA Finelease P. Ltd. (2013) 358 ITR 305 / (2014) 220 Taxman 339 / 98 DTR 172 / 266 CTR 154 (Delhi)(HC)

S.43(5) : Speculative transaction – Deduction of loss – Cancellation of forward contract
The assessee claimed deduction of loss incurred on account of cancellation of forward contract. The Revenue authorities rejected the assessee's claim holding that transaction in question fell within definition of speculative transaction as per section 43(5). The Tribunal, however, allowed the assessee's claim. Held, in view of order passed by Court in case of *CIT v. Friends & Friends*

Shipping (P) Ltd. [Tax Appeal No. 251/2010, dated 23-8-2011], impugned order of Tribunal was to be upheld.
CIT v. Panchmahal Steel Ltd. (2013) 215 Taxman 140 (Guj.)(HC)

S.43(5) : Speculative transaction – Loss on foreign currency forward contracts by a manufacturer/ exporter is a "hedging loss" and not a "speculation loss" [S. 28(i)]
The assessee, an exporter, entered into forward contracts with Banks to hedge against any loss arising out of fluctuation in foreign currency. The forward contract provided that the assessee would buy some quantity of dollars at a particular rate to cover export bill payment. The contract gave delivery option dates and the assessee had the option to cancel the contract and pay the loss to the Bank. The assessee suffered a loss of Rs. 15 lakhs on such cancellation. The AO & CIT(A) held that the loss constituted a "speculation loss" u/s. 43(5) and could not be allowed as a deduction. On appeal, the Tribunal upheld the assessee's claim. On appeal by the department, HELD dismissing the appeal:
Though the assessee is not a dealer in foreign exchange, it entered into forward contracts with banks for the purpose of hedging the loss due to fluctuation in foreign exchange while implementing the export contracts. The transactions in foreign exchanges were incidental to the assessee's regular course of business and the loss was thus not a speculative loss u/s. 43(5) but was incidental to the assessee's business and allowable as such. The fact that there may have been no direct co-relation between the exchange document and the precise export contract cannot be seen in isolation if there are in fact several separate contracts with the bankers.
CIT v. Friends and Friends Shipping Pvt. Ltd. (2013) 217 Taxman 267 (Guj.)(HC)

S.43(5) : Speculative transaction – Business loss – Loss on forex forward contract – Allowable as business loss – Not speculative [Ss.28(i), 37(1)]
Where assessee-exporter entered into foreign exchange forward contracts to hedge loss on receipt of export proceeds, loss on actual settlement of forward contracts was a business loss incidental to business activities of assessee and not speculative loss under section 43(5) as it had a direct nexus with assessee's export activities. (AY. 2009-10)
Sesa Goa Ltd. v. JCIT (2013) 60 SOT 121(URO) (Panaji)(Trib.)

S.43(5) : Speculative transaction – Share trading – F&O derivatives – Treatment of losses – Matter remanded [Securities Contracts (Regulation) Act, 1956, S.2]
The assessee, engaged in business of trading of tobacco and trading in shares suffered loss from share trading in various segments, like, Intraday, F&O derivatives, Nifty and delivery, and claimed same to be set-off against his normal business income. The Assessing Officer held that since share transactions had been settled otherwise than by actual delivery, those transactions were speculative transactions within meaning of section 43(5) and therefore, treated loss in question as speculation loss and disallowed same. However, the Commissioner (Appeals) allowed claim of assessee. The Revenue submitted that merely on basis of statements procured from a share-broker assessee had made claim. Held, the matter was required to be sent back to Assessing Officer to find out certain facts and then to decide issue as per orders of Tribunal rendered in cases of *DCIT v. Paterson Securities (P) Ltd. (2010) 127 ITD 386 (Chennai)* and *DCIT v. SSKI Investors Services (P.) Ltd. (2008) 113 TTJ 511 (Mum.)*.(AY. 2008-09)
DCIT v. Vikrambhai Ravjibhai Patel (2013) 59 SOT 118 (Ahd.)(Trib.)

S.43(5) : Speculative transaction – Loss suffered in jobbing transactions carried on in the regular course of business – Fall under sub-clause (c) of section 43(5) – Eligible for set off against business income of relevant year
The assessee was carrying on business of brokerage as a member of Multi Commodity Exchange (MCX). Besides doing brokerage business for clients, assessee was also carrying on business in individual capacity on MCX. From the business in individual capacity on MCX, assessee declared

certain loss. The assessee claimed that he was eligible for set-off of said loss against income under other heads in terms of provisions of section 43(5)(c). The revenue authorities opined that the transactions entered into by assessee on MCX in his own account were speculative transactions within the meaning of section 43(5). The Tribunal held that where assessee carried out jobbing transactions in regular course of his business, as a member of MCX, loss suffered in said transactions would fall under sub-clause (c) of section 43(5) which is eligible for set off against business income of relevant year. (AYs. 2008-09 & 2009-10)
Prakash Chand Jain v. Dy. CIT (2013) 142 ITD 441 / 158 TTJ 332 / 95 DTR 337 (Jaipur)(Trib.)

S.43(5) : Speculative transaction – Loss on foreign exchange forward contracts is incidental to the exports business and not a "speculation loss". However, if the contract is prematurely cancelled, the assessee has to justify the loss [S. 28(i)]
The assessee, an exporter of diamonds, entered into forward contracts with Banks to hedge the exchange loss, if any, in respect of the outstanding receivable in foreign currency. The assessee suffered a loss of ` 4.69 crore on account of the maturity & premature cancellation of the said forward contracts. The AO & CIT(A) held that the forward contracts constituted a "speculative transaction" u/s 43(5) and that the loss suffered thereon was a "speculation loss" which could not be set-off against the other income. On appeal by the assessee to the Tribunal HELD:

(i) Though a forward contract for purchase or sale of foreign currency falls in the definition of "speculation transaction" u/s. 43(5) as it is settled otherwise than by the actual delivery or transfer of the commodity, it cannot be regarded as constituting a "speculation business" under Explanation 2 to s. 28. A forward contract, entered into with banks for hedging losses due to foreign exchange fluctuations on the export proceeds, is in the nature of a "hedging contract" and is integral or incidental to the export activity of the assessee and cannot be considered as an independent business activity. Therefore, the losses or gains constitute business loss or gains and do not arise from speculation activities. The fact that there is a premature cancellation of the forward contract does not alter the nature of the transaction. There is also no requirement in the law that there should be a 1:1 correlation between the forward contracts and the export invoices. So long as the total value of the forward contracts does not exceed the value of the invoices, the loss has to be treated as a business loss. (ii) On facts, the loss arising on cancellation of matured forward contracts is allowable as it is attributable to the genuine failure of the trade debtors to comply with the credit terms and conditions. As regards the loss arising on account of premature cancellation of the forward contracts, the assessee requires to explain the reason for the premature cancellation. The explanation that the maturity of date of some of such premature cancelled forward contracts fell during the week-end and therefore they were cancelled three days prior to the due date is acceptable and the loss is allowable. The explanation that some other forward contracts were prematurely cancelled due to business reasons and to avoid higher loss requires to be examined by the AO. The correspondence with the banks and the RBI guidelines on the issue as well as the accounting treatment by the banks also requires to be examined. The assessee's alternative argument that the said loss is "damages" payable to the banks for breach of contracts or settlement of the contracts also requires examination by the AO. (ITA No. 6169/M/2012, A.Y. 2009-2010, dt. 11-10-2013)

London Star Diamond Company (I) P. Ltd. v. DCIT (2013) 38 taxmann.com 338 (Mum.)(Trib.) www.itatonline.org.

S.43(5) : Speculative transaction – Hedging transactions – Forward contracts – Loss on foreign currency forward contracts by a manufacturer / exporter is a "speculation loss" and not a "hedging loss" and not allowable
The assessee, a dealer in diamonds, entered into forward contracts in US dollars. Some of the contracts were cancelled during the year and some were outstanding at the end of the year. The assessee suffered a loss of ` 4.02 crores on account of the cancellation and "marked to market" of the

said forward contracts and claimed that sum as a deduction. The AO & CIT(A), relied on Instruction No. 03/2010 dated 23-3-2010 and held that the said loss arose on account of a "speculative transaction" while the assessee claimed that it arose out of a "hedging transaction". HELD by the Tribunal:
There is a difference between a "speculative transaction" and a "hedging transaction". S. 43(5) defines a "speculative transaction" to mean a transaction in which a contract for the purchase or sale of any commodity, including stocks and shares, is periodically or ultimately settled otherwise than by the actual delivery or transfer of the commodity or scrips. Proviso (a) to s. 43(5) refers to a "hedging transaction" as a contract in respect of raw materials or merchandise entered into by a person in the course of his manufacturing or merchandising business to guard against loss through future price fluctuations in respect of his contracts for actual delivery of goods manufactured by him or merchandise sold by him. In order for a transaction to be a "hedging transaction", the commodity dealt in should be the same. If the subject matter of the transaction is different, it cannot be termed a hedging transaction. Also, the merchandise in respect of which the forward transactions have been entered into by the assessee must have a direct connection with the goods sold by him. On facts, as the assessee was not dealing in Foreign Exchange, the forward transactions entered into by it cannot be held to be hedging transactions. As the assessee is dealing in diamonds, only the forward contracts entered into for diamonds would be covered by Proviso (a) to s. 43(5). Consequently, the loss suffered by the assessee is a speculative loss. (2008-09)
S. Vinodkumar Diamonds Pvt. Ltd. v. Addl. CIT (2013) 89 DTR 129 / 59 SOT 124 / 155 TTJ 280 (Mum.)(Trib.)

S.43(5) : Speculative transaction – Speculative loss – Losses from share trading activity and future and options transactions [S.28(i)]
Assessee filed all the evidence for claiming loss from share trading activity including copy of the time stamped contract notes issued by the brokers containing the unique client code and PAN of the assessee, the claim of loss cannot be disallowed merely on the ground that it is directly taken to the capital account without routing it through the P&L a/c. nor it can be treated as a speculation loss; matter is restored to the AO for the limited purpose of verifying whether delivery of shares has been taken or not. (AY. 2008-09)
ACIT v. Naishad I. Parikh (2013) 83 DTR 227 / 152 TTJ 761 / 58 SOT 79 (URO) (Ahd.)(Trib.)

S.43(6) : Written down value – Takeover of unit – Actual cost to assessee
Held, takeover of bulk drug unit of another company was not a case of transfer of assets by holding company to subsidiary or vice versa or amalgamation as the transferor company did not lose its independent existence. Written down value of assets taken over was to be actual cost to assessee. (AY. 1998-99)
Addl. CIT. v. Nicholas Piramal India Ltd (2013) 27 ITR 182 (Mum.)(Trib.)

S.43A : Rate of exchange – Investment allowance in respect of enhanced cost – Exchange fluctuation – Deduction is available-Amendment is prospective w.e.f. 1-4-2003 [S. 32A]
Amended s. 43A is prospective and effective from 1-4-2003 and cases relating to earlier assessment years would be governed by unamended s. 43A. In the relevant year in question, an assessee which was following mercantile system of accounting, would be entitled to exchange rate fluctuation in respect of foreign currency. Therefore, the Tribunal was right in allowing deduction u/s. 32A in assessment year in question with regard to additional liability incurred towards cost of plant and machinery on account of fluctuation in foreign exchange rate subsequent to year in which plant and machinery had been installed. (AY. 1993-94)
CIT v. Punjab Anand Industries, Mohali (2013) 359 ITR 300 / 219 Taxman 121 (Mag.) (P&H)(HC)

S.43B : Deductions on actual payment – Interest payments – Adjustment by book entries is an effective payment of interest – Disallowance cannot be made [S. 43B(d)]
'Actual payment' means 'actual payment' and not actual receipt and delivery of currency by two parties transacting when they are creditor and debtor both. Therefore, in terms of sec. 43B(d) if interest is paid not by actually receiving amount from loan advancing person or institution but is paid out of fund lying in any another account of assessee with such creditor, then that is 'actual payment'. Where the assessee had credit entry with BSFC and out of that credit entry of subsidy amount, amount of interest payable to BSFC was adjusted, that amounted to actual payment. (AY. 1991-92)
CIT v. Shakti Spring Industries (P.) Ltd. (2013) 219 Taxman 124(Mag.) (Jharkhand)(HC)

S.43B : Deductions on actual payment – Retrospective operation – Definition of word "paid"
Section 43B, as amended by Finance Act, 1988, is not applicable retrospectively but prospectively. (AY. 1987-88)
CIT v. MotiLal Padampat Udyog Ltd. (2013) 218 Taxman 148(Mag.) (All.)(HC)

S.43B : Deductions on actual payment – Government loans – DA arrears of employees – Provision is not applicable – Claim to be allowed
Section 43B is not applicable to interest on Government loans and for DA arrears of employees, assessee's claim was to be allowed.(AY. 2002-03)
CIT v. U.P. Rajya Vidyut Utpadan Nigam Ltd. (2013) 218 Taxman 153 / 95 DTR 60 (All.)(HC)

S.43B : Deductions on actual payment – Contribution made to PF and ESI – Payments made before due date of filing of return was held to be allowable [S. 139(1)]
Where assessee deposited employer's and employees' contribution to PF and ESI after expiry of due date but prior to filing return of income under section 139(1), amount so deposited could not be disallowed by invoking provisions of section 43B. (AY. 2001-02)
CIT v. Kamal Family Trust (2013) 219 Taxman 81(Mag.) (P& H)(HC)

S.43B : Deductions on actual payment – Employees' contribution towards GPF, CPF and ESI – Paid before due date of filing of returns – No disallowance can be made [S.36(1)(va)]
Employees' contributions towards GPF, CPF and ESI were deposited by the assessee on or before the due date of filing returns u/s. 139, though beyond the due dates as given under the respective Acts. The same could not be disallowed u/s. 43B or s. 36(1)(va). (AYs. 2001-02 & 2003-04 to 2006-07)
CIT v. Jaipur Vidyut Vitran Nigam Ltd. (2014) 98 DTR 105 (Raj.)(HC)

S.43B : Deductions on actual payment – Employees' PF / ESI Contribution is not covered by s. 43B & is only allowable as a deduction u/s.36(1)(va) if paid by the "due date" prescribed therein. [Ss.2(24)(x), 36(1)(va), 139(1)]
In AY 2005-06 the assessee collected ` 51 crore from its employees as their contribution to the provident fund but deposited an amount of ` 21 crore with the provident fund trust within the time allowed under the Provident Fund Act. The shortfall was deposited with the PF trust before the due date for filing the ROI u/s 139(1). The AO held that the amount not deposited in time was assessable as "income" u/s 2(24)(x) & that a deduction u/s 36(1)(va) could not be allowed as the payment was not within the prescribed "due date". He also held that s. 43B applied only to the employer's contribution. On appeal by the assessee, the CIT(A) and ITAT upheld the assessee's claim by relying on *CIT v. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC)*. On appeal by the department to the High Court HELD allowing the appeal:
S.43B which permits a deduction for payments made up to the due date for filing the ROI applies only to the employer's contribution to the provident fund etc. It does not apply to the employees' contribution. The employees' contribution received by the employer-assessee is deemed to be income in the assessee's hands u/s. 2(24)(x) and if the assessee has not credited the said sum to the

employees' account in the relevant fund or funds on or before the due date mentioned in Explanation to s. 36(1)(va), the assessee shall not be entitled to deductions of such amount in computing the income referred to in s. 28 of the Act. The argument that two view are possible is not acceptable because only one view is possible on a correct interpretation of the provision.
CIT v. Gujarat state Road Transport Corp. (2014) 265 CTR 64 / 98 DTR 112 (Guj.)(HC)

S.43B : Deductions on actual payment – Tax or duty not actually paid – Amendment not retrospective – Section 43B prior to 1-4-1989 is not applicable
For the assessment year 1987-88 a deduction was claimed by the assessee which was payable towards market fee levied under the Bihar Agricultural Produce Market Act, 1960, and the Bihar Agricultural Produce Market Rules, 1975, on the purchase of sugarcane and sale of sugar. The A.O. held that since no payment was made the assessee was not entitled for deduction, which was confirmed by the Commissioner (Appeals) .and the Tribunal held that the assessee was entitled to deduction of market fee. On appeal the court held that market cess or market fee were not taxes under section 43B as it stood prior to its amendment with effect from April 1, 1989, and the section was not applicable to it. (AY. 1987-88)
CIT v. Moti Lal Padampat Udyog Ltd. (2013) 357 ITR 705 / 85 DTR 276 (All.)(HC)

S.43B : Deductions on actual payment – Conversion of sales tax liability into a loan within relevant assessment year is deductible
The circular issued by the Central Board of Direct Taxes permits and allows sales tax liability, which is converted into a loan to be set off in the year in which the liability is so converted and the Government order is issued.
The Honorable High Court held that the assessee converted the sales tax liability into a loan on March 24, 2003, a date which fell within the assessment year 2003-04. Thus, the assessee could not be denied the benefit and the expenditure/deduction was allowed under section 43B. (AY.2003-04)
CIT v. Minda Wirelinks Pvt. Ltd. (2013) 357 ITR 668 (Delhi)(HC)

S.43B : Deductions on actual payment – Tax or duty – Difference between cess and tax – Extension of provision to cess and fees
Effect of amendment in s. 43B extending provision to cess and fees is not retrospective. Amendment is effective from 1-4-1989. Cess and surcharge is deductible in assessment year 1985-86. (AY. 1985-86)
Dalmia Cement (Bharat) Ltd. v. CIT (2013) 357 ITR 419 / 263 CTR 308 / 218 Taxman 327 / 93 DTR 1 (Delhi)(HC)

S.43B : Deductions on actual payment – Luxury tax – Not realized from customers nor deduction was claimed by the assessee – No addition can be made
The assessee company was engaged in the hotel business. The AO held that luxury tax was payable by the assessee which was not paid and hence made an addition u/s. 43B of the Act. The CIT(A) deleted the addition observing that the total payment of luxury tax during the year exceeded total collection of the luxury tax and hence the amount which was not collected could not be treated as the income of the assessee. Appeal filed by the department to the Tribunal was dismissed.
On appeal by the department, the High Court *inter alia* observed that in order to form income of a person, the person must receive or deemed to receive any sum. The amount of luxury tax which was not received cannot form part of the income of any person. The High Court further observed that the scope of inquiry by the AO under section 43B is as to whether the assessee can be allowed deduction which can only be allowed to the assessee when it has liability to pay under the law and has actually paid that amount. The question of addition will arise only when the assessee has claimed deduction and the A) finds that conditions mentioned in this section has not been satisfied. Accordingly, on facts

of the case it held that the assessee has not claimed any deduction in respect of its liability for payment of luxury tax as such no question of addition will arise.(AY. 1987-88 ,1988-89)
CIT v. U.P. Hotels (P.) Ltd. (2013) 35 taxmann.com 565 / 262 CTR 417 / 92 DTR 404 (All.)(HC)

S.43B : Deductions on actual payment – Any sum received from employees – Employees contributions to PF and ESIC – Paid within the due date of filing the return of income cannot be added [S.2 (24)(X), 36(1)(va)]
The assessee deposited the amounts received from its employees as contributions in the PF and ESIC after the due date, i.e., after 15th of the next month but before the due date of filing the return of income. The AO added the amount on the ground that after deletion of the second proviso to section 43B by the Finance Act, 2003, the contribution of the employer is governed by provisions of Section 43B, whereas, employees' contribution continues to be governed by provision of Section 36 (1)(va) read with Section 2(24)(x) of the Act. The CIT(A) deleted the disallowance and Tribunal upheld the decision of the CIT(A) holding that the employees' contribution is allowable, if the same is paid before the due date of return.
On appeal by the revenue, dismissing the appeal, held that assessee would be entitled to the deduction. (AY. 2006-07)
CIT v. Udaipur Dugdh Utpadak Sahakari Sangh Ltd. (2013) 217 Taxman 64 (Mag.) / (2014) 98 DTR 109 / 265 CTR 59 (Raj.)(HC)

S.43B : Deductions on actual payment – Sales Tax – payment made during the year – allowable only if added back in the earlier years
During the relevant year the assessee availed benefits under Sales Tax Amnesty Scheme on payment basis u/s. 43B, in order to discharge unpaid sales tax dues of earlier financial years. The AO did not grant the benefit of the deduction. The CIT(A) upheld the claim for sales tax but disallowed the claim for interest. The Tribunal granted the claim of interest also granted, however, the matter was remitted to the AO to verify as to whether sales tax which remained unpaid in the earlier year was added to the income for those years.
On appeal by the assessee, the High Court dismissing the appeal observed that the Tribunal is merely permitting the AO to verify necessary details and thereafter grant deduction. It observed that the AO is not permitted any latitude to re-examine the question on any principle of law but only to verify a specific fact. It further observed that, the AO shall confine his inquiry to such aspect only and grant the benefit as may be available to the assessee (AY. 2005-06).
Deepak Nitrite Ltd. v. DCIT (2013) 217 Taxman 63 (Guj.)(HC)

S.43B : Deductions on actual payment – Employees' contribution to PF, ESI, etc. –Payment before due date of filing return and beyond due dates prescribed under respective statues is allowable as deduction. [S.2(24)(x), 36(1)(va), 139,264]
The assessee claimed deduction of Rs. 22,91 lakhs, being employee's contribution under the EPF Act, and ESI Act, which were remitted beyond the due dates prescribed under the statutes. An amount of Rs. 20.76 lakhs was paid during the financial year ending 31-3-2006 and balance was paid prior to last date for filing return under section 139(1), extended up to 30-11-2006. Assessing Officer disallowed the payment on the ground that section 43B(b) allowed payment of only employer's contribution till due date of filing of return. The assessee filed revision application under section 264, which was dismissed. The assessee challenged the said order by filing writ petition. Allowing the petition the Court held that where the assessee remitted employees' contribution under EPF Act, and ESI Act after due dates prescribed under said statutes, but before extended due date for filing return u/s 139(1), deduction could not be disallowed. Followed the ratio in *CIT v. Alom Entrusions Ltd.* (2009) 319 ITR 306(SC) and *CIT v. Sabari Enterprises (2008) 298 ITR 141 (Karn.)(HC)* (AY. 2006-07)

Spectrum Consultants India (P.) Ltd. v. CIT (2013) 215 Taxman 597 / (2014) 266 CTR 94 (Karn.)(HC)

S.43B : Deductions on actual payment – "Due date" in s. 36(1)(va) for payment of employees' Provident Fund, ESIC etc. contribution should be read with s. 43B(b) to mean "due date" for filing return of income [S.2(24(X), 36(1)(va)]
The assessee collected employees' Provident Fund contribution for payment to the provident fund authorities. However, the amount was not paid to the provident fund authorities within the "due date" specified in the Provident Fund Act though it was paid before the due date of filing the return of income. The AO assessed the amounts received as income u/s 2(24)(x) but refused to allow a deduction u/s 36(1)(va) on the ground that the amounts were not paid within the prescribed "due date". The CIT(A) and Tribunal allowed the assessee's claim for deduction u/s 43B(b). The Department filed an appeal in the High Court claiming that s. 43B did not apply to employees' contribution. HELD by the High Court dismissing the appeal:
S.2(24)(x) provides that the amounts of employees' contribution to PF etc. collected by the employer shall be assessed as his income. S. 36(1)(va) provides that the said employees' contribution shall be allowed as a deduction if paid within the "due date" specified in the relevant legislation. S. 43(B)(b) provides that any sum payable by the assessee as an employer by way of contribution to any provident fund etc shall be allowed if paid before the due date of filing the ROI. The "due date" referred to in s. 36(1)(va) must be read in conjunction with s. 43B(b) to mean the "due date" of filing the ROI. The AO wrongly proceeded on the basis that the "due date" in s. 36(1)(va) is the due date fixed by the Provident Fund authority, whereas read in the context of s. 43B(b) it is the "due date" fixed for filing the ROI.
CIT v. Kichha Sugar Company Ltd. (2013) 356 ITR 351 / 216 Taxman 90 (Uttarakhand)(HC)

S.43B : Deductions on actual payment – Payment of sales tax made beyond time provided under the proviso to section 43 B of the Act – Assessee not entitle to the benefit provided by proviso. [S.139(1)]
Where the assessee does not make the payment of sales tax dues before filing its return of income under section 139 (1) of the Act,the amount is liable to be disallowed under section 43 B of the Act. (AY. 1993-94)
CIT v. Forbas Ewart (P) Ltd. (2013) 81 DTR 436 (Ker.)(HC)

S.43B : Deductions on actual payment – Disallowance cannot be made on the ground that the payment was not in respect of manufactured goods
The assessee, a car manufacturer, had to comply with the requirements of the Excise Act, in order to clear the goods, by paying duty. The duties are collected in the form of a regular payment into the "Personal Ledger Account (PLA)" in terms of Rule 173-G of the Central Excise Rules. The AO took the position that the amounts paid into, and remaining outstanding, at the end of the financial year, was to be disallowed by reason of section 43B. However, the Tribunal accepted the assessee's contentions. On appeal the court held that where assessee maintained "sufficient" amounts in Excise PLA, as per Rule 173G of Excise Rules to cover the removals, such amounts related to assessee's duty liability, falling within the description under section 43B; thus, revenue's contention that amounts in credit also related to goods not manufactured, and therefore, not relatable to any "liability incurred" had no basis. Thus, the Tribunal rightly held that the amounts deposited by the assessee in the Excise PLA could not be disallowed under section 43B. (AYs.1994-95 to 1996-97).
CIT v. Maruti Suzuki India Ltd. (2013) 212 Taxman 603 / 81 DTR 152 / 255 CTR 140 (Delhi)(HC)

S.43B : Deduction on actual payment – Interest – Schedule bank-Co-operative bank- Interest payable to Shree Mahalaxmi Mercantile Co-operative Bank Ltd could not be disallowed under section 43B [S.11(5)(iii), Reserve Bank of India Act, 1934]

The assessee claimed in respect of interest payable to Shree Mahalaxmi Mercantile Co-operative Bank ltd. The Assessing Officer disallowed the interest under section 43B on the ground that the interest was not paid up to the date of filing of the return. On appeal the Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal to the Tribunal the Tribunal held that section 43B would not apply in case of payment of interest to a co-operative bank for the reasons that section is applicable only in respect of interest payable to a loan taken from a schedule bank. Under terms of Explanation 4(aa) to section 43B of the Act,a schedule Bank would have a meaning assigned to it in the Explanation to cl. (iii) of sub.s. (5) of section 11 of the Act. The Tribunal held that Shree Mahalaxmi Mercantile Co-operative bank is not covered with in the definition of scheduled bank under section 43B,therefore the appeal of assessee was allowed. On appeal to High Court the High Court confirmed the view of Tribunal and the appeal of revenue was dismissed. (AY. 2004-05)
CIT v. Upendra T. Kapadia (2013) 81 DTR 279 / 256 CTR 201 / 213 Taxman 384 (Bom.) (HC)

S.43B : Deductions on actual payment – One time settlement – Waiver of principal / interest
The assessee claimed deduction u/s 43B for the payment of interest of Rs.1.93 crores. This interest was provided in the books in the earlier years, but disallowed u/s.43B on account of non-payment; and there was a one-time settlement agreed upon between the bank and the assessee as a result of which, the assessee made a payment of Rs. 3.78 crores as against the total liability. Held, that the assessee understood that the one-time settlement of Rs. 3.78 crores was first attributed towards interest and the balance towards principal leaving a portion of the principal unpaid and waived. On that basis, the assessee claimed deduction of the interest u/s 43B. If one-time settlement of Rs.3.78 crores was first attributed towards principal and balance towards interest, the unpaid interest of Rs.1.93 crores was to be disallowed u/s 43B and there would be no waiver of principal amount. This would render the waiver of the principal sum of Rs.2.57 made by the assessee erroneous. Therefore, in the interest of justice and equity, the disallowance of Rs. 1.93 crores u/s 43B was to be assumed into the offer of Rs.2.57 crores on waiver of principal. (AY. 2007-08)
KLN Agrotechs P. Ltd. .v. ITO (2014) 65 SOT 283 / 48 taxmann.com 350 / (2013) 27 ITR 648 (Bang.)(Trib.)

S.43B : Deductions on actual payment – Employee's contribution to provident fund and sales tax – Actual payment [S. 36(1)(va), 37(1), 139(1)]
Employee's contribution to provident fund and sales tax before due date specified under section 139(1) was allowable. (AY. 2005-2006)
ACIT v. Phillips Carbon Black Ltd. (2013) 28 ITR 603 (Kol.)(Trib.)

S.43B : Deductions on actual payment – Business expenditure – Certain deductions to be allowed on actual payment – Deduction for sum credited to the employees' accounts in certain funds [S.36(1)(va)]
Deduction u/s.43B cannot be denied, if assessee deposits contribution before due date of filing the return under I.T. Act, and date of payment was after due date under Employees Provident Fund Act. (AY.2006-07)
Patni Telecom Solutions P. Ltd. v. ITO (2013) 23 ITR 534 / 58 SOT 146 (URO) (Hyd.)(Trib.)

S.43B : Deductions on actual payment – Service tax along with interest paid to service tax department is allowable
The Tribunal held that for the claim of deduction the year of payment is relevant which is to be taken into account. The year in which the assessee incurred the liability to pay such tax, duty, etc. has no relevance and cannot be linked in the matter of giving benefit of deduction under section 43B. The

amount of service tax along with interest paid by the assessee is allowable in view of the provisions of section 43B.(AY. 2007-08)
Euro RSCG Advertising (P) Ltd. v. ACIT (2012) 53 SOT 90 / (2013) 154 TTJ 389 / 85 DTR 272 (Mum.)(Trib.)

S.43B : Deductions on actual payment – EPF-ESI – Paid before due date of return is allowable
EPF and ESI contribution collected and remaining payable at year end, but paid before due date of filing return, is allowable. (AY. 2008-09)
Gobindpada Bhanja Chowdhury v. ITO (2013) 58 SOT 135 (URO) (Cuttack)(Trib.)

S.43B : Deductions on actual payment – Employees' provident fund – Payments made after due date [S.10A]
The assessee claimed a deduction for payments made after due date to employees' provident fund. Alternatively, it claimed that even if the amount was disallowed, the sum has to be treated as a part of its business income which is eligible for exemption under section 10A of the Act. The Assessing Officer held that the employees' contribution of provident fund was paid after the due date and hence treated it as deemed income of the assessee. The stand of the Assessing Officer was confirmed by the CIT(A). The Tribunal allowing the appeal of the assessee held that the addition could not be made under section 43B of the Act if the actual payment was made by the assessee before the due date of filing of return. Further, the Tribunal following the decision of the Bombay High Court in the case of *CIT v. Gem Plus Jewellery India P. Ltd. (2011) 330 ITR 175*, also held that if the amount was disallowed the sum was to be treated as part of the business income of the assessee eligible for exemption under section 10A of the Act, (AY. 2006-07)
Patni Telecom Solutions P. Ltd. v. ITO (2013) 23 ITR 534 / 58 SOT 146 (URO)(Hyd.)(Trib.)

S.43B : Deductions on actual payment – Employees' PF/ESI Contribution is not covered by section 43B & is only allowable as a deduction u/s.36(1)(va) if paid by the "due date" prescribed therein [S.36(1)(va)]
In AY 2008-09 the assessee collected employees' contribution to the Provident Fund and ESIC but did not pay it within the due date prescribed by the relevant legislation. The amount was, however, paid before the due date of filing the ROI. The AO assessed the said amounts as income u/s 2(24)(x) but declined to grant a deduction u/s 36(1)(va) as the amount had been paid after the due date. The CIT(A), relying on *CIT v. Alom Extrusions (2009) 319 ITR 306 (SC)* and AIMIL Ltd. (2010) 321 ITR 508 (Del) held that the amounts had to be allowed as a deduction u/s 43B as they had been paid before filing the ROI. On appeal by the department to the Tribunal, HELD reversing the CIT(A):
S.43B covers only the sums payable by way of contribution by the assessee as an employer, i.e., the employer's contribution to the PF and ESI funds. It does not cover the employees contribution. While the employer's contribution is allowable u/s 37(1), the employees' contribution collected by the employer is deemed to be his income u/s 2(24)(x) and is allowable as a deduction u/s 36(1)(va) only if it is paid to the relevant fund by the due date as prescribed in the relevant legislation. Even if one assumes that s. 43B(b) applies to s. 36(1)(va) payments, a deduction would not be admissible because the s. 36(1)(va) payments are not 'otherwise allowable' if they are paid beyond the "due date". The decisions in *CIT v. Vinay Cement (2007) 213 CTR (SC) 268 & Alom Extrusions (2009) 319 ITR 306 (SC*) are not an authority on the point that employees' contributions are also covered by s. 43B. Though in AIMIL Ltd. (2010) 321 ITR 508 (Del) it was held that employees' contribution to EPF and ESI funds are covered by s. 43B, it cannot be followed because (i) the Court moved on the premise that employees' contribution is subject to clause (b) of s. 43B and did not notice the condition in s. 36(1)(va), (ii) the decision by the tribunal, which was approved by the High Court in AIMIL was rendered without considering the decision of the Special Bench in ITC Ltd & (iii) it is inconsistent with *CIT v. Godaveri (Mannar) Sahakari Sakhar Karkhana Ltd.(2008) 298 ITR 149 (Bom)*.

Accordingly, AIMIL cannot be followed and the deductibility of employees' contribution has to be seen only with reference to s. 36(1)(va). (together with grace period). (A.Y. 2008-09)
ITO v. LKP Securities Ltd. (2013) 36 CCH 93 (Mum.)(Trib.) www.itatonline.org.

S.43B : Deductions on actual payment – Employees' PF Contribution – Allowable if paid before due date of filing of return [S. 139(1)]
Payments of employees contribution of provident fund before due date of filing of return disallowance can not be made. (AY. 2006-07)
Apollo Tyres Ltd. v. Dy. CIT (2013) 90 DTR 35 / 155 TTJ 470 / 60 SOT 1 (Cochin)(Trib.)

S.43B : Deductions on actual payment – Provision for leave encashment – Disallowance under section 43B(f) held invalid by High Court – Disallowance not valid
The Assessing Officer had made disallowance by invoking the provisions of section 43B(f) and this was confirmed by the Commissioner (Appeals) also on the basis of section 43B. The Calcutta High Court held in the case of Exide Industries Ltd. that section 43B(f) is not valid. Therefore, disallowance on the basis of section 43B(f) could not be sustained. The provision was deductible. *Bharat Earth Movers v. CIT [2000] 245 ITR 428 (SC) and Exide Industries Ltd. v. Union of India (2007) 292 ITR 470 (Cal)* followed. (AY. 2007-08)
Eimco Elecon (India) Ltd. v. Add. CIT (2013) 22 ITR 380 / 58 SOT 14(URO) (Ahd.)(Trib.)

S.43B : Deductions on actual payment – Octroi duty – Interest [S.139(1)]
Assessing Officer made disallowance under section 43B in respect of octroi duty and interest payment to UTI on ground that said payment had not actually been made before due date of filing of return of income under S.139 (1). Tribunal held that the assessee had made payment of octroi duty in advance and, subsequently, when goods entered into municipal limit, adjustments were made against advance payment to octroi agent. As regards interest payment to UTI, in terms of agreement between parties, interest did not become due for payment till due date of filing of return of income, in view of above, impugned disallowance made under section 43B was to be deleted. (AYs. 2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.43B : Deductions on actual payment – Service tax – Amount paid before due date for filing return – Section 43B is not applicable
The assessee showed liabilities which included service tax payable in respect of which no documentary evidence for payment was filed. The Assessing Officer presumed that such service tax had not been paid and disallowed the service tax payable under section 43B of the Act. The Commissioner (Appeals) deleting part of the disallowance on the ground that the amount was paid before the due date of filing of return, observed in respect of the balance that service tax had not become payable and deleted the disallowance. Tribunal held that order of the Commissioner (Appeals) was justified. (AY. 2007-08)
Dy. CIT v. Ovira Logistics P. Ltd (2013) 21 ITR 436 / 57 SOT 185 (Mum.)(Trib.)

S.43B : Deduction on actual payment – Employees State Insurance – Contribution made to provident fund and Employees' State insurance, the amount deposited within grace period is allowable
The Tribunal held that the disallowance under section 43B is not required when the amounts are paid within the grace period allowed; this is so not only on legal principles but also on the fact that the entire amount was paid before the closure of the financial year or within the due date for filing the return as provided. (AY. 2004-05)
ACIT v. UPS Jetair Express P. Ltd. (2013) 21 ITR 82 / 57 SOT 239 (Mum.)(Trib.)

S.43B : Deduction on actual payment – Employer's and employees contribution to PF and ESIC – Payments were made before due date of filing of return – No disallowance can be made [S. 139(1)]

Payments to Employer's and employees contribution to PF and ESIC were made before due date of filing of return. No disallowance can be made.(AY. 2002-03)

Mattel Toys (I) (P.) Ltd. v. Dy. CIT (2013) 144 ITD 76 / 34 Taxmann.com 203 / 158 TTJ 461 / 95 DTR 100 (Mum.)(Trib.)

S.43D : Public financial institutions – Special provisions in case of – Interest on NPAs

The assessee is a co-operative society engaged in business of banking and extending credit facilities to various members / nominal members, etc. It had not made provision for interest earned on certain outstanding loans on accrual basis claiming that the said accounts had become Non-performing Assets (NPAs) and as per instructions of the RBI, it was not required to provide for the interest on the said loans on accrual basis, particularly where the assessee had filed claims by way of Court cases and no amount had been recovered from the said parties. Assessee was following mercantile system of accounting and in respect of items of interest on NPAs, it was accounted for on receipt basis. A.O. not accepted the assessee's claim. CIT(A) deleted the addition made by the A.O. on second appeal the tribunal held that once certain loans given by assessee had become NPAs and assessee had opted to account for interest on such NPAs only on recovery of same, law recognizes such treatment of interest on NPAs as valid in view of provisions of section 43D and interest on such NPAs could not be included in assessee's income on accrual basis. (AYs. 2007-08, 2008-09)

ACIT v. Punjab State Co-op. Bank Ltd. (2013) 143 ITD 571 / 34 taxmann.com 128 (Chd.)(Trib.)

S.43D : Public Financial institution – Interest – Crediting to reserve account – Provision – Interest on bad or doubtful debts could be claimed as deduction under section 43D

Mere crediting of interest to a reserve cannot be said to be an incidence by which said interest could be charged to tax. Where interest on loans granted by assessee-bank remained unpaid which were classified as non-accrual loans and were reversed to an account called Reserve for Doubtful Interest account, assessee would be entitled to claim deduction under section 43D in respect of said interest and simply on ground that interest had been credited on such type of debts in reserve account, deduction could not be taken away. Appeal of assessee was allowed. (AY.1998-99)

American Express Bank Ltd. v. Add. CIT (2013) 55 SOT 136 (Mum.)(Trib.)

S.44 : Insurance business – Provision for tax and deduction of tax at source. (Sch. I, r. 5)

Provision for tax and TDS could not be added to the balance of profits disclosed by the annual accounts of assessee insurance company. *CIT v. Oriental Fire General Insurance Co. Ltd. (2007) 291 ITR 370 (SC)* followed. (AYs. 1980-81, 1981-82)

Oriental Insurance Co. Ltd. v. CIT (2013) 351 ITR 270 / 83 DTR 185 (Delhi)(HC)

S.44 : Insurance business – Actuarial Valuation – Income to be assessed as work out as per provisions of Insurance Act and not IRDA Act

Assessee declared surplus deficit from life insurance business under Form-I as prescribed under the Insurance Act after adjusting shareholder and policyholder account thereby neutralizing transfer of funds from shareholder's account to policy holders account. Assessing Officer gave credence to new Form-I, prescribed under IRDA Regulation and took 'total surplus' as surplus of Life Insurance business ignoring transfer from shareholder's account and accordingly brought to tax the surplus or deficit under the said Regulation. On appeal Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal to Tribunal it was held that, the Assessee engaged in insurance business should workout actuarial surplus/deficit in accordance with provisions of Insurance Act, and not as

per IRDA Act or it's regulations. Accordingly the appeal of assessee was allowed. (AYs. 2005-06 to 2008-09)
ICICI Prudential Insurance Co. Ltd. v. ACIT (2013) 140 ITD 41 (Mum.)(Trib.)

S. 44AA : Accounts – Civil construction – Rejection of accounts – In the absence of cogent evidence, audited books of account should not be disturbed [S.44AD]
Held, there was no evidence to show that the excess amount, if any, was collected or even if it was collected it was passed on to the assessee. There was no search, survey or seizure at the premises of the assessee. Apart from this, the Department had not examined any purchaser or flat owner to verify the correctness of the noting that the actual price was much higher than the price recorded in the account books. Though there may be some doubt about the price of the flats until and unless it was proved by some evidence, doubt could not take the place of proof. Until and unless such noting was corroborated by material evidence, the Assessing Officer erred in making addition to the income. When the assessee had maintained account books, vouchers and other documents as required under sub-section (2) of section 44AA and got them audited and furnished them along with the audit report such benefit should have been extended to the assessee. The audited account books were maintained and there was no question of disbelieving them in the absence of any cogent evidence. (AY. 1993-94)
CIT v. Dolphin Builders (P.) Ltd. (2013) 356 ITR 420 / 90 DTR 75 / 216 Taxman 116 (MP)(HC)

S.44AB : Audit of accounts – Business – Profession and S.271B – Penalty – Failure to get accounts audited – Assessee, a co-operative society, in view of provisions of U.P. Co-operative Societies Act, 1963 and order of the Allahabad High Court got its accounts audited by its internal auditors-levy of penalty under section 271B upon assessee on ground that it had not got its accounts audited by any chartered accountant was not justified [S.271B]
Assessee is a co-operative society, carrying on banking business and got its accounts audited by its internal auditors as per provisions of section 64 of U.P. Co-operative Societies Act, 1963 and furnished such audit report before AO. The AO having noticed that assessee had not got its accounts audited by any chartered accountant opined that it had not complied with provisions of section 44AB and levied penalty u/s. 271B upon assessee. On appeal to the CIT(A) the penalty was set aside as section 64 of U.P. Co-operative Societies Act, 1963 specifically provides that audit of a co-operative society has to be carried out by an accountant appointed by Registrar of Societies. Allahabad High Court also issued a direction that no audit shall be carried out in any co-operative society in the State of U.P. through a private chartered accountant. The Tribunal affirmed the decision of the CIT(A) and observed that the Allahabad High Court in the assessee's own case [Writ Petition No. 1464 (M/B) of 2002, dated 21-3-2002] had issued a direction that no audit shall be carried out in any co-operative society in the State of U.P. through private chartered accountant.
On appeal by the department, the High Court dismissing the appeal held that the assessee was bound to comply with the order of the High Court and could not have got its accounts audited by any chartered accountant. (AY. 2004-05).
CIT v. District Co. Operative Bank (2013) 217 Taxman 145 (Mag.) (All.)(HC)

S.44AD : Civil Construction – As the receipts were disclosed and income was offered, credit in the bank cannot be assessed as income from other sources
Assessee has filed the return of income applying the provisions of section 44AD. On appeal the CIT(A) held that receipts appearing in the bank account were not from the contract business, therefore such income was assessed as income from other sources. On appeal Tribunal held that the assessee being found to be a name lender and could have charged only commission for lending its name since the assessee had already offered its income to tax, no further amount was taxable. On appeal from the Tribunal order in assessee's favour, it was held that no substantial question arose for

consideration in view of the fact that the relevant amounts were disclosed by the assessee and were assessed to tax in terms of s. 44AD. (AY. 2006-07)
CIT v. Kamlesh (Smt.) (2013) 217 Taxman 272 (P&H)(HC)

S.44AD : Civil construction – Computation – Total receipts including those not accounted for in the books of account does not exceed Rs. 40 lakhs, section 44AD is not applicable. [S.44AA]
Court held that total receipts including those not accounted for in the books of account does not exceed Rs. 40 lakhs ,section 44AD is not applicable. (AY. 1993-94)
CIT v. Dolphin Builders (P.) Ltd. (2013) 356 ITR 420 / 90 DTR 75 / 216 Taxman 116 (MP)(HC)

S.44AD : Civil construction – Computation – Presumptive taxation – Rejection of books of account – Estimation of NP at 8% of receipt was held to be reasonable [Ss. 144, 145]
Assessee, is a civil contractor, declared net profit ratio of 5.64 per cent of gross contract receipts. His gross receipts from contract business exceeded Rs. 40 lakhs. AO rejected book results by invoking section 145(3) and determined total income by estimating net profit ratio of 15 per cent of gross receipts. Tribunal, held that presumptive rate of net profit of 8 per cent incorporated in section 44AD reflects a legislative approved rate of net profit, which can be considered as fair and reasonable to estimate income from contract business in cases like that of instant assessee, where books of account were not found reliable by AO, therefore, income from contract business of assessee be estimated at 8 per cent of gross receipts. (AY.2007-08)
Nishikant T. Patne v. ACIT (2013) 60 SOT 146 (Pune)(Trib.)

S.44B : Non-resident – Shipping business – Computation – Service tax cannot be included in gross receipt
Amount of service tax, being in nature of statutory payment which does not involve any element of profit, cannot be included in gross receipts for purpose of computing presumptive income of assessee under section 44B. (AYs. 2007-08 & 2008-09).
Orient Overseas Container Line Ltd. v. ADIT (2013) 60 SOT 196 (Mum.)(Trib.)

S.44B : Shipping business – Non residents – Permanent Establishment. DTAA-India-Singapore [Article 5, 7]
Assessee, a shipping company incorporated in and a tax resident of Singapore. As per terms of DTAA, 'CMA' was Assessee dependent agent and hence constituted its permanent establishment in India. The A.O. brought income earned by assessee from voyages to tax by applying provisions of Sec. 44B. The DRP upheld the A.O.'s order. The Tribunal held that income in respect of voyages which have been considered as chargeable to tax in India as per Article 7 of DTAA was amount on which Assessee paid commission, etc. to CMA, which was its AE and also a dependent agent. It was undisputed that receipt in hands of CMA had been determined at ALP under due process of law. The associated enterprise that also constitutes a PE was remunerated on ALP, and then nothing further would be left to attribute to PE. Therefore the income in respect of voyages could not be included in hands of assessee. (AY. 2007-08)
ANL Singapore Pte Ltd. v. Dy. DIT (2013) 145 ITD 93 / (2014) 97 DTR 412 (Mum.)(Trib.)

S.44B : Shipping business – Non-resident – Service tax would form part of aggregate amount to determine presumptive profit and gain
The assessee was a company incorporated in Hong Kong. The assessee had computed total income @ 7.5% of total collected by assessee in the gross receipt for purpose of taxation. The DRP confirmed the order of the A.O. The Tribunal held in favour of the revenue that service tax collected by the assessee would form part of aggregate amount for purpose of determining presumptive profit and gain u/s.44B. (AY. 2007-08)

China Shipping Container Lines (Hong Kong) Co. Ltd. v. ADIT (2013) 145 ITD 230 / (2014) 29 ITR 673 (Mum.)(Trib.)

S.44BB : Mineral oils – Non-resident – Fixed place of business in India – Matter remanded

S.44BB applies only to such an assessee, who is a non-resident and not to an assessee, who has a permanent establishment in India or has a fixed place of profession situated in India. Where Assessing Officer did not make any inquiry regarding assessee a non-resident, having fixed place of profession or permanent establishment in India, issue of applicability of s. 44BB was to be remitted back.

DIT v. Western Geco International Ltd. (2013) 216 Taxman 216 (Uttarakhand)(HC)

S.44BB : Mineral oils – Computation – Non-Resident – Providing geophysical survey services to oil and gas exploration industry, provisions of section 44BB is applicable and not section 44DA [S. 9(1)(vii), 44DA]

Assessee, a non-resident, which is engaged in providing geophysical survey services to oil and gas exploration industry by way of electromagnetic survey, processing and interpretation of data. The court held that, assessee is engaged in activities mentioned in specific provisions of section 44BB and, hence its profits will be computed as per section 44BB and not section 44DA. In favour of assessee.

DTI v. OHM Ltd. (2013) 352 ITR 406 / 212 Taxman 440 / 84 DTR 142 / 259 CTR 407 (Delhi)(HC)

S.44BB : Mineral oils – Permanent establishment – Remuneration received is not taxable. DTAA-India-USA. [Article 7]

Assessee, a US enterprise not having permanent establishment in India, would not come within purview of section 44BB even in respect of remuneration received by it in connection with any matter provided in section 44BB. In favour of assessee.

CIT v. Enron Oil & Gas Expat Services Inc. Dehradun (2013) 213 Taxman 44 / 29 taxmann.com 419 (Uttarakhand)(HC)

S.44BB : Mineral oils – Income deemed to accrue or arise in India – Business profits – Remuneration has been received outside India hence will not come with in section 5(2) read with section 9(1) (i)., accordingly is not taxable in India [Ss.5, 9(1)(i)]

Assessee is a non-resident company. It entered into agreement with ‘E’ Ltd. an Indian company, operating in field of oil and gas. In terms of said agreement, assessee agreed to provide administrative and personnel support outside India. During relevant year, assessee received certain amount in respect of said contract. Assessing Officer included said receipt as taxable income and determine tax payable thereon by taking recourse to section 44BB. Tribunal took a view that since there was nothing on record indicating that agreement in question had any nexus with projects carried out by ‘E’ Ltd. in India income derived from said agreement could not be brought to tax in India. Court held on facts, that the impugned order passed by Tribunal did not require any interference. In favour of assessee.

CIT v. J. Ray Mc. Dermott Middle East Inc. (2013) 212 Taxman 582 (Uttaranchal)(HC)

S.44BB : Mineral oils – Quantum of Income

The assessee company was incorporated and a tax resident of South Korea. Assessee was engaged in the business in offshore industry. The assessee for its business of mineral oil prospecting or exploration sought to compute income chargeable to tax in India at a rate of 10 per cent of revenues from inside India operations as reduced by sub contract and salary costs on which TDS had been made. This was accepted by revenue in immediately preceding years holding same as reasonable basis for estimation of income. In view of order of Tribunal in earlier year, authorities below had erred by not computing income chargeable to tax in India at rate of 10 per cent of revenue from inside

India operations and in disallowing 30 per cent of cost of material incurred in respect of work performed inside India and disallowing various other expenses in respect of work performed inside India. (AY. 2008-09)
Hyundai Heavy Industries Co. Ltd. v. ADIT (2013) 145 ITD 158 (Delhi)(Trib.)

S.44BB : Mineral oils – Presumptive tax – Mobilisation, demobilisation and reimbursement charges is includible in gross receipts
Amounts received by the assessee from ONGC received towards fee for mobilisation, demobilisation of rig to or from India and reimbursement of expenses was to be included in the gross receipts under section 44BB. (AY. 2005-06)
Transocean Offshore International Venture Ltd. v. ADIT(IT) (2013) 24 ITR 97 / 144 ITD 389 (Delhi)(Trib.)

S.44C : Non-residents – Head office expenditure – Effect of amendment DTAA – India-Germany [Article 7]
The assessee, a non-resident foreign bank, claimed deduction in respect of head office expenses. The DTAA between India and Germany was entered into on 28-6-1984 and it, *inter alia*, provided that deduction in respect of head office expenses would not be less than what was allowable under Indian Income-tax Act as existing on 28-6-1984. This position changed only by virtue of amendment to DTAA in assessment year 1998-99 and since the pre-amended section 44C allowed more deduction to head office expenses than amended section, during AY. 1994-95 section 44C as applicable would be one existing as on 28-6-1984 and not as existing during subject assessment year. Hence, the assessee was allowed the full deduction claimed. (AY.1994-95)
DIT v. Deutsche Bank AG (2013) 215 Taxman 143 (Bom.)(HC)

S.44C : Non-residents – Head office expenditure – Travelling expenses in India cannot be considered for the purpose of section 44C – Expenditure allowable as business expenditure [S.37(1)]
Assessee incurred travelling expenses for undertaking activities as per contract with airlines. Tribunal held that the amount incurred in India, in Indian currency on air tickets, loading, boarding and conveyance of employees from USA could not be considered as head office expenditure under section 44C, since only expenditure incurred outside India can be brought within its purview. Expenditure could also not be disallowed under section 37(1) as complete details in respect of all items of travelling expenses were made available by assessee. (AY.2007-08)
Panasonic Avionics Corporation v. Dy. CIT (2013) 60 SOT 150 (Mum.)(Trib.)

S.44C : Non-residents – Head office expenditure – DTAA-India-Oman – Revised return [Article 7, 40(a)(ia)]
Where assessee had filed revised return and claimed deduction under section 44C at higher level than that claimed in original return, Assessing Officer was duty bound to consider higher claim. Therefore, matter was to be remanded back to Assessing Officer to consider claim as per revised return filed by assessee. It was also held that transaction charges on NOSTRO account with bank outside India are allowable under section 40(a) (i). (AYs. 2000-01, 2001-02)
ACIT (IT) v. Oman International Bank S.A.O.G (2013) 55 SOT 32 (Mum.)(Trib.)

S.44C : Non-residents – Head office expenditure – Application of provision
The assessee claimed deduction for head office expenses at Rs.1.06 crore on the ground that it was directly attributable to the Indian branch. Assessee claimed that the ceiling provided under section 44C would not apply. The Assessing Officer, however, observed from the invoices submitted by the assessee that the expenses in question were ‘allocated’ to the assessee by the head office; that in some

cases the basis of allocation was not given. The Assessing Officer, therefore, held such amount of Rs.1.06 crore to be covered within the ceiling prescribed under section 44C. On appeal by the assessee, the Commissioner (Appeals) directed Assessing Officer to allow independent deduction distinct from section 44C. Being aggrieved against order of the Commissioner (Appeals), the revenue raised instant ground of appeal. Tribunal held that since the assessee could not produce any evidence to prove that head office expenses to tune of Rs. 1.06 crore were directly attributable to Indian branch, such expenses could only be allowed within ceiling prescribed under section 44C Decided in favour of revenue. (AYs. 1994-95 1998-99 to 2000-01)
Dy. CIT v. Banque Indosuez (Known as Credit Agricole Indosuez) (2012) 19 ITR 463 / (2013) 55 SOT 38 (Mum.)(Trib.)

S.44C : Non-residents – Head office expenditure – Direction to deduction of independent of provisions of section 44C is justified – Rate of tax – Foreign bank-Rate applicable to non-resident companies is justified
Commissioner (Appeals) directed the Assessing Officer to allow the assessee deduction of ` 48,60,008 independent of the provisions of section 44C of the Act Tribunal held that the order of the Commissioner (Appeals) was justified. The assessee's income was taxed at the higher rate of 55 per cent as applicable to non-resident companies. Held, that the order was justified. (AY.1997-98)
ADIT (IT) v. Credit Agricole Indosuez (2013) 21 ITR 345 / 58 SOT 97 (Mum.)(Trib.)

S.44C : Non-residents – Head office expenditure – Permanent establishment – Interest and commission received from head office and other overseas branches and paid to other overseas branches and head office – Mutuality between overseas head office and branch in India – Interest received from overseas head office or branches not chargeable – Interest paid by Indian permanent establishment to overseas head office or branches not allowable as deduction [S.143(3)]
The assessee received interest and commission from its head office and other overseas branches and at the same time also paid interest and commission to other overseas branches and head office. The assessee, in its computation of total income, reduced the interest or commission received and added back the interest or commission paid. The Assessing Officer held that the interest or commission earned by the assessee from its head office or overseas branches should be charged to tax. The Commissioner (Appeals) upheld in principle the assessment order on this issue. On appeal the Tribunal held that (i) that once mutuality is found between overseas head office and branch in India, there can be no interest income by the Indian branch from its overseas head office or branches under the provisions of the Act. No interest or commission received by the Indian branch from the head office can be charged to tax. *Sumitomo Mitsui Banking Corporation v. Deputy DIT [2012] 16 ITR (Trib) 116 (Mumbai) [SB]* followed.
(ii) That the interest paid by the Indian permanent establishment to its overseas head office or branches should also not be allowed as deduction. (AY. 1997-98)
ADIT (IT) v. Credit Agricole Indosuez (2013) 21 ITR 345 / 58 SOT 97 (Mum.)(Trib.)

S.44D : Foreign companies – Royalties – Computation – Agreement for technical know-how-DTAA-India-Russia [Ss. 115A, 195, 254, Art. 7 & 12]
The assessee company having entered into an agreement for technical know-how with a Russian Company "T" made certain remittances to "T" applying TDS at 20 per cent treating the payment as FTS, which the Assessing Officer rejected holding the said payment taxable under section 44D read with section 115A at 30 per cent. The CIT(A) upheld the order of the Assessing Officer. The Tribunal on appeal remanded the matter to be decided in the light of the earlier orders of CIT(A) in the preceding 3 years. The Assessing Officer passed fresh order again determining rate of TDS @ 30%. On appeal CIT(A) upheld orders of Assessing Officer on appeal the Tribunal allowing assessee appeal held:

The Assessing Officer without complying with the orders of the Tribunal determined TDS @ 30% and CIT(A) upheld this action on grounds of non examining issues and those years he had considered Electrim Warsaw Case. The Bench stated the prior consideration was whether Assessing Officer was justified and in case the dept. was aggrieved, remedy was to prefer an appeal to High Court. The Assessing Officer was directed to give compliance of the said order of the Tribunal. (AY. 1999-2000)
Steel Authority of India Ltd. v. ITO (2013) 142 ITD 547 (Delhi)(Trib.)

S.44D : Foreign companies – Computation of gross receipt – Service tax is not part of gross receipt [S. 115A]
Service tax was not part of gross receipt that was to be taxed under section 44D, read with section 115A.(AY. 2007-08)
DCIT v. Egis BCEOM International SA (2013) 57 SOT 134 (Delhi)(Trib.)

S.45 : Capital gains – Investor – Shares and securities – Salaried person – Gains assessable as capital gains and not as business income [S. 28(i)]
Assessee, a salaried class person, earned profit amounting to ` 70 lakhs on sale of shares and claimed same as long-term capital gain. The AO held that the assessee was trading in shares and accordingly treated profit in question as business income. Held, the Tribunal was justified in its view in holding that the assessee was an investor and accordingly treating the gain as long-term capital gain. (AY.2006-07)
CIT v. Brijesh Bhagwatilal Lavti (2013) 219 Taxman 287 (Guj.)(HC)

S.45 : Capital gains – Year of taxability – Capital gains will not be chargeable in the year of Development agreement signed – Chargeable in the year of receipt of sale consideration [S.2(47)]
The assessee owner of a premises, entered in to an agreement in 1994 with the builder for construction a multistorey apartment. As per the agreement builder was to give 35% of the built-up area along with undivided 65% interest in the land. AO held that in the year of handing over the possession capital gains tax is leviable. On appeal the addition was deleted. On appeal the Court held that no capital gains would be charged in assessment year in which assessee, being owner of a piece of land, entered into an agreement in 1994 under agreement with a builder to construct a complex. Also, assessee had paid capital gains in assessment years 1998-99 to 2000-01 when flats/area were sold and consideration was received. Order of Tribunal was up held. (AY. 1995-96)
CIT v. Najoo Dara Deboo (Smt.) (2013) 218 Taxman 473 (All.)(HC)

S.45 : Capital gains – Share transactions – Salaried person – Assessable as capital gains [S. 28(i)]
Assessee, a salaried class person, earned profit amounting to Rs.68 lakhs on sale of shares and claimed same as long-term capital gain which the AO treated as business income. Held, the Tribunal was justified in its view in treating the assessee an investor and in treating gain in question as long-term capital gain. (AY. 2006-07)
CIT v. Manish Nathulal Lavti (2013) 218 Taxman 308 (Guj.)(HC)

S.45 : Capital gains – Sale of land – Assessable as capital gains and not business income – Rule of consistency [S.28(i)]
In preceding assessment year, income earned by assessee from sale of land was assessed to capital gain and same was accepted by revenue. Applying the rule of consistency, revenue could not agitate issue regarding taxability of profit on sale of land, when in preceding assessment year decision on same was accepted. (AY.2004-05)

CIT v. Mahindra Lifespace Developers Ltd. (2013) 218 Taxman 317 (Bom.)(HC)

S.45 : Capital gains – Marketability of shares – Private company – Assessable as capital gains [S.28(i)]
Since shares of a private company sold by assessee to its holding company were not tradeable in market like any other normal trading asset, profit arising from sale of shares had to be taxed under head capital gains (AY.2005-06)
CIT v. Renato Finance & Investment Ltd. (2013) 218 Taxman 312 (Bom.)(HC)

S.45 : Capital gains – Business income – Transaction in shares – Held assessable as capital gains
During the entire year, assessee sold only three scrips which were held for 1380 days. The only other transaction related to sale of one scrip amounting to Rs. 672 which he had held for a day. Gain arising to assessee on transaction of sale of shares would be assessed as long-term capital gain and short-term capital gain and not as business income. (AY.2007-08)
CIT v. Bankim Jayantilal Shah (2013) 218 Taxman 310 (Guj.)(HC)

S.45 : Capital gains – Transfer of Land – Joint development agreement – Neither possession was given nor consideration was received only advance was received -Capital gains cannot be assessed [S.2(47]
Assessee entered into a joint development agreement with one 'S' - Assessing Officer took a view that under said agreement, land had been transferred to 'S' and thus, subjected consideration received to capital gain tax. Commissioner (Appeals) held that there was no occasion for section 2(47) to apply as no possession of factory land could be given by assessee under said agreement. Further, no construction activity had commenced during year under consideration, thus, assessee was not liable to capital gain tax. Tribunal upheld order of Commissioner (Appeals), Tribunal also found that amount received by assessee was only an advance requiring fulfillment of certain obligations. High Court up held the order of Tribunal. (AY. 2000-01)
CIT v. Eastern Ceramics Ltd. (2013) 219 Taxman 66(Mag.) (Bom.)(HC)

S.45 : Capital gains – Business income – Investment in shares – Income from delivery based transactions with Investment motive was assessable as short term capital gains [S.28(i)]
It is possible for a taxpayer to have two portfolios, namely, an investment portfolio comprising securities, which are to be treated as capital assets and a trading portfolio comprising stock-in-trade, which is to be treated as trade asset. Held, the delivery based transactions were made with an investment motive and the income there from was in the nature of short-term capital gains whereas the income from futures and options transactions and daily trading in shares, which were mainly through stock broker were with business motive, and income there from was shown as business income only. (AY. 2005-06)
CIT v. Om Prakash Suri (No.1) (2013) 359 ITR 39 (MP)(HC)

S.45 : Capital gains – Shares – Conversion from stock in trade into investments was accepted in earlier years – Sale of shares assessable as capital gains and not as business income [S.28(i)]
The conversion of shares from stock-in-trade into investments was accepted by the Department in the AY 2003-04 and 2005-06 and gains from such sales were sold were offered under the head "Capital gains" from the date of conversion from stock-in-trade into investments and prior thereto as business profits. The fact that the assessee was trading in the shares would not estop the assessee from dealing in shares as investments and offer the gain for tax under the head "Capital gains". The shares sold were held by the assessee as investments, the gains arising out of the sale of investments were to be assessed under the head "Capital gains" and not under the head "Business profits". (AY. 2006-07)
CIT v. Yatish Trading Co. P. Ltd. (2013) 359 ITR 320 / 218 Taxman 316 (Bom.)(HC)

S.45 : Capital gains – Partner – Retirement – Amount received by partner on his retirement is not chargeable to tax as capital gains [S.2(47)(i), 2(47)(ii)]

The assessee, a partner in a firm, received Rs. 66 lakhs over and above his capital contribution on his retirement from the firm. The assessee claimed that the said sum was a capital receipt not chargeable to tax. However, the AO held that the retirement had resulted in a relinquishment of his pre-existing rights in the partnership firm and, therefore, the same was in the nature of capital gain on transfer of goodwill and liable to tax under s. 45 read with s. 2(47)(i) & (ii) of the Act. The CIT(A) and Tribunal reversed the finding of the AO on the ground that when a partner retires from the firm and receives his share of an amount calculated on the value of the net partnership assets including goodwill of the firm, there is no transfer of interest of the partner in the goodwill, and no part of the amount received is assessable as capital gain u/s 45 of the Act. On appeal by the department to the High Court HELD dismissing the appeal:

The Tribunal has correctly referred to the fact that *N A Mody v. CIT (1986) 162 ITR 420 (Bom)* followed *CIT v. Tribhuvandas G. Patil (1978)115 ITR 95* and that the same has been reversed by the Apex Court in *Tribhuvandas G Patel v. CIT (1999) 236 ITR 515*. This Court in *Prashant S Joshi v. CIT (2010) 324 ITR 154 (Bom.)* has also referred to the decision of Tribuvandas G. Patel rendered by this Court and its reversal by the Apex Court. Moreover, the decision of this Court in Prashant S. Joshi placed reliance upon the decision of the Supreme Court in *CIT v. R. Lingamallu Rajkumar (2001) 247 ITR 801* wherein it has been held that amounts received on retirement by a partner is not subject to capital gains tax. (AY. 2002-03)

CIT v. Riyaz A. Sheikh (2014) 221 Taxman 118 (Mag.)(Bom.)(HC)

S.45 : Capital gains – Business income – Sale of shares – Shares held more than 30 months – Controlling interest – Not freely transferable – Profit on sale of shares is assessable as capital gains and not as business income [S. 28(i)]

The assessee is a company engaged in the business of investment. The assessee had subscribed to 20 per cent of the issued shares of Millennium Alcobey (P) Ltd (MABL) with the right to nominate the manager of MABL, shares were not freely transferable. The above shares were sold to other two share holders of MABL ie. Scottish & Newcastle (S&N) and United Braveries Ltd (UB). The assessee offered the income under the head capital gains and invested the capital gains under the specified Bonds under section 54EC. AO assessed the income as business income-CIT (A) allowed the appeal o assessee. Tribunal reversed the finding of CIT(A) and confirmed the order of AO. On appeal by the assessee the Court held that finding of the Tribunal that the assessee had purchased the shares with the object of trading in them and not to hold as capital asset is perverse, therefore profit on sale of shares was assessable as capital gains and not as business income. (AY. 2006-07)

Accra Investments (P) Ltd. v. ITO (2013) 359 ITR 116 / 93 DTR 89 / 218 Taxman 378 / 263 CTR 48 (Bom.)(HC)

S.45 : Capital gains – Business income – Investment in shares – Profit on sale of shares assessing the income as capital gains was held to be justified [S.28(i), 263]

Assessee, a non-banking finance company, filed its return declaring income from sale of shares under head ‘capital gains’. Assessing Officer after making a detailed enquiry, passed an order accepting assessee’s claim. Commissioner passed a revisional order under section 263 taking a view that income from sale of shares was to be treated as ‘business income’. Tribunal confirmed said revisional order. It was noted from records that assessee had made all investments with its own funds, valued closing stock at cost, earned substantial dividend income, did not deal in futures and derivatives and it never claimed set off of losses arising from sale of investments against other incomes. It was held that in view of aforesaid, impugned order passed by Tribunal was to be set aside and that of Assessing Officer was to be restored. (AY. 2006-07)

Spectra Shares & Scrips (P.) Ltd. v. CIT (2013) 354 ITR 35 / 261 CTR 499 / 91 DTR 289 / 219 Taxman 61(Mag.) (AP)(HC)

S.45 : Capital gains – Disputes among family members – Arbitration and family arrangement – Adjustment of shares among family members does not amount to transfer hence not liable for capital gain

A partition is not a transfer. What is recorded in a family settlement is nothing but a partition. Every member has an anterior title to the property which is the subject-matter of a transaction. When there is no transfer there is no capital gain and consequently no tax on capital gains is liable to be paid. (AY. 1993-94).

CIT v. R. Nagaraja Rao (2012) 207 Taxman 74 / (2013) 352 ITR 565 (Karn.)(HC)

S.45 : Capital gains – No transfer of possession of land during previous year – Only receipt of advance – Amount received in advance is not taxable [S.2(47)]

There was no agreement to sell between the parties in the year in question and the only document which pertained to the transfer of property was the sale deed which was executed in the subsequent year. There was no transfer of possession in the year in question, the sum received was only an advance and no transaction stood concluded in the year in question. Therefore, the deletion of the Tribunal was justified. (AY.2006-07)

CIT v. Delhi Apartments Pvt. Ltd. (2013) 352 ITR 322 / 215 Taxman 113 / 91 DTR 33 (Delhi)(HC)

S.45 : Capital gains – Business income – Assessee treating land as fixed asset for a long time and using it for agricultural purposes – Sale proceeds assessable as capital gains [S.28(i)]

The land was purchased and was shown as an asset in the balance-sheet and that the land had also been used for agricultural purposes. It also noted the fact that the land had been held for a long period of time, having been purchased in 1994-96. There was no evidence that borrowed capital had been used for the purchase. Therefore, the assessee had appropriately offered it for taxation under the head "Capital gains". (AY.2006-07)

CIT v. Delhi Apartments Pvt. Ltd. (2013) 352 ITR 322 / 215 Taxman 113 / 91 DTR 33 (Delhi)(HC)

S.45 : Capital gains – Transfer – Family settlement – A family settlement does not result in a "transfer" and compensation received to equalise inequalities in family settlement is not taxable as "income". [S.(2(47), 4]

There was a dispute between two groups of a family. During the pendency of litigation, the parties agreed to divide the assets and businesses of the family into two lots i.e. lot-1 containing the Jalandhar and Ambala units and lot-2 containing the Delhi and Jaipur units. In terms of such settlement, lot-1 fell to the share of Group 'A' and lot-2 fell to the share of Group 'B' with the condition of payment of Rs.24 crores. A dispute regarding the date of split of the said amount was pending. The AO assessed the said sum in the hands of the assessee. This was reversed by the CIT (A) and Tribunal on the ground that the distribution of assets including the sum of Rs.24 crores was not complete as the matter was sub-judice and the amount did not accrue to the income of the group 'A". On appeal by the department to the High Court, the Court had to consider whether the compensation paid to the assessee to settle inequalities in partition, being a provision of "owelty" i.e. compensation deposited to equalize partition represents immovable property and is not an income exigible to tax. On appeal by the revenue, High Court dismissing the appeal held that a family partition which results in an adjustment of shares and of the respective rights in the family properties is not a "transfer" in the eyes of law. When there is no transfer of asset, there is no capital gain and consequently there is no liability to pay tax on capital gains. In a family partition, a situation arises where an item of property is not capable of physical partition or is such that, if divided, it will lose its intrinsic worth. In such a case, with a view to ensure an equitable partition, the item is allotted to one party and he is asked to pay compensation in money value to the other party. This amount is called "owelty". As the amount of compensation is only to equalize the inequalities in the partition it is nothing but a share in the immovable property itself (though paid in cash) and cannot be treated as

income liable to capital gain. If such amount is to be treated as income liable to tax, inequalities would set in as the share of the recipient will diminish to the extent of tax. On facts, the payment of Rs. 24 crores to Group A is to equalize the inequalities in partition of assets. The amount so paid is immovable property and is not income liable to tax. (AY.2007-08)
CIT v. Ashwani Chopra (2013) 352 ITR 620 / 85 DTR 40 / 213 Taxman 490 / 259 CTR 558 (P&H)(HC)
CIT v. Arvind Chopra (2013) 352 ITR 620 / 85 DTR 40 / 213 Taxman 490 / 259 CTR 558 (P&H)(HC)

S.45 : Capital gains – Shares – Foreign company – Non-resident-Indian assets – DTAA-India-France – Gains arising on sale of shares of foreign company by NR to NR not taxable in India under India-France DTAA even if the foreign co only held Indian assets. [S.9(1), 2(47), 90, 195, 201, 245R(2)(iii), Article 14(5)]
Two French companies named "Murieux Alliance" ('MA') and "Groupe Industrial Marcel Dassault" ("GIMD") held shares in another French company named "ShanH". MA & GIMD acquired shares in an Indian company named "Shantha Biotechnics Ltd" ("Shantha"). The shares in Shantha were transferred to ShanH. MA and GIMD subsequently sold the shares in ShanH to another French company named "Sanofi Pasteur Holding". The assessee filed an application for advance ruling claiming that as the two French companies had sold the shares of another French company to a third French company, the gains were not chargeable to tax in India. The department opposed the application on the ground that ShanH was formed with no purpose other than to hold the shares of the Indian company and that the transaction was taxable in India. The AAR upheld the department's plea on the ground that the French company's (ShanH) only asset were the shares in the Indian company & so when its shares were sold, what really passes were the underlying assets and the control of the Indian company and so the French company was a facade and a scheme for avoidance of tax. On appeal by the assessee to the High Court, HELD reversing the AAR:

(i) ShanH was incorporated as part of the policy that all offshore investments must be made through a subsidiary incorporated in France. It is not the case of the Revenue that in 2006 itself ShanH was conceived as a preordained scheme to avoid tax in India. The Revenue's case about when ShanH became a tax avoidance scheme is ambivalent and incoherent. ShanH is an entity of commercial substance and business purpose. Though a subsidiary of MA/GIMD, it is not a mere nominee or alter ego of MA/GIMD and there is nothing to show that they exercised overriding control over it. The creation of subsidiaries for investment is a legitimate practice. ShanH is accordingly the true and beneficial owner of the Indian company's shares. When the shares of ShanH were sold, it was the sale of shares of a French company and it cannot be said that the control, management or underlying assets of the Indian company were sold so as to attract tax on capital gains in India (*UOI v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC) & Vodafone International Holding B.v. v. UOI (2012) 341 ITR 1 (SC)* followed);
(ii) Article 14(5) of the India-France DTAA which exempts capital gains from shares representing more than 10% holding from tax in India does not permit a see through on whether the alienation of shares by ShanH is an alienation of the control, management or assets of the Indian company. It cannot be said that an actual alienation of the ShanH shares amounts to a deemed alienation of the Indian company's shares. The fact that the value of the shares of ShanH was because of the value of the Indian company's assets is irrelevant;
(iii) The retrospective amendment to s. 9(1) so as to supersede the verdict in Vodafone International and to tax offshore transfers does not impact the provisions of the India-France DTAA because the DTAA overrides the Act;
(iv) The Revenue's argument that as the term "alienation" is not defined in the DTAA, it should have the meaning of the term "transfer" in s. 2(47) as retrospectively amended is not acceptable because as per Article 31 of the Vienna Convention, a treaty has to be interpreted as per good faith and in accordance with the ordinary meaning. Though Article 3(2) provides that a term not defined in the treaty may be given the meaning in the Act, this is not applicable because the term

“alienation” is not defined in the Act. In some DTAAs, the term “alienation” is defined to include the term “transfer” but not in the India-France DTAA;

(v) Even assuming that the controlling rights or assets in India held by the Indian company were transferred on the alienation of the French company’s shares, the cost of acquiring those rights and assets in the Indian company and their date of acquisition cannot be determined. It is also not possible to determine the exact or rationally approximate consideration (out of the total consideration for the transaction in issue), apportionable to these assets/rights. As the computation provisions fail, the charging provisions also fail (*CIT v. BC Srinivasa Shetty (1981) 128 ITR 294 (SC), PNB Finance Ltd. v. CIT (2008) 307 ITR 75 (SC)& Dana Corporation (2009) 32 DTR 1 (AAR)* followed);

(v) The AAR has no power to review its own order. Having admitted the application, the AAR cannot at a later stage invoke clause (iii) of the Proviso to s. 245R(2) (iii) & decline to rule on the application.

Sanofi Pasteur Holding SA v. Dept. of Revenue, Ministry of Finance (2013) 354 ITR 316 / 257 CTR 401 / 84 DTR 185 / 213 Taxman 504 (AP)(HC).
Groupe Industrial Marcel Dassault v. UOI (2013) 354 ITR 316 / 257 CTR 401 / 84 DTR 185 / 213 Taxman 504 (AP)(HC)
Merieux Alliance v. UOI (2013) 354 ITR 316 / 257 CTR 401 / 84 DTR 185 / 213 Taxman 504 (AP)(HC)

S.45 : Capital gains – Computation – MOU – Sale consideration – Amount actual received

The inherited property was sold for Rs. 14 crores but as per MOU reached between the assessee and his brother, the assessee received only ` 6 Crores as his share, the Court held that Assessing Officer was not justified in taking the sale value at Rs. 7 Crores in the hands of assessee. Appeal of revenue was dismissed. (AY.2006-07)
CIT v. Raman Kumar Suri (2013) 81 DTR 33 / 255 CTR 257 / 212 Taxman 411 (Bom.)(HC)

S.45 : Capital gains – Adverse possession – No cost of acquisition – Not liable to capital gain tax

The Income Tax Appellate Tribunal held that when an assessee gets the property by adverse possession there is no cost of acquisition. The consideration is not liable to capital gain tax. Revenue challenged the said order before High Court. High court dismissed the appeal stating that no question of law arises. (ITA NO 1110 of 2009 and 1153 of 2009 dt 11-8-2009)
CIT v. Star Chemicals (Bom.) Pvt. Ltd. (Bom.)(HC) (Unreported)
Editorial: Order of Mumbai Tribunal in DCIT v. Star Chemicals (Bom) (P) Ltd. (2007) 110 TTJ 753 (Mum.) is confirmed.

S.45 : Capital gains – Business income – Transaction in shares – Shares held ranging from exceeds one month assessable as short term capital gains [S. 28(i)]

The assessee was investor in shares and also had speculation loss. The Assessing Officer assessed the short-term and long-term as business income. On appeal the Commissioner (Appeals) held that the gain is assessable as capital gain. Appeal of revenue was dismissed by Tribunal. On appeal to High Court the court held that the assessee had not borrowed funds, 93% of short-term gain /loss was attributable for periods ranging in excess of one month. There is no bar for an assessee to maintain two separate fort folios, one relating to investment in shares and another relating to business activities relating to shares. Following the ratio of *CIT v. Gopal Purohit (2010) 228 CTR 582 (Bom.) (HC),* the order of Tribunal was affirmed. (AY.2006-07)
CIT v. Suresh R. Shah (2012) 76 DTR 320 / (2013) 258 CTR 376 (Bom.)(HC)

S.45 : Capital gains – Transfer – Joint venture – Land – liable to pay capital gain tax in year in which said joint development agreement was signed [S.2(47)]

Where assessee, owner of plot, entered into a development agreement with developer in terms of which he was entitled to receive certain amount in cash and a furnished flat, following order passed in case of *Charanjit Singh Atwal v. ITO [2013] 36 taxmann.com 10 (Chd)(Trib),* it was held that assessee was liable to pay capital gain tax in year in which said joint development agreement was signed. (AY. 2008-09)
Hussan Lal Puri v. ITO (2013) 60 SOT 132(URO) (Chd.)(Trib.)

S.45 : Capital gains – Business income – Investment in shares – Consistently showing as investment – Gain is assessable as capital gains [S.28(i)]
Assessee claimed income from sale of shares as capital gains. AO assessed income as business income on ground that in previous assessment year assessee himself had accepted treatment of long-term capital gains from sale of shares as business income and no appeal was filed. Tribunal held that, merely because assessee had not appealed against treatment of gain on sale of shares as business income in previous assessment year due to small tax effect, same could not be followed in current year as rule of estoppel and *res judicata* are not applicable in matter of taxation. On facts the assessee had consistently held shares as investments and valued them at cost and had made a clear demarcation between investment and trading activity of shares sold during current year, gain from sale of shares could not be held as business income.(AYs. 2005-06 to 2006-07)
Dharmesh R. Shah v. Jt.CIT (2013) 60 SOT 182 (Mum.)(Trib.)

S.45 : Capital gains – Business income – Development agreement – Sale of flat allotted – Market value of land transferred to developer together with additional FSI if any would be deemed cost of construction, while taxing capital gains on sale of two flats-Income attributable to land would be long-term and income from sale of building will be short term capital gains [S. 48]
Assessee entered into development agreement with developer to construct multi-storied building on his land by demolishing old structure. In terms of agreement, developer had to bear cost of construction and in lieu thereof, would get 50 per cent of constructed area/flats in said building. Out of his share of constructed area, assessee sold two flats. Tribunal held that income earned by assessee on such sale would be assessed as capital gains. Since 50 per cent area of building had been transferred by assessee to developer, 50 per cent of market value of total land in question together with value of additional FSI, if any, on date of agreement would be deemed to be cost of construction of constructed area which fell in share of assessee as per development agreement and assessee would be entitled to proportionately claim deduction for cost of construction while taxing capital gains arrived from sale of two flats. Income attributable to sale of land would be chargeable as long-term capital gain and income from sale of building part would be chargeable as short term capital gain. (AY.2007-08)
DCIT v. Jai Trikanand Rao (2013) 60 SOT 189 (Mum.)(Trib.)

S.45 : Capital gains – Share transactions – Cash credits – Transaction was recorded in Demat account at quoted price – Transaction cannot be treated as non genuine though the share broker denied the transaction [S.68]
Assessee filed return showing capital gain arising out of purchase and sales of shares done through a share broker. She furnished purchase and sale bills of share transaction. Since share brokers denied transaction, AO held that share transaction was not genuine and, therefore, taxed it as income from undisclosed sources. Tribunal held that shares were in respect of a listed company and transaction was through Demat account as per recognised Stock Exchange quoted price hence there was no reason to hold such nature of transaction as non-genuine.(AY.2004-05)
Meenadevi N. Gupta v. ACIT (2013) 60 SOT 51 (URO) (Ahd.)(Trib.)

S.45 : Capital gains – Business income – Share dealings – Set off of loss – Matter was set aside [S.28(i), 73]

Assessee claimed set off of loss arising out of sale of shares of two companies, which were purchased during year, from long-term capital gain. AO treated loss as speculation business loss by invoking provisions of section 73. On appeal, CIT(A) treated loss to be short-term capital loss accepting assessee's claim that shares were purchased for investment purpose. On appeal by revenue the Tribunal held that question whether shares in question was stock-in-trade of assessee giving rise to business loss or profit or same was investment or capital asset of assessee giving rise to capital loss to assessee would depend upon intention with which shares were acquired by assessee, since lower authorities had not properly verified entire facts and circumstances relevant to acquisition of shares in question so as to ascertain true intention of assessee for acquiring shares in question matter was to be remanded for readjudication. (AY. 2005-06)
ITO v. Bunty Holdings (P.) Ltd. (2013) 60 SOT 70 (URO) (Kol.)(Trib.)

S.45 : Capital gains – Dissolution of partnership firm – Sale of property – Taxable in hands of firm – Taxable in year of sale and not in year of execution [S. 2(47)]
The assessee partnership firm executed a dissolution deed. The A.O. held that property had been transferred to partners on date of dissolution and therefore the partners were liable to capital gains on sale of the property. The CIT(A) confirmed the A.O.'s order. The Tribunal held in favour of the assessee, that the property was never transferred to partners on execution of deed of dissolution, there would be no question of owning said property by them in capacity as partners of firm, and hence capital gain on its subsequent sale was taxable in hands of firm, and not assessee partner; it would be taxable in year of sale of property and not in year of execution of deed. (AYs. 2001-02 and 2003-04)
S. Balmukund Paper v. ITO (2013) 145 ITD 166 (Pune)(Trib.)

S.45 : Capital gains – Business income – Dealing in shares – High frequency transaction and borrowed funds for making investment in shares cannot be the ground to transaction in shares as business income [S.28(i)]
The Tribunal held that the assessee shown share trading account and Investment separately. Investment in shares was shown in the balance sheet under the head 'Investment'. Investment in shares was valued at cost. Merely because the assessee was indulged into high frequency transaction could not be regarded as trading activity. A prudent investor always keeps a watch on the volatility of the market and makes sound investment decisions in accordance with such market fluctuation and has the liberty to liquidate its investments in shares as and when necessary. Tribunal held that borrowed funds cannot constitute a factor to decide the character of investment. (AY.2007-08)
Koradia Construction (P) Ltd v. DCIT (2013) 39 taxmann.com.20 / (2014) 146 ITD 251 (Mum.)(Trib.)

S.45 : Capital gains – Buyback of shares – Interest – Interest related to the delay in completing the process of buy-back of shares under open offer is assessable as capital gains & not as interest income [S.48]
C made an open offer for acquisition of 20% of the issued capital of CI indicating the offer price of Rs.311.91 per equity share shared on the price on the market price as on 7th July, 2000. Thereafter on 16-2-2001 SEBI directed C to revise minimum offer price today 14-3-2000 as the relevant date. C challenged the order of SEBI by filing an appeal before the SAT. SAT upheld the SEBI's directions against which C filed an appeal in HC. In the meantime, on 23-7-2001 SEBI directed the merchant banker to proceed with the offer formalities & pay interest @ 15% p.a on an offer price period from 14-3-2000 till the actual date of payment of consideration. On an appeal, SAT held that C is liable to pay interest to the successful offer @15% p.a on open offer price from 8-8-2000 till the actual date of payment of interest. 10,42,518 equity shares which were held by the assessee were accepted by C as on 23rd November 2001. Thus assessee received additional amount of Rs. 7,07,76,547 on account of interest. Tribunal held that the since the payment of interest was directed by SEBI under regulation 22 of takeover Regulation, it was not a penalty but interest on account of failure to make payment by the

acquirer as per the time schedule prescribed under SEBI Regulations. However, the interest received by the assessee was for the period prior to the tendering of shares & acceptance of same. Thus the interest related to the delay in completing the process of buy –back of shares under open offer. It was held that it was not a case of delay in making the payment of the determined consideration after the transaction of purchase of shares is over. Thus, interest falls within the ambit of consideration received by the assessee against the shares tendered in the open offer. Therefore for the period from 8/8/2000 to 22/11/2001 related to the part of sale consideration & accordingly assessable as capital gains & not as interest income. (AY. 2002-03)
Genesis Indian Investment Co. v. CIT (2013) 145 ITD 1 / 158 TTJ 67 / 94 DTR 132 (Mum.)(Trib.)

S.45 : Capital gains – Short-term capital gains or long-term capital gains – Cancellation of original allotment by BDA and fresh allotment in an alternative site – Sale to be assessed as long-term taking in to account original allotment letter. [2(29A), 2(29B), 2(42A), (42B)]
Assessee paid entire consideration of site originally allotted by BDA in year 1988. BDA could not deliver vacant possession of site free from encumbrance. BDA undertook alternate site. After subsequent allotments, BDA registered sale deed in respect of alternate property. Thereafter assessee sold property & computed LTCG. AO concluded that property sold & property originally allotted were different & therefore treated gain on sale of property as Short Term Capital. CIT(A) affirmed the findings of AO. On further appeal in Tribunal, Tribunal affirmed the findings of the CIT(A) & held that BDA had allotted property to the assessee on 27th Feb, 2008 in lieu of the property originally allotted to him *vide* lease-cum-sale agreement dt 25-8-1988 & successive allotments & cancellation of alternative sites owing to its failure to deliver vacant possession of such sites , the title to the property ultimately allotted to the assessee can be traced to the original allotment & therefore capital gains arising on the sale of the said property by the assessee on 28th Feb, 2008 has to be treated as Long Term Capital Gains.
A. Suresh Rao v. ITO (2013) 144 ITD 617 / 157 TTJ 753 / 94 DTR 1 (Bang.)(Trib.)

S.45 : Capital gains – Long term or short-term – Flat received under the development agreement-Period of holding starts from date of possession of flat and not from date of development agreement [S. 2(29A)]
The assessee a land owner, under a development agreement, received flats as consideration and later on sold the same, period of holding of such flats is to be considered taking into account date of possession of flats and not date of development agreement. (AY. 2007-08)
ACIT v. Jaimal K. Shah (2012) 137 ITD 376 / (2013) 90 DTR 350 (Mum.)(Trib.)

S.45 : Capital gains – Gain on purchase and sale of equity shares and mutual funds – shares and mutual funds purchased for holding them as investment – Assessable under head 'short-term capital gain'. [Ss.2(42B), 28(i)]
The assessee-company was engaged in providing consultancy relating to tours and travels and allied service. During the year it earned gain on purchase and sale of equity shares and mutual funds and claimed the same as short-term capital gain. In the balance sheet it had shown purchase of shares and mutual funds as investment. The AO treated the Short Term Capital Gain declared by the assessee as Business Income by observing that (i) the assessee's receipt in the year under consideration was mainly on account of transactions in shares and mutual funds, (ii) the major portion of the funds available had been invested by the assessee in purchase of shares and mutual funds, and (iii) unsecured loan taken during the years had also been deployed in purchase of shares and mutual funds, and (iv) the assessee's auditor had given a remark in the financial statement that in his opinion the company was dealing in or trading in securities. The CIT(A) confirmed the order of the AO. The Tribunal held that where assessee earned gain on purchase and sale of equity shares and mutual funds and its intention was to purchase shares and mutual funds for holding them as investment, gain in question was assessable under head 'Short-term capital gain'. (AYs. 2006-07, 2007-08)

Trinetram Consultants P. Ltd. v. Dy. CIT (2013) 143 ITD 634 (Mum.)(Trib.)

S.45 : Capital gains – Consideration from the developer was held to be assessable as capital gain and not as business income [S.28(1)]

Tribunal held that sale consideration received by the assessee from developer on the sale of plots under the development agreement is realization of capital asset held by it for over 30 years and is taxable as capital gains.

Marudhar Hotel (P) Ltd. v. ACIT (2013) 156 TTJ 697 / 92 DTR 1 / 61 SOT 27 (Jodh.)(Trib.)

S.45 : Capital gains – Business income – Land developed and selling to collaborator assessable as capital gain – Actual sale consideration is to be adopted [S.28(1)]

Assessing Officer passed the assessment order on the basis that the activities of the assessee company in getting the land developed dividing it into number of plots and selling it in collaboration with developers was an adventure in nature of trade and hence income shown by the assessee under the head capital gain was treated as business income. The CIT(A) confirmed the order of Assessing Officer and also enhanced the sale receipts. The Tribunal by following the decision of the Tribunal for AY. 2006-07 & 2007-08 in assessee's own case held that the income has to be assessed as long term capital gain and not as a business income.

The Assessing Officer took another plea that even if receipts were to be taxed as capital gain the cost of acquisition had to be adopted at the rate of Rs. 8 per Sq. Yd. as against Rs. 250 per Sq. Yd. claimed by the appellant for the reason that average cost as per valuation was Rs. 3.98 per sq. yd. But the Tribunal directed the Assessing Officer to adopt the actual sales consideration as against the enhanced sale consideration.

Marudhar Hotel (P) Ltd. v. JCIT (2013) 156 TTJ 697 / 92 DTR 1 / 61 SOT 27 (URO) (Jodh.)(Trib.)

S.45 : Capital gains – Business income – Transactions in shares – Portfolio management scheme – Assessable as capital gains

The assessee was a private family trust. It had invested its corpus fund in purchase of shares/securities through four Portfolio Management Services (PMS) and had shown long-term capital gains (LTCG) and short-term capital gain (STCG) on sale of such securities. During the course of scrutiny assessment proceeding, the Assessing Officer found enormous volume, frequency and multiplicity of transactions of purchase and sale in share and security. He also observed that the intention of the assessee was not to make investment in shares for long-term benefit, but to earn quick profit by frequently buying and selling the shares with an eagerness to account for as much gains as quickly as possible under guise of STCG/LTCG. He, therefore, concluded that the profit on the sale of said shares was assessable under the head 'profit and gain of business or profession'. On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal held, that, on perusal of the agreements between assessee and portfolio managers clearly shows that the intention of the assessee to appoint these portfolio managers is to invest its corpus fund in shares and securities for wealth creation. The submissions of the assessee have been rejected by the lower authorities only because the assessee has engaged portfolio manager to look after its investment. Further, more thrust is given on the volume, periodicity and frequency of transactions. In this background, the finding of the Commissioner (Appeals) that the PMS are nothing but agents working for and on behalf of the assessee is not correct. All decisions regarding investments, its timings, etc., are made by the PMS provider and not by the assessee *per se*, though the resultant gain/loss is on account of the assessee's investment. The contention of the revenue authorities that in respect of certain scrips, the holding period was very less cannot be held against the assessee inasmuch as it had no control on such decision making in a discretionary PMS arrangement because such decisions were taken by the PMS provider. Insofar as other objections of the revenue authorities that volume and frequency of transactions were large so as to constitute business activity are concerned, it is found that the assessee

has engaged four PMS provider, has transacted in 7 shares and the total number of transactions is 110. In a stock exchange, where more than 5000 shares are traded every day, the observations of the lower authorities do not carry much weight. Considering the facts and the submissions, the decision of the Commissioner (Appeals) is erroneous. Considering the nature of transaction through Portfolio Management Services providers the transactions have resulted into capital gains, STCG and LTCG as returned by the assessee. Therefore, the Assessing Officer is directed to accept the capital gains as returned by the assessee. (AY. 2008-09)
Salil Shah Family (P.) Trust v. ACIT (2013) 36 taxmann.com 543 / 144 ITD 390 (Mum.)(Trib.)

S.45 : Capital gains – Share sale agreement – Only consideration received or accrued can be taxed [S.48,54EC]
The assessee had shown long-term capital gains on sale of Unisol Infrastructures Ltd and claimed exemption under section 54EC. On examining the agreement pertaining to transfer of shares the AO noticed that the said agreement grants absolute right to the assessee as well as other transferors to receive the specified amount in an deferred manner with nomenclature of 'initial' and 'deferred' consideration being employed. AO reworked the share of the assessee in the alleged total consideration 'accrued' to the transferors by clubbing the initial consideration and deferred consideration and thereby assessed the capital gains and made additions. On appeal Commissioner (Appeals) held that deferred gain could not be taxed as the gain was not received nor accrued to the assessee. On appeal by the revenue, the Tribunal held that under section 45 read with section 48 what is to be taxed is the gain received or accrued. Accordingly deferred consideration under share sale agreement cannot be taxed. Maximum cap provided in the agreement cannot be equaled either with sale value nor with full value of consideration since the said maximum cap is neither received nor accrued for the purpose of calculating capital gains.(ITA no 2198/Mum/2010 dt 10-7-2013.'H" Bench) (AY. 2006-07)
DCIT v. Hemal Raju Shete (2013) BCAJ-September-P. 26 (Mum.)(Trib.)

S.45 : Capital gains – Computation – Floor space index ["FSI"] Amount received on transfer of additional FSI was not chargeable to tax in its hands-"principle of mutuality" applied in this case between the society and its members and therefore, the sum could not be taxed as dividend in the hands of the assessee [S.4, 48, 50]
In the year 1984, the assessee purchased a residential flat in a co-operative society. Under the Development Control Regulations, 1991, the society became entitled to the right to allow the usage of additional floor space index ["FSI"] of an area equivalent to the existing FSI, which was available for development. The society decided to demolish the existing building and construct two new buildings on the property by utilising the FSI. For this purposes, development of the building was undertaken and the transferable development rights ["TDRs] were sold to the builder for a consideration of Rs.8.35 crores towards collective share of the 24 occupants of the flats. In this amount, the assessee's share was Rs. 33,23,522/- out of which Rs. 16,61,761/- was receivable at the time of execution of the agreement. In its books, the assessee recognized the entire amount as income following the mercantile system of accounting, but in the return of income, the assessee claimed that cost on transfer of additional FSI was not chargeable to tax in its hands. The Assessing Officer held that the net amount was chargeable to capital gains under section 50 of the Act. Alternatively, the Assessing Officer held that the amount was taxable as dividend received by the assessee from the co-operative housing society. The CIT(A) overruled the view of the Assessing Officer. On appeal by the Department, the Tribunal dismissing the revenue appeal held: That even though the transfer of transferable development rights amounts to transfer of a capital asset, the gains could not be subjected to tax under the head "Capital gains" for the reason that there was no cost of acquisition in acquiring the flat which had been transferred and the computation mode given under section 48 was, thus, inapplicable in such cases. That firstly money has not been received by the assessee from the society - under the agreement entered into between the developer, the society and the members, the consideration was

payable to the members by the developers for transfer of respective entitlements of the members and secondly, the "principle of mutuality" applied in this case between the society and its members and, therefore, the sum could not be taxed as dividend in the hands of the assessee. (AY. 2005-06)
Dy. CIT v. IGE India Ltd. (2013) 22 ITR 462 (Chennai)(Trib.)

S.45 : Capital gains – Fair market value – Value fixed by sub-registrar is only a guideline value to ascertain market value of land for collection of stamp duties and it cannot be a sole basis for fixing fair market value as on 1-4-1981
Tribunal held that value fixed by Sub-Registrar is only a guideline value to ascertain market value of land for collection of stamp duties and it cannot be a sole basis for fixing fair market value as on 1-4-1981. Fair market value may fluctuate depending upon area of land, location, accessibility to infrastructure facilities, potentiality for future development, etc. therefore, for purpose of estimating fair market value as on 1-4-1981 factors to be taken into consideration is locality, accessability to infrastructure facilities, comparative sale in locality, potentiality for future development, distance between land and bus stand, railway station, airport, etc. Matter remanded to reconsider the issue in all factors mentioned above. (AY. 2008-09)
R. Vidhyadharan v. Dy. CIT (2013) 141 ITD 7/155 TTJ 100 / 88 DTR 29 (Cochin)(Trib.)
Santhadharan (Smt.) v. Dy. CIT (2013) 141 ITD 7 / 155 TTJ 100 / 88 DTR 29 (Cochin)(Trib.)

S.45 : Capital gains – Capital asset – Indexation – Transfer of right to use suit in a Hotel is a capital asset and consideration is taxable as capital gain and not as income from other sources. [S. 2(14), 48, 56]
Assessee had long-term advance booking of a hotel suite, permanently reserved for use. She treated profit on its transfer as long-term capital gains, deducting indexed cost of acquisition. Assessing Officer did not hold long term advance booking to be capital asset and taxed it as income from other sources, deducting only amount of installments. Commissioner (Appeals) held long-term advance booking as capital asset, but did not allow deduction of maintenance charges. Long-term advance booking of hotel suite, which gave assessee perpetual right of possession and right to transfer capital asset under section 2(14). Profit on its transfer was taxable as capital gain. Maintenance charges paid to Hotel cannot be considered for cost of indexation. On appeal by revenue Tribunal confirmed the order of Commissioner (Appeals). (AY. 2007-08)
ACIT v. Shabnam Sachdev (2013) 141 ITD 730 / 89 DTR 293 / 155 TTJ 258 (Delhi)(Trib.)
ACIT v. Sharada Sachdev (2013) 141 ITD 730 / 89 DTR 293 / 155 TTJ 258 (Delhi)(Trib.)

S.45 : Capital gains – Cost of acquisition – Tenancy rights – Compensation on surrender of tenancy rights – Assessees right in property constituted "tenancy rights" under section 55(2) – Matter remanded [S.55(2)]
The assessee was in possession of certain property since 1975 and acquired the right to remain in possession. He transferred the right to R for a sum of Rs. 84 lakhs by agreement dated August 14, 2006. He computed capital gains in accordance with provisions of amended section 55(2). The assessee invested the gains in a residential house and claimed the benefits of section 54 of the Act and did not pay any tax of Rs. 84 lakhs. The Assessing Officer did not accept the assessee's claim and mentioned that the assessee was never a tenant, but was merely occupying the premises illegally and therefore, did not have the rights of tenancy. Therefore, the rights sold by him are not tenancy rights, consequentially provisions of section 55(2) did not have any application to the present case. The income was brought to the tax under the head "income from other sources." The Commissioner (Appeals) confirmed this. On appeal: Held, that there was need for interpreting the facts of the present case in the light of the amended law, where the "tenancy rights "attained legal cognisance by the amended section 55(2) of the Act. There was need for first deciding whether the assessee's right in the property constituted "tenancy rights" within the meaning of section 55(2). Further, the Commissioner (Appeals) was to consider the fact that the assessee transferred some rights, whose

exact nature was yet to be determined by the Department with the help of concrete basic facts. Thus, Commissioner (Appeals) was to pass an order after granting the assessee a reasonable opportunity of being heard. (AY. 2007-08)

Kishori Lal Basanti Lal Patodia v. ACIT (2013) 23 ITR 42 / 58 SOT 91 (URO) (Mum.)(Trib.)

S.45 : Capital gains – Transfer – Development Agreement – Substance shall prevail over the form – Capital gain is assessable in the year of development agreement and not in the year of possession. [S.2(47), 292B, Transfer of Property Act, 1882, S.53A]

The assessee had entered into a development agreement with that company on 14-4-2002 for construction of a multi-storied building consisting of residential apartments on land owned by him. The assessee was to receive certain constructed area and car parking area in addition to a sum of Rs.18 lakhs. The said amount of Rs.18 lakhs was received by the assessee from the said company spread over financial years 2002-03, 2003-04 and 2004-05. As the assessee had not filed his return of income, the Assessing Officer issued notice under section 148 for three assessment years i.e. 2003-04, 2004-05 and 2005-06. Thereafter, the Assessing Officer completed the assessment by determining the long term capital gain for the assessment year in question, i.e. 2003-04. He also held that since handing over of possession which took place on 21-4-2004, capital gain had to be assessed for the assessment year 2005-06. On appeal the Commissioner (Appeals) upheld Assessing Officer's for the assessment year in question i.e. 2003-04. Before Tribunal it was contended that since the Assessing Officer having decided to assess the capital gain in the assessment year 2005-06, he could not have assessed the same in the assessment year 2003-04. The possession was given only on 21-4-2004 and, hence, the capital gain was assessable in the assessment year 2005-06 only. It was argued that section 53A of the Transfer of Property Act had undergone a change with effect from 24-9-2001, i.e. about eight months prior to the date of agreement and according to the said amendment; unregistered agreements shall not have any effect for the purposes of section 53A of the Act. Hence, the Assessing Officer was wrong in invoking the provisions of section 2(47)(v) for the purpose of assessing capital gains during the assessment year 2003-04. Tribunal held that it is a well-settled proposition of law that the substance shall prevail over the form. Though it is mentioned in the agreement that the possession of land shall be handed over only after handing over of the assessee's portion of constructed area, yet the builder, under practical circumstances, cannot start construction unless the physical possession of land is handed over to him. Hence, for all practical purposes, the physical possession was handed over to the builder after entering into the agreement dated 14-4-2002. In the instant case, the builder shall commence construction within 30 days from the date of entering the schedule property for the purpose of construction. Further it is the responsibility of the builder to obtain necessary approvals. It is also mentioned that the assessee has executed a registered general power of attorney in favour of the builder on the very same date, i.e., on 14-4-2002. Hence, the impugned agreement, being a development agreement, a mere mentioning in one of the clauses of the agreement to the effect that there is no handing over of possession, shall not take away the actual fact that the physical possession was handed over to the builder. According to the assessee, section 53A of the Transfer of Property Act has undergone changes and according to amended section, the unregistered documents shall not fall in the purview of section 53A of the Transfer of Property Act. If one carefully read clause (v) of section 2(47) of the Act, one can notice that the reference is to the 'transactions …. of the nature' referred to in section 53A of the Transfer of Property Act, 1882, i.e., clause (v) talks about the type or nature of transaction only and it does not mandate invoking of the provisions of section 53A of the Transfer of Property Act fully. Thus, the stress in clause (v) given to the Income-tax Act is concerned with the type or nature of transaction referred to in section 53A of the Act and hence the amendment brought into that section with regard to the registration of the document, shall not have any effect on clause (v) of section 2(47) of the Act. Even otherwise the contract entered into by the assessee would be hit by clause (vi) of section 2(47) and as per section 292B the Act, the impugned assessment, being in substance and effect in conformity with or according to the intent and purpose of the Income-tax

Act, the assessment order is saved by the provisions of section 292B of the Act. Tribunal held that The Commissioner (Appeals) was right in law in confirming the action of the Assessing Officer in assessing the capital gain in the assessment year 2003-04, since the development agreement was entered into on 14-4-2002. The Tribunal alo observed that since the capital gain is assessable in assessment year 2003-04, the right course for the assessee would be to approach the tax authorities for exclusion of the income, which was wrongly offered by him in the subsequent assessment years. In the interest of natural justice, the tax authorities may consider any such request made by the assessee in a liberal manner. (AY.2003-04)
G. Sreenivasan v. Dy. CIT (2013) 140 ITD 235 / 153 TTJ 640 / 86 DTR 34 (Cochin.)(Trib.)

S.45 : Capital gains – Agreement for development rights – Power of attorney [S.2(47), 48]
Agreement for development of property cancelled and agreement for sale and irrevocable power of attorney executed with same party. Advance received under first agreement and forfeited and sums received as damages together constitute part of consideration for sale and is taxable as capital gains. (AY. 2005-06)
Hyderabad Bottling Co. Ltd. v. Dy. CIT (2013) 23 ITR 175 / 58 SOT 148 (URO) (Hyd.)(Trib.)

S.45 : Capital gains – Firm – Partner – Purchase of property by partner in personal capacity and sale thereof by document executed in personal capacity – Shown in the balance sheet of firm – Long-term capital gains not to be taxed in hands of firm [S.54F]
One of the partners of the assessee-firm purchased a piece of land with money withdrawn from the Firm. The purchase deed was registered in his personal name. In the books of account of the assessee-firm the purchase of the land was shown as an asset. In the accounts of the assessee-firm, the property was shown as purchased by the firm. Accordingly, the landed property was reflected in the balance sheet of the assessee-firm. The partner sold this property on June 17, 2005 to a third person by executing the sale document in his personal capacity. The partner purchased another property for claiming deduction under section 54F of the Income-tax Act, 1961 in respect of the capital gains arising out of the sale of the property purchased on June 17, 1999. The assessee-firm did not disclose any capital gains arising in its hands. On the other hand, the partner offered the long-term capital gains in his personal assessment with his claim. The Assessing Officer held that the funds necessary for purchasing the property were withdrawn by one of the partners of the assessee-firm from the partnership fund and on the sale of the property also the funds were brought back to the assessee-firm and during all the relevant period, the property was shown in the balance sheet of the assessee-firm as its own property and in such circumstances the property was owned by the assessee-firm and accordingly brought the long-term capital gains to taxation in the hands of the assessee-firm. On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. On further appeal, the Tribunal held that the purchase document was registered in the name of one of the partners of the firm. The document was executed in his personal capacity and in his individual name. There was no recital in the purchase deed that the property was being purchased for and on behalf of the firm. Likewise, the property was sold by a sale deed executed by the partner individually and in his independent capacity as the owner of the property. There was also no mention that the property belonged to the assessee-firm and the firm was actually selling the property. Even though the books of account of the assessee-firm contained entries regarding the purchase and sale of the property and the balance sheet of the assessee-firm showed the property as its own asset for some time, the accounting entries reflected in the books of account of the assessee-firm could not undo the rule of law or the law of land. In order to bring the property into the ownership of the assessee-firm, it was necessary to have a conveyance deed registered in the name of the assessee-firm. As no such document was available, no such conveyance could be presumed and it was not possible to hold that the property was ever owned by the assessee-firm. Consequently the long-term capital gains could not be assessed in the hands of the assessee-firm. It was one of the partners of the assessee-firm, who was bound to account for the long-term capital gains arising from the transaction and the Assessing

Officer as to process the return filed by him in accordance with law. The addition made in the assessment of firm was deleted. (AY. 2006-07)
Raja Fertilizers v. ITO (2013) 21 ITR 658 / 142 ITD 435 (Chennai)(Trib.)

S.45 : Capital gains – Capital asset – Transferable Development Rights – Transfer of 'transferable development rights' available under Development Control Regulation of Greater Mumbai, 1991, amounts to 'transfer' of a 'capital asset, however, since no cost of acquisition can be ascribed to such a right, computational provisions of section 48 cannot be applied and, therefore, such transfer cannot be subjected to tax under head 'capital gain [Ss. 2(14), 48]
In the return of income, assessee showed the above receipts as 'compensation received' on account of grant of permission and towards settlement of disputes between the developer, the society and its members. The Assessing Officer, however, observed that the assessee-society was entitled to utilise the transferable development rights (TDRs) in respect of the land admeasuring 3367 square metres owned by them, in the ratio of 1:1 in accordance with the provisions of Development Control Rights, 1991. As per the Assessing Officer, the assessee had transferred such right (TDRs) to the Ariel View under the terms of consent. The Assessing Officer expressed that land is a bundle of rights and when land admeasuring 3367 square metre was purchased all rights, present and future, embedded in it were also acquired. As per the Assessing Officer, the assessee had transferred its TDR entitlement to the Ariel View under terms of consent which was nothing but an agreement towards transfer of the TDR entitlement of the assessee. The Assessing Officer, therefore, held that the benefit in the form of TDR arising out of the existing land was an immovable property, the transfer of which tant amounted to transfer of long-term capital asset and hence liable to be taxed as income under the head 'Capital gain'. Thereafter, the Assessing Officer computed the capital gain under section 48 by spreading over the cost of acquisition of land admeasuring 3367 sq. metres over the increased TDR provided by the Development Control Regulation, 1991. Commissioner (Appeals), under appeal from the assessee, confirmed the order of Assessing Officer. Being aggrieved, the assessee preferred instant Second Appeal. It was contended that there was no transfer in the instant case, as just permission was given to use TDR and no part of the land was ever transferred. Computational provisions of section 48 would not be applicable in case of transfer of TDRs as there is no cost of acquisition in such cases. The Tribunal held that, the concept of TDRs originates from the regulation of 'Development Control Regulation of Greater Mumbai' i.e., 'DCR, 1991' wherein it was provided that the owner or a lessee of a plot, which was reserved for public purpose under the development plan of DCR, would be eligible for award of compensation by way of development right certificate of equivalent Floor Space Index (FSI). In other words, the Govt. decided to grant Transferable Development Rights to the land owners, who agreed to surrender their lands on FSI for public purposes. These TDRs can be transferred to other land owners or building for construction of the building or additional floors. The plots on which those development rights could be used were termed as 'Receiving Plots' and on these plots in addition to whatever FSI were originally available to the owner or lessor of such plots, additional FSI can be allowed to the owner or lessor on using the transferable development rights contained in DRCs for the purpose of construction of the building. Thus, the TDR is available to the owner/lessee of the land which surrenders to the Govt. and, therefore, the acquisition of such TDRs are to detriment the land surrendered by the owner/lessee, and such TDRs can be utilised on any plot vacant or already developed or by erection of additional storeys subject to the FSI available in the DCR. TDR entitlement is capital asset and transfer thereof is 'transfer'. The contentions and reasoning of the Assessing Officer to the extent that the word 'Property' not only includes tangible asset but also intangible asset and, therefore, additional FSI available to the assessee in view of DCR, 1991, was a right acquired by virtue of being owner of the plot, is correct. Thus, such a right is definitely a 'Capital Asset' held by the assessee and assignment of such a right in favour of the developer amounts to transfer of capital asset. It is held that transfer of TDRs amounts to transfer of a 'Capital Asset'. However, it has to be seen as to whether there was any kind of cost in acquiring these

rights. This right was acquired automatically by virtue of DCR, 1991, and what the assessee has transferred is not the plot or the building but a right, parting with which, did not result in parting with land or building. Therefore, such a right cannot be said to be embedded in the land as held by the Assessing Officer and the Commissioner (Appeals), because there was no detriment to cost of land by granting such rights. Even though, there was a transfer of a capital asset, however, there was no cost of acquisition or any cost can be ascribed to such right, because the land and the building continued with the possession of the assessee even when transfer of TDR was made to the developer. The reasoning and the logic given by the Assessing Officer and the Commissioner (Appeals) that these development rights were embedded with the land and, therefore, the sum chargeable to cost has to be ascribed, it is held, is not tenable for the reason that these development rights have been available to the assessee as per the DCR, 1991, and is separate and distinct from the original right in land and, hence, it cannot be held that such a right was embedded in the land. Therefore, the conclusion drawn by the Assessing Officer and the Commissioner (Appeals) on this score gets failed. In such a situation, computational provisions of section 48, also gets failed because no cost of acquisition can be ascribed to a right which has emanated from DCR, 1991. This issue has come up several times and has been dealt and discussed in detail by various decisions of Mumbai Co-ordinate Bench of the Tribunal. Respectfully following the ratio laid down in the such decisions and also as per instant findings and observations given above, it is held that even though the transfer of TDR amounts to transfer of a capital asset, however, the same cannot be subjected to tax under the head 'Capital Gain' for the reason that there is no cost of acquisition in acquiring the right which has been transferred and computational mode given in section 48, thus fails in this case. Therefore, taxing of the receipt from transfer of TDRs under the head 'Capital gain' by the Assessing Officer for a sum of Rs.10,70,46, 274 cannot be sustained. Accordingly, the same is directed to be deleted and order of the Commissioner (Appeals) is thus reversed. (AY. 2007-08)
Land Breeze Co. Operative Hosing Society Ltd. v. ITO (2013) 55 SOT 103 / 21 ITR 467 (Mum.)(Trib.)

S.45 : Capital gains – Capital asset – licensee of looms – Transfer of land – Amount paid to assessee for surrender of rights in land. Assessee deemed tenant by virtue of amendment of Rent Control Act. Right of assessee a capital asset within the meaning of section 2(14). Amount received assessable as capital gains and not as income from other sources. [S.2(14), 54EC, 55, 56]

The assessee in the return for the assessment year 2009-10, it declared long-term capital gains on surrender of sub-tenancy rights and claimed exemption under section 54EC, by making investment in NHAI bonds. The Assessing Officer found that possession of a portion of the shed was incidental to the licence granted to it for the use of machinery. Therefore, the Assessing Officer came to the conclusion that the amount received by the assessee was merely gratuitous. He held that the assessee could not be said to have had sub-tenancy rights particularly with regard to land for which the compensation had been received by the assessee and, therefore, the amount received by the assessee was not assessable under the head "Capital gains". He taxed it under "Other sources". This order was confirmed by the Commissioner (Appeals). On appeal to the Tribunal, held that the assessee had entered into an agreement for licence to use looms and machinery. It was entitled to use the shed in which the looms were situated by way of permissible use on licence basis only as incidental to the use of the looms and machinery. Incidental right to use the premises was provided by the agreement itself. The fact also remained that the assessee had been referred to as a licensee in the agreement. The Bombay Rent Hotel and Lodging and House Rates Control Act, 1947 (Rent Control Act), which was amended by the Amendment Act of 1973, had converted the status of the assessee from "licensee" to "deemed tenant" under section 5(11)(bb). Under section 15A, which was inserted by the Maharashtra Act 17 of 1973, certain licensees in occupation on February 1, 1973 would become tenants. By the provisions of section 55(2) of the Income-tax Act, tenancy rights have been considered to be a capital asset. Moreover, the definition of capital asset

under section 2(14) of the Act is wide enough to cover "property of any kind" and the type of right acquired by the assessee in the property used by it could not in any manner be said to be less than "any kind of property" held by the assessee. The assessee in fact was enjoying possession of the property and for peaceful vacation thereof it had received the amount which was described by the parties as amount paid for surrender of tenancy rights. The right of the assessee was undisputed and the nature thereof was "property of any kind" which was held by the assessee and was a capital asset within the meaning of section 2(14). The amount received by the assessee was assessable under the head "Capital gains" and eligible for exemption under section 54EC. (AY. 2009-10)
Kewal Silk Mills v. ACIT (2013) 21 ITR 121 (Mum.)(Trib.)

S.45 : Capital gains – Capital asset – Inam land – Prior to sale of land nomenclature of such land was changed from Inam to Patta, property could not be treated as Inam Land – Liable to capital gain [S.2(14)]
Where prior to sale of land nomenclature of such land was changed from Inam to Patta, property hence the land was held to be capital asset and liable to capital gain tax. (AY.2007-08)
Syed Nawab Hussain v. ACIT (2013) 24 ITR 180 / (2014) 61 SOT 18 (URO) (Hyd.)(Trib.)

S.45 : Capital gains – Business income – Adventure in the nature of trade – Development agreement – Sale consideration based on the rate of land at which the same had to be sold. The sale consideration to be assessed as capital gains and not as business income [Ss. 2(13), 28(i)]
The Assessee-Company was engaged in the hotel business. It entered into a development agreement with a real estate Developers to develop a residential colony. The Assessee was entitled to receive a percentage of sale consideration based on the rate of land at which the same had to be sold. The assessee treated sale consideration as capital gains. The Assessing Officer was of opinion that the activities of the assessee in getting and selling the land developed through developer and thereafter taking its share as per developer agreement, was adventure in the nature of trade. The CIT(A) upheld action of the Assessing Officer. On appeal by the assessee before the Tribunal, the Tribunal held that an assessee is not ordinarily engaged in business of purchase and sale of properties/land, normal/primary inference would be that any transaction of purchase/sale of land is not an adventure in nature of trade. (AYs. 2006-07 to 2008-09)
Marudhar Hotels (P) Ltd. v. ACIT (2013) 156 TTJ 697 / 92 DTR 33 (2014) 61 SOT 27 (URO) (Jodh)(Trib.)

S.45(4) : Capital gains – Distribution of capital asset – Retiring partner – Consideration received in cash – Section does not apply if the retiring partner takes only money towards the value of his share and there is no distribution of capital assets among the partners – No transfer of capital asset-No profit or gains payable by firm under section 45(4) [S.2(47)]
The assessee partnership firm was constituted on 9-1-1985 with Anurag Jain and Nirmal Kumar Dugar as its partners. On 13-4-1987, Nirmal Kumar Dugar retired from partnership and L.P. Jain entered the partnership and contributed capital for purchase of land to construct a housing complex. The assessee-firm purchased land for a consideration of Rs.2.5 lakhs. Another reconstitution took place on 1-7-1991 by which L.P. Jain retired from the firm and Pushpa Jain and Shree Jain were inducted as partners. Later, on 28-4-1993, five partners belonging to the Khemka Group were inducted. Prior to the induction of the Khemka Group, the assets of the firm were revalued. The three old partners retired through deed of retirement dated 1-4-1994 and received the enhanced value of the property in FY 1994-95. The AO held that the introduction of the Khemka Group and the retirement of the old partners was a device adopted to transfer the immovable property and to evade capital gains tax and stamp duty. He assessed the firm on capital gains. This was upheld by the CIT(A) though reversed the Tribunal. The Tribunal held that as the land continued to remain with the assessee-firm, there was no transfer u/s 2(47) and that the retiring partners had merely withdrawn the amounts standing to their credit in the capital account. On appeal by the department to the High Court, it was

felt that there was a conflict between, *CIT v. Mangalore Ganesh Beedi Works (2004) 265 ITR 658* and *CIT v. Gurunath Talkies (2010) 328 ITR 59* and the issue was referred to the Full Bench. HELD by the Full Bench:

(i) S.45(4) deals with a distribution of capital assets on the dissolution of a firm or other AOP or BOI or otherwise and provides that if in the course of such distribution of capital asset there is a transfer of a capital asset by the firm, the firm shall be chargeable to tax on capital gains. In order to attract s. 45(4), the conditions precedent are (1) there should be a distribution of capital assets of a firm; (2) such distribution should result in transfer of a capital asset by firm in favour of the partner; (3) on account of the transfer there should be a profit or gain derived by the firm and (4) such distribution should be on dissolution of the firm or otherwise. In other words, the capital asset of the firm should be transferred in favour of a partner, resulting in firm ceasing to have any interest in the capital asset transferred and the partners should acquire exclusive interest in the capital asset. On facts, the partnership firm purchased the property and it was not in the name of any partner. No partner brought that capital asset as capital contribution into the firm. Also, there was no dissolution of the firm because the firm continued to exist even after the retirement of some partners. What was given to the retiring partners is cash representing the value of their share in the partnership. No capital asset was transferred on the date of retirement. In the absence of distribution of a capital asset and in the absence of transfer of capital asset in favour of the retiring partners, no profit or gain arose in the hands of the partnership firm and so the question of the firm being assessed u/s 45(4) would not arise;

(ii) The department's argument that the transaction by which the five incoming partners brought money into the firm and the three erstwhile partners retired by taking money (leaving the capital asset in the firm) is a device adopted to evade payment of profits or gains is not acceptable because it proceeds on the premise that the immovable property belongs to the erstwhile partners and that after the retirement the erstwhile partners have taken cash and given the property to the incoming partners. The property belongs to the partnership firm and not to the partners. The partners only had a share in the partnership asset when they retired and took their share in cash, they were not relinquishing their interest in the immovable property. What they relinquished is their share in the partnership. Therefore, there is no transfer of a capital asset and no capital gains or profit arises (AY.1994-95)

CIT v. Dynamic Enterprises (2013) 359 ITR 83 / 95 DTR 97 / 263 CTR 138 (FB)(Karn.)(HC)

S.45(4) : Capital gains – Distribution of assets of firm on dissolution – Family settlement – Distribution of capital asset – Capital gain is chargeable [S.2(47)]

There was a family settlement and there was a retirement as well as induction on new partner. On account of re-constitution of partnership firm, assets of firm i.e. land and building had been revalued on mutual understanding to Rs.47.86 lakhs as against book value of Rs. 6.45 lakhs. Firm credited amount on account of revaluation in respective partners/capital accounts in their profits sharing ratios in firm and accordingly, firm had paid Rs.23.93 lakhs to retiring partners on account of revaluation of assets of firm. Tribunal held that when there was transfer of capital assets in nature of capital gains which was chargeable to tax under section 45(4).(AY. 1999–2000)

Bharat Ginning & Pressing Factory v. ITO (2013) 89 DTR 300 / 155 TTJ 343 / 60 SOT 93 (URO) (Ahd.)(Trib.)

S.45(4) : Capital gains – Admission of partner – Admission of a new partner in partnership firm does not attract provisions of section 45(4) [S. 2(47)]

Assessee-firm was engaged in business of builders and developers. It admitted a new partner. Assessing Officer found that assessee owned a plot of land 50 per cent of which was transferred in favour of new partner. He thus, opined that assessee-firm was liable to be taxed under section 45(4). On appeal, it was noted that from very beginning of partnership, plot in question was treated as stock-in-trade and even at end of relevant assessment year it was shown as current asset in balance sheet of firm. In view of above,

there was no extinguishment of right as envisaged by section 2(47) in case of assessee-firm. Admission of a new partner in partnership firm does not attract provisions of section 45(4). In the instant case no capital asset was transferred by the assessee during the relevant assessment year. From the very beginning of the partnership the plot of land in question was treated stock-in-trade by the assessee firm. Even on 31-3-2008 it was shown as current asset (i.e. W-I-P) in the balance sheet. The Assessing Officer has nowhere rebutted/ doubted this factual position. Considering the above, the Commissioner (Appeals) rightly held that no capital asset was transferred by the assessee-firm and, hence, provisions of section 45(4) should not have been invoked. In the result, the revenue's appeal has to be dismissed. (AY. 2008-09)
ITO v. Fine Developers. (2013) 55 SOT 122 (Mum.)(Trib.)

S.47 : Capital gains – Transfer of shares – Sale of wholly owned subsidiary – Provision will not apply where no charge on capital gain was involved [S.4 of Gift-tax Act, 1958]
Assessee company acquired shares from its holding company which the AO noted to have been transferred far below market value. He, therefore, assessed the difference between market value of shares and actual consideration as deemed gift. Held, provisions of section 47 would not apply to a case where no charge on capital gain was involved. Furthermore, whether the transaction was to be held as transfer or not, had to be seen in context of provisions of Gift-tax Act and not under provisions of Income-tax Act. (AY. 1994-95)
New Ambadi Estates (P.) Ltd. v. JCIT (2013) 358 ITR 360 / 218 Taxman 164 (Mag.) (Mad.)(HC)

S.47 : Capital gains – Transaction not regarded as transfer – Assessee acquiring title directly or indirectly before 1-4-81, the FMV as on 1-4-1981 was to be adopted as cost of acquisition for purpose of computing capital gain on sale of said property. [Ss. 2(42A), 49(1)(ii), 55]
In this case, Ld. CIT(A) agitates the direction by the Ld. CIT(A) in taking the fair market value of the capital asset as on 1-4-1981, being prior to that date, as its cost of acquisition, as against of the said value by the Assessing Officer. The issue in dispute before Tribunal was whether from which date the cost inflation index would apply in computing the LTCG under reference. Dismissing the appeal, the Tribunal held that the conveyance of property through inheritance or by will is not regarded as a transfer under section 47 of the Act. The cost of acquisition to the previous owner i.e., the owner who comes to own the property through inheritance by will is not regarded as a transfer under section 47 of the Act. The cost of acquisition to the previous owner i.e., to the owner which comes to own the property in a manner other than these specified in section 49(1)(ii), or succession or inheritance or devolution as per section 49(1)(iii) is to be deemed as the cost of acquisition in the hands of the assessee, in whose hands the entire capital gains on the transfer of the property is to be computed. The fiction extends to be holding period of the asset as well, so that the lives of the testator and the legatee/s are combined for reckoning the holding period (Expl. 19b) to section 2(42A). Further, where the date of acquisition is prior to 1-4-1981 i.e., the cut-off date, the assessee, may at its option substitute the fair market value of the capital asset as on that date for its cost of acquisition. Therefore the cost held that the treatment of FMV of the asset as on 1-4-1981 was to be treated as the cost of acquisition. (AY. 2006-07)
ITO v. Noella P. Perry (Ms.) (2013) 56 SOT 495 (Mum.)(Trib.)

S.47 : Capital gains – Transaction not regarded as transfer – Evaluation of assets – Transfer of assets and liabilities by proprietary concern to company – Revaluation of assets-benefit of section 47(xiv) is allowable-denying exemption was not justified. [S. 45, 47(xiv)]
Assessee a proprietary concern having business of property development. During the year he had transferred all his assets and liabilities to a private limited company as per deed of succession. In Deed of Succession dated 31-3-2009 assessee had re-valued assets and liabilities at Rs. 963 crores and against entire consideration he was allotted equity shares in said company. Net worth of proprietary concern of assessee was Rs. 1.61 crores. Assessee claimed provisions of section 47(xiv) were applicable to transfer so made. Assessing Officer held that provisions of section 47(xiv) were not applicable in instant case, as

assessee had not complied with condition stipulated under clause (c) of proviso to section 47(xiv). He was of view that assessee had received consideration by way of allotment of shares in company and value of those shares was much more than value of assets as was disclosed in books of proprietary concern. Since clause (c) of proviso to section 47(xiv) permitted receiving of consideration or benefit directly or indirectly by way of allotment of shares in a company and it did not prohibit receipt of higher value of shares because of re-valuation of assets at time of succession, it could not be said that assessee had not complied with condition stipulated under clause (c) of proviso to section 47(xiv). In appeal Commissioner (Appeals) held that the assessee is entitled to exemption. On appeal by revenue the Tribunal held that it is not a case where the assessee has received any consideration or benefit other than allotment of shares in company. Clause (c) of proviso to section 47(xiv) does not prohibit receipts of higher value of shares because re-valuation of the assets at the time of succession. Therefore assessee is entitled to benefit of section 47(xiv) and the order of the Commissioner (Appeals) is confirmed. (AY.2009-10)
ACIT v. Joe Marcelinho Mathias (2013) 143 ITD 132 / 92 DTR 331 / 156 TTJ 777 (Panaji)(Trib.)

S.47(ii) : Capital gains – Transfer – Amount received by partner on dissolution of firm is not liable to capital gain tax [Ss. 2(47), 45(1), 45(4)]
Payment to assessee partner on dissolution of firm towards his capital contribution did not constitute "transfer" so as to attract capital gains tax. (AY. 1989-90)
Chalasani Venkateswara Rao v. ITO (2012) 349 ITR 423 / (2013) 83 DTR 200 / 257 CTR 39 (AP)(HC)

S.47(ii) : Capital gains – Capital asset – Transfer – Association of persons – Distribution of assets on dissolution of Association of persons prior to omission of clause 47(ii) w.e.f. 1-4-1988. [Ss.2(31), 2(47), 45)]
The question before the High Court was whether on distribution of capital asset on the dissolution of the firm, body of individuals or association of persons did not constitute "transfer" of a capital asset for the purpose of attracting the provisions of capital gains. The court held that when the status of an assessee is treated as an association of persons, on the dissolution or distribution of assets as a natural corollary, section 47(ii) would ensure to the benefit of the assessee to exclude the operation of section 45. Section 47(ii) was omitted by the Finance Act, 1987, with effect from April 1, 1988 and sub-sections (3) and (4) of section 45 were inserted by the Finance Act, 1987, with effect from April 1, 1988. The Court held that distribution of assets on dissolution of association of persons prior to omission of clause is not transfer. The assessee is entitled to the benefit of section 47(ii) of the Act. (AYs. 1985-86, 1986-87)
Midland Theatres v. ACIT (2013) 350 ITR 676 / 258 CTR 183 (Mad.)(HC)
A.R. Srinivasan (BY LRS) v. ACIT (2013) 350 ITR 676 / 258 CTR 183 (Mad.)(HC)
A.R. Srinivasan (HUF) v. ACIT (2013) 350 ITR 676 / 258 CTR 183 (Mad.)(HC)

S.47(xiv) : Capital gains – Transaction not regarded as transfer – Sole proprietary concern succeeded by a company – Allotment of shares after revaluation of shares
The Tribunal held that the receipt of higher number of shares because of revaluation cannot be treated as consideration of benefit received other than by allotment of shares. The Tribunal dismissed the appeal filed by Revenue and upheld the order of CIT(A) that assessee is entitled to exemption. (AY. 2005-06)
ACIT v. Nayan L. Mepani (2012) 49 SOT 641 / (2013) 156 TTJ 768 (Mum.)(Trib.)

S.48 : Capital gains – Inherited property – Indexed cost – Cost of acquisition of such asset is to be computed with reference to year in which previous owner first held said asset [S. 49]
For the purpose of computing long-term capital gains in hands of an assessee who has acquired an asset under inheritance, indexed cost of acquisition of such capital asset is to be computed with reference to year in which previous owner first held said asset. (AY. 2006-07)

CIT v. Gautam Manubhai Amin (2013) 218 Taxman 319 (Guj.)(HC)

S.48 : Capital gains – Cost of improvement – Claim of tenants – Entitled to indexation benefit [S.45]

Held, there was no obligation on the assessee to settle claim of tenants for getting vacant possession. Hence, the compensation paid to tenants for delivering vacant possession was not transfer of development rights but cost of improvement, and entitled to indexation benefit. (AY.2003-04)
CIT v. Spencers and Co. Ltd. (No.3) (2013) 359 ITR 644 (Mad.)(HC)

S.48 : Capital gains – Computation – Full value of consideration – Family arrangement-Sale of shares at loss due to family arrangement disallowance of loss was not valid [S.45]

Assessee company sold some shares and claimed long-term capital loss on sale of such shares. The Assessing Officer disallowed the claim of loss on the plea that the shares were sold due to family arrangement at the low price and hence the loss had been contrived. Tribunal allowed the claim of loss. On appeal by revenue the Court held that the Assessing Officer disallowed the assessee's claim on plea that the shares were sold due to family arrangement at very low price. However, assessee's claim was to be allowed as the Assessing Officer had merely alleged that shares were sold at very low price, but he had not discharged burden of proving the same. (AY. 2004-05)
CIT v. Tainwala Chemicals & Plastics India Ltd. (2013) 215 Taxman 153 (Bom.)(HC)

S.48 : Capital gains – Computation – Full value of consideration – Report of inspector on verbal enquiry cannot be relied on for determining the consideration

The Inspector had made verbal enquiries from two-three persons with regard to correct valuation of two plots sold by respondent-assessee after a gap of three years. The Tribunal was held to be justified in not placing any reliance on Inspector's report and in adopting only other values that were available to it which were circle rates of two localities at time of sales of said plots. (AY.2003-04)
CIT v. Delhi Housing & Finance Corporation (2013) 215 Taxman 11(Mag.) (Delhi)(HC)

S.48 : Capital gains – Computation – Full value of consideration – Relying on the sale agreement recovered from the assessee's premises and the income-tax return of purchaser, the Department was justified in enhancing the full value of consideration [S. 45]

Assessee sold an immovable property under sale deed for a sum of Rs. ` 2.33 lakh. A survey was carried out at assessee's premises in course of which a sale agreement was found disclosing that assessee's wife had agreed to sell said property for a sale consideration of Rs.6.48 lakh. Assessing Officer relying on sale agreement, enhanced amount of capital gain arising from sale of property. Tribunal confirmed order of Assessing Officer. On appeal, it was noted that agreement of sale was executed by assessee's wife which was substantiated by income tax returns filed by purchaser also. It was in such circumstances sale consideration of Rs. 6.48 lakhs was confirmed by Commissioner (Appeals) and Tribunal. High Court held that on facts, there was no legal infirmity warranting interference with Tribunal's order.
M. Basheer Ahamed v. CIT (2013) 352 ITR 157 / 214 Taxman 302 / 263 CTR 359 / 93 DTR 421 (Mad.)(HC)

S.48 : Capital gains – Computation – Inherited property – Memorandum of understanding (MOU) – Consideration stated in the MOU cannot be ignored as personal arrangement [S.45]

Assessee and his brother sold an inherited property for Rs.14 crores. A memorandum of understanding (MOU) was entered into by them as per which assessee received only Rs. 6 crores for sale of his rights and he offered same to tax. Sale document also showed that assessee had received Rs.6 crores as sale consideration. The Court held that the Assessing Officer was not justified in assessing sale consideration at Rs. 7 crores treating, said MOU as personal arrangement. In favour of assessee. (AY.2006-07)

CIT v. Raman Kumar Suri (2013) 81 DTR 33 / 255 CTR 257 / 212 Taxman 411 (Bom.)(HC)

S.48 : Capital gains – Computation – Cost of acquisition – Will – Relevant year

The property was acquired by mother in the year 1974,assessee acquired the property in accordance with mother's will dated 11th October, 1987 and sold in 2005, benefit of indexation is to be given from 1st April, 1981 and not from 1987. (AY.2006-07)

CIT v. Raman Kumar Suri (2013) 81 DTR 33 / 255 CTR 257 / 212 Taxman 411 (Bom.)(HC)

S.48 : Capital gains – Cost of improvement – Cost incurred by previous owner – Indexation benefit is to be allowed from the year of improvement [S.2(42A), 49]

Cost of improvement to property by previous owner is to be included and indexation benefit has to be allowed on such cost of improvement from year of improvement. (AY. 2007-08)

Lalitha Rathnam (Mrs.) v. ITO (2013) 153 TTJ 59 (UO) / 59 SOT 2(URO) (Chd.)(Trib.)

S.48 : Capital gains – Computation – Cost of acquisition of shares

Assessee sold the shares as per book value to parent company. Assessing Officer made addition by reducing the cost shown as per books of account at market rate. CIT(A) confirmed the order of Assessing Officer. The Tribunal held that the transaction is solely between the parent company and the holding company, the same cannot be treated as a sham transaction as the shares have been transformed purely on the book value disclosed earlier. It is not a case of make belief arrangement or colourable device as held by the Assessing Officer, as nothing has been brought on record that the book value which was shown in the earlier years was fictitious, specifically when the same has been accepted by the Department in scrutiny proceedings. The addition made on account of short-term capital gain by reducing the value if cost of acquisition of shares is uncalled for. The cost of acquisition has to be taken as per book value for the purpose of computation of short-term capital gain. (AY. 2007-08)

Euro RSCG Advertising (P) Ltd. v. ACIT (2012) 53 SOT 90 / (2013) 154 TTJ 389 / 85 DTR 272 (Mum.)(Trib.)

S.48 : Capital gains – Sale of shares by a non-resident to resident – Breach of RBI guidelines – Addition cannot be made in assessment proceedings on the basis of price fixed by RBI guidelines [S.144C, Foreign Exchange Management Act, RBI guidelines]

The Assessee is a tax resident of Germany. It had an Indian subsidiary. During the year the Assessee sold the part of shares held by its Indian subsidiary taking the selling price at Rs 390 per share. The AO enhanced the amount of capital gains taking a view of Guidelines issued by RBI, selling price per share was to be taken at Rs. 400 per share. Guidelines issued by RBI are addressed to authorised dealer banks for FEMA purposes and, thus, It is FEMA authorities and not Income-tax Authorities who are competent to take appropriate action against assessee on breach of said Guidelines. Therefore, where in view of Income-tax Authorities, assessee while computing capital gains arising on sale of shares committed violation of these Guidelines, appropriate course open to them was to bring it to notice of authorised dealer banks. (AY. 2007-08)

Zeppelin Mobile System GmbH v. Add. CIT (2013) 58 SOT 18 / 154 TTJ 684 / 87 DTR 34 (Delhi)(Trib.)

S.48 : Capital gains – Computation – Leasehold Land acquired at NIL value prior to 1-4-1981 – Determination of "fair market value" – Provision of section 55(2)(a)(ii) is not applicable while valuing the "cost of acquisition" of the land and value of the lease-hold rights in the land in question has to be determined in accordance with the section 48 of the Act by valuing "fair market value" of the land as on 1-4-1981 [S.55(2)(a)]

The assessee had taken land on lease for 98 years *vide* registered deed dated 15-9-1966. Revenue authorities took the cost of acquisition of the land as NIL by invoking the provisions of section

55(2)(a)(ii). The assessee claimed that in accordance with the scheme of the Act and in particular the provision of section 48 of the Act, the assessee was entitled to adoption of fair market value of the land as on 1-4-1981 and the indexed cost of the acquisition thereof. On appeal by the assessee to the Tribunal, held partly allowing the appeal:
Section 55(2)(a) applies only in relation to the capital assets specifically mentioned in the Section only. The capital assets as mentioned in the Section are exhaustive and all inclusive of capital assets, such as goodwill, trade mark brand name, right to manufacture, produce or process any article or thing or right to carry on any business, tenancy rights, stage carriage permits or loom hours, and being an exhaustive list of capital assets, any other capital asset such as land etc. could not be included for the purpose of valuation of "cost of acquisition" for the purposes of sections 48 and 49. The Legislature has intentionally not added word "land" in the provision of Section 55(2)(a). Accordingly, the value of the leasehold rights in the land in question of the assessee, has to be determined in accordance with the provision of section 48 of the Act by valuing "fair market value" of the land as on 1-4-1981 and the indexed cost of acquisition has to be determined in order to assess long term capital gains in the hands of the assessee; and cost cannot be taken as 'nil'. (AY. 2007-08)
Natraj v. Dy. CIT (2013) 56 SOT 23 / 152 TTJ 619 / 83 DTR 201 (Ahd.)(Trib.)

S.48 : Capital gains – Cost of improvement – Making alteration to semi-finished building – Cost of improvement of property [S.45]
The assessee, a playback singer, carried out the unfinished construction of the building without which he could not have used that property as dubbing and recording theatre. Since the contractors left without completing the work, the assessee completed the work himself. He paid amounts to contractors deducting tax at source. Held, the assessee could not be denied cost of improvement for the purpose of computing capital gains because the contractors to whom the payments were made did not carry out the work. (AY. 2007-08)
S. P. Balasubramaniyam v. ITO (2013) 144 ITD 525 / 24 ITR 47 (Chennai)(Trib.)

S.48 : Capital gains – Computation – Cost of acquisition – Tenancy rights – Demolishing old property and construction of new property – Cost paid by assessee and not on the basis of valuation report [S. 55(2)]
Assessee bought the property of which she was one of the tenants for Rs. 4.75,000. All the tenants entered into an agreement on 10th June, 1999 and formed a co-operative society. The old building was demolished and a new building was constructed thereon. The tenants got possession in AY. 2002-03. Assessee sold her property on 17th September, 2004. Held that the agreement dated 10th June, 1999 itself gave interest and right in the impugned property to the assessee along with other tenants, the transaction clearly involved long-term capital gains. Assessee claimed cost of acquisition at Rs.10.04475 based on approved valuer. The Tribunal held that, cost of acquisition of impugned property would be taken at Rs. 4,75,000/- being payment made by the assessee and not as per the higher value declared by the approved valuer. (AY. 2005-06)
Nila V. Shah (Mrs.) v. ITO (2012) 51 SOT 461 / (2013) 83 DTR 218 (Mum.)(Trib.)

S.48 : Capital gains – Computation – Cost of acquisition – Fair market value as on 1st April 1981 of a leasehold land is also to be determined [S. 55(2)(a)]
Assessee acquired leasehold land for nil value prior to 1st April 1981, and sold the same in 2006. The provisions of s. 48 were held to be applicable and the fair market value of the land as on 1st April, 1981 along with the indexed cost of acquisition has to be determined in order to arrive at the long-term capital gain. Cost of acquisition of land cannot be taken as nil in accordance with the provisions of s. 55(2)(a)(ii). Approved valuer having estimated the fair market value of the land at Rs. 1, 200 per sq. yd. as on 1st April 1981, disregarding the fact that it was leasehold land, it would be fair and reasonable to value the leasehold rights of the assessee at ` 800 per sq. yd. as on 1st April 1981, and to determine the long-term capital gain. (AY. 2007-08)

Natraj v. Dy. CIT (2013) 83 DTR 201 / 56 SOT 23 / 152 TTJ 619 (Ahd.)(Trib.)

S.48 : Capital gains – Computation – Cost of acquisition – Fair Market value as on 1st April, 1981. [S. 2(22B), 2(28), 45, 55(2)(b)(i)]
It was held that average value of land as adopted by the revenue at Rs. 27,030 per acre on the basis of registered sale deeds cannot be considered as the fair market value of the land in question as on 1st April, 1981, within the meaning of s. 2(22B) r.w.s 55(2) (b) (i) when the fair market value at Rs. 5 lacs per acre adopted by the assessee is supported by the certificate issued by the Patwari and duly endorsed by the Tehsildar and the AO has adopted fair market value of similar land at Rs. 1,80,000 per acre in the asst. order for Asst. year 2005-06 passed u/s. 143(3). On the facts of the case, the fair market value of the land in question as on 1st April, 1981 is to be taken at Rs. 3.50 lacs per acre for the purpose of computation of capital gains. (AY. 2008-09)
Manjit Singh v. Dy. CIT (2013)141 ITD 21/ 151 TTJ 1 (UO) / 21 ITR 149 (Chd.)(Trib.)

S.48 : Capital gains – Deductions – Payments made to sisters and brothers held to be not allowable as deduction as they had no title over the property
The Assessee sold his ancestral property. Out of sale consideration, the assessee paid certain amount to sisters and brothers of his forefathers and same was deducted while computing capital gains. The Assessing Officer disallowed deduction claimed by the assessee on the ground that there was no such provision under the Income-tax Act. The CIT(A) upheld disallowance. On appeal by the assessee before the tribunal, the tribunal held that there was no material to show that brothers and sisters of forefathers of assessee having any title over property, assessee was not entitled for deduction towards the payment to those persons. (AY.2007-08)
Syed Nawab Hussain v. ACIT (2013) 24 ITR 180 / (2014) 61 SOT 18 (URO) (Hyd.)(Trib.)

S.49 : Capital gains – Cost of acquisition – Gifted property – Cost to previous owner can be adopted on the basis of valuation report [Ss. 242A, 48]
Cost of acquisition in case of property received as gift has to be reckoned with reference to cost to previous owner and valuation can be adopted on basis of valuation report in absence of any other material on record. (AY. 2007-08)
Lalitha Rathnam (Mrs.) v. ITO (2013) 59 SOT 2 (URO) / 153 TTJ 59 (UO) (Chd.)(Trib.)

S.49 : Capital gains – Previous owner – Cost of acquisition – Gifts – Base year – Acquisition by previous owner or 1-4-1981. [Ss.2(22B), 2(42A), 55]
The assessee acquired land as a gift from his mother and sold that land. He opted for fair market value of land as on 1-4-1981 under section 55(2)(b)(ii), calculated on basis of Patwari's certificate and a comparable sale transaction. A.O. held that period of holding was to be reckoned from date of gift, ignoring period for which it was held by donor. The assessee therefore calculated cost of acquisition on date of gift and indexed it taking it as base year. Tribunal held that where capital asset became property of assessee by gift or other modes mentioned in section 49(1), period of holding of previous owner was to be included while calculating capital gains. Therefore, cost of acquisition of such capital asset was cost to previous owner or fair market value on 1-4-1981, at option of assessee, and indexation was to be done taking year of acquisition by previous owner or 1-4-1981, as the case may be, as base year. (AY. 2006-07)
Vishwanath Sharma v. ACIT (2013) 58 SOT 267 (Chd.)(Trib.)

S.49 : Capital gains – Previous owner – Cost of acquisition – Cost incurred by successor cannot be added to cost. [S. 45, 48]
The assessee sold a residential flat for sum of Rs.1.75 crores. While computing capital gain, the assessee claimed a deduction of Rs. 35 lakhs on the ground that said sum was paid as a condition precedent subject to which only the said property stood bequeathed to, among others, her. The

Assessing Officer rejected assessee's claim holding that amount claimed fell neither of clause (i) or clause (ii) of section 48 of the Act. Commissioner (Appeal) also confirmed the order of Assessing Officer. On appeal Tribunal held that in case of acquisition of property by succession it is only cost to previous owner, that would stand to be considered as cost of acquisition, and there is no scope for adding thereto cost, if any, incurred on acquisition by successor. The same has again been found as well settled by the court, the law does not recognised transfer by way of Will so that even if it were so condition precedent, entitling a cost to the legatee/s it is only cost to the previous owner. Appeal of assessee was dismissed. (AY. 2006-07)
Sonia Maria Mistry v. ITO (2013) 141 ITD 508 / 89 DTR 348 / 155 TTJ 458 (Mum.)(Trib.)

S.50 : Capital gains – Computation – Block of asset – Assets converted into stock in trade or let out – Concomitant financial implications – WDV of block which was to be adjusted [Ss.2(11), 32 43(6), 50C)
The assessee owned two house properties namely 'Arun chambers' and 'Nariman Bhavan" Both were used for business in the immediately preceding year and constituted block of assets i.e. 'Buildings' as at the beginning of the current year. The assessee sold 'Arun chambers' for a consideration of Rs. 39 lakhs. The AO adopted the stamp valuation of Rs. 72.63 lakhs. In appeal the assessee contended that the relevant asset being only depreciable asset only section 50 is applicable and section 50C. CIT(A) allowed the appeal of assessee. On appeal by revenue the Tribunal held that in view of the Special bench judgment in *ITO v. United Marine Academy (2011) 130 ITD 113(SB)(Mum.)(Trib.)* both sections 50 and 50C would apply vis-a-vis the same transaction. As regard the computation is concerned the Tribunal held that where an asset itself is removed by assessee from relevant block e.g., where same is converted into stock-in-trade or let out, same has to be excluded from relevant block of assets, with concomitant financial implications. Assessee's case fell under section 50(2) and, accordingly, WDV of block which was adjusted for removal of property that was let out during year was to be taken into account for computing STCG under section 50. For the purpose of section 50C stamp valuation will be substituted. (AY. 2006-07).
ITO v. Sabah Investment (P.) Ltd. (2013) 60 SOT 173 / (2014) 146 ITD 396 / 161 TTJ 544 (Mum.)(Trib.)

S.50B : Capital gains – Slump sale or itemised sale – Mere execution of a conveyance of immoveable property by itself, does not constitute sale of itemised assets – Matter remanded. [S.45]
The mere execution of a conveyance of immovable properties by itself do not constitute sale of itemised assets. It could not be made out whether any other movable assets used by the transferor or the assessee were also the subject matter of sale. It could not be held that sale was a slump sale. Matter was remanded for reconsideration. (AY. 1996-97)
CIT v. Mahabaleswara Enterprises (2013) 86 DTR 297 / 218 Taxman 287 (Karn.)(HC)

S.50B : Capital gains – Slump sale – Scheme of amalgamation – Transfer of assets without monetary consideration is not a "slump sale" – Not liable for capital gains [S.2(42C)]
The assessee transferred its manufacturing division to Novapan Industries Ltd under a scheme of amalgamation pursuant to which Novapan transferred investments worth Rs.25.24 crore to the assessee and allotted shares worth Rs. 6.81 crore to the assessee's shareholders. There was no monetary consideration. The AO held that the transfer of the manufacturing division was a "slump sale" and that it attracted s. 50B. He computed capital gains on that basis. The CIT(A) reversed the AO and held that there was no slump sale. On appeal by the department to the Tribunal HELD dismissing the appeal:

S. 2(42C) defines a 'slump sale' to mean the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. A plain reading of s. 2(42C) makes it clear that to qualify as a slump sale, two conditions have to be satisfied viz., (i) there must be transfer of one or more undertakings as a result of sale and (ii) the sale should be for a lump sum consideration without values being assigned to the individual assets and liabilities. The presence of money consideration is an essential element to a transaction of sale. If the consideration is not money but some other valuable consideration it may be an exchange or barter but not a sale. In the present case, as no monetary consideration was received by the assessee for transfer of the assets and liabilities of the manufacturing division to Novapan Industries Ltd, the transaction is not a "slump sale" and does not attract s. 50B. (AY. 2007-08)
ITO v. Zinger Investments (P.) Ltd. (2013) 27 ITR 218 (Hyd.)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Reference to Valuation Officer – Report of Valuation Officer – Binding nature – Opportunity of hearing must be given to the Valuation Officer by the Tribunal – Matter was set aside. [Ss.16A and 24 of the Wealth-Tax Act, 1957]
Valuation officer is an independent and distinct statutory forum for resolving controversy regarding determination of market value of property with all necessary powers; its order or report is made binding on Assessing Officer. When report/order of Valuation Officer under section 50C(2) is objected to by assessee, CIT(A) or Tribunal are obliged to extend an opportunity of hearing to such Valuation Officer.
CIT v. Prabhu Steel Industries Ltd. (2013) 218 Taxman 290 / (2014) 265 CTR 581 (Bom.) (HC)

S.50C : Capital gains – Full value of consideration – Stamp valuation – When assessee objected for valuation – Reference to Valuation Officer is mandatory [S.45]
Where specific objection was made by assessee as to Assessing Officer adopting market value of property under section 50C(2), Assessing Officer ought to have referred valuation of capital asset to Valuation Officer. (AY.2009-10)
S. Muthuraja v. CIT (2013) 218 Taxman 73(Mag.) (Mad.)(HC)

S.50C : Capital gains – Full value of consideration – Sale to sister concern – Distress sale – Sale was more than stamp value however lesser value than to sale to other parties – Price at which the assessee sold the property to third party cannot be the basis for determining the capital gain in respect of sale of the property to its sister concern. [S.45]
During the year, the assessee-company sold land to its sister concern at a price which was greater than the guideline value. The assessee submitted that it needed money for its construction work but could not raise it from its financial institution as it had exceeded its limit. Therefore, the property in question was disposed of as a distress sale to a sister concern which could profitably put the property to use. Since the property was not sold outside to a third party, but to its sister concern, which never parted with the property, the sale was claimed to be at arm's length by the assessee. The Assessing Officer did not accept the assessee's contentions and calculated capital gains taking the market value at which the assessee had sold land to a third party. On appeal, the Commissioner (Appeals) and the Tribunal allowed assessee's appeal. On further appeal by the revenue, the High Court held that the legality of the sale of land to sister concern is not questioned and the consideration received has been accepted. Admittedly the said consideration is more than the guidance value prescribed by the Government for sale of such property. Assessee sold the land as it needed funds. Price at which the assessee sold the property to third party cannot be the basis for determining the capital gain in respect of sale of the property to its sister concern. (AY.2005-06)
CIT v. Velankani Information Systems (P.) Ltd. (2013) 218 Taxman 88 / 94 DTR 357 / (2014) 265 CTR 250 (Kar.)(HC)

CIT v. Golfink Software Park (P) Ltd. (2013) 218 Taxman 88 / 94 DTR 357 / (2014) 265 CTR 250 (Kar.)(HC)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Extent to which reliance can be placed by AO on stamp duty valuation explained – Recording of reasons mandatory – Matter remanded [S.55A]

The assessee sold property for Rs. 25 lakhs. The AO held that as the property was valued by the stamp valuation officer at Rs. 78.48 lakhs and as the purchaser had paid stamp duty on that basis, the capital gain had to be worked out on that basis applying s. 50C(2). The assessee claimed that the property was tenanted and produced valuation reports to justify the sale consideration. On appeal by the assessee the CIT(A) held that the AO ought to have referred the matter to the DVO and directed him to adopt the value arrived at by an approved valuer. This was approved by the Tribunal. On appeal by the department to the High Court, HELD:

(i) S. 50-C is a rule of evidence in assessing the valuation of property for calculating capital gains and is rebuttable. It is well known that an immovable property may have various attributes, charges, encumbrances, limitations and conditions. The Stamp Valuation Authority does not take into consideration the attributes of the property for determining the fair market value and determines the value in accordance with the circle rates fixed by the Collector. The object of valuation by the Stamp Valuation Authority is to secure revenue on such sale and not to determine the true, correct and fair market value for which it may be purchased by a willing purchaser subject to and taking into consideration its situation, condition and other attributes such as it occupation by tenant, any charge or legal encumbrances;

(ii) If the assessee raises an objection that the value assessed by the stamp valuation authority u/s 50C (1) exceeds the fair market value of the property on the date of transfer, the AO has to apply his mind on the validity of the objection and may either accept the valuation of the property on the basis of the report of the approved valuer filed by the assessee or invite refer the valuation of the capital asset to the DVO in accordance with s. 55-A. In all these events, the AO has to record valid reasons, which are justifiable in law. He is not supposed to adopt an evasive approach of applying the deeming provision without deciding the objection or referring the matter to the DVO u/s. 55-A as a matter of course without considering the report of the approved valuer submitted by the assessee.(AY.2005-06)

CIT v. Chandra Narain Chaudhri (2013) 219 Taxman 60 / (2014) 99 DTR 101(2014) 271 CTR 80 (All.)(HC)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Stock in trade provision is not applicable [S. 69]

The assessee sold a plot of land which was held by him as stock-in-trade. Since the sale of plot gave rise to business income and not to capital gain and, therefore, section 50C would have no application.(AY.2008-09)

CIT v. Mukesh & Kishor Barot Co-owners (2013) 215 Taxman 151 / 91 DTR 220 (Guj.)(HC)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Registration value adopted by the government – Entire amount invested would get the benefit irrespective of fact that funds from other sources are also utilised [S. 54F]

When the registration value was not the disputed question, now, at this stage it was not permissible for the assessee to contend that the registration value was excessive and disproportionate to the market value of the property. In the absence of contra material, the deemed full value of consideration as stated in section 50C would come into effect. However, when the capital gain is assessed on notional basis, whatever amount is invested in new residential house within the prescribed period u/s 54F, entire amount invested, should get the benefit of deduction irrespective of the fact that the funds from other sources are utilized for new residential house. In that context, whatever total amount

actually invested by the assessee for construction of house should be deducted irrespective of the fact that part of the funds invested were from different sources and not from the capital gains.
Gouli Mahadevappa v. ITO (2013) 356 ITR 90 / 215 Taxman 145 / 88 DTR 59 / 259 CTR 579 (Karn.)(HC)
Editorial: Tribunal order in Shri Gaouli Mahadevappa v. ITO (2011) 128 ITD 503 (Bang.)(Trib.) is partly affirmed.

S.50C : Capital gains – Full value of consideration – Stamp valuation – Amendment of section 50C w.e.f. 1-10-2009 is not retrospective [Circular No. 5 of 2010, dated 3-6-2010]
The insertion of the words "or assessable" in section 50C of the Income-tax Act, 1961, with effect from October 1, 2009, is neither a clarification nor an explanation to the existing provision and it is only an inclusion of new class of transactions, namely, the transfer of properties without or before registration. Before the amendment, only transfer of properties where the value was adopted or assessed by the stamp valuation authority were subjected to section 50C application. However, after introduction of the words "or assessable" such transfers where the value is assessable by the valuation authority are also brought into the ambit of section 50C. Thus, such introduction of a new set of class of transfer would certainly have prospective application only. In Circular No. 5 of 2010, dated June 3, 2010, issued by the Board, it is made clear that the amendment made by the Finance (No. 2) Act, 2009, is prospective in nature and cannot be applied retrospectively (AY. 2005-06).
CIT v. R. Sugantha Ravindran (2013) 352 ITR 488 / 214 Taxman 543 / 90 DTR 353 / 260 CTR 412 (Mad.)(HC)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Registration in subsequent year – Provisions of section 50C is applicable [S. 2(47(V)]
The assessee was owner of a part of land. In the year 1996 he agreed to sell his land to several buyers. The assessee claimed to have been given possession of land in that year. However, the conveyance deeds were executed in the year relevant to assessment year 2006-07, while registration was done in the year relevant to assessment year 2007-08. The assessee offered sale proceeds for taxation in the year of receipt 2005-06 of sale consideration. The assessee's further case was that section 50C had no application in the instant case. The Assessing Officer held that the provision of section 50C was applicable for determining full value consideration. He applied the valuation made by the stamp valuation authority for calculation of stamp duty for the assessment year 2006-07. The assessee's appeal was accepted by the Commissioner (Appeals). On revenue's appeal, the Tribunal reversed the order of Commissioner (Appeals) and applied section 50C by taking the value of land assessed by the Stamp Valuation authority for the relevant assessment year. The Court held that where the land or building or both are sold or otherwise transferred, such transfer shall be deemed to have taken place only after the stamp duty has been assessed by the State Government, because it is on the valuation made for the purpose of stamp duty that the tax is payable. The assessee cannot contend that section 50C would not be applicable merely because the Deed of Conveyance had not at that time been executed or registered (AY.2006-07)
Bagri Impex (P.) Ltd. v. ACIT (2013) 214 Taxman 305 / 89 DTR 89 / 259 CTR 553 (Cal.)(HC)

S.50C : Capital gains – Valuation report – Completion of assessment. [S. 55A, 155(15)]
Departmental Valuation Officer's value outside scope of section 155(15). Assessment was done adopting stamp value. Report of Valuation Officer disclosing enhanced value was received after completion of assessment. Held, the Assessing Officer cannot invoke section 155(15) to modify order in accordance with report of Departmental Valuation Officer. (AY. 2006-07)
Addl. CIT v. Rajkumar L. Daryanani (2013) 28 ITR 72 (Mum.)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Dispute in valuation of Stamp Valuation Authority – Reference to be made to DVO

The assessee had sold two properties. The A.O. invoked Sec. 50C computing capital gains, rejecting assessee's for reference to DVO on ground that assessee had disputed valuation determined by Stamp Valuation Authority. On appeal to CIT, the assessee submitted that he had not moved court for an order with regards to valuation; however, he filed an affidavit that he disputed the valuation. However, the CIT(A) invoking clause (b) of sub-section (2) of Section 50C, held that once assessee had raised a dispute to stamp valuation, reference could not be made to the DVO. The Tribunal remanding the matter held A.O. should have examined objection of assessee in light of documentary evidence and if satisfied, might refer matter of valuation to Valuation Officer. (AY. 2007-08)
Pawan Kumar Agarwal v. ACIT (2013) 145 ITD 169 (Luck.)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Sale by developer – Sale of stock-in-trade provision is not applicable [S.45]
Provisions of section 50C were not applicable to cases where income from sale of residential flats was computed under the head 'profit and gains of business or profession'. (AY. 2009-10)
ITO v. Inderlok Infra-Agro (P.) Ltd. (2013) 59 SOT 10 (URO) (Mum.)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Lease hold rights – Provision is applicable – Sale of rights in plots and buildings-Matter remanded since complete details were not available
The assessee had taken a plot of land on lease from Maharashtra Industrial Development Corporation (MIDC) in the year 1967 for a lease of 95 Years. It had also paid the premium. During the relevant year the assessee had sold part of plot with the consent of MIDC. The AO applied the provisions of section 50C. The contention of the assessee was since this plot of land was a leasehold rights only, it was neither land nor a building and therefore, section 50C would not be applicable to such transactions. In appeal Commissioner (Appeals) upheld the order of AO. On appeal the Tribunal held that since the assessee transferred rights in plots as well as rights in building, provisions of section 50C were attracted. However, since complete details of relevant facts were not available on record matter was to be remanded to file of Assessing Officer. (AY. 2008-09)
Shavo Norgren (P.) Ltd. v. Dy. CIT (2013) 58 SOT 23 / 81 DTR 434 / 152 TTJ 482 (Mum.)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – lease hold rights – MIDC Land
It is settled position that the provisions of section 50C do not apply to lease hold rights. However whether or not an assessee has mere leasehold rights or has rights superior to lease rights would depend upon correct interpretation of the deeds. Merely because the nomenclature given to the deed is of 'Lease', it does not follow that the assessee has only lease rights. Matter remanded. (AY. 2008-09)
Shavo Norgren (P) Ltd. v. Dy. CIT (2013) 81 DTR 434 / 58 SOT 23 / 152 TTJ 482 (Mum.)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Leasehold rights – Delayed registration – Bona fide reasons-Stamp duty on the date of agreement and not on the date of registration is required to be adopted [S. 2(47)]
The assessee sold property and transferred possession vide sale agreement on 13-6-2005, but sale deed was registered only on 25-11-2005. The Assessing Officer took stamp duty value on date of registration as full value of consideration under section 50C for computing capital gains. Held, where the transfer was completed in terms of section 2(47) by giving possession of property on date of sale agreement, but registration was delayed on *bona fide* reasons and execution of sale deed was only a legal formality, stamp duty value on date of sale agreement and not on date of registration was required to be adopted for computing capital gains.(AY. 2006-07)
DCIT v. S. Venkat Reddy (2013) 57 SOT 117 (Hyd.)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Applies mandatorily when consideration stated by assessee less than guideline value – Appellate authority not bound by valuation by Valuation Officer – Entitled to fix value below that determined by Valuation Officer

The assessee sold a portion of the land of its factory property for a consideration of Rs.2,22,64,409. At the time, the guideline value adopted by the registering authority was Rs.3,95,91,000. In the computation of long-term capital gains the assessee adopted the consideration at Rs. 2,22,64,409 but, the Assessing Officer held that the guideline value of Rs. 3,95,91,000 must be adopted in computing the long-term capital gains. On the assessee's request the Assessing Officer referred the matter to the Valuation Cell under section 50C of the Income-tax Act, 1961. But since the Assessing Officer had to complete the assessment before the limitation period expired he completed the assessment before the Valuation Report was available adopting the guideline value of Rs.3,95,91,000. The District Valuation Officer finally valued the property at Rs.3,54,73,536. On appeal, the Commissioner (Appeals) held that the valuation report was not binding on the appellate authorities and determined the consideration at Rs.2.25 crores. On appeal by the Department, the Tribunal held that the document consideration was less than the guideline value. The deeming provision of section 50C(1) operated, however it was within the authority of the appellate authority to hear the assessee on the question of value of consideration and grant appropriate relief, depending upon the facts and circumstances of the case. The Commissioner (Appeals) determined the valuation at Rs. 2.25 crores. On appeal by revenue The Tribunal held that when all these variables were changing from time to time, from authority to authority, it was not possible to reject the contentions of the assessee as a whole. Nor could the valuation reported by the Valuation Officer be accepted as sacrosanct. Taking into all aspects of the case, the consideration accountable in the hands of the assessee-company for the purpose of section 50C was to be fixed at Rs.2.5 crores and the long-term capital gains assessable in the hands of the assessee-company was to be accordingly modified. Departmental appeal was partly allowed. (AY. 2005-06)

ACIT v. MIL Industries Ltd. (2013) 21 ITR 627 / 142 ITD 428 / 94 DTR 373 (Chennai)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Reference to DVO – Reference to valuation is mandatory when assessee objects for valuation

Tribunal held that where assessee objected to valuation adopted by stamp valuation authority and also filed copy of valuation report by an approved valuer, Assessing Officer was required to make a reference to Valuation Officer in terms of section 50C(2) to ascertain correct fair market value of property. (AY. 2005-06)

A.T.E. Enterprises (P.) Ltd. v. Dy. CIT (2013) 55 SOT 175 (Mum.)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Depreciable asset – Assessee had not challenged valuation adopted by stamp valuation authority, impugned addition made by Assessing Officer was to be upheld

Assessee-company declared short-term capital gains on sale of flats under section 50. Assessing Officer noticed that Stamp Valuation Authority had adopted a higher stamp value for a flat. He thus having invoked provisions of section 50C, made addition on basis of value adopted for stamp duty purposes. Assessee challenged said addition contending that in respect of depreciable asset, i.e., flat, provisions of section 50 were applicable in which event method prescribed under section 50C could not be invoked. Tribunal held that sections 50 and 50C operate in two different fields and if value adopted by Stamp Valuation Authority is accepted by purchaser/seller, there cannot be any variation for limited purposes of computing consideration received under section 50C. Since, in instant case, assessee had not challenged valuation adopted by stamp valuation authority, impugned addition made by Assessing Officer was to be upheld. (AY. 2006-07)

Rallis India Ltd. v. Addl. CIT (2013) 55 SOT 288 (Mum.)(Trib.)

S.50C : Capital gains – Full value of consideration – Stamp valuation – Sale of shares – Section 50C does not apply to transfer of immovable property held through company [S. 45]

The assessee held shares in a company called Kamala Mansion Pvt. Ltd. The company owned flats in a building known as Om Vikas Apartments, Walkeshwar Road, Mumbai. The shares were sold by the assessee for ` 37.51 lakhs and capital gains were offered on that basis. The AO & CIT (A) held that by the sale of shares in the company, the assessee had effectively transferred the immovable property belonging to the assessee and that it was an indirect way of transferring the immovable properties being the flats in the building. He accordingly 'pierced the corporate veil', invoked s. 50C and computed the capital gains by adopting the stamp duty value of the flats. On appeal by the assessee to the Tribunal, held allowing the appeal:

S.50C applies only to the transfer of a "capital asset, being land or building or both", "assessed" by any authority of a State Government for stamp duty purposes. The expression "transfer" has to be a direct transfer as defined u/s 2(47) which does not include the tax planning adopted by the assessee. S. 50C is a deeming provisions and has to be interpreted strictly in accordance with the spirit of the provision. On facts, the subject matter of transfer is shares in a company and not land or building or both. The assessee did not have full ownership on the flats which are owned by the company. The transfer of shares was never a part of the assessment of the Stamp duty Authorities of the State Government. Also, the company was deriving income which was taxable under the head 'income from property' for more than a decade. Consequently, the action of the AO & CIT (A) to invoke s. 50C to the tax planning adopted by the assessee is not proper and does not have the sanction of the provisions of the Act. (AYs. 2007-08, 2008-09)

Irfan Abdul Kader Fazlani v. ACIT (2013) 56 SOT 12 (Mum.)(Trib.)

S.50C : Capital gains – Full value of consideration-Stamp valuation – FSI-TDR – Section 50C does not apply to transfer of FSI & TDR (S.45)

The assessee owned a plot of land admeasuring 2244.18 sq. metres of which 2110 sq. metres was acquired by the Municipality for development purposes. The assessee was entitled to receive TDR/ FSI in lieu of the land acquired. The assessee sold the development rights to the said property for Rs.20 lakhs and computed capital gains on that basis. However, for purposes of stamp duty, the property was valued at Rs.` 1.19 crores. The AO held that the value of the property as adopted by the stamp duty authorities had to be taken as the consideration u/s 50C for purposes of capital gains. This was reversed by the CIT (A). On appeal by the department to the Tribunal,held:

S.50C applies only to the transfer of "land or building" and not to the transfer of all "immovable property". Accordingly, though FSI and TDR is "immovable property" as held in *Chedda Housing Development v. Babijan Shekh Farid 2007 (3) MLJ 402 (Bom)*, it is not "land or building" and so cannot be the subject matter of s. 50C. The property acquired for development (in lieu of which the FSI/TDR was granted) also cannot be considered even though the property continues to stand in the assessee's name in the property records. The property should be valued by the DVO net of the land transferred to the Developer by the assessee after considering the acquisition made by the Govt & the Municipal Corporation and also excluding the value of TDR or additional FSI included in the consideration shown in the Development Agreement (AY. 2006-07)

ITO v. Prem Rattan Gupta (2012) 31 CCH 384 (Mum.)(Trib.) www.itatonline.org

S.51 : Capital gains – Advance money received – Forfeiture of earnest money – Capital receipt [Ss. 4, 56(2)(vi)]

The assessee entered into an agreement to sell his house property to a company and in terms of agreement received certain sum as earnest money. Since purchaser failed to pay balance consideration by stipulated period, the assessee forfeited the earnest money and claimed same as capital receipt. The Assessing Officer, however, held that entire transaction was a shame transaction in which purchaser attempted to book bogus losses. He, accordingly, made addition of forfeited amount. The Commissioner (Appeals) set aside impugned order of the Assessing Officer. The Tribunal upheld the order of Commissioner (Appeals) observing that the earnest money was received through banking channels and genuineness of the receipt was not in dispute. The court held that, the provisions of section 51 would come into play when there is forfeiture of advance. Once the transaction has been held to be genuine, there is no question of the transaction being without any consideration. (AY. 2007-08)

CIT v. Meera Goyal (2013) 214 Taxman 298 / 88 DTR 277 / (2014) 360 ITR 346 (Delhi)(HC)

S.51 : Capital gains – Advance money received – If transaction is not genuine section 51 is not applicable

Where transaction is not genuine, provisions of section 51 is not applicable. In favour of revenue. (AY. 2002-03)

Ashwani Oberoi v. CIT (2013) 212 Taxman 392 / 256 CTR 301 / 82 DTR 277 (P&H)(HC)

S.54 : Capital gains – Profit on sale of property used for residence – Agreement to sell – Purchase prior to transfer – Exemption is not available [S.2(47)]

Agreement to sell could not be treated as date of transfer of property. Since date of purchase of property "B" was prior to one year of transfer of right in property "A", assessee was not entitled to deduction under section 54. (AY.2005-06)

Shail Moti Lal (Smt.) v. CIT (2013) 218 Taxman 298 (P&H)(HC)

S.54 : Capital gains – Profit on sale of property used for residence – Purchase of two or more flats – Deduction allowable for purchase of multiple independent house units [S. 54F]

The assessee offered long term capital gains on sale of property and claimed s. 54 deduction on the ground that he had purchase two adjacent residential flats. The Assessing Officer held that the deduction could not be given for both flats on the ground that they were independent units, separated by a strong wall. The CIT(A) and Tribunal allowed the claim on the basis that section 54 deduction was available for purchase of multiple flats, even if the flats were on different floors. On appeal by the department to the High Court, HELD dismissing the appeal:

The expression "a residential house" in s. 54(1) has to be understood in the sense that the building should be of residential nature and "a" should not be understood to indicate a singular number. Where an assessee had purchased two residential flats, he is entitled to exemption u/s 54 in respect of capital gains on sale of its property on purchase of both the flats, despite the fact that the flats were purchased by separate sale deeds. Deduction is allowable even if the flats are on different floors. On facts, as the two flats purchased by the assessee are adjacent to one another and have a common meeting point, the deduction cannot be denied. (AY. 2007-08)

CIT v. Syed Ali Adil (2013) 352 ITR 418 / 215 Taxman 283 / 89 DTR 386 / 260 CTR 219 (AP)(HC)

S.54 : Capital gains – Profit on sale of property used for residence – Investment in two flats which is used as one house

Assessee purchased two flats which were joined together before the purchase, exemption under section 54 was rightly allowed in respect of both the flats treating them as one residential house. The Tribunal decided the issue in favour of assessee following the ratio of *ITO v. Sushi lM. Jhaveri (2007) 292 ITR 1 (SB) (Trib.)*. On appeal by revenue the High Court affirmed the view of Tribunal. (AY. 2006-07)

CIT v. Raman Kumar Suri (2013) 81 DTR 33 / 255 CTR 257 / 212 Taxman 411 (Bom.)(HC)

S.54 : Capital gains – Year of taxability – Sale deed / Handing over of possession

As sale deed executed was executed on 3-9-2005 and was possession handed over in the financial year relevant to AY 2006-07. Hence, capital gains were held to be assessable in AY 2006-07 and not in AY 2007-08. (AY. 2007-08)

Satishkumar Agarwal v. DCIT (2013) 28 ITR 167 (Hyd.)(Trib.)

S.54 : Capital gains – Scope of intimation – Nature of disallowance made in intimation [Ss.143(1)(a), 154]

Assessee claimed exemption for capital gains on the basis of investment of consideration in residential property in foreign country. Intimation under section 143(1)(a) denying exemption is not permissible. The assessee filed a petition for rectification under section 154. The Assessing Officer held that investment made outside India could not be considered for the purpose of exemption under section 54F and dismissed the petition under section 154. The Assessing Officer was directed to initiate proceedings permissible under law to bring the question of exemption under section 54F of the Act for scrutiny and to pass a fresh order on the petition filed under section 154 of the Act on the subject-matter raised in the petition. (AY. 2009-10)

Sushiela Natarajan (Ms.) v. ITO (2013) 28 ITR 237 (Chennai)(Trib.)

S.54 : Capital gains – Tenancy rights – Fair market value on 1st April 1981. [Ss. 48, 49(1)(iii)(a), 55(2)(ii)(a), (b), 54F]

Since cost to previous owner of tenancy rights inherited by assessee was not nil, assessee had the option to adopt fair market value of tenancy right as on April 1, 1981.Assessee entitled to exemption for expenditure incurred for making old house habitable. Surrender of tenancy rights is not entitled to exemption for transfer of residential house u/s 54, since it is deemed ownership. Deduction allowable for purchase of more than one house u/s 54F. (AY. 2009-10)

Meher R. Surti v. ITO (2013) 27 ITR 340 / (2014) 61 SOT 5 (URO) (Mum.)(Trib.)

S.54 : Capital gains – Exchange of flats – Construction – NABARD Bonds – New flat received in exchange of old flat, which constructed by builder amount to construction and entitled to exemptions. [S.54EC]

The assessee exchanged an old flat for a new flat and cash compensation, under development agreement with builder. She claimed capital gains arising of transfer of old flat as exempt under section 54 and amount invested in NBARD bonds exempt under section 54EC. The AO held that the assessee had neither purchased a house property within 1 year before or two years after the date of transfer nor had constructed a new residential house within a period of three years from the date of transfer therefore disallowed the exemption under section 54 and 54EC. On appeal Commissioner (Appeals) also confirmed the order of AO. On Second Appeal the Tribunal held that, where new flat received in exchange of old flat was constructed by builder and its possession was given to assessee within 3 years from the date of transfer, it amounted to construction, and therefore exemptions under section 54 is allowable and part of consideration was invested in NBARD bonds the exemption under section 54EC is also allowable. (AY. 2006-07)

Veena Gope Shroff (Smt.) v. ITO (2013) 58 SOT 36 (Mum.)(Trib.)

S.54 : Capital gains – Purchase of plot for construction – Eligible for exemption – Assuming the construction is not completed within three years, the exemption can be withdrawn the period when three years expires [S.54F]

Investment in purchase of a plot for construction of house would entitle an assessee to claim exemption under section 54 or section 54F. Exemption claimed by assessee under section 54 cannot be denied on the ground that assessee has not utilised sale consideration received from sale of flats itself, in purchasing a new residential house. Assuming the construction is not completed within three years, the exemption can be withdrawn the period when three years expires. (AY. 2007-08)

Pushpa Devi Tirbrewala (Smt.) v. ITO (2013) 58 SOT 41 / 158 TTJ 46(UO) (Hyd.)(Trib.)

S.54 : Capital gains – Cost of improvement – No evidence was produced – Not entitled to deduction

The complete absence of any bills, materials and details of expenses, and the claim of the purchases from brokers visiting the work site, showed the falsity of the claim and established that no such work was undertaken. Hence, no deduction for cost of improvement was allowed. (AYs. 2004-05, 2007-08)
Usharani Kalidindi (Smt.) v. ITO (2013) 25 ITR 409 / 144 ITD 526 (Hyd.)(Trib.)
K. Bala Vishnu Raju v. Addl. CIT (2013) 25 ITR 409 / 144 ITD 526 (Hyd.)(Trib.)

S.54 : Capital gains – Overriding title – Capital asset – Payment to others out of sale consideration. [S.2(14)(iii)(a)]
Assessee made payments out of consideration of ancestral property to brothers and sisters of forefathers under the Muslim law. Since there was no material to show recipients had title over property, assessee was not entitled to deduction of payments. (AY. 2007-08)
Syed Nawab Hussain v. ACIT (2013) 24 ITR 180 / (2014) 61 SOT 18(URO) (Hyd.)(Trib.)

S.54 : Capital gains – Profit on sale of property used for residence – Cost of purchase – Additional expenditure incurred after purchasing the unit would be eligible for qualifying investment – Matter remanded [Ss. 45, 55(1)(b)]
The assessee purchased the house and claimed the exemption in respect of cost of purchase and the expenditure incurred on improvement. Assessing Officer and Commissioner (Appeals) denied the exemption on cost of improvement. On appeal, the Tribunal held that cost of purchase does include any capital expenditure incurred by the assessee on such property to make it livable. Even if the assessee has brought a readymade unit, as per his taste and requirements the cost so incurred will form an integral part of the qualifying amount of investment in the house property. The use of words 'purchased or constructed' does not mean that the property can either be purchased or constructed and not a combination of both the actions. As long as the assessee has incurred *bona fide* construction expenditure, even if after purchasing the unit, the additional expenses so incurred would be eligible for qualifying investment under section 54. Matter remanded.(AY. 2007-08)
Shrinivas R. Desai v. ACIT (2013) 90 DTR 346 / 155 TTJ 743 / 145 ITD 12 (Ahd.)(Trib.)

S.54 : Capital gains – Profit on sale of property used for residence – Construction of new house not completed within stipulated period due to non-sanction of layout –Exemption cannot be denied – Capital gains to be charged in year in which period of three years expires – Capital gains cannot be taxed in year of transfer [S. 45]
The assessee had derived long-term capital gain on sale of residential flat and claimed exemption under section 54 of the Act towards purchase of a land for constructing a residential house. Due to builder not being able to approve sanction for layout, construction of the house could not be made within the period of 3 years from the date of transfer of the original asset. The assessee contended that if the capital gains at all has to be taxed, it has to be taxed only after the end of the period of 3 years. The assessee had duly offered the gains after the said period. The CIT(A) rejected the assessee's contention. On appeal, allowing the appeal:
The Assessing Officer was directed to allow the exemption claimed by the assessee under section 54 of the Act for the impugned assessment year. The Assessing Officer was required to verify whether the assessee has offered the capital gain for taxation in AY. 2011-12 (after the end of the 3 year period). If on verification, the assessee's claim is found to be incorrect, then the Assessing Officer was required to being the gains to tax in AY. 2011-12. No addition could be made in the present AY. (AY. 2008-09)
Sri Prasad Nimmagadda v. Dy. CIT (2013) 56 SOT 473 / 27 ITR 63 (Hyd.)(Trib.)

S.54 : Capital gains – Profit on sale of property used for residence – Investment in residential house – Independent Provisions [S. 54F]
The assessee earned long term capital gain out of transfer of two separate assets of which one being a house property. The assessee claimed the entire long-term capital gain was invested in residential

house and hence claimed exemption under Sections 54 & 54F which were rejected by the Assessing Officer. The CIT(A) upheld the order of the Assessing Officer. The Tribunal held in favour of the assessee. (AY. 2008-09)
Venkata Ramana Uma Reddy v. Dy. CIT (2013) 142 ITD 16 / 155 TTJ 234 / 88 DTR 33 (Hyd.)(Trib.)

S.54 : Capital gains – Development rights – Year of taxability – Profit on sale of property used for residence – Development agreement – Consideration for land is assessable as long-term – Profits arising of super structure is assessable as short-term gain [Ss.2(42A), 45, 54F]
Held, the assessee had entered into an agreement for development of the land in question in the financial year 2004-05. The income arising from sale of land to the extent of 57.5 per cent share arose to the assessee in the financial year in which the agreement was executed. According to the assessee's computation, the assessee had earned the long-term capital gain from the sale of land to the developer and long-term capital gain arising out of sale of share of undivided land at the time of sale of built-up area. The assessee had invested a sum of Rs. 1,60,00,000 in capital gains bonds and Rs.1,15,00,000 in capital gains scheme totaling Rs. ` 2,75,00,000 and had claimed deduction under sections 54 and 54F. Assessing Officer held that since the agreement was executed in the financial year 2004-05, the said long term gain was to be assessed in the assessment year 2005-06 and short-term gain was to be assessed during the financial year 2006-07. i.e. AY. 2007-08. On appeal, the Commissioner (Appeals) held that sale consideration received towards land should be assessed as long-term capital gain and the profits arising out of the superstructure was to be assessed as short-term capital gain. Benefit of exemption under sections 54 and 54F will be available to long-term capital gain. Tribunal confirmed the view of Commissioner (Appeals). (AY. 2007-08)
ACIT v. V. Ram Mohan (2013) 24 ITR 50 (Chennai)(Trib.)

S.54 : Capital gains – Profit on sale of property used for residence – Deemed owner – Tenancy rights – Sale of residential property and investment of gains in acquiring tenancy rights in perpetuity in another residential property, Assessee is not entitled to exemption under section 54. [Ss. 22, 26, 27(iib), 269UA(f), Bombay Stamp Act 1958, S.2(9)]
The assessee sold his bungalow and purchased tenancy rights in two flats in the third floor. The assessee computed the long-term capital gains from sale of residential bungalow which he claimed as exempt because of the investments made in acquisition of the tenancy rights in the new two flats. The Assessing Officer rejected the claim of the assessee of exemption under section 54 of the Income-tax Act, 1961, in respect of tenancy rights acquired in the new flat. Accordingly, the claim under section 54 was disallowed. This was confirmed by the Commissioner (Appeals). On appeal to the Tribunal held that the exemption under section 54 from capital gains is available to an assessee, who invests the capital gains in a similar asset being a residential house which would obviously mean that acquisition of the house should be as an owner, as the capital gains covered under section 54 are the capital gains arising from transfer of a residential house owned by the assessee. The principle that in case of ambiguity a taxing statute should be construed in favour of the assessee would not apply to the construction of an exception or an exempting provision; these have to be construed strictly. That the person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the provision. In case of doubt or ambiguity, benefit must go to the State. In section 54 there is no ambiguity. The provision refers to purchase or construction of a new residential house and it is quite obvious that the same should be as an owner and not as perpetual tenant. The argument of deemed ownership was relevant only in connection with computation of income from house property and not in relation to exemption under section 54. Similarly, treating the tenancy as conveyance under the Bombay Stamp Act, 1958, was only for the purpose of payment of stamp duty and cannot be considered as conveyance of the title of the property to the assessee as an owner. Taking possession could not be considered as ownership as possession had been taken as a tenant and not as an owner of the flat. The assessee was permitted to sub-let the flat, to bequeath it and to raise loan but such powers were only in relation to tenancy rights of the assessee and not as an owner of the flat. All these facilities to which the

assessee was entitled were only against right of the assessee as tenant in the flat and not as owner. Further the agreement provided that the tenant was not entitled to make any structural changes in the flat which showed that the assessee was not the owner because an owner had full right in relation to his property. The assessee was not entitled to exemption under section 54. (AY. 2008-09)
Yogesh Sunderlal Shah v. ACIT (2013) 21 ITR 97 / 154 TTJ 309 / 86 DTR 269 (Mum.)(Trib.)

S.54B : Capital gains – Land used for agricultural purposes – Assessee not establishing land was being used for agricultural purpose for a period of two years prior to date of transfer, exemption was not available [S. 54F]
The assessee had a one-fourth share in a property. She sold her share and claimed exemption under section 54F of the Act. During the course of the assessment proceedings, the assessee contended that she was entitled to exemption under section 54B. The Tribunal affirmed the findings of the authorities that the assessee was not entitled to the benefit of section 54B on the ground that the property which she sold was not used for agricultural purposes for a period of two years prior to the date of the sale as required under section 54B. The Tribunal found that the assessee was entitled only to take Rs.2 lakhs as the cost of acquisition over and above Rs. 1 lakh allowed as value of superstructure under section 54F. On appeal the Court also held that, the property in the hands of the purchaser was used for putting up an apartment complex, as the document did not establish that the land was being used for agricultural purpose for a period of two years prior to the date of the transfer. Appeal of the assessee was dismissed. (AY. 2005-06)
Asha George (Smt.) v. ITO (2012) 139 ITD 194 / (2013) 351 ITR 123 / 83 DTR 217 / 214 Taxman 236 (Ker.)(HC)

S.54B : Capital gains – Transfer of land used for agricultural purposes – Investment to be made in assessee's own name to claim exemption and cannot be extended to kin
The assessee sold agricultural land and made investment in purchase of agricultural land and residential flat in the name of her two married major daughters. While computing LTCG, the assessee claimed exemption u/ss. 54B & 54F. The A.O. rejected exemption claimed by the assessee on ground that the properties were not registered in the name of assessee. The CIT(A) upheld A.O.'s order. The Tribunal dismissing the appeal held the 'assessee' used in Sec. 54B/54F could not be extended to include major married daughters. Therefore, assessee was not entitled to claim exemption in respect of investment made in the name of her daughters. (AY. 2008-09)
Ganta Vijaya Lakshmi v. ITO (2013) 145 ITD 150 / (2014) 97 DTR 423 (Visakhapatnam) (Trib.)

S.54B : Capital gains – Land used for agricultural purposes – When land unable to cultivated due to vagaries of nature – Exemption permitted in purchase of another agricultural land
The Tribunal held that the assessee if could not cultivate land two years preceding its sale owing to vagaries of nature, when earlier the same was cultivated, and after the sale of such a land, when the assessee purchases another agricultural land, it may be granted deduction under section 54B as the aim of the legislature was to encourage agriculture. (AY. 2006-07)
ACIT v. N. Raghu Varma (2013) 142 ITD 421 / 24 ITR 616 (Hyd.)(Trib.)

S.54EA : Capital gains – Specified securities – Investment in Fixed deposit cannot be construed as investment in bonds
For claiming exemption under section 54EC a taxpayer has to deposit amount in capital gain bond. Deposit of money in fixed deposit cannot be construed as deposit in capital gain bond for claiming said exemption under section 54EC. (AY.2008-09)
R. Vidhyadharan v. Dy. CIT (2013) 141 ITD 7 / 155 TTJ 100 / 88 DTR 29 (Cochin)(Trib.)
Santhadhadhran (Smt.) v. Dy. CIT (2013) 141 ITD 7 / 155 TTJ 100 / 88 DTR 29 (Cochin)(Trib.)

S.54EC : Capital gains – Investment in bonds – Long term capital asset – Deeming fiction – Exemption cannot be denied – Section 50 does not restrict exemption [S. 50]

Since capital gain arose out of long term capital asset and same was invested in specified assets, exemption under section 54EC could not be denied on account of fact that deeming fiction of short-term capital gain was created under section 50. The assessee cannot be denied the exemption.(AY.2007-08)

CIT v. Aditya Medisales Ltd. (2013) 218 Taxman 477 / (2014) 99 DTR 92 / 362 ITR 600 / (2014) 266 CTR 98 (Guj.)(HC)

S.54EC : Capital gains – Specified securities – Investment in bonds – Long term capital loss-Set off of loss [Ss.45, 70(3), 74, 263]

Assessee sold shares which resulted in to long term capital gains. The assessee had also had long term capital losses from sale of shares and properties which he carried forward. Assessing Officer accepted the above treatment in the assessment passed under section 143(3). Commissioner revised the order under section 263 and held that the long term capital losses should be first set off against long term capital gains and then deduction under section 54EC be allowed. The Tribunal decided in favour of assessee. On appeal to the High Court by revenue the court held that on reading of section 70(3) shows that the loss that has to be looked first is not with reference to the loss arising in respect of new asset, but in the totality of the loss suffered on the sale of capital asset, chargeable to tax under section 45. Thus going by the scheme of the Act, for taking benefit under section 54EC, it is not necessary that one should first apply section 70(3) and thereafter only, the assessee could invest the capital gain arising from the long term capital asset to any specified under section 54EC of the Act.(AY. 2003-04)

CIT v. Vijay M. Mahtaney (2013) 217 Taxman 15 / 92 DTR 180 / 35 taxmann.com 228 / 261 CTR 635 (Mad.)(HC)

S.54EC : Capital gains – Investment in bonds – Sale of depreciable assets – Availability of benefit [Ss.48, 49, 50]

Exemption under section 54EC would be made available in case of transfer of long-term capital assets. However, once such condition is fulfilled, by virtue of the fact that asset was such on which the depreciation was allowed and, therefore, computation would be done as provided under section 50, by applying modifications in section 48 and section 49 would not change the nature of capital asset or availability of exemption specified under section 54EC. (AY. 2003-04)

Dy. CIT v. Himalaya Machinery (P.) Ltd. (2013) 214 Taxman 291 / 88 DTR 175 / 261 CTR 621(Guj.) (HC)

S.54EC : Capital gains – Investment in bonds – Limit of investment – Exemption is allowed in each financial year up to ` 50 Lakhs

The assessee sold capital assets and earned long term capital gain of Rs. 1.10 Crores. The Assessee invested Rs.50 lakhs each in two different assessment years in REC Bonds but within the period of six months. The Revenue allowed only a claim of Rs.50 lakhs and the remaining was denied. The Tribunal in the case of *Smt. Sriram Indubal v. ITO [2013] 32 taxmann, 118 (Chennai)* held that if the assessee had invested Rs. 50 lakhs each in specified assets in two different financial years but within six months from date of transfer of capital asset, restrictive proviso to Sec. 54EC would not limit exemption claim to Rs. 50 lakhs only and the exemption claimed by the assessee upto Rs.1 Crore was allowed. (AY.2009-10)

Coromandel Industries (P.) Ltd. v. ACIT (2013) 145 ITD 171 (Chennai)(Trib.)

S.54EC : Capital gains – Investment in bonds – For computing long term capital gains date of purchase to be considered when shares were purchased and transferred in the broker's demat account and not from the date broker transferred from his demat account to assessee's demat account

The assessee earned capital gains on sale of certain shares. His claim was that those shares were purchased on 9-1-2003 and sold on 23-4-2004 and, accordingly, the holding period being more than twelve months, those gains were required to be treated as long-term capital gains and he was entitled to exemption under section 54EC. As per information available to the Assessing Officer, those shares were transferred from demat account of broker to the demat account of the assessee on 5-3-2004 and back to demat account of broker on 23-4-2004. Accordingly, the Assessing Officer held that the holding period of shares by the assessee was less than twelve months, and gain on sale of such shares was required to be treated as short-term capital gains. In effect, according to the Assessing Officer, the assessee was not eligible for exemption under section 54EC. On appeal, the Commissioner (Appeals) noted that the assessee did not have any demat account at the point of time when shares were purchased and it was only on 5-3-2004 that the assessee opened a demat account. He noted that the purchase transaction was supported by the contract note from the broker and also reflected in the balance sheet as on 31-3-2003. Therefore, he directed the Assessing Officer to treat the gain on sale of shares as long-term capital gain and allowed the claim of section 54EC. On revenue's appeal, the Tribunal held that, once the Assessing Officer does not dispute the date of purchases, merely because the date of transfer of shares to assessee's demat account is a later date, the date of transfer to demat account cannot be taken as date of purchases. The assessee has given an explanation for delay in transfer to his demat account, and this explanation has not even been challenged or controverted. In these circumstances, Assessing Officer's challenge to the capital gains being treated as long-term capital gains is indeed devoid of legally sustainable basis. Once the Assessing Officer does not challenge genuineness of a transaction, it cannot be open to him to alter the date of purchases, as claimed by the assessee, and once this date remains unchallenged, there is no basis for holding the capital gains as a short-term capital gain. There is not even a whisper of an allegation about genuineness of the transaction even though it is a case of, what is commonly known as, penny stock and the value of the shares has gone up almost 40 times within one year. For the said reasons, the conclusion arrived at by the Commissioner (Appeals) is to be approved. (AY. 2005-06)
ITO v. Ram Krishna Ghosh (2013) 33 taxmann.com 145 / 142 ITD 544 (Kol.)(Trib.)

S.54EC : Capital gains – Investment in bonds – Limit of Rs. 50 lakhs – Two different financial years – Each financial year the assessee can make investment of Rs. 50 lakhs.
The assessee had sold a property on 5-2-2008. Assessee invested a sum of Rs.50 lakhs out of sale consideration in Capital Gains Bonds on 31-3-2008. Assessee thereafter invested a sum of Rs. 50 lakhs on 30-06-2008 in capital Gains Bond. Assessee claimed exemption under section 54EC on the amount of Rs.1 crores. Assessing Officer allowed only Rs. 50 lakhs. On appeal the Tribunal held that the plain reading of section 54EC(1) as well as the proviso thereto clearly suggests that the limit of Rs.50 lakhs as given under the proviso is per person per financial year. Restriction relates only to investment in any financial year by the assessee. The language of section 54EC is clear and unambiguous and it leads to the interpretation that the assessee can make the investment in two different financial years provided in a financial year the investment made did not exceed Rs. 50 lakhs. Accordingly the assessee was entitled to exemption in respect of both investments in capital gain bonds. (AY. 2008-09)
ITO v. Rania Faleiro (Ms.) (2013) 142 ITD 769 (Panji)(Trib.)

S.54EC : Capital gains – Investment in bonds – Limit of 50 lakhs
The assessee sold the property for Rs.2.47 crores and claimed the exemption of Rs.1 crore under section 54EC in respect of long term capital gain invested in specified capital gain bonds. The Assessing Officer disallowed the claim on the basis that the assessee having made a claim of Rs. 1 crore, exceeded the investment limit prescribed in the proviso below section 54EC and therefore, restricted the deduction up to Rs.50 lacs. The CIT(A) decided in favour of assessee upholding the claim of Rs. 1 crore. The Tribunal reversed the order of CIT(A) and held that the CIT(A) was not

justified in allowing deduction to the assessee to the extent of Rs. 1 crore under section 54EC of the Act. (AY. 2008-09)
ACIT v. Raj Kumar Jain & Sons (HUF) (2012) 50 SOT 213 / 20 ITR 212 / (2013) 153 TTJ 49(UO) (JP)(Trib.)

S.54EC : Capital gains – Investment in bonds – Investment with in specified time was beyond its control since neither the REC bonds nor any other tax savings bonds were available during the relevant time period-Exemption is available
Assessee sold a property on 10-11-2006 and to claim exemption under section 54EC, he invested the proceeds in REC bonds on 13-7-2007. Assessing Officer disallowed the same which was confirmed by the Commissioner (Appeals) on ground that investment was made beyond specified period of six months from date of transfer of property. On Second Appeal assessee contended that the delay in the investment was beyond its control since neither the REC bonds nor any other Tax Savings Bonds were available during the relevant time period and that the new series of bonds were introduced in the market only on 1-7-2007 and it made investment in said bonds on 13-7-2007. Issue of non-availability of REC bonds during relevant period had not been proved with documentary evidence by assessee, matter was to be remitted to Assessing Officer for verification. (AY.2007-08)
Shambhu Lal Sah (Lt. Col) v. ITO (2013) 143 ITD 189 (Delhi)(Trib.)

S.54EC : Capital gains – Investment in bonds – Full value of consideration – Stamp valuation – Deemed value cannot be considered for the purpose of section 54EC [S.50C]
The actual sale consideration was Rs. 160000, the stamp authorities valued the said property at Rs. 24,48,118. The Tribunal held that deeming fiction of s. 50C cannot be imported into s. 54EC and, therefore, the deemed value cannot be considered for the purpose of exemption u/s. 54EC. However for the working of the long term capital gain the sale consideration will be taken up as per the value determined under section 50C. (AY. 2005-06)
Nila V. Shah (Mrs.) v. CIT (2012) 51 SOT 461 / (2013) 83 DTR 218 (Mum.)(Trib.)

S.54F : Capital gains – Investment in a residential house – Long-term capital assets – Evidence of period of holding – No evidence of holding of property – Not entitled exemption [Ss.2(47), 45]
Since there was no evidence that assessee was in possession of subject land pursuant to an agreement of purchase any time beyond period of 3 years, assessee would not be entitled for exemption as provided for under section 54F. (AY. 2008-09)
Latha Ramachandra Inamdar (Ms.) v. DCIT (2013) 218 Taxman 277 / (2014) 360 ITR 367 (Kar.)(HC)

S.54F : Capital gains – Investment in a residential house – Deposit in capital gains account scheme by s. 139(4) due date sufficient. [Ss. 45, 139(1), 139(4)]
The assessee sold property on 20-6-2006 (AY 2007-08) for a consideration of ` 2.24 crores. The said amount was not invested in the capital gains account scheme by the due date of filing the return u/s 139(1) (31-7-2007) and was instead used to purchase a new residential house on 31-3-2008. The assessee claimed exemption u/s 54F which was denied by the AO & CIT (A) on the basis that u/s 54F(4) the amount of the consideration which is not appropriated for purchase of the new asset before the date of furnishing the return of income u/s 139 had to be deposited in the "capital gains account scheme" before the due date for filing the return of income u/s. 139(1). On appeal by the assessee, the Tribunal allowed the claim. On appeal by the department to the High Court, HELD dismissing the appeal:
Though s. 54F(4) provides that the amount not appropriated towards purchase of the new asset has to be deposited in the capital gains account scheme before the due date for filing the return u/s 139(1), sub-section (4) of s. 139 is in the nature of a proviso to s. 139(1). S. 139(4) provides that a

person who has not furnished a return within the time allowed to him under s. 139(1) may furnish the return at any time before the expiry of one year from the end of the relevant assessment year or before the completion of the assessment whichever is earlier. For AY 2007-08, the last date for filing the return u/s 139(4) is 31-3-2009. This extended time limit is available for making deposit in the capital gains account scheme. As the assessee had invested the consideration in purchase of a new house before that date, the exemption has to be allowed.(AY. 2007-08)
CIT v. Jagtar Singh Chawla (2013) 87 DTR 217 / 215 Taxman 154/259 CTR 388 (P&H)(HC)

S.54F : Capital gains – Investment in residential house – Exemption – Several independent units can constitute "a residential house" [S.54]
The assessee entered into a development agreement pursuant to which the developer demolished the property and constructed a new building comprising of three floors. In consideration of granting the development rights, the assessee received Rs.4 crores and two floors of the new building. The AO held that in computing capital gains, the cost of construction of Rs.3.43 crores incurred by the developer on the development of the property had to be added to the sum of Rs. 4 crores received by the assessee. The assessee claimed that as the said capital gains was invested in the said two floors, she was eligible for exemption u/s 54. The AO rejected the claim on the basis that the units on the said floors were independent & self-contained and not "a residential house" and granted exemption for only one unit. The CIT (A) and Tribunal upheld the assessee's claim by relying on *CIT v. D. Ananda Basappa (2009) 309 ITR 329 (Kar.) and CIT v. K.G. Rukminiamma (Smt.) (2011) 331 ITR 211 (Kar)*. On appeal by the department to the High Court HELD dismissing the appeal:
As held in B. Ananda Bassappa (SLP dismissed) & K G Rukminiamma, the Revenue's contention that the phrase "a" residential house would mean "one" residential house is not correct. The expression "a" residential house should be understood in a sense that building should be of residential in nature and "a" should not be understood to indicate a singular number. Also, s. 54/54F uses the expression "a residential house" and not "a residential unit". S. 54/54F requires the assessee to acquire a "residential house" and so long as the assessee acquires a building, which may be constructed, for the sake of convenience, in such a manner as to consist of several units which can, if the need arises, be conveniently and independently used as an independent residence, the requirement of the Section should be taken to have been satisfied. There is nothing in these sections which require the residential house to be constructed in a particular manner. The only requirement is that it should be for the residential use and not for commercial use. If there is nothing in the section which requires that the residential house should be built in a particular manner, it seems to us that the income tax authorities cannot insist upon that requirement. A person may construct a house according to his plans, requirements and compulsions. A person may construct a residential house in such a manner that he may use the ground floor for his own residence and let out the first floor having an independent entry so that his income is augmented. It is quite common to find such arrangements, particularly post-retirement. One may build a house consisting of four bedrooms (all in the same or different floors) in such a manner that an independent residential unit consisting of two or three bedrooms may be carved out with an independent entrance so that it can be let out. He may even arrange for his children and family to stay there, so that they are nearby, an arrangement which can be mutually supportive. He may construct his residence in such a manner that in case of a future need he may be able to dispose of a part thereof as an independent house. There may be several such considerations for a person while constructing a residential house. The physical structuring of the new residential house, whether it is lateral or vertical, cannot come in the way of considering the building as a residential house. The fact that the residential house consists of several independent units cannot be permitted to act as an impediment to the allowance of the deduction u/s 54/54F. It is neither expressly nor by necessary implication prohibited. (AY. 2007-08)
CIT v. Gita Duggal (2013) 357 ITR 153 / 214 Taxman 51 / 84 DTR 346 / 257 CTR 208 (Delhi)(HC)

S.54F : Capital gains – Investment in residential house – Exemption – Assessee purchasing residential house in name of his wife is entitled to exemption [S.45]

The assessee, an individual, inherited 50 per cent share in a residential house from his father. In computing the capital gains, the assessee claimed exemption under section 54F of the Acton the ground that the sale proceeds were invested in the acquisition of a vacant plot and purchased a residential house in the name of his wife. The Assessing Officer took the view that under section 54F, the investment in the residential house should be made in the assessee's name and inasmuch as the residential house was purchased by the assessee in the name of his wife, the claim was not allowable. He restricted the exemption and computed the capital gains. The Commissioner (Appeals) allowed the claim. This was confirmed by the Tribunal. On appeal by revenue dismissing the appeal, the court held that for the purposes of section 54F, the new residential house need not be purchased by the assessee in his own name nor is it necessary that it should be purchased exclusively in his name. Moreover, the assessee had not purchased the new house in the name of a stranger or somebody who was unconnected with him. He had purchased it only in the name of his wife. There was also no dispute that the entire investment had come out of the sale proceeds and that there was no contribution from the assessee's wife. Therefore, the Tribunal was right in law in allowing the claim of the assessee under section 54F. (AY. 2008-09)

CIT v. Kamal Wahal (2013) 351 ITR 4 / 214 Taxman 287 / 86 DTR 37 / 258 CTR 251 (Delhi)(HC)

S.54F : Capital gains – Investment in a residential house – Duplex flat – Two flats purchased as one unit exemption is available as one house

Assessee purchased a flat and claimed exemption under section 54F. Assessing Officer found that it was not one flat but two flats which had been joined into one flat and restricted exemption to half of investment. Court held that two flats were joined before assessee became owner of said property and certificate from society also established fact that these two flats were considered as one residential house property, therefore, exemption was fully allowable. In favour of assessee. (AY.2006-07)

CIT v. Raman Kumar Suri (2013) 212 Taxman 411 / 81 DTR 33 / 255 CTR 257 (Bom.)(HC)

S.54F : Capital gains – Investment in a residential house Land appaurtenant – Farm house with adjoining land – Value of entire land purchased is not eligible for exemption under section 54F [S. 54B]

The assessee sold land for Rs.11 lakhs and claimed exemption under section 54F by purchasing farm house with Rs.1.92 acres of land with entire sale proceeds. During the assessment proceedings the assessee the assessee contended that she was eligible exemption under section 54B, which was denied by the Assessing Officer on the groind that the land which was sold was not used for agricultural purposes for period of two years prior to the date of transfer. The Assessing Officer allowed only Rs. 2 lakh as the cost of acquisition of the land pver and above Rs. 1 lakh as value of super structure under section 54F. On appeal to Tribunal the tribunal made an estimation and directed that the value of the plot on which the farm house was located and the land appautenant be fixed as Rs. 2 lakhs. On appeal to High Court. High Court dismissed the appeal of assessee holding that no substantial question of law , the finding being perverse was not raised.(AY. 2005-06)

Asha George(Smt) v. ITO (2013) 351 ITR 123 / 83 DTR 217 / 214 Taxman 236 (Ker.)(HC)

S.54F : Capital gains – Investment in residential houses – For claim of deduction land appurtenant to residential house determined with locality, social status, profession of assessee – Completion certificate issued by Local Panchayat acceptable – Certificate of village officer valid to accept land use [S.54B]

The assessee, along with his brother had purchased agricultural land and the same was sold during the year under consideration and the assessee claimed exemption under S. 54F for residential house constructed on land. The A.O. rejected the entire claim and the CIT(A) granted deduction only for the proportionate value of land. On appeal by the assessee to the Tribunal, held:

For claiming exemption u/s. 54F, the area of land on which the house is constructed, the deduction is granted after determining the locality, social status, profession and other allied factors of the assessee. Similarly, it is held that the completion certificate issued by local Panchayat for purpose of electrification before expiry of three years is acceptable for allowing deduction. The Tribunal also held that for deduction u/s. 54B, if the assessee's brother, the joint owner, has not claimed deduction, but the assessee has claimed with production of certificates from village officer, the same could not be disallowed. (AY. 2007-08)
Tony J. Pulikal v. Dy. CIT (2013) 145 ITD 172 (Cochin)(Trib.)

S.54F : Capital gains – Investment in residential house – Flat in lieu of plot – Construction not started – Exemption is not allowable [S.2(47)(v), Transfer of Property Act, 1882, S.53A.]
Where assessee was a member of a housing society which had entered into an agreement with a developer, whereby members were to be given flats in lieu of their plot, deduction under section 54F could not be allowed when construction of such flat had not yet started as it could not be said that amount had been invested in a new residential house. (AY. 2008-09)
Binder Khokher (Smt.) v. ACIT (2013) 59 SOT 141(URO) (Chd.)(Trib.)

S.54F : Capital gains – Investment in residential house – Expression 'a residential house' as appearing in section 54F cannot be interpreted in a manner to suggest that exemption would be restricted to a single residential unit [S.54]
Expression 'a residential house' appearing in sections 54 and 54F has to be understood in a sense that building should be of a residential nature and word 'a' should not be understood to indicate a singular number.(AY.2009-10)
Vittal Krishna Conjeevaram v. ITO (2013) 144 ITD 325 (Hyd.)(Trib.)

S.54F : Capital gains – Investment made before sale of existing residential property is not entitled to exemption [S.45]
Investment in construction of new residential property made by assessee is not entitled to deduction under section 54F to the extent the same is made before the sale of existing residential property.(AY. 2008-09)
Nimmagadda Sridevi (Smt.) v. DCIT (2013) 58 SOT 54 (Hyd.)(Trib.)

S.54F : Capital gains – Sale of shares – Investment in residential property is eligible to exemption [S.45]
Assessee could not be denied exemption under section 54F for investment of sale proceeds of shares in acquiring residential unit, on the ground that the assessee has not provided the details of broker. Sale consideration cannot be treated as bogus. (AY.2004-05)
Ramesh Kumar Goel v. ITO (2013) 58 SOT 49 (Guwahati)(Trib.)

S.54F : Capital gains – House should be inhabitable – Basic amenities – Evidence was not produced
The house for which exemption is claimed must be inhabitable and should have had basic amenities like a place for cooking, toilet and bathroom, approach road within plot. Exemption could not be granted when there was no evidence of grant of electricity or telephone or water connection. (AY.2004-05, 2007-08)
Usharani Kalidindi (Smt.) v. ITO (2013) 25 ITR 409 / 144 ITD 526 (Hyd.)(Trib.)
K. Bala Vishnu Raju v. Addl.CIT (2013) 25 ITR 409 (Hyd.)(Trib.)

S.54F : Capital gains – Onus to prove – Claim of deduction
If the assessee constructed a residential house, the onus is on assessee to prove that the construction of new residential building took place. In the absence of any material to suggest the construction of

the house, out the sale proceeds of the land the assessee was not entitled for deduction under section 54F. (AY.2007-08)
Syed Nawab Hussain v. ACIT (2013) 24 ITR 180 / (2014) 61 SOT 18 (Hyd.)(Trib.)

S.54F : Capital gains – Investment in residential house – Capital Gains Savings Account – Deposit made after filing return, but instructions to bank were given prior to due date – Assessee entitled to benefit [S. 139(1)]
The assessee was denied benefit of section 54F on the grounds that investment in special capital gain account was made after filing of return under section 139(1). The Assessing Officer and the CIT(A) rejected the assessee's claim. On appeal held, allowing the appeal:
The assessee on 30-7-2008, prior to the due date for filing of return under section 139(1), had issued instruction to its bank to transfer the relevant amount from savings bank account to the special capital gain account maintained with the same branch of the said bank. In this regard, the assessee also furnished a certificate from the bank confirming this factual position. Assessee having issued necessary instructions to the aforesaid bank in which both the accounts (i.e. savings bank account as well as special capital gain account) were maintained for transfer / deposits, the assessee proceeded to file his return of income on the same date i.e. 30-7-2008. The instructions of the assessee were acted upon by the bank only on 31-7-2008. However, there was sufficient compliance with the mandate of section 54F by the assessee, and benefit could not be denied on this ground. Merely because the return of income itself was not accompanied by the prescribed documents / certificate, benefit of section 54F cannot be denied. Further, it was observed that section 54F does not require one-to-one correlation between the capital gain arising out of transfer of long term capital asset and utilization thereof for purchase / construction of residential house. (AY. 2008-09)
Sunil Sachdeva v. ACIT (2013) 56 SOT 321 (Delhi)(Trib.)

S.54F : Capital gains – Investment in a residential house – Capital gains – Exemption of, in case of investment in five residential houses was allowed [S.54]
Assessee had entered into an agreement with one 'H' Ltd. for development of a piece of land owned by her. As per agreement, Assessee was to receive 43.75 per cent of built up area after development, which was translated to five flats. Assessee filed her return claiming deduction under section 54F on value of five flats. The Assessing Officer restricted the claim of deduction in respect of one flat only and disallowed the claim in respect other flats, which was confirmed by the Commissioner (Appeals). Tribunal held that 'a residential house' in the context could not be construed as a singular. Meaning given in section 54 would apply to section 54F also. New asset defined in section 54F as 'a residential house' has to be understood in plural. It is not necessary that all residential units should be single door number allotted. Following the ratio in *CIT v. K.G.Rukminiamma (2011) 331 ITR 211 (Karn.)(HC)* the claim of assessee was allowed. (AY.2007-08)
V.R. Karpaam (Smt.) v. ITO (2013) 143 ITD 126 / 157 TTJ 887 / 93 DTR 243 (Chennai)(Trib.)

S.54F : Capital gains – Investment in a residential house – New residential house acquired outside India is also eligible to claim exemption
The assessee invested the entire capital gains in the acquisition of a house property in the United States of America and claimed exemption under section 54F. Assessing Officer denied the exemption, which was up held by the Commissioner (Appeals).On appeal the Tribunal held that on a plain reading of the provisions of section 54F one does not find anything therein to suggest that the new residential house acquired should be situated in India. The words 'in India' cannot be read into section 54F, when Parliament in its legislative wisdom has deliberately not used the words 'in India' in section 54F, therefore exemption under section 54F cannot be denied on ground that residential house acquired was situated outside India. (AY. 2009-10)
Vinay Mishra v. ACIT (2012) 150 TTJ 245 / 20 itr 129 / 79 DTR 1 / (2013) 141 ITD 301 (Bang.)(Trib.)

S.54F : Capital gains – Investment in a residential house – House demolished – Extinguishment [Ss. 2(47), 45]

Deduction under section 54F is available for purchase of residential house and such house should be real and not symbolic. If old house is only meant for demolition, it may not satisfy the test of purchase of residential house, more particularly when it was demolished within two years. It was held that voluntary demolition of house amounts to transfer. Matter remanded to Commissioner (Appeals)(AY. 2007-08)

ACIT v. Dilip Manhar Parekh (2013) 56 SOT 487 (Mum)(Trib.)

Editorial: Ratio may not be good law in view of judgment in the case of Co-owner Mrs. Abhhay B. Parikh the Bombay High Court held that the voluntary demolition of house will not amount to transfer and the assessee is eligible exemption under section 54F. AB. ITA no 1583 of dt 24th January, 2013(Bom.) (HC)(ACIT v. Ms Chhaya B.Parekh ITA 4956 /Mum/2010 Bench "B" AY. 2007-08 dt 16-5-2012

S.54F : Capital gains – Investment in a residential house – Purchase of house property – Two houses – Exemption denied [S.45]

The assessee had sold two plots of land on 22-7-2005 and 22-3-2006 respectively and invested the sale consideration in purchase of two houses. Before the sale of first plot, the assessee entered into an agreement in January, 2005 to purchase a house in Chandigarh and the said house was purchased *vide* sale deed dated 18-7-2005. Further she had broken down this house and commenced new construction on 19-5-2006 which was completed before 26-12-2008. She had also purchased a flat at Manimajra on 28-7-2006. The Assessing Officer disallowed the claim of exemption on the ground that the assessee had purchased another house other than the first house (new asset). Since the assessee had purchased another residential house other than the new asset within the period of one year after the date of transfer of the original asset and is hit by clause (a)(ii) of the proviso to section 54F(1) and hence, the assessee was not entitled to deduction.(AY. 2006-07)

Kuldip Kaur Chatha (Smt) v. ITO (2013) 56 SOT 478 (Chd.)(Trib.)

S.54F : Capital gains – Investment in residential house – Failure to Construct new house property within specified period – Not entitled to deduction claimed under section 54F, taxable in the year of 2008-09 and not in the year 2011-12

The assessee had sold a property during the year and capital gain was worked out. The assessee invested that sum in purchasing a plot on which residential house was to be constructed. The assessee claimed proportionate deduction under section 54F. However, the house could not be constructed. The Assessing Officer disallowed the deduction claimed under section 54F by the assessee as no construction had taken place within specified time. On appeal, the Commissioner (Appeals) upheld order of the Assessing Officer observing that the assessee had not started the work of construction on the said plot, therefore, the claim of deduction under section 54F was not acceptable. Assessee only after a period of three years and, therefore, if the construction could not be completed, the said capital gain could be taxed only after a lapse of period of three years. Since the assessee had filed return declaring capital gain in assessment year 2011-12, the same could not be taxed again in assessment year 2008-09. Tribunal held that Plain reading of section 54F clearly shows that deduction under this section is allowable only in case where the assessee within a period of one year before or two years after the date on which the transfer took place purchases, or has within a period of three years after that date constructed the residential house. Therefore, if the assessee has not purchased or constructed the house within the specified period the deduction is not available. No doubt the proviso to sub-section provides that in case the amount of capital gain has been deposited in the specified account as provided in sub-section (4) and the same could not be used for construction then such capital gain would be charged in the previous year in which the period of three years expires from the date of transfer of original asset. It is a settled position of law that proviso provide exception to the rule. In

the instant case, the proviso carves out an exception only in those cases where the amount had been deposited in the specified account and could not be used for the purpose of construction. This exception cannot be made part of the rule where the assessee fails to purchase or construct within specified period. In the instant case, admittedly no plans were made, therefore, there is no question of getting the same approved. Apart from this, assessee admitted that assessee has no evidence to prove that assessee wanted to start construction. If the tax is allowed to be postponed merely on the basis of purchase of plot then no assessee would pay correct taxes during the year and postpone the payment of taxes by merely purchasing the plot and that cannot be intention of the provisions of section 54F. Therefore, the Commissioner (Appeals) is right in denying the deduction under section 54F to the assessee and accordingly his order is to be upheld. The assessee has voluntarily filed return declaring capital gain in assessment year 2011-12, therefore, the tax paid in that year would amount to double taxation if the capital gain is also taxed in assessment year 2008-09. The taxes paid in 2011-12 needs to be adjusted against the capital gain liability during assessment year 2008-09. Accordingly, the Assessing Officer is directed to adjust the taxes already paid by the assessee in assessment year 2011-12 regarding the same capital gain after verification during the current year against the capital gain liability. In the result, appeal of the assessee is to be partly allowed. (AY. 2008-09)
Anu Agarwal (Smt.) v. ITO (2013) 55 SOT 294 (Chd.)(Trib.)

S.54F : Capital gains – Investment in a residential house – Construction of additional floors would be part of existing house – Deeming fiction under section 50C [S.45, 48, 50C]
The assessee sold a plot of land and computed capital gains. In computing capital gain, the assessee claimed deduction u/s 54F on the ground that the sale consideration (FVC) was utilized for construction of residential house. The Ld. AO, while invoking section 50C disallowed the deduction on the ground that the requirements of section 54F were not met. The actual amount utilised for the new house was more than the FVC even as per section 50C. In appeal, the CIT(A) upheld the application of section 50C but also held that the assessee was entitled for the deduction u/s 54F. However, the CIT (A) restricted the same to the figure computed by the assessee. According to the CIT (A) the ‘full value of consideration’ was to be adopted as per section 50C but benefit of section 54F was to be restricted to the amount declared by the assessee. In other words, the difference between ‘full value of consideration’ as per section 50C and the actual amount declared by the assessee was to be taxed as ‘capital gain’; the benefit of section 54F being restricted to the amount declared (which was also to be presumed to be ‘investment’/ utilization for s.54F) claimed by the assessee. The Hon’ble tribunal held that since the actual investment was more than even the FVC as per section 50C, there was no taxable capital gain. In the present case, the assessee’s house includes ground plus 4 floors, where the ground floor is a big living room, 1st floor has a kitchen plus 2 bed rooms, 2nd floor has three bedrooms, 3rd floor has three bedrooms and fourth floor has 3 bed rooms. Thus, the said details suggest that functionally. The Commissioner (Appeals) restricting the exemption of capital gains to Rs. 5,84,837/ is not proper. (AY. 2008-09)
Raj Babbar v. ITO (2013) 56 SOT 1 (Mum.)(Trib.)

S.54F : Capital gains – Investment in residential house – Exemption was denied as the assessee failed to prove that construction of residential building out of sale proceeds of land [S.45]
On facts the assessee could not prove that construction of residential building was out of sale proceeds of land hence the exemption was denied.(AY.2007-08)
Syed Nawab Hussain v. ACIT (2013) 24 ITR 180 / (2014) 61 SOT 18 (URO) (Hyd.)(Trib.)

S.55 : Capital gains – Cost of improvement – Cost of acquisition – Guideline value emanating from Sub-Registrar cannot be adopted unless it was scientifically arrived at-Estimate by Tribunal was justified [S.48]

Guideline value emanating from Sub-Registrar's office for valuation as on 1-4-1981 could not be adopted unless it was scientifically arrived at. Tribunal has reasonably estimated fair market value as on 1-4-1981. Order of Tribunal was affirmed. (AY.2006-07)
CIT v. Ashven Datla (2013) 218 Taxman 74 (Mag.) (AP)(HC)

S.55 : Capital gains – Cost of acquisition – Self generated asset – Amount received on termination of tenancy [Ss. 45, 54EC, 131, 132(4)]
In the return filed the assessee claimed exemption under section 54EC in respect of capital gain received on surrender of tenancy rights. The assessee reduced from the sale consideration an index cost of Rs. 16,80,000 on a market value of Rs. 3,50,000 as on April 1, 1981. The Assessing Officer held that the cost of tenancy right being self generated, it had to be taken as nil in terms of section 55. The Assessing Officer held that the assessee had not produced any proof of payment of pugree for Rs.20000. The view of Assessing Officer confirmed by Commissioner (Appeals) and Tribunal. On appeal the High court held that in the statement in the course of Search the assessee had not stated that he had paid pugree of Rs. 20,000. He only stated that for getting tenancy in 1969 he had to pay three months advance rent of Rs. 390. The Court also observed that the assessee had maintained receipts of Rs.335 however not produced any evidence for payment of pugree. As there was no proof entire sum was held to be taxable.
P. Kunhiraman Nair v. CIT (2013) 354 ITR 141 / 219 Taxman 128 (Mag) / 85 DTR 83 (Ker.)(HC)

S.55 : Capital gains – Cost of improvement – Cost of acquisition – Registered value report – Valuation report will have precedence over Guide house tax
The Court held that valuation done by a registered valuer is with regard to specific property and takes in to account its various advantages and disadvantages all of which influence valuation of property, whereas any Guide to House tax is generalised guide and does not take in to account peculiar features of property being valued and therefore, valuation done by an empanelled registered valuer of Income-tax Department would certainly takes precedence over any Guide to House Tax. In favour of assessee. (AY.2006-07)
CIT v. Raman Kumar Suri (2013) 212 Taxman 411/81 DTR 33 / 255 CTR 257 (Bom.) (HC)

S.55 : Capital gains – Cost of improvement – Cost of acquisition land – As on 1-4-1981 – Valuation report – Valuation adopted by assessee was adopted [S.48]
Assessee declared capital loss on sale of land and building. While computing capital gains, assessee adopted value of land at rate of Rs. 575 per sq. ft. as on 1-4-1981 on basis of valuation report of approved valuer. However, DVO worked out value of land by applying rate of Rs. 145 per sq. ft. on basis of land rate obtained from sub-Registrar's office. Sub-Registrar provided five certified documents, and DVO considered only one document, further, property of assessee was having better commercial prospects and being approximately 8 times bigger than property considered by DVO, same commanded higher price and the rate adopted by assessee was based on report of approved valuer who had considered rates prescribed by Collectorate and there was various flaws in rate adopted by DVO, Assessing Officer was to be directed to adopt value of land as on 1-4-1981 at rate of ` 575 per sq. ft.(AY.2001-02)
Tushir Kant Agarwal (HUF) v. ITO (2013) 155 TJJ 490 / 90 DTR 122 / 60 SOT 140(URO) (Jodh.)(Trib.)

S.55 : Capital gains – Cost of improvement – Cost of acquisition – Shares – Adoption of average market price on date of conversion of GDR into shares as cost of acquisition is reasonable and justifiable and not closing price prevailing in stock exchange on date of conversion [Ss. 48(ii), 17(vi)(d), Rule 40C]
The assessee was holding GDRs of company "c" which were converted in to shares of "c" on 10-7-2006. The assessee sold equity shares of "c" and claimed closing price prevailing in stock exchange

on date of conversion as cost of acquisition of shares for computation of capital gains. AO adopted weighted average price of shares of “c” and made addition. CIT(A) held that the term ‘cost of acquisition’ in section 48(ii) is pari materia to the fair market value of shares provided in section 17(2)(vi)(d) and also Rule 40C. Following Rule 40C he adopted the average price of shares prevailing on the date of conversion as the cost of acquisition of shares. On appeal the Tribunal held that where Rule 40C is cognate to section 17(2)(vi)(d) and section 48(ii) for purpose of determining cost of acquisition of shares and where rule 40C specifically provides taking average of opening and closing value of shares on date of conversion as cost of acquisition, claim of assessee could not be allowed, therefore, adoption of average market price on date of conversion of GDR into shares as cost of acquisition is reasonable and justifiable in absence of any circular/rule vis-à-vis scheme, under which GDRs were issued and redeemed into shares of company.(AY.2008-09)
Master Trust Bank of Japan Ltd. v. ACIT (2013) 60 SOT 163 / 94 DTR 351 / 158 TTJ 175 (Mum.)(Trib.)

S.55 : Capital gains – Cost of acquisition – Interest on pre-construction period cannot form cost of acquisition – Allowable as deduction u/s. 24(b) [S.24(b)]
Interest of pre-construction period of house property cannot form part of cost of acquisition for computing gain on sale of that property but would be allowable as deduction under section 24(b). (AY. 2009-10)
Bajrang Prasad Ramdharani v. ACIT (2013) 60 SOT 66 (URO) (Ahd.)(Trib.)

S.55 : Capital gains – Transferable Development Rights – No Cost of acquisition hence not liable to capital gains tax [Ss.45, 48]
Even though transfer of TDR amounted to transfer of capital asset, the same could not be subjected to tax under head ‘capital gain’ for reason that there was no cost of acquisition in acquiring flat which had been transferred and computation mode given under section 48 failed. (AY. 2005-06)
ACIT v. IGE India Ltd. (2013) 58 SOT 62 / 22 ITR 365 (Mum.)(Trib.)

S.55 : Capital gains – Cost of acquisition – Non-compete fees – Capital receipts not chargeable to tax [Ss. 4, 5, 28(va)]
Assessee received a sum towards restraint covenants for desisting from carrying on of business activities connected with manufacture, sale and distribution of marketing of carbonated soft drinks for a period of ten years. Assessing Officer had treated sum so received to be taxable under head ‘Capital Gains’ on grounds that assessee had itself invested part of receipt in securities specified under section 54EA and that non-compete right was also a valuable right and was covered by section 55(2)(a). Since the amount in question had been given for not to carry out any business activities, provisions of section 55(2)(a) was not applicable. Also, section 28(va) was brought to in statute with effect from 1-4-2003 and prior to this period, such receipt was to be treated as capital receipt not chargeable to tax. (AY.1999-2000)
DCIT v. Bisleri Sales Ltd. (2013) 58 SOT 73 / 81 DTR 197 / 151 TTJ 285 (Mum.)(Trib.)

S.55 : Capital gains – Cost of acquisition – Property devolved on assessee – Benefit of Indexation is eligible if properties acquired prior to 1-4-1981 [Ss.2(42A), 48, 49]
Where owner through whom assessee derived her title directly or indirectly, acquired property prior to 1-4-1981, its fair market value as on 1-4-1981 was to be adopted as cost of acquisition, for purpose of computing capital gain. In such a situation, the benefit of cost inflation index since 1-4-1981 was to be granted even though property devolved on assessee on 20-5-1998. (AY.2006-07)
ITO v. Noella P. Perry (Ms.) (2013) 56 SOT 495 (Mum.)(Trib.)

S.55 : Capital gains – Cost of acquisition – Leasehold land for 99 years – Indexation – Fair market value as on 1-4-1981 is to determined [S.48]

The assessee had acquired land on lease for 98 years in the year 1966. Under the agreement to lease, the assessee was obliged to construct a Cinema Hall on or before 31st December, 1966 at minimum cost of Rs. 4 lakhs. The assessee claimed this amount of ` four lakhs as 'cost of acquisition'. The Department took the cost of acquisition as 'NIL' by invoking the provisions of Section 48 r.w.s. 55(2) (a) (ii).The Hon'ble Tribunal held that"land" does not find any mention in Section 55(2(a), and hence section 55(2)(a)(ii) will not be applicable while valuing the "cost of acquisition" of the land. And hence, the 'cost of acquisition' of the lease-hold rights in the land in the hands of the assessee, has to be determined as per section 48 and accordingly such 'cost' would be the "fair market value" of the land as on 1-4-1981. It was held that the 'cost' was Rs.4 Lakhs and indexation had to be permitted accordingly. (AY.2007-08)
Natraj v. Dy. CIT (2013) 83 DTR 201 / 56 SOT 23 / 152 TTJ 619 (Ahd.)(Trib.)

S.55 : Capital gains – Cost of acquisition – Indexation – Fair market value as on 1-4-1981 – Sub-registrar value need not be basis – It can be higher.[S.48]
Assessee adopted the fair market value as on 1-4-1981 at Rs.108. per.sq. AO relying upon the value adopted by sub-registrar adopted at Rs. 5 per sq.ft. CIT(A) valued the property at Rs. 50 per sq.ft, which was confirmed by Tribunal in earlier year. Order of CIT(A) was confirmed.(AY.2009-10)
ACIT v. Best & Crompton Engineering Ltd. (2013) 60 SOT 53 (URO) (Chennai)(Trib.)

S.55A : Capital gains – Reference to Valuation Officer – AO can make reference to Valuation Officer to determine the value as on 1-4-1981 [S.45]
There is nothing in section 55A which debars Assessing Officer for making reference to DVO under clause (b) even when registered valuer's report has been filed. In case AO is of opinion that value as per registered valuer is higher than market value, he can make reference under section 55A(b)(ii), however, valuation of property is required to be made after allowing proper opportunity of hearing to assessee by DVO. Matter remanded.(AY.2007-08)
Vijay P. Karnik v. ITO (2013) 60 SOT 155 (Mum.)(Trib.)

S.56 : Income from other sources – Business income – Set off against cost of construction – Interest on short term zero coupon bonds to maintenance of debt-equity ratio is assessable as income from other sources [S.4. 28(i)]
Interest earned by short-term investment of money raised by issue of zero coupon bonds in order to maintain debt equity ratio is taxable as income from other sources and not income from business and could not be set off against cost of construction. (AY.2008-09)
Bharat Oman Refineries Ltd. v. CIT (2013) 356 ITR 399 / 218 Taxman 282 / 96 DTR 29(MP)(HC)

S.56 : Income from other sources – Principle of mutuality – Interest from bank
The fund invested was the mutual fund belonging to members of co-operative societies, but for keeping those funds invested with a third party, i.e., bank, third party was making contribution to that fund by paying interest and it being no contribution by any of members of societies, same could not be treated to be an expansion of mutual fund by contributions of members but expansion of funds of co-operative society by a third party. Thus, it was rightly assessed as other income of society.
CIT v. Laksar Cooperative Cane Development Union Ltd. (2013) 216 Taxman 218 (Uttarakhand)(HC)

S.56 : Income from other sources – Composite or inseparable letting – Income from house property [Ss.22, 24]
The assessee claimed deduction in respect of its rental income under the head 'Income from house property. The Assessing Officer perused rent agreements and found that premises were let out on condition that the assessee would provide certain facilities like furniture and fixtures, plant and

machinery, etc. He held that the letting out of the machinery, plant and furniture and the letting out of buildings being inseparable, the rental income be taxed under the head 'Income from other sources', which resulted in disallowance under section 24. Commissioner (Appeals) confirmed said order The Tribunal held that the letting out of the plant, machinery or furniture and the premises constituted a single, composite and inseparable letting rental income be assessable as 'income from other sources'. On appeal High Court also held that letting of building and letting of fixture, furniture, etc., was inseparable and, therefore, rental income was assessable as income from other sources. Appeal of assessee was dismissed. (AY. 2007-08)
Garg Dyeing & Processing Industries v. ACIT (2013) 212 Taxman 160 (Delhi)(HC)

S.56 : Income from other sources – Gift received from mother's sister's son is taxable under the head income from other sources
Mother's sister's son is not a relative as per section 56(2)(v) and therefore, gift received from him is taxable under the Act. (AY. 2006-07)
ACIT v. Masanam Veerakumar (2013) 143 ITD 664 / 157 TTJ 141 / 92 DTR 159 (Chennai)(Trib.)

S.56 : Income from other sources – Business income – Interest income before commencement of business is assessable as income from other sources [S.28(i)]
Interest income on FDRs etc., before commencement of business is to be taxed as income from other sources. Tribunal followed the decision in the case of *Madhya Pradesh State Industries Corp. Ltd. v. CIT (1968) 69 ITR 824 (MP)*.(AY.2008-09)
Bharat Oman Refineries Ltd. v. Dy. CIT (2013) 154 TTJ 211 / 85 DTR 113 / 58 SOT 149 (URO) (Indore)(Trib.)

S.56 : Income from other sources – Lump sum alimony from ex-husband – Not assessable as income from other sources [S.56(2)(vi)]
In August 2007 i.e. during previous year assessee received lump sum payment from her ex-husband, a foreign national as per diverse agreement executed in the year 1990. A.O. held that as the amount received without consideration and the assessee has not received the same from the persons covered under definition of relative as provided in exemptions to section 56(2)(vi) hence assessable as income from other sources. On appeal Tribunal held that receipt represented accumulated monthly installments of alimony, which had been received as a consideration for relinguishing all her past and future claims, and therefore, provisions of section 56(2)(vi) would not be applicable.(AY. 2008-09)
ACIT v. Meenakshi Khanna (2013) 143 ITD 744 / 158 TTJ 782 / 96 DTR 220 (Delhi)(Trib.)

S.56 : Income from other sources – Hawala transactions – Dealing in shares – Commission income can be added and not entire amount of transaction [S.28(i), 68]
Since the assessee was concerned with commission earned on providing accommodation entries, it was only amount of commission that could be added to assessee's taxable income and not entire amount of transaction. (AY. 2002-03)
Gold Star Finvest (P.) Ltd v. ITO (2013) 57 SOT 409 (Mum.)(Trib.)

S.56 : Income from other sources – Business income – Sub-letting of property – Income from house property [Ss. 22, 27, 28(i), 269UA(f)]
Assessee had taken premises on lease for period of three years, first floor of premises was sub-leased and amount of receipt was considered as business income. Assessing Officer treated the amount earned from sub-letting as 'income from house property'. On appeal Tribunal held that it was a case of simple subletting of property, not facilitating carrying on of assessee's business and could not be considered as 'business income', it should be included under head 'Income from other sources. (AY. 2006-07)

Stream International Services (P.) Ltd. v. ACIT (2013) 141 ITD 492 / 152 TTJ 553 / 23 ITR 70 / 83 DTR 394 (Mum.)(Trib.)

S.56 : Income from other sources – Commencement of business – Set off Interest against business expenditure.[S. 37(1)]

Assessee set-off interest received on term deposits against business expenditure. Assessing Officer holding that business had not yet commenced, taxed interest under ‘income from other sources’. On appeal Tribunal held that interest received could not be set off against business expenses and was taxable under ‘income from other sources’. (AY.2005-06)

Deccan Goldmines Ltd. v. ACIT (2013) 141 ITD 579 / 89 DTR 330 (Mum.)(Trib.)

S.56 : Income from other sources – Interest – Capitalisation

The assessee credited interest income to the capital expenditure account of projects under completion. The assessee did not give any specific reason why this amount should be allowed as interest capitalised. Held, the interest was rightly treated as income of the year. (AY. 2005-2006)

E-City Entertainment (India) Pvt. Ltd. v. ACIT (2013) 24 ITR 73 (Mum.)(Trib.)

S.56 : Income from other sources – Income from house property – Sub-letting of property is assessable as income from other sources. [Ss. 22, 27(iiib), 28(i), 269UA(f)]

The assessee had taken three floors of a building on lease for its business purpose. Due to the availability of excess capacity out of the three floors, the assessee sublet one of the floors and received rent which it treated as business income. The assessee claimed deduction for expenses of rent and maintenance and depreciation on leasehold improvements. The Assessing Officer treated the sum earned from subletting of leasehold premises as “Income from house property” consequently disallowing the expenses claimed. Held, that in order to be covered under section 22, it is *sine qua non* that the assessee must be the owner of the house property in terms of section 27 read with section 269UA(f). The assessee was not the owner of the property. It could not also be deemed the owner of house property within the meaning of section 27 because it took the property on lease for a period of three years. Since the assessee was neither the owner nor the deemed owner of the house property, applying the provisions of section 22, the annual value of such property could not have been charged to tax under the head “Income from house property”. As it was a case of simple subletting or property, not facilitating the carrying on of the assessee’s business in any manner, the rental income so realised by the assessee in the present circumstances could not be considered as “business income”. In such a situation, it was to be included under the head “Income from other sources” and the Assessing Officer was to allow eligible deductions and allowances in accordance with the relevant provisions under Chapter IV-F. (AY. 2006-07)

Stream International Services P. Ltd. v. ADIT (IT) (2013) 23 ITR 70 / 152 TTJ 553 / 141 ITD 492 / 83 DTR 394 (Mum.)(Trib.)

S.56 : Income from other sources – Capital receipt – Setting up of business – Interest from customer, employees, from escrow account before setting up of business can be reduced from cost of project [S.4]

Interest received from supplier on excess advance made for supply of steel for setting up of refinery and interest received on loan advanced to employees at the setting up of refinery was are capital receipts and the same are to be adjusted against the cost of the project. Interest received from escrow account as a precondition for grant of loans by banks for financing its refinery project, interest on such deposits can be capitalized in the books and is to be reduced from the cost of the project. Interest earned on escrow account to be capitalized and reduced from cost of project (AY. 2004-05, 2005-06)

Essar Oil Ltd. v. Addl. CIT (2013) 94 DTR 153 / 157 TTJ 785 / 28 ITR 609 (Mum.)(Trib.)

S.56(2) : Income from other sources – Gift received on the occasion of daughter's marriage is not exempt from tax

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 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. On appeal High Court affirmed the view of Tribunal (AY. 2007-08)

Rajinder Mohan Lal v. Dy. CIT (2013) 36 taxmann.com 250 / 263 CTR 231 / 218 Taxman 213 / 95 DTR 126 (P&H)(HC)

Editorial : View of Tribunal in Rajinder Mohan Lal v. Dy. CIT (2012) 49 SOT 713 / 148 TTJ 369 / 75 DTR 85 (Chd.)(Trib.) is affirmed.

S.56(2) : Income from other sources – Gift of residential flats through transfer of shares by foreign company to Indian company – Can not be assessed as business income or income from other sources [S.4, 9(1)(i), 28(iv), 47(ii), Companies Act 1956 – S.82, Transfer of Property Act, 1882 – Ss. 5, 122]

The Assessee had received by way of gift, three residential flats in Hill Park from its sister concern viz., BISNCL, a UK based company. BISNCL was holding shares of Hill Park Ltd. which entitled it for use and occupation of the said three flats and the gift was effected by transfer of the said shares. Both, the assessee and BISNCL, were 100% subsidiary of a U.K. based entity which in its turn was 100% subsidy of a Dubai based entity.According to the Tribunal, such a transfer may trigger capital gains ramifications in India, since the shares of an Indian company were situated in India and when the transferor is a non resident, the deeming provisions of sec. 9(1) (i) of the I.T. Act. 1961 came into play. However, referring to sec. 47(ii), the tribunal noted that the transfer of a capital asset, amongst others, under a gift is not treated as transfers for the purposes of sec. 45 of the Act. Referring to the provisions of sec. 5 and section 122 of the Transfer of Property Act (TPA), the Tribunal noted that there was no requirement in the TPA that a 'gift' can be made only between two natural love and affection which means that as long as a donor company is permitted by its Articles of Association to make a 'gift', it can do so. In case where donor is a foreign company, the Tribunal noted that the relevant corporate/commercial law of the jurisdiction where the donor is based needs to be considered. Referring to the Certificate and Attestation by the Notary Public of the City of London, England, wherein the authority has *inter alia* certified and attested that the Deed of Gift was binding on BISNCL in accordance with the relevant provisions of English law, the tribunal concluded that BISNCL was legally authorised to give gift of shares. Therefore, it held that the gift of shares of an Indian company by a foreign company without consideration has to be treated as gift within the meaning of sec. 47(iii) of the Act.

Simply because both the donor and the done happened to belong to the same group cannot ipso facto establish that they have any business dealings to attract the provisions of section 28(iv). The Tribunal noted that a plain reading of the provisions of sec. 56(2) show that no every receipt is taxable under the head `income from other sources' but only those which can be shown as 'Income' can be brought to tax under this head, if it does not fall directly under other heads of income specified in section 14 of the Act. According to it, the issue involved under the present appeal got covered under the clause (viia) of sec. 56(2). However, the said clause was introduced with effect from 1st day of June, 2010, hence, not applicable to the case of the assessee. (AY.2008-09)

DP World P. Ltd. v. Dy. CIT (2013) 140 ITD 694 (Mum.)(Trib.)

S.56(2) : Income from other sources – Gift – Relative – Gift received from relative of karta is not taxable in the hands of HUF

The assessee in the capacity of HUF received a gift of Rs. 7 lakhs from uncle of the karta of HUF. The Assessing Officer held that as the Explanation to section 56(2)(v) the definition of relative does not include relationship *vis-à-vis* HUF, therefore the amount received from the donor by the HUF does not fall within the relationship as prescribed in the said Explanation. Tribunal held that even in case of HUF if a sum of money is received and that relative is as defined in Explanation, then also it falls within the exception as prescribed in the said section. On the facts the gifts was received from a relative who is an uncle of the karta of his HUF, i.e, as per Explanation sub clause (iv) "brother or sister of either of the parents of the individual" and thus falls within the category of the "relative" prescribed in the Act, therefore, not chargeable to tax in the hands of the assessee.(AY.2005-06)

Harshadbhai Dahyalal Vaidhya (HUF) v. ITO (2013) 88 DTR 288 / 144 ITD 605 / 155 TTJ 71 (Ahd.)(Trib.)

Editorial: Finance Act 2012 w.e.f. 1-10-2009, definition of term relative in respect of an HUF. (ii) in case of a Hindu undivided family, any member thereof.

S.57 : Income from other sources – Deductions – Interest – When nexus is established the principle of netting must be applied

Assessee received interest from 'S' Ltd. against which it claimed deduction of certain amount being interest paid to same entity and declared net interest as his income. According to assessee, he had received interest from 'S' Ltd. in respect of land sold to them against which sales proceeds were received late and, on other hand, he had also paid interest on loan obtained from 'S' Ltd. earlier for purchase of said land. Court held that since right to receive interest and liability to pay interest arose in respect of same period and out of same event, i.e., non-payment of sale proceeds in time, it afforded sufficient nexus between two so as to justify applicability of principle of netting, therefore, claim raised by assessee was to be allowed. In favour of assessee. (AY.2000-01)

CIT v. UK Bose (2013) 212 Taxman 399 / 91 DTR 36 (Delhi)(HC)

S.57 : Income from other sources – Interest – Director – Order of Tribunal is set aside and matter was to be remanded back for disposal afresh

Assessee was a director in various companies belonging to 'S' group In course of assessment proceedings, Assessing Officer noticed that assessee had declared certain loss under head 'income from other source'. He further noted that loss represented amount of interest on loans borrowed from one company belonging to 'S' group for purchase of shares in several other companies belonging to same Group. According to Assessing Officer, method adopted by assessee amounted to a colourable device for transferring funds of some concerns of 'S' Group to other concerns of same Group, himself acting as a conduit. He thus disallowed assessee's claim for deduction of interest on borrowed funds. Tribunal, however, allowed assessee's claim. The Court held that on facts, it was worth examining why companies belonging to same group could not have helped each other directly and why assessee was introduced as a conduit. Therefore, impugned order of Tribunal was to be set aside and, matter was to be remanded back for disposal afresh. Matter remanded. (AY.1994-95)

CIT v. J.B. Roy (2013) 212 Taxman 591 / 89 DTR 348/ 265 CTR 505 (Delhi)(HC)

CIT v. O.P. Srivastava (2013) 89 DTR 348/265 CTR 505 (Delhi)(HC)

S.57 : Income from other sources – Wholly and exclusively incurred – Cost of construction of such barricades was to be set-off as expenditure wholly and exclusively incurred for purpose of making such income

Assessee, is engaged in construction, had erected barricades for smooth constructions of roads, and earned income from advertisements placed on such barricades. Tribunal held that when AO treated

income from advertisements placed on barricades as income from other source, cost of construction of such barricades was to be set-off as expenditure wholly and exclusively incurred for purpose of making such income. Alternatively, if cost of barricades were to be considered as preliminary and pre-operative expenditure, income from advertisements would only go to reduce such expenditure. (AY. 2006-07)
IT Expressway Ltd. v. ITO (2013) 60 SOT 67(URO) (Chennai)(Trib.)

S.57 : Income from other sources – Interest on borrowed capital – Loan taken for acquiring controlling interest in company – Interest is allowable under section 36 or under section 57 [S. 36(1)(iii)]
The assessee had taken a loan for the purpose of acquiring controlling interest in a company. Tribunal held that as on the facts the dividend was taxable, and following the judgment of the Supreme Court of India in Vodafone's case as controlling interest is not a separate capital asset. The Tribunal held that interest was paid on borrowed funds for acquiring the shares of a company and the dividend income is taxable during the year under consideration. Therefore, the interest income is allowable as deduction under section 57(iii) or under section 36(1)(iii). (AY. 2003-04)
Pistabhai Rikhabchand Kothari v. ITO (2013) 56 SOT 222 (Mum.)(Trib.)

S.57 : Income from other sources – Management fee – Investment advisor – Interest – Dividend – 50% was allowed [S.56]
Since the entire management fee paid by the assessee was not for earning income by way of interest and dividend, only fifty per cent of impugned management fee was entitled to be allowed u/s 57(iii) against income by way of interest and dividend. (AYs. 2004-05, 2005-06)
Anil Kumar Nehru v. ACIT (2013) 57 SOT 296 (Mum.)(Trib.)

S.57 : Income from other sources – Interest – Commencement of business – Deductions. [S. 28(i)]
The assessee – company was implementing a multi-products special economic zone. It had obtained secured loan from banks for business purposes the said loan could not be deployed immediately and was kept in fixed deposits. The assessee earned interest income on fixed deposits and it paid interest on secured loan. The amount of interest earned was netted of and the netted amount was shown as pre-operative expenses. Assessing Officer taxed the interest as income from other sources as the assessee had not commenced the business operation yet. Commissioner (Appeals) confirmed the decision of assessing Officer. On appeal the Tribunal held that interest earned from FDs was taxable as Income from other sources. Interest paid on borrowed funds had no connection with receipt of interest income and interest on such loans could not be deductible under section 57(1)(iii) from interest earned on fixed deposits. (AY.2008-09)
Kakinada SEZ (P.) Ltd. v. ACIT (2013) 141 ITD 635 (Hyd.)(Trib.)

S.64 : Clubbing of income – Spouse – Qualification of spouse – Income could not be clubbed
Where the spouse of assessee was a post-graduate, and was director in many companies and had expertise in business matters, her income could not be clubbed with that of the assessee. (AY. 1997-98)
CIT v. Subrata Roy (2013) 219 Taxman 133 / (2014) 99 DTR 177 (All.)(HC)

S.64 : Clubbing of income – Minor child – Adding the income of the minor child in the income of the parent, whose income is greater, cannot be said to be arbitrary [Article 14, Hindu Minority and Guardianship Act, S. 6]
Under the Hindu law both mother and father are the natural guardians of the minor sons or daughters. It cannot be said that the mother is not the natural guardian during the lifetime of the father or until he is disqualified from being the natural guardian. If that is so, then the contention raised by the learned

counsel for the petitioner that clause (a) of Explanation to section 64(1A) which provides that for the purposes of this sub-section, the income of the minor child shall be included where the marriage of his parents subsists, in the income of that parent whose total income is greater, is contrary to the provisions of section 6 of the Hindu Minority and Guardianship Act and violative of article 14 of the Constitution, does not arise. The object of the impugned provision is to tax the minor's income in the hands of the parents whose income is greater by clubbing the income of the minor in his or her own right. When both mother and father are natural guardians, then adding the income of the minor child in the income of the parent, whose income is greater, cannot be said to be arbitrary, artificial or evasive of the object sought to be achieved. (AYs. 1993-94, 1994-95)
Anju Mehra v. UOI (2013) 356 ITR 149 / 94 DTR 226 / 38 taxmann.com 383 / 262 CTR 577 / 219 Taxman 96 (P&H)(HC)

S.64 : Clubbing of income – Income of minor – Higher income of parent
The income of minor had rightly been clubbed with the income of the mother on the ground that the mother's income was higher.
Anju Mehra v. CIT (2013) 357 ITR 416 (P&H)(HC)
Ragav Mehra v. CIT (2013) 357 ITR 416 (P&H)(HC)

S.64 : Clubbing of income – Spouse – Qualification – Burden is on assessee
The assessee, engaged in the business of civil construction, claimed deduction of salary paid to his wife. According to him she was an engineer by profession and looked after plans for executing work allotted to the assessee and helped in making administrative decisions. The Assessing Officer disallowed the salary. On appeal, the Commissioner (Appeals) allowed the deduction. On appeal by revenue, the Tribunal disallowed the deduction. On appeal High Court held that, the assessee's wife though, was in possession of technical qualification but the assessee was required to prove conclusively that his wife was in fact looking after plans for execution work and was taking administrative decisions. The assessee cannot be given benefit merely on the ground that the deduction had been allowed in the earlier assessment years. (AYs. 2003-04, 2004-05)
Yashwant Chhajta v. Dy. CIT (2013) 214 Taxman 280 / 85 DTR 26 (HP)(HC)

S.67A : Association of persons-Body of individuals – Member's share – Computation of a share of a member – Set off of loss
Assessee entered into joint venture with other concerns for execution of various projects. Joint venture was assessed as AOP. Assessee claimed set off of share of loss from AOP against its business income. Tribunal held that share in loss of AOP could not be set off against other income of assessee when profit of AOP was not includible in total income of assessee,even otherwise, when loss was eligible for carry forward and set off as per provisions of Chapter VI of Act in hands of AOP, then no such claim could be allowed in hands of individual member of AOP. (AY. 2003-04, 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.68: Cash credits – Interim order – Interim order of Magistrate to release 70% of cash seized by the police to the assessee was held to be valid. [S.69, S.397 and 401 of the Code of Criminal Procedure, 1973]
Cash was recovered from assessee by police. Seized cash was deposited in bank and Income-tax department was informed accordingly. Assessee submitted that cash was required in his business but department opposed said claim. Meanwhile, police dropped said case on ground that no further action required. Magistrate accepted said report and directed to pay 30 per cent of seized cash to department and to return balance to assessee subject to deposit of bond along with security on condition that cash would be deposited back as and when required. Court held when there was no lapse in conclusion arrived at by Magistrate and interim order was maintainable.
ADIT v. A. Khader Mohideen (2013) 219 Taxman 187 (Mad.)(HC)

S.68 : Cash credits – Difference in balances – Reconciliation statement was furnished – Addition was not justified
Where assessee furnished reconciliation statement substantiated by necessary evidence, addition on account of difference in balances was not sustainable.
CIT v. Shree Rama Multi Tech Ltd. (2013) 219 Taxman 162 (Mag.) (Guj.)(HC)

S.68 : Cash credits – Remand proceedings – Deletion of addition was held to be justified
In remand proceedings, when the AO himself had verified genuineness of credits and did not doubt bona fides of transactions relating to creditors, he could not have made addition to income of assessee. Held, the said findings of fact needed no interference. (AY. 2006-07)
CIT v. Kaiser Construction & Engineers (2013) 219 Taxman 111 (Mag.) (All.)(HC)

S.68 : Cash credits – Share application money – Identity was proved – Addition cannot be made in the assessment of company
Held, since identity of shareholders stood proved, share application money could not be taxed in the hands of the assessee. Addition, if any, can be made in the hands of the shareholders. (AY. 2004-05)
CIT v. Al Anam Agro Foods (P.) Ltd. (2013) 219 Taxman 125(Mag.) (All.)(HC)

S.68 : Cash credits – Sale of shares – Held in demat account – Shares were in possession of assessee – Merely because broker not furnishing contract notes – Addition cannot be made
The assessee transferred shares and received sale consideration by demand draft. Held, merely because in such circumstances, the Tribunal held that the broker could not file any evidence because same were seized by Department, there was no fault on part of assessee. Since assessee was in possession of shares in question and had sold said shares in course of ordinary transaction at stock exchange, addition set aside by the Tribunal was liable to be upheld. (AY. 2004-05)
CIT v. Anirudh Narayan Agrawal (2013) 219 Taxman 126 (Mag.) (All.)(HC)

S.68 : Cash credits – Gift – NRI – Deletion of addition was held to be justified
On appeal, Commissioner (Appeals) as well as Tribunal deleted addition by recording a finding of fact that the impugned gift amount was given by one 'J' staying in UK by cheque from his NRE account and said fact had been confirmed by 'J'. Hence, the order passed by Tribunal could not be interfered with.
CIT v. Harishbhai Raojibhai Patel HUF (2013) 219 Taxman 125(Mag.) (Guj.)(HC)

S.68 : Cash credits – Sale in cash – Agricultural income – Addition as cash credit was not justified – There is nothing in the Income-tax Act debarring assessee from selling agricultural produce in cash, addition to income based only on suspicion that no agricultural activities were carried out could not be sustained [S. 2(1A)]
Assessee-company showed agricultural income in cash. Appropriate entries were found to have been made in regular books of account that was maintained, audited and accepted in AGM as per Companies Act. There was no evidence to establish that assessee had sold agricultural land or that assessee had stopped agricultural operation. Since there is nothing under Income-tax Act debarring assessee from selling agricultural produce in cash, addition to income based only on suspicion that no agricultural activities were carried out could not be sustained (AY.2005-06)
CIT v. Neel Giri Krishi Farms (P.) Ltd. (2013) 218 Taxman 95(Mag.) (All.)(HC)

S.68 : Cash credits – Agricultural income – Suspicion – Addition was not justified [S.2(1A)]
Assessee, being a private company, was maintaining regular books of account as required under Companies Act, which were also audited and accepted in AGM of company. Also, entries in books were not proved to be bogus. Since there was nothing under Act debarring assessee from selling

agricultural produce in cash, and thus, additions based only on suspicion could not be sustained. (AY. 2005-06)
CIT v. Landmark Innovation (P.) Ltd. (2013) 218 Taxman 158(Mag.) (All.)(HC)

S.68 : Cash credits – Amounts received from persons regularly assessed to tax – Land transactions – Addition was not justified
Where the assessee-developer received amounts from people for allotment of land, who were regularly assessed to income-tax, and where genuineness of credit was approved by authorities below, addition as cash credit was not sustainable.(AY.1989-90)
CIT v. Lucknow Property Management Group (2013) 218 Taxman 94(Mag.) (All.)(HC)

S.68 : Cash credits – Deposit in savings bank account – Explanation was not satisfactory – Addition was held to be justified – Substantiation
Where unexplained deposits in savings bank account were added as cash credits, as assessee could not substantiate its claims that money was received from neighbours for making payments to various persons, assessee's appeal could not be allowed.
S. Muthukumar v. ITO (2013) 218 Taxman 94 (Mag.) (Mad.)(HC)

S.68 : Cash credits – Share transactions – Evidence – No evidence was produced – Addition was justified
As a source of investment of Rs. 20 lakhs in shares, assessee produced current account of his proprietary concern and pleaded that cash withdrawn during earlier year was used for purchasing shares in year in question. However, the assessee did not produce any evidence whatsoever in respect of the transaction. Further, it was found that on very same day assessee deposited cheque received from broker, assessee had made gifts. Therefore, the Tribunal was justified in concluding that cash withdrawn might have been used in proprietary business and not in purchase of shares. (AY. 2000-01)
Satyendra Sharma v. CIT (2013) 218 Taxman 157 (Mag.) (All.)(HC)

S.68 : Cash credits – Advanced and repaid account payee cheques – PAN was furnished – Addition cannot be made
Loan was advanced and repaid through account payee cheques. PAN of lenders was furnished. Also, lenders had sufficient funds in their bank accounts and cash was not deposited on date preceding to or at time when cheques were issued by lenders. No addition under section 68 was called for.
CIT v. Kapoor Chand Mangesh Chand (2013) 218 Taxman 157(Mag.) (All.)(HC)

S.68 : Cash credits – Statement retracted – On money – Addition was deleted
Where addition was made on account of 'on money receipts' by assessee-firm, which had constructed an office complex, only on basis of statement of assessee firm's partner, which was later retracted, addition was not sustainable. (AY.1996-97)
CIT v. Radhe Associates (2013) 218 Taxman 97 (Mag.) (Guj.)(HC)

S.68 : Cash credits – Sufficiently explained – Addition was rightly deleted
Where both the CIT(A) and Tribunal had reduced the addition made by Assessing Officer on ground that assessee had maintained account on computers and sufficiently explained entries, except an amount, which was confirmed as undisclosed income, there was no substantial question of law to be considered. (AYs. 1998-99 to 2000-01)
CIT v. Das Cold Storage (P.) Ltd. (2013) 218 Taxman 75(Mag.) (All.)(HC)

S.68 : Cash credits – Income not relatable to any known or *bona fide* source – Assessable as cash credits and not as income from other sources [S.56]

In return of income, assessee under head 'income from other sources' had shown certain income as commodity income received from one 'S'. It had credited said income in books of account. Said income was not relatable to business of assessee and was a sham transaction. Assessee was unable to satisfactorily explain its dealings with 'S'. In peculiar facts of case, commodity income in question could not be considered as income from other sources and the said income would fall under section 68, being unexplained cash receipts. (AY. 2006-07)
Dulari Digital Photo Services (P.) Ltd. v. CIT (2013) 219 Taxman 126 / 94 DTR 259 (P&H)(HC)

S.68 : Cash credits – Gift – NRE – Donee denied the gift – Addition was justified
Assessing Officer held gift received by assessee from NRE account of certain person as bogus and added same as undisclosed income of assessee. In his letter to department, donee not only denied gift but also stated that he did not open account from which gift was made to assessee. On facts, Assessing Officer rightly made addition under section 68.
CIT v. Kamlesh Rani (Smt.) (2013) 219 Taxman 185 (P&H)(HC)

S.68 : Cash credits – Addition by estimation – Not permissible
The Assessing Officer during the course of assessment proceedings noticed an unexplained cash entry to the tune of Rs.15,17,060. On an overall examination of the assessee's accounts, the Assessing Officer was of the opinion that even the profits returned were not truly disclosed as were other sources of income. He rejected the accounts and completed the assessment on an estimate basis. He added a sum of Rs.25 lakhs over and above the specific amount of Rs.15,17,060. The High Court held that under section 68 any amount other than one found credited in the account books of the assessee could not be estimated and charged to tax. (AY.1989-90)
D.C. Rastogi v. CIT (2013) 359 ITR 513 (Delhi)(HC)

S.68 : Cash credits – Gift received through banking channels and copies of cheque issued by donor and acknowledgement of donor having filed return in USA were produced – Deletion was held to be valid
The Assessee received gift from the brother of the assessee. The gift was received through banking channel; copies of draft/cheque issued by the donor and the copy of the passport and the acknowledgment of the donor having filed the return in USA were produced. The A.O. made addition on account of unexplained gift. The CIT(A) reversed the findings of A.O and concluded that the assessee had discharged his burden to establish the identity, creditworthiness and genuineness of the gift. The Tribunal confirmed the findings of the CIT (A). On appeal by the department the High Court, held that the gift which was made by the brother of the assessee was genuine, and full details were produced during the course of the assessment, no question of law arises.
CIT v. Hatish Ramanlal Patel (2013) 217 Taxman 26(Mag.) (Guj.)(HC)

S.68 : Cash credits – Loan – Confirmation was filed – Addition made on account of unexplained cash credit was deleted
The A.O. made addition on account of "unexplained cash credit" under Section 68 of the Act. The CIT (A) deleted the addition made observing that "the confirmation letters were filed by the assessee from Pittalya group. As the credits have been confirmed by them and they have explained source of credits, the said credits are accepted as genuine". Tribunal confirmed the findings of the CIT (A). On appeal by the department the High Court, held that the issue is essentially based on factual matrix and the question having been based on facts, no question of law arises, much less a substantial question of law.(AY. 2001-02)
CIT v. Hemant Hasmukhlal Shah (2013) 217 Taxman 25 (Mag.) (Guj.)(HC)

S.68 : Cash credits – Share application money – Deletion of addition was held to be valid

The A.O. made an addition on account of share application money received from the shareholders on the ground that the assessee has failed to prove genuineness of transactions and creditworthiness of the shareholders. The CIT(A) deleted the addition by relying upon the decision of Hon'ble Supreme Court in the case of *CIT v. Stellar Investments Ltd. 251 ITR 263* and also *CIT v. Lovely Exports 172 Taxman 44*. The Tribunal upheld the CIT(A) order. On appeal by the revenue the High Court affirmed the order of the CIT(A) and Tribunal and held that the matter is squarely covered by the decision of Hon'ble Supreme Court in the case of Stellar Investments Ltd. (supra). (AY. 2005-06)
CIT v. Kamna Medical Centre (P) Ltd. (2013) 217 Taxman 16 (Mag.) (All.)(HC)

S.68 : Cash credits – Sham transaction – Income from other sources
In return of income, assessee under the head 'income from other sources' had shown certain income as commodity income received from one SC Ltd. It had credited said income in books of account. Said income was not relatable to business of assessee and was a sham transaction. Assessee was unable to satisfactorily explain its dealings with SC Ltd. as bills and other documents produced did not inspire confidence and were rejected. Held that, a due consideration of findings recorded by the A.O. as well as the Tribunal leave no ambiguity that Rs. 11,19,765/- claimed by the assessee as commodities income is not relatable to the business of the assessee as held by the A.O., duly affirmed by the Tribunal, is a sham transaction recorded with the sole object of evading tax by claiming this amount as income from other sources. In peculiar facts of case commodity income in question could not be considered as income from other sources and the said income would fall under section 68, being unexplained cash receipts. (AY.2006-07)
Dulari Digital Photo Services (P.) Ltd. v. CIT (2013) 94 DTR 259 / 219 Taxman 126 / 38 taxmann.com 390 (P&H)(HC)

S.68 : Cash credits – Where Tribunal while deleting addition made failed to consider material produced by respective parties, order passed by it was to be set aside and matter remanded for fresh consideration
Assessee is engaged in business of hire purchase finance and received certain deposits from various persons. In the course of assessment the AO noticed that the deposits received were classified as Fixed Deposits, Small Deposits and Cumulative Deposits, but the assessee was not able to justify the genuineness, nature and source of the amounts received and hence made the addition as unexplained cash credits. The CIT(A) confirmed the additions. The Tribunal, however, deleted said addition.
On appeal by the department, the High Court observed that the Tribunal had not applied its mind to various aspects of case and had allowed assessee's appeal by making general remarks. The Tribunal being last fact finding authority, should have considered evidence and material produced by respective parties in support of its findings and hence the impugned order passed by it was set aside and matter remanded back to the Tribunal for fresh disposal (AY. 1997-98).
CIT v. Arya Auto Financers (2013) 217 Taxman 24 / 33 taxmann.com 489 (All.)(HC)

S.68 : Cash credits – Share application money received through banking channels – existence of the applicants proved – cannot be added as unexplained cash credits
The AO made an addition u/s. 68 of the Act, treating an amount of Rs. 58.40 lakhs, received by the assessee on account of share application money, as unexplained share capital on the ground that the assessee failed to furnish confirmation from the allottees/ shareholders. The CIT(A) and the Tribunal deleted the addition.
On appeal filed by the department, the High Court dismissed the departmental appeal following the decision of the Supreme Court in the case of *CIT v. Steller Investment Ltd. (2001) 251 ITR 263 (SC).* (AY. 1997-98)
CIT v. Bhaval Synthetics (2013) 217 Taxman 23 / 35 taxmann.com 83 (Raj.)(HC)

S.68 : Cash credits – Additions deleted – Evidence for cash received from genuine parties was made available

The assessee is engaged in construction and development of properties. During assessment the AO added an amount of Rs.62.25 lakhs as unexplained cash credit in spite of the assessee's contention that the amounts credited were genuine and received for booking flats. On appeal, the CIT(A) found that Rs.43.75 lakhs was genuinely received from various parties and deleted the same. The Tribunal upheld the order of the CIT(A).

On appeal by the department, the High Court held that the finding of fact recorded by the CIT(A) and affirmed by the Tribunal is correct and the revenue has not been able to show that a concurrent finding of fact arrived by the authorities below is either perverse or arbitrary. Accordingly, the appeal was dismissed. (AY.2005-06)

CIT v. Fairdeal Construction Co. (2013) 217 Taxman 22(Mag.) (Bom.)(HC)

S.68 : Cash credits – Share application money – Addition merely on the basis of investigation report was not justified

There was no finding that material disclosed untrustworthy or lacked credibility. Hence, the addition solely based on investigation report not justified. (AY. 2002-03)

CIT v. Fair Finvest Ltd. (2013) 357 ITR 146 (Delhi) (HC)

S.68 : Cash credits – Property held for charitable purposes – Donation received cannot be assessed as cash credits where receipt issued by assessee already in custody of the department [S.11]

The AO had denied deduction u/s. 11(1) for the expenditure incurred on purchase of capital assets on the basis of his finding that unaccounted money by way of anonymous donation was used for the expenditure. The CIT(A) and the Tribunal allowed the claim of the assessee.

On appeal by the department, the High Court dismissing the appeal observed that since the donation receipts are already in the possession of the AO, as the receipt books were impounded in the course of the survey and no confirmations were required to be filed by the assessee, the donations received by the assessee are not anonymous (AY. 2006-07).

DIT v. Hans Raj Samarak Society (2013) 217 Taxman 114(Mag.) (Delhi)(HC)

S.68 : Cash credits – Share application money – Creditworthiness – Identity

Where the assessee had established identity of person providing share application money, burden of proving creditworthiness of said person was not on assessee, and, therefore, addition could not be made as cash credit under s. 68.

CIT v. Peoples General Hospital Ltd. (2013) 216 Taxman 320 (MP)(HC)

S.68 : Cash credits – Prima facie evidence was not established addition was justified

Until *prima facie* evidence in support of claim or contention is adduced, onus does not shift to Assessing Officer to disprove same. Assessee's failure to disclose relevant evidence, even *prima facie*, would amount to no explanation at all and the impugned addition was justified. (AY.2006-07)

CIT v. Arati Jana (Smt.) (2013) 356 ITR 65 / 91 DTR 346 / 216 Taxman 109 (Cal.)(HC)

S.68 : Cash credits – Share application money – Details of applicants were provided addition was not justified

Where the assessee company had furnished complete details of receipt of share application money along with share application forms, names, addresses, PAN and other relevant details of share applicants, the share application money could not be added as cash credit u/s. 68. (AY.2005-06)

CIT v. Shree Rama Multi Tech Ltd. (2013) 215 Taxman 157 (Mag.) (Guj.)(HC)

S.68 : Cash credits – Unexplained credit representing value of suppliers made on credit can also be added as cash credits

An unexplained credit representing the value of supplies made by suppliers on credit can be added u/s 68. The scope of the provision is not restricted to cash credits alone. (AY.1997-98)

Rekha Krishnaraj (Smt.) v. ITO (2013) 215 Taxman 159 / 261 CTR 79 / 91 DTR 132 (Karn.)(HC)

S.68: Cash credits – Accommodation entry – Without giving an opportunity of cross-examination merely on the basis of oral statement additions cannot be made [S.143(3)]

The oral statement of a third party recorded by search authorities which was never placed to be confronted by assessee and no documentary evidence was supplied to assessee, could not be considered in making addition u/s. 68 on account of alleged accommodation entries.

CIT v. A. L. Lalpuria Construction (P.) Ltd. (2013) 215 Taxman 12 (Mag.) (Raj.)(HC)

S.68 : Cash credits – Gifts – Confirmations, PAN card, gift deed, balance sheet, acknowledgement for filing of return were filed – Addition was held to be not valid. [S. 133(6)]

The assessee had shown receipt of gifts from 12 persons received through 11 demand drafts issued on a single day. One of gifts was received from 'M' of USA. The Assessing Officer doubted the genuineness of gift and he issued show-cause notice to assessee and also letters to all donors under section 133(6). Although confirmations were received, no reply was received and, hence, said amount was added to taxable income of assessee. The Tribunal noted that the Assessing Officer had called for confirmations letters from donees which were received by it. The assessee had also furnished all other requisite documents like copies of demand drafts, gift deed, copy of PAN cards, copy of acknowledgement of returns of donors along with computation and balance sheet. The Tribunal, thus, taking a view that assessee had proved identity of donors so also creditworthiness and genuineness of transactions, set aside addition made by Assessing Officer. Held on facts, no substantial question of law arose from Tribunal's order.

CIT v. Heena Sharma (2013) 215 Taxman 85 (Mag.)(Guj.)(HC)

S.68 : Cash credits – Gifts from son – Subject to tax in USA – Addition was not justified

The assessee received amount as gift through bank, from his son residing in U.S.A. The Assessing Officer disbelieved gift on basis of return filed by assessee's son in India and made addition under section 68. The Commissioner (Appeals) and the Tribunal, observing that the income declared by assessee's son in India was not his only income and he was subject to tax in U.S.A., deleted the addition. Held, that the amount gifted through the bank established the genuineness of the transaction, and sufficiency of funds of donor was proved, amount could not be added as cash credit. (AY.1998-99)

CIT v. Mahendra A. Patel (2013) 215 Taxman 84 (Mag.) (Guj.)(HC)

S.68 : Cash credits – Share application money – Summons not complied with – Matter remanded [Ss.131, 254(1)]

The assessee had received share application money from various subscribers. The Assessing Officer issued summons to said subscribers u/s. 131 which were not complied with. The Assessing Officer further noted that companies who subscribed to assessee's share capital were established entry operators who gave accommodation entries to several persons. However, looking at the evidence adduced by the assessee, the Tribunal deleted the addition. Held, since the Tribunal had merely looked at evidence adduced by assessee and had not adverted to attempts made by Assessing Officer in course of assessment proceedings to examine evidence and discredit the same, the order of the Tribunal was remanded back for fresh adjudication. (AY. 2001-02)

CIT v. Titan Securities Ltd. (2013) 357 ITR 184 / 215 Taxman 164 / 89 DTR 8 (Delhi)(HC)

S.68 : Cash credits – Transactions between creditors and sub-creditors – Assessee need not prove the genuineness of creditors and credit worthiness of sub-creditors

Section 68 only sets up a rebuttable presumption against the assessee whenever unexplained credits are found in the books of account of the assessee. The initial burden, which is placed on the assessee, shifts as soon as the assessee establishes the authenticity of transactions as executed between the assessee and its creditors. It is no part of the assessee's burden to prove either the genuineness of the transactions executed between the creditors and the sub-creditors nor is it the burden of the assessee to prove the creditworthiness of the sub-creditors. The Court held that revenue to prove that credits were circular route adopted by assessee to plough back its own undisclosed income into accounts. In the absence of any exercise by the Assessing Officer addition on account of unexplained credits was not justified. (AY. 2002-03)

MOD Creations Pvt. Ltd. v. ITO (2011) 62 DTR 25 / (2013) 354 ITR 282 (Delhi)(HC)

S.68 : Cash credits – Received by cheques – Tax was deducted at source – Initial onus discharged, *ad hoc* addition cannot be made

When an unexplained credit is found in the books of account of an assessee the initial onus is placed on the assessee. Once that onus is discharged, it is for the Revenue to prove that the credit found in the books of account of the assessee is the undisclosed income of the assessee. While making an addition under section 68, the Assessing Officer has to advert to each and every entry and not pick up a couple of entries, as in the assessee's case, and label the entire set of deposits made during the assessment year as undisclosed income of the assessee. The discrepancy appeared *qua* four credits, which were answered suitably to the satisfaction of the Commissioner (Appeals) therefore, no *ad hoc* addition could be made by the Assessing Officer. (AY. 1998-99)

CIT v. Kinetic Capital Finance Ltd. (2011) 202 Taxman 548 / (2013) 354 ITR 296 (Delhi)(HC)

S.68 : Cash credits – Meagre balance in bank account – Cash was deposited before issue of cheque, addition was justified on the ground that genuineness of the transaction was not established

In case of all the depositors, their bank accounts contained meager balances. Sizeable amount of Rs.1 lakh or above were deposited in cash in their accounts and immediately the entire amounts were withdrawn through issuance of cheques in favour of assessee. Furthermore, the depositors' capacity to raise such cash amount was also not established. This was a case where Revenue made addition on assessee failing to establish source of source which was held to be justified. (AY. 2005-06)

Blessing Construction v. ITO (2013) 214 Taxman 645 (Guj.)(HC)

S.68 : Cash credits – Gift – Partner – Capital account – Assessee need not prove the source of source, or origin of origin, additions was held to be not sustainable

The assessee was a partnership firm, in which 'K' and 'Z' were partners, who had deposited amounts in their capital accounts in the firm. It was explained that 'K' had received the amount from six persons and 'Z' from five persons by way of gift and all of them had filed their income-tax return and gift-tax returns. Thus, the assessee had explained the nature and source of the deposit and discharged its burden. The assessee could not have been asked to prove the source of source/ origin of origin. (AY. 1992-93)

Zafa Ahmad & Co. v. CIT (2013) 214 Taxman 440 / 93 DTR 29 / 263 CTR 612 (All.)(HC)

S.68 : Cash credits – Capital gains – Income from undisclosed source – Sale transaction of shares cannot be disbelieved only for reasons that the assessee could not give the identity of purchasers

The assessee sold shares and claimed to have earned capital gains. He produced purchase bills of shares, letter of transfer, sale bills, accounts with brokers, purchase and sale chart and copy of quotations from stock exchange showing rate of shares at relevant time and letters from brokers

conforming sale of shares. Also, payment of sale price was made through bank channel and not in cash. Held, in view of mass of documentary evidence, sale transactions of shares could not be disbelieved only for reason that assessee could not give identity of purchasers and, therefore, income there from could not be treated as income from undisclosed source.(AY. 2004-05)
CIT v. Sudeep Goenka (2013) 214 Taxman 418 / (2014) 360 ITR 163 (All.)(HC)

S.68 : Cash credits – Share application money – Evidence furnished by assessee – Addition was not valid
The assessee received certain amount as share application money. In order to prove genuineness of transaction, the assessee brought on record various documents such as names and addresses of share applicants, confirmatory letters of share applicants, copies of their bank statements etc. The Assessing Officer found the assessee's explanation to be unacceptable and, consequently, added the amount of share application money to assessee's taxable income which was deleted by the Commissioner (Appeals). The Tribunal upheld the order of the Commissioner (Appeals). On appeal High Court held that, there was a clear lack of inquiry on the part of the Assessing Officer once the assessee had furnished all the relevant material. In such an eventuality no addition can be made under S. 68. (AY. 2004-05)
CIT v. Gangeshwari Metal (P.) Ltd. (2013) 214 Taxman 423 / 96 DTR 299 / (2014) 361 ITR 10 / 264 CTR 277 (Delhi)(HC)

S.68 : Cash credits – Share application money – Share applicants did not attend investigation proceedings despite summons under section 131, addition was justified [S.131]
The assessee-company, a share broker, claimed that during year it received certain amount from seven share applicants. This addition was deleted by the appellate authorities. The share applications were received on 18-2-2004 but shares were sent to parties only on 15-6-2004, share applicants did not attend investigation proceedings despite summons under S. 131, assessee did not show any transactions in stocks and shares, assessee was receiving dividend but it did not declare any dividend to its investors, and assessee's bank accounts showed large amounts of cash debits and credit entries. Having to regard to facts and circumstances of case, the appellate authorities were wrong in deleting impugned addition made by the Assessing Officer. (AY. 2004-05)
CIT v. N.R. Portfolio (P.) Ltd. (2013) 214 Taxman 408 / 87 DTR 162 / 263 CTR 456 (Delhi)(HC)

S.68 : Cash credits – Cash deposit in bank – Amount received from another branch which was Verified by Commissioner (Appeals), addition was not justified
During assessment proceedings, Assessing Officer made certain addition on account of undisclosed cash deposit in bank. In appellate proceedings, assessee's explanation was that it had received said amount from another branch. The Commissioner (Appeals) having verified said fact, deleted the addition, which was upheld by the Tribunal. Court held, that the Tribunal did not commit any error in law and hence, its order was liable to be upheld.
CIT v. Megha Industries (2013) 214 Taxman 400 (Guj.)(HC)

S.68 : Cash credits – Gift – Confirmation was filed – For not furnishing of information under section 133(6) addition cannot be made [S.133(6)]
The assessee received gifts from different persons through demand drafts. The Assessing Officer doubted genuineness of gift and issued letters to all donors under S. 133(6).Although confirmations were received, no reply was received and hence, the amount of gifts was added to income of assessee. It was noted that the assessee had furnished all other requisite documents like copies of DD, gift deed, copy of PAN cards, copy of acknowledgement of returns of donors along with computation and balance sheet. Held, on facts, that the assessee had duly established identity of donors so also creditworthiness and genuineness of transaction and, thus, Tribunal was justified in deleting impugned addition.

CIT v. Bhanwarlal Sharma (2013) 214 Taxman 122 (Mag.) (Guj.)(HC)

S.68 : Cash credits – Share application money – Genuineness of transaction – Addition was confirmed
When the Tribunal itself concluded that the assessee was non-co-operative, it could naturally be safely concluded that the assessee did not want to produce evidence. This was a case where adverse inference should have been drawn. Thus, the additions made by the Assessing Officer were restored. (AY. 1995-1996)
CIT v. Gold Leaf Capital Corporation Ltd. (2013) 353 ITR 163 (Delhi)(HC)
Editorial: Order of Tribunal in Gold Leaf Capital Corporation of India v. JCIT (2009) 308 ITR 94(AT)(Delhi)(Trib.) set aside.

S.68 : Cash credits – Share application money – Where most of the share applicant's had deposited money a few days before the issue of shares and also not responded to the summons – Addition under section 68 held to be justified (S.131)
Where most of the investors deposited monies in the accounts a few days before the issue of shares and they also did not respond to the summons issued by the assessing officer under section 131 of the Act, the Assessing Officer was held justified in making the additions under section 68 of the Act. (AY. 2006-07)
CIT v. Neelkanth Ispat Udyog (P) Ltd. (2013) 81 DTR 214 (Delhi)(HC)

S.68 : Cash credits – Shares – Demat account – Shares held in Demat account and consideration received through demand draft, transaction genuine and addition under section 68 is not called for
Where the shares were held by the assessee in a demat account and sale consideration of the same was also received through bank draft transaction held to be genuine, addition under section 68 held to be justified. (AY 2004-05)
CIT v. Udit Narain Agrawal (2013) 81 DTR 63 / 213 Taxman 178 (Mag.) / 255 CTR 102 (All.)(HC)

S.68 : Cash credits – Sale proceeds – No addition u/s. 68 can be made in respect of sale proceeds already offered as income
Once the sale proceeds have been offered as income by the assessee and the same has been accepted by AO, no addition in respect of the same can be justified u/s. 68 or else. It shall tantamount to double taxation of the same income. (T.A.No.2471/ 2475/2475 & 2476 of 2009 dt 3-7-2012.)
Vishal Exports Overseas Ltd. (2012) ACAJ – November-P. 400 (Guj.)(HC)

S.68 : Cash credits – Share application money – Onus – Pvt. Company – Burden is on assessee – On facts the addition was confirmed. Reassessment was held to be valid [Ss.131, 143(1), 147]
The Assessing Officer on the basis of report of investigation wing of the department the assessment was reopened under section 147, which was completed under section 143(1) of the Act on the ground that the alleged share application money was mere accommodation entries. All the notices were returned. It was contended that the registered offices of the company could be found in the website www.mca.gov.in and the Assessing Officer may visit the site for further verification. The Assessing Officer has not accepted the submission and made addition under section 68 and also commission of 2.5% on the said amount. In appeal Commissioner (Appeals) following the ruling of Supreme Court in *CIT v. Lovely Exports (P) Ltd (2008) 216 CTR 195, (2009) 319 ITR (St.) 5 (SC)* held that the addition was not justified. Revenue appeal was dismissed by the Tribunal. On appeal to High Court the Court held that there is no onus on the Assessing Officer to visit website for address of share application for verification, onus on assessee to prove genuineness. Mere furnishing of bank statements of share applications is not sufficient to prove the creditworthiness. Failure to furnish report of investigation wing does not affect validity of addition. On facts and on reassessment the

appeal of revenue was allowed and the addition made by the assessing Officer was confirmed. (AY. 2004-05)

CIT v. Nipun Builders and Developers Pvt. Ltd. (2013) 350 ITR 407 / 82 DTR 145 / 214 Taxman 429 / 256 CTR 34 (Delhi)(HC)

S.68 : Cash credits – Advances – Forfeiture – On facts it was held that the assessee routed undisclosed income in his capital account as forfeited amount

The assessee had shown advance of a sum against land in his capital account. He claimed that this amount was on account of forfeiture of earnest money from 'L' for sale of his plot. The Assessing Officer held an enquiry into the matter and found that said amount came from the account of one 'D' whose account with the Bank was found to be shady. Accordingly, the Assessing Officer treated said amount as undisclosed income. The Commissioner (Appeals) as well as the Tribunal upheld the order of the Assessing Officer holding that the assessee routed his undisclosed income to his capital account. The Court upheld the order of Tribunal. In favour of revenue. (AY. 2002-03)

Ashwani Oberoi v. CIT (2013) 212 Taxman 392 / 256 CTR 301 / 82 DTR 277 (P&H)(HC)

S.68 : Cash credits – Firm – Capital – Partner – First year of business – Contribution of capital by partner cannot be added in hands of firm

One of the partners, who was a minor, introduced Rs.2,62,000 as his capital. The Assessing Officer disputed the capital contribution made by the minor. The explanation offered was not found satisfactory and the Assessing Officer added the sum in the hands of the assessee. This was confirmed by the Tribunal. On appeal the Court held that (1) the authorities below had failed to take into account that this was the first year of business of the assessee. The Tribunal was not justified in holding that the unexplained cash credit recorded in the assessee's books be added in the hands of the assessee. There was no material before the Tribunal to hold that the capital introduced by the minor partner at the time of starting of the business, was income of the assessee-firm. The Tribunal erroneously came to the conclusion that the deposits represented undisclosed income of the assessee-firm. Accordingly the appeal of assessee was allowed. (AY.1991-92)

Abhyudaya Pharmaceuticals v. CIT (2012) 72 DTR 59 / (2013) 350 ITR 358 (All.)(HC)

S.68 : Cash credits – Identity proved – Creditworthiness not proved hence addition was held to be justified

Assessee HUF claimed to have received a loan of Rs.2.15 lakhs in cash from karta's wife, who was a State Government employee. She claimed to have received gifts of Rs.2 lakh from her parents who had supposedly earned amount by leasing agricultural land. However, no evidence about such source was submitted. Further, no evidence was filed taking State Government's permission as required before accepting gifts of such an amount by a Government servant. Creditworthiness of creditor and genuineness of transaction was not proved in instant case, even though identity of creditor was established. Therefore, the addition of impugned amount was appropriate. Appeal of assessee was dismissed. (AY.2002-03)

D. Siva Sankara Rao (Dr.) v. ITO (2013) 356 ITR 117 / 212 Taxman 151 (AP)(HC)

S.68 : Cash credits – Share application money – Assessee producing tax returns and also producing confirmation of shareholders – Burden of proving source of share application money discharged addition was deleted

Assessee produced the names, addresses and permanent account numbers of the shareholders the onus on the assessee to prove the source of share application money stands discharged. If the assessing authority is not satisfied with the creditworthiness of the shareholders, it is open to the assessing authority to verify the same in the hands of the shareholders concerned. The Tribunal recorded the findings that the assessee had produced the returns filed by the shareholders who had paid share

application money. The assessee had also produced confirmations from the shareholders indicating the details of their addresses, permanent account numbers and particulars of cheques through which the amounts were paid towards the share application money. The Tribunal treated the deposits of share application money as genuine. On appeal High Court also confirmed the order of Tribunal.
CIT v. Jay Dee Securities and Finance Ltd. (2013) 350 ITR 220 / 214 Taxman 62(Mag.) (All.)(HC)

S.68 : Cash credits – Non resident – Amounts transferred from foreign account additions can not be made [Ss.4,6 (1)(a), 69]
Assessee being non-resident in the relevant year, addition under section 68 can not be made in respect of the amount transferred from the assessee's foreign account to the domestic account. (AY.2003-04)
CIT v. Suresh Nanda (2013) 352 ITR 611/ 90 DTR 225 / 260 CTR 140 / 216 Taxman 185 (Delhi)(HC)
Editorial: Suresh Nanda v. ACIT (2012) 53 SOT 222 / (2013) 90 DTR 225 (Delhi)(Trib.) is affirmed.

S.68 : Cash credits – Evidence – Belonging to third party
Deposit should be treated as unexplained cash credit when there was no evidence to show money related to other parties.(AY. 2009-2010)
S. Muthukumar v. ITO (2013) 28 ITR 518 (Chennai)(Trib.)

S.68 : Cash credits – Genuineness – Onus on assessee
In the absence of relevant information regarding genuineness of the transaction and the creditworthiness of the creditor, the transaction could not be treated as genuine and the credit would be treated as unexplained. Merely providing details of the identity of the creditors was not enough. (AY 2008-09)
A. Audinarayana Reddy v. DCIT (2013) 27 ITR 580 (Hyd.)(Trib.)

S.68 : Cash credits – Voluntarily surrender of Cash Credits during Survey – Addition was held to be justified [S.133A]
The assessee firm was engaged in business of trading of ghee. For assessment assessee declared NIL income. The A.O. issued on assessee a notice, and for which during proceedings assessee produced only purchase bills. The competent authority conducted survey at assessee's business premises during which assessee voluntarily surrendered credits of Rs. 28.20 Lakhs. Further, assessee filed revised return and disclosed the aforesaid amount for taxation. Revised return had been regularised by issue of notice u/s. 148. Subsequently, the A.O. on basis of original return completed assessment and made addition of Rs.36.39 Lakhs which were purchases from "S" and Rs. 28.20 Lakhs were added as unexplained cash credits u/s. 68. The Tribunal held in favour of the Revenue that the said addition to income of assessee as unexplained cash credits u/s. 68 was justified. (AY.2006-07)
ACIT v. Uday Bhagwan Industries (2013) 145 ITD 401 (Agra)(Trib.)

S.68 : Cash credits – Share capital – Notices issued by A.O. returned by postal authorities – Cash deposited immediately prior to issue of cheques – Bank accounts of the companies were closed immediately after transfer of funds. Transactions are not genuine
The Tribunal held that where assessee 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, AO was justified in making addition under section 68 in respect of share capital. (AY. 2007-08)
Vaibhav Cotton (P) Ltd. v. ITO (2012) 139 ITD 264 (2013) 84 DTR 130 / 153 TTJ 341 (Indore)(Trib.)

S.68 : Cash credits – Share application money – Matter set aside
The CIT(A) deleted the addition on the basis that the company is in inception stage and it would not have earned Rs.3,60,18,709/- from unexplained sources. The Tribunal held that the reasons advanced by the CIT(A) for deletion of the addition under section 68 are not correct. The assessee has given the

identity of the subscribers but genuineness and creditworthiness of transactions is not established. The Tribunal set aside the order of CIT(A) and sent the matter back to CIT(A) for fresh consideration. (AY. 2006-07)
ACIT v. Mancherial Cement Company (P) Ltd. (2013) 153 TTJ 1 / 84 DTR 18 / 143 ITD 676 / 23 ITR 30 (Hyd.)(Trib.)

S.68 : Cash credits – Bank passbook – Books of account – Addition could not be invoked on the basis of deposits made in bank account of assessee
The assessee being an advocate by Profession had not maintained any books of account for the previous year relevant to the assessment year under consideration. The Assessing Officer invoked provisions of s/68 by making addition of all the deposits in his bank by taking a view that deposits from the banks pass book of the assessee on different dates. On appeal in CIT(A), CITA(A) deleted the additions. On further appeal in Tribunal, Tribunal dismissed the appeal of the revenue and held that maintenance of books of account and whatever credit entries are found by the Assessing Officer ,it was from the bank A/c of the assessee in which deposits were made at different points of time . Even the Passbook issued by the Bank A/c cannot be termed to be the book of the assessee as per the judgment of the Bombay High Court in the case of *CIT v. Bhaichand N. Ghai (1982) 11 Taxman 59*. Therefore provisions of section 68 cannot be invoked on various deposits/ credits found recorded in the books of account of the assessee in the absence of books of assesee maintained for the previous year.(AY. 2009-10)
ITO v. Kamal Kumar Mishra (2013) 143 ITD 686 (Luck.)(Trib.)

S.68 : Cash credits – Gifts – Mere confirmation is not sufficient – Donor was not produced for examination – Addition was justified – Reopening of assessment on the basis of information by investigation wing was held to be justified [S.147]
The Assessing Officer reopened the assessment of the assessee's case under section 147 after information was received from ACIT regarding bogus entries of long term /short term capital gain and bogus gift, found as a result of enquiries by Investigation Wing. Information from enquiry by Investigation Wing formed reason to believe that income had escaped assessment and reopening of assessment under section 147 was justified. In CIT(A) proceedings it is also found that the assessee did not disclose the facts, receipt of amount of gift in his initial return of income. Therefore, the A.O. stand in assessment proceedings was right and CIT(A) also confirmed the same. The ITAT observed the facts of the case and held that mere identification of donor and showing movement of gift through banking channel was not sufficient to prove genuineness of gift, and onus to establish identity of donor, his capacity to make such gift and genuineness of transaction was on assessee, where there was no relationship between donor and donee, and donor was neither produced by assessee for examination nor was he traceable at given address to verify correctness of gift deed, addition of amount as income from undisclosed sources under section 68 and also for commission for taking such gift entries was justified. (AY.2001-02)
Anil Kumar Singhal v. ITO (2013) 58 SOT 92(URO) (Agra)(Trib.)

S.68 : Cash credits – Gift – Creditworthiness not proved – Addition was held to be justified
In case of a gift, it is necessary not only to establish identity of donor, but also creditworthiness of donor to show that money belongs to donor. Assessee had received gift of two sums from his brother's wife 'A' settled in UK. Statement of 'A' revealed that she was not a person of means or knowledge about her financial affairs and her finances were managed by her husband. Facts revealed that she had no independent source of income and money was not given from her own bank account or her sources, but stated to have been given out of a loan. On facts, creditworthiness of donor was not proved and, therefore, amounts of gift would be added to assessee's income under section 68.(AY. 2006-07)
Sat Pal John v. ITO (2013) 34 taxmann.com 95 / 143 ITD 668 / 94 DTR 233 / 157 TTJ 875 (Asr.)(Trib.)

S.68 : Cash credits – Cash deposit in the savings account – Genuineness was proved – Addition was deleted

The assessee had made certain cash deposit in his saving account with a bank. The assessee explained that this account was opened to help one 'S', who was managing the Indian Oil Corporation's retail outlet. The retail outlet was company-owned and company-operated and 'S' was working on job contract basis. The assessee helped him to purchase demand drafts favouring Indian Oil Corporation to effect payments towards the cost of diesel and petroleum products and all the cash deposits made by the assessee were in fact moneys handed over by 'S' for the purchase of demand drafts. The Assessing Officer did not accept explanation of the assessee and treated the deposited amount as unexplained cash credit. The Commissioner (Appeals) found that the facts as stated by the assessee were true and supported by 'S'. He, accordingly, deleted the addition. The Tribunal held that the details of the savings bank account the assessee had with Tamilnad Mercantile Bank Ltd., which was the subject-matter of dispute, were very much reflected in the books of account of the assessee. In the statement of accounts filed by the assessee along with his return of income, the savings bank account balances were also reflected. Therefore, there cannot be a case that the assessee has not disclosed these materials before the Assessing Officer. He has not suppressed any fact. He explained the reason why the amounts were deposited in his savings bank account. But, the Assessing Officer without making any useful enquiry, just made the addition by rejecting the explanations offered by the assessee. Further the most important point to be seen in the present case is that every cash deposit made in the disputed savings bank account of the assessee was immediately withdrawn for the purpose of purchasing the demand drafts in the name of Indian Oil Corporation Ltd. These details, available in the bank passbook itself supported the contention of the assessee beyond any doubt. All the demand drafts were purchased in favour of Indian Oil Corporation Ltd. and they were all purchased for the purpose of running the fuel station managed by 'S'. Further 'S' also had explained these things in a detailed manner. Therefore, when all these matters are crystal clear as per the books of account as well as in the bank statement and the other particulars, it is very reasonable on the part of the Commissioner (Appeals) to come to the conclusion that the assessee has explained the nature of these cash deposits found in the savings bank account maintained by the assessee with Tamilnad Mercantile Bank Ltd. Therefore, the Commissioner (Appeals) is justified in deleting the said addition. (AY. 2007-08)

R.v. Jansi (Smt.) v. Addl. CIT (2013) 36 taxmann.com 506 / 144 ITD 395 / 154 TTJ 41 (UO) (Chennai)(Trib.)

S.68 : Cash credits – Share application money – Confirmation, balance sheet etc. were filed – Addition cannot be made [S.69]

Balance-sheets, certificates of incorporation, confirmations and certificates of good standing, of non-resident entities were filed by assessee. Money received cannot be treated as income of assessee. (AYs. 2002-03 to 2007-08)

Russian Technology Centre P. Ltd. v. DCIT (2013) 25 ITR 521 / 145 ITD 88 / 155 TTJ 316 / 89 DTR 267 (Delhi)(Trib.)

S.68 : Cash credits – Mere establishing identity is not sufficient – Genuineness and capacity also to be proved [S.69]

Burden of proof to prove genuineness of transaction and capacity of creditor is on the assessee. Merely establishing their identities and creditworthiness to some extent is not sufficient. Heavy burden is on assessee to prove that the transaction is genuine. (AY. 2004-05, 2007-08)

Usharani Kalidindi (Smt.) v. ITO (2013) 25 ITR 409 / 144 ITD 526 (Hyd.)(Trib.)
K. Bala Vishnu Raju v. Addl.CIT (2013) 25 ITR 409 (Hyd.)(Trib.)

S.68 : Cash credits – Sale of gold – Evidence not furnished – Addition was justified

The assessees had not produced any evidence or details of persons to whom the gold was sold. The wealth-tax returns filed by the assessees were just before the completion of assessment and that there was no other reason for filing these returns except for explaining the source for deposits into bank account. Held, the addition was justified. (AY.2009-10)
K.R.S. Suresh v. ITO (2013) 25 ITR 32 (Chennai)(Trib.)

S.68 : Cash credits – Burden of proof not discharged by the assessee
During the course of the assessment proceedings the Assessing Officer noticed that the assessee had received unsecured loans from 8 parties. As the assessee failed to establish the identity, creditworthiness and genuineness of the transactions, the Assessing Officer treated the sum as unexplained cash credit under section 68 of the Act. The CIT(A) while deleting the said addition held the assessee had produced addresses of all the parties, that the identities of the parties was proved and the bank accounts of four parties did not reveal suspicious features. The Tribunal while allowing the appeal of the department held that the assessee, in order to discharge the onus cast on it, was expected to establish proof of identity of the creditors, capacity of the creditors and genuineness of the transactions. It held that filing of bank account details of the creditors, was not enough to hold that the assessee had satisfied the ingredients of section 68 of the Act. (AY. 2005-06)
ITO v. Gayatri Associates (2013) 23 ITR 528 / 144 ITD 392 (Hyd.)(Trib.)

S.68 : Cash credits – Firm – Partner – Capital – No addition in the hands of the firm where a partner introduces fresh capital which has been confirmed and owned by him
The assessee, a partner in a partnership firm, introduced fresh capital who had confirmed and owned the same. The Assessing Officer made an addition under section 68 of the Act on the ground that the partner failed to explain the source of the sum. The CIT(A) upheld the addition made by the Assessing Officer. On appeal by the assessee, the Tribunal held that the genuineness of the deposit was discharged by the partner. Hence any addition in the hands of the firm as unexplained cash credit could not have been made on the ground that the partner failed to explain its source. (AY.2004-05)
Patel Vishnubhai Kantilal & Co. v. ITO (2013) 21 ITR 204 / 58 SOT 309 (Ahd.)(Trib.)

S.68 : Cash credits – Additional evidence – Increase in liability under the head 'Agents & dealers deposits' [Rule 46A]
Tribunal held that the learned CIT(A) was justified in admitting the additional evidence under Rule 46A and the CIT(A) examined all the evidences furnished by the assessee and came to the conclusion that in most of the cases the balances were carried forward from the preceding year and increase in liability was due to the interest. When Assessing Officer had not doubted the closing balance of the parties in the preceding year and the interest credited in the accounts of the parties there was no justification in treating the increase in liability mainly on account of interest credited in the accounts of the parties as unexplained and unverifiable liability. CIT(A) was right in deleting the addition.
Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1 / 86 DTR 49 (Jodh.)(Trib.)

S.68 : Cash credits – Cash deposits in bank accounts
The Assessing Officer made the addition by observing that the cash deposits in bank accounts of the assessee on various date are not verifiable. The CIT(A) deleted the impugned addition after considering the remand report of the Assessing Officer, explanation given by ICICI Bank and the detailed submissions made by the assessee. The Tribunal observed that the letter given by the bank which was forwarded by the Assessing Officer himself to the CIT(A) clearly stated that entries mentioned in their letter were only deposited once in customer account and pertained to different dates within two financial years. Therefore, the Assessing Officer was not justified in observing that entries appeared twice. The Tribunal confirmed the order of the CIT(A).
Fashion Suitings (P) Ltd. v. JCIT (2013) 154 TTJ 1 / 86 DTR 49 (Jodh.)(Trib.)

S.68 : Cash credits – Genuineness of share transaction

Assessee purchased the shares of two companies. The Assessing Officer found that the transactions were bogus as no actual purchases were made and that the purchases were back dated so that unaccounted cash is brought into the accounts in the form of long term capital gain.

The Assessing Officer made addition under section 68. The CIT confirmed the order of Assessing Officer. The Tribunal held that income tax proceedings are civil proceedings and the degree of proof required is by preponderance of probabilities, therefore applying the test of preponderance of probabilities and considering the entire sequence of events, the revenue authorities have rightly concluded that the assessee's claim about the long term capital gains from the sale of shares is not genuine. (AY. 2004-05)

Arvind M. Kariya v. ACIT (2013) 153 TTJ 422 / 85 DTR 89 (Mum.)(Trib.)

S.68 : Cash credits – Additional ground – Relationship and creditworthiness was not proved – Addition was held to be justified [S.254(1)]

The assessee raised additional grounds before the Tribunal. The Tribunal held that there was no *bona fide* omission or good reasons arise in favour of assessee to raise the additional grounds and the request of assessee for raising the additional ground was rejected.

The assessee received Rs.1.5 lakh by way of gift from Shri Kiran Sharma, the Assessing Officer made addition on account of unexplained gift in the hands of assessee. CIT(A) confirmed the order of Assessing Officer. The Tribunal following the Apex Court decisions in the case of *CIT v. Durga Prasad More (1971) 82 ITR 540 and Smt. Sunali Dayal v. CIT (1995) 214 ITR 801* held that it is clearly established that the assessee failed to prove her relation with the donor and his creditworthiness. The Tribunal dismissed the appeal as the assessee failed to prove genuine gift. (AY. 2004-05)

Archana Pandey (Smt.) v. ITO (2013) 144 ITD 218 / 34 taxmann.com 88 / 153 TTJ 116 / 84 DTR 108 (Agra)(Trib.)

S.68 : Cash credits – Unexplained payments made to sub-contractors [Ss.40(a)(ia), 194C]

Tribunal held that if the Revenue Department has not doubled the deduction of TDS at source and the tax collected under the 'TDS head' was acceptable to the Revenue Department then there was no reason for disbelieving the genuineness of the payment on which admittedly the TDS was deducted by the assessee. Therefore, the ground raised by the Revenue has no legal as well as factual force. The Tribunal dismissed the appeal filed by Revenue. (AY. 2005-06)

B.M.S. Projects (P) Ltd. v. Dy. CIT (2013) 143 ITD 645 / 153 TTJ 649 / 85 DTR 393 (Ahd.)(Trib.)

S.68 : Cash credits – Share application money

The Tribunal set aside the order of the CIT(A) and sent the matter back to CIT(A) for fresh consideration as the assessee failed to prove the creditworthiness of the share applicants and genuineness of the share application money raised by the assessee. (AY. 2006-07)

ACIT v. Mancherial Cement Co. (P) Ltd. (2013) 143 ITD 676 / 84 DTR 18 / 153 TTJ 1 / 23 ITR 30 (Hyd.)(Trib.)

S.68 : Cash credits – Capital – Explained the source – Addition was deleted

The Assessing Officer made addition on account of unexplained cash introduced in capital account. The assessee submitted that said cash was received on return of loans by certain persons. Also, the concerned debtors admitted to have returned amount in question to assessee. Hence, the capital was held to be introduced from explained source and therefore, impugned addition was to be deleted. (AY. 2007-08)

ITO v. Pushpa Devi Vadera (Smt.) (2013) 151 TTJ 28 (UO) / 57 SOT 138 (URO) (Jodh.)(Trib.)

S.68 : Cash credits – Advance received – PAN and bank account number

Assessing Officer made addition on account of unexplained advances from 'J' and 'M', for non-furnishing of PAN and bank account number. During appellate proceedings assessee filed detailed submission including assessee's account in books of 'J' and 'M' as well as PAN. Commissioner (Appeals) found submissions to be plausible explanation within meaning of section 68 and deleted addition. On appeal by revenue Tribunal, confirmed the order of Commissioner (Appeals) (AY. 2007-08)

ITO v. Sains Engg. Works (2012) 20 ITR 194 / (2013) 141 ITD 294 (Chd.)(Trib.)

S.68 : Cash credits – Firm – Partners – Capital – Contribution prior to commencement of business

Two partners had deposited certain amount in assessee firm as their capital. Assessee had not furnished necessary evidence about source of said amount. Assessing Officer treated said amount as unexplained cash credit under section 68 and added same to income of assessee. On appeal Tribunal held that since the amount deposited was from partners at the most the impugned amount could have been added in the hands of the partners, if they failed to discharge the onus but not in the hands of the assessee firm. More over the contribution of the capital by the partners was prior to the commencement of the business hence could not have been treated as income of the assessee. (AY.1994-95)

Laxmi Imaging & Medical Research v. ACIT (2012) 150 TTJ 44 (UO) / (2013) 141 ITD 297 (Jodh.)(Trib.)

S.68 : Cash credits – Dealer deposits – Loan – Dealers deposit and loans received earlier years – Additions cannot be made – Assessee need not prove the source if genuineness is established – Creditors not produced the matter was remanded

Dealer deposits received in assessment years 2003-04 and 2004-05. Addition cannot be made for subsequent year. Assessee producing creditors and creditors filing bank accounts. Assessing Officer satisfied as to genuineness of transaction and creditworthiness of creditors. Credits to be accepted. Onus on assessee to prove identity, creditworthiness of creditor, genuineness of transaction. Not to prove source of creditor. Where creditor neither attending office of Assessing Officer nor assessee producing creditor. Transaction not established. Loan obtained during financial year 1995-96 and still outstanding.-Credit could have been added in year of receipt but not during this year. Creditor not produced before Assessing Officer and remand report of Assessing Officer silent on this issue. Matter remanded. (AY. 2006-07)

Harish Kawadmal Bajaj v. ITO (2013) 22 ITR 411 / 58 SOT 289 (Pune)(Trib.)

S.68 : Cash credits – Income was not estimated by Assessing Officer – Addition under section 68 is permissible – Matter remanded

Tribunal held that when the income of the assessee was not estimated but was determined after considering the returned income and making further disallowance for discrepancies in voucher/bills produced by the assessee. However, since the lower authorities had not examined the issue relating to section 68 in proper perspective the matter was to be remanded to the Assessing Officer for fresh consideration. (AY. 2002-2003 to 2008-2009)

ACIT v. Mir Mazharuddin (2013) 22 ITR 314 / 59 SOT 9 (URO) (Hyd.)(Trib.)

S.68 : Cash credits – Identity – Capacity is proved – Additions deleted

Tribunal held that during the course of appellate proceedings, the assessee produced documents and the details of repayment made through cheque and bank confirmations showing that the cheques issued by the assessee were encashed by the respective parties. The assessee had also furnished the identity of persons with complete details of addresses and the fixed deposit applications showing details. After satisfying himself with the documents, the Commissioner (Appeals) had allowed the

ground of appeal of the assessee. No interference was warranted. Appeal of revenue was dismissed. (AYs. 2005-06, 2008-09)
ABT Ltd. v. ACIT (2013) 21 ITR 634 / 83 DTR 178 / 56 SOT 42 / 152 TTJ 791 (Chennai) (Trib.)

S.68 : Cash credits – Gifts – Search and seizure – Block assessment – Failing to prove genuineness of gifts, addition is held to be proper [S.158BC]
Pursuant to a search conducted at the residential premises of the assessees who were father and son, it was found that the assessees received gifts from certain parties. The Assessing Officer noted that most of the donors were friends and not relatives, as claimed, and the gifts were not received on any special or ceremonial occasion. He added the amounts as undisclosed income under section 68 of the Income-tax Act, 1961. The First Appellate Authority deleted on the basis that, firstly, they could not be said to be undisclosed and, secondly, no material to doubt the genuineness of the credits or gifts was found during the search. On appeal by the Department, it was held that there was no mention of the credits in the returns of income furnished by the assessee from year to year. It was only as a result of search that the credit transactions were found, and which the assessee was unable to satisfactorily explain to the Assessing Officer. No gifts had been given by the assessees to any of their close friends and relatives, including those from whom gifts were being regularly received over the years. Further, none of the donors were produced for examination before the Assessing Officer. No evidence in support of their financial capacity was submitted. The receipt of the credit through the banking channel, or confirmation by the creditor or donor, was itself not sufficient to prove the gifts in terms of section 68. There was nothing to explain to why the gifts should be made by the assessee's father's friends and ex-employees. There were materials and information found as a result of search to discredit the gifts as not genuine. The additions made by the Assessing Officer were to be upheld. (Block period 1-4-1990 to 12-10-2010)
ACIT v. Dwaraka Prasad Malpani (2012) 71 DTR 1 / 146 TTJ 498 / 135 ITD 323 / (2013) 21 ITR 719 (Cochin)(Trib.)

S.68 : Cash credits – Sale of property – Long-term capital gains – Addition was deleted as unexplained cash credits
In course of assessment, assessee declared certain amount as long-term capital gain arising on sale of flat. Assessing Officer treated said amount, as deemed income under section 68, which was credited in books of account on ground that assessee had failed to bring any evidence on record that it was on account of sale of said property. Tribunal noted that assessee had filed a copy of sale agreements in respect of sale of flat wherein it had been mentioned that said property had been sold for a total sale consideration of Rs. 13.80 lakhs. Tribunal held that since money had been received by way of sale of a property duly mentioned in sale agreement, same could not be treated as unexplained, consequently, impugned addition made by Assessing Officer was to be deleted.(AY.2005-06)
A.T.E. Enterprises (P.) Ltd. v. Dy. CIT (2013) 55 SOT 175 (Mum.)(Trib.)

S.68 : Cash credits – Withdrawal from bank – Source explained addition cannot be made.
During previous year, assessee had deposited a sum of Rs. 13 lakhs in his bank account by way of cash. It was submitted that all deposits had been made out of cash withdrawn from cash book. Tribunal held that since sources of amount deposited in bank account were clearly explained, no addition could be made under section 68. (AY.2005-06)
Deora Trading Co. v. ITO. (2013) 55 SOT 349 (Mum.)(Trib.)

S.68 : Cash credits – Where Assessing Officer failed to bring on record cogent and corroborative material to support his conclusion, addition is deleted
Tribunal held that the assessee has discharged onus within the meaning of section 68 of the Act and also in consonance with the general principles of law. In the present case the assessee filed evidences before the Assessing Officer and the CIT(A) showing identity of the share holders, creditworthiness

of such parties and the genuineness of the transactions. In view of this the onus stands shifted to revenue to bring credible material on record to show the non existence of such shareholders and non-genuineness of such transactions. The Tribunal confirmed the order of CIT(A) and the addition made under section 68 by Assessing Officer was deleted. (AY. 2006-07)
ACIT v. Kisco Casting P. Ltd. (2013) 152 TTJ 629 / 82 DTR 63 (Chd.)(Trib.)

S.68 : Cash credits – Income from undisclosed sources – Liability towards outstanding sale consideration for acquisition of cinema hall, additions cannot be made either under section 68 or 69, unless liability is held to be bogus [S.69]
The assessee had purchased the cinema hall lock, stock and a barrel which was registered and registration was granted for the assessee to enjoy possession. The seller has acknowledged parphent as mentioned in the sale deed duly registered in 2007 of having received the amount in cheque in 2012. The Assessing Officer made the addition of the amount on account of unexplained sundry creditors. The Tribunal set aside the CIT(A) order and directed the Assessing Officer to delete the addition and held that addition cannot be made either under section 68 or under section 69 unless the assessing authority comes to the finding that an asset has been created on account of bogus liability or the bogus liability exists which has been adjusted in cash. (AY. 2009-10)
Dinesh Chandra Das v. ACIT (2013) 152 TTJ 25(UO) / 143 ITD 691 (Ctk.)(Trib.)

S.69 : Unexplained investments – Failure to establish investment in property – Addition was held to be justified [S.158BC]
The assessee stated that the investment in property was from funds generated out of sale of jewellery in an auction and from loan taken from son-in-law. However, she could not furnish the requisite details. Held on facts, the assessee had not discharged burden as regards source from which investment had been made. Therefore, the investment in property was an unexplained investment and same was rightly added to income of assessee. (Block periods 1-4-1996 to 21-2-2003)
CIT v. R. Mallika (2013) 219 Taxman 244 (Mad.)(HC)

S.69 : Unexplained investments – Immovable property – Construction expenses –Addition based on the valuation report was not justified [S.145]
As several objections raised by assessee were not considered by AO and difference in PWD rates and CPWD was explained, addition based on higher valuation done by Valuation Officer vis-à-vis the amount offered by the assessee was not justified. (AY. 2005-06)
CIT v. Sweta Kalyan Samiti (2013) 219 Taxman 115 (Mag.) (All.)(HC)

S.69 : Unexplained investments – Recording in books – Purchases – Addition was held to be justified [S. 158BC]
Since assessee failed to show that purchase undisclosed in search, were in fact recorded in books of account or that same was related to pre-block period, same would be liable to be added as unexplained income and additions were to be made for corresponding unaccounted sale and income therefrom as well as unrecorded octroi payment. Addition was held to be justified.
Rajesh Trade Link (P.) Ltd. v. DCIT (2013) 218 Taxman 97 (Mag.) (Guj.)(HC)

S.69 : Unexplained investments – Onus to establish genuineness – Share transactions – Burden on assessee – Order of Tribunal was set aside as the order was passed without application of mind [S.45]
Since the assessee could not produce any evidence of purchase and sale of shares, the Assessing Officer treated the said income as income from undisclosed sources. The Tribunal allowed claim of assessee on ground that there was no material on record to show that what assessee had claimed as regards value of shares was factually incorrect. Held, the Tribunal wrongly placed burden of proving correctness of return of income, which assessee had filed, on revenue, whereas it was for assessee to

show reasonable possibility of value of shares having risen as high as had been shown by assessee. Hence, the impugned order suffered from non-application of mind and, therefore, same was to be set aside. (AY. 2003-04)
CIT v. Jasvinder Kaur (Smt.) (2013) 357 ITR 638 / 260 CTR 69 / 218 Taxman 78 (Mag.) (Gau.)(HC)

S.69 : Undisclosed investments – Jewellery covered under VDIS – Disclosed investment was to be deleted
Assessee-firm dealing in manufacturing and sale of jewellery participated in jewellery exhibition where a search was conducted upon it. On basis of material, Assessing Officer made addition on ground of unexplained investment in diamond jewellery. On appeal, both appellate authorities observed that said jewellery was received by assessee from partners and family members only for exhibition and same had been declared under VDIS or in wealth tax return before date of search. Further, assessee's contention that diamond jewellery was remade after receiving gold from one 'T' was substantiated by a bill for labour charge and entries in books of account maintained by assessee before date of survey/search. On facts, addition for undisclosed investment was to be deleted. (Block periods 1-4-1990 to 16-1-2001)
CIT v. Raj Jewellers (2013) 219 Taxman 21(Mag.) (All.)(HC)

S.69 : Unexplained investments – Reference to Valuation Officer – Difference between cost declared and valuation was not assessable as unexplained investment [S.142A]
No defect was detailed in books of account, and hence, reference to Valuation Officer was not valid. Held, the difference between cost of construction disclosed by assessee and estimate by Valuation Officer was not assessable as unexplained investment. (AY. 1989-90)
Goodluck Automobiles Pvt. Ltd. v. ACIT (2012) 78 DTR 104 / 254 CTR 1 / (2013) 359 ITR 306 (Guj.)(HC)

S.69 : Unexplained investments – Capital gains earned on sale of bonds purchased in earlier years – Not to be treated as income from undisclosed source, merely relying upon the details collected upon inquires done at the back of the assessee – When transaction is through banking channel [S.45]
Assessee declared capital gain on sale of bond. The assessing officer based on inquiry report collected on the back of the assessee without allowing assessee to cross- examine the same relied upon the report and made addition under section 69 of the Act as undisclosed income. On appeal the High Court affirming the finding of the Tribunal deleting the addition under section 69 of the Act, held that sale proceeds were received by the assessee through proper banking channel through a registered stock broker who had also given his confirmation. The High Court further held that the assessing officer was not justified in relying upon the inquiry report collected on the back of the assessee without allowing the assessee to cross-examine the person. (AY. 2002-03)
CIT v. Malti Mishra (Smt.) (2013) 93 DTR 451 / 262 CTR 564 (All.)(HC)

S.69 : Unexplained investments – Liabilities taken over in case of slump purchase to be considered for reaching at the value of the amount of assets taken over and cannot be regarded as unexplained investment
The assessee paid a sum of Rs. 41.80 crores to Dhillon Kool pursuant to a Business transfer Agreement ('BTA'). The total value of assets taken over was Rs.64.38 crores. The AO added the difference of Rs.22.58 crores as unexplained investment, which also included liabilities taken over as per the BTA of Rs. 15.80 crores, leased assets of Rs. 5.53 crores and transaction cost of Rs. 1.25 crores. The CIT(A) and Tribunal deleted the addition and on examining the books of the assessee confirmed that the opening entries in the books of the assessee after the slump purchase had shown the assets at Rs.64.38 crores as a result of transfer from Dhillon Kool. Further, they

also observed that on perusal of the BTA, it is apparent that the assessee acquired all the rights, interests and benefits which the seller Dhillon Kool had in the leased assets.
On appeal by the department, the High Court held that the issue involved was based on clear findings of fact and, therefore, cannot be disturbed unless and until some perversity is pointed. Accordingly, it dismissed the departmental appeal.(AY. 2004-05).
CIT v. Aradhana Drinks & Beverages (P.) Ltd. (2013) 354 ITR 4 (Delhi)(HC)

S.69 : Unexplained investments – Assessment – Where the books of accounts are not rejected additions on the basis of valuation report of DVO cannot be made. [Ss.142A, 143(3), 145]
The investment made by assessee in building a petrol pump was duly recorded in his books. The AO made a reference to the DVO who enhanced the cost of construction. On the basis of valuation report the AO made addition under section 69 of the Act. However the books of accounts were not rejected. On appeal following the ratio in *Sargam Cinema v. CIT (2010) 328 ITR 513 (SC)* the Court held that addition cannot be sustained where assessee's books are not rejected. (AY.2005-06)
Nirpal Singh v. CIT (2013) 359 ITR 398 / 96 DTR 385/(2014)266 CTR 108 / 220 Taxman 152(Mag.) (P&H)(HC)

S.69 : Unexplained investments – Immovable property – Factors affecting cost of construction – Matter remanded
On considering geographical location, availability of work force and cost of materials, it is not proper to blindly go by CPWD rates for purpose of arriving at cost of construction unless there are similarities in rates of CPWD and State PWD. Where DVO adopted CPWD rates for arriving at cost of construction of assessee's property and there was a substantial difference between CPWD rates and State PWD rates, matter was to be remitted back to Assessing Officer for working out cost of construction by taking State PWD rates (AY.1998-99)
CIT v. K. Jayakumar (2013) 216 Taxman 166 (Mad.)(HC)

S.69 : Unexplained investments – Cogent evidence – Entries in the note book – Audited books – Doubts cannot take place of proof – Addition was not justified [S.44AD, 132]
The assessee, a construction company entered into an agreement with 'G' to sell flats constructed by it. During a raid conducted at the premises of 'G', a note book was found mentioning some figures in respect of flats constructed by assessee. The Assessing Officer on taking view that figures in seized document indicated sale price of flats, recomputed income of assessee. Held, in the absence of material evidence regarding authenticity of seized document and there was no evidence that any excess amount was passed on to assessee, making addition on mere doubt could not be held as correct. Where books of account maintained by assessee were duly audited and there was no question of disbelieving them in absence of any cogent evidence, benefit under section 44AD could be granted to assessee. (AY.1994-95)
CIT v. Dolphin Builders (P.) Ltd. (2013) 356 ITR 420 / 90 DTR 75 / 216 Taxman 116 (MP)(HC)

S.69 : Unexplained investments – Identity and creditworthiness of donor – Genuineness of gift – Search and seizure – Block assessment [S.68, 132, 158C]
Where the assessee had proved identity and creditworthiness of donor and genuineness of transaction, gift from assessee's mother could not be added as undisclosed income. Investments could not be treated as unexplained, if they were reflected in books of account and details of payments were available. Addition cannot be made for transactions which do not fall within block period under consideration. (Block assessment 1-4-1996 to 6-9-2001)
CIT v. Indrajit Singh Suri (2013) 215 Taxman 581 (Guj.)(HC)

S.69 : Unexplained investments – Creditworthiness of donors was not proved addition was held to be justified.

Assessee advanced ` 78 lakhs to partnership firm and claimed that said amount was sent from Singapore by her non-resident mother, brother and sisters-in-laws. On enquiry, from Singapore Revenue Authorities, it was found that donors did not have sufficient income to makes gift of ` 13 lakhs each. Assessee also could not place proof to show source of funds. Since creditworthiness of donors was not proved, whole amount was to be added to income of assessee as her income from undisclosed income. In favour of revenue. (B.P. 1986-87 to 1996-97)
Kumari Kanagam (Mrs) v. CIT (2013) 213 Taxman 154 / 261 CTR 84 91 DTR 57 (Mad.) (HC)

S.69 : Unexplained investments – Search and seizure – Valuation of property – Reference to District Valuation Officer – Tribunal finding valuation based on incomparable sales hence addition as unexplained investment is held to be not valid [S.132, 153C]
The Assessing Officer referred the question of valuation of the properties purchased by the assessee to the District Valuation Officer. The difference in the values of the two properties, as between that declared by the assessee and as opined by the District Valuation Officer, was added by the Assessing Officer under section 69. However, the Commissioner (Appeals) and the Tribunal concluded, on facts, that there was no material found during the search to justify the reference to the District Valuation Officer for valuation of the properties. The Tribunal held that there must be some material to show that the investment made by the assessee was outside the books and in any event the District Valuation Officer's report was based on incomparable sales and, therefore, could not be relied upon. The Tribunal also held that the burden was on the Revenue to show that the real investment in the properties was greater than the apparent investment, as disclosed by the assessee and the burden had not been discharged by the Revenue. On appeal by revenue is missing the appeal, the Court held that there was no material found in the search and seizure operations, which would justify the Assessing Officer's action in referring the matter to the District Valuation Officer for his opinion on valuation of the properties. Therefore, the valuation arrived at by the District Valuation Officer would be of no consequence. In any event, the Tribunal had also, on facts, held that the District Valuation Officer's valuation was based on incomparable sales, which is not permissible in law. Appeal of revenue was dismissed (AY. 2006-07)
CIT v. Abhinav Kumar Mittal (2013) 351 ITR 20 / 87 DTR 69 / 213 Taxman 54 (Delhi) (HC)

S.69 : Unexplained investments – Share application money – Assessee producing relevant evidence and establishing that all share applicants not fictitious persons deletion of addition held to be justified
The assessee is engaged in the business of running a cold storage. For the assessment year 1988-89, the Assessing Officer made additions on account of unexplained share capital, unexplained share application money, unexplained sundry creditors, difference in the cost of construction being unexplained investment, fixed deposit receipts purchased by the assessee and loading and unloading expenses. The Commissioner (Appeals) deleted the addition of Rs.15,07,920 made against the unexplained share capital Rs.3,13,500 out of the addition made against the unexplained share application money of Rs. 4,68,100, and Rs.46,500 out of the addition made against the difference in the cost of construction of Rs.2,47,994, and confirmed the other additions made by the Assessing Officer. The Commissioner (Appeals) rectified his order allowing further relief of Rs.54,800 and Rs. 20,848 out of the total addition of Rs.3,05,493 made on account of unexplained sundry creditors for goods and expenses. The appeals filed by the Department and the assessee were partly allowed by the Tribunal. On further appeal by the Department the High Court also confirmed the order of Tribunal and held that additions was rightly deleted. (AY. 1988-89)
CIT v. Misra Preservers (P.) Ltd (2013) 350 ITR 222 / 213 Taxman 196 / 91 DTR 217 (All) (HC)

S.69 : Unexplained investments – Source of investment – Tribunal ought to have returned a specific finding whether explanation offered by assessee satisfactory – Matter remanded

Section 69 of the Income-tax Act, 1961, envisages two situations when an addition can be made on account of unexplained investments. The first situation is where the assessee does not offer any explanation about the nature and source of the investment. The second situation is where the explanation offered by him is, in the opinion of the Assessing Officer, not satisfactory. The Court allowing the appeal held that the assessee had offered an explanation but there was no express finding of the Commissioner (Appeals) or of the Tribunal as to whether the explanation offered by the assessee was satisfactory. Although an inference could possibly be gathered that the Commissioner (Appeals) had found the explanation to be satisfactory the matter could not be decided on inferences. The Tribunal is the final fact finding authority and, therefore, it is incumbent on the Tribunal to return a finding in clear and express terms. This is so, because it is only when the finding is clear that a question of law based on those findings can be examined by the court. Therefore, the matter was remitted to the Tribunal to return a clear finding as to whether or not the explanation offered by the assessee was satisfactory. (AY. 2008-09)
CIT v. Ajai Shukla (2013) 350 ITR 594 / 214 Taxman 404 (Delhi)(HC)

S.69 : Unexplained investments – Additional evidence – Rejection of reconciliation statement. [Rule 46A]
Closing stock shown in audited balance sheet on March 31 less than stock statement submitted to bank on March 30. Sales booked on March 31 and reconciliation statement produced before Commissioner (Appeals). No cogent reason for rejecting reconciliation statement. Held, either closing stock or additional evidence of sales should be accepted. (AY. 2009-10)
Munish Kumar Bansal v. JCIT (2014) 65 SOT 136 / (2013) 28 ITR 89(Amritsar)(Trib.)

S.69 : Unexplained investments – Difference in reconciliation – Purchases outside books
Mere discrepancy between purchase figures of assessee and those of suppliers is not sufficient to presume that the assessee had made purchases outside the books of account. (AY. 2008-09)
Kailash Chandra Sahoo v. ITO (2013) 28 ITR 530 (Cuttack)(Trib.)

S.69 : Unexplained investments – Alleged understatement of sale consideration – Addition on presumption was deleted
The assessee is a developer. The Assessing Officer made the addition of differential rates as recorded in mortgage deed and registered sale deed. The Tribunal held that the court cannot come to the conclusion that the price mentioned in the sale deed is not correct. The Tribunal followed the decision of Hon'ble Kerala High Court in the case of *CIT v. Smt. K. C. Agues (2003) 262 ITR 354* wherein the Hon'ble High Court held that when a document shows fixed price, there will be a presumption that is correct price agreed upon by the parties. Tribunal confirmed the order of CIT(A). (AYs. 2008-09, 2009-10)
Dy. CIT v. Singla Enclave Developers (P) Ltd. (2013) 156 TTJ 1 (UO)(Chd.)(Trib.)

S.69 : Unexplained investments – Addition based on AIR information
Assessee, a foreign company is in business of FIIs/Sub Account (Investment in Indian Capital Market). Being a non-resident corporate entity, assessee is registered with SEBI as a sub-account holder under FII "Threadneedle Investment Fund ICVC Asia Fund' for carrying out investment activity in Indian market. During course of assessment proceedings AO asked assessee to reconcile AIR data provided by BSE of various transactions reflected in assessee's name. It was assessee's contention that transaction reported by AIR does not pertain to assessee and moreover details furnished by AIR do not indicate any specific information with reference to contact number, scrip name, quantity etc. Assessee pleaded its inability to reconcile transactions on one-to-one basis in absence of complete details. AO without referring to explanations of assessee or examining nature of details came to a conclusion that assessee made investment in scrip 'Steel Authority of India' of 4,85,909 shares valued at Rs. 11,32,38,770/- on 17-12-2007 and as this transaction was not

reconciled or explained, amount was treated as unexplained investment u/s 69 and taxed at rate of 40 percent. Held, just because an AIR report was generated indicating PAN No. of assessee, onus does not shift completely to assessee. It is responsibility of AO to examine complete details before asking for reconciliation and whether transactions were indeed undertaken or not. AIR report also does not contain any authentication but since it is generated by Department, credit was given by AO and DRP about its authenticity. Matter require re-examination by AO by giving due opportunity to assessee. Therefore, for proper examination and coming to a conclusion on facts, orders of DRP and order of AO in this regard were set aside and assessment was restored to file of AO for fresh consideration (AY. 2008-09)
Threadneedle Investment Fund v. ADIT(IT) (2013) 56 SOT 214 (Mum.)(Trib.)

S.69 : Unexplained investments – Basis for addition – Valuation report submitted to bank
It is a common practice in business circles of inflating stock for availing of loans from banks. Unexplained investment cannot be presumed solely relying upon valuation report submitted to bank.(AY. 2006-07)
Leo Meridian Infrastructure Projects and Hotels Ltd. v. DCIT (2013) 24 ITR 123 / 144 ITD 445 (Hyd.)(Trib.)

S.69 : Unexplained investments – Unexplained investment in property
Three grounds were raised by the department before the Tribunal regarding the investment by the assessee in the properties as the additions were deleted by the CIT(A). As per as first ground is concern the Tribunal held that the AO made the arbitrary addition particularly when he accepted the investment in the hands of the wife of the assessee and all the documents relating to the said investment were available in the assessment record of the wife of the assessee who was assessed by the same Assessing Officer. Therefore, the CIT(A) was fully justified in deleting the impugned addition made by the Assessing Officer.
Regarding second ground of appeal by the department for deleting the addition of Rs.16,30,000/- out of Rs.16,80,000/-, the assesse has filed cross objection also as the CIT has confirmed the addition of Rs. 50,000/-. The Tribunal considered the submissions of both the parties and carefully gone through the material available on record and noted that the Assessing Officer in his report submitted to the learned CIT clearly stated that impugned land was not registered in the name of the assessee and the said report was furnished to the learned CIT(A) after verifying from the records available with the sub-registrar. Therefore, the Tribunal held that the addition of Rs.16.80 lacs was made by the Assessing Officer only on the basis of surmised and conjectures which is not tenable in the eyes of law and learned CIT(A) was fully justified in deleting the addition made by the Assessing Officer. As regards to the sustenance of addition of Rs.50,000/- is concern it was noticed that the person who had given advance had received back the advance of Rs.` 50,000/- and filed the affidavit. Since the proposed deal relating to the purchase and sale of the land did not materialize it was not justified to disbelieve the contents of affidavit. The Tribunal deleted the addition of Rs. 50,000/- which was confirmed by the CIT(A).
The third ground agitated by the department relates to the addition made by the Assessing Officer in respect of sale of plot. The assessee explained before the Assessing Officer that he had worked as agent for the purpose of transaction and furnished a copy of the sale deed and the affidavit of the father of the purchaser. It was noticed by the Tribunal that the Assessing Officer ignored the report of his Inspector who clearly stated in his report that the assessee acted only as an agent and the Tribunal held that the CIT(A) was fully justified in deleting the addition made by the Assessing Officer on the basis of surmises and conjectures. (AY. 2005-06)
ACIT v. Om Prakash Lohiya (2013) 154 TTJ 202 / 86 DTR 1 (Jodhpur)(Trib.)

S.69 : Unexplained investments – Estimation of cost of construction merely on the basis of statement recorded during the course of survey – Not justified [S. 142A]

In the course of survey proceedings the statement of one of the partners of the assessee-firm was recorded in which he had disclosed certain amounts on account of undisclosed construction expenses which has not been recorded in the books of the assessee-firm. The partner also stated that the unaccounted expenses have been invested in work-in-progress. The Assessing Officer asked the assessee to explain the source and the manner in which the amounts have been generated. The assessee filed before the Assessee Office work-in-progress and the bank statement as evidence for computing the work-in-progress. The assessee also explained that the work-in-progress computed on the date of survey was gross misunderstanding which did not tally with the facts and figures. The partner of the assessee-firm also filed an affidavit to that effect. However, the Assessing Officer has not accepted the contention of the assessee and taxed the amount as Income from Other Sources. The Assessing Officer also referred to the DVO for overall valuation of the projects. The CIT(A) after considering the submissions of the assessee granted partial relief. The assessee carried the matter further in appeal before the Tribunal. The Appellate Tribunal after examining the evidences furnished by the assessee allowed the appeal by observing that survey team having not found any incriminating documents during the course of survey, it was not justified in estimating the cost of construction simply on the basis of statement made by a partner of the assessee-firm which has no evidentiary value; both Assessing Officer as well as CIT(A) having not pointed out any defect in the assessee's books of account and rejected the same under section 145(3), the income could not be enhanced simply on the basis of DVO's report. (AY. 2008-09)
Chanakya Developers v. Dy. CIT (2013) 86 DTR 203 / 154 TTJ 601 / (2014) 63 SOT 26 (URO) (Ahd.)(Trib.)

S.69 : Unexplained investments – Acquisition of flat in lieu of the surrender of a tenancy right – Addition was not justified
The assessee is an individual who has been allotted a flat in a building in lieu of surrender of his tenancy right. The value of the flat allotted in lieu of surrender of tenancy right was Rs. 50-35 lakhs as per valuation done by the Stamp duty Authorities, while registering the agreement. Assessing Officer and Commissioner (Appeals) held that the assessee was not able to prove that the assessee had received the flat by virtue of the surrender of tenancy rights. Accordingly an addition of Rs. 50-35 lakh was made under section 69 of the Income-tax Act. On appeal The Tribunal held that it was beyond the purview of the lower authorities to suspect a transaction solely on the ground of adequacy /inadequacy of consideration in the absence of any other corroborating evidence and thereby making any adverse inferences. Mere suspicion without evidence on record could not be the basis for making an addition to income under section 69 of the Act.(AY. 2006-07) [ITA no 8899/Mum/2010 dt 12-6-2013. Bench 'D']
Dilip Sambhaji Shirodkar v. ITO (2013) BCAJ – July - P. 56 (Mum.)(Trib.)

S.69 : Unexplained investments – Value of property – Huge difference in value in similar property – Addition was held to be justified on the basis of valuation of property as per wealth tax Rules [S. 142A, Wealth Tax Act 1957, Rule 3 Schedule III]
Since there was a huge difference between amount shown as purchase value of property and amount representing value of similar property in area, it would be held to be understatement of investment and since long time had expired and it would not be useful to refer matter to Departmental Valuation Officer, the Assessing Officer could adopt value of property as per rules of Wealth-tax Act, 1957. (AY. 2006-07)
ACIT v. P. Srinivas Reddy (2013) 57 SOT 135(URO) (Hyd.)(Trib.)

S.69 : Unexplained investments – Search and seizure – Affidavit – Gold and gold ornaments – Assessee filing affidavits containing details of gifted jeweller – Addition to be deleted [S.132]
The Assessing Officer made addition of the value of gold jewellery, and gold ornaments found in the locker owned jointly by the assessee and his wife. They were explained to belong to the assessee's wife, giving the break-up thereof. The Assessing Officer did not accept this as the assessee's wife was a wealth

tax payer for the relevant year, i.e., in which the gift was received, and also for the subsequent years, while this gift was not verifiable with reference to her total wealth. The Commissioner (Appeals) deleted the addition holding that the affidavits contained full details of the gifted jewellery, the genuineness of which had not been doubted by the Assessing Officer. On appeal by the Department :

Held, (i) that once the assessee had furnished the affidavits, it was incumbent on the Assessing Officer to cross-examine the deponents. The quantity claimed to be received in gift was not high in relation to the status of the assessee's family or of the donors. Also, a reference to the wealth-tax returns of the assessee's wife was not relevant in view of a change in the wealth-tax law with effect from assessment year 1995-96. The order of the Commissioner (Appeals) was to be upheld in the case of the assessee.

ACIT v. Dwaraka Prasad Malpani (2012) 135 ITD 323 / N 146 TTJ 498 / (2013) 21 ITR 719 (Cochin)(Trib.)

S.69A : Unexplained money – Statement of third person – Addition relying on statement without opportunity to cross examine is violation of principle of natural justice-Matter remanded

Since the Assessing Officer was of the opinion that material obtained during the search of a third person yielded some relevant materials adverse to the assessee, he ought to have disclosed them to the assessee. The assessment order was bereft of any discussion as to what were these materials and what was the inference could be drawn from them. Therefore, the matter was remitted for fresh consideration by the Assessing Officer who shall proceed to make available the necessary documents, adverse to the assessee, and proceed in accordance with section 69A.

CIT v. P. C. Chemicals (2012) 211 Taxman 166 / (2013) 359 ITR 129 (Delhi)(HC)

CIT v. Ashok Prasad Gupta (2012) 211 Taxman 166 / (2013) 359 ITR 129 (Delhi)(HC)

S.69A : Unexplained money – Amount disclosed during survey – No source declared [S.28(i)]

Where amount surrendered during survey was not reflected in books of account and no source from where it was derived was declared by assessee, it was assessable as deemed income of assessee under s.69A and not business income. (AY.2006-07)

Kim Pharma (P.) Ltd. v. CIT (2013) 258 CTR 454 / 216 Taxman 153 (Mag.)/ 258 CTR 454 (P&H)(HC)

S.69A : Unexplained money – On money – Builder – Entire on money cannot be taxed only profit element to be taxed at 15%

The assessee, a builder, received on money while selling properties constructed by it. The Assessing Officer taxed the entire on-money received by the assessee. The assessee contended before the Tribunal that not entire on-money received but only profit element could be taxed in its hands. The Tribunal substantially accepted contention and sustained addition at rate of 15% of on-money received by assessee. Assessee contended that only 10% could be taxed. Held, when the assessee's sole contention before Tribunal was substantially accepted, appeal of assessee did not survive. Order of Tribunal is up-held.

Jay Builder v. ACIT (2013) 215 Taxman 50(Mag.) (Guj.)(HC)

S.69A : Unexplained money – Set off of undisclosed income against trade addition is permissible

In course of assessment, Assessing Officer opined that assessee had failed to explain genuineness of deposits received from ten different parties and on that basis Rs. 1.90 lakh was added to its taxable income. On appeal, assessee raised a plea that addition confirmed, if any, in trading results should be allowed to be set off against unaccounted income introduced in garb of cash deposits. The Commissioner (Appeals) accepted the plea of the assessee and this was upheld by the Tribunal. On appeal Court held that there was no error in the order of the Tribunal and hence, could not be interfered with.

CIT v. Megha Industries (2013) 214 Taxman 404 (Guj.)(HC)

S.69A : Unexplained money – Search and seizure – Hand written note found during search of third person – Statement of third person was not supplied – Matter set aside for re adjudication [S.132]

Hand written note found during search of third person stated that he had taken cash from assessee for transfer of a tenanted property taken on rent. As per the evidence available with the Revenue, the transaction of a change in possession of the property had taken place and the same being undisclosed or not explained as to its source,the corresponding amount was added under section 69. Commissioner (Appeals) deleted the addition primarily on the ground that there was no corroborative evidence to show that the assessee was in possession of such a huge amount. Before the Tribunal the assessee contended that he has not been supplied with the copy of the statement by third person or of having not been given an opportunity for cross examining them. The Tribunal in the interest of justice restored the matter back to the A. O. for readjudication. (AY.2005-06)

ITO v. Legal Heirs of Nazmin Jamal (2013) 58 SOT 321 (Mum.)(Trib.)

S.69A : Unexplained money – Obligation discharged only after satisfactorily explained not just source of money but also nature

The Tribunal held that obligation cast on assessee is to explain both nature and source of money and not just the source. The assessee's obligation discharged only after satisfactory explanation and addition could be made only to an extent of money used by assessee and not to amount used by others. (AY. 2006-07)

Alliance Hotels v. ACIT (2013) 142 ITD 270 (Mum.)(Trib.)

S.69A : Unexplained money – Unaccounted sales – Order of settlement commission (Central Excise) – Without obtaining comments from assessee additions cannot be made – Matter remanded [s.143(3)]

AO made additions as unaccounted sales soley on the basis of order of Settlement Commission (Central Excise) without making any independent enquiry and without obtaining comments from assessee. Tribunal held that addition can not be sustained. Matter remanded to AO for decision afresh. (AY. 1997-98)

Kanpur Plastipack Ltd. v. ITO (2013) 144 ITD 1 / 34 Taxmann.com 296 / 95 DTR 201 / 158 TTJ 484 (Luck.)(Trib.)

S.69B : Amounts of investments not fully disclosed in books of account – Capital work-in-progress – Amounts wrongly shown in return and later rectified – Addition was not justified

Various figures of assets such as capital work-in-progress, investment, etc., were wrongly shown by assessee in its return. However, during course of proceedings by way of corrigendum, such defect was aptly explained and rectified and capital work-in-progress was also accounted in books of account and was represented by increase in assets in balance-sheet. Even then, these figures were treated as unexplained investments of the assessee. Held, said investments could not be treated as unexplained investments of assessee. (AY. 2005-06)

CIT v. Suryadeep Salt Refinery and Chemical Works Ltd. (2013) 219 Taxman 251 (Guj.)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Source of investment – Matter set aside

During assessment proceedings, AO found that assessee had made certain deposits in banks and had certain loans and liabilities. Assessee could not explain source of investment and details of loans. AO made addition under section 69B. On appeal CIT (A) deleted the additions which was confirmed by Tribunal. On appeal by revenue the court held that neither the order of CIT(A) nor the order of Tribunal discussed any evidence produced by assessee to substantiate source of investment. Order was set aside to the AO to decide a fresh. (AY.2005-06)

CIT v. Jeeva Raja (2013) 219 Taxman 44 (Mag.) (Mad.)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Investment in unaccounted purchases – Gross profit of 2.25% was held to be reasonable

Where there were unaccounted sale transactions, onus was on assessee to show that unaccounted investment in purchases was out of accounted stock, and it could not be presumed that unaccounted sales must have been made from accounted purchases. Where Assessing Officer applied gross profit rate of 53.76 per cent on unaccounted sales to calculate profit, it was too high, and thus not sustainable, and profit calculated as per gross profit rate of preceeding year at 2.25 per cent was acceptable. (AY.2002-03).

CIT v. Ajay Kapoor (2013) 219 Taxman 42(Mag.) (Delhi)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – DVO's report though a useful tool in hands of the AO – Cannot form conclusive basis for making an addition u/s. 69B

The assessee had purchased land admeasuring 7300 sq.mtrs. along with factory building thereon. On valuation by the DVO, there was a difference in the valuation of the land and building thereon and in view of such difference between the disclosed investment of the assessee and the DVO's estimation of its fair market value, the AO added a sum of Rs. 40.24 lakhs to the assessee's taxable income u/s. 69B of the Act. The CIT(A) and the Tribunal deleted the addition relying on the decision of the Supreme Court in the case of *K.P. Varghese v. ITO [1981] 131 ITR 597* and holding that the valuation report of DVO cannot be a conclusive evidence and that there has to be some clinching evidence in the form of proof to show that additional consideration had passed between buyer and seller.

On appeal by the department, the High Court observed that it is undisputed that the sole basis for making the addition was the DVO's report. It held that the DVO's report may be a useful tool in the hands of the AO, nevertheless it is an estimation and without there being anything more, it cannot form basis for additions u/s. 69B of the Act. Accordingly, in absence of any other material on record it held that addition was correctly deleted and therefore dismissed the departmental appeal. (AY. 2006-07).

CIT v. Berry Plastics (P.) Ltd. (2013) 217 Taxman 39 / 35 taxmann.com 296 (Guj.)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Purchase of land – Addition made without giving an opportunity of cross examination was held to be bad in law – No question of law

The Assessing Officer made addition on account of undisclosed investment in purchase of agricultural land on the ground that some lands in village were sold at a higher price and that sellers had given statements to the Assessing Officer having received higher sale consideration. The assessee objected the allegation and requested for cross examination of the authors of such statement. The Assessing Officer refused to grant such permission on premises that the sale deed were executed. Court held that, the CIT (A) and the Tribunal held that the other lands were not shown to be comparable and witnesses were not offered for cross examination and there was no evidence supporting theqa Assessing Officer's version that assessee had invested large amount in purchase of land, no question of law arose.

ACIT v. Govindbhai N. Patel (2013) 215 Taxman 575 (Guj.)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Jewellery – CBDT circular – Interest on cash loans – Deletion was held to be valid [S.69A]

During search, jewellery was found, which was added as undisclosed investment. The documents showing cash loans given were also found. The Assessing Officer made addition on account of interest on cash loans. The Commissioner (Appeals) and the Tribunal deleted the addition for jewellery belonging to family members as it was covered under CBDT circular permitting owning of jewellery by ladies. The addition on account of interest on cash loans was also deleted as no addition

had been made for cash loans itself. Held the deletion of addition on account of jewellery belonging to family members, covered under CBDT circular, was justified the addition on account of interest on cash loans was unwarranted, as no addition had been made for cash loans itself.
CIT v. Prafulbhai alias Rohitbhai J. Shah (2013) 215 Taxman 86 (Mag.) (Guj.)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Investment in property – Addition based solely on report of District Valuation Officer held to be not justified
Unless and until there is some other evidence to indicate that extra consideration had flowed in the transaction of purchase of property, the report of the District Valuation Officer cannot form the basis of any addition on the part of the Revenue (AY. 2007-2008).
CIT v. Sadhna Gupta (2013) 352 ITR 595 / 214 Taxman 540 (Delhi)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Investment in property – Documents seized from assessees premises – Addition as undisclosed investment was held to be justified [S.132, 134(4A)]
Documents pertaining to a property were found and seized from assessee's premises. Assessee submitted that said property papers were given by a property dealer for verification. Name of purchaser of property was not mentioned in documents. Further no one came forward to claim these documents. Even summons served on owner of property came back being unserved. In view of aforesaid, addition under section 69B was justified. In favour of revenue.
CIT v. Jai Pal Aggarwal (2013) 212 Taxman 1 / 91 DTR 327 (Delhi)(HC)
Editorial: S.L.P. of assessee was dismissed (2013) 359 ITR 1(St.)(S.L.P.) (C) NO. 15967 of 2013 dt 18-4-2013)

S.69B : Amounts of investments not fully disclosed in books of account – Deposits – Dumb documents – Addition as undisclosed investment was held to be not justified [S.132]
A document had been seized which showed that some FDRs were made. Assessing Officer found that interest on said FDRs had not been shown in return. Accordingly, he made addition under section 69B. However, figures in seized documents did not correlate with any date or details nor was document signed and, thus, it was a dumb document, therefore, addition under section 69B was not justified. In favour of assessee.
CIT v. Jai Pal Aggarwal (2013) 212 Taxman 1 / 91 DTR 327 (Delhi)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Undisclosed investments – Investment in companies – Addition was held to be justified [S.132]
Certain documents seized showed that assessee had made investments in a company from 26-11-1993 to 10-2-1994. Seized papers contained date-wise receipts of amount from assessee - Assessee took a plea that said company belonged to his son. However, it was found that assessee's son had not started any business before 26-12-1994, there was no reason for assessee to make investment before 26-12-1994, therefore, addition under section 69B to assessee's income was justified.
CIT v. Jai Pal Aggarwal (2013) 212 Taxman 1 / 91 DTR 327 (Delhi)(HC)

S.69B : Amounts of investments not fully disclosed in books of account – Hypothecation – Statement furnished to banking authorities [S.145]
Merely relying upon statement furnished to banking authorities, additions cannot be made on account of difference arising in quantity and value of stock shown in books of account and statement furnished to banking authorities, admittedly to avail higher credit facilities. Stock was only hypothecated and not pledged. Stock was not kept in lock and key of the bank. (AY. 2009-10)
Riddhi Steel & Tubes (P.) Ltd. v. ACIT (2013) 36 taxmann.com 369 / 144 ITD 397 (Ahd.)(Trib.)

S.69B : Amounts of investments not fully disclosed in books of account – Noting on seized paper – Cost of land – Addition made without giving an opportunity of cross examination was held to be bad in law
In the absence of any positive material on record to prove that the bald figure found noted on a seized paper actually represents the cost/purchase price of the land, addition u/s. 69B cannot be made simply by rejecting assessee's explanation; supporting evidence, i.e., statements of original landowners admitting additional consideration which was neither taken into consideration by the AO nor filed by the department before the CIT (A) cannot be accepted by the Tribunal, same being totally new evidence, more so when these statements were neither confronted to the assessee nor any cross-examination was allowed. (AY. 2007-08)
Dy. CIT v. Countrywide Buildestate (P) Ltd. (2013) 83 DTR 346 / 154 TTJ 422 / 59 SOT 11 (URO)(JP)(Trib.)

S.69C : Unexplained expenditure – No details were furnished – Addition was held to be justified
Incriminating documents relating to unrecorded expenditure were found and seized by revenue. Assessing Officer made addition under section 69C and taxed unaccounted expenditure. Appellant had neither furnished details of expenditure nor established that impugned expenses were personal in nature but related to or was pertaining to unaccounted business and, further, transactions were not recorded in books of account. Court held that addition made by Assessing Officer was justified.
Kahan Udyog v. CIT (2013) 219 Taxman 23 (Mag.) (Delhi)(HC)

S.69C : Unexplained expenditure – Detailed examination – Proportionate disallowance – Held to be justified
Deduction on account of expenditure had been disallowed by the AO on the ground that assessee had failed to produce books of account and prove genuineness of some expenses. The Commissioner (Appeals) found that books of account were produced and after a detailed discussion on each and every aspect of matter concluded that addition to a certain extent would be justified for want of verification of expenditure. Held, no question of law arose for consideration. (AY. 2006-07)
CIT v. Kaiser Construction & Engineers (2013) 219 Taxman 111 (Mag.) (All.)(HC)

S.69C : Unexplained expenditure – Law applicable – Proviso to section 69C inserted w.e.f. 1-4-1999 – Proviso affects substantive rights – Proviso not retrospective – Proviso to section 69C is not applicable to block assessment periods 1986-87 to 1996-97 – No proper explanation regarding expenditure was furnished hence the amount is assessable as undisclosed income [S.158BC]
The proviso does not have retrospective operation inasmuch as it changes the existing legal position and creates a new obligation on the assessee. There is also nothing in the language of the proviso that compels one to give retrospective effect. On appeal to the High Court it was held (i) that since the proviso to section 69C has only prospective operation it was not applicable to the block assessment for assessment year 1986-87 to 1996-97. As regards the assessment as undisclosed income the court held that the assessee was in the best position to explain the expenditure incurred according to the books of account maintained but could give an explanation only with regard to a part of the expenditure and not the entire expenditure. Both the authorities i.e. A.O. as well as the Tribunal considered the explanations offered and found them unsustainable. There was no perversity in the conclusion of the Tribunal. The addition was justified. (B.P. 1986-87 to 1996-97)
P. Ram Gopal Varma v. Dy. CIT (2013) 357 ITR 493 / (2014) 265 CTR 79 (AP)(HC)

S.69C : Unexplained expenditure – Cash payments – Diesel expenses on the basis of confirmation letter by officer-in-charge held to be allowable

Assessing Officer made addition on account of diesel expenses paid in cash to BP, Sanchor, a company pump of BPCL. Tribunal on basis of confirmatory letter given by Officer-in-charge of BP, Sanchor wherein it was stated that diesel was supplied by it to assessee deleted additions. Letter clearly mentioned that bills issued to assessee had also been verified before issuance of certificate . Whether since conclusion arrived at by Tribunal was based upon concurrent findings of fact and there was no material to contrary so as to dislodge findings of Tribunal, same was to be upheld. In favour of assessee. (AY.2006-07)
CIT v. G.K. Patel & Co. (2013) 212 Taxman 384 (Guj.)(HC)

S.70 : Set off Loss – One Source against income from another source – Same head of income – Transaction with different tax rate
The Tribunal held merely because two set of transactions are liable for different rate of tax, it cannot be said that income from these transactions does not arise from similar computation, particularly when computation in both cases has to be made in similar manner under same provisions and, therefore, short-term capital loss arising from STT paid transactions can be set off against short-term capital gain arising from non-STT transactions. (AY. 2007-08)
Capital International Emerging Markets Fund v. Dy. DIT (2013) 145 ITD 491 (Mum.)(Trib.)

S.70 : Set off loss – One source against income from another source – Loss of regular business can be set off against speculative income [S.73]
Tribunal held that as both speculation business and regular business or profession falls under the head Chapter IVD, such adjustment is permissible except to the extent contained in section 73(1). The latter provision, in turn prohibits the setting off of loss from speculation business against income from no speculation business. On the facts the case the assessee claimed set off of speculation income, against the loss from regular business. Such a course of set off is fully permissible as per the relevant provisions. (ITA no 4774/Mum/2012 dt 30-8-2013 Bench "B" (AY.2009-10)
ITO v. Mittal Investments (Mum.)(Trib.)(Unreported)

S.70 : Set off loss – One source against income from another source – Same head of income – Survey – Income surrendered during survey is not allowable for setoff [Ss.71, 133A]
During the course of survey assessee surrendered an additional income. The Assessing Officer held that since income surrendered during survey was not recorded in the books of account therefore no deduction of set off loss on depreciation could be allowed. Accordingly the Income surrendered during the course of survey was assessed separately. On appeal Commissioner (Appeals) also confirmed the order of Assessing Officer. On appeal the Tribunal relying on the judgement of Punjab and Haryana High Court in Kim Pharma (P) Ltd. (IT Appeal No. 106 of 2011 (O&M) the Tribunal held that brought forward loss cannot be set off against surrendered income under section 70 & 71. Appeal of assessee was dismissed. (AY. 2005-06)
Liberty Plywood (P.) Ltd. v. ACIT (2013) 140 ITD 490 / 154 TTJ 769 / 87 DTR 293 (Chd.)(Trib.)

S.71 : Set off loss – Survey – Intra head set off – Set off against undisclosed income – Current year's loss can be set off against disclosed income declared in survey [S.14, 69, 133A]
Income declared in survey to be taxed, it has to fall under one of heads of income u/s. 14 and cannot be taxed separately. Therefore current year loss can be set off against undisclosed income declared in survey.
CIT v. Shilpa Dyeing & Printing Mills (P.) Ltd. (2013) 219 Taxman 279 (Guj.)(HC)

S.72 : Carry forward and set off – Earlier years' assessments – Finality of orders

Carry forward and set off would depend upon finality of order for earlier years. Hence, the AO was directed to determine carried forward losses based on outcome for earlier years. (AYs. 2006-07, 2007-08)
GE India Industrial P. Ltd. v. DCIT (2013) 27 ITR 543 (Ahd.)(Trib.)

S.72 : Carry forward and set off – Windmill business – Losses of eligible business can be set off against other business [S.80IA]
Loss from windmill business, which fell under category of eligible business as per section 80-IA, could be set off against other heads of income of assessee. (AY.2008-09)
DCIT v. V.B. Koujalgi (2013) 20 ITR 618 / 58 SOT 15 (URO)(Bang.)(Trib.)

S.72 : Carry forward and set off – Business losses – Profit from speculation business – Normal business loss/brought forward business loss is allowed to be set off against speculation business profit [Ss.70, 71, 73]
The Assessing Officer treated the gains arising on sale of shares as profit in speculation business in absence of any evidence of delivery of shares. While adjusting the business loss incurred during the year, A.O. brought the balance income to tax as income from speculation business in the hands of the assessee and did not allow set off of business losses carried forward against this assessed income. CIT(A) confirmed the same that speculative business profit could not be set off against business losses of the current year as well. The Hon'ble ITAT direct when an assessee has two distinct businesses and there is a loss in one business while profit in the other business, the loss can be set off against profit of the other business unless there is a statutory restriction of such a set off. Restriction set out in section 73 relates only to losses of speculation business being set off against profits of non-speculation business. Therefore in the absence of specific restriction on set off of normal business losses against profits of speculation business the same cannot be inferred or assumed.S 72(1) provides that non-speculation business loss can be set off against "profits and gains from any income". The approach of A.O. was unsustainable in law and he was to be directed to allow set off of normal business losses against speculation business profits. (AY. 2005-06)
Ramshree Steels (P.) Ltd. v. ITO (2013) 144 ITD 227 / 35 taxmann.com 273 / 96 DTR 66 / 158 TTJ 627 (Luck.)(Trib.)

S.72 : Carry forward and set-off – Business losses – Unabsorbed depreciation cannot be denied without reason
The Tribunal held that carry forward and set off of losses is a statutory right of assessee, same could not be denied without reasons. Thus unabsorbed depreciation could be set-off against profits of any business of assessee foreign company, other than business to which section 44D was applicable. (AY. 2007-08, 2008-09)
ADIT v. Rolls Royce Industrial Power India Ltd. (2013) 142 ITD 585 (Delhi)(Trib.)

S.72A : Carry forward and set off – Accumulated loss and unabsorbed depreciation – Amalgamation
The assessee company board decided on 11-3-2008 to merge with a Co. "T" subject to approval of shareholders, High Court, Stock Exchanges and other authorities. The scheme of amalgamation fixed the date for the same for 31-3-2008. Subsequently assessee claimed set off of carried forward losses of "T" against the income declared by it. The Assessing Officer held that the appointed day of amalgamation was arbitrarily fixed and was a colourable device to set off amalgamated losses of "T" against its profits and hence the claim was disallowed. The CIT(A) allowed the claim of the assessee. The Tribunal dismissing revenue's appeal held that the Assessing Officer exceeded his jurisdiction to question appointed day fixed under scheme of amalgamation and Assessing Officer's doubts were without basis and in the circumstances claim of assessee for set off had to be allowed. (AY. 2008-09)
Dy. CIT v. Indus Fila Ltd. (2013) 142 ITD 296 / 94 DTR 378 (Bang.)(Trib.)

S.72A : Carry forward and set off – Accumulated loss and unabsorbed depreciation – Amalgamation

Two separate companies, BTPU and another company, got amalgamated with the assessee-company in the previous year relevant to the assessment year 2004-05. The Assessing Officer denied set off of the brought forward loss of BTPU on the grounds that (i) 43.79 per cent of assets of the amalgamating company had been disposed of by the assessee in the very first year of the amalgamation; (ii) the assessee-company was not able to substantiate that the scheme of amalgamation was with a view to revive the business of the amalgamating company and amalgamation was for a genuine business purposes; (iii) the assessee-company did not achieve the level of production of at least 50 per cent. of the installed capacity of the amalgamating company before the end of four years from the date of amalgamation and that it further failed to demonstrate that it continued to maintain the said minimum level of production till the end of five years from the date of amalgamation; (iv) the assessee-company failed to furnish a certificate in the prescribed Form 62 duly verified by an accountant showing particulars of production, which was one of the prerequisite conditions for availing of the allowance under section 72A, as laid down in rule 9C(b). The Commissioner (Appeals) affirmed this. On appeal:

Held, (i) that two companies, BTPU and BSPPL amalgamated with the assessee-company in the relevant previous year. The assessee claimed set off of brought forward loss of BTPU alone. In order to claim such benefit, it was incumbent upon the assessee not to dispose of more than 25 per cent of the assets of BTPU alone. The disposal of assets by the assessee in all the three years combined was around 10 per cent of the book value of total assets of BTPU. The Assessing Officer, while calculating the percentage of 43.79 per cent., erred in including the disposal of assets of BSPPL with the disposal of assets of BTPU. The objection of the Assessing Officer for not granting set off and carry forward of accumulated loss and unabsorbed depreciation of BTPU that the assessee disposed more than 25 per cent of the assets of BTPU was, therefore not, sustainable.

(ii) That the amalgamation took place on April 1, 2003. The period of four years had not expired at the time of completion of the assessment. The Assessing Officer was required to restrict himself to the year before him for considering as to whether there was any violation of section 72A(2). As the previous year relevant to the assessment year under consideration was not the fourth year from the date of amalgamation, the Assessing Officer was not required to examine this aspect at that stage.

(iii) That it was premature to require the material for demonstrating efforts taken by the amalgamated company for reviving the business of amalgamating company.

(iv) That as the assessee admittedly did not achieve the production at the desired level of the installed capacity and it was not the fourth year from the date of amalgamation, the requirement of furnishing certificate in Form 62 was premature.

(v) That, therefore, there was no failure on the part of the assessee to fulfil the requisite conditions for claiming set off of brought forward business losses and unabsorbed depreciation of BTPU in year under consideration. (A Y.2003-04, 2004-05)

Bayer Material Science P. Ltd. v. ACIT (2013) 142 ITD 22 / 22 ITR 287 / 90 DTR 133 / 155 TTJ 564 (Mum.)(Trib.)

S.73 : Losses in speculation business – Set off – Interest on advances and loans – Purchase and sale of shares – Loss from sale of shares was entitled to set off against profits of business of company [S.28(i)]

Under Explanation to s.73, business of purchase and sale of shares by assessee was speculation business and it was entitled to set off losses from sale and purchase of share against profits of business of company from loans and advances. (AYs. 1998-99 to 2000-01)

Saurabh Industrial Financing Ltd. v. ITO (2013) 219 Taxman 112 (Mag.)(All.)(HC)

S.73 : Losses in speculation business – Share dealing – Company – Loss from shares dealing cannot be deemed to be from "speculation" under Explanation to s. 73 if company is not engaged in the "business" of shares dealing

The assessee, engaged in the business of trading of crafts paper etc claimed a loss of ` 5.53 lakhs arising on account of a transaction whereby it purchased and sold shares. The AO held that under the Explanation to s. 73, the said loss was deemed to be arising from a speculation business and could not be set off against other business profits. However, the CIT(A) and Tribunal allowed the assessee's claim on the basis that the assessee was not engaged in the "business of purchase and sale of shares" so as to fall into the mischief of the Explanation to s. 73. In appeal before the High Court, the department relied on *CIT v. Bhikam Chand Jankilal (1981) 131 ITR 554 (MP)* and argued that even a single transaction of sale or purchase of shares might amount to a "business". HELD by the High Court dismissing the appeal:

The assessee was engaged in the business of trading of crafts paper, installation, job work, consultancy and commission. By all means, the transaction whereby it purchased the shares and incurred loss on account of the fall in the value of the share was a solitary one. The findings of the Tribunal that the transaction did not constitute the business carried on by the company, cannot be termed as perverse or unreasonable. No substantial question of law arises (Standipack 350 ITR 251 (Cal) noted) (AY. 1991-92)

CIT v. Orient Instrument Pvt. Ltd. (2014) 360 ITR 182 (Delhi)(HC)

S.73 : Losses in speculation business – Explanation to section 73 – Derivative transaction – Definition of speculative transaction in section 43(5) is confined to its application to that section and cannot be extended to section 73 of the Act [S.43(5)]

Section 43 defines, certain terms for the purpose of sections 28 to 41 of the Act. Section 43(5) excludes derivative transactions from the mischief of 'speculative transactions' only for the purpose, that is for computations of business income. Explanation to Section 73 is enacted to clarify that share business of certain types of company are deemed to be speculative in nature. The intendment of Parliament that such derivative transactions are also to be excluded from the provisions of Explanation to section 73 is not born out. (AY. 2007-08)

CIT v. DLF Commercial Developers (2013) 218 Taxman 45 / 261 CTR 127 / 91 DTR 49 (Delhi)(HC)

S.73 : Losses in speculation business – CBDT – Circular – Carry forward and set off – To be set off against speculative profit of current year before adjusting any other loss [S. 119]

The assessee for the assessment year 2000-01 set off brought forward loss from speculation business for the assessment year 1999-2000 and 1998-99, against current year's speculative profit. AO disallowed the set off. On appeal the set off was allowed. AO while giving effect first adjusted the current year's loss from all the business of the assessee against current years speculative profits. After this adjustments the balance of speculative loss was allowed to be carried forward. Immediately succeeding the assessment for which loss was first computed, the assessee filed the rectification application, which was rejected. In appeal Commissioner (Appeals) allowed the appeal of assessee. Appeal of revenue was dismissed by the Tribunal following the circular of the Board No. 23 of 1960 dated September 12, 1960, though the said circular was issued in the context of section 24 of the Indian Income-tax Act, 1922. On appeal by the revenue, dismissing the appeal the Court held that, beneficial circulars relaxing rigour and other executive Act is binding on Assessing Officer. Court upheld the order of Tribunal and held that Carry forward and set off to be set off against speculative profit of current year before adjusting any other loss. (AY.2000-01)

CIT v. Ashok Mittal (2013) 357 ITR 245 (Delhi)(HC)

S.73 : Losses in speculation business – Business of purchase and sale of shares by assessee being speculation business, loss therefrom was entitled to be set off of against profits of business of company from loans and advances

The assessee's principle business was earning interest on loans and advances. From the interest so earned, it also carried on business of purchase and sale of shares. The assessee in its return set off the loss in share trading activities against the profits earned from the interest on the advances and loans. The AO reopened the assessment on the ground that the business of the petitioner was to earn income from interest on advances and loans, the share trading activity of the petitioner was 'speculative business' as such and loss therefrom is not liable to be adjusted towards business profit of the company and income had thus escaped assessment.
On a Writ Petition by the assessee, the High Court observed that section 73 provides for set off the loss of speculation business against the profits and gains of another speculation business of the assessee. By virtue of the Explanation to section 73, a company, whose principal business is the business of banking or the granting of loans and advances consists in the purchase and sale of shares of other companies, such company shall, for the purposes of this section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares. It is admitted between the parties that principal business of the petitioner is earning interest on the advances and loans. It also carries on business of purchase and sale of shares from the income derived from the interest. Under the Explanation to section 73, the business of purchase and sale of shares by the petitioner is speculation business. Accordingly, following its own decision in the case of *CIT v. Narain Properties Ltd. [2012] 209 Taxman 274*, the High Court held that the assessee is covered under Explanation to section 73 of the Act and is entitled to set off the losses from sale and purchase of the share against the profits of the business of the company from loans and advances. Thus the reassessment proceedings were quashed. (AY. 1998-99 to 2000-01)
Usha Politex Ltd. v. ITO (2013) 217 Taxman 113 (All.)(HC)

S.73 : Losses in speculation business – Buying and selling of shares – Deeming fiction can be applied only losses in speculation business or intend to carry forward non-absorbed loss, it cannot be applied when there is income on sale of shares
The assessee received certain income by sale of shares. The assessee shown the income as capital gains. The Assessing Officer applied Explanation to S. 73 and held that income arose out of speculative business of assessee and taxed income as business income. On appeal Commissioner (Appeals) and Tribunal upheld that contention of assessee. On appeal by revenue the Court held that, section 73 has application when assessee has incurred loss or intends to carry forward non-absorbed loss. Hence, the Assessing Officer committed an error in resorting to Explanation 73 as said Explanation only provides for deeming fiction in certain circumstances where assessee would be deemed to be carrying on a speculative business and such deeming fiction would not apply in situations not covered under S. 73. Court also clarified that the Assessing Officer has not given any finding on merit whether buying and selling of shares was assessable as business income, hence appeal of revenue was dismissed. (AY.2005-06)
CIT v. Appollo Vikas Steels (P) Ltd. (2013) 214 Taxman 642 (Guj.)(HC)

S.73 : Losses in speculation business – Explanation to section 73 – Major portion of gross total income of assessee did not consist of income from granting of loans and advances, but of purchase and sale of shares of other companies. Share trading loss to be treated as speculative loss
Where the assessee claimed its principal business was of granting loans and advances, as at year end, 62 per cent of its funds were invested in that business However, the Assessing Officer observed that for more than 10 months of whole year, less than 50 per cent of available funds were utilised in business of granting loans and advances He accordingly, treated share trading loss as speculative loss invoking the provisions of Explanation to section 73. The finding of fact was confirmed by appellate authorities Therefore, the High Court did not interfere with the consistent finding of fact of the lower authorities and dismissed the Appeal. (AY. 2000-01)
Alfa Tie Up (P) Ltd. v. CIT (2013) 81 DTR 336 / 214 Taxman 7 (Mag.) / 256 CTR 90 (Cal.)(HC)

S.73 : Losses in speculation business – Dealing in shares – Sham transaction – Justified in disallowing the loss [S.43(5)]

Assessee was engaged in business of sale and purchase of shares and government securities. It sold shares of JP and HFCL at loss and set off loss against profit from sale of shares. Sale and purchase were made through a sister concern. There was no physical delivery of shares and shares were sold on dates when prices were lowest. The court held that the Assessing Officer was justified in disallowing loss on sale of shares of JP on ground that it was a sham transaction. And also the Assessing Officer was right in treating loss in sale of shares of HFCL as speculation loss. Appeal of revenue was allowed. (AY. 2001-02)

CIT v. Vachanband Investment Ltd. (2013) 212 Taxman 131 (Delhi)(HC)

S.73 : Losses in speculation business – Income arising from trading in shares is speculative income within meaning of Explanation to section 73

The assessee was engaged in trading of shares for customers and for itself on delivery basis. The A.O. treated business of the assessee with regard to trading of shares for itself as speculative business within the meaning of provisions of section 73. The Tribunal upheld the action of the A.O. and held that where assessee is engaged in business of share brokerage and share trading, income on account of trading of shares for itself is speculation income. (AYs. 2000-01, 2002-03 to 2004-05)

Nashik Capital Financial Services (P) Ltd. v. Dy. CIT (2013) 142 ITD 581 / 25 ITR 48 (Pune)(Trib.)

S.73 : Losses in speculation business – Gross total income

The assessee had shown income from house property at Rs. 35,73,950/-, income from other sources at Rs.24,92,129/-, capital gain on sale of flat at Rs.62,285/- and loss from sale of shares at Rs.3,25,23,981/-. The Assessee contended that main source of income was income from house property and therefore, Explanation to section 73 was not applicable. The Tribunal held, that since the figure of loss in absolute terms in share trading was higher than income from other sources taken together, the Explanation to section 73 would be applicable. The assessment order was upheld. (AY. 2001-02)

DCIT v. Savlani Trading & Investments Co. (P) Ltd. (2013) 56 SOT 208 (Mum.)(Trib.)

S.73 : Losses in speculation business – Explanations – Loss incurred on buying and selling of shares is speculative loss hence not eligible for set off against business income [S.28(i)]

Assessee claimed deduction in respect of loss incurred on buying and selling of shares as business loss. Revenue authorities held that the principal business of the assessee company was not advancing loans and buying and selling of shares. Principal business of assessee was manufacture, sale, dealing in export and import all types of chemicals and drugs, therefore loss incurred by assessee was speculation loss. On appeal Tribunal held that assessee's principal business was to manufacture, sell, export and import of chemicals and drugs, Explanation to section 73 applied to assessee's case. Hence the revenue authorities were justified in rejecting assessee's claim. (AY 1997-98 to 1999-2000)

Dr. Reddy's Laboratories Ltd. v. ACIT (2013) 141 ITD 650 / 156 TTJ 106 / 88 DTR 233 (Hyd.)(Trib.)

S.74 : Losses – Capital gains – Depreciable assets – Set off – Short term capital gain on long term depreciable assets can be set off against long-term capital loss. [S. 2(11), 50]

Short-term capital gain computed u/s 50 on long-term depreciable assets can be set off against long-term capital loss u/s 74.(AY. 2005-06)

CIT v. Manali Investment (2013) 219 Taxman 113 (Mag.) (Bom.)(HC)

S.74 : Losses – Capital gains – S.50 – Depreciable assets – Block of assets – Long-term capital loss can be set off against short-term capital gain calculated u/s. 50 [S.50]

The assessee sold its office premises and secured long-term capital gains. However, being a depreciable asset, gains were computed in terms of section 50 of the Act as short-term capital gain.

The AO disallowed the claim of the assessee to set off its carry forward long-term capital loss against the aforesaid long-term capital gains u/s. 74 of the Act. The CIT(A) upheld the order of the AO. On further appeal, the Tribunal allowed the claim of the assessee to set off its long term capital loss in terms of Section 74 of the Act by following its decision in the case of *Manali Investments v. ACIT (2011) 45 SOT 128 (Mum)(Trib).*
The High Court, following its Order in the case of Manali Investments, dismissed the departmental appeal thereby permitting the set off of bought forward long term capital loss (AY. 2006-07)
CIT v. Pursarth Trading Co. (P.) Ltd. (2013) 217 Taxman 113 (Mag.) (Bom.)(HC)

S.74 : Losses – Capital gains – Set off loss – One source against income from another source – Same head of income – Set off of short term capital gains against capital loss of same year cannot be branded as colourable device or method of tax avoidance [Ss.4, 70]
The assessee-company sold plant and machinery and earned short-term capital gains on one hand while on the other, sold cumulative convertible preference shares and incurred capital loss and set off loss against capital gains earned. Since both capital gains and loss co-existed during the same period, the Assessing Officer concluded that assessee had adopted a colourable device for tax avoidance. Held since both the transactions were genuine and traded at proper valuation, even if same had been entered with a motive to avoid tax, same would not become colourable device subject to any disqualification. (AY. 2001-02)
CIT v. Special Prints Ltd. (2013) 215 Taxman 628 / 356 ITR 404 / 262 CTR 119 / 93 DTR 351(Guj.)(HC)

S.74 : Losses – Capital gains – Share swapping – when approved by a Government agency – Transaction cannot be challenged
The Tribunal held where swapping of shares was approved by a Government agency like FIPB, approved ratio of shares to be swapped, prudence of transaction could not be challenged and loss therefrom had to be assessed. (AY. 2007-08)
Capital International Emerging Markets Fund v. Dy. DIT (2013) 145 ITD 491 (Mum.)(Trib.)

S.79 : Carry forward and set off losses – Change in share holdings – Companies in which public are not substantial interested – Carry forward losses cannot be denied on ground of change in shareholding due to merger, if management of company remains the same
98% shares of the assessee company were held by one IIPL. Same set of people were managing both the assessee and IIPL. On merger of IIPL with the assessee, the AO disallowed the carry forward of losses, u/s. 79, holding that there had been a change in shareholding. The CIT(A) and Tribunal held that there was no change in the management of the company and it remained with the same set of people who were earlier exercising control.
On appeal by the department the High Court, held that the holding company-IIPL was amalgamated with the assessee-company, however, the share holders of that holding-company continued to be share holders of the assessee-company and in these circumstances, the prohibition from carrying forward the losses placed by section 79 does not operate (AY. 2004-05).
CIT v. Select Holidays Resorts Pvt. Ltd. (2013) 217 Taxman 110 (Delhi)(HC)

S.79 : Carry forward and set off losses – Change in share holdings – Companies which public are not substantially interested – Beneficial owner – Loss is allowed to be carried forward
In the absence of any material to hold that Tribunal accepted the assessee's contentions and that PM and Mrs. DR were in fact holding the shares on behalf of foreign investors and the foreign investors fell within the description of "beneficial owner" u/s. 79, Tribunal was not justified in allowing carry forward and set off of loss. Matter was remanded for reconsideration. (AY. 2002-03, 2003-04.)
CIT v. S Net Freight India (P) Ltd. (2013) 83 DTR 243 (Delhi)(HC)

S.80 : Loss – Loss return – Return of income – Original return filed in time-Date of filing of revised return is not relevant for carrying forward the loss [S.139(1)]

The assessee filed the original return in time claiming the short-term capital loss. AO held that the loss was not filed on due date hence not entitled to carry forward loss.CIT(A) held that the AO has not considered the original return but only revised return hence directed to allow the carry forward the loss. On appeal by revenue the Tribunal held that disentitlement for carry forward of loss under section 80 comes into play only when original income tax return disclosing loss sought to be carried forward, is not filed within time prescribed under section 139(1); date of filing of revised return is not to be considered for this purpose.(AY.2009-10)

Dy. CIT v. Ashok Walia (2013) 60 SOT 72 (URO) (Kol.)(Trib.)

S.80AC : Return to be furnished – Mandatory – Condonation of delay – Matter remanded [Ss.80IB, 139(1)]

Deduction u/s 80-IB is not to be allowed unless return is furnished. Where the assessee-company filed delayed return of income, involving refund claims arising due to deduction claimed under section 80IB, CBDT alone could consider claim of assessee to condone delay. Matter remanded.

Unique Shelters (P.) Ltd. v. UOI (2013) 218 Taxman 99(Mag.) (Kar.)(HC)

S.80AC : Deduction not to be allowed unless return furnished – Housing project [Ss.80IB (10), 139(1), 153A]

For claiming deduction under section 80-IB(10) it is mandatory for the assessee to file his return before due date prescribed under section 139(1) as per the mandate of section 80AC.(AY. 2008-09, 2009-10)

ACIT v. V.N. Devdoss (2013) 93 DTR 73 / 157 TTJ 165 / 57 SOT 67 (URO) (Chennai)(Trib.)

ACIT v. V.N. Devdoss (HUF) (2013) 93 DTR 73/157 TTJ 165 (Chennai)(Trib.)

S.80C : Life insurance premium – Contribution out of loan funds – Eligible for claiming deduction

The Tribunal held that the provisions of section 80C, as applicable to the relevant year, do not specify the condition that the premium payments should be made out of income chargeable to tax and, therefore, payments of LIC premiums made by the assessee during the relevant previous year out of the loan funds are eligible for deduction under section 80C of the Act. (AY. 2006-07)

Goutham Reddy v. ITO (2013) 86 DTR 155 / 154 TTJ 219 / 59 SOT 90 (URO)(Cochin)(Trib.)

S.80G: Donation – At the time of granting approval for object of Trust is required to be examined

At time of granting approval for exemption under section 80G, object of trust is required to be examined and application of funds, can be examined by Assessing Officer at time of framing assessment.

CIT v. O.P. Jindal Global University (2013) 219 Taxman 70(Mag.) (P&H)(HC)

S.80G : Donation – Grant of approval under sub-s. (5) – Continuation of approval

Where assessee-trust had valid approval under s.80G(5) on 1-10-2010, such approval shall continue in perpetuity as per Circular No. 5 dated 3-6-2010.

CIT v. Shri Vishav Namdhari Sangat (2013) 354 ITR 33 / 216 Taxman 153(Mag.) (P&H)(HC)

S.80G : Donation – Eye hospital – Hospital not started – Rejection of renewal application was held to be not valid

The assessee was in process of establishing an eye hospital which was enjoying exemption under S. 80G. The assessee's claim for renewal of exemption was rejected by Commissioner on ground that grant given by State Government for specific purpose was not utilized within time stipulated by State Government. It was noted that there was no occasion to misuse funds as hospital had not yet started and, thus, plant and machinery could not be purchased from grant. Therefore, the assessee's application for renewal of exemption was to be allowed.
CIT v. Association for the Prevention of Blindness (2013) 214 Taxman 535 (All.)(HC)

S.80G : Donation – Cancellation of certificate – Charitable purpose – Cancellation without notice was held to be illegal [S. 2(15)]
No notice was issued by the Commissioner to the assessee calling upon it to show cause with regard to violation committed by it to cancel the exemption certificate granted under section 80G. Since no profit was made by the assessee during the relevant assessment year. Therefore, it cannot be said that the activity of the assessee-trust is not charitable. Thus, the cancellation of certificate was held illegal.
CIT v. Rajasthan Jain Charitable Trust (2013) 351 ITR 354 / 214 Taxman 198 / 84 DTR 420 (Karn.)(HC)

S.80G : Donation – Renewal of exemption – Furnishing of information – Matter remanded to allow one more opportunity
Assessee, an educational society, applied for renewal of exemption granted under section 80G. Commissioner directed assessee to furnish certain information. Assessee did not furnish information, Commissioner declined renewal of exemption. Assessee submitted before High Court that its entire staff was busy in examination work so on date of hearing such information could not be furnished, resulting an order jeopardizing its interest. Court held that since assessee was enjoying benefit of section 80G since long time but because of lapse on part of its employees exemption had been refused, it was to be allowed one more opportunity to furnish all information before Commissioner. Matter remanded.
Guru Gobind Singh Educational Society v. CIT (2013) 354 ITR 517 / 214 Taxman 194 / 88 DTR 121 (MP)(HC)

S.80G : Donation – Approval of institution – Circular clarifying that existing approvals deemed to have been extended in perpetuity unless specifically withdrawn – Circular binding – Approval to continue
The Commissioner rejected the application of the assessee for grant of renewal of registration under section 80G(5) of the Act, on the ground that it would be applicable to those trusts or institutions which had received the registration under section 80G subsequent to October 1, 2009 and since the assessee was granted the last registration on June 25, 2008, it was not entitled to approval in perpetuity. On appeal, held, allowing the appeal, the Tribunal held that the approval under section 80G(5) of the Act already granted to the assessee would continue unless and until the concerned authority took appropriate action in accordance with law. On appeal by revenue to High Court, held dismissing the appeal, that the assessee had valid exemption on October 1, 2010, when the provisions of section 80G amended so as to dispense the periodic renewal of the exemptions. Such statutory provisions were clarified by Circular No. 5 of 2010 and Circular No. 7 of 2010 issued by the Central Board of Direct Taxes. Once the statute has given perpetuity to the exemptions granted under section 80G(5) the exemption could not be withdrawn without issuing show-cause notice in terms of the statutory provisions in the manner prescribed by law.
CIT v. Bhhola Bhandari Charitable Trust (2013) 351 ITR 469 / 87 DTR 215 / 215 Taxman 138 (Mag.) / 87 DTR 215 / 259 CTR 279 (P&H)(HC)
Editorial.Order of Tribunal in Bhole Bhandari Charitable Trust v. CIT (2013) 22 ITR 661 (Chandigarh)(Trib.), affirmed.

S.80G : Donation – Charitable purpose – Denial of renewal

Upon a specific finding that training, medical care and concession provided to all persons irrespective of their caste, creed or religion, denial of renewal of exemption on the ground that object religious in nature was not justified. (AY. 2012-13)

Christian Medical College v. CIT (2013) 27 ITR 308 / 157 TTJ 83(UO) (Chd.)(Trib.)

S.80G : Donation – Opportunity to hearing

Assessee Society that the assessee continued to work for charitable activity for public purposes as in the earlier years and there was no change in the facts and circumstances. Assessee applied for renewal of exemption under section 80G. Commissioner rejected application for renewal of section 80G exemption without providing an opportunity of being heard to assessee. Appeal was filed by assessee against order providing 'reasonable opportunity of being heard' is a responsibility on authority by way of rules of natural justice. The Tribunal held that reasonable opportunity of being heard should be granted to appellant.

Swayambhar v. CIT (2013)143 ITD 503 / 35 taxmann.com 217 (Kol.)(Trib.)

S.80G : Donation – Bar on objects – Rejection of approval was held to be justified

In view of fact that there was nothing in object clause to indicate a bar on the assessee-trust limiting expenditure on religious objects to 5% of its total income for a particular year, the assessee's claim for approval u/s 80G(5)(vi) was to be rejected.

Radhika Seva Sansthan v. CIT (2013) 20 ITR 31 / 57 SOT 120 (URO) (Jaipur)(Trib.)

S.80G : Donation – Charitable trust – Application for renewal of deduction – Finding that trust created by mutual club of masons – Mother body not surrendering its mutual status – Not to be treated as independent charitable institution

The assessee, a registered trust, was granted recognition under section 80G for a period from June 2, 1995 to March 31, 1996. Thereafter, recognition under section 80G was renewed from time to time upon application put in by the assessee. The assessee enjoyed approval from April 1, 1996 to March 31, 2007 and filed a renewal application on March 26, 2012. The Director (Exemptions) rejected the application. On appeal :

Held, that the trust was an extension of the mutual Club of Masons. The mother body had not sacrificed or surrendered its mutual status. Therefore, the status of mutuality reflected on the assessee-trust which could not claim the status of a charitable institution. As the mother body was not surrendering its status of mutuality, it was not possible to treat the assessee as an independent charitable institution. Even though the assessee was registered under the law relating to trusts, it could not be construed as a charitable institution for the purpose of the Income-tax Act. Therefore the application was rejected.

The Lodge of Universal Charity 273 EC Charitable Trust v. DIT (Exemptions) (2013) 23 ITR 25 / 59 SOT 12 (URO) (Chennai)(Trib.)

S.80G : Donation – Charitable institutions – Approval of institution – Renewal – Circular clarifying that existing approvals deemed to have been extended in perpetuity unless specifically withdrawn – Circular binding – Approval to continue

The assessee filed an application for renewal of approval for purposes of the deduction under section 80G of the Act. It made a request to treat the application for renewal of exemption under section 80G as withdrawn in view of Circular No. 5 dated June 3, 2010 (2010) 324 ITR (St.) 293, which provided that approvals under section 80G were deemed to be in perpetuity. The Commissioner did not accept the request of the assessee, observing that the society did not fulfil the conditions necessary for exemption under section 80G(5). On appeal: Held, allowing the appeal, that approval under section 80G(5) of the Act already granted to the assessee would continue unless and until the concerned authority took appropriate action in accordance with law. (AY. 2011-12)

Vishav Namdhari Sangat v. CIT (2012) 137 ITD 74 / (2013) 22 ITR 468 (Chandigarh) (Trib.)

S.80G : Donation – Recognition of institution etc. u/s. 80G(5) Trust created exclusively for a particular religion

Assessee trust was created for the construction of a temple of a deity and worship of the said deity under a trust deed which provided that the income of the trust shall be applied in the maintenance and repair of the temple properties and spent on the daily worship of the said deity and on defraying the usual expenses of holding festivals of the said deity and the aforesaid objects were still intact even after the unauthorized amendment of the trust deed by the founders and trustees, it was held that it is atrust expressed to be for the benefit of a particular community i.e. Hindu religious community, which contravenes the provisions of s. 80G(5)(iii) r/w Expln. 3 to S. 80G and, therefore, assessee trust was not entitled to renewal of approval u/s. 80G(5).

Ramanujam Spiritual Public Charitable Trust v. CIT (2012) 138 ITD 81 / (2013) 151 TTJ 682(TM) (Asr.)(Trib.)

S.80GGA : Donation – Donation for scientific research or rural development – Income includes loss – Gross total income being loss deduction is not available [S.147]

The word 'income' should be understood as including losses also and therefore, where assessee had incurred loss from its business and same was included in its gross total income, claim of deduction under section 80GGA could not be allowed.(AY. 2005-06)

K. Anji Reddy v. DCIT (2013) 59 SOT 92 (URO) (Hyd.)(Trib.)

S.80HH : Newly established industrial undertakings – Back ward areas – Consultancy charges cannot be held to be 'derived from industrial undertaking' [S.80I]

The assessee-company was engaged in the manufacturing of wide range of products like industrial perfumes, chewing tobacco, synthetic essential oil etc. It entered into an agreement with 'HLL' whereby assessee as a licensor, had licensed its formula developed through research to HLL to use it in their products especially in soap. In addition to monetary consideration, the assessee had also received the royalty/consultancy charges from HLL. The assessee claimed deduction under sections 80HH and 80-I in respect of amount received as royalty/consultancy charges. The revenue authorities rejected assessee's claim holding that the consultancy charges could not be said to be profit earned and derived from the industrial unit. However, the Tribunal allowed the entire claim of the assessee pertaining to the consultancy charges by observing that it was an income derived from the industrial undertaking and was thus, eligible for deduction under sections 80HH and 80-I. The High Court held that, consultancy activity might be incidental to the business of the assessee but it has no direct nexus with the activity of the industrial undertaking which is the manufacturing unit of the products in the backward area. Only income that is derived from the manufacturing activity is eligible for deduction under sections 80HH and 80I. For the purpose of this section, the profit and gains of the new undertaking is not commercial profit but only such profit as are computed in the manner laid down under the Act in pursuance of section 80AB, as if each undertaking was a separate assessee. Hence, consultancy charges cannot be held to be 'derived from industrial undertaking'. (AYs. 1991-92 to 1993-94)

CIT v. Khattri Perfumers (P.) Ltd (2013) 94 DTR 345 / 219 Taxman 35 (Mag.) 37 taxmann.com 449 (All.)(HC)

S.80HH : Newly established industrial undertakings – Backward areas – Infrastructure development – Computation – Loss in non-eligible unit [S.80A(2), 80AB, 80B(5), 80IA]

While calculating the deduction u/ss. 80HH and 80-IA, the profits of each unit have to be calculated separately. Loss of an eligible unit has to be taken into account while calculating the deduction but not the loss of non-eligible unit.

CIT v. Him Teknoforge Ltd. (2013) 83 DTR 117 / 256 CTR 393 (HP)(HC)

S.80HHC : Export business – Incentive – Export exceeds Rs. 10 crores [S.28(iiid)]

Where export turnover of an assessee exceeds Rs. 10 crores, he does not get benefit of addition of ninety per cent of export incentive under clause (iiid) of section 28 to his export profits, but he gets a higher figure of profits of business, which ultimately results in computation of a bigger export profit.

Ellora Time (P.) Ltd. v. CIT (2013) 219 Taxman 79(Mag.)(SC)

S.80HHC : Export business – Profit on sale of DEPB – Export turnover exceeds Rs. 10 crores-Matter remanded to Assessing Officer [S.28(iiid)]

Topman Exports v. CIT (2012)342 ITR 49 (SC)) reaffirmed; where export turnover exceeds Rs. 10 crores, assessee does not get benefit of addition of ninety per cent of export incentive under clause (iiid) of section 28 to his export profits, but he gets a higher figure of profits of business, which ultimately results in computation of a bigger export profit.

Global Agro Products (P.) Ltd. v. ITO (2013) 93 DTR 436 / 262 CTR 273 / 217 Taxman 395 / (2014) 360 ITR 117(SC)

Nissan Export v. CIT (2013) 93 DTR 435 / 262 CTR 275 / 217 Taxman 395 / (2014) 360 ITR 93 (SC)

S.80HHC : Export business – Cut and polished marble blocks – Eligibility for deduction.

Deduction u/s. 80HHC can be allowed on export of cut and polished marble blocks.

CIT v. Jyoti Minerals (P.) Ltd. (2013) 219 Taxman 114 (Mag.) (Raj.)(HC)

S.80HHC : Export business – Cut and polished granite – Mineral – Not eligible deduction – As stands prior to amendment by Finance Act, 1991

Cut and polished granite would also be a mineral and export thereof would not qualify for special deduction u/s 80HHC(2)(b) as it stands prior to amendment by Finance Act, 1991.(AYs. 1986-87 to 1989-90)

CIT v. Vijay Granites (P.) Ltd. (2013) 351 ITR 247 / 89 DTR 19 / 219 Taxman 165(Mag.) (Mad.)(HC)

S.80HHC : Export business – Computation – Net interest which has to be taken

It is net interest which has to be taken into account while computing deduction u/s 80HHC as per Explanation (baa) to s. 80HHC(4C). (AY. 1997-98)

CIT v. Paliwal Exports (2013) 219 Taxman 114(Mag.) (P&H)(HC)

S.80HHC : Export business – Export of rough granite – No relief is available

The assessee claimed export benefit under section 80HHC on total export sale of granite blocks. The Assessing Officer, on perusal of export invoices, found that export sale consisted of rough granite and dimensional granite. The Assessing Officer granted deduction only with regard to dimensional granite as per CBDT's Circular No. 729, dated 1-11-1995. On appeal, the Commissioner (Appeals) granted the deduction on total export by holding that assessee had exported cut and trimmed granite block as per the records. On revenue's appeal, the Tribunal reversed the order of the Commissioner (Appeals). On appeal the Court confirmed the order of Tribunal.(AY. 2000-01).

D. Anuradha (Smt.) v. Dy. CIT (2013) 219 Taxman 26 (Mag.) (Mad.)(HC)

S.80HHC : Export business – Total turnover – Sales tax is to be excludible

Amount of sales tax is excludible from total turnover while computing deduction under section 80HHC. (AY. 1989-90)

CIT v. Malwa Cotton Spinning Mills Ltd. (2013) 219 Taxman 38(Mag.) (P&H)(HC)

S.80HHC : Export business – DEPB – DFRC – Entire sale profits is not to be treated as profits for computing deduction

Entire sale proceeds of Duty Entitlement Pass Book (DEPB) and Duty Free Replenishment Certificate (DFRC) are not to be treated as profit for working out deduction under section 80HHC.(AY.2004-05)
CIT v. Rachana Exports (2013) 219 Taxman 25(Mag.) (Guj.)(HC)

S.80HHC : Export business – Realisation of convertible foreign exchange – Extension of time limit – Entire proceedings realised before expiry of time allowed by RBI
Assessee filed an application seeking extension of time to realise foreign exchange amount stating that due to disintegration of USSR and fall in value of Russian currency. Market conditions in said country had become very tight and buyers were unable to remit payment within time. Since Commissioner rejected the application without rebutting or denying that the assessee was factually correct. He had also not adverted to fact that the RBI had realised said problem and had taken notice of unprecedented situation and hardship faced by exporters from India. Also, since the assessee had realised entire export proceeds before expiry of time-limit for completing assessment. In view of the aforesaid, impugned order was to be set aside and assessee's application seeking extension of time was to be allowed. Matter remitted to the CIT to decide the matter within two months and allow the refund if any. (AY.1994-95)
York Exports (P.) Ltd. v. CIT (2013) 218 Taxman 355 (Delhi)(HC)

S.80HHC : Export business – Deduction allowable on counter sale to foreigners against foreign exchange
The High Court following its own judgment in the case of *Ram Babu and Sons v. Union of India [1996] 222 ITR 606 (All.)(HC)* which has been approved by the Apex Court in the case of *CIT v. Silver & Arts Palace [2003] 129 Taxman 56 (SC)* held that counter sale to foreigners against foreign exchange are export sales and benefit of section 80HHC has to be given to the assessee (AY. 1989-90)
Kraft Palace v. CIT (2013) 217 Taxman 106 (All.)(HC)

S.80HHC : Export business – Admissible to exporter of cut and polished marble blocks
Following its own Order in the case of the assessee for the AY. 2003-2004, the High Court held that the assessee is entitled to claim deduction u/s. 80HHC in respect of cut and polished marble blocks (AY. 2004-05).
Galaxy Exports v. CIT (2013) 217 Taxman 108 (Mag.) / (2014) 360 ITR 359 (Raj.)(HC)

S.80HHC : Export business – 90% of sales tax subsidy and discount received on early payment – Cannot be reduced from business profit
During the year, the assessee had received sales tax subsidy and discounts from customers for early payments during the year. The AO reduced 90% of these receipts in view of clause (baa) of Explanation to section 80HHC of the Act, which was upheld by the CIT(A). On cross appeal to the Tribunal, it was held that sales tax subsidy and discounts is not in the nature of clause (baa) and thus directed the AO not to exclude 90% of the said receipts from "profits of the business" for the purpose of computing deduction u/s 80HHC of the Act.
The High Court dismissed the departmental appeal and held that sales tax subsidy and discount cannot be reduced from business profits. The High Court observed that the decision of the Supreme Court in the case of *CIT v. K. Ravindranathan Nair (2007) 295 ITR 228* was not applicable to the present case.
CIT v. Abhishek Industries Ltd. (2013) 217 Taxman 104(Mag) (P&H)(HC)

S.80HHC : Export business – DEPB licence to be included for working out deduction
The High Court, in appeal by the revenue, held that in view of the decision of the Supreme Court in the case of *Topman Exports v. CIT (2012) 342 ITR 49* wherein it was held that DEPB is a 'cash assistance' receivable by assessee and is covered under clause (iiib) of section 28 of the Act, the

Tribunal was right in directing the AO to include DEPB licence for working out deduction u/s. 80HHC of the Act (AY. 1997-98).
CIT v. Cadila Health Care Ltd. (2013) 217 Taxman 107(Mag) (Guj.)(HC)

S.80HHC : Export business – Interest income cannot form part of export income and thus no deduction can be claimed u/s. 80HHC
Assessee received certain amount by way of interest. It claimed that interest income in question was also from export income and, therefore, same was part of business profit for deduction u/s. 80HHC. The AO did not agree with assessee and consequently deducted amount of interest from business profit by treating same as not directly related to business activity of assessee. The CIT(A) allowed the ground raised by the assessee. The Tribunal, however, held that amount received towards interest could not be business income and, denied deduction u/s. 80HHC on interest income.
On appeal by the assessee, the High Court confirmed the findings of the Tribunal and held that the Tribunal was absolutely justified in coming to a conclusion that the said amount cannot be business income.
Ravindra Heraeus (P.) Ltd. v. ACIT (2013) 216 Taxman 109 (Raj.)(HC)

S.80HHC : Export business – Premium received on transferring export licence does not involve any earning of foreign exchange and does not result into profits attributable to export profits hence no deduction is allowable [S.28(iv)]
Premium received on transferring export licence does not involve any earnings of foreign exchange and does not result in profits attributable to an export activity. Hence, no deduction under section 80HHC is allowable on the same. (AY. 2001-02)
CIT v. Garniwal Exports (P.) Ltd. (2013) 356 ITR 432 / 90 DTR 241 / 219 Taxman 33(Mag.)(Karn.)(HC)

S.80HHC : Export business – Survey-Surrender of income – Excess cash found-Surrendered income during survey could not be added to business income while computing eligible deduction under section 80HHC. [S.133A]
Income surrendered on the alleged excess cash found during the survey under section 133A cannot be treated as business income. Hence, deduction under section 80HHC can be allowed as the disclosure does not amount to turnover there was complete absence of this intention when surrender was made as Section 80HHC is part of Chapter VIA and provides deductee in respect of income / profits derived from exports made out of India of any goods or merchandise. (AY. 1997-98)
CIT v. Goel Jewellers (2012) 74 DTR 345 / (2013) 258 CTR 254 / 216 Taxman 193 (Mag.) (Delhi)(HC)

S.80HHC : Export business – Amendment – Third and fourth proviso – Retrospective effect is held to be not valid – Constitutional validity [Ss.28(iiid), 28(iiie)]
The insertion of conditions in third and fourth provisos to section 80HHC(3) by amendment of Taxation Laws (second amendment) Act, 2005 would be given effect from date of amendment and not in respect of earlier assessment years.
Priknit Exports v. ACIT (2013) 215 Taxman 79 (Mag.) (P&H)(HC)
Texport (India) v. ACIT (2013) 215 Taxman 79 (Mag.) (Bom.)(HC)

S.80HHC : Export business – Sale of DEPB licence – Matter remanded
The Assessing Officer disallowed the claim of deduction on the ground that the assessee had not complied with conditions prescribed under third proviso to section 80HHC(3).Held that the Assessing Officer was to be directed to compute deduction under section 80HHC in light of decision of Supreme Court rendered in case of *Topman Exports v. ITO (2012) 342 ITR 49(SC)*
CIT v. Sara Leather Industries (2013) 215 Taxman 88 (Mag.) (Mad.)(HC)

S.80HHC : Export business – Directory in nature so far an it relates to time for furnishing of audit report – Audit report submitted during assessment proceedings deduction cannot be denied

The Assessing Officer disallowed the claim of the assessee under section 80HHC on the ground that the assessee failed to file Form No. 10CCAC along with the return. Held, that the expression "along with the return of income" occurring in section 80HHC(4) is directory in nature in so far it relates to the time for furnishing. If it is furnished during the course of assessment proceedings, deduction cannot be denied. (AY.2003-04)

CIT v. Godha Chemicals Pvt. Ltd. (2013) 353 ITR 679 / 83 DTR 190 / 257 CTR 10 (Raj.) (HC)

S.80HHC : Export business – Survey – Stock valuation found during the course of survey and surrendered as business income of the assessee was eligible for the deduction under section 80HHC to the extent prescribed [S.133A]

The Assessing Officer, for the AY 2002-03, disallowed the deduction under section, in respect of a sum representing excess stock valuation surrendered by the assessee as income during the course of survey. The Commissioner (Appeals) and the Tribunal held that because the assessee was doing business in handicraft items and nothing contrary was found by the Department during the survey proceeding, which could show that the assessee was doing business in items other than handicraft items, the Assessing Officer ought to have allowed the deduction under section 80HHC.

Held, dismissing the appeal, that the assessee had exported handicraft items manufactured by it during the AY 2002-03 and had realised the convertible foreign exchange therefor and had thus satisfied the requisite condition for grant of the deduction under section 80HHC to the extent of excess closing stock valuation also. The income added in the hands of the assessee was merely on account of surrendering the amount as income by the assessee on account of excess valuation of the closing stock made by the assessing authority on account of survey conducted under section 133A. Hence, the excess stock valuation found during the course of survey and surrendered as business income of the assessee was eligible for the deduction under section 80HHC to the extent prescribed. (AY. 2002-03)

CIT v. Haswani Arts (2013) 352 ITR 574 / 83 DTR 81 / 256 CTR 335 / 219 Taxman 163 (Mag.) (Raj.)(HC)

S.80HHC : Export business – Cut and polished marble blocks – Extent of cutting and polishing not prescribed – Eligible for deduction

The Act does not prescribe the degree or extent of cutting and polishing to be applied to the marble blocks for claiming deduction under section 80HHC. The Act does not specifically mention that the marble should be given final cut and final polish before being exported. When rough marble is cut into dimensional blocks of uniform colour and size and a certain amount of dressing and polishing is done, which would remove various natural flaws such as colour variations, etc., it would certainly amount to "processing" of the marble and add value to its marketability. Circular No. 693, dated November 17, 1994, did not adversely affect the claims of the assessees and the assessees were entitled to the benefit of deduction under section 80HHC. (AY.2003-04)

CIT v. Arihant Tiles and Marbles Pvt. Ltd. (2013) 352 ITR 20 / 215 Taxman 140(Mag.) / 257 CTR 169 / 84 DTR 58 (Raj.)(HC)

S.80HHC : Export business – Dividend and interest receipts – Ninety per cent of net receipts, included in profits, and not of gross receipts

That the Tribunal was correct in excluding 90 per cent of the dividend receipts and interest receipts for arriving at the business profits attributable to such receipts for the purpose of arriving at the profits of the business of the assessee in general and not the gross receipts. The decision of *ACG Associated Capsules Pvt. Ltd. v. CIT (2012) 343 ITR 89 (SC)* was applied.

CIT v. Infosys Technologies Ltd. (2013) 352 ITR 74 (Karn.)(HC)

S.80HHC : Export business – Total turnover – Miscellaneous income is part of total turnover
Miscellaneous income under the residuary head necessarily had to be part of the total turnover.
CIT v. Infosys Technologies Ltd. (2013) 352 ITR 74 (Karn.)(HC)

S.80HHC : Export business – Computation – Adjustment of unabsorbed depreciation – Deduction is allowable to an exporter only after adjustment of unabsorbed depreciation of earlier years from current year profit [S. 32,80AB]
In the context of computing total income of the assessee and even in computation of the total income, the depreciation allowance whether for the current year or unabsorbed depreciation of earlier years necessarily is factored. It is only after making adjustments against these carried forward losses or unabsorbed depreciation allowance the true profits and positive profits can be arrived at.(AY.1997-98)
J.K. Industries Ltd. v. ACIT (2013) 351 ITR 434 / 85 DTR 225 / 214 Taxman 52 (Mag.)/ 260 CTR 348 (Karn.)(HC)

S.80HHC : Export business – Loss in one unit to be adjusted against profits of another.
Different units of the assessee company were engaged in the manufacturing of different goods. This does not make separate units of the assessee company as separate and different assessable units for the purposes of the Income-tax Act, 1961 or for that matter for the purposes of s. 80HHC. Deduction u/s. 80HHC could be allowed to the assess company only after adjustment of loss in unit III against profits of unit I. (AY. 2003-04)
Madhav Marbles & Granites Ltd. v. ACIT (2013) 352 ITR 331 / 83 DTR 17 / 256 CTR 329/ 217 Taxman 105 (Mag.)(Raj.)(HC)

S.80HHC : Export business – Cash system of accounting – Receipt of export incentives pertaining to earlier years is allowable in the subsequent to the year of export [S.145]
Assessee was following cash system of accounting in respect of export incentives. It received such incentives pertaining to earlier years in the relevant financial year. Held that it was entitled to deduction under section 80HHC by taking the export turnover and the total turnover of the year in relation to which the export incentive has been received. (AY. 1992-93)
Barclays International v. CIT (2013) 83 DTR 159 / 257 CTR 166 / 217 Taxman 110 (Mag). (P&H)(HC)

S.80HHC : Export business –Export turnover of more than Rs.10 crore- Third and fourth provisos – Constitutionality. (Constitution of India. Article, 14, 226)
Amendment of s. 80HHC(3) by insertion of certain conditions in the third and fourth provisos thereto with retrospective effect by Taxation Laws (Second Amendment) Act, 2005, violates Art. 14 of the Constitution as it denies the benefit of deduction u/s. 80HHC to the class of assessees having export turnover of more than Rs.10 crores whose assessment were still pending, while allowing such benefit to the same class of assessees whose assessments have already been concluded. It is also invalid for the reason that its retrospective operation takes away the benefit from one class of assessees. Impugned assessment is quashed to the extent that the operation of section could be given effect from the date of amendment and not in respect of earlier assessment years in the case of assessees whose export turnover is more than Rs. 10 crores.
Vijaya Silk House (Bangalore) Ltd. v. UOI & Ors. (2012) 349 ITR 566 / (2013) 83 DTR 241 / 257 CTR 67 (Bom.)(HC)

S.80HHC : Export business – Profits of the business – DEPB credit not transferred – Provisions of section 28(iiid) is not attracted – Where DEPB credit utilised assessee wuld be entitled to deduction-Sale of special import licence – Entitled to deduction [Ss.28(iiia, 28(iiid)]

The assessee itself had utilised the DEPB credit for its business and had not transferred/sold the same to any third party, then the provisions of section 28(iiid) would not be attracted, and therefore the second, third, fourth provisos of 80HHC(3) are not attracted. Since AO was directed to recompute the deductions under section 80HHC, in accordance with the law as held by the Supreme Court in *Topman Exports v. CIT (2012) 342 ITR 49(SC)*. Assessee would be entitled to deduction on DEPB credit utilized by itself. The profits of the sale of special import licence could not be reduced from the profits of the business to the extent of 90 percent. If they could not be so excluded, since they did not fall under the various clauses of section 28 enumerated in such Explanation (baa) there would neither be an exclusion nor adding back under various provisions of sub-section (3) of section 80HHC. Assessee would be entitled to deduction under section 80HHC on sale of special import licence.

CIT v. K.R.B.L. Ltd. (2013) 357 ITR 258 / 82 DTR 241 / 257 CTR 32 / 219 Taxman 166 (Mag) (Delhi)(HC)

S.80HHC : Export business – Computation – Profits of the business – Interest from money lending is not excludible for purpose of applying formula for computing export profits for earlier year – Law is amended with effect from assessment year 1992-93. [S.80AB]

The assessee is an individual engaged in export business. For the assessment year 1991-92, he claimed deduction of Rs. 33,63,149 under section 80HHC of the Income-tax Act, 1961. The income-tax authorities objected that the interest income, even if it was assessed as business income on the footing that the assessee was carrying on moneylending business, represented domestic profits and not export profits and, therefore, a mechanism should be devised by which the domestic profits were excluded from the profits of the business for the purpose of applying the formula prescribed by section 80HHC. The Tribunal held that the domestic business need not have any nexus with the export business for the purpose of deduction under section 80HHC and hence interest income could not be excluded from the profits of the business. On appeal the Court held that the amendment made to clause (baa) of the Explanation below section 80HHC defined "profits of the business" in such a manner as to exclude receipts like interest, commission, etc., which did not have an element of turnover, was introduced prospectively by the Finance (No. 2) Act, 1991, with effect from the assessment year 1992-93 and the amendment did not operate retrospectively. Therefore, for the assessment years prior to the assessment year 1992-93, it would not be permissible to exclude interest receipts even if the business from which interest arose did not have an element of turnover. Appeal of revenue was dismissed. (AY.1991-92)

CIT v. Anil Chanana (2013) 350 ITR 47 / 214 Taxman 62 (Delhi)(HC)

S.80HHC : Export business – Trading – Manufacturing – Deduction had to be allowed only from net profit – Since there was net loss, the claim of deduction was to be disallowed

Assessee had earned profit from trading export and there was loss from manufacturing export claimed deduction under section 80HHC ignoring loss from manufacturing export. Held, the deduction had to be allowed only from net profit from both activities and since there was net loss, the claim of deduction was to be disallowed. (AY.1999-2000)

KEC International Ltd. v. DCIT (2012) 20 ITR 282 / (2013) 58 SOT 18 (URO) (Mum.)(Trib.)

S.80HHC : Export business – Computation – Separate books for each division

Since the assessee was maintaining separate sets of books of account for each division, clubbing of profits of divisions while calculating deduction was not proper. (AY.2003-04)

ACIT v. LG Electronics India P. Ltd. (2013) 24 ITR 634 (Delhi)(Trib.)

S.80HHC : Export business – Singer – Export of master tape – Since the assessee had received consideration for export of the goods along with certificates of foreign inward remittance deduction was to be allowed

The Assessing Officer while denying the assessee deduction under section 80HHC of the Act held that evidences of customs clearance were not produced by the assessee. The CIT(A) allowed the said deduction to the assessee. On appeal by the department, the Tribunal confirmed the order of the CIT(A) and held that the assessee had adduced reasonable evidence to show that the goods were delivered by him to the parties in Sharjah. The Tribunal also relied on the decision of the Bombay High Court in the case of *Abdulgadar A. Nadiadwala v. ACIT in (2004) 267 ITR 488* and held that since the assessee had received consideration for export of the goods along with certificates of foreign inward remittance by ANZ Grindlays Bank, he was entitled to deduction under section 80HHC of the Act thereby dismissing the revenue's appeal. (AY. 1993-94)

Dy. CIT v. K. J. Yesudoss (2013) 23 ITR 540 / 144 ITD 444 (Chennai)(Trib.)

S.80HHC : Export business – Insurance compensation – Technology transfer receipt – Operational income is eligible for deduction

Insurance receipt and technology transfer receipt relating to development works realised by assessee on loss of stock-in-trade would constitute 'operational income' eligible for deduction u/s. 80HHC. (AY.2004-05)

Cipla Ltd. v. DCIT (2012) 20 ITR 98 / (2013) 57 SOT 85 (URO) (Mum.)(Trib.)

S.80HHC : Export business – Computation – Local sales – Export turnover – Total turnover

In view of the provisions of S.80HHC(3)(b), indirect cost incurred for local sale and export sales need not be categorised and it is to be calculated in ratio of export turnover to total turnover. (AY. 1998-99)

Aventis Pharma Ltd. v. DCIT (2013) 57 SOT 102 (URO) (Mum.)(Trib.)

S.80HHC : Export business – Total turnover – Insurance claim, interest, rent to be excluded from profits of business. Amount of sale of raw material to be included in total turnover for purpose of computation of deduction

In the computation of deduction under section 80HHC the Assessing Officer included the sale of raw materials in the total turnover and excluded 90 per cent of insurance claims, sales tax refund, interest and lease rental receipts from the profits of the business. This was affirmed by the Commissioner (Appeals). On appeal :

Held, (i) that 90 per cent. of other income such as, insurance claim, interest, rent, etc., was liable to be excluded from the profits of the business while computing deduction under section 80HHC. (ii) That the amount of sale of raw material was liable to be included in the total turnover of the assessee for the purpose of computation of deduction under section 80HHC according to the formula given in the statute. (AY.2002-03)

Kansai Nerolac Paints Ltd. v. Dy. CIT (2013) 22 ITR 424 / 57 SOT 10(URO) (Mum.)(Trib.)

S.80HHC : Export business – Net interest – 90 per cent thereof

Tribunal held that when there is a nexus between interest receipts and interest payment interest receipt should be set off against interest payment before excluding 90 per cent thereof in terms of Explanation (baa) to section 80HHC, it is 90 per cent of net interest and not gross interest which has to be deducted under clause (i) of Explanation (baa) to section 80HHC for determining profits of business in order to compute deduction under section 80HHC. In favour of assessee. (AYs. 2004-05 & 2005-06)

ACIT v. Avon Organics Ltd. (2013) 55 SOT 260 (Hyd.)(Trib.)

S.80HHC : Export business – Block assessment [Ss.158BC, 158BH]

In course of appellate proceedings, assessee raised an objection that revenue authorities were not justified in denying deduction claimed under section 80HHC. Tribunal held that since book results were neither altered nor rejected by revenue authorities which showed export proceeds being received by assessee, deduction claimed under section 80HHC was to be allowed within premise of section 158BH. In favour of assessee. (Block period 1-4-1987 to 23-10-1997)
Hindustan Polyamides & Fibres Ltd. v. Dy. CIT (2013)55 SOT 52(URO) (Mum.)(Trib.)

S.80HHC : Export business – Income from windmill is to be excluded – Insurance claim cannot be excluded
Income from windmill is not related to the activity of exports and to be excluded from profits of the business for the purpose of allowing deduction under section 80HHC. Insurance receipts has a clear nexus with the business and is not a standalone profit activity ,therefore it can not be excluded from profits of the business for the purpose of allowing deduction under section 80HHC.(AYs.2002-03 to 2004-05)
Micro Inks Ltd. v. ACIT (2013) 157 TTJ 289 / 144 ITD 610 / 92 DTR 186 (Ahd.)(Trib.)

S.80HHE : Export business – Export of computer software – Special provision excludes general provision – Assessee has no choice of claiming deduction either under section 80HH or under section 80-O – Order of Tribunal was set aside [S. 80-O]
The services rendered by the assessee were systems analysis, systems design programme specifications, programme development, documentation, installation and implementation of software packages and the technical services rendered by the assessee were in connection with the development of production of computer software.
Once the nature of services rendered by the company is in connection with the development of production of computer software, it cannot seek deduction under a provision which deals in general with the deduction on the income earned in technical or professional services rendered outside India. It is true that under sub-section (5), the grant of deduction under section 80HHE has to be claimed by an assessee and allowed by the officer and once it is considered, it will not be allowed under any other provision, either in the same or in any other assessment year. This, however, does not mean that an assessee has a choice to claim the relief either under section 80HHE or under section 80-O. Order of Tribunal was set aside.(AYs. 1993-94, 1994-95)
CIT v. B.T. System and Service Ltd. (2012) 254 CTR 411 / 79 DTR 18 / (2013) 358 ITR 30 (Mad.)(HC)

S.80HHE : Export business – Unabsorbed depreciation – Profits should be reduced by unabsorbed depreciation and unabsorbed loss – Foreign exchange fluctuation – 90% of amount not excludible in arriving at profits of business
Business profits should be reduced by the unabsorbed depreciation and unabsorbed losses before computing the deduction under s. 80HHE. There was no occasion to exclude 90% of the amount attributable to export gains from the foreign exchange rate fluctuation. (AY. 1996-97)
CIT v. Novell Software Development (I) Pvt. Ltd. (2013) 355 ITR 339 / 260 CTR 372 / 219 Taxman 32 (Mag) (Guj.)(HC)

S.80HHE : Export business – Export turnover – Total turnover – Development of software – Expenditure on marketing – Matter remanded
The assessee-company was engaged in business of development and sale of computer software. It was also rendering technical services in connection with development of software, etc. The assessee filed its return claiming deduction u/s 80HHE. The assessee also submitted that from out of its business activities in supplying software products to its customers abroad, it had incurred expenditure on activity other than marketing offices. The Assessing Officer took a view that it was impliedly an expenditure incurred in connection with providing technical service in relation to development of

software and, therefore, same was required to be excluded from total turnover and export turnover. The Tribunal, however, taking a view that assessee's case being one of export of software, exclusion of expenditure in question was not contemplated as per definition of 'export turnover' and 'total turnover' under clause (c) and (e) respectively of Explanation to section 80HHE – It was noted that Tribunal did not rely on available and relevant material for giving its finding on question as to whether assessee's activity related to first part of sub-section (1) of section 80HHE or second part thereof and in absence of same, directing exclusion of expenses became a hypothetical situation. In view of above, impugned order of Tribunal was to be set aside and matter was to be remanded back for disposal afresh. (AYs. 1993-94 to 1996-97)
CIT v. Infosys Technologies Ltd. (2013) 215 Taxman 46 (Mag.) / 261 CTR 586 (Karn.)(HC)

S.80HHE : Export business – Computation – Profits of branch office – Export turnover – Total turnover
As per the provisions of section 80HHE, profits of any branch, office, warehouse or any other establishment of assessee situated outside India are to be reduced from 'export turnover' of business and not from 'total turnover'. In favour of revenue. (AY.2002-03)
CIT v. Patni Computer Systems Ltd. (2013) 215 Taxman 108 (Bom.)(HC)
Editorial: Patni Computer Systems Ltd v. Dy. CIT (2012) 135 ITD 398 (Pune)(Trib.)

S.80HHE : Export business – Transfer of film software – Export turnover – Total turnover – Expenditure incurred in foreign exchange by providing technical services outside India – Whether to be reduced from export turnover and total turnover.
The order of the Tribunal reversing the findings of the Assessing Officer that for the purpose of computing deduction under section 80HHE, the expenditure incurred in foreign exchange by providing technical services outside India were to be reduced from the export turnover and total turnover before granting such deduction was liable to be set aside. The matter was remitted to the Tribunal for decision afresh in the light of the material to be placed by the assessee before him.
CIT v. Infosys Technologies Ltd. (2013) 352 ITR 74 (Karn.)(HC)

S.80HHE : Export business – Computer software – Data entry – Export of customised electronic data is eligible for deduction
The assessee is engaged in the business of information vending. The activities undertaken by the assessee is transmission of customised data through internet to its clients abroad and that of data entry processing. The assessee claimed the deduction under section 80HHE. The Assessing Officer disallowed the claim on the ground that department has not accepted the order of Tribunal which has allowed the claim of assessee for the assessment year 2000-01. On appeal the Commissioner (Appeals) and Tribunal allowed the claim of assessee. On appeal by revenue the Court held that the job data entry has been notified as computer software service, *vide* notification dt 26th Sept, 2000 by the CBDT the assessee is eligible to deduction under section 80HHE. Accordingly the appeal of revenue was dismissed. (AY. 2003-04)
CIT v. Malhar Information Services (2013) 351 ITR 119 / 83 DTR 44 / 257 CTR 69 / 213 Taxman 45(Mag.) (Bom.)(HC)
Editorial: Refer ACIT v. Malhar Information Services (2008) 119 TTJ 346 (Mum.)(Trib.) reversed.

S.80HHE : Export business – Computer software – Interest on FDR – Interest on delayed payment by customers – Deduction is not available
Deduction under section 80HHE is not allowable on interest earned on FDR. Interest received from customers on delayed payment cannot be treated as income derived from activities contemplated under section 80HHE. Hence, deduction is not allowable for the same. (AY. 2003-04)
DCIT v. Bechtel India (P.) Ltd. (2013) 59 SOT 99 (URO) (Delhi)(Trib.)

S.80HHE : Export business – Computer software – Total turnover – Scrap etc-reimbursement of expenses – Amount written off – Not part of total turnover

Receipts from sale of PC/Server scrap, etc., which had no element of profit in it, cannot be included in total turnover for computing deduction under section 80HHE. Reimbursement made by clients at actuals for expenses incurred towards travelling, boarding and lodging expenses would not form part of total turnover for computing deduction under section 80HHE. Amount of liability written back would not form part of total turnover for computing deduction under section 80HHE. (AY.2003-04)

DCIT v. Bechtel India (P.) Ltd. (2013) 59 SOT 99(URO) (Delhi)(Trib.)

S.80HHE : Export business – Computer software – Reimbursement of expenses – Total turnover

Tribunal held that reimbursement of expenses are to be reduced from total turnover for purpose of computing deduction under section 80HHE. (AYs. 2004-05, 2005-06)

ACIT v. Bechtel India (P.) Ltd. (2013) 141 ITD 200 / 85 DTR 50 / 153 TTJ 416 (Delhi) (Trib.)

S.80HHE : Export business – Computer software – Total turnover – Export turnover – Turnover of eligible business to be considered and not the turnover of all the units

The assessee had claimed deduction under section 80HHE taking in to consideration total turnover and export turnover of eligible business. The Assessing Officer restricted the assessee's claim by taking into account the turnover of all the units of the assessee instead of the turnover of only the eligible units. In appeal the Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal the Tribunal held that the qualifying profit for the purpose of computing 'profits and gains of business or profession' as per Explanation (d) to the section would be the profits of the computer software business and correspondingly, it would be the export and the total turnover of the said business only that would stand to be considered for apportionment under section 80HHE. The Tribunal relied on the judgment of Mumbai Tribunal in Tessitura Monti India Pvt. Ltd. (ITA no 7127/Mum/2010 dt. 11-1-2013. (AY. 2003-04)

Datamatics Technologies Ltd. v. DCIT (2013) BCAJ–May-P. 49 / 59 SOT 101(URO) (Mum.)(Trib.)

S.80-I : Industrial undertakings – Manufacture – Quarrying of granite stone – Cutting polishing and exporting – Matter remanded

Assessee carried on business of quarrying of granite stones and after cutting and polishing them exported them abroad. Since there was no evidence to come to a definite conclusion as to whether assessee was doing manufacturing activity or not, it was appropriate to remand matter to AO for purpose of eliciting and proving same.(AYs. 1986-87 to 1989-90)

CIT v. Vijay Granites (P.) Ltd. (2013) 351 ITR 247 / 89 DTR 19 / 219 Taxman 165 (Mag.) (Mad.)(HC)

S.80-I : Industrial undertakings – Cold storage plant – Deduction was not allowable for the assessment year 1989-90 – Amendment is w.e.f. 1-4-1990 whereby operation of cold storage plant was held to be qualified for deduction

Assessee was running a cold storage plant. In course of assessment, assessee claimed deduction under section 80-I. Assessing Officer rejected assessee's claim. Tribunal, however, allowed assessee's claim. It was noted that section 80-I was amended by inserting sub-section (1A) with effect from 1-4-1990 whereby operation of cold storage plant qualified for deduction, since instant case was concerned with assessment year 1989-90, aforesaid amendment would not benefit assessee running business of cold storage. Therefore, assessee's claim for deduction was to be rejected. (AY.1989-90)

CIT v. Amar Nath Singhal (2013) 219 Taxman 27(Mag.) (All.)(HC)

S.80-I : Industrial undertakings – Backward areas – Gross total income – Allowable without deduction under section 80H. [S.80HH]

Deduction under section 80-I would be allowable on gross total income without reducing deduction under section 80HH.(AY.1993-94).

CIT v. Radico Khaitan Ltd. (2013) 219 Taxman 84 (Mag.) / (2014) 360 ITR 462 (All.)(HC)

S.80-I : Industrial undertakings – 10 or more workers – Whether the employees are direct employees or engaged through sister concern – Eligible for deduction

The mandatory requirement to employ 10 or more workers by an industrial undertaking with the aid of power specified as quantum number as per sec.80-I(2)(iv). It does not recognise the fact whether the employees are direct employees or engaged through sister concern. (AYs.1992-93 to 1994-95)

CIT v. Delhi Press Patra Prakashan Ltd. (No. 2) (2013) 355 ITR 393 / 260 CTR 253 (Delhi)(HC)

S.80-I : Industrial undertakings – Derived from – Service charges – Plant is operated by assessee service charges received by assessee is entitled to deduction

Assessee-company received service charges for operating and maintaining a heavy water plant owned by Government, which was next to its own ammonia plant. Such service charges received were not considered as part of profit of industrial undertaking eligible for deduction under section 80-I, by Assessing Officer as plant was not owned by assessee. The question that arose before the court was whether the service charges received was directly relatable to operation and management of heavy water plant, which was an industrial undertaking and whether these service charges were to be considered as profits of industrial undertaking eligible for deduction as section 80-I does not require ownership of an industrial undertaking. The court answered the question in affirmation and in favour of the assessee.(AY.1993-94, 1994-95)

Krishak Bharti Co-operative Ltd. v. Dy. CIT (2013) 91 DTR 1 / 358 ITR 168 / 261 CTR 363 / 219 Taxman 146 (Mag.)(Delhi)(HC)

S.80-I : Industrial undertakings – Employees – Workers – Acquisition of raw materials on job work basis

There is no condition that workers in industrial undertaking must be on rolls of assessee. If more than ten workers are permanently involved in carrying on activities, assessee would be entitled to deduction. There is also no condition that the assessee must structure its business in any particular form. Acquiring raw material on job work basis does not disentitle assessee to deduction.(AYs. 1991-92 to 1994-95)

CIT v. Delhi Press Patra Prakashan Ltd. (No.2) (2013) 355 ITR 14 / 217 Taxman 288 / 260 CTR 253 (Delhi)(HC)

S.80-I : Industrial undertakings – Consistency – Earlier years' assessments not disturbed

Since the Assessing Officer has been consistently allowing deduction for preceding three years, denial of deduction on the ground of non-fulfilment of condition in s. 80I(2) without disturbing earlier assessments was not justified on the basis of rule of consistency.(AY. 1991-1992 to 1994-1995)

CIT v. Delhi Press Patra Prakashan Ltd.(No.2) (2013) 355 ITR 14 / 217 Taxman 288 / 260 CTR 253 (Delhi)(HC)

S.80-I : Industrial undertakings – Produce – Manufacture – Printed paper

The term "produce" has wider connotation than "manufacture". Printed paper produced in the units of the assessee is includible in the ambit of expression "article" or "thing" and hence, assessee entitled to deduction. (AYs. 1991-92 to 1994-95)

CIT v. Delhi Press Patra Prakashan Ltd. (No.2) (2013) 355 ITR 14 / 217 Taxman 288 / 260 CTR 253 (Delhi)(HC)

S.80-I : Industrial undertakings – Manufacture or production – Galvanisation of pipes is neither manufacture or production is not entitled to benefit of section 80-I

Held, by galvanization, the iron and steel are not changed and remained iron and steel. Hence, the industrial undertaking of the assessee which is engaged in the business of galvanizing MS Pipes is not involved in manufacture or production of any article or thing and as such, it is not entitled for the benefits u/s 80-I. (AY. 1991-92, 1992-93, 1995-96)

CIT v. Aggarwal Tubes (P) Ltd. (2013) 215 Taxman 89 (Mag.)(All.)(HC)

S.80-I : Industrial undertakings – Amalgamation of one company with another – Not a transfer as defined in section 2 (47) of the Act – Disallowance of deduction u/s. 80 I of the Act not called for [2.(47)]

When a company is amalgamated into a company it does not amount to transfer within the meaning of section 2 (47) of the Act. Therefore deduction under section 80 I of the Act cannot be denied on the ground that it was a case of transfer of machinery to a new business. (AY. 1995-96)

CIT v. Bhuwalka Steel Industries Ltd. (2013) 81 DTR 348 / 214 Taxman 392 / 255 CTR 516 (Karn)(HC)

S.80-I : Industrial undertakings – While computing deduction under section 80-I of the Act, deduction granted under section 80 HH of the cannot be deducted from the gross total income

While computing deduction under section 80-I of the Act, deduction granted under section 80HH of the Act cannot be reduced from the gross total income.

CIT v. Hindustan Pipe Udyog Ltd. (2013) 81 DTR 175 / 214 Taxman 9(Mag.) / 255 CTR 389 / (2014) 360 ITR 437 (All.)(HC)

CIT v. Hindustan Pipe Udyog Ltd. (2013) 219 Taxman 24 (Mag.)(All.)(HC)

S.80-I : Industrial undertakings – Deduction is allowable on gross total income without reducing deduction under section 80HH [S.80HH]

Deduction is allowable on gross total income without reducing deduction under section 80HH (AY. 1993-94)

CIT v. Raico Khaiyan Ltd (2013) 219 Taxman 84 (Mag)(2014) 360 ITR 462 (All.)(HC)

S.80-IA : Industrial undertakings – Business transferred to its other business would be considered for purpose of computation of profits and gains of eligible business in terms of section 80-IA(8) [S.80IA(8)]

Assessee set up a unit for generation and distribution of power to its chemical works division and charged rate at which said division would have purchased electricity from SEB/UPPCL. Surplus power which could not be stored was sold to UPPCL at lesser price. While computing deduction under section 80-IA, Assessing Officer reduced profit shown by assessee by taking price at which electricity was sold to UPPCL. Price which had been adopted by assessee for electricity generated by eligible business transferred to its other business would be considered for purpose of computation of profits and gains of eligible business in terms of section 80IA(8).

CIT v. Kanoria Chemicals & Industries Ltd. (2013) 219 Taxman 35(Mag.) (Cal.)(HC)

S.80-IA : Industrial undertakings – Audit report – Deduction cannot be denied on the ground that audit report was not furnished along with return of income [S.288(2)]

Where assessee got his accounts audited by an accountant as defined in Explanation below sub-section (2) of section 288, deduction under section 80-IA could not be denied on ground that report of such audit was not furnished along with return of income.

CIT v. Sanjay Kumar Bansal (2013) 219 Taxman 41 (Uttarakhand)(HC)

S.80-IA : Industrial undertakings – Computation of deduction – Gross total income – Deduction under Chapter VI-A would be available only if computation of gross total income as per provisions of Act after setting off carried forward loss and unabsorbed depreciation of earlier years is not 'nil'. [S.80IB]

Assessee-company was engaged in business of manufacturing of thermoplastic mouldings, prefab structures, etc., and blended and common fabrics and yarns. It had two units, named Baddi unit and Daman unit and one Captive Power Plant (CPP). Assessee claimed deduction under section 80-IA on account of income derived from CPP and deduction under section 80-IB on account of Baddi unit. However, it had incurred loss in its Daman unit. Assessing Officer held that deduction under section 80-IA in case of CPP and deduction under section 80-IB for Baddi unit were to be allowed only after allocation of loss of Daman Unit on proportionate basis in ratio of sales of units. Court held that no error or illegality had been committed by Assessing Officer in reducing eligible profits under section 80-IA of CPP and under section 80-IB of Baddi unit by adjusting loss of Daman unit. (AY. 2006-07).
Sintex Industries Ltd. v. ACIT (2013) 219 Taxman 43 (Guj.)(HC)

S.80-IA : Industrial undertakings – Infrastructure development – Contract to effect repairs to infrastructure – Mere works contract not eligible for deduction

The assessee was a contractor for marine, mechanical, civil, underwater works and supplier of machinery and equipment on hire. It had entered into an agreement with Inland Waterways Authority of India under which it had undertaken work of construction of permanent banks/protection wall of two canals in Kerala. It claimed deduction u/s. 80-IA for maintenance of infrastructure facility. The AO held that the contract in question was a works contract and, therefore, the assessee was not entitled to the benefit u/s. 80-IA. The CIT(A) and Tribunal upheld the order of the AO.

On appeal by the assessee, the High Court observed that taking note of the nature of the work executed by the assessee, it is a works contract. It is not a case where assessee has invested money in development of infrastructure or operating and maintaining an infrastructure. It is merely an agreement entered into for a period of three years to effect repairs to infrastructure by construction of permanent bank. Accordingly, the High Court held that the contract is a works contract and deduction u/s. 80-IA cannot be allowed. (AY. 2005-06)
Yojaka Marine (P.) Ltd. v. ACIT (2013) 354 ITR 530 / 217 Taxman 101 (Mag.) / 92 DTR 54 / 263 CTR 491 (Karn.)(HC)

S.80-IA : Industrial undertakings – Charging at market rates – Job work – Allocation of expenses [S.80IB]

In the absence of either evidence to show that job work charges charged from publishing unit are not at market rates or defect/ manipulation found in books of account, expenses attributable to publishing unit not to be allocated to unit carrying out job work of printing for publishing unit. (AYs. 1997-98 to 2004-05)
CIT v. Delhi Press Patra Prakashan Ltd. (No.1) (2013) 355 ITR 1 / 90 DTR 329 / 260 CTR 242 (Delhi)(HC)

S.80-IA : Industrial undertakings – Computation – Insurance compensation is eligible for deduction

The compensation received by industrial undertaking from Insurance company on account of loss of raw materials and finished goods in fire, would be eligible for deduction under section 80-IA.
CIT v. Shree Rama Multi Tech Ltd. (2013) 215 Taxman 90(Mag.) (Guj.)(HC)

S.80-IA : Industrial undertakings – Infrastructure undertaking – Approval of industrial park – Delay in issuing notification – Exemption cannot be denied. [Income-tax Rules 1962 Rule 18C]

The claim of assessee for deduction under S. 80-IA was denied on ground that assessee was recognised as an industrial park under rule 18C on 5-6-2006; and, thus, benefit of S. 80-IA would not

be available. It was observed that the Ministry of Commerce and Industry had finally approved assessee as industrial park by 31-12-2004 and in terms of rule 18C, once industrial park is so approved, the CBDT has to *suo motu* issue concerned notification. Held, merely because delay in issuing concerned notification occurred on part of CBDT, deduction under S. 80-I should not be denied to assessee since all other requisite conditions for claiming deduction were complied with. (AY.2005-06)
CIT v. Ackruti City Ltd. (2013) 214 Taxman 398 / 92 DTR 345 / 261 CTR 617 (Bom.)(HC)

S.80-IA : Industrial undertakings – Miscellaneous income – Sale of import licence, interest, insurance claim, weighbridge income is not eligible for deduction
Miscellaneous income like, sale of import licence, interest, insurance claim, weighbridge income is not eligible for deduction under section 80-IA.(AYs. 1994-95, 1995-96)
Kohinoor Foods Ltd. v. CIT (2013) 353 ITR 264 (Delhi)(HC)

S.80-IA : Industrial undertakings – Different manufacturing units – Attributable expenses – Corporate expenses which has direct nexus is deductible while computing the deduction of eligible business – Matter remanded.[S.263]
With regard to one of the five manufacturing units of the assessee, the original assessment for the AY 1998-99 was completed. Subsequently, pursuant to an order under section 263, the Assessing Officer made a fresh assessment adding Rs.1,75,73,406 on account of proportionate corporate expenses out of the profit of one of the units, and thus reduced the deduction under section 80-IA. The Tribunal held that the corporate expenses incurred by the assessee at its registered and head office during the financial year relevant to the assessment year 2000-01 were essential expenses and had a direct nexus with the running of that unit and were, therefore, deductible in computing the profits and gains derived from the eligible business. Held, that the Assessing Officer had to implement the earlier two decisions of the Tribunal calling for the audited accounts of both, the unit as well as the corporate office and to find out the expenses incurred essentially for the unit. The amount of such expenses found should be deducted from the profit earned at the unit. (AY. 1999-2000, 2000-01)
Tide Water Oil Co. (India) Ltd. v. CIT (2013) 353 ITR 300 / 216 Taxman 160 (Mag.)(Cal.)(HC)

S.80-IA : Industrial undertakings – Manufacture – Production – Activity undertaken by a diagnostic centre does not result in manufacture or production,therefore diagnostic centre is not eligible for deduction under section 80-IA
Facilities provided by a diagnostic centre viz, X – rays, MIR, CT scan, NMI etc. do not result in manufacture or production of article or thing therefore, a diagnostic centre is not entitle an industrial undertaking eligible for deduction under section 80-IA of the Act. (AY. 1995-96, 1998-99, 1999-2000)
CIT v. Dewan Chand Satyapal (2013) 81 DTR 382 / 212 Taxman 370 / 256 CTR 356 (Delhi)(HC)

S.80-IA : Industrial undertakings – Infrastructure development – Process of converting semi-finished bags into laminated HDPE bags amounts to manufacture and hence, deduction can be availed u/s. 80-IA
The process of converting “semi-finished bags” into “Laminated HDPE bags” amounts to “Manufacture” since both the products are entirely distinct, have different identity, have different utilities and both fetch different prices in the market. The assessee’s unit being engaged in an activity of manufacture, fall within the ambit of “Industrial Undertaking as defined u/s. 80-IA(12) (b) and is therefore eligible for deduction u/s. 80IB of the Act. (AY. 1995-96)
Jhaveri Coaters (P) Ltd. v. ACIT (2012) 74 DTR 145 (Guj.)(HC)

S.80-IA : Industrial undertakings – Infrastructure development – Works contract- Explanation that s. 80IA(4) does not apply to “works contracts” is clarificatory and its retrospective

operation is valid, amendment did not impose fresh levy hence the same is not violative of Articles 14 and 19(1)(g) of the Constitution [Art 14(19(1)(g), Constitution of India)]

By the Finance Act No.2 of 2009 an Explanation was added to s. 80IA(4) with retrospective effect from 1-4-2000 to provide that s. 80-IA(4) would apply to a business which is in the nature of a works contract awarded by any person and executed by an undertaking or enterprise. The said retrospective amendment was challenged on the ground that (i) it was a fresh levy of tax, (ii) no reasons were given to support the retrospective levy, (iii) the period of retrospective operation was long and so it violated Article 19(1)(g) of the Constitution. HELD by the High Court dismissing the challenge:

(i) An enactment can be questioned only on the ground of lack of competence or on the ground that the statute violates the fundamental rights or any other constitutional provisions. An enactment cannot be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. As all taxes are raised for public good, there is considerable latitude to Parliament in framing a taxing statute. There is always a presumption of constitutionality and the burden is on the Petitioner bringing such a challenge;

(ii) On merits, the argument that the Explanation below s. 80-IA(13) provides for a levy of tax which was hitherto unknown is not acceptable. It cannot be said that the Legislature in introducing the explanation materially changed the exemption which existed till such explanation was introduced. The explanation was introduced for the "removal of doubts" and is declaratory in nature. By the Explanation, the Legislature has distinguished between cases of developing/ operating etc. from a works contract. It cannot be disputed that there is an intrinsic difference between developing an infrastructure facility and executing a works contract. The Explanation merely aims to clarify that deduction u/s 80-IA(4) is not available in case of execution of works contract. Such an interpretation is possible even on the basis of the existing provisions of s. 80-IA(4).

Katira Construction Ltd. v. UOI (2013) 352 ITR 513 / 258 CTR 337 / 86 DTR 1 / 214 Taxman 599 (Guj.)(HC)

S.80-IA : Industrial undertakings – Infrastructure development – Telecommunication services – VSAT services – Matter remanded

Assessee, a public limited company, was providing satellite based telecommunication solutions including VSAT services, and broadband service through satellite. It claimed deduction under section 80-IA in respect of income derived from providing broadband/internet services. Assessing Officer rejected assessee's claim on ground that satellite was not a domestic satellite because it was owned by Department of Space, Government of India, which was not an Indian company and, moreover, it was being operated by 'B' Ltd. i.e. a foreign company. Court held that as long as assessee was providing stipulated services and had received payments for specified services, income earned would qualify for deduction under section 80-IA(4)(ii); however, in absence of any details regarding nature and character of service rendered by assessee through satellite, matter was to be remanded back for disposal afresh. Matter remanded. (AY. 2005-06)

Essel Shyam Communication Ltd. v. CIT (2013) 212 Taxman 328 (Delhi)(HC)

S.80-IA : Industrial undertakings – Infrastructure development – Tax component of sales price – Deduction is available

The assessee NLC was engaged in the business of mining and production of lignite and using them in the generation of electricity. Under Bulk Power Supply Agreement entered into between the assessee and State Electricity Board, the assessee agreed to sell the electricity generated by it. The tariff that was arrived at between the parties consisted of various components including tax liability on the income streams from the core activity of NLC. A reading of the agreement made it clear that in strict sense, there was no reimbursement of the tax liability by the recipient, but was treated as part of the tariff and whatever was done on the receipt of the statement of the tax payable by the assessee was

that the tariff price payable on the electricity sold was finally reckoned with reference to the above said tax payment. In the proceedings under section 263, the Commissioner pointed out that the income tax liability of the assessee had been paid by the electricity boards and the amount received by the assessee was shown as receipt of the income and included for claiming deduction under section 80-IA. The Commissioner viewed that the receipt of the income tax by way of reimbursement was not an income from the manufacturing or production activity. Consequently, no deduction under section 80-IA. Tribunal confirmed the view of Commissioner under section 263. On appeal to the High Court, held that Under a bulk power supply agreement between assessee-electricity generating company and State Electricity Board, various components of tariff was to be charged for sale of electricity. Said agreement as well as relevant notification by Ministry of Power clarified that tax liability would be part of the tariff charged for sale of electricity from Thermal Power Generating Stations and it would not stand independent of the tariff charge. Further, there was no reimbursement from State Electricity Board of tax paid by assessee. Tariff could not be dissected to conclude that tax component specified as part of tariff was reimbursement of liability of assessee and, hence, it would not form part of income. Relief to be granted under section 80-IA, would not call for exclusion of tax component in sale price of electricity. In favour of assessee. (AY.2001-02).
Neyveli Lignite Corpn. Ltd. v. ACIT (2013) 212 Taxman 318 / (2014) 267 CTR 352 (Mad.)(HC)

S.80-IA : Industrial undertakings – Infrastructure undertaking – Activity of extension of runway at airport, it was to be regarded as developer – Deduction to be allowed. [S.80IA(4)]
The three conditions as laid down under section 80-IA(4) have to be read separately and, therefore, if an assessee fulfils any of the said three conditions, its claim for deduction under section 80-IA cannot be denied. Therefore, where the assessee was engaged in activity of extension of runway at airport, it was to be regarded as developer within meaning of section 80-IA(4) and, thus, its claim for deduction under section 80-IA was to be allowed. (AYs. 2003-04, 2004-05)
TRG Industries (P.) Ltd. v. DCIT (2013) 59 SOT 64(URO) (Asr.)(Trib.)

S.80-IA : Industrial undertakings – Industrial Park Scheme – Pending approval –Deduction is not eligible [R.18C of Income-tax Rules, 1962]
Where the assessee had applied for approval required under section 80-IA(4)(iii), under Industrial Park Scheme which had lapsed and application under new scheme was still pending, it was not eligible for deduction under section 80-IA. (AY. 2008-09)
SSPDL Ltd. v. DCIT (2013) 24 ITR 295 / 59 SOT 68 (URO) (Hyd.)(Trib.)

S.80-IA : Industrial undertakings – Transmission or distribution of power – Eligibility for deduction
Deduction under section 80-IA should be allowed in respect of profits derived from transmission or distribution of power through network of new transmission or distribution lines. (AY. 2007-08)
Kinfra Exports Promotion Industrial Parks Ltd. v. DCIT (2013) 59 SOT 57 (URO) (Cochin)(Trib.)

S.80-IA : Industrial undertakings – Providing infrastructural facilities – Interest income is not derived from eligible undertaking hence not eligible to deduction
Since nexus of interest income on bank deposits with business of undertaking was not direct but incidental, same could not be considered as profit and gain derived from eligible undertaking hence and, thus, deduction claimed under section 80-IA in respect of interest income was to be rejected. (AY. 2007-08)
Kinfra Exports Promotion Industrial Parks Ltd. v. DCIT (2013) 59 SOT 57(URO) (Cochin)(Trib.)

S.80-IA : Industrial undertakings – Infrastructure development – Developer – Contractor
Assessee-company was in business of construction and had carried out construction of bridges of certain Government organisations. As per assessee, income from eligible business was 100 percent

exempt in view of provisions of section 80-IA. AO held that assessee was not a "Developer" but income was derived as a "Work Contractor", hence not eligible for deduction u/s 80IA. The Tribunal held that, an enterprise had to enter into an agreement with Central or State Government or a Local Authority or any Statutory Authority. Infrastructure facility belonged to Government. But enterprise which was developing or constructing infrastructure facility was to be owned by a Company registered in India. Act also says that an enterprise which was constructing or developing infrastructure facility could be a consortium of such companies. Such an arrangement was eligible for claim of deduction u/s 80-IA. Few Circulars had been issued by CBDT through which it has also been clarified, that benefit of impugned deduction was available to an enterprise which either develops or maintains or operated or executed combination of these three, *inter alia* as a Build, Operate and Transfer (BOT), or, Build, Own, Operate and Transfer (BOOT), or, Build, Own, Lease and Transfer (BOLD) basis or similar other basis where ultimately infrastructure facility so constructed is ultimately transferred to Government or Public Authority, then such an enterprise is within ambits of qualification of deduction. Explanatory memorandum to Finance Act, 2007, states that purpose of tax benefit has all along been to encourage investment in development of infrastructure sector and not for persons who merely execute civil construction work. Thus, there was a distinction between "developer" and a "contractor". It was wrong on part of AO to hold that assessee had merely acted as a contractor. By analysing the nature of work executed by assessee, it could be said that assessee had acted as a developer. An enterprise which was either developing or operating or maintaining infrastructure facility was required to be owned by a company or a consortium of companies duly registered in India. Act does not prescribe that infrastructure facility was to be owned by such an enterprise. Infrastructure facility was always property of Government and an enterprise was bound by agreement to transfer same after settled period. Assessee's execution of work was development of infrastructure facility. Assessee had executed construction of infrastructure facility in respect of Government projects. Hence it was a factual error on part of AO to say that assessee had entered in some contract with few private parties. Therefore, assessee was eligible for the deduction u/s 80-IA. (AY. 2001-02)
Sugam Construction (P.) Ltd. v. ITO (2013) 56 SOT 45 (URO) (Ahd.)(Trib.)

S.80-IA : Industrial undertakings – Splitting up or reconstruction – Windmill – Leased back – Not eligible for deduction
The assessee had earlier purchased the windmill, sold it and later on got it leased back. Therefore the assessee's status as a proprietor of the plant hand changed to that of a lease holder. This amounted to splitting up of the business for the purpose of the legislative provision under section 80-IA3(ii) of the Act. It was held that since the plant previously used for generating power stood transferred to a new business of its sister concern, the condition above said would come to play in these circumstances. Therefore the claim of deduction under section 80-IA was not liable to be accepted being a violation of section 80-IA(3) of the Act. The Tribunal therefore upheld the order of the CIT(A). (AY. 2007-08)
Armstrong Knitting Mills (Pvt.) Limited v. Dy. CIT (2013) 56 SOT 334 (Chennai)(Trib.)

S.80-IA : Industrial undertakings – Interest on employee's loan and advances – Interest on margin money – Interest income on dues towards income tax refund
The Tribunal held that by virtue of the decision of the Hon'ble apex court in *Liberty India v. CIT (2009) 317 ITR 218*, the assessee is not entitled to deduction under section 80IA of the Act. (AY. 2003-04)
Essar Power Ltd. v. Addl. CIT (2013) 142 ITD 251 (Mum.)(Trib.)

S.80-IA : Industrial undertakings – Infrastructure development – Partnership – Body of individuals – Developer – Firm is not eligible under section 80IA(4) [S.80IA(4)]
The assessee firm was an Indian railways contractor, was carrying on construction on behalf of Indian Railways for constructing rail over bridges, foot over bridges and new railway station building etc. It

claimed deduction under section 80IA. The Assessing Officer held that the assessee being a 'contractor' could not be treated as a 'developer' so as to avail deductions under section 80IA(4), accordingly, he disallowed the assessee's claim. Commissioner (Appeals) confirmed the disallowance. On appeal Tribunal held that if under the provisions of Partnership Act, a firm is not created i.e., it is not a creation of statute, but it is a body of individual regulated by that statute, the assessee firm failed to satisfy applicability clause of provision as envisaged u/s 80IA(4)(i). Accordingly claim was rejected. (AY. 2008-09)
Eshwarnath Constructions v. ACIT (2013) 57 SOT 290 (Chennai)(Trib.)

S.80-IA : Industrial undertakings – Infrastructure development – Power generation-Captive consumption – Supply, rate at which consumers get electricity is market rate of electricity
Assessee is engaged in business of power generation. It captively consumed power generated and balance was procured by Tamil Nadu Electricity Board [TNEB] from assessee at rate of Rs.2.70 per unit. TNEB, in turn charged Rs. 3.50 per unit from its consumers. Assessing Officer took market value of power consumed at Rs. 2.70 PER unit and made addition accordingly, computed profits and gains of eligible unit for purpose of section 80-IA. Commissioner (Appeals) confirmed the addition. On appeal Tribunal held that Market rate of electricity being regulated by Government not by forces of demand and supply, rate at which consumers get electricity is market rate of electricity; and, therefore, Assessing Officer was directed to recompute profits and gains on basis of price of Rs. 3.50 per unit for purpose of section 80-IA deduction.(AY. 2007-08)
Sri Matha Spinning Mills (P.) Ltd. v. Dy. CIT (2012) 20 ITR 317 / (2013) 141 ITD 238 (Chennai)(Trib.)

S.80-IA : Industrial undertakings – Infrastructure development – Deductions – Works contract
Assessee made a claim of deduction under section 80-IA with respect to business income earned from execution of projects relating to development of infrastructure facility such as dams, roads, power projects etc. Revenue authorities took a view that assessee was merely engaged in works contract executed for Government authorities for development of infrastructure facility. Accordingly, revenue authorities concluded that assessee was not entitled for deduction under section 80-IA(4). Tribunal held that since assessee could not controvert aforesaid finding recorded by authorities below, impugned disallowance was to be confirmed. (AYs. 2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.80-IA : Industrial undertakings – Infrastructure Development – Initial assessment year – Overriding effect of section 80-IA(5) limited to where allowance not already set off against other income is applicable for current year, set-off of loss/allowance against other income allowable. [S. 32(2), 70, 71]
Section 80-IA(5) of the Income-tax Act, 1961, which begins with a *non obstante* clause, subject to which the deduction under section 80-IA(1) is to be granted, deems the eligible business to be the only source of income for the previous year relevant to the initial assessment year, up to the assessment year of determination of deduction under section 80-IA(1). The deeming, thus, commences with the previous year relevant to the initial assessment year. Circular No. 281 dated September 22, 1980 ([1981] 131 ITR (St.) 4) issued by the Board on introduction of section 80-I by the Finance (No. 2) Act, 1980, which contained a like provision in section 80-I(6) explains that the losses, depreciation and investment allowance of earlier years in respect of the new industrial undertaking will be taken into account in determining the quantum of deduction admissible under the new section 80-I even though they may actually have been set off against the profits of the assessee from other sources. The whole purport and intent of section 80-IA(5) is towards providing a separate and parallel basis for the aggregation and carry forward of unabsorbed depreciation and/or loss of the eligible business for the purpose of determination of the quantum of deduction admissible under the section. To the same effect and purport are the Notes on Clauses of the Finance (No.2) Bill, 1980 and

the Memorandum Explaining the Provisions of the Bill, clarifying the legislative intent. If the first year of claim of deduction under section 80-IA(1) is itself taken as the initial assessment year, the whole purpose of the provision gets defeated and where there is an unabsorbed deprecation or loss incurred prior to that year, there is no scope for it to be carried forward and set-off. There is no rationale for such an embargo or restriction nor is it borne out by the clear language of the provision. Though the period of deduction under section 80-IA(1) over which the deeming of section 80-IA(5) is to be applied commences with the previous year relevant to the initial assessment year, and up to the year of determination of deduction, its stated purpose is determination of the quantum of deduction under section 80-IA(1) for the year immediately succeeding the initial assessment year and not the initial assessment itself and for every subsequent year because there could be no brought forward allowance or loss prior to the initial assessment year. If so, the first year for which there could be a loss or unabsorbed depreciation is the first year of operations, so that the question of aggregation of income for the purpose of determination of quantum of deduction could, at the earliest, be the immediately succeeding assessment year. Therefore, while the aggregation is applicable from the initial assessment year itself, the determination of quantum of deduction is to be for or begins from the year immediately succeeding the initial assessment year. Also, once the deeming commences with the initial assessment year, the aggregation of income is to continue over every subsequent year, i.e., irrespective of whether the deduction under the provision is exigible for that year or not. The deeming would thus continue to be operative, and is not dependent on whether deduction for a particular year is being claimed or not. The first year of determination of deduction under section 80-IA(1), or of returning profits of the eligible business, ignoring the losses, if any, incurred prior to that year cannot, thus, be considered as the initial assessment year.
The absence of a definition of the initial assessment year in section 80-IA, as amended by the Finance Act, 1999 with effect from April 1, 2000 is deliberate. The year marking the commencement of operations of the eligible undertaking or enterprise is the initial assessment year. Any other reading of the initial assessment year would render the provision internally inconsistent, besides considerably diluting its purport of giving tax shelter only to the profits of the eligible undertaking/business.
The option to the assessee to choose a period of ten consecutive years from a block of fifteen years commencing the year in which the undertaking begins its operations has nothing to do with the quantum of deduction *per se*. The deduction under the provision is to be computed considering the eligible source to be the only source of income throughout. The tax holiday period has nothing to do with the aggregation principle *per se*, the whole purport of which is to extend the tax shelter only to the profits of the eligible undertaking or enterprise over the tax holiday period. The aggregation prescribed by the section is limited only to quantifying the deduction under section 80-IA(1), and which would only be on the unit turning positive, returning profits. As a corollary, the losses/unabsorbed depreciation would stand to be set off against the other incomes under the regular provisions of the Act.
Once the depreciation/loss of an eligible unit is set-off against the assessee’s other income (non-eligible business income), it is no longer available for being carried forward and set-off, i. e., on a notional basis. Section 80-IA(5), does not restore life to a non-existent allowance/loss so as to permit a set off thereof on a notional basis. In other words, the overriding effect of section 80-IA(5) would only be limited to where the allowance does not stand already set off against the other income.
Section 80-IA(5) is a separate provision, which was incorporated with a specific purpose, treating the profits from the eligible source as the only source of income to determine the quantum of deduction that could be allowed under the provision. All the other applicable provisions of the Act, including sections 32(2) and 72, would apply in the computation of such income. It, thus, presents a parallel method for arriving at the profits of the eligible business, and is to be given full play. That being the mandate of the section, carry forward and set off of the loss for earlier years from such a source would hold, considering it as the only source of income, in terms of section 72. It may or may not have been already set-off against other income, but that is irrelevant. A deeming provision or a legal fiction, it is even otherwise trite, to be taken to its logical end/conclusion. This also agrees with the

avowed objective of the provision, i.e., to restrict the tax shelter under the provision only to the profits from the eligible source. The grant of the deduction is, however, circumscribed by the condition of section 80-IA(1), which must in any case be satisfied. In other words, the gross total income would continue to be computed in terms of section 80B(5), and would not stand restricted by section 80-IA(5) in any manner.

Held accordingly, that the initial assessment year would be the assessment year 2005-06 and section 80-IA(5) being applicable for the current year, the assessee's claim for set off of loss/allowance under sections 32(2), 70 and 71, i.e., against other income, admittedly from a non-eligible business / source, was sustainable. (AY. 2005-06 to 2008-09)

Hercules Hoists Ltd. v. ACIT (2013) 22 ITR 527 / 59 SOT 43 (URO)(Mum.)(Trib.)

S.80-IA : Industrial undertakings – Infrastructure development – Civil contractor – Developing, maintaining and operating the facility – The assessee is eligible for benefit u/s. 80-1A even if only part of the Infrastructural Project work is executed by it. Larger Bench verdict in B. T. Patil v. ACIT (2009) 32 DTR 1 is not good law

The assessee, a civil contractor, claimed deduction u/s 80-IA(4) in respect of the profits from infrastructure projects executed by it. The lower authorities rejected the claim on the ground that the assessee was a mere contractor and not a developer. Before the Tribunal, the Members of the Division Bench dissented and so the issue was first referred to a Third Member and then to a Larger Bench of three Members. The Larger Bench (32 DTR 1) rejected the assessee's claim on the ground that in order to be eligible u/s 80-IA(4), the assessee had to be directly engaged in developing, maintaining and operating the facility and that there had to be a complete development of the facility and not just a part of it. When the matter came before the Division Bench for giving effect to the Larger Bench's verdict u/s 255(4), the assessee did not appear and hence, the Bench dismissed the appeal in limine for non-appearance. The assessee filed a MA before the Tribunal to recall the said order and also filed an appeal before the High Court. The Tribunal recalled its order dismissing the appeals and re-fixed the matter for hearing. Consequently, the assessee withdrew the appeal filed in the High Court. In the order permitting the withdrawal, the High Court directed the Tribunal to consider the judgment in *CIT v. ABG Heavy Industries Ltd. & Ors. (2010) 322 ITR 323 (Bom).* HELD by the Tribunal:

The view of the Larger Bench that the assessee had to be directly engaged in developing, maintaining and operating the facility and that there had to be a complete development of the facility and not just a part of it is contrary to the law laid down in *CIT v. ABG Heavy Industries Ltd. & Ors. (2010) 322 ITR 323 (Bom)*. The High Court held that the effect of the amendment by the Finance Act of 1999 is that the benefit of s. 80-IA(4) is available to any enterprise carrying on the business of (i) developing, (ii) maintaining & operating, or (iii) developing, maintaining and operating an infrastructure facility. It was also held that the assessee did not have to develop the entire project in order to qualify for deduction u/s 80-IA and that Parliament did not legislate a condition impossible of compliance. The Explanation below 80-IA(13) inserted by FA 2007 & 2009 w.r.e.f 1-4-2000 which provides that s. 80-IA(4) shall not apply to a person executing a "works contract" does not apply to a case where the assessee executes the work by shouldering Investment & technical risk by employing team of technically & administratively qualified persons and it is liable for liquidated damages if failed to fulfil the obligation laid down in the agreement and also securing by bank guarantee. On facts, the assessee had shouldered the investment & technical risk in respect of the work executed and it was liable for liquidated damages if failed to fulfil the obligation laid down in the agreement. The liabilities which had been assumed by the assessee were obligations involving the development of an infrastructure facility. Consequently, it is not correct to say that the assessee is merely a contractor & not a developer. The assessee is eligible for benefit u/s 80-1A even if only part of the Infrastructural Project work is executed by it. (AYs. 2000-01, 2001-02)

B.T. Patil & Sons Belgaum Constructions Pvt. Ltd. v. ACIT (2013) 59 SOT 61 (URO) (Pune) (Trib.)

S.80-IA : Industrial undertakings – Infrastructure development – Manufacture – Activity of repairing the old gas cylinder fit to use is not manufacture

Rendering a particular thing fit for being used for which it stand already produced or manufactured, i.e., restoring it to good and workable condition once again is essentially a repair and not manufacture. Activity of rendering old gas cylinders fit for use as per safety standards and also fitting peripherals parts as required, would be repair and not manufacture for purpose of allowing deduction under section 80-IA. Appeal of revenue was allowed. (AY.2001-02)

ACIT v. Bhiwadi Cylinders (P.) Ltd. (2013) 55 SOT 32 (URO) (JP)(Trib.)

S.80-IA : Industrial undertakings – Computation – Provisions of sections 80A(2) and 80AB shall apply

The assessee owned a hotel which was eligible for deduction u/s 80-IA. Since sub-sec. (7) of S. 80-IA provide for determination of amount of deduction whereas section 80AB and S. 80A(2) provide for amount actually allowable while computing total income, assessee’s contention that provisions of S. 80A(2) and 80AB shall not be applicable, cannot be accepted. Matter remanded. (AYs.1999-2000 to 2005-06)

Hotel & Allied Trades P. Ltd. v. Dy. CIT (2013) 140 ITD 309 / 87 DTR 49 / 154 TTJ 503 (Cochin)(Trib.)

S.80-IA : Industrial undertakings – Infrastructure – Development of projects – Developer – Works contract – Deduction was allowed (S 132, 153A)

S. 80IA(4) allows deduction to “any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility”. The Explanation provides that it shall not apply to “business which is in the nature of a works contract”. Whether an assessee is a developer or works contractor depends on the nature of the work undertaken by the assessee. The word ‘contractor’ is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer is a contractor. Contracts involving design, development, operating and maintenance, financial involvement, and defect correction and liability period cannot be called as simple works contract. A case where in an undeveloped area, infrastructure is developed and handed over to the Government cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility. If the contract is composite, it will have to be segregated so as to allow deduction on the parts that involve design, development, operating and maintenance, financial involvement etc. and to deny on those which are pure works contracts. On facts, the assessee had made substantial investments in fixed assets and was exposed to various kinds of risks. It was not a mere contractor. It is enough if the assessee is a developer. It need not also maintain & operate the infrastructure facility (*Patel Engineering Ltd. v. Dy. CIT (2004) 94 ITD 411 (Mum) & GVPR Engineers Ltd.* (included in file) followed). Deduction under section 80-IA was allowed. (AY. 2000-01 to 2005-06)

ACIT v. Pratibha Industries Ltd. (2013) 141 ITD 151 / 23 ITR 766 (Mum.)(Trib.)

S.80-IA : Industrial undertakings – Initial assessment year – Absorbed losses – Wind mill – Absorbed losses pre “initial assessment year” need not be set off – Revision order passed by Commissioner was set side [S. 263]

The assessee set up a Wind Mill and commenced operations on 29.09.2006 (AY 2007-08). In that year the assessee suffered a loss of Rs. 3.5 crores on account of depreciation and interest which was set-off against the other income. In AY 2008-09, the assessee earned profit of Rs. 7 lakhs from the Wind Mill and claimed 100% deduction u/s 80-IA by treating AY 2008-09 as the “initial assessment year”. The AO allowed the claim. However the CIT, relying on *ACIT v. Goldmine Shares and Finance P. Ltd. (2008) 302 ITR (AT) 208 (SB) (Ahd) & Hyderabad Chemical Supplies Ltd. v. ACIT (2011) 137 TTJ 732 (Hyd)*, revised the order u/s 263 on the ground that as u/s 80-IA(5), the eligible unit was deemed to be the "only source of income", the earlier years' losses of the unit had to be set-off against the profits before allowing s. 80-IA deduction. On appeal by the assessee, HELD reversing the CIT:

The fiction created by s. 80-IA(5) is that the eligible business is the only source of income and the deduction would be allowed from the initial assessment year or any subsequent assessment year. It nowhere defines as to what is the "initial assessment year". Prior to 1-4-2000, s. 80-IA(12) defined the "initial assessment year" for various types of eligible assessees. However, after the amendment by the Finance Act, 1999, the definition of "initial assessment year" has been specifically taken away. Now, when the assessee exercises the option of choosing the initial assessment year as culled out in s. 80-IA(2) from which it chooses its' 10 years of deduction out of 15 years, then only the losses of the years starting from the initial assessment year alone are to be brought forward as stipulated in s. 80-IA(5). The loss prior to the initial assessment year which has already been set off cannot be brought forward and adjusted into the period of ten years from the initial assessment year as contemplated or chosen by the assessee. It is only when the loss have been incurred from the initial assessment year, then the assessee has to adjust loss in the subsequent assessment years and it has to be computed as if the eligible business is the only source of income and then only deduction u/s 80-IA can be determined. This is the true import of s. 80-IA(5) (AY. 2008-09)

Shevie Exports v. JCIT (2013) 156 TTJ 525 / 87 DTR 401 / 59 SOT 74 (URO) (Mum.)(Trib.)

S.80-IA : Industrial undertakings – Loss of eligible unit – Loss of eligible unit, even if set-off against non-eligible profits, has to be aggregated & carried forward for set off against future eligible profits

The assessee set up two windmills, the income from which was eligible for deduction u/s 80-IA. The assessee suffered a loss in the said Wind Mills and claimed a set off of the same against its other income. The AO and the CIT (A) rejected the claim by relying on *ACIT v. GoldMine Shares and Finance (P) Ltd. (2008) 113 ITD 209 (SB) (Ahd)* where it was held that in view of s. 80-IA(5), the loss suffered by the eligible unit cannot be set off against the profits of other units / other business in the initial year of assessment or subsequent years of eligible years of assessments. The Tribunal had to consider the following legal issues: (i) what is the "initial assessment year"?, (ii) whether the loss/ depreciation from the eligible unit is entitled to be set off against the other income?, (iii) whether the said loss/ depreciation of the eligible unit is, after set off against the other income, still required to be notionally carried forward for set off against the future profits of the eligible unit? HELD by the Tribunal:

(i) The "initial assessment year" is the year in which the eligible unit commences operations. It is not the year in which the assessee chooses to claim deduction. The requirement of s. 80-IA(5) is that the loss and unabsorbed depreciation of the eligible unit should begin to be aggregated from the "initial assessment year" to the last allowable year. The aggregation has to continue for every year irrespective of whether s. 80-IA (1) deduction for that year is exigible or not;
(ii) If the eligible unit has no profit, the loss & depreciation of the eligible unit is entitled to be set off against the other income. However, despite such set off, the loss and depreciation has to be aggregated and notionally carried forward for set-off against the future profits of the eligible unit. (AY. 2005-06 to 2008-09)

Hercules Hoists Limited v. ACIT (2013) 22 ITR 527 / 59 SOT 43 (URO) (Mum.)(Trib.)

S.80-IA : Industrial undertakings – Production of tea – Infrastructure development activity of 'processing' was not included in section 80IA. Assessee is not entitled for deduction under section 80IA.

Section 80IA mandates that the industrial undertaking should manufacture or produce any article or thing. The activity of the assessee is blending of tea amounts to processing only and does not amount to manufacture or production. Tribunal held that activity of processing was not included in section

80-IA as it stood in Asst. Year 1999-2000, therefore assessee is not entitled for deduction under section 80-IA. (AY. 1999-2000, 2000-01)
Dy. CIT v. Sunrise Tea Processing (P) Ltd. (2013) 152 TTJ 661 / 84 DTR 333 / 23 ITR 398 / 58 SOT 16(URO) (Pune)(Trib.)

S.80-IB : Industrial undertakings – Derived from – Transport subsidy, power subsidy, interest subsidy and insurance subsidy – First degree nexus – Deductions to be granted [S.80IC]
The question that arose before the court was whether transport subsidy, power subsidy, interest subsidy and insurance subsidy reduce cost of production of an industrial undertaking, is there first degree nexus between said subsidies and profits and gains derived by industrial undertaking and, therefore, deduction under sections 80-IB and 80-IC has to be granted in respect of subsidies so received. The court held, that since transport subsidy, power subsidy, interest subsidy and insurance subsidy reduce cost of production of an industrial undertaking, there is first degree nexus between said subsidies and profits and gains derived by industrial undertaking and, therefore, deduction under sections 80-IB and 80-IC has to be granted in respect of subsidies so received.(AY.2004-05, 2006-07).
CIT v. Meghalaya Steels Ltd. (2013) 356 ITR 236 / 91 DTR 81 / 261 CTR 17 / 217 Taxman 184 (Gau.)(HC)

S.80-IB : Industrial undertakings – Disallowance u/s. 40(a)(ia) for non-deduction of TDS increases the profit of assessee from the business of developing housing projects and will qualify for deduction.[S.40(a)(ia)]
The AO disallowed an expenditure of sum of Rs. 10,93,134 u/s. 40(a)(ia) of the Act on the ground that the assessee had failed to deduct the tax at source on payment of transportation charges. The CIT(A) confirmed the disallowance. Before the Tribunal, the assessee took two stands – firstly it was contended that this was the first year of applicability of the provisions and therefore, out of ignorance, the deduction was not made, secondly it was contended that in any case such disallowance should qualify for deduction u/s. 80-IB(10). The Tribunal allowed the appeal accepting the alternate contention and directed the AO to grant deduction accordingly.
On appeal by the department, the High Court observed that even if a certain expenditure which was incurred by the assessee for the purpose of developing housing project was not allowable by virtue of section 40(a)(ia) of the Act, it cannot be denied that such disallowance would ultimately go to increase the assessee’s profit from the business of developing housing project. Accordingly, the High Court held that whatever be the ultimate profit of assessee as computed even after making disallowance under section 40(a)(ia) of the Act, would qualify for deduction.
ITO v. Keval Costruction (2013) 354 ITR 13 / 217 Taxman 96 / 35 taxmann.com 277 (Guj.)(HC)

S.80-IB : Industrial undertakings – Ownership of land not necessary for claiming deduction
The AO disallowed the assessee claim for deduction u/s. 80-IB(10) since assessee did not own the land and name of the assessee did not appear in the permission for development granted by local authority. The CIT(A) and the Tribunal allowed the deduction to the assessee.
On appeal by the department, the High Court following its own decision in case of *CIT v. Radhe Developers (2012) 204 Taxman 543* (against which the SLP was dismissed by the Supreme Court), held that the assessee cannot be denied deduction u/s. 80-IB(10).
CIT v. Vishal Construction Co. (2013) 217 Taxman 96 / 35 taxmann.com 182 (Guj.)(HC)

S.80-IB : Industrial undertakings – Transport subsidy, power subsidy – is eligible for deduction [S.80IC]
As there is a direct nexus between transport, subsidy, power subsidy, bank interest subsidy and insurance subsidy, that directly contribute to the profits and gains of an industrial undertaking, hence,

the profits derived by a undertaking on account of aforementioned subsidy are liable for deduction u/s. 80-IB or Sec. 80-IC. (AY. 2004-05 & 2006-07)
CIT v. Pride Coke (P) Ltd. (2013) 356 ITR 235 / 261 CTR 17 / 91 DTR 81 / 217 Taxman 184 (Gau.)(HC)

S.80-IB : Industrial undertakings – Computation – Interest on late recovery of debtor
Interest earned on late recovery of sale proceeds from debtors could be included in calculation of deduction under section 80-IB.
CIT v. Suzlon Energy Ltd. (2013) 354 ITR 630 / 215 Taxman 272 / 93 DTR 50 (Guj.)(HC)
Editorial: Tribunal order in Suzlon Energy Ltd. v. Dy. CIT (2012) 20 ITR 391 (Ahd.)(Trib.) is affirmed.

S.80-IB : Industrial undertakings – Derived from – Income from other sources – Interest income on FDRs is not to be included in computing deduction under section 80-IB
Court held that a bare look of S. 80-IB(4) would reveal that reference made to 'profits and gains derived from such industrial undertakings' and not to 'profit and gains derived from any business of the industrial undertaking'. Interest income on FDRs cannot be said to be an income flowing from the business activity of Industrial Undertaking, thus, it cannot be computed for deduction under S. 80-IB. Assessing the interest income as income from other sources was held to be justified.
Asian Cement Industries v. ITAT (2013) 214 Taxman 365 / 92 DTR 229 / 261 CTR 551 (J&K)(HC)

S.80-IB : Industrial undertakings – New Unit not expansion of business
The assessee company which is engaged in the business of manufacture and sale of pharmaceutical products. It set up a new tablet manufacturing unit and claimed deduction under section 80IB. The Assessing Officer disallowed the claim on the ground that it is expansion of unit. The Commissioner (Appeals) and the Tribunal have recorded concurrent finding of fact that from the material which was on record, the assessee had established that it was entitled to claim the deduction under S. 80-IB and as such, it will not be possible to interfere with the finding of fact recorded by both the authorities below. (AYs. 2007-08, 2008-09)
ACIT v. Geno Pharmaceuticals Ltd. (2013) 214 Taxman 83 (Mag.) (Bom.)(HC)

S.80-IB : Industrial undertakings – Computation – Deduction to be allowed without setting up the Loss of other units – Gross total income was more than eligible claim [S.80IA(5)]
AO disallowed claim of deduction under section 80-IB in respect of two eligible projects, as loss on two other eligible projects was more than such profit. Tribunal held that profit derived from a particular eligible industrial undertaking is qualified for deduction under section 80-IB without reduction of loss suffered by any other eligible industrial undertaking, subject to gross total income of assessee, where gross total income of assessee, after adjusting losses suffered by assessee in other projects was more than claim of deduction under section 80-IB, deduction could not be disallowed.(AY.2008-09)
Shriram Properties (P.) Ltd. v. ACIT (2013) 60 SOT 75 (URO) (Chennai)(Trib.)

S.80-IB : Industrial undertakings – Small scale industry – Fulfilment of conditions to be on year to year basis and not merely in initial year – Not entitled to exemption. [Industries (Development and Regulation) Act, 1951, S.11B]
Assessee, engaged in manufacture and sale of components of CNC lathes and similar machines claimed deduction under section 80-IB as a SSIU. Held, the conditions for qualifying as a small scale industry was to be fulfilled on an year to year basis and not merely in initial year alone and since investment in plant and machinery exceeded prescribed limit, assessee was not entitled to deduction.(AY. 2005-06)
Ace Multi Axes Systems Ltd. v. DCIT (2013) 26 ITR 83 / 59 SOT 76 (URO) (Bang.)(Trib.)

S.80-IB : Industrial undertakings – Manufacture – Production – Assembly job would amount to production and eligible for deduction [S.80-IB(4)]

The processes of mounting bought out components on panel and wiring them undertaken by assessee in making electrical control panels though not 'manufacture' would amount to 'production'. All fabricated components, were assembled in a definite manner, each performing its function, so as to function as a cohesive unit. Therefore, assessee was eligible for deduction under section 80-IB(1) and denial of deduction on the ground that the same was an assembly job was not justified. (AY.2007-08)

ITO v. Advance Power Engineering (2013) 59 SOT 79 (URO) (Mum.)(Trib.)

S.80-IB : Industrial undertakings – Infrastructure development undertakings – Interest on security deposit with electricity Board – Deduction is not eligible

Assessee is not eligible for deduction under section 80-IB in respect of interest received from security deposit with Electricity Board.(AY. 2007-08)

Midas Polymer Compounds (P.) Ltd. v. ACIT (2013) 59 SOT 87 (URO) (Cochin)(Trib.)

S.80-IB : Industrial undertakings – Development of Geographical Information System software is entitled to deduction

Deduction under section 80-IB could not be denied to assessee who was engaged in development of Geographical Information System software by converting raw data supplied by its customers into maps by digitizing and vectorizing it. (AY. 2003-04)

Bahvin Arun Shah v. ITO (2013) 91 DTR 377 / 156 TTJ 507 (Ahd.)(Trib.)

S.80-IB : Industrial undertakings – Mere handling and transportation of food grains and storing same at godowns – Not eligible for deduction, nothing attributed towards infrastructure development

Main purpose of S. 80IB(11) is construction of godowns specifically for stocking food grains for greater efficiency in grain management system and minimise 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 u/s 80IB(11) as it is nothing attributed towards infrastructure development. (AYs. 2005-06, 2006-07)

ITO v. Shankar K. Bhanage (2012) 139 ITD 39 / (2013) 82 DTR 281 / 152 TTJ 21 (Mum.)(Trib.)

S.80-IB : Industrial undertakings – Duty drawback – DEPB – Though Duty Drawback & DEPB were held not eligible for deduction in *Liberty India v. CIT(2009) 317 ITR 218 (SC)*, answer could be different if business model shows dependence on Duty Drawback & DEPB for survival

The assessee claimed that the "duty drawback" receipt of ` 1.53 crores was eligible for deduction u/s 80-IB on the ground that the said duty drawback refund was a refund of customs and Central Excise duty on inputs used in manufacturing of its products. The AO & CIT(A) rejected the claim by relying on *Liberty India v. CIT (2009) 317 ITR 218 (SC)* where it was held that duty drawback was not "derived" from the industrial undertaking. On appeal by the assessee to the Tribunal HELD:

Though in Liberty India it was held that duty drawback and DEPB arises from an independent source and is not "derived" from the industrial undertaking, in *CIT v. Dharam Pal Premchand Ltd. (2009) 317 ITR 353 (Del)* (SLP dismissed) it was held that refund of excise duty had a direct nexus with the manufacturing activity & was eligible for s. 80-IB deduction. Accordingly, though duty drawback & DEPB was held in Liberty India to be an independent source of income and to not have a "first degree" nexus with the undertaking, this was in the context of a fact-situation where the duty drawback & DEPB did not arise from core activities of the undertaking and was an additional, ancillary or supplemental profit. There can be situations in which duty drawback itself could be more than the overall profits and in such situations, the duty drawback may not be seen on standalone basis

or as an independent source of income because the overall profit is only a part of the duty drawback receipt, and the commercial motivation of running the industrial undertaking is earning only that part of duty drawback receipts. On the present facts, the duty drawback was more than the entire operational profit and so it cannot be an open and shut inference that the duty drawback receipts are an independent source of income and have no first degree nexus with the business activity of the industrial undertaking. There is still room for consideration of the plea that but for the duty drawback the assessee would not have carried out the business activity in the industrial undertaking, because, that would have meant carrying out business for incurring losses. If that be so, the duty drawback receipts can be said to derived from the undertaking and to be eligible for s. 80-IB deduction. The question whether the duty drawback is an incidental profit or a profit of the first degree depends on the business model followed by the assessee.(AY.2003-04 to 2006-07)
Arvind Footwear Pvt. Ltd. v. DCIT (2013) 39 Taxmann.com 99 (Luck.)(Trib.) www.itatonline.org
Editorial: High Court in appeal held that Tribunal in remitting the matter to the CIT (A) despite binding judgment of the Supreme Court has acted patently contrary to law; the judgment of the Tribunal amounts to a clear infraction of judicial discipline, CIT v. Arvind Footear (P) Ltd. (2014) 100 DTR 425 (All)(HC)

S.80-IB : Industrial undertakings – Manufacturing – Masala powder
Manufacturing of masala (curry) powder is manufacturing activity and eligible for deduction under section 80-IB. (AY. 2005-06)
ACIT v. Navas M. Meeran (2013) 24 ITR 111 / 60 SOT 74 (URO)(Cochin)(Trib.)

S.80-IB : Industrial undertakings – Separate books – Convention centre – Deduction cannot be denied – Revision was not valid [S.80-IB(7), 263]
Books of accounts were accepted by the Department and no defect was pointed out. Failure to maintain separate books of account for convention centre is no ground to deny deduction.(AY. 2006-07)
Leo Meridian Infrastructure Projects and Hotels Ltd. v. DCIT (2013) 24 ITR 123 / 144 ITD 445 (Hyd.)(Trib.)

S.80-IB : Industrial undertakings – Other than infrastructure development – Assembling air conditioner, microwave and DVD – Manufacture [S. 80IC]
The Tribunal held dismissing the revenue's appeal, that transformation of any article which is commercially different from the one which is converted is manufacture. Held, assembling of air conditioner, DVD, microwave would fall within ambit of 'manufacture. (AY. 2004-05, 2006-07 to 2009-10)
ACIT v. Dixon Technologies (I) (P.) Ltd. (2013) 142 ITD 484 (Delhi)(Trib.)

S.80-IB : Industrial undertakings – Additions made to be taken in account while computing special deduction
The assessee was eligible for deduction under section 80IB of the Act. Therefore, any addition to the income of the assessee would entitle it to enhanced special deduction. (AY. 2007-08)
Vishal Paper Industries v. JCIT (2013) 21 ITR 220 / 58 SOT (Chd.)(Trib.)

S.80-IB : Industrial undertakings – Common records – No denial of deduction under section 80IB on the basis of assessee maintaining common record of excise duty, sales tax, service tax and had common registration and no separate permission necessary from Pollution Dept. and as when having common electricity connection
Assessee had established a new industrial unit by way of fresh investment of building and Plant & Machinery. For separate industrial units, assessee maintained separate production records on the basis of which separate books of account were maintained and P & L A/c had been drawn for each unit

separately on the basis of which assessee had determined its profit from each of industrial undertaking. The Assessing Officer denied deduction under section 80-IB for unit-2 & unit-3 and initiated penalty proceeding. CIT(A) upheld the order of Assessing Officer. The issue of dispute before Tribunal was whether when the assessee had maintained common record of excise duty, sales tax, service tax and common registration and no separate permission from Pollution Dept. as well as had common electricity connection, could same be a basis of denial of deduction under section 80-IB. The Tribunal allowed the appeal of the assessee & held that there is no requirement for the assessee to obtain separate registration for each of the three industrial undertakings, having established new industrial undertaking by way of fresh investment of building & Plant & Machinery and therefore it cannot be held that no separate record of each of the industrial undertakings were required to be maintained by the assessee company. It was also held that Assessing Officer has not disputed the P & L A/c of each undertaking. Further, it was disputed that the products are manufactured by the assessee from undertakings in its three independent undertakings in the same premises having separate building & separate Plant & Machinery. The Court held there was no interconnection between 3 units. On these basis denial of deduction under section 80-IB was granted. (AY.2005-06)
FIL Industries v. ACIT (2013) 56 SOT 52 (Asr.)(Trib.)

S.80-IB : Industrial undertakings – Manufacture or production – Profit on sale of monitors is not income derived from industrial undertaking hence not eligible for deduction
Assessee sold computers manufactured from its industrial undertakings at Pondichery, monitors are integral part of the computers manufactured therein. Assessee claimed deduction u/s. 80-IB on profit on sale of monitors and printers procured from outside which were sold along with computers. Assessee submitted that the monitor is an output device for the computer and value of monitor include the value of computer on which excise duty charged. Assessee has not recovered any separate consideration for monitor. The Assessing Officer held that the assessee carrying some trading activity of monitors and printers in addition to manufacture of computer hardware and held that such devices can be sold separately / independently. Where there is neither any value addition nor any change in name, character or use, such an activity would not constitute manufacture or production. Since monitors were sold without making any value addition by industrial undertaking, profits derived from sale of such monitors could not be considered as profit derived from industrial undertaking eligible for deduction under section 80-IB. Which was confirmed in appeal by Commissioner of income tax (Appeals). Tribunal followed assessee own case decision and considered the opinion that the profit from sale of monitors and printers are not included in computation of deduction u/s.80-IB. (AY. 2005-06)
Wipro Ltd. v. Dy. CIT (2013) 143 ITD 1 (Bang.)(Trib.)

S.80-IB : Industrial undertakings – Rental income – Provisions reversed – First degree nexus was not established hence not eligible for deduction
Other income of assessee industrial undertaking comprised rental income and provisions reversed under head “provisions no longer required”. Assessing Officer disallowed claim on view that activities which did not have first degree nexus with industrial undertaking were not to be included in profits of such undertaking. Whether, where rental income of assessee did not meet requirement of being a recovery of rent paid by its industrial undertaking and, provisions reversed were not derived from such industrial undertaking, these income were not to be regarded as profits and were not eligible for deduction under section 80-IB. (AY. 2005-06)
Wipro Ltd. v. Dy. CIT (2013) 143 ITD 1 (Bang.)(Trib.)

S.80-IB : Industrial undertakings – Small Scale Industries in backward areas – Eleventh Schedule
Assessee’s industrial undertaking was recognised as small scale industry and it was located in an industrially backward State. It was engaged in manufacturing of ophthalmic instruments and

equipments included in the Eleventh Schedule. It claimed deduction under section 80-IB. Assessing Officer held that as the item manufactured by the assessee was an article specified in Schedule XI, it was not eligible for deduction under section 80IB. On appeal, Commissioner (Appeals) allowed the claim of assessee. On appeal Tribunal also confirmed the order of Commissioner (Appeals). (AY. 2009-10)
Dy. CIT v. Eye Photonics India (P.) Ltd. (2013) 141 ITD 617 (Chennai)(Trib.)

S.80-IB : Industrial undertakings – Manufacturing or production – Masala powder
The manufacturing of masala was manufacturing activity eligible for deduction under section 80-IB. (AY. 2005-06)
ACIT v. Navas M. Meeran (2013) 24 ITR 111 (Cochin)(Trib.)

S.80-IB : Industrial undertakings – Eleventh Schedule – Backward state – Small Scale Industrial Undertaking – Manufacture of Indian Made Foreign Liquor
The assessee firm is engaged in manufacture and sale of IMFL. (Indian Made Foreign Liquor). It claimed deduction under section 80-IB. Assessing Officer disallowed the claim on the ground that IMPL was an article specified in the Eleventh Schedule. Since the assessee was not a small scale industry (SSI) under Industries (Development and Regulation) Act, 1951, it could not claim benefit of proviso to section 80-IB(2)(iii). On appeal, Commissioner (Appeals) held that as the assessee's Industrial undertaking was located in the industrially backward state of Pondicherry and manufactured article specified in the Eleventh Schedule. There was no need to fulfil requirement of SSI for claiming deduction under section 80-IB. On appeal to Tribunal by revenue, Tribunal confirmed the view of Commissioner (Appeals). (AY. 2009-10)
Dy. CIT v. Vinbros & Co. (2013) 141 ITD 626 (Chennai)(Trib.)

S.80-IB : Industrial undertakings – Additional ground – Claim not made in return –Claim cannot be entertained in view of specific provision of section 80A(5) which was inserted by Finance Act, 2009 which is applicable retrospectively from the Assessment year 2003-04. [S.80IB (5)]
Assessee did not make a claim of deduction in AY 2003-04 and 2004-05, rather made the claim for the first time before CIT (A) by filing an additional ground. It was held that the provisions of S. 80-IB(5) inserted by Finance Act, 2009 which are applicable retrospectively from AY 2003-04, clearly provides that in case assessee fails to make a claim in the return of income, the claim could not be allowed. The provision was applicable for AY 2003-04 and 2004-05. Therefore, in the view of these provisions which are quiet unambiguous and clear, claim of assessee cannot be allowed. (AY. 2003-04, 2004-05)
Hindustan Colas Ltd. v. ACIT (2013) 140 ITD 277 / 151 TTJ 421 / 81 DTR 296 (Mum.) (Trib.)

S.80-IB(10) : Housing projects – Ownership of land – Not a condition precedent
Provisions of section 80-IB(10) nowhere require that only those developers who themselves own land can deduction. Hence, assessee's claim was to be allowed. [Followed *CIT v. Radhe Developers (2012) 341 ITR 403 (Guj)(HC)*].
CIT v. Shreeji Developers (2013) 218 Taxman 100 (Mag.) (Guj.)(HC)

S.80-IB(10) : Hosing projects – Developing and building – Date of approval – Approval for construction of flats on 28-3-2005 and communicated same to assessee on 4-4-2005, as date of approval was 28-3-2005, assessee would be entitled to exemption under section 80-IB(10) on profit earned from assessment year 2005-06 onwards
Assessee company undertook a project with regard to construction of flats in Bangalore. It applied for approval of said project before Bangalore Development Authority [BDA] on 8-10-2004. BDA granted approval on 28-3-2005 and communicated said approval to assessee on 4-4-2005. Assessee

filed returns of income claiming exemption under section 80-IB(10) on profit earned. It submitted before Assessing Officer that as approval was granted on 28-3-2005, it was entitled to benefit under section 80-IB(10) from assessment year 2005-06 onwards. Assessing Officer sought clarification from BDA, who wrote a letter to Assessing Officer informing that assessee's project was approved with effect from 4-4-2005 and said approval would be in force till 3-4-2007. Assessing Officer acting on said letter denied benefit of section 80-IB(10) to assessee. Court held that since in instant case date of approval was 28-3-2005, assessee was entitled to benefit under section 80-IB(10) from assessment year 2005-06. (AYs. 2005-06 to 2007-08)
CIT v. Akshay Eminence Developers (P) Ltd. (2012) 206 Taxman 99 (Mag.) / 72 DTR 406 / (2013) 259 CTR 266 (Karn.)(HC)

S.80-IB(10) : Housing projects – Deduction allowable on projects approved after 1-10-1998 wherein area of flats were less than 1500 sq. ft.
The assessee undertook a construction project which was first approved in 1997 but the revised plan was approved in 2002. The AO denied benefit u/s. 80-IB on ground that original plan was approved in 1997 and that the area of flat was more than 1500 sq. ft. The CIT(A) held that though the plan was originally approved in 1997, the revised plan was approved only in 2002 and further the examination by DVO revealed that the size of the flats was less than 1500 sq. ft., therefore, the assessee's project was not hit by sub-section 80-IB(10). The Tribunal confirmed the finding of the CIT(A).
On appeal by the department, the High Court observed that the conclusion reached by the Tribunal based on finding of fact cannot be found fault with as the revenue has not been able to show that the impugned order is perverse warranting an interference by this Court. Accordingly, it dismissed the appeals filed by the department (AYa. 2004-05 to 2006-07)
CIT v. Ashray Premises Pvt. Ltd. (2013) 217 Taxman 97 (Mag.) / 34 taxmann.com 165 (Bom.)(HC)

S.80-IB(10) : Housing projects – Amendment brought about in section 80-IB(10) by insertion of clause (d) with effect from 1-4-2005 will not apply to assessment year prior to 2005-06
The AO disallowed the assessee's claim of deduction under Section 80-IB on the ground that the assessee is having commercial area exceeding 5% as well as 2000 sq.ft. The CIT(A) confirmed the disallowance. The Tribunal observed that the amendment by inserting clause (d) in Section 80-IB(10) is not applicable for the assessment years in question i.e. 2003-04 & 2004-05, and thus relying on the decision of the Hon'ble jurisdictional High Court in the case of *CIT v. Brahma Associates 333 ITR 289*, held that no disallowance can be made on account of commercial establishment in the project.
The High Court following the aforesaid decision as also the fact that the issue had been decided in favour of assessee in its own case in the earlier years dismissed the departmental appeal. (AY. 2003-04, 2004-05).
CIT v. Jogani Construction Ltd. (2013) 217 Taxman 95 (Mag.) (Bom.)(HC)

S.80-IB(10) : Housing projects – Interest on delayed payments and amounts written off out of payment to contractors is eligible for deduction
Interest received from purchasers on delayed payments is part of assessee's income derived from development of housing project and thus, eligible for deduction u/s 80IB (10). The court also held that the difference between the bill amount and the payment actually made to suppliers during course of business of development of housing project is eligible for deduction u/s. 80IB (10).
CIT v. Pratham Developers (2013) 355 ITR 507 / 215 Taxman 570 (Guj.)(HC)

S.80-IB(10) : Housing projects – Development on behalf of other person
The Assessing Officer disallowed the claim of deduction u/s.80IB(10) on ground that the assessee was not the owner of the land and it had developed housing project for and on behalf of some other person. The Tribunal relying on its own decision rendered in the case of *Radhe Developers v. ITO (2008) 23 SOT 420 (Ahd.)(Trib.)* allowed the claim of deduction. The challenge to this decision was

dismissed by the HC *CIT v. Radhe Developers (2012) 341 ITR 403 (Guj)(HC)* and the SLP was dismissed in *ITO v. Shree Gokul Corporation* dt. 27-7-2012. Hence, the Tribunal was justified in its view.
CIT v. Shree Ram Construction (2013) 215 Taxman 17(Mag.) (Guj.)(HC)
Editorial: SLP was dismissed in ITO v. Shree Gokul Corporation dt 27-7-2012

S.80-IB(10) : Housing projects – Disallowance of labour expenses will also qualify for exemption [(S.40(a)(ia)]
The Assessing Officer disallowed deduction claimed by assessee under section 80-IB(10) as it did not furnish full and complete detail regarding scheme for which deduction was claimed. He also disallowed labour expenditure under section 40(a)(ia). With respect to assessee's claim for deduction under section 80-IB(10), the Tribunal found that there was insufficient evidence to decide issue and observed that disallowance of labour expenses under section 40(a)(ia) would also qualify for deduction under section 80-IB(10). It therefore, remanded proceedings for fresh consideration to Assessing Officer in light of its own decision. The Tribunal order was upheld. (AY. 2005-06)
CIT v. Sahjanand Associates (2013) 214 Taxman 132 (Guj.)HC)

S.80-IB(10) : Housing projects – Assessee need not own the land for claiming the deduction under section 80-IB(10)
The Assessing Officer disallowed claim of deduction on ground that assessee had not developed housing project, as land was not owned by it. The Tribunal having noticed that (i) as per development agreement assessee had to incur and bear all expenses for development of land, and (ii) it had right to allot possession of constructed units to members of housing project after developing housing project, allowed claim of deduction. Held, the Tribunal order was liable to be upheld.
CIT v. Mahadev Developers (2013) 214 Taxman 130 (Mag.) (Guj.)(HC)
CIT v. Prathama Developers (2013) 214 Taxman 131 (Mag.) (Guj.)(HC)

S.80-IB(10) : Housing projects – Head room constructed by flat owner after sale and occupation certificate issued by local authority, there is no contravention of conditions, exemption cannot be denied – The definition of built-up area, cannot be held to be retrospective – Restriction of size of shops and commercial establishments is not retrospective
Based on the material on record, it was disclosed that a head room was constructed. The head room was not included in the sale deed. The local authority, after construction of the building, inspected the building and granted the occupancy certificate. Therefore, the construction put up by the assessee *prima facie* could be said to be in accordance with the sanctioned plan. If after issue of the occupancy certificate and after sale of these residential flats, the owners of the flats on the top floor decided to put up a head room and engaged the very same contractor and the engineer may have put up identical structures, it could not be said that the assessee had put up the construction and, thus, contravened the requirement of section 80-IB. The definition of built-up area, as inserted in sub-section (14)(a) of section 80-IB by the Finance (No. 2) Act of 2004, which came into effect from April 1, 2005, cannot be held to be retrospective. It applies only to such housing projects, which are approved subsequent to April 1, 2005. That the interpretation placed by the assessing authority and the Appellate Commissioner, that the approval was for a housing-cum-commercial complex and, therefore, the assessee was not entitled to the benefit of section 80-IB(10) was unwarranted.
CIT v. G. R. Developers (2013) 353 ITR 1 (Karn.)(HC)

S.80-IB(10) : Housing projects – Commercial units – Proportionate deduction to extent of compliance, would be allowed [S.80HHBA, 133A]
The assessee, engaged in business of developing and constructing housing projects, claimed deduction under section 80-IB(10) in respect of two projects. Survey under section 133A

revealed that built up commercial area was 9.31 per cent. Therefore, the Assessing Officer disallowed deduction since provisions under section 80-IB(10) were not satisfied in his opinion. The assessee, on appeal, before Commissioner (Appeals), submitted that disallowance made by Assessing Officer, at best, could be restricted to the area exceeding limit prescribed under section 80-IB(10) (c) and relief on pro rata basis should be granted. The Commissioner (Appeals) rejected the appeal on grounds that section 80-IB did not contemplate any flexibility till 2004-05 for partly residential and partly commercial projects. There could be no liberal construction of deduction provision even on pro rata basis. The Tribunal allowed the assessee's appeal and allowed deduction on residential units on a pro rata basis. Deduction was disallowed for the commercial area, being 9.31 per cent, as the residential units had been converted into commercial units by the Managing Director and his relatives. On appeal by revenue the Court held that, in the face of the clear provisions and going by the strict construction, one cannot read any limitation into the expression "housing project" to mean residential project alone and that if and when the projects have mixed built-up area of commercial and residential, the question of disallowance will arise only if and when the residential flats are beyond the limit as provided under sub-clause (c) of section 80-IB(10) and not otherwise. Even herein, the disallowance could be only proportionate to the extent of units in violation of the area prescribed under clause (c). In a pure commercial housing project, the question of applicability of sub-clause (c) does not arise at all. Going by the background of the expression 'housing project' and various clauses contained in section 80-IB of the Act, read in the context of subsequent insertion of clause (d), inserted prospectively under the Finance Act, 2005, the term 'housing project' has to be understood as a building project and need not be restricted to residential project alone, meaning thereby, user of the unit is not of relevance in the matter of grant of relief. The project may be either out and out residential project or commercial project or mix up of both for, a housing project, purely of commercial nature, approved by the Local Authority, is also a housing project, entitled to 100% deduction. So too, in projects containing residential units alone, where there is a partial compliance, proportionate to the compliance, the assessee would be entitled to have the deduction. In the case of mixed projects, the assessee's claim has to be allowed in full, if all the residential units satisfied clause (c); otherwise, to the extent of compliance, the relief has to be worked out. A housing project of commercial premises is entitled to 100% deduction, there being no necessity of looking at clause (c) for compliance. Thus, the assessee would be entitled to the benefit of deduction on satisfaction of clauses (a), (b) and (c) of section 80-IB(10) and that the requirement as regards clause (c) would arise, wherein, in a given building, where there is a residential unit, the same has to satisfy the maximum built-up area specified under sub-clause (c) of section 80-IB(10). Even though the provisions under sub-clauses (d), (e) and (f) of section 80-IB(10) are prospective in nature, yet, for the purpose of understanding the scope of deduction under the provisions of the Act, there is no hesitation in drawing assistance from these provisions to decide on the scope of section 80-IB, as it stood at the material point of time. In the circumstances, the Revenue's appeal is to be rejected and the order of the Tribunal is to be confirmed. (AYs.2003-04, 2004-05)
CIT v. Arun Excello Foundations (P.) Ltd. (2013) 212 Taxman 342 / 86 DTR 99 / 259 CTR 362 (Mad.)(HC)

S.80-IB(10) : Housing projects – Each block – In respect of each block, the assessee is entitled to have benefit of deduction in respect of units satisfying the requirements of section 80 IB (10) of the Act [S.80HHBA]
Within a composite housing project, where there are eligible and ineligible units, the assessee can claim deduction in respect of eligible units in the project and even within the block, the assessee is entitle to claim proportionate relief in the units satisfying the extent of the built-up area. (AYs. 2004-05 to 2008-09)
Viswas Promoters (P) Ltd. v. ACIT (2013) 81 DTR 68 / 214 Taxman 524 / 255 CTR 149 (Mad.)(HC)

S.80-IB(10) : Housing projects – Filing of completion certificate – Amendment came into effect from AY. 2005-06. No such requirement to file completion certificate for earlier assessment years

The Assessee was engaged in the building and developing housing society, for AY. 2004-05. The department disallowed the claim of the Assessee on the ground that the Completion certificate was not filed. The High Court held that, prior to amendment of S.80IB(10), w.e.f. 1-4-2005, there was no obligation on the part of the assessee to file completion certificate. Appeal of revenue was dismissed. (AY. 2004-05)

CIT v. Jain Housing & Construction Ltd. (2013) 82 DTR 135 / 214 Taxman 178 / 256 CTR 408 (Mad.)(HC)

S.80-IB(10) : Housing projects – Open terrace – Certificate of completion – Deduction allowed

Assessee has undertaken the development and construction of housing project hence eligible for deduction. Assessee completed the construction on 6th march 2006, corporation certified the completion on 28th Dec. 2007, one of the authorities namely CMDA had issued a letter on 13th June, 2008 cannot be ground to reject the claim of assessee. The Court also held that open terrace could not be the subject – matter of inclusion as a built up area to deny the benefit under section 80IB (10). Appeal of revenue was dismissed. (AYs. 2005-06, 2006-07)

CIT v. Sanghvi & Doshi Enterprises (2013) 81 DTR 75 / 255 CTR 156 / 214 Taxman 463 (Mad.)(HC)
Editorial: Sanghvi & Doshi Enterprise v. ITO (2011) 141 TTJ 1 (TM) (Chennai)(Trib.) affirmed.

S.80-IB(10) : Housing projects – Development of plots and their sales and no construction activity was carried on-Not eligible deduction

Tribunal held that deduction under section 80-IB(10) is specifically provided in respect of profit earned from development and construction of housing projects on or after 1-10-1998. Therefore, since construction and development of housing projects is sine qua non for claim of deduction under section 80-IB(10), deduction was not available to assessee company as it had just undertaken development of plots and their sales, and no construction activity was undertaken in respect of residential units proposed on such plots during relevant assessment year. (AY. 2008-09)

Navratan Techbuild (P.) Ltd. v. ACIT (2013) 60 SOT 81 (URO) (Indore)(Trib.)

S.80-IB(10) : Housing projects – Lay out approval of the assessees project to be considered and not the earlier approval which was not implemented – Entitled exemption

The assessee, a firm engaged in business of developers and builders acquired development rights for a Housing project in respect of a plot of land by way of development agreement 1-10-2004. It obtained layout approval on 19-1-2005 & completion certificate on 30-12-2008 and claimed exemption u/s. 80 1B. The A.O. denied deduction on grounds that original approval was granted on 2-11-2003. The Tribunal on perusal of facts held that the earlier approval was obtained by previous owners of plot for another project which did not materialise and therefore land was sold to the assessee. The layout approval was first approval of assessee’s project post the assessee firm’s constitution on 20-4-2004 and therefore exemption could not be denied to assessee. (AY. 2007-08)

ITO v. A.V. Bhat Developers (2013) 145 ITD 305 (Pune)(Trib.)

S.80-IB(10) : Housing projects – Land was not in the name of firm – Developer had dominance control over project – Exemption is available – Amount disallowed for failure to deduct tax at source – Deduction is available on such disallowance

The assessee-firm was engaged in business of development of land and construction of residential building. The Assessing Officer denied deduction under section 80-IB to assessee on ground that land was not in name of firm, and assessee acted merely as an agent for collection of land consideration on

behalf of land owner. Benefit of section 80-IB(10) would be available if developer had dominance control over project and had developed land at its own cost and risk.
Where transport expenses were disallowed for want of deduction of TDS, deduction under section 80-IB to be allowed on such disallowance. (AY. 2005-06)
ITO v. Keval Construction (2013) 23 ITR 820 / 59 SOT 13(URO) (Ahd.)(Trib.)

S.80-IB(10) : Housing projects – Project approved after 1-4-2004 – Submissions of completion certificate from local authority is mandatory – Non submission of certificate the assessee is not entitled to deduction
An assessee will be entitled to claim deduction under the said provision if he fulfills all the conditions mentioned therein. Clause (a)(ii) of the aforesaid provision, which is relevant for our purpose, provides that in a case where housing project has been approved by the local authority on or after the 1st day of April, 2004 and has been completed within 4 years from the end of the financial year in which the housing project has been approved by the local authority would be entitled for deduction. Explanation-II to the aforesaid clause however puts a rider that the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority. Therefore, it is apparent that as per clause (a), deduction u/s 80IB(10) in respect of a housing project shall be available to the assessee, provided the project is approved by the local authority after 1-4-2004 and has been completed within a period of 4 years and such completion has been certified by the local authority. The use of the word 'shall' in Explanation-II makes the furnishing of completion certificate issued by the local authority mandatory to prove that the development and construction of the Housing Project is complete in all respects. The contention that if other evidences produced indicate completion of the project then deduction cannot be disallowed only because of non-furnishing of completion certificate issued by the local authority, cannot be accepted in view of the clear language employed in the statutory provision. The provision was introduced to the statute by the Finance Act, 2004 with effect from 1-4-2005. Earlier to it, the provision as contained u/s 80IB-(10) did not require furnishing of a completion certificate issued by the local authority. Therefore, the intention of the legislature in bringing such a provision requiring production of completion certificate issued by the local authority cannot be overlooked or brushed aside for conferring a benefit upon the assessee only for the sake of liberal interpretation. The requirement of completion certificate assumes importance for removing the possibility of deviation from the sanctioned plan and to see to it that the project has been constructed in accordance with the sanctioned approval. It is settled principle of law that when the language of a provision is clear and unambiguous then there is little scope to interpret it in a different manner. The language used in Clause (a) of section 80IB-(10) is clear and unambiguous enough to leave any scope for interpreting it in a different manner to confer benefit upon the assessee. To a specific query from the Bench in course of hearing of appeal with regard to obtaining completion certificate from the local authority, the learned AR only submitted a copy of the application made for occupancy certificate and a certificate of the licensed architect. These documents, however, does not prove the completion of the housing project. The learned AR also could not explain the reasons for non-issuance of completion certificate by the local authority. If the furnishing of the completion certificate to prove the completion of the project is not to be insisted upon then the purpose for bringing such a provision to the statute becomes redundant. If the furnishing of completion certificate from the local authority is to be considered as not mandatory then in every case the assessee will come up with one plea or the other for not furnishing the completion certificate while claiming deduction u/s 80IB(10) of the Act. In that event, the intent and purpose of enacting such a provision will not be fulfilled. Similarly, the municipal assessment of the individual flat owners or sale of flats cannot be a substitute for the completion certificate issued by the local authority. These facts do not conclusively prove that the entire project was complete in all respects. These documents certainly cannot be considered to be in compliance with the statutory provision. (AYs. 2005-06 & 2006-07)

Sainath Estates (P) Ltd. v. DCIT (2013) 88 DTR 11 / 142 ITD 370 / 155 TTJ 39 / 26 ITR 155 (Hyd.)(Trib.)

80-IB(10) : Hosing projects – Entitled for benefit under section 80-IB(10) in respect of flats completed before prescribed limit even though the housing project was not completed in time due to reasons beyond control
Assessee's project consisted of six buildings having 205 flats out of which completion certificate was obtained and furnished before AO for 173 flats only. AO denied deduction on ground that project was not complete within stipulated period of time. CIT(A) confirmed order of AO. Held, liberal interpretation should be used in favour of assessee when he is incapacitated in completing project in time for reasons beyond his control. Assessee submitted certain modifications/rectifications for top floors of building. Said modification/rectification could not be completed as local authority could not approve modification as their files have been taken over by concern intelligence department for investigation of violation of urban land ceiling Act applicable to land in question at relevant point of time. Same fact has not been disputed by revenue. Thus, assessee was prevented by sufficient reasonable cause which compelled impossibility on part of assessee to have completion certificate in time. Revision of plan is vested right of assessee which cannot be taken away by strict provisions of statute. Provisions of taxing statute should be construed harmoniously with object of statue to effectuate legislative intention. Therefore, the assessee was entitled for benefit under section 80-IB(10) in respect of flats completed before prescribed limit even though the housing project was not completed in time due to reasons beyond control. (AY. 2007-08)
Ramsukh Properties v. DCIT (2012) 138 ITD 278 / (2013) 153 TTJ 211 / 84 DTR 383 (Pune)(Trib.)

S.80-IB(10) : Housing projects – Loss from eligible business under section 80IB(10) could be set off against other business income under section 80IA(5)
The assessee claimed loss for a project qualified under section 80IB(10). The Assessing Officer held loss incurred could not be set-off against other business income under section 80IA(5). The CIT(A) considering section 80B(5) and section 80A(1) allowed loss to be set-off under section 70(1). The Tribunal dismissing revenue's appeal held: the loss from eligible business under section 80IB(10) could be set-off against other business income in view of provisions of section 80IA(5). (AY.2008-09)
ACIT v. Sterling Developers P. Ltd. (2013) 142 ITD 536 (Bang.)(Trib.)

S.80-IB(10) : Housing projects – Date of approval – Date of commencement – Date of commencement of project is to be taken into consideration rather than date of approval for granting deduction
Assessee undertook a project under the scheme of slum Rehabilitation Authority (SRA) framed by Governance of Maharashtra for carrying out a housing project towards a slum area. Assessee claimed section 80IB(10) deduction. Assessing Officer disallowed it contending that the conditions given in the proviso to section 80IB(10), clearly states that the claim has to be notified by the CBDT and in this case the scheme on which the assessee had done its project had not been notified. On an appeal before CIT(A), the assessee produced a copy of notification No. 67/2010 dated 3-8-2010 issued by CBDT wherein by the scheme of SRA of the Government of Maharashtra was notified. Accordingly the appeal was allowed by the CIT(A) relying on this Notification. On further appeal filed by revenue in Tribunal, the Tribunal held that the approval was given by the SRA on 4/8/2003 whereas the said notification dated 3-8-2010 issued by CBDT categorically stated that the benefit of the scheme would be available on the projects approved after 14/2004 and therefore benefit of provision to section 80IB(10) would not be available to the assessee. The Tribunal dismissed the appeal of the revenue and held that it cannot be said that the assessee's project is not eligible for deduction under section 80IB, once all the other conditions are fulfilled. In this case, one can say that the date of

commencement i.e., 1-10-2004, can be taken as the date of approval as it was from this date the approval given by the SRA becomes operative. (AY. 2007-08)
ITO v. Asha Kashiprasad Ringhia Pandurang Sadan (2013) 56 SOT 340 (Mum.)(Trib.)

S.80-IB(10) : Housing projects – Provision of S.80-IB(10)(d) as inserted by Finance (No. 2) Act with effect from 1-4-2005 is not retrospective in operation
Housing project approved by local authority as residential-cum-commercial project would qualify for deduction u/s 80-IB(10). Provision of s. 80-IB(10)(d) as inserted by Finance (No. 2) Act with effect from 1-4-2005 is not retrospective in operation. Definition of 'built-up area' mentioned in s. 80-IB(14)(a) which prescribed for inclusion of projections and balconies would not apply to housing project which commenced prior to 1-4-2005 as the said s. was inserted by Finance (No. 2) Act, 2004 with effect from 1-4-2005. (AYs. 2003-04 to 2006-07)
Raviraj Kothari Punjabi Associates v. DCIT (2013) 57 SOT 71 (URO)(Pune)(Trib.)

S.80-IB(10) : Housing projects – Claim made in the return pursuance to search action cannot be denied [S. 80AC, 132, 139, 153A]
The assessee is engaged in the business of developing and building of housing projects approved by local authority. Search under section 132 was conducted on 6-08-09. For the assessment years 2008-09 to 2010-2011, the assessee originally filed the returns on 11-11-2010, ie after the due date prescribed under section 139(1) and after the search was conducted. There after the assessee in response to the notice issued under section 153A filed the returns for the aforesaid assessment years on 23-9-2011. In the returns so filed claimed deduction under section 80IB(10). The Assessing officer held that as per the provisions of section 80AC to be eligible for deduction under section 80IB, the return should have been filed within the time stipulated under section 139(1). He disallowed the claim. On appeal the Commissioner (Appeals) held that section 80AC was directory and therefore the Assessing Officer was not justified in denying the assessee claim for deduction under section 80IB(10). According to Commissioner (Appeals) returns filed in pursuance to notices issued under section 153A had to be construed as returns filed under section 139, all provisions of the Act would apply including the provisions of Chapter VIA, which deals with deductions. Accordingly claim under section 80IB(10) was allowed. On appeal by revenue the Tribunal held that in pursuance of a notice issued u/s 153A is as good as a return filed u/s 139 and more particularly u/s 139(1) and deduction u/s.80IB(10) cannot be denied. (AY. 2008-09 to 2010-11)
ACIT v. V.N. Devadoss (2013) 57 SOT 67 (URO) / 93 DTR 73 / 157 TTJ 165 (Chennai)(Trib.)
ACIT v. V.N. Devadoss (HUF) (2013) 57 SOT 67 (URO) / 93 DTR 73 / 157 TTJ 165(Chennai)(Trib.)

S.80-IB(10) : Housing projects – Competition method – Percentage completion method – Plot of area earmarked for laying roads should be considered as part of housing project [S.145]
The assessee had undertaken the project of construction of residential complex on a plot of land admeasuring more than 1 acre and claimed deduction under section 80IB(10) of the Act. The Assessing Officer disallowed the claim of deduction on the ground that as per approved municipal plan of the project after taking out the area earmarked for road, the total area of the plot was less than one acre. On appeal the Tribunal held that as per the provisions of section 80IB(10) of the Act, the housing project should be on the size of a plot of minimum one acre. If the building project was sanctioned by the Municipal Corporation for developing the project in the area of one acre or more, the assessee is entitled for deduction under section 80IB(10). Thereafter, if a portion of plot area is earmarked for roads after the assessee entered in to development agreement and the plan was duly sanctioned by the competent authority, it is not the fault with the assessee as the same is beyond the control of the assessee. Thus in such a case liberal interpretation of section 80IB(10) is to be considered and the assessee should be allowed the deduction under section 80IB(10) of the Act. If the revenue is taxing the profit in the year under consideration on the ground that the assessee is adopting percentage completition method then the natural corollary should be that the connected deduction

ought to be granted simultaneously in this year,or the other method of computaion is that the revenue must not tax the profit of the project yearly on the basis of percentage completion method, but tax the entire profit on the completition of the project by applying project completition method. (AY. 2008-09)
Sigma Constructions v. ITO (2013) The Chamber's Journal –July-P. 118/(2013) 59 SOT 83(URO)(Hyd.)(Trib.)

S.80-IB(10) : Housing projects – Amounts disallowed constitute the income derived from the undertaking hence eligible for deduction [S.40(a)(ia)]
The assessee is engaged in the business of construction and development of housing project. It claimed deduction under section 80IB(10) of the Act. Assessing Officer made disallowance of certain payment under section 40(a)(ia) and made addition to income. However he did not allow deduction under section 80IB(10) in respect of such amount. On appeal, Commissioner (Appeals) allowed the claim of assessee. On appeal to Tribunal by revenue, the Tribunal held that once an amount was disallowed under section 40(a)(ia), same constituted part and parcel of profits and gains from business and also a part of gross total income and would be eligible for deduction under section 80-IB. (AY.2007-08)
ITO v. Kalbhor Gawade Builder (2013) 141 ITD 612 / 155 TTJ 124 / 89 DTR 185 (Pune)(Trib.)

S.80-IB(10) : Housing projects – Disallowance of expenses – Deduction is available on enhanced income [Ss.35, 40(a)(ia), 43B]
Assessee claimed deduction u/s. 80-IB(10) in respect of income earned from a housing project. Assessing Officer, in course of assessment proceedings had disallowed certain amounts under sections 40(a)(ia), 43B and 35(1)(va). Assessee claimed that due to such disallowances business income increased and hence deduction under section 80-IB(10) should be allowed on enhanced business income. Assessing Officer has not accepted the claim of assessee. On appeal Commissioner (Appeals) held that turnover was from the same source in respect of the claim under section 80IB(10). Hence the assessee was entitled for deduction after including the statutory disallowances. On appeal Tribunal held that deduction u/s. 80-IB(10) was also available in respect of amounts which were disallowed under section 40(a)(ia), 43B and 35(i)(va). (AY. 2007-08)
Dy. CIT v. Magarpatta Township Development & Construction Co. (2012) 79 DTR 150 / 150 TTJ 590 / (2013) 141 ITD 682 (Pune)(Trib.)

S.80IB(10) : Housing projects – Combining the two flats by the buyers after sale exemption cannot be denied
Assessee had constructed a housing project and this project consisted of 25 buildings including 'Prime building' and 'I building'. Assessee claimed deduction under section 80-IB(10) in respect of profits derived from 24 buildings excluding Prime building. Assessing Officer disallowed claim on grounds that (i) all flats in Prime building were having built-up area exceeding 1500 sq.ft., and (ii) two flats in 'I building' were combined and after combining built-up area of combined units exceeded 1500 sq.ft. Order of Assessing Officer was confirmed by the Commissioner (Appeals). On appeal Tribunal held that the assessee itself had excluded Prime building and deduction had been claimed on remaining 24 buildings and (ii) two flats in 'I' building were not combined at time of sale and customers had combined same later, hence the assessee was entitled to deduction under section 80-IB(10). (AY. 2007-08)
Dy. CIT v. Magarpatta Township Development & Construction Co. (2013) 141 ITD 682 / 79 DTR 150 / 150 TTJ 590 (Pune)(Trib.)

S.80-IB(10) : Housing projects – Revised computation in the course of assessment proceedings – Proportionate deduction – Five projects – All projects to be considered as a single unit
Assessee was engaged in the business of property development. In the ROI it claimed deduction u/s 80IB (10) on its five housing projects. In revised computation it claimed deduction for those dwelling

units which were having built-up area less than 1500 Sq. feet on a proportionate basis. It was held that deduction originally claimed in the return of income filed could be revised in course of assessment proceedings. Even though some of the dwelling units of assessee had built up area exceeding 1500 sq. ft. it was entitled for deduction u/s 80IB(10) in respect of those flats having built-up area not exceeding 1500 sq. ft. It was further held that since there was nothing on record to show that each of the project of assessee was independent, all these five projects together had to be considered as a single unit for purpose of working out deduction u/s 80IB(10). (AY. 2005-06)
Dy. CIT v. Macro Marvel Projects Ltd. (2013) 140 ITD 472 / 154 TTJ 242 / 87 DTR 234 (Chennai)(Trib.)

S.80-IB(10) : Housing projects – Undertaking – Developing and building – Shops – Amount not deductible – Amount disallowed cannot be taken in to account to determine profit of business for the purpose of computation [S.40(a) (ia)]
The assessee deducted tax at source but deposited the same in to Government after due date. The Assessing Officer disallowed the said payment under section 40(a) (ia). The assessee in appeal contended that the addition on account of disallowance of expenditure would result in increased business which would be eligible for deduction under section 80IB(10). Commissioner (Appeals) has accepted the contention of assessee and allowed the deduction. On appeal by revenue the tribunal held that legal fiction created by virtue of section 40(a) (ia) cannot be extended to determine the profit of the business for the purpose of computing deduction under section 80IB (10).Accordingly the amount disallowed u/s. 40(a) (ia) cannot be taken into account to determine profit of business for purpose of computing deduction u/s.80 IB. Finding of Commissioner (Appeals) was that shops located on ground floor covered 2 percent of built up area hence deduction is available. (AY. 2006-07)
Dy. CIT v. Rameshbhai C. Prajapati (2013) 140 ITD 486 / 23 ITR 516 (Ahd.)(Trib.)

S.80-IB(10) : Housing projects – Matter remanded to determine accrual of income
Assessee company is engaged in the business of civil construction. It entered into contract with land owners for development of residential cum commercial complex on land. The assessee claimed deduction u/s 80IB(10). It was noted from the records that neither aggregate amount of sale agreement entered into nor advance received there against had been mentioned. It was held that reasonable certainty as to the realization of sale proceeds were crucial to income recognition, and both sale agreement as well as advance received in pursuance thereof were vital thereto. Matter was thus, remanded back to AO. (AY. 2008-09)
Dy. CIT v. Vertex Homes P. Ltd. (2013) 140 ITD 300 (Hyd.)(Trib.)

S.80-IC : Special category States – Manufacturing and sale of fragrance – Flowers purchased from other states – Exemption cannot be denied
Assessee was engaged in manufacturing and sale of fragrance. In manufacturing process, flowers were purchased from Uttar Pradesh and distilled oil extracted from such flowers were brought to assessee's manufacturing unit at Uttarakhand. Assessing Officer having noticed that most important activity, namely, extraction of oil from flowers had taken place in Uttar Pradesh and not in Uttarakhand, assessee was not entitled to benefit of section 80IC. Since after procuring distilled oil many a things were required to be mixed and then those were to be processed and steamed, distilled oil obtained by assessee from Uttar Pradesh did not remain distilled oil at time of sale of its product and same became a different product. Therefore, assessee was entitled to benefit of section 80IC.
Dy. CIT v. Natural Fragrances (2013) 219 Taxman 28(Mag.) (Uttarakhand)(HC)

S.80-IC : Special category States – Manufacture – Radio frequency identification device – Communication net work product is manufacture and entitled to deduction [S.2(29BA)]

The assessee was engaged in the business of manufacture and service of communication and networking products, mainly to State Government and Central Government undertakings. The A.O. took the view that the assessee was only doing assembling work and not manufacture and hence was not eligible for deduction under section 80-IC. The Commissioner (Appeals) and Tribunal allowed the assessee`s claim to deduction under section 80-IC. On appeal to the High Court, it was held by dismissing the appeal of the revenue, u/s. 2(29BA) the definition of "manufacture" was inserted by the Finance (No. 2) Act of 2009, with effect from April 1, 2009, to mean, a change in a non-living physical object or article or thing resulting in transformation of the object or article or thing into a new and distinct object or article or thing having a different name, character and use; or bringing into existence a new and distinct object or article or thing with a different chemical composition or integral structure. On the findings of fact that the various materials that had gone into making of the radio frequency identification device had undergone a change and that they had lost their original identity, the order of the Tribunal was correct. There was no fresh material to show that the manufactured item was no different from the inputs that were used in bringing out a totally different marketable product, therefore Components such as printed circuit boards, random access devices, high and low transmission wireless adaptors, wireless antennae and other networking components put together to make single product to requirement of customer is a new item formed is manufacture and entitled to deduction. (AY.2006-07).
CIT v. Gemini Communication Ltd. (2013) 357 ITR 759 / 219 Taxman 37 (Mad.)(HC)

S.80-IC : Special category States – Manufacture or production – production of advanced microprocessor based on fast bus transfer scheme panel – Expert opinion not sought or on record, matter remanded
The assessee was engaged in the activity of manufacturing advanced microprocessor based on fast bus transfer scheme panel, on which the assessee had claimed deduction u/s 80IC. There was a dispute as to the activity of the assessee amounted to manufacture or assembly. The Hon'ble high court held that, due to the complexity in the production, the assessee or the department ought to have taken an expert's opinion on the issue involved. In view of the same the issue is remanded to the file of the AO for fresh adjudication with a direction to give an opportunity to the assessee. (AY.2006-07)
Aartech Solonics Ltd. v. CIT (2013) 82 DTR 9 / 214 Taxman 133(Mag.) / 256 CTR 293 (MP)(HC)

S.80-IC : Special category States – Manufacture – Water filter-cum-purifiers – Entitled deduction [S.2(29BA)]
Assessee-company purchased various components and assembled them to prepare water filter-cum-purifiers. Where a new distinct article called water purifier, having commercial market, came into existence and original components no longer remained, activity was to be held as manufacture, and not assembling, and therefore, deduction under section 80-IC was to be allowed. (AYs. 2005-06, 2006-07, 2008-09)
Aquamall Water Solutions (P.) Ltd. v. CIT (2013) 60 SOT 78 (URO) (Hyd.)(Trib.)

S.80-IC : Special category States – Tea business – Processing and plantation – Mere processing of tea is not eligible to claim deduction
To claim deduction under section 80-IC(2)(b), an undertaking is required to carry on both activities, i.e., processing and plantation of tea.(AYs. 2005-06, 2006-07)
DCIT v. Sewujpur Tea Co. (P.) Ltd. (2013) 59 SOT 88 (URO) (Kol.)(Trib.)

S.80-IC : Special category States – Computation – Allocation of expenses debited to head office on the basis of turnover
The assessee has five manufacturing units and it is eligible for deduction under section 80-IC in respect of Baddi unit only. The Tribunal found that the turnover of Baddi unit was 2.54 per cent of the

total turnover. Therefore directed the Assessing Officer to compute the deduction under section 80-IC by treating 2.54 percent of the total expenditure attributable to Baddi unit. (AYs. 2006-07 to 2008-09)
Amartex Industries Ltd. v. Addl. CIT (2013) 155 TTJ 43(UO) (Chd.)(Trib.)

S.80-IC : Special category States – Deductions – Audit Report [S.44AB]
The assessee prior to third proviso to section 80IB(4), enjoyed deduction under 80IB, and thereafter under 80IC. The Tribunal held merely auditor observing NIL for deduction under Chapter VI-A it being technical non disclosure, could not be a ground for denial of deduction, when claim raised in return subsequently was duly supported by audit report in FORM 10CCB as required under section 80IC and the Revenues appeal was dismissed. (AY. 2004-05)
ACIT v. Assam Dyeing Plants (P.) Ltd. (2013) 142 ITD 532 (Guwahati)(Trib.)

S.80-IC : Special category States – No inter-unit transfer of goods – Provisions of section 80IA(8) cannot be invoked [S. 80-IA(8)]
When the product was being manufactured through supplier 'P', the assessee was having margin of about 80.12 per cent which had increased to about 86.32 per cent when the assessee started to manufacture the product itself. The Assessing Officer invoked the provisions of section 80-IA(8) and allowed deduction under section 80-IC only on the additional 6.2 per cent profit. It was held that in the absence of any inter-unit transfer of goods by "B'' unit to any unit of the assessee company, the provisions of section 80-IA(8) were not applicable and there was no occasion for the Assessing Officer to compute the profits on reasonable basis. (AY. 2007-08)
Cadila Healthcare Ltd. v. ACIT (2013) 56 SOT 89 (URO) (Ahd.)(Trib.)

S.80-IC : Special category States – Set off of losses – Eligible to claim set off losses in its 80IC undertaking against its other taxable income [Ss. 70, 80(IA(5)]
The Tribunal held that provisions of section 80-IA(5) only prescribes method by which quantum of a deduction has to be arrived at and it does not bar an assessee to claim set-off of losses of eligible business against undertaking which is not entitled to claim a deduction. Therefore, assessee is eligible to claim set-off of loss incurred in its section 80-IC eligible industrial undertaking against its other taxable business income. In favour of assessee. (AY. 2006-07)
Wipro Ltd. v. Add. CIT (2013) 55 SOT 3(URO) (Bang.)(Trib.)

S.80JJA : Bio-degradable waste – Fuel briquettes from bagasse – Derived from – Eligible deduction
The Assessee is engaged in the business of fuel briquettes from bagasse. The assessee claimed the deduction under section 8OJJAA. The Assessing Officer disallowed the claim on the ground that (1) bagasse is not waste; (2) it is not generated in municipal /urban limits i.e., by local authorities;(3) it is not collected but it is purchased; and (4) the process does not involve any treatment or recycling of a biodegradable waste. In appeal the Commissioner (Appeals) allowed the appeal of assessee. The Tribunal also confirmed the order of Commissioner (Appeals). On appeal by the revenue, the Court held that bagasse is a biodegradable waste of sugar factory and therefore, deduction under section 80J is allowable on the profits derived from the business of manufacturing fuel briquettes from bagasse; requirement of collecting biodegradable waste as provided under section 80JJA is satisfied whether such waste is collected on payment of consideration or without consideration. Accordingly the appeal of revenue was dismissed. (AYs. 2003-04, 2004-05)
CIT v. Padma S. Bora (Smt) (2013) 355 ITR 368 / 81 DTR 99 / 255 CTR 1 / 214 Taxman 505 (Bom.)(HC)
Editorial: Judgment of Pune Tribunal in CIT v. Padma S. Bora (2010) 133 TTJ 108 (Pune) (Trib.) is affirmed.

S.80M : Inter corporate dividends – Deduction under section 80M of the Act cannot be disallowed on the ground that the dividend distribution related to a earlier financial year

For claiming deduction under section 80 M of the Act it is not necessary that dividend distributed must match or relate to the assessment year itself. Thus, deduction under section 80 M of the Act cannot be denied on the ground that dividend distribution related to earlier financial years. (AY. 1992-93)

CIT v. Delhi Tourism & Transportation Development Corporation Ltd. (2013) 357 ITR 95 / 92 DTR 105 (Delhi)(HC)

S.80M : Inter corporate dividends – Deduction on gross dividend – Deduction of estimated expenditure is not justified

The assessee claimed deduction for the assessment year 1997-98 being dividend income under section 80M of the Act. The A.O. held that in view of section 80AA of the Act the deduction under section 80M of the Act was to be allowed only on net dividend, i.e., after deducting expenses incurred for earning the dividend income. However, as the assessee had not claimed any expenses towards the earning of dividend income, the A.O. estimated 10 per cent. of its gross dividend income as expenditure incurred and restricted the deduction under section 80M of the Act. The Tribunal held that there was no justification to reduce the dividend income entitled to deduction under section 80M of the Act by estimating the expenditure. On appeal the court held that it was held that, that the Tribunal was justified in law in allowing special deduction under section 80M in respect of gross dividend without deducting estimated expenses there from. The provisions of section 80HHC are entirely different from those of sections 80M and 80AA. There is no basis for importing the provisions of section 80HHC for interpreting section 80M, that would not lead to a satisfactory computation of the net dividend under section 80M.(AY. 1997-1998)

CIT v. Modern Terry Towels Ltd. (2013) 357 ITR 750 / 90 DTR 321 (Bom.)(HC)

S.80M : Inter corporate dividends – Year of deductibility – Dividend need not relate to year in question

Dividends relating to 1990-91 and 1991-92 distributed in accounting year relevant for assessment year 1993-94 is entitled to deduction in assessment year 1993-94. The condition precedent was that dividends must be received by domestic company from another domestic company and it should be distributed in year in question before due date. The dividend need not relate to year in question. (AY. 1993-94)

CIT v. Delhi Tourism and Transportation Development Corporation Ltd. (2013) 357 ITR 95 / 92 DR 105 / 218 Taxman 6(Mag.) (Delhi)(HC)

S.80M : Inter-corporate dividends – No evidence of expenditure incurred disallowance was not justified [S.80AA]

The Revenue had not made out any case for deduction by demonstrating the actual expenditure incurred by the assessee for earning a dividend income and, therefore, just because section 80AA of the Act provides for such deduction, deduction as applied by the Assessing Officer by resorting to best judgment, was not justified. (AY. 1993-94)

CIT v. ING Vysya Bank Ltd (2012) 208 Taxman 511 / (2013) 356 ITR 532 / 263 CTR 276 / 94 DTR 425 / 24 taxmann.com 51 (Karn.)(HC)

S.80M : Inter corporate dividends – Only interest paid on loan availed for making investment giving rise to dividend income to be deducted – Interest paid on entire borrowings cannot be deducted

The assessee made investments in Unit Trust of India giving rise to the dividend income. The assessee claimed deduction of such dividend income in terms of section 80M r.w. section 80AA.

Also, the assessee had raised loans for which it paid interest of Rs. 3.56 crores in respect of borrowings for different purposes during the relevant year. Instead of considering the proportionate interest amount relating to earning of dividend, the AO took into consideration the entire amount of interest including interest on loan taken for general purpose for computing deduction u/s. 80M. The CIT(A) upheld this view. The Tribunal held that the assessee is entitled to deduction of dividend income after adjusting of interest on loan raised for earning of the said dividend income only as per provisions of section 57 rather than the entire interest paid during the year in question. The High Court dismissed the revenue's appeal as there was no substantial question of law and upheld the decision of the Tribunal. (AY. 1991-92)
CIT v. Consumer Health Care Ltd. (2013) 217 Taxman 94 (Mag) (P&H.)(HC)

S.80M : Inter-corporate dividends – Mutual agreement procedure – Foreign company – DTAA-India-France [Art.26]
Since an Indian company can avail deduction u/s. 80M only after fulfilment of conditions as prescribed u/s. 80M, benefit of non-discriminate clause of DTAA can be available to foreign national under similar circumstances and therefore, conditions which are required to be fulfilled by Indian national are also required to be fulfilled by foreign national. Since the assessee did not fulfill conditions prescribed u/s 80M, its claim for deduction was rightly rejected. (AY. 1991-92, 1994-95)
BNP Paribas SA v. DCIT (2013) 57 SOT 82 (URO) (Mum.)(Trib.)

S.80M : Inter corporate dividends – Deductions – Shares
Assessee claimed deduction under section 80M with respect to dividend received from shares. Assessing Officer was of view that deduction was allowable on net income after apportionment of expenses. Assessing Officer having apportioned interest expenses, worked out net dividend at a negative figure. He thus rejected assessee's claim. Tribunal held that when Assessing Officer had accepted entire expenditure as business expenditure under section 36, then apportionment of interest without establishing nexus between borrowed funds and investment was not justified. Even otherwise, since investments on which dividend income had been earned by assessee was not made during year under consideration; but same had been carried forward in earlier year, in such a case, apportionment made by Assessing Officer towards interest expenditure against dividend income was not sustainable. (AY 2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.80M : Inter corporate dividends – Deductions – Mutual funds
Where assessee had failed to prove that dividend on mutual fund was received from domestic company, disallowance of deduction under section 80M had to be confirmed (AY. 2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.80P : Co-operative societies – Interest income – Deduction will be available only on net income after deducting expenses
Assessee, a co-operative society, rendered variety of services to its members against collection of annual subscription from them. It received interest from co-operative societies and co-operative banks. Assessing Officer held that deduction under section 80P(2)(d) would be available to assessee only on net income from interest received from co-operative societies/co-operative banks, which will have to be worked out after determining and deducting expenses debited to income and expenditure account relatable to earning of such income. Court held that view of Assessing Officer was held to be justified. (AY.1993-94)
CIT v. U.P. Cooperative Sugar Factories (2013) 219 Taxman 33 (All.)(HC)

S.80P : Cooperative societies – Sale of liquor exemption is not available – Sale of agricultural produce is eligible for exemption [S. 148]

Deduction claimed in respect of sale of liquor did not fall under the categories stipulated in section 80P(2) and, therefore, the Tribunal had rightly rejected the claim of the assessee with regard to the sale of liquor.

When it was not in dispute that the agricultural produce was grown by its members and fell within category (iii) of section 80P(2)(a) and, moreover, the goods were meant for public distribution, the assessee was entitled to deduction. (AY. 1997-98, 1998-99, 1999-2000)

Satyamangalam Agricultural Producer's Co-operative Marketing Society Ltd. v. ITO (2013) 357 ITR 347 / 219 Taxman 127 (Mag) /(2014) 98 DTR 199 / 267 CTR 249 (Mad.)(HC)

S.80P : Co-operative societies – Co-operative Banks entitled to deduction on interest earned on deposits made even out of non-SLR funds

The High Court following its own decision in the case of *CIT v. H.P. State Co-operative Bank Ltd. (2010) 323 ITR 1 (HP)* confirmed the finding of the Tribunal that interest earned by assessee-bank on deposits made even out of non SLR funds is eligible for deduction under section 80P(2)(a)(i).

CIT v. Himachal Gramin Bank (2013) 217 Taxman 94(Mag.) (HP.)(HC)

S.80P : Co-operative societies – Interest income – Non-Statutory liquid ratio (SLR) funds is also qualify for exemption

The question as to whether the business is derived from or attributable to SLR or non-SLR funds would not make any difference for the purposes of qualifying the interest earned by the cooperative bank under S.80P(2)(a)(i) as the deposits of surplus idle money available from working capital, including reserves, excess collection of interest tax and other incomes are all attributable to the business of banking. Held, the Tribunal did not commit any error in arriving at findings that the interest earned on deposits of non-SLR funds will qualify for exemption under S. 80P(2)(a)(i).

CIT v. Gulshan Mercantile Urban Co-Operative Bank Ltd. (2013) 214 Taxman 510 / 29 taxmann.com 8 (All.)(HC)

CIT v. Muzaffarnagar District Co-Operative Bank Ltd. (2013) 214 Taxman 498 (All.)(HC)

CIT v. Muzaffarnagar Kshetriya Gramin Bank Ltd. (2013) 214 Taxman 177(Mag.)/ 81 DTR 145 / 256 CTR 322 (All.)(HC)

S.80P : Co-operative societies – Interest earned on deposits of non – SLR fund – Eligible for deduction under section 80P of the Act

Interest earned by the co-operative society on the deposits of its non – SLR funds is income from banking business and eligible for deduction under section 80 P (2) (a) (i) of the Act.

CIT v. Muzaffarnagar Kshetriya Gramin Bank Ltd. (2013) 81 DTR 145 / 256 CTR 322 / 214 Taxman 117 (Mag.)(All.)(HC)

S.80P : Co-operative societies – "Any such activities" – Interest on Income tax refund is not operational income from banking activity and is assessable as income from other sources

Payment of income-tax has nothing to do with any business or activity. The source of income is immaterial for payment of income-tax except for classification of the head of income for the purpose of computation. Therefore, interest on income-tax refund cannot be considered to be operational income and has to be assessed under the head "Income from other sources" and the assessee is not eligible for deduction under section 80P(2)(a)(i) on the same. (AY. 2003-04)

Kollam District Co-operative Bank Ltd. v. DCIT (2013) 24 ITR 281 (Cochin)(Trib.)

S.80P : Co-operative societies – Interest on the investment-locker rent – NPA provision, purchase of vehicle fund and provision for investment fluctuation reserve-income from undisclosed sources – Presumption – Profits and gains arising from the business [S.68, 292C]

Three appeals were filed by the Department and three appeals were filed by the assessee before the Tribunal. The Department, the ground taken by revenue was whether the assessee is a credit co-operative society or a co-operative bank. On this issue the Tribunal held that the assessee cannot be regarded to be a primary co-operative bank as defined in Banking Regulation Act, 1949 as its bye-laws permit admission of any other co-operative society as a member of the assessee society, apart from the fact that its prime object or principal business is not banking business and consequently it is a credit co-operative society and not a co-operative bank and therefore, the assessee is eligible for deduction under section 80P.

Grounds of appeal taken by the assessee in all the three appeals are as under:-

1. The assessee has earned the interest on the investment made in the joint venture and claimed deduction under section 80P. The Tribunal send the matter back to the Assessing Officer to find out whether the joint venture from where the assessee has derived interest is a member of the assessee co-operative society or not. Assessee is entitled to deduction only if the joint venture (AOP) is member of the society.
2. The assessee has claimed the deduction under section 80P on the locker rent derived by the assessee. The Tribunal held that locker rent cannot be regarded to be profits and gains of business attributable to providing credit facilities to its members. Therefore, assessee is not entitled to deduction on locker rent derived by assessee.
3. In respect of NPA provision, purchase of vehicle fund and provision for investment fluctuation reserve the Tribunal sent the matter back to the Assessing Officer to verify whether these provisions were reduced by the assessee while computing the income from profits and gains from credit facilities to members and the assessee got the deduction under section 80P on the income after reducing these amounts. If this is the fact, the Assessing Officer is directed to increase the deduction to the extent the provisions so disallowed.
4. Contribution towards PF or SF were made within the accounting year, the Tribunal allowed the deduction. Assessee challenged the addition under section 68 as income from undisclosed sources.
5. Assessee stated before the Tribunal that presumption arising under section 292C is not conclusive and is rebuttable. Tribunal held that the addition made by Assessing Officer cannot be sustained in the absence of any corroborative evidence on record to disprove the explanation of the assessee. Tribunal deleted the addition.
6. The assessee accepted deposits in violation of KYC norms. The Assessing Officer made the addition under section 68 on this basis. Tribunal upheld the addition by ignoring the plea of the assessee that its manpower was not fully equipped and properly trained for complying with KYC norms.
7. The Tribunal directed the Assessing Officer to allow deduction under section 80P in respect of the addition sustained under section 68 on unexplained deposits as income added under section 68 has to be treated as the profits and gains arising from the business of the assessee. (AYs. 2007-08 to 2009-10)

ACIT v. Buldana Urban Co-op. Credit Soc. Ltd. (2013) 153 TTJ 728 / 23 ITR 411 / 85 DTR 410 / 57 SOT 76 (URO) (Nagpur)(Trib.)

S.80P : Co-operative societies – Return – Belated return beyond time limit prescribed deduction under section 80P is not available [S.80A(5),139(1), 139(4), 142(1),148]

The assessee – co-operative society claimed deduction under section 80P. The Assessing Officer denied deduction on the ground that the assessee having not filed the return, they were not entitled for deduction under section 80P. Commissioner (Appeals) up held the order of the Assessing Officer. On appeal to Tribunal the Tribunal held that in view of the mandatory provisions contained in section 139(1) read with section 80A(5) it is mandatory for every co-operative society for claiming deduction under section 80P to file Return of Income and to make a claim of deduction under section 80P in the return itself .If the return was not filed either under

section 139(1), or 139(4) or in pursuance of notice issued under section 142(1) or under section 148 the tax payer is not entitled for any deduction under section 80P.(AY.2009-10)
Kadachira Service Co-op. Bank Ltd. v. ITO (2013) 141 ITD 270 / 153 TTJ 129 / 84 DTR 177 (Cochin)(Trib.)

S.80P(2)(a)(i) : Income of co-operative societies – Banking societies – Interest earned on deposits made even out of non-SLR fund is eligible for exemption.
The Assessee is a co-operative society and carrying on banking business. The Assessee earned income on account of interest on deposits made out of the non SLR funds. Tribunal held that the assessee- bank was entitled to deduction under section 80P (2)(a)(i) in respect of interest earned on deposits made even out of non-SLR fund. On appeal by the revenue the High Court relied upon decision of *CIT v. H.P. State Co-operative Bank Ltd. (2010) 323 ITR 001 (HP)(HC).*
CIT v. Himachal Gramin Bank (2013) 217 Taxman 94 (Mag.) (HP)(HC)

S.80VV : Expenses Incurred in Connection with Income-Tax Proceedings – Retainership fee – Disallowance cannot be made
Where assessee paid retainership fee to an advocate which was not in connection with income tax proceedings but for general advice relating to other laws, provisions of section 80VV were not attracted, therefore, disallowance of retainership fee made by authorities below was to be deleted. In favour of assessee. (AY.1985-86)
CIT v. Dalmia Cement (Bharat) Ltd. (2013) 358 ITR 1 / 259 CTR 505 / 212 Taxman 126(Mag.) (Delhi)(HC)

S.88E : Rebate – Securities transaction tax – Company book profit – Rebate is applicable to tax computed under section 115JB [Ss.87, 115JB]
Section 88E applies to income computed under section 115JB and assessee is entitled to rebate of securities transaction tax which has been paid.
CIT v. MBL and Co. Ltd. (2013) 358 ITR 1 / 259 CTR 505 / 89 DTR 105 / 212 Taxman 126 (Mag.) (Delhi)(HC)
CIT v. Multiplex Capital Ltd. (2013) 358 ITR 1 / 259 CTR 505 / 89 DTR 105 / 212 Taxman 126(Mag.) (Delhi)(HC)

S.88E : Rebate – Securities transaction tax – Book profit – Rebate is to allowed from tax payable on book profits [S.115JB]
Gross tax payable under normal provisions without deducting rebate under section 88E is to be compared with tax payable under section 115JB. From the higher of the two, rebate under section 88E is to be allowed. Rebate under section 88E is allowable from tax payable on book profit under section 115JB.(ITA no 2163 /Mum/2013 dated 10-7-2013. Bench ‘A’)(AY. 2008-09)
DCIT v. Kaushik Shah Shares & Securities Pvt. Ltd. (2013) BCAJ-Sept- P.25 (Mum.)(Trib.)

S.90 : Double taxation relief – Composite contract – Article 7 of DTAA: Even in a composite contract, Dept cannot assess off-shore profits without showing how it is attributable to the permanent establishment-DTAA-India-Korea [Articles 5(1), 7]
The assessee entered into a consortium contract with ONGC and L&T to carry the work of surveys, design, engineering, procurement, etc. It opened a project office in India for co-ordination and execution of the project. The assessee claimed that a portion of the work was carried out inside India and a portion was carried out outside India. It claimed that it had suffered a loss on the work done inside India and that income on the work done outside India was not assessable to tax in India. The AO held that 25% of the work done outside India had to be assessed in India. This was upheld in

principle by the Tribunal (133 ITD 413 (Del)) on the ground that the contract was indivisible and that opening a project office in India was a condition precedent for the contract. It was held that the said project office constituted a "permanent establishment" under Article 5(1) of the India-Korea DTAA and that it covered the entire scope of work. As regards the percentage of income attributable to the PE, the Tribunal directed the AO to determine the extent of business activities carried on through the said project office. On appeal by the assessee to the High Court HELD reversing the Tribunal:

Being a resident of Korea, the assessee is governed by the Income-tax laws as prevalent in Korea. Therefore, it has a tax identity in Korea. In addition, the assessee has submitted to the jurisdiction of Indian taxing authorities by furnishing return of income and, thereby, acknowledged that it has also a tax identity in India. The question is, this identity is covered by which provision of the India-Korea DTAA. In terms of Article 7(1), the assessee will acquire its tax identity in India only when it carries on business in India through a permanent establishment situate in India. By submitting the return, the assessee has held out that it is carrying on business in India through a permanent establishment situated in India. In the circumstances, the contention of the assessee, whether the Project Office of the appellant opened at Mumbai can be, or cannot be said to be a permanent establishment within the meaning of the said DTAA is of no consequence. In terms of the DTAA, if an enterprise does not have a tax identity in India in the form of a permanent establishment, it has no obligation to either submit any tax return with, or pay any tax to India. The Indian Taxing Authority is not entitled to arbitrarily fix a part of the revenue to the permanent establishment of the assessee in India. The assessee held out that a part of the revenue was received by it for doing certain work in India. It did not contend that even those works were done by or through its Project Office at Mumbai. On the other hand, there is not even a finding that 25 per cent of the gross revenue of the assessee was attributable to the business carried out by the said Project Office. Neither the AO nor the Tribunal has made any effort to bring on record any evidence to justify the same. Tax liability cannot be fastened without establishing that the same is attributable to the tax identity or permanent establishment of the enterprise situate in India (ITA No. 01 of 2012, dt. 27.12.2013.)(AY.2007-08)

Samsung Heavy Industries Co. Ltd. v. DIT (2014) 98 DTR 89 (Uttarakhand)(HC)

S.90 : Double taxation relief – Alienation of shares – Capital gain tax – Tax avoidance – Capital gain is not chargeable to tax in India-Not liable to deduct tax at source – DTAA- India-France [Ss.2(47) 4, 5, 9, 195, 45, Art. 14, 25]

SBL was an Indian company and engaged, *inter alia*, in the business of research and development of technologies for pharmaceutical products. U, a company set up in Mauritius as a special purpose investment vehicle, became a major shareholder of SBL in 1994. During August/September 2006, MA, a French company engaged in business in pharmaceutical products, negotiated with GIMD, another French company, for a strategic association for investment in SBL through a holding structure and pursuant to a board resolution of MA, resolving to allow SH (subsidiary of MA) to acquire 54% of the shares in SBL. The AAR ruled that though the transaction did not involve alienation of shares in an Indian company on a literal interpretation of Article 14(5), on a purposive construction thereof, the capital gains arising out of the transaction were taxable in India since the essence of the transaction involved various rights including a change in the controlling interest of the Indian company, SBL, having assets, business and income in India.

Held, Article 14(4) of the India-France DTAA pertains to gains from alienation of shares of the capital stock of a company, the property of which consists directly or indirectly principally of immovable property situated in a Contracting State. The expression "directly or indirectly" is intended to clarify that gains from alienation of shares in a company, whose property consists principally of immovable property, whether directly or indirectly, is chargeable to tax and the right to tax is allocated to the Contracting State where the immovable property of the company so liable, is situate. Article 14(5) deals with alienation of shares (excluding those comprehended within paragraph (4)) representing a participation of at least 10% in a company which is a resident of a Contracting

State and the right to tax is allocated to that Contracting State in which the company is a resident. Article 14(5) of the DTAA does not permit a "see through".

Corporate shareholding does not amount to ownership of the corporate assets. A company is a juristic persona distinct from its shareholders and while controlling interest would be an incident of shareholding, it has no independent existence.

Also, SH was not a sham entity and the transaction did not involve tax avoidance. Further, it was held that the transaction was not liable to tax in India. Amendments to Act, not containing *non obstante* clauses, do not override provisions of agreements with other countries. Assessee cannot be held be liable to deduct tax at source.

Sanofi Pasteur Holding SA v. Department of Revenue (2013) 354 ITR 316 / 257 CTR 401 / 84 DTR 185 / 213 Taxman 504 (AP)(HC)

Groupe Industriel Marcel Dassault v. UOI (2013) 354 ITR 316 / 257 CTR 401 / 84 DTR 185 / 213 Taxman 504 (AP)(HC)

Merieux Alliance v. UOI (2013) 354 ITR 316 / 257 CTR 401 / 84 DTR 185 / 213 Taxman 504 (AP)(HC)

S.90 : Double taxation relief – Income from operation of ships – Effective management of its enterprises-DTAA-India-Netherlands [Article 8A]

'M', a shipping company was incorporated in Netherlands. It was represented in India by the assessee-company. For the relevant AY, the assessee filed its return claiming benefit under India-Netherlands DTAA. The Assessing Officer rejected the assessee's claim holding that the assessee had failed to supply documents necessary to avail the benefit as claimed. The Commissioner (Appeals), on basis of material produced on record, opined that effective management of its enterprises was situated in Netherlands and, thus, requirement of condition as mentioned in Article 8A of DTAA was met. The Tribunal, finding that revenue had failed to point out any contrary material either from record or at time of hearing before it, confirmed order of the Commissioner (Appeals).Court held that since the finding recorded by the Tribunal was a finding of fact, the impugned order passed by the Tribunal did not require any interference.(AY. 2007-08)

DIT v. Mitsutor Shipping Agency (P.) Ltd. (2013) 214 Taxman 532 / 95 DTR 285 / (2014) 264 CTR 574 (Guj.)(HC)

S.90 : Double taxation relief – Treaty shopping – Transfer of 74% share holding in an Indian company-DTAA-India-USA. [S.10(38), 94(7)]

US company proposed transfer its 74% share holding in an Indian company to its 100 percent Singapore subsidiary. Revenue contended that, if shareholding would remain with US company, on any future transfer ,income would be taxed both in India and US as per Indo-US DTAA where as if share holding would remain with Singapore company, on any future transfer, income would be taxed only in Singapore and not in India as per Indo Singapore DTAA. Revenue contended that the transfer was designed for treaty shopping so as to avoid tax in India, the AAR held that since shares of Indian company were listed, income arising from any future transfer would itself be exempt by virtue of section 10(38) and hence, there was no need for treaty shopping. On writ by revenue the Court held, the revenue's contention was correctly answered by AAR and there was no reason to interfere with order of AAR.

DIT v. Goodyear Tire & Rubber Company (2013) 214 Taxman 669 / 258 CTR 464 / 86 DTR 97 / (2014) 360 ITR 159 (Delhi)(HC)

S.90 : Double taxation relief – Limited partnership – Royalty – Fees for technical services – Paying trade tax – Benefit of DTAA is available to a person who is liable to pay tax in Germany – DTAA-India-Germany [Ss.234B, Art.2(3), 3(d), 4, 12(2)]

The assessee is a non-resident (Foreign company). In the return of income, it claimed the benefit of Article 12 (2) in respect of royalties and technical fees received by it. The Assessing Officer denied the benefit of DTAA on the ground that the assessee being a limited partnership which is not liable to tax at Germany. In appeal the Commissioner (Appeal) allowed the appeal of assessee. Appeal of revenue was dismissed by Tribunal. On appeal to High Court, the Court held that the Assessee, a limited partnership, paying tax in Germany is considered as taxable unit under the taxation laws of Germanyas evident from the tax residence certificate issued by the German Authorities and the trade tax being one of the taxes to which Indo-German DTAA applies, in terms of article 2(3), thereof is applicable to the assessee and therefore, benefit of Article 12(2) thereof cannot be denied. The Court held that the Tribunal was correct in holding that no interest was chargeable under section 234B. Assessee, a limited liability partnership, was paying trade tax in Germany. Assessee was issued a tax resident certificate by German authorities and considered a taxable unit. Held that DTAA applicable to the assessee and benefit of Art. 12(2) cannot be denied. (Appeal of revenue was dismissed. (AY. 2002-03)
DIT(IT) v. Chiron Bearing Gmbh & Co. (2013) 351 ITR 115 / 256 CTR 342 / 83 DTR 1 / 213 Taxman 174 (Bom.)(HC)
Editorial: ADIT(IT) v. Chiron Behring Gmbh & Co. (2009) 120 TTJ 329 (Mum.)(Trib.) is affirmed.

S.90 : Double taxation relief – DTAA-India-Malaysia [S.195]
The assessee was engaged in the business of telecommunication. The assessee did not withhold the tax on the payment of transponder fees for the usage of the satellite of the foreign company, for the business carried out in India, as required u/s195. The AO disallowed deduction of the payment u/s 40(a)(ia). On facts, AO was directed to re-adjudicate the matter in accordance with the provisions of the DTAA. (AY. 2006-07)
ACIT v. Zee News Ltd. (2013) 27 ITR 240 / (2014) 61 SOT 59 (Mum.)(Trib.)

S.90 : Double taxation relief – Non-discrimination – Rate of tax at 48% instead 35% as claimed by assessee-DTAA-India-Japan [Article 24]
Where agreement exists tax, rate of 48 per cent as per provisions of Income-tax Act, 1961 would be applicable on income of non-resident assessee-company, instead of 35% as claimed by the assessee invoking provisions of Article 24 of the Indian Japan treaty. Followed *Chohung Bank v. DCIT (IT)(102ITD 45)* (AY.1996-97 to 2002-03)
Toyo Engineering Corporation v. DCIT (2013) 60 SOT 241 (Mum.)(Trib.)

S.90 : Double taxation relief – Interest payment to head office – Deduction of tax at source – CBDT Circular No. 740, dated 17-4-1996. DTAA-India-Sri Lanka-Matter remanded. [Article 12]
Since assessee did not deduct tax at source while making interest payment to its head office, the revenue authorities disallowed payment of interest. On appeal, it was noticed that assessee did not produce copy of DTAA between India and Sri Lanka, if any, in support of its contention that interest remitted by Indian Branch to its Head Office at Sri Lanka was either not taxable at all or was entitled for concessional rate of tax. Further, the applicability of CBDT Circular No. 740, dated 17-4-1996 not examined. Hence, the matter was remanded. (AY.2008-09)
Bank of Ceylon v. ADIT (2013) 59 SOT 42 (Chennai)(Trib.)

S.90 : Double taxation relief – Fees for technical services – Training and Market awareness & development training to employee – No obligation to deduct tax at source-DTAA-India-UK [S.9(1)(vii), 195, Art 13(4)(c)]
Tribunal held that the fees for training service cannot be brought to tax under Art. 13(4)(c) of the DTAA. In this case the assessee made payments to two UK companies for providing in house training and market awareness and development training to its employee. There is no transfer of technology.

Therefore the assessee did not have any obligation to deduct tax at source under section 195. (AY. 2008-09)
ITO (IT) v. Veeda Clinical Research (P) Ltd. (2013) 144 ITD 297 / 156 TTJ 115 / 90 DTR 324 (Ahd.)(Trib.)

S.90 : Double taxation relief – Permanent establishment – Computation which is more favourable to the assessee to be adopted - DTAA-India-UK [Art. 7, 13]
Since the assessee is a non resident governed by the provisions of DTAA, it is entitled to the benefits of the DTAA. Matter is restored to the file of AO for computation of income of the assessee. AO will compare the income of the PE as per domestic law and the DTAA and will adopt which is more benefiacial to the assessee.(AY. 2002-03)
Lloyds Register v. DCIT(IT) (2013) 24 ITR 579 / 142 ITD 726 / 93 DTR 116 (Mum.)(Trib.)

S.90 : Double taxation relief – Permanent establishment – Law on non-taxing foreign PE profits no longer good law after insertion of s. 90(3) & Notification dated 28.08.2008 (which has clarificatory effect)- Business income from the P.E. in and also the capital gain from sale of assets in these countries will be chargeable to tax in India and credit of taxes paid has to be given as per the relevant of the DTAA-India-Oman – Qatar. [Sa.4, 5, Articles 7, 15, 7, 13, General clauses Act, 1897, S. 24]
The assessee, an Indian company, had a P.E. in Oman and Qatar. The net business profits of the said Oman & Qatar Branch was ` 2.30 crore. The assessee also earned long term capital gains on sale of assets of the said P.E. in Oman and Qatar. The assessee claimed that as the said business profits and LTCG were taxed in accordance with the taxation laws of Oman & Qatar, they were not chargeable to tax in India. The assessee relied on the judgment of the Tribunal and High Court in its own case where the view was taken that as the DTAA provided that the business profits & capital gains of the PE "may be taxed in the other Contracting State", the Country of residence i.e., India loses its right to tax if the Country of source has taxed the income. This view was based on the verdicts of the Supreme Court in *CIT v. P.V.A.L. Kulandagan Chettiar (2004) 267 ITR 654(SC)* and that of the High Courts in *CIT v. R.M. Muthaiah (1993) 202 ITR 508 (Kar) & CIT v. S.R.M. Firm and Ors.(1994) 208 ITR 400 (Mad)*. The department argued that the aforesaid law was no longer good law in view of s. 90(3) inserted by the Finance Act, 2003, which provides that any term used but not defined in the Act or the DTAA shall have the same meaning as assigned to it in the notification issued by the Central Government. Pursuant thereto, the Central Government has issued a Notification No. 91/2008, dated 28-8-2008, wherein it has been expressly provided that where the tax treaty provides that any income of a resident of India "may be taxed" in other country, such income shall be included in his total income chargeable to tax in India in accordance with the provisions of the Act and relief shall be granted in accordance with the method of elimination or avoidance of double taxation provided in the DTAA. HELD by the Tribunal:
The law laid down by the Courts on the interpretation of the expression "may be taxed" that once the tax is payable or paid in the country of source, then the country of residence is denied of the right to levy tax on would no longer apply after the insertion of s. 90 (3) w.e.f. 1-4-2004, i.e. AY 2004-05 pursuant to which Notification dated 28-8-2008 has been issued. The said Notification is clarificatory in nature and hence the interpretation given by the Central Government through the Notification is effective from 1-4-2004. Also, as the phrase "may be taxed" is not appearing in the statute but is appearing in the DTAA, the interpretation as understood and intended by the negotiating parties should be adopted. Here one of the parties i.e., Government of India has clearly specified the intent and the object of this phrase and the meaning assigned by the Government of India for a phrase or term used in the DTAA notification will prevail. The result is that the business income from the P.E. in Oman and Qatar and also the capital gain from sale of assets in these countries will be chargeable to tax in India. (AYs. 2004-05, 2005-06)
Essar Oil Limited v. ACIT (2013) 94 DTR 153 / 157 TTJ / 28 ITR 609 785 (Mum.)(Trib.)

S.90 : Double taxation relief – Income – Accrual – Salary paid in Japan by Indian company to a non-resident-DTAA-India-Japan [S.5]

Salary received by a non-resident assessee for services rendered in Japan was not liable to tax in India as the assessee was present in India only for 83 days.

Bholanath Pal v. ITO (2012) 52 SOT 369 / (2013) 153 TTJ 764 / 86 DTR 134 (Bang.)(Trib.)

S.90 : Double taxation relief – Capital gains – Gross block of assets – DTAA-India-UK. [Article 12(2)]

The Tribunal held that by virtue of Article 12(2) of DTAA taxing rights is given to the State in which the Income arises and in the assessee case interest had mainly arisen in respect of bank balances in UK and the same could not be taxed in India. (AY. 2005-06, 2007-08, 2008-09)

ADIT v. Rolls Royce Industrial Power India Ltd. (2013) 142 ITD 585 (Delhi)(Trib.)

S.90 : Double taxation relief – Shipping & Air Transport – Slot Charter Agreements would be eligible for benefit of Art 8-DTAA–India-Singapore [S.44B, Article 3, 8]

The assessee, a Singaporean company engaged in seafaring cargo business operated globally and in India operated in the Singapore Chennai sector wherein the assessee entered into joint service agreements for slot allocation in feeder vessels for carrying cargo to its hub & loading into mother vessels. The Assessing Officer disallowed relief on grounds that slot charterer would not make the assessee eligible under Article 8 of the DTAA. The Tribunal held in favour of the assessee in the light of Article 8.4 of the India-Singapore DTAA and the claim come within the precinct of Article 8. (AY. 2004-05)

APL Co. Pte. Ltd. v. Dy. CIT (2013) 142 ITD 498 / 94 DTR 254 / 158 TTJ 75 (Mum.)(Trib.)

S.90 : Double taxation relief – Interest from an Indian partnership firm is not taxable as business income – DTAA rate is not to be further enhanced by surcharge and educational Cess – DTAA-India-UAE [Art.2, 7(7), 11(2)]

The Tax payer resident of UAE, received interest income from partnership firms in India in which he was a partner. The Taxpayer offered such interest income to tax in India as per the provisions of India-UAE DTAA. The tax authority, in addition to taxing the interest income at the rate prescribed in Article 11 of DTAA, also levied education cess and surcharge. In appeal Commissioner (Appeals) held that interest income was assessable as business income as per normal rates and the concessional rate as prescribed in Article 11 was not applicable. On appeal Tribunal held that though interest may be assessed as business income under the Act, in view of specific interest Article i.e. Article 11, interest income should be governed by the said Article 11. The term 'income Tax' has been defined in Article 2 of the UAE DTAA to include surcharge. Therefore, tax rate provided in Article 11(2) dealing with interest income also include surcharge. The Tribunal also held that educational cess is in the nature of surcharge. Accordingly both education cess and surcharge can be regarded as included in the treaty rate of 12.5%. (AY.2008-09)

Sunil V. Motiani v. ITO (2013) 59 SOT 37 (Mum.)(Trib.)

S.91 : Countries with which no double taxation agreement exists – Kuwait – Credit for taxes was given

During previous year 1996-97, assessee paid taxes in Kuwait on income earned there and sought benefit of deduction from tax payable in India under section 91(1). Assessing Officer denied benefit of section 91(1) on ground that payment of taxes in Kuwait was not made in previous year 1996-97. Court held that since payment of taxes on income earned in Kuwait during previous year had been found to be correct by Commissioner (Appeals), assessee was entitled to benefit of section 91 (1). Object of section 91(1) is to give relief from taxation in India to extent taxes have been paid abroad

for relevant previous year and this relief is not dependent upon payment also being made in previous year. In favour of assessee. (AY.1997-98)
CIT v. Petroleum India International (2013) 351 ITR 295 / 213 Taxman 41 / 90 DTR 384 / 260 CTR 418 (Bom.)(HC)

S.91 : Countries with which no double taxation agreement exists – Relief under section 91 was allowable at rate of average tax paid in Bhutan
Assessee earned income from hydroelectric project in Bhutan and paid tax under Bhutan Tax Law. Since said income was again subjected to tax in India by virtue of residential status of assessee, relief was claimed under section 91. Assessing Officer computed relief at rate of 8.53 per cent being average rate of tax paid in Bhutan on total income computed at Rs.36.41 crores and not on income from Bhutan operations which stood at Rs. 68.63 and subjected to double taxation. Tribunal held that since average rate of tax in India was higher than Bhutan, relief under section 91 was allowable at rate of average tax paid in Bhutan, however, relief was to be computed on amount of income earned from Bhutan operations because it was said income which was subjected to tax in both countries. Matter was to be remanded back to Assessing Officer to recompute quantum of relief allowable under section 91. (AY. 2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.92 : Transfer pricing – Adjustments – Profit level indicators
Transfer pricing adjustment was to be limited to international transaction with associated enterprises not to entity level transactions.
Altering of profit level indicator without assigning reason and opportunity of hearing was contrary to principles of natural justice. Hence, matter was remanded. (AY. 2008-09)
Sandvik Asia P. Ltd. v. ACIT (2013) 27 ITR 477 (Pune)(Trib.)

S.92 : Transfer pricing – Selection of comparables – Part period data
The financial data of a new company, taken by the TPO, was available only for four months during the financial year 2004-05. Held, the part period data could not be considered as a comparable to determine the arm's length price.
Also held, company "X", proposed to be introduced by TPO, could not be considered as a comparable as this company was rejected by a co-ordinate Bench while deciding a similar issue.(AY. 2005-06)
BA Continuum India P. Ltd. v. ACIT (2013) 28 ITR 445 (Hyd.)(Trib.)

S.92 : Transfer pricing – Selection of comparables – Abnormal loss or profit
Companies having abnormal loss or profit and functionally different companies to be excluded for being taken as comparables.(AYs. 2004-05, 2005-06)
Brigade Global Services P. Ltd. v. ITO (2013) 28 ITR 411 / 143 ITD 59 (Hyd.)(Trib.)

S.92 : Transfer pricing – Exclusions – Export turnover [S. 10B(4)]
Expenses on freight, telecommunication charges, or insurance attributable to delivery of articles or providing technical services outside India were to be excluded from export turnover. (AYs. 2004-05, 2005-06)
Brigade Global Services P. Ltd. v. ITO (2013) 28 ITR 411 / 143 ITD 59 (Hyd.)(Trib.)

S.92 : Transfer pricing – Safe harbour/- +/- 5%
As the difference between arm's length price determined by Transfer Pricing Officer and assessee within range of +/- 5%, assessee was held entitled for deduction of such 5%. (AYs. 2004-05, 2005-06)
Brigade Global Services P. Ltd. v. ITO (2013) 28 ITR 411 / 143 ITD 59 (Hyd.)(Trib.)

S.92 : Transfer pricing – Profit level indicator – Adjustment for depreciation
Held, the depreciation had an impact on the profit margin of the assessee. Therefore, adjustment was to be made for depreciation. The Assessing Officer was directed to use the profit level indicator as profit before depreciation, interest and taxes to recompute the arm's length price. (AY. 2005-06)
BA Continuum India P. Ltd. v. ACIT (2013) 28 ITR 445 (Hyd.)(Trib.)

S.92 : Transfer pricing – Purchase of web portal – Valuation report
Assessee purchased a web portal, an intangible asset. A valuation report was furnished as external comparable uncontrolled price. There was nothing on record against the value shown by assessee. Hence, the intangible asset so purchased to be considered at arm's length price and depreciation to be allowed as it was used for assessee's business. (AY. 2008-09)
Social Media India Ltd. v. ACIT (2013) 28 ITR 212 / (2014) 148 ITD 222 (Hyd.)(Trib.)

S.92 : Transfer pricing – Power of TPO – Necessity of expenditure
Held, TPO was not entitled to consider whether it was necessary or prudent for the assessee to incur expenditure or disallow it on ground assessee has not derived benefit. The AO was directed to the examine nature of expenditure. (AY.2008-09)
Social Media India Ltd. v. ACIT (2013) 28 ITR 212 / (2014) 148 ITD 222 (Hyd.)(Trib.)

S.92 : Transfer pricing – Comparables – Exclusion
Held, there was no cogent reason to exclude comparables since materials on record indicated that profits and functionality were comparable. (AY. 2008-09)
Sandvik Asia P. Ltd. v. ACIT (2013) 27 ITR 477 (Pune)(Trib.)

S.92 : Transfer pricing – Arm's length price – Comparability
Functionally different and super normal profit companies cannot be treated as comparables. However, company with Rs. 200 crores turnover can be accepted as comparable when assessee's turnover is above ` 151 crores. (AYs. 2007-08, 2008-09)
Cognizant Technology Services P. Ltd. v. ACIT (2013) 28 ITR 125 (Trib.)(Hyd.)

S.92 : Transfer pricing – Safe harbour – +/-5%
TPO was directed to verify whether variation between arm's length price determined and price at which transaction undertaken was within range of 5%. (AYs. 2006-2007, 2007-2008)
General Motors India P. Ltd. v. DCIT (2013) 27 ITR 373 / (2014) 146 ITD 559 (Ahd.)(Trib.)

S.92 : Transfer pricing – Adjustments – Assessee's submissions not dealt with
Assessee's submissions and objections were not dealt with by the DRP. No cogent reasons were given why objections were not acceptable. The non-speaking order was liable to be set aside. (AYs. 2006-07, 2007-08)
GE India Industrial P. Ltd. v. DCIT (2013) 27 ITR 543 (Ahd.)(Trib.)

S.92 : Transfer pricing – Provisions of S.92 are applicable to the assignment of the portion of the onshore contract [S.92B(2)]
Assessee's AE "T" entered into offshore & onshore contracts with a Government of India enterprise PGCIL & assigned part of the onshore contract to the assessee with the consent of PGCIL subject to the specific condition that the assignment will not amount to novation of the contract. The TPO held that provisions of S/92 were applicable to the assignment of the portion of the onshore contract by 'T' to the assessee. CIT (A) upheld the findings of TPO by relying on the provisions of S.92B(2). On an appeal in Tribunal, Tribunal upheld the contention of the CIT(A) & held that provisions of S/92 were applicable to the assignment of the portion of onshore contract by 'T" to the assessee, however, PGCIL neither being part of a prior agreement as stipulated in the first limb of S/92 B(2) nor having

in substance determined the terms of the transactions with the assessee as stipulated in the second limb of S/92 B(2), it cannot be held that there is deemed international transactions within the meaning of S/92B(2) between the assessee & "T". (AYs. 2003-04, 2004-05)
Tellabs India (P) Ltd. v. DCIT (2013) 94 DTR 95 / (2014) 159 TTJ 215 (Bang.)(Trib.)

S.92 : Transfer pricing – Arm's length price – Reimbursements to be considered as "international transactions" and comparability based on functional similarity
Deciding on the Transfer Pricing issues the Tribunal held:
A pure reimbursement of expenses by one AE to another AE is very much a 'transaction' as per section 92F(v) and, consequently, is equally an international transaction as per section 92B requiring consideration as per section 92. The revenue could not demonstrate the fact that such reimbursement of expenses was without any mark-up. It is the similarity of the functional profile which needs to be taken into consideration as a first step in the process of selection of comparable cases. If the two companies are functionally different and incapable of comparison, then the similarity of the other factors is of no consequence. In that view of the matter, a case in which services are outsourced and then provided to its customers cannot be compared with the rendering of in-house services. The pertinent criteria for selection of comparable cases should be similarity in the nature of services and not the higher or lower margin of profit in one case viz-a-viz the other. (AY. 2006-07)
Stream International Services P. Ltd. v. ACIT (2013) 141 ID 492 / 83 DTR 394 / 23 ITR 70 / 152 TTJ 553 (Mum.)(Trib.)

S.92A : Transfer pricing – Permanent establishment [Ss.92B, 92CA(3)]
Transactions with permanent establishment of non-residents are not international transactions and not subject to transfer pricing regulations as permanent establishments treated as resident and taxed in India. (AY. 2008-2009)
IJM (India) Infrastructure Ltd. v. ACIT (2013) 28 ITR 176 (Hyd.)(Trib.)

S.92B : Transfer pricing – Maintenance services could not be deemed to be international transactions – Operating cost of these services could not be considered for transfer pricing adjustment [S. 92C]
Assessee was a wholly owned subsidiary of Mauritius company which, in turn, was a wholly owned subsidiary of a US company. Assessee used to book orders in India for microwave link equipments manufactured by US company and earned commission. It also rendered services against warranty given by US company. Apart from that, assessee entered into independent contracts with Indian customers for installation, commissioning and maintenance of said equipments. There was no contract between Indian customers and US company in respect of installation, commissioning and maintenance services. It was thus held that maintenance services could not be deemed to be international transactions within meaning of section 92B. Thus, operating cost of these services could not be considered for transfer pricing adjustment.
CIT v. Stratex Net Works (India) (P.) Ltd. (2013) 354 ITR 304 / 215 Taxman 533 / 88 DTR 185 / 259 CTR 512 (Delhi)(HC)

S.92B : Transfer pricing – Excess credit period – Matter restored
The Tribunal held that loss suffered by assessee by allowing excess period of credit to Associated enterprise without charging any interest during such credit period would not amount to international transaction. Held, in view of amendment to section 92B(1) by Finance Act, 2012 with retrospective effect from 1-4-2002, issue was to be restored to file of Tribunal for fresh decision in light on amendment. (AY. 2002-03)
CIT v. Patni Computer Systems Ltd. (2013) 215 Taxman 108 (Bom.)(HC)
Editorial: Patni Computer Systems Ltd v. Dy. CIT (2012) 135 ITD 398 (Pune)(Trib.)

S.92B : Transfer pricing – Advertising, marketing and promotional expenses. [Ss.92C(1)(f), 92CA, 92F(v)]

In respect of advertising, marketing and promotional expenses, arm's length price was to be determined in accordance with the guidelines laid down by Tribunal in *L. G. Electronics India P. Ltd. v. ACIT*. Hence, matter was remanded. (AY. 2008-09)

Ray Ban Sun Optics India Ltd. v. DCIT (2013) 27 ITR 440 (Delhi)(Trib.)

S.92B : Transfer pricing – Determination of arm's length price – Interest free advances [S. 92CA(1), Rule 10B]

The appropriate rate for adjustment on account of notional interest on interest free advances to associated enterprise would be LIBOR plus 2% on monthly closing balance of advances during financial year. (AY 2007-08)

Aurionpro Solutions Ltd. v. Addl. CIT (2013) 27 ITR 276 (Mum.)(Trib.)

S.92B : Transfer pricing – Advertisement, marketing and brand promotion – Expenses incurred in relation to sale – Matter remanded [S.92CA]

Advertisement, marketing and promotion expenditure can be considered as international transaction. However, expenditure relating to market research service charges paid to selling agents and discount on sales and consumer market research expenses were to be excluded as being not relatable to advertisement and marketing expenditure, as they were incurred in connection with sale and did not lead to brand promotion. Also, TPO entitled to consider transaction not referred to him by the AO. (AY. 2007-08)

Glaxo Smithkline Consumer Healthcare Ltd. v. Addl. CIT (2013) 25 ITR 100 (Chandigarh)(Trib.)

S.92B : Transfer pricing – Reimbursement of expenses [S.92C]

Tribunal held that a pure reimbursement of expenses by one Associated Enterprise(AE) to another Associated Enterprise(AE) not involving any profit element or mark-up is very much a 'transaction' as per section 92F(v) and, consequently, is equally an international transaction as per section 92B requiring consideration as per section 92C. (AY. 2006-07)

Stream International Services (P.) Ltd. v. ACIT (2013) 141 ITD 492 (Mum.)(Trib.)

S.92B : Transfer pricing – Corporate guarantee – Benefit to US Subsidiary must be charged

AO held that corporate guarantees issued by assessee to CITY Bank of India for benefit of its US subsidiary was an international transaction with in the meaning of section 92B and made an addition to arm's length price. Assessee contended that the said transaction is not international transaction. Tribunal held though immediate transaction was between assessee and CITY Bank of India, benefit of guarantee was for US subsidiary for which it must charge fees at an arm's length price.(AY.2006-07).

Infotech Enterprises Ltd. v. Addl. CIT (2014) 63 SOT 23 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments

During relevant assessment year, assessee entered into various international transactions. In order to benchmark its international transactions, assessee submitted a list of 23 comparables. In transfer pricing proceedings, assessee was asked to re-work list of comparables and same was reduced to 20. TPO included two new comparable cases, namely, 'I' Ltd. and 'S' Ltd. On basis of fresh list of comparables, certain adjustment was made to ALP determined by assessee. DRP reduced a part of said addition. Before Tribunal, both parties agreed that 'S' Ltd. could not be adopted as a comparable. Tribunal further opined that profit earned by 'I' Ltd. could also not be benchmarked or equated with profit of assessee in order to determine results declared by assessee. Tribunal thus finding that average mean margin of remaining comparables worked out to 10 per cent as against margin of 17 per cent shown by assessee, held that

impugned addition made by authorities below was not sustainable. On appeal Court confirmed the order of Tribunal. (AY.2006-07)
CIT v. Agnity India Technologies (P.) Ltd. (2013) 219 Taxman 26 / 93 DTR 357 (Delhi)(HC)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments – Functionally non comparable – Could not be sustained
Assessee entered into service agreement with its AE in Singapore. TPO, for determining arm's length price, compared services provided by assessee to AE with four companies and made certain adjustment which resulted in Assessing Officer making certain addition. Since services rendered by assessee to its AE were in nature of marketing service which were entirely different to services in nature of engineering rendered by four comparable companies, said companies were functionally non-comparable to assessee and, therefore, adjustment arrived by TPO and addition made by Assessing Officer on basis of transfer pricing study with regard to said companies could not be sustained.(AYs.2004-05, 2005-06)
CIT v. Verizon India (P.) Ltd. (2013) 219 Taxman 29 / (2014) 360 ITR 342/265 CTR 521 (Delhi)(HC)

S.92C : Transfer Pricing – Share premium – Alternative remedy – Existence of income is a jurisdictional requirement for the applicability of Trasper pricing provisions. AO must deal with it after giving personal hearing before making reference to TPO. [S. 92, 92CA, 144C, Article 226]
The assessee, an Indian company, issued equity shares at the premium of Rs. 8591 per share aggregating Rs. 246.38 crores to its holding company. Though the transaction was reported as an "international transaction" in Form 3 CEB, the assessee claimed that the transfer pricing provisions did not apply as there was no income arising to it. The AO referred the issue to the TPO without dealing with the preliminary objection. The TPO held that he could not go into the issue whether income had arisen or not because his jurisdiction was limited to determine the ALP. He held that the assessee ought to have charged the NAV of the share (Rs. 53,775) and that the difference between the NAV and the issue price was a deemed loan from the assessee to the holding company for which the assessee ought to have received 13.5% interest. He accordingly computed the adjustment for the shares premium at Rs. 1308 crore and the interest thereon at Rs. 88 crore. The AO passed a draft assessment order u/s 144C(1) in which he held that he was bound u/s 92-CA(4) with the TPO's determination and could not consider the contention whether the transfer pricing provisions applied. The assessee filed a Writ Petition challenging the jurisdiction of the TPO/AO to make the adjustment. On the merits of the adjustment, the assessee filed objections before the DRP. Before the High Court the assessee argued that (i) it was a precondition before the transfer pricing provisions apply that there has to be income arising to the assessee. As the allotment of shares at a premium does not give rise to income, the transfer pricing provisions do not apply, (ii) there was a breach of natural justice because neither the TPO nor the AO had heard the assessee on, or decided, the fundamental issue as to whether the transfer pricing provisions applied at all, (iii) the DRP does not offer an alternative remedy because the DRP has no power to quash the draft assessment order even if it is satisfied that the same is without jurisdiction & (iv) the DRP cannot take an unbiased view because one of its members is the DIT (TP). HELD by the High Court:

(i) The assessee's contention that the DRP does not offer an alternative remedy because it does not have the power to quash the assessment order even if it is satisfied that the same is without jurisdiction is not acceptable because in Vodafone 37 taxmann.com 250 it was held that the DRP's power to confirm would include the power not to confirm and to annul the draft assessment order;
(ii) It is clear from s. 92(1) that there must be income arising/ potentially arising by an international transaction for the application of the transfer pricing provisions. This is a jurisdictional requirement and has to be dealt with by the AO when specifically raised by the assessee before

making reference to the AO. Grant of personal hearing before referring the matter to the TPO has to be read into s. 92CA(1) in cases where the very jurisdiction to tax under Chapter X is challenged by the assessee (*Veer Gems v. Asst. CIT (2013) 351 ITR 35 (Guj)* disagreed with to the extent it holds that no hearing is required at the stage of reference to the TPO even on jurisdictional issues). If, after the hearing the assessee, the AO holds that there is an international transaction, that would be binding on the TPO;

(iii) The department's contention, based on CBDT Instruction No.3 dated 20-5-2003, that the action of the AO in referring the international transaction is a mere administrative act is not acceptable. The AO is bound to hear the assessee in respect of jurisdictional issues before making the reference. The failure to do so is an illegality;

(iv) The assessee's contention that the DRP would not give a fair hearing as one of its members is the DIT (TP) is not acceptable because it overlooks the fact that these are not appeal proceedings but to finalize the draft assessment order. Also, the DIT(TP) who approved the TPO's order is not on the panel;

(v) The Revenue should keep in mind the sage advice of Nani Palkhivala that the department should not cause misery and harassment to the taxpayer and the gnawing feeling that he is made the victim of palpable injustice. In this case it would be natural for the assessee to feel harassed as neither the AO nor the TPO gave a hearing or dealt with the preliminary objection. It is hoped that the revenue will be more sensitive to the just demands of the assessee and not treat the assessee as an adversary who has to be taxed, no matter what;

(vi) The DRP should decide the assessee's objection regarding chargeability of alleged shortfall in share premium as a preliminary issue. In case the DRP's decision on the preliminary issue is adverse, the assessee shall be entitled to challenge it in a writ petition if it can show that the DRP's decision on the preliminary issue is patently illegal notwithstanding the availability of alternate remedy before the ITAT.(W.P. No. 1877 of 2013, Dt. 29-11-2013)

Vodafone India services Pvt. Ltd. (No.2) v. UOI (2013) 96 DTR 193 / (2014) 264 CTR 30 (Bom.)(HC).

S.92C : Transfer pricing – Arm's length price – TNMM under Rule 10B(1)(e) contemplates ALP determination with reference to the relevant factors (cost, assets, sales etc.) of the assessee and not those of the AE or third party. Assessee's study report cannot be discarded without showing how it is wrong. Finding that assessee is a risk bearing entity should be based on tangible material. [S.92CA]

The assessee, a wholly owned subsidiary in India of Li & Fung (South Asia) Ltd., Mauritius, was set up as a captive offshore sourcing provider. It entered into an agreement with Li & Fung (Trading), Hong Kong, an associated enterprise, for rendering "sourcing support services" for the supply of high volume & time sensitive consumer goods. The assessee was entitled to receive cost plus a markup of 5% for the services rendered to the AE. The assessee claimed that it was a low risk captive sourcing service provider performing limited functions with minimal risk. It adopted the TNMM and computed the PLI at operating profit margin/total cost. Since the operating profit margin at 5.17% exceeded the weighted average operating margin of 26 other comparable companies, the assessee claimed that its remuneration was at arm's length. The TPO did not dispute the TNMM or the comparables but held that the assessee ought to have received 5% on the FOB value of the goods sourced through the assessee (i.e. the exports made by the Indian manufacturers to overseas third party customers). He also held that the assessee was a risk bearing entity and an independent entrepreneur and it could not be said that the assessee is a risk-free entity. The DRP upheld the TPO's order though it reduced the mark up to 3% of FOB value of exports. On appeal by the assessee, the Tribunal {*Li & Fung (India) Ltd. v. Dy. CIT (2012) 143 TTJ 201(Delhi)*} upheld the stand of the TPO. On further appeal by the assessee HELD by the High Court reversing the Tribunal:

(i) The assessee's compensation model is based on functions performed by it and the operating costs incurred by it and not on the cost of goods sourced from third party vendors in India.

Allotting a margin of the value of goods sourced by third party customers from Indian exporters/vendors to compute the assessee's profit is unjustified. To apply the TNMM, the assessee's net profit margin realized from international transactions had to be calculated only with reference to cost incurred by it, and not by any other entity, either third party vendors or the AE. Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's net profit margin for application of the TNMM. Rule 10B(1)(e) contemplates a determination of ALP with reference to the relevant factors (cost, assets, sales etc.) of the enterprise in question, i.e. the assessee, as opposed to the AE or any third party. The approach of the TPO in essence imputes notional adjustment/income in the assessee's hands on the basis of a fixed percentage of the FOB value of export made by unrelated party venders;

(ii) The finding that the assessee assumed substantial risk is not based on any material. The assessee made no investment in the plant, inventory, working capital, etc., nor did it bear the enterprise risk for manufacture and export of garments. It merely rendered support services in relation to the exports which were manufactured independently. Thus, attributing the costs of such third party manufacture when the assessee did not engage in that activity and when those costs were clearly not the assessee's costs, but those of third parties, is clearly impermissible. A contrary conclusion would amount to treating the assessee as the vendor/ exporters' partner in their manufacturing business – a completely unwarranted inference;

(iii) Tax authorities should base their conclusions that the assessee bears "significant" risks on specific facts, and not on vague generalities, such as "significant risk", "functional risk", "enterprise risk" etc. without any material on record to establish such findings. If such findings are warranted, they should be supported by demonstrable reason, based on objective facts and the relative evaluation of their weight and significance;

(iv) Also, as the TPO did not discard the exercise conducted by the assessee of comparing its operating profit margin with that of the comparable companies, and it was not shown that the profit margin and cost plus model adopted by the assessee was distorted, he could not have proceeded to his own determination and calculations. The TPO must first reject the assessment carried out by the assessee before making further alterations. Where all elements of a proper TNMM are detailed and disclosed in the assessee's study reports, care should be taken by the tax administrators and authorities to analyze them in detail and then proceed to record reasons why some or all of them are unacceptable.(AY. 2006-07)(ITA No. 306/2012, dt. 16-12-2013)

Li And Fung India Pvt. Ltd. v. CIT (2014) 97 DTR 70 / (2014) 361 ITR 85 (Delhi)(HC)

S.92C : Transfer pricing – Computation of Arm's Length price – Adjustment of ALP – Captive unit-no adjustment of ALP was permitted

Assessee being a Captive unit of a parent company and having assumed only limited risk as compared to parent company with its varied OP/TC ratio, no adjustment of ALP was permitted.

CIT v. Agnity India Technologies (P) Ltd. (2013) 262 CTR 291 (Delhi)(HC)

S.92C :Transfer pricing – Arm's length price – S.147 – Reassessment – Re-opening bad in law in absence of any material to discard the ALP determined by the assesse.[S.147]

The AO reopened the assessment for the reason that as per Form No. 3CEB filed alongwith the return the assessee had international transactions with its Associated Enterprise ('AE') and determination of arm's length price ('ALP') in relation thereto was required. The AO made reference to the TPO who made an adjustment in the ALP and consequently AO made the addition to the declared income of the assessee. The Tribunal observed that on going through the purported reasons it was apparent that the AO allegedly had reason to believe that income of Rs.1.33 crores had escaped assessment and this income comprised of two components, i.e. Rs. 11 lakhs in respect of the claim of loss on account of foreign exchange fluctuation and an amount of Rs. 1.22 crores on account of claim of expenses under the head 'data usage charges'. In the Assessment Order made by the AO no addition had been made

on account of foreign exchange fluctuation loss. However, with regard to the data usage charges 25% of the same had been initially disallowed, but the same had been deleted by the Disputes Resolution Panel. Therefore, no addition on the basis of the reasons recorded for reopening the completed assessment survived. Accordingly, the Tribunal cancelled the addition made by the AO.
On appeal by the department, the High Court held that the methodology for computation of ALP is prescribed u/s. 92C which the assessee has clearly followed and computed the ALP by net margin method. If the AO was not satisfied with the ALP, then during original assessment he should have referred the matter to the TPO and given the assessee an opportunity to be heard. There was no tangible material whatsoever before the AO when the purported reasons were recorded to indicate that the ALP determined by the assessee was not correct. Therefore, the alleged reason for determination of the ALP, as given in the reasons for reopening the assessment, was not a reason at all. Accordingly, the High Court dismissed the departmental appeal. (AY. 2006-07)
CIT v. Cheil Communication India (P.) Ltd. (2013) 354 ITR 549 / 217 Taxman 275 / 87DTR 224 / 259 CTR 296 (Delhi)(HC)

S.92C : Transfer pricing – Arm's length price – Installation/commissioning and maintenance services to domestic customers-All related transactions cannot be considered for PLI determination [S.92B(2)]
The assessee's parent company, Digital Microwave Corporation USA, supplied equipment to Indian customers for which the assessee received commission. The said equipment was covered by warranty and the service relating thereto was provided by the assessee. The assessee also undertook installation of the said equipment and provided annual maintenance. The assessee claimed that while the receipt of commission and the provision of warranty service were "international transactions" with the AE and subject to transfer pricing regulations, the installation & maintenance service was an independent transaction and could not be considered while computing the PLI for determining the ALP. The TPO rejected the claim and held that in computing the profit level indicator of the international transactions involving warranty services and commission income, the operating revenue and operating costs of the installation/commissioning and maintenance services had to be taken. The CIT(A) & Tribunal upheld the assessee's claim. On appeal by the department to the High Court, HELD dismissing the appeal:
The department's argument that the installation, commissioning & maintenance services were intricately connected with the international transactions of warranty support services and commission income and that their operating cost and operating revenue had to be considered while computing the profit level indicator is not acceptable because the installation/ commissioning and maintenance agreements were independent agreements unconnected with the transactions of warranty support services and commission income. This is shown by the fact that while the equipment was supplied to 40 customers by the AE, only three of them availed of the installation services from the assessee. Also, a corroborative circumstance for construing the transactions of installation/commissioning and maintenance as domestic transactions was that the TPO had made no adjustment in respect of these transactions. The transactions pertaining to the installation/commissioning and maintenance services were also not deemed international transactions u/s 92B(2) because none of the conditions stipulated therein of a prior agreement existing between the customers of the assessee and the AE have been established as a fact. Moreover, there is no finding that the terms of the transaction of installation/commissioning as well as maintenance had been determined in substance between the customers and the assessee by the AE. In the absence of such finding, it cannot be deemed that the transaction of installation/commissioning as well as provision of maintenance services by the assessee to its domestic customers in India were international transactions falling within s. 92B(2).
CIT v. Stratex Net Works (India) Pvt. Ltd. (2013) 354 ITR 304 / 215 Taxman 533 / 259 CTR 512 (Delhi)(HC)

S.92C : Transfer pricing – In computing arm's length price, interest & abnormal costs to be excluded

The assessee rendered marketing support services to its foreign AE for which it earned a commission. The assessee claimed that in determining the ALP, the interest earned by it on short-term deposits arose from a core treasury function and had to be included in the operating profit and the expenses incurred by it on closure of business were 'abnormal' and had to be excluded from the operating profit. The TPO, CIT(A) and Tribunal (144 TTJ 474) rejected the assessee's contention. On appeal by the assessee to the High Court, HELD:

(i) The question whether a particular activity of the assessee such as the interest generating activity should be taken into consideration in the determination of the ALP is a question which needs to be decided considering the nature of the business of the assessee and its' "business model". The Tribunal rightly held that as the earning of interest income was only the result of investment of surplus funds and was not a primary income-generating activity, the interest income had to be excluded from the "operating profit" for purposes of determination of ALP;

(ii) It is not possible to lay down a formula that would be applicable universally to determine whether a particular expenditure or cost incurred by the assessee is a normal or abnormal item of expense in cases relating to transfer pricing. If the assessee is compensated for its service on the basis of cost plus 10%, the question may arise as to whether the compensation paid for closure of the Indian units can be considered to be normal or abnormal cost, because the compensation would directly depend or vary according to the quantum of the costs. But if the assessee is being compensated by a fee or commission which has no connection with the costs incurred, such costs would be treated as abnormal. On facts, as the assessee was being compensated by way of a commission of fees by the AE and not on cost plus basis, the compensation paid in connection with the closure of the Indian units represents abnormal costs which have to be excluded for determining the ALP. (AY. 2002-03, 2003-04)

Marubeni India Pvt. Ltd. v. DIT (2013) 354 ITR 638 / 259 CTR 169 / 87 DTR 281 / 215 Taxman 122(Mag.)(Delhi)(HC)
Editorial:Marubeni India P. Ltd v. ADDL.CIT (2012) 15 ITR 297 (Delhi)(Trib), is affirmed.

S.92C : Transfer pricing – Arm's length price Selection of comparable – Eight comparables selected by TPO not being comparable,Tribunal was justified in rejecting them and consequently allowing safe harbor margin of +/-5 percent – Revenues appeal was dismissed [S.92C(2)]
Transfer Pricing Officer rejected all comparables except one comparable chosen by the assessee and selected 8 more comparables. Tribunal held that 8 comparble selected by the TPO were not comparable to the assessee company. On appeal by revenue the Court held that comparables selected by the TPO were not functionally comparable to the assessee , then no question of law arises. Appeal of revenue was dismissed.(AY. 2007-08)
CIT v. Carlyle India Advisors (P) Ltd. (2013) 357 ITR 584 / 32 taxmann.com 23 / 214 Taxman 492 / 93 DTR 359 / 262 CTR 432 (Bom.)(HC)
Editorial: Carlyle India Advisors P.Ltd v. ACIT (2012) 17 ITR 24 (Mum)(Trib) is affirmed.

S.92C : Transfer pricing – Arm's length price – Cost plus method
For the relevant assessment year the Transfer Pricing Officer did not accept CPM as most appropriate method and instead chose Transaction Net Margin Method (TNMM) to compute the arm's length price of the international transaction. In subsequent years the Assessing Officer had accepted CPM as most appropriate method and computed the arm's length price. In appeal Commissioner (Appeals) up held that CPM was correctly chosen as the most appropriate method. The appeal of revenue was dismissed by Tribunal. On appeal to High Court by revenue the Court held that the Tribunal was right in accepting the Cost plus method adopted by assessee. The Court held that the revenue could not prove that the facts in subsequent years were materially different. Appeal of revenue was dismissed.(AY.2002-03) (TS-58-HC-2013 (Bom.-TP)
CIT v. L'Oreal India Pvt. Ltd. (2013) The Chamber's Journal – May P. 103 (Bom.)(HC)

S.92C : Transfer pricing – Selection of comparables – Arm's length price – If more than one price is determined by the most appropriate method, the ALP has to be the arithmetical mean of such prices

The assessee was engaged in providing "software development support services" by which it developed software upon the instructions of its parent associated enterprise (IKOS Systems Inc). The entire software developed by the assessee was used by the parent AE captively for integrating the same with other software components developed by it. The assessee adopted the TNMM and claimed that its transactions were at ALP. The TPO rejected the assessee's comparables on general grounds and selected his own comparables and used figures for a subsequent year. He determined the ALP at a much higher figure and made an adjustment. On appeal by the assessee, the Tribunal [*ACIT v. Adani Export Ltd. (2007)109 ITD 101*] held that the criteria adopted by the TPO for searching comparables was not correct. It held that the TPO was wrong in selecting his own comparables without first rejecting the assessee's comparables. It also held that where one of the prices determined by the most appropriate method is less than the price as indicated by the assessee, that may be selected and there would be no need to adopt the process of taking the arithmetical mean of all the prices arrived at through the employment of the most appropriate method. On appeal by the department to the High Court, HELD:

The Tribunal was wrong in holding that if one profit level indicator of a comparable, out of a set of comparables, is lower than the profit level indicator of the taxpayer, then the transaction reported by the taxpayer is at an arm's length price and there is no need to take the arithmetical mean. The proviso to s. 92C(2) is explicit that where more than one price is determined by most appropriate method, the arm's length price shall be taken to be the arithmetical mean of such prices. The Tribunal was also wrong in the finding that unless and until the comparables drawn by the taxpayer were rejected, a fresh search by the TPO could not be conducted because s. 92C (3) which stipulates four situations where under the AO/ TPO may proceed to determine the ALP in relation to an international transaction. If any one of those four conditions is satisfied, it would be open to the AO/ TPO to proceed to determine the ALP price. Also, the question of applying OECD guidelines does not arise at all because there are specific provisions of Rule 10B(2) & (3) and the first proviso to s. 92C(2) which apply. The Tribunal was also not right in reducing the list of comparables to merely four. Having held that the comparables given by the assessee were to be accepted and those searched by the TPO were to be rejected, the only option then left to the Tribunal was to derive the arithmetical mean of the profit level indicators of the comparables which were accepted by it. It erred in selecting only one profit level indicator out of a set of profit level indicators. However, on facts, this makes no difference because even if the arithmetical mean of the comparables as accepted by the Tribunal are taken into account, the profit level indicator would be less than 6.99 % which is the profit level indicator of the assessee. Matter seta side partly.(AY.2002-03)

CIT v. Mentor Graphics (Noida) Pvt. Ltd. (2013) 354 ITR 586 / 86 DTR 283 / 259 CTR 1 / 215 Taxman 539 (Delhi)(HC)

Editorial: Mentor Graphics (Noida)(P) Ltd. v. Dy. CIT (2007) 112 TTJ 408 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm' length price – Interest

Assessee had advanced loan to its US subsidiary and charged interest of 4.29 percent per annum. TPO has made adjustment of rate of interest adopting at 14 percent per annum as comparable under "CUP" method. DRP gave partial relief adopting at 7. 247 percent (US inter-bank offered rate of 5.2476 percent + 2 percent). On appeal Tribunal held that reasonable rate would be Libour of 4.17 percent + 2 percent and AO was directed to adopt the same. Differential interest to be levied should be calculated for relevant period only instead of entire period of one year.(AY. 2006-07)

Infotech Enterprises Ltd. v. Addl. CIT (2014) 63 SOT 23 (Hyd.)(Trib.)

S.92C : Transfer pricing – Rejection of comparables – Non-availability of data in public domain [R. 10B(4)]

Rejection of comparables was held to be justified on the ground of non-availability of data in public domain. (AY. 2004-2005)

Michael Aram Exports P. Ltd. v. ITO (2013) 27 ITR 528 (Delhi)(Trib.)

S.92C : Transfer pricing – Advertisement, Marketing and Sales promotion expenses constituted international transaction – Where compensation for such higher service was embedded in pricing arrangement of contract goods itself and price charged was adequate to ensure recovery of total costs as well as earning of representative profits, no transfer pricing adjustment was required. [S.92B]

The assessee company wholly owned by a subsidiary of BMW, Germany and engaged in manufacturing, training, marketing and distribution of motor vehicles and related spare parts and accessories. Considering the TP study documentation of the assessee, the TPO show caused the assessee as to why it had not been compensated by its AE for its brand promotion activities which resulted in creating marketing intangibles for its AE, the assessee's contention, that there was no international transaction in incurring AMP expenditure, were not agreed to by the TPO, who was of the view that judicial mandate was that 'form' should prevail over 'substance'; and by incurring expenditure over and above the bright line, the assessee had incurred expenses which were non-routine expenditure far beyond the requirements of a normal distributor, which had resulted in the brand promotion of the AE who was the legal owner of the brand. Consequently, the brand had gained value. Accordingly, he held that for the services rendered by the assessee, it should have been compensated and a mark-up on the costs incurred should also have been received.

The Transfer Pricing Officer (TPO) made adjustment accordingly. In appeal proceedings the Dispute Resolution Panel concurred with the findings of the TPO and it directed the TPO to exclude from the AMP calculation, amounts pertaining to after sales support costs and salesman bonus etc. from AMP cost bundle. On appeal Tribunal held that as per importation agreement between assessee and its foreign associate enterprises, assessee had performed greater intensity of service than a normal distributor, by also performing functions of advertisement, it contributed to brand building for its associated enterprise, and constituted an international transaction. However where compensation for such higher service was embedded in pricing arrangement of contract goods itself and price charged was adequate to ensure recovery of total costs as well as earning of representative profits, no transfer pricing adjustment was required. (AY. 2008-09)

BMW India (P.) Ltd. v. ACIT (2013) 28 ITR 716 / 37 taxmann.com 319 / (2014) 146 ITD 165 (Delhi)(Trib.)

S.92C : Transfer pricing – Arms length price – Payment of non compete fees – Estimation of control premium-CUP method [S.28 (va), Rule 10B of I.T. Rules]

The assessee alongwith one RA Group held shares in an Indian Company which were sold to a foreign JV of the holding foreign company of the assessee. Both RA & assessees signed a non-compete agreement. RA Group was paid non-compete fees; however, the assessee was not so paid. The TPO estimated non-compete fees at the same rate as paid to RA Group using the internal comparable uncontrollable price (CUP) method.

On the assessee's appeal to the DRP, it was held that the assessee having a controlling stake must be paid non-compete fees. The Tribunal held no infirmity in the order of the A.O.

The assessee had transferred controlling shareholding of 50.97% to the J.V. but no payment was made for controlling premium. The TPO held the adjustment at the rate of 25%. The assessee raised objections before the DRP which did not accept the contentions raised and on appeal to the Tribunal, held control premium estimated by TPO at the rate of 25 per cent of share price adopting CUP method would be proper. (AY. 2008-09)

Lanxess India P. Ltd. v. Addl. CIT (2013) 145 ITD 53 / 94 DTR 314 / (2014) 159 TTJ 443 (Mum)(Trib.)

S.92C : Transfer pricing – Arms length – Comparables and adjustments
The assessee a company manufacturing and selling of SIM cards in India and abroad. The TPO made Transfer Pricing adjustments after excluding some comparables while introducing new ones. The DRP confirmed the order of the TPO. On appeal to the Tribunal held:
A company cannot be excluded as a comparable solely because it is a high profit making unit. A persistently loss making company cannot be considered as a comparable. The comparability of an uncontrolled and unrelated transaction with international transaction has to be tested by using current year data, and only when current year data does not give a true picture of results of comparable due to some abnormal circumstances, multiyear data can be considered. Similarly, transfer pricing adjustment must be restricted only to income from international transaction and not to income of assessee at entity level. Transfer Pricing adjustment can be made irrespective of fact that assessee' associate enterprise suffered losses, as assessee is tested party and not its associate enterprise. (AY. 2008-09)
Syscom Corporation Ltd. v. ACIT (2013) 145 ITD 34 / (2014) 98 DTR 45 (Mum.)(Trib.)

S.92C : Transfer pricing – Computation of Arm's length Price – Comparables and Adjustments – When only one comparable
The assessee, a manufacturer and dealer of basic liquid and solid resins as well as formulations and exported finished goods to its AE's. It was held by the Tribunal in favour of revenue that where only one comparable is available, for purpose of comparability analysis in order to determine ALP, benefit of +/- 5 per cent adjustment as per proviso to section 92C (2) would not be available to assessee. (AY. 2005-06)
Dy. CIT v. Petro Araldite (P.) Ltd. (2013) 145 ITD 182 (Mum.)(Trib.)

S.92C : Transfer pricing – Computation of Arms length Price – Profit margin of comparables – Value of international transactions.
The assessee, a manufacturer and dealer of basic liquid and solid resins as well as formulations and exported finished goods to its AE's. It was held by the Tribunal in assessee's favour, that profit margin of comparables should be applied only to value of international transactions of assessee with its AE's to determine ALP of the said transactions and TP adjustment has to be worked out on the basis of ALP so determined. (AY. 2005-06)
Dy. CIT v. Petro Araldite (P.) Ltd. (2013) 145 ITD 182 (Mum.)(Trib.)

S.92C : Transfer pricing – Computation of Arm's length Price – Comparables and adjustments.
The assessee, a manufacturer and dealer of basic liquid and solid resins as well as formulations and exported finished goods to its AE's. The assessee had selected two comparables and claimed that PLI of comparables being at 8.04 per cent against assessee's at 12.55 per cent, no T.P. adjustment was required. The TPO rejected one comparable of assessee and selected three more comparable. The Tribunal held in assessee's favour, that since one comparable of T.P.O was having related party transactions and remaining two were functionally different from assessee, they should be rejected from list of comparables. (AY. 2005-06)
Dy. CIT v. Petro Araldite (P.) Ltd. (2013) 145 ITD 182 (Mum.)(Trib.)

S.92C : Transfer pricing – Computation of Arms length Price – Comparables and Adjustments – Difference in capacity utilisation – Affects profit margin
The assessee, a manufacturer and dealer of basic liquid and solid resins as well as formulations and exported finished goods to its AE's. The Tribunal held difference in capital utilization at level of

assessee and at level of comparables affects profit margin; hence adjustment is to made to profit margins of comparables. Depreciation cannot be excluded for purpose of computing O.P. There was difference in capacity utilisation of assessee and comparables. The Assessee claimed that profit margin was to be taken before excluding depreciation. T.P.O. included depreciation to work out total operating cost and after deducting same from total sales, he worked out O.P. to sales at 8.63 per cent. However, CIT(A) upheld assessee's stand. The Tribunal held depreciation for computing operating profit was to be included and the A.O. was directed to make adjustment on account of difference in capacity utilisation after verifying stand of assessee. (AY. 2005-06)
Dy. CIT v. Petro Araldite (P.) Ltd. (2013) 145 ITD 182 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments
The assessee gave foreign currency loan to its associated enterprise at 6 per cent. The TPO took 5 year bond rates for TPO adjustment under CUP Method. The Tribunal in favour of assessee held for benchmarking lending in foreign currency, interbank rate should be taken instead of domestic prime lending rates further where it could not be proved that assessee had incurred interest on funds advanced to AE, it could not be held that borrowed funds were source of loans, merely because some interest had been paid by assessee in immediately preceding year. (AY. 2008-09)
Hinduja Global Solutions Ltd. v. Addl. CIT (2013) 145 ITD 361 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's Length price – Safe Harbour Rules
The CIT(A) has granted relief to assessee for 5 percent of margin of international transactions as standard deduction. Revenue resisted contending it was not a standard deduction. Meanwhile a retrospective amendment had been made in Section 92 C which provided that if the TP adjustment exceeded Safe Harbour of 5 Per cent, then assessee would not be entitled to claim that relief as Standard deduction. The Tribunal held since amendment was not available if CIT(A) passed order, as per rules of natural justice, it would be appropriate to restore matter back to file of CIT(A) for re-adjudication. (AY. 2007-08)
ITO v. Jazzy Creations (P.) Ltd. (2013) 145 ITD 384 (Mum.)(Trib.)

S.92C : Transfer pricing – Computation – Arm's Length Price – Comparables and Adjustments – Safe Harbour Rules – TNM Method
The Assessee entered into various international transactions such as rendering of technical services. Assessee benchmarked its International transactions using TNMM with PL1 as operating Profit to operating revenue. To prove transactions were carried out at ALP, assessee submitted audited segmental accounts in respect of its AE and Non AE. TPO found that it was not clarified as to whether material/services taken from AE's were utilized for Non AE's jobs. In absence of information, not clear whether AE or Non AE segmental accounts as submitted by assessee were actually insulated, TPO concluded it were not reliable and rejected the same. TPO having adopted PLI at entity level made certain adjustment to assessee's ALP. The Tribunal held that entire work of assessee depended on man hours and it was maintaining a system known as TMA which generated monthly reports for purpose of tracking man hours. Assessee gave details regarding man hours utilized by it for purpose of each project and on basis of such system assessee had prepared segmental accounts. It was undisputed that results declared by assessee on segmental basis if accepted then difference between ALP determined by TPO in respect of AE transactions and ALP charged by the assessee was less than 5 per cent. The benefit of proviso to section 92C(2) was available to assessee and therefore impugned addition made by authorities below was to be deleted. (AY. 2008-09)
Tecnimont ICB (P.) Ltd. v. Dy. CIT (2013) 145 ITD 388 / 95 DTR 57 / 158 TTJ 186 (Mum.)(Trib.)

S.92C : Transfer pricing – Computation of Arm's length price – Comparables and Adjustments
The assessee company was engaged in providing software development services. It entered into international transactions with its AE. In T.P. proceedings, TPO on basis of some new comparables

made an adjustment of Rs. 2.45 Crore to ALP determined by assessee. It was noted that one of comparable selected by TPO had related party transactions in excess of 25 per cent and the same was excluded, another comparable was excluded on grounds of higher turnover filter and the other comparable was not functionally comparable. The Tribunal held that after excluding the above three comparables, margin earned by the assessee came within +/- 5 per cent safe harbour provided under proviso to Sec. 92C(2), impugned adjustment made by TPO was set aside. (AY. 2006-07).
Bind view India (P.) Ltd. v. Dy. CIT (2013) 145 ITD 436 (Pune)(Trib.)

S.92C : Transfer pricing – Computation of Arm's length price – Comparables and adjustments – Number of years of data to be considered [Rule 10B (4)]
In view of proviso to Rule 10B(4), where data of more than two years prior to such financial year is to be considered, it is required to be demonstrated that such data reveals facts which could have an influence on determination of transfer price in relation to transactions being compared. (AY. 2006-07)
Bind view India (P.) Ltd. v. Dy. CIT (2013) 145 ITD 436 (Pune)(Trib.)

S.92C : Transfer pricing – Computation of Arm's length price – Comparables and adjustments
The Assessee provided ITES to its AE and claimed its transaction to be at arm's length. TPO selected 23 comparables and made adjustments. Assessee claimed that its margin would be within safe harbour of +/- 5 per cent, requiring no adjustment. The Tribunal held where assessee carried out its own activities, company which outsourced its activities could not be taken as comparable. Where profit of a company taken as comparable was claimed to have been not calculated properly, matter was to be remanded. Segmental profits of company were required to be considered to facilitate comparison. (AY. 2008-09)
Nomura Fin Services (India) (P.) Ltd. v. ACIT (2013) 145 ITD 424 (Mum.)(Trib.)

S.92C : Transfer pricing – Computation – Arm's Length Price – Comparables and Adjustments – TNMM
The assessee, a wholly owned subsidiary of GB International, B. V. Netherlands, engaged in processing of intermediaries and Bulk drugs. Basic raw material penicillin (Pen G) was imported from 'D' Netherland and 'Z' China. Assessee adopted TNMM for T.P. analysis with Operating Profit/Sales ratio as PLI. It selected companied engaged in manufacturing of Drug intermediaries and bulk drugs and certain filters were used for rejecting non-comparables Arithmetic mean of operating profit margins earned by those comparable companies was (-) 105.91 per cent whereas assessee had earned operating profit margin (-) 7.3 per cent and hence was claimed to be at arm's length. In T.P. proceedings, basic filter applied by TPO was that only those companies using 'Pen-G' as raw material were to be selected. Some of assessee's comparables were rejected and TPO included some new. On basis of new list of comparables, average ratio of operating profit/sale was computed at 0.17 per cent. The Tribunal held, companies selected should be functionally comparable and not identical. TPO was not justified in rejecting two comparables selected by the assessee merely on basis of low percentage of PEN-G as raw material and an entity with whom related party transactions do not exceed 25 per cent of total revenue has to be regarded as an uncontrolled entity. Applying above said filter to facts TPO was justified in selecting one comparable with related party transactions of 21.77 per cent to sales. The matter was remanded back. (AYs. 2005-06 and 2006-07)
DSM Anti Infectives India Ltd. v. Dy. CIT (2013) 145 ITD 454 (Chandigarh)(Trib.)

S.92C : Transfer pricing – Computation of arms length price – Comparables and adjustments [Rule 10B]
The Tribunal held remanding the matter that unless and until there are specific reasons and factors as provided under rule 10B, an entity cannot be excluded from list of comparables solely on basis of high profit/ loss making entity, because no such factor finds place either in Rule 10B(2) or Rule

10B(3). The Profit or Loss arising from forward contracts entered for hedging of foreign currency exposure on underlining trade receivable or payable has to be treated as part and parcel of operating profit while determining ALP. Transfer Pricing adjustment is required to be made only in respect of transactions between assessee and AE. (AY. 2008-09)
Rusabh Diamonds v. ACIT (2013) 145 ITD 499 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Contract manufacturer – Sales made to AE's and non-AE's at same rate-No adjustment was required to be made
Where there was no assurance to assessee-company that its entire production will be purchased, and only a small portion of assessee's total sales were made to its AEs, it could not be termed as contract manufacturer. Where assessee paid royalty to its parent-company at same rate on sales made to both AEs and non-AEs, and there was nothing to show that transfer price of goods included royalty as price of intangibles, no transfer pricing adjustment was required. (AY. 2007-08)
Samsung India Electronics (P.) Ltd. v. ACIT (2013) 59 SOT 261 / 158 TTJ 201 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – CUP method – Comparison with actual figures – It cannot be solely be based on the List prices of unassociated enterprises
For making a comparative study under CUP method, what is required is a comparison with actual sale and purchase with unassociated enterprise or transaction between unassociated enterprises; it cannot solely be based on list prices of unassociated enterprise, which at best can be considered only as a reference point. When an Associated Enterprise sold items to assessee at very same price at which AE had purchased from a non-AE, there cannot be any question of under-pricing or over-pricing.(AY. 2006-07)
Redington (India) Ltd. v. ACIT (2013) 59 SOT 152 (URO) (Chennai)(Trib.)

S.92C : Transfer pricing – Arm's length price – Where internal comparables are available, the TPO has no mandate to have recourse to external comparables
Where internal comparables are available for computing arm's length price, Transfer Pricing Officer has no mandate to have recourse to external comparables. Where assessee had benchmarked international transactions with AE by making internal comparison with its international transactions with unrelated parties, rejection of same by Transfer Pricing Officer was not sustainable, on basis of assessee's own case for preceding two assessment years.(AY. 2008-09)
Birla Soft (India) Ltd. v. DCIT (2013) 59 SOT 156 (URO) (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables with high controlled/related party transactions – Inclusion/exclusion
TPO was to be directed to exclude, after due verification, those comparables from list having related party transactions or controlled transactions in excess of 15% of total revenue for relevant financial year. In view of above, impugned adjustment was to be set aside and, matter was to be remanded back for disposal afresh. (AY. 2007-08)
Delmia Solutions (P.) Ltd. v. DCIT (2013) 59 SOT 151 (URO) (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Contract of manufacturing – Payment as per agreement
Since the impugned royalty was payable as per agreement for using technical know-how on value added price which was worked out separately, it constituted a payment for business purpose. Therefore, impugned addition made by TPO on the ground that it was a case of contract manufacturing, no royalty was payable and the ALP was nil, was to be set aside.
Where in course of transfer pricing proceedings, TPO was required to determine arm's length price of royalty payment and then recommend adjustment, he exceeded his jurisdiction in making

recommendation for disallowance of entire royalty payment on ground of no justification. (AY. 2007-08)
SC Enviro Agro India (P.) Ltd. v. DCIT (2013) 59 SOT 109(URO) (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments –Similarity of business
Company engaged in doing same business by itself but not those in functionally different line could be taken as a comparable.Where there were no details, matter regarding addition of indirect cost separately was to be referred back to Assessing Officer for further verification.Also, where interest expenditure was not actually incurred by assessee, same could not be included in cost base for purpose of calculating arm's length price, as for calculation of cost base only actual expenditure incurred is to be taken into consideration.(AY. 2002-03)
Pfizer Ltd. v. ACIT (2013) 59 SOT 111 (URO)(Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Selection of comparables – Factors to be considered
While selecting comparables to work out ALP of international transactions size of two companies and related economies of scale under which they operate are important factors in comparability. Therefore, companies having turnover exceeding Rs.200 crores and other companies which were functionally dissimilar to that of assessee were liable to be excluded from TPO's list of comparables. (AY. 2007-08)
Transwitch India (P.) Ltd. v. DCIT (2013) 59 SOT 119(URO) (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments – Peculiar nature of business – Matter remanded
On facts, held that the DRP had not considered peculiar nature of assessee's business and had compared same with recruitment agencies. The assessee thus objected to comparables given by TPO and approved by DRP. In view of assessee's submissions, impugned order of DRP was to be set aside and matter was to be remanded back for disposal afresh. (AY. 2007-08)
Genpact Mobility Services (India) (P.) Ltd. v. ACIT (2013) 59 SOT 118 (URO) (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Internet E-commerce and software development – Third part transactions
The assessee provided technology and operational support to its American holding company on various projects for shipping, chemical industry and software development services for building enterprise products. The TPO rejected the CUP analysis undertaken by assessee for computing ALP on ground of lack of strict comparability between uncontrolled transaction and assessee's international transactions and applied TNM method and made certain upward adjustment. Held on facts, the rates charged by assessee-company were identical to rates charged by third parties in same line of business for same job. Hence, the addition made by TPO was to be deleted. (AYs. 2003-04 to 2007-08)
ACIT v. Vistaar Systems (P.) Ltd. (2013) 59 SOT 114 (URO) (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments
The assessee, in its TP study chose ten comparables out of which the TPO rejected eight and relied on five fresh comparables. It was noted that Tribunal in case of another company engaged in providing similar pharmaceuticals research services to its AE, had held that five comparables selected by TPO were not proper comparables. Thus, those five comparables adopted in instant case were to be rejected. Also, one of comparables selected by assessee was held to be wrongly rejected taking a view that it was a continuous loss making company. (AY. 2007-08)
Apotex Research (P.) Ltd. v. DCIT (2013) 59 SOT 117(URO) (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – CUP method deals with price of product and not profit margin earned thereon [R. 10B of Income-tax Rules, 1962]
Where the Transfer Pricing Officer applied internal CUP method and took profit margin of internal comparable to make adjustment, application of CUP method was incorrect as it deals with prices of a product and not profit margin earned thereon.(AY. 2008-09)
Sabic Innovative Plastic India (P.) Ltd. v. DCIT (2013) 59 SOT 138 / 155 TTJ 537 (Ahd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – TNM Method – Matter remanded
Companies which incurred losses due to extraordinary factors and not during normal course of business, could not be taken as comparables. Also, the comparables selected should be functionally similar. Therefore, where assessee was a trading concern, manufacturing concerns could not be taken as comparables. Furthermore, transfer pricing adjustment is required to be computed only with respect to international transactions and not in respect of entire business transactions.(AY. 2007-08)
TCL Holdings (P.) Ltd. v. ACIT (2013) 59 SOT 68 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – TNM Method – Internal comparability Product Similarity – Brand promotion [S.92B]
The focus under the TNMM is on transactions rather than operating income of the enterprise as a whole. Once in a given case, there are similar nature of transactions and functions between controlled transactions with the related party and uncontrolled transactions with unrelated party, then internal comparability will result into more appropriate result of ALP, as it will require least amount of adjustments. Since product similarity has to be seen while applying CUP method and not TNM method, rejection of internal TNM method, simply on basis of distinction between alcoholic beverages, holding whisky and non-whisky as two different products, is wholly undesirable and not sustainable. Advertisement, marketing and sales promotion expenses incurred by assessee, resulting in brand promotion of foreign AE, is an international transaction as per section 92B, triggering transfer pricing mechanism. However, sales expenses not related to brand promotion, should be excluded while determining cost of international transactions in respect of AMP expenses. (AY. 2007-08)
Diageo India (P) Ltd. v. DCIT (2013) 59 SOT 150 / 28 ITR 242 / 157 TTJ 145 (Mum.)(Trib.)

S.92C : Transfer Pricing – Selection of comparables
The Tribunal remitted the matter back to the assessment stage for fresh adjudication on the basis that the assessee has selected only 20 comparables from 463 comparables and quantitative analysis based on it is not specified. The assessee should have subjected all the comparables selected by the Revenue to the same tests. (AY. 2008-09)
All Scripts India (P) Ltd. v. ACIT (2013) 157 TTJ 509 (Ahd.)(Trib.)

S.92C : Transfer pricing – Payment of royalty – Cannot be disallowed in the latter years on the basis of benefit test
Tribunal held that payment of royalty is at the same percentage as that paid by other auto ancillaries in the automotive industry and that being so the action of the TPO to make the disallowance mainly on the ground of the benefit test, is unsustainable in law. The Tribunal also held that the royalty has been claimed and allowed right from the year 1984 to A. Y. 2003-04 as business expenditure of the assessee it cannot be disallowed in the later years on the basis of the benefit test. (AY. 2008-09)
Lumax Industries Ltd. v. ACIT (2013) 157 TTJ 412 / 92 DTR 221 (Delhi)(Trib.)

S.92C : Transfer pricing – Natural justice – No opportunity was given to TPO – Violation of Rule 46A – Matter set aside to CIT(A) [R.46A]

In the present case the assessee was engaged in business of supply of telecommunication equipment and providing of telecommunication solutions to customers in India, entered into international transactions with Associate Enterprise. It used adjusted profit computed in relations to sales affected as appropriate PLI. TPO computed margins of comparable companies using operating profit by operating revenues as the PLI. TPO computed profits of comparable companies at (-) 8.47% as against that of assessee at (-) 12.18 percent and made addition. In an appeal assessee submitted that due consideration should be given for heavy start up costs incurred by assessee as against comparables travelling and conveyance, legal and professional charges and communication expenses accounted for 50% of administrative and other expenses. Assessee was asked to furnish further details in respect of expenses. Thus, failed to follow rules of natural justice, as there was apparent violation of Rule 46A in as much as no opportunity was provided to the TPO in this regard. The order of the CIT(A) was a non speaking order as it does not give reasons for making adjustments to the operating results of tested party i.e. assessee. In these circumstances, the matter was remitted to CIT(A) to consider the issue afresh, after giving adequate opportunity to TPO of being heard. (AY.2004-05)
Dy. CIT v. Marconi Tele Communication India (P) Ltd. (2013) 56 SOT 399 (Delhi)(Trib.)

S.92C : Transfer pricing – Transfer pricing – Computation of arm’s length price –Selection of comparables – Data of relevant financial year [10B(1)(e), 10B(4)]
Expression “shall” used in R.10B(4) makes it abundantly clear that the current year data of an uncontrolled transaction is to be used for the purpose of comparability while examining the international transaction with AE. However, proviso appended to the rule carves out an exception that the data relating to the period more than two years prior to such financial year may also be considered, if such data reveals facts which could have an influence on the determination of transfer price in relation to the transaction of comparison. Fluctuation in the operating margin per se cannot be such an exception. A comparable could not be excluded merely on the ground that it has shown super profit in the relevant year.
The functional operation of the comparable was not similar to that of the assessee. Therefore, it has been rightly excluded from the comparables.
One has to demonstrate the nature of risk likely to be faced in its line of business and the nature of risk faced by the comparables. If there is a significant difference, then the difference can be ironed out by making adjustment but on facts such difference has to be demonstrated in its transfer pricing study report. Assessee nowhere applied the risk adjustment filters in its analysis. No risk adjustment was allowed in arriving at the profit margins of the comparables on the basis that assessee being a captive service provider is a risk-free enterprise. (AY. 2007-08)
Qualcomm India(P) Ltd. v. Dy. CIT (2013) 87 DTR 259 / 155 TTJ 23 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm’s length price – ALP of royalty for trademark usage and technical know-how fee can be determined as per TNMM. Approval of RBI & Govt. means payment is as at arms length
The assessee entered into an agreement with its parent company, Cadbury Schweppes, pursuant to which it agreed to pay royalty for the use of trademarks and royalty for the use of technical know-how at 1.25% each of the net sales. This was approved by the RBI and the SIA (Government). The assessee adopted the Transaction Net Margin Method (“TNMM”) for computing the ALP of the international transactions by comparing the net margin of the company at entity level with that of companies engaged in food products, beverages and tobacco business. The TPO held that the transactions pertaining to payment of royalty for trademarks and technical know-how fee had to be separately and independently bench-marked using the Comparable Uncontrolled Prices (“CUP”) method. He held that the ALP of royalty and technical know-how fee should be computed at 1% of sales the instead of at 1.25% of the sales. This was reversed by the CIT(A) who held that the royalty and technical know-how fee paid by the assessee were at ALP. On appeal by the department to the Tribunal HELD dismissing the appeal:

The assessee has been paying royalty on technical know-how to its parent AE since 1993. Other group companies across the Globe are also paying the same royalty. Also, the payment is as per the approval given by the RBI and the SIA. Hence there cannot be any scope of doubt that the royalty payment on technical know-how is at arm's length. As regards the royalty on trademark usage, the assessee is in fact paying a lesser amount if the payment is compared with the payment towards trademark usage by other group companies using the brand "Cadbury" in other parts of the world. Accordingly, the royalty payment on trademark usage is also within the arms' length and does not call for any adjustment. The Department's request for a remand to the TPO to examine the AMP expenses in the light of Maruti Suzuki 328 ITR 210 (Del) (and *L. G. Electronics India (P) Ltd. v. Asstt.CIT (2013) 140 ITD 41 (Del)(SB))* rejected. (AY. 2002-03)
Cadbury India Ltd. v. ACIT(2013) (2014) 147 ITD 487 / 162 TTJ 352 / 102 DTR 1 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price-net profit margin of tested party (i.e. assessee) drawn from its financial accounts can be suitably adjusted to facilitate its comparison with other uncontrolled entities/transactions. [Rule 10B of the Income-tax Rules, 1962]
The assessee company was a subsidiary of MTS-Italy. In the Transfer pricing study undertaken by the assessee, the international transactions were benchmarked on the basis of the TNMM. For the purposes of comparability analysis, assessee computed its operating margin for the year under consideration after excluding fixed cost attributable to start-up phase and underutilized production capacity. The assessee's case was that in the initial year, assessee was not able to generate the required sales so as to recover the fixed costs incurred by it. The assessee was not able to utilize the production capacity to its optimum level during the year, as it was conducting negotiations to get purchase orders, studying the market price to understand the requirements of the market and planning its production accordingly. Therefore, in order to facilitate appropriate comparability analysis, assessee contended before the income-tax authorities that adjustments be made to the profit margin of the assessee on account of abnormal start-up costs and under capacity utilization being the initial year of operations. The TPO as well as the DRP did not accept the aforesaid stand of the assessee. The first point made out was that for the purpose of comparability analysis the adjustments that could be made were only those which were in accordance with Rule 10B(1)(e) of the Income-tax Rules, 1962, which is in respect of the TNMM. As per the revenue in terms of rule 10B(1)(e) of the Rules, the adjustments were permissible only with respect to the net profit margin of the comparable uncontrolled transactions and not with regard to the net profit margin of the tested party i.e. the assessee. For the aforesaid reason, the adjustments sought by the assessee on account of low capacity utilisation and abnormal start-up costs were denied. Accordingly, certain adjustment was made to ALP determined by assessee and the same was confirmed by the DRP. The Tribunal held that in terms of sub-clause (i) of Rule 10B(1)(e) of 1962 Rules, net profit margin of tested party [i.e. assessee] drawn from its financial accounts can be suitably adjusted to facilitate its comparison with other uncontrolled entities/transactions. (AY. 2006-07)
Ariston thermo India Ltd. v. Dy. CIT (2013) 92 DTR 318 / 157 TTJ 481 (Pune)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparable – benefit of plus/minus 5 per cent as mentioned in proviso to section 92C(2) is required to be given on sale value or purchase price of international transactions and not on profit element embedded in such transactions
While determining arm's length price, benefit of plus / minus 5 per cent as mentioned in proviso to section 92C(2), is required to be given on sale value or purchase price of international transactions and not on profit element embedded in such transactions. Assessee is engaged in trading of diagnostic products only and therefore companies engaged in diagnostic products as well as disposables could not be taken as comparables.(AY.2004-05)
Dy. CIT v. Roche Diagnostics India (P.) Ltd. (2013) 90 DTR 434 / 157 TTJ 708 / 51 SOT 1 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Expenses incurred in brand building of foreign AE falls within purview of 'International Transaction' and accordingly, TP adjustment is to be made in ALP

The Tribunal held that the expenses incurred in brand building of foreign AE falls within purview of 'International Transaction' and accordingly, TP adjustment is to be made in ALP. Expenses which are directly related to sales do not come within the meaning of "brand building". (AY.2007-08)

Panasonic sales & Services India (P) Ltd. v. ACIT (2013) 143 ITD 733 / 91 DTR 303 / 157 TTJ 615 (Chennai)(Trib.)

S.92C : Transfer pricing – Computation of Arm's length price – Internal comparables

In the present case transfer pricing analysis has been made by the assessee as well as the authorities below only on the basis of internal comparables. At the same time, there is no case that instances of external comparables are unavailable. External comparables are available in the industry carried on by the assessee company. Thus the assessees as well as lower authorities have erroneously overlooked the necessity of analysing external comparables as well. In an environment where sufficient numbers of external comparables are available, it is imperative to examine those external comparables also along with internal comparables so as to come to a balanced finding on the matters relating to determination of ALP and consequential adjustment called for, if any. Therefore the matter is remitted back to the TPO to redo the exercise of transfer pricing analysis taking into consideration both external and internal comparables.(AY.2007-08)

California Software Co. Ltd. v. ACIT (2013) 82 DTR 59 / 151 TTJ 678 (Chennai)(Trib.)

S.92C : Transfer pricing – Arm's length price – Expenditure on promotion of foreign brand.

The Assessing Officer made disallowance by 10% of the expenditure on advertisement & sales promotion relatable to promotion of 'Samsung' brand. CIT(A) deleted the addition. Tribunal held that no part of the advertisement and sales promotion expenditure can be treated as relatable to promotion expenditure of foreign brand in India. There was no allegation by the TPO that the assessee had spent proportionately higher amount of AMP expenses to draw an inference of a transaction between the assessee and its AE of promoting the foreign brand. (AY. 2002-03)

ACIT v. Samsung India Electronics (P.) Ltd. (2013) 156 TTJ 44 / 92 DTR 106 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Reimbursement of warranty & service expenses

Tribunal held that the assessee has made no claim for deduction and no debit to P & L account was made. Therefore the CIT(A) was justified in treating the warranty and service expenses as part of operating profit of the assessee. (AY. 2002-03)

ACIT v. Samsung India Electronics (P.) Ltd. (2013) 156 TTJ 44 / 92 DTR 106 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Adjustment in respect of payment of lease rentals or dredger hector

The Tribunal held that since the price paid is within the +/- 5 per cent range of the quotations available at the time of entering into the agreement, there is no need for making any addition on the basis of the data available on record. The Tribunal also accepted the working of the assessee which the assessee demonstrated before the TPO the internal CUP & the VG Bonus certificates as external CUP. Under both workings the assessee is able to justify the price paid and on this reasoning also the Tribunal accepted the assessee's contentions. (AY. 2002-03)

Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Selection of comparables

The Tribunal held that CIT(A) was correct in holding that rejection of comparables selected by assessee is not correct. Therefore ITAT upheld CIT(A) direction that one of the CIT(A) in directing

the Assessing Officer must compute the arithmetic mean of comparables selected by him and determine the ALP after computing the adjusted average PLI is upheld.
Hellosoft India (P) Ltd. v. Dy. CIT (2013) 153 TTJ 322 /23 ITR 1 / 57 SOT 4 / 84 DTR 345 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Applicability
In view of sub-section (2A) of section 92C inserted with retrospective effect from 1-4-2002, benefit of +/- 5 per cent under proviso to sub-section (2) as a standard deduction cannot be allowed.
Hellosoft India (P) Ltd. v. Dy. CIT (2013) 153 TTJ 322 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Adjustment on account of risks
The Tribunal upheld the direction of CIT(A) in allowing the benefit or risk adjustments at 1 per cent while computing adjusted average PLI.
Hellosoft India (P) Ltd. v. Dy. CIT (2013) 153 TTJ 322 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arms' length price – Most appropriate method
The Tribunal held that the objection of assessee to adoption of TNMM by the TPO cannot be accepted because the assessee has not disputed in the earlier assessment years.
Hellosoft India (P) Ltd. v. Dy. CIT (2013) 153 TTJ 322 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arms' length price – Income exempt under section 10.[S.10]
The Assessing Officer is not required to prove the shifting of profits by the assessee to its AE before applying transfer pricing provision even if assessee's income is exempt. (AY. 2005-06)
Hellosoft India (P) Ltd. v. Dy. CIT (2013) 153 TTJ 322 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arms' length price – TNMM Method
Assessee company was engaged in the business of manufacturing airbrake sets of passenger cars & wagon coaches. It entered into international transactions with AE. Assessee determined ALP of said transactions by applying TNMM Method. During Transfer Pricing proceedings, TPO adopted CUP Method. He determined ALP in respect of transactions relating to professional consultancy, management fee for support services & SAP consultancy charges at NIL. Accordingly AO adopted the view taken by TPO without making any adjustment. The objections raised by assessee against proposed assessment order were rejected by DRP. On appeal in Tribunal, Tribunal held that since transactions approach was possible in assessee's case and moreover CUP, method for subject transactions being most direct method for determining ALP, there was no error in impugned order passed by TPO making adjustments on basis of CUP Method. Tribunal held that as regards adjustment relating to SAP consultancy charges, since it was undisputed that assessee had purchased SAP licence at lower rate and it had gone to benefit assessee, it was not appropriate to uphold conclusion of TPO for making addition to assessee's income on that account. Further regarding professional consultancy charges, Tribunal held that it was apparent that those services had only provided incidental and passive association benefit, TPO had rightly adopted NIL value for benchmarking ALP in respect of the said services. (AY. 2007-08)
Knorr Bremse India (P.) Ltd. v. ACIT (2013) 56 SOT 349 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – For carrying out comparability analysis, it is to be seen as to whether comparable company is comparable having regard to characteristic of property and service, functions performed, assets used and risk assumed
The assessee was a subsidiary company of LTSB and was engaged in providing support services relating to overall management of LTSB's business in India. A reference was made to the TPO to ascertain the ALP. The assessee shortlisted nine comparable companies using data of Financial year

2007-08 as directed by the TPO for benchmarking its international transactions. Out of nine comparables the TPO accepted four comparable companies having high PLI and rejected the other five on the grounds that they were functionally different and made the upward adjustment of ALP at Rs. 2.68 crore. The assessee filed objection before DRP for the inclusion of five comparable companies which had been rejected by the TPO. The DRP upheld the findings of the TPO. On further appeal in Tribunal the Tribunal held that for carrying out comparability analysis, comparison of controlled transactions with an uncontrolled transaction has to be done to see whether they are comparable having regard to characteristics of property and service transferred, functions performed taking into assets used and risk assumed and other economic circumstances. Further, while carrying out comparability analysis economically significant activities and responsibility taken by unrelated parties in relation to tested party has to be seen. Therefore once a company is found to be functionally similar in just preceding year, it cannot be rejected on functional analysis in current year. (AY.2008-09)
Loyds TSB Global Services (P) Ltd. v. DCIT (2013) 85 DTR 75 / 59 SOT 123 (URO)(Mum.) (Trib.)

S.92C : Transfer pricing – Arm's length price – Royalty to associated enterprise
Where assessee was not a contract manufacturer and paid royalty to its Associated Enterprises for obtaining technical know-how for manufacturing goods, the same could not be disallowed, taking its arm's length price to be nil. (AY.2005-06)
SC Enviro Agro India (P.) Ltd. v. DCIT (2013)143 ITD 195 / 58 SOT 22 (URO)(Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables – Lower turnover – Upper turnover – Order of Tribunal for another year accepted
Where lower turnover filter had been applied for selection of comparables, application of upper turnover filter was also warranted. Also, functionally dissimilar companies cannot be taken as comparables for computing arm's length price. Where a company taken as comparable is engaged in varied lines of business, segmental profit margin of comparable line of business should be reckoned with instead of entity level margins. Where assessee had no authority to conclude contracts in name of its Associated Enterprise (AE) nor could it hold itself to bind its AE in any way, pre-sales and marketing services to AE could not be held to be in nature of commission agency. Where assessee's international transactions had been accepted to be at arm's length by Tribunal for another assessment year, same was applicable to year under consideration as well. (AY. 2007-08)
NDS Services Pay-TV Technology (P.) Ltd. v. Addl. CIT (2013) 58 SOT 24 (URO) (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Resale Price Method – Margin of export sale to third party, being an internal comparable was to be compared to export sale made to AE, instead of taking external comparables
The assessee company, a wholly owned subsidiary of a U.S.A. company, (Associated Enterprise) was engaged in marketing and selling of toys and games imported from its AE. The assessee company also returned some unsold goods to its AE. The Assessee adopted Transactional Net Margin Method (TNMM) in its transfer pricing report and rejected the Resale Price Method. The Transfer Pricing Officer (TPO) made certain adjustments. He also treated the goods returned to the AE as export of goods to AE. On appeal, the assessee claimed that the Resale Price Method (RPM) should be followed instead of TNMM, which was rejected by the Commissioner (Appeals) on ground that assessee itself had given a detailed analysis as to why RPM could not be taken in its TP report. Resale price method is most appropriate method where resale takes place without any value addition to product, for benchmarking arm's length price. where at any stage of proceedings it is demonstrated by assessee that most appropriate arm's length price can be determined by adopting a prescribed method other than that chosen by it earlier. Assessment authorities as well as appellate courts should consider such plea. Where assessee exported back unsold goods to its associated enterprise (AE) or to third party to recover best available price, margin of export sale to third party, being an internal

comparable was to be compared to export sale made to AE, instead of taking external comparables. (AY.2002-03)

Mattel Toys (I) (P.) Ltd. v. Dy. CIT (2013) 144 ITD 76 / 34 taxmann.com 203 / 158 TTJ 461 (Mum.)(Trib.)

S.92C : Transfer pricing – Arms' length price – TNM Method – Transfer pricing adjustment is warranted only *qua* transactions with associated enterprises and not non-AEs. Matter remanded. Assessee operating wholesale business, a party operating in retail sgment cannot rank as comparable. For determining percentage of related party transactions to the total revenue for purposes of selecting comprables only transactions of revenue nature to be included: loan taken by comparable on which no interest was paid could not be taken into consideration

The assessee is engaged in the business of manufacturing of diamond studded gold jewellery. In transfer pricing proceedings, the TPO observed that the assessee made purchases of diamond studded jewellery from its Associated Enterprises (AEs) and sales were made of diamond studded jewellery to AEs. The assessee benchmarked its international transaction on Transactional Net Margin Method (TNMM). It applied Profit Level Indicator (PLI) of OP/TC. The assessee chose nine comparable cases with the average of OP/TC at 4.43 per cent and OP/Sales at 4.12 per cent. Thus, the assessee's margin of OP/Sales at 4.45 per cent and OP/TC at 4.65 per cent was claimed at ALP.

In the context of TNMM, where underlying object is to ascertain profitability from international transactions at arm's length with a suitable base and question is of determining comparability of a case, term 'related party transactions' (RPTs) cannot be considered in its generic sense rather it will encompass only such transactions between related parties which directly affect overall profitability in one way or other. when one determines RPTs as a percentage of total revenue what is intended to be included in said transactions is transactions which find their place either in manufacturing, trading or profit and loss account, all of which are of revenue nature and, therefore, transactions of capital nature finding their place in balance sheet shall be expelled from purview of 'related party transactions' for said purpose. In course of transfer pricing proceedings, ambit of RPTs is confined to actual transactions and not any hypothetical transactions which may have resulted in said proceedings. In terms of provisions of section 92C, transfer pricing adjustment is warranted only *qua* transactions with associated enterprises and not non-AEs. Where in course of transfer pricing proceedings computation of separate capital employed or profitability in respect of transactions with AEs is not practical due to commonality of both sets of transactions with AEs and non-AEs, correctness of applicability of return on capital employed (RoCE) as PLI under TNMM cannot be countenanced. Matter remanded. Assessee operating whole sale business, a party operating in retail segment can not rank as comparable. For determining percentage of related party transactions to the total revenue for purposes of selecting comprables only transactions of revenue nature to be included: loan taken by comparable on which no interest was paid could not be taken into consideration.(AY.2008-09)

Goldstar Jewellery Design (P.) Ltd. v. ITO (2013) 144 ITD 99 / 36 taxmann.com 292 / 95 DTR 326 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Selection of comparables – Percenatge of export sale – Partly reamnded

Assessee was an indirect subsidiary of Rhodia S.A. France. Assessee-company, incorporated in India, was primarily involved in canvassing of Rhodia Products from and around the world to the various customer of India. AO referred the matter to TPO. TPO rejected most of the assessee's comparable companies on the ground that assessee has taken the criteria of filtration, the ratio of sales in trading upon gross sales which are less than 90 per cent, whereas, it should have been less than 75 per cent. Second filtration criteria which was used by the assessee for selection of comparable cases were the companies which were having export turnover of 20 per cent out of gross sales, as per TPO this should have been Nil, as assessee's exports were negligible. TPO also rejected company, Oregon

Commercials Ltd., a comparable company short listed by the assessee. Average gross profit margin was taken at 14.60 per cent ALP was determined at Rs.1,88,37,650, and enhancement was made at Rs.81,78,650. Subsequently, in rectification proceedings u/s 154, enhancement on account of arm's length price was reduced, after taking the gross profit margin of 10.94 per cent. CIT(A) deleted addition. The Tribunal held that assessee's sales on account of trading, accounts for 77 per cent of its gross sales which is almost very near to the 75% which is the filtration criteria adopted by the TPO. Criterion adopted by the TPO for selection of comparable companies is absolutely correct. As regard to the companies having export sales being less than 20 per cent of the total sales, it is seen that assessee's exports are around 13 per cent, therefore, the selection criteria of 20 per cent of the export does not seem to be correct one. TPO's rejection of this criteria is also not correct that it should be taken as "Nil" or zero percentage. Criteria for selection of comparable companies should be the companies having export sales of in and around 13 percent. Reasoning given by the TPO for elimination of company Oregon Commercials Ltd. from comparables is not correct, should be taken into consideration after adopting the above two selection criteria. The impugned order passed by the Commissioner (Appeals) is set aside and restore the matter to the file of the TPO and direct him to compute the assessee's average gross profit margin in determining the ALP (AY.2003-04)
ACIT v. Rhoida Chemicals India (P) Ltd. (2013) 81 DTR 29 / 158 TTJ 658 / (2014) 146 ITD 715 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables – Advertising and sales promotion expenses
Held on facts, there was nothing to show that the assessee incurred advertising and sales promotion expenditure over and above that by similarly placed other companies having no associated enterprise dealings. Artificial split on marketing intangible in nature of brand building unwarranted. Addition considering 1% of sales as brand development fee was justified. Discounts given under schemes of sales promotion, remuneration to sales consultants, expenses incurred for customer survey, to be excluded from advertising and sales promotion expenditure.(AY. 2007-08)
Ford India P. Ltd. v. DCIT (2013) 25 ITR 456 / 59 SOT 221 (Chennai)(Trib.)

S.92C : Transfer pricing – Arm's length price – Reasoned order of TPO – Rejection/ selection of comparables – Matter set aside
There was no discussion in TPO's order why comparables of assessee were rejected or why other comparables accepted. Adjustment on entire turnover of assessee including transactions with non-associated enterprises is not proper. Adjustments on reimbursements of expenditure part of segments were already considered. There was double addition- Order of Transfer Pricing Officer order of Assessing Officer and Dispute Resolution panel was set aside and matter was remanded to the Assessing Officer for fresh adjudication on transfer pricing. (AY. 2008-09)
Sandoz P. Ltd. v. DCIT (2013) 25 ITR 347 / 145 ITD 551 / 96 DTR 401 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Selection of comparables – Events impacting financial results/ supernormal profits
Companies which have suffered events like merger or demerger, impacting financial results, those having supernormal profit, those functionally dissimilar, those acting as intermediary having outsourced their activity, those whose directors involved in fraud, those whose turnover exceeding Rs. 200 crores not to be treated as comparables. (AY.2007-08)
Zavata India P. Ltd. v. DCIT (2013) 25 ITR 504 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Selection of comparables – Benefit of +/- 5%
Held, that CRISIL is a leading independent and integrated research house whereas the assessee's research activities were on a very small scale. Therefore, the research division of CRISIL was not comparable to the assessee. Even though it was possible to compute the arm's length price on the

basis of just one comparable, in such case, the assessee would not be entitled to the benefit of the 5% variation allowed under the proviso to section 92C(2). (AY.2008-09)
IIML Asset Advisors Ltd. v. ACIT (2013) 25 ITR 369 / 58 SOT 21 (URO) (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Additional evidence – Sufficient cause
Applicability of comparable uncontrolled price method was held to be not properly dealt with by Dispute Resolution Panel and the Transfer Pricing Officer. Documents were subsequently procured and necessary for proper ascertainment of transfer pricing adjustment were produced by the assessee. Held, that the assessee was prevented by sufficient cause from producing them in assessment proceedings, and hence, the same was to be admitted. (AY. 2007-08, 2008-09)
Hughes Systique India P. Ltd. v. ACIT (2013) 25 ITR 556 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Benefit of +/- 5% – Only one comparable
In the preceding year, only one comparable out of the eight selected by the assessee were accepted by the Tribunal. Held, for this year also, only one comparable was to be selected. The benefit of +/- 5% adjustment was not available where only one comparable is chosen. No facts were brought by the assessee for quantification of risk adjustment, and hence, no adjustment to be allowed on that account. (AY. 2007-08)
General Atlantic P. Ltd. v. ACIT (OSD) (2013) 25 ITR 389 / 89 DTR 99 / 157 TTJ 452 (Mum.)(Trib.)

S.92C : Transfer pricing – Assignment of contract by AE is an international transaction and should be at arms length price. [S. 92B, 92CA]
The assessee's AE, Tellabs Denmark, was awarded a contract by Power Grid Corporation for the supply, installation and commissioning of telecommunication equipments. The work was to be performed both outside India (manufacture and supply of telecom equipments from Denmark-offshore) and in India (customs clearance in India and installation of the equipments – onshore). The Off-shore and Onshore contracts were independent contracts. Pursuant to a corporate restructuring, Tellabs Denmark assigned a portion of the On-shore contract relating to freight, insurance and installation to the assessee. Power Grid consented to the assignment on the condition that Tellabs Denmark will continue to be liable for due performance of all contracts. The AO & TPO held that as Tellabs Denmark continued to be liable to Power Grid for the onshore contract, the assignment of the said contract by Tellabs Denmark to the assessee constituted a sub-contract (and not an independent contract) and that for the work of customs clearance and installation of equipment performed thereby the assessee ought to have earned an arm's length profit margin of PBIT/Sales of 9.49%. On appeal by the assessee to the Tribunal HELD:
The assessee's claim that the effect of the assignment of the work of customs clearance and installation by Tellabs Denmark to the assessee is that an independent contract came into existence between the assessee and Power Grid and that as both parties were residents, the transfer pricing provisions cannot apply is not acceptable because it is clear from the various agreements that there has been only an assignment of the portion of an onshore contract by Tellabs Denmark to the assessee and not a novation of the portion of the onshore contract between Tellabs Denmark and PGCIL. The consequences in the event of an assignment and novation are different. Since there has only been an assignment and not novation of the contract in the present case, the transaction of assignment between the assessee and Tellabs Denmark cannot be said to be a transaction between two persons either or both of them were not non-residents. It is a very strange situation because if Tellabs Denmark had not assigned the portion of the onshore contract, the transfer pricing provisions would not have been applicable because Tellabs Denmark and PGCIL are not Associated Enterprises. Though the assignment of the portion of the onshore contract has taken place exactly at the same consideration for which Tellabs Denmark agreed to render services to PGCIL, nevertheless, the assignment agreement between Tellabs Denmark and the assessee has all the ingredients of an international transaction within the meaning of s.92 of the Act. However, the ALP will have to be determined

afresh because the international transaction is the assignment between Tellabs Denmark and the assessee and not the agreement between the assessee and PGCIL. The TPO should also consider whether as the assignment of the contract had taken place due to business restructuring and on the same terms as agreed between Tellabs Denmark and PGCIL, it could be said that this transaction itself would constitute a comparable uncontrolled transaction. (AY. 2003-04, 2004-05)
Tellabs India Private Ltd v. ACIT (2013) 94 DTR 95 / (2014) 159 TTJ 215 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Contribution to cost – Apportionment [S.92, 92CA]
Indian subsidiary and Korean parent company were to share contribution for sponsorship of cricket world cup tournament in ratio of 40:60. Since the benefits of advertisement would accrue only to entities in cricket, playing nations, considering sales of entire group was not appropriate basis to apportion the benefits. Since the agreement lead to significant cost-saving for the assessee and its sales increased by 35.04% during year, assessee was held to derive commensurate benefit and its contribution was not excessive. Also, apportionment of contribution in respective gross profit ratio of assessee and Korean holding company was not correct. (AY. 2003-2004)
ACIT v. LG Electronics India P. Ltd. (2013) 24 ITR 634 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Net margin method – Comparables – Arm's length price
Since the TPO accepted the ratio of cash profit to operating cost as the correct profit level indicator in the assessee's case for earlier years and in view of the orders passed by the Tribunal, the adoption of such profit level indicator in the prevailing circumstances had the sanction of law. Therefore, the applicability of this profit level indicator in the present facts and circumstances was established and accordingly, the Commissioner (Appeals) was justified in applying ratio of cash profit to operating cost as the correct profit-level indicator under the transactional net margin method and the addition was rightly deleted. (AY. 2005-06)
DCIT v. Reuters India P. Ltd. (2013) 24 ITR 231 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – +/- 5% – Royalty
The net profit margin declared by the assessee was 5.02% as against that computed by the TPO at 6.23%. Since the former was within +/- 5% range, the assessee was entitled to the benefit of proviso to s. 92C(2). (AY. 2004-05)
ACIT v. Reebok India Co. (2013) 24 ITR 599 / 59 SOT 158 (URO) (Delhi)(Trib.)

S.92C : Transfer pricing – Adjustment to arm's length price – Amendment *vide* Finance Act, 2012. [Ss.92, 92B]
Held the TPO erred in computing the transfer pricing adjustment on the entire manufacturing segment sales instead of computing the transfer pricing adjustment on manufacturing segment sales pertaining to import of components and spares from associated enterprises only.
Arm's length price of the international transactions pertaining to the manufacturing activity and export of components and spares had to be computed taking into account ± 5% variation from the mean was to be reconsidered in the light of legal position emerging as a result of the amendments made by the Finance Act, 2012 in section 92C(2). (AY. 2007-08)
Demag Cranes and Components (India) P. Ltd. v. DCIT (2013) 24 ITR 760 / 56 SOT 187 (Pune)(Trib.)

S.92C : Transfer pricing – Comparability – Nature of transaction
Applying gross profit margin earned from trading transaction with non-associated enterprises on value of goods on which commission earned is not proper. (AY. 2007-08, 2008-09)
Sojitz India P. Ltd. v. DCIT (2013) 24 ITR 474 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables – Comparability of turnover – Reimbursement

Held that the giant companies which were taken as comparables by the TPO had to be excluded as the turnover of these companies was several times higher compared to that of the assessee.

As the assessee had not brought out any material in respect of the claim of the assessee against including the amount received as reimbursement, the same was liable to be included as income. (AY. 2008-09)

Patni Telecom Solutions P. Ltd. v. ACIT (2013) 24 ITR 235 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – International transactions – Intention to avoid tax [R. 10B]

Claim that the income of the assessee was exempt and there was no motive to divert profit are not grounds to claim that transfer pricing adjustment should not be made. There is no provision calling for limiting transfer pricing adjustment so that it does not exceed total profits earned by group. Rejection of internal comparables on ground of less volume is not proper. It is permissible for TPO to decide in different way from decision in earlier year in subsequent year based on further material. (AYs.2006-07, 2007-08)

Interra Information Technologies (India) P. Ltd. v. DCIT (2013) 24 ITR 140 / 81 DTR 70 / 151 TTJ 313 / 55 SOT 585 (Delhi)(Trib.)

S.92C : Transfer pricing – Total ownership and control exercised by USA company over assessee – Associated enterprises [S.92F]

Assessee, a wholly owned subsidiary of USA company, was licensed to manufacture motor vehicles using technical know-how supplied by the parent company. The assessee was to pay royalty in consideration of grant of licence. Transaction for creating and improving marketing intangible comprised in logo by assessee for and on behalf of USA company. Since total ownership and control exercised by USA company over assessee, inference that advertising and sales promotion expenses incurred based on a corporate plan of U. S. A. company was justified and the transaction of brand building was rightly treated as an international transaction. (AY. 2007-08)

Ford India P. Ltd. v. DCIT (2013) 25 ITR 456 / 59 SOT 221 (Chennai)(Trib.)

S.92C : Transfer pricing – Non-reporting of international transaction – Coming to notice of TPO

Transfer Pricing Officer can consider international transactions not reported by the assessee but coming to this notice during proceedings before him.(A Y. 2007-08)

Ford India P. Ltd. v. DCIT (2013) 25 ITR 456 / 59 SOT 221 (Chennai)(Trib.)

S.92C : Transfer pricing – Arm's length price – Cost plus method – Bright line test

Order of TPO not void ab initio when the TPO applies cost plus method but does not take second and third steps in determination of gross profit mark-up and applying it to results. Held, "bright line" test applied by TPO falls within method prescribed. (AY. 2007-2008)

Ford India P. Ltd. v. DCIT (2013) 25 ITR 456 / 59 SOT 221 (Chennai)(Trib.)

S.92C : Transfer pricing – Arm's length price – Interest free advances to wholly owned subsidiary – Notional adjustment – Law on adjustment for notional interest on interest-free loan & excess credit period to AE-. Unless the products and the price of the products sold by the assessee are the same and extra credit period is allowed to the AE, no ALP adjustment can be made on the basis of excess credit period

The assessee advanced an interest-free loan to its wholly owned subsidiary called Micro USA. It claimed that the said loan was in the form of equity capital and was advanced to meet the business needs of the subsidiary and that no interest was required to be computed thereon. The assessee also extended credit of 165 days to the said subsidiary in respect of the goods supplied by it which it claimed to be in the normal course of business. The TPO held that the assessee ought to have charged interest on the loans advanced by it and that the credit period should not have exceeded 120 days. He computed notional interest at the rate of 11% on the loan and excess credit period and made an adjustment. The CIT(A) upheld the adjustment in principle though he reduced the interest to LIBOR. On cross appeals, HELD by the Tribunal:

(i) The question which really needs to be adjudicated, in the context of s. 92A, is whether, but for the management, capital or control being in the same hands, the AE would have entered into the transaction on the same terms. In other words, whether there is such a commercial justification for the values at which transactions have been entered or not, so as not to attract the adjustment in the arm's length price, has to essentially depend on factors other than the factors regarding management, capital or control. In still other words, merely because the entity receiving interest free funds is a subsidiary wholly owned by the assessee cannot be reason enough to justify such loans or advances being interest free and not warranting an arm's length price adjustment, so far as transfer pricing provisions are concerned;

(ii) On facts, the assessee's claim that the loans were in the nature of "quasi-capital" deserves to be accepted. Under the RBI's guidelines, while a loan from the EEFC account could be given without permission, the subscription to the equity capital required permission. The assessee applied for the permission and on receipt of it converted the loan into equity capital;

(iii) Further, the entity receiving the interest-free advance was not only a wholly owned subsidiary of the assessee company but also played a very significant role in its sale and distribution chain. Micro USA was a significant part of the marketing apparatus of the assessee and there was a significant commercial relationship between the two. The relationship between the assessee and Micro USA was not that of a lender and borrower *simpliciter*;

(iv) Further, in applying the CUP method, an adjustment has to be made under Rule 10B(1) "to account for differences…. which could materially affect the price in the open market". There are significant differences between a typical transaction of loan of money and this transaction. LIBOR cannot be adopted in this situation because (a) the transaction is not a *simplicter* financing transaction but is a transaction of investing in a subsidiary as quasi capital pending formal approval of the RBI and (b) it is not a case of granting advance to a business concern without significant and decisive commercial considerations. The monies were given for strengthening the assessee's marketing apparatus in the USA and to keep alive its biggest exports customer. The comparable uncontrolled price for interest on such a transaction in which advances are made pending capital subscription in a company which plays strategically significant commercial role in assessee's business would be nil;

(v) As regards the excess credit period allowed to Micro USA, no adjustment can be made because it was part of the arrangement that specified credit period was allowed. The cost of funds blocked in the credit period was inbuilt in the sale price. Also, the question of excess credit period arises only when the goods are sold to third parties and the credit period allowed to the AE is more than the credit period allowed to others. Here, as similar products are not sold to any other concern, the question does not arise. (AY. 2002-03 to 2004-05)

Micro Inks Ltd v. ACIT (2013) 157 TTJ 289 / 144 ITD 610 (Ahd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Royalty – Scope in the context of expenditure (royalty payment) explained

The assessee paid royalty at the rate of 5% to its associated enterprise and claimed that the same was at arm's length basis by applying the CUP method. The TPO and DRP determined the ALP of the royalty at Nil on the basis that (a) the approval given by the Government for payment of royalty did not automatically mean that the transaction was at arm's length; (b) the assessee had not furnished a cost benefit analysis, (c) the technology had in fact not helped the assessee in earning better margins.

It was held that as the technology had not contributed to the assessee's profitability and there was no commercial benefit received, no independent enterprise would have make payment for royalty for the technology and so its ALP had to be determined at Nil. On appeal by the assessee to the Tribunal, HELD reversing the TPO & DRP:

(a) The TPO's argument that the assessee need not have paid for the technology as it did not derive any benefit therefrom is not acceptable. The assessee is free to conduct business in the manner it deems fit and the commercial and business expediency of incurring any expenditure has to be seen from the assessee's point of view. The Revenue cannot step into the shoe of the assessee and decide what is prudent for the business. On facts, the very survival of the assessee in the industry depended upon the license and technology & know how provided by the AE. There has been a considerable increase in the sales figures and the growth in revenue clearly demonstrates the benefits derived by the assessee from the use of technology;

(b) the payment of royalty was approved by the Government of India. Though it is not conclusive proof, the said approval of the Government has to be given consideration while considering the arm's length price of the transaction;

(c) Under Rule 10B(1)/ s. 92C(2), the arm's length price has to be determined by one of the five methods which is found to be most appropriate method. While the assessee rightly considered the CUP method for determining the ALP, the TPO's conclusion that the arm's length price of the royalty payment should be NIL without specifying any cogent basis is not sustainable (AY. 2008-09)

Reebok India Co. v. ACIT (2013) 24 ITR 599 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Foreign associated enterprise can be taken as 'Tested Party'

The assessee bought CKD Kits from General Motor Daewoo Auto & Technology (GMDAT), a foreign associated enterprise. The assessee claimed that to determine whether the transactions were at arm's length, GMDAT had to be selected as the tested party on the ground that the functions and risks of the assessee are more complex in nature and that numerous adjustments would have to be made if the assessee were taken as the selected part. The TPO & DRP rejected the assessee's contention on the basis that (a) a foreign entity could not be a tested party, (b) GMDAT is a complex entity owing valuable intangibles & (c) the data for comparability of GMDAT is not available. On appeal by the assessee to the Tribunal, HELD:

While there is nothing in the transfer pricing law as to the selection of the tested party, the tested party normally should be the party in respect of which reliable data for comparison is easily and readily available and fewest adjustments in computations are needed. It may be local or foreign entity, i.e., one party to the transaction. The object of transfer pricing exercise is to gather reliable data, which can be considered without difficulty by both the parties, i.e., taxpayer and the revenue. It is also true that generally least of the complex controlled taxpayer should be taken as a tested party. But where comparable or almost comparable, controlled and uncontrolled transactions or entities are available, it may not be right to eliminate them from consideration because they look to be complex. If the taxpayer wishes to take foreign AE as a tested party, then it must ensure that it is such an entity for which the relevant data for comparison is available in public domain or is furnished to the tax administration. The taxpayer is not then entitled to take a stand that such data cannot be called for or insisted upon from the taxpayer. This is supported by the United Nation's Practical Manual on Transfer Pricing for Developing Countries which stated that a foreign entity (a foreign AE) could also be taken as a tested party for comparison. The revenue's argument that GMDAT should not be selected as a 'tested party' as it does not fall within the ambit of TPO's jurisdiction and he can neither call for any additional information nor scrutinize their books of accounts is not acceptable because the Revenue can get all the relevant particulars around the globe by using the latest technology under its thumb or direct the assessee to furnish the same (ITA No 3096/Ahd/2010 and 3308/Ahd/2011,A.Y.2006-07,dt. 2-8-2013)

General Motors India Pvt. Ltd v. DCIT (2013) 37 taxmann.com 403 / 27 ITR 373 (Ahd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Commission realised by assessee from international controlled transactions.

The assessee entered into various international transactions with it's AE's (Associated Enterprises), namely "FE" and 'FL' and provided marketing support functions to them. Transactions entered into by assessee with 'FE' were controlled transactions. It received commission from AE's. The assessee provided same services to its other AE's also. Hence the commission realised by assessee from international controlled transactions with its one AE, namely 'FE' could not be taken as an internal cup for computation of ALP of other international transactions with another ALS, namely 'FL' the rate of commission adopted by the CIT(A) was therefore rightly determined by him and the ITAT upheld the said order. (AY.2002-03)

ACIT v. Fuchs Lubricants (I) Pvt. Ltd. (2013) 56 SOT 246 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparable selected by the TPO were engineering companies, providing end-to-end solutions and, they were not functionally comparable and hence the same were to be excluded from list of comparables for determining ALP

One 'H' based in Sweden was engaged in design, production and retail of clothing items and related accessories. The assessee was established in India as a wholly owned subsidiary of 'H' to act as a facilitator between Indian manufacturers and its AEs and ensure that supplier manufactured products according to quality and design segments specified by AEs. The assessee, thus, made provision of sourcing and procurement service. In determining arm's length nature of international transaction, assessee used Transactional Net Margin Method ('TNMM'), as most appropriate method using operating profit/operating cost as profit level indicator ('PLI'). The TPO rejected comparable companies selected by assessee stating that those companies were functionally different. The TPO thereafter selected a different set of comparable companies engaged in a combination of business support, technical services and engineering services. On basis of arithmetic mean of said companies the adjustment of ` 1.80 crore to assessee's income. The DRP granted partial relief to assessee. On appeal by the assessee the Tribunal held that it was apparent from records that the comparable selected by the TPO were engineering companies, providing end-to-end solutions and, they were not functionally comparable and hence the same were to be excluded from list of comparables for determining ALP (AY. 2008-09)

H and M Hennes & Mauritz India (P.) Ltd. v. Dy. CIT (2013) 35 taxmann.com 349 / 23 ITR 614 / (2014) 146 ITD 72 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – CUP method – TNM method – Comparables and adjustments-Safe harbour rules

The assessee paid commission to AEs at 12.5% compared to 5% paid to non-AE foreign agents, this was due to the additional obligations undertaken by the AEs, being bearing of market development, advertising and sales promotion expenses as well as market risks, which were absent in case of agreement with non-AE foreign agents. The TPO rejected assessee's comparison and compared the average non-AE export price with the price charged to AEs. He also took 5% as the arm's length rate of commission based on the commission paid to non-AE foreign agents. On appeal, the CIT(A) admitted that there were no direct comparable uncontrolled transactions for computing arm's length price, and therefore, after analysing the profit ratio and operating expenses of the AEs, he held that the AEs were running at losses and no third party would carry on such business at loss. Thus, he accepted the operating margin of the AEs. On the issue of commission paid to AEs at 12.5%, observing the relevant obligations carried out by the AEs, which were not there in the case of non-AE foreign agents, the CIT(A) took 10% per cent as the arm's length rate of commission. Benefit of

arm’s length range of +/- 5%, in terms of the proviso to section 92C was also given on the premise that it was a standard deduction.
On appeal, the Tribunal held that:
Re.: Most appropriate method:
The CIT(A) made the AEs as tested parties and without looking into the independent comparables operating in the same kind of products in the said countries, he accepted the operating margin of the AEs.
Once the CIT(A) accepted that CUP method was the appropriate method, then he had to examine whether there were any internal comparables or any external comparables.
In the present case, once the CIT(A) held that there were no internal comparables, he was required to look into external comparables operating or dealing with the similar products under similar terms in a similar market condition where these AEs were operating, which he failed to do and simply accepted the trading results of the AEs.
Once the CIT(A) found that there are so much of variables for applying either internal CUPs and had not applied external CUP due to this factor, the entire application of CUP failed in this case.
Once the CUP method failed in this case, then it was required by the CIT(A) to look into for other appropriate methods.
The question is what should be the most appropriate method. At the time of hearing, both the parties agreed that in case CUP method failed, then TNMM could be adopted as most appropriate method, wherein the ALP is determined by comparing the operating profit relative to appropriate base viz. cost as well as asset of the tested party with the operating profit of an uncontrolled party engaged in comparable transactions.
Accordingly, the impugned order passed by the CIT(A) is set aside and the matter is restored to the file of the TPO for examining the ALP after adopting TNMM and carry out fresh comparability analysis.
Re.: Payment of commission:
The conclusion and the reasoning given by the CIT(A) based on his functional analysis, are liable to be accepted.
He concluded that looking to the various differences in the agency arrangement with the AE and non-AE foreign agents, the arm’s length commission of the AE should be taken at the rate 10% and the reasoning given by him is appreciable.
Otherwise also, if one considers the agency agreement between the AEs and that of non-AEs and carries out the functional analysis, then it would be seen that the cost which is to be incurred by the AEs and risk assumed are far more. Rate of 10% is quite reasonable when it is analysed with a case where there is less risk and commission rates range between 3% and 10%.
Therefore, the rate adopted by the CIT(A) at the rate 10% is at arm’s length.
The benefit of +/- 5% given by the CIT(A) is set aside. (AYs. 2003-04, 2005-06)
Garware Polyester Ltd. v. ACIT (2013) 23 ITR 549 / 143 ITD 87 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm’s length price – Risk involved & asset employed by assessee-company with the parent company having International Transactions remains unmatched – Benchmarking by TPO is incorrect
Assessee was engaged in the business of manufacturing, distribution and marketing of iron & ferrous powders in India. It not only took part in International transactions relating to purchase of iron powder for manufacturing, etc. also undertook international transactions relating to provision of market services of its parent company situated in Sweden. As per agreement with the parent company, assessee had to receive commission @ 30 per MT on sales directly made by the parent company in India. Sales commission received by assessee from parent company worked to 149% of corresponding sales achieved by parent company in India. Assessee adopted TNMM method whereas TPO disagreed with the rate for the purpose of benchmarking. Accordingly he treated assessee itself as a comparable and worked out to 44.44% taxing the difference between 4.4% & an 1.49%. The

Dispute Resolution Panel confirmed the order of the TPO. On further appeal, the appeal was allowed and it was held that nothing was brought on record by TPO that the assessee had to incur cost for the sales achieved by the parent company as in the case of its own marketing. The Court also held that benchmarking done by TPO is not correct, as the parameters of the risk involved and the assets employed were not matching. Therefore impugned addition made by the TPO to the income was liable to be deleted. (AY. 2006-07)
Hoganas India (P) Ltd. v. Dy. CIT (2013) 56 SOT 169 (Pune)(Trib.)

S.92C : Transfer pricing – Arm's length price – Turnover filter is very important
The Tribunal held that the turnover filter is very important and considering the assessee's turnover of mere ` 60 crores, companies having turnover of ` 1 crore to ` 200 crores alone can be considered as comparable in the case of assessee. The Tribunal directed the Assessing Officer to recomputed the ALP after excluding Infosys Technologies Ltd. & Wipro Ltd. as comparables. (AY. 2007-08)
ADAPTEC (India) P. Ltd. v. Dy. CIT (2013) 154 TTJ 129 / 86 DTR 26 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Transfer Pricing Adjustment only with transaction of Associate Enterprise [S.37(1) 92A & 92B]
The Tribunal held that the Transfer pricing adjustment should be restricted to international transactions, i.e. transaction between AE's alone and not with transaction with non-AE's. Where assessee fails to prove that services have been rendered from its Associated Enterprises and payments is at Arm's Length Price, charges paid by assessee for such services cannot be allowed. Matter restored. (AY. 2008-09)
Petro Araldite (P) Ltd. v. Dy. CIT (2013) 86 DTR 233 / 154 TTJ 176 / 144 ITD 625 (Mum.)(Trib.)

S.92C : Transfer pricing – Comparable – Adjustments – TPO can use contemporaneous data available at time of transfer pricing audit, though same may not have been available to assessee at time of preparation of statutory transfer pricing study / documentation
Since the Act has not provided for any cut-off date up to which only information in public domain has to be taken into consideration by TPO while arriving at ALP or making TP adjustments, the TPO can use contemporaneous data available at time of transfer pricing audit, though same may not have been available to assessee at time of preparation of statutory transfer pricing study/documentation. Use of data of the financial year in which the international transaction was actually entered into is a mandatory requirement of law in comparability analysis to be undertaken as per transfer pricing regulations. When anassessee claims adjustments under rule 10B to account for differences in accounting practices, marketing expenditure, research and development expenditure and risk profile between assessee and comparable companies, onus is on assessee to establish need for adjustments on specific issues and how these issues affect comparability. (AY. 2006-07)
Yodlee Infotech (P.) Ltd. v. ITO (2013) 57 SOT 457 (Bang.)(Trib.)

S.92C : Transfer pricing – Comparables and adjustment – Additional evidence – Matter remanded
The assessee was to be granted permission to file additional evidences as same would go to root of matter and facilitate adjudication of issue raised in appeal. (AY. 2007-08)
Global Turbine Services India (P.) Ltd. v. ACIT (2013) 57 SOT 116 (URO) (Delhi)(Trib.)

S.92C : Transfer pricing – CUP method – Arm's length price
Since the assessee had earned/paid revenue from/to its AEs in same proportion, transactions had been recorded at arm's length price and there was no justification for making adjustment in ALP worked out by assessee. (AY. 2004-05)
ACIT v. DHL Danzas Lemuir (P) Ltd. (2013) 57 SOT 123 (URO) (Mum.)(Trib.)

S.92C : Transfer pricing – Number of comparables – Reasons for exclusion

Since no size or number of comparables has been prescribed under provisions of Transfer Pricing Regulation, Transfer Pricing Officer can include any number of comparables. Merger of two otherwise functionally cannot be reason by itself for exclusion from list of comparables. Where good number of comparables are already available, a company cannot be considered as uncontrolled, if related party transactions exceed 15% of total revenue. In the absence of specific reasons and factors provided under Rule 10B, an entity cannot be excluded from list of comparables only on basis of it either being a high profit making unit or a loss making unit. Risk adjustment and working capital adjustment can be made only on the basis of actual risk or proper data and accurate calculation; and not on ad hoc basis. (AY.2007-08)

Willis Processing Services (I) (P) Ltd. v. DCIT (2013) 57 SOT 339 (Mum.)(Trib.)

S.92C : Transfer pricing – Comparables and adjustments – Foreign exchange gain/loss should be considered as operating revenue or cost

Foreign exchange gain or loss should be considered as operating revenue or cost while computing operating margins of assessee and comparables. Where the assessee was operating in a risk mitigated environment and assumed lesser risk than comparables, risk adjustment was to be made. (AY.2007-08)

Bearing Point Business Consulting (P.) Ltd. v. DCIT (2013) 57 SOT 244 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Transfer pricing rules do not authorise TPO to disallow any expenditure on ground that it was not necessary or prudent for assessee to have incurred same. [S.37(1)]

Assessee manufacturing household insecticides and pesticides. It entered into a license agreement with SCCL for commercial production of specified products and paid royalty to SCCL for utilizing know-how and licence. SCCL acquired 90 per cent of equity share capital of Assessee Company. Assessee sold most of its products to SCI a 100 per cent subsidiary of SCCL. TPO held that it was a contract manufacturing agreement and there was no justification for payment of royalty and hence, determined arm's length price at NIL. The Assessing Officer made similar disallowance in the assessment order passed 'having regard to' the TPO's order. Commissioner (Appeals) held that assessee was contract manufacturer so allowed royalty payment on the sales made to outside parties and therefore, partly allowed the claim of the assessee. On appeal to Tribunal held that transfer pricing rules do not authorize TPO to disallow any expenditure on ground that it was not necessary or prudent for assessee to have incurred same. Since royalty was paid for allowing assessee in utilizing technical know-how and license which was independent of fact as to whether assessee was a manufacturer, payment of royalty was wholly and exclusively for purpose of business. The TPO has to examine whether the price paid or amount paid was at arm's length or not under the provisions of Transfer Pricing and its rules. The rule does not authorise the TPO to disallow any expenditure on the ground that it was not necessary or prudent for assessee to have incurred the same. On that principle alone the TPO has exceeded the jurisdiction. Ratio in *CIT v. EKL Appliances (2012) 206 Taxman 97(Mag.)(Delhi)(HC)* followed. (AY.2003-04, 2004-05)

SC Enviro Agro India Ltd. v. Dy. CIT (2013) 143 ITD 195 / 58 SOT 22(URO) (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Foreign exchange gain or loss has to be considered [R 10B]

During the relevant year assessee has followed the TNM method for international transaction and for comparability analysis the assessee used data for F.Y. 2001-04. Assessee failed to reveal any facts pertaining to earlier financial years which had an influence on determination of transfer prices with reference to comparables companies. In view of provisions of rule 10B TPO was justified in using data of only current financial year for determining ALP. TPO arrived average profit margin at 34.82% to operational cost. TPO made addition of ` 4.68 crore to ALP

determined by the Assessee. Gain or loss on account of foreign exchange fluctuation arose in normal course of business transactions same was to be considered while computing net margin of international transactions entered into by assessee with its AEs. Tribunal directed the Assessing Officer to consider the data of MCS Ltd. as comparable while computing the ALP and exclude other two companies from comparables. AY. 2004-05,2005-06)
Brigade Global Services (P.) Ltd. v. ITO (2013) 28 ITR 411 / 143 ITD 59 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Interest free loans to its wholly subsidiary – Adjustment of interest at 9% was held to be justified
Assessee advanced interest free loans to its wholly owned foreign subsidiaries. Assessing Officer made transfer pricing adjustment with respect to arm's length interest taking 12 per cent rate of interest. Commissioner (Appeals) reduced rate of interest to 9 per cent. On appeal Tribunal confirmed finding of Commissioner (Appeals) holding that, transfer pricing adjustment is possible only in cases where comparable uncontrolled transactions between two entities have been established. decision taken by CIT(A) was upheld.(AY. 2005-06)
Wipro Ltd. v. Dy. CIT (2013) 143 ITD 1 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – TNM method – Comparable and ± 5% adjustments
Assessee company is engaged in business of manufacturing and selling automobile catalysts in India. It purchased raw material from its AEs located abroad in respect of international transactions. Assessee Company adopted TNM method for determination of ALP. For application of TNMM 'Rate of return on capital employed' was selected as Profit Level Indicator ('PLI'). TPO adopted operating profit/total cost ratio method as PLI, certain addition to ALP determined by assessee. On appeal Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal the assessee contended that the TPO was not justified in adopting operating profit/total cost ratio PLI. It was further contended that revenue authorities were required to allow margin of ± 5 per cent as provided in proviso to section 92C(2) while determining ALP. Tribunal held that in view of fact that accounting of assessee showed that cost of raw material was a value added cost and not a pass through cost, operating profit as a percentage of total cost had to be appropriate basis instead of operating profit as a percentage of total cost minus raw material cost as claimed by assessee. In view of above, impugned addition made by TPO was upheld. Tribunal also held that the tolerance band of ± 5 per cent provided in proviso to section 92C(2) cannot be construed as a standard deduction. If arithmetic mean of more than one ALP falls within range of tolerance band than there may not be any adjustment to ALP determined by assessee but if it exceeds, then ultimate adjustment is not required to be computed after reducing arithmatic mean by 5 per cent. (AY.2003-04)
Johnson Matthey India (P.) Ltd. v. Dy. CIT (2012) 78 DTR 12 / 149 TTJ 646 / (2013) 141 ITD 375 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Selection of comparables
Assessee company while conducting its TP study had adopted comparables which were all in field of development and export of computer software. The TPO, however held that the assessee was providing 'Research and Development' services and not 'computer software development services' as claimed by assessee and that the service agreements of the assessee with its affiliates did not speak of software development and therefore, the enterprises developing software could not be used as comparables. The TPO selected comparables 'Lurggi India'. 'Vimta Labs' etc having engineering services and determined the ALP by adopting TNMM as the most appropriate method. Commissioner (Appeals) confirmed the adjustment made by the TPO. On appeal Tribunal held that as per assessee's submissions it was conducting research and development through its multi-disciplinary R&D centre and its activities were for several streams / areas including Information Technology. TPO had rightly rejected TP study conducted by assessee and had rightly proceeded to select his own comparables in

field of Research and Development and redetermine ALP. However TPO had not conducted FAR analysis before selecting comparables, issue of selection of comparables were to be remanded back to Assessing Officer. (AY. 2004-05 to 2006-07)
GE India Technology Centre (P.) Ltd. v. Dy. CIT (2013) 141 ITD 245 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Commercial borrowings
Assessee obtained two Commercial Borrowings from its AEs at fixed rate of interest at 7.5% and 8.9% respectively Tribunal held that, since Assessing Officer for earlier assessment year had accepted rate of interest as fixed in loan agreement, TP adjustment on account of interest on external commercial borrowings for this assessment year was not called for. (AY. 2004-05 to 2006-07)
GE India Technology Centre (P.) Ltd. v. Dy. CIT (2013) 141 ITD 245 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Adjustments – Export – Computer –Increasing the turnover – Not permissible [S.80HHE)
The assessee-company is engaged in the business of designing engineering projects. It had entered into International Transaction with its AEs. The TPO had made certain additions in relation to said transaction. Based on addition made by the TPO the Assessing Officer recomputed the deduction permissible under section 80HHE by increasing the total turnover; (i) by the amount of adjustment made by the TPO and (ii) reimbursement of expenses. On appeal Commissioner (Appeals) allowed the relief to the assessee. On appeal by revenue Tribunal held that, Proviso to section 92C(4) prohibits deduction under Chapter VI-A to be allowed on enhancement made as per TPO's order, therefore no effect is to be given to addition made by Assessing Officer as per TPO's order while computing deduction under Chapter VI-A (AY 2004-05, 2005-06).
ACIT v. Bechtel India (P.) Ltd. (2013) 141 ITD 200 / 85 DTR 50 / 153 TTJ 416 (Delhi)(Trib.)

S.92C : Transfer pricing – Comparables – Resale price method
The assessee imported components from its Associated Enterprises. It adopted the resale price method. Since its gross margin was more than average gross margin of two of its comparables, the transactions were claimed to be at arm's length. However, the TPO did not take one comparable as its product range included various other items. Therefore, taking the higher gross profit margin of the other comparable, the arm's length price of assessee was worked out and addition was made by way of Transfer Pricing adjustment. Held, since the comparable rejected by the TPO was accepted by him in later years, the same should have been accepted in AY.2003-04 as well. However, the working to arrive at arm's length price on the basis of comparability analysis should be done by taking into consideration the gross margin of the assessee-company as well as the two comparables. Therefore, the issue is restored to the file of the Assessing Officer/TPO for the limited purpose of doing this exercise. Matter remanded. (AY. 2003-04)
Greaves Cotton Ltd. v. ITO (2013) 57 SOT 158 (Mum.)(Trib.)

S.92C : Transfer pricing – No motive to divert profit – Matter remanded to decide fresh [S.10A]
The fact that the income of the assessee-company is exempt under section 10A is not a ground for the assessee to claim that the transfer pricing adjustment should not be made for the reason that there is no motive to divert profit. Neither the Act nor the Rules provide for capping of a transfer pricing adjustment so that it does not exceed the total profits earned by the group. Such an exercise is not practical as the profits of the entire group are not subject to scrutiny of the Indian tax authorities. Transfer pricing adjustments by the Revenue Officer of another jurisdiction have no bearing on the decisions that Indian authorities have to take under the Indian law. Even otherwise, if the profit of a transaction should be allocated to different jurisdictions, then the profit-split method has been prescribed under the Rules and it is open to the assessee to follow the most appropriate method. (AY. 2006-07, 2008-09)

Interra Information Technologies (India) P. Ltd. v. DCIT (2013) 24 ITR 140 / 55 SOT 585 / 81 DTR 70 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Net margin method – RBI approved rate. (Rule 10B)
The assessee paid royalty at effective rate of 1.87 per cent to its Associated Enterprise for use of technical know-how. Since the rate was lower than rate approved by RBI and Government authorities, it was claimed to be at arm's length. However, the TPO added entire amount paid, as assessee did not furnish details of rate of royalty paid by other associated enterprises. However, the CIT (A) deleted the addition. Held, where arm's length price for royalty was not determined by one of methods prescribed under section 92C, read with rule 10B, arm's length price was to be recomputed. Matter remanded. (AY. 2003-04)
Greaves Cotton Ltd. v. ITO (2013) 57 SOT 158 (Mum.)(Trib.)

S.92C : Transfer pricing – Extraordinary factors – Comparables
If certain extraordinary factors materially affected profit in a particular year then that aspects has to be taken into consideration and due adjustment is required to be made to net profit margin for bringing comparable on same platform at which an assessee is performing its functions. An assessee is well within his right to demonstrate that a comparable supplied by it in transfer pricing analysis was not correct and had to be excluded and this right of assessee is not curtailed in any manner.(AY. 2007-08)
American Express Services India Ltd. v. DCIT (2013) 57 SOT 22 (URO) (Delhi)(Trib.)

S.92C : Transfer pricing – Extraordinary factors – Selection of comparables
Following guidelines laid down by the Tribunal to select the comparables; (a) Companies with extraordinary circumstances, like those which suffered events like merger/de-merger, impacting financial results, could not be treated as comparables; (b) Companies having supernormal profit could not be considered as comparables; (c) Companies which were functionally dissimilar could not be taken as comparables; (d) Companies acting merely as intermediary having outsourced its activity cannot be compared as comparable; (e) Companies whose directors were involved in fraud cannot be taken as comparables, as their financial results are not reliable; (f) Companies, who were industrial giants and market leaders having substantially high turnover could not be taken as comparables. (AY.2007-08)
Capital IQ Information Systems (India) (P.) Ltd. v. DCIT (2013) 57 SOT 14 (URO) / 25 ITR 185 (Hyd.)(Trib.)

S.92C : Transfer pricing – No impact on profits – Disallowance made by assessee
The assessee made payment of ` 7.42 crore to its AE for setting up a new business centre in India. Assessee claimed that said transaction did not assume character of international transaction and, moreover, it did not have any bearing on income or profit of assessee since assessee itself had disallowed said expenditure while computing taxable profit. Since the assessee had *suo motu* added amount while computing its taxable income for impugned assessment year and no benefit of same had been taken either by capitalizing it and claiming depreciation on it, no adjustment could be made to assessee's ALP in respect of transaction in question. (AY. 2007-08)
Eaton Technologies (P.) Ltd. v. DCIT (2013) 57 SOT 8 (URO) (Pune)(Trib.)

S.92C : Transfer pricing – Comparables – Benefit of ± 5%
In the absence of any change in business profile and other facts and circumstances as existed in A.Ys. 2006-07 and 2007-08 as well as functions of sole comparable company, contention of revenue that comparable found for AY 2007-08 could not be suitable comparison for AY. 2006-07 was devoid of any merit. Since only one comparable was considered to determine ALP, benefit of ± 5 per cent as provided under proviso to section 92C(2) would not be available to assessee. The current year data would be taken into consideration until and unless some exceptional circumstances are brought on

record to show that one year data of comparable do not give true picture being influent by such circumstances. (AY. 2006-07)
General Atlantic (P.) Ltd. v. DCIT (2013) 57 SOT 27 (URO) / 89 DTR 81 / 157 TTJ 434 (Mum.)(Trib.)

S.92C : Transfer pricing – Comparables – Benefit of ± 5%
In the course of transfer pricing proceedings, ALP determined by assessee has to be seen only with regard to international transaction with AEs and not on entire turnover/sales. Thus, since the TPO had applied mark up at entity level after taking into account entire transactions, the impugned working was incorrect. Even otherwise, since it was apparent from working of TPO that assessee's transactions fell within permitted range of ± 5 per cent as mentioned in proviso to section 92C, impugned adjustment made by TPO, was to be set aside.(AY.2006-07)
Hindustan Unilever Ltd. v. ACIT (2013) 22 ITR 737 / 57 SOT 1 (URO) (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Fluctuation of foreign exchange
The proposition that gain on foreign exchange if it relates to the business of the assessee is part and parcel of operating income is well established. Nothing has been brought on record to suggest that the gain made by the assessee on fluctuation of foreign exchange was not on account of business transactions of the assessee. Hence, it should be included for the purpose of computing the profit margin of the assessee. (AY. 2008-09)
S. Narendra v. ACIT (2013) 57 SOT 32(URO) (Mum.)(Trib.)

S.92C : Transfer pricing – Comparables – Difference in turnover
The Assessee claimed that it was merely a facilitator for indenting transactions, on which it earned commission. It considered commission per cent of non-AE indenting segment as arm's length commission for indent sales, after deducting 50% discount on basis of volume. However, the TPO took gross profit margin of non-AE trading segment as arm's length commission. The Tribunal held that since the nature of assessee's indenting transactions was different from its trading transactions and gross profit margin of latter could not be taken as arm's length commission for indenting transactions. However, held that, mere difference in turnover is not sufficient for treating two entities or two transactions as not comparable or warranting any adjustment. (AY. 2007-08)
Sumitomo Corporation India (P.) Ltd. v DCIT (2013) 57 SOT 18 (URO) / 24 ITR 385 / 85 DTR 1 (Delhi)(Trib.)

S.92C : Transfer pricing – Comparables – Arm's length price – TNM method – Import of raw material
Assessee in its TP study using TNM method in respect of purchase of material from AEs in which 12 comparables were selected. It had conducted study on basis of data of last three years. TPO having noticed that four out of 12 comparables selected by assessee were not comparable to business of assessee excluded said comparables and included one more comparable which was in same business as that assessee. A.O. therefore computed ALP in relation to international transactions on basis of nine comparables and made adjustment made by TPO. Commissioner (Appeals) confirmed the adjustment made by Assessing Officer. Tribunal in assesee's own case for earlier assessment year 2006-07 had held that enterprise level profit margin had been applied in relation to international transactions with AEs which was not correct and restored issue to file of Assessing Officer for fresh adjudication. Since the facts of current assessment year were identical with facts of earlier assessment year, which had been restored to the file of the Assessing Officer. Hence, the same action had to be followed for this AY as well. (AY. 2007-08)
Givaudan Flavours (India) (P.) Ltd. Dy. CIT (2013) 56 SOT 105 (URO) / 22 ITR 732 (Mum.) (Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments

The assessee company is engaged in business of providing IT enabled services to its associated enterprises in US and Europe and entered into certain international transactions. It applied Transactional Net Margin Method (TNNM) for determination of arm's length price in respect of international transactions. It chose 15 comparable cases for working out operating profit on total cost (OP/TC) at 7.31 per cent as per current year's data. TPO included certain new cases of his own and ignored certain cases considered by assessee. In selection of comparables, the Transfer Pricing Officer (TPO) applied filter of: (i) comparables with less than 25 percent related party transactions, and

(ii) comparables with export revenue more than 25 percent of the revenue.

The assessee objected to inclusion of four cases in the list of comparables. Applying the OP/TC at 24% the TPO recommended an adjustment of 2.20 crore which came to be made by the Assessing Officer in the final order, after consideration of the matter by the DRP.

On appeal Tribunal held that assessee had inadvertently included a case in its list of comparables for computing arm's length price, it could be allowed to exclude same if it did not pass through filter adopted by TPO. A case should be excluded from list of comparables for computing arm's length price on ground of unreliability of data, when its reputation was under serious indictment. Pertinent criteria for selection of comparable cases should be similarity in nature of services and not higher or lower margin of profit in one case vis-à-vis other. When here is a vast difference in cases where services are outsourced and where services are provided in-house, there cannot be any comparison between them. Decided in favour of assessee. (AY. 2006-07)

Stream International Services (P.) Ltd. v. ACIT (2013) 141 ITD 492 / 152 TTJ 553 / 23 ITR 70 / 83 DTR 394 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments [S.92D]

The assessee, an Indian company, was engaged in the business of providing call centre services exclusively to its US Associated Enterprise. The TPO passed an order making an upward adjustment of Rs. 15.23 crores. The Assessing Officer determined the income of the assessee at Rs.15.41 crores making the disallowances of telecommunication charges and leased hire charges both of which were incurred in foreign exchange from 'export turnover' but not from 'total turnover' while computing deduction under section 10A. On appeal, the Commissioner (Appeals) allowed the assessee partial relief. On appeal to Tribunal the Tribunal held that; TP provisions do not require TPO to establish a motive of transferring profits out of India prior to finding out as to whether assessee's international transactions are at arm's length or not. For conducting comparability analysis and determining ALP, it is mandatory to use current year data; and not data of multiple year. +/- 5 per cent variation is allowed only to justify price charged in international transactions and not for adjustment purposes. An entity can be taken as uncontrolled if its related party transactions do not exceed 10 to 15 per cent of total revenue. Where entire services of a comparable company are rendered to a single enterprise, it would become an AE and as such all its transactions would assume character of controlled transactions making it ineligible to be a comparable. A company having exorbitantly high turnover cannot be taken as comparable. Where a comparable company had developed its own unique software for performing specialised services, from which it would derive substantial benefits/advantages when compared with assessee which had undertaken pure call centre services, applying principle that companies which were on similar standards only should be taken as comparables, this company which had unique intangibles could not be taken as a comparable for assessee. Where assessee was carrying out its work by itself whereas in case of a comparable, it was outsourcing most of its work, said company could not be a comparable. Even where comparable with highest margin had different functional segment, since it had a clearly demarcated call centre segment and segmental results were available in audited financial statements of company, it could be considered as a comparable. In case assessee catered to export market, whereas comparable companies catered to domestic market, these companies are to be rejected as comparables.(AY. 2004-05)

24/7 Customer.Com (P.) Ltd. v. Dy. CIT (2013) 140 ITD 344 / 21 ITR 514 / 89 DTR 209 / 158 TTJ 94 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length – Selection of comparables – "High End" Cos in ITES/BPO sector comparable to "Low End" ones- Adjustment can be made even if income is exempt under section 10A – Amendment by the Finance Act 2009 will apply all assessments pending as on 1st October, 2009 – Matter remanded [S. 10A]

The assessee raised three contentions in support of the contention that its charges were at ALP: (i) that the assessee was engaged in the "low end" activity of "voice based call centre" and that the comparables chosen by the TPO were not functionally comparable as they were engaged in the "high end" activity of "knowledge process outsourcing (KPO)", "software development" etc, (ii) that the margin has to be computed on the basis of return on asset employed (ROA) or on capital employed (ROCE) and not on the basis of operating cost & (iii) that as its income was exempt u/s 10A, there was no 'tax avoidance' and the transfer pricing provisions could not apply. HELD by the Tribunal:

(i) The argument that the ITES/BPO industry has several segments starting from low end segment such 'call centre', 'customer care' to high end segments such as 'KPO', 'content development' etc. in which there is wide variation in the billing rates and that high end services are not comparable to the low end services is not acceptable because under Rule 10B(2) the comparability of an international transaction with an uncontrolled transaction has to be judged with the reference to the services provided, functions performed, asset employed and risk assumed. All companies which are in the ITES segment are providing similar services and difference is in the internal working which is reflected through difference in qualifications and skills of the employees. The difference in skill/ qualification of the employees and their payment structure and the difference in billing rate does not affect the comparability in any significant manner under TNMM;

(ii) Though Rule 10B(1)(e) gives the option of computing the margin in relation to asset employed (ROA or ROCE), the OECD and the United Nations TP manual provide that ROCA/ROA are suitable only for manufacturing and other capital or asset intensive industries and not for the service sector. In the case of service companies, the main asset is employees which is not reflected in the balance sheet and, therefore, ROCA/ROA will not be an appropriate method for the purpose of computation of margin;

(iii) The argument that as the assessee's income is exempt u/s 10A, there was no tax avoidance in transferring profit to a low tax jurisdiction is not acceptable because the law has to be applied as enacted. There is no provision in the transfer pricing regulations that for applying the said provisions the revenue has to prove tax avoidance. Once there is a international transaction, the ALP has to be computed as per the prescribed methods. Matter remanded.(AY. 2007-08)

Vodafone India Services Pvt. Ltd. v. DCIT (2013) 157 TTJ 513 / (2014) 146 ITD 78(Mum.)(Trib.)

S.92C : Transfer pricing – Domestic leg of cross-border deal, even if consequential to overseas deal by parent AE, not covered if terms not dictated by parent AE

Eastman Kodak, USA, entered into an agreement with Onex Healthcare Holdings, USA, for the global sale by Eastman of the medical business to Onex for a consideration of USD 23.5 billion. Pursuant to this, the assessee, the Indian subsidiary of Eastman Kodak, sold the Indian business to the Indian subsidiary of Onex for a consideration of USD 13.54 million. The assessee claimed that as it was not an Associated Enterprise of the buyer and as both the seller and the buyer were residents, the transfer pricing provisions did not apply. However, the TPO invoked s. 92B(2) and held that though the transaction was with a person other than an AE, it attracted the transfer pricing provisions as there was a prior agreement in relation to the said transaction between such other person and the AE and/or the terms of the relevant transaction were determined in substance between such other person and the AE. The TPO computed the ALP by applying the "ratio of revenue" method and determined the ALP at USD 32.9 million and made an adjustment of ` 79.96 crores. This was upheld by the DRP. On appeal by the assessee to the Tribunal, HELD reversing the TPO & DRP:

(i) Though s. 92B(2) provides for a situation where even a transaction between two non-associated enterprises can be subject to the transfer pricing provisions, it is essential that there should first be an "AE" with whom there exists an "international transaction" before it can be examined whether the international transaction with the "the non-AE" exists or not. On facts, the agreement between the two foreign companies was independent of the agreement between the two Indian domestic companies. The assessee had full authorisation to perform and take its own decision with regard to the sale of the imaging segment to the buyer. Even if one accepts that the sale agreement by the assessee was as the result of prior agreement or was consequential upon the agreement between the two non-resident companies, yet, as the holding company had not dictated the terms and conditions of the sale and the entire exercise of transfer of imaging segment was independently done on its own terms by the assessee and the buyer, the deeming provision of s. 92B(2) does not apply. The Department's argument that the legal character of the assessee and the other enterprise be disregarded due to the influence of the agreement between the foreign holding companies is not acceptable (*Vodafone v. UOI 341 ITR 1 (SC)* followed);

(ii) Further, the TPO was not justified in adopting an alien method for arriving at the ALP. U/s 92C(1) read with Rule 10B, the ALP can be determined only by adopting one of the prescribed methods and by no other (LG Electronics (SB) followed). (AY. 2008-09)

Kodak India Pvt. Ltd. v. ACIT (2013) 155 TTJ 697 / 88 DTR 242 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Determination – Appropriate method – Net margin method not to be used without making adjustments for such differences – Power to collect information under section 133(6) – Information so collected and proposed to be utilized to be confronted to assessee-officer has to prove shifting of profits by assessee to associated enterprise. Provision introduced with retrospective effect from April 1, 2002 – Benefit of plus or minus 5 per cent standard deduction not to be allowed. [Ss. 10A, 133(6)]

The assessee, a wholly owned subsidiary of H Inc of the U.S.A., its associated enterprise, was engaged in the business of development of software on behalf of its holding company and transferred the software to the holding company for marketing and licencing to its customers. For this purpose, the assessee entered into an agreement with its holding company according to which for the services rendered by the assessee the holding company would reimburse all the cost incurred plus 8 per cent mark-up. The assessee adopted the cost plus method for computing the arm's length price for its international transaction. The assessee claimed deduction under section 10A of the Income-tax Act, 1961. The Assessing Officer referred the matter to the Transfer Pricing Officer under section 92CA(2) of the Act for computing the arm's length price. The assessee produced all the documents called for by the Transfer Pricing Officer. The Transfer Pricing Officer rejected the cost plus method adopted by the assessee and held that the transactional net margin method was the most appropriate method to compute the arm's length price of the international transaction of the assessee. The Transfer Pricing Officer also rejected the transfer pricing study report of the assessee. The Transfer Pricing Officer also found some of the filters adopted by the assessee to be inadequate. The Transfer Pricing Officer therefore adopted certain additional filters. Out of the 22 companies selected as comparables by the assessee in the transfer pricing study report the Transfer Pricing Officer rejected 20 companies. The Transfer Pricing Officer selected 15 companies as additional comparables rejecting the assessee's objections to the companies. The Transfer Pricing Officer determined the arithmetic mean profit level indicator of the comparables selected at 26.88 per cent and after allowing working capital adjustment of 2.09 per cent determined the adjusted arithmetic mean profit level indicator at 24.79 per cent. Applying the arithmetic mean profit level indicator the Transfer Pricing Officer determined the arm's length price of the international transactions by the assessee with its holding company at Rs. 15,26,61,330. Since the assessee had disclosed the price received by it at Rs.13,37,43,661 the shortfall of Rs.1,89,17,669 was proposed as adjustment under section 92CA of the Act. On appeal, the Commissioner (Appeals) upheld the transactional net margin method adopted by the Transfer Pricing Officer as the most appropriate method but accepted the assessee's contention that large companies having turnovers more than ` 100 crores could not be treated as comparables. He further held that the "employee cost to sale" filter adopted by the Transfer Pricing Officer was not appropriate as relevant data was not available in respect of all the companies available on the database. Moreover, part of the employee cost was included by certain companies under different heads like software package cost or operating expenses as a result of which the filter could not be uniformly and objectively applied for selection of comparables. He accepted the assessee's contention that the Transfer Pricing Officer was not correct in excluding companies whose onsite income was more than 75 per cent. He held that loss-making companies and companies having super profits could not be treated as comparables. He selected 11 companies as comparables and directed the Assessing Officer to find out the arithmetic mean of those eleven companies and compute the adjusted average profit level indicator after allowing working capital adjustment and risk adjustment at 3 per cent and benefit of ± 5 per cent under the proviso to section 92C(2). On appeal :

Held, (i) that while the assessee had a turnover of about Rs. 13.57 crores many of the comparables selected by the Transfer Pricing Officer had high turnovers of more than Rs. 100 crores. Therefore, those companies could not be considered as comparables. The decision of the Commissioner (Appeals) excluding companies whose turnover was more than Rs. 100 crores was correct. The Commissioner (Appeals) was equally correct in not sustaining the rejection of comparables selected by the assessee by applying the "employee cost to sale" filter as relevant information for this filter was not available. Selection of comparables applying the "onsite income" filter also stood on the same footing as relevant information was not available in respect of all the companies in the database. Though the Transfer Pricing Officer had himself not applied this filter observing that companies having onsite income of more than 75 per cent. could not be treated as comparables, two of the companies selected as comparables by the Transfer Pricing Officer had onsite income/expenses of more than 75 per cent. The Commissioner (Appeals) was correct in holding that rejection of comparables selected by the assessee by applying this filter was not correct. Loss-making companies and companies having super normal profits could not be considered as comparables. Therefore, the selection of companies by the Commissioner (Appeals) as comparables was rational and appropriate and the order of the Commissioner (Appeals) directing the Assessing Officer to compute the arithmetic mean of 11 comparables selected by him and determine the arm's length price after computing the adjusted average profit level indicator, was proper.

(ii) That the Finance Act, 2012 amended the provision of section 92C of the Act by inserting sub-section (2A) with retrospective effect from April 1, 2002 made it clear that an assessee shall not be entitled to exercise its option as referred to in the proviso to sub-section (2) if the variation between the arithmetical mean and the price at which such transaction had actually been undertaken exceeded 5 per cent of the arithmetical mean. In view of the retrospective operation of the provision, the benefit of ± 5 per cent as a standard deduction could not be allowed. The direction given by the Commissioner (Appeals) was to be modified to this extent.

(iii) That the materials on record clearly proved the fact that the assessee was a captive service provider. It had transactions only with its associated enterprise. It was also a fact that all the risks lay with the associated enterprise. Different Benches of the Tribunal having taken divergent views on this issue the view favourable to the assessee had to be taken and the direction of the Commissioner (Appeals) in this regard in allowing the benefit of risk adjustments at one per cent was affirmed.

(iv) That the assessee had itself accepted that the transactional net margin method was similar to the cost plus method excepting that the cost plus method was based on gross margins whereas the transactional net margin method was based on net margins. The assessee had also accepted that if proper selection criteria were adhered to, the application of the transactional net margin method would also result in the fact that the price at which the assessee had undertaken the international transactions were at arm's length. The assessee had not disputed adoption of the transactional net margin method by the Transfer Pricing Officer in the earlier assessment years.

(v) That though the assessee's income was exempt under section 10A of the Act that did not necessarily mean that the Assessing Officer had to prove the shifting of profits by the assessee to its associated enterprise before applying transfer pricing provision.

Though the Transfer Pricing Officer is empowered under the provisions of the Act to collect information under section 133(6) of the Act, at the same time, the principles of natural justice demand that the information so collected, and proposed to be utilised, be confronted to the assessee. (AY. 2005-06, 2006-07)

Dy. CIT v. Hellosoft India Pvt. Ltd. (2013) 23 ITR 1 / 57 SOT 4 (URO) / 84 DTR 153 (Hyd.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Determination – Transactional net margin method – Comparables – Judged primarily on functional similarity – "Transaction"- Reimbursement of expenses by one associated enterprise to another is "transaction" – Not to be ignored in applying filters based on quantum of related party transactions

The assessee is engaged in the business of providing information technology enabled services to its group companies in the U. S. A. and Europe through its call centre located in Mumbai. It entered into international transactions with its associated enterprises. A reference under section 92CA(1) was made by the Assessing Officer to the Transfer Pricing Officer for determination of the arm's length price in respect of international transactions undertaken by the assessee during the year under consideration. The assessee declared operating profit on total cost at 15 per cent. It applied the transactional net margin method as the most appropriate method. The arm's length percentage of operating profit to total cost was worked out at 7.31 per cent on the basis of current year's data and 9.93 per cent on the basis of multiple year data. The assessee chose 15 comparable cases for working out the percentage of operating profit on total cost at 7.31 per cent according to the current year's data. The Transfer Pricing Officer included certain new cases at his own and ignored certain cases considered by the assessee. Eventually, the Transfer Pricing Officer took 13 cases as comparables and determined the percentage of operating profit on total cost at 24 per cent applying filters of companies with less than 25 per cent related party transactions, and companies with export revenue more than 25 per cent of the revenues. The Transfer Pricing Officer recommended an adjustment of ` 2.20 crores which the Assessing Officer made. On appeal: Held, (i) that section 92F(v) defines "transaction" in the context of transfer pricing provisions to include an arrangement, understanding or action in concert whether or not it is formal or in writing or whether or not it is intended to be enforceable by legal proceeding. Since the Transfer Pricing Officer applied the filter of having companies with less than 25 per cent related party transactions, it was not open to ignore the transactions duly reported by the comparable D as international transactions within the meaning of section 92B simply because they represented reimbursement of expenses. A pure reimbursement of expenses by one associated enterprise to another associated enterprise is very much a "transaction" within the meaning of section 92F(v) and consequently is equally an international transaction under 92B requiring consideration in terms of section 92 of the Act. In any case, the Department did not demonstrate that such reimbursement of expenses was without any mark-up. Therefore, D was liable to be excluded as it involved related party transactions at a much higher level, as against the filter adopted by the Transfer Pricing Officer himself, being companies with less than 25 per cent related party transactions.

(ii) That the Transfer Pricing Officer, *inter alia*, applied filter of companies with export revenues more than 25 per cent of the revenues to include G. Its total revenue was Rs.30.89 crores from three segments and the break-up of such revenue showed earnings in foreign currency at Rs. 4.24 lakhs. This case therefore, did not pass through the filter adopted by the Transfer Pricing Officer. Although the assessee had earlier included the case of G within its transfer pricing study and the Transfer Pricing Officer also included it in his final list of comparables, the purpose of income tax assessment is to determine the correct income of the assessee. As the Revenue cannot allow an assessee to depress his income, in the same manner, it is not permissible to the Revenue to take advantage of the ignorance or mistake of the assessee in offering more than due income and the assessee was entitled to argue at least before the appellate authorities that a wrong stand taken at the time of filing the

return of income should be allowed to be modified. The Transfer Pricing Officer was to examine in fresh proceedings the correctness of the figures placed on record by the assessee in support of its contention that the case of G was wrongly included by it in the list of comparables and decide the question of inclusion or exclusion of this case afresh independent of the Tribunal's observations, albeit keeping in mind the filter of companies whose export revenues were more than 25 per cent of the revenues.
(iii) That the reputation of the group, owning M was under serious indictment and other Benches of the Tribunal had directed M to be excluded from the list of comparables for this reason. M was to be excluded from the final list of comparables.
(iv) That the predominant view taken by various Benches of the Tribunal was to exclude the case of V on the reasoning that profit margin in self-provision and outsourcing of services was different. Therefore on this comparable case the matter was to be decided afresh by the Transfer Pricing Officer in consonance with the Tribunal's observations.
(v) That since the Tribunal had excluded two cases and the decision as to inclusion or otherwise of the remaining two cases had been restored to the Transfer Pricing Officer it would only be when the Transfer Pricing Officer decided the fate of these two cases that any decision could be arrived at about the mean of the operating profit/total cost of the remaining cases. The Transfer Pricing Officer was to give effect to the provisions of section 92C after deciding the destiny of such two cases after allowing a reasonable opportunity of being heard to the assessee in such fresh proceedings. (AY. 2006-2007)
Stream International Services P. Ltd. v. ADIT (IT) (2013) 23 ITR 70 / 152 TTJ 553 / 141 ITD 492 / 83 DTR 394 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Cost of providing services by German company to all entities of group worldwide and basis of allocation of cost to various group entities across the world to be submitted to enable Transfer Pricing Officer to ascertain whether there was profit or mere reimbursement of actual cost – Matter remanded
The assessee company, engaged in the business of manufacture and trading of pneumatic equipment, entered into international transactions with its associated enterprises under which, *inter alia*, the assessee paid a sum of Rs. 2,28,65,807 to the German group company, an associated enterprise, for SAP service charges. The assessee explained that the F group had implemented a standard ERP software, namely SAP R/3, that the cost incurred to implement the software and the ongoing cost towards user licence and maintenance was allocated to each of the group companies on the basis of use, that for the financial year 2006-07, that the German company had allocated the actual cost incurred in relation to use of such software amounting to Rs. 2,28,65,807 to the assessee, that the German company allocated or apportioned the costs pertaining to the assessee without any mark-up and the charges for the implementation activity were based on actual costs incurred by them without any mark-up. The Assessing Officer referred to the determination of the arm's length price in respect of the transaction to the Transfer Pricing Officer under section 92CA of the Act. The Assessing Officer was of the view that the assessee was not able to demonstrate the services rendered by the German company for which the payment was made and that even if the services were incurred, the quantum of such services would not be to the extent of Rs. 2.28 crores. Moreover, when expenditure is incurred for the benefit of the group as a whole. The Transfer Pricing Officer proceeded on the assumption that no services were rendered by the German company for which SAP charges were paid by the assessee. For this reason and also for the reason that no comparable instances had been provided by the assessee, the Transfer Pricing Officer treated the entire payment as not at arm's length. The Dispute Resolution Panel confirmed the order of the Assessing Officer rejecting the stand of the assessee that the Transfer Pricing Officer had no jurisdiction to go into the question as to whether the assessee received services for which a payment had been made by the taxpayer. On appeal. Held, that the transfer pricing study done by the assessee did not give out any comparable instances of similar transactions between the unrelated parties. The assessee had to substantiate the

price that is paid to its associated enterprise was at arm's length within one of the methods prescribed. The transfer pricing study of the assessee was not in tune with the provisions of section 92C of the Act. The order of the Assessing Officer on this issue was to be set aside and the question of determination of arm's length price remanded to the Transfer Pricing Officer for fresh consideration. The Transfer Pricing Officer shall not take into consideration the payments made for SAP modules which were not the subject-matter of the international transactions in dispute in this appeal. The assessee was to file the transfer pricing study in accordance with the provisions of the Act and substantiate that the price paid by it to the German company was at arm's length within the methods laid down in the Act. The cost of providing SAP charges by the German company to all entities of the group worldwide and the basis of allocation of cost to various group entities across the world should be submitted by the assessee with a view to enable the Transfer Pricing Officer to ascertain as to whether there had been any profit element involved or was it a case of mere reimbursement of actual cost incurred for the assessee by the parent company. (AY. 2007-08)
Festo Controls P. Ltd v. Dy. CIT (2013) 22 ITR 574 (Bang.)(Trib.)

S.92C : Transfer pricing – Royalty – Arm's length price – Comparable – Commissioner (Appeals) relief to the assessee by revising the rate upwardly at 4.5 per cent as fair and reasonable without giving any basis as required by the provisions of section 92CA as well as the relevant rules, no further relief was warranted on this issue
During the year under consideration, the assessee had entered into two international transactions with its associate enterprise in Japan. One of the two transactions involved a payment of royalty for use of technical know-how by the assessee-company to the Japanese company for supply of technical know-how at 5 per cent of the domestic sales and 8 per cent. of the export. The assessee having entered into agreements with other non-related foreign parties for supply of technical know-how and since the data relating to the said non-related foreign parties was available, it had considered the comparable uncontrolled price method the most appropriate method for its transfer pricing study and keeping in view the rate of royalty paid to the non-related parties, it contended that the rate at which royalty was paid by the assessee to its associated enterprise was at arm's length. The Transfer Pricing Officer found that royalty was paid by the assessee to the related and non-related parties only in respect of domestic sales and not exports. He therefore, proceeded to compare the rate at which royalty was paid by the assessee to the related and non-related parties on domestic sales. Since the arithmetic mean of the royalty rates of the non-related parties of 3 per cent and 5 per cent worked out at 4 per cent, he adopted this as the arm's length rate of the royalty payable on domestic sales in the order passed under section 92CA(3). According to the said order, addition was made by the Assessing Officer. The Commissioner (Appeals) held that it would be fair and reasonable to take 4.5 per cent as the arm's length rate of the royalty. On appeal :
Held, that the comparable uncontrolled price method was followed by the assessee to determine the arm's length price of the royalty paid to its associated enterprise, namely on the ground that there being similar payment of royalty made to two unrelated parties, the internal comparable uncontrolled prices were available. Since the royalty paid to the two unrelated parties on domestic sales for supply of technical know-how was 3 per cent and 5 per cent, the arithmetic mean of royalty rate was worked out by the Transfer Pricing Officer at 4 per cent under the relevant provision of section 92CA. The assessee itself having taken the two non-related parties as comparables in its transfer pricing study, it could not now turn back and say that one of the parties was not comparable without giving any cogent or convincing reason. Although the assessee contended that the use of technology availed from D had restricted application the domestic sales generated by the assessee using the technology of D was quite comparable with the domestic sales generated from the use of technology of its associated enterprise. The royalty of 5 per cent paid to O was also for use of a particular trade mark of that company to which the Transfer Pricing Officer attributed the royalty payment to the extent of one per cent. on the basis of Government policy of automatic route. Whether any product with the trade mark was actually manufactured by the assessee or was simply imported by it from O was irrelevant

because use of the trade mark was undoubtedly allowed by O to the assessee along with supply of technology for a royalty payment of 5 per cent of the domestic sales and irrespective of whether the assessee had manufactured the goods with the trade mark or not, it was entitled to do so on payment of royalty at the rate of 5 per cent as agreed between the parties. There was nothing to point out any infirmity in the rate of 4 per cent determined by the Transfer Pricing Officer as the arm's length rate of royalty paid/payable by the assessee to its associate enterprise and since the Commissioner (Appeals) had already allowed a further relief to the assessee by revising the rate upwardly at 4.5 per cent. as fair and reasonable without giving any basis as required by the provisions of section 92CA as well as the relevant rules, no further relief was warranted on this issue. (AY. 2002-03)
Kansai Nerolac Paints Ltd. v. Dy. CIT (2013) 22 ITR 424 / 57 SOT 10 (URO) (Mum.)(Trib.)

S.92C : Transfer pricing – RBI approval – FDI policy – RBI approval has no relevance on issue of Arm's length price – CUP Method- TNM Method – Matter set aside and Assessing Officer to decide the matter by adopting CUP method
The assessee was engaged in the manufacturing and marketing of beer using technical know-how provided by SAB Miller. The assessee paid royalty for the technical know-how and the question arose whether the same was at arm's length. One of the arguments advanced by the assessee was that as under Press Note no. 9 of 2000 issued by the Ministry of Commerce and Industry in relation to FDI policy, remittance of royalty not exceed 5% of domestic sales and 8% of export sales was permitted, the royalty paid by it which was within those limits should be considered as being at arm's length for transfer pricing purposes. HELD by the Tribunal rejecting the plea:
Press Note No.9 of 2000 issued by the Ministry of Commerce and Industry in respect of FDI policy and prescribing the percentage of royalty to the sales allowed under automatic route cannot substitute as ALP to be determined under the provisions of the Act and Rules. FDI policy permitting certain percentage of payment of royalty is only for remittance of the amount in foreign exchange and therefore, such permission given in an entirely different context and purpose cannot be considered as relevant for determination of the ALP under I. T. Act. The RBI is only concerned with the foreign exchange and, therefore, would look into the matter from that point of view. The RBI, at the time of giving such permission would not keep in mind the provisions of the I T Act, which is the function of the income tax authorities and, hence, cannot validly go into such an issue. When a proper mechanism is provided under the provisions of the I. T. Act and Rules for determination of the ALP, then the approval by other than the I. T. Authorities, for the purpose of remittance/outflow of the foreign exchange, does not *ipso facto*, partake the character of ALP, which has to be determined as per TP regulations (*CIT v. Nestle India Ltd. (2011) 337 ITR 103 (Del)* followed). (AY. 2007-08)
SKOL Breweries Ltd. v. ACIT (2013) 142 ITD 49 / 84 DTR 271 / 153 TTJ 257 / 28 ITR 465 (Mum.)(Trib.)

S.92C : Transfer pricing – Automatic RBI approval means transaction is at Arm's Length Price
The ITAT had to consider two legal issues in the context of transfer pricing (i) whether if a royalty agreement falls within the 'automatic approval scheme' and is approved/ deemed to be approved by the RBI, the royalty can be treated to be at arm's length just because it is approved/ deemed approved and (ii) what are the parameters to be applied while applying "Internal TNMM". HELD by the Tribunal:

(i) The assessee's collaboration agreement with its AE for payment of 2% of contract value for manufacturing, drawing and engineering services and 5% of the selling price as royalty falls under the "automatic approval scheme" of the RBI. When the rate of royalty payment and fee for drawings etc. has been approved or deemed to have been approved by the RBI, then such payment has to be considered at ALP;
(ii) Rule 10B(1) (e) (i) requires the profit margin realised by the enterprise from an international transaction entered into with an AE to be ascertained for determining as to whether or not it is at arm's length. The margin with which such margin earned by the assessee is compared with for

determining the ALP, can be internally available from comparable transaction(s) or from externally available cases. If the enterprise has entered into similar transactions with third parties as are under consideration with the AE, then the profit realized from such transactions with third parties is a good measure to benchmark the margin from international transaction. Thus, on one hand we need to have profit margin which is to be compared from transactions with the AEs and on the other hand, we need to find out the profit margin from similar transactions with non-AEs with which comparison is to be made. Both these figures should come from separate watertight compartments. No overlapping is permissible in the composition of such compartments. In other words, neither the first compartment of profit margin from AE transactions should include profit margin from the transactions with non-AEs, nor the second compartment should have profit margin from the transactions with the AEs. If such an overlapping takes place, then the entire working is vitiated, thereby obliterating the finer line of distinction of the profit margin to be compared and the profit margin to be compared with. On facts, as the assessee had not maintained segment-wise accounts and as the figures of AE and non-AE transactions were segregated from the common pool of figures, the margins derived therefrom were not reliable and the claim of internal TNMM was not acceptable. (AY. 2008-09)

ThyssenKrupp Industries India Pvt. Ltd. v. ACIT (2013) 87 DTR 65 / 154 TTJ 689 / 25 ITR 243 (Mum.)(Trib.)

S.92C : Transfer pricing – ALP should be determined on segment – Wise profits & not at an entity level. Adjustment cannot be made to the entire entity turnover/ profits

The assessee entered into several international transactions with its AE and claimed that there were at arm's length on the basis of a segment-wise TNMM analysis for each of them. The TPO rejected the claim on the ground that the segment-wise accounts were not audited. He adopted an entity method approach for purposes of determining the ALP. However, while rejecting the segmental analysis undertaken by the assessee, the TPO accepted 4 segments of the assessee's operations and identified comparables. He arrived at different arithmetical means of appropriate profit level indicators by taking operating profit by cost of various identified comparables in each segment. He thereafter gave weighted average to the assessee's percentage of turnover out of the total turnover and determined the weighted average of the arithmetic mean in each segments and arrived at the operating profit at 18.09% at entity level. This was taken as the arm's length profit margin and as the assessee's operating margin of 4.78% operating cost was less than the ALP so determined, an adjustment of ` 82 crore was made to the assessee's income. Before the DRP, the assessee furnished audited segmental accounts though these were ignored by it. On appeal by the assessee to the Tribunal, HELD:

As the assessee's operates in four different & independent segments and it submitted segmental accounts for each of its operation, the correct approach under TNMM should be to determine the ALP of each of the segments by comparing with the corresponding comparables involved in similar lines of functioning after proper FAR analysis. As the TPO had details of each segment-wise profit margin of the comparables, he ought to have compared the relevant profit margins with that of the assessee's profit margins in each segment. His approach of taking the weighted average method of arriving at entity based profit margin is not correct. Also, his approach of making the adjustment on the entire turnover of the assessee including transactions with non-AEs instead of restricting it to the AEs' transactions is not supported by the transfer pricing provisions. Further, in arriving at the segment-wise profit margin, the TPO should carry out an analysis of each company's business activity, why they are selected as comparable and what are the functions of the company, operating margins, etc. He should adopt proper parameters/filters in respect of each segment. If the assessee opposes the selection of comparables by the TPO, it is the responsibility of the TPO to furnish necessary details. The onus cannot be shifted to the assessee when it is contending that proper data is not available in public domain in this regard. (AY. 2008-09)

Sandoz P. Ltd. v. DCIT (2013) 25 ITR 347 / 145 ITD 551 / 96 DTR 401 (Mum.)(Trib.)

S.92C : Transfer pricing – ALP of loan transaction has to be determined as per CUP & LIBOR

The assessee, an Indian company, gave a loan of $ 10,50,000 to its USA based Associated Enterprise (AE) at 4% rate of interest. The TPO adopted the Indian company as the tested party and held that the comparable rates for benchmarking the interest had to be selected from the Indian domain and the rate that the assessee would have earned by giving loans in the Indian market had to be taken as the ALP. It was also held that an addition to the interest rate had to be made for the risk factor. The interest rate was determined at 17.25%. On objection by the assessee, the DRP held that the ALP had to be taken at the PLR of RBI being 13.25%. On appeal by the assessee to the Tribunal, HELD reversing the TPO & DRP:

(i) CUP is the most appropriate method for ascertaining the arm's length price of an international transaction of lending money. Where the transaction is of lending money in foreign currency to its foreign subsidiaries, the comparable transactions have to be of foreign currency lent by unrelated parties. The financial position and credit rating of the subsidiaries will be broadly the same as the holding company. In such a situation, domestic prime lending rate would have no applicability and the international rate fixed being LIBOR should be taken as the benchmark rate for international transactions. On facts, the assessee had an arrangement for loan with CitiBank for less than 4% and on the loan provided to its AE's it had charged 4% interest. Hence, the adjustment made by the TPO was not warranted.

(ii) Further, the assessee's profits are exempt u/s 10B and so there was not a case where the assessee would benefit by shifting profits outside India. (AY. 2008-09)

Cotton Naturals (I) Pvt. Ltd. v. Dy. CIT (2013) 22 ITR 438 / (2014) 146 ITD 662 (Delhi) (Trib.)

S.92C : Transfer pricing – No notional interest addition for delayed payments by AE

The assessee raised invoices on its Associated Enterprise (AE) and gave 30 days credit for payment. As there was delay by the AE in making payment beyond the stipulated credit period, the TPO held that the assessee ought to have charged interest at the rate of 1% per month. A notional addition towards the said interest was made. This was upheld by the DRP. On appeal by the assessee to the Tribunal, HELD reversing the AO & DRP:

The assessee has no borrowings and so there is no interest liability. Even if the payments have been made by the AE beyond the normal credit period, there is no interest cost to the assessee. Moreover, there is no such agreement whereby interest is to be charged on such a delayed payment. The assessee does the billing on a quarterly basis and accordingly, the payment is being received. Therefore, the delay is not wholly on account of late payment by the AEs only. Moreover, the T.P. adjustment cannot be made on hypothetical and notional basis until and unless there is some material on record that there has been under charging of real income. Consequently, an addition an account of notional interest relating to alleged delayed payment in collection of receivables from the A.Es is uncalled for.(AY. 2007-08)

Evonik Degussa India P. Ltd. v. ACIT (2013) 55 SOT 566 / 81 DTR 143 / 151 TTJ 1 (Mum.) (Trib.)

S.92C : Transfer pricing – Arm's length price – Matter remanded

Arm's length price not to be determined without proper comparables. Failure by assessee to file transfer pricing report on ground no public domain comparable in assessee's line of business – Matter remanded for fresh transfer pricing study for determination of fair arm's length price. (AY. 2005-06 to 2007-08)

Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Discount granted to AE – Addition was not justified

Assessee-company had granted 10 per cent discount on sales made to its associated enterprise. In course of assessment, Assessing Officer held that price charged by assessee to its AE was not at arm's length and TP adjustment to extent of discount granted was made by him on basis of report obtained

from TPO. Commissioner (Appeals) set aside TP adjustment holding that TPO and Assessing Officer had arrived at price difference not on basis of any established method of determining arm's length price but simply on basis of 10 per cent discount granted by assessee-company to its associate enterprise. Tribunal following order passed by co-ordinate Bench of Tribunal in assessee's own case relating to assessment year 2006-07, impugned order passed by Commissioner (Appeals) deleting addition made by way of TP adjustment was to be upheld. (AY. 2004-05)
Dresser Rand India (P.) Ltd. v. Dy. CIT (2013) 55 SOT 167 / 24 ITR 610 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – TNMM – Method cannot be discarded in preference over transactional profit methods, without any valid reasons
Assessee-company determined ALP of its international transactions with AE on basis of Cost Plus Method (CPM). TPO, however, made adjustment to ALP determined by assessee relying on Transactional Net Margin Method (TNMM). It was noted that TPO had not assigned any valid reason for rejecting method adopted by assessee for determination of ALP. Further, if four companies earning super normal profits were excluded from list of comparables selected by TPO, average OPM would come to 18.91 per cent whereas net profit margin of assessee was 18.11 per cent, in view of above, impugned adjustment made to ALP determined by assessee was to be set aside. Tribunal held that where an assessee has followed one of standard methods of determining ALP, such a method cannot be discarded in preference over transactional profit methods, unless revenue authorities are able to demonstrate fallacies in application of standard methods. (AY.2005-06)
CIT v. Sonata Software Ltd. (2013) 55 SOT 533 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Matter remanded
Assessee belonged to a multinational group of companies which undertook IT project named Common Operating Environment System (COE3). It received IT support from its Associated Enterprises (AEs). Costs incurred in respect of said project were allocated to group companies. Assessee shared related cost and reimbursed cost to its AEs.TPO observed that relevant details regarding allocation of costs were not furnished by assessee. He determined arm's length price at nil and disallowed entire cost borne by assessee. Significant costs were incurred in respect of said project. Assessee had also furnished relevant invoices raised in this regard. Tribunal held that TPO was not justified in ignoring these details and computing ALP at nil and, therefore, matter be remanded to TPO to workout ALP of relevant transaction. Matter remanded. (AY.2002-03)
Castrol India Ltd. v. ACIT (2013) 55 SOT 521 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables – While carrying out comparability analysis for determining ALP, one has to examine functional profile of company and attributes of products and services provided
Assessee in course of international transactions provided testing and analytical support services in connection with research and development to its associate enterprise. In transfer pricing study report for comparability analysis, assessee had identified 12 comparable companies. Dispute resolution panel for determining arm's length price selected six companies for comparability analysis. These six comparable companies were arrived after rejecting three diagnostic companies, which were selected by assessee, and two new comparable companies were added. Tribunal held that since functional profile of two new comparable companies was different with that of assessee, inclusion of said companies in set of comparables was not justified, since functional profile of three diagnostic companies was not only different but characteristic of services rendered was also different, these three companies had rightly been rejected from set of comparables. Therefore, only four set of companies should be included for purposes of comparability analysis and arithmetic mean of these companies should be taken for purpose of determining ALP. Partly in favour of assessee. Tribunal held that while carrying out comparability analysis for determining ALP, one has to examine functional profile of company and attributes of products and services provided.(AY. 2007-08)

Evonik Degussa India (P) Ltd. v. ACIT (2013) 55 SOT 566 / 81 DTR 143 / 151 TTJ 1 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Notional interest – Addition was deleted
Assessee had international transactions with its AE. It had given credit of thirty days in invoices raised against AE. AE made payments to assessee beyond stipulated credit period. Assessee had not charged any interest on delayed payment. TPO worked out notional interest at rate of one per cent per month for period of delay beyond thirty days and added same to income of assesse. Whether since there was no agreement between assessee and AE to charge interest on delayed payment, impugned addition was not justified. (AY. 2007-08)
Evonik Degussa India (P) Ltd. v. ACIT (2013) 55 SOT 566 / 81 DTR 143 / 151 TTJ 1 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparable by TPO was not proper hence adjustment was not proper – Matter remanded
Assessee-company engaged in business of software development services and information technology enabled services (ITES) entered into an international transactions with its associated enterprise. TPO made transfer pricing adjustment by selecting certain comparable companies. Since comparables selected by TPO were super profit making companies and functionally different as they were not in same line of business as that of assessee, and, there were many other significant differences in companies selected by TPO, same were to be excluded from list of comparables for purpose of making transfer pricing adjustment. In favour of assessee. (AY.2006-07)
Google India (P.) Ltd. v. Dy. CIT (2013) 55 SOT 489 / 28 ITR 403 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables – Adjustments cannot be made without giving an opportunity [S. 133(6)]
Tribunal held that where Assessing Officer in exercise of power under section 133(6) obtained information from comparables and on basis of said information made adjustment to assessee's ALP without obtaining objections from assessee, said adjustment was to be set aside and, matter was to be remanded back for disposal afresh. (AY. 2007-08)
Headstrong Services India (P.) Ltd. v. ACIT (2012) 33 CCH 448 / (2013) 55 SOT 481 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Matter set aside
Assessee is required to support its claim for any adjustment with robust data and full details and evidences and burden of proof is on it whenever it makes such a claim. Assessee-company was a 100 per cent subsidiary of a US-based company. It was registered under Software Technology Park Scheme of Government of India and was primarily engaged in software development for its parent company. It entered into international transactions with its associate enterprise – It also entered into direct contracts with domestic customers. For purpose of computing arm's length price, it adopted transactional net margin method and relied upon internal comparables. TPO rejected internal comparables on ground that internal uncontrolled transactions were just 1.4 per cent of total revenue earned by assessee and hence comparison with such transactions would not provide meaningful benchmarking. He also rejected some other claims of assessee and computed arm's length price at a margin of 16.3 per cent being arithmetic mean of final set of four comparables. Since assessee had uncontrolled comparables transactions with third parties in export segment to tune of 15 per cent of total turnover and had uncontrolled transactions with third parties in domestic sector to tune of 10 per cent of total turnover, domestic uncontrolled transactions were significant part of total turnover of assessee. In case domestic uncontrolled transactions were functionally comparable, same could be used for benchmarking. Therefore, matter required to be sent back to TPO to consider internal comparables given by assessee and arrive at fresh decision. Matter remanded. Tribunal held that it cannot be laid down as a proposition that transfer pricing adjustment could not exceed total profits earned by group. Assessee as well as revenue authorities are bound to determine ALP by applying law and rules laid down and cannot be guided by extraneous parameters, any claim for adjustment on

basis of risk or any other factors has to be based on proper data and sound calculation and *ad hoc* adjustments should not be granted. Where material available with TPO in current year is vastly different to material available with TPO in earlier year, principle of consistency does not hold water. (AY.2006-07, 2007-08)
Interra Information Technologies (India) (P.) Ltd. v. Dy. CIT (2013) 24 ITR 140 / 55 SOT 585 / 81 DTR 70 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – TNM Method – Matter remanded
Assessee had provided software development services to its overseas enterprise. It had applied TNMM and in comparison with profits earned by comparables, assessee had benchmarked itself. As it had lost a major contract during year it claimed idle capacity cost so as to justify profits earned by it. TPO disallowed said claim and on basis of operating profit margin of comparables, fixed arm's length margin at 11.96 per cent. However, Commissioner (Appeals) shifted method to profit split method and changed tested party and considered profit margin of 6 per cent as appropriate - No reason for adopting arm's length margin at 11.96 per cent was assigned by TPO. Further even Commissioner (Appeals) had accepted only profit making AEs, and arbitrarily fixed margin at 6 per cent. Neither TPO's order could be considered as appropriate nor order of Commissioner (Appeals), and, therefore, issue was to be restored for reconsideration. Matter remanded. (AY. 2004-05)
SITEL India (P.) Ltd. v. ACIT (2013) 55 SOT 541 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Resale Price Method – Adjustment held to be not justified
Assessee-company is engaged in business of distribution of telecom equipment, logic analysers and other test and measurement equipment on behalf of its Associated Enterprise (AE). Besides, if any customer in India wanted to purchase equipment directly from AE, assessee acted as intermediary and derived commission income for services rendered. In transfer pricing proceedings, TPO asked for segmental data of trading activity and commission agency activity separately and thereafter worked out margin in both activities and arrived at adjustment. It was noted that by applying resale price method (RPM), GP as percentage of sales in case of comparables selected by TPO was 12.90 per cent whereas GP as percentage of sales in case of assessee was much higher at 35.60 per cent. Tribunal held that in view of above, impugned adjustment made to ALP determined by assessee was not sustainable. (AY.2006-07)
Textronix India (P.) Ltd. v. Dy. CIT (2013) 55 SOT 512 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments – Value of International transaction and not entire turnover
Tribunal held that whatever be method followed or adopted for arriving at ALP, ALP can only be determined on value of international transactions alone and not on entire turnover of assessee at entity level.(AY.2007-08)
Thyssen Krupp Industries India (P.) Ltd. v. ACIT (2013) 55 SOT 497 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments
Tribunal held that so long as expenditure or payment has been demonstrated to have incurred or laid out for purpose of business, it is no concern of TPO to disallow same on any extraneous reasoning - Held, yes - Whether TPO cannot determine ALP at nil as jurisdiction provided to him is to determine ALP of transactions under methods provided under the Act. (AY.2007-08)
Thyssen Krupp Industries India (P.) Ltd. v. ACIT (2013) 55 SOT 497 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Comparables and adjustments – liquidated damages

Assessee made payment to its AE on account of liquidated damages paid by AE to a third party. TPO determined arm's length price at nil and made adjustment. Question as to whether liquidated damages were to be paid by assessee or not was outside purview of TP provisions as that was a business decision taken by assessee, as far as TP provisions were concerned, since assessee reimbursed exact amount which was recovered by third party, no adjustment could be made. (AY.2007-08)
Thyssen Krupp Industries India (P.) Ltd. v. ACIT (2013) 55 SOT 497 (Mum.)(Trib.)

S.92C : Transfer pricing – The "Bright Line test" can be applied to determine whether AMP expenses incurred by assessee are excessive and for the benefit of the brand owner – Adjustment in relation to advertisement, marketing, and sale promotion expenses incurred by assessee for creating or improving, marketing intangible for and on behalf of foreign AE is permissible. Expenses in connection with sales which do not lead to brand promotion cannot be brought within ambit of 'advertisement, marketing and promotion expenses'. Correct approach under TNMM is to consider operating profit from each international transaction in relation to total cost or sales or capital employed etc. of such international transaction and not net profit, total costs sales, capital employed of assessee as a whole on entity level [S. 92B, Rules 10A, 10B]
L.G. Electronics Inc, a Korean company, set up a wholly owned subsidiary in India (the assessee) to which it provided technical assistance. The assessee agreed to pay royalty at the rate of 1% as consideration for the use of technical know-how etc. The Korean company also permitted the assessee to use its brand name and trade marks to products manufactured in India on a royalty-free basis. The AO, TPO & DRP held that as the Advertising, Marketing and Promotion ("AMP expenses") expenses incurred by the assessee were 3.85% of its sales and such percentage was higher than the expenses incurred by comparable companies (Videocon & Whirlpool), the assessee was promoting the LG brand owned by its foreign AE and hence should have been adequately compensated by the foreign AE. Applying the Bright Line Test, it was held that the expenses up to 1.39% of the sales should be considered as having been incurred for the assessee's own business and the remaining part which is in excess of such percentage on brand promotion of the foreign AE. The excess, after adding a markup of 13%, was computed at ` 182 crores. On appeal by the assessee, the Special Bench had to consider the following issues: (i) whether the TPO had jurisdiction to process an international transaction in the absence of any reference made to him by the AO? (ii) whether in the absence of any verbal or written agreement between the assessee and the AE for promoting the brand, there can be said to be a "transaction"? (iii) whether a distinction can be made between the "economic ownership" and "legal ownership" of a brand and the expenses for the former cannot be treated as being for the benefit of the owner? (iv) whether such a "transaction", if any, can be treated as an "international transaction"? (v) whether the "Bright Line Test" which is a part of U. S. legislation can be applied for making the transfer pricing adjustment? (vi) whether as the entire AMP expenses were deductible u/s 37(1) despite benefit to the brand owner, a transfer pricing adjustment so as to disallow the said expenditure could be made? (vii) what are the factors to be considered while choosing the comparable cases & determining the cost/value of the international transaction of AMP expenses? (viii) whether, if as per TNMM, the assessee's profit is found to be as good as the comparables, a separate adjustment for AMP expenses can still be made? (ix) whether the verdict in *Maruti Suzuki India Ltd. v Add. CIT/Transfer Pricing Officer(2010) 328 ITR 210 (Del)* has been over-ruled/ merged into the order of the Supreme Court so as to cease to have binding effect?
By the Majority (Hari Om Marathe, JM, dissenting)
(i) Though s. 92CA(2A), inserted w.e.f. 1-6-2011, which permits the AO to consider international transactions not specifically referred to him does not apply as the TPO's order was passed before that date, sub-sec (2B) to s. 92CA inserted by the Finance Act 2012 w.r.e.f. 1-6-2002 (which provides that the TPO can consider an international transaction if the assessee has not furnished the s. 92E report) cures the defect in the otherwise invalid jurisdiction at the time of its original exercise. The assessee's argument that jurisdiction has to be tested on the basis of the law existing at the time of assuming jurisdiction and that s. 92CA(2B) cannot regularise the

otherwise invalid action of the TPO is farfetched and not acceptable because it will render s. 92CA(2B) redundant. The argument that s. 92CA(2B) should be confined only to such transactions which the assessee perceives as international transactions but fails to report is also not acceptable;

(ii) The assessee's contention that in the absence of any mutual agreement between the assessee and its foreign AE, there is no "transaction" is not acceptable in view of the definition of that term in s. 92F(v) which includes an "arrangement or understanding". An informal or oral agreement, which is latent, can be inferred from the attending facts and circumstances and the conduct of the parties. As long as there exists some sort of understanding between two AEs on a particular point, the same shall have to be considered as a "transaction", whether or not it has been reduced to writing. However, the department's contention that the mere fact that the assessee spent proportionately higher amount on advertisement in comparison with other entities shows an understanding is also not acceptable. On facts, as it was seen that the assessee not only promoted its name and products through advertisements, but also the foreign brand simultaneously, and the fact that the assessee's AMP expenses were proportionately much higher than those incurred by other comparable cases, lent due credence to the inference of the transaction between the assessee and the foreign AE for creating marketing intangible on behalf of the latter;

(iii) The assessee's contention that a distinction should be made between the "economic ownership" of a brand and its "legal ownership" and that AMP expenses towards the "economic ownership" of the brand, which are routine in nature, cannot be allocated as being for the benefit of the brand owner is not acceptable as it will lead to incongruous results. While the concept of economic ownership of a brand is relevant in a commercial sense, it is not recognised for the purposes of the Act;

(iv) The assessee's argument that there is no "international transaction" is not acceptable because the definition of that term in s. 92B(1) is inclusive. Under clause (i) of the Explanation to s. 92B, a transaction of brand building is in the nature of "provision of service" by the assessee to the AE. Clause (ii) of the Explanation defines "intangible property" to include "marketing related intangible assets, such as, trademarks, trade names, brand names, logos". Consequently, brand building is a "provision of service". The fact that no consideration is paid by the foreign AE is irrelevant;

(v) While a provision from a foreign legislation cannot be imported into the Indian legislation, there is an inherent fallacy in the assessee's argument that the bright line test cannot be adopted to determine the ALP of the international transaction as it is not one of the recognised methods u/s 92C. The bright line test is a way of finding out the cost/value of the international transaction, which is the first variable under the TP provisions and not the second variable, being the ALP of the international transaction. Bright line is a line drawn within the overall amount of AMP expense. The amount on one side of the bright line is the amount of AMP expense incurred for normal business of the assessee and the remaining amount on the other side is the cost/value of the international transaction representing the amount of AMP expense incurred for and on behalf of the foreign AE towards creating or maintaining its marketing intangible. If the assessee fails to give any basis for drawing this line by not supplying the cost/value of the international transaction, and further by not showing any other more cogent way of determining the cost/value of such international transaction, then the onus comes upon the TPO to find out the cost/value of such international transaction in some rational manner. On facts, the cost/value of the international transaction was determined at Rs. 161.21 crore while its ALP (after the 13% markup) was Rs. 182.71 crore. The assessee was not entitled to claim a deduction for Rs. 161.21 crore and it was liable to be taxed on the markup of Rs. 21.50 crore;

(vi) The assessee's contention that once the entire AMP expense is found to be deductible u/s 37(1), then, no part of it can be attributed to the brand building for the foreign AE notwithstanding the fact that the foreign AE also got benefited out of such expense is not acceptable because the whole purpose of transfer pricing is to provide a statutory framework which can lead to computation of reasonable, fair and equitable profits and tax in India in the case of multinational enterprises. The TP provisions prevail over the general provisions. The exercise of separating the amount spent by the assessee in relation to international transaction of building brand for its foreign AE for separately processing as per s. 92 cannot be considered as a case of disallowance of AMP expenses u/s 37(1)/40A(2). s. 37(1)/40A(2) & s. 92 operate in different fields;

(vii) In principle, it is necessary that properly comparable cases should be chosen before making comparison of the AMP expenses incurred by them. However, the argument that only such comparable cases should be chosen as are using the foreign brand is not acceptable. The correct way to make a meaningful comparison is to choose comparable domestic cases not using any foreign brand. Also, several factors have to be considered for determining the cost/value of the international transaction of brand/logo promotion through AMP expenses (14 illustrative issues set out). On facts, the TPO restricted the comparable cases to only two without discussing as to how other cases cited by the assessee were not comparable. Also, a bald comparison with the ratio of AMP expenses to sales of the comparable cases without giving effect to the relevant factors cannot produce correct result (matter remanded);

(viii) There is a basic fallacy in the assessee's contention that if the TNMM is adopted and the net profit is at ALP, there is no scope for making an adjustment for AMP expenses. TNMM is applied only on a transactional level and not on entity level though it can be correctly applied on entity level if all the international transactions are of sale by the assessee to its foreign AE and there is no other transaction of sale to any outsider and also there is no other international transaction. Where there are unrelated international transactions, it is wrong to apply TNMM at an entity level. Further, even assuming that in applying the TNMM on entity level for the transaction of import of raw material the overall net profit is better than other comparables, an adjustment can still be made by subjecting the AMP expenses to the TP provisions. There is no bar on the power of the TPO in processing all international transactions under the TP provisions even when the overall net profit earned by the assessee is better than others. Earning an overall higher profit rate in comparison with other comparable cases cannot be considered as a licence to the assessee to record other expenses in international transactions without considering the benefit, service or facility out of such expenses at arm's length. All the transactions are to be separately viewed. Also, the contention fails if any of the other methods (CUP etc.) are adopted instead of TNMM;

(ix) Maruti Suzuki 328 ITR 210 (Del) lays down the law that (a) brand promotion expenses are an "international transaction", (b) AMP expenses incurred by a domestic entity which is an AE of a foreign entity are required to be compensated by the foreign entity in respect of the brand building advantage obtained by it & (c) the factors required to be considered by the TPO. This verdict has not been overruled by the Supreme Court except to the extent those directions were given to the TPO to proceed in a particular manner. The verdict has also not merged into that of the Supreme Court because the principles of law laid down by the High Court have not at all been considered and decided by the Supreme Court. Consequently, the law laid down therein continues to have binding force.

Per Hari Om Maratha, JM (dissenting):

(i) Before making any transfer pricing adjustments, it is a pre-condition that there must exist an 'international transaction' between the assessee and its foreign AE. The Department has proceeded on a presumption that because the AMP expenses are supposedly higher than that incurred by other entities, there is an 'international transaction' discernible and a part of these expenses have to be treated towards building of the LG Brand owned by the foreign AE. It is not permissible to proceed on such presumption in the absence of a written agreement or evidence to suggest any oral agreement between the parties;

(ii) Further, the assessee had not paid any 'brand-royalty' to the foreign AE though it got the benefit of the brand and earned revenue therefrom which has been taxed. The AMP expenses have been paid to an unrelated entity in India which has in turn paid tax thereon. As there is no shifting of income to a different jurisdiction, neither Chapter X nor the bright line method has any application;

(iii) Also, the concept of commercial ownership of a brand is a reality in modern global business realm and it is as good as a legal ownership in so far as its effects on sale of products in India are concerned. Any advertisement which is product-centric and even entirely brand-centric will only enhance the sales of the products of that brand in India. In no way is the brand owner benefited. Consequently, the AMP expenses are not a case of brand-building/ promotion and no 'covert transaction' between the Indian entity and its foreign AE can be presumed or inferred. The Revenue has no power to re-characterise the AMP expenditure as routine and non-routine expenditure;

(iv) *Maruti Suziki India Ltd. v. Add. CIT /Transfer Pricing Officer (2010) 328 ITR 210 (Del.)* cannot be regarded as a binding precedent after the verdict of the Supreme Court in *Maruti Suzuki India Ltd. v. Addl. CIT (2011) 335 ITR 121 (SC)*. The fact that a reference was made to the Special Bench itself shows that because a covered issue cannot be referred to a Special Bench. (AY. 2007-08)

L.G. Electronics India Pvt. Ltd. v. ACIT (2013) 140 ITD 41 / 22 ITR 1 / 83 DTR 1 / 152 TTJ 273(SB) (Delhi)(Trib.)
Haier Telecom P. Ltd. (Intervenor) (2013) 22 ITR 1(SB)(Delhi)(Trib.)

S.92C : Transfer pricing – Computation of arm's length price – Sale Price realised from AE much higher than ALP fixed by TPO – No recommendation by TPO for adjustment – AO is not required to make any adjustment [S.10B(7), 80IA (10)]

The assessee is engaged in sale and export of pasteurized crab meat. The assessee entered into international transactions with its associated enterprise and showed sale price at Rs. 24 Crores. TPO on reference made by the Assessing Officer, fixed arm's length price of goods at ` 18 Crores. Assessing Officer opined that receipts of the assessee from sales to AE were in excess of arm's length price and such excess was nothing but income from other sources. The Assessing Officer relying on provisions of section 10B(7) read with section 80-IA(8) and 80(IA)(10) added excessive receipts to income of assessee. On appeal Commissioner (Appeals) deleted the addition. On appeal by revenue, the Tribunal held that, where sale price realised from AE was much higher than ALP fixed by TPO and there was no recommendation by TPO for making any adjustment, Assessing Officer was not at all required to make any adjustment in ALP. Accordingly the appeal of revenue was dismissed. (AY. 2007-08)

ACIT v. Handy Waterbase India (P.) Ltd. (2013) 140 ITD 112 (Chennai)(Trib.)

S.92C : Transfer pricing – Computation of ALP – Assessing officer deducted from operating cost, only material cost relatable to purchases from AEs – Not from Non-AE's – Computation of ALP of purchases from non-AEs erroneous – Matter remanded back

Assessee, engaged in auto components manufacturing and sale, had international transactions with four Associated Enterprises (AEs). International transactions comprised import of raw materials, import of machinery and payment for royalty and technical assistance. The Assessing Officer divided total operating cost between material cost relatable to AEs and cost relatable to non-AEs, which included both material cost as well as other costs. Thus, Assessing Officer deducted from operating cost, only material cost relatable to purchases from AEs and not operating cost attributable to such material cost. It was held that if along with material cost paid to AEs, operational cost attributable to such cost was also considered, then amount considered by TPO as ALP of AE purchases, would have gone up significantly, and hence work out of ALP of purchases from non-AEs had been erroneously done. Matter remanded back (AY. 2007-08)

SL Lumax Ltd. v. ACIT (2013) 140 ITD 158 (Chennai)(Trib.)

S.92C : Transfer pricing – Computation of ALP – Similar transactions with AE for subsequent years accepted by TPO without any ALP adjustment – TP analysis be considered as ALP

Where similar transactions with associated enterprises for subsequent years have been accepted by TPO without any ALP adjustment, he should adopt TP analysis conducted by assessee for relevant assessment year also to be at ALP. Revenue could not be permitted to take a different approach in the relevant assessment year. Matter Remanded. (AY. 2006-07)

Lenovo India P. Ltd. v. ACIT (2013) 140 ITD 127 (Bang.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Secret information not be used against the assessee without giving an opportunity – Matter remanded [S.133(6)]

Information relied upon by Transfer Pricing Officer is not available in public domain. Secret information not to be used against the assessee. No uniformity in rejection of assessee's comparables and selection of comparables by Transfer Pricing Officer. Proper and appropriate functions, assets and risk analysis required to be done. Transfer Pricing Officer and Dispute Resolution Panel to deal with assessee's objections and discuss them in order. Matter remanded (AY.2006-07)

Wills Processing Services (India) P. Ltd. v. Dy. CIT (2013) 21 ITR 1 / 151 TTJ 555 / 57 SOT 34 (URO)(Mum.)(Trib.)

S.92C : Transfer pricing – Turnover filter must be applied to exclude giant companies from comparison

The assessee, a provider of software development services, claimed that in determining the ALP under TNMM, Infosys Technologies & Wipro were not comparable entities given their extreme large turnover in comparison to that of the assessee. To oppose this, the Department relied on Capgemini India (ITAT Mum.) where it was held that the concept of economy of scale was not applicable to service oriented companies and that the turnover filter could not be applied to exclude companies with an extremely large turnover. HELD by the Tribunal:

Though in Capgemini it was held that the concept of economy of scale is relevant only for manufacturing concerns, which have high fixed assets, and not for service concerns and that the turnover filter cannot be applied to exclude companies with an extremely large turnover from comparison, a contrary view has been taken in *Dy. CIT v. Deloitte Consulting India (P) Ltd. (2012) 145 TTJ 589 (Hyd.)* that "giant" companies like Wipro are not at all comparable with smaller "pygmy" companies. Consequently, giant companies line Wipro and Infosys cannot be taken as comparables as their turnover is multiple numbers of times higher compared to that of the assessee and the TPO erred in considering their PLI to arrive at the arithmetic mean. (AY. 2008-09)

Patni Telecom Solutions Pvt. Ltd. v. CIT (2013) 24 ITR 235 / 58 SOT 146 (URO)(Hyd.)(Trib.)

S.92C : Transfer pricing – Business advances – Even business advances have to be benchmarked on LIBOR ALP

The assessee, an Indian company, gave loans of Rs. 15.65 crores to its AEs in USA, Singapore and Bahrain. It claimed that the said loans were "working capital advances" given for commercial consideration to secure business and that no interest was recoverable on it. The TPO applied the CUP method and determined the ALP of the advances at LIBOR plus 3% mark up. The DRP held that only inbound loans (ECBs) taken by the Indian entities from outside India could be benchmarked with LIBOR and that outbound loans had to be benchmarked on the interest rate prevailing in India on corporate bonds. It treated the advance as an unrated bond having very high risk and enhanced the assessment by directing the TPO to adopt 14% as the ALP rate. On appeal by the assessee, HELD reversing the DRP:

The assessee's argument that the non-charging of interest on the working capital advances to AEs from whom the assessee was getting good business was justified by commercial considerations and that no transfer pricing adjustment is warranted is not acceptable because the existence or non-existence of commercial consideration between the assessee and the AEs is not a required condition for applicability

of the TP regulations. Further, the advance was not the credit period extended to the AEs in respect of business transactions but was a transaction of advancing loans to the AEs which falls under the ambit of "international transaction" u/s 92B. In principle, the DRP is justified in its view that the ALP should be determined on the basis of the interest rate that would have been earned by the assessee by advancing loans to an unrelated third party (in India) such as a Fixed Deposit with the Bank. However, since LIBOR has been accepted by the Tribunal in other cases, the ALP should be determined on the basis of LIBOR + 2% (AY. 2007-08)
Aurionpro Solutions Ltd v. ACIT (2013) 33 taxmann.com 187 / 27 ITR 276 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Benefit of tolerance margin available only when variation between arm's length price determined under section 92C(1) and price at which transaction actually undertaken with in specified margin – Scope of +/- 5% tolerance adjustment to ALP explained.(As amended by Finance Act, 2012 w.r. e.f. April 1, 2002)[S.92C(2)]
The Special Bench was constituted to consider whether prior to the insertion of the second proviso to s. 92C(2), the benefit of 5% tolerance margin as prescribed under proviso to s. 92C(2) for the purposes of determining the arm's length price of an international transaction is allowable as a standard deduction in all cases, or is allowable only if the difference is less than 5%. In the meanwhile the second proviso to s. 92C(2) was amended by the Finance Act, 2012 with retrospective effect from 1.4.2002. The assessee claimed, relying on *Piagio Vehicle P. Ltd. v. DCIT* that even after the retrospective amendment by the Finance Act, 2012, it was entitled to the benefit of adjustment of +/- 5% variation while computing the ALP. It was also argued that the amendment was unconstitutional. HELD by the Special Bench:
There was a controversy on whether +/- 5% tolerance adjustment was a standard deduction or not. After the retrospective amendment to the second proviso to s. 92C by the Finance Act, 2012 with retrospective effect from 1-4-2002, it is evident that if the variation between the arm's length price and the price at which international transaction was actually undertaken does not exceed the specified percentage, then only the price at which the international transaction has actually been undertaken shall be deemed to be arm's length price. Thus, the benefit of tolerance margin would be available only if the variation is within the tolerance margin. Once the variation exceeded the tolerance margin, then there would be no benefit even up to tolerance margin. Then, the ALP as worked out under s. 92C(1) shall be taken as ALP without any benefit of tolerance margin. The view taken in Piaggio vehicle was without considering the amendment and is *per incuriam* and not good law. The challenge to the constitutional validity of the retrospective amendment cannot be made before the Tribunal as it is a creation of the Act and not a constitutional authority. (AY. 2006-07)
IHGIT Services (India) Pvt. Ltd. v. ITO (2013) 144 ITD 16 / 23 ITR 608 / 86 DTR 257 / 154 TTJ 137(SB) (Delhi)(Trib.)

S.92C : Transfer pricing – Foreign AE cannot be the tested party – TP additions can exceed overall group profits [S.92B]
The Tribunal had to consider the following important transfer pricing issues: (i) whether the foreign AE can be taken as the tested party & if the sale price received by the foreign AEs from the services ultimately sold to customers is equal to that charged by the assessee from its AEs, it would show that the international transaction between the assessee and the AEs is at ALP? (ii) whether the transfer pricing additions can result in the overall profit of the group of AEs being breached? & (iii) whether if the assessee has consistently followed a method for determination of the ALP and the same has been accepted by the TPO in the past, he cannot reject that method for the current year? HELD by the Tribunal:
(i) The argument that the foreign AE should be selected as the tested party and the profit earned by the foreign AE from outside comparables should be compared with the price charged by the assessee from the AE to determine whether they are at ALP is not acceptable because under the

scheme of s. 92C, the profit actually realised by the Indian assessee from the transaction with its foreign AE has to be compared with that of the comparables. There is no question of substituting the profit realised by the Indian enterprise from its foreign AE with the profit realized by the foreign AE from the ultimate customers for the purposes of determining the ALP of the international transaction of the Indian enterprise with its foreign AE. The scope of TP adjustment under the Indian taxation law is limited to transaction between the assessee and its foreign AE. The contention that the profit earned by the foreign AE should be substituted for the profit of the comparables is patently unacceptable. The fact that this may be permissible under the US and UK transfer pricing regulations is irrelevant;

(ii) The contention of the assessee that the authorities cannot go beyond the overall profit of the group of AEs in determining the ALP of the international transaction is also not acceptable because it will constitute a new method/ yardstick for determining the ALP. The transfer pricing adjustments made in India may result in the overall profit earned by all the AEs taken as one unit being breached;

(iii) The contention that as the assessee consistently followed the same method for determination of the ALP and it was accepted by the TPO in the past, he cannot take a different view is not acceptable. A delicate balance needs to be maintained between the principle of consistency and the rule of res *judicata*. There is no estoppel against the provisions of the Act. As the method employed by the assessee for determining the ALP is contrary to the statutory provisions, the inadvertent acceptance of the wrong method by the TPO in an earlier year does not grant a licence to the assessee to continue calculating the ALP in the grossly erroneous manner in perpetuity. It needs to be discontinued forthwith. (AY. 2006-07)

Onward Technologies Ltd. v. Dy. CIT (2013) 89 DTR 311 / 155 TTJ 439 / 26 ITR 734 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Revenue is not required to prove tax avoidance due to transfer of profit to lower tax jurisdiction – Net margin method – Selection of comparables – Comparables not to be rejected rejected merely on account of high profit or loss – Important principles on "turnover filter" etc. [Ss.92, 92CA, Rule 10B]

The Tribunal had to consider the following important transfer pricing issues: (i) whether a one-time and extraordinary item of expenditure (ESOP cost) debited to the assessee's P&L A/c has to be excluded while comparing the margins, (ii) whether for the purpose of comparison of margins, the consolidated results of comparables having profit from different overseas markets can be considered? (iii) whether extreme profit and loss cases should be excluded or in case extreme profit cases are included, the case of losses should also be included? (iv) whether a turnover filter can be adopted to exclude companies with extremely high turnover? (v) whether the assessee can seek to exclude its own comparables? (vi) whether an adjustment for working capital is permissible? (vii) whether if the assessee can show that because the AE is in a high tax jurisdiction and that there is no transfer of profit to a low tax jurisdiction, a transfer pricing adjustment need not be made? HELD by the Tribunal:

(i) A comparison of margin between the assessee and the comparables has to be made under identical conditions. As the comparables had not claimed any extraordinary item of expenditure on account of ESOP cost, for the purpose of making proper comparison of the margin, onetime ESOP cost incurred by the assessee has to be excluded. There is nothing in the Rules that prohibits adjustment in the margin of the assessee to remove impact of any extraordinary factors *(Skoda Auto India (P) Ltd. v. ACIT (2009) 30 SOT 319 (Pune), Demag Cranes & Components (India) (P) Ltd. (2012) 49 SOT 610 (Pune)*, Transwitch, Toyota Kirloskar Motors followed);

(ii) Under Rule 10B(2) (d), the comparability of transactions has to be considered after taking into account the prevailing market conditions including geographical locations, size of market and cost of capital and labour etc. Therefore, consolidated results which include profit from different overseas jurisdictions having different geographical and marketing conditions will not be comparable. Only standalone results should be adopted for the purpose of comparison of margins (American Express followed);

(iii) Comparable cases cannot be rejected only on the ground of extremely high profit or loss. In case the companies satisfy the comparability criteria, and do not involve any abnormal business conditions, the same cannot be rejected only on the ground of loss or high profit. The OECD guidelines also provide that loss making uncontrolled transactions should be further investigated and it should be rejected only when the loss does not reflect the normal business conditions;

(iva) In certain Tribunal decisions, various reasons have been given for applying the turnover filter for comparison of margins such as economy of scale, greater bargaining power, more skilled employees and higher risk taking capabilities in cases of high turnover companies, which increase the margins with rise in turnover. However, in these decisions, no detailed examination has been made as to how these factors increase the profitability with rising turnover. The concept of economy of scale is relevant to manufacturing concerns, which have high fixed assets and, therefore, with the rise in volume, cost per unit of the product decreases, which is the reason of increase in margin as scale of operations goes up because with the same fixed cost there is more output when the turnover is high. The same is not true in case of service companies, which do not require high fixed assets. In these cases employees are the main assets, who in the case of the assessee are software engineers, who are recruited from project to project depending upon the requirement. The revenue in these cases is directly related to manpower utilised. With rise in volume cost goes up proportionately. Therefore, the concept of economy of scale cannot be applied to service oriented companies. On facts, it is shown by the department that in the case of the comparables selected by the assessee, there is no linear relationship between margin and turnover and that that the margin has come down with the rise in turnover in some cases. Such detailed study was not available before the various Benches of the Tribunal which have applied the turnover filter and consequently those decisions cannot be followed;

(ivb) Under Rule 10B(2), comparability of international transactions with uncontrolled transactions has to be judged with reference to functions performed, asset employed and risk assumed. The functions performed by all comparable companies are same as it is because of same functions they have been selected by the assessee as comparables. The asset employed has two dimensions i.e. quantity and quality. More employees would mean more turnover, but there is no linear relationship between margin and turnover. As regards quality of employees, this will depend upon the nature of projects and since the comparables are operating in the same field having similar nature of work, and employee cost being more in case of more skilled manpower, it will not have much impact on the margins. As for the bargaining power, the assessee is part of a multinational group and well established in the field and, therefore, it cannot be accepted that it has less bargaining power than any of the Indian companies, however big it may be. Therefore, it would not be appropriate to apply turnover filter for the purpose of comparison of margins. However, for the purpose of comparison, the turnover would be relevant only from the limited purpose to ensure that the comparable selected is an established player capable of executing all types of work relating to software development as the assessee is also an established company in the field (Genesis Integrating System not followed);

(v) The assessee had selected Infosys and Wipro as comparables on the basis of its own transfer pricing study after being fully aware of its work profile. The assessee raised no plea either before the TPO or DRP for excluding these comparables though it had added some more comparables. The assessee, therefore, cannot raise any grievance before the Tribunal to exclude these comparables, without giving any cogent and convincing reason. The reasons given by the assessee (turnover filter) are not found convincing and so it cannot be permitted to exclude Infosys and Wipro (Kansai Nerolac Paint followed)

(vi) Working capital adjustments are required to be made because these do impact the profitability of the company. Rule 10B(2) (d) also provides that the comparability has to be judged with respect to various factors including the market conditions, geographical conditions, cost of labour and capital in the market. Accounts receivable/payable effect the cost of working capital. A company which has a substantial amount blocked with the debtors for a long period cannot be fully comparable to the case which is able to recover the debt promptly. The average of opening and closing balance in the account receivable/payable for the relevant year may be adopted which may broadly give the representative level of working capital over the year. Even if there is some difference with respect to the representative level, it will not affect the comparability as the same method will be applied to all cases. Working capital adjustment cannot be denied to the assessee only on the ground that the assessee had not made any claim in the TP study if it is possible to make such adjustment. Working capital adjustment will improve the comparability.

(vii) The argument that no adjustment need be made because the parent company is situated in US where tax rate is high and that there was no reason for the assessee to transfer profit to the parent company is not acceptable. The arm's length price of an international transaction has to be calculated with respect to similar transaction with an unrelated party as per the method prescribed and the revenue is not required to prove tax avoidance due to transfer of profit to lower tax jurisdiction. Arguments such as that the parent company was incurring loss or had shown lower margin are not relevant. (AY. 2007-08)

Capgemini India Private Limited v. ACIT (2013) 27 ITR 74 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Adjustment for export – Cost of goods sold – Deduction of rebate/discount received

Export incentives cannot be deducted from cost of goods sold in the transfer pricing analysis. Assessee entitled to deduct rebate received upon purchase of goods from the value of goods sold in transfer pricing analysis; issue of verification of netting off of rebate from cost of purchase was remitted to the AO. (AY. 2006-07)

Goodyear India Ltd. v. Dy. CIT (2013) 143 ITD 35 / 152 TTJ 458 / 83 DTR 233 (Delhi)(Trib.)

S.92C : Transfer pricing – Arm's length price – Selection of comparables

Assessee cannot be said to have charged any commission from 'E', a client, as it had entered into fixed fees arrangement with that company and, therefore, 'E' could not be considered as comparable, more so it was earning commission at 7% whereas, as per the industry policy media agencies earned commission of 2.5%. (AY. 2002-03)

Lintas India (P) Ltd. v. ACIT (2013) 83 DTR 263 / 152 TTJ 706 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – Adjustment for interest on credit period allowed to foreign company

Since assessee did not charge any interest from any client, Indian or foreign, for the delay in payments for the services rendered, debit notes provided, no interest is to be charged for the credit period made available to the AE in the computation of the ALP. (AY. 2002-03)

Lintas India (P) Ltd. v. ACIT (2013) 83 DTR 263 / 152 TTJ 706 (Mum.)(Trib.)

S.92C : Transfer pricing – Arm's length price – CUP – TNMM [Rule 10B(1)(a), 10B(1) (e) & 10B(2)(d)]

In the absence of availability of exact data to compare the process of similar products supplied to AEs and non-AEs, CUP method cannot be applied as the most appropriate method for transfer pricing exercise; assessee having manufactured and exported wide variety of bathrobes to its AEs as well as non-AEs cannot be taken as CUP and, therefore, AO was justified in applying TNMM for benchmarking and not CUP method. (AY. 2005-06)

Welspun Zuchhi Textiles Ltd. v. ACIT (2013) 83 DTR 293 / 23 ITR 53 / 56 SOT 444 / 153 TTJ 153 (Mum.)(Trib.)

S.92C : Transfer pricing – Computation of arm's length price – Inclusion of DEPB benefit for computation of profit margin [Rule 10B(1)(e)]

Once the DEPB benefit is taken into account in the comparable cases while working out their profit margin DEPB benefit received by the assessee during the year under consideration should also be considered as part of the turnover of the assessee for working out the profit margin to make the comparison of like to like and similar to similar. (AY. 2005-06)

Welspun Zuchhi Textiles Ltd. v. ACIT (2013) 83 DTR 293 / 23 ITR 53 / 56 SOT 444 / 153 TTJ 153 (Mum.)(Trib.)

S.92CA : Transfer pricing – Determination of arm's length price after notice to assessee and hearing it – Principle of natural justice is followed – Writ is not maintainable [Article 226]

The assessee was on notice as to the nature of the enquiry which was being pursued by the TPO. The TPO addressed a communication detailing the information that was required on the basis of which disclosure was sought. The assessee also adduced detailed submissions by its letter. There was no breach of the principles of natural justice which would warrant the interference of the court under Article 226 of the Constitution. Assessee had alternative remedy.

Hindalco Industries Ltd. v. Addl. CIT (2012) 252 CTR 167 / 75 DTR 238 / 211 Taxman 315 / (2013) 359 ITR 46 (Bom.)(HC)

S.92CA : Transfer pricing – Jurisdiction of TPO – Alternative remedy – Though substantive, applies to all proceedings pending on 1-6-2011 & TPO has jurisdiction to consider transactions not reported by Assessee and transactions not referred to him by Assessing Officer. AO has no power to deviate from order of TPO. S. 92CA(2B) applies even to cases where Form 3CEB is filed but the transaction is not reported. DRP has power to hold that TPO had no jurisdiction & to quash his order. Writ cannot be entertained where there is alternate remedy. [S.2(47) 92A, 92B, 92E, 144C, Constitution of India, Article 226]

In AY. 2008-09, the assessee entered into two transactions: (i) it sold its call centre business to Hutchison Whampoa and (ii) it assigned its call options to Vodafone International Holdings B.V. The said two transactions were not reported in Form 3CBEB. The AO made a reference on 25-1-2010 u/s 92CA(1) to the TPO to determine the ALP of certain other transactions entered into by the assessee with the AEs. The said two transactions were not a part of the reference. The TPO took *suo motu* cognisance of the said two transactions and held that though the sale of the center business was between two domestic companies, it was pursuant to the share sale agreement with Vodafone International and so was hit by s. 92-B(2). He also held that the assignment of the call options was the transfer of a capital asset giving rise to capital gains. He made an adjustment of Rs. 8,590 crore. The assessee did not raise any objection on the jurisdiction of the TPO to consider the said two unreferred transactions though it filed objections on the merits before the DRP. During the pendency of the DRP proceedings, the assessee filed a Writ Petition contending that (a) under the law laid down in *CIT v. Amadeus India (P) Ltd. (2011) 203 TM 602 (Del)* the TPO has no jurisdiction to go beyond the reference made by the AO, (b) s. 92CA(2A) which was inserted on 1-6-2011 to provide that the TPO can *suo motu* take cognisance of an unreferred international transaction is a substantive provision and cannot apply retrospectively to a reference made on 25-1-2010, (c) the rewriting of the call options was not an international transaction in view of the law laid down in *Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1(SC)*. It was urged that as there was inherent lack of jurisdiction in the TPO and as the DRP did not have jurisdiction u/s 144C(8) to quash the TPO's order, the Writ Petition was maintainable. HELD by the High Court dismissing the Petition:

(i) Though s. 92CA(2A) inserted w.e.f 1-6-2011 is a substantive provision and not a procedural one and confers fresh jurisdiction on the TPO, it applies to all proceedings that are pending as of 1-6-2011. Consequently, the TPO has jurisdiction to consider unreported and un-referred international transactions in proceedings that were pending before him on 1-6-2011;

(ii) The assessee's contention that s. 92CA(2B) inserted by FA 2012 w.r.e.f. 1-6-2002 operates only where an assessee has not furnished a report u/s 92E in Form 3CEB and thereafter an international transaction comes to the notice of the TPO is not correct. S. 92CA(2B) applies also where the assessee has filed Form 3CEB but not included certain transactions. There is no cogent reason why the Legislature would have conferred jurisdiction upon the TPO to consider an unreported international transaction in cases where a report has not been furnished at all but not in cases where a report has been furnished u/s 92E, but the report does not include a particular international transaction;

(iii) The department's contention that the AO is entitled to revisit and, in effect, sit in appeal over the TPO's report in all respects is not correct. It is not that the TPO is a valuer who merely facilitates the AO in the computation of the arm's length price. U/s 92CA(4) the AO is bound to pass an order "in conformity" with the TPO's order and so he is bound by the TPO's determination and cannot sit in judgment over the same in any respect;

(iv) The assessee's contention that it has no alternate remedy because the DRP is not entitled u/s 144C to consider whether or not the transactions are international transactions is not correct. Though s. 144C(8) refers to the DRP's powers to only "confirm, reduce or enhance", its powers are wider and it can consider the question as to whether the unreported transactions are international transactions or not or even whether what the TPO considered was a transaction at all. S. 144C is an alternate to an appeal to the CIT(A) and the legislature cannot be intended to curtail the assessee's rights;

(v) While in principle a Writ Petition can be entertained if the TPO lacks inherent jurisdiction to proceed in the matter u/s 92CA(2A)/(2B), that should be done only if it is invoked at the appropriate time viz. at the outset or soon thereafter. There would be no question of exercising jurisdiction after the TPO has made the order or has proceeded to a considerable extent in the determination of the arm's length price. On facts, as the TPO has already passed his order and as the assessee has an alternate remedy before the DRP/ ITAT, the writ petition cannot be entertained;

(vi) On merits, the contention that the sale of the call center business was between two domestic companies and that it could not be regarded to be pursuant to the share sale agreement for purposes of s. 92-B(2) cannot *prima facie* be accepted because the sale of the call centre business appears to be foreshadowed by the shares sale agreement. The assessee does not have an 'open and shut' case. Likewise, the argument that there was no transfer of the call options and that the findings of the TPO are contrary to *Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1(SC)* would have to be urged before the DRP especially in view of the subsequent amendment to s. 2(47).(AY.2008-09)

Vodafone India Service Pvt. Ltd. v. UOI (2013) 359 ITR 133 / 93 DTR 129 / 262 CTR 133 (Bom.)(HC)

S.92CA : Transfer pricing – Arm's length price – Powers – Reference to Transfer Pricing Officer valid – Assessing Officer need not consider objections of assessee – The Transfer Pricing Officer is not called upon to and is not competent to decide the issue which is sole jurisdiction of the Assessing Officer. [S.144C]

The assessee is engaged in the business of purchasing rough diamonds, manufacturing of polished diamonds and sale/export of such polished diamonds. During the assessment proceedings for the assessment year 2008-09, the Assessing Officer issued a notice under section 142 stating that on a perusal of the assessment records for the assessment year 2007-08, it was observed that the assessee had filed an audit report in the prescribed form as required under section 92E of the Act as there were international transactions with an associated concern, BG. The assessment proceedings for the assessment year 2007-08 were in progress. The audit report showed that during the previous year relevant to the assessment year 2008-09, the assessee had international transactions with the associated concern amounting to Rs. 78.63 crores. However, the record did not show that the assessee had filed the audit report under section 92E of the Act in the prescribed form. There was

correspondence between the assessee and the Assessing Officer. The Assessing Officer referred the matter to the Transfer Pricing Officer. On a writ petition challenging the reference to the Transfer Pricing Officer and also the notice from the Transfer Pricing Officer,the Court dismissing the petition, held that, admittedly, between the assessee and the associated enterprise there was an international transaction in the preceding year and the assessee had admittedly filed a report under section 92E of the Act. In the current year also the assessee had entered into transactions worth Rs. 78.63 crores. In the affidavit-in-reply it was further stated that the assessee had made substantial purchases from the associated enterprise. The partners of the assessee were three brothers and their wives/sons together holding the entire partnership stake. The fourth brother along with his wife and his son controlled the entire shareholding of the associated enterprise, the fourth brother and his son being directors of the assessee. It was clear that both the entities were being controlled by the same family of four brothers and their close relatives. It was clear that the associated concern was closely related with the assessee and fell within the parameters of section 92A(2)(j), (k) and (m). Therefore, it was not necessary or appropriate to judge, in the present petition, whether there was any international transaction between the assessee and the associated enterprise during the previous year relevant to the assessment year 2008-09 and such issue must be left to be judged by the competent authority while framing the final assessment. (AY. 2008-09)
Veer Gems v. ACIT (2012) 246 CTR 352 / 204 Taxman 16 / 65 DTR 66 / (2013) 351 ITR 35 (Guj.)(HC)

S.92CA : Transfer pricing – Powers – No power to determine arm's length of transaction not referred to him – Provision empowering Transfer Pricing Officer to determine arm's length price of any international transaction other than that referred to him is prospective in operation
The activity of the assessee is to provide connectivity to the host system by its computer programmes online. The assessee entered into international transactions with associated enterprises. The Assessing Officer referred only the international transactions mentioned in Form 3CEB but not the issue of advertisement, marketing and promotion expenses to the Transfer Pricing Officer. The Transfer Pricing Officer took upon himself the consideration of the question as to whether the advertisement, marketing and promotion expenditure was in the nature of an international transaction. Having concluded that it was an international transaction, he adjusted an amount of Rs.32,92,83,589 attributable to the difference. On a question whether the Transfer Pricing Officer could have determined the arm's length price in respect of an international transaction which was not specifically referred to him by the Assessing Officer, the Tribunal took the view that the Transfer Pricing Officer could not have done so. On appeal by revenue the Court dismissing the appeal, held that(i) that it was not within the domain of the Transfer Pricing Officer to determine whether a particular transaction, which had come to his notice, but which had not been referred to him, was or was not an international transaction and then to go on and determine the arm's length price thereof.
(ii) That there is nothing in the statute to indicate that sub-section (2A) was introduced in section 92CA in a manner so as to operate with retrospective effect. Sub-section (2A) expands the jurisdiction of the Transfer Pricing Officer by empowering him to determine the arm's length price of any international transaction other than an international transaction referred to him by the Assessing Officer under sub-section (1) of section 92CA. This is clearly an expansion of the jurisdiction of the Transfer Pricing Officer and, therefore, sub-section (2A) can only have prospective effect from June 1, 2011, and would have no application to the assessee's case which was in respect of the assessment year 2006-07. Order of Tribunal is affirmed.(AY.2006-07)
CIT v. Amadeus India Pvt. Ltd. (2011) 203 Taxman 602 / (2012) 246 CTR 338 / 65 DTR 85 / (2013) 351 ITR 92 (Delhi)(HC)

S.92CA : Transfer pricing – Selection of comparables – Comparability

Company in debt cannot be compared to company with sufficient capital base and differ in product. (AY. 2004-05)
Michael Aram Exports P. Ltd. v. ITO (2013) 27 ITR 528 (Delhi)(Trib.)

S.92CA : Transfer pricing – Selection of comparables – Foreign associated enterprise
Foreign associated enterprise can be tested party. TPO was not justified in rejecting comparable companies outside his jurisdiction saying he could not call for additional information or scrutinise books. Since Dispute Resolution Panel did not consider in detail why associated enterprise should not be selected as tested party, matter was remanded.
Since DRP did not state why the comparables selected by TPO were held to be comparable with those of the assessee, DRP's order was held to be bald and cryptic. (AYs. 2006-07, 2007-08)
General Motors India P. Ltd. v. DCIT (2013) 27 ITR 373 / (2014) 146 ITD 559 (Ahd.)(Trib.)

S.92CA : Transfer pricing – Comparables – FAR analysis
In the selection of comparable companies, functions, assets and risks should be similar. Comparables selected by assessee were accepted in preceding and succeeding years. Hence, rejection of the same without reasons in year in question was not sustainable.(AY.2007-08, 2008-09)
Temasek Holdings Advisors (I) P. Ltd. v. DCIT (2013) 27 ITR 125 / 60 SOT 134 (URO) (Mum.)(Trib.)

S.92CA : Transfer pricing – Reference to transfer pricing officer – Determination of arm's length price – Finding that comparison of transaction was possible-Transactional net margin method cannot be adopted – Matter remanded
The assessee company was manufacturing fuel injection equipment used in vehicles. For its transactions with associated enterprises, it arrived at the arm's length price, adopting the transactional net margin method. The Transfer Pricing Officer rejected the method adopted by the assessee and adopted the comparable uncontrolled price method. The Transfer Pricing Officer concluded that the assessee had paid an excess amount for imports to the associated enterprises when compared to the price at which non-associated enterprises supplied such items to it and recommended upward adjustment of international transaction prices as stipulated in section 92C. The Transfer Pricing Officer later revised the sum, Assessment was accordingly completed. The Dispute Resolution Panel confirmed the proposed addition. On appeal to the Tribunal :
Held, that if transaction to transaction or item to item comparison is possible, that should always be preferred, if proper adjustment can be carried out to account for the differences that could materially affect the prices in the open market of the related items. The assessee had preferred the transactional net margin method. But it was a matter of fact that there were substantial related party transactions in two of the comparables selected by the assessee. The OECD guidelines do not say that even where there were substantial differences between the items manufactured, a candidate for transactional net margin method could be selected. Therefore, the Transfer Pricing Officer was justified in rejecting the transactional net margin method having found that the comparable entities selected by the assessee had substantial related party transactions and the difference in functionality eroded the comparability materially. As against this, the assessee itself had admitted that it had similar items of import from both associated enterprises and non-associated enterprises. The adoption of the comparable uncontrolled price method was appropriate especially when such items could be identified. There was substance in the argument of the assessee that items imported from associated enterprises required further processing, since the processing required at least in the case of four items had been identified and described. The assessee was unable to prove the actual effect of such processing on the prices, by producing evidence in support. Similarly, the claim of the assessee that the components from associated enterprises could be imported at lower numbers when compared to that of non-associated enterprises and this automatically led to more items being ordered from non-associated enterprises resulting in higher inventory carrying cost, also was a factor that could materially affect the comparability of the prices. No doubt, rule 10B(1)(a)(ii) requires prices to be adjusted for differences.

The Transfer Pricing Officer had to assess the prices that could be adopted under the comparable uncontrolled price method for comparison after carrying out the adjustment required. (AY. 2006-07)
Delphi TVS Diesel Systems Ltd. v. ACIT (2012) 53 SOT 284 (URO) / (2013) 22 ITR 478 (Chennai)(Trib.)

S.92CA : Transfer pricing – Arm's length price – List of comparable companies relied on by assessee rejected by Transfer Pricing Officer without stating any reason. Factual matrix exactly the same in all years held Arm's length price adjustment is not justified.
The assessee-company provided computer system consultancy services to private sector, public sector, Government and other organisations, undertaking studies on matters relating to feasibility of computerisation, evaluating and selecting appropriate hardware and software, installing and assisting in using mainframe, mini and microcomputers, etc. For the assessment years 2003-04 and 2004-05, the question of determining the arm's length price of its international transactions with its associated enterprise was referred to the Transfer Pricing Officer under section 92CA(1) of the Act, The assessee filed a detailed transfer pricing study report in which it had adopted the transactional net margin method as the most appropriate method to arrive at the arm's length price. It had selected a list of 6 comparable companies and had determined arm's length price on the basis of the ratio of operating profit to total cost of the assessee-company worked out at 18.04 per cent., the average profit level indicator of the six companies. The Transfer Pricing Officer approved the transactional net margin method adopted by the assessee-company and agreed with the assessee-company's adoption of the ratio of operating profit to total cost as the profit level indicator. The Transfer Pricing Officer, however, made his list of comparable companies and worked out the ratio of operating profit to total cost at 27.52 per cent. This revised profit level indicator worked out by the Transfer Pricing Officer brought out an operating profit of Rs.8.73 crores. But the operating profit returned by the assessee was Rs.4.15 crores. The Assessing Officer made an addition of Rs. 4.58 crores, the differential amount, to the income of the assessee towards arm's length price adjustment. On appeal, the Commissioner (Appeals) deleted the said arm's length price addition of Rs. 4.58 crores and directed the Assessing Officer to allow exemption under section 10A of the Act. The Commissioner (Appeals) also confirmed the disallowance of dividend tax delay charges, interest for delay in remitting tax deducted at source, expenses incurred for delay in UTI dividend payments, and directed the Assessing Officer to allow the claim of expenses towards development of software as allowable business expenditure. On appeals by the Department and cross-objections by the assessee, the Tribunal held that (i) that the list of comparable companies relied upon by the assessee-company had been rejected by the Transfer Pricing Officer without stating any reason, even though the Transfer Pricing Officer had, by and large, agreed with the general premises on which the assessee had computed its arm's length price. The Transfer Pricing Officer had not made any finding that the price charged or paid in the transactions entered into with the associated enterprise was not in accordance with rules. The Transfer Pricing Officer had no case that the assessee-company had not maintained proper information and documentation relating to the international transactions. There was also no dispute on the information and data used in the computation of arm's length price, which related to the financial year 2002-03. The arbitrary selection of comparables had in fact inflated the operating profit in the computation made by the Transfer Pricing Officer. There was no factual basis for the addition of the differential amount of Rs. 4.58 crores worked out by the Transfer Pricing Officer and adopted by the Assessing Officer. Moreover, for the immediately succeeding assessment year 2004-05, the Commissioner (Appeals) had held in the assessee's own case that the Transfer Pricing Officer should not have rejected the arm's length price disclosed by the assessee and in the subsequent assessment year 2005-06, the Transfer Pricing Officer himself had accepted the arm's length price returned by the assessee-company. For all these assessment years, the factual matrix of the case remained exactly the same. Therefore, the Commissioner (Appeals) was justified in deleting the arm's length price addition of ` 4.58 crores. (AY.2003-04, 2004-05)
ACIT v. SRA Systems Ltd. (2013) 22 ITR 205 (Chennai)(Trib.)

S.92CA : Transfer pricing – Arm's length price – TNMM-CUP method – Matter sent back for getting comparable

Assessee, shipping agent of French holding company and Singapore AE, received commission container control fees, detention collection fees, intermodal container handling fees. It also recovered communication expenses and insurance premium paid in course of service. TPO applied CUP method. TPO merely compared data with that of a third party agent of holding company which worked for it earlier and made adjustment in respect of so called undercharged container control fees and recovery of communication expenses. TPO had neither examined comparables nor TNMM for benchmarking ALP in relation to international transactions. In appeal Commissioner (Appeals) had not called for comment upon comparable short listed by assessee. Tribunal held that CUP method and data of erstwhile third party could not be applied. However, since there was no occasion to examine comparables and applicability of TNMM, matter was to be restored back to file of TPO, who would require assessee to furnish comparables into similar line of business and activities and examine same for benchmarking ALP. (AY. 2005-06)

Dy. CIT v. CMA CGM Global India (P.) Ltd. (2013) 55 SOT 20 / 81 DTR 421 (Mum.)(Trib.)

S.92CA : Transfer pricing – Arm's length price – CUP method – Matter remanded

Assessee had procured green coffee beans from coffee planters and traders and sold same to one of its associated enterprises. It selected CUP method for determining arm's length price and relied on monthly prices quoted by Coffee Board. TPO found that transfer pricing documents did not contain details as to how CUP method was applied and price charged to AE was less than price charged by Coffee Board. Accordingly, he worked out ALP and made addition. The Tribunal held that since for earlier assessment year, Tribunal, on identical facts, had restored issue to TPO for fresh consideration, it would be appropriate to remand matter to TPO. Matter remanded. (AY. 2007-08)

Ecom Gill Cofee Trading (P.) Ltd. v. Dy. CIT. (2013) 55 SOT 23(URO) (Bang.)(Trib.)

S.92CA : Transfer pricing – Arm's length price – Advance to AEs – Interest – Matter remanded

Assessee gave advances to its AEs which were its wholly owned subsidiaries but charged no interest. Such issue was also raised in earlier years where assessee took plea of commercial expediency for not charging interest and while TPO sought to make TP adjustment at 14 per cent rate of interest based on LIBOR as reasonable rate under CUP method, Tribunal held that TP adjustment is possible only in cases where comparable uncontrolled transactions entered into between two enterprises are established. Tribunal directed the Assessing Officer to follow earlier years. Matter remanded. (AY.2006-07)

Wipro Ltd. v. Addl. CIT v. (2013) 55 SOT 3 (URO)(Bang.)(Trib.)

S.92CA : Transfer pricing – Arm's length price – Comparables – Reference to Transfer Pricing Officer – Commissioner (Appeals) deleting addition after considering revised Transfer Pricing Officer's remand proceedings – Held to be Justified

The assessee-company is engaged in the business of international transportation and domestic pickup and delivery services. During the assessment year, the assessee entered into international transactions with its associated enterprises. The transactions were reported by the assessee in Form 3CEB which was filed along with the return. The Assessing Officer referred the case to the Transfer Pricing Officer for determining the arm's length price in respect of the international transactions entered into by the assessee. The Transfer Pricing Officer rejected the comparable uncontrolled price method adopted by the assessee. He held that the transactional net margin method was the appropriate method. Therefore, he made an upward adjustment of Rs. 9.35 crores of the international transactions of the assessee. The Commissioner (Appeals) considered that the Transfer Pricing Officer wrongly considered the entity-wise margin of one of the comparable companies for the purpose of benchmarking the assessee's margin under the

transactional net margin method. The matter was referred to the Commissioner (TPO-II). He agreed with the assessee's contention and concluded that consistency needed to be followed while calculating the margins of comparables of the assessee. Considering this, the Commissioner (Appeals) deleted addition made by the Assessing Officer. On appeal the Tribunal held that(i) that once the Transfer Pricing Officer accepted and adjusted the computations on the basis of which the Commissioner (Appeals) deleted the addition there was no ground to interfere with the order of the Commissioner (Appeals), which was to be upheld. (AY. 2004-05)
ACIT v. UPS Jetair Express P. Ltd. (2013) 21 ITR 82 / 57 SOT 239 (Mum.)(Trib.)

S.94(1) : Avoidance of tax – Transaction in securities – Units – Securities – Sale and buyback of units of UTI – Not pressed and hence no opinion was expressed
The assessee was engaged in activities of sale and buyback of units of U.T.I., and claimed that such buy backs did not attract provisions of s. 94 as the units are not 'security' within the meaning of s. 94. The Tribunal rejected the claim of the assessee. On appeal, held, dismissing the appeal:
The question whether U.T.I. units are 'security' or not was not pressed by the assessee in the hearing, and therefore, no opinion was expressed on that question. (AY. 1995-96)
Peerless General Finance and Investment Co. v. CIT (2013) 217 Taxman 251 (Cal.)(HC)

S.94(7) : Avoidance of tax – Adventure in the nature of trade – Business loss – Loss on units – Purchase of units of mutual funds and sale thereof after realisation of dividend at a loss – Matter remanded [Ss. 2(13), 28(i)]
The court held that ultimately the intention and the circumstances alone have to have a bearing on the question as to whether the transaction is only of investment or in the nature of trade. Disallowance of a claim on the ground that the transactions were for tax avoidance or evasion, could be considered only after the in-depth investigation and proper recording and marshaling of all relevant facts, so as to establish the motive of tax avoidance. Matter remanded.(AY. 2001-02)
CIT v. Allu Arvind Babu (2013) 350 ITR 387 / 212 Taxman 260 / 89 DTR 112 / 259 CTR 545 (Mad.)(HC)

S.94(7) : Avoidance of tax – Transaction in securities – Loss on sale of mutual funds – Units purchased within a period of three months prior to record date – Sale made within a period of nine months from record date – Conditions in section 94(7) were cumulatively satisfied – Disallowance of short-term capital loss suffered by assessee justified
Assessee purchased mutual fund units on 20-10-2005. The Record date in respect of mutual fund units was 20-1-2006. The assessee sold said mutual fund units at a loss on 6-2-2006. It was held that since units had been purchased within a period of three months prior to record date and, thereupon, their sale was made within a period of nine months from record date, relevant conditions mentioned in section 94(7) were cumulatively satisfied and, thus, revenue authorities were justified in disallowing short-term capital loss suffered by assessee. Matter decided in against the assessee. (AY. 2006-07)
Krupeshbhai N. Patel v. Dy. CIT (2013) 140 ITD 176 (Ahd.)(Trib.)

S.112 : Tax on long-term capital gains – Non-residents are eligible for the benefit of 10% tax rate on long-term capital gains under the Proviso to S.112 on sale of equity shares. Benefit cannot be denied because the second proviso to section 48 is not applicable. The AAR should avoid giving conflicting rulings. [Ss.45, 48]
The assessee, a company based in Scotland, sold 4,36,00,000 equity shares of Cairn India Ltd. to Petronas International, Malaysia, for consideration of US$ 241 Million. The sale was not through a stock exchange and resulted in long-term capital gain of US$ 85 Million in the hands of the assessee after applying the benefit under first proviso to s. 48. The assessee filed an application for advance ruling in which it claimed that the said capital gains was chargeable to tax at the rate of 10% as per

the proviso to s. 112(1). However, the AAR (Cairn U. K. Holding Ltd. (2011) 337 ITR 131(AAR), departing from its earlier view in Timken France SAS (2007) 294 ITR 513 (AAR), held that the expression "before giving effect to the 2nd proviso to s. 48" in the Proviso to s. 112(1) presupposes the existence of a case where computation of long-term capital gains could be made in accordance with the formula contained in the 2nd proviso in s. 48 (indexation) and that as non-residents were not eligible for indexation, the lower rate of tax specified in the Proviso to s.112 was not available. On a writ petition by the assessee to challenge the AAR's ruling, HELD by the High Court reversing the AAR:

It is not possible to decipher the exact legislative purpose behind the proviso to s. 112(1) in a categorical and unambiguous manner. However, if one squarely focuses on the words used in the proviso and interprets them without extracting or subtracting any phrase or word, a non-resident assessee is entitled to benefit of the said provision. The proviso to s. 112(1) does not state that an assessee, who avails benefits of the first proviso to s. 48, is not entitled to benefit of lower rate of tax @ 10%. The said benefit cannot be denied because the second proviso to s. 48 is not applicable. In case the Legislature wanted to deny the said benefit where the assessee had taken benefit of the first proviso to s. 48, it was easy and this would have been specifically stipulated. The fact that by this interpretation, a non-resident becomes entitled to double deductions by way of computation of gains in foreign currency under the first proviso to s. 48 and then the benefit of lower rate of tax under the proviso to s. 112(1) is no reason to interpret the proviso differently. Further, as the AAR had taken a view in Timkin France SAS which was followed in several cases over several years, it ought not to have taken an opposite view and brought about uncertainty in understanding the effect of the proviso to s. 112(1). There should be consistency and uniformity in interpretation of provisions as uncertainties can disable and harm governance of tax laws. The AAR should follow its' earlier view, unless there are strong grounds and reasons to take a contrary view. (AY.2010-11)

Cairn UK Holdings Ltd. v. DIT (2013) 359 ITR 268 / 94 DTR 1 / 262 CTR 369 / (2014) 220 Taxman 230 (Delhi)(HC)

S.113 : Tax – Block assessment – Surcharge – Leviable

Surcharge under section 113 is mandatory and same is applicable with retrospective effect. (Block period 1-4-1990 to 16-1-2001)

CIT v. Raj Jewellers (2013) 219 Taxman 21 (Mag.) (All.)(HC)

S.113 : Tax – Block assessment – Search and seizure – Surcharge

Surcharge, held, leviable at the rate of 15% on the block assessment made in respect of the search conducted on 29th August 1996 (AY. 1997-98), notwithstanding the fact that proviso to s. 113 was not in the existence at the time of search.

CIT v. D.D. Gears Ltd. (2013) 83 DTR 88 (Delhi)(HC)

S.113 : Tax – Block assessment – Surcharge – Proviso to Section 113 being clarificatory, it operates even to pending assessments – Surcharge can be levied

The amendment to section 113 by Finance Act, 2002 which pertains to the tax in case of a block assessment, by way of proviso thereto, as being clarificatory in nature. It would operate even to pending assessment.(BP.14-89 to 2-12-1989)

Urmila & Co. Ltd. v. Dy. CIT (2013) 60 SOT 1 (URO) (Mum.)(Trib.)

S.113 : Tax – Block assessment – Search and seizure – Surcharge

The amendment to section 113 came into effect from June 1, 2002. Although the search was on 12th and 13th October, 2000 the levy of surcharge on the tax quantified on the assessee's undisclosed income was to be upheld.

ACIT v. Dwaraka Prasad Malpani (2012) 135 ITD 323 / 71 DTR 1 / 146 TTJ 498 / (2013) 21 ITR 719 (Cochin)(Trib.)

S.115A: Foreign companies – Tax – Interest – Benefit of reduced rate under India – Singapore DTAA will be available only if the income was received in Singapore – DTAA-India-Singapore [S.90, Art 11, 24]

The assessee is accompany resident of Singapore engaged in the business of computerized reservation System(CRS). Its primary business was to make airline reservations for and on behalf of the participating airlines using CRS. During the year under consideration the tax authority granted tax refund to the assessee with interest thereon. The Assessee contended that as per Article 11 of India-Singapore DTAA, the tax payer contended that the interest should be chargeable at 15% and not 20% under section 115A of the Act. However the assessee did not provide any supporting evidence about the same having been credited in its Singapore bank account. Tribunal held that, not having bank account in India does not mean that the assessee had received the amount in Singapore. The Assessee is under obligation to provide evidence of remittance or receipt of the interest in Singapore. Since the assessee has not provided such evidence, the benefit of reduced rate under Article 11 was not available and the income was to be taxed as per the Act i.e. as per section 115A.(AY. 2004-05)

Abacus International(P) Ltd. v. DDIT (2013) 27 ITR 49 / 34 taxmann.com 21 / 155 TTJ 550 / 89 DTR 235 / 144 ITD 36 (Mum.)(Trib.)

S.115AD : Capital gains – Foreign Institutional Investors – Securities – High Court verdict in *CIT v. Bharat Ruia (2011) 337 ITR 452 (Bom.)* on taxation of derivatives as speculation income/loss is not applicable to FIIs [S.43(5)]

The assessee, a Foreign Institutional Investor ("FII"), suffered a loss of Rs. 172.18 crore on account of derivative transactions which was claimed as a short-term capital loss. The AO held that the said loss constituted a business/ speculation loss and could not be set-off against the short-term capital gains. Though in the assessee's own case *(Platinum Investment Management Ltd. v. DDIT (ITAT Mumbai)* it had been held that all income arising to a FII, including from dealings in derivatives, has to be assessed as capital gains, the department argued that this view was no longer good law in view of *CIT v. Bharat R. Ruia (HUF) (2011) 337 ITR 452 (Bom.)* where it was held that as transactions in derivatives are entered into and settled without taking any delivery of the shares, the same constitutes a speculative transaction. HELD by the Tribunal rejecting the department's case:

The judgment of the Bombay High Court in Bharat Ruia is not applicable to assessees which are FIIs duly registered with SEBI. FIIs are allowed to only invest in the Capital Market and the income arising from transfer of security is to be considered as short-term capital gain or long-term capital gain as per s. 115AD of the Act. FIIs are not allowed to do business in the security market. Also, derivative is a security as per the clause (ia) to sub-section (h) of section 2 of The Securities Contracts (Regulation) Act, 1956 with effect from 22-2-2000. The co-ordinate Bench of the Tribunal has considered this aspect as well in the earlier order dated 5-12-2012 in which the earlier decision in *LG Asian Plus Ltd v. ADIT (international Taxation) (2011) 46 SOT 159 (Mum.)* was also considered (ITA No. 2787/M/2012. AY. 2006-07, Dt. 4-12-2013)

Platinum Asset Management Ltd. v. DCIT (No.2) (2014) 61 SOT 119 (Mum.)(Trib.)

S.115AD : Capital gains – Foreign Institutional Investors – Securities – FII's securities transactions' profits not assessable as "business profits'

The assessee, a Foreign Institutional Investor ("FII"), suffered a loss of ` 41 crore on account of derivative transactions. The AO & CIT(A) relied on the AAR Ruling in Royal Bank of Canada (2010) 323 ITR 380 and held that as the said loss arose out speculative transactions, it had to be treated as a

business loss and could not be set-off against STCG. On appeal by the assessee to the Tribunal HELD allowing the appeal:
Under the policy of the Central Government and the SEBI (FII) Regulations, 1995 a FII can only "invest" in securities and cannot do "business" in securities. S. 115AD also provides that all income arising to a FII from securities, whether from their retention or from their transfer, is taxable as a capital gain. This is also the view expressed in Press Note F. No. 5(13)SE/91-FIV dated 24-3-1994 issued by the Ministry of Finance. If the Revenue is permitted to make a distinction between the securities held by a FII by classifying them as a capital asset or as stock-in-trade, s. 115AD will become otiose. The result is that all income arising to a FII, including from dealings in derivatives has to be assessed as capital gains. The contrary view of the AAR in Royal Bank of Canada cannot be followed *(LG Asian Plus Ltd. v. ADIT (International Taxation) (2011) 46 SOT 159 followed) (AY. 2007-08)*
Platinum Investment Management Ltd. v. DDIT (2013) 33 taxmann.com 290 (Mum.)(Trib.)

S.115J : Book profit – Carry forward of unabsorbed losses and investment allowance – Not entitled [S.72]
In return of income filed, assessee declared income under section 115J. It claimed that it was entitled to carry forward of unabsorbed losses including investment allowance, as taxable income had been computed on basis of book profits under section 115J and not under normal provisions. In view of judgment of Supreme Court rendered in case of *Karnataka Small Scale Industries Development Corpn. Ltd. v. CIT [2002] 258 ITR 770/[2003] 126 Taxman 121*, assessee was not entitled to carry forward of unabsorbed losses including investment allowance.(AY.1989-90)
CIT v. Prakash Tubes Ltd. (2013) 219 Taxman 22 (Delhi)(HC)

S.115J : Company – Book profit – Adjustment for depreciation – Debenture issue expenses whether revenue or capital [S. 4]
In computing income under s. 115J, The AO has the power to examine whether the books of account are certified by the appropriate authorities under the Companies Act. Thereafter, the AO has only limited powers of making additions or reductions as provided for in the Explanation. Further, the Tribunal was legally correct in allowing debenture issue expenses on issue of convertible debentures to the assessee.
CIT v. Ranbaxy Laboratories (2013) 94 DTR 457 (Delhi)(HC)

S.115J : Book profit – Revalued assets – Assessing Officer not justified in disallowing depreciation on revalued figure while computing book profit under section 115J of the Act.
The Assessing Officer, while computing book profit under S. 115J, disallowed depreciation on revalued assets. The Commissioner (Appeals) and the Tribunal held that in terms of clause (1), read with proviso thereto of the Explanation to S. 115J, the assessee was entitled to deduction of the equal amount from the books profit. The assessee referred to AS-6 'Accounting for fixed assets' issued by the Institute of Chartered Accountants of India which provides for the revaluation of fixed assets and the guidance note GN(A) 3 (issued 1982) on the treatment of reserves created on revaluation of fixed assets. This AS-6 was applicable by virtue of S. 211(3)(c) of the Companies Act. On appeal High court held that the Tribunal did not commit any error in law in allowing the depreciation on the revaluation reserve, which is a prescribed and statutory method of accounting. (AY. 1990-91)
CIT v. Rampur Distillery & Chemicals Co. Ltd. (2013) 214 Taxman 483 / 81 DTR 181 / 255 CTR 394 (All.)(HC)

S.115J : Book profit – Change in method of charging depreciation – Book profit to be computed by allowing depreciation as per the changed method [S.32]

Where the assessee had changed the method of accounting from Straight Line Method (SLM) to Written Down Value (WDV) method, book profit has to be computed by allowing depreciation as be the changed method.
CIT v. Hindustan Pipe Udyog Ltd. (2013) 81 DTR 175 / 214 Taxman 9 (Mag.)(All.)(HC)

S.115JA : Book profit – Provision for bad and doubtful debts is not deductible
Provision for bad debts is not deductible in the computation of book profits. (AY. 1998-99)
CIT v. IBM India Ltd. (2013) 357 ITR 88 / 89 DTR 25 (Karn.)(HC)

S.115JA : Book profit – Liability to pay interest for failure to pay advance tax can be levied. [S.234B]
Interest u/s 234B for default in payment of advance tax can be levied where income of company is computed under section 115JA. (AY. 1998-99)
CIT v. IBM India Ltd. (2013) 357 ITR 88 / 89 DTR 25 (Karn.)(HC)

S.115JA : Book profit – Exempt income – Matter remanded [S.14A]
Proportionate addition of expenditure attributable to exempted income in the computation of book profit under section 115JA was concerned, the assessee contended that going by the decision on section 14A in the assessee's own case for the very same year, no disallowance under section 115JA also was called for, i.e., in the form of addition of expenditure attributable to the exempted income in the computation of book profit. The disallowance in the computation of business income was achieved by the introduction of section 14A which was introduced by the Finance Act, 2001. Since none of the authorities had considered sub-clause (f) of Explanation to section 115JA which is an independent provision authorising addition to the book profit on the proportionate expenditure attributable to the exempted income, the Assessing Officer was directed to consider the provision and modify the assessment without reference to section 14A. (AY.1999-2000)
CIT v. Dhanalakshmi Bank Ltd. (2013) 357 ITR 448 / 219 Taxman 130 (Mag.)(Ker.)(HC)

S.115JA : Book profit – Revised return – Revised profit and loss account showing book loss – Rejection of revised balance sheet by the AO was held to be not proper. Matter remanded back
Assessee-company filed revised return of income after one year from end of relevant assessment year along with revised profit and loss account and balance sheet showing 'book loss' before taxation in place of 'book profit' as shown in original profit and loss account. Revision to profit and loss account and balance sheet was made due to objections raised by Regional Director of Company Affairs that inter divisional transfer of windmills from manufacturing unit to power generating unit could not be treated as sales. Once assessee had filed revised balance sheet and profit and loss account on basis of objections by Regional Director of Company Affairs and same had been placed before annual general meeting and approved, for purpose of assessment of profits under section 115JA, it was not open to Assessing Officer to reject accounts of assessee or rescrutinise accounts to satisfy himself that these accounts had been maintained in accordance with provisions of Companies Act. The court held that therefore, matter required to be remanded back to Assessing Officer to examine issue once again. (AY.1997-98)
CIT v. NEPC India Ltd. (2013) 261 CTR 330 (Mad.)(HC)

S.115JA : Book profit – Provision for contingencies and lease equalisation reserve
Provision for contingencies and lease equalisation reserve has to be added back while computing book profit under section 115JA. (AY. 2000-01, 2001-02)
CIT v. Weizmann Homes Ltd. (2013) 86 DTR 41 / 215 Taxman 264 (Karn.)(HC)

S.115JA : Book profit – Disclosed by profit and loss account

Debenture redemption reserve debited in profit and loss account was a provision for ascertained liability, and hence was deductible. Expenses on voluntary retirement scheme, closure of factory and loss on termination of lease were debited to the profit and loss account. Held, AO could not go behind profits shown in profit and loss account. (AY.1998-99)
Addl. CIT v. Nicholas Piramal India Ltd. (2013) 27 ITR 182 (Mum.)(Trib.)

S.115JA : Book profit – Goodwill – Restraint covenant – Direct entry in balance sheet to capital reserve account the same could not be brought to book profit for MAT liability [S.4, 5, 28(va)]
Where the assessee had credited a sum received towards goodwill and a sum received towards restraint covenant to capital reserve account directly in balance sheet and had not debited to profit and loss account, same could not be brought to book profit for MAT liability under section 115JA. (AY.1999-2000)
DCIT v. Bisleri Sales Ltd. (2013) 58 SOT 73 / 81 DTR 197 (Mum.)(Trib.)

S.115JA : Book profit – Eligible business – Not on basis of profit computed under normal provisions of Act. [S.80HHC]
For the purpose of adjustment under section 115JA, profit eligible for deduction under section 80HHC is to be computed on basis of adjusted book profit under section 115JA and not on basis of profit computed under normal provisions of Act. (AY.1999-2000)
KEC International Ltd. v. DCIT (2012) 20 ITR 282 / (2013) 58 SOT 18 (URO)(Mum.)(Trib.)

S.115JA : Book profit – Deemed income – Non-resident – Banking company – Interest on securities [Ss.4, 5]
The assessee was following mercantile system of accounting. In its books of account it had credited income from interest on securities on day-to-day accrual basis, however, in the return of income the said interest was not offered for taxation on the ground that interest which had not become due for payment during previous year and hence cannot be treated as income. The Assessing Officer held that the interest accrued on securities but not due for payment as on the end of the previous year was income of assessee and hence added the same to its income. The CIT(A) upheld the findings of the Assessing Officer. The Tribunal following the judgment of the Bombay High Court in the case of *DIT (International Taxation) v. Credit Suisse First Baston (Cyprus) Ltd. (2012) 209 Taxman 234* held that the interest in question did not constitute income of assessee for year under consideration. (AYs.1999-2000, 2000-01)
Dy. DIT v. Dresdner Bank AG (2013) 22 ITR 500 / 57 SOT 203 (Mum.)(Trib.)

S.115JA : Book profit – Provision for bad debts
The assessee, a banking company, made provision for bad debts. The AO added the provision for bad debts to net profit of assessee while computing book profit under section 115JA. Held, in view of amendment in clause (g) of Explanation to section 115JA(2) by Finance (No.2) Act, 2009, with retrospective effect from 1-4-1998, Assessing Officer was justified in making addition of said provision to net profit of assessee while computing book profit under section 115JA. (AY. 1999-2000)
Dresdner Bank AG v. ACIT (2013) 22 ITR 500 / 57 SOT 203 (Mum.)(Trib.)

S.115JB : Book profit – Expenditure estimated on earning of dividend – Addition deleted in normal computation consequently has to be deleted for the purpose of computation of book profit [S.14A]
When addition u/s 14A was deleted for the purpose of normal computation of income, same had to be deleted for MAT computation as well. (AY.2004-05)
CIT v. Gujarat State Fertilizers and Chemicals Ltd. (2013) 358 ITR 323 / 217 Taxman 343 / (2014) 101 DTR 175 (Guj.)(HC)

S.115JB : Book profit – Lease equalisation reserve and provision for contingencies to be added [S.36(1)(viii)]
Lease equalisation reserve and provision for contingencies to be added for the computation of book profits. (AYs.1998-99 to 2001-02)
CIT v. Weizmann Homes Ltd. (2013) 357 ITR 74 / 86 DTR 41 / 215 Taxman 264 / 263 CTR 121 (Karn.)(HC)

S.115JB : Book profit – Retrospective amendment – AO was directed to redo the assessment
In view of the subsequent amendment with retrospective effect to nullify decision the decision of the Supreme Court in favour of the assessee, the AO directed to redo assessment in the light of amended provisions. (AY.1999-2000)
CIT v. Dhanalakshmi Bank Ltd. (2013) 357 ITR 448 (Ker.)(HC)

S.115JB : Book profit – Miscellaneous income and interest part of business income – 100% deduction u/s.80HHC allowable for purpose of computing book profits – Special deduction cannot be limited to thirty percent [S.80HHC]
The High Court following the decision of the Supreme Court in the case of *Ajanta Pharma v. CIT (2010) 327 ITR 305* held that 100% of the deduction would be allowable u/s. 80HHC while computing "book profit" u/s. 115JB. Miscellaneous income and interest part of business income. Special deduction cannot be limited to thirty per cent. [AYs.2003-04, 2004-05]
CIT v. Flex Foods Ltd. (2013) 217 Taxman 108(Mag) / (2014) 360 ITR 359 (Delhi)(HC)

S.115JB : Book profit – provision towards leave encashment should not be treated as being made in respect of unascertained liability and added back to book profit for computation of MAT
The assessee had made a provision towards leave encashment of employees. The AO added back the same in MAT computation, treating it as unascertained liability. The Tribunal held that the provision was in respect of ascertained and definite liability. On appeal, held, dismissing the appeal:
In view of the decision of the Supreme Court in *Bharat Earth Movers v. CIT [2000] 245 ITR 428*, it is not open for the High Court to overturn the Tribunal's finding that the provision was not towards an unascertained liability, but was in respect of an ascertained and definite liability.
CIT v. H.P. Tourism Development Corporation [2013] 217 Taxman 148 (Mag.)(HP)(HC)

S.115JB : Book profit – Provision for diminution in value of asset debited to profit and loss account to be added – Retrospective effect – Constitutional validity – clause (i) inserted in Explanation 1 after sub-section (2) of the section 115JB is not unconstitutional [Constitution of India Article 226]
The Supreme Court in *CIT v. HCL Comnet Systems & Services Ltd. [2008] 305 ITR 409/174 Taxman 118* held that debt is the amount receivable by the assessee and not any liability payable by the assessee and, therefore, any provision made towards irrecoverability of the debt cannot be said to be a provision for liability.
After the judgment of the Supreme Court, a new clause (i) was inserted in Explanation 1 after sub-section (2) of the section 115JB so as to provide that if any provision for diminution in the value of any asset has been debited to the profit and loss account, it shall be added to the net profit as shown in the profit and loss account for the purpose of computation of book profit.
The petitioner was advised to recompute its book profit for relevant years by taking into account the provision for diminution in the value of assets, including any provision made for bad and doubtful debts, in view of the retrospective amendment. The petitioner, accordingly, recomputed its book profit and deposited additional taxes consequent to the recomputation.

The petitioner challenged retrospectivity of the amendment.
It was held that absence of any reason or justification given in 'statement of objects and reasons' for an amendment would not invalidate legislative action and would not render amendment unconstitutional on that ground alone. (AYs.2002-03, 2003-04, 2009-10)
Whirlpool of India Ltd. v. UOI (2013) 355 ITR 51 / 258 CTR 378 / 86 DTR 129 (Delhi) (HC)

S.115JB : Book profit – Doctrine of promissory estoppel – Dividend distribution tax – Withdrawal of MAT and DDT exemption to SEZs is not breach of promissory estoppels [S.115-O(6), Constitution of India, Article 14]
As a corollary to the Special Economic Zones Act, 2005 ('SEZ Act'), s. 115JB(6) and s. 115-O(6) was inserted to exempt SEZs from payment of Minimum Alternate Tax ("MAT") on book profits and tax on distributed profits [Dividend Distribution Tax ("DDT")]. By the Finance Act, 2011, the exemption granted by S.115JB(6) and 115-O(6) was made inoperative w.e.f. 1-4-2012 and 1-6-2011 respectively. The Petitioners claimed that they had established SEZs on the basis of the promise made by the Government that SEZs would enjoy an exemption from payment of MAT and DDT and that the amendments by the Finance Act, 2011 withdrawing the said exemption was opposed to the Doctrine of Promissory Estoppel and the Doctrine of Legitimate Expectation. HELD by the High Court dismissing the Petition:
Firstly, it is the settled position of law that every tax exemption should have a sunset clause. As the exemption in s. 115JB(6) & 115-O(6) did not have a sunset clause, the flaw is removed by the impugned amendment. Secondly, the exemption created an inequality between SEZ companies and other companies which is now removed. Thirdly, the exemptions provided to SEZ companies resulted in erosion of tax base. Fourthly, the impugned amendment relates to fiscal policy of the State and any decision in the economic sphere is *ad hoc* and experimental in its nature and the Government is well within it sovereign power to regulate the same. Lastly, the impugned amendments do not transgress any of the fundamental rights of the petitioners guaranteed under the Constitution. The legislature can never be precluded from exercising its legislative power by resort to the Doctrine of Promissory Estoppel. Since it is an equitable doctrine, it must yield when equity so requires. The courts would decline to enforce this doctrine if it results in great hardship to government and would be prejudicial to the public interest.
Mindtree Limited v. UOI (2013) 89 DTR 297 / 260 CTR 146 / 217 Taxman 58 (Karn.)(HC)

S.115JB : Book profit – Warranty provisions – Diminution in value of asset
Assessee claimed that provision made for warranty in respect of sale of medical consumable devices and diagnostic equipment would be deducted for calculating book profit. Assessing Officer added back the amount by applying the Explanation 1(i) to section 115JB (2). Tribunal held that such provision could not be treated as a provision for diminution in value of asset. Court upheld the order Tribunal. (AY.2000-01, 2002-03, 2004-05, 2005-06)
CIT v. Becton Dickinson India (P.) Ltd. (2013) 214 Taxman 636 (Delhi)(HC)

S.115JB : Book profit – Computation – Provision for gratuity not to be added
Though the actual payment of gratuity might be made at a later point of time upon the periodical release of the employees from service, it was a provision been made on the actuarial basis, and could not be stated to be an unascertained liability so as to be added back in terms of clause (c) to Explanation 1 to section 115JB of the Income-tax Act, 1961. (AY.2003-04)
DCIT v. Inox Leisure Ltd (2013) 351 ITR 314 / 213 Taxman 160 / 85 DTR 103 (Guj.)(HC)

S.115JB : Book profit – Computation – Matter remanded [S. 143(3)]
Assessee-company filed return showing total income as nil. However, it had shown book profit under section 115JB. Assessing Officer rejected account books of assessee on ground that it was unable to prove genuineness of transactions made with other parties. He treated said transactions as unexplained and added

relevant amount to total income/book profit of assessee. He also examined assessee's claim of deduction under section 40(a)(ia) and after rejecting claim added relevant amount to total income/book profit of assessee. He in operative part of order ordered 'assessed under section 143(3).He also ordered 'computation as per section 115JB was modified accordingly'. Commissioner (Appeals) considered each and every component which had been considered by Assessing Officer and deleted above addition. He held that Assessing Officer had added back aforesaid amount to book profit for purpose of charging tax under section 115JB without giving any reason. Tribunal held that Assessing Officer had not made impugned addition under provisions of section 143(3). It upheld deletion of impugned addition by Commissioner (Appeals). It further restored matter to Assessing Officer for recomputing demand under section 115JB. On appeal High Court held that matter required to be remanded back to Assessing Officer for fresh consideration obviously to decide whether assessment was required to be made under section 115JB or under section 143(3). Matter remanded. (AY.2005-06)
CIT v. International Auto Ltd. (2013) 214 Taxman 67(Mag.) / 254 CTR 298 (Jharkhand) (HC)

S.115JB : Book profit – Bank – Provision – Actuarial valuation – Cannot be added
The Court held that provision is made on the basis of actuarial valuation it cannot besaid that the provision for gratuity is not ascertained liability hence cannot be added back while computing book profit under section 115JB.
DCIT v. Inox Leisure Ltd. (2013) 213 Taxman 260 (Guj.)(HC)

S.115JB : Book profit – Provisions for diminution in value of assets
Provision for diminution in value of assets claimed as provision for doubtful advances is not to be deducted for computing book profits. (AY.2007-08)
I Dream Productions P. Ltd. v. ACIT (2013) 27 ITR 169 (Mum.)(Trib.)

S.115JB : Book profit – Foreseeable losses, claims and import duty demands
AO directed to re compute book profits after considering issues like provision for bad and doubtful debts and advances, provision for claims. (AYs. 2006-07, 2007-08)
GE India Industrial P. Ltd. v. DCIT (2013) 27 ITR 543 (Ahd.)(Trib.)

S.115JB : Book profit – Minimum alternate tax – Amount disallowable under section 14A can be added back [S.14A]
Amount disallowable under section 14A can be added back while computing book profit under Explanation 1 to section 115JB. (AY. 2008-09)
ITO v. RBK Share Broking (P.) Ltd. (2013) 60 SOT 61(URO) / 37 taxmann.com 128 / (2014) 97 DTR 27 / 159 TTJ 16 (Mum.)(Trib.)

S.115JB : Book profit – Exempt Income [S. 14A, Rule 8D]
The assessee earned certain exempt income but did not offer any disallowance u/s. 14A. The A.O. computed disallowance by applying Rule 8D. The CIT(A) upheld the order of the A.O. The Tribunal held in the favour of revenue, that amount disallowable u/s. 14A is covered under clause (A) of Exp. 1 to Sec. 115JB(2) and thus said amount has to be added back while computing amount of book profit. (AY. 2009-10)
Dabur India Ltd. v. ACIT (2013) 145 ITD 175 / (2014) 159 TTJ 563 (Mum.)(Trib.)

S.115JB : Book profit – Minimum alternate tax – Effect of S. 80 HHC deduction [S. 80HHC]
The Tribunal held book profit under section 115 JB is to calculated after allowing 100 per cent of export profit as calculated in accordance with provisions of S. 80 HHC. (AY. 2004-05)
ACIT v. Jindal Steel & Power Ltd. (2013) 145 ITD 277 (Delhi)(Trib.)

S.115JB : Book profit – Banking companies is not liable to be taxed to minimum alternative tax [Companies Act, S.211]
A Banking company to which proviso to section 211(2) of Companies Act applies for that company would not be liable to be taxed under section 115JB. (AY.2007-08)
State Bank of Hyderabad v. Dy. CIT (2013) 58 SOT 278 (Hyd.)(Trib.)

S.115JB : Book profit – Adjustment – Provision for diminution in value
Provision for diminution in value of investment and contingency reserve written back to be reduced for computation of book profits as per Explanation 1(i). (AY.2007-08)
DCIT v. Mcleod Russel India Ltd. (2013) 24 ITR 262 (Kol.)(Trib.)

S.115JB : Book profit – Mesne profits being capital receipts were deductible while computing book profits [S.4]
The Tribunal held that since the mesne profit is capital in nature in view of the decision of special Bench in Narang Over seas P. Ltd. (2008) 111 ITD 1, they cannot be brought to tax under section 115JB of the Act. Even Explanation 2 to section 115JB supports the case of assessee. (AY. 2008-09) (ITA no 8185 dt 19-06-2013 Bench G)
ACIT v. Goodwill Theatres Pvt. Ltd. (2013) BCAJ – August–P. 34 (Mum.)(Trib.)

S.115JB : Book profit – Accumulated losses – First time the net worth has exceeded the accumulated losses during the impugned assessment year
The Assessing Officer held that the assessee is liable to tax under section 115JB of the Act as the net worth of the company for the year is more than the accumulated losses. In appeal, the CIT(A) held that, deduction is available from the year in which the company first became sick to the year in which its net worth becomes positive for the first time, both years included. The CIT(A) noted that assessee's net worth became positive for the first time in the financial year 2006-07 relevant to the assessment year under dispute. Therefore, the CIT(A) held that deduction under clause (vii) to Explanation 1 of section 115JB(2) is allowable to the assessee. The Tribunal while dismissing the departmental ground of appeal held that the deduction under the aforesaid provision commences from the AY. in which it becomes a sick industrial company and ends in the AY. during which the net worth becomes equal to or exceeds the accumulated losses. In case of the assessee, admittedly, for the first time the net worth has exceeded the accumulated losses during the impugned assessment year. Accordingly, the Tribunal held that the provision contained in clause (vii) to Explanation-1 of section 115JB of the Act are very much applicable to the assessee and as such, the assessee is entitled to claim deduction under the aforesaid provision. (AY. 2007-08)
ACIT v. Praga Tools Ltd. (2013) 23 ITR 622 / 59 SOT 14 (URO)(Hyd.)(Trib.)

S.115JB : Book profit – Loan admitted by assessee – To be included in book profits for purpose of MAT
Assessee took a loan in cash and subsequently the same was adjusted in cash and the accounts were squared up. The assessee admitted aforesaid loans and cash as income. The Assessing Officer while computing book profit under section 115JB added the amount admitted by assessee. CIT(A) upheld the order of Assessing Officer. On further appeal in Tribunal, the Tribunal held that the agreed addition was a part and parcel of net profit as shown by the assessee in the Profit & Loss Account and therefore this was not as part of adjustment. Further there was no restriction in calculating correct net profit as per Profit & Loss A/c plus agreed addition that will be the net profit as per the assessee and in the light of the fact. (AY.2008-09)
Dream Shelters (P) Ltd. v. ITO (2013) 56 SOT 440 (Agra)(Trib.) (Delhi)(Trib.)

S.115JB : Book profit – Companies Act – Other than adjustments provided in Explanation to S. 115JB is not permissible

Where accounts prepared under Companies Act have been certified by authorities under Companies Act, the Assessing Officer while computing book profit, cannot tinker with accounts and make changes other than adjustments provided in Explanation to s. 115JB.(AY.2004-05)
Forever Diamonds (P.) Ltd. v. DCIT (2013) 152 TTJ 682 / 83 DTR 411 / 57 SOT 113 (URO) (Mum.)(Trib.)

S.115JB : Book profit – Exempt income – Disallowance of expenditure [S.14A]
Expenditure which is disallowed under section 14A and attained finality has to be added back while computing book profit under section 115JB. (AY. 2003-04 to 2006-07)
Hindustan Construction Co. Ltd. v. Dy. CIT (2013) 140 ITD 642 (Mum.)(Trib.)

S.115JB : Book profit – Bank – Profit and loss account – Not to be altered – Net interest earned by assessee from placement of funds with head office or other overseas branches is not covered by any of clauses (i) to (ix) of Explanation to section 115JA hence Includible in computing “book profit”. Foreign bank whether governed by section 115JB – Contention raised for first time – Matter remanded. [S.115A]
For the purposes of section 115JA, the amount of net profit according to the profit and loss account is immune from alteration irrespective of whether the alteration is ventured by the Assessing Officer or the assessee. Just as the Assessing Officer has no authority to go beyond the profit and loss account prepared by the assessee and tinker with the figure of profit so disclosed, this is equally true for the assessee as well. Once an amount as shown to the credit side of the profit and loss account of the assessee and it is not covered by any of the clauses (i) to (ix) of the Explanation to section 115JA, it cannot be reduced.
Accordingly the Tribunal held that that the interest earned by the assessee from its head office or overseas branches was part and parcel of the credit side of the profit and loss account of the assessee. This amount was not covered by any of the clauses from (i) to (ix) of the Explanation. The net interest earned by the assessee from placement of funds with the head office or other overseas branches amounting was includible in computing the “book profit” for the purposes of section 115JA of the Act. Appeal of assessee was dismissed. Before the Tribunal for the first time on the basis of Judgment of Tribunal in Krung Thai Bank PCL (2012) 49 SOT 70 (Mum.) (URO) the assessee has raised the issue stating that the assessee being foreign bank is not required to draw its profit and loss account as per Companies Act and very applicability of provision of section 115JA is not valid. As the issue was raised for the first time the matter was directed to the Assessing Officer to decide accordance with law. (AY.2000-2001, 1998-99 to 2003-04)
Societe Generale v. Dy. DIT (IT) (2013) 21 ITR 606 / 57 SOT 101 (Mum.)(Trib.)

S.115JB : Book profit – Computation – Provision for doubtful debts – Is to be added in computation of book profits
The assessee made provision for bad and doubtful debts which was not added to the profit and loss account for computing the book profits for the purpose of section 115JB of the Act. The Assessing Officer held that provision for an unascertained liability as litigation was going on between the assessee and CCL over the power tariff and that provision for doubtful debts was covered by clause (i) of Explanation 1 to section 115JB which had been made effective by the Finance (No. 2) Act, 2009 retrospectively from April 1, 2001. The Commissioner (Appeals) also confirmed. On appeal to Tribunal the Tribunal held that in view of the insertion of clause (i) to Explanation 1 to section 115JB the Assessing Officer had no choice to make additions to arrive at the book profits. Now where the assessee stated that it was a provision for unaccrued income, appeals of the assessee was dismissed. (AY.2005-06 to 2007-08)
Eastern India Powertech Ltd. v. Addl. CIT (2013) 21 ITR 542 / 57 SOT 110 (URO)(Delhi) (Trib.)

S.115JB : Book profit – MAT – Unabsorbed depreciation – No carry forward loss – Not eligible to claim deduction of brought forward depreciation while computing book profit under section 115JB

It was held that in terms of clause (iii) of Explanation 1 to S. 115JB, while computing book profit, assessee is entitled to deduct amount of loss brought forward or unabsorbed depreciation whichever is less as per books of account. It was therefore held that where there was no carry forward loss as per books of account, assessee was not eligible to claim deduction of brought forward depreciation while computing book profit under section 115JB. (AY.2003-04)

Hotel & Allied Trades (P.) Ltd. v. Dy. CIT (2013) 140 ITR 309 / 87 DTR 49 / 154 TTJ 503 (Cochin)(Trib.)

S.115JB : Book profit – Non-resident companies – Liable to book profit

Provisions of section 115JB is not confined to a domestic company but it applies to both resident company and a non-resident company. In favour of revenue. (AAR No. 1098 of 2011 dt 8-6-2012)

ZD, In re (2012) 348 ITR 351 / 254 CTR 479 / (2013) 212 Taxman 246 (AAR)

S.115U : Venture capital companies – Venture capital funds – Tax on income – Provision does not provide that income received by investor from VCC or VCF is exempt – Assessing Officer has assessed the income as short-term capital gain, the claim of the assessee as short-term capital loss has to be allowed

The assessee had acquired units in India Value Fund (IVF), a venture capital fund registered with the SEBI. IVF had purchased equity shares of Biocon and also received its equity shares as bonus. It proposed to divest a part or whole of its stake in Biocon and, accordingly, gave option to all its investors either to receive its attributable share of net proceeds as divested investment in Biocon shares in cash or to receive its attributable share of investment in Biocon. The assessee opted for attributable shares of Biocon to be transferred by IVF and, accordingly, 53711 equity shares of Biocon were transferred to the assessee. Apart from the shares, the assessee also received its share in capital loss suffered by IVF due to sale of Biocon shares. The Assessing Officer held that profit on account of distribution of shares of Biocon (Value of shares attributed minus share in capital loss suffered by IVF) was taxable as short-term capital gain. On appeal, the Commissioner (Appeals) held that treating the reimbursement of capital in the shape of shares of Biocon as income was not sustainable. He restricted the addition to share of assessee in capital loss suffered by IVF. On appeal the Tribunal held that, as per section 115U, trustee venture capital company or venture capital fund is given the status of pass through vehicle for the purpose of the treatment of the income received on account of investment made in the venture capital undertaking. Meaning thereby, a person who makes investment in the venture capital company or venture capital fund and earns the income out of such investment, such income shall be treated as if the investment was directly in the venture capital undertaking and venture capital fund or venture capital company, is only a pass through vehicle. Chapter XII-F and section 115U have been introduced in the statute *vide* Finance Act, 2000 for making VCF/VCC as a pass through vehicle and taxing investors as if they had received income directly from the Venture Capital Undertaking. This section has been introduced corresponding to the insertion of new clause (23FB) in section 10 being an enabling provision for taking investors, who receives the income from VCC/VCF because as per the provisions of section 10(23FB) any income of VCC or VCF is exempt. Section 115U is intended to grant tax concession to the recipient of income from a VCC/VCF and such income in the hands of the investor shall be chargeable to tax as if it were income from investment in venture capital undertaking made directly by such person. Thus, section 115U stipulates that the income received by a person from VCC/VCF shall be deemed to be of same nature and the same proportion accruing to the VCF/VCC. However, the concession in tax is in the shape that the provisions of Chapter XII-D or XII-E or XVII-B shall not apply to the income paid by the VCC or VCF. This means that no tax shall be payable under section 115O or section 115R and no tax deduction at source shall be made under the provisions contained in Chapter XVII-B from the income paid by the VCC or VCF to an investor. As per sub-section (2) of section 115U, it is mandatory on the part of the VCC or VCF to furnish a statement

in the prescribed form and verify in the prescribed manner giving the details of nature of income paid during the previous year. Form 64 is provided for making the statement of income distributed by VCC or VCF to be furnished under section 115U. It makes clear that VCC or VCF has to furnish the details of the nature of income received by the investor from VCC or VCF. The details specifically require about the income/amount paid under long-term capital gains, short-term capital gains, dividend or other income such as interest, etc. Thus, section 115U mandates that the nature of income, which is received by the VCC or VCF from the venture capital undertaking and further distributed to the investor shall be taxable in the hands of the investor, by treating the same nature of income like long-term capital gains, short-term capital gains, dividend or other income such as interest, etc., and accordingly be taxed as per the provisions as applicable under different heads of the income. Hence, section 115U prescribes the principle of pass through by treating the VCC or VCF as a pass through vehicle and further, grants some concession in the shape of non-applicability of provisions of Chapter XIV-D, XII-E or XVII-B; but does not provide that the income received by the investor from VCC or VCF is exempt. In view of the above discussion, the income received by the assessee from IVF is taxable in the manner as prescribed under section 115U. Since the Assessing Officer has assessed the income as short-term capital gain, the claim of the assessee as short-term capital loss has to be allowed. (AY. 2005-06)
Scope (P.) Ltd. v. DCIT (2013) 33 taxmann.com 167 / 142 ITD 515 (Mum.)(Trib.)

S.115VA : Shipping business – Qualifying ships – Computation – Slot charter –Assessee is required to produce 'valid certificate' in respect of such ships
The assessee-shipping company was operating its own ships and had also chartered in ships under 'slot charter' (part of ship) agreement. In order to avail benefit of Chapter XII-G, the assessee submitted the 'valid certificate' only for its own ships and not in respect of chartered ships, as according to it 'valid certificate' was required only for own ship and ships chartered in fully and there was no requirement to submit the 'valid certificate' in respect of ships chartered under 'slot charter' agreement, since income for full chartered ships was computed on basis of 'net tonnage' shown in valid certificate and income from ships chartered under 'slot charter' was computed on deemed tonnage. The Assessing Officer did not accept said submission and denied the benefit of Chapter XII-G to slot charter income. On appeal, the Commissioner (Appeals) upheld the denial. On Second Appeal the Tribunal held that the benefit of provisions of Chapter XII-G can be availed only by a 'tonnage tax company' (shipping company) in respect of the business of operating 'Qualifying ships'. 'Operation of Qualifying ships' is a mandatory condition for availing the benefit of Chapter XII-G. Undoubtedly, the assessee opting to avail the benefit of Chapter XII-G has to necessarily show that it has generated income from the business of operation of 'Qualifying ships'. It is necessary to show that the ships chartered in under 'Slot Charter' arrangement are also 'Qualifying ships' by producing the 'Valid certificate'. The assessee heavily placed reliance on the provisions of section 115VG, 'Deemed tonnage' defined in section 115VA and 'Specific shipping trades' defined in section 115VI and also on clause 10 of Form No. 66 to contend that there is no necessity to furnish the 'Valid certificate' in respect of ships chartered in under 'slot charter' arrangement. The net result of the said contention is that the ship chartered in under 'slot charter' arrangement need not be a 'Qualifying ship'. (AY. 2005-06 & 2008-09)
Trans Asian Shipping Services (P.) Ltd. v. Dy. CIT (2013) 55 SOT 1 (Cochin)(Trib.)

S.115VD : Shipping business – Qualifying ship – Offshore installation – Tonnage tax scheme
The assessee, being owner of ships/vessels, engaged in drilling operations, opted for tonnage tax scheme. The Assessing Officer rejected the assessee's claim holding that vessel 'D' was not a qualifying ship, but was an offshore installation. The court held, that offshore installations are fixed for a specific purpose and after finishing purpose are dismantled and shifted to other site. Since 'D' had been registered under Merchant Shipping Act, 1958, it was held to be a qualifying ship.
CIT v. Jaggon International Ltd. (2013) 214 Taxman 630 (Delhi)(HC)

S.115VP : Shipping business – Tonnage tax scheme – Procedural requirement is directory and not mandatory

The period prescribed under section 115VP(2) is primarily a directory provision and not a mandatory one. As per provisions of section 115VP, the assessee was required to make application u/s. 115VP after 31-9-2004 but before 1-1-2005. The assessee made such application on 4-1-2005. Held since application was made only 4 days after last date prescribed, there was substantial compliance with procedural requirements and such application should be considered.

CIT v. Blue Ocean Sea Transport Ltd. (2013) 215 Taxman 189 (Guj.)(HC)

S.115WA : Fringe benefit – Business promotion expenses – Expenses incurred in Travel agents

There is no employer-employee relationship between the assessee and the recipient of benefit. Therefore FBT is not chargeable on these payments.

Jet Airways (India) Ltd. v. Dy. CIT (2013) 153 TTJ 624 / 25 ITR 36 (Mum.)(Trib.)

S.115WA : Fringe benefit – Insurance expenses

The Tribunal remanded back to Assessing Officer and the assessee is directed to substantiate its claim. That such insurance premium is a statutory liability by bringing cogent material evidence.

Jet Airways (India) Ltd. v. Dy. CIT (2013) 153 TTJ 624 / 25 ITR 36 / 59 SOT 167 (URO)(Mum.)(Trib.)

S.115WA : Fringe benefit – Gifts to travel agents/customers

Employer-employee relationship is a perquisite for the levy of FBT, expenses incurred on giving gifts with whom the assessee has no employer-employee relationship are not chargeable to FBT. (AY. 2006-07 to 2008-09)

Jet Airways (India) Ltd. v. Dy. CIT (2013) 153 TTJ 624 / 25 ITR 36 / 59 SOT 167 (URO)(Mum.)(Trib.)

S.115WA : Fringe benefit – Charge of tax – Employer – Employee relationship – Non-resident company – Consultants – Fringe benefit tax not attracted [Ss.194C, 194J]

The fringe benefits tax introduces by Chapter XII-H of the Income-tax Act, 1961 is in the nature of a presumptive tax. An employer–employee relationship should be in existence for the Assessing Officer to invoke the provisions of Chapter XII-H of the Act. Therefore, in such cases where there is in existence an employer–employee relationship, then the Assessing Officer is empowered to assess the value of the fringe benefits granted to the employees in consideration of their employment. If on facts, the accepted factual position is that that there is no employer–employee relationship, merely on a presumption the employer or employee relationship cannot be thrust upon the assessee. Non-resident company engaging consultants on retainer ship basis for its projects in India. Tax was deducted at source under section 194C or 194J, such persons not eligible for retirement or superannuation or gratuity benefits. Fringe benefits tax not attracted. (AY.2006-07)

Joshi Technologies International Inc v. ADIT (IT) (2013) 143 ITD 365 / 25 ITR 170 / 93 DTR 103 / 157 TTJ 468 (Ahd.)(Trib.)

S.115WA : Fringe benefit – Charge – Expenditure incurred on brand equity payment

The assessee was engaged in the business of generation, purchase, transmission and distribution of electricity. It claimed that expenses on brand equity contribution were not liable for fringe benefit tax. The Assessing Officer treated the expenditure as being in the nature of sales promotion and publicity, and hence to be considered for the purpose of computing the value of fringe benefits at 20% of the expenditure. Held, fringe benefit tax could not be levied in respect of brand equity as it did not give rise to any benefit to the employees of the assessee either directly or indirectly. (AY.2008-09)

ACIT v. Tata Power Co. Ltd. (2013) 25 ITR 58 (Mum.)(Trib.)

S.115WB : Fringe benefit – Employee welfare – No statutory liability [S.17(2)]
Fringe benefit like uniform and washing allowance, etc. provided by assessee to its employees otherwise than for a statutory obligation, is liable to fringe benefit tax and same is not liable to income tax in hands of employee because same cannot be considered as perquisites as per provisions of section 17(2)(vi) and, therefore, there was no liability of deducting TDS on assessee-company.(AY. 2009-10)
Oil & Natural Gas Corpn. Ltd. v. ACIT (2013) 59 SOT 160 (URO) / 22 ITR 587 / 143 ITD 159 / (2014) 162 TTJ 119 (Ahd.)(Trib.)

S.115WB : Fringe benefit – Free/concessional tickets issued by airlines to employees for private journeys is a fringe benefit chargeable to tax [S.115WC(1)(a)]
The Tribunal directed the Assessing Officer to value the fringe benefit of free / concessional tickets as per the valuation of frequent flyer programme as provided by the assessee in its books of account and the same has been accepted by the Department, after reducing the costs of foreign travels & the cost recovered from the employees.
Jet Airways (India) Ltd. v. Dy. CIT (2013) 153 TTJ 624 / 25 ITR 36 / 59 SOT 167 (URO) / 85 DTR 55 (Mum.)(Trib.)

S.115WB : Fringe benefit – Subscription to Tata Brand Equity contribution
In the present case the assessee company was engaged in business of manufacturers of computer hardware, software, consultancy and IT enabled services. Assessing Officer held that payment made to 'T' company towards Tata Brand Equity contribution was liable for fringe benefit tax. As the said expenditure did not contain an element of personal benefit to employers nor there was employer and employee relationship between assessee and 'T' subscription payment deserved to be kept outside the purview of FBT. (AY.2007-08)
ACIT v. Tata Consultancy Services (2013) 20 ITR 239 / 56 SOT 71 (UO) (Mum.)(Trib.)

S.115WB : Fringe benefit – Expenses incurred on non-employees did not fall in ambit of the provision [S.115WA]
Expenses prescribed in S.115WB(2) are liable to be considered as fringe benefits only to extent same are incurred in consideration for employment. Entertainment expenditure had been incurred for guest of assessee, same was not liable to be subjected to provisions of s.115WB(2). Since auditors were not employees of assessee, any expenditure on their travelling did not fall in ambit of provisions of s. 115WB. Driver salaries could not be subject matter of provisions of s.115WB because salary paid to a driver is taxable in his hands under head 'salary income' and thus tax is paid or payable in respect of same. (AY.2006-07)
Desai Brothers Ltd. v. Add. CIT (2013) 57 SOT 106 (URO) (Pune)(Trib.)

S.119 : Instructions – CBDT – Carry forward and set off of speculation loss – Provisions of old and new Acts similar – Circular to be applied – Circular is binding on assessee [S.73]
Whether the provisions of old and new Acts (i.e. 1922 Act and 1961 Act) are similar, and a circular issued under the Old Act was not withdrawn, the circular is to be applied to the new Act as well. Circular no 23D of 1960 dated 12-9-1960, Section 24 of the 1922 Act. (AY. 2000-2001)
CIT v. Ashok Mittal (2013) 357 ITR 245 / 89 DTR 198 (Delhi)(HC)

S.119 : Instructions – CBDT – Audit report not issued in time – Delay condoned and directed the Commissioner allow the claim under section 80P [S.80P, 139]
The assessee for the assessment years 1999-2000 to 2000-01 filed the return of income on 23-11-2004 for claiming exemption under section 80P, along with condonation of delay, which was rejected by

Commissioner. On Writ allowing the petition the Court held that, where the assessee co-operative society could not file return within stipulated time due to interim stay on audit report, there was sufficient cause for delay, and denying condonation of delay on ground that assessee ought to have filed return within time on unaudited books was not sustainable. Court allowed the petition and directed the Commissioner to process the return and pass the order in accordance with law and effect the refund if the assessee is entitled. (AY.1999-2000, 2000-01)
Arecanut Processing & Sale Co-operative Society Ltd. v. CIT (2013) 216 Taxman 122 / 88 DTR 281 / 358 ITR 337 (Karn.)(HC)

S.119 : Instructions – CBDT – Deduction of tax at source – Condonation of delay – Hardship – Revised return filed beyond prescribed time limit was directed to be considered and grant deduction of expenses in respect of tax was deducted at source [Ss.40(a)(ia), 139(5), 264]
The assessee filed the return for the assessment year 2005-06 claiming deduction of freight charges. The Assessing Officer disallowed the claim on the ground that the assessee had not deducted the tax at source. On revision the Commissioner held that the credit for tax deducted at source might be allowed in the year in which the same was deposited in the Government treasury and corresponding expenses may be allowed as a deduction in that year. While proceedings were going on the assessee deposited tax deducted on 29-3-2008. The assessee field revised return for the assessment year 2008-09 claiming deduction of freight charges. As the return was time barred the assessee filed petition before the Commissioner under section 119 requesting that necessary orders may be passed admitting the claim of refund and admitted the revised return. Commissioner held that the assessee’s application was not maintainable. The Assessee filed the writ petition against the said rejection order The court held that in view of fact that assessee had already deposited amount of TDS during relevant year and, moreover, assessee being a small time transport operator, disallowance of huge amount of freight expenses would cause a genuine hardship, a case for condonation of delay in filing revised return belatedly was made out u/s 119(2)(b). Therefore, the impugned order was to be set aside and Commissioner was to be directed to admit assessee’s revised return for being processed in accordance with law. (AY.2008-09)
Jay Vijay Express Carriers v. CIT (2013) 215 Taxman 562 / 94 DTR 462 (Guj.)(HC)

S.119 : Instructions – CBDT – Binding nature – Circular contrary to the decision of High Courts or Supreme court is to be ignored by judicial functions
If an existing circular is in conflict with the law of the land laid down by the High Courts or the Supreme Court, the Revenue authorities while acting quasi-judicially, should ignore such circulars in discharge of their quasi-judicial functions. (AY.1998-99)
Bhartia Industries Ltd v. CIT (2011) 245 CTR 328 / 201 Taman 180 / 60 DTR 121 / (2013) 353 ITR 486 (Cal.)(HC)

S.119 : Instructions – CBDT – Circular passed by CBDT as per S.119 beyond its authority is not considered to be effective [S.194A(3)(v)]
As per the provision of Section 194A(3)(v) a co-operative society is not supposed to comply with the requirements of TDS as prescribed u/s. 194A at the time of paying interest to its members or to any other co-operative society. The said section makes no distinction between different classes of members. However, CBDT issued a circular date 11-9-2002 making certain distinction between different classes of members and narrowed down the scope of members in respect of whom the said exemption was available. On challenging the said validity of the said circular, the Hon’ble High Court held that CBDT had crossed its authority under the garb of section 119 of the Act. And hence, the said circular is not effective.
Gujarat Urban Co-operative Bank Federation. (2012) 209 Taxman 340 / 75 DTR 354 (Guj.)(HC)

S.119 : Instructions – CBDT – Binding nature – Bad debts – Bank – Provision for bad debt – Instruction is binding on revenue [Ss.36(1)(vii), 36(1)(viia)]

The Instruction No. 17/2008, dated 26-11-2008 issued under section 119 clarifies the position in respect of working out the deduction under section 36(1) (vii), it is well settled that such instructions issued by the Board in exercise of its statutory powers under section 119(2) may have the effect of relaxing the rigours of a statutory provision. Hence, there is no reason to entertain the appeal of the revenue. Therefore, the appeal of the revenue was dismissed. In favour of assessee. (AY.1998-99)

CIT v. UTI Bank Ltd. (2013) 212 Taxman 296 / 82 DTR 168 / 256 CTR 76 (Guj.)(HC)

S.124: Jurisdiction of Assessing Officer – Raising objection – First time in appeal –Matter set aside. [S.148]

Objection as to the jurisdiction of the AO cannot be taken for the first time in appeal before the Tribunal when the same was not taken before the AO. (AYs.1993-94 to 1997-98)

CIT v. All India Children Care and Educational Development Society (2013) 357 ITR 134 / 96 DTR 394 (2014) 264 CTR 532 (All.)(HC)

S.124 : Jurisdiction of Assessing Officer – Assessee participated in proceedings and filed return voluntarily at Delhi, assessment order passed at Agra was held to be valid [S.127]

The petitioner, a share broker, was incorporated in U.P. After shifting its corporate office to Delhi, the petitioner, as per CLB order of 24-1-2003, also shifted its registered office. It was alleged that up to AY 2000-01, filing of income tax returns and assessment thereof were made at Agra. For the year 2002-03, the return was filed at Delhi. Through the instant writ petition, the petitioner prayed for quashing of the assessment order dated 28-3-2005 passed at Agra for AY 2002-03 and for issuing of directions to the respondents to restrain to proceed with penalty proceedings. The petitioner submitted that the writ was maintainable in as much as entire proceedings of assessment by the AO at Agra were without jurisdiction. On the facts, the petitioner could not have changed the place of his assessment and proceeded to file the return unilaterally at Delhi. He participated in the assessment proceedings and acquiesced to the jurisdiction of the Assessing Authority, Agra but it was only when the assessment order was made on protective basis against the company and on substantive basis against its director, who was found to have indulged in large scale fictitious and bogus transactions, that the petitioner filed writ petitions. The Court held that, section 124 provides for jurisdiction of AO. Sub-section (1) and (5) of section 124, when read together provide that where two or more AOs have territorial jurisdiction in respect of same income, they exercise concurrent jurisdiction in the matter of issuing notice to the assessee and where notices have been issued by any one office, it is unnecessary for the other office to issue the same notice again. In respect of petitioner, a survey was conducted under section 133A on 24-4-2001 in which a large number of incriminating documents were found. After enquiries, the AO found that there were serious defects in the books of account. The director had created large number of fictitious concerns, which were not doing any business and therefore, the AO completed the assessment on protective basis. The director appeared and filed reply to the notice and clearly stated before the AO that his company was assessed to tax with Company Circle-1 (2) at Agra. The petitioner thus acquiesced to the jurisdiction, which the AO at Agra already possessed, and allowed him to complete the assessment proceedings for the assessment year 2001-02. In the circumstances, there was no error in exercise of jurisdiction by the ACIT, Circle-IV(1) Agra. The writ petition was accordingly, dismissed. (AY.2002-03)

Aayushi Stock Brokers (P.) Ltd. v. ACIT (2013) 213 Taxman 192 / 87 DTR 394 / 262 CTR 619 (All.)(HC)

S.127 : Power to transfer cases – Opportunity of hearing – Transfer of case without disposing the objection was held to be bad in law [S.124, 144, 147, 148]

Assessee was filing returns of income with Assessing Officer, Delhi and was consecutively assessed at Delhi for number of years, However, Assessing Officer, NOIDA issued on assessee notice under section 147/148 requiring him to furnish returns of income for assessment years 1996-97 to 2001-02 with him. Assessee filed objections to jurisdiction of Assessing Officer, NOIDA. Assessing Officer, NOIDA did not decide objections and got assessee's case transferred under section 127(2) from Assessing Officer, Delhi to him. Thereafter he finalised assessment under section 147 read with section 144. It was held that it was mandatory for Assessing Officer, NOIDA to decide objections before proceeding further. Therefore, order of transferring jurisdiction and reassessment proceedings were liable to be quashed. (AYs.1996-97 to 2001-02)
CIT v. Deepak Gupta (2013) 219 Taxman 1 (All.)(HC)

S.127 : Power to transfer cases – Search and seizure – For co-ordinated investigations was held to be valid
There was search and seizure in group cases at New Delhi and allegation of tax evasion at New Delhi. Though the head office of the company was at New Delhi, the registered office and business activities of group were mostly around New Delhi. It was not possible for the AO in regular charge to undertake detailed and coordinated investigations. The case was transferred to Delhi with the concurrence of Commissioner, New Delhi. The transfer order was within the scope of s. 127.
Continental Mikose (India) Ltd v. CIT (2013) 351 ITR 292 / 258 CTR 110 / 84 DTR 124 (Gauhati)(HC)

S.127 : Power to transfer cases – Reason for co-ordinate investigations and assessment – Substantial financial transactions of the assessee with the various entities of the group Companies – Not perverse or arbitrary – Writ petition not maintainable
For co-ordinated investigation, case of the assessee transferred from Mumbai to New Delhi as there were substantial transactions of the assessee with the related parties. Challenging the transfer of the assessee's case to New Delhi from Mumbai, the assessee filed a writ petition before the High Court under Article 226 of the Constitution of India. The High Court held that so long as reasons indicated in the order of transfer are neither arbitrary or unreasonable, the High Court under the writ jurisdiction should not set aside the order passed by the CIT u/s. 127 of the Act.
Sahara Hospitality & Anr. v. CIT & Ors. (2013) 94 DTR 36 / 262 CTR 548 / 219 Taxman 10 (Bom.)(HC)

S.127 : Power to transfer cases – Income-tax authorities – Effective and co-ordinated investigation
Where Commissioner, pursuant to search proceedings carried out at different places in case of assessees belonging to same group, transferred their pending assessments to one particular place for centralisation of cases and for effective and co-ordinated investigation after giving a sufficient opportunity of being heard to assessees, said order of Commissioner was justified and it did not require any interference.
Shree Ram Vessel Scrap (P.) Ltd. v. CIT (2013) 355 ITR 255 / 91 DTR 235 / 215 Taxman 203 / (2014) 266 CTR 274 (Guj.)(HC)

S.127 : Power to transfer cases – Reasons for transfer – Specific reasons – General reasons
Reasons for transfer of case cannot be vague and too general in nature but must be specific and based on material facts and same should be communicated to affected party. Where case of assessee was transferred from one jurisdiction to another for a co-ordinated investigation but no specific reasons were mentioned in show cause notice except a stock phraseology namely 'co-ordinated investigation' which was bald and vague in its tenor, order of transfer was liable to be quashed in absence of communication of special reasons for transfer to assessee.
Ram Gopal Agrawal v. UOI (2013) 216 Taxman 154 (Mag.) (Chhattisgarh)(HC)

S.127 : Power to transfer cases – Co-ordinated investigation – Transfer case was held to be valid. [Art. 226,227, Constitution of India]
Power of transfer under section 127(2) is not a judicial power and writ appeal is maintainable against order of Single Judge quashing order passed under section 127. The word 'co-ordinated investigation' is not vague; it has a definite meaning and transfer order cannot be set aside merely on ground that transfer has been done on vague terms.(W.P No 27 to 40 of 2013 dated 14-3-2013]
CIT v. UOI (Maa Mahamaya Group and others) (2013) 216 Taxman 135 / 358 ITR 341(2014) 266 CTR 253/100 DTR 238 (Chhattisgarh)(HC)

S.127 : Power to transfer cases – Reasons for transfer – Opportunity to be heard [S.153A]
Reasons for transfer of case must be communicated to the assessee and adequate opportunity must be given to the assessee to raise objections. Transfer of case for co-ordinated investigation and administrative convenience valid. (AY. 2008-09)
J. R. Tantia Charitable Trust v. DCIT (2011) 245 CTR 162 / 203 Taxman 348 / 62 DTR 313 / (2013) 355 ITR 226 (Raj.)(HC)

S.127 : Power to transfer cases – Natural justice – Objection to transfer of cases – The notice was not appended with any relevant material particulars [S.132]
The Petitioner's name appeared in case of search & seizure operations, carried out at Hyderabad. The ITO issued notice u/s.127 calling upon petitioner to submit objection for transfer of its case from Bangalore to Hyderabad. The notice was not appended with any relevant material particulars. Held the principles of natural justice require the revenue to make available all relevant material particulars, while calling upon assessee to submit objection for transfer of its case to another State and since the petitioner, in absence of relevant material particulars, was handicapped to submit objection for transfer of its case, order transferring case of petitioner was to be quashed and assessment order passed by authority at Hyderabad was to be declared a nullity.
Span Design & Development (P.) Ltd. v. CIT (2013) 215 Taxman 559 (Karn.)(HC)

S.127 : Power to transfer cases – Grounds for transfer – Once the nexus is established transfer cannot be interfere with
Where the impugned order clearly showed assessee had made investment by way of share capital and unsecured loans with group of companies whose cases were being investigated at Delhi, the order of transfer of case cannot be interfere with as the transfer order for centralisation of assessment was made with object of co-ordinated and effective investigation.
Arrow Alloys Pvt. Ltd. v. UOI (2013) 351 ITR 260 / 258 CTR 106 / 84 DTR 121 / 215 Taxman 141 (Mag.)(Gauhati)(HC)

S.127 : Power to transfer cases – Co-ordinated investigation – Recording of reasons is mandatory – Merely mentioning that it is necessary to transfer the case for co-ordinated investigation is not sufficient.
Held, there cannot be any dispute that the case can be transferred for the purpose of coordinating investigation but why the Commissioner feels that it is necessary to transfer the case for co-ordinated investigation has to be at least briefly stated in the said order. In the instant case, the Commissioner apart from stating that case has been transferred for co-ordinating investigation has not given any other reason. Impugned order is therefore quashed and set aside.
Global Energy (P) Ltd. v. CIT (2013) 215 Taxman 224 / 89 DTR 194 / 356 ITR 502 (Bom.)(HC)

S.127 : Power to transfer cases – Failure to inform assessee of reasons for transfer – Opportunity of hearing is mandatory

The court held that under section 127(2), the requirement of giving an assessee a reasonable opportunity of being heard wherever it is possible to do so, is mandatory; transfer of assessees' cases from Mumbai to Delhi without affording an opportunity of hearing was liable to be set aside.(AY. 2003-04 to 2011-12)
Sahara Hospitality & Anr. v. CIT (2013) 352 ITR 38 / 258 CTR 275 / 85 DTR 331 (Bom.)(HC)

S.127 : Power to transfer cases – Related transaction – Order of transfer was held to be valid
Commissioner while transferring matter recorded reasons that transfer was done for co-ordinated investigation and the assessment as petitioner had substantial financial transactions with various related parties .ie entities belonging to Sahara Group of comaonies. The court held that transfer was held to be valid. (AY. 2010-11)(W.P. No. 408 of 2013 dated 26-9-2013)
Sahara Hospitality Ltd v. CIT (2013) 262 CTR 548 / 219 Taxman 10 (Bom.)(HC)

S.127 : Power to transfer cases – Failure to inform assessee of reasons for transfer –Objections of assessee to be considered
Unless a party is informed of the reasons for the proposed action, it would be impossible for the notice to put forth its point of view with regard to the reasons for the proposed action. The views of the notice are to be considered by the authority before taking any decision to confirm or drop the notice. A show-cause notice to be effective must be adequate so to enable a party to effectively object/respond to the notice and the authority concerned is obliged to consider the objections, if any. Merely because the assessee had not specifically asked for a personal hearing it would not absolve the Revenue of its obligation to ordinarily grant such a hearing.
Shikshana Prasaraka Mandali v. CIT (2013) 352 ITR 53 / 258 CTR 289 / 85 DTR 345 / 215 Taxman 191 (Bom.)(HC)

S.127 : Power to transfer cases – Opportunity to be heard – Personal hearing necessary
Though the reasons for transferring the case of the assessee from Mumbai to New Delhi were furnished to the assessee and the basis on which the transfer was sought to be effected was indicated, no personal hearing was afforded. The requirement of a personal hearing in the assessee's case was of some significance because the assessee had submitted objections both on the need to transfer the case to New Delhi and on the hardships that would be caused if such a transfer were to be effected. The furnishing of a personal hearing was necessary.
However, because of the delay on the part of the assessee in moving the court in relation to the transfer pertaining to proceedings for the assessment year 2010-11 which would become time barred on March 31, 2013, the Commissioner, Mumbai, was to furnish an opportunity of being heard to the assessee and for that purpose treat the order dated January 5, 2012, as a notice calling upon the assessee to show cause why the case should not be transferred.
Aamby Valley Ltd. v. CIT (2013) 352 ITR 48 / 258 CTR 284 / 85 DTR 341 / 217 Taxman 126 (Mag.)(Bom.)(HC)

S.129 : Change of incumbent of an office – Scope of provision – Successor officer/ predecessor officer [S.147, 148]
Where the objections to notice were filed before the predecessor officer, but order rejecting those objections was passed by successor officer, order was valid.
Ester Industries Ltd. v. UOI (2013) 215 Taxman 673 / 260 CTR 225 (Delhi)(HC)

S.132 : Search and seizure – Money laundering information – Satisfaction note – Privilege for un published material in public interest – Search and seizure action is valid. [S.123, 124 of the Evidence Act, 1872]

Since Financial Intelligence Unit (FIU) was responsible for collecting information related to suspected financial transaction against money laundering, terrorist financing and related crimes, sources and methods of organization collecting and processing such sensitive information could not be subjected to public scrutiny to jeopardize interest of organization and national interest. Preparation of satisfaction note on such information could be treated as unpublished document for which privilege from disclosing source of information could be validly claimed, and assessee was held not entitled to examine the same to challenge the validity of search carried out against it. Search and seizure action was held to be valid.
M.D. Overseas Ltd. v. DGIT (2013) 219 Taxman 255 / (2014) 360 ITR 72 / 266 CTR 166 / 100 DTR 56 (All.)(HC)

S.132 : Search and seizure –Warrant – Panchnama – Copy of search warrant should be given to the searched person. Defects in the panchnama do not invalidate the search or the s.153A assessment proceedings [S.153A]
A search u/s. 132 was conducted on the premises of the assessee and its group concerns. Though a panchnama was prepared, the assessee's name did not appear therein. An assessment order u/s. 153A was passed to assess the alleged undisclosed income. The assessee claimed that as s. 153B imposed a limitation for passing of a s. 153A order by reference to the last panchnama drawn in relation to the searched person, the absence of the assessee's name in the panchnama meant that the s. 153A assessment order could not be passed. A Writ Petition was filed to challenge the assessment. HELD by the High Court dismissing the Petition:
S.153A(1) does not make any reference to panchnama or the date of panchnama. A panchnama is not a pre-condition for invoking s. 153A. As regards the argument that the time limit u/s. 153B is calculated with reference to the date of the last panchnama, a panchnama was drawn up on the occasion of the search and it referred to documents belonging to the assessee though it did not refer to the assessee by name. The panchnama also does not refer to the conclusion of the search. The non-reference to the name of the assessee and the suspension/ conclusion of the search is a lapse and failure to comply with the requirements of the search and seizure manual. However, this does not affect the validity of the search or the assessment order u/s 153A. The department should take remedial steps and ensure that such lapses do not occur in future. Also, the department should give a copy of the search warrant to the person searched so as to curtail allegations of interpolation, addition of names etc. (writ Petition No. 823/2013, dt. 20th Dec. 2013)
MDLR Resorts Pvt. Ltd. v. CIT (2014) 361 ITR 407 / 265 CTR 356 / 97 DTR 257 (Delhi)(HC)

S.132 : Search and seizure – Order passed for retaining entire amount seized, without giving opportunity of hearing to assessee – not sustainable [Section 132(5) r.w. Rule 112A(1)]
While deciding the Writ Petitions filed by the assessee, the High Court observed that though these Writ Petitions were filed in the year 1989, no written statement/reply has been filed till date. Since allegations are not controverted, one has to proceed on the premise that before passing the impugned orders, opportunity of hearing was not given even when that is mandatorily required under Rule 112A of the Income Tax Rules as also Section 132(5) of the Act. Accordingly, the writ petitions were allowed and the impugned orders passed retaining the amounts seized were quashed. (AY.1989-90).
Chiranjilal Motilal v. ITO (2013) 34 taxmann.com 73 (P&H)(HC)

S.132 : Search and seizure – Trespassing of assessee's property may be prosecuted before a competent Criminal Court, however Warrant issued was held to be valid [S.131]
The Act does not invest in the Deputy Director, the power to have a camp office at the residence of the assessee and call the assessee's attendance in connection with proceedings under the Act. The allegation that the Deputy Director trespassed into the house of the assessee and, thereafter, issued the notice to him was not controverted. Therefore, the Deputy Director without authority of law, having trespassed

into the house of the assessee deserved to be prosecuted before a competent criminal court, if so advised.
However, the warrant preceded the search. That the assessee had time up to March 15, 2012, to pay the advance tax and, thereafter, time to file his return for the previous year 2011-12 (assessment year 2012-13), but that by itself did not mean that the authorities did not have the jurisdiction to issue a warrant and effect search and seizure under section 132.
Prakash v. Sanghvi v. Ramesh G., Major, DDIT (Inv.) (2013) 356 ITR 426 / 219 Taxman 131 (Mag.)(Karn.)(HC)

S.132 : Search and seizure – Validity of proceedings
The assessee was carrying gold ornaments worth ` 6.42 crores on a flight from Ahmedabad to Chennai to show them to retail owners hoping to procure bulk orders for the same. On basis of information received from the security officials at the airport, revenue authorities conducted inquiries with assessee and also with the Karta of HUF who according to assessee was the owner of gold which was leased to them under certain conditions. Subsequently, on basis of a satisfaction note, search and seizure operations were carried out against the HUF. On Special Civil Application filed by the HUF, the High Court quashed search and seizure operations.
The High Court, allowing the Special Civil Applications filed by the assessee, held that since search proceedings in case of HUF were already quashed, said proceedings on very similar grounds and hence would not be sustainable.
Dipen Laljibhai Mandalia v. DGIT (2013) 217 Taxman 66 (Guj.)(HC)

S.132 : Search and seizure – Cash seized from third person adjusted towards his tax liability – No material to show that cash seized from him belongs to assessee
The money seized was already adjusted towards the tax liability of B and there was no material on record to show that the money seized in the hands of B belonged to the assessee. Further, there was no finding by the Commissioner (Appeals) that the money seized in the hands of B belonged to the assessee and under such circumstances the direction issued by the Commissioner (Appeals) to give credit to the assessee to the extent of Rs. 10 lakhs which was seized from B was not sustainable in law. (AY.1992-93)
CIT v. B. Sumangaladevi (Smt.) (2013) 352 ITR 143 / 90 DTR 198 / 262 CTR 433 / 212 Taxman 362 (Karn.)(HC)

S.132 : Search and seizure – Retention of seized articles – Payment of entire demand, retention of seized articles held to be not valid
Since there is no outstanding demand of tax and penalty against the petitioner due to be recovered from the assessee, there is no justification for detention of seized assets. Pendency of appeal before the ITAT on the issue of penalty which is already deposited by the assessee, can only result in further relief to petitioner to the extent, which may be allowed by the ITAT if the appeal is allowed. Hence, detention of assets was not justified. Assessee cannot be asked to give bank guarantee to extent of seized articles. Circular no F.No. 286/6/2008-IT(In.v.II) dated 21-January, 2009 was referred.(BP 2001-02 to 2006-07)
Bhawna Lodha (Smt.) v. DGIT (2013) 354 ITR 134 / 214 Taxman 273 / 257 CTR 176 (Raj.)(HC)

S.132 : Search and seizure – Authorisation for search – Information in possession of competent authority – Search and seizure is held to be illegal gold seized was directed to be deleted
Assessee-company was engaged in business of wholesale trading in bullion. Director of assessee, along with other were found carrying about 23 kilos of gold ornaments by air from Ahmedabad to Chennai. Department seized said gold ornaments under section 132. Director of assessee at spot gave statement that 25 kilos of gold was received by assessee from MG-HUF on lease and gold ornaments in question were made out of said gold. Said statements given by director of assessee at

airport matched with that of MG-HUF and goldsmith supported by relevant books of account. On facts, competent authority could not have formed a reasonable belief that such gold jewellery had not been or would not be disclosed for purpose of Income-tax. Therefore, search and seizure operation was to be declared illegal and seizure of gold ornament was also to be quashed.
LKS Bullion Import & Export (P.) Ltd. v. DGIT (2013) 214 Taxman 68 / 88 DTR 95 / (2014) 265 CTR 191 (Guj.)(HC)

S.132 : Search and seizure – Validity of search – Warrant of authorisation – Satisfaction – Authority entertaining belief that assessee secreted certain documents relevant for purpose of investigation of matter relating to evasion of tax – Assessee cannot stall proceedings on ground of lack of jurisdiction to issue warrant – Assessee to raise all grounds available in his defense during enquiry and subsequent proceedings. [Constitution of India, Article 226]
The assessee challenged the action under section 132 of the Act by way of writ before the High Court. The Court dismissed the petition by observing that there were materials available before the authority concerned, for the formation of his belief to issue such a warrant. Further, the authority had also reason to believe that such documents and things would not be produced by the persons concerned, in the normal course, to enable the Department to conduct necessary inquiries in the matter. Therefore, it was premature on the part of the assessees to stall further proceedings relating to the allegations of evasion of payment of tax by the assessees, by raising the issues relating to the jurisdiction of the Department to issue the search warrants. Of course, it would be open to the assessees to defend themselves by showing, at the appropriate stage of the proceedings, that they were not liable to pay the tax, as assessed by the authorities of the Department. The belief of the authorities that the assessees had secreted certain documents relevant for the purpose of investigation of the matter relating to the evasion of tax by the assessees, was based on materials available before the authorities. When serious allegations of tax evasion by the assessees, to the tune of several lakhs of rupees, have been made, it would not be appropriate for the court to scuttle the process by placing undue emphasis on the hyper technical pleas put forth on behalf of the assessees, with regard to the procedural formalities in the issuance of the search warrants. (Block period 1-4-1996 to 12-9-2002)
P.G. Viswanathan (Dr.) v. DIT (In.v.) (2013) 351 ITR 217 / 214 Taxman 105 / 88 DTR 33 (Mad.)(HC)
V. Muthulakshmi v. DIT (In.v.) (2013) 351 ITR 217 / 214 Taxman 105 / 88 DTR 33 (Mad.)(HC)
K. Viaswanthan alias Kumar v. DIT (In.v.) (2013) 351 ITR 217 /214 Taxman 105 / 88 DTR 33 (Mad.)(HC)
Aruna Viswanthan (Dr.) v. DIT (In.v.) (2013) 351 ITR 217 / 88 DTR 33 / 214 Taxman 105 (Mad.)(HC)
Anjana Viswanthan (Dr.) v. DIT (In.v.) (2013) 351 ITR 217 / 214 Taxman 105 / 88 DTR 33 (Mad.)(HC)
Vikram Viswanathn (Dr.) v. DIT (In.v.) (2013) 351 ITR 217 / 214 Taxman 105 / 88 DTR 33 (Mad.)(HC)

S.132 : Search and seizure – Warrant of authorisation – Reason to believe – Existence of tangible material a pre-requisite – Mere reason to suspect not sufficient, articles seized to be released to assessee
The assessee challenged the search action. Allowing the petition the Court held that the so-called information was undisclosed and what exactly that information was, was also not known. At one place in the affidavit of the Deputy Director of Income-tax, it had been mentioned that he got information that there was a “likelihood” of the documents belonging to the DS group being found at the residence of the assessee. That by itself would amount only to a surmise and conjecture and not to solid information and since the search on the premises of the assessee was founded on this so-called information, the search would have to be held to be arbitrary. When the search was conducted on January 21, 2011, no documents belonging to the DS group were, in fact, found at the premises of the

assessee. The warrant of authorisation was not in the name of the DS group but was in the name of the assessee. In other words, the warrant of authorization under section 132(1) had been issued in the name of the assessee and, therefore, the information and the reason to believe were to be formed in connection with the assessee and not the DS group. None of clauses (a), (b) or (c) mentioned in section 132(1) stood satisfied in the assessee's case and, therefore, the warrant of authorisation was without any authority of law. Had the warrant of authorisation been issued in the name of the DS group and in the course of the searches conducted by the authorized officer, the premises of the assessee had also been searched, the position might have been different. But that had not happened in the case of the assessee. The warrant of authorisation was in the name of the assessee and, therefore, it was absolutely necessary that the pre-conditions set out in section 132(1) ought to have been fulfilled. Since those pre-conditions had not been satisfied, the warrant of authorisation would have to be quashed. Once that was the position, the consequence would be that all proceedings pursuant to the search conducted at the premises of the assessee would be illegal and therefore, the prohibitory orders would also be liable to be quashed. The jewellery/other articles/documents were to be unconditionally released to the assessee.
Madhu Gupta v. DIT (Inv (2013) 350 ITR 598 / 256 CTR 21 / 82 DTR 116 / 214 Taxman 246 (Delhi)(HC)

S.132 : Search and seizure – No reason to issue authorization to conduct the search did not exist–Search was invalid [S.153A]
In this case, search was conducted only on the basis of information received from SP, CBI that the assessee was carrying undisclosed cash. There was no complete information in the possession of SP, CBI that the any bullion, jewellery, cash or any incriminating document was in possession of the assesse. Accordingly department acted on the said information provided by the Police & concluded the search on the same day. Thereafter notice u/s 153A of the Act was issued by the AO. Before CIT (A), the assessee challenged the validity of search since the reasons for authorization was based on the information from other agencies & therefore operation u/s.132 was invalid. CIT (A) upheld the order passed by AO. On further appeal in Tribunal, the Tribunal allowed the appeal of the assessee & held that if condition of existence of reason to believe in the consequence of information in the possession of the officer is not satisfied, there can possibly be no authorization & if any search is conducted in pursuance of any authorisation issued in absence of the eventualities mentioned in Cls. (a) to (c) of sub-sect(1)of 13 cannot be said to be a valid search . Nothing was brought on record by department to substantiate that cash or incriminating document or ay valuable article or thing was found in the possession of assessee. Therefore Assessment order was invalid based on said search. (A.Ys. 2001-02 to 2003-04, 2005-06 & 2007-08)
Parma Ram Bhakar v. DCIT (2013) 94 DTR 342 / 157 TTJ 866 (Jd.)(Trib.)

S.132(4) : Search and seizure – Statement on oath – Evidentiary value – Addition was held to be justified [S.68,131]
A search was conducted in the residential premises of the assessee, which revealed deposits of ` 8 lakhs in cash, in three bank accounts. The assessee was examined on oath under section 131 where he offered ` 3 lakhs as consultation charges received. Later, he explained that the amount of ` 3 lakhs was not his income and belonged to his daughter employed in a bank. The amount was treated as his income and this was confirmed by the CIT(A) and the Tribunal. Held, the assessee, at the time of search, had given a statement and he had no case that he had retracted from the statement on the basis that the statement was procured by unlawful means. Furthermore, circumstances also indicated that the findings of the Tribunal affirming the orders of the authorities were probable in this regard. Hence, the appeal was dismissed.
P. Kunhiraman Nair v. CIT (2013) 354 ITR 141 / 219 Taxman 128 (Mag.)(Ker.)(HC)

S.132(4) : Search and seizure – Statement on oath – Block assessment – Seizure of cash – Retraction of statement after four years was held to be after thought [S. 132, 158B]
The Authorized Officer conducted search under S. 132 upon assessee and seized certain cash from his possession. At time of search, the assessee surrendered said cash amount as his undisclosed income but after four years, he retracted confessional statement and submitted that aforesaid amount was cash-in-hand as reflected from books of account. The Assessing Officer disbelieved the retraction made by assessee and treated amount in question as undisclosed income of assessee. Held, the retraction made after four years was an afterthought and therefore, the action of the Assessing Officer in treating cash amount as undisclosed income was justified. (Block period 1-4-1988 to 14-5-1998)
Ravindra Kumar Verma v. CIT (2013) 214 Taxman 117 (Mag.)(All.)(HC)

S.132(4) : Search and seizure – Statement on oath – Addition – Loose papers – On the basis of admission of third person and jointly signed by assessee addition was held to be justified [S.143(3)]
Search was conducted at the premises of H under section 132. Simultaneously, search was also carried out in the case of B. On the very same date, B passed away. He was survived by his legal heir, the assessee. An addition was made by the Assessing Officer to the tune of ` 30,16,000 in the income of the assessee, based on a loose paper. This was done on the ground that H and the late father of the assessee had jointly signed the document. The statement of H under section 132(4) revealed that he had received this amount from the assessee and he owed this amount to the assessee. Held, the loose paper had clearly indicated the amount given by B by way of loan. Based on facts, there was no perversity in the conclusion of the Tribunal. The amount had to be added to the income of the assessee.
Bhanuvijaysingh M. Vaghela (Decd.) v. ITO (2012) 246 CTR 274 / 65 DTR 201 / (2013) 353 ITR 146 (Guj.)(HC)

S.132(4) : Search and seizure – Statement on oath – Retraction in the return –Statement on oath is a piece of evidence and when there is incriminating admission against himself, then it is required to be examined with due care and caution – Addition made only the basis of statement was deleted
During course of search conducted under section 132 upon assessee-firm, a partner made a statement under section 132(4) and surrendered a sum of Rs. 20 lakhs for assessment year 1988-89 as income. In return filed after search assessee-firm did not declare income of Rs. 20 lakhs on plea that declaration made by partner was misconceived and divorced from real facts and that firm or individual had no undisclosed income. Lower authorities did not accept assessee's said retraction on ground that statement given by partner appeared to be voluntarily given statement disclosing undisclosed income of Rs. 20 lakhs and added said amount to its income as undisclosed income. No specific reason had been given for rejection of assessee's contention by which it had retracted for admission of partner. During course of search there was no recovery of assets or cash by department, having regard to facts and circumstances of case a wrong inference had been drawn by authorities below in holding that there was undisclosed income to tune of Rs. 20 lakhs of assessee. Addition was deleted. (AY. 1998-99)
Shree Ganesh Trading Co. v. CIT (2013) 214 Taxman 262 / 257 CTR 159 / 84 DTR 94 (Jharkhand)(HC)

S.132(4) : Search and seizure – Income from undisclosed sources – Statement on oath – Retraction – No evidence to establish that admission was incorrect in any way, hence addition made on basis of statement was held to be justified [S.69]
During the course of search the assessee surrendered a sum of Rs. 1 crore in respect of the financial year 2005-06 for buying peace of mind and to avoid litigation. He also requested the Income-tax Department not to initiate any penalty proceedings against him. After ten days, during the further

search conducted by the Income-tax Department, the assessee made another statement on November 21, 2005, wherein he surrendered an additional sum of Rs.75 lakhs on behalf of himself and all family members, family firms and the companies. The request for no penal measures was reiterated. In the statement, however, he indicated that after receiving all the seized documents from the Income-tax Department he would provide the break up of the voluntary disclosure of Rs. 1.75 crores in various hands. He also promised to pay the due tax as soon as possible. The sum of Rs. 1.75 crores which was surrendered by the assessee was bifurcated by him into sums of Rs.1.5 crores and Rs. 25 lakhs. The former sum was, according to him, to be treated as undisclosed business income in his hands whereas the latter sum of Rs. 25 lakhs was to be considered in the hands of different family members or business concerns of the assessee's group. The Tribunal reversed the decision of the Commissioner (Appeals) and sustained the decision of the Assessing Officer in making an addition of Rs. 1.75 crores on the basis of the statements made by the assessee under section 132(4). On appeal by the assessee the Court dismissing the appeal, held that it was incumbent upon him to show that he had made a mistake in making that admission and that the admission was incorrect. He had access to all the documents which had been seized inasmuch as copies had been supplied to him. However, he did not produce anything to establish that the admission was incorrect in any way. Thus, the assessee could not reconcile from his statements made on November 10,11, 2005, and November 21, 2005. The statements recorded under section 132(4) were clearly relevant and admissible and they could be used as evidence. In fact, once there was a clear admission, voluntarily made, on the part of the assessee, that would constitute a good piece of evidence for the Revenue. Appeal of assessee was dismissed.(AY.2006-07)
Bhagirath Aggarwal v. CIT (2013) 351 ITR 143 / 215 Taxman 229 / 89 DTR 362 (Delhi)(HC)
Editorial: S.L.P of assessee was dismissed (2013) 359 ITR 2(St.)(S.L.P.(C)No. 16170 of 2013 dt 7-5-2013)

S.132(4) : Search and seizure – Statement on oath – Retraction
Since retraction was filed after more than two years of admission by assessee in statement u/s 132(4), the same was not accepted by Tribunal in quantum proceedings. Penalty was held to be justified on these grounds.
Vasant Thakoor v. ACIT (2013) 27 ITR 254 (Mum.)(Trib.)

S.132(4) : Search and seizure – Statement on oath – Retraction of statement – Disclosure in statement was found to be correct and complete, retraction of statement was not accepted [S.158BB]
In the course of search voluminous records were seized which indicated unaccounted transactions. Director of assessee-company was examined on oath and he conceded that assessee obtained bogus bills. Subsequently, assessee filed affidavit claiming bills to be genuine and contended that disclosure during search was made without reference to records. In appeal retraction of disclosure was accepted by CIT(A). On appeal by revenue since disclosure in statement was found to be correct and complete in all respects and also explained purpose for which bogus bills were raised, retraction of disclosure could not be accepted. Additions made on the basis of disclosure was confirmed. (AY.2008-09)
Urmila & Co. Ltd. v. Dy. CIT (2013) 60 SOT 1 (URO)(Mum.)(Trib.)

S.132(4) : Search and seizure – Statement on oath – Addition merely on the basis of statement without having any cogent and corroborative evidence – Unjustified [S.158BB]
The Tribunal has held that the admission under section 132(4) was made under the mistaken belief of law instead of the correct legal position. The revenue cannot make the addition merely on the basis of statement without any evidence found in the course of the search action or post search enquiries to the effect that the assessee has undisclosed income. (Block period 1996-97 to 2002-03)
Jyotichand Bhaichand Saraf & Sons (P) Ltd. v. Dy. CIT (2013) 86 DTR 289 / 154 TTJ 226 (Pune)(Trib.)

S.132(4) : Search and seizure – Statement on oath – Addition made merely on the basis of statement was held to be not justified

Addition made merely on the basis of statement of assessee recorded u/s. 132(4) without establishing factum that assessee was in fact found in possession or control of any books of account, other documents, money, bullion, jewellery or other valuable article or thing etc. could not be sustained. (AY. 2002-03 to 2007-08)

Naresh Kumar Verma v. ACIT (2013) 57 SOT 99 (URO)(Chd.)(Trib.)

S.132(4) : Search and seizure – Statement on oath – Retractions – No addition can be made merely on the basis of statement (Ss.132, 143 (3)

The Tribunal held that in the absence of any discrepancy in inventory, no addition could be made. As the figures of discrepancy were not available with the Department and the director of the assessee-company had retracted the surrender made by him on account of stock difference, no addition could be made on the basis of a statement recorded under section 132(4) of the Act. If the Assessing Officer wanted to add the amount of Rs.11 crores on account of stock inventory, he should have brought material on record. (AY. 2005-06 to 2007-08)

Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi)(Trib.)

S.132(8) : Search and seizure – Retention of seized documents beyond 30 days – Non-communication of CIT's approval to assessee

Books of account, seized under s.132(1), were retained by the officer for a period exceeding 30 days from the date of order of assessment passed u/s. 153A without communicating to the assessee reasons recorded for the same and approval obtained from the CCIT, Director General, or Director, as the case may be, for such retention. Held that the requirements of s. 132(8) were not satisfied and therefore, the retention of documents beyond 30 days after completion of assessment was illegal. (AY. 2002-03 to 2007-08)

Joshi P. Mathew v. Dy. CIT (2013) 83 DTR 5 / 214 Taxman 267 (Ker.)(HC)

S.132A : Powers – Requisition of books of account – Cash seized by police authorities, reasonable explanation regarding cash, no evidence that amount would not be disclosed to income-tax authorities, Order of requisition held to be not valid

The assessee, a cotton broker, carried with him cash of Rs.11 lakhs collected from A in respect of the sale of cotton through him. The cash was seized by the police authorities. The assessee furnished an explanation but the police authorities did not accept the explanation and seized the cash. An order was passed under section 132A and the amount was requisitioned by the income-tax authorities. The income-tax officials recorded the statement of the assessee wherein he stated that the amount had been arranged by RS through a shroff of Kalupur against purchase of cotton. The income-tax officials surveyed the business premises of RS and examined his books of account. RS corroborated the statement of the assessee. RS's accounts showed issuance of five cheques in favour of STC. The accounts of the shroff showed that the five cheques issued by RS had been deposited with them for discounting against which Rs.11 lakhs in cash had been handed over to the assessee. The assessee requested for release of the cash but this was refused. On a writ petition :Held, allowing the petition, that in view of the factual background, no reasonable person could have come to the conclusion that the amount of Rs.11 lakhs belonged to the assessee or that he would not disclose the amount to the income-tax authorities under the provisions of the Act. In the circumstances, on the basis of the material before him, the Director of Income-tax could not have formed the requisite opinion as required under section 132A of the Act. The warrant of authorisation issued by him, therefore, was vitiated as having been issued without the condition precedent for exercise of powers under section

132A being satisfied. The warrant of authorisation as well as the order under section 132A was liable to be quashed. The assessee was entitled to the seized amount along with interest.
Prakash Jaichand Shah v. DIT (Investigations) (2013) 350 ITR 336 / 255 CTR 403 / 81 DTR 396 (Guj.)(HC)

S.132A : Powers – Requisition of books of account – Cash seized – Offences and prosecution – Release of cash seized with surety was held to be valid – No prejudice was caused to the revenue [S.132B, CrPC, 41(2), 102]
When the accused was travelling on his motorcycle with a sum of ` 8,07,050 in cash, the Sub-Inspector of Police intercepted him and registered a case against him for offences under section 41(2) read with section 102 of the Code of Criminal Procedure, 1973. He seized the cash and produced the cash before the court. The court ordered release of the case on stringent conditions of surety, bond, security, affidavit by the accused. On a revision petition by the ADIT (Investigation), held dismissing the revision, that there was no lapse in the conclusions arrived at regarding the return of money in part to the accused on a stringent condition. The seized amount should not be kept idle as "dead investment". The amount seized from the accused could be utilised until the veracity of the case had been determined. Hence, the interim order was maintainable. The order of release of the cash on stringent conditions could not be said to be prejudicial to the interest of the Income-tax Department.
ADIT (Investigation) v. A. Khader Mohideen (2013) 358 ITR 163 (Mad.)(HC)

S.132B : Application of seized or requisitioned assets – Search and seizure – Seizure of cash – Interest – Assessee is entitled to interest on cash appropriated during search even if refund is directed in appeal proceedings [S.132(5), 240, 244A]
Pursuant to a search conducted u/s 132, cash of Rs. 2.35 lakhs was recovered. The AO passed an order u/s 132(5) in which he calculated the tax liability and appropriated the seized cash. An assessment order was also passed to the same effect. The AO's order was finally set-aside by the Tribunal and it became final. Consequently, the assessee was refunded the amount of Rs. 2.35 lakhs with interest from 4-3-1994 (date of last of the regular assessments by the AO) until the date of refund. The assessee claimed that he is entitled to interest u/s 132B(4)(b) of the Act for the period from the expiry of period of six months from the date of order u/s 132(5) to the date of regular assessment order. In other words, as the order u/s 132(5) was passed on 31-5-1990, six months expired on 30-11-1990 and the last of the regular assessments was done on 4-3-1994, the assessee claimed interest u/s 132B(4)(b) from 1-12-1990 to 4-3-1994. HELD by the Supreme Court:
The department's argument that the refund of excess amount is governed by s. 240 and that s. 132B(4)(b) has no application is not acceptable. S. 132B(4)(b) deals with pre-assessment period and there is no conflict between this provision and s. 240 or for that matter s. 244(A). The former deals with pre-assessment period in the matters of search and seizure and the later deals with post assessment period as per the order in appeal. The department's view is not right on the plain reading of s. 132B(4)(b) and the assessee is entitled to simple interest at the rate of 15% per annum u/s 132B(4)(b) from 1-12-1990 to 4.3.1994. The interest shall be paid within two months from today.
Chironjilal Sharma (HUF) v. UOI (2013) 263 CTR 625 / 96 DTR 305 / (2014) 360 ITR 237 / 222 Taxman 352 (SC)

S.132B : Application of seized or requisitioned assets – Interest – Value of assets not in excess of liability of assessee – Settlement of case under Kar Vivad Samadhan Scheme – Liability under settlement less than value of seized assets – Interest is payable to the assessee [S.132, 240, 244A]
A search and seizure operation was carried out in the business premises of the assessee under section 132. Cash and jewellery were seized. The value of the seized assets was only Rs. 6,15,808 as against the tax and penalty liabilities of Rs.31,71,462. The seized assets were retained. Thereafter, regular assessment in respect of the assessment year 1986-87 was completed and the assessment order was

framed on March 30, 1989, whereby a demand of Rs. 5,92,980 including interest was raised. The cash amount which was available with the Department was Rs. 5,35,000. The assessee sought adjustment of the seized cash against the demand raised in terms of the assessment order but this was not done. The assessee being filed an appeal against the assessment order dated March 30, 1989. During the pendency of the appeal, the Kar Vivad Samadhan Scheme, 1998, was introduced by virtue of the Finance (No. 2) Act, 1998. Taking advantage of the Scheme, the assessee paid an amount of Rs.3,29,670, in February, 1999, and obtained a certificate under the Scheme. In other words, by payment of the sum of Rs. 3,29,670 the entire dispute with regard to the assessment year 1986-87 stood closed and no amounts were due from the assessee from that day on. This meant that the sum of Rs. 5,35,000 became returnable to the assessee on that day itself. However, it was returned on February 17, 2000. On a writ petition contending that since the assessee had asked for adjustment at the very beginning and the adjustment had not been given by the Department, he should be paid interest on the sum of Rs. 5,35,000. The Hon'ble Delhi High Court held by allowing the petition partly, that neither section 240 nor section 244A would apply in the facts and circumstances of the assessee's case. Section 240 would not apply because it deals with the provision of refund on an appeal. The assessee had not received any refund consequent upon an appeal. On the contrary, the assessee had opted for the Kar Vivad Samadhan Scheme, 1998, and had paid the amount under that Scheme in February, 1999. The appeal was dismissed, as it had become in fructuous, subsequently on March 30, 1989. In so far as section 244A was concerned, the provisions of sub-section (4) make it clear that section 244A applied only in respect of assessment for the assessment year commencing on April 1, 1989, and subsequent assessment years. Since in the assessee's case the assessment year was 1986-87, section 244A was clearly inapplicable. The assets available for application were not in excess of the liabilities which were sought to be discharged. Therefore, there was no question of any interest running under section 132B. when the assessee made the payment of Rs.3,29,670 under the Scheme and closed all issues pertaining to the assessment year 1986-87. Because all issues stood closed in February, 1999, the entire amount of Rs. 5,35,000 became immediately returnable to the assessee. However, that amount was returned a little later on February 17, 2000. Therefore, the amount of Rs. 5,35,000 was retained by the Department to the detriment of the assessee from February, 1999, to February, 2000, which was approximately one year. Therefore, the assessee was entitled to interest on the amount. (AY.1986-87)
Ram Kishan Gupta v. UOI (2013) 357 ITR 534 / 215 Taxman 525 / 95 DTR 53 / 263 CTR 583 (Delhi)(HC)

S.132B : Application of seized or requisitioned assets – Search and seizure – Calculation of interest
The assessee was entitled to be paid interest at the rate of 12 per cent in respect of the amount seized for the period from the date on which assessment was completed till date it was actually released to him.(AY. 2005-06)
S.K. Jain v. CIT (2013) 354 ITR 84 / 215 Taxman 237 / 87 DTR 264 (Delhi)(HC)

S.132B : Application of seized or requisitioned assets Search and seizure – Delayed Refund – Assessee entitled to interest under section 132B(4) [S.132]
Where the assessment of the assessee was concluded resulting in a refund to the assessee which was not given to the assessee for a long time assessee was entitled to interest on refund under section 132B(4) of the Act.
Om Prakash Agrawal v. UOI (2013) 81 DTR 341 / 214 Taxman 5 (Mag.) / 255 CTR 445 (MP)(HC)

S.132B : Search and Seizure – Retained assets, application of Adjustment of seized cash – After passing of 120 days from last date of execution of search and seizure operation is liable, either to return remaining amount to assessee/concerned person and/or to adjust same towards his future liability if a specific request has been made.

Where concerned person/assessee makes an application during course of assessment proceedings to adjust remaining amount of cash seized towards his future liability, AO after passing of 120 days from last date of execution of search and seizure operation is liable, either to return remaining amount to assessee/concerned person and/or to adjust same towards his future liability if a specific request has been made by assessee in this respect. (AY.2008-09).
Vijay D. Mehta v. CIT (2013) 60 SOT 100 (URO)(Mum.)(Trib.)

S.132B : Application of seized or requisitioned assets – Explanation w.e.f. 1-6-2013 is prospective in nature. [Ss.234B, 234C]
During the course of search conducted at the residential premises of the assessee, aggregated cash of Rs. 43 Lakhs was seized. The assessee submitted that out of Rs. 43 Lakhs seized,Rs. 10 Lakhs was to be treated as towards payment of advance tax in its case. The AO invoked explanation to s/132 B according to which the existing liability did not include advance tax payable. He thus adjusted the cash seized towards self-assessment tax and levied interest u/s. 234 B & 234C. CIT(A) confirmed the action of the AO. On appeal in Tribunal, the Revenue relied on the amendment made to s/132 B vide Finance Bill of 2013 and held that it was found that as per the amendment the existing liability would not include advance tax payable and the explanation has been made applicable w.e.f. 1-6-2013. Allowing the appeal, the tribunal held that when the legislature has made explanation operative prospectively by words expressed therein, its operation shall have to be confined to the future date. Further when a statute & particularly when the same has been made applicable w.e.f. a particular date, should be construed prospectively and not retrospectively. Therefore the court held that by its interpretation of applicability of explanation and amendment made by the Finance Bill, 2013 and the facts it is viewed that the amended explanation cannot be applied in the present case (AY.2007-08).
Kanishka Prints (P) Ltd. v. ACIT (2013) 143 ITD 716 / 96 DTR 275 / (2014) 159 TTJ 699 (Ahd.)(Trib.)

S.132B : Application of seized or requisitioned assets – cash seized during the course of search proceedings can be adjusted only against existing tax liability referred to in section 132B(1)(i).
During the course of search and seizure action under section 132 of the Act at the residence of assessee, certain cash was found and the same was seized. The assessee admitted same to be its undisclosed income and requested to foreclose same and adjust the proceeds thereof towards its tax liability. The A.O. issued notice as per the provisions of section 153A, asking the assessee to file a return of income by 5-11-2009. However, the assessee filed return of income only on 29-4-2010. The A.O. finalized the assessment under section 153A and levied interest under sections 234A, 234B and 234C. Before the Ld. CIT(A), the assessee pleaded that interest under sections 234A, 234B & 234C was not a penalty and was only compensatory, therefore to the extent the money of the assessee was lying with the department, the same had to be considered as paid while determining the taxes due and thereafter only on the remaining sum after such set off, interest should be levied. However, the Ld. CIT(A) confirmed the action of action of A.O. The Appellate Tribunal also confirmed the order of the Ld. CIT(A) and held that Cash seized in search proceedings can be adjusted only against existing tax liability. (AYs. 2008-09 & 2009-10)
M.J. Ramani v. Dy. CIT (2013) 142 ITD 281 / 93 DR 88 (Bang.)(Trib.)

S.133 : Power to call information – Notice – Bank – General information – Amendment w.e.f., 1st July 1995 – After the amendment, AO is empowered to issue notice calling for general information with a view to detect tax evasion [S.133(6)]
The ITO issued a notice u/s 133(6) to the assessee-bank u/s 133(6) of the Act calling for general information regarding details of all persons who have made cash transactions and time deposits of Rs.1,00,000/- and above for the period of three years between 1-4-2005 and 31-3-2008. The assessee claimed that s. 133(6) does not empower the ITO to conduct a roving or fishing enquiry into the affairs of the assessee or regarding the deposits made by its customers. It was also contended that the

AO can only seek "case specific" or "area specific" information u/s 133(6). The High Court dismissed the Writ Petition. On appeal by the assessee to the Supreme Court HELD dismissing the appeal:

The legislative intention behind s. 133(6) was to give wide powers to the income-tax department to gather general particulars in the nature of survey and store those details in the computer so that the data so collected can be made use of for checking evasion of tax effectively. It would not fall under the restricted domains of being "area specific" or "case specific." S. 133(6) does not refer to any enquiry about any particular person or assessee, but pertains to information in relation to "such points or matters" which the assessing authority issuing notices requires. This clearly illustrates that the information of general nature can be called for and names and addresses of depositors who hold deposits above a particular sum is certainly permissible (*Karnataka Bank Ltd v. Government of India (2002) 9 SCC 106* followed; *M.V. Rajendran & Ors. v. ITO (2003) 260 ITR 442 (Ker) approved)(Civil Appeal No. 7460 of 2013*)

Kathiroor Service Cooperative bank Ltd. v. CIT (2013) 95 DTR 129 / 263 CTR 129 (SC)

S.133A : Survey – Loss set off against surrendered income – Business income – Loss was allowed to be set off [S.28(i), 56]

The assessee claimed set off of loss of Rs. 54,10,054 against the amount offered during survey on the basis of incriminating documents, claiming that the income was from business. The Commissioner (Appeals) as well as the Tribunal had recorded a concurrent finding of fact based on cogent material available before them, that the surrendered amount was income of the assessee from business and not from other sources. The Revenue was unable to point out any perversity in the finding recorded by the Commissioner (Appeals) and the Tribunal. Hence, assessee was eligible to set-off the said loss against business income. (AY.2003-04)

CIT v. Ram Gopal Manda (2013) 359 ITR 389 / 216 Taxman 95 (Mag) / 89 DTR 49 / 261 CTR 631 (Raj.)(HC)

S.133A : Survey – Statement on oath – Evidentiary value [S. 132(4)]

In contradistinction to the power under section 133A, section 132(4) enables the authorised officer to examine a person on oath and any statement made by such person during such examination can also be used in evidence. Since the statement recorded under section 133A was not recorded on oath, such statement was not at par with the statement recorded under section 132(4) and did not have any evidentiary value. Addition made merely on the basis of statement in the course of survey was held to be not valid. (AY. 2003-04)

CIT v. P. Balasubramanian (2013) 354 ITR 116 / 215 Taxman 288 (Mad.)(HC)

S.133A : Survey – Retraction from statement – Onus on assessee was heavy to show as to what mistake of fact resulted in admission of income – Mere denial is not sufficient – 10% of estimated income was confirmed

In the course of survey, loose papers were found containing several amounts written thereon. The assessee could not explain the said receipts and, accordingly, a sum of Rs.2.3 crore was admitted as income. The same was retracted subsequently stating that the disclosure was under duress, and that the assessee had maintained all the books, which reflected its true income. The AO opined that the onus to explain the entries written on loose papers was on the assessee and since it had abysmally failed to discharge the same amount written in those documents was to be treated as unexplained income of the assessee. CIT(A) agreed with the view of the A.O. and he restricted the income at the rate of 10% on basis that entire amount could not represent income. Tribunal held that on facts, onus on assessee was heavy to show as to what mistake of fact resulted in admission of income, therefore, a mere denial, without anything more, would by itself not lead to a valid retraction in law. AO was justified in making impugned addition. Tribunal also held that revenue failed to prove

that entire amount written on loose papers represented suppressed income, estimation of income at 10 per cent of said amount would meet ends of justice. Order of CIT(A) was confirmed. (AY.2007-08)
ITO v. Devji Premji Pujara & Sons (2013) 60 SOT 6 (URO) (Mum.)(Trib.)

S.133A : Survey – Rejection of audited books of account was not justified merely on the basis of documents found in the course of survey [S.144]
On the basis of documents, information etc., found in course of survey, audited books of account could not be totally disregarded. (AY.2008-09)
Davis Langdon & Seah Consulting India (P.) Ltd. v. DCIT (2013) 58 SOT 124 (Bang.)(Trib.)

S.133A : Survey – Addition made on the strength of a statement recorded during the survey cannot be sustained
During the course of survey, the assessee made declaration and surrendered a sum of Rs. 2 crore. The Assessing Officer found that the assessee had not filed a revised return of income and had failed to incorporate the surrendered amount to tax in the return. The assessee contended that he had not made any voluntary disclosure. The statement recorded during the course of survey was not given on oath and had no evidentiary value. Not being satisfied with the explanation of the assessee the Assessing Officer made an addition of Rs.2 crores which addition was confirmed by the CIT(A). On appeal by the assessee, the Tribunal deleting the addition held that:
The department failed to collect any material during the course of survey and the Assessing Officer was harping upon the statement of the assessee.
The statement recorded during survey had no evidentiary value and no addition could be sustained on the strength of this statement. (AY. 2005-06)
Mahesh Ohri v. ACIT (2013) 23 ITR 522 / 154 TTJ 33 (URO) / 59 SOT 16 (URO)(Delhi)(Trib.)

S.133A : Survey – Admission – Provisional trading account – Addition made only on the basis of admission in the course of survey was deleted. [S. 69, 69A, 145]
During the survey operation, the survey party worked out excess stock of Rs.37.11 lakhs by preparing a provisional trading account. The partners of firm not being able to explain the excess stock, surrendered same and agreed to pay tax on the value of excess stock. Excess cash found during survey was declared by the partners as income of firm other than regular income. The return of income filed by assessee after survey did not disclose the excess stock and excess cash found during survey. The Assessing Officer rejected books of account and made addition for excess stock under section 69 as unexplained investments, and on account of excess cash under section 69A as unexplained moneys. On appeal the Commissioner (Appeals) reduced the addition made by the Assessing Officer. On appeal by Revenue the assessee established that admission made during survey by surrendering income on excess stock was not correct, and also that excess cash was actually invested by partner. The Tribunal confirmed the order of Commissioner (Appeals)(AY.2008-09)
ACIT v. Maya Trading Co. (2013) 143 ITD 176 (Agra)(Trib.)

S.139 : Return of income – Condonation of delay – Revised return – Claiming enhanced loss – Delay due to audit report of Auditor – Rejection of rectification was held to be not justified [Ss.119, 154]
The Petitioner co-operative society filed belated return due to submission of belated first report by statutory auditor. Thereafter, revised return was also filed belatedly claiming enhanced loss again on basis of belated final audit report. On application for condonation of delay, CBDT passed order directing assessing authority to accept enhanced claim of loss. The CBDT, however, had not made

reference to revised return. The Petitioner's request for rectification was rejected by the CBDT. Held explanation for sufficient cause made in application to condone delay was not only with regards to original return but also to revised return as it referred to enhanced loss as claimed in revised return and, thus, order of CBDT had to be modified to condone delay in filing revised return of income. (AY. 2005-06)
Mahalakshmi Co-operative Bank Ltd. v. CBDT (2013) 216 Taxman 128 / 358 ITR 23 (Karn.)(HC)

S.139 : Return of income – E-return – Clerical errors – Not ignorance of law but ignorance of usage of latest technology, direction to Assessing Officer to examine interest paid and if satisfied, positive interest to be added to taxable income. [S.143 (1)]
The assessees filed e-returns showing interest income earned as well as interest paid under the head "Income from other sources". The assessees did not realise that the server would not accept a negative figure and therefore the interest paid was rejected by the server while processing the returns. The Commissioner (Appeals) observed that it was an incorrect claim on account of the assessees failing to reflect the correct details in the returns, under the computerised processing programme. The Assessing Officer made adjustments for this incorrect claim for deduction and held that there was no mistake in the processing of returns and further concluded that no appeals would lie against such processing where adjustments had been correctly made during processing under section 143(1)(a)(ii) of the Income-tax Act, 1961. On appeal the Tribunal held that no one cared to educate the taxpayers about the nuances of preparing an e-return compared with filing details in the return forms. This had resulted in many clerical errors because of the ignorance of the taxpayers in acclimatising themselves with the latest technology. This was not ignorance of law but ignorance of the usage of the latest technology. Therefore, the Assessing Officer was to examine the assessee's claim of the interest paid and if satisfied with the claim, he was to deduct it from the positive interest figure to be added to the taxable income. (AY 2009-10)
Sumanchandra G. Mehta v. ITO (2013) 22 ITR 270 / 60 SOT 21 (URO)(Mum.)(Trib.)
Tarulata S. Mehta v. ITO (2013) 22 ITR 270 / 60 SOT 21 (URO)(Mum.)(Trib.)

S.139(5) : Return of income – Revised return – Condition precedent – Return filed after stipulated time under section 139(4) cannot be revised [S.139(1), 139(2), 139(4)]
The due date for filing return was 31-8-1993. The assessee filed the return on 30-9-1993. The intimation was issued on 21-9-1994 and served on assessee on 24-11-1994. The assessee filed the revised return for the purpose of correcting the mistake in the claim by declaring the enhanced amount of unabsorbed depreciation. In appeal Commissioner (Appeals) directed the Assessing Officer to consider the revised return. The Tribunal set aside the order of Commissioner (Appeals). Rectification application of the assessee was also dismissed by the Tribunal. On appeal the court held that provision of S.139(5) is applicable in respect of returns filed u/s 139(1)/(2) and the benefit of the said provision would not apply to returns filed after stipulated time as envisaged u/s.139(4).(AY. 1993-94)
Menezes Fernandes Enterprises v. ITO (2013) 356 ITR 82 / 215 Taxman 241 / 89 DTR 368 (Bom.)(HC)

S.139(5) : Return of income – Revised return – Services charges which was shown as income in the original return was withdrawn by filing revised return was held to be valid
Assessee was a State Government owned company, acting as a development financial institution for assisting cause of medium and large scale industries in State of Gujarat. In the Sales Tax Deferment scheme, a charge was to be created in favour of Sales Tax Department and the deferred amount of sales tax was considered as a 'deemed loan' and assessee acted as a nodal agency for scheme. During the year under consideration provision was made for receipt of service charges for above referred fee based activities and additional income was accounted for and offered to tax while filing original return of income. Subsequently, Government of Gujarat cancelled Sales Tax Deferment Scheme and

due to this withdrawal of earlier Government Resolution, no income was receivable by assessee and accordingly return had been revised. The Tribunal accepted revised return of income filed under S. 139(5) and the HC held that the order of the Tribunal did not merit interference. (AY. 2004-05)
CIT v. Gujarat Industrial Development Corpn. (2013) 214 Taxman 118 (Mag.)(Guj.)(HC)

S.139(5) : Return of income – Revised computation – Filing of revised computation
A consequential claim arising out of a decision of Settlement Commission could be made by way of a revised computation. For AY. 2006-07 the assessee offered an Income of Rs. 3.16 crores in its return of income, as reversal of excess warranty provision of earlier years. However, the Settlement Commission, by its order dated 24-3-2008 held that such provision to be contingent liability and, hence it is not allowable to the assessee. Therefore, the assessee filed its revised computation, withdrawing the income offered earlier, claiming that when the order of the Settlement Commission was received, there was no time left for filing a revised return. The AO. held that seven days were left for filing a revised return, after the date of the order of the Settlement Commission and assessee could have made a fresh claim only by filing a revised return and not a revised computation. CIT(A) allowed the claim of assessee. On appeal by revenue the Tribunal held that, CIT(A) having co-terminus power that of the AO was right to allow a legitimate claim of withdrawal of income made by the assessee. (AYs. 2005-06, 2006-07)
Dy. CIT v. Vistas Wind Technology India (P.) Ltd. (2013) 60 SOT 10 (URO) / 31 taxmann.com 356 / (2012) 20 ITR 243 (Chennai)(Trib.)

S.139(5) : Return of income – Revised return – Survey – Revised return was held to be valid as it has satisfied all stipulated conditions [S.142(1)]
In pursuance of survey, assessee filed its return wherein income was disclosed from sale of immovable property to sister concern. Subsequently, a revised return was filed on account of cancellation of transactions in immovable property and reversal of income recognition from said transactions. AO held that view of assessee in filing revised return was not *bona fide*, made assessment on basis of original return of income. The original return was filed in response to notice issued u/s. 142(1) and, thereupon revised return was filed before assessment was made as well as before expiry of one year from end of relevant assessment year. Tribunal held that after termination of sale transactions, declaration of income as made by assessee in original return turned out to be a wrong statement and after becoming aware of same, revised return was filed. Revised return filed by assessee was to be treated as a valid return because it duly satisfied conditions stipulated under section 139(5). (AY.2007-08)
Lok Housing & Constructions Ltd. v. ACIT (2013) 60 SOT 15 (URO)(Mum.)(Trib.)

S.140A : Self-assessment – Interest – Date from which payable. [S.156, 220(2)]
The assessee, who himself submitted revised return of self assessment of his income u/s 140A, was liable to pay interest from date when his tax liability was finally determined by appellate order and not from date of his filing revised return. Notice under section 156 was given to the assessee after final assessment order dated 24-3-1992. Court held that the authorities below were, thus right in holding that the assessee was liable to pay interest from the date of the order 24-3-1992.
CIT v. Misrilal Jain (2012) 254 CTR 554 / 80 DTR 140 / (2013) 215 Taxman 249 (Jharkhand)(HC)

S.142 : Enquiry before assessment – Special audit – Opportunity of hearing was given – Order was valid
Commissioner after giving personal hearing to assessee, opined that assessee's accounts were complex and it was in interest of revenue that said accounts be audited by special auditor. He thus granted approval for special audit. It was in pursuance of said approval, AO passed order referring

accounts for special audit. Held on facts, there was no infirmity in impugned order passed by AO and, thus, same was to be upheld. (AY. 2005-06 to 2010-11)
Neesa Leisure Ltd. v. DCIT (2013) 219 Taxman 331 / (2014) 98 DTR 215 / 266 CTR 500 (Guj.)(HC)

S.142 : Enquiry before assessment – Natural justice – Opportunity of being heard [Ss.44AB, 145]
On the basis of special audit report submitted by assessee, AO rejected books of assessee and made various additions to income of assessee. Assessee submitted that copy of letter seeking approval was not served on it and, thus, opportunity to explain discrepancies was not granted to it. Held, since lower authorities had violated principles of natural justice without granting opportunity of hearing to assessee, impugned order was to be set aside. (AY.2001-02)
Sadana Electric Stores v. CIT (2013) 219 Taxman 294 / 92 DTR 375 (All.)(HC)

S.142 : Enquiry before assessment – Service of notice – When assessee denies the service of notice – Burden is on department to prove the service of notice. [Ss.142(1) 143(2), 144]
When an assessee denies receipt of notice, it is imperative on part of revenue to produce requisite materials and, if available, such persons who has sent notices. Where nothing of this sort was done by revenue, revenue could not be said to have proved beyond any shadow of doubt that notices u/ss. 142(3) and 142(1) were indeed issued to and served upon assessee. (AY. 2002-03)
CIT v. Gita Rani Ghosh (Smt.) (2013) 219 Taxman 264 / 90 DTR 65 / 260 CTR 186 / (2014) 361 ITR 17 (Guwahati)(HC)

S.142 : Enquiry before assessment – Notice – Person – Validity of notice to co-operative bank held to be valid [Ss.2(31), 133(6)]
S. 142(1) read with s. 2(31) leads to the only conclusion that co-operative societies are also “person” as defined in the Income-tax Act. Therefore, the impugned notice u/s. 142(1) cannot be held issued without jurisdiction.
Mangalam Service Co-operative Bank Ltd. & Anr. v. ITO & Ors. (2013) 351 ITR 312 / 83 DTR 198 / 86 DTR 399 / 258 CTR 449 / 216 Taxman 138 (Mag.)(Ker.) (HC)
Editorial: Order of single judge in *Mangalam Service Co-operative Bank Ltd. & Anr. v. ITO & Ors. (2013) 351 ITR 312 (Ker)(HC)* is affirmed in *Mangalam Service Co-operative Bank Ltd. & Anr. v. ITO & Ors. (2013) 354 ITR 601 / 258 CTR 452 / 213 Taxman 406 (Ker.)(HC)*

S.142 : Enquiry before assessment – Special audit – Approval without application of mind on same day held to be nullity [S.142(2A)]
Assessing Officer issued notice for assessee to show cause why special audit should not be ordered. Assessee filed replies and Assessing Officer wrote to Commissioner saying that assessee had answered queries regarding complexities in accounts. However next day changing his mind he wrote a letter to CCIT seeking approval for grant of special audit who granted such approval on same day. Court held that there was no application of mind by CCIT to proposal of special audit sent by Assessing Officer, further in absence to any further development and another notice to assessee under section 142(2A) after Assessing Officer changed his mind, order of special audit was nullity. In favour of assessee. (AY.2009-10)
DLF Commercial Projects Corporation v. ACIT (2013) 357 ITR 211 / 212 Taxman 43 / 257 CTR 298 (Delhi)(HC)

S.142 : Enquiry before assessment – Special audit – Natural justice – Complexity of accounts and safeguarding interests of revenue is conditions cumulative, notice on basis of notes of accounts is not valid [S.142(2A)]
In order to direct special audit under section 142(2A) of the Income-tax Act, 1961, the Assessing Officer must form an opinion with regard to twin conditions, viz., nature and complexity of

accounts and the interests of the revenue. Additionally, special audit requires approval of the Chief Commissioner or the Commissioner. Further, the power under section 142(2A) is not to be lightly exercised, and it is to be based on the foundation of available material. A genuine and honest attempt must be made to understand the accounts since an order under the provisions not only entails a heavy monetary burden but it also causes a lot of inconvenience to the assessee. Section 142(2A) is not a provision by which the Assessing Officer delegates his powers and functions, which he can perform, to the special auditor. The provision has been enacted to enable the Assessing Officer to take the help of a specialist, who understands accounts and accounting practices to examine the accounts when they are complex and the Assessing Officer feels that he cannot understand them and comprehend them fully, till he has help and assistance of a special auditor. Interest of the revenue is the other consideration. An order under section 142(2A) directing special audit, entails civil consequences. And therefore, the principles of natural justice in the form of hearing have to be complied with. However, this does not require an elaborate hearing. The notice under the section may contain briefly the issues that the Assessing Officer thinks to be necessary and need not be detailed ones. An order of approval by the Commissioner/Director should not be granted or passed mechanically but should be done having regard to materials on record. Questions should be raised with regard to accounts and entries and only when the explanation offered is not satisfactory, or verification is not possible without the help and assistance of a special auditor, action under section 142(2A) is required. For the assessment year 2005-06, the recommendation for special audit was made on October 17, 2007, within two days after the books of account were produced on October 15, 2007. The Assessing Officer had not obtained comments/findings on the Comptroller and Auditor General's report but he had directed the special auditor to obtain it and then give his opinion. Considering the facts of the case the notices under section 142(2A) relating to the assessment years 2003-04 to 2009-10 were not valid and were liable to be quashed. (AY. 2003-04 to 2009-10)
Delhi Development Authority v. UOI (2013) 350 ITR 432 / 214 Taxman 130 / 89 DTR 54 / 259 CTR 518 (Delhi)(HC)

S.142 : Enquiry before assessment – Special audit – Limitation – Failure to record reasons, High Court giving liberty to Department to pass a fresh order – Fresh order cannot be challenged on ground of limitation – Reference to special audit is held to be justified [Ss. 132, 153A, 153B]
The Assessing Officer is required to find out the income to be brought to tax. He has to apply the accepted methods of accounting and if there are any inaccuracies, he may direct the assessee to assist him by explaining and to reconcile such accounts. He is not a specialist accountant or an auditor to find out the methods adopted by the assessee for assessing the income to be taxed. He is not required to act as an investigator or a specialist auditor nor does he have a team of assistants to enter into the web to decipher the codes and to demystify the procedures adopted in the accounting methods to find out and arrive at the aggregate income to be assessed to tax. The assessees challenged the directions under section 142(2A) of the Income-tax Act, 1961, for special audit on the ground that no reasons were given in the order. The assessee relied on the principles of natural justice to challenge the order. Held, dismissing the petitions, (i) that the assessees not having challenged the observations of the High Court, giving liberty to the Department to proceed with a fresh order in accordance with law they could not be permitted now on the principles of equity to challenge the fresh order on the ground of limitation. Any advantage gained in such circumstances must be neutralised. The prescription of limitation by itself should not be permitted to confer an advantage on the assessees for such delay. The defect complained of in the notice was at best a lapse, which could be corrected by serving a proper notice and recording of reasons. The court did not hold that the reasons were not sufficient. It held that the reasons were not recorded. It observed that reasons must be recorded in the order to show application of mind on the part of the officer concerned on the basis of the material available on record. The submission that after the earlier notice was set aside, a fresh notice could not be issued,

was thus devoid of any substance and must be rejected. On facts reference to special audit held to be justified. (AY. 2002-03, to 2008-09)
ATS Infrastructure Ltd. v. ACIT (2013) 350 ITR 563 / 256 CTR 46 / 81 DTR 249 / 215 Taxman 302 (All.)(High Court)
Prateek Resorts & Builders (P) Ltd. v. ACIT (2013) 350 ITR 563 / 256 CTR 46 / 81 DTR 249 (All.)(HC)

S.142(2A) : Special audit – For inordinate delay in fixation of fee, departmental auditor should be appropriately restituted by way of interest
The Income-tax department engaged the service of a Chartered Accountant (C.A.) to conduct special audit u/s. 142(2A). The C.A. submitted its report and bills but in spite of repeated reminders the authority did not fix the fee or grant remuneration. After a delay of 6 years, the authority fixed the fee of the C.A.
On a Writ Petition filed by the CA, the High Court, in view of the inordinate delay in fixing the fee, long after the assessment proceedings for the special audit were completed, directed the authority to pay an interest of 8% p.a. as also directed the Chief Commissioner of Income-tax to conduct an inquiry and fix responsibility of the person or persons who was/were responsible for the delay.
SC & Associates, Chartered Accountants v. UOI (2013) 217 Taxman 67 (Delhi)(HC)

S.142(2A) : Special audit – Not judicial proceedings detailed reason is not necessary. [Art. 226, Constitution of India]
Held that the proceedings u/s 142(2A) are not judicial proceedings and detailed reasons are not necessary. Since the accounts of assessee are complex, order u/s 142(2A) was held to be passed after application of mind. (AY.2010-11)
U. P. Samaj Kalyan Nirman Nigam Ltd. v. CIT (2013) 263 CTR 602 / 96 DTR 182 (All.)(HC)

S.142(2A) : Special audit – Complexity of accounts – Direction to special audit is justified [S.12A]
The AO found that there was no reference to related party transactions in the audit report furnished by the assessee trust in Form No 10B. The AO directed special audit having regard to the complexity of the accounts. The Assessee challenged the order by Writ. The Court held that the special audit was ordered after obtaining the approval of the Chief Commissioner and considering the complexity of the accounts, accordingly the petition was dismissed. (AY. 2010-11)
Hiranandani Foundation v. JCIT (Exemption)(2013) 359 ITR 29 / 262 CTR 422 / 94 DTR 63 (Bom.)(HC)

S.142(2A) : Special audit – Appointment of special auditor to examine books of account – If they are complex and not understandable
During assessment proceedings, the AO noticed certain discrepancies in the audited books of account of the assessee which were complex in nature and were not understandable. He, therefore, issued notice u/s. 142(2A) and appointed special auditor to audit the books of account of the assessee. The assessee contended that, the accounts maintained were not complex and, therefore, there was no basis to get the same audited u/s. 142(2A). Accordingly, a Writ Petition was filed. The High Court observed that in the instant case, the discrepancies in the account books have already been pointed out by the Comptroller and Auditor General as well as in the auditor's report and further on perusal of the accounts, the assessing authority has come to the conclusion that the accounts are complex and difficult to understand. The assessing authority before passing the impugned order for appointment of special auditor has made genuine attempt to understand the accounts so maintained. The High Court, further observed that with regard to the satisfaction of the assessing authority, while referring the matter u/s. 142(2A), it is not only the books of account, but even by other documents which are available during the course of an

assessment and at any stage subsequent thereto may become available to the Assessing Officer. To give a narrow meaning to the expression 'accounts' so as to confine it to the books of account would amount to giving an interpretation which would completely defeat the very object of the section. Accordingly, the High Court dismissed the Writ Petition (AY. 2010-11).
U. P. Projects Corporation Ltd. v. CIT (2013) 217 Taxman 69 (All.)(HC)

S.142(2A) : Special audit – Enquiry before assessment – Qualificatory remarks in audit report – Writ petition is not maintainable
Where there were defects in maintenance of books of account of assessee with qualificatory remarks in audit report and further assessee did not produce supporting vouchers to substantiate its income/expenditure account, it was in interest of revenue and justice to get accounts audited under s. 142(2A). (AY.2005-06)
Kanpur Development Authority v. CIT (2013) 216 Taxman 312 / 95 DTR 25 / 263 CTR 233 (All.)(HC)

S.142(2A) : Special audit – Enquiry before assessment – Limitation – Direction was given without giving an opportunity to assessee only to extend period of limitation – Order was void as being barred by limitation [S.158BC]
Held, that the assessee was not heard before the order passed under s. 142(2A). Such a procedure was resorted to extend the period of limitation. Therefore, the assessment order passed was void as being barred by limitation.
CIT v. Subboji Rao C. H. (2013) 355 ITR 320 / 216 Taxman 132 (Karn.)(HC)

S.142(2A) : Special audit – False statements – Cost was levied on the petitioner
Proceedings under section 142(2A) are not strictly judicial proceedings. The satisfaction regarding complexity of the accounts is not required to be arrived at by discussing the accounts in meticulous detail. Where the approving authority has considered the account books along with the auditor's reports and finds that there was a *mala fide* intention to avoid verification of the books of account and that there were various comments by the auditors regarding gross neglect and misappropriation of funds, an order under section 142(2A) would be justified. Cost of Rs.1 lakh levied on the petitioner. (AY.2008-09)
U. P. State Industrial Development Corporation Ltd. v. Chief CIT (2011) 203 Taxman 337 / 71 DTR 329 / 252 CTR 98 / (2013) 353 ITR 176 (All.)(HC)

S.142A : Estimate by Valuation Officer – Non-rejection of books – Reference to DVO was held to be not valid – Addition as undisclosed investment was not valid [S. 69B]
Since AO had not specifically rejected books of account maintained by assessee, reference to DVO was not desirable. Accordingly, addition made on basis of DVO's report was set aside. (AY.2001-02)
CIT v. Raghuraji Agro Industries (P.) Ltd. (2013) 219 Taxman 149 (Mag.)(All.)(HC)

S.142A : Estimate by Valuation Officer – Where the books of account are not rejected, reference to valuation officer was not valid. [Ss.69, 145]
The AO could not have referred the matter relating to the investment towards the construction of the petrol pump building to the Departmental Valuation Officer when there was no rejection of books of account maintained by the assessee. (AY. 2005-06)
Nirpal Singh v. CIT (2013) 359 ITR 398 / 96 DTR 385/(2014)266 CTR 108 / 220 Taxman 152(Mag.) (P&H)(HC)

S.142A : Estimate by Valuation Officer – Where the books of account are not rejected, reference to valuation officer was not valid [S.145]

Wherever the books of account are maintained with respect to the cost of construction, the matter can be referred to the District Valuation Officer after the books of account are rejected by the Revenue on some legal or justified basis. In the absence of the rejection of books of account, the reference to the District Valuation Officer cannot be upheld.(AY. 2007-08)
CIT v. Chohan Resorts (2012) 76 DTR 163 / 253 CTR 106 / (2013) 359 ITR 394 (P&H)(HC)

S.142A : Estimate by Valuation Officer – Recalling of ex-parte order [S.69]
Order can be recalled u/s. 142A if the Assessing Officer feels that for ascertaining of the value of a investment made u/s. 69, the matter should be referred to valuation Officer for reporting. Exercise of such power u/s. 142A cannot be held as incompetent on the basis of law laid down by the Supreme Court in *Smt. Amiya Bala Pal v. CIT (2003) 262 ITR 407(SC)*(AY.1997-98)
CIT v. Rajendra Aggarwal (2012) 208 Taxman 391 / 78 DT 317 / (2013) 260 CTR 420 (Uttarakhand)(HC)

S.142A : Estimate by Valuation Officer – Reference was held to be not valid [Ss.69, 69B]
During relevant assessment year, assessee made additional construction of cold storage. Assessing Officer did not accept cost disclosed by assessee and referred matter to DVO. DVO estimated figures. Assessing Officer then determined cost. Tribunal held that reference made to DVO by Assessing Officer in assessment proceedings was beyond power of Assessing Officer in view of judgment of Supreme Court in case of *Smt. Amiya Bala Paul v. CIT [2003] 262 ITR 407*. Revenue contended that in view of new provisions of section 142-A introduced retrospectively w.e.f. 15-11-1972 by the Finance Act, 2004, Assessing Officer can require Valuation Officer to make an estimate of value of movable/immovable property. Impugned amendment authorise Assessing Officer only for purposes of making an assessment or reassessment, where an estimate of value of any investment referred to in section 69 or section 69B or value of any bullion, jewellery, etc., is required to be made, to refer matter to Valuation Officer to make an estimate of such value and report same to him. In view of above, finding of Tribunal in favour of assessee was correct. The amendment to section 142A, introduced retrospectively w.e.f 15-11-1972 by the Finance Act, 2004, authorises Assessing Officer only for purposes of making an assessment or reassessment, where an estimate of value of any investment referred to in section 69 or section 69B or value of any bullion, jewellery, etc. is in question (AY. 1997-98).
CIT v. Behari Cold Storage (P.) Ltd. (2013) 214 Taxman 48 (Mag.)(All.)(HC)

S.142A : Estimate by Valuation Officer – where books of account maintained by assessee were not rejected, A.O. could not have referred matter to DVO [Ss.147, 148]
Reassessment proceedings were initiated under section 147/148 of the Act. Before completion of the assessment, the AO referred the matter to the DVO invoking the provision of section 142A of the Act. Thereafter the assessment was completed and various additions were made. CIT(A) confirmed the additions. On appeal Tribunal held that the books were never rejected hence the AO was not justified in making any addition on the basis of report given by the DVO.(AY.2005-06)
Prithavi Raj Bohra v. ITO (2012) 150 TTJ 57 / (2013) 60 SOT 22 (URO)(Jodhpur)(Trib.)

S.142A : Estimate by Valuation Officer – Assessing Officer did not reject books of account maintained by assessee – Made reference to DVO – Reference without jurisdiction [S.145]
Assessing Officer without rejecting books of account maintained by assessee made reference under section 142A to DVO, for valuation of factory building of assessee. Assessing Officer made addition on basis of cost of construction estimated by DVO. Commissioner (Appeals) confirmed the addition and reduced some addition. On appeal to Tribunal held that Commissioner (Appeals) for estimation of construction cost on basis of DVO’ s report could not be approved particularly when Assessing

Officer made reference to DVO without rejecting books of account. Assessee's appeal was allowed.(AY.2004-05)
Prahalad Kumar Jindal v. ACIT (2013) 140 ITD 147 (Agra.)(Trib.)

S.143 : Assessment – Purchases in cash from market – Bogus bills – Gross profit rate at 12% may be added and not the entire purchase
It was found that though purchases were not made from parties from whom assessee claimed but such materials were purchased from open market incurring cash payment and bills were procured from various sources, held that only profit element at rate of 12.5% was to be added to income of assessee. (AY. 2003-04)
CIT v. Sathyanarayan P. Rathi (2013) 219 Taxman 149 (Mag.)(Guj.)(HC)

S.143 : Assessment – Inventory details – Basic records were maintained – Addition was not justified [S. 145, Accounting Standard – AS-12]
The Assessing Officer made addition to assessee's income on basis of note of auditor that inventories details could not be ascertained. The assessee submitted that basic records were maintained by Indian Airlines as per procedure; and that amount was duly reflected in annual report. Addition was liable to be deleted. (AY. 2003-04)
CIT v. Airline Allied Services Ltd. (2013) 218 Taxman 396 (Delhi)(HC)

S.143 : Assessment – Consequential remand proceedings – When reassessment was held to be invalid – Assessment made consequential reassessment proceedings was held to be in valid. [S.147]
When reassessment proceedings had been held to be invalid, consequential remand proceedings would be of no consequence. (AY.2001-02)
CIT v. Infomediary India (P.) Ltd. (2013) 218 Taxman 103 (Mag.)(Delhi)(HC)

S.143 : Assessment – Service of notice – Issue of notice within prescribed period – Notice served by affixture on last day of limitation was valid [S.143(2), General clauses Act, 1987, S.27]
The expressions "serve" and "issue" are interchangeable, as has been noticed in section 27 of the General Clauses Act, 1897, and also in a judgment of the Supreme Court in *Banarsi Devi v. ITO [1964] 53 ITR 100 (SC)*. Held, that the notice which was served by affixture on the last day of limitation was valid. (AY.2009-10)
V. R. A. Cotton Mills P. Ltd. v. UOI (2012) 250 CTR 188 / 70 DTR 439 / (2013) 359 ITR 495 (P&H)(HC)

S.143 : Assessment – Limitation for service of notice – Impossibility of performance. Last day of service being postal holiday, the notice was served on next day – Notice was held to be valid [S.143(2)]
Notice under section 143(2) was issued on September 26, 2012 and sent by speed post and the last date for service of the notice under section 143(2) was September 30, 2012, which was a postal holiday, and therefore, it was served upon the assessee on the very next working day, i.e., on October 1, 2012. Held, there was sufficient compliance with section 143(2), more particularly the first proviso to section 143(2) of the Act, and, therefore, the notice under section 143(2) of the Act was not invalid and, consequently, the assessment order was not bad on that ground. Ratio of Supreme court in *Mohd Ayub v. State of U.P (2009) 17 SCC 70*, the court held that there is general principle that a party prevented from doing an act for reasons beyond his control can do so at the first subsequent opportunity. The principle is based on the doctrine that law does not compel performance of an impossibility.(AY. 2010-11)
Gujarat State Plastic Manufacturers Association v. DDIT(E) (2013) 359 ITR 516 (Guj.)(HC)

S.143 : Assessment – Income from undisclosed sources – Amounts shown as sundry creditors – No evidence of such creditors – Assessment at flat rate after rejection of account – Amounts shown as sundry credits could also be taxed – Matter remanded [S.144]

There is nothing in law which prevents the A.O. in an appropriate case from taxing both the sundry credits, the source and nature of which are not satisfactorily explained, and the business income estimated by him after rejecting the books of account of the assessee as unreliable.

Matter remanded to the Tribunal with as direction to examine the identity, creditworthiness and genuineness of the transactions of the sundry creditors.(AY.2003-04)

CIT v. G. S. Tiwari and Co. (2013) 357 ITR 651 (All.)(HC)

S.143 : Assessment – Issue of notice – Revised return was not taken in to consideration – On the basis of original return notice was issued – Assessment was held to be valid [S.143(2)]

The assessee had filed revised return and since no notice u/s. 143(2) on revised return had been issued by the AO. The assessee contented that since no notice under section 143(2) on revised return was issued the assessment is held to be null and void. The Tribunal held since Assessing Officer framed assessment order on basis of original return of income filed and in which notice u/s. 143(2) had been validly issued, there was no need to issue any further notice u/s. 143(2) on revised return filed, which was also not taken into consideration and the assessment order passed was therefore a valid one. (AY. 2006-07)

ACIT v. Uday Bhagwan Industries (2013) 145 ITD 401 (Agra)(Trib.)

S.143 : Assessment – Amalgamation – Transferor company – Scheme of amalgamation sanctioned by the High Court – No proceedings can be initiated against the transferor company.

The High Court held that by virtue of the amalgamation sanctioned by the High Court, the transferor company no longer survives and hence the question of assessing such transferor company for the purpose of income tax would not survive. (AY. 2010-11).

Khurana Engineering Ltd. v. DCIT (2013) 217 Taxman 75 (Guj.)(HC)

S.143(2) : Assessment – Notice – Beyond limitation period – Block assessment – Violation of the mandatory provision then the assessment order passed is illegal and liable to be set aside [Ss. 143(2), (143(3), 158BC]

For determination of the undisclosed income for the block assessment under the provisions of section 158BC, the provisions of section 142 and sub-sections (1) and (3) of section 143 are applicable. Where the Assessing Officer, in repudiation of the return filed under section 158BC, proceeds to make an enquiry, he has to necessarily follow the provisions of section 142 and section 143(2)/(3). If there is violation of the mandatory provision then the assessment order passed is illegal and liable to be set aside.

Dy. CIT v. PaiVinod (2013) 353 ITR 622 / 217 Taxman 71 (Mag.)(Karn.)(HC)

S.143(2) : Assessment – Block assessment – Issue of notice [Ss.143(3), 158BD]

Omission on the part of the Assessing Officer to issue notice within stipulated time in case of search was fatal and not curable.

DCIT v. Shrikant Rathi (2013) 28 ITR 576 (Indore)(Trib.)

S.143(2) : Assessment – Notice – Whether mandatory [S. 148]

Assessment framed under section 143(3) read with section 147 without issue of notice under section 143(2) is invalid. (AY. 2004-05)

ITO v. D. D. Ahuja and Brothers (2013) 28 ITR 551 (Luck.)(Trib.)

S.143(2) : Assessment – Notice – Service of notice to chartered accountant who has audited the accounts is not valid service – Assessment is bad in law [S. 144]

The assessment was made under section 144 of the Act. The Assessee contended that there was NO valid notice under section 143(2) upon the assessee, therefore assessment was bad in law. Revenue contended that notice under section 143(2) dt 29-10-2002 was served on 31-10-2002 with the Chartered Accountant who has audited the accounts of the assessee firm. He has also sent second notice through speed post on 15-12-2003. Tribunal held that assessment completed without valid service of notice under section 143 (2) with in statutory time limit was held to be null and void. (AY. 2001-02)(ITA No 1419/A.2006 dt 1-2-2013)

Devnath Enterprise v. ITO (2013) ACAJ-June – P. 152 (Ahd.)(Trib.)

S.143(3) : Assessment – Additional income offered to tax at time of survey for any discrepancy or disallowance found during assessment proceedings – No separate addition required at the time of completion of the assessment

In course of a search operation on the assessee company along with its group concerns, the assessee declared a sum of Rs.5 crores as additional income. However, during assessment, the AO found that the assessee had claimed set off of speculative loss of Rs. 39 lakhs against business income. He, therefore, added the said sum to the income of assessee. Before the CIT(A), the assessee contended that out of Rs. 15 crores offered Rs.1.4 crores was towards covering any discrepancy or deficiency found during assessment. Therefore, it pleaded that in absence of any other discrepancy, and disallowance being less than the additional amount offered to tax, addition was not called for. The CIT(A) deleted the addition made by the A.O. The Tribunal confirmed the order of the CIT(A).
On appeal by the department, the High Court held that the Tribunal had arrived at the correct decision in concluding that the said sum of Rs. 39 lakhs which was added by the AO was embedded in the additional offer of Rs.1.41 crores made by the assessee at the time of the survey proceedings and hence no further disallowance was called for(AY. 2008-09).

CIT v. AKME Projects Ltd. (2013) 217 Taxman 74 (Mag.) / 35 taxmann.com 605 (Delhi)(HC)

S.143(3) : Assessment – Valuation of property – Addition solely on basis of valuation report is not permissible

A property was sold for Rs.1 crore. The property had two sellers, i.e., (i) the assessee, and (ii) four individual co-owners. The assessee disclosed a sale consideration of Rs. 39 lakhs for sale of its 50 per cent share, in the property. Rs. 44 lakhs was paid to the four individual co-owners for purchase of the balance 50 per cent share. Thus, in all they showed a sale consideration of Rs. 83 lakhs. In the assessee's case, the DVO opined that the value of the property at the time of purchase was Rs. 2,84,72,600/- and this became the basis of the addition made by the A.O. The Tribunal held in favour of the assessee. On appeal before High Court held that no addition could be made solely on the basis of the report of the Departmental Valuation Officer. (AY. 1999-2000)

CIT. v. Lhasa Construction Pvt. Ltd. (2013) 357 ITR 671 (Delhi)(HC)

S.143(3) : Assessment – Bogus purchases – Income from undisclosed sources – Not entire purchase price only profit element can be estimated – Estimation of profits and no uniform yardstick could be adopted [Ss.69, 145]

The Commissioner (Appeals) believed that the purchases were not bogus but were made from the parties other than those mentioned in the books of account. That being the position, not the entire purchase price but only the profit element embedded in such purchases could be added to the income of the assessee. In essence, the Tribunal only estimated the possible profit out of purchases made through non-genuine parties. The estimation of rate of profit return must necessarily vary with the nature of business and no uniform yardstick could be adopted. (AY. 2006-07)

CIT v. Simit P. Sheth (2013) 356 ITR 451 / 219 Taxman 85 (Mag.)(Guj.)(HC)

S.143(3) : Assessment – Additions were deleted on facts – No substantial question of law [S.260A]

Where appellate authorities deleted addition on account of consultation fees and operation receipts after thoroughly analysing material on record and after referring to inconsistencies in assessment order on accounting aspects and fact that trading addition had been made in original assessment, no substantial question of law arose for consideration (AY. 2006-07)

CIT v. Suresn Sharma (Dr.) (2013) 83 DTR 249 (Raj.)(HC)

S.143(3) : Assessment – Opportunity of hearing – Principles of natural justice – Notice was dispatched after the date of hearing [S.143(2)]

Revenue authority has to afford an opportunity of hearing to assessee in accordance with law, before proceeding to pass an assessment order. Where notice under s. 143(2) was dispatched to assessee only after date fixed for hearing, there was denial of reasonable opportunity of hearing to assessee and, in such a case, impugned order passed by revenue authority was not sustainable as it violated principles of natural justice. (AY.2005-06)

Green Power Realtors (P.) Ltd. v. DCIT (2013) 216 Taxman 169 (Mag.)(Mad.)(HC)

S.143(3) : Assessment – Income from undisclosed sources – Bogus purchasers – Profit element in purchase price can be assessed and not entire purchases [S.69]

Tribunal was of the opinion that though the purchases might have been made from bogus parties, the purchases themselves were not bogus. Held not the entire amount, but the profit margin embedded in purchases would be subjected to tax and not entire purchase price. (AY.2005-06)

CIT v. Bholanath Poly Fab Pvt. Ltd. (2013) 355 ITR 290 (Guj.)(HC)

S.143(3) : Assessment – CBDT directed to inquire into conduct of Assessing Officer in framing assessment with ill-will/ulterior motive – Cash deposited in bank – Sale consideration – Income from undisclosed source [S.69]

The assessee sold agricultural land for Rs. 1.20 crore and deposited the cash proceeds in his bank account. He filed a return in which the transaction was disclosed and claimed to be not chargeable to tax. However, as the sale deed showed the transaction at Rs. 22 lakh and because the purchasers claimed that the sale value was only Rs. 22 lakh, the Assessing Officer treated the difference of Rs. 97.80 lakhs as income from undisclosed sources. The Assessing Officer admitted that the evidence produced by the assessee to show that the land was in fact worth Rs. 1.20 crore and that he had in fact received the said sum from the purchasers *prima facie* supported the version of the assessee though he still made the addition. The CIT(A) upheld the stand of the Assessing Officer though the Tribunal reversed it on the ground that the evidence on record showed that the assessee had offered the entire sale proceeds and that the purchasers had sought to undervalue the land. On appeal by the department to the High Court HELD dismissing the appeal;

The assessee is an honest citizen who deposited the entire amount in the bank and voluntarily filed return. He also made a complaint to the registering authority that the sale deed has been registered at a value much below the amount actually received. The other evidence produced by the assessee was more than sufficient to discharge the burden which the Assessing Officer had unreasonably placed on the assessee. The Assessing Officer did not act in a *bona fide* manner. He discarded the overwhelming evidence led by the assessee without giving any reasons at all. The assessment was framed only on the ipse dixit of the Assessing Officer which gives us reason to believe that he had exceeded his authority with some ill will or with ulterior motive. The CBDT should cause an enquiry into the conduct and motives of the Assessing Officer in framing the assessment and raising demand of income tax against the assessee.

CIT v. Intezar Ali (2013) 38 taxmann.com 103 / (2014) 220 Taxman 75 (Mag.) / 99 DTR 201 (All.)(HC)

S.143(3) : Assessment – Opportunity of being heard – Personal hearing – Order set aside

Where the assessee desired matter in appeal to be decided through personal hearing, there was no need or necessity to submit any written submissions. A notice was issued to the assessee specifying his right to dispense with personal hearing by filing written submissions. Later, an order was passed by revenue without issuing any notice of hearing to assessee, contending that assessee had not filed any written submissions. Held the impugned order passed without giving an effective opportunity of hearing to assessee was to be set aside.

O.G. Sunil v. DCIT (2013) 215 Taxman 73 (Mag.)(Ker.)(HC)

S.143(3) : Assessment – Survey – Unaccounted stock – Addition to income [Ss. 69, 145]

In respect of unaccounted stock of iron ore, assessee claimed that stock was taken on loan and returned in the same year to sister-concern. However, no proof regarding actual movement of stock was made available, nor was any bill for loan of cargo was raised by assessee during year. Since the assessee was not in a position to establish or to give satisfactory reason in respect of unaccounted stock of ore, addition to income was justified. (AY.2005-06, 2006-07)

D.B. Bandodkar & Sons (P.) Ltd. v. ACIT (2013) 215 Taxman 77(Mag.) / 90 DTR 125 (Bom.)(HC)

S.143(3) : Assessment – Additions to income – Suppression of sale price – Additions cannot be merely on perceived general market conditions or notorious practice in trade circles – There is no provision under the Act [S. 50C, 92BA]

The assessee constructed shopping malls and sold them. The Assessing Officer noticed that there were no registered sale documents; there was variation in sale prices of shops in same floor and sale of shops were made to sister concerns. He, therefore, held that the sale price had been suppressed to book losses. He disallowed the loss. The Commissioner (Appeals) and the Tribunal set aside the said order as there was no evidence showing suppression of sale price and the Assessing Officer had relied only on perceived general market conditions to make additions. Held the Assessing Officer could not make additions to sale price or profits, without evidence to show either that sales were sham transactions or that market prices were in fact, paid by purchasers; no addition could be made based merely on perceived general market conditions or notorious practices in trade circles. There is no other provision in the Act permitting the Assessing Officer to enhance the profits or the sale price except section 50C and section 92BA of the Income-tax Act,1961 and those sections were not applicable to the assessee.(AY. 2006-07, 2007-08)

CIT v. Discovery Estates (P) Ltd. (2013) 356 ITR 159 / 215 Taxman 74 (Mag.) / 88 DTR 298 (Delhi)(HC)

CIT v. Discovery Holdings Pvt. Ltd. (2013) 356 ITR 159 / 215 Taxman 74 (Mag.) / 88 DTR 298 (Delhi)(HC)

S.143(3) : Assessment – Valuation by sales tax authorities – Binding nature [S.132]

Unless and until competent authority under Sales Tax Act differs or varies with closing stock of assessee, return accepted by said authority is binding on Income-tax authorities and Assessing Officer, in such a case, has no power to scrutinise return submitted by assessee. (AY. 1998-99 to 2002-03)

CIT v. Sakuntala Devi Khetan (Smt.) (2013) 215 Taxman 18 (Mag.) / 352 ITR 484 (Mad.)(HC)

S.143(3) : Assessment difference in balance – Reconciliation – Additions was deleted

The Tribunal after considering the explanation of assessee and finding of the Commissioner (Appeals) recorded the reconciliation statement substantiated by necessary evidence which had been furnished by assessee. Remand report of the Assessing Officer was also called for and in the absence of any difference in details and reconciliation statement furnished by assessee, the Commissioner

(Appeals) deleted addition and same came to be confirmed by Tribunal. Held, the orders of lower authorities needed no interference.
CIT v. Shree Rama Multi Tech Ltd. (2013) 214 Taxman 129 (Mag.)(Guj.)(HC)

S.143(3) : Assessment – Balance of creditors – Unverified creditors of opening balance
The Assessing Officer noticed that opening and closing balance of some of creditors were same and no business transactions had taken place during year in question. He, accordingly, added back said amount to income as unverified creditors. The CIT(A) and the Tribunal held that merely because assessee had no transactions with some creditors and their opening and closing balances remained same, could not be a ground to add said amount. Held that, the order of the Tribunal could not be interfered with.(AY. 2005-06)
CIT v. Superior Crafts (2013) 353 ITR 101 / 82 DTR 209 (Delhi)(HC)

S.143(3) : Assessment – Valuation of stock – Statement of third parties – Valuation adopted by Sales Tax authorities has to be accepted additions cannot be made by merely relying on the basis of statement of third parties
Unless and until the competent authority under the Sales Tax Act differs or varies with the closing stock of the assessee, the return accepted by the Commercial Tax Department is binding on the Income-tax authorities and the Assessing Officer has no power to scrutinise the return submitted by the assessee to the Commercial Tax Department and accepted by the authorities. The Assessing Officer has no jurisdiction to go beyond the value of the closing stock declared by the assessee and accepted by the Commercial Tax Department.
Since the assessee had placed sufficient materials before the AO in respect of the relevant assessment years which had been accepted by the authorities, the Department could not have made the addition merely on the basis of the statement of third parties (AYs. 1998-99 to 2002-03)
CIT v. Sakuntala Devi Khetan (Smt.) (2013) 352 ITR 484 (Mad.)(HC)

S.143(3) : Assessment – Undisclosed income – Average rate of surgery based upon number of surgeries performed by assessee in one year and income earned therefrom – Once it was admitted earning of average rate of surgery earned, assessee can not dispute the flat rate applied by Tribunal [S.260A]
The assessee, a surgeon, had admitted to 247 undisclosed surgeries. The statement of the assessee was that Rs.6,000 per surgery should be applied to determine the undisclosed income, whereas the Tribunal had reduced the rate of the addition at Rs. 10,147 applied by the Assessing Officer to Rs.8,000 per surgery. Once the assessee had himself stated before the Tribunal that the average rate of the surgery be reduced to ` 6,000 per surgery, it was not open to the assessee to dispute that the flat rate applied by the Tribunal was arbitrary. No substantial question of law. (AY. 2006-07)
Gurvinder Singh Randhawa (Dr.) v. CIT (2013) 352 ITR 616 / 84 DTR 41 / 217 Taxman 79 (Mag.)(P&H)(HC)

S.143(3) : Assessment – Scrutiny guidelines – CBDT – Income-tax department must make return scrutiny guidelines public
The Petitioner, an advocate, filed an application with the CBDT under s. 6 of the Right to Information Act, 2005 seeking information pertaining to cases excluded from scrutiny, where the disclosure was made during survey. He also sought information *qua* the scrutiny guidelines for the financial year 2009-10. The Department opposed the disclosure of the scrutiny guidelines on the ground that it would prejudice the "economic interest" of the country and enable assessees to "configure" their return to avoid scrutiny. The refusal to supply the information was upheld by the CIC. The Petitioner filed a Writ Petition to challenge the order of the CIC. HELD by the High Court reversing the CIC: The Income-tax department has issued instructions with regard to procedure for selection of cases for scrutiny from time to time both *qua* corporate assessees as well as non-corporate assessees. These

instructions give detailed procedure on the basis on which the concerned officers are required to make a random selection of assessees whose cases are taken up for scrutiny. These instructions are in public domain even prior to the enactment of the RTI Act. Most of these instructions have been issued in the middle of the financial year and not in the beginning and they are applied to pending returns as well. Therefore, the argument, that assessees would configure their returns in the manner, which would impact the economic interest of the country, cannot be accepted. The expression “economic interest” takes within its sweep, matters which operate at a macro level and not at an individual, i.e., micro level. By no stretch of imagination can scrutiny guidelines impact the economic interest of the country. These guidelines are issued to prevent harassment to assessees generally. It is not as if, *de hors* the scrutiny guidelines, the I.T. Department cannot take up a case for scrutiny, if otherwise, invested with jurisdiction, in that behalf. This is information which has always been in public realm, and therefore, there is no reason why the department should keep it away from the public at large. The department shall supply the relevant scrutiny guidelines to the petitioner for the financial year 2009-10 and hereafter upload the guidelines with regard to scrutiny on their website.
Joginder Pal Gulati v. OSD – CPIO (Delhi)(HC) www.itatonline.org

S.143(3) : Assessment – Undisclosed income – Gross receipt – Only “Profit element” embedded in gross receipts added as “undisclosed income” should be charged to tax if the same are in respect of business transaction
AO made addition of the gross receipts as “Undisclosed Income “ The Hon’ble ITAT held that only “Profit element” embedded in such gross receipts should be charged to tax since the said receipts were in respect of business transactions. Hon’ble High Court dismissed the tax appeal preferred by the revenue since it didn’t give rise to any substantial question of law. (T. A. No 2280 of 2009, dt, 17-7-2012) (2012)/ (T.A. No. 323 / 325 of 2000, dt 16-6-12)
Jinendra S. Jain (2012) ACAJ-November-P. 399) (Guj.)(HC)
Panna Corporation (2012) ACAJ-November-P. 399) (Guj.)(HC)

S.143(3) : Assessment – Duties of Assessing Officer – Mention of wrong section –Exemption cannot be denied – Matter set aside to decide the applicability of section 54F [S.54F, 124]
The assessee sold a shop and worked out the capital gains. He invested the sale consideration in construction of residential house and claimed exemption under sections mentioning sections 54B, 54D and 54D in the return. The Assessing Officer denied exemption claimed on ground that assessee had mentioned wrong sections while claiming exemption. Held where due to ignorance wrong section had been mentioned by assessee in return. On appeal the Tribunal held that the Assessing Officer was required to advise assessee about correct claim and also to assess tax legitimately. Tribunal referred the Circular no 14.(XL-35), dated 11-4-1955 and letter No.F.81 /27/65–IT(B) dated 18-5-1965) and directed the Assessing Officer to allow the claim under section 54F after providing due opportunity of hearing. (AY. 2005-06)
Paramjeet Singh Chhabra v. ITO (2013) 59 SOT 165 (URO)(Indore)(Trib.)

S.143(3) : Assessment – AIR information – Addition to Income – Reconciliation filed hence addition held to be not justified
Assessee received interest on FDR with HDFC Bank and bank had deducted TDS on interest. A.O. made addition of interest on ground that assessee had failed to file reconciliation for interest receipt as per AIR information. Commissioner (Appeals) after considering reconciliation filed by assessee found that both amounts of TDS deducted on interest as per AIR information and TDS deducted by bank tallied. On the basis of finding, Commissioner (Appeals) deleted addition. In absence of any contrary material, order of Commissioner (Appeals) was to be confirmed. (AY. 2009-10)
Dy. CIT v. Subhash Chand Agrawal (2013) 58 SOT 122 (URO)(All.)(Trib.)

S.143(3) : Assessment – Signature of Assessing Officer – Original order – If copy of assessment order does not bear the signature the order would not vitiate the assessment [S.156]
The assessee, after examining the assessment record, had confirmed that the Assessing Officer had signed the original assessment order. Further, the "notice of demand" served upon the assessee bore the signature of the Assessing Officer. Hence, the absence of his signature in the copy of the assessment order would not vitiate the assessment. (AY. 2007-08)
Mampilly Antony (Dr.) v. DDIT(IT) (2013) 25 ITR 91 / 144 ITD 665 (Cochin)(Trib.)

S.143(3) : Assessment – Natural justice – Income-tax authorities must verify the records and decide the allowability [S.37(1)]
If records are available with the Department and the assessee points towards it, the authorities must verify that evidence and decide allowability. (AYs. 2002-03, 2003-04, 2005-06, 2007-08)
Russian Technology Centre P. Ltd. v. DCIT (2013) 145 ITD 88 / 25 ITR 521 / 155 TTJ 316 / 89 DTR 267 (Delhi)(Trib.)

S.143(3) : Assessment – Method of accounting – Chargeability of income – Interpretation – Principles of taxation – Guidelines of statutory authorities do not have the force of an Act of Parliament – No accounting principle determinative in computation of total income under the Act [Ss.4, 145]
Taxation principles are enshrined in the Legislature. Power to legislate lies with Parliament. Accounting Standards or Guidance Note or Guidelines, by whatever name called, issued by any autonomous or even statutory bodies including the Institute of Chartered Accountants of India, or for that matter, the SEBI are meant only to prescribe the way in which the transactions should be recorded in books or reflected in the annual accounts. These guidelines do not have the force of an Act of Parliament.
Biocon Ltd. v. DCIT (LTU) (2013) 25 ITR 602 / 144 ITD 21 / 155 TTJ 649 / 90 DTR 289 (SB)(Bang.)(Trib.)

S.143(3) : Assessment – Remand proceedings – Jurisdiction – Subject matter –Commissioner (Appeals) has no power of enhancement in respect of issue which the Assessing Officer had no jurisdiction [S. 80HHC, 251]
Where an issue was neither considered in original assessment nor was it subject matter of remand proceedings, the Assessing officer travelled beyond his jurisdiction and scope of enquiry by making addition on such issue in remand proceedings, therefore Commissioner (Appeals) also exceeded jurisdiction by issuing notice of enhancement on issue in which Assessing Officer himself had no jurisdiction. (AY. 1998-99)
Aventis Pharma Ltd. v. DCIT (2013) 57 SOT 102 (URO)(Mum.)(Trib.)

S.143(3) : Assessment – CBDT – Guidelines – Assessment void if case picked up contrary to CBDT's Scrutiny Guidelines
For AY 2006-07, the assessee filed a ROI declaring income of Rs. 3.97 crore. The case was selected for scrutiny under clause 2(v)(b) of the Scrutiny Guidelines issued by the CBDT. The said clause of the Scrutiny Guidelines provided that a case had to be selected for compulsory scrutiny if an addition/ disallowance of Rs. 5 lacs or more was pending in appeal before the CIT(A) and such identical issue also originated in the year under consideration. The assessee claimed that as this condition stipulated in the Scrutiny Guidelines was not satisfied, the AO had no jurisdiction to select the case for scrutiny. The AO & CIT(A) rejected the claim. On appeal by the assessee to the Tribunal, HELD allowing the appeal:
The CBDT's instructions for assumption of jurisdiction for selection of cases of corporate assessees for scrutiny and assessment are issued u/s 119 and are binding on the AO and have to be followed by him in letter and spirit. The burden lies on the authority assuming jurisdiction to show and establish

that such instructions have duly been complied and satisfied in letter and spirit. On facts, as there was no disallowance of Rs. 5 lakhs or more in the earlier years and as no identical issue had arisen in the present year, the notice issued u/s 143(2) was not in terms of the CBDT's Scrutiny Guidelines and consequently the assumption of jurisdiction was illegal and the entire assessment proceedings were invalid *(CIT v. Nayana P. Dedhia (Smt.)(2004) 270 ITR 572 (AP) followed). (AY.2006-07)*
Crystal Phosphates Ltd. v. ACIT (2013) 33 taxmann.com 116 (Delhi)(Trib.) www.itatonline.org.

S.143(3) : Assessment – Method of accounting – Valuation of closing stock – Dispute before Civil court – Addition on account of under valuation of closing stock. [S.145]
Land purchased by assessee in dispute before civil court. Dispute having adverse impact on market value. No change in method of valuation. Department accepting value as value of opening stock in subsequent year. Additions made to value not proper. (AY. 2006-07)
ACIT v. Satish Estate P. Ltd. (2013) 22 ITR 349/ 58 SOT 129 (URO)(Chand.)(Trib.)

S.143(3) : Assessment – Cross examination – Opportunity must be given.
If the accountant of ST stated that he was accepting sums of money without recording them in the books of account, addition could be made in the hands of ST and not in the hands of the assessee. No material had been brought on record to suggest that the amount of Rs. 73,000 was paid by the assessee to ST without recording it in the books of account. It is a settled law that third party evidence cannot be the base of addition unless cross-examination is allowed. The assessee could not be condemned without a hearing. In the absence of any such evidence/cross-examination, no addition could be made. (AY. 2005-06 to 2007-08)
Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi)(Trib.)

S.143(3) : Assessment – Search and seizure – Undisclosed income – Entries in papers
Entries in papers seized from person making purchases for assessee. No material to show difference between sales recorded there and according to books of account, no addition is warranted. (A.Y. 2005-06 to 2007-08)
Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi)(Trib.)

S.143(3) : Assessment – Addition to income – Matter remanded
Where there is categorical findings by assessing authority in respect profit rate for preceding year which differed from what assessee claimed, Commissioner (Appeals) should have called for assessee's assessment records for preceding year as well as current year, and issued definite findings after hearing both parties, matter remanded. (AY.2001-02)
ACIT v. Bhiwadi Cylinders (P.) Ltd. (2013) 55 SOT 32 (URO)(JP)(Trib.)

S.143(3) : Assessment – Additions to income – Charging of differential interest was not justified
Assessee kept certain deposits received from clients abroad in NOSTRO account by way of Foreign Currency Non-Resident (Bank) Deposit. Such account was maintained by head office of assessee which was used by head office for its global operations. Assessing Officer noted that interest paid by assessee for above deposits was higher than interest earned by assessee from its domestic deposits held with head office. Assessing Officer held such differential interest to be not deductible and charged same to tax. Tribunal held that since decision as to when above foreign deposits were to be brought into India was with assessee on consideration of factors like foreign exchange rate prevailing at time of receipt of deposits, and further since such deposits were not with head office but were in NOSTRO account, action of Assessing Officer charging differential interest to tax could not be sustained. (AY.1998-99)
Dy. CIT v. Banque Indosuez (Known as Credit Agricole Indosuez) (2012) 19 ITR 463 / (2013) 55 SOT 38 (Mum.)(Trib.)

S.143(3) : Assessment – Addition – Understatement of income addition was deleted

It was noted from audit of CAG that assessee, State Electricity Distribution Company did not recognise unbilled revenue, i.e., revenue from energy supplied but bills not issued till March in respective years. Tribunal held that findings that assessee had been following specified method of accounting consistently which was in agreement with changed accounting policies and principles under ESSAR, 1985, were to be upheld, hence no addition could be made on account of understatement of Income. In favour of assessee. (AY.2007-08, 2008-09)

Maharashtra State Electricity Distribution Co. Ltd. v. ACIT (2013) 55 SOT 84 (URO) (Mum.)(Trib.)

S.143(3) : Assessment – Loose papers – Addition to total income of certain amounts as sale consideration – No direct evidence of receiving money – Loose papers merely in nature of an offer which was made to assessee – Addition not sustainable.

Assessee sold certain land at a consideration of Rs.10.62 crores. In course of search, Assessing Officer recovered certain documents which showed two figures of Rs. 22.61 crores and Rs.14.75 crores. Assessing Officer opined that those figures related to sale of land. Therefore, in absence of any direct evidence about receiving on money, it was to be concluded that such loose papers were merely in nature of an offer which was made to assessee. Hence, addition made by Assessing Officer on basis of those loose papers was not sustainable. (AY.2006-07 to 2009-10)

Krupeshbhai N. Patel v. Dy. CIT (2013) 140 ITD 176 (Ahd.)(Trib.)

S.143(3) : Assessment – Income – Computation – Interest – Broken period

Interest paid in respect of broken period to be set off against interest received in respect of broken period. (AY.1997-98)

ADIT (IT) v. Credit Agricole Indosuez (2013) 21 ITR 345 / 58 SOT 97 (Mum.)(Trib.)

S.143(3) : Assessment – Claim made in the courses of assessment proceedings – Fresh claim before Assessing Officer held to be allowable.

Assessee has not made claim of bad debt in the return of income but made same during the course of assessment proceedings. Assessing Officer disallowed the claim relying on *Goetz (India) Ltd. v. CIT (2006) 284 ITR 323/ 157 Taxman 1* and similarly the claim was disallowed by CIT(A). On appeal in Tribunal, Tribunal set aside on factual aspect but as far as fresh claim of bad debts was concerned, Tribunal held that the judgment of Supreme Court in the case of Goetz India Ltd. was regarding the claim to be made before the Assessing Officer. The Supreme Court in the said case has clarified that the said judgment would not apply to the appellate authorities which could entertain the claim as their appellate powers. Facts relating to the claim were already on record with the Assessing Officer therefore the claim could be admitted by the Assessing Officer. (AY.2007-08)

Givaudan Flavours (India) (P) Ltd. v. Dy. CIT (2013) 56 SOT 105 (URO) / 22 ITR 732 (Mum.)(Trib.)

S.143(3) : Assessment – Claim not made in the return – Commissioner (Appeals) ought to have considered the claim on merits – Matter set aside [S.35(2AB), 28(i), 80IA, 250(5) 254(1)]

The Tribunal held that though the claim was not made in the return or revised return, the Commissioner (Appeals) ought to have considered the claim on merits. The matter was set a side. (AY.2006-07)

Apollo Tyres Ltd v. Dy. CIT (2013) 90 DTR 35 / 155 TTJ 470 / 60 SOT 1 (Cochin)(Trib.)

S.143(3) : Assessment – Scope of remand – AO should restrict the disallowance only to the extent of direction of Tribunal. [S.254(1)]

Tribunal has remitted the matter to the file of AO to examine the admissibility of the expenditure of Rs.13,94,779 which was originally disallowed by the AO. In remand proceedings AO disallowed the entire expenditure of Rs.43,88,823. Order of AO was confirmed in appeal. On appeal the Tribunal held that AO should have confined the

disallowance only to the extent of expenditure of Rs.13,94,779, while completing the assessment as per the direction of the Tribunal. (AY.1998-99)
Superfil Products Ltd. v. ACIT (2013) 141 ITD 567 / 157 TTJ 343 (Chennai)(Trib.)

S.144 : Best judgment assessment – Alternative remedy – Writ petition is not maintainable. [Ss.147, 148, 271(1)(c), Constitution of India Art. 226]
The Assessing Officer initiated proceedings under sections 147 and 148. The Assessee did not comply with the notices issued. The Assessment was completed under section 144 and penalty proceedings were initiated under section 271(1)(c). Instead of filing appeal before the Commissioner (Appeals) the assessee approached High Court under Article 226 of the Constitution of India. Writ Court quashed the assessment order on merits. Revenue filed an appeal before the Hon'ble Supreme Court questioning the correctness of the judgment of High Court. Allowing the appeal Hon'ble Supreme Court held that the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. (AY.1995-96, 1996-97)
CIT v. Chhabil Dass Agarwal (2013) 357 ITR 357 / 217 Taxman 143 / 261 CTR 113 / 91 DTR 193 (SC)

S.144 : Best judgment assessment – Separate addition of sundry creditors cannot be made [Ss. 68, 145]
Where best judgment assessment is made, there is no question of making addition on ground of sundry creditors. (AY. 1997-98)
CIT v. Modern Rubber Industries (2013) 218 Taxman 70 (Mag.)(All.)(HC)

S.144 : Best judgment assessment – Defective return – Without serving notice under section 143(2) or 148, best judgment assessment was held to be invalid [Ss.139(2), 148, 144]
Prior to 1-4-1989, when the assessee filed a defective return, and did not rectify the defects which were pointed out by the Income-tax Officer, the Assessing Officer was bound to treat the return as invalid and take further proceedings on the footing that the assessee had failed to furnish the return. The assessing authority could not have proceeded to make ex parte assessment under section 144 without serving notice under section 139(2) or, as the case may be, under section 148. The order of best judgment assessment was not valid. (AY.1986-87)
CIT v. Bake Food Products P. Ltd. (2013) 356 ITR 690 / 259 CTR 136 / 215 Taxman 68 (AP)(HC)

S.144 : Best judgment assessment – Reduction in net profit rate during best judgment assessment acceptable if rate is not arbitrary or perverse
The assessee was a civil contractor working primarily for the government department. During the course of best judgment assessment, the AO rejected the books of account of the assessee and framed the assessment by applying net profit rate of 13%. The CIT(A) reduced the rate of net profit to 8% which was confirmed by the Tribunal.
On appeal by the department, the High Court did not find that applying 8% as net profit rate is so arbitrary or perverse and therefore dismissing the appeal declined to interfere in the facts of the present case (AY. 2006-07)
CIT v. Vidya Sagar Saini (2013) 217 Taxman 78 (P&H)(HC)

S.144 : Best judgment assessment – Evaluation of evidence – Human probability and surrounding circumstances, best judgment held to be justified [S.142(1)]
The Assessing Officer made a best judgment assessment under section 144, as the assessee failed to avail of the various opportunities and did not reply to the notice under section 142(1). The assessee

filed additional evidence which was not found genuine. The Commissioner (Appeals) evaluated the evidence on the basis of human probability and surrounding circumstances. Held, that the order of the Commissioner (Appeals) could not be termed incorrect. (AY.1994-95)
Bhairavnath Agrofin Pvt. Ltd. v. CIT (2013) 354 ITR 276 / 85 DTR 403 (Raj.)(HC)

S.144 : Best judgment assessment – Rectification of mistake – Disallowance of interest paid on capital account and remuneration to partners – Opportunity of hearing –Contentions not raised before appellate authority cannot be raised for first time before High Court. [Ss.143(3), 143(2),154 – Constitution of India, Art. 226]
The assessee-firm consisted of four partners engaged in civil and electrical contract works. On a writ petition contending that for the assessment year 1995-96 its taxable income was determined at ` 35,930 and the assessment order was rectified under section 154 of the Act, and disallowances were made in respect of interest paid by them on capital deposit and remuneration paid to the partners and subsequently without any notice the assessment was completed under section 144 determining the taxable income at Rs.1,36,500. Held, dismissing the petition, that in so far as the absence of notices under section 143(2) and the proviso to section 144(1) were concerned, a reading of the order passed by the revisional authority showed that such a contention was never urged by the assessee before the revisional authority. Similarly the inapplicability of section 144 for want of the circumstances specified in sections 144(1)(a) to (c) was also not urged before the revisional authority. A contention which was not urged before the statutory authorities and which the authority had no occasion to deal with, cannot be allowed to be raised for the first time before the High Court. Therefore, these contentions could not be urged before the court for the first time. (AY.1995-96)
P.P.Abdul Khader and Co. v. CIT (2013) 351 ITR 17 / 83 DTR 41 / 215 Taxman 71 (Mag.)(Ker.)(HC)

S.144 : Best judgment assessment – Civil contract work – Income estimated at 6% of gross receipt [Ss.44AD, 145]
In view of non-maintenance of proper books of account by assessee-contractor, revenue authorities estimated its net income at 8 per cent of gross receipts. It was found that assessee made purchases more than 80 per cent which were billed and were forming part of gross receipts from contractees, remaining amount could not fetch 8 per cent as per provisions of section 44AD when assessee rendered civil contract work without material. It was also not case of assessee to make profit of 8 per cent on material cost and in this view of matter, it would be reasonable to estimate income on gross receipts at rate of 6 per cent. (AY.2007-08)
Girish Chandra Nayak v. ITO (2013) 140 ITD 143 (Cuttack)(Trib.)

S.144 : Best judgment assessment – Civil contract work – Income estimated at 7% of gross receipt [S.44AD, 145]
Assessing Officer estimated assessee's income at 8 per cent of gross receipts. He made additions on account of disallowance of sundry creditors which had increased not in proportion to increase in material cost thereby indicating that assessee had raised bills on contractees when material cost was still to be borne by assessee. Tribunal held that estimation of 8 per cent after deleting additions and disallowance was not proper and 7 per cent profit on gross receipts would be reasonable. [AY. 2008-09]
Girish Chandra Nayak v. ITO (2013) 140 ITD 143 (Cuttack)(Trib.)

S.144C : Reference to dispute resolution panel – Alternative remedy – Writ – Transfer pricing – Arm's length price [S.92CA, Constitution of India, Art. 226]
The AO made reference to the TPO and following his determination of the arm's length price and the AO issued the draft assessment order. The assessee raised objection before the Dispute Resolution Panel. The Panel determined the arm's length price and the AO passed the final assessment order.

The Assessee challenged the order of Panel by Writ petition. Dismissing the writ petition the court held that the assessee has the remedy of an appeal hence the Writ is not maintainable.
Lionbridge Technologies Pvt. Ltd. v. Dy. CIT (2013) 358 ITR 599 (Bom.)(HC)

S.144C : Reference to dispute resolution panel – Draft assessment order – Denial of deduction under section 80-IA – Writ petition – Alternative remedy – Matter remanded [S. 80IA ,Article 226,]

The assessee claimed deduction under section 80-IA. In scrutiny assessment, though the assessee submitted that there was no inter-unit transfer, but it was found that machinery was transferred to one of its units. Draft assessment order was passed making some additions. Thereafter, final assessment order was passed which completely denied benefit of deduction though it was allowed in principal in draft assessment order. The assessee in a writ petition contended that once a draft order was made and served upon the assessee, the Assessing Officer had no jurisdiction to make any additions thereto and that by passing the impugned assessment order, the assessee had been denied an opportunity of availing the provisions of section 144C with respect to the additions that were not made in the draft order. The Court held that although this writ petition is maintainable, but it is viewed that the petitioner ought to pursue its alternate remedy which it had already availed of by filing an appeal before the Commissioner (Appeals), albeit without prejudice to this petition. Therefore, no opinion was expressed on the merits of the matter. By not entertaining this writ petition, it is not suggested that assessee's submissions are without substance. These indeed are important issues which will undoubtedly require a decision of the Court at some stage in a given matter or even in the present case at another stage in appropriate proceedings. They certainly are points and aspects that require serious consideration by the authorities and this Court. The Court held that despite the same, jurisdiction under article 226 is not exercised for this matter involves several points, some of which require a detailed consideration on disputed questions of fact including as to whether the petitioner had made false statements as indicated earlier. It would serve no purpose and would indeed be cumbersome to have these issues decided in different proceedings. In the circumstances, the writ petition is dismissed only on the ground that this is not a fit case to exercise jurisdiction under Article 226. Needless to add that the rights and contentions of the parties are kept open in any proceedings that have been adopted and that may be adopted hereafter. Matter remanded.
Piramal Healthcare Ltd. v. Addl. CIT (2013) 213 Taxman 27 (Mag.)(Bom.)(HC)

S.144C : Reference to dispute resolution panel – Direction of DRP – Binding on AO

Direction of Dispute Resolution Panel is binding on Assessing Officer. Matter was remanded to pass fresh assessment order in accordance with directions of Dispute Resolution Panel. (AY. 2007-08)
Diamond Management and Technology Consultants Ltd. v. ADIT (IT) (2013) 28 ITR 359 (Mum.)(Trib.)

S.144C : Reference to dispute resolution panel – Draft assessment order – Objections before DRP can be filed by agent or assessee. [S.140, Form 35A, Income Tax (Dispute Resolution Panel) Rules, 2009, R.4]

Assessee entered into international transaction with associate enterprises. A reference was made to TPO and draft assessment order was passed with intimation to assessee to file objections. Assessee filed application in Form 35A. DRP rejected objections on ground that Form 35A, appeal and statement have not been not been signed by MD or director relying on s. 140 and appeal was dismissed in limine. AO passed assessment order against which appeal was preferred before CIT(A). CIT(A) dismissed the appeal, as according to him AO had passed order pursuant to DRP's directions.
Held, objections against the draft order u/s. 144C can be filed in person or through his agent within the specified period in Form 35A under Rule Under rule 4 of the Income-tax (Dispute Resolution Panel) Rules, 2009. — Under these Rules it is not prescribed that the objection should be filed by assessee in person or in case of company, by the MD, Director, Chartered Accountant or any other

person. Reliance placed by the DRP on s. 140 in case of Form No.35A was without jurisdiction. (AY. 2007-08)
Nomura Services India (P) Ltd. v. ITO (2012) 20 ITR 645 / (2013) 81 DTR 20 (Mum.)(Trib.)

S.144C : Reference to dispute resolution panel – Transfer pricing – Arm's length price – Non-speaking order
In support of its comparables the assessee made various assertions and facts which had not been dealt with by the Dispute Resolution Panel as required by it under section 144C. Accordingly, the order of the Dispute Resolution Panel was to be set aside and the matter was to be restored to the file of the Dispute Resolution Panel to pass a speaking order in accordance with law.(AY. 2006-07)
Dorling Kindersley India P. Ltd. v. ITO (2013) 24 ITR 686 (Delhi)(Trib.)

S.144C : Reference to dispute resolution panel – Bias or conflict of interest – Jurisdiction Commissioner or Director of Income-tax should not be on Dispute Panel Resolution
Whether jurisdictional Commissioner or director should not be on Dispute Resolution Panel, to avoid possible bias or conflict of interest? The Court held the possible bias on the part of the jurisdictional Commissioner cannot be rejected outright, as the jurisdictional Commissioner is part of the DRP which rejected assessee objections. Various Benches of ITAT, following the principles laid down by the Hon'ble High Court of Uttarakhand in the case of Hyundai Heavy Industries Ltd. (supra), is setting aside the orders of the DRP with a direction to reconstitute the DRP without the jurisdictional Commissioner and pass fresh orders. (AY. 2008-09)
Ingram Micro (India) Experts (P) Ltd. v. Dy. CIT (2013) 56 SOT 273 (Mum.)(Trib.)

S.144C : Reference to dispute resolution panel – Non-speaking order – Objections of assessee
Where the Dispute Resolution Panel upheld additions made by the Assessing Officer without discussing any objections of assessee, same was to be set aside for being a non-speaking order and matter was to be remanded for fresh adjudication. (AY. 2006-07)
Glaxo Smithkine Asia (P) Ltd. v. ACIT (2013) 57 SOT 86 (URO)(Delhi)(Trib.)

S.144C : Reference to dispute resolution panel – Order of Dispute Resolution Panel should give reasons – Non-speaking order is not valid
On an appeal on the ground that the Dispute Resolution Panel's order was against the judicial principles which required judicial orders to be speaking order. Held, that the draft assessment order no where suggested that the Dispute Resolution Panel had considered the facts and circumstances of the case, the nature of dispute and what was the defense. The order was of a few lines and did not disclose application of mind by the adjudicators. It was a non-speaking order. The Dispute Resolution Panel had not applied its mind. The assessee's objection had not been considered by the Dispute Resolution Panel. The order of the Dispute Resolution Panel was not valid. *Roadmaster Industries of India P. Ltd. v. Inspecting Assistant Commissioner of Income-tax [2008] 303 ITR 138 (P&H)* followed. (AY.2006-07)
Panasonic Consumer India P. Ltd. v. ACIT (2012) 54 SOT 34 (URO) / (2013) 22 ITR 390 (Delhi)(Trib.)

S.144C : Reference to dispute resolution panel – Consequential order of Assessing Officer – Directed to pass consequential order
The draft order was passed by the Assessing Officer. The assessee filed objection against the draft order before the DRP. Subsequently, on basis of circular dated 20-1-2010, the assessee sought to withdraw objection filed so as to file an appeal before the Commissioner (Appeals). The Assessee also informed the Assessing Officer about that withdrawal of objection. The Assessing Officer passed assessment order under section 144C(3). On the other hand, the DRP sent letter to the assessee fixing hearing. The assessee informed DRP about the Assessing Officer's order In view of the DRP's

direction for hearing, the Commissioner (Appeals) dismissed the appeal filed against order by the Assessing Officer. The DRP ultimately passed order accepting the request of the assessee. Subsequently, the Assessing Officer passed order under section 144C(13) which was identical to his earlier order under section 144C(3) which the assessee challenged. On appeal Tribunal held that, Where DRP after taking note of fact that assessee desired to exercise option to file appeal before Commissioner (Appeals) against assessment order, accepted request of assessee for withdrawal of objection raised, no direction per se could be said to have been passed by DRP on merit of dispute so as to enable Assessing Officer to pass an assessment order on basis of DRP'S order. Appeal of assessee was allowed. ((AY. 2006-07)
Bank of America NA v. ADIT (2013)55 SOT 30 (URO)(Mum.)(Trib.)

S.144C : Reference to dispute resolution panel – Transfer pricing – Non Speaking Order – Order violation of provisions – Set aside
Where DRP confirmed addition made by Assessing Officer without passing a speaking order, said order being in violation of provisions of section 144C, was to be set aside. Matter was remanded back to decide both on TP and non TP issues. (AY.2006-07)
Ford India (P.) Ltd. v. Dy. CIT (2013) 140 ITD 171 (Chennai)(Trib.)

S.144C : Reference to dispute resolution panel – Power of enhancement – DRP is entitled to enhance by questioning the very existence of transaction after giving an effective opportunity to the assessee
The assessee entered into international transactions with its AE by way of payment of management fees, reimbursement of tender cost and payment of R&D expenses and claimed that the transactions were at ALP. The TPO & AO did not dispute that the transactions had been entered into for business purposes and determined the ALP by making adjustments. The assessee filed objections before the DRP. The DRP held that the assessee had to first show that the services had been rendered by the AE and that some tangible and direct benefit was derived by the assessee as a result of such payment and called upon the assessee to produce proof. As the assessee failed to do so, the DRP held that no tangible and direct benefit was derived by the assessee and directed that a much larger adjustment by way of disallowance of the entire amount be made. The assessee appealed to the Tribunal and claimed that the DRP could not have enhanced the assessment. HELD by the Tribunal:
S. 144C(8) empowers the DRP not only to confirm or reduce the variation proposed in the draft order to the benefit of the assessee but also to enhance it to the prejudice of the assessee. This power of enhancement which is impliedly embedded in the matter of issuing directions, due to the use of expression 'as it thinks fit' in s. 144C(5) is expressly set out in s. 144C(8). If the DRP reaches the conclusion that the TPO erred in determining the ALP correctly, warranting further adjustment, the assessee, objecting to the variation in the income due to the order of the TPO, may land in difficulty, and end up with the enhancement of variation. But, for the DRP to exercise its power there has to be some variation proposed in the draft order. The Explanation to s. 144C(8) inserted by the Finance Act, 2012 with retrospective effect from 1-4-2009 has widened the DRP's power of enhancement to all the matters arising out of the assessment proceedings irrespective of whether they were raised or not by the assessee. With this amplification of the power, even the matters n ot agitated by the assessee before the DRP can also be considered for the purposes of enhancement. Accordingly, in principle, the DRP was entitled to embark upon the question of enhancement of the TP adjustments. However, on facts as the DRP did not give reasonable opportunity to the assessee, the matter has to be remanded to it for fresh consideration. (AY. 2007-08)
Hamon Shriram Cottrell Pvt. Ltd v. ITO (2013) 155 TTJ 129 / 88 DTR 281 / (2014) 148 ITD 599 (Mum.)(Trib.)

S.145 : Method of accounting – Project wise details – Specific defects were not pointed out – Rejection of books of account was not justified [S.145(3)]

Specific defects were required to be pointed out in assessment proceedings for invoking provisos u/s 145(3) especially when assessee had not maintained project wise details to enable AO to compute correct profit. (AY. 2004-05)

CIT v. Das's Friends Builders (P.) Ltd. (2013) 219 Taxman 150 (Mag.)(All.)(HC)

S.145 : Method of accounting – Survey – Loose papers entries – Satisfactory explanation was furnished – Addition was not justified

On survey, some entries in loose papers pertaining to building construction were found which recorded some unaccounted income and expenses. All those entries were duly recorded in primary record and thereafter those loose papers entries were recorded in books of account. Further, no defect or discrepancy was found. Held, since loose papers entries were satisfactorily explained and, therefore, no addition was warranted to assessee's income. (AY. 2005-06)

CIT v. Sweta Kalyan Samiti (2013) 219 Taxman 115 (Mag.)(All.)(HC)

S.145 : Method of accounting – Quantity details were not maintained – GP rate – *Ad hoc* addition can be made

Assessee was engaged in processing as well as sale of rice and its by-products. It had declared low gross profit compared with earlier year. Quantity details were not maintained. Since the assessee had failed to provide particulars as demanded by lower authorities, ad hoc addition made to income of assessee on the basis of GP rate was held to be justified. (AY. 2008-09)

G.V. (God Vishnu) Rice Unit v. CIT (2013) 219 Taxman 358 (P&H)(HC)

S.145 : Method of accounting – Valuation of stock – Method of accounting has been accepted in earlier years – Method of accounting could not be changed

Assessee was engaged in the manufacture and sale of sugar. It was valuing stock bifurcating same as levy sugar and free sugar at cost or market price whichever is lower. In case of levy sugar, market value was lower than the cost and hence such stock was valued at market price, while free sugar was valued at cost because market price of free sugar was higher than the cost. AO rejected the method of valuation of closing stock and taking levy sugar and free sugar at same price and made certain addition. Court held that in view of the regular method adopted by assessee which had been accepted by department in earlier years, method of valuation could not be changed in relevant assessment year. (AY. 1987-88)

CIT v. The Kisan Cooperative Sugar Factory Ltd., Pilibhit (2013) 219 Taxman 362 (All.)(HC)

S.145 : Method of accounting – Fall in gross profit rate – Biri manufacturer – *Ad hoc* addition was held to be valid

Assessee was in the business of biri manufacture. There was fall of consumption of tendu patta from 17-67 percent to 17.21 percent. Huge wastage was shown of Rs.1.10 crores. AO made addition of Rs.82.46 lakhs. Since there was no sufficient explanation for fall in gross profit rate, Commissioner (Appeals) sustained *ad hoc* addition of Rs. 27.48 lakhs being 1/3 of addition made by AO. The Tribunal affirmed order of Commissioner (Appeals). Held on facts, there was no error of law in order of Tribunal. (AY.2002-03)

CIT v. Shyam Biri Works Ltd. (2013) 219 Taxman 151 (Mag.)(All.)(HC)

S.145 : Method of accounting – Estimation of Profits – Bogus purchases – Entire purchase cannot be added only profit element can be estimated [S.28(i)]

Assessee was engaged in business of trading in steel on wholesale basis. Assessing Officer having found that some of alleged suppliers of steel to assessee had not supplied steel to assessee but had only provided sale bills, held that purchases made from said parties were bogus. He, accordingly,

added entire amount of purchases to gross profit of assessee. Commissioner (Appeals) having found that assessee had indeed made purchases, though not from named parties but other parties from grey market, sustained addition to extent of 30 per cent of purchase cost as probable profit of assessee. Tribunal however, sustained addition to extent of 12.5 per cent Since purchases were not bogus but were made from parties other than those mentioned in books of account, only profit element embedded in such purchases could be added to assessee's income. Order of Tribunal was confirmed. (AY.2006-07)
CIT v. Simit P. Sheth (2013) 219 Taxman 85 (Mag.)(Guj.)(HC)

S.145 : Method of accounting – Estimated turnover – Relevant material considered – No infirmity in the order of Tribunal [S.144]
When determination of turnover and profit was based on various factors and all relevant materials had been taken into consideration while fixing turnover at Rs. 2.30 crores, there was no legal infirmity in order of Tribunal. (AY.1997-98)
CIT v. Modern Rubber Industries (2013) 218 Taxman 70 (Mag.)(All.)(HC)

S.145 : Method of accounting – Writ petition – Alternate remedy [Art. 226, Constitution of India]
In prior years, the Department had accepted the assessee's method of accounting. Closed assessments were reopened, and reassessment orders were passed, rejecting the method. On a writ petition filed by the assessee challenging the reassessment orders, held, dismissing the petition:
Admittedly, an appellate remedy is available to the assessee as the reassessment orders have been passed. Whether the mandate of s. 145 has been followed or not and whether the Revenue was right in its treatment of the accounts are matters which can be gone into by the appellate authorities. As there is an efficacious alternative remedy in the form of statutory appeals, writ petition cannot be entertained.
Kone Elevators v. ACIT (2013) 94 DTR 723 (Mad.)(HC)

S.145 : Method of accounting – Estimation of income – Unexplained investment on sale was held to be not justified [S.132(4)]
In the return of income assessee shown the gross profit rate at the rate of 4.2% from the sales of Rs. 1,67,19,652/-. The A.O. estimated sales at Rs.2,30,00,000/- and by applying gross profit rate @ 5%, the profit would come to Rs. 11,50,000/-. Since the assessee has shown profit of Rs. 7,01,187/- and had also surrendered an amount of Rs. 4,00,000/- under Section 132(4) of the Act, therefore, an amount of Rs. 48,813/- was found to be concealed income of the assessee during the year under consideration. In addition to the said amount, another Rs. 50,000/- was added to the income on the basis of probable investment made by the assessee during the year under consideration. The CIT (A) deleted the addition and reversed the finding of the A.O. The Tribunal upheld the order of the CIT (A). On appeal by the revenue the High Court affirmed the view of the Tribunal and held that no question of law on the basis of finding arises from the order of CIT (A) and the addition of was set aside. (AY.1987-88)
CIT v. Jay Kay Feeds (P.) Ltd. (2013) 217 Taxman 81 (Mag.)(P&H)(HC)

S.145 : Method of accounting – Cenvat Credit Rules, 2004. R. 2(1)
Service tax paid for testing and analysis services while carrying our trial batches prior to production is entitled to avail Cenvat Credit as testing is directly related to manufacture of final products.
CIT v. Cadila Healthcare Ltd. (2013) 259 CTR 433 / 86 DTR 337 (Guj.)(HC)

S.145 : Method of accounting – GP addition made with reference to case of another assessee not justified when assessee's past history was available

The assessee engaged in liquor business was assessed by adopting net profit rate of 18% as against declared rate of 13.54% for country liquor business and for its 'Indian Made Foreign Liquor' business was assessed by adopting net profit rate of 26% as against declared gross profit rate of 24.40% after rejecting books of account of assessee u/s.145. The profit rate was adopted by the AO by taking into account the past history of the assessee and comparable case of one 'R'. The addition was confirmed by the CIT(A) as the sale vouchers were not available but keeping in view the past history of the assessee restricted the addition made. The Tribunal deleted the entire addition.
On appeal by the department, the High Court relying on the decision of *CIT v. Jaimal Ram Kasturi & Partners [D.B. IT Appeal No. 145 of 2006]* held that relying on the case of another assessee is not a safe guide for making an addition, more particularly, when the assessee's past history was available and there was no material difference in the facts pertaining to the relevant assessment year and the past history year. (AY.1994-95).
CIT v. Ashok Behi Bharat Sethi & Party (2013) 217 Taxman 80 (Mag.)(Raj.)(HC)

S.145 : Method of accounting – Valuation of stock – Change in method – Cost or market price – Change in consequence of mandatory requirement, change is valid
The assessee had been regularly following a method of valuing its closing stock on the basis of net realisable value. However, during the period relevant to the assessment year 1997-98, the assessee changed the method of valuation of its closing stock from the net realizable value to the cost or market price, whichever was lower. As a consequence of the change in the method of valuing the closing stock, the valuation of closing stock went down by Rs. 6.17 crores. The A.O. did not accept the explanation offered by the assessee for the change in the method of valuing the closing stock, viz., that Accounting Standard (AS-2) required the closing stock to be valued at cost or market value, whichever was lower. The Tribunal held that the change in method was valid. On appeal the court held that the valuation of the closing stock on the basis of cost or net realizable value, which was lower, as done by the assessee, which was a mandatory requirement of law was correct. Whenever there is a change in the method of valuation, there is bound to be some distortion in calculating the profit in the year in which the change takes place. But if the change is brought about *bona fide* and is in accordance with the normally accepted accounting practice, it should be permitted. (AY. 1997-98)
CIT v. Modern Terry Towels Ltd. (2013) 357 ITR 750 / 90 DTR 321 (Bom.)(HC)

S.145 : Method of accounting – Valuation of stock – Unquoted equity shares–RBI guidelines – Bad debt – Bank [S. 36(1)(viia]
Valuation of unquoted equity shares as per yield to maturity method according to RBI guidelines was held to be valid. (AY. 1999-2000)
CIT v. Dhanalakshmi Bank Ltd. (2013) 357 ITR 448 (Ker.)(HC)

S.145 : Method of accounting – Valuation of inventory – Write off not proved by assessee – AO was directed to verify the figure
The only objection of the Revenue, was that the write off factor of 8.5 per cent had not been proved by the assessee. The figures extracted from the accounts showed how the assessee had arrived at the write off factor. Therefore, the Assessing Officer was to verify the figures furnished by the assessee in support of the write off factor of 8.5 per cent. and complete the assessment afresh on the limited issue. (AY. 2007-08)
Suzuki Motorcycle India P. Ltd. v. CIT (2013) 357 ITR 250 (Delhi)(HC)

S.145 : Method of accounting – Valuation – Investments held on maturity as stock in trade – Allowance of depreciation was justified [S.32]
The Tribunal was correct in allowing depreciation on investments "held on maturity" treating them as stock-in-trade. (AY. 2003-04)
CIT v. Vijaya Bank (2013) 356 ITR 578 / 219 Taxman 152 (Mag.)(Karn.)(HC)

S.145 : Method of accounting – Estimation of income at a higher rate – cannot be disputed

During the course of assessment, the AO made an addition on account of undisclosed 247 surgeries at a rate of Rs. 10,714 per surgery. The CIT(A) confirmed the addition. Before the Tribunal, the assessee had proposed that an average rate of Rs. 6,000 per surgery should be adopted but did not file any basis to establish the rate. The Tribunal confirmed the addition, but reduced the rate per surcharge to Rs. 8,000 observing that the AO had applied the average rate of surgery vis-à-vis the total receipts declared by the assessee for the year under consideration. On appeal by the assessee, the High Court dismissing the appeal held that once the assessee has himself stated before the Tribunal that the average rate of the surgery be reduced to Rs. 6000/- per surgery, then now it is not open to the appellant to dispute that that the flat rate applied by the Tribunal is arbitrary. (AY. 2006-07).

Gurvinder Singh Randhawa (Dr.) v. CIT (2013) 352 ITR 616 / 217 Taxman 79 (Mag.) (P&H)(HC)

S.145 : Method of accounting – Rejection of Books – Books can be rejected in spite of certificate from the CA

Certification of the C.A. is not a valid ground to not reject the books u/s. 145. Once the books maintained shows discrepancies as regards to consumption register for stores consumables as well as packing materials, the Assessing Officer can reject the books u/s. 145.

Rajasthan Cables & Conductors (P) Ltd. v. ACIT (2013) 91 DTR 47 (Raj.)(HC)

S.145 : Method of accounting – Valuation of stock – Deduction on actual payment – Excise duty – Modvat – Accounts – Valuation of closing stock – Amount lying credit at the end of year is allowable [S.37(1), 43B]

The assessee followed the net valuation of closing stock. Dismissing the department's appeal the Apex court held that the amount lying credited in the Modvat account at the end of the accounting year was expenditure allowable under section 37 read with section 43B of the Income-tax Act 1961. Delhi High Court decision affirmed following the judgment of Supreme court in *CIT v. Indo Nippon Chemicals Co Ltd. (2003) 261 ITR 275 (SC)*. (AY. 1995-96, 1997-98)

CIT v. Shri Ram Honda Power Equipment Ltd. (2013) 352 ITR 481 / 258 CTR 329 / 85 DTR 390 (SC)

S.145 : Method of accounting – Valuation of stock – Shown as investment – Entry in books of accounts is not deciding factor, allowability of claim depends on provision of law

Whether assessee was entitled to particular deduction or not will depend upon provisions of law relating thereto and not on regulations according to which entries are required to be made in books of account. Since assessee had consistently for more than two decades treated investment in securities as stock-in-trade and depreciation was claimed and allowed on it, deduction could not be denied under pretext that it was shown as investment in balance sheet in terms of RBI regulation. Assessee Bank can show securities held by it as investment in balance sheet and stock in trade for income-tax purposes. (AY. 2004-05)

Karnataka Bank Ltd. v. ACIT (2013) 356 ITR 549 / 216 Taxman 192 / 94 DTR 448 / 263 CTR 299 (Karn.)(HC)

S.145 : Method of accounting – Rejection of books of accounts – Net profit rate

The assessee was engaged in liquor business. The Assessing Officer applied provisions of S.145(2) and rejected books of account maintained by assessee and compared the case of the assessee with another assessee engaged in the same line of business and assessed net profit by taking 20.5% instead of 19.13% as declared by assessee. Held, the Assessing Officer was obviously in error in taking case of other assessee as a comparable one in face of assessee's available and consistent past history. (AY.1991-92)

CIT v. Jaimal Ram Kasturi (2013) 216 Taxman 226 (Mag.)(Raj.)(HC)

S.145 : Method of accounting – Estimation of income – No specific defect in books of account pointed out

The Assessing Officer noticed that there was fall in gross profit rate declared by assessee as compared to the preceding year and he made addition on account of low gross profit rate to assessee's income. However, no specific defect in maintenance of books of account by assessee had been pointed out by Assessing Officer. Held, the Assessing Officer was not justified in rejecting book results and enhancing gross profit rate. (AY.2005-06)

CIT v. Symphony Comfort System Ltd. (2013) 216 Taxman 225 (Mag.)(Guj.)(HC)

S.145 : Method of accounting – Change in method – No valid reason – Completed contract method to percentage completion method – Writ is not maintainable when alternative remedy is available [S.5 Article 226 of the Constitution of India.]

Assessee changed its method of accounting from completed contract method to percentage completion method without any valid reasons. A.O. has not accepted the change. The Assessee challenged the said order by Writ. The Court held that writ could not be maintained against the order of the A.O. when alternative remedies were available. (AY.2008-09)

Kone Elevator India Pvt. Ltd. v. ACIT (2013) 355 ITR 139 / 94 DTR 273 (Mad.)(HC)

S.145 : Method of accounting – Excise duty – Inclusion in closing stock – Opening and closing stock should be maintained in the same manner [S.145A]

Where the assessee was liable to pay excise duty on finished goods, the revenue authorities were justified in adding amount of excise duty so payable during relevant year at time of valuation of closing stock. Opening and closing stock should be maintained in the same manner. (AY. 2001-02)

Krishi Discs (P.) Ltd. v. CIT (2013) 215 Taxman 132 / 263 CTR 476 (All.)(HC)

S.145 : Method of accounting – Impairment and defect in goods – Consistent method – Addition cannot be made

The assessee reduced a sum of Rs. 90 lakhs from value of closing stock on account of impairment and defect. Where same method of valuation of stock was consistently followed by assessee, resulting in no distortion of profit, any alleged difference or discrepancy such as diminution in valuation of closing stock on account of impairment and defect could be allowed. (AY. 2004-05)

CIT v. Hughes Communication India Ltd. (2013) 215 Taxman 136 (Delhi)(HC)

S.145 : Method of accounting – Valuation of stock – 'Slow moving finished goods' – Realisable value – No addition can be made

The Assessing Officer made a disallowance in respect of 'slow moving finished goods'. The Tribunal set aside the disallowance and held that the assessee had been consistently following method of accounting over a period of time and had a fool proof method of identification of slow moving or dead stock and had put realizable value for purpose of valuing same. Held, there was no reason to disturb findings of Tribunal and same were to be upheld.(AYs. 2001-02, 2002-03, 2004-05, 2005-06)

CIT v. Becton Dickinson India (P) Ltd. (2013) 214 Taxman 636 (Delhi)(HC)

S.145 : Method of accounting – Rejection of accounts – Estimation-Sales outside the book – Gross profit

When the sales declared by the assessee had been accepted by the sales tax authorities and the Assessing Officer failed to bring on record any cogent material to show the quantum of sales outside the books of account, his estimate at more than one and half times the sales declared by the assessee could not have been considered justified. So far as the gross profit rate of the other company was concerned, the Assessing Officer was in error in taking the case as a comparable one, while omitting to consider the basic difference that the concern had worked for the whole of the year whereas the assessee had worked only for a period of about nine months during the year.

Estimation of more than one and half times sales declared by assessee was held to be not justified. Estimate of Gross profit of twenty five percent was held to be proper. (AY.1996-97)
CIT v. Mahan Marbles Pvt. Ltd. (2013) 354 ITR 238 / 216 Taxman 106 (Mag.)/ 258 CTR 212 (Raj.)(HC)

S.145 : Method of accounting – Rejection of books – Profit ratio low – Matter remanded
The entire basis of rejection of the account books was that the profit ratio was low in comparison to the earlier year though it was submitted by the assessee that the purchase of coal in both the years 1993-94 and 1994-95 as recorded by the Assessing Officer was not correct. The factual position could be ascertained only from a perusal of the account books and hence, the matter was remanded. (AY.1994-95)
Mahakoshal Pottaries v. CIT (2013) 354 ITR 149 / 88 DTR 286 / 218 Taxman 9 (Mag.)(MP)(HC)

S.145 : Method of accounting – Failure to maintain stock register – Rejection of books justified, estimate of GP is proper
The assessee had not been maintaining day-to-day account of stock but had been determining closing stock items on physical verification at end of year. However, no efforts had been made by revenue to gather any other material to establish that closing stock on last day of accounting period was higher than declared value. Even if Assessing Officer rejected closing inventory on ground that no day to day stock register was maintained, he had to determine gross profit only on estimate either on basis of assessee's own past record or on basis of a comparable case; that no comparable case had been brought on record. Thus, the findings of the Tribunal were not perverse and no substantial question of law arose. (AY. 2002-03)
CIT v. Superior Crafts (2013) 353 ITR 101 / 82 DTR 209 (Delhi)(HC)

S.145 : Method of accounting – Rejection of accounts – Defect in books
There was no specific evidence to prove any defects in maintenance of books of account by assessee. Merely because loss declared by assessee from its business was held to be very high, books cannot be rejected without pointing out specific defects.
CIT v. Jananamandal Ltd. (2013) 214 Taxman 49 (Mag.)(All.)(HC)

S.145 : Method of accounting – Change in method – Closing stock
Change in the method of accounting adopted by the assessee tends to distort the picture for the purpose of taxable income of the assessee. Consequently, the Assessing Officer has to recompute the income by treating unsold lottery tickets as part of the closing stock of the assessee. (AY.1989-90, 1990-91)
CIT v. K and Co. (2013) 214 Taxman 1 / 259 CTR 398 / 88 DTR 166 (Del.)(HC)

S.145 : Method of accounting – Valuation of stock – If liability to pay excise duty is not incurred excise duty is not to be included inclosing stock
Under the scheme of excise duty, an assessee incurs liability to pay excise duty only upon both the events taking place, namely manufacture of excisable goods and removal of excisable goods. Accordingly, if such a liability is incurred, excise duty is not to be included in the valuation of closing stock. (T.A. No. 436/ 437 of 2011, dated 13-6-2012)]
Bell Granito Cermica Ltd. (2012) ACAJ - November-P. 402) (Guj.)(HC)

S.145 : Method of accounting – Hire – purchase – Indexing system followed by assessee there cannot be Mercantile system for purposes of assessment, appeal dismissed
The assessee which is engaged in the business of leasing, hire-purchase and finance. Finance charges represented the interest component of the hire-purchase monthly instalments paid by hirers to the assessee. The assessee had itself credited Rs. 12,33,700 under this head in its profit and loss account for the

assessment year 1987-88. However, in its return of income the finance charges were reduced to Rs. 6,71,326 on the ground that the amount of Rs. 5,62,374 did not accrue as income though credited as such in the profit and loss account during the assessment year. The Assessing Officer did not accept this deduction and took into account the credited amount of Rs. 12,33,700 while computing the income under this head. The assessee credited Rs.12,33,700 towards finance charges in its books of account and this figure was arrived at by adopting the "indexing" or "sum of digits" system of accounting. The Assessing Officer's order was upheld by the Tribunal. On appeal to the High Court : Held, dismissing the appeal, that there was no indication of the assessee's hire-purchase agreements reflecting bifurcation of the equated monthly installments into principal and interest components. In the absence thereof, the common and accepted usage of the indexing system of accounting in the hire-purchase trade must be held to be valid as otherwise the rate of interest under the mercantile system in so far as the later equated monthly installments are concerned would be far higher and contrary to the rate prescribed in the assessee's agreements. Further, as the assessee had itself employed this system of accounting in its books of account, applying the law laid down in Sanjeev Woolen Mills case [2005] 279 ITR 434, the Department was bound to accept the same for the assessment proceedings. Appeal of assessee was dismissed. (AY.1987-88)
Chakra Financial Services Ltd. v. CIT (2013) 350 ITR 396 / 214 Taxman 15 (Mag.)(AP)(HC)

S.145 : Method of accounting – Rejection – Estimation of profit
In the absence of books of account, bank statement and supporting evidence against net profit shown by assessee, profit was estimated at 3.5% and entire sales cannot be considered as income. (AY. 2006-07)
Dineshbhai Dhansukhlal Mithaiwala v. ITO (2013) 28 ITR 536 (Ahd.)(Trib.)

S.145 : Method of accounting – Business expenditure – Provision for medical reimbursement / leave travel allowance – Allowable as business expenditure [S.37(1), A.S.15]
Assessee changed method of accounting to follow mandatory requirement of A.S.-15 Employee Benefits, issued by ICAI - which required assessee to make provision for estimated liability on account of medical reimbursement and leave travel allowance. The Tribunal held that the liability could not be disallowed on ground of accrue / crystallise only on receipt of claim by employee. (AY. 2007-08)
Hero MotoCorp Ltd. v. ACIT (2013) 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.145 : Method of accounting – Valuation of stock Inclusion of freight – Addition for alleged under-estimation of stock was not justified
Assessee Company purchased material on CIF basis, however, in exceptional circumstances, where material was immediately consumed, transport charges were not included in purchase price, but were separately debited to profit and loss account as invoices of transporters were received after consumption of material. AO has rejected the method of accounting which is consistently followed by the assessee on the ground that there may be chance where in a particular year, the method adopted by the assessee may result in underestimation of profits. Tribunal held that addition on account of non-inclusion of freight inward and import clearing expense to cost of closing inventory, in such cases was not justified, since revenue had accepted assessee's method of valuation of stock in past. Revenue failed to demonstrate that impugned method of accounting resulted in material underestimation of profits. (AY.2007-08).
Hero MotoCorp Ltd. v. ACIT (2013) 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.145 : Method of accounting – System of accounting – Interest Income
Assessee had been regularly following system of declaring interest as income during the year when it was actually realised. Yearly accrued interest on FDR's was calculated and credited in profit and loss account but while filing return of income, an adjustment of actual interest realised during year was made and total taxable income was computed accordingly. This method was accepted by the

department in earlier years. However, for relevant assessment year, the A.O. included amount of interest not realised during year in assessee's chargeable income. When assessee had been following a particular method of accounting for interest on FDR's, the A.O. could not include amount of unrealized interest to the assessee's income. (AY. 2008-09)
Chaman Vatika Educational Society v. Dy. CIT (2013) 145 ITD 105 (Chd.)(Trib.)

S.145 : Method of accounting – Weighted average method – Shares and bonds – Cannot be discarded
Weighted average method is a recognised method of valuation of stock and, therefore, value of shares and bonds taken on basis of weighted average method cannot be held as notional. (AY. 2005-06)
ACIT v. Agrawal Enterprises (2013) 59 SOT 17 (URO) / 154 TTJ 12 (UO)(Pune)(Trib.)

S.145 : Method of accounting – Percentage – Completion method cannot be substituted by mercantile system of accounting
The assessee company being a non- resident Firm had its registered office at USA & place of business at Texas. The assessee entered into a contract with Dabhol Power Corporation in connection with the responsibility for onshore construction work and onshore service in connection with Phase II of DR. It has a project office in India in connection with such project and has filed its return of Income declaring an income from such contract receipts. The assessee contended that it has been following Percentage of Completion method which is a well recognised accounting standard under Accounting Standard-7. AO held that the assessee is following mercantile system of accounting and held that details for completion of work has not been provided. CIT(A) affirmed the findings of AO. On appeal Tribunal allowed the appeal and held that even under the mercantile system of accounting, in order to determine the net income of accounting year, the revenue and other income are matched with the expenses incurred for earning that revenue. Further the assessee for earlier years has been following Percentage Completion method as per AS-7. There was no basis for sustaining an addition.
Lingtec Construction LP v. ITO (2013) 156 TTJ 76 / 88 DTR 153 (Mum.)(Trib.)

S.145 : Method of accounting – Percentage completion method
Tribunal held that this method of accounting has been recognized by the Hon'ble Supreme Court in *CIT v. Bilhari Investment (P) Ltd. (2008) 299 ITR 1 (SC)*. Therefore if cannot be held that AS-7 is against the provisions of law or the profits cannot be determined for the purpose of taxability. There is no any infirmity in the method of accounting. The Tribunal sent the matter back to the file of Assessing Officer with direction to allow another opportunity to the assessee to place on record all the invoices on the basis of which assessee had been receiving payments, the project having completed more than 20% will be liable to be assessed to that extent during the year under consideration.
Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

S.145 : Method of accounting – Accounts Rejection of books of accounts – Estimation of GP
When the books of account are rejected, then the only way to determine the income is to apply GP rate or net profit rate by considering the past history. The Tribunal held that it is fair and reasonable to apply GP rate of 7.50% subject to deduction of interest, depreciation and salaries to partners against the GP rate of 7.20 per cent declared by assessee and the GP rate of 12.50% and 8% applied by the Assessing Officer & CIT(A). (AY.2008-09)
ITO v. Shri Ram Traders (2013) 155 TTJ 622 / 144 ITD 666 (Jodh.)(Trib.)

S.145 : Method of Accounting – Real estate developer – Project completion method – Accounting standards-7 – Percentage of completion method is not mandatory assessee can follow project completion method
It is not mandatory for all real estate developers to follow percentage of completion method as prescribed by Institute of Chartered Accountants of India under AS-7. It is option of assessee to

follow either completed contract method or percentage completion method. Therefore, where assessee, a real estate developer, maintained its accounts on mercantile basis by regularly applying project completion method, there was no justification in rejection of its accounts by application of provisions of section 145(3) and changing method from project completion to percentage completion method by Assessing Officer. (AY. 2008-09, 2009-10)
Krish Infrastructure (P.) Ltd. v. ACIT (2013) 58 SOT 127 (URO)(Jaipur)(Trib.)

S.145 : Method of accounting – Estimation of income – Merely on low profit ratio addition of gross profit was not justified
Assessee is manufacturing and supplying footwears to retailers. It had shown gross profit ratio at 18.49 per cent and net profit ratio at 0.71 per cent. A.O. held that such gross profit ratio and net profit ratio were very low and determined income by adopting net profit ratio of 5 per cent on net sales. Tribunal held that when Assessing Officer could not point out any defect in details filed by assessee, addition made on account of low gross profit ratio could not be sustained. (AY. 2007-08)
ITO v. Sai International (2012) 20 ITR 1 / (2013) 58 SOT 137 (URO)(Delhi)(Trib.)

S.145 : Method of accounting – Cash System-Form no 26AS – Deduction of tax at source – Contract amounts not received, on which tax was deducted at source by contractees, was not taxable without allowing expenditure claimed to have been incurred to earn it
Assessee maintained accounts on actual receipt basis. A.O. noticed difference in contract receipts shown by assessee in his return and in Form No. 26AS, giving details of tax deducted at source on receipts. Assessee claimed that differential amount had not been received. A.O. added entire differential amount to income without allowing expenditure claimed to have been incurred to earn such amount. where assessee maintained accounts on receipt basis, contract amounts not received, on which tax was deducted at source by contractees, was not taxable without allowing expenditure claimed to have been incurred to earn it. (AY.2008-09)
Gobindpada Bhanja Chowdhury v. ITO (2013) 58 SOT 135 (URO)(Cuttack)(Trib.)

S.145 : Method of accounting – Gross profit rate – Books of account maintained cannot be rejected merely because of low gross profit
A.O. found that a low rate of G.P. was declared by assessee as compared to previous year. He rejected books of account of assessee and made addition by applying G.P. rate of 4 per cent and proportionately enhanced sale in place of 3.30 per cent disclosed by assessee. The Tribunal held that for rejecting system of accounting followed by assessee, A.O. must refer to inherent defect in system and record a clear finding that correct profit cannot be deduced from books of account maintained by assessee and the addition made by the A.O. was unjustified. (AY.2009-10)
Dy. CIT v. Subhash Chand Agrawal (2013) 58 SOT 122 (URO)(All.)(Trib.)

S.145 : Method of accounting – Sales to sister-concern – Merely because sales to sister concern at lower rate books of account maintained by the assessee cannot be rejected
Assessee company is engaged in manufacture of machine parts and sold the same parts to a sister-concern at a price which was much less than price at which similar products were sold by assessee to third parties. Assessee submitted that since its major customer is sister concern and they had to sell to them at a lower price. Assessee company gave detailed calculation of costs and demonstrated before A.O. that price charged to sister concern was also profitable. A.O. did not accept assessee's explanation and rejected assessee's books of account and determined higher rate of profit on estimate basis. CIT(A) deleted the addition made by the A.O. Tribunal held that mere fact that assessee had sold products to its sister-concerns at a lesser price would not be a sufficient ground to come to a conclusion that books of account of assessee were not complete and correct. even otherwise, since sister concern was not claiming any tax exemption which necessitated assessee shifting profits to it.

The impugned order passed by Commissioner (Appeals) deleting addition was to be upheld. (AY. 2007-08)
Dy. CIT. v. Sphoorti Machine Tools (P.) Ltd. (2012) 19 ITR 736 / (2013) 58 SOT 139 (URO) (Bang.)(Trib.)

S.145 : Method of accounting – Mercantile System – Non-finance company – Interest on NPAs cannot added only on the ground that only on the ground that the assessee is following mercantile system of accounting
The Assessee company is a registered non-banking finance company engaged in the business of providing micro finance services, i.e., providing collateral free loans to the poor in the rural area. It derecognized the interest accruing to it on the non-performing assets. A. O. issued a show cause notice to the assessee asking why the interest derecognised be not added to the income. Assessee explained that it was duty bound to follow the directions of the RBI and as per the specific directions of the RBI the assessee was not supposed to recognise the interest on NPAs. A.O. however did not find substance in the stand taken by the assessee. It observed that the RBI Guidelines were prudential in nature and were not binding under the Income-tax Act. The Commissioner (A) and ITAT held that where no income has resulted no income can be said to have accrued just because mercantile system of accounting is being followed. Where a non-banking finance company, which was engaged in providing micro-finance services to rural poor, was derecognising interest accruing on non-performing assets in pursuance of mandatory directions of RBI, A.O. could not make an addition for such derecognised interest by invoking section 145 on ground that assessee was following mercantile system of accounting. (AY 2004-05 to 2008-09)
Dy. CIT v. Bhartiya Samruddhi Finance Ltd. (2013) 58 SOT 141 (URO)(Delhi)(Trib.)

S.145 : Method of accounting – Low G.P. – Rejection of accounts merely on the basis that low G.P. compared with earlier is held to be not justified
During Assessment proceedings, the A.O. noticed that the assessee had declared 15.41 per cent G.P. in the year under consideration in comparison to 26.40 per cent in preceding year. He rejected assessee's books of account and estimated profit by applying 20 per cent rate of profit. CIT(A) deleted the addition made by the A.O. The ITAT held that Provisions of section 145 by itself do not deal with addition or deletion in income and, therefore, merely because there is some deficiency in books of account or merely because there is rejection of books of account, it does not mean that it must necessarily lead to additions in returned income of assessee. It was found that books of account maintained by assessee company had been duly audited under Companies Act and Income-tax Act and not even a single instance of inflation of sales or suppression of profit, or claiming non-business expenditure or inflated expenditure was pointed out by Assessing Officer and he was not justified in rejecting books of account and determining higher gross profits on estimated basis. (AY.2006-07)
Amarjothi Granites (India) (P.) Ltd. v. ACIT (2013) 58 SOT 130 (URO) (Jodh.)(Trib.)

S.145 : Method of accounting – Valuation of closing stock – Unutilised Modvat – Opening stock valuation to be changed
Corresponding opening stock of this year is to be increased on account of unutilized Modvat added to closing stock of earlier year.(AY.2008-09)
Sandoz P. Ltd. v. DCIT (2013) 25 ITR 347 / 145 ITD 551 / 96 DTR 401 (Mum.)(Trib.)

S.145 : Method of accounting – Non-Banking Financial Corporation – Non-performing assets
The assessee was a Non-Banking Financial Corporation. The assessee was following the mercantile system of accounting, but in case of non-performing assets, income had been recognised on actual receipt only. As assessee had not written of debts, Assessing Officer calculated interest accrued on said NPA and treated the same as income of the assessee. As per RBI guidelines vide Non-Banking Financial companies prudential Norms (Reserve Bank) Directions interest income on NPA was

required to be credited on actual receipt basis and not on accrual basis and further as the assessee was a NBFC, it was bond to follow the said guidelines. There was further no error or infirmity in the CIT(A)'s order and the same was held in the favour of the assessee. (AY. 2003-04 to 2005-06)
ACIT v. Bobcards Limited (2013) 56 SOT 232 (Mum.)(Trib.)

S.145 : Method of accounting – Valuation of closing stock.
Tribunal held that the method of valuation of stock followed by the assessee for last 16 years is an accepted method in consonance with the law as well as accounting standard and therefore there is no reason to discard the same. (AY. 2005-06)
ACIT v. Agrawal Enterprises (2013) 59 SOT 17 / 154 TTJ 12 (UO)(Pune)(Trib.)

S.145 : Method of accounting – Valuation of closing stock vis-a-vis inclusion of incidental expenses – No specific defect found in the books – Rejection of accounts not justified
Expenses incurred by the assessee on insurance on goods in transit, freight and handling, entry-tax (purchase) and channel finance interest being directly linked to purchases having been already included in the cost of purchases, proportionate amount of the said expenses could not be included in the valuation of closing stock by invoking the provisions of section 145(3). (AY. 2008-09, 2009-10)
Drillcon (Raj) (P) Ltd. v. Addl. CIT (2013) 87 DTR 159 / 154 TTJ 620 (Jodhpur)(Trib.)

S.145 : Method of accounting – Rejection of books of account not valid
The Assessing Officer, in the course of the assessment proceedings, on examination of books of account and information filed noticed certain discrepancies pertaining to uneven consumption of electricity and failure to maintain record of month-wise details of consumption of chemicals or consumables. Accordingly, the Assessing Officer invoked provisions of section 145(3) of the Act and made additions on account of unaccounted production and alleged capital employed in the unaccounted production. Deduction under section 80IB of the Act was also not granted on the said additions. The CIT(A) upheld the findings of the Assessing Officer. On appeal by the assessee the Tribunal held that:
Books of account could not be rejected, on the ground of consumption of electricity being abnormally high *vis-à-vis* the units of production, so far as the consumption of steam chemicals and consumables was concerned, the submissions filed by the assessee remained unrebutted.
It was not proper on the part of the Department, to compute estimated unaccounted production solely on the basis of higher consumption of electricity, in the face of credible reasons assigned by the appellant, for such variation in the consumption of electricity.
The CIT(A) failed to bring on record material to demonstrate that the assessee indulged in purchases of raw material and sales of manufactured goods outside the books of account by way of higher consumption of electricity. In the manufacturing world, there was no direct and uniform correlation between consumption of electricity and production of manufactured goods. (AY. 2007-08)
Vishal Paper Industries v. JCIT (2013) 21 ITR 220 / 58 SOT 133 (URO)(Chd.)(Trib.)

S.145 : Method of accounting – Valuation of stock – Valuation of securities purchased at premium – Write off of premium was not allowed
Assessee purchased securities from market at a premium. It wrote off premium so paid which was amortised over life of investment. Commissioner (Appeals), however, rejected amortization on ground that when securities were purchased as stock from market at market value, there could be no question of carrying stock at a lower price by writing off premium paid. Tribunal upheld the order of Commissioner (Appeals), but with a rider that securities could be sold or mature over a period and once amortization was not allowed, purchase price was to be taken as such irrespective of fact as to whether securities were sold or got matured. In favour of revenue (AY. 1999-2000)
Dy. CIT v. Banque Indosuez (Known as Credit Agricole Indosuez) (2013) 55 SOT 38 (Mum.)(Trib.)

S.145A : Method of accounting – Valuation of closing stock – Excise duty was not paid but goods were removed – The Assessing Officer was justified in making addition to value of closing stock [S.43B]

Unlike in the case of section 43B, which mandates inclusion, in computation of income, amounts paid towards certain liabilities including tax, but not actually arising or accruing at time of payment, the provision of section 145A directs inclusion of amounts of tax, duty, etc., actually paid for purpose of valuation alone. The total excise duty to be levied on closing stock was Rs.2.81 crores, out of which Rs.70 lakhs remained outstanding. Court held that since all goods were found to be removed and, in fact, duty of Rs. 70 lakhs was payable, the Assessing Officer was justified in making addition to value of closing stock of amount of Rs. 70 lakhs as per provisions of section 43B, read with section 145A. (AY.2005-06)

CIT v. Lakshmi Sugar Mills Co. Ltd. (2013) 215 Taxman 126 / 263 CTR 470 (Delhi)(HC)

S.145A : Method of accounting – Valuation of closing stock – slow moving and obsolete inventory

Closing stock of inventories valued at cost or market value, whichever was lower. Provision for slow moving and obsolete inventory being net decrease in such inventory was debited to P&L account. Held, it was practically not possible to determine market value of each and every part and necessity to maintain adequate inventory. Matter remanded. (AYs.2006-07, 2007-08)

General Motors India P. Ltd. v. DCIT (2013) 27 ITR 373 / (2014) 146 ITD 559 (Ahd.)(Trib.)

S.145A : Method of accounting – Valuation – Addition on account of adjustment to the closing stock without making corresponding adjustment to the opening stock – Not justified

The tribunal held that any adjustment is made in the valuation of stock, will affect both; opening as well as closing stock. Therefore, before making any adjustment to the closing stock, corresponding adjustment be made in opening stock. (AY.2005-06)

ITO v. Navjivan Synthetics (2013) 142 ITD 96 (Ahd.)(Trib.)

S.145A : Method of accounting – Valuation of stock – Inclusion of custom and excise duty – Matter remanded [S.43B]

Assessee had valued its stock of inventories net of custom and excise duty. The Assessing Officer held assessee in default of section 145A and worked out Cenvat relatable to opening and closing stock. However, the assessee contended that no duty was attracted as part of closing stock was lying in bonded warehouse. Held, there was no infirmity in revenue's stand in not accepting assessee's claim of goods lying in bonded warehouse. Since the prescription of only section 145A was not fully adopted by revenue, except only in case of valuation of inventories, matter was to be restored back for determining valuation of closing stock afresh.In principle, inclusion of duty or tax cost, where incurred or suffered, should not result in any variation in profit as disclosed. Where tax/duty is not paid by due date, it cannot be said to have been 'incurred' due to overriding effect of section 43B, read with section 43(2) and it would not would be reckoned as cost. Consequently, it would be liable for inclusion in valuation of purchases, irrespective of method of accounting being followed.(AY.2006-07, 2007-08)

Raj Petro Specialities (P.) Ltd. v. ACIT (2013) 58 SOT 60 (URO) / 157 TTJ 349 / 93 DTR 36 (Mum.)(Trib.)

S.145A : Method of accounting – Valuation – Service provider – Trading account – Service tax not to be includible in cost of components [S.43B]

The assessee is a service provider company. It had not considered Service tax for computing cost of components. The AO enhanced the trading profit by adding service tax. This was confirmed in appeal. The Tribunal held that since the assessee is a service provider company patently the provisions of section 145A cannot be made applicable because the provision was specifically introduced for the purpose of

manufacturing segment of the business. Accordingly provisions of section 145A do not apply to service tax, therefore service tax is not includible in cost components. (ITA No.2021/Mum/2011 Bench 'A' dt.10-07-2013) (AY. 2007-08).
Knight Frank (India) Pvt. Ltd. v. Addl. CIT (2013) BCAJ–September-P. 27(Mum.)(Trib.)

S.145A : Method of accounting – Valuation – Devaluation of closing stock permitted
The assessee devalued its closing stock to Rs. 1 as on March 31, 2005 explaining that the company had brought forward certain slow and non-moving items in its inventory as they remained unsold for the whole of year. The Assessing Officer held that these were contrary to the provisions of section 145A and accounting standards for valuing inventory. The assessee furnished the details of various packing materials, quantity, rate and value as available in the books and submitted that most of the material pertained to packing material on which the batch numbers and price were already printed and these had no value to the assessee after a lapse of time. The CIT(A) confirmed the disallowance. On appeal by the assessee, the Tribunal allowing the ground held that:
Even under the normal accounting principles, the closing stock has to be valued either at the cost price or at the market price whichever is less. It was the assessee's case that inventory of packing material had no value as it could not be used in production of current batches and had become not only obsolete but also unutilisable for the last year. In these circumstances, if the assessee took the value at Rs. 1 the Assessing Officer could not reject outright the contention of the assessee on the ground that the valuation is not according to the provisions of section 145A and accounting standard. Since the assessee had not used the packing material which had to be discarded by way of destruction or sale as scrap, the assessee had rightly reduced the value and the same was to be allowed the deduction.(AY. 2005-06 to 2007-08)
Sonic Biochem Extractions P. Ltd. v. ITO (2013) 23 ITR 447 / 59 SOT 4 (URO)(Mum.)(Trib.)

S.145A : Method of accounting – Valuation of closing stock – Purchase tax has to be taken in to for valuation
Tribunal held that value of purchase tax has to be taken into account while valuing closing stock; however, in such a case, opening stock valuation has to be correspondingly adjusted. Matter remanded. (AY.2006-07)
Rallis India Ltd. v. Addl. CIT (2013) 55 SOT 288 (Mum.)(Trib.)

S.147 : Reassessment – Alternative remedy-Writ petition to challenge a reassessment order should not be entertained [S.148, Article 226]
The Assessing Officer issued a notice u/s 148 reopening the assessment and pursuant thereto passed a re-assessment order u/s 147. The assessee filed a Writ Petition in the High Court to challenge the said notice and re-assessment order. The High Court entertained the Writ Petition and quashed the re-assessment order. On appeal by the department to the Supreme Court HELD reversing the High Court:
The Income-tax Act provides a complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities. The assessee cannot be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he has adequate remedy open to him by an appeal to the Commissioner of Income-tax (Appeals). As the said statutory remedy is an effectual and efficacious one, the Writ Court ought not to have entertained the Writ Petition filed by the assessee.(Civil Appeal No of 2013 dt 8-8-2013)(AY. 1995-96, 1996-97)
CIT v. Chhabil Das Agrwal (2013) 357 ITR 357 / 261 CTR 113 / 217 Taxman 143 (SC)
Editorial: This principle of alternate remedy ought not to apply to a case where the Assessing Officer passes a reassessment order without following the GKN Driveshafts (India) Ltd v. ITO (2003) 259 ITR 19 (SC) procedure of passing an order on objections and waiting 4 weeks

thereafter as held in Allana Cold Storage Ltd v. ITO(2006) 287 ITR 1 (Bom.)(HC), Kamlesh Sharma (Smt.) v. B.L. Meena, ITO (2006)287 ITR 337 (Delhi)(HC)

S.147:Reassessment-Transfer pricing – Arm's length price - Re-opening bad in law in absence of any material to discard the ALP determined by the assesse.[S.92C.]

The AO reopened the assessment for the reason that as per Form No. 3CEB filed alongwith the return the assessee had international transactions with its Associated Enterprise ('AE') and determination of arm's length price ('ALP') in relation thereto was required. The AO made reference to the TPO who made an adjustment in the ALP and consequently AO made the addition to the declared income of the assessee. The Tribunal observed that on going through the purported reasons it was apparent that the AO allegedly had reason to believe that income of Rs.1.33 crores had escaped assessment and this income comprised of two components, i.e. Rs. 11 lakhs in respect of the claim of loss on account of foreign exchange fluctuation and an amount of Rs. 1.22 crores on account of claim of expenses under the head 'data usage charges'. In the Assessment Order made by the AO no addition had been made on account of foreign exchange fluctuation loss. However, with regard to the data usage charges 25% of the same had been initially disallowed, but the same had been deleted by the Disputes Resolution Panel. Therefore, no addition on the basis of the reasons recorded for reopening the completed assessment survived. Accordingly, the Tribunal cancelled the addition made by the AO.

On appeal by the department, the High Court held that the methodology for computation of ALP is prescribed u/s. 92C which the assessee has clearly followed and computed the ALP by net margin method. If the AO was not satisfied with the ALP, then during original assessment he should have referred the matter to the TPO and given the assessee an opportunity to be heard. There was no tangible material whatsoever before the AO when the purported reasons were recorded to indicate that the ALP determined by the assessee was not correct. Therefore, the alleged reason for determination of the ALP, as given in the reasons for reopening the assessment, was not a reason at all. Accordingly, the High Court dismissed the departmental appeal. (AY. 2006-07)

CIT v. Cheil Communication India (P.) Ltd. (2013) 354 ITR 549 / 217 Taxman 275 / 87DTR 224 / 259 CTR 296 (Delhi)(HC)

S.147 : Reassessment – Export undertaking – Repatriation of foreign exchange –Reassessment was held to be valid [S.10B]

Since no opinion was expressed by AO while passing assessment order on issue of repatriation of foreign exchange, it could not be held that s. 147 proceedings had been initiated by change of opinion or by way of review. Also, as reasons for reopening was furnished to assessee, there was no procedural lapse on part of revenue. (AY. 2005-06)

Suntec Business Solutions (P.) Ltd. v. UOI (2013) 219 Taxman 143 (Mag.)(Ker.)(HC)

S.147 : Reassessment – Disallowance of expenditure – Exempt income – Proviso – Prior to AY 2001-02 – Reassessment was not justified [S.14A]

By virtue of proviso to s. 14A, there is no justification to make reassessment u/s 147 for any assessment year prior to 2001-02.(AY 1999-2000)

CIT v. Dhanalakshmi Bank Ltd. (2013) 219 Taxman 130 (Mag.)(Ker.)(HC)

S.147 : Reassessment – Clubbing of income – Minor children – Interest income – Interest income was belong to minors – Reassessment was bad in law [S. 64, 148]

The AO reopened assessee's assessment on the ground that return of income filed in the name of assessee's minor children showed interest and other income which was assessee's own money in as much as minors were not competent to contract. He added income offered in hands of minors to income of assessee. When assessment in case of assessee's minor children had been completed before issue of notice u/s 148 and department did not place any material to conclude that interest income of

minors did not belong to them, reopening of assessment and consequential order were not sustainable. (AY. 1988-89)
CIT v. Anil Chand Bansal (2013) 219 Taxman 284 (All.)(HC)

S.147 : Reassessment – Business income – Suppression of sales – New information – Matter set aside [Ss.28(i), 148]
On receipt of information that Mandi Board had held assessee liable for suppression of its sales, a reassessment notice was served upon assessee. Consequently, the AO made an addition to the income which the Commissioner (Appeals) deleted on the ground that the order passed by Mandi Board had been set aside. Held, though the order passed by Commissioner (Appeals) did not suffer from any error of law or jurisdiction as would require interference, but in view of fact that fresh proceedings were initiated by Mandi Board holding assessee liable for payment of additional fee and interest, matter needed further adjudication.(AY. 2002-03)
CIT v. R.J. Traders (2013) 219 Taxman 160(Mag.)/(2014) 360 ITR 190 (P&H)(HC)

S.147 : Reassessment – Book profit – No failure to discloses the facts – Reassessment was held to be bad in law [Ss.115JB, 148]
Assessment was completed under section 143(3) on 28-11-2007. Reassessment notice was issued under section 148 on 10-2-2013 seeking to reopen said assessment under section 147. He recorded reasons to effect that book profit of assessee was under assessed. In reasons recorded there was no mention at all of assessee having not disclosed fully or truly material facts which were necessary for purpose of computing income. Assessing officer also failed to point out as to in what manner there had been non-disclosure on part of assessee. Court held that since no new material had come on record, nor it was case of Assessing Officer that facts revealed before him were not primary or material facts, notice for reassessment lacked validity, therefore, impugned notice was liable to be quashed together with subsequent proceedings. (AY.2005-06)
Gujarat Lease Financing Ltd. v. Dy. CIT (2013) 219 Taxman 70 / (2014) 360 ITR 496 (Guj.)(HC)

S.147 : Reassessment – Undisclosed investments – Higher estimation by DVO – Facts was not stated in the recorded reasons – Reassessment was bad in law [Ss.69B, 142A, 148]
Assessee-firm declared investment in construction of a hotel and assessment was completed. Thereafter, a reassessment notice was issued to assessee on ground that DVO had estimated that higher investment was made by assessee. Assessee submitted that Assessing Officer could not take recourse to section 148 by relying on valuation report made available to him at a later point of time. Department contended that valuation report was very much available with Assessing Officer but said fact was not stated in reasons recorded. Court held that since department itself admitted that Assessing Officer would record fresh reasons incorporating correct factual position and then proceed in matter in accordance with law, notice under section 148 did not survive. (AY.2007-08)
Royal Garden v. ITO (2013) 219 Taxman 22 (Mag.)(HP)(HC)

S.147 : Reassessment – Depreciation – Book profit – Matter remanded [Ss.32, 115JA, 115JB]
Assessee claimed depreciation at rate of 40 per cent on commercial vehicles. Assessing Officer allowed assessee’s claim. Subsequently, Assessing Officer initiated reassessment proceedings taking a view that depreciation was allowable at rate of 20 per cent. Assessee filed Writ petition challenging validity of reassessment proceedings on ground that it was a MAT company under sections 115JA/115JB and even after discarding higher rate of depreciation claimed, it would have no tax liability higher than what was computed under section 115JA. In view of fact that no such contention had been raised earlier, matter was to be remanded back to Assessing Officer for disposing of assessee’s objection in accordance with law. Matter remanded. (AY.1998-99)
Garden Silk Mills Ltd. v. ACIT (2013) 219 Taxman 72 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Delay by assessee in responding – Writ was dismissed [S.4, Art.226]
After assessment was complete, information was received by the Department that assessee had received from its Japanese counterpart some amount which was not disclosed. In response to the notice, petitioner only informed that it could not trace any such receipt. Only after reasons to believe were recorded by Assessing Officer and notice for reassessment was received, assessee submitted that said receipt had already been brought into books of account and taxed in immediately preceding year. Since the assessee delayed in rendering reply, Assessing Officer did not have benefit of examining averment made therein before recording reasons to believe and, therefore, petitioner should furnish complete detail in reassessment proceeding, in view of which Assessing Officer might stop or proceed with reassessment proceeding after verifying merit of assessee's case. The writ was dismissed in the instant case. (AY. 2006-07)
Canon India (P.) Ltd. v. ACIT (2013) 218 Taxman 405 (Delhi)(HC)

S.147 : Reassessment – After expiry of four years – No fresh tangible had come to knowledge of Assessing Officer – Reassessment was bad in law [S.10B]
In the original assessment, AO disallowed a part of deduction claimed by petitioner under section 10B and subsequently even rectified the order. This clearly established that Assessing Officer had formed a definite opinion on claim of benefit under section 10B as a deduction. Having formed such an opinion, Assessing Officer could not seek to change opinion and sought to reopen assessment after expiry of four years from relevant assessment year, to withdraw section 10B deduction, particularly where no fresh tangible material had come to knowledge of Assessing Officer. (AY. 2005-06)
Moser Baer India Ltd. v. DCIT (2013) 218 Taxman 161 (Mag.) /94 DTR 265 (Delhi)(HC)

S.147 : Reassessment – Knowledge of activities were within the knowledge of the AO – Reassessment was bad in law – Appropriate remedy will be revision under section 263 [Ss.10B, 263]
The nature of activities being undertaken by assessee were in knowledge of Assessing Officer in first round and he, as per 'reasons to believe', had formed an erroneous legal opinion in original assessment order. Held in such cases, reassessment proceedings cannot be made under section 147 and appropriate remedy available to revenue was to initiate revision proceedings under section 263. (AY. 2006-07)
Replika Press (P.) Ltd. v. DCIT (2013) 218 Taxman 399 / 92 DTR 153 (Delhi)(HC)

S.147 : Reassessment – Declaration – Non-payment of tax – Reassessment on the basis of information provided through VDIS was held to be justified [S.67, VDIS, 1997]
Where assessee admitted to particulars furnished in declaration made under voluntary disclosure scheme as true which was not disclosed in regular course but had not taken this declaration for further compliance by paying tax, etc., details given therein could be treated as information for purpose of reopening assessment. (AY. 1989-99)
CIT v. R. Selvaraj (2013) 218 Taxman 101 (Mag.)(Mad.)(HC)

S.147 : Reassessment – Unexplained investments – True and full disclosure – Reassessment was not justified [S.69, 148]
Mere fact that full particulars regarding computation of income are not supplied, cannot, by itself, lead to an inference that income has escaped assessment. Held, assessee had fully and truly disclosed all relevant materials in respect of investment in purchase of silver sold for purpose of assessment for year under consideration and, therefore, initiation of proceedings under section 147(a)/148 was not legally sustainable. (AY.1987-88)
CIT v. Surendra Chand Bansal (2013) 218 Taxman 159 (Mag.)(All.)(HC)

S.147 : Reassessment – Method of accounting – Acceptance of explanation in earlier year – Valuation of stock – Details were furnished in the original assessment proceedings – Reassessment was not justified [S.143(3), 145]

Where Assessing Officer in preceding assessment year accepted explanation of assessee that difference between closing stock of last year and opening stock of previous year was because of reduction in commercial value, addition made by Assessing Officer for year under consideration on basis of under-valuation of stock was to be deleted following doctrine of consistency. AO in the course of assessment proceedings raised the question and reply was furnished. On the same set of facts reopening of assessment was held to be not justified. (AY. 2004-05)

CIT v. SBJ VON Compounders (P.) Ltd. (2013) 218 Taxman 71 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Reason to believe – Alleged excess deduction under section 80HHC – Language employed in section 147 makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1)-In the absence of any intangible material in possession of AO subsequent to intimation under section 143(1), reopening was not sustainable [S.80HHC, 143(1), 148]

The assessee was 100 percent export oriented undertaking and was entitled to substantial amounts as duty drawback. The assessment was completed under section 143(1). The assessment was reopened on the ground that assessee was wrong in treating the proceeds of sale of quota as part of the export turnover for claiming deduction under section 80HHC. According to the AO the sale proceeds of the quota cannot be considered as export turnover but represented business income covered under section 28(iv) and had to be reduced to the extent of 90 percent from the business income covered under section 28(iv) as provided b Explanation (baa) to section 80HHC. Not doing so resulted in excessive allowance of the deduction under section 80HHC and consequently in escapement of income chargeable to tax. On appeal Tribunal cancelled the reassessment. On appeal by revenue the Court held that even where proceedings under section 147 are sought to be taken with reference to an intimation under section 143(1), the ingredients of section 147 have to be fulfilled, there should exist "reason to believe" that income chargeable to tax has escaped assessment. In the absence of any tangible material in possession of AO subsequent to intimation under section 143(1), reopening was held to be not valid. (AY. 2002-03)

CIT v. Orient Craft Ltd. (2013) 354 ITR 536 / 215 Taxman 28 / 87 DTR 313 / 263 CTR 335 (Delhi)(HC)

S.147 : Reassessment – No new material – Change of opinion – Original scrutiny assessment – Reassessment was not valid. [S.115JB, 143(3), 148]

The return was scrutinised and the initial assessment order was passed after thorough examination of the facts. On the basis of the same set of facts, if the Assessing Officer was of the view that it was a case of escaped assessment, then it was a case of change of opinion and not a case of reassessment as there was no new material before the Assessing Officer. Held, the notices of reassessment were not valid. (AYs. 2001-02, 2002-03)

CIT v. Fujistu Optel Ltd. (2013) 359 ITR 67 / 91 DTR 129 (MP)(HC)

S.147 : Reassessment – After four years – No failure on part of assessee – Reassessment notice was not valid [S.148]

The reasons recorded showed that there was not even a whisper to the effect that income had escaped assessment on account of any failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. Even in the affidavit-in-reply filed by the Revenue, there was no allegation of any such failure on the part of the assessee. Therefore, the notice under section 148, after four years could not be sustained. (AY. 1989-90)

Kanak Fabrics v. ITO (2013) 359 ITR 447 (Guj.)(HC)

S.147 : Reassessment – After four years – Failure to disclose facts – Notice was valid [S.148]
Failure to disclose facts regarding particular transactions would amount to failure to disclose facts fully and truly. Hence, notice was held to be valid.
OPG Metals and Finsec Ltd. v. CIT (2013) 358 ITR 144 / 92 DTR 348 / 218 Taxman 471 (Delhi)(HC)

S.147 : Reassessment – Notice – Beyond four years – Change of heads – Capital gains – Reassessment was bad in law [S.148]
Notice u/s 148 after four years in spite of true and full disclosure made by Assessee – Same receipt has been charged under different heads as undisclosed income by the Assessing Officer which was declared under Capital Gains by the assessee. Change of nomenclature does not amount to escapement of income. Since the rate of tax is same under both the heads of Income, the issue of notice u/s 148 after 4 years is bad-in-law and action to reassess is beyond jurisdiction.(AY.1999-2000)
CIT v. Bhushan Capital & Credits Services Ltd. (2013) 260 CTR 393 / 216 Taxman 214 (Mag.)(Delhi)(HC)

S.147 : Reassessment – Full and true disclosure – Auditors report – Reopening is bad in law [S.148]
When there was a full and true disclosure of all material facts in the Statutory Audited Accounts and in the Auditor's Report, re-opening of completed assessment based on earlier years is bad-in-law. (AY.2004-05)
Nyk line (India) Ltd. v. Dy. CIT (2013) 262 CTR 309 (Bom.)(HC)

S.147 : Reassessment – Notice beyond four years – No allegation of failure to disclose all material facts – Reassessment was held to be invalid [S.148]
Notice issued u/s.148 beyond four years without any allegation of failure to disclose fully and truly in the reasons becomes invalid. (AY. 2005-06)
Sitara Diamond (P) Ltd. v. Dy. CIT (2013) 262 CTR 299 (Bom.)(HC)

S.147 : Reassessment – Notice – Lapse of time to initiate proceedings under section 158BD – Reassessment was valid [S.158 BD]
The issue of notice u/s 147 and re-opening is justified in some peculiar cases with sufficient materials to form belief that amount has escaped assessment notwithstanding that lapse of time to initate processing u/s 158 BD has expired; therefore, initiation of proceeding u/s 147 is justified. (AY.1993-94)
CIT v. Abhyudaya Builders (P) Ltd. (2012) 340 ITR 310 / (2013) 259 CTR 128 (All.)(HC)

S.147 : Reassessment – No failure on part of assessee to disclose truly and fully all material facts – Reassessment proceedings cannot be initiated merely because claim of depreciation was not previously processed during scrutiny assessment
The AO re-opened the assessment for AY. 2006-07 beyond a period of 4 years and denied set-off of unabsorbed depreciation of Rs. 68.36 lakhs. The CIT(A) dismissed the appeal filed by the assessee. The Tribunal, however, allowed the assessee's appeal.
On appeal by the department, the High Court observed that even as per the AO, there was no failure on part of the assessee to disclose material facts, and there being no new material on record, issue of notice u/s. 148 beyond a period of four years was invalid. Although the claim was not legally sustainable, merely because the claim was not previously processed during the scrutiny assessment, does not authorize the AO to initiate reassessment proceedings. Accordingly, the departmental appeal was dismissed. (AY. 2006-07)
CIT v. Alfa ICA (India) Ltd. (2013) 217 Taxman 129 / 34 taxmann.com 262 (Guj.)(HC)

S.147 : Reassessment – Relevant material for reopening of assessment – Scrutiny assessment not completed within time limit and intimation u/s. 143(1) issued –reassessment u/s. 147 can be initiated [S.143(1)]

The assessee derived income from salary alongwith rent free accommodation provided by his employer company which was disclosed in his return. However, the AO, on basis of a report of the Income-tax inspector regarding 'annual rental value' ('ARV') of the accommodation of the assessee, formed an opinion that the ARV was not correctly disclosed by assessee which resulted in escapement of income. He therefore reopened the assessment. The Tribunal held that the re-opening is not permissible in cases where an intimation has been issued u/s. 143(1).

On appeal by the department, the High Court held that the Income-tax Inspector has no jurisdiction to submit a report regarding the ARV of the accommodation of the assessee and the AO should rely on substantial material other than the report of subordinate officers of the department for forming the opinion. Accordingly, the re-opening was held to be bad in law. (AY. 1973-74).

CIT v. Bindra (J.S.) (2013) 217 Taxman 82 (Mag.)(All.)(HC)

S.147 : Reassessment – Avoidance of tax – Transfer pricing – Arms' length price – Re-opening bad in law in absence of any material to discard the ALP determined by the assessee

The AO reopened the assessment for the reason that as per Form No. 3CEB filed alongwith the return the assessee had international transactions with its Associated Enterprise ('AE') and determination of arm's length price ('ALP') in relation thereto was required. The AO made reference to the TPO who made an adjustment in the ALP and consequently AO made the addition to the declared income of the assessee. The Tribunal observed that on going through the purported reasons it was apparent that the AO allegedly had reason to believe that income of Rs.1.33 crores had escaped assessment and this income comprised of two components, i.e. Rs. 11 lakhs in respect of the claim of loss on account of foreign exchange fluctuation and an amount of Rs. 1.22 crores on account of claim of expenses under the head 'data usage charges'. In the Assessment Order made by the AO no addition had been made on account of foreign exchange fluctuation loss. However, with regard to the data usage charges 25% of the same had been initially disallowed, but the same had been deleted by the Disputes Resolution Panel. Therefore, no addition on the basis of the reasons recorded for reopening the completed assessment survived. Accordingly, the Tribunal cancelled the addition made by the AO.

On appeal by the department, the High Court held that the methodology for computation of ALP is prescribed u/s. 92C which the assessee has clearly followed and computed the ALP by net margin method. If the AO was not satisfied with the ALP, then during original assessment he should have referred the matter to the TPO and given the assessee an opportunity to be heard. There was no tangible material whatsoever before the AO when the purported reasons were recorded to indicate that the ALP determined by the assessee was not correct. Therefore, the alleged reason for determination of the ALP, as given in the reasons for reopening the assessment, was not a reason at all. Accordingly, the High Court dismissed the departmental appeal. (AY. 2006-07).

CIT v. Cheil Communication India (P.) Ltd. (2013) 354 ITR 549 / 259 CTR 296 / 87 DTR 324 / 217 Taxman 275 (Delhi)(HC)

S.147 : Reassessment – Notice after four years – First proviso – No failure on part of assessee to disclose primary facts – Notice without jurisdiction and not valid [S.148]

The assessee was engaged in the business of manufacturing of packing materials. The assessment of the assessee for the assessment year 2003-04 was completed on March 24, 2006, under section 143(3). On August 31, 2007, a notice under section 148 was issued and, thereafter, the reassessment was completed on December 23, 2008, in which an addition of Rs. 2.45 crores was made. On March 26, 2010, another notice under section 148 was issued reopening the assessment. The assessee's objections to the effect that the reassessment was without jurisdiction were rejected by the A.O. by order dated December 14, 2010.

On a writ petition to question whether the notice issued under section 148 on March 26, 2010, beyond the period of four years from the end of the assessment year 2003-04 & was without jurisdiction:
The High Court held by allowing the petition, that complete particulars relating to the memorandum of understanding and its impact on the profit and loss of the assessee were disclosed by the assessee in its return. When the assessment for the assessment year 2003-04 was first completed on March 24, 2006, all the relevant facts had been disclosed by the assessee by way of notes to the accounts. There was no failure on the part of the assessee to disclose the primary facts. Since all the primary facts had been disclosed by the assessee in the original return for the assessment year 2003-04 there was no escapement of income chargeable to tax because of the assessee's failure to furnish the primary facts. The notice issued under section 148 was, therefore, without jurisdiction and was liable to be quashed. (AY. 2003-04)
Rollatainers Ltd. v. Dy. CIT (2013) 357 ITR 553 / 90 DTR 387 (Delhi)(HC)

S.147 : Reassessment – Notice – Validity to be considered with reference to recorded reasons – A.O. cannot justify notice on other grounds – Notice on ground that no return had been filed – Declaration filed under Voluntary Disclosure of Income Scheme – Notice not valid [S.148]
Pursuant to the Scheme, the assessee filed a declaration of income under the Scheme disclosing its income for the assessment years 1989-90 to 1997-98. In respect of the assessment year 1997-98. In accordance with the provisions of the Scheme, the assessee also paid the tax at the rates prescribed by the Scheme. A notice of reassessment was issued to it on the grounds that it had not filed its return for the assessment year 1997-98.
On a writ petition against the notice held allowing the petition, that the entry in the proceeding sheet stated one more reason for initiating reassessment proceedings, namely, that there was a difference between the profit before tax and the amount declared in the Scheme. The reasons recorded were not explicit and did not refer to this fact. For the assessment year 1997-98 the income declared under the Scheme. "after permissible deductions under the Income-tax Act". A note was appended. The implication of this note was that the assessee was entitled to the deduction under section 80-O in respect of its consultancy income which had been declared in its profit and loss account for the year ended March 31, 1997. Thus, there had been no escapement of income. Moreover, the return for the assessment year 1997-98 was filed under the Scheme. For this reason the A.O. could not have reason to believe that income chargeable to tax had escaped assessment. The notice of reassessment was not valid. (AY. 1997-98)
Northern Exim P. Ltd. v. Dy. CIT (2012) 74 DTR 333 / (2013) 357 ITR 586 (Delhi)(HC)

S.147 : Reassessment – Notice after four years – Proviso – No evidence of failure – Cash credits – Notice invalid [S.148]
A plain reading of the proviso to section 147, makes it more than clear that where the provisions of section 147 are being invoked after the period of four years from the end of the relevant assessment year, in addition to the A.O. having reason to believe that any income chargeable to tax has escaped assessment, it must also be established as a fact that such escapement of assessment has been occasioned by either the assessee failing to make a return under section 139 either, etc., or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.
The Hon'ble High court by dismissing the appeal held that in the purported reason for the notice under section 147 there was no mention of the assessee not having made a full and true disclosure of the material facts necessary for assessment. The reasons indicated that the amounts mentioned therein had been shown in the books of account as receipts from the companies mentioned therein. The list of the companies from which amounts had been allegedly received, the name of the assessee had been shown. This meant that the assessee received money from itself which could hardly be an allegation in this case. The notice under section 147 was not valid.(AY.2002-03)

CIT v. Viniyas Finance and Investment P. Ltd. (2013) 357 ITR 646 / 215 Taxman 20 (Mag.) (Delhi)(HC)

S.147 : Reassessment – After four years – Failure to disclose material facts necessary for assessment [Ss.143(3), 148]
Assessment was made after detailed enquiry into identity and creditworthiness of share applicants. Notice after four years on ground that share applications not genuine was held invalid as there was no failure to disclose material facts necessary for assessment. (AY. 2002-03)
CIT v. Suren International P. Ltd. (2013) 357 ITR 24 / 88 DTR 16 (Delhi)(HC)

S.147 : Reassessment – Cash credits – Share application money – Notice – On the basis of vague information – Notice was held to be not valid [Ss.68, 148]
The Tribunal had found that the AO did not mention the details of the transactions that represented unexplained income of the assessee. The information on the basis of which the Assessing Officer had initiated proceedings u/s 147 was vague and uncertain and could not be construed to be sufficient and relevant material on the basis of which a reasonable person could have formed a belief that income had escaped assessment. Reasons recorded by the AO were totally silent with regard to amount, nature of bogus entries and transaction and person with whom transaction had taken place. The notice of reassessment was not valid and was liable to be quashed.(AY. 2002-03 to 2003-04)
CIT v. Insecticides (India) Ltd. (2013) 357 ITR 330 / 219 Taxman 111 (Mag.)(Delhi)(HC)

S.147 : Reassessment – After four years – Failure to disclose material facts necessary for assessment [Ss.148, 154]
When claims were considered by Assessing Officer after examining tax audit report, a mere computation error in calculating depreciation did not mean that there was failure to disclose material facts necessary for assessment. Therefore, notice of reassessment after four years was not valid. (AY. 2005-06)
Microsoft Corporation (I) P. Ltd. v. DCIT (2013) 357 ITR 50 / 90 DTR 33 / 217 Taxman 371 / (2014) 266 CTR 378 (Delhi)(HC)

S.147 : Reassessment – Fresh claim by assessee cannot be entertained – Reassessment proceedings for the benefit of revenue [S. 80P, 148]
Since the reassessment proceedings for benefit of Revenue, fresh claim by assessee regarding interest on investment cannot to be entertained. (AY. 1997-98, 1998-99, 1999-2000)
Satyamangalam Agricultural Producers' Co-operative Marketing Society Ltd. v. ITO (2013) 357 ITR 347 / 219 Taxman 127 (Mag.)(Mad.)(HC)

S.147 : Reassessment – Effect of s. 14A – Year prior to AY 2001-02 – Reassessment cannot be done [S.14A]
No reassessment for any AY prior to AY 2001-02 can be done for disallowance of expenditure in relation to exempted incomes, by virtue of proviso to s. 14A. (AY.1999-2000)
CIT v. Dhanalakshmi Bank Ltd. (2013) 357 ITR 448 (Ker.)(HC)

S.147 : Reassessment – Change of opinion – Matter not considered in original proceedings – Reassessment was held to be valid [S.148]
The reasons for effecting reassessment were not matters considered by the assessing authority while passing the assessment order and no opinion had been formed in this regard. Therefore, the contention of the assessee that no new materials had been brought to light to invoke the power and reassessment proceedings or that it was proposed by way of "change of opinion", did not contain substance. (AY.2007-08)
Innovative Foods Ltd. v. UOI (2013) 356 ITR 389 / 218 Taxman 79 (Mag.)(Ker.)(HC)

S.147 : Reassessment – Fringe benefits tax – Special provision – Reassessment under general provision is not permissible in case of fringe benefits tax [S.148, Chap.XII-H]
In light of the special provisions for reassessment of fringe benefits escaping assessment, reassessment under general provisions was not permissible in case of fringe benefits tax. Hence, notice was held to be invalid. Issues which were examined in original assessment, cannot be reopened in reassessment proceedings. (AY. 2008-09)
CIT v. P. G. Foils Ltd. (2013) 356 ITR 594 (Guj.)(HC)

S.147 : Reassessment – Beyond four years – Disclosures made in subsequent year-Form no 3CB – International transaction – Non filing of form no 3CEB regarding international transactions amounted to failure to disclose all material facts-Reassessment was valid [Ss.92CA, 92E, 143(1), 148]
The assessment was completed under section 143(1). The AO has issued the notice under section 148. The assessee filed the writ petition and thereafter withdrawn the said petition. The AO issued second notice where in it was also mentioned that the assessee failed to produce the requisite audit Form No. 3CEB. AO passed the order considering the objection of assessee. The assessee challenged the notice under section 148. Dismissing the petition the court held that non filing of Form No. 3CEB regarding international transactions amounted to failure to disclose all material facts, there was no change of opinion as no opinion had been formed regarding Arm's length price (ALP), therefore reopening was valid. (AY.2006-07)
Sitara Diamond (P) Ltd. v. ITO (2013) 92 DTR 362 / 262 CTR 324 / 358 ITR 424 (Bom.)(HC)

S.147 : Reassessment – Beyond four years – Facts gathered by the AO from the assessment records – Reopening invalid
The assessee-company paid commission to its directors who were also its major shareholders. The AO held that such payment was covered by section 36(1)(ii) and that the commission would have been payable to the directors as profits or dividend, if it had not been paid as commission, therefore he added back the commission to the taxable income. The CIT(A) set aside the disallowance and held that reopening was not valid. The Tribunal upheld the decision of the CIT(A).
On appeal by the department, the High Court observed that, the Tribunal has found that the assessee has furnished full and true particulars at the time of the original assessment under section 143(3) and there was no failure on its part. The fact of payment of commission to the directors and the fact that they were major share holders were already on record and the assessing officer gathered these facts only from the perusal of the assessment record. The Tribunal has accordingly held that the reopening of the assessment made after four years from the end of the relevant assessment year, where the original assessment was framed under section 143(3), was invalid. It has not been pointed out before us on behalf of the revenue that these findings of fact are erroneous or were contrary to the material on record. Accordingly, the High Court held that the re-assessment proceedings were invalid (AY. 2002-03).
CIT v. Convertech Equipments (P.) Ltd. (2013) 81 DTR 409 / 217 Taxman 115 (Mag.)(Delhi)(HC)

S.147 : Reassessment – After expiry of 4 years from the end of the relevant assessment year – Not permissible when all relevant facts were disclosed
The assessee had claimed deduction u/s. 80HHC and 80-IA in its returns and Assessment Orders were passed u/s. 143(3). Subsequently, the AO issued notices u/s. 148 seeking to reopen the assessments to deny deduction. Before the AO it was contended that in absence of any failure on part of the assessee to disclose truly and fully all material facts, reopening would not be permissible beyond period of four years from the end of relevant assessment year. The AO rejected the objection and passed the re-assessment orders. The CIT(A) held that there was no failure on part of the assessee to disclose true and full facts. The Tribunal upheld the finding of the CIT(A). On appeal by the department, the High

Court observed that CIT(A) as well as the Tribunal have held that there was no failure on part of the assessee to disclose true and full facts and hence the re-assessment proceedings are not valid. (AY. 2000-01 and 2001-02)
CIT v. Micro Inks Ltd. (2013) 217 Taxman 103 (Guj.)(HC)

S.147 : Reassessment – AO in possession of material which indicates escapement of income – Reassessment even beyond the period of four years justified
The assessee had filed his return of income for the year, but the AO reopened the assessment alleging that the assessee had not filed his return of income for concerned year and further that the AO had obtained information which suggested that the assessee had obtained accommodation entries from another person. Accordingly, the AO reassessed the income of the assessee. On appeal by the assessee, the CIT(A) held that when the AO found that the appellant had already filed his return but the reassessment proceedings had been initiated for failure of the appellant to file his return, he ought to have dropped the reassessment proceedings. The department carried the matter in appeal to the Tribunal where the appeal was still pending. In the meanwhile a fresh notice was issued seeking to reopen the assessment. Against, this the assessee filed a Writ Petition objection to the reopening of the assessment arguing that the fresh notice had been issued on the same ground as the earlier notice.
The High Court dismissing the petition observed that the order of the CIT(A) (which in any event has not attained finality) did not bar fresh proceedings u/s. 148. Accordingly, it held that though the reopening has taken place beyond the period of four years, the reasons which have been indicated to the assessee have a sufficient nexus with the proviso to section 147 so as to justify the reopening. This is not a case involving a change of opinion since the AO has come in possession of material which would indicate that there has been an escapement of income. (AY. 2006-07)
Hitesh R. Shah v. ITO (2013) 217 Taxman 92 (Mag.)(Bom.)(HC)

S.147 : Reassessment – In absence of any independent material – Statement recorded during survey cannot form a valid basis for reopening
The assessee is a proprietor of Ganesh Hall and Decorators and Gunjan Corporation. During course of survey u/s. 133A of the Act at assessee's business premises, statement of her son, who was looking after day-to-day business being run by her, was recorded. On basis of the said statement, AO issued notice u/s. 148 to reassess income of assessee. The appeal of the assessee was dismissed by the CIT(A). The Tribunal, however, allowed the appeal holding that the reopening was not valid.
On appeal by the department, the High Court observed that the statement made during the course of survey by the son of the assessee formed the sole basis of reopening, and the reasons recorded did not give any further details as to what is the amount which had been accepted by the son of the assessee and how the same would bind the assessee. The High Court also referred to the Tribunal's reliance on CBDT Circular dated 10-3-2003 wherein the insistence on the part of the board is not to force any confession as any such confession recorded by the officer is based on no other evidence except the oral version in confessional mode and if later on it is retracted, it leaves the revenue with no basis. (AY.1999-2000)
CIT v. Shardaben K. Modi (2013) 217 Taxman 89 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Reassessment proceedings set – Aside when the very basis for reopening had gone
The assessee filed his income-tax return *inter alia* disclosing agriculture income, this return was finalized u/s. 143(1). Subsequently, Notice was served u/s. 148 for reopening the assessment on the ground that in the A.Ys. 2001-02 and 2003-04 the assessee had shown agriculture income, however, the assessment was completed u/s. 143(3) treating the agriculture income as income from other sources.

On writ petition by the assessee, the High Court observed that since the appeals for the A.Ys. 2001-02 and 2002-03 were allowed and the entire income was treated as agricultural income. Accordingly, the High Court held that the reason assigned for initiating the reassessment proceeding is *nonest* and no useful purpose is going to be served by permitting the AO to proceed further in the matter as the very basis for re-opening has gone (AY.2000-01, 2002-03)
Rahul Prakash v. ITO (2013) 217 Taxman 100 (Mag.)(All.)(HC)

S.147 : Reassessment – Basis relied by the AO to reopen assessment had become non-existent – Reassessment notice cannot be taken forward
Assessee received compensation on land acquired by Government and worked out capital gain by applying rate of Rs. 180.07/sq. yard. Initially, cost worked out was accepted by AO. Subsequently, the AO reopened assessment relying upon co-owner's case wherein cost of land was worked out at Rs. 81.13/sq. yard. Thereafter, the decision in co-owner's case was set aside by the CIT(A) holding that rate of Rs. 130 must be reckoned.
On a Writ Petition by the assessee, the High court observed that the assumption of the AO in respect of the co-owner cost being ` 180.07/sq. yard, is a non-existent fact and hence the reopening deserves to be quashed and set aside (AY.1993-94).
Uma Kuthiala (Smt.) v. CIT (2013) 217 Taxman 91 (H.P.)(HC)

S.147 : Reassessment – No application of mind during assessment u/s. 143(1) – Reopening for disallowing expense previously allowed – Did not amount to mere change of opinion – Reopening was held to be valid [Ss.37(4), 143(1)]
Assessment was completed u/s. 143(1). Subsequently, it was reopened as assessee had claimed guest house maintenance expenses and guest house rent. The AO disallowed both u/s. 37(4). Both the CIT(A) and the ITAT confirmed the disallowance.
On appeal by the assessee, the High Court observed that assessment cannot be reopened on mere change of opinion. However, in the present case the AO noticed that the guest house maintenance expenses had been claimed, which was not allowable. Therefore, he had reason to believe that the income had escaped assessment. It is note-worthy to mention that the assessment order framed u/s. 143(1) did not require any application of mind as the same is subject to certain adjustment. If subsequently it came to the notice, on the basis of the material already on record, that an item of expenditure had wrongly been allowed, which was against the specific statutory provision, then certainly it is not a case of change of opinion thus, reopening of the assessment completed valid. On merits too the claim for the guest house expenditure, etc., was denied following the decision of the Apex Court in the case of B*ritannia Industries Ltd. v. CIT (2005) 278 ITR 546* (AY. 1987-88)
Bharat Straw Board & Paper Mill (P.) Ltd. v. CIT (2013) 217 Taxman 129 (Mag.)(All.)(HC)

S.147 : Reassessment – Beyond period of four years – Reopening not permitted on the basis of facts disclosed [S.148]
The petitioner is a cooperative Bank in liquidation. Return of income was filed, declaring loss, which was accepted by the AO. Subsequently, the AO sought to reopen the assessment on ground that assessee's banking licence having been cancelled by RBI on 30-7-2003, assessee was not engaged in banking business or any other business activity and, therefore, loss incurred by assessee was chargeable to income-tax under head 'income from other sources' and not under head 'profits and gains of business or profession' as claimed by assessee and as such the assessee could not carry forward such loss to be set off in the subsequent years. It was observed by the High Court that,the fact that the assessee's license for banking was cancelled by the Reserve Bank of India was clearly brought on record in return filed by assessee and also on the draft assessment orders. In view of such cancellation of license, its banking activities were carried out only for purpose of recovery of advances and payment to depositors. Thus there was no failure on part of assessee to disclose truly

and fully all material facts. Accordingly, the High Court held that the AO was not justified in reopening the assessment beyond period of four years. (AY. 2005-06)
Charotar Nagrik Sahakari Bank Ltd. (In Liquidation) v. Dy. CIT (2013) 217 Taxman 131 (Mag.) / (2014) 360 ITR 373(Guj.)(HC)

S.147 : Reassessment – Beyond four years – Share application money – A mere statement that DRI had seized certain goods of assessee and levied a penalty also could not be stated to be a reason for reopening of assessment [S. 68]
During previous year assessee received a sum of Rs.4.82 crores as share application money from various persons. It furnished all particulars relating to share application money including confirmation from share applicants. Assessing Officer conducted an inquiry and concluded that a sum of Rs. 42 lakhs on account of share application money was liable to be taxed as unexplained cash credit under section 68. He, therefore, made addition of Rs. 42 lakhs to income of assessee. Commissioner (Appeals) deleted addition made by Assessing Officer to extent of Rs. 37 lakhs and sustained addition of Rs. 5 lakhs. In meantime, Assessing Officer after expiry of four years from end of relevant assessment year reopened aforesaid assessment for reasons that (i) during certain investigation proceedings a statement of one 'D' was recorded and he had allegedly admitted that during assessment year 2002-03 assessee had taken accommodation entries amounting to Rs.3.65 crores from accounts operated by him, (ii) information had been received that assessee's goods had been seized by DRI and also penalty of Rs. 2 crores was levied by Commissioner of Customs, and (iii) under circumstances he had reason to believe that an amount of Rs. 3.65 crores had escaped assessment within meaning of section 147. In reassessment proceedings Assessing Officer concluded that identity, creditworthiness of share applicants and genuineness of transactions in relation to share application money totalling a sum of Rs. 4.75 crores was not established and, accordingly, added said amount to income of assessee. He made a further addition of Rs. 3.46 crores to income of assessee on alleged ground of concealment of goods. The High Court held that since aforesaid accommodation entries disclosed that same entries had been repeated multiple times to arrive at figure of Rs. 3.65 crores, reasons had been recorded without any application of mind. Since in reasons recorded there was no specific allegation that assessee had failed to truly disclose any material facts at time of assessment nor could one readily infer same from reasons itself, reassessment proceedings were illegal and without jurisdiction. A mere statement that DRI had seized certain goods of assessee and levied a penalty also could not be stated to be a reason for reopening of assessment. (AY. 2002-03)
CIT v. Suren International (P.) Ltd. (2013) 357 ITR 24 / 88 DTR 16 (Delhi)(HC)

S.147 : Reassessment – Change of opinion – Actual cost – Capital structure of company – Reassessment is not valid [S.43(1)]
Where valuation of assets and capital structure were mentioned in final accounts and annual report, which were considered during scrutiny assessment, reopening of assessment on same issue was mere change of opinion, and was thus, not sustainable in absence of any further tangible material to warrant same. Since reserves and surplus of a company are part of share holders funds, there was no basis for Assessing Officer to surmise that reserves represented subsidy or reimbursement from which cost of assets were met, and therefore it could not form reason to believe that income had escaped assessment. (AY. 2001-02, 2002-03)
Bharat Sanchar Nigam Ltd. v. DCIT (2013) 355 ITR 188 / 216 Taxman 220 / 261 CTR 135 (Delhi)(HC)

S.147 : Reassessment – Income not includible in total income – Reassessment to withdraw exemption – Claim examined in scrutiny assessment – Reassessment is bad in law [S.10]
After framing scrutiny assessment, the Assessing Officer sought to reopen the same on the ground that excess deduction under s. 10B was granted to assessee and assessee had not offered to tax rebate

on excise duty of export sales. No material was produced to show that income chargeable to tax had escaped assessment for reason of assessee's failure to disclose truly and fully all material facts. On the contrary, records revealed that necessary declarations were made in return filed and both claims were scrutinised by the Assessing Officer in assessment proceedings. Therefore, reopening of assessment was not justified. (AY.2005-06)
Bilag Industries (P.) Ltd. v. ACIT (2013) 216 Taxman 176 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Change of opinion – Claim scrutinized during assessment – Reassessment is bad in law [S. 14A, 37(1), 148, Rule 8D]
The reasons recorded by the Assessing Officer were to effect that (i) assessee had claimed expenditure of Rs. 86.17 lakhs related to SAP implementation charges as revenue expenditure, whereas such expenditure was capital in nature, and (ii) assessee who had earned tax free dividend income should have been subjected to disallowance of proportionate expenditure under S. 14A for earning such income on basis of formula provided in rule 8D When the expenditure of Rs. 86.17 lakhs itself was never claimed by assessee by way of revenue expenditure, question of disallowing such an expenditure on such basis requiring of reopening of assessment would not arise. Held, since entire issue pertaining to disallowance of expenditure under s. 14A was scrutinised by Assessing Officer during original assessment proceedings, reopening of assessment to make disallowance of such expenditure on basis of formula provided in rule 8D would amount to change of opinion, and hence, bad in law. (AY.2007-08)
Reckitt Benckiser Healthcare India Ltd. v. ACIT (2013) 216 Taxman 209 (Mag.) / (2014) 360 ITR 427 / (2014) 102 DTR 103 (Guj.)(HC)

S.147 : Reassessment – Error committed by earlier Assessing Officer – Legality of conclusion recorded by earlier Assessing Officer – Succeeding Assessing Officer cannot doubt legality of a conclusion recorded by earlier Assessing Officer – Reassessment is bad in law [Ss.40(a)(ia), 148]
The earlier Assessing Officer, in scrutiny assessment, found that assessee did not deduct TDS on labour payments and after considering assessee's explanation, he disallowed 20% of said expenditure under s. 40(a)(ia). Held, when the earlier Assessing Officer had framed scrutiny assessment and examined certain deductions thoroughly, thereafter, it is not open to latter Assessing Officer to re-open assessment on basis that earlier Assessing Officer had committed a legal error. Succeeding Assessing Officer cannot doubt legality of a conclusion recorded by earlier Assessing Officer.(AY.2008-09)
Siddhi Vinayak Transport v. ACIT (2013) 216 Taxman 211 (Mag.) / (2014) 362 ITR 72 (Guj.)(HC)

S.147 : Reassessment – Non-disclosure of primary facts – Business income – Income from other source – Notice was held to be valid [S. 28(i), 148]
The Assessing Officer reopened assessment of assessee on ground that the assessee was not the owner of premises let out by it but hired the same on rent, and therefore, receipt of amount as leave and licence fee was taxable under head income from other sources and not as business income. Held, whether the assessee had disclosed fact regarding ownership of premises in question in return of income or in assessment proceedings were not clear, it was not fit case for interference with reassessment proceedings in writ petition (AY.2006-07)
Soham Data Processing & Finance (P.) Ltd. v. CIT (2013) 216 Taxman 213 (Mag.)(Bom.)(HC)

S.147 : Reassessment – Notice within or after four years – Change of opinion – Matter decided in favour of assessee in subsequent year – Reassessment was held to be not valid [S.148]
Identical issues had already been decided in favour of assessee for assessment year 2000-01 where it was held that assessee had fully and truly disclosed material particular and there was change of opinion on part of Assessing Officer. Held since notice under s. 148 being beyond four years from

end of relevant assessment year, it would be barred by limitation.(AY. 1999-2000, 2001-02 to 2003-04)
NTPC Ltd. v. DCIT (2013) 216 Taxman 37 / (2014) 360 ITR 380 (Delhi)(HC)

S.147 : Reassessment – Beyond four years – No failure on the part of assessee – Reassessment is bad in law [S. 80-IA]
Where there was no failure on part of assessee to disclose fully and truly all material facts and claim made by assessee in assessment year under consideration was accepted after proper examination, irregularities noticed in claim while framing assessment for subsequent assessment year could not be held as sufficient reason for re-opening of assessment beyond period of four years. (AY.2006-07)
Jivraj Tea Ltd. v. ACIT (2013) 216 Taxman 32 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Valuation of stock – Subsequent reassessment following the due process of law held to be valid [S.148]
When the earlier order of reassessment stood annulled on ground of lack of fulfillment of basic requirement of recording of reasons for exercise of jurisdiction under section 147, there was no bar against reopening assessment once again on same grounds after following due procedure in accordance with law.(AY.1994-95)
A G Group Corporation v. Harsh Prakash (A.O.) (2013) 216 Taxman 108 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Fake bills – Cash credits – Survey – Recorded reasons had no nexus to form an opinion, with material to connect assessee to supplier – Reassessment notice was held to be bad in law [Ss.68, 133A, 148]
On finding that assessee had purchased raw material from agencies to whom fake sale bills were issued by “J”, Assessing Officer drew an inference that income of assessee had escaped assessment and, therefore, issued notice under section 148 for reopening of assessment. Held since there was no material to connect assessee with supplier issuing fake sale bills, it could not be held that income of assessee had escaped assessment. Reasons recorded by the authority concerned had no nexus to form an opinion that the income of the assessee had escaped assessment No prudent person can draw an inference from the revenue recorded by the authority concerned that the income of the assessee had escaped assessment. Reassessment notice was quashed.(AY. 1995-96, 1996-97)
Madan Madhav Fertilizer & Chemicals (P.) Ltd. v. JCIT (2013) 216 Taxman 34 (Mag.)(All.)(HC)

S.147 : Reassessment – Exclusion from limitation – Opportunity of being heard – Notice was beyond six years without giving an opportunity – Reassessment were held to be barred by limitation [Ss. 148, 149, 150]
The assessee advanced loans to a co-operative society which created a special corpus fund. The society earned interest on the special fund but did not disclose it in its returns of income on the ground that the money actually belonged to the assessee and that any income earned thereon was on behalf of the assessee. The Tribunal agreed with the submissions of the society and held that the interest was not taxable in the hands of the society but ought to be taxed in the hands of the assessee. On this basis the Assessing Officer issued the notices to the assessee under s. 148 seeking to reopen its assessments for the assessment years 1999-2000 to 2002-03. On writ petitions contending that all the notices under s. 148 were issued beyond the period of six years stipulated in s. 149 and the bar of limitation prescribed in s. 149 would be applicable unless the Revenue was able to establish that the cases fell within s. 150 read with Explanation 3 to s. 153. Before a notice under s. 148 can be issued beyond the time limits prescribed under s. 149, the ingredients of Explanation 3 to s. 153 have to be satisfied which requires that there must be a finding that income which is excluded from the total income of one person is income of another person. The second ingredient is that before such a finding is recorded, such other person should be given an opportunity of being heard. Since assessee was not given an opportunity of being heard, the deeming clause would not get triggered. Thus, s. 150 would

not apply and, therefore, the bar of limitation prescribed by s. 149 was not lifted. In such a situation, the normal provisions of limitation prescribed under s. 149 would apply. Those provisions restrict the time period for reopening to a maximum of six years from the end of the relevant assessment year. The notices under s. 148 having all been issued beyond the period of six years were time barred. Proceedings were quashed. (AY. 1999-2000 to 2002-03, 2004-05)

Rural Electrification Corporation Ltd. v. CIT (2013) 355 ITR 345 / 260 CTR 126 / 88 DTR 153 (Delhi)(HC)

Rural Electrification Corporation Ltd. v. CIT (2013) 355 ITR 356 / 260 CTR 136 / 88 DTR 163 (Delhi)(HC)

S.147 : Reassessment – Change of opinion – Transfer of business at book value – Reassessment were held to be invalid [Ss.43(1), 143(3), 148]

Wholly owned Government company was formed to take over telecommunications business carried on by Government Department. When assessment in the original assessment proceedings was completed after calling for explanations as to capital structure, reassessment to withdraw excess depreciation to the extent cost of assets met by reserves was a mere change of opinion and not permissible. (AY. 2001-02, 2002-03)

Bharat Sanchar Nigam Ltd. v. DCIT (2013) 355 ITR 188 / 261 CTR 135 / 216 Taxman 220 (Delhi)(HC)

S.147 : Reassessment – Opinion of revenue party – Reassessment was held to be bad in law [Ss.11, 12AA, 143(3), 148]

Notice based on opinion of Revenue audit party and not that of Assessing Officer is bad in law since belief should be that of Assessing Officer. (AY.2006-07)

Agricultural Produce Market Committee v. ITO (2011) 63 DTR 7 / (2013) 355 ITR 384 (Guj.)(HC)

S.147 : Reassessment – Notice after four years – Assessee's explanation in original proceedings accepted – Reassessment was not valid [Ss.143(3), 148, 149(1)(b)]

Original assessment allowing long-term capital loss after accepting explanation of assessee was not a case of assessee's failure to disclose fully and truly all material facts necessary for assessment. Reassessment proceedings after four years were barred by limitation. (AY. 1996-97)

CIT v. Mysore Cements Ltd. (2013) 355 ITR 136 / 217 Taxman 187 (Mag.)(Karn.)(HC)

S.147 : Reassessment – Transfer – Agreement to sell – Transfer of property – Society has not transferred the property, possession remained with society, there is no escapement of income [S.2(47), 45, 143(1), 148, Transfer of Property Act, 1882. S.5, 19]

The assessment of the assessee completed under section 143(1) without scrutiny. The Assessing Officer issued the notice to reassess the sale consideration as short-term capital gains. The assessee raised the objection, which was rejected by the Assessing Officer. Assessee challenged the rejection order by filling writ petition. The Court allowing the petition held that, where the society had not, by virtue of agreement, transferred property in favour of assessee but had only agreed to do so on certain terms and conditions and most important possession remained with society till final payment, it could not be said that property had been transferred to assessee at time of agreement to sell. Under these circumstances, there was no escapement of income under head short term capital gain. Reassessment was quashed. (AY. 2005-06)

Ratna Trayi Realty Services (P.) Ltd. v. ITO (2013) 215 Taxman 650 / 356 ITR 493 / 87 DTR 33 (Guj.)(HC)

S.147 : Reassessment – Retrospective amendments – With in four years – Book profit – Held to be valid. [Ss.115JB, 145, 148]

The Finance Act, 2008 inserted clause (h) of Explanation 1 to section 115JB retrospectively from 1-04-2001. The effect of this clause was to increase the book profit by 'the amount of deferred tax and the provisions therefor'. Recorded reasons specifically state that the reopening was done in view of retrospective amendment. The assessee challenged the reopening of assessment. The Court held that issue on notice u/s 148 within four years in light of a retrospective amendment was valid. (AY. 2004-05)
Ester Industries Ltd. v. UOI (2013) 215 Taxman 673 / 260 CTR 225 (Delhi)(HC)

S.147 : Reassessment – Where PET bottles manufactured by assessee did not fall within negative list stipulated in 13th Schedule – Assessing Officer cannot take plea of negative list for reopening the assessment and deny deduction u/s. 80-IC of the Act [S.80IC]
The assessee was engaged in the manufacture of PET bottles. It was allowed deduction under section 80-IC of the Act. Subsequently, the Assessing Officer reopened the assessment as the claim of the assessee was respect of manufacturing of PET bottles and PET bottles being an article specified in the Thirteenth Schedule (Sr. No. 20) assessee was not entitled to deduction under section 80-IC. The High Court quashing the reassessment held that a reasonable interpretation of the provisions of section 80-IC(2) read with serial No. 20 of the 13th Schedule read with the First Schedule to the Central Excise Tariff Act, 1985, it would be clear that the assessee's product does not fall within the negative list and therefore the assessee had rightly claimed deduction under section 80-IC. Further the High Court held that assessment cannot be reopened because no reasonable person can be attributed with any reason to believe that income had escaped assessment when the assessee's product clearly does not fall within the negative list. (AYs. 2005-06 to 2008-09)
Ajay Kumar Sharma v. CIT (2013) 351 ITR 428 / 214 Taxman 518 (Delhi)(HC)

S.147 : Reassessment – Export business – Disclaimer certificate was not filed reopening of assessment was held to be justified [S. 80HCC, 149]
Where the assessee did not file 'disclaimer certificate' in support of claim for deduction u/s 80HHC and further supplier to whom supply was effected by assessee had claimed deduction u/s 80HHC, reopening of assessment of assessee was justified. (AY. 1989-90)
Veeteejay Exports (P.) Ltd. v. DCIT (2013) 257 CTR 151 / 215 Taxman 122 (Mag.)(Ker.)(HC)

S.147 : Reassessment – Beyond four years – Discount to dealers on prepaid sim cards and research vouchers – Deduction of tax at source – There was no failure on part of assessee to disclose true and full facts – Reassessment notice was held to be not valid [S.148]
During the assessment proceedings, the assessee replied to a query of the Assessing Officer and supplied such details in this regard which were called for. Thus, the contention of the Revenue that by supplying the list of only those dealers who received commission in excess of Rs. 50 lakhs, the assessee failed to provide full facts, could not be accepted. When full facts regarding the charges having been paid having come on record during such proceedings, it could not be stated that there was failure on the part of the assessee to disclose true and full material facts. Hence, the reassessment proceedings could not be sustained. (AY. 2005-06)
Vodafone West Ltd. v. ACIT (No.1) (2013) 354 ITR 520 / 215 Taxman 456 (Guj.)(HC)

S.147 : Reassessment – Maintainability of writ – Disposing off of objections [Ss.32, 148]
A writ petition under Article 226 of the Constitution of India is maintainable where no order has been passed by the Assessing Officer deciding the objection filed by the assessee under section 148 and assessment order had been passed or the order deciding an objection under section 148 has not been communicated to the assessee and assessment order has been passed or the objection filed under section 148 has been decided along with the assessment order. If the objection under section 148 has been rejected without there being any tangible material available with the Assessing Officer to form an opinion that there is escapement of income from assessment and in the absence of reasons having

direct link with the formation of the belief, the writ court under article 226 can quash the notice issued under section 148. On merit the court held that the provisions of section 32(2), as amended by the Finance Act, 2001, would allow the unabsorbed depreciation allowance available in the assessment years 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years and if any unabsorbed depreciation or part thereof could not be set off till the assessment year 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years, without any limit whatsoever. The order of reassessment was held to be not valid.(AY.2006-07)
General Motors India P. Ltd. v. DCIT (2013) 354 ITR 244 / 82 DTR 304 / 257 CTR 123 (Guj.)(HC)

S.147 : Reassessment – Beyond four years – Amendment – Works contract – Amendment, retrospective effects – Reassessment held to be not valid [Ss.80IA(4), 148]
The assessee is engaged in the business of undertaking renovation and modernization of existing net work of transmission or distribution lines, was allowed deduction under section 80-IA. Subsequently, an explanation was introduced to section 80IA with effect i.e. from 1-4-2000 which provides that deduction under section 80IA would not be admissible to an assessee who carries on business which is in the nature of work contract. Assessing Officer issued notice for reassessment, which was challenged by filing writ petition. Allowing the petition the court held that initiation of reassessment was not justified, particularly when there was no failure on part of assessee to make full and true disclosure, where section 80-IA had been amended to the effect that section 80IA deduction will not be admissible to works contractors. (AY.2005-06)
Avadh Transformers (P) Ltd. v. Union of India (2013) 215 Taxman 432 (All.)(HC)

S.147 : Reassessment – Beyond four years – Retrospective amendment – Works contract – Reassessment is not valid [S. 80IA(4)]
Reassessment proceedings initiated on account of retrospective amendment to section 80-IA(4) beyond period of four years was not justified. (AY. 2003-04)
CIT v. Backbone Parth Joint Venture (2013) 215 Taxman 109 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Beyond four years – Valuation of closing stock – Specific query was raised in the course of original assessment, hence reassessment was held to be bad in law [Ss.143(3), 148]
Nowhere in the recorded reasons, did the Assessing Officer state that the assessee failed to disclose fully and truly the facts which were necessary for his assessment. The relevant details were disclosed by the assessee not only in the audited accounts, but also in response to a specific query subsequently raised by the Assessing Officer. When the Assessing Officer issued notice u/s 148, he had no material other than what was considered by him in course of the original assessment. Hence, the notice issued u/s 148 the Assessing Officer is held to be illegal and the same is hereby quashed and set aside. (AY. 2004-05)
Asian Silk Mills v. DCIT (2013) 215 Taxman 63 (Guj.)HC)

S.147 : Reassessment – Search and seizure – Disclosure – Retraction – Non-disclosure of primary facts reassessment was held to be valid [Ss.132, 143(2)]
A search was carried out in course of which assessee made disclosure of certain unaccounted income for relevant assessment year which the assessee subsequently retracted. The assessee filed his return of income without disclosing the fact that he had made disclosure of certain unaccounted income in course of search which was retracted later on. After completing the assessment on the basis of return of income filed by assessee, the Assessing Officer initiated reassessment proceedings on ground that the assessee at the time of filing return did not make true and complete disclosure of all material facts necessary for assessment. Held the assumption of jurisdiction by Assessing Officer under section 147 was justified.(AY.1995-96)
Bipinkumar P. Khandheria, Advocate v. DCIT (2013) 215 Taxman 510 (Guj.)(HC)

S.147 : Reassessment – Infrastructure capital company – Approval – Exemption – Trustee company – Reassessment invalid [S.10(23G), R.2E]

As per the provisions of section 10(23G), it is the investee company and not investor company, which is required to obtain approval of Central Government. Reassessment notice was quashed. (AY. 2004-05)

RPG Cellular Investment & Holdings (P.) Ltd. v. ACIT (2013) 355 ITR 310 / 215 Taxman 103 / 263 CTR 13 (Delhi)(HC)

S.147 : Reassessment – Fringe benefit – Notice issued under section 148 for reassessment of Fringe benefit is bad in law [Ss.115 WG, 148]

Since there is a special provision under section 115WG for reopening assessment in respect of fringe benefit escaping assessment and notice under section 148 cannot be issued for this purpose. Significantly section 115WH; unlike proviso to section 147 does not recognize any distinction between notice for reopening issued beyond the period of four years from the relevant assessment year, except for requiring that in cases of notice issued beyond four years, there has to be a satisfaction of the Commissioner or Chief Commissioner, arrived at on the reasons recorded by the Assessing Officer that it is a fit case for issuance the notice. This crucial requirement under proviso of section 147 is missing. In view of absence of specific provisions, reassessment was held to be bad in law.(AY. 2008-09)

CIT v. P.G. Foils Ltd. (2013) 33 ITR 548 / 215 Taxman 104 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Change of opinion – Within four years – Recharge advance – Reassessment was held to be invalid [S. 148]

The Assessment was completed under section 143(3) on 30-12-2010. Notice under section 148 was issued on 17th October, 2011. In the course of assessment, the Assessing Officer held that amount received towards recharges was advance, and thus expenditure incurred to earn said income could not be allowed in the relevant assessment year. He accordingly issued the notice under section 148. The assessee filed the writ petition. The Court held that where the Assessing Officer having examined nature of receipts and corresponding expenditure in original assessment in detail, could not be permitted to change his view with respect to nature of treatment such receipts must receive. Therefore, the view that the amount paid to the assessee for prepaid service was for outright purchase of 'recharge' and not an advance to be appropriated against future use of service and thus, income from 'prepaid service' crystallised as soon as customer made payment, was not justified. Reassessment was quashed on the ground of change of opinion.(AY. 2008-09)

Vodafone West Ltd. v. ACIT (2013) 215 Taxman 412 (Guj.)(HC)

S.147 : Reassessment – Change of opinion – Tax not deducted at source – Ad hoc disallowance was made in the original assessment – Reassessment held to be not valid. [S.40(a)(ia), 148]

The assessee claimed labour expenditure on which tax was not deducted at source. During scrutiny assessment, the Assessing Officer made *ad hoc* disallowance at 8% of such payments. On appeal, Commissioner (Appeals) deleted the disallowance on the ground that TDS provisions were not applicable. Revenue filed an appeal, which was pending before Tribunal. While matter was still pending before the Tribunal, the Assessing Officer issued notice under section 148 for reopening assessment on ground that failure to disallow labour payments under section 40(a)(ia), for non-deduction of tax at source, had resulted in underassessment. Held where Assessing Officer had thoroughly and fully scrutinised assessee's claim in scrutiny assessment and partially disallowed the same, power of reopening was not available as it amounted to change of opinion. Reassessment was held to be not valid.

Trans wind Infrastructure (P) Ltd. v. ITO (2013) 215 Taxman 111 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Beyond four years – Netting of income – Deduction was allowed without deducting interest expenses – Reassessment was held to be not justified [Ss.80AB, 80P, 143(3)]
The assessee claimed deduction under section 80P which was allowed in assessment completed under section 143(3). After four years, the assessment was sought to be reopened on ground that assessee had not netted income eligible for deduction with interest expenses. Held, since the assessee had given full details of dividend income, interest income as well as interest expenses for the said year, essential requirement to reopen assessment after four years was not satisfied. (AY. 2004-05)
Surat District Co-op Milk Producers Union Ltd. v. ITO (2013) 215 Taxman 490 (Guj.)(HC)
Editorial: SLP of department was dismissed (2013) 359 ITR 5(St).(S.L.P. (C) No.15965 of 3013 dated 17-4-2013)

S.147 : Reassessment – Excess interest – Working not clear – Reassessment was held to be valid [S. 80-IA]
The Assessing Officer noted that the assessee had received interest on overdue bills from its sister concern 'A' Ltd. at the rate of 24%, which was higher than the prevailing market rate and by adopting such modality, assessee had reduced taxable profit of 'A' Ltd. and at the same time increased profit of unit 'S' of assessee-company which was eligible for deduction under section 80-IA. Further, these facts were not clear from working out of deductions under section 80-IA submitted along with return of income. In these circumstances, the reopening was justified. (AY.1998-99)
Sun Pharmaceutical Industries Ltd. v. DCIT (2013) 353 ITR 474 / 215 Taxman 97(Mag.)(Guj.)(HC)

S.147 : Reassessment – Beyond four years – No new material – Reassessment was held to be not valid. [S. 80IA]
Where the assessee had disclosed all facts and figures relating to its claim for deduction under section 80-IA in the original return which the Assessing Officer scrutinised and disallowed part of, the assessment so framed after scrutiny could not be reopened beyond a period of four years without bringing new material to have reason to believe that excess deduction under section 80IA was granted. Reassessment was not valid. (AY.1998-99)
Sun Pharmaceutical Industries Ltd. v. DCIT (2013) 353 ITR 474 / 215 Taxman 97(Mag.) (Guj.)(HC)

S.147 : Reassessment – Beyond four years – Foreign travel – Reason to believe – Reassessment was held to be valid [S.148]
As the assessee had not disclosed expenditure on foreign travel, or filed any evidence along with the return of income explaining the expenditure incurred by her on her foreign travels during the relevant assessment year. Reassessment notice was issued by the Assessing Officer. The Assessee challenged the notice by filing the writ petition. The Court held that, the Assessing Officer had reason to form *prima facie* belief that that there was escapement of income on the ground of assessee's failure to satisfy requirements of Explanation 1 to section 147. Reassessment notice was held to be valid. Accordingly the writ petition was dismissed. (AY.2005-06)
Shumana Sen v. CIT (2013) 356 ITR 291 / 215 Taxman 501 (Delhi)(HC)

S.147 : Reassessment – Under-valuation – Information on the basis of search and seizure proceedings in the premises of sister concern – Ordinary person of reasonable prudence – Reassessment was held to be valid [Ss.69, 132, 148]
The assessee had sold a residential plot to K for certain consideration. During course of search in case of K's sister concern, department found that said concern had purchased a plot in close vicinity of plot sold by assessee and there was exchange of money over and above recorded sale consideration in relation to said property. On basis of the said information, the Assessing Officer believed that sale consideration disclosed by assessee for property sold by it also could not be relied as market value of that property and issued notice under section 148. Held on facts, the reasons recorded by the Assessing Officer for

reopening were such which would impel an ordinary person of reasonable prudence to hold that income had escaped assessment. Hence, the notice u/s 148 was justified. (AY. 2009-10)
Shree Om Builders and Colonizers v. ACIT (2013) 215 Taxman 399 / 94 DTR 154 (Raj.)(HC)

S.147 : Reassessment – Beyond four years – There was no failure to disclose material facts reassessment was held to be not valid. [Ss. 80-IC, 148]
Notice under section 148 was issued beyond four years to disallow the deduction allowed under section 80IC. The assessee challenged the said notice, the Court held that since there was no failure on the part of the assessee to disclose fully and truly all material facts for assessment, issuance of notice under section 148 for reassessment beyond period of four years was not valid. (AY. 2005-06)
Shivalik Bimetal Controls Ltd. v. ITO (2013) 215 Taxman 441 (Del.)(HC)

S.147 : Reassessment – Intimation – Change of opinion – Since intimation under section 143(1) did not amount to assessment question of change of opinion did not arise hence reassessment was held to be valid. [S.143(1)]
Since intimation under section 143(1) did not amount to assessment, question of change of opinion did not arise, and therefore, reopening of assessment based on sufficient material forming reason to believe that income had escaped assessment, was valid. (AY. 2005-06)
Rhythm Chemicals (P) Ltd. v. ACIT (2013) 215 Taxman 107 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Reasons to believe – Explanation 3 – Reassessment on the basis of investigation report was held to be justified in respect of cash credits [Ss.68, 148]
Reopening of assessment on the basis of investigation report was justified. Also, the addition made was justified even though the same did not form part of 'reason to believe' to reopen assessment. Cash credits and bank deposits which the assessee could not substantiate with supporting documentary evidence could be added to income. (AY. 2001-02)
Pratibha Finvest (P.) Ltd. v. ITO (2013) 215 Taxman 470 / 94 DTR 124 / 263 CTR 206 (Delhi)(HC)

S.147 : Reassessment – Beyond four years – Capital gains – Failure to make true disclosure – Reassessment was held to be valid [S.45]
The assessee claimed the long-term capital loss in respect of sale of shares. The assessment was completed under section 143(3). After expiry of four years from the relevant assessment year, Assessing Officer initiated the reassessment proceedings on the ground that as per share certificates, assessee had acquired those shares on 30-1-2004 which were sold on 12-5-2004. According to the Assessing Officer, transaction of sale of shares resulted in earning of short-term capital gain which escaped assessment. The assessee filed writ petition. The Court held that since there was failure on part of assessee to make a true disclosure that it was only on 30-1-2004 payment of final call money had been made for acquisition of shares of 'D' Ltd., the Assessing Officer was justified in initiating reassessment proceedings even beyond period of four years from end of relevant assessment year. Accordingly writ petition was dismissed. (AY. 2005-06)
Pranawa Leafin (P.) Ltd. v. DCIT (2013) 215 Taxman 109 (Mag.)(Bom.)(HC)

S.147 : Reassessment – Beyond four years – When there is sufficient disclosure merely because the Assessing Officer has nor scrutinised the claim cannot be the ground for reopening the assessment [S. 148]
Since there was sufficient disclosure in the original return filed by assessee to enable the Assessing Officer if he so desired to scrutinize the claim, the impugned notice was not justified on the ground that during the original assessment proceedings, the Assessing Officer did not examine that claim. Reassessment beyond four years was held to be invalid. (AY.2005-06)
National Dairy Development Board v. DCIT (2013) 215 Taxman 392 / 356 ITR 413 / (2014) 362 ITR 79 (Guj.)(HC)

S.147 : Reassessment – Beyond four years – Housing project – All primary facts were disclosed in the original assessment proceedings – Reassessment is bad in law [S.80-IB(10)]

Where all primary facts as to whether built-up commercial area/area of shops conformed to requirement of section 80-IB(10), were available with the Assessing Officer while passing assessment order under section 143(3), reopening of assessment on the ground that deduction was wrongly claimed was not justified. (AY. 2005-06)

Kalpataru Sthapatya (P) Ltd. v. ITO (2013) 215 Taxman 479 (Guj.)(HC)

S.147 : Reassessment – Objections of assessee – Non-application of mind while disposing the application – Order set aside

Where the Assessing Officer, while rejecting assessee’s objections to notice, had not applied his mind, the order of the Assessing Officer was to be set aside.(AY.2007-08)

Jay Bharat Maruti Ltd. v. ACIT (2013) 215 Taxman 113 (Mag.)/ 351 ITR 342 / 258 CTR 462 / 86 DTR 328 (Delhi)(HC)

S.147 : Reassessment – Audit objection – Notice issued on the basis of audit objection, without independent application of mind – Notice was liable to be quashed [148]

The reasons recorded by the Assessing Officer for reopening the assessment were almost identically worded as that of audit party and no material on record to show that the Assessing Officer had any independent application of mind. Hence, the notice of reopening was invalid for the Assessing Officer having not formed his independent belief. (AY. 2007-08)

Jagat Jayantilal Parikh v. DCIT (2013) 355 ITR 400 / 215 Taxman 444 (Guj.)(HC)

S.147 : Reassessment – Raising the query and not making the addition in the original assessment proceedings – Not discussing in the original assessment proceedings cannot be the ground for reopening of assessment [S.143(3)]

Merely because after raising queries with respect to proposed addition, the Assessing Officer did not give any reason in assessment order for not making any addition, same would not mean that issue was not scrutinized and, thus, subsequent attempt on part of the Assessing Officer to re-examine such issue would only amount to change of opinion. (AY. 2008-09)

CIT v. P.G. Foils Ltd. (2013) 215 Taxman 104 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Beyond four years – Software expenses – Capital or revenue – Change of opinion – Reassessment was held to be bad in law [S.37(1), 148]

After expiry of four years from relevant assessment year, the Assessing Officer initiated reassessment proceedings taking a view that software expenses were capital in nature and, thus, deduction in respect of same was wrongly allowed. Held since the assessee had disclosed all material facts at time of assessment, in view of proviso to section 147, Assessing Officer could not initiate reassessment proceedings merely on basis of change of opinion.

CIT v. Maruti Suzuki India Ltd. (2013) 215 Taxman 495 (Delhi)(HC)

S.147 : Reassessment – Non-initiation of action u/s 143(2) though time is available – Reassessment is held to be valid [Ss.143(1), 143(2)]

The failure to take steps under section 143(2) would not render the Assessing Officer powerless to initiate reassessment proceedings under section 147 even when intimation under section 143(1) had been issued, even when the time available for issuing notice under section 143(2) had not expired. (AY. 2005-06)

CIT v. Jora Singh (2013) 215 Taxman 424 / 262 CTR 630 / 94 DTR 169 / 32 Taxmann.com 263 (All.)(HC)

S.147 : Reassessment – Within four years – Apportionment of expenses – Change of opinion – Reassessment was held to be bad in law [S. 10B]

After feeling satisfied with the material brought on record, the Assessing Officer allowed the assessee's claim for exemption. Subsequently, the Assessing Officer initiated reassessment proceedings taking a view that apportionment of expenses between two units of the assessee was not proper. Held since the assessee's claim for exemption under section 10B was scrutinized by the Assessing Officer in detail in original assessment, reassessment proceedings even though initiated within a period of four years was not justified. (AY.2001-02)

CIT v. Fag Bearing India Ltd. (2013) 215 Taxman 387 (Guj.)(HC)

S.147 : Reassessment – Beyond four years – Letter to Assessing Officer during assessment – Reassessment was held to be bad in law [S. 35AB]

The basis for reopening assessment after four years was that documents, viz., copies of agreement with regard to shares being allotted to 'D' in consideration of technical know-how provided by it were not furnished and this resulted in excess benefit of section 35AB. The Tribunal held that all facts with regard to allotment of shares were disclosed to the Assessing Officer by a letter during course of assessment. Therefore, reopening beyond period of four years was not warranted. (AY. 1995-96)

CIT v. Daimler Chrysler India (P) Ltd. (2013) 215 Taxman 110 (Mag.)(Bom.)(HC)

S.147 : Reassessment – Transfer pricing – Reopening on the basis of order passed of earlier year, reopening was held to be valid [Ss.92C, 143(3)]

The assessee-company was engaged in the business of development and export of computer software to its affiliate enterprises located abroad. The assessee filed its return and assessment order was passed under S. 143(3). On basis of the order passed in transfer pricing proceedings in earlier AY, the Assessing Officer initiated reassessment proceedings. It was noted from records that even though assessee had reflected said transactions in its return, yet same had escaped notice of assessing authority and, thus, assessee's case squarely fell under S. 147.(AY. 2006-07)

Sysarris Software (P.) Ltd. v. DCIT (2013) 214 Taxman 493 / 352 ITR 448 / 84 DTR 138 / 257 CTR 204 (Karn.)(HC)

S.147 : Reassessment – Change of opinion – Ignorance of Assessing Officer – Nature of expenditure examined in original assessment and allowed as revenue expenditure – Reassessment in permissible [S.148]

The Revenue's contention that the Assessing Officer having framed the assessment ignoring the Supreme Court's directives, now the assessee must appear before the appellate authority, was not tenable. The Assessing Officer, having ignored the Supreme Court's directives of disposing of the objections before finalising the assessment at least could not hope to capitalize on his own wrong saying that the assessee now must go in appeal. This would amount to allowing the Assessing Officer to take advantage of his own wrong. Also, it was not open to the Assessing Officer to re-examine the question which had already been examined in the original assessment proceedings. (AY.2006-07)

Vishwanath Engineers v. ACIT (2013) 354 ITR 211 (Guj.)(HC)

S.147 : Reassessment – Bogus donation – Charitable Trust – Reassessment notice was held to be valid – Shock & Anguish expressed at maladministration by Assessing Officer and Commissioner. CBDT is directed to take action against erring officials [Ss.11, 12, 12AA(3) 148]

The assessee, a charitable trust registered u/s 12A, received donations of ` 5.23 crore in AY 2006-07. The assessee filed a ROI offering Nil income and the same was accepted by the Assessing Officer u/s 143(3) without making any inquiry. Subsequently, the Commissioner initiated proceedings u/s 12AA(3) for cancellation of registration of the assessee as a charitable trust. However, this was dropped without assigning any reasons. Thereafter, the Assessing Officer issued a notice u/s 148 seeking to reopen the assessment on the ground that the said donation was bogus as the donor had no financial capacity to give the donation. The assessee filed a Writ Petition to challenge the reopening. HELD by the High Court dismissing the Petition:

It is a shocking to note that as a matter of fact, the said assessment order is no assessment order in the eyes of law. There is not even a whisper with regard to the receipt of donation of Rs.1.57 crore. It is really not understandable under what circumstances the said assessment order came into existence. The assessment order is bereft of any discussion with regard to the genuineness of the donation given or the creditworthiness of the donor to part with such a huge amount. It is also shocking to note that the Commissioner passed an order dropping the proceedings for cancellation of registration without assigning any reason. One fails to understand what impelled him to do so. The order being bereft of any reason is no order in the eyes of law and is liable to be ignored being illegal and void. The income tax authorities are required to administer the Act. The right to administer cannot obviously include the right to mal-administer. Thus, we find no words to express anguish as what kind of governance it had been. Failure to give reasons amounts to denial of justice. It is a case where the Assessing Officer, the Addl. Commissioner and the Commissioner have abdicated their duties. The Court in the exercise of supervisory jurisdiction under Articles 226 and 227 of the Constitution of India cannot be a mute spectator. Such actions on the part of the department not only bring disrepute to the department but also encourages the dishonest assessees and promotes the nefarious activities which not only causes loss to revenue but also promotes dishonestly. An honest tax payer feels cheated. Let the matter be examined by the Chief Commissioner of Income-tax and appropriate departmental proceedings may be taken out against the erring officials. A copy of this judgment may also be sent to the Chairman of the CBDT for appropriate action. (AY.2006-07)

Fateh Chand Charitable Trust v. CIT (2013) 357 ITR 604 / 219 Taxman 172 / (2014) 98 DTR 346 (All.)(HC)

S.147 : Reassessment – Within two years – Change of opinion – Calling information and not discussing on the issue in the assessment order, reassessment held to be not valid [S.148]

The Assessing Officer framed the assessment under section 143(3), and made disallowance of certain expenses. He called the information about unutilized CENVAT credit as well as the treatment of indirect taxes ,with provisions of section 145A, which was duly complied with, however the Assessing Officer chose not to deal with the same in his order under section 143(3). He issued the notice under section 148 in the recorded reasons he mentioned that assessee following exclusive method of accounting for CENVAT. As per the provisions of section 145A of the Act the difference of Rs. 4,69,54,465 is to be included in the closing stock of the assessee. As the assessee has not included the said amount in its closing stock, the income was under assessed. On writ the court held that the Assessing Officer has called the details and chose not to deal with in his order hence the same issue cannot be reopen the assessment. Accordingly the order under section was quashed. (AY.2008-09)

Heavy Metal & Tubes Limited v. Dy. CIT (2014) 364 ITR 609 (Guj.)(HC)

S.147 : Reassessment – Mutuality – TDR premium – Appellate Tribunal – Effect to Tribunal's order – In reassessment proceedings the income assessed on reassessment could not be less than then income originally assessed. Income less than that originally assessed [Ss.143(3), 254(1)]

The assessee was a plot owner society. It received certain amount of TDR premium from its members. In original return of income, assessee had offered TDR premium to tax after deducting expenditure incurred by it. Subsequently, the Assessing Officer initiated reassessment proceedings on ground that expenditure incurred on TDR premium was not allowable. In course of said reassessment proceedings, assessee contended that TDR premium was not taxable at all, on the principles of mutuality. The Assessing Officer rejected the assessee's contention. However, the Tribunal held that TDR premium received by the assessee was not taxable on account of principles of mutuality. In an appeal before the High Court, revenue contended that income assessed on reassessment could not be less than the income originally assessed. Court held that that since the income assessed in reassessment proceedings after giving effect to order of Tribunal became less than income originally

assessed, said order passed by Tribunal was not sustainable, being contrary to decision of Apex court in *CIT v. Sun Engg. Works (P) Ltd (1998) 198 ITR 297 (SC)*. Matter was restored to the file of the Tribunal for fresh decision. (AY.1999-2000)
CIT v. Jaihind Co-operative Housing Society Ltd. (2013) 214 Taxman 134 (Mag.) / 259 CTR 501 (Bom.)(HC)

S.147 : Reassessment – Property held for charitable purposes – Accumulation of income – Form No. 10 can be filed in the course of assessment proceedings. [S.11, Income-tax Rules, 1962, Rule 17, Form no 10]
The Tribunal rejected the assessee's claim for accumulation of income on the ground that Form No. 10 had not been furnished along with the return but was filed during the course of reassessment proceedings. The Court held that Form No. 10 could be furnished by assessee-trust for purposes of section 11 (2), i.e., for accumulation of income, during reassessment proceedings. (AY.1998-99, 2000-01, 2001-02)
Association of Corporation & Apex Societies of Handlooms v. ADTI (2013) / 351 ITR 286 / 213 Taxman 15 (Delhi)(HC)

S.147 : Reassessment – Objections of assessee – Participation in proceedings – Objections were not dealt with speaking order – Reassessment proceedings held to be valid as no steps having been taken for a year after providing reasons for reopening and assessee participated in the proceedings [S.148, 263]
The assessee has taken no steps for a year after providing reasons for reopening and assessee having participated in assessment proceedings, it could not be alleged now that its objections to the reasons for reopen were not dealt with by a speaking order. Assessee also participated in the proceedings under section 263 read with section 143 (3). Accordingly the writ petition was dismissed.(AY. 2005-06)
NTUC Income Insurance Co-operative Ltd. v. DDIT(IT) (2013) 351 ITR 372 / 258 CTR 370 / 85 DTR 77 / 215 Taxman 380 (Bom.)(HC)

S.147 : Reassessment – Audit objection – Forming of opinion – Reassessment held to be invalid
Though an audit objection may serve as information, on the basis of which the Income-tax Officer can act, ultimate action must depend directly and solely on the formation of belief by the Income-tax Officer on his own. The Assessing Officer in her affidavit did not deny that she held no independent belief that income chargeable to tax had escaped assessment and that she was under compulsion by the audit party to issue notice for reopening of assessment. Therefore, the notice was quashed.(AY.2000-01)
Gujarat Fluorochemicals Ltd. v. ACIT (2013) 353 ITR 398 (Guj.)(HC)

S.147 : Reassessment – Commission allowed in original assessment – Notice to disallow commission to failure to deduct tax at source – Reassessment held to be not valid [Ss.40(a)(ia), 40A(2)(b), 148]
During the original assessment proceedings, the Assessing Officer disallowed export commission payment made by the assessee to S. It was specifically brought to the notice of the Assessing Officer that a certificate had been issued by the assessee, whereby the assessee was permitted to make payment of commission to S without deducting tax under section 194H. However, the Tribunal allowed it. The Department had issued a certificate under section 197(1) for the financial years 2003-04 and 2004-05 indicating that the assessee-company was permitted to make the payment of commission to S for both assessment years without deducting tax under section 194H. Since, there was no violation of the provisions of section 194H, the decision of the Assessing Officer to reopen the assessment on the violation of the provisions laid down under section 40(a)(ia) of the Act on the

premise that tax was not deducted at source under section 194H of the Act was not tenable in law. (AY.2005-06)
Rubamin Ltd. v. Love Kumar (2013) 353 ITR 432 / 216 Taxman 195 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Beyond four years – Scrutiny of Depreciation – Commercial vehicle given on lease – Reassessment was not valid
During the course of scrutiny assessment, the assessee made detailed submissions regarding higher rate of depreciation. Therefore, it was not a case where income chargeable to tax could be stated to have escaped assessment for the reason of the assessee failing to disclose truly and fully all material facts. Therefore, the reopening of the assessment beyond the period of four years was invalid.(AY. 1996-97)
Garden Finance Ltd. v. ACIT (2013) 353 ITR 522 (Guj.)(HC)

S.147 : Reassessment – Beyond four years – Audit objection – Reassessment held to be not valid
During the course of the scrutiny assessment, these claims which were the subject-matter of reasons recorded were examined by the Assessing Officer. The assessee pointedly brought to the notice of the Assessing Officer such claims. It may be that in the ultimate order of assessment that the Assessing Officer passed, these specific issues were not recorded. Additionally, in the petition, the assessee had averred that the Assessing Officer had issued the notice at the behest of the audit party calling for the explanation of the assessee. It was further averred that the letter was issued under the audit objection only. This had not been denied by the Department. Thus, the notice was not valid and was liable to be quashed. (AY.1996-97)
Fag Bearings India Ltd. v. Dy. CIT (2012) 209 Taxman 360 / (2013) 353 ITR 405 / 256 CTR 413 / 83 DTR 136 (Guj.)(HC)

S.147 : Reassessment – Material on record – Original assessment – Claim not examined in the original assessment – Reassessment held to be valid [S. 80-IA,143(1), 148]
The assessment under section 143(1)(a) does not envisage consideration of any point and formation of any opinion for assessment purposes. In the original assessment, the assessee had preferred a claim under section 80-IA of the Act. However, the Assessing Officer did not examine the claim on the merits. Therefore, it could not be said that it was a case of mere change of opinion when no opinion was formed in the first instance. Therefore, the recourse to section 147/148 was valid and justified.(AY.1994-95, 1995-96)
Kohinoor Foods Ltd. v. CIT (2013) 353 ITR 264 (Delhi)(HC)

S.147 : Reassessment – Beyond four years – Capital gains – Exemption granted in the original proceedings reassessment on the ground that proof of investment is not sufficient is not valid [S.54]
The assessee had been allowed exemption under section 54 for the purchase of a residential house while computing his income. In support of such purchase, he had produced receipts showing deposit of the amount with two different parties. The assessment was reopened after four years on the ground that the receipts filed could not prove the investment made for purchase of flat, and also no evidence like purchase deed, etc., were obtainable on record, this amounted to failure on the part of the assessee to disclose fully and truly all material facts. Held, merely because the Assessing Officer who had sought to reopen the assessment found the proof submitted by the assessee at the time of assessment proceedings to be not sufficient for the purpose of admitting the claim, it could not be said that there was any failure on the part of the assessee so as to invoke the provisions of section 147. Hence, the notice could not be sustained.(AY.1991-92)
Shirish C. Parikh v. ITO (2013) 353 ITR 505 / 216 Taxman 196 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Beyond four years – Reasons not recorded reassessment set aside – Second notice after recording reasons, reassessment held valid [S.148(2)]

The earlier assessment was set aside on the ground that the Assessing Officer had not recorded reasons for reopening the assessment which is a condition precedent for issuing notice under section 148(2). In these circumstances, there was no bar against reopening the assessment once again on the same grounds after following due procedure in accordance with law (i.e. after recording the reasons).

Further, since income had escaped assessment because the assessee had suppressed the closing stock, such escapement was by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment and hence, the notice of reassessment after four years was valid. (AY. 1994-95)

A G Group Corporation v. Harsh Prakash (2013) 353 ITR 158 (Guj.)(HC)

S.147 : Reassessment – Beyond four years – No failure to disclose facts hence reassessment is bad in law [S. 80HHC]

The original assessment was framed after scrutiny. There was not an iota of such allegation either in the reasons recorded or anywhere else that the income chargeable to tax had escaped assessment for the reason of the assessee failing to disclose fully and truly all material facts for the purpose of the assessment. In the original assessment had examined the claim of the assessee pertaining to deduction under section 80HHC, at considerable length. Hence, the notice of reassessment was not valid. (AY. 2004-05)

ILAG Industries P. Ltd. v. ACIT (2013) 353 ITR 393 (Guj.)(HC)

S.147 : Reassessment – Subsequent information that lease agreement was not genuine – Reassessment was held to be valid [S.32, 148]

The assessee was a manufacturer of television sets and it also ran a business in leasing of computers. During assessment year 1990-91, it purchased computers from PCL and on the same date leased them to AIL, which in turn sub-leased to PCL, this being a lease back transaction. In the original assessment, the assessee had disclosed the lease rent received and it was assessed as such. The Assessing Officer came to know during the course of assessment proceedings for the assessment year 1993-94, that substantial amount of deduction claimed by way of lease rentals had been surrendered for taxation by the lessees. The lease rent paid to the assessee was also included in the amount. The Assessing Officer had come to know that PCL had sold the same computers to the assessee which on paper had been leased out it. On enquiry, it was found that PCL had not delivered the computers to the assessee nor were they delivered to AIL. The Assessing Officer also came to know that the lease rentals were not paid to the assessee by AIL but by PCL. The reassessment proceedings were valid. (AY. 1990-91)

Video Electronics Ltd. v. JCIT (2013) 353 ITR 73 / 216 Taxman 223 (Mag.)(Delhi)(HC)

S.147 : Reassessment – Duty of assessee to disclose facts – Depreciation claimed on building on the ground that it constituted plant – Two issues one issue was held valid – Reassessment cannot be held to be invalid [S.32, 148]

Omission of the assessee to bring to the assessing authority's attention particular items in the account books, or to particular portions of the documents which are relevant, will amount to omission to disclose fully and truly all material facts necessary for his assessment. Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. Where reassessment proceedings are started with regard to more than one issue if the reopening is sustainable on one issue, even if on the other issues the exercise of power under section 147 of the Income-tax Act, 1961, is not justified, it would not render the assumption of jurisdiction under section 147 of the Act invalid. (AY.2006-07)

Aquagel Chemicals P. Ltd. v. ACIT (2013) 353 ITR 131 / 216 Taxman 219 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Beyond four years – Failure to disclose facts – Loan accepted in subsequent years – Reassessment was not valid – Alternative remedy is not a bar for issue of writ [Article 226. Constitution of India]

It was not the case of the Revenue that the assessee did not explain the source from which the loan was funded, even though it was called upon to do so. It was also not the case of the Revenue that any information furnished by the assessee with regard to the source of funds for the loan was false. The loan was disclosed in the return of income for AY 1983-84. The Assessing Officer upon consideration of all relevant records accepted the loan, not only in that year but in subsequent years as late as in 1989-90. Therefore, the Assessing Officer lacked jurisdiction to reopen the assessment after four years. (AY. 1983-84)

Mimec (India) P. Ltd. v. Dy. CIT (2013) 353 ITR 284 / 216 Taxman 157 (Mag.)(Cal.)(HC)

S.147 : Reassessment – Beyond four years – Subject-matter of appeal – Reassessment was not valid [Ss.43, 148]

The Assessing Officer reopened the assessment on the ground that while computing the taxable income, from the net profit and income and expenditure account, the assessee had deducted under the head "provision written back". The second ground was based on the fact that, in view of the retrospective introduction of Explanation 6(b) to section 43 of the Act by the Finance Act, 2008, w.e.f. 1st April 2003, the assessee's claim required to be restricted. The second ground was the subject-matter of appeal. By virtue of the second proviso to section 147, income involving matters which are subject-matters of any appeal, reference or revision has expressly been taken out of the purview of the section 147.(AY.2003-04)

National Dairy Development Board v. Dy. CIT (2011) 242 CTR 302 / 54 DTR 217 / (2013) 353 ITR 538 (Guj.)(HC)

S.147 : Reassessment – Assessment set aside – Reassessment was held to be not valid

Held, that the material on which the Assessing Officer had formed the belief as regards escapement of income, was the assessment order for the year 2006-07, which on the date of reopening of the assessment for the year under consideration was set aside by the CIT(A) and as such had no existence in the eyes of law. Therefore, the notice could not be sustained. (AY. 2005-06)

P. G. Foils Ltd. v. Dy. CIT (2013) 353 ITR 548 / 216 Taxman 34 (Mag.)(Guj.)(HC)

S.147 : Reassessment – Subject of appeal – Second proviso – Depreciation was not subject matter of appeal – Reassessment was held to be in valid [Ss.32, 143(3)]

Held, dismissing the writ petition that, the amount of depreciation which was allowed by the Assessing Officer, while completing the assessment under section 143(3) was never before the higher authorities. Therefore, the second proviso to section 147 upon which reliance was placed was wholly inapplicable. Since the notice contained the reason and the assessee was present before the Assessing Officer there was no need for interference by the court. (AY. 2006-07)

Indian Metals and Ferro Alloys Ltd. v. ACIT (2011) 243 CTR 258 / 58 DTR 377 / (2013) 353 ITR 561 (Orissa)(HC)

S.147 : Reassessment – Deduction of expenses on voluntary retirement scheme – Subsequent CBDT circular – Reassessment was held to be not valid [S. 148]

During the assessment, after considering the submissions of the assessee, the Assessing Officer accepted the assessee's stand and did not disallow the expenditure incurred on the voluntary retirement scheme. A subsequent Board's circular dated January 23, 2001 (2001) 248 ITR 257 (St) laid down general guidelines for the Assessing Officer to follow while examining the claims of the assessee for deduction as revenue expenditure, the amount expended as ex gratia payment for retrenchment of employees under the voluntary retirement scheme. The Assessing Officer,

therefore, could not have blindly relied on such circular to hold a belief that in the assessee's case, income chargeable to tax had escaped assessment. The notice of reassessment was not valid. (AY.1997-98)
Arvind Polycot Ltd. v. Chandra Ram (2013) 353 ITR 511 / 214 Taxman 156 / 89 DTR 246 / 262 CTR 636 (Guj.)(HC)

S.147 : Reassessment – Notice – Full facts disclosed – Reassessment was held to be invalid [S. 148]
Since the assessee had enclosed the details of valuation of polished diamonds and the methodology for working out the average cost of polished diamonds per carat and after this detailed exercise undertaken by the Assessing Officer, original assessment. Was framed, there was no failure on the part of the assessee to disclose fully and truly all material facts for the purpose of assessment. The notice of reassessment after four years was held invalid. (AY. 2003-04)
Balar Exports v. Dy. CIT (2011) 60 DTR 369 / 202 Taxman 293 / (2013) 353 ITR 422 (Guj.)(HC)

S.147 : Reassessment – Limitation – Notice on the ground to give effect to appellate order would result in escapement of income. Reassessment notice was quashed [S.148, 150]
Held that the assessment had not been reopened to give effect to the order of the CIT (A), but because, according to the Assessing Officer, giving effect to the order made by the CIT (A) would result in escapement of income. Thus, in effect and substance the Assessing Officer was sitting in appeal over the order passed by the Commissioner (Appeals). The ingredients for invoking section 150 of the Act were clearly not satisfied. Hence, the reassessment notice was liable to be quashed.(AY.1989-90)
Harsiddh Specific Family Trust v. Joint CIT (2013) 353 ITR 500 / 216 Taxman 199 (Mag.) (Guj.)(HC)

S.147 : Reassessment – Beyond four years – Accounting treatment – Change in treatment of subsidy – Reassessment held to be not valid [S.148]
In 1995, the assessee received subsidy at the rate of 30 per cent of the investment in eligible assets. Notice under section 148 was issued for AY 2004-05 to the assessee on the ground that the subsidy had been wrongly distributed amongst the partners instead of being utilized for business purpose. Held, that either on accrual or actual receipt, the taxable event did not arise during the year under consideration. In the relevant year, nothing had happened which would permit the Department to collect tax on such receipt. The fact that for accounting purposes the assessee changed the nature of treatment of such subsidy amount received in the year 1995, would not permit the Revenue to examine the taxability of such receipt. (AY. 2004-05)
Chimanlal and Sons v. Dy. CIT (2013) 353 ITR 344 (Guj.)(HC)

S.147 : Reassessment – Change of opinion – Interest to partner – Reassessment was not valid [S.148]
A perusal of the assessment order as originally framed under section 143 indicated that while computing the profit as per the profit and loss account, the Assessing Officer had added interest to partners and remuneration to partners and thereafter, allowed the deduction, which clearly exhibited due application of mind on the part of the Assessing Officer. The view taken by the Assessing Officer was a plausible view. Once the view taken by the Assessing Officer was a plausible view, the notice issued under section 148 based on a change of opinion was not valid.(AY.2005-06)
Tulsi Developers v. Dy. CIT (2011) 59 DTR 51 / (2012) 246 CTR 160 / (2013) 353 ITR 530 (Guj.)(HC)

S.147 : Reassessment – Recorded reasons – Different grounds – Notice cannot be held to be valid on different ground – Beyond four years – Failure to disclose interest at higher rate – Reassessment on this ground was held to be valid [S.37(1), 80HHC, 80IA(10), 148]

When the assessee objected to the grounds of reopening of assessment and pointed out in detail that the claims were valid and that no double claims, as alleged, were made, the Assessing Officer in the order rejecting the objections went on yet different aspect altogether. This was not permissible and this would not form a valid basis for reopening the assessment.In this case, it could not be said that the assessee failed to fully and truly disclose all material facts. In the original assessment, the Assessing Officer scrutinized the claim of the assessee under section 80HHC. Even in the order disposing of the objections, the Assessing Officer had nowhere stated that the assessee failed to disclose full facts with respect to such claim. This ground of reopening the assessment, therefore, was not valid. Merely because the Assessing Officer did not disallow the claim of the assessee under section 80-IA, that would not be a ground to permit reopening of such alleged underassessed income beyond the period of four years. From the facts on record, it was not possible for the Assessing Officer to ascertain that the assessee received interest from sister concern which was higher than the normal rate of interest. Since this fact was relevant to the provisions of section 80-IA(10), the notice on this ground was valid. (AY. 1997-98)

Sun Pharmaceutical Industries Ltd. (No. 1) v. Dy. CIT (2013) 353 ITR 450 / 216 Taxman 41 (Guj.)(HC)

S.147 : Reassessment – Within four years – Recorded reasons – Sufficiency of reasons – Interest from sister concern at higher rate – Reassessment was valid [Ss.37(1), 80-IA, 148]

Inquiry at the stage of finding out whether the reassessment notice under section 148 is valid is only to see whether there are reasonable grounds for the Income-tax Officer to believe and not whether the omission/failure and the escapement of income is established. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief is not for the court to judge. The assessee had failed to disclose fully and truly all material facts. The only disclosure made was that the assessee had earned interest income of Rs.3,03,48,973. There was no further information available on record that such interest included overdue payment charges at the rate of 24 per cent. received from its sister concern viz., AM. Three essential facts, namely, that the assessee received interest on overdue payments from AM, that AM was a sister concern of the assessee and that such interest was charged at the rate of 24 per cent. per annum, were not discernible from the record at all. Under the circumstances, from the material on record, it was not possible for the Assessing Officer to make adjustment under section 80-IA(10) even if it was required. It may be that the assessee did give the total figure of interest received. However, from such figures, it was not possible for the Assessing Officer to ascertain these vital facts. Even from the account books and other evidence which the assessee had produced, even after due diligence, it was not possible for the Assessing Officer to discover these three vital facts. The notice of reassessment issued within four years was valid.(AY.1999-2000)

Sun Pharmaceutical Industries Ltd. v. Dy. CIT (No.2) (2012) 210 Taxman 167 / (2013) 353 ITR 474 (Guj.)(HC)

S.147 : Reassessment – Direction for assessment – Assessment in pursuance of direction [Ss. 144A, 148, 263]

The petitioner invoked the provisions of section 144A. Pursuant thereto, the Additional Commissioner passed an order under section 144A directing the Assessing Officer not to treat the share trading loss of as deemed speculation loss, after which the assessment was framed. After the assessment was made, the Assistant Commissioner issued notice under section 148 of the Act. Held, since the Department did not take steps to revise the order passed under section 144A by invoking the provisions of section 263, the notice under section 148 issued by the Assistant Commissioner could not be sustained. (AY.2001-02)

Amrit Sales Promotion Pvt. Ltd. v. UOI (2013) 353 ITR 68 / 216 Taxman 104 (Mag.)(Cal.)(HC)

S.147 : Reassessment – Abatement of proceedings – Death of legal representative brought on record – Application for substitution of legal representatives was not considered while passing the order. Order was recalled on a review petition [S.148]

The Assessing Officer completed the reassessment against the deceased assessee without issuing notices to all his legal representatives. The CIT(A) accepted the contention of the assessee that since notices had not been issued to all the legal representatives of the assessee, the proceedings were wholly without jurisdiction. The Tribunal and the HC affirmed the views of the CIT(A). On a review petition, held allowing the petition that the co-ordinate Bench proceeded to consider the appeal as having abated, for the legal representatives of the assessee having not been brought on record. The observations had been made even to the effect that the Revenue had not moved any application seeking substitution of the legal representatives of BPB. It was clear that while passing the order dated September 16, 2011, the fact that the Revenue had indeed moved an application seeking substitution of the legal representatives of the assessee, had been overlooked. The appeal could not have been considered as having abated and, hence, the order dated September 16, 2011, was required to be recalled.

CIT v. Mangi Lal (2013) 352 ITR 422 / 257 CTR 248 / 84 DTR 89 (Raj.)(HC)

S.147 : Reassessment – Beyond four years – Information regarding transport subsidy available in audited accounts and statements – Reassessment was not valid

The assessee had disclosed, very clearly and thoroughly, its transport subsidy reserve was. The Revenue could not say that the assessee did not disclose all such material facts. There was no omission or failure on the part of the assessee. Reassessment was not valid. (AY.1997-98)

CIT v. Sonitpur Solvex Ltd. (2013) 352 ITR 305 / 258 CTR 420 / 215 Taxman 87 / 85 DTR 262 (Gauhati)(HC)

S.147 : Reassessment – Retrospective amendment – Notice beyond four years – Reassessment held to be invalid [S. 80HHC]

Whether when Legislature amends provisions of Act with retrospective effect, it cannot be said that there was failure on part of assessee to disclose fully and truly all material facts relevant for purpose of assessment. Therefore, reassessment proceedings were liable to be set aside.

CIT v. K. Mohan and Co. (Exports) (Regd.) (2013) 349 ITR 653 / 214 Taxman 17 (Mag.) (Bom.)(HC)

S.147 : Reassessment – Grounds for reopening – No opinion in assessment order regarding allowability – Reassessment was held to be invalid [Ss. 80IB(10, 143(3)]

In spite of full disclosure, the Assessing Officer gave benefit of the provision by considering the materials on record. The fact that the Assessing Officer, in the assessment proceedings under section 143(3), did not give any opinion regarding the allowability or otherwise of deduction under section 80-IB(10) is not a ground for invoking section 147.

Ganesh Housing Corporation Ltd. v. Dy. CIT (2013) 350 ITR 131 / 214 Taxman 18(Mag.) (Guj.)(HC)

S.147 : Reassessment – Non-disclosure of primary facts – Change of opinion – One year within two years other years beyond four years – Reassessment was held to be invalid – Form can not override statutory provision [Ss. 80-IB, 143(3), 148]

Since the AO had also noted that the eligibility of the assessee for claiming a deduction under section 80-IB has been duly verified, it would be totally contrary to the record for him to state that the nature of the activity of the assessee was not verified during the course of the assessment proceedings. For assessment years 2007-08 and 2008-09, reopening the assessment on this ground would amount to change of opinion. The objection of the Assessing Officer that the form ITNS-34 did not contain any provisions to disclosure that the assessee has failed to disclose fully and truly all material facts

necessary for assessment is not valid. Form can not override statutory provision. (AY. 2005-06 to 2008-09)
Dynacraft Air Controls v. Sneha Joshi (Smt.) (2013) 355 ITR 102 / 214 Taxman 183 / 89 DTR 310 (Bom.)(HC)

S.147 : Reassessment – Ground of reassessment dropped – Other income cannot be assessed [S. 148]
Where ground on which reassessment notice under section 148 was issued was dropped while passing reassessment order, Assessing Officer could not reassess or assess any other income which has escaped assessment and comes to his notice in reassessment proceedings. Hence, the reassessment order was liable to be set aside (AY. 1999-2000).
CIT v. Double Dot Finance Ltd. (2013) 214 Taxman 47 (Mag.)(Bom.)(HC)

S.147 : Reassessment – Quantum of escaped tax – Reopening invalid if reasons silent on quantum of escaped tax [Ss.148, 149, 151]
In AY 2000-2001 the assessee sold a plot of land after converting leasehold land into freehold. The capital gains arrived at was offered as LTCG and the same was accepted by the AO. After the expiry of 4 years, the AO issued a notice u/s 148 for reopening the assessment on the ground that as the property was sold within three years of conversion into freehold, the gains were assessable as STCG. The approval of the Joint/ Addl. CIT was obtained. However, in the recorded reasons, it was not stated whether the amount of income escaping assessment exceeded Rs. 1 lakh. The assessee challenged the reopening on the ground that as the recorded reasons did not state that the income escaping assessment is Rs. 1 lakh or more, the reopening was invalid. HELD by the High Court upholding the plea:
S. 149 (1) (b) provides that no notice u/s 148 shall be issued after the expiry of 4 years from the end of the relevant AY unless the income chargeable to tax which has escaped assessment amounts to Rs. 1 lakh or more. Under the proviso to s. 151 (1), no notice u/s. 148 can be issued after the expiry of four years from the end of the relevant AY unless the CCIT/ CIT is satisfied on the reasons recorded by the AO that it is a fit case for issue of such notice. Accordingly, it is imperative that the AO should state in the recorded reasons that the escaped income is likely to be Rs.1 Lakh or more so that the sanctioning authority is aware that it has exercised power of extended period of limitation u/s. 149 (1) (b) and applies its mind accordingly. A sanction given without being aware of this fact is not valid. On facts, as there is nothing in the recorded reasons to suggest that the income chargeable to tax which has escaped the assessment is ` one lakh or more, the reopening is not valid. (AY.2000-01)
Mahesh Kumar Gupta v. CIT (2013) 215 Taxman 114 (Mag.)(All.)(HC)

S.147 : Reassessment – Reason to believe – Reopening has to be on the basis of some tangible material available to the Assessing Officer. On the same material reassessment held to be not valid [S.80IA(4)]
Exercise of reopening has to on the basis of some tangible material becoming available with the Assessing Officer. There has to be a rational connection and a live link between the material discovered and the formation of belief by the Assessing Officer. Once the Assessing Officer had applied his mind and allowed deduction u/s. 80-IA(4) to the assessee on the basis of material before him, it was not permissible for him to reopen the assessment u/s. 147 on the same material on the ground that certain aspects were not considered or that they were overlooked; a change of opinion is no ground for exercise of powers u/s. 147. (AY. 2007-08)
Agrawal JV v. ITO (2013) 83 DTR 101 / 257 CTR 112 (Guj.)(HC)

S.147 : Reassessment – Proviso – Full and true disclosure – Notice after expiry of four years [Ss.80M, 148]
Assessee had claimed deduction u/s. 80M which the AO granted without discussing the issue in the order and without looking into the provisions of the Act. The AO had erred while framing the original

assessment. Therefore, merely by adding a line in the reasons recorded that the assessee had failed to disclose fully and truly all material facts, the requirements of the proviso to s. 147 would not be satisfied. Reassessment was held to be invalid. (AY. 1995-96)
Himson Textile Engineering Industries Ltd. v. N.N. Krishnan or His Successor to Office (2013) 83 DTR 132 (Guj.)(HC)

S.147 : Reassessment – Change of opinion – Reassessment on same set of facts was held to be bad in law [S.148]
A different view taken on the same set of facts amounts to change of opinion. Reopening on change of opinion is bad-in-law. (AY. 2006-07)
Praveen P. Bharcuhua (Mrs) v. Dy. CIT (2012) 348 ITR 325 / (2013) 256 CTR 346 / 82 DTR 374 / 212 Taxman 166 (Bom.)(HC)

S.147 : Reassessment – The expression 'reason to believe' cannot be restrictively construed – The formation of belief by the assessing officer must always be tentative and not a firm or final conclusion – Reassessment was held to be valid
Once there are reasons for the assessing officer to believe, whether such reasons originate out of the record already scrutinised or otherwise, he shall be within his competence to initiate the re-assessment proceedings. The formation of belief by the assessing officer must always be tentative and not a firm or final conclusion as the latter will negate the very object of giving an opportunity of hearing to the assessee. Reassessment based on agreement to sale which was signed by both parties is held to be valid. (AY. 2001-02)
Arun Kumar Goyal v. CIT (2013) 81 DTR 123 / 215 Taxman 692 / 255 CTR 330 (P&H) (HC)

S.147 : Reassessment – Beyond four years – At the time of original assessment no failure to disclose – Reopening not sustainable
Where the assessee had furnished full and true particulars at the time of original assessment under section 143 (3) and there was no failure on his part to disclose. The reopening of assessment made after four years from the end of the relevant previous year was held to be invalid. (AY. 2003-04)
CIT v. Convertech Equipment P. Ltd. (2013) 81 DTR 409 (Delhi)(HC)

S.147 : Reassessment – Full and true disclosure – Beyond four years – Within four years – Change of opinion – Remuneration to directors – No tangible material – Reopening is bad in law [Ss. 36(1)(ii), 148]
Assessee company in the course of original assessment proceedings, has explained the nature of the payment basis of computation and rationale for computing the remuneration paid to the directors partly with reference to fixed amount and partly as a proportion of the net profit, which was accepted under section 143(3). The Assessing Officer reopened the said assessment on the ground that the payment made to a director who is a shareholder is not covered by section 36((1)(ii) to be eligible for deduction. The Assessee challenged the said notice by writ petition, the Court quashing the notice held that the reassessment was based on a pure change of opinion and not on tangible material and hence it is impermissible in law. In respect of notice issued after four years the notice was quashed on the ground that in the absence of any allegation in the notice that there was failure on the part of the assessee to disclosure fully and truly material facts for the assessment, reopening of assessment does not fulfill the requirement set out in the proviso to section 147, therefore the notice was quashed. (AY.2005-06, 2006-07, 2007-08, 2008-09)
OHM Stock Brokers (P) Ltd. v. CIT (2013) 351 ITR 443 / 258 CTR 90 / 85 DTR 111 / 215 Taxman 53 (Bom.)(HC)

S.147 : Reassessment – Deduction at source 194C is not applicable in the first year of operation Consequently, notice issued u/s 148 to disallow expenditure for non- compliance of s. 194C is liable to be quashed. [Ss.143(3), 194C]

A notice u/s. 148 was issued within a period of four years form the end of relevant Asst. Year so as to disallow an amount of Rs. 3,07,59,872/- in respect of labour charge on the pretext that the assessee failed to deduct tax at source u/s. 194C at the time of making the said payment. Assessment was framed earlier u/s. 143(3) without making disallowance in respect of the same. According to Proviso to Section 194C(2) an individual or HUF is supposed to deduct tax at source only if its total sales, gross receipts or turnover from its business or profession exceeds monetary limits specified under clauses (a) or (b) of Section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid. This being the first year of operation, the said condition is not fulfilled and hence the assessee is not supposed to deduct tax u/s. 194C Hence AO's reason to believe that income chargeable to tax in case of assessee has escaped assessment is without foundation and lacks validity. Accordingly, the impugned notice issued u/s. 148 is quashed.

Harshadbhai Naranbhai Bagadia v. ACIT (2013) 86 DTR 89 (Guj.)(HC)

S.147 : Reassessment – Notice – Return-*non est* – Once Department accepts the tax paid under returns of income filed by an assessee without ever questioning that such returns were filed before a wrong officer, it cannot later contend that such officer had no jurisdiction to accept the same [Ss. 120, 143(1), 143(30, 148]

Assessee had filed its return of income before his normal Assessing Officer which were accepted by such officer u/s.143(1) whereas he was actually supposed to file the same before the special Assessing officer designated as such consequent to search action at the assessee's premises in the past Hence, the assessment was sought to be reopened on the sole ground that assessee had filed return of income with other wards with *mala fide* intentions. It was held by the Hon'ble High Court that the assessee had discharged his liabilities by filing returns of income and the same being accepted *vide* intimation u/s.143(1). Since the Department has accepted the tax paid under such returns without ever questioning filling of such return before a wrong officer, it cannot now be allowed to contend that such returns were filed before wrong officers who had no jurisdiction to accept the same. Since the sole ground for such re-opening of the assessment was not sustainable notice u/s.148 were quashed. (AY.1997-98 to 2000-01)

Bipinkumar P. Khandheria v. Dy. CIT (2013) 354 ITR 268 / 90 DTR 310 (Guj.)(HC)

S.147 : Reassessment – Advance Ruling – Binding Precedent – Reassessment based on some other case the decision was overrun led cannot be the ground for reassessment [Ss. 245S, 263]

The assessee, a foreign company having residential status of non-resident, had approached the Authority for Advance Rulings, whereby it was held that profits arising to it from realisation of portfolio investments in India will be treated as business profits. The loss on sale of shares claimed by the assessee under the head 'profits and gains from business or profession' was accepted by the Assessing Officer under section 143(3). A notice to reopen assessment under section 147 was issued on grounds that the Advance Ruling in assessee's own case was overruled by a subsequent Advance Ruling in another case, which held that earnings on purchase and sale of shares would be taxable under the head 'capital gains' and not 'profits and gain from business or profession'. Consequently, a reassessment order was passed. The Tribunal set aside the order of the Assessing Officer on grounds that for two other assessment years, the Director of Income-tax had initiated proceedings under section 263 on identical grounds which had been set aside in a writ petition, the Court held that Advance Ruling in assessee's own case cannot be overruled by a subsequent Advance Ruling in case of another assessee, accordingly reopening of assessment under section 147 on above ground was not valid, particularly when there was no failure on part of assessee to make full and true disclosure. In favour of assessee. (AY. 2003-04)

DIT v. Prudential Assurance Co. Ltd. (2013) 352 ITR 66 / 213 Taxman 111 (Bom.)(HC)

S.147 : Reassessment – Exchange of information – Reassessment proceedings initiated on basis of information received from Government were held to be valid – DTAA-India-Japan [Ss.90, 148, Article 26]

For the assessment year 2006-07, the assessee's return was processed under section 143(1). Subsequently, the Assessing Officer received information from the Government of India that the assessee had received certain amount from a Japanese-company. Since said amount was not shown in books of account by the assessee, a notice was issued under section 148. The assessee challenged the impugned notice in instant writ petition. Revenue contended that the information was received from the foreign tax authorities under the aegis of the OECD on which the respondent had no control and hence, the credibility of the information could not be questioned. Assessee contended that the Japanese authorities had no authority to verify the accounts of the assessee to find out whether the amount in question had been accounted for in its books and, therefore, the Assessing Officer was not right in stating that the information received from the Japanese authorities related only to the amount not disclosed in the books of account of the assessee. The material in the possession of the Assessing Officer could not in any case constitute 'reason to believe' so as to clothe him with jurisdiction to reopen the assessment. The court held that the very fact that this information was received from a Government agency under Article 26 of DTAA, same would constitute live link or nexus between material and formation of belief that income to that extent had escaped assessment. (AY. 2006-07)
Mitsui & Company India (P.) Ltd. v. ITO (2013) 213 Taxman 32 / 90 DTR 417 (Delhi)(HC)

S.147 : Reassessment – Notice – Share application money – Information from Investigation Wing that assessee one of beneficiaries of accommodation entries – Share applicants confirming factum of application for shares and of funds for such shares in response to notice under section 133(6) at time of original assessment-Reassessment on ground information neither available with Department nor did assessee disclose information at time of assessment proceedings, notice was held to be not valid [Ss.133(6), 143(3), 148]

In the course of the assessment proceedings under section 143(3) of the Act, the Assessing Officer issued a questionnaire to furnish the details of the share capital introduced and the share application money received but there was no response from the assessee to the questionnaire till December, 2009. On August 24, 2009, the Additional Commissioner circulated a letter to all Assessing Officers including the Assessing Officer of the assessee. The letter was on the subject of a list of beneficiaries of accommodation entries. Thereafter, on November 9, 2009, the assessee furnished a reply to the questionnaire and gave details of the share capital raised by it and furnished confirmation from the parties. The Assessing Officer, in order to further verify and confirm the facts, issued notices under section 133(6) to the share applicant companies directly and all the five companies responded to those notices and reaffirmed their respective confirmations. Thereafter, assessment was framed on December 30, 2012. The assessment was reopened and the main reason for reopening the assessment of the assessee was that there were bogus accommodation entries and the assessee was one of the beneficiaries of the accommodation entries to the extent of Rs. 1,35,00,000. The reasons also indicated that the information that the entries were accommodation entries and were provided by bogus companies were not available with the Assessing Officer at the time the assessment was done under section 143(3). On a writ petition : Held, allowing the petition, that the plea taken in the reasons that the information was "neither available with the Department nor did the assessee disclose the information at the time of assessment proceedings" was factually not correct. The information was available with the Department and it had been circulated to all the Assessing Officers. There was nothing to show that the Assessing Officer did not receive the information. There was also nothing to show that the Assessing Officer had not applied his mind to the information received by him. On the contrary, it was apparently because he was mindful of the information that he issued notices under section 133(6) directly to the parties to confirm the factum of application of shares and the source of funds of such shares. Therefore, the very foundation of the notice under section 148 was not

established even *ex facie*. Consequently, it could not be said that the Assessing Officer had the requisite belief under section 147 and, as a consequence, the notice and the order rejecting the objections were liable to be quashed. (AY. 2007-08)
Pardesi Developers and Infrastructure Pvt. Ltd. v. CIT (2013) 351 ITR 8 / 258 CTR 411 / 86 DTR 120 (Delhi)(HC)

S.147 : Reassessment – Notice – Beyond four years – Incorrect allowance of deduction – Assessing Officer raising specific queries and considering material before him, reassessment held to be invalid [S.148]
The assessee is engaged in the business of manufacturing and sale of various types of pharmaceutical products. Notice under section 148 of the Act, was issued to the assessee after the expiry of four years from the end of the assessment year 2003-04 for the reasons that incorrect allowance of deduction had been granted (i) in respect of royalty received from foreign enterprise ; (ii) in respect of export profits; (iii) in respect of profits and gains from newly established undertakings; and (iv) of non-business expenditure. Detailed objections were given by the assessee explaining each of the reasons. However, the Assessing Officer did not accept the objections and rejected them. On a writ petition:
Held, allowing the petition, that in so far as all the reasons other than the reason pertaining to club expenses were concerned, specific queries had been raised and the Assessing Officer had considered the material placed by the assessee before him in the course of the original assessment. As regards the club expenses, it was stated that since no specific query had been raised, Explanation 1 would get attracted. This could not be accepted because the club expenses were specifically mentioned in the tax audit report in Form 3CD which was annexed along with the return. This was a clear statutory disclosure on the part of the assessee with regard to the claim of club expenditure. It was not a piece of evidence which was hidden in some books of account and which the Assessing Officer could have possibly, with due diligence, discovered. On the contrary, this was material which was placed before the Assessing Officer along with the return which the Assessing Officer was duty bound to go through before completing the assessment. Therefore, the case could not fall in the category of material which was referred to in Explanation 1 to section 147. (AY. 2003-04)
Ranbaxy Laboratories Ltd. v. Dy. CIT (2013) 351 ITR 23 / 213 Taxman 91 Mag.) /(2014) 100 DTR 392 (Delhi)(HC)

S.147 : Reassessment – Notice – Duty to disclose primary facts – Licence fee for use of goodwill – Claim based on terms and conditions of licence agreement – Failure on part of assessee to furnish primary facts fully and truly at time of original assessment – notice is held to be valid – Notice need not contain list of documents required to be furnished, but not actually furnished, by the assessee [Ss.143(1), 148]
For the assessment years 2002-03 to 2006-07, amounts paid by the assessee under a licence agreement for use of goodwill were claimed and allowed as deduction. In the course of the assessment proceedings for the assessment years 2003-04, 2004-05, 2005-06 and 2006-07 the assessee did not furnish the licence agreement before the Assessing Officer. In the course of the assessment proceedings for the year 2007-08 the licence agreement was examined but the claim for deduction of the licence fee payment was found not allowable. Thereafter, notices were issued on the ground that the assessee had not disclosed all material facts correctly and fully and there was failure on its part to disclose fully and truly all material facts necessary for its assessment in terms of the proviso to section 147 of the Income-tax Act, 1961, by reason of which there was escapement of income chargeable to tax. On a writ petition contending that (i) the reasons recorded for reopening the assessment did not allege that the assessee failed to file the licence agreement nor was there anything in the counter-affidavit to that effect and, therefore, it was not open to the Revenue to take up that point for the first time before the court ; and (ii)the partnership deed which was filed in the course of the original assessment proceedings narrated the history of the firm in the preamble wherein there was a reference to the payment of the licence fee as also to the agreement, which would amount to

sufficient disclosure. Held, dismissing the petitions, (i) that it was not necessary for the Assessing Officer to list the documents that were required to be furnished, but not actually furnished, by the assessee in the course of the original assessment proceedings. The primary condition for reopening assessment is that there should be reason to believe that income chargeable to tax had escaped assessment. The claim for deduction of the licence fee payment undeniably was based on the terms and conditions of the licence agreement. Neither the partnership deed nor the letter in question could be considered to be primary facts on the basis of which an inference as to the allowability of the licence fee payment could be properly drawn by the Assessing Officer. The profit and loss account, the tax audit report and its annexures and the replies to the questionnaire issued by the Assessing Officer in the course of the original assessment proceedings did not contain anything with regard to the licence fee agreement. This disclosure was only for the purpose of section 40A(2) (b) which permits the Assessing Officer to disallow such payments to the extent they were found to be unreasonable having regard to the various factors spelt out in the section. Furnishing of these particulars could in no way be considered as furnishing the primary facts in relation to the allowability of the payment of the licence fees which could be adjudicated upon only if the terms and conditions stipulated in the agreement were made known to the Assessing Officer.
(ii) That it is difficult to attribute any knowledge to the Assessing Officer while he is dealing with a return for a particular year under section 143(1), as to what he had done in the case of the same assessee in the earlier assessment years. Therefore, it would not be correct to say that the Assessing Officer consciously allowed the licence fee payment as a deduction when he accepted the return under section 143(1). There is nothing in section 147 prohibiting the reopening of an assessment completed under section 143(1) on the ground that the assessee failed to furnish the primary facts fully and truly. Therefore, failure to furnish the primary facts would constitute reason to believe authorising the issue of notice under section 148 also in a case where the first assessment was made by a mere processing of the return under section 143(1). (AY. 2002-03 to 2006-07)
Remfry and Sagar v. CIT (2013) 351 ITR 75 / 84 DTR 65 / 213 Taxman 268 / 261 CTR 255 (Delhi)(HC)

S.147 : Reassessment – Change of opinion – Speculative transaction – Hedging Loss – Commodity exchange – Reopening of assessment on the basis that the Exchange was recognized only with effect from 22-5-2009 the transaction would not be covered under section 43(5)(d) was held to be not valid due to change of opinion [Ss.43(5), 143(3)]
The assessee, engaged in wholesale business of gold and silver, claimed loss on hedging of metals in commodity exchange to insure against price fluctuation. The said loss was allowed in the course of assessment proceedings under section 143 (3). The Assessing Officer proposed to reopen the assessment on the ground that exchange was recognized in a subsequent year. In assessment it was not case of Assessing Officer that impugned hedging transactions did not satisfy condition of section 43(5)(a). Court held that any post-assessment attempt on part of Assessing Officer to fall back on conditions required to be satisfied for application of sub-clause (a) would amount to change of reasons recorded for reopening; and any such inquiry would be wholly a fishing inquiry, therefore, no reopening was to be allowed. In favour of assessee (AY. 2007-08, 2008-09)
Jayesh Raichand Shah v. ACIT (2013) 212 Taxman 306 (Guj.)(HC)

S.147 : Reassessment – Income deemed to accrue or arise in India – DTAA-India-USA – Failure to file return of income would invite action to reopen assessment on ground of escapement of income [S.9(1) (i), 148]
Petitioner-US company outsourced its core business to its Indian subsidiary CISPL. CISPL worked exclusively for petitioner. According to revenue default in filing return would per se attract provision of section 147, read with Explanation 2(a).Court observed that apart from *prima facie* existence of a business connection there was also material to entertain belief that Indian subsidiary was a permanent establishment of foreign company in India. There was *prima facie* material in possession of Assessing

Officer to form a tentative belief that section 9(1) (i) was attracted and this reason by itself would constitute a relevant ground to reopen petitioner's assessments, therefore mere failure to file return of income (though assessee is liable to do so) would invite action to reopen assessment on ground of escapement of income and this has been provided in Explanation 2(a) below section 147. (AY. 2002-03 to 2004-05)
Convergys Customer Management v. ADIT (2013) 357 ITR 177 / 212 Taxman 613 / 255 CTR 482 (Delhi)(HC)

S.147 : Reassessment – Non-disclosure of primary facts – Notice after Expiry of four years – Tax royalties under section 44D – Where agreements were on record, reassessment were not justified, however where agreements were not available on record the assessments were justified [Ss.44D, 143(3)]
Assessee, a Singapore based company, had a Branch Office (B.O.) in India. It is engaged in providing technical consultancy in area of road construction to NHAI in India. Assessee also entered into a sub-consultancy contract with respect to same NHAI project with one 'Q' - Assessee filed its returns wherein gross receipts from NHAI were offered to tax under section 44D. Assessment was completed under section 143(3). Subsequently Assessing Officer initiated reassessment proceedings holding that payments made to 'Q' a sub-contractor, were to be included in taxable income of assessee. It was noted from records that as regards assessment years 2004-05 and 2005-06 agreement between assessee and NHAI and agreement between assessee and 'Q' were available on records. However, for assessment years 2002-03 and 2003-04, agreement between assessee and 'Q' was not in assessment records and, thus, there was concealment of fact on part of assessee. Court held that on facts, reopening of assessment for assessment years 2004-05 and 2005-06 was not sustainable however, said proceedings were validly initiated for assessment years 2002-03 and 2003-04. (AYs. 2002-03 to 2005-06)
Meinhardt Singapore Pte Ltd. v. ADIT (2013) 212 Taxman 637 / 81 DTR 283 / 256 CTR 143 (Delhi)(HC)

S.147 : Reassessment – Export oriented undertaking – Reason to be live – Setting off loss of one eligible unit against profit of another eligible unit – Reassessment was not valid [S.10B]
In original assessment assessee declared profit in respect of its two units and claimed deduction under section 10A/10B but on account of loss situation it claimed nil deduction in respect of its third unit and had also submitted Forms 56F/56G along with return. Assessing Officer specifically examined said claim in detail and allowed deduction with some modifications. Subsequently on 23-7-2010 i.e. after expiry of four years from end of relevant assessment year, Assessing Officer reopened assessment by invoking proviso to section 147 on ground that assessee acted incorrectly in not setting off losses of one eligible unit against profits of another eligible unit. On challenge to reassessment by way of writ the Court held that since 'reason to believe' note was silent as to what tangible materials had persuaded revenue to invoke extraordinary powers under proviso to section 147, reopening was unjustified.(AY. 2004-05)
Moser Bare India Ltd. v. Dy. CIT (2013) 81 DTR 10 / 212 Taxman 139 (Mag.)/ 255 CTR 128 (Delhi)(HC)

S.147 : Reassessment – Since all facts relating to royalty income had been placed on record in course of assessment, initiation of reassessment proceedings on basis of change of opinion was not sustainable – DTAA-India-USA [Ss.9, 44D, 115A, Art.12]
The assessee, a non-resident company, had entered into a master licensing agreement (MLA) with MIPL. In terms of said arrangement the MIPL was granted non-exclusive right to use the assessee's system at agreed locations in India. The terms also required MIPL to pay the assessee initial franchise fee upon the opening of each restaurant and royalty on recorded monthly sales of each restaurant during the period. For the relevant assessment years, scrutiny assessments were completed after the

relevant documents and materials were considered. Subsequently, a notice was issued under section 148 proposing to reopen the proceedings. The assessee filed its return and assessment was completed. On said occasion, the Assessing Officer accepted the assessee's submissions that the rate of taxation applicable was 15 per cent as originally held and assessed the royalty receipts in respect of the relevant assessment years. After completion of reassessment proceedings, again in respect of the same assessment years the Assessing Officer sought to initiate proceedings afresh. The reason for reopening the assessment was that Article 12(6), read with Article 7 of DTAA between India and USA provides that where an assessee was earning income in the nature of Royalty or Fees for Technical Services through a permanent establishment situated in the other State, such income was taxable as business income in accordance with the domestic provisions of the State of source. Therefore, in such case section 44D, read with section 115A should be applied. The assessee filed its return in response to notice issued under section 147. The income was held to be taxable in terms of section 115A, read with section 44D at the rate of 30 per cent. On appeal, the Commissioner (Appeals) accepted the assessee's contention that since basic facts relevant for royalty income had been disclosed with other material, inference sought to be drawn could hardly be characterised as 'reasons to believe'. He thus set aside the reassessment proceedings. The Tribunal upheld the decision of the Commissioner (Appeals). On appeal by revenue the Court held that since all facts relating to royalty income had been placed on record in course of assessment, initiation of reassessment proceedings on basis of change of opinion was not sustainable.(AY. 2000-01, 2001-02)
DIT v. McDonalds Corporation (2013) 213 Taxman 26 (Delhi)(HC)

S.147 : Reassessment proceedings – Property held for charitable purposes – Accumulation of income – Entire accumulated income shall be deemed to be income of assessee of previous year in which breach of conditions or contingency occurs, reassessment for all assessment years was held to be invalid. [Ss.11, 13, 35, 47]
Assessee is a scientific research society approved by competent authority under section 35(1) (ii). For relevant assessment years, assessee's income was held as exempt from tax. On 1-4-2000, assessee transferred its properties to its sister concern. Assessing Officer thus taking a view that assessee violated provisions of section 13(2)(g), read with section 13(3) (b), initiated reassessment proceedings. During reassessment proceedings, Assessing Officer having invoked provisions of section 11(3), brought, balance of accumulated income at end of each relevant year, to tax. The assessee challenged the reassessment proceedings by filing the writ petition. Allowing the writ petition the court held that in view of provisions of section 11 (3), entire accumulated income shall be deemed to be income of assessee of previous year in which breach of conditions or contingency occurs, therefore, it was impermissible in law for Assessing Officer to entertain a reason to believe that income chargeable to tax for all assessment years in question had escaped assessment, in view of above, impugned addition made in reassessment proceedings was to be deleted. In favour of assessee. (AY. 1998-99 to 2000-01)
Escorts Heart Institute & Research Centre v. CIT (2013) 213 Taxman 11 / 91 DTR 157 (Delhi)(HC)

S.147 : Reassessment – Change of opinion – Within period of four years – If there is no fresh tangible material reassessment is not valid – Reasons cannot be supplemented /improved upon later [S.148]
When assessee disclosed all relevant facts,even in case of reopening of assessment within period of four years from the end of the relevant assessment year, the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment on the basis of tangible material, there being no fresh tangible material which would warrant taking a view different from one taken during the regular assessment proceedings, reopening was not sustainable. The reasons recorded at the time of issuing notice cannot be supplemented/improved upon later. Writ petition of assessee was allowed and notice was quashed. (AY. 2007-08)
NDT Systems v. ITO (2013) 81 DTR 1 / 255 CTR 113 (Bom.)(HC)

S.147 : Reassessment – Change of opinion – Beyond four years – Third proviso – Merger – There was no failure on part of assessee to disclose full and true particulars, and order of original assessment was merged with order of the appellate Authority, hence the reassessment held to be invalid [S.80IA(8)]

The assessee is in the business of generation of distribution of electricity. Deduction under section 80IA was allowed under section 143(3). Reassessment notice was issued on the ground that the assessee has claimed excess deduction under section 80IA. Reassessment order was challenged before the Commissioner (Appeals). Commissioner (Appeals) held that there was no failure on the part of assessee hence the reassessment was not valid. Tribunal also confirmed the order of Tribunal. On appeal by revenue the court held that order of Maharashtra Electricity Regulatory Commission was passed by MERC on 1st July, 2004 and that order specifically dealt with fixation of tariff rate for consumer and had nothing to do with the actual profits earned by a power generation plant; The Court held that reopening of assessment was also barred by in view of the third proviso section 147 since the quantum of deduction under section 80IA was subject matter of appeal before the Commissioner (Appeals) and the Tribunal and consequently, the order of original assessment had merged with the order of the appellate authority. Accordingly the appeal of revenue was dismissed. (AY. 2001-02)

CIT v. Reliance Energy Ltd. (2013) 81 DTR 130 / 255 CTR 357 / 214 Taxman 64 (Mag.)(Bom.)(HC)

S.147 : Reassessment – Change of opinion – Third proviso – Merger – Order of original assessment merged with order of the appellate Authority, hence the reassessment held to be invalid [S.80IA(8)]

The Court held that reopening of assessment was barred in view of the third proviso section 147 since the quantum of deduction under section 80IA was subject matter of appeal before the Commissioner (Appeals) and the Tribunal and consequently, the order of original assessment had merged with the order of the Appellate Authority. Accordingly the appeal of revenue was dismissed. (AY. 2003-04)

CIT v. Reliance Energy Ltd. (2013) 81 DTR 138 / 255 CTR 365 / 213 Taxman 185 (Mag.)(Bom.)(HC)

S.147 : Reassessment – Non-disclosure of primary facts-losses – Facts different from recorded reasons was held to be not valid hence reassessment held to be in valid

While making assessment for assessment year 1996-97, Assessing Officer held that loss in shares had been fraudulently claimed. Accordingly assessment for relevant year was reopened assigning reasons that position mentioned in assessment year 1996-97 also existed in relevant year. As facts of subsequent year were altogether different from facts of relevant year, reasons recorded by Assessing Officer was not valid. Thus accordingly, reassessment proceedings were to be quashed. (AY. 1995-96)

CIT v. Kanodia & Sons (2013) 212 Taxman 55 (Mag.)(All.)(HC)

S.147 : Reassessment – Notice after four years – Change of opinion – Inspection report indicating two different units – Reopening on basis of report to withdraw deduction under section 80-IA is a change of opinion held to be not valid [Ss.80IA, 148]

The assessment was completed under section 143(3) and deduction under section 80IA was allowed. The assessment was reassessed after four years on the inspection report indicating different units to withdraw the deduction under section 80IA. The assessee challenged the reassessment proceedings allowing the petition, the Court held that this was not a case where the assessee has failed to disclose fully and truly all material facts and the pre- conditions for triggering the exception in the proviso to section 147 were not satisfied, thus reassessment was set aside. (AY. 2000-01)

NTPC Ltd. v. Dy. CIT (2013) 350 ITR 614 / 256 CTR 217 / 215 Taxman 101 (Mag.)(Delhi) (HC)

S.147 : Reassessment – Beyond four years – Foreign travelling expenses – On the basis of complaint of Director of assessee – Held to be valid [S.148]

The assessee is engaged in the business of running hotels consisting of five independent units. For the assessment year 2003-04, the assessee's case was selected for scrutiny and after issuing notices under sections 143(2) and 142(1) of the Income-tax Act, 1961, and after examining the details furnished by the assessee, an assessment order was passed under section 143(3). Thereafter, notice under section 148 was issued to reopen the assessment. The assessee challenged the reassessment dismissing the writ petition the court held that; Director of assessee complaining before statutory authority that assessee had siphoned off monies as foreign travelling expenses and under agreement no obligation of assessee to incur such expenses. No details furnished at time of original assessment towards travelling expenses. No denial of such a clause in agreement. On facts failure to disclose fully and truly all material facts on the basis of Complaint constituting tangible material hence reassessment held to be valid. (AY. 2003-04, 2005-06)

Rambagh Palace Hotels P. Ltd. v. Dy. CIT (2013) 350 ITR 660 / 214 Taxman 166 / 82 ITR 177 / 261 CTR 469 (Delhi)(HC)

Maharaj Jai Singh v. ITO (2013) 350 ITR 660 / 82 DTR 177 / 261 CTR 469 (Delhi)(HC)

Maharaj Pritviraj Singh v. ITO (2013) 350 ITR 660 / 82 DTR 177 / 261 CTR 469 (Delhi) (HC)

S.147 : Reassessment – Beyond four years – Travelling and repair and maintenance – Reassessment held to be invalid [S.143(1), 148]

For the assessment year 2004-05, the return declaring loss of the assessee was first processed and accepted under section 143(1) but was later selected for scrutiny and notice was issued under sections 143(2) and 142(1). Questionnaires were also issued calling for details relating to fixed assets, loans and advances, opening and closing inventory, sundry debtors, loss on sale of fixed assets, repairs and maintenance expenses, details of travelling expenses for foreign visits, etc., and these queries were answered by the assessee and the information was submitted. The assessment was completed. The notice under section 148 was issued beyond the period of four years on the ground that the expenditure was debited under the head "repairs and maintenance of building and additions to fixed assets", but the amounts were actually siphoned off by illegal withdrawals. On a writ petition: Held, allowing the petition, that not only did the assessee furnish all the relevant details relating to the purchase of fixed assets, repairs and maintenance of buildings but also the details relating to the foreign travel expenses. The proceedings relating to the original assessment also showed that the Assessing Officer had raised queries regarding repairs and maintenance of building, plant and furniture which were answered by the assessee. No query would appear to have been raised in relation to the foreign travel expenses in regard to which the assessee had furnished the relevant details. Therefore, it could not be said that there was any failure on the part of the assessee to submit full and true particulars at the time of the original assessment. It was for the Assessing Officer to examine the details and draw the appropriate inferences. The notice under section 148 issued for the assessment year 2004-05 was, therefore, without jurisdiction. (AY.2004-05)

Rambagh Palace Hotels P. Ltd. v. Dy. CIT (2013) 350 ITR 660 / 214 Taxman 166 / 82 ITR 177 / 261 CTR 469 (Delhi)(HC)

Maharaj Jai Singh v. ITO (2013) 350 ITR 660 / 214 Taxman 166 / 82 ITR 177 / 261 CTR 469 (Delhi)(HC)

Maharaj Pritviraj Singh v. ITO (2013) 350 ITR 660 / 214 Taxman 166 / 82 ITR 177 / 261 CTR 469 (Delhi)(HC)

S.147 : Reassessment – Complaint by director – Reassessment held to be valid [Ss.143(1), 148]

For the assessment year 2005-06, the return of the assessee declaring nil income was processed under section 143(1) and an intimation was issued on June 6, 2006. On March 30, 2012, notice under section 148 was issued reopening the assessment on the ground that the complaint filed by one of the directors before the Company Law Board regarding irregularities in the accounts of the assessee. On a

writ petition: Held, dismissing the petition, that there was no scrutiny assessment under section 143(3) in the first instance ; the return filed by the assessee was merely processed under section 143(1). The most basic and indispensable requirements for the validity of the notice under section 148 were satisfied. There was a complaint filed by one of the directors before the Company Law Board alleging irregularities such as illegal siphoning off the company's funds by the other two directors in the guise of fixed assets, repairs and maintenances, travelling expenses, etc. This complaint constituted tangible material on the basis of which action to reopen the assessment could be taken in good faith ; the belief entertained by the Assessing Officer on the basis of the complaint which had been filed with some responsibility by one of the directors of the assessee, could not be said to be a mere pretense nor could the belief be said to be divorced from the material. The complaint constituted relevant material for the belief. Therefore, the notice issued under section 148 was within the jurisdiction. The fact that the assessee submitted all the details to the Assessing Officer along with the return was not relevant where only an intimation under section 143(1) was issued after merely processing the return without any scrutiny. There should, however, be reason to believe that income had escaped assessment and this condition had been satisfied in respect of the assessee. (AY.2005-06)
Rambagh Palace Hotels P. Ltd. v. Dy. CIT (2013) 350 ITR 660 (Delhi)(HC)

S.147 : Reassessment – Within four years – Tangible material – No query was raised in the course of assessment hence as there is no application of mind by Assessing Officer notice held to be valid [Ss.143(3), 148]
When an assessment is sought to be reopened within a period of four years from the end of the relevant assessment year, the test to be applied is whether there is tangible material to do so. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. Something which is tangible need not be something which is new. An Assessing Officer who has plainly ignored the relevant material in arriving at an assessment acts contrary to law. If there is an escapement of income in consequence, the jurisdictional requirement of section 147 of the Income-tax Act, 1961, would be fulfilled on the formation of a reason to believe that income has escaped assessment. The reopening of the assessment within a period of four years is in these circumstances within the jurisdiction. The Court held, dismissing the petition that no query was raised during the course of the assessment and the assessment order would *ex facie* disclose that the Assessing Officer had not applied his mind to any of the points on the basis of which the assessment was reopened. Therefore, there was tangible material for the Assessing Officer to reopen the assessment. Reassessment held to valid on facts. (AY. 2006-07)
Export Credit Guarantee Corporation of India Ltd. v. Addl. CIT (2013) 350 ITR 651 / 87 DTR 154 / 259 CTR 465 (Bom.)(HC)

S.147 : Reassessment – Notice – Single judge permitting assessee to file objections to notice and directing Assessing Officer to take decision after considering objections – Failure to file objections-Assessee to file objections and order to be passed after considering objections [S.133A, 148]
The assessee was engaged in jewellery business. During the survey conducted under section 133A of the Income-tax Act, 1961, in the assessee's premises on February 1, 2006, the managing partner of the assessee admitted certain irregularities in the books of account and offered Rs.1.5 crores as additional income for investments made by the partners in the business of the assessee for the assessment year 2006-07. The income already projected for advance tax payment in 2006-07 was Rs. 1 crore and the amount of Rs. 1.5 crores was over and above the estimated income for the year 2006-07 so that the total income projected was Rs. 2.5 crores and the assessment was completed. Notice was issued for reassessment. On a writ petition, the single judge found that the proceedings were only at the notice stage and it was for the assessee to submit objections and it was for the officer to take the proceedings to the logical conclusion by passing appropriate orders in accordance with law, after considering the objections. Since the time for submitting objections was over, the single judge

granted a further period of one month. On appeal held dismissing the appeal, that this was a case where the assessee had not cared to file any objection to the notice. It was in the exercise of discretionary jurisdiction that the single judge permitted the assessee to file objections. In fact, the stand of the Revenue was that the objections would certainly be considered. Therefore, the objections which the assessee had filed must necessarily be considered and reasons must be given. In the above circumstances, interference is declined and the writ petition is dismissed. However, since the time for submitting the objections is already over, the petitioner is granted a further period of "one month" to submit the same. The proceedings shall be finalised in accordance with law, as expeditiously as possible, at any rate, within three months thereafter. (AY. 2006-07)
Alappat Jewels v. ACIT (2013) 350 ITR 471 / 257 CTR 358 / 87 DTR 102 / 215 Taxman 680 /217 Taxman 89 (Mag.)(Ker.)(HC)
Editorial: Order is affirmed by Division Bench in Alpaat Jewels v. ACIT (2013) 356 ITR 299 (Ker.)(HC)

S.147 : Reassessment – Audit objection – Royalty – Beyond four years – Change of opinion – Audit objection that royalty payment resulted in capital benefit cannot constitute tangible material hence reassessment held to be not valid [Ss.37, 148]
Allowing the writ petition of the petitioner the Court held that (i) the assessing authority cannot keep improving his case from time to time and that the reassessment proceedings have to stand or fall on the basis of what was stated in the reasons recorded under section 148(2) of the Income-tax Act, 1961, and nothing more. No failure to furnish full and true particulars relating to the royalty payments, including the failure to file the relevant agreements, had been alleged in the reasons recorded. If anything, the reasons are an admission that it was the Assessing Officer who did not draw the inference that the royalty payments were capital in nature. It was for him to draw the appropriate inference and not for the assessee to tell him what inference of fact or law should be drawn from the primary facts furnished. Therefore, the reassessment notices after four years from the end of the assessment years 2002-03 and 2003-04 were quashed as also the consequent proceedings. The court also held that opinion expressed by audit that payment of royalty resulted in a capital benefit could not constitute a tangible material on the basis of which the assessment could be reopened. (AY.2002-03, to 2004-05)
Xerox Modicorp Ltd. v. Dy. CIT (2013) 350 ITR 308 / 81 DTR 321 / 255 CTR 342 / 213 Taxman 285 (Delhi)(HC)

S.147 : Reassessment – Notice – Assessing Officer has power to issue notice of reassessment [Ss. 143(1), 143(2), 148]
In *Asst. CIT v. Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500 (SC)* the Supreme Court held that so long as the ingredients of section 147 of the Income-tax Act, 1961, are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued. (AY. 2000-01)
D.T.T.D.C. Ltd. v. Dy. CIT (2013) 350 ITR 216 (Delhi)(HC)

S.147 : Reassessment – Export business – Original reason dropped – Assessing Officer cannot assess other escaped income if original reason dropped [Ss.80HHC, 148]
The AO issued a notice u/s. 148 to reopen the assessment for AY 2003-04 on the ground that the assessee had wrongly computed s. 80HHC deduction. However, in the reassessment order, the AO did not make any addition for the s. 80HHC claim and made additions in respect of other unconnected issues. The Tribunal held that as the AO had made no addition in respect of the issue for which the s. 148 notice was issued, he had no jurisdiction to assess any other income. On appeal by the department to the High Court, HELD dismissing the appeal:

S.147 empowers the AO to reopen an assessment if he has reason to believe that income has escaped assessment. If the requirements of giving jurisdiction to the AO to reopen the assessment are satisfied, he may also assess any other escaped income which comes to his notice subsequently in the course of the proceedings. Prior to the insertion of Explanation 3 to s. 147 by the Finance Act 2009 w.e.f. 1-4-1989, it was clear that if the reason for which the assessment is reopened fails, the AO could not proceed to assess other income which had escaped assessment. For assuming jurisdiction to frame an assessment u/s 147 what is essential is a valid reopening. If the very foundation of the reopening is knocked out, any further proceeding in respect to such assessment naturally would not survive. Explanation 3 to s. 147 does not change this position. Explanation 3 to s. 147 was inserted to counter the view taken by some courts (*CIT v. Atlas Cycle Industries (1989) 180 ITR 319 (P&H) & Travancore Cements Ltd. v. ACIT (2008) 305 ITR 170 (Ker.)* that even if the jurisdiction was validly exercised, the AO could not assess the other escaped income that was not referred to in the reasons. It merely clarifies the existing law and does not expand the powers of the AO u/s. 147. If the AO drops the ground for which the notice for reopening was issued, it means he had no “reason to believe” that income had escaped assessment and so he has no jurisdiction to assess the other escaped income (AY.2003-04)
CIT v. Mohmed Junded Dadani (2013) 355 ITR 172 / 214 Taxman 38 / 85 DTR 12 / 258 CTR 168 (Guj.)(HC)

S.147 : Reassessment – Revenue audit – Reopening of assessment due to revenue audit’s compulsion is void [S.148]
The AO passed u/s. 143(3) assessment order in which he allowed the assessee’s claim for business expenses. The Revenue Audit raised an objection that as the assessee’s business had ceased, the income had to assessed as “other sources” and the expenditure disallowed. The AO replied to the Audit stating that the objection was not correct and that the assessment order was correct. The Revenue Audit thereafter wrote to the CIT that the AO’s stand was not correct. Based on this, the AO issued u/s. 148 notice (within 4 years from the end of the AY) to reopen the assessment and disallow the expenditure. The assessee challenged the reopening on the basis that the AO was compelled by the audit party to re-open the assessment though he was of the belief that no income had escaped assessment. HELD by the High Court upholding the plea:
If the audit party brings certain aspects to the notice of the AO, he is entitled to reopen the assessment after forming his own belief. However, if the AO acts under compulsion of the audit party and not independently, the action of re-opening would be vitiated. On facts, it is clearly established that the AO was under compulsion from the audit party to issue notice for reopening because after the audit party brought the controversial issue to the notice of the AO, he did not agree to the proposal for re-examination of the issue and wrote a letter and gave elaborate reasons why the assessment order was correct. The s. 148 notice was issued only after the Revenue Audit wrote to the CIT reiterating its stand that income had escaped assessment. Consequently, the s. 148 notice had to be quashed (AY. 2007-08)
Vijay Rameshbhai Gupta v. ACIT (2013) 215 Taxman 465 (Guj.)(HC).

S.147 : Reassessment – Beyond four years – Depreciation – Primary facts relating to claim disclosed – Notice to withdraw the depreciation is not valid [S.148]
Since the primary facts relating to claim for depreciation furnished and depreciation was allowed after considering facts, notice after four years to withdraw depreciation was not valid. (AY. 2002-03)
Vatika Ltd. v. ITO (2012) 206 Taxman 301 / (2013) 357 ITR 170 (Delhi)(HC)

S.147 : Reassessment – Beyond four years – Permanent establishment – DTAA-India-Korea-N Primary facts relating to claim disclosed – Permanent establishment – Reassessment was held to be bad in law [S.9(I)(i), 148, 149, Art 5]
Notice recording that the assessee had permanent establishment in India but no indication as to why and how permanent establishment had impacted tax payable or income assessed in original

assessment. Held, the notice was incomplete and incomprehensible and requisite belief that income had escaped assessment was not possible on basis of reasons recorded. Reassessment was set aside. (AY. 2002-03)
G. S. Engineering and Construction Corporation v. DDIT(IT) (2013) 357 ITR 335 / 263 CTR 195 / 219 Taxman 369 (Delhi)(HC)

S.147 : Reassessment – Summary assessment – New and Tangible material [S. 143(1)]
When originally, return processed u/s. 143(1), and subsequently new information and tangible material came into possession of AO in course of assessment for later year, reassessment was valid and it was not mere change of opinion. (AYs. 2003-04, 2004-05, 2005-06)
Sowcar Janaki (Smt.) v. ITO (2013) 27 ITR 229 / (2014) 61 SOT 1 (Chennai)(Trib.)

S.147 : Reassessment – Capital gains – Investment in residential house – Initiation of reassessment proceedings on same materials was void ab initio and invalid [S.54, 132, 148, 158BD]
Once material gathered during course of search under section 132 is considered in block assessment under section 158BC, thereafter it is not open for AO to initiate proceedings under section 147 on same issue merely because conditions in block assessment proceedings were not found sustainable, therefore, where deduction under section 54F was partly allowed to assessee in scrutiny assessment and same was again considered in block assessment proceedings, initiation of reassessment proceedings under section 147/148 on said issue on same materials was void ab initio and invalid (AY.1998-99)
Motilal P. Khinvasara, HUF v. Dy. CIT (2013) 26 ITR 101 / 60 SOT 141 (URO)(Pune)(Trib.)

S.147 : Reassessment – Non-disclosure of primary facts – Change of opinion – Difference due to method of accounting – DTAA-India-USA [S.9(1)(vi), 148, 199, Art.12]
AO reopened assessment on ground that assessee had offered lesser amount of royalty to tax as compared to amount of royalty shown in TDS Certificate. Assessee submitted that difference in amount of royalty arose due to method of accounting followed by it and paying entities, i.e., cash basis and mercantile basis. Since all information relating to receipt of royalty was furnished and was available with AO at time of assessment and even AO made enquiries with reference to claim of TDS of part amount, AO's opinion in reopening assessment could only be considered as change of opinion from that of his predecessor, therefore, issuance of notice under section 147 was bad in law. (AY.2004-05)
Johnson & Johnson v. ACIT (2013) 60 SOT 109 (URO)(Mum.)(Trib.)

S.147 : Reassessment – Non-disclosure of primary facts – Cash credits – Information from investigation wing – Share application money [S.68, 148]
On receipt of specific information from Investigation Wing that assessee had indulged in money laundering activities by way of inflow of share money through bank account, AO initiated reassessment proceedings and added receipt on account of share application as undisclosed income on ground that assessee could not discharge its onus to prove genuineness of transactions and creditworthiness of share applicants. In appeal CIT(A) cancelled said order on ground that AO had neither conducted inquiry nor verified veracity of information. On appeal by revenue the Tribunal held that AO is not required to verify information before forming belief that income had escaped assessment but nexus is to be established between information and formation of belief about escapement of income and since AO had recorded detailed reasons in order to arrive at conclusion that provisions of section 68 were applicable, there was nexus between specific information and reasons recorded and, AO was justified in re-opening assessment. Matter remanded to decide the matter on merits.(AY.2001-02)

ITO v. Contel Medicare Systems (P.) Ltd. (2012) 20 ITR 701 / (2013) 60 SOT 107 (URO) (Delhi)(Trib.)

S.147 : Reassessment – Information by CIT(A) – Reassessment was valid [S.143(ia), 148]
Assessee filed its returns of income which were processed under section 143(1)(a).Subsequently, Commissioner noticed that assessee had taken loan of ` four crore from 'V' bank for purpose of construction of commercial complex and for repayment of existing loan with 'C' bank. Assessee had claimed deduction of interest on entire borrowed sum under section 24 even though it had utilized a sum of Rs. 1.66 crore out of loan amount. In such a situation, CIT(A) opined that excess claim of deduction was allowed in respect of interest amount. Commissioner brought said fact to notice of AO. Thereupon, AO initiated reassessment proceedings in respect of assessment years in question. Assessee raised an objection that reopening of assessment was based on mere change of opinion. Tribunal held that since there was no scrutiny assessment in relevant assessment years, AO could not be said to have formed any opinion about assessability of interest expenses. Therefore, AO was justified in initiating reassessment proceedings on basis of information. (AYs. 2002-03, 2003-04)
Delhi Industries & Enterprises v. ACIT (2012) 150 TTJ 756 / 80 DTR 252 / (2013) 60 SOT 112 (URO)(Delhi)(Trib.)

S.147 : Reassessment – Change of opinion – Capital gains – no new information came to possession of AO after passing scrutiny assessment – Reassessment is bad in law [Ss.24, 45(4), 143(3)]
For relevant assessment years assessee filed its returns in respect of which assessment was made under section 143(3). Subsequently, AO initiated reassessment proceedings on ground that in assessment year 2004-05 assessee firm was dissolved and thus transfer of capital assets on dissolution of firm fell within ambit of section 45(4) in respect of which a capital gain was required to be computed. Another reason assigned by AO was that assessee claimed excess deduction in respect of interest paid under section 24. It was noted from records that both issues were before AO when he passed scrutiny assessment, though no discussion on said issues was discernible. Tribunal held that since no new information came to possession of Assessing Officer after passing scrutiny assessment, reopening of assessment was merely based on change of opinion and, thus, validity of said proceedings could not be upheld.(AYs. 2004-05, 2005-06)
Delhi Industries & Enterprises v. ACIT (2012) 150 TTJ 756 / 80 DTR 252 / (2013) 60 SOT 112 (URO)(Delhi)(Trib.)

S.147 : Reassessment – Non disclosure of primary facts – Export – Change of opinion-Audit objection – Reassessment was bad in law [S.80HHC, 143(3)]
Assessee claimed deduction under section 80HHC. AO in course of original assessment proceedings called for particulars regarding various items of income going into computation of deduction under section 80HHC, for which assessee had given requisite details and particulars. Deduction was allowed. Subsequently AO on basis of audit objection and on reappraisal of details furnished by assessee reopened the said assessment and in reassessment proceedings re-determined deduction under section 80HHC. Tribunal held that reopening of assessment was merely on change of opinion of AO. Therefore, reassessment order made by AO. was null and void. (AY.2004-05)
DCIT v. Lee Pharma (P.) Ltd. (2012) 20 ITR 499 / (2013) 60 SOT 104 (URO)(Hyd.)(Trib.)

S.147 : Reassessment – Non residents – Head office expenditure – Allowed in the original assessment on the basis of certificate of Chartered Accountant – Reopening for verification was held to be not valid. DTAA-India-UAE [Ss.44C, 143(3), Art.7]
The assessee, a UAE Bank was allowed deduction in respect of head office administrative and supervision expense. The A.O. reopened assessment on ground that head office expenses claimed by the assessee were allowed only on basis of CA Certificate. On appeal CIT(A) upheld order of the

A.O. The Tribunal held since CA Certificate was considered by the earlier A.O. in original assessment proceeding, reopening on such reason would amount to change of opinion. Since initiation of reassessment proceedings was not based on any material which would lead to escapement of income and also there was complete disclosure of facts by assessee in original assessment, reopening of assessment was not justified. (AY. 2003-04)
Abu Dhabi Commercial Bank Ltd. v. Dy. DIT (2013) 145 ITD 354 (Mum.)(Trib.)

S.147 : Reassessment – Capital gains – Stamp valuation – Failure to compute capital gains u/s 50C does not lead to escapement of income [Ss.45, 50C]
The assessee sold property for Rs. 6 lakh and offered capital gains on that basis. The AO accepted the claim without examining the applicability of s. 50C. He later (within 4 years from the end of the AY) reopened the assessment on the basis that the stamp duty valuation was Rs. 25 lakhs and the capital gains had to computed on that basis u/s. 50C. The assessee challenged the reopening inter alia on the ground that the failure to apply s. 50C did not mean income had escaped assessment. The CIT(A) accepted the plea. On appeal by the department to the Tribunal HELD dismissing the appeal:
S.50C is not a final determination to prove that it is a case of escapement of income. The report of the approved valuer may give estimated figure on the basis of facts of each case. Therefore, mere applicability of s. 50C would not disclose any escapement of income in the facts and circumstances of the case. The AO at the original assessment stage considered all the documents and material produced before him and has accepted the cost of property as was declared by the assessee. The reassessment is on change of opinion which is not justified (ITA No. 282/Agra/ 2013, AY. 2004-05, 20-12-2013)
ITO v. Hares Chand Agarwal HUF (Agra)(Trib.) www.itatonline.org

S.147 : Reassessment – Misleading facts – Employment of new workmen – Condition precedent for getting deduction – Employment for 300 days – Reassessment was held to be valid [S.80JAA]
For the purpose of determining eligibility for availing deduction, only new workmen employed for a period of 300 days in relevant previous year are eligible for deduction under section 80JJAA and not workmen employed in preceding year who have completed 300 days in current year. Where the assessee submitted misleading facts in audit report regarding eligibility of workmen employed in the year 1999-2000 for calculation of new workmen employed during year under consideration, it had not made true and full disclosure of material facts for claiming such deduction, and thus, reopening of assessment under section 147 was justified. (AY. 2001-02)
LG Electronics India (P) Ltd. v. ACIT (2013) 59 SOT 96 (URO)(Delhi)(Trib.)

S.147 : Reassessment – Donation – Not examined the issue in the original assessment order – Reassessment is valid [S.80G]
Where the Assessing Officer had not examined issue relating to claim under section 80GGA made by assessee in original assessment and had not formed any opinion in that regard, it could not be said that there was a change of opinion while reopening of assessment on that issue. Therefore, initiation of proceedings for reassessment was valid. (AY.2005-06)
K. Anji Reddy v. DCIT (2013) 59 SOT 92 (URO)(Hyd.)(Trib.)

S.147 : Reassessment – No original assessment u/s.143(3), proviso to 147 is in applicable for reassessment – Reassessment was valid-Where original assessment was completed under section 143(3) reassessment was in valid [Ss.143(1), 143(3)].
Assessment for Assessment years: 1992-93 & 1993-94 was reopened u/s.147 of the IT Act, 1961 & against such order of reassessment, the assessee had filed appeal before CIT(A) who had cancelled the reopening the assessment & consequently had annulled the Assessment. Against the order of CIT(A), revenue filed appeal before the Tribunal. Tribunal upheld the order of CIT(A) & dismissed the appeal filed by revenue. On further appeal in High Court by the revenue, the

Hon'ble High court remitted the matter back to the Tribunal with the direction to consider the appeal filed by the revenue afresh for the A.Ys.: 1992-93 & 1993-94. On appeal in Tribunal, assessee contended that the original assessment for these two years was not made u/s.143(3) & therefore proviso to S.147 was not applicable & therefore submitted that even if original assessment was made u/s 143(1), reopening was based upon the change of opinion. The Tribunal held that when there was no original assessment u/s 143(3), it cannot be said that the reopening of assessment was based on change of opinion by the Assessing officer, proviso to s/147 was not applicable. Reopening of assessment was applicable & therefore reopening of assessment could not be quashed on the basis that assessee had disclosed all the material facts necessary for assessment. For the assessment year 1991-92 original assessment was completed under section 143(3), reassessment was held to be in valid. (AYs1991-92, 1992-93, 1993-94)
ACIT v. Kapil Dev (2013) 94 DTR 35 / 157 TTJ 686 (Delhi)(Trib.)

S.147 : Reassessment – Accommodation entries – Reopening was held to be valid [Ss.148, 292B]
AO had precise and definite information regarding receipt of accommodation entries in respect of capital from various persons. The same was verified by AO with the return of income of the assessee available with him for the year. As information did not match, AO recorded reasons that income escaped assessment.
Held, AO rightly reopened the assessment by following right procedure provided under the rule. (AY. 2002-03)
Mukut Finvest & Properties (P) Ltd v. ITO (2012) 138 ITD 166 / (2013) 84 DTR 364 / 153 TTJ 309 (Delhi)(Trib.)

S.147 : Reassessment – Reason to believe – Absence of new tangible material – Reassessment is bad in law [S.80IB (10), 133A]
Assessee fully disclosed the fact of sale of open plot and the profit from the the housing project on which deduction u/s. 80-IB(10) was claimed excluding the profit on sale of plots in the returns and the accompanying documents. AO allowed deduction u/s. 80-IB(10) in the assessments made u/s. 143(3), the reopening of assessments by the AO after forming the belief that deduction u/s. 80-IB(10) has been wrongly allowed to the assessee following a survey u/s. 133A is based on mere change of opinion and, therefore, unsustainable. (AYs. 2003-04 to 2005-06)
Nath Associates v. ACIT (2013) 92 DTR 162 / 157 TTJ 224 / (2014) 61 SOT 8 (Pune)(Trib.)

S.147 : Reassessment – Notice under section 143(2) of the Act is mandatory – Section 292BB inserted by Finance Act 2008 w.e.f. 1-04-2008 is prospective. [S.143(2), 292BB]
In the absence of notice under section 143 (2) of the Act, the reassessment is not valid. Section 292 BB of the act has been inserted by Finance Act, 2008 w.e.f. 1st April, 2008 prospectively and is not applicable in the AY. 2001-2002. It was further held that even otherwise, in the absence of notice; the same was not a curable defect under section 292 BB of the Act and therefore C.I.T.(A) was justified in setting aside the reassessment. (AY.2001-02)
ITO v. Aligarh Auto Centre (2013) 83 DTR 418 / 152 TTJ 767 / 58 SOT 90 (URO)(Agra) (Trib.)

S.147 : Reassessment – Reassessment after five years – Full & True disclosure – Notice was held to be invalid [S.148]
The assessment was reopened by notice under section 148 after more than five years from the end of relevant assessment year. It is also evident that in the notice of reopening, there is not even an iota of allegation that any income had escaped assessment attributable to failure on the part of the assessee is not disclosing full particulars. The Tribunal held that notice under section 148 was invalid in the absence of reasons that the assessee had not disclosed particulars of the income disclosed. (AY. 2002-03)
ACIT v. Sterling Infotech Ltd. (2013) 59 SOT 19 / 153 TTJ 20(UO) (Chennai)(Trib.)

S.147 : Reassessment – No addition was made in respect of reasons recorded –Reassessment was held to be invalid

The Tribunal held that the Assessing Officer has not made any addition in respect of the income which is stated to have escaped assessment in the reasons recorded by him. Therefore, the reasons as recorded are not *bona fide*, the reassessment is invalid. (AY.1999-2000)

Mihani Dal Mills v. ITO (2013) 156 TTJ 28 (UO) (Jabalpur)(Trib.)

S.147 : Reassessment – Allowance of brought forward loss and grant in aid-Reassessment was held to be valid

The Tribunal held that excess allowance of brought forward loss claimed by the assessee resulted in income escaping assessment. This point was not brought to notice of the Assessing Officer by the assessee at the time of original assessment. Grant in aid received was also not offered for taxation and no reason was adduced before the Assessing Officer in support thereof. Therefore the Assessing Officer was justified in reopening the assessment. (AY. 2004-05)

The Rohtak Co-operative Milk Producer Union Ltd. v. ACIT (2012) 18 ITR 310 / (2013) 155 TTJ 684 / 90 DTR 387 (Delhi)(Trib.)

S.147 : Reassessment – Notice – Mandatory – Without issue and service of notice under section 143(2), reassessment is null and void [S.143(2), 292BB]

Where no notice under section 143(2) had been issued or served upon assessee, reassessment proceedings under section 147 would be null and void. Since a provision of section 292BB has been inserted by Finance Act, 2008 with effect from 1-4-2008, same would not apply prior to said date. Further absence of notice is not curable under section 292BB (AY.2001-02)

ITO v. Aligarh Auto Centre (2013) 83 DTR 418 / 58 SOT 90 (URO) (Agra)(Trib.)

S.147 : Reassessment – Unexplained money – Reopening of assessment without supplying the reasons – Matter set aside [S.69A]

A search conducted on assessee's premises by Central Excise authorities revealed that assessee maintained different sets of invoices and made under-payment of duty by indulging in clandestine removal of goods. The assessee took up the matter before Customs and Central Excise Settlement Commission and immunity was granted to assessee. Thereafter A.O. reopened assessment, and without supplying reasons for reopening made addition relying only on order of Settlement Commission. Assessing Officer had not supplied reasons and had made addition only on basis of order of Central Excise Settlement Commission. CIT (A) also confirmed the same order passed by the A.O. Before the Tribunal, the assessee contended that it had not been supplied reasons for reopening assessment. The Hon'ble ITAT had give direction to the A.O. that matter to be remanded for fresh adjudication. (AY. 1997-98)

Kanpur Plastipack Ltd. v. ITO (2013) 144 ITD 1/ 34 Taxmann.com 296 / 95 DTR 201 / 158 TTJ 484 (Luck.)(Trib.)

S.147 : Reassessment – Reason to believe – Not valid when AO initiated only 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. (AY. 1996-97)

Dy. DIT v. Societe International De Telecommunication (2012) 139 ITD 328 / (2013) 153 TTJ 55 / 23 ITR 714 / 84 DTR 219 (Mum.)(Trib.)

S.147 : Reassessment – Within four years – Intimation. There was no tangible material hence reassessment is bad in law [S.143(1)]

Tribunal held observed that the information that was considered by the AO to reopen the assessment was already on record and if the AO failed to consider the same for framing the assessment by issuing notice under section 143(2) he was precluded from considering the same material for reopening of the assessment under section 147, r.w.s. 148, as there was no tangible material justifying the reasons for reassessment. (ITA No.290/292 & 336/Hyd./2012 Bench 'A' dt 7-06-2013 (AY.2006-07)

S. Ranjit Reddy v. Dy. CIT (2013) 35 taxmann.com 415 (Hyd.)(Trib.)(Unreported)

S.147 : Reassessment – Valid reasons to believe escapement – Indexation on short-term capital assets – Reassessment was held to be valid [Ss.54, 143 (3)]

The assessee contended that the reassessment was bad since the Assessing Officer failed to pass the assessment order on the original return filed by him and also that there was no escapement of income. The Assessing Officer held that the assessee had claimed the benefit of indexation in computing the short-term capital gain, the exemption claimed by the assessee under section 54 of the Act was not in order and the land on which short-term capital gain was claimed was vacant land and not an agricultural land. Therefore, he believed that there was an escapement of income. The reopening was held valid. (AY.2007-08)

Mampilly Antony (Dr) v. DDIT(IT) (2013) 25 ITR 91 / 144 ITD 665 / 37 taxmann.com 243 (Cochin)(Trib.)

S.147 : Reassessment – Recording of reasons is mandatory – Need to verify or re-examine the matter further, cannot be said to be sustainable 'reasons to 'believe' recoded [S. 143(1)]

Even where the original assessment has been completed under section 143(1), there must be reasons recorded for reopening the assessment and such reasons should be capable of being sustained in the eyes of law. Mere need to verify or re-examine the matter further, cannot be said to be sustainable 'reasons to 'believe'

Meherla Reid & Co. v. ITO (2013) 81 DTR 386 (Kol.)(Trib.)

S.147 : Reassessment – Beyond four years-years – Change of opinion. [S.14A, 143(3)]

Tribunal found that the assessee had fully and truly disclosed all material facts necessary for computing the depreciation allowance in the course of the original assessments completed under section 143(3). Notice under section 148 was issued after expiry of 4 years from the respective assessment years. Therefore, any notice issued after the expiry of 4 years from the end of the relevant assessment year is illegal and is without jurisdiction. (AY. 2002-03)

ACIT v. Sterling Infotech Ltd. (2013) 153 TTJ 20(UO) / 59 SOT 19(URO) / 35 taxmann.com 510 (Chennai)(Trib.)

S.147 : Reassessment – Prima facie belief – Proceedings of subsequent year – Reopening is justified. [S. 28(va),143(1)]

On basis of details of agreement noticed during assessment proceedings of subsequent year, the Assessing Officer came to *prima facie* belief that amount received by assessee was taxable as revenue receipt. Held on facts, the reopening was justified. (AY.2004-05)

Control & Switchgear Contractors Ltd. v. DCIT (2012) 18 ITR 520 / 24 taxmann.com 227 /(2013) 57 SOT 127 (URO)(Delhi)(Trib.)

S.147 : Reassessment – Notice – Best-judgment assessment – Notice is mandatory where the assessee has file the return. [S.142(1), 143(2), 144]

The requirement of issuing notice u/s.143(2) would apply even where re-assessment proceedings are initiated. Best judgment assessment cannot be made where assessee had filed its return in time as required u/s 139(1)and no notice was issued u/s. 142(1). (AY.2002-03)

ACIT v. Indo Swiss Exports Ltd. (2012) 25 taxmann.com 85 / (2013) 57 SOT 125 (URO) (Chennai)(Trib.)

S.147 : Reassessment – Audit objection – Book profit – Lease equalisation reserve – Reassessment is bad in law [Ss.115JB, 148]

The assessment was completed under section 143(3). The assessed income was less than book profit the assessment was completed by applying the provisions of 115JB of the Act. While computing the assessment as per normal provisions of the Act, the Assessing Officer made addition on account of leasing equalisation reserve to the total income of the assessee, however while computing book profit he did not add the same amount. Assessing Officer issued the notice under section 148 and reassessed the income. Commissioner (Appeals) confirmed the reassessment proceedings. On appeal the Tribunal held that the reassessment proceedings were initiated by the Assessing Officer after objections were received from the internal audit party. The Tribunal held that the reassessment on the basis of interpretation of audit party and change of opinion is held to be bad in law. (AY.2002-03) (ITA No.167/and 223/Mum/2010 dt 3-7-2013)

Infrastructure Leasing & Financial Services Ltd. v. DCIT (2013) Chamber's Journal – July –P.116 (Mum.)(Trib.)

S.147 : Reassessment – Deemed dividend – Trade advance – Issue on which the reassessment proceedings was initiated was dropped during assessment proceedings – Other additions on account of Transfer Pricing adjustments based on reassessment proceedings was held to be bad in law [S.2(22)(e), 92C]

Assessing Officer reopened the assessment under section 147 on the reason that there were advances received from the associate concern whose 100% shares are also held by the SCCL and has 90% shareholding in assessee company. Even though there is no direct share holding by the AE company (SCI) in assessee's company, Assessing Officer was of the view that the provisions of section 2(22)(e) are applicable on the loans and advances given by the SCI to assessee. For that reason only assessment was reopened. In the course of the assessment proceedings assessee submitted that the amount received was nothing but trade advance and does not attract deemed dividend provisions under section 2(22)(e). Assessing Officer accepted the submissions and no adverse inference was drawn on this issue. based on the TP report for Assessment Year 2004-05, Assessing Officer disallowed the royalty amount even though on record there seems to be no reference to the TPO as prescribed under the provisions. Since the issue of disallowance of royalty was not an issue for reopening the assessment and the issue on which the assessment was reopened was dropped in the course of the assessment proceedings. Assessing Officer has exceeded the jurisdiction provided under section 147. Reopening of the assessment itself was bad in law. Ratio in *CIT v. Jet Airways (I.) Ltd (2011) 331 ITR 216 (Bom.)(HC)* is followed.(AY. 2003-04)

SC Enviro Agro India Ltd. v. Dy. CIT (2013) 143 ITD 195 / 58 SOT 22 (URO)(Mum.)(Trib.)

S.147 : Reassessment – Non-disclosure of primary facts – Beyond four years – Reassessment was held to be invalid on facts and law. [Ss.48, 143(3), 148]

Assessee is a non-residential banking company having its headquarters in France. It was involved in normal banking activities which included financing of foreign trade and foreign exchange transactions. Assessment was completed under section 143(3).Assessing Officer initiated reassessment proceedings for three reasons, i.e. loss on sale of investment was a capital loss, profit on sale of shares was not identifiable in profit and loss account and thirdly first proviso to section 48, assessee had wrongly deducted indexed cost of acquisition. Tribunal held that deposits in Government securities was not an option of assessee-bank. Business compulsion as per directions of RBI and loss claimed by bank either on valuation of securities or sale thereof was to be allowed as business loss. As regards second reason no infirmity in profit and loss account as assessee had added back profit on sale of shares in computation of income. As regard the benefit of indexation under

section 48 was undisputed fact that assessee had purchased shares in Indian currency, first proviso and second proviso to section 48 was not applicable to assessee's case. Assessing Officer was not justified in initiating reassessment proceedings. Tribunal also held that reassessment proceeding was initiated after expiry of four years from end of relevant assessment year. Assessee had disclosed all material facts at time of assessment. Impugned reassessment proceedings were barred on ground of limitation as well. (AY. 2000-01)
Calyon Bank v. Dy. CIT (2013) 141 ITD 521 / 24 ITR 114 / 155 TTJ 143 / 89 DTR 161 (Mum.)(Trib.)

S.147 : Reassessment – Income escaping assessment – Non-Disclosure of primary facts – Capital gains – Reassessment as held to be valid [S.148]
Assessee entered into a development agreement with builder and received consideration in installments spread over financial years 2002-03, 2003-04 and 2004-05. On this fact coming to notice of Assessing Officer during a search, Assessing Officer issued reassessment notices for assessment years 2003-04, 2004-05 and 2005-06. Tribunal held that issue of notice for all three years was valid though finally Assessing Officer brought capital gains to tax only in Assessment Year 2003-04. Tribunal also held that it is not necessary for Assessing Officer to come to a definite conclusion as to year of taxability of capital gain at time of issue of notice. (AY. 2003-04, 2004-05, 2005-06).
G. Sreenivasan v. Dy. CIT (2013) 140 ITD 235 / 153 TTJ 640 / 86 DTR 34 (Coch.)(Trib.)

S.147 : Reassessment – Beyond four years – No failure on the part of assessee – Reassessment was held to be bad in law. Order of Commissioner (Appeals) was held to be mala fide – Assessee was allowed cost of Rs. 25000 for unnecessary mental and financial harresment [Ss. 10B 148, 234B, 234C]
The assessment was completed under section 143(3) and claim under section 10B was allowed. The assessment was reopened beyond four years, which was confirmed in appeal. On appeal to Tribunal the Tribunal held that the reason for reopening given by the Assessing Officer did not fall within the ambit of the provisions leading to escapement of assessment. It was a change of opinion on the part of the Assessing Officer. The Assessing Officer had applied his mind while passing the assessment order and thereafter at the time of passing of revision order. The Department had not alleged that the assessee had withheld any material information or document at the time of assessment proceedings which had resulted in the escapement of assessment. Accordingly the reassessment was quashed. The Tribunal also held that the assessee was not liable to pay interest under sections 234B, 234C. The Tribunal also held that the order had been passed by the Commissioner (Appeals) in a non-judicious and arbitrary manner. The order of the Commissioner (Appeals) was not only against the law laid down by the High Court but smacked of *mala fide* on the part of the Commissioner (Appeals). The Department had to compensate the assessee for causing the latter unnecessary mental and financial harassment. Therefore the appeal of the assessee was allowed with costs of Rs. 25,000. (AY.2004-05)
Qmax Test Equipments P. Ltd. v. ACIT (2013) 22 ITR 690 / 34 taxmann.com 136 (Chennai) (Trib.)

S.147 : Reassessment – Jurisdiction – Search and seizure – *Non obstante* clause – Original assessments completed and no proceedings pending when search action taken – Additional ground was allowed to be first time before the Tribunal – Thereafter notice of reassessment for years falling within six year period – Not permissible during pendency of assessment proceedings pursuant to search [Ss.143(3), 148, 153A]
For the AY. 2001-02 and 2002-03 regular assessments of the assessee, a banking company, were completed on February 13, 2004 and December 30, 2004, respectively. A search action u/s. 132 of the Act, was conducted at the premises of one of the branches of the assessee on July 2, 2005 pursuant to which the Assessing Officer issued notice under section 153A of the Act on May 4, 2007. Meanwhile, the Assessing Officer also took proceedings u/s. 148 for the AY. 2001-02 and 2002-03 by notices dated August 28, 2006 and July 25, 2006 respectively and invoking the provisions of section 145(3) of the Act disallowed the excess depreciation by assessments completed on October 31, 2006. He also

completed the assessments for these two assessment years at the very same income by the assessment orders u/s.143(3) read with section 153A of the Act. The Commissioner (Appeals) upheld the action of the Assessing Officer. On appeal raising the additional ground that the reassessment proceedings for the two years in question were without jurisdiction :Held, allowing the appeals,

(i) That a question of law which arose from the facts found by the income-tax authority could be raised at any stage. The additional ground raised by the assessee was to be admitted.

(ii) That the original assessments for the assessment years in question were completed u/s.143(3) on February 13, 2004 and December 30, 2004, respectively. Thereafter, a search and seizure action was initiated in the assessee's case by the Department on July 2, 2005 on which date the assessments for the two assessment years were not pending. Therefore, in view of the *non obstante* clause with which section 153A(1) opens, the Assessing Officer had no jurisdiction to issue notice u/s. 148 of the Act in respect of those six assessment years which fell within the exclusive jurisdiction of section 153A of the Act and accordingly the Assessing Officer was not justified in issuing notices u/s. 148 and in completing the assessments u/s.143(3) read with section 147 of the Act on October 31, 2006. The Assessing Officer instead of complying with the requirement of section 153A proceeded with the provisions of sections 147 and 148 which were not applicable in the assessment under section 153A of the Act. Therefore, the assessments completed u/s.143(3) read with section 147 of the Act were wholly without jurisdiction and liable to be quashed. (AY. 2001-02, 2002-03)

State Bank of India v. Dy. CIT (2013) 22 ITR 609 / 60 SOT 116 (URO)(Mum.)(Trib.)

S.147 : Reassessment-Within four years – Nothing to show consideration of provision of section 80-IA(5) by Assessing Officer while framing original assessments – Reassessment proceedings rightly initiated [S.80-IA(5), 148]

Where the reopening of assessments is before the expiry of a period of four years from the end of the relevant assessment years, the first proviso to section 147 is not applicable and true and full disclosure of the material facts is not a relevant consideration. The question of change of opinion, which would bar reopening of an assessment, would come into play only where there has been an expression or formation of opinion by assessing authority while framing the assessment being subject to reassessment. The assessment must show an application of mind and a conscious decision by the Assessing Officer in the matter. Held accordingly, that there was nothing to show consideration of the provisions of section 80-IA(5) by the Assessing Officer while framing the original assessments. This aspect of assessment remained to be considered by the assessing authority. The reassessment proceedings stood rightly initiated in law. (AY. 2005-06 to 2008-09)

Hercules Hoists Ltd. v. ACIT (2013) 22 ITR 527 / 59 SOT 43 (URO)(Mum.)(Trib.)

S.147 : Reassessment – Existence of material and rational belief – Tax deducted at source-No return was filed, reassessment was valid – Limitation – Reasons for reopening were furnished after six years from the end of the relevant assessment year was held to be valid-Sanction by Addl. Director of income tax was held to be valid. Due to typing error sanction cannot be held to be invalid. [S.2. (28C), 149, 151]

At the stage of formation of belief the final outcome of the proceedings is not relevant and the fact of escapement of income need not be established. The phrase 'reason to believe' cannot be said to mean that the AO should have finally ascertained the fact by legal evidence or conclusion. Once the AO had formed a *prima facie* belief on the basis of relevant material, any facts which subsequently surface in the course of assessment proceedings which contradict the basis on which the belief was formed cannot vitiate the reassessment proceedings is valid. The contention that since tax was deducted at source for assessment years 2002-03 and 2003-04, the presumption is that there is no escapement of income is not tenable. No such presumption can be there. The fact remains that for the Assessment years 2002-03 and 2003-04 there was income from FTS derived by the assessee which was subject to tax at source and that no return of income was filed. Reassessment was held to be

valid. Reassessment proceedings cannot be held to be barred by limitation on the ground that reasons for reopening were furnished after the expiry of six years from the end of the relevant assessment year. Sanction under section 151 given by an Add. Director of IT who is authorised to exercise the power of an Addl.CIT is a sanction by an appropriate authority. Sanction under section 151 accorded by the Addl. Director cannot be said to have given without application of mind simply because the findings of the Addl. Director are typed. (AY. 2001-01 to 2004-05)
Qualcomm Incorporated v. ADIT (2013) 23 ITR 239 / 85 DTR 156 / 153 TTJ 513 / 56 SOT 72 (URO) / 58 SOT 97 (URO)(Delhi)(Trib.)

S.147 : Reassessment – Block assessment – Reassessment based on same material requisitioned under section 132A was held to be invalid [Ss.132A, 148, 158BC]
The police authorities intercepted a car in which assessee was travelling with two other persons. A sum of Rs. 32.34 lakhs was recovered from them. The police authorities recorded the statement of occupants of the car and the information was passed on to income-tax department. Consequently case was requisitioned by the Department under section 132A. As per the Assessing Officer the assessment proceedings in the name of AOP consisting of three persons including assessee were initiated under the provisions of Chapter XIV-B. In pursuance of those proceedings, the amount recovered was added to taxable income of AOP on ground that same remained unexplained. The Commissioner (Appeals) confirmed said addition. On further appeal, the Tribunal opined that whether the cash was explained or unexplained, the fact remained that action could be taken only in the hands of individuals and not in the hands of AOP'. Accordingly, the addition made in the hands of AOP was deleted. On receipt of the Tribunal's order, the Assessing Officer initiated proceedings under section 148 in case of assessee. The assessee filed an appeal before the Commissioner (Appeals) challenging the validity of reopening on the ground that in case of documents or any asset requisitioned under section 132A, then the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of Chapter XIVB of the Act. The Commissioner (Appeals) having accepted assessee's submission set aside reassessment proceedings taking a view that said proceedings were void *ab initio*. On revenue's appeal the Tribunal held that once Assessing Officer proceeds to make block assessment under section 158BC based on material gathered during search under section 132, he cannot proceed to make reassessment under section 147 on basis of same material, therefore, where material on basis of which Assessing Officer sought to reopen a regular assessment was material pertaining to requisition under section 132A, such material could be subject to only block assessment and it could not form basis for reopening an assessment.(AY. 1999-2000).
ACIT v. Vidit Kumar Agarwal (2012) 150 TTJ 640 / 26 taxmann.com 185 / (2013) 55 SOT 48 (URO)(Agra)(Trib.)

S.147 : Reassessment – Issue not mentioned in recorded reasons – Explanation 3 – Reassessment held to be justified [Ss.35D, 148]
The assessment was completed under section 143(3). The assessment was reopened on the ground that the assessee had debited Rs.44,90,600 towards 'loss on sale of investment' allowed as business expenditure though it is a capital in nature. In the reassessment proceedings the Assessing Officer disallowed the preliminary expenses though the said expenses were not referred in the reasons record. On appeal the Tribunal held that Explanation 3 to section 3 to section 147 inserted by the Finance (No 2) Act, 2009, provides that the Assessing Officer may assessee or reassess the income in respect of any issue, which has escaped assessment, if such issue comes to his notice subsequently in the course of the proceedings under section 147 notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub section (2) of section 148. Therefore in view of explanation 3 to section 147 inadmissible claim of deduction of miscellaneous expenses under section 35D could be disallowed by the Assessing Officer in the course of reassessment even though the same did not find in the reasons recorded under section 148(2). Appeal of assessee dismissed. (AY. 2005-06)
Instant Holdings Ltd. v. Dy. CIT (2013) 81 DTR 35 (Mum.)(Trib.)

S.147 : Reassessment – Merger – Rectification – Merger of rectification proceeding with reassessment proceedings – validity of proceedings – Reassessment was held to be valid. [Ss.143(1), 148, 154]

Assessment was completed under section 143(1) of the Act. Thereafter the notice was issued under section 154/155 of the Act for rectifying certain mistakes. Subsequently the Assessing Officer issued notice under section 147/148. Before Commissioner (Appeals) it was contended that no reopening can be made after due date of completing scrutiny assessment under section 143(3) has been allowed to be lapsed by the Assessing Officer. It was also contended that there should not be simultaneous action under section 154 and 147. Commissioner (Appeals) held that reassessment was void *ab initio*. On appeal by revenue the Tribunal upheld the validity of reassessment and directed the Commissioner (Appeals) to decide on merits. The Tribunal held that reassessment proceedings, validity of those proceedings could not be challenged on ground that there could not be a simultaneous action by Assessing Officer u/s 154 and 147. (AY. 2002-03)

Hotel & Allied Trades (P.) Ltd. v. Dy. CIT (2013) 140 ITR 309 / 87 DTR 49 / 154 TTJ 503 (Cochin)(Trib.)

S.147 : Reassessment – Information from investigation wing – Reassessment held to be valid [S. 148]

Where the information is factual and not false one and the same has merely been communicated to the Assessing Officer, he would be within his statutory right to invoke the provisions of section 147 r.w.s. 148. The Tribunal held that information from the investigation wing being factually correct and the assessee failed to refuse the same in any proceedings under the Act, then the Assessing Officer has jurisdiction under section 147 r.w.s. 148 of the Act and there is no infirmity and illegality in issuance of notice under section 148 of the Act by Assessing Officer. (AY. 2006-07)

ACIT v. Kisco Casting P. Ltd. (2013) 152 TTJ 629 / (2014) 147 ITD 269 (Chd.)(Trib.)

S.148 : Reassessment – Objection to notice – Implementation of direction of High Court – No writ of mandamus can be issued to implement the decision [S.147, Article 226]

The High Court, in *Alappat Jewels v. ACIT [2013] 350 ITR 471 (Ker.)* dismissed appeal of the assessee with observation that objection preferred by assessee against issue of notice u/s 148 must be necessarily considered and reasons must be given. The assessee filed the instant writ petition for issuance of a writ of mandamus to implement said direction of High Court. Held, no writ of mandamus can be issued to implement decision in said case. (AY. 2006-07)

Alappat Jewels v. ACIT (2013) 356 ITR 299 / 219 Taxman 142 (Mag.)(Ker.)(HC)

S.148 : Reassessment – Beyond four years – Notice was not valid

Failure to disclose all material facts necessary for assessment is a condition precedent for reopening of an assessment beyond the period of four years from the date of assessment. No allegation in notice of failure on part of assessee to disclose any material facts. In the order of rejection no mention was made about failure to disclose material facts. Reassessment was not valid. (AY. 2005-06)

E.I. Dupont India Pvt. Ltd. v. Dy. CIT (2013) 351 ITR 299 / 215 Taxman 92 (Mag.)(Delhi)(HC)

S.148 : Reassessment – Representative assessee – Agent-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 [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 Hon'ble 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. (AY.1999-2000)

Arvind Mills Ltd. v. ACIT (2012) 211 Taxman 158 / (2013) 263 CTR 247 (Guj.)(HC)

S.148 : Reassessment – Notice – Excess depreciation – Alternative remedy – Writ petition is not maintainable [Ss.32, 147, Art.226]

Interim order of status quo is not a factor to interfere with order of reassessment. Writ petition filed without availing of remedy of appeal is not maintainable. (AY. 2007-08)

Narmadha Chemicals (P.) Ltd. v. ACIT (2013) 357 ITR 45 (Mad.)(HC)

S.148 : Reassessment – Recording of reasons – Notice – Additional reasons recorded after issue of notice cannot be considered without issuing a fresh notice based on additional reasons recoded – Proceedings were held to be bad in law [S.147]

Assessing Officer reopened assessment of assessee and issued on it a notice under section 148. He recorded reasons to effect that in computation of income, assessee had deducted certain amount on account of provision for doubtful debts, but in profit and loss account this amount was not added to other income, therefore, said amount chargeable to tax, had escaped assessment within meaning of section 147/148 - Subsequently, Assessing Officer sometime in October, 2010 recorded two additional reasons and supplied same to assessee on 29-10-2010. Since no notice under section 148 had been issued on assessee pertaining to purported additional reasons, additional reasons could not be looked into for purposes of determining validity of proceedings initiated under notice dated 19-1-2010. Since from record of assessment no where it was coming out that assessee had claimed any deduction on account of provision for bad debts, initiation of proceedings under section 147 was itself bad. Assessing Officer reopened assessment of assessee after recording reasons and served on it a notice under section 148 on 19-1-2010, additional reasons recorded by Assessing Officer subsequent to issuance of notice under section 148 could not be looked into for purposes of determining validity of proceedings initiated under notice dated 19-1-2010. (AY. 2006-07)

CIT v. Living Media India Ltd. (2013) / 359 ITR 106 / 35 Taxmann.com 105 (Delhi)(HC)

S.148 : Reassessment – Notice – Recourse to section 148 cannot be sought on a hypothesis as to what would be possible outcome of appeal before higher Appellate Authority – Notice issued on alternative basis for taxing income held to be not valid [S.147]

The assessee, a venture capital fund claimed in its return that the contributions by its investors in terms of the trust deed constituted revocable transfers u/s. 61 and 63 and, hence, the income accruing to the fund was not liable to tax in the hands of the assessee, but in the hands of the investors/contributors in proportion to their respective contributions. The AO held that the contributors had no control over the scheme and hence, the provisions of sections 61 and 63 were not applicable and the total income of assessee was exigible to tax. The CIT(A) ruled in favour of assessee. While appeal was pending before the Tribunal, the AO, for the subsequent year, passed an order treating the assessee as an AOP and then further went on to reopen the assessment for the year to tax the income as an AOP on a protective basis.

On a Writ Petition by the assessee, the High Court observed that the reasons recorded for the reopening of the assessment clearly postulate that the reopening is based on the contingency that should the Tribunal accept the contention of the assessee and affirm the view of the CIT(A), the income would be exempt. Accordingly, the High Court allowing the Petition held that when recourse is sought to be taken to the provisions of section 148, there has necessarily to be the fulfillment of the jurisdictional requirement that the AO must have reason to believe that income has escaped assessment. To accept the contention of the revenue in the present case would be to allow a reopening

of an assessment under section 148 on the ground that the AO is of the opinion that a contingency may arise in future resulting an escapement of income. That would, be wholly impermissible and would amount to a rewriting of the statutory provision (AY. 2008-09).
DHFL Venture Capital Fund v. ITO (2013) 217 Taxman 116 / 358 ITR 471 / 261 CTR 482 (Bom.)(HC)

S.148 : Reassessment – Notice Limitation [Ss. 147, 149, 153]
For issuing of notice u/s. 148 beyond the limit prescribed u/s. 149, all the requirements of provision 3 to Sec. 153 have to satisfied unless the Expl. 3 of Sec. 153 gets fulfilled the bar prescribed u/s. 149 could not be lifted. (AYs. 2001-02 & 2002-03)
Rural Electrification Corporation Ltd. v. CIT (2013) 355 ITR 345 / 260 CTR 126 (Delhi)(HC)

S.148 : Reassessment – Mineral oils – Proviso to sub-s. (1) – Applicability from 1-4-2011 [S. 44BB]
Since proviso to s. 44BB is applicable only from 1-4-2011, Assessing Officer could not reopen completed assessments on such issue for accounting years which stood closed prior to 1-4-2011.
DCIT v. B.J. Services Company Middle East Ltd. (2013) 216 Taxman 190 (Uttarakhand)(HC)

S.148 : Reassessment – Recording of reasons – No mention of assessment year in the recorded reasons – Reassessment held to be valid as the assessee participated in the proceedings without raising any objections [Ss. 147, 292B]
The assessee had participated in the reassessment proceedings without raising any objections as to which assessment year the reasons recorded relate. Tribunal set aside the reassessment order, as in the reasons there is omission of assessment year. On appeal by revenue the Court held that after participating in the reassessment proceedings in which the Assessing Officer made certain additions, the assessee raised an objection before the Tribunal that the recorded reasons did not mention the assessment year. Held, since it was not shown that the assessee was misled by not mentioning the assessment year in the reasons recorded and that the assessee participated in reassessment proceedings without raising any such objection, hence the reassessment was valid , however the additions made have to be decided on merits. Matter was restored back to Tribunal. (AY. 2002-03)
CIT v. Shyam Cold Storage (2013) 215 Taxman 669 (All.)(HC)

S.148 : Reassessment – Notice – Mandatory [S. 80IB, 143(2)]
Notice under S. 143(2) is mandatory and in the absence of such service, the Assessing Officer cannot proceed to make an inquiry on the return filed in compliance with the notice issued under S. 148. Order of Tribunal quashing the reassessment proceedings was held to be valid. (AY. 2005-06, 2006-07)
ACIT v. Geno Pharmaceuticals Ltd. (2013) 214 Taxman 83 (Bom.)(Mag.)(HC)

S.148 : Reassessment – Notice – Reopening assessment based on order of Transfer Pricing Officer – Alternative remedy – Appeal pending before DRP, notice held to be valid [S.147]
The reasons for reopening the assessment for AY. 2006-07 were that for the AY. 2005-06, the assessee had international transactions with associated enterprises to the extent of Rs.9.77 crores and the adjustment suggested to the arm's length price was Rs. 5.13 crores which was 52 per cent of such turnover. The assessee, for the assessment year 2006-07 also, had transactions to the extent of Rs. 6.99 crores. The adjustment to the arm's length price for the assessment year 2005-06 clearly indicated that the parties with whom the transactions were made remaining the same, there would be adjustment to the arm's length price in similar proportion in the assessment year 2006-07 also,held, dismissing the writ petition that, the assessee was already before the DRP against the orders of the TPO for both years. Undoubtedly, if the proceedings went against it before the Dispute Resolution Panel, it was

always open to it to file an appeal before the Tribunal wherein all contentions available to it could be raised. Therefore, the question of interference did not arise (AY. 2002-03 to 2004-05)
Sysarris Software Pvt. Ltd. v. Dy. CIT (2013) 352 ITR 443 / 84 DTR 135 / 257 CTR 201 (Karn.)(HC)

S.148 : Reassessment – Notice – For failure to issue notice, reassessment held to be not valid, section 292BB does not have retrospective effect [S.143(2), 292BB]
The A.O. issued a notice u/s 148 to make a reassessment. However, as a notice u/s 143(2) was not issued, the Tribunal quashed the reassessment. The Department filed an appeal before the High Court where it relied on s. 292BB (which provides that the failure to issue notice cannot be objected to if the assessee has appeared in the proceeding), inserted by the Finance Act 2008 w.e.f. 1-4-2008 and argued that the said provision was retrospective in operation and the reassessment was valid. Held by the High Court dismissing the appeal: The issue of a notice u/s.143(2) is mandatory. The failure to do so renders the reassessment void (*CWT v. HUF ofH. H. Late Shri. J.M. Scindia (2008) 300 ITR 193 (Bom.)* followed). S.292BB was inserted w.e.f. 1-4-2008 and came into operation prospectively for AY 2008-09 and onwards.
CIT v. Salman Khan (Bom.)(HC) www.itatonline.org.

S.148 : Reassessment – Notice after four years – Averment in notice or in reasons recorded
There was no averment in notice or in reasons recorded of failure by assessee to disclose fully and truly material facts, and hence, notice after four years was invalid. (AY.2001-02)
Agilsys IT Services India P. Ltd. v. ITO (2013) 27 ITR 244 / (2014) 61 SOT 3 (Mum.)(Trib.)

S.148 : Reassessment – Notice – Where no return was filed in pursuance of notice issued u/s. 148, issue of notice u/s. 143(2) could not be held as a mandatory requirement for making assessment. [S.139, 142, 143(2), 147]
For the AY. 2003-04 the assessee had filed its original return of income on 25-11-2003, and revised return on 29-12-2008 declaring the surrendered income. A.O issued notice u/s. 143(2) on 16-11-2009 and further issued notice u/s. 148 to regularise the revised return. Assessee did not file return of income in response to notice issued u/s. 148 by the AO. The AO. completed the reassessment proceedings by making certain additions. Before CIT(A) the asseesee contended that where return had not been filed in response to notice issued u/s. 148, it was mandatory to serve notice u/s. 143(2) within 6 months from the end of financial year in which return was filed. Therefore, reassessment made by AO. was invalid as notice u/s. 143(2) was served after the prescribed time limit i.e. 30-9-2009. The CIT(A) had deleted the addition made by AO. on the facts that notice u/s. 143(2) was beyond the time limit. On appeal by revenue the Tribunal held that the revised return filed on 29-12-2008 which is not a valid return of income, the revised return can be filed u/s. 139(5). In the case under consideration, one year from the end of the assessment year has been expired on 31-3-2005, the original return filed was processed on 25-11-2003. The assessee has filed the so-called revised return on
29-12-2008 surrendering the amount surrendered at the time of survey. Thus, the revised return was filed after the prescribed period u/s. 139(5). Therefore, in the eyes of law the revised return filed by the assessee on 29-1-2008 is not a valid revised return. it is also admitted fact that after the issue of notice u/s. 148 of the act, the assessee did not file any return or made submission that the original return filed may be treated as return filed against the notice u/s. 148 of the act. No notice u/s. 142(1) of the act issued by the AO for furnishing return of income. For issuing notice u/s. 143(2), the basic requirement of the law are (1) that the return must be furnished u/s. 139 or (2) the return to be furnished in response to notice under sub-section (1) of section 142 of the act. In case under consideration, the assessee neither furnished the revised return of income u/s. 139 nor it was furnished in response to notice under sub-section (1) of section 142 return filed on 29-12-2008 is invalid return. Thus, both conditions are not applicable in the case under consideration. From the facts of the case it is admitted that the revised return is not a return furnished u/s. 139 of the Act nor the AO. u/s. 142(1)

to furnish return of income. Accordingly the Tribunal held that where no return was filed in pursuance of notice issued u/s. 148, issue of notice u/s. 143(2) could not be held as a mandatory requirement for making assessment. As the CIT(A) has not decided the issue on merits, the matter was set aside to decide on merits. (AY. 2003-04)
ACIT v. Uday Bhagwan Industries (2013) 60 SOT 22 (URO)/ 33 taxmann.com 226 (Agra)(Trib.)

S.148 : Reassessment – Notice under section 148 after transfer of jurisdiction – Notice was held to be bad in law [S.127]
The CIT Delhi transferring the jurisdiction from ITO New Delhi to ITO Kolkata under section 127, the jurisdiction in respect of every action for all assessment years lies with the ITO Kolkata and only he is competent to issue notice under section 148. The Tribunal held that the notice issued under section 148 by the ITO New Delhi is bad and illegal.
Chanakya Finvest (P) Ltd. v. ITO (2013) 143 ITD 378 / 157 TTJ 625 (Kol.)(Trib.)

S.148 : Reassessment – Handed over to postal authorities on 1st April 2008 – Service of notice beyond 6 years – Reassessment notice was held to be invalid [Ss.147, 149]
The notice u/s.148 was handed over to the postal authorities on 1st April, 2008 & not only that it was addressed to the wrong postal authorities on 1st April, 2008. Also the reasons given for reopening was vague since the basis for reopening was as per the information gathered from the Investigating wing. Tribunal, allowed the appeal of the assessee & held that Department having handed over the impugned notice u/s 148 to the postal authorities on 1st April, 2008, which was beyond the period of limitation of 6 years provided in s.149 & also wrongly addressed the same, notice was not valid. Also quashing reassessment, Tribunal held that AO having reopened the assessment on the basis that the assessee has received accommodation entries from the company ASB Ltd, pursuant to the information received from the Investigating wing, without indicating the nature of transactions made by the assessee, much less anything to establish that the said transactions are in the nature of the accommodation entries, the reasons forming the basis of reopening of assessment did not satisfied the requirement of s.147 of the IT Act.(AY.2001-02)
ITO v. On Exim (P) Ltd. (2013) 26 ITR 697 / 94 DTR 140 / 157 TTJ 633 / (2014) 61 SOT 12 (URO)(Delhi)(Trib.)

S.148 : Reassessment – Notice under section 148 where time limit under section 143(2) not expired [S.143(2)]
The Assessing Officer cannot acquire two jurisdictions to issue notice under section 148 as well as under section 143(2) of the Act with respect to the original return filed by the assessee. The jurisdiction under section 147 can be acquired only after the limitation to issue notice under section 143(2) had expired. Therefore the notice under section 148 is bad in law. (AY.2007-08)
Dy. CIT v. Mangat Ram (2013) 154 TTJ 24 (UO) / 59 SOT 22 (Asr.)(Trib.)

S.151 : Reassessment – Sanction to issue of notice – When notice is issued by Deputy Commissioner of Income-tax no sanction is required [S.148]
Only in a case where a notice is issued by a person below rank of Assistant Commissioner or Deputy Commissioner, sanctioning by Joint Commissioner is required. On the facts the notice was issued by the Deputy Commissioner of Income-tax, therefore no sanction is required to be given by the Joint CIT. (AY. 2004-05)
Ester Industries Ltd. v. UOI (2013) 215 Taxman 673 / 260 CTR 225 (Delhi)(HC)

S.151 : Reassessment – Sanction for issue of notice – Merely writing "approved" in the sanction form without recording satisfaction renders the reopening void [Ss.147, 148]

The AO issued a notice u/s 147 and reopened the assessment on the ground that the assessee was the beneficiary of hawala entries in the form of loans, expenses & gifts. He alleged that the assessee had deposited unaccounted cash and received cheques in the form of loans, expenses, gifts. The CIT granted sanction u/s 151 to the reopening by writing the words "approved". The assessee challenged the reopening on the ground that as satisfaction was not recorded by the CIT the sanction was without application of mind and void. HELD by the Tribunal allowing the appeal:
S. 147 and 148 are a charter to the Revenue to reopen earlier assessments and are, therefore protected by safeguards against unnecessary harassment of the assessee. They are sword for the Revenue and shield for the assessee. S. 151 guards that the sword of S. 147 may not be used unless a superior officer is satisfied that the AO has good and adequate reasons to invoke the provisions of S. 147. The superior authority has to examine the reasons, material or grounds and to judge whether they are sufficient and adequate to the formation of the necessary belief on the part of the assessing officer. If, after applying his mind and also recording his reasons, howsoever briefly, the Commissioner is of the opinion that the AO's belief is well reasoned and *bona fide*, he is to accord his sanction to the issue of notice u/s 148 of the Act. In the instant case, we find from the perusal of the order sheet which is on record, the Commissioner has simply put "approved" and signed the report thereby giving sanction to the AO. Nowhere the Commissioner has recorded a satisfaction note not even in brief. Therefore, it cannot be said that the Commissioner has accorded sanction after applying his mind and after recording his satisfaction (ITA No. 611 & 534/Mum/2004, dt. 24-7-2013)(AY. 1995-96)
Amarlal Bajaj v. ACIT (2013) 60 SOT 83 / 37 taxmann.com 7 (Mum.)(Trib.)

S.153 : Assessment – Reassessment – Limitation – In case where ITAT remands a matter to the file of AO, if AO doesn't pass Asst. Order within one year from the end of financial year in which such order is received by CCIT or CIT, such asst. Proceedings become time barred
Whenever Hon'ble ITAT remands a matter to the file of AO with certain specific directions, AO must pass an Asst. Order within a period of two years from the end of financial year("One Year" instead of "two years" w.e.f. 1-6-2001) in which such order passed by Hon'ble ITAT is received by the Chief Commissioner or Commissioner as prescribed u/s. 153(2A) of the Act. If AO doesn't pass an Asst. Order within the prescribed time limit such proceeding become time-barred and the assessment placed before AO by Hon'ble ITATs order must be treated as having abated. Any excess tax paid by the assessee under original assessment framed by the AO must be refunded with consequential effect [SCA 10330 of 2003,
dt.18-6-2012]
Instruments and Control Company. (2012) ACAJ - November-P. 401) (Guj.)(HC)

S.153 : Assessment – Reassessment – Limitation – Even in the absence of specific direction of Tribunal that aforesaid income was to be brought to tax in relevant assessment year, in light of provisions of Explanation 2 to section 153, it was permissible for AO to issue notice under section 148 [Ss.148, 150]
Assessing Officer found that amount collected by assessee company from its chit fund subscribers in form of penalty for late payment, dividend forfeited, etc., had not been shown as income. Additions on above account were made for the assessment years 1995-96 to 2001-02, which were confirmed by CIT(A). Tribunal deleted said addition holding that income in question had accrued to assessee only in assessment year 2002-03, when right to receive these amounts had fructified. On said basis, AO reopened assessment for Assessment Year 2002-03 by issuing notice under section 148 CIT(A), upheld validity of reassessment proceedings. Tribunal held that even if there was absence of specific direction of Tribunal that aforesaid income was to be brought to tax in relevant assessment year, in light of provisions of Explanation 2 to section 153, it was permissible for AO to issue notice under section 148 for assessment of such income. Reassessment was valid. (AY.2002-03).
Margadarsi Chit Fund (P.) Ltd. v. ACIT (2013) 60 SOT 85 (URO)(Hyd.)(Trib.)

S.153(2) : Assessment – Notice – Period of limitation

Since assessment was completed after expiry of one year from end of financial year in which notice issued, it was barred by limitation. (AYs. 2003-04, 2004-05, 2005-06)

Sowcar Janaki (Smt.) v. ITO (2013) 27 ITR 226 / (2014) 61 SOT 1 / 160 TTJ 747 (Chennai)(Trib.)

S.153A : Assessment – Search – Abate of pending proceedings – Completed assessments can be reopened-It is not open to assessee to make claim of deductions or claim of expenditure which has not been claimed in original assessment proceedings which stand completed in the proceedings under section 153A [Ss.132, 132A, 147, 148, 151]

In consequence of search proceedings, the AO can reopen assessments or reassessments already made without following provisions of ss. 147, 148 and 151 and determine total income of assessee. It is not open for assessee to seek deduction or claim expenditure which has not been claimed in original assessment, which assessment already stands completed, only because assessment u/s 153A in pursuance of search or requisition is required to be made (AYs. 2000-01 to 2002-03)

Jai Steel (India), Jodhpur v. ACIT (2013) 219 Taxman 223 / 259 CTR 281 (Raj.)(HC)

S.153A : Assessment – Search – Filing of returns for six years is mandatory [S.132]

Once there is a search, the Assessing Officer has no option but to call upon assessee to file returns of income for earlier six assessment years. Therefore, notice issued under section 153A calling upon assessee to file returns for those years, cannot be challenged merely on ground that it would cause certain degree of hardship to assessee.

Madugula Venu v. DIT (2013) 215 Taxman 298 / 91 DTR 284 / (2014) 266 CTR 373 (Delhi)(HC)

S.153A : Assessment – Search – Seizure of articles – Release – Writ to quash the proceedings held to be not maintainable [S. 153C, Art. 226]

The assessee was engaged in the business of purchase and sale of jewellery, etc. The entire consignment of bullion sent by the assessee was seized from the custody of the assessee's courier by police. The assessee applied for release of the bullion. The assessee's Income-tax Officer passed an order under section 132B, to release the entire quantity in favour of the assessee, after examining his account books and all other relevant materials, and after recording findings that the silver bullion was part of the stock-in-trade, and was duly disclosed by the assessee. The entire seized bullion had been released to the assessee and the courier's assessment was completed under section 153B(1)(b) read with section 143(3). However, the Assessing Officer of the courier referred the matter along with the satisfaction note under section 153C to the Assessing Officer of the assessee. On receipt of the satisfaction note, the assessee's Income-tax Officer acting under the provisions of section 153C of the Act initiated assessment proceedings for seven assessment years 2003-04 to 2009-10 by issuing a separate order directing the assessee to file the return on the prescribed form. On a writ petition challenging the initiation of the assessment proceedings against the assessee, held that if there is power to do something under the Act, the action taken in fiscal matters cannot be set aside in exercise of the writ jurisdiction on the ground that such power has been exercised needlessly, without any purpose. The exercise of power in such a case can only be challenged, if the power is being exercised with ulterior motive and *mala fide* intention. It was not open to the assessee to contend before the court that the exercise of power, which ultimately existed in the authority, would expose the assessee to assessment for the same period on which the assessing authority had already recorded satisfaction.(AY. 2009-2010)

Savesh Kumar Agarwal v. UOI (2013) 353 ITR 26 / 216 Taxman 109 (Mag.)(All.)(HC)

S.153A : Assessment – Search – Income offered to buy peace – Withdrawal of income offered

The AO cannot presume the income of the assessee for the period covered by s. 153A on the basis of a confession statement. The AO is required to bring on record positive material in support of the

addition. Tax can be collected only as provided under the Act. If an assessee, under a mistake, misconception or on not being properly instructed, is over assessed, the authorities under the Act are required to assist him and ensure that only legitimate taxes due are collected. The income-tax is a levy on income. If income does not result at all, there cannot be a tax, even though there is offer by the assessee which did not materialise. The plea of the Department that the Department could not be faulted for accepting returns filed by the assessee where he himself had offered the donations for tax could not be accepted.(AY. 2008-09)
A. Audinarayana Reddy v. DCIT (2013) 27 ITR 580 (Hyd.)(Trib.)

S.153A : Assessment – Search – Donation of gold – Confirmation of receipt
It was found that the assessee and his family members had made huge donations in the form of gold to Shirdi Saibaba Sansthan (SSS). The assessee took a plea before the lower authorities that he donated gold worth Rs. 25 lakhs and the balance was collected from various friends and relatives from his native village. The assessee and his two sons, in order to purchase peace with the Department, offered the difference as additional income. However, the Department instead of acting upon the offer started enquiry with the donors and made detailed enquiry. In enquiry the donors about 70 donors appeared before the Department and confirmed the donations. As the basic condition and purpose for which the declaration was made ceased to exist, the assessee withdrew his earlier offer. The Department had not brought anything on record to show that the confirmations were false. Therefore, assessment was held to be not based on any cogent material. The shifting of some transactions of others to the hands of the assessee was not justified in view of absence of any incriminating material found in the course of search as belonging to the assessee.(AY. 2008-09)
A. Audinarayana Reddy v. DCIT (2013) 27 ITR 580 (Hyd.)(Trib.)

S.153A : Assessment – Search – Addition made in the hands of company – Addition in the hands of loanee
The award of contract works by the company was disbelieved and the additions were made in the hands of the company on that account. The contract receipts having already suffered tax in the hands of the company, there was no basis for making the addition originating from the same amounts in the hands of the assessee, being the loanee. (AY. 2008-09)
A. Audinarayana Reddy v. DCIT (2013) 27 ITR 580 (Hyd.)(Trib.)

S.153A : Assessment – Search – Once search or requisition is made AO is bound to proceed for all six years [S.132, 143(3)]
Once a search /requisition is made under section 132, Assessing Officer is bound to proceed under section 153A for all six years immediately preceding assessment years relevant to previous year in which search was conducted or requisition was made, even if there is no incriminating material to indicate any undisclosed income during original assessment completed under section 143(3) for any particular year. Once Assessing Officer has issued notice under section 153A inviting return of income, he is duty bound to proceed with reassessment proceedings and apart from income already assessed in original assessment completed under section 143(3), he can assess total income of assessee by making addition on account of undisclosed income or income escaped assessment. (AY. 2005-06)
Scope (P.) Ltd. v. DCIT (2013) 33 taxmann.com 167 / 142 ITD 515 (Mum.)(Trib.)

S.153A : Assessment – Search – Assessment completed – In case of completed assessments, addition can be made only if incriminating document found during search [S.72A, 132]
Pursuant to a search and seizure operation u/s 132, the AO passed an assessment order u/s 153A in which he held that the accumulated loss and unabsorbed depreciation of the amalgamating company was not allowable u/s 72A of the Act. The assessee claimed that as the assessment for that year had

not abated, an addition u/s 153A could be made only if there was incriminating material found during the search and as the issue of amalgamation was a part of the record in the original assessment, it could not be assessed u/s. 153A. The CIT(A) rejected the claim. On appeal by the assessee to the Tribunal HELD allowing the appeal:

There are three possible circumstances that emerge on the date of initiation of search u/s. 132 (1): (a) proceedings are pending; (b) proceedings are not pending but some incriminating material found in the course of search indicating undisclosed income and/or assets and (c) proceedings are not pending and no incriminating material has been found. In circumstance (a), since the proceedings are pending, they are abated and the AO gets a free hand to make the assessment. In circumstance (b), there is no question of abatement as the proceedings are not pending and the AO has to pass an assessment order u/s. 153A to assess the undisclosed income. In circumstance (c), the AO has to pass an assessment order though as there is no incriminating material no income can be assessed. On facts, as the assessments were completed and there was no incriminating material found during the search, the AO was not entitled to make any addition.(ITA No. 4212 & 4213 /Del/2011, dated 28-6-2013).(AY. 2004-05, 2005-06)

MGF Automobiles Ltd. v. ACIT (Delhi)(Trib.) www.itatonline.org

S.153A : Assessment – Search – After expiry of S.143(2) time limit, S.143(1) assessment is final & addition u/s.153A can be made only if incriminating material is found in search [S.143(1)]

For AY 2005-06, the AO passed an intimation u/s 143(1) accepting the return as filed. Subsequently, there was a search u/s 132. The AO noticed that an amount of Rs.93 lakhs received by the assessee as a loan in earlier years had been treated as a gift and credited to the capital account. He passed an assessment order u/s 153A in which he held that the said amount was assessable as a cash credit u/s 68. The CIT(A) partly confirmed the addition. Before the Tribunal, the assessee argued that as no incriminating material was found during the search, the addition could not be made u/s 153A. HELD by the Tribunal upholding the plea:

In *All Cargo Global Logistics v. Dy. CIT (2012) 137 ITD 287 (Mum)(SB)*, the Special Bench held that in a case where the assessment has abated the AO can make additions in the assessment, even if no incriminating material has been found. However, in a case where the assessment has not abated, an assessment u/s. 153A can be made only on the basis of incriminating material (i.e. books of account & other documents found in the course of search but not produced in the course of original assessment and undisclosed income or property disclosed during the course of search). On facts, as the assessment was completed u/s 143(1) and the time limit for issue of s. 143(2) notice had expired on the date of search, there was no assessment pending and there was no question of abatement. Therefore, the addition could be made only on the basis of incriminating material found during search. As the addition u/s 153A was made on the information/material available in the return of income (i.e. the information regarding the gift was available in the return of income as capital account had been credited by the assessee by the amount of gift) and not on the basis of any incriminating material found during the search, the AO had no jurisdiction to make the addition u/s 153A. (AY. 2005-06)

Gurinder Singh Bawa v. DCIT (Mum.)(Trib.) www.itatonline.org.

S.153A : Assessment – Search – Assessment is mandatory even if no incriminating material is found. Distinction between “developer” and “works contractor” in s. 80-IA(4) explained [S. 80IA (4)]

A search and seizure action u/s.132 was conducted on the premises of the assessee. No incriminating material or evidence was found to indicate that there was any undisclosed income. The AO passed an order u/s. 153A for AY 2000-01 to 2005-06 in which he took the view that the assessee was not entitled to claim deduction u/s 80IA(4) on the ground that it was a contractor and not a developer of infrastructure projects. The Tribunal had to consider two issues: (a) whether if the assessments for the concerned years have attained finality and no incriminating material is found in the course of the search, the AO has jurisdiction to proceed u/s 153A and (b) how to distinguish between a "developer" and a "works contractor" for purposes of s. 80-IA(4). HELD by the Tribunal:

(i) Three possible circumstances emerge on the date of initiation of search u/s 132(1): (a) proceedings are pending; (b) proceedings are not pending but some incriminating material is found in the course of search, indicating undisclosed income and/or assets and (c) proceedings are not pending and no incriminating material has been found. Circumstance (a) is answered by the Act itself, that is, since the proceedings are still pending, all those pending proceedings are abated and the AO gets a free hand to make the assessment. Circumstance (b) has been answered in Anil Bhatia to hold that while there is no question of any abatement since no proceedings are pending, the AO is entitled to reopen the assessment (without having to comply with the strict conditions of s. 147, 148 and 151) and bring the undisclosed income to tax. Also, in *All Cargo Global Logistics Ltd v. Dy. CIT (2012) 137 ITD 287 (Mum.)(SB)* it was held that in the case of a non-abated assessment, an assessment u/s 153A has to be made on the basis of incriminating material. Circumstance (c) has been kept open and left unanswered. Circumstance (c) has to be answered to say that even where there is/are no pending proceedings and no incriminating material has to be found, the AO is still required to pass an order u/s 153A though the assessed income will have to be the same as the originally assessed income as there was no incriminating material. Accordingly, the assessee's argument that when there is no incriminating material or assets, then there is no jurisdiction to proceed u/s 153A is not acceptable. S. 153A contains a non-obstante clause and is triggered automatically whenever a search is undertaken. The fact that no incriminating material was found has no bearing on the applicability of s. 153A;

(ii) S. 80-IA(4) allows deduction to "any enterprise carrying on the business of (i) developing or (ii) operating and maintaining or (iii) developing, operating and maintaining any infrastructure facility". The Explanation provides that it shall not apply to "business which is in the nature of a works contract". Whether an assessee is a developer or works contractor depends on the nature of the work undertaken by the assessee. The word 'contractor' is used to denote a person entering into an agreement for undertaking the development of infrastructure facility. Every agreement entered into is a contract. Therefore, the contractor and the developer cannot be viewed differently. Every contractor may not be a developer but every developer is a contractor. Contracts involving design, development, operating and maintenance, financial involvement, and defect correction and liability period cannot be called as simple works contract. A case where in an undeveloped area, infrastructure is developed and handed over to the Government cannot be considered as a mere works contract but has to be considered as a development of infrastructure facility. If the contract is composite, it will have to be segregated so as to allow deduction on the parts that involve design, development, operating and maintenance, financial involvement etc. and to deny on those which are pure works contracts. On facts, the assessee had made substantial investments in fixed assets and was exposed to various kinds of risks. It was not a mere contractor. It is enough if the assessee is a developer. It need not also maintain & operate the infrastructure facility (*Patel Engineering Ltd. v. Dy. CIT (2004) 94 ITD 411 (Mum.)*& GVPR Engineers Ltd (included in file) followed) (AY. 2000-01 to 2005-06)

ACIT v. Pratibha Industries Ltd. (2013) 141 ITD 151 / 23 ITR 766 (Mum.)(Trib.)

S.153B : Assessment – Search – Time limit – Direction to give effect to order of Tribunal and issue refund as per law [S.132]

On January 17, 1985, a search under section 132(1) was conducted at the premises of the assessee and other persons. The Tribunal held that no effective opportunity had been provided to the assessee to explain its case and set aside the entire assessment order and the order of the Commissioner (Appeals) and restored the matter to the file of the Assessing Officer to pass the assessment order afresh after providing reasonable opportunity to the assessee. But no order was passed by the Assessing Officer. In the meantime, the income-tax record of the assessee was transferred from Delhi to Lucknow. On August 3, 2011, the Assistant Commissioner, Lucknow, issued notice under section 143(2). Held, in

view of the provisions of section 153B proviso 2(a), the limitation for the reassessment is one year, which had already expired as far back as in the year 2003. Hence, now there was no occasion for initiation of proceedings for reassessment/scrutiny pertinent to the assessee for the assessment year 1985-86. The impugned notice was to be set aside and the authorities were to give effect to the order of the Tribunal order against which no appeal had been filed by the Department. The refund, if any, may be issued to the assessee as per law at the earliest within a period of three months. (AY.1985-86)
Naresh Chand Agarwal v. UOI (2013) 359 ITR 353 (All.)(HC)

S.153C : Assessment – Income of any other person – Search and seizure – Appeal to Supreme Court – Show-cause notices issued u/s. 153C – assessee should file appropriate reply to said notices – cannot file writ petition, followed by a special leave petition [Constitution of India, Art. 226]
The assessee filed writ petition, challenging the notices issued u/s. 153. The High Court held that the documents seized did not belong to the assessee, and therefore, quashed the show-cause notices.
On special leave petition by the department, the Supreme Court held that at the said stage of issuance of the notices u/s. 153C, the assessee could have addressed his grievances and explained his stand to the AO by filing appropriate replies to the said notices, instead of filing the writ petition. It is settled law that when an alternate remedy is available to the aggrieved party, it must exhaust the same before approaching the writ court. At the said stage of proceedings, the High Court ought not have entertained the writ petition and instead should have directed the assessee to file reply to the said notices.
Accordingly, the Supreme Court set aside the impugned judgment and order of the High Court. Further, it granted time to the assessee, if it so desires, to file reply/objections, if any, as contemplated in the said notices within 15 days' time and directed the AO to first consider the said reply/objections and thereafter directed the assessee to file the return for the assessment years in question. Lastly, it stated that, If, for any reason, the assessment order goes against the assessee, he/it shall avail and exhaust the remedies available to him/it under the Act, 1961. (AY. 2001-02 to 2006-07)
CIT v. Vijaybhai N. Chandrani (2013) 357 ITR 713 / 217 Taxman 138 / 91 DTR 202 / 261 CTR 225 (SC)

S.153C : Assessment – Income of any other person – Search and seizure – Satisfaction should be reasonable but need not be conclusive – Matter remanded [Ss.132, 143(3), 153A]
Before a notice under section 153C can be issued, the AO ought to be satisfaction that undisclosed income belongs to a third person. Such satisfaction should be reasonable but need not be conclusive. Matter remanded. (AYs. 2001-02 to 2006-07)
CIT v. Classic Enterprises (2013) 358 ITR 465 / 219 Taxman 237 (2014) 268 CTR 364 / 100 DTR 79 (All.)(HC)

S.153C : Assessment – Income of any other person – Search and seizure – Documents belong to assessee – Action was justified [S.153A]
In order to initiate any action under S. 153C, it is essential that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized or requisitioned should belong to a person other than person referred to in S. 153A. The assessee sold certain land to S group. Subsequently, 'S' group was subjected to search during which sale deeds of land in question and agreements entered into by and between tenants of said property and assessee on various dates regarding eviction of tenants were seized. Held that the action against the assessee under S. 153C was justified on the basis of the seized documents.(AY.2005-06)
Kamleshbhai Dharamshibhai Patel v. CIT (2013) 214 Taxman 558 / 95 DTR 88 / 263 CTR 362 (Guj.)(HC)

S.153C : Assessment – Income of any other person – Search and seizure – Approval – Failure to Obtain JCIT's Approval Renders s. 153C Assessment Order Void [S.132, 144, 153D]

Pursuant to search & seizure action u/s. 132 on the premises of a third party, certain documents belonging to the assessee were found and seized pursuant to which a notice u/s 153C was issued to the assessee and assessment u/s 153C r.w.s. 144 were framed. In passing the assessment orders, the A.O. (ITO) omitted to obtain the consent of the JCIT as mandated by S.153D. Before the Tribunal, the assessee argued that the failure to obtain the JCIT's consent rendered the assessment a nullity. The Tribunal {*Akil Gulamali Somki v. ITO (2012) 137 ITD 94 (Pune)*} upheld the plea on the basis that as the heading to s. 153D refers to a "prior approval" and uses negative wording and the word "shall", compliance of s. 153D is mandatory and cannot be waived by the assessee. Reliance was also placed on Clause 9 of the Manual of Office Procedure which 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. On appeal by the Department to the High Court, held dismissing the appeal:

Though the question raised proceeds on the basis that approval of the JCIT was given as he had corrected the draft assessment order and the changes were incorporated by the AO in the final assessment order, the finding of fact was recorded by the Tribunal is that no prior approval of the Joint Commissioner was taken before the ITO passed the order. In view of the above, there is no reason to entertain the proposed question and the appeal is dismissed.

CIT v. Akil Gulamali Somji (Bom.)(HC) www.itatonline.org.

S.153C : Assessment – Income of any other person – Search and seizure – Satisfaction to be recorded even if both the parties are same – Mere confirmation is not books of account – Original assessment must be pending – Concluded Assessment – Incriminating material – Limitation [Ss. 132, 143(2), 153A]

Pursuant to a search u/s.132 conducted on the premises of another person, the AO issued a notice u/s.153C upon the assessee and thereafter passed an assessment order. The assessee claimed that the said assessment was not valid on the ground that (a) no books of account of the assessee were found in the premises of the other person, (b) though the AO of the searched person & the assessee was the same it was not shown that the satisfaction was recorded in the course of the assessment of the searched party and not of the assessee, (c) as no assessment was pending on the date of search, the assessment could be made only for the incriminating material found in the search & (d) as the satisfaction was recorded on 23-7-2010 and the relevant AY was 2011-12, the AO could issue a notice u/s 153C only for six preceding AYs relevant to this AY (i.e. AY 2005-06 to 2010-11) and the notice issued for AY 2004-05 was barred by limitation. HELD by the Tribunal:

(a) & (b) the satisfaction u/s 153C has to be recorded by the AO of the searched person and not by the AO of the assessee. Even if the AO of both parties is the same, he has to go through the formality of separately recording satisfaction and the record has to show that satisfaction was recorded in the assessment of the searched party. Also s. 153C proceedings can be initiated only if books of account etc which are seized from the searched party belong to the assessee. A mere confirmation of account or a copy of the audited accounts or a copy of the return of income does not constitute "books of account" for purposes of s. 153C (DSL Properties (Del) & Therapeutic India (Del.) followed);

(c) the scope of assessment u/s 153A & 153C depends on whether the original assessment proceedings are pending or concluded. If a s. 143(1) intimation is passed and the time limit for issue of a s. 143(2) notice has lapsed, the assessment is concluded. In such cases, the s. 153A/ 153C assessment has to be based only on incriminating material found in the search (*All Cargo Global logistics Ltd. v. Dy. CIT (2012) 137 ITD 287 (Mum)(SB), Asst. CIT v. Pratibha Industries Ltd. (2013) 141 ITD 151 (Mum) & Gurinder Singh Bawa* followed);

(d) S. 153A/ 153C permits the AO to issue a notice for six AYs preceding the AY in which the search took place. As the satisfaction was recorded on 23.7.2010, the relevant AY was 2011-12 and the AO could issue a notice u/s 153C only for six preceding AYs relevant to this AY (i.e. AY 2005-

06 to 2010-11). The notice issued for AY 2004-05 is barred by limitation.(ITA No. 5460 to 5465/Del/2012, AYs. 2004-05 to 2009-10)
V. K. Fiscal Services Pvt. Ltd. v. DCIT (Delhi)(Trib.) www.itatonline.org

S.153C : Assessment – Income of any other person – Search and seizure – Satisfaction note – Same Assessing Officer – Recording satisfaction in file of person searched is mandatory and then such note along with seized document/books of account is to be placed in file of such other person, before issue of notice-Condition were not fulfilled-Notice was barred by limitation [S.132, 153A]
Tribunal held that for initiating action under section 153C recording of satisfaction by AO of person searched that any money, bullion, jewellery or other valuable article or thing or books of account or documents seized belong to person other than person searched as well as handing over of books of account, other documents or assets seized to AO of such other person is a *sine qua non*. If AO of person searched and AO of such other person is same, he has to first record satisfaction in file of person searched and then such note along with seized document/books of account is to be placed in file of such other person and thereafter in capacity of AO such other person, he has to issue notice under section 153C, read with section 153A. On the facts of the case condition were not fulfilled hence notice was barred by limitation. Accordingly assessment completed in pursuance to such notice also quashed. (AY.2004-05)
DSL Properties (P.) Ltd. v. Dy. CIT (2013) 60 SOT 88 (URO)(Delhi)(Trib.)

S.153C : Assessment – Income of any other person – Search and seizure – Firm – Partners –No separate satisfaction note is required to be recorded. [S.132]
Tribunal held that when books of account of assessee firm found and seized from place of partner of firm, AO is fully empowered to initiate proceeding under section 153C against firm i.e. 'other person' and no separate satisfaction is required to be recorded.(AYs. 1999-2000, 2000-01, 2002-03 to 2004-05)
Bharat Ginning & Pressing Factory v. ITO (2013) 155 TTJ 343 / 60 SOT 93 (URO) (Ahd.)(Trib.)

S.154 : Rectification of mistake – Search and seizure – Unexplained investments –Request for remanding the matter to the Tribunal is declined. [S.69, 158BC]
Unexplained investments of Rs. 4.84 crore were found during search of company MSIL. Rs.1 crore out of same was claimed to be invested by its five directors equally, who were assessee in present case, which was added as unexplained income in their hands. Later, MSL, a sister concern offered income of Rs.4.84 crore, claimed to be invested in MSIL, before Settlement Commission, which passed order taking its income at Rs. 2.65 crore. Therefore, assessees made applications for rectification of earlier assessment order, by going back on their declared income of Rs. 20 lakh each, amounting to Rs.1 crore on premise that such amount formed part of amount offered by MSL. This was accepted by the Tribunal. The High court observed that the stand of MSIL and the present assessees, not to bring the amount of Rs. 4,84,88,500/- to the extent of Rs. 3,84,88,500/- in the hands of the company and to the extent of Rs. 1 crore, i.e.Rs. 20 lakhs in the hands of the assessees, all proceeded on the premise that the very amount had been offered by MSL before the Settlement Commission as its undisclosed income but a perusal of the order passed by the Settlement Commission does reveal that it is not the entire amount that is brought to tax as an undisclosed income of MSL but it is only to the extent of Rs. 2,65,04,626/-. Settlement Commission has also positively declined to give a direction to exclude the assessment of a sum of Rs. 20 lakhs each in the case of the assessees on the premise that the applicant MSL was making an offer of Rs. 4,84,88,500/- as its undisclosed income for the reason that it cannot issue such directions in respect of persons not before the Commission. In the absence of any discussion regarding the source of investment in MSIL, a remand for such purpose will be a futile exercise and moreover such an exercise if at all could have been in the case of very company MSIL and not by either the present assessees or MSL, an applicant

and declaring before the Settlement Commission. Therefore, the request for remanding the matter to the Tribunal is declined.(AYs.1989-90 to 1999-2000)
CIT v. Manish Kumar Bothra (2013) 94 DTR 177 / 36 taxmann.com 435 / (2014) 360 ITR 398 (Karn.)(HC)
CIT v. Bhimladevi Bothra (Smt.) (2013) 94 DTR 177 / 36 taxmann.com 435 / (2014) 360 ITR 398 (Karn.)(HC)
CIT v. Trilok Kumar Bothra (2014) 360 ITR 398 (Karn.)(HC)
CIT v. Rajendra Kumar Bothra (2014) 360 ITR 398 (Karn.)(HC)
CIT v. Sudhir Kumar Bothra (2014) 360 ITR 398 (Karn.)(HC)

S.154 : Rectification of mistake – Part of claim allowed in original assessment – Balance claim could be allowed in rectification proceedings [S.80M]
The assessee claimed deduction under section 80M a sum of Rs. 8,39,174/-. The assessee filed an application under section 154 seeking rectification of mistake apparent on the face of record. In the application, it was mentioned that the assessee had received dividend from U and the same was an allowable deduction. In the application under section 154 the assessee restricted its claim to Rs. 25,07,554, i.e., equal to gross income. The A.O. did not allow the claim but the Tribunal allowed it. On appeal to the High Court held that the genuineness of the claim was not doubted. The claim could not be denied because the A. O. had already allowed a sum of Rs. 8,39,174/- u/s. 80M. hence, the balance of Rs. 16,68,380 would have to be allowed as per law. (AY. 1990-91)
CIT v. Sahara India Savings and Investment Corporation Ltd. (2013) 357 ITR 520 (All.)(HC)

S.154 : Rectification of mistake – Refund – Interest – Where issue of attribution of delay to whom, was a debatable issue, rectification order disallowing interest on refund under section 244A was invalid [S.244A]
After Commissioner (Appeals) allowed assessee's claim for not taxing retention money, Assessing Officer gave effect to his order and allowed interest on refund. Thereafter, Commissioner directed Assessing Officer to rectify his mistake and not allow interest on refund till date of order of Commissioner (Appeals). Accordingly, Assessing Officer passed rectification order withdrawing interest. The Court held that where issue of delay if any, attributable to whom was a debatable issue, rectification order disallowing interest on refund was invalid, as there must be a mistake apparent from record which can be rectified and not something which can be established by a long drawn process of reasoning on which there could be two possible opinions. The Court held that rectification order disallowing interest on refund till date of order of Commissioner (Appeals) was not maintainable. Where issue of attribution of delay to whom, was a debatable issue, rectification order disallowing interest on refund under section 244A was invalid.(AY. 2002-03)
CIT v. Nathpa Jhakri Joint Venture (2013) 261 CTR 110 / 88 DTR 224 / 358 ITR 233 (Bom.)(HC)

S.154 : Rectification of mistake – Time limit – Beyond four years from the end of financial year in which assessment was completed is barred by limitation [S.154(7)]
Assessment was completed on 29-12-2006. Notice for rectification was issued on 2-3-2012 and order was passed on 23-3-2012. Thereafter, demand was raised against assessee pursuant to order passed under section 154. Assessee claimed that as per section 154(7), limitation period for rectification is four years from end of financial year in which assessment is completed, which was 31-3-2011 in this case. It was held that demand raised pursuant to order under section 154 was time barred. (AY. 2004-05)
Vodafone Mobile Service Ltd. v. UOI (2013) 86 DTR 332 / 259 CTR 393 / 215 Taxman 707 (Delhi)(HC)

S.154 : Rectification of mistake – Credit of TDS – Department's practice of not giving prompt & full credit for TDS condemned [S.143(1), Form 26AS]

The assessee filed a return of income in which he claimed a refund of Rs. 2.11 lakhs. An intimation u/s 143(1) was issued by the CPC Bangalore in which credit for certain TDS certificates was omitted to be given. The assessee filed a rectification application u/s 154 before the AO which was not acted upon. The assessee filed a writ petition to challenge the neglect of the AO to give proper TDS credit. Before the High Court the AO argued inter alia that as the details of the e-return had not been transferred to him by the CPC, he was not authorized to accede to any request of the assessee. It was also claimed that the assessee had not filed full details relating to the claim. HELD by the High Court allowing the Petition:
Form 26AS, available on the department's website, clearly reflects the assessee's entitlement to credit for TDS. Instead of giving credit for the TDS, the department has adamantly continued to take the stand that there is a failure on the part of the assessee to furnish details. We are not impressed with such a stand. Computerization is with the object to facilitate easy access to the assessee and make the system more viable and transparent. In the event of any shortcoming of software programme or any genuine mistake, the Department is expected to respond to such inadvertence spontaneously by rectifying the mistake and give corresponding relief to the assessee. Instead of that, even when it is being brought to the notice of the Department by the assessee, by a rectification application and subsequent communication, not only it has chosen not to rectify the mistake, but, the lack of inter-departmental coordination has driven the assessee to this Court for getting his legitimate due. This attitude for sure does not find favour with the Court, as more responsive and litigant centric system is expected; particularly in the era of computerisation. Tax payers friendly regime is promised in this electronic age. For want of necessary coordination between the two departments, the assessee cannot be expected to be sent from pillar to the post. If the Centralised Processing Center meant for return processing, accounts, refund, storage of data etc. adds to the difficulties of the Tax payers, due to lack of distribution of work between back office and front office, and that too, after having been pointed out the actual error, a serious re-look is expected.(SCA No. 6726 of 2013, dt. 9-7-2013)
Vaghjibhai S. Bishnoi v. ITO (Guj.)(HC) www.itatonline.org

S.154 : Rectification of mistake – Settlement Commission – Power of review [S.245D]
An application for rectification under section 154 is impermissible and beyond the jurisdiction of the Commission. The Revenue ought to have challenged the order of the Commission perhaps by way of *certiorari*. (AY. 1991-92 to 1993-94)
U. Narayanamma (Smt) v. Govt. of India (2013) 352 ITR 598 / 216 Taxman 201 (Mag.)(AP)(HC)

S.154 : Rectification of mistake – Survey – Search – Re-appreciated entire material on record and came to a different conclusion than conclusion arrived at in block assessment order, there was no mistake apparent from records and rectification order was liable to be quashed
Surveys/ Search were conducted in the premises of the assessee and the assessment order was passed declaring the undisclosed income. Subsequently the Assessing Officer initiated rectification proceedings and passed the rectification order under section 154. Commissioner (Appeals) partly allowed assessee's claim. On appeal by revenue the Tribunal quashed entire rectification order. On appeal to Court the Court held that something which is debatable, on which two view are possible cannot be subject of rectification and only a mistake apparent from records can be rectified u/s 154. Where the assessing authority re-appreciated entire material on record and came to a different conclusion than conclusion arrived at in block assessment order, there was no mistake apparent from records and rectification order was liable to be quashed (AY. 1988-90 to 1998-99).
CIT v. Mysore Breweries Ltd. (2013) 356 ITR 346 / 215 Taxman 704 (Karn.)(HC)

S.154 : Rectification of mistake – Investment Deposit Account – Profits of business – Provision of excise duty written back – Rectification order was not valid [S.32AB]
Assessee entitled to allowance under section 32AB in respect of provision of excise duty written back. Assessing Officer was not justified in taking action under section 154 to disallow the claim.

CIT v. Tata Yodogawa Ltd. (2013) 87 DTR 26 / 351 ITR 379 / 215 Taxman 152 / 263 CTR 371 (Jharkhand)(HC)

S.154 : Rectification of mistake – Prior period expenses – Calculation mistake –Rectification is valid

The Assessing Officer disallowed certain prior period expenses by detailed discussion. However, while computing additions on account of disallowances in final calculation, said disallowance was left from calculation. Held, such mistake could be corrected by the Assessing Officer in exercise of powers conferred u/s.154. (AY.1998-99)

CIT v. Punjab Agro Industries Corpn. Ltd. (2013) 215 Taxman 22 (Mag.)(P&H)(HC)

S.154 : Rectification of mistake – Not taking any decision cannot be held to be debatable – Application is maintainable [Ss.132B, 234C]

During assessment proceeding assessee requested AO to adjust seized cash against tax liability but Assessing Officer did not take any decision on that issue. On assessee's application under section 154, Assessing Officer held that cash seized during course of search and seizure operation could be adjusted against any existing liability and not against future liability. CIT(A)dismissed assessee's appeal holding that question as to issue whether seized cash can be adjusted against advance tax payable by assessee or not was debatable issue and, therefore, order of Assessing Officer could not be subject-matter of rectification. Tribunal held that since AO had not dealt with application moved by assessee for appropriation of seized cash in assessment order issue was neither taken nor decided by AO and, so, findings of CIT(A) that application was not maintainable or issue was debatable, was not correct. (AY.2008-09)

Vijay D. Mehta v. CIT (2013) 60 SOT 100 (URO)(Mum.)(Trib.)

S.154 : Rectification of mistake – Limitation – As the intimation was not served on the assessee, AO was directed to pass an order entertaining the rectification application [S.143(1), 154(7)]

A.O. processed u/s. 143(1) return of income furnished by assessee and issued intimation on 30-6-1999, in which credit of TDS amount was not properly given to assessee. Said intimation had not been served on assessee and remained with department's record. In March, 2006 when A.O. called upon assessee to make payment of outstanding demand for year. assessee made enquiries and came to know that demand was raised only because credit of TDS amount was not properly being granted to it. Thereupon assessee made an application under section 154 on 20-3-2006 seeking rectification of intimation issued under section 143(1) on 30-6-1999. A.O. dismissed said application on ground of limitation holding that return for assessment year 1998-99 was processed under section 143(1) on 30-6-1999. Therefore time limit under section 154(7) of four years expired on 31-3-2004. On appeal Tribunal held that as per provisions of section 143(1) Assessing Officer was duty bound to send impugned intimation to assessee specifying sum so payable. since impugned intimation was not sent to assessee, question of limitation as raised by A. O. was against Natural Justice as well as unjustifiable. Therefore, Assessing Officer was to be directed to entertain said rectification application and dispose it off as per law. (AY. 1998-99)

Liberty Pesticides & Fertilizer Ltd. v. ACIT (2013) 144 ITD 49 / 35 Taxmann.com 431 / 95 DTR 135 / 158 TTJ 522 (Ahd)(Trib.)

S.154 : Rectification of mistake – Assessment – Omission to claim exemption – AO has no power to correct return of filed by assessee – Omission to claim deduction cannot be rectified by filing rectification application [S.143(1)(a)]

The assessee omitted to claim exemption in the return of income. It was a mistake of the assessee in not making claim of exemption in the return of income. The Assessing Officer had no power under section 154 of the Act to correct the return of income filed by the assessee. Omission to claim exemption in the return of income did not fall in the definition of "incorrect claim" as mentioned in

section 143(1)(a) of the Act read with its Explanation. Rectification application of assessee under section 154 was not maintainable.(AY. 2009-10)
Jhansi Development Authority v. DCIT (2013) 25 ITR 338 / 69 SOT 97 (URO)(Agra)(Trib.)

S.154 : Rectification of mistake – Deduction of tax at source – Refund – Application for refund of TDS due to cancellation of contract with non-resident can be made *vide* s. 154 application [S.195]
The assessee remitted consulting charges/fees to a Taiwan based company called 'Scandinavian Health Ltd' on which it did not deduct tax at source u/s 195. The AO passed an order u/s.201 & 201(1A) by which he held the assessee to be in default. The assessee filed an application u/s. 154 in which it pointed out that the agreement with the Taiwanese company had been subsequently cancelled and that there was no obligation to deduct TDS as per the CBDT's Circular No.7 of 2007 dated 23-10-2007. The AO rejected the application on the ground that there was no mistake apparent from the record. On appeal, the CIT (A) upheld the claim and directed the AO to verify whether the conditions laid down in Circular No. 7 of 2007 for a refund of tax already collected had been satisfied. The department filed an appeal before the Tribunal claiming that there was no apparent mistake in the AO's order and that the CIT(A) had admitted new evidence without granting any opportunity to the AO. HELD by the Tribunal dismissing the appeal:
Before the CIT(A) the assessee filed copies of various invoices raised on it in pursuance to the contract by the Taiwanese company and also filed copy of credit note issued pursuant to the cancellation of the contract and documents showing inward remittance of the amount earlier paid. The CIT(A) held that the case of the assessee is covered by sub-clause (b) of clause 2 of Circular No. 7 dated 23-10-2007 and clause 2(b) of Circular No. 790 dated 20-4-2000. In para 2.1 of Circular 7 dated 23-10-2007, it is clearly provided that once the amount already remitted in pursuance of a contract has been return back to the remitted after cancellation of the contract, no income accrues to the non-resident. It is also provided in the circular that the amount of tax paid u/s195 can be refunded to the deductor with prior approval of the CCIT. The detailed procedure is provided in the said circular and certain pre-conditions are to be satisfied, suitable undertaking from the deductor has to be obtained before the refund can be issued. It is also specified that refund can be given only if the non-resident has not filed any return and the time limit for filing of return has already expired. It was held that as the contract has been cancelled and the money has been received back, no tax is payable by the non-resident assessee. The CIT (A) directed the AO to verify that the conditions laid down in Circular No.7 of 2007 have been satisfied. There is no infirmity in the order of the CIT(A) and it cannot be said that AO was not allowed any opportunity as he has to verify the details before granting any refund of tax if any. (ITA No. 6100/Mum/2011 dt. 10-7-2013) (AY. 2007-08)
ITO v. Sun Pharmaceutical Industries Ltd. (Mum.)(Trib.) www.itatonline.org.

S.154 : Rectification of mistake – Debenture redemption reserve – Book profit – Adjustment cannot be made under section 154 [S.115JB, 143(1)]
Return of assessee was processed under section 143(1).Thereafter, an order under section 154 was passed on ground that assessee did not include debenture redemption reserve and short provision for expenses for earlier years while determining book profits under section 115JB. Tribunal held that the disputed issues as to whether or not debenture redemption reserve is for ascertained liability and whether or not such reserve is deductible while determining book profits under section 115JB and also as to whether or not liability for prior period expenses crystallized in year under consideration cannot be adjudicated in proceedings under section 154. In favour of assessee. (AY. 2008-09)
ACIT v. Uflex Ltd.(2013) 55 SOT 43 (URO)(Delhi)(Trib.)

S.154 : Rectification of mistake – Commissioner(Appeals) – Powers – Exempt income – Rectification application denial of exemption under section 10A was held to be not justified [Ss.10A, 251]

Assessee-company claimed deduction under section 10A. Assessing Officer allowed same after reducing 'internet expenses' from export turnover. The assessee went in appeal against said order. The Commissioner (Appeals) dismissed the appeal as infructuous. The Assessee sought rectification in said order, by filing rectification application, under section 154. Disposing the said application, the Commissioner (Appeals) accepted the existence of the assessee-company; however, he entirely disallowed the claim of assessee under section 10A on ground that activity carried out by the assessee was not manufacture. On appeal to Tribunal held that issue of eligibility for deduction under section 10A required examination of facts, business activity and relevant provisions and, therefore, same could not be considered as mistake apparent from records under section 154. Therefore, the Commissioner (Appeals) was not justified in denying deduction in order pursuant to rectification application under section 154. In favour of assessee. (AY. 2007-08)
Nuance Transcription Services India (P.) Ltd. v. Dy. CIT. (2013) 55 SOT 39 (URO)(Bang.) (Trib.)

S.154 : Rectification of mistake – Tax on STCG – Clerical error – Assessee did not showed STCG under Schedule CG of e-return – Depicted same under Schedule SI – Gain taxable at special rate 10% appeal of assessee was allowed [Ss. 111A, 143(1)]
The assessee filed e-return. The Assessing Officer received the intimation under section 143(1). The Assessing Officer computed the tax payable on short term capital gain at 30 percent as against at the rate of 10 percent under section 111A. The assessee moved application under section 154. The Assessing Officer held that short term capital gains had not been shown under section 111A at Schedule CG of e. return. Commissioner (Appeals) up held the order of Assessing Officer. On appeal the Tribunal held that where due to clerical error, assessee did not showed STCG under Schedule CG of e-return, but depicted same under Schedule SI. It was held that Income chargeable at special rates, gains would be taxable at special rate of 10 per cent. (AY. 2008-09)
Shrikant Real Estates (P.) Ltd. v. ITO (2013) 140 ITD 155 / 152 TTJ 30 / 22 ITR 266 / 81 DTR 431 (Mum.)(Trib.)

S.154 : Rectification of mistake – Free trade zone – Depreciation and brought forward losses – Held benefit of tax holiday availed from AY 1999-2000, its exemption period was continuing hence, S. 10A(6) not applicable, hence rectification was not justified [S.10A]
Assessee, a S.10A unit claimed deduction for depreciation and brought forward losses which were allowed. Assessing Officer found that claim for depreciation and brought forward business loss for AY had been wrongly allowed as assessee, a section 10A unit, had violated S.10A(6). Assessing Officer passed the order under section 154 and rejected the claim. In appeal Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal the Tribunal held that since assessee chose to avail benefit of tax holiday from AY 1999-2000, its exemption period was continuing and therefore S. 10A(6) would not apply. Accordingly the rectification order was quashed and appeal of assessee was allowed.(AY. 2003-04, 2004-05)
Tata Consultancy Services Ltd. v. ACIT (2013) 140 ITD 325 (Chennai)(Trib.)

S.155 : Assessment – Rectification of mistakes – Limitation period – From the original order. [S.245D]
Where there was no substantial change in rectified order of Settlement Commission, limitation period of four years for passing rectification order under section 155 was to be reckoned from date of original order, and not rectified order. (AYs. 1986-87 to 1988-89)
A.O. Antony v. ITO (2013) 218 Taxman 103 (Mag.)(Ker.)(HC)

S.158A : Avoiding repetitive appeals – Identical question of law is pending before High Court or Supreme Court – No immunity from payment of full tax dues

When a declaration u/s.158A that identical question of law is pending before the High Court or the Supreme Court, is made by the assessee, it will not provide any immunity to assessee from payment of tax due. Therefore, the contention raised by the assessee that once such an application was accepted, the Assessing Officer was to refrain from demanding tax in terms of assessment order, was to be rejected.
Karnataka Chamber of Commerce & Industry v. CIT (2013) 215 Taxman 39 (Mag.)(Karn.)(HC)

S.158BA : Block assessment – Undisclosed income – Time limit for filing return - Disclosure of income in the return, cannot be assessed as undisclosed income
The First Appellate authority re appreciated entire material on record and held that time limit for filing of return for AY 1999-2000 was not over. Since assessee had disclosed income in question in return for AY 1999-2000, addition made by Assessing Officer was to be deleted. The Tribunal confirmed this order holding that assessee had already disclosed income in regular return filed by him within time. Since two fact finding authorities had deleted impugned addition on proper appreciation of material on record, impugned order passed by said authorities was to be upheld. (Block period 1-4-1989 to 11-5-1999)
CIT v. K.S. Puttaswamy (HUF) (2013) 216 Taxman 39 (Mag.)(Karn.)(HC)

S.158BA : Block assessment – Assessment of undisclosed income – Protective assessment was passed – Addition as undisclosed income was held to be not justified
In course of block assessment, the Assessing Officer made addition in respect of undisclosed income by way of FDs and KVPs. The Tribunal found that such investment were out of professional receipts recorded in diaries maintained by assessee. According to the Tribunal, since last date for filing return wherein the said professional receipts could be shown had not expired, FDs and KVPs made out of such receipts could not be regarded as undisclosed income. On revenue's appeal, it was noted that assessee still had time to file returns and he had in fact filed returns in respect of which a protective assessment order was passed. In view of the above, Tribunal rightly concluded that FDs and KVPs did not represent undisclosed income of assessee.
In course of block assessment, the Assessing Officer noticed that the assessee owned agricultural land along with his brother; they were cultivating said lands and there existed agricultural income. After being satisfied about said factual aspect, assessing authority held that share of assessee was only 50% and therefore he gave benefit to that extent. The Tribunal opined that in absence of any evidence to show that brothers divided income equally and since, assessee was in complete financial management of all assets, entire agricultural income belonged to assessee. Accordingly, the Tribunal set aside addition made by the Assessing Officer. Hence, the impugned order passed by Tribunal did not require any interference. (Block assessment period 1-4-1988 to 4-2-1999)
CIT v. Dr. K.P. Viswanath Prabhu (2013) 355 ITR 163 / 215 Taxman 67 (Mag.) / (2014) 98 DTR 28 (Karn.)(HC)

S.158BB : Block assessment – Computation of undisclosed income – Estimation of inflated purchases of entire block period held to be not valid – Inflated purchase price could be made only for period to which document was related
During search, a document seized disclosed that assessee had paid unusually high purchase price to 'P' for period between April 1998 to July 1998. The Assessing Officer, therefore made addition for undisclosed income on account of estimated inflated purchase price for the entire block period. Held in the absence of link between document found during search and assessee's activities for the entire block period, addition for undisclosed income on account of inflated purchase price could be made

only for period to which document was related and not for entire block period. (AY. 1993-94 to 1998-99)
CIT v. Standard Tea Processing Co. Ltd. (2013) 215 Taxman 659 (Guj.)(HC)

S.158BB : Block assessment – Search and seizure – Regular assessment – Issues which are relating to subject matter of regular assessment cannot be added in the block assessment if there no material seized in the course of search [S.132]
In course of block assessment, the Assessing Officer made addition to assessee's income on three grounds, firstly, investment made in properties in name of assessee's wife and son out of undisclosed income of assessee, secondly, investment made by assessee in wine shop out of agricultural income and, thirdly, investment made in thandal business out of undisclosed income of assessee. The Tribunal, however, set aside addition made by Assessing Officer. As regards first addition, there existed no material on record for revenue to draw inference that assessee's wife and son did not have separate source of income. As regards other two additions, there was no material seized at time of search of assessee's premises so as to make it a subject matter of block assessment. Held on facts, the Tribunal was justified in deleting impugned additions. (Block period 1986-87 to 1996-97)
CIT v. P.R. Perumal (2013) 215 Taxman 19 / 88 DTR 68 (Mad.)(HC)

S.158BB : Block assessment – Search and seizure – No undisclosed income was found, block assessment was invalid
Since the Tribunal had found that during search proceedings there was no evidence found and there were no materials found showing undisclosed income it rightly held that the block assessment was not valid. [Block assessment 1986-87 to 1995-96)
CIT v. Soora Subramaniam HUF (Individual) (2013) 353 ITR 298 / 216 Taxman 112 (Mag.)(Mad.)(HC)

S.158BB : Block assessment – Computation of undisclosed income – Unexplained investment in stock – Cash receipts and expenses noted on seized material
Tribunal deleted the additions made by the AO towards the alleged discrepancy in stocks on the ground that the entire process of inventorisation followed by the I-T authorities was inaccurate as it was humanly impossible to complete the entire exercise in a single day and that the AO has not examined the reconciliation of stock filed by the assessee and ignored the value addition made to the semi-finished goods and the discount and profit element in arriving at the value of stocks coupled with the fact that there was no evidence of sale of stocks outside the books. Findings of the Tribunal are findings of facts and, therefore, no substantial question of law arises out of the findings of the Tribunal. AO having made addition of unaccounted receipts noted on seized handwritten slips without allowing deduction for the unaccounted expenses recorded in the same material, and the Tribunal having deleted the addition on the ground that the seized material should be followed in its entirety and that the said expense were incurred by the assessee for the purposes of the business. Findings of the Tribunal, both of facts and law, do not suffer from any perversity and, therefore, no substantial question of law arises.
CIT v. D.D. Gears Ltd. (2013) 83 DTR 88 (Delhi)(HC)

S.158BB : Block assessment – Undisclosed income – Absence of any material addition deleted by the Tribunal was held to be justified [S. 158B(b)]
Documents on record having indicated that the assessee has in fact, not received any royalty w.e.f. October 1999, for the user of his trademark from the company. Once the trademark stood assigned to the company by virtue of the shareholders agreement entered into by the assessee with another company which is not shown to be sham and bogus, the finding of the Tribunal that no royalty income was assessable under Chapter XIV-B does not raise a substantial question of law.

In the absence of any material to show that the assessee had actually received the reimbursement of marketing expenses from the company using his trademark which he was entitled to receive only “on demand” but was not demanded by him, the question of undisclosed income does not arise and no substantial question of law arises. (Block period 1-4-1999 to 1-11-2000)
CIT v. M.P. Ramchandran (2013) 83 DTR 143 (Bom.)(HC)

S.158BB : Block assessment – Computation – Undisclosed income – Money requisitioned under section 132 A of the Act from police beyond the block period cannot treated as undisclosed income [S.132A]
Money requisitioned under section 132 A of the Act from Police which was received beyond the block period cannot be included while computing undisclosed income in block assessment. (Block Period: 25-8-84 to 26-10-95 & 1-4-85 to 14-11-95)
CIT v. Nirankar Nath Mittal (2013) 81 DTR 233 / 255 CTR 488 / 215 Taxman 43 (Mag.) (All.)(HC)

S.158BB : Block assessment – Undisclosed income – Assessee following cash system of accounting – interest on Indira Vikas Patra accrued on year to year basis cannot be assessed as undisclosed income
Where the assessee is following cash system of accounting it cannot be said that interest on Indira Vikas Patra accrued to the assessee on year to year basis so as to assess the same as undisclosed income of the assessee in block assessment. (Block Period: 1-4-1990 to 6-4-2000)
CIT v. Roshan Singh (2013) 81 DTR 58 (P&H)(HC)

S.158BB : Block assessment – Undisclosed income – Salary – TDS – Income from salary which has been subjected to TDS can’t be categorized as undisclosed income [S.192]
Income from salary which has been subjected to deduction of tax at source cannot be categorized as “Undisclosed Income” as defined u/s 158B(b) Such an income cannot be taxed as income during the block period by virtue of computation provisions of section 158BB in Search cases.
Dy. CIT v. Harishkumar J. Gupta (2013) 215 Taxman 41 (Mag.)(Guj.)(HC)

S.158BB : Block assessment – Undisclosed income – Cash credits – Gifts – Value of property – Gifts held to be genuine- Documents found explained addition was not justified [Ss.68, 69]
The assessee has received gifts amounting to Rs.22.75 lacs. In the assessment proceedings the assessee had filed the details of capacity of donors, Income tax details, PAN no, copies of pass book. Commissioner (Appeals) and Tribunal have given the finding that gifts are genuine. On appeal by revenue the High Court also confirmed the view of Tribunal by holding that the order is not perverse. Accordingly the appeal of revenue was dismissed. A document was found at the premises of assessee in the course of search. The assessee explained that the said document was in the hand writing of the assessee’s father which contained the resale value of property for the purpose of distribution of property within family. The Commissioner (Appeals), and Tribunal has accepted the explanation of assessee that no cash consideration in excess of Rs. 71.35 lacs was paid for the purchase of the property. On appeal by revenue the High Court also confirmed the order of Tribunal. Hence no addition is called for. (Block period 1st April, 1997 to 29th Jan, 2003)
CIT v. Sunita Makhija (2013) 256 CTR 197 / 82 DTR 140 / 214 Taxman 50 (Mag.)(Bom.)(HC)

S.158BB : Block assessment – Undisclosed income – Deduction under Chapter VI-A is available – Amount considered in regular assessment cannot be assessed as undisclosed [S.158B]
Assessing Officer disallowed deduction under Chapter VI-A while computing undisclosed income of assessee for relevant block period. The court held that deduction under Chapter VI-A has to be given while computing total income or loss. The court also held that the amount in question had been taken into consideration in regular assessment order under section 143(3), said amount could not be included under sub-clause (b) of section 158B.(B.P. 1-4-1985 to 14-11-1995)

CIT v. Anil Sarin (2013) 212 Taxman 108 (Mag.)(All.)(HC)

S.158BB : Block assessment – Computation – Undisclosed income – Foreign travel – Expenditure reflected in regular books of account could not be considered in block assessment proceedings [S.37(1)

When expenditure on foreign travel of a director was reflected in assessee's regular books of account, disallowance could only be in regular assessment proceedings; it could not be considered in block assessment proceedings. (AY. 2008-09)

Urmila & Co. Ltd. v. Dy. CIT (2013) 60 SOT 1 (URO)(Mum.)(Trib.)

S.158BC : Block assessment – Search and seizure – No warrant in the name of assessee – Block assessment was not valid [S.132]

In the absence of warrant in the name of the assessee, block assessment was not valid.

CIT v. Sonal Constructions (2013) 359 ITR 532 / 211 Taxman 167 / 260 CTR 377 (Delhi)(HC)

CIT v. Urmila Lodhi (2013) 359 ITR 532 / 211 Taxman 167 / 260 CTR 377 (Delhi)(HC)

S.158BC : Block assessment – Search and seizure – Procedural lapses – Remand of matter

A document pertaining to firm was recovered from the possession of partner. Merely because partners were not examined at the time of assessment, reliance on these documents for making additions was not precluded as this was a procedural lapse. In the event of procedural lapses on part of the AO while making assessment, a proper course was not to invalidate assessment or delete additions but to remand assessment to Assessing Officer.

CIT v. Sonal Constructions (2013) 359 ITR 532 (Delhi)(HC)

CIT v. Urmila Lodhi (2013) 359 ITR 532 (Delhi)(HC)

S.158BC : Block assessment – Search and seizure – Search in premises of assessees' father – Block assessment was not valid [Ss.132, 158BD]

A search was conducted on the premises of the father of the assessees. There was no authorization of search or search warrant u/s. 132(1) against the assessees. In the course of the search documents and other materials were found which did not belong to the assessees. And on the basis of the same block assessment were made against the assessees.

Held, in a situation when there is no authorization in respect of the assessees, provisions of s. 158BD and not s. 158BC becomes applicable. Assessees were issued notices u/s. 158BC and assessment orders were passed. In the absence of search warrants u/s. 132(1) assessments could not have been made u/s. 158BC. Such assessments without authorization were void *ab initio.*

CIT v. Ram Singh (2013) 351 ITR 391 / 223 Taxman 78 / 262 CTR 96 (P&H)(HC)

CIT v. Gurdeep Singh(2013) 351 ITR 391 / 223 Taxman 78 / 262 CTR 96 (P&H)(HC)

CIT v. Amarjit Singh (2013) 351 ITR 391 / 223 Taxman 78 / 262 CTR 96 (P&H)(HC)

CIT v. Gurmail Singh (2013) 351 ITR 391 / 223 Taxman 78 / 262 CTR 96 (P&H)(HC)

CIT v. Dalip Singh (2013) 351 ITR 391 / 223 Taxman 78 / 262 CTR 96 (P&H)(HC)

S.158BC : Block assessment – Procedure – Addition cannot be made on the basis of material seized which neither belonged to the assessee nor was recovered from his possession

The assessee was in dairy business and jointly occupied a premises with one 'N'. A search was conducted at said premises and some documents were seized. The AO issued notice u/s. 158BC to assessee and on basis of material seized worked out details of average sale of milk per liter, determined operating profit earned per year and made addition to assessee's income. The CIT(A) deleted the addition as the material seized did not belong to the assessee. The Tribunal confirmed the order of the CIT(A) as the figures on basis of which the AO had made the addition were on the basis

of a register which belonged to a third person and further, no material was found from the assessee to establish any unaccounted income from the sale of milk.
On appeal by the department, the High Court confirmed the order of the Tribunal observing that the findings of the Tribunal were on correct on appreciation of the facts and materials before it.(Block period 1-4-1991 to 9-10-2001).
CIT v. Arif Ahmed Nandolia (2013) 35 taxmann.com 465 / 217 Taxman 195 (Mag.)(Guj.)(HC)

S.158BC : Block assessment – Undisclosed income – Disclosure of closing balance in balance-sheet submitted before Assessing Officer – Entries in balance-sheet not disputed – Opening balance cannot be treated as undisclosed income. Non-filing of return on ground that after allowing deduction income remains below taxable limit – Not undisclosed income. [Ss.132, 139]
A search was conducted at the residential premises of the assessee Documents were found and seized and cash amounting to Rs. 63,625 was found, out of which an amount of Rs.30,500 was seized. Notice under section 158BC was issued and the A.O. added Rs. 30,000 as opening cash in hand on April 1, 1985, as undisclosed income for the assessment year 1986-87 on the ground that the assessee was not maintaining personal books of account. However, the Tribunal, on the basis of the balance-sheet filed by the assessee before the A.O. as on March 31, 1985, till November 23, 1995, held that the balance-sheet was a statement of affairs showing the assets and liabilities of the assessee as on a particular date it also incorporated opening balances of various assets and liabilities brought forward from earlier years along with the net increase/decrease in each of the assets and liabilities during the year ; if the closing balance or cash in hand was disclosed income, the opening balance could not be regarded to be undisclosed income. The Tribunal held that the addition on the ground that the assessee was not maintaining personal books of account was not correct. On appeal the court held that the opening balance could not be regarded to be undisclosed income. The assessee received gifts from abroad. The A.O. asked the assessee to furnish the details as regards the relationship with the donors and the occasions on which the gifts were received and also prove the genuineness of the transactions. The assessee submitted affidavits of the donors, certificates of bank managers to prove the genuineness but in respect of the relationship and the occasion of the gifts, the assessee submitted that none of the provisions under the Act require that there should be an occasion or there should be a relationship for gift transaction. The A.O. treated the amount of Rs. 4 lakhs as undisclosed income of the assessee under section 69. The Tribunal held that assessee had received the gifts through the bank account either through bank drafts or cheques, which were duly deposited in the bank which was reflected in the balance-sheet. The amounts received through gifts by the assessee were transferred to the account of the firm and credited in the capital account of the assessee on two dates. The firm and the assessee were assessed by the Revenue, which was apparent from the copy of the assessment order of the firm filed before the Tribunal. The books of account for all the years in the block period were seized and were with the Department, merely that the assessee had not filed return in respect of one assessment year in which his income did not exceed the maximum amount not liable to tax was not sufficient to hold that the assessee had not disclosed the entry of the gifts to the Revenue. The gift amount was received by the assessee and the amount was transferred to the capital account of the firm in which the assessee was a partner and the return of the firm was duly filed before the A.O. and the A.O. duly accepted the capital account of the partner. Therefore, the gift received by the assessee could not be said to be undisclosed income.
High Court also held that the assessee was filing his return and return of the firm of which he was a partner, regularly and the A.O. had assessed the income of the firm as well as of the assessee and had not doubted any entry therein. Therefore, non-filing of the return for the assessment year 1995-96 on the ground that after allowing the deduction under the Act income remained below the taxable limit could not be treated as undisclosed income for the block period. The Appeal of the revenue therefore dismissed. (Block period 1986-87, 1995-96)
CIT v. V.P. Singh (2013) 357 ITR 681 / (2014) 220 Taxman 87 (P&H)(HC)

S.158BC : Block assessment – Undisclosed income – Best judgment assessment is not permissible to determine undisclosed income [S.144]

Undisclosed income in search cases is to be determined on the basis of evidence found during search operations or requisition of books and documents and not on the basis of best judgment. During the search, no cash, bullion, jewellery or any material was found, which could be considered as undisclosed income, and hence, the additions were made on estimate basis after seizing the register from the business premises of the assessee.(Block period 1-4-1986 to 26-6-1996]

CIT v. Dr. Ratan Kumar Singh (2013) 357 ITR 35 / (2014) 222 Taxman 98 (Mag.) / 265 CTR 103 (All.)(HC)

S.158BC : Block assessment – Warrant of authorization not in the name of assessee-Assessment of third person – Not curability of defect under section 292B – Order is not valid – Addition as benami was deleted [Ss.132, 158BD, 292B]

Warrant of authorization was not in the name of the assessee. But, assessee's business premises searched in consequence of search of third person and order passed u/s.158BC. Held, order of assessment passed under section 158BC was not valid and not a defect curable under section 292B. Court also held that addition of amount without giving an opportunity is not valid. As there was no proof, addition on account of benami was held to be not valid. (Block period 1986-87 to 1996-97)

V. Ramaiah v. CIT (2013) 356 ITR 646 / 91 DTR 169/(2014)222 Taxman 89(Mag)(Mad.)(HC)

S.158BC : Block assessment – Undisclosed income – Entry in diaries-Disclosed in regular books of account – Addition could not be made

Investments out of professional receipts recorded in diaries maintained by the assessee found during search were disclosed in regular returns and accrued interest was offered to tax. Held, the same did not constitute undisclosed income.

CIT v. K. P. Viswanath Prabhu (Dr.) (2013) 355 ITR 163 / 215 Taxman 67 (Karn.)(HC)

S.158BC : Block assessment – Search and seizure – Validity – Assessing Officer or Tribunal cannot consider validity of Search [S.132, 254(1)]

The satisfaction to be reached by the authority issuing a warrant of authorisation is an administrative function. Assessing Officer or Tribunal cannot consider validity of search by calling for the warrant of authorization and examining the records authorizing search for the purpose of an enquiry whether the Search was valid.

CIT v. A. K. Bansal (Dr.) (Individual) (2013) 355 ITR 513 / 216 Taxman 23 (Mag.)/ 262 CTR 355 / 93 DTR 438 (All.)(HC)

DIT(Inv) v. ITAT (2013) 93 DTR 438 / 262 CTR 355(All.)(HC)

S.158BC : Block assessment – Undisclosed income from land – Addition cannot be made in the hands of assessee

Assessee had adopted the son of his brother in whose name the land stood. The brother of the assessee was in charge of the agricultural operations of land. In absence of evidence that brothers divided income equally, no addition could be made in hands of assessee.

CIT v. K. P. Viswanath Prabhu (Dr.) (2013) 355 ITR 163 / 215 Taxman 67 (Karn.)(HC)

S.158BC : Block assessment – Asset acquired and amount spent from the surplus amount hence cannot be assessed as undisclosed income

The Tribunal gave a finding that car, education expenses and stock of medicines were expended/ acquired out of surplus amount and not acquired out of undisclosed income. Hence, no addition could be made to the declared undisclosed income.

CIT v. K. P. Viswanath Prabhu (Dr.) (2013) 355 ITR 163 / 215 Taxman 67 (Karn.)(HC)

S.158BC: Block assessment – Search in premises of father of assessees – No warrant of authorization in respect of other assessees – Proceedings can be taken under section 158BD and not under section 158BC – Block assessment was void ab initio [S.132, 158BD]

Search under section 132 was made at the premises of the father of the assessees, during which some documents and other materials not belonging to the assessees was seized, and on that basis block assessments were made against the assessees. Assessees were issued notice under section 158BC. Appeal was dismissed being void *ab initio*. In a situation when there was no authorization in respect of the assessees, provisions of section 158BD would be attracted and not provisions of section 158BC. (AY. 1986-87 to 1996-97)

CIT v. Ram Singh and Ors. (2013) 351 ITR 391 / 262 CTR 96 (P&H)(HC)

S.158BC : Block Assessment – Undisclosed income – Beyond Block Period

Amount received from policy which was in fact received by the Assessee beyond block period could not possibly be included in the computation of undisclosed income in the Block Assessment. (Block Period 1984 to 1995)

CIT v. Nirankar Nath Mittal (2013) 81 DTR 233 / 255 CTR 488 / 215 Taxman 43 (Mag.) (All.)(HC)

S.158BC : Block assessment – Undisclosed income – Donation to political parties – Statement on oath – No addition can be made merely on the basis of sworn statement of third party without given an opportunity of cross examination [S.132, 132(4)]

The Assessing Officer made addition in respect of advance by assessee as donation to political party. The Tribunal deleted the addition by observing that the assessee established the source of fund collected and given to the Political party. As regards the noting in the diary the assessee stated that the entries were not written by him. The addition was made consequence to sworn statement of one Mr. J.A. Richards which was taken from the personal assistant of the assesse. The assessee asked for cross examination and opportunity was not given. The Tribunal held that his statement cannot be used as evidence against the assessee. Accordingly, the Tribunal deleted the addition. On appeal by revenue the Court also affirmed the order of Tribunal. (Block period 1987-88 to 1997-98)

CIT v. M. Chinnasamy (2013) 350 ITR 694 (Mad.)(HC)

S.158BC : Block assessment – Undisclosed income – Revenue accepting Commissioner (Appeals) finding in case of assessee's wife from assessment year 1997-98 that she was owner of business and on that basis filed her return – No addition as undisclosed income in hands of assessee on ground business belonged to him – Revenue cannot take a different view in the assessment of husband

Pursuant to a search of the assessee's business and residential premises, the Assessing Officer made an addition for the assessment years 1995-96 to 1997-98 on the basis that the business in question belonged to the assessee rejecting the assessee's claim that the business had been transferred to his wife after 1994 and, thereafter, was run by her and, that therefore, the entire income from that business should be assessed in her hands. In support of the claim the assessee had filed an affidavit from the assessee's wife before the Assessing Officer. The affidavit was, however, rejected and it was noted that the statement given by the assessee's wife on oath earlier before the income-tax authorities should be given more weight. The assessee also claimed before the Assessing Officer that the income from the business was declared in the returns filed in the name of his wife. This claim was also rejected by the Assessing Officer as irrelevant. The Commissioner (Appeals) deleted the addition following his predecessor's order. His predecessor had deleted the additions on the ground that the income from the business had been disclosed in the returns filed by the assessee's wife. The Tribunal confirmed the decision of the Commissioner (Appeals). On appeal by revenue dismissing the appeal, the Court held that the finding as to the ownership of a particular business is a finding of fact. The Commissioner (Appeals) found as a fact that from the assessment year 1997-98 it was the assessee's wife, who was the owner of the concern. It was on that basis that she had filed her return and the

finding of the Commissioner (Appeals) was accepted by the Revenue. The finding of fact had not been challenged as perverse. The Revenue, having accepted the finding in the assessee's wife case, could not take a different view in the assessment of the husband. That would amount to taking contradictory or inconsistent stands without any just cause. Therefore, the additions were rightly deleted by the Tribunal. (AY.1998-99)
CIT v. Kuldeep Sood (2013) 351 ITR 166 / 214 Taxman 134 (Mag.) / 92 DTR 246 / (2014) 265 CTR 382 (Delhi)(HC)

S.158BC : Block assessment – Undisclosed income – Fixed deposits
FDRs in names of employees found to be bogus, addition to income is held to be justified. Deletion of amounts representing FDRs in names of friends and relatives of managing director as there was no evidence regarding genuineness of FDRs--Matter remanded. (Block period 1-4-1986 to 28-11-1996)
Hastalloy India Ltd. v. Dy. CIT (2013) 350 ITR 52 / 88 DTR 131 / (2013) 215 Taxman 13 (Mag.)(AP)(HC)

S.158BC : Block assessment – Matters finalised in proceedings following survey, cannot be considered as undisclosed income in the block assessment on legal principles [S.133A]
Matters which are recorded in the books of account and on which no incriminating material is found cannot be considered in the block assessment. Proceedings taken under section 133A of the Income-tax Act, 1961, and information already gathered before the search cannot be a basis for completing the block assessment unless there is incriminating material. The same material cannot be considered in the block assessment. Issues which are crystallised by inquiries made under section 133A cannot be considered as undisclosed income in the block assessment on legal principles.[Block period 1-4-1987 to 18-12-1997]
Heatshrink Technologies Ltd. v. ACIT (2013) 25 ITR 269 (Mum.)(Trib.)
ACIT v. Repl Engineering Ltd. (2013) 25 ITR 269 (Mum.)(Trib.)

S.158BC : Block assessment – Set off of losses – Computation of true undisclosed income – Bar applies to losses arising from transactions accounted – Losses of block period from unaccounted transactions can be set-off
The provisions of section 158BC for set off of losses is in relation to those losses which were incurred in regular course out of duly accounted transactions. The embargo does not apply to losses for the block period relating to unaccounted transactions. Without such set-off the income that would be taxed under Chapter XIV-B would not represent true undisclosed income of the block period. Losses which were determined and eligible for set off in the regular assessment cannot be considered in the block assessment but there is no restriction under the law to set off the losses arrived at the block period itself which have nothing to do with the losses quantified in regular assessments.
Heatshrink Technologies Ltd. v. ACIT (2013) 25 ITR 269 (Mum.)(Trib.)
ACIT v. Repl Engineering Ltd. (2013) 25 ITR 269 (Mum.)(Trib)

S.158BC : Block assessment – Anonymous donation
Where the assessee fails to keep records of names & addresses of donors, the provisions of section 158BC are attracted and such donations would be taxed in the hands of the recipient.
Shri Girraj Educational & Welfare Society v. ITO (2013) 81 DTR 257 / 56 SOT 428 / 151 TTJ 260 (Agra)(Trib.)

S.158BC : Block assessment–Gift – Cash credits – Jewellery belongs to wife [S.68,69]
Pursuant to a search conducted at the residential premises of the assessee it was found that he had received gifts from certain parties. The Assessing Officer held the amounts to be undisclosed income of the assessee since most of the donors were friends and not relatives and the gifts were not received on any special or ceremonial occasion. The CIT(A) deleted the addition on the basis that they could

not be said to be undisclosed and also that no material to doubt the genuineness of the credits or gifts was found during the course of the search. On appeal by the department the Tribunal reversed the findings of the CIT(A) and confirmed the Assessing Officer's Order observing that:

There was no mention of the credits in the returns of income furnished by the assessee from year to year.

It was only as a result of search that the credit transactions were found which the assessee was unable to satisfactorily explain to the Assessing Officer.

No gifts were given by the assessee to any of their close friends and relatives, including those from whom gifts were being regularly received over the years.

None of the donors were produced for examination before the Assessing Officer and no evidence in support of their financial capacity was submitted.

The receipt of the credit through the banking channel, or confirmation by the creditor or donor, was itself not sufficient to prove the gifts in terms of section 68.

The Assessing Officer had also made addition of the value of gold jewellery and gold ornaments found in the locker owned jointly by the assessee and his wife, which the assessee explained as belonging to his wife. The CIT(A) deleted the addition holding that the affidavits filed by the assessee contained full details of the gifted jewellery, the genuineness of which had not been doubted by the Assessing Officer. On appeal by the department the Tribunal confirmed the findings of the CIT(A) by observing that once the assessee had furnished the affidavits, it was incumbent on the Assessing Officer to cross-examine the deponents. (Block period 01-04-1990 to 12-10-2000)

ACIT v. Vishal Malpani (2012) 135 ITD 323 / 71 DTR 1 / 146 TTJ 498 / (2013) 21 ITR 719 (Cochin)(Trib.)

S.158BC : Block assessment – Non recording of transaction – Valuation – No variation in overall stock – Addition was deleted

A search and seizure operation was undertaken by department in assessee's case wherein department disputed valuation and quantities of raw materials, work in progress and finished products, within factory premises. Assessee filed its return showing nil undisclosed income. Assessing Officer completed block assessment making addition on account of discrepancies in stock quantities. Tribunal held that there was no variance in overall stocks. Further, revenue failed to prove that assessee had indulged in either investments made from outside books or any sales had been made outside books, which could lead to an element of income having been generated, and which could come under purview of Chapter XIV-B, in view of above, impugned addition made by Assessing Officer was to be set aside. In favour of assessee. (Block period 1-4-1987 to 23-10-1997)

Hindustan Polyamides & Fibres Ltd. v. Dy. CIT (2013) 55 SOT 52 (URO)(Mum.)(Trib.)

S.158BD : Block assessment – Undisclosed income of any other person – Release of assets [S.132B(3)]

Due to joint search of luggage van resulting in proceedings under section 158BD, Assessing Officer accepted part of jewellary belonging to assessee and trated the remaining gold as undisclosed income of assessee. In appeal Commissioner (Appeals) deleting the addition on account of undisclosed income. Order of Commissioner (Appeals) attaining finality. On writ to release the jewellery, the court held that once the order of the income-tax authorities achieved finality and the Revenue did not choose to go in appeal, further arguments about whether the gold was lying with the income-tax authorities or the Enforcement Directorate, were academic. The material on record either in the form of the Assessment order or the Commissioner (Appeals) order no where disclosed that seizure by the income-tax authorities was made from the custody of the Enforcement Directorate. The Assessing Officer's affidavit was also silent about this. The material on record suggested a joint search of the luggage van which resulted in proceedings under section 158BD. Having regard to the conspectus of these facts, the income-tax authorities were directed to forthwith take all steps and ensure that the gold jewellery is released to the assessee.

M.S. Chain v. Under Secretary, Government of India, Ministry of Finance, CBDT (2013) 354 ITR 310 (Delhi)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Recording of satisfaction is mandatory – Office note which was not inexistence when the notice was issued cannot be treated as recording of satisfaction

The impugned notice against the petitioner u/s.158BD was issued on 29-10-2001 while the assessment was framed in case of the husband pursuant to the search operation on 31-10-2001. The affidavit-in-reply dated 11-10-2002 of the Assessing Officer recorded that the block assessment relating to the searched person was completed on 31-10-2001. It was further stated that additions on several points were made. However, a detailed office note made by the Assessing Officer below the assessment order mentioned every point which required action in case of the petitioner. The office note formed part of the assessment order. The assessment order in case of husband of petitioner having been passed on 31-10-2001, such note, though undated, came in existence only on 31-10-2001. On 29-10-2001, when notice u/s 158BD was issued against the petitioner, above mentioned note was not in existence. Such note cannot also be seen as any recording of the satisfaction as envisaged u/s 158BD, such note not being in existence when notice was issued, cannot form the basis for sustaining the notice u/s.158BD. On the date of issuing notice u/s 158BD, there was no satisfaction recorded by Assessing Officer of the searched person. Therefore, under circumstances at hand, impugned notices are liable to strike off. (AY. 2001-02)

Padmini M Nair v. Union of India (2013) 215 Taxman 49 (Mag.)(Guj.)(HC)

S.158BD : Block assessment – Undisclosed income of any other person – Recording of satisfaction – Satisfaction – Block assessment made without such satisfaction is held to be invalid [S.158BC]

The Tribunal held that mere forwarding of such books of account by itself was insufficient to conclude that the Assessing Officer, having jurisdiction over the Mody group of cases, was satisfied that any undisclosed income was found or detected, as a result of the search, on the basis of which, proceedings under section 158BD of the Income-tax Act, 1961, could have been initiated against the assessee. On appeal the Court dismissing the appeal held that in the communication from the Assessing Officer of the searched person to the Assessing Officer of the assessee, there was no recording of any satisfaction that any undisclosed income belonged to the assessee. The communication merely indicated that the books of account pertaining to the assessee were seized and were lying in the custody of the Assessing Officer in respect of the Mody group of cases. There was no satisfaction recorded by the Assessing Officer of the Mody group of companies that any undisclosed income belonged to the assessee. The very first mandatory condition precedent for assuming jurisdiction under section 158BD and subsequently under section 158BC had not been satisfied. Thus, the entire proceedings were without jurisdiction. (Block period 1-4-1986 to 2-11-1996)

CIT v. Intercontinental Trading and Investment Co. Ltd. (2013) 350 ITR 316 / 81 DTR 314 / 255 CTR 350 / 213 Taxman 59 (Delhi)(HC)

Editorial: Ratio of Manish Maheshwari v. ACIT (2007) 289 ITR 341 (SC) applied.

S.158BD : Block assessment – Undisclosed income of any other person – Conditions precedent were not satisfied – Block assessment bad in law [S.158B]

Tribunal held that nothing is brought on record to substantiate that any books of account or other documents or assets pertaining to the assessee were found or seized during the course of search. Thus the conditions precedent for invoking section 158BD were not satisfied. Therefore, notice under section 158BD issued to the assessee and the subsequent proceedings were not valid. (Block period 1997-98 to 2003-04)

Kusumlata Sarda (Smt.) v. Dy. CIT (2013) 155 TTJ 737 / 90 DTR 329 (Jodh.)(Trib.)

S.158BD: Block assessment - Undisclosed income of any other person –Issuance of notice under section 158BD after expiry of one year and three months is arbitrary and unreasonable

Delay of one year and three months in issuing notice under section 158BD after completion of the assessment in the case of searched person is unreasonable and arbitrary; assessment order passed under section 158BD is quashed.

Dy. CIT v. Thomas N.C. (2013) 87 DTR 91 / 155 TTJ 381 / 144 ITD 667 (Cochin)(Trib.)

S.158BE : Block assessment – Limitation – Limitation assumes on date of vacation of stay and not from date of receipt of order by department – There is no procedure in the High Court to communicate the order to the party to make it effective – Assessment was barred by limitation [S.158BC]

A search was conducted at the assessee's address on September 14, 2002, and notice under section 158BC was issued on April 29, 2003. The search proceedings were challenged by the assessee before the High Court in a writ petition. The Court stayed the assessment proceedings by order dated February 12, 2004. The stay was vacated on August 26, 2009. The Assessing Officer took the date of vacation of the interim order to be the date, when it was received by him on November 9, 2009, and passed the assessment order on June 22, 2010. Held, as soon as the order was vacated, the limitation would restart and exhaust itself on the period of limitation provided under the Act. The assessment was clearly barred by limitation. The provisions of the Act for filing of the appeal from the date of service of the order would not be attracted to calculate the period of limitation to complete the assessment. (BP-Ending 14-09-2002)

CIT v. Drs. X-Ray and Pathology Institute Pvt. Ltd. (2013) 358 ITR 27 (All.)(HC)

S.158BE : Block assessment – Time limit – Prohibitory order – Panchnama – Last panchnama just an empty formality and accordingly, considering date of first panchnama dated 3-2-1999 held that block assessment was barred by limitation [S.132(3), 158BC]

A search was conducted on 3-2-1999 at assessee's premises and books of account and other documents were seized. An order under section 132(3) was passed in respect of an almirah of assessee and accordingly panchnama was drawn on said date. On 13-4-1999 prohibitory order relating to said almirah was withdrawn and a fresh panchnama was drawn on 13-4-1999 . Accordingly block assessment order was passed on 27-4-2001. Commissioner (Appeals) as well as Tribunal treated last panchnama just an empty formality and accordingly, considering date of first panchnama dated 3-2-1999 held that block assessment was barred by limitation. On appeal High Court held that from the facts noticed by both the CIT(A) and the Tribunal, which was not in dispute, it was clear that the Panchnama dated 13-4-1999 itself reveals that nothing was seized on that date nor was anything found on that date. In fact no search was conducted and the drawing of the Panchnama on 13-4-1999 was an empty formality and was executed merely for the purpose of vacating the restraint order issued on 3-2-1999, when a restraint order under Section 132(3) of the Act was passed in respect of an Almirah in the last bed room of residence of assessee and subsequently the search party visited the residence of the assessee on 13-4-1999 and withdrew the prohibitory order under Section 132(3) relating to the Almirah and prepared a Panchnama showing that nothing was found nor anything was seized from the said Almirah, therefore, essentially from 3-2-1999 when the last Panchnama was drawn and the restraint order passed, till 13-4-1999 when the last Panchnama was drawn whereby the restraint order was vacated, nothing else was found and in fact no further search was conducted, therefore, the last Panchnama dated 13-4-1999 was merely a release order and the same could not extend the period of limitation as concurrently found by the CIT(A) and the Tribunal.

CIT v. Om Prakash Mandora (2013) 262 CTR 646 / 94 DTR 209 / 37 taxmann.com 426 (Raj.)(HC)

S.158BFA : Penalty – Concealment – Block assessment – Penalty – Admission by High Court – Not sufficient to hold issue is debatable [S.260A]
Admission of substantial question of law by High Court is not sufficient to hold issue debatable so as not to attract penalty for undisclosed income.
Vasant Thakoor v. ACIT (2013) 27 ITR 254 (Mum.)(Trib.)

S.158BFA : Block assessment – Interest – Delay in filing return – Delay in getting the copies of seized documents – Levy of interest was not justified
There was delay in filing of return in pursuance of notice issued subsequent to search proceedings. The AO levied the interest .Assessee claimed before CIT(A) that copies of seized records were made available to it belatedly. CIT(A) directed AO. to verify the facts and allow relief to assessee. Tribunal held that interest being compensatory in nature, delay which is not attributable to assessee could not be a subject matter of levy of interest. (BP 1-4-1989 TO 2-12-1999)
Urmila & Co. Ltd. v. Dy. CIT (2013) 60 SOT 1 (URO)(Mum.)(Trib.)

S.158BFA : Block assessment – Search and seizure – Levy of interest and penalty in certain cases – Periods of limitation – In computing period of limitation for purpose of levying penalty, period for which A.O. waited for result of M.A. could not be excluded – Penalty order was time barred [Ss. 253, 254(2)]
The Tribunal held Section 158 BFA (3)(c) refers to assessment which remained subject matter of appeal before Tribunal u/s. 253, i.e. main appeal filed by assessee challenging quantum addition; there is no reference of Section 254(2) in Section 158 BFA (3)(c) for extending period of limitation for purpose of levying penalty order. In computing period of limitation for purpose of levying penalty, period for which A.O. waited for result of M.A. could not be excluded. [BP 1-4-1990 to 29-11-2000]
Arvind Kumar Jain v. ACIT (2013) 145 ITD 271 (Agra)(Trib.)

S.158BFA(2) : Penalty – Concealment – Addition on estimate basis – Levy of penalty was not justified
The Tribunal followed the decision of Hon'ble Rajasthan High Court in the case of *CIT v. Giriraj Agarwal Giri (2012) 253 CTR 109 (Raj.)* and held that the addition sustained was only on estimated basis. Therefore, penalty under section 158BFA(2) is not leviable. (BP.1989-90 to 1998-99)
Anil Kumar Jain v. ACIT (2014) 65 SOT 133 / 49 taxmann.com 139 / (2013) 157 TTJ 76 (UO)(Jd.)(Trib.)

S.172 : Shipping business – Deduction at source – Return filed by agent – No deduction of tax to be made under section 194C OR 195. [Ss. 40(a)(ia), 194C, 195]
Returns had been filed by agents under section 172 on behalf of principal. Held, the provisions of section 172 would apply and no deduction of tax was required to be made as per provision of section 194C.
ACIT v. Sudha Devi Saraf (Smt.) (2013) 58 SOT 65 (URO)(Kol.)(Trib.)

S.172 : Shipping business – Non-residents – Agent-DTAA-India-UAE – Assessment made under section 172(4) was held to be null and void and the assessee was assessable under section 172(7) [Ss.172(4), 172(7)]
Assessee, an agent of freight beneficiary of its foreign principal, filed its return without paying freight tax. The AO held that principal having occasional shipping business was not entitled to benefit of DTAA and worked out income and tax payable thereon u/s.172(4). It was thus held that, Principal had filed its return with Director (IT) and thus, it had accepted its liability to be dealt with under the provisions of section 172(7). Thus, the AO was directed to take action u/s. 172(7) to ensure that the

income of the assessee from 86 voyages does not escape assessment as per normal provisions of the Act. Appeal of revenue was dismissed. (AY. 2010-11)
ITO(IT) v. Albatross Shipping Ltd. (2013) 140 ITD 585 (Rajkot)(Trib.)

S.172 : Shipping business – Non-residents – Summary proceedings [Ss.139, 44B]
Tribunal held that where French shipping company undertook a huge number of 40 voyages through Indian agent and had exercised its option under section 172(7) by filing return of income under section 139(1), summary proceedings of assessment under section 172(4) could not be applied; regular assessment proceeding was required. In favour of assessee. (AY.2010-11)
ITO (IT) v. CMA CGM Agencies (India) (P.) Ltd. (2013) 55 SOT 61 (URO)(Rajkot)(Trib.)

S.176 : Discontinued business – Receipt after discontinuation – Receipt to be taken in to total income and not net profit rate
During the year, the assessee under arbitration award received certain amount after discontinuance of business. The Assessing Officer added the said amount to total income of assessee and after giving statutory deductions levied tax on assessed income. However, the Tribunal applied net profit rate on said receipt at 12.5% and restricted the addition at 12.5% of receipt of money. Held, the receipt which is required to be taken into total income of the assessee u/s 176(3A) cannot be reduced to 12.5% as net taxable profit of the assessee which is contrary to the provision of section 176(3A).
CIT v. R.M. Singh (2013) 215 Taxman 17 (Jharkhand)(HC)

S.179 : Private company – Liability of directors – Recovery of penalty
In view of the judgment of Gujarat High Court in the case of *Maganbhai Hansrajbhai Patel v. Asstt. CIT [2011] 211 Taxman 386*, outstanding penalty amount of company could not be recovered from assessee-director. (AY. 1988-89 & 1989-90)
Mahendra Sakarlal Gandhi v. ITO (2013) 216 Taxman 40 (Mag.)(Guj.)(HC)

S.179 : Private company – Liquidation – Liability of director – Interest and Penalty
Recovery from director of private limited company cannot be made towards interest and penalty arising out of assessment order passed against company. (AY. 1995-96)
Nayan M. Shah v. ITO (2013) 215 Taxman 1 (Guj.)(HC)

S.179 : Private company – Liability of directors – Penalty and interest [S. 271(1)(c)]
A director is jointly and severally liable to pay tax dues pending against company, but he cannot be held liable for interest or penalty due from company.(AY. 1988-89 to 1989-90)
Kantilal Sakarlal Gandhi v. ITO (2013) 215 Taxman 340 (Guj.)(HC)

S.179 : Private company – Recovery of tax dues from director – Public company – Lifting of corporate veil would be justified
Despite several attempts made by the Revenue, no recovery could be made from the private company. Once it was established that tax dues could not be recovered from it and that a certain person was a director of the private company at the relevant time, his joint and several liability would arise unless he establishes that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part. The observations of the Assistant Commissioner require further scrutiny and investigation as the order suffered from gross violation of the principles of natural justice. In his notice under section 179(1), he only put the petitioner to notice that he proposed to hold him liable for recovery of the tax dues of the company. Therefore, the proceedings were remitted to the Assistant Commissioner for proceeding further in accordance with law after giving a notice to the petitioner indicating his tentative grounds why he desired to invoke the concept of lifting of corporate veil, giving sufficient opportunity to the petitioner to meet such allegations.

Pravinbhai M. Kheni v. ACIT (2013) 353 ITR 585 / 213 Taxman 85 / 89 DTR 136 / (2014) 266 CTR 410 (Guj.)(HC)

S.179 : Private company – Liability of directors – Recovery of tax – Not liable for recovery of interest and penalty [S. 2(43), 234A, 234B, 271(1)(b), (271(1)(c)]
The assessee, a director in a company, was intimated that the tax authorities had computed the outstanding tax liability of the company and by order, directed that the refund payable to the assessee be set off against the tax liability of the company in accordance with the provisions of section 179(1). On an application for rectification, the tax authorities enhanced the outstanding dues of the company, and, consequently, of the assessee on account of interest due under section 234A/B and penalty leviable under section 271(1)(b)/(c). It was held that the assessee could not be made liable for anything more than the "tax" as defined under section 2(43) which did not include interest and penalty. (AY.1999-2000, 2003-04)
Sanjay Ghai v. ACIT (2013) 352 ITR 468 / 256 CTR 241 / 82 DTR 248 / 216 Taxman 176 (Delhi)(HC)

S.184 : Firm – Registration – Subsequent year registration to be granted unless subsequent event or by default committed by firm [S. 143]
Once registration certificate has been granted to a firm and it has not been subsequently effected by subsequent event or by default committed by firm, it continues for all subsequent years. Registration was granted for the asst year 1987-88, subsequent year registration may be granted by rectification order. (AYs.1988-89, 1989-90)
Om Enterprises v. CIT (2013) 219 Taxman 275 (Jharkhand)(HC)

S.184 : Firm – Status – Illegal partnership – Remuneration to partners – Requisite permission was not obtained for A.P. Excise Act – Remuneration, interest on capital is not allowable [S.185, Andra Pradesh Excise Act, 1968, S.15, Partnership Act 1932, Indian Contract Act, S.23]
The Assessing Officer reopened the assessment of the assessee-firm on the ground that it had not obtained permission from the Excise Department before entering into partnership, such a partnership was prohibited under A.P. Excise Act and therefore, status of assessee could not be treated as a firm. As a result, remuneration paid to partners and interest on capital was added to total income. Held, in the absence of such prior permission being obtained, partnership firm, which had been formed to carry on business of trading in intoxicating liquor, would be an illegal partnership both under Partnership Act, 1932 and A.P. Excise Act and hence, the action of the Assessing Officer was justified. (AY. 1999-00)
CIT v. Swarna Bar Restaurant (2011) 334 ITR 387 / 242 CTR 198 / 57 DTR 265 / (2013) 215 Taxman 347 (Mag.)(AP)(HC)

S.184 : Firm – Assessment – Association of persons – Status – Assessment in the status of Association of persons was held to be valid [S. 2(31) (v)]
The Assessing Officer held that there was no firm and the status to be held as Association of persons. Commissioner (Appeals) and Tribunal up held the order of Assessing Officer. On appeal to High Court the court held that the question of treating it as unregistered firm would arise only if the assessee was able to prove the existence of a valid partnership deed to constitute a firm. The assessee has not produced any evidence of partnership therefore assessment in the status of Association of persons was held to be valid. (AY. 1985-86, 1986-87)
Midland Theaters v. ACIT (2013) 350 ITR 676 / 258 CTR 183 (Mad.)(HC)
A.R. Srinivasan (BY LRS) v. ACIT (2013) 350 ITR 676 / 258 CTR 183 (Mad.)(HC)
A.R. Srinivasan (HUF) v. ACIT (2013) 350 ITR 676 / 258 CTR 183 (Mad.)(HC)

S.184 : Firm – Registration – Assessment
The Tribunal held if certified copy of a deed, duly signed by all the partners is filed, it is allowed to be registered under section 184 following the order in the case of *Dy. CIT v. H.I.D. Bros. Co. of the ITAT Bangalore Bench. (AY. 2009-10)*
ACIT v. Ganpati Enterprises Ltd. (2013) 142 ITD 118 /154 TTJ 1 (UO)(Delhi)(Trib.)

S.185 : Firm – Registration – Rectification deed – Registration cannot be refused. [S.184, Partnership Act, 1932, Indian Contract Act 1872]
The assessee-firm came into existence through partnership deed dated 24-5-1974 duly executed and signed by its all four partners. All throughout, the intention was to share profit/loss of business of firm in ratio of their capital investments and they actually used to share profit/loss accordingly, in original partnership deed, due to typing error sharing of profit/loss was not incorporated according to will/agreement of partners and in order to rectify such mistake, deed dated 6-2-1980 was duly executed and signed by all partners and profit was shown in proportion of their capital investment. Held since the deed dated 6-2-1980 was a rectification deed and had been executed according to real agreement between partners, which was proved from their previous record, such deed would have retrospective effect. Hence, such registration of firm could not be refused on ground that sharing of profit and loss by partners in relevant assessment year was not according to terms of deed dated 24-5-1974 but according to memorandum dated 6-2-1980.(AY. 1980-81)
CIT v. Alison Singh & Co. (2013) 215 Taxman 65 (Mag.) / 358 ITR 458 (All.)(HC)

S.192 : Deduction at source – Salary – Compensation under Motor Vehicles Act –Deduction from salary
Whether if victim is receiving income chargeable under head 'Salaries' one should keep in mind that under s. 192(1), any person responsible for paying any income chargeable under head 'Salaries' shall at time of payment, deduct income tax on estimated income of employee from 'salaries' for that financial year. The High Court deducted 20% from salary of deceased towards income tax for calculating compensation payable under Motor Vehicles Act. Held since the High Court on perusal of last pay certificate had not noticed that income tax on estimated income of deceased employee was not deducted from salary of deceased during said month or financial year, it was to be presumed that salary paid to deceased as per last pay certificate was paid by deducting income-tax for that month or financial year. Therefore, the High Court was wrong in deducting 20% of salary of deceased towards income tax for calculating compensation. (AY.1997-98)
VimalKanwar v. Kishore Dan (2013) 216 Taxman 300 / 88 DTR 81 / 259 CTR 420 (SC)

S.192 : Deduction at source – Salary – Perquisite – Development Officer – Conveyance and additional conveyance – Taxable as perquisite – Liable to deduct tax at source. [S.10(14), 17(2) 192, Rules 2BB and 3]
Conveyance/additional conveyance allowance paid to development officers was taxable as perquisite. Therefore, tax was liable to be deducted at source from amount paid pertaining to conveyance/additional conveyance allowance incurred in performance of duty as development officers for generating business. Writ petition was dismissed.
National Federation of Insurance Field Workers of India v. UOI (2013) 219 Taxman 155/(2014) 360 ITR 175 (All.)(HC)

S.192 : Deduction at source – Salary – Conveyance maintenance reimbursement expenditure – Fringe benefit tax [Ss.17(1), 115WB, 201]
Provisions of section 192 were not attracted to conveyance maintenance reimbursement expenditure (CMRE) allowance paid to employees as per their status and designation and were non taxable income. It also paid Fringe benefit tax on the said expenditure. Followed *CIT v. Oil and Natural Gas Corpn. Ltd. (2002) 254 ITR 121 (Guj.)(HC)*

CIT v. Oil & Natural Gas Corporation (India) Ltd. (2013) 358 ITR 131 / 218 Taxman 370 (Guj.)(HC)

S.192 : Deduction at source – Salary – Seconded employees – Seconded personnel being not employees – Hence, not liable to deduct tax at source [S.40(a)(iii),91(1)]
Assessee, an association of persons consisting of nine public sector oil companies as its members, was engaged in doing business abroad and for that purpose deployed trained man power to foreign companies at contracted rate. Trained man power deployed abroad was drawn by assessee from employees of its member companies. Such deployed man power continued to be employees of its member companies, but were seconded to projects abroad by assessee. Assessee paid certain amount as foreign allowance to seconded personnel and claimed deduction of same. Assessing Officer disallowed claim of deduction on plea that assessee failed to deduct tax at source under section 192 on such payment and, therefore, payment was hit by section 40(a) (iii). In view of fact that seconded personnel were not employees of assessee, amount paid to seconded personnel was not liable for deduction of tax at source. In favour of assessee. (AY.1997-98)
CIT v. Petroleum India International (2013) 351 ITR 295 / 213 Taxman 41 / 90 DTR 384 / 260 CTR 418 (Bom.)(HC)

S.192 : Deduction at source – Salary – Contract employment – Obligation on medical reimbursement & LTC – Honest estimate – Assessee cannot be held to be in default [S.10(5), 17(2), Rule 2B]
The assessee recruited employees under a contract of employment which provided the salary as a 'cost to company' or 'CTC'. Having determined the CTC, the employee was permitted to choose what would be the various components of his salary and for this purpose a basket of allowances was made available for the employee to choose from. The maximum allowance for each such allowance was fixed by the assessee. The said allowances included a component towards medical expenditure & leave travel concession (LTC). If the employee submitted proof of having incurred the expenditure towards medical treatment, he was allowed exemption to the extent provided in proviso (iv) to s.17(2) of the Act. Likewise, if the employee submitted proof regarding leave travel, he was allowed exemption u/s 10(5) read with Rule 2B. The AO held that as Proviso (iv) to s. 17(2) and s.10(5) used the expression "actually incurred", the exemption towards medical reimbursement and LTC could be conferred only for amounts paid as reimbursement after they were incurred by the employee and not before. She held that as the assessee was paying medical reimbursement & LTC as a component of salary every month, without the employee having incurred expenditure, the same had to be considered as salary disbursement for purposes of TDS u/s 192. The assessee was accordingly treated as being in default. On appeal by the assessee, the CIT(A) reversed the AO. On appeal by the department to the Tribunal, HELD dismissing the appeal:
Though TDS has to be effected at the time of payment of salary, s. 192(3) permits the employer to increase or reduce the amount of TDS for any excess or deficiency. Even assuming that the case of the AO that at the time of payment the assessee ought to have deducted tax at source is sustainable, the assessee, on a review of the taxes deducted during the earlier months of the previous year, is entitled to give effect to the deductions permissible under proviso (iv) to s.17(2) or exemption u/s10(5) of the Act in the later months of the previous year. What has to be seen is the taxes to be deducted on income under the head 'salaries' as on the last date of the previous year. The case of the AO that LTC and Medical reimbursement should be paid at the time the expenditure is incurred or after the expenditure is incurred by way of reimbursement and not at an earlier point of time and that if it is so paid, then, even though the payment would not form part of taxable salary of an employee, the employer has to deduct tax at source treating it as part of salary, is contrary to s.192(3) and cannot be sustained. The reliance placed by the AO on the expression "actually incurred" in s.10(5) & Proviso (iv) to s.17(2) cannot be sustained. In any event, the interpretation of the word "actually paid" is not relevant while ascertaining the quantum of tax that has to be deducted at source u/s192. As far as the assessee is concerned, his obligation is only to make an

”estimate” of the income under the head “salaries” and such estimate has to be a *bona fide* estimate. The primary liability of the payee to pay tax remains. In a situation of honest difference of opinion, it is not the deductor that is to be proceeded against but the payees of the sums. On facts, as the assessee had granted exemption towards medical expenditure and leave travel after verifying the details and evidence furnished by the employees, it could not be treated as an assessee-in-default. (AY. 2007-08, 2008-09)
ACIT v. Infosys BPO (2014) 150 ITD 132 / 64 SOT 36 (URO)(Bang.)(Trib.)

S.192 : Deduction at source – Salary – Perquisite – Fringe benefits tax – Reimbursement of expenses – Cost of uniform – Maintenance and use of their own vehicle – Hotel boarding and lodging [Ss.17(2), 115WB, 201]
Uniform and washing allowance provided to employees on which fringe benefits tax paid by employer. Not taxable as perquisite in employee’s hands and no tax deductible at source. Reimbursement of conveyance and maintenance expenditure incurred by employees on maintenance and use of their own vehicles in performance of official duties. Fringe benefits tax paid on such expenditure. No tax deductible at source. Payments to employees under holiday home scheme. Reimbursement of actual expenses incurred. Not taxable as perquisite for tax deduction at source during operation of fringe benefits tax scheme as not specified as fringe benefit. Assessee could not be held to be assessee in default. (AY. 2006-07 to 2009-10)
Oil and Natural Gas Corporation Ltd. v. ACIT (2013) 59 SOT 160 (URO) / 22 ITR 587 / 143 ITD 159 (Ahd.)(Trib.)

S.193 : Deduction at source – Interest on securities – Debentures – On facts the assessee was held not liable to deduct tax at source – As issue of debentures was could not be complied with [Ss. 201(1), 201(IA)]
Assessee had taken loan from banks and financial institutions and subsequently expressed its inability to pay interest on loan. Thereupon, a Memorandum of Understanding (MOU) was arrived at between parties and assessee after passing necessary resolution to that effect, the advances were converted into debentures so as to create a charge on assets of assessee. The assessee credited debenture interest to account of these banks without deducting tax at source and imposed penalty upon assessee. The Appellate authorities held that though resolution was passed to issue debentures and interest was credited as debenture interest, in fact debentures were not issued as necessary formalities required by Registrar of Companies for issuance of debentures could not be complied with. Held, once it was accepted that interest paid by assessee was not debenture interest, it was not open to ITO (TDS) to conclude that interest paid was debenture interest and pass an order under section 201(1)/201(1A) on ground that assessee had failed to deduct tax at source while paying debenture interest. Order of Tribunal affirmed. (AY.1998-99)
CIT v. Aafloat Textile (India) Ltd. (2013) 218 Taxman 106 (Mag.)(Bom.)(HC)

S.194A : Deduction at source – Interest other than interest on securities – Society registered under Travancore – Kochi Literary Scientific and Charitable Societies Registration Act, 1955 is not exempt. [S.197, Societies Registration Act, 1860]
The assessee was a society registered under Travancore-Kochi Literary Scientific and Charitable Societies Registration Act, 1955. Since the assessee-society did not fall within the purview of notification under section 194A(iii)(f), it was not exempted from deduction of tax at source under section 194A on interest income received by it. - Notification No. 3489 dt 22-10-1970.
Kerala State Nirmiti Kendra v. CIT (2013) 215 Taxman 363 / (2014) 98 DTR 360 / 266 CTR 335 (Ker.)(HC)

S.194A : Deduction at source – Interest other than interest on securities – Mutuality – [S.40(a)(ia)]

The Assessing Officer held that since the assessee-trusts paid interest to the umbrella company without deducting tax at source under section 194A of the Act, section 40(a) (ia) was attracted and payments of interest made by the assessee-trusts to the umbrella company were to be disallowed. The Commissioner (Appeals) came to a finding that the assessees were mutual concerns and not taxable. The Commissioner (Appeals) also held that interest expenses in the hands of the assessee-trusts were deductible under section 28 itself and, therefore, section 40(a) (ia) did not apply and deleted the disallowance under section 40(a)(ia) of the Act. On appeal the Tribunal held that the assessees availed of loans from the umbrella company and passed over the loans to various self-help groups working under them. In fact, the loans were not utilised by the assessee-trusts but by the self-help groups working under the trusts. The self-help groups were mutual concerns and ultimately the interest burden was shared by the individual members of the group. Therefore, the expenditure by way of interest was incurred by the members of the self-help groups and in fact the interest was paid by those members of self-help groups to the umbrella company. These individuals, not being liable for audit under section 44AB, section 194A was not applicable to them. All the assessee-trusts were representative assessees of the members constituting the self-help groups. What was not applicable to the members, would not apply to representative assessees. Therefore, the Commissioner (Appeals) was justified in holding that the assessees were not bound to deduct any tax at source while making the interest payments to the umbrella company. The additions made by the assessing authorities under section 40(a)(ia) of the Income-tax Act, 1961 were liable to be deleted. (AY. 2007-08, 2008-09)

ITO v. Sarvodaya Mutual Benefit Trust (2013) 22 ITR 277 / 56 SOT 507 (Chennai)(Trib.)

S.194A : Deduction at source – Interest other than interest on securities – Not obtaining the Form 15G and 15H on or before last day of relevant financial year, disallowance was justified [S.40(a)(ia)]

Assessee paid interest without deducting tax at source. It was submitted by assessee that persons had filed Form No. 15G and 15H on basis of which tax was not deducted on interest payment. Assessing Officer finding that Form Nos. 15G and 15H were filed after end of relevant financial year, disallowed payment of interest under section 40(a)(ia). Tribunal held that for allowance of deduction under section 40(a)(ia) assessee should have obtained Form No. 15G/15H on or before last day of relevant financial year. Since assessee failed to do so, impugned disallowance made by Assessing Officer was to be upheld. (AY.2006-07)

ACIT v. Meerut Rubber Factory (2013) 55 SOT 325 (Delhi)(Trib.)

S.194A : Deduction at source – Interest other than interest on securities – Trading liability – Purchase of bills – Not liable to deduct tax at source [Ss.2(28A), 40(a)(ia)]

Tribunal held where a payment which has direct link and immediate nexus with trading liability being connected with delayed payments of purchase bills, will not fall within category of interest as defined in section 2(28A) and, therefore, while paying interest on delayed payment of purchase bills, assessee is not liable to deduct tax at source under section 194A. (AY.2005-06)

Sri Venkatesh Paper Agencies (Hyd.) (P.) Ltd. v. Dy. CIT (2013) 55 SOT 332 (Hyd.)(Trib.)

S.194A : Deduction at source – Interest other than interest on securities – Firm – Partner – Interest paid by partner to firm, tax is deductible at source on such interest

The assessees borrowed money from the firms in which they were partners and paid interest to the firms. The Dy. CIT (TDS) noticed that the assessee did not deduct tax at source under the provisions of section 194A on the interest so paid to the firms. After hearing the assessees, the Dy. CIT (TDS) levied penalty under section 201 (1) of the Act equivalent to the amount of tax liable to be deducted at source and levied interest under section 201 (1A) of the Act for the period from the

closing of the relevant financial year to May 31, 2009 for the assessment years 2005-06 to 2007-08. The Commissioner (Appeals) confirmed the penalties and interest. On appeal to the Tribunal held that the Income-tax Act recognises a partner and a firm as different "persons", despite the legal relationship between them as prevailing under the Partnership Act. Further section 194A provides exemption from the obligation imposed under that section only in respect of interest paid or credited by a firm to its partner. The Act does not provide such exemption to the interest paid or credited by a partner to his firm. Tax is deductible at source on the interest paid by the partner to the firm. Penalty levied was directed to be deleted after verification of facts. (AY.2005-06 to 2008-09)
Thomas Muthoot v. Dy. CIT (2012) 80 DTR 33 / 150 TTJ 665 / (2013) 21 ITR 133 / 55 SOT 390 (Cochin.)(Trib.)

S.194B : Deduction at source – Winning from lottery or crossword puzzles – Prizes under sales promotion scheme – Payment in kind – Before releasing the winnings provisions cannot be attracted – Assessee cannot be held as assessee in default. [S.2(24)(ix), 201(1), 201(IA)]
Assessee-company was engaged in business of manufacture and sale of various consumer products. It had conducted certain sales promotion schemes, wherein coupons were inserted in packs/containers of consumer products. Some of those coupons indicated that on purchase of packs/containers, customers would get prizes as indicated in coupons. During previous years, assessee distributed prizes wholly in kind of an amount of ` 60 lakhs. AO was held that the assessee was obliged to deduct tax at source before the winning was released. For failure to deduct tax at source under section 194B, He initiated the Proceedings under section 201(1) read with section 201(IA). On appeal the Tribunal held that there was no obligation to deduct tax at source in respect of prizes paid in kind and in absence of any such obligation no proceedings under section 201 could be taken against the assessee. On appeal by the revenue the Court held that the assessee was not obliged to deduct tax at source under section 194B in respect of prizes paid in kind (AYs.2001-02, 2002-03)
CIT v. Hindustan Lever Ltd. (2013) 39 taxmann.com 152 / (2014) 264 CTR 93 / 220 Taxman 177 / 361 ITR 1 (Karn.)(HC)

S.194B : Deduction at source – Lottery or crossword puzzle – Horse race – Stake money – Assessee in default – The petitioner has to pursue the remedy of appeal available under the statute, but they cannot straightway invoke the jurisdiction of this court under Article 226 of the Constitution of India. [S.201, Constitution of India, Article 226]
The petitioner is carrying on the business of horse racing. The DCIT treated the petitioner as an assessee in default for not making TDS u/s 194B in respect of payments made as stake money to horse owners. The Deputy Commissioner passed the order under section 201(1) of the Act. The Petitioner challenged the said order by filing writ petition. The contention of the petitioner that this action was illegal and without jurisdiction since there is no provision under the Act for making TDS with regard to payments made towards stake money. The Court held that it was only for appellate authority to determine on exploration of record and on appreciation of documents produced by petitioner. Error of jurisdiction which the DCIT had allegedly committed in passing impugned order was not a mere error apparent on face of record which could be corrected under Article 226. The petitioner has to pursue the remedy of appeal available under the statute, but they cannot straightway invoke the jurisdiction of this court under Article 226 of the Constitution of India. The Writ petition was dismissed. (AYs. 2007-08 to 2012-13)
Hyderabad Race Club v. DCIT (2013) 215 Taxman 664 (AP)(HC)

S.194B : Deduction at source – Winning from lottery – Cross word puzzle – Tax is required to be deducted at source on gifts to winners of TV shows, where gifts were sponsored by assessee as a mode of advertising [S.40(a)(ia)]

The assessee incurred expenditure on account of distribution of motor vehicles to winners of game shows organized by TV channels. The AO disallowed the aforesaid expenditure u/s. 40(a)(ia) on the ground that the assessee failed to deduct tax at source u/s. 194B of the Act. The assessee contended that, the liability to deduct tax at source under the aforesaid section arises where an assessee has a contract with the participants in a game organised by the assessee and is responsible for making payment, in cash or kind, to the winner or to any person as income. The assessee was merely a sponsor of the game show and had no responsibility/contract with the participants of such show to give prize, in cash or in kind, to the winner. The motorcycles were given by the assessee to the organizer of the show, who were under obligation to award the same to the winner. The motorcycles were not given by way of gift by the assessee to the winner of the game show organised by the TV company, warranting obligation of TDS u/s. 194B. The DRP accepted that the distribution made by the assessee was in the nature of sponsorship /advertisement of the products. But on the finding it was held that assessee was liable to deduct tax at source under section 194B from such payment towards advertisement/sponsorship. On appeal Tribunal held that the assessee is liable to deduct tax at source from eligible payments, even if the same are not paid by way of cash/cheque, but by any other mode. (AY.2007-08)

Hero MotoCorp Ltd. v. ACIT (2013) 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.194C : Deduction at source – Contractors – Work – Deduction at source does not apply to contract manufacturing agreements [S.201(1), 201(1A)]

The assessee, a manufacturer of pharmaceutical products, entered into agreements with various manufacturers who manufactured the said items according to the specifications provided by the assessee. The Assessing Officer held that the transaction between the assessee and the manufacturer was in the nature of a “works contract” and fell within the purview of s. 194C and that the assessee ought to have deducted TDS thereon. The assessee was held to be in default and liable to pay the tax and interest u/s 201(1) & 201(1A). On appeal by the assessee, the Tribunal held that the transaction was one of sale *simpliciter* and was not in the nature of a work contract and that the assessee was not liable to deduct TDS u/s 194C. The department’s appeal to the High Court was dismissed by following *CIT v. Reebok India Co. (2008) 306 ITR 124 (Del).* On appeal by the department to the Supreme Court, HELD dismissing the SLP:

On examining the terms and conditions, invoices, purchase orders and challans indicating payment of excise duty, there is no material on record to indicate that the transaction in question is a “contract for carrying out works“. Hence, s. 194C is not attracted. S. 194C has been amended by the Finance (No.2) Act, 2009, w.e.f. 1-10-2009 to provide that “work” includes manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer. It is clarified that the definition of the word “work” will not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person other than such customer.

CIT v. Silver Oak Laboratories P. Ltd (SC) www.itatonline.org.

S.194C : Deduction at source – Advertising contracts – Sub-agent – Not required to deduct tax from payments made to advertising agencies

The assessee was engaged in the business of advertising and acted as sub-agents of five advertising agencies. Whatever amount was received from clients was paid to aforesaid agencies. Held, the assessee was not supposed to deduct TDS u/s 194C from payment made to advertising agencies. (AY.2006-07)

CIT v. Honest Publicity (2013) 219 Taxman 272 (Guj.)(HC)

S.194C : Deduction at source – Works contract – Payment to franchise – Not liable to deduct tax at source

Assessee was running coaching classes for competitive exams. Its agreements with franchisees did not amount to works contract, and hence, tax not deductible at source on payments to franchisees. (AYs. 2004-05, 2005-06, 2006-07)

CIT v. Career Launcher India Ltd. (2012) 250 CTR 240 / 71 DTR 161 / 207 Taxman 28 / (2013) 358 ITR 179 (Delhi)(HC)

S.194C : Deduction at source – Contractors – Payments to C&F agents – Deduction of tax at 2.2% treating them as contractor was held to be valid [Ss. 194I, 201]

The assessee is a manufacturer of consumer goods such as detergent, soaps etc. It hires godowns on rent and also engages C & F agents to manage them for various purposes. It deducted TDS @ 2.2% under section 194C from payments made to C & F agents. Assessing Officer opined that assessee ought to have deducted TDS at 22 per cent under section 194-I because said payment contained warehousing charges. The Court held that, the CIT(A) and Tribunal had examined entire documentary evidence which consisted of various lease deeds and C & F agents documents. Conclusions drawn by these authorities on the basis of such scrutiny are concurrent that tax was deductible at source u/s 194C and not 194-I. Assessee had rented premises from their landlords and payments of rent were made after deducting tax as per S.194-I. What the assessee paid to the C & F agents as warehousing charges was the consideration in terms of the agreement which was tax deductible u/s 194C. It is for the Revenue to establish as to how S.194-I was attracted on the amounts paid to C & F agents. (AY. 2001-02)

CIT v. Hindustan Lever Ltd. (2013) 94 DTR 415 / 29 taxmann.com 313 / 216 Taxman 280 / (2014) 265 CTR 518 (Delhi)(HC)

S.194C : Deduction at source – Contractors – Where assessee had a contract for repairing of transformers, tax under section 194C was rightly deducted only on labour charges by excluding value of material used by contractor for repairing of transformers

The assessee, a government company had given a contract for repairing transformers. While making payment, the assessee deducted tax only with reference to the labour charges by excluding value of material used by the contractor for carrying out repairing of transformers. A survey was conducted at place of assessee and it was found that tax deducted by assessee was less, accordingly a demand was raised by the AO. The CIT(A) and Tribunal recorded a finding that TDS was rightly deducted only with reference to labour charges and there was no short deduction.

On appeal by the department, the High Court affirmed the view of the appellate authorities as the contract was divided into various components on supply of leg coil, transformer oil, various supply items and labour charges and held that since the payment was in the nature of repairing of transformer and not a work in the nature of manufacturing and supplying a product as per section 194C, the withholding tax provisions were not applicable u/s. 194C (AY.2009-10, 2010-11).

CIT v. Executive Engineer (Electricity Stores), Distribution Division (2013) 217 Taxman 199 (Mag.) / 94 DTR 167 (All.)(HC)

S.194C : Deduction at source – Works Contract – Tenderer securing material from other source and supplying material to assessee – Contract amounts to sale and not works contract – Tax not deductible at source

The assessee a milk producers society, for the assessment years 1999-2000 to 2004-05, invited tenders for supply of sachets. The A. O. held that the supply of sachets by the successful tenderers was in the nature of “works contract” and tax should have been deducted at source on payments to them. The Commissioner (Appeals) confirmed the order of the A.O. The Tribunal held that the transaction was not “works contract” but purchase of materials and, hence, the question of deduction of tax at source did not arise. On appeal it was held by dismissing the appeal, that the assessee had not

supplied any material. However, the tenderer had secured the material from other sources and had supplied it to the assessee. Some features of works contracts may overlap, but that should not be taken as necessary criteria to determine the nature of work. The expression “works contract” has a definite legal connotation. What is stated in section 194C(1) is for “carrying out any works” between the contractor and the specified person. The work is also defined to exclude a situation where the material is not supplied by the assessee. In view of the specific definition of work, the contract amounted to sale and not works contract. The fact that clause (a) of the definition of “work” was amended subsequently and was not in the statutory book for the relevant years in question would not be of consequence. (AY. 1999-2000 to 2004-05)
CIT v. Bangalore District Co-operative Milk Producers Societies Union Ltd. (2013) 357 ITR 676 / 91 DTR 29 / (2014) 220 Taxman 398 (Karn.)(HC)

S.194C : Deduction at source – Contractor and sub-contractor – Transporters –Relationship [S. 40(a)(ia)]
The assessee, engaged in the business of construction made payment to transporters for transporting construction material at site. The assessee was solely responsible for execution of work and no part of such liability was fastened on the transporters. Since relationship of a contractor and sub-contractor between assessee and transporter was missing, liability to deduct tax at source did not arise. (AY.2007-08)
CIT v. Prashant H Shah (2013) 216 Taxman 287 / 94 DTR 331/(2014) 270 CTR 611(Guj.)(HC)

S.194C : Deduction at source – Contractor and sub-contractor – Applicability to individuals only with effect from 1-6-2007
Since provisions of section 194C were made applicable in respect of payment made to individuals with effect from 1-6-2007, such provision, therefore, will not be applicable for assessment year 2005-06 (AY.2005-06)
CIT v. Vishnudutt Sharma (2013) 216 Taxman 41 (Mag.)(Guj.)(HC)

S.194C : Deduction at source – Contractor and sub-contractor – Works contract –Composite contract – Equipments and materials – Labour-cum-erection – Construction of refinery – Assessee is liable to deduct tax at source. [Ss.197, 201]
The assessee entered into three contracts viz., for supply of material, for labour-cum-erections and for construction of refinery, with its sister concern. Held, this was a works contract and hence, the assessee was liable to deduct tax on the same. (AY. 1998-99)
Essar Oil Ltd. v. ITO (2013) 215 Taxman 365 / 92 DTR 330 / 262 CTR 63 (Guj.)(HC)

S.194C : Deduction at source – Contractor and sub-contractor – Booking of cargo for other transporters – Not liable to deduct tax at source [S. 40(a)(ia)]
Assessee collecting freight charges from clients who intended to transport their goods through separate transporters and paying to transporters entire amount collected from clients after deducting his commission. There is no privity of contract of carriage of goods between assessee and his clients, assesse is not a person responsible but only a facilitator hence not liable to deduct tax at source. Appeal of revenue was dismissed. (AY.2007-08)
CIT v. Hardarshan Singh (2013) 350 ITR 427 / 89 DTR 389 / 216 Taxman 283 / 263 CTR 466 (Delhi)(HC)

S.194C : Deduction at source – Contractors and sub-contractor – Transport contracts – Matter remanded to consider the nature of work [40(a)(ia]
Assessee was engaged in transport contracts. It claimed that since it merely took trucks on hire and truck owners were not sub-contractors and did not do any ‘work’ as contemplated under section 194C, section 194C did not apply to payments made to them. Since there was no detailed discussion

on facts as to how assessee operated/hired trucks from owner, matter remanded to the AO. (AY.2009-10)
S. S. Warad v. ACIT (2013) 60 SOT 144 (URO)(Bang.)(Trib.)

S.194C : Deduction at source – Contractors – Sub-contractors – Supply of finished goods to assessee at their own risk and cost, and title to such goods passed to assessee only on acceptance of goods, it could not be held as work-contract – Tax is not deductible [S. 40(a)(ia)]
The Assessee company, engaged in manufacturing two wheelers, placed purchase orders on vendors for customised intermediary products. While placing such purchase orders, assessee also provided specification of products to be purchased, name of suppliers and the price negotiated by the assessee with such suppliers. The AO held that the assessee, by giving specifications, was controlling the supply of raw material to vendors, and hence, the contract with vendors constituted work contract u/s. 194C, accordingly disallowed the purchases u/s. 40(a)(ia) for non-deduction of tax at source under section 194C. Tribunal held that considering the facts of the case, held that it is a case of contract of sale and not a contract of work. Hence, the provision of section 194C are not applicable and the disallowance made u/s. 40(a)(ia) is to be deleted. (AY.2007-08)
Hero MotoCorp Ltd. v. ACIT (2013)60 SOT 25 (URO) 36 taxmann.com 103 (Delhi)(Trib.)

S.194C : Deduction at source – Contractors and sub-contractor – For availing catering services at hotel the tax is deductible – Failure to deduct tax the amount was disallowable [S.40(a)(ia)]
The assessee has availed catering services from the hotel hence the assessee ought to have deducted as TDS u/s 194C for the catering services availed as the tax was not deducted the said expenditure was a disallowable u/s 40(a)(ia). (AY.2007-08)
Hero MotoCorp Ltd. v. ACIT (2013) 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.194C : Deduction at source – Contractors/Sub-contractors – Payments – Works Contract
Assessee Company entered into two separate contracts, namely supply contract and Installation contract, for procurement and installation of plant and machinery. The assessee did not deduct tax at source u/s. 194C treating it as a contract for sale. The Tribunal held in favour of assessee that such specialised machineries had individual existence and property therein continued to remain with supplier till they were inspected and tested by supplier and then dispatched to assessee. Supply contract was a contract of sale and not a works contract and this not requiring TDS u/s. 194C. (AYs. 2008-09 to 2010-11)
NTPC, Sinhadri Super Thermal Power Project (VSP) v. ITO (2013) 145 ITD 314 (Visakhapatnam)(Trib.)

S.194C : Deduction at source – Contractors – Payments to Crane Trucks [S.194I]
The assessee hired two Diesel hydraulic truck mounted mobile cranes on contract basis and deducted TDS on payment of hiring charges. A.O. treated crane fitted truck as plant and machinery and held provisions of Sec. 194I were applicable. The Tribunal held since crane trucks which were designed for special services falls within category of motor trucks and not machinery; hence provisions of Sec. 194C were applicable. (AY.2008-09)
Oil India Ltd. v. Dy. CIT (2013) 145 ITD 513 / 94 DTR 273 / 158 TTJ 1 (Jodh.)(Trib.)

S.194C : Deduction at source – Contractors – Services received by the assessee on contract basis were not technical services, S.194C is applicable and not 194J.[S.194J, 201(1), 201(1A)]
Assessee was engaged in the business of exploration, development, extraction, transportation of crude oil & natural gas, transportation of finished petroleum products & production of liquid field Petroleum gas. For the aforesaid business, assessee engaged contractors having expertise in the respective fields. It treated the contracts with the service providers as works contract & deducted TDS u/s 194C. AO was of the view that the contract with the service providers was a technical

service contract & therefore the provisions of S/194J were applicable instead of provisions of S/194C. CIT(A) upheld the findings of AO. On further appeal in Tribunal, Tribunal allowed the appeal & held that the services received by the assessee on contract basis were not technical services. AS per CBDT Circular No. 202, dt 5-7-1976, the expression “Fees for technical services” were not applicable in the case of any mining or like project. Further assessee had been consistently collecting TDS from the Contractors u/s 194C & depositing the same with the Government in line with the practice followed in the other offices/projects & also in other upstream oil & gas companies & the department has treated such contracts as works contracts liable to TDS u/s 194C in all the earlier years. Therefore impugned demand u/s 201(1) & 201(1A) was deleted. (AY 2008-09, 2009-10)
Oil India Ltd. v. DCIT (2013) 145 ITD 513 / 94 DTR 273 / 158 TTJ 1 (Jodh.)(Trib.)

S.194C : Deduction at source – Contractors – Delay in filing Form 15-I / Form 15J – Payee furnishing PAN
Filing of Form 15J belatedly could not be a reason to deny the deduction claimed by the assessee. If these forms were duly filled with basic details, such as, full address, permanent account number, father’s name, whether assessed to tax and the jurisdiction, date and place of verification, they should be considered, as filing of these forms was only procedural in nature. Since the assessee furnished these forms before the Commissioner (Appeals), benefit was to be given. (AY.2009-10)
Associated Roadways P. Ltd. v. DCIT (2013) 25 ITR 713 (Hyd.)(Trib.)

S.194C : Deduction at source – Contractors – Transport contract –Service – Hire of vehicle is not a case of hire of machinery [S.194I]
Payment made by assessee to bus owners for hire of vehicles to provide pick-up and drop facility to school students was not a case of hire of machinery but of service rendered by bus owners to assessee and hence liable to TDS under s. 194C and not section 194I. (AY. 2008-09, 2009-10)
ACIT (TDS) v. Delhi Public School (2013) 24 ITR 531 / 144 ITD 670 (Delhi)(Trib.)

S.194C : Deduction at source – Contractors – Printing contracts – Contract for sale, not liable to deduct tax at source [S. 40(a)(ia)]
Assessee made payments to a party for purchase of packaging and printing material. Since entire activity of packaging and printing and later supplying same to assessee showed that this was a contract for sale and could not be termed as works contract , hence no TDS was required to be deducted by assessee under section 194C. (AY. 2007-08)
Vishal Paper Industries v. JCIT (2013) 21 ITR 220 / 58 SOT 133 (URO)(Chd.)(Trib.)

S.194C : Deduction at source – Contractors – Payment for purchase and transmission of material gas [S. 194J, 201(1), 201(1A)]
The assessee company needs gas as feed stock for manufacturing and for purchasing gas it has entered into a gas sales and transmission contract with GAIL. The assessee company is a ‘buyer’ of natural gas and GAIL is a seller. The contract between the assessee and GAIL is a contract for sale of gas and not a works contract and the Tribunal held that a contract which is intended to be a contract for sale of goods, cannot be construed as anything else but a contract of sale. Accordingly, no duty is cast, in the facts and circumstances of the case on the assessee company to deduct any TDS either under section 194C or 194J of the Act. The assessee was deducting TDS under section 194C on account of abundant caution cannot be treated adversary to its interest as has been canvassed by the Department. Therefore, interest charged under section 201(1A) of the Act has been correctly set aside by the CIT(A). The GAIL and IOU have already deposited tax due on their total income as is evidenced from the copies of its acknowledgment of return available on record. The Tribunal followed the decision of Hon’ble Supreme Court in the cases of *Hindustan Coca Cola Beverages P. Ltd. v. CIT (2007) 211 CTR 545* and *Eli Lilly & Co. (I) (P) Ltd. and Ors. v. CIT (2009) 312 ITR 225*

and held that when the primary liability itself ceases to exist there can be no further levy / disallowance in that regard. The assessee company has proved that the recipients have shown these charges as their income and have paid due taxes thereon and thus the assessee in default under section 201(1) of the Act charging of interest under section 201(1A) in both the years is found not correct and has been correctly deleted by the learned CIT(A). (AY. 2007-08, 2008-09)
ACIT v. Chambal Fertilizers & Chemicals Ltd. (2013) 154 TTJ 407 / 87 DTR 1 (Jodhpur)(Trib.)

S.194C : Deduction at source – Contractors – Payment towards transmission charges for supply of gas not a work contract. [S. 194J, 201(1)]
The Tribunal in this case has held that transmission charges paid by the assessee for supply of gas being a part of the price as per the invoice raised by the GAIL and there being nothing on record to show that there was any works contract between the assessee and GAIL, provisions of section 194C or section 194J were not applicable. (AYs. 2008-09, 2009-10)
ITO v. Samtel Glass Ltd. (2013) 87 DTR 12 / 154 TTJ 401 / 59 SOT 24 (URO)(Jodh.)(Trib.)

S.194C : Deduction at source – Contractors – Rent – Hire charges for machinery – Explanation (i), the words "machinery or plant or equipment" had been added with effect from July 13, 2006 by the Taxation Laws (Amendment) Act, 2006. [40(a)(ia), 194-I]
For the assessment year 2006-07 the assessee made payments under the head "Machinery hire charges" without deduction of tax at source. Assessing Officer observed that though the provisions of section 194-I of the Act were applicable only from July 13, 2006 section 194C of the Act was applicable. Therefore, he made addition under section 40(a)(ia) of the Act. On appeal, the Commissioner (Appeals) finding that section 194-I of the Act had been in existence since 1994, the assessee was not under the legal obligation to deduct tax on the hire charges of machinery because the words "machinery, plant and equipment" were specifically added with effect from July 13, 2006. The Commissioner (Appeals) held that hiring machinery was not a contract for work and could not be covered under section 194C of the Act. Accordingly, he deleted the addition under section 40(a)(ia) of the Act. On appeal by the Department. Held, dismissing the appeal, that the contract was a machinery hire contract and not a contract for carrying out any work, therefore, the provisions of section 194C of the Act were not applicable. The provisions of section 194-I of the Act were applicable for the payment of rent and tax was to be deducted at source on payment of specified rent. The meaning of "rent" for the purposes of this section has been mentioned in Explanation (i) appended to section 194-I of the Act. In Explanation (i), the words "machinery or plant or equipment" had been added with effect from July 13, 2006 by the Taxation Laws (Amendment) Act, 2006. The previous year relevant to the assessment year under consideration ended on March 31, 2006 while insertion of the words "machinery or plant or equipment" had been made effective from July 13, 2006 i.e., much after the end of the previous year relevant to the assessment year under consideration. Therefore, the provisions of section 194-I were not applicable. (AY.2006-07)
ACIT v. Kiran Constructions (2013) 22 ITR 356 (Hyd.)(Trib.)

S.194C : Deduction at source – Contractors – Companies agreed to depute their employees, would not mean that it was a works contract, hence the disallowance was deleted.
Assessee company was promoted as Joint Venture Company by HPCL and GAIL. It was engaged in business of distributing and marketing of CNG, LPG and Natural Gas. Assessee paid GAIL and HPCL certain amounts towards reimbursement of cost of salaries of employees who were on deputation, to assessee company without deducting tax at source. It was noted that deputed employees worked under the control and management of assessee and, their salaries were charged on assessee's profit. Thus, in aforesaid circumstances merely because companies had agreed to depute their employees it would not mean that it was a works contract covered u/s.194C. Hence, impugned disallowance was deleted. (AY. 2007-08, 2008-09)
Bhagyanagar Gas Ltd. v. ACIT (2013) 140 ITD 591 (Hyd.)(Trib.)

S.194C : Deduction at source – Contractors – Companies agreed to depute their employees would not mean that it was a works contract, hence the disallowance was deleted [S.194I, 40(a)(ia)]
Assessee a transport contractor, hired lorries/ truck from lorry owners and further gave them on hire to L who used same for carriage of goods. Since no work of carriage of goods was entrusted either with assessee or with lorry truck's owners from whom assessee hired lorries/trucks, assessee was not liable to deduct tax at source from payment of hire charges to lorry/truck owners. At the most the hire charges may fall within the provision of section 194I, however section 194I is not applicable for the relevant year. Moreover the tax payer has admittedly paid hire charges to lorry owners. Following the Special Bench in *Merlyn Shipping & Transporters v. ACIT (2012) 136 ITD 23 (SB) (Visakha) (Trib.)* the provision of section 40a(ia) is applicable only in respect of the amount which remains to be paid at the end of the financial year and is not applicable to the amount already paid. (AY.2006-07)
Dy. CIT v. Shri Reez Karakkattil Raghavan Friends Transport Co. (2013) 140 ITD 598 (Cochin)(Trib.)

S.194C : Deduction at source – Contractors – BIFR – No relief can be given to BIFR company for deduction of tax at source
Tribunal held that where payment has been made by manufacturer of clothes for processing and weaving, liability to deduct TDS arises under section 194C(1). Even where recipient company was under BIFR, no relief could be given in terms of TDS liability. Partly in favour of assessee. (AY.2005-06)
Deora Trading Co. v. ITO (2013) 55 SOT 349 (Mum.)(Trib.)

S.194C : Deduction at source – Contractors – Violation of provident fund act cannot be the ground to disallow payment to civil contractor [S.40(a)(ia)]
Assessee, a civil contractor made labour payments to various persons but failed to deduct TDS. Assessing Officer invoking provisions of section 40(a) (ia), disallowed said charges. On appeal, assessee produced some registers, namely, labour register, wage register, etc., which were accepted by Commissioner (Appeals) and additions were deleted. Revenue raised an objection that labour registers were not maintained properly and, moreover, there was no deduction of provident fund; hence, there was no direct payment to labourers, but to sub-contractor who made labour payments. Thus, TDS liability under section 194C was violated. Tribunal held that whether violation of provisions of Provident Fund Act and labour laws had nothing to do with proceedings under Income-tax Act, therefore, revenue's objection was to be set aside and impugned order passed by Commissioner (Appeals) was to be upheld. (AY. 2006-07)
Dy. CIT. v. Arjun Bhowmick (2013) 55 SOT 82 (URO)(Kol.)(Trib.)

S.194C : Deduction at source – Contractors – Agents of truck owners – Did not have obligation to deduct tax at source. [S.40(a) (ia)]
Assessee is engaged in business of transportation of goods. During course of business, assessee had to take several trucks on hire. Assessee did not deduct tax at source under section 194C, while making payments to agents of truck owners, which *inter alia*, resulted in disallowance under section 40(a) (ia). Tribunal held that since assessee made payments for hiring of trucks *simpliciter* and not for transporting goods which he received from other parties, it was not a case of sub-contracting work and, thus, assessee did not have any obligation to deduct tax at source while making said payments, therefore, impugned disallowance was to be deleted. (AY. 2006-07)
Lokesh Duggal v. ITO (2013) 55 SOT 78 (URO)(Kol.)(Trib.)

S.194C : Deduction at source – Contractors – Printing material on paper – Works contract – Sale – Contract for sale the assessee is not liable to deduct tax at source. [Ss.201, 201(IA)]

Tribunal held that if a person has given specifications for printing and has supplied his own paper or ink and printer is only printing such material on paper, then it would constitute a works contract and provisions of section 194C would be attracted. However, if a person has only given specifications for printing and such material is delivered to such person after specified printing, it would be a contract of sale. Assessee had specified printing material for printing to 'F' - 'F' had rendered services as specified by assessee and in many cases had charged even VAT/CST. It was not alleged or proved that assessee had supplied paper or ink to printer, it was contract for sale or purchase and provisions of section 194C were not attracted and, thus, assessee was not in default under section 201 (1). (AYs. 2006-07 to 2009-10)
Punjab Tractors Ltd. v. ITO (2013) 55 SOT 75 (URO)(Chd.)(Trib.)

S.194C : Deduction at source – Contractors – Supervising – Matter remanded [S.194J]
Tribunal held that,where contractor merely provided service *simpliciter* for supervising construction work of assessee, tax was not to be deducted under section 194C. In respect of applicability of section 194J to such payment Commissioner (Appeals) had to specify in appellate order as to which of clauses of section 194J would apply in case of assessee and he had to give reasons for same in appellate order, merely because assessee originally mentioned section 194J in TDS return, that by itself was not sufficient to put assessee in default for short deduction and late payments of taxes with interest, in case payee had paid tax on same payment to revenue department, tax could not be recovered once again from assessee, although charging of interest was mandatory in nature for delay. Matter remanded. (AY. 2008-09)
Radheyshyam Bhakar & Co. v. ITO (2013) 55 SOT 80 (URO)(Agra)(Trib.)

S.194H : Deduction at source – Commission – Agent – Procurement and marketing of products through concessionaires – Difference between MRP fixed by assessee and price concessionaire paid to assessee – Not liable to deduct tax at source [S.201(1), 201(IA)]
Assessee was undertaking procurement and marketing of milk and milk products through concessionaires. Concessionaires were making purchases of milk outright. The fact that concessionaires operated out of booths or with equipment provided by assessee or that assessee had right of inspection was not material. The difference between maximum retail price fixed by assessee and price concessionaire paid to assessee was not commission, and hence, tax need not be deducted at source there from. (AYs. 2004-05, 2005-06)
CIT v. Mother Dairy India Ltd. (2012) 249 CTR 559 / (2013) 358 ITR 218 (Delhi)(HC)
CIT v. Mother Dairy Food Processing Ltd. (2012) 249 CTR 559 / (2013) 358 ITR 218 (Delhi)(HC)

S.194H : Deduction at source – Commission – Liability of BSNL to deduct tax – Not liable to deduct tax at source – Amendment is clarificatory
BSNL was not required to deduct tax at source under s. 194H pertaining to assessment years prior to insertion of third proviso to s. 194H with effect from 1-6-2007 as said amendment is a clarificatory amendment and would be applicable even in respect of assessment years prior to insertion of said amendment. (Period 1-4-2002 to 31-5-2007)
CIT v. Bharat Sanchar Nigam Ltd. (2013) 216 Taxman 277 / 95 DTR 253 / (2014) 265 CTR 212 (P&H)(HC)

S.194H : Deduction at source – Commission – Difference between sale and agency – Sale of stamp paper not liable to deduct tax at source [U.P. Stamp Rules, 1942, Rule, 157, 161, Sale of Goods Act, 1930, S. 19]
Sale of stamp paper to licensed vendors under U. P. Stamp Rules, 1942 amounted to "sale" and tax was not deductible at source on discount on such sales. Sale of stamp papers by assessee to the licensed vendor is a sale on principal to principal basis.

Chief Treasury Officer v. UOI (2013) 355 ITR 484 / 94 DTR 246 / 263 CTR 346 / (2014) 220 Taxman 403 (All.)(HC)

S.194H : Deduction at source – Commission – Mobile telephone service provider – Discount allowed to franchisee for selling SIM cards – Liable to deduct tax at source

The assessee was engaged in the business of providing cellular mobile telephone services through its franchisees by selling to them starter pack and rechargeable coupons, SIM and pre-paid cards which were purchased by the franchisees engaged by the assessee at a rate below the market price and sold to retailers by whom they were ultimately sold to customers. Held, that the property in the starter pack and pre-paid coupons even after transfer and delivery to the franchisees remained with the assessee, (ii) the franchisee really acted as a facilitator or instrumentality of providing services by the assessee to the ultimate subscriber, (iii) the franchisee had no free choice to sell it and everything was being regulated and guided by the assessee, and (iv) the rate at which the franchisee sold to retailers and that at which the assessee sold to the franchisee, was also regulated and fixed by the assessee. Hence, there had been indirect payment by the assessee to the franchisee of the commission and the commission would attract tax deduction at source under section 194H. (AY.2003-04, 2004-05)

Bharti Cellular Ltd. v. ACIT (2011) 244 CTR 185 / 200 Taxman 254 / 61 DTR 225 / (2013) 354 ITR 507 (Cal.)(HC)

194H : Deduction at source – Commission – Utilisation of credit card facilities [S. 201(1)]

Held, tax was not deductible at source from payments made to banks on account of utilisation of credit card facilities. (AY. 2010-2011)

ACIT v. Jet Airways (India) Ltd. (2013) 28 ITR 594 / 95 DTR 173 / 158 TTJ 289 / (2014) 146 ITD 682 (Mum.)(Trib.)

S.194H : Deduction at source – Commission – Discounts to dealers – Tax is not deductible

Tribunal held that no tax is required to be deducted at source under section 194H on incentives and discounts to dealers under various schemes, as they are not commission agents. (AY. 2007-08)

Hero MotoCorp Ltd. v. ACIT(2013) 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.194H : Deduction at source – Commission – Commission or discount on SIM cards & recharges.

Commission paid to distributors attracts TDS under section 194H. (AY. 2006-07 to 2008-09)

Dy. CIT v. Tata Teleservices Ltd. (2013) 154 TTJ 480 / 140 ITD 451 / 87 DTR 346 (Bang.)(Trib.)

S.194H : Deduction at source – Commission – Payment to banks for providing credit card facility to customers

Under an agreement, the bank allowed assessee’s customers to make payments to assessee through credit cards for which the bank charged the service fee. The Tribunal held that the service fee charged by banks are bank charges and not commission, therefore the provisions of section 194H are not attracted.

Dy. CIT v. Tata Teleservices Ltd. (2013) 154 TTJ 480 / 140 ITD 451 / 87 DTR 346 (Bang.)(Trib.)

S.194H: Deduction at source – Commission – Credit card expenses – Disallowance was warranted [S.40(a)(ia)]

The Tribunal held that the obligation to deduct tax at source under section 194H is not cast upon the assessee company therefore, the disallowance made under section 40(a)(ia) on account of alleged failure to deduct tax at source from payment of credit card acquiring fees is not warranted by law. Therefore we have to delete the same.

Marudhar Hotel (P) Ltd. v. JCIT (2013) 156 TTJ 729 (Jodh.)(Trib.)

S.194H : Deduction at source – Commission – Sub-brokerage paid in connection with services rendered in course of buying and selling of units of mutual funds is not covered by section 194H
The assessee was engaged in the business of mutual fund distribution, etc. The Assessing Officer observed that the assessee had paid sub-brokerage to various parties without deducting tax at source and hence disallowed the sub-brokerage under section 40(a)(ia) of the Act. The CIT(A) following the Order of the Tribunal in the assessee's own case for the earlier year deleted the disallowance so made. On appeal the Tribunal following the Order for the earlier years dismissed the departmental appeal and held:
The sub-brokerage is paid in relation to units of Mutual Funds. From the details placed on record, we are convinced that the sub-brokerage paid is connected with the services rendered in the course of buying and selling of units of Mutual Funds or in relation to transactions pertaining to Mutual Funds and as per the provisions of section 194H these are not covered by the provision for deduction of tax at source. There is nothing on record to indicate that the sub-brokerage is paid for any other services other than relating to securities. The Assessing Officer also accepts that the brokerage received by the assessee is not covered by TDS whereas he was of the opinion that the sub-brokerage paid is covered by the provisions. We are unable to understand this logic of the Assessing Officer. For these reasons, we are of the opinion that the order of the CIT(A) does not require any modification and accordingly the same is confirmed. (AY. 2005-06, 2007-08)
Dy. CIT v. S. J. Investment Agencies P. Ltd. (2013) 21 ITR 258 (Mum.)(Trib.)

S.194H : Deduction at source – Commission – Agent of post office – Commission paid in respect of sale of securities provision is not applicable [Securities Contract Act 1956, S. 2(h)]
The assessee is an agent of post office scheme. It claimed expenditure on account of commission paid to sub-brokers in respect of sale and purchase of mutual funds. The Assessing Officer disallowed the claim as no tax was deducted at source under section 194H of the Act. On appeal the Tribunal held that according to Explanation (i) to section 194H, if the commission or brokerage is paid by a person acting on behalf of another person for services rendered in connection with securities then the said commission or brokerage falls outside the purview of section 194H. On the facts the commission was paid to sub-broker with respect to purchase and sale of mutual funds and according to clause (h) of section 2 of the Securities Contract Act, 1956 mutual funds are within ambit of the term 'securities', therefore the assessee is not liable to deduct tax at source under section 194H of the Act.(AY.2008-09)
ITO v. Mittal Investment & Co. (2014) 147 ITD 624 (Delhi)(Trib.)

S.194H : Deduction at source – Commission – Principal – Agent relationship – Distributors – Matter remanded [S.40(a)(ia)]
The assessee has contended that discount given to the distributors is not subjected to the provisions of section 194H on the ground that the relationship between the assessee and the distributor is on principal to principal and not principal to agent basis. The Tribunal held that section 194H does not talk about the relationship between the payer and payee necessarily be of a principal and agent, the provisions do not require any formal contract of agency. On facts, the Tribunal held that the assessee has failed to produce any material such as scheme under which the benefit had been given to the distributors. Accordingly the matter was set aide to decide accordance with law.(AY. 2007-08)
SKOL Breweries Ltd v. ACIT (2013) 142 ITD 49 / 84 DTR 271 / 153 TTJ 257 / 28 ITR 465 (Mum.)(Trib.)

S.194H : Deduction at source – Commission – SIM cards – Recharge coupons – wholesale dealers – discount – Commission – Discount allowed on sale of recharge coupons is not discount but commission, tax is deductible at source on such amount [S.201]

The assessee-company was selling SIM cards and recharge coupons of the Chennai Telephones to wholesale dealers and paying commission to them up to the financial year 2007-08. From the financial year 2008-09 onwards the assessee-company distinguished the sale of SIM cards and recharge coupons. It treated the commission paid to dealers on sale of recharge coupons as discount and did not deduct tax at source under section 194H of the Income-tax Act, 1961 thereon. The Assessing Officer treated the company as an assessee-in-default under section 201. This was confirmed by the Commissioner (Appeals). On appeal to the Tribunal held that the payment amounted to commission and tax was deductible at source on such amount. Appeal of assessee was dismissed. (AY. 2009-10, 2010-2011).
Cellular Mobile Telecom Services v. ITO (2013) 21 ITR 456 (Bang.)(Trib.)

S.194H : Deduction at source – Commission – Travel agent – Distribution of amount, the assessee is not liable to deduct tax at source [S.40(a)(ia)]
Assessee is engaged in business of travel agents. It entered into a consortium agreement with 12 other members who were travel agents for booking air tickets through platform provided by 'A' Ltd. In terms of said agreement all members travel agents except assessee, rendered services of booking airline tickets and utilised computerised electronic reservation system platform provided by 'A', who offered preferential rates subject to bulk business being offered by all travel agents as one entity. Consortium members agreed that assessee would act as a lead member and authorised it to enter into contracts with 'A' to make collections and distribute monies to each of consortium travel agents in proportion to segment bookings effected by each of travel agents. Lead member, i.e., assessee collected commission for services rendered by other members and distributed said commission amongst members on priority basis. Though TDS certificate issued by 'A' reflected commission of Rs.65,71,690, assessee distributed amount of Rs. 52,22,326 amongst members for services rendered by them in booking tickets etc. Since assessee did not deduct tax at source while making payment of commission to travel agents, referring to provisions of section 40(a) (ia), Assessing Officer disallowed amount of Rs. 52,22,326. Tribunal held that since assessee only distributed monies amongst members in terms of agreement for services rendered by them in booking ticket etc., and had not claimed said amount as expenditure in its account, it could not be treated as income of assessee so as to attract provisions of sections 194H and 40(a)(ia). (AY.2006-07)
ITO v. Interserve Travels (P.) Ltd. (2013) 55 SOT 356 (Delhi)(Trib.)

S.194H : Deduction at source – Commission – Trade discount – Assessee is not liable to deduct tax at source [S.40(a)(ia)]
Assessee is a franchisee of BSNL. It received commission on gross value of purchase and on said commission BSNL had deducted tax at source under section 194H. It had also appointed sub-franchisees for selling products of BSNL. It, out of its own commission, allowed trade discount to sub-franchisees. Assessing Officer treated trade discount as commission and disallowed same by applying section 40(a)(ia) on plea that assessee had not deducted tax at source under section 194H on trade discount. Tribunal held that trade discount made available to sub-franchisees was a compensation by foregoing part of commission already subjected to tax at source by BSNL and it could not have suffered taxation under section 194H. Therefore, the disallowance under section 40(a)(ia) was unjustified. (AY. 2008-09)
Pareek Electricals v. ACIT (2013) 55 SOT 338 / 81 DTR 342 (Cuttack)(Trib.)

S.194H : Deduction at source – Commission – Relation of principal and agent – Discount was treated as commission for provision of S. 194H hence the assessee was held to be liable to deduct tax at source
Assessee was engaged in the business of providing telecom services across country. To market its products and services, assessee appointed persons called "channel Partners (CP)". To enable its

customer to use its services, assessee gave starter packs as well as recharge vouchers to its CPs. While MRP of the products were fixed at time of raising invoices, product was priced at discounted price agreed to between assessee and CP. It was held that the relationship between the assessee and its distributors was that of principal and agent and thus, difference between MRP of product and price actually charged constituted commission which would fall under realm of provisions of section 194H. The assessee was held to be liable to deduct tax at source on such payment. Appeal of assessee was dismissed. (AY. 2005-06, 2008-09)
Tata Teleservices Ltd. v. Dy. CIT (2013) 140 ITD 451 / 87 DTR 346 / 154 TTJ 480 (Bang.) (Trib.)

S.194H : Deduction at source – Commission – Bank charges – Payment to bank for utilization of credit card facilities is not in nature of commission hence section 194H is not applicable
Assessee had arrangement with several banks whereby customers of assessee, who also held credit card of such banks, could make payment for communication service utilised by them from assessee through credit cards. It was held that the payment to bank for utilization of credit card facilities would be in nature bank charge and not in nature of commission within meaning of section 194H. Assessee is not liable to deduct tax at source on such payments. Appeal of assessee was allowed. (AY. 2005-06, 2008-09)
Tata Teleservices Ltd. v. Dy. CIT (2013) 140 ITD 451 / 87 DTR 346 (Bang.)(Trib.)

S.194-I : Deduction at source – Rent – Passenger service fee
Passenger service fees collected from passengers on behalf of airport authorities was neither rent nor lease or tenancy. (AY. 2010-11)
ACIT v. Jet Airways (India) Ltd. (2013) 28 ITR 594 / 95 DTR 173 / 158 TTJ 289 / (2014) 146 ITD 682 (Mum.)(Trib.)

S.194-I : Deduction at source – Rent – For hiring rooms and banquet halls – Tax is required to be deducted at source under section 194-I [S.40(a)(ia)]
The assessee incurred expenditure towards booking of banquet halls/space in hotel for convening meetings. The assessee also incurred expenses in respect of hire charges of room for lodging facility provided to foreign professional. The AO. held that the assessee was liable to deduct tax at source from above payments under section 194-I of the Act and accordingly made disallowance under section 40(a)(ia) of the Act. Assessee contended that the predominant purpose was to take the banquet hall on hire for the purposes of meeting. Tribunal held that the assessee was liable to deduct tax at source for hiring of rooms and banquet in hotels .The payment was disallowable. (AY.2007-08)
Hero MotoCorp Ltd. v. ACIT (2013) 60 SOT 25 (URO)/ 36 taxmann.com 103 (Delhi)(Trib.)

S.194-I : Deduction at source – Rent – Car and generator fall within category of machinery, plant or equipment – Tax is required to be deducted at source under section 194-I on lease rentals for same – Lease lines – No tax is required to be deducted at source on rental payments to MTNL/BSNL for leased lines. [S.40(a)(ia), 43(3)]
The assessee took car on lease from Hero Honda Finlease Ltd., which was used by employees in the course of discharging administrative functions for the purpose of business, against which the assessee paid rental charges. AO. held that assessee was liable to deduct tax therefrom under section 194-I, as car falls within the meaning of ‘plant’, as defined in section 43(3), and, therefore, disallowed the aforesaid expenditure u/s. 40(a)(ia).
Before the Appellate proceedings the assessee contende that u/s. 194-I, a person making payment of rent, under any lease arrangement, for use of, *inter alia*, machinery or plant or equipment, is required to deduct tax at source at the applicable rate. Car does not fall within the category of assets viz., machinery, plant or equipment prescribed in the aforesaid section. Accordingly, the ordinary meaning and the context in which these assets have been included in the said section, would have to be

adopted. In assessee's case car on which impugned lease rental has been paid has been used by employees in the course of discharging administrative functions as part of regular business activities, such car is not used as a tool in the course of main business function of manufacturing two wheelers. Accordingly, car taken on lease does not fall within the meaning of "machinery, plant or equipment" as prescribed in section 194-I.
Tribunal held that the provisions of section 194-I would be attracted in respect of lease rentals paid by the assessee to Hero Honda Finlease Ltd for lease of car. The submission of the assessee that the definition of plant does not include car for the purposes of Section 194-I, does not find merit. U/s. 194-I, "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of, among other things, machinery or plant or equipment'. Tribunal also held that car does fall within the category of machinery, plant or equipment and payment made for the use of the same would fall within the definition of "Rent" under sec. 194-I of the Act. and accordingly, non-deduction of tax at source, would attract the provisions of sec. 40(a)(ia). The Tribunal also held that no tax is required to be deducted on rental payments to MTNL/BSNL for leased lines. (AY. 2007-08)
Hero MotoCorp Ltd. v. ACIT (2013) 60 SOT 25 (URO) / 36 taxmann.com 103 (Delhi)(Trib.)

S.194-I : Deduction at source – Rent – Payment of Passenger Service Fees to airport authority
Assessee-airlines collects passenger service fees from the passengers for and on behalf of the airport authority / operator, therefore, PSF paid by the assessee to the Airport Authority on behalf of its customers does not attract the provisions of S. 194-I. (AY. 2010-11)
ACIT v. Jet Airways (India) Ltd. (2013) 95 DTR 173 / 28 ITR 594 / 158 TTJ 289 / (2014) 146 ITD 682 (Mum.)(Trib.)

S.194-I : Deduction at source – Rent – Lease premium – MMRDA – Capital expenditure – No Liability to deduct tax – Order passed beyond limitation period. [S.194I, 201(1A)]
Held, the assessee was not liable to deduct tax on payment of lease premium because it was capital expenditure to acquire land on lease with substantial right to construct a commercial building complex.
The finding of the CIT(A) that the order was passed beyond the period of limitation u/s 201(3) was correct, and hence, no interference is required with the order. (AYs.2007-2008, 2009-10)
ITO v. Indian Newspapers Society (2013) 25 ITR 377 / 144 ITD 668 (Delhi)(Trib.)

S.194-I : Deduction at source – Rent – Provision for rent vis-a-vis actual payment – TDS liable to be deducted on actual rent payment and not on provision [S. 201(1), 201(1A)]
The assessee was operating its hotel business from a leasehold building. Due to dispute over the rent payable to the landlord, the lease rent to be paid is not finalized. The landlord demanded lease rent of Rs. 75 Lakhs per month whereas the assessee was offering Rs.50 Lakhs for the leasehold premises. In these circumstances, the assessee at the time of closing its Books of Account for the year ended 31-3-2007 made a provision of an amount of Rs. 9 Crore as lease rent i.e. @ Rs. 75 Lakhs per month payable to the landlord. Since the lease rent was not agreed upon neither the assessee paid any lease rent nor remitted any amount by way of TDS towards the lease rent. However, in the Computation of Income, the assessee added back the entire sum of Rs. 9 Crores debited to the Profit & Loss Account and offered the same to tax. Subsequently, the assessee and the landlords agreed upon a monthly rent of Rs. 50 Lacs per month and therefore, the assessee reversed the provision for the lease rent to the extent of Rs.3 Crores in its Books of Account. The assessee also remitted the TDS as applicable on the actual lease rent of `6 Crores per annum, together with interest for delayed remittance. The Assessing Officer while passing the Assessment Order held that the assessee is liable to deduct TDS on Rs.9 Crores being the provision for rent. The CIT(A) after considering the submissions of the assessee granted relief to the assessee. The Tribunal upheld the order of the CIT(A) by observing that the assessee had deducted and remitted TDS on the lease rent of Rs. 6 Crores after the same was

agreed to between the assessee and the landlord, it could not be contended that the assessee was liable to deduct tax on a provision of Rs. 9 Crores initially made by the assessee. (AY. 2007-08)
ITO v. Hotel Parag Ltd. (2012) 53 SOT 205 / (2013) 86 DTR 12 / 154 TTJ 382 (Bang.)(Trib.)

S.194-I : Deduction at source – Rent – Wagon Investment scheme' – Not liable to deduct tax at source [S.40(a) (ia)]
Assessee is engaged in business of mining and processing of iron ore. For its logistical requirement, it entered into an agreement with Indian Railway where under, it made an investment in 'Wagon Investment scheme' where under it was entitled to get assured supply of particular number of rakes on monthly basis and was charged with regular freight. Such entitlement if remained unused could be seconded to other concerns and vice-versa. Assessee used entitlement rights of two companies, FGCP and RSP and made payments to them as wagon facilitation charges. Assessing Officer formed an opinion that such charges were paid as hire charges under an arrangement entered with said two companies on which tax was to be deducted under section 194-I. As assessee failed to deduct tax, payments were disallowed under section 40(a) (ia). It was noted that wagons procured under scheme were to merge and operate in general pool of wagons of Indian Railways and were to be reverted back to Indian Railways after 10 years. Tribunal held that rent as defined under section 194-I has to be understood from point of view of ownership and Assessing Officer could not correlate WI Scheme in question and rent. Assessing Officer misdirected himself by holding arrangement with two companies as arrangement under section 194-I. Therefore, order of Assessing Officer was to be set aside. In favour of assessee. (AY. 2008-09)
Bonai Industrial Co. Ltd. v. Dy. CIT (2013) 55 SOT 363 (Cuttack)(Trib.)

S.194J : Deduction at source – Fees for professional or technical services – Service tax was not subject to TDS
As per terms of agreement, amount of service tax was to be paid separately and same was not included in professional or technical service. Hence, same was not liable to be included in professional or technical service and no tax was liable to be deducted from the same.
CIT v. Rajasthan Urban Infrastructure (2013) 218 Taxman 10 (Mag.)(Raj.)(HC)

S.194J : Deduction at source – Fees for professional or technical services – Fees paid to consultant doctors is not salary – Tax is deductible under section 194J [S. 192, 201(1A)]
Consultant doctors were employed in hospital in addition to full time resident doctors. The consultant doctors were rendering services under contract. They declared professional fees in their returns and paid tax thereon. Fees paid to them was not salary and tax was deductible under section 194J and not under section 192. Since there was no loss to the Revenue, levy of interest was not justified. (AY.2007-08)
CIT (TDS) v. Apollo Hospitals International Ltd. (2013) 359 ITR 78 (Guj.)(HC)

S.194J : Deduction at source – Fees for professional or technical services – Service tax – Under contract to be paid separately – Not subject to tax deduction at source
The words, "any sum paid", used in section 194J relate to fees for professional services or fees for technical services. According to the terms of the agreement, the amount of service tax was to be paid separately and was not included in the fees for professional services or fees for technical services. Therefore, the orders passed by the Commissioner (Appeals) as well as the Tribunal were in accordance with the provisions of section 194J. Whether the service tax was to be paid separately or not, was purely a question of fact and under the agreement it was to be paid separately and there was a finding of fact in this regard, recorded by the Commissioner (Appeals) as well as the Tribunal. Even if the Circular dated April 28, 2008, was held to be not applicable in the assessee's case, the orders

passed by the authorities below were in accordance with the provisions of section 194J looking to the facts and circumstances of the case.(AY.2007-08)
CIT (TDS) v. Rajasthan Urban Infrastructure Development Project (RUIDP) (2013) 359 ITR 385 (Raj.)(HC)

S.194J : Deduction at source – Fees for professional or technical services – Service tax – As per contract Service tax was to be paid separately – Tax was not deductable on service tax [S. 194I]
Jaipur Bench of the Tribunal held that if the parties to a contract for provision of technical or professional services agree only on the consideration for such services and that service receiver agrees only on the consideration for such services and that the service receiver shall pay the applicable service tax to the service provider as per the extant law, then no tax need to be deducted at source on such service tax. It was further held by the Tribunal that if the contracted amount includes the amount of service tax, then tax ought to be deducted at source on the service tax portion as well. On appeal by revenue the High Court dismissed the appeal of revenue and confirmed the order of Tribunal. (AY.2006-67, 2008-09)
CIT v. Rajasthan Urban Infrastructure Development Project (RUIDP) (2013) 261 CTR 628 / 92 DTR 401(Raj.)(HC)

S.194J : Deduction at source – Fees for professional or technical services fee – Portfolio management scheme – On entry load fees – Not in the nature of management fee – No tax is required to be deducted
The assessee paid entry load fees at the time of subscription of PMS. No management fee was paid. The AO. misconstrued the aforesaid payment as towards management fees and held that the assessee was liable to deduct tax u/s. 194J. The assessee contended that, since, no management fees was paid and only entry load was paid, which is not subject to TDS. ITAT held that the nature of payment in this case is placed on record by way of agreement and same is not reproduced for the sake of brevity. The ITAT perused the PMS agreement and on perusal of the above held it clearly demonstrates that the AO was wrongly construed the aforesaid payment as was made towards management fees. entry load fees at the time of subscription of portfolio management scheme (“PMS”). Thus, there is no such liability on part of the assessee to deduct tax at source u/s 194J of the Act.
Hero MotoCorp Ltd. v. ACIT (2013) 60 SOT 25 (URO) 36 taxmann.com 103 (Delhi)(Trib.)

S.194J : Deduction at source – Fees for professional or technical service – Extraction of oil and natural gas
The assessee was engaged in project of carrying out drilling operation in exploration or extraction of oil and natural gas. Assessee obtained different oilfield services and consistently deducted TDS u/s. 194C. A.O. held that contract was for technical services and provisions of Sec. 194J were applicable. The Tribunal held that as per instruction no. 1862 of CBDT, services sought by assessee for extraction of Oil, could be termed as mining operation and not technical services. TDS not deducted u/s. 194J and *Res Judicata* is not applicable in Income Tax Proceedings as each assessment year is separate and independent, principle of consistency to be maintained when facts are identical. (AY. 2008-09)
Oil India Ltd. v. Dy. CIT (2013) 145 ITD 513 / 94 DTR 273 / 158 TTJ 1 (Jodh.)(Trib.)

S.194J : Deduction at source – Fees for professional or technical services – Transmission charges/wheeling fees could not be considered as fees for technical services – No Liability to deduct tax at source
The assessee was not liable to deduct tax at source as payment made by way of wheeling/transmission charges could not be considered as fees for technical services.(AY. 2007-08)
ACIT v. Dakshin Haryana Bijli Vitran Nigam Ltd. (2013) 59 SOT 133 (URO)(Delhi)(Trib.)

S.194J : Deduction at source – Fees for professional or technical services – Technical service fees – Exploration of oil and natural gas – Hire charges – Contract [S.9(1)(vii), 194C, 194-I]

The assessee had undertaken projects of exploration of oil and natural gas and made payment towards seismic survey and pre-mining activities which would not be covered under exception carved out in Explanation 2 to section 9(1)(vii) and would be considered as fees for technical service and therefore, liable to TDS under section 194J. Payment of hiring charges on availing services of vehicles is liable to TDS under section 194C.For AMC paid for EPINET, VRC Hardware, PSDM sub-system, ACs, lifts and UPS facility, section 194C is applicable and not provision of section 194J.(AY. 2009-10)

Oil & Natural Gas Corpn. Ltd. v. ACIT (2013) 59 SOT 160 (URO) / 22 ITR 587 / 143 ITD 159 (Ahd.)(Trib.)

S.194J : Deduction at source – Fees for professional or technical services – Payments made for services of modelling are unconnected with production of cinematographic film, and, thus, said payments are not covered by provisions of section 194J [S.194C]

The assessee is a subsidiary company engaged in manufacturing cameras, trading in cameras and dealing in photographic films in and out of India. The assessee deducted tax at source under section 194C while making payments to modeling. The AO held that the payment made by the assessee were towards fees for a model and it fell within the purview of Explanation(a) to section 194J. On appeal the ITAT held that taxable receipts under section 194J are services specific and not person specific. Payments made for services of modelling are unconnected with production of cinematographic film, and, thus, said payments are not covered by provisions of section 194J. (AY. 2007-08)

Kodak India (P.) Ltd. v. Dy. CIT (2013) 58 SOT 251 (Mum.)(Trib.)

S.194J : Deduction at source – Fees for professional or technical services – Royalty – Purchase of computer software hence not liable to deduct tax at source [S.9(1) (vii), 40(a) (i)]

Assessee is a company engaged in business of purchase and sale of computer software. It made a payment for purchase of software from persons who were resident in India. Assessee did not deduct tax at source while making payments towards such purchases. Assessing Officer opined that payment was made for acquiring a right to use software which was in nature of royalty. According to Assessing Officer, since assessee did not deduct tax at source while making payments in question, same were to be disallowed. Commissioner (Appeals), however, took a view that amount paid by assessee towards purchase of computer software as a good could not be treated as payment of royalty and, therefore, disallowance made by Assessing Officer was not sustainable. Tribunal held that on facts, impugned order of Commissioner (Appeals) deleting addition was justified and called for no interference.(AY. 2007-08)

ACIT. v. Sonata Information Tech. Ltd. (2013) 152 TTJ 590 / 55 SOT 455 (Mum.)(Trib.)

S.194J : Deduction at source – Fees for professional or technical services – Wheeling and transmission charges – Not liable to deduct tax at source [S.194C]

Tribunal held that wheeling and transmission charges paid by assessee state electricity distribution company in case of which provisions of Electricity Act, 2003 is applicable are not liable for deduction of tax either under section 194J or section 194C. In favour of assessee. (AY.2007-08, 2008-09)

Maharashtra State Electricity Distribution Co. Ltd. v. ACIT (2013) 55 SOT 84 (URO) (Mum.)(Trib.)

S.194LA : Deduction at source – Compensation on acquisition of certain immoveable property – Purchase of land under the provisions of Chhattisgarh Nagar Tatha Gram Nivesh Adhiniyam, 1973. [S.201]

Purchase of lands by the assessee from local authority from various landowners under the provisions of Chhattisgarh Nagar Tatha Gram Nivesh Adhiniyam, 1973 did not amount to compulsory acquisition of land as the said enactment does not authorize compulsory acquisition of land and, therefore, the provisions of s. 194LA were not applicable. (AY. 2008-09)

Naya Raipur Development Authority v. ITO (2013) 91 DTR 393 (Bilaspur)(Trib.)

S.194LA : Deduction at source – Compensation on acquisition of certain immoveable property – Payment made to the competent authority to remit the same to the actual beneficiary – TDS provisions are not applicable to such transaction
The Tribunal held that payment of compensation for compulsory acquisition of land under the Metro Railways (Construction of Works) Act, 1978 is made by the assessee to the competent authority appointed under section 16 of the said Act, and it is the competent authority, who in turn, makes the payment to the landowners, and therefore, TDS liability under section 194LA comes into play only when the payments are made by the competent authority to the actual beneficiaries of compensation and not when payments are made by the assessee to the competent authority. (AY. 2005-06 to 2009-10)
Metro Railway Kolkata v. ITO (2013) 87 DTR 33/154 TTJ 592 (Kol.)(Trib.)

S.195 : Deduction at source – Non-resident – Commission to foreign agents – Withdrawal of circular latter – Circular was operative at relevant time – Not liable to deduct tax at source [S.9(1)(vii), 40(a)(i)]
Since assessment should be governed by circular that was operative at relevant time, assessee was under no obligation to deduct TDS in view of Circular Nos. 23 of 1969, 163 of 1975 and 786 of 2000, notwithstanding that Circular No. 7 of 2009 dated 22-10-2009 had withdrawn earlier circulars. (AY. 2007-08)
CIT v. Model Exims (2013) 358 ITR 72 / 219 Taxman 289 (All.)(HC)

S.195 : Deduction at source – Non-resident – Royalty – Cancellation of agreement – No liability to deduct TDS [S.201]
Where agreement with regard to payment of royalty was cancelled, no royalty was payable and, therefore, no question of deducting TDS would arise. (AY.2002-03)
CIT v. Wipro Healthcare IT Ltd. (2013) 216 Taxman 42 (Mag.)(Karn.)(HC)

S.195 : Deduction at source – Reimbursement of salaries of seconded employees –Payment already subjected to tax – DTAA-India-UK. [S. 201, Article 13(4)]
Merely providing employees or assisting the assessee in the business and in the area of consultancy, management, etc. would not constitute making available the services of any technical or consultancy nature. Fees for technical services means payment of any kind to any person in consideration for service or services of technical nature if such services make available technical knowledge, experience, skill know-how or process which enables the person acquiring the services to apply technology contained therein. Thus, expatriation of employee under a secondment agreement without transfer of technology would not fall under the term make available under Article 13(4)(c) of the DTAA. (AY. 2010-11)
Addl. DIT (IT) v. Mark and Spencer Reliance India P. Ltd. (2013) 27 ITR 448 (Mum.)(Trib.)

S.195 : Deduction at source – Non-resident – Shipping business – Demurrage charges are liable to be taxed under section 172 – Not liable to deduct tax at source [Ss.194C, 172]
Provisions of sections 194C and 195 relating to tax deduction at source are not applicable where provision of section 172 relating to shipping business are applicable, assessee was not liable to deduct tax at source, as demurrage charges are liable to be taxed under section 172 in hands of shipping company. (AY.2009-10)
Sesa Goa Ltd. v. JCIT (2013) 60 SOT 121 (URO)(Panaji)(Trib.)

S.195 : Deduction at source – Non-resident – Shipping business – Ocean freight – Not liable to deduct tax at source [Ss.40(a)(i), 172]

Assessee paid ocean freight expenses to non-resident shipping company. AO disallowed ocean freight expenses to non–resident shipping company. AO disallowed the expenses on ground that assessee not deducted tax at source. The Tribunal held that since income of non-resident shipping companies was separately taxed under section 172, assessee was not required to deduct tax at source. Disallowance cannot be made. (AY.2007-08)
Gujarat Reclaim & Rubber Products Ltd. v. Addl. CIT (2013) 60 SOT 22 (Mum.)(Trib.)

S.195 : Deduction at source – Non-resident – Net of royalty on sales returns – Deduction as per invoices raised. [S.40(a)(i)]
The assessee was a distributor of software of Microsoft. Whenever there ware sales returns, Microsoft used to issue credit notes for royalty refund arising out of sales returns. While making payment to Microsoft, assessee deducted tax at source on amount which was net of returns. Held, even if subsequent issue of credit note by manufacturer came to knowledge of the assessee-distributor when credit entries for royalty payment were passed by assessee in its books, it was obliged to deduct tax at source based on invoices or demands raised by manufacturer.(AY. 2006-07)
Redington (India) Ltd. v. ACIT (2013) 59 SOT 152 (URO) (Chennai)(Trib.)

S.195 : Deduction at source – Non-resident – Foreign agent – Commission – Not liable to deduction of tax at source [S.40(a)(ia)]
Tribunal held that where foreign agents were appointed to act as a selling agents of assessee outside India, commission earned by them for services rendered by them outside India could not be considered as income chargeable to tax in India, therefore, when commission paid to non-residents were not chargeable to tax under provisions of Act, no deduction of tax was required to be made under section 195(1) warranting disallowance under section 40(a) (i). (AY.1998-99)
ACIT v. Priyadarshini Spinning Mills (P.) Ltd. (2013) 55 SOT 432 (Hyd.)(Trib.)

S.195 : Deduction at source – Non-resident – Reinsurance premium – Matter remanded [S.40(ia)]
Assessee-company paid reinsurance premium to non-resident reinsurance companies. Assessing Officer finding that assessee did not deduct tax at source while making said payments, disallowed same. On appeal, assessee relied on order passed by Supreme Court in case of *GE India Technology Cent. (P.) Ltd. v. CIT [2010] 193 Taxman 234* to contend that reinsurance premium paid to non-resident reinsurance companies was not taxable in their hands and, therefore, question of deducting tax at source did not arise. Assessee also brought on record details of reinsurance premium ceded to non-resident insurance companies, profit margin of assessee-company, explanation on concept of unexpired risk reserve, etc. Tribunal held that since aforesaid details were not available before lower authorities, it was appropriate to remit matter back to concerned assessing authority to reframe assessments in light of the new materials and latest judicial pronouncements. Matter remanded. (AY.2001-02 to 2010-11)
Royal Sundaram Alliance Insurance Co. Ltd. v. ACIT (2013) 55 SOT 429 (Chennai)(Trib.)

S.195 : Deduction at source – Non-resident – NRI purchasing flat, seller is liable to deduct tax at source as the tax was not deducted liable to be held as assessee in default under section 201(1) [S.201 (I)]
NRI assessee purchased a residential flat from one G whose Hong Kong address given in sale deed indicated that she was NRI seller. Assessing Officer opined that assessee had failed to make TDS at prescribed rate on sale consideration as required by section 195 before making payment to NRI seller and therefore, he was assessee-in-default under section 201 (1). Assessee claimed that he was unaware of provisions of section 195 and also thought that seller was resident in India. Tribunal held that assessee's said claim would not absolve him of duty to make TDS under section 195 when seller's address given in sale deed clearly established that she was NRI and therefore, he ought to

have made TDS. Therefore, assessee was rightly held as assessee in default in accordance with provisions of section 201 (1). (AY. 2007-08)
Syed Aslam Hashmi v. ITO (2013) 55 SOT 441 (Bang.)(Trib.)

S.195 : Deduction at source – Non-resident – Sale consideration – Purchase of flat –Capital gain – Liable to deduct tax on entire consideration unless application is made to the Assessing Officer under section 195(2)
NRI assessee contended that Assessing Officer had wrongly quantified TDS under section 195 by applying specified rate on entire sale consideration paid to NRI seller for purchase of residential flat and not on capital gain arising on this transaction. Assessee also stated that tax on said capital gain was duly paid, However, it was found that assessee did not fulfil requirement of section 195(2) *vide* which he was required to make application to Assessing Officer to determine amount chargeable if he had considered that whole or part of sale consideration would not be income in hands of NRI seller. Tribunal held that when assessee did not apply for lower or no deduction of tax, he was statutorily duty bound to have deducted tax at specified rate on entire sale consideration before making payment to NRI seller, therefore, quantification of TDS as made by Assessing Officer was to be upheld. In favour of revenue. (AY.2007-08)
Syed Aslam Hashmi v. ITO (2013) 55 SOT 441 (Bang.)(Trib.)

S.195 : Deduction at source – Non-resident – Surcharge – Educational cess – DTAA -India-France – If DTAA is silent, no obligation to deduct surcharge & education cess.[Ss.90, 201(1), Art 12, 13]
The assessee made a remittance of management fee and interest to a resident of France. The AO held that in deducting TDS thereon u/s 195, the assessee ought to have deducted surcharge and education cess. The assessee claimed that as the India-France DTAA was silent about inclusion of surcharge & education cess, it was under no obligation to do so. HELD by the Tribunal upholding the assessee's plea:
The India-France DTAA does not say anything about inclusion of surcharge and education cess for the purpose of deduction of tax at source. Therefore, there is an apparent conflict between the Income-tax Act and the DTAA between the two sovereign countries with regard to deduction of tax at source on surcharge and education cess. U/s 90(2) if the provisions of the DTAA are more beneficial to the taxpayer, the DTAA prevails over the Act. Since the DTAA is silent about the surcharge and education cess for the purpose of deduction of tax at source, the taxpayer may take advantage of that provision in the DTAA for deduction of tax. (AY. 2003-04 to 2008-09)
ITO v. M. Far Hotels Ltd (2013) 156 TTTJ 137 / 58 SOT 261 / 92 DTR 138 (Cochin)(Trib.)

S.195(2) : Deduction at source – Non-resident – Lower deduction of tax at source – Assessing Officer has no power to issue Nil TDS certificate under section 195(2) – Tax was required to be deducted on shares issued to CIMAB [S. 9(1)(vi), 195(3) 201]
The assessee entered into a Joint Venture agreement with CIMAB SA, Cuba, to set up a JVC in India. It was agreed that CIMAB would provide technology to the JVC in consideration for which it would be allotted 49% of the equity capital of the JVC. The assessee filed an application u/s. 195(2) claiming that the technology was not chargeable to tax in India and that the shares should be permitted to be allotted without TDS. The AO passed an order u/s 195(2) in which he accepted the assessee's contention that no TDS was required to be deducted on the allotment of shares. However, later the AO took the view that the allotment of shares in consideration of the technology transfer was chargeable to tax and that the assessee was in default u/s 195 & 201. This was upheld by the CIT(A). Before the Tribunal the following issues arose: (i) whether u/s 195(2) the AO has the jurisdiction to issue a certificate that no tax need be deducted at source, (ii) whether s. 195(1) applies where payment is made in kind and not in money terms & (iii) whether the consideration (in the form of shares) for

technology transfer can be said to be "transfer of a capital asset" outside India so as to be exempt from tax? HELD by the Tribunal:

(i) S. 195(2) presupposes that the person responsible for making the payment to a non-resident is in no doubt that tax is payable in respect of the some part of the amount to be remitted to a non-resident, but is not sure as to what should be portion so taxable or is not sure as to the amount of tax to be deducted. Consequently, in an application made u/s 195(2), the AO cannot assume jurisdiction to hold that the entire payment is not chargeable to tax and the payer need not deduct tax at source. As the AO had no power u/s 195(2) to hold that no tax is deductible at source, the order passed by him holding that no tax is deductible at source on the technology transfers is non est in law. As there is no estoppel against the law, the assessee cannot take advantage of such an order (*GE India Technology Centre (P) ltd. v. CIT (2010) 327 ITR 456 (SC)* referred)

(ii) The argument that s. 195(1) does not apply to a case where shares are allotted is not acceptable because the expression "any other sum chargeable under the provisions of the Act" in s. 195(1) has to be read in conjunction with the words "at the time of credit of such income …. in cash … or by any other mode". Thus payment in terms of the money is not the only mode contemplated u/s 195(1) of the Act. The use of the expression "or by any other mode" makes the intention of the legislature clear that s. 195(1) applies even to cases where payment is made otherwise than by money.

(iii) The definition of "royalty" in Explanation 2 to s. 9(1)(vi) excludes consideration which would be income of the recipient chargeable under the head 'capital gains'. For application of the above exclusion clause, it is necessary that (a) technical know-how should be a capital asset in the hands of CIMAB, (b) the said technical know-how should be capable of being transferred and should have been transferred by CIMAB, (c) the machinery provisions viz., the computation of capital gain as given in s. 48 should be capable of being applied & (d) the transfer of technical know-how should have taken place outside India. On facts, the assessee has not shown that the transfer of technical know-how took place outside India. Further, the terms make it clear that there was no transfer of the know-how by CIMAB to the assessee but the assessee had a mere right to use the know-how, though the nomenclature used in the Agreement is 'transfer of technology'. Consequently, the consideration for the know-how constitutes "Royalty" under Explanation 2(iv) to s. 9(1)(vi).Application for non deduction of tax at source can be made only under section 195(3) , any such application made under section 195(2) is not valid.(AY. 2004-05 to 2006-07)

BIOCON Biopharmaceuticals Pvt. Ltd. v. ITO (2013) 144 ITD 615 (Bang.)(Trib.)

S.197 : Deduction at source – Certificate at lower rate – Mutual agreement procedure – Application pending – Nil withholding certificate – If the proceedings are under consideration of the competent authorities under the mutual agreement procedure, the collection and assessment of taxes would stop at least from the date when the mutual agreement proceedings are commenced for the assessment year 2010-2011 – DTAA-India-USA [S.90, Art.27]

An identical issue as arising in the current year was the subject-matter of the mutual agreement procedure for earlier assessment years and nil tax withholding orders had been issued. For the instant year, the assessee had moved the competent authority in the USA under the mutual agreement procedure(Art. 27 of India-USA DTAA) to resolve its claim that no withholding tax was payable in respect of the amounts received by it. A memorandum of understanding (MOU) was arrived at between the USA and India which, *inter alia*, provides for deferment of assessment and/or suspension of collection of tax during the mutual agreement procedure.

An application for a certificate of nil withholding tax under section 197 was made to the Assessing Officer while pointing out certificates passed for nil tax withholding orders passed for the earlier assessment years and its application to the competent authority in the USA. Besides, in terms of the MOU, the assessee also furnished a bank guarantee of Rs. 6,07,55,238/-. In the meantime, notice had been issued by the Department to Respondent No.1 to deduct the tax in respect of payment being

made by it to the assessee. In the above circumstances, this notice was held invalid. Petition was allowed. (AY.2010-2011)
UPS Worldwide Forwarding Inc. v. UPS Jetair Express P. Ltd. (2013) 359 ITR 427 / (2014) 101 DTR 150 (Bom.)(HC)

S.197 : Deduction at source – Certificate at lower rate – Cancellation of certificate with retrospective effect is not valid
Validity of certificate under section 197(1) would be there till it is cancelled, however, no retrospective effect is to be given to it. (AY.1998-99)
Essar Oil Ltd. v. ITO (2013) 215 Taxman 365 / 262 CTR 63 / 92 DTR 330 (Guj.)(HC)

S.197 : Deduction at source – Certificate at lower rate – Income – Interest on arbitration award – When arbitration award is alive and is pending income does not accrue – Assessing Officer was directed to issue the certificate [S.4, 5, Civil Procedure Code, 1908 [S.144]
The court held that so long as the challenge to the arbitral award is alive and is pending, and the legality of the arbitral award has not attained finality, the amount which has been awarded has not attained finality, the amount which has been awarded does not represent income which has accrued, no interest income can also be said to accrue, the Assessing Officer was directed to issue the certificate under section 197. (AY. 2013-14)
DSL Enterprises (P) Ltd v. N.C. Chandratre (Mrs.) ITO (2013) 355 ITR 209 / 258 CTR 155 / 84 DTR 451 / 216 Taxman 173 (Mag.)(Bom.)(HC)

S.197 : Deduction at source – Certificate at lower rate – Short deduction of tax-Certificate for deduction at lower rate issued to principal officer of M unit – Assessee is not in default merely on ground certificate not issued in name of B unit. [S.194C, 204, Income–tax Rules, 1962, Rule 28AA]
The assessee had appointed various persons for executing the works, making it liable to deduct tax at the rate prescribed under section 194C of the Act. The assessee's Mumbai unit had a separate tax deduction account number from its Bahadurgarh unit. The Mumbai unit held a certificate under section 197 permitted deduction of tax at a lower rate. On the ground that the two units were separate entities for the purpose of deduction of tax at source the Assessing Officer recorded a finding of short deduction of tax at source and passed an order under section 194C. The Commissioner (Appeals) held that since the genuineness of the issue of certificates under section 197 had not been doubted by the Assessing Officer, there was no justification to hold that the assessee was in default merely on the ground that the certificate was not issued in the name of the Bahadurgarh unit. This was affirmed by the Tribunal. On appeal by revenue the Court dismissing the appeal, held that the Assessing Officer of the contractors had furnished a certificate under section 197 to the principal officer of the Mumbai unit in terms of clause (iii) of section 204 mandating the persons to whom such certificate was issued to deduct tax at a rate lower than the prescribed rate under section 194C. Merely because the assessee had got separate tax deduction account numbers for the Bahadurgarh unit and for the Mumbai unit, that would not render the certificate issued under section 197(2) redundant. Such certificate was to be issued to the principal officer of the company as the person responsible for deduction of tax and not to any other person or unit of the assessee. Therefore, the order passed by the Commissioner (Appeals) and affirmed by the Tribunal could not be said to suffer from any illegality in any manner.
CIT (TDS) v. Parle Biscuits Pvt. Ltd. (2013) 351 ITR 138 / 88 DTR 77 / 259 CTR 565 / 216 Taxman 13 (P&H)(HC)

S.197 : Deduction at source – Certificate at lower rate – Security charges – Society [S. 80P]
The assessee paid towards security services provided by society whose income was exempted u/s. 80P. It had not deducted TDS on submission of no deduction certificate issued by concerned authority to payee Society. A.O. found that said certificate did not mention validity period and held that the assessee

was liable to deduct TDS. Assessee submitted that it had furnished copy of no deduction certificate related to society. The Tribunal held if on verification it was found assessee was having certificate issued by competent authority for non deduction of TDS on payment made to said society, assessee could not be held as assessee in default for non deduction of TDS. (AY. 2009-10)
Oil India Ltd. v. Dy. CIT (2013) 145 ITD 513 / 94 DTR 273 / 158 TTJ 1 (Jodh.)(Trib.)

S.199 : Deduction at source – Credit for tax deducted – Joint venture – Income shown – Credit must be given though the certificates in the name of joint venture or director of the company [Income-tax Rules, 1962, Rule, 37BA]
Assessee-firm, along with three others entered into a joint venture agreement for carrying out works contract for Municipal Sewerage Board. TDS was deducted and assessee claimed credit of tax mentioned in the TDS certificates. Assessing Officer refused to give credit on ground that some of TDS certificates belonged to joint venture. Held, income shown in TDS certificates had either to be taxed in hands of joint venture or in hands of individual co-joint venture. Since joint venture had not filed return of income and claimed credit for TDS certificates, said credit was to be allowed to assessee in capacity of a co-joint venture. Revenue cannot be allowed to retain tax deducted at source without credit being available to anybody .If credit of tax is not allowed to the assessee and the joint venture has not filed a return of income, then credit of the TDS cannot be taken anybody. This is not the spirit and intention of law. (AY.2004-05)
CIT v. Bhooratnam and Co. (2013) 216 Taxman 6 / 357 ITR 396 / 92 DTR 382 / 262 CTR 405 (AP)(HC)

S.199 : Deduction at source – Credit for tax deducted – TDS Credit must be given even if TDS Certificate is not available/ entry is not shown in Form 26AS [S.26AS]
The assessee claimed credit for TDS which was denied by the AO on the ground that the claim did not match the entries shown in Form No. 26AS and that there was a discrepancy. On appeal, the CIT(A) held that the assessee would be entitled to credit to the extent shown in the computer system of the department. On further appeal by the assessee to the Tribunal HELD:
The AO is not justified in denying credit for TDS on the ground that the TDS is not reflected in the computer generated Form 26AS. In *Yashpal Sahni v. ACIT (2007) 293 ITR 539 (Bom)* the Bombay High Court has noted the difficulty faced by taxpayers in the matter of credit of TDS and held that even if the deductor had not issued a TDS certificate, still the claim of the assessee has to be considered on the basis of the evidence produced for deduction of tax at source. The Revenue is empowered to recover tax from the person responsible if he had not deducted tax at source or after deducting failed to deposit with Central Government. The Delhi High Court has in Court On Its *Own Motion v. CIT (2013) 352 ITR 273(Delhi)(HC)* directed the department to ensure that credit is given to the assessee even where the deductor had failed to upload the correct details in Form 26AS on the basis of evidence produced before the department. Therefore, the department is required to give credit for TDS once valid TDS certificate had been produced or even where the deductor had not issued TDS certificates on the basis of evidence produced by assessee regarding deduction of tax at source and on the basis of indemnity bond. (AY. 2007-08)(ITA No. 8532/Mum/2011, dated 13-9-2013)
Citicorp Finance (India) Ltd. v. ACIT (Mum.)(Trib.) www.itatonline.org

S.200 : Deduction at source – Duty of person deducting tax – Authorised person – Procedural [S. 201(1)]
Tribunal held that sub-section (3) of section 200 as inserted by Finance (No 2) Act, 2004 with effect from 1-4-2005, mentioning that authorised person to initiate proceedings is DGIT (System)/NSDL, is a procedural section to streamline process of statements in computerised set up; however, this section does not take away powers of Assessing Officer to initiate proceedings under section 201 (1). Matter remanded. (AY. 2010-11 to 2012-13)

Kingfisher Airlines Ltd. v. ACIT (2013) 55 SOT 370 (Bang.)(Trib.)

S.201 : Deduction at source – Failure to deduct or pay – Assessee in default – Bona fide belief regarding exemption for conveyance allowance – finding that action of non-deduction of TDS was bona fide and therefore assessee could not be treated as assessee in default. [S. 192,201(IA)]
The assessee was deducting tax on conveyance allowance upto January 1993. Subsequently, a *bona fide* doubt was felt as to whether tax was required to be deducted on conveyance allowance. Assessee obtained declaration from its employees, and on the basis of the declaration, tax was not deducted at source. Assessing Officer held the assessee to be an assessee in default, and passed orders under section 201(1A), which were upheld by the CIT(A). The Tribunal allowed the assessee's appeal accepting the assessee's explanation to be *bona fide*. On appeal, held, dismissing the appeal:
The finding of the ITAT that the assessee's non-deduction was based on bona fide belief is a finding of fact which cannot be interfered with. Deduction of tax on estimated income reflected by employer under s. 192(1) is based on bona fide estimation. In the absence of a specific direction by the AO, if the assessee is not mala fide, he cannot be treated as an assessee in default. In these circumstances, the assessee was not liable for payment of interest u/s 201(1A).
CIT v. JK Synthetics (2013) 95 DTR 71 (All.)(HC)

S.201 : Deduction at source – Failure to deduct or pay – Exempt income – Holiday home scheme – Amount not spent – Fringe benefits tax was paid – No default on failure to deduct tax at source [S.10(14) 17(1)(iv), 115WB, 201(1), (1A), Rule 3(7)(ii) of Income-tax Rules, 1962]
Payment received under holiday home scheme is exempt in employee's hands only if used towards hotel boarding and lodging facilities for holidays, and the amounts not spent towards holiday home scheme would constitute employee's taxable income. However, as long as the fringe benefits tax regime was in existence, the assessee had already paid the fringe benefits tax under section 115WB. Therefore, there was no default on the part of the assessee under section 201(1).
CIT (TDS) v. Oil and Natural Gas Corporation (India) Ltd. (2013) 358 ITR 131 / 220 Taxman 187 (Guj.)(HC)

S.201 : Deduction at source – Failure to deduct or pay – Conveyance allowance – Reimbursement of travelling expenses – *Bona fide* belief – Cannot be treated as assessee in default [S.201(IA)]
Assessee was deducting tax on conveyance allowance. During relevant year, a *bona fide* doubt arose as to whether tax was to be deducted on conveyance allowance paid for reimbursement of travelling expenses for which declaration/certificates were given by employees. Assessee obtained declaration from employees and on such declaration, tax was not deducted. Assessee-company took up plea that it had discussions with concerned Income-tax Officer and submitted a letter as proof of in this regard. On facts, findings of the Tribunal was that action of assessee for not deducting tax at source was based on *bona fide* belief. The Court Held that where Tribunal found that action of assessee for not deducting tax at source on conveyance allowance paid to its employees was based on *bona fide* belief, assessee could not be treated as assessee in default liable to interest under section 201(1A). (AY.1992-93)
CIT v. I.T.C. Ltd. (2013) 263 CTR 241 / 95 DTR 71 / (2014) 220 Taxman 414 (All.)(HC)

S.201 : Deduction at source – Failure to deduct or pay – Liability for payment of tax and interest [S.201(1)]
Where the recipient-deductee had been assessed on its income and tax due on same had been paid, no further tax could be collected by Assessing Officer from assessee-payer deductor by raising demand under s. 201(1). However, interest could be charged on assessee-deductor from date of its liability till date of actual tax payment by recipient-deductee. (AY. 2003-04)
S.A.A. Ispahani Trust v. ITO (2013) 216 Taxman 1 / 88 DTR 219 (Mad.)(HC)

S.201 : Deduction at source – Failure to deduct or pay – Short deduction – Demand cannot be raised for Short deduction of tax at source [S.201(1A)]

The Tribunal held that short deduction of tax at source, by itself does not result in a legally sustainable demand under s.201(1) and s.201(1A) The Tribunal further held that taxes cannot be recovered once again from the assessee in a situation in which the recipient of income has paid the taxes on income embedded in the payments from which tax withholding requirements were not fully or partly complied with. (AY. 2008-09)

ICICI Bank Ltd. v. Dy. CIT (2013) 90 DTR 401 / 156 TTJ 569 (Luck.)(Trib.)

S.201 : Deduction at source – Failure to deduct or pay – Assessee deemed to be in default – Commission paid to distributors

Tribunal held that if the tax was paid by distributors on the commission received then the assessee may not be in default under section 201(1) but assessee was liable to interest under section 201(1A). (AY. 2006-07 to 2008-09)

Dy. CIT v. Tata Teleservices Ltd. (2013) 154 TTJ 480 / 140 ITD 451 / 87 DTR 346 (Bang.)(Trib.)

S.201 : Deduction at source – Failure to deduct or pay – Survey – Matter set a side [S. 133A]

Assessee company is engaged in business and operating as a schedule passenger airline in India – A survey under section 133A was conducted in assessee's premises on 18-3-2011 in order to verify TDS compliance. In course of survey Assessing Officer noted that assessee-company had deducted TDS from employee's salaries but it had not remitted same to Government's account within due dates. Assessing Officer, though issued a show-cause notice, passed order in haste treating assessee to be assessee-in-default without providing assessee reasonable opportunity of being heard. Moreover, it was not clear how liability for default in terms of section 201(1) and levy of interest under section 201(1A) had been determined and as to whether remedies available to assessee for making adjustments had been exhausted. Order passed by Assessing Officer was to be set aside and, matter was to be remanded back for disposal afresh. (AY. 2010-11 to 2012-13)

Kingfisher Airlines Ltd. v. ACIT (2013) 55 SOT 370 (Bang.)(Trib.)

S.201 : Deduction at source – Failure to deduct or pay – Recovery provisions under section 201(1) can be invoked only when loss to revenue is established, matter remanded

Assessing Officer treated assessee as assessee-in-default for non-deduction of tax at source on several payments made. Assessee contended that since recipients had paid tax on income embedded in such payments, taxes could not once again be recovered. However, Assessing Officer held that assessee was not able to prove that taxes had been duly been paid by recipients. Further, assessee's request to Assessing Officer to 'use his statutory powers to corroborate from payers whether they had paid tax on their account' was also rejected. Tribunal held that recovery provisions under section 201(1) can be invoked only when loss to revenue is established, once assessee furnishes lawfully maintained information about recipients, Assessing Officer should first ascertain related facts about payment of taxes directly from recipients before invoking section 201(1). Matter remanded. (AY.2005-06, 2006-07, 2008-09)

Ramakrishna Vedanta Math v. ITO (2013) 55 SOT 417 (Kol.)(Trib.)

S.201 : Deduction at source – Failure to deduct or pay – Perquisites – Stay order of High Court assessee is not liable under section 201 [Ss. 192, 200]

Tribunal held where during assessment years, assessee-employer could not deduct TDS under section 192 on account of stay order of High Court for non-deduction of TDS on perquisites granted to employees, assessee could not be held liable under section 201.(AY. 200-03 to 2008-09)

State Bank of Indore v. ITO (2013) 55 SOT 422 / 142 ITD 215 (Indore)(Trib.)

S.201 : Deduction at source – Failure to deduct or pay – Firm – Partner – Penalty – Interest – Interest is not payable if no tax is payable by firm. Matter remanded (S.201(IA)

The Tribunal held that penalty under section 201(1) is compensatory in nature. Failure to deduct tax at source on interest paid by partner to firm. Penalty is not leviable if no tax is payable by firm. Matter remanded. (AY. 2005-06, to 2008-09)

Thomas Muthoot v. Dy. CIT [2013] 21 ITR 133 / 55 SOT 390154 TTJ 5 (UO)(Cochin.)(Trib.)

S.206AA : Requirement to furnish Permanent Account Number – Non-residents – Higher rate of tax – Grossing up [S.195A]

Where income is chargeable to tax in India irrespective of residential status of recipient, it has to obtain PAN and provide same to assessee-deductor. In case of failure of recipient to do so assessee is liable to withhold tax at higher rates as prescribed under section 206AA. Grossing up of the amount is to be done at the rates in force for the financial year in which such income is payable and not at 20 percent as specified under section 206AA. (AY.2011-12)

Bosch Ltd. v. ITO (2013) 141 ITD 38 / 155 TTJ 354 / 88 DTR 311 (Bang.)(Trib.)

S.206C : Collection at source – Distillery – Liability to deduct tax

In view of Explanation (a)(iii) of s. 206C, the petitioner distillery could not be termed as 'buyer' and they were excluded from provisions of s. 206C. Therefore, distillery was to be directed not to collect tax under s. 206C at time of purchase of country liquor.

Sankatha Shukla v. UOI (2013) 216 Taxman 294 / (2014) 98 DTR 128 (All.)(HC)

S.206C : Collection at source – Waste and scrap – Molasses, generated during sugar production is not waste or scrap – Not liable to deduct tax at source

Molasses generated during sugar production is not waste or scrap. Assessee not liable to collect tax at source.(AYs. 2007-08 to 2010-11)

Nawanshahar Co-op. Sugar Mills Ltd. v. ITO (2013) 85 DTR 121 / 153 TTJ 493 / (2014) 146 ITD 523 (Asr.)(Trib.)

S.206C : Collection at source – Scrap – Sale of scrap in the business of trading in scrap is also covered – Buyer has shown income in its return and paid tax thereon – Proviso in sub section 6A of section 206C with effect from July 1, 2012, being beneficial provision will have retrospective effect – Matter remanded

Section 206C of the Act is not restricted to sale of scrap generated from the business of manufacturing undertaken by the assessee himself but also covers sale of scrap in the business of trading in scrap, assessee itself having declared the goods imported by it as brass scrap before the customs authorities it is bound by that declaration and therefore, the material imported and sold by the assessee was scrap within the meaning of Explain (b) to section 206C of the Act, assessee was liable to collect tax at source. First proviso inserted in sub-section (6A) of section 206C with effect from July 1, 2012 not only seeks to rationalise the provisions relating to collection of tax at source but is also beneficial in nature in that it seeks to provide relief to the collectors of tax at source from the consequences flowing from non/short collection of tax at source after ensuring that the interest of Revenue is well protected, therefore the said proviso will apply retrospectively. (AY. 2009-10, 2010-11)

Bharti Auto Products v. CIT (2013) 92 DTR 345 / 27 ITR 611 / 145 ITD 1 (Rajkot)(SB) (Trib.)

S.206C : Collection at source – Meaning and scope of scrap – Definition of scrap as given in Expln. (b) to s.206C – not limited to scrap arising from the manufacture or mechanical working of materials alone but extends to cover waste also. [Explanation (b) to s.206C]

The Tribunal held that the applicability of s.206C is not restricted to sale of scrap generated from the business of manufacturing undertaken by the assessee himself but also covers sale of scrap in the business of trading in scrap. (AY.2009-10, 2010-11)
Bharti Auto Products v. CIT (2013) 92 DTR 345 / 27 ITR 611 / 145 ITD 1 (SB)(Rajkot)(Trib.)

S.206C : Collection at source – Allotment of parking lots to contractors
The assessee allotted parking lots to different contractors and did not collect tax at source from the contractors. Summons were issued under section 131 to the assessee to furnish details of tax collected at source pertaining to parking lots. After considering the reply of assessee the Assessing Officer passed the assessment order and noted that the person who is granting parking lots is responsible for collecting tax at source under section 206C(1C). The assessee challenged the assessment order before the CIT(A). The CIT(A) considering the submissions of the assessee in detail confirmed the order of the Assessing Officer. The Tribunal held that since the assessee failed to collect the taxes as per law. Therefore, the assessee would be responsible to pay tax as per law alongwith interest. (AY.2007-08 to 2009-10)
Agra Development Authority v. ACIT (2012) 138 ITD 127 / (2013) 153 TTJ 499 / 85 DTR 296 (Agra)(Trib.)

S.206C : Collection at source – State Government – Person – Collector Amravati is required to collect tax at source [Ss.2(31), 133A]
In the course of survey the Assessing Officer found that Tax collected at source (TCS) was not collected from the lessees or the licensees while debiting their account with the amount payable by them for the lease or license or at the time of receipt of amounts so payable during the financial years 2004-05, 2005-06 and 2006-07 by them to them. Assessing Officer held that Government is also person hence failure to collect tax at source Collector was held liable to pay tax with interest. Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal Tribunal held that, State Government is a person for purpose of collecting tax at source as per provisions of section 206C. Appellant representing State Government had allowed licence-holders to excavate minerals, he was required to collect TCS from them. (AYs.2005-06, 2007-08)
Collector v. ITO (2013) 141 ITD 550 / 155 TTJ 374 / 89 DTR 202 (Nag.)(Trib.)

S.215 : Advance tax – Interest payable by assessee – Application of mind is necessary – Order of Tribunal deletion of interest held to be justified [S.217]
That 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 the assessee must be made to know that the Assessing Officer had applied his mind and had ordered the 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 provision of law under which such interest is charged are two different things. The appeal filed by the department is dismissed. (AY. 1988-89)
CIT v. Misra Preservers (P.) Ltd (2013) 350 ITR 222 / 213 Taxman 196 / 91 DTR 217 (All.) (HC)

S.216 : Advance tax – *Bona fide* estimate – No question of law [S.260A]
High Court held that conclusion of Tribunal that the estimate by the assessee was reasonable and *bona fide* and therefore no interest could be charged under section 216 .No question of law.(AY.1985-86)
Dalmia Cement (Bharat) Ltd. v. CIT (2013) 357 ITR 419 / 263 CTR 308 / 218 Taxman 327 (Delhi)(HC)

S.220 : Collection and recovery – Stay – Rejection merely stating that no prima face case was made out held to be not proper – Non-speaking order – Matter remanded

Where Commissioner (Appeals) and Tribunal rejected assessee's application for stay of demand without recording any reasons and by merely stating that no *prima facie* case was made out, said order was not sustainable and, consequently, matter was to be remanded back for disposal afresh.

Vignahar Sahakari Sakhar Karkhana Ltd. v. ITO (2013) 219 Taxman 116 (Mag.)(Bom.)(HC)

S.220 : Collection and recovery – Disposal of stay application – Status quo – CIT(A) was directed to dispose the stay application with in the period of four weeks

On facts, CIT (A) was to be directed to dispose of stay petition, within a period of four weeks and till such time, parties would maintain status quo and no recovery could be initiated by the TRO.

Venture Metal Products (P.) Ltd. v. DCIT (2013) 218 Taxman 12 (Mag.)(Mad.)(HC)

S.220 : Collection and recovery – When tax payable and when assessee deemed in default – Writ – Held to be not maintainable [S.156, Art.226]

Assessment of assessee had become final after dismissal of assessee's appeal by the Tribunal. Consequential order was issued for recovery of tax plus interest. Assessee challenged the said order by filing writ petition which was dismissed. Assessee having not pointed out any mistake in impugned order/notice, said order could not be interfered with in writ appeal. (AY.1999-2000)

K. Avara Haji v. ITAT (2013) 219 Taxman 110 (Mag.)(Ker.)(HC)

S.220 : Collection and recovery – Reduction of period for payment of tax to recover the budget deficit of Income-tax Department was held to be invalid

The condition precedent for reduction of period for payment of tax is reason to believe that grant of full period would be detrimental to Revenue. Budget deficit of Income-tax Department is not a ground for reduction of the period. Also, prior permission of Joint Commissioner was not obtained. (AY. 2010-11)

Amul Research and Development Association v. ITO (2013) 359 ITR 549 / 262 CTR 49 (Guj.)(HC)

S.220 : Collection and recovery – Grounds for reduction of time period – Action plan of CBDT – Not a ground for reduction of period

Reduction of time of 30 days to pay demand on the basis that according to the action plan decided by the Central Board of Direct Taxes, 30% of the demand raised during the year should be recovered in the financial year 2012-13, is not justified. Mere discussion in a meeting of several high ranking tax officers chalking out a certain action plan for timely recoveries would not satisfy such a requirement which must be observed individually. There was nothing on record to suggest that if the full period of 30 days was allowed, the assessee government-company would have defaulted or would have in any manner frustrated the recovery.

Gujarat State Energy Generation Ltd. v. ACIT (2013) 358 ITR 254 / 262 CTR 44 (Guj.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Interest – Sick Industrial company – SICA have to prevail over those the IT Act [S. 234B, SICA S.32, 72A]

The Petitioner company started incurring heavy losses resulting in closure of its operations. In view of the colossal losses, the net worth of the petitioner eroded pursuant to which it made a reference to BIFR. The BIFR declared the petitioner as a sick company and directed IDBI to act as the operating agency. The BIFR directed winding up of the company. During the pendency of the said appeal, the Department filed an application seeking permission to recover its dues, with an alternative claim that in the event the scheme is allowed to be formulated then a suitable provision for payment of income-tax dues of the petitioner company ought to be made in the scheme itself. BIFR circulated the draft scheme. The BIFR after considering the objections/suggestions sanctioned the scheme. Against the said scheme the IT Department filed an appeal in respect of income tax reliefs and concessions

provided, i.e. waiver of interest u/s. 220(2) and 234B. The AAIFR allowed the IT department's appeal and set aside the scheme approved by the BIFR. On further appeal, the court held that, a prior special law will prevail over a later and general law. This is more so, when the prior law contains a non obstante clause. In the case of S. 32 of SICA, the specific exclusion of two enactments, and the express reference to S. 72A, to say that its provisions apply manifest Parliamentary intention that provisions of SICA have to prevail over those the IT Act. The AAIFR orders were quashed and the BIFR sanctioning the scheme including waiver of interest u/s 220(2) and 234B were restored.
Lord Chloro Alkalies Ltd. v. DIT (2013) 94 DTR 144 (Delhi)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Coercive measure for recovery – Notice of demand – Reduction of time for payment from normal period of 30 days to a period of 5 days [S.156]
The petitioner-assessee received notices of demand under section 156 in which the Revenue reduced time for payment from normal period of 30 days to a period of 5 days in some notices on apprehension that assessee would be exploring legal options to delay and obstruct recovery and put in tax avoidance scheme. Held, the revenue should not take any coercive measures for recovery of demands which were subject matter of impugned notices, till next date of hearing.(AY. 2007-08 to 2012-13)
Nokia India (P.) Ltd. v. UOI (2013) 216 Taxman 37 (Mag.)(Delhi)(HC)

S.220 : Collection and recovery – Stay – Appeal pending – Recovery of penalty was stayed [S.271(1)(c)]
The petitioner filed the return of income disclosing loss return, which was re determined by the Assessing Officer, against which the appeal was pending. Assessing Officer levied penalty under section 271(1)(c). The appeal was pending before Commissioner (Appeals). The Assessee moved an application to stay the recovery proceedings of penalty before Commissioner. Commissioner directed the Assessee to pay 20 percent by Feb 2013. The Assessee filed writ petition. The Court held that despite petitioner being ready and willing to proceed with hearing, decision in appeal was still pending, impugned order of Commissioner directing petitioner to deposit a portion of penalty was to be stayed. (AY. 2004-05 to 2007-08)
Konkan Railway Corporation Ltd. v. ACIT (2013) 216 Taxman 44 (Mag.)(Bom.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Stay – TDS on accrued interest – Recovery proceedings within 30 days of demand notice was stayed [S.156, 194A]
While the assessee-bank had 30 days' time to prefer an appeal against the notice of demand under s. 156, it approached the writ court against the assessment order and also asked for at least 30 days to take necessary steps for obtaining a stay in appeal. The Single Judge felt that the revenue should not have taken steps to realise amount under demand until expiry of time statutorily granted to prefer appeal. Held, since the assesse had already preferred appeal and applied for stay of demand, order under appeal was to be set aside and bank was to be permitted to press its stay application before appellate forum.
DCIT v. State Bank of India (2013) 216 Taxman 43 (Mag.)(Uttarakhand)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Stay – Commissioner (Appeals) – Appeal pending [S.250(6A)]
Against the order of the Assessing Officer, the assessee filed an appeal before the Commissioner (Appeals). Thereafter, the assessee filed two applications and while they were pending before the Commissioner (Appeals) without any adjudication the Income-tax Officer initiated proceedings for recovery and taking coercive action, attached the bank account of the assessee. Held, that the assessee shall move an application before the Commissioner (Appeals) to decide the appeal expeditiously and also to consider the applications filed by the assessee for staying the recovery. The Income-tax

Officer shall not take any coercive action but shall await the decision of the Commissioner (Appeals) on the stay application and during the period the Income-tax Officer shall release the bank account of the assessee and the amount transmitted to the Revenue shall be subject to the decision of the appeal by the Commissioner (Appeals).
Sanjay Kumar Sahu v. ITO (2013) 354 ITR 177 / 93 DTR 470 (MP)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Waiver of interest –Retention of seized assets – Dispute between assessee and its partners Oder set aside for redetermination [Ss.132, 132B, 220(2)]
Search and seizure operations under section 132 of the Income-tax Act, 1961, were conducted at the business premises of the assessee firm and the residential premises of its partners, who were brothers. There was a dispute between the two brothers as to whether the jewellery belonged to the assessee or one of its partners. On a writ petition at the instance of the assessee the High Court set aside the order of the Commissioner entrusting the jewellery to one partner and remanded the matter for redetermination. In compliance with the directions the Commissioner passed an order holding that the entire jewellery belonged to that partner and levied interest under section 220(2).Held that the Commissioner overlooked section 220(2A) which expressly vests power to waive or reduce the amount of interest with the Chief Commissioner or the Commissioner. Since the existence of circumstances which may justify reduction or waiving of the interest liability is a question of fact and this aspect had not been discussed in the order by the Commissioner the matter was remanded to the Commissioner to re determine the interest liability of the assessee without prejudice to the right of the assessee or its partners after afresh determination.
Roxy Industrial Corporation v. CIT (2013) 352 ITR 569 / 86 DTR 313 / 260 CTR 331 (P&H) (HC)
Pawan Kumar Mittal v. CIT (2013) 352 ITR 569 / 86 DTR 313 / 260 CTR 331 (P&H)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Stay – Demand should be stayed if strong prima facie case made out. Demand on covered issues cannot be recovered by adjustment of refunds [S. 237, 245]
The Assessing Officer passed an assessment order u/s 143(3) and raised a demand of Rs. 1719 crores. In response to the assessee's stay application, the Assessing Officer accepted that demand of Rs. 1370 crores had to be kept in abeyance as they were covered in favour of the assessee by appellate orders for earlier years. However, he still held that the said demand had to be adjusted against refunds of Rs. 560 crores determined for earlier years. He demanded that the balance demand of Rs. 377 crores on the other issues be paid by the assessee. The assessee filed a Writ Petition to challenge the adjustment of refunds against the demand on covered issues and the non-grant of stay on the other issues. HELD by the High Court:
The manner in which and the ground on which an adjustment of the refund was made is arbitrary and contrary to law. The stay order states that the assessee would not be treated as an assessee in default in respect of covered issues. Yet the department has proceeded to adjust the refund due and payable to the assessee merely on the ground that the department's appeal is pending. The adjustment of a refund is a mode of effecting recovery. Once an issue has been covered in favour of the assessee in respect of another assessment year on the same point, it was wholly arbitrary on the part of the department to proceed to make an adjustment of the refund. If the adjustment was not made, there can be no manner of doubt that the assessee would have been entitled to a stay on the recovery of the demand. The demand cannot be adjusted by the department in this manner merely because it is in possession of the funds belonging to the assessee to which the assessee is legitimately entitled to and has been granted a refund. The making of an adjustment in these facts is totally arbitrary and contrary to law. As regards the other issues, the assessee has made out a strong prima facie case for a stay of the recovery of the demand. As the action of the department in adjusting the refunds due to the assessee was contrary to law, the interests of justice would be served if the department is permitted to make an adjustment to an extent of Rs. 60 crores and refund the balance with interest. (AY.2010-11)

HDFC Bank Limited v. ACIT (2013) 354 ITR 77 / 86 DTR 393 / 259 CTR 20 (Bom.)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Garnishee proceedings under section 226(3) – AO did not pass a speaking order u/s. 220(6), order of attachment was quashed [S.226(3)]

The assessee was denied claim of deduction U/S 10B, and substantial demand was raised. The assessee had made an application u/s 220(6) to the AO stating that the demand should be stayed till disposal of appeal by the CIT (A).The AO rejected the stay without citing any reasons, and the bank accounts and rents were attached of the assessee. The assessee filed a writ with the High Court, and while allowing the writ, held that non-speaking order under section s.220(6) without assigning any reasons needs to be quashed, and therefore the order attaching the accounts and rent of assessee is also liable to quashed. (AY. 2009-10)

Lalit Wadhwa v. CIT (2013) 82 DTR 130 / (2014) 220 Taxman 420 (P&H)(HC)

S.220 : Collection and recovery – Assessee deemed in default – Appeal before Commissioner (Appeals) pending – Demand stayed pending disposal of appeal

The assessee, a joint venture company,claimed deduction of Rs. 103.04 crores towards software development and information technology related services to its associated enterprise. It incurred a sum of Rs. 5.86 crores towards reimbursement of expenses incurred by its associated enterprise. The Assessing Officer made a reference to the Transfer Pricing Officer to investigate into the reasonableness of the international transactions of the assessee with its associated enterprise. The Transfer Pricing Officer came to the conclusion that no services which would benefit the assessee had been rendered by its associated enterprise and that the assessee should not have made the claim for reimbursement. The Transfer Pricing Officer made an addition of Rs. 5.86 crores under section 92CA(3) of the Act,. The Assessing Officer passed an order under section 143(3) (iii) determining a total income of Rs. 6.41 crores after making an adjustment in terms of the findings of the Transfer Pricing Officer. Notice under section 271(1)(c) was issued to the assessee and thereafter penalty was imposed in a sum of Rs. 2.05 crores. An appeal was filed before the Commissioner (Appeals) against the order of penalty. On an application made before the Assessing Officer under section 220(6), the application for stay of demand was rejected and the assessee was directed to deposit 50 per cent of the outstanding demand. Thereafter, the assessee moved the Additional Commissioner who similarly rejected the application observing that the quantum addition on the basis of which penalty was imposed, had been confirmed by the Commissioner (Appeals). Upon an application made before the Commissioner the request for stay of demand was rejected. The quantum appeal was in the meantime also dismissed by the Tribunal. Against the order of the Tribunal, the assessee filed an appeal before the court which was pending admission. On a writ petition the Court held that the Assessing Officer as well as the Commissioner had failed to exercise their jurisdiction in accordance with law. The Commissioner adverted to the fact that the quantum appeal had been rejected by the Commissioner (Appeals) and the Tribunal. The order for the deposit of the entire penalty was not justified. The assessee was to deposit an amount of Rs. 50 lakhs in two instalments each of Rs. 25 lakhs. Conditional on the payments, recovery of the demand was to be stayed pending disposal of the appeal before the Commissioner (Appeals). If an order adverse to the assessee was passed by the Commissioner (Appeals), no coercive steps for the recovery of the balance demand were to be pursued for a period of two weeks.

By the court: "When the statute confers a discretion on the Assessing Officer, that is a discretion which is wielded in the exercise of a quasi-judicial function. Assessing Officers reject stay applications in a cavalier fashion making a bald statement to the effect that 'looking to the facts and circumstances of the case', no case for stay has been made out. This does not amount to a valid or proper exercise of discretion. What is expected of an Assessing Officer is at least a brief statement in the order of the reasons on the basis of which he formed his decision under section 220(6). Otherwise recourse to section 220(6) is a meaningless formality. Assessing Officers when they dispose of

applications under section 220(6) are required to act fairly. Fairness as a concept does not undergo a change in the hands of an Assessing Officer. Fairness requires objectivity. Objectivity that is guided by the need to protect the Revenue while at the same time being fair to the assessee whose case has to be tested in a statutory appeal." (AY. 2004-05)
Deloitte Consulting India Pvt. Ltd. v. ACIT (2013) 351 ITR 160 / 84 DTR 437 / 258 CTR 164 (Bom.)(HC)

S.220 : Collection and recovery – Waiver of interest – Hardship – Attachment of entire properties – Entire liabilities subsequently satisfied by appropriation of compensation, Authorities to reconsider waiver application
The application for waiver of interest liability of Rs.8,54,476 under section 220(2A) of the IT Act, 1961, was rejected and subsequently the entire interest liability of the assessee was satisfied by appropriating amounts from out of Rs.18,06,402 remitted by a corporation which was due to the assessee in a land acquisition proceedings. The reasons for rejecting the application were (i) that the assessee did not produce any proof that he had no other business or source of income, and (ii) there had not been any co-operation extended to the Department during the recovery proceedings. On a writ petition the Court held that the assesse *prima facie*, proved by the fact that the entire properties of the assessee were under attachment and that the entire liabilities were subsequently cleared by making appropriation of the compensation. Therefore, the order rejecting the application could not be sustained. Commissioner directed to pass the order according to law.
Anto Nitto v. CIT (2013) 350 ITR 305 / 258 CTR 100 / 85 DTR 94 / 214 Taxman 37 (Mag.) (Ker.)(HC)

S.220 : Collection and recovery – Interest – Waiver – Partial waiver can be given
In a writ petition filed in the High Court the Court held that section 220(2A) of the Income-tax Act, 1961, is an incentive to defaulter/Assessees to co-operate with the Department and to remit the tax voluntarily at the earliest and, therefore, compliance should be rewarded by taking a liberal view and approach. The Commissioner or the Chief Commissioner need not always waive the amount of interest in full but can grant waiver or reduction partially. What is indicated by the provision is that relief to be granted under section 220(2A) should be proportionate to the extent of satisfaction of the conditions stated therein. In other words, if the conditions are partially satisfied the assessee should be given partial relief, i.e., partial waiver which should be in proportion to the extent of satisfaction of the conditions and Application for stay of recovery proceedings cannot be construed as non-co-operation as entire arrears paid within six months, partial relief under section 220(2A) granted. The Writ petition was allowed. (AY.2006-07)
Arun Sunny v. Chief CIT (2013) 350 ITR 147 (Ker.)(HC)

S.220 : Collection and recovery – Interest – Rejection of waiver application for interest held to be justified
Assessee partner in two firms and having substantial agricultural income. Assessment was necessitated on account of addition to taxable income of firm of which assessee was a partner. Assessee not satisfying conditions. Payment of interest would not cause genuine hardship rejection of application for waiver of interest was held to be justified
K. C. Mohanan v. Chief CIT (2013) 350 ITR 461 / 258 CTR 103 / 85 DTR 125 / 214 Taxman 127 (Mag.)(Ker.)(HC)

S.220 : Collection and recovery – Stay – Appeal pending before CIT(A) – Directed to pay installment as directed by AO
Assessee made certain payments and subsequently failed to honour or pay the installments as allowed by AO. The Court held that Circular no 530 dt 6-3-1089 and instruction no 1914 dt 2-12-1993 was

held not applicable. Assessee was directed to pay the installments as per the order of AO. (AY.2007-08)
Jeans Knit (P.) Ltd. v. DCIT (2013) 216 Taxman 252 / 358 ITR 505 / 96 DTR 404 (Karn.)(HC)

S.220 : Collection and recovery – Interest – Period of charging interest
Once the original demand notice has been dispensed with in view of the order giving effect to the Commissioner (Appeals)'s order wherein instead of demand there was a refund and such an order has attained finality as no second appeal was filed, then interest cannot be levied under section 220(2), from the date of the original demand notice. The Assessing Officer has to work out the demand and chargeability of interest under section 220(2), if any, from the demand notice of assessment under section 143(3). (AYs. 2002-03, 2003-04, 2004-05)
Emkay Share and Stock Brokers P. Ltd. v. DCIT (No.2) (2013) 28 ITR 64 (Mum.)(Trib.)

S.220 : Collection and recovery – Assessee deemed in default – Tribunal had power to order refund of amounts collected by revenue in violation of stay order [S.221 and 254]
The Tribunal granted stay on recovery of outstanding demand on condition that assessee should deposit Rs.2.50 crores and furnish a bank guarantee. Also, the assessee could not seek any adjournment. If the assessee did not comply with the conditions, the stay would be cancelled and entire outstanding demand would be recoverable. During the course of hearing of the appeal, the assessee pointed out that the same issue is pending before the special bench and the different benches of the Tribunal were awaiting the order of the special bench. Therefore, the division bench adjourned the hearing. The A.O. held that the assessee had flouted the stay order by seeking adjournment, and he, therefore, recovered the outstanding demand by issuing notices under section 221(1) and 226(3). The Tribunal held that where hearing was adjourned to await order of Special Bench of ITAT on same issue, it could not be held that assessee had sought adjournment by pointing out such fact, and thus flouted stay order. The Tribunal further held that Tribunal has power to order refund of amounts collected by revenue in violation of stay order. (AY. 2008-09)
Motorola solutions India P. Ltd. v. Dy. CIT (2013) 144 ITD 246 / 154 TTJ 673 (Delhi)(Trib.)

S.222 : Collection and recovery – Investigation by TRO – Ownership of shares – Civil suit is maintainable [Rule 11(6) of Schedule II]
Since objection of petitioners who were close relatives of the person searched, since deceased, regarding ownership of shares found during search, were rejected, in terms of rule 11(6) of Schedule II, petitioners would be entitled to institute a suit in civil court to establish right which they claim in said property.
Jay R. Shah v. ACIT (2013) 219 Taxman 117 (Mag.)(Guj.)(HC)

S.222 : Collection and recovery – When stay application was pending no Coercive action shall be taken
Till decision on stay application is pending no coercive action can be taken against assessee for recovery (AYs. 2004-05 to 2010-11)
H.K. Kalchuri Education Trust v. ACIT (2013) 218 Taxman 14 (Mag.)(MP)(HC)

S.222 : Collection and recovery – Non-appearance on the appointed day was due to reasonable cause – Court directed to grant one more opportunity of hearing
Where assessee had explained reason of absence on date of hearing, it would be justified to direct DDIT to pass a fresh order on application for stay of recovery of demand.
Sudhir MadhavjiLal v. DCIT (2013) 218 Taxman 12 (Bom.)(HC)

S.222 : Collection and recovery – Attachment of bank account – Pending appeal – On paying the installment the attachment was to be lifted

An application for stay of recovery of demand for an amount of Rs. 34.68 crore was made by petitioner before the AO which was rejected. Subsequently, a stay application was made before DIT who directed the petitioner to pay a sum of Rs. 15 crore in instalments which the petitioner defaulted in. It filed an appeal before the CIT (A). However, since the first installment was not paid by due date, bank accounts of petitioner were attached. High Court held that attachment order be lifted subject to petitioner paying a sum of Rs. 2.10 crore which would bring it in-line with schedule of payment and balance amount would remain stayed till orders were passed by CIT(A). (AY.2009-10)
Patanjali Yogpeeth (Nyas) v. Chairman CBDT (2013) 218 Taxman 13 (Mag.)(Delhi)(HC)

S.225 : Collection and recovery – Stay of proceedings – On passing of order by the ITAT in favour of assessee TRO cannot refuse to release the property attached on the ground that time limit for filing appeal has not expired [S.80IB(10)]
The Assessing Officer disallowed deduction u/s. 80IB(10) and raised demand. The CIT(A) allowed partial relief. The ITAT decided in favour of the assessee as a result of which the demand became nil. The TRO refused to lift the attachment as the period for filing appeal had not expired. It was held that as per sec. 225(2) the TRO has to pass appropriate orders in accordance with orders passed in appeal and other proceedings. If the dept. succeed in appeals it can proceed with recovery. As demand was nil after the order of the ITAT, TRO had to release the property from attachment.(AY. 2006-07 to 2009-10)
Sri Lakshmi Brick Industries v. Tax Recovery Officer (2013) 351 ITR 345 / 260 CTR 212 / (2014) 223 Taxman 50 (Mag.)(Mad.)(HC)

S.226 : Collection and recovery – Modes of recovery – Garnishee proceedings – Show – cause notice issued u/s.226(3) based on failure to intimate admission of MAP proceedings – controversy with respect to admission of MAP conceded in assessee's favour by reply filed on behalf of Revenue – garnishee notices quashed
On a writ petition by the assessee seeking quashing of garnishee proceedings, held:
Controversy with respect to admission or pendency of MAP proceedings is conceded in favour of the petitioner. The show-cause notice for initiating proceedings u/s 226(3) was based on failure to intimate admission of MAP. In relation to the very same demand, ACIT had already granted stay of recovery pending the MAP. It is distressing that the Revenue tried to draw an artificial distinction between "pendency" and "admitted". Actions u/s 226(3) are therefore liable to be quashed.
Motorola Solutions India (P) Ltd v. CIT (2013) 95 DTR 33 / 158 TTJ 120 (P&H)(HC)

S.226 : Collection and recovery – Modes of recovery – Stay – Stay Applications are not a "Meaningless Formality". No recovery during pendency of a stay application. S.226(3) notice must ordinarily be pre-served on assessee [S.220 (6), 226(3)]
The assessee, an age-old charitable trust, amended its objects. Because of this change, the AO passed an order u/s 143(3) denying exemption u/s 11 and raised a demand of Rs. 11 crores. The assessee filed a stay application and requested a hearing. During the pendency of the stay application, the AO issued a notice u/s. 226(3) and attached the assessee's bank accounts. The notice specifically stated that the bank should not contact the assessee till payment was made. A copy of the said notice was not served on the assessee. The assessee filed a Writ Petition to challenge the recovery action undertaken by the department. Held by the High Court allowing the Petition:
(i) The action of attaching the assessee's bank account u/s 226(3) during the pendency of a stay application and without giving it notice was arbitrary and high handed. The whole object of serving a notice on the assessee is to enable the assessee to have some recourse. While in a given case, it may not be feasible to serve a prior notice on the assessee if there is an apprehension that the monies would be spirited away, this was not a case of that type. In a situation such as the present where appeals filed by the assessee are pending before the CIT (A) and the assessee had sought an opportunity of being heard and filed applications for stay, there was no justification

whatsoever to proceed hastily with the enforcement of the recovery of the demand without disposing of the application for stay;

(ii) Applications for stay cannot be treated by the AOs & appellate authorities as meaningless formalities. Quasi-judicial authorities have to apply their mind in an objective and dispassionate manner to the merits of each application for stay. While the interests of the Revenue have to be protected, it is necessary for AOs to realize that fairness to the assessee is an intrinsic element of the quasi-judicial function conferred upon them by law. Applications for stay must be disposed of at an early date. Such applications cannot be kept pending to obviate compliance with the need to evaluate the contentions of the assessee until after monies are recovered using the coercive arm of the law. Appellate authorities must set down time schedules for disposal of stay applications with reasonable expedition. The manner in which recourse has been made to the coercive process of law, leaves much to be desired and the action which was pursued was completely high handed and arbitrary. There could have been absolutely no apprehension that the assessee in the present case was likely to spirit out the monies which were invested in Fixed Deposits. A part of the money has to be refunded to the assessee to carry out its day-to-day activities.(AY. 2004-05, 2006-07, 2009-10)

Society of the Franciscan (Hospitaller) Sisters v. DDITV (2013) 351 ITR 302 / 261 CTR 410 / 89 DTR 1 (Bom.)(HC)

S.226 : Collection and recovery – Modes of recovery – Stay – Stay of demand can be granted even if there is no financial hardship [S.10(23D), 161, 177]

The AO raised a demand on the assessee on the same lines as had been done in the preceding AY. Though in the preceding AY, the assessee had obtained a stay from the High Court (see UTI Mutual Fund vs. ITO (2012) 345 ITR 71 (Bom), the AO refused to follow that for the present AY. The assessee filed a Writ Petition to challenge the refusal to grant stay. To oppose the grant of stay, the department relied on CIT vs. IBM India Pvt. Ltd where the Karnataka High Court had held that in matters involving large amounts due to the Revenue, an interim order of stay would be granted only in case of genuine financial hardship of the assessee and not otherwise. The Department argued that as the assessee did not have any financial hardship, the stay should be rejected. HELD by the High Court rejecting the department's plea and granting stay of the demand:

The order of the Karnataka High Court in *CIT v. IBM India Pvt. Ltd.* cannot be read to mean that consideration of whether an assessee has made out a strong *prima facie* case for stay of enforcement of a demand is irrelevant. Nor is the law to the effect that absent a case of financial hardship, no stay on the recovery of a demand can be granted even though a strong *prima facie* case is made out. In considering whether a stay of demand should be granted, the Court is duty bound to consider not merely the issue of financial hardship if any, but also whether a strong prima facie case raising a serious triable issue has been raised which would warrant a dispensation of deposit. That is a settled position in the jurisprudence of our revenue legislation. In *CEAT Limited v. UOI 2010 (250) ELT 200 (Bom)* it was held that "If the party has made out a strong *prima facie* case, that by itself would be a strong ground in the matter of exercise of discretion as calling on the party to deposit the amount which *prima facie* is not liable to deposit or which demand has no legs to stand upon, by itself would result in undue hardship of the party is called upon to deposit the amount." Where a strong *prima facie* case has been made out, calling upon the assessee to deposit would itself occasion undue hardship. Where the issue has raised a strong prima face case which requires serious consideration as in the present case, a requirement of pre-deposit would itself be a matter of hardship. Also the manner in which the Revenue has sought to brush aside a binding decision of the Court in the case of the assessee on the issue of a stay on enforcement for the previous year has to be serious disapproved. The rule of law has an abiding value in our legal regime. No public authority, including the Revenue, can ignore the principle of precedent. Certainty in tax administration is of cardinal importance and its absence undermines public confidence.(AY. 2010-11)

UTI Mutual Fund v. ITO (2013) 86 DTR 301 / 260 CTR 56 (Bom.)(HC)

S.226 : Collection and recovery – Modes of recovery – Recovery without following due process of law is liable to be refunded – AO's action of recovering outstanding taxes without affording reasonable time to take remedial steps is a misuse of powers and a gross violation of the directions laid down by the Courts. AO has to refund the taxes recovered

The assessee received the order of the CIT(A) on 16-11-2013. It filed an appeal before the Tribunal on 18-11-2013 which was the next working day. The assessee also filed an application before the Tribunal requesting stay of demand. The said application was fixed for hearing on 22-11-2013. However, the AO, without awaiting the outcome of the stay application, attached the assessee's bank account u/s 226(3) on 18-11-2013 and withdrew Rs. 159.84 crore. The assessee argued before the Tribunal that the coercive action of the AO was wrong because (i) the AO had taken coercive action before the expiry of time of filing the appeal against the order of the CIT(A), (ii) the action was taken even prior to the disposal of the stay application by the Tribunal and (iii) no prior notice was given to the assessee before taking the recovery action u/s 226(3). HELD by the Tribunal:

The action of the AO in recovering the outstanding without affording the assessee minimum reasonable time to take remedial steps is a misuse of powers and a gross violation of the directions laid down by the Courts as well as the basic rule of law and principles of natural justice. Accordingly, we direct the Revenue to refund the entire amount of Rs. 159.84 crore to the assessee within 10 days from the receipt of this order. (ITA No 6678/M/2013. Dt. 25-11-2013.)(AY. 2010-11)

Maharashtra Housing & Area Development Authority v. ADIT (Mum.)(Trib.) www.itatonline.org

S.234A : Interest – Default in furnishing return of income – Not due to giving Seized material by revenue, hence levy of interest was justified [Ss.153A, 234B]

In the absence of the seized materials or the fact that delay on the part of the Revenue in giving the seized materials was the reason for the delay in filing the return of income, the assessee could not be granted any relief.

Sri Sivapriya Shelters Pvt. Ltd. v. DCIT (2013) 355 ITR 221 (Karn.)(HC)

S.234A : Interest – Default in furnishing return of income – Advance tax – Mandatory.[S. 234B]

Interest under sections 234A, 234B is mandatory.

Gouli Mahadevappa (2013) 356 ITR 90 / 215 Taxman 145 / 88 DTR 59 / 259 CTR 579 (Karn.)(HC)

S.234A : Interest – Default in furnishing return of income – Advance tax – Waiver or reduction – Delay in filing return attributable to assessee – Chief CIT correct in only partially waiving the interest

Where there was a delay on the part of the assessee in seeking copies of the impounded documents for filing return, the Chief CIT was correct in only partially waving the interest under section 234 A of the Act for delay in filing return of income. (AY. 2001-02, 2002-03)

Shebin Jewellery v. Chief CIT (2013) 81 DTR 329 (Ker.)(HC)

S.234A : Interest – Default in furnishing return of income – Advance tax – No interest can be levied u/s.234A if entire amount of tax has been paid on or before due date of filling return of income even if return is filed after due date

If entire amount of tax on taxable incomes has been paid on or before due date of filing return of income then even if return of income is filed after due date of filing return of income, no interest can be levied u/s.234A. If tax on total income has been paid in part on or before due date of filling return of income then interest u/s.234A can be levied only on differential amount of tax (i.e. on total tax less tax already paid on or before due date)and not on the entire amount of tax or else, it shall render the provisions of section 234A penal in nature which the statue does not provide for.

Bharatbhai B. Shah v. ITO (2013) 214 Taxman 36 (Mag.)/ 255 CTR 278 / 355 ITR 373 (Guj.)(HC)

S.234A : Interest – Default in furnishing return of income – Advance tax – Waiver of interest – Commissioner waiving one-third of interest – No further waiver of interest [S.234B]
That interest under sections 234A and 234B could be waived by the Chief Commissioner, only if the conditions specified in Notification F. No. 400/29/2002-IT (B), dated June 26, 2006, are satisfied. The first condition requires seizure of documents in search and seizure operations and the second condition was applicable only where interest is charged under section 234C. The third condition was applicable only in cases where the statute has been amended retrospectively and the fourth condition was applicable only where the return is filed voluntarily. None of these grounds were applicable and in spite of this, one-third of the interest had been waived up to the assessment year 1992-93. Since the conditions specified in the notification were not available, the assessee could not seek waiver of interest levied under sections 234A and 234B. Therefore, the order rejecting waiver of interest had to be sustained.
K. C. Mohanan v. Chief CIT (2013) 350 ITR 461 / 258 CTR 103 / 85 DTR 125 / 214 Taxman 127 (Mag.)(Ker.)(HC)

S.234A : Interest – Default in furnishing return of income – Advance tax – Duty is on the payer to deduct TDS, on failure of payer to do so, no interest can be imposed on payee – Matter set aside
The Tribunal sent the matter back to the file of Assessing Officer to decide the chargeability of interest under section 234B in accordance with the judgment of jurisdiction High Court in the case of *DIT(IT) v. NGC Network Asia LLC (2009) 313 ITR 187 (Bom)(HC)* (AY. 2000-01)
Lingtec Construction LP v. ITO (2013) 156 TTJ 76 / 88 DTR 153 (Mum.)(Trib.)

S.234A : Interest – Default in furnishing return of income – Computation – Period given in notice [Ss. 139, 143, 153A]
Interest u/s.234A is to be charged from the date of expiry of notice period given in the notice u/s.153A to date of completing assessment u/s 143(3). (AY. 2008-09 to 2010-11)
ACIT v. V.N. Devadoss (HUF) (2013) 57 SOT 67 (URO) / 93 DTR 73 / 157 TTJ 165 (Chennai)(Trib.)

S.234B : Interest – Advance tax – Regular assessment – Intimation [S.143(1), 147]
Where assessee's return was initially processed under section 143(1), interest under section 234B could be levied on reassessment under section 147, treating it as regular assessment. (AY.1989-90)
CIT v. Malwa Cotton Spinning Mills Ltd. (2013) 219 Taxman 38 (Mag.)(P&H)(HC)

S.234B : Interest – Advance tax – CBDT – Waiver of interest – Chief Commissioner was directed to consider the petition on merits [Ss.119, 234A, 234C]
In earlier writ proceedings, Court directed that in case assessee had any grievance in respect of order that had been passed earlier by Chief Commissioner on an application filed by assessee seeking for waiver of interest under provisions of sections 234A and 234B, it was open for him to approach the Board. Thereupon, assessee had approached the Board which issued endorsement directing him to approach the Chief Commissioner. Assessee questioned said order before Court in writ petition contending that when Court had directed the Board to consider matter, it ought to have been considered by the Board itself. Single Judge opined that power of Board exercisable under section 119(2)(a) is an enabling provision empowering Board to pass orders in favour of assessee for waiver of interest levied under sections 234A, 234B and 234C, and that power having already been delegated to CCIT/DGIT, question of remanding matter yet again directing Board to reconsider matter, did not arise. Accordingly, Single Judge dismissed assessee's writ petition. Division bench remanded the matter back to Chief Commissioner and directed to consider assessee's claim for waiver of interest levied under section 234B on merits and dispose it off by giving reasons.

B. Gajendra Kumar v. ITO (2013) 219 Taxman 16 (Kar.)(HC)

S.234B : Interest – Advance tax-Capital gains-Investment in bonds – Reduction of interest – Limit of ` 50 lakhs – Tax was not paid under *bona fide* belief and further tax was paid voluntarily – Partly in favour of assessee [S.45, 54EC]

In January 2007, assessee applied for issue of bond investing Rs. 50 lakhs which was rejected on account of maximum limit of Rs. 50 lakhs which the assessee had already expired. Held, during the period from 1-4-2006 to 31-3-2007 and up to date till Finance Act, 2007 received assent of President of India, petitioner was under bona fide belief that he would be entitled to exemption from payment of capital gains tax under section 54EC and hence, did not pay tax earlier under a *bona fide* belief and further, paid tax on his own voluntarily, assessee had made out a case of reduction of interest under section 234B. Partly in favour of assessee. (AY.2006-07)

P.S. Seshadri v. CCIT (2013) 218 Taxman 485 / (2014) 266 CTR 188 / 99 DTR 25 (Kar.)(HC)

S.234B : Interest – Advance tax – No mention in the assessment order – Levy of interest is not valid [S.156]

Remark in the Assessment Order. if there is no mentioning of interest specifically in the Assessment Order, interest cannot be levied u/s 156.(AY. 1998-99)

CIT v. Deharadun Club Ltd. (2012) 209 Taxman 27 / (2013) 351 ITR 396 / 259 CTR 149 (Uttarakhand)(HC)

S.234B : Interest – Advance tax – Non-resident – Deduction at source – A non-resident assessee which does not admit income chargeable to tax must be inferred to have induced the Indian payer not to deduct TDS and so it is liable for advance-tax interest [S. 195]

The assessee, a USA company, supplied telecom equipments to customers in India. It claimed that it did not have a PE in India and that the income was not chargeable to tax. The AO rejected the claim and attributed 2.5% of the sale proceeds of the hardware as profit attributable to the PE in India. He also levied interest u/s. 234B for failure to pay advance-tax. Before the CIT(A), the assessee accepted that the income was chargeable to tax but argued, relying on *DIT v. Jacabs Civil Incorporated (2011) 330 ITR 578 (Del)*, that as it was a foreign company and the income was liable for TDS, it was not liable to pay advance-tax. The CIT(A) and Tribunal accepted the assessee’s contention. On appeal by the department to the High Court, HELD allowing the appeal:

(i) There is a distinction between a case where the assessee admits that it has income chargeable to tax in India but does not pay advance tax on the basis that the Indian payer ought to have deducted tax at source u/s 195. In such a case (as was the fact situation in Jacabs), the assessee is entitled to take credit for the tax which was “deductible” by the Indian payer while computing its advance tax liability even though no tax was in fact deducted. However, in a case where the assessee does not admit any income in the return, this benefit is not available. An inference or presumption can be drawn that the assessee had represented to its Indian telecom dealers not to deduct tax from the remittances made to it even though there is no positive or direct evidence to that effect;

(ii) The argument that the Indian parties should have discharged their TDS obligations u/s 195 despite the presumed request of the assessee is one of convenience or despair and not acceptable because in a practical view of the matter, the Indian payers could not have resisted the assessee’s request given future business prospects and the need to keep the assessee in good humour;

(iii) Also, having denied its tax liability and leading the Indian payers to believe that no tax was deductible it is inequitable & unfair on the assessee’s part to shift the responsibility to the Indian payers & expect them to deduct tax from the remittances. The assessee must take responsibility for its volte face. Once liability to tax is accepted, all consequences follow; they cannot be avoided;

(iv) Also, applying equitable principles, as the assessee deprived the revenue of the advance tax, it must pay compensation by way of interest. (Clarified that Mitsubishi Corporation, which was decided along with Jacabs, was also a case like that of the assessee and that it was mistakenly given relief) (ITA No 327/330/338/339 of 2012. dt. 7-11-2013)

DIT v. Alcatel Lucent USA Inc (2014) 264 CTR 240 / 95 DTR 345 (Delhi)(HC)

S.234B : Interest – Advance tax – Unavoidable circumstances – Waiver – If an assessee relied on the order of other than jurisdictional High Court, which may be reversed latter, or contrary view may be expressed by jurisdictional High Court, condition of waiver is satisfied, Court directed to pay only 25% interest [S. 119,234C]

As per paragraph 2(c) of Order F 400/234/95, IT(B), dated 30-1-1997, income of an assessee, was not chargeable to income-tax on basis of any order passed by High Court within whose jurisdiction he is assessable to income tax and as a result assessee did not pay tax in relation to such income in any previous years and by a decision of Supreme Court, advance tax paid by an assessee was found to be less than amount of advance tax payable on current income. It was held that Chief Commissioner/Director General would be justified in holding that it was a fit case for waiver of interest under section 234B or 234C. It would be incongruous to hold that paragraph 2(c) would apply not only to cases of orders passed by Jurisdictional High Court but also to decision of any other High Court as under law of precedents too judgments of other High Courts are persuasive. (AY. 2001-02)

UB Global Corporation Ltd. v. CCIT (2013) 355 ITR 87 / 263 CTR 658 (Karn.)(HC)

S.234B : Interest – Advance tax – Company – Book profit – MAT – Interest is not chargeable when assessment completed under section 115J. [Ss. 234C, 115JA, 234C]

Interest under s.234B and 234C is not leviable when assessment is completed under section 115JA.

Lamina Suspension Products Ltd. v. ACIT (2013) 216 Taxman 46 (Mag.)(Karn.)(HC)

S.234B : Interest – Advance tax – Writ before High Court – Against assessment orders pending appeal. [S.234C, Art. 226]

Assessee filed writ petitions before the High Court against the assessment orders challenging charging of interest. Appeals were pending before the Commissioner / Tribunal. Court declined to go into legal pleas taken by the assessee as remedy before appellate forums were available. (AY. 1993-94, 1994-95, 1998-99, 2005-06, 2006-07)

Super Spinning Mills Ltd. v. ACIT (2013) 351 ITR 401 / 259 CTR 160 / 215 Taxman 330 (Mad.)(HC)

S.234B : Interest – Advance tax – Book profit – Company. [Ss.115JB, 234C]

Interest under section 234B and 234C is payable on failure to pay advance tax in respect of tax payable under section 115JB. (AY.2001-02)

CIT v. Glenmark Pharmaceutical Ltd. (2013) 351 ITR 359 / 85 DTR 169 / 213 Taxman 315 (Bom.)(HC)

S.234B : Interest – Advance tax – Non-resident – Income is liable to tax deduction at source no liability to pay advance tax.

The amount received by the assessee, a non-resident, was subjected to 100 per cent tax deduction at source and there was no liability on the assessee to pay advance tax. Hence, the question of levy of interest under section 234B alleging short payment did not arise. (AY.1991-92, 1994-95)

CIT v. Reiter Inglostadt Spinners Imaechinanbau A.G. (2013) 353 ITR 349 / 216 Taxman 200 (Mag.)(Mad.)(HC)

S.234B : Interest – Advance tax – Book profit – Industrial undertakings – Impracticability of giving effect to amended provisions – Levy of interest was not justified for the Asst. year 2002-03 and justified for the Asst. years 2003-04 and 2004-05. [S.80IB, 115JB, 234C]

Section 115JB of the Income-tax Act, 1961, is a special charging provision. Therefore, there is absolutely no question of section 80-IB having any bearing or effect or control over the provisions of section 115JB.
Though the provisions of section 115JB had come on the statute book with effect from April 1, 2000, according to the Finance Act, 2000, and is applicable for the assessment year 2001-02 onwards, it was amended by the Finance Act, 2002, and though the amending Act, in fact, received the assent of the President only on May 11, 2002, it was made applicable from an anterior date, i.e., from April 1, 2001, itself. For the assessment year 2002-03, tax liability determined against the assessee in accordance with section 115JB as amended with effect from April 1, 2001 by the Finance Act, 2002. For the assessment years 2003-04 and 2004-05, the assessee being fully aware of the provisions of section 115JB filed returns, and assessments were made. Held, that in view of the impracticability existing on the date of amendment of the provisions relating to the advance tax in respect of the assessment year 2002-03, the levy of interest under sections 234B and 234C was not justified. The levy of interest under the sections was justified for the assessment years 2003-04 and 2004-05 (AY. 2002-03 to 2004-05).
Sankhla Polymers (P.) Ltd. v. ITO (2013) 352 ITR 452 / 215 Taxman 175 / 257 CTR 185 (Karn.)(HC)

S.234B : Interest – Advance tax – Non-resident – Deduction of tax at source – Not liable to pay interest [S.195, 234C]
The assessee being non-resident and entire income of assessee was subjected to TDS under section 195 hence, it was not liable to pay interest under sections 234B and 234C. (AY.2004-05)
DIT v. WNS Global Services (UK) Ltd. (2013) 214 Taxman 317 (Bom.)(HC)

S.234B : Interest – Advance tax – Waiver of interest – Tax levied in consequence of judgement or retrospective amendment-Waiver is not permissible. [S.234C, Rule 119(2)].
Since assessment was reopened and tax was reassessed following judgment of High Court, interest could not be waived. (AY.1995-96, 1996-97)
P.G. Mani v. CIT (2013) 255 CTR 442 / 214 Taxman 34 (Mag.)(Ker.)(HC)

S.234B : Interest – Advance tax – MAT credit – Amendment in section 234B by Finance Act, 2006 - Retrospective in nature – Therefore, MAT credit to be considered before calculation of interest u/s. 234 B of the Act (S.115JAA)
Amendment in section 234 B of the Act w.e.f. 1-4-2007 was held to be clarificatory in nature which is retrospective in nature. Therefore, MAT credit is to be considered before calculating interest under section 234 B of the Act. (AY. 1999-2000)
Chief CIT v. Gujarat Mitra P. Ltd. (2013) 81 DTR 25 / 214 Taxman 35 (Mag.)/ 255 CTR 18 (Guj.)(HC)

S.234B : Interest – Advance tax – No interest u/s. 234B can be levied unless AO gives specific direction in the Assessment order
No interest can be levied through a notice of demand unless there is any specific direction giving reference to the section charging interest in the Assessment Order. (T.A No. 84 of 200, dt 19-6-2012]
S.K. Patel Family Trust. (2012) BCAJ - November-P. 401) (Guj.)(HC)

S.234B : Interest – Advance tax – Deduction at source – Entire income is subject to deduction at source
When entire income is subject to TDS, it was not liable to pay advance tax, therefore no interest could be charged under section 234B. (AY.2002-03)
DIT(IT) v. Chiron Bearing Gmbh & Co (2013) 351 ITR 115 / 256 CTR 342 / 83 DTR 1 (Bom.)(HC)

S.234B : Interest – Advance tax – Without a specific order cannot be charged [S.156]

Interest under section 234B cannot be charged in notice of demand issued under section 156 in absence of any specific order demanding interest in assessment, reassessment or rectification order. (AY.1996-97)
CIT v. Ruchira Papers Ltd. (2013) 212 Taxman 9 / 259 CTR 153 (HP)(HC)

S.234B : Interest – Advance tax – Non-resident payee – Duty cast on payer to deduct tax at source.
On failure of duty cast on resident-payer to deduct tax at source, non-resident was not liable to interest u/s 234B. (AY. 2009-10)
De Beers UK Ltd. v. ADIT(IT) (2013) 27 ITR 1 / 60 SOT 224 (Mum.)(Trib.)

S.234B : Interest – Advance tax – Non-resident – Entire income was liable for deduction at source – Not liable for interest
Assessee was a non-resident in India and its entire income was liable for deduction of tax at source, interest under section 234B could not be imposed on it on account of failure of payer to deduct tax at source while making payments. (AY. 2007-08 2008-09)
Orient Overseas Container Line Ltd. v. ADIT (2013) 60 SOT 196 (Mum.)(Trib.)

S.234B : Interest – Advance tax – Non-resident – Deduction at source-Interest not leviable.
AO imposed interest under section 234B on a tax resident of UK. Tribunal held that assessee being a non-resident, duty is cast on payer to pay tax at source and on failure, no interest under section 234B was to be imposed on payee.(AY.2009-10)
De Beers UK Ltd. v. ADIT (2013) 60 SOT 224 / 27 ITR 1 (Mum.)(Trib.)

S.234B : Interest – Advance tax – Non-resident payee – Advance tax – Non-deduction of tax at source – Interest is not chargeable.
Where assessee was a non-resident, failure of payer to deduct tax at source on amount payable to it, which was chargeable to tax, could not cause levy of interest under section 234B on non-resident assessee payee.(AY.2007-08)
Panasonic Avionics Corporation v. Dy. CIT (2013) 60 SOT 150 (Mum.)(Trib.)

S.234B : Interest – Advance tax – Interest on excess refund.[S. 208, 210]
It is held that liability to pay interest u/s. 234B arises only if the assessee is liable to pay advance tax u/s. 208 and he has failed to pay such tax or where advance tax paid by assessee under provisions of Section 210 is less than 90 per cent of assessed tax.
Hyundai Heavy Industries Co. Ltd. v. ADIT (2013) 145 ITD 158 (Delhi)(Trib.)

S.234B : Interest – Advance tax – Duty on payer to deduct tax at source
The Tribunal held following decision of High Court in the case of *DIT (International Taxation) v. NGC Network Asia LLC [2009] 313 ITR 187 (Bom.)* in which Hon'ble High Court has held when a duty is cast on the payer to deduct tax at source then on failure of the payer to do so, no interest can be charged from the payee u/s. 234. (AY. 2007-08)
China Shipping Container Lines (Hong Kong) Co. Ltd. v. ADIT (2013) 145 ITD 230 / (2014) 29 ITR 673 / 160 TTJ 246 (Mum.)(Trib.)

S.234B : Interest – Advance tax – Mandatory
Tribunal held that charging interest is mandatory but it admits consequential relief. Therefore, this ground cannot be allowed. (AY. 2009-10)
Marudhar Hotel (P) Ltd. v. JCIT (2013) 156 TTJ 729 / (2014) 62 SOT 134 (Jodh.)(Trib.)

S.234B : Interest – Advance tax – Non resident – TDS not deducted by resident – No interest could be charged from payee [S.234C]

Since assessee was a non-resident, any amount payable to it was chargeable to tax and it was payer who was liable for TDS and, hence, no interest could be charged from assessee payee for default in payment of tax. (AY. 2009-10)

IHI Corporation v. Addl. CIT (2013) 58 SOT 225 / 155 TTJ 4 (Mum.)(Trib.)

S.234B : Interest – Advance tax – Entire income liable for TDS under section 195, assessee not in default for non deduction by prayer [S.195]

The Tribunal held that where the entire income of assessee was liable for deduction of tax at source under section 195, assessee could not be said to be in default for non deduction of tax at source by payer. Interest under section 234B was hence not leviable on assessee rather interest under section 201 was leviable on payer for non-deduction. (AY. 2005-06, 2007-08, 2008-09)

ADIT v. Rolls Royce Industrial Power India Ltd. (2013) 142 ITD 585 (Delhi)(Trib.)

S.234B : Interest – Advance tax – Foreign company [S.234C]

Assessee is a foreign company not liable to tax in India, interest charged under sections 234B and 234C was liable to be deleted. (AY. 2007-08)

Delmas France S.A. v. ADIT (2013) 141 ITD 67 / 86 DTR 145 / 154 TTJ 561 (Mum.)(Trib.)

S.234B : Interest – Advance tax – Company – Book profits – Levy of interest is mandatory [S.115JB]

Charging interest under section 234B of the Act is mandatory. (AY. 2005-06 to 2007-08)

Eastern India Powertech Ltd. v. Add. CIT (2013) 21 ITR 542 / 57 SOT 110 (Delhi)(Trib.)

S.234B : Interest – Advance tax – Deduction at source – Non-resident – Liable to income tax and not advance tax [S.195, 209(1)(d)]

The assessee, a tax resident of USA, supplied telecom equipment to customers in India. The customers while making payment to non-resident-assessee did not deduct tax at source under section 195. In the course of assessment proceedings, the Assessing Officer opined that in view of failure of payers to deduct tax at source while making payments, assessee being payee in instant case, was in default. Accordingly, the Assessing Officer passed an order levying interest under section 234B from the assessee. On appeal, the Commissioner (Appeals) deleted the interest levied under section 234B. On revenue's appeal the Tribunal held that in this case it is an undisputed fact that the tax on the entire income received by the assessee was required to be deducted at source at the appropriate rates by the respective payers under section 195. The revenue have not placed any material on record controverting these findings of the Commissioner (Appeals) nor pointed out any contrary decision so as to enable the Tribunal to take a different view in the matter. In view of aforesaid, it is to be held that the assessee is not liable to pay any interest under section 234B accordingly. the revenue's appeal was dismissed. (AY. 2004-05 to 2008-09)

ADIT(IT) v. Alcatel Lucent USA Inc. (2013) 55 SOT 72 (URO)(Delhi)(Trib.)

S.234B : Interest – Advance tax – Deduction at source – Non-resident – No liability to advance tax – Interest under section 234B cannot be levied [Ss. 195, 208]

The assessee-company registered in U.S.A. belonged to ALU group, a leading manufacturer of telecom equipment in the world ALU group had a substantial presence in India and started its Indian operations in the year 1982 when it entered into an agreement with Indian Telecom Industries Ltd. During the year under consideration, the assessee supplied telecom equipment to various Indian companies. Assessing Officer found that ALU overseas entities including the assessee had a permanent establishment (PE) in India. The Assessing Officer determined net income chargeable to tax as attributable to PE in India at the rate of 2.5 per cent of the sales made by the assessee in India.

Accordingly, assessment was framed at an income of Rs. 6,55,033 and also levied the interests under sections 234A, 234B and 234C. Before the Commissioner (Appeals) the assessee questioned the levy of interest under section 234B by the Assessing Officer at ` 3,46,360. The Commissioner (Appeals) being convinced with the contention of the assessee had deleted the interest levied under section 234B. Tribunal held that combined reading of the provisions of section 209(1) (d) with the provisions of section 234B makes it clear that the liability to pay interest under section 234B would arise only if advance tax is payable after making the necessary adjustment for tax deductible at sources. The amount of (Tax deductible) would obviously mean the tax as was required to be deducted in respect of a particular income and not the tax which has actually being deducted at source. Responsibility of an assessee to pay advance tax arises under the provisions of section 208 read with sections 209 and 210 the mode of computation of advance tax is given in section 209. As long as the assessee has discharged its obligation to pay advance tax as per the provisions of section 208 read with sections 209 and 210 he cannot be held liable for defaulting in payment of advance tax. Section 234B and section 234C only provide a method of computation of interest in case of default by an assessee to pay advance tax as stipulated in sections 208, 209 and 210. The undisputed fact in the present case remained that the tax on the entire income received by the assessee was required to be deducted at appropriate rates by the respective payers under section 195(2). Had the payer made the deduction of tax at the appropriate rate, the net tax payable by the assessee would have been Nil. Thus, there was no liability to pay advance tax by the assessee. Under similar facts, the High Court of Delhi in the case of Jacabs Civil Incorporated/Mitsubishi Corpn. (supra) held that section 195 puts an obligation on the payer i.e. any person responsible for paying any tax at source at the rates in force from such payments and if payer has defaulted in deducting tax at source, the department can take action against the payer under the provisions of section 201. In such a case, the non resident is liable to pay tax but there is no question of payment of advance tax and, therefore, it cannot be held liable to pay interest under section 234B on account of default of the payer in deducting tax at source from the payments made to the non-resident. Appeal of revenue was dismissed. (AY.2002-03)
Dy. CIT (IT) v. Lucent Technologies International Sales Ltd. (2013) 55 SOT 271 (Delhi) (Trib.)

S.234B : Interest – Advance tax – Order giving effect-Deduction at source – Self assessment tax [S.234A, 234C]
The AO while charging interest u/s. 234B calculated interest @ 2% per month for 19 months on Rs. 8,44,797/- (i.e. Rs. 5,63,906/- month of tax worked out after giving credit of Rs and self assessment tax (+) Rs. 1,09,440 amount of interest charged u/s. 234A(+) Rs.1,70, 230 amount of interest u/s. 234B up to 15.5.1994 and Rs 1221 amount of interest charged u/s. 234C). According to the assessee, the interest u/s. 234B was chargeable only on Rs. 5,63,906 which is amount of tax worked out after giving credit of TDS and self assessment tax. Thus, according to the assessee interest u/s. 234B worked out to Rs. 2,14, 284 as against Rs. 8,44,797 charged by the AO. The assessee filed an application u/s. 154 of the Act objecting that interest charged u/s. 234B is not correctly computed. The AO rejected the claim of the assessee vide order dated 15-4-2010. The Tribunal held that, at the time of passing an order giving effect to order of ITAT, interest u/s. 234B is to be computed on tax on total income finally determined under regular assessment as reduced by the amount of TDS and self assessment tax. Interest u/s 234B cannot be levied on amount of interest chargeable u/s. 234A and 234C. (ITA No. 4913/M/11, dated 17-10-2012 ‘C’ Mum.) (AY.1993-94)
Chandrakant S. Shah v. ITO (2013) BCAJ Pg. 20, Vol. 44-B Part 4, January 2013 (Mum.) (Trib.)

S.234B : Interest – Advance tax – Income subject to TDS
As deduction of tax was already made from the payments made to the assessee, interest u/s. 234B cannot be charged.
DDIT(IT) v. Reliance Infocom Ltd. (2014) 29 ITR 132 / 98 DTR 66 / (2014) 64 SOT 137(URO) (Mum.)(Trib.)

S.234C : Interest – Advance tax – Mandatory – Waiver of interest – Assessee not filing application for waiver of interest hence no opinion could be expressed whether assessee's case is covered by circulars

During the assessment year 2004-05, the assessee contended that its principal informed it by letter dated November 4, 2004, that it was entitled to the additional incentive of Rs. 6,07,44,583. The incentive was paid in view of the sale of Rs. 636 crores in the previous year 2003-04 in which the growth of 9.8 per cent. over the last year was recorded. Prior thereto, the assessee was not aware that the income towards the growth incentive would become payable and could not have presumed that it would be entitled to the substantial payment towards growth incentive before the letter dated November 4, 2004, was received by it. The assessee had paid the advance tax of Rs. 1.25 crores on December 14, 2004. The Tribunal upheld the interest charged by the Assessing Officer under section 234C amounting to Rs. 4,17,074. On appeal Held, dismissing the appeal, that the Central Board of Direct Taxes had issued circulars in this regard and the Chief Commissioners and the Director General have been given power to reduce the interest payable under sections 234A, 234B and 234C in specified and specific cases. Since the assessee had not filed any application no opinion could be expressed whether the assessee's case was covered under the circulars. If deemed appropriate, the assessee could make an application. (AY.2004-05)

Bill and Peggy Marketing India Pvt. Ltd. v. ACIT (2013) 350 ITR 465 (Delhi)(HC)

S.234C : Interest – Deferment of advance tax – Assessed income was loss, assessee is not liable for interest under section 234C

Assessment was subjected to modifications due to findings of appellate authorities regarding earlier assessment years and allowing to set off loss carried forward against income of current assessment year. Accordingly, Assessing Officer determined loss for relevant assessment year and refunded TDS, advance tax and interest paid under section 234B. He, however, refused to refund interest paid under section 234C. Tribunal held that interest paid under section 234C is for deferment of advance tax and when income of assessee having finally been arrived at loss advance tax was refunded, there was no logic in making assessee liable for interest under section 234C. (AY. 1996-97)

Dy. CIT v. Mysore Paper Mills Ltd. (2013)55 SOT 56 (URO)(Bang.)(Trib.)

S.234C : Interest – Deferment of advance tax – Book profit [S. 115JA]

Assessee is liable for interest under section 234C on short payment of advance tax even on the income computed under section 115JA.(AY.1999-2000 to 2005-06)

Hotel & Allied Trades P. Ltd. v. Dy. CIT (2013) 140 ITD 309 / 87 DTR 49 / 154 TTJ 503 (Cochin)(Trib.)

S.234D : Interest on excess refund – Explanation 2 – Section does not apply to an assessment completed prior to 1-6-2003 – No retrospectivity

For AY.1998-99, the AO passed an assessment order prior to 1-6-2003 in which interest u/s 234D was not levied. The assessee filed an appeal against the said order on certain other issues and in giving effect to the order of the appellate authority, the AO levied interest u/s. 234D on the ground that excess refund had been allowed u/s 143(1) than what the assessee was entitled to u/s 143(3). The Tribunal allowed the assessee's appeal by relying on *ITO v. Exta Promoters P. Ltd. (2008) 305 ITR (AT) 1* where it was held that as s. 234D was inserted with effect from 1.6.2003, it did not apply to earlier assessment years. The department's appeal was dismissed by the High Court (order included) by relying on its own judgement in the case of *DIT (IT) v. Delta Airlines Inc. (2011) 245 CTR 16 / (2013) 358 ITR 367 (Bom).* On appeal by the department to the Supreme Court HELD dismissing the appeal:

Explanation 2 to s. 234D makes it clear that the provisions of the section shall not apply to an assessment year commencing before the 1st day of June, 2003 if the proceedings in respect of such assessment year is completed before the said date. As the assessment order in the present case was passed before 1-6-2003, the question of retrospectivity of s. 234D does not arise.
CIT v. Reliance Energy Ltd. (2013) 358 ITR 371 / 93 DTR 361 / 262 CTR 272 / (2014) 220 Taxman 89 (SC)
Editorial: Affirmed, CIT v. Rrliance Energy Ltd. ITA No. 2193 of 2009 dt July 19, 2012(Bom)(HC) /DIT v. Delta Air lines Inc (2013) 358 ITR 367 /(2011) 245 CTR 16(Bom)(HC)

S.234D : Interest on excess refund – Interest can be demanded by AO
AO can demand interest u/s.234D on excess refund. (AY. 1999-2000)
CIT v. Dhanalakshmi Bank Ltd. (2013) 357 ITR 448 / 219 Taxman 130 (Mag.)(Ker.)(HC)

S.234D : Interest on excess refund – Regular assessment – Assessment made for first time – Interest under section 234D could not be levied on assessee in an assessment completed under section 147 [Ss. 143, 147]
Section 234D authorizes levy of interest on excess refund in respect of only regular assessment. Where there is no regular assessment, then assessment made for first time under section 147 or 153A shall be regarded as a regular assessment. Therefore, where assessment had already been completed under section 143(3), reassessment under section 147 could not be held as regular assessment and thus, interest under section 234D could not be levied on assessee in an assessment completed under section 147.(AY. 2005-06)
K. Anji Reddy v. DCIT (2013) 59 SOT 92 (URO)(Hyd.)(Trib.)

S.234D : Interest on excess refund – Regular assessment
Tribunal held that in this case the regular assessment was completed after the cut-off date. The Assessing Officer was justified in charging interest under section 234D. (AY. 2001-02)
ITO v. Strides Arcolab Ltd. (2013) 153 TTJ 181 (Mum.)(Trib.)

S.234D : Interest on excess refund – If the amount of refund falls short of such percentage, the assessee cannot claim interest as a matter of right
The assessee contended that the interest u/s.234D, should have been charged from 7-12-2004, being the date on which it actually received the refund interest of 29-10-2004, being the date on which refund was granted. The assessee contended that such date should be considered as the date on which the refund was actually received u/s 244A. Tribunal held that interest on refund is only a statutory right which can be regulated strictly as per the prescribed provisions. There can be no question of granting any interest on refund de hors the relevant provisions in the Act. The proviso to s.244A(1)(a) states that no interest shall be payable if the amount of refund is less than 10% as determined, *inter alia* under sub-sect(1) of S.143(3) or on regular assessment. Thus, if the amount of refund falls short of such percentage, the assessee cannot claim interest as a matter of right. (AY.2002-03)
DCIT v. Development Bank of Singapore (2013) 144 ITD 265 /155 TTJ 265 (Mum.)(Trib.)

S.234D : Interest on excess refund – Chargeable as per the law on the date of completion of assessment
Provision was introduced with effect from June 1, 2003. Assessment for the year was completed after that date. Interest is chargeable.(AY. 2001-02)
Credit Lyonnai (Trough their successors Calyon Bank) v. ADIT (2013) 26 ITR 51 / 144 ITD 644 / 96 DTR 261 / 158 TTJ 826 (Mum.)(Trib.)

S.234E : Fee – Delay in filing statement – Tax deduction at source and tax collection at source – High Court grants interim stay on levy of fee for failure to file TDS statement. [Article 226]

S. 234E of the Income-tax Act, 1961 inserted by the Finance Act, 2012 provides for levy of a fee of Rs. 200/- for each day's delay in filing the statement of tax deducted at source (TDS) or Tax collected at source (TCS). The constitutional validity of S. 234E has been challenged in the Kerala High Court. Vide an interim order dated 18-12-2013, the High Court has admitted the Petition and granted a stay of proceedings for a period of two months. (WP No. 31498/2013, dt. 18-12-2013)

Narath Mapila LP School v. UOI (Ker)(HC) www.itatonline.org

S.237 : Refunds – Delay in applying – No satisfactory explanation – Rejection was held to be justified. [S. 119, 143(1),143(3)]

Held, since no evidence of deduction of tax at source on payments to assessee and no satisfactory explanation regarding delay in filing return and in applying for refund was made by the assessee, rejection of application for refund was justified. No satisfactory explanation regarding delay in applying for refund or grounds for refund. Thus, the Income-tax authorities could not be authorised to admit application u/s 119. (AY.1998-99)

Kiwanis Club of New Delhi v. DIT (E) (2013) 357 ITR 205 (Delhi)(HC)

S.237 : Refunds – Non-grant of refunds-Search and seizure – Refund of seized amount with interest – Strictures passed against Dept for harassing honest taxpayers [Ss. 132, 132B(4), 244A, 245, 292CC]

A search was conducted at the premises of the assessee during which cash of Rs 25 lakhs was seized. The assessee succeeded in the block assessments and the said amount of Rs.25 lakhs became refundable to the assessee. However, the said amount was not refunded to the assessee on the ground that there were demands outstanding against a third party who was also named in the search warrant. The assessee claimed that he had no relation with the third party and the fact that there were demands outstanding there did not mean that the assessee's refund could be blocked. The department refused to pass an order on the assessee's application for refund. HELD by the High Court allowing the plea:

It is but evident that the department has failed to discharge its legal obligation in not refunding the seized amount. The argument of the department that unless a direction is issued, a speaking order shall not be passed on the application for refund of the amount due to him is not appreciated. It shows that the officers of the Income-tax Department are shirking their responsibilities. Speedy and affordable justice is the requirement of the day. But it cannot be achieved until the executive including tax-man discharge their duties faithfully honestly within the four corners of law. The revenue official failed to take any decision right or wrong on the refund application filed by the assessee and passed on the buck on the Court. Time has come for the heads of the departments to keep a strict vigil on such shirkers and to fix their responsibility. While it is no doubt true that collection of revenue is a serious matter for the State and the bounden duty of the authorities functioning under the Act is to implement the provisions of the Act, there should be safety and assurance to an honest tax-payer. An honest tax-payer should not be subjected to unnecessary harassment and an action not warranted in law, which can be of very serious consequence to the tax-payer if allowed to remain without correction, such harassment and browbeating of an honest tax-payer will otherwise drive even such honest tax-payers to become cynical and lead to a situation where taxpayers will get a feeling that paying taxes honestly is not a worthwhile exercise; that the tax authorities are a menace to the society rather than simply being representatives of the State for enforcing the tax provisions. The department shall pay costs of Rs. 15,000 to the assessee (BP.2001-02 to 2007-08)

Vijay Prakash Agrawal v. CIT (2013) 355 ITR 114 / 87 DTR 4 / 261 CTR 602 (All.)(HC)

S.237 : Refunds – Deduction at source – Deposited by mistake – Circular – On the date of application – Refund claim of an assessee must be examined in light of circular in force as of the date of application for such refund- Refund entitled with interest [Ss. 195, 244A]
Petition moved as application for refund arising to it which was appropriate in light of the CBDT circular prevalent at the point of time. Since, the Department did not respond to the said application for a considerable time, another letter remaining about the same was addressed to AO. During the pendency of such application, CBDT came out with another circular superseding the earlier circular and according to provisions of the said circular Petitioner was ineligible for the said refund and the Department denied the said refund on the strength of such subsequent circular. It was held that the Department cannot process application of an assessee after an indefinite period of time and apply a rule that may have changed in the meantime by virtue of change in circular. Hence the refund claim of the Petitioner must be examined in light of the circular in force as of the date of application. TDS under mistake and deposited with the government was liable to be refunded without reference to any circular; further, the case of the petitioner was covered under cl. (i) (c) of para (1) of Circular No. 769 dated 6th August 1998 and not under subsequent Circular No. 790 dt. 20th April 2000; refund directed with interest.
Mardia Chemicals Ltd. (2012) 26 taxmann.com 42 / ACAJ - November-P. 399) (Guj.)(HC)
FAG Bearings India Ltd. (2013) 83 DTR 136 / 256 CTR 413 (Guj.)(HC)

S.239 : Refunds – CBDT – Delayed refunds – Liberal approach [S.119]
Delay in filing of application of refund even though due to fault of petitioner, should liberally be condoned. (AY.1996-97, 1997-98)
Vasco Sales & Marketing Corpn. v. DCIT (2013) 360 ITR 578 / 216 Taxman 250 (Ker.)(HC)

S.240 : Refund on appeal – Writ – Maintainability – Delay – Order rejecting refund accepted by the assessee – Thereafter, writ petition filed one year after when the assessment order was annulled – Writ not maintainable [S. 239, Art 226]
The order rejecting the application for refund was passed in 2004. This rejection was not challenged by the assessee before any authority thereby accepting the same. In 2005 when the appeals of the Revenue were dismissed, annulling the assessment order, assessee attempted to revive the dead action by making representation before the authorities. The application was held to be delayed which was attributable to the assessee. Thus, writ was not maintainable on account of delay.
Dilip Surana LR of Late Gheverchand Suranna v. CIT (2013) 92 DTR 313 / 262 CTR 344 (Karn.)(HC)

S.240 : Refund on appeal – Adjustment of refund without giving notice is invalid [S.244, 244A, 245]
The order adjusting refund not justified since intimation in writing to assessee before making adjustment of refund was not given. (AY. 2008-09)
Cognizant Technology Solutions India P. Ltd. v. DCIT (2013) 356 ITR 373 / 95 DTR 407 (Mad.)(HC)

S.240 : Refund on appeal – Kar Viavd Scheme, 1998 – Interest – Delay of refund for one year the assessee was held entitled for interest [Ss. 132B, 244A]
During search conducted at business premises of assessee cash was seized. Thereafter, an order under section 132(5) was passed determining total amount of tax and interest payable at Rs.31 Lakhs. As the total tax and penalty was far in excess of seized cash, the cash was retained. Thereafter regular assessment was completed raising demand of Rs.5.92 lakhs. As the cash seized was not adjusted, the assessee filed an appeal. During the pendency of appeal the assessee made payment under Kar Vivad Scheme, 1998 resulting in closure of all issues and appeals arising out of search. The assessee claimed interest on the seized amount under section 240 or 244A. Revenue contended that no interest was payable under section 240, 244 or 132B(4) since these sections were not applicable to the case of

assessee. S.244A could not be applied in case of assessee for AY 1986-87. The assessee filed the writ petition. The court held that section 240 is not applicable because the assessee had opted for the Kar Vivad Samadhan Scheme, 1998 and the appeal was dismissed as infructuous. So far as section 244 is concerned, the provisions of sub-section (4) makes it clear that section 244A applied only in respect of assessment for the assessment commencing on 1-4-1989 and subsequent years. The assessment year in question is 1986-87. Where the assets seized were not in excess of liabilities sought to be discharged, interest was not payable u/s132B(4). However the amount of Rs. 5,35,000 was retained by the department to the detriment to the assessee from February, 1999 to February, 2000, which is approximately for one year. The writ petition was partly allowed. (AY. 1986-87)
Ram Kishan Gupta v. UOI (2013) 357 ITR 534 / 263 CTR 583 / 215 Taxman 525 (Delhi)(HC)

S.244 : Refund – Interest on refund – Minimum Alternate Tax – MAT deposit made in advance under section 115JA on basis of book profit bears character of tax paid in advance – Interest under section 244A has to be granted in case of excess deposit of said amount – Order of Assessing Officer was not erroneous [S.115JA, 263]
MAT deposit made in advance under section 115JA on basis of book profit bears character of tax paid in advance and, therefore, interest under section 244A has to be granted in case of excess deposit of said amount. Order of Assessing Officer was not erroneous.(AY. 2000-01)
CIT v. Chambal Fertilizers & Chemicals Ltd. (2013) 258 CTR 240 / 86 DTR 49 / (2014) 360 ITR 225 (Raj.)(HC)

S.244 : Refund – Interest on refund – Intimation – DTAA-India-France [S.143(1)]
Interest assessable in year in which refund granted and not in year in which proceedings under section 143(1) (a) attain finality. If interest reduced on account of assessment under section 143(3) reduced interest to form part of income of that year. Assessing Officer to adopt rate at which interest on income-tax refund charged under Double Taxation Avoidance Agreement between India and France. (AY.1997-98)
ADIT (IT) v. Credit Agricole Indosuez (2013) 21 ITR 345 / 58 SOT 97 (Mum.)(Trib.)

S.244A : Refund – Interest on refunds-Advance tax – Deduction at source – Interest on refund – Payment of advance tax – Deduction at source in excess of assessed tax – The department is not obliged to pay interest on interest – Only provided as provided in statute [S.214]
In *Sandvik Asia Ltd. v. CIT (2006) 280 ITR 643 (SC)* the Supreme Court held that if the department delays paying interest on the refunded amount, the assessee is entitled to interest on interest. Subsequently, in *CIT v. Gujarat Flouro Chemicals*, a view was expressed that *Sandvik Asia Ltd. v. CIT (2006) 280 ITR 643 (SC)* did not lay down the correct law and ought to be reconsidered. The matter was referred to a larger Bench. HELD by the larger Bench:
The judgment in *Sandvik Asia Ltd. v. CIT (2006) 280 ITR 643 (SC)* has been misquoted and misinterpreted by the assessees and also by the Revenue. Their view that in Sandvik case this Court had directed the Revenue to pay interest on the statutory interest in case of delay in the payment and that the Revenue is obliged to pay an interest on interest in the event of its failure to refund the interest payable within the statutory period is not correct. In Sandvik Asia, the Court was considering the issue whether an assessee who is made to wait for refund of interest for decades be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. In the facts of that case, this Court came to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore, directed the Revenue to pay compensation for the same but not an interest on interest. S. 244A provides for interest on refunds under various contingencies. It is clarified that it is only that interest provided for under the statute which may be claimed by an assessee from the Revenue and no other interest on such statutory interest.

CIT v. Gujarat Fluoro Chemicals Ltd (2013) 90 DTR 465 / 262 CTR 269 / 358 ITR 291 /(2014) 222 Taxman 349 (SC).
Editorial: From the judgment Gujarat Flouro chemicals Ltd v. CIT (2007) 210 CTR 587 (Guj.)(HC)

S.244A : Refund – Interest on refunds – Tax deduction at source and advance tax –Claim of assessee was allowed [S.115JB]
Commissioner (Appeals) held that what assessee was claiming was not interest on MAT paid for preceding assessment year but interest on refund to extent it was attributable to advance tax and TDS. Accordingly, assessee's claim was allowed and confirmed by the Tribunal. Held on facts, no substantial question of law arose for consideration and, therefore, impugned order passed by Tribunal was to be upheld.(AY.1997-98)
CIT v. Nagarjuna Finance Ltd. (2013) 219 Taxman 118 (Mag.)(AP)(HC)

S.244A : Refund – Interest on refund – Statutory liability – Where seizure was held to be illegal – Assessee was entitled to interest [Ss.132, 132B, 158BC]
Where interest under section 132B, upto date of framing assessment had been paid, interest on refunds under section 244A could also be paid as it deals with liability after completion of assessment, and there is no overlapping between these two provisions. Where seizure of assessee's money was held illegal, revenue could not be absolved from statutory liability for payment of interest under section 244A on ground that it would cast extra burden on revenue.(BP- 1-4-1998 to 12-5-1998)
Gurvinder Singh v. DIT (2013) 257 CTR 163 / 218 Taxman 16 (Mag.)(All.)(HC)

S.244A : Refund – Interest on refunds – Automatic interest – Failure to make application for refund cannot be attributable to assessee – Interest on refund cannot be denied
No application is necessary for interest on refund under section 244A as interest on refund goes along with refund. Where refund is pending before authorities, failure to apply for refund cannot be treated as delay attributable to assessee and interest on refund cannot be denied.(AY. 1992-93)
CIT v. Sahara India Savings & Investment Corpn. Ltd. (2013) 218 Taxman 363 /(2014) 101 DTR 93 (All.)(HC)

S.244A : Refund – Interest on refunds – Mistake not apparent from the record – Disallowance of interest on refund till date of order of CIT(A) was held to be not maintainable [S.154]
Where the issue of delay, if any, attributable to whom was a debatable issue, rectification order disallowing interest on refund was invalid, as there must be a mistake apparent from record which can be rectified and not something which can be established by a long drawn process of reasoning on which there could be two possible opinions.(AY 2002-03)
CIT v. Nathpa Jhakri Joint Venture (2013) 358 ITR 233 / 261 CTR 110 / 218 Taxman 47 (Mag.)(Bom.)(HC)

S.244A : Refund – Interest on refunds – Self assessment tax – Eligible interest [S.140A]
Where assessee paid self-assessment tax under section 140A, it is eligible to get interest under section 244A on refund arising on account of such payment. (AY.2006-07)
CIT v. Mangalam Arts (2013) 218 Taxman 51 (Mag.)(Raj.)(HC)

S.244A : Refund – Interest on refunds – Interest on interest
Pursuant to assessment order/appellate order, assessee became entitled to refund of taxes paid. Interest under section 244A had become due and payable on tax amount refundable and said interest should have been paid along with tax amount on 30-5-1999. However, Assessing Officer paid amount of interest only on 11-6-2008.

The Court held that the assessee was entitled to interest under section 244A on aforesaid amount of interest with effect from 1-6-1999 to 31-5-2008. Where assessee became entitled to refund of taxes paid and interest under section 244A had become due and payable on tax amount refundable and Assessing Officer did not make payment of interest element on date when tax amount was refunded, revenue would be liable to pay interest under section 244A on said amount of interest up to date of payment.(AYs.1989-90, 1990-91)
Indian Trade Promotion Organisation v. CIT (2013) 263 CTR 18 / 93 DTR 425 / (2014) 361 ITR 646 (Delhi)(HC)

S.244A : Refund – Interest on refunds – Quantification of Interest – When the Assessee is not paid the full amount of refund due to it but, only a part of the amount is paid – Revenue is liable to pay interest on balance amount outstanding which may consist of taxes paid plus the interest payable till the date of payment of part amount
When the Revenue does not pay full amount of refund due to the assessee, but only a part amount is paid, then, the Revenue authorities are liable to pay interest on balance amount outstanding. The balance outstanding amount may consist of the taxes paid or the interest, which is payable till the date of payment of the part amount and interest payable on the principal amount which remained outstanding thereafter. (AYs. 1989–90 & 1990–91)
India Trade Promotion Organisation v. CIT (2013) 263 CTR 18 / 93 DTR 425 / (2014) 361 ITR 646 (Delhi)(HC)

S.244A : Refund – Interest on refunds – Rectification of order – Withdrawal of interest. [Ss.115JB, 143(3), 154]
After completing original assessment, Assessing Officer passed order under section 154 to give effect to amended clause of section 115JB(2) (h) and recomputed income at higher figure than originally assessed. Assessing Officer also withdrew interest granted to assessee under section 244A.On appeal by assessee the Tribunal held that in view of section 244A(3), Assessing Officer was justified in withdrawing interest already allowed to assessee. In favour of revenue. (AY. 2006-07)
Aarti Steels Ltd. v. Dy. CIT (2013) 55 SOT 59 (URO)(Chandigarh)(Trib.)

S.244A : Refund – Interest on refunds – Self assessment tax – Entitled to interest on refund of self assessment tax [S.140A]
Tribunal held that in terms of section 244A interest is payable where refund of any amount becomes due to assessee under Act and, therefore, assessee is entitled to receive interest under section 244A on refund of self-assessment tax. In favour of assessee. (AY.1996-97)
Dy. CIT v. Mysore Paper Mills Ltd. (2013) 55 SOT 56 (URO)(Bang.)(Trib.)

S.245 : Refund – Set-off of refunds – Notice – Adjustment – Notice is mandatory
It is imperative that intimation has to be given to assessee for proposed adjustment of refund against tax remaining payable. (AY.2001-02)
U.P. Forest Corporation v. CIT (2013) 218 Taxman 107 (Mag.)(All.)(HC)

S.245 : Refund – Set-off of refunds – Without prior intimation was held to be bad in law.
Adjustment of refund against sums due from assessee cannot be made without prior intimation. (AY. 2007-08)
Jeans Knit P. Ltd. v. DCIT (2013) 358 ITR 505 / 216 Taxman 252 / 96 DTR 404 (Karn.)(HC)

S.245 : Refund – Set-off of refunds – Set-off against tax remaining payable – Without prior intimation to assessee was held to be illegal
Assessee was issued a notice which specified its entitlement for refund and further stated that same would be adjusted towards demand due for another assessment year. Held taking such action without

giving any prior intimation to assessee was contrary to s. 245 and, therefore, bad in law. (AY.2007-08)
Jeans Knit (P.) Ltd. v. DCIT (2013) 216 Taxman 252 / 358 ITR 505 / 96 DTR 404 (Karn.)(HC)

S.245 : Refund – Set-off of refunds – Set-off against tax remaining payable – TDS credit – Strict guidelines issued to end Dept's TDS credit & refund adjustment harassment [Ss.143(1), 154, 200, 244A, 245]
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 assessees 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. Thereafter, as an interim measure to provide immediate relief to the assessees, the Court passed an order dated 31-8-2012 by which it gave detailed directions. After further hearing, Held by the Court:

(i) Re Uploading of wrong or fictitious demand: The CBDT has accepted that incorrect and wrong demands have been uploaded on the CPC arrears portal. In his letter dated 21-8-2012, the CIT, CPC, has expressed his concern and anguish on account of uploading of incorrect and wrong data in the CPU and the problem faced by them and by the assesses. The CBDT has issued Circular No. 4 of 2012 in which the burden is put on the assessee to approach the AOs to get their records updated and corrected by filing s. 154 applications. While this may be the easiest option available, it should not be a ground for the AO not to suo motu correct his records and upload correct data. Each assessee has a right and can demand that correct and true data relating to the past demands should be uploaded. Asking the assessee to file s. 154 applications entails substantial expenses and defeats the main purpose behind computerisation. Also, the AO's do not adhere to the time limit prescribed for disposal of the s. 154 applications. To ensure transparency (and accountability), a register must be maintained with details and particulars of each application made u/s 154, the date on which it was made, date of disposal and its fate. The s. 154 application has to be disposed of by a speaking order and communicated to the assessee. There must be full compliance of the said requirements;
(ii) Re Adjustment of refund contrary to s. 245: S. 245 postulates two stage action; first a prior intimation to the assessee and then, if warranted, the subsequent adjustments of the refund towards arrears. This is not being followed by the CPC because the computer itself adjusts the refund due against the existing demand. To prevent this breach of the law, the department must follow the procedure prescribed u/s 245 and give the assessee an opportunity to file a reply which should be considered by the AO before giving the direction for adjustment. As regards the cases where such (illegal) adjustment has been made in the past, the cases must be transferred to the AOs for issue of notice to the assessee seeking adjustment of refund. The assessees will be entitled to file a reply to the notice and the AO will then pass an order u/s 245 allowing the refund. The CBDT has to fix a time limit and schedule for completing the said process. Though the process involves expenditure and paper work, the situation has arisen due to the lapses on the part of the AOs and the assessees cannot be made to suffer for the wrong uploading of arrears and wrong adjustment of refund. The question of the assessee's entitlement to interest on the SA tax is left open though when the delay is due to the fault of the Revenue, interest should be paid u/s 244A. False uploading of past arrears and failure to follow the mandate of s. 245 is a lapse on the part of the AO;
(iii) Re non-communication of adjusted s. 143(1) intimations: The non-communication of s. 143(1) intimations, where adjustments on account of rejection of TDS or tax paid has been made, is a matter of grave concern. When there is failure to despatch the intimation within a reasonable

time to the assessee, the return shall be deemed to have been accepted and the intimation will be treated as non est or invalid for want of service. The onus to show that the order was served on the assessee is on the Revenue and not upon the assessee. If a TDS or tax credit claim has been rejected on a technicality but there is no communication to the assessee of the order/intimation u/s 143(1), the AO cannot enforce the demand created by the said order/intimation;

(iv) Re non-grant of credit for TDS: The problem regarding rejection of TDS credit is in two categories. The first is those where the deductors fail to upload the correct particulars of the TDS which has been deducted and paid and the second is where there is a mismatch between the details uploaded by the deductor and the details furnished by the assessee in the ROI. As regards the first, the CBDT had earlier directed that the AOs to accept the TDS claims without verification where the difference between the TDS claimed and the TDS as per AS26 did not exceed rupees one lakh. This figure has now been reduced to a mere Rs. 5,000. Ex-facie, there is no justification for the reduction because credit is being given only if the three core fields match. The CBDT must re-examine this aspect and take suitable remedial steps if they feel that unnecessary burden or harassment will be caused to the assessees. As regards cases of mismatch because of different methods of accounting, or offering income in different years, the department must take remedial steps and ensure that in such cases TDS is not rejected on the ground that the amounts do not tally. The department should also fix a time limit within which they shall verify and correct all unmatched challans. An assessee as a deductee should not suffer because of fault made by deductor or inability of the Revenue to ask the deductor to rectify and correct. Once payment has been received by the Revenue, credit should be given to the assessee. The CBDT should issue suitable directions in this regard. The department's response on the action taken against deductors for non-compliance is unfortunate and unsatisfactory and it purports to express 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 taxpayer because of the fault of the deductor causes unwarranted harassment and inconvenience. The deductee feels cheated. The Revenue cannot be a silence spectator, wash their hands and pretend helplessness. S. 234E has now been inserted by the Finance Act, 2012 to levy a fee of Rs. 200 per day for default of the deductor to file TDS statement within due date. It is unfortunate that the Board did not take immediate steps after even noticing lacuna and waited till FA 2012. The stand of the Revenue that they can only write a letter to the deductor to persuade him to correct the uploaded entries or to upload the details is not acceptable. The AO must use his power and authority to ensure that the deductor complies with the law.

Court On Its Own Motion (Anand Parkash) v. CIT (2013) 352 ITR 273 / 214 Taxman 335 / 85 DTR 301 / 258 CTR 113 (Delhi)(HC)
All India Federation of tax Practitioners v. UOI (2013) 352 ITR 273 / 85 DTR 301 / 258 CTR 113 (Delhi)(HC)
Court on its own motion v. CIT (2013) 85 DTR 289 / 258 CTR 143 (Delhi)(HC)

S.245A : Settlement Commission – Case – Pendency of assessment – Circular – Notice – Limitation – Application filed before expiry of period to complete the assessment under section 153 was held to be valid [Ss.119, 143(2), 153, 245D]

The assessee has filed application before the settlement commission for the AY. 2010-11 on 14th November 2012. When application was filed the period to complete the assessment under section 153 had not expired however the period to issue notice under section 143(2) had expired. Revenue contended that the Settlement Commission had no jurisdiction to entertain the application as no case was pending. The Court held that in view of Circular no 3 of 2008 dated 12th March, 2008, the Settlement Commission had rightly accepted the assessee's application for settlement. Circular is binding on revenue and the revenue has not till date withdrawn the circular to the extent it clarifies that it is immaterial for the purpose of filing an application before Settlement Commission whether the time limit for issuing notice under section 143(2) has expired or not. A beneficial interpretation to

the word ‘case‘ in section 245A(b) given by the Circular dt 12th March 2008 issued by the CBDT is understandable so as to mitigate / lessen the rigour of the definition of the word ‘case’. Settlement Commission rightly accepted the assessee’s application for settlement. Petition of revenue was dismissed. (AY. 2010-11).
CIT v. ITSC (2013) 92 DTR 409 / 262 CTR 28 (Bom.)(HC)

S.245C : Settlement Commission – Gross profit rate applied by the settlement Commission was held to be justified. Writ petition of assessee was rejected [S.245D Rule 9 of Income-tax [Settlement Commission) Rules, 1997]
Assessee resisted application of 12% gross profit rate adopted by Settlement Commission on ground that such gross profit rate could be applied only during course of assessment and it could not be made part of settlement, when same was not an issue raised by Commissioner in his report. Held, since material was available before Settlement Commission and such material had been taken into consideration for returning a finding which was relevant for determining undisclosed income of assessee, addition made on the basis of gross profit rate was just.
Supreme Agro Foods (P.) Ltd. v. ITSC (2013) 218 Taxman 43 / 353 ITR 385 (P&H)(HC)

S.245C : Settlement Commission – Assessment was completed under section 143(1) – Assessment was held to be not pending – Application was held to be not maintainable. [Ss. 143(1), 143(2)]
Assessee filed an application before settlement commission for the Assessment Years 2005-06 to 2011-12. Revenue contended that for the Assessment Years 2005-06 to 2008-09 the returns were processed under section 143(1) and no further proceedings were pending hence the application was not maintainable. Settlement Commission rejected the objections and held that the application was maintainable. Revenue file the writ petition . The Court held that the assessments had become time-barred without any notice under section 143(2) or even final time-limit for passing orders, even if such notices were issued, had expired by the time assessee filed his application for settlement before Settlement Commission, application for settlement *qua* these years was not maintainable. Writ petition of revenue was allowed. (AYs. 2005-06 to 2008-09)
CIT v. ITSC (2013) 218 Taxman 49 / 259 CTR 329 (Guj.)(HC)

S.245C : Settlement Commission – Continuation of proceedings – Appeal against allowing application of assessee
Since the Settlement Commission did not finally decide matter on merits while allowing the application of the assessee to be proceeded with, and moreover, all contentions of both parties would be gone into by Commission before passing any final order, impugned order allowing application to be proceeded with did not require any interference.
CIT v. ITSC (2013) 216 Taxman 246 (Guj.)(HC)

S.245C : Settlement Commission – Application – Maintainability – When there is no pendency of proceedings, application is not maintainable [S.245A]
The assessee had filed returns in respect of Assessment Years 2004-05, 2005-06, 2007-08 and 2008-09. On 5-8-2011 the assessee filed an application before Settlement Commission seeking a settlement of its cases. The revenue opposed application contending that application was not maintainable as no case was pending before any Income-tax Forum. The settlement commission overruled objection of revenue and decided to entertain the settlement application. The revenue filed the writ petition and raised the question.
“Whether proceedings are to be deemed to remain ‘pending’ for the purposes of section 245A(b) when the time-limit for completion of assessment under section 143 or section 144 has expired”.

The Court held that since no proceedings under Income-tax Act were pending at time of filing of application, Settlement Commission was not right in admitting assessee's application. Where by application of section 153, an assessment order can no longer be made, proceeding, for purposes of section 245A, would have to be construed as terminated. (AY. 2004-05, 2005-06, 2007-08, 2008-09)
CIT v. ITSC (2013) 212 Taxman 511 / 87 DTR 178 / 259 CTR 318 (Delhi)(HC)

S.245C : Settlement Commission – True and full disclosure of income – Search and seizure – Bogus purchases – Full and true disclosure and the manner in which the undisclosed income was derived is still open for discussion and debate and the Settlement Commission would have to give its final decision on these aspects before an order of settlement is passed under section 245D(4). Writ petition of revenue was dismissed [Ss.245C(1), 245D(2C), Constitution of India, Article 226]
Revenue challenged the order passed by the settlement commission under section 245C(1) and 245D(2C) of the said Act being not valid because the settlement applications failed to satisfy the pre-requisites stipulated in Section 245C of the Act. Those pre-requisites being, full and true disclosure, the manner in which the undisclosed income had been derived and the additional amount of income-tax payable. The Court observed that considering the various provisions, it is apparent that the settlement applications passes through several stages before the final order providing for the terms of settlement is passed by the Settlement Commission. The first stage is under section 245D(1). This is followed by the next step under section 245D(2C) and finally by the order passed under section 245D(4). In the present case, the final order under section 245D(4) is yet to be passed. The orders under section 245D(1) and 245D(4) are not final orders and they are subject to the final orders that may be passed under section 245D(4). It is therefore, clear that the issue of full and true disclosure on the part of the applicants and the manner in which the undisclosed income was derived is still open for discussion and debate and the Settlement Commission would have to give its final decision on these aspects before an order of settlement is passed under section 245D(4). Accordingly the High Court dismissed the petition of the revenue. (WP(C)NO.1609/2013 dt 2-7-2103)(AY. 2006-07 to 2012-13)
CIT v. ITSC (2013) 217 Taxman 39 / 35 taxmann.com 56 / 262 CTR 10 / (2014) 360 ITR 407 (Delhi)(HC)

S.245D : Settlement Commission – Constitutional validity – Abate – Discrimination – Delay not attributable to assessee – Application will not abate – Settlement commission was directed to dispose the application with in specified time [S.245HA, Art.226]
Amendments were made by Finance Act, 2007 to Chapter XIX-A to the effect that all applications for settlement filed prior to amendment shall abate on 1-4-2008 *vide* S.245D(4A) and 245HA. Validity of these amendments was challenged as being discriminatory. The Bombay High Court in a similar matter in *Star Television News Ltd. v. UOI [2009] 317 ITR 66*, held that to save these ss. from vice of discrimination an applicant could not be punished for inability or failure of Settlement Commission to dispose of its application within specified period; where such delay in disposal was not attributable to applicant u/s 245D(4A) and consequently, where applicants had prevented Settlement Commission from fulfilling its statutory mandatory duty u/s 245D (4A), such applications would abate as per s. 245HA. Constitutional validity of s. 245D(4A) and s. 245HA was thus protected from vice of discrimination.
Jai Guru Jewellers v. UOI (2013) 219 Taxman 119 (Mag.)(All.)(HC)

S.245D : Settlement Commission – Powers – Settlement Commission is yet to apply its mind whether an enquiry under section 245D(3) should be ordered –Writ petition of revenue was held to be not maintainable [S.245D(3), 245D(4) Art. 226]
The Commissioner has challenged an order passed by the Settlement Commission under the provisions of section 245D(2C) The Court held that Commission is yet to apply its mind whether an enquiry under

section 245D(3) should be ordered hence writ petition of revenue was held to be not maintainable. The Court also held that since the proceedings are pending before the Settlement Commission, it would not be appropriate for this court to entertain the proceedings any further. (W.P. No 9617 of 2013 dated 21-10-2013)
CIT v. ITSC (2013) 263 CTR 479 / (2014) 360 ITR 539 (Bom.)(HC)

S.245D : Settlement Commission – Procedure – Order under challenge is cryptic and is not focused on the issues and contentions, which were raised by the assessee – Matter remanded for reconsideration
The petitioners had filed two applications under section 245C and disclosed the entire amount of unaccounted turnover which became subject-matter of orders passed by the Settlement Commission under the Excise Act. Applications were allowed to be proceeded with and a report under section 245D(2B) was sought from the concerned Commissioner. The Settlement Commission, however, held that applicants was indulged in suppression of income even before commission and rejected the application filed by the petitioners. On writ, the petitioners submitted that the two petitioners were subjected to search under the Central Excise Act, 1944 and thereafter by the Income Tax Department and the Settlement Commission was swayed by factors which even the Commissioner did not consider were relevant. Held that, the order under challenge is cryptic and is not focused on the issues and contentions, which were raised by the assessee and by the CIT. Once an application is filed, then the said application must be dealt with in accordance with law, i.e., refer to the contentions of the assessee, the contention of the revenue and then an objective, considered and a reasoned decision has to be taken. Full factual position should be noted, before opinion is formed whether there has been full and true disclosure. There has been error and failure in decision making process and the failure vitiates the order passed. Matter remanded for reconsideration. (AYs.2005-06 to 2012-13)
Marc bathing Luxuries Ltd. v. ITSC (2013) 94 DTR 241 / 38 taxmann.com 308 (Delhi)(HC)
Marc Sanitation (P) Ltd. v. ITSC (2013) 94 DTR 241 / 38 taxmann.com 308 (Delhi)(HC)

S.245D : Settlement Commission – Power of review – Contrary to circular and decision of Supreme Court – Waiver of interest – Revision of order by way of rectification modifying the waiver of interest was held to be impermissible. [Ss.154, 234A, 234B]
Settlement Commission passed order under section 245D(4) granting waiver of interest under sections 234A and 234B. Assailing said order of Settlement Commission, revenue filed an application contending that order of waiver of interest was contrary to CBDT Circular F. No. 400/234/95-IT(B), dated 23-5-1996 and also decision of Supreme Court. Settlement Commission allowed application of revenue and modified order of waiver of interest. It was held that earlier order of Settlement Commission though contrary to CBDT circular and a decision of Supreme Court was an error within jurisdiction of Commission and not an error that went to root of its jurisdiction. Hence an application for rectification under section 154 was, however, impermissible and beyond jurisdiction of Settlement Commission and, therefore, impugned order was to be quashed. (AY.1991-92 to 1993-94)
V. Krishnaveni v. Govt of India (2013) 352 ITR 598 (AP)(HC)
U. Narayanamma v. Govt of India (2013) 352 ITR 598 (AP)(HC)
V. CH. Rama Rao v. Govtof India (2013) 352 ITR 598 (AP)(HC)
T. Uma v. Govt India (2013) 352 ITR 598 (AP)(HC)
A.P. Met Engg Ltd. v. Govt. of India (2013) 352 ITR 598 (AP)(HC)

S.245D : Settlement Commission – Rectification application – Depreciation claim – Directed to recall the order and pass fresh order according to law
Assessee's case was that it had claimed depreciation which remained unabsorbed while passing order of settlement, however Commission completely ignored said vital aspect of matter and raised tax demand which was wholly impermissible. The Commission rejected assessee's application holding that issue raised by assessee was a debatable one and would amount to review of order passed under

section 245D(4) which was not permissible in law. Held since the issue raised by assessee was emergent from face of record and did not require any minute examination of accounts, application for rectification of impugned order should have been allowed by Commission.
Piramal Logistics (P.) Ltd. v. ITSC (2013) 216 Taxman 46 (Mag.)(Guj)(HC)

S.245D : Settlement Commission – Search and seizure – Full and true disclosure – Bogus purchases – Full and true disclosure – Manner in which the undisclosed income had been derived – Matter set aside. [S.254C(1), 245D(2C), Article 226]
A search and seizure action under section 132 of the Act was carried out in the business premises of the assessee. Bogus purchase bills were found and the assessee disclosed the income and thereafter retracted. The assessee filed the petition before settlement commission and disclosed additional income. Before the Commission the revenue contended that the assessee had failed to disclose the income and the manner in which the income was earned. The Commission has come to the conclusion that the application is not invalid and has allowed. Revenue challenged the order of settlement commission. Allowing the petition the court held that the error of the Commission in the present case lies in permitting the application to proceed without the satisfaction being recorded by the Commission, which is a fundamental aspect which goes to the root of its jurisdiction to entertain the application under section 245C. The Court observed that the Commission has moved over to the stage of section 245D(4) without entering upon the fundamental issue as to whether the application was or was not in valid. The Court observed that once a report is received under section 2C of section 245D, the Commission has to consider as to whether or not the application is invalid. The petition was allowed and the Commission was directed to reconsider the order according to the direction. (WP NO. 3900 of 2013 dt 13-6-2013)(AY. 2006-07 to 2012-2013) (ZF Steering Gera Ltd.)
CIT v. ITSC (2014) 267 CTR 7 / 101 DTR 97 (Bom.)(HC)

S.245D : Settlement Commission – Finality of order of Settlement Commission [S. 245F]
Order of the Settlement Commission is conclusive. No power vests in income-tax authorities to initiate proceedings in respect of period and income covered by such order. Settlement Commission cannot direct income-tax authorities to reopen case in respect of period dealt with in its order. (AY. 2000-01 to 2006-07)
CIT v. Diksha Singh (Smt). (2012) 247 CTR 215 / (2013) 350 ITR 157 (All.)(HC)

S.245D : Settlement Commission – Duty of settlement commission to examine materials and admissions referred to in report of commissioner – Order of Settlement Commission being non application of mind the order was quashed [S. 245D]
Having due regard to the seriousness of the objections taken by the Commissioner and the nature of the documents found during the survey of the assessee's premises, the Settlement Commission ought to have actively applied its mind to the report of the Commissioner and the copious materials adverted to. The Settlement Commission lost sight of the fact that the reports of the Joint Director were vague and did not throw light as to what was the explanation of the assessee which merited acceptance. The Settlement Commission could not have been satisfied as to the applicability of the assessee's explanation with regard to the various issues raised before it in the report of the Commissioner merely on the basis of the reports of the Joint Director. It thus ignored the relevant evidence and material which it ought to have taken into account while processing the assessee's application. Hence, its order was not valid and was liable to be quashed.
CIT v. Godwin Steels P. Ltd. (2012) 206 Taxman 96 / (2013) 353 ITR 353 (Delhi)(HC)

S.245D : Settlement Commission – Waiver of interest – Rectification of mistake – Order of Commission charging interest contrary to Circular and decision of Supreme Court – Rectification order is not permissible [Ss. 154, 234A, 234B]

The Settlement Commission, for the AY. 1991-92 to 1993-94, granted waiver of interest under section 234A for the AY. 1992-93 and 1993-94. It charged interest without waiver for the AY.1991-92. It granted waiver of interest under section 234B and directed the balance of interest to be levied up to the date of proceedings under section 143(3). On miscellaneous applications by the Revenue, the Commission held that the error could be rectified in the light of the Supreme Court decision; that as regards the interest under section 234A there was no entitlement for waiver for the AY 1993-94, consequently interest for the AY must be charged fully; and that the interest under section 234B was to be charged up to the date of the order of the Settlement Commission under section 245D(4). On writ petitions filed by the assessee, it was held that the earlier order of the Commission though contrary to the Board Circular and considered in the light of the decision of the Supreme Court was an error within the jurisdiction of the Commission it was not an error that went to the root of its jurisdiction. An application for rectification under section 154 was, however, impermissible and beyond the jurisdiction of the Commission. Thus, the revised order of the Settlement Commission could not be sustained. (AY. 1991-92 to 1993-94)
U. Narayanamma (Smt.) v. Govt of India (2013) 352 ITR 598 (AP)(HC)
V. CH. Rama Rao v. Govt. of India (2013) 352 ITR 598 (AP)(HC)
T. Uma (Smt.) v. Govt. of India (2013) 352 ITR 598 (AP)(HC)
A.P. Met Engg. Ltd. v. Govt. of India (2013) 352 ITR 598 (AP)(HC)

S.245H : Settlement Commission – Immunity from prosecution / penalty – Remanding the matter to settlement commission for de novo adjudication by a single judge held to be valid [S.245C, 245D]
Assessee approached Settlement Commission under section 245C(1) for settlement of its cases. Settlement Commission granted immunity to assessee from levy of penalty and initiation of prosecution. Single Judge of High Court quashed order of Settlement Commission and remanded matter to it for reconsideration. Whether as per provisions of section 245D prevalent at relevant assessment years Settlement Commission on receipt of application had to call for a report from Commissioner and on basis of such report granting of immunity from prosecution and penalty ought to have been scrutinised, since Settlement Commission had not done so, order of Single Judge remanding matter to Settlement Commissioner for de novo adjudication did not suffer from any material irregularity or illegality. (AY. 1994-95 to 1999-2000)
ING Vysya Bank Ltd. v. CIT (2012) 76 DTR 193 / (2013) 213 Taxman 115 / 255 CTR 311 (Karn.)(HC)

S.245R : Advance rulings – No jurisdiction where return has been filed [S.139]
AAR would not have jurisdiction to render ruling where return has been filed. (A.Y. 2009-10)
Netapp B. V. v. AAR (2012) 253 CTR 164 / (2013) 357 ITR 102 / 213 Taxman 427 (Delhi)(HC)
Sin Oceanic Shipping ASA (2012) 253 CTR 164 / (2013) 357 ITR 102 / 213 Taxman 427 (Delhi)(HC)

S.245R : Advance rulings – Procedure – Violation of SEBI guideline – Rectification of mistake – Application cannot be rejected only on the ground that an illegality had been taken place [Rules 18, 19, Constitution of India-Art.226)
AAR refused to give a ruling on the questions formulated at the time of admitting the application of the petitioner on the ground that the applicant has illegally circumvented SEBI Guidelines. On writ, the Court observed that the Authority had refused to give ruling merely on the assumption that an illegality had been committed. In the instant case, there was in fact no contravention of the SEBI Guidelines by the petitioner as per the communication received by the Director of income-tax from SEBI. In these circumstances, the Authority was not correct in refusing to give a ruling at the time of final hearing in the absence of any fresh material, merely on the basis of suspicion. Accordingly the order was set aside. Court also rejected the argument of the revenue that the petitioner should move the authority for appropriate relief under Rule 18 and 19 of Advance Ruling Rules by observing that Rule 18 would not apply as in the instant case no ruling

was rendered by the Authority. Rule 19 presupposes that the order to be rectified is an order on which a ruling is rendered.
Mahindra BT Investment Co (Mauritius) Ltd. v. DIT (2013) 359 ITR 485 / 35 taxmann.com 535 / 91 DTR 225 (Bom.)(HC)

S.245R : Advance rulings – Commissioner or his representative need not be heard at admission stage – Hearing Commissioner or his representative before pronouncing advance ruling only if necessary – Admission of application for advance ruling without hearing Department – No infringement of legal rights [Constitution of India Art. 226]
Section 245R(1) contemplates forwarding of a copy of such application to the Commissioner, if necessary, calling upon him to furnish the relevant records, does not contemplate the filing of objections or response to the application so made. Nowhere does section 245R state that the Commissioner from whom records were called for is to be called upon to make his objections to the admission of application and record reasons when it allowed the application for an advance ruling. Since the Director of Income-tax and the Additional Commissioner failed to substantiate the infringement of legal right conferred on them under the statute while allowing the applications for advance ruling, the writ petitions were devoid of merit and were accordingly dismissed.
DIT (IT) v. AAR (2013) 352 ITR 185/215 Taxman 130 (Mag.)(AP)(HC)

S.245R : Advance rulings – Mere filing of return of income – No bar to advance ruling – Unless question raised in application for advance ruling is in issue in return filed. [S.245Q]
Filing of return before filing of advance ruling application does not necessarily mean that question raised in application is already pending before Income-tax authority. Mere filing of a return does not attract bar created under section 245R(2) unless question raised in application for advance ruling is in issue in return filed.
Hyosung Corporation, Korea, In re (2013) 218 Taxman 36 / 216 CTR 230 (AAR)

S.245R : Advance rulings – Pendency of proceedings – Application – Mere filing of Income tax return does not attract the bar on filing advance ruling application-Application was admitted. [S.139(1) 143(1), 143(2), 245R(2)]
The applicants the return of income was filed on 30-11-2011. Application for advance ruling was filed on 4th August 2012. Notice under section 143(2) was issued on 8th August 2012. i.e. after the date of application. The Authority held that the questions raised by the applicant cannot be said to be already pending before the Income tax Authorities and therefore, the application was admitted. Where only income-tax return was filed before date of filing application for advance ruling but notice u/s. 143(2) was issued only after date of filing application, it cannot be said that matter covered by advance ruling application was pending before income-tax authority so as to attract the bar on filing advance ruling application u/s 245R(2). (A.A.R.NO 1309 of 2012 dated 13-12-2013)
Mitsubishi Corporation, Japan, In re (2013) 40 taxmann.com 335 / (2014) 97 DTR 4 / 360 ITR 704 (AAR)

S.245R : Advance rulings – Procedure – Application – Notice issued before filing of application – Application cannot be entertained [S.143(2)]
The applicant sought an advance ruling on taxability in India of the income received /receivable by the applicant for off shore supply of equipment and provision of supervisory activities. The Authority noticed that in the instant case notices under section 143(2) were already issued before filing of the application. The transaction on those where the rulings of the AAR were sought, were admittedly shown in the return of income-tax filed. The AAR held that they have no jurisdiction to deal with such an issue, accordingly the application was rejected.
Hyousung Corporation Korea, In re(2013) 36 taxmann.com 150/ (2013) 91 DTR 208 / 357 ITR 123 / 261 CTR 230 (AAR)

S.245R : Advance rulings – Procedure – Rectification of mistake – A party cannot claim that since something wrong has been done in another case, direction should be given to another wrong [Rule 19]

AAR held that "mistake apparent from the record" means such error which is apparent on mere looking at the records , without going in to long-drawn process of reasoning. AAR rejected the arguments of the applicant that since while disposing of earlier application , the authority had expanded the scope and ambit of expression apparent from record, same parameters should be used while disposing of this application. It held that even if it is accepted for the sake of argument that the authority did not keep in view the appropriate parameters while dealing with the earlier application under Rule 19, the concept of negative inequality cannot be pressed in to service. A party cannot claim that since something wrong has been done in another case, direction should be given to another wrong. It would not be setting a wrong right, but would be perpetuating another wrong.(1 of 2013 dt 1-4-2013)

CTCI Overseas Corporation Ltd. In re (2013) 36 taxmann.com 268 / 261 CTR 337 (AAR)

S.245R : Advance rulings – Procedure – Application – Ruling is transaction related; seeking a ruling only on part of transaction cannot be said to be proper. [S.10(38), 115JB]

The applicant, a company registered under the laws of Panama, holds shares in two Indian companies, both governed by the Companies Act, 1956. The applicant proposes to transfer the shares held by it in the two companies through recognized stock exchanges. As per applicant, shares held by it in the Indian companies are long-term capital assets in terms of section 2(29A), read with section 2(42A) thereof. According to it, the capital gains arising out of the sales through the stock exchanges in India on which securities transaction tax would be paid, would be exempt under section 10(38).At the hearing under section 245R(4), the applicant emphasised that it was not seeking a ruling on the question whether the transaction would be exempt from taxation under section 10(38), but was seeking a ruling only on the applicability of section 115JB to the proposed transaction. According to the applicant, section 115JB had no application to a foreign company which had no presence in India and its application was confined to companies that are resident in India. Authority held that where proposed transaction requires ruling on question of applicability of section 10(38) and also section 115JB but applicant does not seek ruling on applicability of section 10(38), ruling on applicability of section 115JB is to be declined. In favour of revenue.

ZD, In re (2012) 348 ITR 351 / 254 CTR 279 / (2013) 212 Taxman 246 (AAR)

S.245U : Advance rulings – Powers – Authority cannot refuse to give a ruling only on a mere suspicion of illegality or fraud having taken place

Petitioner sought advance ruling on taxability of capital gains arising to it in certain share transactions. Authority admitted application but refused to give a ruling at final hearing on ground that transactions underlying questions formulated were in breach of SEBI Guidelines and, therefore, based on an illegal act. Later, communication received by Director of Income-tax from SEBI showed that there had been no breach of SEBI Guidelines. Court held that Authority can exercise its discretion not to give a ruling only in cases where fraud and/or illegality is *ex facie* evident or fraud or illegality has been established in some proceedings; such a discretion is not to be exercised on a mere suspicion of illegality or fraud having taken place.

Mahindra BT Investment Co. (Mauritius) Ltd. v. DIT (IT) (2013) 91 DTR 36 / 261 CTR 272 (Bom.)(HC)

S.245U : Advance rulings – Creature of statute – Cannot pronounce upon constitutional validity or *vires* of any provisions of Act [S.245R]

Authority for Advance Ruling (AAR) is a creature of Act and, thus, it cannot pronounce upon constitutional validity or *vires* of any provision of Act.

Hyosung Corporation, Korea, In re (2013) 357 ITR 123 / 261 CTR 230 / 218 Taxman 36 (AAR)

S.245V : Advance rulings – Framing of question – Rectification of mistake – Authority cannot determine the tax liability of any other persons – Not permissible to re frame the questions or to add further questions [S.245R][Rule 19 of Procedure Rules]

A proposed question framed by Authority for Advance Rulings for determination can only relate to tax liability of applicant; and it would be impermissible to determine tax liability of any other person. While dealing with an application for rectification of advance ruling, it is not permissible to reframe questions or issues already framed or to add further questions.

CTCI Overseas Corporation Ltd., In re (2013) 218 Taxman 54 / 261 CTR 34 (AAR)

S.246A : Appeal – Commissioner (Appeals) – Admissibility of additional evidence [Rule 46A]

Additional evidence should be accepted when the assessee makes out a case of insufficient time for complying with requirements. (AY. 2002-03, 2003-04, 2005-06, 2007-08)

Russian Technology Centre P. Ltd. v. DCIT (2013) 25 ITR 521 / 145 ITD 88 (Delhi)(Trib.)

S.246A : Appeal – Commissioner (Appeals) – Appealable orders – Letter to principal officer is not an order: Appeal is not maintainable [S.179]

Assessee was director in company 'K' Ltd. Assessing Officer passed assessment order raising demand. Subsequently Assessing Officer issued letter to principal officer of a different company "B" informing that balance demand in case of 'K' was stayed till 30-4-2008 & that no further stay would be granted unless 50% of demand was paid by 15-5-2008. CIT(A) rejected the appeal by viewing the same as 'non-maintainable'. On further appeal in Tribunal, the Tribunal held that no such specific order under section 179 has been passed by Assessing Officer against the present assessee, making them liable for the payment of such tax etc. No order was passed under section 179 of the Act. A mere letter of the Assessing Officer informing the principal Officer 'no further, request for stay of demand will be considered unless 50% of the demand was paid by 15/5/08 in the case of 'K' for the AY. 2001-02 and a copy of which was endorsed to the assessee did not mean that the assesses has been made liable to pay tax due on behalf of 'K'. Moreover, no order under section 179 was submitted to justify their claim that they have been aggrieved of by the said order.

N. Gowrishankar v. ACIT (2013) 56 SOT 119 (URO)(Bang.)(Trib.)

S.246A : Appeal – Commissioner (Appeals) – Appealable orders [S.144, Rule 45(2)]

Aggrieved by the exparte order dated 31-12-2008 passed by the Assessing Officer (AO) u/s. 144 of the Act the assessee filed an appeal to CIT (A). The memorandum of appeal was signed by CA, Shri S.U. Radhakrishnani, as authorised representative. Since the assessee neither submitted any valid power of attorney nor was there any explanation as to why the appeal was not signed by the assessee, CIT (A) vide order dated 11-10-2010 dismissed the appeal as invalid. Thereafter, the assessee filed a fresh appeal on 7-3-2011 along with application for condonation of delay. The CIT (A) in his order dated 22-12-2011 held that the appeal filed by the assessee against the assessment order had already been adjudicated by CIT (A) and dismissed. There was no provision for filing of an appeal when the first appeal had been dismissed. The appeal was also filed beyond the time limit CIT(A) therefore dismissed the appeal inlimine. Once the appeal was treated as invalid, the same became non-est. The assessee had the right to file another appeal which of course has to be considered as delayed appeal and, in case delay is condoned, the appeal has to be decided on merit. The Tribunal held that the view taken by CIT(A) does not represent the correct view and therefore, has to be rejected. Once the appeal filed by the assessee is found to be legally invalid and dismissed as such, the assessee can file another appeal which has to be considered along with condonation application and, if admitted after due consideration of condonation application, it has to be decided on merit. (AY. 2006-07) ('G' Bench, ITA No.1133/M/12 and ITA No.5490/M/11, Dated 11-12-2012)

Yusuf Husain v. ITO (2013) BCAJ Pg. 25, Vol. 44-B Part 5, February 2013 (Mum.)(Trib.)

S.249 : Appeal – Commissioner (Appeals) – Dismissal – Deposit of tax – Tax was recovered – Appeal was held to be maintainable [S. 260A]

Assessee's appeal was rejected by CIT (A) on failure to pre-deposit tax required for filing appeal. The Revenue sold assessee's property for recovery of tax. Hence, the assessee sought to recall the order of the CIT (A) since tax had been recovered. This application was also rejected by Commissioner (Appeals).However, the Tribunal remanded the matter back to the CIT (A) against which Revenue filed appeal before High Court. Pending the appeal before the High Court, CIT (A) decided remanded matter on merits in favour of Revenue which was affirmed by Tribunal. In view of this fact, Revenue's pending appeal had become infructuous.

CIT v. Abdul Kareem Ladsab Telgi (2013) 218 Taxman 366 (Kar.)(HC)

S.249 : Appeal – Commissioner (Appeals) – Stay – Writ for early disposal of appeal – Failure to comply with directions – Directed to early disposal of appeal

Since the assessee had not complied with the direction of the CIT (A) to pay 50% of the tax in installments, Court could not direct early disposal of appeal, and hence, assessee's writ petition was dismissed.

Ajith K. Mangatt v. ITO (2013) 219 Taxman 120 (Mag.)(Ker.)(HC)

S.249 : Appeal – Commissioner (Appeals) – Stay – Directed to pay Rs.15 crore for each month

On 1-8-2012, assessment order was passed raising huge demand. The assessee filed a stay application before the CIT(A) for giving relief from pre-deposit of tax. The CIT(A) held that the disputed amount was ` 369 crore was undisputed while Rs.665 crore was disputed and thereby directed the petitioner-assessee to pay Rs. 30 crore during current year in addition to Rs.13 crore already paid. On High Court's direction at instance of assessee, CIT(A) reviewed the said order, but directed assessee to pay demand by way of enhanced installment of Rs. 80 crore each. In the instant writ, the petitioner pleaded financial constraints and clarified that actually entire demand was disputed. Held since the CIT (A) had in earlier stay application only directed payment of installments of ` 15 crore each month, same should have been continued.

Unitech Ltd. v. Addl. CIT (2013) 218 Taxman 107 (Mag.) / 89 DTR 44 (Delhi)(HC)

S.249 : Appeal – Commissioner (Appeals) – Form of appeal and limitation – Condonation of delay [S.30 of Indian Income Tax Act, 1922, Sec. 5 of the Limitation Act, 1963]

The assessee filed appeal before the Assistant Commissioner against assessment order. After a period of three years, the assessee moved an application before Assistant Commission for transfer of Appeal CIT(Appeals). The assessee also moved an application for Condonation of delay before the CIT(Appeal). The CIT(A) dismissed appeal of the assessee. The Tribunal upheld the order of CIT(A) as no action was taken by the Assessee for a long period. (AY. 2005-06)

Prashant Projects Ltd. v. Dy. CIT (2013) 145 ITD 202 (Mum.)(Trib.)

S.249 : Appeal – Commissioner (Appeals) – Admitted tax – Appeal was dismissed in limine as non-maintainable was admitted tax as not paid. At the time of filing petition before the Commissioner (Appeals) admitted tax was paid. Appeal held to be maintainable

The CIT(A) dismissed the appeal as non-maintainable due to non-payment of tax. However, at the time of filing the petition before the CIT (A) for restoration of the appeal, the admitted tax has been paid. The CIT (A) rejected the petition.It was held that the assessee has discharged the huge tax liability. Thus, it would be totally unfair for not providing an opportunity to him for disputing the addition made by the Assessing Officer on merit. It was further observed that the expression 'sufficient cause' for condonation of a delay should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party because the judiciary is expected not on account of its power to legalise injustice on technical grounds. (AY.1996-97 to 2002-03)

T. Kishan v. CIT (2013) 56 SOT 114 (URO)(Hyd.)(Trib.)

S.250 : Appeal – Commissioner (Appeals) – Stay – Assessing Officer was directed to follow the procedure under section 245 – Commissioner (Appeals) was directed to dispose the appeals within three months [S.10B]

During pendency of appeals, assessee filed application before Deputy Commissioner for stay on assessment order on ground that in just preceding year, similar issue was decided by Commissioner (Appeals) in favour of assessee. The Assessing Officer rejected stay application on ground that order of earlier year was under challenge before Tribunal and had not attained finality. Assessing Officer was directed to follow the procedure under section 245. Commissioner (Appeals) was directed to dispose of the appeals within three months. (AY. 2008-09)

Jeans Knit (P.) Ltd. v. DCIT (2013) 358 ITR 505 / 216 Taxman 252 (Karn.)(HC)

S.250 : Appeal – Commissioner (Appeals) – Power to stay of recovery

The Petitioner requested the AO to postpone recovery till appeal of petitioner against assessment order was disposed of,which was rejected by the AO. Thereafter, petitioner filed instant petition. Held the Appellate Commissioner has power to grant stay pending appeal. Therefore, the petitioner should file application for stay pending appeal before Appellate Commissioner and till then there would be no recovery against petitioner arising out of order of assessment. (AY. 2011-12)

Uttar Gujarat Vij Co. Ltd. v. ACIT (2013) 216 Taxman 48 (Mag.)(Guj)(HC)

S.251 : Appeal – Commissioner (Appeals) – Power to grant stay – Commissioner has no jurisdiction to pass an order when an appeal is pending before Commissioner (Appeals)- Commissioner (Appeal) was directed to dispose the stay application

Commissioner had no jurisdiction to pass an order on application for stay of order impugned in appeal pending before Commissioner (Appeals), and, therefore, impugned order of Commissioner was to be set aside with a direction to forward application in question to appellate authority for decision making.

Devaraj Pande v. Income tax Authority (2013) 219 Taxman 120 (Mag.)(Kar.)(HC)

S.251 : Appeal – Commissioner (Appeals) – Stay application – Opportunity of being heard must be given – Matter remanded

When the CIT (A) without grant opportunity of being heard on the assessee's stay application and ignoring the request to allow the assessee to produce last updated exemption order directed the assessee to remit 50% of demand raised in five equal monthly installments, matter was directed to be decided by CIT (A) afresh after assessee files appropriate application before it to modify order passed on stay petition.(AY 2009-10)

Marthoma Cheria Pally v. JDIT (2013) 218 Taxman 46 (Mag.)(Ker.)(HC)

S.251 : Appeal – Commissioner (Appeals) – Writ for directing expeditious disposal – Stay application – No coercive steps be taken against assessee for enforcing recovery till stay application was decided [S. 220]

When appeal and stay application were pending before CIT (A) for disposal, asseesee filed writ praying that CIT (A) should be directed to consider and decide his appeal as well as stay application expeditiously. The HC directed the CIT (A) to do so. The AO was also to be directed that no coercive steps be taken against assessee for enforcing recovery till stay application was decided.

Dr. Rajesh Rajora v. DCIT (2013) 218 Taxman 44 (Mag.)(MP)(HC)

S.251 : Appeal – Commissioner (Appeals) – Order giving effect – Assessing Officer can compute the income lower than that returned income [S.139, 154]

Assessing Officer is free to give effect to order of CIT(A) without restricting income to returned income; Assessing Officer can compute income lower than that returned. Tribunal has referred the High Court judgment in *Gujarat Gas Co Ltd. v. JCIT (2000) 245 ITR 84 (HC)* where in the Court directed to ignore the Circular of CBDT which provided that assessed income of assessee should not be below the returned income was invalid.(AY 2001-02)
CIT v. Milton Laminates Ltd. (2013) 218 Taxman 108 (Mag.)(Guj.)(HC)

S.251 : Appeal – Commissioner (Appeals) – Power to remand – To consider alternative contention was held to be valid [S.80HHC, 80I]
On appeal, apart from questioning additions, assessee raised an alternative contention that, if income was positive, it would be entitled to deduction under sections 80HHC and 80-IA. The CIT (A), in principle, agreed with assessee but remanded proceeding keeping it open to Assessing Officer to examine facts and grant deduction, as available. The order of the CIT (A) was upheld by the Tribunal. Held, since CIT(A) only entertained alternative contention of assessee and remanded proceedings for verification of facts to Assessing Officer, there was no error in impugned order and, therefore, same was to be upheld.(AY.2002-03)
CIT v. Shree Rama Multi Tech Ltd. (2013) 218 Taxman 45 (Mag.)(Guj.)(HC)

S.251 : Appeal – Commissioner (Appeals) – Powers – Appellate authority deciding matter against assessee on preliminary issue – Matter to be remanded [S.254(1), 260A]
The assessee submitted his return for the assessment year 2006-07. A notice was issued to him under section 143(2) by speed post. The notice was not complied with. The assessee contended that there was no service of notice. The A. O. held that notice was duly served and proceeded to compute the income and passed the assessment order assessing the total income of the assessee at ` 19,92,440 and ordered initiation of penalty proceedings under section 271(1)(b) and (c). The Commissioner (Appeals) allowed the appeal of the assessee only on the ground that notice under section 143(2) was not served within the stipulated period of 12 months from the expiry of the end of the month in which the return was furnished. The Commissioner (Appeals) in view of this decision did not decide the other issues raised by the assessee with respect to the addition made by the A.O. The Tribunal held that the notice under section 143(2) was duly served upon the assessee and the finding recorded by the Commissioner (Appeals) was reversed. However in spite of the fact of reversal of the finding on the preliminary issue challenging the jurisdiction of the Assessing Officer, the Tribunal did not remand the matter to the Commissioner (Appeals) for deciding the other points raised by the assessee. On appeal to the High Court held, (i) that the notice under section 143(2) was validly served upon the assessee.
(ii) When an appeal was preferred by the Revenue only on one question of law which was decided against the Revenue and upon reversal of the findings of the appellate authority by the Tribunal the assessee automatically got right to agitate the matter before the first appellate authority on all the issues which were not considered and decided by the first appellate authority. When an authority decides the matter on a preliminary issue and if the finding on that preliminary issue is perverse, then normally, the matter is required to be remanded for deciding the remaining issues. If the remanding authority or court itself is not deciding the other issues. Order 41, Rule 23 of the Code of Civil Procedure, 1908, clearly provides that where the court from whose decree an appeal is preferred, has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the appellate court may if it thinks fit, by order remand the case, and may further direct what issues shall be tried in the case so remanded. Matter remanded to the Commissioner (Appeals). (AY. 2006-07)
Milan Poddar v. CIT (2012) 211 Taxman 403 / (2013) 357 ITR 619 / 260 CTR 170 (Jharkhand)(HC)

S.251 : Appeal – Commissioner (Appeals) – Powers – Additional evidence –Commissioner (A) must record reasons for admitting additional evidence – Disallowance of expenditure deleted by

Commissioner (A) on the basis of new plea and additional evidence – Deletion of disallowance not justified [Ss. 40(a)(ia), 194C, forms 15I, 15J, Rule 46A]

Under sub-rule (2) of rule 46A of the Income-tax Rules, 1962, the Commissioner (A) is required to record in writing the reasons for admission of additional evidence. Even in a case where additional evidence may be admitted, it is the bounden duty of the fact-finding authority to assess the value of the evidence permitted to be adduced.

The Honorable High Court allowing the appeal of the revenue held that the assessee was served with a notice to show cause why the amount paid to the sub-contractors on account of transportation charges should not be disallowed. The assessee in reply never took the point that it did not or could not in law deduct the tax because Form No.15-I had been submitted by the transporters. In the absence of any satisfactory explanation as to why this case was not made out in reply to the show-cause notice, the contention that such Form 15J had been submitted on the basis of Form 15-I lost credibility. The Commissioner (A) did not go into the relevant questions and straightaway proceeded to hold that Form No.15-I was received by the Department from the transporters and on the strength of those forms the assessee did not deduct the tax. The additional evidence was not legally admitted by the Commissioner (Appeals). The finding that Forms 15-I and 15J were submitted, was perverse, the deletion of disallowance was contrary to section 194C read with section 40(a)(ia). (AY. 2006-07, 2008-09)

CIT v. Mitra Logistics P. Ltd. (2013) 357 ITR 657 / (2014) 265 CTR 593 / 99 DTR 85 (Cal.)(HC)

S.251 : Appeal – Commissioner (Appeals) – Powers – Matter remanded by Tribunal with set out parameters

Where Tribunal remanded proceedings to Commissioner (Appeals) to consider question of taxing after verifying that whether sales-tax was retained by assessee or deposited with Government, Tribunal set out the parameters, within which Commissioner (Appeals) had to reconsider issue. Therefore, it was not open for Commissioner (Appeals) to examine entire nature of payment to consider whether same could be considered as taxable in hands of assessee.

Whiteline Chemicals v. ITO (2013) 216 Taxman 242 (Guj.)(HC)

S.251 : Appeal – Commissioner (Appeals) – Powers – Remand by CIT (A) for failure by AO to comply with directions of Tribunal

Even after amendment of s. 251(1)(a) w.e.f. 1st June 2001, divesting CIT(A) of power to remand, CIT(A) was justified in remitting the matter to the AO in appeal against giving effect to order of the Tribunal, where the AO failed to make assessment as per directions of the Tribunal. Order barred by limitation. Appeal of revenue was dismissed. (AY. 1979-80 to 1981-82)

CIT v. Hindustan Zinc Ltd. (2103) 83 DTR 231 / 257 CTR 22 (Raj.)(HC)

S.251 : Appeal – Commissioner (Appeals) – Power of enhancement – Notice is mandatory before enhancement

Assessee-company was incorporated on 30-1-1997. Promoters subscribed to equity shares of assessee and also made advances to it towards allotment of additional equity shares. Since allotment of additional equity shares against subscription money could not be completed by 31-3-1997, assessee paid interest to subscribers and claimed deduction of same. Assessing officer accepted assessee's claim for deduction of interest payment. Commissioner (Appeals), on appeal filed by assessee on some other issues, considered payment of interest too and held that assessee was not entitled to deduction for payment of interest. Tribunal upheld order of Commissioner (Appeals) on enhancement of assessment. The Court held that said issue was to be sent back to Commissioner (Appeals) with a direction to issue notice to assessee before considering any such enhancement. Matter remanded. (AY.1997-98)

Infrastructure Development Finance Co. Ltd. v. JCIT (2013) 213 Taxman 28 (Mag.)(Mad.) (HC)

S.251 : Appeal – Commissioner (Appeals) – Powers of enhancement – Opportunity must be given [Ss.11, 12AA, 13]

Though the powers of the Commissioner (Appeals) are co-terminus with that of Assessing Officer, but before making enhancement or rejecting assessee's claim on some other new grounds which were not before Assessing Officer, he should afford reasonable opportunity to assessee for explaining same.(AY. 2007-08)

Spandana Foundation v. ADIT (2013) 59 SOT 176 (Hyd.)(Trib.)

S.251 : Appeal – Commissioner (Appeals) – Powers – New claim – Appellate authorities can entertain the claim, even in the absence of revised return [S.139(5)]

Where assessee had not claimed trading loss in return income but had made a claim during appellate proceedings by way of a note, objection of revenue that in absence of revised return, assessee could not make a fresh claim and Assessing Officer had no jurisdiction to consider a fresh claim could not be accepted as jurisdiction of appellate authorities is not barred. (AY. 2004-05)

APL India (P.) Ltd. v. Addl. CIT (2013) 58 SOT 41 (URO)(Mum.)(Trib.)

S.251 : Appeal – Commissioner (Appeals) – Powers – New claim – Revised return – Making a new claim before the appellate authorities – Not necessary to file a revise return [S.139]

CIT(A) entertained an additional ground which was not raised before the Assessing Officer. The dispute before Tribunal was whether admission of such an additional ground and adjudication thereon was proper or not. The Tribunal held that while making a new claim if any before Assessing Officer it is required to file revised return of income and not by way of letters or by way of filing revised computation, etc. But when comes to the Tribunal or for that matter CIT(A), who is the appellate authority, assessee does not have to initiate a new claim before them by way of filing the revised return of income. As such the returns or revised returns are filed under the provisions of section 139 and it is to be done before the Assessing Officer and not before the first and second appellate authority i.e., CIT(A), Tribunal or higher judiciary. Therefore CIT(A) was justified in entertaining and adjudicating the grounds raised by the assessee.

G.V.K. Industries Ltd. v. ACIT (2013) 56 SOT 73 (Hyd.)(Trib.)

S.251 : Appeal – Commissioner (Appeals) – Powers-Additional evidence – Sufficient cause. [Income-tax Rules, 1962-Rule 46A]

The assessee surrendered an amount in relation to 23 creditors, instead of asking for additional time, when the Assessing Officer asked the assessee to furnish the confirmations of all the creditors. There is nothing on record to suggest that the Assessing Officer did not allow sufficient opportunity to the assessee to submit confirmations. When the assessee expressed its inability to furnish further confirmations or to produce the persons, it offered the amount to tax; and the Assessing Officer accepted the said offer and completed the assessment. The powers of the Commissioner (Appeals) in terms of rule 46A to admit fresh evidence, entail an element of discretion which is required to be exercised in a judicious manner. Additional evidence was admitted and accepted as genuine without the Assessing Officer furnishing his comments and without verification. Hence, the matter was set aside and restored to the file of the Commissioner (Appeals). (AY. 2008-09)

ACIT v. Nirula Handicrafts Bazar (P.) Ltd. (2013) 56 SOT 97 (URO)(Del.)(Trib.)

S.251 : Appeal – Commissioner (Appeals) – Powers – Additional evidence was admitted without giving an opportunity to the Assessing Officer – Matter remanded [Income-tax Rules, 1962 - Rule 46A]

In spite of specific opportunities given to the assessee, it failed to file any evidence before the Assessing Officer as to why the provisions of TDS were not applicable. Before the Commissioner (Appeals), the assessee submitted additional evidence which were in form of circular of the RBI, audit report of RBI and other details. On revenue's appeal, it was held that the Commissioner

(Appeals), without application under rule 46A and without recording any reason for admitting the documents and explanation filed before him and without affording reasonable opportunity to examine such evidence or documents filed before him by the Assessing Officer had decided the issue in favour of the assessee, which is clear violation of principle of natural justice. Hence, the matter remanded. (AY. 2007-08)
DCIT v. Gurdaspur Central Co-op. Bank Ltd. (2013) 56 SOT (URO) 100 (Asr.)(Trib.)

S.251 : Appeal – Commissioner (Appeals) – Powers – Enhancement – Income from same source of income – Held to be valid
Assessee having derived royalty income from licensing of CDMA patents hand sets and equipment cannot be treated as two different source of royalty and therefore, AO having concluded the assessment by taxing only the royalty income from handsets, CIT(A) was competent to exercise his jurisdiction under section 251 to enhance income of the assessee by including royalty income from network equipment. (AY. 2001-01 to 2004-05)
Qualcomm Incorporated v. ADIT (2013) 23 ITR 239 / 85 DTR 156 / 153 TTJ 513 / 56 SOT 72(URO) / 58 SOT 97 (URO)(Delhi)(Trib.)

S.251 : Appeal – Commissioner (Appeals) – Powers – Revision – Commissioner under section 264 has no power to pass an order prejudicial to assessee, issues which are not subject matter of revision under section cannot be enhanced by the Commissioner (Appeals) [Ss.35AB, 264]
The Assessing officer allowed the claim of assessee for deduction under section 35AB in respect of technical know-how fees. The Assessee filed petition under section 264 in respect of claim under section 80IB which the assessee had omitted to make in the original return. Commissioner restored the issue regarding allowability of claim under section 80IB of the Act to the Assessing Officer. Assessing Officer in fresh assessment proceedings disallowed the claim under section 80IB. On appeal the Commissioner (Appeals) *suo motu* disallowed the claim under section 35AB. In appeal before the Tribunal it was argued that Commissioner (Appeals) could not have consider the deduction under section 35AB which is beyond his jurisdiction. The Tribunal held that the Assessing Officer was correct in not considering any issue other than the claim of deduction under section 80IB made by assessee in the application under section 264 before Commissioner as he had no such jurisdiction. No doubt it is true that Commissioner (Appeals) while deciding an appeal has plenary power and can also consider any issue which has been omitted by the Assessing Officer. On the facts the Commissioner (Appeals) cannot consider any issue which is beyond the jurisdiction of Assessing Officer. In the fresh Assessment proceedings the Assessing Officer had no jurisdiction to consider any issue other than the claim under section 80IB and therefore, it cannot be said that in not considering the claim of deduction under section 35AB, the Assessing Officer had failed to do something which was necessary in the assessment. Commissioner (Appeals) has no power to act on which the Assessing Officer has no jurisdiction. Accordingly the order of Commissioner (Appeals) was set aside on this issue. (AY.2003-04)
Hindustan Colas Ltd. v. ACIT (2013) 140 ITD 277 / 151 TTJ 421 (Mum.)(Trib.)

S.253 : Appellate Tribunal – Certificate determining tax arrears – Kar Vivad Samadhan Scheme. [Finance (No.2) Act, 1988]
Certificate determining tax arrears and payment by assessee of arrears and allowing the immunity. Appeals relating to years covered under Kar Vivad Samadhan Scheme 1988 were not maintainable. (AY. 1993-94, 1994-95)
CIT v. SPR Group Holdings (P.) Ltd. (2013) 355 ITR 169 / 216 Taxman 50 (Mag.)(Karn.)(HC)

S.253 : Appellate Tribunal – Condonation of delay – Delay in filing appeal against the original order of the CIT(A) after the Tribunal allowed the appeal of the Revenue holding that the CIT(A) was not justified in rectifying his original order – technical and had to be condoned

Pending the assessee's appeal before the Tribunal the assessee filed a rectification application before the CIT(A) which was allowed by him giving substantial relief to the assessee. Thereafter, the assessee withdrew its appeal before the Tribunal. However, the revenue authorities challenged the order of the CIT(A) in rectification which was allowed by the Tribunal. The Assessee therefore filed an appeal before the Tribunal against the CIT (A)'s original order and also filed an application for condonation of delay. The delay was held to be condonable as the assessee had filed fresh appeal before the Tribunal once the entire reason for challenging the CIT (A)'s order had changed. (AY. 1993-94)
Umakant Leasing & Finance (P) Ltd. v. Dy. CIT (2013) 81 DTR 197 (Guj.)(HC)

S.253 : Appellate Tribunal – Condonation of delay – High Court condoned the delay of more than one year due to negligence of lawyer
Assessee running a tuition centre, an assessment order was passed. Against said order, assessee filed an appeal before Tribunal with a delay of over one year. Tribunal dismissed appeal being barred by limitation. On appeal, it was noted that on account of negligence of assessee's lawyer, appeal could not be filed within prescribed time. Further, sickness of mother was also a contributing factor as assessee was engaged in attending her. The Court held on facts, cause shown by assessee for delay in filing appeal was genuine and bona fide, therefore, impugned order was to be set aside and, matter was to be remanded back for disposal on merits. (AY. 1999-2000 to 2001-02)
Mukesh Jesangbhai Patel. v. ITO (2013) 213 Taxman 37 (Mag.)(Guj.)(HC)

S.253 : Appellate Tribunal – Dismissing the cross objection was seta-side [Rule 46A]
Assessing Officer made re-assessment and added certain amount to total tax liability of assessee. Assessee, in appeal, objected to said addition which was accepted. On appeal before Tribunal by revenue, assessee did not file any appeal or cross-objections. It was disputed whether notice of appeal was in fact received by assessee. Tribunal passed order and directed remand to Assessing Officer on question of consideration of additional evidence relied upon by assessee. Assessee filed appeal before High Court. High Court did not go into question as to whether notice of appeal was served on assessee. High Court directed Tribunal to adjudicate matter afresh on applicability of rule 46A and whether in obtaining factual matrix, only option was to remand matter to Assessing Officer. Assessee filed its cross-objection before Tribunal under section 253(4). Tribunal dismissed cross objection on assumption that assessee did not choose to file cross-objections despite service of notice. The Court held that Tribunal was unjustified in rejecting cross objection when it itself was satisfied that appellant had not, in fact, filed cross objection at time when it could have originally filed it when appeals were filed earlier before Tribunal. The Court also held that Tribunal should have examined whether cross-objections could be entertained in facts and circumstances of case having regard to independent power to entertain them contained under section 253(5), therefore, Tribunal's impugned order dismissing cross-objection was unsustainable and was to be set aside. In favour of assessee.
Ashian Needles (P.) Ltd. v. CIT (2013) 213 Taxman 38 (Mag.)(Delhi)(HC)

S.253 : Appellate Tribunal – Duty of Tribunal – Duty to examine facts carefully
That the order of the Tribunal did not disclose the facts considered on the basis of which it arrived at the conclusion in respect of the fixed deposits made by the friends and relatives of the managing director to the tune of Rs. 21,60,000. Admittedly, reasons are the links between the materials on which certain conclusions are based on the actual conclusions. In the absence of reasons based on consideration of facts by the Tribunal in the order to support its conclusion as regards the fixed deposit receipts of Rs. 21,60,000 its order could not be sustained. Matter remanded.
Hastalloy India Ltd. v. Dy. CIT (2013) 350 ITR 52 / 215 Taxman 13 (AP)(HC)

S.253 : Appellate Tribunal – Condonation of delay – Wrong advice by Chartered Accountant – 513 days delay was condoned

Where it was due to wrong advice of Chartered Accountant that appeal was not filed on time, it was to be held that there was reasonable cause in not filing appeals in time and same was to be condoned. (AYs. 2003-04 to 2009-10)
Perfect Scale Company (P.) Ltd. v. Dy. CIT (2013) 60 SOT 255 (Mum.)(Trib.)

S.253 : Appellate Tribunal – Delay in filing cross-objections – Advice of counsel – No evidence was produced – Delay was not condoned
Held, advice, consequent to change of counsel, cannot be accepted as a proper reason for delay in filing cross objections, without adducing any evidence on record. (AY. 2003-04 to 2007-08)
ACIT v. Vistaar Systems (P.) Ltd. (2013) 59 SOT 114 (URO)(Mum.)(Trib.)

S.253 : Appellate Tribunal – Cross-objection – Delay was condoned
The assessee filed cross-objection which was delayed. The Tribunal condoned the delay on the ground that the appeals were fixed for hearing before the Tribunal for the first time on 12th October, 2011 and the assessee filed the cross objections on 14th October, 2011. In condoning the delay the Tribunal followed the decision of Apex Court in the case of *Collector, Land Acquisition v. Mst. Katiji and others (1987) 167 ITR 471 (SC).*
ACIT v. Kapil Dev (2013) 157 TTJ 686 / 94 DTR 35 (Delhi)(Trib.)

S.253 : Appellate Tribunal – No tax payable by assessee as a result of order passed by Commissioner (Appeals)-assessee not 'assessee aggrieved' as envisaged in section 253(1)
Assessee could not be termed as 'assessee aggrieved' under section 253(1) of the Act if no tax is payable, after the order passed by Ld. CIT(A). (AY. 2003-04)
Nedlloyd B. V. v. Dy. DIT (2013) 144 ITD 236 / 157 TTJ 556 (Mum.)(Trib.)

S.253 : Appellate Tribunal – Cross objection – Jurisdictional issue of reassessment can be raised in cross objection though not raised before lower authorities [S.253(4)]
The Tribunal held that the assessee is duly entitled to raise plea by way of cross-objection as the same goes to the root of the matter even through the assessee has not raised the plea of jurisdiction in reopening the assessment before the Assessing Officer as well as CIT(A).
ACIT v. Sterling Infotech Ltd. (2012) 138 ITD 323 / (2013) 153 TTJ 20 (UO)(Chennai)(Trib.)

S.253 : Appellate Tribunal – Additional evidence – Matter set aside [Income-tax (Appellate Tribunal) Rules, 1963, R.29]
The Tribunal held that the evidence is material in deciding the grounds raised in the appeal, hence the additional evidence adduced by the assessee is admitted. For deciding other grounds on the basis of additional evidence the matter is sent back to Assessing Officer to decide in accordance with law. (AY. 2004-05)
The Rohtak Co-operative Milk Producer Union Ltd. v. ACIT (2013) 155 TTJ 684 / 90 DTR 387 (Delhi)(Trib.)

S.253 : Appellate Tribunal – Jurisdiction – Where the assessment order is passed in a particular state, that particular state has jurisdiction to hear an appeal [S.127]
The assessment of the assessee was framed by the Assessing Officer, New Delhi vide his order dt 29-12-2010. Assessee appealed before CIT (A), Laxmi Nagar, Delhi on 31-1-11. Thereafter jurisdiction of the Assessing Officer over assessee was transferred by commissioner vide his order dt 12/8/11 w.e.f 23-8-11 u/s 127(2) from Delhi to Kanpur. In view of the said transfer, revenue filed an appeal against order of CIT(A) before Luknow Bench of Tribunal. Dismissing the appeal of the revenue the Tribunal held that since office of the Assessing Officer who passed assessment order was located in Delhi and order u/s.127 was passed by the Commissioner after passing assessment order, Delhi Bench

of Tribunal had jurisdiction over assessee to hear appeals & not Lucknow Bench of the Tribunal.(AY. 2006-07, 2007-08)
ACIT v. Lata Jain (Smt.) (2013) 56 SOT 102 / 152 TTJ 33 (Luck)(URO)(Trib.)

S.253 : Appellate Tribunal – Condonation of delay of 485 days – Assessee had not formed any bonafide belief – Delay was not condoned.
Order passed by AO u/s.143(3) pursuant to directions given by Commissioner u/s. 263. The CIT(A) confirmed the disallowance. The Assessee filed two appeals one against the CIT(A) order and second against the CIT order u/s 263. Appeal against CIT order u/s 263 was filed after delay of 485 days. Assessee contended that it was under bona-fide belief that appeal would lie first before First Appellate Authority against order passed by AO. Held that, pragmatic approach should be adopted while exercising discretion in condoning delay but a distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former consideration of prejudice to the other side will be a relevant factor and calls for a more cautious approach, in the latter case no such consideration may arise and such a case deserves liberal approach. It is the case of the assessee that it was under bona fide belief that appeal would lie first before the first appellate authority against the order passed by the AO u/s.143(3) pursuant to the directions given by the Commissioner u/s.263 and therefore it has not filed appeal before this Tribunal against the order passed by the Commissioner. The submission is completely unsupported by any material on record. The assessee had not laced any material to suggest the advice given by any competent professional on the lines pleaded by the assessee. The assessee was represented by qualified professionals before the AO, the Commissioner and also before the CIT(A). In the absence of any material to support that the assessee had formed the aforesaid belief bona-fide, it is not possible to condone such inordinate delay. Besides, the Commissioner has merely set aside the order of assessment originally passed by the AO with the direction to pass a fresh assessment order after hearing the assessee. The appeal filed by the assessee was dismissed.(AY. 2006-07)
Rana Builders v. ITO (2013) 142 ITD 205 (Rajkot)(Trib.)

S.253 : Appellate Tribunal – Tax effect less than 3 lakhs in Tribunal – Appeal not maintainable [S.268A]
The issue involved in Tribunal was regarding the appeal filed by the revenue where the tax effect of the case was less than Rs. 3 lacs. Dismissing the appeal of the revenue, the Tribunal held that it is well settled that instructions issued by the CBDT are applicable for pending cases also. Therefore, the Instruction No. 3 of 2011, dt. 9-2-2011 issued by the CBDT is applicable for the pending cases also and in the said instruction the monetary tax limit for not filing the appeal before the Tribunal is Rs. 3 lakhs. (AY.2002-03)
ITO v. Suresh Sharma (Dr.) (2013) 56 SOT 1 (Jodh.)(Trib.)

S.253 : Appellate Tribunal – Jurisdiction – Location of Assessing Officer at the passing of Order is relevant [S.127]
Since the office of the Assessing Officer who passed assessment orders was located in Delhi, and order under section 127 was passed by Commissioner transferring his jurisdiction to Kanpur after passing assessment order, Delhi Bench of Tribunal had jurisdiction over assessee to hear appeals and not Lucknow Bench of Tribunal. (AY.2006-07, 2007-08)
ACIT v. Lata Jain (Smt.) (2013) 152 TTJ 33 / 56 SOT 102 (URO) (Luck.)(Trib.)

S.253 : Appellate Tribunal – Liability of director – Appeal is not maintainable on the basis of letter of Assessing Officer. [S. 179]
The assessee was erstwhile directors of 'K' Ltd. In case of 'K' Ltd., the Assessing Officer had passed an assessment order raising demand. The Assessing Officer served a notice on the assessee that balance demand in case of 'K' was stayed till 30-4-2008 in appeal preferred by 'K' and no

further stay would be considered unless 50 per cent of demand was paid by 15-5-2008. The assessee, on basis of aforesaid letter, challenged the assessment order in case of ‘K’, before the Commissioner (Appeals) submitting that the tax due from ‘K’ was sought to be recovered from the assessees under section 179 and, therefore, the assessee was aggrieved. The Commissioner (Appeal) upheld the action of the Assessing Officer. On appeal by the Assessee the ITAT held that, by virtue of section 179, it could not be said that the assessee has been made liable to pay tax due on behalf of ‘K’. Also the appeal was decided in favour of ‘K’ and hence, no demand is subsisting against the company as on date. Thus, there was no cause of action that is existing for the erstwhile Directors of the Company to challenge the orders of assessment of ‘K’ and the appeal was dismissed as not maintainable. The Tribunal also held that on the basis of letter the assessee was no justified in challenging the assessment order.(AY. 2001-12)
N. Gowrishankar v. ACIT (2013) 56 SOT 119 (URO)(Bang) (Trib.)

S.253 : Appellate Tribunal – Department cannot argue that registration granted by Commissioner under section 12 AA is not proper [S.12AA]
Tribunal held that order under section, 12AA, is an order passed by competent authority and if any irregularity has crept in the order, the same can be rectified by the competent authority itself. No appeal has been provided for the revenue against this order before the Tribunal. Therefore, the revenue cannot raise any objection qua the irregularity, if any, crept in the order of the Commissioner while granting registration. Decided in favour of assessee.
Addl. CIT v. Chaudhary Raghubir Singh Educational & Charitable Trust (2013) 55 SOT 211 (Delhi)(Trib.)

S.253 : Appellate Tribunal – Condonation of delay – Cross objection delay of 1529 days was not condoned.
Assessee filed cross-objections after a delay of 1,529 days. Assessee explained that it was an oversight which was discovered only in conference with its counsel after expiry of four years. Tribunal held that there was no sufficient cause for delay within meaning of section 253(5) to justify condonation of delay. Decided in favour of revenue. (AY. 2001-02)
ACIT v. Petroleum India International (2013) 55 SOT 69 (URO)(Mum.)(Trib.)

S.253 : Appellate Tribunal – Condonation of delay – Delay of 557 in filing appeal before Tribunal by the revenue was not condoned
Against order of Commissioner (Appeals) revenue department preferred an appeal after a delay of 557 days with condonation of delay application assigning cause as to that due to oversight and pressure of workload appeal could not be filed within prescribed time of 60 days. Tribunal held that cause shown by department was neither reasonable nor sufficient and, therefore, condonation of delay had to be declined. Tribunal also observed that it has power to condone delay in filing an appeal only when sufficient cause is shown with a view to advance substantial justice and even after sufficient cause has been shown party is not entitled to condonation of delay as a matter of right, and Tribunal has still to exercise its discretion after considering bona fides of parties or due diligence exercised by parties. Appeal of revenue was dismissed. In favour of assessee. (AY. 2007-08)
ACIT v. Vimal Mehra (2013) 55 SOT 67 (URO)(Delhi)(Trib.)

S.253 : Appellate Tribunal – Tax effect – Tax effect in a ‘case’ means overall tax effect in respect of disputed issues in a particular assessment year [S.172(7)]
During previous year 40 voyages were undertaken by a French shipping company through its Indian agent and 40 returns were filed - Instead of passing 40 orders, a composite assessment order under section 172(4) was passed by Assessing Officer assessing total income at Rs. 2.72 crore. Tribunal held that since tax effect under appeal in instant case was more than stipulated tax effect of Rs. 3 lakhs, even though 30 out of 40 appeals had tax effects of less than Rs. 3

lakhs each, all 40 appeals were maintainable before Tribunal. Tax effect in a 'case' means overall tax effect in respect of disputed issues in a particular assessment year. In favour of revenue. Circulars and Notifications: CBDT's Instruction No. 3/2011, dated 9-2-2011. (AY. 2010-11)
ITO(IT) v. CMA CGM Agencies (India) (P.) Ltd. (2013) 55 SOT 61 (URO)(Rajkot)(Trib.)

S.253 : Appellate Tribunal – Condonation of delay – Delay of 902 days not condoned as the assessee had not come with clean hands
Tribunal held that when assessee had not come with clean hands before Tribunal and had also failed to establish with cogent and proper evidence that there existed sufficient cause for not presenting appeal within stipulated period, delay of 902 days in filing appeal, could not be condoned; appeal would be barred by limitation and, hence, deserved to be rejected. In favour of revenue (AY. 2005-06)
Shree Balaji Woollen Mills v. ACIT (2013) 55 SOT 65 (URO)(Delhi)(Trib.)

S.253 : Appellate Tribunal – Maintainability – Small tax effect. [S.268A]
Since the tax effect in the case is less than Rs. 3 lakhs, the appeal filed by the revenue before the Tribunal is not maintainable. The limit is also applicable to pending cases. (AY. 2003-04)
ITO v. Saraswati Devi Gehlot (Smt) (2013) 152 TTJ 17 (UO)(Jodh.)(Trib.)

S.253(1)(d) : Appellate Tribunal – Dispute resolution panel – Appeal is not maintainable when DRP has not given any direction to pass order as per draft Assessment order to the Assessing Officer [S.144C]
Issue involved in this case was whether when DRP has not given any direction to the Assessing Officer to pass order as per draft Assessment order, appeal against the order was maintainable? The Tribunal dismissed the appeal of the assessee and held that the DRP had categorically stated that it has no jurisdiction to pass any direction in pursuance of the belated objections filed by the assessee against the draft assessment order of the Assessing Officer and in fact, the panel gave no direction of objections of the assessee. It is also observed that the DRP has also not given any direction to pass the order as per the draft assessment order. Therefore appeal is not covered by the provisions of section 253(1)(d) and the appeal is not maintainable. (AY. 2008-09)
Intimate Fashions India (P) Ltd. v. ACIT (2013) 56 SOT 103 (URO)(Chennai)(Trib.)

S.253(4) : Appellate Tribunal – Cross objection – Jurisdictional issue of reassessment.[S. 14A, 147]
Assessee is duly entitled to raise the plea by way of cross-objection which goes to the root of matter even though the assessee has not raised the plea of jurisdiction in reopening assessment before the Assessing Officer as well as CIT(A). (AY. 2002-03)
ACIT v. Sterling Infotech Ltd. (2013) 153 TTJ 20 (UO) / 59 SOT 19 (URO)(Chennai)(Trib.)

S.253(5) : Appellate Tribunal – Delay of 890 days was Condoned – Pursuing remedy as per the legal advice
Assessee filed the appeal belatedly as he was pursuing one remedy or the other as per the legal advice obtained. The delay of 890 days in filing the appeal before the Tribunal was condoned. Appeal was restored to the Tribunal. (AY. 2005-06)
Faisal Hameed v. ITAT (2013) 83 DTR 10 / 256 CTR 429 / 215 Taxman 81(Mag.)(J&K)(HC)

S.254(1) : Appellate Tribunal – Orders – Dismissal without going into merits – Want of prosecution – No power to dismiss appeal for want of prosecution without going in to merit of case [Rule 24 of the Income-tax (Appellate Tribunal) Rules, 1963]

Tribunal has no power to dismiss appeal for want of prosecution in limine and without going into merit of case, where appellant does not participate in proceedings.
Mayur Sheet Grah (P.) Ltd. v. CIT (2013) 219 Taxman 109 (Mag.)(All.)(HC)

S.254(1) : Appellate Tribunal – Orders – Estimation of income – Unexplained expenditure – Tribunal order was not speaking order – Matter remanded [S.69C]
Tribunal, without assigning any reason, estimated addition at Rs. 30 lakhs, since Tribunal's order was a non-speaking and non-reasoned order, absolutely on estimation basis, same could not be sustained. Matter remanded.(AY. 2006-07)
CIT v. Surat Beverages Ltd. (2013) 219 Taxman 39 (Mag.)(Guj.)(HC)

S.254(1) : Appellate Tribunal – Orders – Distribution of dividend – Power to admit additional grounds – Legal grounds can be raised orally – Question of law can be raised by assessee on ground that said point was not canvassed before CIT(A) and same was not raised in appeal memo-Tribunal was required to consider the said ground [S. 2(22)(d), 115-O, S. 77A of Companies Act, 1956]
The assessee bought its shares from its share holders. AO held that the amount paid by the assessee company for the shares from the share holders amounts to distribution of dividend and the same has to be considered as accumulated profits under section 2(22)(d). CIT(A) confirmed the AO's order in appeal. Before Tribunal the assessee contended that since the provisions of section 77A of the Companies Act had been applicable to buy back of shares of the assess company, section 2(22)(d) of the Act would not be attracted to consider as deemed dividend in order to apply the provisions of section 115O. Tribunal did not consider the said contention on the ground that the said point was not canvassed before the CIT(A) and the same was not raised as ground in the appeal memo. On appeal, the Court held that a legal question can be raised at any stage of appeal and such question need not be raised as a ground. Where a legal question was raised, Tribunal was required to consider the same in accordance with law. (AY 2004-05)
Sankeshwar Printers (P.) Ltd. v. DCIT (2013) 218 Taxman 360 (Kar.)(HC)

S.254(1) : Appellate Tribunal – Orders – Condonation of delay – Delay of 791 days was condoned
It was noticed that assessee had prepared grounds of appeal and obtained signature of authorized signatory. Besides assessee had also paid requisite fees and the matter was old and, therefore company was not able to trace relevant papers. There was sufficient explanation tendered by assessee for preferring appeal with a delay of 791 days, and therefore, assessee's application seeking condonation of delay was to be allowed and appeal was to be admitted for disposal by Tribunal on merits.
Gujarat Electricity Board v. DCIT (2013) 218 Taxman 38 (Mag.)(Guj.)(HC)

S.254(1) : Appellate Tribunal – Orders – Condonation of delay – Lenient view – 77 days was condoned
Although averments made in affidavit were not happily worded but taking a lenient view of matter and fact that delay was not enormous and was around of 77 days, delay should have been condoned by Tribunal by imposing cost to compensate department for delay. (AYs. 1997-98 and 1998-99)
Raghubar Automobile & General Finance (P.) Ltd. v. CIT (2013) 218 Taxman 39(Mag.) (All.)(HC)

S.254(1) : Appellate Tribunal – Orders – Condonation of delay – Discrepancy in affidavit – Directed to reconsider
The assessee filed appeal before Tribunal along with an application for condonation of delay. The reason for delay was explained by assessee as attributable to mistake of office boy due to which appeal could not be filed in time. The Tribunal having noticed discrepancy in name of office boy in

affidavit, did not accept assessee's explanation and rejected appeal. Held, on facts, the Tribunal was to be directed to reconsider issue after taking into account affidavit of office boy. (AY. 2001-02)
Mahendra Ambalal Patel v. DCIT (2013) 218 Taxman 37 (Mag.)(Guj.)(HC)

S.254(1) : Appellate Tribunal – Orders – Additional evidence – Power to remand – Held to be justified.
When the Tribunal admitted additional evidence filed by petitioner and remanded issue back to file of Assessing Officer for fresh adjudication after examining additional evidence, there was no infirmity in order passed by Tribunal. (AY 2003-04)
CIT v. Hukum Chand Agarwal (2013) 218 Taxman 42 (Mag.)(All)(HC)

S.254(1) : Appellate Tribunal – Orders – Declaration of assessee was accepted as per Kar Vivad Samadhan Scheme – Remand of order before CIT(A) was not valid. [S.90. Kar Vivad Samadhan Scheme, 1998]
Tribunal erred in law in remanding matter to CIT (A) for decision afresh, as declaration under Kar Vivad Samadhan Scheme, 1998 had been accepted by designated authority. (AY. 1980-81)
Neeraj Kumar Vijay Kumar v. CIT (2013) 218 Taxman 40 (Mag.)(All.)(HC)

S.254(1) : Appellate Tribunal – Orders – Jurisdiction issue – Concealment penalty – Power to remand – Without disposal of preliminary objection regarding jurisdiction Tribunal could not have remanded the matter to CIT(A) [S. 271(1)(c)]
Where the core issue which was challenged was about jurisdiction of the AO in levying penalty without initiation of penalty proceedings, without deciding said issue in favour of revenue, matter of penalty could not be remanded to CIT (A) to decide on merits.
Gangadhar N. Agrawal, HUF v. ITAT (2013) 218 Taxman 34 (Mag.)(Bom.)(HC)

S.254(1) : Appellate Tribunal – Orders – Remand back – Earlier year's order
Since order of Tribunal in respect of the same issue and same assessee was set aside by High Court in earlier years, the same was to be done for subsequent year's order. (AY. 2005-06)
CIT v. Encorre Software Ltd. (2013) 218 Taxman 33 (Mag.)(Kar)(HC)

S.254(1) : Appellate Tribunal – Orders – Duty to record reasons for orders – Matter remanded
Tribunal noticed the contentions of the parties and accepted the appeal of the Revenue without giving any cogent and convincing reasons. The order was not legally correct, and hence, that matter was remanded. Referred the decision in *Kranti Associates P. Ltd. v. Masood Ahmed Khan (2010) 9 SCC 496*, where in the Court held that quasi-judicial authority must record reasons in support of conclusions. (AY. 2002-03)
ATM Forgings v. CIT (2013) 359 ITR 314 (P&H)(HC)

S.254(1) : Appellate Tribunal – Orders – Business loss – Deletion of addition based solely on assessment order of different assessee by different officer – Deletion was not justified [S.28(i)]
Assessee and his wife may, in fact have occupied equal status initially but in the case of her assessment, the Assessing Officer did not realise the infirmity in her computation which was realised by the Assessing Officer in the case of the assessee. The infirmity pointed out by the Assessing Officer in the case was not refuted by the assessee by any cogent evidence. Therefore, the assessee could not claim equal treatment. Since the Commissioner (Appeals) and the Tribunal relied solely on the assessee's wife assessment order, they were erroneous. Appeal of revenue was allowed.
CIT v. Kamal Kumar Bansal (2013) 359 ITR 406 / 217 Taxman 238 (Cal.)(HC)

S.254(1) : Appellate Tribunal – Orders – High Court irked at in-fighting between the Bench and Bar of the ITAT Lucknow Bench and advises restraint, dignity and decorum to be maintained

Two ARs, Mr. S. K. Garg, Advocate and Mr. Pradeep Kumar Kapoor, CA, evidently had a running feud with Mr. Sunil Kumar Yadav, Judicial Member, Lucknow Bench. Apparently, in the case of Sumit Kumar Rastogi, Garg had made a representation to the President of the ITAT containing "contemptuous and scurrilous allegations" against the Judicial Member. Due to this the Judicial Member recused himself from hearing of those cases which were being represented by Mr. S. K. Garg by passing a speaking order. The Judicial Member sent copies of the proceedings to the Hon'ble President of the ITAT with a request to issue necessary instructions as to how to deal with the situation but the Hon'ble President "instead of issuing necessary instructions in this regard chose to remain silent on the subject". In order to "maintain the dignity of the Institution", the Judicial Member took cognizance of the representation made by S. K. Garg to the Hon'ble President and made a reference to the Allahabad High Court to initiate proceedings for "criminal contempt of court" u/s 15(2) of the Contempt of Court Act, 1971 against S. K. Garg and Pradeep Kumar Kapoor. However, as almost 25% of the appeal pending before the Lucknow Bench are being represented by S. K. Garg, it was felt by the Judicial Member that it would not be fair to keep all the appeals in abeyance as substantial amount of revenue is involved and the Revenue is pressing hard for its fixation. Accordingly the Judicial Member directed the Registry to list all the appeal for hearing. In the case of *Omkar Nagreeya Sahkari v. DCIT, S. K. Garg* filed an application before the Vice-President requesting that the case be transferred from the Bench of the J. M. However, this request was turned down. Thereafter, when the appeal was posted for hearing, Mr. Pradeep Kumar Kapoor appeared for the assessee and the appeal was decided in favour of the assessee. In the order sheet, an entry was made that Kapoor "had no objection to appearing before the Judicial Member". Kapoor filed an application "in his personal capacity" claiming that he had never conveyed his no-objection to the matter being heard by the JM and that he could never have done so in view of the pending criminal contempt proceeding against him. Kapoor requested the Bench to expunge the remark in the order sheet regarding the no-objection of the AR to appear before the JM. On the said application, the JM passed a detailed order dated 18.06.2013 in which severe strictures were passed against Garg and Kapoor for "attempting to scandalise the court and creating hindrance in the proper judicial functioning of the court" and that it is "unheard in the judicial system that some professional can appear before the judicial forum under protest and argue his case". He held the application as being "highly misconceived, contemptuous and is moved with the intention to browbeat and scandalise the court" and directed that Kapoor's action was "gross abuse of process of law" for which costs of Rs. 5,000 should be imposed. He also made a reference to the President of the ICAI to take necessary action as per law against Kapoor for "professional misconduct" and to take "corrective measures and necessary steps to educate its members to behave with the judicial authorities befitting to their status and should not be engaged in scandalising the judicial authority/courts". Kapoor filed a Writ Petition in the High Court to challenge the said directions of the Bench. HELD by the High Court:

From the record, it appears that originally, the dispute was between Accountant and Judicial Members of the Tribunal and it was not functioning. So, adjournment was sought by the petitioner, but the same was refused. However, on 6-3-2013, the case of the petitioner was decided in favour of the assessee in his presence. During the course of arguments, the petitioner has tendered his unconditional apology orally as well as in writing. When the petitioner has tendered his unconditional apology, no further adjudication is required. Matter is resolved in the Court. Keeping in mind the ratio laid down in *M.P. Special Police Establishment v. State of M.P 2004 (8) SCC 805* (that a Writ Court can pass appropriate orders to do justice to the parties) the impugned order is modified and the reference made by the Tribunal to the Institute of Chartered Accountant of India is expunged. The cost of Rs. 5,000 is also cancelled. Adverse remark against the petitioner, if any, is also expunged. We hope that in future such type of incident will not be repeated. It is in the interest of justice to maintain the dignity and

decorum of the judicial system and the Tribunal is an essential part of it.(W.P. No. 9239 of 2013, dt. 18-6-2013)
Pradeep Kumar Kapor v. ITAT (All.)(HC) www.itatonline.org

S.254(1) : Appellate Tribunal – Orders – Remand by Tribunal to determine assessability of commission paid by one organisation in respect of Individuals working in various inter-connected organizations was held to be justified [S.2(24)(iv)]
The court held, that the assessees had various avatars in various establishments. They were directors in the company, partners representing Hindu undivided family. Two out of the four assessees represented the Hindu undivided family. Apart from that, they also represented as franchisees owned by the Hindu undivided families, of which they were the coparceners and kartas. Each unit had different compositions. Each unit had varied number of members. It was also relevant that the assessees in all these cases did not file any return in their individual capacity and notices under section 147 were issued only on the ground that they did not file any return disclosing the perquisites and benefits received by them from the company and that they were guilty of omission to file the returns. The Tribunal had ordered remand only after considering the nature and circumstances of the transaction and in fact, after considering the modus operandi of the entire group. Under such circumstances, the order of remand made by the Tribunal was justified.(AYs. 1996-97 to 2001-02)
CIT v. C. S. Srivatsan (2013) 358 ITR 10 (Mad.)(HC)
CIT v. C.S. Seshadri (2013) 358 ITR 10 (Mad.)(HC)
CIT v. C.S. Varadhan (2013) 358 ITR 10 (Mad.)(HC)
CIT v. C.S. Narasimhan (2013) 358 ITR 10 (Mad.)(HC)

S.254(1) : Appellate Tribunal – Orders – Power to grant stay – Ancillary power – Stay of penalty proceedings when quantum appeal pending before Tribunal was held to be valid [S. 271(1)(c), 275(1)(a)]
Under the circumstances and with a view to see that the penalty appeal before the Tribunal did not become infructuous and to avoid any further multiplicity of proceedings, when the Tribunal had passed an order to stay the penalty proceedings during the appeal before it, it could not be said that the Tribunal had committed any error or illegality. (AY. 2004-05)
ACIT v. GE India Industrial Pvt. Ltd. (2013) 358 ITR 410 (Guj.)(HC)

S.254(1) : Appellate Tribunal – Orders – Duty of Tribunal – Recording of reasons is meant to serve the wider principles of justice and the quasi judicial authority must record reasons in support of his conclusions. Order of the Tribunal is set aside
The assessee was trading in two segments in stock exchange viz., cash segment and Future and Options (F&O) segment. Admittedly, the assessee had two different portfolios, one as investment and another as stock-in-trade. The question before the Tribunal was whether receipts from sale and purchase of various shares/securities should be treated as business income and or short term capital gains. The Tribunal confirmed the A.O. order. The Assessee filed an miscellaneous application for rectification of the order. The Accountant member agreed that there was a mistake, but Judicial member took a different view and the matter was referred to the Third member. The Third member concurred with Judicial member and the A.O. order was confirmed. On further appeal, the Court held that, a reading of the order of the Tribunal clearly shows the perfunctory manner of the disposal of the appeal. When the specific case of the assessee was that the income arising from the sale of shares could not be treated as income from business, in fairness to the claim of the assessee, the Tribunal ought to have considered the same in detail to arrive at a factual finding. The Tribunal has not adjudicated on the issue in the light of materials projected by the assessee in support of his case. Recording of reasons is meant to serve the wider principles of justice and the quasi judicial authority must record reasons in support of his conclusions. Order of the Tribunal is set aside and the Tribunal is directed to hear the appeal de novo and pass orders in accordance with law. (AY. 2005-06)

Altius Securities Trading (P) Ltd. v. Dy. CIT (2013) 94 DTR 418 (Mad.)(HC)
Srikanth C. v. Dy. CIT (2013) 94 DTR 418 (Mad.)(HC)

S.254(1) : Appellate Tribunal – Orders – Non application of mind – Return – Burden of proof on assessee to prove correctness of return – Tribunal placing burden on Revenue – Matter remanded [S. 139, 260a]

The Hon'ble High Court of Gauhati held that the Tribunal had placed the burden of proving the correctness of the return of income, which the assessee had filed. whereas it was for the assessee to show by placing all materials including the profits of the two companies that, if not arithmetically, there was, at least, reasonable possibility of the value of shares having risen as high as had been shown by the assessee in her annual return. The order suffered from non application of mind therefore the matter was remanded to the Tribunal for its decision.(AY.2003-04)

CIT v. Jasvinder Kaur (Smt.)(2013) 357 ITR 638 / 218 Taxman 78 (Mag.) / 260 CTR 69 (Gauhati)(HC)

S.254(1) : Appellate Tribunal – Orders – Tribunal is duty – Bound to deal with all judgements cited during hearing of appeal

The assessee filed an appeal against an addition for alleged bogus purchases/sales which was dismissed by the Tribunal. The assessee filed an appeal before the High Court claiming that he had relied on the judgement in *CIT v. President Industries (2002) 258 ITR 654* in the verbal and written submissions and that the Tribunal had not considered it. HELD by the High Court remanding the case to the Tribunal for fresh consideration:

Whenever any decision has been relied upon and/or cited by the assessee and/or any party, the authority/tribunal is bound to consider and/or deal with the same and opine whether in the facts and circumstances of the particular case, the same will be applicable or not. In the instant case, the Tribunal has failed to consider and/or deal with the aforesaid decision cited and relied upon by the assessee. Under the circumstances, all these appeals are required to be remanded to the Tribunal to consider the addition made by the AO towards alleged bogus purchases/sales and to take appropriate decision in accordance with law and on merits and after considering the decision of this Court in the case of *CIT v. President Industries (2002) 258 ITR 654*.(Tax Appeal No. 847/848/849 of 2013. dt 21-10-2013)

Dattani & Co v. ITO (2014) 41 taxmann.com 360 (Guj.)(HC) www.itatonline.org.

S.254(1) : Appellate Tribunal – Orders – Power of remand – No interference called for.[S.80HHE]

The Tribunal had remanded back the issue, regarding calculation of deduction u/s. 80HHE of the Act, to the AO with a direction to recalculate the workings in light of the decision of the Apex Court *ACG Associated Capsules (P.) Ltd. v. CIT [2012] 343 ITR 89*. In its appeal before the High Court, the Counsel for the department argued that for applying the law laid down by the Apex Court to the case of assessee, order of remand could not be justified as that would impliedly mean that the Tribunal has held all other income intimately connected with the business of assessee. Dismissing the appeal, the High Court observed that the open remand by the Tribunal takes care of the grievance raised by the revenue and hence no interference is called for in the Tribunals Order.

CIT v. Mastek Ltd. (2013) 217 Taxman 99 / 87 DTR 41 (Guj.)(HC)

S.254(1) : Appellate Tribunal – Orders – Stay – Recovery – Refund – Dept hauled up for "over-zealousness" and "ham-handed" attempt to recover taxes in violation of stay order. Tribunal is duty-bound to order refund of amount appropriated by revenue in violatiomn of stay order. [S.151, 220, 221, Civil Procedure Code, 1908. S.151]

The AO raised a demand of Rs.210.57 crores by making certain adjustments for the AMP expenditure incurred. This was confirmed by the DRP. The assessee filed an appeal before the Tribunal as well an application before the CBDT under the Mutual Agreement Procedure (MAP) prescribed in Article 27 of the India-USA DTAA. The assessee also filed a stay application before the Tribunal. The Tribunal granted a stay of the demand for a period of 180 days or disposal of the appeal or of the MAP application, whichever is earlier. It was provided that the assessee sought an adjournment, the stay would be vacated. On the date fixed for hearing, the assessee pointed out that the issue of adjustments to the AMP expenditure was pending before the Special Bench in L. G. Electronics {since decided *L. G. Electronics India (P) Ltd. & Ors. v. Asst. CIT (2013)152 TTJ 273(SB)*} and so the appeal was adjourned. The AO took the view that as the assessee had sought an adjournment, the stay stood automatically vacated and so he attached the assessee's bank account. The assessee filed an application u/s 151 of the CPC before the ITAT seeking refund of the amount recovered by the revenue. The Tribunal held that the adjournment was granted by it *suo motu* in conformity with judicial discipline as the issue was pending before the Special Bench. It held that the AO had acted in violation of the stay order and directed him to refund the amount collected. The Department filed a Writ Petition to challenge the said order. HELD by the High Court dismissing the Petition:

(i) A trivial adjournment, an overzealous revenue department, compelled apparently by year ending revenue collection targets, has led to this unnecessary litigation. It is not a case where the assessee sought an adjournment but one where the Tribunal chose to adjourn to await the decision of the Special Bench. Apart from that the show cause notice issued to the assessee does not refer to vacation of the stay order but refers to admission or not of the MAP application though that there was discussion relating to vacation of the stay order during the personal hearing. The AO should have been honest enough to issue a show cause notice on the ground that the stay order stands vacated. The vacillating stand of the revenue clearly indicates a confused state of mind, apparently compelled by the need to achieve targets fixed by superiors of the department;

(ii) As regards the jurisdiction of the Tribunal to order refund of the amount appropriated by the revenue, the Tribunal has rightly held that it is empowered, in view of nature of its jurisdiction, as well u/s 151 of the CPC to order refund, as the stay order has not been vacated. The power to ensure that its orders are not violated during pendency of a lis are inherent in any Court or Tribunal. In fact it is the bounden duty of the Tribunal to ensure where its order is violated that the violation is adequately redressed and money appropriated, is restituted. If such a power is held not to be available to the Tribunal, its interim orders would be flouted with impunity. If, the revenue was of the opinion that the stay order has been violated by the assessee or has been vacated, it should have approached the Tribunal for clarification by way of an appropriate application but instead proceeded in a ham-handed manner, to appropriate this amount. (CWP No. 8321 of 2013, order dt. 11-10-2013.)(AY. 2008-09)

DCIT v. ITAT (2013) 94 DTR 305 / 262 CTR 569 (P&H)(HC)

S.254(1) : Appellate Tribunal – Orders – Giving effect to order of Tribunal – Successor in office of Assessing Officer, cannot pass a fresh order [S.143(3), 154]

Once the Assessing Officer had given effect to order of Tribunal, his successor in office had no jurisdiction to pass a fresh order. (AY. 2001-02)

Classic Share & Stock Broking Services Ltd. v. ACIT (2013) 216 Taxman 238 / 94 DTR 301 / (2014) 265 CTR 587 (Bom.)(HC)

S.254(1) : Appellate Tribunal – Orders – Search and seizure – Validity – Assessing Officer or Tribunal cannot consider validity of Search [S.132, 158BC]

The satisfaction to be reached by the authority issuing a warrant of authorisation is an administrative function. Assessing Officer or Tribunal cannot consider validity of search by calling for the warrant of authorisation and examining the records authorizing search for the purpose of an enquiry whether the Search was valid.

CIT v. A. K. Bansal (Dr.) (Individual) (2013) 355 ITR 513 / 216 Taxman 23 (Mag.)/ 262 CTR 355 (All) (HC)

S.254(1) : Appellate Tribunal – Orders – Tribunal cannot dismiss the appeals for want of prosecution, it has to decide on merits. (The Income-tax (Appellate Tribunal) Rules, 1963, Rules 19, 20,24]

Tribunal cannot dismiss appeal only for want of prosecution without same being decided on merit. (AYs.1998-99, 1999-2000)

Sanket Estate & Finance (P.) Ltd. v. CIT (2013) 216 Taxman 21 (Mag.)(Guj.)(HC)

S.254(1) : Appellate Tribunal – Orders – Stay – Interim order of High Court.

On appeal by the Revenue, the High Court passed an interim order and stayed the order of the Tribunal in which assessee was directed to deposit a sum of Rs. 50 crores and granted stay for recovery of balance tax demand during pendency of appeal before it. Subsequently, Revenue itself had made offer to assessee for making deposit of 50 per cent of demanded amount and to keep in abeyance enforcement of balance amount for sometime awaiting final order of Tribunal. Held the interim order of the High Court ought to be modified to the extent that said order of stay of enforcement of demand will ensure to benefit of assessee on depositing 50 per cent of demanded amount.

CIT v. IBM India (P.) Ltd. (2013) 216 Taxman 20 (Mag.)(Karn.)(HC)

S.254(1) : Appellate Tribunal – Orders – Reasoned order – Estimation of profit – Civil contractor – Question of fact [Ss.145, 260A]

Held since what was being decided by the Tribunal under the impugned order was a question of fact and there was only an order of affirmance, no detailed reasons were further required. Therefore, the appeal of the Department on the ground that cogent reason had not been assigned by Tribunal while passing impugned order was to be dismissed.(AY.1997-98)

CIT v. Khokhar Construction Co. (2013) 216 Taxman 51 (Mag.)(Raj.)(HC)

S.254(1) : Appellate Tribunal – Orders – Summary dismissal of cross appeal by Tribunal by matter remanded

On cross appeals, the Tribunal mainly decided the appeal preferred by revenue and dismissed same on basis of some reference being made about net profit rate being applied by Commissioner (Appeals). It also dismissed assessee’s appeal by observing that while deciding appeal of revenue stand of Commissioner (Appeals) for applying net profit rate of 2.5% had been upheld. Held, the Tribunal had committed an error in dismissing of assessee’s appeal summarily on basis of decision in revenue’s appeal without dealing with assessee’s contention. Therefore, matter was to be remanded back to Tribunal for deciding assessee’s contention that Commissioner (Appeals) had wrongly applied net profit at 2.5%. (AY.2002-03)

Premswaroop Khandelwal v. CIT (2013) 216 Taxman 13 (Mag.)(MP)(HC)

S.254(1) : Appellate Tribunal – Orders – Consequential direction – Order without giving an opportunity of hearing – Actual cost – Subsidy – Treatment [S.43(1)]

Where nature of subsidy, purpose for which same was made available and all other relevant factors were not examined, treatment of subsidy required fresh consideration and the assessee’s contention that Tribunal had no power to give any consequential directions after upholding decision of Commissioner (Appeals) was not justified. However the Court held that Tribunal committed error in giving directions (1) without availing opportunity of hearing to the assessee and (2) without discussion of facts on record or law applicable to it. Matter was set aside to decide a fresh according to law.

Munjal Auto Industries Ltd. v. DCIT (2013) 215 Taxman 278 /(Guj.)(HC)

S.254(1) : Appellate Tribunal – Orders – Remand of order – Examination on merits

The Tribunal, on Second Appeal filed by assessee, remanded the matter to the Assessing Officer for re-examination in light of judgments relied on by assessee. The assessee and revenue submitted before the High Court that order of Tribunal should be set aside and matter be remanded to it for examination on merits because the Assessing Officer had no role to play, as this was a case involving transfer pricing and it was scrutinised by the DRP comprising of three Commissioners. In light of this, the order of the Tribunal was set aside and matter was to be remanded to it for examination on merits. (AY.2007-08)

GE India Technology Centre (P.) Ltd. v. DCIT (2013) 215 Taxman 52 (Mag.)(Karn.)(HC)

S.254(1) : Appellate Tribunal – Orders – Non-speaking order – Matter remanded for reconsideration [S.36(1)(vii)]

Where the Tribunal allowed deduction under section 36(1)(vii) of the Act in respect of bad debts written off without reasons and by a non-speaking order is remanded back to the Tribunal for reconsideration.

CIT v. Metallurgical Engineering Consultants (India) Ltd. (2013) 81 DTR 22 / 255 CTR 194 / 213 Taxman 193 (Jharkhand)(HC)

S.254(1) : Appellate Tribunal – Orders – Finding of CIT(A) was not considered by Tribunal – Order held to be unsustainable [S. 68]

On failure of the production of creditors, summons were issued under section 131. But none of the creditors appeared and in some cases summons were returned with the endorsement made by the postal authority "no such person concerned was found". However, after analysing everything, the CIT(A) accepted the explanation and also the evidence of the creditworthiness of the creditors and granted relief. However, the Tribunal found that the CIT(A) had erroneously held that the summons were issued after the assessment was done. Only on that ground it was held that the assessee could not establish by producing evidence that the credit was received from customers. The High Court held that the Tribunal had not adjudicated upon the case of the assessee in the light of the evidence found by the CIT(A) and hence, its order was unsustainable. (AY.1994-1995)

Crystal Networks P. Ltd. v. CIT (2013) 353 ITR 171 / 216 Taxman 151 (Mag.)(Cal.)(HC)

S.254(1) : Appellate Tribunal – Orders – Partial disallowance accepted by assessee – Tribunal cannot set aside entire disallowance – Agreed addition appeal is not maintainable [S. 80-IB]

The assessment was an agreed assessment and the assessee's representative did not oppose the partial disallowance by the Assessing Officer. After making a claim under section 80-IB, the assessee requested the Assessing Officer to make necessary adjustment in the claim. This obviously meant that the assessee himself was admitting that the claim was high and the Assessing Officer was free to refix the claim of eligible unit. It was thereafter that the Assessing Officer in consultation with the assessee's auditor made a part disallowance adjusting the profit attributable to final products transferred to the eligible unit. The Court held that the Tribunal had no authority to intervene with this order confirmed in First Appeal. The assessee's representative did not oppose the partial disallowance by the Assessing Officer. Therefore the assessee had no right of appeal against the order and the appeal challenging the disallowance itself was not tenable.

CIT v. M. E. Meeran (2013) 353 ITR 281 (Ker.)(HC)

S.254(1) : Appellate Tribunal – Orders – Writ to restrain ITAT Members from discharging statutory functions not maintainable [Art.226 Constitution of India]

The Petitioner, a Chartered Accountant practicing before the Amritsar Bench of the Tribunal, filed a Writ Petition alleging that he was facing a lot of harassment at the hands of the Judicial Member (Shri. H. S. Sidhu) and the Accountant Member (Shri. B. P. Jain) of the Amritsar Bench. He alleged that the said Members were totally prejudiced against him as he had made a complaint against the

Judicial Member to the Tribunal and also because he had not been able to meet the "expectations" and "illegal demands" of the said Members. It was also alleged that the Bench was delaying the matters of the Petitioner or passing unreasoned orders or by totally ignoring him. A Writ of Mandamus was sought for restraining the said Judicial and Accountant Members of the Amritsar Bench from discharging their functions. HELD by the High Court dismissing the Petition:
It appears that the writ petition is to settle scores which the Petitioner might have raised during the course of his conduct as representative of the assessees. The Petitioner has asserted that he is not able to meet the expectations and illegal demands raised by the Members but there are no details as to when and how the demands were raised. Not only the writ petition is bereft of any material particulars but also the Petitioner has no right to claim mandamus for restraining an authority constituted under the Act from discharging the functions entrusted to it by the statute. The present writ petition is gross abuse of process of law and, therefore, it is dismissed.
Yoginder Kumar Sud v. President, ITAT (2013) 33 taxmann.com.193 (P&H)(HC) www.itatonline.org.

S.254(1) : Appellate Tribunal – Orders – Power to remand – Direction should be very cautious
While remanding issues for fresh consideration by Assessing Officer, Tribunal should be very cautious in issuing directions, even if it is only for guidance of Assessing Officer, direction issued by Tribunal should not give rise to a situation where assessing authority is likely to feel disturbed by it. Matter remanded
CIT v. RBG Investment & Finance Ltd. (2013) 213 Taxman 39 (Mag.)(Delhi)(HC)

S.254(1) : Appellate Tribunal – Orders – Additional evidence – Tribunal can remit matter to Assessing Officer to consider additional evidence. [Appellate Tribunal) Rules, 1963, 29]
The assessee incurred certain expenses in the form of management expenses paid by it to its group companies. The Assessing Officer rejected the claim on the ground that the assessee was not able to prove that the group companies had rendered any services to the assessee. Before the Commissioner (Appeals) the assessee had filed copies of certain agreements entered into between the assessee and its group companies to whom the management fee was given. The Commissioner (Appeals) admitted this fresh evidence but came to the conclusion that the assessee was unable to lead any credible evidence to prove that for carrying on the business it had received any inputs from the group companies and the money to them became payable. The assessee preferred an appeal before the Tribunal. Along with the appeal application for leading additional evidence under rule 29 was filed as the assessee wanted to produce some further evidence which he did not produce before the Assessing Officer and even the Commissioner (Appeals). The Tribunal admitted the additional evidence and remitted the case to the Assessing Officer to decide the issue afresh after considering the additional evidence. On appeal by revenue dismissing the appeals, the Court held that the reason which was given by the assessee in support of its plea for admission of additional evidence was that the assessee could not produce these records before the lower authorities due to non-irretrievability of e-mail on the date because of technological difficulties. This reason was specifically mentioned in the application filed. No reply to this application was filed refuting this averment, though the Departmental representative had opposed the admission of the additional evidence. The ground pleaded by the assessee was not confronted. In this backdrop, the Tribunal looked into the entire matter and arrived at a conclusion that the additional evidence was necessary for deciding the issue at hand. It was, thus, clear that the Tribunal found the requirement of the evidence for proper adjudication of the matter and in the interest of substantial cause. Rule 29 categorically permits the Tribunal to allow such documents to be produced for any substantial cause. Once the Tribunal has predicated its decision on that basis, there was no reason to interfere with the same. (AY. 2004-05)
CIT v. Text Hundred India Pvt. Ltd. (2011) 197 Taxman 128 / 239 CTR 263 / (2013) 351 ITR 57 (Delhi)(HC)

S.254(1) : Appellate Tribunal – Orders – Right of respondent – Powers – Under rule 27 the respondent is permitted to support the order appealed against, though he may not have

appealed against the order, on any of the grounds decided against him, however set side of entire order is not permitted. [S. 253(4), Income-tax (Appellate Tribunal) Rules, 1963, Rule 27]
The assessee had made a claim on account of bad debts in the amount of ` 28.69 lakhs under section 36(2). The Assessing Officer disallowed the claim. In appeal, the Commissioner (Appeals) confirmed the disallowance made by the Assessing Officer to the extent of Rs. 14.96 lakhs. However, the assessee was granted relief to the extent of Rs. 13.73 lakhs under section 36(2). Both, the revenue and the assessee, filed appeals before the Tribunal. The appeal filed by the assessee was, however, barred by limitation, there being a delay of 551 days. During the course of the hearing before the Tribunal, the assessee withdrew its appeal, but sought to press in aid the provisions of rule 27 of the Income-tax (Appellate Tribunal) Rules, 1963 to contend that the Commissioner (Appeals) erred in partly confirming the disallowance. The Tribunal held that in the absence of relevant details being brought on record by the parties and in the interests of justice it was appropriate to remand the entire matter pertaining to the disallowance of Rs. 28.69 lakhs to the Assessing Officer. Accordingly, the order passed by the Assessing Officer on this account was set aside in its entirety and the Assessing Officer was directed to decide the matter afresh in view of the decision of Mumbai Special Bench in *Dy. CIT v. Shreyas S. Morakhia [2010] 40 SOT 432*. On appeal to the High Court, the revenue contended that rule 27 of the 1963 Rules would only permit the assessee, as the respondent to the appeal by the revenue, to support the order appealed against on any of the grounds decided in favour of the assessee and, hence, the assessee could have supported the order of the Commissioner (Appeals) to the extent to which the appellate authority had allowed the claim of the assessee in the amount of Rs.13.73 lakhs and not disallowance of Rs.14.96 lakhs. Allowing the appeal the Court held that Tribunal erred in setting aside order of Commissioner (Appeals) in its entirety and by restoring proceedings to Assessing Officer in regard to entire disallowance; Tribunal could have restored proceedings to Assessing Officer only as regards amount of disallowance deleted by Commissioner (Appeals). Under rule 27 the respondent is permitted to support the order appealed against, though he may not have appealed against the order, on any of the grounds decided against him, however set side of entire order is not permitted. (AY. 2004-05)
CIT v. Jamnadas Virji Shares & Stock Brokers (P.) Ltd. (2013) / 86 DTR 402 / 258 CTR 458/ 212 Taxman 120 (Mag.)(Bom.)(HC)

S.254(1) : Appellate Tribunal – Orders – Rectification of mistake – Ex parte order – Recalling the order and deciding allowing the bad debt was held to be justified [S.36(1)(vii)]
Assessee had written off an advance of Rs. 65 lakhs as bad debts on ground that despite filing a suit sum was not recoverable. Issue had reached up to Tribunal. Tribunal by an ex-parte order held against assessee. Subsequently, however, assessee applied for recall of such an order. Tribunal thereupon proceeded to decide appeal afresh. In such exercise Tribunal overruled objections of Assessing Officer and allowed claim of assessee by holding that loan written off had become bad debt which was allowable, since assessee was in business of banking or money lending. Revenue contended that Tribunal having previously ruled against assessee could not have changed decision. Court held that since original order of Tribunal was passed in absence of assessee which had shown sufficient ground justifying its absence, and had satisfied necessary conditions of section 36(2) (i), Tribunal was right in deciding appeal afresh and allowing claim of assessee.
Dy. CIT v. Hindustan MI Swaco Ltd. (2013) 212 Taxman 293 (Guj.)(HC)

S.254(1) : Appellate Tribunal – Orders – Duty of Tribunal to give its own reason
The Court observed that there was no discussion in the order of the Tribunal about the respective arguments of the parties. It did not contain the points for determination and its findings thereon. Even an order of affirmation by a higher authority requires that the authority should give its own reasons, may be, in brief for its concurrence with the order appealed. The Tribunal is under a legal obligation to record its own finding on the submissions of the parties, may be in brief, depending upon the facts and circumstances of the case. But if it does not contain any reason such an order is no order in the

eyes of law and cannot be allowed to stand. In the opening portion of the order, the Tribunal noticed the grounds raised by the assessee in the memo of appeal. It had taken trouble to reproduce them but left them undecided. Definitely, the case merited a different treatment at the hands of the Tribunal. (AY. 1991-92)
Abhyudaya Pharmaceuticals v. CIT (2013) 350 ITR 358 / 214 Taxman 61 (Mag.)(All.)(HC)

S.254(1) : Appellate Tribunal – Orders – Binding precedent – Interpretation – Special Bench – Intervenor – OECD guidelines and International jurisprudence – Persuasive value
Assessee was not intervenor before Special bench, therefore not bound by the special Bench, but the order may be binding to the extent applicable to facts. Orders in transfer pricing adjudication not necessarily always to be taken as binding precedent unless facts are *pari materia*. In the absence of judicial interpretation, OECD Guidelines and international jurisprudence accepted and have persuasive value. (AY.2008-09)
BMW India (P.) Ltd. v. ACIT (2013) 28 ITR 716 / 37 taxmann.com 319 (2014) 146 ITD 165 (Delhi)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Professional misconduct – Disciplinary proceedings – The assessee and his CA are guilty of fraud for deliberately suppressing the fact – ICAI directed to initiate disciplinary proceedings against CA for suppressing information and obtaining order by fraud [Ss.54F, 271(1)(c)]
The assessee bought and sold shares and claimed that he had earned capital gains which were exempt u/s 54F. When the AO alleged that the transactions were bogus and entered into for converting black money into white, the assessee surrendered the claim for exemption u/s 54F and offered the capital gains to tax. The AO levied penalty u/s 271(1)(c) on the ground that the surrender of income was not voluntary. This was upheld by the Tribunal. The assessee filed an appeal before the High Court which was dismissed. The assessee thereafter filed a Miscellaneous Application before the Tribunal on the ground that as the AO had not specified whether the penalty was for concealment or for furnishing inaccurate particulars, penalty could not be levied. The Tribunal allowed the MA and deleted the penalty. The Department then filed a MA stating that as the first order of the Tribunal had merged in the order of the High Court, the subsequent MA was not maintainable. The assessee accepted that he was advised by his CA not to disclose the fact of dismissal of the appeal by the High Court in the MA so filed. The CA argued that though the fact of dismissal of the appeal was not stated in the MA he had not concealed the fact because it was known to the Department. HELD by the Tribunal allowing the MA:
In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final. On facts, it was the duty of the assessee to disclose the decision of the High Court to the Tribunal while moving the MA and by not doing so, they did not come to the ITAT with clean hands. The assessee and his CA are guilty of fraud for deliberately suppressing the fact that the High Court had dismissed the assessee’s appeal and that the MA was not maintainable. The MA order is thus a nullity and non est in the eyes of law. The CA’s conduct amounts to professional misconduct and requires disciplinary action by the ICAI. (M. A. Mo. 04/Agra/2012 dt. 12-7-2013) (A Y. 2001-02)
ITO v. Bhagwan Agarwal (2013) 38 Taxmann.com 31 / 27 ITR 704 (Agra)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Revision of orders prejudicial to revenue – Issue not challenged before the Commissioner is not entitled to be raised before Tribunal [S.263]

If the assessee has not challenged a particular issue before the Commissioner in proceedings under S. 263, he cannot raise that contention before the Tribunal. (AY.2006-07)
Leo Meridian Infrastructure Projects and Hotels Ltd. v. DCIT (2013) 24 ITR 123 / 144 ITD 445 (Hyd.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Award of cost – Assessing Officer and Commissioner (Appeals) perform statutory functions, hence no case for imposition of any cost [S.254(2B)]
Assessing Officer and the Commissioner (Appeals) perform their statutory functions and there was no case for imposition of any costs on them. (AY. 2002-03, 2003-04, 2005-06, 2007-08)
Russian Technology Centre P. Ltd. v. DCIT (2013) 25 ITR 521 / 145 ITD 88 (Delhi)(Trib.)

S.254(1) : Appellate Tribunal – Orders – 496 days delay in filing appeal due to CA's fault is *bona fide*& must be condoned
The assessee filed an appeal before the Tribunal which was delayed by 496 days. In the application for condonation of delay, the assessee claimed that he had handed over the papers to his Chartered Accountant and that the latter had mixed up the papers with other papers in his office which led to the delay. The department opposed the application on the ground that there was "gross negligence" on the part of the assessee and that sufficient cause for the delay was not explained. HELD by the Tribunal:
The facts do not suggest that the assessee has acted in a *mala fide* manner or that the reasons explained are only a device to cover an ulterior purpose. It is a settled proposition of law that Courts should take a lenient view on the matter of condonation of delay provided the explanation and the reason for delay is *bona fide* and not merely a device to cover an ulterior purpose or an attempt to save limitation in an underhand way. The Court should be liberal in construing sufficient cause and should lean in favour of such party. Whenever substantial Justice and technical considerations are opposed to each other, cause of substantial Justice has to be preferred. On facts, the reasons explained by the assessee show that due to *bona fide* mistake and inadvertence, the appeal could not be filed within the period of limitation. Accordingly, the delay of 496 days has to be condoned (*collector Land Acquisition v. Mst. Katiji and Ors. (1987) 167 ITR 471(SC)* referred). (AY. 2005-06)
Y. P. Trivedi v. JCIT (Mum.)(Trib.) www.itatonline.org.

S.254(1) : Appellate Tribunal – Orders – 54 days delay in filing appeal due to medical grounds was condoned
In *Surya General Traders v. CTO (2003) 133 STC 388 (AP)(HC)* it was held that where the assessee has good case on merits, technical plea of limitation should not defeat his claim and delay may be condoned. Following the ratio delay of 54 days in filing appeal due to medical reasons was condoned.(AY. 2005-06)
R. Vishwanath v. ITO (2013) 59 SOT 22 (Hyd.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Additional grounds – Power to admit
The assessee had not made claim of bad debt in the return of income but made same during the course of assessment proceedings. The Assessing Officer and the Commissioner (Appeals) did not accept the new claim. It was held that the Commissioner (Appeals) could have accepted the new claim by virtue of its appellate powers. (AY. 2007-08)
Givaudan Flavours (India) (P.) Ltd. v. Dy. CIT (2013) 56 SOT 105 (URO) / 22 ITR 732 (Mum.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Delay in filing appeal – Affidavit –Requirements of a valid affidavit in support of delay condonation application is must, otherwise delay may not be condoned
The assessee filed an appeal before the CIT(A) which was delayed by 4 months. The delay was explained to have been caused by the fact that the assistant of the Authorised Representative kept the

papers in a drawer and overlooked them till a penalty notice was received. The CIT(A) declined to condone the delay and dismissed the appeal. The assessee filed an appeal before the Tribunal and also filed an affidavit of the Authorised Representative in support of the application for condonation of delay. HELD by the Tribunal dismissing the application and the appeal.

The affidavit produced by the AR is not a valid affidavit because there is no verification appended on it and there is no mention as to which of the paras are true to the knowledge of the deponent and which of the paras of the affidavit are true to his belief. The affidavit is also not a duly sworn affidavit as required under Rule 10 of the ITAT Rules 1963 because it has not been properly endorsed by the notary regarding the oath of affirmation before him by the executant of the affidavit. The notary has put his signatures under his name seal but there is no mention whether the oath was administered to the signatory or if done so, when and where it was administered. Even words "Sworn before me" are missing. If the affidavit does not certify or endorse the fact that oath has been administered, it remains a waste paper. On merits, the case is one of gross negligence and inaction on the part of the assessee and the AR. The explanation that the AR's assistant kept the papers in his drawer and failed to take necessary action is vague and evasive and not sufficient cause for condonation. There is also no general principle saving the party from all mistakes of its counsel. There is also total inaction and gross negligence on the part of the assessee for not inquiring the status of the appeal from the AR. Though courts adopt liberal view while condoning delay on the principle that technicalities should not prevail over the cause of justice, litigants should not take the courts for granted. (AY. 2006-07)

Kunal Surana v. ITO (2013) 144 ITD 195 / (2014) 161 TTJ 92 (Mum.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Additional evidence – No power to declare retrospective effect of amendment unconstitutional – Additional evidence after hearing is also permissible [Income Tax (Appellate Tribunal) Rules 1963, Rule 29]

The Tribunal has no power to declare retrospective effect of amendment unconstitutional The Tribunal *suo motu* require additional evidence even after conclusion of hearing. (AY. 2007-08)

L.G. Electronics India P. Ltd. v. ACIT (2013) 140 ITD 41 / 22 ITR 1 / 83 DTR 1 / 152 TTJ 273 (SB) (Delhi) (Trib.)

S.254(1) : Appellate Tribunal – Orders – No powers to decide validity of provisions of Act. [S.92C(2)]

The Income-tax Appellate Tribunal is a creation of the Income-tax Act and not a constitutional authority. It has to interpret the provisions of the Act as it stands. It cannot adjudicate upon the constitutional validity or otherwise of any provisions of the Act.(AY.2006-07)

IHG IT Services (India) Pvt. Ltd v. ITO (2013) 144 ITD 16 / 23 ITR 608 / 86 DTR 257 / 154 TTJ 137 (SB)(Delhi)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Additional grounds – When all facts on record, additional ground is raised, which goes to root of matter may be admitted [Ss.147, 153A]

Before the Tribunal, the assessee raised an additional ground to challenge the validity of assessment on the ground that as on the date of search the assessment had to be made under section 153A, the AO has no jurisdiction to issue notice under section 148. Tribunal admitted the additional grounds and held that when all facts are on record additional ground raised which goes to root of the matter may be admitted. (AYs. 2001-02, 2002-03)

State Bank of India v. Dy. CIT (2013) 22 ITR 609 / 60 SOT 116 (URO)(Mum.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Where CIT(DR) displayed contemptuous actions, behaviour and utterances – Tribunal was right in imposing cost of Rs. 1000 deductible from his salary. Action for contempt of court to be initiated

The CIT(DR) during the course of the hearing displayed unacceptable behavior. He arrived late for the hearing, accepted that he had not seen the files and was not prepared for the hearing and neither

applied for adjournment to prepare for the same. The CIT(DR) mentioned case laws whose citations were not known to him, neither did he have copies of the same. He accused the Members saying "Bench is hurrying the justice and burying the justice". He ventured to pounce on the court by making such false, malicious and contemptuous allegations. His contemptuous behaviour was proposed to reprimand and fit to be visited with cost and appropriate consequential action (AY. 2006-07)
Lala Harbhagwan Das & Memorial & Dr. Prem Hospital (P.) Ltd. v. CIT (2014) 29 ITR 316 / 62 SOT 199 (Delhi)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Benefit of telescoping – Can be raised first time in Tribunal.[S.69]
The Assessing Officer estimated the profit @ 40% on imported gods & the goods were found short by the custom authority. The assessee submitted that since there was a search by custom authority and goods did not come to the hands of Shri K.R. Maru & R.K. Mehta & after the proceedings of custom authority, no goods were sold by any person in the market and therefore the question of estimation of profit did not arise. The Assessing Officer estimated the profit @40% & it was deleted by the CIT(A) on the ground that the final outcome of fate of those goods were not available & allowed the benefit of telescoping. On further appeal in Tribunal, Tribunal held that there was no statutory condition for availing telescoping benefit that the assessee should raise the issue of telescoping before the Assessing Officer& CIT (A). This issue can be raised or allowed for the first time at the stage of Tribunal. Further in view of the fact that addition of Rs. 18 Lakhs on account of undisclosed investment in purchase of goods by the assessee for his proprietary concern as well as addition of profit thereon stand confirmed, assessee was entitled to the benefit of telescoping in respect of addition of Rs.4,47,500 & Rs. 1,26,900 being the estimated value of imported goods & estimated profit from goods found short respectively. (AY. 1984-85)
R. K. Mehta v. ITO (2013) 144 ITD 51 / 157 TTJ 649 / 94 DTR 57 (TM) (Raj.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Adjournment – CA/Advocate does not want to appear before particular member – Judicial forum cannot be forced to adjourn all matters for an unlimited period
If a particular Advocate or a Chartered Accountant is not comfortable or has reservation with a particular judicial forum, he can make a representation before judicial forum, but for that reason judicial forum cannot be forced to adjourn all matters for an unlimited period where stakes of revenue are substantially involved. Hearing cannot be adjourned. (AY. 1997-98)
Kanpur Plastipack Ltd. v. ITO (2013) 144 ITD 1 / 158 TTJ 485 / 95 DTR 201 (Luck.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Failure to file power of attorney – Seeking adjournments – Failure to comply with the criterion necessary to represent the matter before the Tribunal, in time, renders appeal liable for dismissal [Income Tax (Appellate Tribunal) Rules, 1963, Rule 24]
The assessee filed an appeal before the Tribunal but repeatedly sought adjournments. He also did not file a letter of authority authorizing his CAs to appear in the appeal. The Tribunal dismissed the appeal on the ground that the assessee is not interested in pursuing the appeal. Thereafter, the assessee filed a Miscellaneous Application seeking restoration of the appeal. The Tribunal restored the appeal even though no power of attorney was filed even at this stage. Even after recalling the appeals the assessee continued to seek adjournments on one pretext or the other. The Tribunal dismissed the appeals and also awarded costs. The assessee again filed a Miscellaneous Application seeking restoration of the appeal. At the hearing of the MA, the power of attorney of the Counsel was not filed. HELD by the Tribunal dismissing the MA:
(i) It deserves to be noticed here that in Mumbai, despite repeatedly pointing out in each and every case, learned counsels rarely follow the practice of filing the power of attorney and many Members of the Tribunal, who do not believe it be their obligation to verify the availability of power of attorney,

may not point out the same to the counsels and it results in counsels appearing without filing a power of attorney. There are equal number of occasions where several other Members, including Members of this Bench, have had occasion to point out that there was no power of attorney and counsels filed Xerox copies or take further time to file power of attorney. In fact some would go to the extent of stating that they assumed that the power of attorney is on record and when we verify the file (though it is their duty to file power of attorney) and inform the counsel that there is no power of attorney then fresh power of attorney is filed. Particularly in the bench which is presided over by the Vice President, the registry notes on the file that the power of attorney of a person, who is representing the matter, is not on record and then the power of attorney is filed, notwithstanding the fact that before filing the power of attorney the same counsel or Chartered Accountant must have already taken adjournments on several occasions.
(ii) On facts, there is no sufficient cause for restoration of the appeal under the proviso to Rule 24. The power of attorney has not been filed. The appeals were dismissed twice as adjournments were sought on spurious grounds. The assessee and his counsels have done lackluster attempt to represent the matters by not fulfilling all the criterion necessary to represent the matter before the Tribunal, in time. (ITA No 7149 &7150/Mum/2008. dated 20-9-2013.)[AY. 1988-89)
Paresh S. Shah v. ITO (Mum.)(Trib.) www.itatonline.org

S.254(1) : Appellate Tribunal – Orders – Stay – Power to stay the proceedings – CIT (A) needs to keep penalty appeals in abeyance till disposal of quantum appeal [S. 250, 271(1)(c)]
During assessment proceedings AO made certain disallowances. On appeal in CIT(A), CIT(A) deleted net disallowance on account of non acceptance of revised return and enhanced the income of the assessee and having found that assessee had furnished inaccurate particulars of income with respect of enhancements made by him, initiated penalty proceedings. Request to keep the penalty proceedings in abeyance till disposal of quantum appeal by Tribunal was not accepted by CIT(A). On appeal in Tribunal regarding stay application till disposal of quantum appeal in Tribunal, the Tribunal allowed the stay application of the assessee and held that there was no dispute about the fact that as per the provision of Section 275(1)(a) of the Act Learned CIT(A) will get six months time to dispose of the penalty proceedings from the end of the month in which the order of the Tribunal is received by the Commissioner or the Chief Commissioner. Further the Tribunal held that learned CIT(A) was allowed to proceed with the penalty proceedings, already undertaken by him, prejudice will cause to the assessee as it will have to face multiplicity of the proceedings. In case assessee succeeds in quantum appeal, the penalty order passed by CIT(A) will have no legs to stand while in a situation the assessee fails CIT(A) will get ample time of six months to dispose of the penalty proceedings. Therefore, Tribunal exercising their appellate powers conferred u/s 254(1) of the Act, and as interpreted by Hon'ble Apex Court in the case of M.K. Mohammad Kunhi (supra) and to prevent multiplicity of proceedings and harassment to the assessee, Tribunal directed CIT(A) to keep the penalty proceedings in abeyance till the disposal of quantum appeal by the Tribunal. Stay Application filed by the assessee was allowed. (AY.2004-05).
GE India Industrial (P.) Ltd. v. CIT(A) (2013) 83 DTR 173 / 148 ITD 70 / 152 TTJ 536 (Ahd.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Additional evidence filed for the first time in Tribunal – Matter remanded back [S.23(1)(a)]
During the assessment proceedings, the Assessing Officer noticed that the assessee was having several house properties. The AO determined the annual letting value of properties at a higher amount as against the NIL value disclosed by assessee in his return of income. The CIT(A) confirmed the AO. Before the Tribunal the assessee has filed additional evidence determined by the local authority. Tribunal admitted the additional evidence being annual value and set aside the matter to AO to determine annual value determined by the local authorities. (AY. 2002-03 to 2008-09)
Laxman Dass Keshwani v. ACIT (2013) 56 SOT 130 (Agra)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Jurisdiction – Reassessment – Additional ground raised before the Tribunal was dismissed as the assessee had agreed to assumption of jurisdiction by Assessing Officer [Ss.68, 148]

Issue of jurisdiction under section 148 is not purely a question of law and it requires adjudication of facts and consideration of reasons and material, on which reopening of assessment has been made. Where assessee did not agitate reopening of assessment under section 148 before Assessing Officer at reassessment stage and though reopening was challenged before Commissioner (Appeals) but assessee did not highlight any point to challenge reopening of assessment and conduct of assessee before Commissioner (Appeals) clearly showed that assessee agreed to assumption of jurisdiction by Assessing Officer under section 148, additional ground raised by assessee before Tribunal on issue of jurisdiction under section 148 could not be admitted. (AY.2004-05)

Archana Pandey (Smt.) v. ITO (2013) 144 ITD 218 / 34 taxmann.com 88 / 153 TTJ 116 / 84 DTR 108 (Agra)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Additional evidence – Issue in respect of bonded ware house was raised for the first time, hence additional evidence was rejected.

Assessee neither raised the issue *qua* goods lying in bonded warehouses before the AO, CIT(A) or in remand proceedings despite several opportunities being afforded to it. Accordingly the additional evidence which was filed before the Tribunal was rejected. (AY. 2006-07, 2007-08)

Raj Petro Specialities (P) Ltd. v. ACIT (2013) 157 TTJ 349 / 58 SOT 60 (URO) (Mum.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Binding precedent – Orders cannot be relied without giving any opportunity

Unreported judgment which was neither cited by the parties nor that was brought to the notice of the Bench nor notice of member proposing order cannot be relied on without giving an opportunity to the parties.(AY.2007-08)

Dy. CIT v. Atul Auto Ltd. (2013) 144 ITD 1 / 157 TTJ 119 / 92 DTR 385 (TM)(Rajkot)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Binding nature – Appeal to High Court is pending order of Tribunal is binding

The fact that an appeal against order of Tribunal was pending in High Court was no ground to disregard order of the Tribunal and the same must be adhered to. (AY.2003-04)

ACIT v. LG Electronics India P. Ltd. (2013) 24 ITR 634 (Delhi)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Condonation of delay – Reasonable cause – Omission on the part of the person who was looking after the tax matter

The Tribunal held that there are plausible reasons for delay as it occurred due to omission on the part of the person who was looking after the tax matters and he had been ailing for some time, the delay is condoned. (AY.2004-05)

The Rohtak Co-operative Milk Producers Union Ltd. v. ACIT (2013) 155 TTJ 684 / 90 DTR 387 (Delhi)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Adjournment – Adjournment cannot be sought only on the ground that counsel did not want to appear before concerned forum.[S.255]

A judicial forum cannot be forced to adjourn all matters for an unlimited period if a particular counsel (advocate or chartered accountant) has reservation in making representation before said judicial forum. where Judicial Member of Tribunal had withdrawn his order of reclusal from hearing cases represented by concerned counsels, adjournment could not be validly granted, merely because such counsels did not want to appear before concerned forum. (AY. 1997-98)

Kanpur Plastipack Ltd. v. ITO (2013) 144 ITD 1 / 34 taxmann.com 296 / 95 DTR 201 / 158 TTJ 484 (Luck.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Binding precedent – Special bench – Suspension by High Court – Deduction at source-Special Bench verdict binding despite suspension by High Court. [S. 40(a) (ia), 194C, 255]

The assessee paid dumper hire charges of Rs. 36.37 lakhs and claimed it as a deduction. The AO disallowed the claim u/s 40(a) (ia) on the ground that the assessee had not deducted TDS thereon u/s. 194C. Before the Tribunal, the assessee argued that it was not liable to deduct TDS u/s. 194C as there was no "contractual agreement". In the alternative, it was argued that in accordance with the Special Bench judgment in *Merilyn Shipping & Transports v. Add. CIT (2012) 136 ITD 23 (SB)*, the disallowance u/s 40(a)(ia) had to be confined to the amounts "payable" as at the end of the year and it did not apply to the amounts already paid during the year. The assessee also argued that though the Andhra Pradesh High Court had granted an "interim suspension" against the said judgment of the Special Bench, it was still binding. Held by the Tribunal:

The argument that s. 194C does not apply in the absence of a written contractual agreement is not acceptable. Even a verbal contract is sufficient. As regards the judgment of the Special Bench in *Merilyn Shipping & Transports v. Addl. CIT (2012) 136 ITD 23 (SB)* where the view was taken that s. 40(a)(ia) can apply only to the amounts remaining payable as at the end of the year and not to the amounts paid during the year, though the Andhra Pradesh High Court has granted "interim suspension" of the said judgment, the said stay/ suspension applies only to the parties to that proceeding and does not destroy the binding effect of the judgment of the Special Bench. There is a difference between "stay of operation" of an order and "quashing of an order". While, in the case of a "quashing", the order of the lower court ceases to exist, in the case of a "stay", the order of the lower court continues to operate and have binding effect. Accordingly, the judgment of the Special Bench in Merilyn Shipping still holds ground and the TDS provisions will apply, for purposes of invocation of s. 40(a) (ia), only on the amounts remaining payable at the end of the year and not on the amounts paid. (AY. 2007-08)

ITO v. MGB Transport (2013) 23 ITR 391 / 143 ITD 564 (Kol.)(Trib.)

S.254(1) : Appellate Tribunal – Orders – Binding precedent – Third Member – High Court – While giving effect to third member the Tribunal is bound to follow directions of Jurisdictional High Court [S.255(4)]

There was difference of opinion amongst judicial and accountant members regarding the allowability of claim under section 80-IA. Matter referred to third member. Third member decided the matter and referred it back to Division Bench to give effects to its order. Matter was dismissed because of non appearance of assessee. Assessee filed petition before the Tribunal to recall the said order. The Assessee also filed appeal before High Court. High Court passed an order granting deduction and directed Tribunal to follow an earlier decision of it in assessee's own case. Tribunal held that while giving effect to opinion of third member as per provisions of section 255(4), Tribunal is bound to follow directions of Jurisdictional High Court.(AY. 2000-01, 2001-02)

B.T. Patil & Sons Belgaum Constructions (P) Ltd. v. ACIT (2013) 59 SOT 61 (URO)(Pune)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of misstate – Depreciation – User of assets – Evidence in support of pointing out mistake in Tribunal's order [S.32]

Since in order to support application for correction of mistake, assessee did not file requisite evidence, the Tribunal committed no error in upholding disallowance of depreciation. Order of tribunal was upheld. (AY 2001-02)

Mukul Agrawal (Smt.) v. CIT (2013) 219 Taxman 161 (Mag.)(All.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Tribunal has no power to dismiss appeal for non-appearance of appellant. It has to deal with the merits. An application for recall of an ex-parte dismissal order is under s. 254(2) & must be filed within 4 years from the date of the order. The Tribunal must permit "mentioning" of matters [S.254(1), Appellate Tribunal Rules, 1963, Rule 24]

The assessee's appeal was fixed for hearing before the Tribunal on 4-12-2007. As nobody appeared for the assessee, the Tribunal dismissed the appeal for want of prosecution. The assessee filed a Miscellaneous Application before the Tribunal on 6-8-2012 seeking to recall the ex parte order. The Tribunal dismissed the MA on the ground that the application for recall had been filed beyond a period of 4 years from the date of the ex-parte order. The assessee filed a Writ Petition contending that (a) the Tribunal had no power under Rule 24 to dismiss an appeal for want of prosecution, (ii) an application for recall of an ex parte order does not fall u/s 254(2) and the time limit of 4 years does not apply to it. It was also contended that the Tribunal ought to allow the system of "mentioning" matters as is done in the High Court. HELD by the High Court dismissing the Petition.

(i) It is a little strange that the Tribunal does not permit the practice of mentioning matters at any time of the day. If it had done so, the exercise of filing an application for recall may not have been necessary. The ultimate object of the Tribunal is to decide a dispute between the revenue and assessee in accordance with law to ensure that justice is done. In the aid of ensuring that justice is done, the Tribunal cannot as a matter of practice bar any Advocates/representative from mentioning their matters before the Tribunal. If indeed this is so, the Tribunal must do away with such a practice. The mentioning of matters should be allowed by the Tribunal. It is of course in the Tribunal's discretion to allow the request made by the parties while mentioning but prohibiting mentioning of matters before a Court/Tribunal is a likely recipe for injustice. We request the Tribunal to henceforth do away with such a practice and allow mentioning of matters;

(ii) Under Rule 24, the Tribunal has no power to dismiss an appeal for non-appearance of the assessee. It has to decide the appeal on merits. The dismissal order is consequently erroneous and the assessee is entitled to have the order set aside (*CIT v. S. Chenniappa Mudaliar (1969) 74 ITR 41 (SC)* followed; Chemipol (244) ELT 497 (Bom) distinguished);

(iii) However, because dismissing an appeal for non-prosecution in the face of Rule 24 is an error apparent on the face of the record, an application to set right the error of dismissal for non-prosecution is an application u/s 254(2) and not under s. 254(1). Where Parliament has provided a specific provision to deal with a particular situation, it is not open to ignore the same and apply some other provision. Such an application has to be filed within a period of 4 years from the date of the order;

(iv) Though the Proviso to Rule 24 empowers the Tribunal to recall an ex-parte order without specifying any period of limitation, this applies only where the appeal is decided ex parte on merits. Where the appeal is dismissed ex-parte for non-prosecution, it is a case of an erroneous order which only be rectified u/s 254(2). Also an order passed in breach of Rule 24 is an irregular order but not a void order. Assuming the said order is a void order, yet it continues to be binding till it is set aside by a competent authority (*Sultan Sadik v. Sanjay Raj Subba (2004) 2 SCC 277* followed) (WP No. 1740 of 2013. dt. 23 October, 2013)

Bharat Petroleum Corporation Ltd. v. ITAT (2013) 359 ITR 371 / 95 DTR 138 / 263 CTR 262 (Bom.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Order passed without giving proper opportunity was rightly recalled by the Tribunal

Where the Tribunal decided certain issues on merits without giving full opportunity to assessee to make submissions thereon, such order was erroneous. Therefore, the Tribunal committed no error in allowing assessee's application under section 254(2), by exercising its power of rectification and recalling its own order for hearing afresh.

DCIT v. Rajendra M. Vyas (2013) 216 Taxman 54 (Mag.)(Guj)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Non-consideration of Supreme Court judgment – Recalling of order was justified

The Tribunal, having noted that inadvertently a Supreme Court decision could not be considered at the time of deciding appeal on merit, directed hearing of issue once again and thus, recalled its order for a limited purpose of deciding such issue. Held, since the applicability of ratio of order passed by Supreme Court to facts of assessee's case was yet to be decided, Tribunal was perfectly justified in recalling its earlier order.

DCIT v. Daniel Measurement & Controls (India) (P.) Ltd. (2013) 216 Taxman 53 (Mag.) (Guj.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record -Review of order is not permissible by law [S.69]

The Tribunal rejected assessee's application for rectification principally holding that it would amount to review of its previous order. Held, if assessee had any dispute on final conclusion of Tribunal in respect of impugned addition, it was always open to seek further remedy of appeal in accordance with law and, therefore, Tribunal was justified in refusing to invoke its jurisdiction for rectification.

Rajesh Trade Link (P.) Ltd. v. ACIT (2013) 216 Taxman 52 (Mag.)(Guj.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record –Review of order is not permissible [S. 44AD]

The assessee had declared net profit at 8.13 per cent in its return . The Assessing Officer disallowed 25% of expenditure. On appeal Commissioner (Appeals) estimated the net profit at 7% before granting salary and interest to partners. On appeal Tribunal adopted net profit rate of 8% before depreciation and partners salary and interest as per section 44AD. Subsequently the Tribunal rectified its order and took net profit at 8.13% as shown by assessee. On appeal, the Court held that the power of rectification can be exercised only for correcting an error apparent on face of record and not for reviewing an order, taking net profit at 8.13% as against 8% estimated earlier, on rectification by Tribunal was not sustainable as there was no ambiguity or uncertainty in its previous order. (AY. 2005-06)

Deep Construction Co. v. DCIT (2013) 215 Taxman 700 (Guj.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Evidence not considered – Application to be allowed [S. 68]

Large credits by way of deposit of gold were found in the assessee's premises and added to its income. The Tribunal deleted the said addition. However, when matter was remanded by the High Court, the Tribunal confirmed said addition. The assessee contended that sales tax records revealing purchase of gold and payment of tax u/s 5A were made available, but they were not considered by Tribunal. In light of this, held, it was a fit case for assessee to move u/s 254(2) for rectification.

A. Shihabudeen v. CIT (2013) 215 Taxman 51 (Mag.)(Karn.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Oral submission – Validity of search – Deciding the issue on merit without giving an opportunity of being heard is a mistake apparent from the record – Recalling the order was valid

The Tribunal upheld the validity of search proceedings carried out at premises of assessee. Thereafter, the Tribunal also proceeded to examine on merits, the various issues raised by assessee regarding additions retained by Commissioner (Appeals). Thereafter, assessee moved an application for rectification of above order on ground that at time of oral submissions assessee was informed that Tribunal would not consider issues of additions on merits and in said situation assessee did not get chance to argue its case. The Tribunal accepted assessee's case and rectified its order. Held, since the Tribunal had proceeded to decide certain issues on merits without giving full opportunity to assessee to

make submissions thereon, the order suffered from an error apparent on record and, therefore, it committed no error in exercising power of rectification.
DCIT v. Manu P. Vyas (2013) 214 Taxman 86 (Mag.)(Guj.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record –Matter remanded by Tribunal – Delay and laches – Period of four years for filing such an application has elapsed – Writ is not maintainable [Ss. 80HH, 80-I, 80-IA, Constitution of India, Art 226]
The Assessing Officer denied the deductions under sections 80HH, 80-I and 80-IA to the assessee in respect of certain plants and added back the prior period expenses which was confirmed by the Commissioner (Appeals). The Tribunal set aside the order of the Commissioner (Appeals) and restored the matter for fresh adjudication before the Assessing Officer, after which the Assessing Officer passed an order giving effect without considering some of the issues before the Tribunal. Against this order giving effect, the assessee filed an appeal before the Commissioner (Appeals), which was dismissed. The assessee filed an appeal before the Tribunal which was pending. On a writ petition challenging the legality of the earlier order which was passed by the Tribunal and in the alternative, seeking a writ of mandamus directing the Assessing Officer to give effect to the order of the Tribunal as if all the grounds of appeal had been set aside for fresh adjudication, it was observed that the assessee failed to adopt the remedy which the statute had provided under section 254(2)and the period of four years for filing such an application has elapsed. Also, since there was no valid explanation for the delay, there was no justification to entertain the request for setting aside the order of the Tribunal. (AY. 1998-99)
Bharat Petroleum Corporation Ltd. v. TAT (2013) 354 ITR 165 / 216 Taxman 210 / 261 CTR 613 / 87 DTR 105 (Bom.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Not considering the decision of Supreme Court can be rectified under section 254(2). [S.11, 13(1)(c)(ii)]
Assessee, a charitable trust, claimed exemption under section 11. Assessing Officer having found that during current year assessee had advanced a sum of Rs. 25 lakh to one P, who was managing trustee of trust, took view that this amounted to violation of section 13(1)(c)(ii). He, therefore, asked assessee to explain as to why exemption claimed under section 11 should not be denied. Assessee explained that in current year no funds were given by trust to P, and that said transaction related to earlier assessment year 2002-03. Assessing Officer did not accept explanation of assessee and denied exemption under section 11. Commissioner (Appeals) having found, that during current year no funds were given by trust to P, granted exemption under section 11 to assessee. Tribunal held that assessee had violated provisions of section 13(1)(c)(ii) and accordingly set aside order passed by Commissioner (Appeals). Thereupon assessee filed a petition under section 254(2) stating that Tribunal while deciding appeal did not consider decision of Supreme Court rendered in case of *Aditanar Educational Institution v. Addl. CIT [1997] 224 ITR 310* for adjudicating issue regarding violation of section 13(1)(c)(ii). Tribunal (i) after taking into account fact that advance of Rs. 25 lakh was given to P during period 1-4-2001 to 31-3-2002, and (ii) also taking into account decision of Supreme Court in case of Aditanar Educational Institution (supra), held that there was a mistake apparent on record in earlier order passed by it. It further on basis of above findings held that assessee had not violated provisions of section 13(1)(c)(ii) during relevant assessment year 2003-04 and accordingly rectified order passed by it earlier. On appeal to High Court by revenue the Court held that,on facts and in circumstances of case, Tribunal had rightly exercised powers conferred under section 254(2). Therefore, the impugned order passed by Tribunal was justified. Section 254(2) has been enacted not only to safeguard interest of revenue but also to enable Tribunal to rectify error apparent on face of record. (AY. 2003-04)
CIT v. Park Trust (2013) 212 Taxman 115 (Mag.)(Mad.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake – Rectification of order based on the Subsequent Larger Bench decision of Supreme Court is proper – Application is made in time – Order can be passed thereafter

Tribunal following a decision of Supreme Court deleted penalty under section 271(1)(c). Subsequently, Larger Bench of Supreme Court overruled decision relied upon by Tribunal. On basis of latter decision of Supreme Court, revenue sought to recall Tribunal's decision under section 254(2). Accordingly, Tribunal recalled its earlier decision. On appeal by assessee the Court held that subsequent decision of Supreme Court operated retrospectively and, therefore, it had to be regarded as it existed when order was passed by Tribunal and, thus, there was mistake apparent from record which could not be allowed to remain, further only limitation for correcting mistake, that is imposed by provisions of section 254(2), is only with respect to time and since in instant case application for rectification had been made in time, order of Tribunal recalling its earlier order could not be faulted. (AY.1993-94, 1996-97, 1997-98)

Lakshmi Sugar Mills Co. Ltd. v. CIT (2013) 212 Taxman 118 (Mag.)(Delhi)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake – Defects were notified on notice board, that itself could be construed as notice to assessee to rectify office objections – Dismissal of miscellaneous application which was filed after nine years was held to be justified [Karnataka Agricultural Income-tax Act, 1957 S. 34]

Assessee presented appeal before Tribunal on 3-1-2002. Matter was adjourned for rectification of defects. When matter was listed on 11-4-2002, Tribunal granted time till 30-4-2002 to rectify defects. Matter was re-listed on 30-4-2002. On said date assessee was not present and defects had not been rectified. Notice of defects was duly published and it was affixed on notice board. Tribunal rejected appeal on ground of non-compliance of office objections. Thereafter assessee received a demand notice on 4-1-2011 on ground that appeal filed by assessee was rejected. After that assessee filed a miscellaneous petition before Tribunal seeking to recall order dated 30-4-2002 and restore appeal to file and hear it on merit. Tribunal found that delay of nine years was not at all explained by assessee inasmuch as assessee was not vigilant after filing of appeal. The Court held that petitioner could not be heard to say that Tribunal was obliged to inform petitioner about dismissal of order for non-removal of office objections. Since defects were notified on notice board, that itself could be construed as notice to assessee to rectify office objections. Therefore, order passed by Tribunal rejecting miscellaneous petition on ground of delay was justified and thus, petition of assessee in respect of rejection of miscellaneous petition was to be rejected. (AY.1998-99)

Baganeheddal 'C' Estate v. Karnataka Appellate Tribunal (2013) 212 Taxman 99 (Mag.)(Karn.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – typographical mistakes – Rectification is to be done after verification [S.154)

Where there were only typographical mistakes in order of Tribunal, on miscellaneous application made by assessee under section 154, same were to be rectified after due verification (AY.2007-08)

Symantec Software Solutions (P.) Ltd. v. ACIT (2013) 60 SOT 120 (URO)(Mum.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Review or recall of the order – Rectification application was dismissed

The Tribunal dismissed the miscellaneous application filed by the Department and held that the Assessing Officer has resorted to seek a review of the impugned order and made knowingly wrong assertions in regard to the position of the return of the bank guarantee. It is unfortunate that the fate of the taxpayers of India nevertheless rests in the hands of such officers. Tribunal applied the decision of the Supreme Court in act *bona fide.* (AY. 2008-09)

Dy. CIT v. Motorola Solutions India (P) Ltd. (2013) 157 TTJ 385 (Delhi)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Third member – Cash credits – Question of law decided by third member – While giving effect the division bench has not decided the issue on merit – Matter remanded to tribunal to decide on merits [Ss.68, 255(4)]

Where there is a difference of opinion between the Members of a Bench of the Tribunal and the opinion of one of the Members finds support of the Third Member, the decision of the Tribunal is not to be treated as the opinion of a three-Member Bench, for denying an opportunity of rectification under section 254(2). Only question of law is decided by third member. While giving effect the division bench has not decided the issue on merit. Matter remanded to Tribunal to decide on merits. Conscious omission to consider the issue of genuineness of gifts on the merits, which was not referred for his opinion was not a mistake apparent on record.(AY. 2003-04)

Renu Aggarwal (Smt.) v. ITO (2013) 358 ITR 483 / 219 Taxman 192 / (2014) 266 CTR 80 / 99 DTR 236 (All.)(HC)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Rectification application filed by the Authorised Representative without the consent of the assessee – Not maintainable

The Tribunal held that no professional has any right to invoke the judicial machinery for his own interest without any reasons. If he does so it would amount to professional misconduct on the part of the professional. In the instant case, CA has moved this application with a request to either recall or expunge the order sheet entry but he could not identify the particular observations of the Tribunal which are injurious to the interest of the assessee or even to him. In view of above, this application is highly misconceived, contemptuous and is moved with the intention to browbeat and scandalise the Court. (AY. 2005-06)

Omkar Nagreeya Sahkari Bank Ltd. v. Dy. CIT (2013) 143 ITD 703 / 156 TTJ 441 / 91 DTR 273 (Luck.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – No mistake was pointed out – Rectification application was rejected

In the present case, assessee had filed miscellaneous application to get recalled order of Tribunal on the plea that some grounds of appeal have not been appropriately considered. The assessee relied upon the decisions in case of *CIT v. Mahalaxmi Textiles Mills Ltd (1967) 66 ITR 710(SC)* and in the case of *Kerala Chemicals and Proteins Ltd v. CIT (1999) 235 ITR 467 (Ker.)(HC)*, it was pleaded to recall the order of the Tribunal and decide the same afresh. It was held that a rectification application can lie only with regard to an error on face of record which has not emerged from material on record. As the assessee could not point out any apparent mistake in the order passed by the Tribunal, the rectification application of the assessee was rejected.

Prem Colonisers (P) Ltd. v. ITO (2013) 56 SOT 121 (URO)(Delhi)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record –When two opinions are possible no mistake apparent from the record

The power of rectification by the Tribunal under section 254(2) of the Income-tax Act, 1961 can be exercised only when the mistake which is sought to be rectified is an obvious and patent mistake which is apparent from the record and not a mistake which requires to be established by arguments and a long drawn process of reasoning on point on which there may conceivably be two opinions. (AYs.1993-94 to 2007 to 2008)

Mahanadi Coalfields Limited v. DCIT (2013) 56 SOT 77 (Cuttack)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Not following Jurisdictional High Court-DTAA-India-Korea

The appeal was decided on the basis of the DTAA between India & Korea. The Tribunal held that there is no mistake apparent from record if the order of the Tribunal is not following the decision of jurisdictional High Court. Therefore, the rectification application filed by the assessee was dismissed. (AY. 2007-08)
Samsung Heavy Industries Co. Ltd. v. Addl. DIT (IT) (2013) 156 TTJ 791 / 92 DTR 90 (Delhi)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Interpretation of Article – It was not permissible to review the decision of the Tribunal in the guise of Rectification – DTAA-India-UK [Art 7(3)].
Assessee, a partnership Firm of Solicitors, had its head office at London with no branch office in India. During the year, it carried out certain work on Indian projects, majority of which was done in UK and some of work was done in India. Tribunal held that entire income earned by assessee from India projects was taxable in India in view of force of attraction principle embedded in Article 7 of DTAA. The assessee filed a rectification application u/s.254(2) seeking rectification of mistake on alleged to have crept in the order of the Tribunal as the issue of computation of profit attributable to the PE of the assessee in India without considering Article 7(3) of the said DTAA that the Tribunal has ignored or overlooked Art 7(3) of the DTAA. Dismissing the MA, the Tribunal held that it cannot be said that the Tribunal has ignored or overlooked Article 7(3) of the DTAA while rendering its decision on the issue & that there is any mistake apparent from the record in the order of the Tribunal on account of non-consideration of the said article as alleged by the assessee. As regards the contention raised on behalf of the assessee that the scope of Article 7(1)(C) of the UN Model Convention it is limited to activities carried on in India only, it was observed that the Tribunal has taken a considered view on interpretation of the said article that the entire profit relating to services rendered by the assessee, whether rendered in India or outside India, in respect of the Indian projects was taxable in India & it was not permissible to review the decision of the Tribunal in the guise of rectification u/s 254(2).
Linkletors & Paines v. ITO (2013) 56 SOT 116 (Mum.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Consideration of additional ground – No mistake apparent from record
The Tribunal had considered the additional ground considered by the assessee before the CIT (A) and the Tribunal also came to the conclusion that there was no infirmity in the order passed by the CIT(A). Therefore, the assessee's contention was not correct. Under these circumstances, pointing out non-consideration of additional ground in the miscellaneous application filed by the assessee, does not amount to mistake apparent from record. (AY. 2009-10, 2010-11)
Cellular Mobile Telecom Services v. ITO (2013) 25 ITR 67 / (2014) 61 SOT 16 (Chennai) (Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Recalling of order – Non-compliance – Reasonable cause
Miscellaneous applications were filed by assessees relating to different assessment years requesting for recall of consolidated order of Tribunal. In that order Tribunal had dismissed appeals of assessee as unadmitted for want of representation at time of hearing of Appeal. Held, assessee in miscellaneous application submitted that he had not received any notice of hearing. Date of hearing was mentioned in acknowledgement slip of filing of appeals which was about 10 months before date of hearing. Therefore, assessee thought that date of hearing in acknowledgment slip was only tentative date. Assessee was of *bona fide* belief that he would receive fresh date of hearing. There was reasonable cause for non-compliance by assessee on date of hearing. Thereby, in interest of justice orders of Tribunal was recalled and appeals restored to their original numbers which would be heard on 10th January 2013. As date of hearing was pronounced in open court, no formal notice of hearing was required to be issued by registry. Miscellaneous Applications allowed.
Rajendra Pandit v. ACIT (2013) 21 ITR 250 (Mum.)(Trib.)

Dharrmesh Pandit v. ACIT (2013) 21 ITR 250 (Mum.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – No power to recall entire order – No power of review

Assessee sought rectification of findings of Tribunal. The Tribunal held that, scope and ambit of application of section 254(2) was very limited and was restricted to rectification of mistakes apparent from record, if there was any. Section 254(2) had not empowered Tribunal to recall entire order and pass a fresh decision. Tribunal had no power to recall an order in its entirety as it either amounts to passing of a fresh order which automatically necessitates rehearing and re-adjudication of the entire subject-matter of appeal or amounts to review which was not permissible under Act. Tribunal had taken due care and had considered all relevant material on record before giving the findings. No error apparent from record was found in assessee's case. Assessee's application dismissed. (AY. 2005-06)
Seven Hills Business Solutions v. ACIT (2013) 56 SOT 32 (Hyd.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Relevant facts recorded by Commissioner (Appeals) not considered – No mistake apparent on record

The assessee was engaged in trading of shares. He claimed that a segment of shares was in the nature of investments. Assessing Officer disallowed as short-term capital gain and treated it as business income. CIT(A) allowed assessee claim. The Tribunal restored the Assessing Officer order. The assessee filed petition seeking rectification of order contending that Tribunal did not take into cognizance relevant facts recorded by CIT(A). The Tribunal (Third Member bench) held that after considering facts of case as available from the records of Assessing Officer & CIT(A), there is no mistake apparent. (AY. 2005-06)
C. Srikanth v. Dy. CIT (2012) 142 ITD 1 / 155 TTJ 418 (TM)(Chennai)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Review – Power to rectify a mistake cannot be used for recalling the entire order [S.54F]

The assessee filed a miscellaneous application before the Tribunal for recalling its earlier order as the Tribunal had not considered a co-ordinate bench decision on the allowability of deduction u/s. 54F of the Act. The Tribunal dismissed the miscellaneous application by holding that it had considered the entire facts and concluded that the assessee is not entitled for deduction under section 54F. The Tribunal held that a statutory authority cannot exercise review power unless such power is expressly conferred upon it. Under the Act, power of review is not given to the Tribunal. The scope and ambit of section 254(2) is restricted to rectification of mistakes apparent from record. What it could not do directly could not be allowed to be done indirectly. (AY. 2006-07)
V. Kumuda (Smt.) v. Dy. CIT (2012) 135 ITD 116 / 147 TTJ 636 / (2013) 21 ITR 396 (Hyd.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Pronouncement in open court is not an order under section 254(1) of the Act. [S.254(1), (Income Tax Appellate Tribunal) Rules, 1963, Rules 34, 35]

The assessee filed MA seeking rectification of the order passed by the Tribunal. The assessee contended that the Tribunal announced in the open court that the issue stood settled in favour of the assessee. However while passing an order; the Tribunal upheld the validity of the block assessment order by relying on some case laws. This was mistake apparent on the record and required rectification. Tribunal held that the order of the Tribunal in accordance with section 254(1) is only where order bears the signature of both members and communicated to the parties. In accordance with rules, 34 & 35 of (Income Tax Appellate Tribunal) Rules, 1963, the pronouncement in open court is not the order of Tribunal under section 254(1). The Court further held that rather the case / appeal was kept for order as per the order sheet dt. 5-10-2008. The court also stated that for such pronouncement in the open court, ruled (4) & (5) of Rule 34 has been inserted by the Income Tax (Appellate Tribunal) (Amendment) Rules, 2009 w.e.f. 1-5-2009. The contention raised in the

miscellaneous application itself shows that the assessee wants a second order after recalling the original order. Therefore the same was not covered under section 254(2) of the Act. (BP. 1989-90 to 1999-2000)
Hariom Soni v. ITO (2013) 56 SOT 408 (Agra)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Second is cellaneous application can be considered against the same Tribunal order
Mistakes pointed in the fresh miscellaneous applications are different. Earlier order certain grounds were not disposed by the Tribunal. Accordingly the second miscellaneous application was allowed. (AY.1999-2000 to 2002-03)
Uday Gas Agency v. ITO (2013) ACJA – June - 151 (Ahd.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Period of limitation will be from the date of communication of the order
The Tribunal passed an ex parte order on 4-8-2006. The Assessee has filed miscellaneous application on 1-3-2012. The assessee contended that he came to know the passing of ex parte order only on 17-2-2012 and accordingly the period of limitation may have to be computed from 17-2-2012 and not from the passing of the order i.e. 4-08-2006. Tribunal held that the phrase 'from the date of the order' should be construed and reckoned with the date of knowledge of the order to the assessee that is when the order has been communicated to the assessee. (MA No.140/M/2012 dt.27-2-2013)
Pawan Kumar Jain v. Dy. CIT (2013) 89 DTR 33 / 155 TTJ 14 (Mum.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Debatable – Failure to apply the law to facts to be investigated cannot be corrected by way of rectification
In order to attract the application of section 254(2), a mistake must exist and the same must be apparent from the record. The power to rectify the mistake, however, does not cover cases where a revision or review of the order is intended. Also, a decision on a debatable point of law or fact or failure to apply the law to a set of facts which remains to be investigated cannot be corrected by way of rectification. (AY. 2006-07)
Prem Colonisers (P.) Ltd. v. ITO (2013) 56 SOT 121 (URO)(Delhi)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Correct finding – Two views
If two views are possible on a point of law and one of the alternatives is adopted in its previous order, it cannot be held that there is a mistake apparent from record on account of non-adoption of the other possible view. Unless there are manifest errors which are obvious, clear and self-evident, the Tribunal cannot recall its previous order, in an attempt to rewrite the order. (AY. 2007-08)
M. Pochamma (Smt.) v. DCIT (2013) 56 SOT 126 (URO)(Hyd.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Power to recall order
Where an error is far from self-evident, it ceases to be an apparent error. It is no doubt true that a mistake capable of being rectified under section 254(2) is not confined to clerical or arithmetical mistakes. On the other hand, it does not cover any mistake which may be discovered by a complicated process of investigation, argument or proof. A rectification application can lie only with regard to an error on the face of the record, which has not emerged from the material on record. Moreover the assessee has not been able to point out any apparent mistake in the order passed by the Tribunal and in case application of the assessee is accepted, it would tantamount to review of the order of the Tribunal, which is not permissible. (AY. 1997-98)
Pushpa Agarwal (Smt.) v. ITO (2013) 56 SOT 128 (URO)(Delhi)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Recalling the entire order is permissible

Recalling the entire order obviously would mean passing of a fresh order. That does not appear to be the legislative intent. The scope and ambit of application of section 254(2) is restricted to rectification of mistakes apparent from the record. Recalling of an order automatically necessitates rehearing and re-adjudication of the entire subject-matter of appeal. The dispute no longer remains restricted to any mistake sought to be rectified. (AY.2005-06)

Syndicate Realtors v. ITO (2013) 56 SOT 123 (URO)(Hyd.)(Trib.)

S.254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Miscalculation of number of assessment years for deduction under section 10B [S.10B]

Tribunal inadvertently miscalculating number of assessment years for which exemption available. Mistake to be rectified. Change of year goes to root of order. Earlier order recalled. (AY.2004-05)

ACIT v. Qmax Test Equipments P. Ltd. (2013) 23 ITR 187 / 59 SOT 8 (URO)(Chennai)(Trib.)

S.254(2A) : Appellate Tribunal – Stay of recovery proceedings – Extended beyond the period of 365 days [S.253(2A)]

The Appellate Tribunal stayed the recovery of demand beyond the period of 365 days in view of the fact that similar issue is pending for final hearing before the Supreme Court in other cases and the assessee has already paid substantial portion of the demand. (AY. 2008-09, 2009-10)

Vodafone West Ltd. v. ACIT (2013) 85 DTR 268 / 154 TTJ 668 (Ahd.)(Trib.)

S.255(4) : Appellate Tribunal – Third member – Cash credits – Third member affirmed the view of accountant member of question of law – Not expressed the opinion on merits – Dismissal by the Tribunal only on the basis of order of third member was not justified – Remand back to Tribunal to decide on merits [S.68]

The Third Member affirmed view of Accountant Member on question of law, but specifically mentioned that he was not deciding issue of impugned gift/donation on merit. In these circumstances, the Tribunal erred in law in dismissing appeal merely because Third Member had agreed with Accountant Member on legal question, even though issue of genuineness of gift and addition thereupon was not adjudicated on merit. Therefore, the matter was to be remanded back to Tribunal for afresh adjudication. (AY.2003-04)

Renu Aggarwal (Smt.) v. ITO (2013) 358 ITR 483 / 219 Taxman 192 / (2014) 266 CTR 80 / 99 DTR 236 (All.)(HC)

S.255(4) : Appellate Tribunal – Third member – Rectification application – Order of third member is an opinion and it is not a final order – Appeal is not maintainable [Ss.254(2), 260A]

Third Member expressed his opinion with regard to some questions and returned rest of questions unanswered. The Department filed rectification application against the order of the Third Member which the Tribunal dismissed. Held, order passed in rectification application would not fall within meaning of order passed by Appellate Tribunal in appeal; it was an opinion, and not a final order of Tribunal, which was required to be framed on such opinion. Therefore, no further appeal would be maintainable before High Court against order passed on rectification application.(AYs.1987-88 to 1992-93)

CIT v. Sahara India Ltd. (2013) 218 Taxman 37 (Mag.)(All.)(HC)

S.256 : Reference – High Court – Additional evidence – Objections raised before High Court in reference was held to be not valid [S.254(1), Rule 29 of Appellate Tribunal Rules, 1963]

If the Tribunal requires any document to be produced or any witness to be examined, or if the income-tax authorities decided a case without giving an opportunity to the assessee to adduce evidence, the Tribunal can always allow production of additional evidence. It is within the discretion

of the Tribunal to permit additional evidence and if anybody has any objection, it should be taken before the Tribunal and not before the reference court. In a reference under section 256, the High Court must accept the finding of fact reached by the Tribunal. (AY. 1982-83, 1985-86)
CIT v. Vijayawada Bottling Co. Ltd. (2013) 356 ITR 625 / (2014) 220 Taxman 51 / 266 CTR 307 (AP)(HC)

S.260A : Appeal – High Court – Substantial question of law – Power of court to consider questions other than those framed not affected [S. 26OA(4)]
Revenue filed SLP on the ground that two questions of law were framed by the High Court for consideration of appeal, by necessary implication that other questions which were raised in the memo of appeal have been rejected. Apex court held that the High Court's power to frame substantial question(s) of law at time of hearing of appeal other than questions on which appeal has been admitted remains u/s 260A(4). However, the same can be exercised subject to two conditions, viz. Court must be satisfied that appeal involves such questions, and the Court has to record reasons therefore. SLP was dismissed.
CIT v. Mastek Ltd. (2013) 215 Taxman 86 / 89 DTR 52 / 259 CTR 577 / 358 ITR 252 (SC)

S.260A : Appeal – High Court – Revision petition – Not maintainable
The High Court passed order to remand the matter to Tribunal for disposal /fresh adjudication on ground that facts were not clear, and thus, answer to substantial question of law was declined. Since no mistake could be said to be apparent from face of record, no review petition would be allowed. (AY. 2003-04)
G.S. Tiwari & Co. v. CIT (2013) 219 Taxman 108 (Mag.)(All.)(HC)

S.260A : Appeal – High Court – Book profit – Computation – A note with the return – Manner of computation was challenged before lower authorities – Contention cannot be raised first time before High Court [S.115JA]
Assessee-company did not compute taxable income under provisions of section 115JA and attached a note with return that said provisions were not applicable. Assessing Officer calculated tax payable under section 115JA at Rs. 4.07 crores. Both Commissioner (Appeals) and Tribunal upheld order of Assessing Officer. Assessee submitted before High Court that adjustments required for computing book profit under section 115JA had been wrongly made by Assessing Officer. Before Tribunal, assessee did not challenge manner of computation of book profit by Assessing Officer. Court held that now in fourth appeal assessee could not be allowed and permitted to raise contention with regard to computation of book profit under section 115JA. (AY.1997-98)
Ester Industries Ltd. v. CIT (2013) 219 Taxman 19 (Delhi)(HC)

S.260A : Appeal – High Court – Reference – Revenue's appeal involving tax effect less than monetary limit prescribed in above instruction was liable to be dismissed [S.256, 268A]
Instruction No. 5 of 2008 of Central Board of Direct Taxes, dated 15-5-2008, shall be deemed to have been issued under section 268A(1), in view of section 268A(5) and, thus, Instruction dated 15-5-2008, fixing monetary limit for filing appeal has statutory flavour. Therefore, revenue's appeal involving tax effect less than monetary limit prescribed in above instruction was liable to be dismissed.(AY.2002-03)
CIT v. Dr. Ashok Kumar Shukla (2013) 356 ITR 697 / 219 Taxman 87 (Mag.)(All.)(HC)

S.260A : Appeal – High Court – Monetary limit – Penalty – Appeal was dismissed – Matter was pending in Apex Court [Ss. 50C, 268A, 271(1)(c)]
Assessee pointed out that subject matter of appeal was for less than Rs. 10 lakh and, thus, such appeal of revenue was not tenable. The Revenue submitted that though High Court had dismissed appeal on

that ground but matter was further carried to Apex Court in earlier cases. In these circumstances, appeal was to be dismissed in like terms reserving liberty to revenue to seek for revival if disposal of appeal based on board circular was held to be not satisfactory. (AY. 2004-05)
CIT v. V. Narayanaswamy (2013) 218 Taxman 36 (Mag.)(Kar.)(HC)

S.260A : Appeal – High Court – Monetary limit – Not maintainable
Where net tax effect of appeal was less than monetary limit of Rs. 4 lakhs prescribed under relevant Instruction No. 2 of 2005, appeal before High Court would not be maintainable.
CIT v. Parimala Enterprises (2013) 351 ITR 471 / 218 Taxman 35 (Mag.)(Kar.)(HC)
ITO v. Ramdas Alva (2013) 351 ITR 471 / 218 Taxman 35 (Mag.)(Kar.)(HC)

S.260A : Appeal – High Court – Monetary limit – Applicable to pending cases also
Instruction No. 3/2011, dated 9-2-2011, whereby minimum tax effect of appeals by revenue before High Court is fixed at Rs. 10 lakhs, is applicable to pending cases also. Ranka and Ranka (2013) 352 ITR 121 (Kar.)(HC), is pending before Apex Court. Revenue was given liberty to revive in case they succeed before Apex Court. *CIT v. Surya Harbal LTD (2013) 350 ITR 300 (SC)* was considered.(AY 2001-02)
CIT v. Spice Telecom (2013) 352 ITR 151 / 218 Taxman 29 (Mag.)(Kar.)(HC)
CIT v. Tirupati Automobile (P.) Ltd. (2013) 352 ITR 151 / 218 Taxman 111 (Mag.)(Raj.)(HC)

S.260A : Appeal – High Court-Monetary limit–Maintainability of appeal
Where the value of subject matter of appeal preferred under s. 260A is less than Rs.10 lakhs, such appeal is not maintainable.(AY. 2004-05, 2005-06)
CIT v. IGATE Global Solutions Ltd. (2013) 354 ITR 1 / 216 Taxman 11 (Mag.)(Karn.)(HC)

S.260A : Appeal – High Court – Monetary limit – Maintainability of appeal
In view of Instruction No. 1997 dated 27-3-2000, appeal filed by revenue as on 10-1-2005, involving tax effect of less than Rs. two lakh was not maintainable.
CIT v. Ramkishore Nandkishore (2013) 216 Taxman 8 (Mag.)(MP)(HC)

S.260A : Appeal – High Court – Monetary limit – Appeal is not maintainable [S.40(a)(ia)]
The Tribunal deleted the addition holding that provisions of section 40(a)(ia) as amended by Finance Act, 2010, with effect from 1-4-2010 were not applicable in instant case. Against the order of the Tribunal, revenue filed appeal before High Court. The tax effect involved was below monetary limit prescribed by Board in Instruction No. 3/2011, dated 9-2-2011. Revenue contended before the High Court that the Tribunal in the impugned order held that section 40(a)(ia) was not applicable, therefore, instant appeal would fall in exception laid down in clause (a) of Para 8 of Instruction No. 3/2011, dated 9-2-2011. Held, simply because the Tribunal held that section 40(a)(ia) was not applicable would not bring instant case within aforesaid exception, and therefore, instant appeal was not maintainable (AY. 2010-11)
CIT v. E.S. Rajshekharan Nair (2013) 216 Taxman 55 (Mag.)(Guj.)(HC)

S.260A : Appeal – High Court – Tax effect less than monetary limit – Penalty – Appeal not maintainable [S.268A]
The mere fact that the assessee had taken two distinctly different stands, one before the income-tax authority, and the other, before the Tribunal, was not a conflict of such a grave nature, which would allow the Revenue to override the prescription of s. 268A and the monetary limit prescribed by the CBDT. Appeal held to be not maintainable. (AY.2001-02)
CIT v. Jugal Kishore Mahanta (2013) 355 ITR 432 / 94 DTR 204 / 219 Taxman 129 (Mag.)(Gauhati)(HC)

S.260A : Appeal – High Court – Monetary limit – Not maintainable [S.244A, 268A]
The Tribunal held that the assessee was entitled to interest u/s 244A. Against this order of the Tribunal, the revenue filed an appeal before the High Court. The tax effect involved in appeal was below monetary limit prescribed by Board in Instruction No.3/2011, dated 9-2-2011. The Revenue urged before High Court that decision of Tribunal was palpably erroneous. Held the submission of revenue would not enable it to ignore conditions of instruction dated 9-2-2011 and file appeal which was otherwise not envisaged in said instruction and therefore, impugned appeal was not maintainable.
CIT v. Sherno Ltd. (2013) 215 Taxman 53 (Mag.)(Guj.)(HC)

S.260A : Appeal – High Court – Monetary ceiling limits-Instruction is not applicable to pending cases [S. 268A]
When clause 11 of Instruction No. 3 of 2011, dated February 9, 2011, specifically says that it will be applicable to the cases filed on or after February 9, 2011, to say that it is applicable to pending cases is against the provisions under section 268A, public interest and the public policy. Therefore, Instruction No. 3, dated February 9, 2011, has no retrospective effect and the appeal filed by the Revenue was maintainable. (AY.1992-93)
CIT v. B. Sumangaladevi (Smt.) (2013) 352 ITR 143 / 90 DTR 198 / 262 CTR 433 (Karn.)(HC)

S.260A : Appeal – High Court – Monetary ceiling limits – Instruction No. 3 of 2011, dated February 9, 2011 raising monetary limits is retrospective – Liberty was given to the Revenue to revive the appeal in the event of success in their appeal before the Supreme Court.
A Division Bench of the Karnataka High Court in *CIT v. Ranka and Ranka [2013] 352 ITR 121 (Karn.)* took the view that Instruction No. 3, dated February 9, 2011, issued by the CBDT enhancing the monetary limits for appeals by the Department is applicable to pending cases also and this had been followed by the court in several subsequent decisions. The judgment in Ranka and Ranka had been made the subject-matter of the appeal before the Supreme Court and in many appeals. Held accordingly, dismissing the appeal, that liberty was given to the Revenue to revive the appeal in the event of success in their appeal before the Supreme Court. *CIT v. Surya Harbal Ltd (2013) 350 ITR 300 (SC)* was considered.(AY.2001-02)
CIT v. Spice Telecom (2013) 352 ITR 151 / 218 Taxman 29 (Mag.)(Karn.)(HC)

S.260A : Appeal – High Court – Monetary limit – Circular: Dept to show why appeal should not be dismissed.
The department filed an appeal before the Tribunal. The Tribunal dismissed the appeal on the ground that the tax involved in the appeal was less than the monetary limit of Rs.3 lakhs prescribed in CBDT Instruction No.3/2011 dated 9-2-2011. The Tribunal followed *CIT v. Madhukar Inamdar (HUF) (2009) 318 ITR 149 (Bom)* where it was held that the CBDT Instructions fixing monetary limit for filing an appeal to the Tribunal would apply even to pending cases. The Department then filed a MA before the Tribunal pointing out that in *CIT v. Surya Herbal* the Supreme Court had held that the CBDT Instruction No.3/2011 would not apply *ipso facto* and would not apply where the matter has cascading effect or raises a common principle involving a large number of matters. The Tribunal dismissed the MA. On appeal by the department to the High Court, HELD dismissing the appeal:
The grievance of the Revenue is that the Tribunal ought to have entertained the appeal by following the decision of the Apex Court in the matter of Surya Herbal Ltd. However, the revenue has not been able to point out before us any of circumstance as laid down by the Supreme Court in the matter of Surya Herbal Ltd. being applicable to this case which would lead to non-application of CBDT instructions No.3/2011. In the above circumstances, we see no reason to entertain the proposed question of law (it was also held following *Chem Amit v. ACIT (2005) 272 ITR 397(Bom) (HC)* that an appeal u/s 260A cannot be filed to challenge an order dismissing a MA)
CIT v. Sevak Pharma Pvt. Ltd (Bom.)(HC) www.itatonline.org.

S.260A : Appeal – High Court – Tax effect – Less than Rs. 2 lakhs – Appeal is not maintainable [S. 268A)]
Tribunal quashed reassessment proceedings to bring gifted amount to tax for want of material. Appeal against order of Tribunal involved tax effect of less than Rs.2 lakh. Court held that the appeal of revenue is not maintainable as tax effect was lower than Rs.2 lakh prescribed under CBDT Instruction No. 1979 [F. No. 279/126/98-IT], dated 27-3-2000. Hence case also did not fall in exclusionary clause of said Instruction. (AY.2005-06)
CIT v. Sanjay Kumar Agrawal (2013) 212 Taxman 127 (Mag.)(All) (HC)

S.260A : Appeal – High Court – Monetary limits – Less than two lakhs appeal was dismissed.
Against common order of Tribunal, revenue filed an appeal under section 260A before High Court, since in instant case tax effect that was involved was not more than Rs. 2 lakhs, in terms of Board's Instruction No. 2/2005, dated 24-10-2005 said appeal was liable to be dismissed on question of maintainability. (AY.1999-2000, 2000-01)
CIT v. Golf View Homes Ltd. (2013)81 DTR 46 / 213 Taxman 8 (Mag.)/ 255 CTR 176 (Karn.)(HC)

S.260A : Appeal – High Court – Condonation of delay – Sufficient cause – 695 days – Delay was Not condoned
The explanation furnished by assessee in support of condonation of delay of 695 days in filing appeal that delay occurred due to discussion with Chartered Accountant who opined that it was a fit case for filing appeal in High Court would not fall within the meaning of "sufficient cause". Hence, the delay was not condoned. (AY.2005-06)
Chopal Plywood v. CIT (2013) 218 Taxman 110 (Mag.)(P&H)(HC)

S.260A : Appeal – High Court – Delay of 62 days was condoned. [S.5, Limitation Act, 1963]
Case of appellant was that litigation of Union of India had to pass through various officers at different levels and for their lackadaisical attitude there was delay. Looking at delay of 62 days in filing appeal, the HC condoned it with a caution to department and its officers.
CIT v. Prakash Chandra Bhutoria (2013) 218 Taxman 32 (Mag.)(Cal.)(HC)

S.260A : Appeal – High Court – Condonation of delay – Lawyer's laches and negligence, is pardonable however laches and negligence on the part of Officials which is culpable one cannot be accepted or pardoned by Court.
Lawyer's laches and negligence is obviously pardonable. However, laches and negligence on part of officials, which is culpable one, cannot be accepted and pardoned by Court. When Revenue filed an appeal along with an application for condonation of delay of 2197 days without any explanation or document was produced for such inordinate delay, delay was not pardonable. Since the entire statements and averments constituted culpable laches and negligence on part of departmental official, application for condonation of delay in filing appeal was to be dismissed.
CIT v. Peerless General Finance & Investment Co. (2013) 216 Taxman 12 (Mag.)(Cal.)(HC)

S.260A : Appeal – High Court – Territorial jurisdiction of High Court – Assessment order in Jammu – Case transferred to Delhi during pendency of appeal to Tribunal – Delhi High Court had jurisdiction to hear appeal. [127]
For the assessment year 2005-06, the assessee was assessed by the A.O. at Jammu. The A.O. had disallowed the deduction claimed by the assessee under section 80-IB(4). The Commissioner (Appeals) allowed the assessee's claim for deduction under section 80-IB(4). Thereafter, the Department filed an appeal before the Tribunal at Amritsar. According to the relevant standing order under the Income-tax (Appellate Tribunal) Rules, 1963, and in, particular, rule 4(1) thereof, the jurisdiction of the Amritsar Bench of the Tribunal extended to, *inter alia*, the State of Jammu and Kashmir. On March 23, 2011, while the appeals were pending before the Tribunal, the assessee sent a letter to the Commissioner,

Jammu seeking transfer of its case to Delhi. Pursuant thereto, by an order dated September 20, 2011, issued under section 127 the case of the assessee was transferred with effect from September 26, 2011, from the Income-tax Officer, Jammu to the Income-tax Officer, New Delhi. In the meanwhile, the order dated June 24, 2011, was passed by the Amritsar Bench of the Tribunal. An appeal was preferred from that order in February, 2012. An objection was raised that the Delhi High Court did not have jurisdiction to hear the appeal. The Honourable High Court held that on the dates on which the appeals were filed, the A.O. of the assessee was at New Delhi and, therefore, the Delhi High Court would have jurisdiction to entertain these appeals. (AY. 2005-06, 2006-07, 2008-09)
CIT v. AAR BEE Industries (2013) 357 ITR 542 / 262 CTR 1 (Delhi)(HC)

S.260A : Appeal – High Court – Territorial jurisdiction – Appeal is an extension of suit – Orders passed within territorial jurisdiction High Court could hear appeal from such order. [S.20 of CPC, 1908]
Under section 20 of the Code of Civil Procedure, 1908, suits are to be instituted, where the defendants reside or where a cause of action, wholly or in part, arises. An appeal is nothing but an extension of a suit. Hence, a place where the cause of action, wholly or in part, arises, is the legal venue for institution of an appeal under the Act. Held, dismissing the appeals, that the orders challenged in this set of appeals had been passed within the local limits of the territorial jurisdiction of the court and, hence, the court had the jurisdiction to try the appeals.
CIT v. Shree Ganapati Rolling Mills P. Ltd. (2013) 356 ITR 586 / 219 Taxman 86 (Mag.) (Gauhati)(HC)

S.260A : Appeal – High Court – Territorial jurisdiction – Cause of action – Part of cause action writ is maintainable in that particular State High Court. [Art. 226].
Even if part of the cause of action has arisen in terms of Article 226(2) of the Constitution, the petition would be maintainable, in State of Gujarat and High Court of Gujarat had jurisdiction to entertain instant writ petition.
LKS Bullion Import & Export (P.) Ltd. v. DGIT (2013) 214 Taxman 68 / 88 DTR 95 / (2014) 265 CTR 191 (Guj.)(HC)

S.260A : Appeal – High Court – Failure to formulate substantial question of law – Power of review – Framing of substantial question of law – Inherent power.
High Court has inherent power to review its decision. Procedure laid down in section 260A must be followed strictly. In the event of failure to formulate substantial question of law, the error ought to be rectified.
Meghalaya Steels Ltd. v. CIT (2013) 358 ITR 551 (Gauhati)(HC)
Greystone Smelters Ltd. v. CIT (2013) 358 ITR 551 (Gauhati)(HC)
Shree Ganapati Rolling Mills Pvt. Ltd. v. CIT (2013) 358 ITR 551 (Gauhati)(HC)
Meghalaya Feed Products v. CIT (2013) 358 ITR 551 (Gauhati)(HC)
J.D.B. Coke v. CIT (2013) 358 ITR 551 (Gauhati)(HC)

S.260A : Appeal – High Court – Substantial question of law – Plea not raised before lower authorities cannot be raised before the High court for the first time
In the absence of any plea before lower authorities that the additions made would not cause loss to the Revenue, the assessee could not be permitted to raise such questions in appeal before the High Court without there being any factual basis. (AY.2004-05)
Kandi Friends Educational Trust v. CIT (2013) 357 ITR 84 / (2014) 220 Taxman 50 (P&H) (HC)

S.260A : Appeal – High Court – Estimate – Question of fact – Inflated purchases
The decision of the Commissioner (Appeals) as well as that of the Tribunal was based on estimate. Whether an estimate should be at a particular sum or at a different sum can never be a question of

law. Therefore, the decision of the Tribunal, being based on an estimate, did not give rise to any question of law so as to warrant interference. (AY.1997-98)
CIT v. Vijay M. Mistry Construction Ltd. (2013) 355 ITR 498 / 219 Taxman 145 (Mag.)(Guj.)(HC)

S.260A : Appeal – High Court – Power – Substantial question of law – High court has power to frame additional question of law during hearing [S.260A(4)]
Proviso of sub-section (4) to section 260A empowers High Court to frame new or additional substantial question of law during the course of hearing, if it is satisfied on its own or on being pointed by either of the parties. Framing of another substantial question of law does not amount to review of an earlier order or reopening of the issue. The legislature in its wisdom in the proviso added the words" shall be deemed to take away" . The deeming provision has been added consciously to confer wide power on the High Court to formulate additional substantial questions of law and in case the High Court to do so, the provision contained in sub-section (4) shall not come in the way. (AY.1985 to 2000-01)
CIT v. Indo Gulf Fertilizers Ltd. (2103) 355 ITR 437 / 86 DTR 374 / 261 CTR 206 (All.)(HC)

S.260A : Appeal – High Court – Revision – After giving effect – Order of High Court would prevail over all orders that were passed by different authorities and notwithstanding all those orders, Assessing Officer would reframe assessment [S.143(3), 254(1), 263]
Revenue passed first assessment order against which appeal was filed before Commissioner (Appeals). In meantime, there was a revision of assessment and a fresh assessment order was passed. This order was set aside by Tribunal against which revenue preferred appeal before High Court. During pendency of that appeal, first assessment order was set aside by Commissioner (Appeals) and thereafter by Tribunal on 18-1-2012. On other hand, in appeal in revisional matter, High Court remanded matter back to assessing authority to reconsider all issues and directed to pass a fresh order of assessment. In respect of original assessment, revenue filed an appeal before High Court against Tribunal's order. The Court held that the order of High Court would prevail over all orders that were passed by different authorities and notwithstanding all those orders, Assessing Officer would reframe assessment.
DCIT v. S. Madhava (HUF) (2013) 214 Taxman 87 (Mag.)(Karn.)(HC)

S.260A : Appeal – High Court – Commissioner, remanding the proceedings no question of law [S. 263]
The Commissioner after recording cogent reasons found that the order passed by the Assessing Officer was erroneous and also prejudicial to the interest of the revenue. He was, therefore, entitled to exercise revisional powers under S. 263. While doing so, he remanded the proceedings before the Assessing Officer for full inquiry and fresh consideration. He had not given any specific directions to consider the issue in a particular manner. In any case, the Tribunal further clarified this issue in the impugned order. Therefore, no question of law arises for consideration. (AY. 2006-07)
Adani Agro (P.) Ltd. v. DCIT (2013) 214 Taxman 138 (Mag.)(Guj.)(HC)

S.260A : Appeal – High Court – Substantial question of law – Disallowance of depreciation and interest [S. 32, 36(1) (iii)]
Grounds related to the matters of appreciation of evidence for a factual enquiry and rendering of findings on facts about the factory building construction. CIT(A) and Tribunal had deleted disallowance on account of depreciation on building and interest expenses observing that no defects were pointed out in the books. It was not a case where assessee had shown excessive valuation of building. Impugned orders did not suffer from any perversity or wrong application of any principle of law. (AY. 2005-06)
CIT v. Bohra Industries Ltd. (2013) 83 DTR 113 / 216 taxman 143 (Mag.)(Raj.)(HC)

S.260A : Appeal – High Court – Constitutional validity – High Court in appeal cannot determine constitutional validity of amendment, it is beyond scope of jurisdiction under section 260A

Based on retrospective amendment of section 80HHC, assessee's assessment was reopened to disallow deduction in respect of profit on sale of DEPB.Tribunal upheld reopening of assessment. On appeal to High Court, assessee took ground that retrospective amendment of section 80HHC had been struck down by Gujarat High Court, by following or dissenting from judgment of High Court of Gujarat, The Court held that Tribunal could not consider validity of a retrospective amendment, such question could not arise from its order, therefore instant case High Court would be determining constitutional validity of amendment; it would then be stepping out of and beyond scope of jurisdiction under section 260A. High Court in appeal cannot determine Constitutional validity of amendment, it is beyond scope of jurisdiction under section 260A. In favour of revenue (AY. 2001-02, 2003-04)

M. Abdul Rehuman Kunju v. ACIT (2013) 213 Taxman 11 (Mag.)(Ker.)(HC)

S.260A : Appeal – High Court – Plea which was not raised at any stage,could not be raised for first time before Court [S.263, 292BB]

Notice had been issued under signature of Income-tax (Technical), whereas in view of provisions of powers under section 263 (1), it was only Commissioner to issue notice. In appeal to High Court, revenue raised new plea that in view of provisions of section 292BB, it was not open for assessee to raise an objection with regard to proceedings initiated under section 263 as he had participated in proceedings and tendered his reply. The Court held that pleas can be raised only out of judgment passed by Tribunal or other authorities, but plea which was not raised at any stage, as in instant case, could not be raised for first time before Court, therefore, appeal against order of Tribunal failed. (AY. 2007-08)

CIT v. Rajesh Kumar Pandey (2013) 213 Taxman 19 (Mag.)(All.)(HC)

S.260A : Appeal – High Court – Appeal – Guidelines for engagement of standing counsels – CBDT gave assurance to do the needful

Before the Court the CBDT Member stated that, insofar as revamping system and giving better assistance to Court was concerned, all necessary action had been taken; matter of fresh panel was pending before Law Ministry; admitted fee was being paid to standing counsels and arrears of admitted fees would be cleared within next two months and disputed parameters to be sorted by counsels themselves. Member assured court that there would be no laxity in assistance rendered to Court in future.

CIT v. Jackson Engineers Ltd. (2013) 213 Taxman 10 (Mag.)(Delhi)(HC)

S.260A : Appeal – High Court – Memorandum of appeal – The question not relating to appeal cannot be permitted to be agitated

Against orders of Commissioner (Appeals), revenue preferred two appeals before Tribunal. Assessee also preferred an appeal before Tribunal. Tribunal clubbed together all these appeals and disposed of them by a common order. Against order of Tribunal, revenue preferred an appeal before High Court. During pendency of appeal, revenue also filed an application seeking for suitable amendment in memorandum of appeal so that instant appeal could be agitated insofar as it related to order passed by Tribunal in appeal of assessee in common order passed by it. The Court held that allowing application of this nature and also to permit revenue to agitate such question by further alteration of memorandum of appeal, etc., was not feasible course of action at this point of time. As it was barred by limitation. The question not relating to appeal cannot be permitted to agitate.(AY.1999-2000, 2000-01)

CIT v. Golf View Homes Ltd. (2013) 81 DTR 46 / 213 Taxman 8 (Mag.)(Karn.)(HC)

S.260A : Appeal – High Court – Substantial question of law – Meaning – Principle of consistency in tax matters

An appeal under section 260A of the Income–tax Act 1961, will lie before the High Court if the appellant is able to satisfy the Court that it involves a substantial question of law. In order to be substantial, a question of law must be debatable, not previously settled under the law of the land or binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. The High Court in exercise of its second appellate jurisdiction should normally accept all findings of facts recorded by the first appellate court, being forum of facts. Adequacy of materials or possibilities of another view on facts, is no ground for High Court to entertain a second appeal. The High Court can on facts interfere only after it reaches the conclusion that, in view of the materials on record, no person duly instructed in law can reach that conclusion.

Dy. CIT v. Sulabh International Social Service Organisation (2011) 200 Taxman 119 / 242 CTR 70 / (2013) 350 ITR 189 (Patna)(HC)

S.261 : Appeal – Supreme Court – Limitation – Issue raised for first time [S.275]

Revenue has raised two specific questions relating to period of limitation applicable to levy of impugned penalty for the first time before the Supreme Court. Apex court held that, question of law raised for the first time before the Supreme Court in appeal should be answered first by Income Tax Appellate Tribunal. Accordingly the order of High Court and Tribunal remanded back to tribunal to decide the said questions of law after affording opportunity of hearing to both the parties.

CIT v. Jhabua Power Ltd. (2013) 93 DTR 469 (SC)

S.261 : Appeal – Supreme Court – Additional evidence – Documents – Matter set aside [S. 260A]

Assessee filed certain documents before Supreme Court for the first time which are some relevance and are required to be looked in to by the High Court for of deciding the appeal. Accordingly the order of High Court was set aside and the matter remanded back to the High Court for fresh disposal of the appeal after accepting the documents filed by the assessee.

Tek Ram (Dead) Through LRs v. CIT (2013) 262 CTR 118 / 93 DTR 350 (SC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Restricted to directions given – Assessing Officer cannot go beyond the direction [S.143(3)]

Commissioner exercised its revisional jurisdiction and directed Assessing Officer to determine income from one of assessee’s business. Held, since revision order was confined to one of the businesses of the assessee and bereft of any discussion regarding the other business, the AO was not justified in conducting enquires about such other business. On writ the court held that AO cannot go beyond the direction.(AY. 2006-07)

Shobha Govil (Smt.) v. Addl. CIT (2013) 354 ITR 668 / 218 Taxman 30 (Mag.)(All.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Writ – Alternate remedy – Appeal is provided to Tribunal – Writ is not maintainable [S. 253, Art.226]

Records showed that the Assessing Officer did not verify genuineness of trade creditors and assessment order was completely silent and bereft of any discussion on material points. Therefore, the assessment order was erroneous and prejudicial to interest of revenue. Held that on the face of statutory remedy of filing appeal before Tribunal, there was no justifiable reason for not approaching Tribunal, and thus, assessee was relegated to statutory forum and the writ was dismissed. (AY.2008-09)

Meerut Roller Flour Mills Ltd. v. CIT (2013) 218 Taxman 112 (Mag.)(All.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Limitation period –Computation of limitation – Original order and not from the reassessment order [S.143, 147]
Where subject matter of additions made in revisionary order were not dealt in the reassessment order passed under section 147, limitation for revision was to begin from date of original order passed under section 143(3), and not from date of reassessment order. (AY.2005-06)
CIT v. Bharti Airtel Ltd. (2013) 218 Taxman 112 (Mag.)(Delhi)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Block assessment – Order not prejudicial – Revision was held to be not valid. [S.158BC]
Block assessment order passed by Assessing Officer with approval of Joint Commissioner comes within purview of revisional power of Commissioner. However, since Assessing Officer had taken due care by assessing total undisclosed sale, revisional order passed by Commissioner was to be set aside. (Block period 1989-2000)
CIT v. Shivangi Steels (P.) Ltd. (2013) 218 Taxman 104 (Mag.)(All.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Claim of deduction allowed without application of mind –Order of revision was held to be justified.
The AO allowed the payments towards small labourers or machine repairers without the assessee having produced any vouchers, receipts or bills to show the amount incurred. This showed that there was no application of mind on the part of the Assessing Officer. The Commissioner was justified in issuing a direction to the assessing authority to redo the matter afresh and pass appropriate orders in accordance with law.
CIT v. Alloy Steels (2013) 359 ITR 355 / 217 Taxman 262 (Karn.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Exempt income – No disallowance of expenditure was made – Revision was held to be valid [S.14A, R.8D]
Revision of order u/s 263 on account of no disallowance being made by AO u/s. 14A was valid.
CIT v. RKBK Fiscal Services P. Ltd. (2013) 358 ITR 228 / 214 Taxman 89 (Mag.) / 87 DTR 301 / 259 CTR 275 (Cal.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Export business – Transfer of film software – Order passed by AO was held to be not erroneous – Revision was held to be not valid [S.80HHF]
Assessee, is a producer of television news and programme, and was also engaged in business of limited transfer/export of news items and television programmes owned by it. It claimed deduction under section 80HHF. Assessing Officer delved deep into question of deduction, conducted investigation and accepted claim of assessee on being satisfied that conditions stipulated in section 80HHF were fulfilled.
Commissioner could not decide whether acceptance of claim of assessee by Assessing Officer was erroneous or not. He, however, initiated revision proceedings. The Court held that once assessee's claim under section 80HHF was considered and examined by Assessing Officer, Commissioner cannot set aside order without recording contrary finding and upheld the decision of the Tribunal in setting aside order passed by Commissioner under section 263. It was also held that as the Assessing Officer, during course of original assessment proceedings, delved deep into question of deduction under section 80HHF and was satisfied that deduction made were as per law, Commissioner could not revise amount without recording contrary finding. (AY. 2002-03)
CIT v. New Delhi Television Ltd. (2013) 262 CTR 604 / 94 DTR 21 /(2014) 360 ITR 44 / 220 Taxman 44 (Delhi)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Where AO merely accepted claim of assessee without making any enquiry or applying his mind –Revision by the Commissioner justified

The assessee had made payments to small labourers and machine repairers for which it did not have any valid vouchers. During the assessment proceedings it was stated before the AO that the payments were made under emergent conditions and that the expenses were actually incurred. The AO disallowed a sum of Rs. 2 lakhs, which disallowance was accepted by the assessee. The CIT exercised revisionary powers u/s. 263 and directed the AO to modify the assessment order since according to the CIT the 4 aspects mentioned in his notice were not considered by the AO. Tribunal set-aside the order of the CIT.

On appeal by the department, the High Court observed that there was no application of mind on the part of the AO and that the 4 points mentioned by the CIT have not been considered by the AO. Accordingly, the High Court allowing the appeal held that the CIT was justified in directing the AO to redo the matter afresh. (AY. 2006-07)

CIT v. Alloy Steels (2013) 359 ITR 355 / 217 Taxman 262 / 36 taxmann.com 514 (Karn.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – No specific error in assessment order revision was not valid [S.14A]

The assessee had borrowed secured loans by issue of redeemable non-convertible debentures, but utilised the loans towards investment in shares. The assessee claimed interest and finance charges to pay interest on the debentures issued. Alleging that the A.O. had not considered the provisions of section 14A the proper perspective and that the interest claimed by the assessee was not related to the funds deployed in activities from which income had been shown during the year, the assessment was revised. The Tribunal pointed out that the assessee had borrowed secured loans by issue of redeemable non-convertible debentures and there was no material to hold that the assessee made any investment from the date of issue of redeemable non-convertible debentures between March 17, 2004, and March 31, 2004. In the circumstances, the assumption that the loan was utilised for non-tax investment was not correct. It set aside the order of revision.

On appeal to the High Court held, dismissing the appeal that the Tribunal, as a matter of fact, found that the redeemable non-convertible debentures were issued between March 17, 2004, and March 31, 2004, and there were no investments made during this period. This being a pure and simple factual finding, which had not been denied by the Revenue, the finding had to be accepted. Hence, there was no specific error in the assessment order. The order could not be revised. (AY. 2004-05)

CIT v. Land T Infrastructure Development Projects Ltd. (2013) 357 ITR 763 (Mad.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Inadequacy of enquiry – Revising authority has no power to remand and direct Assessing Officer to conduct enquiry [S.52]

When the revising authority feels that the inquiry was inadequate, it must make enquiry and show that assessment order was erroneous. It has no power to remand and direct AO to conduct enquiry. (AY. 2006-2007)

DIT v. Jyoti Foundation (2013) 357 ITR 388 / 219 Taxman 105 (Mag.)(Delhi)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Transport subsidy – Revision was held to be not valid [S.80IA]

The transport subsidy is aimed at reducing the cost of production of the industrial undertakings covered by the transport subsidy scheme and, thus, there is a first degree nexus between the transport subsidy, on the one hand, and the cost of production, on the other and when the cost is reduced it naturally helps in earning of profit and at times higher profits and such profits and gains ought to be treated to be profits and gains derived from, or derived by, the industrial undertaking.

Held allowing the appeal, that the assessee was entitled to claim deduction under section 80-IA in respect of the amount which had been received by it in the form of transport subsidy, and revision u/s 263 was not justified. (AY. 2004-05)
Patkai Coal Products Pvt. Ltd. v. CIT (2013) 356 ITR 528 / 219 Taxman 138 (Mag.) (Gauhati)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Transport subsidy – Revision was held to be not valid [S.80IA]
The transport subsidy is aimed at reducing the cost of production of the industrial undertakings covered by the transport subsidy scheme and, thus, there is a first degree nexus between the transport subsidy, on the one hand, and the cost of production, on the other and when the cost is reduced it naturally helps in earning of profit and at times higher profits and such profits and gains ought to be treated to be profits and gains derived from, or derived by, the industrial undertaking.
Held allowing the appeal, that the assessee was entitled to claim deduction under section 80-IA in respect of the amount which had been received by it in the form of transport subsidy, and revision u/s 263 was not justified. (AY. 2003--04)
Patkai Coal Products Pvt. Ltd. v. CIT (2013) 219 Taxman 167 s(Mag)(Gauhati)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Commissioner has to give a definite finding that an order is erroneous, inadequate inquiry, by itself will not make the order erroneous
The assessee declared the income from short term capital gains from investments in mutual funds, securities. The Income was accepted under section 143(3) by making some inquiries. The Commissioner under section 263 set aside the assessment to do the reassessment by proper inquiry. On appeal by revenue the Court held that without arriving at a definite finding that the order is erroneous the CIT cannot simply remand the matter to the AO for reconsideration. Inadequate inquiry, by itself, will not make the order 'erroneous'. Accordingly the Court held that the jurisdiction under section 263 was wrongly invoked. (ITA no 410/2013 dt 13-09-2013). (AY.2006-07)
CIT v. Gupta Spg. Mills Ltd. (2013) The Chamber's Journal – October – P. 82 (Delhi)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Assessee being a foreign company, for many years, computed income at 10% of "gross receipts" and subtracted accepted expenditure therefrom, as per DTAA between its country and India – Method unknown to law of India, it could be corrected in reversionary proceedings
The assessee, a Korean company had a 'permanent establishment' ("PE") in India and carries on business within India and outside India. In view of exercising the beneficial provisions of section 90 of the Act, the assessee has opted for being taxed in the manner prescribed in the DTAA between India and Korea. In all previous assessment years the tax liability of the assessee was determined on the basis of 10% of the gross receipt minus accepted expenses. Subsequently, the DIT using the powers u/s. 263 of the Act stated that the tax liability should have been determined on the basis of receipt minus accepted expenditure and there was no scope of applying 10% deemed profit of the receipt minus accepted expenditures. The Tribunal held there is not even an apprehension in the order of the DIT about the disclosures made, pertaining to outside India activities relating to receipt or the work done. Accordingly, there was no question of the DIT sending back the matter to the AO, pertaining to outside India activities.
On appeal by the department, the High Court held that in the event, a method, unknown to the law of the applicable State, is adopted for years, that can certainly be corrected by taking recourse to section 144 of the Act. The High Court therefore set aside the judgment of the Tribunal to the extent the same upheld assessment of profit arising out of within India transactions and remitted it back to the AO for reconsideration. (AY. 1990-91, 1991-92)
DIT v. Hyundai Heavy Industries Co. Ltd. (2013) 217 Taxman 134 / 261 CTR 567 (Uttarkhand)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Order set-side to decide as per the case laws

The assessee had been disallowed depreciation on goodwill for earlier years but for the assessment year in question and for subsequent years the Assessing Officer had allowed the depreciation on the goodwill part without assigning any reason. The Commissioner revised the order u/s 263. The assessee raised a preliminary objection pointing out that there was no error in the order passed by the Assessing Officer; that without order being erroneous, Commissioner does not assume jurisdiction and therefore, he cannot pass any orders by issuing directions but Commissioner nevertheless proceeded to pass an order that it had jurisdiction to issue directions to the Assessing officer to redo the assessment in a particular manner. The Tribunal directed the Assessing Officer to redo the matter after giving an opportunity of hearing to the assessee with a categorical direction to the assessing authority not to go by the directions issued by the Commissioner. The High court held that, the Tribunal has rightly observed that the Commissioner assumed jurisdiction only on the assessing authority having not given reason for passing of the order. Where an Assessing Officer does not assign any reason for passing an order having effect on the revenue in the sense that allowing or disallowing a claim put forth by the assessee and if that is not the correct thing, it can amount to an erroneous order. The question is not that, Commissioner is right or wrong but whether bona fide had assumed jurisdiction under section 263. The direction issued by the Commissioner has been set aside and the Tribunal by setting aside the direction issued by the Commissioner has remanded the matter to the Assessing Officer applying the relevant case law, no prejudice is caused to the assessee under the impugned order and in fact, it is an order more in favour of the assessee. (AYs.2006-07, 2007-08)
Fibres & Fabrics International (P.) Ltd. v. CIT (2013) 94 DTR 294 / 36 taxmann.com 527 / 217 Taxman 352 (Karn.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Once application of mind is established by the AO, revision cannot be done on the ground that there is no detailed reasons in the assessment order [Ss.28(i), 45]

Assessing Officer after detailed enquiry accepted the income shown by assessee as capital gains. Commissioner revised the order on the ground that income on sale of shares has to be assessed as business income. The Court held that the Assessing Officer in assessment order is not required to give detailed reasons and once it is clear that there was application of mind by an enquiry, Commissioner, merely because he entertains a different opinion in matter, cannot invoke his powers under section 263. (AY. 2006-07)
Spectra Shares & Scrips (P.) Ltd. v. CIT (2013) 91 DTR 289 / 219 Taxman 61 (Mag.)(AP)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Intimation Reassessment – Issues accepted under section 143(1) and which were not considered under reassessment proceedings cannot be revised as the limitation starts from the date of intimation and not from the reassessment proceedings [S.143(1), 147, 148]

In the reassessment proceedings where some issues accepted under section 143(1) are not dealt with ,the limitation to invoke jurisdiction does not start from the order passed under section 147 .The order passed under section 147 does not extend the limitation so as to cover even those issues which are untouched by the reassessment, which were accepted under section 143(1).Revision of order was held to be bad in law. (ITXA/2426, 2427.2440/2011 DT 6-8-2013)(AY.1999-2000, 2001-02, 2002-03)
CIT v. LARK Chemicals (Bom.)(HC)(Unreported)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Business expenditure – Mere recording an opinion that items required to be examined is not sufficient to satisfy the requirement of law [S.37(1)]

In the absence of recording an opinion over why orders of assessment under s.143(3) required initiation of revisionary proceeding, mere expression that certain items of expenses, etc. were required to be examined, did not satisfy requirement of issue of show-cause, notice under s. 263. (AY. 2006-07)
IBM India (P.) Ltd. (2013) 216 Taxman 170 (Mag.)(Karn)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Business expenditure – Commission – Detailed inquiry – Revision order was set aside [S. 37(1)]
Since the Assessing Officer, on basis of detailed inquiry found that 'SG' had rendered services in his individual capacity, order of Commissioner under s. 263 on ground that no services for procuring order were rendered at all was to be set aside. (AY. 1992-92 to 1994-95)
CIT v. Amar Kant Gupta (Dr.) (2013) 216 Taxman 149 (Mag.)(All.)(HC)

S.263 : Commissioner - Revision of orders prejudicial to revenue – Depreciation – Unabsorbed depreciation – Investment allowance – Set off against capital gain – Revision was held to be not valid [Ss. 32, 34A, 71(2), 72]
Commissioner of income tax found that the set off of unabsorbed depreciation and investment allowance is to be restricted to 2/3 of such allowance and it is not permissible to be set off against any head of income other than the income from business or profession. He directed the Assessing officer accordingly. Tribunal allowed the appeal. On appeal by the revenue the Court held that unabsorbed brought forward depreciation and investment allowance are to be added to current depreciation and investment allowance to set off against income from 'Capital gain'. Court held that the Commissioner of income-tax was not justified in invoking the jurisdiction under section 263 of the Income-tax Act or not allowing the unabsorbed depreciation against income from capital gains to the extent of admissibility to Rs. 66.67%. Court also observed that they were called upon to interpret the law relevant to assessment year 1992-93 only. (AY. 1992-93)
CIT v. Kisan Engineering Works Ltd. (2013) 215 Taxman 620 / 358 ITR 510 (All.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Rejection of books of accounts and passing best assessment making addition to declared total income, revision is not valid [S.145]
Twin conditions of assessment order being erroneous as well as being prejudicial to interest of revenue should be satisfied for invoking jurisdiction u/s 263 and mere alleged insufficiency of enquiry by assessing authority could not permit Commissioner to invoke revisionary jurisdiction u/s 263. Where the Assessing Officer rejected books of account of assessee on defects being same as pointed out by Commissioner and passed best judgment assessment making additions to declared total income, there was no occasion of revising said order on ground that no proper verification was done by assessing authority. (AY. 2006-07)
CIT v. Jain Construction Co. (2013) 215 Taxman 127 (Mag.) / 257 CTR 336 (Raj.)(HC)

S.263 : Commissioner – Revision of order prejudicial to the interest of revenue – Rectification of mistakes – Deduction of tax at source – Amendment – Provision permitting rectification was not in force at the time of rectification but in force at the time of revision – Revision was held to be not valid [Ss.154, 155(14)]
As against the assessee's claim of Rs. 1,36,35,634, the Assessing Officer gave credit of Rs.38,14,844 towards tax deducted at source. The assessee sought rectification of the intimation on the ground that credit for the entire tax deducted at source was not given. The assessee also pointed out that at the time of filing the return, credit for the tax deducted at source amounting to Rs. 19,44,692/- was not claimed since the relevant certificates of tax deduction at source were not available and since the certificates had been received subsequently, credit should be given to the extent of Rs. 19,44,692. The Assessing Officer rectified the intimation under section 154 and gave credit to a sum of Rs.

1,45,98,652 towards tax deducted at source which included the amount of Rs. 19,44,672. On this date, section 155(14) was not in the statute book. The Commissioner exercising his power under section 263 withdrew the credit given to the amount of Rs. 19,44,672.
Held, that as the provisions of section 155(14) were not in the statute book on the day the Assessing Officer passed the order under section 154. The amendment came into effect only from June 1, 2002. But on the day the Commissioner exercised his power and passed the order, the amendment was in the statute book. Therefore, when revisional jurisdiction was exercised, the Commissioner could not have held that the order passed by the assessing authority was erroneous, as on that day the amended law provided for such rectification. (AY.1999-2000)
CIT v. Digital Global Soft Ltd. (2011) 203 Taxman 98 / (2013) 354 ITR 489 (Karn.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Block assessment – Block assessment order passed after obtaining approval of commissioner cannot be revised under section 263 [S.132, 147, 158BC, 158BG]
It is no doubt true that the availability of an appeal remedy cannot pronounce on the scope of section 263 *vis-à-vis* section 158BG. A reading of section 263 shows that it is more in the nature of a corrective mechanism in cases where the Revenue may not have a chance to correct the error in the order of assessment, which is prejudicial to the interest of the revenue, which does not fall for consideration u/s 147 proceedings. In case of block assessment order passed u/s 158BC after obtaining approval of Commissioner u/s 158BG, there can be no assumption of jurisdiction u/s 263 to revise said order of block assessment. (BP.1-4-1986 to 13-2-1996)
R. Srinivasan v. DCIT (2013) 215 Taxman 6 / 88 DTR 257 / 260 CTR 201 / (2014) 360 ITR 471 (Mad.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to the interest of revenue – Capital gains [S.54]
The condition precedent for exercising the revisional power under section 263 is that the order under revision should not only be erroneous, but such erroneous order should result in prejudice to the interests of the Revenue.The assessee was exempted from paying tax under section 54 since the fund was utilized fully towards purchase of another property. The Commissioner set aside the order of assessment on the ground that the gain should have been treated as short-term capital gains and hence, deduction under section 54 was to be denied. The Tribunal set aside the order of the revisional authority and granted relief to the assessee. Held, the assessee had demonstrated that in no event the order passed by the Assessing Officer was prejudicial to the interests of the Revenue. That aspect had not been considered and there was no reference to that aspect in the entire order passed by the revisional authority and by a cryptic order, the matter was remanded to the assessing authority. Though the Tribunal was not expected to go into the merits of the case, in order to demonstrate that the order passed by the assessing authority even if it was erroneous, was not prejudicial to the interests of the Revenue, it set out the computation of capital gains and demonstrated that the order was not prejudicial. Therefore, the order passed by the revisional authority was illegal.
CIT v. D. G. Gopala Gowda (2013) 354 ITR 501 / 88 DTR 273 (Karn.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Omission by Assessing Officer – Contingent liability – Provision for warranty [S. 37(1)]
The Tribunal pointed out that the Assessing Officer had not examined the aspect with regard to the admissibility of a certain sum shown as provision for warranty cost. The non-consideration or omission by the Assessing Officer having been found to be erroneous and prejudicial to the interests of the Revenue, there was no reason to interfere with such factual findings. Order of Tribunal confirming the revision was up held. (AY. 2004-05)
Renowned Auto Products Mfrs. Ltd. v. ITO (2013) 354 ITR 127 / 93 DTR 118 / 219 Taxman 144 (Mag)(Mad.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Circular contrary to the decision of High Courts or Supreme court is to be ignored by judicial functions Revision was held to be not valid [S.119]

If an existing circular is in conflict with the law of the land laid down by the High Courts or the Supreme Court, the Revenue authorities while acting quasi-judicially, should ignore such circulars in discharge of their quasi-judicial functions. The sole reason for invocation of section 263 was a Board circular. Since the outcome of the original order of assessment was in tune with the Division Bench decisions of the jurisdictional court, the order of revision was held invalid. (AY. 1998-99)

Bhartia Industries Ltd. v. CIT (2011) 245 CTR 328 / 201 Taxman 180 / 60 DTR 121 / (2013) 353 ITR 486 (Cal.)(HC)

S.263:Commissioner – Revision of orders prejudicial to revenue – Export – Without reducing the profits – Revision was held to be valid [Ss.80HHC, 80IA]

The assessee had claimed deduction u/s 80 HHC and also u/s 80IA and the same was allowed by the AO. The CIT while exercising his revisional powers u/s 263 held that assessment is erroneous and prejudicial to the interest of the revenue, as the assessee while computing the deduction u/s 80HHC, had not reduced the claim of deduction u/s 80IA from the profits and gains from the business, therefore revision by the CIT u/s 263 was held to be valid. (AY. 2004-05)

CIT v. Abhishek Industries Ltd. (2013) 255 CTR 504 / 82 DTR 1 / 213 Taxman 176 (P&H) (HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Revision to make further enquiry is held to be not valid

When, during course of framing of assessment, Assessing Officer had access to all records of assessee, and after perusing said records, he framed assessment, said assessment could not be re-opened in exercise of revision power under section 263 for making further inquiries.

CIT v. Amit Corpn. (2013) 213 Taxman 19 (Mag.)(Guj.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Investment was made beyond due date – Revision of order was not justified [Ss.54F, 139(1), 139(4)]

Assessee filed her return wherein she raised a claim for deduction under section 54F. Assessing Officer allowed assessee’s claim. Commissioner passed a revisional order holding that assessee’s claim was wrongly allowed because she made investment in new house beyond due date prescribed under section 139(1).Tribunal set aside revisional order holding that investment was made within time specified under section 139(4) relying on the order passed in case of *Fatima Bai v. ITO [2009] 32 DTR 243 (Kar.)*. On appeal by revenue it was contended that order passed in aforesaid case was incorrect and, thus, it could not be accepted. The Court held that if order passed in aforesaid case was incorrect, revenue should have filed an appeal against it; however, at any rate that would not be a ground for invoking section 263. The Court held that Tribunal was justified in setting aside revisional order. (AY. 2006-07)

CIT v. Vrinda P. Issac (Smt) (2013) 212 Taxman 101 (Mag.)(Karn.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Period of limitation – On facts the limitation to be computed from the date of original order [Ss.68, 80-I]

In original assessment order dated 28-3-1995, an addition under section 68 was made and deduction under section 80-I was granted on total income, inclusive of income under section 68. Grant of such deduction was not questioned by revenue at relevant time. Tribunal remitted issue pertaining to addition under section 68 to Assessing Officer for reconsideration. In remand proceedings, Assessing Officer once again made addition under section 68 and granted deduction under section 80-I. Invoking section 263, Commissioner vide order dated 30-3-2007, set aside

assessment order on ground that deduction under section 80-I was wrongly computed. The Tribunal set aside revision order on ground that the proceedings under section 263 was barred by limitation. On appeal by revenue the High Court held that remand proceeding was limited to addition under section 68 and, therefore, limitation qua issue of deduction under section 80-I would have to be computed from date of original assessment order, i.e., 28-3-1995, therefore, revision order dated 30-3-2007 was time-barred. (AY. 1992-93)
ACIT v. Modern Cement Industries Ltd. (2013) 212 Taxman 135 (Mag.)(Guj.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Alternative remedy – Writ against the order under section 263 was held to be not valid as an alternative remedy is available [Ss.43B, 253(1)(c)]
Assessee claimed deduction on account of payment of bonus for assessment year 1995-96. Same was allowed under section 43B. Said claim had also been allowed in preceding assessment year 1994-95 - Rectification proceedings were initiated but subsequently dropped. Commissioner invoked section 263 and directed Assessing Officer for recomputation. Assessee filed writ petition alleging that there was jurisdictional error in invoking section 263. Single Judge held that order passed by Commissioner was without jurisdiction. On writ appeal it was held that single judge was not justified in interfering with the order of the Commissioner passed under section 263, remedy of appeal under section 253(1) (c) was available to it. Therefore, writ petition ought not to be entertained and Single Judge was not justified in interfering with revisional order. In favour of revenue. (AY. 1995-96)
CIT v. B & A Plantation and Industries Ltd. (2013) 212 Taxman 137 (Mag.)(Gau.)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Error of Assessing Officer should be “unsustainable” – Disallowance under section 14A, debatable, hence revision held to be not warranted [Ss.10(33), 14A]
Whether the deduction under section 14A was warranted, was a debatable fact. In any event, even if it were not debatable, the error by the Assessing Officer was not “unsustainable”. Possibly he could have taken another view; yet, that he did not do so, would not render his opinion an unsustainable one, warranting exercise of section 263. (AY. 2002-03)
CIT v. DLF Ltd. (2013) 350 ITR 555 / 214 Taxman 91 (Mag.)(Delhi)(HC)

S.263 : Commissioner – Revision of order prejudicial to revenue – Non-residents –Mineral oil, business for prospecting/exploration, etc. [S.44BB]
Where Assessing Officer did not analyse as to whether payment received by assessee was in respect of services rendered or facilities provided in connection with prospecting for extraction or production of mineral oils or it was received only by way of sale price of goods/materials sold by assessee, may be outside India and, thus, there was failure on part of Assessing Officer to ascertain whether said revenue would or could come under provisions of section 44BB, Commissioner rightly revised said order under section 263.Appeal of assessee was dismissed. (AY.2006-07)]
M-I Overseas Ltd. v. DIT (IT) (2013) 212 Taxman 190 (Uttarakhand)(HC)

S.263 : Commissioner – Revision of order prejudicial to revenue – Business expenditure – Capital or revenue – Revision held to be not justified
Assessee paid certain amount towards regulatory fee and stamp duty and claimed deduction of same as a revenue expenditure. Assessing Officer allowed claim of deduction. Commissioner issued on assessee a notice under section 263 stating that license fee, loan arrangement charges and stamp duty were capital expenditure. Assessing Officer before passing assessment order made an enquiry and directed his mind on all aspects. View adopted by him was clearly one among two plausible views that could have been taken. Commissioner did not specifically furnish any reasons to say why original assessment order was unsupportable in law. Commissioner could not have validly exercised his revisionary power under section 263 in instant case. (AY. 2004-05)

CIT v. Vodafone Essar South Ltd. (2013) 212 Taxman 184 (Delhi)(HC)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Non-application of mind – No reasons cited by AO

Failure by AO to record reasons for allowing assessee's claims amounts to non-application of mind to materials filed, and is prejudicial to interests of Revenue. Hence, the revision was proper. (AYs.2006-07, 2009-10)

G. Sunilkumar v. DCIT (2013) 27 ITR 117 (Cochin)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Twin conditions – Error and prejudicial to interests of Revenue

Both conditions i.e. assessment order must be erroneous and it should be prejudicial to interests of Revenue, must be satisfied for invoking s. 263.(AY 2008-09)

Kailash Chandra Sahoo v. ITO (2013) 28 ITR 530 (Cuttack)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Special category States-cryptic order without making enquiry regarding assessee's entitlement to section 80-IC – Revision was held to be justified [S.80IC]

Section 263 empowers Commissioner to initiate *suo motu* proceedings where AO takes a wrong decision without considering materials available or without making an enquiry into matters, where such inquiry was *prima facie* warranted. Therefore where AO passed a cryptic order without making enquiry regarding assessee's entitlement to section 80-IC deduction, exercise of revisionary powers by Commissioner, holding Assessing Officer's order as erroneous and prejudicial to interest of revenue, was correct. (AY.2006-07).

Aquamall Water Solutions (P.) Ltd. v. CIT (2013) 60 SOT 78 (URO)(Hyd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Provision for bad and doubtful debts – Schedule Bank – Co-operative bank is entitled to deduction – Different nomenclatures as per RBI guidelines will not disentitle deduction – Revision was not justified [S.36(1)(viia)]

The assessee was a Co-operative Bank. The assessment was completed on certain Loss. The Commission passed order u/s. 263 on ground that the assessee being a co-operative was not entitled to deduction u/s. 36(1)(viia) and the assessee had also not created provision for bad and doubtful debts a criteria for S. 36(1) (viia). The Tribunal on allowing the assessee appeal held co-operative bank is entitled to claim benefit of provisions of S. 36(1) (viia). The assessee, a co-operative bank had created provision for bad and doubtful debts under a different nomenclature in accordance with RBI directions, this would not disentitle assessee for claiming deduction u/s. 36(1) (viia). (AY. 2008-09)

Vellore Dist. Central Co-operative Bank Ltd. v. CIT (2013) 145 ITD 129 (Chennai)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Revision of order without stating any valid reasons how the assessment order is erroneous cannot be sustained

Assessee filed a NIL return of income and the AO completed the assessment. CIT recalled records and set aside AO's order holding it erroneous and prejudicial to interest of revenue. Revisional order of CIT was challenged.Held, revisional power conferred on CIT u/s 263 is of wide amplitude- Assessment order can be revised only if twin-conditions of 'error in order' and 'prejudice caused to Revenue' co-exist. CIT should exercise revisional power within the bounds of the law and in accordance with principle of *audi alteram partem* as envisaged in Constitution of India as well as in s. 263. AO had examined each and every issue in accordance with the law. There was no lack of inquiry inadequate inquiry. Order of CIT was directory in nature and substituted his view for the one taken by AO. CIT failed to give valid reason as to how assessment order was erroneous. Order of CIT set aside and that of AO was restored. (AY. 2009-10)

Pradeep Bandhu v. CIT (2013) 81 DTR 289 / 151 TTJ 519 / (2014) 64 SOT 146 (URO) (Jodh.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Capital gains – Investment of part of capital gains in acquiring new asset to be held as corpus of trust – Revision of order was held to be bad in law. [S.11, 45, 55A]

The assessee a charitable educational society had sold a land for Rs. 4,00,00,000/- and invested Rs.2,78,38,080/- in acquiring new capital asset and thus declared a sum of Rs. 3,41,169/- being taxable long-term capital gain. The assessee claimed exemption under section 11(1A) for investing the proceeds in the capital asset to be held as corpus of trust. The AO held that for claiming exemption under section 11(1A), the whole of net consideration had to be invested in capital assets whereas the assessee had invested part of the sale proceeds, i.e., Rs. 2,78,38,080/- and thus not entitled for exemption under section 11(1A) for the entire capital gains. AO held that the capital gains of

Rs.1,03,53,927/- only was exempt and the balance of Rs. 45,23,430/- was taxable. The Director (Exemption) in exercise of powers under section 263 held that the computation of capital gains by the AO in the assessment proceedings was erroneous and prejudicial to the interest of revenue by holding that when capital assets are transferred by a charitable trust, the capital gain on such sale has to be determined in accordance with the provisions of section 11(1A) and not under the normal provisions of the Act, viz., sections 45 to 55A. He further held that the investment of the capital gains in acquiring another capital asset by the assessee was in the earlier years and such investment could not be said to be application of income for charitable trusts. It was only investments made during period after transfer of the capital asset that could be considered as application of income for the purpose of section 11(1A). The Tribunal held that 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). The Tribunal further held that though the order of the AO was erroneous, the same was not prejudicial to the interest of the revenue as no part of the capital gains becomes taxable because of loss of exemption under section 11(1A). Since the order sought to be revised under section 263 was erroneous but not prejudicial to the interest of the revenue, jurisdiction under section 263 could not be invoked by the Commissioner. Thus, the order under section 263 is quashed. (AY. 2006-07)

Al Ameen Educational Society v. DIT (Exem.) (2013) 92 DTR 73 (Bang.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Order passed after examining the details – Revision was held to be not valid

Tribunal held that since the Assessing Officer framed the assessment after examining the records and the details which were called for by him and also after applying his mind came to a conclusion, therefore, the assessment order passed by him cannot be said to be erroneous or prejudicial to the interest of the Revenue. The order passed by learned CIT under section 263 of the Act deserves to be set aside. (AY. 2006-07)

Jeewanram Choudhary v. CIT (2013) 153 TTJ 195 / 84 DTR 317 (Jodh.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Revision – Capital gains – Valuation – Revision was not valid. [S.45, 50C, 263]

The valuation officer determined the fair market value of the property. The Assessing Officer computed the capital gains by adopting this value instead of sale consideration shown by assessee. The CIT passed order under section 263 modifying the assessment order and enhancing the capital gains on the basis that valuation officer had failed to take cognizance of a similarly situated sale instance which was available at the time of determining the fair market value. The Tribunal held that the action of CIT for substituting the full value of consideration disclosed by the assessee with the fair market value is not sustainable and the order of CIT is quashed to that extent. Since the issue whether

the sale consideration disclosed by the assessee is to be adapted or the value adopted by the Assessing Officer on the strength of valuation report is not before Tribunal, figure adopted by Assessing Officer cannot be disturbed. (AY. 2008-09)
Eldeco Infrastructure & Properties Ltd. v. CIT (2012) 52 SOT 207 / (2013) 153 TTJ 33 (UO) (Delhi)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Keyman insurance – No Revision proceedings can be invoked on basis of plausible view of judicial precedents [Ss.37(1), 80IA (9), 80IB(13), 154]
The assessee incurred certain expenditure on account of Keyman Insurance charges paid on the lives of its partners. The claim of the assessee was allowed in entirety by the Assessing Officer. The Assessing officer thereafter invoked S.154 which was dropped subsequently. The CIT invoked its jurisdiction u/s. 263 and held that the order of the Assessing Officer to be prejudicial to the interest of the revenue on the ground that the aforesaid expenses were not allowable. On an appeal in Tribunal, the Tribunal allowed the appeal of the assessee relying on the decision of B.N. Exports & Sunita Finlease Ltd. and Max India Ltd & held that the view expressed by the Assessing Officer was a plausible view which was supported by the Assessing Officer passed for the AY. 2005-06 and said view was not open for review by CIT by way of invoking the jurisdiction u/s.263 of the Act. The Tribunal also held that mere absence of discussion of the provision of S.80IB(13) r.w.s.80IA(9) would not mean that the Assessing officer had not applied his mind to the said provisions.(AY.2006-07).
Laj Exports v. DCIT (2012) 20 ITR 111 / (2013) 142 ITD 306 (Chd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Revision proceedings on the basis of audit objection is not tenable in law [Ss.40(a)(ia), S.44E]
Assessee was carrying on the business of transportation by using his own trucks hired by him. During the course of assessment proceedings, the assessee‘s inability to produce books of account, the Assessing officer invoked the provisions of s.44AE. As the assessee failed to produce the books of account, the loading charges and freight charges of the trucks hired by the assessee were worked out on proportionate basis. Thereafter Commissioner invoked s.263 and issued show cause notice pointing out that since the assessee made payments on account of freight charges, loading & unloading charges etc without deducting TDS, provisions of s/40(a)(ia) got attracted. CIT further found that disallowance of expenses by the Assessing officer for want of deduction of TDS was at lower side and same ought to be made at 10%. The Assessing Officer was directed to examine the issue of non-maintenance of books of account & initiated penalty proceedings. On appeal in Tribunal, the Tribunal held that the order of assessment cannot be said to be erroneous merely because in the opinion of the Commissioner the percentage adopted by the Assessing Officer was on the lower side and consequently the income assessed in the hands of the assessee by applying such lower rate of profit was determined at a lesser figure. The Tribunal also held that commissioner had directed Assessing officer to recompute income in the hands of the assessee by applying suitable net profit rate, such direction u/s. 263 was not tenable in law. Secondly the Tribunal also held that the audit objection under no circumstances be called as record empowering the commissioner to exercise jurisdiction u/s. 263 of the Act. Commissioner had initiated the revision proceedings only on the basis of audit objections. Such exercise of power u/s. 263 was not tenable in law. Therefore order passed by the Commissioner was set aside. (AY. 2005-06).
Jaswinder Singh v. CIT (2013) 56 SOT 85 (URO)(Chd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Depreciation –Unabsorbed depreciation – Revision order was held to be justified as there was no discussion in the order and revision order was in conformity with the Special Bench order of Tribunal [S.32]

Where Assessing Officer allowed assessee's claim for set off of unabsorbed depreciation without examining material available on record. Order passed by him was erroneous and prejudicial to interest of revenue and, thus Commissioner was justified in setting aside same in exercise of his revisional power. (AY. 2007-08)
Dharti Dredging & Infrastructure Ltd. v. Addl. CIT (2013) 144 ITD 120 / 35 Taxmann.com 563 (Hyd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Deduction u/s.80IB. [S.80IB]
CIT on the opinion that the Assessee's role is only that of a builder of the apartments and not that of owner or developer of the entire project, invoked the revisionary powers u/s 263 and held that deduction u/s 80-IB was not allowable. CIT held that the AO failed to realize that developing and building of housing projects are twin conditions that are to be satisfied simultaneously in order to obtain deduction u/s 80-IB (10) and hence the assessment order was erroneous and prejudicial to the interest of the Revenue. Hence, AO was directed to make necessary enquiries and verify the submissions of the assessee in the light of his discussions and arrive at a conclusion in the matter. Assessee objected to the exercise of jurisdiction u/s 263. The Tribunal held that, when an issue which has been agitated before the CIT(A) who, in turn, after due application of mind, decided the issue either way, there was no jurisdiction u/s 263 of the Act precisely on the ground that the assessment order passed by the AO got merged with the appellate order of the CIT(A). Once the order of the AO got merged with the appellate order of the CIT(A) on a particular issue, the CIT cannot invoke the provisions of section 263 of the Act on the premise to verify the eligibility of deduction u/s 80IB since those were two different issues. Further, the AO had adopted one of the possible views in law, which has not been agreed upon by the CIT, the order passed by the AO cannot be treated as erroneous order and prejudicial to the interests of the Revenue, thereby the provisions of section 263 have no role to play. CIT was not justified in invoking the provisions of section 263 (AY. 2006-07)
Sobha Developers Ltd. v. CIT(LTU) (2012) 19 ITR 764 / 56 SOT 43 (Bang.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Long term capital gains – Revision cannot be made on the ground that the AO should have made through enquiry
Assessee filed return of income showing Long Term Capital Gains (LTCG) on sale of shares. AO completed assessment u/s 143(3)/148 accepting LTCG after considering documents produced by assessee in support of transaction of shares. CIT(A) invoked jurisdiction u/s 263 holding that AO had not carried out any investigation during assessment proceedings and completed assessment simply by accepting claim of LTCG disclosed by the assessee in his return. The Tribunal held that, if an AO acting in accordance with law makes an assessment, same cannot be branded as erroneous by Commissioner simply because, according to him, AO should have made thorough enquiry and order should have been written more elaborately. In instant case at time of original assessment, AO made necessary enquiries and called for necessary explanation and material from assessee. AO had also taken action u/s 148, reasons were recorded necessary explanation was asked before completing original assessment. CIT invoked section 263 simply on account that AO did not carry out investigation of case on the line of investigation as CIT wanted. Assessment order passed by AO cannot be said to be erroneous. CIT has wrongly invoked section 263. Assessee's appeal allowed. (AY. 2002-03)
Sudhir Kumar Agarwal v. CIT (2013) 56 SOT 35 (URO)(Agra)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Lack of discussion by AO – Not applying correct provision of law revision is justified [S. 80IB(7B)]
The Commissioner has to be satisfied of twin conditions viz., (i) the order sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. The phrase "prejudicial to the interests of the Revenue" should be understood in ordinary meaning, it is of wide import and it is not

confined to laws of tax. Since while passing the order, the AO had not applied correct provisions as they stood during the relevant time and had just accepted what the assessee wanted him to accept without discussing the allowability or disallowance of these deductions, Commissioner's jurisdiction was justified. (AY. 2006-07)
Leo Meridian Infrastructure Projects and Hotels Ltd. v. DCIT (2013) 24 ITR 123 / 144 ITD 445 (Hyd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Opportunity of being heard – Addition on account of issues not mentioned in notice is not valid
The grant of an opportunity to the assessee is a necessary concomitant of the enquiry. In this case, neither in the show-cause notice nor in the subsequent show-cause notice nor even in any proceedings under section 263, had he afforded an opportunity to the assessee on the issue of verification of the genuineness of the outstanding creditors or debtors; the Commissioner travelled beyond the issues contained in the notices and thus his order on that count was not in accordance with section 263. Therefore, the order was to be set aside. (AY. 2007-08)
Krishan Gopal (HUF) v. CIT (2013) 25 ITR 69 (JP)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Debatable issue as regards revision – Consistent method of accounting followed by assessee – Revision is not valid
Whether the assessee should follow the percentage completion method in respect of one project, when the project completion method was followed in respect of the other project, constituted a debatable issue. The assessee had not committed any legal error by uniformly and consistently following the project completion method in respect of its projects, and hence, the order of the Assessing Officer did not suffer from any error either on law or fact. Therefore, the order of the Commissioner was not valid. (AY.2007-08)
Aditya Builders v. CIT (Admn.)(2013) 25 ITR 77 (Mum.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Due and proper enquiry – Prejudice to assessee – Revision is valid
The assessee had placed on record confirmations in assessment proceedings before the Assessing Officer. The Assessing Officer did not make any enquiry and accepted the fact on its face value. This was to be termed as a case of only half-hearted enquiry as no definite conclusion could be arrived at merely on the filing of confirmation before the Assessing Officer. In the present case, the Commissioner had given a direction to decide afresh. Such a direction did not cause prejudice to the assessee. Therefore, the Commissioner was justified in setting aside the order of the Assessing Officer as erroneous and prejudicial to the interests of the Revenue.
As regards the issue of reconciliation of tax deducted at source and trading account in various agricultural items, the Assessing Officer had not made due and proper enquiry and the Commissioner gave direction to decide afresh, which caused no prejudice to the assessee. (AY. 2007-08)
Krishan Gopal (HUF) v. CIT (2013) 25 ITR 69 (JP)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Repairs – Prior period expenses – Repairs and insurance of machinery, plant and furniture Assets damaged due to is cannot be considered as current repairs or revenue in nature [S.31, 37(1)]
In the return of income assessee claimed deduction of expenditure incurred on repairs of a portion of damaged building and plant and machinery. Assessing Officer accepted the assessee's claim. CIT set aside the order and held that replacement or repairs of building and plant and machinery on destruction of same by fire cannot be considered as current repairs or revenue expenditure because said replacement results in to brining in to a new asset giving enduring benefit to assessee. On appeal the Tribunal held that revision order was justified. Tribunal also held that prior period expenses which was wrongly allowed, revision order was held to be justified.(AY. 2005-06)

Navabharat Ventures Ltd. v. CIT (2013) 143 ITD 533 / 35 taxmann.com 50 (Hyd.)(Trib.)

S.263 : Revision – Revision of orders prejudicial to revenue – Doctrine of merger – Subject matter of appeal before the Commissioner (Appeals) [S.153A]
The jurisdiction under section 263 of the Act cannot be invoked where the issues raised under section 263 are subject matter of appeal before the Commissioner (Appeals) . Further, orders passed after conducting inquiries cannot be said to be 'erroneous'. (AY. 2004-05 to 2008-09)
Parminder Singh v. ACIT (2013) 81 DTR 321 / 151 TTJ 633 / 58 SOT 67 (URO)(Amritsar)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Recording of reasons – Necessary for invoking revision proceedings.
Issue before the Tribunal was whether while exercising jurisdiction under section 263 it is necessary for Commissioner to record reasons as to why order passed by the Assessing Officer was erroneous & prejudicial to the interest of revenue?
The Tribunal allowed the appeal of the assessee & held that there is no reasons to exercise whatsoever set in the show-cause notice as to why the Commissioner was of the view that the assessment order was erroneous and prejudicial to the interest of revenue. Further unless the Commissioner specifically sets out such reasons in the show- cause notice and hears the assessee on the same ,it is not open to him to exercise his revision order, the Commissioner does mention about a few points, ostensibly borrowed from revenue audit objections, on the basis of which revision proceedings were initiated, but it was not even the Commissioner's case that he had any opinion of his own, beyond this borrowed opinion, to even consider the assessment order as erroneous and prejudicial to the interest of the revenue. Therefore, the conditions precedent under section 263 for initiating revision proceedings were not satisfied. (AY. 2007-08)
J. Thomas & Co. (P) Ltd. v. JCIT (2013) 56 SOT 41 (URO)(Kol.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Creation of brand- Not resulted in any kind of addition or augmentation of any profit making asset. Thus revision was held to be not valid [S. 37(1)]
Assessee Company was engaged in the business of manufacturing and export of jewellery. Assessing Officer computed assessment allowing assessee's claim in respect of brand erection expenses as deferred revenue expenditure. CIT invoked section 263 and treated it as capital expenditure. On further appeal in Tribunal, Tribunal set aside the revision proceedings and held that the expenditure incurred by the assessee does not create any enduring benefit of an assessee but is rather helped the assessee in augmenting its sales & resultantly its profit. Secondly the Tribunal also held that such payment has also to be seen from the context of business necessity or expediency also. Secondly such expenditure incurred by the assessee has not resulted in any kind of addition or augmentation of any profit making asset. Thus the Tribunal set aside the revisional order & upheld the view taken by the Assessing Officer.
Fine Jewellery (I.) Ltd. v. ACIT (2012) 19 ITR 746 / (2013) 56 SOT 226 (Mum.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Assessing Officer taking a possible view – Every loss of revenue cannot be treated as prejudicial to the interest of revenue
Where the Assessing Officer applies his mind to a given issue and takes one of the possible views in framing the assessment on that issue, it cannot be revised under the provisions of section 263 even if the CIT has a different view on the subject. (AY. 2007-08, 2008-09)
Ganesh Builders v. CIT (2013) 87 DTR 182 / 158 TTJ 801 (Jodh.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Representative capacity – Appointment of an existing partner as representative partner for another party may circumvent the ceiling on number of partners [S.40(b), Partnership Act, 1932]

The assessee, a firm of Chartered Accountants, filed a return offering income of Rs. 17.70 crores which was accepted by the Assessing Officer u/s 143(3). The Commissioner then passed an order u/s. 263 stating that the assessee had amended its partnership deed pursuant to which Mr. Mukund Dharmadhikari, who was already a partner of the firm, was added once again as a partner in a representative capacity, to represent Deloitte Haskins & Sells, Mumbai. As Mr. Dharmadhikari had the right to share profit, both in the representative capacity as well as in his individual capacity, the Commissioner held that the number of partners exceeded 20, the maximum allowed under the Partnership Act, 1932, and that the assessee had, therefore, to be treated as an Association of Persons. He held that the assessee was not entitled to claim a deduction u/s 40(b) for the salaries paid to its' partners. On appeal by the assessee to the Tribunal HELD:

A study of the partnership deed shows that Deloitte Haskins & Sells, Mumbai, which is the participating firm, is not a stranger to the assessee. The assessee can take policy decisions, which have a policy bearing on such firm, once there is an approval of the majority of the members of the "National Firm". Mukund Dharmadhikari was representing Deloitte Haskins & Sells, Mumbai, and the endeavour of the assessee was to bring on board the participating firm, on which it had powers to make policy decision, so that they became entitled for a share of profit. In other words, the effort of the assessee was to bring indirectly into the partnership M/s Deloitte Haskins & Sells, Mumbai, which was already a participating firm. The assessee was a renowned partnership firm and was well aware that number of partners cannot exceed 20. It is a well settled principle of law that what is permissible is tax planning, but not evasion. When an attempt is made by a concern to evade tax using subtle camouflages, bounden duty of the authorities is to find out the real intention. It is the duty of the Court in every case, where ingenuity is expended to avoid taxing and welfare legislations, to get behind the smoke screen and discover the true state of affairs. The Court has to go into substance and not to be satisfied with the form. Though in *Rashik Lal and co. v. CIT (1998) 229 ITR 458 (SC)&CIT v. Bagyalakshmi & Co.(1965) 55 ITR 660 (SC)* it was held that a partner may be a trustee or may enter into a sub-partnership with others, or can be a representative of a group of persons and that *qua* the partnership, he functions in his personal capacity, these decisions will not apply since the assessee was indirectly trying to bring in M/s Deloitte Haskins & Sells, Mumbai, another firm, which was already a participating firm, as its partner, circumventing the limit of maximum 20 members. The AO did not apply his mind and go into these aspects and so the Commissioner was justified in directing him to look into the issue. (AY.2008-09) (ITA No. 1164/Mds./2012, dated 4-7-2013)

Deloitte Haskins & Sells v. DCIT (2013) 36 taxmann.com 349 (Chennai)(Trib.) www.itatonline.org

S.263 : Commissioner – Revision of orders prejudicial to revenue – Capital gains –Investment in a residential house [S. 54F]

Assessee was deriving income from dealing in property transactions. Assessee had claimed LTCG and had also claimed benefit of section 54F. Assessment was completed under section 143(3). Commissioner was of the view that assessee was engaged in business of sale and purchase of properties, concluded that he could not claim benefit of deduction under section 54F. Accordingly set aside order of the Assessing Officer. On appeal the Tribunal held that even though assessee's main source of income was sale and purchase of plots/land, yet it did not mean that assessee could not purchase and hold some plots as capital asset and claim exemption under section 54F on their sale. Moreover in view of the fact that Assessing Officer had made proper enquiries in this regard and he had taken possible views, accordingly impugned revisional order passed by commissioner was not sustainable. (AY. 2006-07)

Sunil Bhandari v. ACIT (2013) 141 ITD 10 / 154 TTJ 751 (Jodhpur)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – AOP – Housing project – Merger [S.80IB(10)]

Assessee is an AOP.It claimed deduction under section 80-IB(10) which was disallowed by the Assessing Officer. On appeal it was allowed by the Commissioner (Appeals) and Tribunal. The

matter was remanded back to the Assessing Officer to give effect to the appellate order. Assessing Officer passed the order allowing the claim of assessee. Commissioner passed the revision order under section 263 setting aside the assessment on ground that profits of the assessee–AOP were not distributed between the members in accordance with terms of agreement which resulted in excess allowance of deduction claimed under section 80IB(10).Before tribunal it was contended that manner in which the AOP distributes its profit has no bearing over eligible quantum of deduction under section 80IB(10) as the eligible quantum will be gross receipts from the project reduced by expenses incurred on the project. It was also contended that once deduction under section 80IB(10) was subject matter of appeal before Commissioner (Appeals), it covered all aspects of the matter relating to deductions under section 80IB(10) and the order of Assessing Officer on that issue had merged with the order of Commissioner (Appeals), therefore according to clause (c) of Explanation to section 263(1) the Commissioner was debarred from exercising jurisdiction under section 263 as the subject matter of the appeal was deduction under section 80IB(10). Tribunal held that on merit as well as on merger, power under section 263 has been wrongly invoked. Appeal of assessee was allowed. (AY. 2007-08)
Fortaleza Developers v. CIT (2013) 141 ITD 133 (Mum.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Avoidance of tax – Transfer pricing – Transfer pricing provisions do not apply (i) to an investment in share capital of overseas companies & (ii) to transactions where no "income" has arisen. [S.92B, 92C]
The assessee invested Rs. 21 crores in the share capital of its overseas subsidiaries. The AO completed the assessment without making any transfer pricing adjustment. The CIT revised the assessment u/s.263 on the ground that the transaction was an "international transaction" u/s 92B and that the AO ought to have referred the matter to the TPO to determine whether the investments were made at arm's length. The assessee filed an appeal before the Tribunal in which it argued (i) that an investment in the share capital of another company was not an "international transaction" u/s 92-B and (ii) as there was no "income", the transfer pricing provisions did not apply. HELD by the Tribunal upholding the plea:
An amount paid for investment in share capital of subsidiaries outside India is not in the nature of an "international transaction" as defined in S.92-B. Transfer pricing provisions are not applicable to transactions where there is no income (AY. 2007-08)
Vijai Electricals Ltd. v. ACIT (2013) 60 SOT 77 (URO)(Hyd.)(Trib.) www.itatonline.org

S.263 : Commissioner – Revision of orders – Twin conditions to be satisfied – Assessing Officer not discussing allowability or disallowance of deductions-Revision order partly up held and partly rejected [S. 32, 8OIB]
The Commissioner has to be satisfied of twin conditions viz., (i) the order sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue, for invoking section 263. If one of this is absent, revision cannot be made. The claim of the assessee under section 80IB(7B) was allowed though the assessee had not maintained separate books of account for the business of convention centre. The Assessing Officer has not discussed the allowability or disallowance of these deductions and his order was silent on these aspects. Thus, the order of the Assessing Officer was erroneous in so far as it was prejudicial to the interests of the Revenue. To that extent, the Commissioner's action in exercising jurisdiction under section 263 of the Act was justified. With reference to disallowance of additional depreciation claimed by the assessee on plant and machinery under section 32(1)(iia) of the Act the assessee, having not challenged this issue before the Commissioner, could not reargue the issue before the Tribunal after conceding before the Commissioner.
Non-maintenance of separate books of account for convention centre itself could not be a reason for rejecting outright the claim under section 80-IB of the Act. In that event also the deduction under section 80IB(7B) could be granted to the assessee in proportion to the turnover to profit of the

convention hall; the assessee's claim under section 80IB(7B) could not be denied by the Commissioner. (AY. 2006-07)
Leo Meridian Infrastructure Projects and Hotels Ltd. v. Dy. CIT (2013) 24 ITR 123 / 144 ITD 447 (Hyd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Order passed without application of mind is liable to be revised. [S.80IA]
Assessing Officer accepting nil return of assessee allowing claim to deduction under section 80-IA without enquiry whether assessee fulfilled conditions for eligibility. Tribunal held revision is valid. (AY. 2005-06)
Vodafone Essar Ltd. v. CIT (2013) 23 ITR 147 / 153 TTJ 451 / 85 DTR 337 / 58 SOT 151 (URO)(Chandigarh)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Capital or revenue [S. 37(1)]
Revision on ground that expenses incurred by assessee were capital in nature. Finding of the Assessing Officer was that expenses were revenue in nature. Tribunal held that assessment order was not erroneous. Order of revision to be set aside.(AY. 2006-07)
Star Music v. Dy. CIT (2013) 22 ITR 700 / 59 SOT 28 (Chennai)(Trib.)

S.263 : Commissioner – Revision of order prejudicial to revenue – Business expenditure – Deduction at source – Failure by Assessing Officer to make enquiry in respect of payments liable to tax deduction at source, revision is held to be justified. [Ss.40(a) (ia), 194J 194H]
The assessee is a telecommunications service provider. The Assessing Officer, inter alia, made two disallowances under section 40(a) (ia) of the Income-tax Act, 1961 on the ground of failure by the assessee to deduct tax at source on the payments: free airtime to distributors in the nature of commission expenses liable to deduction of tax at source under section 194H of the Act, and roaming charges paid to other operators in the nature of fees for technical services liable for deduction of tax at source under section 194J of the Act. On the basis that the nature of business of the assessee was the same for the assessment year 2007-08 also and that the assessee had not deducted tax at source on the free airtime allowed to distributors under section 194H of the Act or on the roaming and interconnection charges under section 194J of the Act, the Commissioner issued notice of revision under section 263 to the assessee, set aside the assessment for that year and directed the Assessing Officer to examine the case afresh in respect of these two issues and after giving proper opportunity to the assessee and pass a speaking order. On appeal : Held, dismissing the appeal, (i) that the issue of disallowance of free airtime to distributors under section 40(a) (ia) of the Act had not been examined by the Assessing Officer in the course of assessment proceedings for the assessment year 2007-08. No reference thereto was there in the assessment order. The Assessing Officer had not issued any query in this regard or obtained necessary details. Hence, it could not be said that the Assessing Officer had applied one of the two views possible. (ii) That on the issue of roaming charges paid the fact that certain tax deductible at source had not been so deducted was clearly prejudicial to the Revenue. That something was available in the balance-sheet, profit and loss account or books of accounts could not lead to the conclusion that the Assessing Officer had applied his mind. There was no discussion by the Assessing Officer on these subjects, nor had the Assessing Officer made any enquiry on these subjects. The Assessing Officer had mechanically accepted what the assessee wanted him to accept without any application of mind or enquiry. Similarly, no evidence had been placed that the claim made by the assessee was objectively examined or considered by the Assessing Officer either on record or in the assessment order. The Assessing Officer had completely omitted the issue in question from consideration and made the assessment in an arbitrary manner. Hence, it was a fit case for the Commissioner to exercise his revisional jurisdiction under section 263. Appeal of assessee was dismissed. (AY. 2007-08)
Bharti Hexacom Ltd. v. CIT (2013) 21 ITR 648 (Delhi)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Transfer pricing – Commissioner has no jurisdiction over TPO administratively and, therefore, Commissioner cannot revise order passed by TPO under section 92CA(3). [S.92CA]

Assessee sold shares to its AE located abroad. In transfer pricing proceedings, TPO determined ALP of share transactions at a higher amount. He thus passed an order under section 92CA(3) proposing certain adjustments. Assessing Officer passed assessment order accepting addition proposed by TPO. Subsequently, TPO made a proposal that order passed by him contained some computation errors and, thus, same be rectified. Commissioner passed an order under section 263 revising assessment order. It was, however, undisputed that there was no error in assessment order because Assessing Officer had proceeded to compute total income under section 92CA(4) in conformity with ALP determined by TPO. Tribunal held that where two views are possible and the TPO has taken one possible view the proceedings under section 263 cannot be invoked. Even otherwise, in this case instead of initiating proposal on TPO order as suggested, the Commissioner initiated the proceedings under Assessing Officer's order which is not erroneous or prejudicial to the interests of the revenue, as Assessing Officer sincerely followed the mandate of provisions of section 92CA in proceeding to compute the total income under sub-section (4) of section 92CA in conformity with the arm's length price so determined by the TPO. As the provisions of section 92CA(4) have been amended with effect from 1-6-2007 which used the word "shall" Assessing Officer is bound to follow the TPO's order determined under sub-section (3). Accordingly, there is no error in the order of Assessing Officer so that it can be considered as erroneous and prejudicial to the interests of the revenue. In view of above, the impugned revisional order passed under section 263 has to be set aside. (AY. 2005-06)
Essar Steel Ltd. v. Add. CIT (2013) 55 SOT 1 (URO)(Mum.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Commission to various parties – Matter remanded for verification

Assessee paid commission to different parties to the tune of Rs. 4.19 crores. Assessing Officer accepted claim of payment of commission by placing reliance only on confirmation letters issued by payees without gathering any information regarding genuineness of payments and evidence to suggest nature of services rendered by these parties. Commissioner revised the order under section 263. On appeal by revenue the Tribunal held that it was incumbent on the part of Assessing Officer to come to independent conclusion that payments were commensurate with nature of services rendered by parties as mere confirmation letters themselves could not prove genuineness of payments and nature of services rendered; therefore, it would be appropriate to remit entire issue back to file of Assessing Officer to carry further enquiry and examine issue thoroughly. Matter remanded. (AY. 2007-08)
Sun Minerals v. Add. CIT (2013) 55 SOT 54 (Hyd.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Penalty – Setting aside assessment for de novo consideration was held to be not valid [S.271(1)(c)]

Assessee claimed 100 per cent depreciation on centering material. Assessing Officer found that centering material fell under head 'Plant and machinery' on which 15 per cent depreciation was admissible. Accordingly, he disallowed excess depreciation and made addition. In revision, Commissioner found that Assessing Officer had not levied penalty under section 271 (1) (c). He, set aside assessment. Tribunal held that Commissioner has authority to initiate and levy penalty under section 271(1)(c) and justification of imposition of penalty should be decided by him. Therefore, there was no necessity to set aside assessment for de novo consideration. (AY.2006-07)
S. Anitha (Smt) v. CIT (2013) 55 SOT 88 (URO)(Bang.)(Trib.)

S.263 : Commissioner – Revision of order prejudicial to revenue – Capital gains – Exemption – Investment in bonds – Beyond Prescribed time limit – As no evidence to justify the delay, order under section 263 was held to be justified [S.54EC]

Assessee sold agricultural land on 10-1-2006 and invested the sale consideration in Rural Electrification Corporation Ltd. bonds on 27-1-2007 which is beyond the prescribed time limit. The assessee claimed exemption u/s.54EC. The claim was allowed by the Assessing Officer under section 143(3). Commissioner under section 263 directed the Assessing Officer to disallow the claim. The Assessee filed an appeal before the Tribunal. The assessee submitted that delay was due to unavailability of applied forms. However, it was held that there was no evidence to show that assessee had applied for bonds but due to their unavailability, failed to invest within time. The Tribunal also held that it could be accepted that the time-limit for investment extended by Notification up to 31-12-2006 can be stretched up to 27-1-2007 by exercising jurisdiction under the Act. Hence, in the view of above stated legal position withdrawal of exemption u/s 54EC by commission was justified. Note: Notification No.S.O. 2146(E) dated 22-12-2006.(AY. 2006-07)
Anuradha Venkatesan (Smt) v. ITO (2013) 140 ITD 421 / 87 DTR 393 (Chennai)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Lack of proper enquiry cannot be the ground for revision. [S.43(5)]
The CIT invoked the provision of section 263 on the ground that the Assessing Officer accepted the long term capital gain shown by the assessee without making sufficient enquiries. The Tribunal found that in the Asst. Years 1995-96, 1996-97, 2001-02, 2002-03, 2003-04, 2005-06 and 2006-07, the claimed investment and the capital gain claimed thereon have been accepted by the Assessing Officer or at the appellate stage. Even in the future Asst. Years 2008-09 and 2009-10 the Assessing Officer has accepted the claim of long term capital gain as well as short term capital gain in assessment orders framed under section 143(3) of the Act. The Tribunal followed the decision of Hon'ble Bombay High Court in the case of *CIT v. Gabriel India (1993) 114 CTR 81 (Bom.)* and held that the assessment order was not erroneous as the Assessing Officer has accepted the claimed long term capital gain and loss in derivative trading after conducting inquiry thereto and thus the assessment order cannot be held erroneous and thus also prejudicial to the interest of revenue. (AY. 2007-08)
HB Stock Holdings Ltd. v. CIT (2013) 152 TTJ 451 / 83 DTR 210 (Delhi)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Lack of proper enquiry – Matter remanded to Commissioner
AO did not enquire about the genuineness and reasonableness of the payment of commission and syndication fees. He neither enquired about the guarantee fees paid by the assessee to two companies. The assessment order was erroneous and prejudicial to the interests of the revenue. However, CIT also did not consider the merits of the objections raised by the assessee to the show-cause notice, matter is remanded to CIT for adjudication and to record his findings on the objections of the assessee. (AY. 2006-07)
Religare Finvest Ltd. v. CIT (2013) 83 DTR 315 / 152 TTJ 647 / 58 SOT 13 (URO)(Delhi) (Trib.)

S.263 : Commissioner – Revision of orders prejudicial to interest of revenue – No application of mind by the AO at the time of assessment – An order without application of mind is definitely prejudicial to the interest of revenue [S.36(1)(viia)]
The assessee claimed provision made for standard assets also as a provision for bad and doubtful debts under section 36(1) (viia). Assessing Officer allowed the deduction under section 36(1) (viia). CIT initiated proceedings under section 263 of the Act. As per CIT, the provision for standard assets could not be considered as provision for bad and doubtful debts which could be allowed under section 36(1) (viia) of the Act. Before the Tribunal the assessee submitted that Assessing Officer has taken a lawful view and therefore, CIT could not substitute his view with that of Assessing Officer. The Tribunal upheld the revisional order passed by the CIT and observed that there was no enquiry made during the course of assessment proceeding. Therefore, the order which was silent on the claim made by assessee, and allowing such claim, without any discussion will definitely render it erroneous and

prejudicial to the interest of revenue. Tribunal dismissing the appeal followed the decision of Apex Court in case of *Malabar Industrial Co. Ltd. v. CIT (2000) 243 ITR 83 (SC)* (AY. 2007-08).
Bharat Overseas Bank Ltd. v. CIT (2013) 152 TTJ 546 / 82 DTR 373 (Chennai)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to interest of revenue – Initial assessment year – Absorbed losses – Wind mill – Absorbed losses pre "initial assessment year" need not be set-off – Revision order passed by Commissioner was set side. [S.80IA]
The assessee set up a Windmill and commenced operations on 29-9-2006 (AY 2007-08). In that year the assessee suffered a loss of Rs. 3.5 crores on account of depreciation and interest which was set-off against the other income. In AY 2008-09, the assessee earned profit of Rs. 7 lakhs from the Wind Mill and claimed 100% deduction u/s 80-IA by treating AY 2008-09 as the "initial assessment year". The AO allowed the claim. However the CIT, relying on *ACIT v. Goldmine Shares and Finance P. Ltd. (2008) 302 ITR (AT) 208 (SB) (Ahd)*&*Hyderabad Chemical Supplies Ltd. v. ACIT (2011) 137 TTJ 732 (Hyd)*, revised the order u/s 263 on the ground that as u/s 80-IA(5), the eligible unit was deemed to be the "only source of income", the earlier years' losses of the unit had to be set-off against the profits before allowing s. 80-IA deduction. On appeal by the assessee, HELD reversing the order of the CIT:
The fiction created by s. 80-IA(5) is that the eligible business is the only source of income and the deduction would be allowed from the initial assessment year or any subsequent assessment year. It nowhere defines as to what is the "initial assessment year". Prior to 1-4-2000, s. 80-IA(12) defined the "initial assessment year" for various types of eligible assessees. However, after the amendment by the Finance Act, 1999, the definition of "initial assessment year" has been specifically taken away. Now, when the assessee exercises the option of choosing the initial assessment year as culled out in s. 80-IA(2) from which it chooses its' 10 years of deduction out of 15 years, then only the losses of the years starting from the initial assessment year alone are to be brought forward as stipulated in s. 80IA(5). The loss prior to the initial assessment year which has already been set-off cannot be brought forward and adjusted into the period of ten years from the initial assessment year as contemplated or chosen by the assessee. It is only when the loss have been incurred from the initial assessment year, then the assessee has to adjust loss in the subsequent assessment years and it has to be computed as if the eligible business is the only source of income and then only deduction u/s 80-IA can be determined. This is the true import of s. 80-IA(5).Order passed by Commissioner was set aside.(AY. 2008-09)
Shevie Exports v. JCIT (2013) 87 DTR 401 / 59 SOT 74 (URO)(Mum.)(Trib.)

S.263 : Commissioner – Revision of orders prejudicial to revenue – Penalty – Concealment – Depreciation – Non-levy of penalty – Revision of order was held to be not valid [Ss. 32, 271(1)(c)]
The assessee claimed depreciation @ 40% on CT scan system. The AO disallowed the same and initiated penalty proceeding u/s. 271(1)(c) by following assessee's own case in the previous assessment year. Subsequently, the AO observed that the depreciation @ 40% was claimed under *bona fide* belief that CT scan machine amounted to magnetic imaging system and its bona fide belief was based on its interpretation of the equipment and its professional use which was purely medico-technical and thereby, dropped the penalty proceeding. The CIT(A) invoked power u/s. 263 and once again levied penalty.
On appeal by the assessee, the Tribunal held that in view of the fact that in the preceding year as well the Tribunal had deleted the penalty, on *bona fide* belief on the assesse, 263 proceedings by CIT(A) were to be quashed, and merely because the AO had passed a cryptic order the same cannot be a reason for it being prejudicial to the interest of revenue. (AY. 2006-07)
Lala Harbhagwan Das & Memorial & Dr. Prem Hospital (P.) Ltd. v. CIT (2014) 29 ITR 316 / 62 SOT 199 (Delhi)(Trib.)

S.264 : Commissioner – Revision of other orders – Writ – Appellate remedy – Writ was held to be not maintainable [S. 69, Article 226]

The Assessing Officer made addition to assessee's income treating a sum received as unexplained investment. Taking note of factual aspects of case, the Commissioner declined to interfere with the order of Assessing Officer u/s 264. The assessee filed a writ petition. Held, since alternative remedy of filing appeal under statute was available to assessee, writ petition need not be entertained (AY.2003-04)

S. Thilakam v. CIT (2013) 218 Taxman 29 (Mag.)(Mad.)(HC)

S.264 : Commissioner – Revision of other orders – Condonation of delay – Commissioner (Appeals) – Doctrine of merger – Order rejecting appeal by Commissioner (Appeals),further revision before Commissioner is not maintainable [S. 264(4)(c)]

The assessee filed an application before the Commissioner (Appeals) to condone the delay. He declined to condone the delay and dismissed the appeal. Subsequently, the assessee filed a revision application under section 264 of the Act,, and along with it he also filed an application to condone the delay. The Commissioner rejected the revision application. In the order, he had dealt with the maintainability of the revision, the tenability of the request for condonation of delay and also the merits of the revision itself. On all these grounds, he decided against the assessee. On a writ petition by assessee, dismissing the petition, the Court held that the order dismissing the appeal filed by the assessee was an order in the appeal filed by the assessee. The assessee had not waived his appellate right to maintain an application for revision under section 264. Thus, the finding of the Commissioner that in view of section 264(4), the revision filed by the assessee was not maintainable, had to be upheld. (AY. 2000-01)

K. H. Traders v. CIT (2013) 351 ITR 1 / 85 DTR 287 / 213 Taxman 41 (Mag.)(Ker.)(HC)

S.264 : Commissioner – Revision of other orders – Condonation of delay – Disputes between partners – Delay was condoned

The assessee-firm is carrying on business in the export of walnuts and walnut Kernels. During the relevant assessment year, it filed its return of income declaring loss of Rs. 3.8 crores. The return was taken up for scrutiny by the Assessing Officer and several notices of hearing were issued to the assessee. In absence of proper response, the Assessing Officer completed the assessment under section 144 on 28-2-2003. A revision petition under section 264 along with an application before the Commissioner was filed for condonation of the delay. The Commissioner held that the assessment order was delivered to the authorized representative of the assessee firm on 9-3-2004 and even allowing for the pendency of litigation between the partners before the High Court for rendition of partnership accounts and for partition of the family business properties, the delay after February, 2005, when the consent decree was passed by the Court, remained to be explained. He accordingly refused to condone the delay and rejected the revision petition in limine. On writ the court held that there was litigation between partners of assessee-firm as well as litigations against assessee-firm. Authorised representative of assessee-firm was acting on his own and partners of firm were not aware of passing of best judgment assessment order. Assessing Officer passed best judgment order even though he was aware of fact that assessee's books of account was in custody of Court Commissioner. It was only when services of authorised representative were subsequently terminated, partners of assessee-firm came to know about aforesaid proceedings and, then they filed application seeking condonation of delay immediately. The Court held that, delay had to be viewed having regard to background of litigation between partners of assessee-firm which ultimately resulted in consent decree and in view of above, it could be concluded that there was sufficient cause for condoning delay in filing revision petition before Commissioner. In favour of assessee (AY. 2000-01)

Narinder Kumar v. CIT (2013) 212 Taxman 105 (Mag.)(Delhi)(HC)

S.264 : Commissioner – Revision of other orders – Reasoned order – Natural justice – Non-speaking order of Commissioner rejecting the application was set aside

The Commissioner dismissed the petition of the petitioner on the ground that the petitioner has an alternative remedy by filing an appeal. Petitioner filed writ petition against the said order, the court held that it is well settled law that one of the basic principle of natural justice is that the authority concerned must pass a speaking order so as to enable a party to know the reasons so as to why his application is being accepted or rejected. This giving of reasons also ensures due application of mind to the facts by the authority concerned. On facts non-speaking order of Commissioner rejecting assessee's application under section 264 was set aside. (AY. 2007-08)

Universal Packaging & Ors v. CIT (2013) 352 ITR 398 / 84 DTR 101 / 257 CTR 236 / 216 Taxman 56 (Mag.)(Bom.)(HC)

S.264 : Commissioner – Revision of other orders – Commissioner cannot dismiss revision application merely on ground that quantum issue has not attained finality

The assessee for the assessment year 2003-04 by filing the return of income declared loss of Rs.93,33,000. The Assessing Officer framed a scrutiny assessment under section 143(3) on 18-1-2006 disallowing the reduction of Rs.1,08,16,965. He also initiated penalty proceedings under section 271 (1) (c). He also passed an order imposing penalty of Rs.1,19,25,702. The assessee challenged the said order of penalty before the Commissioner by filing revision application under section 264. After condoning delay caused in filing such revision application, the proceedings were taken up by the Commissioner for hearing. Before the Commissioner the assessee had pointed out the quantum additions on the basis of which the penalty was imposed were deleted. It had also come on record that against such appellate order the department's appeal was also dismissed by the Tribunal. Turning down such contentions of the assessee the Commissioner rejected the revision petition on two grounds, firstly, that the question of quantum additions had not achieved finality. Against the judgment of the Tribunal confirming deletion of such quantum additions, the revenue had preferred further appeal before High Court and such appeal was pending. Second reason why the Commissioner was not inclined to entertain the revision petition was that according to him revision proceedings were contemplated only to mitigate the situation faced by the assessee who is unable to approach the appellate authority for relief. The Commissioner noted that the assessee had already exercised his right of appeal before the appellate authorities. He could not claim relief under section 264. On petition : The court held that (1). Section 264 nowhere provides than an assessee can resort to such proceedings only when he is unable to approach appellate authority, (2) Fact that assessee has preferred appeal against quantum additions will not therefore, take away his right to file revision application. (3) Commissioner while deciding revision petition must take into consideration prevailing order at that time. Therefore Commissioner cannot dismiss revision application merely on ground that quantum issue has not attained finality. In favour of assessee. (AY. 2003-04)

Aryaman Spinners (P.) Ltd. v. CIT (2013) 212 Taxman 102 (Mag.)(Guj.)(HC)

S.268A : Appeal – High Court – Low tax effect – Assessing the nil income after set off of loss – Dismissal of appeal was not proper – The matter remanded to decide the issue on merits. [S.253, 260A]

Assessee filed return declaring nil income. Assessing Officer fixed total income of assessee at Rs. 1,76,32, 251. He further allowed set-off of business loss and unabsorbed depreciation to tune of Rs. 1,74,96,566 and eventually determined taxable income of assessee at Rs.1,35,685. Commissioner (Appeals) partly allowed appeal of assessee. Revenue challenged order of Commissioner (Appeals) before Tribunal, which dismissed appeal on ground of low tax effect. Revenue contended before High Court that notional tax effect in instant appeal exceeded monetary limit prescribed by Board. The court held that in view of judgment of Gujarat High Court delivered in another appeal on identical question of law, Tribunal was wrong in dismissing appeal of revenue on ground of low tax effect.

Therefore matter deserved to be remanded back to Tribunal for reconsideration on merits. Matter remanded. (AY. 2004-05)
CIT v. Sambhav Media Ltd. (2013) 212 Taxman 129 (Mag.)(Guj.)(HC)

S. 268A : Appeal – High court – Monetary limits – Matter referred to larger Bench [S.260A]
The Revenue filed appeal on 13-10-2010 against Tribunal's judgment when the tax effect involved exceeded Rs. 4 lac i.e. threshold limit as provided in "instructions of 2008". However, as per "instructions of 2011", such limit was revised to "does not exceed Rs.10 lac". The assessee contended that though at the time of filing of the appeal the limits prescribed by 'instructions of 2008' were applicable but the revised limits contained in the 'instructions of 2011' should be applied when the appeal is taken up for hearing. In view of the conflicting judgments, the High Court was of the view that issue requires consideration by a larger Bench regarding applicability of 'instructions of 2011' prospectively or otherwise to all pending cases filed earlier. Matter referred to larger Bench.
CIT v. Shambhubhai Mahadev Ahir (2013) 213 Taxman 179 / 260 CTR 320 (Guj.)(HC)

S.269SS : Acceptance of loans and deposits – Business as "shroff" – Cheque discounting business cannot be considered as taking loan or deposit – Levy of penalty was held to be not valid [Ss. 269T, 271D, 271E]
Assessee was doing business as "shroff" i.e. cheque discounting business. Assessee used to discount post-dated cheques of farmers for cash. Held, it was not a case of assessee taking loan or deposit from agriculturists or repaying loan to agriculturists and provisions of section 269SS or section 269T not attracted. Hence, there was no question of levy of penalty under sections 271D and 271E.
CIT v. Dineshchandra Shantilal Shah (HUF) (2013) 359 ITR 57/(2014) 100 DTR 222 / 266 CTR 529 (Guj.)(HC)

S.269SS : Penalty – Acceptance of loans and deposits – Loan in cash exceeding prescribed limit [S. 271D]
Assessee received amount in cash from her father-in-law for purchasing property. Transaction was genuine and source of transaction was also disclosed. Penalty could not be imposed. (AY. 2005-06)
CIT v. M. Yesodha (Smt). (2013) 351 ITR 265 (Mad.)(HC)

S.269SS : Penalty – Acceptance of loans and deposits – Mode of repayment – Penalty was deleted [Ss.269T, 271D, 271E]
Assessing Officer found that assessee-hostel had accepted and repaid amounts of loans/deposits otherwise than by cross-cheques / drafts in contravention of provisions of sections 269SS and 269T. Assessee contended that some expenditure was incurred by hostel or school students and amount was reimbursed to hostel by managing trustee of school, and it did not become a deposit or loan given or taken by way of cash. It therefore contended that there was no contravention of provisions of sections 269SS and 269T and they were not liable to pay penalty under sections 271D and 271E. Assessing Officer did not accept submission of assessee and imposed penalty under sections 271D and 271E, respectively. Since there was nothing on record to show that above transactions were attached with certain conditions or stipulation as to period of repayment, rate of interest, manner of payment, etc., so as to treat transactions as loan or deposits, penalty could not be levied upon assessee. Appeal of revenue was dismissed.
ITO v. V S Hostel (2013) 212 Taxman 61 (Mag.)(Guj.)(HC)

S.269SS : Acceptance of loans and deposits – Securities – Optionally fully convertible debentures were securities, they were neither "loans", nor "deposits" – Penalty is not leviable [S. 271D, Companies Act, 1956, Securities Contracts (Regulation) Act, 1956]
Assessee accepted deposits under the nomenclature optionally fully convertible debentures which were contended to be securities. Held, Optionally fully convertible debentures were "securities"'

under the Companies Act, 1956 as well as under the Securities Contracts (Regulation) Act, 1956. Once the optionally fully convertible debentures were securities, they were neither “loans”, nor “deposits”. Hence, section 269SS was not applicable, and penalty u/s 271D was not leviable. (AY. 2005-06)
DCIT v. Sahara India Commercial Corporation Ltd. (2013) 28 ITR 108 (Delhi)(Trib.)

S.269T : Repayment of loans and deposits – Reasonable cause – Opportunity of being heard – Matter remanded [S. 271E]
Held, assessee should have been given some opportunity to prove that there was reasonable cause for non-compliance with statutory provisions of s. 269T and there being no finding about availability or otherwise of banking facilities in and around place where payment of loan had been made, matter was to be remanded to the assessing authority to record a finding thereabout and then to pass appropriate orders.(AY. 2005-06)
CIT v. K. Srinivasulu Reddy (2013) 219 Taxman 89 (Mag.)(Ker.)(HC)

S.269UD : Purchase by Central Government of immoveable properties – Valuation of cost for resettling tenant – Order without any reasons – Order of appropriate authority was quashed
On February 18, 1995, the petitioners entered into an agreement with the owners of a property for purchase of the property which was occupied by a monthly tenant. On May 5, 1995, the Appropriate Authority issued a notice to the petitioners to show cause why the property should not be purchased by the Central Government under the provisions of section 269UD(1) on the ground that *prima facie* the consideration had been undervalued by more than 15%. On different writ petitions, the court set aside the order of the Appropriate Authority and restored the matter to the Appropriate Authority for fresh disposal holding that the Appropriate Authority had completely ignored the directions of the court and continued to give the same reasons which the court had found not good enough to sustain the acquisition of the property. Since the matter was sent back to them twice, remanding the proceeding again would serve no purpose. The reasons for exercise of pre-emptive right of purchase under Chapter XX-C could not be sustained as it was passed without considering the submissions of the petitioners.
Satish Balan v. UOI (2013) 359 ITR 15 / 92 DTR 273 / 263 CTR 564 (Bom.)(HC)

S.271(1)(c) : Penalty – Concealment –Survey-Surrender of income after detection of incriminating documents-Satisfaction need not be recorded in particular manner – Voluntary disclosure – Under Explanation 1 to s. 271(1)(c), voluntary disclosure of concealed income does not absolve assessee of s. 271(1)(c) penalty if the assessee fails to offer an explanation which is bona fide and proves that all the material facts have been disclosed.[S.133A]
The assessee filed a return of income for AY 2004-05 declaring an income of Rs. 16 lakhs. During the course of the assessment proceedings, the AO noticed certain documents comprising of share application forms, bank statements, blank share transfer deeds etc had been impounded in the course of s. 133A survey proceedings conducted in the case of the assessees. The AO sought specific information regarding the documents from the assessee. In reply to the show-cause notice, the assessee made an offer to surrender Rs. 40.74 lakhs with a view to avoid litigation and buy peace and to make an amicable settlement of the dispute. The AO assessed the said sum of Rs.40.74 lakhs to tax and levied penalty u/s 271(1)(c) for concealment of income and not furnishing true particulars. This was upheld by the CIT(A) though the Tribunal reversed it on the ground that the surrender was without admitting any concealment. On appeal by the department, the High Court (*CIT v. Mak Data Ltd. (2013) 87 DTR 172 (Del.)*) reversed the Tribunal on the ground that as there was absolutely no explanation by the assessee for the concealed income of Rs. 40.74 lakhs, the first part of clause (A) of Explanation 1 to s. 271(1)(c) is attracted. On appeal by the assessee to the Supreme Court HELD dismissing the appeal:

(i) The Tribunal has not properly understood or appreciated the scope of Explanation 1 to s. 271(1)(c). The AO shall not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to s. 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise;

(ii) The assessee has only stated that he had surrendered the additional sum of Rs. 40.74 lakhs with a view to avoid litigation, buy peace and to channelize the energy and resources towards productive work and to make amicable settlement with the income tax department. The statute does not recognize those types of defences under Explanation 1 to s. 271(1)(c) of the Act. It is trite law that the voluntary disclosure does not release the assessee from the mischief of penal proceedings. The law does not provide that when an assessee makes a voluntary disclosure of his concealed income, he had to be absolved from penalty;

(iii) On facts, the surrender of income is not voluntary in the sense that the offer of surrender was made in view of detection made by the AO in the search conducted in the sister concern of the assessee. In that situation, it cannot be said that the surrender of income was voluntary. AO during the course of assessment proceedings has noticed that certain documents comprising of share application forms, bank statements etc have been impounded in the course of survey proceedings u/s. 133A conducted in the case of the assessee's sister concern. The survey was conducted more than 10 months before the assessee filed its return of income. Had it been the intention of the assessee to make full and true disclosure of its income, it would have filed the return declaring an income inclusive of the amount which was surrendered later during the course of the assessment proceedings. Consequently, it is clear that the assessee had no intention to declare its true income;

(iv) It is the statutory duty of the assessee to record all its transactions in the books of account, to explain the source of payments made by it and to declare its true income in the return of income filed by it from year to year. The AO has recorded a categorical finding that he was satisfied that the assessee had concealed true particulars of income and is liable for penalty proceedings u/s 271 read with s. 274 of the Act;

(v) The AO has to satisfy himself whether penalty proceedings be initiated or not during the course of the assessment proceedings. He is not required to record his satisfaction in a particular manner or reduce it into writing. The scope of s. 271(1)(c) has also been elaborately discussed by the Supreme Court in *UOI v. Dharmendra Textile Processors & Ors. (2008) 306 ITR 277 (SC)* and *CIT v. Atul Mohan Bindal (2009) 317 ITR 1 (SC)*. The principle laid down by this Court has been correctly followed by the Revenue and there is no illegality in the department initiating penalty proceedings in the instant case. (AY.2004-05)

MAK Data P. Ltd. v. CIT (2013) 94 DTR 379 / 358 ITR 593 / 263 CTR 1(SC)
Editorial: Affirmed CIT v. Mak Data Ltd (2013) 352 ITR 1 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Voluntarily shown in return in reassessment proceedings – Deletion of penalty was held to be justified [Ss.147, 148]

Assessee, a tennis player, did not offer to tax amount received as awards from Government and from other institution. However, when the assessment was reopened, assessee voluntarily offered said amount for tax. Since the amount in question was shown by assessee in her return, there being no concealment of income or furnishing of inaccurate particulars of income, it was not fit case for imposition of penalty u/s.271(1)(c). (AY. 2004-05)

CIT v. Sania Mirza (Ms.) (2013) 219 Taxman 133 (Mag.)(AP)(HC)

S.271(1)(c) : Penalty – Concealment – Disallowance of claim – *Bona fide* explanation – Sundry balances written off – Levy of penalty was not justified [S. 37(1)]

Whether even if claim made by assessee is unsustainable in law, so long as assessee substantiated explanation offered by him or same is found to be bona fide, Explanation 1 to s. 271(1)(c) would not stand attracted. Assessee claimed deduction in respect of contribution made to trust fund, provisions for diminution in value of investments and sundry balances written off. However, in assessment proceedings, assessee offered said expenditure as income. The AO, however, imposed penalty u/s 271(1)(c) for claiming said non-admissible expenditure. Tribunal deleted penalty on ground that claim of expenditure made by assessee was based on decision of Supreme Court and, hence, there was no concealment of income. Tribunal's order was to be upheld. (AY. 2007-08)

CIT v. Shriram Properties and Constructions (Chennai) Ltd. (2013) 219 Taxman 140 (Mag.) (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Stock statement – As per books and statement given to bank – Discrepancy – Levy of penalty was held to be not valid [S. 145]

It was found that assessee was required to show a particular value of stock to the bank in order to enjoy continuous overdraft facility. Furthermore, whatever was submitted before bank was disclosed before authority. Hence, difference in stock disclosed in stock statements given to bank and stock as per books of account cannot be a ground for levy of penalty.

CIT v. Sachidanand Pulse Mills (2013) 219 Taxman 153 (Mag.)(Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Fabricated evidence – Exemplary costs of Rs. 1 lakh was held to be valid

Since there was no error whatsoever in appreciation of evidence by authorities, Single Judge had rightly upheld imposition of exemplary cost of Rs. 1 lakh in case of fabricated evidence.

M. Shantha Kumar v. CIT (2013) 219 Taxman 154 (Mag.)(Kar.)(HC)

S.271(1)(c) : Penalty – Concealment – No clear finding – Levy of penalty was not justified

Where no clear finding was recorded by AO whether assessee was guilty of concealing income and/or furnishing inaccurate particulars of income, Tribunal was justified in deleting penalty levied by the AO.

CIT v. Whiteford India Ltd. (2013) 219 Taxman 98 (Mag.)(Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Search cases – No incriminating material – Explanation 5-N0 penalty could be imposed [S. 132]

In the absence of incriminating materials relating to assessee's transaction, penalty merely on the ground that books of account was submitted and return of income was filed only because there was a search, is not justified. Also, there was neither recovery and seizure of any cash/ amount nor any allegation that books of account had not been maintained or assessee's books contained inaccurate particulars of income. Therefore, Explanation 5 to s. 271(1)(c) could not be applied and, hence, no penalty could be levied on assessee. (AY. 2005-06)

S.M.J. Housing v. CIT (2013) 219 Taxman 94 (Mag.)(Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Book profits – Deemed income was higher than the income determined under normal provision – Levy of penalty was not justified [S.115JB]

Where deemed income assessed under section 115JB becomes basis of assessment as it was higher than income determined under normal provision, concealment would have no role to play and it would be totally irrelevant, concealment did not lead to tax evasion at all for imposing penalty. (AY. 2008-09)

CIT v. Aleo Manali Hydro Power (P.) Ltd. (2013) 219 Taxman 90 (Mag.)(All.)(HC)

S.271(1)(c) : Penalty – Concealment – Addition set aside – No ground could survive to sustain penalty [S. 80IA]
When addition made was set aside, whole basis which led to imposition of penalty ceased to exist and, thus, no ground could survive to sustain penalty.(AY. 2004-05)
CIT v. Shah Aollys Ltd. (2013) 218 Taxman 27 (Mag.)(Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Bonafide claim – Time to file revised return was expired – Excess claim was *bona fide* – Levy of penalty was not justified [S. 32, 37(1)]
During assessment proceedings, assessee itself pointed out mistake of excess claim, which was claimed to be bonafide and inadvertent. The Tribunal's order deleting penalty on the ground that excess claim was on account of bonafide mistake and time to file revised return for correction of mistake had expired, was to be upheld.(AY. 2003-04)
CIT v. Somany Evergree Knits Ltd. (2013) 218 Taxman 27 (Mag.)(Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Wrong description of status – Mere wrong description of status or reduction of loss could not be treated as furnishing wrong particulars to attract penalty.
An omission, which did not lack *bona fides* and was corrected immediately on being pointed out by Assessing Officer before assessment, cannot attract penalty. Mere wrong description of status of assessee, especially when the AO knew the correct status or reduction of loss could not be treated as furnishing wrong particulars to attract penalty (AY.2003-04)
CIT v. Hapur Pilkhuwa Development Authority (2013) 218 Taxman 116 (Mag.)(All.)(HC)

S.271(1)(c) : Penalty – Concealment – Burden of proof on assessee – Deletion of penalty on the ground that section 69A is deeming provision was held to be not justified [S. 69A]
Amount having been added under section 69A was to be treated as income of assessee and burden was upon assessee to prove that there was no concealment of income. Deletion of penalty was not justified. (AY 1983-84)
CIT v. Agrawal Refrigeration (2013) 218 Taxman 130 (Mag.)(All.)(HC)

S.271(1)(c) : Penalty – Concealment – Accrued liability of interest – Explanation by assessee – Levy of penalty was not justified
Assessee contended that it was in distressed condition and therefore filed inaccurate particulars of income claiming the expenditure on account of liability of interest accrued. For deleting penalty, Tribunal recorded a reason that AO did not ask assessee to furnish explanation. Held, Tribunal's order deleting penalty was to be upheld.
CIT v. Bihar Air Products Ltd. (2013) 218 Taxman 131 (Mag.)(Jharkhand)(HC)

S.271(1)(c) : Penalty – Concealment – Deliberate loss – Share transaction with closely connected firm – Levy of penalty was held to be justified
Since transaction of sale of shares had been made at price lower than prevalent price at stock exchange, it was a deliberate loss. Held, since appellant had concealed particulars of his income by giving inflated losses, test of conclusive evidence was proved, and therefore, penalty was to be levied.
Varren Financial Services Ltd. v. CIT (2013) 218 Taxman 131 (Mag.)(P&H)(HC)

S.271(1)(c) : Penalty – Concealment – Disclosure of additional income – *Suo motu* offer to tax-Levy of penalty was not justified
Tribunal set aside the penalty order passed under section 271(1) (c) holding that penalty was not leviable because assessee itself had disclosed additional income before passing of assessment order. Held on facts, no substantial question of law arose from Tribunal's order and, therefore, revenue's appeal was to be dismissed.

CIT v. Deewan Tourism Ltd. (2013) 218 Taxman 123 (Mag.)(All.)(HC)

S.271(1)(c) : Penalty – Concealment – Wrong claim – Full disclosure was made in the return – Claim made by the assessee was rejected cannot be the ground for levy of penalty

Where full details of loss claimed by assessee was stated in return of income, which was rejected by revenue, it would not amount to furnishing of inaccurate particulars or concealment of income on part of assessee, and therefore, penalty for concealment of income could not be levied.(Ay. 2003-04)

DIT v. Administrator of the Estate of Late Mr. E.F. Dinshaw (2013) 218 Taxman 125 (Mag.)(Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Claim incorrect in law – Non-availability of supporting evidence – Levy of penalty was not justified

Mere submitting of a claim which is incorrect in law would not amount to giving inaccurate particulars of income. Where expenditure was disallowed due to non-availability of supporting evidence, it could not be held as concealment of income, and therefore, penalty could not be levied. (AY. 2002-03)

CIT v. Udaipur Hotels Ltd. (2013) 218 Taxman 132 (Mag.)(Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Assessee had not voluntarily surrendered his income at the time of filing revised return – Levy of penalty was justified [S. 54F, 148]

Tribunal found that impugned amount was not offered to tax by way of claiming wrong deduction under section 54F and impugned amount was offered to tax only in response to notice under section 148 and assessee could not be allowed any advantage or benefit of revised return. Held, since assessee had not voluntarily surrendered his income at the time of filing revised return, imposition of penalty under section 271(1)(c) was justified. (AY.2002-03)

Sunil Chand Gupta v. CIT (2013) 218 Taxman 128 (Mag.)(All.)(HC)

S.271(1)(c) : Penalty – Concealment – Additional income was disclosed before completion of assessment – Levy of penalty was not justified

Assessee having disclosed all material facts, penalty under section 271(1)(c) was not leviable.

CIT v. Standard Agro Engineers (2013) 218 Taxman 123 (Mag.)(Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Disclosure of information – Legal advice – Stock option as long term capital gains – Levy of penalty was not justified [S.45, 54F]

As assessee had disclosed all material facts and had claimed exemption under section 54F based on legal advice that gains from exercise of ESOP would not be taxed, penalty could not be levied. (AY.2008-09)

CIT v. Neenu Dutta (Smt.) (2013) 218 Taxman 127 (Mag.) (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Revised return to buy peace – Levy of penalty was justified [S 139(5)]

The assessee admitted in the course of assessment certain additions and offered the said sum as income by filing the revised return of income.

AO issued notice to the assessee for levying penalty. The assessee contended that the said amounts were paid to the agriculturists towards purchase of kapas, which was noted in the rough cash book and the entries were yet to be entered in the cash book at the time of survey. To buy peace with the Department, they had voluntarily agreed to declare the said sums towards cessation of the creditors liabilities. The Assessing Officer found that reply was not convincing and as such minimum penalty was levied under section 271(1)(c).

On appeal, the Commissioner (Appeals) confirmed the levy of penalty. However, the Tribunal accepted the explanation offered by the assessee and held that penalty could not be levied on inference.

The question before the Court was where assessee had not challenged order of assessment levying tax and interest, that by itself would not be sufficient to impose penalty under section 271(1)(c), unless it was discernible from assessment order that addition was on account of concealment of income.Penalty under section 271(1)(c) is a civil liability. Therefore, *mens rea* is not an essential element for imposing penalty for breach of such civil obligations or liabilities. Wilful concealment is not an essential ingredient for attracting civil liability. (AY.2000-01)

CIT v. Manjunatha Cotton & Ginning Factory (2013) 263 CTR 153 / 218 Taxman 423 (All.)(HC)

S.271(1)(c) : Penalty – Concealment – Additions confirmed – Explanation was *bona fide* – Levy of penalty was not valid

The return filed was processed and the assessment was completed under Section 143(1) of the Act. A survey was conducted under Section 133A of the Act and information was collected under Section 133(6) of the Act. The statutory returns, which were filed by the assessee, when compared with the stock position reflected disclosed a difference. A notice under Section 148 of the Act was issued for re-opening of the assessment. The assessee contended that it was handling bulk material and there were no facilities to weigh the ore in such quantity and stock records were maintained on estimate basis. Therefore, to ward off litigation and to buy peace in the Department, the assessee agreed that they had in stock, ores of such magnitude. Accordingly, addition was made under Section 69 of the Act. Simultaneously, the penalty proceeding was initiated.

The assessing authority observed in his order that the Appellate Authority had confirmed the quantity of stock suppressed by the assessee, which was outside books of account based on the materials collected by the Assessing Authority. The only change suggested by the Appellate Authority was the method of computation of the concealed income. Aggrieved by the said order, the assessee preferred an appeal to the Appellate Authority. The Appellate Authority confirmed the said order of penalty.The Tribunal held that on perusal of the notice issued under Section 271(l)(c) of the Act, it is clear that it is a standard proforma used by the Assessing Authority. Before issuing the notice the inappropriate words and paragraphs were neither struck off nor deleted. The Assessing Authority was not sure as to whether she had proceeded on the basis that the assessee had either concealed its income or has furnished inaccurate details. The notice is not in compliance with the requirement of the particular section and therefore it is a vague notice, which is attributable to a patent non-application of mind on the part of the Assessing authority. Further, it held that the Assessing Officer had made additions under Section 69 of the Act being undisclosed investment. Since the Assessing Authority had initiated penalty proceedings based on the additions made under Section 69 of the Act, which was struck down by the Appellate Authority, the initiated penal proceedings, no longer exists. If the Appellate Authority had initiated penal proceedings on the basis of the addition sustained under a new ground it has a legal sanctum. This was not so in this case and therefore, on both the grounds the impugned order passed by the Appellate Authority as well as the Assessing Authority was set-aside.(AY. 2003-04)

CIT v. Veerabhadrappa Sangappa & Co. (2013) 359 ITR 565 / 263 CTR 153 (Kar.)(HC)

S.271(1)(c) : Penalty – Concealment – Levy of penalty based on the finding of Appellate Authority was not valid

The Assessing Officer made additions under Section 69 of the Act being undisclosed stock and concluded the assessment accordingly. Thereafter, the Assessing Authority simultaneously initiated penal proceedings under Section 271(l)(c) of the Act. Against the aforesaid additions, the assessee preferred appeal to the Commissioner of Income-tax (Appeals). The Appellate Authority held that the Assessing Authority had not brought any evidence of any expenditure outside books of account, so as justify the additions under Section 69. Therefore, he set aside the said additions. However, he found

that there is a stock outside books of account. It has to be valued and brought to tax. Acting on the said finding recorded by the Appellate Authority, the Assessing Authority in the penalty proceedings initiated under Section 271(1) (c) of the Act initially on the basis of the assessment order passed by him proceeded with the same proceedings and imposed the penalty on the basis of the order of the Appellate Authority. Aggrieved by the said order, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Appellate Authority directed the cancellation of the penalty levied. Aggrieved by the said order, the Revenue preferred an appeal before the Tribunal. The Tribunal held the initiation of the penal proceedings should have been made on the new grounds and that too by the Appellate Authority, Gulbarga who made the orders of disallowances by upholding the disallowances on different grounds for both the assessments years under dispute.The Court held that, if the Appellate Authority was satisfied that the addition had to be made on the ground of under valuation of the closing stock, which was not the finding recorded by the Assessing Authority, on which penalty proceedings had been initiated by the Assessing Authority, then, it was the Appellate Authority who should have initiated penalty proceedings and issued notice to the assessee to show cause why penalty should not be imposed. The said procedure was not followed, and therefore, though for different reasons, the first Appellate Authority set aside the order levying penalty, the Tribunal correctly appreciated the facts in a proper perspective and was justified in not interfering with the order passed by the Appellate Authority, setting aside the penalty order. (AY.2003-04, 2004-05)
CIT v. V. S. Lad & Sons (2013) 263 CTR 153 (Karn.)(HC)

S.271(1)(c) : Penalty – Concealment – Claiming in AY 2002-03 set-off of losses carried forward of AY 1998-99 despite letter addressed to assessee where it was informed that it was not able to carry forward the said losses as the return for AY 1998-99 was filed belatedly – Penalty is not justified
The power to levy penalty or not is discretionary in nature. Unless the case is strictly covered by the provision, penalty cannot be invoked. Making an incorrect claim in law does not amount to furnishing inaccurate particulars. The details supplied in the return for AY 2002-03 in respect of loss suffered in 1998-99 were factually correct. Claiming set-off of the losses would not amount either to concealment or to furnishing of inaccurate particulars. In such circumstances, penalty cannot be invoked.
CIT v. Makino Asia (2013) 95 DTR 9 / (2014) 264 CTR 172 (Karn.)(HC)

S.271(1)(c) : Penalty – Concealment – Addition on estimate – Rejection of books of account – Penalty cannot be levied
The Court held that addition has been sustained purely on estimate basis hence levy of penalty was not justified.(AY.1996-97)
CIT v. Krishi Tyre Retreding & Rubber Industries (2013) 263 CTR 484 / (2014) 360 ITR 580 (Raj.)(HC)

S.271(1)(c) : Penalty – Concealment – Write off of value of good will in the books by debiting partners account – Mere making wrong claim would not warrant imposition of penalty, more over the view taken by the assessee was as possible view as the Tribunal in quantum appeal has accepted the view [S.45]
The assessee wrote off the goodwill in books by debiting the same in partners account held that the goodwill was chargeable to capital gain tax. On appeal the claim of assessee was allowed by CIT(A) and Tribunal. The penalty levied by the AO was deleted by Tribunal. On appeal by revenue the Court held that mere making wrong claim would not warrant imposition of penalty moreover the view taken by the assessee was as possible view as the Tribunal in quantum appeal has accepted the view.(AY.1992-93)
CIT v. Mansukh Dyeing & Printing Mills (2013) 219 Taxman 91 (Mag.)(Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Wrong claim under section 10B – Merely because claim for deduction was denied assessee could not be subjected to penalty [S.10B]

Claim of deduction under section 10B was denied on the ground that the assessee was not entitled. Penalty was confirmed by Tribunal .On appeal by assessee the court held that since the assessee disclosed all facts relating to claim merely because claim of deduction was denied, assessee could not be subjected to penalty under section 271(1)(c)(AY. 2005-06)

Seas Resources Ltd v. ACIT (2013) 219 Taxman 92 (Mag.)(Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Search and seizure – No return filed under section 153A – Amount surrendered in revised return – Immunity from Explanation 5 to section 271(1)(c) is not available – Levy of penalty was held to be valid [S.132, 153A]

Since no return was filed under section 153A and amount was surrendered only in revised return, Explanation 5 to section 271(1)(c) was not applicable. Imposition of penalty was held justified. (AYs. 2005-06, 2006-07)

Shourya Towers P. Ltd. v. DCIT (2013) 359 ITR 523 / 255 CTR 225 / 81 DTR 161 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Addition agreed to by assessee – Concealment discovered by appellate authority – AO was not competent to initiate penalty proceedings – Explanation was not false-Deletion of penalty was justified

Merely because the assessee agreed to the addition and the assessment order was passed on the basis of this addition, when the assessee had paid the tax and the interest thereon in the absence of any material on record to show the concealment of income, it could not be inferred that the addition was on account of concealment. Moreover, the assessee had offered an explanation. The explanation was not found to be false. On the contrary, it was held to be *bona fide.* The cancellation of penalty by the Tribunal was justified. Also, since the concealment was discovered by the appellate authority, notice by AO was not justified. Deletion of penalty by the Tribunal was up held. (AYs. 2000-01, 2003-04, 2004-05)

CIT v. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 / 263 CTR 153 (Karn.)(HC)

CIT v. Manjunatha Ginning and Pressing (2013) 359 ITR 565 / 263 CTR 153 (Karn.)(HC)

CIT v. Veerabhadrappa Sangappa and Co. (2013) 359 ITR 565 / 263 CTR 153 (Karn.)(HC)

CIT v. V.S. Lad and Sons (2013) 359 ITR 565 / 263 CTR 153 (Karn.)(HC)

CIT v. G.M. Exports (2013) 359 ITR 565 / 263 CTR 153 (Karn.)(HC)

S.271(1)(c) : Penalty – Concealment – Search and seizure – Need not specify manner in which income was earned – Deletion of penalty was justified

During search, the assessee admitted expenses were incurred out of business income but were not reflected in books of account. In terms of Explanation 5(2), it was sufficient to disclose this income and since tax was paid before completion of assessment, there was no scope of penalty. The assessee need not specify manner in which income was earned. It is sufficient if disclosure is made and tax is paid before completion of assessment. Immunity as per explanation 5 section 271 (1)(c) is available. (AY. 1992-93)

CIT v. Sidh Nath Goel (2013) 359 ITR 481 / 219 Taxman 96 (Mag.)(All.)(HC)

S.271(1)(c) : Penalty – Concealment – Claim made during scrutiny assessment – *Bona fide* claim – Penalty is not leviable

The company revised its returns multiple number of times revising its figure of losses. In the last revised return, it claimed that the loss of ` 98.55 lakhs on account of loan granted to its subsidiary, which was written off, was deductible as business expenditure or in the alternative should be considered as a capital loss, which was not allowed.

During penalty proceedings, the claim was put forward on the basis that the loan granted to the subsidiary was for a specific purpose and for the benefit of the holding company. The loan in fact was granted and had been also written off. There was no concealment or furnishing of inaccurate facts. The legal position put forward by the assessee that the loan unpaid and written off should be either treated as business loss or alternatively as capital loss was rejected. The full facts were before the Assessing Officer at the time of assessment when this claim was made. The fact that scrutiny assessment was pending was a relevant and important circumstance to show the *bona fides* of the assessee as it was aware that the claim would be examined and would not go unnoticed. Secondly, the claim was rejected in view of the legal position, which was against the assessee and not because of the statement of incorrect or wrong facts. (AY. 2002-03)
CIT v. DCM Ltd. (2013) 359 ITR 101 / 262 CTR 295 / 93 DTR 406 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Penalty cannot be levied if the assessee discharges the primary burden by a cogent explanation and the AO is unable to rebut it. MAK Data (SC) explained [S.132]
Pursuant to a search conducted u/s 132 it was revealed that the assessee had "on-money" transactions in real estate dealings. The assessee accepted the "on-money" but claimed that it was taxable only on completion of the projects under the 'completed contract method'. The assessee's claim was rejected by all the authorities including the High Court. In the s. 271(1)(c) penalty proceedings, the assessee claimed that there was a mistake in the entries regarding the sale of flats to J.B. Exports in as much as the rate at which the property was shown as sold to the said party was much higher than the rate at which the property was sold to other parties. The AO and CIT(A) rejected the claim but the Tribunal accepted it on the basis that the huge difference in the rate of sale of the flat recorded in other cases and in the case of J.B. Exports supported the assessee's contention that there may be a mistake in recording the rate. It held that as the department had failed to prove concealment without any doubt, penalty could not be imposed. On appeal by the department to the High Court, HELD dismissing the appeal:
Merely because the assessment proceedings have been confirmed does not automatically mean that penalty u/s 271(1)(c) is justified. Unless the case is strictly covered by s. 271(1)(c), penalty cannot be invoked. For sustaining penalty, the *bona fide* explanation of the assessee must be looked at so that the contumacious conduct of the assessee for the purpose of sustaining the penalty would be taken as condition that is the main requirement u/s 271(1)(c). In Mak Data P. Ltd vs. CIT the Supreme Court held that when a difference is noticed by the AO between the reported and assessed income, the Explanation to Section 271(1) raises a presumption of concealment and the burden is on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the Explanation has been discharged by the assessee, the onus shifts on the Revenue to show that the amount in question constituted undisclosed income. On facts, the onus cast upon the assessee has been discharged by giving a cogent and reliable explanation. If the department did not agree with the explanation, the onus was on the department to prove that there was concealment of particulars of income or furnishing inaccurate particulars of income. Such onus has not been discharged by the department and so the Tribunal's finding cannot be interfered with (*UOI & Ors. v. Dharmendra Textiles Processors & ors. (2008) 306 ITR 277 (SC)&CIT v. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 (SC)* referred) (Appeal No. 504 of 2009, dt. 12-11-2013)
CIT v. Gem Granites (Karnataka) (Mad.)(HC). www.itatonline.org.

S.271(1)(c) : Penalty – Concealment – Export business – Statement of purchaser –Income from business or other sources – Tribunal was justified in allowing deduction under section 80HHC and deletion of penalty [S.80HHC, 56]
The assessee had explained the statement dated December 28, 1994, of one party, denying making any purchases from the assessee on the ground that it was given at the behest of a business rival which had complained to the Ministry of Commerce on the basis of which inquiries were initiated

by the Government and this had put pressure on that party who wanted to dissociate himself from the assessee. It was only when the difficulties were removed that the party came forward to make a statement retracting his earlier statement. The Tribunal held that there was no basis to disbelieve the entire documentary evidence merely because of the statement of S made on December 28, 1994. The Tribunal finally held that the tax authorities were not justified in treating the export sales made by the assessee as non-genuine and in refusing the deduction claimed under section 80HHC. Hence, the deduction was granted and penalty deleted. On appeal High Court upheld the order of Tribunal holding that the assessee was entitled to deduction under section 80HHC and deleting the penalty. (AY. 1993-94 1994-95)
CIT v. M. S. International Ltd. (2013) 358 ITR 203 (Delhi)(HC)
CIT v. M. S. Shoes East Ltd. (2013) 358 ITR 203 (Delhi)(HC)
CIT v. Pearl Intercontinental Ltd. (2013) 358 ITR 203 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Merely making a claim which is ultimately found to be unsustainable may not by itself amount to furnishing of inaccurate particulars of income leading to concealment of income
The assessee had merely preferred a claim that its land was situated beyond eight kilometres of municipal limits and not liable to capital gain tax. The claim was rejected and gain was taxed as capital gain. Penalty was also levied for the same. On appeal the High Court held that Tribunal had recorded a factual finding that there was no intention on the part of the assessee to furnish inaccurate particulars. Further, the High Court held that mere making a claim which was ultimately found to be unsustainable by itself does not amount to furnishing of inaccurate particulars of income leading to concealment of income. (AY. 1996-97)
CIT v. Rajiv Bhatara (2013) 94 DTR 137 (P&H)(HC)

S.271(1)(c) : Penalty – Concealment – Cash credits – Mere failure in proving capacity of shareholders to invest in share capital of assessee, could not be a ground for imposing penalty on company [S.68]
There was an increase in the share capital of the assessee. During assessment proceedings, the assessee submitted confirmatory letters of shareholders to prove genuineness, except in the case of two persons. A number of defects regarding the new loans and shareholders were found in those letters. As assessment was getting barred and the assessee was unable to produce necessary documentary evidence vis-à-vis capacity of share holders and depositors to full extent, in order to buy peace and avoid litigation, the assessee filed a revised return and surrendered share capital and unsecured loans to certain extent. The loss as declared in the revised return was accepted by the AO. However, penalty u/s. 271(1)(c) was levied on the ground that the assessee had concealed its income to the extent of the share capital and unsecured loans which were surrendered in the revised return. The CIT(A) confirmed the levy of penalty. The Tribunal, however, deleted the penalty.
In its appeal to the High Court, the department argued that the revised return filed by the assessee was no return in the eyes of law and filing a revised return cannot absolve the assessee from paying the penalty. The High Court observed that the loss declared by the assessee in the revised return filed, had been accepted in toto and that the bona fide of the assessee is, therefore, established because it was not able to produce the necessary documentary evidence for proving the capacity of the shareholders and depositors to the full extent within a short span of time as the assessment was getting barred by limitation. Accordingly, relying on the decision of Supreme Court in the case of *CIT v. Stellar Investment Ltd. [2001] 251 ITR 263* and *CIT v. Lovely Exports (P.) Ltd. [2008] 216 CTR 195 (SC)*, and holding that factually, *bona fide* of the assessee having been established, failure of the assessee in proving the capacity of various share holders to invest in the share capital, could not have been a ground for initiating penalty proceedings, the High Court dismissed the departmental appeal. (AY. 1989-90)
CIT v. Awadh Fertilisers (P.)Ltd. (2013) 217 Taxman 27 / 35 taxmann.com 453 (All.)(HC)

S.271(1)(c) : Penalty – Concealment – Search and seizure – Non production of books – Opportunity of being heard – Levy of penalty was justified

A search was carried out in course of which certain documents were seized. Subsequently, management of assessee company was changed and two new directors having majority shareholding in company were appointed. In response to notice issued by Assessing Officer to file return of income, assessee demanded copies of documents seized by department. Department denied that the books of account were in their possession, and relied on the request made by the Assessee through its chartered accountant for giving time to produce the books. Details of books which were alleged to be retained by department, were not given. Assessee company had neither cared to reply or to establish that the documents seized were relevant for assessment. Assessing Officer rejected assessee's request and passed an order of assessment. On basis of assessment order, penalty was also imposed under section 271(1)(c). Against the assessment order and the penalty order, assessee filed instant writ petition. The Court observed that, from records that details and relevancy of documents seized from custody of erstwhile directors of company had not been explained. The Assessee refused to cooperate with the A.O. in the assessment proceedings. They deliberately absented from the proceedings as they could not have faced the A.O. who was aware of the facts and from whom they had taken time to produce the books of accounts. It was also apparent that assessee was in possession of relevant books of account as it had produced cash book, purchase register etc. for verification before Trade Tax Authorities in proceedings pending before them. Instead of filing statutory appeals, the assessee-company took the risk of approaching the court and obtained interim orders, which have continued for nine years. Held that, assessee was merely offering a lame excuse for non-compliance of notices issued by Assessing Officer and, thus, no case for interference with impugned assessment and penalty order was made out. (AYs. 1998-99 to 2002-03)

Shivji Palace Hotel & Club (P.) Ltd. v. CIT (2013) 94 DTR 214 / 37 taxmann.com 215 (All.)(HC)

S.271(1)(c) : Penalty – Concealment – Employees' stock option scheme – Revenue treating gains not as long-term capital gains but as short-term capital gains. Assessee surrendering right to contest issue on condition no penalty would be imposed – Not a case of furnishing inaccurate particulars or concealment of income – No penalty is leviable

The Assessing Officer made an addition of Rs. 86,98,461/- to the income of the assessee on account of short-term capital gains holding that the gains arising out of exercising of options and sale of the shares of Citi Bank were not long-term capital gains but short-term capital gains inasmuch as the shares were sold on the very same day assessee exercised her employees stock option. The date of grant of the employees stock option was not considered by the A.O. as the date of acquisition of the capital asset sold by the assessee. In order to avoid litigation and to buy peace the assessee decided not to contest the assessment order. The assessee also wrote a letter accepting the view of the Department and surrendering her right to contest the issue on the condition that no penalty under section 271(1)(c) would be imposed. However, the A.O. imposed a penalty of Rs.29,56,610/- which was calculated on 100% of the incremental tax payable on the addition made by the A. O. The assessee contended before the Commissioner (Appeals) that making a wrong claim would not be a ground for imposing penalty under section 271(1)(c) as it did not amount to furnishing inaccurate particulars or concealment of income as the assessee had disclosed all material facts and had claimed exemption under section 54F based on the legal advice that gains from exercise of options would not be taxed. The Commissioner (Appeals) accepted the contentions of the assessee and set aside the order of penalty. The Tribunal upheld the decision of the Commissioner (Appeals) that merely making a wrong claim could not be a ground for imposing a penalty under section 271(1)(c).

On appeal to the High Court held by dismissing the appeal that this was not a case which would attract penalty under section 271(1)(c). The question whether gains arising out of exercise of cashless options were long-term capital gains or short-term capital gains could have been a contentious issue at the

material time. Facts of the case did not indicate that the assessee had furnished inaccurate particulars or concealed income.(AY.2008-09)
CIT v. Neenu Dutta (Smt) (2013) 357 ITR 525 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Burden on Revenue to prove concealment – Best judgment assessment – Rejection of accounts – No evidence of concealment of Income – Penalty could not be imposed [Ss.44AD, 143(3), 145]
Assessment order was passed rejecting the books of account under section 145 of the Act. The Commissioner (Appeals) granted partial relief to the assessee. The Tribunal set aside the order and remanded the matter to the A. O. In pursuance of the direction, the A. O. passed an order under section 143(3), where the interest on the fixed deposit receipts was calculated for a separate source of income and an addition was also made computing the net profit at 8 per cent u/s. 44AD of the Act, on the contract business. Penalty was imposed under section 271(1)(c) which was upheld by the Commissioner (Appeals) and the Tribunal. On appeal to the High Court allowed the appeal, that nothing was concealed by the assessee. It was the Assessing Officer who had rejected the books of account in the second round and applied the 8 per cent net profit rate. No finding of deliberate concealment of income was brought as the assessee had never suppressed the interest from fixed deposit receipts. Interest from fixed deposit receipts was duly shown. It was for the Assessing Officer to treat the income as business income or income from other sources. Penalty could not be levied under section 271(1)(c).
Naresh Chand Agarwal v. CIT (2013) 357 ITR 514 / 219 Taxman 93 (Mag) / (2014) 98 DTR 280 / 265 CTR 306 (All.)(HC)

S.271(1)(c) : Penalty – Concealment – Non-compete fee – Capital or revenue – Miscellaneous expenses – Payments exceeding ` 5,000 – Corporate office maintaining consolidated accounts and regional offices maintaining books of account – Failure to file details some claims – Tribunal accepting *bona fides* of assessee – Penalty could not be imposed
The assessee made a monthly payment of non-compete fee and claimed it as a revenue expense. The A.O. held that it was a capital expense. The Tribunal upheld the order of the Commissioner (Appeals) deleting the penalty imposed by the A.O. u/s. 271(1)(c).On appeal the Honourable High Court held by dismissing the appeal of the revenue, that the issue was clearly debatable and not free from doubt. It was not the case of the Revenue that there was an affirmative decision of the High Court or the Supreme Court on the subject matter, when the return was filed or an affirmative opinion of the Tribunal or the High Court in the case of the assessee.
The assessee claimed miscellaneous expenses. The assessee was asked to file details of all miscellaneous expenses exceeding Rs. 5,000. Details were filed by the assessee but in respect of two heads petty miscellaneous expenses and miscellaneous balances written off amounting to Rs.19,04,980 and Rs.15,85,685, the assessee could not file full details. The assessee agreed to the addition on the ground that it was difficult to collect details from its offices all over India for all expenses over Rs. 5,000. However, some details were furnished. In the penalty proceedings, the assessee reiterated and submitted its explanation, and stated that its explanation was bona fide. The assessee suffered substantially high losses of Rs. 372 crores in the last ten years and, therefore, addition of Rs. 34.9 lakhs was not material as the assessee was not to pay any tax. The expenses were in fact incurred but the difficulty was in procuring documents/papers from different offices all over India. The assessee's explanation was accepted as *bona fide* by the Commissioner (Appeals) and the Tribunal to delete the penalty levied by the A.O. On appeal before High Court it was held by dismissing the appeal, that the Tribunal accepted that the expenses claimed were day-to-day expenses and written off balances. The corporate office of the assessee at Delhi had kept consolidated accounts and books of account were kept in the regional offices. The Commissioner (Appeals) and the Tribunal had accepted the explanation given by the assessee and were satisfied about the *bona fides* of the explanation. No substantial question of law arose.

CIT v. Electrolux Kelvenatro Ltd. (2013) 357 ITR 665 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Bogus claim – Bill discounting charges – Depreciation – Levy of penalty was justified

Mere submitting of a claim which is incorrect in law would not amount to giving inaccurate particulars of the income of the assessee but the claim made by the assessee needs to be *bona fide.* The claim for deduction of bill discounting charges for both assessment years was found to be totally untrue, as there was no physical movement of goods. The bills were found to be bogus. There had been concealment of income and the levy of penalty was justified.(AY. 2002-03, 2003-04)

Sharma Alloys (India) Ltd. v. ITO (2013) 357 ITR 379 / 260 CTR 403 / 90 DTR 399 (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Disclosure of particulars in the return of income and accounting policy adopted by assessee was disclosed – Deletion of penalty was justified

The AO held that assignment of deferred sales tax loan liability was held to be sham and addition was made. The AO levied the penalty. Tribunal deleted the penalty. On appeal by revenue the Court held that, where all relevant particulars of income relating to assignment of business of assessee were fully furnished and even accounting policy adopted for determining said income was disclosed penalty for concealment of income was not leviable.(AY. 2004-05)

CIT v. Adonis Electronics (P) Ltd (2013) 218 Taxman 134 (Mag.)(Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Duty draw back and dividend Amounts offered *suo motu* – No penalty could be levied.

The AO for the asst. year 2001-02 curtailed the deduction under section 80IB and also added duty draw back and dividend income from foreign companies and levied the penalty. CIT (A) deleted the penalty. Tribunal gave finding that the amounts were offered to tax *suo motu* by the assessee and not consequence of disallowance of a claim and not a case of concealment of income or furnishing inaccurate particulars of income. High Court dismissed the appeal of revenue and confirmed the order of Tribunal. (AY. 2001-02)

CIT v. Blue Star Ltd (2013) 357 ITR 669 (Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Revised return – Capital gain disclosed in revised return – Penalty is leviable

Original return was filed without disclosure. Capital Gain is arising out of the sale of share. Revised return filed showing capital gain on sale of share amounts to concealment as it is a subsequent act of the Assessee. Contumacious conduct of the assessee, but for the investigation and enquiry made by revenue, the revised return would not have been filed. Hence, penalty deserves to be confirmed. (AY. 2002-03)

N. Ranjit v. CIT (2013) 91 DTR 17 / 262 CTR 411 (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Income offered by filing revised statement – Claim in the original return was *bona fide* – Levy of penalty was not justified

The query raised by the Assessing Officer revealed the doubt in the mind of the Assessing Officer as to whether the expenditure was allowable one or not. However, the assessee filed a letter offering the expenditure as income, which, by itself, would not make this a case of concealment. The declaration of the enhanced income thus belied the claim of the Assessing Officer that there was concealment. Hence, penalty was not leviable. (AY. 2007-08)

CIT v. Shriram Properties and Constructions (Chennai) Ltd. (2013) 356 ITR 700 / 219 Taxman 140 (Mag.)(Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Even if loss return penalty is leviable

Even if a loss return is filed, if the amount of concealment has the effect of reducing the loss in the return or converting such loss into income, section 271(1)(c) is attracted. A taxing statute has to be strictly interpreted by giving a plain meaning to the clear and unambiguous language used by the Legislature. When Explanation 4(a) clearly speaks of the return of loss and also deals with the effect of concealment of such return of loss either decreasing loss or converting loss into income, penalty under section 271(1)(c) would be attracted and can be levied even in a case where the assessed income is a loss.(AY.1990-91)
CIT v. Balaramakrishna Engineering Contractors Corporation (2013) 356 ITR 524 (AP)(HC)

S.271(1)(c) : Penalty – Concealment – Capital loss – Loss on investments and vehicle – Deduction not allowable under section 43B – Levy of penalty will be justified, if the wrong claim is impossible to accept or highly unreasonable [Ss.37(1), 43B,147]
The assessee had claimed certain capital loss as 'revenue' losses and certain expenditure to ESIC PF which was not allowable under section 43B. Depreciation was also claimed on plant and machinery though there was no manufacturing activities during the year. The assessment was accepted under section 143(1). The assessment was reopened under section 147. In the return pursuant to notice under section 148 the assessee did not make any rectification while filing the return in pursuance under section 148. During the assessment proceedings the assessee conceded the mistake and filed a revised computation. The AO levied the penalty. Tribunal deleted the penalty. On appeal by revenue, the Court held that the assessee had not rectified its mistake even while filing the return under section 147. The Court observed that the plea that the issue was debatable or there was wrong advice, cannot be stretched beyond the point to believe or accept contentions when the claim itself is impossible to accept and is contrary to fundamentals of tax or accountancy. Income tax returns are mostly accepted without scrutiny or regular assessment. Self and due compliance of tax provisions are required. The High Court accordingly upheld that penalty vis-a-vis wrong claim of revenue loss and deduction under section 43B. (AY.2003-04)
CIT v. Arcotech Ltd. (2013) 262 CTR 278 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Doctrine of merger – Commissioner (Appeals) deleted penalty – Revision was not valid [S.263]
On appeal Commissioner (Appeals) deleted the penalty. Thereafter the Commissioner passed the revision order on the ground that the quantification of penalty in the original order was omitted. The Court held that once penalty itself had been set aside by Commissioner (Appeals), provisions of section 263 could not be invoked by revenue to impose penalty. (AY.2006-07)
CIT v. Trident Ltd. (2013) 216 Taxman 64 (Mag.)(P&H)(HC)

S.271(1)(c) : Penalty – Concealment – Disallowance of bonafide claim – Retrospective amendment – Debatable Levy of penalty was not valid [Ss.9, 40(a)(ia)]
The payment was to a foreign company without deducting tax at source. In quantum appeal the Tribunal deleted the disallowance. Revenue challenged the order of Tribunal by placing reliance on Explanation 5 introduced to section 9 by Finance Act, 2012 with retrospective effect from 1-6-1976. The Court held that the very fact that law had been amended with retrospective effect clearly showed that issue was debatable and in absence of any failure to disclose material facts penalty levied under section 271(1)(c) was not justified.
CIT v. Yahoo India (P.) Ltd. (2013) 216 Taxman 66 (Mag.)(Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Addition based on decision of High Court – *Bona fide* claim – Levy of penalty was not justified [S.36(1)(iii)]
The assessee had given interest-free advances and borrowed interest bearing loan. On basis of judgment of High Court, Assessing Officer disallowed interest on borrowings under section 36(1)(iii) and made addition to income of assessee and imposed penalty. Held, since additions were made on

basis of decision of High Court, it did not establish that assessee had either concealed its income or furnished inaccurate particulars of income and, therefore, penalty was to be deleted.
Where the assessee had claimed deduction on account of bad debt and later, he withdrew his claim treating it to be an inadvertent mistake and offered same as additional income, there was no justification to hold that assessee had furnished inaccurate particulars of income and the penalty was not justified. (AY. 2004-05)
CIT v. Trident Infotech Corpn. Ltd. (2013) 216 Taxman 58 (Mag.)(P&H)(HC)

S.271(1)(c) : Penalty – Concealment – Estimation of income – Clear case of suppression not made out – Levy of penalty was not justified
The assessee explained that an amount of Rs.47.36 lakh was deposited over a period of twelve months out of sales and amount recovered from debtors after which he filed return admitting income on estimate basis, no penalty was leviable since Revenue had not come out with clear case of suppression of turnover.(AY. 2005-06)
CIT v. P. Rojes (2013) 356 ITR 703 / 216 Taxman 9 (Mag.) / 260 CTR 397 / 90 DTR 393 (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Satisfaction of assessing officer – Clear finding for concealed particulars of income or having furnished inaccurate particulars of income not recorded by the Assessing Officer – Levy of penalty was not justified
Since the Assessing Officer, in the order of penalty did not come to a clear finding regarding penalty being imposed on concealment of income or on furnishing inaccurate particulars of income, Tribunal was justified in setting aside impugned penalty order.
CIT v. Jyoti Ltd. (2013) 216 Taxman 64 (Mag.)(Guj)(HC)

S.271(1)(c) : Penalty – Concealment – Satisfaction of assessing Officer – Recording in assessment order is sufficient – Order of Tribunal set aside
In view of insertion of sub-section (1B) of section 271 by Finance Act, 2008 with effect from 1-4-1989, initiation of penalty in the assessment order of Assessing Officer constituted sufficient satisfaction for initiating penalty proceedings. Tribunal order deleting the penalty was set aside. (AY. 2000-01)
CIT v. Sanjay Ghai (2013) 216 Taxman 59 (Mag.)(Uttarakhand)(HC)

S.271(1)(c) : Penalty – Concealment – Explanation 5 – Disclosure of manner of earning income and payment of due tax – Entitle it immunity [S.132(4)]
The Tribunal granted assessee benefit of immunity from penalty as per clause (b) of Explanation 5 to s. 271(1)(c). The Revenue opposed same on the ground that assessee sought to defraud revenue by not disclosing income before search proceedings. Assessee submitted that statement contemplated by clause (b) of Explanation 5 was duly made in course of search and the said statement was on record. It was further, submitted that the manner in which income was derived had also been disclosed and thereafter tax and interest had been paid. Held since the assessee had complied with all requirements of Explanation 5 to s. 271(1)(c), he was entitled to benefit of immunity.
CIT v. Amardeep Singh Dhanjal (2013) 216 Taxman 63 (Mag.)(Cal.)(HC)

S.271(1)(c) : Penalty – Concealment – Wrong claim does not lead to automatic levy of penalty. [S.80HHC]
Mere making of a claim, which is not sustainable in law, would not, *ipso facto* amount to furnishing inaccurate particulars regarding income of assessee and would, therefore, not automatically result in a penalty order against assessee. Where Assessing Officer in course of quantum proceedings, disallowed a part of deduction claimed under section 80HHC, it could not serve as a valid ground for imposing penalty under section 271(1)(c). (AY.2001-02)
CIT v. Madhushree Gupta (2013) 216 Taxman 65 (Mag.)(Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Deletion of addition in quantum appeal – Penalty appeal of revenue became infructuous

Since the very basis of levy of penalty i.e. assessment order making assessment treating assessee as trust was not eligible for exemption from income as a trust had been ultimately set aside by Tribunal with direction to treat assessee as trust and make assessment afresh in accordance with law and Department's appeal dismissed by the High Court, the appeal preferred by revenue against penalty order on account of changed circumstances deserved to be dismissed as having become infructuous.

CIT v. Krishi Upaj Mandi Samiti (2013) 216 Taxman 57 (Mag.)(Raj.)(HC)

S.271(1)(c) : Penalty – Concealment – Wrong claim – Debatable issue – Levy of penalty was not justified [S.4]

The assessee received a sum as grant-in-aid from the State Government and same was disclosed as capital receipt. The Assessing Officer, however, treated receipt of grant-in-aid as revenue receipt and thereafter levied penalty under s. 271(1)(c). Held, since issue whether amount of grant-in-aid was capital receipt or a revenue receipt was a debatable issue, penalty under s. 271(1)(c) was not imposable. (AY. 2003-04)

CIT v. Gurdaspur Co-operative Sugar Mills Ltd. (2013) 216 Taxman 186 (Mag.)(P&H)(HC)

S.271(1)(c) : Penalty – Concealment – Explanation.1 – Absurd or illogical interpretations cannot be pleaded and become pretense and excuses to escape penalty. "Bona fides"- Penalty is valid even if claim is disclosed and as per Chartered Accountants certificate [S.80IA(13)]

The assessees claimed deduction u/s 80IA on the ground that it has executed an eligible infrastructure project. A copy of Form No.3CB, 3CD and Form No.10CCB was filed with the return in support of the claim. In the assessment order, the AO denied 80-IA deduction on the ground that the assessee had not executed the work but had given a sub-contract to another party and that it was not eligible u/s 80IA(13). The assessee accepted the denial of the claim. The AO levied penalty u/s 271(1)(c) for filing inaccurate particulars of income which was upheld by the CIT(A). The Tribunal relied on *CIT v. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 (SC)* and deleted the penalty on the ground that the claim for deduction u/s 801A was on the basis of a certificate of the CA, was bona fide and all the material facts relevant thereto had been furnished. On appeal by the department to the High Court, HELD reversing the Tribunal:

While it is true that the Income-tax Act, 1961 is one of most vexed and complicated legislation and requires highest degree of interpretative skills and there are divergent views on interpretation of its provisions and while it is also true that penalty for concealment cannot be imposed merely because assessee's interpretation or claim is rejected, such cases have to be distinguished from cases where the claim of the assessee is farcical or farfetched. Dubious and fanciful claims under the garb of interpretation, are a mere pretense and not bona fide. Absurd or illogical interpretations cannot be pleaded and become pretense and excuses to escape penalty. "*Bona fides*" have to be shown and cannot be assumed. The fact that the claim for deduction u/s 80IA was duly supported by the Chartered Accountant's Certificate and prescribed forms signed by the CA cannot absolve and protect an assessee who furnishes in-accurate particulars because then in all cases where a form/certificate is furnished by the CA but a wrong claim of deduction is made, no penalty u/s 271(1)(c) can be imposed. Merely because the assessee complies with the statutory procedural requirement of filing the prescribed form and certificate of the Chartered Accountant cannot absolve the assessee of its liability if the act or attempt in claiming the deduction was not *bona fide*. On facts, the assessee's claim was not tenable due to the Explanation to s. 80IA (13) which stipulates that benefit is not available to a contractor carrying on a works contract. The assessee has not shown any "tangible material" or basis as to why a clear statutory provision which excludes works contracts was ignored.(AY. 2007-08)

CIT v. HCIL Kalindee ARSSPL (2013) 261 CTR 462 (Delhi)(HC)

CIT v. HCIL Triveni (JV)(2013) 261 ITR 462 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – *Bona fide* claims – Long term or short term – Sale of employee stock option shares – Levy of penalty was not justified

Profit on sale of stock options was a debatable issue. Assessee declared long-term capital gains, but the same was assessed as short-term capital gains. Penalty under section 271(1)(c) could not be levied. (AY.2002-03)

CIT v. Jaswinder Singh Ahuja (2013) 86 DTR 414 / 351 ITR 262 / 259 CTR 213 / 216 Taxman 67 (Mag.)(Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Penalty cannot be levied even for unsustainable/ non-debatable claims if there is disclosure in the return [S.10(33)]

Though the income from the transfer of units of a mutual fund is exempt u/s 10(33), the assessee claimed a deduction for the loss of ` 3.08 crores suffered by him on transfer of US 64 units. The Assessing Officer disallowed the loss on the ground that the exemption in s. 10(33) applied to a loss as well and imposed penalty u/s 271(1)(c). The Commissioner (Appeals) confirmed the penalty. On appeal by the assessee, the Tribunal allowed the appeal on the ground that as the assessee had disclosed the details with the return, he had not filed inaccurate particulars of his income and that the making of a wrong claim/ incorrect claim did not attract penalty u/s.271(1)(c). On appeal by the department to the High Court, HELD dismissing the appeal:

As the assessee had disclosed all details in the return of income, at the highest it can be said that the claim of the assessee was not sustainable in law. But as there was no furnishing of inaccurate particulars or concealment of income on the part of the assessee. penalty u/s 271(1)(c) could not be levied (*CIT v. Reliance Petroproducts Pvt. Ltd. (2010) 322 ITR 158 (SC)* referred). (ITA No. 49 of 2013, dt. 5-7-2013)

CIT v. Nalin P. Shah (HUF) (Bom.)(HC) www.itatonline.org

S.271(1)(c) : Penalty – Concealment – Non-payment of TDS – Inaccurate particulars – Technical default deletion of penalty was justified

The Assessing Officer imposed penalty on assessee under section 271(1)(c) for not deducting and depositing TDS on time. The Commissioner (Appeals) and the Tribunal deleted the said penalty. Held, there was no concealment of income or furnishing of inaccurate particulars of income by assessee and non-payment of TDS being a technical default, deletion of penalty was justified. (AY.2006-07)

CIT v. L G Chaudhary (2013) 215 Taxman 95 (Mag.)(Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Revised return – To buy peace and avoid litigation levy of penalty was not justified

It was not case of revenue that assessee filed revised return, since some inaccurate particulars of income were detected by Assessing Officer during course of assessment. The assessee, to buy peace and to avoid protracted litigation, being disturbed by the death of his brother, who looked after the business filed revised return during assessment proceedings declaring additional income of Rs.37 lakhs. The reason for filing revised return was shown to be that the business was substantially looked after by the brother, who would have been in a position to comply with the details. In his absence, such details would not be easily available and it was, therefore, that the assessee opted to file the revised return. Hence, the levy of penalty was not justified. (AY. 2005-06)

CIT v. Girish Devchand Rajani (2013) 215 Taxman 94 (Mag.)(Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Disallowance of claim – Bad debt – Difference of opinion – Levy of penalty was not justified [S. 36(1)(vii)]

The Assessing Officer imposed penalty u/s 271(1)(c) upon assessee on account of disallowance of bad debt. The Tribunal deleted penalty holding that it was a case of difference of opinion on allowability of certain deductions and in absence of any material to indicate any dishonest attempt on part of assessee to conceal income, no penalty could be imposed. Held the Tribunal was justified in deleting penalty.
CIT v. Sambhav Media Ltd. (2013) 215 Taxman 54 (Mag.)(Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Furnishing inaccurate particulars – Assessee's claim scaled down – Levy of penalty was not justified [S. 80IB]
Mere making of a claim which is ultimately held not to be sustainable in law, would not amount to furnishing inaccurate particulars regarding the income of an assessee. Where assessee's claims of deduction under S. 80-IB had been downscaled. It would not mean that it is a case of furnishing inaccurate particulars of income. Furthermore, there was no finding in the penalty order as to which part of the income, the assessee had concealed and with regard to which particular facet of income had the assessee provided inaccurate particulars thereof. Therefore, no penalty could be levied. (AY. 2003-04, 2004-05)
CIT v. Jakson Ltd. (2013) 214 Taxman 94 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Rejection of books of account on fair gross profit rate – Levy of penalty was not justified
The Assessing Officer imposed penalty on two counts, firstly, additions were made in income of assessee after rejection of book results on basis of fair gross profit rate and, secondly assessee had retained 3 per cent of sales tax with it. With respect to first aspect of penalty, Tribunal opined that no penalty could be imposed merely because account books of assessee were rejected and that profit was estimated on basis of fair gross profit ratio. As regards retention of portion of sales tax, Tribunal stated that no evidence was brought on record to suggest that assessee had retained a portion of sales tax with it and hence, deleted the penalty. Since the order passed by Tribunal was based on appreciation of evidence on record, same did not require any interference. (AY. 2001-02)
CIT v. Whitelene Chemicals (2013) 214 Taxman 93 (Mag.)/(2014) 360 ITR 385 (Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Wrong claim – Levy of penalty was not justified [S. 80IA]
During assessment proceedings, the Assessing Officer opined that assessee had raised a wrong claim of deduction under S. 80-IA. He, thus, rejected the assessee's claim and also passed a penalty order under S. 271(1)(c).The Commissioner (Appeals) as well as Tribunal took a view that issue relating to deduction under S. 80. It was squarely covered in favour of assessee in view of the decision of the Apex Court in case of *CIT v. Reliance Petroproducts (P.) Ltd. [2010] 322 ITR 158*. Hence, the impugned penalty order was set aside.
CIT v. Shree Rama Multi Tech Ltd. (2013) 214 Taxman 94 (Mag.)(Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – For not offering capital gains on S.50C stamp duty value Concealment penalty cannot be levied. [S.50C]
The assessee sold property for a consideration of Rs.2.50 crore. However, for the purpose of stamp duty, the property was valued at Rs. 5.19 crore and stamp duty was paid on that value. The assessee offered capital gains on the basis that the sale consideration was Rs. 2.50 crore. The AO invoked S.50C and held that the sale consideration had to be taken at Rs. 5.19 crore and capital gains computed on that basis. The AO imposed penalty u/s 271(1)(c) which was deleted by the CIT(A) and the Tribunal by relying on Renu Hingorani. On appeal by the department to the High Court, HELD dismissing the appeal.
Though the assessee could have disputed the valuation on the basis of the deemed value and chose not to do so, the fact remains that the actual amount received was offered for taxation. It is only on the basis of the deemed consideration that the proceedings u/s.271(1)(c) started. The revenue has failed to

produce any iota of evidence that the assessee actually received one paise more than the amount shown to have been received by him. As such, there is no scope to admit the appeal.
CIT v. Madan Theatres Ltd (2013) 88 DTR 217 / 260 CTR 75 (Cal.)(HC)

S.271(1)(c) : Penalty – Concealment – Bogus purchases – Statement of seller denying the sales – Penalty held to be valid
The seller, in his sworn statement, had stated that he had not made any sales and had given only bills to the assessee. The assessee had also not chosen to cross-examine the seller. The Tribunal as well as the appellate authority had not controverted or distinguished this fact by relying on any statement or material documents produced by the assessee. Therefore, the levy of penalty was valid. (AY. 2000-01, 2001-02)
CIT v. Mahaveer Mirror Industries P. Ltd. (2013) 353 ITR 553 / 216 Taxman 184 (Mag.)(Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Depreciation – Misdeclaration of machinery as of foreign origin – Concealing real value to claim 100 percent depreciation – Levy of penalty was justified.
The valuer, after inspecting the machinery, was of the opinion that the machinery was of Indian make and it would not cost much. Held, he would have necessarily disclosed the fact to the officials of the assessee and the assessee could not plead ignorance of the fact. However, even thereafter the assessee had submitted its return claiming depreciation. One of the officials of the assessee who had inspected the machinery along with the valuer was examined by the Directorate of Revenue Intelligence and his statement was recorded. On the facts, it could only be presumed that the assessee being well aware that after the enquiry it would be liable to pay additional tax and penalty, was forced to make payment voluntarily. Therefore, the contention that in order to show the *bona fides* of the assessee, the assessee had volunteered to make payment even before the enquiry proceedings were complete could not be accepted. Thus, the penalty levied was justifiable.
CIT v. Sundaram Finance Ltd. (2013) 353 ITR 375 / 216 Taxman 60 (Mag.) (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Survey – Revised return filed after survey showing the unaccounted sales – Levy of penalty was justified
During survey, it was found that the stock book was not maintained properly and that there were unaccounted sales and unaccounted cash credits. The assessee filed a revised return showing the closing stock as on March 31, 1995, at Rs.37,34,245 as against Rs.17,88,961 declared in the original return. The assessment was accordingly completed and penalty was levied.
Held, the assessee had not only declared higher value of closing stock but had also increased the quantity of the closing stock, namely, gold. Therefore, but for the survey being conducted, these would not have been detected. Even though the discrepancy was unearthed on the date of survey, the assessee had admitted to the discrepancy for the year 1995-96. The imposition of penalty was valid. (AY.1995-96)
B. Damodar Vaman Baliga Jewellers v. JCIT (2013) 353 ITR 206 (Karn.)(HC)

S.271(1)(c) : Penalty – Concealment – Conversion of stock-in-trade into investment just before sale of property – Intention was to pay lower tax, levy of penalty was justified
The assessee purchased a piece of land in the financial year 1998-99 and shown it as stock-in-trade. During the financial year relevant to the assessment year 2003-04, it converted its stock-in-trade into "investment" and sold the property and offered the profit as long-term gains. Since the change in the books of account, just before the sale of the property, was made to avoid payment of full taxes by changing the complexion of the earnings on the sale of the property, the assessee had clearly furnished inaccurate particulars of income. Hence, levy of penalty was justified (AY.2003-04)
CIT v. Splender Construction (2013) 352 ITR 588 (Delhi)(HC)

S.271(1)(c) : Penalty – Concealment of income – Penalty for disallowance of claim on basis of subsequent Supreme Court decision is held to be not justified

Additions made on account of disallowance on the basis of subsequent Supreme Court judgement were neither due to the failure on the part of the assessee to furnish accurate particulars nor on account of furnishing inaccurate particulars. Hence, the levy of penalty was not justified.

CIT v. Celetronix Power India P. Ltd. (2013) 352 ITR 70 / 216 Taxman 68 (Mag.)(Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Capital or revenue – Disallowance of claim, penalty was not justified

It was on the basis of the interpretation of the provisions of the statute, that the Assessing Officer had found that the expenditure claimed by the assessee was not revenue expenditure but capital expenses. There is a fine distinction as to when expenditure can be treated as revenue or capital expenditure. Therefore, merely for the reason that the assessee had claimed the expenditure to be revenue, would not render the assessee liable to penalty proceedings. (AY.2001-02)

CIT v. Amtek Auto Ltd. (2013) 352 ITR 394 / 218 Taxman 124 (Mag.)(P&H)(HC)

S.271(1)(c) : Penalty – Concealment – Wrong advice by chartered accountant – Levy of concealment is not valid, if wrong claim due to mistake *bona fide* – Wrong advice of Chartered Accountant

The assessee filed a return of income in which it committed two mistakes (i) Depreciation was claimed at Rs. 1.70 crores instead of at Rs. 1.05 crores due to a mistake in calculation, (ii) the assessee sold its garment manufacturing machine and suffered a loss of Rs. 21.68 lakhs thereon. Though the loss was on capital account, it was claimed as a revenue deduction. In the course of the assessment proceedings, the assessee realised its mistake and withdrew the claim for excess depreciation and the claim for the loss. The AO levied penalty u/s 271 (1) (c) on both issues which was confirmed by the CIT (A). However, the Tribunal held that both mistakes had occurred due to a mistake/ wrong advice given by the Chartered Accountant and that there was a "bona fide mistake". It was also held that "the bonafide of the assessee is established from the fact that the assessee accepted the mistake and did not prefer any appeal against the order of the AO". On appeal by the department to the High Court, HELD dismissing the appeal:

The grievance of the revenue is that penalty is justified in view of the fact that the assessee had not filed a revised return of income. However, the Tribunal noted that the time to file revised return had expired. In any event, even the revenue does not dispute that it was a bonafide mistake on the part of the assessee. In the above view, imposition of penalty upon the assessee is not warranted.(AY. 2003-04)

CIT v. Somany Evergreen Knits Ltd. (2013) 352 ITR 592 (Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Revised Return – During the assessment proceedings assessee filed revised return declaring higher profit – AO not recoding satisfaction that the assessee has concealed income-Penalty is not leviable

Where the A.O. had not recorded any satisfaction that the assessee had concealed income or furnished inaccurate particulars of income and the additional income offered in the revised return filed during the assessment proceedings is accepted by the A.O. Penalty under section 271(1)(c) is not leviable. (AY. 1976-77)

CIT v. Ashok Kumar Jain (2013) 81 DTR 94 / 214 Taxman 98 (Mag.)/ 255 CTR 189 (Jharkhand)(HC)

S.271(1)(c) : Penalty – Concealment – Absence of due care does not mean that the assessee is guilty of furnishing inaccurate particulars of income

Where Additions were made not in respect of lack of *bona fides*, penalty levied under section 271(1)(c) of the Act is not sustainable as absence of due care does not mean that the assessee is guilty of furnishing inaccurate particulars. (AY. 1991-92)

CIT v. Balaji Distilleries Ltd. (2013) 81 DTR 190 / 214 Taxman 96 (Mag.) / 255 CTR 265 (Mad.)(HC)

S.271(1)(c) : Penalty – Concealment – Loss return – Speculation loss – Wrong claim penalty was confirmed

Assessee filed its return without disclosing speculative profit earned from sale of shares. In response to Assessing Officer's notice, assessee contended that there was no need to disclose speculative profit in profit and loss account because speculative loss had been incurred in earlier years. Assessing Officer having rejected assessee's explanation, added speculation profit to taxable income and also imposed penalty under section 271(1)(c). The court held that even if speculation profit was eligible for set off against carried forward speculation loss, same would have effect of diminishing such speculation loss which would be carried forward for future years. Since, it is well settled that in case of loss return also, penalty could be imposed if by virtue of wrong claim, due to which the computation of loss is likely to reduce. Accordingly the impugned penalty order was to be confirmed. In favour of revenue. (AY. 2006-07)

Subhash S. Shah v. ITO (2013) 213 Taxman 43 (Mag.)(Guj.)(HC)

S.271(1)(c) : Penalty – Concealment – Explanation 5 – Search and seizure – In the return pursuant to search action the amount was not included, the computation was revised in the course of assessment proceedings – Levy of penalty was justified [Ss.132(4), 139(1), 153A]

After filing of return under section 139(1), search was conducted. In statement recorded under section 132(4), assessee admitted benami share investment. On being issued with notice under section 153A, assessee did not file any return and by a letter, requested that its return, filed under section 139(1) prior to search and seizure be treated as its return filed in response to notice under section 153A. It was only when assessment proceedings were taken up for consideration, did assessee seek to revise its computation. The court held that it could be said that assessee did not include amount in return pursuant to notice issued, and instead chose to merely reiterate its return originally filed, therefore, 'escape route', provided by clause (2) to Explanation 5 to section 271 (1)(c) in this case, was not available to assessee, and it would be liable to penalty for concealment, as a return filed under section 153A can never be assumed to be covered as one under section 139(1). (AY. 2006-07)

Shourya Towers (P.) Ltd. v. Dy. CIT (2013) 213 Taxman 20(Mag.) / 255 CTR 225 / 81 DTR 161 (Delhi)(HC)

Editorial: SLP dismissed. Shourya Towers (P.) Ltd. v. Dy. CIT (SLP(CC) NO 8305 of 2013 dt 18-04-2013 (2013) 216 Taxman 205 (Mag.)(SC)

S.271(1)(c) : Penalty – Concealment – Surrender of income – Penalty is Justified

In the course of assessment proceedings extra liability in respect of sundry creditors was found by Assessing Officer. Assessee simply stated that balance as per his account books were correct and balance shown by third parties incorrect, however, to end prolonged assessment proceedings and buy peace, assessee surrendered income and agreed to addition, however, no plausible explanation was given regarding discrepancy in books of account. The court held that mere surrender of income by assessee without offering plausible explanation regarding its correctness, would not absolve assessee from charge of penalty for concealment of income. Penalty would be levied on assessee. In favour of revenue. (AY.1989-90)

Bajrang Glass Emporium v. CIT (2013) 213 Taxman 25 (Mag.) / (2014) 361 ITR 376 (All.) (HC)

S.271(1)(c) : Penalty – Concealment – Depreciation was claimed on cost of land, levy of penalty was held to be justified [S.32]

Assessing Officer disallowed assessee's claim of depreciation in respect of a property on ground that said properly was not used for business purpose and moreover cost of land was included in claim of depreciation though no depreciation is allowable under Act on land. He also levied penalty under

section 271(1)(c) for furnishing inaccurate particulars holding that there was complete lack of any evidence to show that property was used for purpose of assessee's business and attempts made by assessee to show to contrary were indicative of frivolous nature of claim. In appeal Commissioner (Appeals) confirmed the levy of penalty. Tribunal deleted the penalty holding that explanation submitted by assessee was *bona fide* and for mere disallowance levy of penalty was not justified. On appeal by revenue the Court held that levy of penalty was justified. In favour of revenue.(AY.2005-06)
CIT v. Morgan Finvest (P.) Ltd. (2013) 81 DTR 441 / 213 Taxman 23 (Mag.)(Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – High court admission of quantum appeal – Admission of quantum appeal by High Court shows issue is debatable levy of penalty is not justified.
The assessee's appeal against the disallowance made u/s 14A was admitted by the High Court. The AO levied penalty u/s 271(1)(c) in respect of the said disallowance. The CIT (A) and the ITAT set aside the penalty levied u/s 271(1)(c) on the ground that the issue of deduction u/s 14A was a debatable issue. On appeal by the Department to the High Court HELD:
Both the CIT(A) as well as the ITAT have set aside the penalty imposed by the AO u/s 271(1)(c) on the ground that the issue of deduction u/s 14A of the Act was a debatable issue. We may also note that against the quantum assessment where under deduction u/s 14A of the Act was prescribed to the assessee, the assessee has preferred an appeal in this Court u/s 260A of the Act which has also been admitted and substantial question of law framed. This itself shows that the issue is debatable. For these reasons, we are of the opinion that no question of law arises in the present case.
CIT v. Liquid Investment and Trading Co. (Delhi) (HC) www.itatonline.org

S.271(1)(c) : Penalty – Concealment – Short-term capital gains – Business income – Treating income under some other head is not furnishing of inaccurate particulars of income levy of penalty is rightly deleted
The assessee declared income from short-term capital gains. The Assessing Officer assessed it as income from business. He also levied penalty under section 271(1)(c) of the Act, on the ground that the assessee had furnished inaccurate particulars of his income. The Commissioner (Appeals) cancelled the penalty. This was confirmed by the Tribunal. On appeal by revenue the Court also confirmed the order of Tribunal.
CIT v. Amit Jain (2013) 351 ITR 74 / 258 CTR 88 / 85 DTR 175 / 215 Taxman 81 (Mag.)(Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – Inadvertent mistake – Wrong heads – Concealment penalty cannot be levied if income not offered to tax due to "inadvertent mistake"
The assessee claimed deduction/ exemption of interest on tax-free bonds of Rs. 5.60 crores. Assessing Officer asked the assessee to give details of the interest on tax-free bonds, the assessee stated that it had inadvertently treated taxable interest of Rs. 75 lakhs as being tax-free and offered the said sum to tax. The AO levied penalty u/s 271(1)(c) for concealment of income/ filing inaccurate particulars of income. This was upheld by the CIT(A) though deleted by the Tribunal on the ground that there was an "inadvertent mistake" by which the taxable bonds were classified as tax-free and that there was "no desire" on the part of the assessee to hide or conceal its income so as to avoid payment of tax on interest from the bonds. On appeal by the department,dismissing the appeal the Court held that the decision of the Tribunal is based on finding of fact that there was an inadvertent mistake on the part of the assessee in including the interest received of 6% on the GOI Capital Index Bonds as interest received on tax free bonds. It is not contended by the Revenue that above finding of fact by the Tribunal is perverse. In these circumstances, there is no reason to entertain the proposed question
Note: It was also decided that offering income under the wrong head (capital gains instead of other sources) does not attract s. 271 (1) (c) penalty.(AY.1999-2000)
CIT v. Bennett Coleman & Co. Ltd (2013) 259 CTR 383 / 215 Taxman 93 (Mag.)/ 87 DTR 368 (Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – Revised return – Search and seizure by Excise Department – Survey by Tax department – Levy of penalty is not justified when the revised return was filed before issue of notice under section 148 [S.148, 133A]
In course of a search conducted at assessee's premises by Excise Department, assessee admitted suppression of turnover. Thereafter, based on said search, income-tax authorities, conducted survey and consequent thereto assessee filed revised returns before issue of notice under section 148 declaring additional income and suppression of sales and paid taxes as well as interest. The Assessing Officer held that there was concealment of income by way of suppression with intention to evade tax and the assessee even failed to revise the income after the date of search conducted by the Central Excise Department. On appeal, the Commissioner (Appeals) confirmed the order of the Assessing Officer. On further appeal, the Tribunal held that when once the return was filed before the issue of notice under section 148 and tax due with interest was paid, as the income was not suppressed, the imposition of penalty was not proper. Therefore, the order of imposition of penalty was set aside. On appeal by revenue the Court held that merely because it was only after survey that a revised return was filed, it was not a ground to hold that there was suppression of income so as to justify levy of penalty. In favour of assessee. (AY. 2004-05 to 2006-07)
CIT v. Vega Auto Accessories (P.) Ltd. (2013) 212 Taxman 96 (Mag.)(Karn.)(HC)

S.271(1)(c) : Penalty – Concealment – Survey – Surrender of income without explanation attracts penalty. Penalty justified [S.133A]
A survey u/s.133A was conducted on the assessee's premises in the course of which certain documents belonged to certain entities who had applied for shares in the assessee company were found. The AO called upon the assessee to prove the nature and source of the monies received as share capital, the creditworthiness of the applicants and the genuineness of the transactions. The assessee offered Rs.40.74 lakhs as income from other sources "to avoid litigation and to buy peace". It was made clear that in making the surrender, there was no admission of concealment. The A.O. completed the assessment by adding the said sum and levied penalty u/s 271 (1) (c) for furnishing inaccurate particulars of income u/s. 271(1)(c). This was upheld by the CIT (A) though reversed by the Tribunal (included in file) on the ground that there was no material to show any concealment and even in the penalty order it was not specified as to the particular credit in respect of which the penalty was being imposed. It was also emphasized by the Tribunal that the assessee had made it clear while surrendering that there was no admission of concealment and that the offer was made in a spirit of settlement. On appeal by the Department to the High Court, HELD reversing the decision of the Tribunal:
When the AO called upon the assessee to produce evidence as to the nature and source of the amount received as share capital, the creditworthiness of the applicants and the genuineness of the transactions the assessee simply folded up and surrendered the sum of Rs. 40.74 lakhs by merely stating that it wanted to "buy peace". In the absence of any explanation in respect of the surrendered income, the first part of clause (A) of Explanation 1 to s. 271 (1) (c) is attracted because the nature and source of the amount surrendered are facts material to the computation of total income. The absence of any explanation regarding the receipt of the money, which is in the exclusive knowledge of the assessee leads to an adverse inference against the assessee and is statutorily considered as amounting to concealment of income under the first part of clause (A) of the Explanation to s. 271 (1) (c) and penalty has to be levied.(AY. 2004-05)
CIT v. MAK Data Ltd. (2013) 352 ITR 1 / 263 CTR 6 / 87 DTR 172 (Delhi)(HC)
Editorial: Affirmed by supreme court in MAK Data P. Ltd. v. CIT (2013) 94 DTR 379 / 358 ITR 593(SC)

S.271(1)(c) : Penalty – Concealment – False claims – Levy of penalty was held to be justified

An amount of Rs.10.81 lakhs was paid to PM (P) Ltd which was assessees sister concern. These payments were made through a debit note raised at the close of the year. Tribunal has given the finding that no such amounts were paid. This finding of Tribunal was accepted by assessee. On appeal by the assessee against the confirmation of penalty the court held that where Tribunal had reached a finding of fact that appellant had filed inaccurate particulars regarding its income by showing false/exaggerated expenses, it would be concluded that there was a concealment of income on part of appellant, leading to imposition of penalty under section 271 (1) (c) upon appellant. Appeal of assessee was dismissed. (AY.1989-90)
Sanghvi Swiss Refills (P.) Ltd. v. ACIT (2013)81 DTR 40 / 255 CTR 251 / 212 Taxman 66 (Mag.)(Bom.)(HC)

S.271(1)(c) : Penalty – Concealment – As there was no clarity on law levy of penalty was held to be not justified [S.78(2), 170(1)]
Assessee succeeded to business of a partnership firm by way of family settlement. He claimed set off of losses of erstwhile firm. Claim of assessee was disallowed by Assessing Officer, Commissioner and Tribunal on ground that section 78(2) did not entitle assessee to set off losses. High Court however, held that such claim was not allowable in view of section 170(1). Meanwhile, penalty was imposed on ground that assessee had made a false claim. High Court, on appeal, noted that there was absolutely no discussion of section 170 in order of Commissioner (Appeals) and Tribunal which was applicable provision as regards succession. Moreover, Assessing Officer as also Commissioner (Appeals) was under misapprehension that assessee was not a successor. There was lack of clarity by income-tax authorities right up to Tribunal itself and, hence, imposition of penalty was not warranted. Appeal of assessee was allowed.
Pramod Mittal v. CIT (2013) 212 Taxman 64 (Mag.)(Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – AOP – Deletion of penalty held to be justified [S.167B]
Assessee, an AOP, was constituted for carrying on business of procuring orders on behalf of RIL for supply of purified trephthalic acid. In respect of assessment years in question, assessee filed a return of income at nil. During course of assessment proceeding, assessee was required to explain as to why income should not be charged to tax in hands of AOP by applying provisions of section 167B(2). According to assessee, it had distributed profit amongst its members as per their respective shares which were defined in joint venture agreement and all of them had shown their respective shares as income under provisions of section 167A, and, therefore, section 167B(2) was not applicable. Assessing Officer rejected assessee’s explanation and assessed entire income in hands of AOP under section 167B(2). On second appeal, Tribunal referred matter to Special Bench which upheld order passed by Assessing Officer. Thereupon, Assessing Officer taking a view that assessee had deliberately shown income in hands of members of AOP in order to evade taxes, passed a penalty order under section 271 (1) (c). Tribunal, however, set aside penalty order. On revenue’s appeal, it was noted that when assessee had filed nil return, there were two views possible inasmuch as Tribunal itself was in doubt as to which of two views were to be preferred and it was for this very reason that Tribunal had passed referral order requiring matter to be considered by a Special Bench. In view of above, it could not be said that assessee could not have had such a doubt in its mind when it had indeed filed its return. Therefore, Tribunal was justified in setting aside penalty order. Appeal of revenue was dismissed. (AY.2003-04, 2004-05)
CIT v. Pradeep Agencies Joint Venture (2012) 349 ITR 477 / (2013) 212 Taxman 72 (Mag.)(Delhi)(HC)

S.271(1)(c) : Penalty – Concealment – No explanation was filed – Penalty was held to be justified [S.94(7)]
Assessee-company engaged in business of sale and purchase of shares claimed certain loss on sale of shares. Assessing Officer disallowed amount for not complying with provisions of section 94(7) and

assessed it as income of assessee. Assessing Officer, thereafter imposed penalty under section 271(1)(c). On appeal, Commissioner (Appeals) deleted penalty but on appeal by revenue Tribunal reversed order of Commissioner (Appeals). When assessee-company had been availing services of a chartered accountant and in spite of that no reply was filed by it for non-compliance with provisions of section 94(7) while working out income shown in income-tax return, Explanation 1 to section 271(1)(c) was directly applicable and penalty was rightly imposed by Assessing Officer. Appeal of assessee was dismissed. (AY. 2005-06)
VSB Investment (P.) Ltd. v. CIT (2013) 212 Taxman 59 (Mag.)(P&H)(HC)

S.271(1)(c) : Penalty – Concealment – Revised return – After detection – Levy of penalty was justified.
Assessee's case was taken up for scrutiny and concealment of income had been detected by Assessing Officer. Assessee filed revised return. An amount was surrendered on ground of buying peace with department. However, it was a specific concealment for a particular month which was detected by Assessing Officer and not a case where addition was made in income on estimate and surmise. Since it was clear case of concealment of income and furnishing of wrong particulars of income, penalty was correctly imposed. Appeal of assessee was dismissed. (AY.1993-94)
Standard Hind Co. v. CIT (2012) 250 CTR 207 / 71 DTR 85 / (2013) 212 Taxman 74 (Mag.) (2014) 361 ITR 270 (All.)(HC)

S.271(1)(c) : Penalty – Concealment – Substantial question of law – Admission by High Court
Upon admission of substantial question of law by High Court with respect to additions on basis of which penalty levied, penalty to be deleted. (AY. 2006-07)
Advaita Estate Development P. Ltd. v. ITO (2013) 27 ITR 112 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Dispute regarding year of taxability – Inaccurate particulars of income
Since the assessee had offered the advances for taxation in subsequent assessment years before the AO made inquiry about them, it can be said that the assessee had on its own paid tax on the amounts in question. It was not a case where the assessee had concealed the facts of earning of income but a case where the year of taxability of income was in dispute. No penalty could be levied. (AY. 2007-08)
DCIT v. Otis Elevator Co. (I) Ltd. (2013) 27 ITR 303 / (2014) 61 SOT 26 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Expenditure not allowable – Earlier years assessment [S. 14A]
Department levied penalty in respect of the disallowance effected under section 14A read with rule 8D. Expenditure in relation to income not includible in taxable income was accepted at 10% in earlier years. Held, on facts this was not a case of concealment, and penalty could not be levied. (AY 2008-09)
AFL P. Ltd. v. ACIT (2013) 28 ITR 263 / 60 SOT 63 (URO)(Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Wrong claim of depreciation – Concealment
The assessee claimed that depreciation was claimed on the basis of tax audit report and complete particulars regarding depreciation were disclosed in the tax audit report. Held, nothing was concealed from the Department. The deletion of penalty was justified. (AY. 2006-07)
JCIT v. Swapna Printing Works P. Ltd. (2013) 27 ITR 69 (Kol.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Transfer pricing adjustment

Merely because some adjustment was made by applying transfer pricing provisions, it could not be said that there was any concealment of income or furnishing of inaccurate particulars. (AY. 2004-2005)
Michael Aram Exports P. Ltd. v. ITO (2013) 27 ITR 528 (Delhi)(Trib.)

S.271(1)(c) : Penalty – Information from assessee's portfolio manager – Levy of penalty was justified
During AY 2005-06, AO made additions upon the information obtained from the portfolio management authorities that the value of the assets held in the name of the assessee had increased. He also levied penalty for that year. For the current year i.e. AY 2007-08, the AO again sought to tax the same investment, when the assessee had not transferred it but had shown the increase in the value as short-term capital gains. The short-term capital gains never accrued to the assessee. In fact, it was a loss in the capital leading to duplication of income taxed. The information that the capital investment of the assessee was worth more was accepted by the AO. Hence, the action of the AO was not justified.
In case of contra decisions of various authorities, decisions which are favourable to the assessee should be accepted. (AY. 2007-08)
Kalyan Sarkar v. DCIT (2013) 27 ITR 360 / (2014) 63 SOT 24 (URO)(Cuttack)(Trib.)

S.271(1)(c) : Penalty – Concealment – Estimated addition
No penalty was leviable for estimated addition when there was no evidence to show payment of higher sale consideration than that disclosed in sale deed. (AY. 2007-08)
JCIT (OSD) v. Bhagwan Dass Garg (2013) 28 ITR 77 / 158 TTJ 137 / 95 DTR 45 (Chd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Estimated addition – Defect in books
Penalty cannot be imposed on estimated trading profit of assessee when there were defects in account books and flat rate of gross profit was applied. (AYs. 2001-2002, 2004-05)
Whiteline Chemicals v. ITO (2013) 28 ITR 523 (Ahd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Evidence – Sales tax retained by assessee
In the absence of corroborative evidence against assessee that it retained with it the sales tax, penalty could not be sustained. (AY. 2001-02, 2004-05)
Whiteline Chemicals v. ITO (2013) 28 ITR 523 (Ahd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Search and seizure – Disclosure and surrender of cash during search – Tax paid with interest [S.132]
The assessee surrendered cash during search. The due date of filing of return had not expired on the date of surrender. Held, failure to declare sum in return was an inadvertent mistake since revised return was filed and tax was paid with interest. Assessee was entitled to benefit of Explanation 5(2) to section 271(1)(c). (AY. 2007-08)
JCIT (OSD) v. Bhagwan Dass Garg (2013) 28 ITR 77 / 158 TTJ 132 / 95 DTR 45 (Chd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Wrong claim of repair and maintenance expense when the same was capital in nature – Not a basis for imposition of penalty [S. 37(1)]
The Tribunal held that in a case where repair and maintenance expenses in respect of plant and machinery and building which were in the actual sense, capital in nature, when genuineness of expense not disputed, just a wrong claim not basis for imposition of penalty. The Tribunal held where disallowance of miscellaneous expenses were made on estimated basis for want of supporting voucher and there was no case that any bogus expenses not relating to its business were claimed by assessee, penalty u/s. 271(1)(c) was not justified. (AY. 2004-05)
Dresser - Rand India (P.) Ltd. v. Dy. CIT 145 ITD 91 / 24 ITR 610 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Seized documents – Denial of receipt-Offered as income to avoid prolonged litigation – Levy of penalty was not justified [S. 132]
When the assessee had denied receipt of amount in question and seized documents also did not bear signatures or initials of any person, merely because assessee had offered same as additional income to buy peace of mind and to avoid prolonged litigation, same did not call for levy of penalty under section 271(1)(c). (AY. 2005-06)
Marathon Nextgen Realty & Textiles Ltd. v. DCIT (2012) 67 DTR 249 / 154 TTJ 254 / (2013) 59 SOT 36 (URO) (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Avoidance of tax – Transfer pricing – Disallowance of expenses – Details furnished from time to time – Levy of penalty was not justified [S.92C]
In the absence of any finding indicating that assessee failed to offer any information or information provided was false, impugned penalty levied by invoking Explanation 7 to section 271(1)(c) was to be set aside especially when the assessee had furnished all the required details called for from time to time. Mere fact that the Assessing Officer disallowed travelling and legal expenses incurred by assessee in relation to its international transactions, penalty was not justified. (AY. 2002-03)
Mastek Ltd. v. DCIT (2013) 59 SOT 55 (URO)(Ahd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Disclosure of additional income in return under section 153C – Levy of penalty was not justified. [S.139(1), 153C]
The Tribunal held that assessment has been framed by the Assessing Officer on the basis of the return filed under section 153C and not on the basis of original return filed under section 139(1), at the most it can be said that there was a wrong claim by the assessee in the original return which has been corrected while filing the return under section 153C. Therefore levy of penalty under section 271(1)(c) is not justified. Tribunal followed the decision of Hon'ble Supreme Court in the case of *CIT v. Reliance Petroproducts (P) Ltd. (2010) 322 ITR 158 (SC)*. (AY. 2004-05)
Mahaveer Jain v. Dy. CIT (2013) 157 TTJ 743 / 94 DTR 25 (Jd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Revised return accepted by the Department – Penalty was deleted.
The Tribunal deleted the penalty levied by the Assessing Officer and sustained by the learned CIT(A) on the basis that the revised return in which the additional income was disclosed by the assessee was accepted by the Assessing Officer in its entirety and the other additions were made only on the basis of the estimated income by applying the GP rate declared by the assessee itself. (AYs. 2000-01 & 2002-03 to 2004-05)
Poonam Marbles (P) Ltd. v. Dy. CIT (2013) 157 TTJ 59 (UO) (Jodh.)(Trib.)

S.271(1)(c) : Penalty – Concealment – *Bona fide* belief on the part of assessee – Levy of penalty was not justified [S.10(23G)]
The assessee could not offer the capital gain as assessee sought approval under section 10(23G). Since the claim of exemption under section 10(23G) was bona fide it is not either a case of concealment of particulars of income or furnishing of inaccurate particulars of income. The Tribunal found that the explanation furnished by the assessee was not false. Therefore penalty under section 271(1)(c) is not attracted. On other grounds, Tribunal followed the decision of Hon'ble Supreme Court in the case of *CIT v. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC)* wherein it was held that disallowance of expenditure does not call for penalty. Disallowance of expenses on *ad hoc* basis, disallowances under section 14A and disallowance of depreciation does not call for levy of penalty. (AY. 2006-07)
Skill Infrastructure Ltd. v. ACIT (2012) 139 ITD 25 / 93 DTR 196 / (2013) 157 TTJ 565 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Additions to income under section 153A – Not concealed any particulars of income. Penalty was not sustainable [S.153A]

The Tribunal held that the assessee has not concealed any particulars of income. Therefore, penalty under section 271(1)(c) was not sustainable. The assessee having not concealed any particulars of income, penalty under section 271(1)(c) is not leviable simply because additions have been made on account of unexplained investments and disallowance of certain claims made by the assessee which were not found to be bogus. Tribunal followed the decision of Hon'ble Supreme Court in case of *CIT v. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC)*. (AY. 2007-08)

Om Prakash Lohiya v. Dy. CIT (2013) 157 TTJ 65 (UO) / (2014) 61 SOT 15 (Jd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Income shown in the return filed admitting income from undisclosed income – Penalty cannot be imposed referring the return filed under section 139(1) [S.153A]

In the present case, on the basis of entries recorded in documents seized from the premises of the assessee, it was found that assessee had been carrying on unaccounted business activities which was not disclosed in the returns of income. Assessee filed returns of income including return for AY. 2004-05 under section 153A admitting income from undisclosed business activities. A.O. completed assessment admitting income from undisclosed business activities. A.O. initiated penalty proceedings and held that since the return was filed in response to notice under section 153 A of the Act, The provisions of Explanation 5 to section 271 (1) (c) of the Act were clearly attracted.

It was held that when scheme of search assessment as designed by the legislature does not prescribe to take into account the earlier assessment proceedings whether abated or not, it will not be proper or justified to refer to returned income under section 139 for the purpose of imposition of penalty under section 271(1)(c) of the Act. For the purpose of imposition of penalty under section 271(1)(c) resulting as a result of search assessments made u/s. 153A, the original return of income filed u/s. 139 cannot be considered. When there is no concealment, question of levy of penalty u/s. 271(1)(c) of the Act will not arise. (AY. 2004-05)

Prem Arora v. Dy. CIT (2012) 78 DTR 91 / 149 TTJ 560 / (2013) 56 SOT 14 (Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – Amount surrendered in the return filed under section 153A – Levy of penalty was not justified on the basis of original return under section 139(1) [Ss.139(1), 153A, 153C]

In the return of income u/s 153A, the assessee offered certain sum for levy of tax on account of cash available with the assessee out of books. It was out of cash available at the time of search & offered for levy of tax / surrendered by the assessee in his statements as recorded during the course of search. Further, the assessee showed certain income as amount on account of difference between the sale value & the value as adopted by sub-registrar considering the provisions of S.50C as he was unaware of the provisions of s.50C. Therefore the assessee was not liable for penalty on the differential amount of tax offered by the assessee. AO levied penalty u/s 271(C) since there was difference between the income declared in the return filed u/s 139(1) & that disclosed in the proceedings u/s 153A. CIT(A) confirmed the penalty. On further appeal in Tribunal, the Tribunal held that the AO has accepted cash available with the assessee. Therefore earlier cash available with the assessee cannot be treated as undisclosed income for the purpose of levy of penalty u/s 271(1)(c). The other difference was in capital gain which was on account of difference between the sale value & the value as adopted by the Sub-Registrar as per the provisions of S.50C. Tribunal held that the assessee had disclosed all the relevant facts relating to capital gain in his return of income. Further the assessee had agreed to pay tax on legitimate & correct amount of income on agreed basis. The letter was made to be treated as statement u/s 132(4). The AO had nowhere stated that the contents of the said letter were wrong & that the same have not been accepted. When AO, had accepted whatever was offered by the assessee in his return of income while framing the assessment u/s143(3) r.w.s 153A, no penalty was liveable. (AY.2005-06)

Devidas Sukhani v. DCIT (2013) 94 DTR 21 / 262 CTR 604 / (2014) 360 ITR 44 (Jodh.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Search and seizure – Declaration of Income in return by filing letter by husband of assessee and income disclosed in the return of income under section 153A – Levy of penalty u/s 271(1)(c) was not justified, assessee was entitled to immunity as per Explanation 5 was to section 271(1)(c) [Ss.132(4), 139(1), 153A, 153C]

Assessee did not file her return of income u/s 139(1) before the search took place though the belated return u/s 139(1) was available to the assessee which she did not file. No document or loose paper was found at the search place except letter written by the assessee's husband admitting to treat letter as statement u/s 132(4) wherein he agreed to pay the legitimate taxes on agreed basis & to avoid litigation. Thereafter assesse declared income in her return of income u/s 153A. The said income was accepted by the Assessing officer u/s 153C r.ws 153A. Thereafter penalty was levied invoking S. 271(1)(c) r.w.s. 274 of the Act for concealing particulars of income by not filing return u/s 139 of the Act. On an appeal before CIT(A), CIT(A) confirmed the order of the Assessing Officer. On further appeal in Tribunal, Tribunal deleted the penalty and held that the authorities having found no document or loose paper pertaining to the income of the assessee in her possession at the time of search & the Assessing Officer having accepted the income declared by the assessee, in her return u/s 153 r.w.s 153A without any addition & time was available for return u/s.139(4), assessee was entitled to immunity in terms of explanation 5 to s.271(1)(c) Therefore levy of penalty u/s.271(1)(c) was unjustified. (AY.2006-07)

Shashi Lohiya (Smt.) .v. DCIT (2013) 94 DTR 361 / 158 TTJ 260 (Jd)(Trib.)

S.271(1)(c) : Penalty – Concealment – Estimation of income by rejecting books of account – Penalty is not leviable

The Tribunal held that assessee having offered the income on the basis of audited books of account maintained by it and the AO having rejected the books of account and estimated profit @8 per cent, assessee is not liable for penalty under s.271(1)(c) in the absence of any finding by the AO that the assessee made any false claim. (AY. 2002-03)

ACIT v. Technip Italy SPA (2013) 91 DTR 401 / 156 TTJ 481 (Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – *Bona fide* claim – Revised computation – Year of taxability – Levy of penalty was not proper

Assessee was engaged in the business of copyrights of motion pictures, received certain amount regarding transfer of ownership rights of a movie in AY.2006-07. Assessing Officer added consideration in assessment as assessee had not included it in sales. CIT(A) held that the said amount could only be taxed in next AY.2007-08. Thereafter assessee filed revised computation of income as well as Profit & Loss Account mentioning consideration amount for AY. 2006-07 in question. The Assessing Officer did not accept the revised computation of Income & levied penalty u/s.271(1)(c) as assessee failed to disclose all material facts & particulars in assessment and thereafter CIT(A) deleted the penalty on the ground that the assessee had already disclosed the fact in the earlier AY. i.e. 2006-07. On revenue's appeal in Tribunal, the Tribunal upheld the findings of CIT(A) & held that the asseseee had neither concealed the income nor furnished any inaccurate particulars of income. The very fact that it had duly mentioned the consideration in the year of receipt itself proves its *bona fides*. Tribunal also held that every addition in the assessment proceedings does not *ipso facto* lead to the conclusion that the assessee is guilty of concealment of income etc, as the penalty proceedings are altogether different in nature. (AY. 2007-08).

ITO v. Jain Associates (2013) 53 SOT 83 (URO)(Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Tax avoidance – Where there had been no avoidance of tax by assessee by availing benefit of treaty, penalty under section 271(1)(c) was not leviable

The assessee company was incorporated in Hong Kong. Its wholly owned subsidiary, SAS-BV, incorporated in Netherlands, undertook sale of advertisement airtime in India. The assessee calculated income on receipt basis and claimed that it had not received any income from India for relevant year. However, Assessing Officer calculated income on accrual basis in hands of assessee, instead of its subsidiary, SAS-BV, holding it as a conduit of assessee. He further held that assessee had floated SAS-BV to avoid paying taxes in India by availing benefit of treaty between India and Netherlands, and therefore, levied penalty under section 271(1)(c). Held, advertisement revenue could not be taxed in hands of assessee parent company, disregarding existence of its subsidiary, without giving assessee an opportunity of being heard. Also, department could not impose a particular method of accounting to be followed by assessee and advertisement revenue was assessable on receipt basis as per circular of CBDT. Furthermore, where there had been no avoidance of tax by assessee by availing benefit of treaty, penalty under section 271(1)(c) was not leviable.(AY. 1998-99 to 2000-01)
Satellite Television Asian Region Ltd. v. DCIT (2013) 58 SOT 109 (Mum.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Rental income – Business income – Change of head of income – Levy of penalty was not justified
In the assessment order, rental income from warehousing of Rs 65,01,328/- declared by the Assessee as 'business income' was treated as 'income from house property' and after allowing deduction u/s 24A was net income of Rs. 45,50,932/- was brought to tax under that head. The Assessing officer levied penalty u/s 271(1)(c) on the income of Rs. 45,50,932/-. The Tribunal held that change in the head of income has actually resulted in reduction of total income which is evident from the fact that the total income finally assessed by the A.O. is a loss of Rs.1,21,18,311/- as against the loss of Rs. 1,13,12,996/- returned by the Assessee. Hence, no penalty u/s 271(1)(c) can be imposed as it cannot be said that the assessee has sought to evade any tax by declaring its rental income as business income. (AY. 2003-04)
Swan Energy Ltd. v. Addl. CIT (2013) 90 DTR 261 / (2014) 61 SOT 32 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Estimate of income – Levy of penalty was not justified [S. 115A]
The Tribunal held that, on the addition on account of offshore supply of equipments, the genuineness of foreign expenditure was not accepted on the basis that the books of account pertaining to dollar payments were not verifiable and estimated profit @ 8%. Assessee had offered the income from onshore supply of equipments and other contract receipts of tax on the basis of the account as maintained by it. A.O. has not given the reason for applying the profit rate of 8 %. There is no finding beyond doubt by the A.O. that any false claim was made by the Assessee. Estimation in this regard has been made on the basis of the disclosure made by the Assessee. Material findings of the CIT(A) that the income from the activity of onshore supply and contract receipts was duly disclosed by the assessee in its return has not been rebutted. Therefore CIT(A) has rightly deleted the penalty. On the addition on account of income from fee for design and engineering by invoking section 115A. Assessee had credited the revenue arising on account of fees from design and engineering services in its profit and loss account and the income so earned has been offered to tax on the basis of net profit as per audited books of account. Complete break-up of the revenue was furnished before the A.O. and the explanation for not considering such receipts as taxable u/s 9(1)(vii) was also furnished. Thus, Assessee had a *bona fide* basis and reasoning regarding the manner of taxability of income on account for design and engineering fees and there is not disputed that all the facts necessary for computation of income were duly disclosed by the assessee. Therefore CIT(A) has rightly deleted the penalty on addition made on account of assessment of income from fee from design and engineering u/s 115A. Even otherwise, no penalty is leviable as the tax sought to be evaded is nil. (AY. 2002-03)
ACIT v. Technip Italy Spa (2013) 156 TTJ 481 / 91 DTR 401 (Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – Voluntary surrender of income during course of assessment proceedings to buy peace and avoid litigation – Levy of penalty was not justified.

During the assessment proceedings the AO asked the assessee to justify the cash payment made to farmers for purchase of earth soil and also asked the assessee to produce them. The assessee submitted that she has already submitted the details however the assessee voluntarily offered to be assessed at net profit of Rs. 75,00,000 inclusive of income declared of Rs. 4,35, 757, on the condition that no penalty is leviable. The AO accepted the income declared , however levied the penalty which was confirmed by the CIT (A). On appeal tribunal held that Voluntary surrender of income during course of assessment proceedings to buy peace and avoid litigation, hence levy of penalty was not justified. (ITA No.871/Delhi/2013 Bench "H" dt 30-08-2013. (AY.2009-10)

Vinay Sharma (Smt) v. ITO (Delhi)(Trib.)(Unreported)

S.271(1)(c) : Penalty–Concealment-Incorrect claim of set off of excess loss under short-term capital gains – Furnishing of inaccurate particulars

The claim of the assessee could not be allowed because provisions of the Act had been amended with effect from April 1, 2005 and the assessee, in considering new amendments, made a wrong claim, which was a bona fide error on the part of the assessee and could not be a reason for levy of penalty. (AY. 2005-06, 2006-07)

DCIT v. M. Ravinder (2013) 25 ITR 86 / (2014) 61 SOT 21 (URO) (Hyd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Capital or revenue expenditure – Disclosure by way of note in the return – Levy of penalty was not justified

While furnishing the return of income, the assessee had made full disclosure about the repair expenses. It had also attached a note to its return stating that since the question whether repair expenditure was revenue or capital was debatable, the admissibility as revenue expenditure of amount debited as repairs would be discussed at the time of assessment. The claim made by the assessee may have been rejected but it could not be said that it was not held to be not plausible or legally tenable. (AY. 1997-98)

Bennett Coleman and Co. Ltd. v. ACIT (2013) 24 ITR 102 / 144 ITD 459 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Belated return – Search and seizure – Explanation 5A to s. 271(1)(c): Undisclosed income offered in belated return filed u/s 139(4) eligible for immunity from penalty [S.132, 132(4), 139(4)]

Pursuant to a search and seizure action u/s 132 on 16-10-2008, the assessee offered undisclosed income of Rs.1.25 crore to tax in the statement recorded u/s 132(4) for AY 2008-09. The due date for filing of the return of income u/s 139(1) for AY 2008-09 was 30-9-2009. The assessee filed the return of income on 31-10-2009. The return was accordingly filed u/s 139(4) and not u/s 139(1). The AO held that as the return had been filed late, it was beyond the "due date" specified in clause (b) of Explanation 5A to s. 271(1)(c) and so penalty had to be levied under Explanation 5A to s. 271(1)(c). The CIT(A) reversed the AO. On appeal by the department to the Tribunal HELD dismissing the appeal:

Explanation 5A to s. 271(1)(c) provides that if during the course of search, the assessee is found to be the owner of any asset or income which has not been shown in the return of income which has been furnished before the date of search and the "due date" for filing the return of income has expired, the assessee is deemed to have concealed the particulars of his income or furnish inaccurate particulars of income and liable for penalty u/s 271(1)(c). In other words, if the income is offered in the return filed by the "due date", no penalty can be imposed. The question is whether the "due date" in Explanation 5A encompasses a belated return filed u/s 139(4). The "due date" can be very well inferred as due date of filing of return of income u/s 139(4) because wherever the legislature has provided the consequences of filing of the return of income u/s 139(4), then the same has also been specifically provided. E.g., s. 139(3) which denies the benefit of carry forward of losses u/s 72 to 74A if the return

of income is not filed within the time limit provided u/s 139(1). In absence of such a restriction, the limitation of time of "due date" cannot be strictly reckoned with s. 139(1). Even a belated return filed u/s 139(4) will be entitled to the benefit of immunity from penalty. (AY.2008-09)
ITO v. Gope M. Rochlani (2013) 158 TTJ 120 / 95 DTR 33 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Cash credits – Penalty even if explanation unproved if it is not disproved by Assessing Officer.
The assessee had a cash credit of Rs. 7.33 lakhs in his books. He also claimed agricultural income of Rs. 1 lakh. He offered an explanation on both issues which was not accepted by the AO. He accordingly surrendered both amounts to tax to buy peace. The AO imposed penalty u/s 271(1)(c) which was confirmed by the CIT(A). Before the Tribunal, the assessee claimed that the additions were made on "voluntary surrender" and to avoid further litigation and to buy mental peace and that the same could not be considered as furnishing of inaccurate particulars of income or concealment of income. HELD by the Tribunal allowing the appeal:
If the assessee gives an explanation which is unproved but not disproved i.e. it is not accepted but circumstances do not lead to the reasonable and positive inference that the assessee's case is false, then the penalty is not imposable. In the present case, the assessee's explanation remained unproved but it cannot be said as disproved. Further, s. 68 is an enabling provision for making an addition where the assessee fails to give an explanation regarding the cash credit but such addition does not automatically justify imposition of penalty u/s 271(1)(c) r/w Explanation 1 thereto. In order to justify levy of penalty, there must be some material or circumstances leading to a reasonable conclusion that the amount does represent the assessee's income and the circumstances must show that there was a conscious concealment or act of furnishing of inaccurate particulars. From a bare reading of s. 271, it is clear that the provisions of Explanation 1 to s. 271 do not make the assessment order conclusive evidence that the amount assessed was, in fact, the income of the assessee and that the assessee did not satisfactorily explain the cash credits by producing evidence and documents. Accordingly, penalty u/s 271(1)(c) is not leviable (Upendra V. Mithani (Bom) (included in file) and *National Textile v. CIT (2001) 249 ITR 125 (Guj)* followed)(ITA No. 3194/Del/2012, dt. 20th June 2013) (AY. 2008-09)
Saket Agarwal v. ITO (2013) 36 taxmann.com 298 / (2014) 147 ITD 686 (Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – Inaccurate particulars – Termination of services – Capital or revenue – Penalty is leviable [S. 17(ii)]
The assessee received a certain amount on termination of services. He paid tax on the said amount but did not include the same in the return claiming it to be non-complete fee which was a capital receipt. Assessing Officer rejected his claim-Tribunal also held that the receipt was taxable. In the penalty proceedings it was held that not declaring capital receipt in question as his Income in the return of income, filed by the assessee, assessee had furnished inaccurate particulars of income attracting penal provisions under section 271(1)(c) of the Act. Therefore, penalty was leviable. (AY. 2000-01)
ADIT v. Ravindra Bahl (2013) 56 SOT 27 (UO) (Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – No penalty leviable if there is a mere change in the figure of capital work-in-progress [S.153A]
The assessee had shown the investment in capital work-in-progress in the return filed under section 153A of the Act at a reduced figure as compared to the figure taken in the return filed prior to the search. The Assessing Officer levied penalty under section 271(1)(c) of the Act for this increase on CWIP. The CIT(A) deleted the penalty levied. On appeal by the department, the Tribunal observed that the assessee subsequently revised the figures of investment in capital work-in-progress, which did not have any impact on the income assessed and that the Assessing Officer had not brought out any material on record, even though there had been a search in the case of the assessee, on the basis of which it could be said that the assessee had furnished inaccurate particulars of its income.

Accordingly the Tribunal held that the cancellation of penalty was justified. (AY. 2001-02 to 2006-07)
Dy. CIT v. Purti Sakhar Karkhana (2013) 23 ITR 667 / 84 DTR 65 / 59 SOT 29 (URO)/ 23 ITR 667 (Nag.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Gift – Wrong claim – Furnishing of inaccurate particulars – Source of gifts explained – Penalty was not exigible
During the course of assessment proceedings the Assessing Officer found that the assessee had received two gifts from two persons in the name of his son and daughter, respectively. Since there were cash deposits in the donors' account prior to the date of making the gift, the Assessing Officer doubted the creditworthiness and treated the gifts as bogus and unexplained. Accordingly, additions were made to the returned income and penalty proceedings under section 271(1)(c) of the Act were initiated. The assessee explained the source of the gifts with complete documents before the Assessing Officer. The Assessing Officer not satisfied with his explanation, held that the assessee had filed inaccurate particulars of income and imposed penalty. The CIT(A) confirmed the penalty levied. On appeal by the assessee, the Tribunal deleting the penalty levied held:
Admittedly the assessee had furnished particulars of gifts in the return originally filed by him. Such particulars were not found false. There was also no finding that details supplied in the return were incorrect, erroneous or false. It, therefore, was not a case of furnishing inaccurate particulars by the assessee for inviting penalty under section 271(1)(c) of the Act. That apart, the assessee had furnished income-tax particulars as well as declarations for making gifts from the donors along with their balance sheets with the income-tax return. The assessing authority made no enquiry. Even the satisfaction as envisaged by section 271(1B) of the Act was not discernible from the body of the Assessment Order. The explanation furnished by the assessee was found *bona fide.* (AY. 2004-05)
Sushil Kumar Modi v. ACIT (2013) 23 ITR 513 / 58 SOT 155 (URO)(Jaipur)(Trib.)

S.271(1)(c) : Penalty – Concealment – Revised return – Income not declared in the original return of income but in the return filed in response to notice under section 148, penalty upheld partially [S.148]
The assessee, a qualified anaesthetist, filed his return of income in November 2003. The Assessing Officer was of the opinion that the assessee has not accounted certain amounts in its return of income based on the investigations carried out by the department on the hospital where the assessee was employed. Pursuant to the notice issued under section 148, the assessee declared a higher income as compared to his original return and claimed certain expenditure. Re-assessment order was passed and subsequently the Assessing Officer levied penalty under section 271(1)(c) of the Act. The CIT(A) upheld the action of the Assessing Officer. On appeal by the assessee the Tribunal held that the assessee chose to disclose the receipts and claimed expenditure only when a Notice under section 148 was issued and despite the quantum proceedings attaining finality, the conclusion that can be drawn from the conduct of the assessee is that he had concealed his income which led to furnishing of inaccurate particulars and hence penalty under section 271(1)(c) was attracted. The Tribunal further by adopting the "doctrine of continuity" and "concurrence" held that penalty was leviable only for the first assessment year out of six assessment years before it. (AY. 2003-04 to 2008-09)
A. K. Pujari (Dr.) v. ACIT (2013) 21 ITR 714 (Chennai)(Trib.)

S.271(1)(c) : Penalty – Concealment – *Bona fide* belief – Bad debt – No penalty
Assessee wrote off certain amount as provision for bad debts and claimed deduction under section 36(1)(vii) of the Act. The Assessing Officer disallowed the claim & levied penalty holding that a mere technical error in claiming an irrecoverable amount did not attract penalty. CIT(A) allowed the appeal holding that a mere technical error in claiming an irrecoverable amount did not attract penalty. On revenue's appeal in Tribunal, Tribunal dismissed the appeal & held that in view of the uncertainty as to

its realisiability, the assessee made a provision against its dues under the bona fide belief that the same was allowable and there was no attempt to conceal this fact. The inference as to the bona fide belief of the assessee flow from the conduct of full disclosure. It is not necessary that the same i.e., the *bona fides* of its explanation, which no doubt are to be shown by an assessee, is to be only on the basis of some materials. (AY. 2005-06)
Dy. CIT v. VRB Investment (P) Ltd. (2013) 56 SOT 12 (Kol.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Withdrawal of claim for deduction. [S.80IB]
The assessee claimed the deduction under section 80IB and on legal advice withdrew the claim by paying the taxes due on withdrawal of claim suo motu and voluntarily. The bona fide of making the claim and withdrawal thereof, was duly proved. A mere claim, which is not sustainable in law, by itself will not amount to furnishing inaccurate particulars. The Tribunal held that penalty was wrongly levied just for the purpose of levying the penalty. (AY.2006-07)
ACIT v. Grand Organics (P) Ltd. (2013) 153 TTJ 221 / 85 DTR 142 (Panaji)(Trib.)

S.271(1)(c) : Penalty – Concealment – Addition on estimate basis – Levy of penalty is not justified
Tribunal held that the additions are a result of estimated disallowances of expenses and estimated trading addition. Any estimate is an opinion which is taken subjectively, when this different of opinions leads to any addition, it cannot terminate into a penalty under section 271(1)(c) of the Act. Tribunal confirmed the order of CIT(A) who has deleted the impugned penalty. (AY. 2000-01)
ITO v. Guru Nanak Oil Agency (2013) 154 TTJ 38 (UO) / 59 SOT 36 (URO)(Jodh.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Substantial question of law admitted by High Court – Levy of penalty was not justified – Other issues quantum of appeal was set aside – Penalty order was also set aside [S.115JB]
The Tribunal held that since the disallowance forming the basis for levy of penalty itself have been set aside penalty imposed under section 271(1)(c) of the Act does not survive. Tribunal followed the decision of Supreme Court in the case of *K. C. Builders & Anr. v. ACIT (2004) 265 ITR 562 (SC)*. The Tribunal also held that in these two assessment years, book profits alone have been assessed as income and if the tax is paid on the income assessed under section 115JB of the Act, concealment of income had no role to play and is totally irrelevant. The Tribunal followed the decision of Hon'ble Delhi High Court in the case of *CIT v. Nalwa Sons Investments Ltd. (2010) 327 ITR 543*. As the quantum appeal was admitted by the High Court on substantial question of law .Penalty levied on the said issue was deleted. (AY. 2006-07, 2007-08)
ACIT v. SREI Infrastructure Finance Ltd. (2013) 154 TTJ 111 / 85 DTR 361 / 144 ITD 457 (Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – Education of managing director's son – Disallowance of claim for deduction – Levy of penalty is not justified
The assessee claimed expenses on account of education of its managing director's son as business expenses. The Assessing Officer disallowed the said expenses on the ground that same was personal and non-business expenses. The Assessing Officer levied penalty under section 271(1)(c), which was confirmed in appeal. On appeal to the Tribunal, the Tribunal held that the assessee has neither concealed any facts nor furnished incorrect details of the expenses. Therefore, penalty levied by the Assessing Officer after disallowing certain expenses cannot be justified. (AY.2004-05)
Kansara Bearings Ltd. v. ACIT (2013) 153 TTJ 13(UO) / 58 SOT 156 (Jodh.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Depreciation – Part was let out – Knowhow expenditure – Excess claimed – Levy of penalty was not valid

The assessee claimed deduction of depreciation on factory building even though the part of it was let out and the rental income was received, which was taxed under the head income from house property. Secondly the addition was made on account of 1/6th of technical knowhow expenditure written off, which in the facts of the case was excessively claimed. Revenue relied on Delhi High Court judgment in *CIT v. Zoom Communications Pvt. Ltd. (2012) 327 ITR 510 (Delhi)(HC)* and contended that the assessee had made wrong claim, hence penalty was rightly levied. Tribunal held that since all the necessary facts with respect to claim of depreciation and expenditure were furnished levy of penalty was not justified. (AY.2006-07) (ITA No. 2380/Ahd/2002 dt. 30-4-2013)
Mamata Machinery Pvt. Ltd. v. ACIT (2013) ACAJ–July-P.225 (Ahd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Expenditure on higher study of son of managing director – Matter set aside.
The assessee company incurred expenditure on sponsorship of advance education of son of a managing director and claimed under the head 'staff and labour training welfare' The Assessing Officer disallowed the expenses on the ground that son of the managing director was not an employee or director of company. The Assessing officer levied the penalty. On appeal Commissioner (Appeals) deleted the penalty. On appeal to Tribunal by revenue the Assessee contended that an agreement was entered in to by assessee company with son of managing director that he would serve the company for three years after returning to India. Tribunal held that the assessee could not furnish details when the son of managing director of the assessee company returned from abroad and when he joined the assessee company and could not give details of resolution passed in favour of the person who entered in to said agreement with son of the managing director of the assessee company. Matter was set aside to decide fresh. (AY. 1997-98, 1998-99)
Dy. CIT v. Inox India Ltd. (2012) 20 ITR 763 / (2013) 141 ITD 481 (Ahd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Repair expenses – Claim *bona fide*, levy of penalty was not justified
The assessee, while furnishing the return of income, had made full disclosure about the repair expenses. It had also attached a note to its return stating that since the question whether repair expenditure was revenue or capital was debatable, the admissibility as revenue expenditure of amount debited as repairs would be discussed at the time of assessment. The claim made by the assessee may have been rejected but it could not be said that it was not plausible or legally tenable. The bona fides of the claim had not been doubted by the Department at any stage. In the absence of any contrary material brought on record by the Department to show that the deduction claimed by the assessee was not bona fide or was bogus, there was no concealment on the part of the assessee calling for levy of penalty under section 271(1)(c). (AY. 1997-98)
Bennett Coleman and Co. Ltd. v. ACIT (2013) 24 ITR 102 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – For S.40(a)(i) disallowance if TDS deducted next year, levy of penalty was not justified [S.40(a)(i)]
The assessee incurred expenditure towards "fees for technical services" on which TDS was not deducted by the end of the year. Though the auditor stated in the tax audit report that the amount had to be disallowed u/s 40(a)(i), the assessee still claimed a deduction. The TDS was paid in the subsequent financial year. The Assessing Officer disallowed the deduction and imposed penalty u/s 271(1)(c) which was affirmed by the CIT(A). On appeal by the assessee to the Tribunal, HELD allowing the appeal:
S. 40(a)(i) does not impose an absolute disallowance for failure to deduct TDS. It provides that the deduction shall be allowed in the year of deduction of the TDS. As the assessee had in fact deducted TDS in the immediately succeeding year, it had substantially complied with the provision. Also, as the fact that TDS was not deducted was stated in the tax audit report which was filed with the return,

it could not be said that the assessee has not disclosed the correct particulars of income. (AY. 2003-04)
Dynatron Private Limited v. DCIT (2013) 33 taxmann.com 603 (Mum.)(Trib.) www.itatonline.org.

S.271(1)(c) : Penalty – Concealment – Inaccurate particulars – Details not furnished by assessee, levy of penalty was held to be justified
The assessee-company, engaged in running a hospital, had sold off all its fixed assets. It did not carry out any business during the previous year and returned nil income but claimed deduction of expenditure on account of research and development activities. Since the assessee could not furnish reasonable evidence to support its claim of incurring expenditure, penalty was levied by the Assessing Officer. The Tribunal observed that since no business was carried out by assessee during relevant previous year and no detail regarding nature of research carried out by assessee could be produced, assessee had no locus standi to claim such expenditure and, thus, it was a false claim. Hence, the penalty was held to be justified. (AY. 2006-07)
ACIT v. Harvey Heart Hospitals Ltd. (2012) 20 ITR 722 / (2013) 57 SOT 62 (URO) (Chennai)(Trib.)

S.271(1)(c) : Penalty – Concealment – Addition on estimate basis – Levy of penalty was not justified
The Assessing Officer has made all additions, disallowances, treating the cash credits/foreign receipts as well as the assessee’s declared agricultural income merely on estimate and guess work basis without bringing on record any positive and concrete evidence to be applied against the assessee. Hence, the liability could not be sustained. Also, the Assessing Officer has not brought any material on record to establish any *mala fide* intention of the assessee to evade tax in return filed by assessee. Penalty was cancelled. (AY. 2005-06)
ITO v. Sukhamrit Singh (2012) 20 ITR 636 / (2013) 56 SOT 107 (URO)(Asr.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Voluntary declaration by assessee – No satisfaction of Assessing Officer in the reassessment proceedings – Levy of penalty was not justified [S.148, 273A]
Since assessee voluntarily filed the petition under section 273A which admittedly was not very legal, as no penalty had been imposed, but, nevertheless was the starting point for initiation of reassessment proceedings. Therefore, Assessing Officer should have arrived at a satisfaction in the course of reassessment proceedings regarding fulfilment of either of these twin conditions. This satisfaction had to be derived from the conduct of the assessee. Since the very basis for initiation of reassessment proceedings was the petition under section 273A along with which assessee had filed return of income and the same income had been returned in consequence to proceedings under section 148, therefore, it cannot be held that Assessing Officer had judiciously acquired the satisfaction regarding fulfilment of either of these twin conditions. Thus, no penalty was liable to be levied. (AY. 2003-04 to 2008-09)
Vaish Degree College Trust v. ACIT (2012) 150 TTJ 25 / (2013) 56 SOT 112 (URO)(Del.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Agreed additions – *Bona fide* explanation – Levy of penalty was not justified.
During course of assessment proceedings in response to query of Assessing Officer, assessee furnished necessary evidence called for by Assessing Officer with respect to booking advance in all cases except in one case. The Assessing Officer levied penalty in respect of this. The assessee explained that despite its best effort it could neither produce that party nor any evidence in respect of booking advance and it therefore itself offered same as income during assessment proceedings with an intention of buying peace of mind and to avoid litigation. Since the explanation of assessee prima facie appeared to be bona fide in view of fact that in all other cases assessee furnished necessary

evidence to satisfaction of Assessing Officer and nothing had been brought on record by revenue to controvert explanation furnished by assessee, the penalty was liable to be deleted. (AY. 2005-06)
Megh Malhar Developers v. ACIT (2013) 151 TTJ 37 / 56 SOT 109 (URO)(Ahd.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Surrendered Income – Survey – Return filed after survey – Levy of penalty was not justified.
The assessee firm is engaged in real estate business. For the relevant year the assessee did not file its return before due date of filing of return as per section 139(1). A survey was carried out in the business premises. In the course of survey assessee agreed to offer 11.5% of the sales as its income .There upon , the assessee in the course of assessment proceedings agreed that the income declared in the course of survey be adopted as the total income of the assessee. Assessment was completed on the basis of disclosure and the Assessing Officer levied the penalty under section 271(1)(c) of the Act. Commissioner (Appeals) confirmed the order of Assessing Officer levy of penalty. On appeal Tribunal held that the assessee filed return disclosing amount surrendered in survey. Assessing Officer who passed a penalty order, it is not found that there is actually a concealment or non-disclosure of particulars of income in return. Penalty cannot be imposed. (AY. 2007-08, 2008-09)
Vasavi Shelters v. ITO (2013) 141 ITD 590 / 85 DTR 403 (Bang.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Claim to depreciation on entire medical equipment as life saving device – No concealment of any fact, penalty is not leviable
During the assessment proceedings, the Assessing Officer found that the assessee claimed depreciation at the higher rate of 40 per cent on all equipment treating them as life saving devices. The Assessing Officer observed that not all equipment were life saving equipment and disallowed the excess depreciation. He initiated penalty proceedings under section 271(1)(c) treating this addition as concealment of income and furnishing of inaccurate particulars. The Commissioner (Appeals) held that the assessee had made a wrong claim of deduction, which was not to be equated with concealment of income. Therefore he deleted the penalty. On appeal by the Department : Held, that the assessee furnished the entire details of the medical equipment deployed in its hospital. There was no concealment and no furnishing of inaccurate particulars. The assessee did not claim depreciation at a non existent rate and had not misrepresented any fact. It had made a wrong claim of depreciation on the entire medical equipment, since there was no separate entry for general medical equipment to reckon the rate of depreciation. The deletion of the penalty by the Commissioner (Appeals) was justified. (AY. 2004-05).
Dy. CIT v. Apollo Hospitals Enterprise Ltd. (2013) 23 ITR 49 / 85 DTR 378 / 58 SOT 158 (URO)(Chennai)(Trib.)

S.271(1)(c) : Penalty – Concealment – Claim to depreciation on cost of development of portal and e-commerce site – Not a fixed asset under section 2(11)(b) – Penalty not leviable for wrong claim – Deletion of penalty is held to be justified [Ss.2(11)(b), 32]
The assessee claimed depreciation towards expenses incurred on development of portal and e-commerce site. The Assessing Officer disallowed the depreciation on the ground that virtual portal and e-commerce site could not be treated as fixed assets and eligible for depreciation at the rate applicable to plant and machinery and initiated penalty proceedings under section 271(1)(c) of the Act. The Commissioner (Appeals) held that the assessee had disclosed the material facts in its return in respect of the cost of the portal and e-commerce site and there was no concealment or furnishing of inaccurate particulars of income by the assessee. Therefore, he deleted the penalty. On appeal by the Department : Held, that the Assessing Officer had not made out any case of concealment of particulars of income rather, it was a case of disallowance of expenditure on the basis that the portal and e-commerce site was not fixed asset. The expenses were genuine and not denied by the Assessing Officer. There was no doubt that the assessee had developed the portal and

e-commerce site and no declaration was false. The deletion of the penalty by the Commissioner (Appeals) was justified. (AY. 2005-06)
Dy. CIT v. Hifunda Ltd. (2013) 22 ITR 488 / 59 SOT 27 (URO)(Kolkata)(Trib.)

S.271(1)(c) : Penalty – Concealment – Income deemed to accrue or arise in India – Furnishing of inaccurate particulars – Exclusion of amount of tax deducted at source from income not *bona fide* hence penalty is leviable [S. 9(1)(i)]
Assessee, a Japanese bank was operating in India through its branch office/ PE. Its branch in India received certain amount as income from a Korea company as guarantor in respect of a loan given by bank to one 'D'. The amount was subject to tax under Korean law and balance after deduction of tax was remitted to India. It was held that whatever tax had been deducted in Korea on behalf of non-resident assessee had to be claimed in its own country i.e. Japan and therefore, entire amount accrued in India. The amount excluded was not an expenditure claim but only tax paid on behalf of principal company and therefore, entire amount was taxable in hands of assessee in India. It was therefore held that mere note given by assessee that tax deducted in Korea did not accrue in India was not sufficient. As the exclusion of amount was not bonafide penalty u/s 271 (1) (C) was leviable. (AY. 2001-02)
Dy. DIT v. Sumitomo Mitsui Banking Corpn. (2013) 140 ITD 528 / 151 TTJ 409 / 81 DTR 161 / 56 SOT 390 (Mum.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Unrealised export proceeds disclosed in return – Information given in return not found to be incorrect, Levy of penalty held to be not justified [S.10A]
The assessee filed the return and claimed exemption under section 10A of the Act. The Assessing Officer observed that the assessee could not furnish any reason for treating the unrealised export proceeds, eligible for claim for exemption. He, accordingly, added back Rs.13,72,927 and initiated penalty under section 271(1)(c). The Commissioner (Appeals) held that the assessee had not concealed any particulars of income or not suppressed any facts and deleted the penalty. On appeal to the Tribunal, held that the assessee had made adequate disclosure with respect to the unrealised export proceeds at the time of filing its return, and no fault could be found on the conduct of the assessee. Therefore, penalty was not exigible under section 271 (1) (c) of the Income-tax Act, 1961. Appeal of revenue was dismissed. (AY.2007-08)
Dy. CIT v. Genesys International Corporation Ltd. (2013) 21 ITR 581 / 151 TTJ 606 (Mum.) (Trib.)

S.271(1)(c) : Penalty – Concealment – Revised return – Income not fully declared in original return but in return filed pursuant to notice under section 148 – Liable for penalty in first assessment year instead of all assessment years [S.148]
The assessee is a qualified anesthetist working in a private hospital. In response to notice under section 148 of the Income-tax Act, 1961, the assessee filed another return substantially enhancing his income and also claiming expenditure which had not been previously admitted. The Assessing Officer disallowed the claim and also initiated penalty under section 271(1)(c) of the Income-tax Act, 1961. The Commissioner (Appeals) granted part relief to the assessee and held that his claim of expenditure was liable to be accepted at 30 per cent of net receipt on estimation basis. On appeal, the Tribunal restricted the expenditure to 15 per cent. Since, penalty proceedings stood revived, the assessee submitted before the Assessing Officer that he had neither concealed his income nor furnished inaccurate particulars. The Assessing Officer held that the revised return submitted by the assessee was only after the initiation of the investigation and therefore he imposed penalty. The Commissioner (Appeals) confirmed this. On appeal, Held, that only when notice under section 148 was issued to the assessee, he chose to disclose the receipt and raise the claim of expenditure. Despite the fact that the assessment proceedings attained finality, this *ipso facto* did not absolve the assessee from the necessary conclusion from his conduct that he had nevertheless concealed the income which ultimately led to furnishing inaccurate particulars in the initial return.

Therefore, the provisions of section 271(1)(c) were attracted in the act and conduct of the assessee. It is a settled law that the assessment proceedings and penalty proceedings are altogether different and any disallowance does not result in imposition of penalty. In penalty proceedings, the assessee's conduct during assessment always carries significance. Therefore, it could not be said that he was not guilty of concealment and furnishing of inaccurate particulars of income within the meaning of section 271 (1) (c). Moreover, the assessee had been continuing with the practice of alleged concealment and furnishing inaccurate particulars in the assessment years 2000-01 to 2005-06. However, adopting the "doctrine of continuity" and concurrence, the penalty was liable to be confirmed only in the first assessment year i.e., assessment year 2000-01 instead of all the assessment years. (AY. 2000-01 to 2005-06)
Bapuji Cherukuri (Dr) v. Dy. CIT (2013) 21 ITR 714 (Chennai)(Trib.)

S.271(1)(c) : Penalty – Concealment – Explanation 5 – Due date expired – Concession given by revenue, penalty was deleted [S.153A]
Pursuant to search proceedings, assessee filed its returns admitting undisclosed income of various assessment years. Assessing Officer having completed assessments, passed separate penalty orders for each assessment year involved. Assessee was successful in first appeal for some of assessment years on basis of applicability of Explanation 5 to section 271 (1)(c). For relevant assessment years, immunity under Explanation 5 to section 271 (1)(c) was not available mainly for two reasons, firstly, due date for filing return under section 139(1) had already expired as on date of search and, secondly, there was non-satisfaction of condition of payment of tax and interest by due date of filing return of income under section 153A. However, in appellate proceedings revenue itself conceded that assessee's case was squarely covered by Explanation 5 to section 271 (1) (c). Tribunal held that in view of revenue's concession, impugned penalty order passed for assessment years in question was to be set aside. (AY. 2004-05, 2005-06)
Dy. CIT v. Sheo Kumar Kajaria (2013) 55 SOT 91 (URO)(Kol.)(Trib.)

S.271(1)(c) : Penalty – Concealment – Transfer pricing – Computation of ALP – Debate at the time of filing return as to whether current year data can be used or multiple year data has to be used – Assessee adopting multiple year data, bona fide exercise levy of penalty held to be not justified [S.92CA]
Assessee, engaged in providing market support services, returned nil income and computed arm's length price of its transactions on basis of multiple year data. TPO being of opinion that current year data was to be used, added some comparables and made transfer pricing adjustment. The Assessing Officer made addition to assessee's income and initiated penalty proceedings. It was held that where at time of filing return, there was a legal debate as to whether current year data can be used or multiple year data has to be used, assessee's adopting multiple year data was a bona fide exercise. The assessee acted in *bona fide* manner in conducting its transfer pricing study and arriving at arm's length price. The explanation is *bona fide* hence levy of penalty under section 271 (1) (c) is not warranted.(AY. 2006-07)
Verizon Communication India (P.) Ltd. v. Dy. CIT (2013) 140 ITD 122 / 94 DTR 147 (Delhi) (Trib.)

S.271(1)(c) : Penalty – Concealment – Surrender of income – Levy of penalty held to be valid
During the course of assessment proceedings, the Assessing Officer after obtaining details of creditors, issued notice under section 133(6) of the Act to N and G. In the light of the details reflected in the copy of account of the assessee received from these parties *vis-a-vis* the books of account of the assessee, the Assessing Officer noticed differences. The assessee surrendered the amount. Accordingly in terms of the surrender of the amount, the Assessing Officer added the amount and initiated penalty proceedings under section 271(1)(c). This was upheld by the Commissioner (Appeals). On appeal to the Tribunal held that as a result of enquiries made by the Assessing Officer, the assessee did not reconcile the difference in the account of the two parties and instead surrendered the amount as income of the year

under consideration. In the course of penalty proceedings, the assessee did not bring any material before the Assessing Officer to rebut the inferences drawn by the Assessing Officer in the course of assessment proceedings. The assessee claimed before the Assessing Officer and the Commissioner (Appeals) that the addition was accepted in order to purchase peace of mind and to bring an end to the issue. But this explanation was tendered only after the Assessing Officer confronted the evidence in the form of copies of account of the assessee in the books of the two parties. Apparently, only when the assessee was cornered, the assessee surrendered the amount. The surrender was not voluntary. The levy of penalty was valid. (AY.2007-08)
Ajay Jain v. ACIT (2013) 21 ITR 41 / 57 SOT 64 (URO)(Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – Levy of penalty was not justified without pointing out any specific fact
No penalty can be imposed if Assessing Officer has not pointed out any specific fact not disclosed by the assessee or any wrong particulars furnished by the assessee. Based on the primary facts disclosed by the assessee inference drawn by the AO could have been drawn. (AY.2004-05)('C'Delhi, ITA No. 3522/Del/12 dated 11-1-2013)
ADIT v. GE Energy Control Systems (2013) BCAJ Pg. 24, Vol. 44-B Part 5, February 2013 (Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – Consistent losses show mistake/ absence of intention to evade taxes
The assessee filed a return declaring a loss of Rs.16 lakhs in which it had made a wrong claim of depreciation. The AO disallowed the claim and levied 100% penalty which was upheld by the CIT (A). Before the Tribunal, the assessee claimed that its' Directors were technical persons not knowing the intricate provisions of the Act but were dependent on the advice of professionals for preparing income tax returns. It claimed that it had committed a bona fide mistake and that there was no intention to evade taxes. HELD by the Tribunal upholding the plea:
A mere mistake in making of a claim in the return of income would not ipso facto reflect concealment or furnishing of inaccurate particulars of income in terms of s. 271 (1)(c). The wrong claim of depreciation cannot be said to be made with an intention to evade taxes in as much as even after the disallowance of depreciation, the resultant income of the assessee remains a loss. The assessee had been incurring losses since the year 2003 due to the market forces. Considering the entirety of circumstances, the claim on account of depreciation was a mistake, and did not invite the provisions of s. 271(1)(c). (AY. 2007-08)
Amruta Organics Pvt. Ltd v. DCIT (Pune)(Trib.) www.itatonline.org

S.271(1)(c) : Penalty – Concealment – Provision for diminution of value certain stocks – Levy of penalty was held to be not justified
The assessee had made a provision for diminution of value certain stocks but could not provide details of the stocks whose value had decreased. During the course of assessment proceedings the AO made disallowance of write-off of certain obsolete stock on the ground that the write-off was actually a provision for unascertained liability - the AO also held that the loss accrued to assessee was diminution in the value of stock. The view of the AO was affirmed up to the ITAT on the ground that write-off is not allowable as the assessee has failed to file supportive documents and details - The AO levied penalty and the order of the penalty was affirmed by the CIT (A). In the course of the penalty proceedings, the assessee produced material which justified write-off and hence contended that it was entitled for the write-off. The Hon'ble Tribunal deleted the penalty on the ground that the quantum proceedings and penal proceedings being separate and independent, the finding in the quantum proceedings cannot be relied upon to justify penalty; the assessee was entitled to lead fresh evidence to establish that the finding in quantum proceedings is not conclusive. (AY. 2001-02)
Global Green Co. Ltd. v. Dy. CIT (2013) 56 SOT 30 (URO)(Delhi)(Trib.)

S.271(1)(c) : Penalty – Concealment – Expenditure on R&D – Non furnishing of details of fixed assets – Liable to penalty

The assessee claimed to have incurred expenditure for 'R & D' items. The A.O. asked the assessee to produce documents to establish the claim of expenditure. The assessee failed to produce any documentary evidence and hence the A.O. levied penalty. Before the Tribunal, the assessee contended that the 'Tax Audit' report was furnished which mentioned incurring of the expenditure and this fact was sufficient to establish the claim of the assessee. Rejecting this contention and upholding the penalty, the Hon'ble Tribunal held that a tax audit report cannot take place of the documentary evidence and having failed to produce evidence to establish its claim the assessee had exposed itself to penalty. ([AY. 2003-04).

Clariant Chemicals Ltd. v. ACIT (2013) 56 SOT 25 (URO)(Mum.)(Trib.)

S.271AA : Penalty – Failure to maintain information as required by section 92D – Levy of penalty was held to be not justified. [S.92D, R.10D]

The Tribunal deleted the penalty under section 271AA on the basis that the penalty has been levied only on the ground that the assessee had not maintained particulars as per Rule 10D which is not justified because the details enlisted in clauses show caused by Assessing Officer were not required to be maintained by the assessee and further the no opportunity of hearing was afforded by the officer imposing the penalty. The Tribunal held that on merit also penalty under section 271AA is not leviable because the international transaction entered upon by the assessee with its associate concern has been held to be at arm's length. (AY. 2006-07)

Dy. CIT v. Bebo Technologies (P.) Ltd. (2013) 157 TTJ 602 / 93 DTR 129 / (2014) 148 ITD 122 (Chd.)(Trib.)

S.271AAA : Penalty – Search initiated on or after 1st June 2007 – Applicability of provision – Matter remanded [S.271(1)(c)]

For assessment years 2007-08 and 2008-09, assessee filed returns of income after 1st June, 2007. The authorised officer conducted a Search u/s. 132 upon assessee and found undisclosed income. The A.O. as a result of undisclosed income found on search levied penalty u/s. 271(1)(c) upon assessee in both assessment years. The Assessee submitted that provisions of subsection (1) of Section 271 AAA were applicable and therefore provisions of Section 271 (1)(c) were not applicable. The Tribunal held remanding the matter, provisions of Section 271 (1)(c) were not applicable and since no argument was advanced by assessee about otherwise applicability of Section 271 (1)(c). (AYs. 2007-08 2008-09).

Mahendra R. Gupta v. Dy. CIT (2013) 145 ITD 265 (Ahd.)(Trib.)

S.271AAA : Penalty – Search initiated on or after 1st June, 2007 – disclosure of income in revised return filed during course of assessment proceedings – Only revised return is valid – Penalty deleted.[S.132(4)]

The assessee during the course of search proceedings disclosed additional income pertaining to unexplained jewellery. In the original returns the assessee had not disclosed the same. However, the assessee during the course of the assessment proceedings, but before the completion of the assessment, filed revised return of income and offered the entire value of jewellery disclosed in the search. The Assessing Officer levied penalty under section 271AAA for the reason that the assessee has not acted according to the statement made under section 132(4) of the Act. The CIT(A) deleted the penalty levied by the Assessing Officer. The Tribunal confirmed the order of the CIT(A) by observing that assessee having offered the whole of undisclosed income admitted by him at the time of search in the revised return filed by him before the completion of assessment, and paid the tax thereon along with interest and explained that the undisclosed jewellery was acquired over a period of time, penalty under section 271AAA was not leviable. (AY. 2009-10)

ACIT v. A. N. Annamalaisamy (HUF) (2013) 87 DTR 202 / 155 TTJ 98 (Chennai)(Trib.)

S.271B : Penalty – Failure to get accounts audited – Appointment of auditor – Delay in audit – Reasonable cause – Deletion of penalty was held to be valid [S.44AB, 273B]

Tribunal granted relief under section 273B to assessee from levy of penalty u/s 271B holding that the assessee, being a co-operative society, registered under U.P. Co-operative Societies Act, 1965, established that appointment of auditor was not within its domain and, it was also not within its domain to have auditor to be appointed by Registrar or such person as appointed by State Government, to complete audit within specified date. Deletion of penalty was held to be valid.

CIT v. Iqbalpur Cooperative Cane Development Union Ltd. (2013) 218 Taxman 70 (Mag.) (Uttarakhand)(HC)

S.271B : Penalty – Failure to get accounts audited – Reasonable cause – Delay by auditors [S.44AB, 273B]

Where the assessee-cooperative society had provided books of account to auditors in time, but failed to get accounts audited within period stipulated under s. 44AB due to delay on part of auditors, penalty under s. 271B was not leviable as there was reasonable cause for delay as per s. 273B. (AY. 1990-91)

CIT v. U.P. Rajya Sahkari Evam Bhoomi Vikas Bank Ltd. (2013) 216 Taxman 191 (Mag.)/ 353 ITR 152 (All.)(HC)

S.271B : Penalty – Failure to get accounts audited – Delay on part of auditors – Penalty could not be levied [S.44AB]

Held that the books of account were delivered by the assessee for audit on August 14, 1989 (in time) and the report was received from the auditors on March 31, 1991. On this fact, the Tribunal arrived at a conclusion that the delay was on the part of the auditors and it amounted to reasonable cause. This finding of the Tribunal on the facts and circumstances that there was reasonable cause, was a finding of fact. Hence, penalty could not be imposed under section 271B. (AY. 1990-91)

CIT v. U. P. Rajya Sahkari Evam Bhoomi Vikas Bank Ltd. (2013) 353 ITR 152 (All.)(HC)

S.271B : Penalty – Failure to get accounts audited – Illness of auditor levy of penalty was not justified [S.44AB]

Going by the nature of illness that the assessee's auditor had, and considering that he had filed the tax audit report promptly for the earlier years, the delay of 29 days in filing the tax audit report under section 44AB merited to be condoned. Hence, penalty could not be imposed.(AY. 1988-89)

Lakshmi Card Clothing Manufacturing Co. P. Ltd. v. Dy. CIT (2013) 353 ITR 544 / 216 Taxman 112 (Mag.)(Mad.)(HC)

S.271B : Penalty – Failure to get accounts audited – Civil Contractor is not liable to penalty as the CBDT has not prescribed the books of account [S. 44AA, 44AB, 271A, Rule 6F]

The assessee was a civil contractor engaged in Government contract. He did not maintain books of account. The A.O. levied penalty under section 271A and 271B.In appeal before the Tribunal the Assessee contended that since no books of account were prescribed by the CBDT in respect of civil contractor, penalty levied under section 271B for not getting books of account audited was also not justified. The ITAT held that since there is an obvious omission in respect of civil contractor in Rule 6F(1), penalty under section 271A cannot be imposed on civil contractor for non-maintenance of books of account. Once penalty is not leviable under section 271A, there is no question of imposing penalty under section 271B for not getting books of account audited. (AY.2008-09)

K.V. Ramachandran v. Dy. CIT (2013) 58 SOT 264 (Cochin)(Trib.)

S.271B : Penalty – Failure to get accounts audited. [S.44AB, 80P]

The assessee had not got their accounts audited under section 44AB of the Act inspite of the fact that their gross total income had exceeded ` 40 lakhs on the ground that their income was exempt under section 80P(2) of the Act. As a result the Assessing Officer imposed penalty under section 271B of the Act. It was however held that as the assessee was under the *bona fide* belief that their income was exempt under section 80P(2) of the Act, they did not get their accounts audited and hence penalty under section 271B of the Act was not imposable. (AY. 2006-07, 2007-08)
Cane Development Union v. ACIT (2013) 21 ITR 683 / 56 SOT 9 (UO)(Luck.)(Trib.)

S.271B : Penalty – Failure to get accounts audited – Business Income – Tax Audit – Turnover – Online buying and selling of commodities being speculative in nature not liable for penalty [S.44AB]
Assessee is engaged in online buying and selling commodities through commodity exchange, as a speculative activity, wherein no physical delivery was taken or given, total transaction booked with such commodity exchange could not be considered as 'turnover' for purpose of considering liability of assessee to get accounts audited u/s.44AB. Buying and selling the units was a speculative transaction. No delivery has taken place hence Levy of penalty was deleted. (AY.2006-07)
Banwari Sitaram Pasari HUF v. ACIT (2013) 140 ITD 320 / 155 TTJ 110 / 88 DTR 349 (Pune)(Trib.)

S.271B : Penalty – Failure to get accounts audited – Business Income – Tax Audit – Project completion method [S.44AB]
The assessee company was engaged in business of construction. It was following project completion method of accounting. In respect of a SRA project taken up by the assessee, it had received a booking advance of ` 11.25 crore from M/s. Welspun Gujarat Stahi Robern Ltd. The advance was subsequently returned in 2010 since the property had several encroachments. The assessee did not get its accounts audited as required u/s. 44AB of the Act since it was of the view that the provisions of sec. 44AB would apply only when sales, turnover or gross receipts exceed ` 40 lakh. Since the assessee had only received an advance which was later refunded and the assessee was following project completion method and the sales would be accounted in the year of completion of the project. The AO levied penalty u/s 271B of the Act. The Tribunal held that, in case of an assessee following project completion method, advance received which is required to be adjusted against future income cannot be considered as gross receipt of business or turnover. Bonafide belief constitutes reasonable cause for non-levy of penalty. (AY. 2007-08) (ITA no 307/M/011, dated 21-11-2012)
Pilot Construction Pvt. Ltd. v. ITO (2013) BCAJ Pg. 18, Vol. 44-B Part 4, January 2013 (Mum.)(Trib.)

S.271B : Penalty – Failure to get accounts audited – Since assessee is entitled to registration for levy of penalty matter sent back to Assessing Officer [S.12A]
Assessee trust did not get its accounts audited on the basis that the income is exempt. Therefore, the assessee had a reasonable cause for not getting its accounts audited under section 44AB of the Act. The Tribunal held that the assessee is entitled to registration. So for the levy of penalty, the Tribunal remanded the matter back to the file of Assessing Officer to be decided afresh in accordance with law after providing due and reasonable opportunity of being heard to the assessee. (AY. 2003-04 to 2007-08)
Urban Improvement Trust Sriganganejor v. CIT (2013) 142 ITD 313 / 152 TTJ 507 / 24 ITR 622 / 83 DTR 282 (Jodh.)(Trib.)

S.271BA : Penalty – Failure to furnish reports – International transaction – Transfer pricing – Report from accountant to be furnished – Failure to furnish report is liable to penalty [S.92E, Form No 3CEB]
Assessing Officer levied penalty under section 271BA on ground that assessee failed to furnish accountant's report in Form No. 3CEB as required under section 92E by due date. Submission of

assessee was that it had filed return of income electronically; therefore annexures were not required to be furnished, and that Form No. 3CEB was filed during penalty proceedings. Though the contention of assessee that return of income in electronic form was not to accompany report in Form 3 CEB was correct. Tribunal held that the Assessee was required to file report under section 92E, read with rule 10E, before specified date i.e., due date for filing of return. Therefore, penalty under section 271BA was rightly imposed. (AY. 2006-07)
Nectar Lifesciences Ltd. v. Dy. CIT (2013) 55 SOT 93 (URO)(Delhi)(Trib.)

S.271C : Penalty – Failure to deduct tax at source – Bona fide belief for non deduction of TDS – No penalty [S.40(a)(ia), 195, 271B]
Assessee was non-resident company having its principle office at H and procured advertising airtime from some Hong Kong based channel companies and sold same to SIPL in India. Accordingly, assessee claimed deduction of cost of advertising airtime. Assessing Officer observed that since channel companies had business connection in India, these were taxable in India and thus for non–deduction, he disallowed cost of advertising airtime under section 40(a)(i) and levied penalty under section 271C r.w. section 273B of the Act on the ground that no reasonable cause was shown for non deduction of TDS under section 195. CIT(A) deleted penalty on the grounds that the assessee had given all the details and had the bona fide belief that no tax was deductible at source. On further appeal in Tribunal, Tribunal dismissed the appeal of the revenue and held that when the payment was made by non- resident to resident and at time of fling of return, there was prevalent view of judicial pronouncement of *Shri Kumar Poddar v. Dy. CIT (1998) 65 ITD 248(Mum.)(Trib.)* and the assessee was under the bona fide belief that no tax was deductible at source under section 195 with respect to transaction with the channel companies for advertising airtime, since the company were not taxable in India & also the assessee had deposited all the tax after arising order under section 143(3) of the Act. After relying on the decision of Vodafone Holding *B. V. v. Union of India 341 ITR 1 (SC) & Asia Satellite Telecommunication Co. Ltd. v. DIT 332 ITR 340 (Delhi) & CIT v. Eli Lilly & Co. (P) Ltd. 312 ITR 225*, Tribunal deleted the penalty and held that since the assessee had a bona fide belief that it was not required to deduct tax at source, even if the amount is held taxable later on, it will not result in levying penalty under section 271C.
Dy. CIT v. Satellite Television Asian Region Ltd. (2013) 56 SOT 22 (URO)(Mum.)(Trib.)

S.271D : Penalty – Loan or deposit – Amount assessed as undisclosed income, such amount could not be considered as deposit or loan – Levy of penalty was not justified. [Ss. 68, 271E]
Since the booking advance received by the assessee in cash had been assessed as undisclosed income during assessment proceedings, such amount could not again be considered as deposit/loan in violation of section 269SS/269T for levy of penalty under section 271D/271E.
CIT v. Shyam Corporation (2013) 218 Taxman 136 (Mag.)(Guj.)(HC)

S.271D : Penalty – Accepts any loan or deposit – Finding of fact – Explanation not reasonable – Levy of penalty was held to be justified [S.269SS]
Held the order of the Tribunal had dealt with all the questions of fact and there was no question of law much less a substantial question of law to be considered. The Tribunal being the last court of fact had discussed in detail and had discarded the explanation given by the assessee. The assessee had contravened the provisions of s. 269SS. The imposition of penalty was valid. (AY. 1991-92)
Auto Piston Mfg. Co. P. Ltd. v. CIT (2013) 355 ITR 414 / 218 Taxman 150 (Mag.)(P&H)(HC)

S.271D : Penalty – Cash payments in excess of Rs. 20,000 – No reasonable cause – Levy of penalty was justified [Income-tax Rules 1962 – Rule 6DD]
Except for stating that they had to make payments to the suppliers and the labour, there is hardly any material available on record to show any justification for payment of cash over and above ` 20,000 during the course of the year. Even the justification for making payment in cash must

necessarily satisfy extant rule 6DD of the Income Tax Rules. The assessee had not shown any acceptable or unavoidable circumstances or impracticability or difficulty in receiving money otherwise than in cash. Except for mere statement that the work undertaken by the assessee at outside the State was for the first time and there was necessity for meeting the requirements to labour and other suppliers demanding cash, no details were placed before the authorities concerned to accept the case of the assessee that there was a reasonable cause shown in receiving an amount of Rs.6,51,000 in cash from 'M'. Thus, the assessing authority rightly pointed out that the explanation was not convincing, hence, the case of the assessee was rejected. The plea that the transaction should be viewed as a gift transaction is devoid of merit and it is only an afterthought. Confronting with the factual situation the transaction in cash attracted penal provision, the assessee immediately wanted to change the colour of the transaction to one of gift. Hence, this plea was liable to be rejected. (AY. 1994-95)
Builtec Engineers & Builders v. DCIT (2012) 76 DTR 410 / (2013) 256 CTR 205 / 214 Taxman 99 (Mag.)(Mad.)(HC)

S.271D : Penalty – Accepts any loan or deposit – Reasonable cause. [S.269T, 271E, 273B]
Tribunal cancelled penalties u/ss. 271D and 271E after appraising several facts and circumstances in accepting the assessee's explanation that there existed reasonable cause within the meaning of s. 273B for the violation of the provisions of S. 269SS and 269T. The revenue had not brought on record any material to show that the finding of the Tribunal as to the existence of reasonable cause is perverse. No substantial question of law arose. (AY. 1992-93, 1993-94, 1996-97, 1999-2000 & 2000-01)
CIT v. Sahara India Mutual Benefit Co. Ltd. (2013) 83 DTR 171 / 257 CTR 225 / 212 Taxman 97 (Mag.)(Delhi)(HC)

S.271D : Penalty – Accepts any loan or deposit – Limitation – Show cause notice –Barred by limitation. [S.269SS, 275]
Show-cause notice for the alleged contravention of s. 269SS was issued on the assessee by the AO on 27th March 2003. Penalty levied by Jt. CIT on 28th May 2004 was beyond the period of limitation, notwithstanding issue of show-cause notice by Jt. CIT after the matter was referred to him on 22nd March 2004. (AY. 2001-02)
CIT v. Jitendra Singh Rathore (2013) 352 ITR 327 / 83 DTR 227 / 257 CTR 18 (Raj.)(HC)

S.271D : Penalty – Accepts any loan or deposit – Contravention. [S. 269SS, 269T, 271E]
Tribunal held that there was no violation of either section 269SS or section 269T so as to attract penalty under section 271D or section 271E because the payment and repayment were made through same current account.
Dy. CIT v. Forging Ltd. (2012) 138 ITD 143 / (2013) 153 TTJ 107 / 84 DTR 153 (Delhi)(Trib.)

S.271D : Penalty – Accepts any loan or deposit – Reasonable cause – No material was placed [S.269SS]
Assessing Officer imposed penalty upon assessee for acceptance of cash loans from various persons exceeding specified limit. Assessee submitted that he had to follow village customs and traditions and accept words of elders of village and that some depositors did not have PANs. No material was placed on record as to which elder advice assessee had taken and why loan was not received through crossed cheque when some depositors were having PAN, therefore, imposition of penalty under section 271D was justified. In favour of revenue. (AY. 2005-06)
Addl. CIT v. Madireddy Venkat Reddy (2013) 55 SOT 94 (URO)(Hyd.)(Trib.)

S.271E : Penalty – Builder – Earnest money returned to parties in cash – Neither loan or deposit – Penalty could not be levied [Ss.269T, 271E]

The assessee, engaged in the business of building properties on various sites returned an amount of Rs. 15,92,940 to various parties had been received by of advance and the assessee also reflected the amount of advance received in its balance-sheet, which had been accepted by the Revenue in the earlier years. It was rightly held that section 269T would not be applicable and, therefore, no penalty under section 271E could be levied for breach of section. (AY. 2006-07)

CIT v. Madhav Enterprise Pvt. Ltd. (2013) 356 ITR 588 / 218 taxman 115 (Mag.)(Guj.)(HC)

S.271FA : Penalty – Annual information return of income – Writ – Alternative remedy. [S. 246, Constitution of India, Art 226]

The assessee, a sub-registrar, filed instant writ petition against imposition of penalty under s. 271FA. Held, since an alternative remedy by way of appeal was available to assessee against impugned penalty order before Commissioner (Appeals), writ petition was to be dismissed.

Sub-Registrar, Pali v. UOI (2013) 216 Taxman 187 (Mag.) / 258 CTR 446 (Raj.)(HC)

S.271G : Penalty – Documents – International transaction – Transfer pricing – Maintenance of information – Notice to furnish information – Levy of penalty was not justified. [S.92D, Rule 10D]

Where the Assessing Officer in his order under section 271G had not mentioned which document or information was required by a notice under section 92D(3) and was not furnished by assessee within a period of thirty days or extended period, order of penalty under section 271G could not be sustained.

CIT v. Leroy Somer & Controls (India) (P.) Ltd. (2013) 218 Taxman 216 / 92 DTR 369 / (2014) 360 ITR 532 (Delhi)(HC)

S.272A : Penalty – Furnish information – Delay in filing PAN – Delay of more than eight years – Quarterly return was filed – Matter was set aside

The assessee raised a ground that there was a reasonable cause for not filing quarterly statements in time because as per departmental instructions, assessee had to submit details with at least 80 per cent of PAN details, however, it was operating in transport industry where most of truck drivers and owners were not educated and they had not provided their PAN details, due to which, filing of declaration had been delayed. The Commissioner (Appeals) accepted assessee's version and deleted penalty. The Tribunal allowed revenue's appeal observing inter alia that no evidence had been brought on record to show that there was any correspondence undertaken by assessee with deductees for obtaining PAN and that such PAN were obtained only in year 2010 when such quarterly returns were filed. Held, since Tribunal did not even call for documents on record available before Commissioner (Appeals) in order to find out whether there was any evidence showing assessee's inability to file returns in time, impugned order was to be set aside and, matter was to be remanded back for disposal afresh.

Kataria Transport Co. Ltd. v. ITO (2013) 216 Taxman 69 (Mag)(Guj.)(HC)

S.272A : Penalty – E-TDS return – Delay in filing TDS return through NSDL is a technical breach – Levy of penalty is not justified

The AO imposed penalty u/s 272A(2) (k) for delay in filing the TDS return u/s 200(3). The assessee's argument that the delay was due to a shortage of staff was rejected on the ground that the same was not reasonable cause. The CIT (A) confirmed the penalty. On appeal by the assessee to the Tribunal, HELD allowing the appeal:

The penalty was levied by the department in a mechanical manner. The assessee would have filed the hard-copy of the quarterly statements but this is not accepted by the department. The computer has to generate a number for acknowledging receipt of such statements. The number is not generated till the

computer tallies the PAN and the information available on AS-26. The late filing is caused by an administrative glitch. The delay occurs because the assessee deductors are dependent on information of TDS and its deposit from the sub treasury of the Government and the filing of the e-return through the designated service provider of the Income-tax Department. The assessee-deductors have no technical competency to file the return by themselves without external aid. They are also not competent to do so by themselves as per rule 37B and "Filing of Return of Tax deducted at source" scheme 2003, which requires the submission of quarterly statement through NSDL or other approved agencies which are third parties and not under the control of the assessees. Penalty u/s 272(A) (2) cannot be levied in a routine manner. The late filing of TDS return cannot be said to be intentional or willful. It is only a technical or venial breach.(AY.2009-10)
Branch Manager, UCO Bank v. ACIT (2013) 23 ITR 209 / 58 SOT 78 (URO)(Cuttack)(Trib.)

S.272A : Penalty – E-TDS return – Penalty deleted first year of default [Form No.24Q, 26Q]
Tribunal held that when there is no provision for issuing separate notice for levy of penalty for late or non-filing of From nos. 24Q and 26Q as in case of failure to file these forms penalty is leviable under section 272A(2). For relevant assessment year, assessee did not file E-TDS returns within specified time - Assessing Officer, thus, levied penalty under section 272A(2). Tribunal held that since requirement of filing Form No. 24Q was new one being first year of filing such return and, moreover, tax had been duly deducted by assessee, in such a case, impugned penalty order was not sustainable. In favour of assessee.(AY.2006-07)
The Manager, Union Bank of India v. Dy. CIT (2013) 55 SOT 96 (URO)(Agra)(Trib.)

S.272B : Penalty – Permanent account number – PAN of deductees – Reasonable cause – Levy of penalty was not justified. [S.139A(5A)]
Where assessee-deductor did not mention PAN of deductees on TDS certificates issued by it, as same was not provided by deductees within time prescribed, there was reasonable cause for non-compliance of section 139A(5A), and, therefore, penalty under section 272B could not be imposed. (AY.2003-04)
CIT v. Gail (India) Ltd. (2013) 356 ITR 711 / 261 CTR 544 / 92 DTR 238 / 218 Taxman 415 (All.)(HC)

S.272B : Penalty – Permanent account number – Penalty on deductor for wrong/ non-stating of PAN in TDS return is not applicable if information is not furnished by deductee. Penalty is Rs. 10000 per deductor and not per wrong PAN.
The assessee filed a TDS return in which the PAN of 30,706 deductees was either missing or was incorrectly stated. The AO held that as penalty of Rs. 10,000 u/s 272B was levaible for the non-mentioning of the PAN, the penalty had to be computed per PAN/deductee. He accordingly levied penalty of Rs. 30.70 crore at the rate of Rs. 10,000 per deductee. The CIT(A) restricted the penalty to Rs. 10,000 on the ground that as per the CBDT's letter dated 5-8-2008 bearing No. 275/24/2007-IT(B), s. 272B penalty is linked to the person/ deductor and not with the number of defaults in the PAN quoted in the TDS return. The Tribunal upheld the view of the CIT(A) (order attached). On appeal by the department to the High Court HELD dismissing the appeal:
There are two reasons why the appeal cannot be entertained. Firstly, the AO in the penalty order u/s 272B has not specifically referred to any default or failure by the assessee mentioning PAN Number even when the said particulars and details were available. The stand taken by the assessee was that the PAN Numbers were not furnished by the truck owners and, therefore, they were not quoted by them or PAN Numbers as informed were quoted. In case, the PAN Numbers are not furnished by the deductees, the assessee cannot be penalized u/s 272B. S. 139A also imposes the obligation on the deductees to furnish PAN Number to the deductor. Secondly, the stand taken by the revenue is contrary to the stand taken by the CBDT. The AO had imposed penalty of Rs. 10,000/- in each case where PAN Number was not provided by the deductee. However, the CBDT has in letter dated 5-8-

2008 *vide* No.275/24/2007-IT(B) clarified that penalty of Rs. 10,000 u/s 272B is linked to the person, i.e., the deductor who is responsible to deduct TDS, and not to the number of defaults regarding the PAN quoted in the TDS return. Therefore, regardless of the number of defaults in each return, maximum penalty of Rs. 10,000/- can be imposed on the deductor. Penalty cannot be imposed by calculating the number of defective entries in each return and by multiplying them with Rs. 10,000/-. This also appears to be a legislative intent, as in many cases, the TDS amount may be small or insignificant fraction of Rs. 10,000. (Clarified that the Q whether penalty u/s 272B can be imposed if the deductor has not correctly recorded the details despite proper representation by the deductee is not decided) (ITA. No. 314/2013, dt. 26-7-2013)
CIT v. DHTC Logistics Ltd. (2014) 41 taxmann.com 439 / 221 Taxman 83 (Mag.)(Delhi)(HC)

S.272B : Penalty – Permanent Account Number
Assessee during the year under consideration had filed the TDS quarterly statement for the financial year 2008-09 in Form No. 26Q on 24.9.2009. AO on the scrutiny of the said e-TDS return noted that the PAN Numbers of six deductees were found to be invalid and hence levied the penalty u/s 272B. CIT(Appeals) noted that default was in the case of one deductee and hence upheld the levy of penalty u/s 272B. The Tribunal held that, where the assessee has failed to furnish the PAN number of one of the deductees, the assessee has defaulted and is exigible to levy of penalty u/s 272B. Assessee has failed to establish its case of reasonable cause for the failure to furnish the correct PAN number of one of the deductees. Hence order of the CIT (Appeals) upheld. (AY. 2009-10)
Tej Pal Gupta v. ITO(TDS) (2012) 20 ITR 46 / 56 SOT 67 (Chd.)(Trib.)

S.272B : Penalty – Permanent account number – Failure to mention PANs in form no 16, 16A, is liable to penalty [S.139A, form no 16, 16A]
During course of inspection, Assessing Officer noticed that assessee had failed to mention PANs on Form Nos. 16 and 16A issued to persons from whom tax has been deducted at source. Assessee neither gave any explanation nor even appeared before ITO (TDS) on date fixed - ITO (TDS), thus, formed an opinion that assessee was not prevented by any reasonable cause and, thus, he passed a penalty order under section 271B. Tribunal held that on facts, assessee had not made any compliance of section 139A(5B) and, thus, impugned penalty order was to be confirmed. (AY. 2007-08 to 2009-10)
General Manager, J&K Project Construction Corpn. Ltd. v. ITO (2013) 55 SOT 98 (URO (Asr.)(Trib.)

S.273 : Penalty – Initiation – Draft assessment order – Levy of penalty was valid [Ss. 144B, 210]
Merely because the Assessing Officer in the draft assessment order passed u/s 144B had not proposed levy of penalty u/s 273(2)(a) upon assessee and subsequently while passing regular assessment order initiated proceedings for levy of penalty upon assessee, penalty proceedings could not be quashed on ground that no such proceedings were proposed in draft assessment order.(AY. 1979-80)
J.K. Synthetics Ltd. v. CIT (2013) 356 ITR 104 / 215 Taxman 54 (Mag.)/ 95 DTR 76 (All.)(HC)

S.273A : Penalty – Commissioner – Power to reduce or waive – Delayed filing of return – Reasons were accepted in one year and not for other years – Rejection of application was held to be not proper
Since returns for all the relevant years were filed late, reason assigned while accepting waiver of penalty for assessment years 1985-86 to 1987-88, would equally apply to assessment year 1988-89 and, thus, Commissioner was not justified in declining relief to assessee in one of the years while granting it for others. (AY. 1985-86 to 1988-89)
Joginder Singh v. CIT (2013) 219 Taxman 98 (Mag.)(P&H)(HC)

S.273A : Penalty – Commissioner – Power to reduce or waive – Factors to be considered – Order was set aside – Commissioner was directed to decide the matter on merits [S.139, 148]

Since survey proceedings were not conducted against assessee and no notice under section 139 or 148 was ever served on assessee, Commissioner was not justified in holding that return was not voluntary and rejecting assessee's application for waiver of interest and penalty under section 273A on the ground that survey was conducted against assessee's husband and only after detection of concealed income, assessee filed her return. Held, Commissioner should confine his consideration to factors referred to in section 273A and to no other factor. Rejection of application holding that the return was not voluntary was held to be not justified. (AY 1985-86 to 1989-90)

Dr. Santosh Rani Batra v. CIT (2013) 218 Taxman 136 (Mag.)(P&H)(HC)

S.273A : Penalty – Commissioner – Power to reduce or waive – Disclosure of income prior to any detection of the concealed income – Commissioner was directed to decide the application [S.139(2)]

The non-obstante clause indicates that the power so exercised would take colour from the sub-sections and sub-clauses of Section 273-A of the Act, and from no other provision of the Act. The opening words of Section 273-A of the Act, i.e., "Notwithstanding anything contained in this Act...", confine consideration by the Commissioner of Income Tax to factors enumerated in Section 273-A of the Act. An adjudication based on grounds, other than grounds referred to in Section 273-A, would necessarily invite a valid charge that the order is null and void for an illegal exercise of jurisdiction, or a failure to exercise jurisdiction in accordance with statutory parameters set out in Section 273-A of the Act. A perusal of the impugned order reveals that the assessee had, prior to issuance of notice under sub-section 2 of Section 139 of the Act, voluntarily made full disclosure of his income prior to any detection of the concealed income or the inadequacy of the particulars furnished. The Commissioner of Income Tax has assumed the role of an Assessing Officer and while dismissing the petition and rejecting the plea for reduction/waiver of the amount of penalty imposed has referred to the very same factors that led the Assessing Officer to impose penalty. In this view of the matter, the writ petition is allowed, the impugned order is set aside and the matter is remitted to the Commissioner of Income Tax, to decide the application, in accordance with law, within three months from the date of receipt of a certified copy of this order. (AYs. 1985-86 to 1987-88)

Kahan Chand & Ors. v. CIT (2013) 94 DTR 234 / 38 taxmann.com 71 / (2014) 264 CTR 322 (P&H)(HC)

S.275 : Penalty – Concealment – Limitation – Appeal – Supreme Court – Raised first time – Matter set aside to Tribunal [s.261, 271(1)(c)]

Limitation issue raised for the first time before Hon'ble Supreme Court on the applicability of whether Ss. 275(1)(a) or 275(1)(c), The same should first be answered by the Tribunal and then by the High Court, therefore, the matter is set aside.

CIT v. Jhabua Power Ltd. (2013) 262 CTR 277 (SC)

S.275 : Penalty – Bar of Limitation for Imposition – Block assessment has no bearing with orders passed under sections 271D and 271E

The Block assessment order was passed in the month of June 2001. Penalty proceedings u/s. 271D and 271E were initiated on 15.01.2001 by issue of show cause notice and penalty orders were passed on 30-3-2006. CIT(A) held that block assessment had no bearing with orders passed u/s. 271D & 271E and held that impugned penalty orders were barred by limitation in terms of Section 275(1)(c). Judicial member upheld order of CIT(A) while Accountant member held otherwise. The Third Member held the judicial member was justified in setting aside penalty orders on ground of limitation in view of order passed by Rajasthan High Court in case of *CIT v. Jitendra Singh Rathore (2013) 352 ITR 327.*(BP. Ending-8.6.1999)

ACIT v. Dipak Kantilal Takwani (2013) 145 ITD 35 / (2014) 159 TTJ 304 (Rajkot)(Trib.) (TM)

S.276B : Offences and prosecutions – Dismissal of complaint for default of assessing officer – Restoration of original complaint [S. 278B]

The Income-tax Officer, for the assessment year 1988-89, filed a complaint against the first respondent-company and its two directors, who were in charge of the affairs and responsible for the conduct of the business of the company, for the offence under s. 276B read with s. 278B. The matter was adjourned for twenty-three hearings. The Income-tax Officer filed 131 cases. In spite of this, he had not taken any steps to produce the witnesses or mark the documents. Under the circumstances, the Income-tax Officer filed a memo stating that twenty-two documents had been filed before the Chief Judicial Magistrate for some other case. He further informed the court that at the time of hearing, he would produce the documents. The Magistrate dismissed the complaint on the ground that the Income-tax Officer had been given sufficient opportunities to prove his case but he had failed to do so and discharged all the accused. Subsequently, the Income-tax Officer had filed a revision petition before the District and Sessions Judge but the case was rejected in limine. On a revision petition, held, allowing the petition, that the Income-tax Officer had listed twenty-two documents along with the complaint. Those documents were on the file of the Chief Judicial Magistrate. Therefore, he could not produce the documents before the trial court within a reasonable time. Therefore, the delay had not been caused by him since the documents were in judicial custody in some other case. Besides, the documents were not created ones. Therefore, the character of the prosecution case had not been changed. The case had to be decided on the merits and a complete trial was necessary. The Magistrate was directed to restore the case on his file and proceed with the case on the merits after giving an opportunity to the parties within a period of five months from the date of receipt of this order without being influenced by this court's discussion. (AY. 1988-89)

P. Jayanandan, ITO v. Sri Ramakrishna Steel Industries Ltd. (2013) 355 ITR 528 (Mad.) (HC)

S.276CC : Offences and prosecutions – Failure to furnish return of income – Where assessee had not filed return timely, revenue could be permitted to raise a presumption regarding culpable mental state of assessee, and therefore, it would be for assessee to establish that failure was not wilful, therefore, where such presumption had not been taken into consideration by Courts, their orders were to be set aside and assessee was to be prosecuted under section [S.278E]

Assessee filed return of income on 1-5-1995 for assessment year 1994-95. Revenue initiated prosecution under section 276CC on ground that delay was wilful and no valid reasons were given by assessee for late filing of return. However, trial Court and Sessions Court discharged assessee on ground that revenue could not prove wilful failure of assessee. Revenue filed petition for reversal of orders of Courts. Where assessee had not filed return timely, revenue could be permitted to raise a presumption regarding culpable mental state of assessee, and therefore, it would be for assessee to establish that failure was not wilful, therefore, where such presumption had not been taken into consideration by Courts, their orders were to be set aside and assessee was to be prosecuted under section 276CC.(AY.1994-95)

ACIT v. Nilofar Currimbhoy (2013) 219 Taxman 102 (Mag.)(Delhi)(HC)

S.276CC : Offences and prosecutions – Compounding cannot be done in cases where order of conviction has been passed – Assessee to show sufficient cause or reason to support request for compounding [Ss. 271(1)(a), 279]

Held, the assessee should have made a written request for the compounding of the offence, in the prescribed proforma, as provided under paragraph 4.4.1 of the guidelines. The assessee should also have satisfied the other conditions contained in the guidelines, for the compounding of the offence. Even though the guidelines prescribe that certain cases should not be compounded, normally, it is for

the assessee to show sufficient cause or reason to support his request for the compounding of the offence. The assessee was permitted to submit an appropriate application, before the Director General of Income-tax in the format prescribed in the guidelines for the compounding of the offence. On receipt of the application appropriate order had to be passed on the merits and in accordance with law after giving an opportunity of personal hearing to the assesse. (AY.1987-88)
V.G. Paneerdas and Co. P. Ltd. v. Secretary, CBDT (2013) 352 ITR 77 / 218 Taxman 138 (Mag.)(Mad.)(HC)

S.276CC : Offences and prosecutions – Failure to file return in time – Accused paying tax and moving Settlement Commission – No immunity by Commission from prosecution already launched
Prosecution was launched under section 276CC of the Act for not filing return after conducting a search at the premises of the assessee. After paying the tax due, the assessee filed an application before the Settlement Commission which found the disclosure made by him to be true and holding that the petitioner had agreed to be taxed on the deposits granted immunity from penalty for all years involved in the settlement application. However, the Commission did not grant immunity from the prosecution already launched under section 276CC on which the trial court took cognizance of the matter. Held, that the order of the Settlement Commission was justified.
Anil Kumar Sinha v. UOI (2013) 352 ITR 170 / 89 DTR 329 / 261 CTR 89 / 219 Taxman 99 (Mag.)(Patna)(HC)

S.277 : Offences and prosecutions – False statement – Verification – Refund certificate in fictitious names – Prima facie evidence that offence has been committed – Prosecution will not be quashed. [Code of Criminal Procedure, 1973, S. 397, 401]
There was a prima facie case against the assessee. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance with the requirements of the offence. The Court held that the prosecution will not be quashed. (AY. 1984-85)
Hema Mohnot v. State by Chief Commissioner (Administration) (2013) 356 ITR 602 / 219 Taxman 87 (Mag.)(Mad.)(HC)

S.278B : Offences and prosecutions – Partners liable unless able to prove innocence – Finding that firm had tried to evade tax [S.276C, 276D Crl. PC, S. 482]
Under section 278B, all the partners are equally responsible for commission of any offence by the company/firm. The onus lies on the partners or directors to prove that they were not responsible for acts of omission or commission committed by the firm/company.
It was a case of filing incorrect and false return clubbing the income of a proprietary concern of the partner. After noticing that criminal prosecution was filed for the alleged act, at a much belated stage in the year 1997, under the Voluntary Disclosure of Income Scheme tax was paid on behalf of the proprietary concern of the partner. At a subsequent stage, action taken by the petitioners may not absolve them from the charges. At least for the period between 1989 and 1997 the offence of evasion of the income-tax was committed by the petitioners. The prosecution could not be quashed. (AY. 1989-90)
Deepak Engineering Works v. CIT (2011) 243 CTR 278 / 57 DTR 292 / (2013) 352 ITR 161 (Patna)(HC)

S.281 : Certain transfers to be void – Collection and recovery – Attachment of mortgaged property – Priority over secured debt – Income-tax Act, 1961 does not provide for a priority to

statutory charges over all other charges including mortgage under 'SFC Act'. [S.226, Schedule II, rule 93, State Financial Corporation Act, 1951, S.29]

The petitioner a State owned Corporation and a Financial Institution governed by The State Financial Corporation Act, 1951. The petitioner has advanced money to borrower who failed to repay the amount with interest. Petitioner took possession of the properties which was mortgaged. The Recovery Officer attached the properties including properties mortgaged of the petitioner. The Recovery Officer attached the property and proposed to sell the property as it had a first charge over the property. The petitioner filed the writ petition. Allowing the petition the Court held that under the State Financial Corporation Act, 1951, first charge on property is created clearly giving priority to dues of said statutory authority over all other charges on property on basis of mortgage . Since Income-tax Act, 1961 does not provide for a priority to statutory charge over all other charges including mortgage under 'SFC Act', order of Tax Recovery Officer attaching property of assessee, mortgaged to State owned Corporation was not proper. Petition was allowed.

Karnataka State Industrial Investment Development Corporation Ltd. v. CIT (2013) 89 DTR 129 / 259 CTR 485 (2013) AIR 104 (Karn.)(HC)

S.281B : Provisional attachment to protect revenue in certain cases – Where property, which is subject matter of provisional attachment, is sufficient to satisfy tax liability and safeguard interest of revenue, petitioner can seek release of provisional attachment in respect of other properties and amounts due from debtors and depositors

The petitioner is a private limited company. The petitioner/company filed a return of income for the assessment year 2011-12 showing an approximate loss. On 25-4-2012, The officers, consequent to the survey made under Section 133A of the Act, impounded books of accounts and documents under the cover of a letter dated Nil. Thereafter, Assessing Officer passed orders of provisional attachment of property in terms of Section 281B of the Act which included various immovable properties as well as amounts due from debtors and depositors. The assessee filed the present writ petition, claiming that one immovable property, was sufficient to meet the tax liability estimated by the revenue, and provisional attachment of other properties and amounts due from debtors and depositors was unjustified.

The Court held that where the property, which is subject matter of provisional attachment, is sufficient to satisfy tax liability and safeguard interest of revenue, petitioner can seek release of provisional attachment in respect of other properties and amounts due from debtors and depositors. (AY.2011-12)

KDH Properties (P) Ltd. v. ACIT (2013) 356 ITR 1 / 94 DTR 321 / 263 CTR 111 (All.)(HC)

S.281B : Provisional attachment – Sale was permitted, subject to deposit of amount and undertaking to pay interest and penalty

High Court allows transfer of assets (under provisional attachment) to Microsoft subject to foreign parent's liability to pay tax dues of Nokia India to the extent of dividend received from Nokia India even when tax disputes were pending and provisional attachment of assets was under challenge in writ petition, subject to deposit of 2250 crores in an escrow account and undertaking to pay tax demand under sections 201(1) 201(IA), interest and penalty thereon.

Nokia India (P.) Ltd. v. ACT (2013) 96 DTR 433 / 40 taxmann.com 200 / (2014) 264 CTR 6 (Delhi)(HC)

S.281B : Provisional attachment – Recovery of tax – Attachment over and above demand raised was held to be not justified and illegal

Once the assessment had been completed, the Revenue would be justified to attach the account to the extent of the demand raised against the assessee and not the entire amount standing to the credit of the

assessee. The action of the Revenue in extending the period of attachment in respect of all the bank accounts of the assessee was wholly unjustified and illegal.
Nirmal Singh v. UOI (2013) 352 ITR 396 / 88 DTR 119 / 259 CTR 496 / 218 Taxman 82 (Mag.)(P&H)(HC)

S.281B : Provisional attachment – Validity period – After passing of assessment order the provisional attachment ceases to operate
Court held that provisional attachment order passed under section 281B and notices/letters issued to bank and sundry debtors of petitioner not to make payment to petitioner would cease to operate after passing of assessment order. Hence, the validity period of six months of provisional attachment order would be extinguished after passing of assessment order. In favour of assessee. (AY.2008-09)
Motorola Solutions India (P.) Ltd. v. CIT (2013) 212 Taxman 35 / 87 DTR 369 / 263 CTR 215 (P&H)(HC)

S.281B : Provisional attachment – There is no provision in statute which gives preferential rights to dues of State under Act – Bank as a secured creditor has preference over the dues of the Income tax department in respect of the secured assets.[S.13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002]
A company availed loan from petitioner and mortgaged certain property to secure loan advanced to it. Since said company defaulted in making payments of loan, petitioner initiated proceedings under section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Thereupon, petitioner took possession over property and put it on sale. Impugned property had been provisionally attached under section 281B with prior approval of Commissioner and, it was on said basis, revenue claimed preferential right to realize its dues being crown debt. There is no provision in statute which gives preferential rights to dues of State under Act. Therefore, the petitioner as secured creditor had preference over dues of department in respect of secured assets. In view of aforesaid, instant writ petition was to be disposed of with a direction to petitioner to remit any excess amount, after adjusting its dues, to revenue being preferential creditor amongst unsecured creditors. Writ petition of assessee was allowed.
Axis Bank Ltd. v. CIT (2013) 212 Taxman 19 (Mag.) / 259 CTR 492 (P&H)(HC)

S.282 : Service of notice – Service by post – Notice was never returned back to office, same would raise presumption of service under section 27 of General Clauses Act [S. 143, S. 27 of the General Clauses Act, 1897]
Records showed that revenue had dispatched notice under section 143(2) for both assessment years together in single envelope vide same dispatch and assessee appeared before Assessing Officer for assessment year 1990-91 in pursuance of notice issued for said assessment year. Since the impugned notice was never returned back to office, same would raise presumption of service under section 27 of General Clauses Act. Therefore, there was no error of jurisdiction or of law in impugned order or proceeding. (AYs. 1990-91 and 1991-92)
Shahbad Cooperative Sugar Mills Ltd. v. DCIT (2013) 218 Taxman 352 (P&H)(HC)

S.282 : Service of notice – Service by "post"-"Post" includes speed post – Notice under section 143(2) sent by speed post – Valid service [S.143(2)]
Notice u/s. 282 can be sent by post including "ordinary post", "registered post" and "speed post". "Post" is a generic word and its species are "ordinary post", "registered post", "speed post" and "under certificate of posting", etc. The language of the statute is generally extended to new things which were not known and could not have been contemplated when the Act was passed, when the Act deals with a genus and the thing which afterwards comes into existence was a species of it. The speed

post is a new mode of sending post, and, therefore, this new postal mode not mentioned in the statute specifically is included in the generic word "post" or "registered post". (AY. 2006-07)
Milan Poddar v. CIT (2012) 211 Taxman 403 / (2013) 357 ITR 619 / 260 CR 170 / 90 DTR 80 (Jharkhand)(HC)

S.288 : Appearance by authorized representative – Retired additional commissioner – Income tax practitioner (ITP) – Registration and procedure for grant of certificate – Without any certificate of registration retired additional Commissioner cannot practice before the Income-tax authorities and the Tribunal – Joint power of attorney of advocate and ITP is not valid [Income-tax Rules, 1962) Rule 49 to 57]
Retired Additional Commissioner, appeared before the Tribunal on behalf of assessee and he had signed power of attorney as ITP. He did not have any certificate of registration in his favour as ITP. Before Tribunal he contended that he was retired departmental officer, therefore without any certificate of registration as ITP he could practice and was not required get himself as ITP with Commissioner. Tribunal held that mere possession of educational qualification without undergoing departmental examination conducted by Board itself was not sufficient to have any right to practice as ITP. Retired additional Commissioner could not practice without any certificate of registration granted in his favour by Chief Commissioner or Commissioner under provisions of section 288 read with rules 49 to 57. Mere possession of educational qualification without undergoing departmental examination conducted by Board itself was not sufficient to have any right to practice as ITP. Therefore, 'B' could not practice without any certificate of registration granted in his favour by Chief Commissioner or Commissioner under provisions of section 288 read with rules 49 to 57. Tribunal forwarded the copy of order to the Chief Commissioner Gwalior for necessary action. Tribunal also held that law could not provide any unauhorised person/representative to appear before the Income-tax authorities or the Tribunal.
Samagra Vikas Mahila Samiti v. CIT (2013) 59 SOT 293 (Agra)(Trib.)

S.292B : Return of income not to be invalid on certain grounds – Assessment –Defective notice – Notice under s.143(2) – Irregularities in the notice – Assessment was held to be valid [S.142(1), 143(2), 147]
Mere compliance to the notice may not validate a notice which is totally illegal but where there is only an irregularity in the notice which is otherwise in substance in conformity with the intent and purpose of the Act, the notice cannot be deemed to be invalid. Reassessment was held to be valid. (AY.2002-03)
Mukut Finvest & Properties (P) Ltd. v. ITO (2012) 138 ITD 166 / (2013) 84 DTR 364 / 153 TTJ 309 (Delhi)(Trib.)

S.292BB : Notice of demand to be valid in certain circumstances – Absence of notice is not curable – Provision is not applicable only with effect from 1-4-2008
Since a provision of section 292BB has been inserted by Finance Act, 2008 with effect from 1-4-2008, same would not apply prior to said date. Further absence of notice is not curable under section 292BB. (AY.2001-02)
ITO v. Aligarh Auto Centre (2013) 58 SOT 90 (URO)(Agra)(Trib.)

S.292BB : Notice deemed to be valid in certain circumstances – Reassessment – Section 292BB does not have retrospective effect [S.143(2), 148]
The AO issued a notice u/s 148 to make a reassessment. However, as a notice u/s. 143(2) was not issued, the Tribunal quashed the reassessment. The Department filed an appeal before the High Court where it relied on s. 292BB (which provides that the failure to issue notice cannot be objected to if the

assessee has appeared in the proceeding), inserted by the Finance Act 2008 w.e.f. 1-4-2008 and argued that the said provision was retrospective in operation and the reassessment was valid. HELD by the High Court dismissing the appeal:

The issue of a notice u/s 143(2) is mandatory. The failure to do so renders the reassessment void (*CWT v. HUF of H. H. Late Shri. J.M. Scindia (2008) 300 ITR 193 (Bom.)* followed). S. 292BB was inserted w.e.f. 1.4.2008 and came into operation prospectively for AY 2008-09 and onwards.

CIT v. Salman Khan (Bom.)(HC) www.itatonline.org.

S.292C : Presumption as to assets, books of account – Search and seizure – Seized documents – Presumption is available for the purpose of block assessment [S.132, 158BC]

Seized documents can be in any form including loose papers on which notings are made are sufficient and there is no requirement that every seized document should be corroborated. Presumption as to seized documents is available for the purpose of block assessment.

CIT v. Sonal Constructions (2013) 359 ITR 532 (Delhi)(HC)

CIT v. Urmila Lodhi (2013) 359 ITR 532 (Delhi)(HC)

S.292C : Presumption as to assets, books of account – Onus of rebutting presumption on party claiming otherwise – Unexplained Investments, cash and expenditure is to be presumed as stated in the seized documents [Ss. 69, 69A, 69C]

The Tribunal held in favour of the assessee that unless the contrary is proved, what is stated in seized documents has to be presumed true. Section 292C grants no discretionary power to presume or not to presume correctness of documents. Onus of rebutting is on party claiming otherwise. Contents of documents unless disproved by cogent evidence held true. (AY. 2003-04 to 2008-09)

Vivek Kumar Kathotia v. Dy. CIT (2012) 150 TTJ 462 / 79 DTR 81 / (2013) 142 ITD 394 (Kol.)(Trib.)

S.292C : Presumptions as to assets, books of account etc. – Presumption not available in respect of person other than person from whose possession books or assets seized [S.153A]

During the course of search, papers were seized from the premises of a hospital showing date-wise cash received from the assessee. The assessee explained that the donations were made out of unaccounted income declared by S. The Assessing Officer further noted that the company was maintaining separate cash account. The presumption under section 292C of the Act was that the paper belonged to the assessee and its contents were proved. The Assessing Officer therefore, made the addition. The Dispute Resolution Panel rejected the objections raised by the assessee on the ground that the addition made was based on seized papers. Papers seized from the possession of S from the premises of the hospital showed the expenses incurred on construction of a school building belonging to the M trust. An addition was made in the hands of the assessee. That admittedly, the papers were seized from the premises of the hospital from the possession of S who had owned up to the documents. No evidence was found during the course of search to establish that the donations were made by the assessee out of undisclosed income. S had donated the amount out of undisclosed income declared by him under section 153A of the Act. The source of income out of which the payment had been made existed in the earlier years. The bank statement of M Trust which gave details of Rs. 5 lakhs debited to the account. There was nothing on record to suggest that these amounts had been paid by the assessee. Therefore, no addition could be made in the hands of the assessee-company. According to the provisions of section 292C the presumption was that the documents related to S and not to the assessee. Hence, the Assessing Officer had wrongly applied the provisions of section 292C. The Tribunal held that the paper in question did not show the name of any person from whose account the money had come for investment in school building. There was no indication on these pages that amount had come from the account of the assessee-company. Therefore, no addition could be made in the hands of the assessee-company. Since the school was owned by M trust the addition could be made if at all, in the hands of the trust and not in the hands of the assessee. (AY. 2005-06 to 2007-08)

Mahashian Di Hatti Ltd. v. Dy. CIT (2013) 21 ITR 731 (Delhi)(Trib.)

S.292C : Presumption as to assets, books of account, etc. – Search and seizure –Addition on the basis of documents is held to be justified

Pursuant to a search at assessee's premises, certain documents were found and one of such documents contained working of interest at rate of 3 per cent on total sum of Rs.3 lakh. Assessee was directed to explain contents of document found during course of search - Assessee explained that contents of said document were rough working and no loan was given out. Assessing Officer rejected assessee's explanation and brought to tax principal amount of Rs. 3 lakh and interest thereon. Commissioner (Appeals) and Tribunal confirmed order of Assessing Officer. On basis of material recovered during search, lower authorities had rightly drawn presumption in terms of section 292C. Therefore, impugned addition was to be confirmed. Appeal of assessee was dismissed. (AY.1998-99)

Hiren Vasantlal Shah v. ACIT (2013) 255 CTR 272 / 81 DTR 202 / 212 Taxman 23 (Mag.) (Guj.)(HC)

Income-tax Rules, 1962

Rule 40 : Waiver of interest – Delay not attributable to assessee – Revised returns. [Ss.139(5), 215]

The assessee filed a revised return and a second revised return. Held, interest from date of first revised return to date of second revised return to be waived as the delay in assessment for this period was not attributable to the assessee. Interest from date of first revised return to date of second revised return to be waived.(AY. 1985-86)

Kelvinator of India Ltd. v. CIT (2013) 358 ITR 440 (Delhi)(HC)

Gift-tax Act, 1958

S.4 : Gift of shares – Capital gains – Subsidiary – Inadequate consideration – Deemed gift – Lifting the corporate veil did not arise-Review petition was dismissed [S.2(xxiv), I.T. S. 45, 47]

The assessee transferred, at book value, its shares to its wholly owned subsidiary company, which was engaged on the business of purchase and sale of shares and treated the shares purchased as stock-in-trade. Since the transfer was for inadequate consideration, the transactions were squarely covered by section 4(1)(a) of the Gift-tax Act, 1958.

Merely because the assessee held the entire share of the subsidiary company, it could not be held that both the companies were one and the same. Thus, the question of lifting the corporate veil did not arise. Revision petition filed by the assessee was dismissed. (AY. 1994-95)

New Ambadi Estates P. Ltd. v. JCIT (2013) 358 ITR 360 / (2014) 101 DTR 186 (Mad.)(HC)

S.4(1) : Deemed gift – Reconstitution of Partnership firm doesn't amount to deemed gift

Reconstitution of a Partnership firm at the time of admission of new partner resulting into reduction of share in profit of erstwhile partners doesn't amount to deemed gift and shall not give rise to levy of gift tax. (T.A. No. 394/ 395 of 2000, dated 16-6-2012/(T.A. No. 346 of 2002, dated 16-6-2012)]

Ratilal P. Patel (2012) ACAJ -November-P. 402) (Guj.)(HC)

Urmilaben A. Patel (2012) ACAJ -November-P. 402) (Guj.)(HC)

S.4(1)(a) : Deemed gift – Shares allotment at face value – No deemed gift – Fair market value – Subscription of shares no transfer of property – Allotment of shares are creation of shares

hence not covered – No inadequate consideration – Subscription to the shares of closely held companies at face value could not be regarded as giving rise to deemed gift

In a case of subscription of shares, there is no transfer of property. For the purpose of application of s. 4(1)(a) of the Gift Tax Act, the condition precedent is transfer of property for inadequate consideration.

In *Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association Ltd. (1963) 33 Comp Cas 862 (SC) and Khoday Distilleries Ltd. v. CIT (2008) 307 ITR 321 (SC)* the Supreme Court held that there is a vital difference between the creation of shares and the transfer thereof. An allotment of shares by a company results in creation of shares by appropriation out of the un appropriated shares to a particular person and, hence, such creation does not amount to a transfer. There is no inadequate consideration. Appeals of revenue was dismissed.(AY. 1994-95)

CIT v. O. P. Srivastava (2013) 357 ITR 1 / 96 DTR 268 / 263 CTR 693 (All.)(HC)

CIT v. Istiaq Ahmed (2013) 357 ITR 1 (All.)(HC)

CIT v. J.B.Roy (2013) 357 ITR 1 (All.)(HC)

CIT v. U.K. Bose (2013) 357 ITR 1 (All.)(HC)

CIT v. Suboroto Roy (2013) 357 ITR 1 (All.)(HC)

S.4(1)(c) : Deemed gift – Revocable gift of shares – Donor revoking gift but bonus shares continued with donee – Matter remanded [S.11, 16(1)]

The assessee owned 6000 shares of Hero Cycles. On 20-2-1982, he executed a deed of revocable transfer in favour of M/s. Yogesh Chandra. The deed permitted the assessee to, after completion of 74 months from the date of transfer but before the expiry of 82 months from the said date, exercise the power of revoking the gift. In other words, there was a window of 8 months within which the gift could be revoked. The deed of revocable transfer specifically stated that the gift shall not include any bonus shares or right shares received and/or accruing or coming to the transferee from Hero Cycles by virtue of ownership of the said shares. Effectively, therefore, only a gift of 6000 equity shares was made by the assessee to the transferee. On 29-9-1982 & 31-5-1986, the company issued 4000 and 10,000 bonus shares to the transferee. On 15-6-1988, the assessee revoked the gift with the result that the 6000 shares gifted to the transferee came back to the assessee. However, the 14,000 bonus shares allotted to the transferee while it was the holder of the equity shares of the company continued with the transferee. In AY 1982-83, the GTO relied on *McDowell and Co. Ltd. v. Commercial Tax Officer (1985) 154 ITR 148 (SC)* and held that the revocable transfer was only for the purpose of reducing the wealth tax liability and was void. He, however, made a protective gift-tax assessment. The Tribunal and the High Court (*CGT v. Satya Nand Munjal (2002) 256 ITR 516 (P&H))* reversed the AO and held that a revocable transfer was valid even if its object was to avoid wealth-tax. The assessee was held liable to pay gift-tax u/r 11 of the Gift-tax Act. In AY 1989-90 the AO & CIT(A) held that the 14,000 shares belonged to the assessee and as the revocation was only with respect to the 6,000 shares and the 14,000 bonus shares continued with the transferee, there was a chargeable gift to that extent. The Tribunal reversed the AO & CIT(A). On appeal by the department, the High Court reversed the decision of the Tribunal and held that the assessee was liable to gift tax on the value of the bonus shares gifted by him to the transferee applying the principles of *Escorts Farms (Ramgarh) Ltd. v. CIT (1996) 222 ITR 509 (SC)*. On appeal by the assessee to the Supreme Court, held:

The fundamental question is whether there was in fact a gift of 14,000 bonus shares made by the assessee to the transferee. The answer to this question lies in s. 4(1)(c) of the Gift-tax Act which provides that "where there is a release, discharge, surrender, forfeiture or abandonment of any debt, contract or other actionable claim or of any interest in property by any person, the value of the release, discharge, surrender, forfeiture or abandonment to the extent to which it has not been found to the satisfaction of the AO to have been bona fide, shall be deemed to be a gift made by the person responsible for the release, discharge, surrender, forfeiture or abandonment". On facts, the assessee had made a valid revocable gift of 6000 equity shares in the company on 20-2-1982 to the transferee. The only event that took place in AY 1989-90 was the revocation of the gift by the assessee on 15-6-

1988. The question whether the revocation of the gift of the original shares in AY 1989-90 constitutes a gift of the bonus shares that were allotted to the transferee on 29.09.1982 and 31-5-1986 requires to be answered in the light of s.4(1) (c). The question of applicability of Escorts Farms has to be decided after a finding is reached on the applicability of the first part of s. 4(1)(c) (matter remanded). (AY.1989-90)
Satya Nand Munjal v. CGT (2013) 350 ITR 640 / 256 CTR 121 / 82 DTR 284 / 213 Taxman 437 (SC)
Om Prakash Munjal v. CGT (2013) 350 ITR 640 / 256 CTR 121 / 82 DTR 284 (SC)

S.4(1)(c) : Deemed gift – Finance company – Loans – Advances – Matter remanded
The assessee had taken the advances/loans on the interest at 18%. Equal interest was charged from only some of the sister concerns. Held, why interest was not earned from a few selected sister concerns had to be examined. The assessee had suffered a huge loss in the AY 1990-91 and past AY. How the sister concerns used the interest-free advances, whether they were given for business purposes or the individual benefit of partners/directors need to be examined by the Tribunal being a final fact finding authority to establish bona fide action on the part of the assessee. Since the facts were not clear, the order of the Tribunal was set aside and the matter was restored to the file of the Tribunal to pass fresh orders in accordance with law. (AY. 1990-91)
CIT v. Sahara India (Firm) (2013) 359 ITR 337(All.)(HC)
CIT v. Sahara India Ltd. (2013) 359 ITR 337 (All.)(HC)

S.16B : Revocable gift – Interest – Matter remanded
The High Court held *inter alia*, that since gift-tax was leviable on the revocable transfer of equity shares by the assessee to Y, interest was liable to be paid by the assessee on the gift-tax levied. On appeal, the Supreme Court set aside the judgment of the High Court and remanded the matters for fresh consideration on the merits of the case. (AY. 1989-90)
Satya Nand Munjal v. CGT (2013) 350 ITR 649 / 256 CTR 127 / 82 DTR 275 / 214 Taxman 10 (Mag.) / (2013) AIR SC 2011 (SC)
Om Prakash Munjal v. CGT (2013) 350 ITR 649 / 256 CTR 127 / 82 DTR 275 / 214 Taxman 10 (Mag.)(SC)
Brij Mohan Lal Munjal v. CGT ((2013) 350 ITR 649 / 256 CTR 127 / 82 DTR 275 / 214 Taxman 10 (Mag.)(SC)

Interest-tax Act, 1974

S.2(5) : Interest – Credit institution – Chargeable interest
Interest tax collected by a credit institution cannot partake character of chargeable interest and, thus no interest tax would be exigible on it.
CIT v. Haryana Financial Corpn. (2013) 212 Taxman 25 (Mag.)(P&H)(HC)

S.2(5) : Interest – Non banking financial institution – Financial transaction – Hire purchase – Matter remanded
Tribunal has remitted the matter to original authority to have a fresh look, in to matter both aspect of relevance of Board circular and judgment of Supreme Court in case of *Sundaram Finance v. State of Kerala, AIR 1966 SC 1178.* Appeal of revenue was dismissed. (AY.1998-99)
CIT v. Standard Chartered Finance Ltd. (2012) 68 DTR 249 / (2013) 212 Taxman 24 (Mag.)(Karn.)(HC)

S.2(5B) : Financial Company – Lease charges – Discounting charges
Where factual aspect as to whether assessee was a financial company and whether interest earned under three heads namely, lease charges, hire purchase charges and bill discounting charges, were

chargeable to tax under Interest-tax Act being not clear, matter was to be remanded back to lower authorities for reconsideration - Matter remanded.
CIT v. Motor & General Finance Ltd. (2013) 212 Taxman 76 (Mag.)(Delhi)(HC)

S.2(5B) : Leasing – Financial lease – Operating lease – Assessee, NBFC being a financial company under the Interest Tax act, 1974 is liable to tax – Matter set aside for verification
The assessee contended that the principal activity of the assessee was leasing and it was not covered u/s.2(5B) of the Interest Tax Act. Assessee claimed to be engaged in the granting operating lease. The special bench of the Tribunal set aside the appeal & remitted the matter to the file of the Assessing Officer in order to verify whether the principal activity of the assessee is financial lease or an operating lease. The Tribunal further held that finance lease activity should be considered as financial activities & operating lease activity should be considered as leasing activity. Other activities of the assessee of granting loans & advances etc, hire purchases & other activities should also be grouped accordingly in the two categories i.e. Finance Lease or operating lease and thereafter, it has to be decided as to what is the principal activity of the assessee & then only, this aspect should be decided as to whether the assessee is a credit institute or not.
Gujrat Gas Financial Services Ltd. v. ACIT (2013) 142 ITD 21 / 155 TTJ 401 (SB)(Ahd.)(Trib.)

S.2(7) : Interest – Finance charges – Separate Accounts
Assessee-bank received finance charges in case of lease transactions entered into by it with its customers where customers purchased machinery from finances provided by assessee. Assessing Officer held that amount received by assessee was liable to interest tax. On appeal, Appellate Authorities held that amount collected by assessee was hire purchase charges and not interest and, therefore, there was no liability to pay tax as such. In view of concurrent finding of fact recorded by Appellate Authorities, no case for interference was made out. Appeal of revenue was dismissed. When assessee had maintained a separate account in respect of amounts collected from customers towards interest-tax, amounts so collected by assessee were not 'interest' within meaning of section 2(7) and, hence, could not be treated as chargeable interest. Appeal of revenue was dismissed.
CIT v. Karnataka Bank Ltd. (2013) 212 Taxman 78 (Mag.)(Karn.)(HC)

S.5 : Chargeable interest – Interest tax collected by a credit institution cannot partake character of chargeable interest and, thus no interest tax would be exigible on it [Ss.2(5), 26C]
The assessee is a credit institution earning interest. It filed its return of chargeable interest. In the course of assessment, Assessing Officer noted that assessee had not included the interest tax collected from its clients in the chargeable interest. The Assessing Officer completed the assessment under section 8(2) adding the said amount to the chargeable interest in view of provisions of section 26C. On Second Appeal, the Tribunal deleted the addition holding that amount of interest tax recovered from the customers was not chargeable to interest. On revenue's appeal the court held that interest tax collected by a credit institution cannot partake character of chargeable interest and, thus no interest tax would be exigible on it. In favour of assessee
CIT v. Haryana Financial Corpn. (2013) 212 Taxman 25 (Mag.)(P&H)(HC)

S.5 : Chargeable interest – Provision – Interest on bad or doubtful debts
Interest on non-performing assets would be charged to interest-tax only in year in which said interest is credited to profit and loss account or in year of receipt, whichever is earlier. Appeal of assessee was allowed. (AY.1998-99)
American Express Bank Ltd. v. Addl. CIT (2013) 55 SOT 136 (Trib.)(Mum.)

S.10 : Reassessment – Non-disclosure of primary facts – Reassessment held to be valid [Ss.8, 10A]

Assessee filed return of chargeable interest voluntarily, which had not been processed/ finalized by Assessing Officer. Later on, Assessing Officer issued a notice under section 10 to reopen assessment on ground that certain interest chargeable to tax had escaped assessment on account of non-disclosure by assessee. Assessing Officer passed a reassessment order and brought to tax certain amount of interest. Appellate authorities having found that Assessing Officer had not processed original return filed by assessee within limitation period of two years from end of assessment year under consideration, held that reopening of assessment was barred by time. Situations may develop where Assessing Officer may be inactive, may be indecisive or may be for justifiable reasons or deliberately does not conclude assessment, but to hold or opine that even a re-assessment is not possible in such situations will be virtually amounting to re-writing contents of section 10. Since a reopening is permitted even in a situation where an assessment order is passed, but that has resulted in escapement of some chargeable interest to tax, reopening is also permitted where a return is filed, but no assessment order is passed within time permitted for passing an assessment order under section 10A. Section 10 is a specific enabling provision only to remedy such situations and only criteria is escapement of such chargeable interest to tax for whatever reason may be; while invoking section 10 it can only be within parameters mentioned in section 10 and not with reference to time stipulations provided for concluding an assessment or passing assessment order under section 8. Reopening held to be justified. (AY.1997-98).
CIT v. Standard Chartered Finance Ltd. (2013) 212 Taxman 79 (Mag.)(Karn.)(HC)

Kar Vivad Samadhan Scheme, 1988

S.90 : Kar Vivad Samadhan Scheme – Appellate Tribunal – Appeals – Certificate determining tax arrears – [Finance (No 2) Act, 1988]
Certificate determining tax arrears and payment by assessee of arrears and allowing the immunity. Appeals relating to years covered under Kar Vivad Samadhan Scheme 1988 were not maintainable. Revenue cannot prosecute appeals covered under the Kar Vivad Samadhan Scheme 1988. (AY. 1993-94, 1994-95)
CIT v. SPR Group Holdings (P.) Ltd. (2013) 355 ITR 169 (Karn.)(HC)

Voluntary Disclosure of Income Scheme, 1997

S.64(2) : Existence of stock, cash and amount of sundry debtors accepted in previous years – Presumption that the same continued for a short period [Finance Act, 1997]
Under the Voluntary Disclosure of Income Scheme, 1997, the assessee submitted a declaration of undisclosed income on December 26, 1997, which included stock, cash and the amount of sundry debtors. It claimed that the disclosure was not only for the assessment year in which the survey was conducted but also for the three years preceding the date of survey. The Tribunal held that the disclosure made by the assessee was not voluntary and it was a compulsion on the part of it to opt for the Scheme.
Held, that rejection of stock, cash and the amount of sundry debtors for the year 1997-98 would tantamount to rejection of the accepted fact of the Revenue of the increase of stock, etc., in the years 1994-95, 1995-96, which had been accepted by the Revenue under the Scheme and accordingly the assessee had been taxed. Once that stock, cash and the amount of sundry debtors was accepted to be in existence in the years 1994-95 and 1995-96 it could not be declared to have been extinguished in such a short period of time, i.e., from 1994 to 1997 only. (AY.1997-98)
Jainsons v. ITO (2013) 352 ITR 28 / 257 CTR 278 / 84 DTR 174 (Jharkhand)(HC)

Wealth-tax Act, 1957

S.2(ea) : Asset – House property – Transit house for executives does not form part of asset.
Transit house used for the stay of executives on official tour does not form part of asset u/s. 2(ea). (AY. 1995-96)
Carborandum Universal Ltd. v. Dy. CWT (2013) 83 DTR 75 (Mad.)(High Court)

S.2(ea) : Asset – House property – Building let out – Commercial properties – Commercial Properties were not considered as assets in terms of S.2(ea) (i) of the Wealth–tax Act, 1957 prior to 1-4-1997 and hence, such properties can't be assessed
Property given on rent, being a productive asset, bears the character of a "Commercial Property" Commercial Properties were not included in the definition of asset as prescribed u/s.2(ea)(i) of the Wealth-tax Act, 1957 as it stood prior to 1-4-1997. Since the year under consideration was Asst. Year 1996-97, it was held by the Hon'ble High Court that the said property cannot be assessed under the Wealth-Tax Act. 1957.(AY. 1996-97)
CWT v. Narayan T. Baddi (Dr.) (2013) 90 DTR 363 (Guj.)(HC)

S.2(ea) : Asset – Lease for 99 years – Used for the purpose of business – Land is exempt
Assessee had been allocated land in question on 99 years lease by State Industrial Corporation. WTO denied exemption under section 2(ea)(i)(3) and subjected land to wealth tax on ground that assessee was not doing any business therefrom for last number of years. In fact it was found that assessee had carried on its business utilizing aforesaid asset for this purpose, and this position was even accepted by department as well. On facts land in question held by assessee was exempt from wealth-tax under section 2(ea) (i) (3). (AY.2001-02 to 2004-05)
CIT v. Sohna Forge (P.) Ltd. [2013] 212 Taxman 82 (Mag.)(Delhi)(HC)

S.2(ea) : Asset – Agricultural land – Stock-in-trade – Even otherwise agricultural land is not an asset
The assessee was in the business of land development, buying agricultural lands and developing them into plots after obtaining N.A. permission and approval from local authority. It claimed that land in question constituted stock in trade & therefore not an 'Asset' u/s. 2(ea). The A.O. objected this claim. The CIT(A) accepted it as a part of stock in trade & also that the said land was an agricultural land and no conversion yet and therefore also not an 'asset' within meaning of Sec. 2(ea). The Tribunal upheld the CIT(A) order. (AYs. 2003-04 to 2006-07)
ACWT v. Vasantrao Sudam Pingle (2013) 145 ITD 97 / (2014) 98 DTR 18 (Pune)(Trib.)

S.2(ea) : Asset – Urban Land – Agricultural Land
In the facts of the all the below cases, Land owned by the assessee comes within the purview of urban area, even though the assessee is carrying on agricultural activities on the same. There is nothing on record to show that construction on of building on the assessee's land is prohibited. Therefore, when the lands are situated in urban area classified by the revenue authorities as either residential or industrial or commercial, there is no material on record to come to a conclusion that these lands are prohibited from construction of building and section 2(ea)(v)(b) of wealth-Tax Act, 1957 has no application. Therefore the same are very much covered under the definition of 'Urban land' within the meaning of section 2(ea)(v)(b) for being assessable to wealth-tax. (AY. 2008-09)
Abdul Kareem v. ACIT (2012) 138 ITD 537 / (2013) 151 TTJ 796 / 82 DTR 55 (Chennai)(Trib.)
Abdul Lateef v. ACIT (2012) 138 ITD 537 / (2013) 151 TTJ 796 / 82 DTR 55 (Chennai)(Trib.)

Abdul Rasheed v. ACIT (2012) 138 ITD 537 / (2013) 151 TTJ 796 / 82 DTR 55 (Chennai)(Trib.)

S.2(ea) : Asset – Exemptions [S. 5(vi)]
Assessee purchased a land in year 1994 and commenced construction of residential house on certain part of said land. He had constructed a residential house on ground floor and before construction of first floor was completed, he sold entire premises in October, 2002. According to assessee, since property was a land and residential building appurtenant thereto, it fell under exempted asset as defined under section 5(vi). Assessing Officer assessed said property and land with incomplete construction liable to tax under section 2(ea) as asset. The tribunal observed that, the facts revealed that on said construction there was no plaster done, flooring was not done, drainage and electricity fitting was not done and doors, windows were not installed, construction was old dilapidated construction with damaged ceiling slab, and that to make it habitable entire fresh construction would have to be put up. In view of above, said construction could not be considered as habitable house entitled for exemption under section 5(vi) - Since area of land was in excess of prescribed limit of 500 sq.mts. and house was incomplete, assessee was liable to wealth-tax on value of plot exceeding 500 sq.mts. along with cost of incomplete construction. (AY. 1999-2000, 2001-02, 2003-04)
Sunil B. Handa v. DCWT (2012) 138 ITD 525 / 24 taxmann.com 123 / 82 DTR 290 / (2013) 151 TTJ 654 (Ahd.)(Trib.)

S.2(ea) : Agricultural Land – Lands are located within urban area are not exempt from wealth tax
Where the lands are located within urban area and not categorised as ‘agricultural’ land by land/revenue authorities and construction on these lands could be done by obtaining approval of the appropriate authorities, the assessee’s lands were not exempt under the Wealth-tax provisions notwithstanding the fact that the assessee carried on agricultural activities.
Mohammed Ibrahim v. ACIT (2012) 138 ITD 537 / 151 TTJ 796 / (2013) 82 DTR 55 (Chennai)(Trib.)
S.2(m) : Net wealth – Asset – Surplus of income – Presumption – Exception – No presumption – Addition of income from undisclosed sources in earlier years is not treated as surplus available in assessee’s hands to be treated as wealth for purpose of wealth-tax for latter years
The Income-tax Officer, for the assessment years 1985-86 to 1988-89, found that the total surplus available with the assessee by way of income being Rs. 21,15,164 and the total wealth disclosed by the assessee being Rs.97, 25,000, the increase in the wealth was to the tune of Rs. 76,09,836. That income of Rs. 76,09,836 was taken to be income from undisclosed sources. The total available surplus available with the assessee during the assessment years 1973-74 to 1976-77 was declared to be Rs. 21,15,164 based on the assessed income of the assessee for the three years. The Tribunal upheld the assessment. On appeals :
Held, dismissing the appeals, that the addition of Rs. 23,59,461 made from the assessment years 1963-64 to 1970-71 could not be held to be assets in the hands of the assessee after the period of more than eight years and, therefore, no tax could be imposed on the basis of such addition of Rs.23,59,461 treating it to be wealth for the purpose of wealth-tax for the years 1985-86 to 1988-89 and onwards. (AY. 1985-86, to 1988-89)
Gyan Chand Jain v. CWT (2013) 350 ITR 353 / 84 DTR 170 / 257 CTR 273 / 213 Taxman 212 (Jharkhand)(HC)

S.4 : Deemed wealth – Asset – ‘Belonging to’ – Allotment of land – Liable to wealth tax
Assessee was allotted certain land by State Government. It constructed sheds thereon and rented out same to industrialists. Assessing Officer observed that though income from those sheds had been reflected in income of assessee, in return of wealth tax aforesaid shed were not shown as ‘assets’ of assessee. Assessing Officer, therefore, added value of those sheds towards assets of assessee - On

appeal, Tribunal held that property in question could not be treated to be assets of assessee since same had only been allotted to it and was actually transferred in its favour in a later year. Since assessee was deriving rental income from sheds, property should be deemed to be belonging to assessee and was liable to be included in its assets.
CIT v. H. P. Small Industries & Export Corp. (2013) 212 Taxman 84 (Mag.)(HP.)(HC)

S.5(i) : Exemptions – Property held by charitable and religious trust – Exemption is held to be available
Assessee trust was constituted with object to provide educational facilities in catering. One 'K' transferred movable and immovable properties of hotel 'V' to assessee-trust for providing catering education therein. Said transfer was treated as gift in hands of 'K' but on appeal levy of gift tax was set aside by Tribunal holding that there was no gift and it was only a permission granted for a college to manage same free of rent. In case of assessee, Assessing Officer treated assets of hotel 'V' as assessee's wealth and computed wealth tax liability payable by assessee, when assessee was not liable to pay any income-tax on income derived by it from activity carried on by it and 'K' was held not liable to pay gift-tax for transfer of property in assessee's favour, levy of wealth tax on very same property on ground that activity conducted by assessee in respect of property did not constitute a charitable or religious purpose was unjustified. Appeal of revenue was dismissed. (AY. 1986-87)
CIT v. Manipal Hotel & Restaurant Management College Trust (2013) 212 Taxman 86 (Mag.)(Karn.)(HC)

S.7 : Valuation of assets – Immovable property – Let out property – Interest free deposits – Annual rent – Addition was up held:
Assessee let out its property on annual rent of Rs. 4.42 lakhs. It also received interest free deposits of Rs.31.50 lakhs from tenant - While computing fair market value of property let out, Assessing Officer added interest at rate of 14 per cent on Rs. 31.50 lakhs to figure of annual rent. Commissioner (Appeals) as well as Tribunal held that interest amount could not be added to annual rent to compute fair market value of property. It is undisputed that as per Schedule III, rule 5, where an owner has accepted an amount or deposit, not being an advance payment towards rent for a period of 3 months or less, an amount calculated at rate of 15 per cent per annum on amount of deposit outstanding from month to month shall be added to compute annual rent. In view of aforesaid, computation made by Assessing Officer by adding interest on security deposit to figure of annual rent was to be upheld. Appeal of revenue was upheld. (AY.1985-86 to 1987-88)
CWT v. M G Builders Co. (2013) 212 Taxman 15 (Mag.)(Delhi)(HC)

S.7 : Valuation of assets – Immovable property - Slums on property has to be considered for the purpose of valuation of property
Assessee acquired 50 per cent of share in a property. He acquired same under registered sale deed. AAC accepted valuation of assessee where under apart from consideration mentioned in sale deed and market value of the property, impediments like ownerships slums on property were also taken into consideration in coming to fair market value. On appeal, Tribunal declined to interfere with finding recorded by AAC. On facts, valuation accepted by Tribunal was just and proper and represented true market value of property. (AY.1996-97 to 2003-04)
CIT v. S.K. Ramprasad (2013) 212 Taxman 15 (Mag.)(Karn.)(HC)

S.7 : Valuation of assets – Foreign cars – Notional depreciation – [Wealth-tax Rules, 1957, Rule 14 – Schedule III]
Where assessee had only one foreign car on relevant date, no depreciation having been admittedly either claimed or allowed on any foreign car, its actual cost had to be considered as its WDV as at

year end. Concept of block of assets is relevant only to ascertain depreciation exigible or admissible and consequently to determine WDV thereof. Value of any asset under rule 14, on other hand is to be taken qua each separate business asset of assessee. Notional depreciation i.e. neither claimed nor allowed, could not be taken into account or consideration for purpose of computing WDV of relevant asset as at year end. (AY.2005-06)
Venus Records & Tapes (P.) Ltd. v. ACWT (2013) 141 ITD 221 / 88 DTR 226 (Mum.)(Trib.)

S.7 : Valuation – Land – Actual sale consideration
CIT(A) worked out the value of two plots of land by applying the rates of Rs. 107 and Rs. 91 per sq mtr on the basis of actual sale consideration of the said plots as against the rate of Rs. 400 per sq mtr applied by the AO. No interference was warranted in the absence of anything or record to controvert the finding of the CIT(A). (AY. 2003-04 to 2006-07)
ACWT v. Vasantrao Sudam Pingle (2013) 145 ITD 97 / (2014) 98 DTR 18 (Pune)(Trib.)

S.16 : Assessment – Notice – Reassessment – Order passed without issuing mandatory notice held to be invalid [Ss.16(2), 16(4), 17]
A notice under section 17 was issued to assessee on ground that authority had reason to believe that wealth had escaped assessment - Assessee did not file any return, in response to said notice. Assessing Authority issued a notice under section 16(4) calling upon assessee to produce accounts books and other documents for verification. Instead of producing books as sought for in said notice, assessee filed returns under section 16(4) (i).Thereafter, Assessing Authority passed assessment order. Assessee challenged said order before Appellate Commissioner on ground that notice under section 16(2) was not issued before passing an order of assessment which was mandatory. Appellate Commissioner taking a view that notice issued under section 16(4) would satisfy requirement of law as well as principles of natural justice, dismissed assessee's appeal. On further appeal, Tribunal held that impugned order of assessment passed without complying with requirement of section 16(2) was invalid. On appeal by revenue the Court held that since Assessing Officer had neither given a notice under section 16(2) nor a notice as contemplated in proviso to section 16(5) and passed impugned order, order so passed was violative of principles of natural justice, therefore, Tribunal was justified in setting aside impugned assessment order. (AY.1999-2000 to 2003-04)
CWT v. Prameela Krishna (Smt.) (2013) 212 Taxman 16 (Mag.)(Karn.)(HC)

S.16 : Assessment – Opportunity of hearing – No proper notice – Best judgment assessment order was not valid [S.17]
The assessee did not file any return in response to notice issued u/s. 17 (1), but only filed a letter that he was not liable for wealth tax. Thereafter, the A.O. proceeded to pass best judgment assessment order. The CIT(A) ruled in favour of assessee dismissing assessment framed by the A.O. on grounds it was null and void as it was completed in violation of mandatory provisions of Sec. 16(5). The Tribunal upheld CIT(A) order. (AY. 2003-04 to 2006-07)
ACWT v. Vasantrao Sudam Pingle (2013) 145 ITD 97 / (2014) 98 DTR 18 (Pune)(Trib.)

S.16(1)(a) : Assessment – Prima facie adjustment – Debatable – Transit house
In the proceedings u/s. 16(1) (a), transit house could not be included in the value of net wealth. (AY. 1995-96)
Carborandum Universal Ltd. v. Dy. CWT (2013) 83 DTR 75 (Mad.)(HC)

S.18(1)(c) : Penalty – Concealment – No penalty can be levied in respect of addition made on account of adoption of different methods of valuation by assessee and Department

No penalty can be levied u/s.18(1) (c) on addition made in respect of difference in valuation of properties on account of adoption of different methods of valuation by assessee and department, further, in case the penalty order does not clearly spell out as to whether the penalty is levied for concealment of wealth orfor furnishing inaccurate particular of wealth. (T.A. No. 145 / 147 of 200, dt, 24-7-12)]
Ramanbhai B. Patel HUF (2012) ACAJ – November-P. 399) (Guj.)(HC)

S.18B : Penalty – Commissioner – Waiver or reduction – Order of Commissioner was set aside [S.273A]
The non-obstante clause indicates that the power so exercised would take colour from the sub-sections and sub-clauses of Section 273-A of the Act, and from no other provision of the Act. The opening words of Section 273-A of the Act, i.e., "Notwithstanding anything contained in this Act...", confine consideration by the Commissioner of Income Tax to factors enumerated in Section 273-A of the Act. An adjudication based on grounds, other than grounds referred to in Section 273-A, would necessarily invite a valid charge that the order is null and void for an illegal exercise of jurisdiction, or a failure to exercise jurisdiction in accordance with statutory parameters set out in Section 273-A of the Act. Section 18-B of the Wealth Tax is *pari materia* to Section 273-A of the Income Tax Act, 1961 and, requires the Commissioner, while considering a prayer for reduction/waiver of penalty etc., to consider parameters set out in Section 18-B of the Act. The ratio recorded while deciding the case of *Kahan Chand & Ors v. CIT (2013) 94 DTR 234*, relating to Section 273-A of the Income Tax Act, 1961 would necessarily apply to Section 18-B of the Wealth Tax Act. The Commissioner of Wealth Tax has assumed the role of an Assessing Officer and while dismissing the petition and rejecting the plea for reduction/waiver of the amount of penalty imposed has referred to the very same factors that led the Assessing Officer to impose penalty. In this view of the matter, the impugned order is set aside and the matter is remitted to the Commissioner of Wealth Tax, to decide the matter afresh, in accordance with law. (AY. 1985-86 to 1987-88)
Inderjeet Mehta v. CWT (2013) 94 DTR 234 / 38 taxmann.com 71 / (2014) 362 ITR 476 / 264 CTR 322 (P&H)(HC)
Kahan Chand v. CIT (2014) 362 ITR 476 (P&H)(HC)
Harivash Lal v. CIT (2014) 362 ITR 476 (P&H)(HC)
Prem Parkash Khanna. v. CIT (2014) 362 ITR 476 (P&H)(HC)
Inderjeet Mehta v. CIT (2014) 362 ITR 476 (P&H)(HC)
Punaj Bricks Supply company v. CIT (2014) 362 ITR 476 (P&H)(HC)

S.24 : Appellate Tribunal – Rectification of mistake – No power to review
Assessee is an individual belonging to royal family of Patiala. In course of wealth-tax proceedings, department had bifurcated residential land bounded by four walls of property into different segments and adopted different rates of land. On appeal, Tribunal considered facts of case and proceeded to hold that value of residential house and land appurtenant to residential house might be valued as per provisions of section 7(4). However, in same order, Tribunal proceeded to hold that classification of land into different categories, area of land and valuation of land, was fair and reasonable. In view of apparent contradictions in Tribunal's order, assessee filed a miscellaneous application. Tribunal thus recalled its order for a limited purpose of determining valuation of land appurtenant to residential house in question. Subsequently, Tribunal concluded that there was no contradiction in findings recorded. On facts, approach adopted by Tribunal in impugned order smacked review of earlier order. Therefore, the impugned order was to be set aside and, matter was to be remanded back with a direction to Tribunal to reconcile two orders instead of writing a perfunctory order. (AY.1972-73 to 1984-85)

Raja Malwinder Singh v. CWT (2013) 212 Taxman 17 (Mag.)(P&H)(HC)

S.31 : Interest on delayed payment – Not relating to assessment year in question –Demand notices set aside

Since assessment order was for default in payment of wealth tax for assessment years in question while period for which interest was charged was subsequent to order of assessment in years 1986-88, interest levied in the impugned orders did not form part of process of assessment. The assessee filed the writ petition. Allowing the petition court, held that the , impugned orders, insofar as they related to levy of interest under section 31(2) was to be set aside and, consequently, demand notices insofar as they related to interest were also to be set aside.(AY 1979-80, 1980-81, 1982-83 and 1983-84)
Indrakshi Devi Avaru (Smt.) v. WTO (2013) 218 Taxman 83 (Mag.)(Kar.)(HC)

S.34AB : Registration of valuer – Qualification – Rejection of application on the ground that application was not in the prescribed format was not justified [Rule 8A of the Wealth-Tax Rules 1957]

Since the authority dismissed application of petitioner to be registered as a valuer under Wealth Tax Act without considering the relevant qualification certification that was issued by Central Government, matter was to be decided afresh. Since the petitioner's application was not on standard format, the petitioner should submit fresh application before competent authority.
Sarch Kumar v. UOI (2013) 218 Taxman 84 (Mag.)(MP)(HC)

Interpretation of taxing statutes

Interpretation of Taxing statutes – External Aid – Comparing Draft Bill and Ultimate Enactment

Reason for using a certain language in a draft Bill and a different expression in the provision ultimately enacted cannot be gathered from mere comparison of the two sets of provisions. There may be variety of reasons as to why the ultimate provision varies from the original draft. Therefore, it would be unsafe to refer to or rely upon the drafts, amendments, debates etc. for interpretation of a statutory provision when the language used is not capable of several meanings. (AY. 2007-08)
CIT v. Sikandarkhan N. Tunvar & Ors. (2013) 357 ITR 312 / 87 DTR 137 / 259 CTR 57/(2014) 220 Taxman 256 (Guj.)(HC)

Interpretation – Precedent – Judgment of Foreign Courts – Persuasive value

The judgment of Foreign Courts have only persuasive value.
L.G. Electronics India P. Ltd v. ACIT (2013) 140 ITD 41 / 22 ITR 1 / 83 DTR 1 / 152 TTJ 273 (SB)(Delhi)(Trib.)

Interpretation – Precedent – Conflict of decisions – View in favour of assessee to be adopted

If two views are possible, one in favour of the assessee and one against the assessee, the view in favour of the assessee should be adopted. (AY.2003-04)
ACIT v. LG Electronics India P. Ltd. (2013) 24 ITR 634 (Delhi)(Trib.)

Central Excise Act, 1944

S.35C : Stay of recovery Excise and Customs – Stay – Recovery – CBEC Circular that demand should be recovered even if stay application is not disposed of for no fault of assessee is arbitrary, unjustified & unlawful-Digital data records – For better administration and control

to safe guard the interest of revenue as well as fairness to assessees, Union of India Ministry of Finance requested to give these suggestions serious and urgent consideration

The Central Board of Excise and Customs (CBEC) issued Circular No. 967/01/ 2013 – CX dated 1-1-2013 to deal with recovery of demand. The Circular provided that (i) even if a stay application is pending, steps for recovery must be initiated thirty days after the filing of the appeal if no stay is granted, (ii) if the Commissioner (Appeals) has confirmed a demand, recovery has to be initiated immediately despite s. 35F permitting the assessee to move the Tribunal for a dispensation of the requirement of deposit and (iii) if the Tribunal has confirmed the demand, recovery should be initiated immediately despite the statute providing a time period for filing an appeal to the High Court. The Circular was challenged by the assessees on the ground that recovery of the demand even when the assessee is not responsible for the delay in disposal of the stay application/ appeal and during the pendency of the time period for filing an appeal was arbitrary and violative of Article 14 of the Constitution. Held by the High Court upholding the plea:

(i) Though in *Krishna Sales (Collector of Customs Bombay v. Krishna Sales (P) Ltd. (1994) 73 ELT 519 (SC)* it was held that the mere filing of an appeal does not operate as a stay or suspension of the order appealed against, where the delay in the disposal of an appeal or a stay application arises due to a failure of the Appellate Authority to dispose of the appeal or the stay application and the assessee is not at fault, there is no reason or justification to penalize the assessee by recovering the demand in the meantime. Administrative reasons for non-disposal of the stay application may include lack of adequate infrastructure, unavailability of the officer concerned before whom the stay application has been filed, absence of a Bench before the CESTAT for the decision of an application for stay or the sheer volume of work. In such a situation, where an assessee has done everything within his control by moving an application for stay and which remains pending because of the inability of the Commissioner (Appeals) or the CESTAT to dispose of the application within thirty days, it would be a travesty of justice if recovery proceedings are allowed to be initiated in the meantime. The protection of the revenue has to be necessarily balanced with fairness to the assessee. That was why, even though a specific statutory provision came to be introduced by Parliament in s. 35C(2A) to the effect that an order of stay would stand vacated where the appeal before the Tribunal was not disposed of within 180 days, the Supreme Court held in *COC & C.Ex.(Ahd) v. Kumar Cotton Mills Pvt. Ltd. (2005) 180 ELT 434 (SC)* that this would not apply to a situation where the appeal had remained pending for reasons not attributable to the assessee.

(ii) Also initiation of recovery proceedings without allowing the assessee, the time which is allowed by the statute for filing an appeal and for applying for a waiver of pre-deposit or for filing an appeal to the High Court is not justified. The circular is in terrorem and its plain effect and consequence is to deprive the assessee of the remedy which is provided under the law of moving, as the case may be, the CESTAT, the High Court or the Supreme Court against an order of adjudication of the competent appellate forum. There is no justification to commence recovery immediately following an order in appeal where the limitation period for challenging the decision of the Appellate Authority has not expired. The Circular is to that extent patently arbitrary and violative of Article 14 of the Constitution. The Department's argument that the field officers who initiate recovery action have no means of verifying the status of the stay application is not justified. The Ministry of Finance should take steps to ensure that proceedings before all the authorities are recorded in the electronic form. This will provide transparency and accountability in the functioning of all authorities. However, if the failure to dispose of the stay application is because of the conduct of the assessee, the revenue would be justified in commencing recovery action.

Larsen & Toubro Limited v. UOI (2013) (288) E.L.T. 481 / 86 DTR 162 / 259 CTR 37 (Bom.) (HC)

S.35C : Stay of recovery – Proviso – CBEC Tax Recovery Circular is untenable, misconceived, wholly illegal and arbitrary

The High Court had to consider two issues:

(i) Whether the revenue is justified in initiating recovery proceedings on the basis of Circular dated 1-1-2013, even when an application for waiver of pre-deposit is pending before the Appellate Authorities for the reason that on such application for stay or waiver of pre deposit, no orders have been passed? And (ii) whether the second proviso in sub-section (2A) of s. 35C is directory and that the Tribunal in appropriate circumstances can extend the period of stay beyond 180 days? Held, by the High Court:(i) The Circular is purported to be issued in terms of the judgement in *Krishna Sales (73) ELT 519 (SC)*. Though in Krishna Sales it was held that mere filing of an appeal does not operate as stay or suspension of the order appealed against, the Board has overlooked the fact that the assessee is not seeking stay only on account of filing of an appeal, but for the reason that the assessee has sought dispensing with the pre-deposit of duty and penalty and has a right to demand decision on such application, a right which is created by the Statute. Therefore, the very basis of the Circular is untenable, misconceived, wholly illegal and arbitrary. Therefore, the condition of recovery, if no stay is granted within 30 days, is illegal, arbitrary, unjustified and consequently set aside (Larsen & Toubro (Bom) referred);

(ii) As regards appeals pending before the Tribunal, the assessee has no control over the non-disposal of the appeal on account of non-availability of infrastructure; the members of the Tribunal and the workload. The vacation of stay for the reason that the Tribunal is not able to decide appeal within 180 days is a harsh, onerous and unreasonable condition. It burdens the assessee for no fault of his. Such a condition is onerous and renders the right of appeal as illusory. An order passed by a judicial forum cannot be annulled for no fault of the assessee. Therefore, s. 35C(2A) which provides for automatic vacation of stay on the expiry of 180 days has to be read down to mean that after 180 days the Revenue has a right to bring to the notice of the Tribunal the conduct of the assessee in delay or avoiding the decision of appeal, so as to warrant an order of vacation of stay. If the provision is not read down in the manner mentioned above, it suffers from illegality rendering the right of appeal as redundant.

PML Industries Limited v. UOI (2013) 86 DTR 227 / 259 CTR 87 (P&H)(HC)

S.35L : Appeal – High Court – Grounds not argued before Tribunal is not to be raised

The Court held that in an appeal under section 35L of the 1944 Act, it is not open to either party to raise a new ground which was never argued before the Tribunal. The court's scrutiny of the arguments advanced has to be limited only to those grounds which were argued by the parties and addressed by the Tribunal in its order.

CCE v. Connaught Plaza Resataurant P. Ltd. (2013) 18 GSTAR 1 (SC)

Customs Act, 1962

S.129 : Member – Service Rules – Bar in s. 129(6) on ex-Members practising before CESTAT does not apply to Members demitting office on probation

The respondent, a practising Advocate at Indore, was offered appointment as Member (Judicial) of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). It was indicated that the respondent would be on probation for a period of one year and upon confirmation shall hold office for a term of 5 years extendable by another term of 5 years. It was indicated in the letter that if the respondent accepted the offer his first posting would be at CESTAT Chennai Bench. The respondent sent a letter accepting the offer of appointment but requested that he may be posted at a place nearby Indore, preferably at Mumbai. That request was not accepted and the respondent was requested to convey his unconditional willingness to accept the offer of appointment as Member (Judicial) within 10 days. The respondent wrote a reply in which he gave his unconditional willingness to be appointed Member (Judicial) but sought clarification whether a Member is entitled to practice and appear in

CESTAT after he is discharged from services for any reason during the period of probation. The Government responded and stated that the bar in s. 129(6) of the Customs Act which applied to a member 'on ceasing to hold office' is applicable to all types of cessation; whether on retirement, resignation or discharge during probation or by any other way. The respondent challenged the said letter before the Central Administrative Tribunal and sought a direction that he should be allowed to join as Member in the CESTAT without being subjected to the embargo of s. 129 (6) in the event of his ceasing to hold office as Member before the expiry of period of probation. During the pendency of the application before the CAT, the Government withdrew the offer of appointment on the ground that his unconditional willingness to accept the offer of appointment had not been received. The respondent challenged the withdrawal of the offer of appointment before the CAT. The CAT held that a person under probation was not holding an office for the purpose of s. 129(6) of the Customs Act and that the case of discharge of a probationer from service on account of not being not found suitable for being confirmed was not comparable with cessation of office by person who has acquired a lien on it. The CAT followed the order in *Concept Creations v. ACIT (2009) 120 ITD 19 (Del.) (SB)* where it was held that Members of the ITAT are debarred from appearing before the ITAT only after retirement from service of the Tribunal and such conditions are not made applicable to a member discharged from service during the period of probation. It also held that the clarification sought by the respondent did not mean that he had not unconditionally accepted the offer of appointment and that the same could not be revoked. The Government challenged the said order in a Writ Petition. HELD by the High Court dismissing the Petition:

The bar under s. 129(6) that a Member "on ceasing to hold office" shall not be entitled to appear, act or plead before the Tribunal is applicable to a Member holding the post on substantive basis and not to a person demitting office as a probationer. The word 'probation' means the testing of the character, conduct or abilities of a person. A Member on probation cannot be said to be "holding office" because he has no vested right in the said office. The Service Rules also show that a distinction has been made between the appointment of a Member who is on probation and a Member who is confirmed. Also, the fact that the respondent sought a change in the place of posting and sought clarification does not mean that he had not unconditionally accepted the offer of appointment. (W.P.(C) No. 7112/2013, dated 2-12-2013)

UIO v. Ramesh Nair (Delhi)(HC).www.itatonline.org

Constitution of India

Central Civil Services (Classification, Control and Appeal) Rules, 1965 – Dismissal, removal or reduction in rank of persons employed in civil capacities under Union or a State – Approval by disciplinary authority – Charge sheet/charge memo having not been approved by disciplinary authority, i.e., Finance Minister, was *nonest* in eye of law. [Article 311, of the Constitution of India, Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 and clauses (8) to (12) of the Office Order No. 205 of 2005, dated 19-7-2005]

One 'G' joined Indian Revenue Service in year 1987 as Assistant Commissioner of Income-tax. He earned promotion as Additional Commissioner in year 2000. On 7-9-2005, whilst working on aforesaid post, 'G' was served with a charge sheet under rule 14 of Central Civil Services (Classification, Control and Appeal) Rules, 1965 [CCS (CCA) Rules]. Said charge sheet was issued on allegation that 'G' failed to maintain integrity and exhibited conduct which was unbecoming of a Government servant. Charge memo was not approved by disciplinary authority, i.e., Finance Minister. He had granted approval only for initiation of departmental proceedings against 'G'. 'G' submitted his reply to allegations and denied charges levelled against him. During pendency of inquiry proceedings, 'G' filed O.A. before Central Administrative Tribunal claiming that charge sheet was without jurisdiction, as charge memo had not been approved by Finance Minister. Tribunal quashed charge sheet. Court held that a plain look at provisions of Article 311 of Constitution, Rule 14 of CCS (CCA) Rules and clauses (8) to (12) of Office Order No. 205 of 2005, dated 19-7-2005

made it clear that all decisions with regard to approval of charge memo, dropping of charge memo, modification/amendment of charges had to be taken by Finance Minister. Therefore, charge sheet/charge memo having not been approved by disciplinary authority, i.e., Finance Minister, same was *non est* in eyes of law.
UOI v. B.v. Gopinath (2013) 219 Taxman 73 (Mag.)(SC)

Writ – Court of appeal – Jurisdiction – Special audit [S. 142(2A), Article 226, Constitution of India]
While exercising its jurisdiction under Article 226 of the Constitution of India, the High Court does not sit as a court of appeal and a patent illegality or lack of inherent jurisdiction in passing the action/letter would be a limited ground for invoking the jurisdiction of the Court. The order was held to be valid. (AY. 2010-11)
U. P. Samaj Kalyan Nirman Nigam Ltd. v. CIT (2013) 357 ITR 12 (All.)(HC)

Writ – Sales-tax Tribunal – Accommodation to members – High Court irked by apathy of Government towards the (non) working of the Sales-tax Tribunal despite 4000 pending appeals with revenue effect of Rs. 4,500 crore
The Sales Tax Tribunal Bar Association filed a Writ Petition seeking certain directions relating to appointment of Members of the Sales Tax Tribunal. The High Court passed an order dated 6-9-2013 in which it expressed surprise that despite revenue of about Rs. 4,500 crores which was locked up on account of pending litigation, the Government had not bothered to fill vacancies in the post of Members. The Government sought 4 weeks to consider the matter. Now HELD by the High Court:

(i) The problem highlighted by the Petitioner appears to be very genuine and quite serious. It appears that the policy of the State Government is not to give official accommodation to members of such Tribunals if they are retired Administrative Officers / Police Officers / Judicial Officers. Official accommodation is being provided to only those who are in service before reaching the age of superannuation. This Court fails to understand why the State Government should not provide official accommodation to the members of Administrative Tribunals even if they have retired and are now employed after their retirement;
(ii) The other major problem is that out of the sanctioned strength of 10 members (5 Judicial and 5 Administrative), at present there is only one President, who is a retired Judicial Officer, and 2 administrative members. That means as against the strength of 10, there are only 3 persons manning the post of President and members of the Sales Tax Tribunal at Mumbai. This also appears to be a very serious matter. The State Government shall take necessary steps for filling in the vacant posts;
(iii) Retired Administrative Officers / Police Officers / Judicial Officers would be willing to accept the assignment only if they are given official accommodation and, therefore, let the State Government first decide the question of providing official accommodation to the members from amongst the retired persons;
(iv) When the pendency before the Maharashtra Sales Tax Tribunal is more than 4000 appeals, it is high time that the issue is taken up very seriously at all concerned levels. (WP No. 8023 of 2013. dt. 17 October, 2013)

Sales Tax tribunal Bar Association. v. State (Bom.)(HC) www.itatonline.org

Writ – Sales tax Tribunal – Filling of vacancies – Accommodation – Retirement age – Government of Maharashtra is directed to take steps for filling vacancies of Members, providing accommodation to them and to consider increasing their retirement age limit
The Sales Tax Tribunal Bar Association filed a Writ Petition seeking certain directions relating to appointment of Members of the Sales Tax Tribunal under the Maharashtra Value Added Tax Act, 2002. HELD by the High Court:

(i) At present there are 5 Benches of the Sales Tax Tribunal, but on account of the vacancies in the post of Members, at present only 1 Bench is functional. It is surprising that the State Government has not realised that sales tax revenue to the extent of about ` 4,500 crores is locked up on account of litigation pending before the Sales Tax Tribunal;

(ii) Even when retired District Judges are appointed as Members of the Sales Tax Tribunal they do not wish to continue on account of not being provided with residential accommodation. Very recently one Member (originally belonging to Judicial service) has tendered resignation only due to absence of residential accommodation in Mumbai. On account of the above difficulty of accommodation not being provided to the retired Judges who are appointed as Members, the High Court on the administrative side also finds it difficult to obtain willingness of retired Judges for appointment as Members of the Sales Tax Tribunal. It would be desirable for the State Government to provide residential accommodation to all the Members of the Tribunal so as to ensure proper functioning of the Tribunal;

(iii) The suggestion made by the Bar Association that as the retirement age of the President of Tribunal is 65 years, there is no reason why the other Members of the Tribunal should not be given retirement age of 65 years is quite reasonable and the State Government may consider the same at the earliest. (WP No. 8023 of 2013, dt. 6-9-2013)

Sales Tax Tribunal Bar Association v. State (Bom.)(HC) www.itatonline.org

Writ – Income Tax – Appellate Tribunal – Appointment of officiating President –Challenge to removal of ITAT President admitted but no interim relief granted

Shri. G. E. Veerabhadrappa, the senior-most Vice President of the Tribunal, was *vide* order dated 13-10-2011 appointed President of the Tribunal in an "officiating capacity till the post was filled up on regular basis". Vide notification dated 5-5-2012 the said order was modified to read "in an officiating capacity up to 31.8.2012 or further orders". On 31-8-2012, Shri H. L. Karwa (the junior-most Vice President) was appointed the President in place of Shri G. E. Veerabhadrappa. Shri. Veerabhadrappa was thereafter transferred on 7-11-2012 to Calcutta. Shri. Veerabhadrappa filed a Petition before the Central Administrative Tribunal ("CAT") claiming that (i) the curtailment of the period of appointment till 31-8-2012 was unjustified, (ii) his removal from the post of President was actuated by "malice and personal vendetta" of the Law Secretary owing to his refusal to cancel the transfers of Shri. Hari Om Maratha and Smt. Diva Singh and (ii) the appointment of Shri. H. L. Karwa as President was irregular as found by the Appointments Committee of the Cabinet. The Law Ministry opposed the Petition on the ground that there were complaints regarding integrity and that the decision was taken at the highest level after "due consideration". The CAT dismissed the Petition and Shri. Veerabhadrappa filed an appeal to the High Court. HELD by the High Court admitting the appeal but refusing interim stay:

The only interim relief which is prayed for is for stay of the operation of the impugned order of the CAT. As the Petitioner did not challenge the order dated 5-5-2012 and as on 31-8-2012 Shri H. L. Karwa took over the charge of the post of the President and continues to hold the charge of the post till today and as the appointment of Shri Veerabhadrappa was purely *ad hoc,* it is not a fit case to grant interim relief. Prayer for interim relief is rejected. (Writ Petition No.5126 of 2013, dt. 25-6-2013)

G. E. Veerabhadrappa v. UOI (Bom.)(HC) www.itatonline.org

Chartered Accountants Act, 1949

S.8 : Moral turpitude. (S. 17 of the Hindu Marriage Act, 1955 and S. 494 of the Indian Penal Code, 1860)

Involvement of a person in an offence of bigamy comes within the purview of 'moral turpitude' and by virtue of conviction for bigamy, a chartered accountant attracts disqualification to retain his name in register of Institute of Chartered Accountants of India.

P. Mohanasundaram v. President, Institute of Chartered Accountants of India (2013) 216 Taxman 25 (Mad.)(HC)

Service Tax

Service tax – Recovery – Stay – Outstanding for service tax and penalty – Recovery of penalty was stayed until final disposal of appeal [S.76,78]

Civil appeal was admitted by the Apex Court on 21st September 2012. Assessee moved application to stay the demand. Assessee was required to pay about Rs.13 crores towards service-tax and Rs.16-75 crore towards penalty. Out of Rs. 13 core service tax liability an amount of Rs. 6 crore has already been deposited. Prayer for stay was rejected. Penalty imposed under section 76 under section 78. Assessee prayed for stay of recovery of penalty amounting to Rs. 16.75 crores. Four weeks time was granted to pay the remaining service tax. Recovery of penalty was stayed till the disposal of appeal.
British Airways PLC India Branch v. CIT (2013) 95 DTR 252 / 263 CTR 260 (SC)

S.65 : Service tax on transfer or permitting the use of copyright of cinematograph films for exhibition in a theatre – Writ [Art.366 (29A)]

Service tax on transfer or permitting the use of copyright of cinematograph films for exhibition in a theatre – A variant mode of business transfers between the producer, distributor and the sub-distributor or area distributor or exhibitor (theatre owner) – these transfers are not "sale of goods" to fall in Entry 54, List II Or Entry 92 A, List I or residual Entry-sec 65(105)(2222t) and therefore, is not ultra vires the Constitution.
AGS Entertainment (P) Ltd v. UOI (2013) 262 CTR 471 (Mad.)(HC)

S.65 : Service tax – Point of taxation – CBEC Circulars on CA's liability to pay higher service tax rate on services rendered/ invoice raised before 1-4-2012 but payment received thereafter is *ultra vires*. (Finance Act, 1994. S. 65(105) (s),66b), Point of taxation Rules 2011, rule, 4, 7)

Rule 2(e) of the Point of Taxation Rules, 2011 inserted w.e.f. 1-4-2011 defined "point of taxation" as the point in time when a service shall be deemed to have been provided. Consequent to the insertion of s. 66B, the rate of service tax was enhanced from 10% to 12% w.e.f. 1-4-2012. The High Court had to consider what would be the rate of tax where (a) the service is provided by the chartered accountants prior to 1-4-2012 (b) the invoice is issued by the CAs prior to 1-4-2012 but (c) the payment is received after 1-4-2012. On facts, as the services were rendered before 1-4-2012 and even the invoices were raised before that date and it was only that the payment was received after the said date, the Petitioner claimed that Rule 4(a) (ii) of the Point of Taxation Rules, 2011 applies and the point of taxation shall be the date of issuance of the invoice. However, the service tax authorities issued Circular No.154 dated 28-3-2012 and Circular No.158 dated 8-5-2012 that in respect of invoices issued on or before 31st March 2012 the point of taxation shall be the date of payment. The Petitioner filed a Writ Petition to challenge the said Circulars. HELD by the High Court upholding the plea:

Rule 4 of the Point of Taxation Rules, 2011 which has continued even after 1-4-2012 is clearly the answer. It provides for a specific situation namely determination of the point of taxation in case of change in effective rate of tax. As per Rule 4, whenever there is a change in the effective rate of tax in respect of a service, the point of taxation shall be determined in the manner set out in the Rule. Sub-clause (ii) of Clause (a) of Rule 4 provides that where the taxable service has been provided before 1-4-2012 and the invoice was also issued before 1-4-2012, but the payment is received after 1-4-2012, then the date of issuance of invoice shall be deemed to be the date on which the service was rendered and, consequently, the point of taxation. The result is that where the services of the chartered accountants were actually rendered before 1-4-2012 and the invoices were also issued before that date, but the payment was received after the said date, the rate of tax will be 10% and not 12%. The circulars in question have not taken note of this aspect, and have proceeded on the erroneous

assumption that the old Rule 7 continued to govern the case notwithstanding the introduction of the new Rule 7 which does not provide for the contingency that has arisen in the present case. Consequently, the circulars are quashed as being contrary to the Finance Act, 1994 and the Point of Taxation Rules, 2011. A Circular which is contrary to the Act and the Rules cannot be enforced (Ratan Melting & Wire Industries followed).
Delhi Chartered Accountants Society v. UOI (2013) 84 DTR 25 / 257 CTR 73 (Delhi)(HC)

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

Attachment of property – Interest in property – Share holder of company – Occupancy rights in flat conferred by Articles of Association confer ownership rights in flat. Restriction on transferability of flat in Articles of Association is void – Property can be attached and sold
Hill Properties Ltd., by its Articles of Association, permitted its shareholders to use and occupy flats in the building owned by it. A shareholder mortgaged a flat to secure a loan taken from the Union Bank. As there was a default in repayment of the loan, the flat was attached in proceedings initiated under the Securitization Act before the DRT. Hill Properties claimed that it was the owner of the flat and that the shareholder had a mere right to use and occupy the flat and that the mortgage of the flat was void. The High Court rejected the contention and held that the shareholder had the right to mortgage the flat. On appeal by Hill Properties to the Supreme Court HELD dismissing the appeal:
The right, title & interest over a flat conveyed is a species of property, whether that right has accrued under the provisions of the Articles of Association of a Company or through the bye-laws of a Cooperative Society. Flat owners' right to dispose of its flat is also well recognised, and one can sell, donate, leave by will or let out or hypothecate his right. By purchasing the flat, the purchaser, over and above his species of right over the flat, will also have undivided interest in the common areas and facilities, in the percentage as prescribed. Flat owners will also have the right to use the common areas and facilities in accordance with the purpose for which they are intended. It is too late in the day to contend that flat owners cannot sell, let, hypothecate or mortgage their flat for availing of loan without permission of the builder, Society or the Company. Neither the Companies Act nor any other statute make any provision prohibiting the transfer of species of interest to third parties or to avail of loan for the flat owners' benefit. A legal bar on the saleability or transferability of such a species of interest will create chaos and confusion. The right or interest to occupy any such flat is a species of property and hence has a stamp of transferability. The Articles of Association of a Company have no force of a Statute and the right of the shareholder to mortgage could not have been restricted by the Articles of Association. Warrant of attachment issued by the DRT on the flat in question is valid. (Civil Appeal No. 7939 of 2013, dt. 11-9-2013)
Hill Properties Ltd v. Union Bank (2014) 1 SCC 635 (SC) www.itatonline.org

Service matters

Service matter – Promotion of income-tax Inspectors – Direct recruits – promotees
Where examination and selection process of direct recruits could not be completed within recruitment year itself, modification/amendment in manner of determining inter se seniority between direct recruits and promotees, carried out through Office Memorandum dated 7-2-1986, and compilation of instructions pertaining to seniority in Office Memorandum dated 3-7-1986 leave no room for any doubt that 'rotation of quotas' principle would be fully applicable to direct recruits. Direct recruits will, therefore, have to be interspaced with promotees of same recruitment year. Claim of promotees that direct recruit Income-tax inspectors in such a case should be assigned seniority with reference to date of their actual appointment in Income-tax Department; and not date of original/first examination/selection, was to be declined.
UOI v. N.R. Parmar(2013) 212 Taxman 97 (SC)

Income-tax Appellate Tribunal – *Ad hoc* appointment as officiating president of ITAT is proper and legal

Shri. G. E. Veerabhadrappa, the senior-most Vice President of the Tribunal, was vide order dated 13-10-2011 appointed President of the Tribunal in an "officiating capacity till the post was filled up on regular basis'. Vide notification dated 5-5-2012 the said order was modified to read "in an officiating capacity up to 31-8-2012 or further orders". On 31-8-2012, Shri. H. L. Karwa was appointed the President in place of Shri G. E. Veerabhadrappa. Shri. Veerabhadrappa was thereafter transferred on 7-11-2012 to Calcutta. Shri. Veerabhadrappa filed a Petition claiming that (i) the curtailment of the period of appointment till 31-8-2012 was unjustified, (ii) his removal from the post of President was actuated by "malice and personal vendetta" of the Law Secretary owing to his refusal to cancel the transfers of Shri. Hari Om Maratha and Smt. Diva Singh and (ii) the appointment of Shri. H. L. Karwa (the junior-most Vice President) as President was irregular as found by the Appointments Committee of the Cabinet. The Law Ministry opposed the Petition on the ground that there were complaints regarding integrity and that the decision was taken at the highest level after "due consideration". HELD by the CAT dismissing the Petition:

(i) The order appointing the applicant as President made it clear that the appointment was "in an officiating capacity and until further orders". The appointment order did not confer any invincible right on the applicant to continue in office. Also, the order dated 5-5-2012 restricting the applicant's tenure as President till 31-8-2012 was challenged by him several months later. Even though there may not be delay and laches, it can be said that the conduct was one of acquiescence and did not entitle him to relief;

(ii) As regards the allegation that the removal was motivated by "malice and personal vendetta", the exchange of correspondence between the President and the Law Ministry regarding the transfers of the Members took place after the passing of the order dated 5-5-2012 curtailing the tenure of the Applicant till 31.8.2012. There is some merit in the contention of the Respondents that the Applicant is trying to create a "smoke screen" by unnecessarily dragging the names of the Law Secretaries and making personal allegations;

(iii) The allegation that the appointment of Shri H. L. Karwa as Officiating President was improper as a selection process was not resorted to is also not correct. The Government is entitled to appoint the President in an officiating capacity so as to ensure that no vacuum is left in the Institution. The opinion expressed by the Appointments Committee of the Cabinet is totally misconceived. It is immaterial whether the person appointed as officiating President is junior or not and there is no question of supersession. It is, however, desirable that the appointment to the post of President be made at the earliest on a regular basis rather than on an *ad hoc*/ officiating basis.

G. E. Veerabhadrappa v. UOI (CAT) www.itatonline.org.

Income-tax Appellate Tribunal – Powers of President – Transfer of members – As there is prima facie merit in the allegation regarding improper Collegium & mala fides, interim stay on transfer of ITAT Member cannot be vacated

Hon'ble Shri. Sunil Kumar Yadav, Judicial Member, posted at Lucknow, filed a case before the Central Administrative Tribunal (CAT), Lucknow Bench, claiming that his transfer, within a span of one year, from Lucknow to Chennai, which was then modified from Lucknow to Kolkata was "arbitrary and with a malafide intention" and contrary to the guidelines laid down in *Ajay Gandhi v. V. B. Singh (2004) 2 SCC 120.* By an interim order dated 19-11-2012, the CAT stayed operation and implementation of the impugned transfer order. The UOI and the President of the Tribunal filed an application seeking vacation of the stay order. HELD by the CAT:

The interim order has been passed on the basis of a *prima facie* case that the impugned transfer order has not been made by a proper Collegium in accordance with the guidelines laid down in Ajay Gandhi's case and also on the ground of alleged mala fides against the present officiating president of

the ITAT. A new point has now been raised by the transferred Member that the ACC (Cabinet Committee of Appointment) has not yet accorded approval on the proposed appointment of Shri Karwa as officiating President of the ITAT on the ground that by such appointment there is a supersession of three persons and as there is no difference between an appointment in a substantive capacity and an officiating capacity, the appointment requires to be considered first by the Selection Committee. This approval may or may not come in due course of time and then only the exact status of the competent authority i.e. the President, ITAT, would be ascertained. For the present, *prima facie*, this point is in favour of the applicant. As regards the point of proper Collegium, the requirement in Ajay Gandhi is that the President should consult two senior Vice Presidents and not the two Vice Presidents available. It has been alleged that though the two senior Vice Presidents were available for the Collegium, they were ignored in an arbitrary manner and in utter defiance of the law. *Prima facie* there appears to be some substance in the submission. A prima facie case has also been made out as regards the allegation of *mala fides*. Consequently, there is no substantial and sufficient ground for vacating the interim order dated 19-11-2012
Sunil Kumar Yadav v. UOI (CAT) www.itatonline.org

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S.90: Double taxation agreement-Agreement for exchange of information with respect to taxes with foreign countries – Principality of Monaco – Notification no 43 /2013 [F.no 503 /05/2009-FTD-I /SO 924(E)], dated 12-6-2013 (2013) 216 Taxman 3(st)

S.90: Agreement signed between the Republic of India and the Republic of Albania for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital dt 8th July, 2013 (2013) 355 ITR 80(St.)

S.90: Convention between the Government of the Republic of India and the Government of the People's of Republic of Bangladesh for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income; Amendment. Notification No.S.O. (E) dated 4th July, 2013 (2013) 355 ITR 97(St.)

S,90: Agreement between the Government of the Republic of India and the Government of the Principality of Monaco for the exchange of information relating to tax matters. Notification No. S.O.(E) dated 12th June, 2013 (2013) 355 ITR 197(St.)

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Acknowledgements: Sincere thanks to the research team and the editorial team of the Journal Coommitee of the All India Federation of Tax Practioners (AIFTP), the editorial team of www.itatonline.org and the research team of KSA Legal chambers, staff members of the AIFTP ,ITAT Bar Association ,Mumbai and KSA Legal Chmbers.