CONSOLIDATED DIGEST OF CASE LAWS (JANUARY 2012 TO SEPTEMBER 2012

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

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

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

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

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

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

CIT v. Namdhari Seeds P. Ltd (2012) 341 ITR 342 (Karn.) (High court)

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

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

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

S.2(1A): Definitions - Agricultural income – Compensation received on demolition of borewell is agricultural income .

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

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

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

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

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

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

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

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

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

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

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

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

The assessee trust is a society. One of the objects of the trust is to publish books, booklets etc. on professional subjects. The assessee trust filed an application in Form 10G for grant of renewal under section 80G of the Act. The renewal was rejected on the ground that the assessee was publishing and selling books of professional interest and its activities are commercial in nature. On appeal the Tribunal held that the activities of selling books could be considered as a part of ongoing education of chartered accountants , which in turn would help the society to get better, well-equipped and skilled set of chartered accountants for maintaining audit quality. The Tribunal allowed the appeal and held that the assessee is entitled to approval under section 8OG. On appeal by revenue the Court up held the order of Tribunal and held that activities of the assessee trust in publishing and selling books of professional interest which are meant to be used as reference material by general public as well as the professional in respect of bank audit, tax audit etc. cannot be construed as commercial activities and therefore, assessee trust formed with the object inter alia to conduct periodical meetings on professional subjects is entitled to approval under section 80G (5).

DIT v. The Chartered Accountants Study Circle (2012) 70 DTR 219(Mad.) (High Court)

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

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

Held, that the fundamental or dominant function of the Institute was to exercise overall control and regulate the activities of the members/enrolled chartered accountants. A very narrow view had been taken that the Institute was holding coaching classes and that this amounted to business. The Institute had framed the Chartered Accountants Regulations, 1988, and the Regulations provided for training of students, their examination, award of degrees and

membership of the Institute. There was a clear distinction between coaching classes conducted by private coaching institutions and the courses and examinations which were held by the Institute. The question whether the Institute carried on business had not been examined with proper perspective. The Institute maintained that it never granted any loan and/or advance to the Institute of Chartered Accountants of India Accounting Research Foundation. The facts regarding this question had not been considered. The order denying the exemption was not valid. (A.Y. 2006-07, 2007-08, 2008-09, 2009-10)

Institute of Chartered Accountants of India (ICAI) v. Director General of IT (E)
(2012) 347 ITR 99 (Delhi)(High Court)

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

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

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

S. 2(17): Definitions-Company-Free Zone Entity(FZE)-Income of Vega cannot be assessed as taxable income in India under section 5 (1) of the Income-tax Act.(S.5(1))

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

AIA Engineering Ltd v. ADCIT (2012) 50 SOT 134 (Ahd.) (Trib.)

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

The applicant is a company incorporated in India , 48.87 percent , of whose shares were held by a group holding company in the U.S.A, 25.06 percent by a group holding in Mauritius , 27.37 percent by a group holding company in Singapore and 1.76 percent by the general public. On June 15 , 2010 , the board of directors of the applicant passed a resolution proposing a scheme of buy back of its shares from its existing share holders in accordance with section 77A of the Companies Act 1956. Mauritius company which acquired the shares sought advance ruling on whether the capital gains that may arise , were chargeable to tax in India in the context of the Double Taxation Avoidance Agreement between India and Mauritius and whether it would have the obligation to with hold the tax in terms of section 195 of the Income-tax Act ,1961.The authority for advance ruling while admitting the application under section 245R(2) of the Act for a ruling, held that the Authority can look into avoidance of tax and whether the transaction is colourable. On the facts of the case the Authority held that the applicant had not paid dividend to any of the share holders after

April 1, 2003 ,on which date section 115-0 of the Act was introduced .Neither the holding company in the U.S.A .nor that in Singapore accepted the offer of buy- back for obvious reasons that it would have been taxable in India as capital gains .There was no proper application on the part of the applicant as to why no dividends were declared subsequent to 2003, when the company was regularly making profits and when dividends were being distributed before the introduction of section 115-O of the Act. Therefore, the proposal of buy-back was a scheme devised for avoidance of tax, a colourable devise for avoiding tax on distributed profits as contemplated in section 115-O of the Act. The arrangement could only be treated as a distribution of profits by a company to its share holders satisfying the definition of dividend which includes any distribution by a company of accumulated profits to its share holders. The payments in question would also satisfy the definition of dividend in the Article 10(4) of the DTAA between India and Mauritius. Under Article 10(2) of the DTAA, dividend paid by a company which is a resident of India, to a resident of Mauritius, may also be taxed in India, according to the laws of India but subject to the limitation contained therein. The proposed payment would be taxable in India in terms of article 10(2) of the DTAA between India and Mauritius hence the applicant was required to withhold tax on the proposed remittance of the proceeds to the Mauritius company.
XYZ India,In re (2012) 343 ITR 455 / 206 Taxman 631 (AAR)

S. 2(22)(e): Definitions- Dividend - Deemed dividend – Credit balance-Credit balances in the normal course of business cannot be assessed as deemed dividend.
Assessee has filed the confirmation and copies of accounts showing that the amounts representing in the accounts were receipts due to the appellant, in the normal course of business dealings with these companies. The Court held that receipts from these companies cannot be treated as deemed dividend. (A. Y. 2003-04).
CIT v. Francies Wacziarg (2012) 66 DTR 453 / (2011) 203 Taxman 391 (Delhi)(High Court)

S. 2(22)(e): Definitions-Dividend-Deemed dividend-Loan to partnership- Since the partnership firm which has purchased the shares through its partners though not registered share holder , being beneficial owner is to be treated as share holder and loan advanced by company to such partnership is liable to tax as deemed dividend.
The Assessing Officer has held that loan received by partnership firm from Bharti Enterprises (P) Ltd should be treated as deemed dividend as two partners hold more than 10 percentage shares in Bharti Enterproses (P) Ltd . CIT (A) and Tribunal decided the issue in favour of assessee. On appeal, the High Court following the Judgment in National Travel services (2012) 249 CTR 540 (Delhi) held the issue in favour of revenue holding that partnership firm is to be treated as the share holder and it is not necessary that it has to be "registered shareholder". The question was answered in favour of revenue. As regards the accumulated profits the matter is set aside to the Tribunal by giving a reasonable opportunity to both the parties. (A.Y. 2004-05)
CIT v. Bharati Overseas Trading Co. (2012) 249 CTR 554/70 DTR 336 (Delhi) (High Court)

S. 2(22)(e) : Definitions-Dividend- Deemed dividend- Unsecured loans from other Company - Provisions of section 2(22)(e) cannot be invoked if the assessee does not possess the prescribed voting rights in that company
S. 2(22)(e) cannot be invoked in respect of the unsecured loans taken by the assessee from the other company if the assessee does not possess the prescribed voting rights in that company; shareholding of the common shareholder or director cannot be taken into consideration for the purpose. (AY 1994-95, 1996-97 & 1997-98)
CIT v. Gopal Clothing Co. Ltd. (2012) 71 DTR 358 (Delhi)(High Court)

S. 2 (22)(e):Dividend- Deemed Dividend-Partnership firm-Shares held by partners on behalf of partnership firm is to be treated as shareholder.
A partnership firm which purchases shares of a company through its partners, though not registered shareholder, being beneficial owner, is liable to be treated as shareholder for the purpose of section 2 (22)(e) of the Act.
CIT v. National Travel Services (2012)347 ITR 305/ 70 DTR 321 / 249 CTR 540 (Delhi)(High Court)

S. 2(22)(e): Definitions-Dividend-Deemed dividend-Journal entries-Journal entries could not be said to be credit entries hence can be assessed as deemed dividend.

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

ACIT v. Gurbinder Singh (2012) 50 SOT 263 (Chennai) (Trib.)

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

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

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

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

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

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

S.2(24): Definitions – Income – incentive prize – Not income

The Assessee subscribed to PPF which formed part of Small Savings Scheme encouraged by Government of Punjab. The Govt issued lucky coupon on every investment of Rs.5,000/-. The Assessee also received lucky coupon which won the prize of 1kg gold. The Assessing officer held that the price money won by assessee fell within the meaning of section 2(24)(ix) and made addition as income. On Appeal, the CIT(A) as well as the Tribunal deleted the addition. On appeal, the High Court, confirmed the view of the Tribunal and held that incentive price received by assessee on account of coupon given on the strength of small saving certificate would not fall within the definition of lottery and would not be included as income as per section 2(24)(ix). (A.Y. 1996 – 97).

CIT v. Tilak Raj Kalra (2012) 206 Taxman 126 / 249 CTR 205/69 DTR 363(P&H.)(High Court)

S.2(24): Definitions- Income – Capital receipt –TDR- TDR-Gains on housing society redevelopment is not-taxable as it is a capital receipt. [S. 4,45]

The assessee was the member of a housing society. The housing society and it's members entered into an agreement with a developer pursuant to which the developer demolished the building owned by the housing society and

reconstructed a new multistoried building by using the FSI arising out of the property and the outside TDR available under Development Control Regulations. The assessee, as a member of the housing society, received a larger flat in the new building, displacement compensation of Rs. 6 lakhs (at Rs.34,000/- p.m. for the period of construction of the new building) and additional compensation of Rs.11.75 lakhs. The Assessing Officer &CIT(A) held that the said "additional compensation" was assessable as income in the assessee's hands. On appeal by the assessee, held allowing the appeal:
In principle, though the scope of "income" in section 2(24) is very wide, a capital receipt is not chargeable to tax as income unless there is a specific provision to that effect. As the residential flat owned by the assessee in the society's building was a capital asset in his hands, the compensation was a capital receipt. The department's argument that the cash compensation was a "share in profits earned by the developer" is not acceptable because it proceeds on the fallacy that the nature of payment in the hands of the payer determines the nature in the hands of the recipient. However, as the said receipt reduced the cost of acquisition of the new flat, it had to be taken into when computing the gains from a transfer thereof in the future.(A.Y.2007-08)
Kushal K. Bangia v. ITO(2012) 50 SOT 1 (Mum.)(Trib.)

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

The assessee has availed interest free loans from two companies. Assessing Officer taxed the alleged interest as deemed benefit under section 2 (24)(iv) of the Act, which was confirmed by the Commissioner (Appeals). Tribunal deleted the addition. On appeal by revenue the court held that the interest on interest free loans availed by assessee from two companies in which she was a director could not be treated as her deemed income in terms of section 2 (24)(iv) of the Act. (A.Ys 1990-91 to 1995-96)
CIT v. Madhu Gupta (2012) 205 Taxman 303 / 71 DTR 385 (P&H.) (High Court)

S. 2(47)(v): Definitions – Transfer –Possession-Capital gains-Conditions of execution of a written agreement and handing over possession have to be cumulatively satisfied.

The Twin conditions of execution of a written agreement and handing over possession have to be cumulatively satisfied in order to bring case within the ambit of Section 2(47)(v), read with Section 53A of the Transfer of Property Act, 1882. None of the conditions are satisfied in the said case i.e. neither the agreement to sale the land was signed nor the possession of the land had been delivered. Since the transaction of the transfer has not taken in that year, thus nothing could be brought to tax. (A.Y. 2006-07)
ADCIT v. Delhi Apartment P. Ltd. (2012) 135 ITD 441/147 TTJ 451 (Delhi)(Trib.)

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

Interest on amount deposited by allotment on account of delayed allotment of flats does not fall under section 2(28A).
CIT v. H. P. Housing Board (2012) 340 ITR 388 / 67 DTR 113 (HP.)(High Court)

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

The amount received by the official liquidator in terms of orders of company court, though referred to as interest, for the purpose of assessment of income-tax it was part of the sale consideration and therefore, could not be treated as income from other sources under section 56, the amount is assessable as capital gains under section 45. (A.Y. 1995-96)
Cauvery Spinning and weaving Mills Ltd. (In liquidation) v. Dy. CIT (2012) 340 ITR 550/ (2011) 238 CTR 55 / 50 DTR 218 (Mad.)(High Court)

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

The applicant sought an advance ruling on the questions whether gains arising to the applicant on sale of equity shares and compulsory convertible debentures held by the applicant in S Ltd were exempt from capital gains tax in India under article 13(4) of the Double Taxation Avoidance Agreement between India and Mauritius .The Authority for Advance Ruling held that, the term "interest" has been defined in the Income-tax Act , 1961 and in the DTAA to mean

any type of income payable on a debenture. Sale of investment to holding company of Indian company before conversion of debentures in to equity , debentures remain debt till discharged. Convesion rate determined on basis of period of holding, hence gains arising on sale of debentures to be taxed as interest. The entire gains arising to the applicant on the sale of shares and compulsory convertible debentures were not exempt from capital gains tax in India under the DTAA with
Mauritius. The gains arising on the sale of compulsory convertible debentures being interest within the meaning of section 2(28A) of the Act and article 11 of the DTAA was taxable as such.
Z, In re (2012) 345 ITR 11 / 69 DTR 329/249 CTR 225/206 Taxman528 (AAR)

S.2(31):Definitions- Person- Minor-Income clubbed in hands of parents – Exemption allowable. (S.54EC,64)

Minor is an assessable entity even though his income is clubbed in his parents. When income is clubbed with parents all deductions are to be allowed including the exemption under section 54EC.(A.Y. 2007-08)
Dy.CIT v. Rajeev Goyal (2012) 52 SOT 335 (Kol.) (Trib.)

S.2(42A):Definitions- Long term or short term-Period of holdings-The date of transfer or sale is treated as a cut-off point to apply the test of period of holdings. [S.10(38), 54EC, General Clauses Act, 1897 S. 3(35)]

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

S. 2(43): Definitions- Tax- Education cess - Foreign company-DTAA-India-Singapore- "Education cess" is "additional surcharge" & is included in "tax" under DTAA. If DTAA caps the rate of "tax" payable, cess is not payable by foreign assessee. (S. 2(23A),90, Art, 11, 12)

The assessee, a Singapore company, offered interest and royalty income to tax at the rate of 15% & 10% as specified in Articles 11 & 12 of the India-Singapore DTAA respectively. The AO held that the assessee was also liable to pay surcharge and education cess in addition to the tax. The CIT (A) upheld the assessee's claim that surcharge was not leviable though he rejected the claim with regard to cess. On further appeal by the assessee. Held, allowing the appeal:
Articles 11 & 12 of the DTAA provide that the "tax" chargeable in India on interest and royalties cannot exceed 15% and 10% respectively. The expression 'tax' is defined in Article 2(1) to include 'income tax' and includes 'surcharge' thereon. Article 2(2) extends the scope of the 'tax' by laying down that it shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1". "Cess" was introduced by the Finance Act, 2004 and it is described in s. 2(11) of the Finance Act 2004 as "additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax". Accordingly, the "education cess" is in the nature of an "additional surcharge" and is covered by Article 2. Accordingly, education cess cannot be levied in respect of the assessee's tax liability.(A.Y .2009-10)
DIC Asia Pacific Pte. Ltd v. ADIT (2012) 147 TTJ 503/74 DTR 140/52 SOT 447/18 ITR 358(Kol.)(Trib)

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

The family members of the assessee were holding the family properties and shares in different business concerns. There was disputes and the arbitrator suggested a settlement , which the assessee and family members agreed. Consequence to family arrangement the assessee resigned from a partnership firm and transferred his share of profit /loss in the firm to a family member for a consideration of Rs 35,000 being the capital balance of the firm. The assessing Officer held that there was a capital gain in the hands of the assessee and was liable to pay capital gain tax. On appeal Commissioner

(Appeals) up held the order of the Assessing Officer. Tribunal held that there was no transfer and not liable to capital gain tax. On appeal by revenue the Court held that since partition is not a transfer, there was no liability of assessee to pay capital gain tax.(A.Y.1993-94)

CIT v. R. Nagaraja Rao (2012) 207 Taxman 236 (Karn.) (High Court)

S.2(47):Definitions-Transfer-Development agreement-If developer has taken any steps in relation to construction of flats, on the basis of development agreement, then it has to be considered as transfer under section 2 (47)(v), (S.45)

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

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

S.2(47)(v): Definitions-Transfer-Immoveable property- Possession-Possession of immoveable property by way of lease on facts held is not transfer - Transfer of Property Act, 1982.(S.45)

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

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

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

Subsidiary and its parent are totally distinct taxpayers and therefore entities subject to income-tax are taxed on profits derived by them on stand alone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to share holders / participants. Principle of Lifting of corporate veil can be applied in cases of holding

company–subsidiary relationship, where, in spite of being separate legal personalities, if facts reveal that they indulge in dubious method of tax evasion.

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

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

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

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

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

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

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

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

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

assessee's income, hence the collection of contingency deposit against payment of sales tax would form revenue receipt, the matter decided in favour of revenue. (A. Ys. 1996-97 & 1997-98).
CIT v. Sundaram Finance Ltd. (2012) 205 Taxman 37 / 67 DTR 117 (Mad.)(High Court)

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

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

S.4: Charge of income-tax- Diversion by overriding title- Sale proceeds deposited in other general economic service fund did not have the character of income earned by the assessee and it has to be excluded from the profit.
The assessee was given license to conduct and carry on liquor trade in Delhi. On the basis of the minutes of the meeting construction of flyovers etc was a precondition or an obligation imposed and had to be complied with to enable the assessee to conduct business of sale of country liquor in Delhi.
The assessee on the directions of the Delhi Administration had got flyovers and infrastructure facilities constructed . As per the terms of letter the sale proceeds under the head Other General Economic Services (OGES) head was transferred to the Delhi Administration. Till the said date, the amount under OGES was retained by the assessee. The Court held that these receipts did not have character of income earned by the assessee and it has to be excluded from the profit. (A.Ys. 1990-91 to 1992-93, 1994-95 & 1996-97)
CIT v. D.T.T.D.C. LTD (2012) 71 DTR 115 / 206 Taxman 507 (Delhi)(High Court)
D.T.T.D.C. LTD v.CIT (2012) 71 DTR 115 / 206 Taxman 507 (Delhi)(High Court)

S.4: Income–Principle of mutuality – Co-operative Housing Society – TDR Premium - TDR Premium received by Co-op Hsg. Society from its members is exempt on ground of "mutuality". (S. 24)
The assessee, a Co-operative Housing Society formed of plot owners, passed a resolution to the effect that if any member desired to avail of the benefit of Transferable Development Rights (TDR) for carrying out construction or additional construction on his plot, he should apply for a No Objection Certificate which would be granted on payment of a premium calculated at the rate of Rs.250 per sq.ft. The Society received a premium of Rs.18.75 lakhs from its members for this purpose and claimed that the receipt was not chargeable to tax on the grounds of mutuality. The AO rejected this plea on the ground that the TDR premium was in reality a "profit sharing arrangement of commercial nature" and was chargeable to tax. The CIT (A) & Tribunal upheld the assessee's plea. On appeal by the department to the High Court, held dismissing the appeal:
In Mittal Court Premises Co-op Society (2010) 320 ITR 414 (Bom) it was held in the context of non-occupancy charges that the principle of mutuality would apply to a co-op society. The same principle applies to the TDR premium paid by a member to the Society of which he is a member as consideration for being permitted to make an additional

utilization of FSI on the plot allotted by the Society. There is a complete mutuality between the Society and its members and the TDR premium is not chargeable to tax. (A.Y. 2005-06)
CIT v. Jai Hind CHS Ltd (2012) 209 Taxman 163(Bom.) (High Court)

S.4: Income- Chargeability-Excess cash in possession of bank –Excess cash found of relevant year which was transferred to suspense account cannot be treated as income of relevant year. The excess arrears brought forward from earlier years is liable to be taxed as income.

The court held that when there is no possibility of any one claiming any amount against surplus in the suspense account maintained by the assessee, the assessee cannot treat it as liability or provision for liability ,further as and when the claim is made the appellant has to make any payment the same is allowable as a deduction in the year in which the claim is made , therefore the Tribunal is right in rejecting the claim of the assessee in respect of arrears carried over for several years .However in respect of excess found during the previous year need not be treated as income. The High Court confirmed the order of Tribunal in respect of arrears brought forward except Rs.95,000/- which is the excess found in the previous year.
Catholic Syrin Bank Ltd v. Addl.CIT (2012) 251 CTR 430/74 DTR 19 (Ker.)(High Court)

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

The assessee a 100 percent subsidiary of a German company which is engaged in the activity of housing finance. The holding company granted subvention assistance to the assessee .It was done on the evaluation of the holding company that the assessee was likely to on account of its business activity , incur losses which would be substantial if not entirely eroded .The Assessing Officer held that subvention receipt was by way of casual receipt and liable to tax . On appeal, Commissioner (Appeals) held that receipt was capital in nature . On appeal by revenue, the Tribunal also confirmed the order of Commissioner (Appeals). On appeal to the High Court, it was held that the subvention assistance received by assessee from its holding company to recoup losses likely to be suffered by it, was a capital receipt not liable to tax. Appeal of revenue was dismissed.
CIT v. Deutsche Post Bank Home Finance Ltd (2012) 209 Taxman 313 (Delhi) (High Court)

S.4: Charge of income-tax- Undisclosed income- Search and seizure-On money- Paper seized from third party addition is deleted.(S. 132)

In the course of search and seizure action against third party, from the Director of the said company certain loose papers were seized which recorded the alleged payments to artists. One of the name was of the assessee. On the basis of said paper the assessment of the assessee was reopened. Assessing Officer treated the said amount of Rs. 20 lakhs as undisclosed income of assessee. In the course of cross examination the director of the company has stated that he did not recollect the year of payment either 1996 or 1999 nor the person to whom he has given the money. The Tribunal held that under the circumstances the statements given by Director had no evidentiary value, hence the addition could not be taxed in the assessment year 1999-2000. (A. Y. 1999-2000).
Saif Ali Khan Mansuraliv.v. ACIT (2012) 13 ITR 204 (Mum.)(Trib.)

S.4: Charge of income-tax-Capital or revenue receipt- Subsidy-Sales tax subsidy is capital receipt.

Subsidy given under dispersal of Industries scheme as incentive to set up industries in areas other than Mumbai, Pune and Thane is capital receipt. (A.Ys. 2004-05, 2005-06, 2006-07).
Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 (Delhi)(Trib.)

S.4: Charge of income-tax-Diversion by overriding title- Infrastructure fund-Infrastructure fund retained can not be held as diversion by overriding title.

Assessee is a development authority created under the provisions of UP Urban Planning & Development Act, 1973. 90 percent of the amounts collected by the assessee by way of development fees, conversion charges of land user, stamp duty and fees on regularization of colonies were retained in the infrastructure fund account. As per office memorandum assessee has power to collect the fees/charges for functioning. The amount collected by office memorandum not being a separate independent entity of the assessee and the said memorandum having not created any overriding title of the

State Government at source of collection of the specified fees/ charges, which have to be applied towards fulfillment of assessee's object, there is no diversion of income by overriding title as regards the amounts credited to the infrastructure fund.(A.Y. 2006-07 &2007-08)

Mussore Dehradun Development Authority v. Addl. CIT (2012) 65 DTR 297 / 143 TTJ 395 / 16 ITR 358 (Delhi)(Trib.)

S.4: Charge of income-tax-Salary –Performance incentive-Appeal- Same income cannot be assessed twice, and claim of assessee has to be allowed as mistake apparent on record , though the income was offered by assessee in the return of income .(S., 139.154, 246A).

The assessee while filing the return for the assessment year 2007-08 in addition to regular income also admitted a sum of Rs 4,28,750/- as performance incentive from his employer. The assessment was completed under section 143 (3), which were accepted by the assessee. In the assessment year 2008-09 after going through the TDS certificates, the assessee realized that the correct assessment year should be assessment year 2008-09 and offered for taxation in the Assessment year 2008-09, which was accepted by the tax department. The assessee filed an appeal to Commissioner (Appeals) for the assessment year 2007-08, which was dismissed by Commissioner in-limine as appeal is not maintainable. The assessee preferred an appeal before the Tribunal. As there was difference of opinion the matter was referred to third member. The third member held that the Act does not authorize levy of tax on same amount more than once, therefore, when amount of performance incentive had been assessed for assessment year 2008-09, assessment of same amount for impugned assessment year 2007-08 was a mistake apparent on records. Accordingly the claim of assessee was allowed. (A.Y 2007-08)

R. Natarajan v.CIT(2012) 135 ITD 55/ 70 DTR 249/ 146 TTJ 315(TM) (Chennai) (Trib.)

S.4: Charge of income-tax-Income- Accrual-Retention money-Retention money in the contract is assessable only in the year of receipt that too after clearance of the defect liability.(S.5)

The issue referred for the consideration of Third Member was whether the retention money is accrued in the year of retention or in the year of actual receipt of the retention amount from the contractee s departments after the clearance of effect liability claims .The third member held that assessee had no right to receive the money by virtue of the contract between parties and the assessee also had no right to enforce the payment and therefore the assessing officer could not include the retention money in the assessment year when actually this amount had not been paid to the assessee. The Tribunal held that the retention money in the contract is assessable only in the year of receipt , that too after clearance of the defect liability.(A.ys.2003-04 to 2005-06)

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

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

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

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

S. 5: Scope of total income- Interest income-Debenture- Matching principle-Interest (Difference between purchase and redemption price) not assessable in year of allotment of debenture.

The assessee's act of offering the interest income arising on the difference between purchase price of the debenture and redemption price after six years on an amortization basis is in accordance with the "matching principle" laid down in Taparia Tools Limited v. JCIT (2003) 260 ITR 102 (Bom.) (High Court) and the real income principle. Such interest cannot be taxed on accrual basis in the year of allotment of debenture itself but has to be taxed on spread over basis .(A.Y.1995-96)(C.A.NO 2051 of 2007 dated 13-9-2012)

Rakesh Shantilal Merdia v.DCIT (SC.) www.itatonline.org

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

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

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

Editorial:- Decision of Bombay High Court in Vodafone International Holdings B.V.v. UOI (2010) 329 ITR 126 (Bom.)(High Court) is set aside.

S.5: Scope of total income – Accrual – Real income-Even under mercantile system of accounting mere raising of proforma invoice income does not accrue.

On advice of the Controler and Auditor General of India, the assessee had been raising proforma invoices/bills, even when no money was received in respect of those bills as income of assessee on the ground that assessee was following the mercantile system of accounting, therefore, income had accrued. Very fact that spaces were given to those agencies and against those spaces proforma invoices/ bills were raised. There was some dispute and some of departments had never made any payments, hence no income accrued merely because pro forma advices were raised that too at the instance of the Comtroller and Auditor General of India. The matter was remitted to the Assessing Officer to examine the matter on the merits. (A.Y.1998-99)

Airports Authority of India v. CIT (2012) 340 ITR 407/247 CTR 149/66 DTR 440 / 205 Taxman 84 (Mag./ /2012 Tax LR 497) (FB)(Delhi)(High Court)

S.5: Scope of total income-Accrual-Lease rentals-It is only financing charges which represent real income which has to be offered for tax.(S.145)

The assessee is a non-banking finance company. For the relevant assessment year , it had received a sum of Rs 11-84 crores as the lease rentals . The assessee deducted a sum of Rs 4.35 crores representing the lease equalization account from lease rentals . According to assessee lease equalization charges should not be added as income. The tax authorities, and Appellate Tribunal held that the assessee is not entitled to deduction . On appeal to High Court , the court held that , lease rental may consist of financing charges as well as capital recovery . Amount received towards capital recovery constitute capital expenditure, where as financing charges which represent real income which has to be offered for tax. In the absence of any provision in Act for calculating lease equalization charges , Accounting Standards prescribed by ICAI can be adopted for that purpose and assessee would be entitle to claim said amount as deduction from total lease rentals . Accordingly the claim of assessee was allowed. (A.Ys.1998-99 to 2000-01)

Prakash Leasing Ltd v. Dy.CIT (2012) 208 Taxman 464 (Karn.) (High Court).

S.5: Scope of total income-Income- Accrual-Securities-Government debt- Interest on Government Securities accrues only on the date specified in such instrument and not on the last date of financial year.

The Assessing Officer taxed the interest accrued though not due on securities held as on 31st March, 2007, being last date of the financial year. Addition was deleted by the Commissioner (Appeals) and Tribunal. On appeal, the High Court held that, the right to receive interest on the Government securities vested in the respondent only on the due date mentioned in the securities. Consequently, interest accrued on the securities only on the due dates and cannot be said to have accrued to the respondent on any date other than the date stipulated therein. The contention that interest

accrues for broken periods between two consecutive dates stipulated in the agreement / instrument for payment of interest is without any basis in law. The court up held the order of Tribunal.(A.Y.2001-02)

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

S.5: Scope of total income – Accrual – Commission- Foreign agents–Commission which is reduced from invoice value cannot be assessed as income it is in the nature of discount.

Assessee was engaged in business of export of fabrics. Assessee allegedly claimed the deduction as commission expenses paid to foreign agents. On enquiry by the Assessing Officer the assessee contended that the said amount was reduced from the invoice itself therefore it is discount given to buyer. The Assessing Officer disallowed the commission. On appeal the Tribunal held that when the alleged commission was deducted from invoice value and only net amount was received by assessee from buyer, amount of commission recorded in invoice could not be treated as income arising to assessee.(A.Y.2005-06)

Rajesh Manikchand Jain v. ITO (2012) 49 SOT 167 (Ahd.)(Trib.)

S.5: Scope of total income- Accrual – Surcharge- Method of accounting – Cash– Mercantile-Levy of surcharge being contingent tax can be levied only when realized and not on the basis of accrual.(S. 145)

Assessee a PSU, engaged in distribution of electricity which maintained the accounts on mercantile system. On the basis of prudence norms the method of accounting was changed and the surcharge was accounted on the basis of actual receipt. The levy of is not mandotority enforceable by assessee at the time of payment of bill. The court held that the receipt of surcharge is purely contingent hence tax can be levied only on the realized income and not on hypothetical income. (A.Y. 2006-07)

Dy. CIT v. Dakshin Haryana BijliVitran Nigam Ltd. (2012) 65 DTR 388/144 TTJ 307 (Delhi)(Trib.)

S.5: Scope of total income – Accrual - Bill discounting charges - Pertaining to period after 31st March, 2000, could not be assessed in assessment year 2000-01 on accrual basis.

The Tribunal applied the 'matching concept' in the mercantile system of accounting and held that if due date of bill crosses the date of closure of the financial year, the bank discounting the bill will incur matching interest cost on its year end also be deductible in the current year. The interest cost of subsequent year cannot be deductible hence the income pertaining to next year shall also not accrue as income in the current year. Therefore, amounts representing discounting charges pertaining to period after 31st March, 2000 could not be assessed in the assessment year 2000-01 on accrual basis. (A. Y. 2000-01)

The Siam Commercial Bank PCL v. Dy. Director of IT (2012) 134 ITD 463 / 66 DTR 369 / 144 TTJ 235 (Mum.)(Trib.)

S.5: Scope of total income- Accrues or deemed to be accrued –Award- Interest and compensation awarded by Motor Accident Claim Tribunal to be taxed in the year in which award is final

The assessee received compensation and interest under the award passed by Motor Accident Claim Tribunal (MACT) and appeal filed by Insurance company was pending before the High Court. The Tribunal observed that such interest received would be chargeable to tax in the year when compensation and interest awarded by the MACT reaches finality. (A.Y. 2006-07)

Sharda Pareek (Smt.) v. ACIT (2012) 50 SOT 439 / 145 TTJ 41 (UO) (Jaipur)(Trib.)

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

Assessee received certain guarantee commission and offered the same to tax on accrual basis which was consistently followed by it. It was held that such income should be spread over period to which it is related and should be assessed proportionately. (AY 2002-03 & 2003-04)

BNP Paribas SA v. Dy. DIT (IT) (2012) 137 ITD 322 (Mum.)(Trib.)

S. 5:Scope of total income – Income-Accrual – Rent of premises – Assessee not tenant in premises ,compensation received for surrender of tenancy rights would be liable to tax in hands of individuals and not in hands of assessee firm

In the instant case, premises in question was given on rent to one Y who ran business in name and style of 'Bombay Electrical Laundry'. In 1947, Y migrated to Pakistan and Custodian of Evacuee property sold rights, titles and interest

of Y to A and V. Their legal heirs continued to hold tenancy rights and continued business in the name and style of 'Bombay Electrical Laundry'. None of the partners at any point of time had ever introduced his/her share in tenancy as capital in accounts of firm. Thus, it was held that since assessee firm was never a tenant in aforesaid premises, compensation received for surrender of tenancy rights would be liable to tax in hands of individuals and not in hands of assessee firm. (A.Y. 2006-07)

ITO v. Bombay Electrical Laundry (2012) 138 ITD 17 (Mum)(Trib.)

S.5:Scope of total income-Income-Accrual – DTAA – India – USA - Compensation for settlement of class action dispute in USA. (Art. 23)

An Indian company, having made some misstatements by manipulating its financial statements with the alleged connivance of its auditors, the cause of action for the class action suit filed against them claiming damages in USA arose in India and, therefore, the amount deposited by Indian Company and its auditors in the escrow account as part of the settlement of the class action dispute is income from other sources arising in India. It is also chargeable to tax in terms of para 3 of article 23 of the Indo-US DTAA

IC & Ors., In Re (2012) 76 DTR 177 / 252 CTR 265 (AAR)

S.6: Residence in India-Non-resident–Subsidiaries-Subsidiaries can not be treated as deemed resident.

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

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

S.9: Income deemed to accrue or arise in India-Transfer of shares - Foreign company-Jurisdiction-Off shore transaction tax authorities in India has no jurisdiction to spilt the payment.

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

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

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

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

"We have carefully gone through the review petition filed by the Union of India on 17th February, 2012. We find no merit in the review petition. The review petition is, accordingly, dismissed. Review Petition dismissed"
UOI v Vodafone International Holding (Review Petition) (SC) www.itatonline.org

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

The assessee a non-resident Swedish company had entered into an agreement with Atlas Copco (India) Ltd. for supply of the technical know how for the manufacture of screw type air compressors and to render technical assistance that may be required in the said manufacture during the existence of the agreement against the lump sum consideration payable in three installments. It was contended by the assessee that the amount received during the year pursuant to the aforesaid agreement was not taxable as per the provisions of the Double taxation Avoidance Agreement. The Assessing Officer held that the amount received by the assessee was royalty which is covered under DTAA. The said order was confirmed in appeal by the Tribunal. In a reference at the instance of the assessee the Court held that since amount was paid to assessee on
account of transfer of know-how by assessee–company to Indian Company it was in the nature of 'royalty' covered under Article VII of DTAA , hence, the Tribunal was justified in holding that the amount in question was taxable in India. (A. Y. 1986-87).
Atlas Copco AB Sweden v. CIT (2012) 205 Taxman 5/69 DTR 325/ 249 CTR 450 (Bom.)(High Court)

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

Where a foreign agent of an Indian exporter operates in his own country and his commission is directly remitted to him, such commission is not received by him or in his behalf in India. Such agent is not liable to income tax in India on commission received by him. As there was no right to receive income in India nor there was any business connection between assessee and Evon Technologies UK,(ETUK) therefore, when income was not chargeable to tax in India under section 4(1), there was no question of invoking provisions of section 195 hence no disallowance be made under section 40(a)(ia). (A.Y. 2007-08).
CIT v. Eon Technology (P) Ltd. (2011) 203 Taxman 266 / 64 DTR 257 / (2012) 343 ITR 366 / 246 CTR 40 (Delhi)(High Court).
Editorial: Affirmed view of Tribunal in Dy.. Eon Technology (P) Ltd. (2011) 46 SOT 323 (Delhi)(Trib.)

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

The Tribunal held that the assessee is not liable to deduct tax at source in respect of payments made for purchase of software as the same cannot be treated as income liable to tax in India as royalty or scientific work under section 9 of the Act read with Double Taxation Avoidance Agreements and treaties. On appeal by revenue the Court following the Judgment in CIT v. Samsung Electronics Co Ltd (2011) 203 Taxman 477 (Karn.)(High Court and in view of retrospective amendment in section 9 Explanation 4 and explanation from 1-6-1976, decided the issue in favour of revenue. The Court held that the assessee is liable to deduct tax at source. (A.Y.2001-02)
CIT v. P .S .I .Data System Ltd (2012) 208 Taxman 452 (Karn.)(High Court)

S. 9: Income deemed to accrue and arise in India Despite payment of arms length remuneration to the agent, further profit could be attributable to the PE in India. –DTAA- India Singapore Art.7

Assessee is a company incorporated in Cayman Islands and conducts its business operations from Singapore. Singapore tax authority had issued tax residency certificate to the tax payer confirming that its control and management was exercised from Singapore . During the relevant assessment year, the assessee was conducting its entire TV channel activities of Asia –Pacific Region from Singapore. The Assessing officer held that the assessee had appointed an Indian company as it agent in India and Indian company was entitled to 15% commission on a gross advertisement revenue from India, the income of the assessee comprised only the advertisement time sold in by Indian company. Indian company collected the payments and remitted them to Singapore The Assessing Officer held that the assessee had an Agency PE in India. Assessing Officer further held that even if the assessee paid arm's length remuneration to the

agent, further profits could be attributed to the agency PE. The Assessing Officer accordingly attributed profits at 40, 30, 25, and 25% for relevant assessment years. In appeal CIT (A) up held the further attribution of profits but reduced the quantum. On appeal the tribunal held as under

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

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

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

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

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

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

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

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

S.9: Income deemed to accrue or arise in India – DTAA – Services rendered for development of Balance Score Card, business management tool-held to be Fees for Technical Services

The assessee is a foreign company located in Singapore providing services to various clients all over the world for development of Balance Score Card (BSC) project. The AO held that the receipts to be divided into two parts : charging one as royalty for sale of software and other as professional fees from rendering the said services. On appeal before Tribunal it was held that the software used by assessee cannot be considered independent, but part of services rendered by assessee to client. It was held that the fees for designing of BSC was Fees for Technical services as per provisions of Article 12 of India- Singapore DTAA as the assessee made available the knowledge for using BSC for their business purposes for meeting their long term targets and benefit ran into future. (A.Y. 2007-08)

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

S.9: Income deemed to accrue or arise in India – India – USA DTAA – term "attributable" equivalent to expression "effectively connected" – Interest on income tax refund chargeable to tax as per Article 11(2) (S.90, Art 7 &11)

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

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

Bechtel International Inc. v. ADIT (2012) 135 ITD 377 /72 DTR 458(Mum.)(Trib.)

S.9: Income deemed to accrue or arise in India – DTAA – Income from marketing services and 'Frequent Flier Program' and 'Starwood Preferred Guest' services outside India, held not fees for technical services

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

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

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

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

BNP Paribas SA v. Dy. DIT (IT) (2012) 137 ITD 322 (Mum.)(Trib.)

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

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

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

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

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

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

S.9: Income deemed to accrue or arise in India – Royalties- DTAA-India- Denmark-Transportation of coal.(S. 40(a)(ia), 195, Art. 12)

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

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

S.9: Income deemed to accrue or arise in India – DTAA-India –USA Telecom engineering services – As contract for providing technical experts and making available expertise, hence held as fees for included services [Art 12(4b)]

The assessee was a US company specialized in providing highly qualified technocrats and technology relating to telecom sector and higher solutions in telecom engineering services. The assessee entered into an agreement with an Indian company for providing qualified technocrats for its project in India. It was held that as it was clear from various clauses of agreement that it was a contract for providing technical experts and making available expertise of assessee in this

field, hence the service rendered assessee clearly fell within purview of clause 4(b) of Art 12 of Indo- US DTAA, and thus amount received in respect of said services was taxable in India as fees for included services. (A.Y. 2003-04)
Avion Systems Inc. v. DDIT (2012) 138 ITD 57 (Mum.) (Trib.)

S. 9: Income deemed to accrue or arise in India – DTAA -India – UAE – Head office expenditure. [S.44C,Art. 7(3)]
Assessee is a foreign bank incorporated in UAE. It had two branches i.e. PEs in India. Profits of PE were computed in hands of assessee as per provisions of article 7(3). An amount of Rs. 40.04 lakhs was allocated to PEs representing head office expenses incurred and attributable to such Indian PEs. The AO restricted the deduction for head office expenses by applying provisions of section 44C. Applicability of domestic law, viz, section 44C had been provided for allowing deduction of section expenses of PEs by amendment brought in article 7(3) w.e.f. 1/4/2008 and it would not have any retrospective effect. Thus, provisions of section 44C had been provided for allowing deduction of expenses of PEs by amendment brought in article 7(3) w.e.f. 1/4/2008 and it would not have any retrospective effect. Hence, it was held that the provisions of the said section were not applicable to the instant case and therefore, income of Indian PEs of assessee was to be computed after allowing all expenses attributable to its business in India including head office expenses.(A.Y. 1995 – 96 to 2000-01)
Abu Dhabi Commercial Bank Ltd. v. Asst. DIT (IT) 2012) 138 ITD 83 (Mum)(Trib)

S. 9: Income deemed to accrue or arise in India – DTAA –India-USA-UK- Kingdom of Thailand- Agreement for making interior and exterior changes – No technical services rendered – Not taxable in India. (S.5,195,201, Art. 5, 12, 13, 15. 7, 14, 22)
The assessee was engaged in the business of running a five star hotel at Hyderabad. It entered into four separate and independent agreements with non – resident consultants for making interior and exterior changes and made payments in respect to certain services rendered. There was no permanent establishments for non-resident. It was held that the services rendered did not involve any technical expertise nor did it make available any technical know-how plan, design etc. The services rendered by the non-resident company was inspection of the hotel, reviewing the facilities, comparing them with the standards and suggesting improvements or changes wherever required. Amount paid to non-resident is not assessable in India. (A.Y. 2003-04 to 2005-06)
ACIT v. Viceroy Hotels Ltd. (2012) 18 ITR 282 (Hyd.)(Trib.)

S. 9: Income deemed to accrue or arise in India – DTAA India – Sri Lanka – Capital Gain – Article 13(4) gives exclusive power to tax such income in Sri-Lanka (Art. 13(4))
Assessee a resident of India was holding shares in company T incorporated in Sri Lanka. The said shares were sold by the assessee. The assessee claimed that the capital gain could not be taxed in India because such sale was governed by Article 13(4)of India – Sri Lanka DTAA. It was held that the words 'may be taxed' under Art. 13(4) of DTAA gave exclusive power to tax such income in Sri-Lanka and thus, said income could not be taxed in India. (A.Y. 2007-08)
Apollo Hospital Enterprise Ltd. v. Dy.CIT (2012) 53 SOT 103 (Chennai)(Trib.)

S.9: Income deemed to accrue or arise in India - Business connection - Offshore supply of equipment - Right title has passed outside India and the applicant is not owner, amount received is not liable to tax in India.
As per the terms of the contract, applicant is responsible for off shore supplies, off shore services and mandatory spares (for off shore supplies). Applicant can be said to have a business connection in India, however, it has not carried out any part of the business relating to offshore supplies in India. As the applicant is not the owner of the supplies in India. Right title, payment, etc. in the supplies had passed on to P. Ltd. outside India, therefore, the amount received /receivable by the applicant from P. Ltd. for off shore supplies in terms of contract is not liable to tax in India.
CTCI Overseas Corporation Ltd. (2012) 247 CTR 233 / 66 DTR 506/205 Taxman 297 (AAR)

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

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

Speco III Electric Power Construction Corporation (2012) 342 ITR 313/ 247 CTR 230 / 66 DTR 511 / 204 Taxman 66 (AAR)

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

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

The applicant is an Indian company engaged in the manufacturing and supply of Rice Par Boiling and Dryer Plants as per requirement of customers. It had received orders from two agents situated in Pakistan. The plant was shipped and commission was payable to agents on completion of export orders. The question was raised whether the income of non –resident agent can be considered as deemed to accrue or arise in India and whether tax deduction would be mandatory under section 195 on export commission paid to non-resident agent if so , at what rate. The Authority for Advance Ruling held that the fact that the agents have rendered services abroad in the form of soliciting the orders and the commission is to be remitted to them abroad are wholly irrelevant for the purpose of determining the situs of their income . Following the ruling in Rajive Malhotra (2006)284 ITR 564 (AAR) , it is to be held that income arising on account of commission payable to the two agents is deemed to accrue and arise in India and is taxable under the Act in view of section 5(2)(b) read with section 9(1)(i) . The provision of section 195 would apply and the rate of tax will be as provided under the Finance Act for the relevant year.

SKF Boilers and Driers (P) Ltd (2012) 343 ITR 385/ 206 Taxman 19 / 248 CTR 121(AAR)

S.9: Income deemed to accrue or arise in India-Subsidiary- Permanent establishment-DTAA-India-Singapore-A subsidiary created for Indian business is a PE of the foreign parent. (Art.5(8)

The applicant, a Singapore company, entered into an agreement with an Indian group subsidiary company for the performance of shipment transport services within & outside India. The agreement was on a principal to principal basis. The question arose as to whether applicant has a PE in India. The Authority held that a "permanent establishment" is something, either independent entity or a subsidiary, which enables a non-resident to carry on a part of its whole business in a particular country. The Aramex group could not have done business in India without a presence in India. As the subsidiary has a fixed place of business in India and the business of the applicant is carried on through it, the definition in Article 5(1) of India-Singapore DTAA is satisfied. The subsidiary is also a PE under Article 5(8) because it habitually secures orders in India wholly for the Aramex group and concludes contracts for the group. The exception in Article 5(10) does not apply because it is not a case of the subsidiary carrying on "its business" in India but it is a case of the entire group carrying on business in India through the subsidiary. Also, the fact that the agreement refers to the subsidiary as "independent" and "non-exclusive" is not relevant because it is a mere camouflage to screen the fact that the subsidiary is really a PE of the applicant's group in India.

Aramex International Logistics Private Limited (2012)22 Taxmann.com 74 / (2012) 73 DTR 121(AAR)

S.9: Income deemed to accrue or arise in India –Permanent establishment-Outbound and inbound consignment- India-Singapore DTAA- Receipts from outbound and inbound consignments attributable to PE.(Art.5)

Wholly owned subsidiary of AX group, which is facilitating the overseas express shipment business carried on by the said group in India through the applicant, a Singapore company, by securing orders, collecting articles, transporting them and delivering the same to addresses in various countries through the group entities is PE of applicant in India

within the meaning of art. 5 of Indo-Singapore DTAA and, therefore the receipts by applicant from outbound and inbound consignments attributable to PE in India are taxable in India.

Aramex International Logistics (P.) Ltd. In re, (2012) 251 CTR 9/208 Taxman 355 (AAR)

S.9:Income deemed to accrue or arise in India-Income from employment -DTAA-India USA – Applicant has obligation to withhold taxes. (S.195, (Art-15

Applicant company is fully owned subsidiary of US company T. It entered into an agreement with T for seconding certain number of employees. Seconded employees shall continue to have their pay roll processed by T but applicant is to reimburse T for those amounts and also pay Tax service charge. Right to terminate employee is with T. It was held that since applicant has not become employer of seconded employees, what applicant pays to T is income of T and not in nature of reimbursement of salary and while paying amounts applicant has obligation to withhold taxes u/s. 195.

Target Corpn. India (P) Ltd In re (2012) 348 ITR 61 / 209 Taxman 601 / 252 CTR 242 (AAR)

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

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

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

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

Applicant is a HongKong based company, engaged in the business of engineering, procurement and construction of petroleum, petro-chemical and power plant. With a view to execute project awarded by company P, it entered into a consortium with an Indian Company to develop a terminal for receipt and storage of liquefied natural gas at Kochi. On

question as to whether income received/ receivable by applicant for off-supplies from P was liable to tax in India, it was held that though applicant had a business connection in India, but it had not carried any part of business relating to off shore supplies to India. Under the deeming provision of Section 9(1) read with Explanation 1(a), any business income accruing or arising to the applicant can be taxed in India only in respect of operation carried in India. It was held that the applicant was not the owner of supplies in India and as the right, title, payment in supplies passed to P which was importing these supplies from outside India. Thus, all that income from transaction had not arisen in India and therefore, not liable to tax in India.

CTCI Overseas Corporation Ltd., In re (2012) 342 ITR 217 (AAR)

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

The applicant which consisted the consortium of two members for executing offshore activities. According to the applicant it is a divisible contract and its obligations under the contract are well defined, the offshore activities are not taxable in India. A PE would come into existence in India in terms of art 5.2(1) of DTAA between India and Germany only after the equipment reaches the site in India. The applicant approached the Authority for determination of tax liability. The Authority held that applicant is assessable as an AOP notwithstanding the internal division of responsibility by the consortium members and reognition thereof or by making separate payments to two members. On the facts part of design and engineering work for manufacture and procurement of equipment done outside India being inextricably linked with the erection and commissioning of the project undertaken by the consortium , amount payable in respect of design and engineering is liable to be taxed in India as situs of the contract is in India . Amount receivable for supply of equipment material and spares allegedly outside India is also taxable in India .

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

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

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

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

S.9(1)(i):Income deemed to accrue or arise in India-Business profits-Design-DTAA-India-FRANCE-AOP-Composite contract cannot be split to exempt profits from offshore supply of goods - A joint contract constitutes an AOP despite separate responsibility of parties.(S.2(31)(v),5, Article 7)

The Applicant, a foreign company, entered into a consortium agreement with three other companies for the submission of a joint bid in response to the Bangalore Metro Rail Corporation Ltd's (BMRC) tender for "design, manufacture, supply, installation, testing & commissioning of signaling/ train control and communication systems". The consortium parties agreed to be jointly and severally liable to BMRC for the performance of all obligations under the contract. However, the respective obligations of the parties was split up & each was separately responsible for its own profit/loss. The applicant filed an application for advance ruling and claimed, relying on Ishikawajima–Harima Heavy Industries Ltd v.DIT (2007)288 ITR 408 (SC),CIT v. Hyundai Heavy Industries Co Ltd (2007) 291 ITR 482 (SC) & Hyosung Corp(AAR), that the income derived by it from offshore supply of plant and materials was not taxable in India as the title to the goods had passed, and payment was received, outside India. It was also claimed that as each consortium member had separate responsibility and was accountable for its own profit/ loss, the fact that the contract with BMRC was joint, did not make the consortium an "AOP". The Authority held that though in cases of Ishikawajima, Hyundai & Hyosung, it was held that that a composite contract was capable of being dissected and it was open to the assessee to raise the contention that parts of the contract should be treated separately for the purpose of

deciding whether income from the performance of that part of the contract arose onshore or offshore and that part of the income attributable to offshore transaction cannot be taxed in India, this is no longer good law in view of the larger bench decision in Vodafone International Holdings where it was held that the transaction has to be looked at as a whole and not by adopting a dissecting approach.

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

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

Alstom Transport SA (2012) 208 Taxman 223/74 DTR 281(AAR)

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

The applicant filed an application under section 197 of the Income-tax Act and claimed that no portion of the amount payable was liable to be with held under section 195 of the Act , since what it received were off-shore and hence not chargeable to tax in India. The Income-tax officer did not accept the plea of the applicant and directed OPAL to withhold tax on amounts paid to the applicant in terms of contract in question. The assessee moved application under section 245Q. The Authority held that in face of an indivisible contract and existence of an association of persons, amount payable to applicant in respect of design and engineering and for supply of equipment, material and spares allegedly outside India would be taxable in India. The Authority for advance ruling held that the assessee is liable to deduct tax at source.

Linde AG (2012) 207 Taxman 299/74 DTR 265(AAR)

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

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

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

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

S.9(1)(ii):Income deemed to accrue or arise in India-Leave encashment- Termination of employment-Amount received by previous employer as retirement benefit has not accrued or deemed to accrue in India.(S.5(1)(c), 6,17(3)(ii))

The assessee was an employee of American company from 1991 till November, 1999 and during this period he was non-resident Indian. On termination of employment , he received certain amount as leave encashment according to the number of years of service. The assessee claimed that the said amount was exempt under section 5(1)(c) read with section 9(1)(ii). The Assessing Officer held that the said amount is taxable as perquisite treating the said amount as profit in lieu of salary .In appeal the Commissioner (Appeals) held that the amount received was in respect of past

services, rendered outside India at a time when he was non-resident and thus could not be deemed to have accrued or arisen in India and would not come under the purview of section 9(1)(ii). In appeal Tribunal also confirmed the order of CIT(A). On appeal by revenue the court also confirmed the order of Tribunal and held that in terms of section 6 and 9(1)(ii), amount received by assessee had not accrued /deemed to be accrued /paid in India hence not taxable . (A.Y. 2001-02)

CIT v. Anant Jain (2012) 207 Taxman 117 (Delhi) (High Court)

S.9(1)((ii): Income deemed to accrue or arise in India-Salaries earned in India-Service provider-DTAA-India-Poland-Assessee has been functioning from India hence income is deemed to accrued or arise in India.(S.5(1)(b), 90, Art 17)

The assessee in the return of income claimed that the salary received from Pharmaceutical Works Polpharma S.A. Poland being exempt from tax on the basis of DTAA between Poland and India. The Assessing Officer held that during the year the assessee was employed as a "service provider" providing services for Polpharma Indian representative office at Bangalore, thus the place of employment is Bangalore and not outside India and therefore any income that arise or accrued ,due to employment ,in India Only, hence taxable in India. On appeal , Commissioner (Appeals) held that the assessee is entitled to relief under DTAA , and allowed the claim. On appeal by the revenue, the Tribunal held that, Assessee having been employed as "service provider" by a Polish company to support establishing and preparing organization of the company's representative office in India cannot be said to be holding "top level managerial position" and therefore, he is not entitled to benefit of art 17(2) of the Indo-Poland DTAA in respect of the salary received by him from

the said company, further such income is to be deemed to have accrued or arisen in India as the assessee has been functioning mainly from India, hence the income is deemed to accrue or arise in India.(A.YS 2005-06& 2006-07)

DCIT v. Mohan Balakrishnam Pookulanagara (2012) 71 DTR 365/52 SOT 415/149 TTJ 73 (Ahd.) (Trib.)

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

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

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

inevitable conclusion is that the assessee rendered technical services to its subsidiary and the payments are in the nature of fees for technical services;

(ii) The subsidiary constituted a dependent agent PE (DAPE) of the assessee because de facto the assessee was carrying on the contract work on behalf of the subsidiary and if we pierce the veil of the assignment contract and go to the root, there is interlacing of activities and interlocking of funds between the assessee and the subsidiary in executing the dredging contract. There is a relationship of agency and a PE is created. (A.Y. 2003-04)

Van Oord ACZ Marine Contractors BV v. ADIT(2012)52 SOT 423/75 DTR 72 /149 TTJ 124/17 ITR 103(Chennai)(Trib.)

S. 9(1)(v) : Income deemed to accrue or arise in India – Interest-Sale price of CCD difference is inte *Van Oord ACZ Marine Contractors BV v. ADIT(2012)52 SOT 423/75 DTR 72 /149 TTJ 124(/17 ITR 103(Chennai)(Trib.)***rest income and not capital gains. [S.2(28A)]**

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

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

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

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

CIT v. Sunary Computers (P) Ltd. (2012)348 ITR 196/ 204 Taxman 1 (Karn.)(High Court)

CIT v.Lucent Technologies (2012)348 ITR 196/ 204 Taxman 1 (Karn.)(High Court)

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

Assessee a Swedish company, supplied hardware and software to an Indian cellular operator under supply agreement whereby both the transfer of the property in the goods and risk passed outside India, and the installation activity having been carried out by two separate companies, though belonging to the same group, which received separate remuneration and have been independently assessed, in respect of their income, assessee did not have any business connection in India and therefore, not taxable in India. Software supplied by the assessee being an integral part of the GSM mobile telephone system incapable of independent use and therebeing nothing to establish that the cellular operator has obtained any copy right of such software, no part of the payment received by the assessee under supply agreement can be classified as royalty either within the meaning of section 9(1)(vi) or under Article 13(3) of the DTAA between India and Sweden.(A.Y. 1997-98)

DIT v. Ericsson A.B. (2012) 343 ITR 470/ 66 DTR 1/ 246 DTR 422 (Delhi)(High Court)

DIT v. Ericsson Radio System A.B. (2012) 343 ITR 470/66 DTR 1/ 246 DTR 422 (Delhi)(High Court)

DIT v. Metapath Software International Ltd. (2012) 343 ITR 470/ 66 DTR 1/ 246 DTR 422 (Delhi)(High Court)

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

The assessee is a company engaged in the development of computer software and exported such software to its head office located in South Korea. The AO held that the payment made by the assessee constituted royalty u/s 9(1)(vi) and thus, liable for deduction of tax at source. It was held that the payment was made for by assessee to the non-resident for

having imported shrink wrapped software/off-shelf software. It was clear from the material on record that what was transferred was the right to use software, an exclusive right which the owner of the copyright owned and what was transferred was only right to use copy of the software for the internal business. It was held that right for transfer would constitute "royalty" within the meaning of article 12(3) of the DTAA and the provisions of S. 9(1)(vi) of the Act. (AY 1999-2000 to 2001-02)

CIT v. Samsung Electronics Co. Ltd. (2012) 345 ITR 494 (Karn.) (High Court)

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

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

As regards the profits on supply of software, there is a distinction between the supply of a "copy right" and supply of a "copyrighted article" . Though the Explanation 4 was added to section 9(1)(vi) by the Finance Act , 2012 with retrospective effect from 1-6-1976 to provide that all consideration for user of software shall be assessable as "royalty" the definition in the DTAA has been left unchanged . In CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom.)(High Court), it was held that amendments cannot be read in the treaty. As the assessee has opted to be assessed by the DTAA, the consideration cannot be assessed as "royalty" despite the retrospective amendments to the Act.(A.Ys 1997-98 and 1998-99(ITA 512 of 2007 .1137of 2006/ 1138 of 2006/ 505 of 2007/506 of 2007/359 of 2005/ 1324 of 2007/30 of 2008 dated 7-9-2012)

DIT v. Nokia Networks OY and others (2012) 78 DTR 41Delhi) (High Court) www itatonline.org.
DIT v.CIT Alcatel New Delhi(2012)78 DTR 41 (Delhi) (High Court) www itatonline.org.
Nokia Net works OY v. Asst DIT (2012) 78 DTR 41(Delhi) (High Court) www itatonline.org.
ICEC India (P) Ltd v.CIT (2012) 78 DTR 41 (Delhi)(High Court)
DIT v. UOP LLC (2012) 78 DTR 41(Delhi) (High Court)

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

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

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

as well in view of Article 24(1) of the DTAA (non-discrimination) which provides that nationals of a Contracting State shall not be treated less favorably than the nationals of the other Contracting State.
Dy. DIT v. Solid Works Corporation (2012) 17 ITR 510/51 SOT 34 (Mum.)(Trib.)

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

Assessee was a non-resident company having business in production and distribution of films. It entered into an agreement with an Indian company, WBPIPL whereby the assessee granted exclusive rights of distribution of cinematographic films on payment of royalty. The assessee received certain sum as royalty. WBPIPL deducted the tax at source while remitting the amount. The assessee filed the return and claimed the refund of tax deducted at source. The Assessing Officer held that the royalty received was taxable as per article 12(2) at
15%. The Commissioner (Appeals) held that royalty received was not taxable. The Tribunal held that assessee did not have any permanent establishment in India, income in question arising outside Indian Territories could not be brought to as business income. (A. Y. 2006-07)
ADIT (International) v. Warner Brother Pictures Inc. (2012) 49 SOT 438 (Mum.)(Trib.)

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

The assessee, a Mauritius company, made payment to Panamsat, USA, for hire of a "transponder satellite". The AO held that the said hire charges constituted "royalty" and that the assessee ought to have deducted TDS u/s 195 and that as it had not done so, the amount was to be disallowed u/s 40(a)(ia). Before the Tribunal, the department argued that though as per Asia Satellite Telecommunications Co. Ltd. (2011) 332 ITR 340 (Delhi)(High Court), the hire charges were not assessable as "royalty", this verdict was no longer good law in view of the amendment to s. 9(1)(vi) by the Finance Act 2012 w.r.e.f. 1.4.1976 to provide that such hire charges shall be assessable as "royalty". Held by the Tribunal:
(i) In Asia Satellite Telecommunications Co. Ltd. v. DCIT (2011) 332 ITR 340 (Delhi)(High Court) it was held that in order to constitute "royalty", the payer must have the right to control the equipment. A payment for a standard service would not constitute "royalty" merely because equipment was used to render that service. A similar view was taken in Skycell Communications Ltd v.Dy. CIT (2001) 251 ITR 53 (Mad.)(High Court). In De Beers India Minerals (www.itatonline.org)(Kar.) & Guy Carpenter & Co. Ltd. (www.itatonline.org) (Delhi)(High Court) it was held that to "make available" technical knowledge, mere provisions of service was not enough and the payer had to be enabled to perform services himself. The department's argument that the amendments by the Finance Act, 2012 changes the position is not acceptable because there is no change in the DTAA between India and USA and the DTAA prevails where it is favourable to the assessee;
(ii) Even otherwise as the payment is made from one non-resident to another non-resident outside India on the basis of contract executed outside India, s. 195 will not apply as held in Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1 (SC). As s. 195 did not apply, no disallowance can be made u/s 40(a)(i);
(iii) Further, as prior to the insertion of s. 40(a)(ia) in AY 2004-05, payments to a resident did not require TDS, under the non-discrimination clause in the DTAA, the disallowance u/s 40(a)(i) in the case of non-residents cannot be made as held in Herbalife International India (P) Ltd (2006) 101 ITD 450 (Delhi)(Trib.), Central Bank of India & Millennium Infocom Technologies Ltd v. ACIT (2008) 21 SOT 152 (Delhi)(Trib). (A.Y. 2002-03)
B4U International Holdings Ltd v. DCIT(2012)74 DTR 162/18 ITR 62/52 SOT 545/148TTJ 237 (Mum.) (Trib.)

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

The assessee was engaged as a consultant by Essar Oil Ltd to provide consultancy services in connection with sale of its energy business. As the consultancy required high level technical and industry knowledge, the assessee engaged KPMG LLP, USA & KPMG Consulting LP, Canada for rendering professional services and paid Rs. 20 lakhs & Rs. 13 lakhs respectively. The AO held that the said fees constituted "royalty" u/s 9(1)(vi) & Article 12 and as there was no TDS,

the amount was to be disallowed u/s 40(a)(i). This was reversed by the CIT(A). On appeal by the department, held dismissing the appeal:

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

KPMG India Pvt. Ltd v. DCIT (2012) 17 ITR 569(Mum.)(Trib) www.itatonline.org.

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

Payment by ICO to FCO for transponder hire charges is not `royalty' under provisions of income tax Act. Obligation to withhold tax at source only arises when income is chargeable to tax in India. (A.Y. 2007-08)

Times Global Broadcasting Co. Ltd v. DCIT, ITA No. 5868/M/10, dated 12-1-12, BCAJ Pg. 44, Vol. 44-A, Part 1, April, 2012.(Mum.) (Trib)

S.9(1)(vi): Income deemed to accrue or arise in India –Software-Data card- Payment for actual cost for purchases/ upgrades made, including data cards, application, support software and OS/OS upgrades – Matter restored to file of CIT (A) as agreement and other material not on record and nature of software not examined

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

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

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

The applicant has entered into cost contribution agreement with foreign company SIPCL for the provision of business support services, in the form of general finance advice, taxation advice, legal advice on information technology, media advice on information technology, media advice, taxation advice, legal advice, etc. SIPCL is in the business of providing various advices and services to various Shell operating companies. On the facts the applicant will be able to use any know how intellectual property generated from the services independent

of the service provider and hence the services under the agreement are made available to the applicant, hence payment received by SIPCL is chargeable to tax in India and the applicant is liable to withhold tax under section 195.

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

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

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

software product is in nature of royalty within the meaning of section 9(1) (vi) and consideration paid for right to use a copy right from distributor is to be treated as royalty within the meaning of Article 12.

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

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

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

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

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

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

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

S.9(1)(vii): Income deemed to accrue or arise in India- Fees for technical services-Deduction of expenses-Even if not assessable as "fees for technical services" under DTAA, bar in section 44D against deduction of expenses will apply.

The assessee, an Australian company, set up a permanent establishment (PE) in India to render technical services for evaluation of coal deposits and conducting feasibility studies for transportation of iron ore. The Assessing Officer & CIT(A) held that the payments received by the assessee were taxable as "fee for technical services" under section 9(1)(vii) read with section 115A on a gross basis without any deduction in view of section 44Dat the rate of 20%. On appeal, the Tribunal[Rio Tinto Technical Services v.Dy.CIT(2010)39 DTR 327 (Delhi)] held that as the assessee had a PE in India, the receipts were chargeable to tax as "business profits" after deduction of expenses under Article 7 of the DTAA and section 44D & 115A did not apply. On appeal by the department, the High Court held partly reversing the view of the Tribunal:

(i) As the assessee had a PE in India from which the income arose, the income was chargeable to tax as "business profits" under Article 7 of the DTAA and not as "fees for technical services" under Article 12;

(ii) Article 7(3) permits a deduction of expenditure "in accordance with and subject to limitations of the law" relating to tax in India including executive and general administrative expenses so incurred regardless whether they have incurred in India or elsewhere. The words "in accordance with and subject to limitation of the law relating to tax" applies not only to the "executive and general administrative expenses" but to all expenditure;

(iii) The income received by the assessee, though not assessable as "fees for technical services" under the DTAA, is "fees for technical services" under Explanation 2 to section 9(1)(vii)because it is for providing technical information and does not arise from a "project". Consequently, section 44D, which provides that no deduction shall be admissible while computing income of the nature of "fees for technical services" shall apply.

DIT v. Rio Tinto Technical Services (2012) 340 ITR 507/ 66 DTR 401/ 206 Taxman 439/251CTR 366 (Delhi)(High Court)

S.9(1)(vii): Income deemed to accrue or arise in India- Non-resident-Insurance business-Fees for technical services- Make available- DTAA-India-UK- To "make available" technical knowledge, mere provision of service is not enough; the payer must be enabled to perform the service himself.(Art 13(4)(c))

The assessee, a UK based reinsurance broker, received commission from several Indian insurance companies for arranging reinsurance contracts. The AO & CIT (A) held that the commission was assessable to tax in India as "fees for technical services" u/s 9(1)(vii) & Article 13(4)(c) of the DTAA. However, the Tribunal (included in file), relying

extensively on Raymond vs. DCIT(2003) 86 ITD 791 (Mum) & other judgements, held that "In order to fit the terminology "make available" in Article 13(4)(c), mere provision of technical services is not enough but the technical knowledge must remain with the payer, and he must be equipped to independently perform the technical function himself without the help of the service provider". It was held that, as the nature of services rendered by the assessee was not "technical or consultancy services which made available technical knowledge" etc to the payer, the commission was not assessable to tax. On appeal by the department,the tribunal held dismissing the appeal:

The Tribunal conclusions are based on an assessment of the factual matrix. As there is no perversity in the findings, it does not give rise to a substantial question of law.(A.Y.2006-07)

DIT v. Guy Carpenter & Co. Ltd. (2012)346 ITR 504/ 72 DTR 105 (Delhi) (High Court)

S. 9(1)(vii): Income deemed to accrue or arise in India- Fees for technical services or interest -Upfront appraised fees.-DTAA-India- UK (S. 2(28A, , 90,Article 7, 12, 13)

Fee was charges by the assessee irrespective of whether or not the loan transactions were entered into between the assessee and the applicants. Fee was charged prior to and entirely independent of the loan transaction that was subsequently entered into parties had agreed that the assessee would be entitled to the said fee irrespective of whether the loan transaction was entered into or not. Interest was separately charged by the assessee in respect of the moneys lent pursuant to the agreements that were entered into ,nor can the fee be said to be in respect of credit facilities granted but not utilized for the said fees preceded the credit facility and had nothing to do with it. Upfront appraisal fee, therefore, does not fall within the ambit of art. 12(5) of the DTAA, further, by no stretch of imagination can it be said that the assessee imparted to the applicants or the borrowers, any technical services, much less technical services of the nature referred to in art. 13(4)(c) of the DTAA, said Upfront appraisal fee was business income and as the assessee did not have a PE in India, the same could not be charged to tax in India under art. 7 of the DTAA. (A.Y. 1998-99)

DIT(International Taxation) v. Commonwealth Development (2012) 76 DTR 233/253 CTR 208/210 Taxman 310 (Bom.) (High Court)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The department's argument that if the sum is not assessable as "fees for technical services", it is assessable as "other income". Article 23 of the DTAA is not acceptable because that Article applies only to "items of income which

are not expressly mentioned in the foregoing Articles of this Agreement". Article 23 does not apply to items of income which can be classified under Articles 6-22 whether or not taxable under these articles. Therefore, income from consultancy services, which cannot be taxed under articles 7, 12 or 14 because the conditions laid down therein are not satisfied, cannot be taxed under article 23 either.(A.Y.2008-09)

DCIT v. Andaman Sea Food Pvt Ltd (2912)74 DTR 353/148 TTJ 382/ 52 SOT 562/ 18 ITR 509(Kol.)(Trib.

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

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

Dy. DIT (IT) v. Toyo Engineering Corpn. (2012) 136 ITD 268(Mum.) (Trib.)

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

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

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

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

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

The assessee paid sums to foreign parties for repairing and refurbishment of equipment. The AO held that the payments constituted "*fees for technical services*" u/s 9(1)(vii) and that the assessee ought to have deducted TDS u/s 195 r.w.s. 201 though the assessee argued that as there was *no intellectual aspect* involved in the repairs and refurbishment activity, it was no assessable as "*fees for technical services*". The CIT (A) allowed the claim. On appeal by the department to the Tribunal, Held dismissing the appeal:

The activities carried out by the foreign parties involved assembly, disassembly, inspection, reporting and evaluation. These are routine maintenance repairs and do not involve services of technical nature so as to be assessable as "fees for technical services" u/s 9(1)(vii). Routine repairs do not constitute 'FTS' as they are merely repair works and not technical services. *Technical repairs are different from 'technical services'. The assessee was not required to deduct tax at source under section 195* (Lufthansa Cargo India Pvt. Ltd. v Dy. CIT (2005) 274 ITR (AT) 20 (Delhi)(Trib.) followed; Mannesmann Demag Lauchhammer v CIT (1988)26 ITD 198(Hyd.)(Trib.) distinguished)(AY 2001-02 to 2006-07)

ADIT v. BHEL-GE-Gas Turbine Servicing(2012) 77 DTR 29/53 SOT 460 (Hyd.)(Trib.)

BHEL-GE-Gas Turbine Servicing v. ADIT (2012) 77 DTR 29/53 SOT 460 (Hyd.)(Trib.)

S. 9(1)(vii): Income deemed to accrue or arise in India- Fees for technical services-Necessary that some sort of 'managerial' 'technical' or 'consultancy' services should have been rendered in consideration.

It was held that to constitute "fees for technical services", it is necessary that some sort of 'managerial' 'technical' or 'consultancy' services should have been rendered in consideration. In the instant case, services rendered under a buying service agency agreement are routine services offering procurement assistance. They consist of negotiating between the Principal and manufacturers for purchase of merchandise. Hence, consideration received was classified as " commission" and not for " fees for technical services" Appeal of the assessee was allowed.
(A.Y. 2007-08)(ITA no 5300/Del/2010 Bench 'D' dated 18-9-2012)
Adidas Sourcing Limited v.ADI (Delhi) (Trib.) (www.itatonline.org)

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

S. 9(1)(vii): Income deemed to accrue or arise in India – Fees for Technical Services – No FTS as services rendered did not involve any technical, managerial or consultancy services
The assessee was engaged in the business of manufacturing and export of garments. It made remittances to a non-resident company SEL, without deduction of tax at source. It was held that the payment in the issue did not fall within the ambit of Fees for technical services u/s 9(1)(vii) as the services were availed to ensure that imports were received in India import were received in India on time and in correct quantity. It was clear from the records that SEL nowhere was involved in identification of exporter or selecting material and negotiating price and thus, no consultancy services were involved. Role of SEL did not involve much technical knowledge. Further, there was no managerial services involved as SEL was acting on behalf of assessee as its agent and there no independent application of thought process in any activity. (A.Y. 2007-08)
Jeans Knit (P.) Ltd. v. Dy. CIT (2012) 53 SOT 76 (Bang.)(Trib.)

S.9(1)(vii): Income deemed to accrue or arise in India-Fees for technical services-Managerial services-DTAA- India- France-Article 7 &13- Payment made for advisory services is fees for technical services hence tax there on is not to exceed 10 percent of the gross amount of fees and tax deduction at source under section 195(1) has to be on that basis. (S.90, 195)
The applicant and its parent company in France, are both in the business of manufacturing electrical components. Under the service agreement, Mersen has undertaken to provide the applicant with services in the nature of assistance, professional and administrative consultation and training. The issue raised for consideration was whether the payment by the applicant is towards fees for technical services as per art 13(4) of the India-French DTAA read with the protocol to the said DTAA. If yes what is the rate of tax to be deducted under section 195(1). The Authority for Advance ruling held that advisory services rendered by a French company to the applicant an Indian company, under service agreement in the field of management, international relationship, finance financial control and accounting, taxation and law insurance ,purchase and sales environment and safety and human resources issues are in the nature of managerial as well as consultancy services which are made available to the applicant and therefore ,payment made by the applicant to the French company towards such advisory services is fees for technical services in terms of art 13 of India – France DTAA read with Protocol thereto . The Authority also held that in terms of para 2 of Art 13, tax thereon is not to exceed 10% of the gross amount of fees and consequently TDS under section 195(1) has to be on that basis.
Mersen India (P) Ltd. (2012) 70 DTR 121 / 249 CTR 345/208 Taxman 486 (AAR)
S.9(1)(vii): Income deemed to accrue or arise in India-Fees for technical services- Make available-Fees received for IVTC services are chargeable to tax as fees for technical services under section 9(1)(vii). (S.90, 139 195)

The applicants are engaged in the business of inspection, verification, testing and certification (IVTC) services .The applicants approached the Authority for Advance Rulings on the question whether they are liable to be taxed on these transactions in India as "fees for technical services" or "royalty " in the absence of PE in India, whether there was obligations on the Indian customer to with hold the tax under section 195, whether the applicants have an obligation to file a return of income . The Authority for Advance Rulings held that payments received or receivable by the applicants in connection with IVTC services rendered to Indian customers are chargeable to tax as fees for technical services under section 9(1) (vii) but not under the provisions of the article on "Royalties and fees for technical services" under respective DTAAs or when the said article is read with the most favoured nation clause; Since technical services do not "make available" technical knowledge, experience, skill knowledge or process while preparing reports. Since the applicants do not have a tax presence in India , Indian customers are not required to with hold taxes under section 195, however the applicants are bound to file returns in India under section 139.

XYZ (2012)348 ITR 31/ 249CTR 241/ 206 Taxman 494 / 69 DTR 155 (AAR)

S.9(1)(vii):Income deemed to accrue or arise in India-Royalties -Fees for technical services-DTAA- India-USA-Receipts as per the contract for overhauling services would be taxable as fees for technical services .(S. 90, 195, Art.12)

The applicant is a Company located in San Diego and incorporated under the America. It has a branch office in Singapore. The applicant is a manufacture of industrial gas turbines. In addition to supply and installation, the applicant has entered in to a contract with ONGC for carrying out trouble shooting repair and maintenance of the turbines. It had also entered in to another contract for repair and over haul services of turbines. The applicant approached the authority for a ruling on the question whether the amount received by it for fulfilling its obligations under the contract for overhauling and repair is chargeable to tax in India. The authority held that part of the amount received by the applicant a US company, for overhauling the gas turbines supplied and installed by it at the ONGC's facility in Mumbai which is attributable to the services rendered in modifications and replacement of parts and make available intellectual property rights in engineering, designs, data and specifications to ONGC in terms of the contract is taxable as included services in India under Article 12 of the DTAA, and on that part of the apportioned payment, tax has to be with held under section 195.

Solar Turbines International Company (2012) 250 CTR 337/72 DTR 145/ 209 Taxman 21 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services– DTAA-India-US.

Income from inspection, verification, testing and certification services (IVTC) provided by FCO in India qualifies as Fees for technical services (FTS) under I.T. Act. IVTC does not qualify as FTS under treaties containing a `make available' clause, as services cannot be independently applied by service recipient. Under treaties having a most favoured nation (MFN) clause, benefit of a restricted meaning of FTS in terms of make available clause is available. Income from IVTC qualifies as `other income' under treaties not having specific FTS article.

XYX (AAR Nos. 886 to 911, 913 to 924, 927, 929 and 930 of 10), Dated 19-3-12BCAJ Pg. 36, Vol. 44-A, Part 3, June, 2012(AAR).

S**.9(1)(vii):Income deemed to accrue or arise in India-Royalty- DTAA-India-Germany-Consideration for use of process or formula developed by research member would be assessable as royalty.(Art .12.3)**

The applicant is a German company engaged in the business of executing contracts for assembly and supervision of paint shop, including supply of materials and supervision of installation for various automobile companies . A group of companies are its affiliates .The group companies has formulated a research and development policy . As per the policy all Research and development activities for A group is co –ordinate through applicant. Entire cost is to be shared by the parties to the agreement based on key allocation. The participants are allowed a royalty –fee unlimited access to the research results including any intellectual Property Rights generated from the research and development. Though all are joint owners of the Intellectual Rights, the rights are registered in the name of the applicant. The applicant approached the Authority for a ruling whether the payments made to the applicant by "A" India, in terms of the Cost allocation Agreement can be treated as income in the hands of the applicant and whether it is not merely reimbursement of the expenses incurred for the Research and Development .The Authority held that in terms of agreement it appears that it is only an agreement to share product of research and development allegedly without

payment of royalty , but paying a consideration for use described as contribution costs of research incurred by researching party. This payment occurs only on use of product of research and not otherwise. Thus on facts ,payment made by any party to the applicant can only be understood as a consideration for use of process or formula developed by researching member and thus, would satisfy definition of royalty under Explanation 2 to section 9(1)(vii), therefore, payment received by applicant from " A" India under agreement would be royalty in terms of article 12.3 and section 9(1)(vii). The question is answered in favour of revenue.
'A' Systems, In re(2012)345 ITR 479/ 208 Taxman 137/74 DTR 305 (AAR)

S. 9(1)(vii): Income deemed to accrue or arise in India- Fees for technical services- 100 percent subsidiary-DTAA-India-Australia(S. 90, 195)Article, 5 12).
Applicant, an Indian Company, engaged in the business of development of computer software and related services, undertakes work in Australia and sub contracts a part thereof to its Australian subsidiary Infosys Australia which performs the work wholly in Australia . Though Infosys Australia is a 100 per cent subsidiary of the applicant, they are independent entities in the eye of law . Unless it is postulated that the applicant is a PE of Infosys Australia, the income of Infosys Australia from the work done by it cannot be taxed in India. As per para 5 of art. 12 of the DTAA, it has to be deemed that the income has arisen in India . As per para 5 of art. 12 of the DTAA, it has to be deemed that the income has arisen in India . Fact that the services are rendered in Australia cannot override the legal effect of the circumstances that the contract, as far as Infosys Australia is concerned, is secured from India and the applicant is giving directions to Infosys Australia about the performance of its work. Admitedly, the payment made to Infosys Australia would be fees for technical services under s. 9(1)(vii) However, no services are performed in India by Infosys Australia. Thus, it cannot be held that Infosys Australia is making available any technical service to the applicant to as to satisfy the requirement of cl. (g) of para 3 of ar. 12 of the DTAA, therefore, the fees for technical services paid to Infosys Australia is not chargeable to tax in India in terms of the DTAA, hence the provisions of section 195 would not be applicable.
Infosys Technologies Ltd, In re (2012) 76 DTR 287 (AAR)

S. 9(1)(vii): Income deemed to accrue or arise in India – Composite contract –DTAA- India-Netherlands DTAA – Fees for Technical Services. (S.90, 195, Article 12)
Applicant, a Dutch Company, having entered into a contract with an Indian Company for supply of machinery, spare and wearing parts and technical documentation for the production of autoclaved aerated concrete, and another contract on the same day for supply of project services for erection and installation of the machinery supplied under the first contract, it was actually one indivisible contract for supply, erection, commissioning, testing, etc. of the project which was artificially split up merely to ward off liability to tax on the whole of the transaction and, therefore, the consideration received by the applicant is fees for technical services under the Act as well as the Indo-Netherlands DTAA, chargeable to tax in India and it does not fall under the exception in para 6(a) of Article 12 of the DTAA.
HESS ACC Systems B.V., In Re (2012) 76 DTR 122 / 252 CTR 457/210 Taxman 290 (AAR)

S. 9(1)(vii)(b): Income deemed to accrue or arise in India- Fees for technical services-Export sales is not a "source of income outside India". Expenditure on fully convertible debentures is deductible(S., 40(a)(ia),195)
The assessee, an Indian company, paid Rs. 14.71 lakhs to a US company for 'KEMA' certification which was necessary to enable it to sell its products in the European markets. The assessee claimed that though the said amount was 'fees for technical services' u/s 9(1)(vii), it was paid "for the purpose of earning income from a source outside India" (i.e. the exports) and so it was not taxable in India u/s 9(1)(vii)(b). The AO & CIT (A) rejected the claim though the Tribunal upheld it. On appeal by the department, held reversing the Tribunal:
(i) S. 9(1)(vii)(b) provides that fees for technical services payable by a resident in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India shall not be taxable in India. The term "source" means not a legal concept but one which a

practical man would regard as a real source of income. It is a spring or fount from which a clearly defined channel of income flows. The assessee manufactured goods in India and concluded the export contracts in India. The source of income is created the moment the export contracts are concluded in India. The customer located outside India is not the source of the income though he is the source of the monies received. There is a distinction between the source of income and the source of receipt of monies. In order to fall u/s 9(1)(vii)(b), the source of the income, and not the receipt, should be situated outside India. Further, though the profits arise both from the manufacturing activity and from the sale, bifurcation of the fees is not permissible (CIT v. Aktiengesllschaft Kuhnle Kopp and Kausch (2003) 262 ITR 513 (Mad) not followed); (A.Y. 2005-06)

CIT v. Havells India Ltd2012) 208 Taxman 114 / 73 DTR 57/253 CTR 271 (Delhi) (High Court)

S. 9(1) (vii)(b): Income deemed to accrue or arise –Fees for technical services- Payment for Inspection, Verification, Testing and Certification (IVTC) services is chargeable as fees for technical services.(S. 139, 195)

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

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

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

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

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

(iii) eBay India & eBay Motors also do not constitute a "place of management" so as to be a PE under Article 5 (2)(a) of the DTAA. A "place of management" ordinarily refers to a place where overall managerial decisions of the enterprise are taken. eBay India & eBay Motors are not taking any managerial decision. They are simply rendering marketing services to the assessee in the form of collection of amount from the customers and remitting the same to the assessee, apart from creating awareness amongst the Indian sellers about the availability of the assessee's websites in India. All business decisions and deals are settled through the assessee's websites. eBay India & eBay Motors have no role to play either in the maintenance or the operation of the websites. They have absolutely no say in the matter of entering into online business agreements between the sellers and the assessee or the finalization of transactions between the buyers and sellers resulting into the accrual of the assessee's revenue. Consequently, they are not a "place of management" of the assessee's overall business.(A. Y. 2006-2007)

eBay International AG v. ADIT (Mum.)(Trib)www.itatonline.org.

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

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

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

S. 10(10CC):Exemption- Perquisite-Employee- Tax on employees' salary is a "non-monetary" perquisite exempt u/s 10(10CC)(S.17(2)(iv))

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

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

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

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

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

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

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

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

CIT v.Rjan Nanda (2012) 249 CTR 141/ 69 DTR 250 (Delhi) (High Court)

CIT v.Naresh Kumar Trehan (2012) 249 CTR 141/69 DTR 250 (Delhi) (High Court)

S. 10 (14):Exempt incomes- Special allowance- Development officer- Reimbursement of expenses certified by LIC can be held taxable.

The assessee a development officer of LIC filed the return of income claiming deduction in respect of incentive bonus, conveyance allowance and additional conveyance allowance received from LIC . The Assessing Officer rejected the claim of assessee. On appeal to the Tribunal , the Tribunal held that where LIC certified that reimbursement of expenses incurred in performance of duties of Office , of employment the same has to be held as not taxable for the purpose of exemption under section 10 (14).(A.Ys 1996-97 and 1997-98)

Satish Gupta v.ITO (2012) 134 ITD 686 (Delhi) (Trib.)

S.10(15): Exempt incomes – Interest-Foreign currency loans-Withdrawal of exemption by Government-Interest payment to non-resident is exempt.

Assessee had raised foreign currency loans in form of External Commercial Borrowings (ECBs) towards part of financing its import of capital goods and services. ECBs were duly approved by Government of India. As certain conditions of approval were violated, approval was withdrawn and exemption available under section 10(15)(iv)(f) was also withdrawn. Subsequently, assessee made payment of interest to non-resident lenders and claimed exemption under section 10(15)(iv)(f). Assessing Officer rejected the claim. On appeal the Commissioner (Appeals) held that exemption withdrawn by Central Government holding, interest as not exempt under section 10(15)(iv)(f) was to be ignored and it was held that interest payment by assessee to non-resident lenders as per ECB loan approved by Central Government would continue to be exempt. The Tribunal confirmed the view of Commissioner (Appeals).(A.Ys. 2002-03 & 2004-05)

ADIT v. Reliance Industries Ltd. (2012) 49 SOT 181 (Mum.)(Trib.)

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

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

Go Airlines (I) P. Ltd. v. UOI (2012) 76 DTR 353 (Delhi)(High Court)
Kingfisher Airlines Ltd v. UOI (2012) 76 DTR 353(Delhi)(High Court)

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

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

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

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

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

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

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

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

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

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

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

The Synodical Board of Health Services v. DGI (2012) 66 DTR 433 (Delhi)(High Court)

S.10(23C): Exemptions- Educational institutions - Horticulture Income - utilised for educational activity – Exemption to be allowed.

Application of petitioner trust for grant of exemption u/s. 10(23C) (vi) was rejected on grounds that assessee was engaged in non educational activities of horticulture and generating income from same; and that petitioner had collected fees under head `placement and training' from students which was not in conformity with fees prescribed. It was held that amount received from horticulture had been utilized in educational activities of institutions and for infrastructural development, it could not be treated that profit was earned for non educational activities. Denial of exemption was held to be not valid.

Orissa Trust of Technical Education and Training v. Chief CIT, Orissa (2012) 209 Taxman 552 (Orissa) (High Court)

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

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

Rukmanrani Education Foundations v. CCIT (2012) 74 DTR 218 (Bom.) (High Court)

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

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

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

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

The Commissioner must give an opportunity to the assessee if he desires to use the evidence collected against the assessee through reports of subordinate authorities. On the facts the court held that order passed by Chief Commissioner denying approval under section 10(23C)(vi), relying upon certain adverse material without supplying the same to the petitioner and without allowing an opportunity of rebuttal thereof does not fully meet the requirement of principles of natural justice and therefore, it can be sustained. The matter was set aside to the Commissioner to decide a fresh.

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

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

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

Delhi Music Society v. DIG (2012) 65 DTR 337 / 246 CTR 327 / 204 Taxman 231 (Delhi) (High Court)

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

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

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

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

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

Gagan Education Society v. Addl. CIT (2012) 145 TTJ 230 (Agra)(Trib)

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

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

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

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

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

CIT v. St. Mary's Malankara Seminary (2012)348 ITR 69/71 DTR 153 / 250 CTR 294 (Ker.)(High Court)

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

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

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

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

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

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

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

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

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

Schrader Duncan Ltd v. Addl.CIT (2012) 50 SOT 68 (Mum.) (Trib)

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

The Assessing Officer held that the since the shares were not listed securities at the time of transaction, the tax was payable at normal rate and not concessional rate . The view of Assessing Officer was confirmed by the Commissioner (Appeals) and Tribunal. The Court held that trading of these shares in the Stock exchange commenced only in the morning of 6-1-2006 . The shares were transferred from the demat account of the assessee on 5-1-2006 the credit of sale consideration was credited on 6-1-2006 would not be relevant to determine the transfer. The court held that once shares were transferred from demat account of assessee to account of 'Registrar to issue' and then to demat accounts of allottees, transfer is complete in terms of section 2 (47) by 5-1-2006. On the facts transfer for purchase being completed prior to listing of shares and commencement of trading in stock exchange being on 6-1-2006, transaction cannot be held to be in stock exchange hence the assessee would not be eligible for payment of capital gains tax at lower rate of 10 percent , normal rate is applicable.(A.Y. 2006-07)

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

S. 10(38): Exempt incomes-- Capital Gains – Delay in transferring shares into D-mat account from date of purchase of share – AO not justified in ignoring the relevant evidences and doubt the date of purchase – Exemption u/s 10(38) was allowed

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

ITO v Ajay Shantilal Lalwani (2012) 145 TTJ511/69 DTR 135 (Pune)(Trib)

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

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

CIT v. Ehpt India (P) Ltd. (2012) 65 DTR 187/ 246 CTR 217 (Delhi)(High Court)

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

Income of section 10A unit has to be excluded at source itself before arriving at gross total income, the loss of non section 10A unit cannot be set off against the income of section 10A unit. Exemption under section 10A, has to be allowed without setting off brought forward unabsorbed losses and depreciation from earlier assessment year or current assessment year either in the case of non STP units or in the case of very same undertaking. The Court observed that when section 10A, was recast by the Finance Act, 2000, the Parliament was aware of the character of relief given in Chapter III. Chapter deals with incomes which do not form part of total income. If the parliament intended that relief under section 10A should be by way of deduction in the normal course of computation of total income,it could have placed the same in Chapter VI-A, which houses the sections like section 80HHC, 80IA, etc. The Parliament was aware of the various restrictions and limiting provisions like section 80A, section 80AB, which were in Chapter VI-A, which do not appear in Chapter

III. The fact that even after recast, the relief has been retained in Chapter III indicates the intention of Parliament that it is to be regarded as an exemption and not deduction. This is supported by Circular No. 7 of 2003 dt.5thSeptember 2003 (2003)263 ITR (st) 62.(A. Ys. 2001-02 to 2006-07)

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

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

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

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

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

Assessee had shown the income from the sale of software as long term capital gain. The Assessing Officer held that the same is taxable as trading receipt. It was contended that if it was held to be trading receipt the same is exempt under

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

CIT v. Infosys Technologies Ltd. (2012) 65 DTR 271/ 205 Taxman 389 (Karn.)(High Court)

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

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

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

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

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

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

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

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

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

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

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

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

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

CIT v. H.B. Global Soft Ltd. (2012) 342 ITR 263 (Karn.)(High Court)

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

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

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

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

Assessee which had commenced its manufacturing activities in the previous year relevant to A.Y. 1984-85, could claim exemption for A.Y. 1984-85 to 1988-89 and had no option of choosing any five consecutive years for availing the benefit of exemption u/s 10A. In case of an assessee who had already started availing the benefit of S.10A in any assessment year prior to substitution of sub-section (3), there is no manner in which it could exercise option under the new sub-section (3), Hence assessee could not claim exemption u/s 10A for the assessment year, 1986-87 to 1990-91.(A.Y. 1990-91)

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

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

The assessee company has set up its industrial undertaking in the assessment year 1996-97 in domestic tariff area. The assessee received approval of STPI on 28-3-2000. The claim of deduction under section 10A was rejected by the

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

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

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

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

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

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

The Assessing Officer referred the matter to Transfer Pricing Officer to determine the arm's length price in respect of finance and accounting services to its associate enterprise. The Transfer Pricing Officer has accepted the method adopted by the assessee and no adjustments were made. However the Transfer Pricing Officer, passed the a draft order under section 144C(1) restricting the claim under section 10A by deducting the lease line charges incurred by the assessee from export turnover on the ground that those expenses were incurred by delivery of software outside India and foreign travel expenses from export turn over for the reasons that they were incurred in providing technical services out side India. He also proposed disallowance of o.5% of the investment expenditure estimated to have been incurred for earning non-taxable income in accordance with of rule 8D , read with section 14A. The Assessing Officer reduced the quantum of deduction under section 10A. The Dispute Resolution Panel rejected all the objections of assessee and confirmed the order of Transfer Pricing Officer. On appeal the Tribunal held that section 10A deduction not to be worked out on basis of Transfer Pricing Officer. That all such adjustments made by the Assessing Officer to the export turn over of the assessee had also to be made in the total turn over of the assessee. The disallowance under rule 8D was held to be not justified . A reasonable disallowance can be made. The draft assessment order cannot be said to be bad in law . When adjustments made by the were deleted by the Tribunal that irregularity was automatically cured . In such circumstances the assessment order need not be invalidated. Therefore the assessment is not time barred.(A.Y. 2007-08)

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

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

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

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

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

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

Patni Computer Systems Ltd. v. Dy. CIT (2012) 135 ITD 398 / 16 ITR 533 (Pune)(Trib.)

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

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

Madhu Jayanti International Ltd v. DCIT(2012)137 ITD 377/ 148 TTJ 1/74 DTR 401/18 ITR 1 (SB.)(Kol.)(Trib.)
Narendra Tea Co (P) Ltd v.JCIT (2012) 148 TTJ 1/74 DTR 40118 ITR 1 (SB.)(Kol.)(Trib.)
Rajrani Exports (P) Ltd v.Dy.CIT (2012) 148 TTJ 1/74 DTR 401/18 ITR 1(SB.) (Kol.)(Trib.)
Tea Promoters (India) (P) Ltd v.Dy.CIT (2012) 148 TTJ 1/74 DTR 40118 ITR 1 (SB.)(Kol.) (Trib.)

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

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

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

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

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

WNS Global Services Pvt. Ltd v. ITO (Mum.)(Trib.) www.itatonline.org

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

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

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

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

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

CIT v. Sasken Communications Tech. Ltd. (2012) 204 Taxman 84 (Karn.) (High Court)

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

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

CIT v. DSL Software Ltd. (2012) 66 DTR 97/246 CTR 542 (Karn.)(High Court)

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

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

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

S.10B:Newly established hundred per cent export-oriented undertakings- Splitting up – Reconstruction-Separate undertaking for production of similar goods-Entitled for exemption.

Assessees earlier undertaking which started in the Assessment year 1994-95, stopped its sales with effect from the assessment years 1998-99 onwards. New undertaking was set up in the assessment year 2002-03. The Tribunal held that provisions of section 10B do not place any bar on the assessee having a separate new undertaking for manufacture and production of same or similar goods as done earlier. Development Commissioner did not take any objection. Process carried on by assessee to produce quilts, bed sheets, bed spreads and bed covers etc. are commodities different from the new raw cloth or consumables out of which they are manufactured. (A.Y. 2002-03 & 2003-04)

Taurus Merchandising (P) Ltd. v. ITO (2012) 143 TTJ 1/ 65 DTR 48 (Delhi) (Trib.)

S.10B: Newly established hundred per cent export-oriented undertakings- Allocation of expenses-Charity - Miscellaneous expenses should be excluded - Management salary expenses is to be allocated in the ratio of sales turnover.

Charity and miscellaneous expenses should be excluded from allocation of expenses pertaining to export oriented unit. As regards the management salary, the allocation should be made in the ratio of sales turnover as adopted by the assessee itself to allocate other expenses. This method of allocation was more accurate and correct to facts of the case. The basis adopted by the assessee of time estimated in proportion to the production capacity employed in export oriented units and non-export oriented plants was unreliable and unscientific.(A. Ys. 2004-05, 2005-06, 2006-07)

Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 (Delhi)(Trib.)

S.10B: Newly established hundred per cent export-oriented undertakings- Software development-Computation-Exemption to be allowed separately in respect of each unit without setting off of losses of the units.

The assessee has five units which are developing the software. Four units suffered the loss and one unit earned the profit .Assessee claimed the exemption under section 10B on the income of profit making unit and carried forward the losses of other units. Assessing Officer computed the gross total income after setting off the losses of other units against the profit making unit. On appeal Commissioner (Appeals) confirmed the view of Assessing Officer. On appeal to Tribunal ,the Tribunal held that the assessee is entitled to deduction in respect of eligible units , while the loss of other units could not be set off against normal business income. i.e. Deduction under section 10B(4) can be allowed in respect of each unit separately without setting off losses of other units , matter remanded for consideration.(A.Y.200-2003)

Aithent Technologies (P) Ltd v. ITO (2012) 144 TTJ 731/68 DTR 68 (Delhi) (Trib)

S.10B:Newly established hundred per cent export-oriented undertakings-Interest on income tax refund-claimed netting off same against interest paid-netting off is not allowable as income tax refund has no connection with the business of assessee .

During the year the assessee earned interest on income tax refund . The assessee claimed the exemption under section 10B . The Assessing Officer disallowed the claim . On appeal the Commissioner (Appeals) allowed the claim . On appeal by revenue, the Tribunal held that, since interest received by assessee from department on income tax refund had no connection with business of assessee no deduction could be allowed under section 10B . (A.Y. 2002-03)

Dy. CIT v. American Express (India) (P) Ltd (2012) 135 ITD 211/ 70 DTR 330/ 146 TTJ 442 (Delhi) (Trib)

S.10B:Newly established hundred per cent export-oriented undertakings- Commercial production- Extension of relief period available for existing units.

The assessee, a 100 % EOU, commenced commercial production in AY 1992-93 and was entitled to claim exemption u/s 10B(3) in any 5 consecutive assessment years falling within the period of 8 years. The assessee did not claim a deduction in the first 3 assessment years as there was a loss and claimed it for the first time in AY 1995-96. The eligibility period was upto AY 1999-2000. With effect from 1.4.1999, the period of exemption prescribed u/s 10B(3) of 5 years was substituted by 10 years. The assessee claimed that it was entitled for exemption u/s 10-B for a further period of two years i.e. AY 2000-01 and 2001-02. Thereafter, w.e.f. 1.4.2001, s. 10B was substituted by the Finance Act, 2000. The assessee's claim was resisted by the AO & CIT (A) on the ground that the benefit applied only to "new undertakings" set up after that date and not to existing units. Held by the Special Bench:

(i) In AY 1999-2000, before expiry of the original time limit of five consecutive assessment years for which deduction was available as per then applicable law, the amended law became applicable and the assessee was accordingly eligible for deduction for the extended period of 10 years, as against 5 years allowed under the preamended law (DSL Software Ltd followed);

(ii) If there is only one decision of a non-jurisdictional Hon'ble High Court on the issue, it is binding on the Special Bench in view of the settled principle of judicial proprietary;

(iii) The department's argument that the new units set up by the assessee was a mere "capacity extension" and not a separate industrial undertaking on the basis that the certificates granted by the EOU authorities was for enhanced capacity and not for setting up a new industrial undertaking is not acceptable because S. 10B does not stipulate the issue

of a separate approval for each unit from the competent authority. The only requirement is that the undertaking should be approved (Saurashtra Cement & Chemical Industries (2003)260 ITR 181 (SC) distinguished)

(iv) On the question whether export incentives are "derived" from the undertaking and are eligible for deduction u/s 10B, s. 10B(4) stipulates a formula by apportioning the profits of the business of the undertaking in the ratio of turnover to the total turnover. Thus, though s. 10B(1) refers to profits "derived" by the EOU, the manner of determining such eligible profits has to be done as per the formula. S. 10B(4) does not require an assessee to establish a direct nexus with the business of the undertaking and once an income forms part of the business of the undertaking, the same would be included in the profits of the business of the undertaking and be eligible for deduction.(A.Ys.2001-02&2002-03)

Maral Overseas Ltd v. ACIT (2012) 136 ITD 177/ 146 TTJ 129/ 70 DTR 170 / 16 DTR 565 (SB)(Indore)(Trib.)

S.10B:Newly established hundred per cent export-oriented undertakings-Export or transfer of film software – Deduction under both section is not allowable.(S. 80HHF)

Assessee set up an EOU unit. It claimed deduction u/s 10B. With regard to its other businesses it claimed deduction under section 80HHF. While computing deduction u/s 80HHF it included export profit of EOU. The Commissioner (Appeals), however, reduced profit derived from EOU on ground that profit derived by EOU was exempt from tax under section 10B. The Tribunal held that the express intention of Legislature with regard to sections 10B and 80HHF is not to allow deduction under both sections and further, both of said sections expressly prohibits to allow deduction other than allowable under respective sections. Therefore, order of Commissioner (Appeals) was confirmed (A.Y. 2001 – 2002)

ACIT v. Sri Adhikari Brothers Television Network Ltd. [2012] 137 ITD 154/149 TTJ 324 (Mum.)(Trib.)

S. 10B : Newly established hundred per cent export-oriented undertakings – Exemption - Customization of SAP programmes as per the specification of client & its transmission through internet or e-mail – Falls in definition of 'Computer Programme' and 'Produce', hence, entitled to exemption

The activity of customization of SAP programmes as per the specification and requirements of the overseas clients and transmission thereof through internet or e-mail by the assessee fall within the definition of 'computer programmes' as clarified in S. 10BB as well as under Expln. 2 to S. 10B and the same fits into the definition of the term 'produce' and, therefore, assessee is entitled for exemption u/s 10B in respect of the receipts from overseas clients. (A.Y.. 1997-98 & 1999-2000)

Cybertech Systems & Software Ltd. v. CIT (2012) 149 TTJ 17/ 76 DTR 1 (Mum)(Trib.)
CIT v. Cybertech Systems & Software Ltd. (2012) 149 TTJ 17/76 DTR 1 (Mum)(Trib.)

S. 10B: Newly established hundred per cent export-oriented undertakings – Exemption – Interest Income - No direct nexus with the income derived from undertaking by the export of the computer software, no exemption

Interest income has no direct nexus with the income derived by the assessee from its undertaking by the export of the computer software and, therefore, assessee is not entitled to exemption u/s 10B in respect of interest income. (A.Y. 1997-98 to 1999-2000)

Cybertech Systems & Software Ltd. v. CIT (2012) 149 TTJ 17/76 DTR1 (Mum)(Trib.)
CIT v. Cybertech Systems & Software Ltd. (2012) 149 TTJ 17/76 DTR1 (Mum)(Trib.)

S. 10B: Newly established hundred per cent export-oriented undertakings – Exemption - To claim exemption u/s. 10B, there is no legal bar against outsourcing of activities

Provisions of S.10B do not place any bar on assessee having a separate new undertaking for manufacture and production of same or similar goods, as done earlier because what is required to claim exemption under said section is that undertaking established must be a newly established undertaking. Existence of business is a pre-supposition for formation of a new undertaking by reconstruction or splitting up thereof. Therefore, in a case when there is no business in old unit of assessee before start of production by new EOU, it cannot be concluded that new unit is formed by reconstruction or splitting up of a business already in existence so as to deny exemption u/s. 10B. In order to claim

exemption u/s. 10B, there is no legal bar against outsourcing of activities involved in manufacturer or processing of goods as what is required is that undertaking must mainly engage itself in manufacturer or processing of goods, either itself, or through some agency under its supervisory control or direction. (A.Y. 2002-03 & 2003-04)
Taurus Merchandising (P) Ltd. v. ITO (2012) 138 ITD 204 (Delhi)(Trib.)

S. 10BA: Export-Articles or things- Undertaking-DEPB- DEPB as profit derived from export business is eligible for exemption.
DEPB as a profit derived from export business for the purpose of computing deduction under section 10BA. Revenue conceded the issue before the High Court.(A.Ys 2003-04 to 2005-06)
CIT v. Arts & Crafts Exports (2012) 66 DTR 85/ 246 CTR 463 (Bom.)(High Court)
Editorial:- Arts & Crafts Exports v. ITO (2012) 66 DTR 69 / 144 TTJ 56(Mum.)(Trib.)
S.11: Charitable or religious purposes- Local Act-Fund received under section 33C of the local Act is not an income under section 2 (24), hence the trust is entitled to exemption . (S. 2 (24), 12).
The assessee is a statutory body in terms of the Bihar Agricultural Produce Markets , Act , 1960.The Assessing Officer rejected the claim for exemption beyond 15 percent of its receipts under the provisions of section 12 of the Act . The Commissioner (Appeals) and Tribunal up held the order of Assessing Officer. On appeal to High Court , the Court held that , the assessee is not engaged in the any commercial activity and no part of its activity was inspired by profit motive . The Court also held that Board's fund received under section 33C of Local Act of was not an income under section 2 (24) . Accordingly the order of Tribunal set aside and assessee claim for exemption was allowed.
Bihar Agricultural Produce Marketing Board v.CIT (2012) 205 Taxman 378/75 DTR 282 (Patna) (High Court)
S.11:Charitable purpose-Members club- Providing cultural and educational activities for its members does not detract from the position that it advances a general public utility. [S.2(15)]
The assessee is a trust registered under the Bombay Public Trusts Act, 1950, and also registered under section 12 of the Income-tax Act. The Assessing Officer held that the assessee being mutual association computed the income as not charitable. In appeal the Commissioner (Appeals) confirmed the view of Assessing Officer. Tribunal reversed the finding of Commissioner (Appeals) and held that the activities of the club being to encourage or promote and to advance games, sports, athletic activities and cultural activities of the assessee which are of general public utility hence the requirement of section 2(15) is met and entitled to exemption. On appeal by the revenue the High Court also confirmed the order of Tribunal and held that the fact that the assessee provides services to its members does not detract from the position that it advances a general public utility. (A.Y. 1996-97)
DIT v. Chembur Gymkhana (2012)346 ITR 86/ 70 DTR 163/251 CTR 145 (Bom.)(High Court)
S.11: Charitable or religious purposes-Sports club- Denial of exemption held to be not valid (S. 2(15), 12A)
The assessee sports club was registered under the Bombay Public Trust Act, 1950 and under section 12A .The main object of the assessee was to promote sports and athletic activities. The Assessing Officer treated the assessee as a mutual concern and denied exemption under section 11. In appeal the Commissioner (Appeals) and Tribunal held that the assessee had acquired land from the State Government which utilized for facilities such as providing an Olympic size swimming pool which was open to the general public on annual membership basis without restriction as to caste , creed ,religion or profession hence eligible for registration. On appeal by revenue, the Court affirmed the view of Tribunal and dismissed the appeal of revenue. (A.Y.2003-04)
DIT (Exemption) v. Goregaon Sports Club (2012)347 ITR 338/ 207 Taxman 240 (Bom.) (High Court)
S.11::Charitable or religious purposes-Application of income- Commercial principles-Payment of taxes under VDIS-Annual subscription-One time admission fess - Accumulation o of income- Provision for doubtful debts- Taxes paid was treated as application of income- Amount spent in Germany could not be considered as application of income of the Trust in India for charitable purposes. Annual subscription fee paid to keep the membership alive cannot be assessable as business income . One time admission fee paid by members is corpus donation hence not assessable as income. Option to accumulate the income has to be applied before expiry of time allowed under section 139(1) there is no provision to condone the delay. [S. 28(iii), 36(i)(vii) , 36(2)(i),139(1)]

The assessee is a trust registered under section 12A of the Act. Assessee had filed declaration on income and paid the taxes under Voluntary Disclosure of Income Scheme, 1997. The assessee claimed the payment of taxes as application of income . The assessee also incurred the expenses outside India (Hanover ,Germany), the assessee claimed the said expenses as application of income. The Assessing Officer held that the expenditure incurred outside India cannot be considered as application of income in India for charitable purpose. The view of Assessing Officer was confirmed by the Commissioner of income –tax (Appeals). On appeal to the Tribunal, the Tribunal held that, the payment of taxes under VDIS should be treated as application of income of the trust. As regards the expenditure incurred in Germany is concerned, the Tribunal was of the view that the words "is applied to such purpose in India" appearing in section 11(1)(a) of the Act only mean that the purpose of the Trust should be in India and that application of the Trust need not be in India .The Tribunal has accepted the contention of assessee. On appeal by revenue, the court after referring the Circular no 5 dated June 19, 1968 held that taxes paid under the VDIS 1997 was to be deducted before arriving at the commercial income of the Trust available for application of income. As regards the amount spent at Germany the Court held that the requirement of provision is that the income of the trust should be applied not only to charitable purposes, but also applied in India to such purposes. Therefore, on a proper interpretation of section 11(1)(a) of the Act, the amount spent by assessee –trust in Germany could not be considered as application of income of the Trust for charitable purpose.

As regards the option to accumulate the income for future application to charitable purpose has to be exercised by the trust in writing before the expiry of the time allowed under section 139(1) for furnishing the return of income, as provided in Explanation (iib) below section 11(1) of the Act .In respect all years under consideration the time has expired and there was no provision to condone the delay . As the assessee has not made the application with in time the assessee could not be granted time to make good the shortfall in the application of the income of the trust by permitting the assessee to apply for accumulation of the amount in shortfall for future application.

As regards the receipt of annual subscription fees, the assessee trust had not been shown to have performed any specific services to the members. Whereas the annual subscription fee were recurring receipt, receivable by the assessee –trust by mere efflux of time irrespective of whether any services were rendered or not to the members, what is contemplated in section 28(iii) is the receipt of fees from particular members to whom specific services have been rendered by trust . The annual subscription fee was paid merely to keep the membership alive on yearly basis. The distinction between the two being clear, and in the absence of any evidence to show that the assessee received fees from members as "quid pro quo" for specific services rendered to them, the tribunal was right in holding that the annual subscriptions fees were not assessable under the section.

As regards the one -time admission fee paid by members they were aware that it could be spent by the assessee only for the purpose of acquiring a capital asset therefore the amount must be held to be a corpus donation, not taxable as income .Income of the trust available for application to charitable purposes in India should be computed not in accordance with the strict provisions of the Act but should be computed in accordance with commercial principles .Under commercial principle it has always been reognised that a provision reasonably made for a loss or an outgoing , can be deducted from the income if there is apprehension that the debt might became bad . As there was nothing on record to show that the provision was not made bonafide . Therefore while computing the income available to the trust for application to charitable purpose in India in accordance with section 11(1)(a) the provision for doubtful debts must be deducted .Payment of taxes under the VDIS is to be deducted before arriving at the commercial income of the assessee –truast that is available for application to charitable purposes. (A.ys 1988-89, 2002-03to 2006-07)

DIT v. National Association of Software and Services Companies (2012) 345 ITR 362 / 208 Taxman 178/253 CTR 33 (Delhi) (High Court)

S.11: Charitable or religious purposes-Depreciation-Capital expenditure- Depreciation is allowable even when entire capital expenditure was allowed as application of income.(S. 32)

The assessee is a charitable trust and claimed depreciation on assets. The assessee had also claimed expenses incurred on assets as 'application of income' for charitable purposes. The revenue claimed that no depreciation was allowable since the same would amount to granting 'double deduction'. The Court up held the claim of assessee for allowance of depreciation and held that there was no double deduction ; under normal commercial accounting principles, there is

authority to the proposition that depreciation is a necessary charge in computing the net income and ratio of supreme court in Escorts Ltd vs UOI (1993)199 ITR 43 (SC) is not applicable for the claim of depreciation. Appeal of revenue was dismissed.(ITA no 140 of 2012 dated 29-3-2012) (A.Y. 2006-2007)

DIT v. Vishwa Jagriti Mission (2012) Income Tax Review –Sept – P. 83 (Delhi) (High Court)

S.11: Charitable or religious purposes- Exemption – Charitable Trust – Development Authority engaged in charitable activities is entitled to exemption if books of accounts are maintained for construction business

The grant of registration under section 12AA is not an empty formality as it has to be granted after satisfying that the objects are charitable in nature. The assessee, development authority is engaged on charitable activities and construction business of the assessee is merely incidental to the main object of town planning and therefore is entitled to exemption under section 11 if separate books have been maintained for construction business in accordance with the stipulation in section 11(4A). (A.Y. 2007-08)

ITO v. Moradabad Development Authority (2012) 145 TTJ 746/69 DTR 329 (Delhi)(Trib.)

S. 11: Charitable or religious purposes – Principal objects was promotion of vegetarianism and distribution of Prasad – Preparing and selling vegetarian food held to be incidental to object of assessee trust

Assessee was a charitable trust and its principal objects included promotion of vegetarianism and distribution of Prasad. The AO finding that assessee was in business of running an eating house/restaurant, took a view that entire character and focus of assessee had become totally commercial. Since the promotion of vegetarianism is undoubtedly a charitable activity, business of preparing vegetarian food items and selling same was very much incidental to object of assessee trust and such business could be conducted by a charitable trust as per provisions of section 11(4). Thus, assessee's claim for exemption was to be allowed. (AY 2008-09)

ADIT(Exemption) v. Sri Sri Radha Damodar Charitable Trust (2012) 52 SOT 622 (Mum)(Trib.)

S.11(1)(a) : Charitable or religious purposes- Charitable Trust – Assessee entitled to exemption even if the income is applied to acquire capital asset to be used for object of the Trust

The assessee entitled to exemption even if the expenditure has been incurred for acquiring capital asset to be used for object of the Trust. Application of income for charitable purpose not to be distinguished on the basis of application for revenue purposes and capital purposes. (AY 2000-01 to 2006-07)

Gagan Education Society v. Addl. CIT (2012) 145 TTJ 230(Agra)(Trib.)

S. 12:Trust or institution-Contributions-Amount utilized towards object of trust, held to be corpus fund, exempt.

The assessee is a trust engaged in the field of education. It collected amounts from students at the time of admission towards building fund, education research fund, education infrastructure fund, etc. The AO held that the said funds were not donation but payment for admissions and that receipts could not be treated as donation / corpus donation. It was held that the contribution was made with the clear understanding that it was towards corpus funds and that trust deed also stipulated that the voluntary contribution given by parents for furtherance of objects of Trust were exclusive property of trust which was to be utilized towards the object of trust. Thus, the contribution was held to be in the nature of corpus fund and exempt u/s 12. (A.Y. 2008-09)

DIT (Exemption) v. Shri N.H. Kapadia Education Trust (2012) 136 ITD 111/148 TTJ 37/76 DTR 233 (Ahd.) (Trib.)

S.12A:Trust or institution-Registration-Charitable purposes-Cancellation by Commissioner.

Once the certificate of registration is granted after examination of the object of Trust and due compliance of necessary formalities, the same cannot be cancelled later on by the CIT. And once it is found that the trust carried out its activity as per its object, it cannot be treated as not formed in accordance with the object on which the registration was earlier granted. Therefore, the action of CIT is unwarranted. Registration granted under section 12 A of the Act can be cancelled only in the event the Commissioner is satisfied that the activities of the trust are not genuine or are not being carried out in accordance with the object of the trust. Merely because assessee was earning income from the activities of publication and sale of literature and propagation of Gandhian ideologies, the activities of the trust cannot be held non charitable.(A.Y.

CIT v. Sarvodaya Ilakkiya Pannai (2012) 72 DTR 36 / 250 CTR 332 (Mad.)(High Court)

S.12A :Trust or institution-Charitable purposes-Registration-Refusal of registration was held to be not justified when the particular object was not acted upon. [S.2(15)]

Assessee engaged in educational activities. One of the objects permitted assessee to export computed and other similar activities. The said object was never acted upon by the assessee. The Commissioner rejected the registration. On appeal to Tribunal the Tribunal held that the CIT was not justified in rejecting registration application of the trust only on the ground that the Trust had the object of export of computer, which was not acted upon. The Tribunal referred the Circular No 11/2008 dated 19-12-2008.

Baba Amarnath Educational Society v. CIT (2012) 69 DTR 307/149 TTJ 373 (Changigarh)(Trib.)

ACE Educational & Charitable society v. CIT, (2012) 69 DTR 307/149 TTJ 373 (Changigarh)(Trib.)

S.12A:Trust or institution-Charitable purposes-Registration- Rejection of registration by Assessing Officer is without jurisdiction.

Once the registration is granted under section 12A by the Commissioner, the AO as subordinate authority cannot cancel the registration. The commissioner can cancel the registration on satisfaction of conditions laid down in Section 12AA(3). Thus, cancellation of registration under section 12A and completion of assessment under AOP by the AO is without jurisdiction. (A.Y. 2005-06)

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

S.12A:Trust or institution-Registration-Charitable purposes- Merely a surplus in one year over gross receipts not ground for rejecting registration.

The assessee's application under section 12AA for grant of registration under section 12A was rejected on the ground that assessee had shown a surplus over gross receipts in a particular year; that aims and objectives were not in charitable nature. Therefore, merely a surplus in one year cannot be a consideration for rejecting an application for grant of registration under Section 12A.

Make the Future of Country Education Society v. Dy. CIT (2012) 51 SOT 98 (Delhi) (Trib.)

S.12A: Trust or institution-Registration-Charitable purposes- Significant or material change in object clause of MOA by voluntary act of the assessee – Changes to be vetted by revenue authorities before granting the benefit u/s 11 and 13 of the Act

The assessee is a society registered under section 12A of the Act whose main object is to promote the game of cricket. There was a significant or material change in the object clause of MOA of the assessee's society made by the assessee voluntarily. It was held that in case of such significant change in the object clause, the revenue authorities have a right to examine the question as to whether these changes in the memorandum, rules and regulations are in consonance with the provisions of the Act so as to enable assessee to avail benefit as charitable institution u/s 11, 12 and 13.

Board of Control Cricket in India v. ITO (2012) 136 ITD 301 (Mum.) (Trib.)

S.12A: Trust or institution-Registration-Charitable purposes – TDS deducted on donation made, by the donor – Held the assessee eligible for registration as mere deduction of TDS does not change the nature of donation to commercial receipt. [S. 2(15)]

The assessee was a Trust created with the object of carrying out research in the field of medicines. The assessee received donations from the donors which was utilized in holding conference for doctors in hotels. The said donors had deducted TDS on the said donations. It was held that merely because donors are pharmaceutical companies and they deducted TDS, it would not convert a donation into a commercial receipt on the basis of presumptive inference as long as assessee had credited amount as donations and also issued donation receipts. Thus, the assessee was eligible for grant of registration.

Heart Care Management v. DIT (IT) (2012) 52 SOT 277 (Delhi)(Trib)

S.12AA:Trusts or Institution- Registration- Charitable purpose– As the activities of the trust being genuine the trust is entitled for registration.

For granting registration the object of the trust must be charitable and activities must be genuine. On the facts of the assessee both the conditions were satisfied and Tribunal was justified in holding that the trust was entitled for registration. (A.Y. 2003-04)

CIT v. Lucknow Educational and Social Welfare Society (2012) 340 ITR 86 (All.)(High Court)(Lucknow)

S.12AA :Trust or Institution-Registration-Charitable purposes-Registration-Constitutional validity-Amendment of section 12AA(3) is held to be valid.

The Commissioner issued the notice under section 12AA(3) on 31 st July , 2007 for cancellation of the registration granted to the petitioner for the assessment year 1999-2000 on the ground that the petitioner is charging capitation fee and donations in respect of admissions and diverting them in respect of personal gain of trustees. The proceedings were initiated and order was passed cancelling the registration. The said order was challenged before the Tribunal . The Tribunal allowed the appeal of assessee on the ground that the registration was granted under section 12A , which cannot be invoked by section 12AA(3) , which were brought on the statute book w.e.f 1st October, 2004. The appeal against the order of Tribunal is admitted and pending for final disposal before the High Court. Section 12AA(3) has been amended by the Finance Act of 2010 w.e.f. June 2010 giving the power to cancel the registration under section 12A. The Commissioner issued fresh show cause notice on 11 th Mach 2011 for cancellation of registration for reasons mentioned in his order dated 9th October , 2007.The assessee challenged the constitutional validity of provision of sub section (3) of the section 12AA as amended by the Finance Act of 2010 w.e.f. 1st June 2010 to the extent they provide for revocation of a registration granted under section 12A. The Court held that the amendment of section 12AAA(3) by the Finance Act, 2010 is not arbitrary and it does not take away vested right nor does it create new obligation in respect of past actions and cannot be said to be retrospective in operation ; even if construed to be retrospective , it cannot be held to be violate of Article 14. Accordingly the petition was dismissed.(A.Y.1999-2000)

Sinhagad Technical Education Society v.CIT (2012) 343 ITR 23 / 249 CTR 45/206 Taxman 314 / 68 DTR 99 (Bom.) (High Court)

S.12AA:Trust or institution-Registration-Charitable purposes-Object clause.(S.11)

While granting registration under section 12 AA of the Act the Commissioner has to satisfy himself only about the objects of the trust and the genuineness of its activities. The fact that there is misapplication of property and funds of the trust is to be looked into only for granting exemption under section 11 and not at the time of registration.

CIT & Anr. v. A.S. Kupparaju Brothers Charitable Foundation Trust (2012) 69 DTR 315 / 205 Taxman 9 (Karn.)(High Court)

S.12AA:Trust or Institution-Registration-Charitable purposes-- Assessee entitled to registration under Section 12AA of the Act, even if the assessee sells certain property

The object of the business of the assessee was to planning and development of the city including preparation of master plan and zonal development plan which are in the nature of public utility. It was held that assessee would be entitled to registration under Section 12AA of the Act, even if the assessee sells certain property as the said activity is incidental to the object of the assessee.

Jodhpur Development Authority v. CIT (2012) 145 TTJ 221/73 DTR 90 (Jodh.)(Trib.)

S.12AA:Trust or institution-Registration-Charitable purposes-Education rendered on commercial lines, charity must subserve the essential requirements of the needy and the destitute hence cancellation of registration held to be justified (S. 2(15),11, 80G)

In the instant case, assessee is running coaching centres recognized by Universities to cater their distance education programme. The assessee collects fees from the students and same is shared between the assessee and the Universities on commercial lines. It was held that the education per se will not be considered charitable unless carried out as charitable endeavour. The litmus of charitable institution is that the activity must be conducted with charitable dedication i.e. it should subserve the essential requirements of the needy and the desitude. Thus held that rendering of education to millionaire is not charity.

Professional Education & Research Foundation (2012) 51 SOT 351 (Chennai) (Trib.)

S.12AA:Trust or institution-Registration-Charitable purposes-Object of trust was charitable ,no income of the trust was applied for benefit of lineal descendant as both the conditions are satisfied the trust is eligible for registration. [S. 2(15)]

Where the dominant purpose of the trust are charitable in nature then mere fact that the poor relatives of settlor would have preference over general public in such charitable objects, would not make trust as non-charitable. Further, Trust deed provided that after death of the settlor, income from the trust property was to be used for charitable purpose, which were covered u/s 2(15). It was held that as no amount was applied for the benefit of any lineal descendant, since

the objects of the trust, after death of settler were fully charitable and whole income of the trust was utilized for charitable purposes set out in trust deed both conditions u/s 12AA for registration of trust were fully satisfied.
Manockjee Cowasjee Petit Charities v. DIT (Exemption) (2012) 136 ITD 355/75 DTR 1/148 TTJ 181(TM)(Mum.)(Trib.)

S.12AA:Trust or institution-Registration-Charitable purposes-Trust constituted with the object clause consisting of charitable as well as religious is entitled exemption.(S.11, 13)

The assessee trust had applied for registration u/s. 12AA of the Act. Its objects, as per its trust deed, were charitable as well as religious. According to the DIT, since the objects were admixture of religious as well as non-religious, the registration u/s. 12AA was denied. According to the Tribunal, the trust, whose objects are religious as well as charitable, would be entitled for grant of registration and also to claim exemption u/s. 11. It further observed that when the assessee seek exemption u/s. 11, the same would be allowed subject to provision of sec. 13(1)(a) and (b) of the Act.(A.Y.)
Shri 1008 Parshwanath Digamber Jain Mandir Trust v. DIT, ITAT 'I' Bench, Mumbai, ITA No. 5544/M/09, dated 8-2-12, BCAJ Pg. 41, Vol. 44-A Part 1, April 2012(Mum.)(Trib.)

S. 13: Trust or institution- Exemption – Land used for society belonging to wife of secretary ,exemption not be denied when no benefit passed.(S.11,12AA)

Assessee society registered u/s 12AA was functioning from land belonging to wife of secretary of assessee society. It had incurred expenditure on construction of building on said land. It was apparent from records that land was taken on lease for period of 30 years with renewable option and, thus, no benefit was passed to secretary's wife. Moreover, there was an option that in case assessee did not want extension of lease, it could remove superstructure erected on leased land. Thus, it was held that impugned order passed by Assessing Officer denying exemption was not sustainable. (A.Y. 2006-07 & 2007-08)
Addl. CIT v. N.L. Education Society (2012) 52 SOT 603 (Agra)(Trib.)

S.14A:Business expenditure-Disallowance-Exempt income- Stock in trade-Disallowance under section 14A, does not apply to shares held as stock-in-trade. Disallowance on notional basis is invalid.(Rule 8D)

The assessee availed of an interest-free loan of Rs.14 crores and paid brokerage of Rs.28 lakhs for purchasing shares. The shares were held as stock-in-trade and the assessee earned dividend of Rs. 46.67 lakhs thereon. The assessee claimed that no expenditure had been incurred to earn the dividend though the AO made a disallowance of Rs. 27.34 lakhs u/s 14A & Rule 8D. The Tribunal held that the brokerage on the loan, though incidental to the trading of shares, was indirectly incurred to earn dividend and had to be disallowed u/s.14A. On appeal by the assessee, Held by the High Court allowing the appeal:
When no expenditure is incurred by the assessee in earning dividend income, notional expenditure cannot be disallowed u/s 14A. The assessee had not retained shares with the intention of earning dividend. The dividend income was incidental to the business of sale of shares, which remained unsold by the assessee. It cannot be said that the expenditure incurred in acquiring the shares had to be apportioned to the extent of dividend income and that should be a disallowance u/s 14A.
CCI Ltd v. JCIT(2012) 206 Taxman 563/71 DTR 141 (Karn.)(High Court)

S.14A:Expenditure disallowance- Exempted income-In remand, disallowance under section 14A cannot exceed original disallowance.

The Assessing Officer has made a disallowance u/s 14A of Rs. 45 Lakhs on the ground that the assessee had not been able to segregate expenses relating to earning of dividend income and that borrowed funds had been used to fund the investments. The CIT (A) reduced the quantum of disallowance & the department accepted that. In the assessee's appeal, the Tribunal totally deleted the disallowance. On appeal by the department, Held:
The Assessing Officer should examine & compute the disallowance on the basis of what is laid down in Maxopp Investment Ltd.(2011)203 TM 364 (Del). However, the quantum of disallowance, if any, to be made by the AO will not exceed the disallowance which was made in the original assessment order as reduced by the CIT(Appeals).(2001-02)

CIT v. Machino Plastic Ltd(2012)348 ITR 523 (Delhi) (High Court)

S.14A: Business expenditure-Disallowance-Exempt income - Firm- Partner -Interest-Disallowance cannot made if there is no tax-free income. [S. 10(2A), 36(I)(iii)]

The assessee, a partner in a firm, borrowed funds and advanced it to the firm on terms that the firm would pay interest if it made a profit. For one year, the firm paid interest which was offered as income by the assessee while for the second year it did not pay interest as it made a loss. The assessee claimed the interest paid on the borrowing as a deduction u/s 36(1)(iii). The AO disallowed the claim on the ground that as the borrowings had been invested in the firm and the income from the firm was exempt u/s 10(2A), the interest expenditure was not allowable u/s 14A. This was reversed by the CIT (A). On appeal, the Tribunal upheld the CIT(A) on the ground that as there was no exemption claimed u/s 10(2A) by the assessee and there was no tax-free income, s. 14A could not apply. The department filed an appeal in the High Court in which it argued that as the profits derived by the assessee from the firm was exempt u/s 10(2A), the interest on the borrowed funds used to invest in the firm was disallowable u/s 14A. The court dismissing the appeal, held :

In so far as Question (A) is concerned, on facts we find that there is no (tax-free) profit for the relevant assessment year. Hence the question as framed would not arise.

CIT v. Delite Enterprises (Bom.)(High Court) www.itatonline.org

S.14A:Business expenditure- Disallowance-Exempt income-Deduction under chapter VI-A-No disallowance under section 14A could be made against income which are entitle to deduction under section 80P(2)(d).[S.80P(2)(d)].

The assessee is a co-operative society which claimed deduction under section 80P(2)(d). The Assessing Officer applied provisions of section 14A and disallowed 1/8 of the employees benefit and remuneration. In appeal the disallowance was deleted by Commissioner (Appeals) and Tribunal. On appeal to the High court , the court held that deductions which are permissible and allowed under chapter VI-A , do not result in exclusion of the income from the charging section . Chapter VIA is a different from the exclusions /exemptions granted /stated in Chapter III. The Court held that no disallowance under section 14A could therefore be made against the income which was entitled to deduction under section 80P(2)(d).(A.Y. 2006-07)

CIT v. Kribhco (2012) 75 DTR 265/209 Taxman 252/252 CTR 374(Delhi) (High Court)

S.14A: Business expenditure-Disallowance- Exempted income-Management fee-Fund management fee-Key man insurance policy are taxable under section 28(vi) hence expenditure incurred relating to same can not be disallowed under section 14A.

The Tribunal held that the proceeds of Keyman Insurance Policy are fully taxable under section 28(vi) of the Act , therefore ,the expenditure relating to the same can not come with in the ambit of section 14A ,therefore disallowance was not justified. Fund management fee paid had no nexus with the earning od dividend disallowance under section 14A can not be made. (A.Y. 2005-06)

Dy. CIT v. Noble Enclave & Towers (P) Ltd(2012) 50 SOT 5 (Kol.) (Trib)

S. 14A: Business expenditure- Disallowance-Exempt income- Rule 8D Disallowance Cannot Exceed Total Expenditure

In AY 2008-09, the assessee earned tax-free dividend income. Its' total expenditure as per the P&L A/c was Rs. 49 lakhs. The AO applied Rule 8D and made a disallowance u/s 14A of Rs. 2.37 crores which was reduced by the CIT (A) to Rs. 1.78 crores. Before the Tribunal, the assessee claimed that even assuming that the entire expenditure had been incurred to earn the dividend, the disallowance u/s 14A & Rule 8D could not exceed the expenditure incurred. held accepting the plea:

U/s 14A read with Rule 8D, disallowance can be made for the expenditure incurred for earning of exempt income. From the assessee's P&L A/c, it is evident that the total expenditure incurred was Rs. 49 lakhs only which was claimed as a deduction. The disallowance u/s 14A & Rule 8D cannot exceed the expenditure actually claimed by the assessee. Accordingly, the action of the AO & CIT (A) in making disallowance in excess of total expenditure debited to P&L A/c is unjustified.(A.Y.2008-09)

Gillette Group India Pvt.Ltd. v. ACIT (2012) 16 ITR 57(Delhi)(Trib)

S.14A:Business expenditure - Exempt income - Shipping business – Company - Book profit -Tonnage tax - When income is computed as per provisions of Chapter XII-G disallowance under section 14A cannot be made. (S. 115VP).

Assessee is a company engaged in the business of hiring and operation of ships opted for assessing the income as per provisions of section 115VP. During the relevant year the assessee received the dividend income was claimed as exempt under section 10(34). Assessing Officer disallowed the expenditure by applying the provisions of section 14A read with Rule 8D. Tribunal held that when the income is computed in accordance with the provisions of Chapter XII-G, no separate disallowance can be made under section 14A. (A. Y. 2008-09).

Varun Shipping Company Ltd. v. Addl. CIT (2012) 134 ITD 339 / 66 DTR 390 / 144 TTJ 286/17 ITR 587 (Mum.)(Trib.)

S.14A: Business expenditure-Disallowance-Exempt income- Disallowance of expenditure without showing how assessee's method is wrong is to be deleted-Rule 8D.

In AY 2008-09, the assessee claimed that it had not incurred any expenditure in earning dividend income and no disallowance u/s 14A could be made. However, the AO computed disallowance u/s14A & Rule 8D of Rs.12.81 lakhs. This was upheld by the CIT (A). On appeal to the Tribunal, Held:

S. 14A(2) empowers the AO to determine the amount of expenditure incurred in relation to tax-free income if, "having regard to the accounts of the assessee, he is not satisfied with the correctness of the claim of the assessee". The satisfaction of the AO as to the incorrect claim made by the assessee is sine qua non for invoking the applicability of Rule 8D. The satisfaction can be reached only when the claim of the assessee is verified. If the assessee proves before the AO that it incurred a particular expenditure in respect of earning the exempt income and the AO is satisfied, then there is no requirement to proceed with the computation under Rule 8D. The AO wrongly proceeded on the premise that Rule 8D is automatic irrespective of the genuineness of the assessee's claim in respect of expenses incurred in relation to exempt income. The correct sequence for making any disallowance u/s14A is to, firstly, examine the assessee's claim of having incurred some expenditure or no expenditure in relation to exempt income. If the AO is satisfied with the same, then there is no need to compute disallowance as per Rule 8D. It is only when the AO is not satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure having been incurred in relation to exempt income, that the mandate of Rule 8D will operate.(A.Y.2008-09)

Auchtel Products Ltd v. ACIT (Mum.)(Trib.) www.itatonline.org

S.14A: Business expenditure-Disallowance-Exempt income-Burden is on Assessing Officer to show expenditure is incurred to earn tax-free income.(Rule 8D)

The assessee earned dividend of Rs. 17 lakhs and LTCG of Rs. 12 crores. The assessee claimed that it had incurred no expense to earn the tax-free income and so no s. 14A disallowance was permissible. However, the AO disallowed Rs. 2 crores under Rule 8D towards interest and admin expenditure. The CIT (A) accepted that no interest was incurred and deleted that disallowance. He also reduced the admin expenditure disallowance. On appeal to the Tribunal, Held:

(i) The contention of the Revenue that some expenditure, directly or indirectly, is always incurred for earning tax-free income cannot be accepted. The burden is on the AO to establish the nexus of the expenditure incurred with the earning of exempt income before making any disallowance u/s 14A (CIT v. Hero Cycles Ltd (2010) 323 ITR 518 (P&H), Jindal Photo followed)

(ii) As regards interest, the AO has to show the nexus between the borrowed funds and the tax free investments. If that is not done, disallowance of interest is not permissible (K. Raheja Corporation (Bom) followed)

(iii) As regards admin expenses, s. 14A disallowance cannot be made on an ad-hoc basis. It is the department's responsibility to bring material on record to show that expenditure was incurred for earning the exempt income. If this is not done, disallowance is not permissible (Wimco Seedlings followed v DCIT) (A.Y. 2006-07)

ACIT v. SIL Investment Ltd(2012) 73 DTR 233/144 TTJ 213(Delhi)(Trib.)

S.14A:Business expenditure – Disallowance-Exempt income-Investment which does not generate any income not forming part of total income disallowance is not warranted.

None of the investments made by the assessee has generated any dividend income which has been claimed as not forming part of total income. Thus, once there is no claim of income which does not form part of the total income under Act, there cannot be any disallowance in relation to an such investment. (AY 2006-07)

Siva Industries & Holdings Ltd. v. Asst. CIT (2012) 145 TTJ 497 (Chennai)(Trib.)

S.14A: Business expenditure – Disallowance- Exempt income- Rule 8D prospective from AY 2008-09.

Rule 8D is applicable prospectively w.e.f. A.Y.2008-09 and therefore, disallowance u/s 14A could not be made with reference to R. 8D in the relevant AY 2004-05; neither the assessee nor the revenue having challenged the estimation of the amount disallowable under section 14A as made by the AO @ 1% of the total exempt income, it is not open to the Tribunal to go into question of quantification of said amount disallowable and, therefore, the amount disallowable under section 14A is sustained to that extent. (AY 2004-05)

Dy. CIT v. Philips Carbon Black Ltd. (2012) 146 TTJ 175/70 DTR 267(TM)(Kol.)(Trib.)

S.14A:Business expenditure-Disallowance-Exempt income - Firm- Partner – Depreciation - Disallowance applies to partner's share of profits. Depreciation is not "expenditure" & cannot be disallowed u/s 14A. (S.10(2A), 28(v), 32)

The Special Bench had to consider two issues: (i) given that a firm pays tax on its profits, whether the share of profit received by a partner from the firm, which is exempt in his hands u/s 10(2A), can be said to be not "tax-free" so as to not attract s. 14A & (ii) whether depreciation can be said to be "expenditure" so as to be disallowable u/s 14A. Held by the Special Bench:

(i) Though a firm and its partners are not different entities in general law, under the Act, they are treated as separate entities. The salary and interest paid by the firm to the partners is deductible in the hands of the firm and taxable in the hands of the partners u/s 28(v). The balance profits are taxed in the hands of the firm and exempt in the hands of the partners u/s 10(2A). As s. 10(2A) provides that the share of profit of the partner shall not be included in his total income, it is not possible to hold that the share income is not excluded from the total income of the partner because the firm has already been taxed thereon. When s. 10(2A) speaks of its exclusion from the total income it means the total income of the person whose case is under consideration i.e. the partner. As the share income is excluded from his total income, s. 14A would apply and any expenditure incurred to earn the share income will have to be disallowed (Dhamasingh M. Popat v. ACIT(2010)127 TTJ 61 (Mum) approved; Sudhir Kapadia & Hitesh Gajaria reversed);

(ii) However, s. 14A applies only to "expenditure" incurred by the assessee. Depreciation u/s 32 is an "allowance" and not "expenditure" and so cannot be disallowed u/s 14A (Hoshang D. Nanavati approved) (A.Y. 2006-07)

Vishnu Anant Mahajan v. ACIT(2012) 137 ITD 189 / 16 ITR 621/72 DTR 217 (SB)(Ahd.)(Trib)

S.14A:Business expenditure-Disallowance-Exempt Income-Tax free investments-Disallowance under section 14A cannot be made if tax-free investments capable of taxable income.

The assessee, an investment company, issued optionally convertible premium notes which entitled the holder thereof to a premium on redemption. The proceeds of the issue was invested by the assessee in acquiring the shares of Reliance Utilities and Power Ltd ("RUPL"), the income whereof was exempt u/s 10(23G). The assessee claimed a deduction of the premium paid to the holders of the notes which was rejected by the AO & CIT(A) on the ground the expenditure was incurred in respect of tax-free income and so deduction could not be allowed u/s 14A. Before the Tribunal, the assessee argued that s. 14A could not apply because (a) though the dividends and LTCG on the shares of RUPL were exempt u/s 10(23G), the STCG & stock-lending income were not exempt and (b) the assessee had in fact not received any tax-free income on the shares. Held upholding the assessee's plea:

(i) Though the proceeds of the premium notes on which the redemption premium was paid had been invested in the shares/debentures of RUPL and although the dividend income and LTCG from the said investment was exempt u/s 10(23G), the premium cannot be regarded as expenditure incurred exclusively in relation to earning of exempt income so as to invoke s. 14A because the said investment had the potential of generating taxable income in the form of STCG etc;

(ii) Further, as no taxable income was actually earned by the assessee, disallowance u/s 14A was not sustainable. (Delite Enterprises followed). The fact that in Delite Enterprises, the appeal was dismissed on the ground that no Q of law arises does not mean that it is not a decision on merits. Even a dismissal of an appeal on the ground that no Q of law arises results in a merger (Nirma Industries Ltd v. DCIT(2006) 283 ITR 402 (Guj)(High Court followed) (A.Ys. 2003-04 & 2004-05)

Avshesh Mercantile P. Ltd. v.. DCIT (Mum.)(Trib.)www.itatonline.org

S.14A: Business expenditure-Disallowance-Exempt income-Stock in trade-DTAA-India-USA-Section 14A applies even if the securities are held as stock-in-trade. Article 7(3) limitation applies to all expenditure and not only to s. 44C H.O. expenditure. [S.44C, Art. 7 (3)]

The Tribunal had to consider two issues (i) Whether the provision in Article 7(3) of the India-USA DTAA that a deduction for expenses, including a reasonable allocation of executive and general administrative expenses, would be allowed "*in accordance with, and subject to the limitations of, the taxation laws of India*" would apply to all expenses or only to executive & general admin expenses and (ii) whether s. 14A applied to tax-free income on securities held as stock-in-trade. Held by the Tribunal:

(i) The qualification in Article 7(3) of the DTAA that the expenses will be allowed "*in accordance with the provisions of and subject to the limitations of the taxation laws of that State*" applies to all expenditure incurred for the business of the PE and not merely to s. 44C alone. The fact that the assessee's interpretation was accepted in earlier year does not mean that it cannot be departed with;

(ii) S. 14A talks of making disallowance of expenses incurred in relation to an income not chargeable to tax. No exception, such as the dividend being main or incidental income, has been carved out in the provision. The relation of expenses for disallowance is with the exempt income irrespective of the source or nature of the exempt income. When the legislature in its wisdom has not spelt out any exception coming in the way of applicability of s. 14A, it is wholly impermissible to artificially find any such exception contrary to the language of the provision and the intention of the legislature. Accordingly. s. 14A applies even if the securities are held as stock-in-trade (CIT v Leena Ramachandran(Smt)(2011)339 ITR 296 (Ker) (High Court)distinguished). (A.Y, 1997-98)

JCIT v. American Express Bank Ltd[2012] 138 ITD 288 /149 TTJ 683/19 ITR 650/78 DTR 38 *(Mum.)(Trib.)*

S.14A:Business expenditure- Disallowance-Exempt income-Interest- Proportionate disallowance u/s 14A should be limited to only interest liability and not overhead or administrative expenses.

Proportionate disallowance u/s 14A should be limited to only interest liability and not overhead or administrative expenses, which should be considered for disallowance u/r 8D from 2007-08. It was held that following the ratio laid in the case of CIT v. Catholic Syrian Bank Ltd. (2012) 207 Taxman 2 (Ker) (High Court), addition made on the account of administrative expenses was to be deleted. (A.Y. 2005-06)

ACIT v. Torrent Pharmaceutical Ltd. (2012) 137 ITD 301 (Ahd.)(Trib.)

S. 14A: Business expenditure-Disallowance– Exempt Income –Pro-rata-Interest- Assessing Officer was not justified in estimating interest expense incurred by the assessee in relation to exempt income on pro-rata basis and in making disallowance invoking provisions of section 14A. (S.10(33)

The assessee earned dividend income in shares of a company and same was claimed as exemption u/s 10(33). The assessee claimed that the said investment was made by from its own funds. It was held that AO was not justified in estimating interest expense incurred by the assessee in relation to exempt income on pro-rata basis and in making disallowance invoking provisions of section 14A. (A.Ys. 2002-03 & 2003-04)

BNP Paribas SA v. Dy. DIT (2012) 137 ITD 322 (Mum.)(Trib.)

S.14A: Business expenditure- Disallowance-Exempt income- Premium paid to premium note holders could not be disallowed under section 14A.(S.10(23G))

The assessees are investment and trading companies. They issued unsecured optionally convertible premium notes of Rs 1 lakh. The Assessing Officer found that income from arising from the said investment was exempt under section 10(23G) , therefore disallowed the premium paid on redemption of premium notes. The disallowance was confirmed in appeal by Commissioner(Appeals). On appeal the Tribunal held that, premium paid to premium note holders could not be disallowed under section 14A, since the said investment had the potentiality of earning taxable income also such as short term capital gains, fees for providing securities ,collaterals etc.(A.Ys. 2003-04 & 2004-05)

Avshesh Mercantile (P) Ltd & Ors v. Dy.CIT(2012) 75 DTR 229/148 TTJ 607 (Mum.)(Trib.)

S. 14A:- Business expenditure- Disallowance-Exempt income-Expenditure neither incurred nor claimed in the profit and loss account disallowance cannot be made.

For the assessment year 2008-09 the Assessing Officer made disallowance under section 14A read with Rule 8D of the Income tax Rules, though neither any expenditure was incurred nor claimed in the profit and loss account. In appeal

Commissioner (Appeals) deleted the addition. On appeal by revenue the Tribunal held that as the assessee has not claimed any expenditure in the profit and loss account for earning the exempt income , the appeal of revenue was dismissed.(A.Y. 2008-09)

ACIT v. Tarun Chandmal Jain(2012) Income tax review –Sept P.90(Mum.)(Trib.)(ITA No. 6310/Mum/2011, Bench "E" dated 10-8-2012)

S.14A:Business expenditure- Disallowance- Exempt income- Interest incurred on taxable income also to be excluded to avoid incongruity

The Tribunal held that it is not necessary that the Assessing Officer has to record specific finding that the assessee's claim of not incurred any expenditure to earn the tax –free income is not acceptable, but when assessee offers a disallowance the Assessing Officer has to satisfy how the expenditure claimed by the assessee is incorrect. When assessee does not offer any disallowance, Rule 8D can be invoked without any need to express satisfaction. As regards the allocation of expenditure as per Rule 8D(2)(ii), by "expenditure by way of interest…., which is not directly attributable to any particular income or receipt" . This refers to interest relatable to tax free income as well as taxable income. However the definition of variable 'A' embedded in the formula under Rule 8D(2)(ii) refers only to interest expenditure directly related to tax exempt income but not to interest expenditure directly related taxable income. The result is that while Rule 8D(2)(ii) seeks to allocate all interest expenditure, it ends up allocating only interest expenditure relatable to tax free income. This is clearly incongruous. In Godrej & Boycee Mfg co ltd v. UOI (2010) 328 ITR 81 (Bom.) (High Court), the department took the stand, to defend the constitutional validity of Rule 8D, that both, interest directly attributable to tax exempt income as well as interest directly relatable to taxable income would be excluded from the definition of variable 'A' in the Rule 8 D(2)(ii) formula , once the Revenue has taken a particular stand about the applicability of the formula in Rule 8D(ii) based on which constitutional validity of Rule 8D is up held , it is not open to the Revenue to take any other stand on the issue with regard to the actual implementation of the formula in the case of any assessee. Accordingly, the correct application of the formula set out in Rule 8D(2)(ii) is as noted in Godrej and Boyce(supra), that interest expenses directly attributable to taxable income have to be excluded from the computation of common interest expenses to be allocated under Rule 8D(2)(ii).The matter was remitted back to the Assessing Officer for verification and cross objection of assessee was dismissed . (A.Y 2008-09)(ITA no 644/Kol/2012 dated 11-9-2012 Bench 'B'

ACIT v. Champion Commercial Co Ltd (Kol.)(Trib.) www.itatonline.org.

S.14A: Business expenditure- Disallowance- Exempt income –Stock in trade-Disallowance under section 14A cannot be made in respect of dividend on shares held for trading purposes.

The assessee is a trader in shares. The assessee has claimed exemption under section 10(33) in respect of shares held as stock in trade. The Assessing Officer applied the provisions of section 14A and disallowed the expenses . It was held that disallowance under section 14A cannot be made in respect of dividend on shares held for trading purposes.

(A.Y.2008-09) (ITA no 5688/Mum/ 2011 Bench "E" dated 29-08-2012)

Esquire Pvt Ltd v. DCIT (Mum.) (Trib.) (www.itatonline.org)

S. 14A:Expenditure disallowance – Exempt income – No exempt income earned during the year, no disallowance can be made.

No disallowance can be made (i) in the absence of any exempt income earned during the year; or (ii) if investment is also capable of generating taxable income. (A.Y. 2003-04 & 2004-05)

Avshesh Merantile P. Ltd. & Others v. DCIT, ITAT 'F' Bench, Mumbai, ITA No. 5779, 5780/Mum./2006, dated 13-06-2012, BCAJ Pg. 33, Vol. 44-A Part 6, September 2012.(Mum.)(Trib.)

S.14A:Expenditure disallowance-Exempt income- Stock in trade- Disallowance under section 14A cannot be made in respect of shares held as stock in trade. The view of Mumbai Tribunal which held that section 14A applies to shares held as stock-in-trade was not followed.

The assessee relying on CIT v Leena Ramachandran(Smt.)(2011) 339 ITR 296 (Ker) & CCL Ltd v JCIT (2012) 250 CTR 291 (Karn), claimed that as the shares were held as stock-in-trade, s. 14A did not apply. The department opposed this plea by relying on American Express Bank [ITA No. 5904/M/2000 dt. 8/8/2012 (Mum.)(Trib.)] where the view

was taken, after considering Leela Ramchandran & Daga Capital Management (2009)117 ITD 169 (Mum) (SB), that s. 14A applied even to a trader in shares. Held by the Tribunal:
Though in American Express Bank (supra), the Tribunal followed ITO v Daga Capital Management (P) Ltd. (2009) 117 ITD 169(SB)(Mum) & distinguished CIT v Leena Ramachandran(Smt.)(2011) 339 ITR 296 (Ker) & held that s. 14A applies also to a trader in shares, the Karnataka High Court has held in CCL Ltd v JCIT (2012) 250 CTR 291 that disallowance of expenses incurred on borrowings made for purchase of trading shares cannot be made u/s.14A. As this is a direct judgment of a High Court on the issue, the same has to be followed in preference to the decision of the Special Bench of the Tribunal in Daga Capital Management (or that in American Express Bank) & it has to be held that disallowance of interest in relation to the dividend received from trading shares cannot be made (Ganjam Trading Co (included in file) & Yatish Trading Co. v ACIT (2011) 129 ITD 237 followed).(A. Y. 2008-2009)
DCIT v. India Advantage Securities Ltd (Mum.)(Trib.) www.itatonline.org

S.14A:Expenditure disallowance- Nexus- Expenditure-Tax free income-Disallowance under section 14A cannot be made in absence of "live nexus" between expenditure & tax-free income.
The assessee earned tax-free income from shares and units and claimed that he had not incurred any expenditure on earning the tax-free income and so no disallowance u/s 14A was permissible. The AO & CIT(A) rejected the claim and disallowed Rs. 2.26 lakhs u/s 14A as expenditure incurred to earn the tax-free income. On appeal by the assessee to the Tribunal, it was held that S. 14A has within it implicit notion of apportionment in cases where expenditure is incurred for composite/indivisible activities in which taxable and non-taxable income is received. But when it is possible to determine the actual expenditure in relation to exempt income or when no expenditure has been incurred in relation to exempt income, then the principle of apportionment embedded in s. 14 A has no application. For s. 14A to apply, there should be a proximate relationship between the expenditure and the tax-free income. If the assessee claims that no expenditure has been incurred for earning the exempt income, it is for the AO to determine as to whether the assessee had incurred any expenditure in relation to the tax-free income and, if so, to quantify the extent of disallowance. In order to disallow the expenditure u/s 14A, there must be a live nexus between the expenditure incurred and the income not forming part of total income. No notional expenditure can be apportioned for the purpose of earning exempt income unless there is an actual expenditure in relation to earning the tax-free income. If the expenditure is incurred with a view to earn taxable income and there is apparent dominant and immediate connection between the expenditure incurred and taxable income, then no disallowance can be made u/s 14A merely because some tax exempt income is received by the assessee. On facts, from the details of the expenditure, it is clear that the expenditure incurred by the assessee has direct nexus with the professional income of the assessee. It is not the case of the revenue that the assessee has used his official machinery and establishment for earning the exempt income. The AO has not given any finding that any of the expenditure incurred and claimed by the assessee is attributable for earning the exempt income. Consequently, s. 14A disallowance is not permissible (Pawan Kumar Parmeshwarlal (ITAT Mumbai) & Auchtel Products (ITAT Mumbai) followed).(A. Y. 2006-07)
Justice Sam P Bharucha v. ACIT (Mum)(Trib.)www.itatonline.org

S.14A:Expenditure disallowance – Exempt income- Investment in shares of companies and units of mutual funds out of interest free funds available and not out of borrowed funds, hence, no disallowance u/r 8D (2)(ii)
The assessee had made investment in shares of companies and units of mutual funds out of interest free funds available with it and there was nothing on record to show that said investment was made out of borrowed funds, no disallowance could be made by invoking rule 8D (2)(ii). (AY 2008-09)
ACIT v. Mohan Exports (P.) Ltd. (2012) 138 ITD 108 (Delhi) (Trib.)

S.15: Salaries -Perquisite- Reimbursement of tax- Perquisite-Resident but not ordinary resident-"Hypothetical Tax" of expatriate employee is not assessable as income
The assessee, a resident but not ordinarily resident individual, was an employee of Coca-Cola Inc USA and had income under the head "Salaries". Under the Tax Equalization Policy framed by the said company, the assessee was guaranteed

net of tax salary and the company was to bear all actual taxes imposed on the employee's assignment income. The employee had to reimburse the company that part of his total tax liability which he would have paid had he worked in Atlanta. This was known as the "Theoretical Tax Liability". The assessee claimed that as the company was liable for the amount in excess of the theoretical tax liability, it was proper to net the company's tax reimbursement with the employee's contribution towards that reimbursement. It was claimed that the hypothetical tax had to be reduced and that only the actual tax borne by the employer should be treated as a perquisite. In AY 1994-95, the assessee received Rs. 77 lakhs on which the tax liability was Rs. 35 lakhs which was to be reimbursed by the employer. The total salary income was consequently Rs. 112 lakhs on which the actual salary paid was Rs. 50 lakhs. The assessee added Rs. 50 lakhs to its income and deducted Rs. 15 lakhs (Rs. 50 – 35 lakhs) on the ground that it was the "hypothetical tax" that he was liable to reimburse to the company. The AO & CIT(A) rejected the claim though the Tribunal (order attached) upheld it on the ground that as, out of the total tax liability of Rs.50 lakhs, the company would reimburse Rs.35.00 lakhs and Rs.15.00 lakhs would be borne by the assessee out of his salary of Rs.77.00 lakhs, the assessee's taxable Income could not be more than Rs.112.00 Lakhs (77 + 35) on which the assessee had paid full tax of Rs.50.00 lakhs. On appeal by the department to the High Court, Held dismissing the appeal:

The total salary received by the assessee in India was Rs.77.00 lakhs on which the tax payable at the maximum rate of 44.8% comes to Rs.35.00 lakhs. Since the assessee under the Tax Equalization Policy was entitled to get reimbursement of the tax payable on the amount of Rs.77.00 lakhs, his salary income was Rs.113.00 lakhs (Rs.77.00 lacs plus Rs.35.00 lacs). Though the assessee paid tax of Rs.50.00 lakhs, he was entitled to reimbursement of tax amounting to Rs.35.00 lakhs and the balance Rs.15.00 lakhs was borne out of the salary income received by the assessee in India. The confusion had arisen because the assessee in his computation had added Rs.50.00 lakhs as income and deducted Rs.15.00 lakhs from the income, when in fact the said amount of Rs.15.00 lakhs was not received from the company but paid out of the salary amount received in India. In other words, though the assessee had paid tax of Rs.50.00 lakhs, since the assessee was entitled to reimbursement of Rs.35.00 lakhs from the Company, the salary income (Rs.77.00 lakhs) received by the assessee had to be enhanced by Rs.35.00 lakhs only and not by the balance Rs.15.00 lakhs which is paid by the assesses from the salary income. Accordingly, the tax of Rs.15.00 lakhs paid by the assessee from the salary income (not reimbursed by the company) could not be added to the assessee's income.(A.Y.1994-95)

CIT v. Jaydev H. Raja (Bom.)(High Court)www.itatonline.org

S.17:Salary-Perquisite-Expenditure on repair of residential accommodation occupied by employee –Cost of repairs and renovation shall be deleted, in the absence of any recital in the lease deed spelling out any obligation on the assessee to carry out repairs and renovations.(Rule 3

Express provision of Rule 3 which elaborates various contingencies in relation to perquisite of rent-free accommodation rules out the intention of the parliament to treat expenses in relation to improvement, repairs or renovations as falling within the meaning of 'perquisite'. Argument of the Revenue that the repairs and renovation expenses constituted an obligation of the employee, which was borne by his employer, is meritless. Lease deed nowhere spells out any obligation on the employee to carry out repairs and renovations. Section 17(2)(iv) cannot be made applicable. If the A.O. had returned a finding that the premises were to be valued at market value (of the rental), in case it increased as a result of the renovations, the only prescribed mode was to ally the method indicated by Rule 3(a)(iii)

Scott R. Bayman v. CIT (2012) 76 DTR 113/253 CTR 233 (Delhi)(High Court)

S.17 (2):Salary-Perquisite-Residential accommodation-Notional interest on deposit paid by employer to land lord cannot be taken in to consideration while computing perquisite-Income tax –Rules, 1962 –rule 3.

The employer provided with rent free accommodation and monthly rent paid by the employer was Rs.10,000 per month. The employer had given an interest free deposit of Rs 30 lakhs to the land lord. While computing the perquisite the Assessing officer taken in to consideration notional interest at 12% on interest free deposit of Rs 30 lakhs, which was confirmed in appeal. On appeal to the Tribunal the Tribunal held that as per the amended rule 3 of the Income –tax Rules, 1962, with retrospective effect from 1-4-2001 ,the perquisite value of the accommodation computed by the assessee was to be accepted. On appeal by revenue the Court held that in view of rule 3 of 1962 Rules, perquisite value of residential accommodation provided by employer to its employee is to be computed on basis

of actual amount of lease rental paid or payable by employer and not on notional basis , hence notional interest on deposits paid by employer to land lord cannot be taken in to consideration. Accordingly the appeal of revenue was dismissed. (A.Y. 2001-02)

CIT v. Shankar Krishnan (2012) 207 Taxman 233 (Bom.) (High Court)

S.17(2): Salary-Perquisite-Tax on salary paid by employer-Rent free accommodation- Tax component of such perquisite value cannot be included in computation of perquisite value of rent free accommodation. (Income –Tax Rules, 1962, Rule 3)

In an appeal before the High Court the revenue raised the question whether the tax paid by the employer (Japan Airlines International Company Ltd) is a "Perquisite" within the meaning of section 17(2) and, therefore , in terms of rule 3 of the Income-Tax Rules 1962 , cannot be taken in to consideration for computing the value of the perquisite "rent free accommodation". While dismissing the appeal of revenue the court held that payment of income-tax by the employer is payment of employee who has taxable income as an assessee is liable to pay tax. His income is chargeable to tax. It is the obligation of the employee as an assessee to pay tax . Its this obligation which is being discharged and paid by the employer .Therefore , it would fall within the ambit of section 17(2) (iv). Thus the tax component paid by the employer towards and as income-tax , when an employee is entitled to tax free salary , is a perquisite within the meaning of section 17 (2) and the monetary value of such tax free salary , that is tax component could not be included in computing the perquisite value of rent free accommodation provided by the employer to the employees.(A.Y. 2006-07)

CIT v. Telsuo Mitera (2012) 345 ITR 256 /208 Taxman 344(Delhi) (High Court)
CIT v. Isao Sakai (2012) 345 ITR 256 (Delhi) (High Court)
CIT v. Yoshimi Kamano (2012) 345 ITR 256(Delhi) (High Court)
CIT v. Yuji Horikawa (2012) 345 ITR 256 (Delhi) (High Court)
CIT v. Hidechito Shiga (2012) 345 ITR 269 (Delhi)(High Court)

S.17(2): Salaries – Perquisites- Tax paid by employer is perquisite – Accommodation- Income–tax Rules 1962-Rule 3.

Tax paid by employer on behalf of employee is perquisite under section 17(2) and therefore not includible in salary under Rule 3 of Income-tax Rules 1962, for purpose of computing perquisite value of accommodation supplied by employer to employee.(A.Y. 2006-07)

Isao Sakai v. Jt. CIT (2012) 49 SOT 154 (Delhi)(Trib.)

S.17(3): Salary-Profits in lieu of salary- Key man insurance policy- Surrender value cannot be taxed as profit in lieu of salary.(2(24(xi), 56)

The Assessing Officer treated the difference between the premium paid by the company and the surrender value paid by assesse as the benefit to be taxed in his hands under section 17. In appeal the Commissioner(Appeals) also confirmed the addition made by the Assessing Officer. On further appeal the Tribunal held that amount in question cannot be treated as "Perquisite" under section 17(3).On appeal to the High Court , by revenue the Court referred the Circular no 762 dated 18th Feb 1998 and held that on assignment of keyman insurance policy by company to its employee –director against receipt of surrender value from the director , difference between premium paid by company, to LIC and surrender value paid by director to company cannot be taxed as "profits in lieu of salary" in the hands of director. The High Court held that neither section 17(3) nor section 56(2) (iv) will be attracted.

CIT v.Rjan Nanda (2012) 249 CTR 141/69 DTR 250 (Delhi) (High Court)
CIT v.Naresh Kumar Trehan (2012) 249 CTR 141/69 DTR 250 (Delhi) (High Court)

S.22: Income from house property – Business income- Builder-Property dealer- Stock in trade-Unsold flats being house property rental income should be assessed as income from house property and not as business income [S. 28(i)]

The assessee is a property developer and builder , in course of its business activities constructed a building for sale , in which some flats were un sold. During the year the assessee received rental income from letting out of the unsold flats which was shown as stock in trade in the balance sheet. It disclosed the rental income from letting out of the unsold flats as income from house property and claimed the statutory deduction. The Assessing Officer held that in the

wealth tax proceedings the assessee had shown the unsold flats a stock in trade and not taxable for the purpose of wealth tax. The Assessing Officer assessed the rental income as business income. Commissioner (Appeals) has accepted the contention of assessee. On appeal to the Tribunal by revenue, the Tribunal restored the order of Assessing Officer. The Assessee filed an appeal to the High Court. The High Court held that under the Act the income of an assessee is one and various sections of the Act direct the modes in which the income is to be levied. No one of the sections can be treated as general or specific for the purpose of any one particular source of income. They all specific and deal with various heads in which an item of income, profits and means of an assessee falls. These sections are mutually exclusive and where an item of income falls specifically under one head, it has to be charged under that head and no other. On the facts since unsold flats being house property, rental should be assessed under the head 'income from house property'. Appeal is decided in favour of assessee. (A.Y. 1998-99)

Azimganj Estate (P) Ltd. v. CIT (2012) 206 Taxman 308/72 DTR 341/251 CTR 48 (Cal.)(High Court)

S.22:Income from house property-Deemed owner-Legal owner-Irrevocable permanent leave and licence to tenants-Tenants will be owner and Income from house property will be assessable in their hands. [S.27, 269UA(f)]

Assessee company is engaged in the business of real estate development. It entered into an agreement with a Trust wherein the assessee was given permission to demolish existing structure which was existing occupied by tenants and construct a new building. After settling old tenants, assessee with regards to new persons assigned tenancy rights by accepting substantial amount as deposit and entered on to irrevocable permanent leave and licence agreement. Assessing Officer held that assessee was owner of property and assessed income from house property in assessee's hand. Tribunal observed that from the agreement with new persons,it could be seen that assessee had given possession to occupant but also absolute right to transfer or assignment but also right to sub let or grant leave and licence of said premises. Considering various other clauses of agreement the Tribunal held that since the assessee had given irrevocable permanent leave and licence to tenants and virtue of section 27, read with clause (f) to section 269UA, tenants would have became deemed owners of premises income from house property would be taxable in their hands.(A.Y. 2002-03 to 2005-06)

Priyadarshini Properties & Estates (P) Ltd. v. ITO (2012) 134 ITD 290/74 DTR 387 (Mum.)(Trib.)

S.22:Income from house property- Terrace-Society-Rent for letting out portion of terrace of its building is assessable as income from house and not as income from other sources (S.56)

The Assessee is a co-operative housing society , it has received the rent from Reliance Telecom to use of portion of the terrace . It has shown the income from house property and claimed the deduction under section 24 of the income-tax Act. The assessing officer assessed the income as income from other sources. On appeal the commissioner (Appeals) also confirmed the assessment as income from other sources. On appeal to the Tribunal . The Tribunal followed the order of Tribunal in Sharda Chamber Premises v.ITO ITA no 1234/Mum/2008 dt 1st Sept ,2009 (A.Y.2003-04) ,ITO v. Cuffe Parade Sainara Premises Co-Operative Society Ltd ITA no 7225/Mum/2005 dt 28th April ,2008 (A.Y. 2002-03), S. Sohan Singh v.ITO (1986) 16 ITD 272 (Delhi) (Trib), and held that rent is assessable as income from house property and assessee is entitled to deduction under section 24 of the Income-tax Act.(A.Y. 2004-05)

Matru Ashish Co-Operative Society Ltd v. ITO (2012) 144 TTJ 446 (Mum.)(Trib.)

S.22:Income from house property-Business income--Tests on when rental income is assessable as "house property income" vs. "business profits".(S.56)

U/s 22, income from the rental of building or land appurtenant thereto is assessable as "Income from house property". However, where complex and varied services are provided and huge investment in the nature of plant and machinery is made, the income is assessable as "Profits & gains of business". On facts, the assessee had conducted systematic activity and rendered extensive and specialized services which could only be utilised by the IT/Software/BPOs businesses to be located in the I.T. Park. Such income cannot be treated as forming part of income from house property but is a constitution of organized structure for carrying out business activities to earn profit and accordingly the income is assessable as income from business.

DCITv.Magarpatta Township Development & Construction Co (Pune)(Trib.)www.itatonline.org

S.23:Income from house property - Annual value – Option-Option of choosing property for claiming exemption is with assessee, Assessing Officer cannot thrust his choice on assessee.

The Assessee was in occupation of three properties, which were situated at Palam, Vihar, Greater Kailash and Malviya Nagar. In the return of income the assessee mentioned address of Malviya Nagar property as self occupied property. During assessment proceedings the assessee stated that Greater Kailash Property was self occupied property. The Assessing Officer held that property at Greater Kailash was lying vacant for so many months hence he estimated the rent at Rs. 50000/- per month and estimated the annual value at Rs. 6 lakh. In Appeal the Commissioner (Appeals), confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that provisions of section 23(4), provide option to assessee to chose any one property mentioned in sub-section (2) of section 23 as self occupied property and no restrictions can be put on such option. The Assessing Officer cannot thrust upon his choice on assessee. (A. Y. 2007-08).

Deepak Kapoor v. ITO (2012) 49 SOT 701 (Delhi)(Trib.)

S.23: Income from house property – Notional Interest – Not to be added as the rent received by the assessee more than the reasonable expected value, the actual rent received should be the annual value of the property under section 23(1)(b).

The assessee had shown the actual rent received, which was far more than the municipal ratable value. As the rent received by the assessee was far more than the sum for which property might reasonably be expected to let from year to year, the actual rent received should be the annual value of the property under section 23(1)(b). Notional interest on interest free security deposit / rent received in advance should not be added to the same in view of the decision of Bombay High Court in case of J.K. Investors (2001) 248 ITR 723 (Bom). (A.Y.2004-05)

ACIT v. Monisha R. Jaisingh (2012) 51 SOT 182 (Mum.)(Trib.)

S.23:Income from House Property – Annual Value – property is not let out at all during previous year - no vacancy allowance can be given [S. 23(1)(c)]

Vacancy allowance to be given only when property is let and vacant for part of the year and thus, in a case, where property is not let out at all during previous year, no vacancy allowance can be given under section 23(1)(c). (AY 2006-07)

Indra S. Jain (Smt) v. ITO (2012) 52 SOT 270 (Mum) (Trib)

S.23(2): Income from house property-Annual value –Exemption-A HUF is "owner" occupying house for own residence hence exemption is available.

The assessee, a Hindu Undivided Family (HUF), claimed deduction u/s 23(2). The AO & CIT (A) took the view that as s. 23(2) applied to "a house or part of a house in the occupation of the owner for the purposes of his own residence", a HUF was not eligible. The Tribunal took a contrary view and allowed the assessee's claim. In view of the apparent conflict amongst various High Courts, the matter was referred to a Full Bench:

S. 23 (2) confers benefit "Where the property consists of a house or part of a house which (a) is in the occupation of the owner for the purposes of his own residence …". A Hindu Undivided Family is not a fictional entity. It is nothing but a group of individuals related to each other by blood relations, or in a certain manner. A Hindu Undivided Family can be seen as a family of a group of natural persons. There is no dispute that the said family can reside in the house, which belongs to Hindu Undivided Family. A family cannot consist of artificial persons. U/s. 13 of the General Clauses Act, the words in masculine gender shall be taken to include females and words in singular shall include plural and vice versa. Therefore, the word 'owner' would include 'owners' and the words 'his own' would include 'their own'. There is nothing,

therefore, in the words used in s. 23(2), which excludes application of such provision to HUF, which is a group of individuals related to each other.

CIT v. Hariprasad Bhojnagarwala (2012) 342 ITR 69/ 70 DTR 252/250 CTR 108/206 Taxman 471 /Vol .42 Tax LR 103 (FB) (Guj.) (High Court)

S.24(b): Income from house property-Deductions- Interest on borrowed funds-Lease rent-Interest paid on borrowed amount for paying no refundable premium for acquiring lease right is allowable as deduction. Lease rent is not allowable.

The assessee acquired lease rights in a property by paying non-refundable premium of sum and lease also monthly lease rent. The lease premium was paid by taking the interest bearing loan. The interest was claimed as deduction. The Assessing Officer has disallowed the interest which was also confirmed in appeal by Commissioner (Appeals) . On appeal to Tribunal the Tribunal held that as the premium is not refundable and the borrowed fund has been utilized for paying premium, the interest paid or payable on such borrowed capital is allowable under section 24(b).As regards the lease rent expenses is concerned the Tribunal held that since there is no provision for allowing any other claim of expenditure other than standard deduction of 30%, the said expenditure cannot be allowed.(A.Y. 2001-02 to 2006-07)
Radio Components & Transistors Co Ltd v. ITO (2012) 50 SOT 237 (Mum.) (Trib.)

S.27(iiib): Income from house property- Deemed owner- Lease-Lease period was for ten years with option of further renewal , assessee will be treated as deemed owner.

The assessee acquired the lease rights by paying a premium for a period ten years , with the option to renewal further. The Assessing Officer treated the assessee as deemed owner and assessed the income as income from house property as against the said income was shown as income from other sources. In appeal the Commissioner (Appeals) confirmed the view of Assessing Officer. On appeal to the Tribunal , the Tribunal held that , the lease period was for 10 years with option of further renewal. The assessee has let out the said premises for a period of five years with option of renewal . Since the assessee was in possession of property with full transferrable rights and had been receiving rent from sub – tenant in his own capacity being owner of property , assessee will be deemed owner under section 27(iiib) and the income was rightly assessed as income from house property. (A.Y. 2001-02 to 2006-07)
Radio Components & Transistors Co Ltd v. ITO (2012) 50 SOT 237 (Mum.)(Trib.)

S.28(i):Business Income - Contingent deposits - Contingent deposits received from leasing /hire purchase customers with a view to protect from potential sales tax liability , which is credited to turnover is assessable to income-tax .

The Assessee is engaged in the business of hire purchase, financing equipment, leasing and allied activities. The assessee has been collecting certain sum as 'contingent deposit' from the leasing hire purchase customers , with a view to protect them from sales tax liability . The collection was on ad hoc basis. The assessee has shown this amount as contingent deposit. The assessee contended that the deposit was collected in the anticipation of sale tax liability. Apex court negated the submission and held that contingent deposits received from leasing /hire purchase customers with a view to protect from potential sales tax liability, which is credited to turnover , is assessable to income-tax. (A.Y.1998-99)(C.A.no 5895 of 2008 dated 11-9-2012)
Sundarm Finance Ltd v. ACIT(2012) 252 CTR 353/76 DTR 417 /210 Taxman 280(SC.)

Editorial: Refer , Sundaram Finance Ltd v. ACIT (2009) 318 ITR 452(Mad.)(High Court)

S.28(i):Business income- Capital gains-Purchase and sales of shares- Frequency – Magnitude – Volume-Assessable as business income-Capital asset.(S. 2(14), 45, 111A)

Assessee filed the return of income showing the income from sale of shares as capital gains. The Tribunal held that the voluminous share transactions were in the ordinary line of the appellants' business, purchase and sale of shares was not for the purpose of earning dividend but with the dominant intention of resale in order to earn profits; the profit made by them is not of mere enhancement of value of the shares, but is a profit made in the carrying on of a business scheme of profit making; huge volume of shares transactions, the repetition and continuity of the transactions, give them a flavour of "trade"; the magnitude, frequency and ratio of sales to purchases on the total holdings is evidence that the assessee had not purchased with the intention to trade in such scripts. The High Court confirmed the order of Tribunal which held that profit on sale of shares as business income. (A.Ys. 2005-06, 2006-07).
P.V.S.Raju v. Addl.CIT (2012) 340 ITR 75/ 67 DTR 272/ 247 CTR 546 / Vol 42 Jan. TLR 76 (AP.)(High Court)
P.Rajyalakshmi v. Addl. CIT (2012) 340 ITR 75/67 DTR 272/ 247 CTR 546 (AP.)(High Court)

S.28(i):Business income- Trading receipt-Collection of contingency deposit-Collection of contingency deposit by assessee against sales tax would form part of income.

The Court followed the judgment in CIT v. Southern Explosive Co (2000) 242 ITR 107 (Mad) (High Court) and held that Collection of 'contingency deposit' by the assessee against the payment of sales tax would form part of income.(A.Y.1996-97 &1997-98)

CIT v. Sundaram Finance Ltd. (2012) 67 DTR 117 (Mad.)(High Court)

S.28(i):Business income- Business loss-Amalgamation- Advances to employees- Security deposit- Advances to employees by amalgamating company which could not be recovered allowable as business loss. Security deposit for obtaining lease of business premises is not allowable as a business loss.

The assessee company was Amalgamated with Gangeshwar Ltd. As per approved scheme the assessee wrote off unrecoverable advances paid to employees and security deposits given to land lords for lease of premises. The Assessing Officer disallowed the expenses written off. In appeal the Commissioner (Appeals) allowed the amount written off as business loss under section 28 of the Income-tax, which was confirmed by the Tribunal. On appeal to the High Court by revenue the Court held that, advances were given to the persons who had been employed by the assessee company and if they became irrecoverable, it would clearly be treated as business loss. As regards the security deposits were not given in the ordinary course of business. These were given for securing the premises on rent, albeit for the purpose of carrying on business therein, hence the amount written off was not a revenue loss and hence not allowable as deduction. (A.Y. 2000-01)

CIT v. Triveni Engineering and Industries Ltd. (2012) 343 ITR 245 / 250 CTR 277 (Delhi)(High Court)

S.28(i):Business Income – Capital Gains-Sale of agricultural land- Assessable as business income.(S.45)

Profit on sale of agricultural land by dividing and sub – dividing it into small plot of land immediately after acquiring it was assessable under the head business income and not exempt as sale of agricultural land.(A.Y.2005-06)

E.V. Mathai & Sons v. CIT (2012) 72 DTR 163 (Ker.)(High Court)

S.28(i):Business income-Interest on security deposit-Income from other sources- Interest on NSCs and fixed deposit which was kept for securing contract is assessable as business income.(S. 56,145(3)

The assessee is a civil contractor firm derived its income from contract work for Government departments .The assessing Officer rejected the books of account and estimated the income . In appeal the Commissioner (Appeals) held that interest of Rs 3,11, 956 had to be assessed as income from other sources. On appeal to the Tribunal , the Tribunal disallowed the interest and depreciation . On appeal by the assessee to the High Court the Court held that the Tribunal as well as the authorities below had erred in holding that interest accrued on security deposits to the extent used for the purpose of securing contract work would be assessable as income from other sources . The interest income is to be assessed as business income.(A.Y. 2003-04)

Shyam Bihari v. CIT (2012) 345 ITR 283 (Patna) (High Court)

S.28(i):Business income-One time settlement-Principal and interest-In an one time settlement of principal and interest, it cannot be assumed that assessee has paid the interest due.

The appellant had availed a term loan from SICOM. The appellant entered into a one-time-settlement (OTS). The assessee has not produced any evidence regarding the apportionment of interest and principal amount. The Tribunal has granted the relief in respect of Rs 19 lakhs. The assessee claimed that deduction of interest on a proportionate basis should be Rs.46,31,658/-. As the assessee has not produced any evidence the order of Tribunal was upheld and appeal of assessee was rejected as no substantial question of law arose, the Court held that in an one time settlement of principal and interest, it cannot be assumed that assessee has paid the interest due.

(A.Y. 1999-2000)(ITA no 5481 of 2010 dated 5-9-2012)

Akay Organics Ltd v. ITO (Bom.) (High Court) www.itatonline.org

S.28(i):Business income- Capital gains - Long-term and short-term gains from PMS transactions taxable as business profits. [S.10 (38),28(i)]

The assessee offered LTCG & STCG on sale of shares which had arisen through a Portfolio Management Scheme of Kotak and Reliance. The investments were shown under the head "investments" in the accounts and were made out of surplus funds. Delivery of the shares was taken. The Assessing Officer &CIT(A) held that as the transactions by the PMS manager were frequent and the holding period was short, the LTCG & STCG were assessable as business profits. On appeal by the assessee, held dismissing the appeal:

(a) In a Portfolio Management Scheme, the choice of securities and its period of holding is left to the portfolio manager and the assessee has no control. Only the portfolio manager can deal with the Demat account of the assessee.

(b) It is at the end of the year the shares available in the DEMAT account can be entered. Therefore, at the time of

deposit of amount, the intention of the assessee was to maximize the profit. (c)As the purchase and sale of shares under PMS is not in the control of the assessee at all, it cannot be said that the assessee had invested money under PMS with intention to hold shares as investment.(d) The portfolio manager carried out trading in shares on behalf of his clients to maximize the profits. Therefore, it cannot be said that shares were held by the assessee as investment. (e).There is, however, a difference between investment in a mutual fund and PMS.

Radials International v. ACIT(2012) 49SOT 567(Delhi)(Trib.)

Editorial:- Refer, ARA Trading & Investment Pvt. Ltd. (2011) 47 SOT 172 (Pune)(Trib.), ITO v.RadhaBirju Patel ITA NO 5382/M/2009 Bench D dt. 30th November, 2010 (Mum.)(Trib.) www.iatonline.org, NaliniNavinBhagwati (Mrs) v. ITO ITA No53/M/2010 Bench "B' Asst year 2006-07 dt 5-8-2011(Mum) (Trib)(Unreported)

S.28(i):Business income- Capital gains - Investment in shares- Assessee had intention to trade therefore assessable as business income. (S. 45)

Assessing Officer treated the share transaction as business income. On appeal the Tribunal upheld the assessment as business income by considering the following factors (1) Company has passed the resolution to open account with depository participant for trading in shares of various companies under DEMAT segment.(2) Company by its resolution authorised its three directors to deal in purchase and sale and securities to tune of Rs. 100.00 crore. (3) Assessee had appointed asset management company as its portfolio manager to provide portfolio management and other related services. On the facts, it was apparent that assessee company had intention to do trading in shares with a profit motive and thus, income arising from share transactions was rightly brought to tax as business income. (A.Y. 2006-07)

Mafatlal Fabrics (P) Ltd. v. Dy. CIT (2012) 49 SOT 303 (Mum.)(Trib.)

S.28(i): Business income – Export- DEPB credit - Not assessable as income till it is sold.

In the profit and loss account the assessee has shown the export benefit was receivable (DEPB). In schedule 9 to the balance sheet, DEPB credit was shown under the head "Other income". The DEPB credit was not sold during the year. The Tribunal held that DEPB credit not sold during the relevant year cannot be assessable as income.(A.Y. 2007-08)

ITO v. Binayak Hi-Tech Engineering Ltd. (2012) 13 ITR 369/144 TTJ 53(UO) (Kol.)(Trib.)

S.28(i):Business income- Business loss- Foreign exchange-Foreign currency assets- Loss is assessable as business loss.

The assessee converted the foreign currency assets and liabilities into rupee terms at the exchange rate prevalent at the last date of financial year i.e.the date on which the balance sheet of the assessee was drawn and this was reflected in the profit and loss account regularly from year to year. In the current year it was loss while in the immediate preceding year there was gain. The loss is allowable as business loss. (A.Ys. 2004-05, 2005-06, 2006-07)

Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 (Delhi)(Trib.)

S.28(i): Business income- Business loss - Loss on sale of properties–Loss on purchase and sale of properties is allowable as business loss.

The Tribunal held that the purchase and sale of land and flat are necessarily parts of the regular business carried on by the assessee, the loss arising out of sale of those assets should be considered as the loss incurred on its regular business, hence, allowable as business loss. (A. Y. 2007-08).

ACIT v. Madeena Constructions (2012) 134 ITD 67 / 67 DTR 1 / 14 ITR 25 / 144 TTJ 137 (TM)(Chennai)((Trib.)

S.28(i):Business income - Income from house property – Technology park-Development of technology park and providing various facilities and amenities, income derived from lessees is assessable as business income and not as income from house property. (S. 22).

Assessee had developed a technology park, and let out its building along with other amenities and facilities. Since the assessee is carrying on a commercial complex activity of setting up software technology park with various facilities and amenities the income derived from lessees is to be taxed as business income and not as income from house property. (A. Y. 1999-2000 to 2004-05).

ITO v. Information Technology Park Ltd. (2012) 49 SOT 491 (Bang.)(Trib.)

S.28(i):Business income - Setting up of business –Participating in tender- Participating in tender construed as setting up of business and interest income was assessed as business income. (S. 56).

Assessee company was incorporated to carry on business of real estate development. It filed the return of income declaring the loss return. Assessee raised interest bearing loan for participating in tender and deposited the amount as security deposit. The tender was not materialized and the amount was returned with interest. The Assessing Officer treated the interest received as income from other sources and did not allow the interest paid. The Tribunal held that participating in the tender is one activity for acquiring the land for development therefore, the business was set up and interest earned has to be assessed as business income after setting of the interest paid. (A. Y. 2006-07)

Dhoomketu Builders & Developers (P) Ltd. v. Addl. CIT (2012) 49 SOT 312 (Delhi)(Trib.)

S.28(i): Business income-Amounts received for three agreement for rendering hospitality services are considered as business income and it can be segregated separately.(S. 22)

The assessee is engaged in the hospitality business , it entered in to three separate agreements with TCS ,ie. For construction of hostel building , lease of hostel facilities , maintenance of amenities and facilities during the period of lease. The assessee claimed the entire receipts as business receipts . The assessing officer held that lease rent of hostel building to be assessed as income from house property . On appeal Commissioner (Appeals) confirmed the order of assessing officer. In an appeal to Tribunal, the Tribunal held that the three agreements had to be considered as part of one agreement undertaken by assessee with TCS for provision of hostel facilities ,therefore entire receipt to be considered as business income. (A.Y.2004-05 , 2006-07)

Kenton Leisure Services (P) Ltd v. Dy.CIT (2012) 135 ITD 10 (Cochin) (Trib.)

S.28(i): Business income- Business loss- Construction business- Project completion-Method of accounting-Estimated expenditure for entire project cannot be accepted.(S.145)

Assessee is in the business of slum rehabilitation projects approved by Slum Rehabilitation Authority (SRA). The assessee was required to construct and provide free of cost tenements of size 225 sq.ft to all slum dwellers and in consideration was entitled to TDR or right to construct additional area over and above normal permissible which the assessee could sell in open market . All the projects were at initial stages of construction. The assessee estimated total revenue from entire project to be completed in future and also cost involved in the completion of project, including the contingencies etc. The resultant loss was claimed as deduction as per Accounting Standard -7. The Assessing Officer did not accept the claim of assessee. He allowed the losses only attributable to the WIP at the end of the year and not losses of the entire projects which were yet to be completed . On appeal Commissioner (Appeals) also confirmed the order of Assessing Officer. On appeal to the Tribunal the Tribunal held that there is no special provisions for computing of income for purpose taxation therefore the income of rehabilitation projects were required to be computed under normal provisions of Act. Income from current year accrue only on account of TDR released and sold or in respect of any additional space constructed for which the agreement for sale had been entered in to and only in respect of such accrued income if any expenditure had to be incurred in future , assessee would incur liability in current year itsself. The Tribunal held that since no agreement for sale had been entered into by assessee , method followed by assessee to show estimated income and expenses in respect of entire project most of which was yet to be executed could not be accepted as proper method to compute income under provisions of Act . Accordingly the assessee would be allowed losses only proportionate to work in progress at end of relevant year and claim of assessee for entire anticipated losses from entire project could not be accepted. The Tribunal confirmed the view of Assessing Officer.(A.Y 2000-01 to 2003-04)

Shivshahi Punarvasan Prakalp Ltd v. ITO (2012) 135 ITD 51/145 TTJ 457/ 69 DTR 1 (Mum) (Trib.)

S.28(i): Business income- Business loss-Speculation- Shares-Loss on sale of share purchased on behalf of client, subsequently disowned is not covered by provisions of section 73, loss is held to be allowable as business loss.(S.73)

Losses incurred by assessee (sub-broker of shares) on account of sale of shares which were purchased on behalf of the client and subsequently disowned by respective client must be allowed as business losses and not be covered under provisions of Explanation to Section 73 of the Act. Explanation to section 73 is attracted only when a part of the business of the assessee company consists of purchase and sale of shares of other companies. Transaction in shares undertaken by share broker as its own under compulsion after certain clients disowned part of such transactions, did not constitute business of the assessee in share dealing. (A.Y. 2001-02)

ITO v. Rajvi Securities (P.) Ltd. (2012) 50 SOT 592 (Ahd.)(Trib.)

S.28(i): Business loss-Government securities-Investment- Securities were not treated as stock –in- trade, but investment hence loss on sale of securities not to be treated as business loss.

The assessee was a cooperative bank. The assessee incurred certain loss on sale of government securities. It was held that where the assessee had been consistently treating the said government securities as its investments and not as the stock-in-trade, the loss could not be considered as business loss. (A.Y.2007-08)

DCIT v. Cooperative Bank of Mehsana Ltd. (2012) 136 ITD 334 (Ahd.) (Trib.)

S.28(i):Business Income –Rent- Leased property- As the property was let out as a reason of commercial viability of project, lease rent is held as business income .(S.22)

Assessee firm constructed a market complex and leased it out to various commercial organisations. Assessee showed lease rent received as business income. The issue was as to whether the rent from the lease be considered as income from house property or business income. It was held by the Tribunal that the said income be considered as business income as the assessee received the loan because of the commercial viability of the project. As also, apart from letting out building assessee also provided other incidental services like electrician, plumber, sweeper, water and ward, etc. (A.Y. 2005-06)

Narayan Market Complex v. ITO (2012) 51 SOT 387 (Cuttack)(Trib.)

S.28(i):Business Income - Income from undisclosed source – Unexplained sales and expenditure – No addition where no independent evidence brought on record to show assessee suppressed production and made sale of unaccounted production

The assessee was engaged in the manufacture of ingots from iron scrap and its trading. On the basis of information regarding the show-cause notice issued by the Central Excise Department, the AO worked out the unaccounted profit earned by the assessee and added it to the income of the assessee. It was held that there was no merit in any addition being made in the hands of the assessee on the account of the alleged suppression in production and also alleged investment in the purchase of raw materials as there was no independent evidence brought on record to establish that assessee had suppressed its production and made sale of its unaccounted production, outside the books of accounts. (AY 2004-05)

ACIT v. A.K. Alloys (2012) 17 ITR 424 (Chandigarh)(Trib)

S.28(i):Business income – Settlement money to competitor to end legal dispute - Not payment for loss of source of income or for entering into negative covenants -No transfer of right, hence revenue was a business income

The assessee was a company carrying on business in joint venture with foreign company. A foreign company incorporated a wholly owned subsidiary company in India to carry on competing business of manufacturing electric equipments. The assessee entered into settlement to settle all legal disputes between parties. It was held that it was not payment for loss of source of income or for entering into negative covenants. There was no transfer of right, hence revenue was a business income. (A.Y. 2004-05)

Control and Switchgear Contractors Ltd. v. Dy.CIT (2012) 18 ITR 520 (Delhi)(Trib.)

S. 28(i): Business loss – deduction – Purchase of goods, showed as closing stock – Disallowance deleted

The assessee imported insulated craft paper. The same were available in bonded warehouse. The assessee recorded purchase of goods and showed it in closing stock. The AO disallowed the deduction claimed on the ground that assessee had neither taken physical delivery of purchased goods nor it furnished any evidence to support that the same had been included in closing stock or sales. On appeal, the addition was deleted as the details of raw material showed that sum pertaining to insulated paper had been included in imported stock. The assessee further informed that the concerned stock was accounted for in closing stock . (A.Y. 2006-07)

ITO v. Shakti Insulated Wires (P.) Ltd. (2012) 53 SOT 64 (Mum.) (Trib.)

S.28(iv): Business income- Perquisite-Amalgamation-Excess fair value cannot be assessed as any benefit or perquisite arising from business or profession.

During relevant assessment year, a company, SIFL, got amalgamated with assessee-company. Pursuant to amalgamation, assets and liabilities and rights and obligations of SIFL vested with assessee-company and those items had been recorded at their fair values. Excess of fair value of net assets taken over by assessee-company over paid-up value of allotted equity shares worked out to Rs. 2,899.68 lakhs and the said surplus amount was transferred by assessee to its General Revenue Account. Held that the sum of Rs. 2,899.68 lakhs was only a balancing figure arising out of entries passed in books of account as a result of amalgamation and same could not be treated as income taxable u/s 28(iv) (A.Y. 2002 – 2003)

Spencer & Co. Ltd. v. ACIT [2012] 137 ITD 141/75 DTR 311/148 TTJ 421(TM)(Chennai)(Trib.)

S.28(iv):Business income – Goodwill – Date of Merger - Excess of cost of acquisition over the carrying value of net assets appearing in accounts of amalgamated company, not income.

Amount of goodwill representing the excess of cost of acquisition over the carrying value of net assets as on the date of merger appearing in the accounts of the amalgamated company cannot be treated as income taxable u/s 28(iv). (A.Y. 2002-03, 2003-04, 2006-07 & 2007-08)

Quintegra Solutions P. Ltd. v. ITO (2012) 148 TTJ 471 (Chennai)(Trib.)

S.28(va): Business income- Capital or revenue receipt – Non-compete fee – Relinquishment of right to manufacture-Capital receipt- Law before April 1, 2003 – Asst. years prior to 2003-04. [S. 55(2)(a)]

In A. Y. 2000-01, the assessee received Rs. 11 crores pursuant to a non-compete agreement which was for 5 years. The Assessing Officer held that there was a "transfer" by way of relinquishment of the assessee's "right to manufacture" and that the same was chargeable to capital gains by taking Nil cost under section 55(2)(a). This was reversed by the CIT(A) on the ground that the personal skills of the assessee were placed under restraint and as the said personal skills were not a "capital asset", capital gains was not chargeable. On appeal to the Tribunal, the matter was referred to the Special bench it was held by the Special Bench:

(i) The taxability of a non-compete fee depends on the purpose for which it is paid. A non-compete fee can be divided into two categories: (a) consideration received by the transferor of a business for agreeing not to carry on the same business; (b) consideration received by other persons associated with the transferor to ensure that they do not indulge in competing business. For A.Y. 2003-04 & onwards, non-compete fee received by the transferor of a business is taxable as a capital gains in view of section 55(2)(a) which provides that the cost of a "right to carry on business" shall be Nil. Though section 55(2)(a) as amended by the FA 1997 w.e.f. 1.4.1998 referred to a "right to manufacture, produce or process any article or thing", that would not cover a non-compete covenant. For A. Y. 2003-04 & onwards, a non-compete fee received by a person associated with the transferor is taxable as "business profits" under section 28(va)(a) as being a payment for "not carrying out any activity in relation to any business". A non-compete fee received in an earlier year is not chargeable to tax in view of Guffic Chem.P.Ltd. v. CIT(2011) 322 ITR 602 (SC);

(ii) On facts, the consideration of Rs. 11 crores received by the assessee was not for sale of any business nor was it for not carrying on any business which he was carrying on, which he had transferred. It was also not a payment for a "right to manufacture, produce or process any article or thing". The sum was not paid for transfer of any intangible right in respect of manufacture, production or process of cement. Accordingly, the capital gains provisions were not attracted. The amount was paid for "not carrying out any activity in relation to any business" and would fall within the ambit of section 28(va)(a). However, as section 28(va) came into effect in A. Y. 2003-04, the receipts was not chargeable to tax in A. Y. 2000-01. (A.Y.2000-01)

ACIT v. B. V. Raju (Dr.)(2012)135 ITD 1/67 DTR 361/ 14 ITR 387/ 144 TTJ 537(SB)(Hyd.)(Trib.)

S.30:Rent, rates, taxes, repairs and insurance for buildings- Tenanted premises –Revenue expenditure- Cost of repairs of tenanted premises is allowable as revenue expenditure.

The assessee company is a tenant in a building occupying 5000 sq.ft . The building was declared by the municipal corporation to be unsafe for occupation. Under the terms of tenancy assessee assumed an obligation to contribute a sum of Rs.1.50 crores for the work of repairs and restoration of the structure .The Assessing Officer held that the assessee had secured rights for an area of 5000 sq ft. on payment of sum of Rs 1.50crores and the assessee became deemed owner of the premises hence the expenditure is capital in nature. On appeal Commissioner (Appeals) reversed

the view of Assessing Officer, which was confirmed by the Tribunal. On appeal by revenue the Court held that the assessee obtained a commercial advantages of securing tenancy of an equivalent area of premises on the same rent as before. Since there was no acquisition of a capital asset and the occupation of the assessee continued in the character of a tenancy, the expenditure could not be regarded as being of a capital in nature. Accordingly the decision of Tribunal was confirmed and appeal of revenue was dismissed. (A.Y.2003-04)

CIT v. Talathi and Panthaky Associated (P) Ltd (2012) 343 ITR 309/ 205 Taxman 309 (Bom.) (High Court)

S.31: Repairs- Machinary – Current repairs or revenue expenditure – Accounting Practice – Nature of expenditure(S, 37)

Each machine in a textile mill is an independent entity. Replacement of old machinery with new machinery is not current repairs but capital expenditure. Replacement of such an old machine with a new one bringing into existence a new asset giving enduring benefit which is capital in expenditure.

Accounting practices may not be the best guide in determining the nature of expenditure but are indicative of nature of transaction and intention of the assessee. (A.Y. 1995 – 96)

CIT v. Sri Mangayarkarsi Mills Pvt. Ltd. (2011) 11 SCC 656(SC)

S.32:Depreciation- Goodwill-Intangible-Stock exchange card- "Goodwill" is an intangible asset eligible for depreciation-Stock exhnage membership cards are assets eligible for depreciation.

Pursuant to an amalgamation of another company with the assessee, the difference between the consideration paid by the assessee and the net value of assets of the amalgamating company was treated by the assessee as "goodwill" and depreciation of Rs. 54 lakhs was claimed thereon u/s 32(1)(ii). The AO rejected the claim on the ground that (i) "goodwill" was not an "intangible asset" as defined in Explanation 3 to s. 32(1) and (ii) the assessee had not paid anything for the same. The Tribunal and High Court upheld the assessee's claim. On appeal by the department to the Supreme Court, Held dismissing the appeal:

Explanation 3 to s. 32 states that the expression "asset" shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. The words "any other business or commercial rights of similar nature" in clause (b) of Explanation 3 indicates that goodwill would fall under the expression "any other business or commercial right of a similar nature". The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b). Consequently, "Goodwill" is an asset under Explanation 3(b) to s. 32(1) & eligible for depreciation. Though the AO held that the assessee had not "paid" anything for the goodwill, this cannot be accepted because (a) the CIT (A) & Tribunal (correctly) held that that the difference between the cost of an asset and the amount paid in the process of amalgamation constituted "goodwill" and (b) this aspect was not challenged by the department before the High Court. The Court also held that the stock exchange cards are assets eligible for depreciation. (A.Y.2003-04)

CIT v. Smifs Securities Ltd.(2012)348 ITR 302/ 75 DTR 417 /252 CTR 233(SC) .

S.32:Depreciation - Leasing truck - Not entitled to higher rate of depreciation – Income-tax Rules, 1962, Appendix I, Entry III, Clause (2)(ii).

The assessee purchased a Truck and gave it on lease. The assessee claimed the higher rate of depreciation of 50 percent on the ground that the truck was run on hire by the lessee. The Tribunal allowed the appeal. On appeal by revenue, the Court held that as the assessee was not carrying on the business of hiring of the vehicle, thew not entitled to higher rate of depreciation. (A. Y.1991-92).

CIT v. Pradip N. Desai (HUF) (2012) 341 ITR 277 (Guj.)(High Court)

S.32:Depreciation - Ownership of asset - Vehicle registered in the name of company - Company entitled to depreciation - Vehicle given on lease - Not entitled higher rate of depreciation.

Vehicles though registered in the names of the directors were used for the purpose of business of the company, company entitled to claim depreciation. The Court held that the assessee is not entitled to higher rate of depreciation when the assessee had given vehicles on lease.

CIT v. Aravali Finlease Ltd. (2012) 341 ITR 282 (Guj.)(High Court)

S.32:Depreciation - Genuineness of assets –Lease- When the assessee has not established the genuineness of purchase of assets, no depreciation can be allowed, though the assets were leased to third parties.

The assessee claimed the depreciation in respect of two flameless furnaces purchased by the assessee company and which was leased to third parties. On enquiry conducted by Joint Director (Inv.), it was revealed that the alleged supplier of machinery has no capacity to manufacture such assets and the partner of the firm disowned the invoices produced by the assessee in support of purchase of said assets. The Tribunal has allowed the depreciation. On appeal by the revenue the Court held that as the genuineness of purchase has not been established, merely because the assessee has leased out the said assets to third parties, depreciation cannot be allowed. (A. Y. 1996-97).

CIT v. S & S Power Switchgear Ltd. (2012) 67 DTR 59 / 247 CTR 604 (Mad.)(High Court)

S.32:Depreciation - Block of assets - Passive user - Asset forming part of block of assets depreciation is allowable even if not used for the relevant year - Unit remained closed for six years depreciation is not allowable.

Depreciation is allowable to block of assets, irrespective of fact that a particular asset is used or not, Revenue cannot segregate a particular asset there from on the ground that it was not put to use. The individual assets have lost their identity when a particular asset is part of block of assets. Once it is established that a particular unit was used for the purpose of business, the depreciation is allowable to entire block. The Court also held that if the Unit is closed for six years and if there is no sign of unit becoming functional the concept of 'passive user' could not be extended to absurd limits, otherwise, the words "used for the purpose of business" would lose their total sanctity. However the Tribunal was right in allowing depreciation based on "block of assets". (A. Y.1998-99).

CIT v. Oswal Agro Mills Ltd. (2012) 341 ITR 467 (Delhi)(High Court)

CIT v. Oswal Chemicals and Fertilizers Ltd. (2012) 341 ITR 467 (Delhi)(High Court)

S.32 :Depreciation - Lease of assets –Put to use- When assets are leased and installed at a place of lessee the assessee is entitled for depreciation irrespective of put to use.

For the relevant assessment year 1997-98, the assessee claimed depreciation on the boiler given on lease, stating that the said boiler had been installed in the factory in the month of Feb., 1997 and the boiler was put to use on 26-3-1997. The Assessing Officer disallowed the depreciation on the ground that the said boiler was put to use only on 6-5-1997. On appeal by the revenue the High Court held that, as and when leased assets are installed at place of lessee, it could be presumed for purpose of depreciation that they had been used by lessee, hence, for allowability of depreciation actual date on which such assets were put to use by lessee has no relevance. The Court answered the question in favour of assessee. (A. Ys. 1996-97 & 1997-98).

CIT v. Sundaram Finance Ltd. (2012) 205 Taxman 37 / 67 DTR 117 (Mad.)(High Court)

S.32:Depreciation- Intangible assets- Business information- Business information, contracts, records etc are "intangible assets" and eligible for depreciation

The assessee, vide slump sale agreement, acquired a transmission and distribution business as a going concern for a lump sum consideration of Rs.44.7 crores. The net tangible assets were valued at Rs.28.11 crores and the balance Rs. 16.58 crores was allocated by the transferee towards acquisition of bundle of "business and commercial rights" being business information; business records; contracts; employees etc, compendiously termed as "goodwill". The assessee claimed that the said "business and commercial rights" were an "intangible asset" and eligible for depreciation u/s 32(1)(ii). The assessee's claim was rejected by the AO, CIT(A) & Tribunal on the ground that depreciation was not allowable on "goodwill". On appeal by the assessee, Held reversing the lower authorities:

S. 32(1)(ii) allows depreciation on "intangible assets" which are defined to mean "know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature". Applying the principle of ejusdem generis, the expression "business or commercial rights of similar nature" need not answer the description of "knowhow, patents, trademarks, licenses or franchises" but must be of similar nature as the specified assets. The specified intangible assets are not of the same kind and are clearly distinct from one another. The nature of "business or commercial rights" cannot be restricted to only the aforesaid six categories of assets but can be of the same genus in which all the aforesaid six assets fall and form part of the tool of trade of an assessee facilitating smooth carrying on of the business. The intangible assets, viz., business claims; business information; business records; contracts; employees; and knowhow, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee without any interruption. These intangible assets are comparable to a license to carry out the existing

transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. Accordingly, the intangible assets acquired under slump sale agreement were in the nature of "business or commercial rights of similar nature" and eligible for depreciation u/s 32(1)(ii) (Techno Shares 327 ITR 323 (SC) followed) (Q whether goodwill per se is eligible for depreciation u/s 32(1)(ii) left open).(A.Ys 2002-03 & 2005-06)

Areva T&D India Ltd v. DCIT (2012) 345 ITR 421/70 DTR 233/208 Taxman 252(Delhi)(High Court)

CIT v. Jai Parabolic Springs Ltd. (2012) 345 ITR 421/70 DTR 233 / 250 CTR 151 (Delhu) (High Court)

S.32:Depreciation-Discarded Machinery- Machineries discarded due to obsolescence and which have not been used in manufacturing of product depreciation is not allowable.

The assessee had been claiming depreciation on block of assets . The Assessing Officer held that two machineries had been discarded and that once the assets had been discarded treating them as obsolete , the same should have been considered for reduction of the block for computing the depreciation on the same . The Assessing Officer has added back the depreciation in the total income. On appeal the Commissioner (Appeals) conformed the order of Assessing Officer. On appeal to the Tribunal , the Tribunal allowed the claim of assessee. On appeal by revenue the Court held that depreciation is not allowable in respect of machineries which have been discarded due to obsolescence and which have not been used in manufacturing of product. Order of tribunal reversed. (A.Y. 1997-98)

CIT v. Luwa India Ltd (2012) 205 Taxman 342/75 DTR 367 (Karn.) (High Court).

S.32:Depreciation - Sale and lease back -Sale & lease back transactions are not "sham" transactions.(S.147,148)

The assessee purchased an igni-fluid boiler from its sister concern and on the same day leased it back. The AO & CIT(A) relied on McDowell & Co Ltd v.CTO (1985)154 ITR 148 and held the sale and lease back arrangement to be a sham & camouflage for a loan by the assessee to the sister concern and rejected the assessee's claim for depreciation. However, the Tribunal allowed the claim on the ground that the transaction was not a "sham". On appeal by the department, held dismissing the appeal:

(i) Though the machinery was embedded and was in possession of the seller, the assessee took constructive delivery of the machinery. As the law recognises constructive delivery as an acceptable mode of delivery and possession, physical possession is not necessary. Thus there is no material on record to show that the sale was a sham transaction and so its genuineness cannot be questioned. As regards the lease, the fact that some part of the funding came from Wipro Finance & that the lessee paid directly to Wipro in satisfaction of the assessee's obligation does not make the agreement a sham because it is a matter of pure commercial understanding between the parties as to the modalities of lease rental payment. Given the freedom to enter into agreements with parties and guided by commercial considerations, even to invoke the theory of tax evasion, the Revenue must have sufficient material to draw an inference of what had been shown as an understanding on an agreement between the parties, is not, in fact, so.

(ii) In Vodafone International Holdings (2012) 341 ITR 1 (SC), McDowell was considered extensively and it was held that there is no conflict between McDowell & Co. Ltd. vs. Commercial Tax Officer (1985) 154 ITR 148 (SC); UOI v. Azadi Bachao Andolan & Anr. (2003) 263 ITR 706 (SC) & Mathuram Agarwal 8 SCC 667. It was pointed out that the task of the Revenue / Court is to ascertain the legal nature of the transaction and while doing so, it has to look at the entire transaction as a whole and not to adopt a dissecting approach. It was pointed out that "the Revenue cannot start with the question as to whether the impugned transaction is a tax deferment / saving device but that it should apply the "look at" test to ascertain its true legal nature. Genuine strategic tax planning has not been abandoned by any decision of the English courts till date." It was held that while colourable devices cannot be a part of tax planning, it cannot be said that all tax planning is illegal / impermissible. Applying this ratio, the mere fact that what had been purchased had been leased out to the vendor or that vendor had undertaken to pay the hire charges on behalf of the assessee to the hire purchase company does not per se lead to a conclusion that the transaction is a sham one. Reassessment was quashed for the assessment year 1995-96 and decided on merits for the assessment years 1995-96 to 1997-98)(A.Y.1995-96 &1996-97).

CIT v. High Energy Batteries (India) Ltd.(2012)348 ITR 574/ 74 DTR 9 (Mad.)(High Court)

S.32:Depreciation - Tippers-Road transport vehicle-Tippers used by assessee in its construction work is entitled to depreciation at 40% .

Assessee is in the business of civil construction and contract work. The assessee claimed depreciation on Tippers, vibrator and vibrator soil compactor at 40% because the said vehicles are registered under Motor Vehicles Act, 1988 as road transport vehicles. The Assessing Officer allowed the depreciation at 15% as applicable to plant and machinery. In appeal Commissioner (Appeals) and Tribunal accepted the contention of the assessee. On appeal by the revenue , the Court held that Tippers , vibrator and vibrator soil compactor registered as road transport vehicles under the Motor Vehicles Act , 1988 are commercial vehicles entitled to depreciation @ 40 percent and not @ 15 percent applicable to plant and machinery. (A.Ys. 2006 -07 & 2007-08)

CIT v. Rakesh Jain (2012) 70 DTR 1/250 CTR 381 (P&H.) (High Court)

S.32:Depreciation – Lease-merely because the vehicles were used by the lessee in their business, the assessee cannot be denied the depreciation.

Assessee engaged in the business of leasing, producing bills showing consideration paid by him for acquiring vehicles as also lease agreement was owner of vehicles entitled to depreciation; merely because the vehicles were used by the lessee in their business, the assessee cannot be denied the depreciation. (A.Y. 1996-97)

Prakash Leasing Ltd. v. Dy. CIT (2012) 71 DTR 156/208 Taxman 204 (Karn.) (High Court)

S.32: Depreciation-Computer system- Cost below 5000 - 100% depreciation-Difference between "Finance Lease" & "Operational Lease", matter set aside-Tribunal to decide afresh.

The assessee bought 1614 items of computer systems for Rs.40 lacs from HCL Hewlett Packard Ltd and leased back to the same company. The assessee claimed 100% depreciation on the ground that the cost of each itemwas less than Rs.5,000. The AO & CIT (A) held that the lease was not a bona fide transaction and that the transaction was a finance transaction. It was held that the assessee had advanced Rs.40 lacs to HCL Hewlett Packard Ltd and agreed to receive back this amount along with the interest over six years. However, the Tribunal upheld the claim on the ground that the conditions of a valid lease were satisfied. On appeal by the department to the High Court, Held:

The question whether an agreement is a finance agreement or an operating lease cannot be decided by merely looking at the title of the agreement or the nomenclature given to the said agreement. The terms and conditions mentioned in the agreement may be relevant but the surrounding circumstances & type and nature of the asset have also to be considered. There is a difference between a finance lease and an operational lease. A finance lease is one where the lessee uses the asset for substantially the whole of its useful life and the lease payments are calculated to cover the full cost together with interest charges. It is thus a disguised way of purchasing the asset with the help of a loan. An operating lease is any other type of lease where the asset is not wholly amortised during the non-cancellable period, if any, of the lease and where the lessor does not rely for his profit on the rentals in the non-cancellable period. This distinction has been explained in Asea Brown Boveri Ltd vs. IFCI (2004) 12 SCC 570, Association of Leasing and Financial Service Companies vs. UOI (2011) 2 SCC 352 &Sundaram Finance Ltd vs. Kerala AIR 1966 SC 1178. As the Tribunal has not considered the issue from the right perspective, matter remanded.

CIT v. The Instalment Supply Ltd (Delhi)(High Court)www.itatonline.org.

S.32: Depreciation-User of assets-Block of assets-It is not necessary that all the assets which falling within the block of assets must be used simultaneously to allow the depreciation. [S. 2(11)]

The court approving the judgment of Tribunal held that, once the factory building is put to use it is not possible to restrict the depreciation on the said building by stating that only a portion there of has been put to use . Similarly in relation to block of assets , it is not possible to segregate items falling with in block for the purposes of granting depreciation or restricting the claim thereof .Once it is found that assets are used for business ,it is not necessary that all the items falling with in plant and machinery have to be simultaneously used for being entitled to depreciation. The appeal of revenue was dismissed.(A.Y.1991-92)

ACIT v. S. K. Patel Family Trust (2012) 251 CTR 427/74 DTR 317 (Guj.)(High Court)

S. 32: Depreciation- First stock exchange card membership-Intangible assets- Revenue has allowed the depreciation in earlier years the depreciation cannot be disallowed in later years.

The assessee has purchased the first stock exchange card in the financial year 1995-96 and claimed the depreciation. The depreciation was allowed and which has became final . During the year, question was raised by the revenue stating that the depreciation can be allowed on intangible assets which are acquired on or after 1st April, 1998. The Court held as the revenue has accepted the decision for the Assessment year 2005-06 the substantial question cannot be raised in late years hence the appeal of revenue was dismissed. (A.Y. 2002-03)
CIT v. Kotak Securities Ltd (No1) (2012) 346 ITR 349 (Bom.)(High Court)
CIT v. Kotak Securities Ltd (No.2)(2012)346 ITR 352 (Bom.)(High Court)

S.32: Depreciation- Rate – Motor cars – commercial vehicles-Light motor vehicles-Depreciation at 50%.

As per note 6 below part A of Appendix I, cards are light motor vehicles and thus commercial vehicles, Assessee was therefore entitled to 50 per cent depreciation on motor cars and not 20 per cent as allowed by AO. (A.Y. 2003-04)
CIT v. Birla Global Asset Finance Ltd. (2012) 76 DTR 342 (Bom.)(High Court)

S.32: Depreciation - Finance lease - Operating lease - Lessee can be treated as owner in case of a finance lease and lessee who is entitled to depreciation and not the lessor.

The assessee, a bank, purchased a boiler and gave it on lease to Indo-Gulf Fertilisers. The assessee claimed depreciation on the said boiler on the basis that it was the "owner" thereof. The Assessing Officer & CIT(A) disallowed the claim for depreciation on the basis that the transaction was a "finance lease" which was akin to a loan given by the assessee and that the assessee was not the "owner". On a reference to the Special Bench held:
(i) The distinction between a "Finance lease" and an "operating lease" is set out in the Guidance Note on Accounting for Leases and Accounting Standard (AS) 19. It is also set out in the judgement of the Supreme Court in Asea Brown Boveri Ltd. v. Industrial Finance Corporation of India (IFCI) (2006) 154 Taxman 512 (SC) & Association of Leasing & Financial Services Companies v. UOI.(2010)235 CTR 521(SC). In a finance lease, the lessee selects the equipment & the lessor provides the funds, acquires the title to the equipment and allows the lessee to use it for its expected life. A finance lease is for a fixed period & non-cancellable. There is a fixed obligation on the lessee for payment of lease money & in case of premature termination, the lessor is entitled to recover his investment with expected interest. In substance, finance lease is a loan from the lessor to the lessee. In an operating lease, the lessor bears the risk of loss, the period is cancellable and lease rentals are not synchronized with the economic life of the asset. On facts, the assessee's lease agreement had all the characteristics of a finance lease;
(ii) The assessee's argument that even in the case of a finance lease, depreciation should be allowed to the lessor is not acceptable because all risks & rewards incidental to ownership are borne by the lessee and the lessor's "ownership" is nominal & symbolic & serves no purpose other than as security for the recoupment of the investment with interest in the form of lease rentals. It is the lessee who is the actual and real owner of the asset (CIT v. Podar Cement (P) Ltd. (1997) 226 ITR 625 (SC) & Mysore Minerals Ltd. (1999) 239 ITR 775 (SC) applied), MCorp Global (P) Ltd. (2009) 309 ITR 434 (SC) distinguished).
(iii) On facts, the assessee had already advanced a loan to Indo-Gulf to purchase the boiler much prior to the entering into of the lease agreement. The lease agreement was entered into subsequently with the sole purpose of enabling the assessee to artificially fulfill the twin requirements of ownership and user of the asset so as to claim depreciation, to which it was not otherwise entitled as per law and thereby reduce its income in a mala fide manner. The agreement was consequently a "sham". The assessee's argument that the issue of depreciation is tax neutral because the tax rates on the lessor & lessee is the same is not correct because while the assessee had huge income, the lessee had a loss. The lease agreement was thus a "dubious way" to mitigate the assessee's tax liability. (A. Ys. 1998-99, 1999-2000).
IndusInd Bank Ltd. v. ACIT (2012) 135 ITD 165/ 15 ITR 89/69 DTR 27/145 TTJ 409 (SB)(Mum.)((Trib.)

S.32: Depreciation - Additional depreciation – Manufacture-Raw grounded blades purchased from market and made ready to use in commercial market amounted manufacture and entitled additional depreciation.

Assessee company which is engaged in the business of exporting safety razor blades and twin track shaving system. It purchased semi finished ground blades not suitable for shaving. Unfinished blades were processed in the factory of assessee from grinding till the final packing. The Assessee has claimed additional depreciation under section 32(1)(iia) at 20 percent on actual cost of machinery and plant which was acquired and installed after 31-3-2005. Assessing Officer

held that the processing does not amount to manufacture and the assessee is not entitled additional depreciation. The Tribunal held that the final product manufactured by assessee is commercially new and different article having distinctive name, character and use, hence, the assessee is manufacturer and is entitled for additional depreciation. (A. Y. 2006-07).

Dy. CIT v. N. V. Exports (P) Ltd. (2012) 49 SOT 534 (Kol.)(Trib.)

S.32:Depreciation - Machinery -Put to use - Assessee installed the machinery prior to 31-3-2005 hence depreciation cannot be denied.

Assessee has claimed the depreciation in respect of a gunsun sorter machine. The Assessing Officer has denied the depreciation on the ground that the machinery was not put to use. The Tribunal held that the machinery was purchased on 14-3-2005 and installation like electric fittings had been done prior to 31-3-2005, hence, the disallowance of depreciation was not justified. (A. Y. 2005-06).

ACIT v. Nayan L. Mepani (2012) 49 SOT 641 (Mum.)(Trib.)

S.32:Depreciation- Computer- Accessories - Computer Accessories are integral part of computer system and is entitled to depreciation at 60%.

Computer accessories are integral part of computer system and depreciation against these are liable to be allowed at 60 percent.(A.Ys. 2004-05, 2005-06, 2006-07)

Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 (Delhi)(Trib.)

S.32:Depreciation- Membership card of BSE--Commercial right-Similar nature- Scheme of Corporatisation and Demutualization –Right to conduct business acquired hence depreciation is not allowable.

Assessee company purchased a membership card in cash segment and derivative segment from Bombay stock exchange. i.e. 'BSE' for a total consideration of Rs. 2.50 crores and claimed depreciation on same which was allowed. Subsequently, BSE under scheme of 'Corporatisation' and 'Demutualisation' was succeeded by a company incorporated under Companies Act, 1956, under the name and style "Bombay Stock Exchange Ltd.". Assessee, consequent to demutualization had acquired two separate rights in new Company i.e. (i) ownership rights and (ii) trading rights. Ownership rights were given by issuing 10000 shares of BSEL in the name of assessee, whereas, trading rights were subject to deposit of certain amount by assessee with BSEL.In the course of original assessment proceedings the Assessing officer held that no part of original cost of BSE card could be attributable to right to conduct trading and hence, assessee would not be entitled to claim depreciation. Since ownership right gave assessee a right to participate in ownership of assets and management of BSEL, it was not a business and commercial right of similar nature under section 32(1)(ii) and thus assessee could not be allowed depreciation in respect of said right. As regards trading right, even though said right was a commercial right,yet in fact the value of said right was equal to refundable deposit to be made by assessee with BSEL, it could be depreciated when its value in reality did not come down. The Tribunal confirmed the view of Assessing Officer.(A.Y. 2006-07)

Sino Securities (P) Ltd.v. ITO (2012) 134 ITD 321/15 ITR 137/72 DTR 57(Mum)(Trib.)

S.32:Depreciation-BSE Card- Corporatization and demutualization- Commercial rights-Depreciation is not allowable as the cost of acquisition of such right was taken as nil hence no cost on acquisition.

The Assessing Officer disallowed the depreciation on BSE card and Foreign Exchange Dealers Association of India (FEDAI) . On appeal the Commissioner (Appeals) allowed the depreciation following the judgment of Supreme Court in Techno shares & Stocks Ltd (2010) 327 ITR 323 (SC).The Tribunal held that after corporatization of the Bombay Stock Exchange membership is no more in existence and the Card holders has been issued 10000 shares of BSE of face value of Rs 1 each . As per the scheme of de-mutualisation, the card ceased to exist and in lieu of membership , the card holder has been issued 10000 shares of BSEL. As per section 55(2)(ab), the cost of the shares allotted to the card holders of a recognized stock exchange under a scheme of demutualization shall be the cost of acquisition of his original membership of exchange .As per the proviso to the said clause , the cost of the capital asset being trading or clearing rights of the recognized Stock Exchange acquired buy as a shareholder on allotment of equity or under the scheme of demutualisation or corporatization shall be deemed to be nil. Since the shares are not a depreciable asset and also independent from rights to trade , no depreciation is allowable . When the membership card ceased to exist and in lieu of card , new capital asset came in to existence being 1000 shares as well as right to trade and clearing in the Stock

Exchange and the acquisition cost of trade and clearing has been explicitly provided as nil by the statute then the entire cost of Membership as stands in the books of account of the assessee would be treated as cost of acquisition of 10000 shares which is not depreciable asset .As per clause (3) Explanation 5 to section 32 (2) if any shortfall of amount between the value realized and written down value of a particular asset , the same is allowable. On the facts the assessee received the shares in lieu of BSE Membership Card then whatever written down value was standing in the books of account of the assessee has been received by assessee by way of shares and therefore , no shortfall arises to be claimed as depreciation. Hence depreciation is not allowable. The Tribunal followed the ratio of Sino Securities (P) Ltd v.ITO (2012) 134 ITD 321 (Mum) (Trib). As regard the FEDAI, no facts are allowable, the matter was set aside to the Assessing Officer. (A.Y.2006-07)

Sunidi Consultancy Services Ltd v. Dy.CIT (2012) 50 SOT 223 (Mum.)(Trib.)

S.32:Depreciation- Non compete fee- Intangible asset- Depreciation is allowable in respect of non compete fee- Stools, tables stainless steel racks, trolley etc, which were required for laboratory purpose are considered as plant and machinery and eligible for depreciation as plant and machinery.

The assessee has paid the non –compete fee and claimed the said expenses as revenue in nature .The claim was disallowed by the Assessing Officer and confirmed by Commissioner (Appeals). In appeal before the Tribunal, the Tribunal held that the expenditure on non-compete fee being capital in nature , it being intangible asset , the assessee will be eligible for depreciation. The assessee is engaged in manufacturing of chemical and vaccines and for the purpose of assessees laboratory, it purchased stools, tables, stainless steel racks trolley etc and claimed the depreciation as part of plant and machinery. The Assessing Officer treated the said assets as furniture and allowed depreciation as applicable to furniture which was confirmed by Commissioner (Appeals) . On appeal to Tribunal , the Tribunal held that since said stools , tables , stainless steel racks etc were required for laboratory purpose i.e. for purpose of production or processing of chemical tests , in laboratory premises leading to production of stock they must be categorized as plant and machinery and entitled to depreciation accordingly. (A.Y.2001-02)

Serum Institute of India Ltd v. Addl CIT (2012) 135 ITD 69 / 147 TTJ 594/72 DTR 89 (Pune) (Trib.)

S.32: Depreciation –Wind mill-Additional depreciation- Device of Wind Mill and foundation, civil works, electrical installation, development expenses, heldto be wind mill and entitled to additional depreciation on entire device and cannot be bifurcated as several parts.

Depreciation was claimed on device of windmill and additional depreciation was claimed on foundation, civil works, electrical installation, development expenses and other machinery. It was held by the Tribunal that the depreciation is allowable on renewable energy which includes windmill also. Where depreciation is claimed on entire device which is capable of generating energy using wind energy, and cannot be bifurcated, into several parts, the depreciation is held to be allowable on entire device. (A.Y. 2007 -08)

ACIT(OSD) v. Parry Engineering & Electronics P. Ltd. ITA No. 3317 / Ahm/ 2012 ,Ahmedabad Tribunal Order dated 02/3/2012(2012) Vol 35 Feb P. 557 (Ahd.)(Trib.)

S.32:Depreciation-Books-Capital expenditure- Expenditure incurred on books by the tutorial institutions is held to be capital expenditure and eligible for depreciation.(S.37(1))

The expenditure incurred by the tutorial institutions on books and preparing students for professional entrance examination is capital expenditure, entitled to depreciation under Section 32(1) irrespective of whether the tutorials are 'profession' or 'business' (A.Y. 2006-07)

Brilliant Study Centre v. Asst. CIT (2012) 135 ITD 351 / 146 TTJ 742 / 17 ITR 394/71 DTR 373 (Cochin)(Trib.)

S.32:Depreciation –Intangible- Website- Entitled depreciation at 25% as intangible and not 60% as applicable to software. Website is not a software hence CBDT Notification No. 890(E), dated 26/9/2000 cannot be applied to section 32 hence depreciation is allowable at the rate of 25% as intangible asset.

The CBDT Notification No. 890(E), dated 26/9/2000 including website services in software. Notified definition for purpose of sections 10A, 10B and 80HHE is for the specific purpose of those sections and cannot be imported for the purposes of depreciation under section 32 or Old Appendix- I applicable for A.Y. 2003-04 to 2005-06. Thus, website cannot be treated as software. It would fall under the definition of intangible asset on which depreciation at the rate of 25% is allowed. (AY 2004-05)

Makemytrip (India) P. Ltd v. Dy. CIT (2012) 51 SOT 19/72 DTR 466(Delhi)(Trib.)

S.32:Depreciation- Non-compete rights- Intangible assets-Non-Compete rights are an "intangible asset" eligible for depreciation.

The assessee paid Rs.4.55 crores to obtain a non-compete covenant from another company for a period of 10 years and claimed that the expenditure had resulted in an "intangible asset" u/s 32(1)(ii) on which depreciation was allowable. The AO rejected the claim though the CIT (A) allowed it. Before the Tribunal, the department relied on Srivatsan Surveyors (P) Ltd. vs. ITO (2009)125 TTJ 286 (Chennai) where it was held that a non-compete right is a 'right in persona' and not a 'right in rem' and so depreciation was not allowable. Held by the Tribunal dismissing the appeal:

The AO's objection that a non-compete right is not an "intangible asset" u/s.32(1)(ii) on the ground that (a) it is not "any other business or commercial right of a similar nature" and (b) it is not capable of transfer like other intangible assets is not acceptable because (i) the right of absence of competition or the 'non-compete right' is an asset which is capable of being transferred and is of a similar nature as the other items referred to. This is shown by the fact that the right was transferred by the assessee at the time of its amalgamation and (ii) the expenditure resulted in the acquisition of an unrivaled and non-competed business territory for 10 years which brought advantages in the capital field. Though in Srivatsan Surveyors v.ITO(2009) 125 TTJ 286 (Chennai), it was held that a restrictive covenant is a "right in persona" and not a "right in rem", a contrary view was taken in ITO v. Medicorp Technologies India Ltd (2009) 30 SOT 506 (Chennai). When two views are possible, the view favourable to the assessee should be followed held in CIT v. Vegetable Products Ltd. (1973) 88 ITR 192 (SC) (A.Y. 2003-04).

ACIT v. GE Plastics India Ltd (2012) 137 ITD 309 (Ahd.)(Trib).

S.32: Depreciation - Financial leased asset - assessee offered the principal portion of the lease rental also for taxation, depreciation allowed

The issue in the instant case is regarding the claim of depreciation on Financial leased asset. The assessee claimed depreciation in light of Circular of No. 2 of 2001 issued by CBDT in the matter of capitalization of leased asset. While claiming the depreciation allowance, the assessee offered the principal portion of the lease rental also for taxation. Thus, it was held that depreciation claim was rightly allowed. (A.Y. 2004-05 to 2007-08)

ACIT v. GMAC Financial Services India Ltd. (2012) 16 ITR 422(Chennai)(Trib.)

S.32: Depreciation-Regularization fee-Hospital- Regularization fees paid for construction of hospital is an asset used in carrying business and profession and it was not unlawful, it should be capitalized to form a part of cost of construction and depreciation could be claimed on it.

The assessee had constructed a hospital building. While constructing the hospital building, assessee made certain deviation which was in violation of relevant metropolitan regulation. The assessee paid regularization fees as step taken by the state government to regularize such deviation and exonerate defaulters. It was held that since the payment was made directly in connection with construction of hospital building which was an asset used in carrying business and profession and it was not unlawful, it should be capitalized to form a part of cost of construction and depreciation could be claimed on it. (A.Ys. 2004-05 to 2006-07)

K. Senthilnathan(Dr) v. ACIT (2012) 136 ITD 233/ 147 TTJ 297/73 DTR 90(TM) (Chennai) (Trib.)

S.32: Depreciation-Intangible-Franchisee-Consideration paid for enhancing network by acquiring rights over infrastructure and other advantages is held to be intangible asset, depreciation allowed.

The assessee-company was engaged in the business of dealing in foreign exchange, money transfer and wind power generation. The assessee acquired a franchisee for consideration and claimed depreciation on the same. It was held that since the assessee paid consideration for purpose of enhancing network in the field of money transfer business by acquiring rights over infrastructure and other advantages attached to marketing network, same fell under the category of intangible asset, eligible for depreciation. (A.Y. 2007-08)

DCIT v. Weizmann Forex Ltd. (2012) 51 SOT 525 (Mum.) (Trib.)

S.32: Depreciation – Block of assets –User- After the first year existence of individual asset in block of asset itself amounts to use for purpose of business.

The requirement of words 'used for the purpose of business' as provided in section 32(1) for the concept of depreciation on block of assets can be summarized, that use of individual asset for the purpose of business can be

examined only in the first year the asset is purchased and, in subsequent years when use of block of asset is examined, existence of individual asset in block of asset itself amounts to use for purpose of business. (A.Ys. 2001-02 to 2004-05)
DCIT v. Coromandal Bio Tech Industries (I) Ltd (2012) 51 SOT 333 (Hyd.)(Trib.)

S.32: Depreciation- Ownership- Possession of building-Company which acquired the possession of building is entitled to depreciation.

The assessee company acquired the possession of the entire building with a right to exercise the necessary control of the property which the assessee was capable of and that being so, evidently, it was the obvious intention of the assessee to exclude others from exercising such control and it was this which showed the element of ownership of the assessee – company over the factory premises acquired. In view of the above C.I.T. (A)'s order upheld and depreciation u/s. 32 of the Act allowed to the assessee.(A.Y. 2006-2007)
DCIT v. Biltech Building Elements Limited { (2012) 50 SOT 39(URO) (Delhi) (Trib.)

S. 32: Depreciation- Goodwill –Land and building- Primary asset transferred was land hence the depreciation is not allowable on goodwill as there was no good will in the nature of commercial rights.

CGEL, a wholly owned subsidiary of the assessee company got amalgamated with the assessee during the year. The subsidiary company earned income by lease of property. It was held that primary asset which was transferred was land and not goodwill. The market value of the primary asset i.e. land and building thereon, should have been considered. If the assessee had paid more than the fair market value of assets minus fair market value of liabilities, then the company would have a case to claim that certain amounts were incurred for good will. In the absence of such a claim there was no goodwill in the nature of commercial rights purchase by assessee. This being only book entry and it was only another way of disclosing the intrinsic value of the fixed asset of the company . Depreciation was not allowable on goodwill.(A.Y.2003-04)
DY.CIT v. Toyo Engineering India Ltd (2012) 18 ITR 159 (Mum.)(Trib.)

S.32: Depreciation- Lease of assets –Lease rent-Lessee started receiving rent from that date, assets in question were put to use for 180 days or more assessee entitled to full rate of depreciation.

The assessee dispatched the Gass Cylinders on 27th September 2003 and claimed 100 depreciation. The Assessing Officer held that the lessee has put to use the assets on 30th September , 2003 hence entitled only 50% depreciation. On appeal the claim of depreciation was allowed 100%. On appeal by revenue the court held that assessee has demonstrated that it has purchased cylinders on 27th September 2003, dispatched the same to the lessee and started receiveing rent from that date , hence the assets in question was put to use for 180 days or more therefore entitled for full rate of depreciation. (A.Ys2003-04 to 2005-06)
Dy.CIT v. Prakash Chemical Agencies (P) Ltd (2012) 136 ITD 222/75 DTR 91/148 TTJ 480(Ahd.) (Trib.)

S.32:Depreciation-Quantification – Applicability of second proviso to S.32(1)

Second proviso to s. 32(1) is applicable only in the year in which the asset is acquired or put to use for the business for the first time and, therefore, assessee's claim for depreciation qua assets acquired and put to use prior to the commencement of the current year is wholly allowable, more so as the assets were in use from 1st April, 2001 to 28th Sept. 2001, i.e. for a period of 181 days in the current year before the suspension of assessee's operations by RBI on 29th Sept. 2011; however, assessee's claim for depreciation to the extent it relates to assets acquired during the current year is subject to second proviso to S. 32(1). (A.Y. 2002-03)
Vinayak Local Area Bank Ltd v. Dy. CIT (2012) 76 DTR 129 / 149 TTJ 261 (Jaipur) (Trib.)

S. 32: Depreciation – Rate – mistakenly understated – Held rectification letter filed to AO rectifying the rate of depreciation was to be allowed.

The assessee installed wind-mill and claimed depreciation @ 15% on written down value basis. However, realizing the wrong rate, assessee filed a letter to rectify the rate @ 80%. It was held that since assessee had made a claim for statutory allowance of depreciation on WDV basis, subject to mistake occurred in choosing correct rate, rectification letter filed by it was to be allowed. (A.Y. 2007-08)
ITO v. Sri Balaji Sago & Starch Products (2012) 53 SOT 15 (Chennai)(Trib.)

S.32(2):Depreciation- Set off –Unabsorbed depreciation-Unabsorbed depreciation of AYs 1997-98 to 2001-02 is eligible for relief granted by amended s. 32(2) in AY 2002-03.

In AY 2006-07, the assessee claimed a set-off of the unabsorbed depreciation brought forward from AY 1997-98, 1999-2000, 2000-01 & 2001-02. The AO allowed the claim u/s 143(3). Subsequently, within four years from the end of the AY he reopened the assessment on the ground that pursuant to the amendment to s. 32(2) by the Finance Act No.2 of 1996 w.e.f. AY 1997-98, the unabsorbed depreciation for AY 1997-98 could be carried forward up to a maximum period of 8 years from the year in which it was first computed and this period expired in AY 2005-06 and could not be allowed in AY 2006-07. The assessee filed a Writ Petition to challenge the reopening in which it claimed (a) that the reopening was based on a "change of opinion" and (b) that as s. 32(2) was amended in AY 2002-03 to remove the time period of 8 years, the claim for unabsorbed depreciation of AY 1997-98 was allowable without any time limit. Held by the High Court upholding the assessee's plea:

(i) There must be "tangible material" to reopen the assessment and it cannot be done because he has drawn another inference from the documents already considered by him because it would amount to a change of opinion. The assessee had disclosed the facts and if the AO drew a wrong legal inference, he cannot take benefit of his own wrong & reopen u/s 147.

(ii) Prior to the Finance Act No.2 of 1996 unabsorbed depreciation could be carry forward indefinitely. The Finance Act No.2 of 1996 restricted the period of carry forward & set-off of unabsorbed depreciation to 8 years from AY1997-98. Circular No.762 dated 18.2.1998 clarified that the brought forward depreciation for the earlier years would be added to the depreciation for AY 1997-98 and the period of 8 years would begin from AY 1997-98 onwards. S. 32 (2) was amended by Finance Act, 2001 w.e.f. AY 2002-03 to restore the position as it was prevailing prior to the Finance Act No. 2 of 1996 and the period of 8 years was done away with. In Circular No.14 of 2001, the CBDT clarified that the removal of the 8 year time period was "with a view to enable the industry to conserve sufficient funds to replace plant and machinery". The effect of the amendment is that the unabsorbed depreciation available to an assessee on 1.4.2002 (AY 2002-03) has to be dealt with in accordance with the s. 32(2) as amended by the Finance Act, 2001 and not by s. 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow unabsorbed depreciation allowance worked out in AY 1997-98 only for eight subsequent assessment years even after the amendment of s. 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision and so a purposive and harmonious interpretation has to be taken. Therefore, the unabsorbed depreciation pertaining to AY 1997-98 can be carried forward for set-off indefinitely.(A.Y.2006-07)

General Motors India Pvt. Ltd v. DCIT (Guj.)(High Court) www.itatonline.org

S. 32(2): Depreciation- Carry forward and set off-Unabsorbed depreciation automatically becomes the depreciation of the subsequent year and would be allowed to be carried forward . (S. 139 (3).

Assessee has filed a return under section 139 (1) declaring nil income which was accepted under section 143 (1). The notice was issued under section 148 In the reassessment proceedings the assessees income was determined very high, however after giving effect to the order of Tribunal the assessed income was loss. Assessee moved application under section 154 to carry forward the loss determined in pursuance of return filed under section 139(3). The assessing officer rejected the application . In an appeal before the Commissioner (Appeals) , the Commissioner (Appeals) held that loss can not be carried forward , however the unabsorbed depreciation was allowed to be carried forward .In appeal by the revenue , the Tribunal held that unabsorbed depreciation automatically becomes the depreciation of the subsequent year and the assessee would be entitled to carry forward and set off notwithstanding the fact the return showing nil income was filed and the loss was determined in pursuance to return filed under section 139 (3). (A.Y. 1999-2000)

ACIT v. Mehsana Distric Co-Operative Milk Producers Union Ltd(2012) 67 DTR 470/ 145 TTJ 107 (Ahd.) (Trib.)
Mehsana Distric Co-operative Milk Producers Union Ltd (2012) 67 DTR 470/145TTJ 107 (Ahd.) (Trib.)

S. 32A: Investment Allowance- Machinery and plant-Job work-Investment allowance is allowable in respect of machinery and plant used in job work.

The assessee is in the business of manufacturing of forging products. They also undertake job work from Republic forge and other companies. The assessee claimed the investment allowance under section 32A. The Assessing Officer disallowed the investment allowance on the ground that the assessee is not manufacturing the products and they are

engaged only on job works. The Commissioner (Appeals) also confirmed the view of Assessing Officer. On further appeal the Tribunal allowed the appeal of assessee. On appeal by revenue the Court up held the order of Tribunal and held that investment allowance can be claimed in respect of machineries and plant used in job work (A.Ys. 1983-84, 1984-85)

CIT v. Firma Hi-Tech (2012) 343 ITR 507 (AP.)(High Court)

S. 35:Expenditure on scientific research- Motor car-Employees- Purchase of motor car for employees is not eligible for deduction as the employees came into car provided by employer or by public transport or hired car had no bearing on in-house research & development.

The assessee contended that, since the salary to employee was eligible for deduction u/s 35(2AB), acquisition of motor car for those employees should also be considered as eligible for this benefit. It was held that expenditure on purchase of motor car could not be accepted as expenditure whether capital or revenue incurred on in-house research and development as whether the employees came into car provided by employer or by public transport or hired car had no bearing on in-house research & development. (A.Y. 2005-06)

ACIT v. Torrent Pharmaceutical Ltd. (2012) 137 ITD 301 (Ahd.)(Trib.)

S. 35AB:Expenditure on known how-Lump sum- Business expenditure-Lump sum technical know-how fees are deductible only under section 35AB and not under section 37(1).(S.37(1))

The assessee entered into a "Licence and Technical Assistance Agreement" with an American company pursuant to which the American company agreed to transfer technical know-how to the assessee in consideration of US $2,25,000 to be paid in three installments. The assessee paid the first installment amounting to Rs.17.49 lakhs. Subsequently, disputes arose between the contracting parties and the know-how was not transferred by the American company. The assessee claimed that as the technical know-how was not received, the amount paid was deductible u/s 37(1) and not under s. 35AB. The AO & CIT(A) rejected the claim though the Tribunal upheld it. The High Court reversed the Tribunal. On appeal by the assessee to the Supreme Court, held: Once S. 35AB comes into play, then S. 37 of the Act has no application. (A. Y. 1993-94)

Drilcos (India) Pvt. Ltd v. CIT(2012)348 ITR 382/ 252 CTR 349/76 DTR 349/210 Taxman 267(SC).

Editorial *–Decision in* CIT v. Drilcos (India) Pvt Ltd (2004) 266 ITR 12(Mad) (High Court) is affirmed.

S.35D:Amortisation of preliminary expenses-Reimbursement of expenses of promoters-Project development-Reimbursement of project development expenses are eligible for deduction under section 35D.

The assessee is a public Limited company. In the return of income the assessee claimed deduction under section 35D in respect of a sum of Rs.2,12, 665 ,which represented expenditure incurred by the promoters for project development. The amount was reimbursed by the company after its formation to the promoters. The Assessing Officer held that as the expenditure was incurred only after 31st March, 1970 it would not qualify for a deduction under section 35D.The view of Assessing Officer was confirmed by the Commissioner (Appeals) and Tribunal. On reference the Court held that the assessee was liable in respect of the expenditure incurred only after acceptance of that liability. That event took place after the date 31st March 1970. The fact that that promoters had incurred the expenditure prior to 31st March , 1970 would not detract from the position that same represented expenditure incurred by the assessee only after the acceptance of the liability which took place after the specified date, hence the expenditure incurred by promoters before 31st March, 1970, reimbursed by the company thereafter is entitled to deduction under section 35D. (A.Y.1975-76)

Zuari Agro Chemicals Ltd v.CIT (2012) 72 DTR 12 (Bom.) (High Court)

S.35D:Amortisation of preliminary expenses- Expenditure on preference shares.- Disallowance was confirmed as extension of industrial undertaking could not be completed during the relevant year.

The assessee issued non-convertible cumulative preference shares of Rs. 150 crores. Assessee claimed the entire issue expenditure as revenue. The assessing officer held that the said expenditure was capital in nature. On appeal Tribunal held that the purchase of a rig might result in extension of its Industrial undertaking. But the deduction under section 35D of the Act would be allow for ten successive years beginning with the year in which extension of industrial undertaking was complete. It was found that the rig was under refurbishment and was not put to use and assessee had shown this as part of work in progress. No article classified as work in progress could be considered as a completed

item. As the extension of industrial undertaking could not be considered as complete during relevant assessment year, claim under section 35D cannot be allowed. (A. Y. 2005-06, 2006-07)
Dy.CIT v. Aban Offshore Ltd. (2012) 13 ITR 180 (Chennai)(Trib.)

S.36(1)(iii): Deductions- Interest on borrowed capital-Subsidiary- Equity capital-Whether interest paid is allowable or not, requires reconsideration.

The Tribunal held that as the assessee, being a holding company had a deep interest in its subsidiary, and hence if the holding company advanced borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would be entitled to deduction of interest on its borrowed loans. On appeal by the department, Held by the Supreme Court:
Issue notice on the applications for condonation of delay as also on the special leave petitions. In our view, S.A. Builders Ltd. v. CIT, needs reconsideration.
ACIT v. Tulip Star Hotels Ltd (SC).www.itatonline.org.

S.36(1)(iii):Deductions-- Interest on borrowed capital - Money lending business -Borrowals had been accepted in earlier year - Interest cannot be disallowed. (S. 14A)

Assessee is in the business of money lending. Interest on borrowed money was allowed in earlier years. The interest is allowable as deduction subject to provisions of section 14A. (A. Y. 1998-99).
Rajendra Kumar Dabriwala & Ors. v. CIT (2012) 347 ITR 353/ 247 CTR 206 / 66 DTR 420 / (2011) 202 Taxman 643 (Cal.)(High Court)

S.36(1)(iii):Deductions-Interest on borrowed capital-Wholly owned subsidiary – Borrowed funds not used by the assessee for purposes of investment in the shares of subsidiary or for making advances to RIL hence disallowance was not justified.

The assessee was engaged in the business of providing telecommunication infrastructure which mainly consisted of a Pan India Fibre Optic Network R. Ltd., wholly owned subsidiary of the assessee which is engaged in the business of providing telecommunication services. The CIT(A) and Tribunal held that the investment made by the assessee in its wholly owned subsidiary and the interest free advances given to RIL were for furthering the business interest of the assessee apart from their concurrent finding of fact that borrowed funds were not used by the assessee for purposes of investment in the shares of subsidiary or for making advances to RIL. There was no justification to make pro-rata disallowance out of deduction which is otherwise allowable u/s 36(1)(iii). (A.Y. 2003-04)
CIT v. Reliance Communications Infrastructure Ltd (2012) 71 DTR 237 / 207 Taxman 319 (Bom.)(High Court)

S. 36(1)(iii):Deductions-Interest on borrowed capital-Pre-construction interest-Interest capital receipt- Funds invested by the assessee and the interest earned were inextricably linked **with the setting up of the power plant and, therefore, the interest earned on fixed deposit of amounts borrowed cannot be treated as a revenue receipt.(S.4)**

The assessee was in the process of expansion of its business by setting up new units for generation of power. It borrowed funds for the project and incurred interest expenditure which was capitalized. A part of the funds were invested in temporary deposits and in deposits by way of margin or giving advances etc. for the purpose of expansion. Such deposits earned interest of Rs.331.58 lakhs. The assessee claimed, relying on CIT v. Bokaro Steel Ltd (1999)236 ITR 315 (SC) that the interest earned had to be reduced from the interest paid on the borrowings and was not assessable as "income". The CIT(A) accepted the claim but the Tribunal rejected it on the ground that CIT v. Bokaro Steel Ltd (1999)236 ITR 315 (SC) and the other judgements on the point were not good law in view of the Proviso to s. 36(1)(iii) inserted w.e.f. 1.4.2004. On appeal by the assessee to the High Court, Held reversing the Tribunal:
In Indian Oil Panipat Power Consortium Limited v. ITO (2009)315 ITR 255 (Delhi)(High Court) it was held that if the interest received was **"**inextricably linked**"** with the setting up of the plant, it could not be treated as income from other sources. This reasoning is in line with Bokaro Steel Ltd**,** CIT v. Karnataka Power Corp (2001) 247 ITR 268 (SC) & Bongaigaon Refinery and Petro chemicals Ltd v.CIT (2001251 ITR 329(SC). Though the proviso to s. 36(1)(iii) enacts that any amount of the interest paid towards ("in respect of") capital borrowed for acquisition of an asset or for extension of existing business regardless of its capitalization in the books or otherwise, "for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to

use" would not qualify as deduction, in all these cases, when the interest was received by the assessee towards interest paid for fixed deposits when the borrowed funds could not be immediately put to use for the purpose for which they were taken, the Courts held that if the receipt is "inextricably linked" to the setting up of the project, it would be capital receipt not liable to tax but ultimately be used to reduce the cost of the project. By the same logic, in the present case too, the funds invested by the assessee and the interest earned were inextricably linked with the setting up of the power plant and, therefore, the interest earned on fixed deposit of amounts borrowed cannot be treated as a revenue receipt.
NTPC SAIL Power Company Ltd v. CIT(2012) 210 Taxman 358 (Delhi)(High Court) www.itatonline.org

S.36(1)(iii):Deductions-Interest on borrowed capital-Interest free advances to sister concerns, held not allowable as business expenditure.

Facts regarding borrowings made immediately before the loans to subsidiaries were granted noticed by the AO would establish a direct nexus with the borrowings made by the assessee and loans granted by the assessee. If interest free loans were not made, then at least to the extent the assessee need not have borrowed from other entities. Borrowals purportedly made for meeting the day to day needs of business, to that extent could have been met from internal resources itself. Such funds then cannot be taken to be having been used for or invested in the business. To that extent there cannot be any claim for business expenditure. (A.Y. 1992 – 93)

CIT v. Harrisons Malayalam Ltd (2012) 76 DTR 335/210 Taxman 115 (Ker.)(High Court)

S.36(1)(iii):Deductions-Interest -Borrowed capital-Interest on Indian venture is allowable as business expenditure .

Assessee borrowed money for working capital loan and paid interest on said loans Assessee also advanced the amount for placing the interest free security deposit for the accommodation of MIL regional business head. Assessing Officer disallowed the proportionate interest in respect of amount kept as security deposit. The Tribunal held that as a group holding company of Indian ventures, it provides certain support / steward services to various downstream ventures in India. Mr. 'S' was south Asia head of the MIL group. It is thus clear that interest free advance in question was owing to commercial and business expediency. The disallowance of interest was not justified.(A.Y. 2003-04 & 2004-05)
Dy. CIT v. Monsanto Holdings (P) Ltd. (2012) 134 ITD 189 / 13 ITR 90 (Mum.)(Trib.)

S.36(1)(iii):Deductions--Interest on borrowed capital- Mercantile system of accounting- When the interest free fund is available with assessee , no disallowance can be made in respect of interest free advances made to sister concern. Deduction of interest could not be denied on the ground that transaction was not recorded in books of account.(S.145)

The assessee had given interest free advances to its sister concern. The Assessing Officer disallowed the claim under section 36(1)(iii) by applying 15 % rate of interest, which was confirmed by Commissioner (Appeals). Tribunal following the judgment in CIT v. Reliance Utility & Power Ltd (2009) 313 ITR 340 (Bom) (High Court), held that if assessee has interest free funds as well as interest bearing funds , then the presumption would be that investments were made from interest free funds . When interest free funds available at disposal of assessee were far in excess of interest free loans advanced to sister concerns , no disallowance could be made under section 36(1) (iii) on account of said interest free advances .Assessee which followed the mercantile system of accounting claimed deduction of interest for which no accounting entries were made . The Assessing Officer disallowed the assessee's claim , which was confirmed in appeal by Commissioner (Appeals). On appeal to Tribunal , the Tribunal held that in mercantile system of accounting deduction is allowed on accrual of liability and it is not material whether the amount is paid or not whether or not recorded in the books of account .As the liability is accrued to the assessee , which is duly acknowledged by assessee. Deduction of interest could not be denied on the ground that transaction was not recorded in books of account . Accordingly the claim of assessee was allowed.(A.Y 2005-06)
Pranik Shipping & Services Ltd (2012) 135 ITD 233/ 70 DTR 417 / 146 TTJ 543 (Mum) (Trib).

S.36(1)(iii):Deductions-- Interest on borrowed capital – Interest expenditure incurred on acquiring land on lease for setting up hotel business held to be disallowed

The assessee took loan from its holding company for acquiring a plot of land on lease. The assessee claimed deduction u/s.36(1)(iii) on interest paid to holding company on the loan taken. The Tribunal upheld the disallowance on the

ground that since interest expenditure was incurred prior to the setting of the business, in view of proviso to section 36(1)(iii), same was not allowable. (A.Y. 2007-08)
Breeze Construction P. Ltd. v. ITO (2012) 51 SOT 546 (Delhi)(Trib.)

S. 36(1)(iii):Deductions-Interest on borrowed capital-Share capital- No interest –bearing funds were utilized by the assessee for subscribing to the share capital of its subsidiary, hence additions cannot be made.

The assessee demonstrated that working capital loan was not utilized for investment with the subsidiary . The Tribunal held that though the assessee had failed to prove that the investment with the subsidiary is for the purpose of business , it has utilized interest free , funds for making the said investment as the assessee's shareholders' fund comprising of share capital and reserves and surplus , and also cash profits during the relevant year are much more than the amount invested by the assessee in the share capital of its subsidiary during the year and therefore , no part of interest on borrowings could be disallowed.(A.Y.2007-08)
Visen Industries Ltd v. Addl. CIT (2012)136 ITD 309/ 74 DTR 57/ 148 TTJ 137(TM)(Mum.)(Trib.)

S. 36(1)(iii): Deductions – Interest on borrowed capital – Interest free advances to sister concern, disallowance of interest is not justified.

Total cash profits of the assessee company in the relevant year being far more than the total interest free advances given by it to subsidiary companies it has to be presumed that the entire interest free advances were given out of interest free funds available with the assessee and no part of the borrowed funds can be said to have been diverted as non interest bearing advances to the subsidiary companies and, therefore no disallowance can be made out of interest paid on borrowings. (A.Y. 2006-07 & 2007-08)
S.P. Jaiswal Estates (P.) Ltd. v. CIT (2012) 147 TTJ 649/74 DTR 294 (Kol.)(Trib.)

S.36(1)(iii):Deductions- Interest on borrowed capital – Funds advanced to sister concern out of business exigencies – Not in nature of personal diversion, hence to be allowed.

Assessee as well as its sister concern being engaged in the same field of business, and the assessee having advanced funds to the sister concern out of business exigenicies, it cannot be said to be in the nature of personal diversion of funds and therefore, interest on borrowings could not be disallowed. (A.Y. 2002-03, 2003-04, 2006-07 & 2007-08)
Quintegra Solutions P. Ltd. v. ITO (2012) 148 TTJ 471 (Chennai)(Trib.)

S.36(1)(vii):Deductions--Bad debts – Banks-Banks are entitled to bad debts and provision for doubtful debts - Both deductions- Circulars are binding on department . [S. 36(1)(viia),119]

Provisions of 36(1)(vii) and 36(1)(viia) are distinct and independent items of deduction and operate in their respective fields; proviso to s. 36(1)(vii) operates only in cases falling under cl. (viia) to limit the deduction to the extent of difference between the debt or part thereof written off in the previous year and credit the balance in the provision for bad and doubtful debt made under cl. (viia) and, therefore, scheduled and non-scheduled commercial banks are entitled to full benefit of deduction of provision for bad and doubtful debts under s. 36(1)(viia). Under section 119 the CBDT is entitled to issue Circulars to explain or tone down the rigours of law and to ensure fair enforcement of its provision. These circulars have the force of law and are binding on the income –tax authorities. Though they can not override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specifief circumstances . So long as the circular is in force , it aids the uniform and proper administration and application of the provisions of the Act)(UCO Bank v.CIT (1999) 237 ITR 889(SC) followed.)
Catholic Syrian Bank Ltd. v. CIT (2012) 343 ITR 270 / 68 DTR 1 / 248CTR 1/206 Taxman 182/ (2012) 3 SCC 784 / Vol. 42 Tax LR May 382 (SC)
Dhanlakshmi Bank Ltd. v. CIT (2012) 343 ITR 270 / 68 DTR 1 / 248CTR 1/206 Taxman 182/ (2012) 3 SCC 784 / Vol. 42 Tax LR May 382 (SC)

S.36(1)(vii): Dedcutions –Bad debts- Ordinary course of business-Allowed as deduction.

The court held that in view of the concurrent finding of fcats the bad debt incurred in the ordinary course of business held to be allowed as deduction.(A.Y.2003-04)
CIT v. Smifs Securities Ltd.(2012)348 ITR 302/ 75 DTR 417/252 CTR 233 (SC)

S.36(1)(vii): Deduction-Bad debt- Provision for non –performing assets-Not entitled to deduction of the provision made by it for non performing assets. (S.37(i))

The question before the Court was ,whether the Tribunal was right in law in holding that the assessee is not entitled to deduction of the 'provision' made in respect of non performing assets which are considered as irrecoverable. The Court following the Sothern Technologies Ltd v. Jt.CIT (2010) 320 ITR 577 (SC), held that assessee is not entitled to deduction of the provision made by it for non-performing assets .(A.Y. 1998-99)

Sundarm Finance Ltd v. ACIT(2012) 252 CTR 353/76 DTR 417 /210 Taxman 280(SC.)

Editorial: Refer , Sundaram Finance Ltd v. ACIT (2009) 318 ITR 452(Mad.)(High Court)

S.36(1)(vii):Dedctions-Bad debts-Money lending- Money lending business allowable as bad debts.

Assessee has advanced the money in the course of money lending business, therefore the claim of bad debt was allowable under section 36(1)(vii) read with second limb of section36(2).(A.Y. 2000-01)

All Grow Finance & Investment (P) Ltd. v. CIT (2011) 338 ITR 496 /(2012) 66 DTR 131/ 249 CTR 361 (Delhi)(High Court)

S.36(1)(vii):Deductions- Bad debts - Share broker - Brokerage offered to tax, the principal debt qualifies as a "bad debt" under section 36(1)(vii) r.w.s. 36(2).

The assessee, a share broker, claimed deduction under section 36(1)(vii) of Rs. 28.24 lakhs as a "bad debt" being the amount due to him by his clients on account of transactions of shares effected by the assessee on their behalf which had become irrecoverable. The Assessing Officer rejected the claim on the ground that as the assessee had offered only the amount of brokerage as income and not the entire amount due from the client, the condition in section 36(2) that the amount of bad debts must be taken into account in computing the total income was not satisfied. The CIT(A) & the Special Bench of the Tribunal (Dy.CIT v. Shreyas .S.Morakhia [(2010)40 SOT 432 (SB)] allowed the claim. On appeal by the department to the High Court, Held dismissing the appeal:

Section 36(2)(i) provides that a deduction on account of a bad debt can be allowed only where such debt or part thereof has been taken into account in computing the income of the assessee. The debt comprised of the value of the shares transacted and the brokerage payable by the client. The brokerage as well as the value of the shares constituted a part of the debt due to the assessee since both arose out of the same transaction. The fact that the liability to pay brokerage arose at a point in time anterior to the liability to pay the value of the shares transacted makes no material difference to the position. As the brokerage from the transaction of the purchase of shares had been taxed in the hands of the assessee as business income, the debt or part thereof has been taken into account in computing the income of the assessee and the requirements of section 36(1)(vii) r.w.s. 36(2) were satisfied. (Issue regarding the value of the shares which remain in the hands of the assessee which has to be adjusted against the amount receivable from the client left open) (CIT v. T. Veerabhadra Rao(1985) 155 ITR 152 (SC) CIT v. Bonanza Portfolio Ltd.(2010) 320 ITR 178 (Delhi) followed).(A.Y.1998-99)

CIT v. Shreyas S. Morakhia (2012) 342 ITR 285 /249 CTR 30/206 Taxman 32/69 DTR 105 / (2012)Vol.114(2) Bom.L.R.0942(Bom.)(High Court)

S.36(1)(vii):Deductions- - Bad debts – Interest income-Interest income offered as income in earlier years which was not realized written back is allowable as bad debts.

Assessee a financial institution which is governed by RBI guidelines offered interest in earlier years as income and assessed as such, as the amount was not realised the same was written back, when it is found that the same is not recoverable. The said amount is allowed as bad debt. (A. Y. 2000-01).

CIT v. Industrial Finance Corporation of India Ltd. (2012) 66 DTR 490/ 248 CTR 69 /(2011) 201 Taxman 75 (Delhi)(High Court).

S. 36(1)(vii):Deduction-Bad debt - Share broker- Claim was allowed.

The Court following the judgment in CIT v.Shreyas S.Morakha (2012) 342 ITR 2985(Bom.)(High Court) dismissed the appeal of revenue and allowed the bad debts. (A.Y. 2004-05)

CIT v. Kotak Securities Ltd (No.2) (2012) 346 ITR 352 (Bom.)(High Court)

S.36(1)(vii): Deductions-- Bad debts - Provision for bad debts - Claim of bad debts can be allowed only to the extent of opening balance in the provision for bad and doubtful debts account as at the beginning of the year.

The Tribunal held that from a conjoint reading of clause (vii) and (viia) it clearly emerges that opening balances of the provision is required to be adjusted against the amount of bad debts written off during the year for computing the amount deductible under cl. (vii) and it is only thereafter that the provision is made under clause (viia) in respect of the remaining debts outstanding as at the end of the year. Accordingly the Tribunal held that the Commissioner (Appeals) was justified in directing the Assessing Officer to restrict the claim of bad debts by the amount of opening balances in the provision for bad debt and doubtful debts account as at the beginning of the year instead of the closing balance then allowing deduction under section 36(1)(viia). (A. Y. 2000-01).

The Siam Commercial Bank PCL v. Dy. Director of IT (2012) 134 ITD 463 / 66 DTR 369 / 144 TTJ 235 (Mum.)(Trib.)

S.36(1)(vii):Deductions-- Bad debts-Business loss-Money lending is one of the ancillary objects hence the loss was not allowable .[S. 28(1), 37(1)]

Money lending is one of the ancillary objects of assessee company, as the loan advanced was not in the course of money lending, the loss is neither deductible as bad debts nor business expenditure.(A.Ys. 2001-02 & 2004-05)

Maini Shipping P.Ltd v.ACIT (2012) 13 ITR 440 (Mum.)(Trib.)

S.36(1)(vii) :Dedcutions--Bad debts-Individual debtors account-Amount debited to profit and loss account it is not necessary that individual debtors account also be closed.

It was held that after insertion of Explanation to Section 36(1)(vii), taxpayer is required not only to debit profit and loss account but simultaneously also reduce loans and advance/debtors account to extent of corresponding amount so that, at the end of year, amount on loans and advances/debtors account is shown as net provisions for bad debt. Therefore, in order to claim deduction on account of bad debt, it is not necessary that individual debtors account has to be closed by crediting said account to extent of provision for bad and doubtful debt is sufficient. (A.Y. 2006-07)

Arrow Coated Products Ltd. v. ACIT (2012) 136 ITD 315/77 DTR 314 (Mum.)(Trib.)

S. 36(1)(vii):Deductions - Bad-debt –Write off- After the amendment with effect from April 1, 1989, it is sufficient to write off the bad debts in the account hence the bad debt is to be allowed

Though the fee disclosed as bad debt had been taken as income of the previous year in respect of the invoices relating to the eight parties and subsequently the assessee had disclosed the debts as irrecoverable and written them off in the books of account for the AY in question. After the amendment with effect from April 1, 1989, it is sufficient that the assessee had written off the bad debts in the account and the debt has to be allowed. Thus, the claim of the bad debt was allowed. (A.Ys. 2001-02, 2002-03 & 2003-04)

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

S.36(1)(vii): Deduction-Bad-debts –Bank- Non-rural branch - Bad-Debt written off relates to non- rural branch is held to be entitled for deduction.

Tribunal following the judgment of Apex court in Catholic Syrian Bank Ltd v.CIT (2012) 343 ITR 270 (SC), the assessee bank is held to be entitled to deduction u/s 36(1)(vii) in respect of bad-debt written off relating to its non-rural branch. (AY 2001-02)

Allahabad Bank v. Dy. CIT (2012) 137 ITD 290 (Kol.)(Trib.)

S.36(1)(viia): Deductions-Bad debt qua sub-standard assets of banking company

Licence of the assessee, a banking company, having been suspended by the RBI vide order dt. 29th Sept. 2011, the case clearly falls under s. 36A(1)(b) of the Banking Regulation Act, 1949-Assessee company was obliged to classify its assets according to RBI norms as any other non scheduled bank irrespective of the fact that its banking licence stood cancelled by the RBI prior to 31st March, 2002. Therefore, assessees claim for deduction u/s. 36(1)(viia) in respect of sub standard assets is allowed to the extent it relates to loss or doubtful assets as per the RBI norms and is otherwise consistent with the provisions of s. 36(1)(viia), subject to the confirmation that the notification u/s. 36A(2) of the Banking Regulation Act was made on 21st Sept 2002, i.e, subsequent to 31st March, 2002. Merely because it was not able to canvass the legal basis of its claim before the authorities below would not preclude the assessee from doing so before the Tribunal . Contention of the assessee based on the provisions of the applicable law cannot be considered as a new plea, thus matter is restored back to the AO for verification and appropriate findings in accordance with law. (A.Y. 2002-03)

Vinayak Local Area Bank Ltd v. Dy. CIT (2012) 76 DTR 129 / 149 TTJ 261 (Jaipur) (Trib.)

S.36(1)(viii): Deductions-- Financial corporation – Dividend- Interest on short term deposit- Service charges on SDF loans is not income derived from business of providing long term finance.

Assessee claimed deduction under section 36(1)(viii), in respect of following items of income (a) Dividend received in respect of redeemable preference share in companies (b) Interest on short deposits with banks (c) Service charges on SDF loans. Assessing opined that these were income not 'derived from' business of providing long term finance. Tribunal and High Court up held the view of Assessing Officer.(A. Ys. 1999-2000 to 2004-05, 2007-08)

National Co-operative Development Corporation v. ACIT (2012) 204 Taxman 6/ 65 DTR 295 (Delhi)(High Court).

S.36(1)(viii): Deductions-- Special reserve -Financial corporation - Amount transferred from general reserve to special reserve account for doubtful account was deductible prior to 1st April, 1998. [S. 41(4A)]

Assessee a financial institution claimed deduction being special reserve created under section 36(1)(viii). Assessee transferred certain amount to provision for bad and doubtful debts accounts. The Assessing Officer disallowed the claim. The Court held that prior to assessment year 1998-99 the only requirement for claiming deduction under section 36(1)(viii) was creation of reserve equivalent to 40 percent of total income by debit to the profit and loss account. Only from the assessment year 1998-99 that the amendment provided for such reserve to be maintained intact and in case of any withdrawal of tax under section 41(4A) in the year of withdrawal .Provision being prospective. Deduction is allowable as bad debt. (A. Ys. 1993-94 to 1998-99).

CIT v. Industrial Finance Corporation of India Ltd. (2012) 66 DTR 490 /248 CTR 69/ (2011) 201 Taxman 75 (Delhi)(High Court)

S. 36(1)(viia): Deductions - Bad-debt – Provision for bad debts – Newly created during the year – Not to be netted against the amount written back or reversed while computing deduction

Provision for bad and doubtful debts newly created during the year under consideration should not be netted against the amount written back or reversed while computing deduction u/s 36(1)(viia). (A.Y.2007-08)

The Kanpur District Coop. Bank Ltd. v. ACIT (2012) 147 TTJ 744 (Cochin)(Trib.)

S.37(1):Business expenditure- Capital or revenue- Encroachment-Removal of encroachments is allowable as revenue expenditure.

Expenditure towards removal of encroachments in and around technical area of airport for safety and security is merely for purpose of removal of disability hence allowable as revenue expenditure. (A.Y. 1998-99)

Airports Authority of India v. CIT (2012) 340 ITR 407/247 CTR 149/66 DTR 440 / 205 Taxman 84 (Mag.)/(2012) Tax.LR 497 (Delhi)(FB)(High Court)

S.37(1): Business expenditure-Capital or revenue–Software-Purchase of Software application- Improvement of leased premises-Both allowable as revenue expenditure.

Expenditure incurred on purchase of software application is allowable as revenue expenditure. Expenditure incurred on improvements of lease hold premises viz. expenses of flooring, partition, wiring, false ceiling, roofing, air-conditioning unit and duct, electric wiring laying network for setting up computers and on purchase of furniture on improvement of leasehold premises allowable as revenue expenditure.(A.Ys. 2001-02 & 2002-03)

CIT v. Amway India Enterprises (2012) 65 DTR 313 (Delhi)(High Court)

S.37(1): Business expenditure- Capital or revenue- Suspension of one manufacturing activities-Severance cost of employees is allowable as business expenditure.

The assessee company had started manufacturing of powdered soft drink. During the accounting year relevant to the assessment year 2003-04, it decided to stop its manufacturing activity as it was found to be non-profitable. Many of employees who were directly in the manufacturing activity were laid off and the severance cost to those employees were paid. Assessee continued to do the trading activity. The Court held that suspension of one of the activities did not amount to closer of business, hence the expenditure was allowable.(A.Y. 2003-04)

CIT v. Kjs India P.Ltd. (2012) 340 ITR 380 (Delhi)(High Court)

S.37(1):Business expenditure-Capital or revenue-Membership of club-ISO certificate.-Both allowable as revenue expenditure.

Expenditure incurred for acquiring membership of clubs is revenue expenditure. ISO certificate would only certify the quality which is already maintained by the assessee in the manufacturing process and does not confer any benefit of enduring credibility, hence the expenditure is revenue in nature.

CIT v. Infosys Technologies Ltd. (2012) 65 DTR 347 (Karn.)(High Court) (A.Ys. 1994-95 to 1996-97)

CIT v. Infosys Technologies Ltd. (2012) 65 DTR 271/ 205 Taxman 389 (Karn.)(High Court) (A.Y. 1997-98)

S.37(1): Business expenditure-Contribution to traffic police- Not allowable-Repairs and renovation of leasehold premises is allowable as revenue expenditure.

The contribution made to traffic police can at the most be considered as donation and cannot be considered as wholly and exclusively incurred for the purpose of business. Expenditure incurred on repairs and renovation of the leasehold premises and done in connection with the business of the assessee to improve the ambience of the office was revenue in nature and allowable as business expenditure.(A.Ys.1993-94, 1994-95 & 1996-97)

CIT v. Infosys Technologies Ltd. (2012) 65 DTR 353/ 246 CTR 371 (Karn.)(High Court)

S.37(1): Business expenditure - Capital or revenue –Stock in trade- Acquiring unfinished works and inventories of another company – Stock-in-trade - Revenue expenditure.

The assessee is engaged in the business of construction of buildings. The assessee entered into an agreement with AFEL on July 1, 1992, to take over by assignment and complete all the pending projects / contracts / work in progress remaining to be completed by transfer company and in future, take up by itself, housing projects. Apart from those projects, the agreement also contemplated takeover of future projects etc. The assessee claimed the amount paid as revenue expenditure. The Assessing Officer held that the said expenditure was capital in nature, which was confirmed by the Tribunal. On appeal to High Court, the Court held that what was transferred under the agreement was in the nature of stock-in-trade and not entire building division of the transferor and there were no clauses to lead to inference that with the transfer of the on going projects and that the projects awaited agreements to be signed, the transferor company had transferred its entire business. The expenditure was deductible as revenue expenditure. (A. Y. 1993-94).

Alacrity Housing Ltd. v. CIT (2012) 341 ITR 264 (Mad.)(High Court)

S.37(1): Business expenditure –Swapping –Foreign currency- Expenditure in connection with swapping of foreign currency is allowable expenditure.

Expenditure incurred in connection with swapping of foreign currency is allowable as business expenditure. (A. Ys. 1993-94 to 1998-99)

CIT v. Industrial Finance Corporation of India Ltd. (2012) 66 DTR 490 / (2011) 201 Taxman 75 (Delhi)(High Court)

S.37(1): Business expenditure – Stock broker-Margin money-Payment made by stock broker for late submission of margin certificate, trading beyond exposure limit is allowable deduction, it is not infraction of law.

Assessee a stock broker has made payment to stock exchange for violation of trading beyond exposure limit, late submission of margin certificate and delay in making deliveries of shares due to deficiencies were deductible as a business expenditure, as the amounts were paid during course of business of the assessee's business and there was no infraction of law. (A. Y. 2000-01).

CIT v. Prasad and Co. (2012) 341 ITR 480 / 69 DTR 76 (Delhi)(High Court)

S.37(1): Business expenditure –Foreign tour-Wife of Chairman- Expenditure incurred on foreign tour of chairman's wife is held not allowable.

The assessee company claimed the foreign tour expenses of the chairman's wife who accompanied him in foreign tour held to be not allowable when she is not occupying any official position in the company. (A. Y.1996-97).

CIT v. S & S Power Switchgear Ltd. (2012) 67 DTR 59 / 247 CTR 604 (Mad.)(High Court)

S.37(1):Business expenditure- Corporate membership-Club-Subscription for obtaining corporate membership in club is allowable as revenue expenditure.

Assessing Officer has held that the subscription of corporate membership as capital expenditure. Tribunal held the said expenditure as revenue in nature . On appeal by revenue the High Court affirmed the view of tribunal and held allowable as revenue expenditure.(A.Y. 1999-2000)

CIT v. Infosys Technologies Ltd (2012) 205 Taxman 250 (Karn.) (High Court)

S.37(1):Business expenditure-Royalty payment held to be revenue expenditure-Foreign tour expenditure of wife of president to attend budget conference held to be allowable business expenditure.

Assessee has entered into an agreement with Luwa Switzerland in respect of obtaining new technology and know how and licence fee at at 5 percent on sales of cost of standard , as per approval given by the Reserve Bank of India. The Assessing Officer held that the expenditure of capital in nature. The first appellate authority and Tribunal held that the expenditure is of revenue in nature . On appeal by revenue the Court held that since licence was granted as per agreement subject to payment of royalty to make use of know how- and more over royalty payable was depending upon sales made and export the Tribunal was justified in treating the same as revenue expenditure. The president of the assessee company had gone abroad with his wife to attend budget conference . The assessee claimed deduction of said expenditure . The Assessing Officer held that the assessee had failed to prove that accompanying of the wife of the president on a foreign tour was for business purpose , and therefore, assessee was not entitled to deduction , which was confirmed by Commissioner (Appeals) .On appeal to the Tribunal , the Tribunal held that tour of the president was for the purpose of business obligation and therefore , assessee was entitled to claim deduction . On appeal by revenue the High Court confirmed the view of Tribunal (A.Y. 1997-98)

CIT v. Luwa India Ltd (2012) 205 Taxman 342/75 DTR 367(Karn.) (High Court)

S.37(1):Business expenditure- Commission-Managing director - Commission to CMD for personal guarantee may be treated as "ploy to divert funds" hence not allowable.

The assessee claimed a deduction for the "guarantee commission" of Rs. 1.15 crores that it paid to its Chairman Shri. Vijay Mallya. The AO & CIT (A) disallowed the claim on the ground that the so-called guarantee was a mere signature on a document, not backed by specific assets and that as the commission payment exceeded Mr. Mallya's net wealth of Rs. 70 lakhs, it was an "innovative method of diverting income from the company" and an "unwarranted benefit" to Vijay Mallya. However, the Tribunal allowed the claim. On appeal by the department, held reversing the Tribunal:

None of the bankers had obtained details of the assets & liabilities of Vijay Mallya in India or abroad. He stood guarantor in respect of total borrowings of Rs. 115 crores and received commission of Rs. 1.15 crores even though his net worth was hardly Rs. 70.47 lakhs. Also, as he was a NRI, the permission of the RBI ought to have been taken which was not done. The assessee paid the MD commission "on the pretext" of paying guarantee commission and it is a "clear case" of "a ploy to divert the income of the companies under his management". The payment was characterized as commission to overcome the RBI's directions, the provisions of s. 309 of the Companies Act and was not a lawful payment and could not be allowed as a deduction u/s 37(1).

CIT v. United Breweries Ltd. (2012) 204 Taxman 244 (Karn.)(High Court) www.itatonline.org

S.37(1):Business expenditure-Unaccounted expenditure-Setoff-Block assessment-Unaccounted expenditure to be set-off against unaccounted income despite Expl. to s. 37(1) & proviso to s. 69C. Govt. criticized for apathy towards black money.(S.69C,158BC)

Pursuant to a search u/s 132, an assessments u/s 158BC was made and various additions were made. One of the issues was whether if the AO makes an addition of unaccounted income on the basis of seized records, he is required to give a deduction for the unexplained expenditure shown in the same records. Held by the Court:

(i) The assessee was engaged in unaccounted business and the seized accounts showed unaccounted receipts and unaccounted expenditure. There is no justification for doubting the entries found in the seized records pertaining to expenditure while accepting the income found recorded therein. When the Department relies on the seized records for estimating undisclosed income, there is no reason why the expenditure stated therein should be disbelieved merely because there is no written agreement and that payments were not made through cheques or demand drafts. This would be unrealistic and not justified. The statute authorizes assessment of "undisclosed income" which has to be arrived at after allowing expenditure incurred by the assessee whether it be accounted in the regular books or not. The Explanation to s. 37(1) does not apply because the unaccounted business is not an "illegal business". Section 69C is concerned, in the first place the proviso introduced with effect from 01/04/1999 does not apply to the block assessment for the period covered herein and secondly we do not think excess expenditure over accounted expenditure in business is covered by Section 69C itself.

(ii) We are constrained to observe about the effort made by us to persuade the Central Government to take steps to prevent generation and circulation of black money. Through a detailed interim order we appraised the Government that unless prohibition is introduced against cash dealings particularly in property sales in film industry and the like against at least for payments over a certain limit in cash, black money generation and circulation cannot be controlled because the disincentives on cash dealings contained under the various provisions of the Income Tax Act have failed to achieve the objective. Further, by prohibiting use of cash in major transactions terror and mafia funding and corruption could be arrested to a large extent. Above all, the worst enemy of our economy that is, circulation of high denomination counterfeit currencies (presently estimated at 7000 crores) could be prevented to a large extent. Unfortunately, the response of the Central Finance Ministry is not at all encouraging in as much as Government wants status quo to continue to the detriment of the economic interest of the country and the people as a whole. Our limitations while exercising appellate jurisdiction u/s 260A inhibit us from initiating any proceedings or issuing direction against the Central Government. However, we express our anguish on the attitude of the Central Government to have created this vicious situation and allow the same to continue. (A.Y. 1988-89 to 1997-98)

CIT v. P. D. Abrahm (Ker)(High Court)www.itatonline.org

S.37(1): Business expenditure- Keyman insurance policy-Premium paid on key man insurance policy is allowable as deduction.

The premium paid for keyman insurance policy is allowable as deduction .The nature of expenditure is to be seen at the time it is incurred. Department could not sit on the armchair of the assessee and decide as to whether it was appropriate on business expediency for the assesse to incur such an expenditure or not. The argument of the department that it is a colourable device is rejected by the High Court. (A.Ys 1994-95 to 2000-2001)

CIT v .Escorts Heart Institute & Research Centre Ltd (2012) 249 CTR 141/69 DTR 250 (Delhi) (High Court)

S.37(1):Business expenditure-C&F handling charges-No evidence of rendering service- Cryptic order-Tribunal's order not dealing with finding of "sham" transaction is "perverse", allowing of expenditure held to be not justified.

The AO disallowed payments made by the assessee to M/s Blue Chip & Co towards "C&F handling charges" on the ground that the transactions were a "sham" and intended to provide interest-free funds to Vijay Mallya& his wife Samira Mallya. This was confirmed by the CIT (A) though the Tribunal allowed the claim on the ground that a similar issue had been allowed in the earlier years. On appeal by the department, Held reversing the Tribunal:

It is not in public interest to accept such a claim when there is no evidence of rendering any service by Blue Chip & Co to the assessee. The sole object of diverting funds to Blue Chip & Co was to facilitate passing of funds as interest free loan to Vijay Mallya and Samira Mallya. The agreement between the assesee and Blue Chip was found to be a "sham transaction" by the AO & CIT (A). The Tribunal committed grave error by recording the order as if it is a consent order though the DR had categorically defended the AO & CIT (A)'s order. Also, the earlier orders of the Tribunal had been challenged before the High Court. Therefore the findings of the Tribunal are wholly erroneous, cryptic, perverse, laconic and perfunctory.

CIT v. Punjab Breweries Ltd(2012) 71 DTR 65 (P&H.)(High Court)

S. 37(1): Business expenditure – Travel allowance - Disallowance to be calculated with respect to each journey undertaken.(Rule 6D)

Intrinsic evidence available in the Rule 6D demonstrates that the disallowance which is available qua an employee or such other person ought to be calculated in respect of each of such journey undertaken. (AY 1989-90)

CIT v. SRF Ltd. (2012) 342 ITR 106 / 71 DTR 199 (Delhi) (High Court)

S.37(1):Business expenditure- Royalty-Sister concern-Held to be allowable as no substantial question of law. (S.260A)

The assessee had made payments to sister concern for the use of trade mark which was held to be genuine and accordance with business exigencies . The Tribunal has followed its own decision for the earlier years , which has been accepted by revenue. The High Court up held the order as no substantial question of law would arise.(A.Y.2005-06)

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

S.37(1):Business expenditure-Capital or revenue- Software expenditure- Expenditure for indigenization of software is revenue expenditure.

The assessee had undertaken expenditure for indigenization of software . The Tribunal noted that software is a product subject to high absolescence hence the same is allowable as revenue expenditure. High Court affirmed the view holding that no substantial question of law arises. (A.Y. 1998-99)

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

S.37(1): Business expenditure- Fully convertible debenture - Expenditure on issue of debentures is allowable as deduction.

Expenditure on fully convertible debentures could not be treated as expenditure on equity and was deductible even though the time and conversion price was fixed (CIT v. Secure Meters Ltd. (2003) 321 ITR 611 (Raj)(SLP dismissed) followed)(A.Y. 2005-06)

CIT v. Havells India Ltd(2012) 208 Taxman 114 / 73 DTR 57/253 CTR 271 (Delhi) (High Court)

S.37(1): Business expenditure- Capital or revenue- Construction of flyovers, pedestrain facilities – Expenditure on construction of flyovers, is of revenue expenditure.

The assessee was given license to conduct and carry on liquor trade in Delhi. On the basis of the minutes of the meeting construction of flyovers etc was a precondition or an obligation imposed and had to be complied with to enable the assessee to conduct business of sale of country liquor in Delhi. The Assessing Officer has held that the said expenditure is capital in nature. Tribunal held that the said expenditure is revenue in nature. On appeal by revenue the Court held that the assessee a corporation established by the Government NCT Delhi having constructed flyovers, etc as a precondition or obligation imposed by Delhi Administration for permitting it to carry on country liquor trade in Delhi which were to be transferred to the Delhi Government, no enduring benefit or advantages has accrued to the assessee and therefore, expenditure incurred by the assessee on the construction of flyovers etc. was revenue expenditure and not capital expenditure. (A.Ys. 1990-91 & 1991-92)

CIT v. D.T.T.D.C. LTD (2012) 71 DTR 115 / 206 Taxman 507 (Delhi)(High Court)

D.T.T.D.C. LTD v.CIT (2012) 71 DTR 115 / 206 Taxman 507 (Delhi)(High Court)

S.37(1): Business expenditure- Education expenses of director- Expenditure could not be regarded as wholly and exclusively incurred for purpose of business hence not allowable.

The assessee company incurred certain expenditure on education of one of its directors , who had undergone a course at United Kingdom from University of Nottingham , and claimed deduction of the same as business expenditure. The Tribunal held that the expenditure in question was not expenditure wholly and exclusively incurred for the purpose of business. On appeal the High Court held that expenditure could not be regarded as wholly and exclusively incurred for the purpose of business. Accordingly the appeal was dismissed. (A.Y. 2006-07)

Natco Exports (P) Ltd. v. CIT (2012)345 ITR 188/ 206 Taxman 491 (Delhi) (High Court)

CIT v. Career Launcher India Ltd. (2012) 71 DTR 161 / 207 Taxman 28 / 250 CTR 240 (Delhi)(High Court)

S.37(1):Business expenditure- Expenditure-Know–how–Preliminary survey- agreement providing for preliminary survey in respect of existing facilities of the assessee and feasibility of proposed project , as no transfer of technical know-how section 35AB cannot be made applicable ,however the expenditure is allowable under section 37(1). (S. 35AB).

The agreement provided for a preliminary survey in respect of the existing facilities of the assessee and on feasibility of a proposed project. Commissioner (Appeals) and Tribunal held that, as there was no transfer of know how involved provisions of section 35AB cannot be applicable, however the same is deductible u/s 37(1). On appeal to the High Court, also confirmed the view of Tribunal (A.Y. 1994-95)

CIT v. Raymond Ltd. (2012) 71 DTR 258/ 209 Taxman 154 (Bom.)(High Court))

S.37(1): Business expenditure – Capital or revenue - Premium on redemption of debenture is held to be revenue expenditure.

The amount expended towards premium is, properly construed as liability which the assessee incurred for the purpose of business in order to obtain the use of funds for the period covered by the issue of non convertible debentures. Therefore the premium on redemption of debenture is allowable as revenue expenditure. (A.Y. 1992-93)

CIT v. Raymond Ltd. (2012) 71 DTR 253/208 Taxman 454(Bom.)(High Court)

S. 37(1): Business expenditure – Capital or revenue – Pre-operative expenses related to salary, wages, etc. held as revenue expenditure.

It was held that pre-operative expenses related to various item i.e. salary, wages, power, travelling, legal and professional fees constituted revenue expenditure. (AY 1997 -98)

CIT v. Raymond Ltd. (2012) 71 DTR 265/209 Taxman 65 (Bom.)(High Court)

S.37(1):Business expenditure- ESOP-Market price-Option price-Difference between market price & option price of ESOP shares deductible.

The assessee allotted shares to its employees under an ESOP scheme. In accordance with the Employees Staff Option Plan and Employee Staff Purchase Scheme Guidelines, 1999 issued by SEBI, the difference between the market value of the shares and the value at which they were allotted to the employees was debited to the P&L A/c. This was claimed as a deduction under the head "staff welfare expenditure". The AO allowed the claim though the CIT revised the assessment u/s 263 and held that the expenditure was notional and contingent in nature and not allowable as a deduction. On appeal, the Tribunal {(2004) S.S.I Ltd. vs. DCIT (2004) 85 TTJ 1049 (Chennai)(Trib.) held that as the SEBI regulations required the difference between the market price of the shares and the price at which the option is exercised by the employees to be debited to the P&L A/c as expenditure, it was an ascertained expenditure and not contingent in nature. On appeal by the department to the High Court, held dismissing the appeal:

As far as the Employees Stock Option Plan is concerned, as rightly pointed out by the Tribunal, the assessee had to follow SEBI direction and by following such directions, the assessee claimed the ascertained amount as liability for deduction. There is no error in the order of the Tribunal. (A.Y. 2001-2002)

CIT v. PVP Ventures Limited (Mad.)(High Court), www.itatonline.org

S.37(1):Business expenditure- Lease premium- Capital expenditure-Lease Premium is capital expenditure & not allowable as "advance rent".

The assessee entered into a lease agreement with NOIDA pursuant to which it acquired land on a 90 year lease. The assessee paid Rs. 2.53 crores as premium and agreed to pay annual lease rent of 2.5% of the premium. The assessee was not entitled to transfer the land before erection of the building without NOIDA's permission NOIDA. There were other restrictions on the assessee's right to transfer, assign or alienate the land. It was entitled to mortgage the land. Non-fulfillment or violation of terms and conditions of the lease agreement could result in cancellation of the lease. The assessee amortized the premium over the period of the lease and claimed the proportionate part as a revenue deduction. The AO accepted the assessee's claim for 15 years. Thereafter, the AO, CIT(A) & Tribunal rejected the claim on the ground that the lease conferred an enduring advantage and the premium was capital expenditure as held in JCIT v Mukund Limited (2007) 291 ITR (AT)(SB) 249 (Trib). On appeal by the assessee, held dismissing the appeal:

(i) S. 105 of the Transfer of Property Act brings out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is capital in nature and the latter is revenue in nature. There may be circumstances where the parties may camouflage the real nature of the transaction by using clever phraseology. In some cases, the so-called premium is in fact advance rent and in others rent is deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps, having regard to the other circumstances, to ascertain the intention of the parties;

(ii) On facts, the premium paid is capital in nature and cannot be treated as "advance rent" because (a) it was a precondition for securing possession and was a one-time consideration; (b) annual lease rent was payable separately; (c) there is no material to support the contention that the annual rent was depressed and does not reflect the market rent; (d) there is no material to support the argument that the amount of Rs. 2.53 crore paid over 23 years ago did not constitute the true and real consideration for creating an interest in the property; (e) the registration and stamp duty and charges were borne by the lessee; (f) the restrictions imposed on the lessee regarding transfer and user of the land were consistent with the nature of interest created, i.e. lease hold rights; (g) the tenure of the lease was quite substantial and virtually created ownership rights in favour of the lessee & (h) exclusive possession was handed over to the assessee at

the time of creation of the lease (CIT v. Panbari Tea Co. Ltd. (1965) 57 ITR 422 (SC) & Durga Das Khanna v CIT (1969) 72 ITR 796 (SC) followed; Madras Industrial Investment Corp.Ltd. v CIT (1997) 225 ITR 802 (SC) distinguished);

(iii)The fact that the AO accepted the assessee's claim for 15 years does not mean that he cannot change his stand because there is no "res judicata" in income-tax law and erroneous or mistaken views cannot fetter the authorities into repeating them, by application of a rule such as estoppel, for the reason that being an equitable principle, it has to yield to the mandate of law. A blind adherence to the rule of consistency would lead to anomalous results & engender the unequal application of laws and direct the tax authorities to adopt varied interpretations, to suit individual assesses, subjective to their convenience, – a result at once debilitating and destructive of the rule of law (Radhasaomi Satsang v. CIT (1992) 193 ITR 321 (SC) distinguished / explained). (A.Y. 2004-05)

Krishak Bharati Cooperative Ltd. v. ACIT (Delhi)(High Court), www.itatonline.org

S.37(1):Business loss- Advance for purchase of property-Real estate business-Bad debt-Amount advanced for purchase of property, property not transferred and amount not repaid, loss is allowable as business loss [S. 36(1) (vii), 36(2)].

The assess is in the business of real estate. The assessee advanced the amount for purchase of property. In spite of reminders neither the physical possession was given not the amount was returned. The Assesee claimed the said amount as bad debt which was disallowed by the Assessing Officer which was confirmed by the Commissioner (Appeals). On appeal to the tribunal the tribunal allowed the loss under section 37 of the income-tax Act. On appeal by the revenue, the court dismissed the appeal of revenue and held that, merely because the assessee also had rental income did not establish that the properties , which were being purchased from Gulmohar Estate were tobe treated as investment and not for stock in trade. Accordingly the loss was deductible, order of Tribunal confirmed. (A. Y. 2004-05)

CIT v. New Delhi Hotels Ltd (2012) 345 ITR 1 (Delhi) (High Court)

S.37(1):Business expenditure-Financial assistance to manufacturers- Allowable as business expenditure.

Assessee was a manufacturer of standardized herbal chemicals. Expenditure incurred by the assessee in providing help to the farmers by supplying seedlings, fertilizer and financial assistance for growing herbal plants which were required for manufacture of the assessee's product was held deductable under section 37 (1) of the Act.(2004-05)

CIT v. Sami Labs Ltd. (2012) 72 DTR 172 (Karn.)(High Court)

S.37(1):Business expenditure- Capital or revenue expenditure-Settlement and legal charges-Expenses incurred by assessee who merely given licence and permission to conduct and manage the restaurant is allowable as revenue expenditure.

The assessee who was owning and conducting a hotel handed over the restaurant to run on contract basis for a period of fifteen years There was certain dispute ,the matter was settled by consent term under which the assessee paid Rs 10 lakhs to the conductor and also incurred the legal expenses of Rs 1, 65, 500. On reference to the High Court by the revenue the Court held that this payment was made for resolving disputes and removing hindrance in the management and running of the restaurant and was incurred as a matter of commercial expediency the payment to a person who was a bare licensee and had no interest by way of settlement charges as well as the legal expenses incurred by the assessee is allowable as revenue expenditure. Question was answered in favour of assessee.

CIT v. Airlines Hotel (P) Ltd (2012)346 ITR 33/ 75 DTR 166/253 CTR 78 (Bom.)(High Court)

S.37(1):Business expenditure- Capital or revenue-Professional fees- Professional fees paid for proposed setting up of factory constitute a capital expenditure.

The assessee was engaged in the business of manufacturing cement manufacturing machinery. It proposed to set up plant for manufacturing cement and for that purpose incurred expenses on professional fees paid to consultants in relation to cement project at Chandrapur. The said expenditure was claimed as revenue expenditure. The Assessing Officer treated the said expenditure as capital in nature, which was affirmed by Commissioner (Appeals) and Tribunal. On reference to the High Court the Court held that where the expenditure incurred for the project / feasibility report in connection with exploring the feasibility of a new business venture then such expenditure is capital expenditure and not revenue expenditure . (A.Y. 1979-80)

Larsen & Toubro Ltd v. CIT (2012) 75 DTR 30 (Bom.) (High Court)

S.37(1):Business expenditure-Capital or revenue-Software expenses- Software expenses is revenue in nature and treatment in books of account is not conclusive.

The assessee is in the business of manufacturing safety glass. It installed the financial software and in the books of accounts it claimed as deferred revenue expenditure. In the return of income it claimed as revenue expenditure,The Assessing Officer disallowed the expenditure as revenue in nature. On appeal the Commissioner (Appeals) allowed the claim of assessee as revenue in nature. On appeal by the revenue the Tribunal up held the order of the Commissioner (Appeals) by holding that the expenses were incurred for either upgrade the system or to run the system therefore the said expenditure is revenue in nature. On appeal to High Court by revenue the Court held that expenditure was not to create new asset or new source of income but to upgrade system and extent of expenditure cannot be a decisive factor in determining its nature and treatment in books of account is not conclusive hence the software expenditure is allowable as revenue expenditure.(A.Ys. 1997-98 & 1998-99)

CIT v. Asahi India Safety Glass Ltd (2012) 346 ITR 329 (Delhi) (High Court)

S.37(1):Business expenditure-Capital or revenue- Software expenses-Purchase of computer software was held to be revenue in nature.

The assessee treated the computer software as revenue expenditure. The Assessing Officer treated the said expenditure as capital in nature and allowed the depreciation. The Claim of assessee was allowed by Tribunal. On appeal by revenue to High Court , the court affirmed the view of Tribunal and held that it would be a unrealistic to ignore rapid advances and to attribute a degree of endurability and permanence to the technical – know how at any particular stage in fast changing area of science. Thus the expenses incurred by assessee on purchase of computer software revenue in nature.

Chief CIT v. O.K.Play India Ltd (2012) 346 ITR 57 (P&H) (High Court)

S. 37(1):Business expenditure- Capital or revenue- Software expenditure-Held allowable as revenue expenditure.

The assessee purchased a software applications i.e. MS office software, antivirus software ,Lotus notes software and message exchange applications. The assessee in respect of these applications acquired a licence to use the said applications on payment of consideration. The said expenditure was disallowed by the Assessing Officer as capital in nature and allowed the depreciation at 25%.On appeal the Commissioner (Appeals) allowed the depreciation at 60%. Both the assessee and revenue carried the appeal to Tribunal .The Tribunal allowed the appeal of assessee and restored the matter to the file of the Assessing Officer with the direction to follow the decision of Special Bench. Against the direction of Tribunal the revenue has filed an appeal before the High Court. High Court following the Judgment in CIT v. Asahi India Safety Glass Ltd (2012) 346 ITR 329 (Delhi) (High Court), decided in favour of assessee.(A.Ys 2001-02 , 2002-03)

CIT v. Amway India Enterprises(2012) 346 ITR 341(Delhi)(High Court)

Editorial: Special Bench of Delhi Tribunal in Amway India Enterprises v,Dy.CIT (2008) 111 ITD 112 (SB)(Trib)(Delhi) is affirmed.

S. 37(1):Business expenditure- Capital or revenue- Software expenditure-Held allowable as revenue expenditure.

On the facts of the case the Tribunal has restored the matter to decide the issue in the light of the decision on the special Bench of the Tribunal Amway India Enterprises v. Dy.CIT (2008) 111 ITD 112 (Delhi) (SB)(Trib.) The court dismissed the appeal of revenue. The Court also observed that the Delhi High Court arising from the Special Bench decision has held that entire expenditure was allowable as revenue expenditure (CIT v.Amway India Enterprises (2012) 346 ITR 341 (Delhi) (High Court), accordingly the software expenses allowable is as revenue expenditure. (A.Y.2002-03)

CIT v. Kotak Securities Ltd (No. 1)(2012) 346 ITR 349 (Bom.)(High Court)

S. 37(1): Business expenditure –Compensation- Amount paid in terms of settlement is not in nature of penalty hence deductible.

The assessee was manufacturing environmental control system. It had been exporting its products to a firm in Canada, S, a company in the USA filed a suit against the Canadian company. The Canadian company settled the dispute and paid

compensation to the American company. The American company sued the assessee. Since the cost of litigation was expected to be exorbitant, the assessee after considering the advice of its legal representative, settled the dispute by making payment of US $ 6,75,000. This amount was claimed as business expenditure. The Assessing Officer rejected the claim but the Tribunal allowed it. On appeal to the High Court: it was held, dismissing the appeal, that no finding had been given by any court that the assessee had violated the patent right of the American company. The payment under the settlement was compensatory in nature.(A.Y. 2005-06)

CIT v. Desiccant Rotors International P. Ltd (2012) 347 ITR 32 (Delhi)(High Court)

S.37(1):Business expenditure- Keyman Insurance Policy-Firm-Partner –Allowable as business expenditure.(S.10(10D)

Partner comes within the purview of the person who is "connected with in any manner whatsoever with the business" of the firm within the meaning of explanation to s. 10(10D),hence the premium paid by assessee firm for Keyman insurance policy of partner such premium is allowable business expenditure u/s. 37(1)

CIT v. Gem Art (2012) 76 DTR 374 /252 CTR 451(Guj.)(High Court)

S. 37(1):Business expenditure- Capital or revenue- Non compete fees paid was held to be capital expenditure.(S. 32(1)(ii))

Assessee purchasing business as a going concern, non-compete fee paid as a part of consideration is capital expenditure, hence not deductible; Tribunal rightly remanded the matter to A.O. to consider whether depreciation thereupon is to be allowed or not u/s 32(1)(ii). (A.Y. 2005-06)

Pitney Bowes India (P) Ltd. v. CIT (2012) 76 DTR 34 (Delhi)(High Court)

S. 37(1):Business expenditure- Capital or revenue- Enhanced lease rentals, and relinquishment of right was revenue expenditure .Non compete fees within specified area was capital expenditure.

Enhanced lease rent paid by the assessee company to the extent it is attributable to the expenditure incurred by the lessor trust on modernization and improvement of the plant and machinery which has been taken on lease and to normal appreciation in the lease rentals prevailing in the market would be revenue expenditure;

Relinquishment of the right to purchase Khairwood from State Government by the lessor-trust in favour of the assessee resulted in better availability of raw material at a cheaper price to the assessee and not acquisition of the source of raw material itself and, therefore, part of the enhanced lease rent which is attributable to the right to purchase Khairwood is also revenue expenditure.

Lessor-trust having agreed not to compete with the assessee's business within a specified area after leasing out whole of its production unit to the assessee, the benefits which accrued to the assessee company on account of elimination of competition from the trust were of enduring nature and hence, increase in lease rent, to the extent it is attributable to this benefit, is a capital expenditure. (A.Y. 1992 – 93 to 2003-04 & 2007-08)

Shanker Trading (P) Ltd. v. CIT (2012) 76 DTR 40 (Delhi)(High Court)

S.37(1): **Business expenditure – Penalty – Stock exchange allowable as deduction explanation to section 37 was held not applicable.**

The following question of law raised by the revenue before High Court.

"(C) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was justified in deleting the disallowance made by the Assessing officer of claim of the Assessing company for a deduction of payment of Rs. 6,51,240/- towards penalty paid to Stock Exchange even though such penalty payment was clearly disallowable under Explanation to Section 37(1) of the Income tax Act?"

The Court held that as regards question (C) is concerned the finding of fact recorded by the ITAT is that the amount paid as penalty was on account of irregularities committed by the assessee's clients. Such payments were not on account

of any infraction of law and hence allowable as business expenditure. In such a case the explanation to section 37 would not apply. Accordingly question (C) raised by the Revenue cannot be entertained.

The Income Tax Commissioner Mumbai City v. Angel Capital & Debit Market Ltd. ITA (L) NO. 475 of 2011, dt. 28/07/2011 (Bom.)(High Court) (unreported)

Editorial Note: ITA No. 5560/M/2009, A.Y. 2006-07, Bench "D" Dated 29/10/2010 DCIT v. Angel Capital & Debit Market Ltd.

S.37(1):Business expenditure- Capital or revenue expenditure – Expenditure on renovation of leasehold office premises was held revenue expenditure-Compensation held as capital in nature.

Amount spent by the assessee for the renovation of the leasehold office premises is allowable as a revenue expenditure but the amount paid by the assessee to the lessor as compensation to put up a structure or alter the structure to suit the requirements of the assessee is not a revenue expenditure. Further, assessee cannot also claim benefit of depreciation in respect of the latter amount as it is not the assessee who has put up the construction and spent the amount thereon.(A.Y.1997-98)

CIT v. Lucent Technologies Hindustan Ltd. (2012) 252 CTR 438(Karn.) (High Court)

Editorial. Lucent Technologies Hindustan Ltd V. Jt.CIT (2007) 106 TTJ 205 (Bang.)(Trib.) partly affirmed.

S.37(1):Business expenditure- Capital or revenue–New product-Expenditure incurred on development of new product in same line of business is allowable as revenue expenditure.(S. 35D)

The assessee engaged in manufacturing of permanent magnets, in its books showed under the head "Miscellaneous expenditure" a sum of Rs. 27,05,401/- being pre-production expenses in relation to bonded permanent magnet and claimed the said expenditure as revenue expenditure in the return of income. The Assessing Officer disallowed the said expenditure on the ground that the assessee had shown the expenditure as "Pre production expenses" and having capitalized in the books of account, the said expenditure to be amortised under section 35D. Commissioner (Appeals) and Tribunal held that, expenditure for development of new product in same line of business is revenue expenditure.(A.Y. 2004-05)

Dy. CIT v. Magnetic Meter Systems India Ltd. (2012) 13 ITR 43 (Chennai) (Trib.)

S. 37(1):Business expenditure- Travelling expenses – Employee- Foreign citizens to be considered for computing disallowance under Rule 6D.

The Assessing Officer, calculated the disallowance under Rule 6D of the Income-tax Rules, 1962, with reference to each trip of the individual employee and after considering other related expenses. Commissioner (Appeals) agreed with the assessee that other related expenses like telephone, local conveyance could not be considered for the purpose of Rule 6D.However, computation in respect of each trip was up held. Tribunal confirmed the view of Commissioner (Appeals). Tribunal held that travelling expenses of foreign citizens to be considered for computing disallowance under rule 6D. (A.Y. 1995-96)

Aditya Birla Nuvo Ltd. v. ACIT (2011) 131 ITD 511 / 141 TTJ 702 / 61 DTR 343 / (2012) 13 ITR 128 (Mum)(Trib.)

S.37(1):Business expenditure- Capital or revenue-Access road-Construction of access road to new plant is capital in nature.

The Tribunal held that the approach road was connected to the additional profit earning apparatus being built by the assessee at the new unit of the expansion programme, therefore expenditure incurred on the approach road was in connection with augmentation to the existing profit earning apparatus of the company and hence the expenditure would be capital in nature. (A.Y. 1995-96)

Aditya Birla NuvoLtd. v. ACIT (2011) 131 ITD 511 / 141 TTJ 702 / 61 DTR 343 / (2012) 13 ITR 128 (Mum.)(Trib.)

S.37(1):Business expenditure – Firm- Key man insurance-Insurance premium on key man insurance policy of partner is allowable . [S. 10(10D)]

The assesseee–firm took a keyman insurance policy in respect of a partner, paid insurance policy premium on the policy and claimed it as expenditure. The Assessing Officer held that the partner was not a separate and independent person from the firm and, therefore, the payment of keyman insurance premium in respect of the policy taken on the

life of partner amounted to claiming the deduction for self and not allowable. The Tribunal confirmed the order of Commissioner (Appeals) who held that insurance premium on keyman insurance policy to insure life of partner is allowable. (A.Y. 2007-08)

ACIT v. Paramount Impex (2012) 13 ITR 374 (Chandigarh)(Trib.)

S. 37(1):Business expenditure- Advertisement expenditure-Ad-hoc disallowance is not justified.

The Assessing Officer cannot disallow the expenditure on ad-hoc basis merely because the advertisement expenditure has increased by 200%, as neither pointing out any defects in the books of account nor rejected the books of account.(A.Y. 2007-08)

Widex India (P) Ltd v. Dy. CIT (2012) 66 DTR 57 (Delhi)(Trib.)

S. 37(1):Business expenditure - SWAP cost -Forward contracts - SWAP cost which pertained to the contracts which had not matured during the previous year, relevant assessment year cannot be allowed as deduction.

Assessee entered into forward contract with third party for purchasing equivalent number of dollars. The difference between buying and selling rate was claimed as loss spread over of two years. The Tribunal held that disallowance of loss by the Assessing Officer was justified as the SWAP cost which pertained to the contracts had not matured during the previous year relevant to the assessment year under consideration as there was no relation whatsoever between the transaction of the assessee receiving FCNR deposit and converting in to Indian rupees with the transaction by which it entered into a forward contract as both these transactions are independent of each other and whether such rate would be higher or lower at the time of maturity in the succeeding year is not capable of ascertainment at the close of the year on 31st March, 2000. Tribunal upheld the disallowance made by the Assessing Officer. (A. Y. 2000-01).

The Siam Commercial Bank PCL v. Dy. DIT (2012) 134 ITD 463 / 66 DTR 369 / 144 TTJ 235 (Mum.)(Trib.)

S. 37(1): Business expenditure – Rent- Advance payment-- Advance paid in advance was lost, loss is allowable as business expenditure.

Assessee entered into a contract for purpose of storage of Kerosene oil and paid advance rent. But the Government prohibited the import of Kerosene oil. The assessee claimed the payment of advance rent as business loss. The Assessing Officer disallowed the loss on the ground that the assessee actually not used the storage facility. The Tribunal held that loss was incurred in the course of business and same is allowable as business loss under section 37. (A. Y. 2004-05).

Seven Seas Petroleum P. Ltd v. ACIT (2012) 14 ITR 21 (Chennai)(Trib.)

S.37(1):Business expenditure - Capital or revenue – Renovation- Rented premises-Expenditure incurred on renovation of rented premises is allowable as revenue expenditure. [S. 30(a)(i)]

Assessee a Solicitor had taken office premises on rental basis. During relevant assessment year the assessee carried our renovation work in office premises which included tiling, plastering, POP, electrification work, etc. The Assessing Officer treated the said expenses as capital expenditure. The Tribunal held that since the expenses had been incurred by assessee only to create a better working environment and agreement specifically provided that repairs shall be carried out only by assessee subject to permission of land lord. The expenses were allowable under section 30(a)(i) as well as under section 37(1). (A. Y. 2001-02).

Dy. CIT v. Bijesh Thakkar (2012) 49 SOT 502 (Mum.)(Trib.)

S.37(1):Business expenditure-Transport business- Violation of traffic rules-Expenses incurred for violation of traffic rules being for infraction of law is not allowable deduction.

The assessee incurred expenditure for violating traffic rules by entering town on no entry times, one way traffic violation etc . The Tribunal held that the expenses being penalty/fine for violation of traffic rules and payment being for infraction of law explanation to section 37 of the Act is applicable and deduction is not allowable under section 37. (A.Y.2005-06)

Kranti Road Transport (P) Ltd v. ACIT (2012) 50 SOT 15 (Visakha.)(Trib.)

S.37(1):Business expenditure- Son of Director-Higher foreign education-Foreign educational expenses of son of director who was not an employee is not allowable.

The Assessing Officer disallowed the foreign educational expenses of son of Director who was not an employee holding that the same is personal in nature. On appeal Commissioner (Appeals) , concurred with the findings of

Assessing Officer. On further appeal to Tribunal the Tribunal held that the expenditure on higher education of son director cannot be said to be wholly and exclusively for the purpose of the business of the assessee and without any extra commercial circumstances , accordingly the disallowance was confirmed.(A.Y.2006-07)

Sunidi Consultancy Services Ltd v. Dy.CIT (2012) 50 SOT 223 (Mum.) (Trib.)

S.37(1):Business expenditure- Interest unpaid purchase consideration-Interest payable on unpaid sale consideration allowable as business expenditure and provisions of section 43B cannot be applicable.(S. 36 (1)(iii), 43B)

The assessee is engaged in the business of manufacturing of polyester film. It was allotted plot of land by GIDC . As per terms of allotment the assessee was required to pay the purchase consideration of the land in installments with interest . For the year under consideration the assessee had paid the sum of Rs 99.97 lakhs as interest to GIDC and the same was claimed as business expenditure. According to the Assessing Officer the expenditure was capital in nature. On appeal the Commissioner (Appeals) held that the same is allowable as revenue in nature. On appeal by revenue the revenue contended that the since interest was not paid the same is not allowable under section 43B.The Tribunal held that the interest is allowable under section 37(1) and since the interest payable is in respect of un paid sale consideration provisions of section 43B can not be applicable as the expenditure is allowable under section 37(1) and not under section 36(1)(iii).(A.Y.2004-05)

Dy.CIT v. MTAZ Poly films Ltd (March-2012-P 22-654(2012) 43B BCAJ.(Mum.)(Trib.)

S.37(1):Business expenditure –Fringe benefit tax –Expenses- Expenditure which are subjected to FBT is allowable as business expenditure.

The Tribunal referred to the CBDT Circular No.8/2005, dated 29-8-2005 and opined that once fringe benefit tax is levied on expenses incurred, it follows that the same are treated as fringe benefits provided by the assessee as employer to its employees and the same have to be appropriately allowed as expenses incurred wholly and exclusively incurred by the assessee for the purpose of its business.(A.Y.2006-07)

Hansraj Mathuradas v. ITO, ITA No. 2397/M/10, dt. 16-9-11, BCAJ Pg. 25, Vol. 43 B Part 5, February 2012(Mum.)(Trib.)

S.37(1):Business expenditure –Licence fee-Capital or revenue-Licence fee paid held to be revenue expenditure as benefit of fees paid endures only till end of the relevant year and not extend to the subsequent financial year.(S.35ABB).

The assessee is engaged in the business of digital communication services for data, fax, etc. The assessee made payment for obtaining licence for providing telecommunication services through for a period of 10 years. The licence fee was payable on yearly basis. The benefit of licence fee paid during the year endures only till end of the relevant year and does not extend to the subsequent financial year. Thus, it was held that the license fee was not in the nature of capital expenditure falling under Section 35 ABB but revenue expenditure as per Section 37(1). (AY 2002-2003 to 2004-05)

BhartiAirtel Ltd. v. Asst. CIT (2012) 145 TTJ 161 (Mum.)(Trib.)

S.37(1):Business expenditure – Performance guarantee –Contractual obligation-Compensation paid for default of assessee as performance guarantee is held to be allowable expenditure.

Where during the continuity of business if in a particular contract the assessee had to compensate for his own default by offering performance guarantee which was a contractual obligation and that the said business continued later on, then a disallowance for a particular contract could not be considered separately. Same be allowed as business expenditure. (A.Y. 2006 – 07)

Neo Structo Construction Ltd. v. Addl. CIT, ITA No. 3026/ Ahd/ 2009 order dated 24/2/2012(2012) Vol 35 Feb P.555 (Ahd.)(Trib.)

S.37(1): Business expenditure – Royalty- Trade mark-Payment of royalty for use of trademark as well as technical information, in relation to manufacture, use and sale of product is held to be revenue expenditure.

The assessee made payment of royalty on net sales for use of trademark and technical information in relation to manufacture, use and sale of product and not in relation to setting up of plant. The assessee did not acquire the ownership over the trademark or technical information as there was no provision for transfer of the same. The Tribunal held that the said expenditure to be treated as revenue expenditure. (A.Y. 2003-04 , 2004 – 05 and 2006 – 07)

Mafatlal Denim Ltd v. Dy. CIT (2012) 135 ITD 483/147 TTJ 346/72 DTR 281(Mum.)(Trib.)

S.37(1):Business expenditure- Foreign income-tax-Foreign income-tax is deductible as business expenditure , bar in s. 40(a)(ii) does not apply to foreign taxes.[S. 40(a)(ii)].

The assessee paid Rs.42.57 lakhs in Belgium as income-tax and claimed that as deduction u/s 37(1). The AO rejected the claim by relying on s, 40(a)(ii) which provides that any sum paid on account of tax levied on profits or gains of business shall not be allowable as a deduction, though the CIT (A) allowed the claim on the ground that the bar in s. 40(a)(ii) did not apply to foreign taxes. On appeal by the department, Held dismissing the appeal:

The term "tax" is defined in s. 2(43) to mean income-tax chargeable under the provisions of this Act. S. 37(1) allows a deduction of all taxes and rates. Taxes levied in foreign countries whether on profits or gains or otherwise are deductible u/s 37(1) not hit by s. 40(a)(ii). It is also not application of income. The same view has been taken by ITAT Mumbai in South East Asia Shipping Co&Tata Sons Ltd and the department's Reference Applications u/s 256(1) & 256(2) were rejected and the issue has reached finality.(A.Y. 2002-03,2003-04 and 2004-05)

DCIT v. Mastek Limited (2012)74 DTR 318/ 44-A BACAJ –May-P.32(Ahd.)(Trib.)

Mastek Limited v. DCIT v. (2012)74 DTR 318/ 44-A BACAJ –May-P.32(Ahd.)(Trib.)

S.37(1): Business expenditure – Royalty - Associated enterprises - Payment of royalty to associated enterprises is not hit by provision of section 92-hence allowable as business expenditure. (S.92)

The Assessing Officer disallowed the claim of royalty payment of Associated enterprise holding that the Transfer Pricing Officer has determined the ALP of royalty paid at nil which was confirmed in appeal by the Commissioner (Appeals). On appeal the Tribunal held that for a transaction to come u/s. 92 of the Act, it is necessary to establish that the course of business between resident and non-resident is so arranged that the business transacted between them provides to the resident either (i) no profit or (ii) less than ordinary profits which might be expected to arise in the business. In the present case, the assessee had declared income and therefore it is not case of "no profit". So are regards the adequacy of profits vis-à-vis ordinary profits which might be expected to arise in the business, the same can be found out only, when exercise is done to compare the income of the assessee with other comparable enterprises in India. In the present case, the TPO observed that no royalty was charged by other group entities and accordingly the Aris Length Price for royalty charges was inferred as nil. The findingof the Assessing Officer in considering the royalty charges as nil as arms length price cannot be accepted since the A.O. in the present case has not brought on record, the originary profits which can be earned in such type of business. Therefore in our view the payment of royalty is not hit by the provisions of Section 92 of the Act and there is no reason to hold that the expenses should not be allowed u/s. 37(1) OF THE Act, since the expenditure has been incurred by the assessee during the course of business and is having the nexus with the business of the assessee. (A.Y. 2004-05)

KHS Machinery (P) Ltd v. ITO (2012) 69 DTR 283 / 146 TTJ 692/ 18 ITR 479 (Ahd.)(Trib.)

S.37(1):Business expenditure- Illegal purpose- Fact that payment is used for 'illegal' purpose does not attract Explanation to s. 37(1)

The assessee exported tea to Iraq under the 'Oil for Food Program', as sanctioned by the United Nations. It paid commission of Rs 1.28 crores to one Alia Transportation, a Jordanian company. The Volcker Committee, which was set up to expose the 'Oil for Food scam' found that this company was a front company for the Iraqi regime, meant to receive illegal kickbacks, and did not render any services. The 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 to the Tribunal, held:

There was no dispute that the assessee had in fact paid Alia. Though the Volker Committee report stated that the amounts paid to Alia were actually kickbacks to Iraqi regime, that fact per se would not attract Explanation to s. 37(1). In order to fall within the Explanation to s. 37(1), the expenditure has to be for "for any purpose which is an offence or which is prohibited by law". Alia was a Jordanian company and while the transactions between Alia and the Iraqi regime may be contrary to the UN sanctions, the transactions between the assessee and Alia were not hit by the UN sanctions. The Revenue has not pointed out any other specific violation of law. The assessee's payment accordingly cannot be said to be for a purpose which is an offence or which is prohibited by law. What the recipient of the payment does is not important from this perspective because the assessee has no control over the matter. It is not the case that the assessee knew that the monies would be used for the purposes of kickbacks to the Iraqi regime. The onus of demonstrating that

the assessee was aware that the payments were intended for kickbacks is on the AO which has not been discharged. The "purpose" of the expenditure has to be seen. If the payment is for bonafide business purposes, the fact that they end up being used as illegal kickbacks, will not attract Explanation to s. 37(1). The commercial expediency of the payments was not called into question by the AO (TIL Ltd (2007) 16 SOT 33 (Kol) referred).(A.Y. 2003-04)
DCIT v. Rajrani Exports Pvt Ltd(2012) 72 DTR 425/52 SOT 168/17 ITR 239(Kol.)(Trib.)

S.37(1): Business expenditure - Capital or revenue - Market support service -Market support services do not result in acquisition of a capital asset hence allowable as revenue expenditure.

Assessee acquired personal computer business from IBM and entered in to a market support agreement with IBM with a view to retain a market share in the business. As per the marketing support agreement, IBM was to provide services to facilitate the sale of the products by the assessee and to extend services to the customers through one or more of its subsidiaries or third parties. The services to be rendered by the IBM are for a period of five years. The Assessing Officer treated the said expenses as capital in nature. The Tribunal held that services rendered by IBM to facilitate the sale of products by the assessee under market support agreement were meant for smooth and efficient running of the business of the assessee for a period of five years and it did not result in acquisition of a capital asset and therefore, fees paid by the assessee for the said marketing support services rendered by IBM is a revenue expenditure.(A.Y. 2006-07)
Lenova (India)(P) Ltd v. ACIT (2012) 71 DTR 90 / 147 TTJ 102 (Bang.)(Trib.)

S.37(1):Business expenditure- Commission – Discount - Takeover of business -Liability pertaining to period prior to acquisition of business is allowable as business expenditure.

The assessee claimed the commission and discount payable to dealers as business expenditure. The Assessing Officer disallowed the expenditure on the ground that the expenditure relating to the period before acquisition of the business by assessee hence cannot be allowed for the relevant year. The Tribunal held that the assessee having taken over a running business from another company along with the liabilities which include the commission and discounts payable to the dealers ,it is bound to make payments thereof in order to maintain business relations with the dealers and therefore, such payments are allowable as business expenditure of the assessee. (A.Y. 2006-07)
Lenova (India)(P) Ltd v. ACIT (2012) 71 DTR 90 / 147 TTJ 103 (Bang.)(Trib.)

S.37(1): Business expenditure-Allotment of sweet equity shares-The value of shares allotted free of cost to employees is deductible revenue: expenditure.

The assessee allotted 3,94,692 Sweat Equity shares (ESOP) to its employees free of cost for rewarding them for past services or providing know how for making available rights in the IPR as per S.79A of the Companies Act, 1956. Though the shares were allotted for no consideration, the assessee accounted for the shares at Rs.106.26 each (face value Rs.10) at its arms length price and claimed Rs.4.19 crores as a deduction towards "employees benefit expenses". The shares were not allotted as at 31.3.2006. The AO disallowed the claim on the ground that it was not an ascertained liability but was a contingent liability though the CIT(A) allowed the claim. In appeal before the Tribunal, the department relied on Ranbaxy Laboratories v ACIT (2009) 124 TTJ 771 (Del) & VIP Industries (ITAT Mum). Held dismissing the appeal:

Though the allotment of the ESOP shares was not done as of 31.3.2006, the number of shares to be allotted to the employees as on 31.3.2006 was specified and immediately thereafter the said shares were so allotted. Consequently, the mere non-allotment of the shares pending completion of certain formalities does not merit the disallowance of said expenditure as being a contingent liability. The fact that the scheme provided for a lock in period of five years under which in case the employee left employment before the expiry of five years, the shares so allotted to him would revert to the assessee, did not make the liability contingent because where the shares were forfeited, the value thereof would be offered to tax in that year (S.S.I. Ltd. vs. DCIT (2004) 85 TTJ 1049 (Chennai) followed; Ranbaxy Laboratories v ACIT (2009) 124 TTJ 771 (Delhi)(Trib) & VIP Industries (ITAT Mum) distinguished) (A.Y. 2006-07)
ACIT v. Spray Engineering Devices Ltd (Chandigarh)(Trib) www.itatonline.org

S.37(1):Business expenditure- Website development-Depreciation- Assessee treated the said expenses as intangible hence not allowable as business expenditure.

The Tribunal held that since the assessee itself has claimed the website development as part of block of assets on which depreciation eligible to intangible assets has been claimed and allowed, the same cannot be treated as revenue expenditure. (A.Y. 2004-05)

Makemytrip (India) (P) Ltd v.Dy.CIT (2012) 72 DTR 466/51 SOT 98 (Delhi)(Trib)

S.37(1): Business expenditure-Cost of production of feature film-Producer of feature film-Even if Rule 9A is applied , the assessee is entitled to claim the un recouped cost of production as loss. (Rule 9A)

The Assessing Officer disallowed the excess un re recouped cost of production of film . In appeal the Commissioner of Income –tax(Appeals) allowed the claim. On further appeal to Tribunal by the revenue the Tribunal held that the Tribunal held that the assessee being producer of feature film is entitled to claim the un recouped cost of production in terms of Rule 9A(3) as also de hors the provisions of Rule 9A.(A.Y.2005-06)

Addl.CIT v. Nitin M. Panchamiya (2012) 73 DTR 202/148 TTJ 96 (Mum.)(Trib.)

S.37(1): Business expenditure – Capital or revenue expenditure – Expenditure on purchase of furniture in leasehold premises – Held that expenditure incurred for capital asset thus, not allowable as revenue expenditure –Depreciation allowed. (S. 32)

Huge expenditure incurred by the assessee on purchase of plywood, furniture, etc. for making partitions, cabins, cubicles, desks, etc. in its leasehold premises was expenditure incurred for capital asset and, therefore, it was not allowable as deduction but is subject to allowance of depreciation in terms of Explanation. 1 to 32. (AY 2001-02 to 2004-05)

Free India Assurance Services Ltd. v. Dy. CIT (2012) 147 TTJ 423 (Mum.) (Trib.)

S.37(1): Business expenditure – Expenditure for increase in share capital after commencement of business – Held expenditure of revenue nature

Expenditure incurred for increase in share capital of company after commencement of business is not capital expenditure but a regular business expenditure of revenue nature. (AY 2005-06)

Dy. CIT v. Raj Laxmi Stone Crusher (P.) Ltd. (2012) 52 SOT 112 (Delhi)(Trib.)

S.37(1): Business expenditure –Feature film- Cost of production-Cost of production is not allowed, which is hit by sub –rule (5) of rule 9A.(Rule 9A)

Assessee having neither himself exhibited feature film on commercial basis nor sold rights of exhibition of the feature film nor transferred the rights of exhibition of feature film, then the claim of deduction in respect of cost of production is hit by sub –rule (5) of rule 9A and cannot be allowed. (AY 2007-08)

Sagar Sarhadi v. ITO (2012)135 ITD 153/ 148 TTJ 86 (Mum.) (Trib.)

S.37(1):Business expenditure – Enterprise Resource Planning (ERP) –Capital or revenue - Expenditure incurred on ERP is held to be revenue in nature.

The assessee company is manufacturer of pharmaceutical items. Following the decision laid in assessee's own case in other Assessment year and decision of Bombay High Court in CIT v. Raychem RPG Ltd. (ITA No. 4176 of 2009 dated 4/7/2011), it was held that expenditure incurred on Enterprise Resource Planning (ERP) was revenue in nature. (A.Y. 2005-06)

ACIT v. Torrent Pharmaceutical Ltd. (2012) 137 ITD 301 (Ahd.)(Trib.)

S.37(1):Business expenditure – Repairs-Improve condition of building – Building used for business purpose hence repair expenses incurred to improve a condition of building held to be allowable revenue expenditure.

The expenditure incurred by assessee on repairs to improve bad condition of building which was used for its business purpose was to be allowed as business expenditure. (A.Ys. 1998-99 & 1999-2000)

Dy. CIT v. Sandoz (P.) Ltd. (2012) 137 ITD 326 (Mum)(Trib.)

S.37(1):Business expenditure- Expenses for profession – Advocate- If there is no doubt that expenditure has been incurred, disallowance is not sustainable.

While computing the tax liability of an assessee the AO is obliged to compute the correct income of the assessee. Once in substance he is in agreement that the expenditure has been incurred for earning the professional income, no disallowances is sustainable in law. Nowhere the AO has doubted that the expenditure claimed as deduction has been incurred by the assessee. In alleging that the expenditure has been deducted in computing the income from other

sources, the AO has ignored the fact that in the return of income, the gross amount of interest income, without any deduction, has been shown under the head "income from other sources" and the income under the head "profits and gains of business or profession" has been shown in the tax return on net basis after deducting the expenditure incurred. (A. Ys.. 2005-06 to 2006-07)(ITA no 50, 72, 49 (Gau/2010 Bench 'D' dated 31-8-2012)
Lira Goswami v. ACIT (Delhi)(Trib.) ***www.itatonline.org***

S.37(1):Business expenditure- Petty cash expenses not supported by vouchers

Total petty cash expenses were to the tune of Rs.5.43 crores addition of Rs.20 lacs made by AO in order to prevent leakage of revenue on this account after recording that the petty cash expenses vouchers were either not supported with proper bills and vouchers or are missing – CIT(A) deleted addition not justified – onus is always on the assessee to satisfy the AO with evidence to his satisfaction to substantiate that the expenditure has been incurred wholly and exclusively for the purpose of business – Merely because the total expenditure of Rs.5,42,69,498 is 1.82 per cent of the total operations at 297.76 crores, it cannot be a ground for accepting the whole of the expenses as genuine – However, in the facts and circumstances, disallowance needs to be reduced to Rs.10 lakhs. (A.Y. 2004-05 & 2005-06)

ACIT v. Agility Logistics (P) Ltd (2012)136 ITD 46/ 76 DTR 212 (Mum.) (Trib.)
Agility Logistics (P) Ltd; ACIT v. (2012)136 ITD 46/ 76 DTR 212 (Mum.) (Trib.)

S.37(1): Business expenditure – Construction of commercial centre on plot in violation of master plan - Misuse charges allowed as deduction.

The assessee constructed commercial centre on plots in violation of master plan. It was held that misuse charges paid by the assessee for the same not allowed as deduction. (A.Y. 2008-09)
ACIT v. Mohan Exports (P.) Ltd. (2012) 138 ITD 108 (Delhi) (Trib.)

S.40(a)(i): Amounts not deductible- Deduction at source-Non-resident-Business expenditure – Commission-Agent-Business connection- Tax is not deductable at source. (S. 195)

Assessee has paid sales commission to its holding company Eon Technology UK.The Court held that, when a non–resident agents operates outside the country, no part of income arises in India and since payment is remitted directly abroad and merely because an entry in the books of account is made in India, it does not mean that non-resident has received any payment in India, therefore, assessee is not liable to deduct tax at source hence, no disallowance can be made by applying the provision of section 40(a)(i)(A.Y. 2007-08).
CIT v. Eon Technology (P) Ltd. (2012) 343 ITR 366 / 246 CTR 40 / (2011) 203 Taxman 266 / 64 DTR 257 (Delhi)(High Court)

S.40(a)(i) : Amounts not deductible - Deduction at source – Non-resident - Assessee deducted tax at source when the amount was credited hence no disallowance can be made on the ground that no tax was deducted at the time of payment. (S. 195)

The assessee had entered into a research and know how agreement with AB Sandvik Coromant Sweden during assessment year 1991-92. The Assessing Officer held that as the duration of agreement being five years the appellant is entitled to deduction of 1/5 of the amount for five years. The assessee deducted the tax on entire amount payable to the party concerned including the future installment payable. For the Asst. year 1994-95 the assessee had claimed the deduction of Rs.42,89,872/- which included the fourth installment and exchange fluctuation loss of Rs.8,82,234/- . The Assessing Officer disallowed the exchange fluctuation loss of Rs.8,82,234/- on the ground that loss pertaining to earlier year. Commissioner (Appeals) directed the Assessing Officer to allow the loss subject to deduction of tax at source. The Assessing Officer held that as the tax was not deducted at source in respect of exchange fluctuation as there is violation of section 40(a)(i), which was upheld by the Commissioner (Appeals). The Tribunal held that as the tax was deducted at source when such income was actually credited to account of foreign party as per the prevailing foreign exchange rate, subsequently when such income was actually paid by foreign concern, same would not again

invite deduction at source as per section 195(1). Accordingly the disallowance made by the Assessing Officer was deleted. (A. Y. 1994-95).

Sandvik Asia Ltd. v. Jt .CIT (2012) 49 SOT 554 / 146 TTJ 644 (Pune)(Trib.)

S.40(a)(ia): Amounts not deductible –Deduction at source- Retrospective- TDS amendment to give extended time for payment is retrospective.

The assessee deducted tax at source from paid charges between the period 1.4.2005 & 28.4.2006 though it paid the TDS in July and August 2006. The TDS was deposited after the end of the F.Y. though before the due date of filing of the return of income. The assessing office invoked section 40(a)(ia) and held that as the TDS had not been paid on or before the last day of the previous year, the deduction was not admissible. The Tribunal allowed the assessee's claim. On appeal by the department, the High Court had to consider whether the amendment to section 40(a)(ia) by the FY 2010 w.e.f. 1.4.2010 to provide that the TDS has to be paid on or before the due date for filing the ROI was prospective or retrospective. The High Court held dismissing the department's appeal:

In Allied Motors (P) Ltd v.CIT (1997) 224 ITR 677(SC) & CIT v. Alom Extrusions Ltd. (2009) 319 ITR 306(SC), the Supreme Court held that the amendments to the aforesaid provision (section 43B) have retrospective application. Also, in R. B. Jodha Mal Kuthiala v.CIT (1971) 82 ITR 570 (SC), the Supreme Court held that a provision which was inserted the remedy to make a provision workable requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well. In view of the authoritative pronouncement of the Supreme Court, this Court cannot decide otherwise. Hence the appeal is dismissed.

CITv.Virgin Creations (Cal) (High Court). www.itatonline.org

Editorial **:** Special Judgement in Bharti Shipyard Ltd. v. Dy. CIT (2011) 132 ITD 53 (Mum.)(SB)(Trib.), may not be good law, requires reconsideration.

S.40(a)(ia): Amounts not deductible-Deduction at source-Commission and brokerage- Failure to deduct tax liable to be disallowed.(S.37(1))

Profit on sale of agricultural land by dividing and sub – dividing it into small plot of land immediately after acquiring it was assessable under the head business income and not exempt as sale of agricultural land, therefore the commission and brokerage paid on sale of such land was also disallowable under section 40 (a) (ia) of the Act on account of failure to deduct tax at source on such payments made.(A.Y. 2005-06)

E.V. Mathai & Sons v. CIT (2012) 72 DTR 163 (Ker.)(High Court)

S.40(a)(ia): Amounts not deductible- Deduction at source-Reimbursement of expenses- Clearing and forwarding agent. Disallowance can not be made(S. 172, 194C, 195)

Reimbursement of payment towards sea freight transport, CCI charges, steam freight charges and REPO container charges made by the assessee to C&F agents who have already made the payment on behalf of the assessee is covered under section 172 and not by section 194C or 195 and the agent having already deducted TDS from the transportation charges and shipping bill before making these payments to the principal which have been reimbursed by the assessee, assessee was not liable to deduct tax at source from such payments and consequently, same could not be disallowed by invoking the provisions of section 40(a)(ia).(A.Y. 2005-06)

ACIT v. Minpro Industries (2012) 65 DTR 113/ 143 TTJ 331 (Jd.)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source- VSAT and transaction charges-Even if payee has paid tax, payer not eligible for deduction.

For A. Ys. 2007-08 & 08-09, the assessee paid VSAT & transaction charges without deduction of TDS. The Assessing Officer held the payment to be "fees for technical services" & disallowed the payment under section 40(a)(ia) for want of TDS under section 194J though the CIT(A) allowed the claim by relying on Skycell Communications Ltd. and another v. Dy. CIT (2001) 251 ITR 53 (Mad.). Before the Tribunal, the assessee argued that though the merits were covered against it by CIT v. Kotak Securities Ltd. (2012) 340 ITR 333 (Bom.), the deduction had to be allowed because (i) section 40(a)(ia) was not a 'tax-levying' provision but was merely to ensure that tax was paid by either the payer or the payee. As the payee had already paid the taxes, the bar in section 40(a)(ia) did not apply in line with Hindustan Coca Cola Beverage Ltd. v.CIT (2007) 293 ITR 226 (SC) and (ii) in accordance with Kotak Securities, as the department had

not objected to the non-deduction of TDS on transaction charges in the past, there was no justification for invocation of section 40(a)(ia). Held by the Tribunal:

The argument, that since the payee has already paid due tax on the income, section 40(a)(ia) cannot be invoked, is not correct. The law in Hindustan Coca Cola Beverage Ltd v.CIT (2007) 293 ITR 226 (SC) that if the payee is assessed, the tax cannot be recovered from the payer was in the context of section 201 and pursuant to Circular No.275/201/95-IT dated 29-1-1997. In the absence of such circular in case of disallowance under section 40(a)(ia), the principle laid down cannot be adopted for s. 40(a)(ia). As regards the principle that the department had accepted the position in the past, the defense is available for A.Y. 2007-08 but not for A.Y. 2008-09.

ACIT v. DICGC Ltd(2012) 14 ITR 194 (Mum.)(Trib.)

S.40(a)(ia) : Amounts not deductible –Deduction at source- Interest – Commission -Short deduction of tax at source provisions of section 40(a)(ia) cannot be applied. (S. 192, 194J)

Assessee firm of Chartered Accountants had employed 18 consultants for a period of two years. During the period the assessee firm paid salary to consultants and deducted the tax at source under section 192. The Assessing Officer held that the as there was no employer and employee relation the payment nature of payment being professional services the provision of section 194J will be applicable. Assessing Officer invoked the provision of section 40(a)(ia) and disallowed the entire payment. The Tribunal held that the assessee has deducted the tax at source under section 192, hence, the provisions of section 40(a)(ia) do not apply, as the said provisions can be invoked only in the event of non-deduction of tax at source but not for lesser deduction of tax. Accordingly the order of Commissioner (Appeals) confirmed. (A. Y. 2006-07).

Dy. CIT v. Chandabhoy & Jassobhoy (2012) 49 SOT 448 (Mum.)(Trib.)

S.40(a)(ia): Amounts not deductible - Deduction at source - Sub-contractor - Amendment by Finance Act, 2010 is retrospective hence no disallowance can be made if payment is made before the due date of filing of return.

Payment made to sub-contractor from April, 2007 to February, 2008 the tax was deducted at source on March 27, 2008 and May 12, 2008. The Assessing Officer disallowed the expenses on the ground that the Tax deducted at source ought to have been deposited on or before 31-3-2008. The Commissioner (Appeals) also confirmed the disallowance. In appeal before the Tribunal, it was contended that the due date of payment was to be considered in accordance with the amended provisions with effect from April 1, 2010, which has to be treated as retrospective with effect from April 1, 2005, as the payment was made before due date of filing of return, no disallowance can be made. The Tribunal held that the disallowance was held to be not justified. (A. Y. 2008-09).

Sanjay Kumar Pradhan v. ACIT (2012) 14 ITR 150 (Cuttack)(Trib.)

Editorial: Special Bench of Mumbai Tribunal in Bharati Shipyard Ltd. v. Dy. CIT (2011) 11 ITR 599 (Mum.)(SB)(Trib.) is distinguished.

S.40(a)(ia) :Amounts not deductible - Deduction at source –Commission- Failure to deduct tax at source on commission to franchisees under section 194H, the amounts will not be allowable as deduction. (S. 194H)

The assessee an individual who is running a business as a liaison officer for the London Institute of Technology & Research, UK. During relevant assessment year the assessee made payment of commission to various parties. Assessing Officer held that as the tax was not deducted at source under section 194H provisions of section 40(a)(ia) was held applicable hence disallowed the commission. On appeal the Commissioner (Appeals) deleted the disallowance on the ground that since the assessee did not receive the professional fee component from the liaison office as his income the provisions of section 194H is not applicable. On appeal by the revenue, the Tribunal held that amount paid to franchisees / Commission agents was for advertisement campaign and other services etc. for the courses offered by the LITR, UK and therefore, the same falls within the meaning of "commission" since the assessee failed to deduct tax at source, the Assessing Officer was justified in disallowing the payment of commission under section 40(a)(ia). (A. Ys. 2005-06 & 2006-07).

ACIT v. Edroos Syed Mohammed Zakir (2012) 67 DTR 236 / 146 TTJ 100 / (2011) 47 SOT 199 (Mum.)(Trib.)

S.40(a)(ia): Amounts not deductible-Deduction at source-Contractor-Sub-contractor-As provisions of section 194(C)(2) has no application to the facts disallowance can not be made by invoking section 40(a)(ia).(S.194C(2).

The assessee , an individual is an management consultant and is engaged in conceptualizing and organizing conferences and seminars in the field of management. The assessee received sponsorship from various sponsors, for which tax was deducted at source. Assessee had made payments for printing, stationery charges of auditorium advertisement charges etc. Assessing Officer held that as the turnover of assessee exceeded the prescribed limit, he should have the sponsors in respect of payment made to the assessee. The Tribunal held that the arrangement entered with the sponsor does not amount to the assessee having undertaken to work of organizing the conference .Just because the assessee is subjected to tax deducted under section 194C (1), and the assessee claimed credit in respect of taxes deducted by the persons making the payments to the assessee , rightly or wrongly or due to correct application of law or by abundant caution , this claim can not prejudice the stand of assessee that the provisions of section 194(C)(2) is not applicable. On the facts, the Tribunal held that section 194(2) has no application therefore provision of section 40(a)(ia) do not come in to play. The Tribunal held that provisions of section 194C (1), can not be applicable to the relevant period because it is only as a result of the amendment of Finance Act , 2008 , w. e.f. 1st June , 2008,that individuals were covered under section 194C(1).(A.Y. 2005-06)

Raju L.Bhatia (Dr) v. JCIT (2012) 134 ITD 615 (Mum.) (Trib.)

S.40(a)(ia): Amounts not deductible- Deduction at source- Contractor- Sub –contractor- Where lorries and trucks are hired for its own use TDS is not required to be deducted hence amount can not be disallowed.(S.194C).

On the facts of the case, the assessee has hired the Trucks /lorries for transporting of the consignment booked by it under its own supervision and control with all responsibility and liabilities .Therefore hiring of Truck and lorries can not be called to be work as per definition given in explanation 3 of section 194C of the Act, hence the assessee is not liable to deduct tax at source.(A.Y.2005-06)

Kranti Road Transport (P) Ltd v. ACIT (2012) 50 SOT 15 (Visakha.)(Trib.)

S.40(a)(ia): Amounts not deductible- Deduction at source-Commissioner-Brokerage- Derivatives are securities therefore tax at source is not deductible.(S.194H)

Tribunal held that as per definition of derivative in section 2 sub section (ac) read with Section 2 of sub section (h) (ia) the derivates are securities and therefore covered by the exception provided in Explanation (1) to Section 194H. hence the brokerage paid can not be disallowed under section 40(a) (ia).(A.Y. 2005-06)

Dy. CIT v.Noble Enclave & Towers (P) Ltd (2005) 50 SOT 5 (kol.) (Trib)

S.40(a)(ia): Amounts not deductible-Deduction at source-Professional fees-MICR clearing charges are reimbursement expenses assessee not liable to deduct tax at source under section 194J- Service charges paid in connection with rented house tax required to be deducted under section 194I.

Assessee is engaged in banking business and a sub member of clearing house of another bank. Bhagyodaya Co-operative Bank Ltd was a clearing house agent of assessee. Assessee paid certain amount for rendering the services of clearing agent without deduction of tax at source. Assessee claimed that its MICR clearing charges were recovered by clearing house from Bhagyodaya Co-operative Bank Ltd and while making paid of said clearing charges Bhagyodya Co-operative Bank deducted tax at source and in support letter was filed .The Tribunal held that the payment of clearance charges were recovered from the assessee as reimbursement by assessee, the assessee is not required to deduct at source under section 194J , accordingly disallowances were deleted. The Tribunal held that service charges to in connection with part of fixtures of a rented house, being part of rent, as the tax was not deducted under section 194I , disallowance under section 40(a)(ia)is justified. (A.Y. 2007-07)

The Karnavati Co-operative Bank Ltd v. Dy.CIT (2012) 134 ITD 486 / 144 TTJ 769 / 14 ITR 175/68 DTR 41 (Ahd.) (Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source- Reimbursement of expenses – Reimbursement simplicitor provisions of section 194J cannot be applicable hence no disallowance can be made.(S.194J)

The assessee is firm of solicitors and advocates had made payments to various lawyers for their professional services , but had not deducted tax at source under section 194J. The Assessing Officer disallowed the such payments by applying

the provisions of section 40(a) (ia).The Commissioner (Appeals) also confirmed the disallowance . On appeal to Tribunal, it was contended that the amounts paid to in respect of lawyers were reimbursed from clients and no deduction was claimed in respect of said payments . The Tribunal held that as the payments to outside lawyers were not claimed as deduction , no disallowance can be made under section 40(a) (ia) of the income-tax Act. The matter was set aside to verify the facts .(A.Y. 2006-07)

Sharma Kajaria & Co v. Dy.CIT (2012) 50 SOT 282 / 68 DTR 142 / 145 TTJ 1 (Kol.)(Trib)

S.40(a)(ia):Amounts not deductible-Deduction at source- Interest-Payment of disputed amount with interest as per court order provisions of section 194A is not applicable , the interest cannot be disallowed.(S.194A)

The assessee claimed as deduction in respect of interest paid to one of creditor for failure to the amount as per the court decree settling the dispute. The assessee claimed the interest as deduction. The Assessing Officer has disallowed the interest on the ground that as tax was not deducted at source under section 194A, the provision of section 40(a) (ia) is applicable. On appeal, the Commissioner(Appeals) also confirmed the disallowance. On appeal the Tribunal following the order of High Court in Madhusudhan Shrikrishna v. Emkay Exports (2010) 188 Taxman 195 (Bom) (High Court) , the Tribunal held that the assessee had no obligation to deduct tax at source in respect of interest paid to creditor as per court order.(A.Y. 2005-06)

Akber Abdul Ali v. ACIT (2012) 146 TTJ 57 (UO) / (2012) March P. 25 -657 (2012) 43-B-BCAJ(Mum.)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source-Interest other than interest on securities-The assessee has neither credited the interest nor paid in relevant year, therefore as mandate of section 194A could not be attracted no disallowance can be made . (S.194A).

The assessee has claimed the deduction of interest expenditure for which no accounting entry was passed in books of account . The said claim was disallowed on the ground that the assessee has not deducted the tax at source under section 194A,which was confirmed in appeal by Commissioner (Appeals) . On appeal to Tribunal, the Tribunal held that section 194A comes in to play only when either amount is credited in books of account or interest is paid whichever is earlier . On facts the assessee had neither credited in interest in books of account nor the interest was paid in relevant year , therefore the mandate of section 194A could not be attracted , therefore no disallowance could be made under section 40(a)(ia). (A.Y. 2005-06)

Pranik Shipping & Services Ltd (2012) 135 ITD 233 / 70 DTR 417 / 146 TTJ 543 (Mum.) (Trib.).

S.40(a)(ia):Amounts not deductible-Deduction at source- Non-jurisdictional High Court prevails over special bench- TDS paid before due date of filing of return- Amendment by FA 2010 w.e.f 1.4.2010 is retrospective

For AY 2005-06, the AO made a disallowance of expenditure incurred by the assessee on the ground that the assessee had made the TDS payments u/s 194C after the end of the year. Before the Tribunal, the assessee claimed that as the TDS had been paid before the due date of filing the ROI, no disallowance could be made as per s. 40(a)(ia) amended by the FA 2010 w.e.f. 1.4.2010. The assessee relied on Virgin Creations and claimed that it had to be followed in preference to the contrary ruling of the Special Bench in Bharati Shipyard Ltd(2011) 132 ITD 53 (Mum). Held by the Tribunal:

In Bharati Shipyard Ltd the Special Bench held that the amendment to s. 40(a)(ia) by the FA 2010 w.e.f. 1.4.2010 could not be held to be retrospective from AY 2005-2006 on the ground that the amendment was not remedial and curative in nature. However, the Kolkata Bench had taken a contrary view in Virgin Creations vs. ITO and held that amendment by the FA 2010 was retrospective w.e.f. 1.4.2005. The view of the Kolkata Bench has been approved by the Calcutta High Court in CIT vs. Virgin Creations. The question as to whether a verdict of the Special Bench should be followed or that of a non-jurisdictional High Court should be followed is answered in Tej International (P) Ltd (2000)69 TTJ 650(Delhi) (Trib.) wherein it was held that in the hierarchical judicial system that we have in India, the wisdom of the court below has to yield to the higher wisdom of the Court above, and therefore, once an authority higher than this Tribunal has expressed its esteemed views on a an issue, normally, the decision of the higher judicial authority is to be followed. It was also held that the fact that the judgment of the higher judicial forum is from a non-jurisdictional High court does not alter this position. Consequently, Virgin Creations is followed and it is held that the amendment to s. 40(a)(ia) is retrospective from 1.4.2005 and any payment of TDS on or before the due date for filing the ROI is sufficient.

Piyush C. Mehta v. ACIT (2012) BCAJ Pg. 32, Vol. 44-A, Part 2, May, Mum)(Trib)www.itatonline.org

S.40(a)(ia): Amounts not deductible- Deduction at source-Precedent- Non-jurisdictional High Court prevails over special bench- TDS paid before due date of filing of return- Amendment by FA 2010 w.e.f 1.4.2010 is retrospective

For AY 2005-06, the AO disallowed Rs. 47.26 lakhs u/s 40(a)(ia) on the ground that the TDS had not been paid in time. The assessee claimed that the amendment to s. 40(a)(ia) by the Finance Act 2010 w.e.f. 1.4.2010 to provide that no disallowance could be made if the TDS was paid on or before the due date specified in s. 139(1) was retrospective in nature as held in CIT vs. Virgin Creations and that the contrary ruling of the Special Bench in Bharti Shipyard Ltd vs. DCIT(2011) 132 ITD 53 (Mum) could not be followed. Held by the Tribunal:

In Virgin Creations the Calcutta High Court has passed a reasoned order and held that the amendment to s. 40(a)(ia) is retrospective in nature. The binding nature of the decision of the Special Bench when a lone decision of non-jurisdictional High Court is available on the very same issue was examined in the Third Member decision in Kanel Oil & Export Ltd(2009) 121 ITD 596 where it was held that where there is only a judgement of the non-jurisdictional High Court prevails over an order of the Special Bench even though it is from the jurisdictional Bench (of the Tribunal). As the Calcutta High Court's decision is the lone one on the issue whether s. 40(a)(ia) is retrospective, it has to be followed in preference to the decision of the Special Bench of the Tribunal in Bharti Shipyard Ltd. Consequently, amounts in respect of which TDS is paid on or before the due date of filing the ROI is eligible for deduction. (A.Y.2005-06)

Rajamahendri Shipping & Oil Field Services Ltd v. ACIT (2012) 51 SOT 242/19 ITR 616(Visakha.)(Trib.)

S.40(a)(ia): Amounts not deductible- Deduction at source- While interest paid by PE of foreign bank to H.O. is deductible in hands of PE, same interest is not taxable in hands of H.O.

The assessee, a Japanese bank, carrying on business through a PE in India, paid interest of Rs. 5 crores to its H.O. & other branches. The assessee, in computing the profits assessable to tax in India, claimed that while the interest received by the H.O. & other branches from the PE was not chargeable to tax in India on the principle that the PE & H.O. were one & the same entity, the PE was entitled to claim a deduction under Article 7 of the DTAA. The AO held that the PE & the H.O. were deemed to be separate entities and that while the interest received by the H.O. from the PE was taxable under Article 11, deduction for that interest could not be allowed to the PE u/s 40(a)(i) as it had failed to deduct TDS. The CIT (A) followed the verdict of the Special Bench in ABN Amro Bank(2005) 98 TTJ 295 (Kol) (partly affirmed in ABN AMRO(2011) 198 TM 376 and held that the interest was neither chargeable to tax nor allowable as a deduction. On appeal to the Tribunal, the matter was referred to a 5 Member Special Bench held by the Special Bench:

(i) On the question whether the interest paid by the PE to the H.O. is deductible, while such interest is not deductible under the Act because the payer & payee are the same person, Article 7(2) and 7(3) of the DTAA & its Protocol makes it clear that for the purpose of computing the profits attributable to the PE in India, the PE is to be treated as a distinct and separate entity which is dealing wholly independently with the general enterprise of which it is a part and deduction has to be allowed for, inter alia, interest on moneys lent by the PE of a bank to its H.O.

(ii) On the question of taxability of the interest received by the H.O. from the PE, such interest is not taxable under the Act as both are, under the Act, the same person and not separate entities & one cannot make profit out of himself. The fiction created in Article 7(2) of the DTAA treating the PE as separate and independent entity does not extend to Article 11. Also, the interest paid by the PE is not interest paid in respect of debt claims forming part of the assets of the PE so as to attract Article 11(6). The DTAA, even assuming that it does create a liability, cannot be applied u/s 90(2) as it is contrary to the Act and less favourable to the assessee (Question as to whether the interest paid by the PE should be netted off against the interest received, left open).(A.Y. 2003-04)

Sumitomo Mitsui Banking Corporation v .DDIT(2012) 136 ITD 66/ 70 DTR 1/145 TTJ 649/ 16 ITR 116(SB) (Mum)(Trib)
Antwerp Diamond Bank NV v. Addl. DIT (2012)136 ITD 66/ 70 DTR 1/ 145 TTJ 649/ 16 ITR 116(SB) (Mum.)(Trib.)

S.40(a)(ia):Amounts not deductible- Deduction at source-Paid-Payable- TDS Disallowance applies only to amounts "payable" as on 31st March and not to amounts already "paid" during the year

The assessee incurred brokerage expenses of Rs.38.75 lakhs and commission of Rs.2.43 lakhs without deducting TDS. Of this only Rs. 1.78 lakhs was payable and the rest was paid. The AO disallowed the entire expenditure u/s 40(a)(ia).

Before the CIT (A), it was argued that disallowance u/s 40(a)(ia) could be made only of the amount "payable" and not of that which had already been "paid" though it was rejected. On appeal to the Tribunal, the matter was referred to the Special Bench. Held by the Special Bench:

Per the majority (S. V. Mehrotra, AM, dissenting):

When s. 40(a)(ia) was proposed to be inserted by the Finance Bill 2004, it applied to any "amount credited or paid". However, when enacted by the Finance Act 2004, it applied only to "amount payable". The words "credited/paid" and "payable" have different connotations and the latter refers to an amount which is unpaid. The change in language between the Bill and the Act is conscious and with a purpose. The legislative intent is clear that only the outstanding amount or the provision for expense (and not the amount already paid) is liable for disallowance if TDS is not deducted. Also, s. 40(a)(ia) creates a legal fiction by virtue of which even genuine and admissible expenses can be disallowed for want of TDS. A legal fiction has to be limited to the area for which it is created. Consequently, s. 40(a)(ia) can apply only to expenditure which is "payable" as of 31st March and does not apply to expenditure which has been already paid during the year.

Per S. V. Mehrotra, AM:

The object of s. 40(a)(ia) is to ensure that the TDS provisions are scrupulously implemented without any default. If a narrow interpretation is assigned to the term 'payable', the object with which s. 40(a)(ia) was inserted would be frustrated. The Legislature could have never intended that only amounts payable at the end of the year should be disallowed but not the amounts paid during the year. The reason the words "credited" or "paid" were dropped was because they came within the ambit of the term "payable" and would have been superfluous. As s. 40(a) is applicable irrespective of the method of accounting followed by an assessee, the term 'payable' covered the entire accrued liability. Also s. 40(a)(ia) is to be interpreted harmoniously with the TDS provisions as its operation depends solely on the provisions contained under Chapter XVII-B & it provides for one of the consequences of non-deduction of tax. In the backdrop of the TDS provisions, the term "payable" means the amount "payable" "on which tax was deductible at source under Chapter XVII-B". Consequently, s. 40(a)(ia) applies to all expenditure which is actually paid and which is payable as at the end of the year. (A.Y.2005-06)

Merilyn Shipping & Transports v.ACIT(2012)136 ITD 23/70 DTR 81/146TTJ 1/16 ITR 1(SB)(Visakha.) (Trib.).

S.40(a)(ia):Amounts not deductible-Deduction at source-Contractor-Professional and technical fees-Payment made before due date of filing of return-Tax deducted was paid before due date of filing of return hence the disallowance cannot be made -Special Bench decision cannot be followed in view of High Court Judgment.

In AY 2005-06, the assessee made payments to contractors & for professionals & technical services. Though TDS was deducted, it was paid after the end of the FY but before filing the ROI. The assessee pleaded that s. 40(a)(ia), as amended by the FA 2010 w.e.f. 1.4.2010 to provide that no disallowance should be made if the TDS was paid before the due date of filing the ROI should be held to be retrospective. However, the AO & CIT (A), rejected the claim by relying on Bharati Shipyard Ltd v.Dy. CIT(2011)132 ITD 53 (Mum) (SB). On appeal to the Tribunal, Held allowing the appeal:

The issue involved has now been decided by the Calcutta High Court in CIT vs. Virgin Creators against the Revenue. However, it is noteworthy that the Special Bench of ITAT Mumbai in the case of Bharati Shipyard Ltd v.Dy.CIT(2011)132 ITD 53 (Mum) has taken a view that the amendment is prospective in nature and would apply accordingly. Respectfully following the decision of the Calcutta High Court in the case of Virgin Creators, the order of the CIT(A) is not sustainable and the assessee's appeal is allowed(A.Y. 2005-06)

Alpha Projects Society P. Ltd v. DCIT (ITAT)(Ahd).www.itatonline.org

S.40(a)(ia): Amounts not deductible-Deduction at source-Rent- Service charges of furniture and fixtures is in the nature of rent hence disallowance is justified.

Payment made for using the part of the fixture of rented property was in nature of rent and the assessee was required to deduct the tax under section 194-I. The disallowance was justified under section 40(a)(ia) for not deducting the tax. (A.Y. 2007-08)

The Karnavati Co-op. Bank Ltd. v. Dy. CIT (2012) 134 ITD 486 / 144 TTJ 769 / 14 ITR 175/68 DTR 41 (Ahd.)(Trib.)

S.40(a)(ia): Amounts not deductible–Deduction at source-Interest paid as per court order there is no obligation to deduct tax at source hence no disallowance can be made . (S.194A).

The Assessing officer disallowed interest, for failure to deduct tax at source payment of disputed amount with interest as per the court order.

The Tribunal held that the amount was paid in accordance with the decision of the High Court. The interest payable under the decree of the court was a judgement debt, therefore, he was not obliged to deduct tax at source.(A.Y. 2005-06)

Akber Abdul Ali v. ACIT, (2012) 146 TTJ 57 (UO) / BCAJ Pg. 25, Vol. 43 B Part 6, March 2012(Mum.)(Trib.)

S.40(a)(ia):Amounts not deductible- Deduction at source- Contract- Tax deducted is paid before due date of filing of return no disallowance can be made under section 40(a)(ia).(S.194C).

The assessee made payments to contractors from April 2007 to February 2008. However, the TDS thereon was deducted (belated) in March 2008 and paid before the due date for filing the ROI. The AO disallowed the payments u/s 40(a)(ia) though the CIT (A), relying on BapusahebNanasahebDhumal, allowed the claim on the ground that as the TDS was (belatedly) deducted in March 2008, it could be paid before the due date for filing the ROI. On appeal by the department, Tribunal held dismissing the appeal:

(i) Though u/s 194C, tax had to be deducted at the time of payment or credit, the assessee deducted TDS only in March. While the assessee has to face consequences for its failure to deduct TDS in time, no disallowance u/s 40(a)(ia) can be made because clause (A) of the proviso to s. 40(a)(ia) provides that if the tax is deducted during the last month of previous year and paid on or before the due date of filing the ROI, no disallowance shall be made (Bapusaheb Nanasaheb Dhumal v ACIT (2010)40 SOT 361 (Mum) followed);

(ii) S. 40(a)(ia) was amended by the FA 2010 w.e.f. 1.4.2010 to provide that no disallowance shall be made if the TDS (for whichever month) is paid before the due date of filing the ROI. While in Bharti Shipyard Ltd. v. DCIT (2011) 132 ITD 53 (Mum) (SB), it was held that the amendment is not retrospective, a contrary view has been taken by the Calcutta High Court in CIT v. Virgin Creations. Considering the precedent in the judicial hierarchy, the judgement of the non-jurisdictional High Court prevails over a judgement of the Special Bench (Kanel Oil & Export (2009)121 ITD 596 (Ahd) (TM) followed) (AY 2008-09)

ACIT v. M.K. Gurumurthy(2012) 52 SOT 84 (Bang.)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source- Business Expenditure – Payment for supply of labour,can be assumed that there was a contract for supply of labour between the assessee and CDLB,hence the provisions of Section 194C was clearly attracted.

Payment made to CDLB towards stevedoring expenses being in the nature of the payment for supply of labour, it can be assumed that there was a contract for supply of labour between the assessee and CDLB and, therefore provisions of Section 194C was clearly attracted even though the labour hired by assessee through CDLB is considered to be in assessee's employment. Matter remanded to the file of CIT(A) as, CIT(A) did not deal with the said provisions. (A.Y. 2006 -07)

Dy. CIT v. Kamal Mukherjee & Co. (Shipping) P. Ltd. (2012) 145 TTJ 374 / 69 DTR 75 (Kol.) (Trib.)

S.40(a)(ia):Amounts not deductible – Deduction at source - Work contract- Printing and supply of diaries, catalogues, etc , material used by the assessee, procured from other parties does not amount to work contract under section 194C. (S. 194C)

Printing and supply of diaries, catalogues and folders by printers as per the requirements of the assessee by using materials procured from other parties did not amount to works contract within the meaning of Section 194C and, therefore assessee was not obliged to deduct tax at source from the payments made to the said printers and consequently, the payment could not be disallowed under section 40(a)(ia). (AY 2007-08)

DCIT v. *Eastern Medikit Ltd. (2012)135 ITD 461/ 71 DTR 241 /146 TTJ 551/ 18 ITR 457 (Delhi)(Trib.)*

S.40(a)(ia):Amounts not deductible-Deduction at source-Amendment by Finance Act 2010 is retrospective tax deducted at source deposited before due date of filing of return no disallowance can be made.

For A.Y. 2008-09, the assessee made a deposit of TDS after the due date for payment but before the due date for filing the ROI. The assessee claimed that the amendment to s. 40(a)(ia) by the FA 2010 w.e.f. 1.4.2010, which allows time for

deposit of TDS upto the due date of the ROI, should be treated as being retrospective w.e.f. 1.4.2005. The AO rejected the plea though the CIT (A) allowed it. Before the Tribunal, the department relied on Bharati Shipyard ITD v. DCIT (2011)132 ITD 53(SB)(Mum.)(Trib.) where it was held that the amendment was not retrospective. Held by the Tribunal dismissing the appeal:

Though in Bharati Shipyard 132 ITD 53 (Mum)(SB), it was held that the amendment to s. 40(a)(ia) by the FA 2010 w.e.f. 1.4.2010 cannot be treated to be retrospective, a contrary view has been taken by the Calcutta High Court in CIT vs. Virgin Creations. As this is the sole High Court judgement on the point, it has to be followed in preference to the view of the Special Bench. Accordingly, the amendment to s. 40(a)(ia) by the FA 2010 is applicable retrospectively from 1.4.2005 and no disallowance u/s 40(a)(ia) can be made if the TDS is paid on or before the due date for filing the ROI (Piyush C. Mehta v. ACIT ITA No. 1321/M/2009, A.Y. 2005-06 date 11/4/2012 and ACIT v. M.K. Gurumurthy ITA No. 717/Bang/2011, A.Y. 2008-09 DT. 10/5/2012 followed) (A.Y.2008-09)

ITO v. Taru Leading Edge (P) Ltd. (Delhi)(Trib.) *www.itatonline.org*

S.40(a)(ia) : Amounts not deductible - Deduction at source – Non-resident –One non-resident to another non-resident-Hiring charges for transponder- Outright sale television programme. (S.9(1) (vi),195)

The assessee, a Mauritius company, made payment to Panamsat, USA, for hire of a "transponder satellite". The AO held that the said hire charges constituted "royalty" and that the assessee ought to have deducted TDS u/s 195 and that as it had not done so, the amount was to be disallowed u/s 40(a)(ia).The Tribunal held that payment of hiring charges for transponder made by assessee a foreign company , to a US Company is not in the nature of royalty within the meaning Indo –US DTAA as a no technology is "made available" in the hiring of transponder and therefore assessee is not required to deduct tax at source under section 195. The Tribunal also held that payment has been made by one non-resident to another non-resident outside India on the basis of contract executed outside India .Accordingly addition was deleted .Similarly payment made by the assessee foreign company to another Mauriitian company being payment for outright sale of Television programmes and not merely for broad casting rights of such programmes , assessee was not required to deduct tax at source. The Tribunal also held that consideration paid for sale, distribution or exhibition of cinematographic films does not fall within the term " royalty" in view of explanation 2 to section 9 (1) (vi), hence payments made by the assessee are not liable to deduct tax in India, hence provision of section 195 is not applicable.(A.Y. 2002-03)

B4U International Holdings Ltd v. DCIT(2012)74 DTR 162 (Mum.)(Trib.)

S.40(a)(ia): Amounts not deductible-Deduction at source-Production of feature film- Individual- Since the provisions of section 194C were not applicable to individuals prior to Ist April ,2007 , the assessee is under no obligation to deduct tax at source hence no disallowance can be made.(S.194C, 194J)

The assessee who is an individual engaged in the business of production of cinematographic films made payments to director of film . The assessee deducted the tax for the assessment year 2005-06 at 2.2% treating the said payment as payment to contractor. The Assessee contended that he is not liable to deduct the tax at source by mistake he has deducted tax at source the assessee should not be held liable for disallowance. The Assessing Officer held that the payments falls under the head fees for technical services hence provision of section 194J is applicable hence the assessee should have deducted the tax at 5.23% hence he disallowed the payment by applying the provisions of section 40(a)(ia) . In appeal Commissioner of Income-tax (appeals) also confirmed the order of assessing officer. The Tribunal held that the payments made by the assessee falls under the expression "work" hence fall under the provisions of section 194C. Since the provisions of section 194C of the Act is not applicable to individuals prior to 1st April, 2007, the assessee was under no obligation to deduct tax at source for the period under consideration therefore disallowance made under section 40(a)(ia) of the Act cannot be sustained .(A.Y.2005-06)

Nitin M.Panchamiya v. Addl.CIT (2012) 73 DTR 202/148 TTJ 96 (Mum.)(Trib.)

S.40(a)(ia): Amounts not deductible- Short deduction of tax-If there is short deduction of tax, assessee be declared as assessee in default under section 201 - No disallowance can be made by invoking section 40(a)(ia).(S.194C,194I,201)

The assessee deducted the tax at source in respect of payment of equipment charges at 2.06 %, treating the said payment as covered under section 194C. The Assessing Officer is of the opinion that equipment charges is in the nature

of hiring and therefore the provisions of section 194I is applicable hence the TDS is required to be deducted at 11.33%. As there was short fall in deduction of TDS the Assessing Officer invoked the provision of section 40(a)(ia) and disallowed the expenses. Commissioner (Appeals) upheld the disallowance. On appeal to Tribunal, the Tribunal held that if there is short fall of deduction due to difference of opinion as to the taxability of any item or nature of payments falling under various provisions of TDS, assessee can be declared as to be assessee in default under section 201, but no disallowance can be made by invoking provisions of section 40(a)(ia). (A.Y.2008-09)(ITA no 6281 /Mum/ 2011 dated 10-8-2012 Bench 'E'.

EGS Survey P.Ltd v. ACIT (2012) Income Tax Review –September –P. 90(Mum.)(Trib.)

S.40(a)(i): Amounts not deductible-Deduction at source-Installation and commissioning services integral part of supply and not assessable as 'fees for technical services' despite separate contract.[S.9(1)(vii)]

The assessee is engaged in the business of engineering and general contracting. In the revised return of income, assessee did not make a disallowance u/s 40(a)(ia) in respect of installation charges to M/s Mesto Automation SCADA Solutions Ltd on the ground that the said amount was paid in relation to plant and machinery supplied by M/s Mesto Automation SCADA Solutions Ltd and the said amount not being chargeable to tax in India in the hands of said party as per the Explanation 2 to section 9(1)(vii) , it was not liable to deduct tax at source from the said amount. There were two agreements; one for supply of equipment another for installation and commissioning work which itself made it clear that the installation and commissioning work are different from the supply of plant. The Tribunal held that, though there was a separate contract for supply and a separate one for installation and commissioning services, the said services held to be treated as 'ancillary and subsidiary as well as inextricable and essentially linked to the sale/supply of the equipment' and, therefore , was not chargeable to tax in the hands of the Canadian company as 'fees for technical services' consequently the disallowance under section 40(a)(i) was not sustainable. Installation and commissioning services are integral part of supply and not assessable as 'fees for technical services' despite separate contract. Appeal of revenue was dismissed.(A.Y.2002-03) (ITA no 2624/Mum/2006 Bench 'L' dated 29-08-2012)

DCIT v. Dodsal Pvt Ltd (Mum.)(Trib.)www.itatonline.org.

S.40(a)(i): Amounts not deductible-Deduction at source- Royalty- Retrospective amendment of law- Due to retrospective amendment of law, No obligation for TDS as the law cannot compel a person to do something which is impossible to perform.(S.9(1)(vi).

The assessee is a company engaged in the business of financing , leasing, hire purchase, production and distribution of internet media and manufacturing of towels. In the said year the video channel started by the assessee became functional. In the course of Video channel business the assessee entered in to an agreement with with M/s Shan Statelite Public Co Ltd (SSA).During the year the assessee paid the amount for the facility of up linking and telecasting programmes, broad casting and telecasting ,the consultation charges to SSA in foreign exchange without deduction of tax at source. The payment was made on the certificate issued by the Chartered accountant, that the said payment constituted business income of that non-resident party and since they did not have a Permanent Establishment (PE) in India, business income earned by them was not chargeable to tax in India in accordance with the Article 7 of DTAA between India and Thailand, and thus, no tax at source was therefore deductible. The Tribunal following the judgment of Ahmedabad Tribunal in the case of Sterling Abrasive Ltd dated 23-12-2010 held that the assessee cannot be held to be liable to deduct tax at source relying the subsequent amendments made in the Act with retrospective effect. Further, the Tribunal relied on the legal maxim 'Lex non cogit ad impossibia' meaning thereby that the law cannot possibly compel a person to do something which is impossible to perform, and on the decision of Honourable Supreme Court in the case of Krishna Swamy S. PD and another v.UOI and other (2006) 281 ITR 305 where in the said legal Maxim was accepted by the Honourable Court. Thus, Tribunal accordingly held that amount paid by the assessee to SSA was not taxable in India in the hands of SSA either under section 9(1)(vii) as per the legal position prevalent time and the assessee therefore was not liable to deduct tax at source from the said amount paid to SSA and there was no question of disallowing the said amount by invoking section 40(a)(i) . In view of above the addition confirmed by the Commissioner (Appeals) was deleted.(A.Y. 2004-05) (ITA nos 12221/ Mum/ 2006 / 579/ Mum/ 2006 Bench "L" dated 29-08- 2012)

Channel Guide India Ltd v. ACIT (Mum.) (Trib.)(www.itatonline.org)

S.40(a)(i)(a): Amount not deductible – VSAT and Lease Line charges – Payment made to Stock Exchange was not for technical services hence provisions of S. 194J r.w.s. Explanation 2 of S. 9(1)(vii) is not applicable. The assessee was not liable to deduct Tax at Source. (S.9(1)(vii), 194J)

The following two questions were raised before the High Court by the revenue:

"(A) Whether on the facts and in the circumstances of the case and in law the Hon'ble was justified in holding the VSAT and Lease Line charges paid to the Stock Exchange by the Assessee Company were allowable as a deduction from taxable Income even though the Assessee Company had failed to deduct TDS thereon?

(B) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was justified in holding that VSAT and Lease Line charges paid to the Stock Exchange by the Assessee Company were not paid in consideration of technical services rendered by the Stock Exchange within the meaning of Section 194J read with Explanation 2 to Section 9(1)(vii) of the Income tax Act.?"

The Court held that as regards first two questions are concerned, the findings of fact recorded by the ITAT is that VSAT and Lease Line charges paid by the assessee to Stock Exchange were merely reimbursement of the charges paid / payable by the Stock Exchange to the Department of Telecommunication. Since the VSAT and Lease Line charges paid by the assessee do not have any element of income, deducting tax while making such payments do not arise. Hence, question Nos. (A) and (B) cannot be entertained.

The Income Tax Commissioner Mumbai City v. Angel Capital & Debit Market Ltd. ITA (L) NO. 475 of 2011, dt. 28/07/2011 (Bom.)(High Court) (unreported)

Editorial Note: ITA No. 5560/M/2009, A.Y. 2006-07, Bench "D" Dated 29/10/2010 DCIT v. Angel Capital & Debit Market Ltd.

S.40(b):Amounts not deductible- Limits- Non business income - For s. 40(b)(v) limits, P&L A/c profits (*including non-business income*) have to be taken & not only "profits & gains of business" as computed u/s 28 to 43D (S. 28, to 43D)

S. 40(b)(v) permits a firm to claim deduction of remuneration paid to a working partner upto certain limits of the "*book profit*". The term "book profit" is defined in Explanation 3 to mean "*the net profit, as shown in the profit and loss account for the relevant previous year, computed in the manner laid down in Chapter IV-D …* ". The High Court had to consider whether the term "book profit" meant the profit as per the P&L A/c (*which included non-business income*) or the "*Profits & gains of business as computed under Chapter IV-D*". Held by the High Court:

The said chapter nowhere provides that method of accounting for the purpose of ascertaining net profit should be the only income from business alone and not from other sources. S. 29 provides how the income from profits and gains of business should be computed and this has to be done as provided u/s 30 to 43D. By virtue of s. 5 that total incomes of any previous years includes all income from whatever source derived. Thus for the purpose of s. 40(b)(v) read with the Explanation, there cannot be a separate method of accounting for ascertaining net profit and/or book-profit. The said section nowhere provides that the net profit as shown in the P&L A/c is not the profit computed under the head profit and gains of business. Following the principle laid down in Apollo Tyres Ltd v CIT (2002) 255 ITR 273 (SC), the AO is not entitled to recompute the P&L profits. Even if income from other sources is included in the P&L A/c, to ascertain the net profit qua book-profit for computation of remuneration of the partners the same cannot be discarded.(AY 1995-96 to 1998-99)

Md. Serajuddin & Brothers v. CIT (2012) 210 Taxman 84(Cal.)(High Court)

S.40(b):Amounts not deductible- Firm -Commission to partners- Partnership deed did not provide for payment of any commission to partners in view of non obstinate clause contained under section 40(b), of the Act, any remuneration paid to partner in whatever manner , is not deductible as an expenditure under section 37(1).(S. 37(1)

The assessee was a partnership firm. Two persons possessed Certificate of Diploma in Pharmacy. To carry on the business of drugs at least one person had to be qualified for selling the drugs. The firm paid commission to the aforesaid two partners, in their individual capacities for the services rendered by them by virtue of the specialized qualification they possessed. The Assessing Officer held that said amount could not be allowed as deduction at the hands of the firm in view of sec. 40(b).

It was held that a partner is not entitled to receive remuneration for taking part in the conduct of the business u/s. 13 of the Partnership Act. This rule is subject to the contract to the contrary. In other words, if there is a contract between partners to receive remuneration for taking part in the conduct of the business, this rule is not applicable. Sec. 40(b) recognizes this rule. It provides for making payment to a partner subject to the condition mentioned therein being fulfilled. The said conditions are:

i) The partnership deed i.e. contract between the parties should provide for such payment.
ii) The person to whom it is paid should be a working partner.
iii) Such payment should be within the limits prescribed in sec. 40(b)(v). (para 12)

Therefore, any payment made to a partner if it is to be eligible for deduction u/s. 37 of the Act, should satisfy the aforesaid requirements. Otherwise, the amount paid to such partner cannot be deducted as expenditure u/s 37.
Dr. Bidari Ashwini Hospital v. ITO, Ward 1, Bijapur (2012) 209 Taxman 303 (Karn.)(High Court)

S.40(b):Amounts not deductible – Firm - Salary to partners - Remuneration paid to working partner was disallowed as the authorisation was not accordance with the provision.
The deed of partnership stated that the remuneration has to be computed as per Explanation 3 to section 40(b). The Tribunal held that where the authorisation in the partnership deed is such that correct quantification of the remuneration payable to the working partner cannot be done, it cannot be construed as a type of authorization which would satisfy the requirement of section 40(b), therefore, the disallowance of remuneration was upheld. (A. Y. 2007-08).
ACIT v. Madeena Constructions (2012) 134 ITD 67 / 67 DTR 1 / 14 ITR 25 / 144 TTJ 137(TM) (Chennai)(Trib.)
S.40(b)(v):Amounts not deductible-Partnership deed-Remuneration- Partnership deed need not quantify partner's remuneration, hence disallowance cannot be made.
The assessee's partnership deed provided that the partners would be paid remuneration / salary "according to the standards and norms fixed by the relevant provisions of the Income Tax Act, 1961". The AO disallowed the claim for deduction of the salary paid to the partners u/s 40(b)(v) on the ground that as the deed did not quantify the amount of remuneration. This was reversed by the CIT (A) and Tribunal. On appeal by the department, Held dismissing the appeal:
The Tribunal finding that "The quantification of the remuneration was apparent from clause 8 of the partnership deed which provided that the remuneration would be payable as per norms fixed by the Income-tax Act. The requirement in law is that remuneration should have been authorized and the amount of remuneration shall not exceed the amount specified in s. 40(b)(v) which uses the word 'authorised' and not the word 'quantify'". It is a finding of fact which cannot be interfered with by this Court
CIT v. The Asian Marketing (Raj)(High Court).www.itatonline.org.
S.40A(2):Expenses or payments not deductible- Trust- Payments made to trust provisions of section 40A(2) was not attracted.
The Trust is neither a company, nor firm, nor HUF, nor an AOP within the meaning of cl.(v) of S.40A(2)(b) and therefore, the provision of S.40A(2) is not attracted to the payments of lease rent by the assessee company (lease) to the lessor-trust even though the company is owned and controlled by the trustees of the trust and their family members. (A.Y. 1994 – 95 to 1999-2000, 2004-05, 2005-06 & 2007-08)
Shanker Trading (P) Ltd. v. CIT (2012) 76 DTR 40 (Delhi)(High Court)

S.40A(2):Expenses or payments not deductible- Business expenditure –Interest- Interest paid by assessee is not in excess of fair market value and wholly and exclusively for the purpose of business, disallowance was deleted.

As there was no material with the Assessing Officer to show that the payment of interest made to sister concern was in excess of fair market value and interest paid was wholly and exclusively for the purpose of business. Hence, disallowance was deleted. (AY 2002-2003 to 2004-05)

BhartiAirtel Ltd. v. A CIT (2012) 145 TTJ 161 (Mum.)(Trib.)

S.40A(2)(b):Expenses or payments not deductible- Excessive or unreasonable-Market price- Disallowance can be made only if the payment made was excess of market price.

Disallowance u/s 40A(2)(b) can be made only to extent payment for services is excessive or unreasonable vis-a-vis market price of such services, but what is essentially required is that market price of these services is established and then amount paid in excess of such market price is to be disallowed. During year, assessee paid salary to his son at rate of Rs. 20,000 per month and claimed deduction of Rs. 2.40 lakhs as business expenditure. Assessing Officer found that assessee's son rendered services but opined that assessee had paid excess salary to his son. He, therefore, estimated salary of son at rate of Rs. 5,000 per month and disallowed a sum of Rs. 1.80 lakhs u/s 40A(2)(b). Since no findings were given by Assessing Officer that payment made by assessee was excessive or unreasonable vis-a-vis market price, estimate of salary made by Assessing Officer at rate of Rs. 5,000 per month was against express provisions of section 40A(2)(b). Disallowance of Rs. 60,000 u/s 40A(2)(b) would meet ends of justice. (A.Y. 2007 – 2008)

Vinod Kumar v. JCIT [2012] 137 ITD 48/19 ITR 246 (Chandigarh)(Trib.)

S.40A(3):Expenses or payments not deductible-Cash payment-Unavoidable circumstances- Financial crises may be "exceptional or unavoidable circumstance" for cash payment.

The assessee made payments exceeding Rs. 10,000 in cash and claimed that a disallowance under section 40A(3) read with Rule 6DD(j) & Circular No. 220 dated 31.05.1997 could not be made as a payment by cheque, etc. was not possible due to "exceptional or unavoidable circumstances", etc. The Tribunal rejected the assessee's claim on the ground that that the assessee's explanation that the payees would not accept cheques as they had been dishonoured on earlier occasions was "fantastic and fanciful" as in such case the assessee could have deposited cash and obtained bank drafts. It was also held that the assessee had not explained how it obtained the cash for making the payments & if the amounts were borrowed, there was a violation of section 269SS. On appeal by the assessee to the High Court, held reversing the Tribunal:

Section 40A(3) & Rule 6DD(j) have been incorporated in the Act to check the incurring of bogus and fictitious expenses to non-existing parties. In the present case, there is no dispute on the identity of the payee and genuineness of the transaction. The only question is whether the assessee has been able to establish "exceptional or unavoidable circumstances" why the payment made in cash. The assessee was not doing well in its business and was facing liquidity and financial crunch. The assessee's explanation that payments were made in cash as preparation of a bank draft or issue of cheque would have resulted in a missed opportunity or failure of a good business deal with third parties is acceptable because there were earlier cases of bounced cheques and when a party is facing liquidity problem, it can get difficult as third parties are reluctant to accept cheques and insist on cash payments. Arranging funds is also a problem and not easy. Also, the cash was obtained from a known party and the Assessing Officer had not made any addition on that score. Accordingly, disallowance under section 40A(3) was not justified.

Basu Distributor Pvt. Ltd. v. ACIT (Delhi) (High Court) www.itatonline.org

S.40A(3): Expenses or payments not deductible –Stock in trade-Union- Provision of section 40A(3) is applicable to payment made for purchase of stock-in-trade – Payment made to union cannot be treated as payment to producers of milk in terms of section rule 6DD(f).

Assessee has made cash payments to Hoshiarpur District Co-operative Milk Producers Union Ltd. As per bye laws of Society no individual producers of milk can be a member of a said society, only a registered milk producers society and the State Government can be a producers of Milk, hence, the payment made by the assessee to the said society can not be treated as payment made to producers of milk in terms of rule 6DD(f), there for disallowance was justified. Further

the provisions of section 40A(3) is also applicable for purchase of stock-in-trade as the same also amounts to expenditure.

Chanchal Dogra (Smt) v. ITO (2012) 67 DTR 108 / 247 CTR 616 (HP)(High Court)

S.40A(3): Expenses not deductible- Cash payments exceeding prescribed limits-Single payment was not in excess of Rs 20000, disallowance cannot be made. Amendment in 2009 adding the word "aggregate" is prospective.

The assessee had made payment in excess to Rs 20000 in cash different dates but Assessing Officer disallowed the expenses under section 40A(3). Addition was confirmed by the Tribunal. On appeal to the High Court, the Court held that Single payment was not excess of Rs 20000, disallowance cannot be made. Amendment in 2009 adding the word "aggregate" is prospective and not retrospective.(A.Y. 2004-05)

Kiran Jaiswal v. ITO (2012) 75 DTR 15 (All.)(High Court)

S.40A(3):Expenses or payments not deductible-Cash payment-Exceptional circumstances- Financial crises may be "exceptional or unavoidable circumstance" for cash payment.

The assessee made payments exceeding Rs. 10,000 in cash and claimed that a disallowance u/s 40A(3) read with Rule 6DD(j) & Circular No.220 dated 31.05.1997 could not be made as a payment by cheque etc was not possible due to "exceptional or unavoidable circumstances" etc. The Tribunal rejected the assessee's claim on the ground that that the assessee's explanation that the payees would not accept cheques as they had been dishonoured on earlier occasions was "fantastic and fanciful" as in such case the assessee could have deposited cash and obtained bank drafts. It was also held that the assessee had not explained how it obtained the cash for making the payments & if the amounts were borrowed, there was a violation of s.269SS. On appeal by the assessee to the High Court, held reversing the Tribunal:

S. 40A (3) & Rule 6 DD (j) have been incorporated in the Act to check the incurring of bogus and fictitious expenses to non existing parties. In the present case, there is no dispute on the identity of the payee and genuineness of the transaction. The only question is whether the assessee has been able to establish "exceptional or unavoidable circumstances" why the payment made in cash. The assessee was not doing well in its business and was facing liquidity and financial crunch. The assessee's explanation that payments were made in cash as preparation of a bank draft or issue of cheque would have resulted in a missed opportunity or failure of a good business deal with third parties is acceptable because there were earlier cases of bounced cheques and when a party is facing liquidity problem, it can get difficult as third parties are reluctant to accept cheques and insist on cash payments. Arranging funds is also a problem and not easy. Also, the cash was obtained from a known party and the AO had not made any addition on that score. Accordingly, disallowance u/s 40A(3) was not justified.

Basu Distributor Pvt Ltd v. ACIT (Delhi)(High Court) www.itatonline.org

S.40A(3):Expenses or payments not deductible-Cash payments- Airports Authority-Payments to agent-Disallowance can not be made. [Income-tax Rules,1962,Rule 6DD(k)]

Payments to Airports Authority of India in accordance with directions of Authority, falls under exceptions specified in Rule 6DD(k) hence disallowance was not justified. (A.Ys. 2005-06 to 2007-08)

SRC Aviation P.Ltd. v. Dy. CIT (2012) 13 ITR 600 (Delhi)(Trib.)

S.40A(3):Expenses or payments not deductible- Cash payments- Advance - Disallowance can not be made in respect of advance for purchase of land.

Advance made to purchase of land was received back by assessee as the deal could not materialize, payment made for purchase of land cannot be disallowed under section 40(A)(3).(A.Y.2006-07)

Yamuna Prasad Peshwa v. Dy.CIT (2012) 65 DTR 330/ 143 TTJ 615 (Jodhpur)(Trib.)

S.40A(3):Expenses or payments not deductible- Cash payments- Purchase of land- No Banking facilities-Disallowance can not be made. [Rule 6DD(e)(g)(j)&(k)]

The cash payments made by assessee colonizer and developers for purchase of land to farmers residing in a villages, where there is no banking facilities and made cash payments after banking hours as indicated by the time of payment mentioned in the cash vouchers, there was an exceptional circumstances for making cash payments which fall under the exception clause in rule 6DD and therefore, the impugned payments could not be disallowed under section 40A(3). (A.Ys. 2006-07 & 2007-08)

Shree Salasar Overseas (P) Ltd. v. Dy. CIT (2012) 66 DTR 9 / 144 TTJ 4 (UO) (Jaipur)(Trib.)

S.40A(3): Expenses or payments not deductible- Cash payments exceeding prescribed limits.

Amended provisions of S. 40A(3) and 40A(3A) are applicable in respect of those expenditure for which liability has been incurred in A.Y. 2008-09 or in any subsequent year but it cannot be made applicable to the liability incurred upto the A.Y. 2007-08. (A.Y. 2008-09)

Anandkumar Rawatram Joshi v. ITO (2012) 76 DTR 82 (Ahd.)(Trib.)

S.40A(3): Expenses or payments not deductible- Cash payments exceeding prescribed limits-

If the liability for an expense is incurred upto A.Y. 2007-08 and the payment is made in a subsequent year i.e. 2008-09 the provisions of S.40A(3) as applicable in the year in which liability was incurred should be applied. Payment by a crossed cheque in A.Y. 2008-09 in respect of liability of A.Y. 2004-05 could not be disallowed in A.Y. 2008-09 by applying amended provisions of S.40A(3). (A.Y. 2008-09)

Tushar A. Sanghvi (HUF) v. ITO (2012)136 ITD 394/ 76 DTR 90 / 149 TTJ 205 (Ahd.)(Trib.)

S.40A(9): Expenses or payments not deductible – Contribution – Reimbursement - Section applies to contribution and not to reimbursement, matter set aside to be decided de nova. (S.37)

The assessee claimed deduction u/s 37, in respect of welfare expenses towards providing education to its employees' children. The payment was by way of reimbursement towards the deficit which the school incurred during the relevant accounting period. The Court observed that ,the interpretation of section 40A(9) of the Act clearly brings out a dichotomy between 'contribution' and 'reimbursement'. Section 40A(9) of the Act was inserted by Finance Act no 2 of 1984. The explanatory memo to the Finance Bill 1984, indicates the reasons why the word 'contribution' finds place in section 40A of the Act. It appears that the section 40A(9) of the Act was inserted as a measure for combating tax avoidance. On the facts of the case as there was no clear finding recorded by the Tribunal, the matter was set aside to Tribunal with the direction to decide the matter de nova and refrained from going into the scope and applicability of section 40A(9) of the Act, when proper foundation of facts has not been laid. (A.Ys .1985-86 to 1992-93)(C.A.no 4666 to4675of 2005 18-9-2012)

Sandur Manganese and Iron Ores Ltd. v. CIT(2012) 253 CTR 6/77 DTR 233 (SC).

S.41(1):Profits chargeable tax-Remission or cessation of trading liability- Income – Accrual- On waiver of loan section 41 (1) is not attracted.

For the application of section 41(1), the condition precedent is that there should be an allowance or deduction in the assessment for any year in respect of loss, expenditure or trading liability incurred by assessee hence the section 41(1) is not attracted to waiver of loan liability since no allowance or deduction was claimed in respect of the same.(A.Y. 2003-04)

CIT v. Compaq Electric Ltd. (2012) 66 DTR 38/249 CTR 214 (Karn.)(High Court)

S.41(1): Profits chargeable to tax – Income-Remission or cessation of trading liability - Amounts not allowed as deduction in earlier years cannot be assessed as income - Explanation 1 to section 41 (1), is applicable in relation to Asst. year 1997-98 on wards and can not have retrospective.

During the year the assessee had written back certain amount representing, unclaimed salaries, wages, and bonus, credit balances unclaimed by the suppliers, credit balances unclaimed by customers, unclaimed cheques, excess dividend and excess provision made for doubtful debts in its books of account. Assessing Officer treated as income of the assessee. In appeal, Commissioner (Appeals) deleted the addition which was confirmed by the Tribunal. On appeal by the revenue the High Court held that, where the amount not allowed as deduction the same can not be assessed as income under section 41(1). As regards unclaimed salaries, wages and bonus and unclaimed suppliers and customers balances could not amount to cessation of liability as Explanation 1 to section 41(1), which provides that unilateral act of assessee by way of writing off such liability in its accounts would be considered as remission or cessation of liability, will apply in relation to assessment year 1997-98 and subsequent years and it does not have any retrospective effect. Departmental appeal was dismissed. (A. Y. 1995-96).

CIT v. Mohan Meakin Ltd. (2012) 205 Taxman 43 / 69 DTR 397 (Delhi)(High Court)

S.41(1): Profits chargeable to tax-Remission or cessation of trading liability-Unpaid liability- Unpaid liability cannot be added as assessee's income.

During the assessment proceedings the assessing Officer noticed that there were several advances which had not been repaid till date. As the assessee has not filed the confirmation letters the assessing officer treated the said amounts as income of assessee. On appeal, the Commissioner (Appeals) held that the credit balances remained static for past several years as the assessee has not proved that the liability of creditor subsisted, he confirmed the order of Assessing Officer. On further appeal to Tribunal, the Tribunal deleted the addition. On appeal by revenue, following the judgment of supreme Court in CIT v. Sugauli Sugar works (P) Ltd (1999) 236 ITR 518 (SC), merely because the amount remained un paid for a sufficient long time and it's required of revenue authorities to show that liability to pay creditor has ceased or remitted by creditors, accordingly the order of Tribunal confirmed. (A.Y. 2005-06)

CIT v. Hotline Electronics Ltd (2012) 205 Taxman 245 (Delhi) (High Court)

S.41(1):Profits chargeable tax-Remission or cessation of trading liability- Liability shown in balance sheet-Merely because the liabilities are outstanding for many years provisions of section 41 (1) cannot be applied.

During the course of assessment it was Assessing Officer noticed that loans were very old and outstanding. The assessee failed to produce the confirmation and postal address. The Assessing Officer held that the liability have seized to exists and taxed under section 41, which was also confirmed by the Commissioner (Appeals). On appeal the Tribunal held that merely because the liabilities are outstanding it cannot be inferred that such liabilities have seized to exists. Accordingly the Tribunal allowed the appeal of assessee. On appeal to the High Court by revenue, the High also confirmed the view of Tribunal and held that merely because the liabilities are outstanding for last many years, it cannot be inferred that the said liabilities have seized to exists, hence section 41(1)cannot be applied. (A.Ys. 2001-02 to 2003-04 & 2006-07)

CIT v. Nitin S. Garg (2012) 71 DTR 73 /208 Taxman 16 (Guj.)(High Court).

S.41(1):Profits chargeable tax-Remission or cessation of trading liability- Liability of creditors-Liability to creditors shown as outstanding for more than four years not assessable as income

The assessee is in the business of manufacturing of rice from paddy and also selling rice after purchasing the same from the local market .In the books of assessee the amount payable was shown as outstanding . The Assessing Officer asked the assessee to file confirmation. The assessee could not file the confirmation. The Assessing Officer treated the outstanding in their accounts as unexplained credits under section 68 of the Income-tax Act. On appeal the Commissioner (Appeals) held that the Assessing Officer was justified in assessing the amount under section 41(1) of the Income-tax Act. Before Tribunal it was argued that additions cannot be made under section 41 (1). The Tribunal held that the applicability of section 68 was ruled out since no fresh amount was credited in the accounts of the creditors under consideration during the relevant accounting year. The Tribunal also held that since the liabilities were shown as outstanding in the balance sheet as on March 31, 2002, the onus had not been discharged, hence section 41(1) of the Act was not applicable. On appeal by revenue the High Court also up held the order of Tribunal and held that the liability shown as outstanding in balance sheet not assessable as income under section 41(1) though the liability to creditors were outstanding for more than four years. (A.Y. 2002-03)

CIT v. Shri Vardhman Overseas Ltd. (2012) 343 ITR 408/69 DTR 379 / 204 Taxman 524 (Delhi)(High Court)

S.41(1): Profits chargeable to tax-Remission or cessation of trading liability- Waiver of loan-Business income-Loan taken on cash credit account used towards day to day basis operation waived by bank is assessable as income. [S. 28(iv)]

During the assessment proceedings the assessee realized that it had wrongly credited the total waiver of loan received from banks /financial institutions to the P& Loss account under the head miscellaneous income. In the course of assessment proceedings the assessee revised the claim by filing revised computation. . The Assessing Officer rejected the claim on the ground that the assesesse has not filed the revised return as per the provisions of section 139(5). On appeal the Commissioner (Appeals) accepted the claim of assessee and decided in favour of assessee. On appeal to the Tribunal by the revenue the appeal was partly allowed by the Tribunal. On appeal by the assessee to High Court the Court held that loan taken by assessee on cash credit account used towards day to day business waived by bank is chargeable to tax under section 28(iv) as also under section 41(1).

Rollatainers Ltd. v. CIT (2012) 250 CTR 25 / 69 DTR 128 (Delhi)(High Court)

S.41(1): Profits chargeable to Tax-Remission or cessation of trading liability-Brokerage- Brokerage liability outstanding written back in to profit and loss account no remission or cessation of liability in relevant assessment year.

The assessee is engaged in the business of share broking and also in shares. The assessee in the Assessment Year 2004-05 written back in to the profit and loss account outstanding brokerage and taxes were paid on it. The Assessing Officer for the Assessment year 2002-03 sought confirmation of outstanding brokerage, the assessee stated that the said brokerage was offered for taxation in the assessment year 2004-05.However the Assessing Officer assessed the income for the assessment year 2002-03. On appeal the Commissioner (Appeals) and Tribunal held that as there was no remission or cessation of liability under section 41 (1) for the assessment year 2002-03 addition was not justified. On appeal, High Court confirmed the order of Tribunal.(A.Y.2002-03).

CIT v. Enam Securities P. Ltd (2012) 345 ITR 64/75 DTR 258/208 Taxman 54/253 CTR 256 (Bom.) (High Court)

S. 41(1): Profits chargeable tax-Remission or cessation of trading liability-Loan taken for capital purpose-Cessation of liability to repay loan taken for capital purposes is not assessable as income.(S. 28(iv))

The cessation of liability to repay the loan taken for purchase of a car is not assessable as income u/s 41(1) in accordance with **Mahindra and Mahindra Ltd(2003)** 261 ITR 501 (Bom). Though in **Solid Containers Ltd** (2009)308 ITR 407 (Bom) it was held that waiver of a loan taken for trading activity would become assessee's income and be subject to tax even if the assessee had never claimed a deduction for the loan, that decision is not applicable because there the loan was taken for "trading purposes" and not for purchase of a capital asset. In the alternative, the waiver of a loan is not taxable u/s 28(iv) as that provision applies only when a benefit or perquisite is received in kind and not in cash.(A.Y. 2004-05)(ITA no 3704 of 2010 dated 13-9-2010)

CIT v. Xylon Holdings Pvt. Ltd. (Bom)(High Court), ***www.itatonline.org***

S.41(1):Profits chargeable to tax – Remission or cessation of trading liability- Income- Refund of value added tax can not be assessed under section 41(1).

After refund is claimed by the assessee in the prescribed form, the Commercial tax authority has to accept or reject the claim. Value added tax refund is not an automatic refund, it is depended on the decision of the commercial tax authority who has to adjudicate the claim. It is not a benefit that accrued to the assessee during the year as the claim was not adjudicated by the commercial tax authority.(A.Y.2007-08)

ITO v. Binayak Hi-Tech Engineering Ltd. (2012) 13 ITR 369/144 TTJ 53(UO) (Kol.)(Trib.)

S.41(1):Profits chargeable to tax – Remission or cessation of trading liability- Income – Accrual- Conditional consent decree passed by Debt recovery Tribunal income can not be taxed during the year.

For the A. Y. 2000-01, the Assessing Officer made addition of income under section 41(1), being the loan written off by Syndicate Bank in pursuance of an order passed by the Debt Recovery Tribunal. The Tribunal held that it was clear from the order passed by the Debt Recovery Tribunal that only on fulfilling certain conditions which were spread over a period of time, the assessee would derive the benefit. The payments to be made by the assessee over a period of three years. The Bank gave the "No dues" certificate only in October, 2003. Hence, income if any from the consent decree could not be brought to tax in the assessment year 2000-01 as the assessee had not obtained any benefit during the year, either by way of any liability in that year. (A.Y. 2001-02 & 2004-05)

Maini Shipping P.Ltd. v. ACIT (2012) 13 ITR 440 (Mum.)(Trib.)

S.41(1):Profits chargeable to tax – Remission or cessation of trading liability- Unclaimed liability which is more than one year, addition cannot be sustained. (S. 68)

Unclaimed liabilities standing in the books of the assessee for more than one year being old liabilities, credits were not made in the relevant year and therefore, addition under section 41(1) or 68 cannot be sustained. (AY 2007-08)

DCIT v. *Eastern Medikit Ltd. (2012)135 ITD 461/ 71 DTR 241/146 TTJ 551/ 18 ITR 457 (Delhi)(Trib.)*

S.41(1): Profits chargeable tax-Remission or cessation of trading liability- Waiver by creditor - Amount not claimed as deduction in earlier years, hence waiver by creditor amount be treated as deemed business income.

The condition in section 41(1) is an absolute condition that the amount must have been claimed as deduction during the earlier assessment year. In the instant case the assessee had not claimed expenditure in any of the earlier years, the provisions of section 41(1) could not be invoked to bring the amount to tax which had been waived by the creditor. Therefore, the addition under provisions of section 41(1) was liable to be deleted. (AY 2003-04)

M.R. Banu (Smt) v. Dy. CIT (2012) 15 ITR 662 (Chennai)(Trib.)

S.41(1):Profits chargeable tax-Remission or cessation of trading liability-Liability shown in books of account – Even in respect of time barred debts provision of section 41(1) cannot be applied.

The Assessing Officer noticed that the liability shown in the balance sheet are more than one year hence brought to tax by applying the provisions of section 41(1) of the Act. In appeal Commissioner of Income-tax (Appeals) also confirmed addition . The Tribunal held that even in respect of time barred debt provision of section 41(1) cannot be applied . On the facts the liabilities were only of one year old therefore addition confirmed by the Commissioner of Income-tax (Appeals) were deleted .(A,Y. 2005-06)

Nitin M. Panchamiya v. Addl.CIT (2012) 73 DTR 202/148 TTJ 96 (Mum.)(Trib.)

S.41(1):Profits chargeable tax-Remission or Cessation of liability –Liabilities of four months-All liabilities were maximum 4 months old, 95% of the unclaimed balances arose only during the last four months it was held that the Assessing Officer was not justified in writing back to the income of the assessee for the same year

Section 41 is applicable in the year in which there was a remission or cessation of a trading liability incurred in an earlier year. It was recorded that all liabilities of the assessee were maximum 4 months old and 95% of the unclaimed balances arose only during the last four months, the Assessing Officer was not justified in writing back to the income of the assessee for the same year. Thus addition was deleted as the department had not brought on record any evidence to establish that there was any remission or cessation of liability. (A.Y.2005-06)

Dy.CIT v. Bax Global India P. Ltd, (2012) 17 ITR 414 (Delhi) (Trib.)

S.41(1):Profits chargeable to tax - Remission or Cessation of Liability –Blocked account to reserve account-Amount in transferred from inter-branch transaction blocked accounts to reserves through P&L a/c, as the primary condition of sum being allowed as deduction in earlier years not fulfilled, hence provisions of section 41 could not be invoked.

The amount was lying in the accounts which were known as inter-branch account. It was expected that all these inter-branch accounts should get squared up on consolidation. Due to human error of accounting or lack of proper advice from different branches, the amount in question remained either in debit or credit in different inter branch accounts and the bank had admittedly not reconciled for over a long period of time. It was held that in case of such sum section 41 could not be invoked as department failed to prove that sum in question forming part of so- called inter-branch transaction was earlier allowed as deduction. (AY 2005-06)

Punjab National Bank v. Addl.CIT (2012) 17 ITR 462 (Delhi)(Trib.)

S.43(1):Definitions--Actual cost—Written down value-Succession of firm by company- Without invoking Explanation 3 to section 43(1) the Assessing Officer cannot replace the actual cost by WDV as appearing in the books of transfer of firm.(S. 47 (xiii))

Partnership firm "Prakash Chemical Agency" has transferred all its assets to Prakash Chemicals Pvt. Ltd. i.e. the assessee. WDV as per the books of account of firm were Rs.19,84,311/-. Assessee company had taken over said firm, 'cost' in books of account were taken at Rs. 82,51,157/-. The assessee claimed the depreciation on the "actual cost" on which the assets were acquired by the firm. The Assessing Officer held that the assessee is entitled to claim depreciation on the WDV as shown by the erstwhile firm. In appeal the Commissioner (Appeals) allowed the claim of assessee by observing that in the case of demerger, amalgamation transfer from holding company to subsidiary company the legislature has specifically indicated that the "actual cost" of the transferred capital asset would be the same as WDV in the books of the transferor company .However ,in the case of transfer of capital assets of firm to company such a provision is not introduced. On appeal the Tribunal held that the Assessing officer has not invoked Explanation 3 to S. 43(1) he was not justified to disturb actual cost as recorded in books of account of assessee company on date of its acquisition of assets and liabilities of erstwhile firm. Event otherwise in view of the fact that rest of explanation through which Assessing Officer could have disturbed 'actual cost' was not applicable, substitution of

'actual cost' as replaced by Assessing Officer for purpose of allowing depreciation was not justified. (A.Ys. 2003-04 to 2005-06)

Dy.CIT v. Prakash Chemical Agencies (P) Ltd (2012) 136 ITD 222 / 75 DTR 91/148 TTJ 480(Ahd.) (Trib.)

S.43B:Deductions on actual payment - Business expenditure – Interest - Disallowance was not justified - Sick Industrial Companies (Special Provisions) Act , 1985. [S. 32, 41(1)]

Assessee took over a sick company under a scheme of a rehabilitation for emulated by the Board for Industrial and Financial Reconstruction. In the rehabilitation scheme the Board had observed that the Income-tax authorities may consider allowing deduction under section 43B of the Income-tax Act, 1961 of interest "payable" by the sick company to banks and financial institutions even though it had not been paid during the year. For the assessment years 1990-91 and 1992-93 the Commissioner (Appeals) did not allow the assessee's claim. The Tribunal allowed the claim relying on two circulars issued by the Board (Circular No. 523 dated 5-10-1988 (1988) 174 ITR (St) 1, & 576 dated 30-8-1990 (1990) 185 ITR (St) 48). The Court held that the Scheme should be read keeping in mind the object of the provisions of SICA for rehabilitation measure in respect sick industry, therefore, the Tribunal is justified in allowing the deduction under section 43B. (A. Ys. 1990-91 & 1992-93).

CIT v. Tube Investments of India Ltd. (2012) 341 ITR 199 / 204 Taxman 686/ 69 DTR 409 (Mad.)(High Court)

S.43B:Deductions on actual payment - Business expenditure –Sales tax provision- Sales tax provision, which was paid before due date of filing of return, cannot be disallowed.

The Court held that sales tax liability on or before due date of filing or furnishing the return of income for the relevant year could not be disallowed. (A. Y.1984-85).

Kishan Automobile v. CIT (2012) 66 DTR 465 (MP.) (High Court)

S.43B:Deductions on actual payment-Business expenditure-– Interest on delayed payment of interest – Demand of tax not payable within specified within the specified period includes payment of interest – Hence, allowed

In light of provisions of Section 17A(2) of Himachal Pradesh General Sales Tax Act, 1968 it was held that when there is a demand of tax and that is not paid within the period, then interest is automatically payable. The Tribunal failed to consider the provision of Himachal Pradesh General Sales Tax Act, 1968 and merely based its conclusion on the term "any sum payable". Therefore the Hon'ble High Court allowed the claim of deduction by the assessee. (AY 1989 -90)

Shankar Trading Co. P. Ltd. v. CIT (2012) 342 ITR 81(Delhi) (High Court)

S.43B:Deductions on actual payment-Business expenditure-Constitutional validity-Section 43B(f),which allows deduction for leave encashment only on payment basis is ultra vires. In any event, it does not cover premium paid to insurer. (S.37 (1),Constitution of India Art 226)

The assessee claimed deduction u/s.37(1) for liability to pay, payment of, premium to LIC under the Group Leave Encashment Scheme policy. The AO allowed the claim though the CIT revised the assessment u/s.263 on the ground that u/s.43B(f), leave encashment was allowable as a deduction only on payment basis. The Tribunal reversed the CIT on the ground that S.43B(f) had been held to be unconstitutional in Exide Industries Ltd and another v. UOI (2007) 292 ITR 470 (Cal.) and that the assessment order was not erroneous. On appeal by the department to the High Court, Held dismissing the appeal:

(i) S. 43B was inserted by the FA 1983 to prevent assessees from claiming a deduction for a provision for statutory liabilities without actually paying the same. Leave encashment is not a statutory liability as held in Bharat Earth Movers v.CIT (2000) 245 ITR 428 (SC) and a deduction is allowable in respect of the accrued liability. To overcome the said decision, clause (f) was inserted in the year 2001 to allow deduction for leave encashment only on payment basis. In Exide Industries Ltd .and another v. UOI (2007) 292 ITR 470 (Cal), clause (f) of S. 43B was held to be inconsistent with the object with which S.43B was inserted and thereby was held to be unconstitutional. As the department has accepted the judgement of the Calcutta High Court and not filed an appeal to the Supreme Court, it is not open to the Revenue to challenge its correctness in the case of another assessee as held in Berger Paints India Ltd v.CIT(2004) 266 ITR 99 (SC).

(ii) Even assuming clause (f) of S. 43B is valid, what is intended by it is to deny deduction for liabilities not actually incurred and to exclude provisions made against future liabilities from being granted a deduction. In the instant case it

was not a provision for future liability which was claimed as a deduction. The assessee had insured itself against the liabilities that may arise on account of the claims made by the employees towards leave encashment. The assessee being covered by a valid insurance policy and premium being regularly paid, incurs no liability towards leave encashment. The liability; being covered by a valid insurance policy, is solely that of the insurer. Even if 43B(f) stands, in the case of the assessee, where the liability is borne by the insurer, there can be no situation wherein assessee could make a valid claim for deduction u/s.43B(f) since the actual liability is not incurred in any of the years. The premium paid towards the renewal and continued validity of the insurance policy necessarily becomes business expenditure wholly and exclusively incurred for the business purpose and allowable as a deduction u/s 37. (A.Y.2005-06)

CIT v. Hindustan Latex Ltd(2012) 74 DTR 212/ 209 Taxman 42(Ker.)(High Court)

S.43B:Deductions on actual payment-Business expenditure- Claim not made in the return-(S.139,250, 251, 254(1))

The assessee made claim under section 43B , in respect of pament of SEBI fees in the course of assessment proceedings.The Assessing Officer rejected the claim on the ground that he had no authority to allow any relief or deduction which had not been claimed in the return. In appeal before the Commissione (Appeals) allowed the claim of assessee. In appeal by revenue the Tribunal also confirmed the Order of Commissioner (Appelas) . On appeal to the High Court , the Court held that an assessee is entitled to raise additional grounds not merel in terams of legal submissions , but also additional claims which was not made in the return filed b it.(A.Y. 2004-05)

CIT v. Pruthvi Brokers & Shareholders Pvt. Ltd(2012) 74 DTR 321/208 Taxman 498/252 CTR 151(Bom.)(HighCourt)

S.43B: Deductions on actual payment- SEBI Registration fee paid under scheme of settlement, liability accrued in year 2011 discharged in year 2004 held deductible.

Under the Securities and Exchange Board of India (Interest Liability Regularisation) Scheme, 2004, all the brokers of the BSE and the NSE were required to pay turnover fees at a prescribed rate for an initial period of five years. The brokers went to the court to get relief and the mater went to the Supreme Court which upheld the Scheme of the SEBI, holding the fees reasonable and valid. As a result thereof, the SEBI formulated a scheme of one time settlement which brokers could avail of if they paid the registration fee on the annual turnover fees along with 20 per cent of the total interest before a specified date, i.e, November 15, 2004. The assessee opted for the one time settlement and paid the amount. The Assessing Officer held that by making the payment in 2004, the assessee discharged its liability in the year 2004 though it accrued in the year 2001. The Assessing Officer allowed Rs.10,14,847 which represented the payment of the current year's liability. The Tribunal held that the entire amount was deductible. On appeal by the department, the High Court held dismissing the appeal, that the Tribunal was correct in law in allowing deduction of Rs.3,84,01,630/- to the assessee being the SEBI registration fees.

CIT v. BLB Ltd. (2012) 347 ITR 139 (Delhi) (High Court)

S.43B: Deductions on actual payment - Business expenditure - Excise duty paid on suppressed sale - When income is estimated the excise duty paid on suppressed sales deemed to have been allowed as deduction, hence, separate deduction cannot be allowed.

The assessee is carrying on business of manufacturing and selling of tobacco, but some sales have been kept outside the books by not paying excise duty. The Assessing Officer estimated the gross profit. The Assessee claimed the deduction under section 43B in respect of excise duty paid. The Tribunal held that when income is estimated on gross profit the excise duty deemed to have been allowed hence, excise duty paid on suppressed sales cannot be allowed as deduction under section 43B. The Tribunal also observed that as the sales are kept outside the books by unlawful means, i.e. payment of excise duty cannot be allowed. (A. Y. 1999-2000).

Chetna Zarda Company v. Dy. CIT (2012) 67 DTR 22 / 144 TTJ 401 (Mum.)(Trib.)

S. 43B: Deduction on actual payment – Employees provident fund- Before due date of filing of return- Contribution to employees provident fund , having been made before the date of filing of a return the payment was to be allowed as deduction.

In the instant case, assessee contended that the assessee's contribution to the employees provident fund be allowed in view of second proviso to section 43B. It was held that the payment having been made before the date of filing of a return the payment was to be allowed as deduction u/s 43B. (A.Ys. 2001-02, 2002-03 & 2003-04)
KPMG India P. Ltd. v. Dy. CIT (2012) 17 ITR 569 (Mum.)(Trib.)

S. 43B:Dedcution on actual payment- Disallowance of expenditure on exempt income-DTAA- India-Mauritius- Section 43B & s. 14A disallowance can be made under Article 7(3) of the India-Mauritius DTAA [S.14A,Article 7(3)]

The Tribunal had to consider two issues: Whether in view of Article 7(3) of the India-Mauritius DTAA, a disallowance u/s 43B and s. 14A was permissible while computing the assessee's income. Held by the Tribunal:
(i) Article 7(3) of the India-Mauritius DTAA provides that "in determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere". This is in contrast to the other DTAAs (e.g. India-USA DTAA) which provide that the deduction shall be "in accordance with the provisions of and subject to the limitations of the taxation laws of that State". As there is no limitation, the result is that all expenses incurred for the purpose of business of the permanent establishment have to be allowed as deduction and no disallowance u/s 43B can be made. Neither Article 3(2) nor Article 23(1) make any difference to this interpretation;
(ii) However, the position with regard to s. 14A is different because unlike other disallowance provisions which disallow deductible expenditure, s. 14A contains a fundamental principle that any expenditure incurred in relation to an income not includible in total income, shall not be allowed as deduction. S. 14A, at the very threshold itself, snatches away the deductibility of expenses incurred in relation to an exempt income. It is not a case that the expenses are otherwise deductible but have become non-deductible due to the operation of s. 14A. Rather, the expenses do not qualify for deduction at the very first instance in accordance with the principle that if an item of income is not chargeable under the Act, the related expenditure has to be ignored. (A.Y. 1999-2000)
State Bank of Mauritius Limited v. DDIT(2012) 19 ITR 675(Mum.)(Trib).www.itatonline.org)

S. 43B:Dedcution on actual payment- Service Tax – If liability to pay service tax does not exist, service tax cannot be said to be payable.

Rigor of S. 43B cannot be made applicable to service tax as firstly, service provider is never allowed deduction on account of service tax which is collected by it on behalf of government and is paid to government accordingly and secondly, liability to payment arises only after service provider has received payments and if there is no liability to make payments to credit of government because of non receipt of payment from receivers of service, it cannot be said that such service tax has become payable. (A.Y. 2007-08)
Pharma search v. ACIT (2012) 53 SOT 1 (Mum.) (Trib.)

S.43D: Public financial institutions- Interest-Interest accrued on NPA cannot be added as income of assessee.

Assessee following mercantile system of accounting, it had neither credited in profit and loss account nor offered for taxation amount of interest that had accrued on non-performing assets (NPA) .Assessing Officer held that assessee was required to credit accrued interest on NPA to its profit and loss account as per section 43D.He accordingly added accrued interest on NPA to income of assessee. The Tribunal held that in view of clear provisions of section 43D, Assessing Officer was wrong in adding accrued interest on NPA to income of assessee. Addition was deleted.
Karnavati Co-operative Bank Ltd v. Dy.CIT (2012) 134 ITD 486/ 144 TTJ 769 (Ahd.) (Trib.)

S.43(1): Definitions- Actual cost-Depreciation- Written down value-Though Expl. 10 to s. 43(1) does not apply to loan waiver, treatment in books of reducing amount waived from asset cost means that WDV has to be reduced.(S.32)

The assessee received a loan of Rs. 5,277 crores from the Steel Development Fund in earlier years. In AY 2000-01, a substantial part of the loan was waived. In its books of account, the assessee reduced the cost of the assets by the amount of loan waived and claimed depreciation on the reduced figure. However, the assessee claimed that for income-tax purposes, the waiver did not impact the WDV of the assets and that depreciation had to be allowed on the original

figure. The AO, CIT (A) & Tribunal (included in file) decided the issue against the assessee by relying on Explanation 10 to s. 43(1) inserted by the F (No. 2) Act 1998 w.e.f. 1.4.1999. On further appeal to the Tribunal, Held reframing the question:

Explanation 10 to s. 43(1) does not cover the case of waiver of the loan. It covers only the grant of a subsidy or reimbursement by whatever name called. Though the assessee's case may not fall under Explanation 10, the waiver of the loan amounted to the meeting of a portion of the cost of the assets under the main provision of s. 43(1) because of the treatment given by the assessee in its books of account in reducing the cost/WDV of the assets by the amount of the loans waived. The real nature of a transaction can be understood by reference to the contemporaneous act of the parties, which throws considerable light on their true intention and their understanding of the transaction. The assessee understood the receipt of the loans as having been given towards meeting a part of the cost of the assets and the waiver cannot have a different effect on such intention. PJ Chemicals Ltd (1994) 210 ITR 830 (SC), which holds, (pre Explanation 10) that a subsidy given as an incentive for industrial growth cannot be reduced from the cost of the assets under s. 43(1), does not apply to the facts.

Steel Authority of India Ltd v. CIT (2012)348 ITR 150/ 206 Taxman 574(Delhi) (High Court

S.43(5): Definitions - Speculative transaction- Non convertible security debentures – Commodities – Shares - Capital loss - Transactions relating to non-convertible security debentures would not come within definition of speculative transaction and loss there from could be claimed as capital loss.

The assessee claimed loss suffered on transfer of Non - convertible secured debentures as a capital loss. The Assessing Officer treated the said loss as speculation loss under section 43(5). In appeal Commissioner (Appeals) also confirmed the order of Assessing Officer. On appeal to the Tribunal it was held that the loss is allowable as capital loss. On appeal by the revenue, the High Court held that transaction relating to non –convertible security debentures would not fall within the definition of "Speculative transaction" as there was actual and constructive delivery . Further expression 'commodity' 'shares' and 'stocks' used in section 43 (5) does not include non-convertible secured debentures purchased or before allotment. Pending allotment, non-convertible portion does not exists and the transaction relating to the partial non convertible security debentures will not come within the expression "commodity" or "shares" or "stocks". And since there was no allotment the question of purchase or sale will not arise. The Court up held the order of Tribunal. (A.Y. 1993-94)

CIT v. New Ambadi Estates (P) Ltd. (2012) 206 Taxman 286/250 CTR 75 / 69 DTR 166 (Mad.)(High Court)

S.43(5):Definitions-Speculative transaction – Derivatives- Futures and options- Business loss- Transaction before 25th Jan., 2006- Net income after setting off loss can only be assessed as business loss . [S. 28(i)]

Assessee has offered a sum of Rs. 3,27,687/- arising out of F&O transactions under the head 'Short term capital gains'. Assessing Officer held that as per provisions of section 43(5)(d) profits from transaction in F&O was assessable under the head 'Business' and not 'Capital gains'. As regards the loss amounting to Rs. 1,35,889/- was allowed to be carried forward as speculation loss. On appeal the Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal the Tribunal held that insertion of clause (d) in section 43(5) is applicable from A. Y. 2006-07 and even loss incurred before 25th Jan., 2006 should also be reckoned as only business loss. The Tribunal directed the Assessing Officer to assess the net profit from F&O at Rs. 3,27,687/- under the head business.(A.Y. 2006-07)

Pradeep Kumar Harlalka v. ACIT (2012) 65 DTR 157/ 143 TTJ 446 (Mum.)(Trib.)

S.43(5):Definitions--Speculative transactions- Derivative-Hedging-Derivative instruments if not used as an hedging it will be assessed as profits and gains of business and hence section 43(5) is applicable.

The assessee is a Private Ltd company which is in the business of corporate finance and share dealing. During relevant year the assessee claimed loss on account of derivative trade. The Assessing Officer has treated the said loss as speculative applying the provisions of section 43(5)(d). On appeal the Commissioner (Appeals) held that the activity being investment the loss is not speculative in nature. On appeal by revenue the Tribunal held that the assessee was involved in day to day operation of share trading activity, the Assessing Officer is justified in treating the loss as speculative . (A.Y. 2005-06)

Deputy CIT v.Noble Enclave & Towers (P) Ltd (2005) 50 SOT 5 (kol.) (Trib)

S.43(5):Definitions-Speculative transaction- Derivatives - loss on account of derivative trading transaction carried out electronically on screen based system and through recognized stock exchange is not disallowable as speculative.

The assessee filed a return claiming business loss emanating from derivative trading in futures and options and setting it off against the business profit. The AO disallowed the claim. It was held that the assessee complied with the conditions with the provisions of section 43(5)(d) of the Act, by carrying out derivative transactions electronically on screen based system and through recognized stock exchange. The assessee had maintained each and every record of the documentation provided by the sub-broker like trade conformation report, bills etc. Thus, relying on the intention of Section 43(5)(d) and Memorandum explaining provisions of finance bill, 2005 the claim of assessee could not be disallowed. (A.Y.2008-09)

Vibha Goel(Smt) v. JCIT (2012) 16 ITR 418 (Chandigarh) (Trib.)

S.43(5):Definitions - Speculative transactions –Actual delivery taken by agent- Purchase and sale of shares by the agent of the assessee ,loss on the transaction cannot be held to be speculative.

Where the actual delivery of shares was not taken by assessee herself but was given or received by an agent of the assessee, it was held that loss from such transaction was not a speculative loss within the meaning of section 43(5). (AY 2008-09)

Dy. CIT v. S. Thilagavathy (Dr.) (2012) 17 ITR 506 (Chennai) (Trib.)

S.43(5):Definitions-Speculative transaction-Derivative trading in commodity- Recognised stock exchange-Notification treating MCX as "recognised stock exchange" on 22.5.2009 to be treated as retrospective and applying since 1.4.2006.(Rule 6DDA, 6 DDB,Income- tax Rules , 1961)

Proviso to s. 43(5)(d) inserted w.e.f. 1.4.2006 provides that a derivative transaction on a recognized stock exchange shall not be a "speculative transaction". MCX Stock Exchange was notified as a recognized stock exchange on 22.5.2009. Though the recognition came later, MCX has to be treated as a recognized stock exchange w.e.f. 1.4.2006 because the provisions providing for recognition are purely procedural and will have retrospective effect. (A. Y. 2007-2008)(ITA no 2742 /Mum/2011 dated 12-09 2012 Bench 'A'

ACIT v. Arnav Akshay Mehta (2012) 53 SOT 581(Mum)(Trib.)

S.44AD: Civil construction- Computation- Interest on security deposit- Gross contract receipt above 40 lakhs – Provision is not applicable.

The assessee is a civil contractor firm derived its income from contract work for Government departments . The Assessing Officer applied the provision of section 145 (3) and calculated the net profit at the rate of 8 percentage of the gross receipt after consideration of expenses debited in the trading account depreciation and interest and salary paid to partners. In appeal the Commissioner (Appeals) held that the net profit of 6 percent of contract receipt, subject to conditions of section 40(b) . The Commissioner (Appeals) held that interest of Rs.3,11,956 had to be assessed as income from other sources. On appeal the Tribunal disallowed the interest and depreciation. On appeal by the assessee to the High Court the Court held that the Tribunal as well as the authorities below had erred in holding that interest accrued on security deposits to the extent used for the purpose of securing contract work would be assessable as income from other sources. The interest income is to be assessed as business income. The Court also held that Tribunal and authorities below had been guided by the provisions of section 44AD, when the said section is clearly not applicable to the assessee as its gross contract receipts were above 40 lakhs. As per the circular dated 31st 1965, the gross profit should be estimated and deduction and allowances including the depreciation allowance should be separately deducted from the gross profit . If the net profit is required to be estimated , it should be estimated subject to the allowance for depreciation and depreciation allowance should be deducted there from . The High Court remitted the matter back to the Assessing Officer for passing a fresh order.(A.Y. 2003-04)

Shyam Bihari v. CIT (2012) 345 ITR 283 (Patna)(High Court)

S.44AE:Goods carriages-Computation - Presumptive income - No addition could be made by invoking section 56 on the ground that there were no withdrawals by the assessee (S. 56)

The assessee is proprietor of Nitin Freight Carrier, he is also director of Northern Alkalies (P) Ltd. He disclosed the income under section 44AE of the income-tax Act. The Assessing Officer made addition under section 56 on the

ground that he is not able to show how he is meeting his daily expenses. On appeal the Commissioner (Appeals) and Tribunal has deleted the additions made under section 56. On appeal by the Revenue to High Court the court held that section 44AE being applicable, no addition could be made by invoking section 56 on the ground that there were no withdrawals by assessee. (A.Y. 2001-02)

CIT v. Nitin Soni (2012) 71 DTR 1 (All.)(High Court)

S.44B: Shipping business-Non-residents-Computation-Slot charter-Voyage charter-DTAA-INDIA-UK-Income from "slot charter" is exempt as income from "operation of ships" as per Article 9.(S.90,Art 9)

The assessee, a UK company, engaged in the international transportation of goods by sea, entered into Slot Hire Agreements with Orient Express Lines Mauritius ("OEL"), under which OEL provided container slot spaces to the assessee on its ships. Availing the slot hire facility, the assessee arranged for the transportation of the goods from ports in India to their international destinations. The assessee claimed that the income from the "slot hire charges" was exempt under Article 9 of the India-UK DTAA. The AO rejected the claim on the ground that Article 9 dealt with "income from the operation of ships" and that slot hire charges were not covered. However, the CIT(A) and the Tribunal allowed the claim. On appeal by the department to the High Court, Held dismissing the appeal:

There is no distinction in principle between a slot charter and a voyage charter of a part of a ship. They are both in a sense charterers of a space in a ship. The phrase "operation of ships" in Article 9 must be understood in the context of the phrase "the business of operation of ships" in s. 44B. As income from slot hire agreements falls within s. 44B it must be held to be within the ambit of Article 9(1)**.** Article 9 does not require the ship to be owned by an the assessee. It merely requires the income to be "from the operation of ships in international traffic". A charter is certainly contemplated by Article 9 and an enterprise that controls the management/operation of the ship would be included in Article 9 even if it does not own the ship **(**DIT v. KLM Royal Dutch Airlines (2009) 178 Taxman 291/(2010) 325 ITR 300(2008) 220 CTR 268/15 DTR 113. (Dellhi)(High Court)) followed)(A.Y. 2001-02 , 2002-03)

DIT v. Balaji Shipping UK Ltd(2012) 77 DTR 361 (Bom.)(High Court) www.itatonline.org

S.44B:Shipping business-Non-residents-Computation-DTAA-India-Germany-Profits from participation of cargo and "slot arrangement" are not eligible for benefit of Article 8, therefore income earned by assessee through such business is taxable in India. (S. 90, 115VB, 115VI)

The assessee is a non-resident company engaged in the operation of ships in international traffic. The assessee is a tax resident of Germany. The assessee filed the return of income declaring nil income. The Assessing Officer held that the income of the assessee shall be assessed under the provisions of section 44B of the Income –tax Act @7.5%. The Assessing Officer passed under section 144C (1) for the consideration of DRP. The DRP passed the order granting partial relief, consequently the Assessing Officer passed the order. The assessee filed an appeal before the Tribunal. The Tribunal held that profits from participation of cargo under "slot arrangement" are not eligible for benefit of Article 8, since assessee, a Germany company is carrying on the business of operation of ships in India through an agent which concludes the cargo transportation of issuing bills of landing , it is having PE in India in terms of Article 5 of the DTAA and therefore, income earned by assessee through such business is assessable to tax in India; neither the Assessing Officer nor the DRP having undertaken the exercise of determining the profit attributable to the PE, matter is set aside to the Assessing Officer for de novo adjudication for this limited purpose in accordance with law. (A.Y. 2007-08)

Hapag –Lloyd Container Line Gmbh v. ADIT (2012) 51 SOT 299 / 146 TTJ 279 / 70 DTR 393 (Mum.)(Trib.)

S.44BB:Mineral oils-Turnkey project- Installation of plat form outside India- Even a "Turnkey" contract has to be split into various components- The work of installation of the platform done inside India does not fall u/s 44BB because the activity cannot be regarded as a "facility in connection with the prospecting for, of extraction or production of, mineral oils.

The assessee entered into a contract with ONGC for fabrication and installation of on-shore and off-shore oil facilities and pipelines. The assessee claimed that though the contract was one, it had to be sub-dividend into two parts, one for designing, fabrication and supply of material and the other for installation and commissioning of the project. It was claimed that the work relating to the former was carried out exclusively in Abu Dhabi and hence no income relating to

receipts for that part of the contract was liable to tax in India as the there was no PE in India. The AO & DRP rejected the claim on the basis that (a) the contract was a "turnkey" one where the entire risk of completion & commissioning was on the assessee & it was not divisible into different components, (b) the assessee had a project office in India which was a PE, (c) the assessee had a Dependent Agent PE, (d) there was a "construction and installation PE" under Article 5(2)(h) & (e) ownership of the equipment transferred to ONGC only after issue of the certificate of acceptance of the entire work. It was also held that s. 44BB was not applicable and the profit was estimated at 25% of gross receipts. On appeal by the assessee to the Tribunal Held:

(i) The assessee's project office in India constituted a PE. It also had a "Dependent Agent PE" and also a "construction and installation PE" under Article 5(2)(h);

(ii) However, though the contract was on a "turnkey" basis, it had to be regarded as an "umbrella contract" and as being a divisible contract because the consideration for various activities has been stated separately. Also, ONGC had the discretion to take only the platform erected by the assessee in Abu Dhabi without having installation thereof. The segregation of the contract revenues into offshore and onshore activities was made at the stage of awarding the contract. The total consideration was earmarked towards different activities and separate payment had to be made on the basis of work of design, engineering, procurement and fabrication. These operations had been carried out and completed outside India. The PE was in respect of the installation and commissioning work done in India and the activities carried outside India were not attributable to the said PE (Hyundai Heavy Industries 291 ITR 482 (SC), Ishikawajma-Harima Heavy Industries 288 ITR 408 (SC) & DCIT v Roxon OY (2006) 103 TTJ 891 (Mum) followed);

(iii) The work of installation of the platform done inside India does not fall u/s 44BB because the activity cannot be regarded as a "facility in connection with the prospecting for, of extraction or production of, mineral oils". (A. Y. 2007-2008)

National Petroleum Construction Company v. ADIT (Delhi)(Trib.)www.itatonline.org

S.44BBA: Air craft-Non-residents- Computation- Non Resident – Income from ground handling and technical services rendered to other airlines at Indian airport not taxable in India under Section 44BBA.

Following the decision of *Lufthansa German Airlines v. Dy. CIT (2004) 90 ITD 310 (Delhi)* it is observed that where assessee is engaged in the airline business, the income from ground handling and technical services rendered to other airlines at Indian airport would not be taxable in India under Section 44BBA and same would be considered as profits from operation of aircraft in international traffic as per provisions of Article 8 of the DTAA. (A.Y. 2006-07)

Dy. DIT v. KLM Royal Dutch Airlines(2012) 50 SOT 578 (Delhi)(Trib.)

S.44BB:Mineral oils-Computation- Service tax is not part of "Gross Receipts" for purposes of s. 44BB

The assessee offered its income to tax on gross basis under sub section (1) of section 44BB and 10 % of the gross receipts was deemed to be income chargeable to tax . It however did not include the amount in the gross receipts , being the service tax received from its customers , while computing its total income. The Assessing Officer rejected the contention of the assessee and added the amount of service tax by the assessee to its gross receipts to compute its total income. In appeal commissioner (Appeals) decided the issue in favour of assessee. Revenue has filed appeal before the Tribunal. The Tribunal held that, section 44BB is a special provision, treating 10% of the aggregate amount specified in sub-s. (2) of s. 44BB as deemed profits and gains of the non-resident. The amount referred in sub-s. (2) of s. 44BB are the amounts (a) paid to the assessee (whether in or out of India) on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India, etc. **Service-tax is a statutory liability** like custom duty and **reimbursement** of custom duty & service-tax paid by the assessee **cannot form part of amount for the purpose of deemed profits** u/s 44BB as it does **not involve any element of profit**. Accordingly, it cannot be included in the total receipts for determining the presumptive income. Department appeal was dismissed. (A. Y. 2008-2009)(ITA no 698/Del/2012 Bench 'E' dated 31-8-2012)

DCIT v. Mitchell Drilling International Pty. Ltd (Delhi)(Trib.) ***www.itatonline.org***

S.44BB: Mineral oils-Computation- Non-resident –Income deemed to accrue or arise in India -Technical services –Royalties -DTAA-India –Singapore –Article 5.5., 12.3(b), 12.4(a).(S. 90, 9(1)(vii)

The applicant is a Singapore company . It was awarded a sub contract by L&T to execute the work of installation and construction services for Single Point Mooring in the waters of Mumbai High South field . For undertaking the construction work, vessels were mobilized to India . The assessee contended that contract with L& T is in connection with prospecting for or extraction or production of mineral oil and would constitute PE only if the services or facilities are provided for a period of more than 183 days in the fiscal year under article 5.5 of the DTAA and for computation of the period of 183 days shall be from the time the vessels of the applicant gain port clearance till the time the said vessels leave the shores of India. As the applicant would not have PE in India and no liability is attracted under section 44BB .The Authority for advance ruling held that the agreement with L&T falls within the ambit of section 44BB as the same deals with a case the assessee is 'engaged in the business of providing services or facilities in connection with , or supplying plant and machinery on hire used or to be used , in the prospecting for or extraction or production of mineral oils'. The applicant has provided the services more than 183 days during the fiscal year , hence the applicant has a PE in India in terms of article 5.5 of the DTAA and falls within the ambit of section 44BB and not under as fees for technical services under the Act or under 12 of the DTAA regarding this contract. Even if part of income falls under 'Royalties' or 'Fees for Technical Services' there is no scope to assess such receipts under these heads, once it is held that the income is from its oil exploration and production activities as envisaged under section 44BB, the applicant has to first exercise the option to get its income computed under section 44B(3). In view of above the entire mobilization demobilization revenue received by the applicant would be taxable in India . Payment received for installation and demobilization relates to use of equipment for undertaking installation work and falls under the definition of royalty – Installation is ancillary and subsidiary to use of equipment or enjoyment of right for such use ,payment for installation would fall under definition of "fees for technical services" - DTAA-India –Singapore-Art 12.3(b), 12.4(a).

Global Industries Asia Pacific Pte Ltd , In re (2012) 343 ITR 253/ 205 Taxman 273/ 248 CTR 127 / 68 DTR 153 (AAR)

S.44BB:Mineral oils-Computation- Non-resident –Income deemed to accrue or arise in India -Technical services-DTAA-India- France-Activities undertaken by assessee providing geological and geophysical services for exploring mining potential derived in India from execution of projects would fall under the definition of fees for technical services hence assessable under section 115A and not under section 44BB(1) (S. 90, 9(1)(vii), 115A)

The assessee is a company , a tax resident of France , during the relevant assessment year the assessee is engaged in the business of geological and geological services for exploring mining potential. The assessee filed the return of income under section 44B (1). The assessee opted for domestic law and not under Indo –France DTAA as the domestic law under section 90(2) which is more beneficial to the assessee. The Assessing Officer has applied the domestic law , however held that income of assessee is taxable under section 9(1)(vii) and not under section 44BB(1) ,he accordingly computed the income at 10% by applying the provisions of section 115A. The DRP also concurred with the view of Assessing Officer. On appeal to the Tribunal, the Tribunal held that (1) Activities undertaken by assessee of seismic survey , processing of 3D seismic data and submission of report in desired media as also providing services of personnel skill will clearly fall under definition of 'fees for technical services' covered in first limb of Explanation 2 to section 9 (1)(vii) hence decided in favour of revenue .(ii) Provisions of section 44BB(1) conveys no meaning independent of section, in case of non –resident where provisions of section 42, or section 44D OR 44DA or section 115A or section 293A are applicable for purpose of computing profits or gains or any income referred to those sections , proviso to section 44BB(1) will be applicable and provisions of section 44BB(1) will not be applicable (iii) . With effect from 1-4-2004 fee for technical services , which is not connected with permanent establishment of business or fixed place of profession in India , will be taxable under section 115A(1)(b).(iv). Activities undertaken by assessee i.e. providing geological and geophysical services for exploring projects for prospecting mineral oil deposits in India form execution of exploration projects for prospecting mineral oil deposits in the off shore waters under four contracts with ONGC and one contract with ENI .UK, would fall under definition of 'fees for technical services' covered in first limb of Explanation 2 to section 9(1)(vii). (v). Since receipts were not connected with PE in India fee for technical services

rendered in connection with prospecting for or extraction or production of mineral oil would be assessable under section 115A , thus the provisions of section 44BB(1) would not apply , accordingly the issue is decided in favour of revenue. (A.Y.2007-08)

CGG Veritas Services , SA v. Addl DIT (2012) 50 SOT 335 (Delhi) (Trib.)

S.44BB:Mineral oils-Computation – Non – Resident - Income deemed to accrue or arise in India - Business connection - Providing services or facilities in connection with prospecting for or extraction of mineral oil section 44BB is attracted. [S.9 (1)(i)]

The applicant approached the Authority for advance Ruling with the plea that it had entered in to a contract with ONGC for supply of manometer gauges, that the title to the goods passed outside India, that payment there for was received outside India and that the transaction of sale was not taxable in India. The Authority for Advance Ruling reframed the question and after examining the contract the Authority held that the a contract has to be read as a whole. The purpose for which the contract is entered in to by parties is to be ascertained from the terms of contract. On the facts applicant a foreign company, having entered in to a contract with ONGC for "services for supply, installation and commissioning of 36 manometer gauges" for the purpose of installation of the gauges at certain sites to enable ONGC to carry on its operations, it is a composite indivisible contract for supply and erection of manometer gauges at sites within territory of India and , therefore, all payments received by the applicant under the composite contract have arisen to the applicant in India and income is chargeable to tax in India. The applicant is providing services or facilities in connection with prospecting for or extraction of mineral oil hence section 44BB is attracted.

Roxar Maximum Reservoir Performance WLL (2012) 250 CTR 4 / 71 DTR 108 (AAR)

S. 44C:Non-residents-Head office expenditure- Laboratory expenses held to be fully allowable.

Laboratory expenditure incurred by the Head office for Research and Development, which was attributable to the Indian branch was fully allowable and was not subject to the restriction in section 44C. (A.Y. 1981-82 & 1982-83)

John Wyeth & Brother Limited v. ACIT, Mumbai, ITA No.6772 & 6773/Mum/2002, dt. 25-07-2012, BCAJ Pg.36, Vol 44-A Part 6, September, 2012.(Mum.)(Trib.)

S.44D:Foreign companies - Royalties-Computation - Fees for technical services -Payments for services is fees for technical services and not as services in connection with extraction of mineral oil, hence taxable under section 44D and not under section 44BB (S. 9(I)(vii), 44BB, 115A)

An agreement was entered in to between the non-resident company /assessee represented by ONGC and in terms of the said contract , non-resident company rendered services for inspection of the existing control system of three units of RR avon gas generator driven process, gas compressor at SHP platform and for utilizing services of engineer for Y2K roll over time at off shore installation. The Assessing Officer taxed the receipts at 15% as per the DTAA between India and Singapore under section 44D, read with section 115A treating that services rendered by the non-resident company was technical services, which was confirmed by the Commissioner (Appeals). In appeal before the Tribunal the Tribunal held that the amount is taxable under section 44B. On appeal by revenue the court held that payment for services is fees for technical services and not as services in connection with extraction of mineral oil. The amount is taxable under section 44D and not under section 44BB. Appeal of revenue was allowed. (A.Y. 2001-02)

CIT v. ONGC (2012) 343 ITR 267 (Uttarakhand)(High Court)

S.45:Capital gains–Transfer- Issue of sale certificate- Lump sum paid towards interest-Sale of property by public action - Income from other sources- Assessable as capital gains after sale certificate issued by competent authority . (S. 2(28A), 2, 47(v), 56)

The amount received by the official liquidator in terms of orders of company court, though referred to as interest, for the purpose of assessment of income-tax it was part of the sale consideration and therefore, could not be treated as income from other sources under section 56, the amount is assessable as capital gains under section 45. Possession of the mill was transferred to the purchaser by way of lease and not in terms of the Transfer of Property Act. Therefore, there was neither actual transfer nor artificial transfer of title on account of the transfer of possession. Such transfer of

title took place only on payment of the entire amount by the purchaser and only after the sale certificate was issued by the competent court.(A.Y.1995 -96)

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

S.45:Capital gains - Agricultural land –Date of conversion- Date of permission for conversion treated as the cut-off date till then it is not capital asset hence no capital gains tax leviable. (S. 2(14), 48)

The Tribunal held that the assessee retained its agricultural character till the date of the order permitting non-agricultural use and could be treated as capital asset only thereafter, therefore capital gains cannot be levied. High Court confirmed the view of Tribunal.

CIT v. K. Leelavathy (2012) 341 ITR 287 (Karn.)(High Court)

S.45:Capital gains –Capital receipt- Non-compete fee - Consideration received under a non-competition agreement is only chargeable from 1st April 2003 under section 28(va) as profits and gains of business, same cannot be charged under section 55(2)(a). Hence on facts held to be capital receipt not chargeable to tax.

Assessee received the amount under non –compete agreement dated 9th Feb., 1988 for not to manufacture of carbon dioxide gas agreed, in lieu of consideration received not to engage in similar business in any capacity for a period of 10 years. Revenue contended that prior to 1st April 2003, such receipts were chargeable to tax under section 45, read with section 55. The Court held that section 55 is not charging section, the consideration paid to him was not for transferring any capital asset to purchaser nor the assessee has transferred any right to produce or manufacture any article, therefore, it would not fall under section 55(2)(a). It is only from 1st April 2003 the consideration received under non–compete agreement is chargeable to tax under section 28(va), as profits and gains of business. As the sum received by the assessee before said amendment the said amount is not chargeable to tax. (A. Y. 1999-2000).

CIT v. K. Chandrakanth Kini (2012)347 ITR 388/66 DTR 467/249 CTR 217 / (2011) 201 Taxman 69 (Karn.)(High Court)

S.45: Capital gains - Short term capital loss disallowed - Tax avoidance - Tax planning - Transaction within four corners of law can be treated as "sham" and "colourable device" by looking at "human probabilities" - Court held that loss cannot be allowed.

In A. Y. 2000-01 the assessee borrowed Rs. 48 crores from the G. K. Rathi group and used that to buy shares in three 100% subsidiary companies. Though the fair value of the shares was Rs. 24, the assessee paid Rs. 150 for each share. The amount received by the said subsidiary companies was transferred back to another company of the G. K. Rathi group. In A.Y. 2001-02, the said shares were sold for Rs. 5 each and a short-term capital loss was claimed and this was set-off against other long-term capital gains. The Assessing Officer, Commissioner (Appeals) & Tribunal rejected the transaction of investment into, and sale of, shares as a sham. On appeal by the assessee, Court dismissing the appeal, held that:

Whenever there are reasons to believe that the apparent is not real; then the taxing authorities are entitled to look into surrounding circumstances to find out the reality and apply the test of human probabilities. The judgement of the Supreme Court in Vodafone International v. UOI makes it clear that a colourable device cannot be a part of tax planning. Where a transaction is sham and not genuine, it cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. It was clarified that there is no conflict between McDowell & Co. Ltd. v. GTO (1985) 154 ITR 148 (SC), UOI v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC) & Mathuram Agarwal. On facts, as the purchase and sale of shares was found to be a sham, the loss cannot be allowed (Sumati Dayal v. CIT (1995) 214 ITR 801 (SC) followed)(A.Y 2001-02).

Killick Nixon Ltd. v. Dy. CIT (2012) Vol.114 (4) Bom.L.R.2088 / (Bom.)(High Court) www.itatonline.org

S.45: Capital loss – Setoff – Short term capital loss-Short term capital loss cannot be setoff against cancellation of agreement.

Assessee suffered the short term capital loss on cancellation of the agreement of sell (banakhat), and set off the same against short term capital gains on sale of diamond disclosed under Voluntary Disclosure Scheme (VDIS). The Court held that, as no assets were owned by the assessee and nothing was transferred loss can not be set off. On facts, the sale was held to be non genuine. (A. Y. 1999-2000, 2000-01).

Dinesh Babulal Thakkar v. ACIT (2012) 341 ITR 632/ 67 DTR 321/249 CTR 568 (Guj.)(High Court)

S.45:Capital gains- Investment in shares-Whether the profit on sale of shares is assessable as business income or capital gains Tribunal must examine the issue holistically as per the test laid down by High Court and Circular of CBDT.

The assessee offered gains from sale and purchase of securities as "capital gains". The AO assessed it as business profits on the ground that in the earlier years, it was offered as such. The CIT (A) & Tribunal accepted the assessee's plea on the ground that the securities were shown as "investments" in the accounts and in the earlier years, the STCG was offered as business profits as there was no difference in the tax rate. On appeal by the department, Held reversing the Tribunal:

There was a dispute whether in the earlier years, the gains were offered as business profits or as capital gains and the Tribunal had not given a clear finding. The Tribunal ought to examine the issue holistically keeping in mind the parameters/tests laid down in CIT v. Rewashanker A. Kothari(2006) 283 ITR 338 (Guj) and CBDT's Circular No.4/2007 dated 15th June 2007 on when income from transactions in securities should be treated as "business profits" and when as "capital gains":

(a) Whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item or with a view to finding an investment?;

(b) Why and how and for what purpose the sale was effected subsequently?;

(c) How the assessee dealt with the subject-matter of transaction during the time the asset was with the assessee. Has it been treated as stock-in-trade or as an investment in the balance sheet?

(d)How the assessee returned the income from such activities and how the department dealt with the same in the preceding and succeeding assessments?;

(e) Whether the deed of partnership or memorandum of association, if the assessee is a firm or a company, authorises such an activity?

(f) Most importantly, what is the volume, frequency, continuity and regularity of transactions of purchase and sale of the goods concerned.

CIT v. Sahara India Housing Corporation Ltd (Delhi) (High Court)www.itatonline.org

S.45:Capital gains- Investment in shares- Business profits-Quantum of shares cannot be the sole test to decide whether assessee is an investor or trader , on the facts the profits on sale of shares held be as capital gains and not as business income.(S.28 (i)).

The assessee offered LTCG of Rs. 2.59 crores and STCG of Rs. 5.53 crores on sale of shares. The AO held that the LTCG & STCG were assessable as business profits on the ground that (a) the dividend was meager, (b) the assessee had undertaken risk by dealing in shares, (c) the holding period of most of the securities was very short, (d) the ratio of sales to purchases is was 1.77, (d) the sale and purchase transactions were frequent and (e) the scale of the activity of sale and purchase of securities was substantial. The CIT (A) upheld the taxability of STCG as business profits though the Tribunal deleted that as well. On appeal by the department, The High Court held dismissing the appeal:

To determine whether an assessee is an investor in shares or a dealer in shares, a pragmatic and common sense approach has to be adopted always keeping in mind commercial considerations. The tests have been laid down in Instruction No.4/2007 dated 15.6.2007&CIT vs. Rewashanker A. Kothari (2006)283 ITR 338 (Guj). On facts, the Tribunal was right that the STCG was not assessable as business profits because (a) the assessee was a salaried employee, (b) He maintained two separate portfolios for investment and trading, (c) the shares were held for periods ranging from 2.4 months to 11 months, (d) though the quantum or total number shares was substantial, the transactions in question were only seven in number and the period of holding was not insignificant and small. While the quantum or total number may not be determinative but in a given case keeping in view period of holding may indicate intention to make investment, (e) substantial dividend income had been received, (f) the element of uncertainty and risk is always there in securities and this factor cannot be a determinative factor to decide whether the assessee is trading in shares or is an investor. Some investors do take risk, (g) The ratio of sales and purchase will always be in favour of sales when the shares are sold and (h) in the earlier assessment years, transactions in the investment portfolio were accepted by the AO. (A.Y. 2007-08)

CIT v. Vinay Mittal (2012) 208 Taxman 106 (Delhi) (High Court).

S.45:Capital gains- Capital loss-Genuineness of transaction-Loss on sale of property purchased by partners wife is allowed as capital loss.

On the facts of the case the Tribunal has allowed the loss. The revenue contended that the finding of Tribunal is perverse. The Court directed the revenue to file the documentary evidence to prove that finding is perverse, however as the revenue has not provided any evidence, the High court up held the order of Tribunal. (A.Y. 2004-05)

CIT v. Bharti Overseas Trading Co. (2012) 249 CTR 554 (Delhi)(High Court)

S.45:Capital gains- Investment in shares- Business income-Despite speculation activity and short period of holding, shares gain is STCG & not business profits. (S.28(i)

The assesseee, a textile consultant, offered LTCG of Rs. 19.97 crores and STCG of Rs. 1.71 crores. The AO held that the LTCG and STCG had to be assessed as business profits on the grounds that (i) the assessee had engaged in speculation activities, (ii) the volume of shares was high, (iii) the frequency of purchase and sale was extremely high, (iv) the holding period for most of the scrips ranged from a few days to few months and in certain cases and (v) the dividend was meager. This was reversed by the CIT (A) & Tribunal on the basis that (a) the assessee had not only invested in shares but also maintained fixed deposits & PPF. Investments in shares were 75% of the total investments & the sales of shares was to balance the portfolio, (b) the LTCG shares were held for several years, (c) the STCG shares consisted of 7 scrips which gave rise to 93% of the STCG profits, (d) the shares were shown as investment in the balance sheet in the earlier years, (e) the assessee had not borrowed funds & (f) STT was paid. On appeal by the department to the High Court, Held dismissing the appeal:

The appellate authorities have come to a finding of fact after examining the relevant material that the assessee is an investor in shares and not a trader. This finding of fact is not perverse. As held in CIT v. Gopal Purohit(2010) 228 CTR 582/(2011) 336 ITR 287 (Bom.) (High Court) there is no bar for an assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business activities involving dealing in shares.(A.Y.2006-07)

CIT v. Suresh R. Shah (2012)76 DTR 32(Bom.)(High Court)

S.45:Capital gains-Merger of company-Scheme of arrangement-Tax planning-Tax planning is legitimate if it is within the framework of the law. (S. 391 to 394 of Companies Act, 1956)

A scheme of arrangement u/s. 391 to 394 of the Companies Act was entered into which provided that five private limited companies would be merged with Unichem Laboratories. Pursuant to the Scheme, (a) the entire undertaking of the transferor companies would stand vested with the transferee, (b) The shares held by the transferor companies in the transferee company would be cancelled & (c) shares of the transferee company would be issued to the shareholders of the transferor companies. The scheme was challenged by a shareholder on the ground that it was propounded to avoid capital gains tax that would have arisen if the transferor companies would have directly transferred their shares to the promoters and that it was a "colourable device to evade tax". Reliance was placed on McDowell and Co. Ltd. v. CIT (1985) 154 ITR 148 (SC), (1976) Wood Polymer (1974) 47 CC 597 (Guj) & Groupe Industrial Marcel Dassault (AAR). Held by the High Court rejecting the objection:

In UOI v Azadi Bachao Andolan (2003) 263 ITR 706 (SC), it was held that McDowell cannot be read as laying down that every attempt at tax planning is illegitimate and must be ignored, or that every transaction or arrangement which is perfectly permissible under law, which has the effect of reducing the tax burden of the assessee, must be looked upon with disfavor. A citizen is free to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity. This was considered again in Vodafone International Holding B.V. v UOI (2012) 341 ITR 1 (SC) and it was held that there is no conflict between McDowell and Azadi Bachao Andolan and reiterated that tax planning may be legitimate provided it is within the framework of law. On facts, the object of the scheme is to enable the Promoter to hold shares directly in the transferee company rather than indirectly and not to avoid any tax. There is nothing illegal or unlawful or dubious or colourful in the Scheme and the same is a perfectly legitimate scheme and permissible by law. Therefore, the objection that the scheme is a tax avoidance device stands rejected.

In Re AVM Capital Services Private Limited(2012) Vol. 114(4)Bom..L.R. 2533 (Bom.)(High Court), www.itatonline.org

S.45:Capital gains-Business income-Sale of land-Sale of land by administrator is assessable as capital gains and not as business income. (S.28(i))

A large tract of land of nearly 2500 acres of land was acquired about in the year 1923 by late F.F. Dinshaw who was solicitor. Upon the death of Mr. F.F, Dinshaw in the year 1936, there was no transaction involved for about sixty five years .There was no improvements in the said land. There was encroachment on the land. The part of land was sold to protect the corpus and the resulting expenditure due to litigation. The Assessing Officer assessed the sale consideration as business income. In appeal the Tribunal held that the sale consideration is assessable as capital gains. On reference by the revenue the Court affirmed the finding of Tribunal and held that sale of land by Administrator of estate, which land had devolved on the assessee by testamentary succession, lying for almost sixty five years and sold for to protect the corpus and the resulting expenditure due to litigation, gave rise to capital gains and not business profits. Order of Tribunal in ACIT v. Administrator of the Estate of Late E.F.Dinshaw (1993) 47 ITD 232 (Bom)(Trib.), affirmed. (A.Ys. 1987-88 to 1989-90)

CIT v. Administrator of the Estate of Late E.F.Dinshaw (2012) 345 ITR 529/72 DTR 49 (Bom.) (High Court)

S.45:Capital gains- Business income-Investment in shares- Tests laid down to distinguish shares gains as LTCG/STCG vs. business profits.(S 28(i))

The assessee offered the gains from buying and selling shares as LTCG/ STCG. The AO held that the assessee was "*dealing heavily in shares*" with *high frequency and magnitude* and that the gains were assessable as business profits. This was reversed by the CIT (A) and Tribunal. On appeal by the department to the High Court, Held dismissing the appeal:

In CIT v Rewashanker A. Kothari (2006) 283 ITR 338 (Guj) six objective tests have been laid down to distinguish between capital gains and business profits on sale of shares. From this, it is clear that where number of transactions of sale and purchase of shares takes place, the *most important test* is the volume, frequency, continuity and regularity of transactions of purchase and sale of the shares. However, where there is repetition and continuity, coupled with magnitude of the transaction, bearing *reasonable proportion to the strength of holding*, then an inference can be drawn that activity is in the nature of business. Learned counsel for the revenue from the records could not demonstrate that there were large number of transactions which had frequency, volume, continuity and regularity and fell within the tests laid down by the Division Bench of this Court. Consequently, the income earned by the assessee from trading in shares under the head long term capital gain / short term capital gain was correctly shown.

CIT v. Vaibhav J. Shah (HUF) (Guj.)(High Court) www.itatonline.org

S.45: Capital gains- Tradeable warrants- Cost of acquisition- Gains on sale of tradeable warrants is not assessable as capital gains. (S. 55(2)(aa))

For the assessment 1993-94 ,on sale of the tradeable warrants which was held as investment , the assessee claimed that the profits arising there from, were not taxable as the tradeable warrants did not have any cost of acquisition. The Assessing Officer held that the income earned on sale of tradeable warrarnts is liable to capital gains tax, which was confirmed by Commissioner (Appeals). On appeal, Tribunal allowed the claim of assessee. On appeal by revenue, the Court up held the order of Tribunal and held that clause (aa) of section 55(2) of the Income-Tax Act, 1961 , which was inserted by the Finance Act,1995, with effect from April 1, 1996, to the effect that cost of acquisition attributable to trading warrants shall be statutorily deemed to be nil with effect from April 1,1996. Since the assessment year involved was the assessment year 1994-95 that is prior to the insertion of clause (aa) of section 55(2) the income was not assessable to tax as capital gains.(A.Y.1994-95)

CIT v. Crown Esta tes P. Ltd (2012) 346 ITR 1 (Bom.) (High Court)

S.45:Capital gains- Set off loss- Sale to group company-Transaction of "sale" of "pledged" shares at loss to a group company with object to set-off loss against gains is not a "colourable transaction".(S.2(47))

The assessee earned capital gains on sale of certain shares. To offset the gains, the assessee sold shares of another company, which were pledged to IDBI, to a group company, at a loss. The AO & CIT(A) treated the transaction of sale to the group company as a "colourable device" & rejected the loss on the ground that as the shares were pledged, they could not have been sold. However, the Tribunal allowed the assessee's claim. On appeal by the department to the High Court, held that the Revenue's argument that the transaction was a "colourable device" and a "paper arrangement" is not acceptable because (i) there is no provision which prevents an assessee from selling loss making

shares with a view to offset the loss against other gains and (ii) the transaction with the group company was at the fair value. The fact that the shares were pledged and could not be registered in the purchaser's name did not establish that transaction was a contrived one.

ACIT v. Biraj Investment Pvt. Ltd (Guj.)(High Cour)www.itatonline.org

S.45: Capital gains –Transfer-Amalgamation- Tax avoidance scheme-. Scheme of arrangement is not a "tax avoidance scheme". (S.391,392,393,394 Companies Act, 1956)

Vodafone Essar Gujarat Ltd ("transferor") filed a Petition u/s 391 to 394 of the Companies Act, 1956 to transfer its 'Passive Infrastructure Assets' to Vodafone Essar Infrastructure Ltd ("transferee") free of liabilities and encumbrances. The corresponding liabilities were not to be transferred. No consideration was payable by the transferee nor were any shares to be allotted to the members of the transferor. Post de-merger, the transferee was to be made a substantially owned company of a new company to be formed by all or some of the shareholders of the transferee. Thereafter, the transferee was to be amalgamated/ merged into Indus Towers Ltd. The application was opposed by the income-tax department on the ground that since no consideration was involved, the transaction was ultra vires. It was also claimed that the transaction did not fall within the anbit of ss. 391 to 394 but was a simple transfer between two separate entities to evade legitimate taxes which would be payable if the transaction was effected as a simplicitor transfer. It was also claimed that the Scheme was solely for purposes of avoiding tax. The Company Judge came to the conclusion that the transferee was a paper company and that the sole object of the Scheme was to avoid tax on income in excess of Rs. 3,500 crore and also stamp duty and VAT to the tune to Rs.600 crores. He accordingly refused to sanction the arrangement. On appeal by the Company, Held reversing the Company Judge:

(i) The Scheme cannot be said to have no purpose or object and that it is a mere device/subterfuge with the sole intention to evade taxes. While it is true that the Scheme may result into tax avoidance, it cannot be said that the only object of the Scheme is tax avoidance.

(ii) The Revenue's argument that the transfer is void for want of consideration is not acceptable because it is not a party to the transaction. Even a consideration of one rupee can be said to be a valid consideration and it is not necessary that consideration is always a monetary consideration. In a reconstruction there is a give and take and mutual/reciprocal promises and obligations, which can be said to be consideration for each other. Even the most trifle benefit can be consideration so as to avoid the impact of section 25 of the Contract Act.

Vodafone Essar Gujarat Ltd v. Dept of Income-tax (2012) 76 DTR 241(Guj.)(High Court).

S. 45: Capital gains-Government Securities-Exemption- DTAA- India- Cyprus-Gains arising from sale of Government Securities is exempt as per Article 14(4) of the DTAA. (S. 90, Article 11(4), 14(4))

The Assessee sold the Government Securities and claimed the gain as exempt from capital gain tax. The Assessing Officer held that the gains in transactions of Government Securities has to be assessed as interest within the meaning of Article 11(4) of the DTAA hence taxable in India. In appeal the additions were deleted by the Commissioner of (Appeal) , which was confirmed by Tribunal. On appeal by revenue the Court up held the view of the Tribunal by holding that Article 14(4) is applicable hence gain is exempt from tax .(A.Y.2001-02)

DIT v. Credit Suisse First Boston (Cyprus) Ltd(2012) 209 Taxman 234/76 DTR 215 (2012) Vol.114(5) Bom.L.R.2783 (Bom.) (High Court)

S. 45:Capital gains -Business income- – Purchase and sale of shares – Chartered Accountant- Amount assessable as capital gains and not assessable as business income. [S. 28(i)]

In the accounting year relating to asst. year 2001-02, the assessee, a chartered accountant, had derived income from his profession and also from purchase and sale of shares shown as short term and long term capital gains and also interest. He had also shown income from speculation business. Though the assessee had purchased and sold other shares and units of mutual funds, this solitary transaction had been disputed by the Assessing Officer mainly because the assessee had purchased the shares from borrowed funds obtained at a high rate of interest. Another reason for holding that the transaction was an adventure in the nature of trade or business was that the shares were held by M till the entire loan was paid and were initially purchased in the name of M in terms of the agreement between the assessee and M. According to the Assessing Officer, since the assessee had not obtained physical possession of the shares at the relevant time, the assessee was not the owner of the shares. The Commissioner (Appeals) treated the receipt as capital gains and

deleted the disallowance of interest. The Tribunal upheld the order. The High Court dismissing the both the Tribunal as well as Commissioner (Appeals) had recorded concurrent findings of fact to the effect that the assessee had disposed of most of the shares held by him after more than a year or two; the investment made in the shares of H was not very high; the assessee had not repeated the transactions of purchase and sale of shares of H, the assessee had not shown the shares as stock in trade; after the shares were sold, the assessee made investments under the provisions of sec. 54EC in the bonds of NABARD, and the profit of purchase and sale of shares or investment in mutual fund was always shown on capital account, that is, capital gains either short term or long term, and that the same was accepted as such in earlier years. The transaction did not amount to an adventure in the nature of trade. (A.Y. 2001-02)
CIT v. Niraj Amidhar Surti (2012) 347 ITR 149 (Guj.)(High Court)

S.45:Capital gains –Deeming fiction-- Sale consideration accruing or arising or received in different years ,chargeable to tax in year which transfer takes place -Transfer of share holdings through share purchase agreement. Merely because the agreement provides for payment of the balance of consideration upon the happening of certain events, it cannot be said that the income has not accrued in the year of transfer. Order of Tribunal was up held.(S.48)
The assessee had transferred his shareholding through a share purchase agreement dated 15-2-2006. The overall sale consideration was Rs.86.25 lakhs. However, in this year the assessee received only an amount of Rs.60 lakhs. The balance amount was to be received in three succeeding years subject to fulfilment of certain conditions. The assessee claimed that in the relevant assessment year only an amount of Rs.60 lakhs was liable to be considered for the purpose of levy of capital gains tax. The A.O. held that whole sale consideration of Rs.86.25 lakhs was subject to capital gains tax under section. 45.It was held that there was no material on the record or in the agreement suggesting that even if the entire consideration or part is not paid the title to the shares will revert to the seller. In that sense the controlling expression of `transfer' in the instant case is conclusive as to the true nature of the transaction. The fact that the assessee adopted a mechanism in the agreement that the transferee would defer the payments would not in any manner detract from the chargeability when the shares were sold. The tenor of the Tribunal's order is that the entire income by way of capital gains is chargeable to tax in the year in which the transfer took place. This is what is stated in sec. 45(1). Merely because the agreement provides for payment of the balance of consideration upon the happening of certain events, it cannot be said that the income has not accrued in the year of transfer. Order of Tribunal was up held.(A.Y.2006-07))
Ajay Guliya v. ACIT (2012) 209 Taxman 295(Delhi) (High Court)
Editorial: Refer *ACIT v. Ajay Guliya (2012) 138 ITD 134 (Delhi) (Trib.)* It was held that in view of deeming fiction contained in sec. 45(1) whole of sale consideration accruing or arising or received in different years was chargeable under head `capital gains' in year in which transfer of shares had taken place.

S.45:Capital gains - Business income- Investment in shares-Rule of consistency-Profit on sale of shares is assessable as capital gains [S. 28(i)]
Assessee is buying and selling shares in a large scale at high frequency and the period of holding was also not very long. Assessing Officer taxed the income as business income. The Tribunal held that once the Assessing Officer has accepted the transaction of shares as investment in earlier year and also in subsequent year, in the absence of any glaring material change in facts and circumstances, Assessing Officer ought to have maintained consistent view on issue. The Tribunal held that income arising from purchase and sale of shares held as investment would be assessable as capital gain and not as business income.(A. Ys. 2005-06 and 2006-07)
Sunil Kumar Ganeriwal v. Dy. CIT (2012) 134 ITD 179 (Mum.)(Trib.)
S.45:Capital gains - Business income- Investment in shares- Rule of consistency is to be followed and assessable as capital gains . [S. 28(i)]
Following the rule of consistency the Tribunal held that the profit on sale of shares has to be assessed as short term capital gains and not as business income.(A.Y. 2005-06)
S.K. Finance v. Dy. CIT (2012) 13 ITR 236 (Mum.)(Trib.)

S.45:Capital gains - Business income- Investment in shares-Rule of consistency-Profit on sale of shares is assessable as capital gains. [S. 28(i)]

The assessee had consistently shown in past several years the share trading income as capital gains, either short term or long term or both and that had not been challenged by the Department. There was no material on record to hold that the assessee had deviated from the accepted nature of transaction or adopted a different method of share transaction more akin to business transaction. As far as the period of holding of an investment was concerned, the accepted legal position was that a decision had to be taken by the assessee himself as to reap the maximum benefits.The profit on sale of shares cannot be assessed as business income. (A.Y.2006-07)

ACIT v. GargiShitalkumar Patel (Smt.) (2012) 13 ITR 386 (Ahd.)(Trib.)

S.45: Capital gains-Business income- Investment in bonds, mutual funds and other securities- Short term-Profit on sale of shares is assessable as capital gains and cannot be treated as business income-Principle laid down[S. 28(i)]

Assessee company was engaged in business of dealing in auto spare parts and investment in bonds, mutual funds and other securities. Assessing Officer treated share transactions as business activity and assessed as business income. The Tribunal held that the assessee has not borrowed funds for purchase of shares, further value of shares at close of year had been taken at cost and not market price or cost whichever is lower, which showed that shares were not treated as stock-in-trade. In earlier assessment year,purchase of shares by assessee had been treated as investment. Tribunal applied 11 principles to determine whether the sale of investment is capital gain or business income. Accordingly the Tribunal directed the Assessing Officer to treat the sale as investment as capital gains and not as business income.(A.Y. 2006-07)

D& M Components Ltd. v. ACIT (2012) 49 SOT 224 (Delhi)(Trib.)

S.45:Capital gains- Business income- Investment in shares- Surplus is assessable as capital gains. [S. 28(i)]

Assessee is carrying on the business of marketing and distribution of books and magazines. He had income from purchase and sale of shares. During the year the assessee officer had large number of transactions of purchase and sale of shares. Assessing held the income as business income. On appeal Commissioner (Appeals) held that transactions resulted into short term capital gains and not business profits. On appeal by revenue the Tribunal held that as the department has accepted the assessee as investor in earlier years and latter years, coupled with fact that bulk of profit had arisen from sale of bonus shares the order of Commissioner (Appeals) is confirmed.(A.Y. 2007-08)

ACIT v. Om Prakash Arora (2012) 134 ITD 217 / 146 TTJ 730 (Delhi)(Trib.)

S.45:Capital gains- Development agreement-Handing over of possession- Business income – Transfer-Assessable as capital gains in the year transferee is willing to perform the obligation as per the contract-Transfer of Property Act Section 53A.[S. 2(47)(v), 28(i)]

On the facts the Tribunal found that developer had violated essential terms of agreement which tend to subvert the relationship established by the development agreement with the assessee. There was no progress in the development agreement for the relevant assessment year, even the municipal sanction for development was not obtained in the relevant year.Handing over the possession of the property is only one of the conditions, section 53A of the Transfer of Property Act but it is not the sole and isolated condition and it is necessary to go in to whether or not the transferee was willing to perform its obligation under the consent terms. On the facts of the case provisions of section 2(47)(v) will not apply in the assessment year under consideration and the capital gains would not be taxed in the assessment year. The Assessee was showing income from the land holding as agricultural income. Land which was acquired in September, 1996 was sold during the A. Y. 2004-05. There was no regular activity of purchasing and selling of land, therefore profit on sale of the land was assessable as capital gains and not as business income. (A.Y. 2006-07)

K. Radhika (Mrs) & Ors. v. Dy. CIT (2012) 65 DTR 250 (Hyd.)(Trib.)

S.45:Capital gains- Sale of shares–ESOP –Short term – Long term – The date on which option to buy the shares is granted, could not be treated as 'date of acquisition of shares' -. Gains will be short term [S. 2(42A)]

Assessee is an employee of Johnson & Johnson Ltd. an India based subsidiary of Johnson & Johnson, Inc USA. During the year the assessee received the consideration in respect of sale of stock option shares received by him. The assessee treated the same as long term capital gain and claimed exemption under section54EA. Assessing Officer held that the holding period for these share to be considered from the date of exercising the stock option to the sale of the shares, which was less than twelve months, hence the gain on these shares to be treated as short term capital gains. The Commissioner (Appeals) held that, the assessee has taken constructive delivery hence treated as long term capital gains. Tribunal reversed the finding of Commissioner (Appeals) and held that the date on which option to buy the shares is granted, could not be treated as 'date of acquisition of shares' As per broker's statement, the assessee was not the owner of these shares before the shares were sold and entries, to that extent, were mere notional in nature, therefore impugned gains cannot be taxed under the head 'long term capital gains'. As the shares were held for less than 12 months, the gains will be short term capital gains. (A.Y. 1998-99)

ACIT v. Pramod H. Lele (2012) 66 DTR 134/143 TTJ 721/(2011) 47 SOT 363 (Mum.)(Trib.)

S.45:Capital gains- Transfer of development rights- TDR is "improvement" of land and if it has no cost, then, even if the land has a "cost", no part of the gain on transfer of land is taxable.

The assessee transferred "Development Rights" being the FSI and the "right to load TDR" on the land. While the right to construct on the land by consuming FSI was a capital asset which was acquired at a cost, the right to load TDR arose pursuant to the DC Regulations, 1991 without payment of any cost. The said right to "load TDR" was an improvement to the "capital asset" held by the assessee. If the "cost of improvement" of an asset is not determinable, capital gains are not chargeable. The result was that even the consideration attributable to the FSI (which had a cost) was not assessable to tax (Principle laid down in Jethalal D. Mehta v.Dy. CIT(2005)2 SOT 422 (Mum.)(Trib.) & Maheshwar Prakash-2 Co-op.Hsg.Society Ltd. (2008) 24 SOT 366 (Mum.)(Trib.) in the context of transfer of only TDR followed).

Ishverlal Manmohandas Kanakia v. ACIT (Mum.)(Trib.)www.itatonline.org

S.45:Capital gains- Sale of shares- Statement of broker- Addition as undisclosed source is not justified. (S.69)

Assessee had purchased the shares more than one year before date of sale and purchase which was accepted as genuine, the Assessing Officer was not justified in making addition of sale proceeds of such shares as undisclosed income of the assessee merely on the basis of statement of the broker that he was issuing accommodation entries. (A.Ys. 2002-03 & 2006-07)

Dalpat Singh Choudhary v. ACIT (2012) 143 TTJ 500 / 65 DTR 148 (Jd.)(Trib.)

Dy. CIT v. Dalpat Singh Choudhary(2012) 143 TTJ 500 / 65 DTR 148 (Jd.)(Trib.)

S.45:Capital gains – Joint venture-Assignment of land- Assignment of land to joint venture with another company - Capital gains cannot be charged for the relevant year.

As per joint venture agreement the assessee company has agreed to provide its land for the development of the joint venture company is getting 50 percent rights in the development of the joint venture the assessee company is getting 50 percent rights in the developed property. The extinguishment of its 50 percent right over the land is compensated by its 50 percent right in built up area. The joint venture has not started the construction during relevant year. The commercial complex is a yet a proposed project. The Tribunal held that, a transfer is contemplated only in case of an existing property. In the present case the property is only in the nature of mutual rights, in the project and development yet to happen. Therefore, there is no extinguishment of any right in the property. During relevant year only agreement is entered into hence, no capital gains is chargeable for the relevant year. (A. Y. 2007-08).

Vijay Productions (P) Ltd. v. Addl. CIT (2012) 134 ITD 19 / 66 DTR 314 / 144 TTJ 1 / 14 ITR 614 (TM) (Chennai) (Trib.)

S.45:Capital gains – Accrual - Disputes between share holders - Till final decision the capital gains cannot arise.

There was disputes between two groups and the matter is pending before the Supreme Court. The amount was deposited in fixed deposit as per interim order of Supreme Court. The Tribunal held that till the dispute is settled capital gains could not be taxed as the capital gains has not accrued. (A. Y. 2007-08).

Dy. CIT v. Ashwani Chopra and Others (2012) 143 TTJ 759 /(2011) 59 DTR 171(Asr.)(Trib.)

S.45:Capital gains-Business income- Investment in shares-Profit from sale of mutual funds and shares is assessable as capital gains and not as business income.(S.28(i))

The assessee is an Insurance agent. He declared the profit on sale of mutual funds and shares as business income. The Assessing Officer assessed the profit as business income, which was confirmed by Commissioner (Appeals). On appeal the Tribunal held that the profit is assessable as short term capital gains, considering the following factors (a), the average length of holding of shares was more than 125 days (b)he had not borrowed any amount from outsider on loan to investment in shares (c) he had only deployed funds with a long term view as amounts were only borrowed from family members having liquid capital available with them (d) the primary business activity pursued by the assessee was that of an insurance agent (e), no intraday transactions in shares and securities ,there was no trading in future and options (f) percentage of gains of less than 30 days was only 5.13 percent . Accordingly the Tribunal held that the gain is assessable as short term capital gains.(A.Y.2006-07)

Dev Ashok Karvat v. Dy.CIT (2012) 50 SOT 167 (Mum.)(Trib.)

S.45:Capital gains-No cost of acquisition-Ancestor land-Compensation received from municipal corporation is not taxable.

The assessee received Inami land from his ancestors for service of 'Dargah'. Subsequently the municipal corporation acquired the said land and paid compensation to assessee. Assessing Officer was of the view that income arising from aforesaid transaction was liable to tax under section 45. In the present case since land was acquired by assessee's ancestors free of cost for maintenance and services of Dargah, any element of cost in acquisition of aforesaid land was in conceivable. The ITAT therefore held that the transaction in question was outside the purview of section 45.(A.Y.2005-2006)

ITO v. Pashu Mohammed Zainuddin (2012) 50 SOT 45(URO)(Pune)(Trib.)

S.45:Capital Gains –Agricultural land - Land purchased for agricultural purpose, held for long period and shown as asset in balance sheet is Liable to capital gain tax on sale and not as business income. [S. 28(i)]

The assessee is a company engaged in the business of purchase and sale of land. Where the assessee purchased the land which was used for agricultural land, showed it as asset in the balance sheet and held it for a long period. It was held by the Tribunal that consideration received on the sale of such land be taxable as Capital Gain and not as Profit from Business and Profession. (A.Y. 2006-07)

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

S.45:Capital gains- Investment in shares-Though the assessee borrowed the money , gains on shares assessable as STCG & not business profits.(S.28(i).

The assessee earned gains from shares of which Rs. 7.61 crores was out of delivery-based transactions and offered as STCG while Rs. 4.26 crores was out of futures & options and offered as business profits. The AO & CIT (A) assessed the STCG as business profits on the ground that (a) there was no LTCG, (b) there was no dividends, (c) there were hundreds of transactions during the year, (d) the assesee had borrowed interest-bearing funds for purchase of shares & (e) the average holding period was 41 days. On appeal by the assessee, the Tribunal held allowing the appeal:

In the books, the delivery based transactions were accounted as investment and a distinction from the non-delivery transactions is maintained. The transactions were with a limited number of companies (8) and the average number of transactions in one month were 8. The CBDT Circular permits the assessee to deal in the shares of one scrip and treat some as trading and some as a capital investment. The fact that the assessee borrowed funds for investing in shares cannot constitute a factor as in none of the case laws or CBDT circular it has been held that borrowings will not be allowed in investment transactions. Investment in capital assets can also be carried out by use of borrowed funds. There is no bar notified by the law, judicial pronouncement or CBDT Circular.(A.Y. 2006-07)

Narendra Gehlaut v. JCIT(2012) 52 SOT 255 (Delhi)(Trib.)

S.45:Capital gains-Capital loss- Genuineness of loss on sale of distressed assets – As the transactions held to be sham the loss was held to be not allowable.

The assessee had given security of shares as guarantee for a loan taken by one Mr Subhash Chopra from Cholamandalam Finance & Investment Co Ltd . Since Mr Chopra defaulted, the assessee had paid a sum 2of Rs 50,40,000 and got released the shares pledged .After getting released the shares the assessee entered in to an agreement with a company to sell this loan as distress asset only for a sum of Rs 4,50,000. Despite the summons issued the parties never appeared before the Assessing Officer. The Assessing Officer held that the entire exercise was to reduce the short

term capital gains hence the loss cannot be allowed as loss on sale of distressed asset. The Tribunal also conformed that loss on account of guarantee for loan could not be allowed as the surrounding circumstances clearly prove that the entire exercise is a sham and fictitious exercise just to reduce the tax liability (A.Y. 2005-06)
Sudhakar Ram v. ACIT (2012) 72 DTR 187 / 49 SOT 90 (Mum.)(Trib.)

S.45:Capital gains-Accrual-Joint venture-On facts transfer of property is complete on the date of entering in to joint venture agreement ie. 12 th July , 2005 (S. 2 (47)(v), 48)

The assessee entered in to a joint venture development agreement with a builder dated 12th July, 2005 in which the consideration was fixed at Rs 2,50,00,000. The document was registered later by way of confirmation deed dated 2nd July 2007 in which the sale consideration was increased to Rs.4,90,00,000. The assessee had ¼ share. According to the assessee as the joint venture agreement was registered in the assessment year 2007-08 capital gains tax is leviable in the assessment year 2007-08. The assessing Officer took the stand that the same is taxable in the year 2006-07 in which the transfer took place. The Assessing Officer also taxed the enhanced consideration in the Assessment year 2006-07. In appeal the Commissioner (Appeals) also confirmed the order of Assessing Officer.
On appeal to Tribunal, the Tribunal held that, as the builder has taken possession of property as per the joint venture agreement dated 12th July, 2005 the agreement fulfills the requirement of section 2(47)(v) and therefore "Transfer" in terms of section 2(47)(v) took place during the assessment year 2006-07. Hence the capital gain was rightly taxed in the assessment year 2006-07. For the purpose of computation of capital gains the enhanced consideration to be taken in to consideration as per section 48 in the year of transfer i.e. 2006-07. (A.Y. 2006-07)
Mahesh Nemichandra Ganeshwade & Ors v.ITO (2012) 73 DTR 1 147 TTJ 488/17 ITR 116(Pune) (Trib.)

S.45:Capital gains- Compensation –Acquisition of land - Compensation received on acquisition of land is assessable as capital gains.

The Assessee received compensation received on acquisition of land under the land acquisition Act. Additional amount received was linked to the period when the Notification was issued till the date of actual possession. The AO treated the sum so received as interest income. The Tribunal held that it was part of the compensation amount receivable and taxable as capital gains.(A.Y.2007-08))
Ghanshyam Mudgal v. ITO, ITAT A Bench Jaipur, ITA No. 896/JP/10, dated 9-9-11, BCAJ Pg. 43, Vol. 44-A Part 1, April 2012(Jaipur) (Trib.)

S.45:Capital gains–Ownership of land-Firm-Partner-Capital gains assessable in the hands of partner.

Assessee-firm had filed its return declaring certain income as long-term capital gains generated out of sale of land. Later on, assessee filed a revised return wherein it was explained that land sold actually belonged to 'J' a partner of assessee-firm, and, therefore, long-term capital gain was accountable in his hands. Assessing Officer took a view that capital gain was taxable in hands of Assessee firm and not in hands of 'J' as individual on ground that land and buildings were shown in balance-sheet of firm as its assets and assessee-firm had claimed depreciation on buildings. On appeal, it was noted that one 'JM'had carried on a business - After death of JM, business was carried on by his four sons including 'J' by constituting assessee-firm. Land property in question belonging to estate of 'JM' was not specifically assigned to partnership firm either by act, deed or conduct as wives of partners were also co-owners. However, same was used by firm for business. Subsequently, at time of dissolution of firm, a release deed was executed whereby land in question came to share of 'J' after paying certain amount to other partners. It was thereafter 'J' sold land property. Thus on facts, it was apparent that property belonged to 'J' in his individual capacity and, therefore, capital gain arising on sale of said property was assessable to tax in his hands and not in hands of assessee-firm. (A.Y. 2007 – 2008)
DCIT v. South India Pulverising Mills [2012] 137 ITD 1/148 TTJ 694/76 DTR 57(TM) (Chennai)(Trib.)

S.45:Capital gains--Transfer-Development agreement-If developer has taken any steps in relation to construction of flats, on the basis of development agreement, then it has to be considered as transfer and assessee is liable to capital gains tax in the year of transfer.(2 (47)(v), 53A, of Transfer of Property Act)

When an owner enters in to an agreement for development of the property and certain rights area assigned to the developer who in turn has made the substantial payment and taken steps to construction of flats , then the transaction held to be transfer under section 2 (47)(v).Legal ownership continued with the owner does not have bearing on taxability of capital gains. Though total profits received in later year for the purpose of capital gains tax the year of

transfer is relevant. On the facts of the case the provisions of section 53A of Transfer of Property Act is held to be applicable.(A.Ys. 2002-03 & 2008-09)
ACIT v. A. Rama Reddy (2012) 52 SOT 521 (Hyd.)(Trib.)

S.45: Capital gains- Distribution of tax free dividend- - "sham" transaction or "colourable device"- On facts, the transaction cannot be regarded as a "sham" or a "colourable device" because (a) the WOS had sufficient reserves and cash surplus for the distribution of dividend & (b) the WOS paid dividend distribution tax which was duly accepted in its assessment.

The assessee's act of getting its' wholly owned subsidiary ('WOS') to distribute tax-free dividend, and thereby reduce the FMV of the shares of the WOS, just prior to the sale of those shares, did result in a tax advantage to the assessee because it paid lower tax on capital gains. However, the transaction of dividend distribution by the WOS cannot be regarded as a "colourable device" or as an "impermissible tax avoidance scheme". A transaction can be regarded as a "sham" where "the document is not bona fide nor intended to be acted upon, but is only used as a cloak to conceal a different transaction" or where "it is intended to give to third parties the appearance of creating between the parties legal rights and obligations which are different from the actual legal rights and obligations which the parties intend to create". On facts, the transaction cannot be regarded as a "sham" or a "colourable device" because (a) the WOS had sufficient reserves and cash surplus for the distribution of dividend & (b) the WOS paid dividend distribution tax which was duly accepted in its assessment.(A. Y. 2006-2007)
ADIT v. Maersk Line UK Ltd (Kol.)(Trib)www.itatonline.org

S. 45: Capital gains – Loss on sale of share – Not related to business activity, hence capital loss not to be allowed.

Where loss on sale of shares was not in accordance with the business activity of the assessee, then the capital loss cannot be allowed. (A.Y. 2003-04, 2004-05 & 2006-07)
ACIT v. Lanco Infratech Ltd. (2012) 18 ITR 579 (Hyd.) (Trib.)

S.45:Capital gains - Short term capital asset - capital gain had to be computed on sale of flats and not on transfer of right of claim in flats [S. 2(42A, 48)]

Assessee owned a land since 1962. It entered into a development agreement on 21-2-2001 with a builder for a consideration of Rs.61 lakh and 55 per cent share in built up area. Assessee was given possession of flats on 24-2-2005. Assessee sold two flats on 10-4-2006 and 12-5-2006 and computed long term capital gain by taking holding period from date of agreement 21-2-2001. `Right of claim in flats' as per agreement of 2001 was an `asset', assessee had not sold `right of claim in flats' but had sold `flats' of which he was owner. `Right of claim in flats' no longer subsisted once assessee acquired flats and took possession of same on 24-2-2005. Therefore, capital gain had to be computed on sale of flats and not on transfer of right of claim in flats; and considering dates of possession of flats and sale therefore, gain on sale of flats was short term capital gain. Since assessee along with flats had also sold right of land as owner, which was an independent asset held since 1962, capital gain in respect of transfer of right of assessee in land had to be computed separately as long term capital gains. It would be reasonable to adopt a profit margin of 25 per cent on cost of construction of flats to arrive at sale consideration pertaining to flats and balance sale consideration of flats would be appropriated towards sale price for transfer of right in land. (AY 2007-08)
ACIT v. Jaimal K. Shah (2012) 137 ITD 376 (Mum.) (Trib.)

S.45: Capital gains-Dutch Citizen - Sale of tenancy rights in property –Sale of shares of a company holding ownership rights in immovable property is taxable as per Article 13 of India-Netherlands DTAA.

Mrs. Punnika, Dutch resident holds ¼ interest in the tenancy rights and 596 shares in Parikh Agencies Pvt. Ltd., a dormant company holding ownership rights in immovable property in Mumbai. The applicant desired to know her tax liability under the Indian Tax Laws and under the laws of Netherlands in respect of the release of tenancy rights and on sale of the said shares. The questions involved for ruling are

1.Is the amount received for the release and relinquishment of tenancy rights, a real estate transaction liable to be taxed under the head capital gain and further, is it to be taxed in India or in the Netherlands?
2.Is it correct that the capital gain tax on sale of shares is to be paid in the Netherlands only and that, the TDS already made on the sale of shares is to be refunded to her by India?
It was held that
Ans. 1 The amount received for the release and relinquishment of tenancy rights is liable to be taxed under Article 13.1 of the DTAA in India.
Ans. 2 The capital gains on sale of shares is taxable in India under Article 13.4 of the DTAA. The TDS already paid on the sale of shares is to be allowed credit against any tax demanded by the Revenue, upon its proper verification.
Punnika Parikh(Mrs) (2012) 249 CTR 253 / 206 Taxman 372 / 69 DTR 153 (AAR)

S.47:Capital gains- Transaction not regarded as transfer-Amalgamation- Excess value cannot be assessed as business income. [S. 2(27), S. 28(iv)]

During relevant assessment year, a company, SIFL, got amalgamated with assessee-company. Pursuant to amalgamation, assets and liabilities and rights and obligations of SIFL vested with assessee-company and those items had been recorded at their fair values. Excess of fair value of net assets taken over by assessee-company over paid-up value of allotted equity shares worked out to Rs.2,899.68 lakhs and the said surplus amount was transferred by assessee to its General Revenue Account. Held that the assessee had acquired business of another company through medium of amalgamation, and in view of provisions of section 47(vi), there was no transfer as such of any capital asset. Therefore, question of taxing capital gains did not arise.(A.Y. 2002 – 2003)
Spencer & Co. Ltd.v. ACIT [2012] 137 ITD 141/75 DTR 311/148 TTJ 421 (TM)(Chennai)(Trib.)

S.47(ii):Capital gains- Transaction not regarded as transfer-Dissolution of firm - The amount received by a partner on dissolution of firm cannot be brought to tax as capital gains by virtue of s.47(ii).

Following the ratio of Bombay High Court in Prasant S. Joshi v.ITO(2010) 324 ITR 154 (Bom.)(High Court) which held that "**During the subsistence of a partnership , a partner does not possess an interest in specific in any particular asset of the partnership. During the subsistence of a partnership , a partner has a right to obtain a share in profits. On a dissolution of a partnership or on upon retirement , a partner is entitled to a valuation of his share in the net assets of the amount paid to a partner upon retirement, after meeting the debts and liabilities .An amount paid by to a partner upon retirement , after taking accounts and upon deduction of liabilities does not involve an element of transfer within the meaning of section 2(47)."** The Court accordingly held that the amount received by a partner on dissolution of firm cannot be brought to tax as capital gains by virtue of s.47(ii). (A.Y.1978-79)
CIT v. Abid A. Kalvert (2012) 76 DTR 109 (Bom.)(High Court)

S.47(iv) :Capital gains- Non-resident-Transaction not regarded as transfer- Buy-back of shares- Indian subsidiary company –DTAA- India- Germany- Indian subsidiary held not to be 100% owned as some shares held through nominees, section 46A being specific provision it was held that capital gains chargeable to tax in India(S. 45, 46A,77A,115JB, Art. 13)

Applicant, a company in Germany holds 43,83,994 shares in the capital of a public limited company in India. Balance 6 shares are held by group companies as nominee of German company to maintain minimum number of shareholder to 7 as required by the Companies Act, 1956. The Indian company has proposed to buy back shares from the applicant. Applicant has approached Authority for Advance ruling on following questions
1. Whether, in the facts and circumstances of the case, would the transfer of shares in the course of the proposed buy-back of shares, be exempt from tax in India in the hands of the applicant, in view of the provisions of section 47(iv)?
2. Without prejudice to Question 1, whether the applicant would be liable to tax under the provisions of section 115JB of the Act, in the absence of any business presence or permanent establishment, (PE) in India?

3. Where the gains arising to the applicant in the course of buy-back of shares by UVW India, is not taxable in India under the Act, whether UVW Germany is entitled to receive the amount on buy-back of shares without any deduction of tax at source?

AAR held that the exemption under section 47(iv) is available only where the parent company itself holds, or its nominees separately hold 100% shares of the shares of the subsidiary. Also the AAR observed that a nominee shareholder has the same rights in the company as any other shareholder and hence the shareholding by the nominees is not to be equated with the shareholding by the Applicant. The AAR held that section 46A has to prevail over section 45. The AAR referred to the speech of the Finance Minister and concluded that the intent behind the section was to clarify that income earned on buy back of shares would be deemed to be capital gains and not dividend income. On that basis AAR ruled the capital gains to be taxable in India. Without further discussion it was held that section 115JB has no application and the income being chargeable to tax, the applicant cannot receive any amount without deduction of tax at source.

RST (2012) 348 ITR 368/ 249 CTR 113 / 69 DTR 1 / 206 Taxman 477 (AAR)

S.47(v): Capital gains- Transfer to subsidiary-Subsidiary must be wholly owned, matter set aside to Tribunal to decide a fresh (S. 45, Companies Act ,1956, S.49, 187C)

During the course of block assessment proceedings the Assessing Officer found that the assessee was not a wholly owned subsidiary of Sunair Hotes Ltd. and it was a wrong claim, hence the entire consideration received by the assessee was liable to tax and benefit of section 47(v) was not available. On appeal Commissioner (Appeals) allowed the claim of assessee, which was confirmed by Tribunal. On appeal by revenue the Court held that for benefit under section 47(v) of the Income-tax Act, 1961, the subsidiary must be wholly owned subsidiary. Being subsidiary is not sufficient, even if one of the share holders was not a nominee of the holding company, the benefit under section 47(v) has to be denied. The Court also held that the normal presumption in law is that the registered share holder holds the share in his own right and in his individual personal capacity. He does not hold shares as a nominee. The onus is, therefore, on the party who claims to the contrary. The Court held that the finding of Tribunal was perverse, because the payments were not by Cheque, no paper was produced & the party has not been examined. The court set-aside the order of Tribunal and remanded the matter to the Tribunal with a direction to examine the matter thereunder.(A.Y.1995-96)

CIT v. Sunaeero Ltd (2012) 345 ITR 163/73 DTR 321/ 209 Taxman 67/172 Comp Cas 562 (Delhi) (High Court)

S.47(xiv) : Capital gains - Transactions not regarded as transfer - Conversion of proprietary concern into company - For continuing the bank account of proprietary concern by the company and issuing the shares on revaluation of shares exemption cannot be denied.

Assessee has transferred all his assets and liabilities of his proprietary concern to a closely held limited company and claimed exemption under section 47(xiv) of the Act. Assessing Officer held that bank accounts of sole proprietary concern still continued and not been transferred to a company nor said accounts were closed as conditions of section not satisfied he disallowed the exemption. The Tribunal held that as the agreement which assigned business in favour of private limited company showed that assessee had transferred all bank accounts in favour of the company and balance sheet referred of company referred to all bank accounts and same had been treated as company's bank account hence exemption cannot be denied. The Assessing Officer also held that the assessee had revalued the intangible assets and transferred the reserves to his capital accounts and the shares have been issued to the assessee on revalued amounts hence the assessee is not entitled for exemption. The Tribunal also held that receipt of higher number of shares because of revaluation cannot be treated as consideration or benefit received other than by way of allotment of shares for attracting proviso (c) to section 47(xiv), hence, denial of exemption was not justified. (A. Y. 2005-06).

ACIT v. Nayan L. Mepani (2012) 49 SOT 641 (Mum.)(Trib.)

S.48: Capital gains – Computation-Indexed cost of acquisition-- Previous owner - In case of transfer by gift, will, trust, etc. indexed cost to be determined with reference to holding by previous owner.(S. 45, 49

The settlor acquired property before 1.4.1981 and he settled in on trust on 5.1.1996. The assessee-trust sold the property and computed the indexed cost of acquisition on the basis that it "held" the property from the time the settlor had held it. The Assessing Officer accepted that the settlor's cost of acquisition had to be treated as the assessee's cost

of acquisition but held that the settlor's period of holding could not be treated as the assessee's period of holding. This was upheld by the Tribunal. On appeal by the assessee to the High Court, Held reversing the Tribunal:
The department's contention that in a case where section 49 applies the holding of the predecessor has to be accounted for the purpose of computing the cost of acquisition, cost of improvement and indexed cost of improvement but not for the indexed cost of acquisition will result in absurdities. It leads to a disconnect and contradiction between "indexed cost of acquisition" and "indexed cost of improvement". This cannot be the intention behind the enactment of section 49 and the Explanation to section 48. There is no reason why the legislature would want to deny or deprive an assessee the benefit of the previous holding for computing "indexed cost of acquisition" while allowing the said benefit for computing "indexed cost of improvement". The benefit of indexed cost of inflation is given to ensure that the taxpayer pays capital gain tax on the "real" or actual "gain" and not on the increase in the capital value of the property due to inflation. The expression "held by the assessee" used in Explanation (iii) to section 48 has to be understood in the context and harmoniously with other Sections and as the cost of acquisition stipulated in section 49 means the cost for which the previous owner had acquired the property, the term "held by the assessee" should be interpreted to include the period during which the property was held by the previous owner (CIT v. Manjula J. Shah (2012) 204 Taxman 42 (Bom) followed) (A.Y.2001-02).
Arun Shungloo Trust v. CIT (2012) 205 Taxman 456/68 DTR 279/ 249 CTR 294(Delhi)(High Court)

S.48:Capital gains- Computation-Cost of acquisition- Amount paid to tenant for vacating the premises is allowable as deduction while computing the capital gains.

Assessee has sold the cinema hall and it paid certain sum to tenant who was running canteen in said cinema hall to vacate the said premises. The amount paid was set off against sale consideration of capital gains. The Assessing Officer disallowed the claim. In an appeal, the Commissioner (Appeals) and Tribunal allowed the claim. On appeal to Tribunal by revenue, the Court held that the amount paid was wholly and exclusively connected and linked with transfer of sale. Accordingly the view of Tribunal was confirmed. The Court also upheld the view of Tribunal as regards the scrap valuation of building which has applied the thumb rule for computing the gain under section 48 of the Act.(A.Y. 2007-08)
CIT v. Eagle Theatres (2012) 205 Taxman 449 (Delhi) (High Court)

S.48:Capital gains-Computation-Non-Cumulative redeemable preference shares-Non-Cumulative redeemable preference shares could not be equated with debentures or Bond assessee is entitled to benefit of indexation.[S. 2(47)].

The assessee had subscribed to the purchase 4 lakh preference shares each of Rs 100 for an aggregate value of Rs 4 crores, in the year 1992. During the assessment year 2001-02 the assessee redeemed three lakhs shares at par and claimed a long term capital loss of Rs 2.73 crores after availing the benefit of indexation. The Assessing Officer disallowed the claim of set off of long term capital gain on sale other shares on the ground that (i) both the assessee and the company in which the assessee held that preference shares, were managed by the same group of persons, and (ii) there was no transfer and that the assessee was not entitled indexation on the redemption of non-cumulative redeemable preference shares. On appeal, Commissioner (Appeals) and Tribunal allowed the claim of assessee following the ratio of judgment in Anarkali Sarabhai v. CIT (1997) 224 ITR 422 (SC). On appeal by revenue the Court held, that set off of loss against the gain on shares is rightly allowed by the Tribunal .Genuineness and creditability of transaction was not disputed in past years hence cannot be questioned in the year of set off. Non-cumulative redeemable preference shares could not be equated with debentures or bond hence the assessee is entitled to benefit of indexation. (A.Y.2002-03)
CIT v. Enam Securities P. Ltd (2012) 345 ITR 64/75 DTR 258/ 208 Taxman 54 / 253 CTR 256 (Bom.) (High Court)

S.48:Capital gains-Computation-Cost of acquisition-Indexation-Valuation accepted for the purpose of wealth tax has to be considered as reliable base for arriving at the cost of acquisition of the jewellary as on 1st April, 1974 by the process of reverse indexation for the purpose of computing the capital gains (S.45, 49, 55(2)(b)(i))

The assessee is the mother of erstwhile ruler of Baroda. The assessee sold the certain jewellary /valuable articles made of gold and pearls which she inherited from her son. The assessee following the method of reverse indexation worked out the fair market value of the said jewellary as on 1 st April 1974 and computed the capital gains. The assessing

Officer valued the indexation based on the actual sale price in December 1991 as the basis, whereas as per the assessee contended that the basis should be valuation done by registered valuer as on 31 March 1989 for the purpose of wealth tax. The Court held that revenue having accepted the valuation of the self same jewellary given by the assessee as on 31st March, 1989, as correct valuation for the purpose of wealth tax Act , the same valuation and not the actual sale price in December 1991 has to be a reliable base for arriving at the cost of acquisition of the jewellary as on 1st April , 1974 , by the process of reverse indexation for the purpose of computing the capital gain. Accordingly the appeal of assessee was allowed. (A.Y. 1992-93)

Shantadevi Gaekwad(Deceased) v.DCIT (2012) 250 CTR 421/72 DTR 241 (Guj) (High Court)

S.48: Capital gains-Computation-Self acquired trademark and design- Retrospective effect of provision-Since there was no cost of acquisition capital gains is not chargeable.(S. 55(2)

The assessee transferred self acquired trade mark and designs for the consideration of Rs 15 crore and Rs. 20 lakhs in the previous year relevant to assessment year 1999-2000 and claimed exemption from capital gains tax relying on the ration of judgment in CIT v. B.C.Srinivasa setty (1981) 128 ITR 249(SC) . Claim of assessee was rejected by the Assessing Officer. On appeal, Commissioner (Appeals) and Tribunal accepted the claim of assessee. On appeal by revenue, the Court upheld the order of tribunal by holding that prior to the amendment made to section 55(2) by the Finance Act, 2001, effective from 1-4-2002 by adding the words 'trade mark or brand name associated with the business self generated assets such as trade mark did not have any cost of acquisition . Therefore, for the period under consideration the computation under section 48 fails resulting in such transfer of trademarks not being chargeable to capital gains tax. Circular issued by the CBDT 14 -2001 explaining of the Finance Act , 2001 specifically state that the amendment bringing self generated intangible assets such as trademarks to capital gains only w.e.f .A.Y. 2002-03 onwards. The Court also observed that so far as the sale of self –generated designs (i.e. not acquired) the same is also not chargeable to capital gains tax not only for the reasons applicable to trademarks but also for the fact that even till date, no amendment has been made to section 55(2) of the said Act, defining cost of acquisition of design as in the case of trademark , goodwill , etc .Appeal of revenue was dismissed .Aprovision introduced with effect from a particular date would not have retrospective effect unless it is expressly stated. (A.Y. 1999-2000)(ITA no 5615 of 2010 dated 12-6-2012)

CIT v. Fernhill Laboratories and Industrial Establishment(2012)348 ITR 1/ 74 DTR 398/(2012) BCAJ-August P. 43 (Bom.)(High Court)

S.48:Capital gains-Computation-Cost of acquisition- Portfolio management-Portfolio management services fee is not deductible. (S. 45)

The expenditure incurred in connection with fee of portfolio management has nothing to do with the cost of acquisition of shares or transaction of shares, therefore it is not allowable.(A.Y. 2006-07)

Pradeep Kumar Harlalka v. ACIT (2012) 65 DTR 157 /143 TTJ 446 (Mum.) (Trib.)

S.48:Capital gains – Computation – Indexation – Bond- Conversion of units of UTI in to tax free bonds no indexation is available .

The assessee filed the return of income disclosing long term capital loss. While computing the capital loss the assessee claimed benefit of indexed cost of acquisition of UTI units. Assessing Officer invoked the third proviso of section 48 as per which no indexation is available on bonds and debentures. According to the Assessing Officer scheme of conversion was required to be listed on whole sale debt segment of NSE, which clearly implied that it was a debt instrument, where fixed rate of interest was available which was in the nature of FD/NSC, Bonds and debentures and other fixed income instruments. Tribunal held that since units issued by UTI fell under definition of 'bond' order passed by the Assessing Officer was upheld. (A.Y. 2005-06)

Dy. CIT v. Areez P. Khambhatta (2012) 49 SOT 319 (Ahd.)(Trib.)

S.48:Capital gains-Cost of improvement-PMS fee-Investment portfolio- PMS fee held to be deductible expenditure.(S.45)

The assessee entered into an investment management (Portfolio Management Scheme) agreement with ENAM AMC pursuant to which it paid Rs. 2.11 crores as "performance fees/ maintenance fee". This was treated as a cost of purchase of the shares. The AO disallowed the claim & the CIT (A) confirmed it on the basis that the as the PMS gains

were assessable as "capital gains", the expenditure was neither cost of investment or improvement nor an expenditure incidental to sale. Before the Tribunal, the assessee relied on its own case (KRA Holding & Trading Pvt Ltd vs. DCIT) where it had been held (*dissenting* from Davendra Kothari 136 TTJ 188 (Mum.)(Trib.) that as there was *a nexus between the expenditure and the acquisition of shares*, the same was allowable u/s 48. The department relied on Homi K. Bhabha vs. ITO which had (*dissenting* from KRA Holdings) held that PMS fees is not deductible against capital gains. Held by the Tribunal:

The Mumbai Bench declined to follow the decision of the Pune Bench of the Tribunal. It is the settled proposition of law that when two view are possible on the same issue the view which is favourable to the assessee has to be followed (CIT vs. Vegetable Products (1973) 88 ITR 192 (SC)). Further, as the Tribunal in the assessee's own case has already taken a view in favour of the assessee, that has to be followed unless it is reversed by a higher court. (AY 2007-08)

KRA Holding & Trading Pvt. Ltd v. DCIT (Pune)(Trib.) www.itatonline.org

S.48:Capital gains-Computation- Fair market value -Sale consideration-Only sale consideration can be taxed and not the fair market value. [S.56(2)(vii)].

It is the sale consideration which is to be considered for purposes of computing capital gains and not the air market value .Even by introduction of s. 56(2)(vii) w.e.f. 1st Oct. 2009, it has not been provided that fair market value of the assets as contained in balance sheet of the company should be considered for ascertaining the value of the shares. Assessee held shares in BAPL which were sold to YCL @ Rs.100 per shares – According to the AO, the assessee sold shares in question to one TS Ltd at Rs.318 per share via YCL as a device to avoid tax . In the absence of any evidence that assessee received anything over and above stated consideration, no addition could be made by artificially relating the transaction to purchase of Plot by BAPL.Further, "share" sale is altogether a different transaction than "asset" sale holding period for purposes of long term capital gains in case of shares is one year while in case of assets it is three years similar sale of shares has been assessed as long term capital gains in the hands of other assessed while it is being treated as short term capital gain in the hands of assessee . There is nothing on record with the company which purchased the shares from the assessee company and has passed on money from TS Ltd. to the assessee .Therefore, there was no case of increasing the capital gain when there is no iota of evidence to suggest that the assessee has received consideration over and above the consideration received. (A.Y. 2007-2008)

Singhal Credit Management Ltd v. ACIT (2012)136 ITD 7/ 76 DTR 169 (Jaipur) (Trib.)
Singhal Securities (P) Ltd v. ACIT(2012) 76 DTR 169(Jaipur)(Trib.)
SNR Rubbers (P) Ltd v. ACIT(2012) 76 DTR 169(Jaipur)(Trib.)

S. 48: Capital gains –Computation- Initial public offer – Pre issue expenses borne by promoter and company proportionately – Deduction allowed for expenses necessarily incurred in connection with sale of such shares.

The assessee were promoter directors in company R which had gone for initial public offering (IPO) of its shares during the PY. Assessee sold their respective shares in 'R' as part of IPO. The pre-issue expenses were borne by 'R' and assessee proportionately. It was held that when prospectus itself mentioned that issue expenses were to be borne proportionately by company and selling shareholders, it could not be considered that such expenses were not incurred for purpose of selling shares. Thus, expenses having being incurred for IPO through which assessee were also able to sell their shares, expenses necessarily in connection with sale of such shares and, therefore deduction claimed by assessee was to be allowed. (A.Y. 2007-08)

Usharani Raghunathan(Mrs) v. CIT (2012) 53 SOT 84 (Chennai)(Trib.)

S.49: Capital gains-Previous owner -Cost of acquisition- The property acquired by assessee under will of her father in the year 1988 and mother in the year 2000, which property was originally acquired by assessee's grand father in 1942 ,the period of holding shall be from 1st April 1981, in respect of entire property and benefit of indexation will be available from that date.(S.242A), 48)

The assessee's father acquired immoveable property in the year 1942, from his father . The assessee's father expired in the year 1988 leaving behind a will bequeathing the property to his wife and the assessee in equal shares. The asssessees mother expired on 21st Feb., 2000 leaving behind a will bequeathing 50 percent share in the property to the assessee.

The assessee sold the property in the assessment year 2005-06 and claimed the indexation from 1-4-1981. The Assessing Officer has allowed the indexation from the date of acquisition by assessee and not from 1-4-1981. The Commissioner (Appeals) allowed the appeal of assessee. The revenue challenged the order of Commissioner (Appeals) only in respect of 50 percent of the property acquired by the mother . On appeal the Tribunal held that in respect 50 percent of the inherited property from his mother period of holding will start from 21st August 1988 as she became the owner of her 50 percent share in the property only from that date under the will made by her husband .Department filed an appeal against the order of Tribunal and the assessee filed a cross appeal . According to revenue the period should be considered from the year 1988. The court held that ,the property acquired by assessee under will of her father in the year 1988 and mother in the year 2000, which property was originally acquired by assessee's grand father in 1942 ,the period of holding shall be from 1st April 1981, in respect of entire property and benefit of indexation will be available from that date . (A.Y.2005-06)

CIT v. Janhavi S. Desai (Ms)(2012) 75 DTR 1/209 Taxman 289/252 CTR 518 (Bom.)(High Court)

Janhavi S. Desai (Ms) v. CIT (2012) 75 DTR 1/209 Taxman 289/252 CTR 518 (Bom.)(High Court)

S.49:Capital gains- Previous owner -Cost of acquisition- Inheritance-Property acquired by inheritance before 1-4-1981 , cost of acquisition would be as on 1-4-1981.

Assessee has inherited a share in the property on death of his wife , who died on 28-11-1994. The said property was acquired by his wife by inheritance form her mother on 28-4-1984 and she was owner of property before 1-4-1981 . Since the property was inherited the assessee took the cost of acquisition as fair market value of the asst as on 1-4-1981 and claimed indexation from 1-4-1981. The Assessing Officer held that the assessee had became owner of the property only on death of his wife i.e. 28-11-1994, hence the cost of acquisition was worked by applying the indexation from the year 1994 as against 1981. On appeal the

Commissioner (Appeals) held that the property was inherited and the cost of acquisition should be as on 1-4-1981. On appeal be revenue, the Tribunal also confirmed the view of Commissioner (Appeals) and dismissed the appeal of revenue.(A.Y. 2008-09)

ITO v. Sapna Dimri (2012) 50 SOT 96 (Delhi) (Trib.)

S.49:Capital gains- Previous owner -Cost of acquisition- Inheritance-Property acquired by inheritance -Cost of acquisition would be as on 1-4-1981.(S. 42A, 48)

The assessee became the owner of the property on 6-4-1990, by transfer, on account of execution of his father's will . The said property was built by his father in 1965 and was expanded in 1971 . The assessee took cost of acquisition at Rs 2.54 Lakhs being the fair value of property as on 1-4-1981, and accordingly worked out cost of acquisition . The Assessing Officer held that the assessee became owner of property on 6-4-1990 , therefore indexation will be available only from 6-4-1990. In an appeal before Commissioner (Appeals), the Commissioner (Appeals) allowed the appeal of assessee. On further appeal to Tribunal, the Tribunal also confirmed the view of Commissioner (Appeals) and held that the indexation has to be allowed from 1-4-1981.(A.Y 2007-08)

ACIT v. Suresh Verma (2012) 135 ITD 102 (Delhi) (Trib.)

S.49:Capital Gains – Previous owner -Cost of acquisition- Property acquired on partition of HUF, year of acquisition of property by HUF to be taken as year of Indexation.

The assessee sold the house property, which she acquired on partition of HUF. Since the property was not acquired by assessee at her own but was acquired under the mode specified in Section 49(1), the index cost of acquisition is to be computed with reference to the year in which HUF had acquired the property and not the year in which the property came to the assessee on partition. (A.Y. 2008-09)

Shakuntala Somani(Smt) v. ITO (2012) 50 SOT 629 (Indore)(Trib.)

S.49:Capital gains-Previous owner -Cost of acquisition-Property inherited indexed cost to be determined as on 1-4-1981. (S. 2(42A), 48)

The assessee has declared long term capital gain, claiming the indexation cost as on 1st April, 1981. The Assessing Officer held that the father of the assessee had expired on 6th April 1990 hence indexation will be available only with the reference to financial year 1990-91. In appeal the Commissioner (Appeals) allowed the claim of indexation from 1-4-1981. On appeal by revenue the Tribunal held that as the property was acquired by assesee's father in 1965 and

inherited by assessee on death of his father in 1990, indexed cost of acquisition of property shall have to be determined as on 1st April 1981, for purpose of computation of capital gains. (A.Y. 2007-08)

ACIT v. Suresh Verma (2012) 72 DTR 82 (Delhi)(Trib.)

S.50 :Capital gains - Depreciable assets - Block of assets - Transfer of EOU units after tax holiday period, capital gains is to be computed by adjusting the depreciable assets of same block of assets.

Assessee carried on business as an export undertaking as well as on domestic in India. On expiry of the period of tax holiday under section 10B the assessee transferred the export undertaking and while working out the capital gains under section 50(2) made adjustment in the matter of working out the capital gains in respect of another unit. The Tribunal held that on expiry of period of tax holiday normal provision of income tax is applicable hence, the assessee was justified in computing the capital gains after adjusting the machineries which fall in the same block of assets. (A. Y.1993-94).

S. Muthurajan v. Dy .CIT (2012) 67 DTR 165/ 247CTR 450 / (2011) 339 ITR 301 / 202 Taxman 356 (Mad.)(High Court)

S.50:Capital gains – Block of Assets - Land and building- Land having been held for a period of more than 36 moths, surplus of sale price over indexed cost of acquisition of land was to be taxed as long term capital gains. (S.2 (11), 2(42A) 32, 45, 54EC)

The assessee had purchased a property in March, 2001. It sold said property in the assessment year 2006-07. In the return of income, the assessee bifurcated the property in to land and building. According to assessee, the capital gain arising from sale of land was taxable as long term capital gain, since the entire capital gain from sale of land was invested in specified bonds under section 54EC, same was not liable to tax. The Assessing Officer held that land and buildings were not sold separately the land was not long term capital asset and it was purchased together with building for a consolidated sum and not separately shown in the balance sheet hence provisions of section 50(2) is applicable. On appeal, Commissioner (Appeals) and Tribunal held that provisions of section 50(2) is not applicable hence directed the Assessing Officer to allow deduction under section 54EC. On appeal by the revenue the Court held that since the land is not depreciable asset and cannot form part of block of assets in the absence of a rate of depreciation having been prescribed therefore, provisions of section 50 could not be invoked . As the land being held more than 36 moths, surplus of sale price over indexed cost of acquisition of land was to be taxed as long term capital gain. (A.Y. 2006-07)

CIT v. I. K. International (P) Ltd. (2012) 206 Taxman 622 / 72 DTR 70 (Delhi)(High Court)

S.50:Capital gains - Depreciable assets - Plant and machinery - Plant and machinery which was not in use and no depreciation was claimed and assets were held for more than 36 moths assets were to be treated as long term capital gains (S. 2(11), 2(29B), 45)

The assessee had sold the plant and machinery in the assessment year 2006-07 and claimed the same as assessable as long term capital gain. The plant and machinery was acquired partly in the financial year 1997-98 and partly in the year 1998-99. The assessee contended that as the plant and machinery was not in use, the assessee had not claimed depreciation. The Assessing Officer held that the section 50 is applicable hence assessable as short term capital gain. The Commissioner (Appeal) also confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that section 50 did not apply and plant and machinery which was not in use had to be regarded as long term capital gain. On appeal by revenue the Court held that once Tribunal had recorded a finding of fact that plant and machinery, which is covered by section 50, would be a depreciable asset and not one on which no depreciation was ever claimed, then such assets, which were not depreciable, could not ever be assessed under section 50. Since assessee held assets as defined under section 2 (28A) and capital gain arising on transfer is required to be assessed as long term capital gain. (A.Y. 2006-07)

CIT v.Santosh Structural & Alloys Ltd. (2012) 206 Taxman 616 / 72 DTR 65/251 CTR 53 (P&H)(High Court)

S.50:Capital gains - Block of assets - Short term capital gain on sale of plant and machinery of one unit cannot be assessed if the assessee has one more unit where the rate of tax is the same. (S. 2(11), 45).

The assessee sold the entire plant and machinery of their paper division and stopped and ceased to carry on business in their paper division with effect from 2nd June, 1987. The Assessing officer held that section 50 of the Act is not applicable as the entire division, i.e. plant and machinery belonging to the paper division had been sold. He

differentiated the block of assets belonging to the paper division and the block of assets belonging to other divisions of the assessee. The view of Assessing Officer is also confirmed by the Commissioner (Appeals) . On appeal to the Tribunal the Tribunal held that section 2 (11) defines the term "block of assets" to mean group of assets in respect of which same percentage of depreciation is prescribed. The definition does not make distinction between block of assets of one division or other. The block of assets held by assessee cannot be differentiated on this ground. Further income of an assessee under the Act was calculated under different heads of capital gains has to be computed as per the provisions contained in Chapter IV-E relating to capital gains and not in accordance with the provisions of chapter IV-D relating to profit and gains of business or profession . Reference was made to section 32, which provides for deduction of depreciation in respect of block of assets in such percentage as is prescribed provided the asset is owned by the assessee and was used for the purpose of business. The Tribunal allowed the appeal of assessee. On appeal by the revenue the court held that, all assets, which may be of different types, but in respect of which same percentage of depreciation is prescribed, are to be treated and forming part of block of assets. On the facts the block of assets carrying on same rate of depreciation does not cease to exist and provisions of section 50 was not applicable. Appeal of revenue was dismissed. (A.Ys. 1989-90, 1990-91)

CIT v. Ansal Properties & Infrastructure Ltd. (2012) 207 Taxman 61 / 73 DTR 131 (Delhi)(High Court)

S.50:Capital Gains-Depreciable assets-Block of assets-On sale of office premises which was included in block of assets no depreciation was claimed hence assessable as long term capital gains.

The assessee earned long-term capital gain on transfer of an office premises. It was apparent from the records that the assessee had included the said property in block of assets but no depreciation was ever claimed or allowed on it. In the present case both the conditions mentioned in section 50 were fulfilled and hence the gain declared by the assessee was accepted as such, since no infirmity was pointed out by A.O. in the calculation thereon by assessee, hence provisions of section 50 cannot be applicable.(A.Y.2006-2007)

Divine Construction Company v. Asst. CIT.(2012) 49 SOT 6 (URO)(Mum)(Trib.)

S.50B:Capital gains- Slump sale- Transfer of unit-Undertaking transferred was a unit as a whole ,itemized earmarking would not be possible the transaction would be a slump sale and hence not liable to capital gains.(S.45)

Assessee company is engaged in the manufacture and sale of liquor. It entered in to an agreement to sell the undertaking business together with its assets and liabilities as a running business/going concern on as is-where-is basis in respect of the business of manufacturing , blending , bottling , distribution, storage and sale of Indian Made Foreign Liquor for a consideration of Rs 1.38 crores. The assessee claimed that the said consideration is not chargeable to tax. Assessing Officer worked out the written down value of fixed assets at Rs 3.48 crores and the difference of Rs 6.90 crores was held to be taxable under the head capital gains. In an appeal the commissioner (Appeals) confirmed the view of Assessing Officer. Tribunal has allowed the appeal of the assessee, the Tribunal held that it was case of slump sale and hence profits arising on transfer of undertaking would not be chargeable to capital gains tax. On appeal by revenue the Court held that since the assessee has sold the unit as a whole and business of said undertaking consisted not only of tangible items but other intangibles such as rights in intellectual property, licenses and manpower, in such a situation itemized earmarking would not be possible therefore the transaction involved a slump sale hence the order of Tribunal was affirmed and revenues appeal was dismissed.(A.Y. 1994-95)

CIT v. Polychem Ltd (2012) 343 ITR 115/ 205 Taxman 465 /68 DTR 139 (2012) Vol.114(2) Bom.L.R. 0824(Bom) (High Court)

S.50B:Capital gains- Slump sale-Slump sale need not be a sale, all slump transfers are covered, hence lump sum consideration is taxable. [S.2 (42c), 2(47)]

The assessee entered into a scheme of arrangement u/s 391-394 of the Companies Act, 1956 pursuant to which it transferred its project finance business and asset based financing business to another company for a lumpsum consideration of Rs. 375 lakhs. The assessee filed a settlement application in which it claimed that the said consideration on transfer of the project finance business was not chargeable to tax as it was not by way of "sale" and there was no cost of acquisition for the same. However, the Settlement Commission held that the said transfer, though effected

through an order of the Court was a "slump sale" and was chargeable to tax u/s 50B. The assessee filed a Writ Petition to challenge the Settlement Commission's order. Held by the High Court dismissing the Petition:
The assessee's argument that a "transfer" under a scheme of arrangement u/s 391-394 of the Companies Act is not a "slump sale" for purposes of s. 50B is not acceptable. S. 50B was inserted to supercede decisions which held that a slump sale (i.e. transfer of business as a going concern) was not taxable for want of cost of acquisition. The term 'slump sale' is defined in s. 2(42C) to mean the "transfer" of an undertaking as a result of a "sale". The use of the word 'transfer' in s. 2(42C) is significant and any type of "transfer" which is in nature of slump sale i.e. when lump sum consideration is paid without values being assigned to individual assets and liabilities is covered by s. 2(42C) and s. 50B. This is the reasonable, plausible and natural grammatical meaning which has to be given to the definition of 'slump sale'. It is not correct to construe the word 'slump sale' to mean that it applies to 'sale' in a narrow sense and as an antithesis to the word 'transfer' as used in s. 2(47). The intention of the legislature was to plug in the gap and tax slump sales and not to leave them out of the tax net. The term 'slump sale' has been used in the enactment to describe a particular and specific type of transfers called slump sales. The use of the word 'sale' in the term 'slump sale' does not narrow down the concept of 'transfer' as defined and understood in s. 2(47). All transfers in the nature of 'sales' i.e. 'slump sales' are covered by s. 2 (42C).
SREI Infrastructure Finance Ltd v. ITSC (2012) 70 DTR 153/ 207 Taxman 74/251 CTR 129 (Delhi) (High Court)

S.50B:Capital gains - Slump sale –Negative net worth- For computing the capital gains for section 50B "Slump Sale", liabilities reflected in "negative net worth" cannot be treated as "consideration" but the resultant "negative net worth" has to be added to the "consideration".

Pursuant to a scheme of arrangement under section 391 & 394 of the Companies Act, the assessee transferred its "Power Transmission Business" to KEC International Ltd for a total consideration of Rs. 143 crores. The assessee claimed this transaction to be a "slump sale" under section 50B. The "net worth of the undertaking" was computed at a negative figure of Rs. 157.19 crores, being the excess of liabilities over assets. The assessee treated the net worth as Nil and offered the entire sale consideration of Rs. 143 crore as LTCG. The Assessing Officer held that as the purchaser had taken over liabilities of Rs. 157.19 crores, the same had to be added to the consideration of Rs. 143 crores to arrive at the "full value of consideration" of Rs. 300 crores. The CIT(A), relying on Zuari Industries Ltd v.Asst CIT(2007) 105 ITD 569 (Mum.) & Paper Base Co Ltd v. Asst.CIT(2008)19 SOT 163 (Delhi), held that the "net worth' in section 50B could not be a negative figure and if it was so because of the liabilities exceeding the assets, the net worth had to taken at Nil. The Special Bench had to consider two issues (i) whether the excess of liabilities over assets could be treated as "consideration" in the hands of the assessee & (ii) whether the resultant "negative net worth" could be treated as Nil or had to be added to the "consideration"? Held by the Special Bench:
(i) On the issue as to the "full value of consideration", the department's argument that since the transferor's liabilities have been taken over by the transferee, it would have to be treated as consideration received by the transferor is not acceptable. In the case of a slump sale, one lump sum value of the undertaking derived by adding all assets and reducing all the liabilities is arrived at. This is the "full value of the consideration". If one adds the liabilities to this value, one is arriving at the consideration for the "assets" but not the consideration for the "undertaking". Also, once the sale consideration has been approved by the High Court, it is unrealistic for the Revenue to contend that the consideration of Rs. 143 crore does not represent the full value of consideration of the undertaking. Accordingly, the "consideration" is Rs. 143 crores and not Rs. 300 crores as calculated by the Assessing Officer (CIT v.George Henderson and Co Ltd(1967) 66 ITR 622 (SC),CIT v. Gillanders Arbuthnot & Co (1973) 87 ITR 407 (SC) & CIT v.Attili N. Rao (2001 252 ITR 880 (SC) distinguished);
(ii) On the issue as to the "net worth" of the undertaking, the assessee's argument that if the net worth is negative (excess of liabilities over assets), it should be taken at Nil is not acceptable. Though, in ordinary parlance, the terms "cost" & "net worth" may not have a negative value, in the context of section 50B, if the liabilities exceed the assets, there would be a negative net worth. The said negative net worth has to be "deducted from" (i.e. "added to") the full value of consideration. Consequently, the chargeable capital gain is Rs.300 crores (Rs. 143 crores + Rs. 157 crores) (Zuari Industries Ltd v.Asst.CIT (2007) 105 ITD 569 (Mum.) & Paper Base Co. Ltd v. Asst.CIT (2008) 19 SOT 163 (Delhi) reversed).(A.Y.2006-07)

Dy. CIT v. Summit Securities Ltd (2012) 135 ITD 99/ 68 DTR 201/ 15 ITR 1/145 TTJ 273(SB)(Mum.))(Trib).

S. 50B: Capital Gains – Slump Sale- Lump-sum compensation received on transfer of business for discontinuance of business – Held to be long term capital gain

The assessee was a proprietor of a going concern engaged in providing consultancy services. The concern was taken over by a company. The assessee received a compensation of Rs. 1,20,00,000 for discontinuance of the business. It was held that the lump- sum compensation so received was in nature of long term capital gain chargeable to tax as it was case of transfer of business was for lump-sum consideration. The intention of assessee was eloquently clear from the disclosure of accounting policies. (AY 2008-09)

ACIT v. Sangeeta Wij (Smt)(2012) 17 ITR 162 (Delhi)(Trib.)

S.50C:Capital gains- Full value of consideration-Stamp valuation-Stock in trade-Land and building—Stamp duty valuation-Provision of section 50C, does not apply to land & building held as 'stock-in-trade'

The assessee sold a plot of land for Rs. 79 lakhs. The AO held that the said plot was a capital asset and that the gains had to be computed in accordance with s. 50C. The CIT (A) & Tribunal upheld the assessee's claim that as the said plot was held as stock-in-trade, s. 50C did not apply. On appeal by the department to the High Court, held dismissing the appeal:

For applicability of s. 50C, it is essential that an asset should be a "capital asset". The question whether an asset is a "capital asset" or "stock-in-trade" is one of fact and has to be determined as per the guidelines laid down. On facts, the assessee was a builder and the investment in purchase and sale of plots was ancillary and incidental to the business activity. The assessee had treated the land as stock in trade in the balance sheet. Consequently, s. 50C had no application. (A.Y.2006-07)

CIT v. Kan Construction And Colonizers (P) Ltd (2012) 70 DTR 169/208 Taxman 478(All.) (High Court)

S.50C: Capital gains- Full value of consideration-Stamp valuation- Booking flat-Rights in land and building-Provision of section 50C is a deeming provision which does not apply to "rights in land & building", amount paid for booking of flat returned subsequently , section 50C is not applicable.(S.45)

The assessee booked a flat in a building which was under construction for which he had paid Rs. 16.12 lakhs. The builder had not handed over possession of the flat to the assessee nor had he executed any registered sale deed in favour of the assessee. The assessee entered into an agreement pursuant to which he transferred his rights, title and interest in the said flat in consideration of the amount paid by him to the builder. The AO took the view that as the flat was valued at Rs. 57.57 lakhs for stamp duty purposes, capital gains had to be computed on that basis u/s 50C. This was reversed by the CIT (A). On appeal by the department, held dismissing the appeal:

S.50C applies "where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty …" S. 50C is a deeming provision and extends to only to land or building or both. A deeming provision can be applied only in respect of the situation specifically given and cannot go beyond the explicit mandate of the section. If the capital asset under transfer cannot be described as "land or building or both", s. 50C will cease to apply. As the assessee had transferred booking rights and received back the booking advance, the booking advance cannot be equated with the capital asset and therefore s. 50C cannot be invoked (Dy.CIT v.Tejinder Singh (2012) 16 ITR 45 (Kol.)(Trib.)followed)(A.Y. 2006-07).

ITO v. Yasin Moosa Godil(2012) 18 ITR 253 (Ahd.)(Trib)

S.50C:Capital gains-Full value of consideration-Stamp valuation- Residential house-Investment in residential house provision of section 50C is not applicable. (S.48,54EC,54F)

During relevant assessment year, assessee sold a property and entire sale consideration was invested in Bonds in view of provisions of section 54EC. Assessing Officer by taking value determined by DVO under section 50C, revalued capital gain and after reducing amount invested in Bonds, added remaining amount in assessee's income. Since the assessee has invested entire amount of sale consideration in Bonds ,provisions of
section 50C are not applicable and he is entitled to deduction under section 54F.Provisions of section 50C is applicable to section 48 and section 54F and not where entire consideration invested in section Bonds under section 54EC. (A.Y. 2006-07)

Prakash Karnavat v. ITO (2012) 49 SOT 160 (Jaipur)(Trib.)

S.50C:Capital gains -Full value of consideration –Stamp valuation-Development agreement- Development agreement provision of section 50C is applicable.

Assessee as a co-owner of building entered into development agreement with developers. Consideration received was Rs. 2,18,35,000, however, the stamp authorities have valued at Rs. 3,82,50,000. The Tribunal held that, in accordance with the terms of agreement, the developer were to demolish the ten structure and redevelop the land in to building 50-50 percent sharing basis. As there was transfer of land and building, section 50C is applicable, however the matter remanded for proper computation of capital gains after providing benefit of indexation. (A. Y. 2005-06)

Chiranjeev Lal Khanna v. ITO (2012) 66 DTR 260/144 TTJ 607 / (2011) 132 ITD 474 (Mum.)(Trib.)

S.50C:Capital gains - Full value of consideration –Stamp valuation-Tenancy rights- Provision of section 50C does not apply to transfer of tenancy/ leasehold rights.

The assessee held lease hold rights for 99 years in a house property. By a tripartite agreement, the owner sold his rights in the property while the assessee assigned his leasehold rights. The assessee received Rs. 3.19 crores. The Assessing Officer held that as the stamp duty valuation of the said property was higher than the agreed consideration, section 50C applied and the assessee was assessable on the basis of the stamp duty valuation. This was reversed by the CIT(A) on the ground that section 50C did not apply to leasehold rights. On appeal by the department to the Tribunal, the Tribunal held dismissing the appeal:

There is a distinction between a receipt for transfer of ownership rights in property and a receipt for transfer of tenancy rights in respect of a property because though both are assessable as capital gains, in the case of tenancy rights, the "cost of acquisition" is deemed to be Nil under section 55(2)(a) unless if it is purchased for a cost. The fact that the assessee assigned his rights, together with the owner, pursuant to the tripartite agreement did not mean that the assessee's had ownership rights in the property. Section 50C applies "where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government … for the purpose of payment of stamp duty in respect of such transfer". The sine qua non for application of section 50C is that the transfer must be of a "capital asset, being land or building or both". A "leasehold right in land or building" cannot be equated with the "land or building". Accordingly, section 50C has no application to the assignment of leasehold/ tenancy rights.(A.Y.2008-09)

Dy. CIT v. Tejinder Singh (2012) 50 SOT 391/ 16 ITR 45/72 DTR 160(Kol.)(Trib.)

S.50C: Capital gains- Full value of consideration- Stamp valuation-Registration- When registration does not take place provisions cannot be applied.

Where the registration does not take place by paying stamp duty, provisions of section 50C cannot be invoked. (A.Y.2004-05)

Ran Mal Bhansali v. ACIT (2012) 143 TTJ 65 (UO)(Jd.)(Trib.)

S.50C:Capital Gains – Full value of consideration-Stamp valuation- Purchaser-Income from undisclosed source- Deeming fiction created under Section 50C cannot with reference to full value of consideration cannot be extended to provision of Section 69 in case of purchaser.(S.69)

Section 50C incorporates special provision for determining full value of consideration in case where such full value of consideration declared to be received or accruing as a result of transfer of immovable property is less than value assessed or adopted by Stamp Valuation authority. It was held that the provisions of Section 50C apply only to the seller of the property and not the purchaser and thus, no addition can be made as unaccounted investment with reference to stamp duty value. (A.Y. 2006-07)

ITO v. Inderjit Kaur(Mrs) (2012) 50 SOT 377 (Chandigarh)(Trib.)

S.50C:Capital Gains – Full value of consideration –Stamp valuation-Reference to DVO - AO to adopt the value ascertained by DVO for purposes of computing long term capital gains. (S. 45)

DVO on reference made by CIT(A), having ascertained the fair market value of the property transferred for amount which is less than value adopted by stamp duty authorities. In view of the provisions of sub-section (2) of S. 50C, the AO has to adopt the value ascertained by DVO for purposes of computing long term capital gains. (A.Y.2005-06)

ITO v. Gita Roy (2012)135 ITD 345/ 146 TTJ 762 / 17 ITR 431/71 DTR 358 (Kol.) (Trib.)

S. 50C: Capital gains – Full value of consideration- Stamp valuation – No notice is required to invoke provisions of the said section.

In the instant case, it was held that there was no requirement under the Act for AO to put the assessee on notice before invoking the provisions of section 50C. Further it was also held that where assessee had objected to action of AO in adopting guideline value of property in place of stated consideration in sale deed, AO ought to make a reference to Valuation Officer for valuation of property as per S. 50C(2)(a). (A.Y. 2008-09)

T.V. Nagasena(Smt) v. ITO (2012) 53 SOT 166 (Bang)(Trib.)

S.54:Capital gains –Property used for residence- Exemption– Investment in joint names Investment in joint names of assessee and her husband is entitled to exemption.(S.54EC.)

Assessee, out of sale proceeds of residential property, purchased another residential property and specified bonds. Exemption u/s. 54 and 54EC could not be denied to her to the extent of 50 per cent on the ground that new property and bonds were purchased in the names of assessee and her husband when admittedly no consideration followed from the husband.(A.Y. 2007-08)

DIT(International Taxation) v. Jennifer Bhide (Mrs.) (2012) 252 CTR 444/ 75 DTR 402 (Karn.) (High Court)

S.54:Capital gains –Property used for residence- Exemption –Mere construction of room without amenities like boundary wall, kitchen , toilet electricity , water and sewerage connection etc cannot be held to be house , hence benefit of section 54 cannot be granted.

The assessee claimed the long term capital gain arising from the sale of his residential house to be exempted u/s. 54 on the ground that investment was made for purchase of residential plot in Janta Enclave, Ludhiana and subsequently he had constructed a room on the said plot, which was let out at the rate of Rs.250 per month. The Assessing Officer concluded that the residential house constructed by the assessee was only one room set and as it was having no amenities, the exemption u/s. 54 could not granted. In the instant case, in order to examine the entitlement of the assessee for exemption u/s. 54, it is to be seen whether the assessee had constructed residential house within three years of the transfer of his property. For doing so, the meaning of the term `house' is to be explored. The term `house' has not been given any statutory definition and, thus, has to be assigned meaning as understood in common parlance. As per dictionary, it means abode, a dwelling place or building for human habitation. A building, in order to be habitable by a human being, is ordinarily required to have minimum facilities of washroom, kitchen, electricity, sewerage etc. In view of the above, it was held that the house in question was not a residential house and therefore, the assessee was not entitled to the benefit u/s. 54. Appeal of assessee was dismissed.A.Y.1997-98)

Ashok Syal v. CIT, Jalandhar(2012) 209 Taxman 376 (P & H)(High Court)

S.54:Capital gains- Property used for residence-Exemption- Investment-Investment in property within time allowed under section 139(4), entitled to exemption.(S.139(4))

The assessee has invested the sale consideration in his new residential house which he acquired on 15-10-2008. The assessing officer has held that as the assessee has not invested the amount in capital gain account scheme , before due date of filing of return of income which was 31-7-2008, as per section 54(2) , the exemption was denied. On appeal the Commissioner (Appeals) allowed the claim of assessee on the ground that the investment was made within the period of section 139(4). On appeal by revenue , the Tribunal also confirmed the order of Commissioner (Appeals) holding that since the assessee had invested in the new property within time allowed under section 139(4) , the assessee would be entitled to exemption under section 54. (A.Y. 2008-09)

ITO v. Sapna Dimri (2012) 50 SOT 96 (Delhi) (Trib.)

S.54: Capital gains- Property used for residence- Exemption- Investment-Investment in property in joint name-Benefit of exemption to be allowed for entire amount of investment .[S. 22 to 26, 27(i), 64(i)(iv)]

The assessee sold the inherited property and purchased a new residential property in joint name with his wife and claimed deduction under section 54. The Assessing Officer allowed the exemption only to the extent of 50% investment on the ground that 50% property belongs to wife. On appeal the Commissioner (Appeals), granted the

exemption of entire amount . On appeal by revenue, the Tribunal held that the name of assessee's wife was entered in the sale agreement just for purpose of security , and for purpose of sections 22 to 26, 27 and 64. Assessee would be owner of whole property and income there from would be assessable in his hands, therefore benefit of section 54 of entire amount invested in new property was to be allowed. Appeal of revenue was dismissed. (A.Y 2007-08)
ACIT v. Suresh Verma (2012) 135 ITD 102/72 DTR 82 (Delhi) (Trib.)

S.54: Capital gains-Property used for residence-Exemption-Exchange of old flat for new one under a development agreement, amounts to construction for claiming deduction u/s 54.(S.45)

Acquisition of new flat under a development agreement in exchange of old flat amounts to construction of new flat for purpose of claiming deduction u/s 54. (A.Y.2006-07)
Jatinder Kumar Madan v. ITO (2012) 51 SOT 583 (Mum.) (Trib.)

S.54B: Capital gains- Exemption-Purchase of agricultural land-Exemption cannot be denied only on the presumption that the assessee may not use the land for agricultural purposes.(S.45)

The assessee purchased the agricultural land and claimed exemption under section 54B .The Assessing Officer disallowed the claim on the ground that the assessee being in the business of the land may not use the said land for agricultural purposes. On appeal the Commissioner (Appeals) allowed the claim. On appeal to Tribunal the Tribunal held that in the absence of any assertion by the Assessing Officer that the new land purchased by assessee for agricultural purpose is being actually put to use for any other purpose, claim for exemption under section 54B cannot be disallowed only on the ground that he has started a real estate business. (A.Y.2006-07)
ITO v. Mahesh Nemichandra Ganeshwade & Ors (2012) 73 DTR 1/144 TTJ 488(Pune)(Trib.)
Mahesh Nemichandra Ganeshwade & Ors v .ITO(2012) 73 DTR 1/144 TTJ 488(Pune)(Trib.)

S.54: Capital gains-Property used for residence-Exemption-Booking of the flat with the builder is to be treated as construction of flat and extended period under section 139(4) has to be considered for the purpose of utilisation of capital gain amount.(S. 139(4).

The assessee sold the property and invested in residential property. The Assessing Officer denied the exemption on the ground that the assessee has failed to deposit the balance amount in the account in any of the specified bank as required under section 54 and utilize the same in accordance with the scheme framed by the Government and could not produce evidence regarding taking possession of the new flat. On appeal Commissioner (Appeals) confirmed the disallowance. On appeal to Tribunal the Tribunal held that the assessee had booked the new flat with the builder and as agreement , the assessee was to make payment by installments and the builder was to hand over the possession of the flat after construction. Based on the circular no 672 dated 16-12-1993(1994) 205 ITR (St) 47, read with circular no 472 dated 15-10-1986,(1986) 162 ITR (st)17 in the case of the assessee was to be considered as construction of new residential house and purchase of flat. The Tribunal held that in the case of assessee had invested the capital gains in construction of a new residential house within a period of three years, this should be treated as sufficient compliance of section 54 and it was not necessary that the possession of the flat should also be taken within the period of three years. The Tribunal also held that the due date of filing of return of income under section 139(1) has to be construed with respect to the due date of section 139(4) as the section 139(4) provides for the extended period of filing return as an exception to the section 139(1) and considering this there is no default as the entire amount of capital gain had been invested within due date under section 139(4) .(A.Y. 2006-07).
Kishore H.Galaiya v.ITO (2012)137 ITD 229/ BCAJ –July –P. 58 (Mum.)(Trib.)

S.54B: Capital gains-Land used for agricultural purposes-Exemption-Land purchased in the name of his son and daughter –in-law assessee is not entitled to exemption.

The assessee purchased new agricultural land in the name of his son and daughter in –law and claimed exemption under section 54B.The disallowance of claim was confirmed by Tribunal. On appeal, the Court held that word "assessee" used in Income –tax Act needs to be given a legal interpretation and not a liberal interpretation and consequently an assessee would not be entitled to get exemption under section 54B for land purchased by him in name of his son and daughter in law .
Kalya v.CIT (2012) 208 Taxman 436 (Raj.) (High Court)

S.54EA :Capital Gain –Investment in specified securities-Exemption-Additional Compensation from date of receipt held allowable

Claim of exemption u/s.54EA for investment made around 5 years after the date of transfer instead of within 6 (six) months. Transfer took place in 1992 but compensation received in June 1997. Amount was invested in UTI Monthly Income Scheme on July 5, 1997, and July 15, 1997. Claim of allowability of exemption under Section 54EA in A.Y. 1998-99, with respect to additional compensation from the date of receipt was held to be allowable. (A.Y.1998-99)

CIT v. J. Palemar Krishna (2012) 342 ITR 366 (Karn.)(High Court)

S.54EC: Capital gains-Investment in bonds- Exemption- Fact that s. 54EC bonds were available during the 6 months & that there were alternative bonds available irrelevant if the bonds not available on the last date.

The assessee sold factory building on 22.3.2006 and earned LTCG of Rs.49.36 lakhs. The LTCG was invested in s. 54EC bonds of Rural Electrification Corporation ("REC Bonds") on 31.1.2007, *beyond the period of 6 months* (21.9.2006) specified in s. 54EC. The assessee claimed that the delay was due to the fact that for the period from 4.8.2006 to 22.1.2007, the *bonds were not available* and the investment was made when available. The Tribunal allowed the assessee's claim (*included in file*). Before the High Court, the department argued that (a) even if the bonds were not available for a part of the period, they were *available* for some time in the period after the transfer (1.7.2006 to 3.8.2006) and the assessee ought to have invested then & (b) the s. 54EC bonds issued by *National Highway Authority* (NHAI) were available and the assessee could have invested in them. Held by the High Court dismissing the appeal:

(i) The department's contention that the assessee ought to have invested in the period that the S. 54EC bonds were available (1.7.2006 to 3.8.2006) after the transfer is not well founded. The assessee was entitled to wait till the last date (21.9.2006) to invest in the bonds. As of that date, the bonds were not available. The fact that they were available in an earlier period after the transfer makes no difference because the assessee right to buy the bonds upto the last date cannot be prejudiced. *Lex not cogit impossibila* (law does not compel a man to do that which he cannot possibly perform) and *impossibilum nulla oblignto est* (law does not expect a party to do the impossible) are well known maxims in law and would squarely apply to the present case;

(ii) The department's contention that the assessee ought to have purchased the alternative s. 54EC NHAI bonds is also not well founded because if s. 54EC confers a choice investing either in the REC bonds or the NHAI bonds, the revenue cannot insist that the assessee ought to have invested in the NHAI bonds.

CIT v. Cello Plast (2012) 76 DTR 439/209 Taxman 617/253 CTR 246(Bom.)(High Court)

S.54EC:Capital gains - Investment in bonds - Exemption- Time limit-Investment time limit begins from date of receipt of consideration and not from date of transfer , hence, entitled for exemption.

The assessee entered into an agreement and handed over possession to the buyer which constituted a "transfer". The consideration received from the buyer was invested by the assessee in section 54EC Bonds beyond 6 months from the date of transfer though within 6 months from the date of receipt of the consideration. The Tribunal had to consider whether in view of the language of section 54EC that the consideration had to be invested in the specified bonds within 6 months of the date of transfer, the relief could be allowed. Held by the Tribunal:

In a case where the consideration for the transfer was received several months after the date of transfer, the period of 6 months for making deposit under section 54EC should be reckoned from the date of actual receipt of the consideration. If the period is reckoned from the date of agreement and receipt of part payment at the first instance, it would lead to an impossible situation by asking assessee to invest money in specified asset before actual receipt of the same. Also, section 54EC requires the "consideration" to be invested. If the consideration is not received, there is no question of investing it (S. Gopal Reddy v.CIT (1990) 181 ITR 378 (AP), CITv.Janardhan Dass (2008)) 299 ITR 210 (All) Darapaneni Chenna Krishnayya(HUF) v. CIT (2007) 291 ITR 98 (AP) (compulsory acquisition cases) followed). (A.Y. 2005-06)

Chanchal Kumar Sircar v. ITO(2012) 50 SOT 289/ 16 ITR 91 (Kol.) (Trib.)

S.54EC:Capital gains - Investment in bonds –Exemption- Financial year-Limit of Rs. 50 lakhs applies to the transaction & not financial year - Order of Assessing Officer was confirmed.

In A.Y. 2008-09, the assessee sold property for Rs. 2.47 crores and disclosed capital gain of Rs. 1.14 crores. To overcome the restriction in the Proviso to section 54EC that the investment made in the specified asset "during any

financial year" should not exceed Rs. 50 lakhs, the assessee, within the prescribed period of 6 months, invested Rs. 50 lakhs on 31.03.2008 (F.Y. 2007-08) & 10.06.2008 (F.Y. 2008-09) and claimed a deduction of Rs. 1 crore. The AO rejected the claim though the CIT(A) allowed it. On appeal by the department, Held reversing the CIT(A):

The object of the proviso to section 54EC is to provide a ceiling of Rs. 50 lakhs on investment by an assessee in the long term specified assets. If the assessee's interpretation is accepted then, because the transfer of assets has taken place from 1st October, to 31st March, the assessee is able to invest Rs. 50 lakhs in the financial year in which the transfer took place and Rs. 50 lakhs in the subsequent financial year. However, assessees who have made a transfer of assets from 1st April to 30th September will not be entitled to do so. Accordingly, the investment has to be linked to the financial year in which transfer has taken place and the claim for deduction cannot exceed Rs. 50 lakhs.(A.Y. 2008-09)

ACIT v. Raj Kumar Jain & Sons (HUF) (Jaipur)(Trib.) www.itatonline.org

S.54EC: Capital gains- Investment in bonds- Exemption-Limit-Financial year- limit of Rs. 50L does not apply to the transaction but financial year. Delay in investing within 6 months owing to non-availability of bonds to be excused.

The assessee sold property on 22.10.2007 and computed long-term capital gains. The s. 54EC investment was required to be made within 6 months i.e. on or before 21.04.2008. The assessee invested Rs. 50 lakhs in REC bonds on 31.12.2007 (FY 2007-08, within the 6 M time limit) and Rs. 50 lakhs in NHAI bonds on 26.5.2008 (FY 2008-08, beyond the 6 M time limit) and claimed a deduction of Rs. 1 crore. The assessee claimed that no eligible scheme was available for subscription from 1.4.2008 to 28.5.2008 and that he applied in the NHAI bonds as soon as it opened and that he was prevented by sufficient cause from investing within the time period of 6 months. The AO & CIT (A) rejected the claim for exemption of Rs. 50 lakhs in respect of the NHAI bonds on the ground that (i) it exceeded the monetary limit of Rs. 50 lakhs prescribed in s. 54EC and (ii) it was made beyond the time limit of 6 months. On appeal to the Tribunal, held allowing the appeal:

(i) The Proviso to s. 54EC provides that the investment made in a long term specified asset by an assessee "during any financial year" should not exceed Rs. 50 lakhs. It is clear that if the assessee transfers his capital asset after 30th September of the financial year he gets an opportunity to make an investment of Rs.50 lakhs each in two different financial years and is able to claim exemption upto Rs.1 crore u/s 54EC. The language of the proviso is clear and unambiguous and so the assessee is entitled to get exemption upto Rs.1 crore in this case;

(ii) Though the time limit of 6 months for making the investment u/s 54EC expired on 21.4.2008, no bonds were available for subscription between 1.4.2008 to 28.5.2008. The investment was made as soon as the subscription opened on 26.5.2008. The assessee was accordingly prevented by sufficient cause which was beyond his control in making investment in these Bonds within the time prescribed. Exemption should be granted in cases where there is a delay in making investment due to non-availability of the bonds (Ram Agarwal (2002)81 ITD 163 (Mum) followed)(A.Y. 2008-09)

Aspi Ginwala v. ACIT **(2012) 52 SOT 16/** *(BCAJ Pg. 31, Vol. 44-A, Part 2, May, 2012) (Ahd) (Trib).www.itatonline.org*

S. 54EC: Capital gains- Investment in bonds- Exemption-Within six months- If investment within 6 months of transfer is impossible, then relief available if investment made within 6 months of receipt of consideration.

The assessee entered into a development agreement on 12.7.2005 in which the consideration was fixed at Rs 2.50 crores. A correction deed was entered into on 2.7.2007 in which the sale consideration was increased to Rs. 4.90 crores. The assessee invested Rs. 50 lakhs in s. 54EC bonds on 3.8.2007 and 27.10.2007. The AO held that the date of transfer was 12.7.2005 and as the s. 54EC investments had been made beyond a period of 6 months from the date of transfer, the exemption was not available. The assessee claimed that as it was impossible for him to invest within 6 months from the date of transfer, the period of 6 months had to be reckoned from the date of receipt of consideration. Held by the Tribunal:

Though s. 54EC requires the investment to be made within 6 months of the date of transfer, a technical interpretation cannot be adopted but it has to be interpreted having regard to the purpose and spirit of the section. In Circular No 791 dated 2.6.2000 the CBDT held in the context of capital gains arising u/s 45(2), that though the transfer arises in the year of conversion of a capital asset into stock-in-trade, the period of 6 months for investment u/s 54E has to be reckoned from the date of sale of the stock-in-trade. The CBDT appreciated the impossibility of the assessee being able to invest

the amount in specified assets within six months from the date of transfer. This interpretation of the CBDT supports the assessee's claim that where the consideration is received much after the date of transfer and it is not possible to invest the same within 6 months of the date of transfer, the period of 6 months must be reckoned from the date of receipt of consideration. (A.Y. 2006-07)

Mahesh Nemichandra Ganeshwade v. ITO (2012) 73 DTR 1/ 147 TTJ 488/17 ITR 116(Pune)(Trib.)

S. 54EC: Capital Gains – Investment in bonds- Exemption-– Purchase of REC Bond prior to sale of property – Exemption disallowed as the investment was made before the date of transfer.

As per Section 54EC of the Act the investment in specified bond is to be made 'within specified six months after date of such transfer'. Thus, exemption claimed on the ground that assessee had purchased REC bonds prior to sale of property was disallowed as the investment was made before the date of transfer.(A.Y.2008-09)

Dakshaben R. Patel (Smt) v. ACIT (2012) 52 SOT 212 (Ahd.) (Trib.)

S. 54EC: Capital Gains – Investment in bonds- Exemption – Investment out of total capital gains in REC bonds, deduction cannot be denied on the ground that the assessee has availed the exemption u/s 54F also against a part of the capital gain. (S.54F)

As per Section 54EC, expression 'the whole or any part of capital gains in long term specified assets' makes it clear that the exemption u/s 54EC is available even when the part of capital gain is invested in specified long term asset. There is no dispute that the assessee has invested out of total capital gain in REC bonds within the prescribed period of time as provided u/s 54EC. Therefore, once the conditions as prescribed u/s 54EC are complied with, then the deduction cannot be denied on the ground that the assessee has availed the exemption u/s 54F also against a part of the capital gain. (AY 2007-08)

ACIT v. Deepak S. Bheda (2012) 52 SOT 327 (Mum.) (Trib.)

S. 54EC: Capital Gains – Investment in bonds- Exemption-Beneficial owners-Clubbing of income- Separate exemption is available in respect of income clubbed under section 64. (S.64)

The assessee earned long term capital gain on sale of shares. The two children of assessee, being beneficial owners also earned LTCG on sale of beneficial shares. The assessee along with his minor children invested amount of long term capital gain in REC bonds and claimed deduction u/s 54EC. The AO clubbed the income of the minor children in the hands of the assessee but disallowed the claim of deduction on account of minor children. It was held that the in case of clubbing of minor/ spouse, all deductions are to be allowed while computing income of minor/spouse and only net taxable to be clubbed u/s 64. Therefore, where income of assessee's minor children was clubbed with his income, assessee was eligible for deduction u/s 54EC on investment in REC capital gain bonds on account of minor's income from long-term capital gains separately. (AY 2007-08)

Dy. CIT v. Rajeev Goyal (2012) 52 SOT 335 (Kol.) (Trib.)

S.54F:Capital gains - Investment in residential house – Exemption- Purchased – Constructed - Section does not require construction to be complete within specified period, just because the construction is not complete the assessee cannot be denied the exemption.

The assessee sold shares for Rs. 4.18 crores and within 12 months, invested Rs. 2.16 crores thereof to construct a house property and claimed exemption under section 54F. However, as even after the expiry of 3 years of the date of transfer, the construction of the house was not complete and sale deed was not executed, the Assessing Officer & CIT(A) denied relief under section 54F though the Tribunal granted it. On appeal by the department to the High Court, the High Court held dismissing the appeal:

Section 54F is a beneficial provision for promoting the construction of residential house & requires to be construed liberally for achieving that purpose. The intention of the Legislature was to encourage investments in the acquisition of a residential house and completion of construction or occupation is not the requirement of law. The words used in the section are 'purchased' or 'constructed'. The condition precedent for claiming benefit under section 54F is that the capital gain should be parted by the assessee and invested either in purchasing a residential house or in constructing a residential house. Merely because the sale deed had not been executed or that construction is not complete and it is not in a fit condition to be occupied does not disentitle the assessee to claim section 54F relief (CIT v.Sardarmal Kothari and another (2008) 302 ITR 286 (Mad.) followed).(A.Y. 2006-07)

CIT v. Sambandam Udaykumar(2012) 345 ITR 389 / 206 Taxman 150 / 72 DTR 232 (Karn.)(High Court)

S.54F:Capital gains – Investment in residential house – Exemption- Purchase of house in joint names of assessee and his wife, assessee is entitled to exemption under section 54F.

Assessee purchased the house in the joint name of assessee and his wife and claimed exemption under section 54F. The assessing Officer has allowed exemption only to the extent of 50 percent, which was confirmed by Commissioner (Appeal). On appeal to the Tribunal, the Tribunal allowed the full exemption to the assessee. On further appeal to High Court by revenue the Court held that as the wife has not contributed to purchase and whole purchase consideration was paid by assessee ,it would be treated as the property purchased by the assessee in his name and merely because he had included the name of his wife and the property purchased in the joint name of his wife would not make any difference and the assessee is entitled to exemption under section 54F.Accordingly the appeal of revenue was dismissed.(A.Y. 2007-08)

CIT v. Ravinder Kumar Arora (2012) 342 ITR 38/75 DTR 406/252 CTR 392 (Delhi) (High Court)

S.54F: Capital gains –Investment in residential house- Exemption– New residential property purchased in joint names of assessee and his wife entitle to exemption.

Assessee having invested the entire amount of long term capital gains in purchase of new residential house was entitled to exemption u/s. 54F in respect of the entire amount even though the new property was purchased in the joint names of assessee and his wife.(A.Y.2007-08)

CIT v. Revinder Kumar Arora(2012) 252 CTR 392 (Delhi) (High Court)

S. 54F: Capital gains –Investment in residential house- Exemption cannot be denied for holding joint property with her husband , since assessee did not own any property in status of an individual as on date of transfer , claim was allowed.

Assessee held a property jointly with her husband. She transferred another property owned by her individually for consideration under a development agreement. It was held that joint ownership of a property could be held to stand in her way of claiming exemption u/s. 54F,hence, since assessee did not own any property in status of an individual as on date of transfer, her claim was to be allowed.(A.Y.2000-01)

P.K. Vasanthi Rangarajan(Dr.)(Smt)v. CIT, Chennai (2012) 209 Taxman 628/252 CTR 336 (Mad.) (High Court).

S.54F:Capital gains-Investment in residential house- Exemption-Transfer- Transfer is complete when possession was handed over-As the investment made by assessee within period of one year prior date of transfer , the assessee is entitled to deduction under section 54F.(S. 2 (47))

The assessee has sold the property at Chennai and the sale agreement was originally entered in to on 27-8-1996 and clearance from appropriate authority was obtained on 8-10-1996 , subsequently the agreement was restated and conveyance was done on 25-11-1999. The assessee once again approached the appropriate authority on 11-02-2000 for clearance and obtained and the possession was given on 28-11-2009 . All these facts were disclosed in the original assessment which was completed under section 143 (3) read with 147 the claim was allowed only for purchase at the stage of assessment. On appeal the Commissioner (Appeals) considering the various judicial pronouncement applicable to section 54 and 54F allowed the claim for both the purchases and construction of property at Bangalore. Subsequently, notice under section 263 was issued which was withdrawn. A fresh notice under section 148 was issued on the ground that the assessee had furnished the wrong date of transfer since the provision was complied with only on 21-2-2000, deduction under section 54 / 54F was wrongly claimed hence to be withdrawn .On appeal the Commissioner (Appeals) allowed the appeal of assessee on reassessment as well as on merits following the ratio of Bombay High Court Judgment in Chaturbuj Dwarakadas Kapadia v.CIT (2003) 260 ITR 491 (Bom) . Revenue filed an appeal before the Tribunal , as there was difference of opinion the matter was referred to third member . The Tribunal held that since the possession was handed over to buyer on 28-11-1999 against receipt of consideration of transaction, it could be said that transfer of property had taken place on 28-11-1999 satisfying the requirement of section 2 (47).The Tribunal also held that latest NOC issued by appropriate authority on 21-2-200- could not be

considered in isolation of first NOC issued on 8-10-1996 as it was revision of first NOC, therefore NOC issued on 21-2-2000 relates back to first NOC issued on 8-10-1996 and as such reinforced facts of transfer of property on 28-11-1999, when the possession was handed over to buyer . Accordingly the investment made by assessee on 9-12-1998 in residential property was well within period of one year prior to transfer i.e. 28-11-1999 for availing deduction under section 54F .Accordingly the issue was decided in favour of assessee. (A.Y.2007-08)

ACIT v. P. R. Chockalingam (2012) 135 ITD 75/ 70 DTR 138 / 146 TTJ 44/17 ITR 617 (TM) (Chennai)(Trib.)

S.54F:Capital gains - Investment in residential house –Exemption-Construction of house-Court order-Assessee could not construct the house with in period of three years due to Court's restraint order, assessee is entitled to exemption.

The assessee sold one of her capital assets in the previous year relevant to the assessment year 2007-08, and purchased land for construction of house and claimed exemption in respect of capital gains under section 54F. The assessee could not construct the house due to injunction order from Civil Court. The Assessing Officer rejected the claim under section 54F. The Tribunal held that, without purchasing the land the assessee was not entitled to construct the house, as the assessee has spent entire amount for purchase of land, the assessee is entitled to exemption under section 54F. (A. Y. 2007-08).

V. A. Tharabai (Smt) v. Dy. CIT (2012) 14 ITR 15/50 SOT 53/75 DTR 113 (Chennai)(Trib.)

S.54F: Capital gains- Investment in residential house –Exemption- Cost of acquisition-Contractor-Amount paid to contactor is to be considered as cost of acquisition.

Amounts paid for completion of flat purchased in semi finished condition, pursuant to a tripartite agreement entered by the assessee with the contractors and the builder form part of cost of new house even though such agreement was entered prior to agreement for purchase of house. On the facts all expenditure incurred prior to taking over possession has to be considered as part of cost.(A.Y. 2006-07)

Nirupama K. Shah v. ITO - 419 (2012) 43B. BCAJ P. 31 (Jan 2012)(Mum.)(Trib.)

S.54F:Capital Gains-Investment in residential house-Purchase of land-Invested in purchase of land construction not completed , entitled to exemption.

The assessee had invested full sale consideration received on sale of original asset in purchase of plot of land and started construction of a new house, though not completed. In view thereof the assessee was entitled to the exemption under section 54F of the Act, in as much as the thrust of the said section is on investment of net consideration received on sale of original asset and started construction of a new residential house, though the new house is not completed the assessee had complied with provisions of section 54F and hence as entitled to benefit of exemption claimed by assessee.(A.Y.2007-2008)

RajneetSandhu(Smt) v. DY.CIT(2012) 49 SOT 7(Chandigarh) (Trib.)

S.54F:Capital Gains –Investment in residential house- Exemption – Assessee unable to construct residential house within prescribed period, exemption to be granted under special circumstances where intention of the statute is satisfied

During the relevant assessment year, the assessee sold the capital asset and earned long term capital gain. Subsequently, assessee invested entire sale consideration in purchasing a land for construction of a residential house. However, assessee was prevented from constructing the house on the said land for the prescribed period of 3 years due to Order of status quo by Civil Court as a result of injunction petition filed by the owner of the land. The Tribunal observed that the conduct of assessee unequivocally demonstrates that

assessee had proceeded to construct a residential house, based on which he had claimed exemption, thus under certain special facts and circumstances the assessee would be entitled to exemption under Section 54F of the Act as the intention of the statute was fully satisfied by the assessee. (A.Y. 2007-08)

V.A. Tharabai(Smt.)v. Dy.CIT (2012) 50 SOT 537 (Chennai)(Trib.)

S.54F:Capital gains- Investment in residential house-Exemption-Though the construction was not completed-As the full consideration was paid to builder, the assessee is entitled for exemption-Exemption was allowed only in respect of one house.

The assessee paid the entire consideration when the building was under consideration and claimed the exemption under section 54F. The assessing Officer rejected the claim on the ground that the flat was not ready within two years of transfer. The Tribunal held that as the assessee having paid full consideration before the statutory period of two years from the date of sale of shares and has acquired the right in the flats constructed by the builder the benefit of exemption under section 54F cannot be denied. The Tribunal allowed the exemption in respect of one flat because the purchase was by two separate agreements though the both the flats were an the same floor and the certificate by architect being a self serving document and nothing has been produced from the builder to show that the flats were used as one unit. (A.Y. 2005-06)

ACIT v. Sudhakar Ram (2012) 72 DTR 187 / 49 SOT 90 (Mum.)(Trib.)

Sudhakar Ram v. ACIT (2012) 72 DTR 187 / 49 SOT 90 (Mum.)(Trib.).

S.54F:Capital Gains – Investment in residential house- Exemption – Investment in four 4 flats – Held that exemption allowed as requirement of assessee family met-out only by enlarging residential unit by merging 4 flats and that too prior to handing over of the possession of said residential unit

The assessee earned capital gain from sale of ancestral property. The assessee claimed exemption u/s 54F in respect of amount invested towards purchase of four flats which were converted into one residential unit. The AO allowed exemption only in respect one flat by holding that flat were separate and independent residential unit having separate kitchen and entrance and thus, according to him flat could not be said as adjacent flats even though builders had referred them as composite unit. It was held by the Tribunal that, if requirement of assessee family was met-out only by enlarging residential unit by merging 4 flats and that too prior to handing over of the possession of said residential unit, then said converted residential unit would be treated as a residential house as stipulated u/s 54F and thus, claim of the assessee was allowed. (AY 2007-08)

ACIT v. Deepak S. Bheda (2012) 52 SOT 327 (Mum.) (Trib.)

S.54F: Capital gains- Exemption - Investment in residential house- Purchase of house jointly with spouse is eligible for exemption.

The assessee had made long-term capital gain on sale of shares. The sale proceeds were invested in purchase of row house in the joint names and exemption under section 54F was claimed. The Assessing Officer denied the exemption on the ground that the property was purchased in joint name of wife. In appeal Commissioner(Appeal) confirmed the denial of exemption. On appeal to Tribunal, the Tribunal held that total consideration for the house had been met by the assessee and the name of wife was added only for the sake of convenience. The Tribunal drew the support from the section 45 of the Transfer of Property Act which provides that the share in the property will depend on the amount contributed towards the purchase consideration.(A.Y.2004-05)(ITA no 4285/Mum/2009 dated 6-6-2012.Bench 'F')

Vasudeo Pandurang Ginde v.ITO (2012) BCAJ –July –P.57(Mum.)(Trib.)

S.54G: Capital gains-Shifting of industrial undertaking from urban area-Exemption- Investment for the purpose of carrying on business is sufficient compliance, it is not mandatory that the investment in land and building in non-urban area is for the purpose of the business of the industrial undertaking transferred.

The assessee company which was carrying on its business of manufacturing activity at its leased premises leased its premises. The assessee sold its plant and machinery and surrendered the tenancy rights. Part of consideration was invested in Capital Gain Account Scheme and part of amount was invested for purchase of land and building in non – urban area and claimed exemption under section 54G and balance amount was offered to tax. The Assessing Officer held that, the assessee had sold entire plant and machinery in the financial year 1999-2000 and since there was no existence of undertaking when the leased premises which was surrendered on 1-10-2003 claim under section 54G was not available. In appeal the Commissioner (Appeals) has allowed the claim of assessee. On appeal by revenue, the Tribunal held that section 54G(1)(b) merely requires that the acquisition of building or land or construction of building should be for the purpose of its business in such non-urban area. The Tribunal compared the section 54Dand section 54G(1)(a) and held that if the amounts are utilized for acquisition of assets for the purpose of its business , this should qualify for the purpose of exemption under section 54G as there is no requirement that the land and building should be used for the purpose of the business of industrial undertaking . The Tribunal also negatived the contention of revenue

that industrial undertaking was ceased to exits in 1999-2000, because the section refers the shifting was 'in the course of or in consequence of' of such undertaking. Appeal of revenue was dismissed. (A.Y. 2004-05)
Dy.CIT v. Enpro Finance Ltd (2012) ***(2012) 53 SOT 151/149 TTJ 546/ 77 DTR 297 (Mum.) (Trib.)***

S.55:Capital gains- Cost of improvement- Cost of acquisition- Fair market value-Fair market value as on 1-4-1981-Matter remanded to the Assessing Officer to determine the valuation afresh.
Assessee has shown the valuation at Rs.1,00,000/- per ground , though the valuation report of valuer of assessee valued at Rs 1, 20,000 per ground for determination of cost of acquisition. The Assessing Officer adopted the value at Rs 15,000 per ground based on the guidelines from the Sub-Registrar collected by the inspector of Income tax. The Tribunal held that the Assessing Officer has could have availed the assistance of the Departmental valuer , he merely relied on the report of inspector , which is an arbitrary method. Similarly the valuation report of the approved valuer submitted by the assessee refers only experience and wisdom , but not given comparable cases of sales or other relevant information which could support the value adopted by the approved valuer . The matter was set aside for fresh consideration.(A.Y. 2007-08)
ITO v. Usha Ramesh (Smt) (2012) 144 TTJ 673/68 DTR 94 (TM)(Chennai) (Trib.)
S.55:Capital gains- Cost of improvement- Cost of acquisition- Trade mark –Brand name- Patents- Designs-Amount received by assessee for transfer of trade mark ,patents and designs is capital receipt and liable to tax.(S.4)
The assessee has executed three deed of assignments for assigning intellectual property rights (IPRS) being trademarks, designs, copyrights for an aggregate consideration of Rs 30 crores. The assessee is of the opinion that the they are not liable to capital gains tax on the ground that IPR being self generated assets. The Assessing Officer held that the same is taxable as long term capital gains as cost of acquisition being nil. The Commissioner (Appeals) upheld the view of Assessing Officer. In appeal before the Tribunal, there was difference of opinion and the matter was referred to third member . The third member held that the assessee has transferred only the rights in IPR and not the right to manufacture ,produce or process biscuits and therefore it was entitled to claim amount of Rs 30 crores as non taxable capital receipt. Appellate Tribunal following the Circular no 14/2001 dated 9-11-2011, held that amendment made to section 55(2)(a) by bringing in terms 'trade mark' and 'brand name' is only prospective and is applicable only from assessment year 2002-03.
Kwality Biscuits (P) Ltd v. Asstt.CIT (2012) 135 ITD 35(TM) (Bang.) (Trib.)
S.55(2)(ab): Capital Gains –Cost of improvement-Cost of acquisition- Computation – Acquisition of shares on corporation and demutualization in lieu of BSE membership – Protective Assessment made on event of sale of shares deleted.
The assessee company was engaged in the business of stock broking and stock trading. The assessee acquired shares of BSE consequent to corporation and demutualization of BSE as a company. The Revenue made protective assessment on the premise that in the event of sale of shares so acquired, the assessee would take benefit of section 55(2)(ab) of the Act and would claim cost of acquisition at the price at which the assessee originally paid by for acquiring stock exchange membership card ignoring the depreciation availed of for period from acquisition of stock exchange membership card till exchange of shares for BSE card. On appeal before the Tribunal, it was held that protective assessment so made was erroneous as while computing capital gains on transfer the assessee had calculated its cost of acquisition on the basis of written down value and Re. 1 which it had paid per share at the time of issue of shares by the BSE. (A.Y. 2006-07)
ACIT v. Omniscient Securities Pvt. Ltd. (2012) 15 ITR 82 (Mum.) (Trib.)
S.55A: Capital gains- Reference to valuation Officer-Report received after completion of assessment-Reference does not became invalid action taken by the tax authorities on the basis of such a valuation will be open for challenge.(S.45)
The assessee opted to take fair market value of land as on 1-4-1981 on the basis of registered valuation report. The Assessing Officer referred the matter to DVO. Since report was not received with in time stipulated for completing assessment proceedings, the Assessing Officer accepted the valuation shown by the assessee. The assessee received the

notice from DVO for valuing the property. The assessee challenged the said notice by way of wit petition on the ground that the said notice by the Valuation officer was invalid once the assessment under section 143 (3) was completed. The Court while dismissing the writ petition held that reference to DVO does not become in valid on completion of assessment proceedings before receipt of valuation report. Such valuation report received after completion of assessment proceedings, would become part of record and if any action is taken by departmental authorities on basis of such valuation report , same will be open to challenge by assessee . (A.Y. 2007-08)
ACC LTD v. DVO(2012) 208 Taxman 397 (Delhi) (High Court)

S.56:Income from other sources - Business income – Lease rent of Hotel-Lease rent from hotel is assessable as business income or income from other sources, matter set a side to the Assessing Officer.

Assessee has shown the lease rent from Hotel as business income, the Assessing Officer without discussing anything treated the said income as income from other sources. The Tribunal set aside the matter to decide the issue a fresh in accordance with law. (A. Y. 2007-08).
Vijay Productions (P) Ltd. v. Addl.CIT (2012) 134 ITD 19 / 66 DTR 314 / 144 TTJ 1 / 14 ITR 614 (TM) (Chennai) (Trib.)

S.56:Income from other sources – Interest-Fixed deposit-Interest from fixed deposit of surplus amount is assessable as income from other sources.

Assessee which is engaged in the business of developing, operating and maintaining an industrial park, interest income earned by it from surplus funds kept as fixed deposits in various banks is to be taxed under the head income from other sources. (A. Y. 1999-2000 to 2004-05).
ITO v. Information Technology Park Ltd. (2012) 49 SOT 491 (Bang.)(Trib.)

S.56(2) (vi):Income from other sources - Gift -Marriage of daughter - Gift received by NRI realtives and friends on the occasion of marriage of daughter is taxable as income from other sources.

Assessee received the gift from NRI friends and relatives on the occasion of marriage of daughter as shoguns. The Assessing Officer has held that the gifts were received on occasion of assessee's daughter marriage of assessee and not the marriage of assessee and the cheques were in the name of the assessee and the same were credited by the assessee to his bank account hence the said amount is taxable as income from other sources, which was upheld by the Commissioner (Appeals). On appeal to the Tribunal the Tribunal held that "A perusal of the provisions of section 56(2)(vi) read with the proviso there under clearly revels that they shall not apply to any sum of money received (b) 'on the occasion of the marriage of the individual'. Therefore, the word 'individual' in the context of marriage of individual. Therefore, the word 'individual' in the context of marriage can only be the bride or bridegroom and cannot include group of individuals". As the cheques were in the name of assessee which were credited to his account the addition was justified as income from other sources. (A. Y. 2007-08).
Rajinder Mohan Lal v. Dy. CIT (2012) 49 SOT 713 /148 TTJ 369/ 75 DTR 85(Chandigarh)(Trib.)

S.56:Income from other sources-Parking rent- Signage rent – terrace rent – licence fee –Assessable as income from other sources and not under the head income from house property. [S.22,194(1)]

The assesse company is engaged in the business of real estate development . It had declared a sum under the head income from house property . The Assessing Officer took the view that the amount received on account of signage rent, parking rent, terrace rent and license fees was to be taxed under the head 'profits and gains of business. On appeal, Commissioner (Appeals) held that the same is assessable as income from other sources. On further appeal, the Tribunal confirmed the view of the Commissioner (Appeal) and held that signage rent, terrace rent and license fee is taxable as Income from other sources u/s. 56 and not as income from house property u/s. 22(A.Y.2006-07).
JMD Realtors (P) Ltd. v. DCIT (2012) 135 ITD 337/ 71 DTR 179 / 146 TTJ 571/71 DTR 179(Delhi)(Trib.)

S.56:Income from other sources –Rental income-Discontinued business-Assessee not started his discontinued business and nothing is available on record hence rental income charged as income from other sources.

Where the assessee has not started his discontinued business and nothing is available on record wherefrom it can be inferred that assessee has ever intended to start its business the rental income was rightly considered by the AO as an income from other sources; however, whatever expenses are necessary to be incurred to earn the income are allowable expenditure u/s 57(iii). (A.Y. 2006 – 07)
ITO v. PujyaSujatha Agro Farms (P) Ltd. (2012) 145 TTJ 489 (Visakha.) (Trib.)

S.56:Income from other sources- Interest on income tax refund- Business income- Income tax refund is assessable income from other sources. (S.28 (i))

The Tribunal held that interest on refund of Income-tax is assessable as income from other sources and not as business income.(A.Y.2003-04)

Kotak Mahindra Capital Co Ltd v. ACIT (2012)138 ITD 57/ 18 ITR 213 /75 DTR 193/ 148 TTJ 393(SB) (Mum.) (Trib.)

S.57:Income from other sources-Deduction- Export undertaking- Netting- Income tax refund-Payment of income tax could not be said to be more for earning interest hence interest paid is not allowable under section 57(iii).

The assessee claimed that the interest earned on income tax refund should be netted off against payment of interest . The Assessing Officer has not agreed with the contention of assessee and assessed the entire interest refund from Income tax department as income from other sources. On appeal the Commissioner (Appeals) held that the netting of interest is to be allowed . On appeal by revenue, the Tribunal held that since the payment of income tax could not be said to be made for earning of interest the deduction cannot be allowed under section 57 (iii).Appeal of revenue was allowed.(A.Y 2002-03)

Dy. CIT v. American Express (India) (P) Ltd (2012) 135 ITD 211/ 70 DTR 330/ 146 TTJ 442 (Delhi) (Trib.)

S.68: Cash credits- Gifts from NRI –Burden of proof - Burden is on assessee to show that donors have financial capacity to give gifts, in favour of assessees .

The Assessee received the gifts from two NRIs. The Tribunal decided the issue in favour of assessee merely observing that the donors are assessed to tax at Singapore. The assessee had not lead any evidence to show that the alleged donors had adequate funds in their respective accounts. The High Court summarily dismissed the appeal of revenue. The assessee contended that no opportunity was given to produce the evidence. On appeal to Supreme court, the Apex court held that the assessee has to lead evidence to show that the alleged donors had adequate funds in their respective accounts to make the purported gifs in accordance with CIT v. P. Mohanakala (2007) 291 ITR 278)(SC). Apex Court set aside the matter to the Tribunal to examine the question and assessee to produce the evidence in the light of the ratio laid down by Apex court in P. Mohankala(Supra). The assessee has to show whether the donors have financial capacity to make the gifts. (A.Ys 1994-95, 1995-96)(C.A.NO 4653-4655 of 2007 dated 12-9-2012)

CIT v. P.R.Ganpathy & Ors (SC) www.itatonline.org.

S.68:Cash credits – Gifts – Relationship-Failure to establish relationship of donor with assessee addition held to be justified.

Assessee had not furnished any iota of evidence for love and affection or being an acquaintance. Activities of donor, suspicious circumstances emerging from the material, non-availability of donor personally but by his father and the huge amount of gift being sent to different persons including assessee without any occasion and without any relationship, connection of family of the donor with the activities of the assessee, the Court held that addition under section was justified. (A. Y. 1999-2000 & 2000-01).

Dinesh Babulal Thakkar v. ACIT (2012) 341 ITR 632/67 DTR 321 (Guj.)(High Court)

S.68:Cash credits- Share application money-Affidavit-Information furnished by Investigation wing showed that the parties who subscribed to share application money were entry providers and summons issued to parties were not responded, affidavits were filed after two years , addition held to be justified.

In the course of assessment proceedings the Assessing Officer issued summons to parties who have subscribed shares, which could not be served, accordingly the addition was made under section 68. On appeal the assessee filed affidavit of directors , the Assessing Officer was directed to examine the directors . After examination the Assessing Officer has forwarded the remand report. On merit the Commissioner (Appeals) deleted the addition , which was confirmed in appeal by the Tribunal. On appeal to the High Court by revenue , the Court held that , the affidavits filed by assessee two years later from entry providers to effect transaction as genuine has no evidentiary value , information from investigation wing and the summons issued to parties has come back hence there is no duty on Assessing Officer to prove that monies emanated from coffers of assessee, hence the addition under section 68 was justified , hence the appeal of revenue was allowed. (A.Y. 2000-01)

CIT v. Nova Promoters and Finlease (P) Ltd(2012) 342 ITR 169 / 206 Taxman 207/75 DTR 65/252 CTR 187(Delhi) (High Court)

S.68:Cash credits-Burden of proof-Identity-Evidence cannot be disregard without bringing any evidence contrary .

Once the assessee produces adequate evidence which prima facie discharge the burden of proving identity, creditworthiness of the shareholders and genuineness of transaction, in facts of such a case if the Revenue authorities want to discard these evidences as 'created evidences' the Revenue should make through probe so as to nail the assessee under section 68 of the Act.(A.Y. 2004-05 & 2006-07)

CIT v. Kamdhenu Steel & Alloys Ltd. (2012) 68 DTR 38/ 248 CTR 33 / 206 Taxman 254 (Delhi)(High Court)

S.68:Cash credits- Credit in capital account of partner- Addition cannot be made in the hands of firm.

The Tribunal treated the credit in capital account of partners at the time of formation of partnership as cash credits in the hands of firm. On appeal by the assessee, the Court held that credit in capital account of partner, being at the time of formation of partnership firm, the firm could not have any income at the time of formation and therefore no addition under section 68 could be made in the hands of firm . (A.Y. 1991-92)

Abhyudaya Pharmaceuticals v. CIT (2012) 72 DTR 58 (All.) (High Court)

S.68:Cash Credits – Share Application Money- Identity of share applicant- Cannot be assessed as cash credits.

Where the assessee company had disclosed the identity of the share applicatn's, their source of investment and their creditworthiness, share application money cannot be added in the hands of the assessee company under section 68 of the Act as undisclosed income of the Company.

CIT v. LDK Shares & Securities (P) Ltd. (2012) 71 DTR 371 (All.)(High Court)

S.68:Cash Credits – Affidavit-Source of income – Addition deleted as no independent inquiry was made by AO to disprove the creditworthiness of creditors.

Where no independent inquiry was made by AO to disprove the creditworthiness of creditors, as established by affidavits and statements showing source of income, etc. Thus, CIT(A) justified in deleting the addition u/s 68. (AY 1990-91)

CIT v. Abdul Aziz (2012) 251 CTR 58 (Chatt.)(High Court)

S.68:Cash credits-Sundry creditors-Outstanding balance-Outstanding in balance sheet additions cannot be as cash credits.

Assessing Officer disallowed the sundry creditors holding that the assessee could not furnish complete names, addresses and PANs of all sundry creditors. The assessee contended that these creditors were petty karigars engaged in doing job work for assessee pertaining very old period and since said records had been destroyed in fire assessee was not in a position to get these outstanding creditors verified further the reading results have been accepted. Tribunal held that taking in to consideration all facts, addition cannot be made as cash credits by invoking deeming fiction under section 68. (A.Y. 2001-02).

Dy. CIT v. Divine International (2012) 134 ITD 148 (Delhi)(Trib.)

S.68:Cash credits-Opening balance-Loan- Loan confirmation filed addition can not be made as cash credits.

Assessee has taken loan from various parties. Assessee filed the confirmation letters, all loans were by account payee cheques and the lenders were employed abroad. The Tribunal held that the assessee has discharged the burden hence addition cannot be made under section 68. As regards loan taken in earlier year addition cannot be made for the relevant year. (A.Y. 2006-07)

ITO v. Nasir Khan J. Mahadik (2012) 134 ITD 166 (Mum.)(Trib.)

S.68: Cash credits- Capital contribution- Partners - Addition cannot be made in the assessment of firm.

Assessee firm received Rs. 7.15 lakhs as fresh capital contributions from its four partners and furnished copies of capital account of partners, their individual cash books, pass books and statement, their balance sheets computation of income and income tax returns. Assessing Officer treated the said amount as unexplained cash credits on the ground that the assessee did not furnish source of cash credit in cash book of partners. The Tribunal held the assessee has discharged the initial onus laid upon it by filing various documents. The Tribunal further held that if the Assessing Officer is

doubting the genuineness the same could be considered in hands of partners and not in the assessment of firm.(A.Y. 2005-06)

ACIT v. MeghMalhar Developers (2012) 134 ITD 437 (Ahd.)(Trib.)

S.68: Cash credits – Firm – Partner – Loan - Capital introduced by partners addition cannot be made in the hands of firm.

The Tribunal held that in respect of capital introduced by the partners, the Assessing Officer is entitled to proceed against partners and assess the sum in their hands, if their explanation was not found satisfactory, but addition cannot be made in the hands of firm. As regards loan from third parties the assessee has filed confirmation, PAN and acknowledgement of income tax return. The Assessing Officer has not made any enquiry, the Tribunal held that the assessee has discharged the burden and hence additions cannot be made under section 68. (A. Y. 2005-06).

Sarjan Corporation v. ACIT (2012) 14 ITR 140 (Ahd.)(Trib.)

S.68:Cash credits- Share application money-Identity- Identity of share applicants were not established hence addition was up held.

The assessee is a Pvt. Ltd company engaged in the trading business in coal. It was found that Hindustan Continental Ltd (HCL) had applied for 40000 share application on face value of Rs 10 each and premium of Rs 90 per share. Similarly the Optimates Textile Industries Ltd (OTL) also applied for 10000 shares. Both the parties are from Indore. The Assessing Officer referred the matter to Assistant Commissioner Indore to verify the genuineness of parties .The investigation carried out by the Officials of Indore; it was found that the parties were not in existence. The Assessing Officer held that as the assessee has failed to establish identity of share applicants the addition was made under section 68. On appeal the Commissioner (Appeals), up held the addition. On appeal to the Tribunal, the Tribunal held that since the identity of share applicants had not been established, the initial onus laid down under section 68 had not been discharged and thus addition made to be up held. The ratio of Supreme Court in CIT v. Lovely Exports (P) Ltd (2008) 216 CTR 195 / 6 DTR 308 (SC) cannot be applicable. (A.Y. 2004-05 to 2006-07)

Agarwal Coal Corporation (P) Ltd v. Addl.CIT (2012) 135 ITD 270 (Indore) (Trib.)

S.68:Cash credits-Share application money-Identity-Identity proved and filed confirmation vide PAN, addition cannot be made.

Four companies had invested in equity shares of assessee Company. All the above four companies had issued confirmation letters regarding purchase of shares from assessee and they also quoted their PAN. The assessee had also submitted resolution of board of director of each Company regarding investment in purchase of equity share of assessee and copy of their bank account's indicating availability of funds for purchase of shares. In view of the above facts, no addition could be made under section 68 of the Act as assessee had proved identity of four companies, genuiness and creditworthiness of companies. (A.Y.2006-2007)

ACIT v. Hitkarni Prakashan Limited (2012) 49 SOT 28 (Jabalpur) (Trib.)

S.68:Cash credits –Balance sheet-Unclaimed liability- Old unclaimed liability in balance sheet for more than one year, no credit made in the books of accounts, held no addition to be made.

The provisions of Section 68 of the Act, held to be inapplicable in case where there are unclaimed liabilities lying in the Balance Sheet of the assessee for more than one year and no credit for the same have been made in the books of accounts. (A.Y.2007-08)

DCIT v. Eastern Medikit Ltd. (2012) 135 ITD 461/71 DTR 241/146 TTJ 551/18 ITR 457 (Delhi)(Trib.)

S. 68:Cash credits – Gift – None of the donors being available at the addresses given in their returns or PAN cards - addition is held to be justified.

Where none of the donors being available at the addresses given in their returns or PAN cards, AO was justified in making addition of alleged gifts under section 68 for failure of assessee to produce the donors though assessee produced their acknowledgements, PAN cards, IT returns, Bank Passbooks, etc. (A.Y. 2002-03)

Prakashchandra Singhvi (HUF) v. ITO (2012)134 ITD 283/ 146 TTJ 121/69 DTR 276 (Ahd.)(Trib.)

S.68: Cash Credits – undisclosed income – burden on department to show that the investment made by the subscribers actually emanated from the coffers of the assessee

Where the assessee discharged the onus by establishing the identity of the shareholder and along with the nature and source of the money. The assessee also filed the confirmation letter, also it was accepted by the AO in the assessment order that identity of share applicant was not in doubt. Thus addition under the said provision was deleted relying on the judicial pronouncement that the department must show that the investment made by the subscribers actually emanated from the coffers of the assessee and then to be treated as undisclosed income u/s 68. (AY 2006-07)

ACIT v. ETC Industries Ltd. (2012) 52 SOT 159 (Indore)(Trib.)

S.68:Cash Credits – loan received from directors – No addition where assessee proved the identity as well as creditworthiness of the lenders who are its directors

The assessee received loans during the year from three directors. AO though treated majority of loans as genuine, but made part addition of part amount as these amounts are deposited in cash in bank account of creditors. It was held that the assessee having proved the identity as well as creditworthiness of the lenders who are its directors, addition u/s 68 could not be made in respect of part of the deposits simply because cash deposit of similar amounts were made in the accounts of the lenders. (2003-04)

Moongipa Investment Ltd. v. ITO (2012) 147 TTJ 378 (Delhi)(Trib.)

S.68:Cash credits – Loans-PAN- Lender assessed to tax and confirmation is filed addition is held not justified.

Assessing Officer treated cash credits in name of one 'G' as unexplained cash credits. Commissioner (Appeals) deleted addition on grounds that 'G' had furnished required certificate before Assessing Officer and latter did not consider same, that 'G' was assessed to income-tax and that he had confirmed loan granted to assessee and quoted his PAN number. Since Commissioner (Appeals) had decided issue on foundation of requisite material on record, he was justified in his action. (A. Y. 2006-07)

ITO v. Bhagwan Dass,[2012] 137 ITD 120/17 ITR 446 (Chandigarh)(Trib.)

S.68: Cash credits – Loans-Account payee cheque-Assessee need not prove the source of source.

Assessee-firm was engaged in business of manufacture of sugar. During previous year, it obtained loans from parties by means of cheques. Assessing Officer accepted part of loans and treated balance amount as unexplained cash credits and added same to income of assessee. Record showed that creditors had explained sources of their deposits in bank. No material was brought on record by Assessing Officer to show that assessee had any other source of income which could have been routed in form of loan given by a third party. On other hand interest payable by assessee on said loans was allowed by Assessing Officer. Held that since initial onus placed upon assessee stood discharged and there was no material to prove that sources explained by creditors were not genuine. Assessing Officer was not justified in calling upon assessee to prove source of source. Therefore, impugned addition made under section 68 was liable to be deleted..(A. Y. 2005-06)

Dwarikadhish Sugar Industries v. ITO [2012] 137 ITD 200/149 TTJ 401/77 DTR 40 (TM)(Lucknow)(Trib.)

S.68:Cash credits – Loans –Examination of creditors- Addition made on assumption without examining the creditors is held to be not justified.

Assessee received unsecured loans from three parties through account payee cheques. Assessee proved identity, genuineness of transactions and also creditworthiness of creditors by producing their respective bank accounts. Assessing Officer did not examine creditors and made addition on assumption that they would not have saved any money to advance loans. Held that, the Assessing Officer should not have come to any conclusion without examining the cash creditors. The assessee cannot be aware of the source of creditors, which would be within the personal knowledge of the creditors. Mere doubt with regard to the creditworthiness should not automatically reflect in disbelieving the case of the assessee to make addition under section 68 without showing that the assessee would have earned more income from any specific source, in the light of the expression may' used in section 68. In the instant case, the Assessing Officer examined the books of account of the assessee but did not make any comment on possibility of earning of any additional income from trading business or from any other source and, thus, addition cannot be made in a routine manner. (A.Y. 2006 – 2007)

Vishnu Jaiswal v. CIT(A)-I(2012) 137 ITD 259/76 DTR 265/149 TTJ 165(TM) (Lucknow)(Trib.)

S.68: Cash credits-Bank pass book-Income from undisclosed source- Addition held to be justified as the bank has acknowledged that assessee has an asset in the form of credit in the pass book.(S.69)

The amount was credited in the pass book of assessee. The Judicial member held that as the amount was credited in the pass book maintained by Bank hence provision of section 68 is not applicable. As there was difference of opinion the matter was referred to third member. The third member held that it cannot be said that assessee has not maintaining books of account in respect of passbook entries pertaining in her individual bank, hence the addition was held to be justified. The third member also held that addition is also justified under section 69, as the assessee has not proved that the source of gift in her bank account and the bank has acknowledged that assessee has an asset credited in bank account of assessee. (A.Y. 2003-04)

Renu Agarawal (Smt) v.ITO (2012)136 ITD 343/ 148 TTJ 169/75 DTR 48 (TM) (Agra) (Trib.)

S. 68: Cash credits – Creditworthiness of creditor and genuineness of transaction proved, all documents produced, no addition warranted

The assessee received loan amount through cheques from two persons. It was held that no addition u/s 68 can be made where the assessee has proved the creditworthiness of the creditor and genuineness of the transaction by producing copy of PAN, copy of ration card, copies of Income-tax returns and return of wealth tax. (A.Y. 2003-04 & 2004-05)

Abhik Jain v. ITO (2012) 18 ITR 497 (Delhi)(Trib.)

S. 68: Cash credits – Gift received from non – relative – No occasion of gift and no reciprocity of gift, hence addition sustained.

The assessee, in the instant case received certain amount as gift. The Tribunal confirmed the addition made u/s 68 on the ground that the assessee had received a gift from a person who was not related to the assessee. There was no occasion for the gift whatsoever and there was no reciprocity of gifts between the donor and the assessee.(A.Y.2002-03)

Saroj Bala v. ITO (2012) 18 ITR 411 (Delhi)(Trib.)

S.69:Unexplained investments-Income from undisclosed source – Disclosure- Loosepaper-Statement under section 132(4)-Addition on the basis of loose papers fouad, was confirmed .

The Assessing Officer has made addition on the basis of loose papers found and the statement jointly signed by the assessee. On appeal Commissioner (Appeals) deleted the addition on the ground that the person who has given the statement did not appear before the Assessing Officer for cross examination. Tribunal held that loose paper was signed by assessee and that it is indicative of the fact that the impugned amount was given as loan by assessee. On appeal, High Court held that the Tribunal has decided the issue based on factual aspects and therefore the order of Tribunal was up held.

Bhanuvijaysingh M. Vachela deceased, through Legal Heir v. ITO (2012) 65 DTR 201/ 246 CTR 274 (Guj.)(High Court)

S.69:Unexplained investments-– Firm – Partner – Capital.- Addition cannot be made in the assessment of firm.(S.68)

Initial capital introduced by partners before commencement of business of firm, could not be treated as undisclosed income of assessee–firm even if the Assessing Officer was not satisfied with the explanation offered by firm explaining the source of said income. At the most the addition could be made in hands of individual partners of firm.(A.Y. 2004-05)

G.L. Foods v. ITO (2012) 134 ITD 159 (Luck.)(Trib.)

S.69:Unexplained investments- unexplained investment in plot-Merely on the basis of draft agreement additions cannot be made.

Alleged amount of Rs.1.85 crores cannot be said to have been paid by the assessee merely on the basis of the draft agreement and the papers found at the time of survey; when it was established that said deal was finally closed as per revised agreement and there was no evidence to show payment of Rs.1.85 crores by assessee or his family members.(A.Y.2007-08)

Dy. CIT v. Rajat Agarwal (2012) 68 DTR 58 / 144 TTJ 753 (Jaipur) (Trib.)

S.69:Unexplained Investments – unaccounted income – Statement-In the absence of evidence, mere statement of DGM of company surrendering deficit for cash, is not a ground to sustain addition. [S. 132 (4)]
Detection of shortage in cash ipso facto does not lead to inference of earning unaccounted income and, therefore, in absence of any evidence of undisclosed income, mere statement of Director cum DGM (finance) of the assessee company surrendering the deficit of cash for taxation during the survey proceedings cannot be a ground for sustaining the addition. (A.Y. 2007-08)
DCIT v. Eastern Medikit Ltd. (2012)135 ITD 461/ 71 DTR 241/146 TTJ 551/18 ITR 457 (Delhi)(Trib.)
S.69:Unexplained investments- Income from undisclosed sources-Addition – Alleged `on money' on sale of land, without allowing an opportunity of cross examination held to be not valid.
Addition of money allegedly received by the assessee on sale of land merely by relying on the documents found and seized from the group concern of the purchaser company and the statement made by a director thereof without allowing the assessee to cross examine the said director or other concerned persons and without providing the incriminatory documents to the assessee is violative of principle of natural justice and therefore, same cannot be sustained.(A.Y. 2008-09)
Sunita Dhadda(Smt) v. Dy. CIT (2012) 71 DTR 33/148 TTJ 719 (Jaipur) (Trib.)
S.69A:Unexplained money - Sale of shares- Short term capital gains- Addition as income from undisclosed source was confirmed .
Assessee has shown the profit on sale of shares, the Court observed that the sale of Shares were not listed. It was also observed that the sale had taken place in 1998 and payment was received by the assessee was in next year. No explanation was offered as to why the payment was delayed about one year and three months. The Court held that purchase and sale of shares was not genuine and addition as undisclosed income was justified.(A.Y.1997-98)
CIT v.Rana Gurjit Singh (2012) 340 ITR 108/75 DTR 376 (P&H.)(High Court)
S. 69: Unexplained investments –On money on sale of land – No opportunity of cross examine to director, no incriminating documents provided to the assessee, as there was violation of principle of natural justice addition was not justified.
Addition of on-money, allegedly received by the assessee on the sale of land merely by relying on the documents found and seized from the group concern of the purchaser company and the statement made by a director thereof, without allowing the assessee to cross examine the said director or other concerned persons and without providing the incriminatory documents to the assessee is violative of principles of natural justice and therefore, same cannot be sustained. (A.Y. 2008-09)
Sunita Dhadda (Smt.) v. Dy. CIT (2012) 148 TTJ 719 (Jaipur)(Trib.)
Dy.CIT v. Sunita Dhadda (Smt.) (2012) 148 TTJ 719 (Jaipur)(Trib.)

S. 69: Unexplained investments – Payment of on-money for purchase of property - Handwritten loose document found at the premises of a third party does not bear the date of the alleged payments and the name of the assessee hence no addition is to be made.
Handwritten loose document found at the premises of a third party which does not bear the date of the alleged payments and the name of the assessee cannot be the basis for making addition on account of payment of on-money for purchase of property in the absence of any corroborative material to suggest that the assessee has actually paid on-money. (A.Y. 2003-04)
K.V Lakshmi Savitri Devi(Smt) v. ACIT (2012) 148 TTJ 517 (Hyd.)(Trib.)

S. 69: Unexplained investments – Money received under Will – Genuineness of Will cannot be doubted when direct evidence available, addition deleted.
In the instant case, the assessee received money from father in law under a will. The AO made an addition doubting the genuineness of the Will. It was held that when direct evidence is available on Will, issue could not be decided on assumption without contracting statements on record. Thus, addition was deleted. (A.Y. 1996-97 to 2001-02)
Rama Yadav v. ACIT (2012) 53 SOT 22 (Delhi.) (Trib.)

S.69A:Unexplained money-Confessional statement- Shifting stand- Addition cannot be made merely on the basis of shifting stand and confessionary statement made by assessee , low tax morality of assessee not a basis of making addition

Where addition under Section 69A was sustained merely on the shifting stand and confessionary statement furnished by the Director- cum- DGM (finance) of the assessee and not on the evidence on record, it was held by the Tribunal that, low tax morality displayed by the assessee cannot be the basis of addition. (A.Y. 2007-08)

Dy. CIT v. Eastern Medikit Ltd. (2012) 135 ITD 461/71 DTR 241/146 TTJ 551/ 18 ITR 457 (Delhi)(Trib.)

S.69A:Unexplained money - Jewellery – HUF-Reasonable amount of jewellery may be accepted as accumulated and explained and additions cannot be made.

Assessee HUF neither furnished item-wise details of the jewellery owned by it nor adduced any reliable evidence to show that it was the owner and in possession of the jewellery on 31st March 2005, as it had filed the WT Return before an incompetent AO and produced an undated valuation report, it could not be accepted that the whole of the jewellery was acquired by it from the deceased father of the Karta and, therefore, provisions of Section 69A are attracted to the sale proceeds of the jewellery and it is not assessable as capital gains; however, it would be reasonable to accept that jewellery was received by the assessee from the deceased and accumulated on other occasions and thus, only the remaining jewellery to be treated unaccounted. (A.Y. 2006-07)

Naveen Bansal (HUF) v. ITO (2012) 146 TTJ 207/69 DTR 193 (Delhi) (Trib.)

S.69A:Unexpalined money –Income deemed to accrue or arise in India-Jewellery- Amount invested in jewellery from non taxable funds cannot be assessed as income from undisclosed source (S.9)

The assessee is non –resident and was living in Singapore. He has earned income which are not taxable in India. The assessee spent from non-taxable funds for gifting jewellary to his family members hence addition could not be made as un explained jewellery in hands of assessee (A.Ys. 2004-05 to 2009-10)

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

S.70:Set off loss-One source against income from another source-Same head of income- Beneficial method-Assessee can adopt which is most beneficial to him.

The assessing officer computed short term capital gain and short term capital loss, suffered by assessee separately for the periods 1-4-2004 to 30-9-2004 & 1-10-2004 to 31-3-2005. He allowed the set off of the short term capital loss against, short term capital gains earned during 1-10-2004 to 31-03-2005 and levied the tax on the net short term capital gains. In appeal before the Commissioner (Appeals) the assessee submitted that as per section 70 assessee is entitled to set off loss under short term capital gains against income from short term capital gains. Section 70 nowhere provides that short term capital loss arising from STT paid transactions can only be set off against short term capital gains or long term capital gains. The Commissioner (Appeals) accepted the contention of assessee and allowed the appeal. On appeal to the Tribunal by revenue , the Tribunal held that since no particular mode or manner of set off is provided in Act , the assessing Officer should adopt that chronological order or manner which is most beneficial to assessee, relying on the Circular no 26 (LXVGI-3 of 1955 dated 7-7-1955) (A.Y. 2005-06)

Deputy CIT v. Noble Enclave & Towers (P) Ltd (2012) 50 SOT 5 (kol.) (Trib.)

S.71: Set off loss- One head against income from another- Inter heads -Exempted income- Assessee is entitled to set off the loss incurred in an eligible industrial unit against the other incomes earned by the assessee (S. 10B, 70)

The assessee suffered loss in Unit eligible for deduction under section 10B and there was a business income in an another Unit. The assessee set off the loss against the income of another unit. The Assessing Officer held that Income of EOU is exempt under section 10B ,which did not form part of the total income , hence the loss is not allowed to be set off . On appeal the Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that there is no restriction to set off the loss of the eligible industrial unit against the income earned by the assessee in any other Unit. Section 10B(6), which is a non obstante clause which provides that loss referred in sub section (1) of section 72 or section 74(3) and section 74(1) , in so far as such loss relates business undertaking eligible under section 10B ,shall not be carried forward or set off where it relates to any of the assessment year

commencing before 1-4-2011, however , it is pertinent to note that provisions of section 70 or 71 have not been included in the non obstante provision, therefore, it cannot be said that the provisions of section 70 or section 71 cannot be applied in computing the total income of the assessee. Accordingly the Tribunal held that, loss in eligible unit for deduction under section 10B and there was a business loss as per section 70 and if after such set off still there is a business loss. Such loss can be set off against other sources as per section 71. (A.Y.2008-09)

Bharat Resins Ltd v. ACIT (2012) 50 SOT 298 (Ahd.) (Trib.)

S.72: Carry forward and set off-Business losses-Unabsorbed business loss- Unabsorbed business loss can be set off against income from assessed under the head 'income from other sources' and 'income from house property'.

The assessee claimed the set off of business loss against the Income from other sources and income from house property. The Court held that while deciding the set off of the loss computed under the head "profits and gains business" against the profits and gains of business of assessee in the subsequent year, the condition that computation of the profits and gains of business carried on by subsequent year should be under the head "profits and gains of business or profession " is consciously absent in section 72 of the Act ,which means that it is not necessary that income against set off claimed in subsequent year , should be assessable under the head 'profits and gains of business'. Applying the commercial principles the income assessed under the head 'income from house property' and 'income from other sources' can be treated as the business income of the assessee, the same shall be eligible for set off against brought forward loss.(ITA no 254of 2006 dated 23-7-2012) (A.Y. 1995 – 1996)

Lavish Apartmenr Pvt Ltd v CIT (2012) 210 Taxman 9/77 DTR 483(2012) Income Tax Review –September P 84 (Delhi) (High Court)

S.72:Carry forward and set off-Business losses- Loss incurred on account of payment of interest treated as business loss and allowed to be carried forward.

The assessee borrowed the money and utilized the said amount for depositing in tender. The tender was not materialized and amount was returned with the interest. The Assessee incurred the loss due to higher rate of interest to lender. The Tribunal held that participation in the process of tender will amount to setting up of business and the loss is to be treated as business loss and allowed to be carried forward. (A. Y. 2006-07).

Dhoomketu Builders & Developers (P) Ltd. v. Addl. CIT (2012) 49 SOT 312 (Delhi)(Trib.)

S.73:Losses -Speculation business- Computation of gross total income to be made by applying the normal provisions of the Act - Share loss to be first set-off to determine what gross total income consists of there after Explanation applies.

The department's submission that in computing the gross total income for the purpose of the explanation to section 73, income under the heads of "Profits and gains of business" must be ignored and /or that the share loss should not be allowed to be set off against the income from any other source under the head "Profits and gains of business" is not acceptable because it leads to an incongruous situation where in determining whether a company is carrying on a speculation business within the meaning of the Explanation, sub-section (1) of section 73 is applied in the first instance. This is not permissible as a matter of statutory interpretation because the Explanation is designed to define a situation where a company is deemed to carry on speculation business. It is only thereafter that sub-section (1) of section 73 can apply. Applying the provisions of section 73(1) to determine whether a company is carrying on speculation business would reverse the order of application. Legislature has mandated that in order to determine whether the exception that is carved out by the Explanation applies, a computation of the gross total income has to be made in accordance with the normal provisions of the Act and it is only thereafter that it has to be determined whether the gross total income so computed consists mainly of income which is chargeable under the heads referred to in the Explanation to section 73 or not.(A.Y.1996-97)

CIT v. Darshan Securities Pvt. Ltd. (2012) 341 ITR 556 / 68 DTR 33/206 Taxman 68/ 249 CTR 199 /(2012) Vol.114(2).Bom.L..R.0794(Bom.)(High Court)

S.73: Losses -Speculation business-Interest on securities- Income from house property-Capital gains-Income from other sources- The assessee had only income from other sources hence explanation to section 73 is not applicable.

The assessee company filed the return of income showing the loss of Rs 1.65 crores arising out of purchase and sale of shares. The said loss consisted of business loss of Rs 1.72 Crores and an income from other sources of Rs 7 lakhs. The Assessing Officer invoked the Explanation to section 73 and treated the said loss as speculation loss . On appeal the Commissioner (Appeals) held that the Explanation to section 73 refers to the words "income which is chargeable under the heads". Since in the instant case the only income which is included in gross total income was dividend income , the gross total income mainly consisted of "income from other sources" therefore, Explanation to section 73 was not applicable. The order of Commissioner (Appeals) was affirmed by the Tribunal . On appeal to the High Court by revenue the Court affirmed the order of Tribunal. The Court refer the Judgement CIT v. Darshan Securities (P) Ltd (2012) 341 ITR 556 (Bom.)(High Court) and Aman Portfolio (P) Ltd v. Dy.CIT (2005) 92 ITD 324 (Delhi) (Trib.)(A.Y. 1997-98)

CIT v. HSBC Securities & Capital Markets India (P) Ltd (2012) 208 Taxman 439 (Bom.) (High Court)

S.74: Losses –Capital gains- Carry forward and set off-Option to set off- Right to set-off capital loss is a "vested right" not affected by amendment.

In AY 2003-04, the assessee earned short-term capital gains ("STCG") of Rs. 2.21 crores and set it off against the long-term capital loss ("LTCL") relating to AY 2001-02. *S. 74 was amended w.e.f. AY 2003-04 to provide that brought forward LTCL could only be set-off against LTCG and not against STCG*. The assessee claimed, relying on CIT v Shah Sadiq & Sons (1987) 166 ITR 102 (SC) that the amendment to s. 74 w.e.f. AY 2003-04 *did not affect the assessee's vested right* in AY 2001-02 to have the LTCL set-off against the STCG. The AO & CIT(A) relied on Reliance Jute Industries v. CIT (1979) 120 ITR 921 (SC) where it was held that the assessment for one AY cannot be affected by the law in force in another AY and that the law prevailing in AY 2003-04 alone had to be considered. On appeal to the Tribunal, the issue was referred to a Special Bench. Held by the Special Bench:

(i) S. 74(1), as substituted w.e.f. 01.04.2003, uses the present tense and refers to the long-term capital loss of the current year. It applies to the long-term capital loss of AY 2003-04 onwards and not to the long-term capital loss relating to the period prior to AY 2003-04. The set-off of long-term capital loss relating to a period prior to AY 2003-04 is governed by s. 74(1) as it stood in that AY;

(ii) The assessee's contention, relying on Shah Sadiq, that it had a "*vested right*" in AY 2001-02 to carry forward the LTCL & set it off against the STCG and that this right cannot be defeated without express language in the statute is also acceptable. In Govinddas and Others(1976)103 ITR 123 (SC) it was held that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right otherwise than as regards the matters of procedure (Reliance Jute Industries v CIT (1979)120 ITR 921 (SC) distinguished; CIT v SSC Shoes (2003) 259 ITR 674 (Mad) followed; Geetanjali Trading (ITAT Mumbai) approved)(AY 2003-04)

Kotak Mahindra Capital Co. Ltd v. ACIT(2012)138 ITD 57/ 18 ITR 213/75 DTR 193/148 TTJ 393(SB)(Mum.)(Trib.)

S.78:Carry forward and set off losses-Change in constitution of firm-Succession-Losses suffered by firm could not be set off from income of as an individual.

Assessee, who was an individual , had taken over the running business of a partnership firm in which he was a partner .He claimed the set of the loss suffered by partnership firm against income earned by him as an individual . Revenue authorities and Tribunal rejected the claim of assessee. On appeal to High Court, the court held that in view of provisions of section 78(2), only person who incurs or suffers loss would be entitled to carry forward same and set off and no other person except in case of succession by inheritance. Since partnership firm and individual are two separate taxable entities or persons under the Act, loss suffered by partnership firm could not be set off from income of assessee as an individual. Accordingly the order of Tribunal confirmed. (A.Y 2005-06)

Pramod Mittal v. CIT (2012) 205 Taxman 444 (Delhi) (High Court)

S.80: Return for losses-Revised return is held to be valid and is allowed to carry forward and set off. [S. 70, 71, 139(5)]

Assessee filed the original return under section 139(1) declaring the positive income. Assessee found certain mistake thereafter and filed revised return declaring the loss and to be carried forward and set off in future. The Tribunal held

that the revised return to be treated as valid return and the assessee is entitled to carry forward of 'long term capital loss'. (A.Y. 2005-06)

Ramesh R. Shah v. ACIT (2012) 65 DTR 104 / 143 TTJ 166 (Mum.)(Trib.)

S.80G:Deduction-Donation-Literature not filed before Assessing Officer (S. 2(15).

Deduction under section 80 G of the Act cannot be denied to the assessee trust where the done trust was approved under section 80 G (5) of the Act merely on the ground that the activities of the done trust were in violation of section 2 (15) of the Act as literature of the done trust was not filed with the assessing officer.

CIT v. Balaji Charitable Trust (2012) 70 DTR 7 / 249 CTR 223 (Raj.)(High Court)

S.80G: Deduction- Charitable institution-Charitable and religious purpose- Expenditure on religious activities exceeding 5%, denial of exemption held to be justified.

The assessee society was formed with the objects of evangelizing and edifying the body of Lord Jesus Christ so as to spread teachings to far off villages, to publish Christian magazines and journals etc. The society incurred major expenses on TV telecast and salaries of preachers. The Commissioner refused the renewal of exemption granted under section 80G, on the ground that the activities of the society are substantially of religious in nature and not for charitable purpose. Commissioner considered the salaries of preachers under the head religious purposes. The assessee claimed that the salaries of preachers are for charitable purposes. The Tribunal confirmed the view of commissioner that salaries of preachers cannot be considered as for charitable purposes . Since the expenditure on religious activities is more than 5 percent of the total income of the assessee , it is hit by sub-section 5 (ii) of section 80G , read with sub section 5B, hence the order of Commissioner is up held.(A.Y. 2010-11)

Church of Christ Social Services Society v.CIT (2012) 67 DTR 330/ 144 TTJ 785 (Viskha.) (Trib.)

S.80G :Deduction-Donation- Charitable purpose-Recognition of institution etc. u/s. 80G(5)

Where a charitable institution is established for both charitable and religious purposes the expenditure on such religious activities (including salary to preachers engaged to spread the teachings of Lord Jesus Christ) exceeding 5 per cent of the total income, it is hit by sub-s (5)(ii) of S. 80G r/w/ subs. (5B) and CIT has rightly refused the registration u/s. 80G.(A.Y.2010-11)

Church of Christ Social Service Society v. CIT (2012) 67 DTR 330/144 TTJ 785 (Visakha.(Trib.)

S.80G:Deduction – Donation- Charitable institutions-Approval granted shall continue .

Assessee filed its application for renewal of exemption under section 80G on 27-12-2010. Subsequently, assessee vide its application dated 4-2-2011, requested Commissioner to treat application filed for renewal of exemption under section 80G as withdrawn. Commissioner (Appeals) however rejected assessee's request, held that exemption under section 80G could not be allowed to assessee society. On appeal, assessee submitted that in view of omission of proviso to section 80G(5)(vi) by Finance (No. 2) Act, 2009, approval once granted shall continue to be valid in perpetuity and even if assessee by ignorance or inadvertently filed an application for renewal, Commissioner was required to decide same in accordance with amended provisions. The Tribunal held that, the approval under section 80G(5) already granted to assessee would continue unless and until concerned authority takes appropriate action in accordance with law. Hence, the impugned order passed by Commissioner (Appeals) was set aside.

Association for Advocacy and Legal Initiatives v. CIT [2011] 130 ITD 573 (Luck.) followed.(A.Y.2011-2012)

Vishav NamdhariSangatv v. ACIT [2012] 137 ITD 74 (Chandigarh)(Trib.)

S.80G: Deduction – Charitable institution – Renewal of registration - No material brought, suggesting non-fulfillment of conditions stipulated u/s 80G(5) and rule 11AA, hence renewal of registration not to be denied.(S.11AA,12A,)

Where the registration granted to the assessee u/s 12A is subsisting and no material has been brought suggesting that the assessee society did not fulfill the conditions stipulated u/s 80G(5) and rule 11AA, therefore CIT was not justified in denying renewal of approval u/s 80G(5)(vi).

Late Shiv Shankar Memorial Education Society v. CIT (2012)147 TTJ 753 (Delhi)(Trib.)

S.80G:Deduction – Donation – Charitable purpose – Registration of Trust –When a particular one clause could not be acted upon, then mere incorporation of the clause in the trust deed would be of no consequence as far as registration u/s 80G (5) is concerned [S. 12A and 10 (23C)]

In the instant case, a clause in the trust deed empowered the trustees to invest in the properties. It was held that where merely if a provision had been incorporated in the Trust Deed, but by reading of all the clauses together, it is evident that the clause could not be acted upon, mere incorporation of the clause in the trust deed would be of no consequence as far as registration u/s 80G(5) is concerned. Therefore, considering all the clauses together, it was evident that the true import of the trust deed was to carry out its activity subject to restrictions laid down under the Act. Since the assessee's trust was registered u/s 12A as well as under section 10(23C) there could not be any dispute that the trust was established for charitable purposes. In any event the trust deed had also been amended. The assessee trust was entitled to registration u/s 80G.

NSHM Academy v. CIT (2012) 18 ITR 244 (Kol.)(Trib.)

S.80G:Deduction – Donation-Charitable purpose – Renewal of registration-Registration of institution u/s 12A by itself a sufficient proof that the institution concerned is created for charitable purpose/ purpose of general public utility ,hence, registration could not be denied.(S.2(15),12A)

The assessee society was registered Societies Registration Act, 1860 and was granted registration u/s 12A of the Act. It was granted exemption certificate u/s 80G(5)(vi) which was renewed for AY 2007-08 and 2009-10. However, Director (exemption) rejected the application filed by assessee in Form 10G on the ground that the activities were beneficial to manufacturers only and not covered u/s 2(15) of the Act. It was held by the Tribunal that the registration of institution u/s 12A by itself was a sufficient proof of the fact that the trust or institution concerned was created or established for charitable purpose or a purpose of general public utility and it enjoys approval u/s 80G. Renewal of registration u/s 80G(5)(vi) had been granted for earlier years and there being no change in the facts and circumstances of the year for which renewal was sought for, there was no justification to reject assessee's application for renewal of exemption certificate u/s 80G(5)(vi) of the AY 2010-11 onwards.

Bengal Hosiery Manufacturers Assn. v. DIT (2012) 18 ITR 205 (Kol.)(Trib.)

S. 80G: Deduction – Donation –Charitable institution- Object of trust purely religious and linked to Hindu religious community, held not entitled to renewal of approval u/s. 80G.

Assessee was a trust for a temple with a deity which was confined only to a particular community for worship. Trust deed provided that income from trust property was to be applied in maintenance and repair of temple property, for worship of deity and in defraying of usual expense of holding festivals of deity. It was held that since objects of assessee trust were purely religious in nature, inextricably linked to Hindu religious community, it was not entitled to renewal of approval u/s. 80G.

Ramanujam Spiritual Public Charitable Trust v. CIT (2012) 138 ITD 81 (TM)(Amritsar) (Trib.)

S.80HH:Deduction-Newly established industrial undertakings-Books of accounts- Requirement of separate books for unit wise is not required - exemption can be claimed on the basis of consolidated accounts certified by Chartered accountant.(S.80 I)

The assessee prepared the consolidated accounts and claimed the deduction under section 80HH/80I. The Assessing Officer has allowed the claim. The Commissioner revised the order under section 263. The Tribunal set aside the order of Commissioner. The departmental appeal was dismissed by the High Court. On appeal to Supreme Court the Court held that requirement of separate books for unit wise is not required exemption can be claimed on the basis of consolidated accounts certified by Chartered accountant. The assessee is directed to file the certificate from the Chartered Accountant which can be prepared from the consolidated accountants before the Assessing Officer.(A.Y.1992-93) (C.A. No 1679 of 2004 dated 5-9-2012)

CIT v. Bangalore Refinery and Petrochemicals Ltd (SC) (www.itatonline.org)

S.80HH: Deduction-New industrial undertakings – Manufacture –Production- Forging process- Sub contract receipts.

Assessee claimed deduction under section 80HH, in respect of sub-contract receipts. The Court held that Krishnapuran unit of the assessee completes hot forging and after the process comes to Padi where there is further value addition and after assembling nuts and bolts, they are marked. Thus only after the process carried on by the Krishnapuran unit, that

the commodities reach a stage of marketability, therefore, it satisfied the test as given in section 80HH, hence receipt of job work done eligible for deduction under section 80HH.(A. Ys.1989-90 and 1992-93).
Sundaram Fasteners Ltd v. CIT (2012) 246 CTR 95 (Mad.)(High Court)

S.80HHA:Deduction - Profits and gains from newly established industrial undertakings - Rural area - Industry situated within 15 kms. of municipality is legible is eligible exemption.
Assessee has claimed the deduction under section 80HHA, in respect of unit situated at Kandla. The Assessing Officer disallowed the claim on the ground that Kandla was part of the greater Municipality Limits of Gandhinagar and within fifteen kilometers. The Tribunal held that as the unit is situated beyond eight kilometers the assessee is eligible deduction under section 8OHHA. The Court held that for denial of exemption under section 80HHA the distance to be considered of eight kilometers. On the facts as the unit is situated beyond eight kilometers the Tribunal was justified in allowing the claim of assessee under section 80HHA. (A. Y. 1989-90).
CIT v. Friends Salt & Allied Industries (2011) 336 ITR 272 / (2012) 67 DTR 79 (Guj.)(High Court)
S.80HHB: Deduction – Projects outside India –Foreign currency-Used to repay the loan- Eligible for deduction.
The assessee executed certain contracts in Oman and Qatar and the foreign currency earned from the project was partially used for repaying the loan taken in foreign currency in foreign country for executing the project. It was held that the loan amount was paid in foreign currency and even if the entire foreign currency was brought into India, the assessee would have been required to remit the foreign currency to discharge the loan taken in foreign currency for executing the project. Therefore the assessee was entitled to claim deduction u/s 80HHB in respect of entire foreign currency earned from the project.
CIT v. Essar Oil Ltd. (2012) 345 ITR 443 (Bom.)(High Court)
S.80HHC:Deduction – Export business – Computation - Profits of business - DEPB sale proceeds is not profits - The face value of DEPB shall be deducted from the sale proceeds. [S. 28(iii)(b), 28(iii)(d)]
The Apex Court held that when assessee sold DEPB his profit on transfer of DEPB, would be the sale value of DEPB less its face value which represents the cost of the DEPB, Ninety percent of the net receipt which has to be included in profits of the assessee as computed under the head "profits and gains of business or profession" and not the gross receipt is to be deducted under clause (1) of Explanation (baa) to section 80HHC for determining the profits of the business. (A. Ys. 2001-02 & 2004-05).
Vikas Kalra v. CIT (2012) 345 ITR 557/ 67 DTR 214 / 247 CTR 382/3 SCC 611 (SC)
S.80HHC:Deduction – Export business – Computation-Profits of business- DEPB sale proceeds is not "profits"- The face value of DEPB shall be deducted from the sale proceeds. [S.28(iiid)]
DEPB is "cash assistance" receivable against exports under the scheme of the Government. While the face value of the DEPB falls under clause (iiib) of section 28, the difference between the sale value and the face value of the DEPB (the "profit") will fall under clause (iiid) of section 28. DEPB represents part of the cost incurred by a person for manufacture of the export product and hence even where the DEPB is not utilized by the exporter but is transferred to another person, the DEPB continues to remain as a cost to the exporter. When DEPB is transferred, the entire sum received on such transfer does not become his profits. It is only the amount that he receives in excess of the DEPB which represents his profits on transfer of the DEPB. (A.Y. 2002-03)
Topman Exports v. CIT (2012) 342 ITR 49/67 DTR 185/247 CTR 353/(277) E.L.T 10/3SCC 593/ Vol. 42 Tax L R 255 / 205 Taxman 119 (SC)
S.80HHC:Deduction – Export business – Computation-Interest – Netting - Explanation (baa) to section 80HHC, refer netting of income from expenditure.
Under Clause (1) of Explanation (baa) to section 80HHC, 90% of any receipts by way of brokerage, commission, etc. "included in any such profits" have to be deducted from the profits & gains of business. The expression "included any such profits" means such receipts by way of brokerage, commission, etc included in the profits & gains. Therefore, if any quantum of receipts by way of brokerage, commission, etc is allowed as expenses under section 30 to 44D and is not included in the profits of business, 90% of such quantum of receipts cannot be reduced under clause (1) of

Explanation (baa) to section 80HHC. In other words, only 90% of the net amount of any receipt of the nature mentioned in clause (1) which is actually included in the profits of the assessee is to be deducted from the profits of the assessee for determining "profits of the business". (Principle in Distributors (Baroda) P.Ltd. v. UOI (1985)155 ITR 120 (SC) followed;CITv Shri Ram Honda Power Equip(2007) 289 ITR 475 (Delhi)(High Court) approved).(A.Y. 2003-04)
ACG Associated Capsules Pvt. Ltd v. CIT (2012) 343 ITR 89/ 67 DTR 205/ 247 CTR 372/3SCC 321 / Vol. 42 Tax LR 406 / 205 Taxman 136 (SC)
CIT v.Bharat Rasayan Ltd (2012)343 ITR 89/ 67 DTR 205/ 247 CTR 372/3 SCC 321 (SC)

S.80HHC: Deduction – Export business-Export from third country.

Assessee is engaged in purchase and sale of non ferrous metals, scraps, skimming ashes etc., who made purchases from one country and made exports to another country at margin of profit by arranging direct shipment from the purchasing country to the selling country. The Court held that in section 80HHC, there is no express words which provide that the export of such goods to be from India. There need not be two way traffic of bringing the goods from a foreign country into the Indian shores and thereafter exporting that goods from Indian shores to the off shore, because it is a mere empty formality and meaningless ritual in which the country gains nothing. If the object of earning of foreign exchange is achieved then the assessee is entitled to entitled to deduction under section 80HHC. (A. Ys. 1998-99 to 2002-03)
Anil Kumar v. ITO (2012) 343 ITR 30/ 65 DTR 49/ 246 CTR 194 (Karn.)(High Court)

S.80HHC :Deduction – Export business – Computation - A new industrial undertaking - Deduction eligible on both the sections on the gross total income independently. (S. 80IA)

The assessee is engaged in the manufacture and export of garments. The assessee claimed the deduction under section 80HHC without reducing the deduction allowable under section 80IB(13), read with section 80IA(9). The Commissioner set aside the order. The Tribunal restored the order of Assessing Officer. On appeal by the revenue the High Court held that the view of Tribunal is correct. The Karnataka High Court preferred to follow the view of Bombay High Court in Associated Capsules P. Ltd. v .Dy. CIT (2011) 332 ITR 42 (Bom.) and dissented the view of Delhi and Kerala High Court. (A. Y. 2001-02).
CIT v. Millipore India P. Ltd. (2012) 341 ITR 219/77 DTR 49 (Karn.)(High Court)

S.80HHC :Deduction – Export business - Computer software recorded on magnetic tapes, floppies, discs or CDs is goods or merchandise and entitled to deduction for export thereof. (S. 80HHE)

Computer software recorded on magnetic tapes or floppies, discs or CDs, etc., would amount to goods or merchandise and entitled to deduction under section 80HHC. Though special provision is introduced for export of software with effect from April 1, 1991, the assessee is entitled to deduction under general provision for period prior thereto under section 80HHC. (A. Y. 1989-90).
CIT v. Ajay Automation (P) Ltd. (2012) 341 ITR 577/70 DTR 465 (AP.)(High Court)

S.80HHC:Deduction-Export business- Sale in India-Export-Sale to UNICEF in India is not considered as "export outside India" hence not eligible for deduction under section 80HHC.

The assessee is engaged in the business of metal printing , coating etc. During the year it sold certain goods to UNICEF in India and treated the sale as "export sales" for the purpose of relief under section 80HHC. The payment for the said goods were received in "convertible foreign exchange". The assessee treated the sale as deemed export. The Assessing Officer held that the said goods never crossed the territory of India and therefore , it could not be said that the assessee had exported the goods outside India or that it was engaged in the business of export outside India In an appeal the Commissioner (Appeals) and Tribunal upheld the view of Assessing Officer. On appeal to High Court , the Court held that plain and simple meaning of the term "export outside India" would entail the transfer of goods out of territory of India ; goods must physically move out of India at least in so far as tangible goods are concerned , therefore the assessee is not entitled to deduction under section 80HHC in respect of sale to UNICEF in India.(A.Y. 1988-89)
Indian Del (P) Ltd v. CIT (2012) 68 DTR 225 (Delhi) (High Court)

S.80HHC: Deduction-Export business-Premium on sale of export quota-Business income- Premium on sale of export quota is not covered by clauses 28(iiia) to 28(iiic) hence not to be considered for deduction. Revision of order under section is held to be valid. (S. 28(iiia), 28(iiib), 28(iiic), 263)

The assessee earned export quota premium of Rs.27,68,991/- in the assessment year 2003-04. 10 percent of the amount was taken in to consideration under Explanation (baa) to section 80HHC. However, the export quota premium was not taken in to consideration while applying the proviso to section 80HHC on the ground that it did not fall within the section 28(iiia), (iiib) and (iiic). On appeal Commissioner(Appeals) held that export quota premium should be given the same treatment as the DEPB for the assessment year 2003-04. The Tribunal held that the assessee is entitled to the benefit of increase to the profit as provided in the proviso to section 80HHC(3) for the assessment year 2003-04). The assessment of the assessee was completed under section 143(3) for the assessment years 2001-02 and 2000- 01 accepting the computation of assessee . Commissioner under section 263 has held that Assessing officer had wrongly included premium on sale of quota rights as covered for deduction under section 80HHC. The Tribunal held that the revision was not justified in view of circular issued by the Board. On appeal the Court held that the premium on sale of export quota is not covered by clauses 28(iiia) to 28(iiic) and therefore cannot be taken in to consideration. The Court also held that the Tribunal was wrong in holding that the order passed by Commissioner under section 263 was bad in law and contrary to the provisions of the Act. Accordingly the matter was decided in favour of revenue. (A.Ys. 2000-01 , 2001-02, 2003-04)

CIT v. Nagesh Knitwers P.Ltd and others (2012) 345 ITR 135/74 DTR 170 (Delhi) (HighCourt)

CIT v.Orient Crafts Ltd(2012) 345 ITR 135/74 DTR 170 (Delhi) (HighCourt)

CIT v.Vogue Setters(2012) 345 ITR 135/74 DTR 170 (Delhi) (HighCourt)

S.80HHC:Deduction-Export business-DEPB-Proviso-Constitutional validity-Retrospective effect given to 3rd & 4th Provisos to S. 80HHC is ultra vires,amendment is prspective , retrspectivity is held to be nt valid. (Constitution of India Articles 14, 19(1)(g), 226)

The Third & Fourth Provisos to S. 80HHC were inserted by the Taxation Laws (Second Amendment) Act, 2005 with retrospective effect from 1.4.1998 to provide that the deduction in respect of exporters having a turnover of more than Rs.10 Crore would be available only if he has evidence to prove that he had an option to choose either duty drawback or DEPB and that he chose DEPB, even when he was entitled to higher benefit under the duty drawback scheme. The assessee claimed that this was an absurd condition because no sensible person would ever exercise the option to choose a scheme under which he would get lesser benefit. The retrospectively of the amendment was challenged on the basis that it was arbitrary and discriminatory under Articles 14 & 19 of the Constitution. Held upholding the challenge:

(i) The assessee's contention that the classification based on turnover is arbitrary cannot be accepted because this is a recognized way of classification throughout the world. Progressive levy is based on income classification in terms of both, the basis of taxation and the rate of tax is not arbitrary;

(ii) The assessee's contention that the amendment should be declared ultra vires being violative of the principles of promissory estoppel and legitimate expectation is also not acceptable because there is no estoppel against legislation. The legislature is not bound by the doctrine of promissory estoppel;

(iii) However, the amendment is violative of Article 14 of the Constitution of India because two assessees of the same class are placed on different footing. While some assessees whose export turnover is more than Rs.10 Crore and who have claimed deduction u/s. 80 HHC on DEPB / DFRC in their ROI and the assessments have become final are given the benefit of deduction without compliance of the conditions imposed by the Taxation Laws (Second Amendment) Act, 2005, assessees whose turnover is more than Rs.10 Crore, and who have claimed deduction u/s. 80 HHC on DEPB/DFRC and whose assessments are pending either before the AO or the appellate authority would be required to comply with those two conditions retrospectively. Two assessees of similar description having export turnover of more than Rs.10 Crore are discriminated inasmuch as the assessees whose assessments have become final is not required to comply with the two conditions and would avail deduction u/s. 80 HHC as against the assessees whose assessments are pending and who would be required to comply with the two conditions. A benefit based on pendency of proceedings of assessment and discrimination based thereon definitely violates Article 14 of the Constitution. In the matter of completion of assessment, the assessees have little role to pay. After the assessees have submitted their returns within the time fixed by law, if for any reason the AO delays in making the assessment, taking advantage of their own delay, the Revenue cannot deprive a class of the assessees of the benefit whereas other assessees of the same class whose assessment have already been completed would get the benefit;

(iv) Although in taxing statute laxity is permissible and a benefit given to the assessee can be curtailed, the same must be effective from a future date and not from an earlier point of time. If after inducing a citizen to arrange his business in a manner with a clear stipulation that if the existing statutory conditions are satisfied, in that event, he would get the benefit of taxation and thereafter, the Revenue withdraws such benefit and imposes a new condition which the citizen at that stage is incapable of complying whereas if such promise was not there, the citizen could arrange his affairs in a different way to get similar or at least some benefit, such amendment must be held to be arbitrary and if not, an ingenious artifice opposed to law. Consequently, the amendment is quashed to the extent it is retrospective. (A.Ys. 1988-89 to 2004-05)

Avani Exports and others v. CIT (2012)348 ITR 391/ 74 DTR 97/252 CTR 473(Guj.)(High Court)

S.80HHC: Deduction-Export business-Depreciation-Supporting manufacture - Loss in business - Depreciation is to be allowed even if not claimed by assessee in the return-If there is loss the same has to be adjusted from the composite business.

While computing the total income , the assessee did not claim depreciation in respect of assets used for the purpose of assessee's business. Depreciation was also not claimed while computing the deduction under section 80HHC. Following the full bench decision in Plastiblends India Ltd v. Addl. CIT (2009) 318 ITR 352 (FB)(Bom.)(High Court), the court held that depreciation has to be allowed to the assessee while working out deduction under section 80HHC and also while working out income under then head "Business" even if not claimed by the assessee in the return. In calculating the profits under section 80HHC(3)(c)(i), the profits determined under section 80HHC(3)(c)(ii) has to be reduced from the composite profits and if there is loss, same has to be adjusted, same analogy, if the assessee has issued certificate to supporting manufacturer. (A.Ys. 1994-95 to 1996-97)

CIT v. V. M. Salgaonkar & Brothers Ltd (2012) 72 DTR 369/253 CTR 59 (Bom.) (High Court).

S.80HHC: Deduction-Export Business-Retrospective effect given to 3rd & 4th Provisos to s. 80HHC is ultra vires .(S.28(iiid), 28(iiia))

The assessee filed a Writ Petition to challenge the constitutional validity of clause (iiid) and (iiie) to s. 28 and the insertion of the third and fourth provisos to s. 80HHC by the Taxation Laws (Amendment) Act, 2005. Similar matters had been filed before various High Courts. Pursuant to the department's application, the Supreme Court directed that the matter should first be decided by the Gujarat High Court. The Gujarat High Court allowed the Petition in Avani Exports vs. CIT and held that retrospective effect given to 3rd & 4th Provisos to s. 80HHC is ultra vires. Held by the Bombay High Court:

In Avani Exports, it was held that the amendment is violative for its retrospective operation in order to overcome the decision of the Tribunal, and at the same time, for depriving the benefit earlier granted to a class of the assessees whose assessments were still pending although such benefit will be available to the assessees whose assessments have already been concluded. In other words, in this type of substantive amendment, retrospective operation can be given only if it is for the benefit of the assessee but not in a case where it affects even a fewer section of the assessee. The amendment was quashed to the extent that the operation of the said section could be given effect from the date of the amendment and not in respect of earlier assessment years of the assessees whose export turnover is above Rs. 10 Crore. In other words, the retrospective amendment should not be detrimental to any of the assessee. As the Supreme Court had transferred all the matters to the Gujarat High Court in order to avoid confusion and difficulties in enforcement of conflicting judgments of different High Courts, it would be appropriate to follow the judgment of the Gujarat High Court.(A.Y.)

Vijaya Silk House (Bangalore) Limited vs. UOI (Mum.)(High Court) www.itatonline.org

S.80HHC:Dedcution-Export Business-Duty drawback and credit under Duty Entitlement pass Book scheme-DEPB credit would fall under clause(iiib), and premium received would represent profits chargeable under clause (iiid) of section 28 , deduction to be allowed accordingly. (S 28(iiib),(iiid))

The Assessing Officer treated the gross amount of DEPB (i.e. premium received on transfer plus the credit to the DEPB) as profit of business under clause (iiid) of section 28 and excluded the same from the eligible profits.. In appeal Commissioner (Appeals) following the Topman Exports v.ITO (2009) 33 SOT 337 held that section 28(iiid) will only cover profit on transfer on DEPB credit . He held that the conditions of the third proviso to section 80HHC(3) of the

Act were not fulfilled and therefore only conditional; benefit would be granted. Appeal was filed by revenue and assessee. The matter was restored to the file of Assessing officer to follow CIT v. Kalphataru Colurs & Chemicals (2010) 328 ITR 451 (Bom.) (High Court). On appeal to the High Court by assessee the court following the judgment of Supreme court in Tpoman Exports v. CIT (2012) 205 Taxman 119 (SC) drawback and credit under Duty Entitlement pass Book scheme-DEPB credit would fall under clause(iiib), and premium received would represent profits chargeable under clause (iiid) of section 28, deduction to be allowed accordingly. (S 28(iiib),(iiid))(A.Y. 2002-03)
Pal Enterprises v. CIT (2012) 209 Taxman 11 (Delhi) (High Court)

S.80HHC:Dedcution-Export Business - Surrender in the course of survey-Profits of business-Treating the surrendered amount as business income will lead to anomalies while computing deduction under section 80HHC(3) .The formula itself is unworkable .(S. 133A)

In the course of survey the assessee surrendered an amount of Rs 75 lakhs under the head business income to by peace with department .In the return of income the assessee claimed the surrendered income as business profits and claimed deduction under section 80HHC.The Assessing Officer disallowed the claim on the ground that the surrendered income was not business profits and the same was not related with foreign exchange. In appeal the Commissioner (Appeals) held that amount surrendered has to be assessed under section 68 and 69A under the head income from other sources .On further appeal to Tribunal the tribunal accepted the surrendered amount as business income and entitled to deduction under section 80HHC.On appeal to the High Court by revenue the court held that treating the surrendered amount as business income will lead to anomalies while computing deduction under section 80HHC(3) .The formula itself is unworkable The court held that there cannot be any presumption that the surrendered income should be treated as income from exports. Accordingly the appeal of revenue was allowed. (A.Y. 1997-98)
CIT v. Goel Jewellers (2012) 74 DTR 345 (Delhi) (High Court)
Goel Jewellers v.CIT (2012) 74 DTR 345 (Delhi) (High Court)

S.80HHC:Deduction- Export-Manufacturing- Trading-Consolidated export activity of manufactured goods and trading goods are to be taken in to account for claiming relief under section 80HHC .(S.80AB)

The Assessee company has claimed deduction under section 80HHC with regard to profit of trading goods in which it gained the profit. It had suffered the loss in respect of its manufactured goods . The Assessing denied the deduction by considering both business together to compute deduction .High Court up held the view of Assessing Officer and appeal of revenue was allowed.*(A.Y. 1992-93)*
CIT v. Harrisons Malayalam Ltd (2012) 76 DTR 335/210 Taxman 115 (Ker.)(High Court)

S.80HHC:Deduction – Export business- Addition as unexplained cash credits. (S.68)

Assessee is engaged in export business. Assessing officer made addition under section 68 on account of unexplained cash credits appearing in books of assessee. Assessee claimed deduction under section 80HHC in respect of addition made on account of creditors. The Tribunal held that since creditors in assessee's case represented purchasers, benefit of section 80HHC was to be allowed to assessee.(A.Y. 2001-02).
Dy. CIT v. Divine International (2012) 134 ITD 148 (Delhi)(Trib.)

S.80HHC:Deduction-Export business-Export oriented undertaking- Profits of business-Profits of EOU unit shall form part of head income' profits and gains of business or profession' and therefore same is includible in 'profits of business of assessee'.(S.10B)

The assessee had two units namely EOU unit and DTA unit and both have domestic as well as export turnover . While the EOU unit was entitled for deduction under section 10B, the DTA Unit was entitled for deduction under section 80IA. The DTA unit is entitled to deduction under section 80HHC on its export profit . The assessee has included export sales of EOU in the export turn over of it while computing deduction under section 80HHC. The Assessing Officer and Commissioner (Appeals) rejected the inclusion of export sales of EOU. The Tribunal held that section 10B is amended by the Finance Act , 2000 , with effect from 1-4-2001 and also section 80A (4) with effect from 1-4-2003 . These amended provisions contains adequate expressions in them to infer and interpret that the provision of section 10B is a 'deduction' provision and not exemption provision. Accordingly following the ratio of judgment in Hindustan

Unilever Ltd v. Dy.CIT (2010) 325 ITR 102 (Bom) high court , the Tribunal held that the profit of EOU unit shall form part of the head of income 'profits and gains of business or profession' and therefore same shall be includible in the 'profits of the business' of the assessee.(A.Y.2001-02)

Serum Institute of India Ltd v. Addl .CIT (2012) 135 ITD 69 / 147 TTJ 594/72 DTR 89 (Pune) (Trib.)

S.80HHC:Deduction-Export business- Excise duty-Excise duty should not be included in total turnover for the purpose computation under section 80HHC-Mistake of chartered accountant in the form 10CCAC can not be relied upon by revenue for reducing the legitimate claim allowable as per provisions of the Act.

The Chartered accountant of assessee in the form 10CCAC has included the excise duty as part of total turnover. The assessee made the claim that in the export sales there is no excise duty and therefore adding the excise duty was not correct. In appeal Commissioner confirmed the addition . On appeal to Tribunal the Tribunal held that the tax liability has to be determined in accordance with law and mistake made in the certificate of chartered accountant on form no 10CCAC should not have been relied upon by the revenue for reducing the legitimate claim for deduction under section 80HHC, accordingly the claim of the assessee was allowed.(A.Y.2004-05)

Schrader Duncan Ltd v. Addl.CIT (2012) 50 SOT 68 (Mum.) (Trib.)

S.80HHC:Deduction-Export business-Unabsorbed business loss- Depreciation-As there was no profit after set-off of unabsorbed business losses and depreciation of earlier year claim of section 80HHC is rejected.

While determining the business profit for the purpose of Section 80HHC of the Act unabsorbed business losses and depreciation of the earlier years to be set-off. Where after set-off of business losses and unabsorbed depreciation there are no eligible profits, claim of deduction under Section 80HHC to be rejected.(A.Y. 2003-04 , 2004 – 05, 2006 – 07)

Mafatlal Denim Ltd v. Dy. CIT (2012) 135 ITD 483/147 TTJ 346/72 DTR 281(Mum.)(Trib.)

S. 80HHC:Deduction-Export business-Export oriented undertaking-Turnover-Eligible units- Both units section 10B eligible units as well as non-eligible units, profit claimed as deduction u/s 10B cannot be included for deduction u/s 80HHC.

Where an exporter has both Section 10B eligible units as well as non-eligible units, turnover of 100% export oriented undertaking, whose profits have been claimed as deduction under Section 10B, cannot be included in total turnover for purpose of computing deduction under Section 80HHC. (A.Y. 2003-04)

Crew B.O.S. Products Ltd v. Asst. CIT (2012) 135 ITD 542 / 147 TTJ 628/74 DTR 203 (Delhi)(Trib.)

S.80HHC:Deduction – Export business - Trading goods-Indirect cost – Only indirect cost attributable to export have to be reduced first and not all costs other than direct costs.

Only indirect cost attributable to export have to be reduced for computing the deduction under section 80HHC in respect of export of trading goods and not all costs other than direct costs. In other words, first, attribution of indirect costs to the export of trading goods is to be made and then only scaling down in proportion is to be resorted to. (A.Y. 2003-04)

B. Parameswaran Bharathan v. Dy. CIT (2012) 136 ITD 119/ 72 DTR 354(TM)(Cochin) (Trib.)

S.80HHC:Deduction – Export business-Trading goods – Only indirect cost attributable to export have to be determined.

While computing deduction under Section 80HHC, indirect costs attributable to export of trading goods has to be first determined and then proportion of trading goods turnover to total turnover be applied to it. (A.Y. 2002-03 and 2003-04)

Dy. CIT v. Kerela Nut Food Co. (2012) 136 ITD 219 /147 TTJ 564/73 DTR 124 (TM) (Cochin)(Trib.)

S. 80HHC: Deduction – Export business-Turnover-Export house-Held can not be considered as turnover of assessee.

Exports through export houses cannot be treated as export turnover of the assessee for the purpose of second proviso to section 80HHC(3); since the export turnover of the assessee from direct exports is less than Rs. 10 crores, it is entitled to benefit of second proviso to S. 80HHC(3). (AY 2001-02)

Baby Marine Products v. ACIT (2012) 147 TTJ 385 / 73 DTR 169 (TM)(Cochin)(Trib.)

S.80HHC:Deduction –Export Business –Direct cost- Direct cost in respect of goods exported but sales proceeds not been brought in India within specified period ,cannot be reduced while computing deduction.

Direct cost incurred in respect of goods which have been exported but sales proceeds have not been brought in India within specified period, cannot be reduced while computing deduction u/s 80HHC. The appeal of revenue was allowed. (A.Ys. 1998-99 & 1999-2000)

Dy. CIT v. Sandoz (P.) Ltd. (2012) 137 ITD 326 (Mum.)(Trib)

S.80HHE:Deduction – Export business-Computer software-Foreign currency-Development and export of software.

The Tribunal has not considered the relevant documents which would clearly show that the expenses incurred in foreign exchange was towards technical services rendered outside India and not for development of software outside India. Once it is held that expenditure incurred for the relevant assessment years pertains to technical services outside India, the same has to be excluded from the export turnover for the purpose of arriving at the deduction admissible under section 80HHE, therefore, High Court set aside the finding of Tribunal.(A. Y.1993-94,1994-95 & 1996-97)

CIT v. Infosys Technologies Ltd. (2012) 65 DTR 353/ 246 CTR 371 (Karn.)(High Court)

S.80HHE:Deduction – Export business- Computer software - Fluctuation in valuation of currency which has direct nexus of export of software has to be taken into consideration for allowing deduction under section 80HHE.

The Court held that fluctuation in the valuation of currency which has to be converted to foreign currency has direct nexus to the export of software should be taken into consideration for computation of deduction under section 80HHE, said amount cannot be assessed as income from other sources. (A. Y. 1998-99).

CIT v. Infosys Technologies Ltd. (2012) 205 Taxman 59 (Karn.)(High Court)

S.80HHE: Deduction-Export business-Computer software –Exchange rate fluctuation rate variation gain has not to be excluded from total turnover and export turn over, in favour of assessee.

The Assessing Officer held that exchange rate fluctuation gains had to be excluded from total turnover and export turnover for computation of deduction under section 80HHE of the Act in view of explanation (e) to section 80HHE of the Act, which contemplates only actual amount of foreign exchange received in India . In appeal the Tribunal set aside the said finding. On appeal by revenue to High Court, the court up held the view of Tribunal and held that the exchange rate variation gain has not to be excluded from total turnover and export turnover for computing of deduction under section 80HHE .(A.Y. 1999-2000)

CIT v. Infosys Technologies Ltd (2012) 205 Taxman 250 (Karn. (High Court)

S.80HHE:Deduction-Export of computer software-Computer software-Turnover- Turnover of foreign branches has been reduced by revenue from export turnover, excludible from figure of 'Turnover' for purpose of computing deduction under section 80HHE

Where turnover of foreign branches has been reduced by revenue from export turnover, same is excludible from figure of 'Turnover' for purpose of computing deduction under Section 80HHE (AY 2002 -03& 2003 – 04)

Patni Computer Systems Ltd. v. Dy. CIT (2012) 135 ITD 398 / 16 ITR 533 (Pune)(Trib.)

S.80HHF:Deduction-Export or transfer of film software- EOU- Deduction is not available in both the sections.(S. 10B)

Assessee set up an EOU unit. It claimed deduction u/s 10B. With regard to its other businesses it claimed deduction under section 80HHF. While computing deduction u/s 80HHF it included export profit of EOU. The Commissioner (Appeals), however, reduced profit derived from EOU on ground that profit derived by EOU was exempt from tax under section 10B. The Tribunal held that the express intention of Legislature with regard to sections 10B and 80HHF is not to allow deduction under both sections and further, both of said sections expressly prohibits to allow deduction other than allowable under respective sections. Therefore, order of Commissioner (Appeals) was confirmed (A.Y. 2001 – 2002)

ACIT v. Sri Adhikari Brothers Television Network Ltd. [2012] 137 ITD 154/149 TTJ 324 (Mum.)(Trib.)

S.80I:Deduction – New industrial undertaking – Manufacture - Dry cleaning charges do not constitute income derived from industrial undertaking hence not eligible for deduction.

Assessee which is engaged in the business of manufacturing and sale of cotton hosiery goods, claimed deduction under section 80I in respect of dry cleaning charges. The Court held that dry cleaning charges do not constitute income derived from industrial undertaking, hence, not eligible for deduction. (A. Ys. 1990-91 & 1991-92).

Nahar Spinning Mills Ltd. v. CIT (2012) 66 DTR 257 / 250 CTR 367 (Pe&H.)(High Court)

S.80I :Deduction - New Industrial undertaking - Substantial expansion - Despite "Dependence" on Old unit, unit can be "New Industrial Undertaking" and entitled to deduction.

The assessee had a plant to produce caustic soda. It increased capacity from 37425 MT to 70425 MT by installing "12 new cells" and incurred expenditure of Rs. 7.5 crore towards new machinery and plant added to the existing plant. The assessee claimed that a "new industrial undertaking" had come into being which was eligible for relief under section 80-I. The Assessing Officer, CIT(A) & Tribunal disallowed the claim on the ground that it was a case of substantial expansion and not a "new industrial undertaking" on the ground that though new plant and machinery by investing substantial funds had been installed, the undertaking was not an "integral unit by itself" but was dependent on the old undertaking for its functioning. On appeal by the assessee to the High Court, held reversing the lower authorities:

The principal object of section 80-I is to encourage setting up of new industrial undertakings by offering tax incentives. A reasonable and purposive construction should be adopted. There is no logic in the argument of the department that the true test would be as to whether a new industrial undertaking can function independently of the existing industrial undertaking. If this argument is accepted, it will amount to adding a new clause in section 80-I of the Act. The fact that the new unit is not capable of independently producing the goods without taking the assistance of the existing plant and machinery of the old unit is no ground to reject the claim under section 80-I. The test laid down in Textile Machinery Corporation Ltd v.CIT (1977) 107 ITR 195 (SC), namely that the new unit should have a "separate and distinct identity" is not violated only because the new undertaking is to a certain extent dependent on the existing unit. It all depends on the nature of the technology and the mechanism of production. One cannot ignore the fact that new machinery and new plant have been installed at an investment of Rs. 7 crore and the fact that production has gone from 34000 MT to 75000 MT (CIT v.Associated Cement Companies Ltd (1979) 118 ITR 406 (Bom) (High Court) distinguished / explained).(A.Y.1982-83)

Gujarat Alkalies & Chemicals Ltd. v. CIT(2012) 249 CTR 82 /69 DTR 57 / Vol. 42 Jan. T.L.R. 59 (Guj.)(High Court)

S.80I: Deduction – New Industrial undertaking- Computer data processing-–Activity of computer data processing services and sale of computer stationary amounted to manufacture or production of any article or thing, thus deduction allowed.

The assessee is an industrial undertaking carrying out activity of computer data processing services and sale of computer stationary amounted to manufacture or production of any article or thing. It was held that assessee was entitled to special deduction u/s 80I. (AY 1989-90 and 1990-91)

CIT v. Business Information Processing Services (2012) 345 ITR 548/74 DTR 21 (Raj.)(High Court)

S.80IA: Deduction-Industrial undertakings- Books of account- In absence of separate books, Assessing Officer is entitled to estimate eligible profits.(S.145)

The assessee manufactured yarn and also sold raw wool, wool waste and textile and knitting cloth. It claimed a deduction of 30% in respect of the profits of the "manufacturing activity". As the assessee had not maintained accounts for manufacture of yarn actually produced as a part of industrial undertaking, the AO worked out the manufacturing account giving a bifurcation in terms of quantity of raw wool produced. The assessee challenged the preparation of separate trading account by the AO in respect of manufacturing and trading activities. The CIT(A) upheld the assessee's claim though the Tribunal and High Court upheld the AO's stand. On appeal by the assessee to the Supreme Court, held dismissing the appeal:

The findings given by ITAT and the High Court are findings of fact. We are not concerned with the interpretation of Section 80IA of the Act. On facts, we find that the assessee ought to have maintained a separate account in respect of raw material which it had sold during the assessment year. If the assessee had maintained a separate account, then, in that event, a clear picture would have emerged which would have indicated the income accrued from the manufacturing activity and the income accrued on the sale of raw material. We do not know the reason why separate accounts were not maintained for the raw material sold and for the income derived from manufacture of yarn.(A.Y. 1998-99)

Arisudana Spinning Mills Ltd v. CIT(2012) 210 Taxman 233 (SC)

S.80IA:Deduction-Industrial undertakings-Infrastructure development-In land port-Inland container depots-Inland container depots are inland ports and entitled to exemption as per section 80IA(4) as infrastructure facility.

The assessee is a public sector undertaking engaged in the business of handling and transportation of containerized cargo to and from industrial centers used to face bottlenecks at the sea ports due to logistical and handling issues and issues relating customs. From the assessment year 1999-2000 that inland ports started enjoying deduction under section 80IA as infrastructure facility. Assessee claimed deduction in respect of income from Inland container depots. Tribunal has disallowed the claim. On appeal to High Court by the assessee, it was held that having regard to the provisions the Customs Act, the communications issued by the CEBC as well as the Ministry of Commerce and industry , the object of including "inland port" as an infrastructure facility and also having regard to the fact that customs clearance also takes place in the Inland container depot , the assessee' claim the Inland container depots are in land ports under explanation (d) to section 80IA (4) .(A.ys 2003-04 & 2005-06)

Container Corporation of India Ltd v. ACIT (2012)346 ITR 140/ 72 DTR 297/252 CTR 67 (Delhi) (High Court).

S.80IA:Deduction- Industrial undertakings – Infrastructure development - Industrial park - Application for notification was not made before cutoff date i.e 31 St March 2006 on which date the 2002 scheme came to an end, the assessee is not entitled to claim benefit under section 80IA(4)(iii).

The petitioner company filed an application on 23rd September, 2006 with the Ministry of Commerce and Industries for registration of the Industrial park under the Industrial Park Scheme, 2002, to avail of benefits / exemption under section 80IA of the Income-tax Act. On the said date the 2002 Scheme was not in operation and was not applicable. On the facts the industrial park set up by it not being operational by 31st March 2006 and completion certificate for the park having been issued on 29th August, 2007, the petitioner's industrial park could not be notified /approved under Industrial Park Scheme, 2002 for claiming benefit of section 80IA(4) (iii). The Court also rejected the plea of promissory estoppels. The Court held that Application for notification was not made before cutoff date i.e 31st March 2006 on which date the 2002 scheme came to an end, the assessee is not entitled to claim benefit under section 80IA (4)(iii).

Regency Soraj Infrastructures v. UOI (2012)345 ITR 105/ 249 CTR 280/70 DTR 29 / 205 Taxman 62 (Delhi)(High Court)

S.80IA:Deduction– Industrial undertaking – Infrastructure Development – Deduction allowed in initial year (A.Y.2004-05), hence deduction cannot be disallowed in AY 2006-07 on ground of fulfillment of conditions of sub-section (3) thereof r/w cl.(ii) of sub-s (4) of S. 80IA inserted w.e.f. 1/4/2005.

Assessee engaged in providing fax and email services was granted license for carrying on internet and internet telephony services w.e.f. October 2000. The assessee having been allowed deduction under Section 80IA in A.Y. 2004-05 as an undertaking engaged in business of internet and internet telephony services, same could not have been disallowed in A.Y. 2006-07 on the ground of fulfillment of conditions of sub-section (3) thereof r/w cl.(ii) of sub-s (4) of S. 80IA inserted w.e.f. 1/4/2005. (A.Y. 2006-07)

CIT v. TATA Communications Internet Services Ltd. (2012) 71 DTR 303 / 204 Taxman 606 (Delhi)(High Court)

S.80IA:Deduction- Industrial undertakings –Expansion of existing unit- New unit- - Commencement of commercial production-Installation of new plant and machinery will amount to new industrial undertaking hence the assessee entitled to deduction.

The assessee has claimed deduction under section 80IA of the income-tax Act , in respect of its Silvasa Unit and its Achhad Unit . The Assessing Officer has rejected the claim .The Commissioner (Appeals) also up held the order on the ground that the deduction under section 80IA is applicable only on those undertakings which had commenced commercial production before March 31, 2000. The Tribunal held that the assessee had started manufacturing some new items of the same nature and for the purpose installed some new plant and machinery along with the old plant and machinery, in the same unit, at the same factory site without any basic change in the administrative set up or business organisation. The Tribunal also noted that earlier the assessee had engaged in the manufacture of stationery items and the new products were of the same nature. The Tribunal held that the assessee is entitled to deduction. On

appeal by the revenue the High Court also held that on subsequent installation of new plant and machinery deduction cannot be denied as the commencement of commercial production was before 31-3-2010.
CIT v. Hindustan Pencils Ltd. (2012) 343 ITR 379/74 DTR 343 (Bom.)(High Court)

S.80IA:Deduction-Industrialundertakings-Manufcature-Development, preparation of voters identify card amounts to manufacture.

Development, preparation of voters identify card amounts to manufacture as its preparation requires to process the data, print the same on cards, held hologram containing the state emblem, taking photograph of the voter, match the photo with voter's data, affix the same on the cards and lamination of the cards and lastly take its master copy. All these processes give a complete new final product. Therefore, it amounts to manufacture and the unit engaged in the production of voters identity cards is an Industrial undertaking eligible for the claim of deduction u/s. 80-IA.(A.Y.
CIT v. Haryana State Electronic Dev. Co-operation (2012) 250 CTR 316/71 DTR 322 (P&H.)(High Court)

S.80IA:Deduction-Industrial development park-Rejection of application-Rejection of application was not justified only on the ground that development park was completed beyond 31-3-2006.

It is not a condition precedent for grant of approval under section 80 IA (4) (iii) of the Act that the undertaking must commence operations by 31.03.2006. Therefore the Empowered Committee was held to be not justified in rejecting the application for notification of approved units under section 80 IA (4) (iii) of the Act under the Industrial Park Scheme of 2002 only on the ground that development of park was completed beyond 31.03.2006.
Silver Land Developers (P) Ltd. v. Empowered Committee & Ors. (2012) 70 DTR 15 / 249 CTR 255 (Bom.)(High Court)

S.80-IA: Deductions-Industrial undertakings –Manufacture-Conversion of HDPE bags in to laminated HDPE bags will amount to manufacture or production of goods.

The assessee is a small scale industrial undertaking located in back word area which is engaged in the manufacturing of laminated sacks. The assessee claimed deduction under section 80IA The Assessing Officer held that the activity of assessee cannot be considered as manufacturing of article or things hence disallowed the claim. This was confirmed by the Tribunal. On appeal to the High Court held that, process under taken by the assessee brings about a structural change in semi finished HDPE bags and brings in to existence laminated HDPE bags which are put entirely different kind of use and thus assessee was manufacturing an article or thing and therefore , was entitled to section 80IA deduction .(A.Y.1995-96)
Jhaveri Coaters (P) Ltd v. ACIT (2012) 74 DTR 145 (Guj.)(High Court)

S.80IA: Deduction- Industrial undertakings-Infrastructure development- Joint venture- Consortium.

Assessee company formed joint venture which was awarded a contract a contract by irrigation department.40 percentage of works awarded was to be executed by assessee as one of constituents of JV and 60 percent by other constituent. Similarly the assessee also formed consortium along with one 'CT' of Moscow and assessee was to execute 100 percent of works which were awarded to said consortium. Assessee claimed deduction under section 80IA(4) on profits of aforesaid works. Assessing Officer disallowed the claim. The Tribunal held that (1)on facts the joint venture is only a de-jure contractor and assessee is de–facto contractor.(2) The joint venture and assessee cannot be held to be main contractor and members as sub-contractors.(3) Each joint venture would stand in relation to a principal as well as agent of others (4) Since Joint venture and consortium was formed only to obtain the contract from Government body, benefit of deduction under provisions of section 80IA(4) was to be allowed to any enterprise carrying on business of developing or operating and maintaining any infrastructure facility subject to fulfillment of other conditions. (A.Y. 2006-07).
Transstory (India) Ltd. v. ITO (2012) 134 ITD 269 / 70 DTR 66 / 146 TTJ 364 (Visakha.)(Trib.)

S.80IA:Deduction - Industrial undertakings-Infrastructure development-Computation of revision of claim was allowed - When assessee maintained a separate books of account apportionment of other expenses of other unit on turn over basis held to be not proper.

Assessee in the return of income claimed the excess depreciation due to mistake. The same was rectified and revised chart was filed due to which claim under section 80IA was increased. The Tribunal held that assessee is entitled to deduction as per revised chart. Assessee maintained separate books of account, and also allocated the expenses. The Assessing Officer allocated the expenses in "total turn over ratio". The Tribunal held that when the assessee maintained

a separate books of account apportioned of expenses on the basis of "total turn over ratio" was not proper and dismissed the appeal of department. (A. Y. 2006-07).

ACIT v. P. I. Industries (2012) 144 TTJ 353/67 DTR 153 (Jodhpur)(Trib.)

S.80IA:Deduction-Industrial undertaking- Infrastructure development- Eligible business-Windmill-Loss of earlier year set off cannot be considered only the loss from the initial assessment year to be brought forward.

The assessee which is running a spinning mill, installed three wind mills ,the first year of commencement of business was the assessment year 2003-04.The assessee opted for A.Y. 2007-08 as the initial assessment year for the purpose of claiming deduction under section 80IA, in respect of wind mills. The assessee in the initial years set off the losses of wind mills against the profit of spinning mill division. The assessee did not claim deduction during the years it suffered losses. The Assessing Officer has held that the initial year should be taken as the year of commencement of business and not the year of claim of deduction and unabsorbed depreciation of the earlier years which had already been absorbed could be notionally carried forward and taken for computing the deduction. On appeal the Commissioner (Appeals) allowed the claim of assessee and directed the Assessing Officer to compute the profits under section 80IA (5) of the Act , as if such eligible business beginning from the initial assessment year were to be brought forward and not loss of the earlier years which had been already set off against the other income of the assessee. On appeal by revenue the Tribunal up held the order of Commissioner (Appeals) following the judgment in Velayudhasamy Spinning Mills P.Ltd v. Asst .CIT (2012) 340 ITR 477 (Mad.) (High Court)

ACIT v. Eveready Spinning Mills Ltd (2012) 14 ITR 491(Chennai) (Trib).

S.80IA:Deduction-Industrial undertakings-Infrastructure development-Industrial Undertaking Electricity-Annual loading cost- Profits in case of electricity collected by Electricity Board at lower rate to be determined on the basis of annual loading cost

The Electricity Board purchased power produced by assessee who was manufacturer of Yarn and had installed windmill for the purpose. Where electricity generated by assessee was collected by Electricity Board at lower rate and released to assessee whenever required, it was held that profits of the eligible undertaking were to be determined on the basis of the annual loading cost of electricity purchased by assessee from Electricity Board. (A.Y. 2007-08)

Excel Cotspin (India) P. Ltd. v. Dy. CIT (2012) 15 ITR 57 (Chennai)(Trib.)

S.80IA: Deductions-Industrial undertakings-Infrastructure development- Profit earned from related parties more in relation to unrelated parties, allowance of deduction u/s 80IB not to be restricted to same proportion at which profit was derived from unrelated parties - working of deduction to be made on individual basis and not on an average basis. (S.80IB)

The assessee company was engaged in the business of generation and distribution of power. The assessee claimed deduction u/s 80IA. The AO by invoking Section 80IA(10) restricted the allowance of deduction by determining the difference between the average price at which power was sold to sister concern and to other related parties. It was held that this section does not provide that if assessee earns more profit from related parties in relation to unrelated parties, then allowance of deduction u/s 80IB is to be restricted to same proportion at which profit was derived from unrelated parties, even in circumstances where profits derived from related parties were such that it could be expected to arise to such eligible business as ordinary profit. It was further held that working for provisions of section 80IA(10) has to be made on individual basis and not on an average basis. (AY 2008-09)

OPG Energy (P.) Ltd. v. Dy.CIT (2012) 52 SOT 321 (Chennai) (Trib.)

S.80IA: Deductions-Industrial undertakings-Infrastructure development- In land port-Container freight station is inland port hence entitled to deduction .

Container freight station is inland port hence entitled to deduction .(A.ys 2004-05 to 2009-10)(Note type full)

All Cargo Logistics Ltd v. Dy.CIT (2012)137 ITD 287/74 DTR 89/147 TTJ 513/ 18 ITR 106 (SB) (Mum.) (Trib.)

S.80IB: Deduction-Industrial undertaking- Other than Infrastructure development - **Income derived- The deduction is not available to service income, interest income, commission compensation for delayed payments and imported materials.**

The assessee which is involved in manufacturing activities and selling of additives on commission basis , claimed deduction under section 80IB on service income, interest on deposits interest received from employees, commission

received , compensation from sundry debtors for delayed payments and income on imported materials. Though the assessee preferred appeal against all the issues the court has admitted the appeal only in respect of service income and commission received. The court held that section 80IB and 80IA are code by themselves. As the finding has been given by the Tribunal that the income is not derived from industrial undertaking , deduction under section 80IB is not eligible. Order of Tribunal confirmed. (A.Y. 1999-2000)

Indian Additives Ltd v. Dy. CIT (2012) 67 DTR 389/2012 Tax LR 479 (Mad.) (High Court)

S.80IB:Deduction-Industraial undertaking - Other than Infrastructure development - Manufacture- Perfumed hair oil- Production of perfumed hair oil by using coconut oil and mineral oil amount to manufacture and entitled to deduction under section 80IB.

The assessee is engaged in the business of production of perfumed hair oil using coconut oil and mineral oil as per the requirement of Hindustan Lever Ltd . The assessee claimed the deduction under section 80IB.The Assessing Officer rejected the claim. On appeal before the Tribunal, the Tribunal allowed the claim of assessee. On appeal by revenue the Court following the ratio of supreme Court in CCE v. Zandu Pharmaceutical Works Ltd (2006) 12 SCC 453,wherein it has been held that addition of perfume to coconut oil to produce perfumed oil constitute a manufacturing process, hence decision of Tribunal holding that the assessee is engaged in manufacturing activity is justified . The appeal of revenue was dismissed.(A.Y. ITA no 5779 of 2010 dt 30-11-2011)

CIT v. Beta Cosmetics (2012) March –P 31 -683 (2012)43-B BCAJ (Bom.) (High Court)

S.80IB:Deduction-Industrail undertakings- Other than Infrastructure development -Manufacture or production- Rule of consistency – Appeal-High Court. (S.10BA(2)(e), 260A)

Department has not challenged the decision of Tribunal in the case of assessee for earlier years holding that the assessee is engaged in manufacturing activity and thus entitled to deduction under section 80IB. High Court refused to entertain the question applying the rule of consistency.(A.Y. 2005-06)

CIT v. Arts & Crafts Exports (2012) 66 DTR 85/ 246 CTR 463 (Bom.)(High Court)

Editorial:– Refer Arts & Crafts Exports v. ITO (2012) 66 DTR69/ 144 TTJ 56/(2011) 45 SOT 415(Mum..)(Trib.)

S.80IB:Deduction - Industrial undertakings - Factory licence - Deduction is available only in cases where application for license was made before the end of previous year (31st March , 2004) and not where it was not made at all or made after the end of previous year.

The assessee had started to manufacture its article or things before 31st March 2004, however the factory license was not obtained on the date of manufacture, the license was issued on 3rd May 2005. The assessee claimed deduction under section 80IB for the assessment year 2005-06. The Assessing Officer disallowed the claim, which was confirmed by Commissioner (Appeals). On appeal to the Tribunal, the Tribunal decided in favour of assessee holding that the conditions of section 80IB is satisfied. On appeal to the High Court the Court held that before starting a factory, intending manufacturer has to obtain license under Factories Act, running a factory without a valid licence is not only prohibited but is also personal offence, deduction under section 80IB was therefore allowable only in cases where application for license was made before end of previous year (31st March, 2004) and not where it was made at all or made after the previous year (A.Y. 2005-06)

CIT v. Jolly Ploymers (2012) 249 CTR 421 / 69 DTR 212 (Guj.) (High Court)
CIT v. Jitsan Enterprse (2012) 249 CTR 421 / 69 DTR 212 (Guj.) (High Court)
CIT v. Adarsh Packaging (2012) 249 CTR 421 / 69 DTR 212 (Guj.) (High Court)
CIT v. Padmey Impex (2012) 249 CTR 421 / 69 DTR 212 (Guj.) (High Court)
CIT v. Samrath Health Care (2012) 249 CTR 421 / 69 DTR 212 (Guj.) (High Court)

S.80IB:Deduction- Industrial undertakings-Workers-Casual or contractual-Casual or contractual workers are workers for the purpose of section 80IB(2)(iv) hence the assessee is entitled deduction.

The Assessing Officer denied the deduction on the ground that the assessee had not employed ten or more workers as required under section 80IB(2)(iv). The Assessing Officer has not considered the casual or the contractual employees and not treated them as workmen. On appeal the Appellate authorities treated the casual and contractual employees as workmen and allowed the claim of assessee. On appeal by revenue the Court up held the view of Tribunal and held that casual or contractual workers are workers and assessee is entitled to deduction under section 80IB. (A.Y.2006-07)

CIT v. Nanda Mint and Pine Chemicals Ltd (2012) 345 ITR 60 (Delhi) (High Court)

S.80IB:Deduction –Industrial undertakings- Other than Infrastructure development - -Excise duty income-Insurance claim.

Excise income and insurance claim received for shortage of material is entitle to deduction under section 80IB.(A.Y. 2006-07)

ITO v. Electro Ferro Alloys Ltd. (2012) 13 ITR 594 (Ahd.)(Trib.)

S.80IB:Deduction–Profits and gains from industrial undertakings-Form- Reassessment-Deduction has to be allowed though the form no 10CCB was filed in the course of reassessment proceedings.(Form No.10CCB)

By filing Form No.10CCB in the course of reassessment proceedings (which form was not filed with the return of income, nor was it filed in the course of assessment proceedings, the assessee is not making any fresh claim for deduction u/s. 80IB but merely furnishing the documents to substantiate its claim made during the course of assessment and even reassessment proceedings and hence deduction to be allowed. (A.Y. 2003-04)

DCIT v. Tide Water Oil Co.(I) Ltd, ITA No. 20151/Kol/10 dated 20-1-2012.BCAJ Pg. 27, Vol. 43 B Part 5, February 2012(Kol.) (Trib.)

S.80IB Deduction - Industrial undertakings – Small Scale - Computation- Cost of equipments such as tools, jigs dies, moulds, spare parts and consumable stores as well as vehicles have to be excluded for determining the status of assesses industrial undertaking as a small scale industrial undertaking.

The assesse claimed the deduction under section 80IB as a small scale industrial under taking treating the investment in Plant and machinery being less than 1 crore if items are considered as per notification dated 10 the December, 1999 issued under section 11B of the IDR Act i.e. tools, jigs, dies, moulds, fixtures patterns and spare parts for maintenance and cost of consumable stores are excluded and its net balance of plant and machinery comes to Rs.34,80,428 .

The Assessing Officer has not accepted the contention of assessee. On appeal the Tribunal held that cost of equipments such as tools, jigs dies, moulds, spare parts and consumable stores as well as vehicles value has to be excluded while computing the status as a small scale industrial undertaking and allowed the claim of assessee. (A.Y. 2004-05)

KHS Machinery (P) Ltd. v. ITO (2012) 69 DTR 283 (Ahd.)(Trib.)

S. 80IB: Deduction – Industrial undertakings – Investment in fixed asset exceeding prescribed limit, provision of s. 80IB (2)(iii) is not complied, hence deduction not allowed.

The assessee made investment in fixed asset in plant & machinery exceeding prescribed limit. Deduction could not be allowed where the assessee was not considered a small scale industrial undertaking u/s 11B of Industrial (Development & Regulations)Act, 1951 thereby not complying the provisions of Section 80IB (2)(iii). (A.Y. 2008-09)

Sawaria Pipes Ltd. v. ACIT (2012) 18 ITR 573 (Hyd.)(Trib.)

S.80IB(4):Deduction – Industrial undertakings-Other than Infrastructure development-assessee not applied for factory licence before 31 March 2004 – Necessary condition of deduction not fulfilled

To qualify for deduction under Section 80IB(4) of the Act, one of the essential requirement is that the industrial undertaking should have begun to manufacture or produce articles or things on or before March 31, 2004. It was held that where the assessee had not even applied for a factory licence before 31 March 2004, the necessary condition under Section 80IB was not fulfilled. However, where application for licence was already made before 31 March 2004, but licence was obtained shortly thereafter, such lapse must be viewed as purely technical. The grant of licence would not relate back to the original date of application. (AY 2005-06)

CIT v. Jolly Polymers (2012) 342 ITR 87/ 249 CTR 421 / 69 DTR 21 (Guj.) (High Court)

S.80IB(10):Deduction – Undertaking- Developing and building-Housing Project- Works contract-Eligible even if developer not "owner" of land.

The assessee entered into a 'development agreement' with the owner of the land pursuant to which it agreed to develop the land. Deduction under section 80-IB(10) in respect of the profits arising from the said activity was claimed on the

ground that it was "derived from the business of undertaking developing and building housing project approved by the local authority". The Assessing Officer & CIT(A) rejected the claim on the ground that the assessee was not the "owner" of the land and that the approval of the local authority to, and the completion certificate of, the "housing project" was given to the owner and not to the assessee. However, the Tribunal allowed the claim. On appeal by the department to the High Court, HELD dismissing the appeal:

Section 80IB(10) allows deduction to an undertaking engaged in the business of developing and constructing housing projects. There is no requirement that the land must be owned by the assessee seeking the deduction. Under the development agreement, the assessee had undertaken the development of housing project at its own risk and cost. The land owner had accepted the full price of the land and had no responsibility. The entire risk of investment and expenditure was that of the assessee. Resultantly, profit and loss also accrued to the assessee alone. The assessee had total and complete control over the land and could put the land to the agreed use. It had full authority and responsibility to develop the housing project by not only putting up the construction but by carrying out various other activities including enrolling members, accepting members, carrying out modifications engaging professional agencies and so on. The risk element was entirely that of the assessee. The assessee was a "developer" in common parlance as well as legal parlance and could not be regarded as only a "works contractor". The Explanation to section 80IB inserted w.r.e.f. 1.4.2001 has no application as the project is not a "works contract". Further, as the assessee was, in part performance of the agreement to sell the land, given possession and had also carried out the construction work for development of the housing project, it had to be deemed to be the "owner" under section 2(47)(v) r.w.s. 53A of the TOP Act even though formal title had not passed (Faqir Chand Gulati vs. Uppal Agencies(2008) 10 SCC 345 distinguished).

CIT v. Radhe Developers (2012) 341ITR 403/ 204 Taxman 543/ 249 CTR 393/69 DTR 185(Guj.)(High Court)

S.80IB(10):Deduction- Undertaking- Developing and building- Housing project-Multiple housing projects-Multiple housing projects on 1 Acre Plot is permissible, assesses eligible for deduction.

The High Court had to consider the following questions on interpretation of s. 80-IB(10): (i) what is a "housing project" u/s 80-IB(10)?, (ii) whether if approval for construction of 'E' building was granted by the local authority subject to the conditions set out in the first approval granted on 12.5.1993 for construction of A and B building, construction of 'E' building is an "extension" of the earlier housing project for which approval was granted prior to 1.10.1998 and, therefore, benefit of s. 80IB (10) cannot be granted?, (iii) whether the housing project must be on a vacant plot of land which has minimum area of one acre and if there are multiple buildings and the proportionate area for each building is less than one acre, s. 80-IB(10) can be denied?, whether the merger of two flats into one so as to exceed the maximum size of 1000 sq feet violates the condition set out in s. 80IB (10)? Held by the High Court:

(i) As the expression 'housing project' is not defined, it must have the common parlance meaning and means constructing a building or group of buildings consisting of several residential units. The approval granted to a building plan constitutes approval granted to a housing project. Construction of even one building with several residential units of the size not exceeding 1000 square feet would constitute a 'housing project' u/s 80IB (10);

(ii) 'E' building is an independent housing project and not an extension of the housing project already existing on the plot because when the earlier plans were approved, 'E' building was not even contemplated and came into existence much later. The fact that the approval was granted on the same terms as that granted to the other buildings does not make it an "extension";

(iii) S. 80IB (10)(b) specifies the size of the plot of land but not the size of the housing project. While the plot must have a minimum area of one acre, it need not be a vacant plot. The object of s. 80IB (10) is to boost the stock of houses. There can be multiple housing projects on a plot of land having minimum area of one acre;

(iv) On facts, as there was no merger of flats and no application was made to the local authority seeking merger of two flats, there was no violation. (A.Ys. 2004-05 & 2005-06)

CIT v.Vandana Properties (2012) 206 Taxman 584/76 DTR 363 (Bom)(High Court)

Editorial : Vandana Properties v. ACIT (2009) 27 DTR 282 (Mum.) (Trib.) is affirmed)

S.80IB(10):Deduction – Undertaking – Developing and Building - Housing project-Built up area- Common area- Common area has to be excluded from the built up area.

The assessee is engaged in the business of construction. The assessee claimed the deduction under section 80IB (10). The Assessing Officer has rejected the claim for the reasons that the built up area of some of the flats exceeded 1500 sq. ft. On appeal the Commissioner (Appeals) held that the assessee is entitled to deduction on pro rata basis. The appeal of revenue was dismissed by Tribunal. On appeal by the revenue to the High Court, the court held that if the area does not exclusively belong to the owner of residential unit and if he has to share that common area with the owner of another residential unit, then that common area has to be excluded from the built up area, it is not necessary for such exclusion whether that area is shared by all the owners of the building. The Court held that if balcony space is excluded all the 160 units are less than 1500 sg .ft therefore the assessee is entitled to 100 percent exemption on the project. As the assessee has not preferred any appeal against the said order, it will not be appropriate for Court to extend the said benefit in these proceedings, however as the law stands today the assessee has not violated the provisions of section 80IB (10) hence entitled to exemption. (A.Y.2007-08)

CIT v. Raghavendra Constructions (2012) 70 DTR 257/208 Taxman 366(Karn.)(High Court)

S.80IB(10):Deduction-Undertaking-Developing and building-Housing project-Approval having been granted on 28th March 2005, assessee entitled to deduction for the Asst years 2005-06 , 2006-07 and 2007-08.

The assessee company undertook a project with regard to construction of residential flats . The approval was granted on 28th March, 2005, however the sanction plan came in to effect from 4th April 2005, and will be in force till 3rd April 2007. The Assessee claimed the deduction under section 80IB(10), from the Asst years 2005-06 on words. The Assessing Officer denied the exemption. Commissioner (Appeals), allowed the exemption, which was confirmed by the Tribunal. On further appeal to High Court , the Court held that approval having been granted on 28th March 2005, the assessee was entitled to deduction under section 80IB(10) from the Assessment year 2005-06 notwithstanding the fact that the sanction letter was communicated to the assessee on 4th April, 2005 mentioning that the time for completing the construction starts from 4th April 2005 and it ends on 3rd April, 2007. (A.Y. 2005-06 to 2007-08)

CIT v. Akshy Eminence Developers (P) Ltd (2012) 72 DTR 406 (Karn.)(High Court)

S.80IB(10):Deduction-Developing and building-Housing project-Balcony area-Built up area- Since housing project of assessee was approved prior to 1-4-2005 the definition of built area inserted by Finance (No.2) Act, which came in to effect from 1-4-2005 is only prospective in nature and it has no application to housing project projects approved prior to that date .

The assessee is engaged in building housing projects . The Assessing Officer found that some of the units sold to purchasers were more than 1500 sq .ft . if the balcony area is taken in to consideration. The assessee contended that if the balcony area is not considered none of the residential units exceeds 1500 sq. ft.The Assessing Officer relying on the built up area inserted by Finance (no 2) Act which came in to effect from 1-4-2005 held that Balcony can be excluded only if it was used as common area. He held that the said amendment being retrospective in nature, the Assessee is not entitled to exemption. On appeal the Commissioner (Appeals) upheld the order of Assessing Officer. The Tribunal up held the order of lower authorities however allowed the relief in respect of those flats which are within 1500 sq. ft. On cross appeal by the assessee the Court held that since housing project of assessee was approved prior to 1-4-2005 the definition of built area inserted by Finance (No. 2) Act, which came in to effect from 1-4-2005 is only prospective in nature and it has no application to housing projects approved prior to that date The court allowed the cross appeal and set aside order of Tribunal. The court also held that one of the purchaser has taken two flats , in order to prevent such transaction , law is amended preventing a person from purchasing two flats in the same project which is prospective in nature , hence the assessee is entitled to exemption.(A.Ys.2005-06, 2006-07)

CIT v.Anriya Project Management Services (P) Ltd (2012) 209 Taxman 1 (Karn.) High Court)

S.80IB(10):Deduction-Developing and building-Housing project-Joint development agreement- Developer of housing project is also entitled to exemption.

The assessee purchased certain agricultural land in a village of Bangalore City.The sale deed was not registered . A joint development was entered in to and the assessee were allotted 40 flats . The assessee sold the flats and claimed exemption under section 80 IB (10) on the profits of said flats. The Assessing Officer denied the exemption on the ground that the conditions laid down in section 80 IB (10) was not satisfied which was confirmed by Commissioner

(Appeals). On appeal the Tribunal held that the assessee has not only obtained the permission / sanction for the construction but also had done the work of making the land useful for the apartment construction, providing roads, supervised the construction activity. The assessee being an integral part of the development and construction activities. It was not merely the land owner, who had agreed to part with the land the developer is also entitled to the benefit under section 80 IB (10). On appeal to the High Court by revenue , the Court held that keeping in mind the object which the provision is introduced all persons who have made investments in this housing project which is for the middle and lower class people and they have complied with all the conditions prescribed under the provision hence the order of Tribunal is confirmed. (A.Y. 2004-05)

CIT v. Shravanee Constructions (2012) 209 Taxman 6 (Karn.) (High Court)

S.80IB(10): Deduction- Undertaking-Developing and building-Housing project-Commercial area-Ceiling on commercial area inserted w.e.f 1.4.05 does not apply to projects approved before that date.

The assessee's housing project was commenced pre 1.4.2005 when s. 80-IB(10) did not impose any ceiling on the commercial area that could be embedded in the project. S. 80-IB(10)(d) was inserted by the Finance (No.2) Act, 2004 to impose a ceiling on the extent of commercial area that could be contained in the housing project. The Tribunal held that as the assessee's project was completed after 1.4.2005, the question of eligibility for s. 80-IB(10) deduction had to be considered as per the law then prevailing and not at the time that the project was approved. As the commercial area exceeded the ceiling stipulated in s. 80-IB(10)(d), the claim for deduction was denied. On appeal by the assessee to the High Court, held reversing the Tribunal:

The judgement of the Bombay High Court in CIT v Brahma Associates (2011) 333 ITR 289 (Bom) that w.e.f. 1.4.2005, deduction u/s 80-IB(10) would be governed by the restriction on commercial area imposed by clause (d) does not mean that even projects approved prior to 1.4.2005 would be governed by the said restriction. Neither the assessee nor the local authority responsible to approve the construction projects are expected to contemplate future amendment in the statute and approve and/or carry out constructions maintaining the ratio of residential housing and commercial construction as provided by the amended Act. The entire object of s. 80-IB(10) is to facilitate the construction of residential housing project and if at the stage of approving the project, there was no such restriction in the Act, the restriction subsequently imposed has to be necessarily construed on a prospective basis and as applying to projects approved after that date.(A.Y 2006-2007) (Tax Appeal no 1053 of 2011 dated 3-9-2012)

Manan Corporation v. ACIT (2012) 78 DTR 205(Guj.)(High Court), www.itatonline.org

S.80IB(10):Deduction - Undertaking- Developing and building - Housing project-Date of commencement-Date of commencement of development and construction of housing project was date when assessee actually started and carried out the work of development and not when the project was first approved- Residence flats sold to company was let out by company for commercial use, exemption to assessee cannot be denied-Two flats exceeded 1000 square feet each , exemption can be allowed proportionately after excluding profits from two flats.

Assessee received the first commencement certificate dated 15-5-1991, however the assessee could not start the project construction said commencement certificate was lapsed. Latter on construction was started in year 2002 , in pursuance of commencement certificate dated 2-3-2001.The claim of deduction under section 80IB (10) was denied on the ground that project had commenced prior to 1-10-1998 .The Tribunal held that date of commencement of development and construction of housing project was date when assessee actually started and carried out work of development and construction and not when the project was first approved .The issue was decided in favour of assessee. The assessing officer has also held that the residential flats which were sold to company were let out by company for non residential purpose hence the assessee is not eligible for deduction. The Tribunal held that the shops are less than 10 % of built up area; hence claim cannot be rejected. The Tribunal also held that subsequent use by end user for non residential purpose exemption cannot be denied. The Tribunal also held that two flats exceeding 1000 square feet the Commissioner(Appeals), has directed to work out proportionate deduction under section 80IB (10), after excluding profit from sale of two flats hence the order of Commissioner (Appeals) was confirmed. (A.Y. 2002-03 to 2007-08)

Maju Gupta (Smt) v. Asst. CIT (2012) 134 ITD 503/ 70 DTR 312 / 146 TTJ 189 (Mum.) (Trib.)

S.80IB(10):Deduction- Undertaking- Developing and building- Housing project- Developer-Developer is entitled to deduction under section 80IB(10).

The assessee has entered into 'Development agreement' with Kalpataru Park Millenium Co-Operative Housing Society Ltd for the purpose of developing the housing project .The Assessing Officer has rejected the claim under section 80IB(10),holding that the assessee is not the developer. The Commissioner (Appeals) held that the assessee is entitled to deduction. On appeal by the revenue the Tribunal held that the developer had all dominant control over the project and developed the land at his own cost and risks . All transactions pertaining to the project have been entered in entirety in the books of account of the assessee . The Co-operative Society did not account for any receipts or expenditure in connection with the building of house .The Tribunal has analysed various clauses in the agreement and come to the conclusion that the assessee is the developer. The Tribunal also held that the decision of Apex court in K.Raheja Development Corporation is dealing with Karnataka Sale Tax Act, hence ratio can not be applied to interpret the provisions of section 80IB (10). Accordingly the Tribunal held that the assessee is eligible for deduction under section 80IB (10) ,accordingly the appeal of revenue was dismissed.(A.Y. 2006-07)

DCIT v. Parshwanath Reality P.Ltd –(2012) 143 TTJ (UO) 69 / BCAJ –January -2012-477 (Ahd.)(Trib.)

S.80IB(10):Deduction – Undertaking- Developing and building –Housing Project-Completion certificate-Residential units- Built up area as defined under local authority-Assessee's claim was allowed.

Assessee is a builder is engaged in construction and development of residential units. For the relevant years the assessee filed its return of income declaring nil income after claiming deduction under section 80IB(10). The Assessing Officer rejected the claim on the ground that completion certificate was issued on later date by Municipal Authorities and covered area /built up area of residential units was more than prescribed limit. Tribunal found that as the housing project was approved by local authority on 22-3-2001 (Before 1st day of 2004), same had to be completed on or before 31-3-2008. As per the clarification issued by Municipal corporation date of completion of project was 27-2-2008. When the launch of project the Income-tax Act did not define the 'built up area' As per M.P. Nagar Grah Nirman Adhiniyaam and M.P.Bhumi Vikas Niyam, 1984, which were applicable to assesse's case, built up area was less than prescribed limit of 1500 sq. ft. In view of the facts the order of Assessing Officer was set aside and the assessee's appeal was allowed. (A.Ys. 2004-05 to 2006-07)

Global Reality v. ITO (2002) 134 ITD 407 (Indore)(Trib.)

S.80(IB)(10): Deduction – Undertaking – Development Building - Housing project- Areas of open and land / garden and also merger of flats exemption cannot be denied- Revision of order held to be invalid. (S.263)

The assessee firm started construction of residential project at Aundh, Pune. The total area of the plot was shown to be 3995.34 mts. i.e. marginally less than the prescribed area of 1 acre. The assessee submitted that an additional area of land measuring 5 'Acre' was also acquired by the assessee for the approach road to the said project vide separate agreement with same land lord . On including this area it exceeded 1 acre. The assessee further submitted that without this local authority area would not have sanctioned the plan and issued commencement certificate. Assessing Officer visited the site and allowed the deduction. Commissioner found this order to be erroneous and prejudicial to the revenue on the ground that (1) the area of the plot of project is less than 1 acre; (2) As per sale agreement of row house, the saleable area mentioned is more than 1500 sq. feet; (3) in A.Y.2005-06 the Assessing Officer in order passed under section 143 (3) denied deduction under section 80IB (10) and (4) flats have been merged together and the modification is not as per approved plans. The assessee filed an appeal before the Tribunal against the order under section 263. The Tribunal held that, Areas of open land /garden /store /gym room meant for common use are not to be included for calculating built up area of the residential unit- Merger of flat after purchase , by owners thereof to make it larger flat for their convince cannot be denied exemption . Tribunal held that the revisional order is not valid. (A.Ys. 2004-05, 2005-06, 2006-07)

Baba Promoters & Developers v. ITO 40 (2012) 44-A. BCAJ – April – Pg. 40 (Pune) (Trib.)

S. 80IB(10): Deduction- Undertaking-Developing and building-Housing project- Cap on commercial area inserted w.e.f. AY 2005-06 applies to projects approved earlier.

Though the assessee's project, when it was commenced in the year 2003, was in compliance with s. 80-IB(10) as it then stood, the law prevailing in the year of completion of the project has to be seen. As the Project breached the ceiling of

maximum commercial area imposed by s. 80-IB(10)(d) inserted w.e.f. 1.4.2005 (lesser of 2000 sq. ft or 5% of aggregate BU area), the assessee is not eligible for s. 80-IB(10) relief (**Saroj Sales Corp vs. ITO** (2008)115 TTJ 485(Mum) not followed; CIT v **Brahma Associates** (2011) 333 ITR 289 (Bom) & **Reliance Jute** & Industries Ltd. (1979) 120 ITR 921 (SC) referred) (A.Y. 2006-2007)(ITA no 7021/Mum/2008 dated 12-9-2012)

ITO v. Everest Home Construction (Mum)(Trib.) www.itatonline.org

Editorial- The view of Tribunal is contrary to the view of Gujarat High Court in Manan Corporation v. ACIT www.itatonline.org.

S.80IB(10): Deduction –Undertaking- Development and construction-Housing project- Charitable institution-Held income derived from business cannot be considered as income derived from property held for charitable purpose, hence deduction allowed (S. 11,12A, 13 and 263)

The assessee was a charitable institution registered u/s 12A. The assessee trust was engaged in the business of construction and earned profits out of it. The assessee claimed deduction u/s 80IB(10). It was held that the income derived from business cannot be considered as income derived from property held for charitable purpose i.e. it will no longer be income within meaning of section 11(1)(a) and said income will form part of total income under Act and assessee would be entitled to deduction u/s 80IB (10). (A.Y. 2009-10)

India Heritage Foundation v. Dy.DIT (2012) 138 ITD 28 (Bang.)(Trib.)

S.80IC: Deduction – Special category states – Eligible business-Head office expenses-Apportionment of expenses- Financial expenses.

One unit of the assessee is eligible for deduction under section 80IC, where as other two units are not eligible for deduction under section 80IC. The Assessee has filed a consolidated statement without substantiating individual items as to how why they should not be considered for the purpose of allocation of common expenses. The Court held that allocation of financial expenses to the eligible unit has to be in the ratio of turnover of the eligible business to the total turnover for the purpose of computing deduction under section 80IC.(A.Y. 2006-07)

Controls & Switchgear Co. Ltd. (2012) 66 DTR 161 (Delhi)(High Court)

S.80IC:Deduction - Special category states – Manufacture- Assembling of TV sets would amounts to manufacture and entitled to deduction.

Assessee which is in the business of producing of TV sets by purchasing and assembling items like cabinet, chassis, IC, Picture tube, etc., could be held to be manufacturing activity and entitled to deduction under section 80IC. (A. Y. 2004-05).

CIT v. I. Tech Electronics (2012) 341 ITR 533 / 67 DTR 257/ 248 CTR 108 (Gau.)(High Court)

S.80IC:Deduction-Undertakings- Special category States-Standing charges –Deduction is not available in respect of standing charges.

Standing charges payable to the assessee by its purchaser for not purchasing agreed quality of goods could not form part of profits / gain derived from manufacturing or production activities and therefore, assessee is not entitle to deduction under section 80 IC with respect to standing charges received.(A.Y.)

Pine Packaging (P) Ltd. (2012) 70 DTR 357 / 250 CTR 45 (Delhi)(High Court)

S.80P:Deduction-Co-operative societies- Banking business- Cancellation of license.

Assessee was registered under Multi State Co-operative Societies Act, 1984 and was subsequently notified by Government of Maharashtra as a State Co-operative Bank and Reserve Bank of India also gave assessee,licence under Banking Regulation Act, 1949.Maharashtra State Government's notification and licence by Reserve Bank of India were challenged by Maharashtra State Co-operative Bank Ltd., by a writ petition before Bombay High Court. High Court allowed the petition, thereupon Reserve Bank of India cancelled assessee's licence with effect from 30-10-2003.During the relevant assessment year the assessee filed the return of income claiming deduction under section 80P(2)(a)(i).Assessing Officer rejected assessee's claim. In an appeal before the Tribunal, the Tribunal held that as the licence was cancelled the income of the society cannot be considered as banking business eligible for deduction under section 80P(2)(a)(i), reason that assessee no longer remained a State cooperative Bank. (A.Y. 2005-06)

Apex Urban Co-operative Bank of Maharashtra & Goa Ltd. v. ITO (2012) 134 ITD 118 (Mum.)(Trib.)

S.80P:Deduction- Co-operative societies – Banking Regulation Act, 1949-Primary business is not banking hence not entitled to deduction.

Assessee was a society engaged in business of providing credit facilities to its members by granting loans for purposes like business, housing, vehicles, etc. Deduction u/s 80P was denied by Assessee Officer in view of amendment brought into section 80P whereby co-operative banks were excluded from purview of section 80P with effect from 1-4-2007. The Tribunal held that on facts, none of assessee's aims and objects allowed assessee to accept deposits of money from public for purpose of lending or investment, hence it could not be said that principal business of assessee was banking business. Therefore, assessee could not be regarded as a primary co-operative bank and, hence, was entitled to deduction under section 80P(2)(a)(i). (A. Y. 2007-08 to 2009-10)

DCIT v. Jayalakshmi Mahila Vividodeshagala Souharda Sahakari Ltd. [2012] 137 ITD 163/ 76 DTR 234/149 TTJ 356 (Panaji)(Trib.)

DCIT v. Dwarka Souharda Credit Sahakari Ltd [2012] 137 ITD 163/ 76 DTR 234/149 TTJ 356 (Panaji)(Trib.)

S.80P(2)(a)(iii): Deduction- Co-operative societies-Marketing of agricultural produce grown by its members - Manufacture- Sugar in to sucrose-To decide what is manufacture the department should have a panel of experts.

The assessee is a co-operative sugar Mill. The assessee buys sugarcane from its members . It undertakes a particular operation whose final outcome is final product in the form of sugar . The assessee claimed the deduction under section 80P(2)(iii) of the Act. The question before the Apex court was whether the final product (Sugar) would make the assessee (s) entitled to claim the benefit of section 80P(2)(iii) of the Income tax Act 1961 , in respect of marketing of the agricultural produce grown by it members.? Whether the operation undertaken by the assess(s) constitute manufacture.?. The assessee contended that the process undertaken by the assessee is not a 'manufacture' .Broadly , according to the assessee sugar(also called 'sucrose') hence the process is not manufacture. According to department process constitute 'manufacture' . The Department referred the judgment of Apex court in CIT v. Oracle Software India Ltd (2012) 340 ITR 546 (SC), wherein it has been observed that, the terms 'manufacture' implies a change, but every change is not a manufacture, despite the fact that every change in article is that the result of a treatment of labour and manipulation. However, this test of manufacture needs to be seen in the context of the above process. If an operation/process renders a commodity or article for its use for which it is otherwise not fit, the operation /process falls within the meaning of the word 'manufacture'. The court said the question whether conversion of sugar in to sucrose is 'manufacture' should be decided by experts. The Court remitted the matter to the file of Commissioner (Appeals) to decide the issue after getting the opinion of experts and giving an reasonable opportunity to the assessee. (C.A.NO 2445 of 2005 dated 26-9-2012 and others)

Morinda cooperative Sugar Mills Ltd v. CIT(2012) 253 CTR 225/210 Taxman 237/77 DTR 481(SC)

CIT v. Budhewal Co-operative Sugar Mills Ltd (2012) 253 CTR 225/77 DTR 481(SC)

CIT v.Doaba Co-operative Sugar Mills Ltd (2012) 253 CTR 225/77 DTR 481(SC)

CIT v. Morinda Co-Operative Sugar Mills Ltd (2012) 253 CTR 225/77 DTR 481(SC)

Dy.CIT v.Shabhad Co-operative Sugar Mills Ltd (2012) 253 CTR 225/77 DTR 481(SC)

JT.CIT v. Karnal Co-operative Sugar Mills Ltd (2012) 253 CTR 225/77 DTR 481 (SC)

S.90: Double taxation relief- DTAA -India-Mauritius.

Indo–Mauritius DTAA and Circular No. 789 dated 13-4-2000, would not preclude Income-tax department from denying tax treaty benefits, if it is established, on facts, that Mauritius company has been interposed as owner of share in India, at time of disposal of share to a third partly, solely with a view to avoid tax without any commercial substance. In such a situation, notwithstanding fact that Mauritian Company is required to be treated as beneficial owner of shares under Circular No. 789 and DTAA, the tax department is entitled to look at entire transaction of sale as a whole and take into consideration real transaction between parties and transaction may be subject to tax.

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

S.90: Double taxation relief- Non-resident-Taxability-Payment being not taxed in both contracting States assessee is not eligible for exemption- DTAA- India –UK –Art 16(1(,(2).

The assessee has claimed the salary amounting to Rs 15, 25, 577 as exempt under article 16(1) and 16(2) of the DTAA between India and United kingdom, on the ground that salary paid in India by a foreign employer cannot be brought to tax under article 16(2) of the DTAA. The claim was rejected by Assessing Officer and Commissioner (Appeals), however the Tribunal has allowed the claim of assessee. On appeal by revenue the court held that as the amount was not taxed either in the U.K. or in India . The payment was made through the Indian based company by the U.K. company. If it was the contention of the assessee that he was an employee of the U.K. company alone , the payment would have been made by the foreign company and not by Indian company . Therefore , the condition stipulated in article 16(2)(b) was not fulfilled in so far as the Indian company treated the assessee as its employee and issued the certificate deducting tax at source .The Court held that the assessee is not eligible for exemption, accordingly the appeal of revenue was allowed.(A.y. 2001-02)

CIT v. Ravi Rajagopal (2012) 342 ITR 22 / 71 DTR 60(Mad.) (High Court)

S. 90: Double taxation relief- Salary-Indian subsidiary- DTAA-– India – UK - – Salary paid to employee of UK based company by its Indian subsidiary – Taxable in India as condition under Article 16(2) not satisfied. [Art 16(2)]

The assessee is an employee in a company in UK, and works for its subsidiary in India and is treated as employee of the subsidiary. It was held that the salary paid by the Indian company which also issued the TDS Certificate is not exempt from income tax in India as the condition (b) of Article 16(2) of DTAA is not satisfied. (AY 2001-02)

CIT v. Ravi Rajagopal (2012) 251 CTR 44 (Mad.)(High Court)

S.90 :Double taxation relief-Avoidance of tax-Permanent establishment- Arms length principle there was no attribution of profit-India France DTAA - Article 5(5)

A French company (FCO) is engaged in the business of operation of ships in international traffic. FCO carried on operations in India through agents who handled the work at most of Indian ports. The agents are responsible for all clearance from the Governments. The Assessing Officer held that FCO had PE in India hence 10 % of the gross receipts from India to agency PE. The FCO contended that it did not have a PE in India under DTAA , hence its business profits could not be taxed in India .In any case , due to arm's length principal , there was no attribution of profit. The Tribunal held that under India France DTAA as long as it is shown that the transactions between the agent and the principal are made under arm's length conditions, the agent would be treated as that of independent status even if he deals exclusively for one principal.

The `profit neutrality' theory on account of arms length remuneration to a dependent agent PE (DAPE) may not always hold good as the dependent agent (DA) may not be compensated for entrepreneurial risk that may arise to the principal.(A.Y. 2006-07)

Delmas France v. ADIT (2012) 144 TTJ 273 / 67 DTR 73 / 14 ITR 1/49 SOT 112 (Mum.) (Trib.)

S.90:Double taxation relief-Interest-Income tax refund- DTAA-India- Netherland-Interest on income tax refund is held to be chargeable to tax as Income from Interest as per the provisions of DTAA. (Art. 11)

The assessee, a company declared income tax refund as income from interest under Article 11 of DTAA between India – Netherland and offered it to tax @ 10%. The Assessing Officer denying the claim of the assessee held that the interest on income tax refund was liable to be considered as business profit under Article 7 of the said DTAA and thus chargeable to tax @ 41%. On appeal to Tribunal it was held that there was no difference in the language used in Article 11 of the Indo-Germany DTAA and Article 11(2) of India – Australia DTAA .Thus, following the decision of Hapag Lloyd Container Linie GmbH v. DIT(IT) (2011) 9 Taxmann.com 126 (Mum) it was held that interest on income tax is liable to be taxed as income from interest and not business profit (A.Y. 2004-05)

International Global Networks BV v. DDIT(IT) (2012) 50 SOT 433(Mum.)(Trib.)

S.90:Double taxation relief- Foreign PE profits –Permanent establishment-Under Article 7 of the DTAA, foreign PE profits may be taxed in India.

The assessee, an Indian PSU company, earned Rs. 10.68 crores from foreign projects in Oman etc. The assessee claimed that it had a "permanent establishment" (PE) in those countries and that in accordance with he DTAA, only

the source country was entitled to tax the profits and India was not authorized to tax the foreign PE profits. HELD by the Tribunal rejecting the plea:

Article 7 of the DTAA provides that the profits of an enterprise of a Contracting State shall be taxable only in that state of residence unless the enterprise carries on business in other contracting state through a PE situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise "may be taxed" in the other Contracting State but only so much of them as is attributable directly or indirectly to the PE. While the first part gives exclusive taxation right to the State of residency, the second part gives taxation right to the state of residency as well as to the State where the PE is situated. The phrase "may be taxed" shows that the State of source has the non-exclusive right to tax while the State of residence continues to have the inherent right to tax. This interpretation is supported by the OECD Commentary on the Model Convention. P.V.A.L. Kulandagan Chettiar (2004)267 ITR 654 (SC) turned on different facts and does not lay down the proposition that the profits of a foreign PE cannot be taxed in the State of residence of the assessee.(A.Y.2000-01,2005-06)

Telecommunications Consultants India Ltd v. ACIT(2012) 72 DTR 385/148 TTJ 311 (Delhi)(Trib.)

S.90: Definitions- Double taxation relief- Tax- Education cess - Foreign company-DTAA-India-Singapore- "Education cess" is "additional surcharge" & is included in "tax" under DTAA. If DTAA caps the rate of "tax" payable, cess is not payable by foreign assessee. (S. 2(23A), Art, 11, 12)

The assessee, a Singapore company, offered interest and royalty income to tax at the rate of 15% & 10% as specified in Articles 11 & 12 of the India-Singapore DTAA respectively. The AO held that the assessee was also liable to pay surcharge and education cess in addition to the tax. The CIT (A) upheld the assessee's claim that surcharge was not leviable though he rejected the claim with regard to cess. On further appeal by the assessee. Held, allowing the appeal:

Articles 11 & 12 of the DTAA provide that the "tax" chargeable in India on interest and royalties cannot exceed 15% and 10% respectively. The expression 'tax' is defined in Article 2(1) to include 'income tax' and includes 'surcharge' thereon. Article 2(2) extends the scope of the 'tax' by laying down that it shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1". "Cess" was introduced by the Finance Act, 2004 and it is described in s. 2(11) of the Finance Act 2004 as "additional surcharge for purposes of the Union, to be called the "Education Cess on income-tax". Accordingly, the "education cess" is in the nature of an "additional surcharge" and is covered by Article 2. Accordingly, education cess cannot be levied in respect of the assessee's tax liability.(A.Y.2009-10)

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

S.90: Double taxation relief-Fees for Technical Services –DTAA-India-Singapore- Amount received for rendering technical services. (Art.5.6)

The assessee, a Singaporean company received an amount for technical service rendered to it by its wholly owned Indian subsidiary, the which constitutes service PE of the assessee within the meaning of Art 5.6(b) of the Indo-Singapore DTAA, is assessable under Article 7 of DTAA by virtue of para 6 of art. 12. (AY 2003-04 & 2004-05)

Addl. DIT (IT) v. Bunge Agribusiness Singapore Pte. Ltd. (2012) 147 TTJ 507/53 SOT 119 (Mum)(Trib)

S.90:Double taxation relief- Loss on sale of shares-Set of-DTAA –India-Assessing Officer cannot thrust the provisions of the Double taxation avoidance agreement on an assessee , who has chosen to be governed by the Income-tax Act. Assessee is entitled to set off loss under "Profits and gains of business or profession" against "Income from other sources". (S.71, Art. 7)

Assessee, a non-resident disclosed a loss on sale of shares falling under the head 'Profits and Gains of Business and Profession' and claimed a set-off of such loss against income under 'Income from other sources'. The assessee did not have a PE in India and chose to be governed by Income Tax Act and not by DTAA. However, the AO superimposed his choice on the assessee considering the case to be under DTAA and holding that since the assessee had no PE in India, there could be no business loss available for set off. However, it was held that the view of the AO ran contrary to the manifest prescription of section 90(2) which in unequivocal terms provides that the provisions of DTAA would apply to the extent they are beneficial to assessee. When assessee chose to be governed by the provisions of the Act and not the DTAA by not claiming to have any PE in India or to be regulated by Art 7 read with Art 5, the AO was not

justified in directing that the business loss should be considered under the provisions of DTAA and not the Act. Hence, the loss is allowed to be set-off. (AY 2003-04)

Prudential Assurance Co. Ltd. v. ADIT (2012) 18 ITR 186 (Mum.)(Trib.)

S.90:Double taxation relief-Avoidance of tax-Gains arising from the transfer of shares is liable to tax in India.- DTAA–India Article 14(5)-

French residents transferred shares of a French company to another French resident. The only business/asset of the French company was shares comprising 80% equity shares in an Indian company. Since the transfer resulted in transfer of underlying assets and control of Indian company, on purposive interpretation, gains arising from the transfer were liable to tax in India.

Merieux Alliance and GroupeInds. Marcel Dassault, In re, (2012) 340 ITR 353 / (2011) 245 CTR 353 / 64 DTR 1 (AAR)
Group Industrail ,Marcel , Dassault, In re (2012) 340 ITR 353 / (2011) 245 CTR 353 / 64 DTR 1 (AAR)

S.90:Double taxation relief - Business income-Non-resident-Permanent establishment- Dependent agent-Advertisement collection-TV Channels-DTAA-India - Mauritius - Tax implications of a "Dependent Agent Permanent Establishment" explained-On the facts it was held that there was no PE in India hence income cannot be taxed.

The assessee, a Mauritius company, was engaged in telecasting TV channels. It had an advertisement collection agent in India who collected revenue from time slots given to Indian advertisers. The assessee claimed that its profits from India were not chargeable under the DTAA because (i) it did not have a PE and (ii) assuming the agent was a PE, the agent had received an arms' length fee from the assessee and further profits could not be attributed. The department relied on DHL Operations B.V. (2005) 142 Taxman 1 (Mag.) (Trib.)(Mum.) and claimed that as the assessee was dependent on the Indian agents, the Indian agents constituted a "Dependent Agent PE" and that despite arms' length fee to the agents, profits were attributable to the DAPE. Held by the Tribunal:

(i) Under Article 5(4) of the DTAA, an "agent" (other than one of independent status) is deemed to be a PE if he "habitually exercises" the authority to conclude contracts. On facts, the agent was not the decision maker and had no authority to conclude contracts or to fix the rate or to accept an advertisement. It merely forwarded the advertisement to the assessee. Accordingly, there was neither legal existence of authority, nor evidence to show "habitual exercise" of authority.

(ii) Under Article 5(5), an agent is deemed not to be of independent status when his activities are devoted exclusively or almost exclusively to the non-resident enterprises. Though in CITv. DHL Operations B.V. (2005) 142 Taxmman 1 (Mag.) (Trib.)(Mum.) it was held that the question whether the agent is "dependent" has to be seen from the perspective of the non-resident principal, this view cannot be followed because it is contrary to the language of Article 5(5). The wordings refer to the activities of an agent and its devotion to the non-resident and not the other way round. The perspective should be from the angle of the agent and not of the non-resident. As the income from the assessee was only 4.69% of the agent's income, the agent was not a "dependent agent" (Morgan Stanley &Co. International Ltd. (2005) 272 ITR 416 (AAR) & Rolls Royce (Singapore) Pvt. Ltd. (Delhi)(High Court) (2011) 202 Taxman 45 (Delhi)(High Court) followed;

(iii) Even assuming that there was a DAPE, as the agent had been remunerated at arms' length basis, no further profit is attributable to the PE as per Circular No. 742 dated 2.5.1996, Set Satellite (Singapore) Pte Ltd. v. Dy. CIT (2008) 307 ITR 205 (Bom.) & DIT v. BBC Worldwide (2011) 203 Taxman 554 (Delhi)(High Court) (A.Y. 2001-02)

DDIT v. B4U International Holdings Ltd. (Trib.)(Mum.) www.itatonline.org

S.90:Double taxation relief – Management fee - Service PE - DTAA – India –US - Fees for rendering marketing and management services in India held to be attributable to service PE and chargeable on net basis. [Art. 5, 12(4) (b)]

Fees received by the assessee, a US company, for rendering marketing and management services to WNS, an Indian Company, is not in the nature of fees for included services within meaning of art. 12(4)(b) of India US DTAA, employees of the assessee having visited India for providing services to WNS in India, the presence of the employees constituted a Service PE of assessee in India within meaning of art. 5(2)(I) of the DTAA and, therefore, the marketing

and management fee for services rendered in India is attributable to service PE and chargeable on net basis. (A.Y. 2005-06)

ADIT (IT) v. WNS North America Inc. (2012) 71 DTR 161 (Mum.)(Trib.)

ADIT v. WNS Global services (UK) Ltd (2012) 71 DTR 161 (Mum.)(Trib.)

S.90:Double taxation relief-Non-resident-Fees for technical services-Business support services-Financial services – DTAA - India-Netherland. (S. 195, Article 12)

SSSABV, a company incorporated in Netherlands, through its branch in the Philippines, is providing back office financial services relating to accounts etc.to the Applicant. Consideration paid by the applicant, an Indian company to SSSAB, a Dutch company is governed by the treaty between India and Netherlands and not the one between India and Philippines and since SSABV is providing back office services to then applicant without any involvement of the latter, the consideration paid for the services is not of fees for technical services within the meaning of Article 12.5(b) of the DTAA between India and Netherlands and therefore, it is not chargeable to tax in India. Since there is no liability to tax in India, applicant has no obligation to with hold tax under section 195.

Shell Technology India (P) Ltd. (2012) 65 DTR 34 / 246 CTR 158/ 204 Taxman 314(AAR)

S.90: Double taxation relief-Capital gains-Shares- DTAA-India- Mauritius – Capital gains on sale of shares of Indian company by Mauritius company, the applicant is under obligation to file return of income.(S.2(14), 139).

Applicant, a Mauritian company, proposes to transfer shares of an Indian company to a Singaporean company. These shares were held as investments and have not been dealt with till date. It was held that the said shares are held by the applicant as capital assets and its proposed sale will generate gains that would qualify to be capital gains under the Act as well as under the DTAA. Though the applicant is a part of GSK Group and can be said to be under the vertical control of W Ltd a U.K. company, the fact remains that it is a legal entity in the eye of law and there is no adequate material to rebut its ownership over the shares. It is not possible to hold that the beneficial owner of the shares is some other entity. Even if it is held that there was treaty. Shopping in this case, same is not a taboo-Also, it cannot be said that the presumption arising out of tax residency certificate has been rebutted. Thus, on facts, it cannot be said that the revenue has established a case of an attempt at tax avoidance. Though the proposed sale would be outside the stock exchange, it is not shown that a company holding shares in another company cannot sell the shares otherwise than through a stock exchange. Thus, the argument that the proposed sale would involve avoidance of securities transaction tax cannot be accepted . There is no obligation on the applicant to sell the shares through a stock exchange. The argument that unless the applicant is actually taxed in Mauritius or is liable to be actually taxed on the capital gains that would arise in Mauritius, DTAA is not attracted cannot be accepted. Therefore, the capital gains would not be chargeable to tax in India in view of para 4 of art. 13 of the DTAA between India and Mauritius. Consequently, there is no obligation to withhold tax. Obligation under s. 139 does not simply disappear merely because a person is entitled to claim benefit of a DTAA. Therefore, the applicant will have the obligation to file return in terms of S. 139.

Castleton Investment Ltd In re(2012) 252 CTR 131(AAR)

S.92C:Avoidance of tax- Transfer pricing- Business expenditure - TPO has no authority to disallow the payment for the purpose of business, on the ground that the assessee has suffered continuous losses. [S. 37(I)]

The assessee entered into an agreement pursuant to which it paid brand fee/ royalty to an associated enterprise. The TPO disallowed the payment on the ground that as the assessee was regularly incurring huge losses, the know-how/ brand had not benefited the assessee and so the payment was not justified. This was reversed by the CIT (A) & Tribunal on the ground that as the payment was genuine, the TPO could not question commercial expediency. On appeal by the department, Held dismissing the appeal:

The "transfer pricing guidelines" laid down by the OECD make it clear that barring exceptional cases, the tax administration cannot disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. The guidelines discourage re-structuring of legitimate business transactions except where

(i) the economic substance of a transaction differs from its form and (ii) the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner. The OECD guidelines should be taken as a valid input in judging the action of the TPO because, in a different form, they have been recognized in India's tax jurisprudence. It is well settled that the revenue cannot dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur (Eastern Investments Ltd v.CIT (1951)20 ITR 1 (SC), Walchand& Co Pvt Ltd (1967)65 ITR 381 (SC) followed). Even Rule 10B(1)(a) does not authorise disallowance of expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same.(A.ys . 2002-03 & 2003-04)

CIT v. EKL Applicances Ltd(2012)345 ITR 241/71 DTR 345/ 250 CTR 264/ 209 Taxman 200 (Delhi) (High Court)

S.92C:Avoidance of tax - Transfer pricing-Arms' length price-Royalty allowable even in respect of unpaid sales.

The assessee entered into a Software Distribution Agreement with CA Management Inc ("CAMI") pursuant to which it was appointed as a distributor of CAMI's products in India. The assessee was required to pay an annual royalty of 30% on sales. The TPO accepted that the rate of royalty was at arms' length price but held that royalty ought not to have been paid on sales where there was complaints on quality or which had turned into bad debts. The CIT(A) upheld the TPO's stand though the Tribunal reversed it. On appeal by the department to the High Court, Held dismissing the appeal:

S. 92C provides the basis for determining the ALP in relation to international transactions. It does not either expressly or impliedly consider failure of the assessee's customers to pay for the products sold to them by the assessee to be a relevant factor in determining the ALP. In the absence of any statutory provision or the transactions being colourable bad debts on account of purchasers refusing to pay for the goods purchased by them from the assessee can never be a relevant factor while determining the ALP of the transaction between the assessee and its principal. Once it is accepted that the ALP of the royalty is justified, there can be no reduction in the value thereof on account of the assessee's customers failing to pay the assessee for the product purchased by them from the assessee. Absent a contract to the contrary, the vendor or licensor is not concerned with whether its purchaser/licensee recovers its price from its clients to which it has in turn sold /licensed such products. The two are distinct & unconnected transactions. The purchaser's / licensee's obligation to pay the consideration under its transaction with its vendor / licensor is not dependent upon its recovering the price of the products from its clients.(A.Y.2002-03)

CIT v. CA Computer Associates India Pvt. Ltd(2012) 75 DTR 265/209 Taxman 382/252 CTR 164/ (2012) Vol.114(4) Bom.L..R.2431 (Bom.)(High Court),www.itatonline.org

S.92C:Avoidance of tax- Transfer pricing-Arms' length price- Computation- -Necessary or expedient- Appeal to High Court-Approval of commissioner-CBDT instruction no 3 of 2003 dt.20-5-2003-TPOs order binding on Assessing Officer-Burden of proof-Various methods-High Court affirmed the view of 5 Member Special Bench of Tribunal on Transfer Pricing verdict without examining merits.(S. 92CA, 260A)

In Aztec Software and Technology Services Ltd. v. ACIT (2007) 294 ITR 32(AT) / 107 ITD 141 (SB)(Bang)(Trib.) a 5 member Special Bench judgement of the Tribunal answered several questions such as (a) Whether it is a legal requirement under the provisions contained in Chapter X of the Income-tax Act, 1961 that the Assessing Officer should prima facie demonstrate that there is tax avoidance before invoking the relevant provisions?, (b) Whether it is a legal requirement under the provisions contained in Chapter X of the Income-tax Act, 1961 that the Assessing Officer should prima facie demonstrate that any one or more of the circumstances set out in clauses (a), (b), (c) and/or (d) of sub-section (3) of section 92C of the said Act are satisfied in the case of any assessee, before his case is referred to the Transfer Pricing Officer under sub-section (1) of section 92CA for computation of the arm's length price?, (c) Whether the Assessing Officer is required to record his opinion/reason before seeking the previous approval of the Commissioner under section 92CA(1) of the Income-tax Act, 1961?, (d) Whether before making a reference to the Transfer Pricing Officer under section 92CA(1) read with section 92C(3) of the Income-tax Act, 1961, is it is a condition precedent that the Assessing Officer shall provide to the assessee an opportunity of being heard?, (e) Is the approval granted by the Commissioner under section 92CA(1) justiciable ? If so, can it be called in question in appeal

on the ground that it was accorded without due diligence or proper application of mind?, (f) What is the legal effect of Instruction No. 3 of 2003 dated 20-5-2003 issued by the Central Board of Direct Taxes on Transfer Pricing matters?, (g) What is the role of the Assessing Officer after receipt by him of the order passed by the Transfer Pricing Officer under section 92CA(3) of the Income-tax Act, 1961 etc. After laying down the principles of law, the matter was remanded to the AO. On appeal by the assessee against the principles of law laid down by the Special Bench, Held by the High Court dismissing the appeal:

We notice that in this appeal, the assessee has raised as many as 30 substantial questions of law. In our considered opinion, it is not really necessary to consider any of these questions, as in the first instance, the order of the Tribunal is not at all adverse to the interest of the appellant but is one to set aside the order passed by the Lower Appellate Authority and remanding the matter. We notice that all questions are left open, for redetermination by the Lower Appellate Authority.

In a matter which is remanded for a reexamination, no question of law arises for examination by the High Court in an appeal under Section 260-A of the Act, unless any part of the remand order suffers from a patent illegality or is an order perverse in nature, and is left to the Lower Appellate Authority to redetermine.

In this view of the matter, we do not propose to examine this appeal on merits any further but dismiss the appeal without expressing any opinion on any of the aspects and leaving it open to the assessee to urge all such contentions as are available to the assessee before the authority to which the matter is remanded.(A.Y.2002-03)

Aztec Software & Technology Services Ltd v. ACIT(2012) 209 Taxman 187(Karn.)(High Court)

S.92C:Avoidance of tax- Transfer pricing-Arm's length price – Subsidiary- International transaction- Not in excess of 5% variation.

Assessee was a wholly owned subsidiary of U.S. based company MTC. It entered into a support agreement with assessee for research services and corporate support services which was an international transaction. For bench marking assessee's international transactions TPO took various companies and made additions. Before Commissioner (Appeals) the assessee submitted that comparable cases identified by TPO were not engaged in similar activities as that of assessee. It was also contended that the TPO has ignored the comparable of another subsidiary where in the business is identical. The Commissioner(Appeals) held that the TPO arbitrarily selected 'S' Ltd. as comparable and ignored 'C' Ltd as comparable. Commissioner (Appeals) further held that had 'C' had been considered as comparable then arithmetic mean all comparable selected by TPO and assessee would be only 11.71 percentage and applying safe harbor rules in terms of second proviso below section 92C(2), difference in price between one adopted by TPO and ALP determined by including 'C' Ltd would be within + or -5 percent range calling for no adjustment to price adopted by assessee in respect of international transaction, accordingly the Commissioner (Appeals) deleted the addition made by the TPO. Tribunal confirmed the view of Commissioner (Appeals). (A. Y. 2003-04 & 2004-05)

Dy. CIT v. Monsanto Holdings (P) Ltd. (2012) 134 ITD 189 / 13 ITR 90 (Mum.)(Trib.)

S.92C:Avoidance of tax- Transfer pricing- Data-TPO can rely on "contemporaneous" data even if not available at specified date.

In a transfer pricing appeal, the Tribunal had to consider two issues: (a) what is the data to be considered by the TPO at the time of determining ALP? & (b) whether the assessee should be given an opportunity to refute the material sought to be utilized by the TPO? Held by the Tribunal:

(i) Under Rule 10D(4) the information and documents should as far as possible be contemporaneous and should exists latest by the 'specified date' specified in section 92F(4) i.e. the due date for filing the ROI. There is no cut-off date upto which only the information available in public domain can be taken into consideration by the TPO while making the transfer pricing adjustments and arriving at the ALP. The assessee's argument that section 92D and Rule 10D is defeated if the TPO takes the data which is available in the public domain after the specified date is not acceptable.

(ii) While the TPO is empowered by section 131(1) & 133(6) to call for information without informing the assessee about the process, he cannot use such information against the assessee without giving the assessee a reasonable opportunity of hearing. If the assessee seeks an opportunity to cross-examine third parties, it has to be given the opportunity (Genisys Integrating Systems followed)

Kodiak Networks (India) Pvt. Ltd. v. ACIT (2012) 71 DTR 114 /15 ITR 610/51 SOT 191(Bang.)(Trib.)

S.92C:Avoidance of tax-Transfer pricing – Data-TPO is duty bound to eliminate differences in comparables' data.

In a Transfer Pricing matter, the Tribunal had to consider whether for purposes of making adjustment under Rule 10B(1)(e)(iii) 'working capital' constituted a 'difference between the international transactions and the comparable uncontrolled transactions of between the enterprises entering into such transactions' and if so whether the said difference 'could materially affect' the amount of net profit margin of relevant transactions in the open market. Held by the Tribunal:

Rule 10B(1)(e)(iii) provides that "the profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the differences, if any between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market". While the "differences" are not specified, it covers "any differences" which could materially affect the amount of net profit margin. The litmus test to be applied is if the 'difference, if any, is capable of affecting the NPM in open market? If yes, then the TPO is under statutory obligation to eliminate such differences. The revenue cannot say that difference is likely to exist in all accounts and so the demands of the assessee should be ignored. The revenue's stand that the assessee is ineligible for any adjustments if he provides the set of comparable is not correct because under Rule 10(3) it is the duty of the AO/TPO/DRP to minimize/eliminate the difference which is likely to materially affect the price. It is the settled proposition that 'working capital' adjustment is an adjustment that is required to be made in TNMM. The revenue's contention that the 'differences' specified should refer to only (i) the factor of demand and supply; (ii) existence of marketable intangibles i.e. brand name etc; (iii) geographical location and the like is not acceptable. Further, as the difference in the Arm's length Operating Margin of the Comparables before and after making the adjustment for working capital was up to 3.77%, it was "material" and had to be eliminated (Mentor Graphics(2007) 109 ITD 101 (Delhi), E-gain Communication(2008) 118 ITD 243 (Pune) Sony India(2008) 114 ITD 448 (Delhi) &TNT India followed). (A.Y. 2006-07).

Demag Cranes & Components (India)(P)LTD v. Dy. CIT (2012) 66 DTR 217/49 SOT610/144 TTJ 320 (Pune)(Trib.)

S.92C:Avoidance of tax-Transfer pricing – Computation-Arm's length price – Royalty-Cup method.

Assessee has paid 3% of the net sales price, which was approved by RBI. The Tribunal has found that the assessee had sold only part of goods manufactured to its Associated enterprise and bulk sales were made to uncontrolled parties, and the Assessing Officer had failed to bring any material on record to show that payment of royalty @ 3% was not at arm's length, hence disallowance of royalty was not justified.(A.Y.2006-07)

Sona Okegawa Precision Forgings Ltd. v. Addl. CIT(2012) 65 DTR 317 /49 SOT 410 / 143 TTJ 516 (Delhi)(Trib.)

S.92C:Avoidance of tax- Transfer pricing – Computation-Arm's length price- Reimbursement of cost-Jurisdiction of Assessing Officer.

Assessee has reimbursed only cost of one employee who is sitting in Singapore. Assessee has produced evidence in the form of e-mails to substantiate its case that it has actually obtained services from its group companies and justified the commercial expediency of reimbursement of cost to said concerns by relating the payment to revenue earned by it from such services, the Tribunal held that there is no justification for adjustment to the ALP in respect of the payments made by the assessee to its group concerns. The Tribunal also held that once an international transaction has been made subject of determination of ALP by the TPO, and he has found that transaction is at arm's length, then it is not permissible for the Assessing Officer to re-examine that transaction and make disallowance under the normal provisions of the Act.(A.Y.2006-07)

Cushman & Wakefield India (P) Ltd v. ACIT (2012) 135 ITD 242/ 66 DTR 28/143 TTJ 692 /17 ITR 48(Delhi)(Trib.)

S.92C:Avoidance of tax –Transfer pricing – Computation - Arm's length price-Functional method- Combining all international transaction is not proper.

Assessee company which is in the business of providing buying services to associated enterprises for sourcing of garments, handicrafts, leather products etc. in India. Assessee determined ALP on 'transaction by transaction' basis using most appropriate method having regard to functional analysis and availability of comparable uncontrolled bench

mark. TPO determined ALP by combining all transactions undertaken by assessee. Tribunal held that in assessee's case, there were different segmental activities, which were
independent of each other, they are required to be analyzed on transaction to transaction basis and not by combining all activities, hence the method adopted by the assessee is correct and up held the computation of assessee.(A.Y. 2006-07)
Benetton India (P) Ltd. v. ITO (2012) 134 ITD 229 / 67 DTR 190 / 144 TTJ 449 / 15 ITR 518 (Delhi)(Trib.)

S.92C:Avoidance of tax-Transfer pricing-Computation- if FAR analysis indicated diversion in two activities bench mark should be done on separate basis-In the absence of comparable cases submitted by assessee TPO can select the comparable from the details submitted by the assessee-Working of adjustment by the TPO was confirmed by the Tribunal.

Assessee entered into international transactions with its Associated Enterprises. Apart from manufacturing the assessee also had business of trading and indenting. There was no disputes as regards the arm's length price declared by assessee in respect of manufacturing activity. Assessee consolidated the results of trading and indenting activities. The TPO requested the assessee to segregate the results in respect of trading and indenting activities. Initially the assessee was reluctant to furnish the details however furnished the details thereafter . The TPO computed the arm' s length price by taking FAR analysis separately . The Issue before the Tribunal was whether the action of the TPO determination of bench mark taking separate basis is justified or not. The Tribunal held that the action of the TPO is justified. The Tribunal also held that when the assessee has not submitted the comparables, the TPO was justified in selecting the comparable from the details furnished by the assessee and making an up word adjustment to ALP of Rs 25.56 crores. The Tribunal confirmed the adjustment made by the TPO.(A.Y.2006-07)
Bayer Material Science (P) Ltd v. Addl .CIT (2012) 134 ITD 582/17 ITR 275/75 DTR 119/148 TTJ 581 (Mum.) (Trib.)

S.92C:Avoidance of tax-Transfer pricing-Computation- Interest free loan to subsidiary , matter is restored to the file of Assessing Officer to apply CUP method.

The Assessee in its TP study observed that as no external CUP was available for bench marking the transaction applied the TNMM and concluded that transaction was at arms's length .The TPO rejected the assessee's method considered a risk free return from the subsidiary , a notional interest at 10 percent on loan as ALP amounting to Rs 31, 51, 259. On appeal, Commissioner (Appeals) also confirmed the addition. On appeal to the Tribunal, the tribunal held that neither the assessee nor TPO having examined applicability of CUP method in order to determine the ALP of the international transaction of interest –free currency loan to its subsidiary by assessee , the Tribunal restored the matter to Assessing Officer for fresh adjudication following CUP method .(A.Y. 2002-03)
Aithent Technologies (P) Ltd v. ITO (2012) 144 TTJ 731/68 DTR 68 (Delhi) (Trib.)

S.92C:Avoidance of tax- Transfer pricing-Computation-TPO flawed on five issues including the selection of comparable only with substantial related transaction held to be not proper and the matter is set as side.

The assessee had international transactions with related and unrelated parties . The TPO has selected only four comparables and also denied the benefit of+ 5 percent sought by assessee. The adjustment made by the TPO was confirmed by the DRP. On appeal to the Tribunal , it was contended that the (1) Party having substantial related party transactions should be excluded as comparable .(2) Allocation of advertisement and sale promotion expenses based on turn over of manufacturing and trading is held to be not proper. (3) The benefit of standard deduction of plus or minus 5 percent is not taken in to consideration. (4)The adjustment can be made only in respect of transaction with Associated Enterprises instead of entire turn over ,(5) While working out the operating profit to sales margin , accurate figures as per the annual accounts of the concerned comparables should be taken .The Tribunal held that the TPO having flawed on five issues as contended by the assessee matter remanded to the Assessing Officer for deciding the matter afresh after taking in to consideration the propositions put forth by the assessee.(A.Y. 2006-07)
Huntsman Adavnced Materials (India) (P) Ltd v. DY.CIT (2012) 68 DTR 162/49 SOT 83 (Mum.) (Trib.)

S.92C:Avoidance of tax- Transfer pricing-Computation- Additions made on the basis of operating cost/operating profit of Vega US was deleted.

The assessee is engaged in the business of manufacturing of several products . It had three overseas subsidiaries , namely Vega UK, Vega US and Vega UAE. The assessee sold its products to domestic market where as marketing and distribution of its products in international markets was undertaken by Vega entities of in their specified jurisdiction.

The TPO made adjustment in respect of sales made to Vega UAE on ground that Vega UAE was neither bearing any inventory risk nor credit risk and therefore it was not a distributor but only market service provider .The TPO adopted the transfer pricing on basis of operating cost /operating profit percentage of Vega UAE, Vega UK and Vega US as base. The Tribunal held that operating cost /operating profit margin depend on level of operating expenses incurred by respective Vega entities and also making business earning by respective Vega entities , if operating cost is higher in US it could not be said that profit margin of other Vega entities in different countries should be at par with profit margin of Vega US . Accordingly once the it was accepted that Vega UAE as distributor and carrying on both inventory or credit risk , TP adjustment made of the TP officer was deleted .(A.Y. 2006-07)

AIA Engineering Ltd v. Addl. CIT (2012) 50 SOT 134 (Ahd.) (Trib.)

S.92C: Avoidance of tax-Transfer pricing-Computation-Result of Loss making companies were held to be not comparable .

The assessee is 100 % subsidiary of a foreign company and is engaged in the business of BPO/ITES. The assessee has adopted TNMM method as the most appropriate method and computed the PLI(OP/TC) at the rate of 15.76 percent on the operating cost . The TPO has determined PLI at 25.78 percent on the basis of eight comparable. Before Commissioner (Appeals) the assessee has furnished eight additional comparables . On the basis of 16 comparables the average PLI was computed at 11.01 percentage which was less than PLI shown by assessee . The Commissioner (Appeals) had excluded the results of loss making companies for the purpose of determining the average profit margin. On appeal to Tribunal ,by assessee the Tribunal held that order of Commissioner (Appeals), held to be justified . (A.Y. 2004-05)

Knooh Solutions (P) Ltd v. ITO (2012) 50 SOT 189 (Hyd.) (Trib.)

S.92C:Avoidance of tax-Transfer pricing-Computation- Price paid by assessee to its associated enterprise was higher than price paid by unrelated parties for purchase of similar goods hence adjustment made by TPO held to be justified.

During relevant assessment year the assessee has undertaken international transactions with its associated enterprises Sri Chirag Private Ltd , Sri Lanka .The TPO has found that the price paid by assessee to its associated enterprises was higher than the price paid by unrelated parties for purchase of similar goods from Associated enterprises accordingly the adjustments were made. On appeal the Commissioner (Appeals) held that the due to increase in price in international market assessee had paid higher price , hence the adjustment made by TPO was deleted . On appeal by revenue , the Tribunal held that as the assessee has not proved that quoted goods were different than the goods dealt with associated enterprise , adjustment made by the TPO was justified .As regards the adjustment, of 5% where there is only on price , the adjustment is neither provided in statute nor justified on general consideration . Accordingly the addition made by the Assessing Officer is held to be justified. (A.Y. 2005-06)

Vipin Enterprises v. Addl.CIT (2012) 135 ITD 130/ 72 DTR 302/147 TTJ 470 (Delhi) (Trib)

S.92C:Avoidance of tax-Transfer pricing-Computation- Benefit of proviso to section 96C(2) would be given-Comparable has to meet the criteria.

The assessee company is engaged in the business of processing and support and is operating 100 percent export oriented unit. During the year the assessee had entered in to international transaction, with its associated enterprises. The assessee compared its international transaction with unrelated parties based on cost plus 5 percent pricing model which the assessee adopted .The analysis was done on the basis of TNMM using external comparables. The TPO held that the Turnover of the assessee with the party to which the comparison was made too insignificant to qualify as a meaningful comparable in comparison entered by assessee with its Associated Enterprises. The TPO also rejected the secondary analysis of the assessee on the ground that the financial data for 1999- 2000 and 2000-01 was applied. The TPO has made fresh search by applying filters (1) Turnover (ii) Net fixed assets (iii) depreciation . By using said filters searched out 9 comparables out of which further three rejected and identifying six comparable made additions of 18% by applying the operative margin to assessee's cost , arms length price of international Transaction. On appeal the Commissioner (appeals) held that during the financial year 2001-02 the turnover of comparable of related party transaction was less than 1 percent of total turnover which cannot influence the profit margin and he also found that related party transaction in the financial data related to some advances /deposits and those receipts and payments did

not form part of the sale /expenditure of the company. The Commissioner (appeals) declined to exclude that party .As regards benefit of plus minus 5 percent the Commissioner (Appeals) has held that difference of plus minus 5 percent is not in the nature of standard deduction. After discussing, the Commissioner (Appeals) held that (i) current year data was to be used for comparable analysis (ii) the filters used by TPO were correct and (ii) One of the comparable has to be rejected as the comparable turnover of medical transaction significant less than 5 crores and thus did not meet the criteria laid down by the TPO and remaining 5 comparables was computed by the Commissioner (Appeals). On appeal by revenue the Tribunal confirmed the view of Commissioner (Appeals) and gave direction to Assessing Officer to verify the figure and if difference as computed as per direction between two remained less than 5 percent , benefit of proviso to section 92C(2) would be given to assessee and no addition would be called for. (A.Y. 2002-03)

Dy.CIT v. American Express (India) (P) Ltd (2012) 135 ITD 211/ 70 DTR 330 (Delhi) (Trib.)

S.92C:Avoidance of tax- Arms' length price-International transaction-Transfer pricing- Computation of ALP – Depreciation - Assessee provides for depreciation on more real time basis and not as per Income Tax Rules - no adjustment called for in the quantum of depreciation for the purpose of determining the Arm's Length Price.

The assessee has followed a scientific system of providing for depreciation on a more real time basis. The assessee is not providing technical depreciation influenced by Income Tax Rules. The assessee provides for more or less actual depreciation. This actual depreciation is more relevant in working out the operating profit of the assessee. Thus, no adjustment is called for in the quantum of depreciation provided by the assessee in its operating account so as to work out its operating profit for the purpose of determining the Arm's Length Price. (A.Y. 2007-08)

Lason India (P.) Ltd. v. Asst. CIT (2012) 50 SOT 583/73 DTR 273/147 TTJ 481/17 ITR 203 (Chennai)(Trib.)

S.92C:Avoidance of tax- Arms' length price-International transaction-Transfer pricing- TPO rejected the filters adopted by the assessee and adopted untenable filters for arriving at the comparables ,Tribunal set aside the matter back to Assessing Officer.

Where TPO rejected the filters adopted by the assessee and adopted untenable filters for arriving at the comparables. The assessee in his detailed submissions before the TPO as well as the Tribunal, brought out various factors that would justify adopting of comparables by the assessee. On appeal, the Tribunal following the decision of Genesis Integrating System India P. Ltd. (Bangalore) set- aside the matter back to the file of AO directing the TPO to allow assessee to cross examine the comparables whose replies were sought to be used against the assessee if the assessee so desires. (A.Y. 2006-07)

Genesis Microchip (I) (P.) Ltd. v. Dy. CIT (2012) 135 ITD 533 (Bang.)(Trib.)

S.92C :Avoidance of tax- Arms' length price-International transaction-Transfer pricing- Extension of credit to the AE beyond a stipulated credit period – Held not to be construed as International Transaction

The extension of credit to the AE beyond a stipulated credit period cannot be construed as an 'international transaction' for the purpose of section 92B(1) so as to require adjustment for ascertaining the ALP. Therefore, the consequential addition is untenable and liable to be deleted. (AY 2002 -03& 2003 – 04)

Patni Computer Systems Ltd. v. Dy. CIT (2012) 135 ITD 398 / 16 ITR 533 (Pune)(Trib.)

S.92C :Avoidance of tax- Arms' length price-International transaction-Transfer pricing-TPO has no power to question business purpose of transaction, rule 10B(1)(a), does not authorize disallowance of any expenditure on the ground that it was not necessary.(S.37)

The assessee made payment of Rs. 31.34 crores to its associated enterprise for "Second Line Support" services. The TPO & DRP held that the assessee had not benefited from the expenditure and that it was not "necessary to be incurred" and that its ALP was Nil. On appeal by the assessee Held:

There is no force in the Revenue's claim that the assessee was not required to make any payment to its AE for resolving warranty claims. The assessee has the right to enter into an arrangement according to which its business interests are protected. It is the prerogative of the assessee to decide the business expediency. Rule 10B(1)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in view of the expenditure was un remunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. However, the

reasonableness of an expenditure has not been excluded from determination and the TPO has to determine the ALP of the transaction (CIT vs. EKL Appliances Ltd&Dresser Rand followed).(A.Y.2007-08)
Ericsson India Pvt. Ltd v. DCIT (2012) 71 DTR 337 / 146 TTJ 708/17 ITR 79 (Delhi)(Trib.)

S.92C:Avoidance of tax- Arms' length price-International transaction-Transfer pricing- Computation of ALP – Loan is granted to foreign subsidiary in foreign currency - International LIBOR rate apply and not the domestic prime lending rate – No addition to be made where assessee charging interest at a rate higher than the LIBOR rate

In case of grant of loan by the assessee to its foreign subsidiary in foreign currency out of its own funds, for determining ALP, it is the international LIBOR rate that would apply and not the domestic prime lending rate, and assessee charging interest at a rate higher than the LIBOR rate, no addition can be made on this account.(A.Y.2006-07)
Siva Industries & Holdings Ltd. v. ACIT (2012) 145 TTJ 497 (Chennai) (Trib.)

S.92C:Avoidance of tax - Transfer pricing-Arms' length price - Expression "shall" used in Rule 10B(4), makes it clear that only current year's data is to be used.

The expression "shall" used in the Rule 10B(4) makes it clear that it is mandatory to use the current year's data first and if any circumstances reveal an influence on the determination of arm's length price in relation to the transaction being compared than other data of the period not more than two years prior to such financial year may be used. The assessee did not raise any objection before the first appellate authority or before TPO during the proceedings, that the TPO failed to take cognizance of the difference in the accounting policies followed by the assessee company and alleged comparable companies selected by them by not allowing the depreciation adjustment made by the assessee. Therefore, ground could not be entertained by the government. (AY 2004-05)
Dy. CIT v. Deloitte Consulting India P. Ltd. (2012) 15 ITR 573 (Bang.)(Trib.)

S.92C:Avoidance of tax - Transfer Pricing – Computation of ALP – Information - Information cannot be used against the assessee without giving an opportunity.

ALP has to be determined by the TPO by taking into consideration contemporaneous data relevant to the previous year in which the transaction has taken place and he is not from using the information available in public domain beyond any cut-off date; though the TPO is not under any obligation to furnish the entire information to the assessee, when any information is sought to be used against the assessee, it has to be given a reasonable opportunity of hearing on that material; TPO having not considered various defects pointed out by assessee in the selection of additional comparables by TPO and other infirmities in the computation of ALP. (A.Y. 2006-07)
Kodiak Networks (India) Pvt. Ltd v. ACIT (2012) 71 DTR 114 / 15 ITR 610/51 SOT 191(Bang.)(Trib.)

S 92C:Avoidance of tax - Transfer Pricing – Computation of ALP – AO has made a reference to the TPO for determination of ALP, adoption of ALP suggested is sufficient compliance

Once the AO has made a reference to the TPO for determination of ALP and he has adopted the ALP as suggested by the TPO that would be sufficient compliance with the requirements of Section 92C(3) even if there is no specific finding in this regards in the order of AO. (A.Y. 2007-08)
Tevapharm Pvt. Ltd. v. Addl. CIT (2012) 71 DTR 209 / 147 TTJ 35 (Mum.)(Trib.)

S.92C:Avoidance of tax- Transfer pricing-Arms' length price-While Computing of Arm's Length Price the data is to be restricted to AEP.

The assessee, part of a group company, exported its services to its associated enterprises and other clients. The assessee received payments from its clients for providing the software development services and information technology enabled services. The assessee filed a transfer pricing study based on transactional net margin method, and using filters arrived at comparables and as the margin earned by it was more than the adjusted mean margin, submitted that price charged by its international transactions was at arm's length. The Hon'ble Tribunal held that the AO was to make transfer pricing adjustment restricting the adjustments to the transactions of the associated enterprise. It was further held that as the TPO had furnished the information gathered from the selected comparables and the assessee had submitted a detail submission along with its objections to their selection and thus, there was no violation of natural justice. (A.Y. 2006-07)
Genesys Intergrating Systems (I) Pvt. Ltd. v. Dy. CIT (2012) 15 ITR 475 (Bang.)(Trib.)

S.92C:Avoidance of tax - Transfer pricing – Arm's length price - Arm's length price is to be done in accordance with Rule 10B.

In the transfer pricing analysis done by both assessee in its TP report and by TPO in its TP order it was found that neither of them spelt out functions performed, risks borne and assets used by assessee as well as its associated enterprises; it was found that FAR analysis had not been performed between assessee and comparable companies as mandated by Rule 10B. Therefore, held that determination of ALP by assessee or revenue authorities was not in accordance with law. (A.Y. 2006-07)

Trigent Software Ltd. v. Asst. CIT (2012) 51 SOT 113 / 15 ITR 452 (Mum.)(Trib.)

S.92C:Avoidance of tax - Transfer pricing-Arms' length price - Rule of consistency - Matter was remitted to ascertain whether similar transactions of the assessee with Associated enterprise have been accepted as ALP by the TPO in subsequent years if yes the Assessing Officer is directed to follow the same.

The Assessee has followed the internal CUP method for arriving at ALP for the import of raw material, where as the TPO in his order mentioned that the assessees has adopted the external CUP method. Similarly, for the royalty payment, the assessee has adopted the external CUP method as it was a single payment, where as the TPO observed that it is recurring payment, there were many flaws in the TPO's order which demonstrated that the facts have not been properly appreciated by the TPO while making the TP study analysis .Where as similar transactions have been accepted to be at ALP for the subsequent years even though the same method is followed by the assessee . Considering the facts the Tribunal remitted the matter to the Assessing authority with the direction to ascertain as to whether similar transactions of the assessee with AEs have been accepted to be ALP by the TPO in subsequent years, and if it is so, then the Assessing Officer to adopt the TP analysis conducted by the assessee for the relevant assessment year and make the assessment accordingly. (A.Y. 2006-07)

Lenovo (India) (P) Ltd v. ACIT (2012) 71 DTR 90 (Bang.)(Trib.)

S. 92C: Avoidance of tax - Transfer pricing - Arms length price – Loss - Turnkey contracts - Law on taxability of "turnkey contracts" for offshore & onshore supply explained and matter set-a-side for redetermination.(S.5, 9(1)(i),92CA)

The assessee, a Chinese company, entered into two contracts with WBPDCL, one for the offshore supply of equipment and the other for onshore supplies, design, engineering and construction etc. Separate consideration was specified for each activity. The assessee claimed, relying on Ishikawjima-Harima Heavy Industries Ltd v. DIT (2007) 288 ITR 408 (SC), that the profits from offshore supply was not taxable in India. The AO rejected the claim on the ground that the project was a "turnkey" one with "cross-fall breach clause" and "single point responsibility" and that the split contracts were entered into only for convenience. It was held that the project office PE played a role in the offshore supplies. He referred the matter for determination of ALP of the onshore supplies to the TPO who determined a profit of Rs. 24 crores as against the loss of Rs. 67 crores offered by the assessee. This was upheld by the DRP. On appeal by the assessee to the Tribunal, held;

(i) As regards the assessee's claim, relying on Ishikawajima-Harima, that offshore supply contracts cannot be taxed, there is a school of thought as advocated in Alstom Transport SA (AAR) that in view of the later & larger bench judgement in Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1, the Ishikawajima -Harima principle is not good law and a "dissecting approach" cannot be adopted. While it is arguable that the observations in Vodafone regarding "looking at the transactions as a whole and not adopting dissecting approach" cannot be applied in all cases where separate contracts are entered into for offshore supplies and onshore services, the observations are applicable in cases where the values assigned to the onshore services are prima facie unreasonable vis-à-vis values assigned to the offshore supplies, which make no economic sense when viewed in isolation with offshore supplies contract. The transactions have to be looked at as a whole, and not on standalone basis, when the overall transaction is split in an unfair and unreasonable manner with a view to evade taxes. In order that such a situation can arise, it is sine qua non that while the assessee submits the bids for different segments (e.g. offshore and onshore) separately, these bids are considered together, as a single cohesive unit, by the other party, and this fact must be apparent from material on record. The fact that there is a "cross fall breach clause" which provides that a breach in one contract will automatically be classified as breach of the other contract give an indication that the "offshore supplies" contract and "onshore

supplies" contract have to be viewed as an integrated contract, this fact by itself does not indicate that the onshore services and supplies contract is understated so as to avoid tax in the source country. That would be the situation in which while offshore supplies show unreasonable profits while onshore supplies and services result in unreasonable losses;

(ii) The fact that the assessee claims to have made a loss on its entire project, including the onshore activities, is not reason enough to show that the value of the onshore activities was deliberately kept at a lower amount to avoid taxability in India because it may make commercial sense that the offshore supplies are made at loss, as long as these supplies are at less than incremental costs i.e. marginal costs of offshore supplies, and thus overall losses of the assessee are minimized (matter remanded for the AO to examine the assessee's claim regarding overall loss on the project) (A.Y.2007-08).

Dongfang Electric Corporation v. DDIT (2012) 74 DTR 25 / 147 TTJ 579/52 SOT 496 (Kol.)(Trib.)

S.92C:Avoidance of tax- Transfer pricing – Arm's length price –Comparables -Operating margin being within the range of 5% of the arithmetic mean of the operating margin of such comparable companies, same has to be accepted as ALP.

Assessee provides investment advisory related support services. It was held that while some of the comparables chosen by the TPO are not engaged in rendering investment advisory services and there is no segmental data relating to investment advisory services provided by the other companies, the aforesaid comparables cannot be treated as functionally comparable with the assessee; TPO having given no reason whatsoever for rejecting the comparables chosen by the assessee and the assessee's operating margin being within the range of 5% of the arithmetic mean of the operating margin of such comparable companies, same has to be accepted as ALP. (AY 2007 - 08)

Caryle India Advisors (P) Ltd. v. ACIT (2012) 146 TTJ 521/71 DTR 273/17 DTR 24 (Mum.) (Trib.)

S.92C:Avoidance of tax- Transfer pricing – Arm's length price- –Comparables –If comparison is not valid the adjustment is liable to be deleted-Remaining margin less than 5% hence adjustment is deleted.

The assessee is engaged in the business of breeding, development and marketing hybrid seeds and is providing research and product development services to Associate Enterprises abroad. The assessee adopted the 15% margin. The DRP rejected the comparable made by the assessee and confirmed the addition. On appeal to the Tribunal it was found that the Engineering India Ltd., a PSU dealing in Engineering consultancy, is not at all engaged in low risk contract research work and it cannot be a valid comparable for this purpose, once Engineering India Ltd is excluded from the list of comparables , the arithmetic mean of remaining comparables will be within 5% range of ALP margin adopted by assessee, therefore the impugned ALP adjustment was deleted. (A.Y. 2007-08)

Bayer Bio Science (P) Ltd v. Add.CIT(2012) 72 DTR 371/148 TTJ 73 (Mum.)(Trib.)

S.92C:Avoidance of tax - Transfer Pricing – Arm's Length Price – comparable selected were in different geographical regions - geographical difference is not material so far as it applies to logistics industry

The assessee company is engaged in the business of International Freight forward as agent of air lines and sea lines. It entered into an international transaction with its AEs and profits were shared equally. Assessee employed CUP method in determining the ALP. Assessee selected six public companies as comparables whose average PLI tallied with that of assessee. The TPO rejected it on the ground that all the companies were operating in different geographical regions. It was held by the Tribunal that geographical difference is not material so far as it applies to logistics industry and in view of splitting of gross profit equally at 50:50 in geographical region, CUP method adopted was upheld. (A.Ys. 2004-05 to 2006-07)

ACIT v. Agility Logistics P. Ltd. (2012) 136 ITD 46/76 DTR 212 (Mum.) (Trib.)
Agility Logistics P. Ltd v. ACIT (2012) 136 ITD 46/76 DTR 212 (Mum.) (Trib.)

S.92C: Avoidance of tax- Transfer pricing-Arms' length price-Interest free loan to overseas associated concern-Interest free loan to overseas concern falls within the ambit of international transaction.

The assessee made advances to its wholly owned subsidiary . The assessee contended that lending of interest free funds to subsidiaries is a normal and acceptable business practice and thus, the existence of such interest free loans does not fall within the ambit of international transaction. The Tribunal held that grant of interest free –loan to overseas

associated concerns comes within the ambit of international transaction, therefore assessee having made interest free advances to its wholly owned subsidiary, a German company, EURIBOR rate is be applied for arriving at the ALP of the interest free loan.(A.Y.2007-08)

Tata Autocomp Systems Ltd v. ACIT (2012) 73 DTR 220/149 TTJ 233 (Mum.)(Trib.)

S. 92C: Avoidance of tax- Transfer pricing-Arm's length price-International transaction-Average of percentage of expenditure incurred by 17 pharmaceutical companies on advertisement and marketing - no analysis as to type of drug, nature of market, period of advertisement – held not to be TNMM as per provisions of the Act

The assessee company was engaged in the business of manufacture and export of pharmaceutical products. The assessee ultimately sold products in Ukraine but routed the same through its Associated Enterprise located in Cyprus as Ukraine was politically and economically very unstable in that period. The assessee adopted CUP method for determining arm's length price for reimbursement of business promotion expenses to the associated enterprise. The TPO rejecting the CUP method without any cogent reason and applied the mean of percentage of expenditure incurred by 17 pharmaceutical companies on advertisement and marketing and termed the same as ALP arrived by using TNMM. It was held that the said method applied by TPO was not TNMM and what was sought to be compared was only average of expenditure incurred by 17 pharma companies, without any analysis as to type of drug, nature of market, period of advertisement, etc. Thus, as TPO had not applied the TNMM in accordance with the provisions of the act and had adopted ad-hoc method to disallow capital expenditure under guise of transfer pricing provision, impugned adjustment was held to be set-aside. (AY 2004-05)

ACIT v. Genom Biotech (P.) Ltd. (2012) 52 SOT 147/17 ITR 260 (Mum.)(Trib.)

S.92C:Avoidance of tax- Transfer pricing-Arms' length price-Reference to TPO does not give presumption that the payment is allowable under section 37.(S.37)

Assessee was a joint venture company between Deloitte and Mastek, formed for establishment and operation of an offshore development centre for provision of both offshore and on site information technology and other related services. As per joint venture agreement Deloitte assisted assessee in generation of sales, management and delivery of projects, and in managing and maintaining customer relationships. For that purpose, three senior managers had been assigned by Deloitte to undertake full-time marketing only for assessee. Cost incurred on assignment of said managers consisting of their salary and related expenditure, was charged by Deloitte on actual basis. TPO held that marketing costs incurred and allocated by Deloitte to assessee did not result in rendering of any service to assessee and, therefore, determined arm's length price for same, at nil. It was very imperative on part of assessee, to establish before TPO, that payments made were commensurate to volume and quality of services and such costs were comparable. When assessee had not furnished evidence to prove that those three personnel had rendered marketing services to it and, in fact, assessee-company had no revenue which had been derived as a result of those marketing expenses, TPO was justified in determining ALP of marketing expenses at nil. 'ALP' has to be determined irrespective of any contractual obligation undertaken by parties. If transactions are, in opinion of TPO, not at arm's length, required adjustment has to be made, as provided in Act, irrespective of fact that expenditure is allowable under other provisions of Act. In view of CBDT instructions dated 20-5-2003, Assessing Officer is bound to refer all transactions beyond specified limit to IPO for determining ALP and mere reference to TPO by Assessing Officer does not raise presumption that amount in question has been allowed under section 37(1). (A. Y. 2002-03 to 2006-07)

Deloitte Consulting India (P.) Ltd.v. DCIT [2012] 137 ITD 21/19 ITR 378(Mum.)(Trib.)

S.92C:Avoidance of tax- Transfer pricing-Arms' length price-Comparables-Matter remanded to decide fresh .

Assessee-company was mainly engaged in providing various kinds of software and services for Internet Protocol, wire line, mobility and cable networks, helping various communications companies. For providing said services, assessee earned a compensation which equalled to its total operating cost of providing services plus a mark-up of 15 per cent. For establishing arm's length price relating to software development and related services, assessee adopted 'Transaction Net Margin Method' (TNMM) as most appropriate method. As per assessee's TP report it had identified 18 comparable companies engaged in software development services. During transfer pricing proceedings, TPO rejected most of comparables selected by assessee and adopted some fresh comparables. Based on comparables selected by TPO, certain

adjustment was made to ALP determined by assessee. DRP rejected various objections raised by assessee. On appeal, it was noted that some of comparables were rightly selected by TPO whereas objections were rightly raised by assessee in respect of some of comparables. On facts, matter was to be remanded back to Assessing Officer for determining arm's length price afresh after taking into consideration arithmetic mean of profit ratio of all finally tested comparables(A. Y. 2007-08)

Telcordia Technologies India (P.) Ltd. v. ACIT [2012] 137 ITD 1 (Mum.)(Trib.)

S.92C: Avoidance of tax- Transfer pricing-Arms' length price-Controlled transaction- A "controlled transaction" can never be regarded as "comparable" even if at ALP.

In determining the comparable parties for purposes of TNMM, the TPO selected a *wholly owned subsidiary* of the assessee called ICB Contractors India Pvt Ltd ("ICB") even though *there were related party transactions between ICB and another AE* called JTS Contracting Co. Malta. The TPO justified the selection on the ground that *the transactions between ICB and the AE were at arms' length and so the distinction between controlled and uncontrolled transactions stood obliterated.* In appeal before the Tribunal, the AM held that as there were *controlled transactions* between ICB and the AE, *ICB could not be taken as a comparable party*. However, the JM took the view as the transactions entered into by ICB was found to be at arms' length, it was an internal comparable which could not be ignored. The Third Member had to consider whether "*the net margin realized from a transaction with an AE found and accepted at ALP could be taken as a comparable being an internal comparable for computation of ALP an international transaction with another AE*?" Held by the Third Member:

The entire scheme in the Act & Rules for determining the ALP of an international transaction is based on making comparison with certain comparable uncontrolled transactions. The various methods prescribed for determining ALP clearly divulge that the comparison is always sought to be made of the assessee's international transactions with comparable 'uncontrolled transactions'. An '*uncontrolled transaction*'is defined under Rule 10A(a) to mean '*a transaction between enterprises other than associated enterprises whether resident or non-resident*'. A transaction between two associated enterprises goes out of the ambit of 'uncontrolled transaction' under Rule l0A. There is no statutory sanction for roping in a comparable controlled transaction for the purposes of benchmarking. If the view that a controlled transaction should not be shunted out for the purposes of benchmarking, is accepted, then all the relevant provisions contained in Chapter X in this regard, will become otiose. The argument that once controlled transactions are verified by the TPO and found at ALP, then the difference between controlled and uncontrolled transactions is obliterated cannot be accepted because it is possible that higher/lower prices for India may have been charged to reduce the overall incidence of tax. The TPO may accept that the transaction does not require adjustment if it benefits India even though the transaction may not be at ALP and cannot be used as a benchmark for purposes of making comparison in other cases. That is why the legislature has ignored controlled transactions, even though at ALP, and restricted the ambit only to uncontrolled transactions for computing ALP in respect of international transactions between two AEs. (A Y 2005-06)

Tecnimont ICB Private Limited v. ACIT(2012)138 ITD 28/ 75 DTR 259/148 TTJ 547(TM)(Mum.)(Trib.)

S.92C: Avoidance of tax- Transfer pricing-Cup method- TNM method- Depreciation- While computing Arms length price profit should be considered without deduction of depreciation.

The Assessee company which is engaged in software development. The assessee has adopted the CUP method. The TPO has rejected the CUP method applied by the assessee and adopted TNMM method for computing ALP. The method adopted by the assessee was rejected by the Commissioner (Appeals). On appeal the Tribunal held that for application of CUP method there should be similarity of transactions to be compared. If there are material product differences CUP method may not be applicable. On the facts the Tribunal held that services rendered by assessee to third parties were different from services rendered by it to Associated Enterprises hence third parties could not be considered for comparability analysis for benchmarking of international transactions made by assessee with its AE and therefore , CUP method could not be adopted for determining ALP , therefore order of TPO was justified . Assessees appeal was dismissed. As regards depreciation which can have varied basis and is allowed on different rates, which has no direct connection or bearing on price , cost or profit margin of international transactions profit should be taken without deduction of depreciation. The issue decided in favour of assessee. (A.Y. 2005-06)

Qual Core Logic Ltd v. Dy.CIT (2012) 52 SOT 574 (Hyd.) (Trib.)

S.92C: Avoidance of tax- Transfer pricing- Arm's length price- Comparables-TNMM – Subsequent year TPO has accepted the operating margin method can be the sole basis to apply profit margin method for the relevant year.

The Assessee in its transfer pricing report has accepted the TNMM as most appropriate method after intensive search of comparable companies. The contention of the assessee that operating profit shown should be accepted solely on the ground that in subsequent years the TPO has accepted the operating margin, cannot be accepted. The Tribunal directed TPO to work out the operating profit of comparable cases with certain specified adjustments and take their arithmetic mean for determining the ALP of the international transactions of the assessee company.TPO will restrict the adjustments to the transactions with the AEs only and not whole of the transactions/turnover. Further , while arriving at the aritmatic mean of the operating profit of the comparable companies , if the difference is less then +-5 percent as given in section 92C(2) , then the benefit of the section 92C (2) should be given according to law. Revenues appeal was partly allowed(A.Y.2002-03)

Dy.CIT v. Firmenich Aromatics (I) Ltd (2012) 75 DTR 33 (Mum,)(Trib,)

S.92C: Avoidance of tax- Transfer pricing-Arms' length price-Cup-TNMM-Weighted average-Broking and trading in shares- For comparability analysis, the comparable uncontrolled method (CUP) is better than the TNMM , especially if internal CUP instances are available .

Assessee is in the business of broking and trading in shares. It provided the stock broking services in respect clearing house trade to its Associated Enterprises. The TPO applied the CUP method for comparability analysis . The Assessee contended that the TNMM method is most appropriate. Without prejudice if CUP method is adopted certain adjustments have to be made as per Rule 10B(1) (a)(ii).

The Tribunal held that ,

(i) For comparability analysis, the comparable uncontrolled method (CUP) is better than the TNMM, especially if internal CUP instances are available ;

(ii) the assessee's argument that "weighted average arithmetic mean' of brokerage rates as compared to the "simple average arithmetic mean' of such rates should be adopted is not acceptable because the first proviso to section 92C refers only to "arithmetic mean" of more than one ALP and does not require the volume of the relevant transactions to be taken in to consideration;

(iii) Under Rule 10B(1)(a)(ii) adjustments to account of difference, if any , between the international transaction and the comparable uncontrolled transaction which could materially, affect the price in the open market have to be made, However ,the onus is on the assessee to make out a case for such adjustment (on account of differences in marketing function, research functions and difference in volumes) supported by relevant facts & figures & documentary evidences. The matter was set aside for verification of details and documentary evidence to be furnished in support. (A.Ys 2003 -04 & 2005-06)(ITA Nos. 3077/ Mum/2009 / 1236/Mum/ 2009 . dated 14-9-2012 .Bench "L".)

RBS Equities (India) Ltd v. ACIT (Mum.)(Trib.)www.iatonline.org.

S.92C: Avoidance of tax- Transfer pricing-Arms' length price-Choice of method and profit level indicator ('PLI')- Functional Asset Risk (FAR)- On the facts of the case the appropriate PLI will be the net profit /total cost and not the % of FOB value of goods sourced by AE .(Rule 10B(1)(e))

The assessee is a wholly owned subsidiary of GAP International Sourcing Inc, USA . The business activities of the assessee is to facilitate sourcing of apparel merchandise from India for the GAP group . Earlier years similar services were provided by a liasoning office , after incorporation as wholly owned subsidiary similar services are rendered by the assessee. Earlier Liasoning office was remunerated at cost +15% for these services. The assessee filed its TP report claiming Transactional Net Margin Method (TNMM) with cost plus 15% remuneration to be most appropriate method for determination of arms length price ("ALP"). The TPO looking at the FAR and other factors rejected the assessee' s claim cost plus 15% ALP and held that commission at 5% of the FOB value of goods by the foreign enterprise through Indian Venders was the most appropriate PLI for determining ALP. Before the DRP it was submitted that assesses, primary business activity comprised identification of vendors, provision of assistance to vendors in procurement of law material, inspection and quality control and co-ordination with vendors to ensure delivery of goods to GAP Group as per schedule supplied by GAP. However DRP has accepted the report of TPO. The main

issue before the Tribunal was whether PLI based on cost plus mark up or 5% of commission on FOB value of goods facilitated by the assessee for out sourcing is the most appropriate in given circumstances . After considering the submissions the Tribunal held that,

(i) The FAR , analysis gives the basis of broad characterization for e.g. Manufacture, service provider , distributor , etc with a further sub- characterization including low risk service provider; fullfledged manufacturer , contract manufacturer , etc . These characterization are vitally important to determine the arm's length price of international transactions;

(ii) The department has to proceeded on the erroneous premises is a risk bearing AE and its functions are not in the nature of a service provider only . The FAR attributable to assessee are far greater than what are claimed. It is also assumed that the assessee has developed substantial intangibles in the form of human resources and supply chain and enjoys location advantages . The fact is that the assessee is only a low risk procurement support service provider;

(iii)The arms' length pricing (method and profit level indicator (PLI) should be the one which reflects commercial and economic realities of the industry and does not lead to absurd and distorted results . The appropriate PLI is the net profit/ total cost as adopted by the assessee.

(iv) On the question of percentage mark up to be applied to the assessee's cost , in comparable instances of Li& Fung India Pvt Ltd v. DCIT (2010) 12 ITR 748 (Delhi) (Trib.), the rate of 32 % was applied as opposed to the rate of 15% applied by the assessee

The Tribunal accordingly held that non risk bearing procurement facilitating functions which are preordained by contract and hand book , the appropriate PLI will be the net profit /total cost and not the % of FOB value of goods sourced by AE . Accordingly the Tribunal up held the net profit /total remuneration model adopted by the assessee .For determination of cost plus remuneration method the Tribunal ,on the facts of the case held as under " In view of the foregoing we have no hesitation to accept candid proposal given by the assessee and hold that assessee TP adjustments be made by adopting the 32% cost plus mark up of the assessee for the Asst years 2006-07 & 2007-08. The mark up proposal of assessee is higher than mark up proposal over total cost earned by all comparables placed on record . The assessments should be framed accordingly . We may hasten to add that this mark we will be subjected to variation in subsequent years if the facts and circumstances of the case so warrant". The appeal of assessee was partly allowed.

(A.Y. 2006-07 & 2007-08)(ITA no 5147/Del/2001& 228/Del/2012 Bench "C' New Delhi. Dated 18-9-2012)

GAP International Sourcing (India) Pvt Ltd v. ACIT (2012) 149 TTJ 437/77 DTR 185(Delhi) (Trib.).

S. 92C:Avoidance of tax- Transfer pricing - Arms Length Price – Discount to both domestic company and AEs – No adjustment in ALP as in independent business situation granting of discount is a normal occurrence.

In the instant case, assessee rendered similar service to both domestic customers and AEs abroad, but granted discount of 10% only to AE abroad. According to TPO price of services rendered was not at ALP and thus, he made upward adjustment in ALP to the extent of discount allowed. It was held that in independent business situation granting of discount is a normal occurrence and unless AO demonstrates that discount so allowed would not have been allowed in an arm's length situation, ALP adjustment could not be made in respect of the same. It was therefore held that since there was nothing on record to show to even suggest that discount in question was not arm's length discount, or that discount had not been allowed under any other situations, adjustment made by revenue was set aside. (A.Y. 2006-07)

Dresser- Rand India (P.) v. Addl.CIT (2012) 53 SOT 173 (Mum.)(Trib.)

S.92CA: Avoidance of tax- Transfer pricing- Reference to TPO- Petitioner participated in the proceedings before TPO and has remedy to move before the DRP as well as appeal before the Tribunal hence writ petition was held to be not maintainable . (Art 226, Constitution of India)

The Assessing officer relying upon the CBDT instruction selected for scrutiny and after seeking approval of CIT made reference to the TPO . The petitioner participated in the proceedings before TPO . The petitioner thereafter filed a writ petition questioning the validity of the approval granted by the Commissioner to the Assessing Officer and the

order passed by the TPO. The Court dismissed the petition by observing that petitioner participated in the proceedings before TPO and has remedy to move before the DRP as well as appeal before the Tribunal hence writ petition was held to be not maintainable under Art 226, of the Constitution of India.

Hindalco Industries Ltd v. Add.CIT (2012) 75 DTR 238 /252 CTR 167(Bom.) (High Court)

S.92CA: Avoidance of tax- Transfer pricing- Alternative remedy – Writ is not maintainable as the petitioner is having alternative and efficacious remedy against the order.(S. 144C, Art 226 of the Constitution of India)

The petitioner challenged the reference made under section 92CA(1) of the Act and the show cause issued by the Addl.CIT . It was contended on behalf of the revenue that there is a complete mechanism provided under the Act for raising objections in the matter of fixation of ALP hence the writ is not maintainable. The court held that petitioner is having alternative and efficacious remedy against the order passed under section 92CA(3) as a complete mechanism exists under section 144C the writ is not maintainable .(A.Y.2007-08, 2008-09)

Bhatia International Ltd v. Addl. CIT (2012) 75 DTR 247/252 CTR 176/210 Taxman 327 (MP) (High Court)

S.92CA: Avoidance of tax - Reference to Transfer Pricing Officer - Transaction based and not entity based.

The reference by the AO under section 92CA(1) is transaction based and not entity based. There may be several international transactions with the same entity, but reference made by the AO is each transaction specific i.e. only the international transaction which have been referred to by the AO after taking the approval of the Commissioner can be looked into by the TPO. (A.Y. 2006-07)

GlaxoSmithkline Consumer Healthcare Ltd v. Addl. CIT (2012) 51 SOT 52 (Chd.)(Trib.)

S.94: Avoidance of tax-Transaction in securities-Purchase of units and the sale thereof at loss after earning dividend loss is allowable.

The assessee had purchased units of mutual funds on 26-12-20003. On the very same date , the assessee received the dividend . On 29-03-2004 , the assessee redeemed the units and claimed shorter capital loss. The Assessing Officer opined that the cheque for the purchase of units was actually realized on 30-12-2003 and therefore , the period of holding before the sale was only 88 days i.e. less than 3 months, therefore provision of section 94(7) of the Act held applicable. He denied the set off short term capital loss claimed by assessee. On appeal the claim of loss was allowed by Commissioner (Appeals) by observing that if date of tender of cheque for purchase of share is considered as the date of purchase , then the sale was not within three months of purchase and provision of section 94(7) held not applicable. On appeal by revenue the Tribunal confirmed the view of Commissioner (Appeals) and dismissed the appeal of revenue. (A.Y.2004-05)(ITA no 4285/Mum/2009 dated 6-6-2012.Bench 'F')

ITO v. Vasudeo Pandurang Ginde (2012) BCAJ –July –P.57(Mum.)(Trib.)

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

The Assessing Officer held that the since the shares were not listed securities at the time of transaction, the tax was payable at normal rate and not concessional rate . The view of Assessing Officer was confirmed by the Commissioner (Appeals) and Tribunal. The Court held that trading of these shares in the Stock exchange commenced only in the morning of 6-1-2006 . The shares were transferred from the demat account of the assessee on 5-1-2006 the credit of sale consideration was credited on 6-1-2006 would not be relevant to determine the transfer. The court held that once shares were transferred from demat account of assessee to account of 'Registrar to issue' and then to demat accounts of allottees, transfer is complete in terms of section 2 (47) by 5-1-2006. On the facts transfer for purchase being completed prior to listing of shares and commencement of trading in stock exchange being on 6-1-2006, transaction cannot be held to be in stock exchange hence the assessee would not be eligible for payment of capital gains tax at lower rate of 10 percent , normal rate is applicable.(A.Y. 2006-07)

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

S.115A :Foreign companies-Tax-Dividends-Royalty –Technical services fees- DTAA- India-USA-Different agreement difference source of income .(S.90, Art 12)

Royalty income receipts under different agreements are different sources of income, taxpayer can take benefit of lower tax rate by comparing the rate of tax under income tax Act and the DTAA separately for each agreement.(A.Y. 2007-08)

IBM World Trade Corporation v. DDIT(2012)(2012)148 TTJ 496/75 DTR 161/(2012) BCAJ Pg. 34, Vol. 44-A, Part 3, June, 2012.(Bang.)(Trib.)

S.115E:Non – residents - Capital gains - Not ordinary resident- Interest –Declaration - Interest on deposits in banks are entitled benefit not required to filing of declaration under section 115H. (S. 6(6)(a), 115H).

The assessee had been a 'non-resident' for 12 years prior to return to India. He has been in India only for 323 days during the previous seven years preceding in the assessment year 1993-94. The Tribunal held that assessee falls within scope of section 6 (6) (a), hence the status of the assessee is 'not ordinary resident' and non –resident up to assessment year 1992-93 .The Assessing Officer denied the exemption under section 115E on the ground that the assessee has not filed the declaration under section 115H. The Tribunal held that there is no requirement of filing of declaration under section 115H. On appeal to the High Court held that the Tribunal has correctly justified in holding that the exemption under section 115E of the Income-tax Act and there is no requirement of filing of declaration under section 115H. (A.Ys. 1994-95 to 1996-97)

CIT v. N. Sundarraman (2012) 70 DTR 9/206 Taxman 364 / 250 CTR 212 (Mad) (High Court)

S.115E:Non-residents - Capital gains – Bonus shares resulted out of original investments in shares made out of convertible foreign exchange, concessional rate in section 115E can be applied to LTGC on such bonus shares.

There can be no differentiation whatsoever between definition of the 'foreign exchange asset' as applied to section 115E and 115F since both the sections fall under chapter XII-A. That being so, the assessee cannot be deprived of the concessional rate available under section 115E just because the sale of the shares were bonus shares. Coordinate Bench of the Tribunal rightly relied on the decision of Apex court in the case of CIT v. Dalmia Investment Co. (1964) 52 ITR 567 for holding that such bonus shares were covered by sub-clause (b) of section 115C and was a foreign exchange asset. This being so, income by way of long term capital gains on transfer thereof was well eligible for application of concessional rate of tax specified under sub-clause (b) of section 115E. It is held that the authorities below fell in error when they applied higher rate of tax. Thus AO was directed to give assessee benefit of concessional rate under Section 115(E). (A.Y. 2008-09)

Deivanayagam Maruthini(Smt) v. Dy. DIT(IT) (2012) 51 SOT 163 (Chennai) (Trib)

S.115J:Company- Book profit – Deduction – Bonus and Donation amounts – Assessee not entitled to deduction when profit and loss account of the assessee disclosed the net profit in accordance with Part II and Part III of Schedule VI of the Companies Act

The AO while completing the assessment under Section 115J of the Act, disallowed the bonus and donation amounts on the ground that they did not relate to AY 1989-90. The High Court held that when the profit and loss account of the assessee disclosed the net profit in accordance with Part II and Part III of Schedule VI of the Companies Act, the assessee was not entitled to have deduction of the amounts debited in profit and loss appropriation account in the computation of net profit. (AY 1989-90)

CIT v. Swamiji Mills Ltd. (2012) 342 ITR 250/72 DTR 139 (Mad.) (High Court)

S.115JA:Company-Book profit – Deduction – Export-Deduction under section 80HHC is to be computed as per P&L Profits and not normal provisions. (S.80HHC, 115JB)

In computing "book profits" under section 115JA & 115JB, the assessee claimed that the deduction admissible there under section 80HHC had to be computed on the basis of the "book profits" and not on the basis of the income computed under the normal provisions of the Act. This claim was upheld by the Tribunal by relying on the judgment of the Special Bench in Dy. CIT v. Syncome Formulations (I) Ltd.(2007)106 ITD 193(Mum.)(SB) (Trib.). On appeal by the Revenue, the High Court [CITv.AI-Kabeer Exports Ltd. (2010) 233 CTR 443 (Bom.)] reversed the Tribunal. On appeal by the assessee, The Apex Court held reversing the High Court:

In view of this Court's Order in the case of CIT vs. Bhari Information Technology Systems(2012) 340 ITR 593(SC)upholding the judgment of the Special Bench of Tribunal in Dy. CIT v. Syncome Formulations (I) Ltd.

(2007)106 ITD 193, the impugned judgment of the High Court is set aside and the judgments of the ITAT in these cases stand affirmed.

Al-Kabeer Exports Ltd. v. CIT (SC) www.itatonline.org

S.115JA: Company- Book profit – Deduction – Export. (S. 80HHC, 115JB)

In computing book profits under section 115JA, 115JB, the deduction under section 80HHC had to be allowed on the basis of book profits and not by applying the normal provisions of the Act for computation deduction.(A.Ys. 2000-01 & 2003-04)

CIT v. C.P.S.Textiles P. Ltd. (2012) 340 ITR 590 (Mad.)(High Court)

S.115JA:Company- Book profit – deduction of withdrawal from the revaluation reserve account - creation of the revaluation reserve account referable to the balance sheet assets portion and not by way of appropriation to the profit and loss account – hence no deduction allowed

The assessee while computing the book profit for the assessment year 1989-90, reduced withdrawal from the revaluation reserve account. The High Court deciding in the favour of the department held that since the creation of the revaluation reserve account was referable to the balance sheet assets portion and not by way of appropriation to the profit and loss account, the question of claiming deduction does not arise. Therefore assessee was not entitled to deduction in respect of withdrawal from the reserve account in terms of Section 115JA. (AY 1989-90)

CIT v. W.S. Industries (India) Ltd. (2012) 342 ITR 231/72 DTR 133 (Mad) (High Court)

S.115JA:Company - Book profit –Minimum alternative tax- Debenture redemption reserve- Adjustment of debenture redemption reserve, the amount held not to be reserve within the meaning of expln. (b) to S. 115JA

It was held that mere fact that the debenture redemption reserve is labelled as a reserve will not render it as a reserve in the true sense or meaning of that concept. An amount which is retained by way of providing for a known liability is not reserve. Accordingly order of Tribunal affirmed and appeal of revenue was dismissed. (A.Y. 1997 -98)

CIT v. Raymond Ltd. (2012) 71 DTR 265/ 209 Taxman 65 (Bom.)(High Court)

S.115JA:Company-Book profit-Exempted income- While computing book profits u/s 115JA/JB, if actual expenditure to earn tax-free income not debited in P&L A/c, s. 14A cannot apply

For AY 2007-08, the assessee invested Rs. 10 crores in shares and units. The assessee claimed that it had incurred no expenditure to earn tax-free income though the AO & CIT (A) made a disallowance of Rs. 19.58 lakhs u/s 14A r.w. Rule 8D. Before the Tribunal, the assessee claimed that (i) Rule 8D could not apply to AY 2007-08 and (ii) No disallowance u/s 14A could be made for purposes of computing book profits u/s 115JB. Held by the Tribunal:

Under the normal provisions of the Act, Rule 8D cannot apply till AY 2008-09 though the AO is at liberty to identify actual expenditure incurred to earn tax-free income & make disallowance. However, while computing book profit u/s 115JB, no actual expenditure was debited in the profit & loss account relating to the earning of exempt income. S. 14A cannot be imported into while computing the book profit u/s 115JB because clause (f) of Explanation to s. 115JB refers to the amount debited to the profit & loss account which can be added back to the book profit while computing book profit u/s 115JB of the Act. In Goetze (India) Ltd. vs. CIT (2009) 32 SOT 101 (Del) it was held that sub-sec. (2) & (3) of s. 14A cannot be imported into clause (f) of the Explanation to s. 115JA. Accordingly, it is held that no addition to book profit can be made on account of alleged expenditure incurred to earn exempt income while computing income u/s 115JB.

Quippo Telecom Infrastructure Ltd v. ACIT (Delhi)(Trib)www.itatonline.org

S.115JB:Company-Book profit- STP unit-Exempt income- Companies Act. (S. 10A)

Book profits prepared by Company in accordance with Companies Act can neither be interfered with by Assessing Officer nor could assessee adjust the same except as provided under the Companies Act. In terms of clause (3) of Explanation to section 115JB(2) lower of amount of loss brought forward or unabsorbed depreciation is to be reduced from book profit and it is amount as per books of account and not as per Income tax records which has been computed under the provisions of Income-tax Act. Therefore while computing book profit under section 115JB and making adjustments thereunder as provided in Explanation thereto, aggregate of profits /losses of both STP and non STP units is to be taken in to consideration and not profit or losses of non STP units only. (A.Y. 2005-06)

Yokogawa India Ltd. v. Dy. CIT (2012) 49 SOT 173 (Bang.)(Trib.)

S.115JB:Company-Book profit- For the purpose computing book profit only permissible adjustments in form of additions and deductions are provided under explanation 1 to section 115JB and no more deductions or allowance are permissible.

The assessee company is in the business of running a multiplex theatre. The Assessing Officer found that while computing the book profit the assessee had reduced an amount of Rs 33,11,687/- which pertained to "foreign exchange fluctuation" due to restating of term loan at the year end , which was rejected by him . On appeal the Commissioner (Appeals) also up held the view of Assessing Officer. The Tribunal held that for the purpose of computing of "Book profit" only permissible adjustments in form of additions and deductions are provided under Explanation 1 to section 115JB and no more deductions or allowances other than what are stated in said Explanation permissible. Accordingly the Tribunal up held the order of Assessing Officer. (A.Y. 2005-06)

City Gold Media Ltd v. ITO (2012) 134 ITD 535/ 146TTJ 510/ 71 DTR 103 (Ahd.) (Trib.)

S.115JB:Company-Book profit-Companies Act-Not crediting profit on sale of shares to profit and loss account is against the accounting policy , Assessing Officer is right in considering the profit on sale of shares to taxation under MAT provisions .(S.115J, 115JA).

The assessee company sold certain shares and earned the profit. The assessee has not routed the said transaction through profit and loss account but had directly credited to capital reserve account .The Assessing Officer computed the book profit by including profit on sale of shares. The view of Assessing officer was up held by the Commissioner (Appeals).On appeal to the Tribunal it was contended that the accounts were duly certified by auditors in accordance with the Companies Act, the Assessing Officer has no jurisdiction to the net profit shown in the profit and loss account except to the extent provided under explanation to sub section (2) to section 115JB.The Tribunal held that the not crediting the profit on sale of shares to profit and loss account was contrary to significant accounting policy of assessee itself as well as against requirements of Accounting Standard AS-13 and requirements of Parts II and III of Schedule VI of Companies Act , 1956 ,therefore , Assessing Officer was justified in treating the profit on sale of shares, to taxation under MAT provisions of section 115JB. (A.Y. 2005-06)

Sumer Builders (P) Ltd v. Dy.CIT (2012) 50 SOT 198 (Mum.) (Trib.)

S.115JB:Company-Book profit- Prior period expenses- There is no provision for any adjustment on account of disallowance of prior period expenses while computing book profit is not permitted .

The Assessing Officer while computing the Book profit added the amount in respect of prior period expense debited to the profit and loss account. The Commissioner (Appeals) upheld the addition. On appeal the Tribunal held that, there is no provision for any adjustment on account of prior period expenses in Explanation 1 to section 115JB (2) and therefore any addition on account of disallowance of prior period expenses while computing book profit is not permitted. (A.ys 2000-01 to 2003-04)

Shivshahi Punarvasan Prakalp Ltd v. ITO (2012) 135 ITD 51/145TTJ 457/69 DTR 1 (Mum.) (Trib.)

S. 115JB:Company-Book profit- Computation –Foreign exchange fluctuation-Companies Act-Reduction of amount held to be not justified.

The assessee is a company engaged in the business of running multiplex theatre. The assessee while computing MAT reduced an amount pertaining to "foreign exchange fluctuation due to restated term loan at the yearend". It was held that the provisions of S. 115JB were a code by themselves therefore, the adjustments can be made as prescribed within this code. Under this code, if a profit and loss account has been made in terms of companies Act, then no adjustment or tinkering is allowable except as provided in the Explanation. The assessee had not demonstrated that under Schedule VI to the companies Act, the income was beyond the scope of profit of the company. By very adoption and inclusion of the income in the profit of the company it had been affirmed by the auditor that it had come within the ambit of "book profit". Thus, held that assessee was not justified in reducing the amount while computing book profit. (AY 2005-06)

City Gold Media Ltd. v. ITO (2012) 17 ITR 192 (Ahd.) (Trib.)

S.115JB:Company-Book profit-Computation-Interest- Adjustment by the Assessing Officer is held to be not justified.

Assessing Officer disallowed assessee's claim of interest expenditure observing that amount of interest had been described as 'interest capitalized' in earlier years written off during current year and added said amount to book profit for computation of tax under section 115JB. Held that amount of interest would not fall under provisions of section 115JB(2) and Explanation 1 thereunder. Therefore, Assessing Officer was wrong in adding amount of interest to book profit under section 115JB. (A. Y. 2008-09)

JCIT v. Shreyans Industries Ltd. [2012] 137 ITD 79/18 ITR 169/74 DTR 437 (Chandigarh)(Trib.)

S.115VD:Shipping bussiness – Qualifying ship- Tonnage tax scheme- Ship operating in coastal waters and ship operating in international waters-Entitled to the benefit of tonnage tax scheme.

Tonnage tax scheme does not distinguish between ships operating in costal waters and ships operating in International waters and therefore, the ship operated by the assessee for transporting thermal coal from one location to another location within country is a qualifying ship under section 115VD and assessee is entitled for the benefit of tonnage tax scheme.(A.Y. 2006-07)

ACIT v. West Asia Maritime Ltd. (2012) 65 DTR 16/ 143 TTJ 129/ 16 ITR 175(TM) (Chennai) (Trib.)

S.115VJ: Shipping bussiness – Qualifying ship- Tonnage tax scheme- Treatment of common costs-Allocation of expenses on fair and reasonable was up held.

Assessee is engaged in shipping business and also other business activities.For shipping business the assessee offered income under tonnage tax scheme under section 115VJ. The Assessing Officer allocated the common expenses between shipping and other business in the ratio of gross receipts between two business and made an addition of Rs 8 lakhs.Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that as the assessee has failed to demonstrate the basis of allocation of common expenses , the allocation of expenses by the Assessing Officer was up held (A.Y. 2005-06)

Rajamahendri Shipping & Oil Filed Services Ltd (2012) 51 SOT 242 (V isakha.) (Trib.)

S.115VJ:Shipping bussiness - Tonnage tax scheme – Treatment of common costs – Reasonable basis -vis-à-vis proportionate basis-Matter set aside.

Assessee as also the authorities below have proceeded to use the expression `reasonable basis' as interchangeable with `proportionate basis'. This approach is fallacious in as much as proportionate basis is not essentially a reasonable basis in all the situations, particularly in the context of passive income like rent and interest. Further, the allocation of the depreciation cost has to be also on the basis of usage of the asset in respect of which depreciation is claimed. Thus, allocation of all the common costs on proportionate basis is neither reasonable nor meets the prescription of the statute. The matter was set aside to Assessing Officer for adjudication de novo. (A.Y. 2005-06)

Surendra Overseas Ltd v. Dy. CIT (2012) 68 DTR 34 / 144 TTJ 746 (Kol.) (Trib.)

S.115WA:Fringe benefits - Hospitality and sales promotion –Hospitality- Providing free car accessories can not be treated as hospitality and is not covered under section 115WA.

Assessee is a car dealer. Assessing Officer held that car accessories provided free of cost to the customers was in the nature of hospitality and hence covered under section 115WB(2)(B). On appeal the High Court held that providing free car accessories cannot be treated as hospitality provided by the appellant to any person nor can be treated as sales promotion expenses, as consideration thereof is in built in the price of the car and therefore provision of such accessories to customers is not covered by section 115WA. (A. Y. 2006-07).

T & T Motors Ltd. v. ACIT (2012) 341 ITR 332 / 67 DTR 98 / 247 CTR 384 (Delhi)(High Court)

S.115WA:Fringe benefits-Residential accommodation to managing Director- Free security deposit- Notional interest on security deposit is in nature of fringe benefit and to be added to value of fringe benefit , however , since no valuation rule has been provided in respect of such fringe benefit same could not be subjected to tax.

The assessee company has provided a residential accommodation to its chairman cum –managing director . It had taken the said premises on lease for monthly rent and had given a deposit Of Rs 5 crores as interest free deposit . The assessee also had borrowings to the extent of Rs 5 Crores. The Assessing Officer calculated notional interest at rate of 9 % and added same to value of fringe benefit . On appeal before the Commissioner (Appeals) , the assessee, submitted that since no valuation was possible for such benefit ,hence the same could not be subject to FBT relying on Board

Circular No 8 dated 29-8- 2005. The Commissioner (Appeals) also confirmed the addition. On appeal to Tribunal, the Tribunal held that , benefit of notional interest on security deposit is in the nature of fringe benefit under clause (a) of sub section (1) of section 115WB. However, since no valuation rule has been provided in respect of such fringe benefit, same could not be subjected to tax.(A.Y. 2007-08)

DP world (P) Ltd v. Dy. CIT (2012) 135 ITD 141/72 DTR 237 (Mum.) (Trib.)

S.115WA:Fringe benefits- Charge – Expenses incurred-Value-FBT on expenses incurred by employer.(S.115WC)

In the present case there was no dispute to the fact that as per Rule 8 of the Income-tax Rules in the case of a tea company, only 40% of the total not income is liable to pay tax under the Act at the prescribed rate and the balance 60% is to be considered as agricultural income, which is not liable to be taxed under the Act, as it is within the domain of the states. However in case of FBT, it is leviable as per provisions of chapter-XII-H, FBI is basically the tax on the expenses incurred by the assessee to provide certain privilege, fercilitate amenities to it's employees. Therefore FBI is not linked with the income of an employer but it is with reference to the expenditure incurred by the employer on the benefits/ privileges provided to its employees. Hence there was no similarity between the provisions of section 115WA vis-a-viz section 115-O. (A.Y. 2006-2007)

DY.CIT v. McLeod Russell India Ltd {(2012) 50 SOT 21(URO)(Kol.) (Trib.)

S.115WB:Fringe benefits-Sales promotion-Gift-Sales promotion expenses can not classified as gift.(S. 115WD,115WO)

Assessee in order to promote its products, from time to time formulated schemes which entitled distributors / dealers /stockiest to specific articles /presents depending upon volume of sales achieved through stockiest/ dealer etc. Value of said articles presents would be considered as advertising / sales promotion expenses falling under section 115WB(D) and could not be classified under section 115WB(O) treating it as gift as the expenditure has direct nexus with sales promotion and publicity.(A. Y. 2006-07)

Birla Corporation Ltd. v. Dy. CIT (2002) 134 ITD 142/16 ITR 60 (Kol.)(Trib.)

S.115 WB (2)(D): Fringe Benefits– gifts to the customers with condition attached – said gifts not given voluntarily or free of consideration – held the expenses on gifts to be included in sales promotion expenses for assessment of FBT

In the instant case, the assessee gave gifts like vouchers, televisions, etc to members who took timeshare units with a condition that the value of the said gifts would be deducted in case of termination of membership. What would fall under Section 115WB(2)(O) was pure gifts would any conditions attached. It was held that there was no element of quid pro quo in the gifts given by assessee to its customers and that there was a condition inbuilt. In such a situation, the gift would fall within what was normally considered as sales promotion and would fall u/s 115WB(2)(D) and thus, AO was to consider the amount as sales promotion for assessment of fringe benefit tax. (AY 2007-08)

Mahindra Holidays and Resort India Ltd v. ACIT (2012) 16 ITR 412 (Chennai) (Trib.)

S.115WB: Fringe benefits-Telephone –Other expenses under the head telephone expenses are not covered under Fringe benefit. For tour and travel expenses rate applicable will be 5 % and not 20% as applied by the Assessing Officer.

The Assessing Officer held that postages, E-mail and courier charges debited under the head telephone expenses has to be considered for the applicability of Fringe benefit, which was confirmed in appeal by the Commissioner (Appeals). On appeal the Tribunal it was held that expenditure debited under the head postage, E-mail, lease line and courier are not covered by section 115WB (2) (J) of the Act hence no disallowance can be made. The Tribunal also held that for the relevant year FBT is applicable at 5 % and not 20% as applied by the Assessing Officer . Accordingly the addition made by the Assessing Officer was deleted. (A.Y. 2007-08)

SGS India (P) Ltd v. Addl.CIT (2012) 75 DTR 221 (Mum.)(Trib.)

S.119:Income-tax authorities- Instructions to subordinate authorities- Waiver of interests – Due to financial difficulties there was delay in payment of advance tax, interest levied under section 234B, and 234C cannot be waived. (S. 234B, 234C)

The assessee was acting as a real estate agent. Due to financial difficulties, there was delay in payment of advance tax. The assessee filed application for waiver of interests levied , which was rejected . The assessee filed writ petition against the said order, and contended that it had made out a case for grant of waiver / refund and the same had been declined by misinterpretation and / or narrow interpretation of the order F.NO 400/29/2002 –IT (B) dated 26-6-2006 (Said order) issued by the Central Board of Direct Taxes (CBDT). In the alternative, it was contended that paragraph 3 of the said order, to that extent it declined the benefit of waiver of interest charged under section 234B, and 234C to the class or classes referred to in paragraphs 2(a) and 2(d) of the said order dated 26-6-2006 , was arbitrary and unequal and was in violation of Article 14 of the Constitution of India. The High Court held that said order specifically mentioned that it would not apply to sections 234B and 234C , in view of above , the assessee was not entitled to any waiver / reduction of interest. Accordingly the writ petition was dismissed. (A.Y. 2008-09)

De Souza Hotels (P.) Ltd. v. Chief CIT (2012) 207 Taxman 84/ 78 DTR 135 (Bom.)(High court)

S.127: Income –tax authorities- Power to transfer cases-Question whether the section 127(2) transfer order is invalid for want of reasons referred to Full Bench.

The CIT, Valsad, passed an order u/s 127(2) centralizing the assessee's case from Vapi to Surat "to facilitate coordinated and effective investigation". The assessee challenged the order on the ground that as no reasons were given in the s. 127(2) order (though given in the affidavit-in-reply), the s. 127(2) order had to be struck down as per Ajanta Industries and others v. CBDT (1976)102 ITR 281 (SC). The department relied on Arti Ship Breaking vs. DIT[(2000)) 244 ITR 333 (Guj)] where it was held that Ajanta Industries was no longer good law and reasons were not required to be stated in the order. Held by the Court:

In Ajantha Industries and others vs. CBDT(1976) 102 ITR 281 (SC), it was held that the requirement of recording reasons u/s 127(1) is mandatory and non-communication thereof is not saved by showing that the reasons exist in the file. However, in Arti Ship Breaking v.CIT (2000)244 ITR 333 (Guj) this law was not followed on the basis that in two subsequent decisions it was held non-communication of reasons recorded by the authority would not vitiate the proceedings. This view of the division bench does not appear to be correct because the said later two decisions related to irregularities in course of disciplinary proceedings which had nothing to do with s. 127 conferring power of transfer. Accordingly, it cannot be said that Ajantha Industries has lost its force in view of those two subsequent decisions. Accordingly, the matter has to be referred to a larger bench to consider the following question:

"Whether the decision of the three-judge-bench of the Supreme Court in the case of Ajantha Industries reported in [1976] 102 ITR 281 so far as it lays down the law that the requirement of recording reasons under section 127(1) of the Income tax Act is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee is still a good law in view of the subsequent decisions of the Supreme Court in the cases of Managing Director, ECIL v. B. Karunakar, AIR 1994 SC 1074, and State Bank of Patiala v. S. K. Sharma, AIR 1996 SC 1669 as held by a Division Bench of this court in the case of Arti Ship Breaking vs. Director of Income Tax (Investigation) and others reported in (2000) 244 ITR 333."

MillenniunHouseware v. CIT (2012) 71 DTR 217 (Guj)(High Court)www.itatonline.org.

S.127: Income –tax authorities-Power to transfer cases – Condition precedent for transfer –Opportunity to be heard must be given.

In a case where the Assessing Officer from whom the case is to be transferred and the Assessing Officer to whom the case is to be transferred are not subordinate to the same Director General, or Chief Commissioner or Commissioner, two basic requirements are required to be satisfied before making an order transferring the case u/s. 127(2) of the I.T. Act, 1961, viz., the concerned Director General, Chief Commissioner o Commissioner from whose jurisdiction the case is to be transferred is required to give the assessee a reasonable opportunity of being heard; and the concerned authority is required to record reasons for doing so. In Ajantha Inds. vs. CBDT (1976) 102 ITR 281 the Supreme Court has held that not only is the requirement of recording reasons u/s. 127(1) a mandatory direction under the law but that non communication thereof is not saved by showing that reasons exist in the file although not communicated to the assessee. Thus, non communication of the reasons recorded would also vitiated the order made u/s. 127(2).

Madhu Khurana v. CIT(2012) 347 ITR 183 (Guj.)(High Court)

S.131 (3)(b): Income –tax authorities-Powers-Survey-Retention of books of account- **Violation thereof- Directed to be released and awarded cost of Rs 25,000..**

Survey action was conducted at the premises of the Assessee. Books produced in pursuance to notice issued during survey . Assessing Officer retained the books for unreasonable period . A long period of five years had lapsed and the Revenue did not complete the assessment and still wants to continue to retain the books which is nothing but amounts to the abuse of powers available under section 131(3)(b). Therefore, it is a fit case for entertaining the Writ and issuing direction to return the book of accounts and to award cost of Rs. 25,000/-.

CIT v. Subha & Prabha Builders Ltd(2012) 250 CTR 106/ 70 DTR 291 (Karn.)(High Court)

S.131: Income –tax authorities-Powers-Discovery-Production of evidence- Statement recorded – Retraction-Held not justified.

The Assessee made a statement in the enquiry conducted by the Department as regards the parting of a sum over and above what was recorded in the sale deed. A reading of the questions and answers shows that the assessee was well aware of the contents of the statement made by him. The statement was recorded in the year 1999 and the assessee thereafter too participated in the enquiry until 2003 and he had no doubt about the truthfulness of the statement made. However, for some reason, best known to him, the assessee in the letter on 26th June, 2003, took a plea that the statements were not recorded in the presence of Dy. Director of Income Tax (Investigation) and statements were not given voluntarily. Taking note of the time of retraction, in the absence of any materials to substantiate the said contention, coupled with other material documents available in the form of seizure made on the premises of K and A and the consistency in the answers made by the assessee, the contention of the assessee that the Department committed serious error in ignoring the retraction is liable to be rejected. The contention of the assessee that the statement was in violation of the provisions of CPC and CPC, is also not sustainable. (Block period 1st April, 1989 to 19th August, 1999)

K. Sakthivel v. ACIT (2012) 76 DTR 79/252 CTR 531 (Mad)(High Court)

S.131: Income –tax authorities-Powers- Service of summons- Validity of service of notice.(S.292BB)

Summons u/s 131 was served on N who has acknowledged the same. Averments in the reply affidavit show that the petitioner is admitting service of summons on him and also that he appeared before the respondent in pursuance of the summons. Though S. 292BB is not retrospective, this section governs all proceedings initiated subsequent to 1st April, 2008, even if such proceedings are in relation to assessment years prior to 1st April, 2008. Thus, petitioner having admitted service of summons and appeared before the respondent in pursuance of the summons, cannot contend that the summons was not duly served on him or that the service was improper for any reason. As regards the contention of the petitioner that the impugned notices were wrongly addressed, petitioner does not have a case that the address indicated in the documents was not that of his residence. Therefore, the fact that in some of the documents the petitioner's address as been shown differently did not invalidate the documents that were served at his residential address which was mentioned by the petitioner himself in his letter and the sworn statement. (A.Y. 2003-04 to A.Y. 2009 -10)

K. M. Mehaboob(Dr.) v. DCIT (2012) 76 DTR 90 (Ker.)(High Court)

S.132:Income –tax authorities- Powers - Search and seizure- Warrant of authorization- Condition precedent – Satisfaction- Inspection must be allowed. (S. 153A)

For issuing warrant of authorization satisfaction must be based on information coming into possession of department. In the absence of new material with authorities, loose satisfaction notes placed by authorities based on the high growth of company, is not sufficient to meet the requirements of provisions. Accordingly the action of search and seizure was held to be invalid. As the search and seizure was held to be invalid the notices under section 153A was held to be bad in law. The Court also held that if appropriate prayer is made, inspection of such documents may be required to be allowed. (A. Ys. 2004-05 to 2009-10)

Spacewood Furnishers Pvt. Ltd. and others v. DIG (Investigation) (2012) 340 ITR 393/ 65 DTR 281/204 Taxman 392/ 246 CTR 313 (Bom.)(High Court)

S.132: Income –taxauthorities- Powers -Search and seizure – Interrogation till late night amounts to "torture" & violation of "human rights"- Officers are held liable for to pay compensation from their salary.

The assessee's premises were searched under section 132 and alleged undisclosed income of Rs. 4.18 crores was detected. The assessee filed a complaint before the Bihar Human Rights Commission stating that interrogation & recording of statement was conducted for more than 30 hours and till the odd hours of the night without any break or interval and this violated his human rights. The Commission upheld the plea and directed the concerned officials to show-cause why the assessee should not be compensated from their salary. The Department filed a Writ Petition to challenge the order,held by the Court:

(i) The interrogation continued till 3.30 a.m. on the second night of search and seizure as per the department's record. The search and seizure manual does not prescribe any time limit for search and survey operation and the same may continue for days if required, but it has to be in keeping with the basic human rights and dignity of an individual. The purpose of the Act is to give effect to the process of execution of actions of executive and bureaucratic machinery in line of accepted standard of basic human rights which are internationally recognized. The laws, and approach to law for its execution must confirm to the charter of human values and dignity. Even a person accused of a serious offence has to be produced before the nearest Magistrate within 24 hours minus the time taken in reaching the Court. There is no possible justification to continue interrogation and keep the assessee awake till 3 a.m. on the second night of search and interrogations. No reason has been assigned as to why the interrogations could not have been deferred till the morning of the next day. The officials could have continued with the interrogation on the next day in the morning after allowing the assessee to retire at an appropriate time in the night. Sleep deprivation method of interrogation amounts to inhuman treatment and violation of Article 3 of the European Convention on Human Rights. The Convention prohibits in absolute terms torture or Inhuman or degrading treatment or punishment. No exception to Article 3 can be made even in the event of Public Emergency threatening the life of the Nation. Accordingly, the department is guilty of violating human rights even though the operations were conducted in best interest of revenue and good faith (Ireland vs. UK (1978) ECHR 1, Kalashnikov vs. Russia (2002) ECHR 596 &Salmouni vs. France (2000) 29 EHRR 403 followed; RajendranChingaravelu 2010(1) SCC 45 distinguished)

(ii) However, as the Commission, without issuing any notice to the officials engaged in the search (as to the violation of Human Rights), issued notice on why monetary compensation be not awarded and be recoverable from their salary, it had pre-judged the officials as being guilty of violation of human rights, without affording them an opportunity of hearing. This was contrary to section 16 of the Protection of Human Rights Act, 1993 and had to be reversed.

CCIT v.State of Bihar ,Through Chief Secretary (Rajendra Singh)(2012) 205 Taxman 232/ 71 DTR 268/ 250 CTR 304r (Patna)(High Court)

S.132:Income – tax authorities – Powers - Search and seizure - Warrant of authorization - Validity-Writ-Warrant of authorization which had been issued in the name of dissolved firm as well as in the name of assessee and his wife cannot be said to be invalid. (Art 226)

The assessee and his wife formed a partnership. The firm was dissolved on 19/4/2004. The assessee continued the business of the firm as sole proprietor. Warrant of authorization were issued under section 132 at the business premises and residential premises of assessee and his wife. The notice was issued to file the return for the assessment years 2001-02 to 2004-05. The assessment was done and when the appeal was pending the assessee challenged the validity of search issue of warrant of authorization by way of writ petition on the ground that the DIT (Investigation) did not entertain a bonafide belief as required under section 132 (1) and secondly , warrants of authorisation were issued in name of a dissolved firm which was not in existence in law . The court held that the warrant of authorization was issued in the name of assessee as well as his spouse hence the issue of warrant of authorization was held to be valid. Accordingly the writ petition was dismissed.

Hemedra Ranchhoddas Merchent v. DIT (2012) 206 Taxman 596 / 71 DTR 361 / 250 CTR 229 (Bom.)(High Court)

S.132: Income tax authorities-Powers-Search and seizure- Warrant- legal representative- Warrant in the name of mother as legal representative-block assessment in consequence of search held to be valid .

Search was carried out to find out the undisclosed income of deceased P. Balaji. On his demise the estate was represented by his legal heirs including the minor son . The estate was represented by the minor through his mother .

Block assessment was made pursuant to the search made in the premises of the deceased and the warrant in the name of mother as a representative of the legal heir (Minor son) of the deceased was held to be valid. The High Court confirmed the order of Tribunal and dismissed the appeal of assessee(Block period 1988 to 1997-98)
P.Balaji v.Dy.CIT (2012) 251 CTR 418/75DTR 6 (Mad.) (High Court)
CIT v. P. Shanthi (Smt.) LR of Minor P.Balaji (2012) 251 CTR 418/75 DTR 6 (Mad) (High Court)

S. 132:Income –tax authorities- Powers- Search and Seizure – Warrant - No evidence produced by persons carrying silver articles to establish ownership – Action of authorities held proper: Criminal Court – Appropriate Authority: (S. 132A,. 451 Cr. P.C.)

The restrictions placed by the provisions of sections 132 and 132A of the Act, and rule 112A of the Income tax Rules, 1962, are not unreasonable restrictions on the freedom under articles 19(1)(f) and (g) or Article 14 of the Constitution. No documentary evidence was produced by the persons carrying silver ornaments and articles in response to inquiries made at the time of recording of statements under sec. 131 of the Act to establish the source, acquisition and ownership of the silver articles. Thus, the act on the part of the concerned authority could not be said to be unreasonable justifying interference at this stage. Section 451 of the Code of Criminal Procedure, 1973, makes the criminal court custodial egis of the property produced before the court in connection with the case regarding which an offence appears to have been committed or which appears to have been used for the commission of the offence. Therefore, the contention of the petitioners that the criminal court was not the appropriate authority or the person in terms of sub section (2) of section 132A was not tenable.
Sunil Vidhyasagar Gat & Anr v. Shalini Verma Dy. Director of Income tax (Invt.) & Ors(2012) 347 ITR 1 (Guj.)(High Court)

S.132:Income –tax authorities-Powers- Search and seizure –Stock in trade- Seizure of stock in trade was directed to be returned in view of specific provision contained in proviso to section 132(1)((iii).

Section 132(1)(iii),empowers the authorized officer to seize any such books of account , other documents , money billion , jewellery or other valuable article or thing found as a result of such search which represent either wholly or partly undisclosed income or property of the person , however , the proviso carves out an exception . It provides that bullion, jewellery or other valuable article or thing , being stock in trade of the business, found as a result of search shall not be seized but the authorized officer shall make a note or inventory of such stock in trade of the business , therefore the court held that in view of the specific provision contained in proviso to S. 132(1)(iii) and third proviso to S. 132(1)(v), bullion, jewellery or other valuable article or things being stock in trade of business found as a result of search could not be seized, even if said stock in trade represents wholly or partly undisclosed income or property of the assessee. On writ the Court directed the Income tax authorities to return the jewellery seized .
Puspa Ranjan Sahoo v. ACIT (2012) 252 CTR 113 (Orissa) (High Court)

S.132:Income-tax authorities- Search and seizure – Authorisation in joint names-In view of section 292CC with retrospective effect from 1st April, 1976, authorization in joint names was held to be valid , and matter was set aide to Commissioner (Appeals) to decide the appeal on merits.(S. 292CC)

The court held that the effect of insertion of S. 292CC with retrospective effect from 1st April, 1976 is that (1) it is not necessary for the authorities to issue an authorization u/s. 132 or requisition u/s. 132A separately in the name of search person; (2) if an authorization/requisition has been issued in the names of more than one person, it shall not be construed that it was issued in the name of AOP or BOI, consisting u/s. 132A in the names of more than one person, the assessment or reassessment can be made separately in the name of search of the person mentioned in the authorization/requisition. As the provisions of S. 292CC have come into force retrospectively i.e. from 1st April, 1976, it shall be deemed that the aforesaid provision was on the statute book i.e. The IT Act, 1961 since 1st April 1976 and the consequence of issue of a warrant of authorization under sec. 132 if issued in joint names of more than one person has to be adjudged in the light of the provisions of s. 292CC.In the present case the warrant of authorization under section 132 has been issued on 10th Nov, 2006 in the joint names of three persons , In view of section 292CC with retrospective effect from 1st April , 1976 , authorization in joint names was held to be valid, and matter was set aide to

Commissioner (Appeals) to decide the appeal on merits. Both the orders passed by the Commissioner (Appeals) and the Tribunal are set aside and the matter was remanded to the Commissioner (Appeals) to decide the appeal on merits. (A.Ys. 2001-02 to 2006-07)

CIT v. Devesh Singh (2012) 252 CTR 356 / 76 DTR 403(FB.) (All.) (High Court)
CIT v. Yogendra Singh ((2012) 252 CTR 356 / 76 DTR 403(FB.) (All.)(High Court)

S.132:Income – tax authorities – Powers - Search and seizure – Survey-Conversion-Conversion of survey into search without application of mind held to be invalid consequently all proceedings including the impugned assessment order held to be null and void.

There was survey on 6-2-2003 at business premises of the assessee, and detailed inventory was prepared. Survey was converted into search. On verification of satisfaction note the Tribunal found that the satisfaction note has been prepared after the officials of the department were stoned and incriminating documents were snatched .The Additional Commissioner has put up the satisfaction note for conversion of survey into search. The Commissioner authorized the search on the basis of satisfaction note of Additional Commissioner. The Tribunal after examining the records found that there being nothing on the record to suggest that reason for conversion of survey in to search nor the recorded reason showed that the assessee would not comply with the directions if he is called upon to produce. There was no material before the department to convert the survey in to search. The Tribunal also observed that the department has not found nothing other than what was inventorised during the survey, therefore the search held to be invalid.

Badri Ram Choudhary v. ACIT (2012) 67 DTR 107/145 TTJ 7 (Jodhpur)(Trib.)

S.132(4): Income – tax authorities – Powers - Search and seizure – Statement on oath-Retraction-Computation of undisclosed income- Additions made on the basis of statement held to be valid.(S.158BB)

In the course of search action the statement of assessee was taken under section 132(4),the assessee made admission of undisclosed income. The statement was retracted thereafter. The assessing Officer made the additions on the basis of statement under section 132(4). In appeal the First appellate authority made some modifications with regard to additions of one property which was accepted by revenue. Assessee challenged the additions confirmed by the Commissioner (Appeals). The Tribunal deleted the additions on the ground that additions cannot be made only on the ground of statement under section 132 (4). On appeal to High Court the Court held that the assessee has not proved that statement recorded under section 132 (4) was due to threat or coercion and further having failed to prove that the amounts shown in documents were the only payments made the Tribunal was not right in deleting the additions. The Court also observed that the retraction made by the assessee can only be considered as self serving afterthought and no reliance can be placed on the same to disbelieve the clear admission made in the statement.

CIT v. O. Abdul Razak (2012) 68 DTR 237/2012 Tax LR 505 (Ker.) (High Court)

S.132(4A): Income – tax authorities – Powers - Search and seizure- Block assessment - Diary seized – Presumption is applicable . (S. 158BC)

In the course of search a diary was found which contained the noting of higher value of value purchase of property than shown in the books of account. The author of the diary was son of the partner, who stated that he has written the diary as per instruction of his partner. On the basis of diary addition was made in the block assessment. The addition was deleted by the Tribunal. On appeal the court held that the presumption under
section 132(4A) is applicable hence addition is justified in block assessment as the author of diary was son of the partner.

CIT v. Ambika Appalam Depot (2012) 340 ITR 497 / 73 DTR 112 (Mad.)(High Court)

S.132A:Income – tax authorities – Powers - Search and seizure- Unexplained cash- Seized by police – Writ is not maintainable warrant of authorization is held to be valid.- Article 226.

Cash of Rs. 6.5 Lacs was seized by police from the vehicle in which the petitioner was travelling. Thereafter warrant of authorization was issued under section 132A, by Director of IT(Inv.)requiring the police authorities to deliver the seized cash to the Income-tax department and the cash was deposited in Court. Assessee filed a writ petition to quash the proceedings on the ground that the amount of Rs. 6.50 seized from him on 23rd Jan., 2001 was the amount received by him on sale of agricultural lands and as against sale of house on various dates beginning from 3rdJune, 1994. The Court

held that it was not clear how and under what circumstances the amounts received by the petitioner during the period of six years were kept by him or were carried by him on the said date. As the explanation was not a convincing, the writ is not maintainable under Article 226 of the Constitution of India.

Atta Husain v. DIT (Investigation) & Ors. (2012) 246 CTR 207 / (2011) 60 DTR 25 (MP)(High Court)

S.132A:Income – tax authorities – Powers - Search and Seizure - Requisition - Reason to believe - Recovery of cash and silver -Requisition held valid.

Police recovered about 118 kgs. of silver and about Rs. 4 lakh in cash from the petitioner in a hotel and later tried to conceal his identity by not giving out his correct name or residential address and could not disclose the source of these possessions, there was 'reason to believe' for the Income Tax Authority to come to the conclusion that there was a likelyhood of non-disclosure of these assets and therefore, impugned requisition issued by the Income Tax department to the police is held to be valid under section 132A.

Krishna Gopal v. DIT (Investigation) (2012) 66 DTR 231 / 247 CTR 239 (MP)(High Court)

S.132B :Income – tax authorities – Powers - Search and seizure - Application of seized or requisitioned assets –Interest- Shares used as working capital was seized, interest is not payable on value of such shares.

Assessee was a member of the Madras Stock Exchange carrying on business as a share broker. During a search the shares and debentures were also seized. The shares were released subsequently on different dates. The Assessee claimed that the shares formed part of his working capital and he should be paid interest on the shares. The claim was rejected. On writ petition against the order, the dismissing the petition the Court held that merely because the shares seized did form part of the capital assets of the petitioner and the petitioner as jobber was in the process of buying and selling shares which was his vocation, it did not mean that the shares should be construed as money, for the purpose of claiming interest. (A. Y. 1991-92, 1992-93, 1993-94).

Anil Kedia v. Settlement Commissioner of Income-tax and Wealth-tax (2012) 341 ITR 613/250 CTR 322/71 DTR 228 (Mad.)(High Court)

S.132B:Income-tax authorities – Powers - Search and seizure - Application of seized or requisitioned assets – Pendency of penalty proceedings - Expression "penalty levied" in S.132B(1) should be read as penalty to be levied in a proceeding under Section 271(1)(c). [S. 271(1)(c)].

Expression "penalty levied" in S. 132 B(1) should be read as penalty to be levied in a proceeding under Section 271(1)(c); S.132B(1) therefore entitles the I.T. department to retain the seized gold in question with them until penalty is levied and apply the same towards the liability so determined, provided the assessee is in default or deemed to be in default. (A.Ys. 2003-04 to 2009-10)

Sree Balaji Refinery v. Dy.CIT (2012) 71 DTR 297/208 Taxman 383 (Ker.)(High Court)

S.132B: Income-tax authorities – Powers - Search and seizure- Retained asset- Cash and other assets- Assets seized from partners cannot be adjusted against advance tax liability of firm.

During the course of search proceedings, cash and other documents from business premises as well as residential premises of partners of assessee firm were seized. After completion of assessment of the firm,the assessee filed application under section 154 and requested the Assessing Officer to adjust payment of Rs. 1.52 croresin P.D. account against tax liability of assessee. Revenue authorities were rejected the application. The Tribunal held that in view of provisions of section 132B(3), Assessing Officer cannot apply seized assets for discharge of liability of person other than person from whose custody assets were seized. Since in instant case,unexplained cash and jewellery were seized from partners of assessee firm said,unexplained cash and jewellery could be adjusted against partners of firm and not firm. Even otherwise since the request for adjustment of amount of PD had been made by concerned persons /partners after due date of payment of advance tax, request made could be considered only against regular and final tax liability of assessee and not against advance tax liability. (A.Y. 2007-08)

Summer Builders v. Dy. CIT (2012) 49 SOT 210 (Mum.)(Trib.)

S.139:Return- Revised computation - Revised statement is nor revised return , assessment has to be based on as per original return.

Assessee cannot revise his return by way of filing a revised statement of income, after filing original return. In the absence of revised return as prescribed under section 139(5), Assessing Officer is bound to make the assessment as per original return. (A.Y. 2006-07)

Orissa Rural Housing Development Corporation Ltd. v. ACIT (2012) 66 DTR 73/ 247 CTR 137 /Vol .42 Tax L R 219 / 204 Taxman 673 (Orissa)(High Court)

S.139: Return-Electronic filing of return – Non-receipt of form ITR–V by the department- Assessee is permitted to file the return .

Assessee furnished adequate material to show that after filing the return electronically, it had also submitted Form ITR–V by ordinary post thrice the impugned communications issued by the Department treating the return as invalid on the ground that Form ITR–V has not been received is thoroughly misconceived, since the order of assessment for the relevant assessment year has still not been passed, assessee is permitted to file a verification of the return before the Assessing Officer with in a period of one week. (A.Y.2009-10)

Crawford Bayley & Co. v. UOI (2012) 343 ITR 232/ 66 DTR 157 / 246 CTR 459 / 204 Taxman 598 (Bom.)(High Court)

S.139:Return- Carry forward and set off –Return filed within extended time loss is allowed to be set off.

For the assessment year 1986-87, the assessee claimed to carry forward the share of loss from the association of persons determined in the previous year to be set off for the future years. The Assessing Officer held that in view of fact that association of persons did not file the return of income for the assessment year under section 139(1) of the Act or with in such time as granted by the department is not entitled to carry forward the loss. In appeal Commissioner (Appeals) held that the assessee had filed the return of income within the extended time granted by the Assessing Officer is entitled to be set off. The view of Commissioner (Appeals) was confirmed by Tribunal. On appeal by revenue the Court held that as the return of income was filed within extended time, the assessee is allowed to be carry forward and set off of loss.(A.Y. 1986-87)

CIT v. Arunajyothi Balasubramanian (2012) 345 ITR 81 (Mad.) (High Court)

S.139: Return- Revised return- Loss – Carry forward and set off is allowed . (S. 70, 71, 80)

Assessee filed the original return under section 139(1) declaring the positive income. Assessee found certain mistake thereafter and filed revised return declaring the loss and to be carried forward and set off in future. The Tribunal held that the revised return to be treated as valid return and the assessee is entitled to carry forward of 'long term capital loss'. (A.Y. 2005-06)

Ramesh R. Shah v. ACIT (2012) 65 DTR 104/ 143 TTJ 166 (Mum.)(Trib.)

S.139:Return- Below returned income- Assessment can be below the returned income or undisclosed income.(S. 143 (3), 158BC)

There is no basis for determining the undisclosed income even on the returned income offered as precautionary measure. Assessing Officer is directed to determine the undisclosed income accordingly without reference to any admitted income in the return filed under protest.

United Phosphorous Ltd v. CIT (2012) 67 DTR 395 (Mum.) (Trib.)

A.CIT v. United Phosphors Ltd (2012) 67 DTR 395 (Mum.) (Trib.)

S.139:Return- Loss carry forward-Loss finally determined after giving effect to order of the appellate authorities has to be carried forward.

Assessee filed the return of income disclosing the nil income .After giving effect to the order of appellate authorities the assessed income was loss. The assessing officer refused to carry forward the loss determined. The Tribunal held that once the loss is determined the same has to be carried forward as per section 72 of the income tax Act. The tribunal has directed the assessing officer to allow the carry forward the loss determined after giving effect to the appellate order.(A.Y. 1999-2000)

A CIT v. Mehsana Distric Co-Operative Milk Producers Union Ltd(2012) 67 DTR 470/ 145 TTJ 107(Ahd.) (Trib.)

ACITv.Mehsana Distric Co-operative Milk Producers Union Ltd (2012) 67 DTR 470/145 TTJ 107 (Ahd.) (Trib.)

S.139(4):Return- Notice- Notice under section 142(1) cannot be issued after filing of Return after time-limit for issuance of notice under section 143(2) has expired

The Assessing Officer not to issue notice under Section 142(1) for the purpose of making an assessment after filing of return after time limit of the issuance of notice under Section 143(2) has expired. (A.Y. 2007-08)
Madan Singh Kangarot v. ITO (2012) 134 IITD 379/ 145 TTJ 262/69 DTR 113(Jaipur)Trib.)

S.142A: Assessment-Income from undisclosed source-Reference to valuation officer. (S. 69B)
When the books of account in respect of cost of construction have been maintained by the assessee and the same were not rejected, the matter could not be referred to the DVO for assessing the value. (A.Y. 2007-08)
CIT v. Chohan Resorts (2012) 76 DTR 163/76 DTR 106 (P & H) (High Court)

S.142A: Assessment-Income from undisclosed sources-Reference to valuation officer-Stamp valuation-Writ petition was held not maintainable. (S. 50C, 69, 292B-Constitution of India , Art. 226)
Mentioning of S. 50C in the notice instead of S.142A is not fatal, also saved by S.292B. S. 142A does not require that for exercise of power under s.142A(1), the A.O. should first reject the books of account of the assessee in which he has shown the valuation of such investment, as a pre-condition for enquiring into the same. Even otherwise, third respondent did not accept the valuation shown by the petitioner in its balance sheet and accounts and he was asking for more information to arrive at the fair market value of the petitioner's plant and civil works connected with it. In fact, that can be treated as amounting to rejecting the books of account of the petitioner by implication and hence no formal order rejecting the books of account is necessary. Writ petition was also not maintainable in view of alternate remedy. (A.Y. 2009-10)
Bharathi Cement Corporation (P) Ltd. v. CIT (2012) 76 DTR 155/253 CTR 98 (AP)(High Court)

S.142(1):Assessment – Limitation-Notice- Held to be invalid.
By Finance Act, 2006, the legislature has added proviso in section 142(1)(i) to the effect that an assessment framed pursuant to a notice issued under section 142 after the end of the assessment year would also be valid, therefore, notice issued after the end of the relevant assessment year i.e. after 31stMarch, 1988 was not invalid. (A.Y. 1997-98)
DIT v. Ericsson A.B.(2012) 343 ITR 470 /66 DTR 1/ 246 CTR 422 (Delhi)(High Court)
DIT v. Ericsson Radio System A.B. (2012) 343 ITR 470 / 66 DTR 1 /246 CTR 422 (Delhi)(High Court)
DIT v. Metapath Software International (2012) 343 ITR 470 / 66 DTR 1/ 246 CTR 422(Delhi)(High Court)
S.142(1):Assessment- Validity – Notices held to be valid. [S. 143(2)]
Section 142(1) empowers the Assessing Officer to issue notice under section 142(1) for production of accounts and documents for the purpose of making assessment. Notice under section 143(2) is issued requiring the assessee to produce his accounts, evidences and particulars on which the assessee may rely in his support of his claim made in the return. On the facts the notice under section 142(1) was issued on 3rdOctober, 2008 where as notice under section 143(2) was issued on 10thOctober, 2007. There is no sequence prescribed as to what manner notices under section 142(1) and 143(2) are to be issued, therefore, there is nothing to say that notice under section 142(1) should precede notice under section 143(2).Therefore notice issued under section 143(2) on 10th October 2007 is within the period of limitation.(A. Y. 2006-07)
Orissa Rural Housing Development Corporation Ltd. v. ACIT (2012) 66 DTR 73/ 247 CTR 137 /Vol .42 Tax L R 219 / 204 Taxman 673 (Orissa)(High Court)
S.142(2A):Assessment- Special audit-Condition precedent- Direction issued by the Assessing Officer for a special audit , without considering the objections of assessee was liable to be set aside as it violates principle of natural justice.
The books of account was audited and the returns were filed along with the audited profit and loss account. There was survey proceedings in the assessment year 2008-09 and it was found that purchases from 11 parties were bogus. It was sated that the findings recorded during the course of assessment proceedings for the assessment year 2008-09 and the material impounded during the survey indicate a similar state of affairs for other assessment years starting from assessment years 2005-06. The assessee was given show cause notice by the Assessing Officer as to why a special audit should not be ordered for the assessment years 2005-06 , 2006-07 and 2007-08 on the grounds that purchases made

from eleven parties were bogus. The assessee has filed a detailed reply in respect of show cause notice, however without considering the reply the Assessing Officer referred the matter to special audit. The assessee challenged the said order directing for special audit by way of writ petition. The Court allowing the writ petition held that there is violation of the principle of natural justice on the part of the Assessing Officer in issuing a direction for special audit under section 142(2A),without considering the objections of the assessee, accordingly the court directed the Assessing Officer to pass an order considering the objections raised by the assessee and upon affording to the assessee a reasonable opportunity of being heard in terms of section 142(2A).(A.Ys 2005-06 to 2007-08)

Nickunj Eximp Enterprises Pvt. Ltd. v. ACIT (2012) 346 ITR 6 (Bom.)(High Court)

S.143:Assessment – Natural Justice – Tribunal cannot issue any direction to the AO to disclose to the assessee the material relied upon by him for making the addition in a particular manner

Majority view expressed by three members constituting the earlier Special Bench on the question whether the Tribunal should give direction to the AO for disclosing complete material in respect of 31 items being in favour of Revenue, the Tribunal cannot issue any direction to the AO to disclose to the assessee the material relied upon by him for making the addition in a particular manner or to a particular extent. (AY 1984-85 to 1986-87)

Golden Tobacco Ltd. v. ACIT (2012) 147 TTJ 1/ 72 DTR 123(SB) (Mum.) (Trib.)

S.143:Assessment – demand notice and order served 130 days of completion of assessment order - held communication is condition precedent to order of assessment becoming effective, order is held to be time barred.

It was held that communication is condition precedent to an order of assessment becoming effective. In the instant case, though the assessment order was made on 31st December 2009 but the demand notice and assessment order was served on same days on 10th May 2010 i.e. after 130 days late. It was held that the order was barred by limitation. (A.Y. 2007-08)

ACIT v. Tulsi Prasad Mohapatra (Dr) and Anr. (2012) 16 ITR 449 / 145 TTJ 73 (UO) (Cuttack)(Trib.)

S. 143: Assessment – Notice – Sending of notice on address, other than that given in return of income and subsequently returned , not amount to either service or deemed service of such notice. (S. 292BB)

No assessment u/s 143(3) or 144 can be said to be have validly made where notice u/s 143(2) is not served or where such notice is served beyond prescribed period or improperly served. The AO cannot wash off his hands from duty to serve notice u/s 143(2) on address given in return, simply on premise that assessee shifted his base to another address at subsequent date. Sending of notice u/s 143(2) on address, other than that given in return of income, and its consequent return by postal authorities, does not amount to either service or deemed service of such notice. (A.Y. 2008-09)

Prakash Ramji Gavali v. ITO (2012) 138 ITD 1 (Mum.)(Trib.)

S.143(2) : Assessment – Notice- Issue -"Issue" of notice is equivalent to its "service" - Assessment cannot be held to be bad in law.

In respect of A.Y. 2009-10, the assessee filed a ROI on 29.09.2009. The last date for service of the section 143(2) notice was 30.09.2010. A notice under section 143(2) was served by affixation at 11.20 p.m. on 30.09.2010. The assessee filed a Writ Petition claiming that under section 282(1), a notice or requisition had to be served either by post or as if it was a summons issued by a Court under the CPC and that service by affixture was invalid. The assessee relied on CIT v. AVI-OIL India P.Ltd (2010) 323 ITR 242 (P&H) where it was held that a notice under section 143(2) had not only to be issued, but had to be served before the expiry of 12 months (now 6M) from the end of the month in which the return was furnished.Asst.CIT v. Hotel Blue Moon (2010) 321 ITR 362 (SC) was relied upon to contend that in the absence of a section 143(2) notice, the assessment was invalid. Held dismissing the Petition:

Section 143(2)(ii) provides that no notice shall be "served" on the assessee after the expiry of six months. The question is that what is the meaning of expression 'served'? Is it used literally, so as to mean actual physical receipt of notice by the addressee or the expression 'served' is inter changeable with the word issue. We are of the opinion that the expressions 'serve' and 'issue' are interchangeable. In view of the law laid down in several judgments, the date of receipt of notice by the addressee is not relevant to determine, as to whether the notice has been issued within the prescribed

period of limitation. The expression "serve" means the date of issue of notice. The date of receipt of notice cannot be left to be undetermined, dependent upon the will of the addressee. Therefore, to bring certainly and to avoid attempts of the addressee to evade the process of receipt of notice, the purpose of the statute will be better served, if the date of issue of notice is considered as compliance of the requirement of proviso to section 143(2) of the Act. In fact that is the only conclusion that can be arrived at to the expression 'serve" in section 143(2). In CIT v.AVI-OIL India P. Ltd (2010) 323 ITR 242 (P&H), a literal meaning of the term "service" was taken in ignorance of the binding precedents. It does not lay down any binding principle and is per incuriam.(A.Y.2009-10)

V. R. A. Cotton Mills (P) Ltd. v. UOI(2012) 70 DTR 439 (P&H.)(High Court)

S.143(2):Assessment- Notice- Mandatory- Notice deemed to be valid in certain circumstances- Very foundation of the jurisdiction of Assessing Officer was on the issue of the notice under section 143(2), as the notice was not issued the assessment was held to be bad in law . (S. 292BB).

The Tribunal held that as the mandatory notice under section 143(2) was not issued the order is bad in law. Revenue filed an appeal before the High Court and contended that the assessee not objected or raised the issue of notice under section 143(2) before the Assessing Officer . On behalf of revenue it was contended that the Supreme Court in Asst.CIT v. Hotel Blue Moon (2010) 321 ITR 362 (SC), did not have an occasion to consider section 292BB as the said section was inserted by the Finance Act, 2008. The court held that section 292BB is a rule of evidence, which validates the notice in certain circumstances , however, it cannot validate the non issue of notice which is mandatory and very foundation of the Jurisdiction of Assessing Officer, hence non consideration of section 292BB , will not have any effect on the Judgment in Hotel Blue Moon. Hence, the High Court dismissed the appeal of revenue.

CIT v. Mukesh Kumar Agarwal (2012) 345 ITR 29 (All.)(High Court)

S.143(2):Assessment-Notice- Correct address- Notice was not served on the correct address mentioned in the return , assessment held to be not valid.

The Assessing Officer issued a notice under section 143 (2) of the Income-tax Act , 1961 to the assessee. The notice could not be served and was received back with the postal remark of the postal authority that no such person existed at the above mentioned address. An inspector was deputed to serve the notice personally but he also reported that the company was not available at the address. The Assessing Officer thereafter served the notice by affixture. The assessment was made ex-parte. On appeal the Commissioner (Appeals) and Tribunal held that the service by affixture was not valid on the ground that the assessee had mentioned a different address in the return of income-tax for the assessment year 2006-07. On appeal by the revenue, the Court held that no attempt was made to serve the assessee on the correct address which was available with the department and in fact stated in the return of the income for the assessment year 2006-07 . Subsequent attempt to serve another notice long after the expiry of the limitation period prescribed by the proviso could not help the assessee. (A.Y. 2006-07)

CIT v. Mascomptel India Ltd (2012) 345 ITR 58 (Delhi) (High Court)

S.143(2): Assessment-Notice- Block assessment-Notice under section 143(2) was not served the assessment is bad in law. Proviso to section 282BB was not applicable in a case where the authority did not have jurisdiction to proceed further and make assessment.(S. 292BBB)

The block assessment under section 158BC was completed without issue of notice under section 143 (2). The assessee contended that the assessment was bad in law . The appeal of the assessee was allowed by the Commissioner (Appeals) which was confirmed by Tribunal . On appeal to the High Court by revenue the court up held that order of tribunal by holding that as no notice under section 143(2) of the Act had been served upon the assessee the assessment was bad in law. The Court also held that the proviso to section 292BBB was not applicable in a case where the authority did not have jurisdiction to proceed further and make assessment, therefore the block assessment was not valid.

CIT v. Bihari Lal Agrawal (2012) 346 ITR 67 (All).(High Court).

S.143(2):Assessment – Jurisdiction- Search and seizure-Notice-Block assessment- Non issue of notice assessment held to be bad in law, deeming provision did not have the effect.(S.158BC,292BB)

Where notice under section 143 (2) of the Act is not issued to the assessee, the assessing authority does not have jurisdiction to proceed further and frame block assessment proceedings. The Hon'ble Court further held that

provisions of section 292 BB of the Act did not have any effect on the judgment of Apex Court in the case of,CITv.*Hotel Blue Moon 321 ITR 362* where in the court held that the very foundation of the jurisdiction of the assessing officer is on issuance of notice under section 143 (2) of the Act. On facts there was finding that no notice was issued under section 143 (2) hence the block assessment held to be bad in law. The court also held that non consideration of section 292BB , which is rule of evidence ,and deeming provision to validate the notice in certain circumstances did not have any effect , when the notice was not served.

Manish Prakash Gupta v. CIT (2012) 68 DTR 112 / 249 CTR 57(All.)(High Court)

S. 143(2): Assessment- Notice- Served on person, not authorized to receive-Assessee participated in assessment proceedings, therefore the assessment is held to be valid.(S.282,292BB)

Notice was served on a person who was not authorized to receive. The assessee's authorized representative appeared before the Assessing Officer. The issue of notice as challenged before the Commissioner of income tax (Appeals), who up held the validity of assessment, however gave relief on merit. Revenue filed an appeal before the Tribunal and the assessee has filed the cross objection challenging the jurisdiction to make the assessment without issue of notice. Tribunal quashed the assessment order on the ground that there was no valid issue of notice. As the assessment was quashed, the Tribunal has not decided the issue on merits. On appeal by revenue, the Court held that as notice under section 143(2) having been served on a person, though not authorized to receive the same, assessee's representative participated in assessment proceedings on the basis of that notice, assessment order passed thereafter could not be said to be invalid. Accordingly the order of tribunal in ACIT v.Vision Inc (2010) 130 TTJ 696 (Delhi)(Trib.) is set aside.(A.Y. 2003-04)

CIT v. Vision Inc (2012) 73 DTR 201/208 Taxman 153 (Delhi) (High Court)

S.143(3):Assessment- Non–existing amalgamating company –Held to be invalid.. (S.292B)

Assessee filed the return and the fact of amalgamation was brought into the notice of Assessing Officer, it was incumbent on the Income Tax Authorities to substitute the successor in place of "dead person". A company dies on its dissolution as per the provisions of the Companies Act. Therefore assessment order made in the name of assessee is void. Mere participation by the assessee in such proceedings is of no estoppels against the law, therefore assessment in the name of a company which has been amalgamated with another company and stands dissolved is null an void; assessment in the name of a non existing entity is a jurisdictional defect and not merely a procedural irregularity of the nature which can be cured by invoking the provisions of section 292B.(A.Ys. 2002-03 & 2003-04)

Spice Infotainment Ltd. v. CIT (2012) 65 DTR 391/247 CTR 500 (Delhi)(High Court)

S.143(3): Assessment- Business expenditure-Natural justice-Cross examination- Breach of natural justice /cross examination should be raised at the earliest opportunity. Disallowance of expenses held to be justified. [S.37(1)]

The principle of natural justice cannot be construed in isolation from the factual matrix of the case. Though the Inspectors report was not given to the assessee , the contents thereof were communicated , the identity of persons question was given and the manner in which the enquiry was held also set out and the assessee was given a chance to explain . Accordingly, the principle of natural justice were substantially complied with at the assessment stage, the assessee did not feel prejudiced categorically indicated that it had submitted whatever materials were within its possession and did not have anything more to submit. It did not ask for a copy of the report or the cross examination of the inspector. If a party fails to avail of the opportunity to cross-examination a person at the appropriate stage in the proceeding, the said party would be precluded from raising such issue at a later stage of the proceedings . Plea of violation of natural justice taken at the appellate stage is an afterthought. Appeal of assessee was dismissed . The disallowance of expenses were confirmed. (A.Y.1994-95)(ITA no 267 of 2003 dated 30-8-2012)

Hindusthan Tobacco Company v. CIT (2012) 77 DTR 237(Cal.)(High Court)www.iatonline.org

Editorial. The view of third member in DCIT v. Hindustan Tobacco Company (2003) 87 ITD (TM)(Kol.) (Trib.), affirmed.

S.143(3):Assessment – Validity- Without signature-Assessment order without Assessing officer's signature is void.(S. 156, 292B)

The Assessing Officer passed an assessment order under section 143(3) and issued the Income-tax Computation Form (ITNS 150), Demand Notice under section 156 and Penalty Notice under section 271(1)(c). While all the other documents were signed by the Assessing Officer, the assessment order was not. In reply to the assessee's contention that the assessment order was invalid, the department relied on section 292B and Kalyankumar Ray v. CIT(1991) 191 ITR 634 (SC) and argued that the Act does not require the service of an assessment order and the service of a valid ITNS 150 & demand notice was sufficient. Tribunal held rejecting the department's plea:

Section 143(3) contemplates that the Assessing Officer shall pass an order of assessment in writing. If the assessment order is signed then because the computation of tax is a ministerial act, ITNS-150 need not be signed by the Assessing Officer. However, if the assessment order is not signed, then the fact that he has signed the tax computation form and the notice of demand is irrelevant. The omission to sign the assessment order cannot be explained by relying on section 292B. If such a course is permitted to be followed than that would amount to delegation of powers conferred on the Assessing Officer by the Act. Delegation of powers of the Assessing Officer under section 143(3) is not the intent and purpose of the Act. An unsigned assessment order is not in substance and effect in conformity with or according to the intent and purpose of the Act (Kilasho Devi Burman(Mrs.) and other v. CIT (1996)219 ITR 214 (SC) followed; Kalyankumar Ray(1991) 191 ITR 634 (SC) explained) (A.Y.

Vijay Corporation v. ITO)(Bcaj .P.22.Vol 43B.Part 6.March .2012)(Mum.)(Trib)www.itatonline.org

S.143(3):Assessment-Revised computation- Deduction on interest- Direction to consider the claim and allow.

Assessee during the course of assessment proceedings filed revised computation of income and claimed additional deduction in respect of payment of interest. Assessing Officer refused to consider the revised claim on the ground that the assessee has not filed the revised return under section 139(5). On appeal, Commissioner (Appeals) upheld the order of Assessing Officer relying on the Supreme Court decision in Goetze India Ltd. (2006) 284 ITR 323 (SC). Tribunal referring the judgment in Pradeep Kumar Harlakarv.Asstt.CIT (2011) 47 SOT 204(URO)(Mum) (Trib)admitted the claim made by the assessee and restored the matter to the file of Assessing Officer with the direction to consider the revised computation of income filed by the assessee and decide the issue a fresh.(A.Y. 2006-07)

Rachna S. Talreja v. Dy. CIT (2012) 16 ITR 53/546 (2012) 43-B.BCAJ –Feb., 2012P. 26(Mum.)(Trib.)

S. 143(3): Assessment- Set aside order by Tribunal- Fresh assessment- In fresh assessment passed pursuant to remand by ITAT, assessee cannot be worse off than what he was in the original assessment order. [S254(1)]

The AO passed a s. 143(3) assessment order in which he disallowed 50% of the expenditure on an ad-hoc basis. This was reduced to 25% by the CIT (A). On further appeal by the assessee, the Tribunal *set aside the matter to the AO to examine the issue afresh*. In the second round of appeal, the AO *disallowed 100% of the expenditure* on the ground that the assessee had already claimed the same expense under some other head and that there was a *claim for double deduction*. This was upheld by the CIT(A). Before the Tribunal, the assessee argued that once a matter has been set aside by the Tribunal, the *assessee cannot be put into a worse situation* than what it was at the time of original assessment. Held by the Tribunal upholding the plea:

It is a settled proposition of law that the Tribunal u/s 254(1) has no power to take back the benefit conferred by the AO or enhance the assessment. Once the matter has been restored by the Tribunal, the income cannot be enhanced from what was determined at the time of original assessment proceedings, which was the subject matter of dispute before the Tribunal. This proposition of law has been upheld by the Supreme Court in Hukumchand Mills Ltd ( )62 ITR 232 (SC) and reiterated in Mcorp Global v CIT (2009) 309 ITR 434 (SC). Therefore, the enhancement of assessment by making 100% disallowance in respect of free food allowance cannot be sustained and the same is restricted to 50%, as was made by the AO in the original round of proceedings.(A.Y. 2002-03, 2003-04))

Kellogg India Pvt. Ltd v. ACIT(2012) 19 ITR 220 (Mum.)(Trib.) www.itatonline.org

S. 143 (3):Assessment- Notice-Service of notice at address other than address shown on return which returned un served, assessment held to be invalid. Provisions of section 292BB is not applicable prior to assessment years 2008-09).(S. 292BB)

The assessment was completed on the basis that notice issued under section 143 (2) was received back un served. When penalty proceedings were initiated the assessee challenged the assessment order stating that no notice were served on the assessee under section 143 (2), as the notice issued was not sent to correct address hence returned un

served .The Commissioner (Appeals) dismissed the appeal on the ground that the assessee participated in the proceedings through authorized representative and by virtue of section 292BB , the assessee was precluded from challenging the notice. On appeal Tribunal held that the service of notice at address other than address shown on return , which returned un served held to be not proper service. Provision precluding assessee from taking such objection is not applicable to assessment years prior to 2008-09, hence the assessment order passed by the Assessing Officer under section 143 (2) (ii) was held to be bad in law.(A.Y.2007-08)
Ashok B. Bafna v. Dy.CIT (2012) 18 ITR 43 (Mum.) (Trib.)

S.144 :Aseesment- Books of acconts- Audited-Books of accounts audited can not be rejected without pointing out specifc defects.
The assessing officer cannot reject the books of accounts maintained by the assessee without pointing out specific mistake in the books of accounts which are audited by the chartered accountant.
A CIT v. Roopchand Tharani (2012) 66 DTR 104/ 249 CTR 326 (Chattisgarh)(High Court)
S.144:Best judgment assessment – Order - Findings of fact same as were available to AO – Hence, deletion of disallowance justified as a change in stand not be made when finding of facts remained the same [S. 40(a)(ia)]
The assessee derived income from publication and trading books. For the relevant assessment year the AO passed an assessment order u/s 144 making certain disallowances. On appeal to Tribunal, it was held that a change in stand could not be made when finding of facts remained the same as were available to the AO in view of fact that part deduction of tax on certain payments did not lead to the finding that all expenditure incurred was susceptible to be disallowed u/s 40(a)(ia) for want of deduction of tax at source. Hence, the deletion of disallowance was justified. (AY 2008-09)
ITO v. Sahadev Pradhan (2012) 18 ITR 180 (Cuttack) (Trib.)
S.144C :Dispute Resolution Panel - Draft assessment order - Application for withdrawal of reference - Order passed by the Panel confirming the draft order was not justified - Draft order without jurisdiction.
Assessing Officer framed the draft assessment order. Assessee submitted the objection to the Dispute Resolution Panel. Subsequently the assessee came to know that a Clarification had been issued by the Central Board of Direct taxes regarding the objections before Dispute Resolution panel which clarified that a choice had been given to the assessee to go before the Dispute Resolution panel or prefer normal appellate Channel. The assessee wrote to the Panel to withdraw the reference and pursue the normal appellate Channel. The Dispute Resolution Panel held that as the assessee had chosen to withdraw the appeal hence, the order passed by the Assessing Officer is correct. The Dispute Resolution Panel further directed the Assessing Officer under section 144C(5) of the Act to pass the assessment order in accordance with the draft assessment order passed by him. The Assessee filed the Writ petition against the said order. During pendency the Assessing Officer passed the order. The High Court held that the order of Dispute Resolution Panel is contrary to facts, law and non application of mind. The order has caused immense prejudice to the assessee in the circumstances the order of Dispute Resolution Panel could not be sustained. Consequently the assessment order could not be sustained. The writ petition was decided in favour of assessee.
AIA Engineering Ltd. v. Dispute Resolution Panel and another (2012) 341 ITR 145 (Guj.)(High Court)
S.144C :Dispute Resolution Panel –Order- Speaking order-Matter set a side to pass a speaking order.
The order passed by DRP was a non speaking order and not stating objections raised by assessee and reasons also not been given only orders of TPO and Assessing Officer were referred, Tribunal set a side the entire matter to DRP to pass a detailed order stating all objections of assessee and disposing them by giving cogent and germane reasons.(A.Y. 2006-07)
Evalueserve.com (P) Ltd v.ITO (2012) 134 ITD 546 / 145 TTJ 763 / 16 ITR 442/69 DTR 93 (Delhi) (Trib.).
S.144C:Dispute Resolution Panel- Constitution-Natural justice- Jurisdiction commissioner cannot be a member of DRP- DRP order is set aside to pass a speaking order.
In Hyundai Heavy Industries Ltd v. UOI (2011) 243 CTR 313 (Uttarakhand) (High Court), the court observed that the jurisdictional Commissioner is not nominated as member of DRP, following the observation of High Court , the Tribunal set aside the order passed by the Assessing Officer . The Tribunal also held that the DRP has not passed a

speaking order in conformity with the principles of natural justice and provisions of Act , accordingly the order is set aside and is directed to pass fresh order in conformity with the provisions of Act.(A.Y. 2007-08)
Lionbridge Technologies (P) Ltd v. Dy.CIT (2012)137 ITD 229/ 144 TTJ 726/68 DTR 7 (Mum.) (Trib.)

S.144C : Assessment- Reference to dispute resolution panel- Draft Order mistakenly termed as Final Order by AO - Corrigendum issued by Assessing Officer rectifying the mistake not prejudicial to the interest of assessee.

The Draft Assessment order passed by Assessing Officer was mistakenly termed as Final Order and demand notice was issued along with the order. The AO issued a corrigendum and withdrew the demand notice. It was held by the Tribunal that corrigendum issued by AO was not prejudicial to assessee. A statutory authority has inherent power to issue corrigendum and once the corrigendum is issued, that mistake is undone and first communication of the AO assumes character of the draft order. (A.Y. 2007-08)
Lason India (P.) Ltd. v. Asst. CIT (2012) 50 SOT 583/73 DTR 273 /17 ITR 203(Chennai)(Trib.)

S.144C:Assessment - Reference to dispute resolution panel - Non speaking Order passed by DRP – Matter restored back to file of DRP.

Order passed by DRP under section 144(5) being a non-speaking order not stating the objections raised by the assessee and the reasons have also not been given as simply the order of TPO and AO are referred, matter restored back to the file of DRP for afresh disposal after giving germane reasons for adjudication of the objections of the assessee. (A.Y. 2006-07)
Evalueserve.com (P) Ltd v. ITO (2012) 134 ITD 546 / 145 TTJ 763 / 16 ITR 442 /69 DTR 93(Delhi)(Trib.)

S. 145: Assessment-Method of accounting-Valuation of stock-Excise duty is not includible valuing closing stock.

The assessee valued its closing stock without including excise duty. The AO held that excise duty had to be included in the closing stock, though the CIT(A), Tribunal and High Court, upheld assessee's plea. On appeal by the department to the Supreme Court, held dismissing the appeal:
The assessee has been following consistently the method of valuation of closing stock which is "cost or market price whichever is lower." Also, while the AO revalued the closing stock, he did not make any adjustment to the opening stock. Excise duty is on the manufacture of the finished product though it is quantified and collected on the selling price. Valuation of unsold stock at the close of the accounting period is a necessary part of the process of determining the trading results of that period. It cannot be regarded as source of profits. The true purpose of crediting the value of unsold stock is to balance the cost of the goods entered on the other side of the account at the time of the purchase, so that on cancelling out of the entries relating to the same stock from both sides of the account would leave only the transactions in which actual sales in the course of the year has taken place and thereby showing the profit or loss actually realized on the year's trading. The entry for stock which appears in the trading account is intended to cancel the charge for the goods bought which have remained unsold which should represent the cost of the goods.(A.Y. 1987-88)
CIT v. Dynavision Limited(2012)348 ITR 380/ 252 CTR 351/76 DTR 351/210 Taxman 239 (SC)

Editorial : View in CIT v Dynavision Ltd (2004) 267 ITR 600 (Mad)(High Court is up held

S.145: Assessment- Method of valuation of stock-Valuation of closing stock-To implement the incentive scheme, sugar was rightly valued at levy price which was less than the cost of manufacture of sugar.

The assessee company engaged in the business of manufacture and sale of sugar. The assessee valued the closing stock of sugar at levy price which is less than the cost price. Department valued the same at cost price. The question raised before the Apex court was "whether on the facts and in the circumstances of the case, ITAT was right in holding that closing stock of incentive sugar has to be valued at levy price and not cost price"
The court observed that, valuation of opening and closing stock is very important of true profits. An improper valuation could result in rejection of books of account though all that is needed for rectifying it, is to make an addition or necessary adjustment based on proper valuation . Valuation of stock , whatever may be the method ,should be consistently followed . Method of valuation is generally at cost or the market value whichever of the two, is lower. As the incentive scheme was held to be a capital receipt in CIT v. Ponni Sugars and chemicals Ltd (2008) 306 ITR 392(SC), the assessee is right in valuing the closing tock of incentive sugar at levy price which was less than the cost of

manufacture of sugar (Cost price). The court also observed that "If we were to accept the case of the Department that the excess amount realized by manufacturer (s) over the levy price was a revenue receipt taxable under the Act ten the very purpose of the incentive scheme formulated by Sampat committee would have been defeated . One cannot have a stock valuation which converts a capital receipt in to revenue income". Appeal filed by the Department were dismissed.(A.Ys .1992-93 to 1997-98)(C.A.NO 7014 of 2012 arising out of SLP no 9263 of 2009 dated 26-9-2012and others)
CIT v. Bannari Amman Sugars Ltd (2012) 210 Taxman 271(SC)

S.145:Assessment- Method of accounting- Lease-In a finance lease, claim for "lease equalization charge" as per ICAI Guidelines is allowable. [S. 28(i)]
The assessee received lease charges and claimed a reduction towards "lease equalization charges" on the ground that reduction was in accordance with the Guidance Note dated 20.09.1995 issued by the ICAI in respect of Accounting for Leases and the Accounting Standard AS-1 notified under section 145 which mandated that the accounting policy of the assessee should represent a true and fair view. The Assessing Officer &CIT(A) rejected the claim on the ground that it was a "notional charge" and that the accounting guidelines could not override the Act. The Tribunal, however, allowed the claim. On appeal by the department, held dismissing the appeal:
(i) As the method for accounting for lease rentals was based on the Guidance Note "Accounting For Leases" issued by the ICAI, the Assessing Officer was not entitled to disregard the same. The Guidance Note reflects the best practices adopted by accountants the world over and the fact that it was not mandatory is irrelevant. The ICAI is recognized as the body vested with the authority to recommend Accounting Standards for ultimate prescription by the Central Government under section 211(3C) of the Companies Act. Also AS-1 pertaining to Disclosure of Accounting Policies has mandatory status for periods commencing on or after 01.04.1991. The change by the assessee in the policy of accounting for leases had the imprimatur of the ICAI and so the Assessing Officer was not entitled to disregard the books of accounts or the method of accounting for leases;
(ii) The department's contention that the "lease equalization charge" is a claim in the form of a deduction which cannot be allowed as there is no provision under the Act is based on a complete misappreciation of what constitutes a lease equalization charge. As the transaction was a finance lease, the charge had to be provided as per the ICAI Guidelines. As long as the method employed for accounting of income meets with the rudimentary principles of accountancy, one of which, includes offering only revenue income for tax, no fault can be found with the assessee debiting lease equalization charges in its profit and loss account. This represented the true and fair view of the accounts; a statutory requirement under section 211(2) of the Companies Act, enabled determination of real income.(A.Y .1996-97-2000-01)
CIT v. Virtual Soft Systems Ltd(2012) 341 ITR 593/ 67 DTR 410/205 Taxman 257(Delhi)(High Court)
Editorial : Virtual Soft Systems Ltd. v. ACIT (2010)38 SOT 412

S.145:Assessment- Method of Accounting – Business Expenditure - Deduction of unutilized Modvat credit – No accounting procedure involved in determining deduction – Matter remanded back to AO giving opportunity to assessee to prove payment of excise duty on inputs
The assessee claimed deduction of unutilized Modvat credit as reflected in the books of accounts from the value of its stock. The AO rejected the books of accounts of the assessee. It was held that the AO was not justified in rejecting the method of accounting as it was not accounting procedure which was involved in the claim made by the assessee but a specific deduction claimed in respect of available Modvat credit. The matter thus remanded back to the AO to give opportunity to assessee to make good its claim towards the value of excise duty paid by the assessee to its vendors and seek reduction in value proportionately. (AY 1995-96, 1996 – 97, 1997-98 and 1998 – 99)
CIT v. H.P. Global Soft Ltd. (No.1) (2012) 342 ITR 263 (Karn.) (High Court)

S.145:Assessment - Method of Accounting – Valuation of Closing Stock – Addition on account of under valuation of goods in process as there is no independent application of mind, matter remanded back.
Addition on account of under-valuation of goods in process and on account of non-inclusion of direct cost could not be deleted by Tribunal without independent application of mind by merely observing that CIT(A) had elaborately discussed the issue. The matter therefore remanded for reconsideration. (A.Y.1990-91)

CIT v. Raymond Ltd. (2012) 71 DTR 249 (Bom.)(High Court)

S.145:Assessment- Method of accounting- Scrap generation – Method of accounting accepted in earlier years and latter years, deletion addition by ITAT was up held.

The assessee which carries on business of ship breaking,maintained regular books of account . In the books of account the assessee claimed the actual recovery of scrap and sold the said scrap. The Assessing Officer based on the report of a committee appointed by the Minstry of Steel and Mines and based on cases engaged in the similar line of business rejected the scrap shown by the assessee and estimated the sale of scrap. In appeal The Tribunal deleted the addition. On appeal by revenue the Court up held the order of Tribunal The Court held that no substantial question of law arise out of Tribunal, accordingly the appeal of revenue was dismissed.(A.Y. 1986-87)

CIT v. Virendra & CO (2012) 77 DTR 210 (Bom.)(High Court)

S.145:Assessment-Method of accounting-Accrual of income-Retention money- Retention money received pursuant to furnishing of bank guarantee is not taxable until successful completion of the contract and expiration of the guarantee.(S.5)

As per the contract 5 % of the amount was to be held as retention money When the retention money reached 2% of the contractprice , the tax payer could ask for release of 1% of retention money by furnishing bank guarantee. The Tax payer received the retention money by furnishing the bank guarantee. The Assessing Officer held that the same is taxable .On appeal CIT (A) held that since the tax payer did not have an absolute right over the payments they were not taxable. On appeal to the Tribunal , the Tribunal held that as long as performance guarantee remains and enforceable without notice to the tax payer ,the retention money received cannot be recognised as income until successful completion of contract and expiration of the guarantee.(A.Y.2004-05)

ADIT v. Ballast Nadam Dregin, ITA no. 999/M/08, BCAJ Pg. 26, Vol. 43 B Part 6, March 2012(Mum)(Trib)

S.145 :Assessment - Method of accounting – Loss on valuation of interest swap - Deduction of loss on account of valuation of interest swap is allowable as deduction in current year is subject to verification of corresponding adjustment

The valuation of interest rate swap as on the balance sheet date only indicates computation of profit or loss on account of these profits as on that date. The assessee is entitled to deduction of loss on account of valuation of interest rate swap subject to the rider that allowability of deduction in the current year is subject to verification of corresponding adjustment in the year in which next settlement date falls. (A.Y.2003-04)

ABN Amro Securities India (P) Ltd v. ITO (2012) 145 TTJ 702/69 DTR 161 (Mum.)(Trib.)

S.145:Assessment- Method of accounting- Estimation of Profit-Rejection of books of account is held to be justified.

For relevant assessment, assessee declared gross profit rate at 12.67 percent as compared to gross profit rate at 15.07 per cent shown in immediate preceding year. He pointed out that main reason for fall in gross profit rate was that during year receipts of fabrication charges were substantially reduced. He did not maintain stock register of raw material, work-in-progress, consumable and finished products. He also did not give any plausible explanation regarding fallin gross profit rate particularly when turnover had remained almost consistent as per past year. Assessing Officer applied provisions of section 143(5)and estimated gross profit rate at 14 per cent. Held that, Assessing Officer had correctly applied provisions of section 145(3). Since Assessing Officer had partly accepted contention of assessee that main reason for fall in gross profit rate was reduction in receipts of fabrication charges, gross profit rate deserved to be reduced to 13 percent. (A.Y. 2007 – 08)

Vinod Kumar v. JCIT [2012] 137 ITD 48 (Chandigarh)(Trib.)

S.145:Assessment-Method of accounting-Rejection of accounts- Manufacturing results could be ascertained properly hence rejection of books of account is held to be justified.

Assessee derived income from manufacture and sale of cattle feed, oils, oil cakes etc. In course of assessment, Assessing Officer found that although quantity of cotton seed, mustard and ground nut crushed during previous year were shown separately but yield of oil and oil cakes had been given in consolidated form. Further, sales of oil and oil cakes had been shown in manufacturing account in consolidated form although there was a wide variation in market price of those

products. Thus, Assessing Officer asked assessee to explain reasons for mixing up cotton, mustard and groundnut oil seeds in same category when there was vast variation in market price of those types of oil seeds and other products. In reply assessee stated that there was not much difference in market price of both these oils and, therefore, he made sales of khal and oil of both these varieties jointly. On facts, unless yield of oil obtained on crushing of three types of oil seeds was separately given, manufacturing results could not be appreciated in their proper perspective. Therefore, books of account of assessee had correctly been rejected under section 145(3). (A.Y. 2008 – 09)
Pawan Kumar v. ITO [2012] 137 ITD 85/19 ITR 185 (Chandigarh)(Trib.)

S.145: Assessment Method of accounting – Valuation of stock –Cost of production of film- the method of reducing the value of the closing stock by revaluing the film at the cost or net realizable value whichever is less, not justified on facts .(Rule 9A)

Cost of production of film cannot be allowed as deduction until and unless the conditions are specified u/r 9A are satisfied hence, such deduction cannot be permitted by adopting an indirect method of reducing the value of the closing stock by revaluing the film at the cost or net realizable value whichever is less. (AY 2007-08)
Sagar Sarhadi v. ITO (2012)135 ITD 153/ 148 TTJ 86 (Mum.) (Trib.)

S.145: Assessment - Method of accounting – Estimation of profits- Advance money- Income could be assessed only when amount received in advance had reached certainty and hence, impugned addition was deleted.

The assessee firm was engaged in the business of civil work and road construction as a contractor. It entered into an agreement with the State Road Transport Corporation for development of commercial complex. The assessee as a developer had been allowed to find intending allottees and to collect sale consideration from such lessees . Intending lessees could become allottees only on approval by State Road Transport Corporation. Assessee collected certain advance money from customers. The AO relying on AS-7, opined that assessee should have declared profit of the said project on percentage of completion method. Thus, on value of work-in-progress, the AO held that the 10% was income generated which was added to the total income. It was held that assessee could be regarded as a contractor and also a developer, revenue could not be recognized in terms of AS-9 guidelines. Thus, income could be assessed only when amount received in advance had reached certainty and hence, impugned addition was deleted. (A.Ys. 2004-05 & 2005-06)
ACIT v. National Builders (2012) 137 ITD 277(Ahd.)(Trib.)

S.145:Assessment-Method of accounting - Project completion Method – Sale of TDR-, TDR has direct nexus with the project undertaken can be brought to tax only in the year in which the project is completed.(S.28(i))

The assessee is following project completion method of accounting. During the financial year 2005-06 the assessee sold the TDR allotted to it by BMC, which TDR was directly linked to the projects undertaken by assessee. As the project was not completed this amount was reflected in the balance sheet as advance. The Assessing Officer brought to tax entire amount as income of the assessee in the assessment year 2006-07.In appeal Commissioner (Appeals) confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that in the case of an assessee following the completion method, receipts by way of sale of TDR which TDR has direct nexus with the project undertaken can be brought to tax only in the year in which the project is completed.(A.Y. 2006-07)(ITA No.193/Mum/2010/dated 25-4-2012)
Pushpa Construction Co v.ITO (2012) BCAJ –July –P. 59 (Mum.)(Trib.)

S. 145: Assessment-Method of accounting- Project completion method – Sale of TDR

In case of an assessee following projection completion method, receipts by way of sale of TDR, which TDR has direct nexus with the project undertaken, can be brought to tax only in the year in which the project is completed.(A.Y.2006 – 2007)
Puspha Construction Co. v. ITO, ITAT 'C' Bench, Mumbai, ITA No. 193/Mum./2010, dated 25-04-2012, BCAJ Pg. 59, Vol. 44-A Part 4, July 2012.(Mum.)(Trib.)

S145: Assessment- Method of accounting –Not produced ledger copies, etc. –Rejection of accounts was held to be justified.

Assessee firm was engaged in business of civil contracts. During course of assessment proceedings, assessee did not produce account books before AO. On plea that same were impounded by local police; however, no evidence was labour charges, salary expenses, etc. Assessing Officer was vested with discretion of either rejecting book results to estimate profit or to proceed on basis of ledger copies. Assessing Officer having chosen second option, Tribunal could not substitute its opinion to that of Assessing Officer to hold that it was a fit case for rejection of books of account, unless it was pointed out that in process of adopting alternative option, Assessing Officer had arbitrarily made addition which had no rational basis. Hence, in absence of such a finding/conclusion, order passed by A.O. was not erroneous. Order of Assessing Officer was held to be justified , matter was decided in favour of revenue. (A.Y. 2005-06)

Pragati Engineering Corporation v. ITO (2012) 137 ITD 355 / 77 DTR 121 / 149 TTJ 273 (TM.) (Luck)(Trib.)

S. 145A:Assessment-Method of accounting – Valuation of stock-Provision applies only to valuation of purchase and sale of goods and inventory and not to service contract.

The provisions of section 145A applies only in respect of valuation of purchase and sale of goods and inventory and not to service contracts. Thus, provisions of said section cannot be invoked for adding service tax to gross receipts. (A.Y. 2007-08)

Pharma search v. ACIT (2012) 53 SOT 1 (Mum.) (Trib.)

S.147: Reassessment – Reopening after expiry of four years –loss was speculative or business loss- Mere "change of opinion" is not permissible for reopening of assessment

In the instant case, the assessee claimed a deduction which was allowed by the AO in s. 143(3) assessment. Subsequently, after the expiry of 4 years, the AO reopened the assessment u/s 147 on the ground that the said loss was a "*speculative loss*" and could not be allowed as a deduction. It was held by the apex court that the assessee had disclosed full details in the Return of Income in the matter of its dealing in stocks and shares. According to the assessee, the loss incurred was a business loss, whereas, according to the Revenue, the loss incurred was a speculative loss. It was therefore held that rejection of the objections of the assessee to the re-opening of the assessment by the Assessing Officer vide his Order dated 23rd June, 2006, was clearly based on change of opinion and thus, reopening of assessment merely on change of opinion was not maintainable.(A.Y. 1999-2000)

ACIT v. ICICI Securities Primary Dealership Ltd.(2012) 348 ITR 299 (SC)

Editorial: Appeal from the judgement of Bombay High Court W.P.NO 1919 OF 2006 dated 22-8-2006.is affirmed.s

S.147:Reassessment- Order on the basis of Jurisdictional high court- Reversal of law by Supreme court-After four years- Reversal of law by Supreme Court does not justify reopening.[S.80HH, 149 (1A)]

When the assessment order was passed, the law declared by the assessee would be entitled to the benefit of section 80HH. This was reversed in CIT v.N.C.Budharaja (1993) 204 ITR 412 (SC). The subsequent reversal of the legal position by the judgment of the supreme court does not authorize the Department to reopen the assessment, which stood closed on the basis of the law , as it stood at the relevant time. Departmental civil appeal was dismissed. (C.A.NO 2329 of 2006 dated 11-9-2012)

DCIT v. Simplex Concrete Piles (India) Ltd(SC)(www. itatonline.org)

S.147:Reassessment- Full and true disclosure- Notice after expiry of four years –Failure to disclose-Exemption - Investment in specified bonds-Reopening is held to be valid. (S.54EC)

Assessee submitted computation of total taxable long term capital gains of Rs. 23.19 crores in its return of income and sought exemption under section 54EC of Rs. 23.24 crores. Assessment was completed under section 143(3).Assessing Officer issued notice under section 148. The assessee challenged the notice in a writ petition. The Court held that Assessee having claimed exemption under section 54EC without making any reference to the dates on which amounts were invested in the specified bonds either in the return or in the disclosures which were made in response to the query of the Assessing Officer there was no full and proper disclosure of all material facts by the assessee and therefore, Assessing Officer was justified in reopening the assessment beyond the period of four years on the ground that income has escaped assessment.(A.Y. 2004-05)

Indian Hume Pipe Co. Ltd. v. ACIT (2012)348 ITR 439/ 65 DTR 26/246 CTR 31/ 204 Taxman 347 (Bom.)(High Court)

S.147:Reassessment- Full and true disclosure- Notice after expiry of four years- Failure to disclose material facts necessary- Waiver of part of loan disclosed in the notes on account-Reassessment held invalid.

Assessee had disclosed the waiver of loans in the notes on account. The Assessing Officer called for details and after satisfying with the explanation the assessment was passed under section 143(3). Thereafter the notice was issued under section 148, read with 147 to reopen the assessment. The assessee challenged the reassessment proceedings. The Court held that there was no failure on the part of assessee to disclosure material facts hence the reassessment after four years held to be invalid.(A.Y. 2004-05)

Kimplas Trenton Fittings Ltd. v.ACIT (2012) 340 ITR 299 / 70 DTR 43(Bom.)(High Court)

S.147:Reassessment-Full and true disclosure-Income forming subject matter of appeal- Reassessment held to be invalid.

The assessee had claimed certain amount as bad debts, which the Assessing officer has allowed partly. In appeal the Commissioner (Appeals) partly allowed the appeal. In the mean time the Assessing Officer issued the notice under section 147 read with 148 on the ground that the assessee had claimed the bad debts, in respect of parties where the income had been exempt under section 10(23G).In a Writ, the Court held that Commissioner (Appeals) having partly allowed the assessee's appeal by accepting its claim under section 36(1)(vii) and allowing a proportionate exemption under section 10(23G), the exercise of power to reopen the assessment on the grounds relating to write off of bad debts under section 36(1)(vii) is in excess of jurisdiction in view of bar of second proviso to section 147, it could not be said that income had escaped assessment by reason of excessive deduction under section 36(1)(viia) when the Assessing Officer has infact, allowed a deduction to the extent of 7.5% of the business income instead of 7.5% of total income and therefore reopening of assessment on this ground is also not valid.(A.Y. 2003-04)

ICICI Bank Ltd. v. Dy. CIT (2012) 65 DTR 249 /246 CTR 292/ 204 Taxman 65 (Mag.)(Bom.)(High Court)

S.147:Reassessment – Penalty – Writ- Alternative remedy- Held not maintainable .(S. 69B, 271(1)(c), Constitution of India - Article 226)

Assessee did not file objections against reassessment, hence there was no breach of principle of natural justice. Writ is not maintainable as it does not fall within the exceptional categories for invoking extraordinary jurisdiction under Article 226 and the impugned reassessment order as well as penalty order being appeallable before the Appellate Authority, the writ was dismissed as not maintainable. (A.Y. 2006-07)

Sushila Kanwar Chauhan v.UOI (2012) 65 DTR 5/246 CTR 1 (Raj.)(High Court)

S.147:Reassessment- Not for correction of errors-Not to recomputed the income on same set of facts-reassessment was not valid.

The petitioner had been returning its income from plying oil tankers for several years. The claim towards driver's expenses was within the knowledge of the assessing officer and also the subject matter of consideration at the stage of original assessment. The finding of the successor–in-office ignoring the findings of the predecessor on the issue and disallowing the expenses in entirety was a case of change of opinion on the same set of facts and could not be permitted. The reassessment was not valid and was liable to be quashed.(A.Y. 2001-02)

Kumar Stores v. CIT (2012) 340 ITR 90/ 70 DTR 144/ 250 CTR 62 (Patna)(High Court)

S.147: Reassessment- Reasons-Issues not included in reasons recorded-Reassessment is held to be valid in view of Expl. 3 to sub-section 3 to section 147. [S. 148(2)]

The Court held that Explanation 3 to sub-section 3 to section 147 of the Act has been inserted by the Finance (No.2) Act, 2009, retrospectively from April 1, 1989, and thus the Assessing Officer is justified in making addition even in respect of those issues which come to his notice subsequently in the course of reassessment proceedings though such issue was not included in the reasons recorded while initiating proceedings under section 147 of the Act.(A.Y. 1998-99)

Balbir Chand Maini v. CIT (2012) 340 ITR 161/ 67 DTR 161/ 247 CTR 468 (P&H.)(High Court)

S.147: Reassessment-Depreciation and revenue expenditure-After four years held invalid and within four years held valid .(S.148)

Notice u/s 148 for assessment years 1991-92 and 1992-93 were issued after four years. There was no mention in the recorded reasons that the escapement of chargeable income from tax was due to omission or failure on the part of the

assessee to disclose fully and truly all material facts necessary for the assessment. The notices in respect of the assessment years 1991-92 and 1992-93 was quashed. Reassessment for the Asst. years 1993-94, within four years held to be valid in respect of depreciation and revenue expenditure. (A. Ys. 1991-92, 1992-93 & 1993-94)

Sri Sakthi Textiles Ltd. v. Jt. CIT(2012) 340 ITR 144 / (2010) 235 CTR 494 / 193 Taxman 216 / 46 DTR 191 (Mad.)(High Court)

S.147:Reassessment – Limitation- After four years but before six years- Clubbing of income- Benamidar- Reassessment is justified.(S. 149)

For different financial years up to 2001-02 the assessee made several payments to Mr. Mitra. For the assessment year1994-95 an amount of Rs. 3,03,345 was made by the assessee to Mr.Mitra. Based on the above information the assessment was reopened. The Court held that as no proper explanation was furnished for payment exceeding three lakhs of Rupees, prima facie escapement of income of more than one lakh of Rupees. On merit clubbing of income of third person as benamidar of assessee was justified. (A.Y. 1995-96)

M.R. Associates v. ITAT & others (2012) 340 ITR 293 (All.)(High Court)

S.147: Reassessment- Dropped the proceedings in respect of income referred in the notice- Assessing the other income not mentioned in the notice is not valid. [S. 148, 152(2)]

Assessment was reopened on the basis of belief that certain income had escaped assessment but in the reassessment order passed under section 147 by the Assessing Officer no addition was made in respect of said income. In respect of other incomes no notice was issued and the assessee had no opportunity to put forward his case under section 152(2) to avail benefit of said section for dropping the proceedings and the revenue cannot take advantage of the Explanation 3 to section 147.(A.Y. 1997-98)

ACIT v. Major Deepak Mehta (2012) 65 DTR 237 / 246 CTR 255/210 Taxman 176 (Chhattisgarh)(High Court).

S.147:Reassessment- Draft assessment order-Delay- Delay in issue of notice under section 143(2), notice renders assessment invalid. (S. 292BB)

The Assessing Officer issued a notice under section 148 to reopen the assessment. Though the assessee filed a ROI, the Assessing Officer did not issue notice under section 143(2) within the prescribed period but passed a draft assessment order under section 144C. The Court had to consider (a) what is the effect of the failure to issue notice under section 143(2) within the period stipulated in the proviso to clause (ii) and (b) the effect of section 292BB of the Act. Held by the Court quashing the assessment proceedings:

(i) The service of notice under section 143(2) within the statutory time limit is mandatory and is not an inconsequential procedural requirement. Omission to issue notice under section 143(2) is not curable and the requirement cannot be dispensed with. Section 143(2) is applicable to proceedings under section 147 & 148. While the Proviso to section 148 protects and grants liberty to the Revenue to serve notice under section 143(2) before passing of the assessment order for returns furnished on or before 1.10.2005, in respect of returns filed pursuant to notice under section 148 after 1.10.2005, it is mandatory to serve notice under section 143(2) within the stipulated time limit (Hotel Blue Moon (2010)321 ITR 362 (SC) referred).

(ii) Section 292BB incorporates the principle of estoppels and stipulates that an assessee who has appeared in any proceeding and co-operated in any enquiry relating to assessment or reassessment shall be deemed to be served with any notice which was required to be served and would be precluded from objecting that the notice was not served upon him or was served upon him in an improper manner or was not served upon him in time. However, the principle of estoppels does not apply if the assessee has raised objection in reply to the notice before completion of assessment or reassessment. As the Assessing Officer had passed a draft assessment order and the assessee had raised an objection before completion of assessment, the estoppels in section 292BB did not apply and the section 147 proceedings could not continue.

Alpine Electronics Asia Pte Ltd. v. DGIT (2012) 341 ITR 247/249 CTR 59 / 205 Taxman 190 / 68 DTR 167 (Delhi)(High Court)

S.147:Reassessment- Retrospective amendment- Retrospective amendment no basis beyond 4 years held to be invalid - Assessing Officer not to delay passing objection order-Direction is given to all the Assessing Officers .

For A. Y. 2005-06, the Assessing Officer passed a section 143(3) order in which he allowed section 80-IA deduction. Thereafter, after the expiry of 4 years, he reopened the assessment under section 147 on the ground that in view of the retrospective amendment to the Explanation to section 80-IA by the Finance (No. 2) Act 2009 w.r.e.f. 1.4.2000, the assessee, being a works contractor, was not eligible for section 80-IA deduction. The Assessing Officer took 6 months to deal with the objections and passed the assessment order within 2 weeks. On a Writ Petition filed by the assessee to challenge the assessment order, held allowing the Petition:

(i) The fact that by virtue of the Explanation to section 80IA added with retrospective effect from 1.4.2000, income derived from the works contract would not qualify for deduction under section 80IA does not mean that an assessment can be reopened beyond 4 years without there being any failure to disclose truly and fully all material facts (Sadbhav Engineering Ltd v.Dy.CIT(2011)333 ITR 483(Guj.) followed);

(ii) The argument that the assessee failed to disclose the nature of works executed and that the same was executed only as works contractor and not as a developer, cannot be accepted for two reasons. Firstly, the reasons recorded do not refer to such a ground. Secondly, when the assessee filed the return of income, the Explanation in question was not in picture. The assessee cannot be expected to comply with the requirements of such Explanation by making disclosures in this regard which Explanation did not form part of the statute book when he filed his return;

(iii) The Assessing Officers have a tendency to delay disposing of the objections and, thereafter at the fag end of final time limit, to frame the assessment. This tendency is not approved. This was not the intention of the Apex Court when GKN Driveshafts (India) Ltd. v. ITO(2003) 259 ITR 19 (SC) was rendered. This should be brought to the notice of the Assessing Officers by the Department so that such instances do not recur in future.

Doshion Ltd. v. ITO(2012) 342 ITR 6 (Guj.)(High Court)

S.147:Reassessment-Satisfaction of one authority can not be substituted by satisfaction of another authority-Procedure should be strictly in accordance with law- Sanction-Sanction of Commissioner instead of Jt. CIT renders reopening invalid. [151(2),292B]

The Assessing Officer issued a notice under section 148 to reopen an assessment. As a section 143(3) order had not been passed & 4 years had elapsed, the Assessing Officer ought to have obtained the sanction of the Joint/Additional CIT under section 151(2). Instead, he routed the file through the Additional CIT and obtained the sanction of the CIT. On appeal by the assessee, the Tribunal struck down the reopening on the ground that correct sanction had not been obtained. On appeal by the department, held upholding the Tribunal:

(i) Section 151(2) requires the sanction to be accorded by the Joint/Additional CIT. The Assessing Officer sought the sanction of the CIT. Though the file was routed through the Addl. CIT, the latter only made an endorsement "CIT may kindly accord sanction". This showed that the Addl. CIT did not apply his mind or gave any sanction. Instead, he requested the CIT to accord approval. This is not an irregularity curable under section 292B;

(ii) The different authorities specified in section 116 have to exercise their powers in accordance with law. If powers conferred on a particular authority are arrogated by other authority without mandate of law, it will create chaos in the administration of law and hierarchy of administration will mean nothing. Satisfaction of one authority cannot be substituted by the satisfaction of the other authority. If the statute requires a thing to be done in a certain manner it has to be done in that manner alone. Also, the designated authority should apply his independent mind to record his satisfaction and it should not be at the behest of a superior authority.(A.Y. 2002-03)

CIT v. SPL's Siddhartha Ltd. (2012)345 ITR 223/ 249 CTR 357 / 70 DTR 133 (Delhi)(High Court)

S.147:Reassessment-Full and true disclosure- Original assessment u/s 143(3)-Subsequent decision of Jurisdictional High Court in favour of revenue –Amounts to change of opinion reassessment is invalid.(S. 44BB)

Assessing Officer assessed the income of the assessee under section 44BB, by passing the order under section 143(3), after due application of mind and making necessary enquiry. Reopening of assessment on the basis of subsequent decision of Jurisdictional High Court holding in favour of revenue amounted the change of opinion, hence invalid.(A.Y. 2003-04)

B.J. Services Company Middle East Ltd.& Ors.v. Dy. CIT (2011) 339 ITR 169 / (2012) 65 DTR 316/ 246 CTR 381 / (2012) Vol.42. Tax LR 130 (Uttarakhand)(High Court)

S.147:Reassessment- Notice-Time -Time available for issue of notice under section 143(2)- Reassessment is held to be bad in law..

Reassessment under section 147 cannot be made within the time available for issuing notice under section 143(2) and for completion of assessment under section 143(3).The Court held that as Madras and Delhi High courts have held that an income escaping assessment under section 147 cannot be completed within the time available for issuing notice under section 143(2) and for completion of assessment under section 143(3) and since these decisions remain unchallenged by the department, the department appeal was dismissed (CITv. TCP Ltd. (2010) 323 ITR 346 (Mad.),CIT v.Qatalys Software technologies Ltd. (2009) 308 ITR 249 (Mad.) and KLM Royal Dutch Air lines v. ADIT (2007) 292 ITR 49 (Delhi) followed.)(A. Ys. 1999-2000, 2000-01, 2002-03 & 2003-04).

CIT v. Abad Fisheries (2012) 65 DTR 370/ 204 Taxman 267/ 246 CTR 513 (Ker.)(High Court)

S.147:Reassessment- Reason to believe-Absence of any new material- New industrial undertaking-Reassessment is held to be invalid. [S. 80IA(4)(iii)]

Assessing Officer reopened the assessment on the ground that for the relevant assessment year mainly on the ground that the petitioner's industrial park was not notified by the CBDT till the end of relevant year, therefore deduction under section 80IA(4)(iii) was wrongly claimed and granted.The Court held that the assessment was completed under section 143(3), and there is nothing on the record to point out any new material justifying the issue of notice under section 148, more so the same issue has been examined by the Court in the case of the petitioner itself and the questions have

been adjudicated in favour of the petitioner.(A.Y. 2005-06)

Ganesh Housing Corporation Ltd. v. Dy. CIT (2012) 341 ITR 312/ 66 DTR 106/ 242 CTR 465 (Guj.)(High Court)

S.147:Reassessment - Reason to believe - Accommodation entries - Reopening held valid. (S. 148)

The Court dismissed the writ petition challenging the reopening on the ground that in the reasons recorded the Assessing Officer had referred to the investigation made by the Director of Income-tax (Investigation), who was in charge of the investigation into groups that operated as entry operators, in the various branches of banks to introduce unaccounted money in the guise of gifts, loans, share application money, etc. After referring to the broad and general modus operandi adopted by the entry providers, the Assessing Officer specifically noticed from the list of entries given to him by the investigation wing that assessee had taken accommodation entry from S in the amount of Rs. 3 lakhs. The reasons to believe recorded in writing by the Assessing Officer were detailed and showed application of mind .At the stage when reasons are recorded for reopening the assessment, the Assessing Officer is not required to build a fool proof case for making addition to the assessee's income; all that is required to do at that stage is to form a prima facie opinion or belief that income has escaped assessment. On the facts the Court up held the reopening of assessment and dismissed the writ petition. (A. Y. 2004-05).

Rajat Export Import India Pvt. Ltd. v. ITO (2012) 341 ITR 135 / 206 Taxman 50/75 DTR 108/252 CTR 307 (Delhi)(High Court)

S.147:Reassessment - Beyond four years - Housing project - Reassessment held to be invalid only on the basis of retrospective amendment as there is no failure to disclose fully and truly all material facts. [S. 80IB(10)]

Assessee claimed the deduction under section 80(IB)(10) after enquiry the deduction was allowed. The amendment was introduced by Finance Act, 2009, inserting Explanation with retrospective effect from 1st April, 2001 which denied benefit of deduction under section 80IB(10) to works contractors execution housing project. The only reason for issuing the notice, was amendment brought in the statute book with retrospective effect. The said notice was challenged before the High Court. High Court quashed the notice and held that reopening only on the basis of retrospective amendment of law is not justified. (A. Y. 2004-05).

Pravin Kumar Bhogilal Shah v. ITO (2012) 66 DTR 236 (Guj.)(High Court)

Vinayak Construction v. ITO (2012) 66 DTR 233 (Guj.)(High Court)

S.147:Reassessment - Change of opinion - Once in the course of original assessment the claim of exemption was allowed based on the communication with the Chairman CBDT, reassessment will be a change of opinion hence notice is held to be invalid.

The Assessing Officer has allowed the claim based upon the communication to the Chairman of Insurance Regulatory and Development Authority (IRDA). The communication clarifies that the exemption available to any other Assessee under any clauses of section 10 is also available to any other person carrying on non life insurance business subject to fulfillment of the conditions. The Court held that the issue as to whether the assessee is entitled for an exemption under clauses (15), (23G) and (33) of Section is directly covered by the decision of Life Insurance Corporation v. CIT (1978) 115 ITR 45 (Bom.) CIT v. New India Assurance Co. Ltd. (1969) 71 ITR 761 (Bom.), the decision is binding on the Assessing Officer. The communication of Chairman of CBDT has also considered by the Assessing Officer in original assessment proceedings. Accordingly the High Court quashed the reassessment proceedings. (A. Y. 2006-07).

General Insurance Corporation of India v. Dy .CIT(2012) 342 ITR 27 / 204 Taxman 587 / (2012) Vol.114 (1) Bom. L.R. 0246 (High Court)

S.147:Reassessment - Notice after expiry of four years - Assessing Officer has discovered in subsequent year that the purchase of components was bogus the reopening of assessment held to be justified.

The Assessee for the assessment year 2004-05 claimed the depreciation on an Effluent Treatment Plant (ETP) which was said to have been supplied by the Vendor. In the assessment year 2008-09 after enquiry, the Assessing Officer treated the purchase from the said vendor as bogus and disallowed the depreciation. On the basis of said order, the Assessment year 2004-05 was reopened. The Assessee challenged the reopening of assessment, the Court held that reopening of assessment was justified. (A. Y. 2004-05).

Indo European Breweries Ltd. v. ITO (2012)343 ITR 195/ 66 DTR 479 / 247 CTR 540 (Bom.)(High Court)

S.147:Reassessment - Notice after expiry of four years - Reassessment held to be invalid.

In the course of original assessment proceedings the assessee furnished the details of dividend received and the expenses incurred towards the portfolio management scheme and depository charges. Therefore, reopening of assessment beyond four years held to be invalid. (A. Y. 2004-05).

HCL Corporation Ltd. v. ACIT (2012) 66 DTR 473 (Delhi)(High Court)

S.147:Reassessment –Retrospective amendment- Reopening, even within 4 years, on basis of retrospective amendment to section 80IB(10) is held to be invalid.

For A.Y. 2005-06, the assessee claimed section 80-IB(10) deduction of Rs. 11.38 crores which was accepted by the Assessing Officer in section 143(3) assessment. Subsequently, within 4 years from the end of the A.Y., the Assessing Officer reopened the assessment under section 148 on the ground that the assessee had not complied with section 80-IB(10) including that after the insertion of the Explanation to section 80-IB(10) by the F.A. (No. 2) Act 2009 w.r.e.f. 1.4.2000, a contractor was not eligible for deduction under section 80-IB(10). The assessee challenged the section 148 notice by a Writ Petition. Held allowing the Petition:

The main reason for reopening the assessment was the insertion of the Explanation to section 80-IB(10) by the F.A. (No. 2) Act, 2009 w.r.e.f. 1.04.2000 which denies deduction to a contractor in respect of works contract awarded by any person and that at the stage of the original assessment, no opinion regarding the allowability or otherwise of deduction under section 80IB(10) was given of the Act. As regards the retrospective amendment, if an Explanation is added to a section for the removal of doubts, the implication is that the law was the same from the very beginning and the same is further explained by way of addition of the Explanation. It is not a case of introduction of a new provision of law by retrospective operation. As regards the formation of opinion, the assessee had disclosed all the material relevant for claiming section 80-IB(10) deduction and there was no suppression of material. The fact that the Assessing Officer in the section 143(3) assessment did not give any opinion regarding the allowability or otherwise of deduction under section 80IB(10) of the Act cannot be a ground for invoking section 147.(A.Y. 2005-06)

Ganesh Housing Corporation Ltd. v. Dy. CIT (2012) 70 DTR 305/246 CTR 465(Guj)(High Court)

S.147:Reassessment- Sanction- Sanction of commissioner instead of JCIT renders reopening is void (S.2 (28(C),148,151)

The Assessing Officer issued a notice u/s 148 to reopen the assessment for AY 2004-05. As no assessment had been made u/s 143(3) or s. 147 for that year and four years had expired, the AO was required to obtain the sanction of the JCIT (which included an Addl. CIT) u/s 151(2). The AO submitted a proposal to the CIT through the Addl. CIT. The Addl. CIT forwarded the proposal to the CIT and requested the CIT to grant sanction, which the CIT did. The assessee

challenged the reopening inter alia on the ground that as s. 151(2) required the JCIT/Addl. CIT to grant approval, the approval of the CIT was not valid. Held upholding the challenge:

There is merit in the contention of the assessee that the requirement of s. 151(2) could have only been fulfilled by the satisfaction of the JCIT that this is a fit case for the issuance of a notice u/s 148. S. 151(2) mandates that the satisfaction has to be of the Joint Commissioner. That expression has a distinct meaning by virtue of the definition in S. 2(28C). The CIT is not a JCIT within the meaning of s. 2(28C). The Additional Commissioner forwarded the proposal submitted by the AO to the CIT. The approval which has been granted is not by the Addl. CIT but by the CIT. There is no statutory provision under which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute requires something to be done in a particular manner, it has to be done in that manner (CIT v.SPL's Siddhartha Ltd(2012) 249 CTR 357 (Delhi) (High Court) followed)(A.Y. 2004-05)

Ghanshyam K. Khabrani v. ACIT(2012)346 ITR 443/ 70 DTR 137/249 CTR 370 (Bom.)(High Court)

S.147:Reassessment-Intimation-Once the assessment is accepted under section 143 (1),though no notice was issued under section 143 (2) ,the assessing officer can issue notice under section 147 , read with 148 of the Act subject to other conditions.

The assessee is an employee of M/S Tokio Marine & Nichdo Fire Ins Co Ltd .The assessee filed the return of income for the assessment year 2008-09 enclosing the form no.16 issued by the employer. Subsequently the assessee filed a revised return enclosing the revised form no 16 , claiming the refund of taxes paid. Assessing officer called the information from the company and after recording the reasons issued the notice under section 148.The assessee challenged the issue of notice under section 148 on the ground that the assessing officer failed to intimate and send the order passed under section 143(1)to the assessee and reasons recorded do not justify and are not 'reasons to believe". The Court held that once the order under section 143(1) was passed, and no notice under section 143(2) has been issued, the Assessing Officer can issue notice under section 147 /148 , if preconditions are satisfied. The failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate proceedings for reopening . Since the period of service of notice under section 143 (2) after filing of the original or revised returns has expired , regular assessment proceedings under section 143 (3) can not be initiated and the only option to Assessing Officer is to issue notice under section 148 , hence issue of notice under section 148 held to be valid.

Atsushi Yoshida & Ors v. Asst .CIT (2012) 67 DTR 347 (Delhi) (High Court)

S.147: Reassessment-Reason to believe-Non filing of return –Information from sales tax and Central Excise department constitute reason to believe and reassessment held to be valid.

The assessee has not filed the return of income for the asst years 1993-94, 1994-95 and 1995-96.On receipt of information and sales tax assessment orders showing huge turn over, the assessing officer issued notice under section 148 after recording the satisfaction. The assessments were completed assessing the income for the asst year at Rs 5, 62,910, asst year 1994 -95 at Rs 7,52 160 and for asst year 1995-96 at Rs 8,90, 000 respectively. Assessee challenged the reassessment proceedings and quantum of addition before Commissioner(Appeals) who up held the reassessment proceedings. On appeal before the Tribunal the Tribunal held that reopening of assessment was not valid. On appeal by revenue to High Court , the High Court held that the Tribunal fell into grave error of law in unduly restricting the scope of power and jurisdiction under section 147 by holding that there is no evidence on record that the assessee earned income on huge transactions and that assessee in similar business incurred loss before income from other sources during the relevant year . The Court held that the approach of Tribunal as adopted is clearly erroneous in law because that would amount to first finally ascertain on established legal evidences for exercise of power under section 147 , that is not the object of section 147 , the condition precedent for section 147 is reason to believe and not actual and final assessment on definite material . As the assessee has not filed the return of incomes of income for the relevant assessment years and information about huge turnover was received from the sales tax /Central Excise department very much constituted reason to believe that income has escaped assessment. Accordingly the order of Tribunal was set aside. (A.Y. 1993-94 to 1995-96)

ITO v. Santosh Jain (2012) 247 CTR 488 / 67 DTR 260 (Chhattisgarh) (High Court)

S.147:Reassessment-Change of opinion- Business expenditure- There was no failure on part of assessee and payment was examined by Assessing Officer hence reassessment held to be not valid.(S. 37 (1))

In the course of assessment proceedings after raising specific query, the assessing officer examined the details filed allowed the royalty payments as allowable business expenditure and passed the order under section 143 (3). The assessment was reopened on the ground that assessee had debited certain amount in its profit and loss account as royalty, however the part of said expenditure was to be considered as capital expenditure as it gave benefit which could be enjoyed over number of years . On appeal the Tribunal set aside the order on the ground that it was based on mere change of opinion .On appeal by revenue the Court held that , there was no failure or omission on part of assessee to disclose head and quantum thereof , even the TDS certificates and other details were filed , hence on facts the assessee's case fell in category of change of opinion as at time of original proceedings the assessing officer has examined and gone in to question of royalty . Even otherwise, if there was any legal error or illegality, same could not be rectified and be made subject matter of reassessment proceedings under section 147. Accordingly the High Court up held the order of Tribunal. (A.Y. 2000-01 and 2001-02)

CIT v. Munjal Show Ltd(2012) 205 Taxman 351 (Delhi) (High Court)

S.147:Reassessment- Full and true disclosure- Notice after four years- Reassessment held to be void.

The assessment was completed under section 143 (3), after detailed enquiry, regarding the reimbursement of expenses allocation of fee etc. Assessing Officer issued notice for reassessment on the ground that certificate under section 197 is valid only for payments or credit made after the date of certificate for non deduction of tax, is not valid in respect of payment of Rs 1.56 crore , as the certificate was issued after the amount of Rs 1.56 crore had been credited in the books and also amount mentioned in the certificate does not tally. The assessee challenged the issue of notice by way of writ before the High Court. The court held that the Assessing Officer has not even indicated in the reasons that have been recorded that there was any failure to disclose fully and truly all material facts and there is merit in the contention of the assessee that there was a full and true disclosure of all necessary material, therefore reopening of assessment after four years was not valid.(A.Y. 2004-05)

Monitor India (P) Ltd v. UOI (2012) 343 ITR 236/ 68 DTR 313/ 206 Taxman 167/ 252 CTR 78 (Bom.) (High Court)

S.147:Reassessment-Limitation-Reasons recorded need not be supplied within limitation period, reopening cannot be held to be invalid. (S.148,149)

For AY 2004-05, the AO issued a notice u/s 148 on 15.3.2011. The recorded reasons were supplied to the assessee on 30.8.2011 (after the expiry of the limitation period of 6 years). The assessee, relying on Haryana Acrylic Manufacturing Co v. CIT(2009) 308 ITR 38 (Delhi), challenged the reopening inter alia on the ground that as the recorded reasons were supplied after the expiry of the limitation period, the reassessment proceedings were invalid. Held dismissing the petition:

There is no requirement in s. 147, 148 or 149 that the reasons recorded should also accompany the notice issued u/s 148. The requirement in s. 149(1) is only that the notice u/s 148 shall be issued. There is no requirement that it should also be served on the assessee before the period of limitation. There is also no requirement in s. 148(2) that the reasons recorded shall be served along with the notice of reopening the assessment. The only mandatory requirement is that before issuing the notice to reopen the assessment the AO shall record his reasons for doing so. After GKN Driveshafts(India) Ltd v.ITO (2003)259 ITR 19 (SC) the AO is duty bound to supply the recorded reasons to the assessee after the assessee files the return in response to the s. 148 notice. Haryana Acrylic turned on the peculiar facts of that case, where two sets of reasons had been recorded by the AO. As the second set of reasons alleging non-disclosure of material facts surfaced for the first time in the affidavit filed by the Revenue before the High Court after the expiry of 6 years, it was held that the reassessment proceedings were invalid. As this is not the fact situation here, the assessee's plea cannot be accepted.(A.Y.)

A. G. Holdings Pvt. Ltd v. ITO 72 DTR 346 (Delhi) (High Court)

S.147:Reassessment-Disclosure in notes on account-Change of opinion- Question whether there is "change of opinion" if AO does not specifically apply his mind referred to larger Bench.

In the Notes to accounts, the assessee had disclosed that it had received Rs.173 lakhs for transfer of exclusive distribution rights of AC and water coolers and that it was credited to capital reserve and not treated as income. The

AO passed assessment order undr section 143(3)in which he did not deal with the issue. Subsequently, as the revenue raised an objection, the AO, within 4 years from the end of the AY, reopened the assessment on the ground that the said amount was chargeable as "Capital gains". The Tribunal, following CIT v Kelvinator of India Ltd (2010) 256 ITR 1 (FB) (affirmed in CIT v Kelvinator of India Ltd (2010) 320 ITR 561 (SC)), struck down the reopening on the ground that it was based on the notes on accounts that was already on record, there was no "fresh material" and so it was a case of "lapse of the AO" and a "change of opinion". On appeal by the department, Held:

A case where the AO specifically examines an issue and applies his mind poses no difficulty because even if the order is silent, it is a case of "change of opinion". However, in a case where the AO does not notice or examine a particular aspect in the assessment order and does not raise any written question or query, can it be said that the doctrine of "mere change of opinion" is applicable. There can be different aspects in which this question may arise including cases where the claim may be a repetition and allowed in earlier years. To what extent the presumption u/s 114 (e) of the Evidence Act applicable is the issue. The question is whether the presumption is rebuttable and when the presumption is rebutted. Further, whether the said presumption only applies to procedural aspects or even to substantive assertions relevant to the assessment. Though in Kelvinator of India Ltd (2010) 256 ITR 1, the Full Bench held that s. 114 (e) of the Evidence Act would apply and the AO would be deemed to have applied his mind, s. 114 was not specifically referred to by the Supreme Court nor did it specifically approve or disapprove the observations of the Full Bench. Accordingly, the matter should be examined by a larger Bench and the issues requiring consideration are:

i) What is meant by the term "change of opinion?

ii) Whether assessment proceedings can be validly reopened u/s 147, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion?

iii)Whether the bar or prohibition under the principle "change of opinion" will apply even when the AO has not asked any question or query with respect to an entry/note, but there is evidence and material to show that the AO had raised queries and questions on other aspects?

iv) Whether and in what circumstances s. 114 (e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion?" (A.Y.2001-02)

CIT v. Usha International Ltd (2012) 251 CTR 28 / 73 DTR 153 (Delhi) (High Court).

S.147:Reassessment –Change of opinion-Beyond four years-Tangible material-Reassessment held to be not valid in the absence of any new or additional information.(S.148)

Where the assessee had made full and true disclosure and also there was a note by the auditor in his audit report, reopening of assessment beyond the period of four years was held to be not valid notwithstanding the fact that for subsequent assessment year a similar addition had been made by the assessing officer. Assessment cannot be reopened on the basis of a mere change of opinion. There should be some tangible material with the assessing officer to come to the conclusion that there is an escapement of income. A mere change of opinion on the part of the assessing officer in the course of assessment for a subsequent year cannot justify the reopening of an assessment.(A.Y.2006-07)

NYK Line (India) Ltd. v. Dy. CIT(No.2) (2012)346 ITR 361/ 68 DTR 90 (Bom.)(High Court)

S.147 :Reassessment –Housing project-Amendment of law-Beyond four years-Reassessment held to be not valid.

The Assessing officer issued the notice for reopening Notice issued after the expiry of four years from the end of the relevant assessment year merely on the basis of a prospective amendment without placing any evidence on record to demonstrate that the assessee had concealed any material facts was held to be invalid.(A.Y.2004-05)

Kalpataru Sthapatya (P) Ltd. (2012)346 ITR 371/ 68 DTR 221 / (2012) TLR Vol. 42 March 212 (Guj.)(High Court).

S.147 :Reassessment –Beyond four years- Notice –Reassessment merely on the basis of investigation wing held to be not valid.

Notice issued after the expiry of four years from the end of the relevant assessment year by the assessing officer merely acting mechanically on the information supplied by the Investigation wing about the accommodation entries provided by the assessee to certain entities without applying his own mind was led to be not justified.(A.Y.2004-05, 2006-07)

CIT v. Kamdhenu Steel & Alloys Ltd. (2012) 68 DTR 38/ 248 CTR 33 / 206 Taxman 254 (Delhi)(High Court)

S.147 :Reassessment –Beyond four years-Reopening held to be valid on the basis of disclosure made in subsequent year.

Assessment can be reopened even after the expiry of four years from the end of the relevant assessment year on the basis of the disclosure made in subsequent year which were not disclosed in the relevant assessment year.(A.Y.2004-05)

Siemens Information Systems Ltd. v. A.CIT & Ors. (2012) 343 ITR 188/ 68 DTR 77 (Bom.)(High Court)

S.147:Reassessment - Full and true disclosure - Notice after expiry of four years - As there is no allegation of failure on the part of assessee to state fully and truly all material facts reopening after four years held to be not sustainable.

The assessment was completed on 30th October under section 143(3). The Assessment was on 16th August 2001 on the ground that the assessee has claimed meling loss in excess of 7.24 percent. The assessee objected for reopening , which was rejected by the Assessing Officer. The assessee challenged the order by writ petition. The Court allowed the petition and held that there is no allegation in the reasons of failure on the part of the assessee to state fully and truly all material facts necessary for assessment and the assessment having made after verification of records, reopening after four years was not sustainable. (A.Y.2004-05)

Shriram Foundry Ltd v. Dy.CIT (2012) 70 DTR 201 / 250 CTR 116 (Bom.)(High Court)

S.147:Reassessment - Full and true disclosure - Notice after expiry of four years - As there is no allegation in the reasons for failure to disclose material facts necessary for assessment reopening beyond four years was held to be not valid.

The assessment was completed under section 143 (3) on 14th December, 2007 accepting the melting loss at 7.75 percent. The notice for reopening was issued on the ground that in the similar line of business other assessee have claimed the melting loss at 5.5 percent. The objection of assessee was rejected by the Assessing Officer. The assessee challenged the reopening by writ petition. The court allowed the writ petition and held that there is no allegation in the reasons which have been disclosed to the assessee that there was any failure on his part to fully and truly disclose material facts necessary for assessment and therefore reopening beyond four years was not valid. (A.Y. 2005-06)

Sound Casting(P) Ltd v. Dy.CIT (2012) 70 DTR 204 / 250 CTR 119 (Bom.)(High Court)

S.147:Reassessment- Full and true disclosure- Notice after expiry of four years- Reassessment is not permissible notwithstanding subsequent decision of Court or retrospective amendment.(A.Y.2005-06)

On the facts the Assessing Officer reopened the assessment on the ground that set off of brought forward unabsorbed depreciation loss was allowed against the income from other sources and capital gains, which is not in accordance with law as explained by special bench in the case of Times Guarantee Ltd and while giving effect to the order of Tribunal no addition was made while computing the income under section 115JB on account of provision for diminution in the value of investment charged to P& L account as the law is amended by Finance Act . 2009 with retrospective effect from the Assessment year 2001-02.The Objection raised by the assessee was rejected by the Assessing Officer. The assessee filed the writ petition . The Court held that there being full and true disclosure by assessee reopening of assessment beyond four years was not permissible not withstanding subsequent decision of Court or retrospective amendment. (A.Y. 2005-06).

Voltas Ltd. v. ACIT (2012) 70 DTR 433 (Bom.)(High Court)

S.147:Reassessment - Full and true disclosure - Notice after four years - Reassessment is not permissible not withstanding retrospective amendment of law.

The assessment was completed under section 143 (3) on 30 the August , 2006 under the provisions of section 143(3) read with section 115JB. Reassessment notice was issued under section 148 on 8 the August 2011 for the Assessment year 2004-05 because of retrospective amendment of law which was introduced by Finance Act, 2009 with retrospective effect from 1st April 2001 due to introduction of Explanation (1) (i) to section 115JB as regards diminution in the value of investment. The reassessment notice was challenged by way of writ petition. The Court held that reasons for reopening contain absolutely no reference to there being any failure on the part of the assessee to fully and truly disclose all material facts Assessing Officer may have reason to believe that income has escaped assessment, but that itself is not sufficient for reopening an assessment beyond the period of four years . There must be failure on

the part of assessee to fully and truly disclose all material facts necessary for assessment, therefore reassessment was held to be not valid, notwithstanding retrospective amendment of law. (A.Y. 2004-05)
DIL Ltd. v. ACIT (2012) 343 ITR 296 / 70 DTR 429 / 205 Taxman 182 (Bom.)(High Court)

S.147:Reassessment - Reason to believe - Reassessment on the presumption that provisions of section 115AD would stand attracted is not valid – Succeeding Assessing Officer cannot improve upon the reasons which were originally communicated to the assessee. (S.148)

The assessee company filed its return of income for the A.Y. 2006-07 on 31st Oct. 2006 declaring nil income. The assessee claimed that profits earned from the transactions in Indian securities are not liable to tax in India in view of art 7 of the India- Singapore treaty because the assessee company did not have PE in India. The assessment was reopened on the ground that no foreign companies are allowed to invest through stock exchange in India unless it is approved as FII by the regulatory authorities Viz- RBI, SEBI. Etc .According to the Assessing Officer the gain earned on investment as FII is liable to be taxed under section 115AD. The reassessment notice was challenged before the Court, the Court held that the attention was drawn to the notice of Assessing Officer that the assessee is not an FII and that provisions of section 115AD would not be attracted. The Assessing Officer attempted to improve upon the reasons which were originally communicated to the assessee. Those reasons constitute the foundation of action initiated by the Assessing Officer for reopening of assessment .Those reasons cannot be supplemented or improved upon subsequently . The court held that in the absence of any tangible material assessment could not be reopened under section 147, further succeeding Assessing Officer has clearly attempted to improve upon the reasons which were originally communicated to the assessee which was not permissible. (A.Y.2006-07)
Indivest PTE Ltd v. ADDIT (2012) 250 CTR 15 / 206 Taxman 351/ 69 DTR 369 / (2012) Vol.114(4) Bom.L.R. 2080 (Bom.)(High Court)

S.147:Reassessment-Deduction at source- Software - Change of opinion -Assessing Officer has applied his mind as regards applicability of section 9(1) (vii), hence reassessment held to be bad in law. (S. 9(I)(vii), 195)

The assessee made payment towards software consultancy services to a foreign company, without deduction of tax at source. In the course of original assessment proceedings the assessee explained that payment made for consultancy services outside India were not chargeable under Act as per section 9 (1) (vii) , hence not liable for deduction of tax at source, which was accepted by the Assessing Officer. The Assessing Officer thereafter reopened the completed assessment on the ground that the assessee had neither any sale of software outside India nor earned any income from outside India and consumed all software in house and therefore consultancy charges paid to foreign company was to be disallowed. On writ petition challenging the reassessment, the court held that the Assessing Officer during the original assessment proceedings had gone in to and examined applicability of section 9 (1) (vii) and thereafter did not invoke section 9(1) (vii), therefore it being a change of opinion, reassessment is bad in law. The court also held that even otherwise since it was found that Assessing Officer had incorrectly recorded reasons by presuming that payments were made to Artech Software Information Systems LLC, where as the said transaction was in respect of software purchase from Micrografx, and assessee had given all details in respect of same, it could be said that the Assessing Officer had proceeded on wrong factual basis also, therefore, reopening proceedings was to be quashed. (A.Y. 2003-04)
Artech Infoystems (P) Ltd. v. CIT (2012) 206 Taxman 432 (Delhi)(High Court)

S.147:Reassessment - Reasons-recorded- Reasons for reassessment was not furnished to the assessee before completion of assessment, held reassessment not valid.

The Tribunal following the judgment of Bombay High Court in CIT v. Fomento Resorts and Hotels Ltd ITA no 71 of 2006 dated 27th November, 2006 , has held that though the reopening of assessment was within three years from the end of relevant assessment year, since the reasons recorded for reopening of the assessment were not furnished to the assessee till date the completion of assessment, the reassessment order cannot be up held, moreover, special leave petition filed by revenue against the decision of this court in the case of CIY v. Fomento Resorts and Hotels Ltd , has been dismissed by Apex Court, vide order dated July 16, 2007. The court dismissed the appeal of the revenue.
CIT v. Videsh Sanchar Nigam Ltd. (2012) 340 ITR 66 (Bom.)(High Court)

Editorial : Refer Tata International Ltd. v. Dy. CIT (2012) 52 SOT 465 (Mum.)(Trib.)

S.147:Reassessment-Full and true disclosure- Notice after expiry of four years-Assessee having not disclosed to the Assessing Officer the fact that it has filed an allegation against its secretary and some other misappropriation of funds during the period , reopening of assessment beyond four years held to be valid.

The assessment was completed under section 143(3) on 22nd December , 2006. The reassessment notice was issued on 29th March , 2011. In the reasons recorded it has been stated that during the course of scrutiny assessment for assessment year 2008-09, the Assessing Officer came to know of the fact that the assessee had lodged a first information report(FIR) on 16th March 2006 against, then secretary of the Board of Control for Cricket in India and others ,inter alia for misappropriation of funds. During the assessment proceedings for the assessment year 2004-05 the assessee had not furnished any intimation to the Assessing Officer for alleged misappropriation of funds .As there was failure on the part of assessee to disclose all material facts necessary for assessment. The assessee challenged the notice by way of writ petition. The court held that assessee having not disclosed to the Assessing Officer the fact that it has filed an FIR against its secretary and some others for misappropriation of funds during the period which covered the financial year relatable to the relevant assessment year , there was a failure on the part of the assessee to disclose fully and truly material facts necessary for assessment and the charge –sheet which has been filed by economic Offences Wing of the CID pursuant to the investigation carried out by it constituted tangible material for the Assessing Officer to form the belief that reopening of the assessment has escaped beyond the period of four years from the end of relevant assessment year was valid. (A.Y.2004-05)

Board of Control for Cricket in India v. ACIT (2012) 71 DTR 376 (Bom) (High Court)

S.147:Reassessment-Material- Reopening in the absence of "fresh tangible material" is invalid.

For A.Y.2002-03, the assessee filed a ROI declaring income of Rs.14.99 crores. A revised ROI was then filed claiming 30% adhoc expenses (Rs. 6.31 crores) and offering income of Rs.8.11 crores. When the AO asked the assessee to substantiate the expenses, he withdrew the claim. The AO passed S. 143(3) assessment determining the income at Rs.56.41 crores. The AO then issued a S. 148 notice (within 4 years) to reopen the assessment on the ground that the claim for expenses (which was withdrawn) had to be assessed as "unexplained expenditure" u/s 69. The CIT (A) & Tribunal struck down the reassessment order on the ground that the material on the basis of which the assessment was sought to be reopened was always available at the time of the original proceeding and there was no new material. On appeal by the department to the High Court, held dismissing the appeal:

The assessee had made a claim for 30% adhoc expenditure. This was withdrawn by the assessee when asked by the AO to substantiate. The reopening on the basis that the said adhoc expenditure constituted "unexplained expenditure" u/s 69 was based on the same material. There was no fresh tangible material before the AO to reach a reasonable belief that the income liable to tax has escaped assessment. It is a settled position of law that review under the garb of reassessment is not permissible. (A.Y. 2002-03)

CIT v. Amitabh Bachchan(2012)74 DTR 314(Bom.)(High Court), www.itatonline.org

S.147:Reassessment-Reason to believe – Information from Enforcement Directorate and Investigation along - Existence of material and rational belief- Prima facie belief regarding escapement of income of the assessee is relevant .(S.148)

The assessee filed the return of income for the assessment year 2002-03 in the status of non –resident and declared property income and interest. The return was accepted under section 143 (1).The notice under section 148 was issued thereafter . The assessee filed the return under protest and objected for reopening of assessment. As per the reasons recorded by the Assessing Officer, it was found that it was mainly based on the information received from the Enforcement Directorate and the Investigation Wing about transfer of commission monies from the company to certain beneficiaries for services rendered in connection with the finding of a buyer for the "Oil food programme". The jurisdiction to reopening was challenged before the Court. The court held that, on the basis of information and documents received from the Enforcement Directorate and investigation Wing, Assessing Officer could have formed the prima facie belief regarding escapement of income of the assessee; finer questions as to business connection in India vis-à-vis commission said to be received by the assessee were not required to be examined at this stage, which could be examined during the reassessment proceedings. Accordingly, the jurisdiction of the Assessing Officer to issue notice

under section 148 on 17th Feb, 2009 reopening of the assessment of the assessee on the ground that income chargeable to tax had escaped assessment is up held and petition was dismissed. (A.Y. 2002-03)
Aditya Khanna v. ACIT (2012) 72 DTR 1 (Delhi)(High Court)

S.147:Reassessment- Change of opinion-Same materials on record- Reassessment on the basis of same material facts held to be not valid.

The assessee is engaged in manufacturing of irrigation projects. For the relevant assessment year the assessee claimed deduction under section 80IA .The assessment was completed under section 143(3) after considering the explanation furnished by assessee. Thereafter the Assessing Officer issued notice under section 147 on the ground that the assessee was a contractor or supplier of irrigation products and could not be called a developer of any new industrial facility and thus the assessee has not fulfilled the condition of section 80IA(4). The assessee objected for reassessment , which was rejected by the assessing Officer. On writ the court quashed the notice issued under section 148 on the ground that in the absence of "any tangible material" to come to the conclusion that there was escapement of income from assessment ,the Assessing Officer exceeded his authority to reopen the assessment merely on the basis of a "change of opinion" and accordingly the reassessment notice was quashed.(A.Y.2006-07)
Parixit Industries (P) Ltd v.ACIT (2012) 207 Taxman 140 / 71 DTR 9 (Guj.) (High Court)

S.147:Reassessment- Full and true disclosure-Change of opinion-Reasons recorded do not disclose that there was failure or omission to disclose fully and truly all material facts, reassessment held to be in valid .

In the course of original assessment proceedings the Assessing Officer has considered and allowed the non –compete fee payment as revenue expenditure. The audit objection was raised that the Assessing Officer had wrongly allowed /treated non-compete fee as revenue expenditure and that the same should have treated as capital expenditure. The Assessing Officer has reopened the assessment. The assessee challenged the reassessment proceedings. The Court held that in the original assessment proceedings, the Assessing Officer had considered and examined whether or not the non –compete fee payment was of capital or revenue nature, further assessee had disclosed fully and truly all material facts relevant assessment and there was no failure or mission to disclose fully and truly all material facts reopening was not therefore not sustainbale.(A.Y.2003-04)
BLB LTD v. ACIT (2012) 343 ITR 129 / 72 DTR 194(Delhi)(High Court)

S.147:Reassessment- Full and true disclosure- Notice after expiry of four years-Failure of Assessing Officer to draw correct legal inferences at the time of original assessment from the said primary facts is not an error or omission on the part of assessee hence neither Explanation 1 nor Explanation 2 is applicable.

The Assessing Officer in the original assessment proceedings had examined the deduction under section 80HHC, 80IB and allowed the claim. The Assessing Officer reopened the assessment on the ground that the deduction under section 80HHC was allowed without reducing the deduction claimed and allowed under section 80IB as required by section 80IA(9), which is also applicable to section 80IB. The Tribunal examined and went in to the question whether there was failure or omission on the part of the assessee in making full and true disclosure of material facts. The Tribunal held that there was no failure on the part of assessee to discloses full and true disclosure, accordingly quashed the reassessment proceedings .On appeal by the revenue the court up held the order and held that there being no failure on the part of the assessee in furnishing material or primary facts , which were available on record , reopening after four years was not sustainable .(A.Y. 2000-01)
CIT v. Purolator India Ltd (2012) 343 ITR 155/ 72 DTR 189 (Delhi) (High Court)

S.147:Reassessment- Full and true disclosure-Notice after expiry of four years- Reopening on the ground that the agreement was not filed is not justified .

The assessment was completed under section 143(3). In the original assessment proceedings the Assessing Officer assessed the income from Department of Science and Technology as business income. The assessment was reopened on the ground that income should have been taxed as fees for technical services . For the assessment year 1995-96 for the first time after examining the legal provisions held that the payment received from the department of Science and Technology Government of India were fees for technical services and not as business income. The reassessment proceedings initiated by the Assessing Officer was quashed on the ground that there was no failure or omission on the part of the assessee to disclose material facts. On appeal by the revenue, the Court held that Assessing Officer being

aware of the nature and character of income, which was received by the assessee, reopening on the ground that the assessee had not filed a copy of agreement dated 5th May, 1988, entered between the assessee and the department of Science and technology, Government of India was not sustainable more so when its letter the assessee had referred to the agreement between the assessee and the Government of India and the nature and character of the obligation performed for which consideration was paid. (A.Ys 1990-01 to 1992-93)

CIT v. Cray Research India Ltd (2012) 343 ITR 212/72 DTR 200 (Delhi) (High Court)

S.147:Reassessment-Revised return-Surrender of income-Assessment under section 143(1).

Where the assessee had filed revised return which was processed under section 143 (1) of the Act, it cannot be said that the additional income surrendered by the assessee in his revised return has escaped assessment giving rise to initiation of reassessment proceedings.(A.Y. 2001-02)

CIT v. Anjana Sabharwal (Smt)(2012) 71 DTR 313 (All.)(High Court)

S.147:Reassessment- Change of opinion –Housing project- Appeal –Alternative remedy-Original assessment all queries were answered in original assessment proceedings, reassessment was quashed.-Writ is maintainable though appeal is pending..(S.80IB(10), Constitution of India –Art 226)

Where during the original assessment proceedings the assessee had answered all the queries raised by the assessing officer about the claim made by it under section 80 IB (10) of the Act and the claim was allowed by the assessing officer. Thereafter, reassessment proceedings initiated on the basis of the same material were liable to be quashed. Writ remedy provided to the assessee to challenge the notice if reassessment on the ground of non – existence of condition precedent for exercise of such power by the assessing officer cannot be taken away by reason if mere subsequent filing of the appeal under the Act against the reassessment order.

Vishwanth Engineers v. ACIT (2012) 72 DTR 113 (Guj.)(High Court)

S.147:Reassessment-Reason to believe-Finding in subsequent year-On the basis of finding in subsequent year that three parties are fictitious reopening was sustainable.

In the present case the original assessment was completed under section 143(3), notice was issued before expiry of four years, on the basis of assessment order of subsequent year. The Court held that reopening on the basis of findings in subsequent year i.e. A.Y. 2008-09, that the identity of the three parties from whom cash has been received is doubtful as they do not exist at the address given by the assessee and the TINs mentioned in respect of the parties are fictitious was sustainable. (A.Y. 2006-07)

Dewas Soya Ltd v. CIT (2012) 72 DTR 393(MP.)(High Court)

S.147: Reassessment- Beyond four years- Depreciation on capital expenditure- Application of income-There has to be vital link between the reasons and evidence, unless the Assessing Officer establishes that there was failure on the part of assessee to discloses, reassessment is bad in law.(S. 148, Constitution of India Art 226)

The assessment of the assessee was completed under section 143(3). The notice for reopening of assessment under section 148 was issued beyond period of four years. One of the reason for reopening was the assessee claimed the depreciation on capital expenditure and also treated the capital expenditure as application of income under section 11(1)(a) of the Act. The assessee challenged the reassessment by way of Writ. The court held that as the reopening of the assessment has taken place beyond period of four years, the jurisdictional requirement in such a case is that there must be a failure on the part of assessee to fully and truly disclose all material facts necessary for the assessment for that assessment year. On the facts there was full disclosure of facts before the assessing Officer and the Assessing officer has not established vital link between the reasons and evidence , the reassessment notice was quashed and writ petition was allowed. (A.Y. 2004-05)

Bombay Stock Exchange Ltd v. Dy.DIT (E)(2012) 74 DTR 300/ (2012) Vol. 114(4) Bom. L.R. 2061 (Bom.)(High Court)

S.147: Reassessment –Reason to believe- Depreciation – Reason to believe to be tested on the material as at the time of when reasons were recorded.

Order of Tribunal deleting the addition on the basis of reopening of assessment held to be cryptic. It was held that the reason to believe to be tested on the material as at the time of when reasons were recorded. Matter remanded back to the Tribunal. (AY 2001-02)

CIT v. Jagson International Ltd. (2012) 345 ITR 414 (Delhi) (High Court)

S.147: Reassessment-Change of opinion-Investment in share-Trade-Assessing Officer accepting the transfer of share form stock in trade as investment, in reassessment change of stand as trade held to be not valid.

In the original assessment proceedings the Assessing Officer accepted the stand of assessee treating the transfer of stock in trade to invests was assessable as short term capital gains. The assessment was reopened on the ground that the same is assessable as business income. The assessee challenged the said notice before High Court , the court held that a change of opinion could not clothe the Assessing Officer with the jurisdiction to initiate the proceeding under section 147 of the Act. An error of judgment also did not confer such a jurisdiction on the Assessing Officer.Accordingly proceedings initiated under section 148 was quashed.(A.Y.2005-06)

Ritu Investments P. Ltd v. Dy.CIT (2012) 345 ITR 214 (Delhi) (Court)

S.147: Reassessment- Intimation –Tangible material-Intimation under section 143(1), cannot be reopened u/s 147 in absence of "tangible material".(S.143(1),143(2),148,)

For AY 2002-03, the Assessing Officer issued an Intimation u/s 143(1) accepting the return. Subsequently, based on objections raised by the audit, he issued a s. 148 notice to reopen the assessment. The Assessing Officer set out four issues in the recorded reasons and for two he stated that the reopening was to "verify" the expenditure. The assessee filed a Writ Petition to challenge the reopening inter alia on the ground that there was no reason to believe that income had escaped assessment. Held by the High Court:

Even in a case where only a s. 143(1) Intimation is passed, the power to reopen can be exercised only where there is "reason to believe that income has escaped assessment" and not merely to "scrutinize" the return or **"**verify**"** the expenditure. Further, even in case of reopening of an assessment which was previously accepted u/s 143(1) without scrutiny, the AO would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment. Such reason to believe need not necessarily be a firm final decision of the Assessing Officer. This safeguard is necessary to prevent arbitrary exercise of powers u/s 147 to circumvent the scrutiny proceedings which could not be framed in view of notice u/s 143(2) having become time barred. On facts, in respect of two issues, the Assessing Officer reopened the assessment to verify the claims. For mere verification of the claim, power of reopening of assessment cannot be exercised. The AO in the guise of power to reopen an assessment cannot seek to undertake a fishing or roving inquiry and seek to verify the claims as if it were a scrutiny assessment.(A.Y.2002-03)

Inductotherm (India) Pvt. Ltd v. DCIT (Guj.)(High Court) www.itatonline.org

S.147: Reassessment- Audit objection- Reopening of assessment based solely on audit department's objection is held to be void.(S.148)

For AY 2006-07, the AO passed an assessment order. The *revenue audit raised an objection* that the AO had wrongly allowed the assessee's claim on several items. Based on this, the AO reopened the assessment *within 4 years* from the end of the AY. The assessee challenged the reopening on the ground that (a) it was based on the audit objection and *without independent application* of the AO's mind & (ii) all the *facts were already on record*, there was no new material and it was a case of "*change of opinion*". Held upholding the challenge:

(i) The belief u/s 147 that income has escaped assessment has to be the reasonable belief of the AO himself and cannot be an opinion and/or belief of some other authority. The AO cannot blindly follow the opinion of an audit authority for the purpose of arriving at a belief that income has escaped assessment. On facts, the recorded reasons are identical to the objection of the audit authority. The reasons do not rely upon any tangible material in the audit report but merely upon an opinion and the existing material already on record. This itself indicates that there was no independent application of mind by the AO before he issued the s. 148 notice (India & Eastern Newspaper Society v CIT (1979) 119 ITR 996 (SC) followed).

(ii) Further, though the power to reopen an assessment within 4 years is very wide, yet there must be "tangible material" to justify the reopening and it cannot be based on a "review". Once all the material with regard to particular issue is before the AO and he chooses not to deal with the same, it cannot be said that he had not applied his mind to all the material before him. A presumption can be raised that he applied his mind to all the facts involved in the assessment (Idea Cellular v Dy.CIT (2008) 301 ITR 407 (Bom), CIT v Kelvinator (2002) 256 ITR 1 (Del)(FB) & CIT v Kelvinator (2010) 320 ITR 561 (SC) followed).(AY 2006-07)

ICICI Home Finance Co. Ltd v. ACIT(2012) Vol..114 (5) Bom.LR. 2724 (Bom.)(High Court)

S.147:Reassessment-Change of opinion-Claim not considered- If claim not considered by Assessing Officer , there is no "change of opinion".(S. 148)

For AY 2002-03, the AO issued a notice u/s 148 to reopen the assessment (within 4 years) on the ground that the assessee had been wrongly allowed exemption u/s 10(23G) on certain bonds that had been acquired out of surplus funds and not by way of loans & advances. The assessee filed a Writ Petition to challenge the reopening on the ground that the issue had been considered at the stage of the original assessment and that the reopening was based on a "change of opinion". Held by the High Court after a comprehensive review of the law on the subject:

(i) An assessment can be reopened within a period of four years if the AO has some tangible material at his command on which he has reason to believe that income has escaped assessment. Reopening on a "change of opinion" is not possible. The term "opinion" means a "view, judgment or appraisal" formed in the mind about a particular matter. Consequently, if in the original assessment, the AO did not examine the claim of the assessee, did not raise queries or elicit answers, it cannot be stated that merely because the AO did not reject such a claim in the final order of assessment, he should be deemed to have expressed an opinion with respect to such a claim. As long as there is some tangible material to support the belief that income chargeable to tax has escaped assessment, reopening is permissible. Such tangible material need not be "new" or be alien to the record;

(ii) The assessee's argument that as the Full Bench judgement in CIT v. Kelivinator of India Ltd (2002) 256 ITR 1 (Delhi)(FB) was approved by the Supreme Court,CIT v. Kelvinator of India Ltd (2010) 320 ITR 561, the observations made by the Full Bench must be regarded as the ratio of the Supreme Court is not correct because the question before the Supreme Court was whether the concept of "change of opinion" stands obliterated with effect from 1.4.1989 or not. The Supreme Court did not hold that the tangible material must be that which did not form part of the original record of the assessment proceedings. The ratio of the decision of the Supreme Court is what the judgement lays down and not what the decisions of the High Court under challenge held. Further, it is doubtful whether even the Full Bench in Kelvinator meant to convey that a certain claim which has not been examined by the AO in the original assessment, cannot be a subject matter of reopening on the basis of material already on record. Now, the Delhi High Court has itself referred the matter for reconsideration to another Full Bench in Usha International;

(iii) If the AO notices the claim, raises queries and extracts a response from the assessee, the fact that he is silent in the assessment order does not mean that he has not applied his mind to the issue. The assessee has no control over the manner in which the assessment order is to be written. A reopening in this situation would be based on a "change of opinion" and not be permissible. The wide observations in Praful Chunilal Patel v. ACIT (1999) 236 ITR 832 (Guj.), cannot be understood to mean that even where a particular claim had been examined by the AO in the original assessment, reopening is permissible because this would be counter to, CIT v. Kelvinator of India Ltd (2010)320 ITR 561;(A.Y. 2002-03)

Gujarat Power Corporation Ltd v. ACIT(2012) 75 DTR 20 (Guj)(High Court)

S. 147: Reassessment- Failure to disclose material facts-after four years- in There must be finding of failure to disclose material facts, reopening on basis of change of opinion is not justified.

For AY 2003-04 the AO reopened the assessment after 4 years from the end of the AY on the ground that the assessee had not fully and truly disclosed the fact that it had a permanent establishment (PE) in India and that it was subject to the higher rate of tax of 20% on the gross royalty. The assessee filed a Writ Petition pointing out that the AO had reopened the assessment earlier on the same point and that he had passed an assessment order after being satisfied with the assessee's submissions that it had no PE. Held by the High Court quashing the reassessment proceedings:

Though in the recorded reasons, the AO alleged that there was no full and true disclosure by the assessee, in the objections order, there is no finding, even prima facie, how the assessee failed to disclose fully and truly all material facts with regard to the allegation of the existence of the PE. It is evident that the question of the assessee having a PE in India had been gone into in the first round. Once that aspect of the matter had been gone into in the earlier round, it was not open to the AO to reagitate it in the second round without any other / fresh material. No such other or fresh material has even been alleged in the reasons in the second round. Re-opening of assessments cannot be done merely on the basis of change of opinion. (A.Y.2003-04)

Qualcomm Inc v. ADIT (Delhi)(High Court)(www.itatonline.org)

S.147: Reassessment- Notice- Recorded reasons- After four years - Reasons for reopening not communicated, notice held to be invalid and quashed.(S.148)

The Assessing Officer issued the notice under section 148 after four years without disclosing the reasons and an opportunity to file an objections for reopening of reassessment . The assessee challenged the said notice by filing a writ petition .High Court allowed the writ petition and held that there was a complete violation of applicability of law by the Assessing Officer . He was required to communicate the reasons for reopening the assessment which he had failed to do. As there is violation of the governing principles of natural justice the order was quashed and set aside . (A.Y. 2004-05)

Agarwal Metals and Alloys v. ACIT (2012) 346 ITR 64 (Bom.) (High Court)

S.147: Reassessment- Bad debts- After four years- Reopening of assessment on ground deduction for bad debts erroneously allowed held to be not valid.(S.148)

The assessment was completed under section 143 (3) the Assessing Officer has allowed the claim of loss on account of embezzlement of funds after enquiry and application of mind. The Assessing Officer reopened the assessment on the ground that the Assessing Officer allowed the loss on account of embezzlement as bad debts which is not permitted by law. The assessee challenged the reassessment notice by way of Writ .The Court held that there was no failure on the part of assessee to disclose material facts hence the reopening of assessment after four years on the ground that deduction for bad debts was erroneously allowed is not justified.(A.Y. 1996-97)

V.B. Investments v. Dy. CIT (2012) 346 ITR 193/75 DTR 228 (Guj) (High Court)

S.147: Reassessment-No failure to disclose material facts- after four years- Income from other sources-Reassessment to disallow the interest on borrowings for purchase of shares. As there was no failure on part of assessee reassessment held to be not valid.(S. 57(iii), 148)

The original assessment was completed under section 143(3) . The Assessing Officer sought to reopen the assessment after four years on the ground that on funds borrowed for purchasing of such shares interest would not be deductible under section 57 (iii) of the Act. The assessee challenged the reassessment by way of writ. High Court allowed the petition and held that there was no failure by assessee to disclose material facts hence reassessment after four years held to be invalid.(A.Y. 2005-06)

Ashank D.Desai v. ACIT (2012) 346 ITR 326 (Guj.)(High Court)

S. 147: Reassessment-No failure to disclose material facts- After four years-Reopening of assessment on ground of preoperative expenses being capital in nature had been allowed as revenue , reassessment held to be invalid.(S.148)

Original assessment was completed under section 143 (3) allowing the expenses as revenue in nature. The assessment was reopened on the ground that pre-operative expenses which are capital in nature has been allowed as revenue expenditure. The assessee challenged the reassessment proceeding by writ . The Court held that it is well settled legal position that for the purpose of reopening the assessment beyond four years from the end of the relevant assessment year , the reasons recorded should reflect that there is failure on the part of the assessee to disclose fully and truly all material facts. While disposing the objects the Assessing Officer stated that expenditure claimed as revenue expenditure in the computation of income but which was capital in nature unconsidered by the Assessing Officer during course of original assessment proceedings. The court held that as there was no failure on the part of assessee the reopening after four years held to be in valid.(A.Y.1996-97)

Ashokjyot Oxygen Pvt Ltd v, H.N.Patel ITO.(2012) 346 ITR 199 (Guj.)(High Court)

S.147: Reassessment - No failure to disclose material facts- After four years-Interest against dividend income-Reassessment to disallow the interest on the ground that the interest was paid for earning dividend income held to be not valid.(S 57(iii), 148)

In the return of income the assessee has claimed the interest under section 57(iii) of the Act .In the course of original assessment proceedings the Assessing Officer made enquiries and allowed the deduction. The Assessing Officer issued the notice under section 148 proposing to reassessment on the ground that the interest was not paid for earning dividends but for acquiring controlling interest in company. The assessee challenged the reassessment proceedings by

filing the writ petition. There was difference of opinion and the matter was referred to third Judge . The majority view was that reassessment after four years to disallow deduction on ground interest was not paid for earning dividend but for acquiring controlling interest in company cannot be said that there was failure on the part of assessee to disclose material facts, accordingly, the reassessment proceedings was quashed.(A.Ys. 1995-96 & 1996-97)

Ketan B.Mehta v. ACIT (2012) 346 ITR 254/77 DTR 258 (Guj.) (High Court)

S.147: Reassessment- No failure to disclose material facts- After four years- Notice issued to disallow the interest paid to non-resident for failure to deduct tax at source held to be not valid.(S. 40(a)(ia), 148,)

The assessment was completed under section 143(3). The assessment was sought to be reopened after period of four years on the ground that since the assessee had paid usance interest to non –residents out of boundaries of India on purchase of ships , it was liable to deduct tax at source as per the provisions of section 40(a)(ia) read with Chapter XVII-B, failing which interest cannot be allowed as deduction in computation of income chargeable to tax under the head "Profits and gains from business or profession". The assessee challenged the reassessment proceedings . The Court held that on persual of the reasons recorded shows that there is not even whisper therein to the effect that there is any failure on the part of the petitioner to disclose fully and truly all material facts necessary under consideration . On the facts the notice has been served after expiry of period of four assessment years from the relevant assessment years , the assumption of jurisdiction by the Assessing Officer is without jurisdiction . Accordingly the reassessment proceedings was quashed.(A.Y. 1996-97)

Priya Blue Industries Ltd v. Dy.CIT (2012) 346 ITR 204 (Guj.)(High Court)

S.147: Reassessment-Another ground than what is recorded in the reasons-- After four years- Export-Recalculation- Reassessment cannot be sustained under another ground not mentioned in notice. To recalculate the deduction under section 80HHC reassessment held to be invalid.(S. 80HHC, 148)

The assessment was completed under section 143(3).The Assessing Officer sought to reopen the assessment on the ground that wrong calculation of deduction under section 80HHC. The assessee raised the objections for the recorded reasons . The Assessing Officer disposed the objections , while disposing the application he also referred one more issue of deemed dividend .The second issue referred while disposing the objection was not part of original recorded reasons. The assessee challenged the reassessment proceedings by writ .The Court held that reassessment cannot be sustained under another ground which was not mentioned in notice hence bad in law. The Court also held that the reassessment after four years to recalculate special deduction under section 80HHC was not valid. Accordingly the petition was allowed and reassessment proceedings were quashed.(A.Y.2004-05)

Dishman Pharmaceuticals and Chemicals Ltd v. Dy.CIT (2012) 346 ITR 245 (Guj.)(High Court)

147: Reassessment- Tangible material- After four years-Off shore supply contract-Assessment reopened on the ground that section 44BBB refers to turnkey project and hence offshore supply contracts are subject to tax in India, reopening beyond four years held to be invalid.(S. 44BBB, 148)

The assessment was completed under section 143(3).The Assessing Officer issued the notice under section 148 on the ground that section 44BBB,refers to turnkey project and hence off shore supply contracts are subject to tax in India .The assessee challenged the reopening of notice by way of writ petition. The Court held that reopening of assessment has to be based on some tangible material which leads to a reasonable belief that income has escaped assessment. In the present case , all material which was the basis of seeking to reopen the assessment was examined in the earlier assessment proceedings. As there was no tangible material for the Assessing officer to form a reasonable belief that income had escaped assessment , reopening of assessment beyond period of four years held to be not valid hence issue of notice under section 148 was quashed .(A,Y, 2004-05)

Atomstroyexport a Joint Stock Co v. Dy.CIT /2012) 210 Taxman 137/77 DTR 134/(2012) Vol. 114(5) Bom.L.R.2472 (Bom.) (High Court)

S.147:Reassessment-Reasons recorded- Within four years- Tangible material- Basis of order is completely different from the reasons recorded for reopening of assessment which is not permissible, reassessment held to be invalid.

In the present case the reassessment was done within four years. The Tribunal held that the reassessment was bad in law . On appeal by the revenue the Court held that the recorded reasons for reopening the assessment furnished for

reopening the assessment was non –fund income had been shown in fund based income so as to avail of higher deduction. However in the assessment order the disallowance was made that 20.1 percent out of gross expenses attributed to non fund income was excessive and ought to be restricted only 10 percent , thus the basis of the order is completely different from the reasons recorded for reopening the assessment .The Court held that if after issuing notice under section 148 he accepted the contention of the assessee and holding that income which he has initially formed a reason to believe has not escaped assessment . It is not open to him independently to assessee some other income. If he intended to do so a fresh notice under section 148 is necessary. Accordingly the order of Tribunal is up held and appeal of revenue was dismissed. (A.Y. 1996-97)

CIT v. ICICI Bank Ltd (2012) 74 DTR 251 (Bom.)(High Court)

S.147: Reassessment - Objection-Recorded reasons-Order passed without considering objections held to be invalid.(S.148)

The assessee raised the objections after receipt of recorded reasons. The Assessing Officer did not hear the objections of the assessee nor did he pass a separate order on those objections. The Assessing Officer passed the order. The assessee challenged the said order by way of writ before the High Court. The High Court quashed the order and set aside and directed the Assessing Officer to pass a fresh order on the objections raised by the assessee to the proposed reassessment within the a period of four weeks.(A.Y.2004-05)

Babo India Fianance Ltd v. Dy.CIT (2012) 346 ITR 81 (Bom.)(High Court)

S.147: Reassessment- Failure disclose material facts- After four years- Failure to disclose substantial interest and amount shown as loan from the company to be assessed as deemed dividend . Reassessment held to be justified.(S.2(22)(e), 148)

The assessment for the assessment year 2003-04 was completed under section 143(3).During the assessment year 2006-07 the Assessing Officer has come to know that certain advances were required to be treated as deemed dividend under section 2(22) (e) . Upon perusal of accounts of the assessee was seen that the assessee had taken loan . The Assessing Officer recorded the reasons accordingly . The objections raised against the recorded reasons were disposed by the Assessing Officer. The assessee filed the writ petition for challenging the reassessment proceedings . The Court held that the assessee has not disclosed that it had a substantial interest in a company , it was found that it had 22.3 percent shareholding. From the return filed and documents annexed within return , nowhere it could be ascertained that what was holding of the assessee in SDBL. On the facts there was failure on the assessee to disclose the material facts hence the explanation to section 147 is being applicable , reassessment even after four years held to be valid , accordingly the petition was dismissed.(A.Y.2003-04)

Disman Pharmaceuticals and Chemicals Ltd v. Dy.CIT (2012) 346 ITR 228 (Guj.)(High Court)

S.147.Reassessment-Depreciation - Sale and lease back -Sale & lease back transactions are not "sham" transactions. Reassessment was held to be not valid(S.32,148)

The assessee ourchsed an ignifluid boiler from its sister concern . On the same day ,it entered in to an agreement of lease of the boiler with its sister concern. The depreciation was allowed in the orginal assessment proceedings . Subsequently the Assessing Officer was of the view that the sale and lease back arrahngemnt as a camouflage and held that the assessee was not entitled to depreciation. The Commissioner (Appeals) up held the action of Assessing Officer. On appeal to the Tribunal the Tribunal held that the Revenue had not brought on record any material to come to the conclusion that the transaction was sham hence , reassessment proceedings were not valid.On appeal the Tribunal held that in the abosence of any material to pronounce on the genuiness of transaction, the mere fact that what had been purchased had been leased out to the vendor ot that the vendor had undertaken to pay the hire charges on behalf of the assessee to the hire purchase company , perse cpuld not lead to a conclusion that the transaction was sham. The Court held tht the reassessment proceedings were not valid.(A.Y. 1995-96 to 1997-98)

CIT v. High energy Batteries(India) Ltd (20120 348 ITR 574/74 DTR 9 (Mad.)(High Court)

S. 147:Reassessment- Failure to disclose material facts- After four years-Investigation by Customs Authorities-Notice need not specify instances of failure. If failure can be inferred the reassessment held to be valid.(S. 148)

The assessee is engaged in the business of imports and export and manufacture of diamonds. The assessment was completed under section 143(3).The assessment was based on the basis of show cause notice issued by the Joint Commissioner of Customs. The assessee challenged the reassessment proceedings .In the affidavit in reply the respondent stated that assessee had stolen the electricity to run its machinery , depreciation was claimed in respect of machinery given on lease It was also brought to the notice of court that the assessee had paid penalty which was not shown in the statement. After considering the material as a whole the court held that for the purpose of invoking section 147 beyond four years, the Assessing Officer is required to record a two fold satisfaction. Firstly, that income has escaped assessment and secondly, that such escapement is on account of failure on the part of the assessee to disclose fully and truly all material facts . Neither sub section (2) of section 148 of the Act nor proviso to section 147, requires that Assessing Officer to expressly state in the reasons that income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts. If, on the face the reasons recorded, it is apparent that failure to disclose is made out, merely because a specific expression does not find place therein, it cannot be said that the Assessing Officer has not recorded the satisfaction in this regard. Accordingly the Court dismissed the writ petition by observing that the Court is only required to examine whether there was prima facie some material on the basis of which the assessment could be reopened. The sufficiency or the correctness of the material cannot be considered. (A.Y. 2003-04)

I.P.Patel and Co v. Dy.CIT (2012) 346 ITR 207(Guj.)(High Court)

S.147: Reassessment- Change of opinion- Within four years – There is no change of opinion if Assessing Officer does not specifically apply his mind .(S.148,Indian Evidence Act, 1872 .S.114(e))

The Full bench was constituted to consider the meaning of the expression "change of opinion" for the purpose of section 147 and whether, in the light of CIT vs Kelvinator of India Ltd. (2002) 256 ITR 1 (Del) (FB), as approved in CIT v Rieta Biscuit Co.(P)Ltd. (2010) 320 ITR 521 (SC), in case where the assessee has furnished full and true particulars at the time of original assessment with reference to the income alleged to have escaped assessment , the Assessing Officer within four years from the end of the assessment year could be said to have formed an opinion and to have no jurisdiction to reopen the assessment even though he had not raised any query with respect to the issue. Full Bench by majority held that (i) the expression "change of opinion" postulates formation of opinion and then a change thereof. The question of change of opinion arises only when the Assessing Officer at the section 143(3) forms an opinion and accepts the assessee's stand. There is a difference between "change of opinion" and failure to "form an opinion" By the Majority ;

(i) The expression "change of opinion" postulates formation of opinion and then a change thereof. The question of "change of opinion" arise only when the AO at the s. 143(3) stage forms an opinion and accepts the assessee's stand. There is a difference between "change of opinion" and failure to "form an opinion". However, for determining whether or not there is "change of opinion", the fact that the assessment order is silent is not relevant because the assessee has no control over the way the order is written. There may also be cases where though the AO has not raised a query, the issue may be so apparent and obvious that to say that the AO has not formed an opinion would be contrary and opposed to normal human conduct;

(ii) The observations in CIT v Kelvinator of India Ltd. (2002) 256 ITR 1 (FB) that when an assessment order is passed u/s 143(3), a presumption is raised u/s 114(e) of the Indian Evidence Act that the order was passed after application of mind and that otherwise there would be a premium on the authority exercising quasi-judicial function to take benefit of its own wrong does not mean that even if the AO does not examine a particular issue and had not formed any opinion, it must be presumed that he must have formed an opinion. There cannot be deemed formation of opinion even when the particular issue is not examined. The observations were made only to reject the Revenue's contention that a non-speaking assessment order means a case of non-formation of opinion;

(iii) In affirming Kelvinator, the Supreme Court referred only to the principle of "change of opinion" and no comments were made on the presumption u/s 114(e) of the Indian Evidence Act. The assessee's argument that the Full Bench verdict has merged in the judgement of the Supreme Court and cannot be reconsidered is not acceptable because there are no observations by the Supreme Court on the issue of whether there is deemed formation of opinion and it cannot be said that the High Court's reasoning is the ratio of the apex Court; (ITA no 2026/2010. Dated 21-9-2012)

CIT v. Usha International Ltd(2012)348 ITR 485/ 210 Taxman 188/253 CTR 113/77 DTR 396(FB) (Delhi)(High Court))

S.147: Reassessment- Reason to believe – Assessment u/s 143(1)

From the materials, it cannot be stated that the AO had not recorded reasons before issuance of the notice. It cannot be contended that since notice u/s. 143(2) was not issued, assessment cannot be reopened. Return was accepted u/s. 143(1) and therefore it cannot be stated that the AO formed any opinion with respect to any of the aspects arising in such return. AO in guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims as if it were a scrutiny assessment. However, with respect to other two grounds, the AO had some materials at his command to form a belief that income chargeable to tax had escaped assessment. Reopening was therefore sustainable. (A.Y. 2002-03)

Inductotherm (I) P. Ltd. v. M. Gopalan, Dy. CIT (2012) 77 DTR 1 (Guj.)(High Court)

S.147:Reassessment- Change of opinion- Decision based on judgments-Reassessment is bad in law.

The Assessing Officer had taken decision in the original assessment by considering the judgments that deductions under section 80HHC and 80IA are to be separately computed. The Tribunal held that, if there is a decision in favour of assessee then the same is to be applied and thus the Assessing Officer has taken one possible view. The Tribunal has held that the concept of 'change of opinion' must be treated as an in built test to check the abuse of power. On the facts there is no tangible material with Assessing Officer for the purpose of initiating reassessment, hence the reopening of assessment is bad in law. (A. Y. 2003-04)

ACIT v. Hycron India (2012) 65 DTR 97 / 143 TTJ 226 (Jodhpur)(Trib.)

S.147:Reassessment – Reasons - Irrelevant and non-existing reasons-Reassessment is held invalid.

In the reasons recorded for reopening of assessment the Assessing Officer received information from the Dy. Director of IT (Inv.) and on the basis of a statement of the bank manger, that assessee purchased demand draft in cash but it was found that no such demand draft was issued in favour of assessee. The Tribunal held that the Assessing Officer proceeded for reopening of the assessment on non-existent and factually incorrect reasons and had not applied independent mind and did not verify the information received from the Dy. Director of IT (Inv.),therefore reassessment was invalid and unjustified. (A.Y. 1993-94).

Mahadev Trading Co. v. ITO (2012) 135 ITD 1/ 65 DTR 140 / 143 TTJ 492/17 ITR 332(Ahd.)(Trib.)

S.147:Reassessment-Recording of reasons-After issue of notice- Full and true disclosure- Notice after expiry of four years- Eligible exemption- Reassessment held valid.(S.11,148)

Department representative submitted documentary evidence in the form of internal correspondence to demonstrate that the reasons recorded by the Assessing Officer for reopening the assessment existed prior to the issue of notice under section 148, hence the notice was held to be valid. Assessee mentioned "no" against the "amount eligible for exemption under section 11(1)(d) in the report, in the return it claimed deduction of Rs. 15,83,100 as eligible for exemption under section 11(1)(d), there was failure on the part of the assessee to disclose fully and truly basic facts required for making the assessment and the same constituted valid reason that escaped assessment (A.Y. 1999-2000)

Singhad Technical Educational Society v. ACIT (2012) 143 TTJ 352 / (2011) 57 DTR 256 (Pune)(Trib.)

S.147: Reassessmnet-Intimation-Assessment under section 143(1), cannot be reopening in absence of "new material".(S. 143(1), 148)

The Assessing Officer has accepted the ROI filed by the assessee under section 143(1). He thereafter issued a notice under section 148 on the ground that the assessee had claimed a deduction for ERP software and that although only 20% of the said expenses was debited to the P&L A/c, the entire amount was claimed as a deduction. The assessee claimed that the reopening was not valid as there was no "new material" in the Assessing Officer's possession. Tribunal held upholding the plea:

Though the assessment was originally under section 143(1), it is clearly evident from the recorded reasons that there was no new material coming to the possession of the Assessing Officer on the basis of which the section 143(1) assessment was reopened. In Telco DadajiDhackjee Ltd., v.Dy. CIT (ITA No. 4613/M/2005 dt. 12-5-2010(Mum.)(Trib.)(Unreported), the Third Member held, after considering ACIT v.Rajesh Jhaveri Stock Brokers P.Ltd. (2007) 291 ITR 500 (SC)&CIT v.Kelvinator of India Ltd. (2010) 320 ITR 561 (SC), that a section 143(1) assessment

could not be reopened under section 147 without there being any new material coming to the possession of the Assessing Officer. As the Assessing Officer had reopened the section 143(1) assessment on the basis of the material which was already on record, the reopening was not valid.(A.Y.)

HV Transmissions Ltd. v. ITO (BCAJ .P.24.vol 43.B.Part 6.March 2012))(Mum.) (Trib.)www.itatonline.org

S.147:Reassessment – Recording of reasons-Reasons recorded not supplied to the assessee within reasonable time, Tribunal remanded the matter to the Assessing Officer-Validity of Re-assessment challenged – Wide enough to cover entire issue relating to reassessment.

On the facts of the case the Tribunal found that the Assessing Officer has not supplied the reasons recorded within a reasonable time. Even after several hearings the reasons recorded were not disclosed to the Assessee. The Tribunal Set a side the order and remanded the matter back to the Assessing Officer for readjudication after supplying the copy of recorded reasons. The Tribunal also held that the ground of appeal contesting the validity of re assessment proceedings is wide enough to challenge the entire proceeding initiated by the Assessing Officer including the non supply of reasons recorded. (A. Y. 2005-06).

Kaushalendra Pratap Singh v. ITO (2011) 133 ITD 111 / (2012) 144 TTJ 384 / 67 DTR 267(TM) (Kol.)((Trib.)

S.147:Reassesment- Within four years- Assessment for subsequent years can be the basis for issue of notice for earlier years- Assessment annulled for delay in issue of notice , re assessment notice held to be valid.

For the assessment year 2001-02 , the assessment was completed under section 143 (3) treating the income from organizing exhibitions as business income. The Commissioner (Appeals), annulled the assessment order on the ground that the notice under section 143(2) was served after 12 months from the end of the month in which the return of income was furnished. The assessment for the assessment year 1997-98 which was completed under section 143 (1) was reopened on the basis of assessment for the asst year 2001-02 and the assessment for the asst year 2001-02 was re opened. In appeal the commissioner (Appeals), allowed the appeal of assessee. On further appeal by revenue to Tribunal, the Tribunal up held the reassessment on the ground that information and material gathered, during the course of assessment proceedings and assessment of exhibition income for the assessment year 2001-02 , under section 143 (3), constituted tangible material for coming to the conclusion that income assessable to tax had escaped assessment. Even otherwise, the case of reopening for these two years fell under the Explanation 2(b) to section 147 , which creates a deeming fiction. For the assessment 1997-98, there was no assessment but only the return was processed under section 143(1). Departmental appeal was allowed.(A.Y. 199-98, 2001-02)

A DIT.v. India ITME Society (2012) 14 ITR 519/67 DTR 217 (Mum.) (Trib.)

S.147:Reassessment- Reason to believe-Subsequent Supreme Court decision-Reassessment based on subsequent decision of Supreme Court is valid in law.

In the original assessment proceedings the Assessing Officer has allowed the exemption under section 10(29) after application of mind. There after the reassessment order was passed, both the assessee and revenue took the matter before the High Court. High Court remitted the matter back to decide on the issue of reopening of assessment. The Tribunal following the decision of the Allahabad High Court in Kartikeya International v. CIT(2010) 329 ITR 539(All) (High Court), held that the theory of change of opinion is not applicable to the facts of the assessee as, the Assessing Officer has implementing the law of land as declared by the Supreme Court , hence the reopening of assessment held to be valid.(A.Y. 1995-96 , 1996-97)

ACIT v. Central Warehousing Corporation (2012) 144 TTJ 764/67 DTR 356(Delhi) (Trib.)
Central Warehousing Corporation v. ACIT (2012) 144 TTJ 764/67 DTR 356(Delhi) (Trib.)

147:Reassessment – Reason to believe – Subsequent Supreme Court decision.- Reopening held to be valid.

After the decision of the Supreme Court in Orissa State Warehousing Corpn vs. CIT (1999) 153 CTR (SC) 177: (1999) 237 ITR 589 (SC), it was incumbent on AO to examine whether the claim allowed by him under s. 10(29) during the original assessment proceedings was in conformity with the same Theory of reassessment based on change of opinion is not applicable to assessee's case as the AO was implementing the law of the land as declared by the Supreme Court. Reopening was therefore valid and sustainable.(A,Y .1995-96 &1997-98)

ACIT v. Ventral Warehousing Corp.(2012) 67 DTR 356 (Delhi)(Trib.)

S.147:Reassessment- Change of opinion-Reopening of assessment on mere change of opinion on set of facts available at the time of completion of original assessment is held to be not valid

No reassessment to be initiated in the case where AO after due application of mind has decided a particular issue in a particular manner in the original assessment unless there are any fresh material coming to his notice after passing assessment order. Thus, change of opinion by the AO on same facts of which were there at the time of completing the original assessment action of AO was held to impermissible. (A.Y. 2004-05)

International Global Networks BV v. DDIT(IT) (2012) 50 SOT 433(Mum.)(Trib.)

S.147:Reassessment- Non –filing of ROI – In absence of any tangible material to show that the income had exceeded the maximum amount not chargeable to tax – Reassessment not justified

In the absence of any tangible material to show that the assessee's income in the AY 1999-2000 and 2000-01 had exceeded the maximum amount which is not chargeable to tax, AO was not justified in initiating reassessment proceeding u/s 147 merely for the reason that the assessee has not filed its return for the said AYs; there was no relevant or tangible material on the basis of which the AO could have formed requisite belief that income had escaped assessment. (A.Y. 1999-2000,2000-01)

Cebon India Ltd. v. ACIT (2012) 145 TTJ 475/67 DTR 86 (Delhi) (Trib.)

S.147:Reassessment – Reason to believe – Non submission of schedules to the balance sheet along with its income and expenditure account and balance sheet, does not form reasonable belief for reassessment.

The fact that the assessee, a charitable trust, has not submitted the schedules to the balance sheet along with its income and expenditure account and balance sheet or that it earned substantial rental income or that it earned income from sale of books and a printing press or that two societies are donating a fraction of their profits to the corpus of the assessee - trust did not constitute reason to believe that some taxable income had escaped assessment, moreso and therefore, initiation of reassessment proceedings as well as the assessment proceedings made under section 147 r.w.s. 143(3) in furtherance thereto were not valid. (A.Y. 1999-2000)

Bharati Vidyapeeth v. ACIT (2012) 146 TTJ 238 / 70 DTR 375 (Pune)(Trib.)
ACIT v Bharati Vidyapeeth (2012) 146 TTJ 238 / 70 DTR 375 (Pune)(Trib.)

S.147:Reassessment – Reason to believe – Assessing Officer –Reasons to be formed only by Jurisdictional Assessing Officer and not any other Assessing Officer ,and issuance of notice is mandatory.(S. 148, 292BB)

The basic requirement of section 147 is that the assessing officer must have a reason to believe that any income chargeable to tax has escaped assessment and such belief must be belief of jurisdictional assessing officer and not any other assessing officer or authority or department. Therefore the jurisdiction of AO to reopen an assessment under section 147 depends upon issuance of a valid notice and in absence of the same entire proceedings taken by him would become void for want of jurisdiction.On plain reading of section 292BB it is clear that the said section is in respect of certain procedural lapses in respect of service of notice , but in the case under consideration the question is of acquisition of jurisdiction which is a mandatory requireemnt of Act. (A.Y. 2006-07)

ACIT v. Resham Petrotech Ltd. (2012) 136 ITD 185/73 DTR 138/147 TTJ 730 (Ahd.)(Trib.)

S.147:Reassessment – objection by audit party – Original assessment order framed in consonance with view in preceding and succeeding years, held action of AO not justified as reassessment merely on basis of change of opinion as no independent application of mind by A.O.

The assessee filed return of income declaring LTCG and business income. The AO completed the assessment u/s 143(3). Subsequently, the AO reopened the assessment on the basis of objection of Audit party within period of four years. It was held that the action of reopening the assessment was not justified as the AO nowhere in the reasons recorded mentioned that the income escaped assessment and that the same was done merely on the objection of audit party without independent application of mind by the AO. Further, in the view by the AO in the original assessment order was taken in consonance of view taken in preceding and succeeding years and that the action of AO of reassessment was merely on the basis of mere change of opinion. (AY 2003-04)

GMR Holdings P. Ltd v. DCIT (2012) 134 ITD 668/16 ITR 457/149 TTJ 338 (Bang.) (Trib.)

S.147:Reassessment- Non supply of recorded reasons- Order bad in law-Non-supply of recorded reasons before passing reassessment order renders the reopening void. Subsequent supply does not validate reassessment order.(S.143(3),148)

After completing the s. 143(3) assessment, the AO received information from the Volcker Committee report that the assessee had paid "illegal" commission for supply of goods to Iraq under the "Oil for Food Programme" of the UN. The AO issued a S. 148 notice to disallow the commission and supplied the assessee with only the "gist" of the recorded reasons. The complete recorded reasons were furnished only after the passing of the reassessment order. In the reassessment order, the AO disallowed the commission. The CIT (A) upheld the reassessment. On appeal by the assessee to the Tribunal, Held allowing the appeal:

As per GKN Driveshafts (India) Ltd v.ITO(2003)259 ITR 19 (SC) and the rules of natural justice, the AO was bound to furnish reasons within a reasonable time so that the assessee could file objections against the same. The adherence to this procedure is a necessity because at the preliminary stage itself, the AO may be satisfied with the explanation of the assessee. A reassessment completed without furnishing the reasons actually recorded by the AO for reopening of assessment is not sustainable in law. The subsequent supply of the reasons would not make good of the illegality suffered at the stage of reopening of the assessment. On facts, though the assessee asked for the recorded reasons, the same was supplied to him only after the passing of the reassessment order. This failure on the part of the AO renders the reassessment order invalid (CIT v.Fomento Resorts & Hotesl Ltd ITA no 71 of 2006 dt 27-11-2006 and CIT v. Videsh Sanchar Nigam Ltd (2012)340 ITR 66 (Bom) (SLP dismissed) followed (included in file)).(A.Y.2001-02, 2002-03)

Tata International Ltd v. DCIT(2012) 52 SOT 465(Mum.) (Trib.)

S.147:Reassessment – Issue of notice –Mandatory-Assessee submitted return before AO in response to notice under section 148 hence the notice under section 143(2) to be issued before passing assessment order.(S.143(2), 148)

The Third member bench held that where there was a return before AO in response to notice under section 148 and he had proceeded from figures of such return to complete assessment, in such a case, he should have issued notice under section 143(2) before assessing order under section 143(3) read with section 147. (AY 2000-01)

V.R. Sreekumar v. ITO (2012) 136 ITD 257/74 DTR 210/147 TTJ 699(TM.) (Cochin.)(Trib.)

S.147:Reassessment-Intimation-New material-Non-compete fee-Depreciation-Assessment under section 143(1) cannot be reopened u/s 147 in absence of "new material". (S.143(1)

The assessee filed a ROI in which it claimed deduction for non-compete fees and depreciation on leased premises which was accepted by the AO vide Intimation u/s 143(1). Thereafter, he issued a notice u/s 148 seeking to reopen the assessment on the ground that the expenses were not allowable. The assessee challenged the reopening on the ground that (a) the AO had not given a copy of the recorded reasons and (b) there was no fresh material to justify the reopening. Before the Tribunal, though the division bench agreed that there was no new material, the AM held that in the case of a s. 143(1) intimation, new material was not required while the JM took the contrary view. On a reference to the Third Member Held by the Third Member:

(i) If the recorded reasons are not furnished to the assessee, it is fatal to the validity of the s. 148 notice issued for reopening the assessment (CIT v. Videsh Sanchar Nigam (2012) 340 ITR 66 (Bom.) (SLP dismissed) followed);

(ii) The law laid down by the Supreme Court in CIT v Kelvinator of India Ltd. (2010) 320 ITR 561 does not cover only a case where a s. 143(3) assessment is passed but also covers a case where only a s. 143(1) intimation is passed. The Supreme Court interpreted the words "reason to believe" and held that the AO did not have the power to review. While in that case of a s. 143(1) intimation, the assessee cannot challenge the reopening on the ground of 'change of opinion", he can challenge it on the ground that there were no "reasons to believe" that income had escaped assessment or that the said reasons did not have a live link with the formation of the belief. Even in the case of a s. 143(1) intimation, the AO must have "tangible material" that income has escaped assessment. On facts, there was no "tangible material" to support the belief that non-compete fees and depreciation had resulted in escapement of income chargeable to tax (ACIT v Rajesh Jhaveri stock Brokers (P) Ltd.(2007) 291 ITR 500 (SC) distinguished).(AY 1998-99)

Telco Dadajee Dhackjee Ltd v. DCIT(TM) ((Mum.)(Trib.)www.itatonline.org

S.147:Reassessment-Intimation- Reason to believe-Marterial available on record along with the return filed constituted sufficient material in the hands of the Assessing Officer to form a reason to belive and reassessment was held to be valid.(S.143(1) ,148)

The assessee assigned the contract to subsidiary , the return was processed under section 143(1), marterial available on record along with the return filed constituted sufficient material in the hands of the Assessing Officer to form a reason to belive and reassessment was held to be valid.(A.Y. 2003-04)

Van Oord ACZ Marine Contractors BV v. ADIT(2012)52 SOT 423/75 DTR 72 /149 TTJ 124/17 ITR 103(Chennai)(Trib.)

S.147:Reassessment – After expiry of 4 years –Intangible materials- No material in possession to conclude that there was escapement of income, hence reassessment proceedings to be quashed.

Instant case, was a simple case of change of opinion without there being any intangible material in the possession of the AO for coming to the conclusion that the there was an escapement of income. Therefore, AO not justified in initiating reassessment proceedings and thus liable to be quashed. (AY 2003-04)

Prudential Assurance Co. Ltd. v. ADIT (2012) 18 ITR 186 (Mum.)(Trib.)

S.147: Reassessment – Absence of service of notice u/s 148 on power of attorney holder of NRIs.(S.148)

In response to the notice by ITO, Jalandhar, J, the power of attorney holder of the NRI assessee, had filed the return which has not been treated as invalid. Further, that ITO issued a letter to 'J' seeking clarification regarding non-declaration of capital gain arising on the acquisition of assessee's land situated at Village Noorpur Dona in District Kapurthala. Thus, it cannot be presumed that the department did not have any knowledge that 'J' is the power of attorney holder of 'JS' and other two NRI assessees. As regards the notice under s. 131(1A) issued by the Asstt. Director of IT, there is no service record of the same with the Department so as to prove that the said notice has actually been served on JS and other assessees at Village Noorpur Dona. Thus, this does not support the Revenue's case. However, notice under s. 148 then issued by ITO, Kapurthala, in the name of assessee. Notice server of the department has given a report that JS does not reside at the given address of Village Noorpur Dona. Reports of the Sarpanch and the Municipal Corporation of Kapurthala also state that JS and other assessees do not live in Village Noorpur Dona/ Mansoorval Dona. As regards the affixation of the impugned notice at Janjghar/Dharamshala in village Noorpur Dona, the said address is not the last known address of the assessees. Copies of the said notices and assessment orders were obtained by inspection after the assessments were made. Thus, the arguments of the Departmental Representative that the notices and orders have been served upon the assessees at Village Noorpur land at Village Noorpur Dona belonging to all the three assessees pursuant to a verbal agreement with J and the payment therefore is made to J in cash after six months. Thus the impugned notices u/s 148 should have been served upon J, power of attorney holder of NRI assessee, to whom other notices had been issued by the Department. Department not having served the notices on J the notices issued on JS and other assessees at Village Noorpur Dona/Mansoorval Dona are bad in law. Hence assessments made pursuant thereto are quashed. (A.Y. 1999-2000)

Jasbir Singh v. ITO (2012) 76 DTR 36 (Asr.)(Trib)

S. 147: Reassessment – Reasons recorded – Precise and definite information received , reassessment was justified.

In the instant case, assessing officer completed assessment of assessee. Subsequently, he received information about receipt of accommodation entries by assessee aggregating to Rs.14.45 lakhs from entry providers and, accordingly, re-opened assessment for taxing same. It was held that since a precise and definite information was received by AO regarding receipt of accommodation entries and after comparing information, with information available in return of assessee, he recorded definite reasons in clear terms that income escaped assessment and hence re-opening was justified. (A.Y. 2002-03)

ITO v. Mukut Finvest & Properties (P.) Ltd (2012) 138 ITD 166 (Delhi)(Trib.)

S.148:Reassessment – Cost on department-Undesirable haste in passing assessment order results in miscarriage of justice - Awarded cost on department - Reassessment order was quashed.

The Assessing Officer issued a reopening notice under section 148 and furnished the recorded reasons pursuant to which the assessee submitted its objections as required by GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC). The objections were filed on 26.10.2010 and were disposed of vide order dated 2.11.2010 by a non-speaking and cryptic order. Thereafter, without issuing any further notice or hearing the assessee, the Assessing Officer passed an assessment order dated 19.11.2010 even though the limitation period for passing the order was to expire on 31.12.2010. The assessee filed a Writ Petition to challenge the reopening. HELD by the High Court quashing the reassessment order and passing strictures:

Though, pursuant to GKN Driveshaft, the Assessing Officer was under an obligation to dispose of the objections to the reopening by passing a speaking order, he passed a non-speaking and cryptic order. Further, though the Assessing Officer had sufficient time to complete the assessment, he had proceeded with the reassessment proceedings with undesirable haste and hurry, in violation of principles of natural justice and contrary to the procedure mandated and this had resulted in a miscarriage of justice. The fact that the assessee had an alternative remedy of filing an appeal (which it had exercised) was no bar to the exercise of writ jurisdiction. The concerned CIT should examine the reassessment file in the present case and take appropriate action if warranted. The department to pay cost of Rs.10,000/- to the assessee.

Sak Industries Pvt. Ltd. v. Dy. CIT (2012) 71 DTR 98(Delhi)(High Court)

S.148:Reassessment – Notice – No reassessment as assessee made full disclosure and the AO considered and examined the claim at the time of original assessment

Where at the time of original assessment, the assessee furnished full and true information germane to the facts of the case and the claim of the assessee as regards the deduction of Section 80IA was specifically considered and examined by the AO, the AO could not reopen the assessment. It was held that the assessee had not failed or did not omit to disclose material facts.(2003-04)

RRB Consultants and Engineers P. Ltd. v Dy. CIT (2012) 342 ITR 127/74 DTR 78 (Delhi)(High Court)

S.148:Reassessment-Notice-Validity of service of notice – Failure to mention the words "principal officer" and the specific words "private limited" is not fatal, orders cannot be vitiated on the said ground of mistake , defect or omission in summons or notice (S. 292B).

In the course of appeal before the Commissioner (Appeals) the assessee challenged that the notice issued under section 148 is bad in law as the words "private limited" were missing in the notice . After calling the remand report the Commissioner held that the order is bad in law . In an appeal by revenue the Tribunal held that section 292B would not come to the aid of the revenue as the requirement to serve the notice was a jurisdictional issue hence the confirmed the order of Commissioner (Appeals). On appeal to high Court by revenue the court held that the test to be applied is whether the party receiving the notice would be in doubt whether the said notice is meant for him or not .If the recipient of notice was not in doubt that it was meant for him , the misdescription is not fatal .Thus failure to mention the words "principal officer" on the notices is not fatal. The court held that section 292B has a salutary purpose and ensures that technical objections, without substance and when there is effective compliance or compliances with intent and purpose , do not come in a way or affect the validity of the assessment proceedings .Accordingly the High Court decided the issue in favour of revenue. (A.Y. 1989-90 & 1992-93 to 1995-96)

CIT v. Jagat Novel Exhibitors (P) Ltd (2012) 67 DTR 289 / 248 CTR 217(Delhi) (High Court)

S.148 :Reassessment – Notice-Jurisdiction – Assessment in Kolkata – Reassessment notice in Delhi, such reassessment is held to be without jurisdiction. (S. 127)

Assessment having been made by AO in Kolkata, in the absence of any order under section 127 transferring the case, reassessment notice issued by AO at Delhi and all subsequent proceedings based on said notice are without jurisdiction. (A.Y. 1999-2000)

Smriti Kedia (Smt.) v. UOI (2012) 71 DTR 245 / 250 CTR 221 (Cal.)(High Court)

S.148:Reassessment – Notice-After expiry of four years – Material and information provided by Investigation Wing to the AO on basis on which reasons recorded and assessment reopened, Issue of notice IS held to be valid.

Material and information provided by Investigation Wing to the AO, on the basis of which he recorded reasons and reopened the assessment, throw considerable doubt on the veracity, correctness, completeness and truth of particulars

furnished by the assessee at the time of the original assessment and therefore notice issued by AO under Section 148 was valid. (A.Y.2004-05)

Money Growth Investment & Consultants (P) Ltd. v. ITO (2012) 71 DTR 317 (Delhi)(High Court)

S.148:Reassessment-Failure to disclose all material facts-Notice after four years-Reassessment notice held was quashed on the ground that as failure to disclose all material facts was not set out in reasons.

The assessment of the assessee was completed, under section 143 (3) on December 10, 2008. The Assessing Officer allowed deduction under section 10A treating the business activity of the assessee is manufacturing of Jewellery in a special economic zone. The Assessing Officer, reopened assessment on the basis of assessment order for the assessment year 2007-08. In appeal the Commissioner (Appeals) has allowed the claim under section 10A of the Income-tax Act after proposing to sought the reassessment for the assessment year 2005. The Court held that in the recorded reasons it has not been stated that there was failure to disclose all material facts. Accordingly the court quashed the notice issued under section 148. (A.Y. 2005-06)

Sitara Diamond Pvt. Ltd. v. DCIT(2012) 345 ITR 91 / 68 DTR 106 (Bom.) (High Court)

S.148:Reassessment- Notice –Jurisdiction-No universal proposition that notice can never be served when time for issue of notice under section 143 (2) has not expired.(S.143(2), 147)

The assessee filed its return of income for the assessment year 2009-10 under section 139(4) of the Act on October 6, 2010.The Assessing Officer issued notice for reassessment under section 148 on July 5, 2011. In a writ petition the assessee challenged the notice on the ground that the return of income could have been taken up for scrutiny by issue of notice under section 143 (2) of the Act and that the Assessing Officer cannot issue reassessment notice under section 148 of the Act , during the period when the Assessing Officer could have issued notice under section 143 (2) of the Act. On the facts of the case the court held that the assessee deliberately keeping matter pending and continuing to appear and neither protesting nor objecting . The assessing officer is not prevented nor barred from recording in writing and issuing fresh notice under section 148.Undertaking by department to withdraw notice with liberty to issue fresh notice. The Court also observed that there is no universal proposition that notice can never be served when time for issue of notice under section 143(2) has not expired.(A.Y.2009-10)

Acorus Unitech Wireless P. Ltd and another v. Dy.CIT (2012) 345 ITR 228 (Delhi) (High Court)

S.148:Reassessment-Notice-Time limit- Notice issued on 30-3-2009, amended provisions of section 149 would apply hence the impugned notice was held to be time barred . Time period /limitation period in the Act on date of issue of notice would apply. (S.147, 149)

The assessee filed the return of income for the assessment year 1998-99 on 20-11-1998,The assessment for the assessment year was passed under section 143 (3) on 28-2-2001.The reassessment notice under section 148 was issued on 30-3-2009 .i.e. after the expiry of nine years from the assessment year in which the return of income for the assessment year 1998-99 was filed .The assessee challenged the validity of notice under section 148 contending that same was barred by limitation Revenue contended that limitation period prescribed on first day of assessment year would determine time period for issue of notice under section 147/148 and thus amendment made in section 149 by Finance Act , 2001 with effect from 1-6-2001 , restricting time period for issuance of notice under section 148 to six years was not applicable. The Court held that the issue involved is procedural, hence time period in which assessment or reassessment proceedings could be initiated and therefore, time period of limitation period as prescribed in Act on the date of issue of notice would apply. On the facts notice under section 148 was issued on 30-3-2009, amended provisions of section 149 would apply and consequently, the notice was quashed being barred by limitation. (A.Y. 1998-99)

C.B. Richrds Ellis Mauritius Ltd v. ACIT (2012) 208 Taxman 322 (Delhi) (High Court)

S.148: Reassessment – Notice – Status of assessee – Matter remanded- Notice to be issued in appropriate status in which income to be assessed.

The notice was issued to the assessee in the status of association of persons, comprising 3 persons. Pursuant to the notice issued to the assessee an assessment was completed in respect of the assessee as an association of persons comprising 3 persons. The Commissioner (Appeals) modified the status from association of persons to body of individuals comprising two persons. This was upheld by the Tribunal. On appeal by assessee it was held that if the

status of the assessee was required to be modified, the only option available was to assess the income in the appropriate status, if permitted by law, by issuing a notice to the assessee in that particulars status. For modifying the status of the association of persons consisting of three persons to a body of individuals consisting of two persons, the Commissioner (Appeals) could not have acted on his own. The only option available to him was to set aside the assessment proceedings and remand the matter back to the Assessing Officer giving him the liberty of issuing a notice to the assessee in the status of a body of individuals comprising two persons, if it was otherwise permissible in law and after obtaining the approval of the Board, if necessary. The order passed by the Commissioner (Appeals) which was upheld by the Tribunal whereby the status of the assessee was "merely" modified from association of persons to body of individuals was not sustainable. The assessment proceedings were required to be set aside and liberty was granted to the Revenue to issue a fresh notice to the assessee according to law. (A.Y. 1972-73)

Gutta Anjaneyulu & Co. v. CIT(2012) 347 ITR 135 (AP.)(High Court)

S.148:Reassessment-Notice-Time limit- Reassessment- Notice "issued" within limitation period is valid even if "service" is later. (S. 149)

For A.Y. 1998-99, the Assessing Officer issued a notice under section 148 dated 28.3.2005 (within the limitation period of 6 years). However, as this notice was returned un-served, a second notice dated 17.6.2005 (beyond 6 years) which issued & served. The assessee contended that since the Assessing Officer had issued a second notice, the first one was non-est and as the second notice was issued beyond limitation period, the assessment proceedings were null and void. The CIT(A) upheld the plea. Before the Tribunal, the AM held that there was a difference between "issue" of the notice and its "service" and that the notice dated 28.3.2005 was valid, though not served, and the second notice was invalid and non-est. The JM took a contrary view and held that the first notice was invalid and the second notice having been issued after the limitation period did not give jurisdiction to make the assessment. On a reference to the Third Member, held:

The Act makes a clear distinction between "issue of notice" and "service of notice". Section 149 which prescribes the period of limitation provides that no notice under section 148 shall be "issued" after the expiry of the limitation period. The "service" of the notice is necessary under section 148 only to make the order of assessment. Once a notice is "issued" within the period of limitation, the Assessing Officer has jurisdiction to make the assessment. A notice is considered to have been "issued" if it is placed in the hands of a person authorized to serve it, and with a bona fide intent to have it served. Service of the notice is not a condition precedent to conferment of jurisdiction on the Assessing Officer but it is a condition precedent to the making of the order of assessment. On facts, as the Assessing Officer had issued the notice within the period of limitation, he had jurisdiction to reopen the assessment (R.K.Upadhyaya v. Shanabhai P. Patel (1987) 166 ITR 163 (SC) followed)(A.Y. 1998-99).

ITO v. Lal Chand Agarwal (2012) 134 ITD 91/ 69 DTR 241/ 145 TTJ 711(TM)(Agra)(Trib.)

S.148:Reassessment-Notice- Recording of reasons- Further information-Reasons recorded cannot be supplemented by receiving further information, provisions of section 292B cannot be invoked. (S. 292B)

The Tribunal found that in the reasons recorded for reopening of assessment there was no mention of Anand enterprises. Since the recording of the reasons is the foundation of initiation of proceedings under section 148, it would not be effected by the provisions of section 292B of the Act . As the reopening has been done on non existent and factually incorrect reasons and assessing Officer has not applied his independent mind and did not verify the information received from DDI (Investigation) prior to recording of reasons, the reopening of assessment held to be invalid.(A.Y. 1993-94)

Mahadev Trading Co v. ITO (2012) 135 ITD 1/ 65 DTR 140/ 143 TTJ 492 /17 ITR 332(Ahd.) (Trib.)

S.148:Reassessment - Recording of reasons - Mandatory before issue of notice - Mandatory requirement of law is not fulfilled reassessment proceedings became without jurisdiction and liable to be struck down.S.147)

The Tribunal held that the very basis for assuming jurisdiction under section 147 of the Act gets vitiated and, consequently , the entire proceedings are rendered void ab initio. Section 148(2) exclusively provides that, the Assessing Officer shall before issuing any notice under this record his reasons for doing so. Therefore it is mandatory before issue

of notice- Mandatory requirement of law is not fulfilled reassessment proceedings became without jurisdiction and liable to be struck down.(A.Y. 1996-97)
Dadanbai B.Bachani v. ITO (2012)137 ITD 218/ Income Tax Review – August –P 140.(Mum.)(Trib.)

S. 148: Reassessment – Notice – Issued on the basis of survey u/s 133A and statements obtained in the course of survey, reassessment held to be invalid.(S.133A,147)
Reassessment was held to be invalid where notice u/s 148 was issued solely on the basis of survey u/s 133A and statements obtained in the course of survey and nothing else on record. (AY 1999-2000 to 2005-06)
J. Mohan(Dr.), & Anr. v. ACIT (2012)18 ITR 363 (Chennai)(Trib.)

S.149:Reassessment – Notice-Reassessment - Agent of non-resident – Limitation - Reassessment on the agent of non-resident under section 163 after expiry of two years from the end of relevant year held to be barred by limitation. (S. 148, 153B,163)
Search and seizure action was carried out at the premises of the petitioner on 17th September, 2007. The Assessing Officer of the view that there was business connection between the assessee and Bermudian Company, hence issued the notice under section 148 proposing to treat the assessee as agent under section 163 for proposing to levy capital gains tax for the Asst. year 2005-06. The notice under section 163 was issued dated 22-11-2010.The petitioner challenged the order passed under section 163 r.w.s. 147, on the ground that the said order was time barred. The Court held that proceedings initiated for treating the petitioner as an agent of a non-resident under section 163 after expiry of two years from the end of the relevant assessment year was clearly barred by limitation under section 149(3). For the relevant assessment year the such notice ought to have been issued on or before 31st March, 2008, where as the notice was issued on 22nd Nov., 2010. The revenue relied on the provisions of section 153B. The Court held that provision of section 153B cannot be said to obviate the bar of limitation on the facts of the case because the search was of the Indian Company and not of the person who is sought to be assessed. The High Court quashed the reassessment to treat the assessee as an agent of non-resident. (A. Y. 2005-06).
Ingram Micro India Ltd. v. Dy. CIT (2012) 67 DTR 50 / 247 CTR 262 (Bom.)(High Court)
S.151: Reassessment- Sanction for issue of notice- Approval of Joint Commissioner- Notice issued by Assessing Officer with approval of JCIT was held to be valid .(S.148)
On the facts of the case the notice under section 148 was issued by Assessing Officer after approval of JCIT. The Tribunal has come to the conclusion that the jurisdiction was not correctly assumed by the Assessing Officer hence the proceedings were quashed . On appeal by the revenue the Court held that notice by the Assessing Officer after approval of JCIT cannot be held to be invalid on the ground that notice was issued by the Assessing Officer and not by JCIT .The court held that explanation to section 151 inserted by the Finance Act , 2008 being clarificatory and having been made retrospective effect shall cover the issue , though the explanation which was added was not available when the Tribunal decided the matter.(A.Y.1995-96)
CIT v. Reshma Arif (Smt) (2012) 74 DTR 357 (All.)(High Court)
S.151: Reassessment- Sanction for issue of notice- Approval of the CIT – Approval of the Commissioner instead JCIT/Addl.CIT, renders reopening void.(S. 147)
The assessee challenged the reassessment notice by way of writ petition . The High Court allowed the petition by observing that,if the approval of the JCIT /Addl.CIT to the reopening as required by section 151 was obtained, it is for the department to produce the same, whether the approval was granted or not is an objective fact which can be established only by producing the approval. Where a statute requires something to be done in a particular manner, it has to be done in that manner, approval by another authority will not satisfy the requirement. On the facts the approval of CIT was taken and not Joint Commissioner hence the reassessment proceeding was quashed .
DSJ Communication Ltd v. DCIT (Bom.) (High Court).www.itatonline.org
S.151:Reassessment – Sanction for issue of notice- Challenge after lapse of eight years-Circumstantial evidence-Not justified.(S. 147, 148)

The Tribunal held that the assessee cannot challenge the issue of notice under section 148 in second round of appeal as regards non–compliance of conditions precedent required by section 151(2) after lapse of more than eight years, more so when the very fact that the assessee did not choose to make such acclaim till the file is transferred from the ITO Ward 17(2) would cast a doubt on the correctness of the claim of assessee.(A.Y.1993-94)
Laxminaryan Agarwal (HUF) v.ITO (2012) 143 TTJ 175 / 65 DTR 70 (Mum.)(Trib.)

S.153A:Assessment- Search or requisition- **-Special procedure for assessment-Abatement of regular assessment which has become final is not justified- Departmental appeal was allowed.(S. 132)**
Only an assessment or reassessment pending on the date of initiation of search under section 132 or requisition under section 132A shall abate under the second proviso to section 153A. Even if an appeal is pending against a competed assessment before the Tribunal on the date of search, such completed proceedings do not abate. The Court observed that the abatement of any proceedings has serious causes and effect in as much as the abatement of the proceedings takes away all the consequences that arise thereafter. In the present case after deducting bogus gifts in the regular assessment proceedings, the proceedings for penalty were drawn under section 271(1)(c). The material found in the search may be ground for notice and assessment under section 153A, but that would not efface or terminate all the consequences which have arisen out of the regular assessment or reassessment resulting in to the demand or proceedings of penalty. Accordingly the Tribunal erred in law in abating the regular assessment proceedings, which had became final, and restoring them as a consequence of search under section 132 and notice under section 153A to the file of the Assessing Officer. (A.Y. 2002-03)
CIT v. Shaila Agarwal(Smt) (2012)346 ITR 130/ 65 DTR 41/ 246 CTR 266/ 204 Taxman 276 (All.)(High Court)
S.153A: Assessment- Search or requisition-Assessment completed-De novo assessment- S. 153A applies if incriminating material is found even if assessments are completed
Pursuant to a search u/s 153A, the AO passed an assessment order in which he assessed various amounts. The Tribunal {(2010)1 ITR (Trib) 484} upheld the assessee's appeal on the ground that (a) no "*incriminating material*" was found in the course of search and (b) as ROIs for the said 6 years disclosed the particulars of the subject additions and these had been accepted by the AO u/s 143(1), no assessment was pending so as to have abated. It was held that s. 153A was *not a de novo assessment* or a normal/ regular assessment and the additions made therein have to be necessarily restricted to the undisclosed income unearthed during the search. On appeal by the department to the High Court, Held reversing the Tribunal:
(i) U/s 153A, the AO is empowered to assess or reassess the "total income" (which includes the disclosed & undisclosed income) of 6 years. This is a significant departure from the earlier block assessment scheme (s. 158BC) in which only the undisclosed income could be assessed. U/s 153A, there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax. If the assessment proceedings are pending completion when the search is initiated, they will abate making way for the AO to determine the total income of the assessee in which the undisclosed income would also be included. If the assessment proceedings have already been completed, there is no question of any abatement since no proceedings are pending & the AO will have to reopen the assessments (*without having the need to follow the strict provisions or complying with the strict conditions of s. 147, 148 & 151*) and determine the total income of the assessee;
(ii) The Tribunal's view that since the returns filed by the assessee for the six years had been processed u/s 143(1)(a) before the search took place, s. 153A cannot be invoked is not correct. The AO has the power u/s 153A to make assessment for all the six years and compute the total income of the assessee, including the undisclosed income, notwithstanding that ROIs were filed which stood processed u/s 143(1)(a);
(iii) On facts, the Tribunal's finding that no material was found during the search is factually unsustainable since the entire case and arguments had proceeded on the basis that the document embodying the transaction was recovered from the assessee. If a document is found in the course of the search, s. 153A is triggered & it is mandatory for the AO to complete the assessment u/s 153A. (AY 2000-01, 2002-03 to 2005-06)
CIT v. Anil Kumar Bhatia (Delhi)(High Court) www.itatonline.org

S.153A:Assessment-Search or requisition--Special procedure for assessment-Abatement of pending assessment- New claim for deduction- Claim made for first time before Commissioner (Appeals).Commissioner can entertain the claim.(S. 132)

While filing the return in response to notice under section 153A, assessee voluntarily disallowed the interest of Rs. 58.86 which was disallowed in the original assessment, However a note to the return of income was annexed claiming the said interest was allowable. Assessing Officer has accepted the loss as returned by the assessee. In appeal before Commissioner (Appeals), it was contended that the funds available in the hands of the assessee were mixed and there was no question of apportionment of such funds available with assessee. After obtaining the remand report he disallowed the interest of Rs. 10,81,326/- and deleted the remaining amount.In appeal before the Tribunal it was contended that the Commissioner was erred in giving relief to the assessee on the income disclosed by him in the return of income filed under section 153A, ignoring the fact that the Assessing Officer has merely assessed the total income at the returned income. Secondly, in view of Apex Court judgment in Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC), the Commissioner (Appeal) should not have entertained the claim of assessee.Tribunal held that requirement of section 153A is to compute the total income of each such assessment years without any reference to what was done in the original assessment, hence the assessee is entitled to seek relief on any addition which was made in the original assessment. As regards the claim made before the Commissioner (Appeals) following the ratio of National Thermal Power Co Ltd v. CIT (1998)229 ITR 383 (SC), the Tribunal can examine and entertain the claim provided facts are exists on record for examination the claim. Accordingly the Tribunal dismissed the appeal of the revenue. (A.Y. 2001-02)

Dy. CIT v. Eversmile Construction Co. (P) Ltd. (2012) 65 DTR 39/ 143 TTJ 322(Mum.)(Trib.)

S.153A: Assessment-Search or requisition-No addition if no incriminating documents- Container Freight Station" is an "Inland Port/ Infrastructure facility" –Additions cannot be made under section 153A assessment if no incriminating documents were found in the course of search. Container freight station is an inland pot / infrastructure facility is entitled deduction under section 80IA(4). (S. 80IA(4)

The Special bench had to consider two issues (i) whether an assessment u/s.153A encompassed additions not based on any incriminating material found during the search and (ii) whether a "Container Freight Station" was an "Inland Port/ Infrastructure facility" for purposes of deduction u/s.80IA(4). Held by the Special Bench:

(i) In assessments that are abated, the AO retains the original jurisdiction as well as the jurisdiction conferred on him by s. 153A for which assessments shall be made for each of the 6 assessment years separately;

(ii) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material i.e. (a) the books of accounts and other documents found in the course of the search but not produced in the course of original assessment and (b) undisclosed income or property disclosed in the course of search;

(iii) A Container Freight Station, like an Inland Container Depot, is an "Inland Port" having regard to the fact that it is referred to as such in the statutory provisions and in the understanding of the CBEC, which administers the Customs Act. It has also been treated as part of the customs port for purpose of customs formalities and clearances. Accordingly, it is an "infrastructure facility" for purposes of s. 80IA(4) (A.Ys. 2003-04 , 2004-05 to 2009-10)

All Cargo Global Logistics Ltd v. DCIT (2012)137 ITD 287/ 74 DTR 89 / 147 TTJ 513/18 ITR 106 (SB)(Mum.)(Trib)

S.153A: Assessment- Search or requisition—Addition deleted of earlier year- Addition made in earlier proceeding for same assessment year was deleted in appeal hence the proceedings cannot be revived and added over again in A.Y .

The additions made in the earlier proceedings for the same assessment years which have been already deleted in appeal cannot be revived and added over again in the assessment year u/s 153A. The scheme of the Act does not permit matters that have become final between the assessee and the IT authorities to be reopened and reagitated except by process known to law.(AY 2001-02 & 2002-03)

ACIT v. Uttara S. Shorewala(Mrs) (2012) 147 TTJ 716/74 DTR 11 (Mum.)(Trib.)
UTARA S.Shorewala(Mrs) v. ACIT (2012) 147 TTJ 716/74 DTR 11(Mum.)(Trib.)

S.153B: Assessment- Search and seizure-Time limit-Limitation- Special audit- Period of required for special audit has to be excluded in terms of explanation (ii) to section 153B, and balance period of 60 days to be considered , hence the order is not time barred.

The Assessing Officer passed an order under section 142(2A), directing special audit, said order was challenged in writ petition. High Court stayed the assessment proceedings. While disposing the writ petition the court stated that time schedule fixed under the Act would apply. A special audit was directed by the Assessing Officer vide order dated 19-1-2007, which was to be completed within 105 days. The Auditor furnished its audit report on 3-5-2007. The Assessing Officer, thereafter passed its assessment order on 29-6-2007.The Tribunal held that the order was time barred. Appeal by revenue, the court held that, the period during which assessment proceedings were stayed i.e. 31-3-2006 to 18-12-2006 , had to be excluded in terms of Explanation (i) to section 153B(1), and period of 105 days required for special audit had been gain to be excluded in terms of Explanation (ii) to section 153B. The proviso to Explanation to section 153B(1) is again became applicable and as per said proviso assessment order could have been passed on or before 3-7-2007, i.e. ,period of 60 days after special audit was to be submitted to Assessing Officer . Therefore the order of Tribunal, holding that assessment order dated 29-6-2007 as time barred was incorrect, accordingly the order of Tribunal reversed and appeal of revenue was allowed.(A.Y. 1998-99 to 2001-02)

CIT v. Ulike Promoters (P) Ltd (2012) 205 Taxman 414/ 69 DTR 48 (Delhi) (High Court)

S.153C:Assessment- Income of any other person-Search and seizure-Satisfaction-There is no requirement that the Assessing Officer should also be satisfied that such valuable articles or books of account or documents belong to any other person must conclusively reflect or disclose any undisclosed income (S. 132 ,153A, 158BD)

There was a search and seizure under section 132 against Puri group of Companies .The documents relating to assessee were found in the premises of Puri group of companies , accordingly the Assessing Officer recorded the satisfaction in accordance with section 153C(1) and handed over to the Assessing Officer of assessee along with other documents. The Assessing Officer issued the notice under section 153A of the Act to furnish the return for in respect of six assessment years. The assessee filed the return. After the Assessment orders for the assessment years 2003-04 to 2008-09 , the assessee has filed a writ petition . The main contention of the assessee is that the Assessing Officer has illegally assumed jurisdiction under section 153C read with section 153A of the Act there was no undisclosed income to be assessed in the hands of assessee. The assessee contended that the seizure of documents, the satisfaction recorded by the Assessing officer under section 153 C (1) and assessment orders passed by the Assessing officer for the assessment years 2003-04 to 2008-09 have all to be struck down. The Court held that in view of provision of section 153C, satisfaction that is required to be reached by Assessing Officer having jurisdiction over searched person is that valuable article or books of account or documents seized during search belong to a person other than searched person, however there is no requirement in section 153C(1) that Assessing Officer should also be satisfied that such valuable articles or books of account or documents belong to other person must conclusively reflect or disclose any undisclosed income . Accordingly the writ petition was dismissed.(A.Ys 2003-04 to 2008-09)

SSP Aviation Ltd v. DCIT (2012)346 ITR 177/ 207 Taxman 260 /252 CTR 291(Delhi) (High Court)

S.153C: Assessment- Income of any other person-Search and seizure-Satisfaction.

It is only the clerical satisfaction of the A.O. that is contemplated u/s 153C. In the instant case, the petitioner has not averred that the A.O. did not record his satisfaction. He only demanded a copy of the satisfaction recorded by the A.O. Request of the petitioner has been turned down stating that the assessee is not entitled to copy of the note. In his subsequent statement respondent has further clarified that the copy of the satisfaction recorded by the A.O. was not given to the petitioner as it is a confidential correspondence and the reason for taking up his case for scrutiny had been already communicated to the petitioner in the notice issued u/s 153A. Therefore, there is no substance in the case of the petitioner that the proceedings were initiated against him without recording the satisfaction of the A.O. in terms of s.153C. (A.Y. 2003-04 to A.Y. 2009 -10)

K. M. Mehaboob (Dr.)v. DCIT (2012) 76 DTR 90 (Ker.)(High Court)

S.153C:Assessment- Search and seizure- Income of any other person- Approval of JCIT-Failure to obtain JCIT's approval renders s. 153C assessment order is void.

Pursuant to search & seizure action u/s 132 on the premises of Mr. Shriram Soni, 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 AO (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. Held by the Tribunal upholding the plea:

S. 153C authorises the AO to exercise jurisdiction over any person in whose case incriminating material has been found during the course of search conducted on another person. S. 153D provides that no order of assessment shall be passed by an AO below the rank of Joint Commissioner except with the prior approval of the Joint Commissioner. The fact that the heading to s. 153D refers to a "prior approval" and that it uses negative wording and the word "shall" makes the intention of the Legislature clear that compliance of s. 153D is mandatory. As the provision is mandatory, an act done in breach thereof will be invalid. Also, as the condition has been imposed in public interest, it cannot be waived by the assessee. Clause 9 of the Manual of Office Procedure also makes it clear that an assessment order under Chapter XIV-B can be passed only with the previous approval of the JCIT and that the approval must be in writing and stated to have been obtained in the body of the assessment order. Accordingly, in the absence of the JCIT's approval, the AO had no jurisdiction to pass the s. 153C order and it was null and void (Ratnabai Dubhash (1998)230 ITR 495 (Bom) & SPL's Siddharth followed)

*Akil Gulamali Somji v. ITO (2012)137 ITD 94/ 78 DTR 137(Pune)(Trib)*www.itatonline.org

S.153D: Assessment- Search and seizure- Approval-Obtaining the approval is mandatory. (S.153C)

An assessment order under section 153C can be passed by Assessing Officer only after obtaining prior approval under section 153D of Joint Commissioner inasmuch as compliance of section 153D requirement is mandatory. (A. Y. 2001-02 to 2004-05)

Akil Gulamali Somji v. ITO [2012] 137 ITD 94/78 DTR 137 (Pune)(Trib.)

S.154: Assessment-Rectification of mistake- Non consideration of Supreme court-Non consideration of Supreme Court decision is a mistake apparent on record and can be rectified.

Assessee suffered the loss from the export of trading goods, which ought to have been adjusted against 90 percent of the export incentive as per the decision of the Supreme Court. High court held that non-consideration of the judgment of the Supreme Court and non-application of the ratio of the judgment of the Supreme Court to the facts of the present case is a glaring, patent and obvious mistake of law which can be rectified under section 154.Accordingly the appeal of revenue was allowed.(A.Y.2002-03)

CIT v. Satish Kumar Agarwal (2012) 66 DTR 68 (Delhi)(High Court)

Editorial:– Refer Circular No. 71 dated 20-12-1971 (1972) 83 ITR (St) 91

S.154 :Assessment-Rectification of mistake – Supreme Court-Subsequent decision of Supreme Court would not obliterate conflict of opinion existing on the date of order - Revenue appeal was dismissed.

Assessee filed the return of income claiming unabsorbed investment allowance to be set off under section 115J. The return was processed under section 143(1)(a). Subsequently, the Assessing Officer passed the order under section 154, withdrawing the claim. The Tribunal agreed with the contention of assessee that brought forward allowance could not be set off as against the income computed under section 115J. On appeal by revenue the High Court held that, a debatable point of law cannot be taken as a mistake apparent from record. A subsequent decision of the Supreme Court would not obliterate the conflict of opinion which existed as on the date of passing of assessment order. Order of Tribunal is up held and the appeal of revenue is dismissed. (A. Ys. 1991-92 &1992-93).

CIT v. Thambi Modern Spinning Mills Ltd. (2012) 341 ITR 229 (Mad.)(High Court)

S.154:Assessment-Rectification of mistake- Valuation of closing stock- When the closing stock is enhanced by the Assessing Officer he has to rectify the mistake in next years opening stock and has to give consequential relief.

Assessee changed the method valuation of stock to the "cost to complete" for the Assessment year 1986-87 for determining its profits in accordance with the International and Indian Accounting Standards under which , in respect of each contract at the end of each year , the cost required to complete the contract was estimated and compared with the total value. Assessing Officer did not accept the change in the method and added value to work in progress amounting to Rs 1, 31, 88,000. The assessee has lost in appeal, however the committee has not given permission to file an appeal before High Court. The return of assessee for A.Y. 1987-88 & 1988-89, was accepted under section 143 (1) as per the method adopted by the assessee. Assessee filed an application under section 154 to pass consequential relief for the Assessment years 1987-88 and 1988-89 , which was rejected by the assessing officer. The view of Assessing Officer was confirmed by the Tribunal. On appeal to high court , the court held that it is incumbent upon the Assessing officer to follow the same principle in the subsequent years , mistake will appear from the record of the case and there is no question of entering in to any new material for the purpose of detecting the said mistake .High Court set aside the order of lower authorities and directing the assessing officer to treat the closing stock of earlier year to treat the opening stock of next year.(A.Y. 1987-88 to 1988-89)

Bridge &Roof Co (India) Ltd v. CIT (2012) 248 CTR 111 (Cal.) (High Court)

S.154:Assessment- Rectification of mistake – deduction from the profit not enumerated in clause (i) to (ix) covered by the Explanation to Section 115JA(2) – Mistake apparent on record

The assessment was completed based on the profit taken from Profit and Loss appropriation account prepared in terms of Part II and III of Schedule IV of the Companies Act. The claim of the assessee of deduction from the profit not enumerated in clause (i) to (ix) covered by the Explanation to Section 115JA(2) was held to be a mistake apparent on record. The order of Tribunal reversing the original Order and passing a revised assessment under Section 154 upheld by the High Court. (A.Y. 1997 – 98)

Sree Bhagawathy Textiles Ltd. v. Asst. CIT (2012) 342 ITR 244 (Ker.)(High Court)

S.154:Assessment- Rectification of mistake –Book profits- Intimation-Computation of book profits for the purpose of expalantion 3 to section 40(b)(v) is a debatable hence can not be rectified .(S. 40(b)(v), 115J,143(1)(a))

Computaion of book profit for purpose of explanation 3 to section 40(b)(v) is a debatable issue hence can not be rectified under section 154.(AY 1995-96 to 1998-99)

Md. Serajuddin & Brothers v. CIT (2012) 210 Taxman 84(Cal.)(High Court)

S.154:Assessment- Rectification of mistake –Credit for TDS-Full credit for TDS certificate must be given though inadvertently the assessee has claimed less credit.(S.143(1),199,Rule 37BA)

The assessee filed the return of income along with TDS certificate of Rs 31,47,636/-. However inadvertently the assessee claimed credit for Rs 16, 67, 134 in the return of income. The return was processed under section 143(1) and only refund of Rs 1,95,554/- was issued .The assessee moved application under section 154 and claimed the refund on the basis of certificates which were filed along with the return. The Assessing Officer has rejected the claim. On appeal the Commissioner (Appeals) has allowed the claim. On appeal to the Tribunal, the Tribunal held that as per Rule 37BA credit for tax deducted at source and paid to the Central Government has to be given for the assessment year in which such income is assessable. On the facts the assessee offered the entire income which was assessed by the Assessing Officer. The Tribunal rejected the contention of revenue that the assessee should have filed the revised the return. The Tribunal confirmed the view of Commissioner (Appeal) and held that the assessee is entitled to the credit of TDS which was filed along with the return.(A.Y. 2005-06)

ITO v. Krishraj Hotels & Motes (P) Ltd (2012) 145 TTJ 118/ 68 DTR 167 (Delhi) (Trib.)

S.154:Assessment – Rectification of mistake – Set off of loss – E-Return - Department is hauled up for Central processing return (CPC) fiasco & unnecessarily harassing assessee but spared of costs on the ground that AO & CIT(A) were "only doing their duty"- Copy of order served on CBDT for necessary action.

The assessee filed an e-return disclosing income of Rs. Nil which was arrived at after setting off against the current year's income of 9.53 crores, the brought forward losses of Rs. 12.43 crores. In the electronic processing, the loss set off was shown at Zero and a demand of Rs. 3 crores was raised. The assessee filed a rectification application u/s.154.

The AO rejected the application on the ground that the assessee had "not claimed any loss" while the CIT (A) rejected it on the ground that "set off of losses cannot be a matter of rectification". The assessee filed an appeal before the Tribunal and demanded costs u/s 254(2B) for the hardship. Held by the Tribunal:

(i) The AO & CIT (A) were not justified in rejecting the assessee's claim because as the losses had already been determined in the earlier years, the same were required to be allowed as set off against current income of the assessee. The CPC itself later issued a rectification order setting off losses of Rs. 9.53 crores though it still did not mention carry forward of losses. The assessee's plea for costs u/s 254(2B) for "unnecessary hardship" cannot be accepted because the lower authorities were only "doing their duty".

(ii) As regards the CPC, observed:

We would like to take this opportunity to bring to the notice of CBDT that after the procedure of Central processing of returns, many issues have come before various forums where unnecessary demands have been raised due to non-grant of TDS, wrong computation of income, adjustment of the previous year demand which have already been deleted by the jurisdictional assessing officer. Therefore, we would like to urge the CBDT to take up this matter urgently and establish proper coordination between the assessing authority and Central Processing Authority so that these problems are immediately solved and unnecessary litigation can be avoided. Copy of this order should be forwarded to the Chief Commissioner of Income-tax, Chandigarh and Chairman of CBDT for necessary action.(2009-10)

Ambala Central Cooperative Bank Ltd v. ITO (2012) 52 SOT 233(Chandigarh)(Trib.)

S. 154: Assessment-Rectification of mistake- Retrospective amendment of law ,rectification order is justified.

The assessment was the subject matter of appeal before the first appellate authority and in accordance with the directions of the first appellate authority the Assessing Officer recomputed the claim under section 80HHC allowing the deduction. The Assessing Officer noted the Taxation Laws (Amendment),Act , 2005 has brought amendments in section 80HHC with retrospective effect whereby assessee having export turnover exceeding Rs 10 Crores is entitled to benefit of second proviso to section 80HHC(3),only if the assessee has necessary evidence to prove that he had an option to choose either duty draw back or DEPB scheme. On the facts as the turnover was more than 10 crores, it had no such option other than DEPB , accordingly the Assessing Officer passed the order under section 154 based on retrospective amendment to section 80HHC.In an appeal before the Tribunal the Tribunal held that rectification under section 154 can be done on the retrospective amendment made by the legislature.(A.Y.2001-02)

Baby Marine Products v.ACIT (2012) 147 TTJ 385 / 73 DTR 169 (TM)(Cochin)(Trib.)

S.158B:Block assessment- Definitions- Search and Seizure – Addition for short- accounting the payments received by the assessee from the distributor, Addition is held to be justified on the ground of accounts evidence collected in the course of search.

On the basis of accounts seized, evidence collected from the film distributor and the statements recorded from him, AO was justified in making addition for short- accounting the payments received by the assessee from the distributor. (AY 1988-89 to 1997-98)

CIT v. A.H. Khais (2012) 74 DTR 54 (Ker.)(High Court)

S. 158B: Block assessment –Definitions- Undisclosed income – Agreement for development of land already declared in ROI prior to search, long term capital gain arising on transfer outside scope.

Assessee having already declared the agreement entered into by them with a company for the development of their landed property in their returns prior to date of search and also the capital gain arising on transfer of proportionate portion of land in AY 2000-01 and subsequent years, the long term capital gains fall outside the scope of the definition of "undisclosed income" in S. 158B(b).

ACIT v. Late Arun Kumar Haridas Dattani By LRs (2012) 148 TTJ 763 (Cochin)(Trib.)

S.158BB:Block assessment- Procedure-Search and seizure-Computation-Undisclosed income-Search and seizure-Assets in the name of wife of assessee addition cannot be made.(S.132)

There was search and seizure action in the premises of assessee and seized the assets. The Assessing Officer treated the income and assets of wife also as income of assessee. In appeal the Commissioner (Appeals) and Tribunal also confirmed the addition. On appeal by the assessee relying on the ratio of Apex court in DSP v. K.Inbasagaran (2006)

282 ITR 435 (SC), Dhirajlal Girdharilal v. CIT (1954) 26 ITR 736 (SC), Lalchand Bhagt Ambica Ram v. CIT (1959) 37 ITR 288 (SC),the High Court set a side the order and held that addition of income from assets belonging to wife of assessee is not justified . The Court also held that the finding of fact not based on evidence can be set aside. (A.Y. 1985-86)

S.K.Bahadur v.UOI (2012) 345 ITR 95 (Delhi) (High Court)

S.158BB:Block assessment- Procedure-Search and seizure-Computation-Undisclosed income-Income which has accrued to the assessee prior to the date of the commencement of the block period would not constitute undisclosed income. Assessing Officer has no jurisdiction to include that income which is disclosed in the regular return. (S.69,158BC)

The assessing Officer has treated the opening capital shown by the assessee as on 1st April 1985 is the undisclosed income for the block period ,though the block period is for the period from 1st April 1985 to 12th December 1985. The addition was deleted by the Tribunal. In appeal before the Court the revenue contended that the assessee was not able to show source of said income therefore provision of section 69 is attracted therefore deemed to be income of the assessee of such financial year and constituted unexplained investment. The Court held that opening capital accrued to the assessee at a point of time anterior to the commencement of block period hence cannot be, treated as undisclosed income. The court also held that the assessing officer has no jurisdiction to include that income which is disclosed in the regular returns.

CIT v. Annapoornamma Chnadrashekar(Smt) (2012) 250 CTR 387 / 69 DTR 31 (Karn.)(High Court)

S.158BB: Block assessment-Computation of income-Undisclosed income- Search and seizure.

Tribunal cannot cancel the assessment of undisclosed income if the same is based on tenable and acceptable evidence recovered in the course of search and which is not disproved by the assessee; when the department relies on the seized records for estimating undisclosed income, there is no reason why expenditure stated therein should be disbelieved. (AY 1988-89 to 1997-98)

CIT v. P.D. Abraham Alias Appachan & Anr. (2012) 74 DTR 34/ 252 CTR 407 (Ker.)(High Court)

P.D. Abraham Alias Appachan & Anr. v. CIT (2012) 74 DTR 34/ 252 CTR 407 (Ker.)(High Court)

S.158BB:Block assessment- Procedure-Search and seizure-Computation-Undisclosed income (158BC)

Record showing unrecorded sales of different dates seized and on that basis the A.O. estimated the sales for entire year. Addition partly upheld by Tribunal. In such cases, some amount of estimate has to be made, however, it should not be unreasonable or arbitrary. Estimate has to have some rational connection with the addition being made. Finding shows that the Tribunal had adopted a rational basis for determining the unaccounted production for the block period. View taken by the Tribunal is a plausible and reasonable view in which no perversity could be pointed out.

Surinder Kumar v. CIT (2012) 76 DTR 71 (P&H)(High Court)

S.158BC:Block assessment-Procedure- Search and seizure-Undisclosed income – Annulment- Interest is not payable.(S.132, 158BFA)

When the assessment under section 158BC of the Income-tax Act, 1961 itself has been annulled on the ground of a defective notice, interest for delay in filing the return would not be payable under section 158BFA. (Block Period : 1988-89 to 1998-99)

CIT v. Micro Nova Pharmaceuticals P. Ltd. (2012) 340 ITR 118/68 DT 294/249 CTR 110 (Karn.)(High Court)

S.158BC:Block assessment- Procedure-Search and seizure – Undisclosed income-Set off against miscellaneous receipts is entitled to set off- Levy of surcharge subject to the decision of larger bench of supreme court .(S. 132, 158BFA)

The Assessing Officer and the appellate authority held that the assessee was not entitled to set off of the amount as miscellaneous income was shown as income from other sources and not from arrack business the unaccounted sale of arrack and the miscellaneous income shown in the books of account by the assessee. The Tribunal held that the assessee is entitled to setoff. As regards estimate of undisclosed income the Tribunal confirmed the addition. The Court held that as the assessee himself admitted that he had not included the excise duty in the sale price, which was Rs. 2 per of such sale , the inclusion of the excise duty was unassailable and levy of surcharge and interest was also justified.The

Court made it clear that the levy of surcharge shall be subject to the larger bench decision of the Supreme Court in the case of CIT v. Rajiv Bhatara(2009) 310 ITR 105 (SC).

J.P. Narayanaswamy v. Dy.CIT(2012) 340 ITR 193/249 CTR 314 / 68 DTR 210 (Karn.)(High Court)

S.158BC:Block assessment- Procedure-Search and seizure- Undisclosed income-Just because the cash vouchers were found additions cannot be made .There is no bar in assessing the total income or undisclosed income less than returned income.(S. 158B (b), 158BB).

The Tribunal held that additions cannot be made in the block assessment only on the ground that the vouchers are of unverifiable nature which cannot be considered as incriminating materials. Similarly unmoved trade debtors cannot be assessed as undisclosed income. The Tribunal also held that there is no bar in determining the total income /undisclosed income less than the returned income if facts so warrant. There is no basis for determining the undisclosed income even on the returned income offered as precautionary measure. Assessing Officer is directed to determine the undisclosed income accordingly without reference to any admitted income in the return filed under protest.

United Phosphorous Ltd v. CIT (2012) 67 DTR 395/ 144 TTJ 683 (Mum.) (Trib.)

ACIT v. United Phosphors Ltd (2012) 67 DTR 395/144 TTJ 683 (Mum.) (Trib.)

S.158BC:Block assessment- Procedure-Search and Seizure – Warrant - Undisclosed income of any other person - As there was no warrant in the name of assessee block assessment in the name of assessee was set aside. (S. 158BD)

A warrant was issued in name of "C" a partner of assessee firm for initiation of search proceedings . There was nothing in the said warrant indicating that it had been issued in name of "C" in capacity as partner of firm. More over the assessment was made in the hands of "C" u/s.158BC . Subsequently the assessment order was passed in the name of firm also u/s.158BC. Before the Commissioner (Appeals) the Assessee challenged that the assessment under section 158BC in the hands of firm is illegal. However the Commissioner (Appeals) dismissed the ground and up held the order. On appeal to the Tribunal the tribunal held that is a treaty law that the assessment has to be completed under Section 158BC in the case of a person whose name search warrant is issued and in the case of 'Other persons', the assessment should be made under Section 158BD r.w.s. 158BC. When it is crystal clear from the panchanama that the warrant was issued in the case of 'C' only and the assessee - firm had been mentioned as the place to be searched it cannot be said that the warrant was in the case of assessee firm. The Tribunal held that the assessment under section 158BC is bad in law and set aside the order.

Kothamangalam Aggregates Nelkrishi v. Dy. CIT (2012) 136 ITD 244/147 TTJ 408/73 DTR 101 (TM)(Cochin)(Trib.)

S.158BD:Block assessment- Undisclosed income of any other person-Notice-Notice issued under section 158BC , in respect of assessment under section 158BD is held to be valid, entire proceedings cannot be held to be void.(S.158BC)

The proceedings under section 158BD were initiated against the assessee, however the notice was issued under section 158BC. On appeal the Tribunal held that the notice issued under section 158BC is void ab initio and consequently the assessment order passed in a proceedings which commenced by issue of such notice is also illegal and therefore set aside the assessment order. On appeal by revenue the court held that in the absence of any prescription of a notice in a prescribed manner under section 158BD, the only notice that requires to be issued both under section 158BC and 158BD is the notice which is prescribed under section 158BC. The Court held that the Tribunal was not justified in holding that a notice issued under section 158BC is void ab initio. The Court also held that in order to clarify the position by Finance Act ,2002, the words "under section 158BC" is expressly provided , said amendment is clarificatory in nature .

CIT v. Annapoornamma Chnadrashekar(Smt) (2012) 250 CTR 387 / 69 DTR 31 (Karn.)(High Court)

S.158BD: Block Assessment – Search and seizure-Recording of satisfaction –In the case of person searched – Recording of satisfaction has to be done before completion of proceedings under section 158BC (S. 158BC)

According to the provisions of section 158BD the satisfaction has to be recorded between the initiation of the proceedings under section 158BC and before completion of block assessment under section 158BC in the case of person searched. It could not be after the conclusion of the block assessment as there was no occasion for an AO to

examine the seized material or document of the person searched when block proceedings had concluded and no other proceedings were pending before him. (Block period 1/4/1996 to 31/12/2002)
Gopal S Agrawal v. DCIT (2012) 136 ITD 199/75 DTR 182 (Mum.) (Trib.)

S.158BE: Block assessment- Time limit- last Panchnama-Search and seizure-If there is more than one authorization, for the purpose of calculating the limitation under section 158BE is the last of the Panchnama recording the conclusion of search irrespective of the date of authorizations. (S.132)

On the facts of the case for conducting the first search proceedings , the authorization was first issued on 10th September, 1997. The search commenced on 11th September ,1997 and proceedings were completed on 11th September, 1997. There was also an authorization on same date , in respect of which, another search was commenced on 11th September, 1997 and completed on 11th September 1997 . The second search commenced on 5th Nov,1997 was concluded on 5th November, 1997. Subsequent there to, in connection with this, there was one more authorization dated 31St October 1997, for which the search commenced on 3rd Nov, 1997 and concluded 0n 3rd Nov 1997. Thus, the last of the Panchnama evidencing the conclusion of search with reference to the authorization issued on 3rd October 1997 was 3rd November, 1997. Going by the above facts, the time limit available for completion of block assessment, as per section 158BE(1)(b), would be the end of the month in which the last of Panchnamas evidencing the conclusion of search in respect of which the authorization was executed . Hence , the relevant starting point is to be calculated taking the last Panchnama dt 3rd November, 1997; that the period of two year time –limit commenced on 30th Nov, 1997 to expire on 30th Nov. 1999. The assessment of the relevant year was made on 26th Nov 1999. Accordingly the appeal of revenue was allowed.(Block period 1998-99 to 1997-98)
CIT v. P. Shanthi (Smt.) LR of Minor P.Balaji (2012) 251 CTR 418/75 DTR 6 (Mad) (High Court)
P.Balaji v. dy.CIT (2012) 251 CTR 418/75 DTR 6 (Mad) (High Court)

S.158BE:Block assessment –Procedure- Search and seizure- Time limit - Panchnama - A panchnama which does not record a search does not extend limitation, hence order held to be invalid.

The AO issued two authorizations for search, one dated 17.2.2002 and the other 20.12.2002. In respect of the first authorisation, the last panchnama was drawn on 3.1.2003 while in respect of the second authorization, the last panchnama was drawn on 27.2.2002. The s. 158BC assessment order was passed on 31.1.2005 on the basis that the "last panchnama" was drawn on 3.1.2003. The assessee claimed that as the panchnama dated 3.1.2003 was merely for revocation of a s. 132(3) order, it was not a "panchnama of search" and so could be taken into account. The "last panchnama" was the one dated 27.2.2002 according to which the assessment order was barred by limitation u/s 158BE read with Explanation 2 thereof. held by the Special Bench upholding the plea:

(i) S. 158BE (1) prescribes the time limit for completion of the block assessment with reference to the end of the month in which the "last of the authorisations for search" was executed. Explanation 2 provides that the authorisation shall be deemed to have been executed "on the conclusion of search as recorded in the last panchnama drawn". The "panchnama" referred to in Explanation 2 (a) to s.158BE is a panchnama which documents the conclusion of a search. If a panchnama does not reveal that a search was at all carried out on the day to which it relates, it would not be a panchnama relating to a search and consequently would not be relevant to determine the time limit for passing the assessment order (CIT v. S.K. Katyal (2009) 308 ITR 168 (Delhi)(High Court), CIT v. White & White Minerals Pvt. Ltd. (2011) 330 ITR 172 (Raj.) (High Court) & C. Ramaiah Reddy v. CIT (2011) 244 CTR 126 (Kar.)(High Court) followed;

(ii) On facts, the panchnama dated 3.1.2003 was drawn as a formality to lift the prohibitory order. There was no conclusion of search. Whatever material was required to be seized or impounded was already seized/impounded by the Department. It was merely a release order and could not extend the period of limitation. Consequently, the s. 158BC assessment order is barred by limitation;

ACIT v. Shree Ram Lime Products Ltd(2012) 137 ITD 220/73 DTR 68/147 TTJ 121 / 17 ITR 1*(SB)(Jodhpur)(Trib.).*

S.158BFA:Block assessment-Concealment penalty- Search and Seizure – Penalty is payable on the differential amount.

Penalty u/s 158BFA(2) is payable on the differential amount i.e. income that is shown by the assessee in the return and that ultimately assessed; however, most of the addition being estimate of profits from the film industry, penalty is sustained in respect of two additions only. (AY 1988-89 to 1997-98)

CIT v. P.D. Abraham Alias Appachan & Anr. (2012) 74 DTR 34 (Ker.)(High Court)

S.158BFA: Block Assessment - Penalty- Search and seizure- Question of law admitted by high Court- Levy of penalty is not justified.

The assessee filed the return of income declaring the income of Rs 10 lakhs along with the note attached with the return. The assessing offier assessed the income at Rs 38.32 lakhs. On appeal the Tribunal confirmed the addition of Rs 13, 13, 816. Assessee filed an appeal which was admitted by High court. The assessing Officer levied the penalty of Rs 8,82,884. In appeal Commissioner (Appeals) deleted the penalty. On appeal by the revenue the Tribunal dismissed the appeal of revenue by observing that the admission of substantial question of law by the High Court lends credence to the bona fides of the assessee . Hence the order of Commissioner (Appeals) confirmed .

ACIT v. Ekta Exports (2012) Income tax review –September P.89(Mum.)(Trib.))(ITA No(SS)A.27/Mum/2011, Bench "E" dated 24-8-2012.)

S.158BFA(2):Block assessment-Procedure-Search and seizure- Penalty- Concealment-Penalty under section is not mandatory however penalty deleted by the Tribunal was not justified.

In pursuance of search and seizure action the assessee filed the return of income declaring income of Rs 45 lakhs for the block period. Assessing Officer assessed the income at Rs 97.30 lakhs. In appeal before Tribunal the addition was confirmed of Rs 18.35 lakhs, which has became final. The assessing Officer levied the penalty of Rs 11.06lakhs, which was confirmed by the Commissioner (Appeals). On appeal to the Tribunal the Tribunal deleted the penalty. On appeal by revenue to High Court , the Court held that penalty corresponding to addition of Rs 17.22 lacs was deleted on the ground that the assessee had demonstrated that there was estimation of additions and therefore penalty could not be levied . The Court held that in the absence of requirement to prove concealment or furnishing of inaccurate particulars found in section 271 (1)(c) of the Act cannot form the sole basis to delete penalty imposed by the Assessing Officer. The matter was restored back to the Tribunal to determine the matter for fresh consideration.

CIT v. Becharbhai P. Parmar (2012) 341 ITR 499 / 248 CTR 86 / 67 DTR 367/2012 Tax L R 489 (Guj) (High Court)

S.158BFA(2):Block assessment – Procedure-Search and seizure- Penalty- – Concealment - Additions confirmed over and above income declared by assessee, levy of penalty was justified.

The assessee made disclosure of income for the block period, which had not been offered to tax. While framing the assessment certain additions were made by the Assessing Officer. On appeal Tribunal confirmed the addition. The Assessing Officer levied the penalty under section 158BFA(2) of the Income-tax Act, 1961, this was confirmed by the Tribunal. On appeal to High Court the Court held that nothing was pointed out to demonstrate how the levy of penalty was not justified, accordingly the High Court confirmed the order of Tribunal.

Kandoi Bhogilal Mulchand v. Dy. CIT (2012) 341 ITR 271 / 67 DTR 361/ 248 CTR 80 (Guj.)(High Court)

S.158 BFA (2):Block assessment-Procedure-Search and seizure-Penalty-Concealment-Estimation-Penalty can not be levied where additions are made on estimate.

Penalty under section 158 BFA (2) was not leviable where addition is made on estimation basis.

CIT v. Giriraj Agarwal Giri(Dr) (2012)346 ITR 152/ 72 DTR 79/ 253 CTR 109 (Raj.)(High Court)

S.158BFA(2) :Block assessment – Procedure-Search and seizure- Penalty- - Concealment - Though the Tribunal has confirmed the addition, as the appeal against the quantum addition is admitted by High Court, penalty levied was deleted by the Tribunal.

On the facts the Tribunal has confirmed the addition on account of gross profit merely on the basis that the entries were found and recorded in the ledger account found in the possession of a third party pertaining to assessee and not on the basis of material found in the possession of assessee. Appeal against the quantum was admitted by the High Court. The Tribunal held that where question of law has been admitted by the High Court against quantum addition no penalty can be levied. The Tribunal deleted the penalty on law as well as on facts.

Sadhu Ram Goyal v. Dy. CIT (2011) 128 ITD / 63 DTR 296 / (2012) 144 TTJ 111 (Jaipur)(Trib.)

Praveen Kumar Goyal v. Dy. CIT (2011) 128 ITD / 63 DTR 296 /(2012) 144 TTJ 111(Jaipur)(Trib.)

S.160: Representative assessee – Non resident – Agent- Subsidiary of holding company-Subsidiary company is not assessable as representative assessee. (S. 161, 162, 163)

The first petitioner was a company incorporated in the State of New York in the United States of America. The second petitioner was a company incorporated in Mauritius that held shares in group companies and investments and had a wholly owned subsidiary in India, G, the fourth respondent to carry on the business of computer software, i.e, data entry conversion, data processing, data analysis, business support billing, etc. The entire share capital of `G' was acquired by the second petitioner along with certain individuals Promotion Board. The second petitioner was a wholly owned subsidiary, through various intermediate holdings of the first petitioner. There were a series of agreements. The consequence of these agreements was that: (a) the shares of the Indian company moved by a gift, from GM, a Mauritius company to GI, another Mauritius company; (b) the shares of the GI were transferred to a holding company. The shares with the holding company were then transferred and so on in a series of transactions, and finally the holding company was GG, in which other business process outsourcing businesses from other countries were also consolidated; (c) The shares of GG were sold to a Luxembourg company, and through a series of transactions, the holding shares were acquired by G (Lux); (d) in the aforesaid manner, G (Lux) acquired 99.1 per cent of the preferred stock and 60.6 per cent of the nominal common stock of GG (Lux) a newly organized Luxembourg company and which was a transfer of a capital asset situated outside India, i.e, shares in a company incorporated in Luxembourg. According to the petitioners, the only capital asset in India which was transferred in the course of the restructuring and reorganization transactions was the gift of the shares of G by the second petitioner – A Mauritius company and certain nominee shareholders to GI and GIH, respectively (both Mauritius companies). Therefore, no income had accrued or arisen or could be deemed to have accrued or arisen in India. The Income tax Dept, on the other hand, maintained that it was a taxable event in India. On a writ petition against the notice: Held, allowing the petition, that even if business connections were proved, it would at the most make the fourth respondent an agent of the petitioners had in the eventuality, the I.T. Dept. could treat the fourth respondent as a representative assessee of the first petitioner. However, in order to assess a particular income, it had to be further established by the Dept. that the fourth respondent had some connection with the income earned by the first petitioner which was sought to be taxed at the hands of the fourth respondent. There was no such live link of income earned by the first petitioner and the fourth respondent in respect of the transaction which was sought to be taxed. The transaction in question, viz. transfer of share to a third party, took place outside India. The fourth respondent was sought to be taxed as representative assessee when he had no role in the transfer. Merely because those shares related to the fourth respondent that would not make it an agent qua deemed capital gains purportedly earned by the petitioner. Therefore, the notice was not valid and was liable to be quashed.(A.Y. 2005-06)

General Electric Co. Anr v. Dy. DIT& Ors (2012) 347 ITR 60 (Delhi)(High Court)

S.163:Representative assesses- Agent-liability --Non-resident- Section is not attracted. (S.161)

Once a person comes within any of clauses of section 163(1), such a person would be 'agent' of non-resident for purpose of Act, however, merely because a person is an agent or is to be treated as an agent, would not lead to an automatic conclusion that he becomes liable to pay taxes on behalf of non–resident. As per section 163(1)(c), income should be deemed to accrue or arise in India and therefore said section is not attracted when there is no transfer of capital asset situated in India.

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

S.163:Representative assessees- Agent of a non-resident – Business Connection – Mere relation between the parties which facilitates or assists the carrying on of the business held as business connection [S.9(i)]

The assessee held to be an agent of non-resident company under Section 163 of the Income Tax Act, 1961 on the principle that mere relation between the business of non-resident and the activity in India which facilitates or assists the carrying on of the business would also result in a business connection within the meaning of Section 163(1)(b) and Section 9(1)(i) of the Act. As also the non-resident was in receipt of income from the assessee as per section 163(1)(c) of the Act. (A.Y. 1998-99)

ADIT v. Jet Airways (India) P. Ltd. (2012) 50 SOT 543/74 DTR 363/148 TTJ 298(Mum.)(Trib.)

S.163:Representative assessee- Agent-Non-resident-Shipping business-Assessment as representative assessee cannot be made when the foreign shipping companies have discharged their liabilities under section 172 (S. 172)

The assessee is carrying on the business of transporting coal by time chartering of vessels. On going through the records the Assessing Officer observed that the assessee had engaged two FSCs in the previous year relevant to the assessment year , as the FSCs have not filed the return for income accruing and arising in India , the Assessing Officer issued notice under section 148 and thereafter completed the assessment under section 163 treating the assessee company as "representative assessee". On appeal the Commissioner (Appeals), confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that when the foreign shipping companies themselves have already discharged their liabilities towards tax by complying with the provisions of section 172, there is no question of any further liability in their hands and therefore, there is no justification in making the assessment again in the hands of the assessee company in the status of representative assessee. (A.Y. 2007-08)

Sical Logistics Ltd v. ADIT(I)(2012) 72 DTR 29/53 SOT 313 (Chennai) (Trib.) 13

S.172(3):Non-residents-Shipping business- Freight payment-Agent of ship-DTAA- India –UAE - Double taxation relief— Claim of freight payment by the agent of ship ,owner of the ship is a resident of UAE - Held that as no scope of taxing the income of the ship in any of the ports in India in view of Art. 8 of DTAA. (S.90,Art .8)

The assessee is an agent of the ship registered in UAE. The assessee furnished return u/s 172(3) of the Act claiming that no tax was payable as final freight beneficiary was the shipping company, a resident of UAE which was not liable for tax under Article 9 of DTAA. But the AO rejected assessee's claim. It was held that the owner of the ship being admittedly a resident of UAE, there was no scope of taxing the income of the ship in any of the ports in India in view of Art. 8 of DTAA between India and UAE; assessee company therefore could not be assessed as agent of UAE company.

DIT (IT) v. Venkatesh Karrier Ltd. (2012) 74 DTR 141 / 251 CTR 170 (Guj.) (High Court)

S.174:Assessment of persons leaving India-Assessment- Prima facie satisfaction- Notice under section 174(4) is mandatory, notice under section 143(2) is not sufficient.(S.143(2), 175).

From the petitioner an amount of Rs 1,74,000 was seized by Police on night patrol duty. The seized amount was deposited in Court and after setting apart an amount of 33 percent towards income tax due the balance amount was released. The petitioner received the notice under section 142(1) as no return were filed .The assessee filed the return declaring the total income of Rs 36000.In the course of assessment proceedings the explanation was given for the sources of the cash . The Assessing Officer disbelieved the explanation and assessed the the entire cash recovered as unaccounted cash recovered. The revision petition filed by the assessee under section 264 was also dismissed by Commissioner. The Assessee filed the writ petition. The Court held that before invoking the powers under section 174 and 175 there has to be prima facie satisfaction of the facts and circumstances and a specific notice has to be issued under section 174(4) . The court also held that the issue of notice under section 142(1) is not sufficient. Accordingly the assessment orders were set aside.(A.Y. 2003-04,2004-05)

Abdul Vahab P. v. ACIT (2012) 249 CTR 102 / 205 Taxman 77 / 69 DTR 101(Ker.) (High Court)

S.192:Deduction at source – Salary-Conveyance allowance- Assessee cannot be held to be assessee in default. (S.10(14)).

Life insurance Corporation (LIC), the employer of the Development officer cannot be held to be assessee in default for not deducting tax at source from conveyance and additional conveyance allowance paid to its officer, as the same was permissible deduction under section 10 (14) of the Act.

Senior Branch Manager, LIC of India v. CIT & Anr. (2012) 72 DTR 152 (All.)(High Court)

S.194A:Deduction at source - Interest other than interest on securities – Interest - Definitions-Discount-Discounting charges is not "Interest" hence not liable to deduct tax at source. (S. 2(28A), 40(a)(ia), 195).

The assessee paid Rs. 3.97 Crores to an associate concern in Singapore on account of discounted charges for getting the export sale bills discounted. The AO held that that the discounting charges was "interest" u/s 2(28A) and that as there was no TDS, the expenditure had to be disallowed u/s 40(a)(i). This was reversed by the CIT(A) and Tribunal. The

High Court also up held the order [CIT v. Gargill Global Trading P. Ltd. (2011) 335 ITR 94 (Delhi)] Relied on Circular No.65 dated 2.09.1971, Circular No.674 dated 22.03.1993 & Vijay Ship Breaking Corporation v. CIT (2009) 314 ITR 309 (SC) and held that as the discounting charges were not in respect of any debt incurred or money borrowed and were merely discount of the sale consideration on sale of goods, it was not "interest" u/s.2(28A) and there was no obligation to deduct TDS thereon. On appeal by the department to the Supreme Court, held that, delay is condoned. The Special Leave Petitions are dismissed. (A.Ys. 2004-05, 2005-06)

CIT v. Cargil Global Trading Pvt. Ltd. (SC) www.itatonline.org.

Editorial- Affirmed ACIT v. Cargill Global Trading (I) P. Ltd. (2009) 34 SOT 424 / 126 TTJ 516 / 31 DTR 289 / (2011) 9 ITR 558 (Delhi)(Trib.) / (CIT v. Gargill Global Trading P. Ltd. (2011) 335 ITR 94 (Delhi) (High Court)

S.194A:Deduction at source – Interest other than interest on securities- Housing Board - Interest credited or paid by Housing Board on amount deposited by allot tees on account of delayed allotment of flats is not subject to deduction of tax at source. [S. 2(28A)]

The Assessee had floated a self financing scheme for sale of Houses /flats. Allottees were required to deposit some amount with the assessee. One of the condition of allotment was if there was delay in construction of project the assessee was liable to pay interest to the allottees. Assessee paid interest to allottees. The Assessing Officer held that the payment being interest with in the meaning of section 2(28A) the assessee was liable to deduct tax at source. On appeal Commissioner (Appeals) held that the payment was in the nature of compensation hence the assessee was not liable to deduct tax at source. The Tribunal confirmed the view of the Commissioner (Appeals). On further appeal by the revenue, the Court held that the Tribunal was right in law in holding that interest paid/ credited by the housing Board on the amount deposited by the allottees on account of delayed allotment of flats does not fall under the definition of interest as assigned to it in clause (28A) of section 2 and that the interest paid or credited by Housing Board to its allottees was of capital nature and thus is not subject to deduction at source.

CIT v. H. P. Housing Board (2012) 340 ITR 388/ 205 Taxman 1 / 67 DTR 113 / 247 CTR 464 (HP.)(High Court)

S.194A: Deduction at source-Interest-Co-operative society- Circular no 9 of 2002 dated 11-9-2002 is invalid ,being in conflict with the provisions of section 194A(3)(v) ; Board cannot override or withdraw the exemption under section 194A(3)(v).(S.119)

The petitioners challenged the validity of circular no 9 of 2002 dated 11-9-2002 (2002) 258 ITR 98 (ST) / 177 CTR 1(ST), which clarified that: "3. A question has also been raised as to whether nominal members , associate members and sympathizer members are also covered by the exemption under section 194A(3)(v). It is hereby clarified that the exemption is available only to such members who have joined in application for the registration of the Co-operative society and those who are admitted to membership after registration in accordance with the bye-laws and rules. A member eligible for exemption under section 194A(3)(v) must have subscribed to and fully paid for at least one share of the co-operative bank , must be entitled to participate and vote in the general body meeting and /or special general body meetings of the co- operative bank". The petitioner contended that Board's power to issue clarification under section 119 of the Act . It is the contention of the petitioner that clause (v) of sub section (3) of the section 194A provides for exemption from deduction of tax at source under sub section 1 of section 194A in case of a member of a co-operative society and no further distinction can therefore be made by the CBDT between different classes of members .The Court held that section 194A(3)(v) provides for exemption from deduction of tax at source in case of a member of a co operative society and no further distinction can, therefore be made by way of circular by the CBDT between different classes of members , therefore circular no 9 of 2002 is invalid being in conflict with the provisions of section 194A(3)(v) ; Board cannot override or withdraw the exemption under section 194A(3)(v). Accordingly the petition was allowed.

Gujarat Urban Co-Operative Federation & Ors v. UOI (2012) 75 DTR 354 (Guj.) (High Court)

S.194C:Deduction at source- Contractors- Sub –contractor- Assessee is supplying technical knowhow and product manufactured in brand name of assessee , contract for work, liable to deduct tax at source.

Assessee is marketing pharmaceutical products. Assessee and supplier are interrelated, assessee supplying technical knowhow and products manufactured in brand name of assessee. The Assessing officer held that the assessee is required to deduct tax at source. On appeal Commissioner (Appeals) and Tribunal held that assessee is not required to

deduct tax at source. On appeal by revenue the High Court held that looking at the rear nature of transaction and reading the all three agreements together ,the provisions of section 194C of the Act is applicable and the view of Assessing Officer is justified and appeal of revenue was allowed.(A.Y. 1997-98)

CIT v. Nova Nordrisk Pharma India Ltd (2012) 341 ITR 451/ 71 DTR 53/250 CTR 98 / 205 Taxman 203 (Karn.) (High Court)

S.194C:Deduction at source –Contractors- works contract – Copy right- Amounts not deductible-Franchisee agreement to utilize the copy right is held not be a works contract hence provisions of section 40(a) (ia) is not applicable [S. 40(a)(ia)].

Agreement between assessee and franchisees was an agreement for permitting payee to utilize the name and copyright of the assessee in the study material and in running the coaching centres, and there were mutual rights, duties and obligations and it was not a work contract. The provisions of S. 194C and consequently S. 40(a)(ia) not applicable. (AY 2004-05 & 2005-06)

CIT v. Career Launcher India Ltd. (2012) 71 DTR 161 / 207 Taxman 28 / 250 CTR 240 (Delhi)(High Court)

S.194C:Deduction at source-Contract-Turnkey project –Electrical sub-station.

Where the Turnkey project for setting up an electrical sub – station consisted of three separate contracts a clarified in the bid documents which included the contract for supply of material, no tax was deductable at source under section 194 C of the Act from the payments made under the contract for supply of material.

CIT & Ors. v. Karnataka Power Transmission Corporation Ltd. (2012) 72 DTR 17 (Karn.)(High Court)

S.194C: Deduction at source–Contractors-Sub-contractors-Hiring services-Agreement for hiring services of contractors for rendering transportation services for goods and passengers by buses , cars , sumos ,utility vans etc would be covered under section 194C and not under section 194I. (S.194I)

The assessee company had engaged the services of contractors for rendering transportation services for goods and passengers by buses, cars, sumos, utility vans, etc. The assessee made deduction of tax in accordance with the provisions u/s. 194C. The revenue authorities, however, held that carriages for the purpose of carrying goods and passengers would be treated to be machinery within the meaning of explanation to sec. 194I and, therefore, the assessee was liable to deduct higher amount of tax as per sec. 194-I.

It was held that on comparison of the two Explanations added to sec. 194I and 194C, it appears that it was never the intention for the Legislature to overlap any of the items mentioned within the meaning of `rent', by including the same within the meaning of `work' under sec. 194C. Since the agreement for carriage of goods by vehicles other than railways comes within the purview of explanation of `work' within the meaning of sec. 194C, it necessarily follows that it was never the intention of the Legislature to include the amount taken for hiring of such vehicles within the meaning of word `rent'. Appeal of revenue was dismissed and the order of Tribunal up held. (A.Y. 2007-08)

CIT (TDS) v. Reliance Engineering Associates (P) Ltd. (2012) 209 Taxman 351 (Guj.)(High Court)

S.194C:Deduction at source – Contractors –Bus contractor- Payments made by school to bus contractors providing pick and drop facility is contract and not rent. (S. 194I)

Payments made by school to bus operators for providing pick and drop facility to school students is not a case of hire of machinery but of service rendered by transport contractor to assessee, therefore section 194C is applicable and not section 194I. (A.Ys. 2008-09 & 2009-10)

Lotus Valley Educational Society v. ACIT (2012) 13 ITR 61 (Delhi)(Trib.)

S.194C:Deduction at source- Contractors-Sub-contractors- Canteen contractors is sub contractor. .

Assessee entering into contract with another person for carrying out part of work undertaken. Deduction at 1% is proper and order of Commissioner (Appeals) was confirmed. (A.Ys. 2005-06 & 2006-07)

Dy. CIT v. Aban Offshore Ltd. (2012) 13 ITR 180 (Chennai)(Trib.)

S.194C:Deduction at source –Contractors-- Electricity Board - Additional transmission lines - Assessee is not liable to deduct tax at source on payment made to State Electricity Boards. [S. 201(1), 201(1A)]

Assessee made payments to State Electricity Boards for construction of transmission lines for providing power to Railway traction sub-station. Payment was made for necessary infrastructure by a person requiring electricity supply under section 46 of the Electricity Act, 2003 is not contractual payment. The payment does not tantamount to works contract hence, the assessee is not liable to deduct the tax at source. Accordingly the demand raised under section 201(1) and interest charged under section 201(1A) of the Act was deleted. (A.Ys. 2000-01 to 2005-06 & 2007-08)

Chief Project Manager, Railway Electrification, Ambala Cantt. v. ITO (2012) 67 DTR 48 / 144 TTJ 495 (Chd.)(Trib.)

S.194C: Deduction at source – Contarctors-–Aggregation- Proviso which was inserted with effect from 1-10-2004 for aggregation of payments of Rs. 50,000, does not have retrospective effect.

Amendment by Finance Act, 2004, with effect from October 1, 2004, insertion of proviso to section 194C(3), providing for aggregation of payments credited or paid exceeds Rs. 50,000 during the financial years, the assessee is liable to deduct tax at sources though the each payment is below Rs. 20,000. The Tribunal held that the proviso is not retrospective hence, the payments made before October 1, 2004 which are below Rs. 20,000 cannot be disallowed. (A. Y. 2005-06).

K. D. Manufacturing v. ITO (2012) 14 ITR 265 (Ahd.)(Trib.)

S.194C:Deduction at source- Contractors- Sub –contractor- Where lorries and trucks are hired for its own use TDS is not required to be deducted hence amount cannot be disallowed.(S.40(a)(ia).

On the facts of the case the assessee has hired the Trucks / lorries for transporting of the consignment booked by it under its own supervision and control with all responsibility and liabilities. Therefore hiring of Truck and lorries cannot be called to be work as per definition given in explanation 3 of section 194C of the Act, hence the assessee is not liable to deduct tax at source.(A.Y.2005-06)

Kranti Road Transport (P) Ltd v. Asst.CIT (2012) 50 SOT 15 (Visakha.)(Trib.)

S.194C: Deduction at source –Contract-Works contract- Payment for making diaries and catalogues is held not a works contract as no material supplied by the assessee.

Payment made to two parties for preparing diaries, catalogues and folders as per requirements of the assessee. It was held that as no material was supplied by the assessee, the same does not constitute work contract. Therefore, assessee not obliged to deduct tax at source. (A.Y.2007-08)

Dy. CIT v. Eastern Medikit Ltd. (2012) 135 ITD 461/71 DTR 241/146 TTJ 551/ 18 ITR 457 (Delhi)(Trib.)

S.194C:Deduction at source —Contract-Other party- Other party not privy to the contract between the assessee and the principal, hence no TDS is to be deducted for payment made to other party .

The provisions of Section 194C apply only when condition of "carrying out any work in pursuance of a contract" is fulfilled. In the instant case as per the agreement, the risk and responsibility of the carrying out contract work is on assessee and other party does not have privity to contract between the assessee and the principal. Therefore the payment made by assessee to the other party does not fall within the purview of Section 194C of the Act. (A.Y. 2007-08)

Bhail Bulk Carriers v. ITO (2012) 50 SOT 622/74 DTR 155 (Mum.)(Trib.)

S. 194C: Deduction at source – Work Contracts – agreement for lease of dumpers and JCBs only and not executing any work or contract – held not work contract and thus, not required to deduct tax u/s 195 and hence no disallowance u/s 40(a)(ia) [S. 40(a)(ia)]

The assessee paid lease rentals for taking dumpers and JCBs on lease from two companies. The Assessing Officer disallowed the rent u/s 40(a)(ia) on the ground that the lease rentals were paid towards transport contract/work contract for transportation of goods and moving and shifting of materials and thus the assessee defaulted in deducting TDS u/s 194C. It was held that the agreement was for lease of dumpers and JCBs only and not executing any work or contract. Thus, the lease agreement could not be classified as work or service contract and therefore assessee was not required to deduct tax while making payment of lease rental. (AY 2005-06)

Dy.CIT v. Raj Laxmi Stone Crusher (P) Ltd. (2012) 52 SOT 112 (Delhi) (Trib.)

S. 194H:Dedcution at source- Commission or brokerage- Discount – The discount made available to the licensed stamp vendors under the provisions of the Gujarat Stamps Supply and Sales Rules 1987 , does not fall within the expression "Commission" or "brokerage" under section 194H of the Act.

The assessee, an association of stamp vendors, bought stamps from the State Govt. at a discount. The department claimed that the stamp vendors were "agents" of the State Govt. and that the said discount was "commission or brokerage" and the State Govt. ought to deduct TDS u/s 194H. The assessee filed a Writ Petition to challenge the department's action. The Gujarat High Court upheld the assessee's plea that (a) title in the stamps passed to the vendors and that they were not "agents" of the State Govt. but were transacting on a "principal to principal" basis and (b) the discount available to the stamp vendors was not "commission or brokerage" so as to fall within s. 194H. On appeal by the department to the Supreme Court, held dismissing the appeal:

We are satisfied that 0.50% to 4% discount given to the Stamp Vendors is for purchasing the stamps in bulk quantity and the said discount is in the nature of cash discount. In the circumstances, we concur with the impugned judgement that the impugned transaction is a sale. Consequently, Section 194H of the Income-tax Act, 1961, has no application.

CIT v. Ahmedabad Stamp Vendors Association(2012) 348 ITR 378/210 Taxman 269(SC).

Editorial : *Decision of Gujarat High Court in Ahamedabad Stamp Vendors Association v. UOI (2002) 257 ITR 202 (Guj.)(High Court) is affirmed.*

S.194H:Deduction at source- Commission-Brokerage - Sale of milk and milk products – Agents - TDS is not deductible on sale of milk and milk products at concessionaires.

Assessee has sold the products to the concessionaires on a principal to principal basis ,that the concessionaries buy the products at a given price after making full payment for the purchases on delivery, that the milk and other products once sold to the concessionaires became their property and cannot be taken back from them, that any loss on account of damage, pilferage and wastage is to the account of the concessionaires and that in these circumstances the payment made to the concessionaires cannot be treated as "commission" for services rendered and consequently there was no liability on the part of assessee to deduct tax. Assessing Officer held that the relationship of assessee and concessionaries are agent hence liable to deduct tax at source. The view of Assessing Officer was followed by the Commissioner (Appeals). On appeal to the Tribunal, the Tribunal held that the real test to be applied is whether the property in the milk and products passed to the concessionaries at the time of delivery .On applying the test the Tribunal came to the conclusion that difference between the price at which the assessee sold the milk and other products to the concessionaries were to sell them to consumers was not liable to be treated as commission within the meaning of section 194H. On appeal to the High Court by revenue the Court also confirmed the view of Tribunal and held that sale of milk and milk products by assessee dairy to concessionaries /agents who hold the same from the booths owned by the assessee was on principal to principal basis and therefore assessee dairy was not liable to deduct tax at source under section 194H from the payments made to concessionaires. Appeal of revenue was dismissed. (A.Ys. 2004-05 & 2005-06)

CIT v. Mother Dairy India Ltd. (2012) 70 DTR 223/249 CTR 559 (Delhi)(High Court)

CIT v. Mother Dairy Food Processing Ltd. (2012) 70 DTR 223/249 CTR 559 (Delhi) (High Court)

S.194H:Deduction at source - Commission – Brokerage - Failure to deduct tax at source the defaulter is liable only for interest and penalty and not the tax.(S. 201(IA, Constitution of Infia , Art 226)

The assessee, a publisher of newspapers, gave 10-15% trade discount to advertising agencies as per rules of the Indian Newspaper Society. The AO held that the said discount constituted "commission" and that the assessee ought to have deducted TDS u/s 194H and was liable as assessee-in-default u/s 201. The assessee filed a Writ Petition to challenge the said order. Held by the High Court:

(i) Though the assessee has an alternate remedy of appeal against a Sec. 201 order, a writ is maintainable if the authority has wrongly assumed jurisdiction. Also, a huge demand has been raised and multiplicity of proceedings will increase the assessee's sufferings even though s. 194H is clearly not applicable;

(ii) To constitute "commission or brokerage" u/s 194H, it is necessary that person receiving payment should be acting as agent and rendering services. The relationship between the assessee and the advertising agency in accordance with the INS Rules is that of a principal to principal because (a) the assessee has no control over the advertising agency, (b) the advertising agency is responsible for payment even if the advertiser has not paid the advertising agency, (c) the advertising agencies are rendering service to the advertisers/ customers & other terms. The "discount" was not "commission";

(iii) The deductor cannot be treated an assessee in default till it is found that the assessee (recipient) has also failed to pay such tax directly. To declare a deductor who failed to deduct the tax at source as an assessee in default, condition precedent is that assessee has also failed to pay tax directly. However, even then, the short deducted tax cannot be realised from the deductor and he is at best liable for interest and penalty only;

(iv) The Department's practice of hurriedly passing assessment orders shortly before the limitation period is about to expire and justifying this practice by saying that there was shortage of time and hence facts could not be verified properly is not appreciated because it puts citizens to great harassment as exorbitant demands are raised and it breaches the principles of natural justice. (A.Y. 2009-10, 2010-11)

Jagran Prakashan Ltd. v. DCIT (TDS)(2012) 345 ITR 288/73 DTR 233/251 CTR 65/ 209 Taxman 92(All.) (High Court)

S.194H:Deduction at source – Commission – Brokerage - In absence of principal-agent relationship, payment, though called "commission", not covered. (S. 201)

The assessee obtained a bank guarantee and paid 'bank guarantee commission'. The Assessing Officer &CIT(A) took the view that since the payment was characterized as "commission" it fell within the ambit of section 194H and the assessee ought to have deducted TDS. The assessee was held liable as assessee-in-default under section 201. On appeal by the assessee, held reversing the Assessing Officer and Commissioner (Appeals):

Section 194H defines the expression "commission or brokerage" to include any payment received by a person acting on behalf of another person for services rendered or for any services in the course of buying or selling of goods. Applying the principle of noscitur a sociis & ejusdem generis, the expression "commission" has to take its colour from the expression "brokerage". As the expression "brokerage", in common parlance and in law, means 'fees or commission given to or charged by a broker', the expression 'commission' must be confined to a payment made to agents etc for effecting sales and carrying out business transactions and cannot extend to payments which are for services rendered or products offered on a principal to principal basis. A principal-agent relationship is a sine qua non for invoking the provisions of section 194H. As there is no principal agent relationship between a bank issuing the bank guarantee and the assessee, the payment, though termed "commission", is not covered by section 194H (SRL Ranbaxy Ltd.vs ACIT (2012) 143 TTJ 265 (Delhi)(Trib.) referred). (A.Y. 2004-05)

Kotak Securities Limited v. Dy. CIT(2012) 14 ITR 495/ 50 SOT 158/73 DTR 265 / 147 TTJ 443(Mum.)(Trib).

S.194H:Deduction at source-Commissioner-Brokerage- Derivatives are securities therefore tax at source is not deductible.(S. 40(a)(ia))

Tribunal held that as per definition of derivative in section 2 sub section (ac) read with Section 2 of sub section (h) (ia) the derivates are securities and therefore covered by the exception provided in Explanation (1) to Section 194H. Hence the brokerage paid cannot be disallowed under section 40(a) (ia). Therefore tax at source is not applicable (A.Y. 2005-06)

Dy CIT v.Noble Enclave & Towers (P) Ltd (2012) 50 SOT 5 (Kol.) (Trib.)

S.194H:Deduction at source-Discount-Principal-Agency-Amount retained by collection centers is not commission hence provisions of section 194H cannot be applied.

Amount of discount retained by the collection centres is not `commission' paid by the assessee to the collection centres and consequently section 194H does not apply to such amounts. Since assessee has not paid any amounts to the collection centres, provisions of sec. 194H could, not have been met.Existence of principal – agency relationship is a sine qua non for invoking section 194H. (A.Y. 2006-07)

SRL Ranbaxy Ltd v. Addl. CIT, (2012) 143 TTJ 265 / 65 DTR 185 (Delhi) (Trib.)

S.194H: Deduction at source- Commission- Credit card companies-Commission retained by credit card companies out of amounts paid to merchant establishment is not liable for deduction of tax at source. [S. 40(a)(ia)]

The assessee company is engaged in business of direct retail trading in consumer goods claimed deduction in respect of commission paid to credit card companies. The Assessing Officer disallowed the commission under section 40(a)(ia) on the ground that the assessee failed to deduct tax at source. In appeal Commissioner (Appeals) allowed the appeal by observing that sale made on basis of a credit card is clearly a transaction of the merchant only and credit card company only facilitates the electronic payment , for a certain payment for a certain charge. The commission retained by the

credit card company is therefore in the nature of normal bank charges and not in the nature of commission/brokerage for acting on behalf of the merchant establishment. Therefore not liable to deduct tax at source. On appeal by revenue the Tribunal also confirmed the order of Commissioner (Appeals).(A.Y. 2007-08)(ITA no 905/Hyd.) 2011/ dated 10-4-2011 Bench 'D')

DCIT v. Vah Magnan Retail (P) Ltd (2012) BCAJ –July P. 56 (Mum.)(Trib.)

S.194I: Deduction at source- Rent-Co-owners-Each of the co-owners of building had definite share in the premises and individual payment being less than 1,20,000 per annum the assessee cannot be treated to be in default for non-deduction of tax at source. [S 26, 201(1), 201(1A)]

The property is owned by 15 co-owners and their shares definite. The property was let out to Bank ie.assessee.The assessee bank is paying rent each co-owner separately and individual payment is less than 1,20,000 per annum. The Assessing Officer treated the payment to AOP and as it failed to deduct tax at source treated the assessee in default. Appeal of the assessee was allowed by Commissioner (Appeals) , which was confirmed by the Tribunal. Revenue filed an appeal before the High Court. The High Court held that it is not necessary that there should be a physical division of property by meats and bounds in order to attract the provisions of section 26. The provision of section 26 come in to play the movement the share of each co-owner in the property is determined and ascertainable. On the facts assessee bank is paying rent to each of the 15 co-owners of building separately as per their definite share in the premises and individual payment being less than Rs 1,20,000 per annum, the assessee cannot be treated to be in default for non-deduction of tax at source under section 194I (A.Ys 1996-97 to 2002-03)

CIT v. Senior Manager , State Bank of India & Anr (2012) 75 DTR 313/252 CTR 523 (All.)(High Court)

S. 194I: Deduction at source –Rent- landing and parking charges payable to Airport Authority of India can be held to be rent hence provision of section 194I is held not applicable.

Landing and parking charges paid by the assessee to Airport Authority of India do not amount to rent within the meaning of S. 194-I. Charges levied are in the nature of fee for the services offered rather than in the nature of rent for the use of the land.(A.Y. 1997-98 to 1999-2000

CIT v. Singapore Airlines Ltd(2012) 252 CTR 429 / 76 DTR 420 (Mad.)(High Court)

S.194-I: Deduction at source- Rent-Enhanced rent- Liability to deduct tax at source arises only when it pays rent or debits whichever is earlier and not on the basis of enhanced rent demanded by the land lord.

The landlord demanded enhanced lease rent. The assessee made a provision in the books of account, however in the computation of income the assessee disallowed the provision debited in the profit and loss account. The later year the enhanced rent was settled at lower figure. The assessee paid the amount along with interest and deducted at source. The Assessing Officer demanded the interest on delayed payment of along with interest. On appeal, the Tribunal held that a mere entry in the books of account will not determine the income or expenditure of assessee. The Tribunal further held that liability to deduct tax at source arises only when it pays rent or debits whichever is earlier and not on the basis of enhanced rent demanded by the land lord. (A.Y. 2007-08) (ITA no 667/M/ 2010 dated 20-7-2012 Bench 'A')

ITO v. Hotel Parag Ltd (2012) Income Tax Review –Sept P. 90(Mum.)(Trib.)

S.194I:Deduction at source – Rent- Payment to State Electricity Board-Transmission of electricity- Not liable to deduct at source.

Payments made by assessee, a State Electricity Board, to PGCIL for transmission of power purchased by it from NTPC was made for the services of transmission of electricity and not for use of transmission wires per se in as much as these transmission lines are used not only for transmission of electricity to the assessee but also for transmission of electricity to various other entities, and the assessee has no say in the manner in which such transmission lines can be controlled or used by PGCIL and therefore section 194I has no application in respect of impugned payments for transmission of electricity. (A. Ys. 2006-07 to 2009-10)

Chhattisgarh State Electricity Board v. ITO (2012) 65 DTR 1/ 143 TTJ 151/14 ITR 91/ 50 SOT 33(Mum.)(Trib.)

S. 194I: Deduction at source – Rent – Transmission charges – Payment made was neither in the nature of fees for technical services nor rent, therefore, assessee not liable to deduct TDS from the transmission charge.
In the instant case, the assessee company engaged in distribution of electricity to the local areas assigned to it was purchasing electricity from power generation company and distributed the same by using the transmission network of the transmission company. It was held that the transmission charges paid to transmission company was neither in the nature of fees for technical services nor rent and, therefore, assessee was not liable to deduct TDS from the transmission charge. (A.Y. 2005-06 to 2007-08)
Bangalore Electricity Supply Co. Ltd. v. ITO (2012) 149 TTJ 102 (Bang.) (Trib.)
ITO v. Bangalore Electricity Supply Co. Ltd.(2012) 149 TTJ 102 (Bang.) (Trib.)
S.194I: Deduction at source – Rent –No TDS where lessor- lessee relationship does not exist.
Assessee was a 100% subsidiary of its holding company 'M'. Holding company took an office premises on rent and permitted assessee to use of portion of said premises. Assessee reimbursed certain amount of rent to holding company without deducting TDS. It was held that where there is no lessor-lessee relationship between holding company and assessee, provisions of S. 194I were not applicable. (A.Y. 2008-09)
ACIT v. Result Services P. Ltd. (2012) 52 SOT 598 (Delhi)(Trib.)

S.194J:Deduction at source- Technical services- School contractor-Payments made by school to contractors for training students in horse riding- Liable to deduct tax at source.(S. 194C)
The assessee entered into a contract with Mustang Riding School to provide five horses for Rs. 10,000/- per horse per month along with qualified and experienced instructor to teach the children horse riding. The school deducted the tax at source as per section 194C of the Income-tax Act. The Assessing Officer held that it was fee for professional or technical services to the assessee and therefore,invoked section 194J. The order was upheld by the Commissioner (Appeals) and Tribunal. (A.Ys. 2008-09 & 2009-10)
Lotus Valley Educational Society v. ACIT (2012) 13 ITR 61 (Delhi)(Trib.)
S.194J:Deduction at source –Technical fees-Leaseline charges held not to be fees for technical services.
Following decision of Angel Broking Ltd. (2010) 3 ITR (Trib) 294 (Mum) it was held that the leaseline charges are not in the nature of fees for technical services as per Section 194J of the Act. (A.Y. 2006-07)
ACIT v. Omniscient Securities Pvt. Ltd. (2012) 15 ITR 82 (Mum.) (Trib.)
S.194J:Deduction at source – Fees for professional or technical services – Rent - Transmission charges – Transmission charges paid is neither fees for technical services nor rent hence not liable to deduct tax at source. (S.194I)
Transmission charges paid by the assessee, an electricity distribution company, to the transmission company neither in nature of fees for technical services nor rent and, therefore the same do not come under the purview of Section 194J and 194I, and thus, assessee not liable to deduct TDS from the transmission charges. (A.Ys. 2005-06 to 2007-08)
Bangalore Electricity Supply Co. Ltd. v. ITO (2012) 71 DTR 186/149 TTJ 102 (Bang.)(Trib.)
ITO v. Bangalore Electricity Supply Co. Ltd.(2012) 149 TTJ 102 (Bang.) (Trib.)

S.194J:Deduction at source – Fees for professional or technical services- State Load Dispatch Centre charges is not in the nature of fees for technical services hence not liable to deduction of tax at source.
In the said case, the assessee was granted distribution and retail supply of power by Karnataka Electricity Regulatory Commission. In pursuance of the mandate of Electricity Act, 2003, the government of Karnataka formed the State Load Dispatch Center (SLDC) for smooth flow of operations amongst the power generation company. It was held that the provisions of S. 194J are not attracted to SLDC charges paid by the assessee, a power distribution company as the assessee or its employees do not receive or derive any benefit of technical nature from SLDC in their sphere of work. The said charges paid by it are only reimbursement of actual expenses, and therefore, no deduction of tax was to be made thereon. (A.Ys. 2005-06 to 2007-08)
Bangalore Electricity Supply Co. Ltd. v. ITO (2012) 71 DTR 186. 149 TTJ 102 (Bang.)(Trib.)

S.194J: Deduction at source- Fees for professional or technical services- Payment of transmission and wheeling charges to electricity transmission company.

Applicant is engaged in the business of distribution and supply of electricity to customers. Production is carried out by the generating company, another entity, and transmission to the applicant is made through the transmission system network of the transmission company, RVPN . It is not possible to accept the argument that no rendering of technical services is involved in maintaining proper and regular transmission of electrical energy, professional and technical personnel ensure regular and consistent transmission of electrical energy at the grid voltage at the distribution point of the applicant .Transmission involves rendering of technical services and the consideration paid towards transmission charges partakes the character of fees for technical services – Thus, the transmission and wheeling charges paid by the applicant to RVPN are in the nature of fees for technical services and the applicant is obliged to withhold tax thereon under s. 194J.

Ajmer Vidyut Vitran Nigam Ltd. In re (2012) 76 DTR 209 / 252 CTR 467 (AAR)

S.194J: Deduction at source- Fees for professional or technical services- Payment of State load despatch centre charges to electricity transmission company.(S.194C)

State Load Despatch Centre (SLDC) is responsible for optimum scheduling and despatch of electricity within the state in accordance with the contracts entered into with the licensees and generating companies. It has to monitor grid operations, keep accounts of the quantity of electricity transmitted through the State grid and exercise supervision and control over the transmission system. Its main duty is the general co-ordination of production and transmission of electricity for an even distribution. Considering the nature of obligation placed on the centre and the role it performs, it cannot be said that it is rendering any technical services to the applicant. Thus, the fee paid to the centre does not qualify as fees for technical services. It appears to be more of a supervisory charges. Therefore, no withholding of tax in terms of S.194J or 194C is called for on the said charges.

Ajmer Vidyut Vitran Nigam Ltd. In re (2012) 76 DTR 209 / 252 CTR 467 (AAR)

S.194LA: Deduction at source- Compensation on acquisition of certain immoveable property-Provision is held to be Constitutionally valid only when compensation was paid tax had to be deducted , petition was dismissed.

The petitioners were aggrieved by the action on the part of the respondents in deducting tax at source u/s. 194LA while paying the amount of compensation on acquisition of the land belonging to the petitioners. The petitioners had also challenged the constitutional validity of sec. 194LA of the I.T. Act. 1961.

It was held that the question of deducting tax at source arises at the time of making payment. In the instant case, compensation was paid on 28-4-2010 and on that day, sec. 194LA was on the statute book and, therefore, tax had to be deducted while making the payment of compensation.

The object of sec. 194LA as per the CBDT Circular No. 5 of 2005, of 2005 dated 15-7-2005(276 ITR (St.) 151) is to curb the tendency of evading taxes by not reporting the income comprised in the compensation received on acquisition of immovable property. Sec. 194LA does not determine the tax liability of the person receiving the amount of compensation but it merely requires the person paying the compensation to deduct certain percentage of the sum payable as compensation towards the tax liability of the recipient that would be determined in the assessment proceedings. Therefore, the argument that sec. 194LA purports to impose tax on the cost of the land acquired under the Land Acquisition Act is without any merit. Consequently, the challenge to the constitutional validity of sec. 194LA must fail. Petition was dismissed.

Leela Bhagwansing Advani v. Union of India (2012) 209 Taxman 356 (Bom.)(High Court)

S.195:Deduction at source – Non-resident – Agent-Business connection-Amounts not deductible- Not liable to deduct at source. [S. 40(a)(i)]

Assessee has paid sales commission to its holding company Eon Technology UK. The Court held that, when a non–resident agents operates outside the country, no part of income arises in India, and since payment is remitted directly abroad, and merely because an entry in the books of account is made in India, it does not mean that non-resident has received any payment in India, therefore, assessee is not liable to deduct tax at source hence, no disallowance can be made by applying the provision of section 40(a)(i). (A.Y. 2007-08).

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

S.195:Deduction at source-Non-resident- Fees for technical services- "make available" technical knowledge, mere provision of service is not enough; the payer must be enabled to perform the service himself, hence the assesse is not liable to deduct tax at source.- DTAA- India-Nether land.(S.90, 201,Art 12)

The assessee, engaged in prospecting and mining for diamonds entered into an agreement with a Netherlands company for conducting air borne survey and providing high resolution geophysical data. The AO held that the consideration was chargeable to tax as "fees for technical services" under Article 12 of the India-Netherlands DTAA and held the assessee liable u/s 195 & 201 for failure to deduct TDS. This was reversed by the CIT (A) & Tribunal on the ground that though the Dutch company had performed services using technical knowledge and expertise, such technical experience etc had not been "made available" to the assessee. On appeal by the department to the High Court, Held dismissing the appeal:

Article 12(5) of the DTAA defines "fees for technical services" to mean payments in consideration for the rendering of any technical or consultancy services "which make available technical knowledge, experience, etc or consist of the development and transfer of a technical plan or technical design. To be said to "make available", the service should be aimed at and result in transmitting technical knowledge etc so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into terminology "making available", the technical knowledge, skills" etc must remain with the person receiving the service even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider has gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. On facts, while the Dutch company performed the surveys using substantial technical skills, it has not made available the technical expertise in respect of such collection or processing of data to the assessees, which the assessee can apply independently and without assistance and undertake such survey independently. Consequently, the consideration is not assessable as "fees for technical services" (AAR Rulings in Perfetti Van Melle Holding, Shell India&Areva T&D distinguished)(A.Y. 2004-05)

CIT v. De Beers India Minerals Pvt Ltd (2012)346 ITR 467/ 72 DTR 82/208 Taxman 406(Karn.)(High Court)

S.195: Deduction at source- Income deemed to accrue or arise in India- Amounts not deductible- Reimbursement of expenses of global management expenses, communication Uplink charges and other expenses provisions of neither section 195 nor 194J are applicable because such payments are not chargeable to tax at all hence cannot be disallowed .(S 9, 40(a)(i), 194J, 197)

The assessee is in the business of supplying chain, management, logistics and freight forwarding that is movement of goods and cargo with in India or outside by road , rail air or ship. To undertake these activities , the assessee company has arrangement with its parent company which is foreign company for rendering global management services and VST uplinking enabling it to have global communication net work. The Assessing Officer did not dispute the genuiness of these payments but disallowed the expenses on the ground that while remitting the aforesaid payment on its parent company the assessee had failed to deduct tax at source hence the he disallowed the payment by applying the provision of section 40(a)(i). On appeal the disallowance was deleted by the Commissioner (Appeals) and Tribunal. On appeal by the revenue the High Court following the ratio of decision in Van Oord ACZ India (P) Ltd v. CIT (2010) 323 ITR 130 (Delhi) (High Court), held that the assessee company has paid Reimbursement of expenses of global management expenses, communication Uplink charges and other expenses provisions of neither section 195 nor 194J are applicable because such payments are not chargeable to tax at all hence cannot be disallowed .(A.Y. 2004-05)

CIT v. Expeditors International (India) (P) Ltd (2012) 209 Taxman 18 (Delhi) (High Court)

S.195:Deduction at source- Non-resident-Production of mineral oil- Not liable to deduct at source. [(S. 40(a)(i), 44AB)]

The assessee had during the relevant previous year, paid for offshore drilling services and machinery repairs /rentals varying amounts to M/s. International Tubular F2E and International Off shore Management both of which were non–resident entities. On such payments, the assessee deducted tax at 4 percent considering the, services rendered by the non-residents entities fall under section 44B of the Act. As per assessee only 10 percent, of the receipts could be deemed income and 40 percent of such 10 percent works out 4 percent. However, Assessing Officer was of the opinion that the assessee was required to deduct at 40 percent, on the gross sum paid to such entities under section 195 of the Act. As the assessee failed to deduct the tax at prescribed rate he disallowed the amount under section 40(a)(ia). In appeal Commissioner (Appeals) held that the assessee had taken a bona fide view hence disallowance was not called for. On the facts the assessee had deducted the tax at specified rate on 10 percent, of the bare boat charges paid to Norway company who is non-resident, computed as per the provisions of section 44BB. Therefore, there is no violation of the provisions of section 195, hence no disallowance can be made under section 40(a)(ia) of the Act.(A.Ys. 2005-06 & 2006-07)

Dy.CIT v. Aban Offshore Ltd. (2012) 13 ITR 180 (Chennai)(Trib.)

S.195:Deduction at source-Non-resident-Reimbursement of expenses- Clearing and forwarding agent- Not liable to deduct at source.. (S. 40(a)(ia), 172, 194C)

Reimbursement of payment towards sea freight transport, CCI charges, steam freight charges and REPO container charges made by the assessee to C&F agents who have already made the payment on behalf of the assessee is covered under section 172 and not by section 194C or 195 and the agent having already deducted TDS from the transportation charges and shipping bill before making these payments to the principal which have been reimbursed by the assessee, assessee was not liable to deduct tax at source from such payments and consequently, same could not be disallowed by invoking the provisions of section 40(a)(ia).(A.Y. 2005-06)

ACIT v. Minpro Industries (2012) 65 DTR 113/ 143 TTJ 331 (Jd.)(Trib.)

S.195:Deduction at source - Non-resident – Payee is not assessed-Under section 195 tax deduction at source liability is on payer if payee is not assessed.(S.201(1)(201(IA))

The assessee made a public issue of Global Depository Receipts (GDR) for which it engaged international lead managers like Jardine Fleming, Merrill Lynch etc and paid management and underwriting commission of Rs. 7.68 crores without deducting TDS. The Assessing Officer & CIT(A) held that the said commission constituted "fees for technical services" and that the assessee ought to have deducted TDS under section 195. The assessee was held to be in default under section 201. Before the Tribunal, the assessee argued that as no action has been taken by the department against the payees and the time for taking such action had expired, no order under sections 195 & 201 could be passed. Held by the Tribunal:

No order under section 201(l) or (1A) holding the payer to be in default can be passed where the Revenue has not taken any action against the payee and the time limit for taking action against the payee under section 147 has expired. On facts, the admitted position is that no assessment has been made in the hands of the payee in respect of the sums received from the assessee in respect of GDR issues. Similarly no proceedings have been taken against it till date for assessing such income. The time limit for issuing notice under section 148 has also come to an end. As the time limit for taking action against the payee under section 147 is not available, and there is no course left to the Revenue for making the assessment of the non-resident, exconsequenti, no lawful order can be passed against the assessee either under section 201(1) or (1A) (Mahindra and Mahindra Ltd v. Deputy CIT(2009) 313 ITR 263 (Mum.)(SB)(AT)(SB) followed).(A.Y. 1998-99)

Crompton Greaves Ltd. v. Dy. CIT (2012) 50 SOT 562/75 DTR 292/17 ITR 151/149 TTJ 484(Mum.)(Trib.)

S.195:Deduction at source - Non-resident - Other sums - Income deemed to accrue or arise in India - Foreign agent – Commission - Business connection - Permanent establishment. (S. 4(1), 40(a)(ia), 195).

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

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

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

S.195: Deduction at source –Income deemed to accrue or arise in India- Business profits - DTAA –India-Switzerland- As there is no PE in India, assessee is not liable to deduct tax at source in respect of remittance towards advertising expenses.(S.9 , Article 7)

The assessee company was engaged in manufacturing and trading of pharmaceuticals bulk drugs and formulations mainly for exports and research and development in the field of pharmaceuticals. The assessee remitted towards advertisement expenses certain amount to Russian advertising agencies through its parent Swiss company in respect of advertisement campaign launched in Russia for introduction of medicine ' Dlianos. Thus, in the view of the fact that there was a DTAA between India & Switzerland and India & Russia , the amount remitted by assessee towards advertisement could be assessed as business profits as per section 9, but having regards to fact that non- resident advertising company had no PE in India, amount in question could not be brought to tax in India. Thus, assessee was not liable to deduct TDS u/s 195 as amount in question was not itself chargeable to tax. (AY 1998-99 & 1999-2000)

Dy. CIT v. Sandoz (P.) Ltd. (2012) 137 ITD 326 (Mum.) (Trib.)

S. 195: Deduction at source – obligation to withhold tax – Obligation arises only if payment is chargeable to tax in hands of non-resident recipient in India.

The obligation of tax deduction at source arises under this provision arises only if payment is chargeable to tax in hands of non-resident recipient in India. Therefore, merely because a person has not deducted tax at source from remittance abroad, it cannot be inferred that person making remittance abroad, it cannot be inferred that person making remittance has committed a failure in discharging his tax withholding obligation. (A.Y. 2006-07)

Dresser Rand India (P.) Ltd. v. Addl. CIT (2012) 53 SOT 173 (Mum.) (Trib.)

S.195:Deduction at source- Non –resident-Permanent establishment- Fees for technical services- Assessee is liable to deduct tax at source as there exists a service PE-DTAA-India-UK-Canada.(S.9 (I)(vii),90, Art. 5.2)

Applicant , an Indian company , is a subsidiary of an overseas entity for co-ordinating the services of various vendors in India to whom it has outsourced some activities needed by it . Overseas entity deputed or seconded some of its employees to the applicant to render their services in India . The salaries were paid by overseas entity. The applicant has reimbursed the remuneration paid by the overseas entity .The Authority for Advance Ruling held that since the employees are rendering services to their employer in India by working for a specified period for subsidiary or associate enterprise of their employer , there exists a service PE within the meaning of Article 5.2 of the Indo –UK. DTAA and Indo-Canada DTAA, therefore income is deemed to accrue or arise in India and the applicant is liable to deduct tax at source under section 195.

Centrica India Offshore (P) LTD , In re (2012)348 ITR 45/ 68 DTR 297/ 206 Taxman 545/249 CTR 11 (AAR)

S.195:Deduction at source—Non-resident-Interest-Income on sale of CCDs - CCDs in the nature of debt until converted therefore income recharacterised as interest income hence benefit under India-Mauritius DTAA is held not applicable and liable to deduct tax treating the same as interest.(S.45, 90, Art 11)

Z, the applicant and an Indian Company V (hereinafter referred as "V") invested in equity shares and CCDs of Company S (hereinafter referred as "S"), wholly owned subsidiary of V.Under the investment agreement executed between S, V and Z, the CCDs were mandatorily convertible into equity shares upon the expiry of 72 months from the investment date; additionally, prior to the mandatory conversion date, Z had a put option to sell specific number of equity shares and CCDs to V and V had the call option to purchase the said shares and CCDs from Z. V exercised the

call option and purchased the CCDs from Z. The tax officer however rejected the application and asked V to deposit the withholding tax on this transaction. Z subsequently approached the AAR for a ruling on the issue.
AAR held that CCD was in the nature of a debt instrument and the obligation to repay the principal and an interest component were embedded in the concept of debt. The AAR further concluded that 'interest' denotes any type of income that become payable on a debenture. On review of the investment agreement the AAR concluded that S had no power to exercise any management control over its business and that for all practical purposes V and S were a single entity.Additionally, V was required to share with Z, its financial statement, debt servicing status etc.
In light of such provisions, the AAR observed that on a close reading of the investment agreements, it was apparent that the commitment to repay the debt was on V, the parent of S and not S and therefore, the purchase of CCDs by V from Z should be considered repayment of the debt such that income arising to Z should be treated as interest income.
Z, In re (2012) 345 ITR 11 / 69 DTR 329/249 CTR 225/206 Taxman528 (AAR)

S.195:Deduction at source – Non- resident (India – Netherland DTAA) – Make Available – recipient of services must be conveyed the right to continue the practice put into effect and adopted

The term "Make Available" means that the recipient of the services should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or know-how in future on his own. Where the expertise in running the industry run by the group is provided to Indian entity in group to be applied in running business, the employees of Indian entity get equipped to carry on that business model or service model on their own without reference to service provider when service agreement comes to an end. This would not be termed as make available as the recipient must also be conveyed specially the right to continue the practice put into effect and adopted under agreement on its expiry.
Perfetti Van Melle Holdings B.V. (2012) 342 ITR 200/246 CTR 8 / 204 Taxman 166 / 65 DTR 12 (AAR)

S.195:Deduction at source – Non- resident (India – Netherland DTAA) - services giving knowledge and experience in the nature of assistance to team of Indian company – Taxable in India

The applicant is Netherland company, engaged in the manufacture and sale of sugar confessionary and gum. The services giving knowledge and experience of the confectionary industry to an Indian company were technical in nature . The agreement clearly shows that the services were in the nature of assistance to team of Indian company. The recipient of the services was bound to apply specified services to optimize the profit to give maximum royalty based on turnover. Therefore, the services under the service agreement when read with the trademark and technology and know-how licence agreement, fell within the purview of article 12(5) of the DTAA. Therefore the payment was taxable as per DTAA and Indian Company is liable to withhold taxes under Section 195 of the Act.
Perfetti Van Melle Holding B.V., In re (2012) 342 ITR 200/246 CTR 8 / 204 Taxman 166 / 65 DTR 12 (AAR)

S.195:Deduction at source –Non-resident – Other sums - Interest- Interest payment to Swedish company is not taxable in India hence the assessee has no obligation to with hold the tax .

The assessee is engaged in the business of providing telecommunication services across different circles in India . During course of its business, it entered in to a contract with Ericsson India (P) Ltd. and Ericsson AB for procuring cellular telecommunication equipment, soft ware services and documentation. To facilitate the financing for such procurements, the assessee availed the of a loan facility from ABN Amro Bank Stockholm Branch and NORDEA Bank AB Sweden. Loans taken from Swedish Banks guaranteed by Swedish Export Credits Guarantee Board. The assessee approached the Authority for advance ruing on the plea that all the agreements relating to the transaction were negotiated and concluded outside India. It takes the stand that loan having been guaranteed by EKN , the interest paid under the transactions is not liable to charge to tax in India under the income-tax Act in view of article 11(3) of Double Taxation Avoidance Convention Between India and Sweden. The Authority held as under
(i) That guaranteeing a loan is not the same as extending a loan or endorsing a loan. Thus, on the basis of article 11(3) of the DTAA between India and Sweden, the applicant could not claim that the interest paid or payable could not be taxed in India.
(ii) That in view of the Protocol to the DTAA in which there was a most favoured nation clause covering interest dealt with in article (11)(3) of the DTAA , even a loan or credit guaranteed by EKN would come within the purview of the exemption contained in article 11(3) of the DTAA. Therefore, the payment of interest by the applicant to SEK through

NORDEA Bank AB was not taxable in India under article 11 (3) of the Double Taxation Avoidance Agreement between India and Sweden.

(iii) That since it was claimed that SEK had no permanent establishment in India, there would be no obligation on the applicant to with hold taxes under section 195 of the Income-tax Act, 1961, on the interest payable on the transaction.

Idea Cellular Limited (2012) 343 ITR 381/248 CTR 124 / 206 Taxman 238 / 68 DTR 10 (AAR)

S.195:Deduction at source - Non-resident – Other sums – DTAA-India-Japan- Informatics software and services- Royalty- Payment received from the sale of software products to the end users/customers through its independent reseller in India is royalty ,hence tax is deductible. (Art. 7, 12)

The applicant, a Japanese scientific informatics software and services company for life sciences, chemical and material research and development was a subsidiary of a company incorporated in the U.S.A.. It had a liaison office in India which acted as a co-ordinator. No sales were carried through the liaison office. The applicant sought an advance ruling on the questions whether payment received by the applicant from sale of software products to end users / customers through an independent resellers in India were taxable as business profits under Article 7 of the DTAA between India And Japan, whether payments received by the applicant from sale of software products to end user / customers through its independent reseller in India would not constitute "royalties and fees for technical services" as defined in article 12 of the DTAA and whether any tax needed to be deducted by the customers while making remittances to the applicant as consideration. The Authority ruled that:

(i) That what was paid by the reseller to the applicant and for updates and maintenance was royalty and not business income covered by article 7 of the DTAA.

(ii) That the payments received by the applicant from the sale of software products to the end users/customers through its independent reseller in India were royalty as defined in article 12 of the DTAA.

(iii) That tax needed to be deducted by the customers while making the remittances to the applicant as consideration for the software supplied to them.

Acclerys kk (2012) 343 ITR 304 / 248 CTR 162 / 68 DTR 206 (AAR)

S.197: Deduction at source- Certificate for lower rate- Charitable Trusts- High Court passed the strictures against tax administration for "Dirty Games" with the citizens of the country to coerce them in making payments which the citizens were not legally obliged to make.

The assessee, a charitable institution whose income was exempt u/s 11, was granted a certificate of Nil TDS u/s 197 in the earlier years. For FY 2009-10, the assessee's application for a s. 197 certificate was not processed and so the assessee filed a Writ Petition pursuant to which the Dept. agreed to consider the application and pass an order. The AO thereafter passed an order stating that since the FY 2009-10 had already lapsed, the s. 197 certificate for that FY could not be issued. The assessee filed a Writ Petition to challenge the rejection. The department filed an affidavit in which it claimed, for the first time, that the rejection was because there were demands outstanding against the assessee. Held by the High Court:

The reason given in the affidavit regarding the arrears outstanding against the assessee is not correct because there were in fact no demands due pursuant to the Tribunal's order. There is inordinate delay and serious laches on the part of the AO in dealing with the assessee's application & there is no explanation why the application submitted on 22.06.2009 was taken up for the first time for consideration towards the fag end of FY 2009-10 and rejected on a wrong ground of non-payment of outstanding dues. Such action is in contravention of CBDT's Circular No.F.No.20/23/67 IT(A-I) which states that application filed by charitable trusts for issuance of Nil/low TDS certificates should be expeditiously processed. The rejection is also in violation of the Court's earlier order where the department did not raise the stand that the s. 197 certificate could not be issued as the FY was over and instead agreed to consider the issue of the certificate. Obviously the department's action are not bona fide and does not speak well of its attitude. Mala fides are writ large because new grounds supporting the rejection have been taken in the counter affidavit though such action is not permissible as per Mohinder Singh Gill vs. CEC AIR 1978 SC 851. The Department cannot take advantage of its own inaction and lapses and say that the certificate cannot be issued as the FY is over. Such action would lead to unnecessary complication for the assessee and the parties dealing with it. As held in Dabur India Ltd State of UP AIR

1990 SC 1814, the Govt. cannot be permitted to play "dirty games" with the citizens of the country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Govt., it should take appropriate steps, but it should not take extra legal steps or adopt the course of maneuvering. The Dept. has to be careful in future not to indulge in such avoidable circumstances which create an impression that the intention of the Department is not to help the assessee but to harass them. This matter needs to be inquired into by the concerned CCIT and appropriate action should be initiated against the erring officer. (A.Y.2009-10)

Management Committee Paradeep Port v. ITO (2012) 252 CTR 363/76 DTR 1(Orissa)(High Court)

S.199:Deduction at source- Credit for tax deducted- Income assessed-Assessee is entitled to credit on TDS certificate only in the assessment year in which income on which tax is deducted is assessed.

The assessees were holding cumulative terra deposits in banks entitling them for interest on deposits which was periodically credited by the bank in the deposit account . As required under section 194A the bank recovered tax at source on interest credited in the deposit account of the assessees. Assessees claimed credit of tax based on TDS certificates issued by Banks however the interest income was not offered to tax. Assessing officer has not allowed the credit for tax deducted .Before Commissioner (Appeals) it was contended that only TDS deducted may be assessed as income for the relevant year and entitled to refund of balance amount of tax deducted. Commissioner (Appeals) held that even if interest is not assessable in the assessment years concerned the assessees are entitled to credit for tax deducted at source in the assessment years relevant previous years during which recovery of tax and remittance of the same was made to banks . On appeal filed by the revenue the Tribunal held that the assessees are entitled to full credit of tax in the assessment years concerned , no matter interest income on which deduction has been made is not returned or assessed in those assessment years . On appeal by revenue to High Court , the High Court held that as per section 199 read with Rule 37BA , assessee is entitled to credit based on TDS certificate in the assessment year in which income from which tax is deducted is assessed. Accordingly the departmental appeal was allowed.(A.Y.1997-98 to 2000-01)

CIT v. Pushpa Vijoy (Smt) & Ors (2012) 67 DTR 354 / 206 Taxman 22 /Vol. 42 Tax. L R 301 (Ker.) (High Court)

S.199: Deduction at source- Credit for tax deducted-Year of credit- Rent-Credit to be given in the year of receipt.(S.194I)s

One 'G' desired to take the franchisee of 'T', a brand belonging to the assessee-company. For said purpose, the franchisee needed to take some property on rent. The property which was so chosen belonged to five members of'S' family. Since the landlords did not know the franchisee very well, they did not prefer to enter into a direct agreement with 'G'. As such, a rent agreement was executed between 'A' Ltd., a sister-concern of the assessee and the franchisee in terms of which 'G' paid the rent to the assessee after deduction of tax at source. The assessee paid over the gross amount of rent to 'A' Ltd., on gross basisand 'A' Ltd., paid the rent to the landlords after deduction of tax at source at the rate applicable. The assessee filed its return declaring total loss of Rs. 7.72 crore. On the basis of the AIR information for CASS-08, it transpired that the assessee-company received rent of Rs. 39 lakh. The Assessing Officer observed that the assessee had claimed credit for tax deducted at source without offering the amount of rent for taxation from which such tax was deducted. On being called upon to explain as to why the said rental income was not offered for taxation, it was submitted that the assessee and 'A' Ltd., were only the link between landlords of the property and the franchisee. That was stated to be the reason for which the assessee had not shown any rental income. The Assessing Officer, on going through the assessee's explanation, agreed that the assessee did not receive any rental income. He, therefore, did not make any addition on this account. However, he held that the amount of TDS could not be refunded to the assessee as the assessee had not shown any income from rent. Held that, in case where amount on which tax was deducted at source is not at all chargeable to tax, command of section 199 will have to be harmoniously and pragmatically read as providing for allowing credit for tax deducted at source in year of receipt of amount, in which tax was deducted at source. Since assessee received amount after deduction of tax at source from 'G'and such amount was not admittedly chargeable to tax in its hands, credit for tax deducted at source was to be allowed in instant year.(A.Y. 2007 – 08)

ArvindMurjani Brands (P.) Ltd.v.ITO [2012] 137 ITD 173/76 DTR 252 (Mum.)(Trib.)

S.201:Deduction at source - Failure to deduct or pay- Salary – VRS – Bonafide - Assessee cannot be held as assessee in default - Not liable for interest. (S. 192, 201IA)

Assessee has deducted the tax at source in regard to payments in excess of that permitted under Rule 2BA, assessee acted in a bonafide manner and could not be treated as assessee in default. The department has accepted in assessments of employees that they are entitled to exemption under section 10(10C), in respect of amounts received under the VRS and assessee having deducted tax at source. Assessee cannot be held as assessee in default. (A. Y. 2002-03).

CIT v. Maruti Udyog Ltd. (2012) 66 DTR 201 (Delhi)(High Court)

S.201:Deduction at source-Failure to deduct or pay- Assessee in default –Salary – Perquisite-Concessional education –Assessee is liable to pay interest- Income–tax Rules, 1962, Rule 3(5). [S. 201(IA)]

While computing the perquisite value of free /concessional education provided by assessee towards its teachers / staff, the cost of education per student exceeds Rs. 1000 per month, entire perquisite value shall be reckoned in the hands of recipient and the assessee deducted tax at source considering only Rs. 1000 per month per child in determining the such perquisite there occurred a resultant short deduction of tax at source, hence the assessee is liable to be treated as assessee in default under section 201(1) and interest under section 201(IA).(A.Y. 2003-04)

CIT v. Director, Delhi Public School (2012) 66 DTR 149/ 247 CTR 308 / (2011) 202 Taxman 318 (P&H.)(High Court)

S.201:Dedcution at source- Failure to deduct or pay- Assessee in default- Limitation of four years-Order of Tribunal set aside to decide in accordance with law.

Assessee did not deduct the tax as required under section 192 of the Act for the Assessment years 1994-95 to 1997-98. Assessing Officer passed the order under section 201(1) and 201(IA) on 20th December, 2005 .On appeal the Commissioner (Appeals) dismissed the appeal of assessee. On further appeal to Tribunal the Tribunal held that Assessing Officer was not empowered to issue a show cause notice after a period of four years from the end of the financial year .Accordingly the Tribunal quashed the order. On appeal by revenue the Court held that "It is true that a principle has been laid down in State of Gujarat v. Patil Raghav Natha (1969) 2 SCC 187 , while dealing with suo motu revisional jurisdiction that though there is no period of limitation prescribed of that power , still such a power must be exercised with in reasonable time. The said judgment has been applied in matters relating to section 6 of the Land Acquisition Act in a large number of cases , which were all referred to in recently in RamChand v.UOI (1994) 1 SCC 45. In our view , this line of cases can not ordinarily apply to monies withheld by a defaulter , who holds them in trust". The Court held that in the absence of limitation period prescribed for taking action under section 201 , Tribunal erred in holding that period of four years was the reasonable period to issue of show cause under section 201 by the Assessing Officer to assessee. The Court set aside the order of Tribunal.(A.Y.1995-96)

CIT v. H.M.T. Ltd (2012) 340 ITR 219/ 248 CTR 103/67 DTR 405(P&H.) (High Court)

S.201:Deduction at source – Failure to deduct or pay- Limitation-For initiating proceedings under section 201, issuance of notice beyond reasonable time period of 4 years, barred by limitation .

Even if no period of limitation is mentioned or prescribed, the statutory power must be exercised within reasonable period. Therefore, notice under section 201 and 201(1A) issued beyond the reasonable period of four years were barred by limitation. (A.Y. 1996-97)

CIT v. Satluj Jal Vidyut Nigam Pvt. Ltd. (2012) 345 ITR 552/ 71 DTR 145/250 CTR 113 (HP) (High Court)

S.201:Deduction at source-Failure to deduct or pay-Assessee in default- Once certificate is issued under section 197(1) , assessee cannot be held to be assessee in default.(S.195, 197(1), 201(IA))

The assessee is a private Limited company having business of project and construction management. The assessee made application under section 197 in respect of not deducting the tax in respect of payment to be made to non-resident in terms of section 195. The Assessing officer issued the certificate under section 197, the payments were made only after receipt of certificate from the Assessing Officer. The Assessing Officer thereafter treated the assessee in default and levied the tax and interest. In appeal order of Assessing Officer was confirmed .On appeal to the Tribunal the Tribunal held that the assessee cannot be held to be assessee in default hence levy of interest under section 201(IA) was held to be not justified, however the Tribunal confirmed the finding of lower authorities and held that the payments which were made by the assessee not being reimbursement the assessee ought to have deducted the tax at source. Revenue has filed an appeal against the order of Tribunal and the assessee has filed the cross objection on merit

sating that the payment made was reimbursement and not in the nature of a fee for managerial services .The Court held that once a certificate is issued under section 197 there is no obligation on the part of the payer to deduct tax at source ; even if tax is payable under the Act, the payer cannot be treated as an assessee in default. As the Court has decided the issue on section 197, it has not decided the issue on merit .(A.Ys 2003-04 to 2005-06)

CIT v.Bovis Lend Lease (India (P) Ltd (2012) 73 DTR 31/ 208 Taxman 168 (Karn.)(High Court)

Bovis Lend Lease (India) (P) Ltd v.CIT (2012) 73 DTR 31/208 Taxman 168 (Karn.)(High Court)

S.201:Deduction at source- Failure to deduct or pay- Assessee in default-Tax paid by payee- Such vicarious liability can not be invoked to make good short fall of tax collection, when tax liability is discharged by recipient of income.(S. 191)

By the virtue of insertion of Explanation to section 191 w.e.f.1st June 2003, a person can be treated as an assessee in default under section 201(1), only when there is lapse in deduction at source on his part and in addition to this lapse, the recipient of income has also failed to pay such tax directly. The reasons are not difficult to fathom. Proceedings under section 201(1) are not penal proceedings. These are vicarious proceedings to make good the shortfall in tax collection and when the tax liability is duly discharged by the recipient of income embedded in payment, such vicarious liability cannot be invoked. Unlike section 271C, 201(1) is not of penal in nature. (A. Ys. 2006-07 to 2009-10)

Chhattisgarh State Electricity Board v. ITO (2012) 65 DTR 1/ 143 TTJ 151/14 ITR 91/50 SOT 33(Mum.)(Trib.)

S.201:Deduction at source- Failure to deduct or pay- Assessee in default – Appeal – Commissioner(Appeals)- Appeal is maintainable. (S. 246A)

The Commissioner (Appeals) held that the Assessing Officer has passed an order levying the interest under section 201 hence the appeal is not maintainable. The Tribunal held that order passed under section 201 is appealable.(A. Ys. 2007-08 to 2009-10)

Canara Bank v. Dy. CIT (TDS) (2012) 134 ITD 1/67 DTR 391/ 144 TTJ 668 (Lucknow)(Trib.)

S.201:Deduction at source – Failure to deduct or pay- Limitation - Extended time limit in section 201(3) Proviso does not save proceedings initiated before 1-4-2010 even if order passed after that date, hence the orders were barred by limittaion.

Pursuant to a search conducted on 11.09.2007, the Assessing Officer passed an order dated 27.4.2010 under section 201(1) / 201(1A) for F. Ys. 2002-03, 2003-04 and 2004-05 in respect of TDS on salary & perquisites of expatriate employees. The assessee relied on CIT v. NHK Japan Broadcasting Corporation . (2008) 305 ITR 137 (Delhi) (High Court) &CIT v. Hutchison Essar Telecom Ltd. (2010) 323 ITR 230 (Delhi) (High Court & argued that as the order was passed after 4 years from the end of the F.Y., it was barred by limitation. The Assessing Officer relied on the Proviso to section 201(3) inserted by the F.A. 2009 w.e.f. 1-4-2010 which provides that an order for a financial year commencing on or before 1.4.2007 may be passed at any time on or before 31.3.2011. The CIT(A) allowed the appeal on the ground that one had to see the law as of the date of initiation of proceedings and held that the order was beyond limitation. On appeal by the department, Held dismissing the appeal:

Section 201(3) inserted by the F.A. 2009 w.e.f. 1.4.2010 imposes a time limit for the passing of section 201 orders. The Proviso to section 201(3) provides that an order for a financial year commencing on or before 1.4.2007 may be passed at any time on or before 31.3.2011. In the present case, the proceedings were initiated after the search on 16.11.2009. On this date, the amended provisions of section 201(3) had not come into force. Accordingly, the law prevailing as on that date as per NHK & Hutchison applied where it was held that an order under section 201 could not be passed after the expiry of 4 years from the end of the F.Y.. The section 201 order was consequently beyond limitation. Orderes were held barred by limitation(CIT(TDS) v.H.M.T. Ltd.ITA nos 524 to 527 of 2009 dt 14-7-2011(2012) 67 DTR 405 (P&H)(High Court) & Bhura Exports Ltd v.ITO (TDS)(2011) 202 Taxman 88 (Cal.)(High Court) not followed).(A.Ys 2003-04 to 2005-06)

ACIT v. Catholic Relief Services(2012) 18 ITR 430 (Delhi)(Trib.)

S.201:Deduction at source-Failure to deduct or pay-Payment of tax by recipient- Before assessing the assessee to be in default ,under section , 201 for TDS Liability, Assessing Officer to show that recipient has not paid the tax.(S.194C)

The Assessing Officer has passed an order u/s 201 in which he held the assessee to be in default for failure to deduct TDS u/s 194C on payments made to contractors. The assessee's argued that in view of Hindustan Coca Cola Beverages(p) Ltd. v CIT (2007) 293 ITR 226 (SC), the tax could not be recovered from it as it must have been recovered from the recipient was rejected on the ground that the onus was on the assessee to prove that the recipient had paid the taxes. On appeal by the assessee to the Tribunal, held, allowing the appeal: In view of the judgment of the Allahabad High Court in Jagran Prakashan Ltd v.DCIT (TDS)(2012) 345 ITR 288 (All.)(High Court), there is a paradigm shift in the manner in which recovery provisions u/s 201(1) can be invoked. S. 201 is intended to make good the loss of revenue suffered by the revenue as a result of non-deduction of tax. However, the question of making good the loss arises only when the recipient of income has not paid tax and, therefore, the department has to establish that the recipient of income has not paid due taxes thereon. The non payment of taxes by the recipient is a condition precedent to invoking s. 201(1) & the onus is on the AO to demonstrate that the condition is satisfied. The assessee has to submit all such information about the recipient as he is obliged to maintain under the law. Once this information is submitted, it is for the AO to ascertain whether or not the taxes have been paid by the recipient of income. (A.Y. 2005-06,2006-07and 2008-09)

Ramakrishna Vedanta Math v. ITO(2012) 18 ITR 603 (Kol.)(Trib.

S.201: Deduction at source- Failure to deduct or pay- Assessee in default- Recipient has paid the tax.

The Act provides for three different consequences for lapse on account of non deduction of tax at source viz., penal provisions [s. 271C], and interest provisions [S.201(1A)] and recovery provisions [S.201(1)]. As far as the matter under the later two provisions were concerned, the former provides for levy of interest in case of any delay in recovery of such taxes and the later provisions seek to make good any loss to revenue on account of lapse by the assessee tax deductor. The Tribunal added that the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient of income has not paid tax. Therefore, it held that recovery provisions u/s 201(1) can be invoked only when loss to revenue is established, and that can be established when it is demonstrated that the recipient of income has not paid due taxes thereon. (A.Y. 2005-06, 2006-07, 2008-09)

Ramakrishna Vedanta Math v. ITO, ITAT 'C' Bench, ITA No.477,478 & 479 /Kol/2012, Dt.31-07-2012, BCAJ Pg. 32, Vol. 44A Part 6, September, 2012.(Kol.)(Trib)

S.201: Deduction at source-Failure to deduct or pay-Reimbursement of expenses. (S.195)

Reimbursement of relocation related expenses of employees had no element of income embedded in such payments. No mark up has been made and the disputed payments are purely reimbursement of actual expenses incurred. As there is no obligation to deduct tax at source, Assessee could not be treated as an assessee in default u/s 201(1). (A.Y. 2007-08)

Global E-Business Operations (P) Ltd. v. DCIT (2012) 76 DTR 106 (Bang)(Trib.)

S.206AA:Require to furnish Permanent Account Number-Deduction at source- PAN law read down to not apply to assessees without taxable income - (S. 139A, Articles,14, 226 Constitution of India,1950)

The assessee, whose income was below taxable limit, filed Form 15G and requested that no TDS be deducted on the interest on fixed deposit. However, she was informed that in view of s. 206AA inserted by FA 2009, TDS would have to be deducted in the absence of PAN. The assessee filed a writ petition to challenge s. 206AA as being arbitrary and unconstitutional to the extent that it compelled persons with no taxable income to obtain a PAN. Held upholding the challenge:

U/s 139A, only persons whose income is chargeable to tax are required to obtain a PAN. However, s. 206AA compels even persons without a taxable income to obtain a PAN to avoid TDS. This creates difficulty for poor and illiterate persons who make small investments and discourages them to invest money. S. 206AA runs counter to s. 139A and is discriminatory. Though the Legislature's intention is to bring maximum persons under the income-tax net, it may not insist that even persons whose income is below the taxable limit have to compulsorily obtain a PAN. If any tax

avoidance is detected, that can be taken care of by penal provisions. Accordingly, s.206AA is read down as being inapplicable to persons whose income is less than the taxable limit. Banks & financial institutions should not insist upon PAN from such small investors. It continues to apply to persons whose income is above the taxable limit.
A. Kowsalya Bai(Smt) v. UOI (2012)346 ITR 156/ 208 Taxman 208/74 DTR 212/251 CTR 150(Karn.)(High Court)

S.206C:Collection at source – Scrap- Importer and dealer-Importer and dealer in recycled ferrous and ferrous metals- Not liable to pay tax.

Assessee, an importer and dealer in recycled ferrous and non ferrous metals, was not liable to collect tax at source under section 206C from the sale of said recycled metals to manufacturers and to other traders as the scrap sold is not the scrap as defined in Explanation (b) to section 206C, since scrap sold was neither generated from the manufacture or mechanical working of materials. The scrap was neither sold nor usable as such. In view of the matter Commissioner (Appeals), was not justified in upholding the orders under sections 206(6) / 206(7) passed by the Assessing Officer directing the assessee to pay the tax.(A.Ys. 2009-10 & 2010-11).
Nathulal P. Lavti v. ITO (2012) 65 DTR 133/ 143 TTJ 509 (Rajkot)(Trib.)

S.206C:Collection at source-Scrap- Manufacture-Manufacture Fluorine and Refrigerant- Scrap not connected with manufacture section 206C(6) is not attracted.

The assessee is engaged in the manufacture of fluorine and other refrigerant gases. It had received payments on account of sale of scrap .The assessee had not collected tax at the time of receipt of the sale proceeds or at the time of debiting the account of purchasers. The Assessing Officer issued a show cause notice to the assessee to raise the demand for tax under section 206C(6) and interest under section 206C(7).The assessee submitted that the scrap sold by the assessee was plastic , drums, wooden scrap generated in the assessee's premises did not raise from manufacturing of product dealt with by the company and therefore provisions of section 206C were not attracted .The Assessing Officer did not agree with the submission of assessee and held that the provision is applicable , which was confirmed in appeal by Commissioner (Appeals) . On appeal, the Tribunal held that the scrap sold by the assessee was not connected with manufacturing or mechanical working of material of fluorine and other refrigeration gasses , hence the provision of section 206 is not applicable hence no interest could be charged under section 206C (7), accordingly the appeal of assessee was allowed. (A.Y. 2009-10, 2010-11)
Navine Flourine International Ltd v. A.CIT (2012) 14 ITR 481 (Ahd.) (Trib.)

S.206C: Collection at source- Auction of parking lot – No contract executed - Tax at source to be collected as oral contract is a valid contract as per contract Act (S. 2(h) & 10 of Contract Act)

Assessee, city development authority, auctioned for running of parking lots and allotted same to different person. As assessee defaulted in collecting taxes at source, Assessing Officer raised demand u/s. 206C(1C) along with interest. The assessee contended that though auction was held for parking lots, but no contract was executed. Thus, it was held that as an agreement could be oral in view of sec. 2(h) and section 10 of Contract Act, plea of assessee was to be rejected. Hence, order of Assessing Officer was upheld. (A.Y. 2007-08 & 2009-10)
Agra Development Authority v. ACIT (2012) 138 ITD 127 (Agra) (Trib.)

S.220:Collection and recovery-Assessee deemed in default- Stay- Stay has to be granted when assessed income is more than 47 times of income declared.

Income assessed by the Assessing Officer was 47 times of income declared by assessee. Therefore instruction No. 95 dated 21st August, 1969 holds the field. Therefore assessee cannot be treated as assessee in default. (A.Y. 2008-09)
Maheswari Agro Industries v. UOI (2012)346 ITR 375/ 246 CTR 113/ 65 DTR 129 / (2012) TLR Vol. 42 Feb. 168 / 206 Taxman 375 (Raj.)(High Court)

S.220:Collection and recovery – Assessee deemed in default- Stay –Guidelines- Guidelines laid down on how stay applications should be dealt with.

The assessee, a mutual fund, was a beneficiary of a trust named India Corporate Loan Securitisation Trust which was set up for securitising a loan of Rs.300 crores by issue of Pass through Certificates (PTCs). The assessee had subscribed to the PTCs and its beneficial interest was proportionate to the PTCs subscribed. The Trust received interest of

Rs.21.49 crores in respect of a loan and distributed the income to its beneficiaries in their respective shares. The AO passed an assessment order on the trust in the capacity of an AOP. Though a stay application was filed, the AO, without disposing of the stay application, demanded that 50% of the demand be paid. He also directed the assessee to pay Rs. 9.63 crores on the ground that it was a member of the AOP (Trust) and was jointly and severally liable in respect of the demand against the AOP. The assessee filed a stay application which was disposed of by the AO on 9.3.2012 (received by the assessee on 13.3.2012). On 12.3.2012, the AO attached the assessee's bank account u/s 226(3). The assessee filed a Writ Petition pointing out that the action had been in pursuance of the CBDT Chairman's letter dated 7.2.2012 promising postings commensurate with tax recovery. Held by the High Court:

The Revenue has made an unfortunate and hasty attempt to make a recovery of the demand without enabling the assessee to take reasonable recourse to the remedies available in law. The assessee filed a stay application before the AO on 7.3.2012 and moved the CIT on 9.3.2012. Before service of the order rejecting the stay application, the assessee's bank account was attached on 12.3.2012. Administrative directions for fulfilling recovery targets for the collection of revenue should not be at the expense of foreclosing remedies which are available to assessees for challenging the correctness of a demand. The sanctity of the rule of law must be preserved. The remedies which are legitimately open in law to an assessee to challenge a demand cannot be allowed to be foreclosed by a hasty recourse to coercive powers. AOs & appellate authorities perform quasi-judicial functions under the Act. Applications for stay require judicial consideration. Rejecting such applications without hearing the assessee, considering submissions and indicating at least brief reasons is impermissible. In KEC International(2005) 251 ITR 158 guidelines regard to the manner in which applications for stay should be disposed of have been laid down. Unfortunately these guidelines are now being breached by the Revenue. In Coca Cola India (2006)285 ITR 419 the conduct of the Revenue was deprecated. In attaching bank accounts even before communicating the order passed the following guidelines should be borne in mind for effecting recovery:

1. No recovery of tax should be made pending

(a) Expiry of the time limit for filing an appeal;

(b) Disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated.

2. The stay application, if any, moved by the assessee should be disposed off after hearing the assessee and bearing in mind the guidelines in KEC International;

3. If the Assessing Officer has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay;

4. When a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;

5. In exercising the powers of stay, the ITO should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the AO has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order: the matter must be considered from all its facets, balancing the interest of the assessee with the protection of the Revenue.

UTI Mutual Fund v. ITO (2012)345 ITR 71/ 249 CTR 190/ 69 DTR 306/ 206 Taxman 341(Bom.) (High Court)

S.220:Collection and recovery- Assessee deemed in default- Power-Reduction of period-Power under S. 220(1) proviso to reduce period for payment of tax to be exercised after application of mind and recording reasons.(S.281B)

The Assessing Officer has passed an order under section 143(3) on 9.3.2012 raising a demand of Rs. 36.56 crores and directed the assessee to pay the entire demand within 7 days even though the period specified in 220(1) is 30 days. The assessee filed a stay application u/s 220(6) on 12.3. 2012 which was rejected on the ground that it did not fall within the guidelines framed in the CBDT's instruction No.1914 issued by the CBDT. The assessee approached the CIT pointing that there was no justification to demand payment within 7 days while s. 220(1) granted 30 days and that as there was

already a provisional attachment, there was no determinant to the revenue. The CIT rejected the application and the AO attached the assessee's mutual fund investments s. 226(3). The assessee filed a Writ Petition. Held by the Court:
The Proviso to s. 220(1) which empowers the AO to demand payment within a period lesser than 30 days with the prior approval of the JCIT cannot be exercised casually and without due application of mind. The AO & JCIT must apply their mind on how it would be detrimental to the interests of the Revenue to allow the full period of 30 days and record reasons. The reasons & approval must be made available to the assessee if he seeks them. On facts, as there was already a provisional attachment u/s 281B attaching the assessee's mutual funds to the extent of Rs.36.54 crores, there would have been no basis for forming the reason to believe that allowing the period of 30 days would be detrimental to the Revenue. Merely because the end of the financial year is approaching that cannot constitute a detriment to the Revenue. The detriment to the Revenue must be akin to a situation where the demand of the Revenue is liable to be defeated by an abuse of process by the assessee. There is absolutely no justification for the AO to demand payment in 7 days and his action is highhanded and contrary to law.
Firoz Tin Factory v. ACIT(2012) 71 DTR 185/209 Taxman 458 (Bom.)(High Court)

S.220:Collection and recovery- Assessee deemed in default Stay –Reasoned order- Assessing Officer must pass reasoned order to deal with stay applications

The AO passed an assessment order raising a demand of Rs.5.76 Crores. The assessee filed a stay application stating that the CIT (A) had heard the appeal and stay of demand be granted till the order on the appeal. The AO rejected the stay application and directed that the demand be paid without giving any reasons. The assessee approached the Addl CIT who noted that as the AO had already started recovery proceedings, there was no point before him to consider. The assessee's bank accounts were attached u/s 226(3). The assessee filed a Writ Petition. Held by the Court:
In several judgments of this Court, the parameters for the exercise of jurisdiction u/s 220(6) of the Act have been spelt out. In KEC International Ltd. v. B.R. Balakrishnan(2001) 251 ITR 158, the importance of reasoned orders being passed on the stay applications was emphasized. The AOs consistently refuse to follow the law laid down in the judgment of this Court. The AO & the appellate authorities are duty bound to act in accordance with binding precedent and there is no reason or justification to act in the manner in which the applications for stay have been disposed of in this case. (A.Ys. 2008-09 & 2009-10)
Tata Toyo Radiators Pvt Ltd v. UOI(2012) 71 DTR 5/ 250 CTR 11 (Bom.) (High Court)

S.220:Collection and recovery- Assessee deemed in default-Stay- Guidelines-Assessing Officer and Appellate authorities are not mere tax gatherers; have duty to be fair to the assessee.

The assessee, a professional, offered income of Rs.19.41 crores. The AO passed an assessment order u/s 143(3) assessing the total income at Rs.22.43 crores and raised a demand of Rs.1.18 crores. The assessee filed a stay application before the CIT (A) who directed that a refund of Rs. 78 lakhs due for a subsequent year be adjusted and the balance of Rs.41 lakhs be paid. The CIT (A) held that considering "the financial status and affairs" of the assessee, the payment of the balance demand would not cause financial hardship. The assessee filed a Writ Petition to challenge the rejection of the stay application. Held by the Court allowing the petition:
The power which is vested in the AO u/s 220(6) and on the CIT (A) to grant a stay of demand is a judicial power. It is necessary for both the AO as well as the appellate authorities constituted under the Income-tax Act to have due regard to the fact that their function is not merely to act as tax gatherers, but equally as quasi judicial authorities, they owe a duty of fairness to the assessee. This seems to be lost sight of in the manner in which the authority has acted in the present case. The parameters for the exercise of the jurisdiction to grant a stay of demand has been set out in several judgments of this Court, including in KEC International vs. B.R. Balakrishnan(2001) 251 ITR 158. The assessee's submissions on merits require consideration. The CIT (A) ought to have devoted a more careful consideration to the issue as to whether a stay of demand was warranted. As out of a total demand of Rs.1.18 crores, Rs.78 lakhs has been adjusted, the balance has to be stayed.(A.Y.2009-10)
Nishith Madanlal Desai v. CIT (2012) 345 ITR 545 / 72 DTR 169 (Bom.)(High Court)

S.220:Collection and recovery-Assessee deemed in default-Power-Guidelines-Assessing Officer reminded that he is not mere "tax gatherer" and cautioned to follow guidelines for recovery of tax

The assessee, a public charitable trust, filed a ROI returning Nil income. The AO passed a s. 143(3) assessment order holding that the assessee was not eligible for s. 11 exemption on the ground that the receipt of donations by it amounted to a commercial activity and assessed its total income at Rs. 3.51 crores. The assessee filed an application for stay u/s 220(6). Without dealing with the stay application, the AO directed the assessee to pay the demand within 3 days and threatened coercive proceedings in the event of failure. The assessee filed an application before the DIT who directed it to pay 50% of the demand by March 2012 and the balance in installments. No reasons were given on why the stay application was not acceded to. The assessee filed a Writ Petition to challenge the direction: Held by the High Court:

In the present case, as in several cases which have come up before this Court and particularly in the month of March, it is evident that the AO & DIT have both had scant regard to the parameters which have been laid down by this Court for disposal of stay applications in KEC International Ltd (2001)251 ITR 158 & UTI Mutual Fund. No reasons are indicated. The orders do not contain a prima facie evaluation of the issues which would arise in appeal. In UTI Mutual Fund, this Court was constrained to issue a cautionary observation to the effect that AOs and Appellate Authorities, when they dispose of applications for stay, act as quasi judicial authorities and not merely as tax gatherers of the Revenue. While they have a duty of protecting the interests of the Revenue, they need to mitigate the hardship to the assessee and applications for stay must be considered objectively. The assessee does have serious issues to be urged before the CIT (A) and the AO & DIT ought to have granted a complete stay of demand u/s 220(6)

Rajasthani Sammelan Sarvoday v. ADIT (Bom.) (High Court) www.itatonline.org

S.220:Collection and recovery- Assessee deemed in default- Power-Extralegal steps- Assessing Officer should not adopt "extra legal steps" of threatening or inducing the assessee for tax recovery.

The assessee won Rs. 25 lakhs in "Kaun Banega Crorepati". On receipt of the prize money by the assessee from Star Plus, the AO issued a notice u/s 208 directing her to pay advance-tax. Though the assessee claimed that the prize was not taxable, the AO deputed an Inspector and wrote a letter in which he threatened the assessee that 300% penalty would be levied and prosecution launched and that the assessee would have no defence. He also assured that upon receiving clarification from the CBDT, the advance-tax would be refunded with interest. Based on the threats of the AO, the assessee paid advance-tax of Rs. 7.55 lakhs. In the s. 143(3) order, the AO held that the prize money was taxable u/s 2(24) (ix) even though the amendment to tax TV game shows was inserted w.e.f. 1.04.2002. The CIT (A) accepted that s. 2(24)(ix) did not apply but held that the prize money was chargeable as "income from other sources". The Tribunal upheld the AO's stand that the winnings were taxable u/s 2(24)(ix). The High Court remanded the matter to the Tribunal for reconsideration pursuant to which the Tribunal allowed the assessee's appeal and dismissed the department's appeals. The department filed an MA before the Tribunal which was also dismissed and no further appeal was filed by the department. In giving effect to the Tribunal's order, the AO treated the winnings as "income from other sources" despite the Tribunal decision that the assessee's appeals were allowed. The assessee filed a Writ Petition to challenge the AO's effect order. Held:

The AO's action of assessing the award as income shows utter disregard to the order of the Tribunal and lacks judicial propriety which is not expected from the AO who is subordinate to the Tribunal. The AO's action of threatening the assessee with penalty and prosecution and deputing his inspector to collect the advance-tax is certainly not a healthy practice. In order to gain faith of the assessees and create confidence in the minds of the tax payers and for smooth administration of tax law, the Revenue authorities must act in a fair and legal manner. Every action of the State and its instrumentality should be fair, legitimate and above board and without any affection or aversion. The Government cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take appropriate steps, but it should not take extra legal steps or adopt the course of maneuvering. Because of discontentment, it is necessary to provide guidelines for just exercise of the power of Revenue authorities. To prevent the abuse of power and to see that it does not become a new despotism, courts are gradually evolving the principles to be observed while exercising such power. New problems call for new solutions.

Lopamudra Misra v. ACIT (2011) 337 ITR 92 / 243 CTR 66 / 202 Taxman 437 / 59 DTR 257 / (2012)Vol.42 Tax L R 121 (Orissa)(High Court)

S.220:Collection and recovery-Commissioner (Appeals)-Powers - Assessee deemed in default- Stay- Prima facie case- If prima facie case is in favour Of the assessee, full demand should be stayed.(S.251)

The AO raised a demand u/s 201 on the ground that the assessee ought to have deducted TDS u/s 194-I instead of u/s 194C. The assessee filed a stay application before the CIT (A) who observed that the there was "enough strength in the plea of the assessee for stay of demand" but directed that 30% of the demand be paid. The assessee file a Writ Petition on the ground that as the CIT (A) had formed a prima facie opinion in favour of the assessee, he ought to have stayed the entire demand and not directed deposit of 30% thereof. Held by the High Court:

While it is true that on merely establishing a prima facie case, interim order of protection should not be passed, if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. As the CIT (A) had himself expressed opinion in the order that there is enough strength in the plea of the assessee for stay of the demand, there was no occasion to direct for deposit of 30 percent. The assessee is entitled to stay on furnishing adequate security (Asstt .Collector of CE v..Dunlop India Ltd (1985) 154 ITR 172 (SC) & Pennar Industries Ltd v.State of AP dated 9-2-2009 (SC) followed)

*LG Electronics India Pvt. Ltd v. CIT (2012) 209 Taxman 536(All)(High Court)*www.itatonline.org

S.220:Collection and recovery- Appeal to Commissioner (Appeals)- Stay- Direction was given for expeditious disposal of appeal and stay of demand till disposal of appeal.

For the assessment years 2003-04, 2004-05 , 2005 -06 the Assessing Officer accepted the contention of the assessee that it was an agent of the Government of India for the Navi Mumbai project. However for the assessment year 2006-07 the Assessing Officer has changed the stand and held that it is liable to be assessed in respect of all the projects including Navi Mumbai project and raised the demand on assessee. The assessee filed an appeal before the Commissioner (Appeals) which was pending. The application for recovery of stay was rejected . The assessee filed a writ petition before the High Court .High Court stayed the recovery proceedings and directed the Commissioner (Appeals) to for expeditiously disposal of appeal. (A.Y. 2006-07)

CITY and Industrial Development Corporation of Maharashtra Ltd v. ACIT (2012) 343 ITR 102 / 72 DTR 226 (Bom.) (High Court)

S.220: Collection and recovery- Assessee deemed in default-Stay- Commissioner is directed to pass a reasoned order.

The court held that when a prayer is made to commissioner to stay the demand he has to pass the reasoned order. The Court held that one of the salutary requirement of natural justice is spelling out reasons for the orders made . On the facts the court set aside the order of Commissioner and directed him to pass a speaking order.

Idea Cellular Ltd v. CIT (2012) 75 DTR 105 (MP) (High Court)

S.220: Collection and recovery- Assessee deemed in default- Stay of demand

Order of the CIT(A) rejecting stay petition without considering all the submissions of the petitioner and also failing to point out even briefly in the order as to why the interim payment of 50 percent of Rs.6.36 crores is necessary in the facts of the present case is liable to be set aside. Revenue's interests also needs to be protected and the petitioner's undertaking not to dispose off, alienate, encumber, part with possession of or create any third party right, title and/or interest in respect of the immovable property, is accepted. (A.Y. 2004-05 to 2007-08)

Balaji Universal Tradelink (P) Ltd. v. UOI (2012) 76 DTR 132 (Bom.)(High Court)

S.220:Collection and recovery – Assessee deemed in default-Stay of recovery – Adjustment of refund against current demand – ITAT has power to stay recovery and not permit adjustment of refund . (S. 245)

Each assessment year is treated as separate and independent under the Act, Sec. 245 of the Act permits the Revenue to recover the demand of one year which is pending by adjusting the refund due for another year. Adjustment u/s. 245 of the Act is a method of recovery. Section 220(6) which permits the A.O. to treat the assessee as not in default is not applicable when an appeal is preferred before the Tribunal, as it applies only when an assessee has field an appeal u/s. 246 or Sec. 246A. As per Circular No. 1914, dated Dec. 2, 1993, the Assessing Officer may reserve a right to adjust, if the circumstances so warrant. In a given case, the AO may not reserve the right to refund. Further, reserving a right is

different from exercise of right or justification for exercise of a discretionary right/power. Moreover, the circular is not binding on the Tribunal.(A.Y.2006-07)

Maruti Suzuki India Ltd v. Dy. CIT (2012) 347 ITR 43 (Delhi)(High Court)

S.220:Collection and recovery –Condition precedent- Demand Notice not received by assessee, recovery proceeding held to be not valid. (S. 156)

The court held that on a plain reading of sub-section (4) of sec. 220 of the Income tax Act, 1961, it is apparent that a person can be said to be an assessee in default, (i) if he does not pay the amount specified in a notice u/s. 156 within the time limited under sub section (1), viz., 35 days of the service of notice, or (ii) if he does not pay the amount specified in a notice u/s. 156 within the time extended under sub section (3) at the place and to the person mentioned in the notice. Thus, before invoking the provisions of section 220 of the Act, a notice is required to be served upon the assessee, specifying the amount as well as the place and the person to whom such amount is to be paid. In the absence of any demand notice u/s. 156 of the Act being served upon the assessee, the time to make payment under sub section (1) would not start running. On facts, no demand notice, as contemplated u/s. 156 of the Act was served upon the petitioner. The petitioner at the earliest point of time, upon receipt of the recovery notice had objected to the initiation of the recovery proceedings as it had not received copies of the assessment order and demand notice. Thus, in the absence of service of a demand notice u/s. 156 of the Act on the petitioner, which was a basic requirement for invoking the provisions of sec. 220 of the Act, the Petitioner could not have been treated to be an assessee in default. The subsequent proceedings u/s. 220 to 226 of the Act were without jurisdiction.(A.Y. 1985-86)

Saraswati Moulding Works v. CIT & Ors(2012) 347 ITR 161 (Guj.)(High Court)

S.220:Collection and recovery- Interest-Assessment set aside-Interest is payable by assessee from the date of fresh assessment order .

The original assessment has been set aside by the CIT(A)„but on further appeal ,the Tribunal set aside the order of CIT(A) and issue was restored back to the Assessing Officer. In the fresh assessment , the Assessing Officer repeated the addition raising the same demand but interest under section 220(2) was levied from the date of demand notice issued as per the original assessment order. In an appeal before the Tribunal the assessee contended that in view of Board Circular dated no 334 dated 3-4-1982 , the interest could be charged only from the date when the demand became due as per the fresh assessment order and not from the date of original assessment order. The Tribunal accepted the contention and held that interest payable is to be computed from the date of fresh assessment order. Accordingly the appeal of assessee was allowed.A.Y.1996-97)

Narad Invt. and Tdg P. Ltd v. DCIT, ITA No.3360/Mum/10, dt 19-10-11 BCAJ Pg. 35, Vol. 43 B Part 4, January 2012(Mum.)(Trib.)

S.220(6):Collection and recovery – Assessee deemed in default- Stay –Reasoned order- Assessing Officer must pass reasoned order to deal with stay applications.

The Assessing Officer passed an assessment order raising a demand of Rs. 5.76 Crores. The assessee filed a stay application stating that the CIT(A) had heard the appeal and stay of demand be granted till the order on the appeal. The Assessing Officer rejected the stay application and directed that the demand be paid without giving any reasons. The assessee approached the Addl. CIT who noted that as the Assessing Officer had already started recovery proceedings, there was no point before him to consider. The assessee's bank accounts were attached under section 226(3). The assessee filed a Writ Petition. Held by the Court:

In several judgments of this Court, the parameters for the exercise of jurisdiction under section 220(6) of the Act have been spelt out. In KEC International Ltd. v. B. R. Balakrishnan and Others(2001) 251 ITR 158, the importance of reasoned orders being passed on the stay applications was emphasized. The Assessing Officers consistently refuse to follow the law laid down in the judgment of this Court. The Assessing Officer & the appellate authorities are duty bound to act in accordance with binding precedent and there is no reason or justification to act in the manner in which the applications for stay have been disposed of in this case.

Tata Toyo Radiators Pvt. Ltd. v. UOI (Bom.)(High Court) www.itatonline.org

S.220(6):Collection and recovery - Assessee deemed in default- Stay – Guidelines-Guidelines laid down on how stay application should be dealt with - The recovery cannot be made without following due process of law.

The assessee, a mutual fund, was a beneficiary of a trust named India Corporate Loan Securitisation Trust which was set up for securitising a loan of Rs. 300 crores by issue of Pass Through Certificates (PTCs). The assessee had subscribed to the PTCs and its beneficial interest was proportionate to the PTCs subscribed. The Trust received interest of Rs. 21.49 crores in respect of a loan and distributed the income to its beneficiaries in their respective shares. The Assessing Officer passed an assessment order on the trust in the capacity of an AOP. Though a stay application was filed, the Assessing Officer, without disposing of the stay application, demanded that 50% of the demand be paid. He also directed the assessee to pay Rs. 9.63 crores on the ground that it was a member of the AOP (Trust) and was jointly and severally liable in respect of the demand against the AOP. The assessee filed a stay application which was disposed of by the Assessing Officer on 9.3.2012 (received by the assessee on 13.3.2012). On 12.3.2012, the Assessing Officer attached the assessee's bank account under section 226(3). The assessee filed a Writ Petition pointing out that the action had been in pursuance of the CBDT Chairman's letter dated 7.2.2012 promising postings commensurate with tax recovery. The Court held:

The Revenue has made an unfortunate and hasty attempt to make a recovery of the demand without enabling the assessee to take reasonable recourse to the remedies available in law. The assessee filed a stay application before the Assessing Officer on 7.3.2012 and moved the Commissioner of Income-tax on 9.3.2012. Before service of the order rejecting the stay application, the assessee's bank account was attached on 12.3.2012. Administrative directions for fulfilling recovery targets, the sanctity of the rule of law must be preserved. The remedies which are legitimately open in law to an assessee to challenge a demand cannot be allowed to be foreclosed by a hasty recourse to coercive powers**.** Assessing Officers & appellate authorities perform quasi-judicial functions under the Act. Applications for stay require judicial consideration**.** Rejecting such applications without hearing the assessee, considering submissions and indicating at least brief reasons is impermissible. In KEC International Ltd v. B.R. Balakrishnan and others (2001 251 ITR 158 guidelines regard to the manner in which applications for stay should be disposed of have been laid down. Unfortunately these guidelines are now being breached by the Revenue**.** In Coca Cola India P.Ltd v. Addl.CIT(2006**)** 285 ITR 419 the conduct of the Revenue was deprecated. In attaching bank accounts even before communicating the order passed the following guidelines should be borne in mind for effecting recovery:

1. No recovery of tax should be made pending

(a) Expiry of the time limit for filing an appeal;

(b) Disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated.

2. The stay application, if any, moved by the assessee should be disposed of after hearing the assessee and bearing in mind the guidelines in KEC International;

3. If the Assessing Officer has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay;

4. When a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;

5. In exercising the powers of stay, the ITO should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the Assessing Officer has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order: the matter must be considered from all its facets, balancing the interest of the assessee with the protection of the Revenue.

UTI Mutal Fund v. ITO (Bom.)(High Court) www.itatonline.org

S.220(2A):Collection and recovery - Waiver or reduction - Genuine hardship - The Commissioner has power to waive the interest in respect of amounts already paid, accordingly the order was set aside and directed the commissioner to pass the order in accordance with the law.

The legal heir of deceased assessee filed application under section 220(2A) for waiver of application of interest levied amounting to Rs. 1,95,570. The Commissioner has waived an interest of Rs. 24,408, which was balance amount due from the deceased assessee. The Assessee filed the writ petition, the Court held that Taxation laws (Amendment) Act, 1984 has conferred the power on the Chief Commissioner or the Commissioner to reduce or waive the amount of interest already paid, therefore the there is no reason to restrict the waiver to the amounts remaining due payable, accordingly the order of Commissioner was set aside for reconsideration. (A. Y. 1989-90).

E. M. Joseph v. CCIT (2012) 342 ITR 379/ 67 DTR 86 (Ker.)(High Court)

S.226:Collection and recovery - Modes of recovery- Garnishee proceedings – Attachment- Search and seizure- Fixed deposit of third parties attachment is held not to be not valid. (S. 132, 222, 281B, Art. 226)

Assessee was searched and articles were seized. Articles were released on bank guarantee on basis of fixed deposits receipts of third parties. Department issued garnishee proceedings against bank and attached the fixed deposits under section 226(3).Department passed the provisional attachment under section 281B.Department invoking the bank guarantee encashed the fixed deposit. The Assessee challenged the order by way of Writ, the Court held that the encashment of the fixed deposit was unjustified. The Court held that the fixed deposits did not belonging to assessee hence attachment of fixed deposit receipts were not valid.

Gopal Das Khandewal & others v. UOI (2012) 340 ITR 235 / (2010) 235 CTR 253 / 45 DTR 47 (All.)(High Court)

S.226:Collection and recovery- Modes of recovery-Garnishee proceedings - Assessee can approach the Assessing Officer against garnishee proceedings and request for withdrawal, writ is not the remedy.

Against the garnishee proceedings the assessee filed a writ petition on the ground that once the money is recovered under garnishee order the revocation of the notice will be of no consequences. The court held that such a presumption is without any legal base because of the reasons that with the withdrawal of the notice of garnishing, the action taken in furtherance of garnishing order falls down and possession of the property is required to be restored to the assessee and if the Assessing Officer by exercising power under sub –clause (vii) of sub section (3) of section 226 of the said Act obtains money from the payee of the assessee, he has been given power to withdraw the notice and it cannot be interpreted to mean that notice can be withdrawn only before giving effect to the garnishing order and receiving the money by the Assessing Officer. Otherwise the words at any time or from time to time will be of no consequence in sub clause (vii) of sub section (3) of the said Act. The Court held that the assessee is free to challenge the order of non – revocation of the garnishee order under sub clause (vii) of sub section (3) of section 226. Commissioner was directed to hear the appeal expeditiously.

Central Coal Fields Ltd v. CIT (2012) 249 CTR 523 (Jharkhand)(High Court)

S.226: Collection and recovery- Modes of recovery- Prohibitory order-Assessee has shown bona fides the court stayed the prohibitory order.

The appeal of the assessee is pending before the Commissioner (Appeals). The Recovery Officer issued the prohibitory order against the creditors. The assessee filed writ petition. The High Court stayed the prohibitory order considering the bonafide of assessee on the condition of paying the tax on installment s.(A.Ys 2007-08 & 2008-09)

Nickunj Eximp Enterprises P. Ltd v. Addl.CIT (2012) 346 ITR 78 (Bom.) (High Court)

S.234A:Interest – Default in furnishing return of income - Charge - Assessment order - Interest, though mandatory, is not payable if Assessing Officer does not direct it to be charged in assessment order (S. 234B & 234C)

The AO passed assessment order u/s. 143(3) in which he omitted to direct that interest u/s 234A, 234B & 234C should be levied. The Tribunal, relying on CIT v. Ranchi Club Ltd (2001) 247 ITR 209 (SC) held that in the absence of a specific direction, interest was not leviable. Before the High Court, the department relied on the larger bench decision in CIT v. Anjum M. H. Ghaswala and Ors. (2001) 252 ITR 1 (SC) and argued that as interest u/s. 234A, 234B & 234C was mandatory, there was no need for the assessment order to specifically direct that interest should be charged. Held dismissing the appeal:

In CIT vs. Ranchi Club Ltd. (2001) 247 ITR 209 (SC) it was held that the order of the AO in the assessment order to charge interest has to be specific and clear and the assessee must be made to know that the AO after applying his mind has ordered charging of interest. In Anjum M.H. Ghaswala (2001) 252 ITR 1 (SC), it was held, in the context of

whether the Settlement Commission could waive interest, that the levy was mandatory and could not be waived. Subsequently, in Insilco Ltd. (2005) 278 ITR 1 (SC), the Supreme Court remanded the matter to decide whether the law laid down in Ranchi Club had been changed by Anjum M.H. Ghaswala or not. Ranchi Club Ltd has not been expressly overruled nor has a different view been taken in Anjum M.H. Ghaswala's case. There is also no force in the department's argument that even if assessment order or computation sheet does not provide for interest, since interest is mandatory, it can be charged in the demand notice which is signed by the A.O. Even if a provision of law is mandatory and provides for charging of tax or interest, the view taken in Ranchi Club Ltd is that such charge by the AO should be specific and clear and assessee must be made to know that the AO has applied his mind and has ordered charging of interest. The mandatory nature of charging of interest and the actual charging of interest by application of mind and the mention of the proviso of law under which such interest is charged are two different things. Consequently, if the assessment order is silent, interest u/s 234A, 234B & 234C cannot be levied.

*CIT v. Awadh Hotels (P) Ltd (Allah) (High Court)*www.itatonline.org

S.234A: Interest-Default in furnishing return of income-Tax paid before due date of filing return- Interest cannot be levied in respect of tax paid before due date of filing of return.(S.234A, 234C)

The return was due on 30 th August 1996. The assessee has paid self assessment tax of Rs 10 lacs under section 140A on 30 the August 1996. The return was filed on 27 th March 1998. The assesses tax was Rs 14, 82 941 after adjusting the tax deducted at source. The revenue demanded interest on entire amount of Rs 14,82, 941 though the assessee had deposited the self assessment tax of Rs 10,0000. The Assessee challenged the action of revenue authorities in determining the interest under section 234A and 234C of the Income –Tax Act . The court held that permitting the revenue to collect interest on the entire amount ,though admittedly tax of Rs 10 lacs was already paid before due date of filing of return would render the provisions of section 234A penal in nature and expose it to challenge of its vires, therefore the interest could be charged only on Rs 4,82, 941 and not entire tax of Rs 14,82,941. Accordingly the petition was allowed.(A.Y.2006-07)

Bhartbhai B. Shah v. ITO (2012) 74 DTR 68 (Guj.) (High Court)

S.234A: Interest- Default in furnishing return of income- Adavnce tax-Search and seizure- Cash seized from third party-Tribunal directed the Assessing Officer to adjust the cash seized against advance tax liability..(S.132, 234B, 234C)

A search and seizure was carried out at the premises of the assessee and cash was seized. Assessee requested that the seized cash be treated as advance tax paid and adjust it against cash liability. However the Assessing Officer has not adjusted the cash seized. The Tribunal held that the cash seized from third party was found to be the cash of the assessee and this fact was not disputed. Therefore the cash seized from the third party or the cash seized from the assessee would retain the same character and did not affect processing of such seized cash. Accordingly the Tribunal directed the Assessing Officer to adjust the seized cash against advance tax liability from the date of seizure itself.(A.Y. 2008-09)

Ram S.Sarda v. Dy. CIT (2012) 13 ITR 457 (Rajkot)(Trib.)

S. 234B: Interest-Advance tax- Waiver of interest-Not mentioning in the assessment order-Interest is mandatory and can be levied even if assessment is silent (S. 234A)

The Court held that as held in CIT v. Anjum M.H.Ghaswala and others (2001) 252 ITR 1 (SC) , interest under section 234A, 234B and 234C is mandatory and interest under section 234B / 234C is mandatory in nature and there is no need to specifically recite in the assessment order that the said interest shall be levied . The order of High Court and Tribunal was set aside and directed the Tribunal to consider whether the assessee is eligible for waiver of interest as per notification no F.NO 400/ 234/95 –IT (B) dated May 23 , 1996(C.A.no 1937 of 2007 dated 6-9-2012)

Karanvir Singh Gossal v. CIT (2012) 210 Taxman 241(SC).

S.234B: Interest-Advance tax – Assessment-Reassessment-Interest is payable from original order of assessment. (S. 143(3), 147)

Original order of assessment was dated 24-6-1991 and order of reassessment was on 28-1-1994. The interest under section 234B was payable from original order of assessment.

Vijay Kumar Saboo (HUF) and another v. ACIT (2012) 340 ITR 382 / (2011) 201 Taxman 366 (Karn.) (High Court)

S.234B : Interest –Advance tax- Book profit – Company - Assessee cannot be charged interest under section 234B and 234C, for the Asst. years 2001-02 and 2002-03, prior to amendment of section 115JB by the Finance Act, 2002.

The assessment was done by applying the provisions of section 115JB and the interest was charged under section 234B and 234C of the Income-tax Act. The assessee contended that the provisions of sections 234B and 234C are not applicable, which was rejected by the Assessing Officer and allowed by the Commissioner (Appeal) and Tribunal. On appeal to High Court by the revenue, the Court held that prior to amendment of section 115JB by the Finance Act , 2002, the advance tax was payable on book profit which is deemed to be total income. As the assessee was under no obligation on the date of the alleged default to pay tax at that particular rate for financial Years 2000-01 and 2001-02. The Court held that though assessee was liable to pay advance tax as per amended provisions of section 115JB for the Assessment years 2001-02 and 2002-03 assessee could not be charged interest under section 234B and 234C on differential amount of pre amended total income and post amended deemed total income. (A. Ys. 2001-02 & 2002-03).

CIT v. Jupiter Bio-Science Ltd. (2012) 67 DTR 91 / (2011) 202 Taxman 80 (Karn.)(High Court)

S.234B:Interest-Advance tax- Specific direction-Without specific order interest cannot be levied.

If the assessment order or computation sheet does not provide for interest , no interest can be levied, even if any provision of law is mandatory and provides for charging of tax or interest , such charge by the Assessing Officer should be specific and clear and assessee must be made to know that Assessing Officer has applied his mind .

CIT v. Deep Awadh Hotels (P) Ltd (2012) 72 DTR 317 (All.)(High Court)

S.234B: Interest- Advance tax- Specific direction-No interest can be levied through a notice of demand , in the absence of any specific direction in the assessment order.

The court following the ratio of judgment in CIT v. Ranchi Club Ltd (2001) 247 ITR 209(SC), held that in absence of any specific direction giving reference to the section charging interest in the assessment order , no interest can be levied through a notice of demand . Accordingly the appeal of revenue was dismissed. (A.Y.1991-92)

ACIT v. S. K. Patel Family Trust (2012) 252 CTR 427/ 74 DTR 317 (Guj.)(High Court)

S.234B: Interest- Advance tax-Matter set aside- Held to be justified.

The court held that the Tribunal was justified in remitting to the matter to the Assessing Officer with a direction to examine and decide the issue of levy of interest under section 234B.(A.Y, 2004-05)

CIT v.Kotak Securities Ltd (No .2)(2012) 346 ITR 352 (Bom.)(High Court)

S.234C: Interest- Deferment of advance tax- Waiver of interest-Failure to pay advance tax due to not releasing of FDRs, hence the assessee is entitled to waiver of interest . (S.119)

There was search and seizure action against the assessee on 10-12-1998 and FDRs of Rs 29 crores were seized. The assessee had not paid the advance tax .The assessing officer levied the interest under section 234C. The assessee moved application to Commissioner to waiver of interest. Commissioner rejected the application for waiver . The assessee filed a writ petition against the said order . The court held that the assessee requested for release of FRDs to make the payment of advance tax , however the same was released latter .The assessee has paid the tax after release of FDRs, therefore the assessee would be entitled to waiver of interest under section 234C in view of Board notification dated 23-5-1996, para 2(b). The matter was decided in favour of assessee. (A,Y,1999-2000 and2000-01)

Super Cassettes Industries Ltd v.Chief CIT (2012) 207 Taxman 153 (Delhi)(High Court)

S.234D:Interest on excess refund- Regular assessment- Date on which the regular assessment order has been passed.

The Court held that since the regular assessment had been completed on March 30, 2004 and section 234D came in to operation on and from June 1, 2003, which was prior to the completion of the regular assessment, the assessee was liable to pay interest on the excess refund amount received as contemplated under section 234D of the Act. It is not the year of assessment that falls for consideration in such circumstances, but the date on which the regular assessment order has been passed. (A.Y. 2001-02)

CIT v. Infrastructure Development Finance Co. Ltd. (2012) 340 ITR 580 (Mad.)(High Court)

S. 234D: Interest on excess refund-Payable by assessee- Applies even to refunds granted prior to 1.6.2003.

Questions of law admitted before High Court was "whether the Tribunal was right in holding that interest under section 234D is chargeable from the assessment year 2004-05 only and it could not be charged for earlier assessment years even though regular assessments for such earlier assessment years are framed after 1-6-2003" ? The argument that as in CIT v. **Bajaj Hindustan** Ltd ITA no 198 of 2009 dated 15-4-2009 it had been held that s. 234D did not apply to refunds granted prior to 1.6.2003, the Explanation to s. 234D inserted by the FA 2012 w..e.f. 1.6.2003 (which provides that s. 234D shall also apply to assessment years commencing pre 1.6.2003) did not apply to the assessee is not acceptable because Explanation 2 is a declaratory/ clarificatory amendment. The alternate argument, relying on CIT v **Kerala Chemicals & Proteins Ltd.(2010)** 323 ITR 584 (Ker) that interest can be charged only from 1.6.2003 is also not acceptable in view of the language of Explanation 2 to s. 234D. The question of law was answered in the negative i.e. in favour of the appellant revenue and against the respondent –assessee. (A.Y .2002-03)(ITA no 2012) of 2011 dated 12-9-2012))

CIT v. Indian Oil Corporation Ltd (Bom.)(High Court), ***www.itatonline.org***

S.234D:Refund- Interest- Explanation 2-Assessee is held to be liable to pay interest.

The Tribunal held that Explanation 2 having been inserted in section 234D by Finance Act , 2012 , with retrospective effect from June 1, 2003 , clarifying that the provisions of section 234D shall also apply to the assessment years commencing June 1, 2003 , if the proceedings in respect of the assessment year are completed after that date , and the proceedings in respect of the assessment year 2003-04 having been completed on November 30, 2005 , the assessee was liable to pay interest under section 234D.(A.Y. 2003-04)

Kotak Mahindra Capital Co Ltd v. ACIT (2012)138 ITD 57/18 ITR 213/75 DTR 193/148 TTJ 393 (SB.)(Mum.)(Trib.)

S.237:Refunds-Refund of Income-tax and Wealth tax- General principles-Article 265 of the Constitution of India.

The Income-tax Act and wealth tax Acts provide for levy assessment ,recovery , refund , appeals and all incidental /ancillary matters . For an assessee to claim refund , he must satisfy the statutory requirements and article 265 of the Constitution of India is not violated if an assessee does not claim refund in accordance with the provisions of the Act or when the "wrong" assessment or any other "wrong" order becomes . An assessment order or an order quantifying the income or taxable wealth can be rectified or modified in the proceedings as contemplated by the enactment . The assessment order or the order quantifying the income or taxable wealth cannot be challenged on the merits while the authorities examine the question of refund . The authorities can not go beyond the assessment order or the order qualifying net wealth /income. The Court held that the refund provisions should be interpreted in a reasonable and practical manner and when warranted liberally in favour of the assessee.. If there is substantial compliance with the provisions for refund , it may not be denied because it is not strictly in the form or prescribed manner. Accordingly the Court allowed the petition for granting refund. For the Assessment year 1999-2000 the assessee had filed the return and had deposited self assessment tax and return filed by the assessee was accepted . The Court observed the the assessee has the right to file a revision under section 25 of the wealth tax Act , however ,the period for filing for the revision had expired and the assessee did not take steps to invoke the power hence the assessee is not entitled to refund.(A.Ys 1994-95 and 1999-200)

Indglonal Investment and Finance Ltd and another v.ITO (2012) 343 ITR 44 (Delhi)(High Court)

Taksal Theatres Private Ltd v. Asst CIT (2012) 343 ITR 44 (Delhi) (High Court)

S.237: Refunds- Credits for tax deducted at source-CBDT- High Court seeks to end TDS & Refund harassment by Department.(S.199)

One Anand Parkash, FCA, addressed a letter dated 30.4.2012 to the High Court in which he set out the numerous problems being faced by the assesses across the Country owing to the faulty processing of the Income Tax Returns and non-grant of TDS credit & refunds. He claimed that because of the department's fault, the assessees were being harassed. The High Court took judicial notice of the letter, converted it into a public interest writ petition and directed

the CBDT to answer each of the allegations made in the letter and certain other queries that the Court raised. The Court also appointed eminent senior counsel to assist it. The department accepted that tax payers are facing difficulties in receiving credit of TDS & refunds on account of adjustment towards arrears. As an interim measure to provide immediate relief to the assessees, the Court passed the following order:

(i) The problem is apparent, real and enormous. It has escalated because of Centralized Computerization and problems associated with incorrect and wrong data which is uploaded by both the deductors or payees and the AOs. The issue is of general governance, failure of administration, fairness and arbitrariness. The magnitude of the problem and the number of tax payers adversely affected thereby is apparent from the fact that 43% and 39% of the returns in Delhi zone for the FYs 2010-11 and 2011-12 were defective. Huge demands are created on this count. Every attempt possible has to be made to redress the grievance of the tax payers. The tax payers should not be made to run around, make repeated visits to deductor or the AO. Rejection of TDS, which has been deducted and paid, hurts the assessee and puts him to needless inconvenience, harassment and costs. It gives bad name to the Revenue. The problems faced by tax payers can be broadly classified into two categories. First, failure and difficulties in getting credit of TDS paid and second, adjustment of past demands or arrears of tax from refunds payable.

(ii) As regards the first problem of failure of taxpayers to get credit for TDS on account of (a) incorrect entries/ mismatch in Form 26AS and (b) failure of the deductor to correctly upload the TDS return, the department's response is unconvincing and unsatisfactory. It expresses complete helplessness on the part of the Revenue to take steps and seeks to absolve them from any responsibility. Denying benefit of TDS to a tax payer because of fault of the deductor, which is not attributable to the deductee, is a serious matter and causes unwarranted harassment and inconvenience. Revenue cannot be a silent spectator and wash their hands or express helplessness. This problem is normally faced by the small taxpayers including senior citizens as they do not have CAs on their pay roles. The marginal amount involved compared to the efforts, costs and frustration, makes it an unviable and a futile exercise to first approach the deductor and then the AO. The CBDT should examine the issue and take appropriate steps to ameliorate and help small tax payers and senior citizens;

(iii) If there are small and insignificant mismatches in the TDS details, they should be condoned or ignored. After all tax has been paid or credited in the name of the assessee. Once the amount is correctly and rightly reflected in Form AS26, small or technical mismatch in the return should not be a ground to deny credit of the amount paid. If the AO still feels that benefit of TDS reflected in AS26 should not be given, he should issue notice to the assessee to revise or correct the mistake and only if the necessary rectification or correction is not made, an order u/s 143(1) should be passed and demand should be raised. An interim direction to this effect is issued;

(iv) As regards the second problem, CPC has stated in letter dated 21.8.2012 that refunds to the extent of Rs. 4800 crores have been adjusted against arrears at the s. 143(1) stage by the CPU. The department's action of adjusting the refunds without giving prior intimation to the assessee is contrary to s. 245. In a few cases where prior intimation is given and the assessee approaches the AO, he is told to approach the CPC, Bengaluru, and when he approaches the CPC, he is told to approach the AO. The department should file an affidavit stating whether prior intimation is sent or not and set out the procedure followed if an assessee objects to the adjustment. In the meanwhile, the department shall not adjust the refunds against the demands at the s. 143(1) stage without giving the assessee an opportunity to file a reply. The AO should deal with the reply and communicate his findings to the CPC before processing the refund or adjustment of demand.

Court On Its Own Motion v. CIT (Delhi)(High Court)www.itatonline.org

S.244(IA): Refund –Interest-Advance tax- Interest payable by government –Tax deducted at source-Aggregate of advance tax/ TDS paid exceeds the assessed tax, advance tax or tax deducted at source loses its identity as soon as it is adjusted against the liability created by the assessment order and becomes tax paid pursuant to the assessment order hence the Judgement of Sandvik Asia requires reconsideration.(S.195, 195A,214, 219, 237, 243)

Issue under consideration before the apex court was whether interest is payable by the Revenue to the assessee if the aggregate of installments of Advance Tax/TDS paid exceeds the assessed tax. The assessee relied upon Sandvik Asia Limited v. CIT (2006)280 ITR 643(SC) where it was held that the assessee was entitled to be compensated by the

Revenue for delay in paying to it the amounts admittedly due. The apex court doubting the correctness of Sandvik Asia (supra) held that the judgement in Modi Industries Ltd and others v.CIT (1995) 216 ITR 759(SC) correctly laid down that advance Tax or TDS loses its identity as soon as it is adjusted against the liability created by the assessment order and becomes tax paid pursuant to the assessment order. If Advance Tax or TDS loses its identity and becomes tax paid on the passing of the Assessment Order, then, is the assessee not entitled to interest under the relevant provisions of the Act? The apex court thus held that the view taken in Sandvik Asia was not correct and thus, directed the Registry to place this matter before Hon'ble the Chief Justice on the administrative side for appropriate orders.
CIT v. Gujarat Flouro Chemicals(2012)348 ITR 319/ 76 DTR 74/252 CTR 237 (SC)

S.244A:Refunds- Interest- Search and seizure - Assessee is entitled to interest on excess cash retained excess of liability. [S. 132, 132B(4)]
During a search at the business and residential premises of the petitioner on September 4, 1992, cash of Rs. 1,60,000 was seized by the Department. On 24-12-1992 order under section 132(5) was passed determining provisional tax liability of Rs. 3,34,492 and the cash seized was apportioned. On regular assessment after giving effect to the Order of Commissioner (Appeals), the tax payable was only Rs. 1654. On 19-8-1996 the assessee applied for refund of Rs. 1,60,000 with interest. On 2-12-1996, the sum of Rs. 1,60,000 was refunded to him without interest. The assessee filed writ petition seeking interest under section 132B(4) and 244A of the Act. The Court held that last assessment was 4-7-1996, excess amount was retained hence, the assessee is entitled the interest from 5-7-1996, till 2-12-1996. The Court also held that if the interest is not paid within three months the assessee is entitled to interest till the receipt interest, under section 244A(1)(b). (A. Y.1993-94).
Sitram through legal LRs v. CIT (2012) 341 ITR 549 /68 DTR 230/ 248 CTR 180/208 Taxman 376(Bom.)(High Court)
S.245: Refunds - Set off of refunds – against tax remaining to be payable -Deduction at source - TDS refund - High Court takes notice of TDS refund harassment by department and demands answers. (S.199)
One Anand Parkash, FCA, addressed a letter dated 30.4.2012 to the High Court in which he set out the numerous problems being faced by the assesses across the Country owing to the faulty processing of the Income Tax Returns and non-grant of TDS credit & refunds. He claimed that because of the department's fault, the assessees were being harassed. The High Court took judicial notice of the letter, converted it into a public interest writ petition and directed the CBDT to answer each of the allegations made in the letter. In addition, the Court demanded an answer to the following issues:
(1) Whether procedure under Section 245 of the Income Tax Act, 1961 is being followed before making adjustment of refunds and whether assessees are being given full details with regard to demands, which are being adjusted.
(2) Whether the Revenue is taking caution and care to communicate rejection of TDS certificates and intimation under Section 143(1) in case any adjustment or modification is made to taxes paid, either as advance tax, self assessment tax or TDS.
(3) Whether and what steps are taken to verify and ascertain that the old demands against which adjustment is being made was communicated to the assessee?
(4) What steps have been taken to ensure that the deductors correctly upload the TDS details/particulars on the Income Tax website?
(5) What is the remedy available to the assessee and can he/she approach the Department in case the deductor fails to correctly upload the particulars in his/her cases?
(6) Whether an assessee can get benefit of TDS deducted or/and paid but not uploaded by the deductor and procedure to claim the said benefit?
Court On Its Own Motion v. CIT (Delhi)(High Court) www.itatonline.org

S.245C: Settlement Commission- Settlement of cases- Conditions.
While granting immunity from prosecution and imposition of penalty it is incumbent upon the Settlement Commission to examine as to whether the criteria prescribed u/s 245C is wholly complied or not; Settlement Commission having granted immunity from prosecution and penalty without recording any finding as to whether there is deliberate

concealment of income or not, other of the Single Judge remanding the matter for de novo adjudication does not suffer from any material irregularity or illegality so as to warrant any interference by the Court in its appellate jurisdiction.
ING Vysya Bank Ltd. v. CIT (2012) 76 DTR 193 (Karn.)(High Court)

S.245D: Settlement Commission- Procedure –Application-Jurisdiction-Cash credits -Penalty-Settlement Commission pass an order on any other matters which are not covered by the application (S.68, 245H, 271(1)(c), 274)

Petitioner filed the writ petition against the order of settlement commission where in it urged that they have in their petition had made disclosure of only Rs 10 lakhs each in two assessment years and since the Commissioner was not in a position to determine either the genuineness or the authenticity of the alleged transaction, entered into by the petitioner with two companies ,the settlement Commission acted outside the jurisdiction in entering upon the genuineness of the transactions in impossible to accept .The Court held that the parliament intended that the entire assessment is before the Settlement Commission .The commission complete the assessment as part of the settlement of the case. Untill the Settlement Commission is seized of proceedings ,there is no parallel assessment contemplated in law .Comprehensiveness, finality , and conclusiveness are three attributes of function assigned to Commission .That object is achieved when the entire assessment is completed , as part of the jurisdiction to settle the case. To dilute this position would defeat the object which Parliament intended to achieve .Once an assessee moves the Settlement Commission , the statute expressly mandates that the application cannot be withdrawn . Unless the Commission in given case decides to reject the application, it is entitle to resolve the case by settlement . An assessee who moves the Settlement Commission cannot be allowed to be anything other than fair and candid . Nor can he assert an unqualified right that the Settlement Commission should either accept what he discloses or leave him to another round of assessment before Assessing Officer, therefore the Settlement commission can pass orders on matters covered by the application and on any matter relating to the case which is referred to in the report of the Commissioner though not covered by application ; it is not constricted from proceeding further where the Commissioner does not submit report at all. As regards addition under section 68 in respect of share premium of two companies, settlement commission considered all the material on record and given the finding that transaction is not genuine hence the provision of section 68 rightly applied to facts of the case. As regards levy of penalty under section 271 (1) (c) , the Court held that the assessee has offered only Rs 10 lakhs in each of the two assessment years in question based on the story of having earned such income without producing the records and without touching upon the real issues for which it was being pursued by the revenue and the settlement commission having found on the basis of totality of evidence that the assessee had not genuinely received the huge share premiums as claimed by it , it was justified in coming to the conclusion that the settlement proceedings was an attempt on the part of the assessee merely to shut out further investigation and ,therefore , levy of penalty under section 271(1)(c) by the settlement Commission after furnishing a reasonable opportunity of hearing to the assessee on merits no interference was called. Accordingly the Court dismissed the petition of the petitioner.(A.Ys. 2008-09 & 2009-10)
Major Metals Ltd v. UOI(2012) 251 CTR 385/ 69 DTR 274 (Bom.)(High Court)

S.245N:Advance rulings- Definitions- Binding-AAR Rulings can be challenged but not directly in the Supreme Court.(S. 245S, Constitution of India. Arts. 136, 226 & 227)

AAR exercises judicial power and is a "tribunal" whose rulings can be challenged under Articles 136 and 227 of the Constitution. Binding nature of the AAR ruling does not affect the jurisdiction of the Court to entertain a challenge to the ruling under Article 136 or under Articles 226 and 227 of the Constitution. The ruling should in the first instance be challenged before the High Court. Ordinarily, an aggrieved party should not be encouraged to appeal directly to the Supreme Court unless it appears to the Court that the SLP raises substantial questions of general importance or a similar question is already pending before it for decision.
Columbia Sportswear Company v. DIT(2012)346 ITR 161/ 75 DTR 33/251 CTR 353/210 Taxman 42/(283) E.L.T.321 (SC)
Editorial: From the Ruling of Columbia Sportswear Company ,In re (2011)337 ITR 407/ 243 CTR 42/59 DTR 233 /201 Taxman 214(AAR).

S.245R: Advance rulings-Procedure-Application- Mere filing of Return of Income disbars an advance ruling application.(S.139(1))

For AY 2009-10, the assessee filed a return of income u/s 139(1) on 31.3.2010. On 17.06.2010, it filed an application before the AAR seeking a ruling in respect of the transactions that had been entered into in that year. The AAR rejected the application on the ground that as the assessee had filed a ROI, the questions raised in the application were "*already pending*" before an income-tax authority and so the application was not maintainable under the proviso to s. 245R(2). The assessee filed a Writ petition contending that (a) the mere filing of a ROI did not mean that all possible questions were "*pending*" if the AO had not raised the issue and (b) as the AAR had in the past admitted applications even though ROIs were filed, it could not change its stand. Held dismissing the Petition:

Upon a return of income being filed, the matter is "*pending*", in the sense that the AO has the right to take such steps, including issuance of notice. The rationale for the bar in the Proviso to s. 245R(2) is that if the applicant wishes to plan its affairs and transactions in advance, it is free to do but once it proceeds to file a return, the AAR's jurisdiction to entertain the application for advance ruling is taken away, because the AO would then be seized of the matter, and would possess a multitude of statutory powers to examine and rule on the return. The fact that in the past the AAR followed a different practice is irrelevant because there is no estoppel against a statute.(A.Y. 2009-10)

Netapp BV v. Authority for Advance Rulings & Ors(AAR) (2012) 76 DTR 145/253 CTR 164(Delhi)(High Court)

Sin Oceanic Shipping ASA v. Authority for Advance Rulings &Ors (2012) 76 DTR 145/153 CTR 164(Delhi)(High Court)

S.245R:Advance rulings-Procedure-Application- International transaction-Pendency of proceedings-Application is not maintainable.(S. 44BBB, 195)

The applicant is a public sector company. It has entered in to an offshore services contract with Atomstroy Export Russia(ASE) for setting up a power plant in the State of Tamil Nadu. According to the applicant, the income from such contracts is taxable under section 44BBB of the Act. It had entered in to four contracts with ASE. The applicant stated that it was assessed to tax for the years 2006-07 and 2007-08 pursuant to the directions of the Dispute Resolution Panel and it was held that payments received by ASE, under off shore services are covered by section 44BBB. The applicant approached the Authority for a ruling on the question "whether ASE is chargeable to tax as per the Act or under the Double Avoidance Convention between India and Russia in respect of the payment made by NPCIL to ASE under off shore supply contracts". The Authority held that since the question whether the payment made under the transaction was chargeable to tax under the Act was pending before the authorities under the Act arising out of an assessment against, before the applicant approached the Authority seeking ruling to know its Tax deducted at source obligations, hence the application is barred by clause (i) of the proviso to section 245R(2).

Nuclear Power Corporation of India Ltd. (2012) 343 ITR 220/ 65 DTR 99/ 246 CTR 165/ 204 Taxman 181 (AAR)

S.245R:Advance rulings-Procedure-Application- International transaction-Pendency of proceedings-Deduction at source- Application is not maintainable.(S. 40(a)(i), 195)

When the issue is pending in appeal, application for Advance Ruling is not maintainable. On facts it was found that the decision of Assessing Officer whether tax to be deducted on payment to non-resident was challenged before the Authorities and was pending hence the Authority held that application is not maintainable.

Foster Pty. Ltd. (2012) 340 ITR 246 / (2011) 243 CTR 534 / 202 Taxman 155 / 61 DTR 54 (AAR)

S.245R:Advance rulings-Procedure-Application-International transaction-Pendency of proceedings-Rectification of mistake- Dismissed the application. (S. 245Q)

Application of the assessee was not admitted on the ground that return filed by assessee and therefore matter pending before Assessing Officer. Assessee filed the rectification application based on certain observation in the hand book published by the Authority for Advance Rulings. The Authority for Advance Rulings held that Hand Book cannot control the rendering a decision with reference to the relevant provisions. It also clarified that the Hand Book referred the situation where a notice is issued calling upon the applicant to file a return. It does not deal with a situation where a return has been filed within time allowed under section 139(1). Accordingly the Authority has not entertained the application for rectification of mistake and dismissed the application.

Sepco III Electronic Power Construction (No. 2) (2012) 340 ITR 231 / (2011) 245 CTR 374 / 204 Taxman 66 / 63 DTR 402 (AAR)

S.245R:Advance rulings- Procedure- Application- Return filed-Application after filing of return- Date of filing of return is the relevant date to consider the applicability of the proviso to section 245R (2) hence application was held to be barred.

The applicant filed the return of income under section 139(1) of the Act on 30th September , 2009 . The transaction based on which rulings on various questions are sought, was entered into on 24th Nov , 2008 . The application for advance ruling was filed on 21st May 2010.The Authority for advance ruling held that by filing a return , an assessee invites adjudication on all the questions arising out of that return and, therefore if the answer to the question arising before the Authority for advance ruling is involved in the return filed or would arise out of return , bar of proviso to section 245R(2) is attracted , hence the date of filing of return is the relevant date to consider the applicability of the proviso to section 245R(2), accordingly the application was held to be barred and dismissed.

Wave Field Inseis ASA, In re.(2012) 343 ITR 136/ 248 CTR 27 /68 DTR 27 (AAR)

S.245R:Advance rulings-Application-Return filed-Admissibility of the application to the Authority after filing return of income is held as barred hence the application rejected.

Application was made by the applicant to reconsider the view in the case of SEPCO III Electric Power Corporation that upon filing the return of income, it cannot consider the question where return has been filed.

It was stated by the authority that the fixing of the date of notice under section 143(2) / 142(1) of the Act by the income-tax authority as the starting point, would result in vagaries and to the use of different yardsticks to different applicants. A jurisdiction cannot depend on such vagaries. It is, therefore, necessary to have a fixed common point or event for determining the existence or absence of jurisdiction. Applying that test it is held that the definite point should be the date of filing of the return juxtaposed with the filing of the application before this Authority. Thus the application is rejected.

Also it may be noted that in the instant case the applicant has approached the authority more than four years after the transaction giving rise to the application was entered into and even assessments for two years were already completed.

Red Hat India Private Limited - A.A.R. No. 1050 dt. 3 February 2012(AAR)(Unreported)

S.245R:Advance rulings-Procedure-Application- Filing of a return of income is considered as matter pending before Income Tax authority which debars the taxpayer from approaching the AAR.(S.195)

The taxpayer, a Norwegian company, had earned income in India under a sub contract from another foreign company. Based on this sub contract, the taxpayer entered into an agreement with a third foreign company to hire a vessel. The taxpayer withheld taxes on the payments for hiring the vessel under Section 195 and filed its return of income. Subsequently, it filed an application with the AAR on various issues. The AAR dismissed the taxpayer's application on the grounds that since the taxpayer had filed its return of income, the questions arising in the application are already pending before the Revenue, and therefore, the application was barred under clause (i) of the proviso to Section 245R(2). The AAR was of the opinion that when a taxpayer files a return of income, multiple questions arise out of the return of income such as computation of total income, exclusions and exemptions, acceptance or non acceptance of any revenue expenditure, computation of income chargeable to tax and tax due thereon. The arising of the question from a return of income filed cannot depend upon the volition, vagaries, diligence, care or lack of care on the part of the AO. If a return of income is accepted with or without being subjected to an audit, it would only mean that the contention of the taxpayer has been accepted and not that the question has not arisen before the AO.

GTB Invest ASA (AAR No 932, 933 dt. 03.02.12)(AAR)

S.245R: Advance rulings-Procedure-Application- Precedent-AAR is not bound by its own ruling – Foreign company is liable for MAT- Transfer pricing and return of income filing provisions would apply despite no income . (S.2(17),115JB, 139(1), Article 226, 227 Constitution of India).

In the instant case, the AAR had to consider whether as the Applicant had no income chargeable to tax in India (a) the Transfer pricing provisions were applicable to its (b) Section 115JB(MAT) was applicable to it and (c) it was liable to file return of income . The AAR was also to consider whether it was bound by its own earlier rulings. It was held that the theory of precedents does not have strict application to the AAR .It is bound by the decisions of the Supreme Court .

The decisions of High Courts have only persuasive value . The AAR is not subordinate to any High Court for even Article 227 of the Constitution to apply and there are grave doubts whether the jurisdiction under Article 226 will be attracted to the AAR . While the AAR should be slow in disagreeing with the propositions of law laid down in earlier rulings , it should not be deterred from taking a contrary view if its convinced that the earlier view is not correct. And thus, on the basis of the above principle and correct legal position determined, it was held that transfer pricing and return of income filing provisions would apply despite no income.
Castelton Investment Ltd(20120 252 CTR 131 (AAR).
Editorial : Refer - Columbia Sportswear Company v. DIT (2012) 346 ITR 161(SC) AAR is subject to the High Court's jurisdiction.

S.245R: Advance ruling-Jurisdiction- Validity of transaction- Capital gains- Gift to subsidiary-DTAA-India-Singapore- Gift by company to subsidiary appears to be dubious tax avoidance scheme- Application dismissed. (S.45, 47(i),47(iii),48, 56(2)(viia), 82, Companies Act. Art . 13)
The applicant a Singapore company "gifted" the shares of Bharath Wind farm Ltd , an Indian company , to its 99.61% subsidiary Orient Green Power Ltd , another Indian Company . As the gift was made prior to the enactment of section 56(2) (viia) and there was no consideration received , it was claimed that there was no taxable income and that the transfer pricing provisions did not apply . The AAR held that under section 82 of the Companies Act , shares in a company is moveable property transferrable in the manner provided by its Articles of Association. The applicant has not shown the gift was authorized by its Articles . It is difficult to imagine the Articles of Association of a company providing for gifting away of the assets in the company to another company of shares in a public company, unless it be one which has been set up for some purpose. The Authority has the right and duty to consider the reality of the transaction and genuineness of the transaction , in addition to its validity . When such transactions are entered in to involving substantial assets, the applicant has to prove to the hilt the factum , genuineness and validity of the transaction, the right to enter into the transaction and the bonafides of the transaction. To postulate that a corporation can give away its assets free to another even orally can only be aiding dubious attempts at avoidance of tax payable under the Act . The Assessing Officer is in a better position to make a proper enquiry in to the question of the genuineness and validity of the transaction . Hence ruling is denied.Matter remanded.
Orient Green Power Pte Ltd(2012) 346 ITR 557/75 DTR 297 /210 Taxman 339.)(AAR)
Editorial : G.T.O v. Venesta Foils Ltd. (1980) 124 ITR 660 (Cal.) (High Court) , where it was held that transfer of assets to a 100% subsidiary at an undervaluation was not a "gift) since the transferor held the shares of the transferee.

S.245R: Advance rulings-Procedure-Rectification of mistakes –Rule 19
An application was made by the Revenue under rule 19 for rectification of mistakes in the order. It was held that, the objection that the ruling has been given effect to by the A.O. cannot be fully accepted. An order under S. 195 or S. 197 has been understood only as a provisional order subject always to a regular assessment and, therefore, modification of the certificate granted to the company by the AO pursuant to the advance ruling cannot stand in the way of the application for rectification of the ruling being entertained on merits.
Ruling of the Authority to the effect that the income from offshore supplies is not liable to tax in India being a ruling inconsistent with its finding that the assessable unit is an AOP, mistake is apparent from record and the same is required to be corrected; that part of the ruling which rules that the amount received/receivable by the applicant (member of AOP) for offshore supplies in terms of the contract is not liable to tax in India is reopened and the main application is posted for fresh hearing.
CTCI Overseas Corporation Ltd In re(2012) 76 DTR 282 (AAR)

S.245R: Advance rulings-Procedure-Application-Rejection of application
Applicant and TM Ltd. having entered into a share purchase agreement for allotment of TM's share in applicant's name at the time when TM Ltd. was under an outstanding obligation to issue shares to another company under a multi-party agreement which stood in the way of a public issue, and TM Ltd. having subsequently made a public issue, the

circuitous arrangement was made evidently to circumvent cl.2.6.1. of the SEBI Guidelines, 2000, and, therefore, advance ruling is declined on the aforesaid transaction.
Mahindra-BT Investment Company (Mauritius) Ltd., In Re (2012) 76 DTR 125 / 252 CTR 460 (AAR)

S.245R: Advance ruling-Procedure-Application-Application was Rejected for failure to produce consortium agreement.
Applicant has been granted some rights or privileges by a Sri Lankan company SLT based on an agreement . To understand what passes to the applicant under that agreement, it is necessary to know the rights of the grantor. Rights of SLT spring from a consortium agreement. An understanding of the terms and effect of that document is essential for giving ruling on the questions raised by the applicant is a satisfactory manner. Applicant has not produced the consortium agreement despite numerous adjournments, hence, ruling is declined on the questions formulated in the application.
Dishnet Wireless Ltd, In Re (2012) 76 DTR 302/253 CTR 187 (AAR)

S.246:Appeal - Commissioner (Appeals) – Appealable orders-Company whose name struck off from the register by ROC the director of erstwhile company is authorized to sign Form 35 and file an appeal
In case of a company whose name has been struck off the register by the Registrar of Companies can file an appeal under Section 246 and in that situation the Director of erstwhile company is authorized to sign the requisite form. (A.Y. 2006-07)
Ajay Ispat (P.) Ltd v. ITO (2012) 136 ITD 145/73 DTR 16/147 TTJ 367 (Ahd.)(Trib.)
S.246A:Appeal – Commissioner (Appeals) – Appealable orders- Maintainability – Merger – Revision is not maintainable. (S. 264)
Once the assessee approaches commissioner under section 264 and order is passed, the assessment order merges with the order of revision, hence the assessee cannot file an appeal before the Commissioner (Appeals) under section 246A, as the appeal filed after rejection of petition under section 264 is not maintainable.(A.Y.2006-07)
Orissa Rural Housing Development Corporation Ltd. v. ACIT (2012) 343 ITR 316/ 66 DTR 73/247 CTR 137 (Orissa)(High Court)
S.246A:Appeal –Commissioner (Appeals)- Additional ground –Capital gain-Legal issue- Benefit of proviso to section claimed was first time before Commissioner(Appeals) held justified in allowing the claim.(S.112(1))
In the return of income filed by the assessee the assessee has shown the long term capital gains taxable at 20%., which was accepted by the Assessing Officer. The assessee has not filed revised return. The assessee filed an appeal before the Commissioner (Appeal) and contended that by mistake the capital gain was offered at 20%. As per proviso the long term capital gain is assessable for the relevant year was at 10%. The assessee also filed an application under Rule 46A(1)(c)/(d) of the IT Rules. The Commissioner (Appeals) has admitted the claim and allowed the appeal. Revenue has filed an appeal before the Tribunal . The Tribunal allowed the appeal following the Goetze (India) Ltd v.CIT (2006) 284 ITR 323 (SC). On an appeal to the High Court by assessee the Court held that the Assessee is entitled to raise the legal issue before the first Appellate Authority , which possessed co terminus power similar to Assessing Officer. The High Court set aside the order of Tribunal and restored the order of Commissioner (Appeals).(A.Y .2001-02)
Raja Rani Gulati (Smt) v. CIT (2012)346 ITR 543/ 249 CTR 51 / 69 DTR 122 (All.) (High Court)
S. 246A: Commissioner (Appeals)-Appealable orders- Penalty for failure to furnish annual information is appealable before Commissioner (Appeals) and Tribunal.(S.253(1)(c), 271, 271FA).
Sec. 246A(1)(q) provides for appeals before the CIT(A) against an order of penalty passed under Chapter XXI. Sec. 271FA admittedly falls within Chapter XXI. Therefore, appeal against an order passed by Director of IT, an officer of the rank of CIT u/s. 271FA is maintainable before CIT(A). Merely because orders u/s. 271 and 272A passed by an officer of the rank of CIT are appealable before the Tribunal u/s. 253, it cannot be held that an order u/s. 271FA passed by an officer of the rank of CIT should also be appealable before the Tribunal. Though orders of penalty us/. 271 and 272A fall under Chapter XXI, appeals there from stand excluded before the CIT(A) under the general

provisions of S. 246A(1)(q) by virtue of the specific provision u/s. 253(1)(c). Consequently, an order u/s. 271FA is appealable u/s. 246A(1)(q).

DIT v. Ravi Vijay & Anr(2012) 252 CTR 228/75 DTR 202 /209 Taxman 498(Raj.) (High Court)

DIT v. Balu Ram& Anr ((2012) 252 CTR 228/75 DTR 202 (Raj.) (High Court)

S.246A:Appeal- Commissioner (Appeals) –Appealable orders- Deduction at source – Interest-Assessee in default- Appeal is maintainable.(S. 201)

The Commissioner (Appeals) held that the Assessing Officer has passed an order levying the interest under section 201 hence the appeal is not maintainable. The Tribunal held that order passed under section 201 is appealable. (A. Ys. 2007-08 to 2009-10)

Canara Bank v. Dy. CIT (TDS) (2012) 134 ITD 1/67 DTR 391 (Lucknow)(Trib.)

S.246A:Appeal- Commissioner (Appeals)- Appealable orders-Income-Salary –Performance incentive-Same income cannot be assessed twice, and claim of assessee has to be allowed as mistake apparent on record , though the income was offered by assessee in the return of income, the appeal is maintainable .(S. 4,139.154).

The assessee while filing the return for the assessment year 2007-08 in addition to regular income also admitted a sum of Rs.4,28,750/- as performance incentive from his employer . The assessment was completed under section 143(3), which was accepted by the assessee. In the assessment year 2008-09 after going through the TDS certificates, the assessee realized that the correct assessment year should be assessment year 2008-09 and offered for taxation in the Assessment year 2008-09, which was accepted by the tax department. The assessee filed an appeal to Commissioner (Appeals) for the assessment year 2007-08, which was dismissed by Commissioner in limine as appeal is not maintainable. The assessee preferred an appeal before the Tribunal. As there was difference of opinion the matter was referred to third member. The third member held that the Act does not authorize levy of tax on same amount more than once, therefore

When amount of performance incentive had been assessed for assessment year 2008-09 , assessment of same amount for impugned assessment year 2007-08 was a mistake apparent on records. Accordingly the claim of assessee was allowed.(A.Y 2007-08)

R. Natarajan v. ACIT(2012) 135 ITD 55/ 70 DTR 249/ 146 TTJ 315(TM)(Chennai) (Trib.)

S.246A: Commissioner (Appeals) – Appealable orders- Order giving effect to revision order u/s 264

CIT having passed order u/s 264 keeping the contentious issues alive by sending the matter back to the A.O. without deciding the same, it cannot be said that the issue have attained finality vide order u/s 264 and, therefore, assessee was entitled to agitate such issues in the appeal against the fresh assessment made by the A.O. pursuant to the order of the CIT (A.Y. 1999-2000)

Jasbir Singh v. ITO (2012) 76 DTR 36 (Asr.)(Trib.)

S.249:Appeal – Commissioner (Appeals) - Form of appeal and limitation – Payment of tax due on returned income mandatory, however no time limit is prescribed for the same.

Only requirement of Section 249(4) is payment of tax due on returned income. There is no such time limit is prescribed for payment of such taxes. If an appeal has been filed has been filed after making payment, it cannot be said that the requirement of section 249(4) has been complied with. (A.Y. 1996-97)

ITO v. Ankush Finstock Ltd. (2012) 136 ITD 168/149 TTJ 502 (Ahd.)(Trib.)

S.249:Appeal- Commissioner (Appeals)- Form of appeal and limitation-Appeal can be filed by the director of erstwhile company, whose name was struck–off the register by the Registrar of company.(S. 140,246 ,Companies Act 1956 , S. 560)

The assessee filed an appeal against the levy of penalty order. The Commissioner (Appeal) noticed that the company was wound up and the name of the company was struck off from the register of ROC. He opined that "in the absence of existing company ,there cannot be any director who can sign the verification for the filing of appeal. There cannot be any appeal by a company which is not in existence .In view of this ,the appeal is treated as invalid and accordingly dismissed." Being aggrieved by the said order the assessee filed an appeal before the Tribunal. The Tribunal held that a

company whose name has been struck-off the register by the ROC can file an appeal under section 246 and in that situation the director of the erstwhile company is authorized to sign the requisite forms. Accordingly, it was held that the appeal is maintainable. (A.Y. 2006-07)

Ajay Ispat (P) Ltd v. ITO (2012)136 ITD 145/ 73 ITD 16/147 TTJ 367 (Ahd.)(Trib.)

S.250:Appeal- Commissioner (Appeals-)-Procedure- Additional Ground-legal.(S.254)

Ground raising the claim for exemption under 10 (23C) of the Act being a legal ground can be raised for the first time before the appellate authority.

CIT v. St. Mary's Malankara Seminary (2012)348 ITR 69/ 71 DTR 153 / 250 CTR 294 (Ker.)(High Court)

S.250:Appeal- Commissioner (Appeals)- Procedure-Additional evidence- CBDT circular can not be treated as additional evidence. (Income–tax Rules, 1962- Rule 46A)

Circular issued by CBDT cannot be termed as an additional evidence in appeal and, therefore, it cannot be said that Commissioner (Appeals) was not justified in admitting circular No. 723, dt.19thSeptember, 1995 and considering the same without affording opportunity of hearing to the Assessing Officer.(A.Y. 2005-06)

ACIT v. Minpro Industries (2012) 65 DTR 113/143 TTJ 331 (Jd.)(Trib.)

S. 250:Appeal – Commissioner (Appeals) – Additional evidence – Document not produced the same before Assessing Officer while replying to relevant query assessee is Not entitled to produce the documents before CIT(A) .(Rule 46A)

Assessee though in possession of the document, having not produced the same before AO while replying to relevant query made by AO, Assessee is not entitled to produce the same in appeal before CIT(A) either under Sub- rule (1) or sub- rule (4) of Rule 46A. (AY 2007-08)

Sagar Sarhadi v. ITO (2012)135 ITD 153/ 148 TTJ 86 (Mum.) (Trib.)

S. 250(5): Appeal-Commissioner of income -tax(Appeals)-Additional ground-Retrospective amendment of law - Additional ground in view of retrospective amendment could be raised before the Commissioner of income -tax (Appeals).

Before the Commissioner of income-tax (Appeals), the assessee raised an additional ground praying for allowability of expenditure in respect of which TDS was paid before due date of filing of return in view of the retrospective amendment in law amending section 40(a)(ia). The Commissioner of income-tax (Appeals), rejected the claim relying on Goetze (India) Ltd v. CIT (2006) 284 ITR 323 (SC).The Tribunal held that in view of retrospective amendment of law additional ground could be raised before the CIT (A) and directed the CIT (A) to entertain the claim. (A.Y. 2005-06)

Nitin M.Panchamiya v. Addl.CIT (2012) 73 DTR 202/148 TTJ 96(Mum.)(Trib.)

S.251:Appeal- Commissioner (Appeals) – Powers-Stay – Recovery-Commissioner (Appeals) has the power to stay the recovery. (S. 220)

Commissioner (Appeals) have inherent implied and ancillary powers to grant stay against recovery of disputed demand of tax while the appeal filed before them under section 246 or 246A is pending. The Court observed that all the first appellate authority in cases of other appellant assessee within State of Rajasthan also would entertain stay applications filed before them during the pendency of appeals and would decide the same on their own merits in future. (A.Y. 2008-09)

Maheswari Agro Industries v. UOI (2012)346 ITR 375/ 246 CTR 113/ 65 DTR 129 / (2012) TLR Vol. 42 Feb. 168 / 206 Taxman 375 (Raj.)(High Court)

S.251:Appeal- Commissioner (Appeals) –Powers-New source of income- Remand-Assessing Officer cannot travel beyond the specific issue contained in remand order.(S. 115J)

The assessing officer is not empowered to travel beyond the specific issues contained in the order of remand passed by the Commissioner of Income tax (Appeals) (A.Y.1988-89)

Dy. CIT v. Surat Electricity Co. Ltd. (2012) 67 DTR 181 / (2011) 337 ITR 271 / 202 Taxman 562 (Guj)(High Court)

S.251:Appeal –Commissioner (Appeals)- Powers- Change of status- In appeal the Commissioner (Appeals) has no power to modify the status of assessee from AOP to BOI.

The Assessing Officer issued the notice under section 148 to assesse in the status of AOP comprising of three persons. The assessment order passed in pursuance of notice under section 148 was challenged before Commissioner (Appeals). The Commissioner (Appeals) changed the status from AOP to BOI consisting of two persons. The Order of Commissioner (Appeals) was upheld by the Tribunal. On appeal by the assessee to High Court the court held that if the status of the assessee is to be modified , the only option available to the Assessing Officer is to assess the income in the appropriate status ,if permitted by law, by issuing a notice to the assessee in that particular status . Commissioner (Appeals) was not justified in modifying the status from AOP to BOI. The question was answered in favour of assessee.(A.Y. 1972-73).

Gutta Anajaneyulu& Co. v. CIT (2012)347 CTR 135/ 249 CTR 106 / 69 DTR 181 (AP.)(High Court)

S.251:Appeal-Commissioner (Appeals)-Powers-New claim before Commissioner (Appeals)- Assessee entitled to raise claims not made in ROI before appellate authorities. (S.139)

The assessee filed a ROI in which it omitted to make a claim for payment of SEBI fees. The claim was made by a letter during the assessment proceedings. The AO rejected the claim on the ground that he had no authority to allow any deduction which had not been claimed in the ROI. The assessee raised the claim before the CIT (A) who allowed and this was confirmed by the Tribunal. The department filed an appeal to the High Court claiming that as per Goetze (India) Ltd v. CIT (2006) 284 ITR 323 (SC), the assessee was not entitled to make an additional claim for deduction other than by filing a revised return. Held by the High Court dismissing the appeal:

It is well settled that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. That they may choose not to exercise their jurisdiction in a given case is another matter. The exercise of discretion is entirely different from the existence of jurisdiction. Goetze was confined to a case where the claim was made only before the AO and not before the appellate authorities. The Court did not lay down that a claim not made before the AO cannot be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. On facts, there was nothing to show that the claim entertained by the CIT (A)/ ITAT was improper CIT v. Jai Parabolic Springs LTD (2008) 306 ITR 42 (Delhi) (High Court) referred). (A.Y .2004-05)

CIT v. Pruthvi Brokers & Shareholders Pvt. Ltd(2012) 74 DTR 321/208 Taxman 498/252 CTR 151(Bom.)(HighCourt

S.251:Appeal-Commissioner (Appeals)-Powers-Additional ground- Raised first time before Commissioner (Appeals)- Additional ground admitted.

Assessee did not claim deduction under section 80C in the return but took up the claim by way of a letter without revising the return. Assessing Officer disallowed the claim. On appeal Commissioner (Appeals) also did not allow the claim. The Tribunal held that the Appellate Authority still has the power to entertain the claim, accordingly the order of Commissioner was set aside and matter remitted to the file of the Assessing Officer, with a direction to consider the claim. (A.Y. 2006-07)

Pradeep Kumar Harlaka v. ACIT (2012) 65 DTR 157 / 143 TTJ 446(Mum.)(Trib.)

S.251:Appeal-Commissioner (Appeals)-Powers – Admission of additional evidence is held to be justified.(Rule 46A)

Assessee had already filed requisite details before Assessing Officer and further detail was to be filed before Assessing Officer, but latter refused to accept same. Such new evidence that was to be filed by assessee was from Government agency and same was essential for disposal of appeal. The Tribunal observed that the CIT(A) had considered the new evidence and the facts and circumstances of the case in entirety and after recording reasons admitted the new evidences. Hence, admission of new evidence by CIT(A) was justified. (A. Y.2006-07)

ITO v. Bhagwan Dass, [2012] 137 ITD 120/17 ITR 446 (Chandigarh)(Trib.)

S.253: Appeal- Appellate Tribunal- Non –payment of admitted tax- Stay-Appeal is maintainable before the Tribunal . Assessee has shown a prima facie, an arguable case, stay was granted with certain conditions. (S.220(6), 249(4))

In an appeal filed by the assessee the revenue contended that as the admitted tax was not paid by the assessee the appeal is not maintainable .The appellate Tribunal after refrying the Judgment of supreme Court in CIT v. Pawn Kumar Laddha (2010) 324 ITR 324 (SC), held that the appeal is maintainable because the provisions of section 249(4) in chapter XX-A relating to filing of appeal before the Commissioner (Appeals) cannot be read in to section 253(1)(b) in Chapter XX-B of the Income-tax Act which relating to filing of an appeal before the Tribunal Accordingly, the Tribunal held that the appeal is maintainable. On the facts the Tribunal has found that the Assessing Officer has raised huge demand by passing and order under section 201(1) and 201(IA) when the bank accounts of assessee was attached. The Tribunal also found that for fraction of financial year 2011-12 demand was raised, which is not permissible . Accordingly the Tribunal granted stay with certain conditions.(A.Y. 2010 to 2012-13)

Kingfisher Airlines Ltd v. ACIT (2012) 73 DTR 257/148 TTJ 113 (Bang.)(Trib.)

S.253(2):Appellate Tribunal- Maintainability-Small tax effect- Instruction no 5 of 2007 dt 16-7-2007.

Appeal can be filed where the tax effect is small provided the department places material before the appellate Tribunal, and falls within the expected category. The tax effect in the present case was less than 2 lakhs.

CIT v. Unitara Finance Ltd (2012) 72 DTR 401/251 CTR 166(MP)(High Court)

S.253(2):Appellate Tribunal-Power-Small tax effect- CBDT instruction no 5 dt. 15th May , 2008 is applicable prospectively-After setting off the loss the assessed income was nil, departmental appeal was dismissed.

Revenue has filed an appeal before the Tribunal in respect of excess claim of depreciation of Rs 4, 09, 769 and disallowance of interest of Rs 14, 57, 534. Assessee contended that the assessed income was nil after setting off the carried forward losses . As the returned income and assessed income being nil , instruction no 2 dt.24th October, 2005 is applicable as the tax effect is less than 2 lkahs appeal of department is not maintainable. The Tribunal accepted the contention of assessee and dismissed the appeal of revenue.(A.Y. 2002-03)

ITO v. Speciality Coatings & Lamination Ltd (2012) 144 TTJ 532 (Delhi) (Trib.)

S.254(1):Appellate Tribunal – Orders-Power - Validity of search - Tribunal has power to decide the legality and propriety of search under section 132, accordingly the matter was set aside to the Tribunal to decide afresh.

The assessee has filed the writ petition challenging the validity of search under section 132 of the Income tax Act, 1961. When the matter was pending before the Tribunal the Tribunal held that it cannot go into the question because the issue is pending before the High Court. The assessee made a prayer to withdraw the writ petition and purse the matter before the Tribunal. The Court held that in view of judgment in CIT v. Chitra Devi Soni (Smt.) (2009) 313 ITR 174 (Raj.), where in the SLP of department was also dismissed (2009) 313 ITR (St) 28, the appeal was set aside and remanded the appeal to the Tribunal to decide on merits strictly in accordance with the law.

Badri Ram Choudhary v. ACIT (2012) 67 DTR 83 / 247 CTR 461 (Raj.)(High Court)

Editorial: Refer Tribunal order Badri Ram Choudhary v. ACIT (2010) 128 TTJ 339 / 34 DTR 335 (Jd.)(Trib.), was set aside. (ITA No. 55/Jd/2006 dated 29th January, 2009)

S.254(1):Appellate Tribunal-Orders- Duty- Reasoned order-Block assessment-Tribunal has to deal with factual findings of Assessing Officer and give reasons for its conclusion, order of Tribunal set aside.

Pursuant to a search u/s 132, the AO passed a block assessment order u/s 158BC. The Tribunal allowed the assessee's appeal on the ground that (i) the search warrant did not mention the assessee's name and (ii) the assessment was not based on material found during the search. The department filed an appeal claiming that (a) the search warrant &panchnama did refer to the assessee's name and (b) the detailed assessment order exposing the assessee's modus operandi had not been dealt by the Tribunal. Held by the High Court allowing the appeal:

The Tribunal recorded a wrong factual finding that the search warrant did not include the assessee's name. The Tribunal has not specifically referred to and dealt with the findings of the AO. which are detailed, specific & with reference to several factual aspects, documents, etc. The Tribunal is required to deal with the factual findings recorded by the AO and give its factual conclusions. The factual conclusion should be based upon reasons and should be outcome of analysis and discussion. The Tribunal being the final fact finding authority cannot merely record its conclusions without discussing the factual matrix, evidence and material. Merely stating that the papers etc. do not pertain to the assessee and the contents of the document cannot be utilized, is the conclusion or the final inference

which is not sufficient in the light of what has been held by the AO in the block assessment order. The fact that the assessee filed a detailed written synopsis does not mean that the order of the Tribunal meets the legal requirement. The law mandates that the Tribunal should give reasons which are discernible and apparent from the order. What weighed with the Tribunal cannot be assumed in the absence of discussion.

CIT v. Promain Ltd (Delhi) (High Court) www.itatonline.org

S.254(1):Appellate Tribunal-Orders-Sufficient cause- Adjournment- Despite "Last Chance" appeal should be adjourned if there is sufficient cause.

The department's appeal was adjourned at the assessee's request to 9.02.2010 and it was made clear that it would be the "last opportunity". The assessee's counsel filed an application for adjournment on 8.02.2010 on the ground that he was going to Mumbai for some urgent work. On 9.2.2010, no one appeared for the assessee and so the Tribunal rejected the adjournment application and allowed the department's appeal. On appeal by the assessee to the High Court Held:

Ordinarily, it is not incumbent on the Tribunal to adjourn the case when a last opportunity had already been granted to the assessee. However, there may be number of circumstances where adjournment becomes necessary in the interest of justice. If Counsel for assessee had to go for some urgent work to Mumbai and an application for adjournment was moved in advance, then in the interest of justice, a short adjournment should have been granted. If number of opportunities had already been afforded to the Counsel for assessee, then adjournment could have been granted, on payment of cost. The Tribunal has not assigned any reason as to whether reason mentioned in the application for adjournment, constituted sufficient cause for adjournment or not. Even if a last opportunity is granted and case is fixed for hearing and sufficient cause is shown on the date fixed for hearing, then the case can be adjourned and it should be adjourned, in the interest of justice. Accordingly, the Tribunal committed an illegality in rejecting the application for adjournment and in deciding the appeal exparte. Appeal remitted to the Tribunal for decision on merits on payment of costs of Rs.21,000 by the assessee.

Mehru Electrical & Engg. (P) Ltd v. CIT (2012) 250 CTR 445/72 DTR 29(Raj.)(High Court

S.254(1):Appellate Tribunal-Orders- Additional evidence- Block assessment- Search and seizure-The Tribunal ought to have remitted the matter to Assessing Officer. (S. 132, Income–tax (Appellate Tribunal) Rules, 1963-Rules, 18(4), 29)

A search and seizure action under section 132 was conducted on assessee. On the basis of statement under section 132(4) undisclosed income was arrived . However in response to notice under section 158BC , the assessee filed nil return. The Assessing Officer determined the income at Rs.5,40,07,340. On appeal, the Tribunal confirmed five additions under different heads and deleted all other items included by the Assessing Officer. On appeal by the revenue, the High Court, held that .the Tribunal had accepted almost all the documents without any detailed consideration. Rule 29 mandates the Tribunal to satisfy itself as to whether those documents can be entertained, and if entertained, shall, apply its mind to the veracity of those documents. This being a power vested in the Tribunal with certain element of discretion attached to it, such power shall be exercised with great care and caution and not arbitrarily. Merely because the opposite party did not seriously object to those documents, the obligation of the Tribunal under rule 29 could not be ignored. On the facts the Tribunal ought to have remitted the matter to the Assessing Officer for consideration.

CIT v. Ku. P. A. Krishnan (2012) 345 ITR 38 (Mad.)(High Court)

S.254(1):Appellate Tribunal-Orders- Reasoned order- Tribunal has to pass a reasoned order.

The High Court held that the Tribunal order should contain points for determination and its finding. Order of Tribunal, not containing any reason, is no order in the eyes of law, and cannot be allowed to stand .(A.Y. 1991-92)

Abhyudaya Pharmaceuticals v. CIT (2012) 72 DTR 58 (All.)(High Court)

S.254(1):Appellate Tribunal-Orders- Reasoned order-Tribunal has to pass a reasoned order.

In an appeal by revenue the Court held that the Tribunal did not discuss, nor dealt with nor recorded any finding or any of the issue much less on the issue on which the substantial question law was framed .The Court held that mere using the expression "Supreme Court held and various High Courts in the similar circumstances have held" without mentioning much less giving the reference to any citation as what was held in which case and how and what way a

particular case has application to the facts of this case , was uncalled for. High Court accordingly remanded the matter to the Tribunal for its fresh consideration for passing a reasoned order.(A.Y. 1991-92)

DCIT v. Rajasthan State Industrial Development & Investment Corporation (2012) 73 DTR 22 (Raj.)(High Court)

S.254(1):Appellate Tribunal-Orders –Power-Tribunal has the power to stay proceedings to give effect to s. 263 revision order. Plea as to jurisdiction of AO/CIT, even if given up, can always be raised.(S.263)

The CIT passed an order u/s 263 by which he set-aside the assessment order and directed the AO to frame a fresh assessment. The assessee challenged the s. 263 order in a Writ Petition. The Court directed the CIT to pass a fresh order u/s 263. The assessee challenged the High Court's verdict in the Supreme Court. In the meanwhile, the CIT passed the s. 263 order and so *the assessee withdrew the SLP* before the Supreme Court and filed an appeal before the Tribunal. The assessee also filed a *stay application* that a stay may be granted to *prevent the AO from giving effect to the revision order* as there would be *multiplicity of proceedings* if the AO passed a fresh assessment order which would be futile if the appeal was allowed. The Tribunal granted stay of the assessment proceedings pending before the AO and also directed production of papers relating to initiation of the s. 263 proceedings. The department filed a Writ Petition to challenge the order of the Tribunal on the ground that (a) as the assessee had challenged the initiation of the s. 263 proceedings before the High Court & Supreme Court and then *withdrawn the challenge* (SLP), it was *estopped from arguing the point* before the Tribunal and (b) the Tribunal has no power to stay the assessment proceedings. Held dismissing the Petition:

(i) Where the jurisdiction of an authority is challenged, neither the question of res judicata nor the rule of estoppel can be invoked so as to restrain the challenge. Neither consent nor waiver can confer jurisdiction upon the AO/ CIT where it does not exist and so no importance can be attached to the fact that the assessee, in the first round of proceedings, expressly gave up the plea against the erroneous assumption of jurisdiction by the authority. Consequently, even assuming that there was a consent/ waiver by the assessee to the assumption of jurisdiction by the Tribunal, he was still entitled to challenge it before the Tribunal (P. V. Doshi v CIT (1978) 113 ITR 22 (Guj.)(High Court) & other decisions followed);

(ii) It is well settled by the judgment in ITO v. Mohd. Kunhi (1969) 71 ITR 815 (SC) that the Tribunal has the power to ensure that the fruits of success are not rendered futile or nugatory and can pass appropriate orders of stay. The assessment orders pending before the AO pursuant to a s. 263 order can also be stayed {ITO v Khalid Mehdi Khan (1977) 110 ITR 79 (AP) followed}.(A.Y 1999-2000)

CIT v. Income Tax Appellate Tribunal & Ors(2012) 78Ddtr 113 (Delhi)(High Court)www.itatonline.org

S.254(1): Appellate Tribunal- Powers- Additional grounds of appeal – Reasons for admission must exist.

A legal issue can be raised at any stage but there should be good reason for admitting the additional ground. The Tribunal allowed the assessee to raise the additional ground in appeal for the first time and then decided the appeal on the merits not only setting aside the order of the Commissioner (Appeals) but setting aside the order of the Assessing Officer. Such approach was neither legal nor proper. The Tribunal had not given the reason for admitting the additional ground and overlooked the fact that the ground did not arise out of the order of the Commissioner (Appeals) which was challenged by both parties. Moreover, the assessment order was passed by the Assessing Officer under section 144 of the Act on the basis of the original return and not on the basis of the revised return. Therefore, the matter was remitted to the Commissioner (Appeals).(A.Y.1996-97)

CIT v. Sahara India (2012) 347 ITR 331 (All)(High Court)

S.254(1):Appellate Tribunal-Orders-Binding – Precedent – Contempt-Tribunal's order is binding and failure to follow it is 'Contempt of Court'.

Though the Tribunal in the assessee's own case held that exemption under section 11 was available and the facts were identical, the CIT(A), for a subsequent year, declined to follow it inter alia on the ground that the DR had not advanced arguments before the Tribunal in a 'comprehensive and effective manner'. The assessee filed an appeal demanding exemplary costs under section 254(2B). Held by the Tribunal after a comprehensive review of the law on the subject:

It is well settled that the Tribunal is exercising judicial functions and has all powers of a Court. The proceeding before the Tribunal are deemed to be judicial proceedings. It appears to be the impression/ misunderstanding of some tax officials that the orders of the ITAT interpreting the law cannot be binding as it is a fact finding authority. However,

this is not correct because the decision of a higher authority in the judicial hierarchy is binding on all the lower authorities below the line. Hence, the Assessing Officer and Commissioner(Appeals) are bound by the decision rendered by the jurisdictional Tribunal. Refusal to follow the order of the ITAT would render that authority guilty of committing contempt of Tribunal for which the concerned authority is liable to be proceeded against. If the decision of the Tribunal is found to be unacceptable to the authorities below, the right course to follow is to carry the matter in appeal to the High Court and to seek suspension of the operation of the order of the Tribunal. A person occupying the chair of CIT(A) is expected to be aware of judicial discipline and the binding nature of the Tribunal's order. To avoid harassment to the assessee and unpleasant circumstances, the CBDT should take appropriate steps to enlighten all officials to ensure that judicial discipline is maintained. Costs under section 254(2B) can be granted only if frivolous appeals are filed and not in a case like this. However, the assessee is free to take proper steps for initiating contempt proceeding against the CIT(A) (Ajay Gandhi and another v. B. Singh and others (2004) 265 ITR 451 (SC), ITAT v. V.K.Agarwal and another (1999) 235 ITR 175 (SC) &Agarwal Warehousing and Leasing Ltd. v. CIT (2002) 257 ITR 235 (MP) followed)

Cargo Handling Private Workers Pool v. Dy. CIT (Vishakhapatanam) (Trib.) www.itatonline.org

S.254(1):Appellate Tribunal- Notice- Service of notice mandatory--Non servicing of notice by the department ,department' s appeal was dismissed owing to 'apathy' in serving notice of hearing.

Notice of hearing of the department's appeal could not be served on the assessee through post at the address given in Form 36. The DR was accordingly directed to directly effect service of the notice of hearing on the assessee. On the date of hearing, the DR was unable to say whether service was effected or not. Held by the Tribunal dismissing the appeal:

The department has shown total apathy in the matter of service of notices of hearing. The opportunity of hearing to the other side is essential before adjudicating appeal for which service of notice is condition precedent. It is the established practice and procedure that in case notices of hearing cannot be served on the assessee in revenue's appeals, such notices are got served through Income-tax authorities. This practice is based on considerations of expediency and equity and is fully in conformity with the judicial powers and jurisdiction of the Tribunal and does not run contrary to any provisions of the Statute. It is within the incidental or implied powers of the Tribunal as enunciated in ITO v. M.K. Mohammed Kunhi (1969)71 ITR 815 (SC) & CIT v .Paras Laminates Pvt Ltd (1990)186 ITR 722 (SC). Accordingly, the Tribunal was within its powers to direct, and it was obligatory on the part of the I.T. authority, to effect service of notice of hearing on the assessee since the service could not be effected by post at the address given by the revenue in the memorandum of appeal since the department, as an executive organization, is well equipped with the requisite staff strength of Notice Server, Income-tax Inspector etc. for serving various statutory notices on the tax payer. Since the revenue has shown apathy with regard for serving the notices of hearing on the assessee and has also not made any request to get the notice served by alternate way i.e., by way of publication etc as laid down in rule 20 of CPC, there is no alternative but to dismiss the appeal (Dy. CIT v. Aditya Organisers (P) Ltd (2004)91 ITD 342 (Ahd) followed)(A.Y.2001-02)

ITO v. Rachana Constructions and Engineers and contractors (2012)18 ITR 262 (Pune)(Trib.).

S.254(1):Appellate Tribunal-Orders-Power-Additional ground-Special bench has power and duty to dispose of the entire appeal. (Income tax (Appellate Tribunal) Rules , 1963 Rule 11)

The Tribunal held that special Bench has not only to answer the specific question for determination in the computation of capital gain. Such computation involves not only ascertaining the full value of consideration but also all other aspects which are germane to such computation. Rule 11 of the Income-tax (Appellate Tribunal) Rules , 1963 empowers the appellant , which is revenue in the instant case to urge any ground not set forth in the memorandum of appeal or taken by leave of the Tribunal provided the affected party has been given an opportunity of being heard on that ground . On the facts the revenue has not only specifically challenged the finding of the Commissioner (Appeals) for ignoring the negative figure of net worth but departmental representative also made submission on this point . The Tribunal not only allowed him to argue on other aspects but also invited the Authorised representative to address on the question of negative net worth held by Commissioner (Appeals) to be taken zero. Thus the Rule 11 is fully

satisfied .Further no fresh investigation of facts is required in deciding this question. Thus the Special bench has not only to answer the specific question but also to dispose of the entire appeal .(A.Y. 2006-07)

Dy. CIT v. Summit Securities Ltd (2012)135 ITD 99/ 68 DTR 201/15 ITR 1/145 TTJ 273(SB.) (Mum.)(Trib.)

S.254(1):Appellate Tribunal –Orders-Binding precedent- Tribunal cannot come to conclusion contrary to earlier order, or alternatively, can refer the matter to larger bench.

The Tribunal is to follow the decision of another bench where the facts are same, this is a treaty law. The only other alternative is to refer the matter to larger bench if the Members of this Bench are not willing to follow the earlier order. However, the Bench cannot come to a conclusion contrary to conclusion reached in earlier order of Tribunal. (A.Ys. 2003-04 to 2005-06)

ACIT v. Chandragiri Construction Co. (2012) 136 ITD 133/73 DTR 20 (TM)(Cochin)(Trib.)

S.254(1) :Appellate Tribunal Orders – Power - Additional ground - Entire law on what is "Additional Ground" & power of Tribunal to admit it reviewed. (S.253(1), Income-tax (Appellate Tribunal) Rules, 1963 – Rule 11

The assessee filed an appeal before the Tribunal in which it raised the ground (in Form 36) that u/s.153A, the AO was not entitled to make additions which were not based on incriminating material found during the search. This ground was not raised before the AO or the CIT(A). Before the Special Bench, the department argued that as the ground was not raised before the lower authorities, it was an additional ground and could not be entertained. Held by the Special Bench:

(i) The assessee's argument that as the ground was taken in the memorandum of appeal, it was not an "additional ground" for which leave was required from the Tribunal is not acceptable because s. 253(1) permits an assessee "aggrieved" to file an appeal. A person can be "aggrieved" only if a ground had been raised and it is decided against him. S. 253(1) bars a ground which was not raised and not decided by the CIT(A) because there can be no grievance in respect of a matter which is not raised at all Pokhraj Hirachand v.CIT (1963) 49 ITR 293 (Bom.) followed;

(ii) On the question whether such a ground can be raised for the first time before the Tribunal, the subject matter of an appeal consist of three elements (a) the grounds taken in the memorandum of appeal, (b) the grounds for which leave is allowed by the Tribunal and (c) grounds taken by the respondent for supporting the order of the CIT(A). The Tribunal is not confined only to issues arising out of the appeal before the CIT(A) but has the discretion to allow a new ground to be raised. If a pure question of law arises for which facts are on record of the authorities below, the question should be allowed to be raised if it is necessary to assess the correct tax liability. The submission that the ground could not be raised earlier as the assessee did not have the services of an advocate at its command is reasonable and bona-fide National Thermal Power Co. Ltd v.ITO (1998)229 ITR 383 (SC) followed). (A.Ys. 2004-05 to 2009-10)

All Cargo Global Logistics Ltd v. DCIT (2012) 137 ITD 26/ 72 DTR 1 / 146 TTJ 657 / 16 ITR 38 (SB)(Mum.)(Trib.)

254(1):Appellate Tribunal- Order- Cost to Assessing Officer-Assessing Officer is awarded cost for not following the direction of Tribunal and for passing the order without following the principle of natural justice.

In search u/s 132, the assessee's statement was recorded u/s 132(4) in which he offered Rs. 1.50 crores as undisclosed income. This was modified/ retracted subsequently by stating that the admission was only to the extent of the evidence found during the course of search operation. Despite the retraction, the AO passed a s. 158BC assessment order in which he determined the total undisclosed income at Rs. 1.50 crores. In the first round of appeal, the Tribunal remanded the matter to the AO to make a fresh assessment on the basis of the evidence found in the search and not only on the basis of the retracted/ modified statement. The AO passed a fresh assessment order in which he again determined the total undisclosed income at Rs. 1.50 crores on the basis of the s. 132(4) statement. In the second round, the Tribunal again remanded the matter back to the AO for framing a fresh assessment after imposing costs of Rs. 5000 upon the AO. The AO once again repeated the conclusions drawn in the earlier orders and determined the income at the same figure of Rs. 1.50 crores on the basis of the s. 132(4) statement. Held by the Tribunal in the third round:

(i) It is very sad that the AO without following the principles of natural justice and inspite of clear findings of the ITAT in the order dated 18.06.2010 has repeated the same orders as was done originally way back in 1998. Inspite of levying cost of Rs. 5000 on AO there is no change in the attitude of the Revenue with reference to the assessee. By taking up the assessment at the fag end of the time barring period and by denying natural justice and not considering

the evidence on record, the assessee was forced to file appeals before the ITAT unnecessarily by incurring heavy cost of not only appeal fees but also engaging Counsels to defend the case. There should be an end to this sorry state of affairs;
(ii) The matter is again remanded to the AO to complete the assessment only on the basis of incriminating material, if any, and not only on the basis of the s. 132(4) statement. If the AO repeats the same order without examining the material on record, the order will be quashed without any further consideration. The AO should pay costs of Rs. 35,000 (20,000 + 15,000) to the assessee for making him come again in appellate proceedings. The Revenue shall decide whether these amounts should be recovered from the officer(s) concerned. As the orders are being approved by a senior officer in the rank of CIT, it is sincerely hoped that the CIT also monitors these assessments and applies his mind while granting the approvals.
Sushila Suresh Malge v. ACIT (Mum.)(Trib).wwwitatonlineorg

S.254(1):Appellate Tribunal- Orders- Binding precedent-Decision of co-ordinate bench- When facts of the case are same,Tribunal to either follow decision of earlier bench or refer the matter to larger bench

Where the facts of the case are same the Tribunal to follow the decision of another bench. The only alternative is to refer the matter to the larger bench if the member of the bench are not willing to follow the earlier order.(A.Ys. (2003-04 to 2005-06)
ACIT v. Chandragiri Construction Co. (2012) 147 TTJ 249 (TM)(Cochin) (Trib.)

S.254(1): Appellate Tribunal- Power- Issues relating to in respect of another assessment year-Tribunal has no power to decide an issue in respect of assessment year which are not before it .

The issue raised before the third member was whether the Tribunal has power to decide the issue in respect of assessment years which were not before the Tribunal. The third member held that under the Income-tax Act, each assessment year is a separate unit and the decision of Assessing Officer given in a particular year cannot operate as res judicata in the matter of assessment of subsequent years , therefore the Jurisdiction of Tribunal in the hierarchy created by the same Act is no higher than that of the Assessing Officer and hence the Tribunal also to confine to the year of assessment . The Tribunal has no power to decide the issue in respect of assessment years which are not before it. (A.Ys. (2003-04 to 2005-06)
ACIT v. Chandragiri Construction Co. (2012) 147 TTJ 249 (TM)(Cochin) (Trib.)

S.254(1):Appellate Tribunal-Powers-Cross objection- Legal ground in respect of independent and separate issue was not allowed in revenues appeal Rule 27 of Income Tax Appellate Tribunal Rules 1963 or under cross objection.(Rule 27)

In revenue's appeal against order of Commissioner (Appeals), assessee filed cross-objections challenging initiation of proceedings under section 153C. Cross-objections were time-barred and, therefore, same were dismissed. Assessee was, however, given liberty to argue same points at time of disposal of departmental appeals. Accordingly, during hearing of appeal before Tribunal, assessee invoked provisions of rule 27 and challenged initiation of proceedings under section 153C. Held that, when validity of invocation of section 153C was decided by Commissioner (Appeals) in favour of revenue and assessee had not filed appeal on said legal ground, assessee could not be allowed to raise such legal ground in revenue's appeal by invoking rule 27. If cross-objections were not withdrawn, even then, such a legal issue was beyond scope of adjudication through a cross-objection under section 253(4) because impugned legal issue was altogether an independent as well as a separate issue. (A.Y. 1998 – 1999 to 2003 – 2004)
DCIT v. Sandip M. Patel [2012] 137 ITD 104 (Ahd.)(Trib.)

S.254(2):Appellate Tribunal- Orders- Rectification of mistake apparent from the record- Bad debts- Appeal High Court – Writ is maintainable. (S. 36(1)(vii), 260A, Article 226)

Decision of Appellate Tribunal disallowing for bad debts disregarding the legal position as settled by the Supreme Court and the amendment in law w.e.f. 1st April, 1989 there is an apparent mistake in the order of Tribunal and therefore, Tribunal was not justified in rejecting the miscellaneous application filed by the assessee and not rectifying the said mistake. No appeal lies before the High Court under section 260A against the order passed under section 254(2) and therefore writ petition filed by the assessee against the order of Tribunal rejecting the miscellaneous application cannot be dismissed on the ground that the assessee has alternative remedy by way of appeal under section 260A.(A.Y. 1999-2000)

Madhav Marbles & Granites v. ITAT (2012) 65 DTR 217/ 246 CTR 243/2012 Tax L R 465 (Raj.)(High Court)

S.254(2):Appellate Tribunal - Orders- Rectification of mistake apparent from the record- Power- Tribunal cannot recall the entire order.

The High Court held that the power conferred under section 254(2) is to amend the order passed under section 254(1) to rectify the mistake which is apparent from the record. While deciding the mistake apparent from the record the recalling of entire order is not proper. (A. Y. 2006-07).

Srinidhi Gold v. ITO (2012) 66 DTR 429 (Karn.)(High Court)

S.254(2):Appellate Tribunal- Orders- Rectification of mistake apparent from the record-Supreme court decision-Subsequent Supreme Court decision overruling earlier decision held to be mistake apparent from the record and order recalling the order is justified.

The Tribunal disposed the appeal following the decision of Supreme Court in Virtual Soft Systems Ltd v. CIT (2007) 289 ITR 83 (SC), holding that if there is no tax payable as assessment was made at loss figure , penalty under section 271(1)(c) cannot be levied. Larger Bench of Supreme court in CIT v.Gold Coin Health Food (P) Ltd (2008) 304 ITR 308(SC), overruled the earlier decision and had taken a contrary view. Revenue moved an application under section 254(2) dt 21-10-2008 to seeking the recall of order dated 31st March, 2008 . The application was filed within four years. The Tribunal recalled the order following the decision of CIT v. Gold Coin Health Food (P) Ltd(supra). Assessee has filed Writ petition against the said order of Tribunal. The Court held that where a decision of the Supreme Court overrules an earlier decision, the view expressed in the later decision would have to be regarded as having always been the law. A judicial decision acts retrospectively .Judges not make the law they only discover or find the law. Thus, where a decision of the Supreme court overrules an earlier decision, the view expressed in the later decision would have to be regarded as having always been the law. The overruling is therefore retrospective, therefore it has to be regarded as the law as it existed when the order was passed by Tribunal ,there is a clear mistake apparent from the record hence order of Tribunal recalling the order held to be justified.(A.Ys 1993-94, 1996-97 & 1997-98)

Lakshmi Sugar Mills Co Ltd v. CIT (2012) 73 DTR 25 (Delhi)(High Court)

S. 254(2):Appellate Tribunal- Orders- Rectification of mistake apparent from the record- 2Tribunal cannot recall its order and substitute by new order for not considering the earlier order.

The power to rectify an order under section 254(2) is extremely limited. It does not extend to correcting errors of law ,or re appreciating factual findings as that would amount to a review . The amendment of an order does not mean obliteration of the order originally passed and its substitution by a new order .The Tribunal's order that it had not considered a decision in the assessee's own case for an earlier year where the facts and circumstances were the same and this was an "apparent mistake" cannot be sustained .(A.Y.2006-07) (WP NO 106 OF 2012 dated 4-9-2012)

CIT v. Maruti Insurance Distribution Services (Delhi) (High Court) www.itatonline.org

S.254(2):Appellate Tribunal -Orders- Rectification of mistake apparent from the record- Erroneous opinion-Erroneous opinion cannot be subject matter of rectification under section 254(2).

The Tribunal held that in a miscellaneous application, it is not possible to consider the plea of the assessee that the view expressed by the Tribunal was erroneous. The scope of a miscellaneous application under section 254(2) was only to rectify an apparent mistake in the order of the Tribunal. In a miscellaneous application it is not possible to seek review of the order of the Tribunal. (A. Y. 1997-98).

Reuters Ltd. v. Jt. CIT (2012) 14 ITR 48 (Mum.)(Trib.)

S.254(2) :Appellate Tribunal -Orders- Rectification of mistake apparent from the record- Third member – Decision of third member is not a final order disposing of entire appeal as contemplated by section 254(1) and consequently an application would not lie under section 254 (2) against third member order. (S. 254, 255)

Revenue filed an application under section 254 (2) against the order of third member. The assessee raised a preliminary objection for rectification of mistakes apparent from the record stating that rectification application under section 254(2) would not lie against the third member order. The Tribunal held that the decision of the third member order is not a final order disposing of the entire appeal as contemplated by section 254(1), therefore application under section 254(2) would not lie against the order of third member. (A. Y. 1998-99).

Dy. CIT v. Telco Dadajee Dhackjee Ltd. (2012) 49 SOT 549(TM) (Mum.)(Trib.)

S.254(2): Appellate Tribunal- Orders- Rectification of mistake apparent from the record- Shortness of order-Shortness of order cannot be held to be mistake apparent from the record.

Assessee has filed an appeal before the Tribunal against the order of Commissioner (Appeals) , before the Tribunal. The only disputes before the Tribunal was whether activity of assessee hiring of one of financing loans for interest within the meaning of Interest –tax Act, 1974. The Tribunal decided the matter against the assessee .Before the Tribunal the ground no 5 was questioning the action of commissioner (Appeals) in ignoring evidence and case laws adduced before him. The Tribunal dismissed the ground by observing that the ground is general in nature. Assessee filed application for rectification of mistake. As there was difference of opinion the matter was referred to third member. The Third member held that, while passing the order member should have given reasons why it considered the ground no 5 is general in nature, but it could not be said that the ground no was not disposed of by the Tribunal , On examining the issue as a whole, only question before the Tribunal was whether interest in question is liable to be taxed under interest -tax Act , 1974 . Therefore shortness of order of itself does not negate fact of disposal of issue involved, therefore the ground no 5 should be taken to have been disposed of in effect and substance and Tribunal's order did not require to be recalled , hence miscellaneous application was dismissed.(A.Ys 1994-95 to 1999-2000)

S.E. Investments Ltd v. Asst.CIT (2012) 134 ITD 81/68 DTR 257/145 TTJ 329(T M)(Agra)((Trib.)

S.254(2) :Appellate Tribunal- Orders- Rectification of mistake apparent from the record- Ex parte order-Non-appearance of chartered Accountant before the Tribunal due to wrong mentioning of date is a reasonable cause, recalling of order is justified.

Assessee,s chartered accountant has filed an affidavit stating that he did not appear at the time of hearing as he had wrongly recorded the date of hearing in his dairy and also furnished a photocopy of the diary showing the wrong noting ,the Tribunal held that it has to be accepted that there was sufficient cause for his non - appearance on the date of hearing .As the Tribunal having effectively decided the matter against the assesee by setting aside the order of the CIT (A) , and restoring the matter back to the Assessing Officer , referring the Rule 23 of the ITAT Rules , the ex-parte order of Tribunal is recalled.(A.Y.2006-07)

Five Star Health Care (P) Ltd v. ITO (2012) 145 TTJ 537/69 DTR 170 (TM) (Delhi) (Trib.)

S.254(2):Appellate Tribunal-Orders-Rectification of mistake apparent from the record- Application to recall the matter - Hearing conducted in open, transparent manner, giving opportunity to assessee to present argument, hence application rejected on the basis that order under section 254(2) does not have existence de-hors the order under Section 254(1).

The assessee filed the instant application under Section 254(2) seeking recall of Tribunal's order contending that impugned order was clearly an incorrect order, passed in violation of rule of law and procedure and inconsistent with maxim Audi AlteramPartem. The Tribunal rejected the application on the basis that it conducted hearing in open and in transparent manner. An order under Section 254(2) does not have existence de-hors the order under Section 254(1), so that it (re-calls) is impermissible under Section 254(2). The court goes on to note the power to recall available under Rule 24 of the rules, observing that under the circumstances as stipulated there in. (A.Y. 2007 – 08)

Karun Dutt Singh(Alias Rinu Singh) v. ACIT (2012)135 ITD 514/74 DTR 376/148 TTJ 126(Cochin)(Trib.)

S.254(2):Appellate Tribunal-Orders-Rectification of mistake apparent from the record-Transfer pricing-Company whose financial statement were falsified, directed to be removed from comparable cases in computation of ALP - only after arriving at the arithmetical means of two ALP, the adjustment of 5% can be done.

On miscellaneous application, one of the companies whose financial statement was publicly known to be falsified directed to be removed from comparable cases in computation of ALP but pleas as regards exclusion of certain other companies risk adjustment rejected; only after arriving at the arithmetical means of two ALP, the adjustment of 5% can be done. Matter restored to the file of Assessing Officer (A.Y. 2003-04)

SAP Labs India (P) Ltd. v. ACIT (2012) 134 ITD 253/145 TTJ521/15 ITR 506/69 DTR 145(Bang.) (Trib.)

S. 254(2): Appellate Tribunal- Orders- Rectification of mistake apparent from the record-Order cannot be rectified when on merit the decision was taken by Tribunal.

The Tribunal having found as a fact that assessee, instead of investing the amount of long term capital gains in purchase of residential house purchased the same with borrowed funds and denied relief u/s 54F on that ground. The order of Tribunal cannot be said to be a misstate apparent on record. Application of assessee u/s 254(2) was rejected on the ground that review of the said order on merit was not maintainable. (AY 2006-07)

V. Kumuda (Smt) v. Dy. CIT (2012) 147 TTJ 636 (Hyd.)(Trib.)

S.254(2): Appellate Tribunal – Orders- Rectification of mistake apparent from the record –Miscellaneous application filed beyond four years was dismissed.

Assessee filed miscellaneous petitions on 4-4-2012 which was beyond four years against ex-parte order dated 23-2-2007 of Tribunal. Held that Tribunal was not enshrined with judicial power of entertaining such petition after expiry of relevant period, and condonation of delay was beyond jurisdiction of Tribunal. The miscellaneous application was dismissed. (A.Y. 1997-98)

Agni Briquette (P.) Ltd v. ACIT (2012) 137 ITD 147/149 ITD 519/77 DTR 81 (Ahd.)(Trib.)

S. 254(2): Appellate Tribunal- Order- Rectification of mistake- Reframing the question -Revenues miscellaneous application was dismissed. [S.255(3)]

In the instant case, revenue filed the miscellaneous application challenging order passed by Special Bench of Tribunal on three grounds i.e. (i) Special bench had formulated a new question which was not referred by President of Tribunal while constituting Special Bench u/s 255(3). For the said ground it was held that there was mistake in the wording of question mentioned by revenue and question reframed by the SB was within the parameters of reference made by the President. (ii) Special Bench of Tribunal had not considered certain arguments of revenue while adjudicating the issue. It was held that SB had passed a well reasoned order and there was no apparent mistake in terms of scheme of section 254(2) and (iii) Special Bench without giving an opportunity of being heard had considered provisions of section 63 of Indian Contract Act. As regards this question, it was held that it was apparent that special bench had examined issue from another angle in light of provisions of section 63 of Indian Contract Act, 1872 and said exercise of Tribunal was not beyond question raised before it. (A.Y. 2003-04)

Dy. CIT v. Suzler India Ltd. (2012) 138 ITD 1/77 DTR 1 / 149 TTJ 137/19 ITR 268 (SB) (Mum.)(Trib.)

S.254(2) :Appellate Tribunal- Order- Rectification of mistakes –Ex parte order- Notice refused by illiterate employee – Affidavit filed by the assessee – matter recalled

In the instant case, notice sent by Tribunal was refused by an illiterate employee. On miscellaneous application, Tribunal recalled the matter on the basis that the assessee had filed an affidavit in support of his claim that by refusing notice he was the loser and did not benefit. (A.Y. 2001-02 to 2003-04)

Sudesh Pandey v. ITO (2012) 18 ITR 560 (Indore)(Trib.)

S.254 (2A):Appellate Tribunal –Orders-Power-Stay-Tribunal has no power to extend stay beyond 365 days even if assessee not at fault.

The Tribunal allowed the assessee's stay applications for a period beyond 365 days (presumably following Tata Communications (ITAT Bom. SB)). The department filed an appeal claiming that the grant of stay beyond 365 days was in contravention of the third proviso to s. 254(2A) inserted by the FA 2008 w.e.f. 1.10.2008. Held by the High Court allowing the appeal:

The third proviso to s. 254(2A) as amended by the FA 2008 w.e.f. 1.10.2008 provides that if the appeal is not decided within the period of 365 days, the order of stay shall stand vacated after the expiry of such period even if the delay in disposing of the appeal is not attributable to the assessee. The Tribunal which is a creature of the statute has to abide by these statutory provisions in letter and spirit. The third proviso to the Finance Act 2008 makes it abundantly clear that the purpose of putting the outer limits is only for curtailing the period an order of stay can operate and to ensure that it has no effect after the period of 365 days from the date of initial order. An interpretation to enable or confer power on the Tribunal to extend a stay order beyond 365 days would be contrary to such statutory provision. While the argument that hardship & injustice will be caused to the assessee by being deprived of the stay even when he is not at fault is

appreciated, one cannot ignore the language of the provision (CIT v Ronuk Industries (2011) 333 ITR 99 (Bom)(High Court) dissented from).(A.Y.2006-07)

CIT v. Ecom Gill Coffee Trading Pvt. Ltd(2012) 74 DTR 241/209 Taxman 190/252 CTR 281(Karn.)(High Court)

CITv B.Fouress (P) Ltd (2012) 74 DTR 241/209 Taxman 190/252 CTR 281 (Karn.) (High Court)

S. 254(2A): Appellate Tribunal- Power-Stay-Judicial conflict whether Tribunal has power to extend stay beyond 365 days has to be resolved in favour of the assessee

The Third Proviso to s. 254(2A), as amended w.e.f. 1.10.2008, provides that if the appeal filed by the assessee is not disposed off within the period of stay granted by the Tribunal (which cannot exceed 365 days), the order of stay shall stand vacated even if the delay in disposing of the appeal is not attributable to the assessee. In Tata Communications Ltd vs. ACIT (2011) 138 TTJ 257 (SB)(Mum), the Special Bench held, following CIT v Ronuk Industries Ltd. (2011) 333 ITR 99 (Bom), that even after the amendment to the Third proviso to s. 254(2A) w.e.f. 1.10.2008, the Tribunal had jurisdiction to extend stay beyond 365 days. However, the Karnataka High Court took the view in CIT vs. Ecom Gill Coffee Trading Pvt. Ltd that after the aforesaid amendment, the Tribunal had no power to extend stay beyond 365 days even if the delay was not attributable to the assessee. The Tribunal had to now consider whether the view of the Bombay High Court & Special Bench had to be followed or that of the Karnataka High Court. Held by the Tribunal:

In Narang Overseas (P) Ltd vs. ACIT (2008) 114 TTJ 433 (SB), it was held by the Special Bench that if there is a cleavage of opinion amongst different High Courts and there is no decision of the jurisdictional High Court on the issue, then the view favourable to the assessee has to be followed. As the view of the Bombay High Court in CIT v Ronuk Industries Ltd. (2011) 333 ITR 99 (Bom) & that of the Special Bench in Tata Communications Ltd vs. ACIT (2011)138 TTJ 257 (SB)(Mum) is favourable to the assessee, that has to be followed and it has to be held that the assessee is entitled to a stay of the demand even after the expiry of the period of 365 days if the delay in disposal of the appeal is not exclusively attributable to it.(A.Y.2000-2001 to 2006-2007)

Qualcomm Incorporated v. ADIT (Delhi)(Trib.)www.itatonline.org

S.255(4):Appellate Tribunal- Orders-Binding -Third memb er- Bench cannot refuse to give effect to third member's opinion.

The Tribunal had to consider whether certain amounts could be assessed as cash credits u/s 68 and whether certain expenditure incurred by the assessee could be allowed as a deduction. The Judicial Member decided both issues in favour of the assessee while the Accountant Member decided both issues in favour of the department. The Third Member agreed with the opinion of the JM and decided both issues in favour of the assessee. At the stage of giving effect to the opinion of the Third Member, the JM passed an order in conformity with that of the Third Member. However, the AM observed that it is not possible to give effect to the order of the Third Member on the ground that the order of the Third Member was contrary to his own expressed opinion and that he had not considered various points of differences arising from the dissenting orders. He accordingly framed certain new questions on the merits of the dispute and directed that the matter be referred back to the President. The JM did not agree and raised the issue whether the Members of a Bench could comment on the order of the Third Member instead of merely passing a confirmatory order in terms of s. 255(4). This was referred to the Special Bench. Held by the Special Bench:

After the Accountant Member passed the order formulating the questions for reference to the Third Member, he became functus officio. The opinion expressed by the Third Member was very much binding on the AM and he was bound to follow the opinion of the Third Member in its true letter and spirit. It was necessary for judicial propriety and discipline that the Member who is in minority must accept as binding opinion of the Third Member. The AM had no power to formulate new questions at the stage of giving effect to the opinion of the majority and his action was not sustainable in law.(A.Ys. 2004-05 & 2005-06)

Tulip Hotels Pvt. Ltd v. DCIT (2012) 136 ITD 1/ 15 ITR 548 / 70 DTR 217/ 146 TTJ 257(SB)(Mum.)(Trib.)

S.255(4): Appellate Tribunal-Procedure- Third member-Jurisdiction- Third member has no right to express third opinion.

The third member held that jurisdiction of the Third member of the Tribunal is confined only to agreeing with either of two opinions available before him given by the dissenting Members who heard the appeal first. Third member has no right to express at a third opinion on the point of difference even if he is fully convinced about the correctness of such third opinion.(A.Y.2007-08)

Visen Industries Ltd v. Addl. CIT (2012)136 ITD 309/ 74 DTR 57/148 TTJ 137(TM)(Mum.)(Trib.)

S.255(4): Appellate Tribunal-Procedure- Third member-Jurisdiction- Third member has no right to express third opinion.

The jurisdiction of third member starts from the 'point' which is referred to him and ends at rendering decision on 'such point' . In the light of the clear manadate given by the legislature , it is crystal clear that the third member's authority extends only to the point on which the members have diffred and such difference has been so referred to him. It is impersible to him to take up any poin for consideration and decision, either suo motu or at the instance of the parties, other than that which has been referred to him . (A.Y.2005-06)

Addl.CIT v. Technimont ICB India (P) Ltd (2012)138 ITD 28/ 75 DTR 259/148 TTJ 547 (TM)(Mum.) (Trib.)

Technimont ICB India (P) Ltd v. Addl.CIT (2012)138 ITD 28/ 75 DTR 259/148 TTJ 547 (TM) (Mum.) (Trib.)

S.260A:Appeal- High Court – Monetary limit-Circular—Circular-Apex Court held that High Court to consider whether the monetary limit of tax fixed by the CBDT Circular No. 3/2001 dated 9-2-2011 has retrospective effect.

The Department filed an appeal under section 260A in 2006 where the tax effect was less than Rs. 10 lakhs. The High Court, relying on Instruction No. 3/2011 Dated 9-2-2011(2011) 332 ITR 1 (St) (which had been held to apply to pending appeals in CIT v. Delhi Race Club Ltd.) dismissed the appeal as not maintainable. The Department challenged the decision on the ground that para. 11 of Instruction No. 3/2011 dated 9-2-2011 made it clear that it would apply only to appeals filed on or after 9.2.2011 and not to appeals filed earlier. Held by the Supreme Court:

In view of Para 11 of CBDT Instruction No.3/2011 dated 9th February, 2011, liberty is granted to the Department to move the High Court by way of review within four weeks.

CIT v. Virgo Marketing Pvt. Ltd (SC). www.itatonline.org

S.260A:Appeal -High Court-Duty of High Court- Reasoned order-Opportunity of hearing- It is the duty of High Court to pass a reasoned order .

In an appeal filed by the department against the order of Tribunal , the High Court set aside the order of Tribunal , without hearing the assessee. The Apex court held that the assessee must be heard and it is the duty of the High Court to pass the reasoned order. Accordingly the order of High Court was set aside to decide de novo.

Rajesh Mahajanv.CIT (2012) 346 ITR 513/ 249 CTR 28/ 69 DTR 99 / 204 Taxman 522 (SC.)

S.260A:Appeal -High court-Order of special bench-Non filing of appeal-. Not assailing the order of Special Bench for earlier years in appeal can be challenged in subsequent year on question of law. (S. 143, 261)

Even though the order of the Special Bench of the Tribunal relating to earlier assessment years was not assailed in appeal by the Department itself, it does not take away the right of the Revenue to question the correctness of the assessment order on the same issue in the relevant assessment year, particularly when a question of law is involved which goes to the very root of the matter.

Catholic Syrian Bank Ltd. v. CIT (2012) 343 ITR 270 / 68 DTR 1 / 248CTR 1/206 Taxman 182/ (2012) 3 SCC 784 / Vol. 42 Tax LR 382 (SC)

CIT v. South Indian Bank Ltd (2012) 343 ITR 270 / 68 DTR 1 / 248CTR 1/206 Taxman 182/ (2012) 3 SCC 784 / Vol. 42 Tax LR 382 (SC)

Federal Bank Ld. v. CIT (2012) 343 ITR 270 / 68 DTR 1 / 248CTR 1/206 Taxman 182/ (2012) 3 SCC 784 / Vol. 42 Tax LR 382 (SC)

S.260A: Appeal-High Court- Remand by Tribunal- Transfer pricing-In a matter which is remanded by Tribunal for re-examination , no question of law arises.(S.92C)

In Aztec Software and Technology Services Ltd. v. ACIT (2007) 294 ITR 32(AT) / 107 ITD 141 (SB)(Bang)(Trib.) a 5 member Special Bench judgement of the Tribunal answered several questions such as (a) Whether it is a legal requirement under the provisions contained in Chapter X of the Income-tax Act, 1961 that the Assessing Officer

should prima facie demonstrate that there is tax avoidance before invoking the relevant provisions?, (b) Whether it is a legal requirement under the provisions contained in Chapter X of the Income-tax Act, 1961 that the Assessing Officer should prima facie demonstrate that any one or more of the circumstances set out in clauses (a), (b), (c) and/or (d) of sub-section (3) of section 92C of the said Act are satisfied in the case of any assessee, before his case is referred to the Transfer Pricing Officer under sub-section (1) of section 92CA for computation of the arm's length price?, (c) Whether the Assessing Officer is required to record his opinion/reason before seeking the previous approval of the Commissioner under section 92CA(1) of the Income-tax Act, 1961?, (d) Whether before making a reference to the Transfer Pricing Officer under section 92CA(1) read with section 92C(3) of the Income-tax Act, 1961, is it is a condition precedent that the Assessing Officer shall provide to the assessee an opportunity of being heard?, (e) Is the approval granted by the Commissioner under section 92CA(1) justiciable ? If so, can it be called in question in appeal on the ground that it was accorded without due diligence or proper application of mind?, (f) What is the legal effect of Instruction No. 3 of 2003 dated 20-5-2003 issued by the Central Board of Direct Taxes on Transfer Pricing matters?, (g) What is the role of the Assessing Officer after receipt by him of the order passed by the Transfer Pricing Officer under section 92CA(3) of the Income-tax Act, 1961 etc. After laying down the principles of law, the matter was remanded to the AO. On appeal by the assessee against the principles of law laid down by the Special Bench, Held by the High Court dismissing the appeal:

We notice that in this appeal, the assessee has raised as many as 30 substantial questions of law. In our considered opinion, it is not really necessary to consider any of these questions, as in the first instance, the order of the Tribunal is not at all adverse to the interest of the appellant but is one to set aside the order passed by the Lower Appellate Authority and remanding the matter. We notice that all questions are left open, for redetermination by the Lower Appellate Authority.

In a matter which is remanded for a reexamination, no question of law arises for examination by the High Court in an appeal under Section 260-A of the Act, unless any part of the remand order suffers from a patent illegality or is an order perverse in nature, and is left to the Lower Appellate Authority to redetermine. Appeal of assessee was dismissed (A.Y. 2002-03)

Aztec Software & Technology Services Ltd v. ACIT(2012) 209 Taxman 187(Karn.)(High Court)

S.260A:Appeal- High Court- Order of Appellate Tribunal- Mistake apparent on record – Writ-Appeal is not maintainable.. (S. 254(2), Article 226)

No appeal lies before the High Court under section 260A against the order passed under section 254(2) and therefore writ petition filed by the assessee against the order of Tribunal rejecting the miscellaneous application cannot be dismissed on the ground that the assessee has alternative remedy by way of appeal under section 260A.(A.Y. 1999-2000)

Madhav Marbles & Granites v. ITAT (2012) 65 DTR 217/ 246 CTR 243/2012 Tax LR 465 (Raj.)(High Court)

S.260A:Appeal-High Court - Monetary limit –Circular- Less than 10 lakhs - CBDT's decision to confine the effect of low tax effect Instruction to fresh appeals is contrary to the object of Section 268A & the National Litigation Policy hence appeal is not maintainable.

The department filed an appeal in the year 2005, the tax effect of which was less than Rs. 10 lakhs. The High Court had to consider whether inspite of para 11 of CBDT's Instruction No. 3 of 2011 dated 9.2.2011 which declared that that the bar on filing departmental appeals with tax effect of less than Rs. 10 lkahs would apply only to appeals filed after 9.2.2011, the Instruction could still be considered to be applicable to pending appeals. Held by the High Court dismissing the appeal as non-maintainable:

Though paragraph 11 of Instruction No. 3/2011 provides that the revised tax limits will apply only to fresh appeals, the same has to be held to be applicable to pending appeals as well because (i) the Department has not kept in mind the object with which such Instructions have been issued from time to time; (ii) the object of section 268A which empowers the CBDT to issue such instructions & under the National Litigation Policy, the Government has to be an "efficient & responsible" litigant and not a "compulsive" litigant and appeals should not be pursued in low-tax matters, (iii) a beneficial circular has to be applied retrospectively (iv) extending the benefit of the Instruction to pending matters will be only in the nature of a one-time settlement akin to the KVSS & VDIS, (v) by experience it is seen that tax is

levied by defeating Parliament's intention to grant incentives to trade and industry & where the Tribunal has come to the rescue of the assessees, appeals are filed mechanically & compulsively with the approach of "let the Court decide" & to "save their skin"; (vi) there would be an anomaly in confining the Instruction to fresh appeals because if the Tribunal has decided a case expeditiously, such matters will be denied the benefit of the bar on filing appeals while if there is no disposal by the Tribunal owing to pendency etc, the benefit accrues to the assessee. The benefit to which the assessee is entitled cannot depend on the date of the decision over which neither the assessee nor revenue has any control; (vii) the Instruction would be discriminatory, if held to be prospective only. It can be saved from the vice of discrimination by holding it as retrospective.

CIT v. Ranka & Ranka (2012) 206 Taxman 322/72 DTR 270(Karn.)(High Court)

S.260A:Appeal- High court - Frivolous appeal – Cost-High Court awarded the cost of Rs. 1 lakh on officer who had file the appeal - High Court held that only way to prevent dept from filing frivolous appeals is by imposing heavy costs.

The assessee set up a 100% EOU unit in A.Y. 1993-94 and claimed 5 year deduction till A.Y. 1997-98 as was then allowable under section 10B. By the IT (SA) Act, 1998, section 10B was amended w.e.f. 1.4.1999 to allow deduction for 10 years from the date the eligible unit started software development. Accordingly, the assessee claimed section 10B deduction for A.Y. 1999-2000 to 2001-02. The Assessing Officer held that as the deduction under the amended provision was allowable only for the "unexpired period", it was necessary that as on the date of the amendment, there was "unexpired period" and as the assessee's entitlement had ended in A.Y. 1997-98, it was not eligible for further relief. The CIT(A) & Tribunal allowed the claim on the ground that there was nothing in the Act to provide that the units which have fully availed the exemption under section l0-B will not get the benefit of the amended provision. On appeal, by the department, held dismissing the appeal while passing strictures and imposing heavy costs:

(i) It is clear from the amended section 10B that the benefit of tax holiday is extended for a period of ten consecutive assessment years beginning with the assessment year in which the undertaking begins to manufacture or produce articles. The object behind the amendment is to give added thrust to exports. If the assessee has already availed the benefit under the unamended provision and 10 years have expired as of 01.04.1999, the assessee would not be entitled to the said benefit. If 10 years from the date of production has not expired prior to 01.04.1999, he would be entitled for the remaining unexpired period. The department's stand that if the 5 year period had expired as of the date of the amendment, the benefit is not available runs counter to the intention with which the amended provision was enacted and negates it.

(ii) This case shows how the department is filing appeals without proper application of mind and wasting the precious time of the Court and the tax payer's money. Even if the Assessing Officer was overzealous in passing the assessment order, there was no need to file an appeal to the High Court. This is not an isolated case. The department is filing appeals mechanically either for the purpose of statistics or to save their skins without application of mind. In the process, a person eligible to tax holiday has been denied the benefit and made to contest the proceedings. If the object of extending the benefits was to give added thrust to exports, the assessee is made to unnecessarily waste his time in fighting the dispute in different forums. The only way to bring reason to the department is by imposing costs so that appropriate action may be taken against the person who has taken a decision to file the appeal and recover the same after enquiry. The department is directed to pay costs of Rs. 1 lakh for wasting the tax payer's money. It is open to the authorities to recover the money from the person who has taken a decision to file the frivolous appeal.

CIT v. DSLD Software Ltd. (Karn.)(High Court) www.itatonline.org

S.260A:Appeal-High Court- Tax effect-Circular-Low Tax Effect Circular is retrospective and department must Show "Cascading Effect" hence appeal of revenue less than 10 lakhs tax limit was dismissed.

The department filed an appeal in the year 2010 where the tax effect was Rs. 6.69 lakhs. The issue raised was whether deduction of interest payment on funds introduced in the firm, (in the form of loan), could be allowed against remuneration received from the firm. In response to the point whether Instruction No.3 of 2011 dated 9.2.2011 issued by the CBDT which states that appeals should not be filed where the tax effect was less that Rs. 10 lakhs, the department argued that (i) as the appeal had been filed prior to the issuance of the circular, the circular did not apply

and (ii) as the appeal had a "cascading effect" involved a "common principle", the appeal could not be dismissed in view of the Supreme Court's verdict in Surya Herbals. Held dismissing the appeal:

In CIT vs. Polycott Corp. (2009) 318 ITR 144 (Bom) & CIT vs. Vijaya V. Kavekar, it was held that Circular No.3 of 2011 has retrospective operation and applies even to pending cases. As regards Surya Herbals, the appeal does not involve any "cascading effect" as the department has not shown whether there are other appeals which raise the same point.

CIT v. Varsha Dilip Kohle (Bom.)(High Court)www.itatonline.org

S.260A:Appeal-High court- Small tax effect-Circular- Appeal is maintainable if substantial question of law is involved.

On the facts of the case all appeals were filed in May 2005 and September, 2007 therefore Circular of board issued in 2005 has to be considered. As per the circular if substantial question of law is involved, regardless of fact, that amount of tax involved was less than 4 lakhs, appeals are maintainable (A.Y. 1997-98 TO 2000-01)

CIT v. Pushpa Vijoy (Smt)& Anr (2012) 67 DTR 354/247 CTR 575 / 206 Taxman 22 /Vol. 42 Tax. L.R. May 301 (Ker.) (High Court)

S.260A:Appeal-High Court- Substantial question of law- At the time of hearing -High court can formulate other substantial questions of law not only formulated earlier but also other substantial questions of law not formulated by it.

The High Court has admitted and formulated the questions only in respect of two items. At the time of arguing the matter the assessee contended that other issues though not admitted may be allowed to argue the matter on substantial question of law. The court held that if the court satisfies that the case involves not only the substantial question of law formulated but also other substantial question of law not formulated by it , it can hear such questions on reasons recorded.(A.Y.1999-2000)

Indian Additives Ltd v. Dy.CIT (2012) 67 DTR 389/2012 Tax LR 479 (Mad.) (High Court)

S.260A:Appeal-High Court-Finding of fact- Question of law-Perverse-"a fortiori".

The court held that , even where a reference of a question of law is made to the High Court in its advisory jurisdiction , and not the appellate jurisdiction , where normally the findings of fact recorded by the Tribunal are binding on the High Court , the finding are not binding on the High Court , if they are perverse or if the findings are such that no person acting judicially and properly instructed as the relevant law could have come to the determination under appeal. The position in an appeal under section 260A of the Income-tax Act ,1961 is "a fortiori".(A.Y. 2000-01)

CIT v. Nova Promoters and Finlease (P) Ltd(2012) 342 ITR 169 / 206 Taxman 207/71 DTR 53/ 75 DTR 65/ 252 CTR 187(Delhi) (High Court)

S.260A:Appeal- High Court - Power of review- Review petition is dismissed against the order of High Court in tax appeals.

Revenue filed application seeking review the order passed by the High Court in the tax appeal. The assessee relying on judgment in the case of CIT v. West Coast Paper Mills Ltd (2009) 319 ITR 390 (Bom.) contended that no review is maintainable , enabling review of the order by the High Court in tax appeal and sub section (7) of section 260A does not permit such a course. The revenue contended that the power of review is a akin to section 100 of the C.P.C. and if an appeal lies on the substantial question of law under section 100 of the C.P.C., the High Court while exercising the appellate power in terms of this provision, is empowered to review its own orders. The revenue submitted that section 114 of the C.P.C. read with order XL.VII, Rule (1) of the C.P.C. specifically confers power of review in appeal and in these circumstances all provisions enabling the High Court, in exercise of its appellate power, to deal with first appeals and second appeals have been made applicable, that would include power of review. The Court held that power of review cannot be read into sub-section (7) of section 260A and therefore, review petition is not maintainable against order passed by High Court in tax appeals by invoking sub section (7) of section 260A.

CIT v. Automobile Corporation of Goa Ltd. (2012) 206 Taxman 640 (Bom.)(High Court)

S.260A:Appeal-High Court- Appellate Tribunal-Finding of fact-Additions confirmed by Income-tax Appellate Tribunal contrary to the evidence is liable to set aside.

There was search and seizure action in the premises of assessee and the assets were seized. The Assessing Officer treated the income and assets of wife also as income of assessee. In appeal the Commissioner (Appeals) and Tribunal also confirmed the addition. On appeal by the assessee relying on the ratio of Apex court in DSP v.K.Inbasagaran (2006) 282 ITR 435 (SC), Dhirajlal Girdharilal v. CIT (1954) 26 ITR 736 (SC), Lalchand Bhagt Ambica Ram v. CIT (1959) 37 ITR 288 (SC), the High Court set aside the order and held that addition of income from assets belonging to wife of assessee is not justified . The Court also held that the finding of fact not based on evidence can be set aside. (A.Y. 1985-86)

S.K.Bahadur v.UOI (2012) 345 ITR 95 (Delhi) (High Court)

S.260A:Appeal- High Court- Condonation of delay-Appeal against Order of Tribunal declining to condone the delay is not maintainable.(S. 253(5))

Order passed by the Tribunal under section 253 (5) of the Act declining to condone the delay in filing the appeal is not appealable before the Hon'ble High Court under section 260 A of the Act.

V.K. Sreenivasan v. CIT (2012) 70 DTR 341 (Ker.)(High Court)

S.260A:Appeal High Court-Review of judgment-Review cannot be done on the ground that later contrary decision was not considered.

Review of the judgment on the ground that the court did not take into account the later contrary decision of the Karnataka High Court is not permissible. Court having its own way considered the scope of the amended provisions applicable to the case rendered by it, not being based merely on an earlier decision of the Karnataka High Court, there is no mistake or any other ground warranting interference with the judgment simply on the ground that the court has not taken into account the later contrary decision of the Karnataka High Court.

Patspin India Ltd. v. CIT (2012) 251 CTR 63 (Karn.) (High Court)

S.260A:Appeal- High Court-Tax effect less than 10 lakhs- Low Tax Effect Circular no. 3 /2011 dated 9-2-2011 is retrospective and applies to pending appeals.(S.268A)

The department filed an appeal in June 2000, the tax effect of which was less than Rs. 10 lakhs. The assessee claimed, relying on Instruction No. 3/2011 dated 9.2.2011, that as the tax effect was less than Rs. 10 lakhs, the appeal was not maintainable. The department opposed the plea on the ground that the said Instruction was *prospective* and did not apply to appeals filed before 9.2.2011. Held by the High Court dismissing the appeal:

S. 268A was inserted by the Finance Act 2008 w.r.e.f. 1.4.1999 to reduce litigation in small cases and regulate the right of Revenue to file or not to file appeal. Instruction no.3/2011 dated 9.2.2011 has been issued by the CBDT pursuant to this power. Though clause 11 provides that the instruction would apply to appeals filed on or after 9.2.2011 and appeals filed that date would be governed by the instructions operative at the time the appeal was filed, in a number of cases, it has been interpreted to mean that the monetary limits specified in the Instruction would apply to pending appeals as well (Vijaya V. Kavekar (Bom) followed (*included in file*).(AY 1986-87)

CIT v. Virendra & Co (2012) 77 DTR 210(Bom.)(High Court)

S.260A: Appeal- High Court-Penalty - Less than 10 lakhs- Low Tax Effect Circular no. 3 /2011 dated 9-2-2011 is retrospective and applies to pending appeals.

The department filed an appeal in the High Court where the tax effect was less than Rs. 10 lakhs. The assessee argued that in view of Instruction No. 3 of 2011 dated 9.2.2011, the appeal was not maintainable. The department argued that the said Instruction made it clear that it applied only to appeals filed the date of its issue and had no retrospective effect. Held by the High Court dismissing the appeal:

The question about applicability of Instruction No.3 of 2011 has been considered in several judgements including Smt. Vijaya V. Kavekar (Bom) and Ranka & Ranka (Kar) and the view is that Instruction No.3 of 2011 dated 9.2.2011 would also apply to pending appeals. We are in agreement with this view and so tax appeals filed by the department which are below the tax effect of Rs.10 lakhs are not maintainable.

CIT v. Sureshchandra Durgaprasad Khatod (HUF) (Guj.) (High Court) www.itatonline.org

S.260A: Appeal –High Court-Tax effect less than 10 lakhs-Pending appeals-Low tax effect Circular has retrospective effect and applies to pending appeals.

The department filed an appeal in the High Court where the tax effect was less than Rs. 10 lakhs. The assessee argued that in view of Instruction No. 3 of 2011 dated 9.2.2011, the appeal was not maintainable. The department argued that the said Instruction made it clear that it applied only to appeals filed the date of its issue and had no retrospective effect. Held by the High Court dismissing the appeal:
The question about applicability of Instruction No.3 of 2011 has been considered in several judgements including Smt. Vijaya V. Kavekar (Bom) and Ranka & Ranka (Kar) and the view is that Instruction No.3 of 2011 dated 9.2.2011 would also apply to pending appeals. We are in agreement with this view and so tax appeals filed by the department which are below the tax effect of Rs.10 lakhs are not maintainable.
CIT v. Sureshchandra Durgaprasad Khatod (HUF) (Guj.)(High Court)www.itatonline.org.

S.260A :Appeal- High Court- Condonation of delay – Reasonable cause

Appeal filed on 1st July 2005 but directions were passed on 14th Feb. 2006 for removal of office objections on or before 7th March 2007. On appellants failure to remove objections, appeal automatically stood dismissed on 8th March 2006. Office copy of the appeal, however, indicates that all the objections were permitted to be removed and were removed on 28th April 2006. Nature of the negligence does not warrant a dismissal of the appeal for it is possible that the appellant who had taken steps to prosecute the appeal, legitimately expected the appeal to come up for admission on account of the objections having been removed albeit belatedly and had even appointed an advocate to prosecute the appeal. Further, scales in this case must tip in the appellants favour for it the respondent loses, the prejudice would not be as severe upon him as it would be to the revenue if the appeal is dismissed due to the alleged negligence of some of its officers. In the circumstances, the notice of motion is made absolute subject to the appellant paying the costs fixed at Rs.10,000/- to the respondent.
CIT v. Kamal Kumar Johari (2012) 77 DTR 12 (Bom.)(High Court)

S. 260A: Appeal –High Court- Monetary limit- Circular-Earlier view of the same Court that Low tax effect Circular applies to pending appeals is against "public policy". Suggestions given on how to increase tax base.

The High Court had to consider (i) whether in the light of the judgement of the same Court in Ranka & Ranka (Kar), Instruction No. 3 of 2011 dated 9.2.2011 which states that the department cannot file appeals where the tax effect is less than Rs. 10 lakhs applies to pending appeals and (ii) whether u/s 132B, credit for the cash seized in the hands of another assessee could be given to the assessee. It was held by the High Court that:

(i) Though in Ranka and Ranka it was held by the Court that Instruction No. 3 of 2011 issued by the CBDT is applicable to the pending cases filed prior to 09.02.2011, this view is against public interest and public policy because clause 11 of the said Instruction specifically says that it will be applicable only to cases filed on or after 9.2.2011. The Revenue's contention that Instruction No.3 dated 09.02.2011 has no retrospective effect is upheld;

(ii) It is suggested to the Union Government to reduce the tax burden/ rate of Income tax on the existing Income tax payers by bringing more persons under the Income tax net. If so, the existing tax payers would not evade tax and Income tax disputes also will come down. The following suggestions are made:

(a) that all Government servants, under the State/Centre (who are not assessees under the Income Tax), shall be made liable to pay Income Tax of at least Rs. 1,000 per annum;

(b) that all male graduates, who are mentally and physically sound, aged between 31 years to 60 years (who are not assessees under the Income Tax), shall be made liable to pay income-tax at least Rs. 1000 per annum and protect their interest on attaining age of 61 years by providing pension;

(c) that Election law may be amended prescribing a condition that every male person contesting election to the State assembly/ Parliament shall be an income tax assessee;
CIT v. B Sumangaladevi(Smt) (Karn)(High Court)www.itatonline.org

S.260A: Appeal –High Court- Retrospective amendment-Review petition-Condonation of delay- A Retrospective Amendment does not affect completed matters.

The assessee filed a belated appeal to the High Court u/s 260A. The High Court dismissed the appeal following CIT vs. Mohd. Farooqui (2009) 317 ITR 305 (All) (FB) where it was held that the High Court had no power to condone delay in filing a s. 260A appeal. S. 260-A (2A) was inserted by the Finance Act, 2010 w.r.e.f. 01.10.1998 to give the High Court the power to condone delay. Pursuant to the said retrospective amendment, the assessee filed a review petition and requested that its appeal mat be restored. Held dismissing the review petition:

Though s. 260A (2A) has been inserted retrospectively w.e.f. 01.10.1998 by the Finance Act, 2010, the fact remains that cases already settled before the said amendment cannot be re-opened as per the ratio laid down in Babu Ram v. C. C. Jacob AIR (1999) SC 1845, where it was observed that the prospective declaration of law is a devise innovated by the apex court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a devise adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. In matters, where decisions opposed to the said principle have been taken prior to such declaration of law cannot be interfered with on the basis of such declaration of law. The amendment is applicable to future cases to avoid uncertainty as per the ratio laid down in M. A. Murthy v. State of Karnataka and others (2003) 264 ITR 1 (SC), where it was observed that prospective over-ruling is a part of the principles of constitutional canon of interpretation and can be resorted to by the Court while superseding the law declared by it earlier. It is not possible to anticipate the decision of the highest court or an amendment and pass a correct order in anticipation as per the ratio laid down in CIT v. Schlumberger Sea Company (2003) 264 ITR 331 (Cal). Therefore, the amendment introduced in s. 260-A(2A) has the effect only on pending and future cases. On the date when the appeal was dismissed on the ground of limitation, there was no discretion with the court to condone the delay. A discretion has come to the court by virtue of the amendment by inserting s. 260-A (2A). The appeal was (rightly) dismissed as per the then law and the subsequent amendment is not applicable as the matter has already attained finality.

J.B. Roy v. DCIT (All) (High Court)www.itatonline.org

S.260A: Appeal-High Court- Circular- Low tax effect-Question whether Low tax effect Circular can apply to pending appeals referred to Full Bench.

The department filed an appeal in the High Court in 2008, the tax effect of which was more than Rs. 4 lakhs but less than Rs. 10 lakhs. The assessee claimed, relying on Sureshchandra Durgaprasad Khatod (HUF) & CIT v Madhukar K. Inamdar(HUF)(2009) 318 ITR 149 (Bom), that as Instruction No. 3 of 2011 dated 9.2.2011 issued by the CBDT applied to pending appeals and as the tax effect was lower than the sum of Rs. 10 lakhs prescribed therein, the appeal was not maintainable. The department argued that the maintainability of the appeal had to be decided on the basis of the CBDT Instruction dated 15.5.2008 which was in force at the time of filing the appeal. HELD by the High Court:

Though in Sureshchandra Durgaprasad Khatod (HUF) (and other judgements), it has been held that Instruction No. 3 of 2011 dated 9.2.2011 shall apply to pending appeals paragraph 11 of the Instruction itself provides that "This instructions will apply to appeals filed on or after 9th February 2011. However, the cases where appeals have been filed before 9th February 2011 will be governed by the instructions on this subject, operative at the time when such appeal was filed". The issue requires consideration by a larger Bench. A number of decisions of various High Courts on the subject (CIT v Kodananad Tea Estates (2005) 275 ITR 244(Mad), CIT v Varinder Construction Co (2011) 331 ITR 449 (P&H)(FB), CIT v John L. Chackola(2011) 337 ITR 385(Ker)) were not brought to the notice of this Court in the case of Sureshchandra Durgaprasad Khatod (HUF). We, independently also have serious doubts if the instructions of 2011 can be applied to cases filed earlier. Also, the said Instruction cannot be interpreted on the basis of the litigation policy. Also, prospective application of the instructions would not lead to any absurdity. If by applying the instructions

prospectively, certain appeals would be decided on merits, because the appeals were filed prior to issuance of the new instructions, the same cannot be stated to be absurd. A counter situation also may arise if such instructions are applied with retrospective effect to all pending appeals whereby an appeal would be dismissed without examination on merits simply because the same survived for a longer period than the cognate appeals. Sureshchandra Durgaprasad Khatod (HUF) accordingly requires reconsideration.

CIT v. Shambhubhai Mahadev Ahir (Guj).(High Court)www.itatonline.org

S.261: Appeal-Supreme Court- Delay- Supreme Court flays department for "peculiar phenomenon" of delay in filing high stakes appeals.(S.260A)

For the reasons given in the Orders passed by this Court on 2nd July, 2012, and 13th August, 2012, on account of huge delay in filing the special leave petitions as also in filing the appeal before the High Court, we had asked the Department to file an affidavit explaining the delay in filing the above proceedings. The affidavit has been filed. It is reiteration of the same affidavit which has been filed earlier in the High Court and the Supreme Court. Further, the affidavit has not been filed by the concerned officer. The amount involved in this matter is approximately Rupees ninety crores. Since the affidavit in this Court pursuant to our Orders, as above, is not satisfactory, we want to know from the learned Additional Solicitor General as to whether the Department intends to hold a departmental inquiry for the above delay.

In large number of cases, we find a peculiar phenomenon. In cases, where huge revenue/demand from the Department is involved, invariably, there is inordinate delay in filing appeals before the High Court under Section 260A of the Income Tax Act, 1961, and in filing special leave petitions before this Court. We do not know the reason why such inordinate delays take place only in matters of stakes. This aspect needs to be looked into. This aspect has been brought to the notice of the learned Attorney General as well as the Ministry of Law in the past. This is one such case. Even in the past, this Court has raised a similar query. Moreover, once a matter is dismissed on the ground of delay, it has a ricocheting effect.

In the above circumstances, we direct the Registry to forward a copy of this Order to the Hon'ble Finance Minister and Hon'ble Law Minister for doing the needful at the departmental level so that such cases of revenue leakages do not recur.(SLP no 19986/2011 dated 14-09-2012)

DIT v. Citibank N.A. (2012) 210 Taxman 258(SC)

S.263:Commissioner-Revision of orders prejudicial to revenue-Penalty-Dropping penalty proceedings-Revicion is justified.

Commissioner under section 263, can revise the order passed by the Assessing Officer dropping penalty proceedings. The word "proceedings" under section 263 is broad enough to include dropping penalty proceedings.(A.Y. 2004-05)

R.A. Himmatsingka and Co. v. CIT (2012) 340 ITR 253/ 247 CTR 546 (Patna)(High Court)

S.263:Commissioner-Revision of orders prejudicial to revenue – Deduction-Export of mica products- Mineral ore-Revision is justified.(S. 80HHC)

Assessee exported the goods which are made by converting mica into pieces of specific sizes and the same lost its character as goods and merchandise of the category namely 'mineral ores' hence claimed the deduction under section 80HHC, which was allowed by the Assessing Officer. The Commissioner revised the order under section 263 on the ground that Assessing Officer gave the benefit of section 80HHC notwithstanding the fact that the legislature had excluded the operation of section 80HHC in respect of goods and merchandise of mineral items processed by the assessee. High Court up held the revision order passed by the Commissioner.(A.Y.1990-91)

Jai Mica Supply Co. (P) Ltd. v. CIT (2012) 246 CTR 280 / (2011) 61 DTR 61 (Cal.)(High Court)

S. 263 :Commissioner- Revision of orders prejudicial to revenue –Not application of mind to relevant material or an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of order being erroneous, hence, revision held to be valid.

The assessee bought shares on 21.4.2000 for Rs. 19,536 and sold them on 2.5.2001 for Rs. 6,36,640. A gain of more than 30 times was made in one year. The Assessing Officer accepted the LTCG and allowed section 54F relief. The CIT passed an order under section 263 in which he held the order to be 'erroneous and prejudicial to the interest of the revenue' on the ground that the Assessing Officer had not made any enquiry to determine the genuineness of the

transaction though the circumstances warranted the same. On appeal of the assessee, the Tribunal relied on B & A Plantation & Industries & Anr. v. CIT (2007) 290 ITR 395 (Gau.) and held that as the order of the Assessing Officer was not without jurisdiction, it could not be held to be 'erroneous' for purposes of section 263. On appeal by the department, the issue was referred by the Full Bench as to the supposed conflict between various judgements of the Court on the subject:

Jurisdiction under Section 263 can be exercised whenever it is found that the order of assessment was erroneous and prejudicial to the interest of the Revenue. Not holding such inquiry as is normal and not applying mind to relevant material would make the assessment 'erroneous' warranting exercise of revisional jurisdiction. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being 'erroneous'. Non application of mind and omission to follow natural justice is in same category. CIT v. Daga Entrade (P) Ltd. (2010) 327 ITR 467 (Gau.) lays down the correct law and is not in conflict with Rajendra Singh v. Superintendent of taxes & Ors. (1990) 1979 STC 10 (Gau.). (A. Y. 2002-03).

CIT v. Jawahar Bhattacharjee (2012) 341 ITR 434 / 67 DTR 217 / 247 CTR 473/ 209 Taxman 174 (Gauhati)(High Court)(FB)

S.263:Commissioner- Revision of orders prejudicial to revenue - Reasoned order - Double taxation relief – India-Canada - As the computation was not clearly indicated in the assessment order the revision was held to be valid. (Art. 23)

Assessee while filing the return of income, claimed relief under DTAA, in respect of Canada and Thailand. Assessing Officer has allowed the claim under section 143(3). The Commissioner passed the order under section 263, and directed the Assessing Officer to examine the enactment of both the countries and to ascertain the exact relief that the assessee can claim under Article 23(2) with Canada and Article 23(3) of the DTAA of Thailand .Tribunal set aside the order of Commissioner and restored the order of the Assessing Officer. On further appeal to High Court by the revenue the court held that as the Assessing Officer has not clearly indicated the computation with the relevant Articles of DTAA and the basis, can be construed as an order both erroneous and prejudicial to the interest of revenue, hence the revision order was justified. (A. Ys. 1995-96 & 1996-97).

CIT v. Infosys Technologies Ltd. (No 2) (2012) 341 ITR 293 / 67 DTR 33 / 205 Taxman 98 / 247 CTR 410 (Karn.)(High Court)

S.263:Commissioner- Revision of orders prejudicial to revenue – Limitation - Order giving effect of order of Commissioner (Appeals) - Revision of orders beyond the period of two years held to be bad in law.

Assessment order was passed on 27th Feb., 1997. The assessment order was subject matter of appeal, while giving effect the Assessing Authority had passed an order dated on 31st March, 1999. The Commissioner has passed the revision order on 31st March, 1999. The Tribunal set aside the order of Commissioner. On appeal to High Court by revenue the High Court held that the order passed by the Commissioner in exercise of the revisional jurisdiction beyond two years of assessment order was clearly barred by limitation and confirmed the order of Tribunal. (A. Y. 1994-95).

CIT v. Infosys Technologies Ltd. (No. 1) (2012) 341 ITR 290 / 67 DTR 57 / 247 CTR 573 (Karn.)(High Court)

S.263:Commissioner- Revision of orders prejudicial to revenue – Business- Coaching classes-Revision of order on the ground that the Institute was carrying on business of coaching against charge of fee held to be not valid.

The Assessing Officer has passed the order under section 143(3) and allowed the exemption under section 10(23C)(iv). Commissioner revised the order under section 263 on the ground that the assessee was carrying on business of coaching against charges of fee and separate books of account were not maintained. High Court in appeal quashed the order passed under section 263 of the Income-tax Act, 1961 and held that Institute cannot be said to be carrying on business. (A. Y. 2005-06).

DIT (Exemption) v. The Institute of Chartered Accountants of India (2012) 67 DTR 67 / (2011) 202 Taxman 138 (Delhi)(High Court)

S 263:Commissioner- Revision of orders prejudicial to revenue –Finding-Remand- Commissioner must give finding on merits and cannot simply remand to Assessing Officer.

The assessee purchased property for Rs. 69.63 lacs in 1997, yielding a rent of Rs. 2.05 lacs per month, and sold it for Rs. 70 lacs in 2003. The assessee claimed indexation loss which was accepted by the Assessing Officer. The CIT passed an order under section 263 holding that a high-yielding asset could not be disposed off at such a low value and that the assessment order was erroneous & prejudicial to the interests of the revenue as the Assessing Officer had not examined the aspect of full value of consideration receivable by the assessee. The Tribunal, reversed the CIT on the ground that he had not come to the conclusion that the actual receipt of consideration was more than what was declared in the return. On appeal by the department, the High Court. Held, dismissing the appeal:

While the Assessing Officer is both an investigator and an adjudicator, a distinction has to be drawn between a case where the Assessing Officer has not conducted any enquiry or examined any evidence whatsoever ("lack of inquiry") from one (i) where there is enquiry but the findings are erroneous; and (ii) where there is failure to make proper or full verification or enquiry ("inadequate inquiry"). The fact that the assessment order does not give any reasons for allowing the claim is not by itself indicative of the fact that the Assessing Officer has not applied his mind on the issue. All the circumstances have to be seen. A case of lack of enquiry would by itself render the order being erroneous and prejudicial to the interest of the Revenue. In a case where there is inquiry by the Assessing Officer, even if inadequate, the CIT would not be entitled to revise under section 263 on the ground that he has a different opinion in the matter. Also, in a case where the Assessing Officer has formed a wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry before passing the section 263 order. The CIT is entitled to collect new material to show how the order of the Assessing Officer is erroneous. The CIT cannot remand the matter to the Assessing Officer for further enquiries or to decide whether the findings recorded are erroneous without a finding that the order is erroneous and how that is so. A mere remand to the Assessing Officer implies that the CIT has not decided whether the order is erroneous but has directed the Assessing Officer to decide the aspect which is not permissible. On facts, as the CIT had doubts about the valuation and sale consideration received, he ought to have examined the said aspect himself and given a finding on the merits on how the consideration was understated (Gee Vee Enterprises v. Addl.CIT (1975)99 ITR 375 (Delhi),CIT v. Sunbeam Auto Ltd (2011) 332 ITR 167 (Delhi) & CIT v. Gabriel India Ltd (1993) 203 ITR 108 (Bom.) followed)(A.Y. 2004-05).

ITO v. DG Housing Projects Ltd.(2012) 343 ITR 329/74 DTR 153 (Delhi)(High Court)

S.263 :Commissioner- Revision of orders prejudicial to revenue- Deduction-Allocation of expenses-Assessing Officer has not applied his mind hence revision is held to be justified. Other issues where the Assessing Officer has applied his mind , revision held to be not justified.

Assessee is engaged in growing of tea leaves and manufacturing of tea filed its return of income and claimed deduction under section 80I, 80IA and 80HH. The Assessing Officer restricted the claim under section 143(3).Commissioner revised the order on the ground that the Assessing Officer should have allocated expenditure on scientific research while computing profits derived from industrial undertaking to which deduction pertained and also agency commissioner and interest paid were also to be allocated while computing the deduction. On appeal to the Tribunal , the Tribunal quashed the order of Commissioner on the ground that the during the course of assessment proceedings the Assessing Officer has asked specific query and same was replied . The Court held that though the specific query was raised and the reply was filed , the Assessing Officer has not applied his mind and failure to do so the revision order was held to be justified.

As regards agency commission and interest the court held that the revision was not justified because the agency commission has already been factored in while computing the profits of the eligible units. Similarly , interest was not depended upon borrowed funds and there was sufficient accruals in the eligible units. As regards whether cess on green leaves is part of expenditure incurred in business of growing and manufacturing of tea and it is allowable as business expenditure, therefore while computing composite income derived from sale of tea grown and manufactured by assessee entire cess would be claimed against taxable income. Hence revision of order is not justified.(A.Y 1998-99)

CIT v. Hindustan Lever Ltd (2012) 343 ITR 161/ 206 Taxman 75/ 70 DTR 185/249 CTR 378 / Vol 114(2) Bom. L. R. 0807(Bom) (High Court)

S.263:Commissioner - Revision of orders prejudicial to revenue - Cess on green tea leaves - Revision of order on the basis of Guwahati High Court which was not approved by Jurisdictional High Court is not valid.

The Assessing Officer while making assessment under section 143(3) has allowed, cess paid green leaf to the Government as business expenditure . After wards the proposal was sent by the Assessing Officer for revising the order under section 263 on the ground that the Guwahati High Court in Jorehaut Group Ltd. v. Agri ITO (1997) 226 ITR 622 (Gau) held that the cess should be deductible from agricultural income-tax proceedings. Commissioner revised the order , which was upheld by the Tribunal. On appeal to the High Court there was no justification for commissioner to invoke section 263 to disallow the cess on green tea leaves on the basis of decision of the Guwahati High Court when the said decision was not approved by the Jurisdictional High Court in CIT v. A.F.T. Industries Ltd (2004) 270 ITR 167 (Cal) (High Court) and it has been held that the amount of cess so payable is deductible. The revision order was set aside. (A.Y.1995-96)

Hindustan Lever Ltd v. CIT (2012) 70 DTR 182 / 249 CTR 367 (Cal.)(High Court)

S.263:Commissioner - Revision of orders prejudicial to revenue – limitation -Limitation from the original assessment order under section 143 (3).

The order under section 143(3) was passed on 10th March 1999. The said order was revised under section 147 read with section 148, the issues which was allowed under section 143(3) was not the subject matter of reassessment. The Commissioner passed the order under section 263 revising the order passed under section 143(3) dated 10th March 1999. Second order of reassessment was passed on 26th March 2002 . The order under section 263 was passed on 28th March 2003. The said order was quashed by the Tribunal. On appeal to the High Court, the Court held that where the jurisdiction under section 263(1) is sought to be exercised with reference to an issue which is covered by the original order of assessment under section 143 (3) and does not form the subject matter of the reassessment . Limitation must necessarily begin to run from the order under section 143 (3). The order of Tribunal is up held. (A.Y.1996-97)

CIT v. ICICI Bank Ltd. (2012)343 ITR 74/ 70 DTR 419/252 CTR 85 (Bom.)(High Court)

S.263: Commissioner-Revision of orders prejudicial to revenue– Charitable purposes – Institution conducting coaching classes and charging fees, matter not investigated by Commissioner , revision order held to be not valid. (S. 2(15)

The Institute of Chartered Accountants of India was established under the Chartered Accountants Act, 1949, for regulating the profession of chartered accountants in India. Since the asst. year 1996-97, the CBDT had been approving the Institute under sub clause (iv) of section 10(23C) of the I.T. Act, 1961. Approval under sec. 10(23C) (iv) was granted for the asst. years 2003-04 to 2005-06. The Commissioner withdrew the exemption on two grounds, namely, that coaching activity was under taken by the Institute and the activity was "business" and not a charitable activity. Secondly, it was also held that the Institute had incurred expenses of Rs.164.33 lakhs on overseas activities including travelling, membership of foreign professional bodies, etc., without permission from the Board as required u/s. 11(1)(c). The Tribunal set aside the order of revision. On appeal by Dept. to the High Court. Held, dismissing the appeal, that the purpose and object to do business is normally to earn and is carried out with a profit motive; in some cases the absence of profit motive may not be determinative. The Commissioner had given no such finding as far as the activities of the Institute were concerned. The Commissioner without examining the concept of business had held that the Institute was carrying on business as coaching and programmes were held by them and a fee was being charged for the same. The order of revision was not valid.(A.Y. 2005-06)

DIT(Exemptions) v. Institute of Chartered Accountants of India (2012) 347 ITR 86 (Delhi)(High Court)

S.263:Commissioner- Revision of orders prejudicial to revenue – Depreciation – Plant- Terminal building– Revision is not justified. (S.32)

Airports Authority of India uses the terminal building for regulation of air traffic and communicational and Navigational control and use of said building for passengers was only incidental, therefore, Assessing Officer was justified in treating entire terminal building as 'plant' and allowing depreciation, hence revision under section 263 may not be justified.(A.Ys. 1995-96 & 1997-98 to 2001-02)

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

S.263:Commissioner- Revision of orders prejudicial to revenue - Capital gains-Business income - Investment in shares-Revision order is not justified.. (S. 28(i), 45)

If an Assessing Officer acting in accordance with law makes certain assessment, same cannot be branded as erroneous by Commissioner simply because he disagrees with view of Assessing Officer or according to him order should have been written more elaborately. Section 263 does not visualize a case of substitution of judgment of Commissioner for that of Assessing Officer, unless the decision is held to be erroneous. Assessee was holding equity shares of various companies as investment, income arising from sale of investment would be assessable as long term/short term capital gains and not as business income. Revision order under section 263 was not justified. (A.Y. 2006-07)

Manish Kumar v. CIT (2012) 134 ITD 27/17 ITR 324/72 DTR 255 (Indore)(Trib.)

S.263:Commissioner- Revision of orders prejudicial to revenue-Computation deduction under section 80HHF- Adjustment of brought forward losses-Legal position to be seen when exercising the revision jurisdiction and not when the Assessing Officer passed the order-Revision held to be valid.

Assessing Officer allowed the deduction under section 80HHF, before setting off the losses of brought forward from earlier years. Commissioner passed the order under section 263 revising the order. On appeal, the Tribunal held that for the purpose of examining the validity of revision proceedings, what one needs to examine is the legal position prevailing as on the time when revision powers are exercised by the commissioner and not when the Assessing Officer passed the order at the point of time. Accordingly revision order held to be valid. (A.Y. 2003-04)

Star India Ltd. v. Addl. CIT (2012) 65 DTR 169/ 143 TTJ 307/14 ITR 106 / 49 SOT 422 (Mum.)(Trib.)

S.263:Commissioner- Revision of orders prejudicial to revenue- Transfer pricing-Computation –Arm's length price- Revision order held to be invalid.(S. 92C)

Assessing Officer has completed the assessment of assessee by accepting export sales made by it. Commissioner passed the revision order on the ground that assessee had entered into international transaction as it had made export sales and the Assessing Officer has passed the order without referring the matter to TPO for determination of ALP. Tribunal held that no part of total export turnover related to any sales made by to any associated concern and more over no evidence had been brought on record by Commissioner to effect that international transactions by way of mutual agreement /arrangement with associated enterprises. As the provision of section 92C itself is not applicable the order cannot be held to erroneous. Tribunal also held that the order may be brief or cryptic but that by itself is not sufficient to brand assessment order as erroneous or prejudicial to interest of revenue. As regards the cash credits the Assessing Officer had made proper enquiries, deputed the inspector, who examined the return of lenders, bank statement, etc. hence the order of revision was not proper. The Tribunal quashed the order and decided the issue in favour of assessee.(A.Y. 2004-05)

Maithan International v. ACIT (2012) 134 ITD 393 (Kol.)(Trib.)

S.263:Commissioner- Revision of orders prejudicial to revenue- Depreciation- Air Craft- - Revision is not justified is entitled depreciation at 40%. (S. 32)

Air Craft owned by assessee not Aeroplane, hence entitled to depreciation at 40%. All air crafts whether lighter–than–air or heavier–than-air were "aircrafts". No aircrafts could ever be termed as an "aero engine" because an "aero engine" was not an aircraft or aeroplane at all. It was only power unit of an aircraft. The Tribunal set aside the revision order of Commissioner on merit and held that depreciation is allowable at 40%.(A.Y. 2005-06 to 2007-08)

SRC Aviation P. Ltd. v. Dy. CIT (2012) 13 ITR 600 (Delhi)(Trib.)

S.263:Commissioner-Revision of orders prejudicial to revenue-Appeal –Fresh assessment- No appeal is preferred by assessee against revision order hence no ground relating to revision order could be taken in appeal against fresh assessment

Where assessee did not prefer any appeal against a revision order of Commissioner, no ground relating to revision order could be taken in appeal against fresh assessment order passed giving effect to revision order. (A.Y. 2003-04)

Crew B.O.S. Products Ltd v. ACIT (2012) 135 ITD 542/147 TTJ 628/74 DTR 203 (Delhi)(Trib.)

S.263:Commissioner- Revision of orders prejudicial to revenue-Application of mind-Assessing officer applies his mind, examines accounts, makes enquiry hence Commissioner cannot revise the order.

The provisions of the Section 263 does not visualize a case of substitution of the judgment of CIT for that of ITO where ITO in exercise of its quasi-judicial powers while making an assessment examines the accounts, makes enquiry, applies his mind to the facts and circumstances of the case and determines the income by either accepting or making changes in accounts. Such order of ITO cannot be called as erroneous. (A.Y. 2003-04)

AntalaSankaykumarRavjibhai v. CIT (2012) 135 ITD 506/74 DTR 228/148 TTJ 121 (Rajkot)(Trib.)

S.263:Commissioner- Revision of orders prejudicial to revenue-Application of mind-Twin condition of 'erroneous order' and 'prejudice caused to revenue' must be satisfied, Assessing Officer has applied mind hence the order not erroneous and cannot be revised.

It is trite that an order can be revised only and only if twin conditions of 'erroneous in the order' and 'prejudice caused to revenue' co-exits. Where the AO examined the issue from all angles it was held that order could not be held to be erroneous on account of non- application of mind. Therefore, the assessment order could not be revised as one of the twin preconditions to revise the order was absent.(A.Y. 2006-07)

S. Murugan v. ITO (2012) 135 ITD 527 (Chennai)(Trib.)

S.263:Commissioner- Revision of orders prejudicial to revenue-Housing project- Areas of open land / garden and also merger of flats exemption cannot be denied- Revision of order held to be invalid .(S.80IB (10)

The assessee firm started construction of residential project at Aundh, Pune. The total area of the plot was shown to be 3995.34 mts. i.e. marginally less than the prescribed area of 1 acre. The assessee submitted that an additional area of land of measuring 5 'Acre' was also acquired by the assessee for the approach road to the said project vide separate agreement with same land lord . On including this area it exceeded 1 acre. The assessee further submitted that if this area would not have sanctioned the plan and issued commencement certificate. Assessing Officer visited the site and allowed the deduction. Commissioner found this order to be erroneous and prejudicial to the revenue on the ground that (1) the area of the plot of project is less than 1 acre ; (2) As per sale agreement of row house , the saleable area mentioned is more than 1500 sq. feet; (3) in A.Y. 2005-06 the Assessing Officer in order passed under section 143 (3) denied deduction under section 80IB (10) and (4) flats have been merged together and the modification is not as per approved plans . The assessee filed an appeal before the Tribunal against the order under section 263.The Tribunal held that, Areas of open land /garden /store /gym room meant for common use are not to be included for calculating built up area of the residential unit- Merger of flat after purchase , by owners thereof to make it larger flat for their convince cannot be denied exemption . Tribunal held that the revisional order is not valid . (A.Ys. 2004-05, 2005-06, 2006-07)

Baba Promoters & Developers v. ITO 40 (2012) 44-A.BCAJ –April –P40 (Pune) (Trib.)

S.263:Commissioner- Revision of orders prejudicial to revenue-Application of mind-Revision order held to be not valid.

In the present case, the assessment order revealed that the Assessing Officer (A.O.) had allowed the claim of payment of house tax after verification of necessary documentary evidence. The A.O., in the order passed under section 143 had categorically after appreciation of factual matrix of the case disallowed ¼ th of the total expenditure. The C.I.T. in the impugned order held that the assessment order was erroneous and prejudicial to the interests of the revenue within the meaning of Section 263. It was held that the A.O. had examined the material on record and then made various disallowances, hence the C.I.T. was not justified invoking the provisions of section 263 of the Act. (A.Y. 2006-2007).

Roshan Lal Vegetable Products (P) Ltd v.. I.T.O. (2012) 51 SOT 1(URO)(Asr.) (Trib.)

S.263: Commissioner- Revision of orders prejudicial to revenue- Order found to be erroneous and prejudicial to interest of revenue - Commissioner to revise any order passed by any subordinate authority.

Section 263 authorizes a Commissioner to revise any order passed by any subordinate authority, which is to be found erroneous and prejudicial to the interest of revenue. The order passed by the authority to give to the orders of the Tribunal is "any order" passed by assessing authority, who is subordinate to the commissioner. Thus, invoking of power of Revision u/s 263 by Commissioner was within the permissible limits of the law. (AY 2002-03 and 2003-04)

Pentamedia Graphics Ltd. v. ACIT (2012) 17 ITR 302 (Chennai) (Trib.)

S.263:Commissioner-Revision of orders prejudicial to revenue-Issue not considered by the Assessing Officer can be brought within the jurisdiction of Commissioner.(S. 147)

Income-escaping assessment order passed u/s 143(3), r.w.s. 147, is an assessment order passed by Assessing Officer and therefore, any issue, which Commissioner thinks that Assessing Officer has not considered in said assessment, can be brought to life by Commissioner in exercise of his powers u/s 263. In such a case, revisional power of Commissioner cannot be denied on ground that issue considered in income-escaping assessment and issue proposed to be considered in revisional proceedings are different (A.Y. 2002 – 2003)

Spencer & Co. Ltd.v. ACIT [2012] 137 ITD 141/75 DTR 311/148 TTJ 421(TM)(Chennai)(Trib.)

S. 263: Commissioner- Revision of orders prejudicial to revenue-Tax effect is nil- Order not open to revision even if erroneous and prejudicial to the interest of revenue

Where tax effect because of an order passed by the AO is NIL, such order even if erroneous being prejudicial to the interest of the revenue, is not open to revision u/s 263 of the Act. (AY 2006-07)

Punjab Wool Syndicate v. ITO (2012) 17 ITR 439 (Chandigarh)(Trib.)

S. 268A: Appeal –Reference Income tax authorities-High Court- Tax effect -Low tax effect Circular cannot apply "Ipso Facto".(S.260A)

Liberty is given to the Department to move the High Court pointing out that the Circular dated 9th February, 2011, should not be applied ipso facto, particularly, when the matter has a cascading effect. There are cases under the Income Tax Act, 1961, in which a common principle may be involved in subsequent group of matters or large number of matters. In our view, in such cases if attention of the High Court is drawn, the High Court will not apply the Circular ipso facto (Surya Herbal reiterated)(A.Y. 1987-88) (C.C 21465 /2011 dated 2-7-2012, from the Judgement order dated 26-4-2011 ITA no 6 /1995)

CIT v. Atma Ram Properties Pvt. Ltd(2012) 210 Taxman 254(SC)

S.269T:Repayment of loans and deposits - Otherwise than by account payee cheque or account payee bank draft-Debit by journal entries-Repayment through journal entries is in contravention of provision, however as the assessee had shown reasonable cause the levy of penalty is not justified. (S.269SS,271D,271E, 273B)

The assessee company has accepted the loan by account payee cheques. While repaying the loan the assessee settled the account by making journal entries in respect of sale price of shares and balance amount was paid by cheque. The Assessing Officer levied the penalty on the ground that the assessee had repaid the loan in contravention of section 269T. In appeal Commissioner (Appeals) confirmed the levy of penalty. On appeal before the Tribunal, the Tribunal held that the payment through journal entries did not fall within the ambit of section 269SS or 269T, hence consequently no penalty could be levied either under section 271 D or section 271E of the Act. On appeal by revenue the Court held that repayment by debit of account through journal entries is in contravention of provision hence penalty can be levied. On facts the assessee had a reasonable cause and the assessee had no intention to evade tax hence the deletion of penalty by Tribunal is justified. (A.S. 2003-04)

CIT v. Triumph International Finance (I) Ltd. (2012) 345 ITR 270/74 DTR 57/208 Taxman 299/Vol. 114(4)Bom. L.R. 2545 (Bom.)(High Court)

S.269UA:Purchase of immoveable property by Central Government – Understatement of consideration-Failure to apply mind - Conflicting finding of authority- Preemptive purchase was not valid.

While passing the order for preemptive purchase of property the authorities have not taken into consideration market value of property, there was conflicting finding by Authorities, hence, the pre-emptive purchase was held to be not sustainable and the property revests in transferors.

Pandharinath Bhikaji Telge and others v. Appropriate Authority and others (2012) 340 ITR 420 / 66 DTR 42 (Bom.)(High Court)

S.271(1)(c):Penalty-Concealment-Company-Book profit-There cannot be concealment if book profit is assessed under section 115JB.

For AY 2001-02, the assessee filed a ROI declaring loss of Rs.43.47 crores under the normal provisions of the Act and book profits of Rs.3.86 crores u/s 115JB. The AO assessed a loss at Rs.36.95 crores as per normal provisions and book profits at Rs.4.01 crores. As there was a reduction in the loss under the normal provisions owing to various additions and disallowances, the A.O. levied penalty u/s 271(1)(c) in accordance with Explanation 4 & CIT v. Gold Coin health

Food P. Ltd (2008)304 ITR 308 (SC). Before the High Court, the assessee argued that even if there was a concealment u/s 271(1)(c) with respect to the normal assessment, the same was not relevant because the assessee's income was assessed u/s 115JB. The High Court accepted the plea and held that as the s. 115JB "book profits" were by a legal fiction deemed to be the "total income", the furnishing of wrong particulars had no effect on "the amount of tax sought to be evaded" as defined in Explanation 4 to s. 271(1)(c). On appeal by the department to the Supreme Court, Held:

Delay condoned. The special leave petition is dismissed

CIT v. Nalwa Sons Investment Ltd (SC) *www.itatonline.org*.

S. 271(1)(c): Penalty- Concealment- Immunity-Income disclosed during search-Explanation 5 immunity available even if tax not paid by due date of filing of return .(S. 132(4)).

In a s. 132 search and seizure operation, on July 29, 1987 the assessee was found with unaccounted income of Rs. 42 lakhs. The assessee made a declaration u/s 132(4) and offered the said amount to tax. However, neither the return of income was filed, nor was the tax due on the surrendered income paid, on the due date (31.7.1987). The tax was paid during the assessment proceedings. The AO took the view that the assessee was not entitled to immunity from penalty under Explanation 5 to s. 271(1)(c) as it had not paid the tax due on the surrendered income by the due date. The CIT (A) reversed the AO. The Tribunal reversed the finding of CIT (A) High Court reversed the finding of Tribunal and decided in favour of assessee. On appeal by the department the Supreme Court, held dismissing the appeal: Explanation 5 to s. 271(1)(c) is a deeming provision which provides that if, in the course of search u/s 132, the assessee is found to be the owner of unaccounted assets and he claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty u/s 271(1)(c). Sub-clause (2) confers an immunity from penalty if three conditions are fulfilled, namely, (i) the assessee must make a statement u/s 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in s. 139(1), (ii) the assessee should specify in the s. 132(4) statement the manner in which such income stood derived and (iii) the tax together with the interest has to be paid. There is no time limit prescribed in the third condition for the payment of the tax & interest. As the assessee had fulfilled the first two conditions and paid the tax & interest (before the completion of the assessment), it was entitled to immunity under Explanation 5 to s. 271(1)(c). (A. Y. 1987-88)

ACIT v. Gebilal Kanhaialal HUF(2012)348 ITR 561/ 252 CTR 345/76 DTR 345/210 Taxman 244 (SC.)

Editorial: View of Rajasthan High Court in Gebelal Kanhailal (HUF) v. ACIT (2004) 270 ITR 523 (Raj) is affirmed.

S. 271(1)(c):Penalty- Concealment- Filing inaccurate particulars of income-Inadvertent-Human error-Bonafide mistake-Levy of penalty held to be not leviable.(S.44B)

The assessee filed the return of income together with audit report . It has claimed an amount of Rs 23 lakhs towards provision for gratuity which was not allowable under section 40A(7). The said claim was allowed by the Assessing Officer. The Assessing Officer thereafter reopened the assessment and disallowed the said claim. The assessee explained that the mistake has occurred due to confusion and the return was prepared by non chartered accountant . The Assessing Officer levied penalty , which was confirmed by Commissioner (Appeals), Tribunal as well as High Court. On appeal to Supreme Court the , the Supreme Court held that , notwithstanding the fact that the assessee is undoubtedly a reputed firm and has great expertise available with it , it is possible that even the assessee could make a "silly" mistake . The fact that the tax audit report was filed along with the return and that it unequivocally stated that the provision for payment was not allowable under section 40A(7) indicates that the assessee made the computation error in its return of income. The Court held this being an inadvertent human error. The caliber and expertise of the assessee has little or nothing to do with the inadvertent error .The Court held the levy of penalty is not justified.(A.Y. 2000-2001)(C.A.NO 6924 of 2012 dt25-9-2012) (A.Y. 2000-01)

Price Water house Coopers Pvt Ltd v.CIT (2012)348 ITR 306/ 253 CTR 1/77 DTR 153(SC),

S.271(1)(c):Penalty– Concealment-Annual value of leased property-Notional income-Levy of penalty is upheld.

Assessee has leased the property to a Bank for a sum of Rs. 1 lakh per annum as per lease agreement. The assessee has also received interest free deposit of Rs. 67 crores. In the course of assessment proceedings the assessee filed the valuation report of an approved valuer who estimated the annual letting value of total constructed area leased at Rs. 75,63,360/-, as per section 23(1)(a).The penalty levied by the Assessing officer was confirmed by the Tribunal. On further appeal to the High Court, the Court held that the assessee has diverted the interest free amount to its sister concerns without any interest. The court held that the explanation of assessee was not bonafide hence Explanation 1 to section 271(1)(c)of the Act would fully applicable and the Assessing Officer was justified in levying the penalty.(A.Y. 2006-07)

PSB Industries India (P) Ltd. v. CIT (2012) 65 DTR 400 (Delhi)(High Court)

S.271(1)(c):Penalty–Concealment-Untenable claim of bad debt-Write off of the share application money advanced to another company - Converting into interest bearing loan-Penalty is justified.

Assessee has deposited an amount of Rs. 50 lacs with Dimension Investments and Securities Ltd. as share application money, however no shares were allotted to the assessee and therefore the assessee chose to exercise the option of converting the share application money into loan bearing interest at 22% compounded quarterly. The assessee wrote off the amount as bad debt. The Court observed that no interest on said advances had been offered and assessed to tax in any earlier years and that in fact no interest was charged and claim which was ultimately disallowed by the High Court, it is a case where the assessee failed to particulars, furnished in accurate particulars of income and there was lack of bona fide on the part of assessee, therefore, penalty was sustainable. (A.Y. 2000-01)

Kanchenjunga Advertising (P) Ltd. v. CIT (2012) 340 ITR 595/ 66 DTR 137/ 246 CTR 409 (Delhi)(High Court)

S.271(1)(c):Penalty–Concealment-Revised return-Penalty for concealment is leviable though the income was offered in pursuance of notice under section 148.(S.148)

The assessee filed a ROI offering Rs. 4.68 lakhs which was assessed. Subsequently, the AO issued a s. 148 notice claiming that cash credits of Rs. 4.50 lakhs had to be assessed. The assesse filed a ROI pursuant to the s. 148 notice in which it offered the said cash credits as income and the assessment was finalized on that basis. In the s. 271(1)(c) penalty proceedings, the assessee claimed that it was not liable for penalty on the ground that (i) the income offered in the ROI was accepted without any addition and so there was no concealment as per the ROI; (ii) the cash credits were offered as income to buy peace & (iii) that the AO had not recorded satisfaction that the assessee had concealed the income. The CIT (A) & Tribunal accepted the assessee's claim. On appeal by the department to the High Court, held reversing the lower authorities:

The ROI filed pursuant to a s. 148 notice is not 'voluntary' & it can be readily inferred that the assessee had not furnished full particulars of his true income and so reopening became necessary. The explanation that the income was offered to buy peace is not acceptable because it is a clear case of admission of not offering true income earlier. If it had not been for the reopening, the income would have escaped assessment. When the assessee admits, by offering additional income in the s. 148 ROI, that the earlier ROI did not disclose the true income, there is no burden on the department to show concealment.(A.Y.1996-97)

CIT v. Sangameshwara Associates(2012) 345 ITR 396/71 DTR 287/208 Taxman 311/(Karn.)(High Court)

S.271(1)(c):Penalty–Concealment-Disallowance of claim-Disallowance of claim under section 80HHC , penalty cannot be levied as the issue is debatable.

Assessee has made full disclosure of claim under section 80HHC in respect of job work charges , which was certified by chartered accountant . The fact that the claim was not allowed on merits does not mean that assessee has concealed the income. The issue being debatable penalty for concealment confirmed by the Tribunal was deleted by High Court.

Geeta Prints (P) Ltd v. Asst. CIT(2012) 247 CTR 620 / 67 DTR 30 (Guj) (High Court)

S. 271(1)(c):Penalty- Concealment of Income – No penalty to be levied where assessee could show and explain that the interpretation propounded was plausible and had merit, though it was not accepted in quantum appeal

The assessee made a payment to Registrar of Companies which it claimed as revenue expense which was disallowed. Also there was disallowance of payment on which tax deducted at source paid to the government after the end of the previous year. It was held that cancellation of penalty under Section 271(1)(c) was justified where the plea and the

interpretation propounded by the assessee was rejected in the quantum proceedings but the assessee could in the penalty proceedings show and explain that the interpretation propounded was plausible and had merit, though it was not accepted. (A.Y. 2001-02)

CIT v. AT & T Communication Service India P. Ltd. (2012) 342 ITR 257/ 70 DTR 379/250 CTR 57/205 Taxman 93 (Delhi) (High Court)

Editorial- Referred : Nestle India Ltd. (2005) 275 ITR 1 (Delhi)(High Court) and Oracle Software India Ltd. (2007) 293 ITR 353 (Delhi)(High Court)

S.271(1)(c):Penalty– Concealment- Lease and finance-Depreciation- Penalty held to be not justified.

The assessee entered in to a transaction of leasing. The assessee claimed the depreciation. It was found that the documents were fabricated and bogus. The assessee filed the complaint in the police station. The claim of depreciation was disallowed and penalty for concealment was levied . The penalty was deleted by the Commissioner (Appeals) and which was confirmed by the Tribunal. On further appeal to the High Court by revenue the Court confirmed the order of Tribunal and held that the order of Tribunal being not perverse, there is no concealment .(A.Ys. 1990-91 , 1991-92)

CIT v. Sangeeta Leasing (2012) 343 ITR 428 (Delhi)(High Court)

S.271(1)(c):Penalty –Concealment- Bonafide mistake- If a wrong claim caused by "bona fide mistake", penalty is not leviable.

The AO levied s. 271(1)(c) penalty in respect of two issues: (i) claim of depreciation in respect of properties that were assessed under the head "house property" and (ii) claim of deduction in respect of provision for income-tax. The CIT (A) & Tribunal deleted the penalty on the ground that the claim for deduction in respect of income-tax was a "human bonafide clerical mistake" as the assessee was a firm not having expert chartered accountants on its payroll. In appeal before the High Court, the department relied on CIT v. Zoom Communication P. Ltd (2010) 327 ITR 510(Delhi)(High Court) and CIT v. Escorts Finance Ltd., (2010) 328 ITR 44(Delhi)(High Court) where it was held that as under no circumstances could an assessee have claimed provision for tax as a deduction, penalty was imposable. Held by the High Court dismissing the appeal:

As regards depreciation, the property was let out for the first time in the latter part of the A.Y. As such, the benefit of inadvertence or mechanical or repetitive claim being made can be given to the assessee. As regards the provision for taxation, the assessee made a claim for deduction of the provision for the first time in the year under appeal. There was no history of furnishing such accurate particulars by the assessee for the previous years. Accordingly, S. 271(1)(c) penalty is not leviable.(A.Y. 1997-98)

CIT v. Societex (Delhi)(High Court)www.itatonline.org

S.271 (1)(c):Penalty –Concealment- Bona fide claim-Penalty cannot be levied.

Where the assessee firm was not able to sufficiently explain the amount appearing in the books of accounts maintained by it, as such the amount was surrendered by the assessee. Further, the partners of the assessee firm were uneducated and not having knowledge of accounting. On these facts it was held that their bonafide act cannot be treated as concealment within the meaning of section 271 (1)(c) of the Act.(A.Y.1992-93

Punjab Rice Mills v. CIT (2012) 71 DTR 79 / 250 CTR 201 (All.)(High Court)

S. 271 (1)(c):Penalty –Concealment- Estimation-Levy of penalty is held to be not valid.

Assessing Officer levied penalty u/s. 271(1)(c) in respect of trading addition made by application of NP rate of 8 per cent, addition u/s. 68 on account of unexplained cash credits in the names of partners and disallowance of interest on unexplained capital. Finding of the Tribunal was that the additions were based on estimation. A fact or allegation based on estimation can be correct or incorrect. Penalty under section 271 (1)(c) of the Act cannot be levied under section 271 (1)(c) of the Act cannot be levied in case additions are made by the assessing officer only on estimate basis.

CIT v. Mahendra Singh Khedla (2012) 71 DTR 189 /252 CTR 453(Raj.)(High Court)

S.271(1)(c): Penalty-Concealment- Ignorance of law- Bonafide belief-Ignorance of law caused by complicated provisions amounts to "bona fide belief", deletion of penalty held to be justified.

The assessee, a foreign national, was an employee of Sandvik AB, Sweden. He was deputed to India and appointed Managing Director of Sandvik Asia Ltd. In addition to the salary from Sandvik Asia, he received an amount from Sandvik AB, Sweden, being the difference between the tax rates in India and Sweden. In the ROI, the assessee did not

offer the amount received from Sandvik AB to tax even though it was taxable in India. On being asked by the AO, the assessee offered the same to tax and paid tax thereon for all years including the earlier and subsequent AYs. The AO levied penalty on the ground that the assessee was assisted by tax experts and so ignorance of the law was no excuse. However, the Tribunal deleted the penalty on the ground that (i) there were multiple amendments to the statutory provisions (s. 10(b)(vii)) and the concept of grossing-up embedded therein is of a technical nature and out of the scope of common knowledge of the tax payers, (ii) the possibility of mistake by even tax experts cannot be ruled out; (iii) the assessee relied on the tax experts and signed the ROI, (iv) the conduct of the assessee in paying up the taxes for all the years including those that were beyond reassessment showed his bona fides, (v) the claim of bona fide belief need not be substantiated with documentary evidence but can also be substantiated by circumstantial evidence; (vi) penalty is not an automatic consequence of addition to income; (vii) concealment implies that the person is hiding, covering up or camouflaging an income; penalty is not leviable in case where assessee is able to provide a 'bona fide' explanation; penalty is not leviable in cases where assessee made errors,under bona fide beliefs. On appeal by the department to the High Court, HELD dismissing the appeal:

In the ROI, the assessee had not offered the above reimbursed amount to tax under the bonafide belief that the same were not taxable. However, when a query was raised by the AO during the assessment proceedings, the assessee immediately offered that amount to tax for all the years. The penalty imposed u/s 271(1)(c) by the AO was deleted by the ITAT after recording detailed reasons that it was a case of bonafide mistake and that there was no intention to evade tax. The discretion exercised by the ITAT in accepting the explanation given by the assessee is reasonable and we see no reason to interfere with the decision of the Tribunal which is based on finding of facts.

CIT v. Hans Christian Gass (Mum.)(High Court) *www.itatonline.org*

S.271(1)(c):Penalty –Concealment- Quantum appeal pending before High Court- If Quantum appeal is admitted by Court, s. 271(1)(c) penalty proceedings may be kept in abeyance till the decision of the High Court on the merits.

The assessee's quantum appeal against the Tribunal's order was admitted by the High Court. In the s. 271(1)(c) penalty proceedings, the Tribunal, instead of deciding the issue whether the assessee was liable to penalty, restored the issue to the AO with a direction to decide the issue of levy of penalty after the decision of the High Court in the quantum appeal. The department challenged the Tribunal's order on the ground that it had no jurisdiction to issue such an order as it would in effect extend the time limit prescribed in s. 275 for passing the penalty order (6 months from the end of the month in which the Tribunal's order is received by the CIT). Held by the High Court dismissing the appeal:

The assessee's quantum appeal has been admitted by the High Court. If the assessee succeeds in the quantum proceedings, it would not even be necessary to consider the s. 271(1)(c) penalty proceedings and so no prejudice has been caused to the department qua the penalty proceedings. The department's apprehension that the penalty proceedings may be barred by limitation u/s 275(1A) is not well founded. In any event, the apprehension is set at rest by directing that in the event the proceedings are held to be barred by limitation, this appeal shall stand revived automatically and without further orders of the Court.

CIT v. Wander Pvt. Ltd (Bom.)(High Court) *www.itatonline.org*

S. 271(1)(c): Penalty- Concealment-Disallowance of expenses- Diminution in the value-Levy of penalty was held to be not justified for disallowance of expensed under section 35D and disallowance of claim on account of diminution in the value of shares.

The assessee a NBFC , claimed deduction under section 35D which was disallowed on the ground that it was not an industrial undertaking. The assessee also claimed deduction on account of diminution in the value of shares held by it. The same was disallowed on the ground that the shares were held as investments and profits and loss on the sale thereof were to be considered as capital gains. The quantum was confirmed. Penalty levied was deleted by the Tribunal. On appeal by revenue the Court held that the assessee neither concealed of any material particulars nor did the assessee furnished inaccurate particulars . The assessee disclosed all material facts and on the basis thereof, made certain claims which have been found to be unsustainable in law. Explanation 1(B), would apply only on where an assessee has concealed the particulars of his income or furnished inaccurate particulars of income. The court following the ratio in

CIT v.Reliance Petro Products Pvt Ltd (2010) 322 ITR 158 (SC), confirmed the order of Tribunal and dismissed the appeal of revenue.(ITXA no 3899/ 2010 dated 14-8-2012) (A.Y.2000-2001)

CIT v. Aditya Birla Nuvo Ltd (2012) Income Tax Review – Sept- P 82 (Bom.)(High Court)

S.271(1)(c):Penalty–Concealment-Taxability of amount received as security deposit ,two views possible ,no concealment of income.

The assessee was engaged in the business of providing service in connection with obtaining orders from Govt. Departments. The Assessing Officer assessed the total income at Rs.88,582 being interest chargeable to tax under the head "Income from other sources". The Commissioner (Appeals) noticed that a sum of Rs.3 crores received by the assessee on March 2, 1998, from D by virtue of clauses 8 to 11 of the memorandum of understanding between D and that the assessee had shown it in the balance sheet as on March 31, 1998, under the head "trade deposits" on the liabilities side. The Commissioner (Appeals) after examining the agreement was of the opinion that the receipt of Rs.3 crores was in the nature of revenue receipt pertaining to the asst. year 1998-99 and since it had not been disclosed and offered for taxation by the assessee in the return as income, he issued notice u/s. 251(2) of the Act for enhancement of income. The Commissioner (Appeals) held that the receipt of Rs.3 cores was in the nature of income and should be taxed in the asst. year 1998-99. The Tribunal confirmed the order of the Commissioner (Appeals) in quantum proceedings. It was held that not only had the assessee disclosed the receipt of the amount of Rs.3 crores from D, albeit, showing it as a liability at that time (as according to the assessee it had not been converted into income) The assessing officer, in fact, went into this aspect specifically and accepting the stand taken by the assessee, did not treat the receipt as income. The issue was dealt with by the Assessing Officer in the quantum proceedings. This would amply demonstrate that the assessee had not concealed the particulars of his income nor was it a case where the assessee deliberately furnished inaccurate particulars of such income. This would also demonstrate that two views were possible and the claim of the assessee was bona fide. Quantum proceedings are independent proceedings and only when the ingredients of s. 271(1)(c) of the I.T. Act 1961, are satisfied, penalty can be imposed. Penalty could not be imposed.(A.1998-99)

CIT v. Mahavir Irrigation P. Ltd. (2012) 347 ITR 241 (Delhi.)(High Court)

S.271(1)(c):Penalty- Concealment – Deduction – Export- Amendment in law – Manufacturing-Levy of penalty is not justified. (S. 80HHHC, 80IB)

Assessing Officer disallowed the claim of deduction under section 80HHC, on export incentive by applying the provisions inserted by the Taxation Laws (Amendment) Act, 2005, which did not exist at the time of filing of the return, assessee cannot be said to have furnished in accurate particulars of income and levy of penalty was not justified. Assessee also disclosed the complete particulars regarding the claim under section 80IB, in its return which was accompanied by audit report, penalty under section 271(1)(c) cannot be levied as the disallowance of claim being debatable. (A. Ys. 2002-03 and 2004-05).

ACIT v. Perfect Forgings (2012) 143 TTJ 117 / (2011) 60 DTR 41 / 11 ITR 166 (Chd.)(Trib.)

S 271(1)(c):Penalty– Concealment – Additional-Depreciation-Penalty is deleted.

Assets installed and put to use in second half of year, depreciation claimed at 50 percentage of rate allowable in that year, balance of depreciation allowable in next year. Additional depreciation was disallowed. Levy of penalty was not justified.(A. Ys. 2004-05, 2005-06, 2006-07)

Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 (Delhi)(Trib.)

S.271(1)(c):Penalty– Concealment- Opinion of Chartered Accountant- Bonafide claim- Chartered Accountant's opinion does not necessarily make claim "bona fide".-Penalty is confirmed.

The assessee obtained the opinion of a Chartered Accountant on whether expenditure on fees to the Registrar of Companies for increasing authorized capital can be claimed as revenue expenditure. The CA relied on judicial precedents and opined that the issue was debatable and a claim could be made on the basis that if two views were possible, the view in favour of the assessee should be taken. The assessee claimed deduction and even the tax auditor did not qualify the same. The Assessing Officer relying on Punjab State Industrial Development Corp. 225 ITR 792 (SC) &Brooke Bond 225 ITR 798 (SC) disallowed the claim and levied section 271(1)(c) penalty which was upheld by

the CIT(A). Before the Tribunal, the assessee pleaded that as it had relied on the opinion of an expert in making the claim, its action was bona fide & penalty could not be levied. Held dismissing the appeal:
In view of the two decisions of the Supreme Court which held the field when the return was filed, the claim was patently disallowable. The claim was also not discernible on the face of the record and the details of expenses had to be gone into, in order to decipher the claim. The argument that the assessee does not have expertise in taxation matters and so it relied on expert opinion is not acceptable because the opinion was furnished for accounting purposes. An accountant's view is not really material for deciding the deductibility or otherwise of an expenditure. The assessee knew about the problem at the time of filing of return, but still made the claim. Not only this, the claim was pursued even up to the level of the CIT(A) in gross disregard for the decision of the Supreme Court, which the assessee came to know at least after receiving the assessment order. Therefore, the claim was not only wrong but also false and it was persisted with for some time. The fact that the assessee did not even seek explanation from the tax auditor or the CA gave the impression that the whole thing was a sham.(A.Y . 2003-04)
Chadha Sugars Pvt. Ltd. v. ACIT(2012) 135 ITD 42/70 DTR 57/17 ITR 316 / 146 TTJ 112 (Delhi)(Trib.)

S.271(1)(c):Penalty– Concealment- Search - Despite surrender after detection- Penalty is deleted. (S. 153A)

Pursuant to a search & section 153A assessment on the basis of seized papers, statements, etc; the assessee offered additional income of Rs. 2.68 crores on the basis that he was unable to explain the old records. Some of the other additions made by the Assessing Officer were partly deleted by the CIT(A) & Tribunal. The Assessing Officer &CIT(A) levied section 271(1)(c) penalty on the ground that the assessee's offer of additional income was not voluntary or bona fide. On appeal by the assessee to the Tribunal, held allowing the appeal:
Though the assessee owned the unaccounted transactions only after search action, when an assessee admits his mistake and that he has committed a wrong and offers the additional income to tax, it cannot be said that his statement is false or not bona fide. Neither the CIT(A) nor the Tribunal were completely clear about the exact amount of concealment and there was no conclusive evidence as some additions had been deleted. Section 271(1)(c) gives discretion to the Assessing Officer to exonerate the assessee from levy of penalty even in case where the assessee has concealed the income or furnished incorrect particulars of income. Penalty should not be imposed merely because it is lawful to do so. The Assessing Officer has to exercise his discretion judiciously. If an assessee files a revised return though at a later stage or discloses true income, penalty need not be levied. No doubt, merely offering additional income will not automatically protect the assessee from levy of penalty but in a given case where the assessee came forward with additional income though after detection because he was not in a position to explain the seized material properly and expresses remorse in his conduct un-hesitantly, the Assessing Officer has to exercise the discretion in favour of such assessee as otherwise the expression 'may' in section 271(1)(c) becomes redundant. In a case of admitted income, concealment penalty is not automatic. The discretion vested in the Assessing Officer should be used not to levy penalty. On facts, the case was most befitting to exercise such discretion because there was divergent opinion while deleting or sustaining the addition and there was no conclusive proof that the assessee concealed income or furnished inaccurate particulars of income. The assessee's offer was to avoid litigation. If the Assessing Officer had clinching evidence of concealment, he should not have accepted the assessee's offer and should have proceeded on the basis of material on record (VIP Industries 112 TTJ 289, Siddharth Enterprises 184 TM 460 (P&H) &Reliance Petro Products 322 ITR 158 (SC) followed).
P. V. Ramana Reddy v. ITO (Hyd.)(Trib.)www.itatonline.org

S.271(1)(c):Penalty– Concealment – Survey- Search and Seizure- Disclosure of income- Explanation 4 & 5- Penalty is deleted. (S. 153C)

Assessee had surrendered a sum of Rs. 1.60 crores during the course of survey/ search and seizure operation. Assessee on its own, furnished its return of income before the issuance of the notice under section 153C where in it had declared additional income of Rs. 1.60 crores, the Tribunal held that levy of penalty was rightly deleted by the Commissioner (Appeals).(A.Y. 2005-06)
ACIT v. Jupiter Distillery (2012) 66 DTR 121/143 TTJ 745 (Ahd.)(Trib.)

S.271(1)(c):Penalty- Concealment - Unexplained cash credits - Surrender of income - Explanation 1 - Penalty justified.

Department has collected sufficient material against the assessee and only after incriminating material collected by the Department was brought to the knowledge of the assessee, the surrender was made by the assessee under the constraint of exposure to adverse action by the Assessing Officer. On the facts the assessee failed to discharge the onus laid down upon him in terms of Explanation 1 to section 271(1)(c) and did not offer any explanation during the penalty proceedings before the Assessing Officer, the Tribunal held that levy of penalty was justified. (A. Y. 2001-02).

Sanjay Enterprises (P) Ltd. v. ITO (2012) 66 DTR 187 / 144 TTJ 198 (Delhi)(Trib.)

S.271(1)(c):Penalty-Concealment –Provision for doubtful debt- Disallowance of provision for doubtful debt and MODVAT credit under section 43B - Possible view levy of penalty is not justified.

The assessee has disclosed full particulars in the return of income. The Assessing Officer has disallowed the provision for doubtful debts and MODVAT credit component under section 43B of the Act. The additions were confirmed by the Tribunal. In the penalty matter the Tribunal held that full particulars were disclosed by the assessee in the computation of income enclosed with the return. The stand taken by the assessee was supported by subsequent decision of another assessee. The Tribunal held that the stand taken by the assessee at the time of filing of return was a possible and plausible view and therefore penalty was not justified. (A. Y. 1998-99).

Hero Honda Motors Ltd. v. Dy. CIT (2012) 14 ITR 161 (Delhi)(Trib.)

S.271(1)(c):Penalty-Concealment - Conditional offer - Seized documents did not contain signatures or initials or director or family members burden is on revenue to prove, Levy of penalty was not justified.

During the search various documents were found, the assessee has made disclosure of certain amount however in the course of assessment proceedings the assessee offered additional income with the condition that no penalty should be levied .In appeal the Commissioner (Appeals) partly allowed the penalty. On further appeal to the Tribunal by revenue and assessee, the Tribunal held that, though the conditional offer made by the assessee consequent to search operation is justifed for addition in quantum assessment, the same is not sufficient to attract the levy of penalty under section 271(1)(c), when the seized document did not contain signatures or initials of director or any family member. Accordingly the appeal of assessee was allowed and appeal of revenue was dismissed. (A. Y. 2005-06).

Marathon Nextgen Reality & Textiles Ltd. v. Dy. CIT (2012) 67 DTR 249 (Mum.)(Trib.)

S.271(1)(c):Penalty-Concealment-Depreciation-Claim of depreciation on non–compete fee deduction under section 10A in respect of foreign exchange expenditure , levy of penalty was not justified.

Assessing officer levied penalty for concealment in respect of depreciation claim on non-compete fee and for not correctly claiming deduction under section 10A on foreign exchange expenditures from export turnover. On appeal the commissioner (Appeals) held that the as regards the deduction under section 10A, the Tribunal has itself decided in favour of assessee and as regards depreciation merely because the assessee had made a claim of depreciation the levy of penalty was not justified. In appeal by the revenue, the Tribunal confirmed the view of Commissioner (Appeals).(A.Ys 2002-03 & 2003-04)

ACIT v. Pentasoft Technologies Ltd (2012) 134 ITD 567/145TTJ 99/68 DTR 154 (Chennai) (Trib.)

S.271(1)(c):Penalty- Concealment-Revised return-Revised return after issue of notice under section 153A,levy of penalty held to be justified.(S.153A).

Assessee filed the return of income under section 139(1). There was search and seizure action . Assessee obtained the zerox copies of seized documents however in response to notice under section 153A, the assessee filed return of income which was disclosed earlier without disclosing any additional income. After several notices and after issue of notice under section 142(1) , the assessee filed a revised return disclosing the additional income which was accepted by the Assessing Officer. The Assessing officer levied penalty in respect of additional income disclosed in the revised return. Commissioner (Appeals) deleted the penalty. On appeal to the Tribunal by revenue the Tribunal held that assessee has filed revised return only after the Assessing Officer had established that the assessee's books of account are incorrect and false and payments claimed to have been made by cheque and debited to the accounts are also held to be false . The tribunal held that it cannot be accepted that the disclosure of the additional income in the revised return was voluntary and in good faith to buy peace with department , therefore levy of penalty was held to be justified.(A.Y. 2004-05 and 2005-06)

Dy. CIT v. Sushma Devi Agarwal (2012) 67 DTR 430/ 144 TTJ 567(T M) (Kol.) (Trib.)

DY.CIT v. Monika Devi Agarwal (2012) 67 DTR 430/144 TTJ 567(T M) (Kol.) (Trib.)

S.271(1)(c):Penalty-Concealment- Disallowance-Penalty for concealment cannot be levied merely on the basis of disallowance u/s 40(a)(ia) where assessee furnished relevant evidence.

Assessee having furnished all relevant material facts and the audit report in the statutory form along with its return and also filed an explanation which could not be said to be not bona fide, it cannot be said to be guilty of concealment of income or furnishing of inaccurate particulars thereof, merely because certain expenses have been disallowed u/s 40(a)(ia) and therefore, no case for imposition of penalty u/s 271(1)(c) is made out.(A.Y.2005-06)

ACIT v. Medversity Online Ltd. (2012) 145 TTJ 398 / 69 DTR 326 (Hyd.)(Trib.)

S.271(1)(c):Penalty- Concealment - Legal opinion - Compensation for alternative accommodation-Simply because the claim of assessee has not been accepted by tax authorities levy of penalty is not justified.

The assessee claimed in the return of income compensation on account of failure to provide alternative accommodation as capital receipt. The assessment was reopened and the addition was confirmed by the Tribunal. In the penalty proceedings it was contended that the a proper note was put in the accounts based on the opinion of the counsel stating that the receipt is not taxable. The penalty was levied by the Assessing Officer and the same was confirmed by the Commissioner (Appeals). Tribunal held that assessee having claimed that the amount received by it from its landlord as compensation on account of land lord's failure to provide an alternative accommodation to the assessee on vacating its premises is a capital receipt on the basis of legal opinion given by senior advocate and distinctly showed the said amount as an extraordinary receipt by giving separate note to the annual accounts as well as in the computation of income attached with the return, the claim of the assessee cannot be categorized as not bonafide in any manner and therefore, it cannot be said to be a case of concealment of income or furnishing of inaccurate particulars simply because the claim of the assessee has not been accepted by the tax authorities ; penalty under section 271(1)(c) deleted. (A.Y. 1994-95)

Pfizer Ltd v. Dy.CIT (2012) 70 DTR 239 / 146 TTJ 385 (Mum.)(Trib.)

S.271(1)(c):Penalty- Concealment- Satisfaction- Penalty not valid if "satisfaction" not recorded in the assessment order.

The AO passed an order u/s 143(3) in which he took the view that the assessee had wrongly claimed deduction for a provision made towards non-saleable goods. This was upheld by the CIT(A) & the Tribunal. The AO also imposed penalty u/s 271(1)(c) for concealment / furnishing of inaccurate particulars of income. The CIT(A) upheld it. Before the Tribunal, the assessee argued that penalty was not imposable because (a) in the assessment order, the AO had not recorded a finding that there was concealment/furnishing of inaccurate particulars of income and so there was no "satisfaction" and (b) there was no finding in the quantum order that the assessee's claim was not bona fide and so penalty was not imposable. Held upholding the assessee's plea:

(i) Despite the insertion of sub-section (1B) to s. 271, the necessity for "prima facie satisfaction" for initiation of penalty proceedings continues to be a jurisdictional fact. The AO has to record the finding that there was concealment of income. In the s. 143(3) assessment order, the AO has not mentioned a word that there was furnishing of inaccurate particulars or concealment of income. He made the addition merely on the ground that the assessee was not able to produce any evidence for writing off of the amount in the books of account. As the satisfaction that the assessee had concealed income or furnished inaccurate particulars of such income is not discernible from the assessment order, the penalty order suffers from lack of jurisdiction to impose penalty (Madhu Shree Gupta v UOI (2009) 317 ITR 107 (Delhi)(High Court) followed);

(ii) It is settled law that assessment proceedings and penalty proceedings are separate proceedings and findings arrived at in quantum appeal may have persuasive value but are not conclusive for levying penalty. In the quantum appeal there was no finding of the Tribunal that the assessee's claim was not bona fide or that there was any fraud or gross or willful neglect on its part;

(iii) Penalty should ordinarily not be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty should not be imposed merely because it is lawful to do so. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the

provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. On facts, the assessee's act of writing off un-saleable goods cannot be said to be not bona fide and it cannot be said to be furnishing of inaccurate particulars of income.(A.Y. 2001-02)
Global Green Company Limited vs. DCIT (Delhi)(Trib), www.itatonline.org

S.271(1)(c):Penalty- Concealment –Disallowance - Deduction under Section 10A and Section 80HHE in relation to unrealized exports –When all relevant particulars were disclosed , mere disallowance cannot be considered as concealment.

Disallowance of claim for deduction under Section 10A and Section 80HHE in relation to unrealized exports cannot be considered as concealment of income or furnishing inaccurate particulars thereof, especially when all the relevant particulars were disclosed before the AO and, therefore, penalty under section 271(1)(c) was not leviable pursuant to disallowance made by the AO. (A.Y. 2003-04 & 2004-05)
ACIT v. DSL Software Ltd. (2012) 147 TTJ 67/ 72 DTR 34 (Delhi) (Trib)

S.271(1)(c):Penalty- Concealment- Opinion- Professional's opinion in support of claim does not per se make it bona fide. Third Member cannot sit in judgment over dissenting Members' views (S.255 (4))

The assessee filed a ROI claiming deduction for the entire VRS liability despite s. 35DDA providing that VRS payments would be allowed in 5 installments. The AO allowed the claim in s. 143(1) and then issued a S.148 notice (on some other issue; the s. 148 notice did not refer to the VRS claim). In the ROI filed pursuant to the s. 148 notice, the assessee itself disallowed the VRS payment and claimed only 1/5th thereof as was allowable u/s.35DDA. The AO accepted the ROI but imposed S. 271(1)(c) penalty on the ground that there was suppression of income in the original ROI and the S. 148 ROI was not "voluntary". The CIT (A) confirmed the penalty. Before the Tribunal, the assessee argued that S.271(1)(c) penalty was not leviable because (a) under Explanation 3 to S.271(1)(c), income declared in a S.148 ROI cannot be subjected to penalty if a S.139(1) ROI had been filed, (b) at the stage of filing the original ROI, the assessee was advised by his CA that in view of CIT v. Bhor Industries Ltd. (2003) 264 ITR 180 (Bom.), VRS was revenue expenditure & allowable in the year it was incurred, (c) after receipt of the s. 148 notice, the assessee was advised by its CA that in view of S. 35DDA, VRS was allowable only in installments and it surrendered the claim and (d) the S.148 notice did not refer to the VRS claim and the assessee had voluntarily disallowed it. The JM accepted the assessee's plea that it had acted in a "bona fide manner" based on a mistaken belief of the law and penalty was not leviable. However, the AM took a converse view. On reference to the Third Member, Held:

(i) Under Explanation 1 to s. 271(1)(c), the onus is on the assessee to prove that the explanation given by him (for not offering the correct income to tax) is bona fide. The explanation must be an "acceptable explanation". While, the assessee is not required to prove what he asserts to the hilt positively, he must bring material on record to show that what he says is reasonably valid. On facts, the assessee's conduct cannot be regarded as "bona fide". Though the assessee claimed to have relied on the CA's opinion, the opinion lacked credibility because while he referred to Bhor Industries, he did not deal with s. 35DDA which was in effect as of 1.4.2001. Further, in the immediately preceding year, the assessee itself applied s. 35DDA and so it cannot claim ignorance of that provision and there was no reason for it to deviate from the tax treatment given to the VRS payments in the earlier assessment years. Just because a claim is supported by a CA's opinion, this fact per se cannot absolve the assessee from penalty u/s 271(1)(c). The assessee's claim was contrary to s. 35DDA and such that no two opinions were possible thereon;

(ii) The assessee's claim, relying on Tapan Bhattacharya v. ITO, ITA no 1024 tO 1026/Kol./2010 dated 18-11-2010 if the s. 148 reopening reasons do not refer to an issue and the assessee voluntarily surrenders it, s. 271(1)(c) penalty is not leviable is not acceptable. The claim that the AM was a party to that judgement and so could not have taken a contrary view in the assessee's claim is also not acceptable. U/s 255(4), a Third Member has to merely expressly an opinion on the difference and he does not hear an appeal against the orders passed by the dissenting members. He cannot decide which dissenting member is right and which one is wrong. The practice usually followed in Third Member proceedings of advancing arguments in support of or against the views adopted by the dissenting Members, proceeds on the fallacious assumption that the job of the Third Member is to approve or disapprove the views of the dissenting embers. While it is very tempting to sit in judgment over the what one's colleagues decide, and take a magnified view of one's powers as a third member, yielding to such temptation, irrespective of how senior or how

junior these colleagues could be to the Third Member, is not only wholly improper but also plainly contrary to the scheme of s. 255(4). It is improper because all the Members in the Tribunal are at the same level of judicial hierarchy with the same judicial powers, and it is contrary to the scheme of s. 255(4) because all that this section provides for is an additional judicial opinion so as to form majority and not an appeal against the orders passed by the Members in the original coram of the bench. (A.Y.2003-04))

Darwabshaw B Cursetjee Sons Ltd v. ITO(2012) 137 ITD 331/147 TTJ 672/74 DTR 268(TM.)(Kol.)(Trib.)

S.271(1)(c): Penalty-Concealment-Stamp valuation-Capital gains-Penalty not leviable for breach of s. 50C, as per deeming provision of valuation of on the basis of stamp valuation for the purpose of capital gains.(S.50C)

The assessee sold land of which he was the owner for Rs.36 lakhs and offered capital gains on that basis. The AO reopened the assessment u/s 147 on the ground that the assessee ought to have taken the consideration at the market value of the land as per s. 50C. The assessee accepted and offered capital gains as per s. 50C. The AO levied penalty u/s 271(1)(c) which was confirmed by the CIT (A) on the ground that the assessee's action of offering capital gains u/s 50C was after the s. 148 notice and not voluntary. On appeal by the assessee to the tribunal, Held allowing the appeal:

The AO had not disputed the consideration received by the assessee & the addition had been made solely on the basis of the deeming provisions of s. 50C. The assessee had furnished all the facts of the sale which had not been doubted by the AO. The fact that the assessee agreed to the additions because of the deeming provisions of s. 50C does not mean that he filed inaccurate particulars of his income. The assessee's acceptance of the addition on the basis of the valuation made by the stamp valuation authority is not conclusive proof that the sale consideration as per the sale agreement was incorrect and wrong and so s. 271(1)(c) penalty cannot be levied (Renu Hingorani v. ACIT (ITA no 2210/Mum/2010 (ITAT Mumbai) followed) (A.Y.2006-07)

Chimanlal Manilal Patel v. ACIT (Ahd)(Trib)www.itatonline.org

S.271(1)(c):Penalty-Concealment- Search and seizure-Penalty leviable where assessee did not disclose the concealed income even during the course of search(S. 153A)

The provisions of section 153A clearly shows that rule of abatement applies to an assessment and reassessment which is pending on the date of initiation of the search. This means all returns filed earlier will not abate but only in case where assessments are pending would abate. The said principle is applicable to the instant case as certain bundles of bills were found which pertained to undisclosed sales which were not recorded in books of account and this fact was admitted during the search and, therefore, offence of concealment was complete and therefore penalty under Section 271(1)(c) was leviable. (AY 2002-03 to 2006-07)

Shreeji Traders v. Dy.CIT (2012) 136 ITD 249/149 TTJ 52/76 DTR 148 (Mum.) (Trib.)

Dy.CIT v.Shreeji Traders ((2012) 136 ITD 249/149 TTJ 52/76 DTR 148 (Mum.) (Trib.)

S.271(1)(c):Penalty-Concealment-Speculation loss-Penalty cannot be levied merely on disallowance of speculative loss.

It was held that since all particulars were furnished by the assessee and AO did not disturb any of computations made by the assessee, therefore there was no furnishing of any inaccurate particulars. Also mere disallowance of speculative loss by the AO did not constitute concealment of income. Thus, penalty could not be levied under section 271(1)(c). (AY 1992-93)

Hongkong & Shanghai Banking Corporation Ltd. v. Dy. DIT (2012) 136 ITD 357 /16 DTR 275 (Mum.) (Trib.)

S.271(1)(c):Penalty-Concealment-Disallowance of loss levy of penalty is not justified.

During quantum proceedings assessee failed to explain certain discrepancies in respect of its claim for loss in share trading business. A.O. disallowed the loss and imposed penalty. The Tribunal held that in the absence of the finding that the claim for loss was bogus or false, penalty cannot be imposed.(A.Y.

Nath Holding & Invt. P. Ltd. v. DCIT, ITAT B Bench, Mumbai, ITA No.5328/M/06, dated 25-10-11, BCAJ Pg. 43, Vol. 44-A, Part 1, April, 2012.(Mum.)(Trib.)

S.271(1)(c):Penalty-Concealment-Rejection of claim-Levy of penalty is held to be not justified.

In the present case, the mere rejection of the claim of deduction of expenditure on account of non-commencement of business would not be sufficient to satisfy the requirement of levy of penalty under section 271(1)(c). There was no

deliberate attempt on the part of the assessee to submit inaccurate particulars of income warrant penalty under section 271 (1) (c) of the Act. (A.Y. 2006-2007)

NTN Manufacturing India (P) Ltd v. ACIT(2012) 51 SOT 66 (URO)(Delhi)(Trib.)

S. 271(1)(c):Penalty- Concealment –Revised return-Survey-Penalty for concealment cannot be levied if revised ROI filed after survey but before issue of s. 148 notice.(S. 133A,148)

It is the settled law that if a revised return offering additional income is filed after investigation has started but before the issue of the s. 148 notice, s. 271(1)(c) penalty is not leviable. In CIT v.Sureshchand Mittal(2001) 251 ITR 9, (SC)the Supreme Court held that even where the assessee surrendered additional income by way of a revised return after persistent queries by the AO, once the revised ROI has been regularized by the revenue, the assessee's explanation that he had declared the additional income to buy peace had to be treated as bona fide and s. 271(1)(c) penalty could not be levied. On facts, as the assessee filed a revised ROI after survey but before the issue of the s. 148 notice, hence penalty was not leviable.(A.Y. 2005-06)

Radheshyam Sarda v. ACIT (Indore)(Trib.)www.itatonline.org

S.271(1)(c): Penalty – Concealment- Advice of counsel-Bona-fide act on advice of counsel, no penalty could be levied as no concealment of income.

Where the assessee had bona-fide acted on advice of his counsel in respect of claim of exemption under particular provisions of the Act, and which are at variance even under same chapter, where assessee so acted, the claim of the assessee could at the best be called a bona-fide mistake. Thus, penalty u/s 271(1)(c) could not be levied. (A.Y.2006-07)

Majorjit Singh v. ACIT (2012) 17 ITR 183 (Chandigarh)(Trib.)

S.271(1)(c):Penalty–Concealment-Confirming addition in quantum appeal-Mere fact of making or confirming the addition in quantum cannot ipso facto lead to inference that there has been concealment of income or furnishing of inaccurate particulars of such income by assessee so as to levy penalty under section 271(l)(c).

Assessee entered into a licence agreement with NOPL in terms of which it was permitted to run a fast food restaurant in premises of NOPL for eleven months. Shareholding of assessee-company as well as NOPL comprised of certain members of 'N' family. Some dispute on distribution of properties, was going on amongst them. A settlement was arrived through which NOPL was allotted to 'R' who wanted assessee to vacate premises. In legal proceedings, city civil court directed assessee-company to deliver vacant possession of premises. Assessee filed an appeal before High Court against above order of city civil court and obtained an order of stay on operation of decree till disposal of appeal subject to condition that assessee would pay a sum of Rs.10 lakhs towards arrears and continue to deposit a sum of Rs.1.25 lakhs per month with effect from 1-8-1993. Thereupon, 'R' filed suit before the High Court praying for possession of premises and also certain amount as mesne profits for illegal occupation of premises by assessee-company. Subsequently, a consent was arrived at in terms of which assessee had to pay a Rs.34.57 crores to NOPL. Since assessee had already paid a sum of Rs.1.10 crores over a period to NOPL as per directive of High Court, assessee reduced this sum from total agreed amount of Rs.34.57 crores and paid the remaining amount of Rs.33.47 crores to NOPL. Assessee's claim for deduction in respect of said payment was rejected on ground that it was a capital expenditure. Further, Assessing Officer passed a penalty order under section 271(l)(c) for raising a false claim in respect of lump-sum payment of Rs.34.57 crores. Mere fact of making or confirming the addition in quantum cannot ipso facto lead to inference that there has been concealment of income or furnishing of inaccurate particulars of such income by assessee so as to levy penalty under section 271(l)(c).Since it was apparent from records that prior to making payment in terms of consent decree assessee had made interim payments of similar nature as per order of High Court which had been allowed, claim raised by assessee in respect of lump-sum payment was bonafide. Since assessee had made a proper disclosure of facts material to claim in question, there was no concealment of particulars of income or furnishing of inaccurate particulars of such income by assessee so as to attract levy of penalty under section 271(l)(c).(A.Y. 2002 – 2003)

Narangs International Hotels (P.) Ltd. v. DCIT [2012] 137 ITD 53 (TM)(Mum.)(Trib.)

S.271(1)(c):Penalty – Concealment – Death of the assessee- Revised return –Order passed on dead person without bringing on record of legal heir held to be bad in law. As the amount of gift was disclosed in revised return levy of penalty held to be not justified.

During pendency of penalty proceedings assessee died and, thereupon Assessing Officer without issuing a fresh notice to legal heir of deceased-assessee passed a penalty order. The Tribunal held that the order so passed was not sustainable being violative of principles of natural justice. Assessee filed revised return wherein he disclosed a gift of Rs. one lakh received from one 'B'. Assessee's case was that though sum of Rs. 1 lakh was given by way of gift by 'B', when he was asked to give in writing for income tax purpose, he showed his inability to furnish details and hence assessee surrendered amount in revised return. Assessing Officer took a view that assessee had filed revised return because Investigation wing had already started investigation in many cases in respect of assessee. However, Assessing Officer had not brought any material on record to indicate that revenue was aware of non-genuineness of gift received by assessee. Assessing Officer had not made any effort to prove either by obtaining statement from donor or otherwise, that gift was not genuine. The Tribunal held that it was not a case of furnishing inaccurate particulars of income and, therefore, no penalty could be levied.(A.Y. 2001-02)

Jai NarainUpadhyay v.ACIT (2012) 137 ITD 241/75 DTR 361/148 TTJ 529(TM)(Lucknow)(Trib.)

S.271(1)(c):Penalty–Concealment–Book Profits–Penalty under section 271(l)(c) cannot be levied on additions made under normal provisions of Act when income in assessment has been finally computed on basis of book profit.(S. 73, 115JB)

Assessee claimed short-term capital gain on sale of shares. However, Assessing Officer rejected said claim and treated gain as speculative business income under section 73. Assessee submitted that it was not engaged in share trading business and that it purchased those shares for investment purposes and, it was under bona fide belief that income from sale of share was taxable as capital gains. The said explanation was rejected by the Assessing Officer and penalty proceedings were initiated on ground that in quantum proceedings assessee had failed to substantiate its claim under head 'capital gains' instead of speculation income. Held that the assessment order is not a final word in penalty proceedings and howsoever good findings may be in assessment proceedings, they are not conclusive so far as penalty proceedings are concerned. Since assessee was carrying out business of infrastructure development and sale and purchase of shares was only ancillary, assessee could not be held to be guilty of furnishing inaccurate particulars of income and hence penalty was deleted. (A.Y. 2007-08)

BSEL Infrastructure Realty Ltd. v. ACIT (2012) 137 ITD 61 /78 DTR 147(Mum.)(Trib.)

S. 271(1)(c): Penalty –Concealment-Addition on estimate basis-Additions on account of unaccounted sales on estimate basis and for disclosure of lower profit from sales made to sister concern without pointing any discrepancy in the accounts maintained by assessee cannot form the basis for concealment .

On a reference to third member the third member held that the conduct of the assessee whether bonafide or mala fide has to be judged in the background of facts of each case and no penalty under section 271(1)(c) for concealment of income or filing of inaccurate particulars of income can be levied in the case of bonafide or genuine mistake or in case where there is a honest difference of opinion with regard to some issues between the department and the assessee resulting in addition made in the assessment of assessees. Merely because , there is a difference in the returned income and assessed income of the assessee , it does not follow that heavy onus is paled on the assessee to reason for such difference, therefore additions on account of unaccounted sales on estimate basis and for disclosure of lower profit from sales made to sister concern without pointing any discrepancy in the accounts maintained by assessee cannot form the basis for concealment. Accordingly the onealment penalty was deleted .(A.Y. 1993-94)

Vikarm Plastics v .ITO (2012)136 ITD 275/ 75 DTR 393/148 TTJ 657 (TM) (Ahd.)(Trib.)

Panorama Plastics v .ACIT (2012)136 ITD 393/ 75 DTR 393/148 TTJ 657 (TM) (Ahd.)(Trib.)

S.271(1)(c):Penalty- Concealment-Revised return- Issue of notice under section 143(2)- Merely filing of revised return after issue of notice under section 143 (2) and showing capital gain in revised return does not tantamount to detection of concealment , penalty levied was deleted . (S. 139(5) , 143 (2))

The assessee filed the return of income , which was selected for scrutiny under section 143(2).The assessee sought adjournments. On the subsequent date the assessee filed the revised withdrawing the long term capital gains which was claimed as exempt in the original return, and also filed the detailed reply . Since the revised return was beyond the prescribed limit the Assessing Officer treated the said return as invalid. In response to penalty notice the assessee contended that the revised return was file voluntarily before detection hence penalty should not be levied . Assessing

Officer levied the penalty. The Tribunal held that , merely because a notice under section 143 (2) had already been issued and the assessee filed the revised return thereafter disclosing additional income towards capital gains which was not correctly shown in the original return does not tantamount to detection of concealment of income under section 271(1)(c) of the Act.Appeal of department was dismissed. (A.Y. 2006-07)
ACIT v. Ashok Raj Nath (2012) 19 ITR 70r(Delhi) (Trib.).

S.271(1)(c):Penalty-Concealment- Deduction of donation- Loss return- Levy of penalty was held to be justified.

The assessee has filed a loss return .In the statement of income it has claimed the deduction under section 80G in respect of donation. As the returned income was loss the assessee was not entitled to deduction . The Tribunal held that as the assessee had not proved that claim was made by mistake and there was no mala fide intention, levy of penalty was held to be justified.(A.Y. 2005-06)
Unison Hotels Ltd. v. Dy. CIT (2012) 138 ITD 39 (Delhi) (Trib.)

S. 271(1)(c): Penalty – Concealment—Commission disallowance- Failure to deduct tax at source- Failure to file appeal and obtain relief – No penalty warranted. (S. 40(a)(ia).

The Assessing Officer disallowed commission paid to foreign travel agent by invoking the provisions of section 40(a)(ia). The assessee did not file an appeal . The Tribunal held that , merely failure of assessee to file appeal and to obtain legitimate relief cannot lead to inference of penalty.(A.Y.2005-06)
Unison Hotels Ltd. v. Dy. CIT (2012) 138 ITD 39 (Delhi) (Trib.)

S. 271(1)(c): Penalty –Concealment- Furnishing of inaccurate particulars – All particulars like freight receipts, income as per the provision of S. 44B disclosed in ROI – No penalty to be levied where treaty benefits denied on the ground that effective place of management in Mauritius.(S.44B)

Where the assessee has disclosed all the freight receipts in respect of Indian operation in the return of income and has also shown the income as per the provision of S. 44B and calculated tax payable accordingly and claimed benefit of treaty, there cannot be a case of furnishing of inaccurate particulars to invoke penalty u/s 271(1)(c) merely because treaty benefits were denied on the ground that effective place of management in Mauritius was not proved by assessee. (AY 2001-02)
Addl. CIT (IT) v. R Liners Ltd. (2012) 149 TTJ 1 (Mum.) (Trib.)
Dy.DIT(IT) v. James Mackintosh & Co. (P.) Ltd. (2012) 149 TTJ 1 (Mum.)(Trib.)

S.271AA:Penalty-Failure to keep and maintain books of accounts-Documents-International transaction-Transfer pricing- Forming general opinion penalty cannot be levied.(S.92D, Rule 10)

The Tribunal held that when there is any failure on part of assessee in complying with requirements of rule 10D, the TPO and Assessing Officer are bound to point it out specifically before levying of penalty , by forming a general opinion that the assessee has not maintained documents as required under rule 10 penalty cannot be levied.(A.Y. 2003-04)
ITO v. PPN Power Generating Co (P) Ltd (2012) 50 SOT 26 (Chennai) (Trib.)

S.271AA:Penalty-Failure to keep and maintain books of accounts-Documents-International transaction-Transfer pricing- different method followed by assessee and TPO, result being same penalty cannot be levied.(S.92D, Rule 10D)

The assessee followed the cost plus method. The TPO was of the opinion that the assessee had not gathered and maintained sufficient information as required under Rule 6D . The TPO applied the net margin method. However he concluded that no adjustment is required. He directed the Assessing officer to initiate penalty proceedings under section 271AA. The assessing Officer levied penalty though no adjustments were made. In appeal Commissioner (Appeals) deleted the penalty. In an appeal by revenue , the Tribunal confirmed the order of Commissioner (Appeals) and held that even if there was any failure on assessee's part to maintain proper records , it was only a benign one which had no effect whatsoever on value of international transactions entered in to by assessee (A.Y. 2002-03 & 2003-04)

A CIT v. Pentasoft Technologies Ltd. (2012) 134 ITD 567/145 TTJ 99/68 DTR 154 (Chennai) (Trib.)

S.271AAA:Penalty-Search initiated on or after Ist June, 2007-Immunity-Limitation- Immunity cannot be denied on the ground that entire tax along with interest was not paid before filing of return or before concluding the assessment proceedings.

During the course of search action u/s 132 , the assessee declared Rs 50,00, 000 as undisclosed income . The Assessing Officer initiated the penalty proceedings on the ground that the assessee has not paid full taxes and interest on disclosure made under section 132(4). The assessee contended that due to in advertent error , the assessee had not computed the interest under section 234C , as a result self assessment tax of Rs 46, 132 was remained to be unpaid and this shortfall was paid within the time mentioned in notice of demand issued under section 156 . The Assessing Officer rejected the explanation and levied the penalty. On appeal the Commissioner (Appeals) deleted the penalty .On appeal by revenue the Tribunal held that payment of taxes along with the interest by the assessee is one of the conditions precedent for availing the immunity from levy of penalty under section 271AAA(2),there is no time limit set out for payment of tax and interest .The Tribunal also held that section 271AAA does not require any subjective satisfaction of the Assessing Officer to be arrived at during the assessment proceedings , therefore outer limit of payment before the conclusion of assessment proceedings will not come into play. Accordingly the order of Commissioner (Appeals) confirmed. (A.Y 2008-09)

DCIT v. Pioneer Marbles & Interiors Pvt .Ltd (2012) (2012) 144 TTJ 663 / 50 SOT 571 / 14 ITR 608/68 DTR 1 (Kol.)(Trib.)

S.271AAA:Penalty–Search and seizure-Limitation for payment of tax-As there is no outer time limit is fixed by statute for payment of tax along with interest, penalty cannot be levied on the ground that tax was not paid before filing of return.

The provisions of Section 271AAA of the Act do not set a time limit for payment of taxes along with interest. Thus where entire tax and interest was duly paid by assessee within time limit for payment of notice of demand under Section 156 and before the penalty proceedings were concluded, the assessee could not be denied immunity under Section 271AAA(2) only on the ground that the said amounts were not paid before filing of income tax return or before concluding the assessment . (A.Y. 2008-09)

Dy. CIT v. Pioneer Marbles & Interiors (P.) Ltd. (2012) 144 TTJ 663 / 50 SOT 571 / 250 CTR 45 / 14 ITR 608 (Kol.)(Trib.)

S.271B:Penalty– Failure to get accounts audited-Delay in filing audit report – Mere availability of the audit report before Assessing Authority even before completing assessment, not a reason to substantiate the delay in filing levy of penalty held to be justified.

The assessee in the instant case failed to furnish audit report along with the necessary enclosures as per provisions of Section 44AB of the Act. The AO accordingly levied penalty as per Section 271B of the Act. On appeal to Tribunal it was held that mere availability of the audit report and other enclosures before Assessing Authority even before completing assessment, by itself is not a reason to substantiate the delay in filing audit report and enclosures. Thus, penalty under Section 271B must be levied.(A.Y. 2006-07)

Paragon Industries v. ITO (2012) 50 SOT 558 (Chennai)(Trib.)

S.271D:Penalty-Accept loans or deposits- Matter remitted to Tribunal to decide a fresh.

The Assessing Officer levied the penalty under section 271D on account of cash received from two individuals . In appeal, Commissioner (Appeals) confirmed the levy of penalty. The Tribunal deleted the penalty without examining issue on merits. Revenue filed an appeal before the High Court, high court setaside the matter to the Tribunal to decide the appeal afresh after recording factual finding and thereafter apply the decision. (A.Y. 2006-07)

CIT v. Numero Uno Financial Services P.Ltd (2012) 345 ITR 84 (Delhi) (High Court)

S.271FA: Penalty for failure to furnish annual information -Appeal-Commissioner (Appeals)- Penalty for failure to furnish annual information is appealable before Commissioner (Appeals and Tribunal. (S.246A,253(1)(c),271)

Sec. 246A(1)(q) provides for appeals before the CIT(A) against an order of penalty passed under Chapter XXI. Sec. 271FA admittedly falls within Chapter XXI. Therefore, appeal against an order passed by Director of IT, an officer of the rank of CIT u/s. 271FA is maintainable before CIT(A). Merely because orders u/s. 271 and 272A passed by an

officer of the rank of CIT are appealable before the Tribunal u/s. 253, it cannot be held that an order u/s. 271FA passed by an officer of the rank of CIT should also be appealable before the Tribunal. Though orders of penalty us/. 271 and 272A fall under Chapter XXI, appeals there from stand excluded before the CIT(A) under the general provisions of S. 246A(1)(q) by virtue of the specific provision u/s. 253(1)(c). Consequently, an order u/s. 271FA is appealable u/s. 246A(1)(q).

DIT v. Ravi Vijay & Anr(2012) 252 CTR 228/75 DTR 202 (Raj.) (High Court)

Director of IT v. Balu Ram& Anr ((2012) 252 CTR 228/75 DTR 202 (Raj.) (High Court)

S.272A(2)(f):Penalty-Form no 15H-Proviso-Prior to 1st June 1992 no penalty can be levied for failure to file form no 15H, Proviso being remedial operation will have retrospective operation and penalty could not exceed the tax deductible.(S.197A)

The assessee was required to obtain and file the declarations in form no 15H , which were to be filed with Commissioner under section 197A(2) of the Act.

In response to show cause notice the assessee pleaded that he was under the bonafide belief that till 1st June, 1992 the Income-tax Act 1961 did not require form no 15H of the Act to be filed and in any case there was no loss to the revenue. The Commissioner levied the penalty. In appeal the Tribunal held that for assessment years 1991-92 and 1992-93 no penalty can be levied under section 272A(2)(f) till 1st June 1992 because there was no statutory obligation to file the prescribed form under section 197A. For the assessment year 1994-95 the penalty should be calculated in accordance with the proviso to section 272A of the Act where in it is stipulated that the penalty levied should not exceed the tax deductible as the said proviso was held to be retrospective in operation .On appeal by revenue the High Court also confirmed the order of Tribunal and dismissed the appeal. (A.ys. 1991-92, 1992-93 and 1994-95)

CIT v. Krishna Cold Storage (2012) 69 DTR 345 / 207 Taxman 1 (Guj.)(High Court)

S. 272B: Penalty- Failure to comply with provisions of S. 139 - Permanent account number- Non production of relevant documents at the time of survey.(S.139)

The Assessing Officer levied the penalty for non production of relevant documents at the time of survey. In an appeal, Tribunal accepted the explanation of the assessee and the relevant documents could not be produced at the time of survey of its premises on account of shifting of its branch shortly before the survey and that the same were furnished afterwards within a period of two weeks. The High Court held that there is no error in the reasoning of the Tribunal and therefore, the impugned order calls for no interference. Appeal of revenue was dismissed.

ITO v. Adinath Co-op. Bank Ltd. (2012) 252 CTR 222 (Guj.)(High Court)

S.276B:Offences and prosecutions-Failure to pay to the credit tax deducted at source- Directors-Liability of company- Company as juristic company is liable to be prosecuted ,though the directors of company was acquitted on technical grounds.(S.2(35), 278B)

The assessing Officer launched the prosecution to the Directors of assessee company as "principal Officers" for failure to deduct and deposit the tax at source from the interest paid to different companies. After the trail the respondents had been convicted under section 276B. One of the director has expired during the trail, hence proceedings against him, stood abated. Another director was acquitted on the technical ground that non-compliance of section 2 (35) of the Act. As no notice was issued to him as principal officer the proceedings held to be bad in law. The Addl. Sessions Judge held that since the notices to individual directors has held to be defective the company cannot be convicted as the company being legal entity managed by the its officers .On appeal by revenue the Court, set aside the order and held that a company can be prosecuted for the offence punishable under section 276B notwithstanding the fact that its director had been acquitted for non compliance of notice under section 2 (35). The court held that juristic person cannot be order to be imprisonment however other consequences would ensure , i.e. payment of fine etc . Accordingly the order was set aside and order of conviction and sentence passed by the ACMM-02 (North) Delhi was restored.

ITO v. Delhi Iron Works (P) Ltd (2012) 67 DTR 380 (Delhi) (High Court)

S.276C:Offences and prosecutions-Willful attempt to evade tax- False verification - Penalty set aside by Tribunal prosecution does not survive.(S.271(1)(c), 277, 278)

The Court held that when the concealment penalty is set a side by the Tribunal prosecution does not survive.
ITO v. Nandlal and Co. (2012) 341 ITR 646/68 DTR 247 (Bom.)(High Court)
ITO v. Veer Radios (2012) 341 ITR 646 (Bom.)(High Court)
ITO v. Vishram (2012) 341 ITR 646 (Bom.)(High Court)

S.281:Certain transfers to be void- Priority of dues to Government –Secured creditor- Income-tax department by way of attachment of assets cannot claim for priority over secured creditor for realization of Income-tax due.(S.13, 35, Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002).

Property of borrower Company mortgaged to secured creditor (Bank). Charge created without notice to Bank of pending income-tax recovery proceedings against company. The Income tax department informed the petitioner stating that substantial tax due for the assessment years 1993-94 to 1996-97 . This fact was informed the official liquidator and outstanding due and property has been attached by the Income tax department , therefore the claim of Income tax department on the assets of the assessee company should be exhausted before the sale of assets of the company. The Court held that transfer or charge would not be void . Income-tax department by way of attachment, of assets covered by section 13 (2) cannot claim for priority over secured creditor for realization of Income–tax dues. It will be open for the secured creditor for realization of income tax dues. It will be open for secured creditor to exercise his right under SARFAESI Act and Rules made there under and Income-Tax department can not in any manner hamper or restrain secured creditor in proceedings further under SARFAESI Act. Accordingly the attachment of property by Income-tax department was held to be illegal. The petition was allowed.
Asset Reconstruction Co (India) Ltd. v. CIT AIR 2012 (NOC) 196 (Guj.)(High Court)

S.281: Certain transfers to be void- Recovery of tax- Pendency of income tax proceedings- Transfer can be held void only if transferee had notice of pendency of income tax proceedings.

The assessee took loans from a financial institution and created a charge on the property . The Financial institutions as a secured creditor took physical and actual procession of the secured assets under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act , 2002.It issued public notice of sale of assets . The Writ petition was filed by the Income tax department and Custom department stating that the assessee being defaulter had not paid huge outstanding income tax demand with interest and penalty , the secured assets already being attached by department , therefore such property of assessee could not have been attached nor possession of the property have been taken by the financial institution to be secured creditor, hence in view of section 281(1) the transfer was void. The Custom department also alleged that the assessee had admitted its huge liability. The Court dismissed the petition stating that the Tax recovery Officer had not served any notice of pendency of any income tax proceedings on the financial institutions on or before execution of the equitable mortgage by the assessee in favour of financial institutions. Under section 142 of the Customs Act , 1962 , no charge was created in favour of the Customs Department , much less a first charge or priority of claim over the secured creditors. The Court held that the Financial Insitutition was entitled to proration and bonafide transfer of the property having made for valuable consideration from the assessee without serving the notice under clause (i) of the proviso to sub section (1) of section 281 of the Act , though the transfer was hit by the main provision of the Act. Accordingly the writ petition of revenue was dismissed. (A.Ys. 1996-97 to 2001-02).
Tax Recovery Officer v. Industrial Finance Corporation of India and another (2012) 346 ITR 11 (Guj.)(High Court)

S.282:Service of notice generally-Search and seizure- Block assessment-Service of notice is held valid-Block assessment- Validity (S. 132, 143(2), 158BC)

Notice dated 17th October,1997 was served by hand and has been received and bears signature /initials but the name of the recipient is not stated/ mentioned. By notice under section 143(2) dated 24thOctober 1997, the Assessing Officer had required the assessee to furnish details as per questionnaire attached. The assessee by letter dated 17thNovember 1997 filed various details. There was no allegation that the appellant was not served with the notice under section 158B dated 17thOctober 1997. The Court held that section 282 provides that notice may be served on a person either by post or as if summons were issued by a Court under the CPC Order V of the CPC prescribes the mode, procedure and the manner of service of notices. The object and purpose of service of notice/ summons is to inform and initiate the

addressee about the proceedings and the date of hearing. If the notice is served or received by the party concerned and this is established, then the manner and mode of service is not relevant. On the facts it was established that notice under section 158BC was served on a person who had represented the assessee and only on that basis reply to notice under section 143(2) was filed, assessee cannot claim non-service of notice under section 158BC and cannot challenge the assessment as in valid.

Venad Properties (P) Ltd. v. CIT (2012) 340 ITR 463 / 65 DTR 258 (Delhi)(High Court)

S.288:Appearance by Authorised representative- Appellate Tribunal- Members of Ex-ITAT members - As interim measure - Ex-ITAT Members permitted to practice before Benches where they were not posted-Advocates Act, 1961 S. 30.(S. 254)

Rule 13E of the Income Tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963 notified on June 3, 2009 imposes a ban on the practice by retired members before the Income-tax Appellate Tribunal. The Petitioner, a retired member of the Tribunal, filed a writ petition to challenge the said Rule as being ultra vires the provisions of section 288 of the Act and section 30 of Advocates Act 1961. Held by the High Court granting interim relief:

Though, prima facie, the Rule appears to be a correct notification supposedly issued in public interest in line with the rules and practice clamping ban on the legal practice by the retired judges of High Court in the courts where they remain posted as permanent judge and the Tribunals and Courts subordinate to High Court, however, it appears to be offensive in two respects; namely, that the retired members have been completely barred from practice before the Tribunal, and secondly, that the aforesaid Rule 13E has been interpreted to apply retrospectively in the judgment rendered in the case of Concept Creations v. ACIT(2009 120 ITD 19 (Delhi)(Special Bench) by the Income-tax Appellate Tribunal, Delhi, beyond its pale of competence as it has the jurisdiction to decide only the matters relating to tax appeals as contained in the Income-tax Act vide Sections 253 and 254 thereof.

Hence, issue notice to opposite party No.3 to show cause as to under what jurisdiction and authority, the Tribunal has interpreted Rule 13E as aforesaid in the judgment passed in the case of Concept Creations(supra) to the disadvantage of the retired members by imposing a complete ban on the practice before the Tribunal.

The petitioner may serve this notice dasti as well.

Till the next date of hearing, operation of the impugned Rule 13E as well as the judgment in the case of Concept Creations shall remain stayed in so far as they impose a complete ban on the practice by retired members before the Tribunal.

Thus, it would be open for the retired members to practice before the Benches of Tribunal where they had not remained posted and held Courts temporarily or on regular basis.

Dinesh Chandra Agarwal v. UOI (2012) 206 Taxman 29 (All.)(High Court)

S. 292B: Return of income not to be invalid on certain grounds- Notice – Only one irregularity in notice - Minor omission of some words, does not invalidate notice.(S.143)

Merely compliance to notice may not validate a notice which is totally illegal, however, where there is only an irregularity in notice which is otherwise in substance in conformity with intent and purpose of act, notice cannot be deemed to be invalid. Minor omission of some words, does not invalidate notice in view of s. 292B. (A.Y. 2002-03)

ITO v. Mukut Finvest & Properties (P.) Ltd (2012) 138 ITD 166 (Delhi)(Trib.)

S.292CC:Authorisation and assessment in case of search or requisition-Search and seizure – Authorisation in joint names-In view of section 292CC with retrospective effect from 1st April , 1976 , authorization in joint names was held to be valid , and matter was set aide to Commissioner (Appeals) to decide the appeal on merits.(S.132,132A)

The court held that the effect of insertion of S. 292CC with retrospective effect from 1st April, 1976 is that (1) it is not necessary for the authorities to issue an authorization u/s. 132 or requisition u/s. 132A separately in the name of search person; (2) if an authorization/requisition has been issued in the names of more than one person, it shall not be construed that it was issued in the name of AOP or BOI, consisting u/s. 132A in the names of more than one person, the assessment or reassessment can be made separately in the name of search of the person mentioned in the

authorization/requisition. As the provisions of S. 292CC have come into force retrospectively i.e. from 1st April, 1976, it shall be deemed that the aforesaid provision was on the statute book i.e. The IT Act, 1961 since 1st April 1976 and the consequence of issue of a warrant of authorization under sec. 132 if issued in joint names of more than one person has to be adjudged in the light of the provisions of s. 292CC.In the present case the warrant of authorization under section 132 has been issued on 10th Nov, 2006 in the joint names of three persons , In view of section 292CC with retrospective effect from 1st April , 1976 , authorization in joint names was held to be valid , and matter was set aide to Commissioner (Appeals) to decide the appeal on merits. Both the orders passed by the Commissioner (Appeals) and the Tribunal are set aside and the matter was remanded to the Commissioner (Appeals) to decide the appeal on merits. (A.Ys. 2001-02 to 2006-07)

CIT v. Devesh Singh (2012) 252 CTR 356 / 76 DTR 403 (All) (FB) (High Court)
CIT v. Yogendra Singh ((2012) 252 CTR 356 / 76 DTR 403 (All.)(FB.)(High Court)

WEALTH-TAX ACT, 1957

S. 2(ea):Definitions-Asset-Building –Let out of factory building and plant -Wealth tax cannot be levied as it remained as commercial asset.

The assessee was carrying on business of manufacturing for two years , however the same was leased thereafter and earned the lease rentals. The Wealth tax Officer levied the wealth tax, which was confirmed in appeal. On appeal to the Tribunal the Tribunal held that even though the assessee is receiving lease rent from lessee, the property i.e. building ,plant and machinery, etc remained commercial assets exploited for the purpose of carrying on manufacturing business, therefore, such assets did not attract levy of wealth –tax. (A.Y. 1997-98 & 1998-99)

Vyline Glass Works Ltd. v. ACWT (2012) 147 TTJ 642 (Chennai)(Trib.)

S.2(ea):Definitions – Assets – Commercial establishment or complex-Leasing of premises- Leasing of premises cannot be considered as commercial establishment hence liable to wealth tax.

Where assessee was not in business of letting out of its office premises and intention of letting out same was not to exploit business assets in relation to its business, said premises would not fall in category of commercial establishment or complex as per provisions of section 2(ea)(i)(5) and therefore, above premises was assessable to wealth-tax (A.Y. 2006-07)

Naturell (India) (P.) Ltd.v. ACWT [2012] 137 ITD 136 (Mum.)(Trib.)

S.2(m):Definitions-Debt owed-Mortgage of property-Money borrowed for securing release of mortgage with bank is deductible.

Money borrowed from the directors for securing release of mortgage which bank had over the assessee's property be treated as a debt incurred to the property , and is deductible as debt owned in the determination of net wealth .The debt incurred "in relation to the asset" in the definition of "net wealth" should enjoy a wide meaning to cover all debts incurred for acquiring , securing and retaining the property free of charge.(A.ys 1995-96 to 2001-02)

CWT v. Associated Industries (P) Ltd (2012) 250 CTR 398/72 DTR 33 (Ker.)(High Court).

S. 5(vi): Exemption – Assets – Plot of Land – Land wrongly shown taxable on return – Held that exemption cannot be ignored, as provided by statute

In the instant case, the assessee wrongly shown a plot of land admeasuring 336 sq meters as taxable. As per the provisions of section 5 and wealth Tax Act, land admeasuring an area of 500 sq meters or less is not chargeable to wealth tax as per provisions of section 5(vi) in return of wealth. It was held that even if assessee had not made any claim for exemption in return of wealth, exemption u/s 5(vi) could not be ignored, which is provided by provisions of the Act. (A.Y. 2007-08)

Udit Narain Agrawal v. Dy. CWT (2012) 138 ITD 51 (Agra)(Trib.)

S.5(1)(i):Exemption - Charitable trust - Kalyan Mandapam – Wealth tax cannot be levied. (Income-tax Act (S.11)

Income of assessee charitable trust from "kalian Mandapam" having accepted as property held under trust and allowed exemption under section 11, exemption under wealth tax cannot be denied. (A. Ys. 1986-87 to 1988-89 &1990-91).
DIT (Exemption) v. Samyuktha Gowda Sarswatha Sabha (2011) 339 ITR 456 / (2012) 66 DTR 211 / 247 CTR 593 (Mad.)(High Court)

S.7: Valuation of assets- Immoveable property- Urban Land (Ceiling &Regulation)Act 1976- Property subject to ULCA restrictions cannot be valued at market value.(S.10 Urban Land (Ceiling &Regulation)Act 1976)
The assessee had a plot of open land which was declared to be surplus under the Urban Land [Ceiling & Regulation] Act, 1976. The assessee claimed that as the land was under ULCA and not marketable, its value for wealth-tax purposes had to be taken at the rate of compensation that it was entitled to be awarded under the ULCA. However, the AO, CIT (A) and Tribunal held that as s. 7 of the W.T. Act required the land to be valued on the basis of "if sold in open market", property had to be valued on that basis and there was no question of reducing the value of the land on the ground of restrictions and prohibitions. On a reference to the High Court, the issue was referred to the Full Bench. Held by the Full Bench reversing the lower authorities:
The words 'if sold in open market' in s. 7 assumes that there is an open market and the property can be sold in such a market. However, if there is a restriction on transfer of the property, the value of the property has to be reduced. On facts, as the land in question was declared surplus land under the ULCA, that had a depressing effect on the value of the asset and the valuation had to be made on the basis of assumption that the purchaser would be able to enjoy the property as the holder, but with restrictions and prohibitions contained in the ULCA. It is not open to the Revenue to assess the property on the basis of the market value, which normally could have fetched without any restriction or prohibition, but it ought to value the land on the basis of the restrictions and prohibitions contained in the ULCA. (A.Y. 1984-85)
AIMS Oxygen Pvt. Ltd v. WTO(2012) 345 ITR 456/73 DTR 313/251 CTR 19/209 Taxman 49 (F.B) (Guj)(High Court)

S.7:Valuation of assets- Residential premises – Rule 3 of Schedule III-Benefit of third proviso is available as the option is with assessee.
Assessee owned a property. He had valued said property on basis of capitalization of net maintainable rent as per third proviso to Rule 3 of Schedule III of Act. The Assessing Officer having noticed that assessee had not occupied property in question for residential purpose for period of 12 months ending on 31-3-2001 valued property as per second proviso to Rule 3 of Schedule III. It was held that the language of third and fourth provisos to rule 3 of Schedule III makes it clear that there may be more than one house belonging to assessee and exclusively used by assessee for his own residential purpose and in that case assessee may not stay in all house, but still benefit of third proviso is available to assessee at his option to one of such house and staying in house is not a mandatory condition. Since property in question was residential house which had not been let out or used for purpose other than residential, conditions as enumerated in third proviso to rule 3 of Schedule III were satisfied by assessee. (A. Y. 2001-02)
Ramesh D. Hariani v.WTO[2012] 137 ITD 128/149 TTJ 494/76 DTR 297 (Mum.)(Trib.)
S.17:Reassessment – Reason to believe – No WT returns were filed by assessee - Assessee cannot challenge notice issued under Section 17
Assessee cannot challenge notice issued under Section 17 on the ground of change of opinion where no WT returns were filed by assessee. (AY 1997-98 & 1998-99)
Vyline Glass Works Ltd. v. ACWT (2012) 147 TTJ 642 (Chennai)(Trib.)
S.17:Reassessment –Information- Tangible material-Information in income tax proceedings constitute a tangible material for reassessment.(S.143 (3))
Information and material found during course of assessment proceedings under section 143(3) of Income-tax Act, 1961 constitute a tangible material for forming a belief that net wealth of assessee assessable to tax has escaped assessment. (A.Y. 2006-07)
Naturell (India) (P.) Ltd. v. ACWT [2012] 137 ITD 136 (Mum.)(Trib.)

S.21AA:Charge-Individual- HUF-Company-Association of persons registered under Society Registration Act, 1860 is not liable to wealth tax (S.3)

The assessee , an association persons which is registered under the Societies Registration Act, 1860 , claimed that it is not liable to wealth tax. The Assessing Officer held that the assessee is liable to wealth tax. The Commissioner (Appeals) upheld the order of Assessing Officer. In appeal before the Tribunal , the tribunal held that the members of the Association did not have any share in the income or asses of the association either on the date of its formation or any time thereafter . The Tribunal held that section 21AA would be applicable subject to the rider that its members should have any share in the income or assets or both of the association on the date of its formation or any time thereafter. Since the second condition was not satisfied, the assessee could not be considered as falling under section 21AA , hence not liable to wealth tax. On appeal by revenue , the High Court upheld the view of Tribunal and held that the assessee association of persons is not liable to wealth tax.(A.Y. 1988-89 and 1989-90)

DIT v. Aparna Ashram (2012) 205 Taxman 362 / Vol. 42 Tax LR May 395 (Delhi) (High Court)

S.34A:Refund – Interest - Self assessment tax - Assessee is entitled to interest on refund of excess payment of self-assessment tax.

Assessee paid more amount by way of self assessment tax. After giving effect to the order of Appellate Authorities the assessee was entitled for refund .The Assessing Officer denied the interest on refund on the aground that the tax was paid by assessee as self assessment tax and not in pursuance of notice under section 30 .On appeal to the High Court the court held that assessee having filed a revised return declaring correct net wealth which was ignored by the Assessing Officer and was finally accepted after appeal .therefore the assessee is entitled to interest on refund as provided under section 34A(4B) (a) on the excess payment of self assessment tax; accordingly claim of interest could not be denied on the ground that such interest is payable only if payment of tax is effected pursuant to a demand notice issued under section 30. (A.Y.1991-92)

Nasser Zackeria & Ors v. CWT (2012) 249 CTR 303/69 DTR 413 / 206 Taxman 139 (Ker.)(High Court)

Wealth Tax - Finance Act, 1983 - S. 40(3)(vib) - Exemption – Leasing – Property leased as part of business is entitled to exemption - Part of property used by managing director as residential accommodation is entitled to exemption.

One of the business of assessee is leasing and in the course of business it had leased out the premises to a factory manufacturing inks, as the property is commercially exploited it was nit liable to be included in the net wealth. The part of property was used by managing director as residential accommodation is also entitled to exemption. (A. Y. 1989-90 to1992-93).

CWT v. Kumudum Printers P. Ltd. (2012) 341 ITR 514 (Mad.)(High Court)

INTEREST- TAX.

S. 2 (5A):Definition- Credit institution- Financial company-Leasing transactions of assessee constituted only 29 percent of its business activity hence not liable to charge interest tax. [S.2(5B)]

The assessee is a subsidiary of a schedule bank. It is engaged in providing financial services .Its main business activities related to income from leasing transactions , merchant banking, brokerage, interest on security , interest on investment , dividend on investment ,profit on sale of investment and interest on loan .

The assessee contended that it is neither "credit institution" nor "financial company" hence provisions of interest –tax Act is not applicable. The claim of assessee was negative by the Assessing Officer and Commissioner (Appeals). On appeal the Tribunal has accepted the claim of assessee. On appeal by revenue to High Court, the High Court up held the claim of assessee and held that leasing transaction vis –a –vis loan transactions of assessee constituted only 29 percent of its business activity therefore the assessee would neither fit in to the definition of "credit institution" as per section 2 (5A) nor financial company as per section 2 (5B) hence not liable to charge tax. (A.Y. 1998-99)

CIT v. Canbank Financial Services Ltd (2012) 208 Taxman 444/ 76 DTR 137(Karn.)(High Court)

S.10(a):Assessment-Reassessment-Full and true disclosure- Change of opinion-Reassessment beyond four years held to be valid.

Assessee is a non banking finance company, which is liable to be charged for interest –tax Act. The Assessing Officer reopened the assessment on the ground that interest which otherwise chargeable to tax under the Act for each of the assessment years had not been brought to tax by non-disclosure on the part of the assessee. In appeal Commissioner (Appeals) held that the reassessment is bad in law on the basis of change of opinion. On appeal by revenue to the Tribunal , up held the view of Commissioner (Appeals).On appeal to High Court , the Court held that the Assessing Officer has reopened the assessment on discovering that assessee had not offered chargeable interest attributable to hire purchase transactions to interest tax in its returns, it is a case of reopening under section 10(a) and not under section 10(b) and the concept of 'change of opinion' not being applicable to a situation where the reopening is made under clause (a) of section 10, it cannot be said that this is a case of change of opinion or that reopening of assessments was barred by limitation as the period of four years from the end of relevant assessment year is not attracted. The court held that the re- opening is valid and appeals of revenue was allowed.(A.Y. 1992-93 to 1996-97)
CIT v. Standard Chartered Finance Ltd (2012) 68 DTR 249 (Kar) (High Court)

S.13: Penalty – Concealment – Non-inclusion of bill discounting charges in chargeable interest, Levy of penalty was held to be justified.
Sec. 13 stipulates that penalty can be imposed when an assessee has furnished inaccurate particulars of interest or concealed particulars of chargeable interest. It does not use the word `deliberately', `wilful' or `wilfully'. Though this section does not have any explanation as in the case of S. 271(1)(c) of the IT Act, 1961, this does not mean that penalty cannot be imposed where an assessee has furnished inaccurate particulars or concealed particulars of chargeable interest. It is well settled that establishment of mens rea is not the requirement or a condition precedent to impose penalty. Question of mens rea is important and relevant in criminal proceeding and not for the purpose of civil penalty u/s. 13. As per s. 2(7), for the purpose of interest tax Act, bill discounting charges have to be treated and regarded as `interest'. Term `interest' as per s. 2(7) as amended w.e.f. 1st Oct. 1991, is absolutely clear and unambiguous. Two divergent views on interpretation of S. 2(7) are not possible Reliance placed by the assessee on Circular No.647 of 1993 dated 22nd March, 1993 is entirely misconceived. Said circular was issued to explain the applicability of the provisions of S. 194A of IT Act,1961, 1961, and not s.2(7) of interest tax Act. Thus, it cannot be accepted that there was a genuine difference of opinion on the question "whether or not bill discounting charges could be treated as interest". Declaration or statement in the return that the said amounts were not included for the purpose of tax may show/establish absence of mens rea but, this by itself does not justify cancellation or quashing of penalty. Penalty u/s. 13 was therefore sustainable. (A.Y. 1996-97 & 1997-98)
CIT v. Fortis Financial Services Ltd. (2012) 76 DTR 429 (Delhi)(High Court)

KAR VIVAD SAMADHAN SCHEME 1998
S.90: Settlement of tax arrear-Pendency of revenue's appeal-Once final determination is made, hearing of any pending appeal before the appellate forum for passing order on merit is not possible. (S.92)
The assessee opted for the benefit of Kar Vivad Samadhan Scheme .The Authority has passed the order final tax arrear. When the application was filed the assessee was not aware whether the department has filed an appeal before the Tribunal. On appeal before the Tribunal, the revenue contended that the benefit of Kar Vivad Samadhan Scheme is not available to the appellant in respect of the Departmental appeal . The Tribunal accepted the argument of revenue and held that the assessee is not eligible for benefit of Kar Vivad Scheme in respect of departmental appeal. On appeal to the High Court, the Court held that once determination is made under section 90 of Finance (No.2) Act, 1998, towards full and final settlement of tax arrears, there is nothing to be treated as pending for final consideration before any authority , including an appeal at the instance of the Revenue before the Tribunal. Accordingly the order of Tribunal set-a-side and appeal was decided in favour of assessee.(A.Y.1993-94)
S. Jagtrakshagan (Dr) v.DCIT (2012) 73 DTR 214 (Mad) (High Court)

VOLUNTARY DISCLOSURE OF INCOME SCHEME, 1997.

S.64(2):Finance Act, 1997 - Voluntary disclosure - Search and Seizure - Firm – Partners - Partners are not entitled to immunity. (S. 132, 158BC)

Search and seizure action was conducted against firm and partners. Partners name were included in the warrant of authorization, therefore the partner is not entitled to immunity under VDS on the basis of the declaration of undisclosed income made by him under the VDS after the search proceedings.

Naresh Chand Baid v. ACIT (2012) 66 DTR 221 / 247 CTR 196 (Chattisgarh)(High Court)

ALLIED LAWS:

AdvocatesAct,1961-Professional misconduct- Professional ethics and morality.(S.35 of the Advocates Act , 1961)

It is not only undesirable but highly unethical on part of appellant to have created title or at least having attempted to create title to him in respect of which litigation was pending in Court and he was representing one of parties in that litigation. The Court also observed that settlement with complainant would not mitigate or wipe out professional misconduct and must not prevent adequate punishment to appellant. The Court held that a person practicing law has an obligation to maintain probity and high standard of professional ethics and morality. On the facts the advocates certificate of practice was suspended for three months.

Dhanraj Singh Choudhry v. NathulalVishwakarma (2012) 204 Taxman 124 (SC)

Appeal - Condonation of delay –Appeal to Supreme Court- Special leave petition- Appeal by department - Delay by Department in filing appeal cannot be mechanically condoned.

The Government filed an appeal to challenge the judgement of the High Court. There was a delay of 427 days in filing the appeal which was caused due to the normal bureaucratic procedure. The department cited a number of judgements and argued that in matters relating to the Government, a lenient view had to be taken as there was no want of bona fides. Held dismissing the appeal:

In the absence of plausible and acceptable explanation for the delay, the question to be posed is why the delay should be mechanically condoned merely because the Government is a party. Though in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government. It is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. As there was no proper explanation for the delay except mentioning of various dates and the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay, the appeals have to be dismissed on the ground of delay.

Office of the Chief Post Master General and others v. Living Media India Ltd(2012) 348 ITR 7 (SC)

Appellate Tribunal-Power of President-Members ACR-Judgment of High Court stating that, ITAT President has no power to write ITAT Members' ACR is stayed

In Uttam Bir Singh Bedi vs. UOI, a Judicial Member of the Tribunal filed a Writ Petition to challenge his supersession to the post of Vice President by his junior. He claimed that the supersession was on account of adverse Annual Confidential Reports ("ACRs") written by the President of the Tribunal which had misguided the high level Selection Committee without the Petitioner being giving an opportunity to represent against the ACR. He claimed that the President of the ITAT had no authority to record the ACRs of the Members. This plea was accepted by the High Court

and it was held as the Tribunal is a judicial body, the President, though exercising administrative control over the Benches, had no power to write the ACRs of the Members. It was also held that the Tribunal had judicial autonomy and the Government could not act like a reviewing authority on the ACRs. It was directed that as the ACRs were illegally recorded by the President and reviewed by the Government, the Selection Committee must reconsider the claim of the Petitioner on merits de hors the ACRs. This verdict was challenged by a Vice President of the Tribunal before the Supreme Court. Held by the Supreme Court at the interim stage:

Put up for final disposal on October 03, 2012. During the pendency of the special leave petition, the direction of the High Court in paragraph 24 of the impugned judgment shall remain stayed.

N. Bharatvaja Shankar v. UBS Bedi (SC) www.itatonline.org.

Appellate Tribunal - Concern expressed at "mutual acrimony" between Members of Chandigarh Bench.

The Applicant, an Accountant Member of the Tribunal, was transferred from Chandigarh to Rajkot. He challenged the transfer on the ground that it was punitive and had arisen because of a complaint against him by a Judicial Member. It was alleged that the Sr. VP, who decided the complaint, had indicted him without a hearing and that the said VP was part of the Collegium which had recommended the transfer. In turn, the Judicial Member alleged that she had been subjected to harassment by the Applicant and other Members of the Chandigarh Bench. She claimed that she had heard a bunch of appeals with the Applicant and that though she had drafted the judgement, the Applicant did not sign it till he sat on another Bench and decided another bunch of appeals by taking a contrary view to the view taken by her. She claimed that the Applicant had "purposely" kept the draft judgement in abeyance in order to be able to take a different view in another Bench while the Applicant alleged that there was something "extra judicial in her mind". Held by the CAT, dismissing the application:

(i) The documentation indicates an unsavoury and uneasy situation prevalent at the Chandigarh Bench of the ITAT and the litigating parties are found to be engaged in an unenviable endeavour to wash the proverbial dirty linen in public. The prevalence of the factual scenario, indicating almost complete want of trust and faith inter-se, ought to be foreign to each segment of dispensation of justice which (system), for optimum and unbiased delivery requires an ambience based upon balanced and conscientious approach. For reasons of propriety, we are not noticing any part of the mutual acrimony as between the personnel who are a part of the dispensation at the local Bench of ITAT. We express our deep sense of exasperation at the prevalent scenario and hope and trust that the sentiments expressed by the President of the ITAT in the course of his letter dated 4.1.2012 for ensuring bonhomie at the local Bench of the ITAT, would be pursued to its logical conclusion;

(ii) Transfer is an incident of public service. It is well settled that Courts/ Tribunals ought to refrain from interfering in transfer matters unless there is an element of perversity or extreme arbitrariness/ bias in the grant of the relevant order. The transfer order was passed on the recommendation of the collegium and though the Applicant found fault with the association of the VP who dealt with the complaint, no bias on part of the President or the other VP was alleged. Further, the claim that as the transfer was pursuant to a complaint, the competent authority ought to have granted a hearing is not acceptable. An employer is free to effect transfer on the basis of a complaint or adverse report without hearing the employee. The giving of a hearing may actually be counter-productive in such matters. Also, the Applicant was not free from blame because, having heard the bunch of appeals with the JM and having allotted the matters to her for dictation, it was not appropriate for him to retain the draft judgement till he sat on another Bench and took a view contrary to the one taken by the JM. If he was not agreeable with the view of the JM, he ought to have written an order of dissent. (Desire expressed that the competent authority may consider the feasibility of doing something to establish appropriate ambience at the Chandigarh Bench of the ITAT).

D. K. Srivastava v. UOI & Ors. (Central Administrative Tribunal) www.itatonline.org

Appellate Tribunal - Section 129(6) of Customs Act barring ex-Members from practice before CESTAT is valid.

The appellant was appointed Member (Technical) of CEGAT on 1-11-1990 and demitted office on 7-3-1993. He enrolled as an advocate with the Bar Council of India on 18-4-1993. Section 129(6) of the Customs Act, 1962 introduced by F.A. 2003 debarred ex-Members from appearing, acting or pleading before the CEGAT/ CESTAT. Section 129(6) was challenged before the High Court on the ground that (i) it was ultra vires Article 19(6) of the

Constitution of India & (ii) could not apply to persons who had demitted office before the insertion of the provision. The High Court (P.C. Jain vs. UOI) rejected the plea on the ground that the restriction was to remove a perceived bias and was not unreasonable. On appeal to the Supreme Court, held dismissing the appeal:
(i) As regards the constitutional challenge, while the right to practice as an advocate is not only a statutory right under the Advocates Act but is also a fundamental right under Article 19(1)(g) of the Constitution, it is subject to reasonable restrictions. The restriction imposed by section 129(6) of the Customs Act is constitutional because (i) the restriction is partial to the extent of practice before CESTAT and does not bar practice before other judicial bodies & (ii) the restriction is intended to serve a larger public interest and to uplift the professional values and standards of advocacy in the country. It adds to public confidence in the administration of justice by the Tribunal;
(ii) The contention that the restriction is based on an illogical presumption of likelihood of bias is also not acceptable because when one has been a member of a Tribunal over a long period and other members have been his co-members, it is difficult to hold that there would be no possibility of bias or no real danger of bias. Even if this possibility was ruled out, it is still in the interest of the institution that restrictions are enforced. Then alone will the mind of the litigant be free from a lurking doubt of likelihood of bias and this would enhance the image of the Tribunal;
(iii) The contention that section 129(6) cannot be given effect to retrospectively so as to adversely affect persons who were enrolled as advocates when the provision was not on the statute book is not acceptable because there is a distinction between a law being enforced retrospectively and a law that operates retroactively. The restriction in the present case is one where the right to practice before a limited forum is being taken away in present while leaving all other forums open for practice. Though the restriction has the effect of relating back to a date prior to the present, the law stricto sensu is not retrospective, but is retroactive. The restriction does not interfere with settled or vested rights.
N. K. Bajpai v. UOI(2012) (278) E.L.T 3. (SC)

Contempt- Officer not following the direction of High Court-The High Court held that the Custom Officer committed gross contempt accordingly punished with simple imprisonment of three months & fine of Rs. 2,000 High court also observed that CBEC may consider prosecuting him.

The assessee's truck loaded with betel nuts was seized by the customs authorities on the suspicion that the assessee was indulging in smuggling. The assessee filed a Writ Petition to challenge the seizure which was allowed by the High Court and the customs authorities were directed to unconditionally release the truck immediately. Despite the High Court's verdict, the customs authorities issued a show-cause notice threatening confiscation. The assessee filed a contempt petition against the department. The department defended its stand and at the same time tendered an unconditional apology. Held by the High Court:

Though the High Court's order was communicated to the department directing a release of the truck without any conditions, the department wrongly demanded 100% cash security and 100% Bond for the said release. The act of issuing show cause notice to avoid giving release is in direct confrontation with the judicial order of the Court. The plea raised with respect to investigation and confiscation is "absolutely frivolous and ridiculous" and has been raised to save from punishment of contempt. Also, the act of justifying the action and simultaneously tendering unqualified apology is a "double faced stance" which is against the settled principle of law. The Asst/Dy Commissioner, Customs, being a senior officer, should have known his limits and by crossing those limits, he has committed gross contempt. He is accordingly punished with simple imprisonment of three months & fine of Rs. 2,000. Also, as the act may constitute "corrupt practice", the CBEC may consider prosecuting him.

Birendra Kumar Singh v. UOI (Patna)(High Court)www.itatonline.org

Constitution of India – Article 226- Avoidance of tax- Transfer pricing- Reference to TPO- Petitioner participated in the proceedings before TPO and has remedy to move before the DRP as well as appeal before the Tribunal hence writ petition was held to be not maintainable . (S.92CA))

The Assessing officer relying upon the CBDT instruction selected for scrutiny and after seeking approval of CIT made reference to the TPO . The petitioner participated in the proceedings before TPO . The petitioner thereafter filed a writ petition questioning the validity of the approval granted by the Commissioner to the Assessing Officer and the

order passed by the TPO. The Court dismissed the petition by observing that petitioner participated in the proceedings before TPO and has remedy to move before the DRP as well as appeal before the Tribunal hence writ petition was held to be not maintainable under Art 226, of the Constitution of India.

Hindalco Industries Ltd v. Add.CIT (2012) 75 DTR 238/252 CTR 167 (Bom.) (High Court)

Companies Act 1956- Company –Scheme of amalgamation - Capital gains –Transfer-Amalgamation- Tax avoidance scheme-. Scheme of arrangement is not a "tax avoidance scheme". (S.391,392,393,394 Companies Act, 1956)

Refer section 45 digest

Vodafone Essar Gujarat Ltd v. Dept of Income-tax (2012) 76 DTR 241(Guj.)(High Court).

Interpretation of statute-Income-tax Act, 1961 - National Housing Bank Act, 1987- Overriding effect.

The NHB Act 1987 was enacted to promote housing finance institutions both at local and regional levels to provide financial and other support to such institutions. There is no provision under the said Act which says that NHB Act will have overriding effect of Income-tax Act, 1961. Since the Assessment orders are passed under the Income-tax Act, the provisions of Income-tax Act is applicable and NHB Act 1987 does not override the Income–tax Act, 1961.

Orissa Rural Housing Development Corporation Ltd. v. ACIT (2012) 66 DTR 73/ 247 CTR 137 (Orissa)(High Court)

Interpretation of statute – Precedent- Per incuriam-Ignorance of earlier decision.

A decision which is rendered in ignorance of an earlier decision of a co-ordinate Bench of equal strength "which covered the case before it" does not have precedent value.The Tribunal followed the ratio of Punjab Land Development & Reclamation Corpn. Ltd. v. Presiding Officer, LabourCourt (1990) 3 SCC 682 and CIT v. B.R. Constructions (1993) 202 ITR 222 (AP)(FB). (A.Y. 1998-99)

ACIT v. Pramod H. Lele (2012) 66 ITR 134/143 TTJ 721/ (2011) 47 SOT 363 (Mum.)(Trib.)

Interpretation of taxing statute- Tax avoidance and tax planning.

The honourable court in Vodafone International Holdings B.V. v.UOI has once again the approved that tax palnning is permissible and not tax evasion. At para 116 observed as under " A five Judges Bench judgment of this court in Mathuram Agrwal v. State of Madya Pradesh (1999) 8 SCC 667 after referring to the judgment of in CIT v. B.M. Kharwar(1969) 1 SCC 651(supra) as well as the opinion expressed by Lord Roskill on Duke of westminister stated that the subject is not to be taxed by inference or analogy , but only by the plain words of a statute applicable to the facts and circumstances of each case.

117. Revenue can not tax a subject without a statute to support and in the course we also acknowledge that every tax payer is entitled to arrange his affiras so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury. Revenue's stand that the ratio laid down in Macdowell is contrary to what has been laid down in Azadi Bachao Andolan , in our view , is unsustainable and therefore , calls for no reconsideration by a larger Branch(Bench)

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

Interpretation- Doctrine of merger –Appeal –Dismissal of appeal on ground of limitation.

The court held that if for any reason an appeal is dismissed on the ground of limitation and not on merits , that order would not merge with the orders passed by the first appellate authority.

Raja Mechanical Co.(P) Ltd v. CCE (2012) 345 ITR 356 9(SC)

Right of information-Members of CESTAT- Corruption charges-Tribunal Member's Corruption Charges Information can be disclosed under RTI.

Certain complaints qua corruption were made against Ms. Jyoti Balasundaram, Member/CESTAT. After examining this complaint, the President of CESTAT made certain adverse entries in the ACR of the said Member. On the basis of the said ACR, the Department of Revenue, Ministry of Finance, opened a file with the subject "follow up action on the integrity in the ACR for the year 2000-01 in respect of Ms. Jyoti Balasundaram, Member (Tech), CESTAT." Ultimately, this file was closed without taking any proper action. The appellant filed a RTI application seeking inspection of the file & copies of the Note Sheets and correspondence. This was rejected by the CIC on the ground that the issue relating to

integrity was a part of the ACR & ACR grades could not be disclosed to third-parties except under exceptional circumstances. The Single Judge held that the information sought was "third party information" and so the authorities had to consider whether the third party's "privacy" defence could be overruled in the public interest or not. On second appeal, Held:

U/s 8(1)(j) of the RTI Act, information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual cannot be disclosed unless the authority is satisfied that the larger public interest justifies the disclosure of such information. U/s 11 (1), where the CPIO etc intends to disclose the information which relates to or has been supplied by a third party and has been treated as confidential by that third party, the CPIO is required to give written notice to the third party and invite him to make submissions why the information should not be disclosed. This mandatory procedure has to be followed and the Single Judge rightly directed the CIC to determine whether disclosure of the Tribunal Member's ACR was in the larger public interest (Arvind Kejriwal vs. CPIO AIR 2010 Delhi 216 followed; Centre for Earth Sciences Studies Vs. Anson Sebastian, 2010 (2) KLT 233 not followed)
*R. K. Jain v. UOI (Delhi)(High Court)*www.itatonline.org

Right of information Act
S.8(1): Income-tax details can be disclosed under RTI only if in "larger public interest"
It was held by the Apex Court that the details disclosed by a person in his income tax returns are "personal information" which stands exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless it involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information. On facts, as the Petitioner has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual u/s 8(1)(j) of the RTI Act.
Girish Ramchandra Deshpande v. CIC (SC) www.itatonline.org

SERVICE TAX
Service Tax Act –Taxable service-Service by consulting engineer – S. 65(105)(g) - Finance Act, 1994 - Rule 8A of Wealth Tax rules
A person who is not an engineer is also qualified to render services as a valuer as evident from the qualifications prescribed for valuers in r. 8A(2) of the WT Rules, 1957 and therefore, services rendered by a valuer, whether an engineer or any other person, are not in relation to advice, consultancy or technical assistance in any one or more disciplines of engineering and accordingly, qualified engineers who act as valuers do not fall within the ambit of term "consulting engineer" as defined in the Finance Act, 1994, to the extent of valuation services rendered by them and such services are not exigible to service tax.
Institution of Valuers & Anr v. UOI & Anr, (2012) 76 DTR 315 (Guj.)(High Court)

Transfer of Property Act, 1882, Ss. 5, 53A & 54 – Indian Stamp Act, 1899, S. 27 – Registration Act, 1908, S. 17 – Transfer of Property – Immovable Property
Immovable property can be legally and lawfully transferred or conveyed only by a registered deed of conveyance. General power of attorney / sales agreements / will transfers do not convey title and do not amount to transfer, nor

can they be recognised as valid modes of transfer of immoveable property. They cannot be recognised as deeds of title except to the limited extent of section 53A of the Transfer of Property Act.
These observations are not intended to in any way affect the validity of sale agreements and power of attorney executed in genuine transactions. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a power of attorney empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers.
Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana &Anr.(2012) 340 ITR 1 (SC)

Judicial enquiry - Out sourcing of Judgment - Judge alleged to have "outsourced" judgements can be dismissed without opportunity of hearing or enquiry.
The appellant was appointed sub-ordinate Judge in the Garhwa Civil Court. The Inspecting Judge inspected the records of the Civil Court and submitted a confidential report to the Chief Justice of the Jharkhand High Court that the appellant did not prepare judgments on his own but got it prepared by somebody else before delivering the judgments. The Chief Justice referred the matter to the Full Court. The Full Court resolved that the appellant be recommended for removal from service without any enquiry as it was felt that it was not practicable in the interest of the institution to hold an inquiry since it may lead to the question of validity of several judgments rendered by him. Pursuant to that resolution, the Governor exercised power under proviso (b) to Article 311(2) of the Constitution and removed the appellant from service. This was unsuccessfully challenged before the High Court. In appeal before the Supreme Court, it was argued that an enquiry for the purpose of removal of a judicial officer could not be dispensed with. It was also claimed that there was no evidence to show that the appellant was guilty of any misconduct as alleged. Held dismissing the appeal:
(i) Under the "doctrine of pleasure" recognized under Article 310, all civil posts under the Government are held at the pleasure of the Government and are terminable at its will. Under Articles 310 and 311, public servants are given protection from being dismissed, removed or reduced in rank without holding a proper inquiry or giving a hearing. Exceptions to Article 311 have been provided that the said Article shall not apply to such employees who have been punished for conviction in a criminal case, where inquiry is not practicable to be held for reasons to be recorded in writing or where the President or the Governor as the case may be is satisfied that such an inquiry is not to be held in the interest of the security of the State. The power to dispense with an enquiry is an absolute power of the disciplinary authority who after following the procedure laid down therein can resort to such extra ordinary power provided it follows the pre-conditions laid down therein meaningfully and effectively;

(ii) On facts, the allegation against the Judge was that he did not prepare judgments on his own but got it prepared through somebody else. The view of the High Court that it is not possible to hold an enquiry and that holding of such enquiry should be dispensed with in view of the fact that if an enquiry is held the same may lead to the question of validity of several judgments rendered by the Judge is a legal and valid ground for not holding an enquiry. There was also no necessity for giving the Judge any opportunity of hearing before removal from service.
Ajit Kumar v. State of Jharkhand (SC) www.itatonline.org

Legal Practice - Foreign Lawyers cannot practice law in India but are entitled to visit India for short periods to advice on foreign law & conduct international commercial arbitration
A Writ Petition was filed claiming that Foreign Law Firms and foreign lawyers were practicing the profession of law in India in contravention of the Advocates Act and that they should be restricted from having any legal practice either on the litigation side or in the field of non-litigation and commercial transactions within the territory of India. Held by the High Court:
(i) Foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfill the requirement of the Advocates Act, 1961 and the Bar Council of India Rules. As rightly held in Lawyers Collective v. Bar Council 112 BLR 32 establishing liaison office in India by the foreign law firm

and rendering liaisoning activities is not permissible. However, given that the foreign law firms have to give legal advise to their clients in India regarding foreign law or their own system of law and on diverse international legal issues, there can be no bar in their visiting India for a temporary period on a "fly in and fly out" basis, for such purpose. Also, having regard to the aim and object of the International Commercial Arbitration introduced in the Arbitration and Conciliation Act, 1996, foreign lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration (Vodafone International Holdings B.V referred).

(ii) The BPO Companies providing a wide range of customised and integrated services and functions to its customers like word-processing, secretarial support, transcription services, proof-reading services, travel desk support services, etc. do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules. However, in the event of any complaint made against these B.P.O. Companies violating the provisions of the Act, the Bar Council of India may take appropriate action against such erring companies.

A. K. Balaji v. GOI (Mad.)(High Court) www.itatonline.org

Professional misconduct - Chartered Accountant - Chartered Accountant issuing wrong section 80HHC certificate is guilty of "gross professional misconduct".

The CIT, Delhi, filed a complaint before the ICAI that the Respondent-CA had issued an audit report in Form No. 10CCAC certifying that the assessee had exports and that it was eligible for deduction under section 80HHC of Rs. 18.32 lakhs. However, during the assessment, the claim was found to be false and the assessee admitted that. The assessee's accounts showed that sale proceeds had not been realized within the prescribed period of 6 months. After enquiry, the ICAI held the CA to be guilty of professional misconduct under clause (7) of Part- I of the Second Schedule read with section 22 & 21 of the Chartered Accountants Act, 1949. It recommended that the CA's name be removed from the Register of Members for a period of three years and filed a reference seeking confirmation of that. In his defence, the CA argued that he had practiced for 21 years without a single incident of professional misconduct or negligence and that he could not put up his defence properly because he had suffered paralytic attack and the assessee had taken away the file and that a lenient view should be taken. Held by the High Court:

(i) The Accountants' profession occupies a place of pride amongst various professions of the world and makes observance of professional duties and propriety more imperative. When conduct of a member of the profession is contrary to honesty, or opposed to good morals, or is unethical, it is misconduct-warranting consequences indicated in the Statute. A breach of confidence is a stigma not only on the individual concerned, but is also likely to have effect on credibility of the profession as a whole.

(ii) The CA's explanation that the assessee had taken away the file and that he suffered a paralytic stroke does not inspire any confidence because the relevant documents and information were supplied to him. The assessee accepted the fact that the section 80HHC claim was not maintainable during the assessment proceedings. Once it is established that no payment was received against the export, the certificate issued by the CA was false. It is a bogey raised by the CA that he has verified all the documents and only then issued the certificate. On the quantum of punishment, on the one hand, the CA pleads his sickness, has an otherwise unblemished practice of 21 years and the incident is old. On the other hand, the misconduct is of serious nature because submitting a false/bogus certificate to the client to enable him to make false claim of deduction under the Income-tax Act, is of serious offence. That the CA made an attempt to dupe the tax authorities and help the assessee to avoid the tax to that extent such a conduct has to be taken seriously. He accordingly cannot be let off merely by giving him reprimand. Some penalty needs to be imposed so that it acts as deterrent and such professional misconduct are not committed. Weighing the circumstances, the ends of justice would be subserved by removing his name from the Register of Members for a period of six months.

Council of ICAI v. Ajay Kumar Gupta (2012) 206 Taxman 117 (Delhi)(High Court)

Foreign Judgment-Information cannot be disclosed u/A 28 of DTAA in absence of strong connection between requested information & India's tax laws

The Indian tax authority seized documents from an Indian national which were believed to indicate the existence of undeclared income deposited in a company's bank accounts in Singapore. Pursuant to Article 28(1) of the India-Singapore DTAA, the Indian tax authority sent a request for information to its Singapore counterpart (the Comptroller

of Income-tax). In support of the request, the Indian tax authority relied on unsigned transfer instructions allegedly issued by the Indian national as evidence that the Indian national remitted monies to the Singapore Company's bank accounts. The Comptroller filed an application in the High Court u/s 105J of the Singapore Income-tax Act for an order requiring the bank to produce the company's bank records. HELD dismissing the application:

(i) Article 28(1) of the DTAA provides that "the Contracting States shall exchange such information as is forseeeably relevant for carrying out the provisions of the DTAA or to the administration or enforcement of the domestic laws concerning taxes… imposed on behalf of the Contracting States …" S. 105J(3) of the ITA imposes two other conditions, namely that, (a) the making of the order is justified in the circumstances of the case**;** and (b) it is not contrary to the public interest for a copy of the document to be produced or that access to the information be given. These three conditions must be satisfied before the High Court will grant an order u/s 105J(2) of the ITA for access to the information requested or for a copy of the document containing the information requested to be given.

(ii) The first requirement of "**foreseeable relevance**" requires the Comptroller (on behalf of the requesting state) to show some clear and specific evidence that there is a connection between the information requested and the enforcement of the requesting state's tax laws**.** Clear and specific evidence is necessary to prevent unwarranted disclosure of information that could not otherwise be sought from any party including the requested state. Spurious or frivolous requests for information are not acceded to and nor are "**fishing expeditions**" allowed. These procedures are not meant to frustrate or delay the information exchange process but are intended to provide a fair and independent assessment of the validity of requests.

(iii) On facts, the Indian tax authorities had relied on an unsigned transfer instruction as evidence that the Indian national remitted monies to the Singapore bank account and claimed that this was evidence of the connection between the Singapore company and the Indian national for the purposes of the investigations. The transfer instruction was a letter to Bank S to transfer monies to an account purportedly held by the Singapore Company with a bank in Dubai. There was no evidence that monies had been transferred to or from the account. There was also no evidence of any transaction between the Singapore Company and the Indian national**.** Accordingly, the Request and the supporting was not sufficiently clear and specific to say that the information requested would be foreseeably relevant to the enforcement of India's tax laws and the ongoing investigations on the Indian national. Even if a tenuous connection between the Indian national and the Singapore Company could have been shown such that the requirement of foreseeable relevance was satisfied, consideration as to whether the application was justified is a process that envisages more evidence than presently adduced. This should include evidence of the use of the accounts for the purposes complained of in India.

Comptroller of Income Tax v AZP (Singapore)(High Court)www.itatonline.org.

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