CONSOLIDATED DIGEST OF CASE LAWS (JANUARY 2015 TO SEPTEMBER 2015)

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

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

S. 1 : Application of the Act-After extension of Income-tax Act, 1961 to State of Sikkim with effect from 1-4-1990, Sikkim State Income-tax Manual, 1948, stands repealed and assessments made there under for assessment years 1997-98 to 2005-06 were without authority of law, nonest and nullity.[Sikkim State Income-tax Manual, 1948, S.17]

The assessee university was established in the year 1995 by an enactment of the Sikkim State Government. On 7-7-2006, the AO passed an assessment order under the Sikkim State Income-tax Manual, 1948,for the assessment years 1997-98 to 2005-06. The assessee filed an appeal before the Special Commissioner for cancellation of the assessment order, claimed refund of the *ad hoc* payment with interest and also claimed exemption u/s.17 of the Sikkim State Income-tax Manual, 1948. The Special Commissioner upheld the order of AO.

On a Writ Petition by the assessee, the High Court observed that the Sikkim State Income-tax Manual, 1948, stood repealed after extension of the Income-tax Act, 1961, in the State of Sikkim with effect from 1-4-1990. It further observed that the assessee was claiming its rights as an assessee under the Income-tax Act, 1961. The High Court held that after extension of the Income-tax Act, 1961 to the State of Sikkim, the Sikkim State Income-tax Manual, 1948, stands repealed and the assessments made thereunder are without authority of law, non est and nullity.(AY. 1997-1998 to 2005-2006).

Sikkim Manipal University v. State of Sikkim(2015)55 taxmann.com 270 / 113 DTR 23 (2015) (Sikkim) (HC)

S. 2(1A) : Agricultural income–Tilling of land, weeding, watering etc.-Sale proceeds from said business of nursery carried on by assessee constitute income from agriculture. [S. 10(1)]

Assessee HUF had carried out operations such as tilling of land, weeding, watering, etc. upon land owned by it and when plants were established in soil they were shifted in suitable containers for sale . Sale proceeds from said business of nursery carried on by assessee constitute income from agriculture.(AY. 1986-87 & 1991-92)

Puransingh M. Verma v. CIT (2015) 230 Taxman 470 (Guj.)(HC)

S. 2(1A) : Agricultural income –Growing of mushroom-Within municipal limits- Income from growing ofsaid mushroom to be treated as non-agricultural income.[S.10(1)]

Assessee claimed growing of mushroom as agricultural income . AO denied the exemption. On appeal the Tribunal held that there was no land on which tilling operations etc., was carried out, and same was basic operation for carrying out agricultural activities, further, entire activity was carried on in residential area within municipal limits and mushrooms were grown under controlled conditions, since assessee had failed to explain basic agricultural operations carried out in mushroom production, income from growing of said mushroom to be treated as non-agricultural income.(AY. 2003 -04 , 200 4-05)

Chander Mohan .v. ITO (2014) 52 taxmann.com 203 / (2015) 67 SOT 28 (Chd.)(Trib.)

S. 2(14)(iii)(b) : Capital asset-Agricultural land- Capital asset-To determine whether the "agricultural land" is situated within 8 km of the municipal limits so as to constitute a "capital

asset", the distance has to be measured in terms of the approach road and not by the straight line distance on horizontal plane or as per crow's flight.

(i) The presumption of the Assessing Officer as well as CIT(A) that the 'area' means the village in which such land is situated is without any basis. In fact, the correct interpretation of the word 'in any area within such distance not being more than 8 Kms. from the local limits of any municipality' would mean the land should be within such area which is not more than 8 Kms. from the local limit of the municipality.

(ii) The Court is of the view that for the purposes of Section 2 (14) (iii) (b) of the Income-tax Act, the distance had to be measured from the agricultural land in question to the outer limit of the municipality by road and not by the straight line or the aerial route. The distance has to be measured from the land in question itself and not from the village in which the land is situated.(ITA No. 714/2015, dt. 14.09.2015)

CIT v. Vijay Singh Kadam (Delhi)(HC) ; www.itatonline.org

S.2(14)(iii)(b):Capital asset-Agricultural land-Land situated within prescribed distance from municipal limit-Measurement of distance for purpose of agricultural land-Amendment in 2014 providing that distance should be measured aerially-Prospective and not to apply to earlier years.[S. 28(1), 45]

Held, dismissing the appeals, (1) that the amendments in the taxing statute, unless a different legislative intention is clearly expressed, shall operate prospectively. If the assessee has earned business income and not the agricultural income, section 11 of the General Clauses Act, 1897, will prevail unless a different intention appears to the contrary. The relevant amendment prescribing that the distance to be counted must be aerial came into force with effect from April 1, 2014. The need for the amendment itself showed that in order to avoid any confusion, the exercise became necessary. This exercise to clear the confusion, therefore, showed that the benefit thereof must be given to the assessee. In such matters, when there is any doubt or confusion, the view in favour of the assessee needs to be adopted. Circular No. 3 of 2014, dated January 24, 2014,(2014) 361 ITR 1 (St.) dealing with applicability expressly stipulates that it takes effect from April 1, 2014, and, therefore, prospectively applies in relation to the assessment year 2014-15 and subsequent assessment years. Hence, the question whether prior to the assessment year 2014-15 the authorities erred in computing the distance by road did not arise at all.

(ii) That the capital gains arising from the transaction in respect of agricultural land could not be considered as business income. (AY. 2009-2010)

CIT .v.Nitish Rameshchandra Chordia (2015) 374 ITR 531 (Bom.) (HC)

S. 2(15): Charitable purpose-If the definition of "charitable purpose" is construed literally, it is violative of the principles of equality & unconstitutional. Merely charging of fee does not destroy the character of a charitable institution.[S.10(23C)(iv), Constitution of India, Art 14]]

The DGIT (E) passed an order stating that though the assessee is engaged in "the advancement of any other object of general public utility" as per s. 2(15) of the Act, its object could not be regarded as "charitable purposes" due to the new proviso to s. 2(15) and that it was not eligible for exemption u/s 10(23C)(iv). It was held that as the assessee had huge surpluses in banks, it had given its space for rent during Trade Fairs and Exhibitions, it had received income by way of sale of tickets and income from food and beverage outlets in PragatiMaidan, etc, the assessee was rendering service to a large number of traders and industrialists in relation to trade, commerce and business and was, therefore, hit by the expanded list of activities contained in the proviso to Section 2(15). It was further observed that the service of allotting space and other amenities like water, electricity and security, etc. to the traders to conduct their exhibitions fell within the ambit of any activity of rendering any service in relation to trade, commerce or business. The assessee filed a writ petition claiming that the First Proviso to s. 2(15), as amended by the Finance Act, 2008, is arbitrary and unreasonable and violative of Article 14 of the Constitution of India. HELD by the High Court:

(i) It is apparent that merely because a fee or some other consideration is collected or received by an institution, it would not lose its character of having been established for a charitable purpose. It is also important to note as to what is the dominant activity of the institution in question. If the dominant activity of the institution was not business, trade or commerce, then any such incidental or ancillary

activity would also not fall within the categories of trade, commerce or business. It is clear from the facts of the present case that the driving force is not the desire to earn profits but, the object of promoting trade and commerce not for itself, but for the nation – both within India and outside India. Clearly, this is a charitable purpose, which has as its motive the advancement of an object of general public utility to which the exception carved out in the first proviso to Section 2(15) of the said Act would not apply;

(ii) If a literal interpretation were to be given to the said proviso, then it would risk being hit by Article 14 (the equality clause enshrined in Article 14 of the Constitution). It is well-settled that the courts should always endeavour to uphold the Constitutional validity of a provision and, in doing so, the provision in question may have to be read down;

(iii) Section 2(15) is only a definition clause. The expression "charitable purpose" appearing in Section 2(15) of the said Act has to be seen in the context of Section 10(23C)(iv). When the expression "charitable purpose", as defined in Section 2(15) of the said Act, is read in the context of Section 10(23C)(iv) of the said Act, we would have to give up the strict and literal interpretation sought to be given to the expression "charitable purpose" by the revenue;

(iv) The correct interpretation of the proviso to Section 2(15) of the said Act would be that it carves out an exception from the charitable purpose of advancement of any other object of general public utility and that exception is limited to activities in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business for a cess or fee or any other consideration. In both the activities, in the nature of trade, commerce or business or the activity of rendering any service in relation to any trade, commerce or business, the dominant and the prime objective has to be seen. If the dominant and prime objective of the institution, which claims to have been established for charitable purposes, is profit making, whether its activities are directly in the nature of trade, commerce or business or indirectly in the rendering of any service in relation to any trade, commerce or business, then it would not be entitled to claim its object to be a 'charitable purpose'. On the flip side, where an institution is not driven primarily by a desire or motive to earn profits, but to do charity through the advancement of an object of general public utility, it cannot but be regarded as an institution established for charitable purposes.

India Trade Promotion Organization .v. DGIT(E)(2015) 371 ITR 333/229 Taxman 347/ 274 CTR 305/ 114 DTR 329 (Delhi)(HC)

S. 2(15) : Charitable purpose - Activities carried out by a Trust for providing employment to rural poor cannot be held as commercial activities.-Activities of Trust is eligible for exemption.[S.11]

The assessee-trust contemplates to organize milk societies for facilitating sale of milk; the underlying intention is to get good price for the milk sold by the villagers and also to encourage them to rear their own milch animals. The villagers can earn a decent livelihood by engaging themselves in rearing of milch animals and selling of milk without middlemen and exploitation, through the societies formed under the guidance of the assessee trust. This is the same case with other proposed activities like ginning, spinning, fruit processing etc., where labour of the village women-folk can be fruitfully deployed, to keep away exploitation. The Hon'ble Appellate Tribunal held that the economic activities in the above nature cannot be treated as activities in the nature of trade, commerce or business as contemplated in proviso to section 2(15). Therefore, we find that the Director of Income-tax (Exemptions) has characterized the activities of the assessee trust as commercial in nature without going into the circumstances in which the activities are contemplated to be carried on by the assessee trust.

Thamizh Thai Seva Trust v. DIT (2015) 67 SOT 166 (URO)/53 taxmmann.com 215 (Chennai)(Trib.)

S. 2(15) : Charitable purpose -Advancement and development of trade, commerce and industry in India, income earned from incidental activities is eligible for exemption under section 11.[S.11, 12A]

Assessee Association was set up for the purpose of promotion and protection of Indian Business & Industry and was registered u/s 12A. the purpose for which the assessee association was established is a charitable purpose within the meaning of section 2(15). The assessee is carrying out activities which

are incidental to the main object of the Association and which are conducted only for the purpose of securing the main object which is the advancement and development of trade and commerce and industry in India. The activities are not in the nature of business and there is no motive to earn profit. Thus, the incidental activities were well covered by the section 2(15) and were thus 'charitable' in nature. In such an eventuality, the application of the section 11(4A) which applies only to business activities stands absolutely negated. Thus the income of the assessee is exempt from tax under section 11. (AY. 2008-09)

Indian Chamber of Commerce v. ITO(E) (2014) 52 taxmann.com 52 / (2015) 67 SOT 176(URO) / 167 TTJ 1 / 37 ITR 688 (Kol.)(Trib.)

S. 2(15) : Charitable purpose-Receiving fees simplicitor is not reason enough to hold that the activity is not a charitable activity. The fundamental essence of the activity has to be seen.[S. 12A, 12AA]

The assessee institution is set up by the Indian Army and it seeks to promote the well being of their personnel after their retirement from the service, as also of the widows and dependents of the brave army men who sacrifice their lives, and help them integrate in the civil society by taking up suitable employment. This is surely an activity of general public utility, and, therefore, covered by the definition of 'charitable purposes' under section 2(15). The true test for deciding whether an activity is business activity is (i) whether the said activity undertaken with a profit motive, or (ii) whether the said activity has continued on sound and recognized business principles, and pursued with reasonable continuity. Clearly, therefore, in a situation in which an activity is not undertaken with a profit motive or on sound and recognized business principles, such an activity cannot be considered to be a business activity.

Army Welfare Placement Organization .v. DIT(E)(2015)168 TTJ 588 / 53 taxmann.com 442 / 38 ITR 1/ 68 SOT 535 (Delhi)(Trib.)

S. 2(22)(e):Deemed dividend-Advance in the course of business- Addition cannot be made as deemed dividend.

BDPL, a closely held company, advanced money to assessee who was holding 99 per cent shares of BDPL .According to assessee, in Karnataka, companies were not allowed to buy land which was of agricultural status and, therefore, funds were given by BDPL to procure land in name of directors and hold same in form of capital asset and then transfer back to company after obtaining conversion order. Whether since balance sheet and journal entries in books of account amply made it clear that funds were provided during course of business, advances made by BDPL to assessee would not fall within the definition of 'dividend' as contained in section 2(22)(e) . (AY. 2002 - 03 to 2007 - 08)

Bagmane Constructions (P.) Ltd. .v. CIT (2015) 277 CTR 338 / 231 Taxman 260 (Karn.)(HC)

S. 2(22)(e):Deemed dividend –Advance in the course of business- Business expediency- Not assessable as deemed dividend.

Assessee was a substantial shareholder in a company.Company received certain export orders but was not in a position to execute these orders as its manufacturing facility was situated in a remote area and was beset with labour problems and erratic supply of electricity. Company, therefore, entered into an agreement with assessee to install plant and machinery at premises of assessee to enable assessee to do job work for company. Assessee also received certain sum as advance from said company to do job work at interest rate below prevailing market rate. Tribunal found that advances were received by assessee in normal course of business as a matter of business expediency and, hence, said advance was not covered by section 2(22)(e). On appeal by revenue the Court held that finding of facts recorded by Tribunal could not be interfered with.

CIT .v. Amrik Singh (2015) 231 Taxman 731 (P&H)(HC)

S. 2(22)(e):Deemed dividend-Mistke in ROC return-Deletion of addition was held to be justified.

Assessee, a director of Frontier Cycles Pvt. Ltd. whoreceived certain loan from said company. During relevant year, Assessing Officer downloaded annual return of Frontier Cycles Pvt. Ltd. from website of ROC and found that assessee was holding 38.8 per cent shares in said company. He thus treated amount of loan as deemed dividend. It was found from records that assessee had already gifted 30 per

cent of its shareholding in Frontier Cycles Pvt. Ltd. to his wife and son in earlier assessment year and it was only on account of mistake on part of concerned employee of Frontier Cycles Pvt. Ltd. ROC could not give effect to share transfer agreement in annual returns. Tribunal held that addition could not be made as deemed dividend. High Court affirmed the view of Tribunal and held that impugned addition made by Assessing Officer was to be deleted. (AY. 2008-09)

CIT .v. Paramjit Singh (2015) 231 Taxman 450 (P&H)(HC)

S. 2(22)(e):Deemed dividend-Loan to shareholder by closely held company-Assessee owning 60% shares of company-Company possessing accumulated profits-Amounts taken as loan from company and payments also made to company - Assessing Officer directed to verify each debit entry and treat only excess as deemed dividend.

Held, the assessee was admittedly a shareholder and director of KIPL. Therefore, any amount paid to the assessee by the company during the relevant year, less the amount repaid by the assessee in the same year, should be deemed to be construed as "dividend" for all purposes. However, the Assessing Officer had taken the entire amount of Rs.76,86,829 received by the assessee from the company as dividend, while computing the income but had lost sight of the payments made. In such circumstances, the Commissioner (Appeals) had rightly come to the conclusion that the position as regards each debit would have to be individually considered because it may or may not be a loan. The Assessing Officer, was, therefore, directed to verify each debit entry on the aforesaid line and treat only the excess amount as deemed dividend under section 2(22)(e) of the Act. Such a direction issued by the Commissioner (Appeals), as upheld by the Tribunal, was in consonance with the provisions of section 2(22)(e) of the Act and only those amounts, which were reflected in the debit side of the books of account of the company falling under the definition of loans and advances with regard to the shareholder, in the relevant year, would be liable to be taken as deemed dividend.(AY 2009-2010)

Sunil Kapoor .v. CIT (2015) 375 ITR 1 (Mad.)(HC)

S. 2(22)(e):Deemed dividend - Loan to shareholder by closely held company-Assessee managing director of company and also partner of firm - Firm acting as agent of company-Amount advanced by firm to assessee-Firm had independent existence-No evidence that funds of company were used for advance-Amount not assessable as deemed dividend.

Held, dismissing the appeal, that the Tribunal held that there was no material on record to show that the funds of the company were utilised by the firm to advance the loan to the assessee. The firm had advanced Rs.1,88,96,202 out of the total available funds of more than Rs. 60 crores; which belonged to different parties though available with it, i.e. the firm. The factual findings did not disclose any error or infirmity. The contention that the two transactions one from S to the firm and the second from the firm to the assessee should be treated as one, was not based on any valid justification. The firm had a legal existence separate and independent of S. It carried on significant commercial activity and collected substantial amounts (crores of rupees). Therefore, the finding that the two transactions, i.e. one of advancing loan (by the firm to the assessee) and the other of the use of funds of S by the firm being in reality one transaction was without any basis. The presumption was drawn without any material to support the case of the Revenue that funds of the company were utilised to advance the loan. Neither did S give him the money nor did it advance the amount to the firm. The firm had an independent existence and it had over Rs. 60 crores in its account. It was also a matter of record that the firm had over 290 branches or units and collections by it exceeded on an average Rs. 10 crores per month. Therefore, it could not be legitimately held that the amount retained by the firm was for the assessee's benefit. The amount was not assessable as deemed dividend under section 2(22)(e).(AY. 1992-1993)

CIT .v. Subrata Roy (2015) 375 ITR 207/278 CTR 176 / 231 Taxman 42 (Delhi)(HC)

S. 2(22)(e): Deemed dividend – Loan by firm- loan by company- Cannot be assessed as deemed dividend.

Advance given to the assessee by a partnership firm which was doing business as an agent of the company in which the assessee was managing director could not be assessed as deemed dividend in the hands of the assessee. The finding that the two transactions i.e. one of advancing a loan (by the

firm to the assessee) and the other of the use of company funds by the firm, are in reality one transaction is without any basis. Appeal of revenue was dismissed.(AY. 1992-93)
CIT .v. Subrata Ray (2015) 375 ITR 207 / 231 Taxman 42 / 119 DTR 113/ 278 CTR 176 (Delhi) (HC)

S. 2(22)(e): Deemed dividend –Trade advance-Cannot be assessed as deemed dividend.
Where an advance is given to a shareholder holding 10% or more voting power or to a concern in which such shareholder has substantial interest which is in the nature of a trade advance to give effect to commercial transactions, such an advance would not fall within the ambit of provisions of S. 2(22)(e). (AY. 2002-03 to 2007-08)
Bagmane Constructions (P.) Ltd. v. CIT (2015) 119 DTR 49 / 231 Taxman 260 / 277 CTR 338 (Karn.)(HC)
CIT v. Chandra Developers (P.) Ltd. (2015) 119 DTR 49 / / 277 CTR 338 (Karn.)(HC)

S. 2(22)(e): Deemed dividend-Not a shareholder-Individual borrowing amounts from assessee-Not a deemed dividend.
HK, a shareholder in PD, borrowed amounts from the assessee-company. The Assessing Officer brought the amounts to tax under section 2(22)(e) as deemed dividend on the ground that HK had more than 10 per cent stake in the assessee-company. The assessee contended before the Commissioner (Appeals) that HK was a shareholder in PD and could not be considered a shareholder in the assessee-company, that the individual could not be considered even a beneficial shareholder of the assessee. Both the contentions were accepted by the Commissioner (Appeals) and the Tribunal.
Held, dismissing the appeals, (i) that in the absence of any finding that HK owned shares in terms of section 2(22)(e) or was a beneficial owner in terms of such provision-on both counts-the findings being adverse to the revenue, no question of law arose.(AY. 1999-2000, 2000-2001, 2001-2002)
CIT (TDS) v. C.J. International Hotels P. Ltd. (2015) 372 ITR 684 / 231 Taxman 818 (Delhi.) (HC)

S. 2(22)(e) : Deemed dividend- Not a shareholder-Not liable to tax.
Assessee was not liable to tax unless it was a shareholder. AY. 2007-08)
CIT v. Karnataka Turned Components (P.) Ltd.(2015) 229 Taxman 465 (Karn.)(HC)

S. 2(22)(e) : Deemed dividend – Current account –Subsidiary company- In the course of business- Deeming provision is not attracted.
When both the Assessee Company and its subsidiary company maintain current accounts and the subsidiary company advances on behalf of Assessee company for the purchase of raw materials resulting into credit lying with the latter company and as these transactions were made during the course of business, the deeming provision u/s. 2(22)(e) is not attracted.(AY. 1993-94)
CIT v. India Fruits Ltd. (2015) 274 CTR 67/ 228 Taxman 243 (Mag)/ 114 DTR 109 (AP) (HC)

S. 2(22)(e) : Deemed dividend –No flow of fund or any benefit-Provision would not be applicable.
Assessee was director in company SEPL, and partner in firm 'SE'. One 'M', who was employee of SEPL, was also proprietor of PSC. SEPL gave loan or advance to PSC on 24-10-2005. On that day itself PSC gave a loan of said amount to SE which gave back money to SEPL on that day itself. Tribunal concluded that section 2(22)(e) was not attracted inasmuch as transaction was a circuitous and money which initially belonged to SEPL was returned to same company on very same day through PSC and there was no flow of fund or any benefit from 'SEPL' to 'SE' or its partner, assesse. On facts finding of Tribunal could not be said to be perverse and section 2(22)(e) would not be applicable. (AY. 2006-07)
CIT v. Pravin Bhimshi Chheda (2015) 228 Taxman 340 (Mag.) (Bom.)(HC)

S. 2(22)(e) : Deemed dividend –Security deposit-Business transaction- Firm was not a shareholder-Deposit could not be treated as deemed dividend.

Assessee-firm entered into an agreement with its sister concern to supply its generator sets against a floating security deposit by said concern . In turn, sister concern would supply electricity to assessee at concessional rate. AO treated security deposit as deemed dividend in hands of assessee .Since deposit made by sister concern was a business transaction arising in normal course of business between two concerns and assesse. Firm was not a shareholder in said company, said deposit could not be treated as deemed dividend. (AY. 2006-07)

CIT .v. Atul Engineering Udyog (2015) 228 Taxman 295 (All.)(HC)

S. 2(22)(e) : Deemed dividend-Trade advance-Not a registered or beneficial shareholder- Not liable to be assessed as deemed dividend

Assessee company received a sum from another company and on same date, assessee paid certain amount to one 'TR' who was director of both companies. AO found that assessee showed received amount as trade advance and amount so paid to 'TR' was utilised by him for repayment of housing loan, accordingly AO held that 'trade advance' was nothing but loan received from company and he made addition under section 2(22)(c). On appeal Court held that the assessee company was not a registered or beneficial shareholder, therefore assessee was not liable to pay tax.(AY. 2005-06)

CIT .v. Printwave Services (P.) Ltd. (2015) 373 ITR 665/ 228 Taxman 378 (Mag.)(Mad.)(HC)

S. 2(22)(e) : Deemed dividend - Assessee holding more than 10% of equity capital of two private limited companies - Lending of money not part of business of companies nor substantial part of business - No organised course of activity involving dealings with anyone else except for assessee - Loan to assessee-Assessable as deemed dividend.

The Legislature has not used the expression "major part of the business" but has designedly used the expression "substantial part of the business of the company". The expression "business" contemplates an organised course of activity which is actually continued or contemplated to be continued with a profit motive and not for sport or pleasure. In each case, the true test is whether the lending of money constituted a substantial part of the business of the company. Within the purview of the exclusionary provision, the advance or loan must be, firstly, to a shareholder; secondly, the payment must be in the ordinary course of business; and, thirdly, the lending of money must constitute a substantial part of the business of the company. What constitutes a substantial part of business is a question of fact.

The assessee held more than 10% of the shareholding of two private limited companies. He received loans and advances from the two companies. Held, neither of the companies, admittedly, lent any money to any entity, save and except to the assessee. The lending of money was not a part of the business of the company, nor for that matter, could it constitute a substantial part of the business. There was no organised course of activity involving dealings with anyone else, save and except for the assessee. The assessee was, therefore, unable to establish that the exclusion was attracted.(AY. 2007-2008)

Shashi Pal Agarwal .v. CIT (2015) 370 ITR 720/229 Taxman 307 (All.)(HC)

S. 2(22)(e):Deemed dividend-Not a shareholder- Provision has to be construed strictly. If assessee is not a shareholder of lending co, S. 2(22)(e) does not apply even if funds are ultimately paid by Co in which assessee is a shareholder

The assessee received loan from one NS Fincon Pvt. Ltd. The Revenue seeks to tax this loan as deemed dividend. The case of the Revenue was that one Lafin Financial Services Pvt. Limited had advanced money to NS Fincon Pvt. Ltd. who in turn advanced money to the Assessee. The Assessee a 50% shareholder of Lafin Financial Services Pvt. Limited and in view thereof, loan advanced by NS Fincon Pvt. Ltd. to the Assessee is to be treated as a dividend in the hands of the Assessee. It is the admitted position that the Assesee is not a shareholder in NS Fincon Pvt. Ltd. The AO brought to tax the amount of loan received by the Asseseefrom NS Fincon Pvt. Ltd. as deemed dividend under Section 2 (22)(e) of the Act. This was deleted by the CIT(A) and the Tribunal. On appeal by the department to the High Court HELD dismissing the appeal:

The submission on behalf of the Revenue made before us is that one has to look at the substance of the transaction and that if one looks at the substance, then the Assessee would be chargeable to tax. This is not acceptable as fiscal status have to be interpreted strictly. Section 2 (22)(e) of the Act creates a fiction by bringing to tax an amount as dividend when the amount so received is otherwise

then dividend. On a strict interpretation of Section 2(22)(e) of the Act, unless the Assessee is the shareholder of the company lending him money, no occasion to apply it can arise (AY. 2007-08)
CIT .v. Jignesh P. Shah(2015) 372 ITR 392/ 274 CTR 198 / 229 Taxman 302/ 114 DTR 249 (Bom.)(HC)

S. 2(22)(e):Deemed dividend- loans and advances given for business transaction between the parties does not fall within the definition of "deemed dividend"
Payments made by a company through a running account in discharge of its existing debts or against purchases or for availing services, such payments made in the ordinary course of business carried on by both the parties could not be treated as deemed dividend for the purpose of Section 2(22)(e). The deeming provisions of law contained in Section 2(22)(e) apply in such cases where the company pays to a related person an amount as advance or a loan as such and not in any other context. The law does not prohibit business transactions between related concerns, and, therefore, payments made in the ordinary course of business cannot be treated as loans and advances . (AY. 2005-06)
Ishwar Chand Jindal v.ACIT (2015) 171 TTJ 436 (Delhi)(Trib.)

S. 2(24):Income-Editor of magazine-Award received from third person for excellence in journalism-Not assessable as income. [S.4]
Held, the amount of Rs. 1 lakh received by the assessee as an award from B. D. Goenka Trust for excellence in journalism being purely in the nature of a testimonial would be a capital receipt. The causa causans in the present case was not directly relatable to the carrying on of vocation as a journalist or as a publisher. It was directly connected and linked with the personal achievements and personality of the person, i.e. the assessee. Further, the payment in this case was not of a periodical or repetitive nature. The payment was also not made by an employer ; or by a person associated with the "vocation" being carried on by the assessee ; or by a client of his. The prize money had been paid by a third person, who was not concerned with the activities or associated with the "vocation" of the assessee. It being a payment of a personal nature, it should be treated as capital payment, being akin to or like a gift, which did not have any element of quid pro quo. The prize money was paid to the assessee on a voluntary basis and was purely gratis. The amount would be a capital receipt and, hence, not income taxable.(AY.1991-1992)
Aroon Purie .v. CIT (2015) 375 ITR 188/231 Taxman 349/ 277 CTR 1/ 118 DTR 105 (Delhi)(HC)

S. 2(28A) : Interest – Capital gains-Ruling of AAR holding that the transaction was sham was set aside- Gain arising on subsequent sale of CCDs was held to be exempt from tax in terms of DTAA-DTAA-India –Mauritius [S. 45,Art, 11].
'Vatika', an Indian company, was engaged in real estate business. Vatika promoted a subsidiary company 'JV' for development of land owned by it. Assessee, a mauritius based company, agreed to acquire 35 per cent ownership interest in JV by subscribing to its equity shares and Compulsorily Convertible Debenture (CCDs). In terms of Shareholder's Agreement (SHA), Vatika exercised a call option and purchased a part of equity shares and CCDs from assessee. AAR opined that transaction between assessee and Vatika was a sham transaction and was essentially a transaction of loan to Vatika which had been camouflaged as an investment in shares and CCDs of JV company . It was thus concluded that gains arising on sale of CCDs was taxable as interest under section 2(28A). On writ by assessee the Court held that, since terms of arrangements between Vatika and assessee revealed that JV was a genuine commercial venture, in which both partners had management rights, there was no reason to ignore legal nature of instrument of CCD or to lift corporate veil to treat JV and Vatika as a single entity, therefore, impugned ruling of AAR holding gain to be taxable, was to be set aside.
Zaheer Mauritius .v. DIT (2014) 270 CTR 244 / 230 Taxman 342 (Delhi)(HC)

S. 2(28A) : Interest–Usage charges-Liable to deduct tax at source. [S.10(15), 40(a)(i),195]
Assessee company was manufacturing wooden furniture's and trading of timber. It paid usance charges to non-resident on import purchases. TheAO held that usance charges paid to the non-resident was the income arising to the non-resident reckoning within the meaning of provisions of

section 5(2)(b), read with section 9(1)(v)(c)(b) and therefore, the assessee was liable to deduct TDS in accordance with the provisions of section 195. Accordingly, he disallowed same under section 40(a)(i).
On appeal, the CIT(A) held that the usance charges paid by the assessee were nothing but increased purchase price paid to the foreign sellers. Further, he held that TDS was not deductible on usance charges, as the same was not in the nature of interest and the recipient was a foreigner, whose income was not taxable in India at all.
On appeal by revenue it was contended that in view of Explanation (2) to section 10(15)(iv)(c) the usance charge in question was to be considered as deemed interest. Tribunal held that said charges would be considered as 'interest' and liable to TDS. (AY. 2007-08)
ACIT .v. Bhavan Enterprises (2015) 152 ITD 339 (Panaji)(Trib.)

S. 2(29A) : Long-term capital asset–Capital gains-Agreement with builder purchase of undivided share and construction-Date of allotment of undivided share in land was to be adopted as date of acquisition for computing capital gain instead of date of sale deed. [S. 2(42A) 45]
The assessee had entered into an agreement dated 22-2-2005 for purchase of undivided share of land as well as for construction of home by a project promoted by VHPL. Thereafter, the assessee sold the entire unit by a sale deed dated 10-4-2008 and claimed the difference between the cost of acquisition and sale consideration as long term capital gains.AO took a view that the undivided share of land was registered on 4-8-2005 and since the property was purchased in the month of August, 2005 and sold in April, 2008, the capital gains arising from sale would be assessed as short term capital gains only and accordingly, denied benefit of section 2(29A) made addition. Appeal claim of assessee was allowed. On appeal by revenue the Court held that on the basis of the admitted facts, the Tribunal placed reliance on Mrs. Madhu Kaul v. CIT [2014] 363 ITR 54 (P& H)(HC) where an identical issue arose as to whether the date of capital gains should be reckoned from the date of allotment or it should be reckoned from the date of actual sale, which is subsequent to the date of allotment. In effect, the High Court held that the allottee gets the title to the property on issuance of allotment letter and the payment in instalments is only a consequential act upon which delivery of possession to the property flows. Circular No. 471 dated 15-10-1986 speaks about the right of an allottee over a property that has been allotted. The other issues like payment of balance installments, delivery of possession, which takes place after the allotment only, relates back to the original allotment, in the present case, agreement. Therefore, the principle on which long term capital gains should be determined has been clearly indicated in the circular. Appeal of revenue was dismissed. (AY.2009-10)
CIT .v. S.R. Jeyashankar (2015) 373 ITR 120/ 228 Taxman 289 (Mad.)(HC)

S.2(31):Association of persons-Finding that joint venture formed only to secure contract-Each partner's task distinctly outlined-Entire work split between two partners-Partners completing task through sub-contracts-Partners responsible for satisfaction of contract-Joint venture not to be treated as association of persons liable to tax. [S.4]
Held, dismissing the appeals, that the concurrent findings were that the joint venture was formed only to secure the contract, in terms of which the scope of each joint venture partner's task was distinctly outlined. Further, the entire work was split between the two joint venture partners, they completed the task through sub-contracts and were responsible for the satisfaction of the National Highways Authority of India. Therefore, the Tribunal did not fall into error of law, in holding that the joint venture was not an association of persons liable to be taxed on that basis.(AY. 2009-10)
CIT v. Oriental Structural Engineers and KMC Construction P.Ltd. –JV (2015) 374 ITR 35 /231 Taxman 823(Delhi) (HC)
CIT .v. Oriental Structural Engineers P.Ltd. and Common India Ltd -JV (2015) 374 ITR 35/ 231 Taxman 823 (Delhi) (HC)

S. 2(42B) : Short term capital gain-Capital asset-Right in the agreement –Transferred within 36 months-Assessable as short term capital gains .[S. 2(14),2(29B, 45]
Right in the agreement was transferred within 36 months hence the gain is assessable as short term capital gains. (AY. 2005-2006)

Prakash Shantilal Parekh .v. ITO (2015) 37 ITR 119 (Mum.)(Trib.)

S. 2(47) : Transfer-Capital asset- Capital gains- Conversion of capital asset to stock in trade-Accrual-Stock in trade-Land ceases to be a capital asset on date of application for conversion into N. A. land. Pursuant to amendment to S. 53A of Transfer of Property Act-Non-registered development agreement does not result in transfer u/s 2(47)(v)- Law in ChaturbhujDwarkadasKapadia v.CIT (2003) 260 ITR 461 (Bom.)(HC) does not apply after amendment to S. 53A;[S.(2(14) 2(47)(v),(vi), 45, 48, Transfer of Property Act, 1882, S.53A]

(i) The land ceased to be a capital asset from the date when assessee filed application before the Bangalore Development Authority for conversion of land from 'agriculture' to non-agriculture. The intent of the assessee to hold the land as 'stock in trade' is further established by the fact that in the records of Revenue Department land was registered as 'N.A. Land' without which no residential project could be carried thereon. The approval of plans to construct residential villas by BDA further proves the intention of the appellants to treat the land as commercial asset. Thus various steps taken by the assessee are very much part of business activities involved in real estate development.

(ii) Amendment made in section 53A in 2001 is also relevant wherein an additional condition for registration of the written agreement was introduced as a result of which if the agreement between transferor and transferee is not registered, the transferor can dispossess the transferee from the property. Simultaneously, a consequential amendment was also been made in The Registration Act, 1908 to provide that unless the documents containing contracts to transfer any immoveable property for the purpose of section 53A of the TOPA is registered, it shall not have effect for the purposes of section 53A of the TOPA. A perusal of the Section reveals that registration of document is a sine qua non for applicability of section 53A of TOPA which entitles the transferee to remain in possession of the property.

(iii) In the instant case, Development Agreement was executed on stamp paper of Rs. 100/- and the same was not registered, hence, provisions of section 2(47)(v) of the Act are not applicable since the conditions stipulated in section 53A of TOPA are fulfilled.

(iv) With respect to the decision of the Bombay High Court in the case of ChaturbhujDwarkadasKapadiav.CIT (2003) 260 ITR 491(Bom)(HC), we found that the said decision is not applicable because the said decision was in the context of transfer of capital asset. Although the said decision was rendered in February 2003 the assessment year under its consideration was A.Y.1996-97. Further for the purpose of assessment of capital gains in the said case, all the conditions specified in Section 53A of the TOPA were satisfied. Hence, the judgment was delivered qua the law prevailing in the year of the transaction. Accordingly, the Hon'ble Bombay High Court has discussed all the conditions required to be complied under Section 53A of the TOPA, other than the condition of registration, since the law provided only five conditions at the time. Thus the case of ChaturbhujDwarkadasKapadia (supra) is of no help to Revenue to bring the transaction within the purview of section 53A of TOPA. As provisions of section 53A was amended in 2001 by which additional condition of registration of the written agreement was introduced and since in the instant case the agreement was not registered, the decision rendered by Hon'ble Bombay High Court in the caseof ChaturbhujDwarkadasKapadia(2003)260 ITR 491 with respect to relevant provisions of section 53A applicable in A.Y. 1996-97 will not be applicable to the facts of instant case. We can therefore safely conclude that the conditions stipulated in section 53A of TOPA are not satisfied n the case of assessee as discussed above, there is no transfer as per the provisions of section 2(47) of the Act.(AY. 2008-09)

Fardeen Khan .v. ACIT(2015) 117 DTR 130/169 TTJ 398 / 40 ITR 487 69 SOT 109 (URO)(Mum.)(Trib.)

S. 2(47)(v) : Transfer –Development right-Possession of land was given-Capital gains-Held to be transfer.[S. 45]

Assessee entered into development agreement with builder and developer for transfer of development rights in respect of land. Developer took possession of that land and started development work. Said transaction was to be treated as transfer of right in property covered under section 2(47)(v) .

Bertha T. Almeida v. ITO (2015) 229 Taxman 159 (Bom.)(HC)

S. 2(47(v) : Transfer-Capital gains-Development agreement-Consideration of 50% constructed area-Liable to capital gain tax.[S.45]

The assessee along with his brother were the owner and in possession of land. They entered into a joint development agreement with 'APL'. The assessee and his brother had given an irrevocable license to the developer to enter and develop the property. They have also executed a power of attorney in favour of the developer to enable the developer to gets sanction site plans, license and other approvals for the development of entire scheduled property. The developer was authorized to avail loans and financial facilities from the financial institutions.

The AO was of the view that the assessees had surrendered their rights to the extent of 50 per cent in the land in lieu of 50 per cent constructed area, whose cost was to be borne by the builder. Thus, in the opinion of the AO, transfer of the land has taken place within the meaning of section 2(47)(v) and the assessees were assessable for long term capital gain. The CIT (A) on an analysis of the agreement had held that no transfer of the asset in the case of the assessee as on the date of entering into joint development and executing the power of attorney taken place. Therefore, capital gain was not assessable. On appeal by revenue the Tribunal up held the order of AO. (AY. 2007-08)

ITO .v. N.S. Nagaraj (2015) 152 ITD 262/118 DTR 163(Bang.)(Trib.)

S.4:Charge of income-tax-Capital or revenue-Subsidy or incentive from Government-Matter remanded to CIT(A).

Assessee had received incentive under the incentive scheme of the Government for payment to sugar cane growers . Matter is remanded to the CIT(A) and the assessee is entitled to raise the contention before the CIT(A) that the issue is covered in his favour by the decision in CIT v.Ponni Sugars & Chemicals Ltd (2008) 306 ITR 392 (SC). (AY. 1993-94)

Dy.CIT v. Budhewal Co-Operative Sugar Mills Ltd. (2015) 373 ITR 35/ 278 CTR 103 (SC)

S. 4 : Charge of income-tax-Non-resident-Indian permanent establishment of foreign bank-Interest received from head office and other overseas branches –Not chargeable to tax-DTAA-India Netherland [S.90,Art, 11(2)]

Tribunal restored the matter the issue of rate at which interest to be charged to tax on income –tax refund received in the light of the Indo –France DTAA and ythe decision of the Special Bench in Asst.CIT v. Clough Engineering Ltd (2011) 9 Trib 618/ 130 ITD 137 (SB) (Delhi) (Trib) The Grievence of the revnue is with the impugned order following the decision of the Specil Bench in Clough Engineering Ltd (supra). The Court observed that the decision of special Bench had been followed in ITA No 183/Mum/2010 , DHL Operations B.V. Netherlands v Dy.CIT . The issue before before the Tribunal was the rate of tax on which income tax refund is to be taxed i.e. on the basis of article of the DTAA in the above case concluded that interest on income tax refund is not effectively connected with the permanent establishment either on asset test or activity test. Therefore tax able under article 11(2) of the Indo –Netherland s tax treaty . The revenue carried the aforsesaid decision of DHL Operations (supra) in appeal to this court , being Income tax Appeal No 431 of 2002 . This Court by order dated July 17, 2014 , refused to entertain the appeal . In the circumstances no fault can be found with the impugned order of the Tribunal in restoring the issue to the Assessing Oficer to determine /adopt the rate of tax on refund in the light of the brelevant clauses of the Indo –France DTAA and the decission of the Special Bench in Clough Engineering (supra) .Accordingly question No 4 does not raise any substantial question of law so as to to be entertained. (AY.1997-98)

DIT .v. Credit Agricole Indosuez (No.1) (2015) 377 ITR 102 (Bom.)(HC)

S.4:Charge of income-tax-Compensation on compulsory acquisition of land-Amount received between April, 1976, and April, 1977-Amount transferred to trust in April, 1983-Amount assessable in hands of assessee up to April, 1983-Compulsory acquisition of land-Enhanced compensation can be gifted. [Gift tax Act, Transfer of Property Act ,1882, S.122, 130]

On a reference by assessee the Court held, (i) that had the assessee gifted the mere right to receive a probable enhanced compensation, things would have been different altogether. By the time he created the trust deed, the compensation stood already enhanced in the year 1974. What was gifted to the trust

was the compensation enhanced in the original petition. The only difference was that the amount so enhanced was subject to modification by the High Court. Therefore, being an actionable claim, it was capable of being gifted.
(ii) That the enhanced compensation of Rs. 4 lakhs was received by the assessee between April 26, 1976, and April 25, 1977. Had he passed on that amount instantly to the trust, the amount would have become the corpus of the trust. Since the amount remained in the hands of the assessee, at least till April 4, 1983, i.e., for a period of 6 years, it partook the character of income and was rightly assessed to tax.(AY 1983-1984, 1984-1985)
Pentakota Radhakrishna v. CIT (2015) 373 ITR 261 (T & AT) (HC)

S.4: Charge of income-tax-Capital or revenue-Non-compete fee-Goodwill- Capital in nature. [S.55(2)(a)]
Dismissing the appeal, the Court held that ; the assessee transferred the technical know-how and other advantages to the joint venture company consisting of the assessee and the German company and the assessee continued its business using its own logo, trade name, licences, permits and approval under an agreement with another company. The Tribunal held that there was no intention to acquire the goodwill of the assessee and, therefore, the non-compete fee received by the assessee could not be treated as payment for goodwill taxable as income. Section 55(2)(a) of the Income-tax Act, 1961, came into effect in the year 1998-99, whereas the assessment year in question was 1996-97. Therefore, there was no basis to fall back on section 55(2). The non-compete fee received by the assessee was capital in nature. Guffic Chem. P. Ltd. v. CIT [2011] 332 ITR 602 (SC) followed.(AY. 1996-97)
CIT v. Hackbridge Hewittic and Easun Ltd. (2015) 373 ITR 109 (Mad.)(HC)

S. 4:Charge of income-tax-Notional interest- Deletion was held to be justified.
In view of order passed in earlier assessment year in assessee's own case, Tribunal was justified in deleting addition towards notional interest attributable to investment in shares.
ACIT v. EMTICI Engineering Ltd. (2015)230 Taxman 82 (Guj.)(HC)

S. 4:Charge of income-tax – Words "discontinued business"- Professional fees received by assessee after elevation to post of Judge would not be taxable as income.[S.176(4)]
Assessee was a sitting Judge of High Court. Prior to this he was practicing as an advocate in High Court. After being elevated to post of judge he discontinued his legal profession as an advocate. Assessee received certain outstanding dues from his past clients. Professional fees received by assessee after elevation to post of Judge would not be taxable as income. (AY. 1996-97, 1998-99)
CIT v. Anil R. Dave (2015) 230 Taxman 395 (Guj.)(HC)

S. 4 : Charge of income-tax-Mutuality-Club-Guest charge-guest charge received by assessee club from its members would not be liable to tax.
Assessee-club received 'guest charge' from its members and utilized it for benefit and development of club members. Since principal of mutuality would apply to transaction with member; guest charge received by assessee club from its members would not be liable to tax.
Junagadh Gymkhana v. ITO (2015) 230 Taxman 460 (Guj.)(HC)

S. 4 : Charge of income-tax – Tenancy of rental belong to individual partners-Addition cannot be made in the name of firm. [S.45,54EC]
The assessee-firm was carrying on business from a rental premises. The Assessing Officer brought to tax consideration in the hands of the assessee-firm.On appeal, the Commissioner (Appeals) held that the rental premises did not belong to the assessee-firm but to its partners in their individual capacity accordingly, appeal of the assessee-firm was allowed.On appeal, the Tribunal upheld the order of the Commissioner (Appeals).On appeal dismissing the appeal of revenue the Court held that; where on examination of evidence it was clearthat tenancy of rental premises belonged to individual partners and not to assessee-firm and consideration was received by partners in individual capacity, addition made in income of assessee-firm was not justified. (AY. 2006-07)
CIT v. Bombay Electric Laundry (2015) 230 Taxman 209 (Bom.)(HC)

S. 4 :Charge of income-tax–Overhead expenses in construction of community centre-Minutes misread-Charges not received-Addition was deleted.

Assessee had undertaken construction of project awarded to them by Government . Assessing Officer relied upon minutes of meeting to hold that assessee was entitled to overhead charges of 1.5 per cent not only in respect of cost of construction of community centre but also on cost of construction of residential flats and made addition. However, it was found that assessee never received 1.5 per cent as overhead expenses for construction of residential quarters and said minutes had been misread, therefore stand of assessee that notes of meeting related to development of community centre complex and not to residential quarters was correct. Additions confirmed by the Tribunal was deleted. (AY. 2002-03)

Housing & Urban Development Corporation Ltd. .v. Addl. CIT (2015) 229 Taxman 157 (Delhi)(HC)

S. 4 : Charge of income-tax-Preoperative expenses-Amortisation of preliminary expenses – Income from other sources-Interest income was to be adjusted against pre-operative cost of plant and machinery cost of plant and machinery.[S.35D,56]

Assessee set up an industrial undertaking at NEPZ to manufacture Halogen lamp. Production was not yet started. Assessee invested share application money received by it in FDRs for a short period for purpose of providing security for obtaining letter of credit to import machineries. Since said deposit was made under compulsion for having letter of credit, interest income was to be adjusted against pre-operative cost of plant and machinery cost of plant and machinery . (AY. 1992-93)

Phoenix Lamps India Ltd. .v. CIT (2015) 228 Taxman 306 (Mag.) (All.)(HC)

S. 4 : Charge of income-tax-Protective assessment-Substantive basis-Double taxation-Additions cannot be made in the hands of partners. [S. 143(3)]

Where additions were already made on substantive basis in case of partnership firm or other partners and said additions had been finally sustained by Tribunal, then same addition could not be made on protective basis in hands of assessee being partner of firm .(AY. 1986-87)

CIT .v. Sobhrajmal (2015) 228 Taxman 308 (Raj.)(HC)

S. 4 : Charge of income-tax–Deduction of tax at source-Compensation awarded under Motor Vehicles Act is awarded in lieu of death of a person or bodily injury suffered in a vehicular accident and it could not be taxed as income-Circular of Board of Board to deduct tax at source was quashed. [S. 2(31), 2(42), 194A, Motor Vehicles Act, 1988]

The Registrar of the High Court had put up a note that Bank Authorities were making tax deductions on interest accrued on the term deposits, *i.e.*, fixed deposits made by the Registry in terms of the orders passed by the Court in Motor Accident Claims cases.

The matter was referred to the Finance/Purchase Committee for examination. The Committee was of the view that since the dispute involved was intricate and public interest was involved, it was recommended that the matter required consideration on judicial side.

The recommendation of the Committee was treated as Public interest Litigation and *suo motu* proceedings were drawn.

The department filed the reply and pleaded that in terms of Circular No. 8/2011, dated 14-10-2011, issued by the income-tax authorities, income-tax was to be deducted on the interest periodically accruing on the deposits made on the court orders to protect the interest of the litigants.

The Court held that the circular, dated 14-10-2011, issued by the income-tax authorities, is not in tune with the mandate of sections 2(42) and 2(31), read with section 6. The said circular also is not in accordance with the mandate of section 194A hence the Compensation awarded under Motor Vehicles Act is awarded in lieu of death of a person or bodily injury suffered in a vehicular accident and it could not be taxed as income. Circular No. 8/2011, dated 14-10-2011, issued by Income-tax Authorities, whereby deduction of income-tax has been ordered on award amount and interest accrued on deposits made under orders of Court in Motor Accident Claims cases run contrary to mandate of granting compensation, thus, was quashed.In case any such deduction has been made by department,

they are directed to refund the same, with interest at the rate of 12% from the date of deduction till payment.

Court on its own motion v. H.P. State Cooperative Bank Ltd. (2015) 228 Taxman 151/ 117 DTR 231/ 276 CTR 264 (HP)(HC)

S. 4 : Charge of income-tax –Income which was taxed in the hands of HUF, cannot be taxed again as a member of HUF in his individual capacity.[VDIS,1997, S.64, 65]

Once a particular amount was taxed in hands of HUF in terms of declaration made under Voluntary Disclosure of Income Scheme, 1997, said amount could not be taxed again in hands of assessee as a member of HUF in his individual capacity.(AY. 1988-89 to 1997-98)

CIT v. Kundanmal Babulal Jain (2015) 228 Taxman 165 (Mag.)(Karn.)(HC)

S. 4 : Charge of income-tax -Principle of real income - Excess billing discovered and rectified- Rectification by making appropriate entries in account books- Deletion of addition which was made on the basis of hypotheiccal income was held to be justified. [S.5,36(2),145]

The excess surcharge which was not lawfully recoverable had to be set right, for which permission of the Reserve Bank of India was required in a procedure prescribed. The assessee had noticed the error and rectified the mistake in the balance-sheet before the return was filed. It offered to tax the actual income and deleted the income, which was relatable to the erroneous claim under surcharge. Hence, the Tribunal was justified in holding that there was no question of tax on a hypothetical income.
(AY.2005-2006)

CIT v. Tyco Sanmar Ltd. (2015) 370 ITR 173/230 Taxman 396 (Mad.) (HC)

S.4:Charge of income-tax-Joint venture-Even if contract is awarded to the Joint Venture, the income is assessable only in the hands of the person which has executed the work.[S. 2(31), 143(3),153A]

The High Court had to consider whether the entire income earned by the joint venture company is liable to be taxed in the hand of one of the members of the assessee company without appreciating the fact that the contract was awarded to the assessee company and not to the individual member of the assessee company. It also had to consider the impact of C.H. Acthaiya 218 ITR 239 (SC) and MurugesaNaicker Mansion 244 ITR 461 (SC) wherein it was held that AO is not precluded from taxing the right person merely on the ground that a wrong person is taxable. HELD by the High Court dismissing the appeal:

The ITAT has as a matter of fact found that the assessee/ joint venture did not execute the contract work and the said work was done by one of its constituents namely SMS Infrastructure Limited. It is also found that the receipts for the said project work are reflected in the books of account of SMS Infrastructure Limited and in return, said SMS Infrastructure Limited has disclosed that income. The said return was accepted by the Assessing Officer in the assessment made under Section 153A read with Section 143 (3) of the Income Tax Act, 1961. It found that, therefore, some income could not have been taxed again in the hands of joint venture/assessee.

CIT v. SMSL- UANRCL (JV)(2015) 116 DTR 430/277 CTR 47(Bom.)(HC)

S.4:Charge of income-tax-Subsidy-Capital or revenue-Subsidy-Entertainment tax subsidy is a capital receipt even though the source is the public who visit the cinema hall after it becomes operational.[U.P.Entertainment and Betting Tax Act, 1979]

(i) The UP Scheme under which the assessee claims exemption to the extent of entertainment tax subsidy, claiming it to be capital receipt, is clearly designed to promote the investors in the cinema industry encouraging establishment of new multiplexes. A subsidy of such nature cannot possibly be granted by the Government directly. Entertainment tax is leviable on the admission tickets to cinema halls only after the facility becomes operational. Since the source of the subsidy is the public at large which is to be attracted as viewers to the cinema halls, the funds to support such an incentive cannot be generated until and unless the cinema halls become functional.

(ii) The State Government had offered 100% tax exemptions for the first three years reduced to 75% in the remaining two years. Thus, the amount of subsidy earned would depend on the extent of viewership the cinema hall is able to attract. After all, the collections of entertainment tax would

correspond to the number of admission tickets sold. Since the maximum amount of subsidy made available is subject to the ceiling equivalent to the amount invested by the assessee in the construction of the multiplex as also the actual cost incurred in arranging the requisite equipment installed therein, it naturally follows that the purpose is to assist the entrepreneur in meeting the expenditure incurred on such accounts. Given the uncertainties of a business of this nature, it is also possible that a multiplex owner may not be able to muster enough viewership to recover all his investments in the five year period. 34. Seen in the above light, we are of the considered view that it was unreasonable on the part of the Assessing Officer to decline the claim of the assessee about the subsidy being capital receipt. Such a subsidy by its very nature, was bound to come in the hands of the assessee after the cinema hall had become functional and definitely not before the commencement of production. Since the purpose was to offset the expenditure incurred in setting up of the project, such receipt (subject, of course, to the cap of amount and period under the scheme) could not have been treated as assistance for the purposes of trade. (AY. 2006-07 to 2009-10)

CIT .v. Bougainvillea Multiplex entertainment (2015) 373 ITR 14/229 Taxman 471 / 116 DTR 129/ 275 CTR 151 (Delhi)(HC)

S. 4 : Charge of income tax-Subsidy-Industrial Policy 1996 of Punjab Government- Capital receipt.

Subsidy received by assessee-company on export oriented unit from Director of Industries, Punjab under Industrial Policy 1996 of Punjab Government for installation of plant and machinery would be capital receipt.

Safari Bikes Ltd. v. JCIT (2014) 33 ITR 665 / 166 TTJ 216 / (2015) 67 SOT 257 (Chd.)(Trib.)

S.4:Charge of income-tax-Capital or revenue-Business income-Receipt on sale of carbon credit-Capital in nature.[S.28(i)]

Tribunal held that the receipt on sale of carbon credits was capital in nature. (AY. 2010-2011)

ACIT v. INTEX (2015) 38 ITR 496 (Chennai)(Trib)

S. 4 : Charge of income-tax-Accrual-Grants from Government-To meet the expenses –Not chargeable to tax-Amount not adjusted is to be chargeable to tax.[S.12A]

The assessee was a Government of India agency under the Ministry of Shipping, Road Transport and Highways and was granted registration under section 12A of the Act. The assessee claimed that income from internal resources were grant from the Government and therefore could not be chargeable to tax. The AO charged the income from internal resources to tax. The CIT(A)(A) confirmed this. On appeal:

Held, that,grants to meet the expenses is not chargeable to tax. Amount not adjusted is to be chargeable to tax. (AY. 1988-1989, to 1996-1997)

Inland Waterways Authority of India .v. Add. CIT (2015) 37 ITR 332 (Delhi)(Trib.)

S. 4 :Charge of income -tax- Diversion of income-Income by over-riding title-Application of income- Contribution of 1% of net profit to the Cooperative Education Fund maintained by National Cooperative Union is an application of income. [S. 61, 62]

On facts, it is only after the net profit reaches the co-operative society that the question of its disposal in terms of the provisions arise of the Act of 1965 and not earlier thereto, net profit is to be apportioned by transferring part of it as may be prescribed by Rules to the reserve fund or to other funds. Part of the profits has to be carried to the co-operative deduction fund constituted under the Rules and the balance is available for utilisation for payment of dividends to the members, bonus to the members and contribution to such other special funds as may be specified in the Rules as per Sec.63(2). As already stated earlier, assessee is not charging the amount of 1% on the profits of the year, in the year of accrual but is claiming the amount paid during the year on the profits of earlier year. This certainly indicates that the amounts have been received by assessee and utilized by assessee, then only amount was remitted to the said National Union under the Act. This indicates, there is no diversion at source but is only appropriation of profits as per principles laid down. It is also an admitted fact that there is no charge in the year in which assessee incurs losses. It is only when there are profits the amount has to be paid. This also distinguishes the issue that it is only an

appropriation of profits earned but not diversion of income. If it is to be considered as diversion at source by overriding title, whether assessee incurs profits or loss, the said amount has to be paid. This is not the case here. The amount at 1% is payable only when assessee has profits in any year. This supports the view that this is not a diversion at source but an appropriation of amounts.
Following the principles laid down in CIT vs. Jodhpur Cooperative Marketing Society 275 ITR 372 (Raj), we are of the opinion that the amount contributed by assessee to the National Cooperative Union, New Delhi is appropriation from the net profits. There is a right to receive the income independent of accrual and receipt of income by the assessee before third party could lay claim to any part of it. Since income reached assessee before it reached to a third party, there is no diversion. As already stated, there is no payment in the year of losses. Therefore, payment under section 63(1)(b) is only an appropriation of profit. Moreover, this amount paid during the year is also not out of the profits of this year but profits of earlier year. Therefore, on that count also amount cannot be allowed as deduction during the year. (ITA No. 1580/Hyd/2013, dt. 31.12.2014) (AY. 2010-11)
A. P. Mahesh Co-op Urban Bank Ltd. .v. DCIT (Hyd.) (Trib.) www.itatonline.org

S. 4: Charge of income-tax – Advance against depreciation by way of tariff charges-Liability not includible in computation of taxable income.[S.145]
Assessee, a public sector company, engaged in selling electricity to State Electricity Boards, received Advance Against Depreciation (AAD) by way of tariff charge which was to be adjusted against future depreciation so as to reduce tariff in future years, amount so received was to be regarded as liability and, thus, not includible in computation of taxable income .(AY. 2000-01, 2001-02 & 2003-04)
ACIT .v. NHPC Ltd. (2014) 50 taxmann.com 221 / (2015) 67 SOT 130 (Delhi)(Trib.)

S. 5 : Scope of total income–Membership fee was for 10 years-Non-refundable deposits-Fee was to be spread over a period of 10 years and whole amount could not be taxed in year of receipt. [S. 4, 37(1)]
Assessee-club collected non-refundable deposits from its members which was operational for a period of 10 years with a rider that liability attached to pay membership fee was for 10 years. Fee was to be spread over a period of 10 years and whole amount could not be taxed in year of receipt. (AY. 2003-04)
CIT .v.Sportsfield Amusement (2015) 231 Taxman 252 (Bom.)(HC)

S. 5 : Scope of total income – Discount cards-Justified in spreading out amount of membership fee and expenses. [S. 37(i), 145(3), Accounting Standard 9.]
Assessee company was engaged in business of providing discount cards to members on payment of membership fees. Accounts of assessee had been prepared on accrual basis and accordingly, it had spread over receipt as well as insurance premium expenditure to period of membership. Dismissing the appeal of revenue the Court held that; since services were rendered partially in a year, both revenue and expenses were to be shown proportionate to degree of completion of service and, therefore, assessee was justified in spreading out amount of membership fee and expenses.(AY. 1989-90 to 2006-07)
CIT v. Winner Business Link (P.) Ltd. (2015) 230 Taxman 399 (Guj.)(HC)

S. 5 : Scope of total income –Method of accounting –Cash system- Interest on fixed deposit-Interest earned on fixed deposit which was not received during relevant A.Y. the would not be added as income of relevant year. [S.145]
Assessee had not shown interest earned on fixed deposit in relevant year on plea that same would be paid to it in near future along with original sum. On reference the Court held that since assessee consistently followed cash system of accounting, interest on fixed deposit would not be added to its income in relevant assessment year.(AY. 1989-90)
CIT v. Adamsons Inc. (2015) 230 Taxman 72 (Bom.)(HC)

S.5:Scope of total income- Accrual-Income from Advance License benefit receivable is taxable in subsequent year in which it has accrued to appellant.[S.145].

Income from Advance License benefit receivable is taxable in subsequent year in which it has accrued to appellant. (AY. 1997-98)
United Phosphorus Ltd. v. Addl. CIT (2015) 230 Taxman 596 (Guj.)(HC)

S.5 : Scope of total income- Accrual-Income from Pass Book scheme is taxable in subsequent year in which it has accrued to appellant.[S. 145]
Income from Pass Book scheme is taxable in subsequent year in which it has accrued to appellant. (AY. 1997-98)
United Phosphorus Ltd. v. Addl. CIT (2015) 230 Taxman 596 (Guj.)(HC)

S. 5 : Scope of total income -Accrual of income-Mercantile system of accounting-Civil construction-Sums retained for payment after expiry of defect-free period-Right to receive amount contingent upon there being no defects-Accrual only on receipt of amount after defect-free period.[S.145]
The assessee, a civil contractor, was awarded a contract by the Hyderabad Municipal Water Supply and Sewerage Board. The contract provided for deduction of 7.5 per cent. from each bill. Out of this, 5 per cent.would be payable on successful completion of the work and the balance 2.5 per cent. after the expiry of the defect-free period. The assessee, for the assessment year 1996-97, did not include the amount representing 2.5 per cent. of the bills. According to the assessee, such amount could be shown as income, only on its being received. The Assessing Officer held that since the assessee was following the mercantile system of accounting, the amount of 2.5 per cent. of bills could be said to have accrued to it, along with the amount paid under the bills and was liable to be treated as income for that year. The Commissioner (Appeals) confirmed this. The Tribunal held in favour of the assessee. On appeal :
Held, dismissing the appeal, that the right to receive that amount was contingent upon there not being any defects in the work, during the stipulated period. It was then, and only then, that the amount could be said to have accrued to the assessee. (AY. 1996-1997)
CIT v. Shanker Constructions (2015) 371 ITR 320 (T & AP) (HC)

S. 5:Scope of total income-Accrual-Nodal agency- Failure by authorities to examine nature and character of receipts. Matter remanded.
Statutory body acting as nodal agency. External development charges received and spent according to direction of State Government. Failure by authorities to examine nature and character of receipts. Matter remanded.(AY. 2009-2010, 2010-2011)
Dy.CIT v. Greater Ludhiana Area Development Authority (2015) 39 ITR 100 / 170 TTJ 457 (Chd.)(Trib.)

S.5:Scope of total income-Accounting-Accrual -Interest on securities-Receipt basis-Interest not chargeable to tax.[S.145]
As the interest from investments due to the assessee for the months of January, February and March would be accruing only in June, the assessee claimed expenditure towards broken period interest by adding back the amount for the assessment year 2005-06. The Assessing Officer disallowed the claim and the broken period interest was brought to tax for the assessment year 2005-06, as the issue pertaining to the assessment year 2004-05 was in appeal. The Commissioner (Appeals) held that the broken period interest was not chargeable to tax in the assessment year 2005-06. On appeal:
Held, that the assessee was following the method of offering interest on securities to tax on receipt basis on maturity and it was accepted by the Department in the past. Therefore, the broken period interest was not chargeable to tax in the assessment year 2005-06.(AY.2005-2006)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250(Bang.)(Trib.)

S. 5 :Scope of total income-Accrual of income outside and in India-Stock option-Not-ordinary resident-Only that portion of stock awards and stock option transfer proceeds which are attributable to services rendered in India can form part of total income of the relevant assessment year of the assessee who is not-ordinarily resident-DTAA-India-USA [S.9(1)(ii),147, 148, Art 16]

Assessee is an individual employed with M/s. Microsoft India (R & D) Hyderabad. The Assessing Officer reopened the assessment under section 147 by issuing notice under section 148. In response to the notice the assessee filed a letter requesting to treat the return filed originally as a return in response to notice under section 148. The Assessing Officer made the addition of the amount of Rs. 1,49,80,713/- being the stock award / SOTP. The CIT(A) confirmed the addition made by the Assessing Officer.

The Tribunal remitted the matter to the Assessing Officer for taking a fresh decision and held that only that portion of stock awards and stock option transfer proceeds which are attributable to services rendered in India can form part of total income of the relevant assessment year of the assessee who is not-ordinarily resident. (AY. 2007-08)

Anil Bhansali v. ITO (2015) 168 TTJ 412/115 DTR 132 /53 taxmann.com 367 (Hyd.)(Trib.)

S. 5 : Scope of total income –Accrual of income- Agreement was signed in the relevant assessment year hence , income cannot be assessed for the relevant assessment year.[S.145]

The assessee was a state government undertaking, engaged in the business of power generation. It supplies power *inter alia* to DISCOMs, which again were undertakings of the State Government. During the year under consideration, huge amount due to the assessee by the DISCOMs running into thousand of crores was outstanding. According to the AO the assessee had right to claim interest on such dues and accordingly interest receivable worked out at Rs. 233.75 crores was added by him to the total income of the assessee.On appeal, the CIT(A) found merit in the submissions made by the assessee on this issue and deleted the addition made by the AO. On appeal by revenue the Tribunal held that said agreement was effective from date of signing of agreement i.e. 22-12-2009, and not in relevant assessment year, therefore, assessee was not entitled to claim any interest on said delayed payments for year under consideration and such interest income could not be said to have accrued to assessee in relevant year . (AY. 2009-10)

Dy.CIT .v. Andhra Pradesh Power Generation Corporation Ltd. (2014) 52 taxmann.com 300 / (2015) 67 SOT 183 (Hyd.)(Trib.)

S. 6(1): Residence in India - Extended stay due to wrongful impounding of passport - Period from impounding of passport till release-Excludible while counting days of stay in India - Assessee to be treated as non-resident. [S.6(1)(a)]

While the executive action of impounding of passport rendered it impossible for the assessee to leave India. He virtually became an unwilling resident on Indian soil without his consent and against his will. His involuntary stay during the period that followed till the passport was restored under the court's directive must be excluded for calculating the period under section 6(1)(a).(AY .2007-2008, 2008-2009)

CIT .v. Suresh Nanda (2015) 375 ITR 172 (Delhi) (HC)

Editorial: Order in Suresh Nanda v. ACIT (2014) 31 ITR (Trib) 620 (Delhi) is affirmed.

S. 9(1) : Income deemed to accrue or arise in India - Business connection-Royalty-Deduction at source. [S. 9(1)(vi),40(a)(i), 195]

Assessee company entered into an agreement with 'F', a foreign firm, to provide investment advice for investments to be carried outside India. AO held that payment made by assessee to 'F' were in nature of royalty. Tribunal held that in assessee's own case for earlier assessment year, it was held that said payment could not be treated as royalty as it did not include any information provided in course of advisory services and further, since services were rendered abroad, no part of income had accrued or arise in India and no tax would be deducted. Following said decision, assessee would not be liable to deduct tax on said payment made. (AY. 2009-10, 2010-11)

ACIT .v. Sundaram Asset Management Co. Ltd. (2014) 52 taxmann.com 466 / (2015) 67 SOT 67 (URO)(Chennai)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India-Concept of "source rule" vs. "residence rule" explained. Definition of expression "fees for technical services" in s. 9(1)(vii) explained with reference to "consultancy" services.[S.9(1)(vii)]

The assessee paid fees to a non-resident (NRC). The obligation of the NRC was to: (i) Develop comprehensive financial model to tie-up the rupee and foreign currency loan requirements of the project.(ii) Assist expert credit agencies world-wide and obtain commercial bank support on the most competitive terms. (iii) Assist the appellant company in loan negotiations and documentation with the lenders. The assessee claimed that as the fees were paid for services rendered outside India, the same were not chargeable to tax in India and that the assessee was under no obligation to deduct TDS u/s 195. However, the AO and CIT rejected the claim of the assessee. The High Court (228 ITR 564) held that the said payment was not assessable u/s 9(1)(i) but that it was assessable u/s 9(1)(vii). The assessee claimed that s. 9(1)(vii) was constitutionally invalid as it taxed extra-territorial transactions. However, this claim was rejected by the Constitution Bench of the Supreme Court in 332 ITR 130. On merits, the matter was remanded to the Division Bench of the Supreme Court. HELD by the Division Bench dismissing the appeal:

(i) Re S. 9(1)(i): The NRC is a Non-Resident Company and it does not have a place of business in India. The revenue has not advanced a case that the income had actually arisen or received by the NRC in India. The High Court has recorded the payment or receipt paid by the appellant to the NRC as success fee would not be taxable under Section 9(1)(i) of the Act as the transaction/activity did not have any business connection. The conclusion of the High Court in this regard is absolutely defensible in view of the principles stated in C.I.T. v. Aggarwal and Company 56 ITR 20,C.I.T. v. TRC 166 ITR 1993 and Birendra Prasad Rai v. ITC 129 ITR 295;

(ii) Re S. 9(1)(vii): The principal provision is Clause (b) of Section 9(1)(vii) of the Act. The said provision carves out an exception. The exception carved out in the latter part of clause (b) applies to a situation when fee is payable in respect of services utilized for business or profession carried out by an Indian payer outside India or for the purpose of making or earning of income by the Indian assessee i.e. the payer, for the purpose of making or earning any income from a source outside India.

(iii) Re "Source Rule" in s. 9(1)(vii): On a studied scrutiny of the said Clause (b) of Section 9(1)(vii), it becomes clear that it lays down the principle what is basically known as the "source rule", that is, income of the recipient to be charged or chargeable in the country where the source of payment is located, to clarify, where the payer is located. The Clause further mandates and requires that the services should be utilized in India.

(iv) Re "Source Rule" vs. "Residence Rule": The two principles, namely, "Situs of residence" and "Situs of source of income" have witnessed divergence and difference in the field of international taxation. The principle "Residence State Taxation" gives primacy to the country of the residency of the assessee. This principle postulates taxation of world-wide income and world-wide capital in the country of residence of the natural or juridical person. The "Source State Taxation" rule confers primacy to right to tax to a particular income or transaction to the State/nation where the source of the said income is located. The second rule, as is understood, is transaction specific. To elaborate, the source State seeks to tax the transaction or capital within its territory even when the income benefits belongs to a non-residence person, that is, a person resident in another country. The aforesaid principle sometimes is given a different name, that is, the territorial principle. It is apt to state here that the residence based taxation is perceived as benefiting the developed or capital exporting countries whereas the source based taxation protects and is regarded as more beneficial to capital importing countries, that is, developing nations. Here comes the principle of nexus, for the nexus of the right to tax is in the source rule. It is founded on the right of a country to tax the income earned from a source located in the said State, irrespective of the country of the residence of the recipient. It is well settled that the source based taxation is accepted and applied in international taxation law.

(v) Re meaning of the expression, managerial, technical or consultancy service in s. 9(1)(vii): The expression "managerial, technical or consultancy service" have not been defined in the Act, and, therefore, it is obligatory on our part to examine how the said expressions are used and understood by the persons engaged in business. The general and common usage of the said words has to be understood at common parlance. By technical services, we mean in this context services requiring expertise in technology. By consultancy services, we mean in this context advisory services. The category of technical and consultancy services are to some extent overlapping because a consultancy service could also be technical service. However, the category of consultancy services also includes an advisory service, whether or not expertise in technology is required to perform it. The word "consultancy" has been defined in the Dictionary as "the work or position of a consultant; a

department of consultants." "Consultant" itself has been defined, inter alia, as "a person who gives professional advice or services in a specialized field." It is obvious that the word "consultant" is a derivative of the word "consult" which entails deliberations, consideration, conferring with someone, conferring about or upon a matter.
(vi) Re Facts: On facts, the NRC had acted as a consultant. It had the skill, acumen and knowledge in the specialized field i.e. preparation of a scheme for required finances and to tie-up required loans. The nature of activities undertaken by the NRC has earlier been referred to by us. The nature of service referred by the NRC, can be said with certainty would come within the ambit and sweep of the term 'consultancy service' and, therefore, it has been rightly held that the tax at source should have been deducted as the amount paid as fee could be taxable under the head 'fee for technical service'. Once the tax is payable paid the grant of 'No Objection Certificate' was not legally permissible. Ergo, the judgment and order passed by the High Court are absolutely impregnable.
GVK Industries Ltd. .v. ITO (2015)371 ITR 453 / 115 DTR 313 275 CTR 121/ 231 Taxman 18 (SC)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection –Telecasting of TV channels such as B4U Music, MCM etc.-Advertisement-Amount received from advertisers was not liable to tax in India-DTAA-India-Mauritius. [Art. 5, 7 .]
Assessee, a Mauritius based company, was engaged in business of telecasting of TV channels such as B4U Music, MCM etc. Assessee's income from India consisted of collections from time slots given to advertisers through its affiliates. Assessing Officer held that affiliated entities of assessee constituted permanent establishment of assessee within meaning of article 5 of India-Mauritius DTAA .Accordingly, amount received from advertisers was brought to tax in India. Tribunal held that the assessee carried out entire activities from Mauritius and all contracts were concluded in Mauritius. It was also undisputed that activity carried out in India was incidental or auxiliary/preparatory in nature which was carried out in a routine manner. On facts, affiliates/agents of assessee in India did not constitute its PE in India in terms of paragraph 5 of article 5 of India-Mauritius DTAA and, thus, amount in question received from advertisers was not liable to tax in India. Appeal of revenue was dismissed by High Court.
DIT .v. B4U International Holdings Ltd. (2015) 231 Taxman 858 (Bom.)(HC)

S.9(1)(i):Income deemed to accrue or arise in India-Business connection-Non-resident-Income from purchase of goods for export-Liaison office in India-Income of liaison office not deemed to accrue or arise in India.
Income from purchase of goods for export. Income of liaison office not deemed to accrue or arise in India. Appeal of revenue was dismissed.(AY. 2003-2004 to 2007-2008)
DIT(IT) v. Tesco International Sourcing Ltd. (2015) 373 ITR 421 (Karn.)(HC)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection –Agent-Revenue has not challenged the order of Tribunal holding that the amount received by non-resident from assesse was not taxable-Question of treating the assesse became academic. [S.195]
Where revenue did not prefer appeal against order of Tribunal holding that amount received by non-resident from assessee was not taxable in India, question as to whether assessee could be treated as agent of those non-residents or not became academic.
PILCOM v. CIT (2015) 228 Taxman 336 (Mag.)(Cal.)(HC)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection-Royalty-Amount received by assessee-foreign company for hiring out dredgers to its Indian company would not be taxable in India as royalty- DTAA-India-Netherland .[S. 2(23A),Art, 12]
The assessee was a company incorporated in Netherlands and falls within the definition of a foreign company under section 2(23A). The management and control of the assessee company was situated in Netherlands. The assessee let out dredging equipment to their Indian company. Amount received by assessee-foreign company for hiring out dredgers to its Indian company would not be taxable in India as royalty, as Article 12 of DTAA does not include said payment within its ambit. (AY.2003-04)

CIT v. Van Oord ACZ Equipment BV (2015) 373 ITR 133/273 CTR 548 / 228 Taxman 199 (Mad.)(HC)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Service PE- Establishing subsidiary in other treaty country does not result in creating PE of a foreign holding company in the third country. As the employees of SRSIPL are not providing services to the assessee as if they were the employees of the assessee, there is no "service PE"- DTAA- India- Switzerland.[S.90, Art, 5]

The AO is not right in (i) treating the assessee as having a Dependent Agency Permanent Establishment; (ii) laying down that the assessee has a business connection in India; (iii) treating SRSIPL as service PE and (iv) treating SRSIPL as Agency PE. Ld. The assessee does not fulfill any of the mandatory conditions for the aforementioned allegations. Article 5(4) of the Indo-Swiss Treaty categorically excludes cases of reinsurance services. The agreement between the assessee and SRSIPL does not include contracts of reinsurance and confirmation of liability. The facts of the case in hand clearly show that the employees of the SRSIPL has only provided services to SRSIPL and there is no noting on record to prove that the employees had provided services to the assessee or the assessee is paying their salaries or perquisites. (AY. 2010-11)

Swiss re-insurance Co. Ltd. .v. DDIT(2015) 169 TTJ 129/ 38 ITR 568(Mum.)(Trib.)

S. 9(1)(i): Income deemed to accrue or arise in India-Royalty-Income from capacity sales under capacity sales agreement between assessee and VSNL-Question of attribution of profits does not arise-Income from capacity sales not taxable in India as business income or royalty or fees for technical services-Standby maintenance charges-Not fees for technical services under section 9(1)(vii).[S.9(1)(vi),9(1)(vii)]

The assessee was a Bermuda-based company which had built a high capacity submarine fibre optic telecommunications cable providing a telecommunication link between the United Kingdom and Japan. The assessee entered into memorandum of understanding with various other international telecommunication carriers for the purpose of planning, designing and constructing the submarine fibre optic telecommunications cable. For this purpose the memorandum of understanding elaborated the rights and obligations of the various parties involved in the fibre optic link around the global cable system (FLAG). At the time of the signing of the memorandum of understanding, there were 13 parties other than the assessee, which included VSNL. All the signatory parties intended to acquire the capacity in the FLAG cable system in terms of minimum investment unit. The memorandum of understanding was effective till construction and maintenance agreement was executed by the parties. Thereafter, the assessee entered into a capacity sales agreement with VSNL. Accordingly, VSNL had to pay US $28.94 million to the assessee towards purchase of capacity. The assessee claimed that it was from sale of goods from a non-resident to a resident which could not be taxed in India. The Assessing Officer held that the payment was in the nature of royalty or fees for technical know-how and it was taxable under section 9(1)(i). The receipts in the hands of the assessee did not arise as a consequence of sale of any article or commodity but the use of "right to use" assignable capacity in the cable system and it was taxable under section 9(1)(vi) and 9(1)(vii). Similarly, the income from standby maintenance activities required highly skilled and technical personnel and was separately received and was also taxable under the head "fees for technical services". The Commissioner (Appeals) observed that the amount received by the assessee from VSNL was on account of sale of capacity in the cable system and it was from normal business of the assessee was taxable as business income of the assessee under section 9(1)(i), that the income attributable to India could be worked out on the basis of the proportionate worldwide profits and the payment could not be taxed as royalty or fees for technical services under section 9(1)(vi) or (vii), that the payment received on account of standby maintenance in terms of the construction and maintenance agreement was taxable in India as fees for technical services under section 9(1)(vii). On appeal :

Held, (i) that in the case of a "royalty", agreement, the complete ownership is never transferred to the other party. The concept of transfer of ownership to the exclusion of the other party is denuded in the case of "royalty". What is envisaged in section 9(1)(vi) read with Explanation thereto, is that there should be transfer of rights of any kind of the property as defined therein ; or imparting of any information in respect of various kinds of property; or use of rights to use of any equipment. If the

consideration has been received for transferring the ownership with all rights and obligations then such a consideration cannot be taxed under the head "Royalty". Thus, characterisation of the transfer has to be seen in the terms of the contract and agreement entered by the parties, which here in this case is for sale and not for simple user.
(ii) That Explanation 1(a) to section 9(1)(i) clarified that the income from business deemed under clause (i) of sub-section (1), is to be attributed to the operation carried out in India. The said Explanation would not be applicable, as there was no deemed income accruing or arising to the assessee in India within the ambit of section 9(1)(i). The question of attribution would only arise, only if it was established that income had accrued or arisen to the assessee within the deeming fiction of section 9(1)(i). Therefore, the attribution made by the Commissioner (Appeals) on proportionate basis of worldwide revenue and gross profit was not correct. The Commissioner (Appeals) had not shown how there was a business connection, asset or source of income in India. Unless the deeming income fell within the parameters of section 9(1)(i), no attribution could be made. Thus, the payment of US $28.94 million received by the assessee from sales of capacity made to VSNL was not taxable either as "royalty" or "business income" accruing or arising in India within the deeming provision of section 9(1)(i).
(iii) That standby maintenance charges were in the form of a fixed annual charge which was in the nature of reimbursement. Only actual cost incurred had been recovered from VSNL in providing the standby maintenance services. There was no profit element or mark up involved. The assessee had also provided the details of receipt and cost involved in the standby maintenance expenses. Therefore, the receipts from standby maintenance charges from VSNL could not be taxed as fees for technical services and within the definition and meaning of section 9(1)(vii) as there was no rendering of services.(AY. 1998-1999 to 2000-2001)
Flag Telecom Group Ltd. v. Dy. CIT (2015) 38 ITR 665/119 DTR 115/ 153 ITD 702 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection -Payment made for utilizing telecom voice services in USA –Not liable to deduct tax at source. [S.40(a)(ia),195]
The assessee made payment to a US company for utilizing telecom voice services in USA and it claimed that the said payment did not constitute fee for technical services but was in the nature of business income of the non-resident. Since the non-resident did not have a Permanent Establishment in India, said income was not chargeable to tax in the hands of the non-resident in India and, therefore, there was no obligation on the part of the assessee to deduct tax at source. The AO however, took the view that the said payment was in nature of fee for technical services and was, therefore, chargeable to tax in India in the hands of the non-resident. Since the assessee did not deduct TDS, the AO invoked the provisions of section 40(a)(i).On appeal, the CIT (A) deleted said addition. On appeal by revenue the Tribunal held that, payment made by assessee, an Indian company to a US company for utilizing telecom services in USA did not constitute fee for technical services as said payments were for use of bandwidth provided for down linking signals in US; and said payments were not in nature of managerial, consultancy or technical services nor was it for use of or right to use industrial, commercial or ascientificequipment.Order of CIT (A) was confirmed. (AY. 2010-11)
ITO .v. Clear Water Technology Services (P.) Ltd. (2014) 52 taxmann.com 115 / (2015) 67 SOT 15 (URO)(Bang.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection –Reimbursed amount- Agreement was not examined by AO- Matter remanded.
AO held that reimbursed amount had to be included in commission income earned by assessee on sales made to its AE. Tribunal held that relevant agreement provided that commission was not to be computed on sale orders which required procurement of local content by assesse, since said agreement was not examined by AO matter was to be remanded for fresh adjudication. (AY. 2008-09)
Varian India (P.) Ltd. .v. Addl. CIT (2014) 51 taxmann.com 404 / (2015) 67 SOT 17 (URO)(Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection –Permanent establishment-Not a dependent agent-Commission earned could not be taxed in hands of assesee-DTAA-India- USA.[Art. 5, 7]

Assessee was Indian branch of company named VIPL which in turn was a 100 per cent subsidiary of Varian USA. VIPL entered into distribution and representation agreement with assessee for supply and sale of analytical lab instruments manufactured by them to Indian customers directly and assessee carried out pre-sale activities like liasoning and other incidental post-sale support activities for which it was entitled to commission.Assessee had no authority and also could not negotiate or conclude contracts .None of risks, like, market risk, product liability risk, R&D risk, credit risk, price risk, inventory risk or foreign currency risk was undertaken by assesse. Tribunal held that on facts, assessee was not a dependent agent of Varian group of companies and did not constitute a PE for said company in India therefore commission earned could not be taxed in hands of assesse. (AY. 2008-09)

Varian India (P.) Ltd. .v. Addl. CIT (2014) 51 taxmann.com 404 / (2015) 67 SOT 17 (URO)(Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection –Make available-Testing-Could not be treated as fees for technical services-Not liable to deduct tax at source-DTAA-India- USA.[S. 9(1)(vii),195, Art, 12]

Assessee, engaged in business of manufacturing ultrasonic meters, paid certain amount to a US company towards calibration and testing of equipment, in view of fact that expertise connected with testing had not been passed on to assessee, payment in question could not be treated as 'fee for technical services' and, thus, assessee was not required to deduct tax at source while making said payment (AY. 2009-10)

ITO .v. Denial Measurement Solutions (P.)Ltd. (2014) 52 taxmann.com 443 / (2015) 67 SOT 76(URO)(Ahd.)(Trib.)

S. 9(1)(vi): Income deemed to accrue or arise in India - Income from supply of software embedded in hardware equipment or otherwise to customers in India - Does not amount to royalty-DTAA-India- France.[Art. 13(3)]

Held, dismissing the appeals, that the income of the assessee from supply of software embedded in the hardware equipment or otherwise to customers in India did not amount to royalty under section 9(1)(vi).

CIT v. Alcatel Lucent Canada (2015) 372 ITR 476/231 CTR 87/ 231 Taxman 87 (Delhi) (HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India -Income deemed to accrue or arise in India – Royalty -Indian agent of foreign company cannot be regarded as "Dependent Agent Permanent Establishment" if agent has no power to conclude contracts. If the agent is remunerated at arms' length basis, no further profit can be attributed to the foreign company. It is doubtful whether retrospective amendment to s. 9(i)(vi) can apply the DTAA. However, question is left open-DTAA-India-Mauritius [S. 4, 5, 6, 90, 195, Art. 5(4), 5(5), 7]

The assessee is a foreign company incorporated in Mauritius. It had filed its residency certificate and pointed out that its business is of telecasting of TV channels such as B4U Music, MCM etc. During the assessment year under consideration, its revenue from India consisted of collections from time slots given to advertisers from India. The details filed by the assessee revealed that there is a general permission granted by the Reserve Bank of India to act as advertisement collecting agents of the assessee. The permissions were granted to M/s. B4U Multimedia International Limited and M/s. B4U Broadband Limited. In the computation of income filed along with the return, the assessee claimed that as it did not have a permanent establishment in India, it is not liable to tax in India under Article 7 of the DTAA between India and Mauritius. The argument further was that the agents of the assessee have marked the ad-time slots of the channels broadcasted by the assessee for which they have received remuneration on arm’s length basis. Thus, in the light of the Central Board of Direct Taxes Circular No.23 of 1969, the income of the assessee is not taxable in India. The conditions of Circular 23 are fulfilled. Therefore, Explanation (a) to section 9(1)(i) of the IT Act will have no application. The Assessing Officer did not accept the contentions of the assessee. However, the Tribunal noted that paragraph 5 of Article 5 of the DTAA indicates that an enterprise of a contracting State shall not

be deemed to have a permanent establishment in the other contracting State merely because it carries on business in that State through a broker, general commission agent, or any other agent of independent status, where such persons are acting in the ordinary course of their business. However, when the activities of such an agent are devoted exclusively or almost exclusively on behalf of that enterprise, he will not be considered an agent of an independent status within the meaning of this paragraph. The Tribunal held that the assessee carries out the entire activities from Mauritius and all the contracts were concluded in Mauritius. The only activity which is carried out in India is incidental or auxiliary / preparatory in nature which is carried out in a routine manner as per the direction of the principal without application of mind and hence B4U is not an dependent agent. Nearly 4.69% of the total income of B4U India is commission / service income received from the assessee company and, therefore, also it cannot be termed as an dependent agent. As far as the alternate contentions are concerned, it was held that the assessee and B4U India were dealing with each other on arm's length basis. 15% fee is supported by Circular No.742. Thus it was held that no further profits should be taxed in the hands of the assessee. On appeal by the department to the High Court, HELD dismissing the appeal:

(i) As per the agreement between the assessee and B4U, B4U India is not a decision maker nor it has the authority to conclude contracts Further, the Revenue has not brought anything on record to prove that agent has such powers and from the agreement any such conclusion could not have been drawn. Barring this agreement, there is no material or evidence with the Assessing Officer to disprove the claim of the assessee that the agent has no power to conclude the contract. This finding is rendered on a complete reading of the agreement. The Indo-Mauritius DTAA requires that the first enterprise in the first mentioned State has and habitually exercised in that State an authority to conclude contracts in the name of the enterprise unless his activities are limited to the purchase of goods or merchandise for the enterprise is a condition which is not satisfied. Therefore, this is not a case of B4U India being an agent with an independent status.

(ii) The findings of the Supreme Court judgment in Morgan Stanley & Co**.** that there is no need for attribution of further profits to the permanent establishment of the foreign company where the transaction between the two is at arm's length but this was only provided that the associate enterprise was remunerated at arm's length basis taking into account all the risk taking functions of the multinational enterprise. Thus, assuming B4U India is a dependent agent of the assessee in India it has been remunerated at arm's length price and, therefore, no profits can be attributed to the assessee. The argument that the assessee had not subjected itself to the transfer price regime and cannot derive assistance from this judgment is not correct because the requirement and in relation to computation of income from international transactions having regard to arm's length price has been put in place in Chapter-X listing special provisions relating to avoidance of tax by substituting section 92 to 92F by the Finance Act of 2001 with effect from 1st April, 2002. Therefore, such compliance has to be made with effect from assessment years 2002-03. In any event, we find that the Tribunal has rightly dealt with the alternate argument by referring to the Revenue Circular 742. There, 15% is taken to be the basis for the arm's length price. Nothing contrary to the same having been brought on record by the Revenue. Similarly, the Division Bench judgment of this Court in the case of Set Satellite (Singapore) Pte.Ltd. vs. Deputy Director of Income Tax (IT) & Anr**.** (2008) 307 ITR 265 would conclude this aspect.

(iii) The argument that the transponder charges being a consideration and process as clarified in terms of Explanation (6) to section 9 of the IT Act, the assessee was obliged to deduct tax at source under section 195 and having not deducted the same, there has to be a disallowance under section 40(a)(i) of the IT Act is not required to be answered. It was doubtful whether any payment which is stated to be made to a US based company by the assessee which is a Mauritius based company, can be brought to tax in terms of Indian tax laws. We are of the opinion that any wider question or controversy need not be addressed. We clarify that the arguments based on whether the payments made could be brought within the meaning of the word "process" and within the explanation can be raised and are kept open for being considered in an appropriate case. (AY. 2001-02, 2004-05, 2005-06)

DIT v. B4U International Holding LTD (2015) 374 ITR 453/ 119 DTR 73/ 277 CTR 213/231 Taxman 858 (Bom.)(HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Lump sum consideration for supply, installation and erection of machinery with relevant know how even if the said amount was treated as royalty, it was covered by S.90 and therefore not liable to tax-DTAA-India-UK. [S. 90].

Amount paid by assessee to the foreign company for imparting technical know-how under collaboration-cum-service agreements being part of lump sum consideration for installation and erection of machinery cannot be treated as royalty. Though there is a possibility to interpret the clauses of the agreement in such a way that the foreign company retained with it the ultimate patent and prohibited sublease or other unauthorized uses thereof by the assessee, the predominant factors are suggestive of the fact that the consideration paid by the assessee under the know-how license and engineering agreement for parting with technical know-how cannot be treated as royalty. Further, it is not a case of mere licensing of know-how but the same is coupled with engineering. Therefore the impugned amount paid by the assessee to foreign company cannot be treated as royalty. Even if said amount is treated as royalty, it is covered by Indo-UK DTAA and therefore it is not liable to tax in India. (AY. 1988-89 ,1989-90)

CIT v. Andhra Petrochemicals Ltd. (2015) 114 DTR 41/275 CTR 58/230 Taxman 402 (AP)(HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India-Royalty –Fees for technical services-Consideration paid for right to use technical knowhow etc. would be taxable as 'royalty' and consideration paid for technical services taxable in India to the extent they are performed in country of source--DTAA-India-Austria. [S. 9(1)(vii), 90, Art. 6, 7]

Assessee had agreed to furnish to an entity, knowhow and technical assistance for manufacture of hydro power equipment and marketing the same. Assessee deputed its technical experts to the entity's factory to assist them in setting up and commissioning manufacturing facilities in the design and manufacturing of products. The agreement described lump-sum payment towards 'information and services to be furnished' and recurring payment as 'royalty'. AO treated entire amount towards royalty taxable under article 6 of DTAA. Held that the agreement with the entity would fall in the category of contract involving supply of technical know-how etc. as well as technical services. Thus both article 6 & 7 of DTAA would be applicable. Consideration paid for right to use technical knowhow etc. would be taxable as 'royalty' and consideration paid for technical services taxable in India to the extent they are performed in country of source. (AY. 1989-90 , 1990-91)

CIT v. VOEST Alpine (2015) 114 DTR 188 / 230 Taxman 405 / 274 CTR 84 (Delhi)(HC)

S. 9(1)(vi):Income deemed to accrue or arise in India- Royalty- Fees for technical services - Consideration for supply of software (whether with or without equipment) is not taxable as "royalty" if there is no transfer of right in the copyright to the software-DTAA-India- USA [S.9(1)(vii) 115A,Art,2, 5 12, 24, Copy right Act,1957, S. 14,52(1)(aa)(ad)]

Allowing the appeal of assesse the Tribunal held that: Consideration received by the Assessee for supply of product along with license of software to End user is not royalty under Article 12 of the Tax Treaty. Even where the software is separately licensed without supply of hardware to the end users (i.e. eight out of 63 customers), we are of the view that the terms of license agreement is similar to the facts of Infrasoft Ltd . Accordingly, we hold that there was no transfer of any right in respect of copyright by the assessee and it was a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article. Hence, the payment for the same is not in the nature of royalty under Article 12 of the Tax Treaty. The receipts would constitute business receipts in the hands of the Assessee and is to be assessed as business income subject to assessee having business connection/ PE in India. Appeal of assesse was partly allowed. (ITA No. 1124 & 1125/Del/2014, dt. 18.05.2015) (AY.2003-04 to 2010-11)

Aspect Software Inc v. ADIT (Delhi)(Trib.); www.itatonline.org

S. 9(1)(vii): Income not included in total income-Non-resident- Royalty-Mere right to use or permission to use intellectual property rights/know-how - No transfer of full ownership - Not a case of outright sale-Payment taxable in India as royalty – DTAA- India-Germany [Art. VIIIA]

The proprietorship or ownership rights continued to vest with ADC, non-resident, but the right to use with trade name, technology, etc., was granted by ADC to HCL, the assessee. Thus, it was not a case

of transfer of ownership rights. Therefore, the payments by HCL to ADC were for mere right to use intellectual property rights and know-how and not for transfer of full ownership. The payments to ADC would be taxable in India as royalty. (AYs. 1989-1990, 1990-1991)

HCL Ltd.v. CIT (2015) 372 ITR 441/276 CTR 416/54 taxmann.com 231/116 DTR 89 (Delhi)(HC)

S. 9(1)(vii) : Income deemed to accrue or arise in India –Shipping business-International traffic-Fees for technical services- Amount paid by Indian entities as "share of cost" of utilizing automated telecommunications system is not assessable as "fees for technical services" if there is not profit element in it-DTAA-India- Denmark [S. 44B,90, 115A, 172, Art.7,8, 9,13(4)]

The assessee had three agents working for them viz. Maersk Logistics India Limited (MLIL), Maersk India Private Limited (MIPL) and Safmarine India (Pvt) Limited (SIPL). These agents would book cargo and act as clearing agents for the assessee. In order to help them in this business, the assessee had procured and maintained a global telecommunication facility called MaerskNet which is a vertically integrated communication system. The agents would incur pro rata costs for using the said system and the agents share of the cost was, therefore, recovered from these three agents. According to the assessee, it was merely a system of cost sharing and hence the payments received by the assessee from MIPL, MLIL and SIPL were in the nature of reimbursement of expenses. However, the AO and CIT(A) held that the amounts paid by these three agents to the assessee is consideration / fees for technical services rendered by the assessee and taxable in India under Article 13(4) of the DTAA and assessed tax at 20% under section 115A of the Income Tax Act, 1961. The assessee submitted before the Tribunal that without this system, it was not possible to conduct international shipping business efficiently and in having the system set up, the assessee had incurred costs. A share of this cost would have to be borne by each of the agents which utilise the system and, accordingly, these pro rata costs relatable to each of the agents was billed to the agents and these amounts were thus paid. It was merely a "charging back" to the agent, proportionate costs of the global shipping communications system and did not, in any manner, amount to rendering of any technical services. The Tribunal accepted the contention of the assessee. On appeal by the department to the High Court HELD dismissing the appeal:

(i) There is no finding by the Assessing Officer or the Commissioner that there was any profit element involved in the payments received by the assessee from its Indian agents. On the other hand, having considered the various submissions, we are of the view that no technical services as contemplated by the Act have been rendered in the instant case;

(ii) In Director of Income Tax (International Taxation) vs. Safmarine Container Lines NV (2014) 209 ITR 366, this Court had occasion to consider the effect of the Double Taxation Avoidance Agreement between India and Belgium in which the questions involved were whether the income from inland transport of cargo within India was covered by Article 8(2)(b)(ii) of the Tax Treaty between India and Belgium. This Court, while considering the said issue found that the assessee was not liable to tax by virtue of DTAA in that case. Moreover, in the present case, there was no occasion for the Tribunal to come to any different view. In our view, the Tribunal has correctly observed that utilization of the Maersk Net Communication system was an automated software based communication system which did not require the assessee to render any technical services. It was merely a cost sharing arrangement between the assessee and its agents to efficiently conduct its shipping business. The Maersk Net used by the agents of the assessee entailed certain costs reimbursement to the assessee. It was part of the shipping business and could not be captured under any other provisions of the Income Tax Act except under DTAA;

(iii) In Commissioner of Income-tax V/s. Siemens Aktiongeselleschaft reported in [2009] 310 ITR 320 (Bom) this Court has held that once there is a treaty between two sovereign nations, though it is open to a sovereign Legislature to amend its laws, a DTAA entered into by the Government, in exercise of the powers conferred by section 90(1) of the Act must be honoured. The provisions of Section 9 Income Tax Act were applicable and the provisions of DTAA, if more beneficial than the I.T. Act, the provisions of DTAA would prevail. Thus, in the instant case also, it is not possible for the revenue to unilaterally decide contrary to the provisions of the DTAA. (AY.20O1-02 to 2003-04)

DIT v. A. P. Moller Maersk A/S (2015) 374 ITR 497 /120 DTR 147/ 278 CTR 139/ 232 Taxman 564(Bom.)(HC)

S. 9(1)(vii) : Income deemed to accrue or arise in India- Fees for technical services-Though construction, installation and assembly activities are de facto in the nature of technical services, the consideration thereof will not be assessable under Article 12 but will only be assessable under Article 7 if an "Installation PE" is created under Article 5. As Article 5 is a specific provision for installation etc, it has to prevail over Article 12.[S. 5, Art. 7, 12]

The Tribunal had to consider whether consideration attributable to the installation, commissioning or assembly of the plant and equipment & supervisory activities thereof is assessable to tax in India under section 5(2)(b) & 9(1)(vii) of the Act and Article 5 & 7 and Article 12 of the DTAA. HELD by the Tribunal:

(i) Under s. 5(2)(b) of the Act, the consideration attributable to the installation, commissioning or assembly of the plant and equipment & supervisory activities thereof is assessable to tax in India as the said income accrues in India. S. 9(1)(vii) does not apply because the definition of 'fees for technical services' in Explanation 2 to s. 9 (1)(vii) specifically excludes "consideration for any construction, assembly, mining or like project undertaken by the recipient". Even though the exclusion clause does not make a categorical mention about 'installation, commissioning or erection' of plant and equipment, these expression, belonging to the same genus as the expression 'assembly' used in the exclusion clause and the exclusion clause definition being illustrative, rather than exhaustive, covers installation, commissioning and erection of plant and equipment;

(ii) However, the said receipt is not assessable as business profits under Article 7(1) of the DTAA if the recipient does not have an "installation PE" in India. Under the DTAA, an installation or assembly project or supervisory activities in connection therewith can be regarded as an "Installation PE" only if the activities cross the specified threshold time limit (or in the case of Belgian & UK, where the charges payable for these services exceeds 10% of the sale value of the related machinery or equipment). The onus is on the revenue authorities to show that the conditions for permanent establishment coming into existence are satisfied. That onus has not been discharged on facts;

(iii) On the question as to whether the said receipt for installation, commissioning or assembly etc activity can be assessed as "fees for technical services", it is seen that the DTAA has a general provision in Article 12 for rendering of technical services and a specific provision in Article 5 for rendering of technical services in the nature of construction, installation or project or supervisory services in connection therewith. As there is an overlap between Article 5 and Article 12, the special provision (Article 5) has to prevail over the general provision (Article 12). What is the point of having a PE threshold time limit for construction, installation and assembly projects if such activities, whether cross the threshold time limit or not, are taxable in the source state anyway. If we are to proceed on the basis that the provisions of PE clause as also FTS clause must apply on the same activity, and even when the project fails PE test, the taxability must be held as FTS at least, not only the PE provisions will be rendered meaningless, but for gross versus net basis of taxation, it will also be contrary to the spirit of the UN Model Convention Commentary. Accordingly, though construction, installation and assembly activities are de facto in the nature of technical services, the consideration thereof will not be assessable under Article 12 but will only be assessable under Article 7 if an "Installation PE" is created;

(iv) In any event, the said consideration cannot be assessed as "fees for technical/ included services" as the "make available" test is not satisfied. The said installation or assembly activities do not involve transfer of technology in the sense that the recipient of these services can perform such services on his own without recourse to the service provider (this is relevant only for the DTAAs that have the "make available" condition). (AY. 2010-11, 2011-12)

Birla Corporation Ltd. .v. ACIT(2015) 153 ITD 679 (Jab.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India –Fees for technical services-DTAA-India- Singapore-Matter remanded. [S.40(a)(i),195, Art. 12]

The assessee-company was engaged in the business of manufacturing and installation of structural glazing works in India. Assessee entered into a management services agreement with its Singapore holding company and made payment for same without deduction of tax at source .AO opined that payment was towards 'Fees for Technical Services' and assessee was liable to deduct TDS before making payment to non-resident holding company and thus invoked provisions of section 40(a)(i).

Assessee stated that services received by it from its holding company was not 'Fees for Technical Services' as per DTAA between India and Singapore and therefore TDS was not required to be deducted and provisions of section 40(a)(i) were not attracted. Tribunal held that AO had only considered applicability of definition of term 'Fees for Technical Services' under section 9(1)(vii) and had not considered applicability of definition of 'Fees for Technical Services' under DTAA between India and Singapore and had also not examined as to which of provisions was beneficial to assessee, matter required readjudication. Matter remanded. (AY. 2008-09)

Permasteelisa (India) (P.) Ltd. .v. Dy. CIT (2014) 51 taxmann.com 502 / (2015) 67 SOT 21 (URO)(Bang.)(Trib.)

S. 10(10C) : Any amount received or receivable by an employee- Bank employee - Exit option scheme - Employee serving for more than ten years and at time of retirement more than forty years of age - Second exit option scheme for overall reduction of employees - Employee declaring he had not accepted any commercial employment in any company belonging to same management - Scheme fulfilling conditions in rule 2BA - Ex gratia amount entitled to exemption. [ITR.2BA]

The assessee had served for a period of more than ten years and at the time of retirement was more than forty years. For the assessment year 2008-09, he declared a total income of Rs. 6,94,390. He exercised the option of voluntary retirement under the exit option scheme and claimed ex gratia/compensation amount as determined under section 10(10C). Though the original authority disallowed the claim of the assessee on the ground that the scheme did not satisfy the conditions laid down under rule 2BA of the Income-tax Rules, 1962, the Commissioner (Appeals) allowed the claim of the assessee. This was confirmed by the Tribunal. On appeal :

Held, dismissing the appeal, that the second exit option scheme was introduced to reduce the staff. It was just impossible to continue in the new environment of computerisation applied to the workers and officers. The scheme had resulted in overall reduction of the employees. The assessee had furnished the declaration that he had not accepted any commercial employment in any company or concern belonging to the same management. Thus, the Commissioner (Appeals) concluded that all the conditions laid down in rule 2BA were fulfilled. The assessee entitled to exemption of the ex gratia payment under section 10(10C) .(AY. 2008-2009)

CIT v. Appasaheb Baburao Kamble (2015) 370 ITR 499/ 122 DTR 238 (Karn.) (HC)

S. 10(10D) : Life insurance policy-Keyman insurance policy - Even a "United Linked Endowment Assurance Plan" with the main object of guaranteed returns rather than life insurance is a "keyman insurance" as defined in s. 10(10D). The fact that policy was not termed as a "keyman insurance" and the fact that the IRDA Guidelines disapproved the issue of such policies is irrelevant.

The assessee claimed a deduction of Rs 1,49,99,222 towards keyman insurance policy on its partner Shri Sanjeev Suri. The Assessing Officer disallowed the claim. This was confirmed by the CIT(A). On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) All that is required for an insurance policy to meet the requirements of Section 10(10D), therefore, has to be – (a) it should be a life insurance policy; (b) it should be taken by the assesse on the life of another person who is, or was, an employee of the assesse or is related to the business of the assesse is any manner. As long as a policy is an insurance policy, whether it involves a capital appreciation or is under any other investment scheme, it meets the tests laid down under section 10(10D). Even if such an inference is desirable, as long as it does not emerge from the plain words of the statute, it cannot be open to supply the same. The concepts of term policy, pure life policy and the IRDA guidelines find no mention in the statutory provisions. But even if these concepts ought to be incorporated in this statutory provision of the Income Tax Act to make it more meaningful and workable, it cannot be open to any judicial forum to supply these omissions.

(ii) The IRDA guidelines, no matter how relevant as these guidelines may be, have no role to play in the interpretation of the statutory provisions. IRDA is a body controlling the insurance companies and its guidance is relevant on how the insurance companies should conduct their business. Beyond this limited role, these guidelines do not affect how the provisions of the Income Tax Act are to be construed. Whenever the provisions of the other statutes are to be taken into account, for interpreting

the provisions of the Income Tax Act, the Income Tax Act specifically provides so. The fulfilment of IRDA terms and conditions is wholly alien to the present context. As for the policy being taken for the benefit of the assesse firm, as long as it is for the purpose of taking an insurance policy on the life of a person who is related to the firm, the same cannot be called into question either.

(iii) The fact that the insurance policies in question were not termed as keyman insurance policies is irrelevant. The keyman insurance policy is a defined concept and as long as it meets the requirements of this definition, the terminology given by the insurers have no relevance for the purposes of the Income Tax Act. All that is necessary is that it should be a life insurance policy, whether pure life insurance policy or not- as such criterion is not set out anywhere in the stature, and it should be taken on the life of a person who is, or has been, an employee of the assesse or any other person who is or was connected in any manner whatsoever with the business of the assesse. These conditions are clearly satisfied on the facts of the case before us.

(iv) The Assessing Officer has questioned commercial expediency of taking the keyman insurance policies on the short grounds that (a) the fall in turnover, apparently according to the Assessing Officer, shows that there was no commercial benefit from taking the keyman insurance cover; (b) the insurance policy was taken for the benefit of the partner rather than the firm; and (c) no necessity or expediency of the person being keyman and the policy being taken for the benefit of the firm was established. When benefit of policy was assigned to the insured, the policy cannot be said to be for the benefit of the assesse firm. We see no merits in these objections to the commercial expediency. As for the fall in turnover, the benefit of an expenditure cannot be, by any stretch of logic, relevant to determine its commercial expediency, and, in any case. Such a benefit of hindsight cannot be available at the point of time when business decisions are made; more often than not, these are the tools of post mortem of events, rather than inputs for the decision making (ITA No. 37/Asr/2010, dt. 31.08.2015) (AY. 2006-07)

Suri Sons v. ACIT (Asr.)(Trib.); www.itatonline.org

S. 10(15) : Exemption-Interest on foreign currency loans- Allowable on gross basis and not on net basis.[S.10(15) (iv)(h)]

Interest on foreign currency loans is allowable on gross basis and not on net basis. (AY, 1997-98)

DIT v. Credit Agricole Indosuez (2015) 377 ITR 102 (Bom.)(HC)

S.10(17A):Awards and rewards in cash or kind–Amount received as an award is a capital receipt and hence not taxable.[S. 2(24), 4]

The assessee was an editor of an English magazine claiming exemption of amounts received as awards for excellence in journalism. The AO disallowed the same on the ground that the award did not satisfy conditions of section 10(17A). The CIT(A) reversed the order of the AO holding that the award received was not income as per section 2(24) and thus there was no question of its taxability. The Tribunal upheld the order of the AO.

The High Court following the decision of the Karnataka High Court in the case of International Instruments (P.) Ltd. v. CIT (1982) 133 ITR 283 observed that a receipt may not be 'income' at all within the proper connotation of that term and yet may come within the express exemption under section 10, due to the over-anxiety of the draftsman to make the fact of non-taxability clear beyond doubt and hence held that an award would be a capital receipt and hence not taxable. (AY. 1991-1992)

Aroon Purie v. CIT (2015) 375 ITR 188/ 231 Taxman 349 / 277 CTR 1 / 118 DTR 105 (Delhi)(HC)

S. 10(23AAA) : Funds established for welfare of employees –Contribution by employer-Rejection of application by Commissioner was held to be not valid.

Assessee-trust was constituted for benefit of employees of a port trust. It filed application for registration under section 10(23AAA).Commissioner invoked Rule 16C of Rules and rejected said application holding that employer could not make any payment for corpus and, therefore, one of conditions laid down in section 10(23AAA) was not fulfilled. On writ allowing the petition the Court held that; since as per CBDT guideline, employer contribution in corpus was acceptable, impugned order passed by Commissioner was to be quashed and set aside.

KPT Employees Welfare Trust v. CIT (2015) / 230 Taxman 20 (Guj.)(HC)

S. 10(23C) : Educational institution-Assessee not only failed to supply initially audited accounts and balance-sheet for relevant assessment year but despite opportunities granted, same were not produced nor books of account were shown, rejection of claim on said ground was justified.
Assessee-society, running educational institutions, filed application seeking approval for exemption under section 10(23C)(vi) on 31-3-2010. Application was rejected on ground that it was time-barred and further assessee failed to furnish audited books of account of relevant year.On appeal dismissing the appeal the Court held that; since assessee not only failed to supply initially audited accounts and balance-sheet for relevant assessment year but despite opportunities granted, same were not produced nor books of account were shown, rejection of claim on said ground was justified .(AY. 2010 – 11)
Bhupesh Kumar Sikshan Evam Vikas Sansthan .v. DGIT (2015) 231 Taxman 637 (Patna)(HC)

S. 10(23C):Educational institution-Assessee carrying on its activities of imparting education - Assessee not existing for the sake of profit-making - Government financing assessee to extent of 25% - Substantial finance – Assessee is entitled to exemption.
Held, Government has financed the assessee-institutions and its share was 25%. It was not in dispute that the assessee is carrying on its activities of imparting education. It is not existing for the sake of profit-making. Therefore, it satisfied all the legal requirements provided under section 10(23C)(iiiab), hence entitled to exemption. (AYs. 2003-2004, 2005-2006)
DIT(E)v. Dhamapakasha Rajakarya Prasakta B.M. Sreenivasaiah Educational Trust. (2015) 372 ITR 307/ 232 Taxman 575 (Karn.)(HC)

S. 10(23C) : Educational institution-Merely because there are other objects of the society, refusal of registration was not justified-Matter remanded.
Assessee, a registered society, was running a school. It applied for registration. Chief Commissioner had refused registration On writ the court held that merely because there were other objects of society did not mean that educational institution was not existing solely for educational purpose . Matter remanded. (AY. 2008-09)
Allahabad Young Mens Christian Association v. CCIT (2015) 371 ITR 23/274 CTR 283 /229 Taxman 279 (All.)(HC)

S. 10(23C) : Educational institution-Object clause cannot be the sole test for granting exemption-No business activities carried on except education-Entitled exemption.
Where assessee was a trust and did not carry on any other business save and except conducting education, assessee was entitled to benefit of exemption. An assessee could not be held not to exist solely for educational purposes merely on basis that object clause under which assessee is constituted contains certain generalised objects, so long as assessee had carried on no other activity save and except conducting education. (AY. 2009-10)
CIT .v. Hardayal Charitable & Educational Trust (2015) 228 Taxman 330 (Mag.)(All.)(HC)

S. 10(23C) : Educational institution- promote piety and learning ,particularly among the native Christian population of India-"wholly or substantially financed by the Government"-Matter remanded.
The assesse was a theological university established to promote piety and learning ,particularly among the native Christian population of India. Assessee claimed exemption under section 10(23C)(iiiab), being substantially aided by the Government.AO rejected the explanation and assessed excess of income over expenditure as total income of assesse. CIT (A) confirmed the order of AO. On appeal Tribunal seta side the matter to AO to decide whether the assesse's case falls in the category of "wholly or substantially financed by the Government" . Matter remanded. (AY. 2009-10 , 2010-11)
Senate of Serampore College .v. JCIT(2014) 52 taxmann.com 223/ (2015) 67 SOT 89 (Kol.)(Trib.)

S. 10(23C)(iiiab):Educational institution- Profit motive- Capitation fee-Treating the donations received by it as "capitation fee" on the basis of the allegation of the persons who have made the

said donation must be institution specific and not the Society as a whole is not correct-Entitle exemption.[S. 12A, 10(22), Indian Evidence Act, 1872 S. 91, 92 ,101, IPC S. 181]

(i) The exemption u/s 10(23C) (iiiab) is available to the society as a whole which has been formed for the sole purpose of establishing, running, managing or assisting schools and colleges in different fields. It is the trust or the society that has to apply for registration and claim exemption. Had it been the intention of the Legislature to grant exemption only to the institutions individually or independently and not to the society as a whole, the language would have been different. The society or trust may run more than one institutions. Therefore, the argument of the Revenue that it should be institution specific and not the Society as a whole in our opinion is not correct.

(ii) As regards the question whether the trust is for profit motive, it is the allegation of the Revenue that the assessee trust was collecting the capitation fee in the garb of donation and was therefore running with a profit motive. We find the Assessing Officer has not reported the violation, if any, by the assessee trust to the Government of Maharashtra for taking any action for violation of The Maharashtra Educational Institutions (Prohibition of Capitation Fee) Act, 1987. None of the persons who have deposed against the assessee by stating that they had given donation for the purpose of getting admission has complained to the Government for any such violation by the society. It is also to be noted that those persons have filled up the requisite proforma stating that they have given donation to the assessee voluntarily and not for seeking admission. Even some of them claimed deduction u/s.80G, a fact stated by the assessee and not controverted by the Departmental Representative. Therefore, changing the stands after their wards completed their education from the institutions run by the assessee trust are contradictory. Further, it is also a fact that all donations received by the assessee trust are recorded in the books of account. There is no allegation by the Revenue that any part of such donation has been siphoned off for the benefit of any of the trustees or related persons. Nothing has been brought on record that any student has been denied admission for not giving donation. Merely because some of the donors stated that they have given the donation for admission the same in our opinion will not disentitle the society from getting exemption which is existing solely for educational purposes and which is otherwise entitled to the exemption.(ITA No. 1480/PN/2014, dt. 13.07.2015) (AY. 2008-09)

Deccan Education society v. ACIT (Pune)(Trib.); www.itatonline.org

S. 10(23C)(iiiad): Educational institution-Mere surplus does not mean institution is existing for making profit. The predominant object test must be applied. The AO must verify the activities of the institution from year to year . [11]

Court held that:(1) Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

(2) The predominant object test must be applied – the purpose of education should not be submerged by a profit making motive.

(3) A distinction must be drawn between the making of a surplus and an institution being carried on "for profit".No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.

(4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not be cease to be one existing solely for educational purposes.

(5) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons.

(6) The correct tests which have been culled out in the three Supreme Court judgments, namely, Surat Art Silk Cloth 121 ITR 1 (SC), Aditanar 224 ITR 310 (SC), and American Hotel and Lodging**,** would all apply to determine whether an educational institution exists solely for educational purposes and not for purposes of profit.

(7) In addition, we hasten to add that the 13th proviso to Section 10(23C) is of great importance in that assessing authorities must continuously monitor from assessment year to assessment year whether such institutions continue to apply their income and invest or deposit their funds in accordance with the law laid down. Further, it is of great importance that the activities of such institutions be looked at carefully. If they are not genuine, or are not being carried out in accordance with all or any of the conditions subject to which approval has been given, such approval and exemption must forthwith be

withdrawn. All these cases are disposed of making it clear that revenue is at liberty to pass fresh orders if such necessity is felt after taking into consideration the various provisions of law contained in Section 10(23C) read with Section 11 of the Income Tax Act.(AY. 2000-01 , 2001-02)

Queen's Educational Society .v. CIT (2015) 372 ITR 699 / 275 CTR 449 / 117 DTR 1/ 231 Taxman 286 (SC);

UOI v. Pinegrove International charitable Trust & Ors. 275 CTR 449 / 117 DTR 1 (SC);

Editorial: Decision in CIT vs. Quuen's Educational Society (2009) 319 ITR 160 (Uttarakhand)(HC) is reversed.

S.10(23C)(iiiad):Educational institution-Society coaching students appearing for civil services examination-Activity education within meaning of section 2(15)-Activity without profit motive-Department allowing exemption in preceding and subsequent assessment years--Eligible for exemption [S. 2(15), 11, 12A]

The assessee, a registered society under the Societies Registration Act, was established with the objects to promote literacy, scientific and other educational activities to undertake research programmes and to arrange training of local boys and girls appearing at the competitive examination held by bodies such as the Union Public Services Commission and the Andhra Pradesh Public Service Commission, and claimed exemption under section 10(23C)(iiiad) of the Act. The Assessing Officer held that coaching students and preparing them for particular competitive examinations was not of the nature of imparting education and that the assessee was not a charitable institution under section 2(15) of the Act and disallowed exemption. The Commissioner (Appeals) held that the assessee was engaged in providing training and skills focused at enabling its students to obtain jobs through competitive examinations and was doing it in a systematic and structured manner. Award of formal degrees or certificates at the culmination of the training programme was not a mandatory requirement for qualifying as education. Therefore, he held that the activities of the assessee fell in the realm of "education" and that it was eligible for exemption under section 10(23C)(iiiad). On appeal by the Department :

Held, that education is one of the activity coming within the meaning of the definition of "charitable purpose". Therefore, if education is considered to mean training and developing the skill, knowledge, mind and character of students, then the activity of the assessee can be termed to be coming within the expression "education" as used in section 2(15) of the Act. Moreover, the provision contained under section 10(23C)(iiiad) used the words "any University or other educational institution" solely for educational purpose and not for the purpose of profit. If the activities of the assessee were as enumerated in the aims and objects then it had to be considered as other educational institution existing solely for educational purpose and without profit motive. Therefore, the assessee would be eligible for exemption under section 10(23C)(iiiad). However, when the Department had accepted the assessee`s claim to exemption not only in the preceding assessment years but also in subsequent assessment years, under similar facts and circumstances, a contrary view should not be taken. There was no dispute that the assessee was a registered charitable institution under section 12A of the Act and it could alternatively have claimed exemption under section 11 of the Act. The Assessing Officer had ignored this aspect and had failed to examine whether the assessee was eligible for exemption under section 11 of the Act. Therefore, the order of the Commissioner (Appeals) was to be upheld.)(AY. 2007-2008)

ADIT v. Hyderabad Study Circle(2015) 38 ITR 293/ 68 SOT 194 (Hyd)(Trib)

S.10(23C)(iiiad) : Educational institution-Donations received with specific direction that receipts should form part of corpus to be excluded-Gross receipts not exceeding Rs. 1 crore-Assessee entitled to exemption.

The assessee was a society running an educational institution. It claimed exemption under section 10(23C)(iiiad) of the Act. The Assessing Officer found that the gross receipts of the society exceeded Rs. 1 crore and therefore, he denied exemption. The Commissioner (Appeals) observed that the total receipts of the educational institution was Rs. 69,24,857 society received Rs.39,15,102 as donations towards corpus fund and held that amounts contributed voluntarily by donors with specific direction that they should form part of the corpus would not constitute income of the society. Therefore the

receipts of the educational institution were below Rs. 1 crore and exemption was to be allowed. On appeal by the Department :
Held, that once the corpus donations received by the assessee-society were separated, the annual receipts of the educational institution were only Rs. 69,24,857. Therefore, annual receipts of the educational institution of the assessee-society was below Rs. 1 crore and it was entitled to exemption under section 10(23C)(iiiad). (AY. 2008-2009)
ACIT v. Shiksha Samiti (2015) 38 ITR 616(Delhi) (Trib)

S. 10(23C)(iv) :Fund or institution-Charitable purposes-Printing and publication of newspaper-Change of law-Not carrying on activity of profit and not charitable in nature according to new law--Not entitled for exemption. [S. 2(15)]
The assessee was engaged in the business of printing and publication of newspaper. In the assessee's own case, the Privy Council had held that the activity of the assessee to be that of a charitable trust providing service in the nature of general public utility. For the assessment year 2009-10, the assessee claimed exemption under section 10(23C)(iv) of the Act. The AO rejected the claim on the ground that, since the assessee was engaged in advancement of general public utility in the nature of trade, commerce or business, for which consideration was charged against the provisions of section 2(15) of the Act, the assessee could not be treated as a charitable trust. The Commissioner (Appeals) allowed the exemption on the basis of notification issued by the Central Board of Direct Taxes approving the assessee for exemption under section 10(23C)(iv) of the Act. On appeal by the Department:
Held, allowing the appeal, that after the insertion of the expression "not involving the carrying of any activity for profit", the decision of the Privy Council in the assessee's own case could not be followed. A more elaborated proviso had been again added under section 2(15), making it clear that, if a trust was engaged in the advancement of any object of general public utility, it could not be considered to be engaged in a charitable purpose, if it was involved in carrying on any activity in the nature of trade, commerce or business. The assessee trust was a large organisation employing a number of qualified persons including chartered accountants and advised by advocates and the income and expenditure accounts of the assessee made it clear that the assessee had definitely earned profits. Admittedly, the assessee had filed a return of fringe benefits under section 115WA of the Act. The assessee could not, on the one hand, file a return of fringe benefits and on the other, claim exemption under section 10(23C). The assessee was not entitled for exemption. (AY. 2009-2010)
ACIT v. The Tribune Trust (2015) 37 ITR 468(Chandigarh)(Trib.)

S. 10(23C)(vi) : Exemption- Mandatory object to perform education –Entitle exemption.
when the object of the Trust to provide education is fulfilled, rendering other object and earning profit out of the said object does not prevent the trust to claim exemption-matter remanded for reconsideration.(AY. 2008-09)
Allahabad Young Mens Christain Association v. CCIT (2015) 371 ITR 23/ 274 CTR 283/ 229 Taxman 279/ 114 DTR 129(All)(HC)

S. 10(23C)(vi) : Exemption-Approving authority should not merely see the objects specified in the instrument/deed, but also the activities of the Trust and how the funds are employed for the purpose of granting approval.[S.12A]
The Trust was registered as a public charitable trust u/s 12A in 1976 with many objects such as relief of the poor, education, medical relief, providing scholarships, establishing hostels, orphanages, etc. and runs a polytechnic college recognized by the Govt. of Tamil Nadu. On making an application for the renewal of the approval, the Chief CIT rejected the assessee's application stating that the Trust does not exist solely for the purpose of education.

On appeal to the Court, it held that merely because there are other objectives for the Trust, other than education, that would not disentitle the Trust to exemption under section 10 (23C) (vi) of the Act. Furthermore, while considering the claim for exemption, the substance of the claim would be more relevant than the form. In other words, the authority should not be solely guided by the objects set out in various clauses in the Instrument of Trust (Deed of Trust). Rather, the authority should be guided by the activities of the Trust, as to how the funds are employed, since the exemption sought is under

Chapter III of the Act, which deals with incomes which do not form part of the total income. Accordingly, the High Court allowed the writ petition and remanded back the matter to the first respondent for fresh consideration.
Tamil Nadu Kalvi Kapu Arakkattalai .v. CCIT (2015) 115 DTR 277 (Mad)(HC)

S. 10(23C)(vi) : Educational institution–Memorandum providing various other objects-Rejection of application was not justified.
The assessee established an educational institution in a rural segment. Apart from the B. Ed. course, the institution imparted education leading to the conferment of B.A., B. Sc. & M. Sc. degrees. Since receipts of the assessee institution exceeded the threshold limit of Rupees one crore, an application under section 10(23C)(vi) was filed before the Chief Commissioner. Chief Commissioner had rejected application for exemption under section 10(23C)(vi) of assessee, running educational institution on ground that its memorandum of association provided for various other objects apart from educational activities. Court held that mere presence of objects in memorandum providing for other charitable activities would not disentitle a society to claim approval under section 10(23C)(vi), where it is established that institution is, in fact, carrying on only educational activities. Accordingly, the petition was allowed and the proceedings should be remitted back to the Chief Commissioner for a fresh decision.
Neeraj Janhitkari Gramin Sewa Sansthan .v. CCIT (2015) 228 Taxman 167 (Mag.) (All.)(HC)

S. 10(23C)(via) : Educational institution- Exemption was not claimed in return- Commissioner granted exemption- Revenue cannot complain against granting of exemption-Appeal-Grounds not pressed by the counsel at the time of hearing cannot be taken in appeal before the High Court.[[S. 11, 12A , 260A]
The assessee was a trust registered under the Bombay Public Trust Act, 1950 by the Charity Commissioner of Maharashtra State. It was also registered under section 12A of the Income-tax Act. Assessee did not claim exemption under section 10(23C)(via) in return where it claimed exemption under section 11, however, Commissioner by his order held that assessee trust was qualified for exemption under section 10(23C)(via) as per approval received during assessment proceedings. Tribunal confirmed said order. where authority was satisfied with regard to essential requirements or ingredients of section 10(23C)(via), then, it was not open for revenue to complain .
The court also observed that "In a decision rendered by the Hon'ble Supreme Court reported in the case of *Daman Singh* v. *State of Punjab* AIR 1985 SC 973, the Hon'ble Supreme Court has commented and rather strongly on the tendency of parties to urge before the Higher Court that a particular ground in the Petition or memo of Appeal was pressed but not considered by the subordinate court or Tribunal. The tendency of parties to complain to the higher Court on such issue is strongly deprecated. It has been pointed out by the Hon'ble Supreme Court and repeatedly that several grounds are set out in memos of Appeals and Petitions. It is eventually a counsel's discretion about which of that should be pressed and which ought not. If the counsel in his discretion chooses not to press certain grounds, then, the complaint of this nature cannot be made subsequently and in a higher Court. Even if such grounds are being pressed during the course of argument before the subordinate or lower Appellate Court, yet, it is not for the parties to complain to the higher Court straightway about such omission but to place material that the omission of such ground and which was raised in the memo was indeed pointed out to the subordinate or lower Appellate Court by making an application for clarification and rectification and that explanation was either decided or dealt with erroneously. In the absence of such material, complaints made to higher Court cannot be entertained.(AY. 2007-08)
DIT v. Bommanji Dinshaw Petit (2015)229 Taxman 370 (Bom.)(HC)

S. 10(23C)(via) :Hospital or institution-Institution consistently generating surplus, utilizing the surplus to buy assets, spending meager amount on treatment of poor patients is not existing "solely for philanthropic purpose" and "not for the purpose of profits". Fact that exemption has been allowed in the past does not mean exemption has to be continued-Rejection of application for exemption was held to be justified.
(i) A plain reading of s. 10(23C)(via) shows that the legislative emphasis is on a twin requirement . Firstly the purpose for which the trust is existing, which should be solely an existence for a

philanthropic purpose and secondly it should not be for profit. This interpretation sub-serves the object of the provision. The clear language of the provision show that the intention of the legislature is to benefit those institutions which cater to variety of illness and suffering as a service to the society and solely for philanthropic purpose and not for the purpose of profit. An existence of the institution ostensibly for a philanthropic purpose and in reality for profit, would not qualify an institution for a deduction under this provision. This would not mean that such an institution cannot incidentally have a reasonable surplus which it utilizes for philanthropic purposes;

(ii) On facts, it was reflected that the petitioner was earning surplus revenue from its activities and that the assets were increasing. The fact that surplus was generated is not disputed by the petitioner. This surplus revenue was utilized for acquisition of assets which in the opinion of the CCIT was capable of generating more income. In AY 2006-07, 2007-08, 2008-09 and 2009-10, the percentage of transfer of gross surplus to the development fund was at 19.12%, 28.37%, 73.17% and 12.12% respectively. Accompanied with this, there was a huge increase in fixed assets from Rs.63,75,577 in AY 2006-07 to Rs.8,02,75,706 in AY 2009-10 which was approximately an increase of Rs.7.50 crores within four years. Petitioner's cash and bank balances also increased from Rs.1,42,420 to Rs.1,74,15,757 during the same period which was an increase of about Rs.1.30 crores. The petitioner had purchased land admeasuring 8,350 sq. meters for an amount of Rs.363.63 lacs. The reasoning as given by the CCIT that all these figures go to show that there was a systematic generation of profits from the activities of the petitioner coupled with the increase in assets which would generate more income / profits cannot be said to be without any basis, arbitrary or perverse. Hence, it was not improper for the CCIT to draw a reasonable inference that the petitioner is not existing solely for philanthropic purpose and for profits, in our opinion cannot be faulted;

(iii) The statement of expenditure incurred by the petitioner showing the concessional treatment claimed to be offered by it clearly indicates that the petitioner has spent meager amount on the weaker section of the society which negatives the contention of the petitioner that the petitioner is existing solely for philanthropic purpose and not for profit;

(iv) A perusal of the statement of the hospital charges and fees furnished by the petitioner shows the very negligible percentage of poor/needy patients receiving treatment in the hospital of the petitioner. What is more glaring are the details in the two columns namely 'Gross Concessional Amount Receivable' and 'The amount Received from Poor patients.' These figures in no manner would inspire any confidence or make a prudent person believe that the petitioner is in fact existing for philanthropic purposes. We say so, for the reason, that it is inconceivable that poor patients would be in a position to pay large amounts as indicated by the petitioner in details given in these financial statements. The CCIT has rightly come to a conclusion that the concessional treatment as given by the petitioner for the above assessment years being meagre 3.56 %, 6.45% and 4.45% respectively, definitely does not speak of the existence of the petitioner for philanthropic purposes;

(v) One more factor which needs to be noted is in regard to the resolution passed by the petitioner which does not specify the purpose of acquisition of the land but only authorises the acquisition of the land at a particular price. The alarming figures of large surplus as generated by the petitioner and the utilization of those surplus for acquisition of assets would speak against the petitioner existing solely for philanthropic purpose and not for profit. This would disentitle the petitioner to the benefit of section 10 (23) (via). If the petitioner was to solely exist for philanthropic purposes and was to conduct the hospital to achieve that object by providing treatment to the weaker sections of the society, it could not have been possible for the petitioner to achieve such a huge surplus and the consequent enabling of the petitioner to utilize such surplus funds to generate assets.

(vi) The contention on behalf of the petitioner that looking to the manner in which the exemption was allowed in the past, the CCIT ought to have granted its application under section 10 (23C)(via) of the Act is completely misconceived and contrary to the requirement of the statutory provision. It was the legal duty of the CCIT to consider independently the application of the petitioner for the assessment year in question on the basis of the material as submitted by the petitioner and applying the requirements of the provisions of sub-clause 23C (via) of section 10 decide the same independently. Any deduction and/or exemption as granted to the petitioner for earlier assessment years cannot be claimed to be of any consequence by the petitioner so as claim this deduction as a matter of right for AY 2009-10 and thereafter. Writ petition of assesse was dismissed.

Yash Society v. CCIT(2015) 375 ITR 152/ 275 CTR 510/ 231 Taxman 256/116 DTR 329 (Bom.)(HC)

S. 10(23C)(via) : Hospital or instititution-Educational institution –Firm-Capital gains-Consideration received on account relinquishment of right in firm - Appellate authorities finding not a transfer and no capital gains tax leviable-Independent of exemption-Matter remanded. [S.45]

On the question whether the appellate authorities were correct in holding that the relinquishment of a right in the firm by the assessee and the receipt of the consideration would not amount to a transfer and no capital gains tax was leviable for the assessment year 2001-02 and whether it was independent of exemption under section 10(23C)(via), held, in view of the decision of a co-ordinate Bench of the court in CIT v.Manipal Academy of Higher Education (MAHE)(2013) 357 ITR 114 (Karn)(HC), the orders of lower authorities were to be set aside and the matter remanded to the assessing authority.(AY. 2001-2002)

CIT .v. Medical Relief Society of South Kanara (2015) 370 ITR 497 (Karn.)(HC)

S. 10(23C)(via) : Hospital or instititution-Charitable institution - Exemption - Continuation of grant of exemption-Fourteenth proviso-Proviso not applicable to previous year which had already expired before introduction of proviso.

The fourteenth proviso to section 10(23C)(via) of the Income-tax Act, 1961, is intended to ensure that any application preferred after June 1, 2006, for the purposes of grant of exemption or continuation thereof is made during the financial year immediately preceding the assessment year for which the exemption is sought. This would mean that, in the case of an assessee choosing to claim the benefit under section 10(23C)(via) for any assessment year after June 1, 2006, the application for the assessment year would necessarily have to be made during the previous year relevant to the assessment year. The proviso obviously cannot have any application to those cases where the previous year, relevant to an assessment year, had already expired before the introduction of the proviso under section 10(23C)(via). The assessment of an assessee in any assessment year is governed by the law prevailing as on the 1st day of April of the relevant assessment year. The fourteenth proviso inserted with effect from June 1, 2006, would have no application to the assessment of the assessee for the assessment years. The proviso would govern only the exemption that was to be granted with effect from the assessment year 2007-08 onwards. Writ petition of the assesse was allowed. (AY .2005-2006, 2006-2007)

Marthoma Medical Mission v. Chief CIT (2015) 370 ITR 418/ 121 DTR 328 (Ker) (HC)

S. 10(23G):Interest from investments in infrastructure capital company-Failure by assessee to submit approval from competent authority before Assessing Officer and Commissioner (Appeals)-Assessee should be granted opportunity to produce required certificate-Matter remanded.

Failure by assessee to submit approval from competent authority before Assessing Officer and Commissioner (Appeals). Assessee should be granted opportunity to produce required certificate. Matter remanded.(AY.2005-2006)

ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250(Bang.)(Trib.)

S. 10(23G):Any income by way of dividends- Income of financial institution from investments in infrastructure facility—Matter remanded.

Exemption can be allowed only if income in nature of "Business income". Income from interest on deposit, staff loan, Government securities. As there was no proper explanation as to true nature of income-Matter remanded.(AY. 1998-1999 to 2009-2010)

Indian Renewable Energy Development Agency Ltd. v. JCIT (2015) 37 ITR 250 (Delhi) (Trib)

S. 10(26): Member of scheduled tribe should reside in specified area - Residence refers to stay in area for a long time for purposes of livelihood - Member of scheduled tribe in one area residing in another specified area - Entitled to exemption - Certificate of exemption to be obtained under section 197 - Certificate valid for one year.[S.197, Constitution of India Art. [366(25)]

Any income derived by a member of a scheduled tribe from any source in the specified area is not to be included in his total income u/s 10(26). Such a person should satisfy the following three conditions: (i) the person claiming exemption should be a member of a scheduled tribe as defined in Article 366(25) of the Constitution; (ii) he should be residing in the specified areas ; and (iii) the income in respect of which exemption is claimed must be an income which accrues or which arises to him (a) from any source in the specified area ; or (b) by way of dividend or interest.

A member of a scheduled tribe would be entitled to the benefit of section 10(26) only when he is posted in the specified areas. Once he is posted outside the specified areas then he ceases to reside in the specified area and the income does not accrue to him in the specified area. The scope and ambit of the word "residing" has to be given its natural meaning that a person has an abode and is living in a particular area for his work and livelihood for a reasonably long length of time. However, whether a person is actually residing or not is a question of fact to be decided on the facts of each case. Any member of a scheduled tribe declared to be so under Article 342 of the Constitution, even though he does not belong to the specified area, would be entitled to the benefit of Section 10(26) when posted to a station in the specified area and residing therein in connection with his employment. A member of scheduled tribe is bound to obtain a certificate of exemption in terms of section 197. The validity of the certificate will be for one assessment year only.

Chandra Mohan Sinku v. UOI (2015) 372 ITR 627/230 Taxman 118/276 CTR 385/118 DTR 65(FB) (Tripura) (HC)

S. 10A : Free trade zone - Export oriented undertakings–Appellate Tribunal- Alternative claim- If Tribunal upholds Revenue's plea that assessee is not entitled to S. 10B, it must consider the assessee's alternate plea for S. 10A deduction even if such alternate plea has not been raised before the lower authorities .[S.10B, 254(1),ITA,R. 12, 27]

In CIT v. Regency Creations Ltd.(2013) 353 ITR 326(Del), the High Court held that for the purposes of availing the benefit of Section 10B of the Act, the certification by the Board was mandatory and that such exemption could not be granted on the basis of the certificate issued by the Joint Director. Upon an application filed by the assessee in that case, the High Court directed the Tribunal to go into the merits of the alternative claim for entitlement under Section 10A. Based on the said direction, the present assessee filed a cross objection before the ITAT in the pending appeals of the Revenue seeking adjudication of its entitlement u/s 10A. However, the ITAT declined to permit the assessee to maintain the cross objections by following the decision of the coordinate Bench of the ITAT in ITO v. Neetee Clothing (P)Ltd. [2010] 129 TTJ 342 (ITAT [Del]), on the ground that since the Assessee had not urged the plea of being entitled to the benefit under Section 10 A of the Act before the CIT (A), it could not be permitted to urge such plea for the first time before the ITAT. On appeal by the assessee to the High Court HELD reversing the Tribunal:

(i) A respondent in an appeal, if he has not filed a cross-appeal, is deemed to be satisfied with the decision. He is, therefore, entitled to support the judgment of the first officer on any ground but he is not entitled to raise a ground which will work adversely to the appellant. In fact such a ground may be a totally new ground, if it is purely one of law, and does not necessitate the recording of any evidence, even though the nature of the objection may be such that it is not only a defence to the appeal itself but goes further and may affect the validity of the entire proceedings. But the entertainment of such a ground would be subject to the restriction that even if it is accepted, it should be given effect to only for the purpose of sustaining the order in appeal and dismissing the appeal and cannot be made use of, to disturb or to set aside, the order in favour of the appellant (See Bamasi v. CIT). This liberty to the respondent is reserved by Rule 27 of the Tribunal Rules.

(ii) As regards the powers of the Tribunal while disposing of the appeal, Rule 12 also lays down that the Tribunal, in deciding an appeal, is not confined to the grounds set forth in the memorandum of appeal or those which the appellant may urge with its leave. It can decide the appeal on any ground provided only that the affected party has an opportunity of being heard on that ground. But it has been laid down in a number of cases that this rule does not enable the Tribunal to raise a ground, or permit the party who has not appealed to raise a ground, which will work adversely to the appellant and result in an enhancement (CIT v. Edward Keventer (Successors) Pvt. Ltd. (1980) 123 ITR 200 followed);

(iii) The Supreme Court in NTPC v. CIT(1998) 229 ITR 383 SC has also explained that the power of the Tribunal in dealing with the appeals under Section 254 of the Act is "expressed in the widest possible terms". It was further observed that "The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."
(iv) The basis of this Court remanding the matters in Valiant Communications Ltd. cases to the ITAT was precisely to consider whether the benefit under Section 10A could be granted to those Assessees notwithstanding that they may not be entitled to the benefit under Section 10B. It was, therefore, open to the Appellant Assessee herein to seek support of the order of the CIT (A) on the ground which was not urged before the CIT (A) as long as it was not going to be adverse to the case of the Appellant i.e. the Revenue before the ITAT. The ITAT in considering such plea was not going to be persuaded to come to a different conclusion as far as the appeal of the Revenue pertaining to the benefit under Section 10B of the Act was concerned. Particularly in the light of the order passed by this Court on 4th January 2013 in the applications filed by Valiant Communications Ltd., there should have been no difficulty for the ITAT to have examined the Appellant Assessee‟s cross objections.(ITA No. 334, 338 & 339/2015, dt. 02.09.2015)
Fast Booking (I) Pvt. Ltd. .v. DCIT (Delhi)(HC) ; www.itatonline.org

S. 10A:Free trade zone - Claiming deduction u/s 80HHE for one year does not debar the assessee from claiming deduction u/s 10A for another year- Fact that claim is not made via a revised return is no bar on the right of the appellate authority to consider it [S.80HHE, 139(5)]
(i) While an AO may not be entitled to grant a deduction or an exemption on the basis of a revised computation of income, there was no such fetter on the appellate authorities. This was recently reiterated by this Court in a decision dated 25th August 2015 in ITA No. 644/2015 (Pr. Commissioner of Income Tax-09 v. Western India Shipyard Limited). In Commissioner of Income Tax v. Sam Global Securities Ltd. (2014) 360 ITR 682 (Del), this Court pointed out that the power of the Tribunal in dealing with appeals was expressed in the widest possible terms and the purpose of assessment proceedings was to assess the correct tax liability. The Court noted that "Courts have taken a pragmatic view and not a technical view as what is required to be determined is the taxable income of the Assessee in accordance with law." In M/s. Influence v. Commissioner of Income Tax 2014-TIOL-1741-HC-DEL-IT a similar approach was adopted when the AO in that case refused to accept the revised computation submitted beyond the time limit for filing the revised return under Section 139(5) of the Act. This Court noted that the decision in Goetze (India) Ltd. v. Commissioner of Income-Tax [2006] 284 ITR 323 (SC) "would not apply if the Assessee had not made a new claim but had asked for re-computation of the deduction."
(ii) Making of a claim under Section 80HHE of the Act in one assessment year will not preclude an Assessee from claiming the benefit under Section 10A of the Act in respect of the same unit in a succeeding assessment year. The purpose of the Section 80HHE(5) of the Act was to avoid double benefit but that would not mean that if for a particular assessment year the Assessee wants to claim a benefit only under Section 10A of the Act and not Section 80HHE, that would be denied to the Assessee. (ITA No. 607/2015, dt. 06.10.2015) (AY.2002-03)
CIT .v. E-Funds international India Pvt. Ltd. (Delhi)(HC) ; www.itatonline.org

S. 10A : Free trade zone–Separate undertakings- Material on record was found to be insufficient to treat each 31 units of assessee as separate undertakings , hence benefit was limited to only 13 eligible undertakings- Benefit not defendant on treatment of facts by assessee.

Assessee was a public limited company engaged in providing software development services through its software development undertakings set-up in Software Technology Park (STP). It had 31 independent software development units or undertakings set up at distinct locations. In original return, assessee had claimed deduction under section 10A only in respect of 13 units but in revised return number of units eligible for benefits under section 10A was increased from 13 to 31 and separate Form 56F was filed for each of these 31 units . AO restricted the claim of deduction to 13' mother' undertakings. However, no material was produced to establish that assessee had treated 31 units as distinct undertakings. Besides, no evidence was placed on record to establish that each and every unit had a separate bank account and no fresh investments were made .Dismissing the appeal the Court held that since deduction under section 10A is available to each undertaking, and material on record was found to be insufficient to treat each of 31 units as separate undertaking, 31 units could not be treated as separate undertakings for purposes of availing benefit under section 10A. View of AO was up held. Benefit not defendent on treatment of facts by assessee. (AY. 2005-06)

HCL Technologies .v. ACIT (2015)377 ITR 483/ 278 CTR 345 / 231 Taxman 895 (Delhi)(HC)

S. 10A : Free trade zone-Loss-Carry forward and set off-Loss in assessment year 2002-03 can be set off against profits of erstwhile section 10A unit in assessment year 2005-06-Post amendment from assessment year 2001-02.[S. 10A(6), 72, 74.]

For the assessment years 2004-05 and 2005-06, the assessee claimed set off of unabsorbed business loss brought forward from the assessment year 2002-03 against the profits of the erstwhile section 10A unit. This claim for set off was disallowed by the Assessing Officer. It was allowed by the Tribunal. On appeal to the High Court :Held, dismissing the appeals, that the assessee was entitled to set off of the carried forward loss against the profits of the erstwhile section 10A unit.(AY. 2004-2005, 2005-2006)

CIT .v. Shantivijay Jewels Ltd. (2015) 374 ITR 520/231 Taxman 627 (Bom.) (HC)

S. 10A : Free trade zone – Post amendment from assessment year 2001-02, claim of set-off of business loss for assessment year 2002-03 against profits of erstwhile section 10A unit for assessment year 2005-06 are allowable.

The assessee engaged in the business of manufacturing and export of gems and jewellery claimed deduction u/s. 10A. Subsequently, assessee filed a revised return withdrawing its claim under section 10A and claimed set off of unabsorbed business loss brought forward from assessment year 2002-03 against the profits of the erstwhile 10A unit. The AO rejected assessee's contention and held that set-off of business loss could not be allowed against the profits of the erstwhile 10A unit as relevant assessment year was first assessment year after the expiry of the tax holiday period. The CIT(A) confirmed the AO's order. The Tribunal set aside the AO's order.

The High Court observed that as per the CBDT Circular No. 7 of 2003, dated 5-9-2003, losses arising in assessment year 2001-02 and subsequent years were to be allowed while computing income under section 10A. The High Court held that by virtue of the non-obstante clause and by virtue of wording of sub-clause (ii) of section 10A(6) the revenue could not have disallowed this claim of set off. (AY. 2005-2006)

CIT v. Shantivijay Jewels Ltd. (2015) 374 ITR 520 / 118 DTR 297 / 231 Taxman 627 (Bom.)(HC)

S. 10A: New industrial undertaking-Computer software-Carrying on business both in unit within software technology park and another unit - Maintaining separate accounts for two units - Software technology park unit not formed splitting up or reconstruction or transfer of used assets of an existing unit - Entitled to exemption.

The assessee was engaged in the business of computer software development and business process outsourcing. During the financial year 2005-06, the assessee ran its business from a unit not registered with the Software Technology Parks of India in rented premises. In this period the assessee applied for permission to set up a unit registered with the Software Technology Parks of India at the ground floor of the same premises for development of computer service/information technology enabled services. The assessee started the business in the newly set up unit during the financial year 2006-07.

The assessee continued to carry on its business from the other unit also. Separate books of account were maintained by the assessee for the two units. In respect of the unit registered with the Software Technology Parks of India the claim for deduction under section 10A, made by the assessee was rejected on the ground that it was formed by splitting of the existing unit. The Commissioner (Appeals) extended the benefit under section 10A to the unit registered with the Software Technology Parks of India for the three assessment years 2007-08, 2008-09 and 2009-10. This was confirmed by the Tribunal. On appeals:
Held, dismissing the appeals, that the unit established by the assessee for which section 10A exemption was claimed was not formed by splitting up or reconstruction or transfer of the used assets of an existing unit and, hence, the assessee was entitled to exemption under section 10A. (AYs. 2007-2008, 2008-2009, 2009-2010)
CIT v. Quest Informaties P. Ltd. (2015) 372 ITR 526 (Karn.)(HC)

S. 10A : Free trade zone - Total turnover-Expenses incurred in foreign currency on telecommunication charges and providing technical services outside India should be excluded from total turnover for purpose of computation of deduction.
Expenses incurred in foreign currency on telecommunication charges and providing technical services outside India should be excluded from total turnover for purpose of computation of deduction. (AY. 2004-05)
CIT v. Tech Mahindra Ltd.(2015) 229 Taxman 298 (Bom.)(HC)

S. 10A : Free trade zone-For purpose of computation of deduction down linking charges could not be excluded from export turnover or total turnover.
For purpose of computation of deduction down linking charges could not be excluded from export turnover or total turnover.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn)(HC)

S. 10A : Free trade zone-Business income –Sale of software was to be treated as a business profit and, not as capital gains, and, thus, assessee would be entitled to deduction.[S. 28(i)]
Consideration received by assessee on sale of software was to be treated as a business profit and, not as capital gains, and, thus, assessee would be entitled to deduction.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn)(HC)

S. 10A : Free trade zone –Export turn over-Expenses in foreign currency-Matter remanded.
Appellate Authorities held that expenses in foreign currency should be allowed from export turnover for computation of deduction. It was necessary for authorities to determine on basis of material produced by assessee as to whether technical services was rendered in post-sales services or pre-sales services and then decide as to whether assessee was entitled to exclusion of expenditure incurred towards technical services - Matter remanded.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn.)(HC)

S. 10A : Free trade zone-Manufacture or production should have commenced in previous year - Registration as STPI unit not a requirement-Entitled exemption-Circular issued u/s 10B is not relevant for deciding the claim u/s 10A[S. 10B].
The assessee, in support of the plea for claiming deduction under section 10A, filed a copy of the communication dated March 4, 2000, from the Software Technology Parks of India according permission for setting up a 100%EOU. According to the Assessing Officer, the assessee was entitled to the benefit from March 4, 2000. The Commissioner (Appeals) placed reliance on a circular issued in the context of section 10B and came to the conclusion that the assessee would be entitled to the benefit derived from "export" after the unit was approved as STPI, i.e, on March 4, 2000. The Tribunal held that the circular issued under section 10B was not applicable to restrict deduction under section 10A and in any event, the circular, which was issued on January 6, 2005, could not be made applicable to the assessment year 2000-01. On appeal to the High Court:
Held, the circular issued under section 10B was not applicable to a case falling under section 10A. The Assessing Officer had restricted the deduction based on an artificial cut off date (i.e.) March 4,

2000, which was not the correct method of computation for benefit flowing under section 10A. Appeal of revenue was dismissed. (AY. 2000-2001)
CIT v. Soffia Software Ltd. (2015) 370 ITR 146/ 120 DTR 162 (Mad.)(HC)

S.10A:Free trade zone-Freight, telecommunication and insurance charges-To be excluded from both export and total turnover.
The Tribunal held that the Assessing Officer has to exclude freight, telecommunication and insurance charges incurred in foreign currency from both the export turn over as well as total turnover while computing deduction.(AY. 2006-2007)
Tektronix Engineering Devt. India P. Ltd. v. Dy.CIT (2015) 39 ITR 212 / 69 SOT 1 (Bang.)(Trib.)

S.10A:Free trade zone -Software technology park unit-Loss-Carry forward and set off-Carry forward of loss of software technology park unit to be allowed against profits of other income of section 10A units-Direction of the Dispute Resolution Panel is binding on the Assessing officer. (S. 144C(10)]
That the losses of the software technology park unit were to be allowed to be set off against other income. According to section 144C(10), every direction of the Dispute Resolution Panel is binding on the Assessing Officer. Therefore, the Assessing Officer could not deviate from the directions of the Dispute Resolution Panel. The order of the Dispute Resolution Panel was to be confirmed.(AY. 2009-2010)
Dy. CIT v. HSBC Electronic Data Processing India P. Ltd. (2015) 39 ITR 83 (Hyd.)(Trib.)

S. 10A: Free trade zone- Communication charges--To be excluded from both export and total turnover.
Held that communication charges were to be excluded from both export turnover and total turnover. (AY. 2009-2010)
Dy. CIT v. HSBC Electronic Data Processing India P. Ltd. (2015) 39 ITR 83 (Hyd.)(Trib.)

S.10A:Free trade zone-Telecommunication and insurance charges-To be excluded from both export and total turnover.
Tribunal held that while computing the deduction the Assessing Officer has to exclude the telecommunication and insurance charges incurred from both the export turnover as well as the total turnover.(AY. 2006-2007)
Cypress Semiconductor Technology India P. Ltd. v. Dy. CIT (2015) 39 ITR 468(Bang.)(Trib.)

S. 10A: Free trade zone- -Foreign exchange gain excluded from export turnover is also to be excluded from total turnover.
Held that if any expenditure was reduced from the export turnover, it was to be excluded from total turnover also. Therefore, the Assessing Officer was to exclude the foreign exchange gain, which was excluded from the export turnover from total turnover also for computing deduction under section 10A of the Act. (AY. 2006-2007)
NTT Data India Enterprise Application Services P. Ltd. v. ACIT (2015) 38 ITR 362 (Hyd) (Trib)

S.10A:Free trade zone -Profits of eligible unit not to be set off against unabsorbed depreciation of another unit.[S. 10B]
Tribunal held that the deduction under section 10A had to be allowed to the eligible unit without setting off the unabsorbed depreciation of another unit.(AY. 2009-2010)
Watson Pharma P. Ltd. v. Dy. CIT (2015) 168 TTJ 281/38 ITR 97/115 DTR 65/54 taxmann.com 88 (Mum.)(Trib.)

S.10A:Free trade zone-Total income-Deduction to be given at the stage of computation of profits and gains of business at the first instance- Order of CIT (A) allowing the loss to be carried forward was affirmed. [S.72]

The assesse had two STPI units eligible for claiming deduction u/s 10A of the Act. The assesse set off total profit from Domestic business against the loss from the non STPI unit and the balance loss was claimed as carry forward. The AO observed that the deduction u/s 10Aof the Act, should be restricted to the profit of the unit eligible for deduction u/s 10A of the Act and the total income have been shown at nil instead of claiming of loss. This issue is covered by the Judgment of Hon'ble Jurisdictional High Court in the case of CIT. v.. Black & Veatch Consulting (P.) Ltd(2012)348 ITR 72 (Bom(HC)), wherein it was held that Section 10A is a provision which is in the nature of a deduction and not an exemption. This was emphasized in Hindustan Unilever Ltd v .Dy. CIT [2010] 325 ITR 102 / 191 Taxman 119 (Bom.). The deduction U/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 Section 72 which deals with the carry forward and set off of business losses.(ITA No. 7033/Mum/2012, dt. 25.03.2015) (AY. 2007-08)

Aditya Birla Minacs Worldwide Ltd. v. DCIT (Mum.)(Trib.);www.itatonline.org

S.10A : Free trade zone-Unabsorbed business loss--Depreciation--Deduction to be calculated before reducing unabsorbed loss and depreciation from profits of undertaking.-Share application money--Income from variation in rates of foreign exchange-Matter remanded.[S.56]

Deduction to be calculated before reducing the unabsorbed loss and depreciation from the profits of the undertaking.

Followed,UOI v Onkar S. Kanwar [2002] 258 ITR 761 (SC).

AO held that the income from variations in the rate of foreign Exchange in respect of share application money had no relevance to the nature of business income eligible for deduction under section 10A of the Act and, accordingly, included it in the income under the head "Other sources". The CIT (A)held that the gain on exchange fluctuation in respect of share application money would not be eligible for deduction under section 10A of the Act. On appeal :

Tribunal held that the CIT(A) had neither adjudicated nor disposed of the issue whether or not the income from variation in foreign exchange rates in respect of share application money should be excluded from the assessee`s income. Therefore, the matter was restored to the Assessing Officer to adjudicate the issue. Matter remanded. (AY. 2005-2006, 2007-2008)

Canam International P. Ltd..v.ACIT (2015) 37 ITR 38(Delhi) (Trib.)

S. 10AA : Special Economic Zone-Foreign exchange fluctuation gain to be excluded from export and total turnover.

It was held that foreign exchange fluctuation gain on sales would be excluded from both export turnover and total turnover for purpose of computing deduction under section 10AA. (AY. 2009-10)

DCIT v. Madras Engineering Industries (P.) Ltd. (2014) 34 ITR 703 / (2015) 67 SOT 152 (URO) (Chennai)(Trib.)

S. 10AA : Special Economic Zones-Manufacture-After purchasing unfinished handicraft goods applied various processes ,incurred substantial labour expenses-Entitled exemption.

Assessee, engaged in manufacture and export of handicraft goods, claimed deduction under section 10AA. A.O. denied deduction on ground that assessee purchased VAT exempted goods which were in fact finished handicraft items and, thus, assessee had exported articles and things not manufactured by it, but had exported purchased finished items. However, certificates issued by several Government authorities revealed that assessee purchased unfinished handicraft goods and applied various processes like cutting, polishing, repairing, remaking, etc., and for that purpose, incurred substantial labour expenses. The view of the A.O. was not correct because the assessee purchased unfinished handicraft goods and applied various processes like cutting, polishing, repairing, remaking, etc., and for that purpose, incurred substantial expenses for labour, which has not been doubted by the AO. The assessee also incurred electric expenses which was also accepted by the A.O. The assessee was engaged in manufacturing activities and this fact is established from various certificates issued by the Government and concerned authorities. Hence, Assessee was entitled to deduction. (AY. 2009 – 2010)

ITO v. Makers Mart (2015) 152 ITD 501(Jodhpur)(Trib.)

S. 10B : Export Oriented undertaking-Assembling of instruments and apparatus for measuring and detecting ionizing radiators is a manufacturing activity producing an article or thing-Eligible for deduction.

Assembling of instruments and apparatus for measuring and detecting ionizing radiators is a manufacturing activity producing an article or thing-Eligible for deduction.(AY. 2003-04, 2004-05)

CIT .v. Saint Gobain Crystals & Detectors India (P.) Ltd. (2015) 231 Taxman 573 (Karn.)(HC)

S. 10B:Export oriented undertakings-Development Commissioner granting approval to assessee-Board of Approval ratifying this subsequently-Ratification relates back to date on which DevelopmentCommissioner granted approval -Entitled to exemption.

The assessee claimed deduction under section 10B, for the assessment year 2007-08, as a 100% export oriented unit. It had obtained approval from the Development Commissioner approving the assessee as 100% export oriented unit. However, on the ground that there was no ratification of the decision of the Development Commissioner by the Board of Approval, the Assessing Officer denied the deduction under section 10B. The Commissioner (Appeals) held that the assessee was entitled to deduction under section 10B as not only was there approval given by the Development Commissioner but the approval was also subsequently ratified by the Board of Approval. This was confirmed by the Tribunal. On appeal:

Held, Circular No. 68 issued by the Export Promotion Council for EOUS and SEZS, dated May 14, 2009, made it clear that from 1990 onwards the Board of Approval had delegated the power of approval of 100% export oriented undertakings to the Development Commissioner and, therefore, the Development Commissioner, while granting the approval of 100% export oriented unit, exercises delegated powers. In any case when at the relevant time the Development Commissioner granted approval of the 100% export oriented unit in favour of the assessee, which came to be subsequently ratified by the Board of Approval the ratification shall be from the date on which the Development Commissioner granted the approval. Hence, both the Commissioner (Appeals) as well as the Tribunal have rightly held that the assessee was entitled to deduction under section 10B as claimed.(AY. 2007-2008).

CIT .v. ECI Technologies Pvt. Ltd. (2015) 375 ITR 595 (Guj) (HC)

S.10B:Export oriented undertaking–Part activities out sourced- Deduction cannot be denied-Sucession-Sucessor entitled to exemption for unexpired period. [S. 10B(7A)] .

Deduction cannot be disallowed if part of the activities are outsourced to third parties by the assessee which are to be performed under the direct control and supervision of the assessee. Sucessor entitiled to exemption for un expired period. (AY. 2007-08 to 2009-10)

MKU (Armours) (P) Ltd. .v. CIT (2015) 376 ITR 514/ 119 DTR 169 (All.)(HC)
MKU (P) Ltd. v. CIT (2015) 119 DTR 169 (All.)(HC)

S. 10B : Export Oriented undertaking- Loss suffered by assessee in a unit eligible for exemption cannot be set off against income from any other unit not eligible for exemption.

The assessee is a public limited company engaged in the business of manufacturing and selling cables, wires and stainless steel wires. It has a 100% EOU and is eligible for exemption u/s. 10B, loss from which it was setting off against income of non-eligible units. The AO disallowed the set-off on the ground that since income was exempt, the losses of the unit too could not be set off against income of any other unit(s). The CIT(A) confirmed the action of the AO. However the Tribunal reversed the order of the AO.

The High Court, allowing the revenue's appeal, relied on its own decision in the case of CIT v. TEI Technologies (P.) Ltd.(2014) 361 ITR 36 and observed that the aim of such provisions was to ensure that "double benefit does not result to an assessee in respect of the same income, once under Section 10A or Section 10B or under any of the provisions of Chapter VIA and again under any other provision of the Act." The High Court held that the only object was to ensure that here is no double benefit arising to the assessee in respect of the same income and hence tax-exempt income of the

assessee, eligible under Section 10B could not have been set off against the losses from tax-liable income.
CIT v. Kei Industries Ltd. (2015) 118 DTR 306 / 231 Taxman 697 / 373 ITR 574 (Delhi)(HC)

S. 10B:Export oriented undertaking-Manufacture - Preparation of data for printing amounted to manufacture.
Held, dismissing the appeal, that the work which ultimately resulted as the culmination of the assessee's efforts of compiling, editing, digital designing, etc. was "transmitted or exported from India to any place outside India by any means". It was, therefore, computer software that are produced or manufactured, to qualify for benefit under section 10B.(AY. 2003-2004 to 2006-2007)
CIT v. Kiran Kapoor (Ms.) (2015) 372 ITR 321/231 Taxman 474/274 CTR 343 (Delhi) (HC)
Editorial: Order in Kiran Kapoor v. ITO [2014] 32 ITR 156 (Delhi)(Trib.) is affirmed.

S. 10B: Export oriented undertaking - Manufacture or production of an article or thing - Entire plant assembled outside India from goods supplied and manufactured in India - Assembled machines partially disassembled for proper packaging for export, transportation and installation - Entitled to exemption.
Dismissing the appeal of revenue the Court Held, (i) that the assessee had assembled the entire plant outside India from the goods supplied and manufactured in India. This would include the expenditure incurred for commissioning and providing technical services outside India, after excluding expenses in the form of payment made in foreign exchange for technical services provided outside India. It was not the case of the Revenue that the assessee had made payment in foreign exchange for technical services provided outside India.
(ii) That the assessee did not self-manufacture or produce most of the articles or things which were exported and used for setting up the plant. It had undertaken detailed engineering drawings and as per the specification and drawings, the actual manufacture and production work was outsourced. Throughout the process, inspection was carried out and only after approval, were the goods dispatched. The goods were re-inspected, checked, assembled and disassembled, before they were exported out of India. Only upon the satisfactory performance and ensuring that there was perfect matching, were the goods exported. Therefore, the activities qualified and should be treated as manufacture or production of goods by the assessee itself.
(iii) That it would be incongruous and inappropriate in the context of section 10B to hold that the assessee, a 100 per cent export oriented unit, which had refurbished a mini cement plant in Zambia and established a mini steel mill in Kazakhstan, was not engaged in "manufacture" or "production" of articles or things. It was accepted that in case the mini steel plant and refurbished cement mill had been completely assembled in the unit in Noida and exported as such, the assessee would qualify and would be a manufacturer or a person engaged in production of articles or things. However, the benefit under section 10B, it was asserted by the Revenue, should be denied for what was exported were separated or disassembled parts of the mini cement and steel plant, as it was not possible to export after fabrication and assembly the entire plant itself. The fabrication and assembly had to be undertaken in view of the size and logistics at the location where the plant had to be upgraded or set up. The reasoning deflated the object and purpose of section 10B. Export of goods and things can take various forms and section 10B accepts and admits such interpretation. The word "production" has a wider connotation than the word "manufacture" and illustratively every manufacture could be categorised as production but not vice versa. The word "production" in section 10B has been used in addition to the word "manufacture" and also an expanded scope and ambit is envisaged for the term in the context of section 10B, Explanation 4.(AY. 2007-2008, 2008-2009)
CIT v. Aar Ess Exim P. Ltd. (2015) 372 ITR 111/230 Taxman 441/ 116 DTR 145(Delhi) (HC)

S. 10B : Export Oriented undertaking – Disallowance of claim based on incomplete investigation was rightly deleted by Tribunal.
Assessee was engaged in manufacture and export of granite monuments and claimed deduction under section 10B.Assessing Officer observed that sale value of granite blocks by three related companies to assessee was lesser than value of sale by said companies to unrelated parties. He, therefore, reduced business profit by certain amount and computed deduction under section 10B on balance profits on

ground that such amount of profit was shifted from related parties to assessee. Tribunal allowed the appeal of assessee. On appeal by revenue, dismissing the appeal the Court held that; in granite dimensional blocks trade, price may vary depending upon size of block and uniformity in colour, defects, etc., and since findings of Assessing Officer were breft of details and based on incomplete investigation, disallowance made by Assessing Officer under section 10B was to be deleted.(AY. 2009-10)

CIT v. Cauvery Stone Impex (P.) Ltd. (2015) 230 Taxman 233 (Mad.)(HC)

S. 10B : Export oriented undertakings-Assessee –When the assessee has the required infrastructure in place, the business can be treated as set-up and accordingly the expenses incurred between the date of set-up and the date of commencement can be taken on revenue account.

The assessee was in the business of voice activation and local number portability, i.e. BPO services, which were made available to M/s Omniglobe International, USA – the holding company. The assessee was incorporated on 19-03-2004 and claimed deduction under section 10B, of the Income-tax Act for a period commencing from 01-04-2004 to 31-05-2004, contending that it had obtained approval as a 100% EOU under the STPI scheme and had commenced operations from 01-04-2004. The AO held that the assessee had commenced its operations only from 01-06-2004, i.e. the date on which the assessee entered into the "service agreement" with its parent company and, therefore, the expenditure incurred between 01-04-2004 to 31-05-2004 should be capitalised. The Commissioner (Appeals) and Tribunal upheld the order of the Tribunal.

On an appeal, the Court keeping in view the nature of business activity of the assessee held that training, imparting skills to employees recruited, or testing their performance cannot be treated as a pre-setup expenditure. The moment employees were recruited and enrolled, and infrastructure to use their service was in place, setup was complete. It was indicative of the fact that business operations had been set up. In the BPO industry, training of employees is an important, essential and integral element of the business activities and when the assessee has the infrastructure in place, the business can be treated as set-up. Accordingly, the High Court reversed the order of the lower authorities.

Omniglobe Information Tech India Pvt. Ltd. .v. CIT (2015) 115 DTR 265 (Delhi HC).

S.10B:Export oriented undertakings-loss suffered in s. 10A/10B units cannot be set-off against the profits of taxable units. [S.2(45),10A,70, 71,72, 80A, 80AB]

The High Court had to consider whether the loss suffered by the assessee in a unit entitled for exemption under sections 10A and 10B of the Income Tax Act, 1961, can be set off against income from any other unit not eligible for such exemption after the amendment by the Finance Act 2000 w.e.f. 1.4.2001 which converted the said sections from an “exemption” provision into a “deduction” provision. HELD by the High Court:

(i) Parliament was aware of the various restricting and limiting provisions like section 80A and section 80AB which was in Chapter VI-A which do not appear in Chapter III. The fact that even after its recast, the relief has been retained in Chapter III indicates that the intention of Parliament is to be regarded as an exemption and not a deduction. The Act of Parliament in consciously retaining this section in Chapter III indicates its intention that the nature of relief continues to be an exemption. Chapter VII deals with the incomes forming part of the total income on which no income-tax is payable. These are the incomes which are exempted from charge, but are included in the total income of the assessee. Parliament, despite being conversant with the implications of this Chapter, has consciously chosen to retain section 10A in Chapter III;

(ii) There is a difference of opinion between the Karnataka and Bombay High Courts as to whether Section 10A or Section 10B are in the nature of exempt income or deductions. However, there is agreement in both the opinions as to the manner of computation and that such profits have to be eliminated at the first stage itself, that is, as soon as they are computed, suggesting that it is an exemption provision. It was held that the eligible profits are not to be subjected to the adjustment under Section 72 of the Act, and the brought forward loss from the unit eligible for the relief under Section 10B cannot be adjusted against the profits from the other three eligible units, which in effect reiterates the position that the loss does not enter the field of taxation just as the profits also do not

enter the field. This, with respect, lends support more to the view that Section 10A and Section 10B are in the nature of exemption provisions, rather than provisions for deduction;
(iii) Even if Section 10A/ Section 10B are treated as exemption provisions, Section 80A (4) cannot defeat that interpretation. The object of Section 80-A (4) is to ensure that double benefit does not result to an assessee in respect of the same income, once under Section 10A or Section 10B or under any of the provisions of Chapter VIA and again under any other provision of the Act. Even if Section 10A or Section 10B is construed as exemption provisions, it is still possible to invoke the sub-section and ensure that the assessee does not obtain a deduction in respect of the exempted income under any other provision of the Act. The only object of the sub-section is to ensure that there is no double benefit arising to the assessee in respect of the same income.
(iv) Consequently, the tax-exempt income of the assessee, eligible under Section 10-B cannot be set off against the losses from tax-liable income.
CIT .v. Kei Industries Ltd. (2015) 373 ITR 574 (Delhi)(HC)

S. 10B : Export oriented undertakings - Computer software- Approval from STPI after end of previous year relevant to assessment year - Question of granting exemption does not arise.[Industries (Development and Regulation) Act, 1951, S. 14.]
The assessee was engaged in manufacturing and export of computer software and had commenced a 100% export of computer software during the assessment year 2005-06 and claimed exemption under section 10B. The Assessing Officer held that the assessee had applied for registration as a 100% export-oriented undertaking to the Software Technology Parks of India on March 24, 2005, and obtained the approval only in May, 2005.Hence, in terms Circular No. 1 of 2005, dated January 6, 2005,(2005) 271 ITR (St.)6.) of the Central Board of Direct Taxes, the assessee was not eligible for the benefit under section 10B. Accordingly, he disallowed the entire claim of exemption under section 10B on the ground that the assessee had obtained the approval from the STPI only in May, 2005, which was after the end of the previous year relevant to the assessment year 2005-06. Held allowing the appeal of revenue , that ; the approval was granted during May, 2005, only and, therefore, prior to that date or the assessment year, relevant to the date of registration, the benefit of section 10B would not be available as the requirement of approval by the competent authority was not available as on the date, from which the assessee claimed the exemption.(AY. 2005-2006)
CIT v. Live Connection Software Solutions P. Ltd.(2014) 51 taxmann.com 454/ (2015) 370 ITR 356 /119 DTR 355 (Mad.)(HC)

S. 10B:Export Oriented undertakings - All business profits of the undertaking are eligible for deduction and it is not necessary to show that they have a "direct nexus" with the undertaking.[S.10B(4)]
Sub-section (4) of section 10B stipulates that deduction under that section shall be computed by apportioning the profits of the business of the undertaking in the ratio of turnover to the total turnover. Thus, notwithstanding the fact that sub-section (1) of section 10B refers the profits and gains as are derived by a 100% EOU, yet the manner of determining such eligible profits has been statutorily defined in sub-section (4) of section 10B of the Act. As per the formula stated above, the entire profits of the business are to be taken which are multiplied by the ratio of the export turnover to the total turnover of the business. Sub-section (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. Thus, once an income forms part of the business of the eligible undertaking, there is no further mandate in the provisions of section 10B to exclude the same from the eligible profits.(ITA No. 219/2014 and 239/2014, dt. 13. 11.2014)(AY. 2008-09, 2009-10)
CIT .v. Hritnik Export Pvt. Ltd. (Delhi)(HC),www.itatonline.org

S. 10B : Export oriented undertakings- Interest income-Book profit [S.115JB]
In view of decision of Tribunal in earlier year, issue of deduction in exemption under section 10B towards allocation of head office expenses/expense of other division and interest income earned by 100% E.O.U. under normal income and MAT provisions was to be decided in favour of assessee.(AY. 2003-04,2005-06)

Aditya Birla Nuvo Ltd. v.ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

S. 10B : Export oriented undertakings- Exemption allowed in earlier years cannot be withdrawn on the ground that undertaking is not approved under S. 14 of Industrial Development and Regulation Act. [Industrial Development and Regulation Act. S 14]

Where exemption under section 10B was allowed in earlier years, same could not be withdrawn in subsequent year on ground that undertaking is not approved by Board under section 14 of Industrial Development and Regulation Act. (AY. 2003-04, 2005-06)

Aditya Birla Nuvo Ltd.v. ACIT (2015) 68 SOT 403 (Mum.)(Trib.)

S. 10B :Export oriented undertakings - Export turnover –Expenditure incurred outside India-is to be excluded from both export and total turnover.

It was held that where assessee-company incurred expenditure in delivering software services outside India, same was to be excluded from both export turnover and total turnover while computing exemption under section 10B to maintain parity.(AY. 2008-09)

Microsoft Global Services Center (India) (P.) Ltd.v. ACIT (2015) 67 SOT 209(URO) (Hyd.)(Trib.)

S.10B:Export oriented undertakings-Approval by Board appointed by Central Government as 100 per cent. export oriented undertaking-Approval under Software Technology Park of India is not sufficient-Exemption is not available. [Industries (Development and Regulation) Act, 1951, S. 14]

The assessee claimed deduction under section 10B of the Act. The Assessing Officer rejected the claim of the assessee on the grounds that, since the assessee's software technology park unit did not have any new computer system and other necessary equipment for the purpose of carrying on software development, the assessee was not a 100 per cent. export oriented undertaking. The Commissioner (Appeals) allowed the exemption on the ground that the Software Technology Parks of India had granted approval to the assessee as a 100 per cent. export oriented undertaking eligible for exemption under section 10B of the Act. On appeal by the Department :

Held, that in order to claim exemption under section 10B, an undertaking must be approved by the Board appointed by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 and the rules made under the Act. There was nothing on record to suggest that the assessee was a hundred per cent. export oriented undertaking approved by the Board. Units set up under the Software Technology Parks Scheme were different from units approved by the Board. Hence the assessee, not having been approved by the Board appointed by the Central Government, it was not entitled for exemption under section 10B of the Act. (AY. 2003-2004 to 2006-2007)

Vishwak Solutions P. Ltd. v. ACIT (2015) 38 ITR 522 / 69 SOT 118 (URO) (Chennai) (Trib)

S.10B:Export oriented undertakings-Export turnover-Profits arising out of fluctuation of rates of foreign exchange-Form part of export turnover-Assessee dealing in manufacture and export of fasteners-Sale of scrap-Proceeds not includible in turnover.[S.10A, 80HHC]

The assessee claimed deduction on foreign exchange rate difference and scrap sale turnover as export turnover and total turnover.The Assessing Officer included the foreign exchange difference amount and scrap sale turnover in the domestic sales on a view that the profits and gains derived by an eligible undertaking from export of eligible articles and that the foreign exchange difference could not be included in the eligible amount. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, that the connotation of "export turnover" under section 10B is no different from that under sections 10A or 80HHC of the Act, the meaning ascribed to export turnover in such decisions will apply with full vigour in the context of section 10B as well. Therefore the foreign exchange fluctuation difference had to be considered as part of export turnover and total turnover. While the assessee was engaged in the business of manufacturing export of fasteners, the sale of scrap could not be included in "total turnover or domestic turnover". (AY. 2009-2010)

Universal Precision Screws v. ACIT (2015) 38 ITR 233 (Delhi)(Trib)

S.10B:Export oriented undertakings-Interest from fixed deposit receipts placed for maintaining margin money-Close nexus with business activity of assessee-To be treated as business income-Eligible for deduction.

The Assessing Officer treated the interest income on fixed deposit receipts as income from other sources, on the ground that it was not derived from the eligible business and denied the deduction On appeal:

Held, that the deposit having been made for the purposes of keeping margin money or for availing of any other credit facility from banks, the interest income had close connection with the business activity of the assessee and the income was to be treated as income from business of the assessee and was eligible for the benefit under section 10B. (AY. 2009-2010)

Universal Precision Screws v. ACIT (2015) 38 ITR 233 (Delhi)(Trib)

S.10B: Export oriented undertakings-Income from interest and sale of scrap--Not to be excluded if income intrinsically connected to business of assessee.[S. 10A,56]

The assessee considered the income from interest and sale of scrap for the purposes of computation of deduction under section 10B of the Act as income derived from the operations of business. The Assessing Officer treated it as income from other sources and excluded the income from interest and sale of scrap from the computation of deduction. The Dispute Resolution Panel confirmed this. On appeal ;Held, that where the income sought to be taxed was intrinsically connected to the business of the assessee and the provisions falling under sections 10A and 10B of the Act form a code within the code, no disallowance was called for. Therefore, the Assessing Officer was to compute the deduction taking into account interest and sale scarp as business income. (AY. 2009-2010)

Watson Pharma P. Ltd. v. Dy. CIT (2015) 168 TTJ 281/38 ITR 97/115 DTR 65/54 taxmann.com 88 (Mum.)(Trib.)

S.10B:Export oriented undertakings-Business income or income from other sources-Freight charges–Assessable as business income-Duty entitlement pass book scheme-Would not form part of eligible profit. [S. 28(i),57(iii)]

The assessee was engaged in the business of manufacture and export of readymade garments. The assessee paid a sum of Rs. 81.30 lakhs on cost plus freight and insurance basis on export of goods, which was then recovered from customers by way of freight charges at Rs. 74.15 lakhs, resulting in a negative impact on the profits of the assessee. The Assessing Officer assessed the freight charges as income from other sources. The Commissioner (Appeals) held that even assuming freight to be an independent source of income, the expenditure incurred by the assessee was to be allowed under section 57(iii) of the Income-tax Act, 1961 which resulted in a loss under the head "Income from other sources". On appeal by the Department :

Held, that the receipt on account of freight was based on the freight and insurance expenses incurred by the assessee on overseas customers and the source of the receipt did not fall in any distinct and independent source of income, apart from the assessee's business of manufacture and export of goods outside India. Hence the receipt was a part of the assessee's business. Tribunal also held that the duty entitlement pass book scheme receipt would not form part of the eligible profit of the assessee's export oriented undertaking under section 10B(1) read with section 10B(4) of the Act. (AY. 2007-2008)

ACIT v. S. K. International (Export) Co. (2015) 38 ITR 33 (Mum.)(Trib.)

S. 10B : Export oriented undertakings–Unabsorbed depreciation-Deduction is available without setting off unabsorbed depreciation of other unit.[S.10A]

The revenue has filed the appeal before the Tribunal and raised the question that the Hon'ble DRP erred in directing the Assessing Officer to allow deduction under section 10B of the Act in respect of its Goa unit without setting off unabsorbed depreciation of another eligible unit. The revenue prayed that the order of DRP be set aside and the order of Assessing Officer be restored.

The Tribunal followed the decision of Hon'ble Bombay High Court in the case of CIT v. Black & Veatch Consultancy Pvt. Ltd. (2012) 348 ITR 72 (Bom.) where it was held that the brought forward unabsorbed depreciation and losses of the unit the income which is not eligible for deduction under

section 10A of the Act cannot be set off against the current profit of the eligible unit for computing the deduction under section 10A of the Act. The Tribunal dismissed the appeal filed by the Department. (AY. 2009-10)

Dy. CIT v. Watson Pharma P. Ltd. (2015) 168 TTJ 281/38 ITR 97/ 115 DTR 65/54 taxmann.com 88 (Mum.)(Trib.)

S. 10B : Export oriented undertakings-Computer software- Disallowance of expenses and addition to income-Such income eligible for exemption.

The assessee was a 100 per cent. export oriented unit and exported computer software. It claimed exemption under section 10B of the Act.The AO held that in the absence of relevant material, the total turnover was domestic turnover and not eligible for exemption under section 10B of the Act. He disallowed certain expenses and added them to the income of the assessee. The Commissioner (Appeals) held that the Assessing Officer had sufficient material on record and there was no reason for not allowing exemption under section 10B and also observed that if expenses were disallowed, the profits of the assessee would increase which would mean that the assessee would become entitled to enhanced exemption under section 10B of the Act. On appeal by the Department : Held, dismissing the appeal, (i) that the assessee was eligible for exemption under section 10B of the Act., Tribunal also held that whatever disallowances were made, such income in turn became eligible for exemption under section 10B of the Act. Therefore the addition was to be deleted. (AY. 2010-2011)

Dy.CIT .v. Vertex Infosoft Solution P. Ltd. (2015) 37 ITR 521 (Chandigarh)(Trib.)

S. 10B : Export oriented undertakings–Computation-Exemption to be allowed before set off of brought forward business losses.[S.72]

Tribunal held that exemption under section 10B has to be allowed before set off of brought forward business losses of assesse. (AY. 2010-11)

ITO .v. Clear Water Technology Services (P.)Ltd. (2014) 52 taxmann.com 115 / (2015) 67 SOT 15(URO)(Bang.)(Trib.)

S. 11:Property held for charitablepurposes-A charity is not entitled to exemption if it carries out activities not as per the objects. The fact that such ultra vires objects are also charitable is not relevant. Fact that CIT has granted registration u/s 12A does not preclude AO from examining compliance with S. 11. Incidental objects to attain the main object, even if significant in value, are permissible. Under principles of consistency, AO is not permitted to change view in the absence of a change in facts. [S. 2(15),12A]

The Assessee contended that it was a charitable institution engaged in running a hospital (both Allopathic and Ayurvedic) and the same constituted a charitable purpose within the meaning of Section 2(15) of the Act. It was urged that as the Assessee had applied its income for charitable purposes, the same was exempt under Section 11 and 12 of the Act. The Assessee further contended that it had been granted registration under Section 12A of the Act after considering the nature of its activities and, therefore, it was not open for the AO to deny the exemption under Section 11 of the Act. The CIT(A) accepted the contentions. However, the Tribunal held that the Assessee's activities relating to Allopathic system of medicine had more or less supplanted the activities relating to Ayurvedic system of medicine and concluded that pre-dominant part of the Assessee's activities exceeded the powers conferred on the trustees and the objects of the Assessee Trust were not being followed. The Tribunal held that whilst the activities of the Assessee relating to providing medical relief by the Ayurvedic system of medicine were intra vires its objects, the activities of providing medical reliefs through Allopathic system of medicine was ultra vires its objects. Consequently, the Assessee was not entitled to exemption under Section 11 of the Act in respect of income from the hospital run by the Assessee, which offered medical relief through Allopathic system of medicine. Accordingly, the Tribunal directed that the income and expenditure of the Assessee from the activities relating to the two disciplines of medicine, namely Ayurveda and Allopathy, be segregated. On appeal by the assessee to the High Court HELD: that charity is not entitled to exemption if it carries out activities not as per the objects. The fact that such ultra vires objects are also charitable is not relevant. Fact that CIT has granted registration u/s 12A does not preclude AO from examining compliance with S. 11. Incidental objects to attain the main object, even if significant in value, are permissible. In the

circumstances, it would not be apposite to permit the Revenue to challenge a position that has been sustained over several decades without there being any material change. Order of Tribunal is set aside. (AY.2006-07)

Mool Chand Khairati Ram Trust .v. DIT(E)(2015) 377 ITR 650 (Delhi)(HC)

S. 11:Property held for charitablepurposes-Educational institution-No evidence of receipt of capitation fees- Entitled exemption. [S. 10(23C), 12,12A, 13].

Charitable trust running educational institutions, there was no evidence of receipt of capitation fees. Cash found in possession of chairman of trust assessed in his hands. There was no evidence of utilisation of income for non-charitable purposes. Charitable trust is entitled to exemption. (AY. 2002-2003 to 2008-2009)

CIT .v. Balaji Educational and Charitable Public Trust. (2015) 374 ITR 274/231 Taxman 267 (Mad.)(HC)

Editorial: Order in ACIT v. Balaji Educational and Charitable Public Trust (2011) 11 ITR 179 (Chennai) (Trib) is affirmed.

S. 11 : Property held for charitable purposes -Charitable purpose major part of donation was spent on religious and other charitable purposes as well as on free food distributed in Rain Baseras in evening or Prasad distributed on various functions trust was entitled for benefit of exemption .[S. 2(15), 12A]

Dismissing the appeal of revenue the Court held that ; All authorities recorded concurrent findings of fact that assessee-Trust stood registered under section 12A which was still valid and objects of trust were charitable in nature. Details of expenses showed that major part of donation was spent on religious and other charitable purposes as well as on free food distributed in Rain Baseras in evening or Prasad distributed on various functions. Donation was provided to a Hospital for maintenance of Polytrauma ward and other activities. Activities of assessee clearly fell within meaning of charitable purposes under section 2(15) and assessee trust was entitled for benefit of exemption under section 11/12.

CIT v. Mandir Shree Ganesh Ji (2015)230 Taxman 83 (Raj.)(HC)

S.11:Property held for charitable or religious purposes – Investment contravening the provisions-Exemption on entire income cannot be denied.[S.13]

Exemption under section 11 can be denied only to extent of investment contravening provisions of section 11(5) read with section 13(1)(d) and not on entire income. (AY. 1997-98 to 2001-02)

CIT v. Orpat Charitable Trust (2015) 230 Taxman 66 (Guj.)(HC)

S. 11:Property held for charitable purposes –Accumulation of income-Assessee had fulfilled its obligation hence no disallowance was called for.[R. 17, Form 10]

Assessee-society was constituted for welfare of employees of a bank in event of retirement, death or disability. Assessee had accumulated a certain sum under heading 'Further utilization'. Assessee submitted that accumulation was done for aims and objectives of society and that sum would only be used for purpose of making payments to members or their legal representatives in case of their death, retirement or permanent disability. On appeal by revenue the Court held that the assessee had fulfilled its obligation as required under section 11(2) and, thus, no disallowance under section 11(2) was called for.(AY. 1996-97)

DIT v. NBIE Welfare Society, New Delhi (2015) 370 ITR 490 / 229 Taxman 277/ 115 DTR 149 (Delhi)(HC)

S. 11 : Property held for charitable purposes –After considering running expenses and capital expenses on medical equipment's from gross receipts , percentage of profit was only 14.06 % hence exemption is allowable.

AO disallowed the exemption on ground that 85 per cent of net income had not been spent on charitable activities . Facts revealed that after deducting running expenses and capital expenses on purchase of medical equipments from gross receipts, percentage of profit was 14.6 per cent, which was lower than 15 per cent permitted to be accumulated as per Act. On appeal by revenue dismissing

the appeal the Court held that since 85 per cent of trust income had been applied towards object of trust, assessee would be entitled to exemption under section 11.
CIT v. Lilavati Kirtilal Mehta Medical Trust (2015) 229 Taxman 276 (Bom.)(HC)

S. 11: Property held for charitablepurposes–Exempt income- In computing the income of charitable institutions income exempt u/s 10 has to be excluded-The requirement in s. 11 with regard to application of income for charitable purposes does not apply to income exempt u/s 10[S.2(45), 10(33), 10(38)]
The High Court had to consider whether an assessee enjoying exemption u/s 11 could claim that the income exempt u/s 10(33) and 10(38) had to be excluded while computing the application of income for charitable or religious purpose. HELD by the High Court:
There is nothing in the language of sections 10 or 11 which says that what is provided by section 10 or dealt with is not to be taken into consideration or omitted from the purview of section 11. If we accept the argument of the Revenue, the same would amount to reading into the provisions something which is expressly not there. In such circumstances, the Tribunal was right in its conclusion that the income which in this case the assessee trust has not included by virtue of section 10, then, that cannot be considered under section 11. (AY.2007-080
DIT (E) v. Jasubhai Foundation (2015) 374 ITR 315/ 120 DTR 373 (Bom.) (HC)

S. 11 : Property held for charitable purposes -Local authority-Exemption was not to be denied merely on basis that view of AO was not reversed or set aside by Tribunal on merits. [S.10(20), 10(20A),12AA]
The assessee was a local authority created by the Government of Maharashtra. Upto the year 2002-03, income of local authorities was not taxable under the provisions of sections 10(20) and 10(20A). However, the said provisions were amended with effect from 1-4-2003, as a result of which this income became taxable. Subsequently, the assessee applied for exemption under section 10(23C) and for that purpose filed an application for registration under section 12AA. That was granted but the Assessing Officer noted that the issue of exemption under section 11 in the case of assessee was raised in the assessment year 2004-05 and there as well the claim was disallowed.
The AO once again sought an *explanation* for the subsequent year and on the same point. The assessee submitted that for the assessment years 2003-04 to 2006-07,the claim had been allowed by the CIT(A)and also by the Tribunal and hence, the same order should be followed. However, that Appeal of the revenue was not dismissed on merits according to the AO but on technical grounds, therefore, he disallowed the claim.
On appeal to the High Court :
It cannot be concluded that the assessee must be denied the exemption and unless requisite satisfaction to the contrary is recorded. Once the denial of exemption is only on the ground that the Assessing Officer asserted that for the earlier years his view was not reversed or set aside by the Tribunal on merits that he proceeded to deny the exemption. However, the Tribunal in the order under challenge applied the correct tests which was to be applied by this Court in the order in relation to SRA. For all these reasons, the view taken by the Tribunal as also the Commissioner (Appeals) is a possible one and in the backdrop of the facts and circumstances. The appeal, therefore, does not raise any substantial question of law. It is accordingly dismissed. (AY. 2007-08)
DIT(E) .v. Maharashtra Housing & Area Development Authority (MHADA) (2015) 228 Taxman 297(Mag.) (Bom.)(HC)

S. 11 : Property held for charitable purposes –Foreign shares-Will-Pending for probate- No infirmity in the order-Rejection of application was not justified.[S. 11(5)]
One 'R' by a will bequeathed his entire property including shares in a foreign country to assessee-trust. However, said will of 'R' was under challenge in probate proceeding and same was pending adjudication. CIT(A) held that there was no violation of section 11(5) as till will was probated and it was affirmed that will was genuine, trust would not acquire legal right on foreign shares ,there was no infirmity in impugned order.
CIT v. Niranjanbapu Education and Charitable Trust. (2015) 228 Taxman 193 (Mag.) (Guj.)(HC)

S. 11 : Property held for charitable purposes- Educational institution - Capital expenditure incurred for attainment of object of institution-Entitled exemption.[S. 12A,12AA,13(3)]

If capital expenditure is incurred by an educational institution for attainment of the object of the society, it would be entitled to exemption under section 11. Therefore, the assessee was eligible for exemption under section 11.(2007-2008)

CIT .v. Silicon Institute of Technology(2014) 272 CTR 319/ (2015) 370 ITR 567/230 Taxman 415 (Orissa)(HC)

S. 11 : Property held for charitablepurposes– Accumulation of income-Purpose of accumulation declared by assessee to be treated as sufficient -No disallowance can be made.

Held it was clear from the assessment order that the aim and objective of the assessee was to work for the welfare of its members. This undoubtedly was the purpose and objective of the society. The assessee had clarified and stated that the money would only be used for the purpose of making payments to its members or their legal representatives in case of their death, retirement or permanent disability. The Tribunal also referred to the scheme floated by the assessee in detail. In view of the factual findings, the Assessing Officer could not have disallowed the accumulation under section 11(2) and added it to the total income of the assessee.(AY.1996-1997)

DIT(E) .v. NBIE Welfare Society (2015) 370 ITR 490 / 229 Taxman 490 (Delhi)(HC)

S. 11 : Property held for charitable purposes-Objects of general public utility-Mixed objects-Super market business- Not entitled to exemption.[S.2(15); 12A]

Assessee was a public charitable trust and claimed exemption under section 11, however, Assessing Officer denied same on ground that major income and expenditure of assessee trust was from running a super market on commercial basis and not by charitable and religious activities . Dismissing the appeal the Court held that where assessee trust carried on super market business and there was no nexus between supermarket business and an activity incidental to attainment of objects of assessee trust, assessee would be disentitled for exemption. (AY. 2007-08, 2008-09)

Ashish Super Mercato v. Dy.CIT (E) (2015) 68 SOT 64 (Cochin) (Trib.)

S. 11 : Property held for charitable purposes-Even post insertion of proviso to S.2 (15) but before 01.04.2016, S. 11 benefit cannot be denied to business activities carried by the trust in the course of actual carrying out of such advancement of any other object of general public utility. [2 (15)]

Trusts are entitled to carry out activities in the nature of trade, commerce or business etc as long as these activities are carried out in the course of actual carrying out of advancement of any other object of general public utility. On facts, activity of auctioning commercial plots for maximum revenue cannot be regarded as a profit-making exercise benefit cannot be denied. (AY. 2009-10 2011-12)

Hoshiarpur Improment Trust v. ITO (Amr.)(Trib.); www.itatonline.org

S.11:Property held for charitablepurposes-Promote education on banking-Charitable in nature-Eligible for exemption. [S. 2(15)]

The assessee was an institute set up to encourage the study of the theory of banking and for that purpose the assessee instituted a scheme of examination for various diplomas and certificate. The assessee claimed exemption under section 11 of the Act. The Assessing Officer rejected the claim of the assessee on the grounds that the assessee had generated huge surplus and did not promote any charitable activities for the public at large. The Commissioner (Appeals) sustained the order of the Assessing Officer. On appeal:

Held, allowing the appeal, that the assessee was set up for the purpose of development of banking personnel in the banking industry. The income and properties of the assessee were applied solely towards the promotion of the objects of the assessee as set forth in the memorandum of association. Since the assessee had given benefit to persons in the banking industry, the activities of the assessee were covered by the definition of "charitable purpose" in section 2(15) of the Act. Hence the assessee was eligible for exemption under section 11 of the Act.(AY.2008-2009)

Indian Institute of Banking and Finance v. Dy.CIT(E)(2015) 39 ITR 323 / 69 SOT 598 (Mum.)(Trib.)

S. 11 : Property held for charitablepurposes-Educational institution- No violation of aims and objects at the stage of construction Exemption is available- Capitation fees- Additions were deleted. [S. 12, 13]

Tribunal held that there was no violation of aims and objects of assessee,at stage of construction of educational building. Corpus of funds towards construction of building proved, hence, exemption is allowable.Tribunal also held that due to failure by Department to prove assessee received capitation fees and cash belonged to assessee, additions to be deleted.(AYs. 2003-2004, 2004-2005, 2009-2010)

DY.CIT v. Indo Global Education Foundation (2015) 39 ITR 489(Chad.)(Trib.)
Sukhdev Sigh v.Dy.CIT(2015) 39 ITR 489(Chad.)(Trib.)

S.11:Property held for charitablepurposes-Development and research in banking technology-There is no profit motive-Entitled to exemption. [S.2(15), 12AA]

(i) The ratio laid down in Sole Trustee, Loka Shikshana Trust v. Commissioner of Income-Tax, Mysore 101 ITR 234 (SC), CIT vs. Andhra Chamber of Commerce 55 ITR 722 (SC) and Additional Commissioner of Income-tax, Gujarat v. Surat Art Silk Cloth Manufacturers Association 121 ITR 1 is that in the case of entity or organization whose objects are several, some of which are charitable and non-charitable; the test of predominant object for which the organization was set up is alone to be applied. Therefore, in the present case, the research and development in the Information Technology in the Banking Sector is the prime object for which the Appellant society was created by the Reserve Bank of India as is evident from the genesis of the organization. Offer of M.Tech course, Ph.D. programmes are only incidental for attainment of main objects of the organization. The primary object of promoting the technology in banking and financial sectors does not fall within the ambit of expression 'education' as defined above, since the said activity does not involve systematic instruction, schooling or training given to the young in preparation for the work of the life. The projects undertaken and the research activities by the society are only aimed at improvement of technology in Indian Banking and Financial sectors. As a result of developments in these areas, society at large shall be benefited and shall promote the welfare of general public. The improvement in technology related to Banking Sector leads to economic prosperity which enures benefitsto entire community. Therefore, these objects can be said to be for advancement of any other objects of general public utility, which is a fourth limb in the definition of 'charitable purpose' in Section 2(15) of the Act. The principle enunciated by Hon'ble Apex Court in the case of CIT vs. Andhra Chamber of Commerce 55 ITR 722 holds good. When an object seeks to promote or protect the interests of a particular trade or industry, that object becomes an object of public utility, but not so, if it seeks to promote the interests of those who conduct the said trade or industry. The distinction between the protection of the interests of individuals and the protection of interests of an activity which is of general public utility goes to the root of the whole problem: CIT v. Andhra Chamber of Commerce, (1965) 55 ITR 722, 727 (SC); Addl. CIT v. Ahmedabad Millowners' Association, (1977) 106 ITR 725, 738 (Guj)]. Applying the ratio laid down in the above cases to the facts of the present case, we have no demur to hold that the objects of the Appellant are aimed at improving the Information Technology in the Banking and Financial Sector. The question of private gain or profit motive cannot be attributed to the appellant society as the Reserve Bank of India is the creator of the appellant society. Therefore, undoubtedly, the objects of the trust fall within the ambit and scope of the expression "general public utility services", which is a fourth limb of the definition of word "charitable" as defined under Section 2(15) of the Act.

(ii) As regards the proviso to Section 2(15) of the Act, it is clearly discernible from the CBDT's Circular No.11 of 2008, dated 19.12.2008 and speech of the Hon'ble Finance Minister that the intention of Parliament in introducing the proviso to Section 2(15) of the Act is to deny exemption to those organizations or entities, which are purely commercial or business in nature or the commercial business entities, which wear the mask of a charity. The genuine charitable organizations are not affected in any way. It was further clarified that Chambers of Commerce and similar organizations rendering service to its Members could not be affected by introduction of the proviso. We, therefore, are required upon to find out whether the objects of the Appellant society are commercial or business

in nature. Keeping this in mind, it is to be examined what is meant by the expression "commercial or business". The words 'trade', 'commerce' and 'business' were enumerated and elucidated in Institute of Chartered Accountants of India v. Director-General of Income-tax (Exemptions) [2012] 347 ITR 99 (Delhi)

(iii) Applying the tests enumerated, by no stretch of imagination, it can be said that the Reserve Bank of India had set up the Appellant society with a profit motive. It is most significant to note that the provisions of the Reserve Bank of India do not empower it to carry on any activity with profit motive. The activities of the appellant society are charitable and are not in the nature of commercial, or business. When the main objects of the appellant society are not business, the incidental activity, which is pursued for attainment of the main objects, cannot be called "business", merely because the appellant society renders services against payment as fees or cess, even if resulting in profit. The Hon'ble Apex Court in the case of CIT vs. Andhra Chamber of Commerce – (1965) 55 ITR 722 – laid down the principle that if the primary purpose of institution was advancement of objects of general public utility, it would remain charitable, even if some incidental or ancillary activity or the purpose for achieving the main purpose, was profitable in nature.

(iv) The rational that can be culled out from the above decisions is that once the primary objects of an institution are established to be in the nature of charity, then the proviso to section 2(15) of the Act can not be made applicable. In other words, the existence of the proviso in substance will not make any difference. The proviso will hit only such cases where the entity or organization is carrying on business activity with a profit motive in the garb of charitable purpose. It will not however affect the case of institution which are genuinely carrying on charitable activities. The words used by the legislature in the proviso "In the nature of trade, commerce or business". If we give due importance to the above mentioned words, the only conclusion will be that the proviso will effect only such cases where the activities of a charitable institution can be considered to be in the nature of trade, commerce or business. In fact, the same controversy, which has been there in the past, whether a charitable institution is carrying on the activities only of charitable nature or is carrying on activities which are in the nature of business, is emerging from this proviso also. In other words, the proviso will not give rise to any new controversy which had not been in the past. The further words used in the proviso, that for a cess or fee or any other consideration, have to be read alongwith the nature of activities, i.e., trade, commerce or business. When an institution is carrying on activities in the nature of trade, commerce or business obviously it will be charging fee, etc. It may be charging fee even when rendering/providing services as part of charitable activity in order to supplement its income for carrying on charitable activities. In that case the proviso will not have any implication as the activities would not be in the nature of trade, commerce or business. Accordingly, the proviso inserted in the definition of 'charitable purpose' will not substantially have any impact on the meaning of charitable purpose.

(v) What needs to be considered is as to whether the charging of amounts from the banks for the services rendered by the appellant society would make the activity 'commercial' as held by the Assessing Officer. The mere fact that the appellant society had generated surplus, during the course of carrying on the ancillary objects, shall not alter the character of the main objects so long as the predominant object continues to be charitable and not to earn the profit. Please refer to the judgments rendered by the Hon'ble Apex Court in the cases of Addl. CIT vs. Surat Art Silk Cloth Manufacturers' Association [1980] 121 ITR 1 and CIT v. A.P. State Road Transport Corporation [1986] 159 ITR 1. The ratio laid down in the cases (Surat Art Silk Cloth Manufacturers Association, Aditanar Educational Institution and American Hotel and Lodging Association Educational Institute) is that mere existence of surplus from the activity does not mean that it will cease to be one existing solely for charitable purpose. The test to be applied is only the nature of predominant activity to determine whether the institution is existing for charitable purpose or otherwise. Therefore, in the instant case also, the mere fact that there was a surplus from the ancillary activities carried on by the appellant society does not mean that its objects ceases to be charitable.(ITA No.1712/Hyd/2014, dt. 30.06.2015) (AY. 2011-2012)

Institution for Development and research in Banking technology (IDRBT) v. ADIT (Hyd.)(Trib.);www.itatonline.org

S. 11:Property held for charitablepurposes-Anonymous donations- Cash credits-Identity of donors was established-Donations cannot be assessed as anonymous donations. [S. 12A,68, 115BBC]

(i) The trust is registered u/s 12A of the Act. There is no dispute that the entire voluntary donations have been disclosed by the trust as income in the Income and Expenditure account. The income so disclosed has been applied for charitable purposes as provided u/s 11(1) of the Act and hence cannot be included in total income of the trust. Adding part of the voluntary donations again as unexplained cash credits u/s 68 to the total income of the trust amounted to taxing the same income twice which is not permissible.

(ii) To obtain the benefit of the exemption under section 11, an assessee is required to show that the donations were voluntary. In the instant case, the assessee had not only disclosed its donations, but had also submitted a list of donors. The fact that the complete list of donors was not filed or that the donors were not produced, did not necessarily lead to the inference that the assessee was trying to introduce unaccounted money by way of donation receipts. That was more particularly so in the facts of the case where admittedly, more than 75 per cent of the donations were applied for charitable purposes;

(iii) Section 68 had no application to the facts because the assessee had in fact disclosed the donations as its income and it could not be disputed that all receipts, other than corpus donations, would be income in the hands of the assessee. There was, therefore, full disclosure of income by the assessee and also application of the donations for charitable purposes. It was not in dispute that the objects and activities of the assessee were charitable in nature, since it was duly registered under the provisions of section 12A;

(iv) Section 115 BBC of the Act were not violated by the trust and the donations received from the nine donors cannot be categorized as anonymous donations. To be excluded from the definition of expression "anonymous donation" the person receiving the voluntary contributions referred to in section 2(24)(iia) is required to maintain a record of identity indicating the name and address of the contributor and such other particulars as may be prescribed. Since no other particulars have been prescribed under the provisions the person receiving the donation is under obligation to maintain the identity of donors indicating the name and address only. On perusal of the details furnished by the trust it is seen that the trust has not only furnished the names and addresses of the donors but also furnished a number of other details in respect of such donors viz. their PANs, copy of ITRs, copy of bank statements their confirmations, financial statements, computation of income etc. In view of the above, it is held that the trust has established the identity of donors as provided u/s 115BBC of the Act and the donations cannot be categorized as anonymous donations and subjected to tax as per provisions of section 115BBC of the Act.(AY. 2010-11)

ITO v. Saraswati Educational Charitable Trust (Luck.)(Trib.); www.itatonline.org

S. 11:Property held for charitable purposes - Charitable institutions are eligible to a blanket deduction of 15% of the gross receipts without being required to satisfy any condition [S. 12AA]

Dismissing the appeal of revenue the Tribunal held that ;The decision of the Hon'ble Supreme Court in A.L.N Rao Charitable Trustreported in 216 ITR 697(SC) clearly held that there is a blanket exemption with regard to the 25% (now 15%) of gross receipts as per second part of Section 11(1)(a) of the Income Tax Act. This exemption of 15% is not dependent on any other condition except that the trust or society should be registered u/s 12AA of the Income Tax Act. The only issue to be examined here is whether the provisions of section 11(1) (a) and 11(2) have been since amended and if so, whether the aforesaid decision would apply to the amended provisions also? It is apparent from the reading of the provisions that section 11 (1)(a) was almost identical during the AY 69-70 and during AY 2010-11. As regards the provisions of section 11(2) are concerned, even the amended sub section (2) operates qua the balance of 85 per cent, of the total income of the previous year which has not got the benefit of tax exemption under sub-section (l)(a) of section 11. Section 11(2), as amended, does not operate to whittle down or to cut across the exemption provisions contained in section 11(1)(a)so far as such accumulated income of the previous year is concerned. As held by the Hon'ble Supreme Court in the case of A.L.N Rao Charitable Trust reported in 216 ITR 697(SC), it has to be appreciated that sub-section (2) of section 11 does not contain any non obstante clause like

"notwithstanding the provisions of sub-section (1)". Consequently, it must be held that after section 11(l)(a) has full play and if still any accumulated income of the previous year is left to be dealt with, and to be considered for the purpose of income tax exemption, sub-section (2) of section 11 can be pressed into service and if it is complied with then such additional accumulated income beyond 15 per cent, can also earn exemption from income-tax on compliance with the conditions laid down by sub-section (2) of section 11. As such, this judgement of the Hon'ble Supreme Court is squarely applicable to the appellant's case. The appellant is thus eligible for exemption of 15% of gross receipts 11(l)(a) of the Income Tax Act.(ITA No. 1093/Chd/2013, dt. 30.04.2015) (A Y. 2010-11)
ITO v. Bhartiya Vidya Mandir Trust (Trib.)(Chd); www.itatonline.org

S. 11: Property held for Charitable purposes-Computation of income-Depreciation-Precedent-HighCourt-Decision of jurisdictional High Court binding upon authorities within its jurisdiction-Commissioner (Appeals) justified in granting relief.[S. 32]
The assessee-trust claimed depreciation on certain assets. The Department disallowed the claim on the ground that it would amount to double deduction as capital expenditure had been treated to have been applied for the objects of the trust. The Commissioner (Appeals), following the decision of the Delhi High Court, allowed the depreciation. On appeal by the Department :
Held, dismissing the appeal, that when the decision of the jurisdictional High Court was available on any issue, under well established law, it was binding upon the authorities working under the jurisdiction of the High Court. The order of the Commissioner (Appeals) was correct. (AY. 2008-2009, 2009-2010)
Dy. CIT (E) v. Bhardwaj Welfare Trust (2015) 38 ITR 482 (Delhi) (Trib)

S.11: Property held for charitable purposes-Business income - Trade associations - Receipts from specific services to members without any profit motive entitled to exemption. [S. (2(15) ,28(i)]
Assessee Association undertook activities like conducting Environment Management Centres, meetings, conferences and seminars and issuance of certificate of origin. The revenue authorities denied assessee's claim for exemption of income under section 11 for the reason that the activities of assessee association was hit by the newly inserted proviso by the Finance (No. 2) Act in section 2(15) with effect from 1-4-2009 and thereby falling under section 28(iii) being profit of business. It was held that where the main object of the Institution was 'charitable' in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non-members, were all 'charitable' in nature. The basic principle underlying the definition of 'charitable purpose' remained unaltered even on amendment in the section 2(15) with effect from 1-4-2009, though the restrictive first proviso was inserted therein. Assessee Association was eligible for exemption u/s 11 (AY. 2009-10)
Indian Chamber of Commerce v. ITO(E) (2014) 52 taxmann.com 52/(2015) 67 SOT 176(URO)/167 TTJ 1 (Kol.)(Trib.)

S. 11 : Property held for charitablepurposes-Medical relief-Income earned from pharmacy being integral to main object of running hospital ,it could not be excluded from computing income eligible for exemption.[S. 2(15), 12A]
Assessee, a charitable society registered u/s. 12A, running a hospital along with dispensary for benefit of public at large. AO held that certain activities carried on by assessee such as running pharmacy, working women's hostel etc. involved carrying on of activities in nature of trade and business and, therefore, such activities, even if meant for advancement of any object of general public utility, could not be treated as charitable purpose within meaning of proviso in s. 2(15). Since running of pharmacy by assesse was integral to running of hospital, collection received by assessee from its pharmacy could not be excluded from computing income eligible for exemption u/s. 11. Collection from other activities such as typewriting institute, working women's hostel and crèche came to less than Rs. 10 lakhs, by virtue of exclusion clause, those amounts also could not be considered for disallowing exemption u/s. 11.(AY. 2009 – 2010)
Franciscan Sisters of St. Joseph Society v. Jt. CIT(E)(2015) 152 ITD 485 (Chennnai)(Trib.)

S. 11 : Property held for charitablepurposes -Depreciation--Not a case of double deduction.[S.12A,32]

Held, dismissing the appeal, that the assessee was claiming depreciation on the assets owned by it. The claim to depreciation did not amount to double deduction. (AY. 2010-2011)

ITO v. Ramananda Adigalar Foundation (2015) 37 ITR 80 (Chennai) (Trib.)

S. 11 : Property held for charitablepurposes--Chamber of Commerce- Even if activity incidental or ancillary to achieving main purpose profitable in nature is not hit .[S. 2(15), 12]

Assessee carrying out activities incidental to main object of association such as advancement and development of trade, commerce and industry in India.Activities not in nature of business and no motive to earn profit. Entitled to exemption under section 11.Assessee's primary purpose advancement of objects of general public utility, remains charitable even if activity incidental or ancillary to achieving main purpose profitable in nature is not hit by section 2(15). (AY. 2008-2009, 2009-2010)

Indian Chamber of Commerce .v. ITO(E) (2015) 37 ITR 688 (Kolkata)(Trib.)

S. 11 : Property held for charitablepurposes –Museum portraying pictures, paintings, antique coins etc- Incidental charges such as entry fee, guide fee, lift charges etc- Entitled exemption. [S. 2(15), 12AA]

Where assessee, a trust registered under section 12AA, was settled with object of establishing a museum portraying pictures, paintings, antique coins etc., its activities were to be regarded as falling under category of 'general public utility' within meaning of section 2(15) and, thus, it was entitled to claim exemption under section 11 in respect of incidental charges such as entry fee, guide fee, lift charges etc. (AY. 2009-10)

Mehrangarh Museum Trust .v. ACIT (2014) 48 taxmann.com 129 / (2015) 67 SOT 1 (URO)(Jodh.)(Trib.)

S. 12A : Registration-Trusts or institutions–Cancellation of registration was held to be not valid.[S.2(15), 12AA,13]

DIT(E)cancelled registration of assessee holding that dominant activity of assessee was letting out choultry on daily rental basis which was in nature of business. Tribunal allowed the registration. On appeal by revenue dismiising the appeal the Court held that; even if receipts from commercial activities were more when compared to overall receipts from charitable activities, it could neither lead to conclusion that activities of trust were not genuine nor could it be said that activities of trust were not being carried out in accordance with objects of trust and, thus, cancellation of registration was unjustified.(AY. 2010-11)

DIT .v. Sri Kuthethur Gururajachar Charities (2015) 231 Taxman 848 (Karn.)(HC)

S. 12A : Registration-Trust or institution–Registration granted cannot be cancelled in view of amendment of section 2(15) as that is not a ground specified in statute for cancellation of registration – Order of Tribunal granting registration was affirmed. [S.2(15), 12AA]

The assessee, industrial area development board, was granted registration under section 12A of the Act. The authority was of the view that there was no element of charity or providing of any services or industrial sites free of cost. Under various heads, the assessee had earned huge profit. Thereafter, taking note of the change in the definition of section 2(15), which came into effect from 1-4-2009, it was held that the activity carried on by the assessee was in the nature of trade, commerce or business or any activity of rendering any services in relation to trade, commerce or business and therefore, the consideration received irrespective of the nature of the use or application, or retention, of the income, from such activity would take the case out of section 2(15) and, therefore, proceeded to pass an order cancelling the registration granted under section 12AA.

On appeal, the Tribunal held that the registration already granted under section 12A could not be revoked for the reason that the charitable trust or institution pursuing of advancement of objects of general public utility carried on commercial activities and therefore as the conditions stipulated in section 12AA (3) did not exist in this case, set aside the order of cancellation of registration under section 12A.

On appeal: The Court held that a reading of the section 12AA(3) makes it very clear, a registration granted earlier under section 12A can be cancelled under two circumstances: (a) If the activities of such trust or institution are not genuine, (b) the activities of trust or institution not being carried out in accordance with the object of the trust or institution. Only on those two conditions being satisfied, the registration granted under section 12A could be cancelled by the authorities.
In fact, sub-section (8) to section 13 which is introduced by Financial Act, 2012 which came into effect from 1-4-2009 categorically provides that, nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the previous year or any receipt thereof. If the provisions of the first proviso to clause (15) of section 2 becomes applicable in the case of such person in the said previous year, the Statute has protected the interest of revenue. Notwithstanding the fact that the assessee is conferred registration under section 12A, unless the assessee falls within section 2(15), excluding the first proviso, the assessee would not be entitled to the benefit of exemption from the tax. If the case of the assessee falls with first proviso to section 2(15), the benefit of registration which flow from section 12A is not available. Anyhow, that is a matter to be considered by the Assessing Authority. But on that ground, registration cannot be cancelled, which is precisely the Tribunal has held.(AY. 2009-10)
DIT v. Karnataka Industrial Area Development Board (2015) 229 Taxman 539 (Karn.)(HC)

S. 12A : Registration–Trust or institution-Cancellation of registration-Finding that trust was running several educational institutions and had not violated any of the conditions for claiming exemption-Cancellation of registration was held to be not justified. [S.10(23C)(vi), 11, 12, 12AA]
KLE was a charitable institution established with the primary object of imparting education to all irrespective of the caste, creed or sex with the preference to north Karnataka. The society was granted approval under section 10(23C)(vi) of the Act. It had been granted registration.AO held that, the society had received donations from the parents and relatives towards admission of students in the educational institutions run by the society or by the KLE University, though the donations were voluntary contribution, they were capitation fees, the society was running a students' hostel and corporate hospital and facilities were charged, the hospital was not used for teaching purpose of its own educational institutions, the activity of the society was commercial activity and not charitable and therefore the society was not eligible for exemption under section 11. Registration granted to the assessee was cancelled and this was upheld by the Commissioner (Appeals). The Tribunal set aside the orders and restored the registration of the society granted under section 12A. On appeal to the High Court :
Held, dismissing the appeal, (i) that the donations received by the society could not be construed as capitation fee for the admission of students by the KLE university ; (ii) that providing hostel to the students/staff working for the society was incidental to achieve the object of providing education, namely, the object of the society ; (iii) that the Revenue not properly appreciated the legal point that though the chairman and few members of the society were the chairman and members of the KLE university, they were separate legal entities ; (iv) that there was no violation of any of the conditions stipulated under the Act, warranting cancellation of registration of the society. The society was entitled to registration under section 12A.(AY. 2008-2009)
CIT v. Karnataka Lingayat Education Society (2015) 371 ITR 249 (Karn.)(HC)

S. 12A : Registration - Trust or institution –Misappropriation of fund by trustees –Cancellation of registration was held to be not justified.[S. 12, 13,80G]
Where assessee-trust was fulfilling its main object of imparting education by establishing educational institution and taking admission of students every year, only on basis that trustees were misappropriating funds of said trust, registration of trust could not be cancelled.
CIT v. Islamic Academy of Education (2015) 229 Taxman 274 / 278 CTR 149 (Karn.)(HC)

S. 12A :Registration-Trust or institution-Merely because some amendments were made in the trust deed,denial of registration was held to be not justified.[S. 2(15), 11]

Assessee-trust was constituted with an intention to carry out charitable activity of imparting education. Entire objects of trust were clearly set out .Number of classes to be conducted by trust were also mentioned in trust deed 80 persons constituted teaching and non-teaching staff in said institution.Merely because some amendments were made in trust deed, it could not be a ground to deny registration as charitable institution particularly when objects of trust were fulfilled.
CIT v. Annapoorneswari Trust (2015) 229 Taxman 202 (Karn.)(HC)

S. 12A : Registration-Trust or institution-Registration for trust cannot be denied on sole ground of non-commencement of activity-Donation to other trust-Refusal of registration was not justified.
Commissioner denied registration to assessee-trust under section 12A by contending that assessee was not engaged in any other activities apart from carrying out activities of distribution of free note books. Absence of activity of a trust at time of registration is not a ground to question genuineness of objectives and activities, registration for trust cannot be denied on sole ground of non-commencement of activity, therefore, registration was to be granted. Commissioner denied registration to assessee-trust under section 12A on ground that assessee made donation to another trust to tune of Rs. 50,000.Once evidence produced disclosed that funds of trust were applied for carrying on charitable activities, purpose of establishing trust was fully satisfied and it did not matter that assessee is carrying on charitable activity through another trust; registration was to be granted.
CIT .v. Niranjanbapu Education and Charitable Trust. (2015) 228 Taxman 193 (Mag.) (Guj.)(HC)

S. 12A : Registration –Trust or institution-Charitable purpose - Commissioner to look into actual activity and main activity of trust - Posh school for children of non-resident Indians on commercial lines under guise of charitable purpose - Not entitled to registration. [S. 2(15), 11]
The Commissioner made an enquiry and was of the opinion that the assessee intended to run a posh international school in the name of charitable activity, and that therefore, it was not entitled to registration. His reasons for rejection of the application were that though the assessee said that its main object was to run educational institutions and establish institutions for training and rehabilitation of mentally retarded persons, physically handicapped persons, etc., enquiries revealed that the activity of the assessee was only to bring under its ambit the already existing school run by the managing trustee. The commencement of the school was in 2006 and the trust was formed in 2007. The school was run in a building where air-conditioned class rooms with breakfast and lunch were provided. The school was maintained and meant for the benefit of children of non-resident Indians. The fee structure indicated huge amounts collected even in kindergarten classes in the year 2006. For play school, it charged Rs. 6,000 per month. Apart from that, clause 6 of the trust deed further indicated that the assessee was at liberty having absolute discretion to accept contributions as donation and contributors had no right or control over the management or in the administration of the assessee.Held, that when the school was running on commercial lines under the guise of charitable purpose, the authorities were justified in making enquiries and rejecting the application.
Dawn Educational Charitable Trust .v. CIT (2015) 370 ITR 724 / 124 DTR 191 (Ker.)(HC)
Editorial :The Supreme Court has dismissed the special leave petition filed by the assessee against this judgment.(SLP (C) 28616 /14 dt.13-10-2014/ SLP (C) 16157 /14 dt. 13-10-2014)

S. 12A : Registration –Trust or institution- Charitable institution carrying activities outside India-Denied of Registration was held to be not valid. [S. 2(15), 11, 12AA]
If activities of a trust are found to be charitable and property is held wholly and exclusively under trust for charitable and religious purposes, then such a trust cannot be denied registration merely because its activities are extended outside India.
Critical Art and Media Practices v. DIT(E) (2015) 153 ITD 664 / 170 TTJ 401 (Mum.)(Trib.)

S.12A: Registration-Trust or institution-Rendering service to promote welfare of ex-Army personnel, their widows and dependents-Receipt of registration charges from members to provide suitable employment would not change fundamental character of charitable activity into commercial activity-Entitled to registration. [S. 2(15),11, 12AA]

The assessee was set up by the Indian Army, under the direct control of the Ministry of Defence, to promote the well-being of retired army personnel, their widows and their dependents. It filed an application for registration as a charitable institution eligible for tax exemption . The DIT(E) rejected the application on a view that, since the organisation was charging fees for giving placement to the members of the organisation, it was a commercial activity in violation of section 2(15) of the Act. On appeal :

Held, allowing the appeal, that charging of fees or any other consideration for rendition of a service, would vitiate the charitable nature of the activity, only when the service was rendered to a trade, commerce or business and the aggregate of such fees exceeds Rs. 25 lakhs. However, the assessee was rendering service to ex-army personnel, their widows and dependents to help them to integrate in civil society by taking up suitable employment, rather than to any trade, commerce or business. The scale of fees received from the members was modest and that could not change the fundamental character of the charitable activity into a commercial activity. The activity of the assessee was of general public utility covered under the definition of charitable purpose under section 2(15) of the Act and the Director of Income-tax had wrongly rejected the registration under section 12A of the Act.

Army Welfare Placement Organisation v. DIT(E) (2015) 168 TTJ 588 / 53 taxmann.com 442 / 38 ITR 1/ 68 SOT 535 (Delhi)(Trib.)

S.12A: Registration –Trust or institution-Assessee's plea that poor patients do not come forward to avail of free medical treatment is not believable. The overall conduct of the assessee suggests that it is conducting its affairs in a commercial manner & not in a charitable manner-Cancellation of registration was held to be justified. [S.2(15), 11, 12AA]

The Tribunal had to consider whether the DIT(E) was justified in canceling the registration of the assessee u/s 12A on the ground that it was not carrying out its main objects and that the objects that were being carried out were not charitable in nature but were commercial in nature. HELD by the Tribunal upholding the cancellation:

(i) The assessee could not demonstrate that it has undertaken any research work as per the main object. The assessee could not even establish that it has undertaken activities in consonance with the objects incidental or ancillary to the attainment of the main object as detailed in the memorandum of association. The registration for exemption U/s. 12A is granted by the DIT(E) on the basis of objects as detailed in the memorandum of association. The assessee is bound to carry on its activities in accordance with the objects. In case the assessee, at a later date, after the registration granted to it, considers it expedient to undertake some other activity which is charitable in nature, it is obliged under the law to amend its objects clause in accordance with law and to submit the same before the DIT(E). No such exercise was undertaken by the assessee of amending its main object. As the assessee has not undertaken its activities in accordance with the objects, it is not entitled to the benefit of exemption under Section 12A of the Act and the exemption was rightly cancelled by the DIT(E).

(ii) On merits, the assessee has not undertaken any activity worth the name, which can be said to be charitable activity. The assessee obtained prime land in an expensive area on perpetual lease at a nominal rent on the condition of providing 10% totally free indoor treatment and 20% free OPD for the weaker sections of the society. Admittedly, the assessee could not comply with this condition and has not provided the required number of beds to the poor and weaker sections of the society. The plea of the assessee that the poor people do not come forward and avail free medical services, the assessee could not be blamed, is not sustainable.

(iii) Also, the assessee could not make charity to a commercial organisation, although not connected with it, by paying exorbitant amounts totalling to about Rs. 40 crores in a year and should have spent the amount in a charitable manner for the deserving sections of the society. The conduct of affairs of the assessee-society are not on charitable lines and were clearly on commercial lines. The rate schedule of its charges from the patients for diagnosis, treatment or indoor facilities including surgery etc. are exorbitant and one of the highest in the metro capital city of New Delhi. In this case, conduct of the assessee leads to the only conclusion that the assessee-society is not running its affairs in a charitable manner.

Devki Devi Foundation .v. DIT(E) (2015) 118 DTR 121 / 170 TTJ 69/ 40 ITR 1/ 153 ITD 716(Delhi)(Trib.)

S.12AA:Procedure for registration – Trust or institution – Charitable purpose-Activities of trust such as providing education, developing natural talents of women and charging fees for the same does not amount to carrying on trade commerce or business. [2(15)]

The High Court observed that the motive of the assessee is not the generation of profit but to provide training toneedy women for their development. It further observed that the nature of activities carried on by the trust was to provide education and the occasional sales made by the assessee for the trust's fund generation and furthering of objects were not indicative of trade, commerce or business. The High Court held that the proviso to section 2(15) would not apply and hence would not be liable to cancellation of registration.

DIT .v. Women's India Trust (2015) 233 Taxman 196 / 277 CTR 180 / 118 DTR 173 (Bom.)(HC)

S. 12AA : Procedure for registration - Trusts or institutions – Huge profits- Cancellation of registration was held to be not justified. [S. 2(15)]

The assessee-trust was registered under section 12A. The revenue authorities, observing that the assessee-trust had earned huge profits, under various heads and taking a note of the change in definition of section 2(15) which came to effect from 1-4-2009, held that the activity carried on by the assessee was in nature of trade, commerce and business.Accordingly, the DIT(E)cancelled the registration of assessee-trust, by invoking provisions of section 12AA(3).On appeal, the Tribunal held that registration granted under section 12A could not be revoked on account of commercial activities by assessee in pursuing the advancement of objects of general utility and registration could be cancelled only on arriving at a finding that the activities of the assessee were not genuine and were not carried out in accordance with the objects of the trust. The Tribunal, therefore, allowed the assessee's appeal. On appeal dismissing the appeal of revenue the Court held that;In absence of any finding that activities of trust are not genuine or they are not being carried out in accordance with objects of trust, registration granted to trust under section 12A cannot be cancelled on ground that receipts from commercial activities are more compared to overall receipts of charitable organization. If case of assessee falls in first proviso to section 2(15) and, therefore, benefit of registration under section 12A is not available, this is a matter to be considered by Assessing Officer but, registration cannot be cancelled on that ground.(AY. 2008-09,2009-10)

DIT .v.Kodava Samaja (2015) 231 Taxman 708 (Karn.)(HC)

S. 12AA : Procedure for registration–Trust or institution- Delay in handing over possession could not be attributed to fault of trust-Entitled for registration. [S.12A]

Trust filed an application for registration under section 12AA. Details in application showed that trust received a land as gift from donors which was registered in their favour and they had recorded in their books of account, however, there was delay on part of donor to hand over physical possession of property to trust .Hence, CIT held that there was an error in maintaining accounts by trust and activities of trust were not at all clear and, therefore, they declined registration. What had been given as gift by a registered document had been entered into books of account promptly and delay in handing over possession could not be attributed to fault of trust, thus, reason to decline registration was trivial and hence assessee was entitled for registration.

CIT .v. Hare Krishna Movement (2015) 228 Taxman 298(Mag.) (Mad.)(HC)

S. 12AA : Procedure for registration-Trust or institution-Non disposal of an application for registration before the expiry of six months as provided u/s.12AA(2) would not result in deemed grant of registration. Assessee will have to file a Writ to compel CIT to consider application. [S.11, 12, 12A]

The Full Bench had to consider the following two questions:

(i) Whether the non disposal of an application for registration, by granting or refusing registration, before the expiry of six months as provided under Section 12AA(2) of the Income Tax Act, 1961 would result in deemed grant of registration; and

(ii) Whether the Division Bench judgment of this Court in the case of Society for the Promotion of Education, Adventure Sport & Conservation of Environment vs. Commissioner of Income Tax (2008)

216 CTR (All) 167 holding that the effect of non consideration of the application for registration within the time fixed by Section 12AA(2) would be deemed grant of registration, is legally correct.
HELD by the Full Bench:
(i) Sub-section (2) of Section 12AA requires that every such order granting or refusing permission under clause (b) of sub-section(1) shall be passed before the expiry of six months from the end of the month in which the application was received. The use of the expression 'shall' in sub-section (2) is, by itself, not dispositive of whether the period of six months is mandatory. The legislature has not imposed a stipulation to the effect that after the expiry of a period of six months, the Commissioner would be rendered functus officio or that he would be disabled from exercising his powers. Similarly, the legislature has not made any provision to the effect that the application for registration should be deemed to have been granted, if it is not disposed of within a period of six months with an order in writing either allowing registration or refusing to grant it. The submission of the assessee essentially requires the Court to read into sub-section (2) a fiction by which an application for registration should be regarded as deemed to be granted, if it is not disposed of within six months. Providing that an application should be disposed of within a period of six months is distinct from stipulating the consequence of a failure to do so. Laying down a consequence that an application would be deemed to be granted upon the expiry of six months can only be by way of a legislative fiction or a deeming definition which the Court, in its interpretative capacity, cannot create. That would be to rewrite the law and to introduce a provision which advisedly the legislature has not adopted (Society for the Promotion of Education, Adventure Sport & Conservation of Environment vs. Commissioner of Income Tax (2008) 216 CTR (All) 167 reversed, CIT vs. Sheela Christian Charitable Trust [2013] 32 taxman.com 242 (Mad) and CIT vs. Karimangalam Onriya Pengal Semipu Amaipu Ltd [2013] 32 taxman.com 292 (Mad) referred). Matter referred to division Bench to pass the consequential order.
CIT v. Muzafar Nagar Development Authority(2015) 372 ITR 209 / 231 Taxman 490/ 275 CTR 233/116 DTR 33 (All.)(HC) (FB)
Editorial: Society for the Promotion of Education Adventure Sport & Conservation of Envirement v.CIT (2008) 217 CTR 568 / 5 DTR 329/ 171 Taxman 113/ [2015] 372 ITR 222 (All)(HC) is overruled.

S. 12AA : Procedure for registration–Trust or institution-Society had been formed to promote relationship between India and Japan without any element of profit and fees collected was utilized only for promotion of its aims and objects, it was entitled to registration.
Assessee-society had been formed to undertake, encourage, facilitate and promote relationship between India and Japan in general without any element of profit. It was not charging any fee for services rendered by it. Fees charged by way of admission fee, monthly subscription, admission and registration fee, etc., were utilized only for promotion of aims and objects of society. Benefits of activities of trust were not confined to select segment but would flow to larger section of society. when in terms of rules of society membership was open to Japanese corporations in Chennai as also their subsidiaries, joint venture companies and Indian individuals in Chennai, it could not be said that benefit of activities would extend to Japan. Assessee was entitled to registration u/s. 12AA.
Japanese Chamber of Commerce & Industry v. DIT(E) (2014) 160 TTJ 356 / (2015) 153 ITD 690 (Chennai)(Trib.)

S. 12AA : Procedure for registration–Trust or institution-Denial of exemption-Provision of section 13 can be invoked by A.O. while framing assessment and not by Commissioner while considering application for registration. [S.13]
Assessee-society was formed with object of establishing schools, colleges, hospitals etc. for benefit of Christian Community. The assessee filed an application seeking registration under section 12AA of the Act. The Commissioner rejected the application on the basis that the society was formed for the benefit of a particular community and there was violation of section 131(b) of the Act. On appeal allowing the claim of assessee the Tribunal held that ; Commissioner could not reject its application for registration under section 12AA on ground that there was a violation of provisions of section of section 13(1)(b). Provisions of s. 13 can be invoked by A.O. while framing assessment and not by Commissioner while considering application for registration u/s. 12AA.

St. Joseph Academy v. DIT(E) (2015) 153 ITD 669 (Hyd.)(Trib.)

S. 12AA : Procedure for registration–Trust or institution-Trust was established with object to protect, preserve, maintain and develop Indian breed of cows and its progeny- Held to be charitable purpose-Registration was allowed. [S.2(15)]

Where assessee-trust was established with object to protect, preserve, maintain and develop Indian breed of cows and its progeny, it was to be for charitable purpose within meaning of section 2(15) and, thus, assessee's application seeking registration u/s. 12AA was sustainable.

Bharatiya Govansh Rakshan Samvardhan Parishad .v. CIT (2015) 153 ITD 636 (Guwahati)(Trib.)

S. 12AA : Procedure for registration–Trust or institution-Denial of exemption-Registration could not be denied by invoking restriction imposed u/s.13(1)(b). [S.13(1)(b)]

Assessee Society was created primarily with the object for upliftment of the people of Kurni cast who were notified by the Government of India as belonging to a back word class. The application for registration was rejected by DIT(E) holding that since the society had been established for the benefit of only one community , it could not be granted registration in view of restriction imposed under section 13(1)(b) , of the Act. On appeal allowing the claim the Tribunal held that ; for benefit of kurni community which was classified as a backward class, would come within exception provided under Explanation 2 to section 13 and, it could not be denied registration under section 12AA by invoking restriction imposed u/s. 13(1)(b).

Kurni Daivachara Sangham .v. DIT(E) (2015) 153 ITD 673 (Hyd.)(Trib.)

S. 12AA:Procedure for registration –Trust or institution-Registration under Andhra Pradesh Charitable and Hindus Religious Institutions and Endowments Act is not a condition precedent for granting registration.[S.12,Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987.S. 43]

Allowing the appeal the Tribunal held that ,Section 12A read with section 12AA of the Act, do not indicate that for the purpose of obtaining registration under section 12AA a trust or institution has to get itself registered under section 43 of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987. Accordingly the Tribunal directed the DIT(E) to modify his order by granting registration without insisting upon registration under section 43A of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1987.

Grace Gospel Ministries v. DIT (E) (2015) 39 ITR 387(Hyd.)(Trib.)

S. 12AA:Procedure for registration –Trust or institution- No violation- Registration cannot be withdrawn.[S. 11, 12, 13 , 80G]

Tribunal held that there was no material to prove activities not genuine or not carried out in accordance with objects of trust and there was no violation against sections 11, 12 and 13 hence registration cannot be withdrawn.(AY. 2003-2004, 2004-2005, 2009-2010)

DY.CIT v. Indo Global Education Foundation (2015) 39 ITR 489(Chad.)(Trib.)

Sukhdev Sigh v.Dy.CIT(2015) 39 ITR 489(Chad.)(Trib.)

S.12AA:Procedure for registration–Trust or institution-Assessee filing application for registration on last day of previous year-Entitled to exemption from assessment year to which previous year relates.[S.11, 12A, 153]

The assessee, a statutory Board created by the Government of Andhra Pradesh, applied for registration under section 12A of the Income-tax Act, 1961 on March 31, 2008. The Director of Income-tax (Exemption) granted registration under section 12AA of the Act with effect from the date of filing the application. In a petition under section 154 of the Act, the assessee contended that, since the application was made on March 31, 2008, the assessee was entitled to exemption from the assessment year 2008-09. On appeal :

Held, allowing the appeal, that the DIT(E)had failed to mention the applicability of provisions under section 11 of the Act from a particular assessment year. In terms of section 12A(2) of the Act, the assessee would be entitled to exemption under section 11 of the Act for the assessment year following

the financial year in which the application for registration was made under section 12A of the Act. Admittedly, the assessee had applied for registration in the financial year 2007-08. Hence, the provisions of sections 11 and 12 of the Act would be applicable to the assessee from the assessment year 2008-09 and not the financial year 2008-09. (AY. 2008-2009)
Andhra Pradesh Pollution Control Board v. DIT (E) (2015) 38 ITR 539 (Hyd.)(Trib.)

S. 12AA:Procedure for registration-Trust or institution-No doubt as to genuineness of activities of trust and charitable nature of its objects-Order declining registrationwas not justified.[S.11,12A]
On facts allowing the appeal, the Tribunal held that the various clauses in the trust deed with regard to promotion of education and medical relief were in no way connected with any business activity so as to deny registration and there were no records to show that the objects of the trust were for non-charitable activity. All the objects of the trust were charitable in nature and the genuineness of its activities was not in doubt. The Tribunal also observed that at the time of registration under section 12A of the Income-tax Act, 1961, the Commissioner is required to verify the objects of the trust and genuineness of its activities. If the objects of the trust are charitable and the activities are genuine, the registration is to be granted. If subsequently, it is found that the assessee is not following its objects or that the objects are not charitable or its activities are not genuine, during the course of assessment, the Assessing Officer has powers to tax such receipts of the trust which are not charitable or commercial in nature. In addition, the Assessing Officer is empowered to exclude receipts of the trust, if he finds that any funds of the trust or institution are invested or deposited in any form or mode specified in sub-section (5) of section 11 and can exclude income of such trust from the provisions of exemption if he finds that such funds were utilised for benefit of any of the persons, who has substantial interest in the trust or institution. (AY. 2012-2013)
Kanakia Art Foundation v. CIT(E) (2015) 39 ITR 53(Mum.)(Trib.)

S. 12AA:Procedure for registration–Trust or institution-Registration cannot be refused on the ground that the assessee is not carrying out any activities of charitable objects.[S.80G]
When the object of assessee is covered by charitable purposes, registration cannot be refused on ground that assessee is not carrying out any charitable activities. Whether the assessee is not carrying out any charitable activities remains to be seen at time of assessment proceedings. As regards registration under section 80G the matter is remanded to Commissioner to decide it according to law.
Life Shines Educational and Charitable Trust v. ACIT (2015) 39 ITR 291(Chennai)(Trib.)

S. 12AA:Procedure for registration–Trust or institution-Failure by authority to record dis-satisfaction about object of trust and its genuineness-Order rejecting registration not sustainable. [S.12A].
The assessee filed an application for registration under section 12AA of the Act. The Director of Income-tax (Exemption) rejected the application of the assessee on the ground that the assessee had not commenced its activities subsequent to its creation. On appeal:
Held, allowing the appeal, that in terms of section 12AA(1)(b)(ii) of the Act, the competent authority must satisfy himself about the objects of the trust and the genuineness of its activities. The Director of Income-tax (Exemption) could enquire into the circumstances responsible for the non-commencement of the activities by the trust or the entity seeking registration and had power to call for documents or information from the applicant. Since no dissatisfaction with regard to the objects of the trust had been recorded by the Director of Income-tax (Exemption), the denial of registration was not sustainable and the assessee's application was to be accepted.
Matru Vandana Trust v. DIT(E)(2015) 39 ITR 30 / 68 SOT 275 (Mum.)(Trib.)

S.12AA:Procedure for registration–Trust or institution-The Proviso to S.2(15) has no bearing on the grant or denial of registration. The applicability of the proviso has to be evaluated on a year to year basis and it only affects the grant of exemption u/s 11.[S.2(15), 11, 12A]
(i) The scope of powers of the Commissioner under section 12AA(3) for cancellation of registration already granted is very limited in scope inasmuch as it can only be invoked only when (i) the activities of the trust are not genuine, and (ii) the activities of the trust or the institution are not being

carried out in accordance with the objects of the trust or the institution. Section 12AA(3) specifically provides that when the CIT "is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or institution, as the case may be, he shall pass an order in writing cancelling the registration of such trust or institution". It is not even the case of the CIT that the activities of the assessee trust are "not genuine" or that the "activities of the assessee are not being carried out in accordance with the objects" of the assessee trust. The case of the CIT rests on the first proviso to Section 2(15) coming into play on the facts of this case but then such a factor cannot warrant or justify the powers under section 12AA(3) being invoked. We, therefore, uphold the grievance of the assessee that the action of the Commissioner, in withdrawing the registration under section 12AA(3), was well beyond the limited scope of the powers conferred on him by the statute.

(ii) There is, however, a much more fundamental reason for the assessee succeeding in this appeal. In our considered view, the considerations with respect to the first proviso to Section 2(15) coming into play and, for that reason, the objects of an assessee trust or institution being held to be not covered by the definition of 'charitable purposes', have no role to play in the matters relating to registration of a trust or institution under section 12A or 12AA- whether in respect of granting or declining of a registration or in respect of cancellation, even if otherwise permissible, of a registration. A closer look at the scheme of the Act would unambiguously show this aspect of the matter;

(iii) The definition of 'chartable purposes' is that the rider set out therein, under first proviso to Section 2(15), can only come into play on year to year basis and not in absolute terms. The same activity can be hit by this rider in one year and thus the assessee trust or institution may not qualify to be existing for 'charitable purposes', and that very activity of the assessee trust or institution may remain unaffected by the same disabling provision for another year. The reason is that it is not only the nature of the activity but also the level of activity which, taken together, determine whether this disabling clause can come into play. The safeguard against the objects of the trust being vitiated insofar as their character of 'charitable activities' is concerned, is inbuilt in the provisions of Section 13(8) which was brought into effect from the same point of time when proviso to Section 2(15) was introduced – i.e. with effect from 1st April 2009;

(iv) The impact of the proviso to Section 2(15) being hit by the assessee will be that, to that extent, the assessee will not be eligible for exemption under section 11 of the Act. The mere fact that the assessee is granted registration under section 12 A or 12AA as a charitable institution will have no bearing on this denial of registration. As a corollary to this legal position, the fact that the objects of the assessee may be hit by the proviso to section 2(15) cannot have any bearing on the grant, denial or withdrawal of the registration under section 12AA;

(v) The scheme of the Act is clear. The status of registration under section 12A or 12AA has no bearing, as recognized in Section 13(8), on the availability of exemption under section 11. To the extent income of the assessee arises from the activities hit by the first proviso to Section 2(15) in any assessment year, the assessee will be disentitled for exemption under section 11 to that extent. It is also important to bear in mind the fact that the disentitlement for exemption under section 11, as a result of the activities of an assessee being held to be not for charitable purposes under section 2(15) read with provisos thereto, is in respect of entire income of the assessee trust or institution but only for the assessment year in respect of which the first proviso to Section 2(15) is triggered.

(vi) If the status of registration is to be declined to an assessee only on the ground that some of the objects may be hit by the first proviso to Section 2(15) but the assessee's receipts from such activities do not exceed specified threshold in a particular assessment year, the assessee will be subjected to undue hardship in the sense that while the assessee will be disentitled to exemption under section 11 due to denial of registration under section 12 A or 12AA which is sine qua non for admissibility of exemption under section 11. On the other hand, if the status of registration is granted to the assessee even when some of the objects may be hit by the first proviso to Section 2(15) and the assessee's receipts from such activities do exceed specified threshold, no prejudice will be caused to the legitimate interests of the revenue because, notwithstanding the status of registration and by virtue of section 13(8), the assessee will not be eligible for exemption under section 11 in respect of such income. It is only elementary that a statutory provision is to be interpreted *utres magis valeat quam pereat*, i.e., to make it workable rather than redundant.(AY. 2009-10)

Kapurthala Improvement Trust v. CIT (2015) 171 TTJ 461 / 154 ITD 637 (Asr.)(Trib.)

S.12AA :Procedure forregistration–Trust or institution -Cancellation-Non-filing of return by assessee-Not sufficient reason for cancellation of registration.

A perusal of section 12AA(3) of the Act, makes it clear that the power to cancel registration can be exercised only if the activities of the charitable trust or institution are not genuine or are not being carried out in accordance with its objects as the case may be. Non-filing of a return does not find a mention as a cause for cancellation of registration under section 12AA.

Shine Educational and Social Welfare Trust v. CIT (2015) 38 ITR 634(Chennai)(Trib.)

S. 12AA:Procedure forregistration–Trust or institution-Filing application for registration on last day of previous year-Entitled to exemption from assessment year to which previous year relates.[S. 11, 12A]

The assessee, a statutory Board created by the Government of Andhra Pradesh, applied for registration under section 12A of the Income-tax Act, 1961 on March 31, 2008. The Director of Income-tax (Exemption) granted registration under section 12AA of the Act with effect from the date of filing the application. In a petition under section 154 of the Act, the assessee contended that, since the application was made on March 31, 2008, the assessee was entitled to exemption from the assessmentyear2008-09.Onappeal. Held, allowing the appeal, that the Director of Income-tax (Exemption) had failed to mention the applicability of provisions under section 11 of the Act from a particular assessment year. In terms of section 12A(2) of the Act, the assessee would be entitled to exemption under section 11 of the Act for the assessment year following the financial year in which the application for registration was made under section 12A of the Act. Admittedly, the assessee had applied for registration in the financial year 2007-08. Hence, the provisions of sections 11 and 12 of the Act would be applicable to the assessee from the assessment year 2008-09 and not the financial year 2008-09. (AY. 2008-2009)

Andhra Pradesh Pollution Control Board v. DIT (E) (2015) 38 ITR 539 (Hyd.)(Trib.)

S.12AA: Procedure for registration –Trust or institution-Objects-larger number of objects in trust deed - Not disentitled assessee from claiming status of a charitable trust.[S.2(15)]

The Hon'ble Appellate Tribunal held that the Assessee shall not disentitle from claiming status of a charitable trust merely because larger numbers of objects are stated in the trust deed and it is only sufficient to look into whether actual activities carried on by the assessee trust are coming under any of the objects stated in its trust deed. Thus, the present ground raised by the Director of Income-tax (E) is not sustainable in law.

Thamizh Thai Seva Trust v. DIT (2015) 67 SOT 166 (URO)/53 taxmmann.com 215 (Chennai)(Trib.)

S.12AA: Procedure for registration –Trust or institution-Assessee complied with all conditions necessary for grant of registration under section 12AA - Assessee is only a single entity but consisted of different colleges/institutions, operating under such single entity-, registration under section 12AA is to be granted.[S. 2(15), 12A]

Assessee, a private limited company, applied for registration under section 12AA. The Ld. DIT(E) held that as per statutory Form No. 10A and also under sections 12A and 12AA Assessee has to be single institution i.e, single entity and since name of assessee-company indicated a cluster of institutions, registration is refused. The Hon'ble Appellate Tribunal held that once Commissioner is satisfied about genuineness of activities of trust and objects of trust, he shall grant registration. Since Assessee had complied with all conditions necessary for grant of registration under section 12AA and since 'institutions' was used as singular noun rather than to bring more than one entity and also that assessee is only a single entity but consisted of different colleges/institutions operating under such single entity, therefore the Ld. DIT(E) is directed to grant registration to Assessee company under section 12AA.

Mahindra Educational Institutions .v. DIT (2015) 67 SOT 169 (URO)/53 taxmann.com 156 (Hyd.)(Trib.)

S. 12AA: Procedure forregistration-Trust or institution - Application can be made only after commencement of charitable activity-Assessee organising lectures and seminars to benefit

banking employees-Rendering service to banking business not charitable activity or purpose-Assessee is not entitled to registration;[S.2(15)

The assessee was a state forum of bankers which organised lectures and seminars for the benefit of bank employees, and applied for registration under section 12AA of the Act. The authorities rejected the claim of the assessee. On appeal, the assessee contended that it was not necessary for the assessee to start any activity, since the application for registration was made immediately after its establishment : Held, dismissing the appeal, (i) that by organising lectures and seminars, the capability of the employees of the bank would substantially increase and the profitability of the bank would also increase. Hence the assessee was rendering service to the banking business which could not be considered as a charitable activity or purpose. There might be an incidental benefit to the customers of the bank, but it did not mean that the assessee was doing charitable activity. (ii) That the assessee could apply for registration only after commencing the activity.

State Forum of Bankers Club (Kerala)v. ITO (2015) 38 ITR 83/ 68 SOT 427 (Cochin)(Trib)

S.12AA:Procedure for registration–Trust or institution-Primary purpose advancement of objects of general public utility--Remains charitable even if activity incidental or ancillary to main purpose profitable in nature-Denial of registration is not justified. [S. 2(15), 11]

The assessee filed an application for registration under section 12AA of Act. The DIT(E) held that the main object of the assessee was to promote business activity and further that the assessee intended to engage business practices for the purpose of economic growth, which did not come under the purview of "charitable purpose" as defined under section 2(15) of the Act. Accordingly, he rejected the claim. On appeal by the assessee :

Held, that when the main object of the institution was charitable in nature, the activities carried out towards the achievement thereof, being incidental or ancillary to the main object, even if resulting in profit and even carried out with non-members, were all held to be charitable in nature. The basic principle underlying the definition of charitable purposes remains unaltered even after the amendment in section 2(15) of the Act, though the restrictive first proviso was inserted therein. The assessee's primary purpose was advancement of objects of general public utility and it would remain charitable even if an incidental or ancillary activity for the purpose of achieving the main purpose was profitable in nature. Hence, the order of the Director of Income-tax (E) was not correct.

IP India Foundation v. DIT (E) (2015) 38 ITR 195 (Hyd.)(Trib.)

S. 12AA:Procedure for registration-Trust or institution- Cancellation of registration was held to be not justified.[S. 2(15), 12A]

The assessee filed appeal before the Tribunal challenging the cancellation of the registration granted to it under section 12A by the Director of Income Tax (Exemption) vide his order passed under section 12AA(3) r.w.s. 12A of the Act.

The Tribunal held that the twin conditions mandatorily required for invoking the jurisdiction under section 12AA(3) to cancel the registration granted under section 12A do not exist in this case as the director himself has accepted in his order that the assessee is carrying on an activity of 'general public utility'. The revenue has not disputed the charitable nature of the activity of the assessee. The Tribunal also held that the receipts (booking charges, health club charges, sponsorship money, sale of tickets, advertisements) are intrinsically related, interconnected and interwoven with the charitable activities and these receipts resulted in subsidizing the cost of the assessee and there is no profit motive. The Tribunal quashed the order cancelling the registration under section 12AA(3).

Delhi & District Cricket Association v. DIT (2015) 168 TTJ 425/115 DTR 217/ 38 ITR 326/ 69 SOT 101 (URO) (Delhi)(Trib.)

S.12AA: Procedure for registration–Trust or institution- Charitable purpose-Appellate Tribunal-Rectification of mistake- issue of withdrawal of S. 11 exemption in the light of S. 2(15) amendment is contentious and requires decision by larger Bench of the ITAT-Matter referred to Honourable president to constitute a larger Bench. [S.2(15), 11, 12A, 254(2), 255(4)]

The assessee's case was that the sole and the only reason for the Revenue in withdrawing its registration u/s. 12A of the Act as a charitable institution, granted on 22.07.2002, with effect from

assessment year (AY) 2009-10, is the invocation of section 2(15), i.e., read with proviso thereto, effective from the said assessment year, contending that the proviso to section 2(15) is applicable to it and, therefore, it is no longer a charitable institution. The assessee appealed there-against, contesting the said withdrawal (u/s.12AA(3)) on both counts. Firstly, the proposition per se that informs the withdrawal under reference, so that an application of proviso section 2(15) would itself operate to be a ground for the withdrawal of registration.

To decide the assessee's Ground, raising the issue of the legal consequence/s of the applicability of proviso to section 2(15) on the registration of an entity as a charitable institution. The arguments of both the parties stand listed in detail at paras 3.1 to 3.4 of the order dated 31.12.2013, which would continue to hold, and shall therefore form part of this order, as indeed shall the other parts of this order, save as not specifically modified or withdrawn per this order. Both the parties have, as shall be evident there-from (refer paras 3.1 & 3.4) relied on several decisions by the tribunal. No doubt, the assessee has relied on one decision by the Hon'ble High Court [CIT v. SarvyodayaIlakkiyaPannai [2012] 343 ITR 300 (Mad)], but then the said decision stands also considered by the tribunal in the case ofEntertainment Society of Goa v. CIT [2013] 23 ITR (Trib) 636 (Panaji), relied upon by the Revenue, holding, with reference to decision by the hon'ble jurisdictional high court in CIT v. Thane Electricity Supply Ltd [1994] 206 ITR 727 (Bom), the decision by the non-jurisdictional high court as not binding. The rule of precedence, in case of conflicting views by the high courts, none of which is jurisdictional, is for the tribunal to follow that which appeals to its conscious. Therefore, the appropriate course under the circumstances, even as indicated during the hearing in the instant proceedings to no objection by either party, is that the matter be referred to the hon'ble President of the Tribunal for constituting a larger bench of the tribunal to decide the highly contentious issue raised by the assessee's Ground, decided differently by different coordinate benches of this tribunal, for uniform application across the tribunal, after hearing the parties. The statement of the case for the purpose of the said reference, as listed per para 3 of the Tribunal's order dated 31.12.2013, delineating the respective cases of both the sides. The larger bench of the tribunal, in the case the reference made hereby is accepted by the Hon'ble President, shall, apart from the other arguments and case law as may be canvassed before it by the parties, consider the same. The ITAT support THE decision for the reference aforesaid, apart from the clear provision of section 255(4) of the Act, on the settled law on precedence as explained by several celebrated decisions in the higher courts of law, as for example in the case of CIT v. B.R. Constructions [1993] 202 ITR 222 (AP)(FB). Matter referred to the Honorable President for constituting a larger Bench to decide the issue. (AY. 2009-10)

Mumbai Metropolitan region Development Authority .v. DIT(E)(2015) 40 ITR 60 /119 DTR 393 /170 TTJ 607 (Mum.)(Trib.)

Editorial: Refer original order in Mumbai Metropolitan region Development Authority .v. DIT(E) (2015) 170 TTJ 621 (Mum)(Trib)

S. 12AA :Procedure for registration-Trust or institution Registration of trust providing medical relief cannot be cancelled on ground that trust was being run on commercial lines- Charitable institution was running a hospital, proviso to section 2(15) would not be applicable. . [S. 2(15)

The revenue in the impugned order is only with reference to the hospital being run on commercial lines. The income of the trust is applied for charitable purpose, there can be no question of any tax liability on the assessee. If there is any short coming in the application of income for charitable purpose, then to that extent the A.O. in the assessment of the assessee, is free to tax such income which is not applied for charitable purpose, cancelling the registration u/s. 12A

A would not be the appropriate course of action for the revenue,where object of assessee trust was to provide medical relief, allegation that assessee was being run on commercial lines could not be ground to cancel registration u/s. 12AA. Charitable institution was running a hospital, proviso to section 2(15) would not be applicable.

Vivekanand General Hospital .v. CIT (2015) 152 ITD 458(Bang.)(Trib.)

S. 12AA: Procedure for registration –Trust or institution-Not having commenced any of charitable activities enumerated in trust deed--Not entitled to registration.[S.12A]

Held, that the assessee had not commenced any of the charitable activities as enumerated in the trust deed. Therefore, the assessee was not entitled to registration.

Progressive Educational and Charitable Trust v. CIT (2015) 37 ITR 84(Cochin)(Trib.)

S. 12AA : Procedure for registration –Trust or institution- Failure to file activity report before Tribunal –Matter remanded to Commissioner.

Commissioner rejected the application of the assessee on the ground that assessee had undertaken very limited charitable activities and the funds available with the assesse also very scanty. On appeal the Tribunal remanded the matter to the Commissioner as the assesse failed to file activity report before Tribunal.

Christian Women's Association v.CIT (2015) 37 ITR 30 (Cochin)(Trib.)

S. 12AA : Procedure for registration–Trust or institution-CIT, while granting registration or renewal, can only look at the nature of activities and is not concerned with potential violation of s. 11(5) or s. 13. Registration cannot be denied on ground that activities have not commenced. [S. 11, 13, 80G]

(i) At the time of grant of registration, the powers of the CIT enshrined under section 12AA of the Act, provided that the CIT is to look into the objects of the Trust and the genuineness of its activities. Merely because, one of the objects of the Trust was for the benefit of upliftment of the Jain community as against the pre-dominant object of providing education by the Trust or the Institution, the issue arises whether the grant of registration under section 12AA of the Act could be denied to the assessee. We find no merit in the order of CIT in observing that the said benefit being provided to the Jain community would attract the provisions of section 13(1)(b) of the Act and the assessee therein would not be entitled to the claim of deduction under sections 11 and 12 of the Act and consequently, there was no merit in allowing the registration under section 12A of the Act. The allowability of the deduction under sections 11 and 12 of the Act is to be looked into by the Assessing Officer while completing the assessment in the hands of the assessee at the relevant time. Whether the said deduction under sections 11 and 12 of the Act is allowable or not to the Trust or the Institution by way of non-fulfillment of the conditions laid down in section 13(1)(b) of the Act is to be considered by the Assessing Officer while completing assessment in the hands of the assessee Trust or Institution. But the said violation by the Trust or Institution on account of provisions of section 13(1)(b) of the Act, if any, are not to be considered by the CIT while granting registration under section 12A of the Act.

(ii) The second aspect of the issue raised by the CIT was that where the assessee had not started its activities, then it was not entitled to the claim of registration under section 12A of the Act. The assessee in the present facts and circumstances of the case, had in its objects recognized the field of education as the activity to be carried on. Merely because that the said activity has not started, does not dis-entitle the assessee from the claim of registration under section 12A of the Act.(ITA No. 1692/PN/2013. dt. 30.01.2015)

Kul Foundation .v. CIT (Pune)(Trib.);www.itatonline.org

S. 12AA: Procedure for registration- Traust or institution- CIT, while granting registration or renewal, can only look at the nature of activities and is not concerned with violation of s. 11(5) or s. 13- CIT was directed to allow the registration.[S.11(5), 13, 80G(5)]

While granting the exemption or renewal of exemption under section 80G(5) of the Act, the role of CIT is limited to look into the nature of activities being carried on by the institution or fund and the violation if any, of the provisions of section 13 of the Act and its various subsections are to be looked into by the Assessing Officer while deciding the issue of grant of deduction under sections 11 and 12 of the Act. The CIT while issuing the extension of exemption under section 80G(5) of the Act has a limited role to play i.e. to see whether the activities of the assessee trust were charitable in nature. Even if the ground about contravention of section 11(5) of the Act was validly taken by the CIT, that would have bearing only at the point of the assessment and would not be a material consideration in so far as the granting approval under section 80G(5) of the Act was concerned.

Ashoka Education Foundation .v. CIT(2015) 118 DTR 280/173 TTJ 54 (Pune)(Trib.)

S.12AA:Procedure for registration- Trust or institution- Charitable purpose-Receipts of assessee exceeded threshold limit-Cancellation of registration was held to be not justified-Exemption may be denied . [S.2(15), 11]

Where objects and activities of assessee trust were genuine, registration of assessee could not be cancelled under section 12AA merely because receipts of assessee exceeded threshold limit as provided under second proviso to section 2(15); however, exemption under section 11 may be denied .
SAE India .v. DIT (2014) 52 taxmann.com 209 / (2015) 67 SOT 15 (Chennai)(Trib.)

S.12AA:Procedure for registration- Trust or institution-Government authority-Charitable purpose-Withdrawal of registration was not justified.[S. 2(15)]
Where assessee, a Government authority, was set up for providing housing, community facilities, civil amenities and other infrastructural facilities, since said activities were charitable in nature not carried out with object to earn profits, same would not be hit by proviso to section 2(15), hence withdrawal of registration was held to be not justified.
Jaipur Development Authority .v. CIT (2014) 52 taxmann.com 25 / (2015) 67 SOT 1 (Jaipur)(Trib.)

S. 12AA:Procedure for registration-Trust or institution-Rejection of registration–Absence of dissolution clause–Non-commencement of charitable activities-Rejection was held to be not justified.[S. 2(15), 12].
The DIT(E) rejected the application for registration u/s 12A on the ground that the trust had not commenced its activities and that the trust did not have a dissolution clause.
Held, the DIT (E) had not come to a finding that the activities of the trust are not genuine. Since the trust had not commenced its activities, it cannot be said that its activities are not genuine. Also, there is nothing in the Bombay Public Trusts Act, 1950, under which the trust was formed, which mandates for incorporation of mandatory clause of dissolution of any irrevocable trust. Therefore, the registration was required to be granted to the trust.(ITA No. 3566/M/2013 dated 02/01/2015)
GeetaLalwani Foundation .v. DIT(E), (Mum.)(Trib.) www.ctconline.org

S.13:Denial of exemption- Services of trustees-Payment to trustees- Denial of exemption was held to be not justified.[S. 11, 12A]
Assessee Trust was availing services of Trustees and on account of such services there was substantial growth in Trust activities. Assessing Officer denied the exemption under section 11 on the ground that the assessee had violated the provisions of section 13(1)(c) by making payments to Trustees. CIT (A) set-aside the order of Assessing Officer. Tribunal affirmed the order of CIT(A). On appeal by revenue, dismissing the appeal of revenue the Court held that; where assesse Trust was availing services of Trustees and on account of such services there was substantial growth in Trust and its activities , payments for such services could not be said in contravention of section 13(1) (c) and benefit under section 11 could not be denied to assessee.
CIT v. CMR Jnanadhara Trust (2015) 230 Taxman 238 (Karn.)(HC)

S. 13 : Denial of exemption-Trust or institution-Investment restrictions–Special exemption from CBDT-No violation-Denial of exemption was held to be not valid. [S.11(5)]
The assessee trust was formed, jointly by the Government of India and Government of France based on the principle of reciprocity and parity, for research in India. It was mutually decided by the two Governments that the aforesaid assessee centre would be exempt from payment of income-tax. Pursuant to aforesaid agreement, the Reserve Bank of India had allowed opening of a foreign currency account by the assessee abroad with a foreign bank to credit the grants freely received from the French Govt. On appeal , The Tribunal held that the assessee had not parked any of their funds in foreign bank account either as an investment or deposit. Pursuant to the request made by the assessee, the CBDT had issued a order stating that the income derived from property held under trust should not be included in total income of assessee to the extent such income was applied in accordance with the objects of the Centre. On appeal by revenue ; dismissing the appeal the Court held that the Funds of assessee Indo-French Centre were deposited with a French financial services group, and interest was earned. CBDT, by a special order, held that (i) income derived from a property held under trust would not be included in total income of assessee centre, provided it applied same in accordance with objects of Centre and that (ii) this income, even when applied abroad, had to be excluded, subject to verification . It was not averred that income derived from property held under trust was not applied in

accordance with objects of centre. When interest earned which was applied for purpose/objects of Centre, would not form a part of total income and, therefore, in respect of said income, there would be no violation of section 11(5), read with section 13(1)(d).(AY. 2008-09, 2009-10)
DIT v. Indo French Centre(2015) 229 Taxman 311 (Delhi)(HC)

S. 13 : Denial of exemption-Trust or institution-Investment restrictions–Shares received as corpus by way of gift-No violation. [S.11, 12]
Where assessee trust was gifted shares of a company by way of gift by another trust on 3-8-2005 and with specific direction that shares would form part of corpus, as per clause (iia) to proviso of section 13(1)(d), there would be no violation of said section on part of assessee till 31-3-2007. (AY. 2006-07)
DIT v. Ajay G. Piramal Foundation (2015) 228 Taxman 332 (Delhi)(HC)

S. 13 : Denial of exemption-Trust or institution-Investment restrictions-Loans given to another charitable institution--Prohibition under section 11(2) and (3)(d) on application of income by way of payment or credit to other trusts as introduced by Finance Act, 2002-Matter to be reconsidered in light of law.[S. 11(2), 12AA]
The assessees were charitable trusts registered under section 12AA of the Act. The assessees advanced loans to other trusts from the unutilised portion of their income. The AO disallowed exemption on the ground that the assessees had invested their funds in a form otherwise than prescribed in section 11(5) of the Act, in violation of the provisions of section 11(2) read with section 13(2)(d) of the Act. The Commissioner (Appeals) held that advancing money to other charitable institutions would not amount to investment or deposit. On appeal by the Department: Held, that the Explanation to section 11(2) and (3)(d) inserted by the Finance Act, 2002 provided that, the income paid or credited to another trust or institution registered under section 12AA or approved under section 10(23C) of the Act, was to be treated as income of the assessee. Section 11(3A) empowers the Assessing Officer to allow the trust to apply the income so accumulated for other charitable or religious purposes. However, the proviso to section 11(3A) mandates that the Assessing Officer should not allow the application of income by way of payment or credit for the purposes referred to in clause (d) of sub-section (3) of section 11 of the Act. The authorities failed to consider the provisions of the Explanation to section 11(2) and (3)(d) of the Act. Hence the matter needed to be reconsidered in the light of the provisions of Explanation to section 11(2) and (3)(d) of the Act as introduced by the Finance Act, 2002. Matter remanded to the Assessing Officer.(AY.2010-2011)
ITO .v. Believers Church India (2015) 37 ITR 495/ 68 SOT 136(URO) (Cochin)(Trib.)

S. 13: Denial of exemption-Trust or institution-Investment restrictions-Cash credits-Denial of exemption was held to be not justified.[S. 68]
The assessee was a trust formed with the objects of offering social, educational and medical facilities to poor and needy citizens. The assessee availed of and was allowed exemption under sections 11 to 13 of the Act,from its inception for more than 25 years. For the assessment years 2002-03, 2005-06 and 2006-07 the AO (a) held that the assessee was not eligible to claim exemption under sections 11 and 12 of the Act on the ground that the assessee had made investment in shares and securities in violation of section 11(5) of the Act, (b) brought the assessee's net agricultural income to tax under section 68 of the Act on the ground that the assessee did not maintain separate books of account for agricultural activities, (c) taxed the corpus donations under section 68 of the Act, (d) held that the assessee had entrusted construction activities to its sister concerns in order to benefit the trustees directly or indirectly, which was in violation of section 13(1)(c) of the Act, (e) denied the assessee the exemption under section 11 on the ground that it was carrying on business and making profits. The CIT(A) held against the assessee on all counts but granted exemption of agricultural income and directed the Assessing Officer to consider agricultural income for rate purposes. On appeals by the assessee and the Department : HeldInvestment in non-specified assets constituting only 1.68 per cent. of total assets. Miniscule investment is not sufficient to deny exemption. Assessee not maintaining separate books of account for agricultural activities.Failure by AO to call for record of Revenue authorities or bring material to show income not from agricultural activities. Exemption cannot be denied. Corpus

donations.Assessee giving list of donors for substantial amount.Failure by AO to collect confirmation regarding donations. Exemption cannot be denied. Payment of money to sister concerns.No material to demonstrate payment not commensurate with market value of services availed of.No violation of section 13(1)(c) and (3).Exemption cannot be denied. Trust running educational institutions.Income incidental to main activity. Exemption cannot be denied. (AY. 2002-2003, 2005-2006, 2006-2007)
Dy. CIT .v. R. N. Shetty Trust (2015) 37 ITR 584 (Bang.)(Trib.)

S. 14A:Disallowance of expenditure - Exempt income – Satisfaction- Rule 8D cannot be automatically invoked. It cannot be invoked if the AO does not record satisfaction as to why the assessee's voluntary disallowance is not proper [R.8D]
The Assessee had dividend income of Rs.2,38,13,275. The Assessee was asked to furnish an explanation as to why the expenses relevant to the earning of dividend should not be disallowed under Section 14A of the Act. The Assessee's representative submitted that as no expenses have been incurred for earning of dividend income, this was not a case for making any disallowance. The AO, inter alia, observed that "the invo-cation of Section 14A is automatic and comes into operation, without any exception, as soon as the dividend income is claimed as an exemp-tion. The AO proceeded to disallow the amount of Rs.33,35,986/- under Section 14A read with Rule 8D of Income Tax Rules, 1962 and added the said amount to the total income of the Assessee. The CIT (A) allowed the appeal filed by the Assessee after recording a finding that the AO had failed to examine the contention of the Assessee that it had sufficient funds of Rs.83.13 crores and "no borrowing, for whatever purposes, was resorted to (no interest expenditure was incurred) and investments gen-erating tax exempt income were done by using administrative machinery of PMS, who did not charge any fees." It was further found by the CIT(A) that the AO had failed to record the AO's satisfaction after examining the accounts which was requirement for invoking Section 14A of the Act. The ITAT dismissed the Revenue's appeal. On appeal by the department to the High Court HELD dismissing the appeal:
(i) The AO has proceeded on the erroneous premise that the invocation of Section 14A is automatic and comes into operation as soon as the dividend income is claimed exempt. The Assessing Officer is required to determine the amount of such expenditure only if the Assessing Officer, having regard to the accounts of the assessee, is not satisfied with the correctness of the claim of the assessee in respect of such expenditure in relation to income which does not form part of the total income under the said Act. In other words, the requirement of the Assessing Officer em-barking upon a determination of the amount of expenditure incurred in relation to exempt income would be triggered only if the Assessing Officer returns a finding that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure. Therefore, the condition precedent for the Assessing Officer entering upon a determination of the amount of the expenditure incurred in relation to exempt income is that the Assessing Officer must record that he is not satisfied with the correctness of the claim of the assessee in respect of such expenditure .
(ii) Also, the Court disapproves of the AO invoking Section 14A read with Rule 8D (2) of the Rules without recording his satisfaction. The recording of satisfaction as to why "the voluntary disallowance made by the assessee was unreasonable and unsatisfactory" is a mandatory re-quirement of the law. (ITA no. 283/2014, dt. 24.09.2015) (AY.2009-10)
CIT .v. I. P. Support Service India (P) Ltd. (Delhi)(HC) ; www.itatonline.org
S. 14A : Disallowance of expenditure-Exempt income–Higher disallowance agreed before Assessing Officer during course of assessment-Assessee could not be bound by such offer- Restriction of disallowance was held to be justified .[S.143(3)]
Dismissing the appeal of revenue the court held that ;the fact that asum of Rs 4, 47, 649 was not conceded in the return but was ad hoc acceptance during the course of assessment, the assessee could not be bound by it. The Tribunal had gone in to the factual aspects in great detail and interpreted the law as it stood on the relevant date.Therefore , the order of the Tribunal restricting the disallowance to Rs 1 lakh under section 14A was justified. (AY. 2007-08)
CIT v. Everest Kento Cylinders Ltd. (2015)378 ITR 57/119 DTR 394/ 232 Taxman 307 (Bom.)(HC)
S. 14A :Disallowance of expenditure-Exempt income–Major part of shares was acquired by merger- No disallowance of interest could be made. [R.8D]

Where out of total investment, major part was of shares came to assessee by virtue of a merger and for making such investment it could not be said that assessee would have used loan fund, suo motu disallowance of interest in respect of balance part of investment made by assessee was justified.(AY. 2008-09)

CIT .v. Cellice Developers (P.) Ltd. (2015) 231 Taxman 255 (Cal.)(HC)

S. 14A : Disallowance of expenditure-Exempt income –Recording of satisfaction- Interest bearing funds-Since there was no tangible material that could have enabled Assessing Officer to record satisfaction, disallowance made was unjustified [R.8D]

Assessing Officer disallowed an amount by holding that interest bearing funds had been used to earn tax free dividend, etc. Dismissing the appeal of revnue the Court held that; Section 14A requires Assessing Officer to record satisfaction that interest bearing funds have been used to earn tax free income based upon credible and relevant evidence. Since there was no tangible material that could have enabled Assessing Officer to record satisfaction in terms of section 14A, disallowance made was unjustified .

CIT .v. Abhishek Industries Ltd. (2015) 231 Taxman 85 (P&H)(HC)

S.14A:Disallowance of expenditure-Exempt income-No disallowance can be made in a year in which no exempt income has been earned or received by the assessee-Provision also does not apply to shares bought for strategic purposes.[S.10(33)]

The High Court had to consider the following substantial question of law:

"*Whether disallowance under Section 14A of the Act can be made in a year in which no exempt income has been earned or received by the Assessee?*" HELD by the High Court:

(i) The expression "does not form part of the total income" in Section 14A of the envisages that there should be an actual receipt of income, which is not includible in the total income, during the relevant previous year for the purpose of disallowing any expenditure incurred in relation to the said income. In other words, Section 14A will not apply if no exempt income is received or receivable during the relevant previous year. The decision of the Supreme Court in CIT v. Rajendra Prasad Moody(1978) 115 ITR 519(SC) was rendered in the context of allowability of deduction under Section 57(iii) of the Act, where the expression used is "for the purpose of making or earning such income". Section 14A of the Act on the other hand contains the expression "in relation to income which does not form part of the total income". The decision in Rajendra Prasad Moody cannot be used in the reverse to contend that even if no income has been received, the expenditure incurred can be disallowed under Section 14A of the Act.

(ii) The investment by the Assessee in the shares of Max India Ltd. is in the form of a strategic investment. Since the business of the Assessee is of holding investments, the interest expenditure must be held to have been incurred for holding and maintaining such investment. The interest expenditure incurred by the Assessee is in relation to such investments which gives rise to income which does not form part of total income.(AY.2004-05)

Cheminvest Ltd. .v. CIT(2015) 378 ITR 33(Delhi)(HC)

S. 14A:Disallowance of expenditure-Exempt income-Loss in purchase and sale of shares-No proximate cause for disallowance - Allowable as business loss-Dividend stripping-Provision against not applicable for assessment years prior to 2002-03.[S.94(7)]

The assessee was engaged in the business of trading in stocks and shares. The Assessing Officer, for the assessment year 2001-02, disallowed the claim to deduction of expenditure/loss in the purchase and sale of units. The appellate authorities confirmed the disallowance. On appeals contending that buying and selling of units resulting in inflow of dividends but at the same time business loss on sale of the units after the record date could not be equated to the transaction in terms of section 94(7), which came into effect only from April 1, 2002:

Held, allowing the appeals, that in the case of the assessee, the assessment year was 2001-02. Therefore, section 94(7) would not be applicable, as the section had come into force only on April 1, 2002, i.e., and was not enforceable for the previous assessment year, viz., 2001-02. Thus, the assessee

was entitled to claim the amount as business loss during the assessment year. Followed ,CIT v. Walfort Share and Stock Brokers P. Ltd. [2010] 326 ITR 1 (SC) followed.(AY. 2001-2002)
Patco Investment and Consultancy Services P. Ltd. v. ACIT (2015) 372 ITR 195 / 233 Taxman 110 (Mad.)(HC)

S. 14A: Disallowance of expenditure-Exempt income- Interest earned on Nostro account is taxable hence no disallowance of intereat expenditure.
Interest earned on Nostro account is taxable hence no disallowance of intereat expenditure.(AY. 1997-98)
DIT v. Credit Agricole Indosuez (2015) 377 ITR 102 (Bom)(HC)

S. 14A: Disallowance of expenditure-Exempt income- Disallowance of expenditure on earning non-taxable income - Disallowance only to extent of expenditure incurred by assessee in relation to tax exempt income - No reason for disallowance of sum volunrearily disallowed - No scrutiny of accounts - Entire tax exempt income lower than disallowance.
Allowing the appeal of assessee the Court held that ; the entire exempt income was Rs. 48,90,000, whereas the disallowance ultimately directed worked out to nearly 110 per cent of that sum, i. e., Rs. 52,56,197. Section 14A or rule 8D cannot be interpreted so as to mean that the entire exempt income is to be disallowed. The window for disallowance was indicated in section 14A and was only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the exempt income surely cannot swallow the entire amount. (AY. 2009-2010)
Joint Investments P. Ltd. v. CIT (2015) 372 ITR 694 / 233 Taxman 117 / 275 CTR 471 / 116 DTR 289 (Delhi)(HC)
Editorial: Order in Joint Investment P. Ltd. v. Asst. CIT [2014] 33 ITR 373 (Delhi)(Trib.) is set aside.

S.14A:Disallowance of expenditure- Exempt income-In the absence of any tax free income earned by assessee, disallowance could not be made. [R.8D]
In the absence of any tax free income earned by assessee, disallowance could not be made.(AY. 2008-09)
CIT v. Shivam Motors (P) Ltd. (2015) 230 Taxman 63 / 272 CTR 277 (All.) (HC)

S. 14A : Disallowance of expenditure-Exempt income-Concurrent finding that expenditure properly established-No disallowance could be made. [S.260A]
Held, dismissing the appeal, that whether or not the expenditure incurred for the purpose of earning the income exempt under section 14A of the Income-tax Act, 1961, had been properly explained, is essentially a question of fact. Both the Commissioner (Appeals) and the Tribunal were of the opinion that the expenditure was properly established. There was no scope for any interference with the concurrent finding of fact recorded by the Tribunal and the Commissioner (Appeals).
CIT v. Crish Park Vincom Ltd. (2015) 371 ITR 15 / 232 Taxman 574 (Cal)(HC)

S. 14A : Disallowance of expenditure - Exempt income –Borrowed funds not invested for earning tax free income- No disallowance was permissible.
Where no borrowed funds on which interest was paid had been invested for earning tax free income, no disallowance was permissible under section 14A.(AY. 2008-09)
Addl. CIT v. Dhampur Sugar Mills (P) Ltd (2015) 229 Taxman 271 (All.)(HC)

S.14A: Disallowance of expenditure - Exempt income -No disallowance can be made for shares held as stock-in-trade .[R.8D]
The Tribunal had to consider whether s. 14A and Rule 8D applied to shares held as stock-in-trade by the assessee. It noted that though in American Express Bank, the Tribunal followed Daga Capital Management 117 ITD 169 & distinguished Leena Ramachandran 339 ITR 296 (Ker) & held that s. 14A applies also to a trader in shares, the Karnataka High Court has held in CCL Ltd 250 CTR 291 that disallowance of expenses incurred on borrowings made for purchase of trading shares cannot be

made u/s.14A. It held that 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 was accordingly held that disallowance of interest in relation to the dividend received from trading shares cannot be made. On appeal by the department to the High Court HELD dismissing the appeal:
(i) One can at best disallow the expenses which are incurred for earning dividend income. For that purpose, the figures under the head "Investment" could be taken and some charges apportioned for the purpose of computing the expenses. The Commissioner found from such figures, that only 10% of the income earned could be apportioned towards expenses for earning the dividend income. He, therefore, made a revised disallowance. It is this revised disallowance which has been accepted by the Tribunal. We do not find that both the questions of law can be termed as substantial simply because the first one is covered against the Revenue by a Judgment of this Court in the case ofGodrej & Boyce Mfg. Co. Ltd. vs. Dy.CIT Both the authorities in this case have followed this Judgment and applied Section 14A of the Income Tax Act, 1961 and Rule 8D of the Income Tax Rules, 1962. They have been applied correctly. The first question is, therefore, not a substantial question of law at all;
(ii) The second question pertains to the application of the Rule and which raises a pure factual issue. We find that the Commissioner, as also the Tribunal's order is neither perverse nor vitiated by any error of law apparent on the face of the record, and as noted above. Therefore, this Appeal does not raise any substantial question of law. It is devoid of merits and is dismissed.(ITA No. 1131 of 2013, dt. 17.03.2015)(AY. 2008—09)
CIT v. India Advantage Securities Ltd. (Bom) (HC), www.itatonline.org
Editorial: Refer Dy.CIT v. India Advantages Securities Ltd (Mum)(Trib) itatonline.org

S. 14A: Disallowance of expenditure - Exempt income -In computing the "average value of investment", only the investments yielding non-taxable income have to be considered and not all investments.[R.8D]
The assessee reported tax exempt income of Rs. 18,26,360. The AO added back Rs. 19,96,242 under Section 14A. While doing so, the AO applied Rule 8D by taking into consideration the total quantum of interest other than that invested, under Section 14A in terms of Rule 8D, and arrived at the said figure after multiplying it with the result of the average value of investments and over average value of assets derived by him. The CIT(A) went into the record and found that the amount of investment attributable to dividend as on 31.3.2008 was Rs. 3,53,26,800, which constituted less than 1% of the total scheduled funds. He however accepted the basis of calculation applied by the AO and directed a disallowance of .05% of the amount determined to be average investment. The ITAT to which the revenue appealed, restored the AO's determination holding it to be a true calculation in terms of Rule 8D. On appeal by the assessee HELD by the High Court:
The first condition for application of Section 14A was fulfilled as the AO expressed the opinion that a disallowance was warranted. In such eventuality the AO is required by the mandate of Rule 8D to follow Rule 8D(2). Clauses 1, 2 and 3 detail the methodology to be adopted. The AO, instead of adopting the average value of investment of which income is not part of the total income i.e. the value of tax exempt investment, chose to factor in the total investment itself. Even though the CIT(Appeals) noticed the exact value of the investment which yielded taxable income, he did not correct the error but chose to apply his own equity. Given the record that had to be done so to substitute the figure of Rs. 38,61,09,287 with the figure of Rs. 3,53,26,800 and thereafter arrive at the exact disallowance of .05% Finding of Tribunal and lower authorities were set aside. Appeal of assesse was allowed. (AY. 2008-09)
ACB India Ltd. v. ACIT (2015) 374 ITR 108 (Delhi)(HC)

S. 14A : Disallowance of expenditure - Exempt income –Mixed funds-Interest expenditure relatable to investment in tax free funds was to be computed under provisions of rule 8D(2)(ii)[R.8D(2)]
Assessee-company borrowed funds and part of it was invested in earning tax free dividend income. AO invoked section 14A and disallowed certain amount from exempted income .On appeal Court held that since funds utilized by assessee being mixed funds, interest paid on borrowed fund was also relatable to interest on investment made in tax free funds. Authorities had rightly invoked provision of

section 14A and interest expenditure relatable to investment in tax free funds was to be computed under provisions of rule 8D(2)(ii) . (AY. 2008-09)
Avon Cycles Ltd. v. CIT (2015) 228 Taxman 368 (Mag.)(P&H)(HC)
Editorial: SLP is garnted .(SLA (C) No 1624 of 2015 dt 2—2-2015)Avon Cycles Ltd v.CIT (2015) 231 Taxamn 226 (SC)

S. 14A : Disallowance of expenditure - Exempt income -Sufficient funds for making investments in shares and mutual funds - No satisfaction recorded by Assessing Officer-Disallowance was held to be not justified.[R.8D(2)
The finding that assessee had sufficient funds for making investments in shares and mutual funds coupled with the failure of the Assessing Officer to record his satisfaction clinched the issue in favour of the assessee. The voluntary deductions made by the assessee were not rejected or held to be unsatisfactory, on examination of accounts. The Assessing Officer erred in invoking sub-rule (2) without elucidating and explaining why the voluntary disallowance made by the assessee was unreasonable and unsatisfactory. There was no such satisfaction recorded by the Assessing Officer before he invoked sub-rule (2) of rule 8D and made the recomputation.(AY. 2008-2009, 2009-2010)
CIT .v. Taikisha Engineering India Ltd. (2015) 370 ITR 338/229 Taxman 143/275 CTR 316/114 DTR 316 (Delhi) (HC)

S. 14A :Disallowance of expenditure - Exempt income -No disallowance can be made if AO does not record satisfaction with reference to accounts that assessee's claim is improper. However, if Rule 8D applies, assessee's claim that interest is not disallowable on ground of "own funds" is not acceptable.[R.8D]
(i) Under sub Section (2) to Section 14A of the Act, the Assessing Officer is required to examine the accounts of the assessee and only when he is not satisfied with the correctness of the claim of the assessee in respect of expenditure in relation to exempt income, the Assessing Officer can determine the amount of expenditure which should be disallowed in accordance with such method as prescribed, i.e. Rule 8D of the Rules. Therefore, the Assessing Officer at the first instance must examine the disallowance made by the assessee or the claim of the assessee that no expenditure was incurred to earn the exempt income. If and only if the Assessing Officer is not satisfied on this count after making reference to the accounts, that he is entitled to adopt the method as prescribed i.e. Rule 8D of the Rules. Thus, Rule 8D is not attracted and applicable to all assessee who have exempt income and it is not compulsory and necessary that an assessee must voluntarily compute disallowance as per Rule 8D of the Rules. Where the disallowance or “nil” disallowance made by the assessee is found to be unsatisfactory on examination of accounts, the assessing officer is entitled and authorised to compute the deduction under Rule 8D of the Rules. This pre-condition and stipulation as noticed below is also mandated in sub Rule (1) to Rule 8D of the Rules Godrej & Boyce Mfg. Co. Ltd. vs. CIT [2010] 328 ITR 81 (Bom.) &MaxoppInvestment Ltd. vs. Commissioner of Income Tax [2012] 347 ITR 272 (Del) followed).
(ii) Section 14A(2) of the Act and Rule 8D(1) in unison and affirmatively record that the computation or disallowance made by the assessee or claim that no expenditure was incurred to earn exempt income must be examined with reference to the accounts, and only and when the explanation/claim of the assessee is not satisfactory, computation under sub Rule (2) to Rule 8D of the Rules is to be made.
(iii) We need not, therefore, go on to sub Rule (2) to Rule 8D of the Rules until and unless the Assessing Officer has first recorded the satisfaction, which is mandated by sub Section (2) to Section 14A of the Act and sub Rule (1) to Rule 8D of the Rules.
(iv) However, the decisions relied upon by the Tribunal in the case of Tin Box Co. 260 ITR 637 (Del), Reliance Utilities and Power Ltd. 313 ITR 340 (Bom.), Suzlon Energy Ltd. 354 ITR 630 (Guj) and East India Pharmaceutical Works Ltd. 224 ITR 624 (SC) could not be now applicable, if we apply and compute the disallowance under Rule 8D of the Rules. The said Rule in sub Rule (2) specifically prescribes the mode and method for computing the disallowance under Section 14A of the Act. Thus, the interpretation of clause (ii) to sub Rule (2) to Rule 8D of the Rules by the CIT(A) and the Tribunal is not sustainable. The said clause expressly states that where the assessee has incurred expenditure by way of interest in the previous year and the interest paid is not directly attributable to any particular income or receipt then the formula prescribed would apply. Under clause (ii) to Rule 8D(2) of the

Rules, the Assessing Officer is required to examine whether the assessee has incurred expenditure by way of interest in the previous year and secondly whether the interest paid was directly attributable to particular income or receipt. In case the interest paid was directly attributable to any particular income or receipt, then the interest on loan amount to this extent or in entirety as the case may be, has to be excluded for making computation as per the formula prescribed. Pertinently, the amount to be disallowed as expenditure relatable to exempt income, under sub Rule (2) is the aggregate of the amount under clause (i), clause (ii) and clause (iii). Clause (i) relates to direct expenditure relating to income forming part of the total income and under clause (iii) an amount equal to 0.5% of the average amount of value of investment, appearing in the balance sheet on the first day and the last day of the assessee has to be disallowed.(ITA No. 115/204 & 119/2014, dt. 25/11/2014) (AY. 2008-09, 2009-10)

CIT .v. Taikisha Engineering India Ltd. (Delhi)(HC),www.itatonline.org

S. 14A :Disallowance of expenditure - Exempt income- Disallowance only to extent of expenditure incurred by assesse in relation to tax exempt income-Rule 8D cannot be interpreted to mean that the entire tax exempt income can be disallowed- Matter remanded.[R.8D]

The AO has not firstly disclosed why the appellant/assessee's claim for attributing Rs. 2,97,440/- as a disallowance under Section 14A had to be rejected. Taikisha says that the jurisdiction to proceed further and determine amounts is derived after examination of the accounts and rejection if any of the assessee's claim or explanation. The second aspect is there appears to have been no scrutiny of the accounts by the AO – an aspect which is completely unnoticed by the CIT (A) and the ITAT. The third, and in the opinion of this court, important anomaly which we cannot be unmindful is that whereas the entire tax exempt income is Rs.48,90,000/-, the disallowance ultimately directed works out to nearly 110% of that sum, i.e., Rs. 52,56,197/-. By no stretch of imagination can Section 14A or Rule 8D be interpreted so as to mean that the entire tax exempt income is to be disallowed. The window for disallowance is indicated in Section 14A, and is only to the extent of disallowing expenditure "incurred by the assessee in relation to the tax exempt income". This proportion or portion of the tax exempt income surely cannot swallow the entire amount as has happened in this case.(AY. 2009-10)

Joint Investments Pvt. Ltd. .v. CIT(2015) 372 ITR 694/ 275 CTR 471/ 116 DTR 289(Delhi)(HC)

S.14A: Disallowance of expenditure-Exempt income-Interest free funds-No disallowance towards interest when interest-Free funds far exceed value of investments-Book profit-Amounts disallowed can be adopted.[S.115JB]

No disallowance towards interest can be made when interest free funds exceed value of investments. Amounts disallowed can be adopted while computing book profit. Rule 8D can be resorted to by Assessing Officer only when he rejects claim made by assessee. On facts the Assessing Officer not rejecting claim of assessee. Matter remanded. (AY. 2009-2010)

Dy. CIT(LTU) v. Microlabs Ltd. (2015) 39 ITR 585(Bang.)(Trib.)

S. 14A : Disallowance of expenditure-Exempt income-Reasonable basis without resorting to rule 8D. [R. 8D]

For assessment year 2007-08 any disallowance under section 14A has to be worked out on some reasonable basis without resorting to rule 8D.(AY.2007-08)

ACIT v. Clariant Chemicals (I) Ltd. (2015) 67 SOT 244 (URO) (Mum.)(Trib.)

S. 14A : Disallowance of expenditure–Exempt income- Recording of satisfaction is mandatory.

It was held that where in respect of dividend income earned by assessee, Assessing Officer straightaway proceeded to apply rule 8D for purpose of disallowance under section 14A without satisfying or complying with mandatory requirement of section 14A(2) or rule 8D(1), impugned disallowance deserved to be set aside. (AY. 2009-10)

Graviss Hospitality Ltd.v. DCIT (2015) 67 SOT 184(URO) (Mum.)(Trib.)

S.14A:Disallowance of expenditure-Exempt income-Satisfaction-Investments in subsidiaries & joint ventures are for strategic purposes and not for earning dividend and so the expenditure

cannot be disallowed, (ii) If the AO does not deal with the assessee's submissions and merely says "not acceptable" it means he has not recorded proper satisfaction.[R.8D]

(i) Investment in subsidiary companies and joint venture companies are long term investment and no decision is required in making the investment or disinvestment on regular basis because these investments are strategic in nature and no direct or indirect expenditure is incurred for maintaining the portfolio on these investments or for holding the same. The department has not disputed that the purpose of investment is not for earning the dividend income but having control and business purpose and consideration. Therefore, prima facie the assessee has made out a case to show that no expenditure has been incurred for maintaining these long term investment in subsidiary companies. The Assessing Officer has not brought out any contrary fact or material to show that the assessee has incurred any expenditure for maintaining these investments or portfolio of these investments. Therefore, no disallowance u/s 14A or Rule 8D can be made .

(ii) The observations of the High Court in Godrej And Boyce Mfg. Co. Ltd. vs. Dy. CIT & Another [2010] 328 ITR 81 (Bom.) and Maxopp Investment Ltd. & Ors. vs. CIT, (2012) 247 CTR 162 (Del), clearly show that the satisfaction of the Assessing Officer with regard to the correctness or otherwise of the claim made by the assessee must be based on reasons and on relevant considerations. Ostensibly, the invoking of rule 8D of the Rules in order to compute the disallowance u/s 14A of the Act is to be understood as being conditional on the objective satisfaction of the Assessing Officer with regard to the incorrectness of the claim of the assessee, having regard to the accounts of the assessee. In order to examine the aforesaid compliance with the pre-condition, we have perused the assessment order and find that no reasons have been advanced as to why the disallowance determined by the assessee was found to be incorrect, having regard to the accounts of the assessee. The only point made by the Assessing Officer is to the effect that "the said disallowance was not acceptable". In-fact, we find that the assessee made detailed submissions to the Assessing Officer. As per the assessee, the determination of disallowance u/s 14A of the Act of Rs.5,00,000/- was based on the employee costs and other costs involved in carrying out this activity. Further, assessee also explained that the shares which have yielded exempt income were acquired long back out of own funds and no borrowings were utilized. The mutual fund investments were claimed to be also made out of surplus funds. It was specifically claimed that no fresh investments have been made during the year under consideration in shares yielding exempt income. All the aforesaid points raised by the assessee have not been addressed by the Assessing Officer and the same have been brushed aside by making a bland statement that the disallowance is "not acceptable". Therefore, in our view, in the present case, the Assessing Officer has not recorded any objective satisfaction in regard to the correctness of the claim of the assessee, which is mandatorily required in terms of section 14A(2) of the Act and therefore his action of invoking rule 8D of the Rules to compute the impugned disallowance is untenable.(ITA No. 538/LKW/2012, dt. 23.01.2015) (AY. 2009-10)

U. P. Electronics Corporation Ltd. v. DCIT (Luck.)(Trib.); www.itatonline.org

S. 14A :Disallowance of expenditure-Exempt income-Share broker-Earning exempted income from investment in shares-10 % of income was to be attributed towards expenditure for earning of such exempted income.

Assessee share broker earned dividend from investment and long term capital gains from shares. Both these incomes were exempted incomes. All these activities were carried on by assessee in a composite manner, Management and administration of its business was involved in earning said exempted incomes. Therefore 10 per cent of exempted income would be attributed to expenditure incurred for earning of said exempted income and thus, it is to be disallowed u/s. 14A.(AY. 2007 – 2008)

Chona Financial Services Ltd. v. ACIT (2015) 153 ITD 119 (Chennai)(Trib.)

S.14A:Disallowance of expenditure-Exempt income- Even strategic investment in group concerns for purposes of control & not for earning dividend attracts disallowance. Plea that no expenditure is incurred to earn dividend is not acceptable because earning dividend is not an automatic process. [Rule 8D(2)(iii)]

The assessee claimed that no disallowance u/s 14A and Rule 8D could be made as (i) the disallowance made by the AO in a mechanical and automatic manner without recording reasons for his satisfaction that the assessee's claim is incorrect and (ii) the assessee made the investment for the purpose of

holding controlling stake in the group concern and not for the purpose of earning dividend. It was claimed that the assessee has not incurred any expenses to earn the dividend income and therefore Rule 8D(iii) is not applicable. HELD by the Tribunal:
(i) The contention that no satisfaction as to the correctness of the claim made u/s 14A read with 8D(iii) has been recorded by the AO as well as the CIT(A) is not acceptable. The AO has complied with the requirement of section 14A of the Act by observing that as to why he is not satisfied with the correctness of claim of the assessee that no expenditure was incurred. The AO has recorded the findings that earning of dividend was not an automatic process and the assessee was required to keep regular control over the investments made;
(ii) The contention that the assessee earned dividend income of Rs.262907.86 lakhs without incurring any expenses does not convince us at all. The term 'expenditure' as per section 14A would include the expenditures that are related to investments made i.e. expenditures on administration, capital expenses, travelling expenses, operating expenses etc. It is difficult to accept that the assessee company was making investments decisions to the tune of Rs.6,31,637 lakhs of public money without incurring a single penny out of its pocket. Such decisions are highly strategic in nature and are required to be made by highly qualified and experienced professionals. The same would also require market research and analysis. The assessee company by acquiring controlling interest in the subsidiary companies would also be required to attend board meetings and make policy decisions with regard to the aforesaid huge amount of investments made. By no stretch of imagination, it can be assumed that such activities were done without incurring any expenditure. It is pertinent to mention here that even the assessee did not rebut the findings of AO that the assessee was required to supervise and administer all the investments made;
(iii) In a case where the assessee claims that no expenditure was so incurred, the statute has provided for a presumptive expenditure which has to be disallowed by force of the statute. In a distant manner, literally speaking, it may even be considered for the purpose of convenience as a deeming provision. When such deeming provision is made on the basis of statutory presumption, the requirement of factual evidence is replaced by statutory presumption and the Assessing Officer has to follow the consequences stated in the statute.(ITA No. 1032/Kol/2012, dt. 1305.2015) (AY. 2008-09)
Coal India Limited v. ACIT (Kol.)(Trib.); www.itatonline.org

S.14A:Disallowance of expenditure-Exempt income-- Percentage of exempt income can constitute reasonable disallowance--Expenses equal to 4 per cent. of exempt income reasonable disallowance.
Tribunal held that expenses equal to 4 per cent. of the exempt income earned by the assessee would constitute a reasonable disallowance.
(ITA NO 9128/M/10, dt. 20-2-2015) (AY. 2006-2007)
Ciba India Ltd. v. Dy. CIT (2015) 38 ITR 474 (Mum)(Trib)

S.14A :Disallowance of expenditure- Exempt income- Book profit- Adjustment of income was held to be not justified.[S.115JB]
The Tribunal held that the assessee may have accepted disallowance u/s 14A but once it was settled in light of the law laid down by High Court in CIT v. Holcim India Pvt Ltd [2014 TIOL 1586 HC DEL IT], that there cannot be any disallowance under section 14A unless there is corresponding exempt income and assessee had no such exempt income, adjustment under clause (f) of Explanation to Section 115JB (2) could not indeed be made. The adjustment had to meet tests of law and what cannot be considered to be 'expenditure relatable to exempt income' under law, cannot be subjected to adjustment either. there is no estoppel against law. the fact that mere assessee had accepted this disallowance affects that disallowance only and nothing more than that; it does not clothe such an adjustment, in computation of book profit under section 115JB, with legality. There was no dispute that there was no corresponding tax exempt income. Therefore, adjustment in question was indeed unsustainable in law. Hence it is directed to AO to delete impugned adjustment. (AY. 2009-10)
Minda Sai Ltd v. ITO (2015) 167 TTJ 689/ 114 DTR 50 (Delhi)(Trib.)

S. 14A: Disallowance of expenditure-Exempt income-Growth mutual funds do not yield dividend and so s. 14A/ Rule 8D does not apply-Disallowance for administrative expenses cannot exceed allocable expenditure debited to P&L A/c.[R.8D]

Tribunal held that (i) Growth mutual fund does not yield any dividend/exempt income, therefore, the provisions of section 14A would not apply on the investment in growth mutual funds.

(ii) As regards the disallowance of administrative expenses in respect of the investment yielding exempt income the computation made under Rule 8D cannot exceed the total allocable expenditure for earning the exempt income debited the P&L Account. Accordingly, the AO is directed to reconsider the disallowance u/s 14A by excluding the investment in the Growth mutual funds scheme and further to earmark and identify the item of expenditure debited by the assessee in the P&L Account which can be allocated in relation to earning the exempt income. (ITA No. 4761/Mum/2013, dt. 25.03.2015) (A. Y. 2008-09)

Manugraph India Ltd. v. DCIT (Mum.)(Trib.);www.itatonline.org

S. 14A : Disallowance of expenditure - Exempt income--Investments to incorporate special purpose vehicles for road projects--Investments not for earning dividend income--Expenses and interest not to be disallowed.[R.8D]

Investments to incorporate special purpose vehicles for road projects.Investments not for earning dividend income.Expenses and interest not to be disallowed. (AY.2007-08)

L & T Infrastructure Development Projects Ltd. .v. ITO (2015) 37 ITR 10 (Chennai)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income – Calculation of disallowance at 0.05 per cent. of average value of investments in shares reasonable and justifiable.

Dividend earned on account of investment made in shares in earlier years. Failure by AO to establish nexus between investment and borrowed funds.Administrative expenditure relatable for earning of dividend income.Calculation of disallowance at 0.05 per cent.of average value of investments in shares reasonable and justifiable. (AY. 2006-2007)

Dy. CIT .v. Eicher Motors Ltd. (2015) 37 ITR 427/ 53 taxmann.com 317 / 67 SOT 306(URO) (Delhi) (Trib.)

S. 14A : Disallowance of expenditure-Exempt income -Object of assessee in making investment to gain holding controlling stake in group concerns and not for earning income--Provisions of section 14A cannot be invoked.[R. 8D]

The Assessing Officer disallowed certain expenses for earning exempted income by invoking section 14A of the Act read with rule 8D of the Income-tax Rules, 1962. The Commissioner (Appeals) confirmed this. On cross objection by the assessee :

Held, that where the primary object of investment was for holding a controlling stake in group concerns and not for earning an income out of that investment, then the provisions of section 14A could not be invoked. (AY. 2006-2007 to 2010-2011)

Dy. CIT .v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kolkata)(Trib.)

S. 14A : Disallowance of expenditure-Exempt income-Powers of Commissioner (Appeals)-Co-extensive with those of Assessing Officer-Failure by Assessing Officer in recording proper satisfaction can be made good by Commissioner (Appeals)-Interest towards investment in shares and mutual funds-Assessee`s share capital with reserves and surpluses far in excess of amount invested in securities fetching exempt income-Interest cannot be disallowed-Rule 8D mandatory-Disallowance of amount equal to one-half per cent. of average of value of investment-Proper.

That the deficiency left by the Assessing Officer in recording proper satisfaction, was made good by the Commissioner (Appeals). It is settled legal position that the first appellate authority holds the same powers in the disposal of appeal as the Assessing Officer possesses. He could do what the Assessing Officer could have done. Therefore, the argument about the non-recording of satisfaction about the incurring of expenses in relation to exempt income was not tenable.

That the first amount of disallowance which amount to Rs. 8,22,725 was the interest towards investment in shares and mutual funds yielding exempt income. In the assessee`s balance sheet the total investments were Rs. 2.33 crores out of which some investments yielded exempt income. The shareholders` funds were Rs. 18.61 crores. As the assessee`s share capital with reserves and surpluses was far in excess of the amount invested in securities fetching exempt income, the interest could not be disallowed.
Disallowance of amount equal to one-half per cent. of average of value of investment was held to be proper. (AY. 2009-2010)
T and T Motors Ltd. v. Add. CIT (2015) 37 ITR 682 (Delhi) (Trib.)

S. 14A : Disallowance of expenditure- Exempt income- Disallowance u/s 14A r.w. Rule 8D cannot exceed the exempt income.[R.8D]
The totality of facts clearly indicates that no borrowed funds were utilized for earning the exempt income by the assessee and further the dividend were directly credited in the bank account of the assessee and no expenditure was claimed. The assessee only received Rs.1,82,362 as dividend income, therefore, there is no question of disallowance of Rs.14,58.412 by invoking section 14A r.w. Rule 8D. At best, if any disallowance could be made that can be restricted to Rs. 1,485 which were claimed as demat charges. Disallowance u/s 14A r.w. Rule 8D cannot exceed the exempt income. (AY. 2009-10) (ITA No. 5592 /M/2012, dt. 01/01/2015)
Daga Global Chemicals Pvt. Ltd. .v. ACIT (Mum.)(Trib.);www.itatonline.org

S. 14A : Disallowance of expenditure - Exempt income –Interest-Where the assesse is able to establish the nexus disallowance can be made under Rule 8D(2)(i) and not under Rule 8D(2)(ii)[R.8D]
Assesseecompany was engaged in share broking business. On examination of return of assessee, AO noticed that assessee had disclosed dividend income and claimed same as exempt from taxation but did not make any disallowance under section 14A ,invoking rule 8D(2)(ii), he computed disallowance. Tribunal held that workings furnished by assessee for interest disallowance were not examined at all by AO and assessee was able to prove nexus between borrowings and investments, and assesse was able to prove nexus between borrowings and investments , interest disallowance was required to be made under Rule 8D(2)(i) and not by invoking rule 8D(2)(i) (AY. 2008-09)
ITO .v. Reliance Share & Stock Brokers (P.)Ltd. (2014) 51 taxmann.com 215 / (2015) 67 SOT 73 (Mum.)(Trib.)

S. 15:Salary- Non compete fee Director- Compensation received to safe guard the interest of business- Held to be capital receipt. [S. 4, 17,55(2)]
Assessee was an engineer, who was experienced in field of industrial drives. He along with another person started a company namely 'RSM' for manufacture of industrial drives. 'CT-PLC', a UK based company and world leader in industrial drives entered into a joint venture agreement with RSM, and a new company CTIL was formed . Assessee became director of CTIL . Subsequently, there was change in shareholding pattern as a result of which shareholding of RSM in CTIL was substantially reduced and shareholding of CT-PLC was increased to 85 per cent. Since assessee had knowledge, experience and capacity in field of industrial drives, to safeguard interests of joint venture company, in which stake of CT-PLC company was increased from 51 per cent to 85 per cent, CT-PLC entered into 'Non-competence Agreement' with assessee in terms of which certain compensation was paid by CT-PLC to assessee. Authorities below brought said amount to tax as salary income. On appeal allowing the appeal court held that ; since there was no employer-employee relationship between CT-PLC and assessee there was no question of taking non-compete fee as 'salary' in hands of assessee. on facts, amount in question was to be regarded as capital receipt not liable to tax.(AY. 1996-97)
G. Raveendran .v. CIT (2015) 231 Taxman 685 (Mad.)(HC)

S. 15:Salaries–Accrues or arise-Diversion of income-Salary received from government by teacher members of religious congregation is their income and subsequent entrustment of amount to the congregation would be merely application of income- Taxable in their individual hands. [S.4 , 5, 192]

Members of a religious congregation were employed as teachers in various education institutions of the state and received income from the government for their services. The AO held that the members were receiving income from salary in return for their services rendered and subsequent disbursements to the congregation were mere application of income.
The High Court observed that for the concept of diversion of income by overriding title would apply only if the diversion was effective at the stage when the amount in question left the source on its way to the intended recipient which was not the case in the present appeal. The High Court held that the diversion of income was a mere obligation of the member based on personal law and hence the payments were taxable in the hands of individuals.
Fr. Sunny Jose v. UOI (2015) 233 Txman 454 / 276 CTR 512 / 118 DTR 41 (Ker.)(HC)

S. 17:Profits in lieu of salary-Expert in Industrial drives system - Restrictive covenant-Assessee with specialized knowledge forming private limited company - Joint venture between private limited company and foreign company - Foreign company paying consideration to assessee under non-competition agreement - No relation of master and servant between foreign company and assessee - Amount received under non-competition agreement not assessable as profit in lieu of salary. [S. 15, 17(3)]
The assessee was an expert in the field of industrial drives. He started a private limited company. A U.K. based company joined hands with the assessee and a joint venture Indian company was formed with 51% of the shares held by the foreign company and 49% shares held by the Indian company. Since the expertise of the technical personnel of the Indian company would be the key to success of this joint venture, the directors of the Indian company were asked to assume executive responsibility in the joint venture company and, accordingly, an employment contract was signed by the assessee and he became the employee of the joint venture. The salary of the assessee was paid by the joint venture Indian company. The Government of India granted approval for changing the shareholding pattern. After obtaining approval, since the shareholding of the foreign company was increased from 51% to 85% correspondingly, the shareholding of the Indian company came to be reduced from 49% to 15% In order to ensure that there was no competition of any kind by the assessee consequent to reduction of the share capital in the joint venture Indian company, the foreign company entered into a non-competition agreement with the assessee. The Assessing Officer held that the amount received by the assessee under the non-competition agreement was assessable as salary. This was upheld by the Tribunal. On appeal to the High Court:
Held, allowing the appeal, that a cursory glance at the non-competition agreement would show that the compensation received from the foreign company by the assessee could not be regarded as profits in lieu of salary and brought to tax under the head "Salary". The Indian company was never merged with the foreign company to form the joint venture. The joint venture was an Indian company with 51% of the shares being held by the foreign company and 49% shares being held by the Indian company as on October 1, 1993. It was clear from the documents on record that the salary portion was received from the joint venture, whereas the non-competition fee had been received from the foreign company and, therefore, both the transactions were distinct. The consideration was received from the foreign company by the assessee, which foreign company had no relationship with the assessee in the nature of employment. The amount received under the non-competition agreement was not assessable as salary. (AY. 1996-1997)
G. Raveendran .v. CIT (2015) 375 ITR 326 (Mad.)(HC)

S. 17:Profits in lieu of salary -Amount received by prospective employee for loss of employment offer is a capital receipt and is neither taxable as "salary" or as "other sources" [S. 15, 56]
The assessee entered into an Employment Agreement with ACEE Enterprises (‘ACEE’) pursuant to which he was to be employed as Chief Executive Officer (‘CEO’) and the employment was to commence from 1st July, 2007. Either party at its option could terminate the employment by giving six months’ notice to the other party in writing. In case the notice period was less than six months, then compensation equivalent to the shortfall of the notice period was payable by the party concerned. ACEE wrote a letter to the Assessee informing him that there was a “sudden change in business plan of the Company vis-a-vis foraying into new financial ventures” and that “the company is extremely disappointed to convey that it shall not be able to take you on board from 1st July, 2007 as per

employment contract." ACEE promised to reconsider the Assessee's services "as and when its operation starts". The second letter was dated 15th May 2007 which was the Assessee's response to ACEE that the news was a "big financial loss personally" since there were "many other opportunities available to me". The Assessee stated that since he had opted for ACEE he did not consider "other lucrative opportunities available to me". Since it was not clear when ACEE was going to start its new venture, the Assessee proposed that "your company must consider something for financial loss incurred by me not available other opportunities. I propose that you must give me at least one year compensation offered to me by your company to cover up the financial loss incurred by me". On 25th August 2007, ACEE informed the Assessee that "as a mark of goodwill/gesture" it was pleased to announce a payment of Rs.1,95,00,000 to the Assessee subject to income tax compliances as "a one-time payment to you for non-commencement of employment as proposed." The assessee claimed that the said sum was a capital receipt. However, the AO assessed it as salary under Section 17 (3) (iii) of the Act. This was reversed by the CIT(A) and the Tribunal. On appeal by the department to the High Court HELD dismissing the appeal:

(i) The Court is unable to accept the interpretation sought to be placed on the plain language of Section 17(3)(iii) of the Act by the Revenue. The words "from any person" occurring therein have to be read together with the following words in sub-clause (A): "before his joining any employment with that person". In other words, Section 17(3)(iii)(A) pre-supposes the existence of an employment, i.e., a relationship of employee and employer between the Assessee and the person who makes the payment of "any amount" in terms of Section 17(3)(iii) of the Act. Likewise, Section 17(3)(iii)(B) also pre-supposes the existence of the relationship of employer and employee between the person who makes the payment of the amount and the Assessee. It envisages the amount being received by the Assessee "after cessation of his employment". Therefore, the words in Section 17(3)(iii) cannot be read disjunctively to overlook the essential facet of the provision,viz., the existence of 'employment' i.e. a relationship of employer and employee between the person who makes the payment of the amount and the Assessee. The Court accordingly concurs that this was a case where there was no commencement of the employment and that the offer by ACEE to the Assessee was withdrawn even prior to the commencement of such employment. The amount received by the Assessee was a capital receipt and could not be taxed under the head 'profits in lieu of salary'.

(ii) The other plea of the Revenue that the said amount should be taxed under some other head of income, including 'income from other sources', is also unsustainable. The decision of this Court in CIT v. Rani Shankar Mishra (2010) 320 ITR 542 (Del) (supra) held in similar circumstances that where an amount was received by a prospective employee 'as compensation for denial of employment,' such amount was not in the nature of profits in lieu of salary. It was a capital receipt that could not be taxed as income under any other head.(ITA No. 203/2014, dt. 16.09.2015)(AY. 2008-09)

CIT .v. Pritam Das Narang (Delhi)(HC); www.itatonline.org

S.17: Perquisite-Salary-Overseas employment-Federal tax-Hypothetical tax-Tax on salary paid by employer-Considering analysis statement of hypothetical tax and remanding matter to Assessing Officer to decide afresh-No interference.[S.15, 17(2)(iv)]

Dismissing the appeal, the Court held that;the Tribunal clearly stated that consequent to the withdrawal of hypothetical tax payable in the U. S., certain amount had been paid towards tax liability of the assessee in India. Taking into consideration the amount paid towards salary and deducting the hypothetical tax payable in the U. S., the Tribunal had determined the salary received after deduction made by the employer towards the hypothetical tax. The calculation made by the Tribunal would reveal that the computation was just and proper and no clarification was required to be given by the Tribunal, as it was for the assessee to explain as to how this amount should be treated for the purpose of determining the tax. (AY. 2009-2010)

CIT v. Rajasekaran Balasubramaniam (2015) 373 ITR 326 (Mad.)(HC)

S. 22:Income from house property-Annual letting value - Mode of determination-Matter remanded.

For the assessment year 1986-87, the Assessing Officer followed the view taken in the earlier years in respect of the assessee to the effect that the annual value should be determined on the basis of the

standard rent and not on the basis of the rateable value as determined by the municipal corporation. He further took the view that in determining the standard rent, the return on the investment should be calculated at 12% and computed the income from house property at Rs. 57,760 instead of Rs. 979 as per the return filed by the assessee. This was upheld by the Tribunal. On appeal to the High Court: Court observed that while determining the annual letting value in respect of properties which are subject to rent control legislation and in cases where the standard rent has not been fixed, the Assessing Officer shall determine the annual letting value in accordance with the relevant rent control legislation. If the fair rent is less than the standard rent, then, it is the fair rent which shall be taken as annual letting value and not the standard rent. This will apply to both self-acquired properties and general cases where the property is let out.(AY. 1986-1987)

Vimal R. Ambani .v. Dy.CIT (2015) 375 ITR 66 (Bom.)(HC)

S. 22:Income from house property - Income from other sources - Land owned by husband and building constructed thereon with joint funds belonging to himself and his wife - Common stock of property between husband and wife - Doctrine of blending - Rent from property - Assessable as income from house property.[S. 27,56]

A building was constructed on the piece of land belonging to the husband of the assessee jointly by the wife and the husband. The cost of construction was shared in the ratio of one-third and two-thirds and the income was proportionately distributed. The Tribunal held that the rent from the property was to be assessed under the head "Income from house property" and not as "Income from other sources", though the land stood in the name of the assessee's husband. On appeal:

Held, that the land admittedly belonged to the husband of the assessee. He had raised the building with the joint funds belonging to himself and his wife. Therefore, one inference which could be drawn was that the land belonging to the husband had been thrown into the common stock of the joint property between the husband and the wife. Both of them thus became the joint owners by operation of the doctrine of blending. They admittedly had borne the cost of construction in the ratio of one-third and two-thirds. Therefore, the income arising out of the property was in fact an income arising out of house property which had to be taxed under section 22 rather than as an income arising out of other sources under section 56.(AY. 2004-2005)

CIT .v. Mina Deogun (Smt.) (2015) 375 ITR 586 (Cal.)(HC)

S. 22:Income from house property-Premises leased to Government or its organisations-Assessing Officer cannot fix imaginary figure based upon information or potential of building.

Allowing the appeal of assessee the Court held that ; it was the specific case of the assessee that the rent for the premises was being paid at Rs. 10,000 per month for the structure and Rs. 3,500 per month for furniture and fittings; and that the same amount was being taken into account year after year. The Assessing Officer had every right to verify the accuracy of the facts and figures furnished by the assessee. Occasions of that nature would arise, mostly when the premises were leased to private individuals. Where, however, the premises were leased to the Government or its organisations, the scope for an assessee to show the rent at a lower figure did not arise. Further, there did not exist any particular standard to fix the rent of any premises. Much would depend upon the location and condition of the building, on the one hand, and the demand in the locality, on the other. Where the lessee is the Government, the transaction is regulated by the fixed parameters. Even if the building has potential to fetch a higher rent, Government departments are not expected to pay such rent. In case the owner of the premises is willing to lease them to the Government or its agencies, for reasons of safety and security or assured payment of rent, the discretion of the Assessing Officer to determine the reasonable rent of his choice gets virtually restricted. He could not ignore the actual payments and fix an imaginary figure, based upon the alleged information or potential of the building. This was a rare case, in which proceedings under section 271C were initiated and on a close verification of the matter, they were dropped. The figure Rs. 2.83 per square feet, mentioned in the order of the Commissioner (Appeals) was imaginary. The figure was derived by dividing the rent of Rs. 13,500 with the carpet area and not the actual area of the building. The effort of the Telecommunications Department in addressing the letter was to resist the plea of the assessee for enhancement of the rent. Once the penalty proceedings were dropped, the suggested figure virtually lost its significance. Therefore, the

rent for the premises must be taken at Rs. 13,500, unless there was any enhancement by the lessee itself, for any subsequent period.(AY. 1995-1996)
A .Venkateswara Rao v. ACIT (2015) 372 ITR 136 (T & AP) (HC)

S. 22: Income from house property-Business income-Construction business -Earning money by selling property and letting it out- Enjoying property by giving use of it to another on rent rather than enjoying it by itself-To be treated as income from house property. [S. 28(i)]
Allowing the appeal of assessee the court held that; Income in the case of the assessee could not be treated otherwise than as arising out of house property because the assessee was enjoying the property by giving the use of it to another on rent rather than enjoying it by itself.
The contention that the main object of the assessee was dealing in property, that the object was business and, therefore, the rental income should be treated as business income, was not tenable because the object was both to earn money by selling the property as also by letting it out. It could not be said that the assessee was not authorised by the memorandum to earn profit by letting the property out.
Azimganj Estates P. Ltd. v. CIT (2015) 372 ITR 243 / 232 Taxman 625 (Cal.)(HC)

S. 22 : Income from house property- Business income-–Letting out of ware houses /godowns-Assessable as income from house property.[S.28(i)]
Where letting out of warehouses/godowns together with various services rendered to occupant did not constitute business activity of assessee, income arising therefrom was not assessable under section 28 as business income but under section 22 as income from house property. Appeal of assesse was dismissed.(AY. 1994-95)
Jyoti Estate v. Dy. CIT (2015) 229 Taxman 404 (Guj.)(HC)

S. 22 : Income from house property –Business income-Rental income earned from letting out commercial complex would be assessed as income from house property .[S.28(i)]
Where assessee was not engaged in any business activity, rental income earned from letting out commercial complex would be assessed as income from house property and not as business income. (AY. 2004-05, 2005-06, 2007-08 & 2008-09)
Keyaram Hotels (P.) Ltd. .v. Dy. CIT (2014) 52 taxmann.com 469 / (2015) 373 ITR 494/228 Taxman 354 (Mad.)(HC)

S. 22 : Income from house property-Business income–letting out immoveable property–Assessable as income from house property-Hire charges from motor car, office equipment etc–Assessable as business income. [S.28(i)]
Assessee let out immovable property along with motor car, office equipments, computers, furniture and fixture. Held rent from immovable property as income from house property ,however, hire charges for office equipments, etc., were assessed as business income referring to fact that in prior assessment year, on same facts AO accepted receipt of these hire charges as business income - Whether once in department had assessed hire charges for office equipments in preceding year as business income, then without anything being brought on record to deviate from said finding, stand of department could not be accepted. (AY. 2003-04)
CIT v. JPS Associates (2015) 228 Taxman 367 (Mag.)(Bom.)(HC)

S. 22 : Income from house property -Letting out of commercial complex-Assessable as income from house property not as business income. [S.28(i)]
Assessee Company constructed a hotel on land taken on lease from Airport Authority . It also constructed some offices and shops in said commercial complex . During relevant year, assessee let out those shops and offices and derived rental income which was offered to tax as 'income from house property'. Assessing Officer found no difference between letting out of hotel rooms and renting out of shops in hotel premises especially when hotel premises, inter alia, includes commercial complex also, therefore, Assessing Officer brought to tax income from renting commercial premises under head Profit and gains of business and profession". Commissioner (Appeals) upheld Assessing Officer's order .On appeal Tribunal held that since letting out of commercial space, i.e., offices and shops, was

not accompanied by incidental services, in such case mere physical proximity of hotel and commercial complex did not really matter as long as character of arrangement had distinct nature therefore, income derived from property in question, was to be assessed as 'income from House Property' . (AY.2009-10, 2010-11)
A.B. Hotels Ltd. v. ACIT (2015) 68 SOT 255 (URO)(Delhi)(Trib.)
A.B. Hotels Ltd. v. ACIT (2015) 68 SOT 334 (URO) (Delhi)(Trib.)

S. 22 : Income from house property-Business income- Income from House property – Auditorium building letting –Assessable as income from house property.[S.28(i)]
Where assessee had exploited auditorium building by letting out, income derived from same was income from house property and not business income of assessee.(AY. 2007-08)
M. Ahammedkutty v. ITO (2015) 67 SOT 353 (Cochin)(Trib.)

S. 22: Income from house property-Renting of terrace- Amount received from cellular companies for renting out of the terrace for installation of mobile antenna-Assessable as income from house property and not as income from other sources.[S.56]
Allowing the appeal of the assesse Tribunal held that the rent was not for antenna but for space for installation of antenna . Therefore what was relevant was the space which had been rented out and the space was part of building ,hence the rent was to be assesses as income from house property and not as income from other r sources. (AY. 2009-10)
Manpreet Singh v. ITO (2015) (2015) 38 ITR 55/114 DTR 237/168 TTJ 502/67 SOT 426/ 53 taxmann.com 244 (Delhi)(Trib)

S. 22 : Income from house property-Rent received from mobile phone company for use of terrace to install antenna is taxable as "Income from house property" and not as "Other sources". [S.56]
The true test is whether the space rented out is part of the building or land appurtenant thereto. The rent is not for the antenna but for the space for installation of antenna. It is not the case of the Assessing Officer that the rent is for the antenna, and, therefore, it is wholly irrelevant whether antenna is part of the building or land appurtenant thereto. What is relevant is the space which has been rented out and, therefore, as long as the space, which has been rented out, is part of the building, the rent is required to be treated as “income from house property”. Learned counsel for the assessee has filed copies of leaves and licence agreements with the BhartiAirtel Limited and the Idea Cellular Limited. In both of these agreements, it is specifically mentioned that the rent is for use of “roof and terrace” area (not more than 900 sqft in the case of BhartiAirtel Ltd and approx 800 sqft in the case of Idea Cellular Limited). The agreement with BhartiAirtel Ltd mentions that the assessee “permits the licences to install, establish, maintain and work on the licenced premises, inter alia, including the following – (a) transmission tower/pole, with multiple antennas; (b) pre-fabricated equipment shelter; (c) D G Set upto 25 KVA: and (d) two earthing connection and laying of other cables to ground an one lightning arrestor, necessary cabling and connecting to each antenna/ equipment, and space for installation of electricity meter and power connectivity etc”. Similarly, agreement with Idea Cellular Ltd, inter alia, states that the assessee gives permission and licence “to use and occupy a portion admeasuring approx. 800 sqft terrace and roof area for installation of prefabricated temporary assembled air conditioned shelter, tower/antenna poles and such other equipment as may be necessary”. All these installations are to be done by the related companies and the obligation of the assessee does not extend beyond permitting use of space for such installations. It is thus clear that the rent is for space to host the antennas and not for the antennas. As long as the rent is for the space, terrace and roof space in this case and which space is certainly a part of the building, the rent can only be taxed as ‘income from house property’ .(AY. 2009-10)
Manpreet Singh v. ITO (2015)38 ITR 55 /114 DTR 237/168 TTJ 502/67 SOT 426/ 53 taxmann.com 244(Delhi)(Trib.)

S. 23 : Income from house property - Annual value -Notional interest on deposit-Addition was deleted.[S.22]

Assessee let out property for rent of Rs. 90,000 per month and also received interest free deposit . Assessing Officer held that deposit was linked with rentals of property and accordingly made addition of notional interest at rate of 12 per cent . CIT(A) deleted the addition. On appeal by revenue dismissing the appeal the Tribunal held that ; since Assessing Officer had not conducted any enquiry to find out effect of interest free deposits and did not determine fair market rent, addition on account of notional interest could not be allowed (AY.2005-06)

ACIT v. Bharati Anirudh Kilachand (Mrs.) (2015) 68 SOT 337 (Mum.)(Trib.)

S. 24:Income from house property–Deductions-Interest- Capitalised as work in progress-Deduction is not available to companies. [S.23(2)].

It was held that where assessee company had paid interest on borrowed fund before completion of construction of property and further had capitalized same by accounting for it in capital work-in-progress, assessee would not be entitled for deduction under section 24(b) as said deduction is applicable to self occupied properties. (AY. 2006-07)

ITO v. Janus Investments (P.) Ltd. (2015) 67 SOT 367 (Mum.)(Trib.)

S. 24:Income from house property-Interest on borrowings-Interest on loan taken for acquiring property—Allowable. (S. 22)

The assessee claimed deduction of interest on term loan under section 24(b) of the Act. The authorities rejected the claim of the assessee. On appeal;Held, that once the term loan had been taken for acquiring or constructing the property, which fetched income under the head "Income from house property", the interest on such loan had to be allowed as deduction under section 24(b) of the Act. Matter remanded to the Assessing Officer to verify and ascertain the amount of loan utilised for the building and to allow deduction towards interest.(AY. 2009-2010)

Universal Precision Screws v. ACIT (2015) 38 ITR 233 (Del.)(Trib.)

S.24: Income from house property- Deduction-Interest-Interest payable to sundry creditors who supplied material for construction of property is an allowable deduction.[S. 22, 24(b)]

Allowing the appeal of the assessee the Tribunal held that the true nature of relationship has to be considered and restrictive meaning cannot be assigned to the term “borrowed capital” in section 24(b) of the Act .If there is direct nexus between the interest payment and construction of property , which in the present case was through creditors because they had supplied material for construction , the said interest would come with in the ambit of section 24(b) of the Act and interest paid to sundry creditors who supplied material for construction of property was an allowable deduction under section 24(b) of the Act .(AY. 2005-06, 2007-08)

Jyoti Metal & Allied Industries (P) Ltd..v. ITO (2015) Chamber’s Journal-February- P. 82 (Delhi)(Trib.)

S.28(i):Business income-Income from house property-Company formed with main object of acquiring and holding properties -Letting of property was held to be assessable as business income and not as income from house property.[S.22]

The Supreme Court had to consider whether the income from letting of property is assessable as “profits and gains of business” or as “income from house property” and what are the tests to be applied. HELD by the Supreme Court:

(i) A mere entry in the object clause showing a particular object would not be the determinative factor to arrive at an conclusion whether the income is to be treated as income from business and such a question would depend upon the circumstances of each case, viz., whether a particular business is letting or not;

(ii) Each case has to be looked at from a businessman’s point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner. We do not further think that a thing can by its very nature be a commercial asset. A commercial asset is only an asset used in a business and nothing else, and business may be carried on with practically all things. Therefore, it is not possible to say that a particular activity is business because it is concerned with an asset with which trade is commonly carried on. There is nothing to support the proposition that certain assets are commercial assets in their very nature;

(iii) Where there is a letting out of premises and collection of rents the assessment on property basis may be correct but not so, where the letting or sub-letting is part of a trading operation. The diving line is difficult to find; but in the case of a company with its professed objects and the manner of its activities and the nature of its dealings with its property, it is possible to say on which side the operations fall and to what head the income is to be assigned. (AY.1986-87, 1979-80, 1983-84, 1984-85))

Chennai Properties & Investment Ltd. v. CIT(2015) 373 ITR 673/231 Taxman 336/ 119 DTR 130/ 277 CTR 185(SC)

Editorial: CIT v. Chennai Properties & Investments Ltd (2004) 135 Taxman 509/ 186 CTR 680 (Mad)(HC) & CIT v. Chennai Properties & Investments Ltd (2004) 266 ITR 685 (Mad)(HC) is approved**.**

S. 28(i) :Business income–Capital gains-Investment in shares-Selling shares frequently- Volume and magnitude was very high- Assessable as business income.[S.45]

Assessee declared income arising from sale of shares as short-term capital gain. Tribunal found that assessee had regularly dealt in purchase and sale of share which indicated period of holding to be very short and that he earned only a meagre amount of dividend while gains from sale of shares was Rs. 65.45 lakhs. High Court upheld order of Tribunal that income arising from sale of shares was assessable as business income. Special leave petition filed against impugned order was dismissed. (AY. 2007-08)

Manoj Kumar Samdaria.v. CIT (2015) 228 Taxman 63 (SC)

Editorial: Judgment of Delhi High Court in Manoj KmuarSamdariav.CIT(2014) 223 Taxman 245 (Mag)(Delhi)(HC) is affirmed.

S. 28(i) : Business income-Income from house property-Primary source of income of assessee letting out godowns and warehouses to manufacturers, traders and companies carrying on warehousing business - Assessable as business income [S. 22].

The assessee was engaged in the business of warehousing, handling and transport business.Held, dismissing the appeals, that the Commissioner (Appeals) as well as the Tribunal had not only gone into the objects clauses of the memorandum of association of the assessee but also into individual aspects of the business to come to the conclusion that it was a case of warehousing business and, therefore, the income would fall under the head "Business income". Thus, the income of the assessee from letting out its warehouse was chargeable under the head "Income from business" and not under the head "Income from house property".(AY 2004-2005 to 2009-2010)

CIT v. NDR Warehousing P. Ltd. (2015) 372 ITR 690 (Mad.)(HC)

S. 28(i) : Business income-Income from house property- Business of establishing facilities as are available in an information technology park- Assessable as business income.[S.22]

Assessee was engaged in business of establishing facilities as available in IT Park and in letting out hotels, commercial complexes in an integrated manner with fully operational infrastructure facilities. Rental income derived from tenants was claimed as 'business income' .Revenue authorities treated 60 per cent of income as 'income from business' and 40 per cent as 'income from house property' which was affirmed by Tribunal Tribunal accepted the contention of assesse. On appeal by assesseee allowing the appeal the Court held that; since facilities given by assessee along with buildings/commercial establishments were inseparable, and entire construction and interiors of buildings was done with sole intention of carrying on business, assessee was entitled to treat entire income as 'business income'.(AY. 2004-05)

Mysore Intercontinental Hotels Ltd. v. ACIT (2015) 230 Taxman 418 (Karn.)(HC)

S. 28(i) : Business income-Advance received- Matter remanded to verify and pass appropriate order.

Assessee-company was dealing in medical equipments.Assessing Officer made addition of income of electro-medical maintenance centre which had not been included in books of account .Assessee produced assessment order for assessment year 1998-99 wherein it had offered said amount as income and was assessed accordingly. On appeal, High Courtremanded to Assessing Officer to verify and

pass appropriate order. Assessing Officer made addition with respect to advances received by assessee from customers as service charges on installation of equipments. Assessee contended that advances received from customers as service charges could not be assessed in current assessment year before expiry of warranty period, since income from advances could not be correctly ascertained, further income which was omitted to be included in return of income for relevant assessment year was offered as income in assessment year 1997-98 by assessee. (AY. 1996-97)
Kody Elcot Ltd. v. Jt. CIT (2015) 230 Taxman 420 (Mad.)(HC)

S. 28(i) : Business income-Income from other sources-Assessee entering into franchise agreements with various entities to operate pizza and chicken restaurants-Services provided by assessee constituting a systematic organised activity conducted with a special purpose-Income therefrom is business income.[S. 2(13),2(24),56]
The assessee was incorporated as an Indian company and its business related to the operation and development of Pizza Hut and Kentucky Fried Chicken restaurants in the Indian sub-continent. For this purpose, it entered into technology licence agreements with K and P. In terms of these agreements, the assessee had the right to use the technology and system in the business of operating service restaurants. For the assessment years 2002-03 to 2008-09, it earned income equivalent to 110 per cent. of all costs incurred for (i) provision of support services to franchisees, (ii) collection and remittance of royalty to brand holders in the US, and (iii) assistance provided for research and development activity, etc. The Assessing Officer treated the income as "Income from other sources". The Commissioner (Appeals) found that the act and course of services provided by the assessee constituted a systematic organised activity conducted with a special purpose as the provision of services was not an isolated transaction but the services had been continuously provided since the assessment year 1998-99 and the assessee continued even in the present date. Hence, he held that the earning of service income could not be classified under any other head but business income since all the essential parameters of classifying the activity as business were fulfilled. The Tribunal affirmed the findings of the Commissioner (Appeals).Held, dismissing the appeals, that the service income declared by the assessee for the relevant years was business income.The word "business" is one of wide import and it means an activity carried on continuously and systematically by a person by the application of his labour or skill with a view to earning income. (AY.2002-03 to 2008-09)
CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129/ 231 Taxman 691 (Delhi)(HC)

S. 28(i) : Business income-Capital gains - Capital asset-Agricultural land - Agricultural land converted into non-agricultural land and sold within a short span of time on regular basis to companies in which he was a director, income earned was taxable as 'business income'. [S.2(14(iii), 45]
The assessee having purchased certain land, sold same to companies in which he was a director within short span of time. The claim of the assessee was that it being a case of sale/transfer of agricultural land, which was not a capital asset within the meaning of section 2(14)(iii), there was no liability to pay tax under the Act. The AO noticed that all the aforesaid lands were purchased by the assessee in his own name and later on transferred/sold to the aforesaid limited companies where the assessee was a Director and there being a consistency and frequency of the transaction of sale and purchase, and considered income earned by assessee was in the nature of business income. The CIT(A) and Tribunal confirmed the order of AO.

On further appeal, The High Court relying on the finding of the tribunal observed that assessee in the conveyance deed himself has recited about the land having been converted u/s.90A and the nature of the land no more remained agricultural. The High court sustaining the finding of the tribunal further observed that no documentary evidence was led by the assessee to substantiate his claim of doing any agricultural operations.The High Court held that the conclusion arrived at by Tribunal that the lands, sold/transferred by the assessee to the private limited companies, were non-agricultural and outside the scope and meaning of section. 2(14) (iii) requires no consideration. (AY. 2008-2009)
Vimal Singhvi v. ACIT (2015) 370 ITR 275 / 230 Taxman 73 / 113 DTR 157/273 CTR 322 (Raj.)(HC)

S. 28(i) :Business income–Cutting of trees of spontaneous growth in tea garden and using wood for own consumption --Not assessable as business income. [S.143(3)]

Business of assessee was growing and producing tea and there was no intention to generate revenue from sale of trees, grown in tea garden. Tribunal concluded that cutting of trees, leaving stump as required by condition imposed by forest department was not for generating income out of trees, but for felling of wood for own consumption. Tribunal re-affirmed view that it was not a case of business income. No question of law, arose for consideration in instant appeal.

CIT .v. PeriaKaramalai Tea & Produce Co. Ltd. (2015) 229 Taxman 200 (Mad.)(HC)

S. 28(i) :Business income–Income from house property-Commercial activities-Assessable as business income.[S. 22]

Where assessee was in business of taking land, putting up commercial buildings thereon and letting-out such building with all furniture, notwithstanding fact that assessee had constructed building and also provided other facilities and there were two separate rental deeds, for two types of activities, income received by assessee would not fall within heading of 'Income from House Property' . Income assessable as business income. (AY. 2002-03)

Black Pearl Hotels (P.) Ltd. .v. Dy. CIT (2015) 229 Taxman 155 (Karn.)(HC)

S. 28(i) : Business income –Income from house property-Ware house business-Assessable as business income [S.22]

Assessee-Corporation had primarily been set up for purpose of acquiring and building godowns and warehouses and letting them out for storage of certain notified commodities. Some of warehouses had been taken on rent and let out to companies/farmers for storage purposes.Since activity of letting out was a part of assessee's business, income therefrom would be assessable as business income and not as income from house property.(AY. 2008-09)

CIT v. Karnataka State Warehousing Corporation (2015) 228 Taxman 346 (Karn.)(HC)

S. 28(i) : Business income –AAR-DTAA- India- Portugese-USA-Netherland- Matter remanded.[S.29.]

Where Authority for Advance Rulings refused to look into Indo-Portugese DTAA or Indo-USA DTAA and memorandum of understanding between India and USA on ground that only Indo-Netherlands DTAA needed to be looked into, impugned ruling could not stand, therefore same was to be set aside and matter was to be remitted to consider entire matter afresh. (W. P.(C) No. 1502 of 2012 dt. 30-09-2014)

Perfetti Van Melle Holding. B.V. v. AAR (2015) 228 Taxman 201 (Mag.)(Delhi)(HC)

S. 28(i) : Business income –Capital gains-Adventure in the nature of trade - Assessee acquiring right to sell property - No intention to hold property.[S.2(47) (v), 2(47)(vi),45]

Held, that the assessee had no intention of purchasing the property, enjoying and holding it for some time. Hence, it would not be an investment in the property. The intention behind this transaction was to sell the property at a higher price than the assessee had paid to the owner, and hence, adventure in the nature of trade. The gains were assessable as business income.

CIT v. Shahrooq Ali Khan (2015) 370 ITR 246 / 230 Taxman 417(Karn.)(HC)

S. 28(i) : Business income - Capital gains - Agricultural land- No evidence by assessee to substantiate claim of carrying out agricultural operations - Sale deed clearly showing assessee as absolute owner of residential land having converted its use from agricultural-Surplus assessable as business income.[S.2(14)(iii)], 45]

The Tribunal had recorded a finding of fact that no documentary evidence was led by the assessee to substantiate his claim of doing any agricultural operations on the land and the Assessing Officer in the assessment order had clearly mentioned that he had repeatedly asked the assessee to substantiate the claim about the exact agricultural operations having been carried on by the assessee but no satisfactory material was placed by the assessee. The Tribunal also observed that the other lands,

though not converted from agricultural to non-agricultural use, were in the vicinity of the lands which were converted from agricultural to non-agricultural and, thus, the nature of the lands too could not be different. Therefore, the lands transferred by the assessee to the private limited companies were non-agricultural and outside the scope and meaning of section 2(14)(iii) defining a capital asset.(AY .2008-2009)

Vimal Singhvi .v. ACIT (2015) 370 ITR 275/230 Taxman 73 (Raj.) (HC)

S.28(i):Business income–Advance received-Entire sale consideration received as advance-On facts held as assessable as business income.

Assessee was engaged in business of sale of imported tractor. Farmer had to make advance booking for purchasing tractor. Assessee-tractor importer maintained 'Sundry World Bank' account where receipt of advance booking was credited.AO made addition by treating such advance deposit as trading receipt. Fact revealed that advance payment for booking was actually entire sale consideration required to be paid which was used to be adjusted on date of delivery and balance amount, if any, remaining with assessee was refunded on production of original booking receipt and in absence of receipt, such payment was withheld. In many occasions even balance due to vendees on adjustment of fluctuation of rates of foreign exchange at time of booking and at time of actual delivery of tractor was not even returned to vendees. Court held on facts advance amount received as sale price was clearly in nature of trading receipt and entire amount was assessable as income of assesse.(AY. 1975-76 to 1977-78)

Modern Farm Services .v. CIT(2015) 228 Taxman 106 (Mag.)(P&H)(HC)

S. 28(i) : Business income - Share dealings- Large volume-Income from share transactions was to be assessed as business income and not as capital gain. [S. 45]

Allowing the appeal of the revenue the Tribunal held that due to large volume of transactions of buying and selling of shares, income from share transaction was to be assessed as business income and not capital gain. (AY. 2007-08)

ACIT v. Vinod K. Sharda (2015) 153 ITD 648 (Mum.)(Trib.)

S.28(i):Business income-Unclaimed balances-liable to tax on credits.

Credits carry forward year after year. No claim from creditor. Failure by assessee to establish genuineness of liabilities. Assessee is liable to tax on credits. (AY. 2006-2007, 2008-2009)

Dy. CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183(Cochin)(Trib.)

S. 28(i) : Business income –Fixed deposit interest-Assessable as business income. [S.10A, 263]

Interest income earned by assessee on fixed deposit receipts with bank which were made in course of its trading business of import and export for purposes of re-export for obtaining Letter of Credit for its purchases, was to be assessed as business income of assessee, FDs being business assets. (AY. 2009-2010, 2010–2011)

Zaveri & Co. (P.) Ltd. v. CIT (2014) 32 ITR 250/ (2015) 153 ITD 85 (Ahd.)(Trib.)

S. 28(i): Business income – Income from other sources-Interest income from business of easing and financing- Assessableas business income .[S. 37(1).56]

Interest income earned by the assessee engaged in the business of leasing , financing , etc , is taxable as busimess income and not as income from other sources , not withstanding the fact that the RBI has refused to register the assessee as an NBFC ; all the expenses related to the said activity are allowable as deduction.(AY. 2006-07)

Preimus Investment and finance Ltd. v. DCIT (2015) 171 TTJ 794 (Mum.)(Trib.)

S.28(i):Business income- Income from house property-Developing malls and business centre on property owned by it- Letting out the same also providing various facilities in the said business centre –Assessable as business income.[S. 22]

Dismissing the appeal of revenue the Tribunal held that merely because oncome is attached to a property it cannot be sole factor for assessing the income as income from house property , it has to be seen that as to what was the primary objective of the assessee while exploiting the property, if the

property is let out simply the income is assessable as income from house property.However, if the property is exploited in a commercial manner then the income there form is assessable as business income. In the present case the assesse had developed shopping malls/ business centres on properties owned by it and let out the same by providing various services/facilities /amenities in the said mall /business centres, it can be said the basic intention of assesse was commercial exploitation of its properties by developing them as shopping centres. Thus, the income was assessable as business income.(AY. 2001-02 , 2002-03, 2004-05 , 2006-07 & 2009-10)
ACIT .v. Steller Developer (P) Ltd. (2015) Chamber's Journal-March –P. 141 (Mum.)(Trib)

S. 28(i) : Business income-Income from other sources- Interest from FDRs-Annual collection from customers-Assessable as income from other sources-Set off income against brought forward business losses-Matter restored to the file of AO. [S.56, 72]
Assessee claimed funds parked in FDRs were related to annual collection made from its customers hence assessable as business income. Tribunal held that as the assesse has brought no material on record to suggest that it was by way of temporary deposit of surplus money or it was in the nature of advance received from intended purchasers , the claim of assesse that interest income earned by it on FDR was in nature of business was not assessable. As regards set off these incomes against brought forward business losses the matter was restored back to the file of AO. (AY. 2007-08, 2008-09)
Shree Nirmal Commercial Ltd..v.Dy.CIT (2014) 52 taxman.com 78/(2015) 67 SOT 78 (Mum.)(Trib.)

S. 28(i) : Business loss–Sale of shares at discount value to JV partners-Not a colourable transaction-Loss was held to be allowable.
Assessee and Plansee Tizit an Australian company, had entered into an agreement for setting up and forming a Joint Venture Company. Due to financial difficulties, assessee was unable to subscribe to shares of JV company offered by way of rights offer and decided to renounce same in favour of Plansee Tizit. Plansee Tizit agreed to buy shares of assessee at a discounted price which resulted in book loss. Assessing Officer termed selling of shares by assessee as a colourable device. Tribunal allowed the appeal of assessee.On appeal by revenue dismissing the appeal of revenue the Court held that rights issue by JV company was for generating, augmenting capital and price paid for acquiring rights shares, could not be equated with price paid to acquire shares from shareholders,thus share sale transaction between JV partners where JV company had offered shares on rights basis resulting in loss was not a 'colourable device' and transaction could not be said to be a cover up for de facto or real transaction . (AY. 2000-01)
CIT .v. SIEL Ltd. (2015) 231 Taxman 619 (Delhi)(HC)

S.28(i):Business loss-Chit fund-Bid loss-Matter remanded- Bad debt allowed.[S.36(2)]
On appeal partly allowing the appeals of revenue the Court held that;(1) the matter was remitted to the assessing authority to give one more opportunity to the assessee to produce the relevant materials as set out by the authority and substantiate the deduction under the head business loss, so that the assessing authority on consideration of the material could pass an appropriate.order.(ii) That the claim of bad debt and royalty payment to the parent company was allowable.(AY. 2003-2004)
CIT .v. Shriram Chits (Karnataka) P. Ltd. (2015) 375 ITR 289/231 Taxman 780 (Karn.)(HC)

S. 28(i) : Business loss –Loss on sale of debentures-Application money forgone by assessee for subscribing to rights issue as a matter of commercial expediency in order to make said issue successful is allowed as business loss.
The assessee was a promoter and shareholder of a company, which declared a rights issue of secured redeemable non-convertible debentures. The company further entered into an agreement with the UTI wherein the allottees of debentures could surrender all their debentures to UTI after the application was made and UTI would pay balance allotment money and secure the debenture registered in its name. The assessee opted for the arrangement and claimed before the AO that the loss incurred on account of such arrangement was a business loss. The AO held that the assessee merely acted as a conduit in the transaction and that the assessee was not acting in his own capacity

and hence the loss was not allowable as business loss. The Tribunal however held that the same was a business loss.

The High Court observed that both the UTI as well as the assessee stood to benefit - UTI picked up the debentures at a discounted rate, i.e., Rs. 389 whereas its face value was Rs. 500 each (that amount being the redeemable value at the end of the maturity period) and the assessee was entitled to one dividend warrant which enabled them to an equity share of Rs. 200.The purpose of issue was commercial and they were not issued only to attract subscriptions to the dividend warrants attached thereto. Therefore the High Court held that Assessee Company suffered loss on their sale and such loss was business loss that constituted allowable deduction.

CIT v. Abhinandan Investment Ltd. (2015) 376 ITR 153/118 DTR 145 / 230 Taxman 558 / 277 CTR 86 (Delhi)(HC)

CIT v. Medicare Invests Ltd (2015) 376 ITR 153/118 DTR 145 / 230 Taxman 558 / 277 CTR 86 (Delhi)(HC)

CIT v. Jindal Equipments Leasing and Cons. Serv . (2015) 376 ITR 153/118 DTR 145 / 230 Taxman 558 / 277 CTR 86 (Delhi)(HC)

S. 28(i): Business loss–Genuineness of share transactions –Share transaction- Fundamental transaction is shown to be a sham transaction, the same cannot necessarily be accepted as genuine merely because a broker's confirmation and invoices had been produced-Appeal of revenue was allowed.

The assessee had claimed loss on account of purchase and sale of shares and also diminution in the value of stock of shares held by the assessee at the end of the year. The AO disallowed the same on the ground that the transactions were bogus and not genuine. The AO brought on record that the transactions were of companies that were linked with the assessee company as the companies in question were promoted by one RR who was also a director of the assessee company. Also, the broker NC who had funded the purchase of shares by the assessee was not a person of means. Shares alleged to have been purchased by the assessee were not paid for and only book entries were passed. Moreover, shares were not actively traded and the certificates issued by Gauhati Stock Exchange showed that the transactions were off the floor transactions. On appeal, CIT (A) reversed the order of the AO and allowed the loss claimed by the assessee. The Tribunal also ruled in favour of the assessee holding the transactions to be genuine.

On Revenue's appeal before the High Court, the High Court reversed the Tribunal's order by observing the peculiar facts that the assesse company purchased shares of companies floated by its director and such companies held substantial shares of the assessee company. Moreover, the sale-purchase transactions were "off market" and not through any stock exchange/broker. The High Court approved AO's finding of bogus transactions as the transactions were done by book entries and no payment was made for share-purchase. Though contract notes, bills, books of account are evidence of genuine transactions, where the fundamental transaction was shown to be a sham, the same cannot necessarily be accepted as genuine merely on the basis of broker's confirmation and invoices. Accordingly, the High Court ruled in favour of the Revenue. (AY. 1997-98 to 1999-2000)

CIT v. Vishishth Chay Vyapar Ltd. (2015) 376 ITR 576/ 119 DTR 89 (Delhi)(HC)

S. 28(i) : Business loss–Rights issue of debentures-Commercial expenditure- Allowable as business loss.

Assessee was a promoter and shareholder of JISCO, which declared a right issue of secured redeemable non-convertible debentures (NCD) of Rs. 500 each. As per terms of said issue, every shareholder had to pay a sum of Rs. 111 per debenture on making application and balance of Rs. 389 per NCD was payable on allotment. Before right issue, JISCO made certain arrangements with UTI, according to which allottees of NCDs could surrender all NCDs to UTI after application was made and UTI agreed to pay balance allotment money (Rs. 389 per NCD) to JISCO and secure NCD registered in its name. Assessee, a shareholder and promoter of JISCO, opted for arrangement entered into between JISCO and UTI and, therefore, when UTI paid balance allotment money (Rs. 389 per NCD) on behalf of assessee, allotment was made in its favour. Assessee claimed that amount of

application money forgone was to be allowed as business loss. Assessing Officer rejected assessee's claim. Tribunal, however, allowed said claim . On appeal by revenue , dismissing the appeal of revenue the Court held that; since assessee subscribed to right issue of NCDs as a matter of commercial expediency in its capacity of promoter as otherwise JISCO might have to repay money to depositors on account of failure of right issue, loss in question was rightly allowed as business loss.
CIT v. Abhinandan Investment Ltd. (2015) 376 ITR 153 / 277 CTR 86 / 230 Taxman 558 (Delhi)(HC)

S. 28(i) : Business loss – Decree of a foreign Court-Loss not allowable in the year under consideration.
Where appellant in respect of due from foreign party has got decree of a foreign court in his favour and there was a possibility of realizing amount in near future, business loss suffered by appellant in foreign is not allowable in year under consideration. (AY. 1997-98)
United Phosphorus Ltd. v. Addl.CIT (2015) 230 Taxman 596 (Guj.)(HC)

S. 28(i): Business loss-Loss of goods in transit-Allowable as business loss.
Where assessee-company incurred trading loss due to loss of goods in transit in normal course of business and had written off said loss in its books of account, assessee was eligible for deduction of said loss .(AY. 1996-97 to 1998-99)
CIT .v. Pyramid Timber Associates (P.) Ltd. (2015) 229 Taxman 174 (Karn.)(HC)

S. 28(i) : Business loss - - Capital or revenue loss-Investment in 100% subsidiary for purposes of business - Loss on sale of investment.
The nature of the investment in 100% subsidiary being for commercial expediency, loss incurred on the sale of investment was a business loss.(AY. 2003-2004)
CIT v. Colgate Palmolive (I) Ltd. (2015) 370 ITR 728 (Bom) (HC)

S. 28(i) : Business loss - Capital or revenue loss-Devaluation of Indian rupee - Loss incurred on account of devaluation of rupee-Allowable as business loss.
Loss incurred on account of devaluation of rupee against the US dollar could not be disallowed. Followed ,CIT v. Woodward Governor India Pvt. Ltd. [2009] 312 ITR 254 (SC)
Oswal Agro Mills Ltd v. CIT (2015) 370 ITR 676 (Delhi) (HC)

S.28(i):Business loss-Speculative business-Market to market loss on derivatives cannot be treated as contingent liability-Allowed as deduction.[S.43(5)]
That the market to market loss on derivatives could not be treated as a contingent liability and was to be allowed as deduction.
CIT v. Kotak Securities Ltd. [2012] 340 ITR 333 (Bom) and Edelweiss Capital Ltd. v. ITO [2010] 8 taxmann.com 157 (Mum) relied on.(AY. 2008-2009)
Centrum Broking Ltd. v. ACIT (2015) 39 ITR 23 (Mum.)(Trib.)

S. 28(i): Business loss- Foreign exchange option contracts-Balance sheet- Does not constitute an ascertained liability.[S.43(5)]
It was held that provision for losses created on foreign exchange option contracts as on Balance Sheet date does not constitute an ascertained liability and, thus, deduction could not be allowed in respect of same as business loss. (AY. 2008-09)
Shankara Infrastructure Materials Ltd. v. ACIT (2015) 67 SOT 210(URO) (Bang.)(Trib.)

S.28(i):Business loss-Bad debt-Amounts advanced to for purchase of capital assets-Cannot be allowed as bad debts or business loss.[S. 36(1)(vii)]
Assessee claimed the amount advanced to purchase of capital asset as bad debts. Assessing officer disallowed the said loss as capital in nature. The Commissioner (Appeals) confirmed the order of the Assessing Officer. Tribunal held that admittedly, the assessee had advanced Rs. 5 lakhs to companies

for the purchase of capital assets and claimed deduction of the sum as bad debt. The amount advanced to for purchase of capital assets could not be allowed as bad debt or business loss. (AY. 2003-2004)
Hindustan Times Ltd. v. Dy. CIT (2015) 38 ITR 165 (Delhi)(Trib.)

S. 28(i) : Business loss-Deposits-Advances given in connection with business could not be allowed as bad debt but had to be considered as business loss. [S.36(1)(vii)]
Assessee claimed deposits/advances given in connection with business as bad debt of Rs.11,08,930/-. AO also observed that any claim of bad debt cannot be allowed and the assessee has to establish that the debt has actually become bad. Further it was also required to be shown that the debt had been taken in to account in computation of the income of earlier years. The AO, disallowed the claim to the tune of Rs. 5,94,454/- on ground that amount had not been taken into account in computation of income of earlier years. These amounts though could not be allowed as bad debt have to be considered as business loss. It has been submitted that the deposits/advances given in connection with business are very old and have not been recovered till now. The assessee therefore written off the amounts in the books of accounts. It is not cost effective to enforce recovery by filing suits. the smallness of amounts and the facts and circumstances of the case, claim has to be allowed as business loss. therefore, allow the claim of the assessee. Deposits / advances given in connection with business could not be allowed as bad debt but had to be considered as business loss.(AY. 2006-07)
Smita Conductors Ltd. v. Dy. CIT (2015) 152 ITD 417 (Mum)(Trib.)

S. 28(i) : Business loss-Loss due to fraud & financial irregularities has to be allowed in the year of detection.[S.37(1), 145]
Loss due to fraud and financial irregularities have to be allowed as a deduction in the year of detection. This is in line with the Board circular No.35D(XLVII- 20)(F.No.10/48/65-IT(A-I) dated 24.11.1965. The Hon'ble Supreme Court in the case of Associated Banking Corporation of India Limited. vs CIT (1965) 56 ITR 1(SC) has held that "the loss by embezzlement must be deemed to have occurred when the assessee came to know about the embezzlement and realized that the amount embezzled could not be recovered" . In another decision, the Hon'ble Supreme Court in the case of Badridas Daga v.CIT (1958)34 ITR 10 (SC) has held that "the losses which have been suffered by the assessee as a result of misappropriation by an employee have (1) which was incidental to the carrying on the business and should therefore be deducted in computing the profit of the business."(ITA No. 3213/Mum/2009, dt. 18.02.2015)(AY. 2005-06)
ACIT v. Boots Piramal Health Care Ltd. (Mum.)(Trib.); www.itatonline.org

S. 28(i) : Business loss- Loss on valuation of interest rate swap contarcts- Mark-to-market loss on interest rate swap contracts is not a notional loss- Dedcutible. [S.37(1).
It is an undisputed fact that the assessee has made the valuation of interest rate Swap contracts as at the end of the year. It is also an undisputed fact that assessee had incurred losses on such valuation. The said losses have been claimed as deduction in the P&L Account. It is also an undisputed fact that the assessee has made the entries following Accounting Standard, AS-11 of the ICAI. Such losses being treated as mark to market the losses have been allowed by the Tribunal in series of cases following Special Bench decision in the case of Dy.CIT v. Bank of Bahrain & Kuwait(2010) 132 TTJ 505 (Mum) (SB)(Trib). The Hon'ble Supreme Court in the case of Woodward Governor India Pvt. Ltd 179 Taxman 326 (SC) has considered such losses as allowable and not of contingent in nature. (AY. 2008-09)
IDBI Capital Market services Ltd. v. DCIT(2015) 42 ITR 379 (Mum.)(Trib.)

S. 28(iv) : Business income-Value of any benefit or perquisites- Converted in to money or not – Loan for capital asset-One time settlement–Waiver of loan was held to be not assessable as business income.
The assessee was engaged in business of manufacturing cloth and textile. It was declared a sick company by BIFR.In course of assessment, the Assessing Officer found that ICICI bank had waived principal amount of loan recoverable from assessee in one time settlement.The Assessing Officer took a view that loan waived off constituted assessee's taxable income under section 28(iv).The Tribunal, however, held that the cessation of liability to repay bank loan taken to purchase a capital asset did not

result in a revenue receipt and it was not taxable under section 28(iv).On revenue's appeal Court dismmssed the appeal following the ratio in Mahindra & Mahindra Ltd. v. CIT [2003] 261 ITR 501 (Bom)(HC) and *Solid Containers Ltd.* v. *Dy. CIT* [2009] 308 ITR 417 (Bom.)(HC). The Court also observed that issue specifically came up for consideration in the matter of Mahindra and Mahindra and it was held that the said provision would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money. Following this decision in the case of CIT v. Xylon Holdings (P.) Ltd. [2012] 211 Taxman 108/26 taxmann.com 333 this Court held that the waiver would not come within the purview of section 28(iv). Accordingly the Court held that the view taken by the Tribunal is rational and judicious.(AY. 2007-08)

CIT .v. Santogen Silk Mills Ltd. (2015) 231 Taxman 525 (Bom.)(HC)

S.28(iv):Business income-Benefit or perquisite arising in course of business-Difference between combined share capital of companies prior to amalgamation and equity share capital after amalgamation transferred to general reserve-Reserves and surplus not benefit or perquisite of business-Capital in nature.[S.4]

The assessee has shown difference between combined share capital of companies prior to amalgamation and equity share capital after amalgamation transferred to general reserve. The AO assessed the said amount as benefit or perquisite by applying the provision of section 28(iv) of the Act. But the Commissioner (Appeals) set aside the order of the Assessing Officer and the Tribunal confirmed this. On appeal:

Held, dismissing the appeal, that the provisions of section 28(iv) make it clear that the amount reflected in the balance-sheet of the assessee under the head "reserves and surplus" cannot be treated as a benefit or perquisite arising from business or exercise of profession. The difference amount post-amalgamation was the amalgamation reserve and it could not be said that it was out of normal transaction of the business. The amount was capital in nature and arose on account of amalgamation of four companies. Hence, the amount could not be treated as falling within section 28(iv).(AY.2003-2004)

CIT v. STADS Ltd. (2015) 373 ITR 313 (Mad.)(HC)

S. 28(iv) : Business income - Value of any benefit or perquisites - Converted in to money or not - share forfeiture amount - Amount of forfeited share application money transferred to 'warrant forfeiture account' is a capital receipt and it cannot be taxed as income of assessee, either under section 28(iv) or under section 41(1).[S 4,41(1)]

it is held that the amount of forfeited share application money transferred to "warrant, forfeiture account" in the capital reserve, was a capital receipt only and could not be taxed as income of the assessee, either under section 28(iv) or under section 41(1). Accordingly, ground raised by the assessee is allowed. (AY. 2009-10)

Graviss Hospitality Ltd. v. DCIT (2015) 67 SOT 184(URO)(Mum.)(Trib.)

S. 28(iv) : Business income - Value of any benefit or perquisites - Converted in to money or not – For assigning development rights of a land and received certain sum as advance- Cannot be assessed as income .

Assessee-company executed Memorandum of Understanding (MOU) with one HR for assigning development rights of a land and received certain sum as advance. As transaction did not complete, assessee did not show that amount as income. AO treated said amount as income by applying section 28(iv).On appeal, CIT(A) as well as Tribunal deleted addition by recording finding that MOU was neither withdrawn nor cancelled and it was a liability towards HR which assessee was obliged to return - Whether finding of fact recorded by CIT(A) and Tribunal was based on material on record and, therefore, could not be interfered with.

CIT .v. Arvind Securities (P.) Ltd. (2015) 228 Taxman 301 (Mag.) (Bom.)(HC)

S. 28(va) : Business income –Non-compete fee- Capital receipt-Prior to amendment.

High Court by impugned order held that prior to insertion of clause (va) of section 28, compensation amount received towards loss of source of income and non-competition fee could only be treated as

capital receipt and was not liable to tax.Special leave petition filed against impugned order was to be dismissed.(AY. 1999-2000)
CIT v. Sapthagiri Distilleries Ltd. (2015) 229 Taxman 487 (SC)

S. 28(va):Business income-Non-compete fees vide agreement after 1st April, 2003 - Taxable.
Held, the assessees had received the amount pursuant to the agreement dated June 2, 2008, that was well after April 1, 2003, and would be covered by the provisions of section 28(va). Had the assessee not entered into an agreement of non-compete, they would have earned the amount from the business carried on out of the division which was sold to T. It was the sale of the division that had deprived them of the income and as part of the sale consideration itself, they were required to execute an agreement of non-compete and the compensation received under the agreement was relatable on a consideration for sale of the business of the division and, therefore, for these reasons also, the amount was taxable under section 28(va).
AnuragA.Toshniwal .v. DCIT (2015) 375 ITR 270 (Bom.)(HC)
Arun Toshniwal .v. DCIT (2015) 375 ITR 270(Bom.)(HC)
Editorial: Order in Anurag Toshniwal .v. Deputy CIT (2013) 23 ITR 112 (Mum.)(Trib) is affirmed.

S. 28(va):Business income- Non-compete consideration received prior to insertion of S. 28(va) in the Act w.e.f. 1.4.2003 is not taxable.[S. 55(2)(a)]
On appeal by revenue ,The High Court had to consider :
" Whether non-compete consideration received by the assessee is not liable to tax as capital gains even after the amendment to Section 55(2)(a) of the Act w.e.f. 1.4.1998 which introduced the words 'or a right to manufacture, produce or process any article or thing'?"
Dismissing the appeal the Court held that ,The Supreme Court held in Guffic Chem Pvt.Ltd. v.CIT (2011) 332 ITR 602(SC) that the restraint of right to carry on business would be taxable only with effect from Assessment Year 2003-2004 consequent to the introduction of Section 28(va) into the Act. It was held that there is a dichotomy between receipt of compensation by an Assessee for the loss of agency and receipt of compensation attributable to the negative/restrictive covenant. The compensation received for the loss of agency is a revenue receipt whereas the compensation attributable to a negative/restrictive covenant is a capital receipt. It was also held payment received as non-competition fee under a negative covenant was always treated as a capital receipt till the assessment year 2003-04. It is only vide Finance Act, 2002 with effect from 1.4.2003 that the said capital receipt is now made taxable. Section 55(2)(a) of the Act would have no application in the present circumstances, as it deals with the cost of acquisition in relation to a capital asset which includes a right to manufacture or carrying on business. In the present case, the Agreement prohibits the assessee in as much as it amounts to giving up its right to carry on business i.e. a restrictive covenant. (AY.1999-00)
CIT v. Bisleri Sales Ltd. (2015) 377 ITR 144 (Bom.)(HC)

S.28(va):Business income-Benefit or perquisite-Non –compete fee-received by assesssees directors of a company Chemito Technologies from another company to which one of the divisions of Chemito Technologies was sold was assessable as business income.[28(i)]
Assessees directors of a company Chemito Technologies (P) Ltd sold one of its divisions toa company Thermo Electron LLS India (P) Ltd on 27 th May, 2008 and vide an agreement dt 2-06-2008 the said Thermo Electron LLS India (P.) Ltd entered into agreements and non compete and non solicitation under which the assesse agreed and under took not to engage in any business directly or indirectly otherwise be involved in activity which was similar to that of the division sold to Thermo Electron LLS India (P) Ltd In consideration of the said undertaking Thermo Electron LLS India (P) Ltd paid to the assessee a sum of Rs 5 crores and 2 crores respectively. Tribunal held that amount received was taxable under section 28(va). On appeal dismissing the appeal the Court held that, had the assessee not entered into an agreement of non–compete they would have earned the amount from the business carried on out of the division which was sold to Thermo Electron LLS India (P) Ltd . It is the sale consideration itself, they were required to execute an agreement of non-compete and the compensation received under the said agreement was relatable on a consideration for sale of the business of the division and therefore the amount is taxable under section 28(va). (AY. 2009-10)

Arun Toshniwal v. Dy.CIT (2015) 375 ITR 270 / 278 CTR 43/ 119 DTR 44 (Bom.)(HC)
Anurag A.Toshiniwal v. Dy.CIT (2015) 375 ITR 270 / 278 CTR 43/ 119 DTR 44 (Bom.)(HC)

S.28(1):Business loss-Speculation-Principal business of company-Activity of granting loans and advances on a larger scale than business of buying and selling shares-Income alone cannot be taken into consideration-Principal business of assessee was granting loans and advances.[S.73(1), Explanation.]

Dismissing the appeal the Court held that;during the year 2001-02, the assessee had a loss of a sum of Rs. 32.31 lakhs arising out of trading in shares whereas it earned a sum of Rs. 13.48 lakhs from out of interest on loans, commission and brokerage. The activity of granting loans and advances by the assessee was on a larger scale than the business of buying and selling shares. Both profit and loss were matters of chance in both the activities. Therefore, profit alone was not made the distinguishing factor. Since the business activity was also a distinct factor, the principal business of the assessee was granting loans and advances.

CIT v. Savi Commercial P. Ltd. (2015) 373 ITR 243 / 233 Taxman 289 (Cal.)(HC)

S. 28(1) : Business loss-Loss on account of forward contract entered into by the assessee to hedge against the loss arising on account of fluctuations in foreign exchange is an allowable deduction. Contrary view in Vinod Kumar Diamonds is not good law. [S.37(1)]

The assessee was exposed to the risk arising in fluctuation out of exchange rate and as a prudent business man it would like to hedge its risk. Accordingly, the assessee had booked the forward contracts and utilised the same during the year or in the succeeding years. The pattern of the assessee reflected that it entered into forward contracts during the normal course of business and utilised the same for business allowing them to run upto the date of contract. The assessee was engaged in the export of diamonds and the forwards contract was entered into in respect of foreign exchange to be received as a result of export and the same was done to avoid the risk of loss due to foreign exchange fluctuations. The claim has to allowed after taking note of the claim of forward contracts and the accounting policies, i.e. AS-11 (revised) and applying the ratio laid down by the Apex Court in the case of CIT vs. Woodward Governor India Pvt. Ltd. 294 ITR 451 (SC). The issue i.e. loss on account of forward contract entered into by the assessee to hedge against the loss arising on account of fluctuations in foreign exchange arose before the Tribunal in a series of cases and the claim has been allowed. The learned D.R. for the Revenue had placed reliance on M/s. Vinod Kumar Diamonds Pvt. Ltd ITA No. 506/Mum/2013 dated 03.05.2013. The said decision is contrary to the view taken in Badridas Gauridu P. Ltd. 261 ITR 256 (Bom). We find no merit in the said reliance. (AY. 2009-10, 2010-11)

ACIT v.Venus Jewel (Mum.)(Trib.); www.itatonline.org

S. 30:Repairs-Capital or revenue-Damage by fire- Repair expenditure is held to be revenue expenditure. [S.37(1)]

The assessee-company had an office at Kolkata and laboratory at Goa. The office at Kolkata was damaged by fire and Goa laboratory was damaged by flood/cyclone. The assessee incurred certain expenditure in respect of its office and laboratory and claimed said expenditure under section 30.The Assessing Officer disallowed said expenditure holding that same was to be treated as an expenditure of a capital nature.On appeal, the Commissioner (Appeals) held that the entire expenditure was of a revenue nature and therefore, deductible.On appeal, the Tribunal upheld the order of the Commissioner (Appeals). On appeal by revenue , dismissing the appeal the Court held that;expenditure incurred by assessee did not enhance value of its capital assets and it was necessary to repair damage caused by fire/flood, same was to be treated as revenue expenditure, therefore the said expenditure was to be allowable.

CIT .v. Norinco (P.) Ltd. (2015) 231 Taxman 84 (Cal.)(HC)

S. 31 : Repairs- Leases premises-Capital or revenue-Repair and renovation of leased premises is capital in nature.[S. 30]

Expenditure towards false ceiling, fixing tiles/flooring, replacing glasses, wooden partitions, replacement of electrical wiring, earthing, replacement of G.I. pipes, plumbing and sanitation lines, plaster and painting of walls of leased premises cannot be regarded as 'current repairs'. 'Repairs', though a term of wider scope, yet cannot extend beyond that of the term itself. A repair, by definition, is toward the maintenance and preservation of an 'existing' asset. Surely, the advantage or asset, in terms of its functional utility and capacity for the business, needs to be maintained, so that expenditure for retaining the same is essentially revenue expenditure, which, again, by definition, does not lead to or result in an enhancement or improvement. The premises in the instant case was admittedly not in use for a long time and, thus, in a dysfunctional, if not dilapidated, state prior to it being acquired by the assessee. The expenditure stands thus incurred on refurbishment and renovation of an old premises, in an inoperable state, so as to make it fit for use. It is therefore wrong to classify or describe it as 'repairs'. The expenditure was incurred to render it in a functional state and, therefore, is clearly in the capital field. Could, one may ask by way of a test, the answer be any different if the same was acquired on own account? The ingredients and prerequisites of a capital expenditure would remain the same, and not undergo any change depending on the object matter of the expenditure, i.e., whether an owned or leased premises, and which itself is the premise of Explanation 1 to section 32(1)(ii), invoked by the Revenue On the termination or expiry of the lease or rent arrangement, leading to the vacation of the premises, the assessee would continue to be entitled to claim deduction on the written down value (WDV) of the relevant block of assets, subject to the adjustment in respect of 'moneys payable', if any, as explained by the tribunal in Metro Exporters Pvt. Ltd. (in ITA No. 7315/Mum/2012 dated 30.09.2014, as modified by its' further order dated 30.01.2015). Reliance by the assessee on the decision in the case of CIT vs. Hi Line Pens (P.) Ltd. [2008] 306 ITR 182 (Del) is misplaced. (ITA No. 6820/Mum/2012, dt. 04.02.2015.) (AY. 2009-10)

Vardhman Development Ltd. .v. ITO (Mum.)(Trib.); www.itatonline.org

S. 32:Depreciation-Intangible assets-Commercial agreements Even prior to the insertion of "intangible assets" in s. 32, intellectual property rights such as trademarks, copyrights and know-how constitute "plant" for purposes of depreciation. The department is not entitled to rewrite the terms of a commercial agreement. [S. 35A, 35AB,43(3)]

The Supreme Court had to consider whether in AY 1995-96, when s. 32 did not make any distinction between tangible and intangible assets, the Assessee was entitled to any benefit under Section 32 of the Act read with Section 43(3) thereof for the expenditure incurred on the acquisition of trademarks, copyrights and know-how. HELD by the Supreme Court upholding the claim:

(i) The definition of 'plant' in Section 43(3) of the Act is inclusive. A similar definition occurring in Section 10(5) of the Income Tax Act, 1922 was considered in Commissioner of Income Tax v. Taj Mahal Hotel (1971) 3 SCC 550 wherein it was held that the word 'plant' must be given a wide meaning. The question is, would intellectual property such as trademarks, copyrights and know-how come within the definition of 'plant' in the 'sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it'? In our opinion, this must be answered in the affirmative for the reason that there can be no doubt that for the purposes of a large business, control over intellectual property rights such as brand name, trademark etc. are absolutely necessary. Moreover, the acquisition of such rights and know-how is acquisition of a capital nature, more particularly in the case of the Assessee. Therefore, it cannot be doubted that so far as the Assessee is concerned, the trademarks, copyrights and know-how acquired by it would come within the definition of 'plant' being commercially necessary and essential as understood by those dealing with direct taxes.

(ii) Section 32 of the Act as it stood at the relevant time did not make any distinction between tangible and intangible assets for the purposes of depreciation. The distinction came in by way of an amendment after the assessment year that we are concerned with. That being the position, the Assessee is entitled to the benefit of depreciation on plant (that is on trademarks, copyrights and know-how) in terms of Section 32 of the Act as it was at the relevant time. We are, therefore, in

agreement with the view taken by the Tribunal in this regard that the Assessee would be entitled to the benefit of Section 32 of the Act read with Section 43(3) thereof;
(iii) The Act does not clothe the taxing authorities with any power or jurisdiction to re-write the terms of the agreement arrived at between the parties with each other at arm's length and with no allegation of any collusion between them. 'The commercial expediency of the contract is to be adjudged by the contracting parties as to its terms.
(iii) There is a clear finding of fact by the Tribunal that the legal expenses incurred by the Assessee were for protecting its business and that the expenses were incurred after 18th November, 1994. There is no reason to reverse this finding of fact particularly since nothing has been shown to us to conclude that the finding of fact was perverse in any manner whatsoever. That apart, if the finding of fact arrived at by the Tribunal were to be set aside, a specific question regarding a perverse finding of fact ought to have been framed by the High Court. The Revenue did not seek the framing of any such question. The High Court was not justified in upsetting a finding of fact arrived at by the Tribunal, particularly in the absence of a substantial question of law being framed in this regard . (Civil Appeal No. 10547-10548 of 2011, dt. 15.10.2015)(AY.1995-96)
Mangalore Ganesh Beedi Works .v. CIT (SC); www.itatonline.org

S. 32:Depreciation-Plant-The "functional" test has to be applied to determine whether an asset is "plant". Even a pond designed for rearing prawns can be "plant".
(i) Applying the 'functional test', since the ponds were specially designed for rearing/breeding of the prawns, they have to be treated as tools of the business of the assessee and the depreciation was admissible on these ponds.
(ii) In Commissioner of Income Tax vs. Anand Theatres 224 ITR 192 it was held that except in exceptional cases, the building in which the plant is situated must be distinguished from the plant and that, therefore, the assessee's generating station building was not to be treated as a plant for the purposes of investment allowance. It is difficult to read the judgment in the case of Anand Theatres so broadly. The question before the court was whether a building that was used as a hotel or a cinema theatre could be given depreciation on the basis that it was a "plant" and it was in relation to that question that the court considered a host of authorities of this country and England and came to the conclusion that a building which was used as a hotel or cinema theatre could not be given depreciation on the basis that it was a plant. We must add that the Court said, "To differentiate a building for grant of additional depreciation by holding it to be a plant in one case where a building is specially designed and constructed with some special features to attract the customers and the building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable." This observation is, in our view, limited to buildings that are used for the purposes of hotels or cinema theatres and will not always apply otherwise. The question, basically, is a question of fact, and where it is found as a fact that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance (C. A. No. 4429 /d 4430 of 2006 & 5099-5100 of 2009, dt. 04.09.2015)
ACIT .v. Victory Aqua Farm Ltd.(SC); www.itatonline.org

S. 32:Depreciation-Sale and lease back-Sham transaction-On facts the depreciation was held to be not allowable-No question of law.
Assessee is said to have purchased a machinery from APSEB and leased the same to the latter itself. All the authorities below have found as a fact that there was no such purchase of machinery and the transaction in question is a sham and hence disallowed the depreciation. On appeal dismissing the appeal of assessee the Court held that finding recorded by the authorities being pure finding of fact no question of law arises.(AY. 1996-97)
Avasarala Technologies Ltd.v. JCIT (2015) 373 ITR 34/ 278 CTR 111/ 120 DTR 309(SC)
Editorial: Refer, Avasarala Technologies Ltd v. JCIT (2003) 185 CTR 402/(2004) 266 ITR 178 (Karn.)(HC)

S.32:Depreciation-Gas Cylinders-Manufacturing business-Lease- Lease income is assessed as business income- Entitle to depreciation.

The assessee purchased the Cylinders, since the manufacturing unit had not started function, assessee leased out the gas cylinders to two parties to enable some income. The income was assessed as business income. The Assessing Officer disallowed the depreciation on the ground that the Gas cylinders were not purchased for leasing business. Disallowance was confirmed by High Court. On appeal allowing the depreciation the Court held that the assesse has proved ownership of gas cylinders and use of gas cylinders for business purposes. Once these ingredients are proved , the assessee was entitled to depreciation. (AY. 1986-87)

K.M.Sugar Mills Ltd.v. CIT (2015) 373 ITR 42 / 231 Taxman 245 /278 CTR 100 / 231 Taxamn 245 (SC)

Editorial: Decision in K.M.Sugar Mills Ltd v.CIT (2003) 262 ITR 70/ 184 CTR 100 (All)(HC) is reversed.

S. 32 : Depreciation- Unaborbed depreciation and unabsorbed investment allowance - Carry forward and set off- Priorities in matter of set off- The assessee has the right to disclaim depreciation in its entirety-However, it cannot claim depreciation for the current year and disclaim unabsorbed depreciation- Situation distinguished from case where no depreciation calimed at all.[S. 32(2), 34, 72, 73]

The assessee claimed the depreciation allowance insofar as it pertained to the current year. At the same time, it did not want to claim the set off of the unabsorbed depreciation allowance of the previous years. The Supreme Court had to consider whether it is open to the assessee to invoke the provisions of Section 32 of the Act by claiming depreciation of the current year, but at the same time choose not to make a claim of set off of unabsorbed depreciation allowance of the previous years. HELD by the Supreme Court rejecting the plea. Where the assesse has not claimed depreciation , the position mentined in CIT v. Mahendra Mills (2000) 243 ITR 56 (SC) would follow.(AY. 1991-92, 1992-93)

Seshasayee Paper & Boards Ltd. v. CIT(2015) 374 ITR 619/ 119 DTR 361/ 277 CTR 448 / 232 Taxman 168 (SC)

Madras Oxyzen and Acetylene Co. Ltd v. CIT (2015) 374 ITR 619 (SC)

Editorial: Decision in Seshasayee Paper & Boards Ltd. v. Dy.CIT(2005) 272 ITR 165/ 193 CTR 641 /144 Taxman 812 (Mad)(HC) is affirmed on different grounds.

S. 32 : Depreciation- Building- Const of construction-Amount paid to State Governemnt to prevent acquisition of land –Not entitled to depreciation.[Maharastra Housing and Area Development Act, 1976 , S. 20, 41]

Amount paid to State Governemnt to prevent acquisition of land is not part of construction hence the assessee was not entitled to depreciation . The amount was paid ander Maharastra Housing and Area Development Act, 1976, to grant exemption.(AY.1990-91)

Sandvik Asia Limited v. DCIT(2015) 378 ITR 114(Bom.)(HC)

S. 32:Depreciation-Optitional-Chapter VIA-Prior to insertion of Explanation 5 to section 32(1)-Depreciation being optional, cannot be allowed by Assessing Officer while computing income where it is not claimed by assessee.[S.29]

The assessee had filed its return for the assessment year.The return was processed and the Assessing Officer allowed full depreciation which was not claimed by the assessee while computing the income.On appeal, the Commissioner (Appeals) allowed the appeal of the assessee.On second appeal, the revenue's stand was partly allowed. On appeal by assessee allowing the appeal the Court held that; In Dy. CIT (Asst.) v. Sun Pharmaceuticals Ind. Ltd. [Tax Appeal No. 93 of 2000] it was observed Gujarat High Court in the case of CIT v. Arun Textiles [1991] 192 ITR 700, stated that nothing in the provisions of section 32(1), read with section 29 indicated that even when no claim is made for allowing deduction in respect of the depreciation, the Income-tax Officer is bound to allow a deduction. Under the scheme of the Act, income is to be charged regardless of depreciation on the value of the assets and it is only by way on an exception that section 32(1) grants an allowance in respect of depreciation on the value of the capital assets enumerated therein.Therefore, the assessee

could clearly state that it does not want to compute depreciation on the assets and wants no benefit of claiming any depreciation in respect thereof. Hence, depreciation is optional to the assessee and once he chooses not to claim it, the Assessing Officer cannot allow it while computing the income. Further, once the depreciation is optional, block of assets would also be optional. The Tribunal was not right in holding that depreciation, whether claimed or not, has to be foisted upon the assessee even prior to insertion of *Explanation* 5 to section 32(1) of the Act while calculating deduction under Chapter VI-A of the Act.

Sakun Polymers Ltd. .v. Jt.CIT (2015) 231 Taxman 532 (Guj.)(HC)

S. 32:Depreciation-Actual cost- Written down value-Customs duty paid in a later year can be capitalized in the year the obligation to pay the duty arose--Question whether it can be capitalized in year of import of the goods left open.

The assessee imported hospital equipment valued at Rs. 2,75,11,988 during the years 1988-89 and 1992-93, without payment of custom duty, on the basis of a customs duty exemption certificate ('CDEC') issued by the Director General of Health Services ('DGHS'). The equipment thus imported was capitalized by the Assessee on the actual value of the equipment paid by it. Depreciation was being claimed on the said equipment from year to year at the prescribed rate as per the Act. Subsequently, the DGHS noted that the assessee had failed to fulfill the essential condition stipulated in the relevant notification of the Customs Department dated 1st March 1968 for retaining CDECs for import of hospital equipments. Accordingly, the CDEC granted to the Assessee stood withdrawn. In AY 2005-06, upon such withdrawal, the Customs authorities raised a demand of Rs. 1,10,04,795 (reduced from Rs. 3,78,66,864) as custom duty on the Assessee for the import of equipment in the aforementioned years. In AY 2009-10, the assessee treated the said payment as 'new' plant and machinery and claimed 100% depreciation on it. The Tribunal allowed the claim. On appeal by the department to the High Court HELD dismissing the appeal:

The central question is whether the obligation to pay customs duty related back to the actual date of payment of customs duty or the date of import of the equipment and whether the said customs duty paid in the previous year relevant to the AY in question can be capitalized with reference to an earlier year. In Funskool (India) Limited (2007) 294 ITR 642 (Mad) the question was whether depreciation could be claimed on the additional customs duty paid in the previous year relevant to the AY in question although such customs duty was in respect of machinery that was imported and installed in an earlier year. That question was answered in the affirmative by the Madras High Court by following the judgment of the Gujarat High Court in Atlas Radio and Electronics P. Limited v. Commissioner of Income Tax (1994) 207 ITR 329 (Guj) in which it was held that even though the sales tax was paid in a subsequent year, the liability to pay sales tax arose in the accounting period relevant to the assessment year in which the machinery was purchased. It was held on the facts of that case that the development rebate had to be claimed in the AY in which the machinery was purchased. Following the above decision of the Madras High Court in Funskool (India) Limited (supra), we are of the view that in the instant case, the AO erred in disallowing the capitalization of the additional customs duty in the manner claimed by the Assessee and adding the entire customs duty paid in the relevant AY to the income of the Assessee. The impugned order of the ITAT affirming the decision of the CIT (A) that the enhanced cost of equipment should be taken into consideration from AY 2005-06 onwards and that the WDV should be reworked for the AY in question does not call for interference. However, as the assessee has not preferred an appeal against the rejection of its cross-objection by the ITAT, the question whether the assessee would be entitled to claim deprecation on the customs duty paid from the year of actual import of equipment is not considered but left open for decision in an appropriate case.(AY. 2009-10)

CIT .v. Noida Medicare Centre Ltd(2015) 378 ITR 65 (Delhi)(HC)

S. 32:Depreciation-Tubewell - Plant and machinery -Entitled to depreciation.

In assessee's own case the court had allowed depreciation on tubewell treating it as plant and machinery. Therefore, the assessee was entitled to depreciation on tubewell. (AY 1991-1992)

CIT .v. Dhampur Sugar Mills P. Ltd. (2015) 375 ITR 296 (All.)(HC)

S. 32:Depreciation Manufacturing- Entitled to depreciation-Question of fact.
Dismissing the appeal of revenue that in view of the concurrent findings of the Commissioner (Appeals) and the Tribunal that in fact the N unit actually functioned during the relevant year, the depreciation was correctly allowed. (AY. 1994-1995, 1995-1996)
CIT .v. Tony Electronics Ltd. (2015) 375 ITR 431 (Delhi)(HC)

S.32:Depreciation-Windmill-Additional depreciation is eligible. [S. 32(1)(iiA)]
Core business of manufacture and export of textile goods. Assessee entering into business of generation of power and installing windmill. Assessee maintaining separate books of account for export division and windmill division. Production of textiles and export nothing to do with generation of power.Assessee entitled to additional depreciation on windmill. (AY 2005-2006, 2006-2007)
CIT .v. Atlas Exports Enterprise (2015) 373 ITR 414/231 Taxman 804 (Mad)(HC)

S. 32: Depreciation –Intangible assets - Goodwill -Depreciation is admissible.
Goodwill as also list of stockiest agreements , distribution agreements lease agreements and also distribution and marketing agreements along with list of licenses and permissions and list of various products , the name license and also manufacturing know how etc along with list of employees are eligible assets , entitled to depreciation.(AY. 2006-07 to 2009-10)
CIT v. RFCL Ltd. (2015) 119 DTR 65 (HP)(HC)

S. 32:Depreciation- Licensee- A licensee who is in full control of the building and can exercise the rights of the owner in his own right is entitled to depreciation including depreciation on the plumbing and sanitary ware installed therein.
Dismissing the appeal of revenue the Court held that; (i) Explanation (1) to Section 32 of the Act also acknowledges that depreciation would be claimed by assessee who carries on business "in a building not owned by him but in respect of which the assessee holds a lease or other right of occupancy and any capital expenditure is incurred by the assessee for the purposes of the business or profession on the construction of any structure or doing of any work or in relation to……. the building." In such event, Section 32 (1) would apply "as if the said structure or work is a building owned by the assessee".
(ii) In any event even for the period earlier than 1st April, 1988, in view of the decision in Supreme Court in Commissioner of Income Tax v. Podar Cement Private Limited (1997) 226 ITR 625 and Mysore Minerals v. CIT 106 Taxman 166 the legal position is no longer res integra. In Podar Cement Private Limited the Supreme Court was called upon to consider whether the income derived by the assessee on the flat or the building were income from other sources and not income from the house property. The Court in that context considered the words "owner" and accepted that this would include "that person who can exercise the rights of the owner, and not on behalf of the owner but in his own right." In Mysore Minerals (supra), the Supreme Court explained that "the very concept of depreciation suggests that the tax benefit on account of depreciation legitimately belongs to one who has invested in the capital asset, is utilizing the capital asset and thereby loosing gradually investment caused by wear and tear, and would need to replace the same by having lost its value fully over a period of time." On the facts of the case, although the appellant-assessee had only paid part of the price of the buildings in question to the Housing Board, and although the document of title had not yet been executed in its favour, the Court was of the view that the assessee would be entitled to depreciation.
(iii) The Court is satisfied that the during the AYs in question Assessee was indeed in full control of the three buildings, viz., the hotel building, the WTT and WTC and that in any event, notwithstanding the clarificatory amendment inserted as Explanation No. 1 in Section 32 with effect from 1st April 1988, the Assessee would be entitled to claim depreciation in respect thereof, including depreciation on the plumbing and sanitary ware installed therein. (AY. 1989-90 to 1993-94)
CIT v. Bharat Hotels (2015) 123 DTR 281 (Delhi)(HC)

S.32: Depreciation-Shuttering material-Each item of shuttering material costing less than five thousand rupees-Entitled to 100 per cent depreciation.

Held, dismissing the appeal, that the "irreducible minimum" for the shuttering material were the individual plates, for providing support to the reinforced concrete and cement or the poles and bars that are used at the time of formation. The assessee was entitled to 100 per cent. depreciation.(AY. 1995-1996)

CIT v. Live Well Home Finance P. Ltd. (2015) 373 ITR 188 (T & AP)(HC)

S. 32:Depreciation - Unabsorbed depreciation-Set-off–Tribunal to decide whether capital gains arising out of sale of depreciable assets could be set off against business profits for AY 1999-2000- Matter remanded.[S. 32(2), 50].

The Assessee set off unabsorbed depreciation loss against capital gain arising out of sale of depreciable assets. The Tribunal constituted special bench which observed that the unabsorbed depreciation relates to A.Y. 1997-98 and the business is still continuing. The Special bench of Tribunal held that unabsorbed depreciation cannot be set off against capital gains in A.Y. 1999–2000 and the assessee can only claim carry forward of unabsorbed depreciation for six more assessment years to be adjusted against the profits and gains from the same business from which the depreciation claim arose as per the provisions of section 32(2)(iii). On appeal, the HC held that the Tribunal had not considered section 32(2)(iii)(a) while passing its order, and hence remanded back the order to the Tribunal to decide afresh. (AY. 1999-2000)

Southern Travels v. ACIT (2015) 117 DTR 335 / 232 Taxman 689 (Mad.)(HC)

S. 32: Depreciation-Additional-Generation of power-Entitle to additional depreciation.[S. 32(1)(iia)]

Assessee is using plant and machinery for purpose of generation of power necessary for its business of manufacture and production of sponge iron ingots and billets. Assessee claimed additional depreciation , which was allowed by the Tribunal. On appeal by revenue dismissing the appeal the Court held that; there was no dispute on facts regarding the assesse acquired the plant and machinery for the purpose of power necessary for the production of the items it manufactures . The assesse having satisfied those conditions was entitled to claim the additional depreciation as provided by clause (iia) irrespective of its original claim for depreciation having made under clause (i) of section 32 (1). (AY. 2008-09)

CIT v. Ankit Metal and Power Ltd. (2015) 372 ITR 660 (Cal.)(HC)

S. 32 : Depreciation – Gas Cylinder- 100% depreciation-Block of asset-Each Cylinder is Less than 5000- Less than 180 days-Depreciation is allowable at 100 %. [S. 2(11)]

The assessee-agency was involved in the supply of gas cylinders and allied activity. The assessee filed its return claiming 100 per cent depreciation on value of cylinders. The assessee claimed that the value of each cylinder was less than Rs. 5000 and in terms of first proviso to section 32 it was entitled to claim depreciation.The revenue authorities however, applied third proviso to section 32 and finding that the cylinders were kept to use for less than 180 days, only 50 per cent depreciation was allowed.The Tribunal, however, allowed the assessee's claim.On revenue's appeal,the Court held that; once an asset is covered by first proviso to section 32, it cannot be subject to any other test including one stipulated under third proviso to section 32, therefore, where an article i.e. gas cylinder, whose cost was less than Rs. 5000, it could not form part of block of assets and depreciation thereon could not be subjectto any test as to extent of use as specified in third proviso to section 32.The appeals are dismissed. (AY. 1993-94, 1994-95)

CIT v. PKL Ltd. (2015) 230 Taxman 80 (AP)(HC)

S. 32 : Depreciation- Hotel and restaurant-Electrical installations and sanitary fittings should be regarded as plant- Entitled to depreciation at 25%.

The assessee firm was engaged in the business of hotel and restaurant. The Assessing Officer noticed that the assessee had claimed expenditure spent on electrical installations such as glow signboard and hoardings as capital expenditure and claimed depreciation. The Assessing Officer treated the installations of glow signboard and hoardings as electric fittings and allowed depreciation at the rate of 15 per cent. On appeal, the Commissioner (Appeals) held said installations as part of plant and allowed depreciation at the rate of 25 per cent.On Revenue's appeal, the Tribunal upheld the order of

the Commissioner (Appeals).On appeal by Revenue dismissing the appeal of Revenue the Court held that; Electrical installations and sanitary fittings should be regarded as plant for purpose of depreciation in scheme of section 32; merely because they were installed in a building used as a hotel would not render those fittings depreciable in same manner as building itself. these items were entitled to depreciation at rate of 25 per cent.(AY. 2002-03)
CIT v. Express Resorts & Hotels Ltd. (2015) 230 Taxman 424 (Guj.)(HC)

S. 32 : Depreciation –Trail run- 'used'- Entitled depreciation.
Section 32 does not contemplate that manufacturing or production should have actually commenced nor does it contemplate that assets should be used for whole of assessment year. Depreciation on machinery would be allowed where machinery was installed before end of financial year and used only for trial run, though not for production.(AY. 1987-88)
CIT v. Escorts Tractors Ltd. (2015) 230 Taxman 584 (Delhi)(HC)

S.32: Depreciation-Hundred per cent-Energy saving equipment- No substantial question of law.[S.260A]
Assessee claiming certain items as energy saving equipment. Commissioner allowing two items. Tribunal finding Commissioner (Appeals) view correct on facts. Finding of fact. No substantial question of law.
Autolec Industries Ltd.v. JCIT (2015) 231 Taxman 81 / 373 ITR 501 (Mad.)(HC)

S. 32 : Depreciation–Charitable institution-Capital asset-Depreciation has to be deducted.[S. 11]
The assessee, a charitable institution claimed depreciation on capital assets for which capital expenditure had already been allowed in relevant assessment year.The AO however, disallowed said claim made by the AO.
On appeal, the CIT(A) affirmed the order of the AO.On further appeal, the Tribunal allowed the appeal made by the assessee.On appeal High Court affirmed the order of Tribunal.
CIT v. Krishi Upaj Mandi Samiti (2015) 229 Taxman 524 (Raj.)(HC)

S. 32 : Depreciation–Estimate of net profit rate-Depreciation is allowable.[S. 145]
Depreciation is allowable from net profits even if total income is calculated by applying net profit rate.(AY. 1990-91)
Lali Construction Co. v. ACIT (2015) 229 Taxman 286 (P&H) (HC)

S. 32 : Depreciation—Block of assets-Assessee purchasing assets for its employees' benefit--Assessee as part of its emolument policy reimbursing expenses incurred by employees--Reimbursement only to extent of employees' entitlement--Individual identity of asset lost in block--Expenses not personal to assessee's employees.--Entitled to depreciation. [S.2(11)]
Dismissing the appeal of revenue the Court held that the Revenue did not dispute the Tribunal's finding that as part of its emolument policy, the assessee reimbursed the expenses incurred by its employees on purchase of furnishings. Such reimbursements were made by the assessee to the employees only to the extent of their entitlement (determined on the basis of their grade or level in terms of their appointment letters). These expenses could not be, therefore, termed as personal to the assessee's employees but were for its business purposes. The assessee was entitled to depreciation.(AY. 2002-2003 to 2008-2009)
CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 (Delhi HC)

S. 32 : Depreciation-Electronic Circuit Boards-Entitle depreciation at 40%-Opinion of expert was considered-[Entry No III (3) (ii) Part A of App. under 5]
Assessee Company was engaged in the business of manufacturing of Electronic Circuit Boards (ECBs). The aseessee company claimed 40% depreciation and allowed 25%. CIT(A) allowed the claim of the assesee by observing that the product manufactured by the assessee i.e. ECB is a semi conductor device and as such the assessee was entitled to depreciation of 40%. Tribunal confirmed the order of CIT(A). On further appeal in HC, HC held that the technical expert from the Ministry of communications & Information Technology has opined that for the purpose of mounting of Silicon

chips on PCB special equipment like chip bonding/ wire bonding etc are required which are the same required in a IC manufacturing process. Since the assesee is applying the use of machinery and plant used in the semi-conductor Industry the opinion of the expert lends support to this conclusion, the asessee company was entitled to claim depreciation @ 40% in accordance with Entry No xi , Part "A" (ii) of old Appendix I under R.5.

CIT v. Titan Time Products Ltd. (2015) 273 CTR 479/ 113 DTR 307 (Bom.)(HC)

S. 32 : Depreciation –Capital asset-Depreciation on capital assets would be allowed as deduction-Position prior to 1-04-2015.[S.11]

Depreciation on capital assets would be allowed as deduction in computing income under section 11.

CIT v. Lilavati Kirtilal Mehta Medical Trust (2015)229 Taxman 276 (Bom.)(HC)

S. 32 : Depreciation –Remission or cessation of trading liability - depreciation granted earlier could not be withdrawn and taxed as income under section 41(1) [S.41(1)]

Following order passed by Supreme Court in case of Nector Beverages (P.) Ltd. v. Dy. CIT [2009] 314 ITR 314 (SC), Tribunal was not justified in holding that depreciation granted earlier could be withdrawn and taxed as income under section 41(1) (AY. 1993-94)

Gujarat Narmada Vally Fertilisers Ltd. v. DY. CIT (2015) 229 Taxman 270 (Guj.)(HC)

S. 32 : Depreciation- Amortisation of preliminary expenses – Share issue expenses-Expenditure allowable u/s 35D cannot be capitalized to asset for claim of depreciation.[S.35D]

The assessee issued 6,25,000 equity shares of Rs.10/- each. The increase in the share capital was for setting up an unit for the manufacture of computer and OEM peripheral manufacturing project. For the issue of shares, the assessee had incurred expenses of Rs.14,21,276 under different heads like financial consultancy, managerial fees, legal fees, underwriting commission, advertisement, issue house expenses, printing charges etc. Out of total expenditure of Rs.14,21,276/-, the assessee capitalised a sum of Rs.29,668/- on plant & machinery and factory equipment and Rs.9,79,438/- on the work-in-progress. The balance sum of Rs.4,12,170 was treated as preliminary expenses and on these expenses had claimed relief under Section 35D of the Act. On the capitalised amount of Rs.29,668/-, the assessee claimed depreciation of Rs.4,203/- in the said Assessment Year. The applicant justified the claim for depreciation on the ground that these amounts which were capitalised represented expenditure incurred in raising finance for the acquisition of and/or for brining into existence capital assets and thus formed part of the cost of fixed assets. In support of its claim for depreciation under Section 32 of the Act, the applicant relied upon the decision of the Supreme Court in the case of Chellapalli Sugars Ltd. vs. CIT(1975) 98 ITR 167(SC). The AO, CIT(A) and Tribunal rejectd the claim. On appeal by the assessee to the High Court HELD dismissing the reference:

A plain reading of section 35D indicates that the Legislature has thought it appropriate to give a special benefit to the assessee in respect of expenditure specified in sub-section (2) incurred before commencement of business or after the commencement of business, in connection with the extension of industrial undertaking or in connection with setting up a new industrial unit. This provision allows amortisation of the specific category of expenditures incurred by the assessee, by way of deduction of an amount equal to one-tenth of such expenditure for each of the ten successive previous years as provided therein. The legislature, therefore, having specifically provided for amortisation of the preliminary expenditure which includes expenditure incurred for issuance of shares by the assessee in connection with the issue of shares, the said expenditure on issue of shares is not eligible for depreciation. The decision of the Supreme Court in "Chellapalli Sugars Ltd. vs. CIT is not applicable in the facts of the present case because the Supreme Court was not dealing with an issue in regard to expenditure incurred by the Assessee in issuing shares and also provisions of Section 35D of the Act was not on the Statute book. In the present case, the assessee having issued shares and incurred expenses on issuance of shares which were sought to be capitalised by the assessee cannot be said to be expenditure incurred for installation of plant and machinery so as to apply the ratio of the decision in "Chellapalli Sugars Ltd." (supra) to the facts of the present case. Moreover, as regards the category of expenditure capitalised by the assessee, the provisions of Section 35D(2)(c)(iii) of the Act were held to be attracted.(AY. 1980-81, 1981-82)

International Computers Indian Manufacture v. CIT(2015)374 ITR 243/ 276 CTR 57/ 117 DTR 24// 230 Taxman 428 (Bom.)(HC)

S. 32 : Depreciation –Machinery was not put to use- Depreciation was not allowable.
Where assessee having purchased machinery from abroad, could not put it to use for business purpose during relevant year, its claim for depreciation in respect of same was rightly rejected. (AY. 1989-90)
CIT v. R.S. Builders & Engineers (P.) Ltd. (2015) 228 Taxman 305 (Mag.)(P&H)(HC)

S. 32 : Depreciation–carry forward of unabsorbed depreciation concerning impugned assessment years could be set off in subsequent years without any set time limit
Considering judgment given in General Motors India (P.) Ltd. v. Dy. CIT [2012]210 Taxman 20 (Mag.) (Guj.)(HC), Tribunal held that carry forward of unabsorbed depreciation concerning impugned assessment years could be set off in subsequent years without any set time limit. (AY. 1997-98 to 2001-02)
CIT v. Gujarat Themis Biosyn Ltd. (2015) 228 Taxman 359 (Mag.)(Guj.)(HC)

S. 32 : Depreciation –Guest house- Depreciation is not allowable.
In view of order passed by Supreme Court in case of Britannia Industries Ltd. v. CIT [2005] 278 ITR 546(SC) AO was justified in rejecting assessee's claim for depreciation on guest house. (AY. 1988-89)
CIT v. Arvind Mills Ltd. (2015) 228 Taxman 358 (Mag.)(Guj.)(HC)

S. 32 : Depreciation –SEBI registration fee-Intangible asset-Rule of consistency-Depreciation was allowed.
Assessee had been approved by SEBI to act as Investment Manager of Mutual Funds. Assessee filed its return claiming depreciation in respect of SEBI registration fee.AO rejected assessee's claim. Tribunal held that fees paid to SEBI for registration of Mutual Funds had already been treated as intangible assets and formed part of block of assets of assessee as on 1-4-2004. Tribunal thus, concluded that consistency should have been maintained by granting claim. Revenue filed instant appeal contending that since in a subsequent decision of High Court such claim of depreciation on expenses incurred for securing registration could not be allowed under section 32(1)(ii), a substantial question of law arose from Tribunal's order. Court held that since Tribunal had allowed assessee's claim emphasizing rule of consistency, reliance placed on subsequent judgment of High Court could not carry case of revenue any further. Therefore, revenue's appeal was to be dismissed. (AY. 2004-05)
DIT v. HSBC Asset Management (I) (P.) Ltd. (2015) 228 Taxman 365 (Mag.)(Bom.)

S. 32 : Depreciation-Moulds-Machinery was installed in third party premises-Entitled depreciation.
Assessee was engaged in business of manufacture and trading of pharmaceutical products. Assessee had entered into a contract with a company to manufacture moulds for eye drops manufactured by assessee. For purpose, it had purchased machinery and installed it at premise of said company .Machinery was used by assessee in its business and, thus, it was entitled to depreciation. (AY. 1996-97, 2003-04 to 2005-06)
CIT .v. Allergan India (P.) Ltd. (2015)/371 ITR 38/ 228 Taxman 362 (Mag.)(Karn.)(HC)

S. 32 : Depreciation- Rate of depreciation - Option exercised in terms of second proviso to rule 5(1A) in return filed under section 139(1) - No separate procedure necessary - Assessee entitled to depreciation on windmills at 80%.[S.139(1), R.5(IA)]
If the assessee exercised the option in terms of the second proviso to rule 5(1A) of the Income-tax Rules, 1962, at the time of furnishing of return of income, it will suffice and no separate letter or request or intimation with regard to of exercise of option is required. Since the returns were filed in accordance with section 139(1), and the form prescribed therein makes a provision for exercising an option in respect of the claim of depreciation, no separate procedure is required. Held, that the assessee was entitled to depreciation at the rate of 80% on windmills.(AY. 2005-2006, 2006-2007)
CIT v. ABT Ltd (2015) 370 ITR 159 (Mad.) (HC)

S. 32 : Depreciation-Actual cost-Acquisition of entire business including assets and liabilities for a lump sum amount - Valuation of buildings, boundary wall and other plant and machinery as on date of sale done by surveyor relied on by assessee and seller - Determination of actual cost of depreciable assets on basis of valuation report justified. [S.43(1)]

The assessee purchased a running undertaking with all assets and liabilities for lumpsum Rs. 6,03,21,910. Relying upon the assessee's surveyor's report, the value of the assets was taken as Rs.3,50,37,238.Held, there was evidence that the assessee and the seller had evaluated the plant and machinery on the date of the sale. Therefore, the authorities and the Tribunal deemed it appropriate to rely upon the surveyor's report for computing actual cost for the purpose of allowing depreciation. (AY. 1990-1991, 1991-1992))

DE NORA India Ltd. .v. CIT (2015) 370 ITR 391/114 DTR 89 / 274 CTR 34 /57 taxmann.com 32 (Delhi)(HC)

S. 32 : Depreciation–Charitable trust-Capital asset-Application of income-Entitled depreciation.[S.11]

A charitable institution, which has purchased captial assets and treated amount spent on purchase of captial asset as application of income, is entitled to claim depreciation on same capital asset utilised for business.

DIT(E) .v. Indraprastha Cancer Society (2015)229 Taxman 93 (Delhi)(HC)

S.32:Depreciation-Semi-conductor-Entitled 40% depreciation. [Income–tax Rules, 1962, Appendix 1, Part A, Item No III(3) (xi)]

The assesse is engaged in business of manufacturing of Electronic Circuit Boards (ECB'S).Assessee claimed 40% depreciation on semi –conductor as integrated circuits and mounted piezo –electronic crystals which are fixed on the board and they are interconnected to produce the end products. i.e. Electronics circuit boards ,which are used in watches and therefore can be said to be engaged in semi conductor industry entitled to higher rate of depreciation at 40 percent. AO restricted the depreciation to 25% only. In appeal CIT(A) and Tribunal allowed the claim of assesse. On appeal by revenue, dismissing the appeal the Court held that the assesse is entitled to depreciation at 40% as claimed by assesse.

CIT .v. Titan Time Products Ltd.(2015) 113 DTR 307 (Bom.)(HC)

S. 32: Depreciation-Leasing of commercial vehicles-Entitled higher rate of depreciation.

Where assesse –NBFC was in business of leasing of commercial vehicles and same were given on lease and was treated as given on 'hire' assesse was entitled to higher rate of depreciation. (AY. 2006-07, 2007-08)

SREI Infrastructure of Income-tax v. Addl. CIT (2015) 230 Taxman 1/116 DTR 359 (Delhi)(HC)

S. 32 :Depreciation-Commercial rights–Network support-Entitle to depreciation.

Payments to transferor who owned commercial rights towards the network and facilities constitute payment for business or commercial right hence entitled to depreciation.(AY. 2006-07)

ACIT v. Bharti Teletech Ltd. (2015) 150 ITD 185 / 163 TTJ 36 / 119 DTR 139 (Delhi)(Trib)

S. 32 :Depreciation –Goodwill- On acquisition of going concern- Depreciation is allowable.

Assessee would be allowed depreciation on goodwill acquired on acquisition of other concern on going concern basis.(A.Y 2003-04,2005-06)

Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S. 32 : Depreciation –Goodwill- One time Licence fee-Eligible for depreciation.

The assessee incurred certain expenditure being one time licence fee paid to the owner for granting to the user and it claimed said expenditure as revenue expenditure. The A.O. disallowed 50 per cent of the same holding that income was obtained for a period of 2 years. CIT(A) disallowed the entire

expenditure on the ground that the same was for acquiring of goodwill for 2 years and on which no depreciation could be allowed. The honorable ITAT held that, There is no dispute to the fact that the assessee has incurred expenditure being one time licence fee paid to the owner for granting to the user, the licence to continue to use the trade mark as per the name licence agreement. The assessee treated the same as revenue expenditure in the books. The entire amount should be allowed as revenue expenditure. The depreciation should be allowed as it is held to be acquisition of goodwill. It has been held that goodwill under *Explanation* 3(b) of section 31(2) is eligible for depreciation.(AY. 2003 – 2004)

ACITv.GKN Sinter Metal (P.) Ltd. (2015) 153 ITD 311 (Pune)(Trib.)

S. 32:Depreciation-Investments held as stock in trade-Depreciation on account of valuation of securities allowable.

The assessee classified its investments under categories as (i) available for sale, (ii) held for trading, and (iii) held to maturity. The assessee claimed depreciation towards diminution in the value of investment under the "available for sale" and "held for trading" categories. The Assessing Officer held that only the net depreciation was allowable on the securities aggregated scrip-wise and he added back the amount of appreciation. The Commissioner (Appeals) deleted the addition. On appeal:

Held, that all investments held by a bank were to be regarded as stock-in-trade and the depreciation on account of valuation of those securities was an allowable deduction.(AY. 2005-2006)

ING Vysya Bank Ltd.v. ACIT (2015) 39 ITR 250(Bang.)(Trib.)

S. 32: Depreciation-Additional depreciation-Food and beverage business-Manufacture- Entitled additional depreciation.[S.29BA)

Assessee engaged in activities of production or manufacture of article or thing and entitled to additional depreciation.(AY. 2009-2010)

ACITv.Gamma Pizzakraft P. Ltd (2015) 39 ITR 567(Delhi) (Trib.)

S. 32:Depreciation-Rate-Software and licences-Use of assets for less than 180 days-Depreciation is restricted to 50 per cent.

Failure by assessee to bring evidence to show installation of software and payment before September 30, depreciation is restricted to 50 per cent. (AY. 2006-2007, 2008-2009)

Dy.CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183(Cochin)(Trib.)

S. 32: Depreciation-Goodwill-AO was not justified in apportioning certain amount towards acquisition of goodwill and denying depreciation on said amount.[S.43(1)]

Assessee company acquired business of magazine and event division of BCCL as an on-going concern on a slum sale basis. On basis of valuation obtained from professionals, certain amount was paid for acquiring intangible assets like trademark and copyright. Assessee claimed depreciation on said amount. AO apportioned the certain amount towards acquisition of goodwill and denied the depreciation on said amount. CIT (A) granted partial relief to assessee. On cross appeals allowing the appeal the Tribunal held that; since depreciation was allowable on goodwill like any other intangible asset, it would not make any difference to segregate various intangible assets for purpose of making disallowance on account of depreciation. Disallowance made by the AOwas deleted. (AY. 2005 - 2006 to 2007 – 2008)

Dy.CIT v. Worldwide Media (P.) Ltd. (2015) 30 ITR 181 / 153 ITD 162 (Mum.)(Trib.)

S.32:Depreciation-Hoardings used for less than 180 days-Tribunal granting 100 per centdepreciation in assessee's own case-Doctrine of stare decisis to be followed--Entitled to 100 per cent depreciation.

Held, dismissing the appeal, that the issue was decided in favour of the assessee by the Tribunal in the assessee's own case. It was not the case of the assessee that the decision was set aside by the High Court. Adhering to the doctrine of stare decisis, the depreciation of 100 per cent. was to be allowed.(AY. 2004-2005 to 2009-2010)

Dy.CIT v. Vantage Advertising P. Ltd. (2015) 39 ITR 240(Kol.)(Trib.)

S. 32:Depreciation-Higher rate of depreciation @ 30 per cent-Vehicles-Financial statements showing assessee received income from hiring out vehicles--Higher rate of depreciation to be allowed.

The assessee undertook contract work for road construction and traded in products of a company I. The assessee claimed depreciation on vehicles at the rate of 30 per cent. The Assessing Officer observed that the assessee having used the vehicles in the business of road construction and trading which were the main business activities of the assessee, it was not entitled to depreciation at the higher rate. The Commissioner (Appeals) confirmed this. On appeal by the assessee :

Held, that the financial statements proved that the assessee had received rental receipts by hiring out its vehicles. Therefore, the assessee was entitled to depreciation at the higher rate of 30 per cent. (AY. 2006-2007)

Urmila Enterprises P. Ltd. v. ACIT (2015) 38 ITR 533 (Chennai) (Trib.)

S.32: Depreciation-Rate of depreciation-Computers-Printers, scanners, modems and routers come within ambit of expression "computer" when used along with computer-Entitled to higher rate of depreciation.

The assessee was engaged in the business of publishing of newspapers and satellite television broadcasting. The Assessing Officer restricted the rate of depreciation at 25 per cent. on computers, software and peripherals. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal, the assessee contended that since the printers, scanners, modems and routers were integral parts of computer systems and without computers, these assets could not function in the business of satellite television broadcasting, depreciation was to be allowed at 60 per cent. :

Held, allowing the appeal, that any device, when used along with computer and whose functions were integrated with the computer, would come within the ambit of the expression "computer". The depreciation was to be allowed at 60 per cent. (AY. 2005-2006, 2006-2007)

Ushodaya Enterprises Ltd. v. Dy. CIT (2015) 38 ITR 148 (Hyd.)(Trib.)

S.32: Depreciation-higher rate of depreciation @ 30 per cent - Using vehicles for transporting goods on hire - entitle for depreciation at rate of 30 per cent according to CBDT Circular No. 609 dated 29-7-1991.

Assessee is engaged in the business of transportation of municipal waste. During the impugned assessment year Assessee claimed depreciation at rate of 30 per cent on Vehicles used for commercial purposes. The Assessing Officer allowed depreciation at 15 per cent as against 30 per cent claimed by the Assessee. The Hon'ble Appellate Tribunal held that when there is commercial exploitation of vehicles for transporting goods on hire, the nature of assessee's business has been fall under ambit of Circular No. 609 dated 29-7-1991. Thus the Assessee is entitled for depreciation at rate of 30 per cent. (A.Y.-2009-10)

C.V. Bhanumurthy Reddy v. DCIT (2015) 67 SOT 154 (URO)/53 taxmann.com 110 (Bang) (Trib.)

S. 32 : Depreciation--Wind electric generators-Integral part of windmill unit--Entitled to higher rate of depreciation.

Dismissing the appeal of the revenue, the Tribunal held that the wind electric generator was an integral part of the windmill and therefore higher rate of depreciation was allowable. (AY. 2008-2009)

Dy. CIT v. Lanco Infratech Ltd. (2015) 37 ITR 95(Hyd)(Trib.)

S. 32 : Depreciation--Building--Owner of property-Land-No registered sale deed executed in favour of assessee--Assessee in possession of property in his own title-Entitled depreciation-Land-On cost of land no depreciation is allowable.

Held, that anyone in possession of property in his own title exercising dominion over the property excluding others therefrom and having the right to use and to occupy the property in his own right would be the owner of building entitled to depreciation for the purpose of section 32(1) of the Act, though a formal deed of title is not executed and registered in favour of the assessee. The Assessing Officer had not denied that the assessee had exercised dominion over the property, and had the right

to occupy and to use it. Denial of depreciation allowance for non-execution of the registered sale deed was not sustainable. The assessee was to be treated as the owner of the properties and entitled to depreciation. However, the cost of land included in the amount on which depreciation had been claimed was to be determined and depreciation thereon not allowed. (AY. 1998-1999 to 2009-2010)
Indian Renewable Energy Development Agency Ltd. .v. JCIT (2015) 37 ITR 250(Delhi) (Trib.)

S. 32 : Depreciation—Higher rate--Routers and switches- Entitled higher rate of depreciation.
Routers and switches integrated with computers to be treated as computer system which is entitled to higher rate of depreciation. (AY. 2008-2009)
Cisco Systems Capital (India) P. Ltd. v. Add. CIT (2015) 37 ITR 343(Bang)(Trib.)

S. 32 : Depreciation--ITG networking equipment--Included in block of computers--Entitled to higher rate of depreciation.
Held, that ITG networking equipment was to be included in the block of computers entitled to depreciation at the rate of 60 per cent. (AY. 2006-2007)
Microsoft Corporation India P. Ltd. .v. Add. CIT (2015) 37 ITR 290/ 54 taxmann.com 167 (Delhi)(Trib.)

S. 32 : Depreciation-Company-Personal use-Vehicles used by employees for personal purpose-Depreciation allowable.
The assessee claimed depreciation on vehicles which were owned by it but used by its employees. The AO disallowed depreciation on the ground that the vehicles were being used by the employees for their personal purposes. On appeal :
Held, that there was no rationale in treating the amount of depreciation on cars as that for personal use, when admittedly these had been provided to employees. A company was a separate legal entity distinct from its directors or employees. There could be no occasion to treat the use of vehicles by the directors or employees as amounting to personal use by the company. Therefore, the addition of depreciation on vehicles was to be deleted. (AY. 2006-2007)
Microsoft Corporation India P. Ltd. .v. Add. CIT (2015) 37 ITR 290/ 54 taxmann.com 167 (Delhi)(Trib.)

S. 32 : Depreciation-LED video display boards-Are temporary structures-Assessee entitled to 100 per cent. Depreciation
Held, dismissing the appeal, that the LED video display boards were temporary structures and they could not be equated with plant and machinery for the reason that these structures were displayed outside in temporary locations and on land taken on lease for a temporary period. Once these temporary structures were dismantled, their value would be reduced to almost nil and they could not be used second time or third time. The life span of LED video display boards was also not more than 6 months to 1 year. The land was neither owned by the assessee nor was it held by the assessee on lease basis. The structures put on such land, whatever in nature, were purely temporary structures. Even these structures were not taken by the assessee for re-use. When such structures were put on land not belonging to the assessee, the expenditure was held to be the nature of revenue. Therefore, the depreciation was allowed. (AY. 2006-2007 to 2010-2011)
Dy.CIT .v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kolkata)(Trib.)

S. 32 : Depreciation-Assessee acquiring commercial rights to display on bridges for business purposes-Entitled to depreciation.
Held, dismissing the appeal, that on the facts it was clear that the assessee had acquired commercial rights and used by them during the relevant year for the purposes of its business. Therefore, the assessee was entitled to depreciation at 12.5 per cent.
(AY. 2006-2007 to 2010-2011)
Dy.CIT .v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kolkata)(Trib.)

S.32: Depreciation-Additional depreciation-Allowed in immediately preceding year–Denial of remaining fifty percent depreciation was held to be not justified.[S.32(1)(iia)]

The assessee was engaged in the business of manufacture of polyester fibres and yarns. For the assessment year 2005-06, the assessee had purchased plant and machinery for its captive power plant and was allowed fifty per cent. of additional depreciation thereon under section 32(1)(iia) of the Act on assets procured since the machinery was put to use for less than 180 days in the previous year. For the following assessment year 2006-07, the assessee claimed the balance fifty per cent. of the additional depreciation but the AO rejected the claim on the ground that the assessee was not eligible to claim additional depreciation on the assets purchased for the power plant. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal.
Held, allowing the appeal, that the assessee had claimed additional depreciation under section 32(1)(iia) of the Act in immediately preceding assessment year 2005-06 and the claim was allowed by the Assessing Officer. Once the conditions regarding the claim of depreciation were examined by the Assessing Officer in the very first year, subsequently he could not go back and hold that the additional depreciation was not allowable on business of generation or generation and distribution of power. Hence, the assessee was entitled to remaining unutilised fifty per cent. of additional depreciation under section 32(1)(iia) of the Act, for the next assessment year. (AY. 2006-2007)
Century Enka Ltd. .v. Dy. CIT (2015) 37 ITR 644(Kolkata)(Trib.)

S. 32: Depreciation-Unabsorbed depreciation can be treated as current depreciation and set off against non business income and be available to carry forward indefinitely- Judgement of a non-jurisdictional High Court has to be preferred over the judgement of a Special Bench of the ITAT.[S. 32(2)]
There is a conflict of opinion between the judgement of the ITAT Special Bench in DCIT Vs Times Guaranty Limited (2010) 4 ITR (Trib) 210 (Mum.) (SB) and that of the Gujarat High Court in General Motors India Pvt. Ltd. Vs DCIT [(2013) 354 ITR 244 (Guj) on the question whether unabsorbed depreciation for the assessment years prior to the amendment made to s. 32(2) w.e.f. AY 2002-03 can be treated as “current depreciation” and set-off against non-business income and be available for carry forward indefinitely. A judgement of the non-jurisdictional High Court binds the Tribunal benches as held in CIT Vs. GodavarideviSaraf (1978) 113 ITR 589 (Bom) and has to be followed over a judgement of the Special Bench. Unabsorbed depreciation can be treated as current depreciation and set off against nonbusiness income and is available to carry forward indefinitely. (AY. 2009-10) (ITA No. 2974/Del/2013, dt. 09/01/2015)
MindaSai Limited v. ITO (Delhi)(Trib.)www.itatonline.org

S. 32A : Investment allowance –Purchase –Continuation of original contract- Deduction is allowable.
Assessee entered into initial contract for purchase of plant and machinery on 2-5-1986 ,however, contract was finally concluded on 18-8-1986 due to revision of price. Assessee claimed deduction under section 32A in respect of aforesaid purchase. Assessing Officer rejected assessee's claim holding that purchase was made after cut off date given in section 32A(8B), i.e., 12-6-1986. On appeal allowing the appeal the Court held that since subsequent contract, i.e., 18-8-1986, was in continuation of original contract, i.e., 2-5-1986, it was to be presumed that purchase was made prior to cut off date and, therefore, assessee's claim was to be allowed . (AY. 1989-90)
Shaily Eng. Plastics (P.) Ltd. .v. Dy.CIT (2015) 231 Taxman 253 (Guj.)(HC)

S. 32A: Investment allowance –Deduction u/s 80HHC - Special deduction to be computed after setting off unabsorbed investment allowance.[S 32A, 80AB, 80HHC].
Allowing the appeal of Revenue the Court held that; in section 32A(3) as well as section 80HHC(3) of the Act, reference is made to the profits computed under the business head. Perusal of section 80HHC(3) makes it further clear that the deduction under section 80HHC(1) is to be allowed on the profits and gains as computed under the head "Profits and gains of business or profession". Section 32A(3) is placed in Chapter IV-D and, therefore, it is clear that unabsorbed investment allowance is to be considered under the head "Profits and gains of business or profession". In view of that the deduction under section 80HHC(3) is required to be computed after setting off the unabsorbed investment allowance under section 32A(3) from profits of the business. The Supreme Court in IPCA Laboratory Ltd. v. Deputy CIT [2004] 266 ITR 521 (SC) in terms held that section 80HHC would be

governed by section 80AB. Hence, for the purpose of computing the benefits under section 80HHC, unabsorbed investment allowance is required to be set off while computing the income chargeable under the head "Profits and gains of business or profession". The question of law was answered in favour of Revenue.(AY. 1991-1992)

CIT v. V.M. Salgaonkar and Bros. P. Ltd. (2015) 372 ITR 248 (Bom.)(HC)

S.32A:Investment allowance-Tribunal allowing in respect of ten items-Reference there against dismissed-Assessee entitled to investment allowance.

Tribunal has followed the earlier years orders and reference to said orders were dismissed. Following the same appeal of Revenue was dismissed. Associated Bearing Co. Ltd. v. CIT [2006] 286 ITR 341 (Bom),followed.(AY. 1986-1987, 1987-1988)

CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

S.32A:Investment allowance-Higher rate of allowance-Installation of machinery for manufacturing sulphuric acid-Assessee entitled to investment allowance.

Court held that the Tribunal was right in law in confirming the order of the Commissioner (Appeals) allowing the higher rate of investment allowance of 35 per cent on machinery installed for the purpose of manufacturing sulphuric acid. (AY. 1986-1987, 1987-1988)

CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

S. 32A : Investment allowance–Amalgamation-withdrawal of benefit of investment allowance–Matter remanded. [Companies Act. 1956. S. 391 to 394]

Assessee company was granted benefit of investment allowance or carried forward of investment allowance under section 32A. Under a scheme of arrangement under sections 391 to 394 of Companies Act, 1956, 9 out of 13 industrial units held by respondent company were transferred to three newly formed companies. Assessing Officer, passed an order under section 32A(5) withdrawing benefit of investment allowance or carried forward of investment allowance. Tribunal held that the scheme of arrangement did not result in 'transfer' under section 32A(5) and hence Assessing Officer erred in withdrawing investment allowance granted earlier. On further appeal, the High court held sub-section (5) uses two expressions "sold or is otherwise transferred". Scheme of amalgamation or reconstruction under Sections 391 and 394 of the Act whereby assets or units/undertakings were transferred would be covered by the expression 'otherwise transferred' in sub-section (5). On the alternate argument, the Court held that, Sub-section (6) to Section 32A is broad enough and would include any scheme of merger provided the legislative stipulations in sub-section (6) are met. It is not necessary and required under the sub-section (6) to Section 32A that the amalgamating company should have been dissolved or fully merged. The expression "amalgamation" as understood in law and in common parlance is a very broad and a wide expression. It would include any type of corporate restructuring or reorganisation and is not restricted to only cases where the amalgamating company/companies get merged into another entity and cease to thereafter exist. It is not necessary that the scheme of amalgamation must postulate a complete merger of the company with assets and liabilities. Part or partial merger would equally be cases of amalgamation. Thus the Court further held that scheme of arrangement/ reconstruction could be regarded as amalgamation and protected under sub-section (6) to section 32A if conditions specified in said sub-section as well as clauses (ii) and (iii) of section 2(1B) were satisfied and hence matter was to be remanded to examine this aspect. (AY. 1983-84 to 1990-91)

CIT v. D.C.M. Ltd. (2015) 114 DTR 1 / 275 CTR 475/230 Taxman 426 (Delhi)(HC)

S. 32A : Investment allowance –Withdrawal of investment allowance-Held to be not justified. [S.155 (4A)]

Allowing the appeal of assesse the Court held that where conditions enumerated in clause (4A) of section 155 were not fulfilled by revenue, Tribunal was not justified in holding that investment allowance granted in assessment year 1983-84 and adjusted in Assessment year 1990-91 could not be withdrawn in year under consideration . (AY. 1993-94)

Gujarat Narmada Vally Fertilisers Ltd. v. DY. CIT (2015)229 Taxman 270 (Guj.)(HC)

S. 32AB:Investment deposit account-Investment allowance-Option to claim deduction either under section 32A or section 32AB for assessment year 1989-90-Assessee allowed deduction under section 32AB for assessment years 1987-88 and 1988-89 - Assessee entitled to deduction under section 32AB for assessment year 1989-90 [S. 32A].

Answering the reference in favour of assessee the Court held that; sub-section (8B) of section 32A of the Act clearly envisages allowance of investment allowance under section 32AB of the Act in respect of plant and machinery installed from April 1, 1987, to March 31, 1988, in the assessment year 1989-90. Therefore, the view of the AO that since the assessee had been allowed deduction under the scheme of investment deposit account under section 32AB of the Act for the assessment year 1988-89, it was not entitled to claim deduction under section 32A(8B) for the same assets was not correct and the order of the Tribunal allowing investment allowance under section 32A of the Act in respect of plant and machinery installed from April 1, 1987, to March 31, 1988, was valid.CBDT Circular No.559, dated 4-5-1990 (1990) 184 ITR 91(St) is considered.(AY. 1989-1990)

CIT v. Indian Petrochemicals Corporation Ltd. (2015) 372 ITR 568 (Guj.)(HC)

S.32AB:Investment deposit account–Amount with drawn for repayment of loan and security deposit- Addition cannot be made.

Out of balance in Investment Deposit Account, some amount was withdrawn by assessee and used for making repayment of loan against trucks and tankers. Remaining amount was used by the assessee for repaying loans taken by it against security of plant and machinery. Machinery was purchased with term loan that was contracted for more than three years from scheduled bank/financial corporation. Dismissing the appeal of revenue the Court held that; no addition could be made under section 32AB. (AY. 1990-91 to 1994-95)

CIT v. Harsiddh Specific Family Trust (2015) 230 Taxman 613 (Guj.)(HC)

S. 32AB : Investment deposit account –Audit report-Directory-

Filing of audit report along with return is only directory and not mandatory; deduction claimed by assessee could not be disallowed only on ground that assessee had not filed audit report along with return . (AY. 2005-06)

CIT v. Ramani Realtors (P.) Ltd. (2015)229 Taxman 283 (Mad.)(HC)

S. 32AB : Investment deposit account – Set off and aggregation of losses and profits respectively of other eligible businesses cannot be made.

Assessee computed deduction u/s 32AB only after considering profits of eligible businesses and ignored the losses of other eligible businesses. The AO aggregated the losses suffered in the eligible businesses as well as non-eligible businesses and reduced the same from the profits earned in the eligible businesses for the purpose of computing the deduction u/s 32AB. The Commissioner (Appeals) accepted the contention of the assessee which was affirmed by the Tribunal. The court held that section 32AB(3) clearly postulates that profits of eligible business should be separately computed. It was observed that in the present case separate accounts were maintained for each eligible business. If all the parts of section 32AB are read harmoniously, then it becomes clear that deduction under the said clause has to be computed with reference to the profits of eligible business only without aggregation of profits or losses of other eligible businesses. Further, the amendment in the said section w.e.f. 1.4.99 negating the concept of eligible business, would not have any effect in so far as concerned year is in question. (AY 1989-90, 1990-91)

CIT v. Kelvinator of India Ltd. (2015) 114 DTR 297 (Delhi)(HC)

S. 32AB : Investment deposit account–Eligible profits-Interest on debenture, fixed deposit, loan and inter corporate deposit and dividend income constitute income from business for the purpose computing deduction. [S.263]

The AO excluded the income shown under the head 'other income' viz. interest on debentures, fixed deposit, loan and inter-corporate deposit and dividend income for the purpose of computing deduction u/s 32AB. The said finding was affirmed by the Commissioner (Appeals). The Tribunal held that income from the eligible business are not to be computed in accordance with the provision of IT Act but in accordance with Sch VI of the Companies Act and therefore, the other income should also be

included for computing deduction. On appeal, the court held that other income viz. interest on debentures, fixed deposit, loan and inter-corporate deposit and dividend income were income from business, and was accordingly shown in Part II and Part III of the Sch VI of the Companies Act, and deduction would be available on the business income as computed in the above manner. (AY 1989-90, 1990-91)

CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 / 114 DTR 297 (Delhi)(HC)

S. 32AB : Investment deposit account-Eligible profits--Assessee having several units some eligible for deduction and others not--Deduction is on profits and not on aggregate of profits of all units.

Held that the concept of eligible business referred to in section 32AB was negated by the Finance Act, 1989, with effect from April 1, 1991. The provisions of section 32AB would have to be read and interpreted in the light of the amendments. However, for the assessment years 1989-90 and 1990-91 under the applicable provisions, only the profits of the eligible business could be taken into consideration for computing the deduction under section 32AB and aggregation would not be permissible. Therefore, the deduction under section 32AB was available on the profits of the eligible industrial undertaking and not on the aggregate profits of the assessee. (AY. 1989-1990, 1990-1991)

CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 / 114 DTR 297 (Delhi)(HC)

S. 32AB : Investment deposit account –business of civil and labour construction-Not eligible deduction.

Assessee, engaged in business of civil and labour construction, was not entitled to deduction under section 32AB . (AY. 1989-90)

CIT .v. R.S. Builders & Engineers (P.) Ltd. (2015) 228 Taxman 305(Mag.) (P&H)(HC)

S. 32AB : Investment deposit account-Assessing Officer has power only to examine whether books of account are certified by authorities under Companies Act - Principles for determination of income under the Income-tax Act - Not applicable.[Companies Act, 1956]

Section 32AB provides an incentive to an assessee who is carrying on business or profession. If the amount is deposited with the Development Bank or utilised for the purchase of any new machinery or plant without depositing any amount in an account under clause (a), how the profits of business or profession are to be calculated for the purpose of section 32AB of the Act is found under sub-section (3). According to which they are to be arrived at on the basis of the profits computed in accordance with the requirements of Part II of the Sixth Schedule to the Companies Act, 1956 and not in accordance with the provisions of the 1961 Act. Therefore, while deciding the benefit to which the assessee is entitled under section 32AB of the 1961 Act, the Assessing Officer has only power to examine whether the books of account are certified by the authorities under the 1956 Act as having been properly maintained in accordance with the 1956 Act. He cannot apply the principles under the 1961 Act for the purpose of determining the profits of the assessee from business or profession for the purpose of section 32AB. (AY. 1990-1991)

Jindal Aluminium Ltd. .v. Dy.CIT (2015) 370 ITR 235/118 DTR 351 (Karn.)(HC)

S.33AB:Tea development allowance-Investment of surplus funds in short-term deposits-Interest-Business income-To be taken into account for purposes of benefit.

Held, allowing the appeal, that the surplus commercial funds available with the assessee were kept in short-term fixed deposits. The assessee had borrowed funds for the purpose of carrying on its business. The funds may not always be necessary or may not always be blocked. Therefore, the funds which were surplus at any point of time were fruitfully invested in short-term fixed deposits and the assessee thus earned interest which in a way had reduced its burden on account of interest. It was, therefore, not possible to hold that the interest earned was not business income. When the assessee had paid interest of Rs. 2.66 crores and had earned interest of Rs. 1.88 crores, the effective debit on that side was less than Rs. 1 crore. Therefore, the interest earned by the assessee should be treated as the business income for the purpose of the benefit under section 33AB.

Warren tea Ltd..v. CIT (2015) 374 ITR 6 (Cal.)(HC)

S. 35:Scientific research-Weighted deduction - Denial of deduction by Assessing Officer on ground machinery required to be installed and commissioned before expiry of relevant previous year is not proper.

The assessee was engaged in the business of manufacture of enzymes and pharmaceutical ingredients. During the assessment year 2003-04, the assessee had incurred certain expenditure on capital towards cost of machinery for a sum of Rs. 7,82,25,431. The Assessing Officer noticed that the amount included a sum of Rs. 2,72,59,589 incurred towards three items of machinery. The three items of machinery had not been installed and commissioned and since such expenditure did not amount to expenditure incurred during that period, he held that the assessee was not entitled to weighted deduction under section 35(2AB). The appellate authorities held that the Assessing Officer was not justified in not allowing the weighted deduction under section 35(2AB). On appeal:

Held, the provision nowhere suggests or implies that the machinery is required to be installed and commissioned before the expiry of the relevant previous year. The provision postulates approval of a research and development facility, which implies that a development facility shall be in existence, which in turn, presupposes that the assessee must have incurred expenditure in this behalf. The Tribunal had rightly concluded that if the interpretation of the Assessing Officer were accepted, it would create absurdity in the provision inasmuch as words not provided in the statute were to be read into it, which is against the settled proposition of law with regard to the plain and simple meaning of the provision. The plain and homogenous reading of the provisions would suggest that the entire expenditure incurred in respect of research and development has to be considered for weighted deduction under section 35(2AB).(AY. 2003-2004)

CIT .v. Biocon Ltd. (2015) 375 ITR 306 (Karn.)(HC)

Editorial: Order in DCIT v. Biocon Ltd. (2014) 3 ITR 680 (Bang)(Trib) is affirmed.

S.35:Scientific research–Business expenditure-Pouch development expenses were in nature of scientific research or acquisition of patent rights or copyright therefore, said expenses was not allowable under section. [S. 35A, 37(i)]

Assessee was engaged in manufacturing plastic pouches . Under an agreement, one HGF produced certain sample of pouches on its behalf,thereafter, assessee made payment to HGF. The Assessing Officer held that said pouch development expenses were in the nature of scientific research or acquisition of the patent rights or copy rights and came under the purview of section 35 or 35A. As none of the conditions mentioned in those sections were fulfilled, the expenditure so debited was disallowed.

On appeal, the Commissioner (Appeals) held that said expenditure was revenue expenditure, therefore, allowed deduction under section 37.

On revenue's appeal, the Tribunal confirmed the order of the Assessing Officer.On appeal; Court held that, pouch development expenses were in nature of scientific research or acquisition of patent rights or copyright and came under purview of section 35 or 35A, therefore, said expenses was not allowable under section 37(1).

Standipack (P.) Ltd. v. CIT (2015) 230 Taxman 307 (Cal.)(HC)

S.35:Scientific research-Development and research-Deferred revenue expenditure-Not allowable.

Dismissing the appeal of assessee the Court held that, deferred revenue expenditure could not be allowed by way of carry forward. There is no provision under the Act which provides for such a method of claiming deferred research and development expenditure. Moreover, the Assessing Officer had allowed the expenses relatable to the year under consideration and disallowed only the expenditure not relatable to the relevant assessment year. It was not the case of the assessee that the expenditure was relatable to the year 2002-03. Therefore, the authorities were justified in disallowing such a claim made by the assessee.(AY.2002-03)

Banyan Networks P. Ltd. .v. ACIT (2015) 373 ITR 566 / 233 Taxman 245 (Mad.)(HC)

S. 35 :Expenditure on scientific research–Board-Reference ought to have been made to CBDT-Disallowance was not justified .[S.43]

Where assessee raised claim for deduction under section 35(1), in view of order passed by Court in another case involving identical issue, it was to be concluded that reference ought to have been sought by revenue before Board to prescribed authority and not having done so, Tribunal was justified in reversing orders of revenue authorities rejecting assessee's claim for deduction. Court also held that Tribunal itself should not have decided the question in favour of assesse without seeking opinion of prescribed authority and without fully discussing material on record. (AY. 1995-96)
CIT .v. Mastek Ltd. (2015) 228 Taxman 377(Mag.) (Guj.)(HC)

S. 35:Scientific research expenditure-Developing prototypes of its products – Held to be allowable as revenue expenditure. [S.37(1)]
Assessee company was engaged in manufacturing of musical instrument. During year assessee incurred expenditure on R & D for developing prototypes of its products and claimed deduction under section 35(1)(i). Assessee contended that on receiving samples, company developed products in-house to satisfaction of buyer.AO held that the said expenses incurred were only to conform to specifications of customers so as to get supply orders in regular course of business , Further such prototypes were of limited use meant only for manufacturing products for a specific customer, he treated the said expenditure as capital in nature. CIT(A) decided the issue in favour of assessee. On appeal by revenue the Tribunal held that after perusing details of R & D expenses, all expenses were in nature of revenue expenses hence the assessee would be entitled for said deduction. (AY.2004-05)
ACIT v. Besson Musical Instrument (P.) Ltd. (2015) 68 SOT 102 (URO) (Delhi)(Trib.)

S. 35:Scientific research expenditure-Receipts credited to profit and loss account is part of normal sales-Weighted deduction is available.[S. 352AB]
Receipts credited to profit and loss account is part of normal sales. Weighted deduction is allowable.(AY. 2009-2010)
Dy. CIT (LTU) v. Microlabs Ltd (2015) 39 ITR 585(Bang.)(Trib.)

S. 35 : Scientific research expenditure –Approval was granted from the assessment year 2010-11, hence deduction is not available for the Asst year 2009-10.
Since approval under section 35(2AB) had been accorded to R & D unit of assessee-company from 1-4-2009 to 31-3-2012, assessee was entitled to claim weighted deduction under section 35(2AB) from assessment years 2010-11 and not 2009-10 as claimed by the assessee.(AY. 2009-10)
Advik Hi tech (P.) Ltd. v. ACIT (2015) 67 SOT 158 (URO) (Pune)(Trib.)

S. 35 :Scientific research - Contribution to IIT and International Advanced Research Centre allowable in terms of Sub-section (2AA) of section 35. [S.43(4)]
It was held that where assessee claimed deduction of contributions made to IIT and International Advanced Research Centre for power metallurgy and new materials, since both institutions to which assessee made contribution were approved for purposes mentioned in sections 35(2AA) and 35(1)(ii), assessee's claim was to be allowed.(AY. 2009-10, 2010-11)
Resil Chemicals (P.) Ltd. v. Dy.CIT (2015) 67 SOT189(URO) (Bang.)(Trib.)

S.35 : Scientific research expenditure-Salary, consultancy fees etc allowed under Sub-section (2AB) of section 35.[S.43(4)]
It was held that where assessee claimed deduction of expenditure incurred on scientific research, in view of fact that major part of expenses were towards salary, equipments, materials consumed, consultancy fees and other routine expenses, deduction so claimed was to be allowed under section 35(2AB).(AY. 2009-10, 2010-11**)**
Resil Chemicals (P.) Ltd. v. Dy. CIT (2015) 67 SOT 189(URO) (Bang.)(Trib.)

S. 35:Scientific research-Any material is purchased for research & development, same should be allowed as deduction and it is immaterial whether material is consumed or held as closing stock.
When a material is purchased for research and development purpose, it is immaterial whether the material is consumed during the year or held as closing stock and the entire expenditure incurred on

raw material for the purpose of research and development qualifies for deduction u/s. 35 irrespective of the accounting treatment of the same in the books of account. (AY. 2007 - 2008 to 2009 – 2010)
Balaji Amines Ltd. v. Addl.CIT(2015) 153 ITD 20 (Pune)(Trib.)

S. 35 : Expenditure on scientific research -Expenditure on research and development for production of new drugs—Mistake apparent –Non consideration or improper consideration of issue -Matter remanded.[S. 254(2)]
The assessee was engaged in the business of research and development towards production of new drugs through bio-technology. The assessee claimed deduction under section 35(1) of the Act, for the expenditure incurred for the development in respect of three products with reference to scientific research activity. The AO treated the expenditure as capital in nature, on the ground that, when the molecules were successfully developed, the assessee would yield patent rights resulting in enduring benefit to the assessee. The CIT(A) held that section 35(1)(iv) read with section 35(2)(ia) specifically allowed the claim of deduction on any expenditure of a capital nature on scientific research carried on by the assessee. On appeal by the Department :
Held, that, the AO had failed to follow the correct procedure prescribed under section 35(3) of the Act to determine whether the assessee's activity constituted scientific research. The Tribunal could not decide the claim against the assessee or in its favour without following the procedure laid down in the Act. [Matter remanded to the AO with the direction to refer the claim of deduction under section 35, according to the procedure laid down under section 35(3) of the Act. (AY. 2006-2007, 2007-2008, 2008-2009)
Dy.CIT .v. Bharat Biotech International Ltd. (2015) 37 ITR 750/169 TTJ 148 (Hyd.)(Trib.)

S. 35 : Expenditure on scientific research –In-house division-Weighted deduction cannot be denied on the ground that prescribed authority did not submit form no 3CL in time to Income–tax department.[S.35(2AB]
Assessee-company claimed research and development expenditure under section 35(2AB), relating to its in-house division. It claimed weighted deduction under section 35(2AB) at the rate of 150 per cent of the capital expenses and revenue expenses.The AO disallowed the claimed deduction holding that the assessee did not submit the approval from the prescribed authority.On appeal, the CIT (A) allowed the deduction. On appealby revenue the Tribunal held that assessee could not be denied deduction under section 35(2AB) merely on ground that prescribed authority did not submit form No. 3CL for granting approval under section 35(2AB) in time to income-tax department. (AY. 2009-10)
Dy.CIT .v. Famy Care Ltd. (2014) 52 taxmann.com 461 / (2015) 67 SOT 85 (Mum.)(Trib.)

S. 35 :Expenditute on scientific research –In house research and development facility-Clinical tests were conducted in assessee's laboratory duly approved by Directorate General of Health services, its claim for weighted deduction was to be allowed.[S.35(2AB), 43(4)]
The assessee-company was a manufacturer and trader of pharmaceutical goods, diagnostic kits, medical instruments etc. During relevant year, the assessee incurred expenditure on 'research and development'. The assessee claimed 150 per cent deduction as prescribed under section 35(2AB).The AO held that the clinical trials were conducted outside the approved facilities. He held that the clinical trial expenses and bioequivalence study was allowable under section 35(1)(i) only up to 100 per cent and, hence, the excess claim of deduction was not allowed.The DRP confirmed the order of the AO. On second appeal theTribunal held that language of section 35(2AB) does not suggest that research has to be conducted within four walls of an undertaking, since assessee collected data from several resources both within and outside premises and thereupon clinical tests were conducted in assessee's laboratory duly approved by Directorate General of Health services, its claim for weighted deduction was to be allowed**.** (AY. 2006-07)
Cadila Healthcare Ltd. .v. Addl. CIT (2012) 21 taxmann.com 483 / (2015) 67 SOT 110 (URO) (Ahd.)(Trib.)

S. 35C :Agricultural development allowance-Salary, verterinary medicines, verterinary transport, artificial insemination expenses, advertisement & publicity and fodder development expenses-Eligible deduction.

Assessee was a co-operative society carrying on business of dairy. It claimed deduction in respect of salary, verterinary medicines, verterinary transport, artificial insemination expenses, advertisement & publicity and fodder development expenses. Following the ratio in case of Kaira Dist. Co-op Milk Producers Union Ltd. v. CIT [2002] 253 ITR 766(Guj.) entire expenses were eligible for deduction under section 35C .(AY. 1980-81)

Kaira District Co-op. Milk Producers' Union Ltd. v. CIT (2015) 229 Taxman 266 (Guj.)(HC)

S. 35D : Amortisation of preliminary expenses – GDR issue-Held to be allowable.

On appeal the Court heldthat theTribunal was not justified in disallowing deduction claimed under section 35D being 1/10th of expenditure incurred on GDR issue by merely relying upon a High Court decision; it should have adverted to relevant material. (AY. 1998-99)

Crompton Greaves Ltd. v. ACIT (2015) 230 Taxman 509 (Bom.)(HC)

S. 35D : Amortisation of preliminary expenses--Expenditure on raising share capital--One-tenth of expenditure was held to be allowable.

The Assessing Officer made a disallowance of Rs. 2,97,924 claimed under section 35D of the Income-tax Act, 1961, in respect of capital raising expenses being one-tenth of Rs. 29,79,237 on the ground that these were not covered under section 35D of the Act. On appeal, the Commissioner (Appeals) deleted the additions and this was confirmed by the Tribunal.Court held that ,the expenditure incurred by way of fees paid to the Registrar of Companies for enhancement of authorised capital was deductible over a period of ten years under section 35D(2)(c)(iv).(AY.1994-1995 to 1999-2000)

CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P & H) (HC)

S. 35D : Amortisation of preliminary expenses-Rule of consistency-Appellate Tribunal Order of Commissioner (Appeals) allowing expenditure for earlier assessment year not appealed against-Department estopped from filing appeal on same issue in subsequent assessment year.[S.253]

Order of Commissioner (Appeals) allowing expenditure for earlier assessment year not appealed against. Following the rule of consistency, department is estopped from filing appeal on same issue in subsequent assessment year.(AY. 2007-2008, to 2009-2010)

Dy.CIT v. Deccan Chronicle Holdings Ltd. (2015) 39 ITR 295(Hyd.) (Trib.)

S.35D:Amortisation of preliminary expenses-qualified institutional buyers- Revenue expenditure-Eligible deduction.

Held that the qualified institutional buyers were a class of investors as a part of the large investor community. The assessee sought for qualified institutional buyers issues to raise funds within a short span of time. Since the buyers were a class of investors, the issue of shares to qualified institutional buyers could be considered as public issue. The expenses in connection with public issue of shares were allowable and therefore, the expenditure incurred on qualified institutional buyers could be treated as revenue expenditure and eligible for deduction under section 35D of the Income-tax Act, 1961.(AY. 2007-2008, to 2009-2010)

Dy.CIT v. Deccan Chronicle Holdings Ltd. (2015) 39 ITR 295(Hyd.)(Trib.)

S.35D:Amortisation of investments-Appeal is pending in preceding year- Matter remanded.

Assessee claiming deduction on amortization. Appeal pending against adjustments on amortisation in preceding assessment years.Assessing Officer to examine issue afresh in light of decision in pending appeals. Assessee not entitled to deduction in year in which securities sold if amortisation allowed as deduction in preceding assessment years. Matter remanded. (AY.2005-2006)

ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250(Bang.)(Trib.)

S. 36(1)(ii) : Bonus- Bonus paid to employee share holders/Directors is deductible.

The bonus paid to emoloyee share holders/Directors is held to be deductible. (AY. 2008-09)

Chryscapital Investment Advisors (India) (P.) Ltd. v. DCIT (2015) 376 ITR 283/ 119 DTR 1 (Delhi) (HC)

S. 36(1)(iii):Interest on borrowed capital-upfront fee-Interest on debenture holder-Allowable in the first year or to be spread over a period of five years-Method of accounting-Matching concept.[S. 35D, 37(1), 43, 145]

The assessee issued debentures in which two options as regards payment of interest were given to the subscribers/debenture holders. They could either receive interest periodically, that is every half yearly @ 18% per annum over a period of five years, or else, the debenture holders could opt for one time upfront payment of Rs. 55 per debenture. In the second alternative, 55 per debenture was to be immediately paid as upfront on account of interest. At the end of five years period, the debentures were to be redeemed at the face value of Rs. 100. The assessee paid to the debenture holder the upfront interest payment and claimed the same as a deduction. In the accounts, the interest expenditure was shown as deferred expenditure. However, the AO, CIT(A), ITAT and High Court rejected the assessee's claim and held that though the amount was paid, the same was only allowable as a deduction over the tenure of the debentures. On appeal by the assessee to the Supreme Court HELD allowing the appeal:

Held that normally revenue expenditure incurred in a particular year has to be allowed in that year and if the assessee claims that expenditure in that year, the Department cannot deny the same. Fact that assessee has deferred the expenditure in the books of account is irrelevant. However, if the assessee himself wants to spread the expenditure over a period of ensuing years, it can be allowed only if the principle of 'Matching Concept' is satisfied**.**Once a return in that manner was filed, the AO was bound to carry out the assessment by applying the provisions of that Act and not to go beyond the said return. There is no estoppel against the Statute and the Act enables and entitles the assessee to claim the entire expenditure in the manner it is claimed. (AY. 1996-97, 1997-98, 1998-99)

Taparia Tools Ltd. .v. JCIT (2015) 372 ITR 605 / 276 CTR 1/231 Taxman 5(SC)

S. 36(1)(iii) : Interest on borrowed capital–Purchase and installation of 'plant and machinery' was allowable.

Interest paid on money borrowed for purchase and installation of 'plant and machinery' was allowable as deduction.

CIT .v. Avery Cycle Inds Ltd. (2015) 231 Taxman 814 (P&H)(HC)

S. 36(1)(iii) : Interest on borrowed capital -Interest on interest free advance to directors was not allowable-Matter remanded

Interest on interest free advance to directors was not allowable-Matter remanded

CIT .v. Avery Cycle Inds Ltd. (2015) 231 Taxman 814 (P&H)(HC)

S. 36(1)(iii) : Interest on borrowed capital –Amounts was utilized for settling the accounts of retiring partner-Interest was not allowable.

Assessee-firm borrowed funds from bank for settling account of retiring partners and claimed deduction of interest under section 36(1)(iii). Facts revealed that amount sanctioned by bank was directly made over to retiring partners as full payment of consideration agreed to be paid by continuing partners to retiring partners for relinquishment of their share. On appeal dismissing the appeal of assessee the Court held that the said amount did not represent amount borrowed for purpose of business and, therefore, interest paid thereon could not be allowed as deduction. (AY. 2002-03)

Hotel Roopa .v. CIT (2015) 231 Taxman 425 (Karn.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Actual cost -Interest expenditure incurred after the asset is put to use was allowable as revenue expenditure. [S. 43(1)]

Assessee borrowed money to purchase assets and paid interest thereon - Whether while interest attributable till asset was put to use for first time was required to be included in actual cost as per section 43(1) while interest expenditure incurred thereafter was allowable as revenue expenditure.(AY. 1995-96, 2002-03,2003-04)

Jt. CIT .v. Bell Ceramics Ltd. (2015) 231 Taxman 82 (Guj.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Interest free security deposit-Sufficient surplus funds- Commercial decision- Deletion of interest was held to be justified.

Assessee was engaged in dealership business of vehicles. Assessee filed its return claiming deduction of interest paid on borrowed capital. Assessing Officer finding that borrowed funds had been used for booking of a property which was to be used as a show room of company in future years, held that money borrowed was not utilised for business purpose.He thus rejected assessee's claim for deduction.Tribunal deleted said disallowance It was noted from records that assessee had sufficient surplus funds for making payment of interest free security deposit to acquire asset in question Even otherwise, it was a commercial decision which could not have been gone into unless Assessing Officer had concrete material to contend that transaction was a sham or illusory . in view of aforesaid, impugned order passed by Tribunal did not require any interference. (AY. 2007-08)

CIT .v. DD Industries Ltd. (2015) 231 Taxman 784 (Delhi)(HC)

S. 36(1)(iii) : Interest on borrowed capital –There was clear nexus of utilization of borrowed fund for earning income in form of interest, rent, and business income of construction- Interest was held to be allowable.

Assessee, a civil engineer was engaged in business of construction activities. Assessee filed his return claiming deduction of interest on loan taken against capital bonds. Assessing Officer rejected assessee's claim holding that payment of interest was a bogus expenditure . Tribunal however noted that there was clear nexus of utilization of borrowed fund for earning income in form of interest, rent, and business income of construction. It was further found that assessee had deducted tax at source on interest payment wherever applicable. Tribunal thus deleted disallowance made by TPO.Finding recorded by Tribunal being a finding of fact, it did not require any interference. (AY. 2009-10)

Principal CIT .v. Ashwin Kantilal Raval (2015) 231 Taxman 615 (Guj.)(HC)

S. 36(1)(iii) : Interest on borrowed capital –Stock in trade- Allowable as deduction.

Where payment of advance was not for acquisition of fixed assets but only for acquiring stock-in-trade, assessee was entitled for deduction in respect of interest on borrowed capital.(AY. 2008-09)

CIT .v. Cellice Developers (P.) Ltd. (2015) 231 Taxman 255 (Cal.)(HC)

S. 36(1)(iii):Interest on borrowed capital-Civil contractor-Entitled to depreciation and interest on estimated profits.[S.32,44AD, 144, 145]

Dismissing the appeal of Revenue the Court held that; if an assessee is entitled to claim deduction of interest, be it under section 36(1)(iii) or any other relevant provision and of depreciation in the ordinary course of assessment, there is no reason why the same facilities should not be extended to him, merely because the profits are determined on the basis of estimation. Depreciation and interest which are otherwise deductible in the ordinary course of assessment retain the same legal character, even where the profits of the assessee are determined on percentage basis. This view gets support from the circular dated August 31, 1965, issued by the Central Board of Direct Taxes. Though the circular was with reference to the Indian Income-tax Act, 1922, it holds good for the analogous provisions under the 1961 Act.

Held, that, on the facts and in the circumstances of the case, the Tribunal was correct in law in directing the Assessing Officer to allow the assessee, a civil contractor, depreciation and interest payments from the estimate of profit made at 12 per cent.(AY. 1994-1995)

CIT v. Ramachandra Reddy (2014) 226 Taxman 206 (Mag.)/ (2015) 372 ITR 77 (T & AP) (HC)

S. 36(1)(iii) :Interest on borrowed capital – AO cannot disallow interest without concrete material to contend that a transaction is a sham.

The assessee was engaged in manufacturing and trading of auto components and dealership business vehicles and filed its return claiming deduction of interest paid on borrowed capital. The AO found that borrowed funds had been used for booking of a property which was to be used as a show room of the assessee company in future years and hence he took a view that money borrowed was not utilised

for business purpose. The Tribunal however deleted the disallowance holding that the assessee had made the advance from his own surplus funds.
The High Court dismissed the department's appeal observed various findings such as the assessee needed the premises, it had a consistent and long standing arrangement with the seller, the security deposit had not been increased for a long time, etc. and held that singling out a factor to hold against the assessee in the absence of any other material establishing dubiousness in the transaction was incorrect.(AY. 2007-2008)
CIT v. DD Industries Ltd. (2015) 117 DTR 355 / 231 Taxman 784 (Delhi)(HC)

S. 36(1)(iii) : Interest on borrowed capital-Sufficient capital and reserve-Advance to sister concern on low rate- No disallowance can be made.
When there was sufficient capital and reserve and surplus at the Assessee's disposal, advance to sister concern on a low interest or without interest having business connection does not prove that Assessee has diverted borrowed funds as interest free loan.(AY.1992-93)
CIT v. Vijay Solvex Ltd. (2015) 274 CTR 384(Raj.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Diversion of borrowed funds to associated concern-Disallowance was held to be justified.
Assessee invested certain sum of money out of borrowed funds in a group concern for the purpose of generation and supply of electricity. The group concern further advanced the said sum as unsecured loan to another group concern which in turn invested the said sum in the shares of the assessee company. Because of the inter connection between the concerns, having common directors, the AO held the transaction as sham transaction and disallowed the interest on borrowed funds. Held:
There being no evidence that the advance made by the assessee was from the funds which the assessee had raised from the shareholders therefore, the interest was rightly disallowed. (AY. 1997-98 to 1999-2000)
CIT v. Bellary Steel & Alloys Ltd. (2014) 223 Taxman 491/(2015) 370 ITR 226 / 114 DTR 287(Karn)(HC)

S. 36(1)(iii) : Interest on borrowed capital –Estimate of net profit rate- Interest on borrowed capital is not allowable.
Deduction on account of interest on borrowed capital is not allowable where income is estimated by applying net profit rate.(AY. 1990-91)
Lali Construction Co. v. ACIT (2015) 229 Taxman 286 (P&H)(HC)

S. 36(1)(iii) : Interest on borrowed capital–Shares and debentures for the purpose of business-Interest was held to be allowable. [S.56]
The assesse firm was engaged in the business of advancing loans and earning income from hire purchase financing, besides investment in shares and debentures .It borrowed funds and invested the same in shares and debentures. It treated the interest arising out of such investments as income from business and claimed interest on borrowed capital under section 36(1)(iii).The AO held that the interest income had to be assessed under the head "other sources" and not under the head "business income" and therefore disallowed the interest on borrowed capital under section 36(1)(iii). On appeal the disallowance was deleted by CIT(A_ and Tribunal. On appeal by revenue dismissing the appeal the Court held that where borrowed capital was invested in shares and debentures for purpose of business, interest paid thereupon would be allowed as deduction.(AY. 1992-93 to 1994-95)
CIT .v. Shriram Investments (Firm) (2015) 229 Taxman 179 (Mad.)(HC)

S. 36(1)(iii) : Interest on borrowed capital –Mixed funds-No diversion of funds as interest free advances-Disallowance was not justified.
Where assessee, engaged in sarafi business, obtained loan from bank, in view of fact that said funds got merged with funds of assessee's other business, but there was no material on record indicating that there was diversion of interest bearing funds as interest free advances, assessee's claim for deduction under section 36(1)(iii) was to be allowed.
CIT v. Rajendra Brothers (2015) 228 Taxman 348(Mag.) (Guj.)(HC)

S. 36(1)(iii) : Interest on borrowed capital –Not utilized for the purpose of business- Kept idle- Not entitled deduction.

Assessee borrowed unsecured loan from friends and relatives and paid interest thereupon . It was found that such borrowed funds were lying idle in an almirah and were never utilised for business purpose. Assessee was not entitled to deduction of interest paid on said loan. (AY. 2001-02)

Tulsi Ram Bhagwan Das Mandi Ghanshyamganj .v. CIT (2015) 228 Taxman 308(Mag.) (All.)(HC)

S. 36(1)(iii) : Interest on borrowed capital - No finding by Assessing Officer that assessee borrowed amount on interest and straightaway passed it on to its sister concern - No disallowance of interest can be made.

Held, dismissing the appeal of revenue, that; since the Assessing Officer could not demonstrate that what was advanced by the assessee to its sister concern was nothing but the amount borrowed from the financial institution, disallowance of interest could not be made.(AY.1992-1993)

CIT .v. Seven Hills Hospitals P. Ltd. (2015) 370 ITR 69 / 229 Taxman 462 (T & AP) (HC)

S. 36(1)(iii) : Interest on borrowed capital-Purchase of immovable property- Interest is held to be allowable.

Where assessee, engaged in business of running pre-schools, took term loan utilised it for acquiring property used for purpose of pre-schooling business, assessee's claim for deduction of interest on said loan was to be allowed . (AY. 2006-07)

ACIT v. Geeta Bhatia (Ms.) (2015) 68 SOT 50(URO) (Mum.)(Trib.)

S. 36(1)(iii) : Interest on borrowed capital-Assessee advancing interest-free funds to sister concern from cash credit account-Advance given out of assessee's own funds to be determined-No addition required if assessee substantiate its claim-Matter remanded.

The assessee had advanced interest-free loans to his sister concern from his cash credit account, against which repayment was received on different dates resulting in outstanding loan. The AOcomputed the interest at 12 per cent. as applicable for cash credit loans and made disallowance on the ground that there was no business nexus between the two business concerns. The CIT(A) confirmed the addition observing that there was no commercial expediency in respect of such interest-free advance. On appeal:

Held, that, if the assessee was able to substantiate its claim that the advance was given out of its own funds, no addition was called for. Matter remanded to the AO. (AY. 2008-2009)

Radha Shyam Panda .v. ITO (2015) 37 ITR 386 (Cuttack) (Trib.)

S. 36(1)(iii):Interest on borrowed capital-Assessee diverting interest bearing funds to sister concern-Disallowance of proportionate interest was held to be proper.

The assessee advanced interest free loans to its sister concern from borrowed capital. The Assessing Officer calculated the proportionate disallowance under the Act, and restricted the disallowance based on the claim of interest. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal:

Held, dismissing the appeal, that admittedly, the assessee had diverted the interest bearing funds to its sister concern. Hence proportionate interest was to be disallowed and the Assessing Officer had fairly restricted the disallowance based on the amount of interest claimed by the assessee. There was no infirmity in the orders of the authorities. (AY. 2010-2011)

Hi Tech Land Developers and Builders v. Add. CIT (2015) 38 ITR 355/69 SOT 245 (Chd.)(Trib.)

S. 36(1)(iii) : Interest on borrowed capital – Broker not confirmed –Disallowance was held to be justified.

Assessee claimed interest paid on loan borrowed from its broker. The said interest was disallowed by the AO. On appeal Tribunal held that in accounts of broker there was no mention of any interest

income and since broker had never confirmed of receiving any interest from assessee, disallowance made was justified.(AY. 1987-88 to 1990-91)
Dhanraj Mills (P.) Ltd. .v. ACIT (2015) 152 ITD 253 (Mum.)(Trib.)

S.36(1)(va):Business expenditure--Delay in deposit of employees' contribution to PF and ESI--Finding that there was no delay--Disallowance held to be not justified[S.37(1)]
An addition of Rs. 47,32,919 was made by the Assessing Officer on account of late deposit of employees' contribution to PF and ESI. The Tribunal while upholding the finding recorded by the Commissioner (Appeals) observed that the amounts had been paid before the due date of filing the return and, therefore, the amounts was allowable. Court held that in view of the finding that there had been no delay in depositing the employees contribution to PF and ESI no addition could be made on that account.(AY.1994-1995 to 1999-2000)
CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P & H) (HC)

S. 36(1)(vii):Bad debt-The principal part of the Inter-corporate Debt (ICD) can be claimed as a bad debt if the interest thereon has been offered to tax in some year.[S.36(2)]
The Assessee made an inter corporate deposit of Rs.1 Crore with M/s. GSB Capital Markets Ltd. Thereafter, during the subsequent Assessment Years, the interest of Rs.42.65 lakh was received and offered for tax. The amount of Rs.49.82 lakhs being the aggregate of the principal amount as well as the interest was treated as doubtful debts from the Assessment Year 1998-99 onwards. In AY 2004-05, a settlement was arrived at between M/s. GSB Capital Market Ltd. and the Assessee whereby an amount of Rs.15 lakhs was paid to the Assessee and the balance amount of Rs.34.82 lakh were written off by the Assessee as bad debts. The Assessee claimed deduction on account of bad debts of Rs.34.82 lakhs being the debts written off out of inter corporate deposit given to GSB Capital Markets Ltd. The AO did not accept the contention and disallowed the claim for bad debts on the ground that the condition of Sections 36(1)(vi) read with Section 36(2)(i) of the Act were not satisfied inasmuch as the amount of Rs.34.82 lakhs being claimed as bad debts was not the income offered to tax either in the relevant Assessment Year or in the earlier Assessment Years. The claim was allowed by the Tribunal. On appeal by the department to the High Court HELD:
So far as first part of Section 36(2)(i) of the Act is concerned, the Assesee had during the earlier Assessment Years offered to tax an amount of Rs.42.65 lakhs received as interest on the deposit made with M/s. GSB Capital Market Ltd. The Appellant had since Assessment Year 1998-99 claimed an amount of Rs.49.82 lakhs as doubtful debts from M/s. GSB Capital Market Ltd. This consisted of the aggregate of principal and interest payable by M/s. GSB Capital Market Ltd. It was in the subject Assessment Year that a settlement was arrived at between the parties and the Assessee received Rs.15 lakhs from M/s. GSB Capital Market Ltd. and the balance amount of Rs.34.82 lakhs being non recoverable was being claimed as bad debts by writing off the same in its books of account. It would thus be noticed the amount of Rs.34.82 lakhs which constitutes partly the principal amount of the inter corporate deposits and partly the interest which is unpaid on the principal debt. The Assessing Officer's contention that amount of Rs.34.82 lakhs was not offered to tax earlier and, therefore, deduction under Section 36(2)(i) of the Act is not available, is no longer res integra. This very issue came up for consideration before this Court in Shreyas S. Morakhia 342 ITR 285 wherein the assessee was a stock broker and engaged in the business of sale and purchase of shares. The brokerage payable by the client was offered for tax. Subsequently, it was found that the principal amount which was to be received from its clients would not be received. The assessee sought to claim as bad debts not only the brokerage amounts not received but the aggregate of principal and brokerage amounts not received in respect of the shares transacted. This Court held that the debt comprises not only the brokerage which was offered to tax but also principal value of shares which was not received. Therefore, even if a part of debt is offered to tax, Section 36(2)(i) of the Act, stands satisfied. The test under the first part of Section 36(2)(i) of the Act is that where the debt or a part thereof has been taken into account for computing the profits for earlier Assessment Year, it would satisfy a claim to deduction under Section 36(1)(vii) read with Section 36(2)(i) of the Act.(ITA no. 1590 of 2013, dt. 05.08.2015) (AY.2004-05)
CIT .v. Pudumjee Pule & Paper Mills Ltd.(Bom.)(HC); www.itatonline.org

S. 36(1)(vii) : Bad debt –Debit balances written off- Appellate Tribunal-Claim was not pressed before the Tribunal because of erroneous understanding of its authorized representative-Matter was set aside. (S. 253)

Allowing the appeal the Court held that , where claim of deduction under section 36(1)(vii) being small debit balances written off as bad debts was not pressed before Tribunal because of erroneous understanding of its authorised representative, assessee could be allowed an opportunity to establish and prove this claim. Matter remanded.(AY. 1998-99)

Crompton Greaves Ltd. v.ACIT (2015) 230 Taxman 509 (Bom.)(HC)

S. 36(1)(vii) : Bad debt–For claiming bad debt it was not necessary for assessee to close individual account of each of its debtors in its books.

Assessee was a co-operative Bank and claimed deduction in respect of bad debt. Assessing Officer denied deduction on ground that assessee was trying to recover amount treated as bad debts. Where assessee had written off bad debt in its books of account and simultaneously reduced corresponding amount from loans and advances to debtors, assessee would be entitled to deduction under section 36(1)(vii); it was not necessary for assessee to close individual account of each of its debtors in its books. (AY. 2007-08)

CIT .v. Newanagar Co-operative Bank Ltd. (2015) 229 Taxman 201 (Guj.)(HC)

S. 36(1)(vii) : Bad debt–Irrecoverable debt-Allowable as bad debt.

Assessee company was engaged in business of hire purchase, leasing and providing consumer durable loans. Assessee claimed bad debts on account of irrecoverable debts .It is not necessary for assessee to establish that debt has become irrecoverable as it is enough if bad debt is irrecoverable in accounts of assesse, therefore, debts claimed by assessee would be allowed.(AY. 2002-03 to 2005-06)

Citi Financial Retail Services India Ltd. .v. ACIT (2015) 228 Taxman 258 (Mag.) (Mad.)(HC)

S. 36(1)(vii) : Bad debt–It is not necessary that same has been offered as income liable to tax in earlier years or that same has become bad .

In order to claim a particular debt as bad, all that assessee is required to show is that said amount is written off in books of account; and it is not necessary that same has been offered as income liable to tax in earlier years or that same has become bad.

CIT v. Essar Teleholdings Ltd. (2015) 228 Taxman 309 (Mag.) (Bom.)(HC)

S. 36(1)(vii) : Bad debt –Advance to sister concern- Genuine of transaction was not proved-Claim as bad debt was held to be not allowable.

Assessee's sister concern was acting as sub-broker. Said sister concern failed to pay amount of debt. Assessee company claimed that amount as a bad debt, however, Tribunal found that a book entry was made to claim bad debts as a means to reduce taxable profits - Whether since entire process was a mere eye-wash, this was not a fit case where substantial questions of law arose for determination in Appeal . (AY. 2004-05)

Sovereign Securities (P.) Ltd. .v. ITO (2015) 228 Taxman 309 (Mag.) (Bom.)(HC)

S.36(1)(vii):Bad debt-Simple write off in books of account sufficient for claiming bad debts-Debt need not be proved as bad.

The Assessing Officer disallowed debts due from the Ministry of Defence and loss on account of irrecoverable advances which was made for development of moulds on the ground that they represented capital loss. The Commissioner (Appeals) confirmed this. On appeal :

Held, that bad debts written off in the books of account were to be allowed as deduction as a simple write off in the books of account was sufficient for claiming deduction and the debt need not be proved as bad. (AY. 2004-2005, 2008-2009)

Devendra Exports P. Ltd. v. ACIT (2015) 38 ITR 744 (Chennai)(Trib.)

S. 36(1)(viia) : Provision for bad and doubtful debts - Schedule bank-Rural branch-Even provisional figures of census data available on first day of relevant financial year can be taken into consideration- Not entitled deduction.

The assessee was a scheduled bank of the Government of India. It, relying upon census of 1991, declared it as a 'rural bank' and claimed deduction under section 36(1)(*viia*).

The revenue authorities, relying upon provisional data of census of 2001, concluded that the assessee was not a rural branch. Accordingly, the assessee's claim for deduction under section 36(1)(*viia*) was disallowed.

The Tribunal confirmed order passed by authorities below.On appeal, the assessee contended that since census data of 2001 was finally published after first day of previous year, it could not be taken into consideration while disposing of aforesaid claim. Dismissing the appeal of assessee the Court held that in order to determine status of a bank as a 'rural branch' for allowing benefit of deduction under section 36(1)(viia) even provisional figures of census data available on first day of relevant financial year can be taken into consideration and if figure shown in provisional population total in a village exceeds 10,000, then bank would not satisfy requirement of rural branch and, consequently, would not be entitled to benefit granted to rural branch.(AY. 2003-04, 2004-05)

State Bank of Mysore .v. ACIT (2015) 231 Taxman 319 (Karn.)(HC)

S.36(2):Bad debt-Not allowable if debt not taken into account while computing income of assessee in any previous year-Allowable as business expenditure. Matter remanded.[S.28(i), 37(1)]

Bad debt is not allowable if debt not taken into account while computing income of assessee in any previous year. Whether can be allowable as business expenditure. Matter remanded.(AY. 2006-2007, 2008-2009)

Dy.CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183(Cochin)(Trib.)

S. 37(1):Business expenditure-Legal expenses incurred for protecting the business of the firm-Held to be allowable business expenditure.

Tribunal held that the legal expenses incurred for defending the business of the going concern and for protecting its interest could not be said to be personal in nature nor could it could be said that the expenses were unreasonable or not bona fide. High Court reversed the finding of Tribunal . On appeal allowing the claim the Court held that the High Court was not justified in upsetting a finding of fact arrived by the Tribunal particularly in the absence of a substantial question of law being framed in this regard . Accordingly the order of Tribunal was restored.(Civil Appeal No. 10547-10548 of 2011, dt. 15.10.2015)(AY.1995-96)

Mangalore Ganesh Beedi Works .v. CIT (SC); www.itatonline.org

S. 37(1): Business expenditure –Commission-Commission expense disallowed when the Assessee did not provide sufficient proof of its payment and when agents could not have been appointed by the Assessee.

The Assessee, a manufacturer of alcoholic beverages, claimed that it had paid commission to agents who would coordinate with retailers and State Corporations to ensure continuous supply of alcohol to the ultimate consumer. The SC upheld the order of the HC in disallowing the claim by the Assessee since sufficient documents were not filed by it to prove its claim. The HC after looking into Government circulars which prohibited liaisoning by manufacturers to obtain supply order and affidavits filed by Government agencies to the effect that no liaisoning activity was conducted by the said agent appointed by the Assessee, held that commission expense incurred by the Assessee was to be disallowed.

McDowell & Co. Ltd. v. Dy. CIT (2015) 116 DTR 233 (SC)

S. 37(1) : Business expenditure-Commission-Agreement-AO has to consider relevant facts and determine according to law-On facts the disallowance of commission was held to be justified, mere existence of agreement was not sufficient.

The question that was posed by the High Court was whether acceptance of the agreements, affidavits and proof of payment would debar the assessing authority to go into the question whether the

expenses claimed would still be allowable under Section 37 of the Act. This is a question which the High Court held was required to be answered in the facts of each case in the light of the decision of this Court in Swadeshi Cotton Mills Co. Ltd. v. CIT (1967)63 ITR 57 (SC) and Lachminarayan Madan Lal vs. CITl(1972)86 ITR 439(SC). In Lachminarayan it was held that "The mere existence of an agreement between the assessee and its selling agents or payment of certain amounts as commission, assuming there was such payment, does not bind the Income Tax Officer to hold that the payment was made exclusively and wholly for the purpose of the assessee's business. Although there might be such an agreement in existence and the payments might have been made. It is still open to the Income tax Officer to consider the relevant facts and determine for himself whether the commission said to have been paid to the selling agents or any part thereof is properly deductible under Section 37 of the Act." There were certain Government Circulars which regulated, if not prohibited, liaisoning with the government corporations by the manufacturers for the purpose of obtaining supply orders. The true effect of the Government Circulars along with the agreements between the assessee and the commission agents and the details of payments made by the assessee to the commission agents as well as the affidavits filed by the husbands of the partners of M/s.R.J. Associates were considered by the High Court. In performing the said exercise the High Court did not disturb or reverse the primary facts as found by the learned Tribunal. Rather, the exercise performed is one of the correct legal inferences that should be drawn on the facts already recorded by the learned Tribunal. The questions reframed were to the said effect. The legal inference that should be drawn from the primary facts, as consistently held by this Court, is eminently a question of law. No question of perversity was required to be framed or gone into to answer the issues arising. In fact, as already held by us, the questions relatable to perversity were consciously discarded by the High Court. We, therefore, cannot find any fault with the questions reframed by the High Court or the answers provided. Civil appeal of assessee was dismissed.

Premier Breweries Ltd. v.CIT(2015) 372 ITR 180/ 230 Taxman 575(SC)

S. 37(1) : Business expenditure– Capital or revenue-Processing charges for financing stock – Revenue expenditure.

Where loan raised from bank was used by assessee for financing its stock, processing charges incurred for raising said land was an allowable expenditure. (AY. 2008-09)

CIT .v. Cellice Developers (P.) Ltd. (2015) 231 Taxman 255 (Cal.)(HC)

S. 37(1):Business expenditure-Capital or revenue- Expenditure to protect the property is capital in nature- Depreciation is also not allowable on said expenditure. [S. 32]

Dismissing the appeal of assesse the Court held; that expenditure incurred to protect the property is capital in nature and the expenditure o has been incurred so as to complete the title/ ownership of the land. Therefore, the above expenditure cannot be attributed to the construction of the building hence depreciation is also not allowable. (AY.1990-91)

Sandvik Asia Limited v. DCIT(2015) 378 ITR 114(Bom.)(HC)

S. 37(1):Business expenditure-Expenses for tea, coffee, cold drinks and snacks - Tribunal sustaining disallowance on estimate basis and deleting balance-Question of fact.

The assessee spent a sum of Rs. 16,885 on tea, coffee, cold drinks and snacks which was disallowed by the Assessing Officer under section 37(2). The Tribunal sustained the disallowance of Rs. 5,000 on estimate basis and deleted the balance. The Tribunal had given the relief on estimate basis, which was a question of fact. (AY 1997-1998)

Sai Computers P. Ltd..v. JCIT (2015) 375 ITR 285 (All.)(HC)

S. 37(1):Business expenditure-Hospital-Daughter of managing director working in hospital as doctor-Expenditure on higher studies of doctor-Doctor coming back to work in hospital-Expenditure had nexus with business of assessee.

Held, before the expenditure was incurred, the daughter had acquired a degree in medicine. She was employed. Apart from the fact that she was the daughter of the managing director and the chief executive, she was an employee of the assessee. She was sent outside the country for acquiring higher educational qualification, which would improve the services, which the assessee was giving to its

patients. It was in this context, that the sum of Rs. 5 lakhs was spent. That was not in dispute. After acquiring the degree, she had come back and she was working with the assessee. Therefore, there was a direct nexus between the expenses incurred towards her education, with the business, which the assessee was carrying on. In that view of the matter, the expenditure was deductible. (AY 2005-2006)
Mallige Medical Centre P. Ltd. .v. JCIT (2015) 375 ITR 522 (Karn.)(HC)

S.37(1):Business expenditure-Capital or revenue-Fluctuation in price of foreign currency-Increase in price of raw material-Extra amount paid deductible as revenue expenditure.
Dismissing the appeal of revenue the Court held that the extra amount paid on account of fluctuations in the rate of foreign exchange was deductible as revenue expenditure.(v) (AY. 1994-1995, 1995-1996)
CIT .v. Tony Electronics Ltd. (2015) 375 ITR 431 (Delhi)(HC)

S. 37(1):Business expenditure-Method of accounting-Accounting Standards issued by Institute of Chartered Accountants of India-Not to be disregarded-That at relevant time accounting standard employed by assessee not notified by Central Government-Not a ground to discard-Lease equalisation charges-Deductible from lease rental income. [S. 145]
Held, dismissing the appeals, (i) that the Assessing Officer could not have disregarded the method of accounting followed by the assessee in respect of the lease rentals as it was based on a guideline commended for adoption by a professional body such as the Institute of Chartered Accountants of India. The guidance note reflected the best practices adopted by accountants the world over. The fact that at the relevant point in time, it was not mandatory to adopt the methodology professed by the guidance note issued by the Institute of Chartered Accountants of India was irrelevant because as long as there was a disclosure of the change in the accounting policy in the accounts, which had the backing of a professional body such as the Institute of Chartered Accountants of India, it could not be discarded by the Assessing Officer. This was specially so, since the Institute of Chartered Accountants of India is recognised as the body vested with the authority to recommend accounting standards for ultimate prescription by the Central Government in consultation by the National Advisory Committee of Accounting Standards, for presentation of financial statements. The provisions of section 211(3C) of the Companies Act, 1956, are quite clear on this aspect. The proviso to the sub-section, quite clearly specifies that till such time the Central Government prescribes the accounting standards, the accounting standards issued by the Institute of Chartered Accountants of India shall be deemed to be the relevant accounting standards.
(ii) That Accounting Standard 1 pertaining to disclosure of accounting policies had already been notified by the Institute of Chartered Accountants of India as having attained mandatory status for periods commencing on or after April 1, 1991. It was not the Assessing Officer's case that the accounting policy with regard to the lease rentals was not disclosed by the assessee. The Assessing Officer took exception to the change in the accounting policy having been brought about only with effect from the assessment year 1996-97. As long as there was a disclosure of the factum of change in the accounting policy and its effect in the accounts no fault could be found with the change in the accounting policy merely on account of the fact that it was employed for the first time in the assessment year 1996-97. The change in the accounting policy had the imprimatur of a duly recognised professional body, i.e., the Institute of Chartered Accountants of India. Therefore, notwithstanding the fact that the opinion of the Institute of Chartered Accountants of India was expressed in a guidance note which had not attained a mandatory status, would not provide a basis to the Assessing Officer to disregard the books of account of the assessee and in effect the method of accounting for leases followed by the assessee.

(iii) That the word "may" normally indicates that the provision is not mandatory. It is also true that the word "may" can also be used in the sense "shall" or "must" by the Legislature. The intent of the Legislature, however, will have to be gathered from the scheme of the relevant provision, Chapter or the relevant statute and also judicial pronouncements dealing with the relevant provision. Having regard to the provisions contained in section 145 the word "may" used in sub-section (2) thereof cannot be read as "shall". Merely because the Central Government has not notified in the Official Gazette "accounting standards" to be followed by any class of assessees or in respect of any class of

income, it could not be stated that the "accounting standards" prescribed by the Institute of Chartered Accountants of India or the accounting standards reflected in the "guidance note" cannot be adopted as an accounting method by an assessee. (AY. 1996-1997 to 1999-2000)
Chandana Leaphin Finance Ltd..v. CIT (2015) 374 ITR 681 (T & AP) (HC)
Pact Securities and Financial Ltd v. CIT (2015) 374 ITR 681 (T&P)(HC)

S.37(1):Business expenditure-Capital or revenue- Technical services- Royalty- intranet facility, Technical know how-Revenue in nature.[S. 32,35AB]
Expenditure for technical services, royalty, intranet facility, technical know-how is held to be revenue in nature. (AY.2002-2003, 2003-2004)
CIT .v. Denso India Ltd. (2015) 374 ITR 62 (Delhi)(HC)

S.37(1):Business expenditure-Scientific research-Expenditure recognised by competent authority. Provision not warranting capitalisation of amount in books of account is allowable.[S.35]
Held, dismissing the appeal, that the Revenue could not state that on a plain reading of section 35 that there was no requirement of any project being completed or the entire amount capitalised in the books of account as reported by the auditors. The reasoning of the Tribunal was not only in consonance with the factual position but the plain language of section 35. The Tribunal had also taken care to observe that when the Assessing Officer found that the expenditure on research and development was eligible for deduction under the same provision in the subsequent year then the view taken by the Assessing Officer all the more could not be sustained.(AY. 2003-2004, 2006-2007)
CIT .v. Hindustan Construction Co. Ltd. (2015) 374 ITR 101 (Bom.)(HC)

S. 37(1):Business expenditure-Contribution by law firm to IFA to create awareness of its activities is business expenditure
The assessee agreed to contribute Rs. 50 lakhs to the Indian branch of the International Fiscal Association (IFA) on progressive basis towards the cost of constructing one of its meeting halls on the understanding that the hall would be named after the Assessee firm. The AO held the payment of Rs. 19 lakhs made by the Assessee as aforementioned was not for business purposes. The CIT (A) upheld the order of the AO. The ITAT accepted the explanation of the Assessee that the IFA was a professional body and a non-profit organisation engaged in the study of international tax laws and policies. It, inter alia, undertakes research, holds conferences and publishes materials for the use of its members. Mr. Ajay Vohra, one of the partners of the Assessee firm, was also a member of the executive body of the IFA. In the facts and circumstances, the contribution made by the Assessee to the IFA was held to be for inter alia creating greater awareness of the Assessee firm's activities and therefore expenditure incurred for the purposes of the profession of the Assessee. It was accordingly held to be allowable as a deduction under Section 37(1) of the Act. Further, since the Indian branch of IFA was a non-profit organisation registered under Section 12 AA of the Act, its income was not taxable and the question of deducting tax at source from the payment made to it in terms of Section 40 (a) (ia) did not arise.The decision of the ITAT that the contribution made by the Assessee to the Indian branch of the IFA, in the manner and in the circumstances noted hereinbefore, would create greater awareness of the Assessee firm and therefore for its business purposes was a possible view to take. No substantial question of law arises as regards this issue as well. (AY.2009-10)
CIT .v. Vaish Associates (Delhi) (HC); www.itatonline.org

S. 37(1):Business expenditure–Lease hold rights-Proceedings against partner-Compromise amount paid by firm-Held to be allowable.
One of two partners in assessee-firm brought in leasehold rights as its share .Other partners shared benefits of lease and agreed to share burden if any . Subsequently a suit was filed by landlord of leasehold property against one of partner, resulting in a compromise between them and with a liability to pay a specified sum which was paid by firm .leasehold rights had formed part of assets of firm and, therefore, those having been terminated resulting in legal proceedings though only against one of partners, compromise amount paid by firm would be allowed as deduction in firm's hands. (AY. 2003-04)

CIT v. Sports field Amusement (2015) 231 Taxman 252 (Bom.)(HC)

S.37(1):Business expenditure–Non-resident- Head office expenses on behalf of Indian Branch of assessee- Deductible- Provision of section 44C is not applicable. [S.44C]
Head office expenses on behalf of Indian Branch of assessee is deductible and provision of section 44C is not applicable. (AY. 1997-98)
DI(IT) v. Credit Agricole Indosuez (2015) 377 ITR 102 (Bom.)(HC)

S.37(1):Business expenditure-Capital or revenue-Business of marketing bulk drugs, formulations-One of assessee's ventures ending in loss-Loss attributable to business-No new line of business-Allowable as revenue expenditure.
Held, dismissing the appeal, that it was not on a new line of business on which loss occurred. The parameters necessary for the expense to be treated as revenue expenditure were squarely attracted to the facts, justifying the loss of the assessee as a business loss, as admittedly, the assessee was in the business of marketing bulk drugs, formulations and one of its ventures had ended in a loss and that loss was attributable to business and it could not be deemed to be a new enterprise and a capital expenditure. (AY. 1996-1997)
CIT v. Saka marketing Services P. Ltd. (2015) 373 ITR 330 (Mad.)(HC)

S. 37(1): Business expenditure-Capital or revenue-Replacing the floor, furniture and carpet-Revenue expenditure.
Expenditure incurred for replacing the floor, furniture and carpet area allowable as revenue expenditure as on its incurrence, no new asset has come into existence.(AY. 2001-02)
CIT v. MAC Charles (India) Ltd. (2015) 273 CTR 596 / 233 Taxman 177 (Karn.)(HC)

S. 37(1): Business expenditure-Capital or revenue-Amount paid to regain unit which was not in its possession, provided enduring benefit and was capital in nature.
The Assessee paid an amount to regain a unit which was earlier leased to a third party due to the unit's labour problems. The amount was claimed as a revenue expenditure which was disallowed by the AO. It was held that the amount was capital in nature since it was paid to re-transfer the unit to the Assessee which provided an advantage of enduring benefit. The amount was paid to regain the unit which was not in its possession and was thus, capital in nature. (AY. 1999-2000)
CITv. McDowell & Co. Ltd. (2015) 116 DTR 75 (Karn.)(HC)

S.37(1):Business expenditure-Advertisement expenses-Expenditure incurred not in nature of advertisement-Rule 6B not applicable-No disallowance could be made.[R.6B]
Court held that the expenditure incurred by the assessee was not in the nature of advertisement and no disallowance under rule 6B could be made.CIT v. Allana Sons P. Ltd. [1995] 216 ITR 690 (Bom.) followed.
(AY. 1986-1987, 1987-1988)
CIT v. Dharamsi Morarji Chemicals co. Ltd. (2015) 373 ITR 545 (Bom.)(HC.)

S.37(1):Business expenditure-Production incentives-Held to be allowable.
Court held that as far as the assessee's claim for production incentives was concerned, the Tribunal held that once the Revenue could not establish that the nature of production of incentive payments for the assessment year 1987-88 was different from the earlier years then the Tribunal's view for the earlier assessment year on the facts would bind the Revenue. Thus, such view could not give rise to any substantial question of law. (AY. 1986-1987, 1987-1988)
CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

S.37(1):Business expenditure-Ex gratia payments to retiring employees-Deductible.
Ex gratia payments to retiring employees is held to be allowable. CIT v. Maina Ore Transport (P.) Ltd. [2010] 324 ITR 100 (Bom.) followed.(AY. 1986-1987, 1987-1988)
CIT .v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

S. 37(1):Business expenditure-Matching concept–Ascertained liability was allowable expenditure when the corresponding income was already offered to tax. [S. 4, 145]

Assessee made a provision for supplies at the rate of 6.5% of the supplies for possible loss due to deduction by the Government for not keeping the supplies to the satisfaction of the Department. The AO disallowed the same stating that it was contingent in nature. It was held that the provision was an allowable expenditure since the liability was ascertained and the Government had in fact deducted at the rate of 10%. Once the entire receipt was shown as income, the corresponding expenditure ought to be allowed. (AY. 1977-78)

CIT v. Om Metals & Mineral (P) Ltd. (2015) 373 ITR 406 /116 DTR 407 (Raj.)(HC)

S.37(1):Business expenditure-Capital or revenue-Technical collaboration agreement-The very nature of a license agreement is that it is not of a permanent nature. The fact that the payment is spread over a period of 10 years does not make the assessee the owner of the technical knowhow. The payment is not of an enduring nature.

The department argued before the High Court that the reliance placed by the ITAT on the decisions in Premier Automobiles Ltd. vs. CIT, (1984) 150 ITR 28 (Bom.) and Travancore Sugars and Chemicals Ltd. vs. CIT (1966) 62 ITR 566 (SC), to hold that the payment of technical knowhow fees is revenue in nature is misplaced because in those cases the assessees were manufacturing units and therefore different considerations would apply. It was urged that inasmuch as the essential business of the Assessee was entirely dependent on the technical knowhow provided by SMCL, the benefit to the Assessee was of an enduring nature and the expenditure incurred should be treated as capital expenditure. HELD by the High Court dismissing the appeal:

A perusal of the TCA shows that the payment by the Assessee to SMCL is for the technical knowhow given to the Assessee as a Licensee. Although the payment is spread over a period of 10 years, it does not make the Assessee the owner of the technical knowhow. The very nature of the license agreement is that it is not of a permanent nature. The view taken by the CIT (Appeals), and concurred with by the ITAT, cannot in the circumstances be said to be improbable or contrary to the settled legal position. The Court, therefore, concurs with the view of the CIT (A) and the ITAT that the benefit to the Assessee as a result of payment of royalty for technical knowhow was not of an enduring nature, and therefore cannot be construed to be a capital expenditure. (AY. 2008-09 to 2010-11)

CIT v. SMCC Construction India Ltd. (Delhi)(HC); www.itatonline.org

S. 37(1): Business expenditure–Expenditure on construction/ acquisition of new facility subsequently abandoned is allowable in the year of write-off.

The High Court allowing the assessee's appeal relied on the decision of the Supreme Court in the case of CIT v. Indian Mica Supply Co. Pvt. Ltd. (1970) 77 ITR 20 and held that the decision of the assessee to abandon the project was the cause for claiming deduction and further the decision was made in the relevant year and hence it could be said that the expenditure, allowable for a deduction, arose in the relevant year. (AY. 2002-2003)

Binani Cement Ltd. .v. CIT (2015) 233 Taxman 340 / 277 CTR 49 / 118 DTR 61 (Cal.)(HC)

S.37(1):Business expenditure–Capital or revenue-Pre-capitalisation costs-Expanding its business into polyester films, pharma chemical business and industrial fabrics - Interlacing and intermingling of funds between new and existing venture - Revenue expenditure.

The assessee was engaged in the manufacture of nylon tyre cord fabrics, packaging film, fluorochemicals, chloromethane and refrigerant gases. During the assessment year 2005-06, it expanded its business in polyester films at Indore, pharma chemical business at Bhiwadi and industrial fabrics business at Trichy. Towards these, it claimed the expenses to the tune of Rs.7,03,95,000 as pre-capitalisation costs. The Assessing Officer as well as the Commissioner (Appeals) disallowed the claim. The Tribunal allowed the pre-capitalisation expenditure as revenue in nature, holding that there was an element of interlacing and intermingling of funds between the new or the expanding venture and the existing venture, and, consequently, it treated the expenses as falling on the revenue side. On appeal:

Held, dismissing the appeal, that the expenses to the tune of Rs.7,03,95,000 as pre-capitalisation costs were allowable as revenue expenditure.(AY. 2005-2006)

CIT v. SRF Ltd. (2015) 372 ITR 425 / 232 Taxman 727 (Delhi)(HC)

S. 37(1):Business expenditure–Capital or revenue- Paper industry - Condition of National Forest Policy of 1988 that all forest-based industries must take up plantation to maintain forest ecology - Plantation expenditure - Revenue expenditure.

The assessee was a manufacturer of paper based on forest wood. It was laid down in the National Forest Policy of 1988 that all forest-based industries must take up plantation so that forest ecology was maintained. The assessee incurred a sum of Rs.14,78,231 on eucalyptus tree plantation.Held, the pre-plantation expenditure claimed by the assessee was allowable as revenue expenditure.

CIT v. Orient Paper and Industries Ltd. (2015) 372 ITR 680 (Cal.)(HC)

S. 37(1): Business expenditure-Amount paid to employees under voluntary retirement scheme-Expenditure incurred on ground of commercial expediency-Expenditure laid out wholly and exclusively for purposes of business of assessee-Allowable.

The claim of the assessee on account of voluntary retirement scheme payments was allowable as revenue expenditure.

CIT v. Orient Paper and Industries Ltd. (2015) 372 ITR 680 (Cal.)(HC)

S. 37(1):Business expenditure - Capital or revenue - Expenditure on replacement of membrane in cell plant - Held to be of revenue nature in earlier years - Principle of consistency in tax matters should be followed.

The AO treated the expenditure on replacement of remembering in membrane cell-1 plant as capital expenditure which was shown by the assessee in the books of account as revenue expenditure. However, for earlier years, the Tribunal had held that such expenditure was treated as revenue expenditure by the Assessing Officer himself and there being no material to make a departure from the earlier view, the rule of consistency should be followed.(AY. 1999-2000, 2000-2001)

CIT v. Gujarat Alkalies and Chemicals Ltd. (2015) 372 ITR 237/230 Taxman 433 (Guj.)(HC)

S. 37(1): Business expenditure-Capital or revenue -Collaboration agreement with foreign company - Amounts paid for technical assistance, model fee and technical guidance fee - Revenue expenditure.

Held, the payments in question were for the right to use or rather for access to technical know-how and information. The ownership and the intellectual property rights in the know-how or technical information were never transferred or became an asset of the assessee. The ownership rights were ardently and vigorously protected by Honda. The proprietorship in the intellectual property was not conveyed to the assessee but only a limited and restricted right to use on strict and stringent terms were granted. The ownership in the intangible continued to remain the exclusive and sole property of Honda. The information, etc., were made available to the assessee for day-to-day running and operation, i.e., to carry on business. In fact, the business was not new. Manufacture and sales had already commenced under the agreement dated January 24, 1984. After expiry of the first agreement, the second agreement dated June 2, 1995 ensured continuity in manufacture, development, production and sale. The period of the agreement 10 years, would be inconsequential for the agreement merely permitted and allowed use of technology subject to payment of royalty and compliances and the proprietorship and ownership right was never granted or transferred. The factum that after 10 years and after returning the tangible properties, the assessee could still have continued to use the technical know-how and information would be a trivial and inconsequential factum as in the automobile industry, technology upgradation is constant and rapid. For 1996-97, the Tribunal had held that the fee was revenue expenditure. The amount was, therefore, deductible.(AY.2000-2001 to 2002-2003)

CIT v. Hero Honda Motors Ltd. (2015) 372 ITR 481/276 CTR 249/230 Taxman 58/ 116 DTR 185 (Delhi)(HC)

S. 37(1): Business expenditure - State financial corporation - Guarantee commission paid to State Government - Commission paid for business purposes - Deductible.

The assessee was created under the State Financial Corporations Act, 1951, for the State of Andhra. Held, that the levy or payment of guarantee commission to the State Government was not something

foreign or unrelated to the activities contemplated under the 1951 Act, by offering itself as guarantor for repayment of the amounts covered by the bonds and dividends raised by the assessee, the State Government was certainly exposed to the liability and the State Government levied the guarantee commission to cover the risk. The transaction was in the form of an agreement between the State Government, on the one hand, and the assessee, on the other. Taking into account the structure of the 1951 Act, the provision for the payment of guarantee commission was not extraordinary so as to be said to be impermissible. Therefore, the payment was deductible.(AY.1990-1991, 1991-1992)
Andhra Pradesh State Financial Corporation v. Dy.CIT(A) (2015) 372 ITR 315 (T & AP) (HC)

S. 37(1): Business expenditure –Deferred interest liability-Mercantile system of accounting-Held to be allowable.[S.145]
Assessee was an undertaking of Government of Karnataka engaged in food and civil supplies activities in State. Assessee in order to purchase food grains was getting government aid, however, assessee was claiming deductions of interest proportionate to food grains sold and in respect of interest relatable to food grains unsold was carried forward to next year and after sale of food grains, deductions was claimed. From current year they switched on to mercantile system of accounting. In that year, assessee claimed deductions of interest in respect of food grains which were sold and unsold and also interest proportionate to food grains sold which were of preceding year. Allowing the appeal of assessee the Court held that ,there was no double benefit claim and Tribunal was not right in law in disallowing claim of deduction of deferred interest liability relating to stock of food grains purchased during preceding assessment year but sold during current assessment year.(AY. 1985-86)
Karnataka Food & Civil Supplies Corporation Ltd. v. CIT (2015) 230 Taxman 645 (Karn.)(HC)

S. 37(1) : Business expenditure-Capital or revenue-Convertible debentures- Capital expenditure.
Expenditure on issue of convertible debentures is directly related to expansion of capital base of company and is a capital expenditure. (AY. 1994-95)
Torrent Pharmaceuticals Ltd. v. ACIT (2015) 230 Taxman 204 (Guj.)(HC)

S. 37(1):Business expenditure-Advertisement expenses-Prior period expenses- Matter remanded.
Tribunal rejected assessee's claim for deduction of advertisement expenses on ground that same were prior years expenses. On appeal the Court held that , Tribunal omitted from consideration totally its own order passed for prior assessment years wherein it allowed such deduction holding that when bills were received in current year, expenditure would arise to assessee in current year, therefore on facts order of Tribunal was to be set aside and assessee was to be granted an opportunity of raising this plea before Tribunal again and producing all materials relevant to claim. Matter remanded.(AY. 1998-99)
Crompton Greaves Ltd. v. ACIT (2015)230 Taxman 509 (Bom.)(HC)

S. 37(1) : Business expenditure- Network repair and maintenance-Mercantile system of accounting – Provision- Held to be allowable.[S.145]
Assessee claimed network repair and maintenance, etc. expenses which was due and payable. Revenue observed that expenditure should not be allowed as it had not been incurred but only a provision had been made which were for non-existing liabilities and same was not quantified. Dismissing the appeal of revenue the Court held that; since assessee followed mercantile system of accountancy and in said system, expenditure was not confined to money actually paid towards a liability, but would cover a liability accrued or had been incurred in praesenti, although discharge could be at a future date, therefore, impugned expenditure was to be allowed.(AY.2003-04)
CIT v. Vodafone Essar South Ltd. (2015) 230 Taxman 541 (Delhi)(HC)

S. 37(1) : Business expenditure – Capital or revenue- Brand launch expenses-Deferred revenue expenditure-Whole expenditure of revenue in nature is allowable as deduction in the current year.

Assessing Officer held that brand launch expenses were of revenue nature, he treated same as deferred revenue expenditure and spread said expenditure over 5 years and allowed 1/5th of same during current year. Dismissing the appeal of revenue the Court held that; since impugned expenditure was revenue in nature, whole of said expenditure was allowable in current year. (AY. 2003-04)
CIT v. Vodafone Essar South Ltd. (2015) 230 Taxman 541 (Delhi)(HC)

S. 37(1):Business expenditure-Amount paid to sister concern- Conference, seminars and professional services-Matter remanded to produce the evidence.
Assessee claimed deduction of a sum paid to its sister concern on account of conferences and seminars and professional services ,but no further details were presented to justify that said expenses were incurred wholly for business purposes nor could assessee explain any business expediency of incurring said expenditure. Assessing Officer made disallowance. In appeal before the Court the Assessee submitted that an opportunity should be granted to it to produce all relevant evidences to show business expediency for incurring said expenditure. Matter remanded to readjudication.
S.R. Batliboi & Associates v. CIT (2015) 230 Taxman 433 (Cal.)(HC)

S. 37(1) : Business expenditure P**rovision for warranty is allowable as deduction.**
Dismissing the appeal of revenue the Court held that the provision for warranty is allowable.(AY. 1997-98)
Jt.CIT v. Kevin Enterprise (2015) 230 Taxman 315 (Guj.)(HC)

S.37(1):Business expenditure-Provision for obsolescence in inventory was an allowable deduction -Accounting treatment and presentation in financial statements of transactions should be covered by a substance and not merely by legal form.[S. 145]
Assessee was carrying on business in manufacture and trading of computer hardware. It made provision for obsolescence in inventory as hardware manufactured by it had become obsolete due to changed technology .According to revenue, once items had become obsolete and market value had become nil, they ought to have reduced value of inventory, instead value of these obsolete items was shown in inventory, and provision for obsolescence was made and benefit was claimed, which was not permissible in law. Dismissing the appeal of revenue, the Court held that; since accounting treatment given by assessee was in compliance with provisions of AS-2 and assessee was following this mode regularly, provision for obsolescence in inventory was an allowable deduction. (AY. 2001-02)
CIT v. IBM India Ltd. (2015) 230 Taxman 544 (Karn.)(HC)

S. 37(1) : Business expenditure – Commercial expediency- In order to avoid execution of said decree against it by way of attachment, arrest and to protect name of assessee, said amount was paid by assessee- Held to be allowable.
Assessee, alongwith others, secured loan taken by company 'E' by executing bills of exchange which were accepted on behalf of assessee by its managing director. When default was committed, creditors moved High Court for repayment of loans against 'E' and, thus, co-acceptors of bills of exchange. Suit was decreed against assessee and three others and in order to avoid execution of said decree against it by way of attachment, arrest and to protect name of assessee, said amount was paid by assesse. Dismissing the appeal of revenue the Court held that; there was commercial expendiency in payment of such amount and, therefore, it was allowable as expenditure. (AY. 2004-05)
CIT v. Hitachi Koki India Ltd. (2015) 230 Taxman 643 (Karn.)(HC)

S. 37(1): Business expenditure –Contractual dispute –Interest of earlier years was held to be allowable on the basis of supplementary agreement.[S. 145]
Assessee was a dealer of TML and vehicles were supplied to assessee on credit. Initially an agreement was entered into under which outstanding dues of assessee to TML was squared off by grant of a loan from NIT to assessee. Under said agreement loan was provided to assessee by NIT on an interest of 12 per cent per annum.However, assessee disputed said amount consistently and no interest was paid. Eventually, it was only on execution of a supplementary agreement, in current year, liability to pay interest at rate of 6 per cent per annum was agreed upon and in pursuance thereof, assessee debited an

amount towards interest in current year .Dismissing the appeal of revenue the Court held that; since it was not a statutory liability of assessee but a contractual dispute which eventually was resolved and liability was crystallised only when subsequent agreement was made, Tribunal was justified in allowing deduction of interest of earlier years in relevant assessment year on basis of said supplementary agreement. (AY. 2008-09)
CIT v. Shivam Motors (P) Ltd. (2015) 230 Taxman 63 / 272 CTR 277 (All.)(HC)

S. 37(1) : Business expenditure–Capital or revenue- Interest-Paid after slump sale- Allowable as revenue expenditure.
Dismissing the appeal of revenue the Court held that ; interest could not be capitalized which was paid after slump sale was effected and factory was in operation, and, therefore, such expenses were revenue in nature. (AY. 2001-02, 2002-03)
CIT v. Sandvik Chokshi Ltd. (2015) 230 Taxman 546 (Guj.)(HC)

S. 37(1) : Business expenditure- Capital or revenue- Premium paid for leasehold land is allowable as revenue expenditure .
Premium paid for leasehold land is allowable as revenue expenditure. (AY. 1997-98)
United Phosphorus Ltd. v. Addl.CIT (2015) 230 Taxman 596 (Guj.)(HC)

S. 37(1) : Business expenditure -Capital or revenue-Replacement of plant and machinery-Matter remanded.
Expenditure on replacement of plant and machinery whether capital or revenue. Matter remanded.
Autolec Industries Ltd.v. JCIT (2015) 373 ITR 501 / 231 Taxman 81 (Mad.)(HC)

S.37(1):Business expenditure-Search and seizure –Commission brokerage- Statement on oath-Retraction-Disallowance of expenditure cannot be made merely on the basis of statement recorded u/s.132(4).[S.132(4), 158BC]
Assessing Officer relied upon a statement recorded under section 132(4) from managing director of assessee company, disallowed deduction towards commission and brokerage on sale of automobile parts. Tribunal allowed the claim of assessee. On appeal by the Revenue, dismissing the appeal the Court held that; Explanation to section 132(4) is retrospective in nature and since statement recorded under section 132(4) had been retracted and Revenue did not press for serving any other supporting material, assessee was entitled for deduction towards commission and brokerage. (AY. 1984-85)
CIT v. Shri Ramdas Motor Transport Ltd. (2015) 230 Taxman 187 (AP)(HC)

S. 37(1) : Business expenditure-Capital or revenue-Expansion of existing business- Revenue expenditure.
Expenditure in connection with expansion of existing business would be allowed as revenue expenditure.(TA No. 358 of 2014 dt. 02-09-2014)(AY. 1998-99)
CIT v. Nirma Ltd. (2015) 55 taxmann.com 125 / 229 Taxman 535 (Guj.)(HC)

S. 37(1) : Business expenditure–Credit card business-scanning or capturing data from application forms-Allowable as business expenditure.
Expenditure incurred by assessee engaged in credit card business on scanning or capturing data from application forms received from prospective customers into electronic form to reduce possibility of errors and issuance of credit cards to 'undeserving candidates', was to be allowed as revenue expenditure.(ITA Nos. 603 & 604 of 2014 dt. 29-09-2014)(AY. 2006-07)
CIT v. SBI Cards & Payment Services (P.) Ltd. (2015) 229 Taxman 356 (Delhi)(HC)

S. 37(1) : Business expenditure-Credit card business- – Advertisement and sales promotion-Allowable as revenue expenditure.
Expenditure incurred on advertisement and sales promotion to increase business turnover and attract more and new customers, was to be allowed as revenue expenditure. (AY. 2006-07)
CIT v. SBI Cards & Payment Services (P.) Ltd. (2015) 229 Taxman 356 (Delhi)(HC)

S. 37(1) : Business expenditure– Capital or revenue-Registration fee to SEBI- Allowable as revenue expenditure.

Amount of registration fee paid to SEBI was allowable as revenue expenditure .Follwed, CIT v. Vysya Bank Ltd. [2009] 313 ITR 315 (Karn)(HC). (AY. 1996-97)

CIT v. Joint Venture of MCL & MMCL (AOP) (2015) 229 Taxman 527 (Guj.)(HC)

S. 37(1) : Business expenditure–Firm-Insurance policy on life of two partners-. Held to be allowable-No substantial question of law.[S.260A]

The assessee was a partnership firm. It was engaged in business of purchase and sale of securities and investment in capital market. The assessee paid insurance premium which was claimed on the life of two partners. The AO held that the Insurance Premium could be treated as personal expenses of the partners. He disallowed 20 per cent of the Insurance Premium on the basis that the expenditure was personal in nature of the partners and it was not incurred wholly and solely for the purpose of business of the assessee firm. In appeal, both the CIT(A)and the Tribunal decided in favour of assessee.

On appeal :

The findings of the Tribunal are that the ad hoc deduction could not have been effected. More so, when the department itself has clarified that premium paid on the Keyman Insurance Premium is allowable as business expenditure. The Keyman Insurance Premium is a life insurance taken by a person on the life of another person who is or was the employee of the first mentioned person or is or was connected in any manner whatsoever with the business of the first mentioned person. The Commissioner referred to the legal provisions. The Commissioner rested his findings on the factual position that emerged from the record. The record indicated that the partnership firm comprised of two partners. It was dealing in securities and shares. The policy was obtained for the benefit of the firm inasmuch as the firm's business would be adversely affected, in the event, one of the partners met with an untimely death. It is, therefore, concluded by the Tribunal that such being the nature of the expenses and the business of the firm being of dealing in securities for protecting it this policy was obtained. The premium expenditure was incurred in the above factual backdrop. There was no basis, therefore, for making any deduction or disallowance. The disallowance was purely a matter of conjecture and surmise on the part of the Assessing Officer. It is in these circumstances that the Commissioner deleted this disallowance. That exercise of the Commissioner having been upheld in the peculiar factual backdrop, any wider question or controversy does not arise for consideration and determination. The view taken been consistent with the factual position is a plausible and possible one. That does not raise any substantial question of law. (AY.2005-06)

CIT v. Agarwal Enterprises (2015) 374 ITR 240/ 229 Taxman 525 (Bom.)(HC)

S. 37(1) : Business expenditure–Credit card business- Card acquisition expenses –Allowable as revenue expenditure.

Assessee credit card company claimed card acquisition expenses in relevant year. Commissioner (Appeals) held that said expenses should be treated as deferred revenue expenditure and a part thereof should be allowed in current assessment year and balance amount should be allowed as expenditure in next assessment year. Since expenditure in question was revenue in nature, it had accrued and was paid, and no acts had to be performed and undertaken in future, entire expenditure was to be allowed in relevant assessment year.(AY. 2006-07)

CIT v. SBI Cards & Payment Services (P.) Ltd. (2015) 229 Taxman 356 (Delhi)(HC)

S. 37(1) : Business expenditure-Credit card business-Credit investigation-Allowable as business expenditure.

In credit card business, expenditure incurred by assessee on account of credit investigation to verify information and data provided by prospective customers for issue of credit cards, is part of running cost incurred to earn profit and, therefore, is to be allowed as revenue expenditure.(AY. 2006-07)

CIT v. SBI Cards & Payment Services (P.) Ltd. (2015) 229 Taxman 356 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue-Hire charges for plastic moulds-Allowable as revenue expenditure.

Assessee paid to foreign associates hire charges for plastic moulds. Those moulds were supplied to two contractual manufacturers free of cost to manufacture goods at assessee's behest and cost. Impugned expenditure was to be treated as revenue expenditure.(AY. 2006-07, 2007-08,2008-09)
CIT v. Tupperware India (P.) Ltd. (2015)229 Taxman 318 (Delhi)(HC)

S. 37(1) : Business expenditure–Capital or revenue-Film production-Advertisement films-Allowable as revenue expenditure.
Expenditure incurred by assessee on film production by way of advertisement films was allowable as revenue expenditure.
CIT v. Proctor & Gamble Home Products Ltd. (2015) 377 ITR 66/ 229 Taxman 383 (Bom.)(HC)

S. 37(1) : Business expenditure-Provision for post sales-Matter remanded [S.145]
Tribunal had held that sum debited towards provision for post sales customers support service was an allowable deduction, however, particulars of same was not furnished nor method of arriving at it was not disclosed .Matter remanded back.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn)(HC)

S. 37(1) : Business expenditure–Club membership fee-Held to be allowable.
Sum paid towards club membership fee was an allowable business expenditure.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2014) 51 taxmann.com 417 / (2015) 229 Taxman 335 (Karn)(HC)

S. 37(1) : Business expenditure-Capital or revenue-Restaurant business-Developing new recipes to develop clientele-Expenses for food tasting and trials-Revenue expenditure.
The assessee, as part of its business expenses, claimed deduction for food tasting and development expenses. The assessee argued that it had continuously developed new flavours and food items to keep its customer base. It claimed that these expenses were incurred for food tasting and trials ; it also incurred certain expenses for studying demographic trends. According to the assessee, these expenses were revenue in nature. The Assessing Officer treated these expenses as capital in nature. The Commissioner (Appeals) and the Tribunal allowed the assessee's claim.
On appeal by revenue the Court held that the assessee was engaged in the restaurant business. As part of its commercial activity, it strove to develop new recipes to develop its clientele, or expand it. The amounts expended towards such development were part of its business. Possibly, some recipes might be viable ; equally possibly, all of them might be unviable. The mere possibility of the result of such exercise being a popular or long lasting recipe would not make the expenditure capital in nature. As such, it could not be held that the food tasting development charges would result in a capital advantage of an enduring nature. Followed, Alembic Chemical Works Co. Ltd. v. CIT [1989] 177 ITR 377 (SC).(AY. 2002-2003 to 2008-2009)
CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 (Delhi) HC)

S.37(1):Business expenditure-Commercial expediency-Royalty payments to foreign principals-Deductible.
Dismissing the appeal of revenue the Court held that the Tribunal recorded a finding that the payment of royalty was for business purposes and what was more, payable to the assessee's foreign principals. Its character as an expense-collected for payment to the foreign party-had not been disputed. Thus, the assessee's claim that it was for business purposes alone, and no other reason, could not have been rejected. Followed, Sri Venkata Satyanarayana Rice Mill Contractors Co. v. CIT [1997] 223 ITR 101 (SC). (AY. 2002-2003 to 2008-2009)
CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 (Delhi HC)

S. 37(1):Business expenditure-Subsidiary company of assessee-Administrative expenses-Final effect is revenue-neutral--No allocation or apportionment of expenses could be made.
Dismissing the appeal of revenue the Court held that , the findings of the Tribunal could not be faulted. The ultimate effect on the revenue would be the same, whether the assessee bore the

administrative expenses and costs of YRMPL or it remitted such amount to YRMPL, its wholly owned subsidiary, towards such costs. The final effect was revenue-neutral. Thus, no addition could be made from out of administrative expenses. (AY.2002-2003 to 2008-2009)
CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 (Delhi HC)

S. 37(1) : Business expenditure-Mercantile system of accounting-Provision made based on past experience-Concurrent finding method not objectionable-Not a contingent liability-Provision allowable.[S.145]
The assessee made certain provision on the basis of the mercantile system of accounting followed by it, at the end of the year. The Assessing Officer held that this provision was not utilised by the assessee in the next assessment year and, hence, the excess provision to be disallowed. The Commissioner (Appeals) deleted the disallowance, stating that the provision was made for certain expenses and that if the provision was not exhausted by the assessee, it did not mean that there was no possibility of that kind of expenditure arising when the provision was made. This was confirmed by the Tribunal. On appeals : the Court held that, the provision made by the assessee was based on past experience. Both the Commissioner (Appeals) and the Tribunal held this method was not objectionable. Besides doubting the estimation, the Assessing Officer had not stated whether, in fact, such past experience did not constitute a rational basis for making provision. Therefore, no disallowance could be made.(AY.2002-2003 to 2008-2009)
CIT v. Yum Restaurants (I) Pvt. Ltd. (2015) 371 ITR 139 / 115 DTR 129 (Delhi HC)

S. 37(1) : Business expenditure-Capital or revenue--State Government undertaking engaged in contract farming--Expenditure on development of land-Finding by Tribunal that land was fallow and expenses were incurred for business purposes—Expenditure was held to be deductible.
The assessee was a Punjab Government undertaking engaged in the business of contract farming, procurement of food grains, marketing and export, etc. It claimed deduction of expenditure incurred on development of land .The Assessing Officer held that the major expenditure incurred by the assessee for the development of the land was capital expenditure. This was confirmed by the Commissioner (Appeals). The Tribunal recorded a finding that the land was lying fallow and was not barren though it was not being put to alternative use. Further, the expenses incurred by the assessee and claimed to be revenue were tractor hiring charges, jeep vehicle expenditure, staff welfare, HSD, preparation and renewal of seeds and electricity charges. The expenses incurred were for the furtherance of the business objectives. The Tribunal on examination of the entire matter, keeping in view the main objects of the assessee, the activities of the assessee, the nature of expenses incurred and also the legal principles, concluded that the expenditure was revenue in nature and deductible. On appeal :
Held, dismissing the appeal, that the findings recorded by the Tribunal were based on appreciation of evidence and the principles laid down by the Supreme Court. The expenses incurred by the assessee could not be categorised as falling in the domain of capital expenditure and were revenue of nature ,they were deductible. (AY .2005-2006)
CIT v. Punjab Agro Foodgrains Corporation (2015) 371 ITR 100 (P&H) (HC)

S. 37(1) : Business expenditure-Guarantee commission-Held to be deductible.
The Assessing Officer made an addition of Rs. 3,60,000 on account of commitment charges/guarantee commission paid by the assessee to its allied concern. The Commissioner (Appeals) deleted the addition. The Tribunal found that the loan taken for which the immovable property of the sister concern of the assessee had been pledged was for the purpose of the business of the assessee. Court held that in view of the finding of the Tribunal the guarantee commission paid by the assessee to its sister concern deductible.(AY.1994-1995 to 1999-2000)
CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P & H) (HC)
S. 37(1) : Business expenditure-Market survey- Held to be allowable.
The Assessing Officer disallowed the expenditure of Rs. 40,000 as market survey on the premise that the assessee had not utilised the survey report in its business activities as the activity of powder quoting for which the report was obtained had not been carried out. The Commissioner (Appeals) had

allowed the expenditure holding that the survey was carried out to determine the potential of powder coatings as the company was manufacturing UF/MF powders. The expenditure was held to be for a business purpose as it was carried out during the course of business activities of the assessee. This was upheld by the Tribunal. Court held that it was not mandatory that the survey report should have essentially it resulted in enhancement of the profits of the company by taking action thereupon except that it was required to be in the course of the business activity. It was not in dispute that the survey report was obtained during the course of business activities of the assessee for exploring the feasibility of powder coatings as the company was manufacturing UF/MF powder. The expenditure on obtaining the survey report was deductible. (AY.1994-1995 to 1999-2000)

CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P & H) (HC)

S. 37(1) : Business expenditure-Firm doing import and export-Foreign travel expenses of persons including a lady-Lady one of the founder partners travelling in that capacity with others-Expenditure incurred wholly and exclusively for the purpose of the business-Allowable deduction.

The assessee was a shoe company and had been issued an importer exporter code. The assessee-firm came into existence on July 1, 1993, and a lady RA was one of the founder partners. The Tribunal held that RA travelled in the capacity of the partner herself of the assessee-firm, which was an importer/exporter of the shoe products and, hence, the foreign travel expenses incurred by the firm for the partner and others were wholly and exclusively for the purpose of the business. On appeals :

Held, dismissing the appeals, that the lady was a partner of the assessee-firm in terms of the partnership agreement. Hence, the expenses incurred towards her foreign travel along with other persons should be treated as expenditure incurred wholly and exclusively for the purpose of the business. There was no reason to discredit the finding of fact, especially since the assessment order passed under section 143(3) read with section 147 of the Income-tax Act, 1961, contained no reason as to why it should not be treated as business expenditure. The mere ipse dixit of the officer was not a ground to deny the claim made by the assessee. Therefore, the foreign travel expenses incurred towards the partner of the assessee and others were an allowable deduction.(AY .2005-2006, 2007-2008)

CIT v. Irbaz Shoe Co. (2015) 371 ITR 215 (Mad.)(HC)

S. 37(1) : Business expenditure – Lease Rental – affidavit of the MD stating that no machinery purchased by lessor and no lease of the same to the assessee- Held lease is sham and unreal

The AO had disallowed the deduction of lease rental on the ground that the lease was a bogus and unreal. AO' s conclusion was also affirmed by the affidavit of the managing director of the assessee that the lease was bogus. Further, the AO also disallowed the claim of the assessee that the said lease rental should be allowed as financial charges. Commissioner (Appeals) affirmed the said finding. The Tribunal allowed the deduction of the amount in question as financial charges after concluding that the Revenue could not dispute the claim of the assessee with documentary evidence. On appeal, held:

From the material on record it was clear that lessor had not purchased any asset and therefore the lease was sham and unreal. Further, the same was confirmed by the MD of the company. Thus, the deduction of lease rental disallowed. Also, in absence of any legal evidence, claim of financial expenditure also cannot be allowed. (AY 1997-98 to 1999-2000)

CIT v. Bellary Steel & Alloys Ltd.(2014) 223 Taxman 491 / (2015) 370 ITR 226 / 114 DTR 287 (Karn)(HC)

S. 37(1) : Business expenditure- Capital or revenue – Royalty- Copy rights-lump sum payment for the master plate and copyright in the music had enduring benefit, the expenditure could be considered as capital in nature, however, royalty paid to the producers on the sale affected, is a revenue expenditure.

The producer had assigned full rights to the assesee in consideration of payment of royalty. The rights included the market rights, whether and/or when to discontinue and recommence the sale or records of the said work and to fix and alter the price of such records. The AO treated it as capital

expenditure. CIT(A) treated it as revenue expenditure relying on earlier years assessment order wherein the AO had relied on the case of Super Cassettes Industries (P) Ltd V. CIT 41 ITD 530(Del). Tribunal upheld CIT(A)'s order. On appeal Court held that the proceeding on the premise that 5% of the fixed amount or a lumpsum payment for the master plate and copyright in the music had enduring benefit, the expenditure could be considered as capital in nature, however, royalty paid to the producers on the sale affected, is a revenue expenditure, more so, when it is clear that the main business of the assesee was manufacture of blank cassettes and pre-recorded cassettes. (AY. 1989 – 1990, 1991-92 to 1993-94)

CIT v. Krishan Kumar (2015) 273 CTR 233 / 53 taxmann.com 273/228 Taxman 264 (Mag) / 113 DTR 105 (Delhi)(HC)

CIT v. Super Cassettes Industries Ltd (2015) 113 DTR 105/ 273 CTR 233/ 228 Taxman 264 (Mag) (Delhi)(HC)

S. 37(1) : Business expenditure –Capital or revenue - Expenditure incurred for the repairs and maintenance of hotel building is revenue expenditure.

The assessee is a public limited company and carrying on the business of hotel. The assessee had incurred expenditure for the repairs, renovation, refurbishing of building, plant and machinery along with interior decoration expenses and claimed the same as revenue expenditure. The AO however, disallowed the expenditure as considering the same as capital in nature. The CIT(A) confirm the order of AO. The Tribunal however, allowed the appeal of assessee.

Dismissing the appeal of revenue, High Court held that merely because the income of the hotel has increased, it does not necessarily follow it is because of the refurnishing or repair work done to the hotel rooms. The High Court further held that the real test is whether all those acts constitute replacing existing assets which is not the case since no extra flooring space or extra room capacity is added on account of repairs and expenditure incurred towards repairs and replacement of old parts would in the nature of revenue expenditure and not capital expenditure(dt. 17-11-2014). (AY. 2001-2002)

CIT v. Mac Charles (India) Private Limited (2015) 113 DTR 253 (Karn) (HC)

S. 37(1) : Business expenditure–Consultancy charges – Genuineness was not in doubt- Held to be allowable.

Assessee claimed consultancy charges as allowable expenditure. The AO opined that no service was rendered by 'B' for installing any plant and machinery, however, he allowed part of amount and made addition for remaining amount. CIT(A) Examined entire materials and observed that full amount of consultancy charges were genuine because same have been received by 'B' and when genuineness of assessee's claim had been accepted by AO there was no reason to give partial relief and order of CIT(A) allowing entire claim of assessee should be upheld. Tribunal affirmed the view of AO. On appeal the High Court affirmed the view of CIT (A) and decided the issue in favour of assesse.(AY. 1996-97)

Maya Machinery (P.)Ltd. v. Dy.CIT (2015) 229 Taxman 398 (All.)(HC)

S. 37(1) : Business expenditure- Deferred revenue-Advertisement- Trading of mobile handsets-Allowable as revenue expenditure.

The assessee, engaged in trading of mobile handsets, its accessories and mobile repairing had incurred certain expenditure on advertisement and claimed same as revenue expenditure. The AO treated said expenditure as deferred revenue expenditure and allowed 25 per cent of expenses in current year observing that balance would be allowed in next three years.

On appeal, the CIT(A) allowed entire expenditure as revenue expenditure. The Tribunal upheld the order of the CIT(A). On revenue's appeal to the High Court affirming the view of Tribunal observed that business of assesse requires continuous and repeated publicity and advertisements to remain in public eye, to do business by attracting customers. It is an expenditure of trading nature. In view of the aforesaid the Tribunal's order did not call for interference. (AY. 2009-10)

CIT v. Spice Distribution Ltd. (2015) 374 ITR 30/ 229 Taxman 400 (Delhi)(HC)

S. 37(1) : Business expenditure-Capital or revenue-Installation of software packages- Held to be revenue expenditure.

Expenses incurred on installation of software packages, enable assessee to carry on its business operations effectively, efficiently, smoothly and profitably and such software enhances efficiency of operation, it is an aid in manufacturing process rather than tool itself, and, thus, payment for such application software, though there is an enduring benefit, does not result in acquisition of any capital asset and it has to be treated as revenue expenditure. (AY. 2002-03)

CIT v. Karur Vysya Bank Ltd. (2015) 229 Taxman 396 (Mad.)(HC)

S. 37(1) : Business expenditure –Capital or revenue-Payment to UPPCL towards construction of a transmission line-Allowable as revenue expenditure.

Assessee started generating power which had to be sold to UPPCL which was only customer. Assessee made payment to UPPCL towards construction of a transmission line and other supporting work .Power transmission lines would constitute exclusive property of UPPCL .Expenditure incurred by assessee company was an allowable revenue expenditure.Appeal of revenue was dismissed.(AY. 2008-09)

Addl. CIT v. Dhampur Sugar Mills (P) Ltd(2015)229 Taxman 271 (All.)(HC)

S. 37(1) :Business expenditure–Subsidiary–New line of business-No nexus with business carried on by assesse-Expenditure was held to be not allowable.

The assessee was a public limited company carrying on the business of manufacture and sale of beer and liquor.Theassessee-company in furtherance of its business started the business of establishment of resorts by incorporating a subsidiary company. The main purpose of the said subsidiary was to put up resorts at important tourist destinations and since the date of incorporation, expenses like employee cost and other establishment costs were being incurred regularly.However, the subsidiary company had not done any business right from the date of incorporation and was also not intending to do any business or commercial activity as laid down in the main objects of its memorandum of association. The company had become defunct. Therefore, a request was made to strike the name subsidiary company under section 560 of the Companies Act. Such a request had been accepted by the Assistant Registrar of Companies.During the financial year ending on 31-3-2001, the assessee made a claim of Rs. 1.42 crore as bad debts written off, including the amount of Rs. 1.28 crore which was given as a loan to the subsidiary company.

The Assessing Officer held that as during enquiry, the assessee was unable to substantiate the said claim and since such expenditure did not relate to any of the existing activities of the assessee-company, it was not allowable.

The assessee thus gave up and withdrew the said claim under section 36(1)(vii) and put up an alternative claim under section 37 contending that it is an expenditure expend wholly and exclusively for the purpose of the business. The Expenditure was disaalowed by the AO which was confirmed by the Tribunal . On appeal , dismissing the appeal of revenue the Court held that ,where-assessee company had lent money to its subsidiary, for purpose of setting up a new line of business, it could not be said that all money lent by assessee to subsidiary company was an expenditure laid down and expended wholly and exclusively for purpose of business of assesse. Where such expenditure had no nexus with business carried on by assessee, same was not allowable.(AY. 2001-02)

United Breweries Ltd. v. ACIT (2015) 229 Taxman 113/ 122 DTR 185 (Karn.)(HC)

S. 37(1) :Business expenditure–Debenture issue expenditure –Held to be revenue in nature.

Expenses incurred in issue of debentures could be allowed as revenue expenditure.

ACIT v. VXL India Ltd. (2015) 229 Taxman 199 (Guj.)(HC)

S.37(1):Business expenditure-Capital or revenue-Expenditure on an abandoned project is revenue in nature & can be claimed as deduction in year of abandoning the project

(i) Expenditure made for construction/acquisition of new facility subsequently abandoned at the work-in-progress stage is allowable as incurred wholly or exclusively for the purpose of assessee's business. It is revenue expenditure as it does not result in the acquisition of an asset or an advantage of an enduring nature;

(ii) The expenditure has to be claimed in the year in which the decision is taken to abandon the project. There would have been no occasion to claim the deduction if the work-in-progress had completed its course. Because the project was abandoned the work-in-progress did not proceed any further. The decision to abandon the project was the cause for claiming the deduction. The decision was taken in the relevant year. It can therefore be safely concluded that the expenditure arose in the relevant year. (AY. 2002-03)

Binani Cement Ltd. .v. CIT(2015) 118 DTR 61/277 CTR 49 (Cal.) (HC)

S. 37(1) : Business expenditure-Trading in equipments- Machinery were given to doctors to keep them for demonstrations purposes-Write off of 1/3 every year was held to be justified-Allowable as revenue expenditure.

Assessee was trading in medical equipments which were treated as stock-in-trade of assesse. Some machinery were given to doctors to keep them for demonstrations purposes. It was a part of promotion for sale of machinery and life of said equipment was 3 years and assessee written off value of said equipment in a period of 3 years deducting 1/3rd for each year. Said sum was revenue nature expenditure.(AY. 1996-97, 2003-04 to 2005-06)

CIT v. Allergan India (P.) Ltd. (2015)371 ITR 38/ 228 Taxman 362 (Mag.)(Karn.)(HC)

S. 37(1) : Business expenditure–Capital or revenue-Creating manufacturing facility in India-Capital in nature.

Assessee was importing components from abroad for making of elevator. Subsequently, due to change in policy, expenses were incurred for creating manufacturing facility in India. Assessee's claim for deduction of said expenses was rejected. Since expenditure incurred by assessee resulted in bringing enduring benefit for a long time impugned order passed by authorities below was to be upheld.

Schindler India (P.) Ltd. v. Jt. CIT (2015) 228 Taxman 357 (Mag.)(Bom.)(HC)

S. 37(1) : Business expenditure–Club subscription –Managing director-Personal in nature- Not allowable as deduction.

Club subscription paid by assessee on behalf of its managing director being in nature of personal expenditure, could not be allowed as deduction.

Schindler India (P.) Ltd. .v. Jt. CIT (2015) 228 Taxman 357 (Mag.) (Bom.)(HC)

S. 37(1) : Business expenditure-Capital or revenue-Royalty paid for obtaining rights of reproduction was allowable as revenue expenditure -

Where assessee carried on business of reproduction of audio sound and music from master plate provided by film producers and distributors, royalty paid for obtaining rights of reproduction was allowable as revenue expenditure. (AY. 1989-90 & 1991-92 to 1993-94)

CIT .v. Krishan Kumar(2015) 273 CTR 233 /228 Taxman 264 (Mag.)(Delhi)(HC)

S. 37(1) : Business expenditure–Capital or revenue-Expenditure incurred for purchase of carpet was a replacement cost and in nature of current repairs and allowable as revenue expenditure.

Where life of carpets is very short and have to be replaced at frequent intervals, expenditure incurred for purchase of carpet was a replacement cost and in nature of current repairs, therefore, same was allowable as revenue expenditure. (AY. 1989-90 & 1991-92 to 1993-94)

CIT .v. Krishan Kumar(2015) 273 CTR 233 /228 Taxman 264 (Mag.) (Delhi)(HC)

S. 37(1) : Business expenditure–Capital or revenue-Expenses incurred on video division, i.e., salary, wages to employees, selling expenses, etc., same was allowable as revenue expenditure.

Where assessee was engaged in manufacture of audio and video cassettes and expenses incurred on video division, i.e., salary, wages to employees, selling expenses, etc., same was allowable as revenue expenditure. (AY. 1989-90 & 1991-92 to 1993-94)

CIT .v. Krishan Kumar(2015) 273 CTR 233 /228 Taxman 264 (Mag.) (Delhi)(HC)

S. 37(1) : Business expenditure–Key man insurance premium-Matter remanded.
Where Tribunal allowed assessee's claim for deduction of Keyman Insurance Premium on ground that similar claim had been allowed in earlier year, in view of fact that even in earlier year assessee's claim had not been allowed on merits, impugned order was to be set aside and, matter was to be remanded back for disposal afresh. Matter remanded. (AY. 2006-07)
CIT v. P G Foils Ltd. (2015) 228 Taxman 313 (Mag.) (Guj.)(HC)

S. 37(1): Business expenditure-Capital or revenue-Wooden partition, electric wiring, power connection, interior layout and carpeting, etc – Long Lease premises.
Assessee got a long lease of a newly constructed building suitable to its own business at a very concessional rent and incurred certain expenditure for wooden partition, electric wiring, power connection, interior layout and carpeting, etc. Assessee did not get any capital asset by spending aforesaid amount and, therefore, expenditure was revenue expenditure . (AY. 1998-88 & 1975-76)
CIT .v. Coromandal Fertilisers Ltd. (2015) 228 Taxman 318 (Mag.)(AP)(HC)

S. 37(1) : Business expenditure-Method of accounting-Dispute settled by Supreme Court in current year-deduction is allowable in the current years.[S.145]
During current year assessee filed its return of income and claimed deduction of differential sugarcane price relevant to previous year 1996-97.Since liability to make payment of sugarcane price differential itself was under challenge and liability under cane price fixation notification arose only in current year when Supreme Court upheld said notification, expenditure could have been claimed in current year.The appeal is accordingly dismissed. (AY. 2005-06)
CIT .v. Dalmia Bharat Sugar & Industries Ltd. (2015) 228 Taxman 315 (Mag.)(Delhi)(HC)

S. 37(1) : Business expenditure-Net profit rate-Sales tax payment could be allowed.[S.145]
Even while making assessment of income on basis of net profit rate, deduction towards sales-tax payment could be allowed. (AY. 1999-2000)
CIT .v. Jain Construction Company (2015) 228 Taxman 314(Mag.) (Raj.)(HC)

S. 37(1) : Business expenditure–Commission-No supporting evidence hence disallowance was held to be justified.
Assessee, who was in a business of import and export of bullion, claimed deduction of commission paid to HBL on ground that services of director of HBL were utilised for purchasing bullion. However, on enquiries made by Tribunal, assessee stated that no such commission was paid in earlier or later year to HBL and assessee could have procured bullion without assistance of any agent. In order to satisfy itself about services rendered by HBL, Tribunal required presence of director of HBL but assessee could not produce him. There being no supporting evidence concerning services rendered by HBL, Tribunal disallowed commission. Finding of fact recorded by Tribunal could not be held to be perverse or vitiated by any error of law apparent on face of record and, therefore, could not be interfered with. (AY. 2004-05)
Sureshkumar G. Hundia .v. ACIT (2015) 228 Taxman 317 (Mag.) (Bom.)(HC)

S. 37(1) : Business expenditure - Expenditure incurred on advertisement and promotion of associated enterprises - One of the functions of assessee - Amount received by assessee for international transactions accepted by Transfer Pricing Officer - No disallowance could be made.
The assessee was acting as a selling agent for advertisements to be aired on the channels. It was entitled to retain 15% of the gross receipts as income and pass on or transfer 85% of the gross receipts to the foreign enterprises. Thus, one of the functions being performed by the assessee was to advertise and promote the channels and to earn subscription revenue. Another function was to procure advertisements. The assessee earned 15% commission for the advertisements.
Held, the assessee was earning revenue in view of the functions being performed. Expenditure incurred on advertisement was clearly relatable and laid out for the purpose of business of the assessee and was not extraneous or unconnected with it. Consequently, it could not have been disallowed on the ground that it was not laid out or incurred wholly or exclusively for the purpose of

business. One of the functions to be performed by the assessee being to incur the advertisement and promotion expenditure, the expenditure incurred for the purpose should be allowed under section 37(1) as incurred wholly and exclusively for purpose of the assessee. However, adequate compensation/price should be paid for the same by the associated enterprise, with reference to the functions, risk and assets. In case the assessee was not being paid adequate consideration or compensated by its associated enterprise, necessary adjustments could have been made by the Transfer Pricing Officer in accordance with the Act. The Transfer Pricing Officer did not deem it appropriate and proper to make any adjustment in respect of these international transactions. The price received by the assessee for the international transaction was accepted by the Transfer Pricing Officer. Therefore, the advertisement and promotion expenditure as one of the functions which the assessee was mandated and required to perform for the purpose of its business and would be allowable as a business expenditure under section 37(1).((AY. 2002-2003 to 2004-2005)

CIT .v. Discovery Communication India (2015) 370 ITR 57/ 273 CTR 492/230 Taxman 539/113 DTR 223 (Delhi.) (HC)

S. 37(1) : Business expenditure - Capital or revenue - One-time lump sum payment for use of technology for a period of six years - Is licence fee for permitting assessee to use technology - Licence neither transferable nor payment recoverable - No accretion to capital asset - No enduring benefit-Allowable as revenue expenditure.

The payment made by the assessee was on account of licence fee. By making such payment, the assessee had got permission to use the technology. The money paid was irrecoverable. If the business of the assessee stopped for some reason or the other, no benefit from such payment was likely to accrue to the assessee. The licence was not transferable. Therefore, it could not be said with any amount of certainty that there had been an accretion to the capital asset of the assessee. If the assessee continued to do business and continued to exploit the technology for the agreed period of time, the assessee would be entitled to take the benefit thereof. But if it did not do so, the payment made was irrecoverable. Therefore, the one-time lump sum payment made by the assessee for acquiring technical know-how for a period of six years was revenue expenditure. (AY. 2000-2001)

Timken India Ltd. .v. CIT (2015) 370 ITR 656 (Cal) (HC)

S. 37(1) : Business expenditure–Interest received was taxed without allowing any expenditure-Matter remanded.

The assessee was an association of person operating a club. It filed its return of income declaring a loss. The AO completed the assessment by an order determining the income of the assessee. He not only disallowed the loss claimed but also made some additions. Two such additions were 'interest received from banks' and another was, 'interest received on KEB Deposit'.On appeal the Court held that , AO made addition on account of interest received from banks as income without allowing any expenditure incurred for earning such income.On appeal matter was to be remanded back.(AY. 2008-09)

Vijayanagara Club .v. Dy. CIT (2015) 229 Taxman 84 (Karn.)(HC)

S. 37(1) : Business expenditure–Development expenses-Held to be allowable.

Assessee was an apex body responsible for development of dairy activities in co-operative sector in State. Assessee claimed Dairy Co-operative Society Development Expenses.AO held that such claim was not allowable as assessee had incurred expenses on its own and without any business expediency.On appeal court held that the assessee had incurred said expenditure to launch various schemes for increasing procurement of milk and protecting dairy farmers for inducing more and more milk producers to join primary dairy co-operative society. Expenses were directly related to business of assessee and incurred for commercial expediency, and, hence, expenditure was to be allowed.(AY. 2007-08 to 2009-10)

CIT .v. Rajasthan Co-operative Dairy Federation Ltd. (2015) 229 Taxman 34 (Raj.)(HC)

S. 37(1) : Business expenditure–Capital or revenue-Product development expenses–Revenue in nature.

Assessee company was developing and selling leading edge optical networking products and claimed product development expenses for upgrading existing products, however, life span of product so developed was hardly a year and due to severe competition, constant upgradation of original products was required. Court held that the impugned expenditure was to be treated as revenue expenditure. (AY. 2003-04)

CIT .v. Tejas Networks India (P.) Ltd. (2015) 229 Taxman 40 (Karn.)(HC)

S. 37(1) : Business expenditure–Capital or revenue-Professional fees paid for IT maintenance in respect of restructuring of company-Revenue in nature.

The assessee company was engaged in the business of generation, transmission and distribution of electricity in the State of Gujarat. The erstwhile Gujarat Electricity Board in a process of restructuring was demerged into seven different companies and assessee company was of the resulting companies. The AO disallowed the "Legal & Professional Fees" pertained to reorganization of the business of erstwhile Gujarat Electricity Board by way of demerger and also included expenditure pertaining to issue of allotment of shares; expenditure pertaining to Internet Bandwidth, supply and installation of software, legal and professional fees in respect of restructuring, etc treating the said expenses as capital in nature. CIT(A) and Tribunal has allowed the claim of assessee. On appeal by revenue dismissing the appeal the Court held that the professional fees paid for IT system maintenance in respect of restructuring of company was not having enduring benefit and as no asset was brought into existence on such payment, it could not be cateogorised as capital in nature. (AY. 2006-07)

CIT .v. Gujarat Urja Vikas Ltd. (2015) 229 Taxman 46 (Guj.)(HC)

S. 37(1) : Business expenditure–Wrong claim made under section 35DDA cannot disentitle claim as business expenditure.[S. 35DDA]

Mere wrongly invoking section 35DDA instead of section 37 in respect of payment to consultant and gift to ex-employees could not disentitle assessee from claiming deduction under section 37(1).(AY. 2001-02)

CIT v. Cadbury India Ltd. (2015) 229 Taxman 5 (Bom.)(HC)

S.37(1):Business expenditure-Capital or revenue-Expenditure incurred to purchase its shres(Buy back of shares) in terms of settlement was held to be revenue expenditure.

There was a dispute between brothers who together owned the assessee company. As a consequence of differences between the two groups, the dispute reached the Company Law Board as well as the Supreme Court. Thereafter, a settlement was arrived at between the two warring groups of shareholders and as per directions of the Company Law Board the assessee was directed to buy 34% shareholding of one of the warring group and cancel the same. The assessee claimed the amount of Rs.6.81 crores (being the difference between consideration paid and face value of the shares acquired for cancellation) as revenue expenditure. This on the basis that in view of the dispute between its shareholders, the business was adversely affected and therefore, the payment was expected to be incurred for purposes of business. However, the AO &CIT(A) did not accept the same and held the expenditure to be of capital nature. However, the Tribunal allowed the claim by relying on Echjay Industries Ltd vs. DCIT 88 TTJ (Mumbai) 1089.

The Court held that the Tribunal has recorded the finding of fact that in view of the dispute between the two warring groups of shareholders the business of the assessee had suffered. After the settlement of the dispute there was a substantial increase in the sales. After settlement of the dispute new products were launched by the assessee-company. All this was evidence of the fact that the dispute between two groups of shareholders had affected the business of the company. The amount paid by the assessee for the purchase of its shares for subsequent cancellation was an expenditure incurred only to enable smooth running of the business. Thus, the expenditure was incurred for carrying on its business smoothly and was a deductible expenditure.(AY.2007-08)

CIT .v. Chemosyn Ltd.(2015) 371 ITR 427 (Bom.)(HC)

S.37(1):Business expenditure-Film production-Cost of production could not be re determined by the AO[R. 9A]

The assesse on dissolution of the partnership firm took over the rights of one film at book value and claimed loss after adjusting collection received from said film. AO based on the return filed by the firm for earlier year , reduced the loss as claimed by the assesee and made addition. In appeal CIT(A)deleted the addition which was affirmed by the Tribunal. On appeal by revenue , the High Court affirmed the view, holding the same as question of fact. (AY. 2005-06)
CIT .v. NitinPanchamiya (2015) 228 Taxman 259 (Bom.)(HC)

S. 37(1) :Business expenditure –Capital or revenue- Refurnishing, repairs and improvement of assets taken on lease would be revenue expenditure.
The assessee-company was engaged in the business of jewellery shops and textile, situated in tenanted premises. It claimed expenditure incurred towards refurnishing, repairs, renovation, interior decoration, fixture and improvements of the leased premises used for business purpose, would always be revenue expenditure and not capital expenditure. The improvement made by the assessee which were of temporary nature and which could not be retrieved by assessee at the end of term of lease could only be revenue expenditure.AO disallowed refurnishing, repairs and improvement expenses incurred by assessee at premises taken on lease as revenue expenditure, categorising entire expenditure as capital expenditure.On appeal the Court held that since said improvements made by assessee were temporary in nature and same could not be retrieved by assessee at end of term of lease, it could only be revenue expenditure. (AY. 2007-08)
Joy Alukkas India (P.) Ltd. .v. ACIT (2015) 228 Taxman 35 (Mag.)(Ker.)(HC)

S. 37(1) :Business expenditure–Capital or revenue-Expenditure to make rig operation was held to be revenue expenditure.
Assessee was engaged in business of oil drilling operations, drilling oil wells and giving on hire oil rigs to clients. It purchased new rigs and installed them for purpose of making them operational. Assessee employed salaried workers and technicians for installation purpose. AO disallowed assessee's claim for salaries by treating same as capital in nature. Tribunal held that the expenditure was revenue in nature. On appeal by revenue the Court held that the drilling operations being very business of assessee, expenditure incurred to make rig operational would be covered and should be treated as 'revenue expenditure'. (AY. 1991-92)
CIT .v. Triveni Oil Field Services Ltd. (2015) 228 Taxman 134(Mag.)/114 DTR 113(Delhi)(HC)

S. 37(1):Business expenditure–Octroi charges-No supporting evidence was produced – Disallowance was held to be justified.
Assessee was engaged in business of sale of imported tractor. Assessee claimed expense on account of octroi charges. The High Court held that since assessee had not been able to show before any authorities that said expenditure had been incurred by it and there was no supporting entries showing payment of octroi, Tribunal was right in affirming addition made by AO.(AY. 1975-76 to 1977-78)
Modern Farm Services .v. CIT (2015) 228 Taxman 106(Mag.)(P&H)(HC)

S. 37(1):Business expenditure-Damages-If a claim of damages and interest thereon is disputed by the assessee in the court of law, deduction cannot be allowed for the interest claimed on such damages.[S.145]
The Special Bench had to consider whether where claim of damages and interest thereon is disputed by the assessee in the court of law, deduction can be allowed for the interest claimed on such damages while computing business income.
In view of the foregoing reasons, we answer the question posted before this Special bench in negative by holding that in the facts and circumstances of the case, where claim of damages and interest thereon is disputed by the assessee in the court of law, deduction can't be allowed for the interest claimed on such damages in the computation of business income.(AY. 2001-02, 2002-03)
National Agricultural Cooperative Marking federation of India Ltd. v. JCIT(SB)(Delhi)(Trib.); www.itatonline.org

S.37(1): Business expenditure-Foreign travel expenses-Expansion of business –Held to be allowable.

Where assessee, engaged in business of running pre-schools, incurred foreign travel expenditure in connection with expansion of business and introduction of private equity therein, assessee's claim for deduction of said expenditure was to be allowed. (AY. 2006-07)
ACIT v. Geeta Bhatia (Ms.) (2015) 68 SOT 50 (URO)(Mum.)(Trib.)

S.37(1):Business expenditure-Civil works- Rented premises- Allowale as revenue in nature.
Where expenditure was incurred towards civil works in rented premises of assessee's office, said expenditure was revenue in nature. (AY. 2008-09)
Anush Shares & Securities (P.) Ltd. v. ACIT (2015) 68 SOT 359 (Chennai)(URO) (Trib)

S. 37(1):Business expenditure-Work-in-progress-Expenditure not relating to current year cannot be allowed as deduction.[S.145, AS-I]
Where an expenditure does not relate to impugned assessment year, in view of AS-I, it cannot be allowed merely on basis that if expenditure is taken to closing work-in-progress in relevant year it will increase value of opening work-in-progress in subsequent year resulting in reduction of income in subsequent year. (AY.2009-10)
ACIT v. Alcon Developers (2015) 68 SOT 299 (Panaji)(Trib.)

S.37(1):Business expenditure-Advertisement expenses-Brand building expenses-ad–hoc disallowance of 50% was held to be not justified -Allowable as revenue expenditure.
During course of assessment proceedings, Assessing Officer noted that assessee had debited a sum on account of contribution for brand building expenses payment meant for marketing Company . Assessing Officer found that assessee company was following the mercantile method of accounting, and, therefore, out of total expenses debited, a sum of 50 per cent in related to profits of subsequent years and could not be allowed .Commissioner (Appeals) held that adhoc disallowance to extent of 50 per cent had been made without any clear & cogent basis thus, he deleted said disallowance. Tribunal held that since there was not dispute that expenditure was a revenue expenditure incurred in relevant year, impugned order passed by Commissioner (Appeal) was to be upheld. (AY.2009-10, 2010-11)
A.B. Hotels Ltd. v. ACIT (2015) 68 SOT 255 (URO) (Delhi)(Trib.)
A.B. Hotels Ltd. v. ACIT (2015) 68 SOT 334 (URO) (Delhi)(Trib.)

S.37(1):Business expenditure - Rural development expenditure- Held to be allowable.
Rural development expenditure were allowable as revenue expenditure.(AY 2003-04)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S. 37(1): Business expenditure -Expenditure on maintaiannce of live stock- Allowable as revenue expenditure.
Expenditure on maintenance of live stock was allowable as revenue expenditure.(AY. 2003-04)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S. 37(1):Business expenditure Raw material discarded-No details were furnished- Disallowance was held to be justified.
Assessee-company was engaged in business of producing films, TV serials and audio tapes. It claimed deduction on account of 'raw material discarded' but it could not furnish any relevant details to satisfaction of Assessing Officer. disallowance made by Assessing Officer of said deduction was to be confirmed.(AY. 1999-2000)
Amitabh Bachchan Corpn. Ltd. v. Dy.CIT (2015) 68 SOT 217(URO) (Mum.)(Trib.)

S. 37(1):Business expenditure - Ad hoc disallowance-Self made vouchers- Disallowance is restricted to 50%.
Assessing Officer had made ad hoc disallowance on account of miscellaneous expenses on ground that corresponding vouchers were not supported with corroborative evidences from side of third party in many cases . It was found that part of vouchers were self made and they were not independently verifiable on occasion .Iin view of reasonability of claim, disallowance was to be restricted to 50 per cent . (AY.1999-2000)

Amitabh Bachchan Corpn. Ltd. v. Dy.CIT (2015) 68 SOT 217(URO) (Mum.)(Trib.)

S. 37(1): Business expenditure-Administrative and selling expenses-Held to be allowable.
Assessee filed loss return and claimed deduction on account administrative and selling expenses . It had produced all details along with books of account, bills and vouchers of expenses and no mistake was pointed out therein.Assessee's claim was to be allowed. (AY.1999-2000)
Amitabh Bachchan Corpn. Ltd. v. Dy.CIT (2015) 68 SOT 217(URO) (Mum.)(Trib.)

S. 37(1) : Business expenditure -Debenture issue expenses- Held to be allowable.
The assessee has issued fresh debentures after pre-payment of the debentures. the amount incurred by the assessee being pre-payment charges paid in respect of debentures issued are expenses incurred for the purpose of business. The company had issued debenture for meeting its financial requirements. Pending utilization of the proceeds these debenture funds were kept in short term deposit with Bank. Subsequently it was realized that the company is paying heavy interest on debenture for a period of 3 years. Therefore these debentures were cancelled and the money was paid back to Deutsche Bank. But in this process the company had to pay pre-payment charges. The A.O. had not satisfied with the Assessee and he disallowed the same. The CIT Appeals upheld the order of the A.O. the honorable ITAT held that it is not the case of the revenue that the assessee has issued fresh debentures after prepayment of the debentures. the amount incurred by the assessee being prepayment charges paid in respect of debentures issued are expenses incurred for the purpose of business and the same is an allowable expenditure. (AY. 2003 – 2004)
ACIT v.GKN Sinter Metal (P.) Ltd. (2015) 153 ITD 311 (Pune)(Trib.)

S. 37(1) : Business expenditure Capital or revenue-Loss on assigned debts -Capital expenditure.
Assessee entered into a share sale and purchase agreement with company 'M'. in the said agreement 51 per cent shareholding of 'M' was purchased by assesse. Further, assessee assigned debts of Rs. 1.35 crore to 'M' for Re. 1 only. Assessee is an assignor had undertaken to collect debts on behalf of assignee 'M' and remitted same periodically. M paid tax on recovered amount. Assessee not shown any income on account of recovery of part of debt. The Assessee's argument was amount should be allowed either as a bad debts or a business loss. The revenue had taken stand that assessee had adopted a colourable device to compensate 'M' for surrender of their 51 per cent shareholding and this was a capital expenditure.(AY. 2003 – 2004)
ACIT v.GKN Sinter Metal (P.) Ltd. (2015) 153 ITD 311 (Pune)(Trib.)

S. 37(1) : Business expenditure-Dividends-No deduction on account of dividend tax delay charges, interest for delay in remitting TDS- Not allowable.
Dividend tax delay charges, interest for delay in remitting TDS, and expenses incurred for delay in UTI dividend payment, partake of character of dividend tax itself and dividend tax not being deductible, no deduction on account of these expenses will be allowed to assesse. (AY. 2003 - 2004 ,2004 – 2005)
ACIT v.SRA Systems Ltd.(2013) 22 ITR 205 / (2015)153 ITD 338 (Chennai)(Trib.)

S. 37(1) : Business expenditure-Capital or revenue-Software development expenses is revenue in nature.
Assessing Officer disallowed claim of assessee towards software development expenses. Tribunal held that day-by-day systems are developed in a new way and softwares are needed like a raw material for use in manufacturing and, therefore, such expenditure is purely of revenue nature and should be allowed. Therefore software development expenses be allowed as business expenditure. (AY. 2003 – 2004, 2004 – 2005)
ACIT v.SRA Systems Ltd.(2013) 22 ITR205 / (2015)153 ITD 338 (Chennai)(Trib.)

S. 37(1): Business expenditure-Capital or revenue-Lease premises-Expenditure incurred for repairs and maintenance of building and theatres-No capital asset comes into existence– Revenue in nature.

The assessee was engaged in the business of operating cinema theatres (multiplex) taken on lease. The assessee claimed deduction of expenditure on repairs and maintenance of buildings and theatres. The Assessing Officer treated the expenditure as capital in nature and allowed depreciation at 10 per cent. The Commissioner (Appeals) allowed the claim as revenue in nature. On appeal Tribunal held that;these expenses were only for the purpose of carrying on of the business and did not bring any capital asset into existence. Therefore, the deduction claimed by the assessee on account of repair and maintenance expenses to the building and theatres were revenue in nature.(AY. 2009-2010)
ACIT v. SPI Cinemas P. Ltd. (2015) 39 ITR 563(Hyd.)(Trib.)

S. 37(1) : Business expenditure–Capital or revenue-Non-compete fee –Allowable as revenue expenditure.
Amount of fee paid by assessee company to its Ex-Managing Director on his retirement to restrict him to share his experience and expertise for a period of 3 years, was an allowable revenue expenditure.(AY. 2007-08)
ACIT v. Clariant Chemicals (I) Ltd. (2015) 67 SOT 244 (URO) (Mum.)(Trib.)

S. 37(1) : Business expenditure-Capital or revenue-Software development and consulting charges was allowable business expenditure.
Expenditure incurred for software development and consulting charges was allowable business expenditure.(AY. 2007-08)
ACIT v. Clariant Chemicals (I) Ltd. (2015) 67 SOT 244(URO) (Mum.)(Trib.)

S. 37(1) : Business expenditure –Capital or revenue- Purchase of application software is revenue.
It was held that where assessee claimed expenditure on purchase of application software for upgradation of existing computers which was required for improving efficiency of existing system for keeping in pace with improvement of technology, same would be revenue expenditure. (AY. 2009-10)
DCIT v. Madras Engineering Industries (P.) Ltd. (2014) 34 ITR 703 / (2015) 67 SOT 152 (URO) (Chennai) (Trib.)

S. 37(1) : Business expenditure –Filling up of land- Allowable as deduction.
Assessee, company, purchased land and incurred certain expenditure for filling up land with soil. It incurred said expenditure for making land suitable for sale. Assessing Officer disallowed said expenditure on ground that vendors of land had already claimed similar expenditure. It was held by ITAT that assessee's claim could not be denied merely because vendor claimed such expenditure for filling up land especially when documentary evidences were available. (AY. 2007-08,2008-09)
DCIT v. Damac Holdings (P.) Ltd. (2014) 33 ITR 331 / (2015) 67 SOT 148 (URO) (Cochin)(Trib.)

S. 37(1) : Business expenditure –Deduction at source-Matter set aside to CIT(A).
Assessing Officer disallowed claim of Rs. 1.53 lakhs noticing that it pertained to TDS paid in respect of technical know-how fees payable to collaborators which had not been paid and hence could not be said to be business expenses of assessee. The Commissioner (Appeals) had not given cogent reasoning while upholding order of Assessing Officer and had merely stated that amount in question being TDS could not be said to be business expenditure of assessee company and, therefore, same could not be allowed. It was held that matter was to be restored to file of Commissioner (Appeals) for decision afresh. (AY. 2008-09,2009-10)
Advik Hi tech (P.) Ltd. v. ACIT (2015) 67 SOT 158 (URO) (Pune)(Trib.)

S. 37(1) : Business expenditure - Vehicle expenses-Ad hoc disallowance of 10 percent was held to be not justified.
Where assessee had furnished complete information regarding vehicle expenses and Assessing Officer did not find any discrepancy in same, impugned disallowance of 10 per cent of said expenses on account of personal use on ad hoc basis was not sustainable.(AY. 2009-10)

UEM India (P.) Ltd. v. ACIT (2015) 67 SOT215(URO) (Delhi)(Trib.)

S. 37(1) : Business expenditure-Capital or revenue-Renovation of hotel taken on lease-revenue expenditure.[S.32,Explanation 1]

The question that arises for consideration is, when the assessee has incurred expenditure on renovation of the hotel taken on lease, then whether the assessee is entitled for deduction of the expenditure incurred on such repairs as revenue expenditure or whether it has to be treated as capital expenditure in view ofExplanation 1 to section 32. In the case on hand, the assessee incurred the expenditure for efficient running of the business and therefore the expenditure incurred is revenue in nature.In such a case the expenditure incurred by the assessee would be out of the ambit and purview of the provisions of Explanation 1 to section 32. Therefore, the Commissioner (Appeals) was not right in upholding the disallowance of the expenditure by holding it as capital in nature.(AY. 2005-06 to 2008-09)

Rupesh Anand v. ACIT (2015) 67SOT227(URO)(Bang.)(Trib.)

S. 37(1) : Business expenditure -Lease rentals on vehicle hire-lease in question was to be regarded as an operation lease and therefore the assessee would be entitled to claim the lease rentals as deduction as revenue expenditure.

In the present case LPIN finances purchase of the vehicle. The vehicle is purchased as and when the assessee (client) makes a demand for hiring of vehicle. The ownership of the vehicle is registered in the name of the client only for the purpose of passing the risk of ownership in law on the client. The lease deed clearly spells out the above purpose and reiterates that LPIN is the owner of the vehicle and that the client is only a lessee. The bifurcation of the monthly payment as partly towards recovery of cost and partly towards interest is only for accounting purposes. It can decide the character of the transaction for early termination of the lease. On the occurance of either termination or on expiry of period, the client is required to return the vehicle to the lessor along with the various documents as mentioned therein. Thus the de facto ownership and control of the vehicle is always with LPIN. The assessee (client) had a right to use the vehicle subject to payment of the hire instalments and complying with the other terms of the agreement. The assessee (client) has no other rights. On a consideration of the terms of the agreement between the parties, it is opined that the lease in question was to be regarded as an operation lease and therefore the assessee would be entitled to claim the lease rentals as deduction as revenue expenditure. (AY. 2009-10, 2010-11)

Resil Chemicals (P.) Ltd. .v. Dy.CIT (2015) 67 SOT 189(URO) (Bang.)(Trib.)

S. 37(1) : Business expenditure - Corporate cost allocation- Appellate Tribunal-Additional evidence before ITAT- Matter restored to Assessing Officer.[S.254(1)]

Assessee company was engaged in business of identifying and evaluating raw material suppliers .Assessing Officer observed that assessee had debited certain amount under head corporate cost allocation. Assessing Officer noted that assessee had neither produced basis of allocation nor produced documentary evidence for receipt of actual services, hence proposed disallowance under section 37(1). It was held that where assessee filed additional evidence before Tribunal and same was relevant for adjudication of allowability of corporate cost of allocation expenses, matter was to be restored to Assessing Officer to decide issue afresh. (AY. 2009-10)

Eaton Industries Manufacturing Gmbh v. DCIT (IT) (2015) 67 SOT 213(URO) (Pune)(Trib.)

S. 37(1):Business expenditure-Contributions towards provident fund-Entitled to deduction though fund not recognized.[S. 36(1)(iv)]

Contributions towards provident fund is entitled to deduction though fund not recognized. (AY. 2009-2010, 2010-2011)

Dy.CIT .v. Greater Ludhiana Area Development Authority (2015) 39 ITR 100 / 170 TTJ 457 (Chd.)(Trib.)

S.37(1):Business expenditure-Statutory body-Contribution towards public welfare fund-Construction of sewerage system through an independent agency- Commercial expediency-Allowable as deduction.

Contribution towards public welfare fund. Nexus with business activities of assessee. Allowable as deduction. Construction of sewerage system through an independent agency. Allowable as deduction. (AY. 2009-2010, 2010-2011)
Dy. CIT v. Greater Ludhiana Area Development Authority (2015) 39 ITR 100 / 170 TTJ 457 (Chd.)(Trib.)

S. 37(1) : Business expenditure-Construction of railway underbridge-Allowable as deduction.
Assessee, a statutory body constituted by State Government Construction of railway under bridge. Objects of assessee commercial in nature. Expenditure directly relating to business purpose is allowable as deduction. (AY. 2009-2010, 2010-2011)
Dy.CIT v. Greater Ludhiana Area Development Authority (2015) 39 ITR 100(Chd.)(Trib.)

S.37(1):Business expenditure-Gratuity-Matter remanded.
Payment to Life Insurance Corporation of India towards gratuity-Assessing Officer to consider afresh—Matter remanded.(AY. 2006-2007, 2008-2009)
Dy.CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183(Cochin)(Trib.)

S.37(1):Business expenditure-Capital or revenue–Expenses for securing agency-Capital in nature-Compensation on termination of agency revenue in nature- Expenses cannot be set off against capital expenses.
Expenses incurred for securing agency business is capital in nature.-Compensation on termination of agency business is revenue in nature. Expenditure cannot be set off against capital expenditure.(AY. 2006-2007, 2008-2009)
Dy.CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183(Cochin)(Trib.)

S. 37(1):Business expenditure-Capital or revenue-Royalty expenses-Revenue in nature.
Royalty payment is allowable as revenue expenditure. (AY. 2009-2010)
ACIT v. Gamma Pizzakraft P. Ltd (2015) 39 ITR 567(Delhi) (Trib.)

S. 37(1): Business expenditure-Capital or revenue-Prior period expenses-Lease premium and interest on delayed payment-crystallising only during previous year pursuant to court order-Allowable as deduction.
Assessee paying lease premium and interest on delayed payment for holding land. Court directing assessee to deposit balance premium with interest for surrendering lease hold land. Liability to pay interest crystallising only during previous year pursuant to court order. Not prior period expenses. Acquiring property closely related to carrying on of business and integral part of profit earning process expenditure revenue in nature. Deduction is allowable. (AY. 2005-2006)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250(Bang.)(Trib.)

S.37(1):Business expenditure--Provision for salary arrears-Allowable as deduction.
Estimate made by assessee reasonable. Excess provision written back.Liability not contingent. Deduction on account of provision for salary arrears is allowable. (AY. 2005-2006)
ING Vysya Bank Ltd.v. ACIT (2015) 39 ITR 250(Bang.)(Trib.)

S. 37(1):Business expenditure-Capital or revenue-Discount on stock option scheme- Matter remanded.
The assessee debited an amount towards employee compensation under the employee stock option scheme and debited these expenses to the profit and loss account in accordance with the SEBI guidelines. The Assessing Officer disallowed the claim for deduction while computing income on the ground that the expenses were contingent in nature and hence not allowable as revenue expenditure. The Commissioner (Appeals) confirmed this. On appeal:
Held, that discount on employee stock option scheme being a general expense, was an allowable deduction under section 37(1) of the Act during years of vesting on the basis of the percentage of vesting during the period, subject to upward or downward adjustment at the time of exercise of the

option. Therefore, the Assessing Officer was to consider the quantification of the deduction to be allowed.Matter remanded.(AY. 2005-2006)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250(Bang.)(Trib.)

S.37(1):Business expenditure-Capital or revenue-Depreciation-Application software- Allowable as revenue expenditure.
Expenditure on purchase of application software.Assessing Officer allowing depreciation. Expenditure allowed as revenue expenditure in assessee's case in earlier assessment year.Expenditureis allowable. (AY. 2005-2006)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250(Bang.)(Trib.)

S. 37(1):Business expenditure- Corporate entity- Even if no business is carried, the expenditure incurred to maintain the corporate entity has to be allowed as a deduction. [S. 57(iii)]
Permission/denial by the RBI to register an assessee as NBFC does not decide the issue of carrying of business or make the business illegal. If the assessee had violated any provisions of law under the RBI Act it would be penalised by the appropriate authority. But that does not mean that the systematic organized activity carried out by the assessee for earning profit would not be treated as business. The explanation to sec.37(1) of the Act is not at all applicable to the case under consideration. In the scrutiny assessment, completed in the earlier years, the AO had assessed the interest income as business income and had allowed all the expenditure related with the business activity. The rule of consistency demands that for deviating from the stand taken in the earlier AY, the AO should bring on record the distinguishing feature of that particular year. We find that the AO or the FAA has not mentioned even a single line as to how the facts of the case under appeal were different from the facts of the earlier or subsequent years. We find that the disallowance of the expenses was without any basis. In the case of CIT v. Rampur Timber & Turnery Co. Ltd. (1981) 129 ITR 58 (All.)(HC), the Hon'ble Allahabad High Court has held that expenditure incurred for retaining the status of the company, namely miscellaneous expenses, salary, legal expenses, travel expenses, expenses would be expenditure wholly and exclusively for the purpose of making and earning income. There is no doubt that the assessee is a corporate entity. Even if it is not carrying on any business activity it has to incur some expenditure to keep up its corporate entity. Therefore expenditure incurred by it has to be allowed.
Premiums Investment and Finance Ltd. v. DCIT (Mum.)(Trib.) www.itatonline.org

S.37(1): Business expenditure-Capital or revenue-Payments for mining lease-Revenue expenditure.
The Government of India had granted approval for mining lease over forest land in favour of the assessee. The Assessing Officer treated the payment made by the assessee for obtaining the mining rights as capital expenditure. The Commissioner (Appeals) held that the expenditure was revenue in nature. On appeal by the Department :
Held, dismissing the appeal, that the payment made by the assessee to carry on its mining business was revenue in nature. There was no infirmity in the order of the Commissioner (Appeals).(AY. 2007-2008)
Dy. CIT v. Rungta Mines Ltd. (2015) 38 ITR 754 (Kol.)(Trib.)

S. 37(1):Business expenditure-Land levelling expenses-Commissioner (Appeals) restricted to 50 per cent. of disallowance-Held to be justified.
The assessee claimed deduction of expenses on levelling land. During the assessment proceedings, the Assessing Officer noticed that the assessee had debited Rs. 15,20,300 in the profit and loss account towards sand charges. He held that the assessee not furnished any evidence and disallowed 50 per cent. of expenses. The Commissioner (Appeals), considering the evidence of the assessee, held that these expenses were incurred for levelling the access road to a property which was sold from which commission income was also returned by the assessee and that invoices were self-made. Therefore, he restricted disallowance to 50 per cent. of Rs. 7,60,150 to Rs. 3,80,075. On appeal by the Department disallowance restricted to 50 percent was held to be justified.(AY. 2008-2009)
ACIT v. Red Brick Realtors P. Ltd (2015) 38 ITR 749(Chennai)(Trib.)

S. 37(1): Business expenditure-Capital or revenue-Windmill-Expenditure on replacing damaged parts of existing windmill or replacing entire old windmill with new one-Allowable only if done without any substantial change in original performance and generation capacity-Matter remanded to verify factual aspect.

The authorities treated the expenditure on replacing the existing windmill with a new one as capital in nature. On appeal, the assessee contended that what was replaced was only the damaged parts of windmill and not the whole windmill :

Held, that it was not clear on the record whether the assessee had replaced only damaged parts of the existing windmill or had replaced the entire old windmill with the new one. If the assessee had replaced only damaged parts of the windmill, without any substantial change in original performance and generation capacity, the expenditure was to be allowed as claimed by the assessee. If the assessee had replaced the old windmill with a new one, the expenditure would be capital in nature. Matter remanded to decide afresh after verifying the factual aspect. (A.Y. 2010-2011)

Pandian Chemicals Ltd. v. Dy. CIT (2015) 38 ITR 620 (Chennai)(Trib)

S. 37(1): Business expenditure-Contingent or accrued liability-Provision for warranty claims in respect of after sales service year after year-Historical trend indicating provision almost equal to actual expenditure incurred-Provision fair and estimate reasonable--Expenditure is to be held allowable.

The assessee was engaged in manufacture and sale of sophisticated engineering goods. The assessee made provision for warranty claims in respect of after sales service year after year. The Assessing Officer disallowed 50 per cent. of such provision in respect of after sales service. The Commissioner (Appeals) deleted the disallowance. On appeal;Held, dismissing the appeal, that the historical trend indicated that the provision made for post sales expenses by the assessee was almost equal to the actual expenditure incurred. In most of the years, the provision made was less than the expenditure incurred and only in two years did the provision marginally exceed the actual expenditure incurred. Thus, the provision made by the assessee was fair and the estimate of post sales expenses to be incurred by the assessee in respect of goods supplied by it was reasonable. Therefore, the expenditure was allowable. (AY. 2005-2006 to 2010-2011)

Jt.CIT v. MIL India Ltd. (2015) 38 ITR 577(Delhi)(Trib.)

S.37(1):Business expenditure-Expenditure incurred on employee and director remuneration-Failure by assessee to specify duties allotted to different employees and functional responsibility of directors-50 per cent. of personnel costs including director's remuneration to be allocated to work in progress.

The assessee claimed the expenditure incurred on general office and administrative expenses including employee and director remuneration. The Assessing Officer capitalised 80 per cent. of that expenditure towards work-in-progress. The Commissioner (Appeals) confirmed this. On appeal:

Held, that indirect costs could include only production or project overheads and not general office and administrative expenses. The assessee had not specified the duties allotted to different employees or the functional responsibility of the directors. Managerial and supervisory costs were necessary inputs to project execution. Therefore, 50 per cent. of the personnel costs including director`s remuneration, as liable for inclusion in the project cost, was to be allocated on some systematic or rational basis which would capture project execution, which was a composite activity commencing with site identification to the construction in a deliverable state. (AY. 2009-2010)

Vardhman Developers Ltd. v. ITO (2015) 38 ITR 512 (Mum.)(Trib.)

S. 37(1):Business Expenditure-Capital or revenue-Expenditure incurred on repair and renovation of rented premises-Expenditure towards making premises functional in accordance with assessee's requirements-capital in nature.

The assessee had taken office premises on rent for a period of five years. The assessee incurred expenditure towards repair and renovation of the premises. The Assessing Officer held that the nature and the volume of the expenditure would not qualify it to be a repair and the expenditure was to be capitalised. The Commissioner (Appeals) confirmed this. On appeal :

Held, that the assessee incurred expenditure towards making the premises functional rather transforming them from an inoperable state. Further the renovation was for the first time and in accordance with the assessee's requirements. Therefore, the expenditure was capital in nature.(AY. 2009-2010)

Vardhman Developers Ltd. v. ITO (2015) 38 ITR 512 (Mum.)(Trib.)

S.37(1):Business expenditure-Capital or revenue-Expenditure incurred on advertisement, sponsorship and brand-building--Expenditure in nature of selling costs--Not capital expenditure--Expenditure is allowable.[S. 28(i)]

The assessee was a builder and developer engaged in executing projects, after bidding for and taking projects from various housing societies. The assessee claimed the expenditure incurred on architect and engineering, tender and survey, advertisement and sponsorship and brand building, treating them as part of the construction work. The Assessing Officer disallowed the claim on the ground that the expenditure could not be related to income of the assessee. The Commissioner (Appeals) confirmed this. On appeal :

Held, that advertisement, sponsorship and brand-building expenses were in the nature of selling costs which could not be capitalised. As the assessee was carrying on a particular business during the year, income therefrom was to be computed under section 28 of the Act, 1961, allowing it all permissible deductions in accordance with the provisions of sections 30 to 43D of the Act. Therefore, the expenditure was allowable. (AY. 2009-2010)

Vardhman Developers Ltd. v. ITO (2015) 38 ITR 512 (Mum.)(Trib.)

S.37(1):Business Expenditure-Capital or revenue-Expenditure incurred on purchase of software-Application software for developing software for clients-No enduring benefit--Revenue expenditure.

The Assessing Officer disallowed software expenses considering them as capital in nature. The Commissioner (Appeals) held that the expenditure was revenue in nature. On appeal : Held, dismissing the appeal, that the software acquired was application software used by the assessee for its business of developing software for its clients and did not result in enduring benefit. Therefore, the expenditure was revenue in nature and was allowable under section 37 of the Income-tax Act, 1961. (AY. 2005-2006, 2006-2007)

Dy. CIT v. ITC Infotech India Ltd. (2015) 38 ITR 401(kol) (Trib)

S. 37(1): Business Expenditure-Capital or revenue - Payment towards right to use trademark-Assessee not entitled to become exclusive owner of trademark-Payment is revenue in nature-Licence fee paid towards purchase of computer software-Revenue in nature.[S.32]

In terms of an agreement, the assessee was allowed to use the brand name of its parent company and was required to pay the trademark fee. The Assessing Officer treated the fee as capital in nature in view of the amended provisions of section 32(1)(ii) of Act,and also disallowed the licence fee paid towards purchase of computer software for its users. The Commissioner (Appeals) deleted the disallowance made by the Assessing Officer. On appeal the Department contended that "the right to use the trade mark" and proportionate rights to use the software acquired by the assessee were an intangible asset as defined under section 32 of the Act :

Held, dismissing the appeal, (i) that on payment of the trademark fee, at no point of time, would the assessee be entitled to become the exclusive owner of the technical know-how and the trademark. Hence the expenditure incurred by the assessee as trademark fee was revenue expenditure relatable to section 37(1) of the Act.

(ii) That the licence fee paid towards purchase of computer software was revenue in nature. (AY. 2008-2009)

Dy. CIT v. Graziano Transmission India P. Ltd. (2015) 38 ITR 426 (Delhi) (Trib)

S. 37(1): Business expenditure-Rent-Matter remanded.

That the addresses registered by the assessee for warehouse purposes with the provident fund and employees State insurance departments showed that the assessee was operating its business activities from the premises for which rent was paid to F. However, the documents submitted by the assessee

required proper examination and verification by the Assessing Officer to evaluate whether the assessee incurred expenditure on rent wholly and exclusively for the purpose of its business. Matter remanded. (AY. 2009-2010)
Dilli Karigari Ltd. v. Dy. CIT (2015) 38 ITR 379 (Delhi)(Trib.)

S. 37(1) : Business expenditure-Professional services-Services availed of for smooth running of business-Expenditure is allowable.
Eminent board was providing full flash legal, technical and professional services to the assessee for smooth running of its business. Therefore, the expenditure incurred by the assessee on legal and professional services was incurred wholly and exclusively for the business purposes of the assessee and it was fully allowable. (AY. 2009-2010)
Dilli Karigari Ltd. v. Dy. CIT (2015) 38 ITR 379 (Delhi) (Trib)

S. 37(1) : Business expenditure-Interest-Receiving loan from its debtor-Assessee would receive money even after adjusting loan amount--Allowing expenditure would cause indirect benefit and diversion of income-Expenditure not allowable.
The Assessing Officer held that the assessee neither carried out manufacturing activity nor trading activity and disallowed part of the expenditure on rent, professional charges and interest paid to group companies. The Commissioner (Appeals) partly disallowed the interest and partly allowed the rent and professional charges. On appeal by the assessee and the Department :
Held, (i) that the assessee received loan and at the same time lender was the debtor of the assessee. Even after adjusting the loan amount against sundry debtors, the assessee was still to receive an amount from debtor. Therefore, interest on such loan could not be allowed and expenditure claimed by the assessee on interest was not allowable. If interest so paid was allowed, then it would be an indirect benefit given by the assessee to debtor and amount to diversion of income of the assessee which was not permissible.(AY. 2009-2010)
Dilli Karigari Ltd. v. Dy. CIT (2015) 38 ITR 379 (Delhi) (Trib)

S. 37(1) : Business expenditure--Prior period expenses to be allowed as deduction.
For the assessment years 2002-03 and 2004-05, the assessee raised bills on certain parties towards advertisement charges at prime time rates and credit notes were given for excess amount bills by debiting prior period expenses. The Assessing Officer disallowed the sum on the ground that the expenditure did not pertain to the year under account and the Commissioner (Appeals) upheld the order of disallowance. On appeal. Held, that the prior period expenses were to be allowed as deduction. (AY. 2005-2006, 2006-2007)
Ushodaya Enterprises Ltd. v. Dy. CIT (2015) 38 ITR 148 (Hyd) (Trib)

S. 37(1) : Business expenditure-Employees' contribution towards Employees State Insurance-Contribution made before due date for filing return of income-Disallowance cannot be made.[S.139(1)]
The assessee deposited the employees' contribution towards employees State insurance for the month of June, 2008, belatedly. The Assessing Officer disallowed the payment and the order was confirmed in the first appeal. On appeal : Held, allowing the appeal, that admittedly, the contribution relating to the month of June, 2008 was deposited before the due date of filing the return under section 139(1) of the Act. No disallowance could be made. (AY. 2009-2010)
Universal Precision Screws v. ACIT (2015) 38 ITR 233 (Delhi)(Trib.)

S. 37(1) : Business expenditure-Festival expenses-Assessing Officer cannot step into shoes of businessman to decide whether a particular expenditure necessary or not-Disallowance not sustainable.
The assessee claimed deduction of Rs. 86,400, on account of festival expenses. The Assessing Officer disallowed the amount on the ground that the expenditure was unnecessary and no proper bills were produced. The Commissioner (Appeals) upheld the order of the Assessing Officer. On appeal :
Held, allowing the appeal, that the Assessing Officer could not step into the shoes of the businessman to decide whether or not a particular expenditure was necessary. The complete details in respect of

Diwali expenses were available in the records. There was no reason to make or sustain any disallowance. Tribunal also held that there was no infirmity in the orders of the authorities in disallowing 10 per cent. of the expenses as being on entertainment, conveyance and telephone expenses towards personal use.(AY. 2009-2010)

Universal Precision Screws v. ACIT (2015) 38 ITR 233 (Delhi)(Trib.)

S. 37(1): Business expenditure-Capital or revenue-Expenditure incurred towards product development including design charges-Revenue expenditure.

The assessee incurred expenditure in respect of product development included design charges. The Assessing Officer, without assigning any proper reason, held it was to be capital expenditure. The Commissioner (Appeals) held that out of disallowance of Rs. 21,20,897 as made by the Assessing Officer, a sum of Rs. 13,58,256 had been debited by the assessee as expenditure on March 31, 2008. Moreover, there was increase in the expenses under this head from last year. Thus, the amount having been debited on the last day, reflected abnormality of the expenditure claimed by the assessee. Accordingly, the Commissioner (Appeals) held that 75 per cent. of Rs. 13,58,256 was to be disallowed. On appeal :

Held, that the expenditure incurred on product development and design charges was revenue expenditure and was to be allowed. The Commissioner (Appeals) had only gone by the premise that a substantial amount had been debited on the last day, and therefore, these expenses could be overstated on the ground that they did not relate to this year. Such a finding of the Commissioner (Appeals) could not be upheld without there being a concrete finding that these expenses pertained to the subsequent year or had not been incurred during the year. Thus, the order of the Commissioner (Appeals) was not correct and was to be deleted.(AY. 2008-2009)

Parle Agro P. Ltd. v. ACIT (2015) 38 ITR 203(Mum) (Trib)

S.37(1):Business expenditure-Creating parking facilities-50% disallowance was held to be justified-Business promotion- Disallowance was held to be proper-Research and development expenses- Allowable as business loss.[S.28(i)]

The assessee was engaged in the manufacture of textile machinery. Expenditure incurred on creating parking facilities and repair of link road. CIT(A) restricting disallowance to 50 per cent. based on personal inspection-Tribunal held restriction was proper. Expenses incurred on business promotion. The Commissioner (Appeals) restricted the business promotion expenditure to 50 per cent. Tribunal held that failure by assessee to place document in support of expenditure Tribunal held that restriction of disallowance by Commissioner (Appeals) merely on estimation was held to be not proper. The assessee entered into an agreement to undertake research and development activities under mill conditions and made payment for using its premises for installing machines and making observation under actual working conditions. Assessee making payment for installing machines and observation under actual working conditions .Machinery stopped on several days for number of hours causing loss of production. The assessee paid compensation for production loss on account of frequent intervention during production period, and expenditure on research and development. The Assessing Officer disallowed the expenditure but the Commissioner (Appeals) allowed the expenditure on research and development in full. Tribunal held that compensation for loss was held to be allowable.(AY. 2007-2008, 2008-2009)

ACIT v. Lakshmi Machine Works Ltd. (2015) 38 ITR 61/ 69 SOT 157 /167 TTJ 40(UO) (Chennai) (Trib)

S.37(I):Business expenditure-Capital or revenue--Market research expenses for deciding market strategy for promoting its products--Expenses for sustaining market and to push up sales--Revenue expenditure.

The assessee claimed deduction of market research expenses. The Assessing Officer held that the assessee could not explain the nature of expenditure and therefore, it was to be treated as capital expenditure and disallowed. The Commissioner (Appeals) confirmed this. On appeal :Held, that the expenditure regularly incurred for sustaining the market and to push up the sales was not in the capital field but was essential and incurred in the ordinary course of business for promoting existing brands. The expenditure was to be allowed.(AY. 2008-2009)

Parle Agro P. Ltd. v. ACIT (2015) 38 ITR 203(Mum.)(Trib.)

S.37(1):Business expenditure-Foreign travel expenditure-No doubt in details of expenses--Disallowance cannot be made on flimsy ground.

The assessee claimed deduction of foreign travel expenses. The Assessing Officer held that the assessee had only provided sketchy details that the business of the assessee had benefited because of the foreign travel and in the absence of proper facts the expenditure was to be disallowed. The Commissioner (Appeals) confirmed this. On appeal: Held, that the assessee's explanation with the details of foreign travel could not be doubted. The business and commercial expediency had to be seen from the point of view of a businessman and if proper explanation with supporting evidence had been given, disallowance could not be made on some flimsy ground. The Commissioner (Appeals) confirmed the expenses mainly on the ground that travel expenses were more than rupees one lakh. Any expenditure less than rupees one lakh had been deleted by him holding it to be so for business purpose and other for non-business purpose, without pointing out any personal uses. Thus, the finding of the Commissioner (Appeals) based on such a dichotomy was not sustainable. (AY. 2008-2009)

Parle Agro P. Ltd. v. A CIT (2015) 38 ITR 203(Mum.)(Trib.)

S.37(1):Business Expenditure-capital or revenue-Artwork charges--Artwork mainly for advertisement and for use for short duration--No enduring advantage--Not capital expenditure.

The assessee was engaged in the business of manufacturing of fruit juice based drink, non-alcoholic beverage base, packaged drinking water, pet preforms, etc., manufacturing of confectionery, snack products and trading in chemicals. It claimed expenditure of Rs. 34,22,131 on artwork charges under section 37 of the Income-tax Act, 1961. The Assessing Officer held that the assessee was incurring similar expenses in the earlier years as well and disallowed the expenses as capital expenditure. The Commissioner (Appeals) held that some of the artwork prepared in electronic form could be reused, but it was also possible that certain artwork could be used for many years and agreed that some of it could not be reused and therefore, directed the Assessing Officer to examine each artwork and decide whether or not the art was reusable for more than a year. On appeal by the assessee :Held, that the artwork were mainly for advertisement and was usable for short duration, which could be less than a year. Even if in some cases, these ideas were used for slightly more than a year, it could not be held that some enduring benefit had accrued to the assessee in the capital field. The expenses claimed under the head artwork were to be allowed as business expenditure. (AY. 2008-2009)

Parle Agro P. Ltd. v. ACIT (2015) 38 ITR 203(Mum) (Trib)

S. 37(1):Business expenditure-Capital or revenue -Extension of existing business--Failure by authorities to find nature of project undertaken--Suspension of capitalisation of borrowing requiring examination of facts--Matter remanded to Assessing Officer

The assessee, a printer and publisher of newspapers and magazines, extended its existing business at Greater Noida. The Assessing Officer disallowed the claim of expenses incurred in connection with extension of the existing business as capital expenditure. Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :Held, that the authorities had failed to find out the nature of the project undertaken by the assessee at Greater Noida. The issue of suspension of capitalisation of borrowing costs also needed examination of facts by the Assessing Officer. Matter remanded. (AY. 2003-04)

Hindustan Times Ltd v. Dy.CIT (2015) 38 ITR 165 (Delhi)(HC)

S.37(1):Business expenditure--Travelling and conveyance expenses--Failure by assessee to produce bills and vouchers supporting expenses incurred—Disallowance was restricted at 20 percent.

The assessee claimed expenditure of Rs. 50.81 lakhs on account of foreign travelling expenses. The Assessing Officer disallowed Rs. 19,46,144 out of the total expenses claimed by the assessee on the ground that the copy of the passport and a letter for purchase of foreign currency had not proved that the expenditure related to business purpose of the assessee. The Commissioner (Appeals) restricted the disallowance to fifty per cent. on the ground that the assessee did not produce bills and vouchers

in respect of foreign travel expenses and mere submission of purchase of foreign currency could not lead to allowance of the entire expenditure. On appeal : Held, that the assessee had not produced any relevant bills and vouchers to support the expenses incurred by it. The Tribunal further restricted the disallowance to 20 per cent. of Rs. 19,46,144.(AY. 2004-2005)
Himson International P. Ltd. v. Dy. CIT (2015) 38 ITR 218 (Ahd) (Trib.)

S.37(1): Business expenditure-Capital or revenue -Technical consultancy charges to foreign company-Enduring benefit- Capital in nature-Depreciation was held to be allowable.[S.32]
Consultancy charges paid to foreign company was held to be capital in nature as the assessee had failed to produce any material to show that the benefit of the expenditure would not be derived by the assessee in future. No material was brought on record to show that no new technical know-how was acquired by the assessee by incurring the expenditure. Depreciation was allowed.(AY. 2004-2005)
Himson International P. Ltd. v. Dy. CIT (2015) 38 ITR 218 (Ahd.)(Trib.)

S. 37(1):Business Expenditure - Capital or revenue Expenditure towards permission from Government for using factory premises for other purposes-Factory premises already in use of assessee-Expenditure towards payment including interest cannot be capitalised-Expenditure revenue in nature.

The assessee was engaged in the business of manufacture of precision instruments. During the previous year the assessee paid an amount towards permission from the Government for using the land for other purpose including commercial or service activities, besides running a factory. The amount of instalment included interest. The Assessing Officer held that the instalment inclusive of interest was capital in nature and could not be allowed as revenue expenditure. The Commissioner (Appeals) allowed the claim as revenue expenditure. On appeal:
Held, dismissing the appeal, that since the factory premises were already in the use of the assessee, the payment made with interest towards conversion of charges of land could not be capitalised and was allowable as revenue expenditure. (AY. 2008-2009)
Dy. DIT v. Micron Instruments P. Ltd. (2015) 38 ITR 242 (Delhi)(Trib.)

S. 37(1):Business expenditure-Business activity carried on, though no revenue generated during previous year--Expenditure is allowable as deduction.
The assessee was engaged in the business of development and sale of software. The AO disallowed the business expenditure which the assessee had debited without earning business income. The assessee had earned interest which was assessable under the head "Income from other sources". The Assessing Officer held that there was no business activity at all carried on by the assessee and the assessee itself had offered interest under the head "Income from other sources" and therefore, no expenses could be allowed.The Commissioner (Appeals) confirmed this. On appeal; Held, allowing the appeal, that the Assessing Officer erred in rejecting the business loss of the assessee admitted in the return of income. The Assessing Officer should have appreciated that there was business activity, though there was no revenue during the previous year. Hence, the expenditure was relatable to the business activity and was allowable as a deduction. (AY. 2004-2005, 2005-2006)
S. P. P. S. Systems P. Ltd. v. Dy. CIT (2015) 38 ITR 49 (Hyd) (Trib)

S.37(1) : Business expenditure- Expenses incurred on renovation and cost of improvement of building are allowable as revenue expenditure.
Assessee - firm incurred expenditure on renovation and cost improvement of leased building only for day to day business and claimed deduction as revenue expenditure. A.O and CIT (A) disallowed it being as capital expenditure. Tribunal allowed it as expenditure as no capital asset was brought into existence.(AY. 2008-09 to 2010 - 11)
Nandini Delux .v. ACIT (2015) 54 taxmann.com 162 / 37 ITR 52 / 167 TTJ 746 (Bang.)(Trib.)

S. 37(1) : Business expenditure - Payment of front end fees for raising loan - Such payment is allowable as revenue expenditure even it is written off in the assessee's books.

Front end fee paid by assessee to HUDCO as a precondition for sanction of loan raised by it is allowable as revenue expenditure in its entirety in the year of payment even though the assessee has written off the amount in its books over a period of years. (AY. 2008 - 09)
DCIT .v. Jaipur Vidyut Vitran Nigam Ltd. (2015) 167 TTJ 24 (UO) (Pune)(Trib.)

S. 37(1) : Business expenditure – Commission-Disallowance was confirmed.
Where expenditure on account of commission was found to be much higher as compared to earlier years and assessee could not justify its claim with relevant material, disallowance of commission was held to be justified.(AY. 2009 – 2010)
Krishna R. Bhat .v. ACIT (2015) 152 ITD 441 (Mum)(Trib.)

S. 37(1) : Business expenditure-Disallowance to 10percent of expenditure was held to be reasonable.
Expenditure incurred by assessee towards conveyance, office expenses and sales promotion in cash was disallowed as being not fully verifiable and restricted disallowance to 10 per cent of expenditure claimed.
(AY. 2009 – 2010).
Krishna R. Bhat v. ACIT (2015) 152 ITD 441 (Mum)(Trib.)

S. 37(1) : Business expenditure –Method of accounting-liability arises during relevant previous year, same has to be allowed as a deduction.[S.145]
For determining the admissibility of an expenditure under the mercantile method of accounting, as followed by the assessee, is the point of time when liability to pay sum accrued or arises. As long as such a liability arises during the relevant previous year, the same is to be allowed as a deduction. A portion of such insurance policy payment may pertain to the subsequent period, but then the total payment made during the relevant year does not exceed for one previous year in as much as corresponding adjustment for the year paid expenses in the immediately preceding year has not been made either. The technical approach adopted by the A.O. is thus does not appeal to in order to determine admissibility of an expenditure under mercantile method of accounting, relevant is point of time when liability to pay sum accrues or arises and, therefore, liability arises during relevant previous year, same has to be allowed as a deduction.(AY. 2008-09)
Sai Builders v. ITO (2015) 152 ITD 462(Agra)(Trib.)

S. 37(1) : Business expenditure-Travelling and conveyance expenses-Discrepanciesin remuneration received from two firms-Matter remanded.
Commissioner receiving no remand report from AO. No evidence for additions. Matter remanded for fresh adjudication. (AY. 2003-2004, to 2006-2007)
Dy.CIT .v. Yuvanshankar Raja (2015) 37 ITR 355 (Chennai)(Trib.)

S. 37(1) : Business expenditure-Expenditure incurred in maintenance of vehicles used by employees, held to be allowable.
The assessee claimed expenditure towards running and maintenance expenses of its vehicles used by the employees. The Assessing Officer, following the direction of the Dispute Resolution Panel, held that 50 per cent. of running and maintenance expenses of the vehicles was to be disallowed for non-business purpose. On appeal :
Held, that there was to be no disallowance on account of running and maintenance of the vehicles used by the employees of the company. The addition was to be deleted.(AY. 2006-2007)
Microsoft Corporation India P. Ltd. .v. Add. CIT (2015) 37 ITR 290 / 54 taxmann.com 167 (Delhi)(Trib.)

S. 37(1) : Business expenditure-Ad-hoc disallowance-Low net profit—Held to be not justified.
Entire expenses incurred duly vouched and supported by necessary documents. Gross profit earned from trading division reasonable.AO cannot make ad hoc disallowance without pointing out single instance of inflation of expenditure.(AY. 2006-2007)
Dy. CIT .v. Eicher Motors Ltd. (2015) 37 ITR 427/ 53 taxmann.com 317(Delhi)(Trib.)

S. 37(1) : Business expenditure-Capital or revenue-Repair and maintenance-Software licence-Allowable as revenue expenditure.[S.30]
Expenditure incurred on repairs and maintenance was held to be revenue expenditure. Capital or revenue expenditure. Expenditure incurred on software licences. Assessee not in business of manufacturing software or rendering services through use of software. Payment for application software not resulting in creation of new profit-earning apparatus or source of income allowable as revenue expenditure.(AY. 2006-2007)
Dy. CIT .v. Eicher Motors Ltd. (2015) 37 ITR 427/ 53 taxmann.com 317 (Delhi)(Trib.)

S. 37(1) : Business expenditure-Prior period expenses-Expenses relating to earlier years-Assessee producing details of expenses debited in profit and loss account and receipt of bills in respective assessment years-Disallowance to be deleted.
Held, dismissing the appeal, that the assessee had produced complete details before the Commissioner (Appeals) in respect to expenses debited in the profit and loss account, on receipt of bills in the respective assessment years. Therefore, there was no infirmity in the order of the Commissioner (Appeals). (AY. 2006-2007 to 2010-2011)
Dy. CIT .v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kolkata)(Trib.)

S. 37(1) : Business expenditure- Restricting office expenses to forty percent was held to be proper.
The assessee, a licensed document writer and engaged in sale of stamps, claimed 60 per cent. of total receipts as expenditure. The Assessing Officer restricted the office expenses to 40 per cent. The CIT(A)confirmed the order of the AO. On appeal :
Held, dismissing the appeal, that admittedly, the assessee had employed some personnel to carry out his professional duties, but claiming 60 per cent. of the gross receipts as expenditure without furnishing any details was not correct. The assessee was expected to maintain records for writing the documents and sale of stamp papers. The total receipts from document writing and sale of stamp papers could be ascertained only if the assessee was maintaining proper records. There was no infirmity in the order of the authorities.
Assessee engaging in drafting documents and sale of stamps. Duty of assessee to maintain proper books of account. Total receipts cannot be ascertained without proper records. Order restricting office expenses to forty per cent proper.(AY. 2003-2004 to 2009-2010)
K. Govinda Pillai .v. Dy. CIT (2015) 37 ITR 772(Cochin) (Trib.)

S. 37(1) : Business expenditure—Share of expenses of common effluent plant-By virtue of notice of demand issued by Government--Held to be allowable.[S.145]
Share of expenses on common effluent treatment plant. Amount payable by virtue of notice of demand issued by Government is held to be allowable as deduction. (AY. 2009-2010)
T and T Motors Ltd. v. Add. CIT (2015) 37 ITR 682 (Delhi) (Trib)

S. 37(1) : Business expenditure-Expenditure on purpose which is illegal or offence-Fees paid to advocate for seeking bail for assessee's driver on account of road accident-Not allowable.
Held, that the advocate`s fees for seeking bail in respect of the offence committed by the assessee`s driver were not allowable in terms of the Explanation to section 37(1) of the Act which prohibits deduction of expenditure incurred for a purpose which was an offence or which was prohibited by law. (AY. 2009-2010)
T and T Motors Ltd. .v. Add. CIT (2015) 37 ITR 682 (Delhi) (Trib.)

S. 37(1) : Business expenditure- Expenditure incurred for certification of net worth of directors for obtaining loan—Allowable.
The expense related to certification charges of the net worth of directors was deductible in accordance with law as the certificates were used for obtaining loans by the assessee from banks. (AY. 2009-2010)

T and T Motors Ltd. v. Add. CIT (2015) 37 ITR 682 (Delhi)(Trib.)

S. 37(1) : Business expenditure–Finance charges on borrowings from banks-Loss on purchase and sale of units cannot be allowed as deduction- Disallowance was justified.
Assessee claimed to have paid finance charges on borrowings from bank and its broker. However, in books of account, difference between sale unit and purchase unit was claimed as finance charges. AO disallowed the claim . On appeal the Tribunal held that transaction clearly showed that there was loss on purchase and sale of units and same could not be considered as equivalent to finances charges ,hence finance charges claimed was to be disallowed.(AY. 1987-88 to 1990-91)
Dhanraj Mills (P.) Ltd. .v. ACIT (2015) 152 ITD 253 (Mum.)(Trib.)

S. 37(1) : Business expenditure–Membership entrance fee to club-Allowable expenditure.
Expenditure incurred on account of payment of membership entrance fee to club was an allowable expenditure .(AY. 2006-07)
Clariant Chemicals (I) Ltd. .v. Addl.CIT (2015) 152 ITD 191 (Mum.)(Trib.)

S. 37(1) : Business expenditure- Capital or revenue-Right to use a particular software-Revenue expenditure.
Expenditure incurred by assessee towards acquisition of right to use a particular software that helped to work do effectively was to be treated as revenue expenditure. (AY. 2006-07)
Clariant Chemicals (I) Ltd. .v. Addl.CIT (2015) 152 ITD 191 (Mum.)(Trib.)

S. 37(1) : Business expenditure–Interest paid on intercorporate deposit-Allowable as business expenditure.
The assessee-company, engaged in the business of real estate and construction. Assessee had taken loan and in order to reduce interest cost, said loan amount was utilised for inter corporate deposit and currency swap arrangement. Tribunal held that where interest expenditure was incurred for earning income from inter-corporate deposit and currency swap arrangement in regular course of business, said interest expenditure was an allowable expenditure.(AY. 2008-09)
Dy.CIT .v. Prestige Garden Constructions (P.)Ltd. (2014) 52 taxmann.com 263 / (2015) 67 SOT 139 (Bang.)(Trib.)

S. 37(1) : Business expenditure–Consent fee to SEBI- Not penalty-Allowable as deduction.
Assessee, a stock broker, claimed deduction on account of payment of consent fee to SEBI - Said payment was not related to penalty imposed by SEBI, rather it was a "Consent Fee" paid by assessee for settlement of dispute, legal expenses and other administrative charges of SEBI. Tribunal held that the said amount was paid clearly specifying that it was paid without admitting or denying guilt just to settle dispute on commercial expediency and said fee could not be equated with penalty for infraction of law under Explanation to section 37(1) but it was an allowable business expenditure. (AY. 2008-09)
ITO .v. Reliance Share & Stock Brokers (P.)Ltd. (2014) 51 taxmann.com 215 / (2015) 67 SOT 73 (Mum.)(Trib.)

S. 37(1):Business expenditure–Trademark and patent registration-Expenditure is allowable as revenue expenditure.
The assessee-company was a manufacturer and trader of pharmaceutical goods, diagnostic kits, medical instruments etc. It claimed deduction of trademark registration fees and patent registration fees. The revenue authorities rejected assessee's claim holding that by incurring said expenditure the assessee had created an intangible asset and, thus, expenditure in question was in the nature of capital expenditure. Tribunal held that where assessee, engaged in manufacturing of pharmaceutical product, paid certain amount as trademark and patent registration fee, in view of fact that said expenditure was incurred for protection of its running business without generating any new asset, same was to be allowed as deduction. (AY. 2006-07)
Cadila Healthcare Ltd. .v. Addl.CIT (2012) 21 taxmann.com 483 / (2015) 67 SOT 110 (URO) (Ahd.)(Trib.)

S. 37(2A) : Business expenditure-Expenditure on maintenance of accommodation of employees was held to be deductible-Expenditure on inauguration of new centre was held to be deductible. [S.37(3)]

The Assessing Officer made an addition of Rs. 37,667 on account of maintenance of guest house on the ground that such expenses were not allowable under section 37(3). The Commissioner (Appeals) deleted the addition holding that the expenditure had been incurred for accommodation of employees. The Tribunal upheld the deletion. Court held that the Commissioner (Appeals) and the Tribunal concurrently concluded that the expenditure was incurred for maintenance of the place for the employees who visited the factory for official purposes for the purpose of business. Hence, it was deductible.

The Assessing Officer disallowed expenses of Rs. 3,735 under section 37(2A) of the Act on account of inauguration of a new centre. The Commissioner (Appeals) deleted the addition and the Tribunal confirmed the deletion. The Court held that , the expenditure on inauguration of a new centre was deductible. (AY.1994-1995 to 1999-2000)

CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P & H) (HC)

S. 37(3) : Business expenditure–Rule 6D by taking each trip of an individual employee and not with reference to total trips made by an individual employee in previous year. [R.6D]

Allowance of expenditure incurred for travelling of employees has to be limited under rule 6D by taking each trip of an individual employee and not with reference to total trips made by an individual employee in previous year. (AY. 1998-88, 1975-76)

CIT v. Coromandal Fertilisers Ltd. (2015) 228 Taxman 318 (Mag.)(AP)(HC)

S.37(4):Business expenditure-Expenditure on guest house-Depreciation was not allowable.[S.32]

Court held that while computing the disallowance under section 37(4) depreciation on guest house was not allowable.

Britannia Industries Ltd. v. CIT [2005] 278 ITR 546 (SC) followed. (AY. 1986-1987, 1987-1988)

CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

S. 37(4) : Business expenditure-Disallowance-Guest house-Depreciation-Rent and repairs-Expenditure on guest house disallowable.

Held that the Tribunal was not correct in deleting the addition being the guest house expenses. Followed, Britannia Industries Ltd. v. CIT [2005] 278 ITR 546 (SC).(AY. 1989-1990, 1990-1991)

CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 (Delhi) (HC)

S.37(4):Business expenditure-Guest house-Rents-Repairs- Disallowance was held to be justified.[S. 30, 32, 37(1)(5)]

Expression "premises and buildings" in sections 30 and 32 and expression "residential accommodation including any accommodation in nature of guest house" in sub-sections (3), (4) and (5) of section 37, could not be similarly interpreted ,therefore, expenses towards rents, repairs and maintenance of accommodation used for purpose of a guest house of nature indicated in sub-section (4) of section 37 was to be excluded from deduction.

ACIT v. VXL India Ltd. (2015) 229 Taxman 199 (Guj.)(HC)

S. 40(a)(i):Amounts not deductible - Deduction at source-Non-resident–Royalty- Cost of software products imported-liable to deduct tax at source. [S.9(1)(i), 195]

Remittances towards cost of software products imported from foreign suppliers was held as royalty hence liable to deduct tax at source.(AY. 2003-04)

CIT v. Rational Software Corpn. India (P.) Ltd. (2015)230 Taxman68 (Karn.)(HC)

S. 40(a)(i):Amounts not deductible - Deduction at source -Non-resident–Income deemed to accrue or arise in India- Commission- Procuring export orders outside India- Fees for technical services- Not liable to deduct tax at source. [S. 9(1)(vii), 195,OECD Model Convention, Art. 12]

The assesse was engaged in manufacturing and exporting of leather garments. It entered in to agreement with foreign agents to procure export orders out side India on commission basis. Assessing Officer disallowed the payment of commission on the ground that non resident agents services were technical in nature and would fall under purview of section 9(1)(vii). CIT(A) held that assesse had neither received any services such as managerial or technical from the foreign agents except procurement of orders on commission basis which was received abroad constituting income in the hands of the agents accruing outside India and thus, no disallowance under section 40(a)(i) was called for. On appeal Tribunal confirmed the order of CIT(A). On appeal by revenue dismissing the appeal of revenue, the Court held that; no limb of activity had taken place in India, services rendered by agents would not fall within definition of "fees for technical services". Order of Tribunal was affirmed. (AY. 2010-11)

CIT v. Orient Express (2015) 230 Taxman 602 (Mad.)(HC)

S. 40(a)(i) : Amounts not deductible-Deduction at source- live telecast of races-Broad cast right-Copy right. [S.9(1)(vi), 194J, Copyright Act, 1957, 2(y), 13, 14]

The assessee had made payment to other clubs/centres on account of live telecast of races. The assessee was engaged in the business of conducting horse races and derived income from betting, commission, entry fee etc. and had made payment to other centres whose races were displayed in Delhi.

The AO made a disallowance under section 40(*a*)(*ia*) on account of 'royalty paid to other centres' and on account of 'live telecast royalty' being royalties covered by section 194J as TDS was not deducted on said expenses.

The CIT(A) upheld the finding of the AO in respect of expenses incurred after 13-7-2006 *i.e* the date when royalty was included in the scope of section 194J.

On appeal, the Tribunal allowed the appeals of the assessee and held that the payment made for live telecast of horse races is not covered under section 9(1)(vi) and as such not being royalty, TDS was not required to be deducted.

On appeal to High Court held that payment for live telecast of horse race was neither payment for transfer of any 'copyright' nor any 'scientific work' to fall under ambit of royalty under Explanation 2 to section 9(1)(vi), hence no section 194J TDS was attracted. There is a clear distinction between a copyright and broadcast right, broadcast or live coverage does not have a 'copyright'. In view of the above, the appeals filed by the revenue are dismissed.(AY. 2007-08 & 2009-10)

CIT .v. Delhi Race Club (1940) Ltd. (2015) 273 CTR 503 / 228 Taxman 185 (Delhi)(HC)

S. 40(a)(i) : Amounts not deductible-Deduction at source-Purchase of film copy right was neither covered under section 194J nor under section 194C-Not liable to deduct tax at source.[S.9(1)(v), 194C, 194J]

The assessee was in the business of Media and dealings in Movie/Film Satellite Rights by taking them on Assignment basis and reassigning to channels and derived income from salary, business and other sources.

The AO was of the view that the transaction claimed was in reality a transfer/lease of right for a definite period of use by convening the film rolls to DVCAM for satellite usage without permanently transferring the satellite right to the assessee. Thus, the payments debited as purchase warranted TDS under section 194J and worked out disallowance under section 40(a)(i) for non-deduction of TDS under section 194J.

The Tribunal held that the payments made would fall within the definition of 'royalty' and in that situation, the assessee was duty bound under section 194J to deduct tax at source on the payments effected, and such deductions having not been made, rigours of section 40(a)(i) stood attracted.

On appeal the Court held that,transfer of satellite right to assessee under an agreement for a period of 99 years, in terms of section 26 of Copyright Act and definition under clause (5) of Explanation 2 to section 9(1)(vi) is a sale and, therefore, excluded from definition of royalty under section

9(1).Therefore, the Tribunal erred in concluding that payment made by the assessee was royalty and not sale. (AY. 2009-10)
S.P. Alaguvel .v. Dy. CIT(2015) 228 Taxman 202 (Mag.) (Mad.)(HC)

S. 40(a)(i) : Amounts not deductible-Deduction at source-Non-resident –Amended provision was held to be applicable prior to 1-04-2005
Tribunal granted benefit to assessee in terms of substituted provisions of section 40(a)(i). Department resisted said order on ground that said substituted provision had no application prior to 1-4-2005 and prayed for interference of court.There being no substantial difference in language employed in unamended and amended sections, no substantial question of law arose for consideration. (AY. 1996-97, 2003-04 to 2005-06)
CIT v. Allergan India (P.) Ltd. (2015)/371 ITR 38/ 228 Taxman 362 (Mag.)(Karn.)(HC)

S.40(a)(i):Amounts not deductible - Deduction at source -Non-resident –Commission-Service was rendered outside India- Not liable to deduct tax at source.[S.9(1)(i), 195]
The commission charges were paid to the foreign agents for procuring business orders. The commission charges were deducted by the foreign buyers from the sale value and paid to the agents directly. The foreign buyers sent payments by LC only for 97% amount. The services were rendered by the agents outside India and the payments were made outside India. The said foreign agents have no business connection or PE in India and the services are rendered by the agents outside India. Therefore, the commission income earned by the foreign agents is not chargeable to tax in India.Therefore, the assessee was not liable to deduct tax at source on the said payments. Since, the income of foreign agents is outside the purview of section 9, consequently section 195 will not come into playand the issue was decided in favour of the assessee.(AY. 2008-09 to 2010-11)
Sri Rajalakshmi Enterprises v. ITO (2015) 67 SOT 240(URO) (Chennai)(Trib.)

S. 40(a)(i):Amounts not deductible-Deduction at source - Payments liable to deduction of tax at source-Failure to remit deducted tax before expiry of time limit-Expenditure is liable to be disallowed.[R. 30]
Failure by assessee to remit deducted tax before expiry of time limit.-Expenditure is liable to be disallowed. (AY. 2006-2007, 2008-2009)
Dy.CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183(Cochin)(Trib.)

S.40(a)(i):Amounts not deductible-Deduction at source-Non-resident –Income deemed to accrue or arise in India (Independent personal services)- Payment to foreign agent, on account of legal consultancy fee for initiating anti-counterfeiting proceeding, since agent was not having any fixed base in India, it could not be taxed in India in respect of fees paid by assesse-Not liable to deduct tax at source-DTAA-India- Morocco[S.9(1)(i), 195, Art 5, 14].
Assessee Company was engaged in business of licensing, protection and defense of trademark. Assessee paid a certain sum to Saba, a trademark and patent agent of Morocco, on account of legal consultancy fees for initiating and prosecuting an anti-counterfeiting proceedings before Tribunal of Commerce at Rabat (Morocco). Though services rendered by lawyers are included in independent personal services as per article 14 of DTAA, but since Saba was not having any fixed base in India, condition of article 14 was not fulfilled and, Saba could not be taxed in India in respect of said fees and disallowance under section 40(a)(i) was not justified. (AY.2008 - 2009)
Kirloskar Proprietary Ltd. v. Dy. CIT (2015) 153 ITD 11 / 171 TTJ 129 (Pune)(Trib.)

S. 40(a)(i) : Amounts not deductible - Deduction at source-Non-resident-Sales commission payment to non-resident agents for services outside India is not tax deductible at source.[S.9(1)(i), 195, Model OECD Convention, Art. 7]
Sales commission paid by assessee to non-resident agents for services rendered by them outside India in procuring export orders for assessee, is not chargeable to tax in India. Consequently, assessee is not under any obligation to deduct tax at source ,therefore, provisions of section 40(a)(i) have no application. (AY.2010 – 2011)
ACIT .v. T. Abdul Wahid & Co.(2015) 153 ITD 128 (Chennai)(Trib.)

S. 40(a)(i): Amounts not deductible-Deduction at source-As there is no requirement in the Act to deduct TDS on purchases made from Indian residents, imposing such a condition while making payments to non-residents violates the non-discrimination provision in Article 24 of the DTAA-DTAA- India-Japan.[S.195, Art, 9, 24]

(i) It can be observed from the international transactions reported by the assessee that apart from earning Service fee amounting to Rs. 2.66 crore, being the commission income for co-ordinating between the buyers and sellers in the capacity of an agent, it also indulged into trading activity by directly making purchases and sale of goods on principal to principal basis. Segment-wise results of the assessee from trading and service/commission segments are available. Thus, it is evident that the assessee did direct purchase and sale transactions with its AEs and also acted as a service provider in the sale of their goods. There is no dispute as regards the transactions undertaken by the assessee under the `Trading segment' on which operating profit was determined by reducing purchase and other operating costs from the sale value. The TPO has accepted such trading transactions at ALP. The controversy is only qua the agency segment, under which `Service fee' was received without making purchase or sale of goods as an owner. In such circumstances, the question arises as to whether the cost of goods, for which the assessee simply provided services by acting as an agent, can be considered in the hands of the assessee and the transaction of receipt of `Service fee' be treated as that of a trading nature? In our considered opinion, the answer to this question can not be in affirmative. The fact that the assessee did not purchase and sell the goods under the `Service fee' segment, has not been disputed by the TPO. There is no finding given by the Officer that the assessee actually undertook trading but wrongly gave it a colour of agency in its books of account. Once the position is that the assessee sold the goods as an agent of its AEs and simply earned commission, how the cost of such goods in the hands of the AE can be taken into consideration and the entire transaction be considered as that of sale and purchase, is anybody's guess. We do not subscribe to the view canvassed by the TPO in this regard. By equating commission business with the trading business, the TPO has ventured to recharacterize the commission transaction as a trading transaction, which is patently unacceptable. The Hon'ble jurisdictional High Court in CIT VS. EKL Appliances Ltd. (2012) 345 ITR 241 (Delhi) has held that the authorities should not disregard the actual transaction or substitute other transactions for them. Examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken. Further, their Lordships have carved out two exceptions to the aforesaid principle, viz., (i) where the economic substance of a transaction differs from its form; and (ii) where 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. Neither the TPO has taken recourse to any of these exceptions nor there is any material on record to justify the bringing of the instant case within their sweep. Ex consequenti, it is manifest that the authorities below erred in recharacterizing a commission transaction into a trading transaction.

(ii) One of the fundamental conditions for making a transfer pricing analysis is that the international transaction must broadly match with a comparable uncontrolled transaction. If the character of the original international transaction is tinkered with certain permutations and combinations so as to make it fit for making a comparison with an adjusted uncontrolled transactions, it will lead to incongruous results, thereby rendering the entire exercise of determining ALP, a futility. By combining the cost of goods incurred by the AE with the expenses incurred by the assessee, the TPO has embarked upon treating the foreign AE as well as the assessee as tested parties to one transaction. Such an approach has no sanction of law. The Hon'ble Delhi High Court in Li & Fung (India) P. Ltd. Vs. CIT (2014) 361 ITR 85 (Del) has repelled an approach similar to the one adopted in the instant case. The Mumbai bench of the tribunal in Onward Technologies Ltd. vs. DCIT (2013) 36 CCH 46 (Mum) has also held that the tested party in an international transaction can only be the assessee and not its foreign AE.

(iii) Adverting to the facts of the instant case, we find it as an admitted position that the assessee simply rendered agency services under this segment by co-ordinating between customers and its AEs. By no standard, the assessee can be said to have dealt with the goods of its AEs as an absolute owner. Once position is such, we fail to comprehend as to how financial results of the commission segment can be adjusted for making a comparison with trading segment.

(iv) The deductibility of tax at source pre-supposes the chargeability of income under the Act and disallowance u/s 40(a)(i) follows from non-deduction/payment of tax at source by the person responsible on such payments. In other words, unless income from the transaction is chargeable to tax under the Act in the hands of non-resident etc., there can be no question of deduction of tax at source and the consequential disallowance u/s 40(a)(i) of the Act cannot follow.
(v) The absence of a Permanent Establishment of a non-resident in India ordinarily implies that no business operations were carried out by him in India. The existence of a PE in India may require examination as to whether such PE was involved in specific transactions between non-resident and an unrelated Indian enterprise. In case there is no PE of the foreign enterprise in India and the goods are directly sold offshore by such non-resident enterprise without performing any operations in India, then, no income can accrue or arise or deemed to accrue or arise to him in terms of section 9(1)(i) of the Act;
(vi) Para 3 of Article 24 of the DTAA provides that any payment made by an Indian enterprise to a Japanese enterprise shall, for the purposes of determining the taxable profit of an Indian enterprise, be taken up under the same conditions as if the payment had been made to an Indian resident and not to a nonresident. In simple words, for the purpose of computing the taxable profit of an Indian enterprise, the provisions of the Act shall apply on a transaction with a Japanese enterprise as if it is a transaction with an Indian enterprise. If the transaction with a Japanese enterprise entails some adverse consequences in comparison with if such transaction had been made with an Indian enterprise, then such adverse consequences will be remedied under this clause by presuming, for computing the total income of an Indian enterprise, as if it was a transaction with an Indian enterprise and not a Japanese enterprise. Thus, Article 24 provides in unequivocal terms that for the purposes of determining the taxable profits of an Indian enterprise, any disbursements made to a Japanese enterprise shall be deductible in the same manner as if it had been made to an Indian resident. When we examine the TDS provisions, it is noticed that no provision under the Chapter XVII of the Act stipulates for deduction of tax at source from payment made for the purchases made from an Indian resident. This position when contrasted with purchases made from a non-resident, imposes liability on the purchaser for deducting tax at source under section 195, subject to the fulfilment of other conditions. When we compare an Indian enterprise purchasing goods from an Indian party vis-a-vis from a Japanese party, there is possibility of an obvious discrimination in terms of disallowance of purchase consideration under section 40(a)(i) in so far as the purchases from a Japanese enterprise are concerned. It is this discrimination which is sought to be remedied by para 3 of Article 24. The effect of this Article is that in determining the taxable profits of an Indian enterprise, the provisions of the Act, including disallowance u/s 40(a)(i), shall apply as if the purchases made from a Japanese enterprise are made from an Indian enterprise. Once purchases are construed to have been made by an Indian enterprise from another Indian enterprise, not requiring any deduction of tax at source from the purchase consideration and consequently ousting the application of section 40(a)(i), the non-discrimination clause shall operate to stop the making of disallowance in case of purchases actually made from a Japanese enterprise, which would have otherwise attracted the disallowance. Thus, it is evident that para 3 of Article 24, without considering the effect of Article 9 and other Articles referred to in the beginning of this para, rules out the making of disallowance u/s 40(a)(i) of the Act;
(vii) The contention of the ld. DR that once Article 9 applies, then the application of Article 24(3) is thrown out, is not wholly correct. The writ of Article 9 does not stop the application of Article 24(3) in entirety. The overriding effect of Article 9 over para 3 of Article 24 is limited to its content alone. In other words, the mandate of Article 24 applies save and except as provided in Article 9 etc. It does not render Article 24(3) redundant in totality. A conjoint reading of these two Articles brings out that if there is some discrimination in computing the taxable income as regards the substance of Article 9, then such discrimination will continue as such. But, in so far as rest of the discriminations covered under para 3 of Article 24 are concerned, those will be removed to the extent as provided.(ITA No. 945/Del/2015, dt. 26.05.2015) (AY. 2010-11)
Mitisubhishi Corporation India Pvt. Ltd. v.DCIT (Delhi)(Trib.); www.itatonline.org

S. 40(a)(i) : Amounts not deductible – Deduction at source -Internet charges paid to foreign company--Payments not taxable in India in terms of Double Taxation Avoidance Agreement--

Failure by Assessing Officer to establish that data storage charges falling under fees for technical services--Disallowance not attracted.[S.9(1)(vi)]

The Assessing Officer disallowed the data storage space charges made to a non-resident company by the assessee, under section 40(a)(i) of the Act, on the ground that the payment made towards internet charges fell under the category of fees for technical services and the assessee had failed to deduct tax at source therefrom. The Commissioner (Appeals) allowed the claim of the assessee holding that the payments were not taxable in India in terms of the Double Taxation Avoidance Agreement between India and the U. S. A. On appeal by the Department :

Held, dismissing the appeal, that the Assessing Officer had not given any finding how data storage charges paid by the assessee would fall either under royalty or fees for technical services so as to require deduction of tax at source. The Commissioner (Appeals) was right in deleting the disallowance under section 40(a)(i) of the Act.(AY. 2003-2004 to 2006-2007)

ACIT .v.Vishwak Solutions P. Ltd. (2015) 38 ITR 522 / 68 SOT 118 (URO) (Chennai) (Trib.)

S. 40(a)(i) : Amounts not deductible-Deduction at source-Failure to deduct tax at source-Deduction to be allowed in accounting year in which tax has been paid. [S.40(a)(ia)].

Held, that the assessee had not deducted tax at source on the payment in question. Therefore, the expenditure could be disallowed under section 40(a)(ia) of the Act. In view of the provisos to section 40(a)(i) and (ia) the deduction claimed by the assessee had to be allowed in the year in which the tax was actually paid by the assessee. The Department having raised no objection to allowing the claim of the assessee in the year in which the tax was actually paid by the assessee, the AO was to verify the actual payment of tax by the assessee on the expenditure claimed and thereafter allow the claim in the year in which the tax was actually paid. (AY. 2006-2007)

Termo Penpol Ltd. .v. ACIT (2015) 37 ITR 87 (Cochin)(Trib.)

S. 40(a)(ia) : Amounts not deductible-Deduction at source-Sub contractor- Non-filing of Form No. 15I, 15J is only a technical defect and provisions of section 40(a)(ia) are not attracted in such a case.[S.194C,Form 15I, 15J]

During relevant year, assessee made payments of freight charges to sub-contractors without deducting tax at source. The Assessing Officer finding that assessee did not file Form 15J within prescribed time, disallowed said payments by invoking provisions of section 40(*a*)(*ia*).

The Commissioner (Appeals) as well as the Tribunal taking a view that non-filing of Form No. 15J was merely a technical defect, deleted said disallowance.On revenue's appeal;dismissing the appeal the court held that,non-filing of Form No. 15I, 15J is only a technical defect and provisions of section 40(a)(ia) are not attracted in such a case .(AY. 2009-10)

CIT .v. Sri Marikamba Transport Co. (2015) 231 Taxman 484 (Karn.)(HC)

S.40(a)(ia):Amounts not deductible - Deduction at source –(a).The second proviso inserted by Finance Act,2012 cannot be treated as retrospective in operation (b) The fact that the payees have already paid tax on the amounts paid does not mean that a disallowance for failure to deduct TDS cannot be made, (c) S. 40(a)(ia) cannot be interpreted to mean that it applies only to amounts "paid" and not to those "payable"—Order of Tribunal was up held. [S. 194A, 201(1)]

The assesses are partners of the firms and during the assessment years in question they have paid interest to the firms without deducting tax as required under section 194A of the Act. The AO disallowed the interest by applying the provision of section 40(a)(ia), which order has been concurrently up held. On appeal the Court dismissing the appeal the Court held that;

(1)The contention that the second proviso to Section 40(a)(ia) of the Act, introduced by the Finance Act 2012, is retrospective in operation, based on the verdicts in Allied Motor (P) Ltd. v. CIT [(1997) 224 ITR 677 (SC)] and CIT v. Alom Extrusions Ltd . [(2009) 319 ITR 306] and that disallowance could not have been ordered invoking Section 40 (a)(ia) of the Act is not acceptable. The proviso was inserted by Finance Act 2012 and came into force with effect from 01.04.2013. The fact the second proviso was introduced with effect from 01.04.2013 is expressly made clear by the provisions of the Finance Act 2012 itself. This legal position was clarified by this Court in Prudential Logistics And Transports v. Income Tax Officer [(2014) 364 ITR 689 (Ker)]. A statutory provision, unless otherwise expressly stated to be retrospective or by intendment shown to be retrospective, is always prospective

in operation. Finance Act 2012 shows that the second proviso to Section 40 (a)(ia) has been introduced with effect from 01.04.2013. Reading of the second proviso does not show that it was meant or intended to be curative or remedial in nature, and even the appellants did not have such a case. Instead, by this proviso, an additional benefit was conferred on the assessees. Such a provision can only be prospective as held by this Court in Prudential Logistics and Transports (supra). Therefore, this contention raised cannot be accepted.

(ii) The contention, relying on the Apex Court judgment in Commissioner of Income Tax v. Hindustan Coca Cola Beverages Pvt. Ltd. [(2007) 293 ITR 226], that the recipients of the amounts paid by the appellants, the firms of which they are partners, have already paid tax and that therefore, it is illegal to disallow the interest paid is not acceptable. First of all, Section 40(a)(ia) is in very categoric terms and the provision is automatically attracted, on the failure of an assessee to deduct tax on the interest paid by him. Therefore, going by the language of Section 40(a)(ia), once it is found that there is failure to deduct tax at source, the fact that the recipient has subsequently paid tax, will not absolve the payee from the consequence of disallowance ..

(iii) The contention, relying on the judgment of the Allahabad High Court in Commissioner of Income Tax v. Vector Shipping Services (P) [(2013) 357 ITR 642 (All)] that the appellants had already paid the amount and therefore, the provisions of Section 40(a)(ia), applicable only in respect of the amount which remains to be payable on the last day of the financial year, is not attracted is not acceptable. Primarily, this contention should be answered with reference to the language used in the statutory provision. Section 40(a)(ia) makes it clear that the consequence of disallowance is attracted when an individual, who is liable to deduct tax on any interest payable to a resident on which tax is deductible at source, commits default. The language of the Section does not warrant an interpretation that it is attracted only if the interest remains payable on the last day of the financial year. If this contention is to be accepted, this Court will have to alter the language of Section 40(a) (ia) and such an interpretation is not permissible. This view that we have taken is supported by judgments of the Calcutta High Court in Crescent Exports Syndicate and another, which have been relied on by the Tribunal. (AY. 2005-06 to 2007-08)

Thomas George Muthoot .v. CIT (Ker) (HC) ; www.itatonline.org

S. 40(a)(ia):Amounts not deductible–Deduction at source-Civil contracts - Material supplied by contractee cannot be taken into account - Assessee, a sub-contractor, not responsible for purchase of raw materials - Assessee not responsible to deduct tax at source - Tribunal ignoring factual as well as legal position - Matter remanded.

The assessee was a sub-contractor for road construction. For the assessment year 2006-07, he filed a return showing a total income of Rs. 3,13,995 stating that he was working as sub-contractor for G. The Assessing Officer passed an ex parte order and assessed the income of the assessee at Rs.29,88,132 applying the profit at 8% and disallowed payments of rent and labour, rent of machinery under section 40(a)(ia), observing that no tax at source had been deducted. The Commissioner (Appeals) gave substantial relief to the assessee. The Tribunal restored the disallowance of Rs.3,23,00,625 made by the Assessing Officer. On appeal:

Held, allowing the appeal, the material supplied by the contractee cannot be taken into account. The profit rate should be estimated with reference to the net payment only after excluding the cost of material supplied to the assessee in terms of the contract. The Tribunal had ignored the factual aspect that under the agreement the assessee was not responsible to purchase the raw materials like sand, gitti, etc. and it was purchased by the main contractor. Therefore, prima facie the assessee was not responsible to deduct tax at source. Therefore, the order of the Tribunal was set aside and the matter was restored to the Tribunal to decide afresh.(AY. 2006-2007)

Ravi Dubey .v. CIT (2015) 375 ITR 469 (All.)(HC)

S. 40(a)(ia):Amounts not deductible-Deduction at source-Finding that payment made to a group company not in nature of income but expenditure reimbursed and not a revenue receipt - Disallowance not warranted.

Held, the issue relating to disallowance under section 40(a)(ia) was never raised before the appellate authorities. The Commissioner (Appeals) observed that the payment made to the W group was not in the nature of income but was expenditure reimbursed which could not be regarded as a revenue

receipt and, therefore, the Tribunal considering the provisions of section 194C had upheld the order of the Commissioner (Appeals). There was no question of law which arose from the order of the Tribunal.(AY. 2002-2003 to 2006-2007)
CIT .v.Karma Energy Ltd. (2015) 375 ITR 264(Bom.)(HC)

S.40(a)(ia):Amounts not deductible-Deduction at source-Amounts paid during assessment year itself and nothing payable at close of year--No disallowance could be made-Tribunal restoring matter to Assessing Officer to determine whether payments made by assessee during assessment year-No reason to interfere either in fact or in law.
Held that ; the Tribunal merely restored the matter to the Assessing Officer to determine whether the payments were made by the assessee during the year under consideration. There was no reason to interfere either in fact or in law. (AY. 2008-2009)
CIT .v. Rajinder Parshad Jain (2015) 374 ITR 545 (P & H)(HC)

S.40(a)(ia):Amounts not deductible-Deduction at source- Deduction u/s 194C instead of u/s 194J renders the shortfall liable for disallowance u/s. 40(a)(ia).[S.194C, 194J, 201]
The assessee, a hospital, entered into an agreement with M/S Lakeshore Hospital and Research Centre Limited by which, the latter had undertaken to perform various professional services in the assessee's hospital. On the payments made, the assessee deducted tax at the rate of 2% under Section 194C. However, assessment was completed on the basis that tax deductible was at 5% as prescribed under Section 194J and the entire tax in this regard was disallowed under Section 40(a)(ia)of Act. The CIT(A) confirmed the assessment and the Tribunal also rejected the appeal filed by the assessee concerning the assessment year 2005-2006. However, in 2006-2007, the Tribunal followed the Calcutta High Court judgment in CIT v. S.K. Tekriwal[2014] 361 ITR 432 (Cal) and held that where tax is deducted by the assessee, even if it is under a wrong provision of law, as in this case, the provisions of Section 40(a)(ia) of the Act cannot be invoked. On appeal to the High Court HELD dissenting from CIT v. S.K. Tekriwal [2014] 361 ITR 432 (Cal):
(i) As per these provisions of the agreement, M/S Lakeshore Hospital and Research Centre had undertaken to render professional services to the assessee and this was not a case where they were undertaking a contract work. If that be so, tax was deductible under Section 194J and not under Section 194C as done by the assessee.
(ii) Section 40(a)(ia) (supra) is not a charging Section but is a machinery Section and such a provision should be understood in such a manner that the provision is workable. The expression "tax deductible at source under Chapter XVII-B" occurring in the Section has to be understood as tax deductible at source under the appropriate provision of Chapter XVII-B. Therefore, as in this case, if tax is deductible under Section 194J but is deducted under Section 194C, such a deduction would not satisfy the requirements of Section 40(a)(ia). The latter part of this Section that such tax has not been deducted, again refers to the tax deducted under the appropriate provision of Chapter XVII-B. Thus, a cumulative reading of this provision, therefore, shows that deduction under a wrong provision of law will not save an assessee from Section 40(a)(ia).
(iii) In so far as the judgment of the Calcutta High Court inCIT v. S.K. Tekriwal [2014] 361 ITR 432 (Cal), which was relied on by the Tribunal is concerned, with great respect, for the aforesaid reasons, we are unable to agree with the views that if tax is deducted even under a wrong provision of law, Section 40(a)(ia) cannot be invoked. (AY. 2005-06, 2006-07)
CIT v. PVS Memorial Hospital Ltd. (Ker.)(HC); www.itatonline.org

S. 40(a)(ia):Amounts not deductible – Deduction of source -Payable- Disallowance can be made even if the payment has already been made by the assessee to the payee/contracting party-Deduction is mandatory irrespective of fact as to whether assesse is following cash or mercantile system of accounting. [S.194C]
The assessee made certain payment to the contracting party without deducting tax at source u/s. 194C. The AO disallowed the payment made u/s. 40(a)(ia). The assessee argued that the disallowance u/s. 40(a)(ia) cannot be made if the payment had already been made by the assessee to the payee/contracting party. The CIT(A) and Tribunal rejected the contention of the assessee and upheld the order of the AO. On an appeal by the assessee, the High Court held that the term "payable" used

in the section is descriptive of the payments which attract the liability to deduct tax at source. It does not categorise defaults on the basis of when the payments are made to the payees of such amounts which attract the liability to deduct tax at source and, hence, disallowance u/s. 40(a)(ia) can be made even if payment has already been made by the assessee to the payee/contracting party. (AY. 2005-06)
P. M. S. Diesels v. CIT(2015) 374 ITR 562 / 119 DTR 212/ 232 Taxman 544 / 277 CTR 491 (P&H)(HC)
Rana Polycot Ltd. v. CIT(2015) 374 ITR 562/119 DTR 212/ 232 Taxman 544 (P&H)(HC)
Torque Pharmaceuticals (P) Ltd. v. CIT (2015) 374 ITR 562/ 119 DTR 212/ 232 Taxman 544 (P&H)(HC)
Swift Laboratories Ltd. v. CIT (2015) 374 ITR 562 / 119 DTR 212 / 232 Taxman 544 (P &H)(HC)

S. 40(a)(ia) : Amounts not deductible-Income deemed to accrue or arise in India –Royalty-Subscription charges paid to non-resident would amount to royalty liable to TDS. [S. 40(a)(i)[S.195]
Subscription charges paid to non-resident would amount to royalty liable to TDS, for non-deduction of tax same was to be disallowed.(AY. 2001-02)
CIT v. Infosys Technologies Ltd.(2015) 229 Taxman 335 (Karn)(HC)

S. 40(a)(ia) : Amounts not deductible –Deduction at source-Commission or brokerage-Credit card payment-Bank providing banking services in form of payment and subsequently collecting payment - Bank does not render any service in the nature of agency - Bank not concerned with buying or selling of goods - Principle of doubtful penalisation is applicable and has to be applied strictly-Not liable to deduct tax at source- Recipient has paid the tax on the receipt-No loss to revenue.[S. 194H].
The assessee was engaged in the business of trading in readymade garments. HDFC provided card swiping machines to the assessee. The assessee paid commission to HDFC on payments received from customers who had made purchases through credit cards. The details of the bill amount, etc., were thereupon forwarded to HDFC, which then made payment to the assessee after withholding or deducting the fee payable to HDFC. Thereafter, HDFC recovered the bill amount from the issuing bank of the customer. The Assessing Officer held that the amount earned by HDFC was in the nature of commission and should have been subjected to deduction of tax at source at 10% under section 194H.
Held, HDFC was not acting as an agent of the assessee. Once the payment was made by HDFC, it was received and credited to the account of the assessee. In the process, a small fee was deducted by HDFC. On swiping the credit card on the swiping machine, the customer whose credit card was used, got access to the internet gateway of the acquiring bank resulting in the realisation of payment. Subsequently, HDFC realised and recovered the payment from the bank which had issued the credit card. HDFC had not undertaken any act on "behalf" of the assessee. The relationship between HDFC and the assessee was not of an agency but that of two independent parties on principal to principal basis. HDFC was also acting and equally protecting the interest of the customer whose credit card was used in the swiping machines. HDFC or its employees were not present at the spot and were not associated with buying or selling of goods as such. Upon swiping the card, HDFC made payment of the bill amount to the assessee. Thus, the assessee received the sale consideration. In turn, HDFC had to collect the amount from the bankers of the credit card holder. HDFC had taken the risk and also remained out of pocket for some time as there would be a time gap between the date of payment and recovery of the amount paid. Therefore, the amount retained by HDFC was a fee charged for having rendered the banking services and could not be treated as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods. Therefore, section 194H would not be attracted.
Also, another reason why section 40(a)(ia) should not have been invoked in the present assessee was the principle of doubtful penalisation which required strict construction of penal provisions. The principle applies not only to criminal statutes but also to provisions which create a deterrence and result in punitive penalty. Section 40(a)(ia) is a deterrent and a penal provision. It has the effect of penalising the assessee, who has failed to deduct tax at source and acts to the detriment of the

assessee's property and other economic interests. It operates and inflicts hardship and deprivation, by disallowing expenditure actually incurred and treating it as disallowed. The Explanation, therefore, requires a strict construction and the principle against doubtful penalisation would come into play. The detriment in the present assessee would include initiation of proceedings for imposition of penalty for concealment, as was directed by the Assessing Officer. The principle requires that a person should not be subjected to any sort of detriment unless the obligation is clearly imposed. When the words are equally capable of more than one construction, the one not inflicting the penalty or deterrent may be preferred. The principles and interpretations can apply to the taxing statutes. HDFC would necessarily have acted as per law and it was not the case of the Revenue that HDFC had not paid taxes on its income. It was not a case of loss of revenue as such or a case where the recipient did not pay its taxes.)(AY 2009-2010)
CIT .v. JDS Apparels P. Ltd. (2015) 370 ITR 454 / 113 DTR 137/ 273 CTR 1 (Delhi)(HC)

S. 40(a)(ia):Amounts not deductible-Deduction at source-scope is not limited to those expenses alone which fall u/s 30 to 38 but covers all those expenses which are specifically enumerated in s. 40. [S. 30 to 38]
It is expenditure per se, and not nature of business in which expenditure is incurred, which is subject matter of disallowance u/s. 40(a)(ia) scope of disallowance of expenses contemplated by section 40(a)(ia) is not limited to those expenses alone which fall u/s. 30 to 38 but covers all those expenses which are specifically enumerated in s. 40. (AY. 2007 – 2008) **ITO v. Rajesh A. Boricha (2015) 153 ITD 537 (Raj.)(Trib.)**

S.40(a)(ia):Amounts not deductible-Deduction at source-Hiring of trucks- Oral contract is also covered- Failure to deduct tax at source –Disallowance was held to be justified.[S. 44AB, 194C]
Assessee was engaged in business of transport contracts. Goods received by assessee from consignors for their carriage were sent through truck owners hired by assessee. There was no privity of direct contract between truck owners hired by assessee and consignors. It was assessee's responsibility to transport goods received from them for which purpose assessee hired services of truck owners. Assessee was not a mere transport commission agent and services of truck owners were hired as sub-contractors. Therefore, assessee was required to deduct TDS out of payments made by him to such truck owners/drivers in terms of section 194C(2). Since he did not do so, provisions of s. 40(a)(ia) were to be invoked for making disallowance. Provision is applicable to individual when exceeds the monetary limits specified in section. (AY. 2007 – 2008)
ITO v. Rajesh A. Boricha (2015) 153 ITD 537 (Raj.)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source-Additional evidence- Matter remanded to Assessing Officer.
Expenditure incurred on software development and licence on software. Commissioner (Appeals) allowing it on obtaining requisite evidence.Assessing Officer to consider it afresh in light of fresh evidence.Matter remanded. (AY. 2006-2007, 2008-2009)
Dy.CIT v. GAC Shipping (India) P. Ltd. (2015) 39 ITR 183(Cochin)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source–VSAT charges-Lease line charges-Not liable to deduct tax at source.
Payments made to Bombay Stock Exchange and National Stock Exchange towards VSAT charges and lease line charges--No requirement to deduct tax at source. (AY. 2008-2009)
Centrum Broking Ltd. .v. ACIT (2015) 39 ITR 23 (Mum.)(Trib.)

S.40(a)(ia):Amounts not deductible- Deduction at source-The amendment is clarificatory and retrospective w.e.f. 01.04.2005-Tax deducted was deposited before due date of filing of return-Disallowance was deleted. [S.139(1)]
It is not in dispute, in the light of a series of judgments of Hon'ble jurisdictional High Court, that the amendment brought to Section 40(a)(ia), which provides that as long as the taxes deducted at source have been deposited before the due date of filing return under section 139(1), disallowance under section 40(a)(ia) cannot be invoked for delay in depositing the tax deducted at source, is only

clarificatory in nature and it will also apply to the assessment years prior to the assessment years 2010-11 as well. In the case of CIT v. Omprakash R Chaudhury & Others (TA No. 412 of 2013; judgment dated 22nd November 2013), it was held that the amendment made in section 40(a)(ia) of the Income Tax Act, 1961, as retrospective in operation having effect from 1st April 2005, i.e. from the date of insertion of Section 40(a)(ia) of the Act.(ITA No. 211/Ahd/2010, dt. 07.07.2015.) (AY. 2006-07)

Shri. Umeya Corporation v. ITO (Ahd.)(Trib.); www.itatonline.org

S.40(a)(ia):Amounts not deductible-Deduction at source–Contractor-Disallowance cannot be made for amount already paid before end of previous year-Matter remanded.[S.194C]

The assessee-firm was engaged in the business of providing cable network services. During the previous year the assessee made payments to various pay channels. The Assessing Officer held that as the assessee had written agreements with the pay channels for a specific period, the assessee was liable to deduct tax at source under section 194C of the Actand failure to deduct it would result in disallowance of payment under section 40(a)(ia) of the Act and thereby disallowed it. The Commissioner (Appeals) confirmed this. On appeal ;Held, that the disallowance under section 40(a)(ia) of the Act was not attracted for amounts which had already been paid before the end of the previous year. The Assessing Officer was to allow the expenditure, if it was found to be paid within the previous year.Matter remanded. (AY. 2009-2010)

S. S. Networks v. ITO (2015) 39 ITR 46 / 68 SOT 351 (Hyd.)(Trib.)

S. 40(a)(ia):Amounts not deductible-Deduction at source-Finance Act 2012, with effect from 1-4-2013, Second proviso is curative and retrospective-Legitimate business expenditure cannot be disallowed if the payee has paid tax thereon.[S. 194A]

(i) The second proviso to section 40(a)(ia) of the Act inserted by the Finance Act, 2012 is curative in nature intended to supply an obvious omission, take care of an unintended consequence and make the section workable. Section 40(a)(ia) without the second proviso resulted in the unintended consequence of disallowance of legitimate businessexpenditure even in a case where the payee in receipt of the income had paid tax. It has for long been the legal position that if the payee has paid tax on his income, no recovery of any tax can be made from the person who had failed to deduct the income tax at source from such amount.

(ii) The settled position in law is that if the deductee/payee has paid the tax, no recovery can be made from the person responsible for paying of income from which he failed to deduct tax at source. In a case where the deductee/payee has paid the tax on such income, the person responsible for paying the income is no longer required to deduct or deposit any tax at source. In the similar circumstances, the first proviso to section 40(a)(ia) inserted by the Finance Act, 2010, which has been held to be curative and therefore, retrospective in its operation by the Hon'ble Calcutta High Court in ITAT No. 302 of 2011, GA 3200/2011, CIT v Virgin Creations decided on November 23, 2011 provides for allowance of the expenditure in any subsequent year in which tax has been deducted and deposited. The intention of the legislature clearly is not to disallow legitimate business expenditure. The allowance of such expenditure is sought to be made subject to deduction and payment of tax at source. However, in a case where the deductee/payee has paid tax and as such the person responsible for paying is no longer required to deduct or pay any tax, legitimate business expenditure would stand disallowed since the situation contemplated by the first proviso viz. deduction and payment of tax in a subsequent year would never come about. Such unintended consequence has been sought to be taken care of by the second proviso inserted in section 40(a)(ia) by the Finance Act, 2012. There can be no doubt that the second proviso was inserted to supply an obvious omission and make the section workable. (AY. 2007-08)

Santosh Kumar Kedia v. ITO (Kol.)(Trib.); www.itatonline.org

S. 40(a)(ia): Amounts not deductible- Deduction at source - Second proviso was inserted by FA 2012 to rectify the unintended consequence of disallowance in the hands of the payer even if the payee has paid tax. It is curative and retrospective in operation. Assessee's claim of having obtained declarations u/s 197A from the payees should not be disbelieved without evidence.

Assessee is not expected to go into the correctness of the declarations filed by the payees.[S. 194C,197A, Form 15 I]

Allowing the appeal of assesse, the Tribunal held that;

(i) The second proviso to section 40(a)(ia) of the Act inserted by the Finance Act, 2012 is curative in nature and intended to supply an obvious omission, take care of an unintended consequence and make the section workable. Section 40(a)(ia) without the second proviso resulted in the unintended consequence of disallowance of legitimate business expenditure even in a case where the payee in receipt of the income had paid tax. It has for long been the legal position that if the payee has paid tax on his income, no recovery of any tax can be made from the person who had failed to deduct the income tax at source from such amount. In Grindlays Bank v CIT, (1992) 193 ITR 457 (Cal) decided on September 5, 1989, it was held by the Hon'ble Calcutta High Court that if the amount of tax has already been realised from the employees concerned directly, there cannot be any question of further realisation of tax as the same income cannot be taxed twice. If the tax has been realised once, it cannot be realised once again, but that does not mean that the assessee will not be liable for payment of interest or any other legal consequence for their failure to deduct or to pay tax in accordance with law to the revenue. The Central Board of Direct Taxes has accepted this position in itsCircular No.275/201/95-IT(B) dated January 29, 1997. Reference in this behalf may also be made to the judgment of the Hon'ble Supreme Court in Hindustan Coca Cola Beverage P. Ltd. v CIT, (2007) 293 ITR 226 (SC) where the same view was taken. The aforesaid settled position in law has also been legislatively recognized by insertion of a proviso in sub-section (1) of section 201 of the Act by the Finance Act, 2012. Thus, the settled position in law is that if the deductee/payee has paid the tax, no recovery can be made from the person responsible for paying of income from which he failed to deduct tax at source. In a case where the deductee/payee has paid the tax on such income, the person responsible for paying the income is no longer required to deduct or deposit any tax at source. In the similar circumstances, the first proviso to section 40(a)(ia) inserted by the Finance Act, 2010, which has been held to be curative and therefore, retrospective in its operation by the Hon'ble Calcutta High Court in ITAT No. 302 of 2011, GA 3200/2011, CIT v Virgin Creations decided on November 23, 2011 provides for allowance of the expenditure in any subsequent year in which tax has been deducted and deposited. The intention of the legislature clearly is not to disallow legitimate business expenditure. The allowance of such expenditure is sought to be made subject to deduction and payment of tax at source. However, in a case where the deductee/payee has paid tax and as such the person responsible for paying is no longer required to deduct or pay any tax, legitimate business expenditure would stand disallowed since the situation contemplated by the first proviso viz. deduction and payment of tax in a subsequent year would never come about. Such unintended consequence has been sought to be taken care of by the second proviso inserted in section 40(a)(ia) by the Finance Act, 2012. There can be no doubt that the second proviso was inserted to supply an obvious omission and make the section workable. The insertion of second proviso was explained by Memorandum Explaining The provision in Finance Bill, 2012, reported in 342 ITR (Statutes) 234 at 260 & 261;

(ii) The claim of the assessee that at the time of making payment, he had before him the appropriate declarations in the prescribed form from the payees stating that no tax was payable by them in respect of their total income and therefore tax need not be deducted and in the light of these declarations he had no option but to make the payment of interest without any tax deduction. If the claim is true then the contention must be accepted because under sub-section (lA) of section 197A, if such a declaration is filed by the payee of interest no deduction of tax shall be made by the assessee. The revenue authorities have doubted the assessee's version because according to them it is only when the Assessing Officer proposed the disallowance of the interest invoking the section 40(a) (ia) in the course of the assessment proceedings that the assessee filed the declarations claimed to have been submitted to him by the payees of the interest in the office of the CIT(TDS) as required by sub-section 2 of section 197A. Apart from this inference, there is no other evidence in their possession to hold that the declarations were not submitted by the payees of the interest to the assessee at the time when the payments were made. Without disproving the assessee's claim on the basis of other evidence except by way of inference, it would not be fair or proper to discard the claim. The Assessing Officer has not recorded any statements from the payees of the interest to the effect that they did not file any declarations with the assessee at the appropriate time or to the effect that they filed the declarations

only at the request of the assessee. In the absence of any such direct evidence, we are unable to reject the assessee's claim. Unless it is proved that these forms were not in fact submitted by the payees, the assessee cannot be blamed because at the time of making payment, he has to perforce rely upon the declarations filed by the loan cr editors and he was not expected to embark upon an enquiry as to whether the loan creditors really and in truth have no taxable income on which tax is payable. That would be putting an impossible burden on the assessee. Thai apart sub-section IA of Section 197A merely requires a declaration to be filed by the payee of the interest and once it is filed the payer of the interest has no choice except to desist from deducting tax from the interest. The sub-section uses the word "shall" which leaves no choice to the assessee in the matter. In the case of payment of leave travel concession and conveyance allowance to employees who are liable to deduct tax from the salary paid to the employees under section 192, the Supreme obligation under the Act or Rules to collect evidence to show that the employee had actually utilized the money paid towards leave travel concession/conveyance allowance. The position is stronger under section 197A which does not apply to section 192, but which provides in sub-section (1A) that if the payee of the interest has filed the prescribed form to the effect that he is not liable to pay any tax in computing his total income, the payee shall not deduct any tax. The subsection does not impose any obligation on the payer to find out the truth of the declarations filed by the payee. Even if the assessee has delayed the filing of the declarations with the office of the CIT/CCIT (TDS) within the time limit specified in subsection (2) of section 197 A, that is a distinct omission or default for which a penalty is prescribed. Section 273B provides that no penalty shall be imposed under any of the clauses of sub-section (2) of section 272A for the delay if the assessee proves that there was reasonable cause for the same. (ITA No. 1278/Kol/2011, dt. 22.05.2015) (AY. 2008-09)

Ballabh Das Agarwal v. ITO (Kol) (Trib) ; www.itatonline.org

S. 40(a)(ia):Amounts not deductible- Deduction at source-Payments made within accounting year cannot be disallowed--Matter remanded.

The assessee claimed deduction of the expenditure incurred in freight transportation. The Assessing Officer disallowed the expenditure on the ground that the assessee failed to deduct tax at source. The Commissioner (Appeals) confirmed this. On appeal contending that the expenses were reimbursement and provisions of deduction of tax at source were not applicable and provisions of section 40(a)(ia) of the Act had no application for the payments made within the accounting year :

Held, that there was no categorical finding that the expenses were only reimbursements made by the assessee. The provisions of section 40(a)(ia) of the Act had no application for the payments made within the accounting year. The issue was to be remitted back to the Assessing Officer for examining whether all the payments were made within the accounting year. The payments made within the accounting year could not be disallowed under section 40(a)(ia) of the Act. Matter remanded. (AY. 2004-2005, 2008-2009)

Devendra Exports P. Ltd. v. ACIT (2015) 38 ITR 744 (Chennai)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source -Electricity charges--Assessee contesting quantification of demand raised by Electricity Board--Liability certain and not contingent—Allowable.

The Assessing Officer disallowed electricity charges payable by the assessee on the ground that the assessee was contesting the demand raised by the electricity board and the liability was yet to crystalise. The Assessing Officer held that the liability was uncertain and contingent liability till the exact liability was quantified by the Board. The Commissioner (Appeals) confirmed this. On appeal :

Held, that according to sub-clause (4) of the notification No. S. O. 69(E), relating to disclosure of accounting policies, provision should be made for all known liabilities and losses even though the amount could not be determined with certainty. In the assessee's case, the assessee was not disputing the whole liability, but only the quantification of the demand raised by the Electricity Board. The liability was certain and not contingent. Therefore, the expenditure was allowable.(AY. 2004-2005, 2008-2009)

Devendra Exports P. Ltd. v. ACIT (2015) 38 ITR 744 (Chennai)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source-Architect fees--Amount paid before end of accounting year--No disallowance can be made.

The assessee claimed deduction of Rs. 18 lakhs paid towards architect's fees. The expenditure was disallowed by the Assessing Officer under section 40(a)(ia) of the Income-tax Act, 1961, on the ground that the assessee had not deducted the tax at source on the payment. The Commissioner (Appeals) deleted the disallowance as the amount was already paid before the end of the year. On appeal by the Department :

Held, that when the amount was paid by the assessee before the end of the accounting year, the expenditure could not be disallowed under section 40(a)(ia) of the Act. (AY. 2008-2009)

ACIT v. Red BrickRealtors P. Ltd (2015) 38 ITR 749(Chennai)(Trib.)

S. 40(a)(ia): Amounts not deductible-Deduction at source-Making payments towards contract within accounting year—No disallowance can be made.

The Assessing Officer disallowed the amount paid to contractors under section 40(a)(ia) of the Act on the ground that the assessee had failed to deduct tax at source. The Commissioner (Appeals) sustained the order of the Assessing Officer. On appeal :

Held, that the provisions of section 40(a)(ia) had no application in case of payments were already made before the end of the accounting year. Since the assessee had made the payments within the accounting year, the provisions of section 40(a)(ia) had no application. (AY. 2007-2008)

Sri Narayana Moorthy Travels v. ITO(2015) 38 ITR 592(Chennai)(Trib)

S. 40(a)(ia):Amounts not deductible - Deduction at source-Payments to parties for hiring buses--No disallowance merely because persons to whom hiring charges paid not responding to letters issued by Assessing Officer.

The Assessing Officer disallowed the bus hire charges paid by the assessee to various persons on the ground that the persons to whom the payments had been made, did not confirm such payments. The Commissioner (Appeals) sustained the order of disallowance. On appeal :

Held, that the assessee had made payments to the parties for hiring buses and returned the receipts from the business of transportation of students. The parties might not have responded to the letters issued by the Assessing Officer in view of the strained relationship with the assessee and on this ground alone, the payments made to the parties for hiring buses by the assessee could not be doubted. The disallowance was to be deleted. (AY. 2007-2008)

Sri Narayana Moorthy Travels v. ITO(2015) 38 ITR 592(Chennai)(Trib)

S.40(a)(ia) :Amounts not deductible -Deduction at source-Depositing tax deducted at source in next financial year but before filing return of income-Sufficient compliance-Disallowance cannot be made. [S.139(1)].

Where the assessee had deposited the tax deducted at source on the remittance on April 29, 2004, i. e., in the next financial year but before filing the return under section 139(1) of the Income-tax Act, 1961 :

Held, allowing the appeal, that there was sufficient compliance and section 40(a)(ia) could not be invoked. (AY. 2004-2005)

Rolls-Royce India P. Ltd. v. Dy. CIT (2015) 38 ITR 599(Delhi) (Trib)

S. 40(a)(ia) Amounts not deductible - Deduction at source-Payments to newspaper publishers for matrimonial advertisements as an agent to its clients-No contractual relationship between assessee and publishers-Disallowance cannot be made.[S. 194C]

The assessee, engaged in the business of marriage bureau, made payments to newspapers for publication of matrimonial advertisements on behalf of its clients. The Assessing Officer disallowed the payment made by the assessee under section 40(a)(ia) of the Income-tax Act, 1961, on the ground that the assessee had failed to deduct tax at source under section 194C of the Act. The Commissioner (Appeals) held that the fact that the assessee had placed advertisements on a regular basis throughout the year for which payments had been made to the publishers would not create a contractual

relationship between the assessee and the publishers attracting section 194C of the Act. On appeal by the Department :
Held, dismissing the appeal, that admittedly, the assessee acted as an agent to its customers and there was no contractual relationship with the newspaper publishers for carrying the advertisement placed by the assessee. The assessee had a contractual relationship only with its clients for providing marriage related services for which the assessee had placed matrimonial advertisements in the newspapers from time to time in terms of the requirements of its business. Though the payment for the entire year was in excess of Rs. 50,000, in the absence of a contractual relationship between the assessee and the publishers, section 194C would not apply to the payments made to the publishers and no disallowance could be made under section 40(a)(ia) of the Act. (AY. 2005-2006)
ITO v. Vanaja Rao Quick Marriages P. Ltd. (2015) 38 ITR 547 (Hyd)(Trib)

S. 40(a)(ia):Amounts not deductible-Deduction at source--Disallowance cannot be made for amounts paid before end of relevant accounting year.[S. 139(1),194C]
The assessee entered into agreements with its sister concerns for production of television serials and made payments on the basis of revenue sharing from income generated from advertisements. The Assessing Officer disallowed the expenditure under section 40(a)(ia) of the Income-tax Act, 1961, on the ground that the assessee had not deducted tax at source under section 194C of the Act. The Commissioner (Appeals) upheld the order of the Assessing Officer. On appeal :Held, that as the assessee had already made payments before the end of the relevant accounting year, the disallowance may not be made under section 40(a)(ia) on such payments.(AY. 2005-2006, 2006-2007)
Ushodaya Enterprises Ltd. v. Dy. CIT (2015) 38 ITR 148 (Hyd) (Trib)

S. 40(a)(ia) : Amounts not deductible–Deduction at source - Amount paid before due date for filing of return-No amount remaining unpaid to truck owners at end of year-Disallowance cannot be made. [S.139(1)]
The Assessing Officer disallowed the payment made by the assessee for hiring of trucks under section 40(a)(ia) of the Income-tax Act, 1961, on the ground that the assessee had failed to deduct tax at source. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal : Held, allowing the appeal, that the payments had been made before the due date for filing of the return and no amount remained unpaid to the truck owners at the end of the year. The disallowance was not attracted. (AY. 2009-2010)
Dipendra Bahadur Singh .v. ACIT (2015) 38 ITR 67(Cuttack) (Trib)

S.40(a)(ia):Amounts not deductible- Deduction at source- Merilyn Shipping 136 ITD 23 (SB) should be followed in view of approval by Allahabad HC and dismissal of SLP by Supreme Court. In any event as two views are possible, view in favour of assessee should be followed. Amounts already paid without TDS cannot be disallowed.
The assessee, having made the payment, section 40(a)(ia) cannot be attracted because it speaks of the amount “payable” and it does not cover the amount already paid. The ITAT Chennai Benches have taken into consideration the decision of the ITAT Special Bench in the case of Merilyn Shipping & Transport 136 ITD 23 (SB), the order of which was suspended by the High Court but at the same time there was a subsequent judgement of the Hon’ble Allahabad High Court in the case of M/s. Vector Shipping Services (P) Ltd. wherein it was held that section 40(a)(ia) applies only to those amount which remains payable by the end of the previous year. In other words, in respect of payments already made section 40(a) (ia) is not attracted: – i. ACIT vs. M/s. Eskay Designs – ITA No.1951/Mds/2012 dated 09.12.2013. ii. ITO vs. Theekathir Press – ITA No. 2076/Mds/2012 & CO No. 155/Mds/2013 dated 18.09.2013. Though there are contrary decisions of the other Hon’ble High Courts, i.e. Hon’ble Calcutta High Court and Hon’ble Gujarat High Court, in the light of the decision of the Hon’bleAllabahad High Court it can be said the there can be two views possible in this matter in which event the one which is in favour of the assessee has to be followed in the light of the decision of the Hon’ble Supreme Court in the case of Vegetable Products Ltd. 88 ITR 192. Hon’ble Allahabad High Court in the case of CIT vs. Vector Shipping Services (P) Ltd.(supra) has held that for disallowing expenses from business and profession on the ground that TDS has not been deducted, amount should be payable and not which has been paid by end of the year. The said decision of

Hon'ble Allahabad High Court was made subject to Special Leave Petition filed before Hon'ble Supreme Court and their Lordships vide their order dated 02/07/2014 in CC No.8068/2014 have dismissed the SLP. In view of above discussion, the decision relied upon by Ld. DR would have no application therefore the Hon'ble ITAT accept the claim of the assessee to the extent of labour payments are made during the year under consideration and to that extent no disallowance should be made.(ITA No. 2293-2294/Mum/2013, dt. 4.03.2015) (AY. 2005-06, 2006-07)
JitendraMansukhlal Shah v. DCIT(Mum.)(Trib.);www.itatonline.org

S. 40(a)(ia):Amounts not deductible- Deduction at source-If an amount becomes taxable due to a retrospective amendment, payments prior to the amendment cannot be disallowed for want of TDS- DTAA- India- China-Singapore.[S. 5A,9(1)(i)(vii),195, Art 8, 12]
It is an undisputed fact that the Finance Act, 2010 received the assent of the President on 8.5.2010 and all the payments have been made by the Assessee to the non-resident party prior to receiving of assent of the President making the retrospective amendment by adding explanation to Sec. 9(1). At the time when the Assessee made the payment there was no provision u/s 9(1) making the technical fees deemed to accrue or arise in India whether or not (a) the non-resident has residence or place of business or business connection in India or (b) the non-resident has rendered services in India. It is not disputed that the non-resident did not have residence or place of business or business connection in India. The non-resident has also not rendered services in India. The source of the income in the hands of the non-resident was outside India. Even the place of business which earned the income was also outside India. Since the technical fees was not deemed to accrue or arise in India at the time when the Assessee made the payment as there was no provision under Sec. 9(1), the income received by the non-resident as per the existing law at the time when the Assessee made the payment, in our opinion, was not taxable in India under the Income Tax Act. Prior to the insertion of explanation to Sec. 9(1) by the Finance Act, 2010 with retrospective effect, the professional and consultancy services even though rendered outside India were not deemed to accrue or arise in India irrespective of the fact whether the party who rendered the services is having place of residence or place of business in India. It is only due to the retrospective amendment made by the Finance Act, 2010 that the position has become clear. If the income was not taxable in India it cannot be made taxable in view of the tax treaty. This is a fact that as argued by the ld. AR the retrospective amendment brought by the Finance Act, 2010 was not in existence at the time when the Assessee had made the payments. The Assessee cannot be penalized for performing an impossible task of deducting TDS in accordance with the law which was brought into the statute book much after the point of time when the tax deduction obligation was to be discharged . (AY. 2010-11)
ACIT v. AjitRamakantPhatarpekar (2015) 119 DTR 27/170 TTJ 529 (Panji)(Trib.)
ACIT v. Neelam Ajit Phatarpekar (2015) 119 DTR 27/ 170 TTJ 529 (Panj)(Trib)

S. 40(a)(ia):Amount not deductible- Deduction at source-Paid or payable-Merilyn Shipping 136 ITD 23 (SB) cannot be followed but Question whether the second proviso to s. 40(a)(ia) is retrospective or not requires to be considered by the AO-Matter remanded.[S. 201(1)
Though the issue as to whether disallowance u/s 40(a)(ia) can be made only in respect of amounts that are "payable" as at the end of the year or whether it can also be made for amounts "paid" during the year has to be decided against the assessee (as the Special bench verdict in Merilyn Shipping and Transport Ltd. 136 ITD 23 (SB) has not been approved by some High Courts, the legal argument that the second proviso to section 40(a)(ia) of the Act (which was inserted by the Finance Act, 2012 w.e.f 01.04.2013 to provide that the disallowance u/s 40(a)(ia) of the Act would not be made if the assessee is not deemed to be an assessee in default under the first proviso to section 201(1) of the Act) is retrospective in nature as it has been introduced to eliminate unintended consequences which may cause undue hardships to the tax payers requires to be restored to the file of the Assessing Officer for consideration.(ITA No. 1372/PN/2013, dt. 18.03.2015) (AY. 2010-11)
ACIT v. BhavookChandraparakasTripathi (Pune)(Trib.);www.itatonline.org

S. 40(a)(ia) : Amounts not deductible-Interest-Recipient had no taxable income- Form no 15G/15H,obtained late–Disallowance was not justified.

Where assessee was aware that recipients had no taxable income, just because their declarations in Form 15G/H were obtained late, assessee could not be fastened with consequences that arose for non-deduction of TDS u/s. 40(a)(ia) while making payment of interest.(AY. 2005 – 2006)
Capital Pharma v. ITO (2015) 152 ITD 497 (Bang)(Trib.)

S. 40(a)(ia) : Amounts not deductible-Commission-Director –Perquisite-No disallowance can be made. [S. 17(1)(iv), 192,194H]
Commission paid to directors for managing affairs of company and not for selling any goods or article of company partakes of character of salary, said commission will partake of character of salary in view of the prov. of s. 17(1)(iv). therefore, provisions of section 194H are not applicable in respect of for such payment. Hence, invocation of prov. of s. 40(a)(ia) to disallow same was not justified.(AY. 2010-11)
Nashik Metals (P.) Ltd. .v. ITO (2015) 152 ITD 467 (Pune)(Trib.)

S. 40(a)(ia) : Amounts not deductible-Deduction at source-Fees for managerial-Benefit against s. 40(a)(ia) disallowance conferred in CIT v. Kotak Securities (2012) 340 ITR 333 (Bom.)(HC), has to be extended to cases where ROI was filed pre-delivery of the verdict-No disallowance can be made. [S.194J]
The disallowance under section 40(a)(ia) of the Act in respect of payments made to Bombay Stock Exchange is covered in favour of the assessee and against the Revenue except that the transaction charges have been considered to be subject to TDS by the decision of Hon'ble Bombay High Court in the case of CIT v. Kotak Securities Ltdin Income Tax appeal No.3111 of 2009(2012) 340 ITR 333(Bom)(HC). However, we find that the Hon'ble High Court has observed that section 194J was inserted w.e.f. 1/7/1995 and till assessment year 2005-06 both the Revenue and the assessee proceeded on the footing that section 194J was not applicable to the payment of transaction charges and accordingly during the period from 1995 to 2005 neither the assessee has deducted tax at source nor the Revenue has raised any objection. The Hon'ble High Court further observed that in these circumstances if both the parties for nearly a decade proceeded on the footing that section 194J is not attracted, then in the assessment year in question, no fault can be found with the assessee in not deducting tax at source under section 194J of the Act and consequently, no action could be taken under section 40(a)(ia) of the Act. As the Return of income for the year under consideration was filed on 14/08/2009 and this decision of the Hon'ble was pronounced on 21/10/2011. Thus, the assessee had already filed the return of income and the time period for deducting tax at source was also lapsed. Considering these peculiar facts, in our considered opinion no disallowance on this account should be made for the year under consideration.(AY. 2008-09)
IDBI Capital Market services Ltd. .v. DCIT(2015) 42 ITR 379 (Mum.)(Trib.)

S. 40(a)(ia) : Amount not deductible-Sub-Contractor- Disallowance u/s. 40(a)(ia) could only be made in respect of sums remaining outstanding at end of year, plea raised by assessee was rejected.
Assessee was engaged in business of civil construction and made payments to sub/contractors in respect of which no tax deductions were made. A.O. disallowed said payments u/s. 40(a)(ia). Assessee raised a plea that disallowance u/s. 40(a)(ia) could only be made in respect of sums remaining outstanding at end of year. In view of order passed by Gujarat High Court in case of CIT v. Sikandar Khan N. Tanvar [2013] 357 ITR 312(Guj)(HC), could not be accepted in the present case. (AY. 2008-09)
Sai Builders v. ITO (2015) 152 ITD 462(Agra)(Trib)

S. 40(a)(ia) : Amounts not deductible-Deduction at source- disallowance cannot be made if the assessee has not claimed a deduction.
Payment has not been claimed as a revenue expenditure while computing the income chargeable under the head 'Profits and gains of business or profession' in this year and therefore the same would not fall for consideration in section 40(a)(i) of the Act. (2014) 362 ITR 174 (Guj). (AY. 2009-10)
Gera Development Pvt. Ltd. .v. JCIT(2015) 169 TTJ 181 (Pune)(Trib.)

S.40(b)(v):Amounts not deductible-Working partner– Remuneration-Provision in partnership deed for payment of salary at percentage share of profits multiplied by "allocable profits" is valid and entitles claim for deduction.[S.28(v), 155]

The Assessee firm was initially constituted with Smt. Manju Vaish, Smt. Kali Vohra and Mr. Vinay Vaish and was carrying on the profession of law in New Delhi and Mumbai. With effect from 1st April 2006, Smt. Manju Vaish and Smt. Kali Vohra retired from the partnership and Mr. Ajay Vohra and Mr. Bomi F. Daruwala joined the partnership. A fresh retirement-cum-partnership deed was executed on 22nd June 2008 and made effective from 1st April 2006. 4. Clause 6(a) of the said deed provided that each Partner shall be entitled to an annual salary equivalent to his percentage share of profits multiplied by "Allocable Profits". It was stated that "Allocable Profits shall be calculated as per the provisions of Section 40(b)(v)(1) of the Income-tax Act, 1961. The monthly salary of a Partner shall be equivalent to annual salary divided by 12. Such salary shall be deemed to accrue from day to day and may be drawn out in arrears and the salary so paid shall be treated as working expenses of the partnership before the profits thereof are ascertained." Subsequently on 1st August 2009 a supplementary deed of partnership was executed between Mr. Ajay Vohra, Mr. Vinay Vaish and Mr. Bomi F. Daruwala whereby Clause 6 was substituted as follows: "Mr. Ajay Vohra Mr. Vinay Vaish and Mr. Bomi F. Daruwala shall be paid with effect from 1st April, 2009 a monthly salary of Rs.26,50,000, Rs.10,00,000 and Rs.13,50,000 respectively. Such salary shall be deemed to accrue from day to day and may be drawn out in arrears and the salary so paid shall be treated as working expenses of the partnership before the profits thereof are ascertained." The AO held that since the partnership deed "neither specified the amount of salary to be paid to each of the working partners nor has laid down a specific method of computation thereof" and has only mentioned "allocable profit" which has not been defined in the partnership deed, Section 40(b)(v) of the Act would not apply and the remuneration to the partners, not being in terms of Section 40(b)(v) of the Act, was disallowed. This was upheld by the CIT (A) but reversed by the ITAT. The ITAT came to the conclusion that the term "allocable profit" should be understood by applying the common meaning which would be "profits available for allocation". Explanation 3 to Section 40(b)(v) of the Act defines the term "book profit" as the "net profit before remuneration". The ITAT, therefore, concluded that "a plain reading of Clause 6(a) leads us to a conclusion that the term 'allocable profits' was used to mean 'book profits' as used in Section 40(b)(v) of the Act or otherwise the reference to the section in the Clause has no meaning. When the partners have understood and meant that the word "allocable profits" to mean surplus/book profits, prior to calculation of partners' remuneration, and when such an understanding is manifest in its actions, we do not see any reason why the Revenue authorities should not understand this term in the same sense."

On appeal by the department to the High Court HELD dismissing the appeal:

(1) Clause 6(a) of the partnership deed dated 20th June 2008 clearly indicates the methodology and the manner of computing the remuneration of partners. The remuneration of the partners has been computed in terms thereof. Under Section 28(v) of the Act, any salary or remuneration by whatever name called received by partners of a firm would be chargeable to tax under the head profits and gains of business or profession. The proviso to Section 28 (v) states that where such salary has been allowed to be deducted under Section 40(b)(v), the income shall be adjusted to the extent of the amount not so allowed to be deducted. Further Section 155 (1A) of the Act states that where in respect of a completed assessment of a partner in a firm, it is found on the assessment or reassessment of the firm that any remuneration to any partner is not deductible under Section 40(b), the AO may amend the order of the assessment of the partner with a view to adjusting the income of the partner to the extent of the amount not so deductible.(AY.2009-10)

CIT .v. Vaish Associates (Delhi) (HC); www.itatonline.org

S.40(c):Amounts not deductible-Company--Payments to directors-Film production-Amounts paid as professional charges to directors for directing and producing film-Amounts not paid in their capacity as members of board of directors-No disallowance can be made.

On reference held that the disallowance made by the Income-tax Officer under section 40(c) was not justified. The amounts paid to the two individuals were not paid in their capacity as members of the board of directors but as professional charges for directing and producing a film. The Revenue was,

therefore, not justified in disallowing the claim, the character of the remuneration mode being different. (AY. 1981-1982)
CIT .v. Rupam Pictures P. Ltd. (2015) 374 ITR 450 (Bom.)(HC)

S.40(A)(2):Expenses or payments not deductible–Excessive or unreasonable-Purchasing windmills-Comparable cases showing payment not inflated-No evidence to establish that price of windmills paid by assessee not actual price-No documentary evidence that money came back to assessee from concern to whom commission paid- No disallowance could be made. [S. 37(1), 40(A)(2)(b)]
Held, the Tribunal considered the statement of comparable cases made by the assessee and concluded that the payment made by the assessee was certainly not inflated. It considered the fact that setting up of windmills was a specialised task and concluded that the Assessing Officer had no evidence on record to establish that the price of windmills paid by the assessee was not the actual price or that the price was inflated. It found that the Assessing Officer had proceeded on the basis of a presumption that the cost of each windmill was inflated by Rs. 1 crore and it had not been proved by documentary evidence that such money came back to the assessee from the concern to whom commission was paid. The Tribunal found that there was no excessive payment. The Assessing Officer had not disputed the fact that the assessee paid lease rent of Rs. 5,51,788 to the W group on account of the windmills taken on lease and the contention of the Assessing Officer that lease rents were unreasonable was not based on any cogent material but only on assumption and presumption. In fact, the lease rents were fixed in accordance with the formula provided by the Indian Renewable Energy Development, a Government of India company which provided support to electricity projects. Thus, no disallowance could be made on ground of excessive and unreasonable payments.(AY. 2002-2003 to 2006-2007)
CIT .v. Karma Energy Ltd. (2015) 375 ITR 264 (Bom.)(HC)

S. 40A(2): Expenses or payments not deductible – Excessive or unreasonable-Payment to sister concern-Question of fact. [S.260A]
The assesse paid conversion of pig iron and cast iron scrap to sister concern. Assessing Officer disallowed certain amount by observing that the payment was excessive, which was confirmed by Tribunal. On appeal by assesse, High Court also dismissed the appeal holding that the question of fact. (AY.1994-1995)
Prakash Engineering Works v. CIT (2015) 373 ITR 246 / 229 Taxman 528 (Cal.)(HC)

S. 40A(A)(2): Expenses or payments not deductible-Administrative support services fee-AD hoc disallowance –Disallowance was not justified.
Company rendering services to assessee not in category of persons enumerated under section 40A(2)(b).Failure to point out any particular expenditure excessive or unreasonable.AO cannot make an ad hoc disallowance. (AY. 2008-2009)
Cisco Systems Capital (India) P. Ltd. v. Add. CIT (2015) 37 ITR 343 (Bang)(Trib)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits – Fish purchased from fisherman/headman of fisher, no disallowancecould be made even if payment in cash exceeded Rs. 20,000. [R. 6DD]
The assessee was a 100 per cent Export Oriented Unit engaged in the export of fish.Out of total purchase of fish the assessee procured fish from fisherman/headman of fisher against cash payment of Rs. 1.40 crore.
The Assessing Officer disallowed the payment under section 40A(3) on ground that the assessee failed to produce identity of sellers and genuineness of purchases.On appeal, the first appellate authority enhanced the addition by disallowing 20 per cent of the entire expenditure.On appeal, the Tribunal deleted the addition.On appeal, dismissing the appeal the Court held that; the assessee has purchased the fish from the fisherman or the headman of the fisher and once the purchase is made of fish from the aforesaid persons, no disallowance under sub-section (3) shall be made, even if any portion in a sum exceeding twenty thousand rupees is made to a person in a day, otherwise than by a crossed cheque drawn on a bank or an crossed bank draft in the cases of bank draft. Therefore, the

order passed by the Tribunal holding that section 40A(3) is not attracted to the facts of this case, is proper and cannot be found fault with.
CIT .v. Blue WaterFoods & Exports (P.) Ltd. (2015) 231 Taxman 377 (Karn.)(HC)

S. 40A(3):Amounts not deductible-Cash payment exceeding prescribed limits-No material is brought on record by the AO- Disallowance is held to be not justified.
Assessing Officer made disallowance under section 40A(3) in case of assessee. No material was brought on record for quantification of probable cash expenditure which would be hit by mischief of section 40A(3). Moreover, tax audit report did not list out cases which attracted provisions of section 40A(3). Said disallowance could not be sustained.(AY.1999-2000)
Amitabh Bachchan Corpn. Ltd. v. Dy.CIT (2015) 68 SOT 217(URO) (Mum.)(Trib.)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits-Amendment w.e.f. 1st April , 1996 restricting the disallowance at 20 percent being substantive in nature,it cannot be applied retrospectively.[S.158B(b)]
Dismissing the appeal of assesse the Court held that , amendment made in section 40(A)(3) w.e.f 1st April , 1996 restricting disallowance to 20% being substantive in nature , it cannot be applied retrospectively and therefore , the benefit of this amendment cannot be allowed over the entire block period beginning from 1 st April 1986 and ending on 13 th September 1996 , simply because the date of amendment falls within the aforesaid block period .[BP.1-41986 TO 13-9-1996)
M.G.Pictures (Madras) Ltd. v. ACIT (2015) 373 ITR 39/ 278 CTR 105/ 231 Taxman 241 (SC)

S. 40A(3) : Expenses or payments not deductible-Cash payments exceeding prescribed limits-– Amendment made in section 40A(3) by Finance Act, 2008 was prospective in-operation, Assessing Officer was not justified in levying taxes on basis of amended provision.
Dismissing the appeal of revenue the Court held that; In the instant case, the proviso 40A(3) prior to amendment only prohibited incurring of expenditure in respect of which a payment is made in a sum exceeding twenty thousand rupees otherwise than by an account payee cheque drawn on a bank or account payee bank draft was not allowed of the deduction, when the law was amended on 1-4-2009 by Finance Act, 2008, when the word 'aggregate of payments' made to a person in a day was inserted. It means till the date even if such payment is made by virtue of the earlier provision, the assessee would not denied the benefit of deduction. When the assessee was enjoying the benefit till the date of amendment, by this amendment tax cannot be levied retrospectively, it would cause great hardship. Therefore, the authority were not justified in holding that the said provision is retrospective and levying taxes on the basis of the said amended provision. In that view, certainly it was not clarificatory in nature. Therefore, the first substantial question of law is answered in favour of the assessee and against the revenue.(AY. 2005-06)
A.N. Swarna Prasad v. Addl. CIT (2015) 230 Taxman 536 (Karn.)(HC)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits-Arrack contractor- Disallowance was held to be justified.[R.6DDJ]
Assessee, an arrack contractor, paid a certain sum in cash to bottlers appointed by Government and claimed that bottling agents demanded for cash payment. Assessing Authority held that assessee being a regular customer of bottling agent, payment should have been made in accordance with section 40A(3) and, therefore, he disallowed cash payment under section 40A(3). However, Tribunal held that rule 14 of Rules permits cash transactions in regard to arrack trade between Government and persons like assessee and, thus, assessee's case fell under exception in rule 6DD(j). On appeal by revenue, allowing the appeal the Court held that;since rule 14 does not apply to purchase of liquor but it applies only to sale of liquor by assessee to its customers, said payment did not fall within section 6DD(j) so as to get exemption from application of section 40A(3). (AY. 1988-89)
CIT .v. Panduranga Enterprises (2015)230 Taxman 631 (Karn.)(HC)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits - Where income of assessee is computed by applying gross profitrate, section 40A(3) need not be invoked [S. 145].

Where income of assessee is computed by applying gross profit rate, section 40A(3) need not be invoked .

CIT v. Gobind Ram (2015) 229 Taxman 491 (P&H)(HC)

S. 40A(3) : Expenses or payments not deductible-Cash payments exceeding prescribed limits-Octroi duty- No disallowance can be made. [R.6DD(b)]

Octroi duty paid by assessee to Municipal Corporation on goods transported within municipal limits did not come under provisions of section 40A(3), read with rule 6DD(b) and, therefore, impugned disallowance made in respect of said payment deserved to be deleted.(AY. 1988-89)

CIT .v. Arvind Mills Ltd. (2014) 52 taxmann.com 475 / (2015) 228 Taxman 358 (Mag.) (Guj.)(HC)

S. 40A(3) : Expenses or payment not deductible- Payments in cash exceeding specified limit-Payment for purchase of land on Sunday-Exceptional circumstances-Covered under rule 6DD(j)-Disallowance not proper.(R. 6DD(j).

The assessee proposed to purchase land and fixed the date for registration of sale deed on March 28, 2010. The assessee had made the payment on the date of registration, which was a Sunday. The Assessing Officer disallowed the cash payment under section 40A(3) of the Income-tax Act, 1961, on the view that though the assessee had plenty of time before March 28, 2010, the payment had been made on Sunday and the assessee had not shown any exceptional circumstances why it was necessary to make the payment on Sunday. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal:

Held, allowing the appeal, that admittedly, it was realised later on that March 28, 2010 was Sunday and in order to execute the sale deed, the assessee paid cash on that date itself. When an agreement provided for a payment on or before a particular date, it was not necessary that just to meet the technical requirement of income-tax provisions, payment should be made earlier. The payment made on March 28, 2010, which fell on a Sunday was covered by the exception provided under rule 6DD(j) of the Income-tax Rules, 1962. The disallowance was to be deleted. (AY. 2010-2011)

Hi Tech Land Developers and Builders v. Add. CIT (2015) 38 ITR 355/ 69 SOT 245 (Chd.)(Trib)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits-No bank account at place of purchase-Genuineness of purchases was not doubted -Disallowance was held to be not justified.

The assessee, engaged in wholesale trade of iron and steel, purchased goods and made payment in cash. The Assessing Officer made addition on the ground that the payments exceeded Rs. 20,000, in contravention of provisions of section 40A(3) of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, allowing the appeal, that it was submitted that the assessee had no bank account at the place of purchase and the cash payments were made on the demand of the seller. The genuineness of the purchases had not been doubted by the Assessing Officer. The disallowance of expenses under section 40A(3) was not justified. (AY. 2008-2009)

Radha Shyam Panda .v. ITO (2015) 37 ITR 386 (Cuttack)(Trib.)

S. 40A(5):Expenses or payments not deductible–Company–Limit -Expenses on motor car-Rule relating to computation of such benefit or perquisite in hands of employee not relevant.[R.3]

Court held that to compute the disallowance in respect of the perquisite value on account of motor car, rule 3 of the Income-tax Rules, 1962, relating to computation of the perquisite value in the hands of the employee was not justified. CIT v. British Bank of Middle East [2001] 251 ITR 217 (SC) followed. Question was decided against the assesse. (AY. 1986-1987, 1987-1988)

CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

S.40A(5):Expenses or payments not deductible–Company–Limit-Premium for group insurance policy-Not salary or perquisite-No disallowance could be made.

That the Tribunal held that the premium of group insurance should not be considered as salary or perquisites for disallowance under section 40A(5). If the Tribunal had found that the earlier decisions and orders rendered in the case of the very assessee were applicable on facts and deserved to be followed then the question could not be termed as substantial question of law. Therefore, the Tribunal was right in law in confirming the order of the Commissioner (Appeals) that the premium of group insurance policy should not be considered as salary or perquisite for disallowance under section 40A(5). (AY. 1986-1987, 1987-1988)

CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.)(HC)

S. 41(1): Profits chargeable to tax - Remission or cessation of trading liability – Credit balances written off were not exempt from taxation when proper records were not submitted before lower authorities to prove that the amounts were already offered to tax in earlier years.

The Assessee wrote of unclaimed credit balances in its books of accounts but excluded the same while computing its taxable income. The same was disallowed by the AO. The CIT(A) and Tribunal gave relief to the Assessee on the basis that that the credit balances occurred due to wrong accounting by the Assessee in its books and that they were already included in the sales turnover of earlier years. The HC set aside the order of the Tribunal since the Tribunal had assumed that the amounts were verified by the CIT(A) whereas, no records were actually submitted by the Assessee to the CIT(A). Issue restored to the AO for fresh adjudication. (AY. 1999-2000)

CIT v. McDowell & Co. Ltd. (2015) 116 DTR 75 (Karn.)(HC)

S. 41(1) : Profits chargeable to tax- Remission or cessation of trading liability -Sales tax liability - Not liable to tax.

Cessation of sales tax liability was not liable to tax under section 41(1). Followed CIT v. Sulzer India Ltd (2014) 369 ITR 717 (Bom)(HC).(AY. 2003-2004)

CIT v. Colgate Palmolive (I) Ltd. (2015) 370 ITR 728 (Bom) (HC)

S. 41(1):Profits chargeable to tax - Remission or cessation of trading liability – Cash credits-Old unclaimed liabilities which are not written back by the assessee can neither be assessed as "cash credits" u/s 68 nor assessed u/s 41(1) as "remission or cessation of liability". [S.68]

The assessee claimed that addition u/s. 68 of the Act could not be made because the credits in question did not relate to the previous year relevant to AY 2009-10 and therefore the provisions of section 68 will not be attracted. On the question of cessation of liability, it was assessee submitted that there is no evidence brought on record to show that liability of the assessee vis-à-vis creditors has ceased to exist. HELD by the Tribunal:

(i) In Shri Vardhaman Overseas Ltd 343 ITR 408 (Del) it has clearly laid down that neither section 41(1) nor section 68 of the Act can be applied. On the applicability of section 68, we are of the view that those provisions will not apply as the balances shown in the creditors account do not arise out of any transaction during the previous year relevant to AY 2009-10. The provisions of sec. 68 are clear inasmuch as they refer to “sum found credited in the books of account of an assessee maintained for any previous year”. Since the credit entries in question do not relate to previous year relevant to AY 2009-10, the same cannot be brought to tax u/s. 68 of the Act. The proper course in such cases for the Revenue would be to find out the year in which the credits in question were credited in the books of account and thereafter make an enquiry in that year and make an addition in that year, if other conditions for applicability of section 68 are satisfied.

(ii) As far as applicability of section 41(1) of the Act is concerned, Explanation 1 which was inserted w.e.f. 1.4.1997 is not attracted to the present case since there was no writing off of the liability to pay the sundry creditors in the assessee’s accounts. The question has to be considered de hors Explanation 1 to Section 41(1). In order to invoke clause (a) of Sec.41(1) of the Act, it must be first established that the assessee had obtained some benefit in respect of the trading liability which was earlier allowed as a deduction. There is no dispute in the present case that the amounts due to the sundry creditors had been allowed in the earlier assessment years as purchase price in computing the business income of the assessee. The second question is whether by not paying them for a period of four years

and above the assessee had obtained some benefit in respect of the trading liability allowed in the earlier years. The words "remission" and "cessation" are legal terms and have to be interpreted accordingly. In the present case, there is nothing on record to show that there was either remission or cessation of liability of the assessee. In fact, there is no reference either in the order of the AO or CIT(A) to the expression "remission or cessation of liability". In such circumstances, we are of the view that the provisions of section 41(1) of the Act could not be invoked by the Revenue. In fact the decision of the Hon'ble Delhi High Court in the case of Vardhaman overseas Ltd. (supra) clearly supports the plea of the Assessee in this regard.(ITA No.1078/Bang/2014, dt. 07.08.2015) (AY. 2009-10)

Glen Williams v. ACIT (Bag.)(Trib.); www.itatonline.org

S. 41(1) : Profits chargeable to tax- Remission or cessation of trading liability-Lenders confirmed- Additions cannot be made.

As regards addition on account of unsecured loans, the authorities below failed to take note of the fact that lender had confirmed the balances due to assessee and assessee was continuously making efforts to repatriate the dues to foreign company. In fact, a part of amount of loans was repatriated also and therefore, there was no case for making additions under section 41(1). Accordingly the impugned addition under section 41(1) was not warranted. (AY. 2009-10)

UEM India (P.) Ltd. v. ACIT (2015) 67 SOT215(URO) (Delhi)(Trib.)

S. 41(1):Profits chargeable to tax-Remission or cessation of trading liability - Unclaimed liabilities are deemed to have been remitted/ ceased and are taxable in the year of discovery by AO.

The assesse has not written back the amount payable as liabilities. The AO assessed the said liability being not proved to be an existing liability. On appeal by assesse dismissing the appeal pf assesse the Tribunal held that. The deeming provision of section 41(1)(a), applicable in the instant case, is qua the benefit by way of cessation or remission of a trade liability in respect of an expenses of business or profession, as the income of business or profession for the year of such cessation or remission. Our second observation is that the cessation or remission of liability is a matter of fact, and which would therefore require being proved. The onus to establish that the conditions of taxability stand satisfied is always on the Revenue. In the present case, the Revenue states of the liabilities continuing to outstand in the assessee's books from 3 to 25 years. Surely, the same raises considerable doubts as to the existence of the liability/s. True, they stand not written back and continue to outstand in the assessee's books, but that is precisely the reason for the same being questioned by the Revenue, or entertaining doubts about the same. The doubt can by no means be considered as not valid, being in accord with the common practice and, thus, discharging the onus that law places on the Revenue. The accounting entries or the treatment that the assessee accords to an asset or liability in its books is not determinative of the matter. Again, the presumption would only be of the same representing the true state of affairs, but the inordinate delay in discharging the same raises considerable and valid doubt as to the existence of those liabilities as at the relevant year-end, i.e., as a fact. The onus on the Revenue, thus, gets discharged and shifts to the assessee, who is in effect only being called upon to show that the position as stated in its accounts reflects the true and correct position. A trading liability would normally get settled within a period of one or two months of it's arising, while in the instant case years and years have passed. The same leads to the question: Why were the same not paid in the normal course and, rather, not paid at all? Is the matter disputed – if so, to what extent, and which shall again have to be demonstrated. In fact, after the lapse of considerable time, it becomes doubtful if the creditor exists, who may have moved to a different place; discontinued business, et. al. No material or evidence or even explanation is forthcoming from the assessee. The only inference under the circumstances is that the liability no longer exists. Per contra, the assessee has obtained a benefit by way of remission or as the case may be cessation of liability. An inference of fact is again only a finding of fact, drawn in consistence and in harmony with in the conspectus of the facts and circumstances of the case. The next question that arises is as to the year of taxability, and which is the year of remission or cessation of liability. The assessee having claimed it as a liability for the immediately preceding year as well, and which stood accepted by the Revenue, would preclude the

assessee from contending that the liability was not existing, or was in fact not a liability even as at the end of the immediately preceding year. That is, it is not open for the assessee to turn back and say that you accepted my lie for the preceding year/s and, therefore, you are bound by it. The only consequence in law is that the cessation or remission has occurred during the relevant previous year. We are in this regard, with respect, unable to agree with the hon'ble high court in the case of Bhogilal Ramjibhai Atara (supra) that the law is not clueless in this regard; the said decision having been rendered without considering the decision by the said court in Hides & Leather Products Pvt. Ltd. [1975] 101 ITR 61 (Guj.). It needs to be appreciated that when the knowledge of the facts is in the possession of a particular person, it is he alone who can, and whom the law contemplates to exhibit it, in the absence of which an adverse inference, as applicable under the circumstances, shall obtain. Appeal of assesse was dismissed.(ITA No. 47/Mum/2011, dt. 22.05.2015) (A.Y. 2007-08)
Natural Gas company Pvt. Ltd. v. DCIT (Trib.)(Mum); www.itatonline.org

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability- Applying commonsense approach, unclaimed liabilities are assessable as income even if not credited to P&L A/c.[S. 4]
If an amount is received in course of trading transaction, even though it is not taxable in the year of receipt as being of revenue character, the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right. When such a thing happens, commonsense demands that the amount should be treated as income of the assessee. Fact that amount is not credited to the P&L A/c & is shown as a liability makes no difference if creditor has written off the debt (ITA No. 1763/Mum/2012, dt. 18.02.2015) (AY. 2003-04)
Genre Export Pvt. Ltd. .v. ITO (Mum.)(Trib.);www.itatonline.org

S. 41(1) : Profits chargeable to tax-Remission or cessation of trading liability-Failure to establish genuineness of old liabilities means that there is a remission/ cessation of such liabilities-Addition was held to be justified. [S. 68]
The assessee failed to furnish the details in respect of sundry creditors amounting to Rs.23,34,721/-. Admittedly, these credits continued to be carried forward year after year. In the normal course everybody would ordinarily claim the dues and usually they take steps to recover the dues if it is a genuine liability. In this case, the liability remains to be recovered year after year. For invoking provisions of section 68 of the Act, if any sum is to be found credited in the books of the assessee maintained during the previous year, only then it would be possible to make addition under section68 of the Income tax Act. In the case of carried forward credit, which is from earlier year, provisions of section 68 cannot be applied. In the present case, the liabilities outstanding in the books of account of the assessee for the assessment year under consideration and only the provisions of the section 41(1) of the Act could be applied. In the present case the assessee failed to establish the actual existence of the impugned disputed amount in the books of account of the assessee. The assessee has drawn its balance sheet based on its books of account, in which the above amount, were being claimed as liabilities due, to various parties, as at the end of the accounting year under dispute. However, the assessee failed to establish the genuineness of these liabilities by producing supporting evidence. Simply the liabilities being reflected against certain names in the books of account would not establish the genuineness of liabilities. Addition was held to be justified. (AY. 2007-08)
Bharat Dana Bera .v. ITO (2015) 39 ITR 632/ 153 ITD 421 / 169 TTJ 721 (Mum.)(Trib.)

S. 42 : Business of prospecting etc- Mineral oils- Production Sharing Contract entered into with the Govt- Conditions not satisfied- Not entitle to claim legitimate expectation-Assessee not entitled to seek direction from court to read such provision in to contract- Extrodinary remedy of writ under art 226 or 32 of the Constitution cannot be invoked in pure contractual matters. ore.[Arts. 32,226, 229, Constitution of India]
(i) First and foremost aspect which has to be kept in mind while answering this issue is that the Income Tax Authorities while making assessment of income of any assessee have to apply the provisions of the Income Tax Act and make assessment accordingly. Translating this as general proposition contextually, what we intend to convey is that the Assessing Officer is supposed to focus on Section 42 of the Act on the basis of which he is to decide as to whether deductions mentioned in

the said provision are admissible to the assessee who is claiming those deductions. In other words, the Assessing Officer is supposed to find out as to whether the assessee fulfills the eligibility conditions in the said provision to be entitled to such deductions. We have already reproduced the language of Section 42, which deals with special provisions of deductions in the case of business for prospecting, etc. for mineral oil. Since, the appellant herein, in its income tax returns for the assessment year in question, i.e., Assessment Year 2005-06, had claimed the deductions mentioned in Section 42(1)(b) and (c) of the Act, we should take note of the nature of these deductions. Section 42(1) (b) provides for deductions of expenditure incurred in respect of drilling or exploration activities or services or in respect of physical assets used in that connection, except for those assets on which allowance for depreciation is admissible under Section 32. Section 42(1)(c) speaks of allowances pertaining to the depletion of mineral oil in the mining area. In order to be eligible to the deductions, certain conditions are stipulated in this very section which have to be satisfied by the assessees.

(ii) From the nature of allowances specified in this provision, it is clear that such allowances are otherwise inadmissible on general principles, for e.g. allowances relating to diminution or exhaustion of wasting capital assets or allowances in respect of expenditure which would be regarded as on capital account on the ground that it brings an asset of enduring benefit into existence or constitutes initial expenditure incurred in setting up the profit earning machinery in motion. It is for this reason this Section itself clarifies that the provisions of this Act would be deemed to have been modified to the extent necessary to give effect to the terms of the agreement, as otherwise, the other provisions of the Act specifically deny such deductions. A fortiorari, the PSC entered into between the parties becomes an independent accounting regime and its provisions prevail over generally accepted principles of accounting that are used for ascertaining taxable income (See –Commissioner of Income Tax, Dehradun & Anr. v. Enron Oil and Gas India Limited (2010) 327 ITR 626). Thus, by virtue of this Section, it is the PSC which governs the field as without it, such deductions are not permissible under the Act. IF PSC also does not contain any stipulation providing for such allowances, the Assessing Officer would be unable to give the benefit of these deductions to the assesee.

(iii) This Court held in CIT v. Enron Expat Service Inc. (2010) 327 ITR 626 that the mere fact that the assessee had offered to pay tax under Section 44 (BB) of the Act in some of the earlier years will not operate as an estoppel to claim the benefit of Double Taxation Avoidance Agreement (DTAA), where the assessee operates under the same PSC which was before the Court. While holding so, the Court had followed its earlier judgment in the case of Enron Oil and Gas India Limited (2008) 15 SCC 33 (Supra).

(iv) In the present case, it is an admitted fact that conditions mentioned in Section 42 of the Act are not fulfilled. In the two PSCs, no provision is made for making admissible the aforesaid allowances to the assessee. It is obvious that the Assessing Officer could not have granted these allowances/deductions to the assessee in the absence of such stipulations, a mandatory requirement, in the PSCs.(AY. 2001-02 to 2005-06)

Joshi Technologies International Inc v.UOI (2015) 374 ITR 322/119 DTR 313/ 277 CTR 409/232 Taxman 201 (SC)

Editorial: Joshi Technologies International Inc v. UOI(2013) 353 ITR 86/ 268 CTR 41/ 102 DTR 51 (Delhi)(HC) is affirmed.

S. 43(1) : Actual cost –Depreciation-Disallowance of depreciation on enhanced cost by invoking explantion 3 to section 43 was held to be not justified. [S. 43(3)]

Assessee-company acquired running business of EMP at a slump sale. Assessing Officer found that assessee enhanced value of assets as WDV of assets shown in books of seller and, therefore, disallowed excess depreciation. Dismissing the appeal of revnue the Court held that ; where at time of acquisition of assets, assessee had no income to reduce its tax liability by way of said transaction, Assessing Officer was in error in invoking Explanation 3 to section 43 for disallowance of excess depreciation. (AY. 1998-99, 1999-2000, 2001-02 & 2002-03)

CIT v. Sandvik Chokshi Ltd. (2015) 230 Taxman 546 (Guj.)(HC)

CIT v. Sandvik Chokshi Ltd. (2015) 230 Taxman 319 (Guj.)(HC)

S. 43(1) : Actual cost-Depreciation-Determination of Actual cost of running undertaking-Valuation on the basis of surveyor.

Assessee had acquired a running undertaking with all the assets and liabilities was acquired by assessee for Rs. 6 crores or so. Assessee appointed a surveyor who computed and valued the fixed assets to be transferred at Rs. 3.5 crores. Held that actual cost of assets for depreciation was rightly taken as Rs. 3.5crores. To hold it to the contrary would be ignoring the information and material which formed the very basis of transfer relied by assessee. (AY. 1990-91 , 1991-92)
De Nora India Ltd v. CIT (2015) (2015) 370 ITR 391 / 114 DTR 89 (Delhi)(HC)

S.43(1):Actual cost-Depreciation--Purchase of second hand windmill a few days before close of previous year 2008-09--Question of determination of "actual cost" arises only for assessment year 2009-10--Depreciation for 2010-11 to be re-worked on written down value determined for assessment year 2009-10--Matter remanded.[S. 32]
The assessee purchased a second hand windmill on March 23, 2009 and claimed depreciation for the assessment year 2010-11. As the seller had already claimed almost full depreciation on the windmill, the Assessing Officer invoked the provisions of Explanation 3 to section 43(1) of the Income-tax Act, 1961. He determined the cost of the windmill and after computing depreciation, disallowed the excess. The Commissioner (Appeals) held that the provisions of Explanation 3 to section 43(1) of the Act could not be applied, but determined the cost of windmill. On appeal by the Department and cross objection by the assessee:
Held, that as the assessee had purchased the windmill on March 23, 2009, the question of determination of "actual cost" should arise only for the assessment year 2009-10. The assessee had also claimed depreciation for the assessment year 2009-10, and the Assessing Officer had restricted the allowance, against which the assessee had preferred an appeal which was pending before the Commissioner (Appeals). Hence, the issue would depend upon the outcome of the identical disallowance made for the assessment year 2009-10 and the amount determined by the Commissioner (Appeals) for the assessment year 2010-11 was liable to be set aside. Therefore, the issue was restored to the Assessing Officer to re-work the amount of depreciation on the written down value determined for the assessment year 2009-10 after the receipt of order of the Commissioner (Appeals).Matter remanded.(A. Y. 2010-2011)
ITO v. V. Sabithamani (Smt.) (2015) 38 ITR 8 (Mad.) (Trib.)

S.43(3):Speculation loss-Loss on sale of shares, even if a speculation loss, can be set-off against the gains on sale of shares.[S.73]
Even if the loss claimed by the assessee relating to share transactions as well as loss resulting on valuation of closing stock is treated as speculation loss, the same is entitled to be set-off against the profit on sale of shares in view of DLF Commercial Developers Ltd. 261 CTR (Del) 127.(ITA No. 2138/Mum/2010, dt. 07.08.2015) (2006-07)
DCIT v. Envision Investment & Finance Pvt. Ltd. (Mum.)(Trib.); www.itatonline.org

S. 43(4) : Scientific research - Expenditure for acquiring rights in scientific research is excluded.
It was held that where scientific research is carried out by somebody else and assessee incurs expenditure for acquiring rights in said scientific research, it is such expenditure which is sought to be excluded under section 43(4)(ii). (AY. 2009-10,2010-11)
Resil Chemicals (P.) Ltd .v. Dy. CIT (2015) 67 SOT189(URO) (Bang.)(Trib.)

S. 43(5) : Speculative transaction - Hedging Transactions- Shares-Held to be business loss and not speculative.[S.28(i)]
Assessee entered into three transactions of sale and purchase of 2850 shares of account between 27/7/1990 to 29/8/1990. Assesee entered into transaction for the purpose of hedging. Assessee suffered loss by reason of the suffered loss by reason of the price of the shares continuing to rise. Assessee contended that assesee having hedged by those transactions, suffered a loss by reason of the price of the shares continuing to rise. Since the transactions came within the exception provided for, those could not be said to be speculative transactions. The HC allowed appeal in favour of assessee and held that proviso(b) of S.43(5) does not require an inquiry into the result of the transactions but that it should have entered into for guarding against loss in the holding of stocks and shares.

Undisputed facts in the case contained certain ingredients of hedging. Result of those transactions however was gain in the holding of shares of Rs.14.lacs, the value of which increased in the holding period of the assesee in the shares in that period. Therefore when ultimately the assesee sold those shares at greater values, it was denied the windfall profit which would have made if and not hedged at all. Therefore loss of Rs. 14.82 lacs was allowable as business loss. (AY.1991-92)
Maud Tea & Seed Co Ltd v. CIT (2015) 273 CTR 590 / 113 DTR 353 (Cal)(HC)

S. 43(5) : Speculative transaction-Business loss-Contract by member of stock exchange in the nature of jobbing and arbitrage - Not speculative - Loss can be set off against business income. [S.28(i),73]
The assessee was a share broker and a member of both the National Stock Exchange and the Bangalore Stock Exchange. Tthe transactions in the nature of jobbing and arbitrage were done to guard against loss which could have arisen in the ordinary course of the assessee's business as a member. Held, the Tribunal was justified in setting aside the order passed by the authorities and allowing the claim of set off of loss on these transactions against business income.)(AY. 2001-2002 /2003-04)
CIT v. First Securities P. Ltd. (2015) 370 ITR 72/ 230 Taxman 463 / 121 DTR 279 (Karn) (HC)

S. 43(5) : Speculative transaction-Stock and share broker - Hedging transactions - Loss due to price of shares continuing to rise - Not speculative loss-Business loss. [S.28(i), 73]
The Revenue held that the loss of Rs. 14.82 lakhs incurred by the assessee fell outside the purview of proviso (b) to section 43(5) because the market price of ACC shares continued to rise and there was no adverse price fluctuation. Held, proviso (b) to section 43(5) does not require an inquiry into the result of the transactions but only that it should have been entered into for guarding against loss in the holding of stocks and shares. Therefore, the loss was allowable.
Maud Tea and Seed Co. Ltd. v. CIT (2015) 370 ITR 603 (Gauhati)(HC)

S. 43(5) : Speculative transaction –Forward market order in order to hedge against possible loss-Fluctuations in the currency-Not speculative in nature.[S.80HHC]
The assessee firm was engaged in the business of manufacturing and trading/export of diamonds. It booked certain foreign exchange against the standing export orders/import liabilities. All those foreign exchange transactions were done with the permission of the Reserve Bank of India. The contracts were booked in the forward market in order to hedge against the possible losses accruing in view of the fluctuations in the currency.
The assessee filed its return claiming deduction under section 80HHC.
The AO rejected assessee's claim taking a view that transaction entered into by assessee fell within definition of 'speculative transaction' attracting proviso (a) to section 43(5).
The Tribunal, however, allowed assessee's claim.
On revenue's appeal:
It is undisputed that once the main business is identified, if some incidental activities or transactions or dealing in foreign exchange is undertaken but that is also related to some extent to the main business activity, then, it could not be said that the assessee is in speculative business or speculative dealings is ordinarily a part of his business. Appeal of revenue was dismissed. (AY. 2003-04)
CIT .v. Vishindas Holaram (2015) 229 Taxman 30 (Bom.)(HC)

S. 43(5):Speculative transaction-Hedge transactions-Foreign currency swap option- Speculative in nature.
It was held that where assessee engaged in trading of steel tubes, pipes, PVC, etc., entered into 'foreign currency swap option', provision for loss shown by assessee pertained to those foreign currency transactions, against which no actual delivery of foreign exchange was made, were not hedging transactions, but same were speculative in nature and, therefore, assessee's case was not covered by proviso (a) to section 43(5). (AY. 2008-09)
Shankara Infrastructure Materials Ltd. v. ACIT (2015) 67 SOT 210(URO) (Bang.)(Trib.)

S.43(5):Speculative transaction-Business loss-Forex derivative contracts-Loss suffered on account of forex derivative contracts (Exotic Cross Currency Option Contracts) cannot be treated as speculative loss to the extent that the derivative transactions are not more than the total export turnover of the assessee. If the derivative transaction is in excess of export turnover, the loss in respect of that portion of excess transactions has to be considered as speculative loss because the excess derivative transaction has no proximity with export turnover.[S.28(i), 73]

The assessee was engaged in the business of manufacturing and export of hosiery garments. During the course of export, the assessee entered into derivative contract. The assessee incurred loss in this transaction. The assessee claimed it as business loss. According to the Assessing Officer this loss was not business loss and it is a speculative loss and this transaction is speculative in nature as such the loss incurred on this transaction cannot be set off against business income of the assessee. On appeal by the assessee HELD:

(i) The derivative transaction cannot fall under sec.73. Explanation to sec.73 creates a deeming fiction by which among the assessee, who is a company, as indicated in the said Explanation dealing with the transaction of share and suffer loss, such loss should be treated to be speculative transaction within the meaning of sec.73 of the Act, notwithstanding the fact that the definition of speculative transaction mentioned in sec.43(5) of the Act, the transaction is not of that nature as there has been actual delivery of the scrips of share. As per the definition of sec.43(5), trading of shares which is done by taking delivery does not come under the purview of the said section. Similarly, as per clause (d) of sec.43(5), derivative transaction in shares is also not speculation transaction as defined in the said section. Therefore, both profit/loss from all the share delivery transactions and derivative transactions are having the same meaning, so far as sec.43(5) of the Act is concerned. Again, in view of the fact that both delivery transactions and derivative transactions are non-speculative as far as sec.43(5) is concerned, it follows that both will have the same treatment as far as application of Explanation to sec.73 is concerned. Therefore, aggregation of the share trading profit and loss from derivative transactions should be done before the Explanation to sec.73 is applied. The above view has been taken by Special Bench of this Tribunal, Mumbai Bench, in the case of CIT v. Concord Commercial Pvt. Ltd. (2005) 95 ITD 117 (Mum)(SB).

(ii) From the above, it is concluded that both trading of shares and derivative transactions are not coming under the purview of Section 43(5) of the Act which provides definition of "speculative transaction" exclusively for purposes of section 28 to 41 of the Act. Again, the fact that both delivery based transaction in shares and derivative transactions are non-speculative as far as section 43(5) is concerned goes to confirm that both will have same treatment as regards application of the Explanation to Section 73 is concerned, which creates a deeming fiction. Now, before application of the said Explanation, aggregation of the business profit/loss is to be worked out irrespective of the fact, whether it is from share delivery transaction or derivative transaction .

(iii) However, we make it clear that total transaction considered for determining this business loss from derivative transactions cannot be more than the total export turnover of the assessee for the assessment year under consideration and if the derivative transaction is in excess of export turnover, then that loss suffered in respect of that portion of excess transactions to be considered as speculative loss only as that excess derivative transaction has no proximity with export turnover and the Assessing Officer is directed to compute accordingly.(AY. 2009-10 & 2010-2011)

Majestic Exports v. JCIT (Chennai)(Trib.); www.itatonline.org

S. 43(5) : Speculative transaction-Transaction of call/put options in foreign currency are "derivatives" and loss suffered therein is not a "speculation" loss.

Proviso (d) to s. 43(5) excludes the transaction from the definition of speculative transaction in respect of trading of derivatives referred to in section 2(ac) of the Securities Contract (Regulation) Act, 1956 carried in recognized stock exchange. Under section 2(ac) of the Securities Contract (Regulation) Act, 1956, derivatives also includes securities. In Rajshree Sugar & Chemicals Ltd. vs. Axis Bank Ltd., AIR 2011 (Mad) 144, the term "derivative" has been defined to include foreign currency as an underlying security of the derivative. In Aug. 2008 SEBI permitted exchange traded currency derivative. Accordingly, there remain no iota of doubt that the transaction of the assessee cannot be treated as speculative transaction. A perusal of the contract note shows that the assessee has either entered into call option or put option and on the settlement day the transaction has been settled

by delivery, either the assessee has paid US dollar on the settlement day or has taken delivery of US dollar. To sum up, the "derivatives" include foreign currency and call option/ put option, are transactions of derivative markets and cannot be termed as speculative in nature. (AY. 2009-10).
IVF Advisors Private Limited v. ACIT; (2015)39 ITR 541/ 68 SOT 222 (URO)(Mum.)(Trib.)

S. 43(5) : Speculative transaction-Loss from trading in derivatives is not a speculation loss and can be set-off against normal business profits [S. 28(i), 43(5)(d), 73]
The assessee suffered a business loss in shares amounting to Rs.95,06,474/- on derivatives which was treated by the AO as speculative in nature. The assessee also earned profit of Rs.74,72,122/- on account of trading in commodity futures. The said profit was also considered by the AO as speculative in nature but without bringing any material on record as to how the same was speculative in nature. The assessee earned the profit relating to delivery based share trading, trading in commodities and earning commission on booking of flats. Profit earned from those activities by the assessee cannot be considered as speculative in nature. Now question arises as to whether the loss suffered by the assessee on derivative was to be treated as a speculative loss or to be set off against the regular business profit. Explanation to clause (d) of Sub-section (5) to Section 43 of the Act provides that eligible transaction in respect of trading in derivatives would not be deemed to be speculative transaction. In the present case, it is an admitted fact that the assessee was engaged in the business of dealing in shares & securities and has incurred loss from dealing in derivatives (shares futures). It is not the case of the AO that the share futures in which the assessee was dealing were not recorded in recognized Stock Exchange, the loss incurred by the assessee was also not disputed by the AO. We, therefore, by keeping in view the provisions contained in clause (d) to Subsection (5) of Section 43 of the Act, are of the view that the ld. CIT(A) was fully justified in directing the AO for not treating the loss incurred by the assessee on derivatives and the profit earned by trading of the commodity as speculative in nature, For the aforesaid view, we are also fortified by the decision of the ITAT Mumbai 'B' Bench in the case of R.B.K. Securities (P) Ltd. Vs ITO reported in 118 TTJ 465. Appeal of revenue was dismissed. (ITA No. 2181/Del/2012, dt. 27.05.2015) (AY. 2007-08)
ITO v. Emperor International Ltd. (Delhi)(Trib.) ; www.itatonline.org

S. 43(6) : Written down value - Assets acquired under the scheme of demerger - Only WDV of the transferred assets of the demerged company as per the accounts maintained under the Act constitutes the WDV of the block of assets of the resulting company.
In view of the Explanation 2B to S.43(6) as amended by Finance Act, 2000, w.e.f 1st April, 2000 only the WDV of the transferred assets of the demerged company as per the accounts maintained under the IT Act constitutes the WDV of the block of assets of the resulting company. The amendment of Explanation 2B made by the Finance Act, 2003 w.e.f 1st April, 2004 omitting the words 'as appearing in the books of account' has merely removed the ambiguity and, therefore, it is curative and clarificatory nature.(AY. 2003 - 04 , 2004 - 05)
Godrej & Boyce Mfg. Co. Ltd .v. ACIT (2015) 167 TTJ 724 / 153 ITD 676 (Mum.)(Trib.)

S. 43A:Rate of exchange- Foreign currency-Business loss- Matter was set aside.[S.28(i)]
Assessee had taken foreign currency loan and claimed loss on foreign exchange fluctuation as business loss. Assessing Officer disallowed said loss holding that it was a contingent and notional loss. It was held by ITAT that matter was not determined in context of present law after substitution of section 43A with effect from assessment year 2003-04. Further, it was not ascertained as to whether loan was repaid and losses incurred by assessee on foreign exchange fluctuation was not a contingent liability .Hence that matter was to be decided afresh. (AY. 2009-10)
DCIT v. Madras Engineering Industries (P.) Ltd. (2014) 34 ITR 703 / (2015) 67 SOT 152 (URO) (Chennai)(Trib.)

S. 43B :Deductionson actual payment-"Vend fee" paid by the assessee to the Government, even if of the nature of "privilege fee" falls within the expression "fee by whatever name called"-Provisions of section 43B is attracted-Appeal of revenue is allowed.

(i) A reading of Section 43B after it was substituted by the Finance Act, 1988 with effect from 01.04.1989 shows that sub clause (a) in Section 43B has been considerably widened by the amendment by the addition of the words "by whatever name called". It is clear, therefore, that to attract this section any sum that is payable whether it is called tax, duty, cess or fee or called by some other name, becomes a deduction allowable under the said Section provided that in the previous year, relevant to the assessment year, such sum should be actually paid by the assessee.
(ii) Even if the vend fee that is paid by the respondent to the State does not directly fall within the expression 'fee' contained in Section 43B(a), it would be a 'fee' by 'whatever name called', that is even if the vend fee is called a 'privilege' as has been held by the High Court in the judgment under appeal. Order of High Court is set aside.(AY. 1990-91)
CIT v.Travancore Sugar & Chemicals Ltd.(2015)374 ITR 585/ 277 CTR 333/119 DTR 273/ 231 Taxman 867 (SC)
Editorial: From the judgment of Kerala High Court in CIT v. Trvancore Sugars & Chemicals Ltd ITA No. 180 of 1999 dt 7-03-2003

S. 43B:Deductions on actual payment- Service-tax billed to customer but not collected from him cannot be disallowed u/s 43B on ground of non-payment to treasury.
Section 43B does not contemplate liability to pay the service tax before actual receipt of the funds in the account of the assesee. Liability to pay service tax into the treasury will arise only upon the assessee receiving the funds and not otherwise. Accordingly, when services are rendered, the liability to pay the service tax in respect of the consideration payable will arise only upon the receipt of such consideration and not otherwise.(ITA No. 1023 of 2013, dt. 17.04.2015)
CIT .v. Ovira Logistics (P) Ltd. (Bom.)(HC); www.itatonline.org

S. 43B:Deductions on actual payment-Loan-Interest-One-time settlement - Either interest amount has to be allowed or sum waived by bank has to be reduced by amount of interest paid.
Held, if out of the total sum of Rs. 257.08 lakhs which had been offered to tax by the assessee in its return, the unpaid interest of Rs. 193.96 lakhs was deducted then the waived principal sum would come to Rs. 62.58 lakhs (i.e. 441.30 minus 378.72). Either it was the interest which was to be waived, or the waived principal of Rs. 257.08 lakhs had to be reduced by the interest of Rs. 193.96 lakhs which was not permitted for deduction under section 43B. In either case, the amount of deduction, as well as the amount which is subjected to tax, would come to the same. Either the interest had to be allowed for deduction under section 43B or the sum offered for tax (as waived by the bank) had to be reduced by the amount of interest paid. (AY 2007-2008)
CIT .v. KLN Agrotechs (P) Ltd. (2015) 375 ITR 301 (Karn.)(HC)
Editorial: Order in KLN Agrotechs P. Ltd. v. ITO (2013) 27 ITR 648 (Bang) (Trib.) is affirmed.

S.43B:Deduction on actual payment-Loan availed of by assessee for one year-Interest not payable-No question of disallowance of claim.
Held dismissing the appeal of revenue held that ; by the plain language of the provisions of section 43B and given the factual and admitted position, the Tribunal had not erred in the view that it had taken. The view taken was neither perverse nor vitiated by any error of law apparent on the face of the record.(AY.2003-2004, 2006-2007)
CIT .v. Hindustan Construction Co. Ltd. (2015) 374 ITR 101 (Bom.) (HC)

S. 43B : Deductions on actual payment-Banking company--Income by way of interest from security--Whether accrued- Consistent finding by Tribunal-No question of law arises [S. 43B(d), 260A]
Dismissing the appeal, the Court held that; the Tribunal had applied and followed its order in the case of the very assessee for assessment year 2000-01. In such circumstances, the question of law projected as substantial could not be entertained. A pure factual finding could not be re appreciated and reappraised. That finding had been consistently rendered by the Tribunal for prior assessment years in the case of the very assessee. If the Tribunal followed and applied it on the same facts for a subsequent assessment year, that exercise undertaken by the Tribunal could not be termed as perverse or vitiated by any error of law, apparent on the face of record. (AY. 2003-2004)

CIT v. Indusind Bank Ltd. (2015) 373 ITR 160 (Bom) (HC)

S. 43B: Deductions on actual payment – Service tax-Not received from parties-No disallowance can be made.

Where it was found that, before end of the year, the amount on which service tax was payable had not been received from parties to whom services were rendered, no disallowance can be made for such unpaid service tax amount. (A.Y. 2007-08)

CIT v. Ovira Logistics (P) Ltd. (2015)232 Taxman 240 / 119 DTR 269 (Bom.)(HC)

S. 43B : deductionson actual payment-Contributions to provident fund and employees' State insurance-Provision that contribution should be paid before due date for filing return applicable to contribution by employees also.[S. 139(1)]

Held, dismissing the appeal, that the employees' contribution made to the provident fund and employees' State insurance by the assessee on or before the due date for filing the return under section 139(1) of the Income-tax Act, 1961, would be eligible for the benefit conferred under section 43B(b).

CIT v. Magus Customers Dialog P. Ltd. (2015) 371 ITR 242 (Karn.) (HC)

S. 43B :Deductionson actual payment-Conversion of outstanding interest into a loan does not amount to an "actual payment" of the interest and so deduction for the interest cannot be claimed-Appeal of revenue was allowed.[S.43B,Explanation 3C]

The High Court had to consider the question: “Whether the funding of the interest amount by way of a term loan amounts to actual payment as contemplated by Section 43B of the Income-tax Act, 1961?”

HELD by the High Court:

Explanation 3C to s. 43B was inserted for removal of doubts and it was declared that deduction of any sum, being interest payable under clause (d) of Section 43B of the Act, shall be allowed if such interest has been actually paid and any interest referred to in that clause, which has been converted into a loan or borrowing, shall not be deemed to have been actually paid. Thus, the doubt stands removed in view of Explanation 3C. This provision was considered by the Madhya Pradesh High Court in Eicher Motors Limited v. Commissioner of Income Tax to hold that in view of the Explanation 3C appended to Section 43B with retrospective effect from 01.04.1989, conversion of interest amount into loan would not be deemed to be regarded as actually paid amount within the meaning of Section 43B of the Act. Explanation 3C squarely covers the issue raised in this appeal, as it negates the assessee’s contention that interest which has been converted into a loan is deemed to be “actually paid”. In light of the insertion of this explanation, which, as mentioned earlier, was not present at the time the impugned order was passed, the assessee cannot claim deduction under Section 43B of the Act.) (AY.1996-97)

CIT v. M. M. Aqua Technologies Ltd (2015) 376 ITR 498/ 120 DTR 300/ 278 CTR 30 (Delhi)(HC)

S. 43B :Deductions on actual payment-Contractual trading liability incurred in nature of additional cost of material - Contingent liability-Not an allowable deduction. [S.37(1)]

In terms of clause 11 any liability arising after the sale of the imported materials in respect of customs duty, excise duty, penalty, sales tax, etc., was payable by the assessee and was to be included as landed cost of the imported material. Held, contractual trading liability incurred in the nature of additional cost of material was a liability contingent on the happening of an event and, thus, was not an allowable deduction while computing the income.

Oswal Agro Mills Ltd. .v. CIT (2015) 370 ITR 676 (Delhi) (HC)

S.43B: Deduction on actual payment- Provision for leave salary-Contractual liability which could not be disallowed. [S.43B(f)]

Provision for leave salary is not a statutory liability but only a contractual liability which is payable only if employees resign or retire from services and such amount could not be disallowed under section 43B(f).(AY 2003-04,2005-06)

Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S. 43B:Deductions on actual payment - Conversion of outstanding interest into a loan does not constitute "actual payment" of the interest so as to qualify for deduction.[S.43B(e)]

On perusing Section 43B(e), it is seen that interest on any loan or advance from a schedule bank, in accordance with terms and conditions of the agreement governing such loans or advance, would be allowed as deduction in the previous year in which sum is actually paid by the Assessee. We further find that Explanation 3D has been inserted by Finance Act, 2006 with retrospective effect from 01.04.1997 and the Explanation 3D states that for the removal of doubt it is declared that the deduction, being interest payable, shall be allowed if such interest has been actually paid and any interest referred to in clause (e) which has been converted into a loan or advance shall not be deemed to have been actually paid. In the present case, it is an undisputed fact that a portion of interest has been converted into loan pursuant to the CDR package approved by the Bankers of the Assessee. Considering the express provision of the Act read along with Explanation 3D and in view of the aforesaid facts, we are of the view that the A.O was right in disallowing the claim of Assessee. Before us, ld. A.R. has also relied on the decision of Karnataka High Court in the case of Vinir Engineering Pvt. Ltd. vs. DCIT reported in 313 ITR 154. We are of the view that the ratio of the aforesaid decision would not be applicable to the facts of the present case more so when in that case, the interest was payable to a Finance Corporation and not to a Scheduled Bank and the issue of disallowance was also not with respect to Section 43B(e) of the Act.(AY. 2005-06 to 2007-08)

DCIT v. Jyoti Ltd. (Ahd.)(Trib.); www.itatonline.org

S. 43B: Deductions on actual payment-Electricity Board collecting electricity duty and surcharge from customers--Electricity duty not remitted to Government within stipulated time under Kerala Electricity Duty Act—Provisions is applicable- Sur charge--Disallowance is not justified.

The assessee paid electricity duty and surcharge to the Government under the Kerala Electricity Duty Act, 1963. The Assessing Officer disallowed the payments in view of section 43B of the Act on the ground that the amount had not been remitted to the Government within the time stipulated under the 1963 Act. The Commissioner (Appeals) allowed the claim. On appeal by the Department :

Held, that the provisions of section 43B are applicable to the electricity duty payable to the Government. Accordingly, the disallowance made by the Assessing Officer was justified. However, electricity surcharge collected from the special category of consumers in terms of section 3 of the Kerala State Electricity Surcharge (Levy and Collection) Act, 1989 and stands on the same footing as under section 4(1) of the Kerala State Electricity Duty Act, 1963. Therefore, in terms of the decision of the Kerala High Court, the provisions of section 43B were not applicable. The order of the Commissioner (Appeals) on the issue of deletion of electricity surcharge was to be confirmed. (AY. 2008-2009)

ACIT v. Kerala State Electricity Board (2015) 38 ITR 458 (Cochin) (Trib)

S. 43B :Deductions on actual payment-Employer's contribution to employees provident fund paid before due date for filing return—Allowable.

Held, dismissing the appeal, that the assessee paid the provident fund deducted on account of employees contribution before due date for filing of return under section 139(1) of the Act. The details were available in the written submission of the assessee. (AY. 2006-2007 to 2010-2011)

Dy. CIT v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kolkata) (Trib.)

S. 43B :Deductions on actual payment- EPF and ESIC contribution made before due date of filing return was held to be allowable. [S. 2(24)(x), 36(1)(va)]

Following the decision by the jurisdictional High Court in CIT v. Hindustan Organics Chemicals Ltd (2014) 270 CTR 478 (Bom)(HC) the Tribunal allowed the assessee's claim; it being admitted that the impugned payments were made well before the due date of the filing the return of income for the relevant year. Further, the fact that some of the impugned payments, admittedly made after the due dates under the relevant statutes, are outside the grace period allowed by the administrative or legal injunction (for the purpose of levy of interest, penalty, etc.), even as stated by the AO in his order, would be in this view of the matter of no consequence. (AY.2008-09) (ITANo. 5487/Mum/2012, dt. 08.12.2014)

ITO .v. Indore Steel and Iron Mills Ltd. (Mum.)(Trib.) www.itatonline.org

S.43D:Public financial institutions-Charge of income-tax -Interest on NPAs and Stick Loans, even if accrued as per the mercantile system of accounting, is not taxable as per prudential norms.[S.2(24),4,5, 145, RBI Act, S. 45Q.]

The assessee, a cooperative bank, claimed that the interest on sticky advances was not chargeable to tax. This was rejected by the AO on the ground that Section 43D of The Income-tax Act applied only to scheduled Banks and not to cooperative banks. The Assessing officer has also held that CBDT circular No.F201/81/84 ITAII dated 09.10.1984 is applicable only to banking companies and not to non-scheduled banks and cooperative banks. This was reversed by the ITAT. On appeal by the department to the High Court HELD dismissing the appeal:

The assessee herein being a Cooperative Bank also governed by the Reserve Bank of India and thus the directions with regard to the prudential norms issued by the Reserve Bank of India are equally applicable to the Cooperative banks. The provisions of Section 45Q of Reserve Bank of India Act has an overriding effect vis-à-vis income recognition principle under the Companies Act. Hence, Section 45Q of the RBI Act shall have overriding effect over the income recognition principle followed by cooperative banks. Hence, the Assessing Officer has to follow the Reserve Bank of India directions 1998. In UCO Bank the Supreme Court considered the nature of CBDT circular and held that the Board has power, inter alia, to tone down the rigour of the law and ensure a fair enforcement of its provisions, by issuing circular in exercise of its statutory powers under section 119 of act which are binding on the authorities in the administration of the Act, it is a beneficial power given to the Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. Further a similar issue was raised about interest accrued on a 'sticky' loan which was not recovered by the assessee bank for the last three years and transferred to the suspense account, would or would not be included in the income of the assessee for the particular assessment year. (AY. 2009-10)

CIT .v. Deogiri Nagari Sahakari Bank Ltd. (Bom.)(HC); www.itatonline.org

S. 44AD : Civil construction – Best judgment assessment-Though gross receipts of assessee were in excess of Rs. 40 lakh- Estimation at 8% was held to be justified.[S.144]

Assessee filed his return declaring income at rate of 8 per cent on gross receipts. Assessing Officer allowed expenses to extent of 75 per cent and computed gross profit at rate of 25 per cent .Tribunal, however, assessed income at rate of 8 per cent on gross receipts. Since Assessing Officer had computed gross projects at rate of 25 per cent without any justification, Tribunal was justified in adopting gross profit rate of 8 per cent as mentioned in section 44AD even though gross receipts of assessee were in excess of Rs. 40 lakh.

CIT v. Lovish Oberoi (2015) 229 Taxman 197 (Delhi)(HC)

S. 44AD:Presumptive taxation-Construction business-No books of account-Estimate of net profit at rate of 11 percent was held to be justified.

The assessee was engaged in construction business. The Department conducted a search and seizure operation in the business and residential premises of the assessee and seized a trial balance signed by the assessee.

The assessee filed returns on presumption basis under section 44AD of the Act, declaring income at 8 per cent. for the assessment year 1995-96 and at 5.6 per cent. for the assessment year 1997-98. The Assessing Officer held that the investments were shown in the name of bogus creditors and added all the amounts as undisclosed income of the assessee for the broken period of April 1, 2000 to April 20, 2000. The Commissioner (Appeals) estimated the profit at 8.5 per cent. allowing partial relief to the assessee. On appeals by both the assessee and the Department; Tribunal held that the Commissioner (Appeals) was justified in making estimation of profit however failure by Department to prove assessee showed bogus creditors. Receipts shown by assessee for cheques book entry for sundry creditors, net profit to be determined at rate of 11 per cent.[BP. 1-4-1990-20-6-2000)

M.C. Puri vs. ACIT (2015) 39 ITR 433 (Chd)(Trib)

S.44AE:Transportation charges-Showing income from tanker more than income deemed to be shown under section 44AE after claiming depreciation--Disallowance of 50 per cent. of total expenses based on consumption of diesel alone not justified. [S.145(3)]

The assessee ran a petrol pump and operated a tanker for transportation of the petroleum products from the refinery to its village. The transportation charges were reimbursed by the petroleum company. Against reimbursement of transportation charges the assessee claimed expenses. The Assessing Officer disallowed 50 per cent. of such expenses on the ground that the expenses for diesel consumption were on the higher side. The Commissioner (Appeals) sustained the order of the Assessing Officer. On appeal :

Held, allowing the appeal, that admittedly, the books of account maintained for the tanker were not rejected in terms of section 145(3) of the Income-tax Act, 1961. The Assessing Officer disallowed 50 per cent. of the total expenses without any basis and the Commissioner (Appeals) worked out the expenses on the basis of consumption of diesel but ignored the other expenses such as salaries to the driver and cleaner, repairs and maintenance and depreciation. The expenditure claimed was much less than the reimbursement made by the company and after claiming depreciation the assessee had shown the income from tanker which was more than the income deemed to be shown under section 44AE of the Act. The orders of the authorities were not sustainable. (AY. 2003-2004)

Pushpak Auto Centre v. ITO (2015) 38 ITR 447 (Delhi)(Trib)

S.44B:Shipping business-Non-resident--Shipping--Income from international shipping--No article in Double Taxation Avoidance Agreement between India and Switzerland dealing with profits from shipping--Assessee covered by residuary article 22 allocating taxing rights to country of residence--Assessee's shipping income not taxable in India-Interest on refund of tax--Taxable under article 11-Advance tax--Interest-Failure by payer to deduct tax at source--Interest cannot be imposed on assesse- DTAA-India- Switzerland. [S. 9(i), 234B,ART. 7, 11, 22]

The assessee was incorporated in Switzerland and was engaged in the business of operation of ships in international seas. The assessee showed its shipping income in India at nil, on the ground that, after the amendment of the Double Taxation Avoidance Agreement between India and Switzerland (DTAA), article 22 would apply and no shipping income could be held to be taxable in India. The Assessing Officer held that article 7 of the DTAA specifically excluded profits from the operation of the ships in international traffic from the business profits of the enterprise of the Contracting State and therefore, the shipping income would be taxable in India under section 44B of the Act. The Commissioner (Appeals) confirmed this. On appeal :

Held, allowing the appeal, that the items of income not dealt with in the other articles of the DTAA were covered in the residuary article 22 and their taxability was governed by article 22, allocating taxing rights to the country of residence. There was no article for the DTAA dealing with profits of shipping which was applicable to the assessee. Therefore, applying article 22 of the DTAA, the shipping income was not taxable in India.

Held also, that interest received from Department on refund was taxable under article 11, i. e. at 10 per cent. and not under article 7 of the DTAA.

Held further, that no interest under section 234B of the Act could be imposed on the payee assessee when the duty to pay tax at source was cast on the payer. (AY. 2005-2006 to 2009-2010)

MSC Mediterranean Shipping Company, S.A. v. Dy. CIT (IT) (2015) 38 ITR 758 (Mum.)(Trib.)

S. 44BB : Mineral oils – Computation- The "pith and substance" test has to be applied to determine the dominant purpose of each agreement. If the dominant purpose is mining, the income is assessable only u/s 44BB and not as "fees for technical services" [S.9(1)(vii),44D]

The Supreme Court had to consider the following question: “Whether the amounts paid by the ONGC to the non-resident assessees /foreign companies for providing various services in connection with prospecting, extraction or production of mineral oil is chargeable to tax as “fees for technical services” under Section 44D read with Explanation 2 to Section 9(1)(vii) of the Income Tax Act or will such payments be taxable on a presumptive basis under Section 44BB of the Act”? HELD by the Supreme Court:

(i) The Income Tax Act does not define the expressions "mines" or "minerals". The said expressions are found defined and explained in the Mines Act, 1952 and the Oil Fields (Development and Regulation) Act 1948. While construing the somewhat pari materia expressions appearing in the Mines and Minerals (Development and Regulation) Act 1957 regard must be had to the provisions of Entries 53 and 54 of List I and Entry 22 of List II of the 7th Schedule to the Constitution to understand the exclusion of mineral oils from the definition of minerals in Section 3(a) of the 1957 Act. Regard must also be had to the fact that mineral oils is separately defined in Section 3(b) of the 1957 Act to include natural gas and petroleum in respect of which Parliament has exclusive jurisdiction under Entry 53 of List I of the 7th Schedule and had enacted an earlier legislation i.e. Oil Fields (Regulation and Development) Act, 1948. Reading Section 2(j) and 2(jj) of the Mines Act, 1952 which define mines and minerals and the provisions of the Oil Fields (Regulation and Development) Act, 1948 specifically relating to prospecting and exploration of mineral oils, exhaustively referred to earlier, it is abundantly clear that drilling operations for the purpose of production of petroleum would clearly amount to a mining activity or a mining operation. Viewed thus, it is the proximity of the works contemplated under an agreement, executed with a non-resident assessee or a foreign company, with mining activity or mining operations that would be crucial for the determination of the question whether the payments made under such an agreement to the non-resident assessee or the foreign company is to be assessed under Section 44BB or Section 44D of the Act.

(ii) The test of pith and substance of the agreement commends to us as reasonable for acceptance. Equally important is the fact that the CBDT had accepted the said test and had in fact issued a circular as far back as 22.10.1990 to the effect that mining operations and the expressions "mining projects" or "like projects" occurring in Explanation 2 to Section 9(1) of the Act would cover rendering of service like imparting of training and carrying out drilling operations for exploration of and extraction of oil and natural gas and hence payments made under such agreement to a non-resident/foreign company would be chargeable to tax under the provisions of Section 44BB and not Section 44D of the Act. We do not see how any other view can be taken if the works or services mentioned under a particular agreement is directly associated or inextricably connected with prospecting, extraction or production of mineral oil. Keeping in mind the above provision, we have looked into each of the contracts involved in the present group of cases and find that the brief description of the works covered under each of the said contracts as culled out by the appellants and placed before the Court is correct.

(iii) The above facts would indicate that the pith and substance of each of the contracts/agreements is inextricably connected with prospecting, extraction or production of mineral oil. The dominant purpose of each of such agreement is for prospecting, extraction or production of mineral oils though there may be certain ancillary works contemplated thereunder. If that be so, we will have no hesitation in holding that the payments made by ONGC and received by the non-resident assessees or foreign companies under the said contracts is more appropriately assessable under the provisions of Section 44BB and not Section 44D of the Act. (AY.1985-86 , 1986-87)

Oil & Natural Gas Corporation Limited v. CIT (2015) 376 ITR 306/121 DTR 289/ 278 CTR 153 (SC)

S. 44BB: Mineral oils – Computation- Service tax & Customs duty collected by assessee from clients is not includible in gross receipt while computing income.

The High Court had to consider the following important question of law: "*Whether the amount of service tax collected by the Assessee from its various clients should have been included in gross receipt while computing its income under the provisions of section 44BB of the Act?*" HELD by the High Court:

(i) Section 44BB begins with a non obstante clause that excludes the application of Sections 28 to 41 and Sections 43 and 43A to assessments under Section 44 BB. It introduces the concept of presumptive income and states that 10% credit of the amounts paid or payable or deemed to be received by the Assessee on account of "the provision of services and facilities in connection with, or supply of plant and machinery on hire used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India" shall be deemed to be the profits and gains of the chargeable to tax. The purpose of this provision is to tax what can be legitimately considered as income of the Assessee earned from its business and profession.

(ii) The expression 'amount paid or payable' in Section 44 BB (2) (a) and the expression 'amount received or deemed to be received' in Section 44 BB (2) (b) is qualified by the words 'on account of the provision of services and facilities in connection with, or supply of plant and machinery.' Therefore, only such amounts which are paid or payable for the services provided by the Assessee can form part of the gross receipts for the purposes of computation of the gross income under Section 44 BB (1) read with Section 44 BB (2).
(iii) It is in this context that the question arises whether the service tax collected by the Assessee and passed on to the Government from the person to whom it has provided the services can legitimately be considered to form part of the gross receipts for the purposes of computation of the Assessee's 'presumptive income' under Section 44BB of the Act?
(iv) The Court concurs with the decision of the High Court of Uttarakhand in DIT v. Schlumberger Asia Services Ltd (2009) 317 ITR 156 which held that the reimbursement received by the Assessee of the customs duty paid on equipment imported by it for rendering services would not form part of the gross receipts for the purposes of Section 44 BB of the Act. The Court accordingly holds that for the purposes of computing the 'presumptive income' of the assessee for the purposes of Section 44 BB of the Act, the service tax collected by the Assessee on the amount paid by it for rendering services is not to be included in the gross receipts in terms of Section 44 BB (2) read with Section 44 BB (1). The service tax is not an amount paid or payable, or received or deemed to be received by the Assessee for the services rendered by it. The Assessee is only collecting the service tax for passing it on to the government.
(v) This position has been made explicit by the CBDT itself in two of its circulars. In Circular No. 4/2008 dated 28th April 2008 it was clarified that "Service tax paid by the tenant doesn't partake the nature of "income" of the landlord. The landlord only acts as a collecting agency for Government for collection of Service Tax. Therefore, it has been decided that tax deduction at source) under sections 194-I of Income Tax Act would be required to be made on the amount of rent paid/payable without including the service tax.' In Circular No. 1/2014 dated 13th January 2014, it has been clarified that service tax is not to be included in the fees for professional services or technical services and no TDS is required to be made on the service tax component under Section 194J of the Act.(ITA No. 403/2013, dt. 28.09.2015) (AY.2008-09)
DIT v. Mitechell Drilling Internation Pvt.ltd. (Delhi)(HC); www.itatonline.org

S.44BB : Mineral oils –Non-resident-Computation –Mobilization/demoblization fee received by assessee on account of services provided/vessel operated outside India were to be included in calculating aggregate amount referred to in sub-section (2) of section 44BB [S.5 (2)]
Assessee, a Norway based company, was engaged in activities relating to acquisition of 3D seismic data under contracts with 'R' Ltd. and ONGC . Income of assessee was assessed under section 44BB .In course of appellate proceedings, Tribunal held that mobilization/demoblization fee received by assessee on account of services provided/vessel operated outside India were to be included in calculating aggregate amount referred to in sub-section (2) of section 44BB . Dismissing the appeal the court held that .since assessee did not claim benefit of sub-section (3) of section 44BB, amount of mobilisation advance received outside India was rightly included for purpose of calculating income in terms of sub-section (2) of section 44BB.in such a situation, provisions contained in section 5(2) would not stand on way of authorities insisting on amount of mobilization advance received by assessee outside India being included.
Fugro Geoteam AS .v. Addl. DIT (2015) 231 Taxman 307 (Uttarakhand)(HC)

S. 44BB : Mineral oils – Computation - Assessment -Revised figures of contract receipts –AO was directed to determine the correct receipts from contracts. [S. 143]
The assessee revised the figures of receipts from two contracts during the assessment proceedings. The Assessing Officer rejected the assessee's claim against receipts from ONGC on technical ground and did not go into the question of correct receipts. The Assessing Officer refused to accept the downward revision of receipts from the contract and accepted upward revision of receipts from the contract.The Tribunal set aside the order and directed the Assessing Officer to determine the correct receipts from the contract and thereafter apply section 44BB. (AY. 2010-11)

ADIT v. Global Geophysical Services Ltd. (2015) 168 TTJ 265/68 SOT 86 (URO)/54 taxmann.com 166 (Delhi)(Trib.)

S. 44BB : Mineral oils-Non-resident-Presumptive taxIncome from service of 3D seismic data processing--Income taxable only under section 44BB and not as fees for technical services. Reimbursement of mobilisation and demobilisation charges outside India— Held to be taxable.

The assessee, a tax resident of Norway, was engaged in the activities relating to acquisition of 3D seismic data under contracts with RL and ONGC. In the return filed, the assessee declared income from contract receipts under section 44BB of the Act.The AO rejecting the claim, held that the income had to be taxed as fees from technical services. The Dispute Resolution Panel confirmed this. On appeal by the assessee :

Held, that the assessee was entitled to declare its income under section 44BB of the Act.

The assessee claimed mobilisation and demobilisation of vessel outside India and was not chargeable to tax in India. The AOrejected the claim. The Dispute Resolution Panel confirmed this. On appeal :

Held, that the income arising from mobilisation and demobilisation charges outside India was taxable.(AY. 2008-2009)

Fugro Geoteam AS .v. Add. CIT (IT) (2015) 37 ITR 46 (Delhi)(Trib)

S. 45:Capital gains-Business income - Transactions in shares - Non-banking financial company-Frequency of transaction not conclusive test - Evidence to show some transactions were business, some investment and some speculation - No fault found with evidence - Concurrent finding that transactions not business activity - Possible view.[S.28(i)]

The frequency of transactions in shares alone cannot show that the intention of the investor was not to make an investment. The Legislature has not made any distinction on the basis of frequency of transactions. The benefit of short-term capital gains can be availed of, for any period of retention of shares up to 12 months. Although a ceiling has been provided, there is no indication as regards the floor, which can be as little as one day. The question essentially is a question of fact.

The Revenue had not been able to find fault from the evidence adduced. The mere fact that there were 1,000 transactions in a year or the mere fact that the majority of the income was from the share dealing or that the managing director of the assessee was also a managing director of a firm of share brokers could not have any decisive value. The Commissioner (Appeals) and the Tribunal had concurrently held against the views of the Assessing Officer. On the basis of the submissions made on behalf of the Revenue, it was not possible to say that the view entertained by the Commissioner (Appeals) or the Tribunal was not a possible view. Therefore, the decision of the Tribunal could not be said to be perverse. No fruitful purpose was likely to be served by remanding the matter.(AY. 2005-2006, 2006-2007)

CIT .v. Merlin Holding P. Ltd. (2015) 375 ITR 118 (Cal.) (HC)

S. 45:Capital gains-Business income- Transactions in shares - Assessee showing shares declared as either long-term or short-term capital gains in investment portfolio - Shares valued at cost and on shareholding in stock-in-trade valued either at market rate or cost - Concurrent finding that transactions not business activity - View taken not perverse.[S.28(i)]

The total number of the assessee's transactions of purchases as well as sales was 220 and the ratio between purchase and sale was 59: 41. The holding period in respect of 77 sale transactions was more than 12 months and in respect of 13 transactions it was less than 12 months.

Held, the Assessing Officer had laid stress on motive. No direct evidence as regards motive is possible. Motive can be inferred from the conduct of the person concerned but that is bound to remain an inference, which may or may not be correct. The Revenue was unable to find fault with the claim of the assessee. The Revenue was also not in a position to support the view of the Assessing Officer. The views expressed both by the Commissioner (Appeals) and the Tribunal for reasons expressed therein were a possible view. It was, therefore, not open to the Revenue to contend that the view taken by the Tribunal was perverse. AY. 2007-2008)

CIT .v. H K Financers Pvt. Ltd. (2015) 375 ITR 577 (Cal.)(HC)

S. 45:Capital gains-Lease hold rights is a capital asset-Lease of less than 10 years there is no transfer- Not liable to capital gains tax. [S. 2(14), 2(47), 50, 50B, 269UA(f), Transfer of Property Act, 1882, S. 105]

Allowing the appeal of assessee the Court held that leasehold right is a capital asset. However,in the present case, where the question arises in the context of the next question whether the lease deed results in a transfer of a 'capital asset', the answer will have to be found from a careful reading of the causes of the lease agreement itself. While de hors the context, it might be possible in theory for a leasehold right to be construed as a capital asset since the words used in Section 2 (14) (a) are indeed of a wide amplitude, in the context of the present case, where under the lease agreement dated 24th February 1994 what is given to SGL is a limited right to hold and possess the facilities leased to it for a limited period of ten years, with further restriction on sub-letting it or transferring any right or interest therein to anyone without the per-mission of the lessor and with the lease agreement making it explicit that at the end of the lease period the facilities leased it SGL would revert to the Assessee, it is difficult to hold that the leasehold rights given to the Assessee under the lease agreement is a 'capital asset'. Consequently, question is answered by holding that the leasehold right, given to SGL for a period of ten years, of the plant and machinery along with land and building, is not a 'capital asset' within the meaning of Section 2 (14) (a) of the Act. As the period of lease being less than 12 years there is no transfer. The mere fact that the Assessee may have applied under Section 230A of the Act to seek permission of the Department cannot be held against it as far as the correct legal position is concerned. In other words the fact that certain columns in the con-cerned form were filled by the Assessee to imply that there was a transfer of lease-hold/ownership rights cannot be read to constitute a waiver by the Assessee of the legal defences that flow from a correct interpretation of the clauses of the lease agreement and from a correct reading of Section 2 (47) with Section 45 of the Act.The Court is also unable to agree with the contention of the learned counsel for the Revenue that the lease of the plant and machinery can be separated from the lease of the land and buildings and the former transaction held to be valid and the latter a sham transaction. The last question that requires to be addressed whether there could be said to be any capital gains under Section 45 of the Act? In light of the above discussion, the question will have to be answered in favour of the Assessee and against the Revenue. The Court is of the view that the transaction in question was nothing more than a transaction of lease and has been acted upon by the parties as such. This was not a device adopted by the Assessee for tax avoidance. (ITA No. 38/2002, dt. 24.09.2015) (AY.1994-95)

Teletube Electronics v. CIT (Delhi)(HC) ; www.itatonline.org

S.45:Capital gains- Business income- Investment in shares- Gains from sale of shares assessable as short-term capital gains and not as business profits explained.[S.28(i), 48]

Judgement of CIT(A) and Tribunal that assessee is an investor and not a trader on the basis of the following facts cannot be faulted:

(a) assessee has been an investor in shares and has consistently treated its entire investment in shares as "investment in shares" & not "stock-in-trade";

(b) the income earned on sale of shares was offered as short term capital gains even when losses were suffered in a particular year;

(c) dealing in 35 scrips, involving 59 transactions for the entire year could not be considered for high volume so as to be classified as trading income;

(d) the assessee earned 75% of the income as short term capital gains by holding shares for more than nine months;

(e) no transfer in shares was done by the assessee for over 75% of working days during the year;

(f) 56% of the Short term capital gains during the year resulted from shares held during the earlier assessment year as a part of the opening investment on 1 April 2007.

(g) the assessee had not resorted to churning of shares or repetitive transactions in shares of the same company.

(h) for the earlier Assessment Years i.e. AY 2005-06 and AY 2006-07, the Assessing Officer had, in the proceedings under Section 143(3) of the Act, accepted the stand of the respondent assessee and taxed the profit earned on purchase and sale of shares as short term capital gains;

(i) dividend Income earned was over Rs.8.50 lakhs;

(j) the assessee had not borrowed any funds but has used her own funds for the purpose of investment in shares;
(k) all transactions were delivery based transactions; and
(l) the speculation loss to which the Assessing Officer has made reference was in fact not so, but happened as a result of punching error
On consideration of the above facts, the CIT (A) and Tribunal rightly concluded that compliance on the part of the assessee in terms of Instruction No.1827 dated 31 August 1989 issued by the Central Board of Direct Taxes laying down the tests for distinguishing the shares held in stock-in-trade and shares held as an investment, the shares held by the assessee was investment and held the income to be treated as short term capital gains.(ITA No. 1601 of 2013, dt.09.09.2015) (AY. 2008-09)
CIT .v. Datta Mahendra Shah (Bom.)(HC); www.itatonline.org

S.45:Capital gains-Business income–Share investment-Principle of consistency- No borrowings-Value and frequency of transactions is not conclusive- Assessable as capital gains. [S.28(i)]
Dismissing the appeal of revenue , the Court held that ; Share scrips traded only amounts held by assessee and no borrowings. Dividend amounting to 4 per cent. of value of investment earned by assessee. Value and frequency of transactions is not conclusive. Similar income for past and subsequent periods accepted as short-term capital gains. No distinctive material to differentiate assessee's activities for assessment year in question. Principle of consistency. Investment in shares assessable as short-term capital gains and not business income.AY 2006-2007)]
CIT .v. Amit Jain (2015) 374 ITR 550 (Delhi) (HC)

S.45:Capital gains- Transfer-Joint development agreement-Accrual-Entering into a joint development agreement with an irrevocable power of attorney in favour of the developer does not results in a "transfer" for purposes of capital gains-Not liable to pay capital gains tax-For the purposes of taxability, the income is not hypothetical and it has really accrued to the assessee. [S. 2(47)(v), 2(47)(vi), 48, Transfer of Property Act, 1882, S.53A]
Tribunal has held that the joint development with an irrevocable power of attorney in favour of the developer results in a transfer and liable to pay capital gains tax.. Against the judgement of the ITAT Chandigarh Bench in Charanjit Singh Atwal vs. ITO[2013] 144 ITD 528, the High Court had to consider the following issues relating to the taxability of capital gains pursuant to a Joint development assessment (JDA) with a developer coupled with an irrevocable general power of attorney:
(i) The scope and legislative intent of Section 2(47)(ii), (v) and (vi) of the Act;
(ii) The essential ingredients for applicability of Section 53A of 1882 Act;
(iii) The meaning to be assigned to the term “possession”?
(iv) Whether in the facts and circumstances, any taxable capital gains arises from the transaction entered by the assessee?
HELD by the High Court revering the Tribunal:
(i) Clause (vi) of Section 2(47) of the Act, as explained by CBDT in its circular No.495 dated 23.9.1987, makes it clear that it was intended to cover those cases of transfer of ownership where the prospective buyer becomes owner of the property by becoming a member of a company, cooperative society etc. In the present case, JDA was executed between the society and the developers and there was no transaction involving the developer becoming member of a cooperative society/company etc. in terms of Section 2(47) (vi) of the Act. The surrender of right to obtain plot by the members was for facilitating the society to enter into the JDA with the developers. There was no change in the membership of the society as contemplated under Section 2 (47)(vi) of the Act. Equally Clause (ii) of Section 2(47) of the Act has no applicability in as much as there was no extinguishment of any rights of the assessee in the capital asset at the time of execution of JDA in the absence of any registered conveyance deed in favour of the transferee in view of judgments in Alapati Venkataramiah vs. CIT, (1965) 57 ITR 185 (SC) and Additional CIT vs. Mercury General Corporation (P) Limited, (1982) 133 ITR 525 (Delhi);
(ii) Section 53A of 1882 Act has been bodily transposed into Section 2(47)(v) of the Act and the effect of it would be that Section 53A of 1882 Act shall be taken to be an integral part of Section 2 (47)(v) of the Act. In other words, the legal requirements of Section 53A of 1882 Act are required to be fulfilled so as to attract the provisions of Section 2(47)(v) of the Act. Section 53-A of Act is clear

to the effect that the person claiming benefit under it, must have "taken possession of the property". This can happen, if the transferee was delivered physical possession of the property. It can also happen when a symbolical delivery of possession was effected, such as by attornment of the existing lease over such property. Where the contemplated transfer relates to an undivided share, Section 53-A takes a different colour. The reason is that, there cannot be delivery of possession of property by a co-owner, of an undivided property, or the corresponding taking possession of such property by the transferee;

(iii) The concept of possession to be defined is an enormous task to be precisely elaborated. "Possession" is a word of open texture. It is an abstract notion. It implies a right to enjoy which is attached to the right to property. It is not purely a legal concept but is a matter of fact. The issue of ownership depends on rule of law whereas possession is a question dependent upon fact without reference to law. To put it differently, ownership is strictly a legal concept and possession is both a legal and a non-legal or pre-legal concept. The test for determining whether any person is in possession of anything is to see whether it is under his general control. He should be actually holding, using and enjoying it, without interference on the part of others. It would have to be ascertained in each case independently whether a transferee has been delivered possession in furtherance of the contract in order to fall under Section 53A of the 1882 Act and thus amenable to tax by virtue of Section 2(47)(v) read with Section 45 of the Act;

(iv) On facts, perusal of the JDA dated 25.2.2007 read with sale deeds dated 2.3.007 and 25.4.2007 in respect of 3.08 acres and 4.62 acres respectively would reveal that the parties had agreed for pro-rata transfer of land. No possession had been given by the transferor to the transferee of the entire land in part performance of JDA dated 25.2.2007 so as to fall within the domain of Section 53A of 1882 Act. The possession delivered, if at all, was as a licencee for the development of the property and not in the capacity of a transferee. Further Section 53A of 1882 Act, by incorporation, stood embodied in section 2(47)(v) of the Act and all the essential ingredients of Section 53A of 1882 Act were required to be fulfilled. In the absence of registration of JDA dated 25.2.2007 having been executed after 24.9.2001, the agreement does not fall under Section 53A of 1882 Act and consequently Section 2(47)(v) of the Act does not apply;

(v) Viewed from another angle, it cannot be said that any income chargeable to capital gains tax in respect of remaining land had accrued or arisen to the assessee in the facts of the case. In Commissioner of Income Tax, Bombay City vs. Messrs Shoorji Vallabhdas & Co. (1962) 46 ITR 144 (SC) it was observed that income tax is a levy on income and where no income results either under accrual system or on the basis of receipt, no income tax is exigible. In CIT vs. Excel Industries Limited (2013) 358 ITR 295 (SC) held that income tax cannot be levied on hypothetical income. Income accrues when it becomes due but it must also be accompanied by a corresponding liability of the other party to pay the amount. Only then can it be said that for the purposes of taxability, the income is not hypothetical and it has really accrued to the assessee. (AY. 2007-08)

C. S. Atwal v. CIT (P&H)(HC);www.itatonline.org

Editorial: Order of Tribunal in Charanjit Singh Atwal v.ITO(2013) 144 ITD 528 (Chd.)(Trib.) is reversed.

S. 45:Capital gains-Business income–Dealing in Mutual fund units –Intention to be looked in to-Matter remanded.[S.28(i)]

In order to determine the characterization of profit on sale of units of mutual fund as 'Capital Gains' or 'Business Income' the actual intention of the assessee and the manner in which transactions took place has to be looked at. Where the Tribunal did not look into these parameters, the matter was remanded for fresh consideration.)(AY. 2005-06)

CIT v. Central News Agency (2015)373 ITR 399/ 119 DTR 194 (Delhi)(HC)

S. 45: Capital gains-Conversion of firm into company-Transfer of assets means a physical transfer or intangible transfer of rights to property - Conversion of shares of partners to shares in company.[S. 45(4)]

The assessee-firm transformed into a private limited company. The entire assets and liabilities of the firm were made over to the company. The respective partners were issued shares by the company corresponding to the value of their share in the firm. The Assessing Officer took the view that there

was transfer of assets from the firm to the private limited company and thereby the capital gains tax under section 45 became payable. The Commissioner (Appeals) and the Tribunal held that section 45 was not applicable. On appeal to the High Court:
Held, dismissing the appeal, that the shares of the respective shareholders in the assessee-company were defined under the partnership deed. The only change that had taken place on the assessee being transformed into a company was that the shares of the partners were reflected in the form of share certificates. Beyond that, there was no physical distribution of assets in the form of dividing them into parts, or allocation of assets to the respective partners or even distributing the monetary value thereof. Section 45 was not applicable. From a perusal of section 45(4), it becomes clear that two aspects become important, viz., the dissolution of the firm and the distribution of assets as a consequence thereof. The distribution must result in some tangible act of physical transfer of properties or intangible act of conferring exclusive rights vis-a-vis an item of property on the erstwhile shareholder. Unless these or other legal correlatives take place, it cannot be inferred that there was any distribution of assets. Appeal of revenue is dismissed. (AY. 1993-1994)
CIT v. United Fish Nets (2015) 372 ITR 67/ 228 Taxman 302 (T & AP) (HC)

S. 45: Capital gains–Business income- Sale of shares- Assessable as capital gains.[S. 28(i)]
Assessee ayurvedic doctor, income derived by him on sale of share was to be assessed under capital gains, and not under head business income.(AY. 2005-06)
A.N. Swarna Prasad v. Addl. CIT (2015) 230 Taxman 536 (Karn.)(HC)

S. 45 : Capital gains-Business income –Investment in shares-Change of portfolio from stock in trade to investment – Tribunal has not gone in to number of transaction and other relevant criteria - Matter remanded. [S. 28(i)]
In assessment year 2005-06, the appellant-assessee changed the nature of its portfolio from shares held as stock-in-trade to that of shares held as an investment. The income of sale of such shares was claimed as short-term capital gains.During the year under consideration, the Assessing Officer did not deal with the facts, but simply followed his predecessor's order for the year related to assessment years 2005-06 and 2006-07 to hold that the transactions relating to shares treated by the appellant-assessee as short-term capital gains should be taxed under the head 'profits and gains of Business of Profession'. On appeal:
The Tribunal in the impugned order has referred to the facts relating to assessment year 2005-06. This was the first year, in which the assessee changed the nature of its portfolio from shares held as stock-in-trade to that of shares held as an investment. With regard to other assessment years, the Tribunal has not discussed the factual matrix or gone into the question of number of transactions relating to sale and purchase, the period for which shares were held and other relevant criteria, which have been elucidated in Circular No. 4 of 2007 dated 15-6-2007. The Commissioner (Appeals) also did not go in depth and detail and preferred to rely upon the earlier orders. In the first appellate order relating to assessment year 2007-08, reference was made to transactions in shares of 8 companies, which were held for a period ranging from 6 days to 97 days, but the assessee states that there were other shares too, which were held for longer period. For the assessment year 2008-09, there is no discussion and elucidation. It is clearly noticeable that the impugned order passed by the Tribunal does not refer to the factual matrix relating to the assessment years 2007-08 and 2008-09.
It was noticed from records that the assessee had declared long-term capital gains and, therefore, the stand of the assessee is that he was an investor as well as trader in shares. In view of the aforesaid factual position, it is held that the Tribunal has not dealt with the contentions raised after examining and ascertaining the facts in detail. The factual position can vary and can be materially different. Thus, the impugned order of the Tribunal is set aside and matter is remanded back for disposal afresh.(AY. 2007-08, 2008-09)
Acee Enterprises v. CIT (2015) 229 Taxman 409 (Delhi)(HC)

S. 45 : Capital gains-Restrictive covenant- Independent and distict assets- Share purchase--Where the agreement between the parties (for sale of shares) indicates that the lump-sum consideration was in respect of two or more promises (i.e. sale of shares & non-compete

covenant), it is liable to be bifurcated and apportioned between each of the assets- Assessee is entitle d to apportionment towards price o shares and price of restrictive covenants- Appeals of revenue was dismissed.[S. 4, 17, 28(ii)(c)]

The High Court had to consider whether, although the agreement for sale of shares did not bifurcate the consideration towards the various covenants in the agreement, the assessee was entitled to bifurcate the same and apportion a part thereof towards the negative covenants and claim that the same is not taxable. HELD by the High Court:

(i) It is difficult to understand how the mere fact that the parties have not apportioned the consideration between the two assets which were being dealt with by this agreement can make any difference to the rights of the parties. The position might have been different if the market value of the shares could not be ascertained. Then it might be said that it is difficult to put a proper value upon the shares and to put a proper value for the consideration. But when the market value is available and when it is known for what price these shares could be purchased or sold, there is no difficulty whatsoever in the apportionment.

(ii) The value to be ascribed to each transaction must obviously depend upon the evidence and the facts in each case. The tax of whatever nature, must be levied on the basis of the true value of the asset of the transaction and not merely on the basis of the value ascribed to it by the assessee. Indeed, the view to the contrary could cause severe prejudice to the revenue itself. To accept the contention would enable assessees to ascribe artificial values to assets enabling them to avoid tax.

(iii) The agreement indicated two distinct assets, namely, the negative covenant and the shares are independent and distinct assets. It was possible to have a separate and independent agreement in respect of each of them. The agreement in terms of the negative covenant contained in Clause 5.5 did not flow out of the agreement to sell the shares. Each of these agreements could have been arrived at independent of the others. Each of the agreements could have been arrived at without and even in the absence of the other. The negative covenant could have been agreed to by the members of the Saboo group without having sold their shares and the members of the Saboo group could have sold their shares without agreeing to the negative covenants. It was therefore not only permissible but necessary to apportion the consideration towards each of the assets provided of course it is possible to ascertain a value of each of the assets.

(iv) The observations in Vodafone International Holdings BV vs. Union of India(2012) 6 SCC 613 cannot be read in isolation. Moreover, even these observations do not support Ms. Dhugga's submission that merely because the written agreement entered into between the parties does not bifurcate the consideration and apportion the same, the authorities and/or the assessees are precluded from doing so. Indeed, the issue, as it arises before us, was not considered by the Supreme Court. The Supreme Court considered the aspect in an entirely different context. The Supreme Court did not hold that even if it had come to the conclusion that the case concerns sale of share and other assets, there could be no bifurcation and apportionment of the consideration stipulated merely because the Share Purchase Agreement did not itself bifurcate the consideration qua the independent components. Our view is, therefore, not inconsistent with the judgment in Vodafone's case (supra). As we noted earlier, this is the view of a Bench of three learned Judges of the Supreme Court in Commissioner of Income Tax, Madras v. Best and Co. (Private) Ltd. 1966 Income Tax Reports (60) 11, which dealt with the very point in issue before us. We are, therefore, in any event bound by the judgment in CIT v. Best and Co. P. Ltd. (supra). (AY.1994-95)

CIT v. Usha saboo (Smt)(2015) 374 ITR 695 / 121 DTR 1/ 278 CTR 57 (P& H) (HC)
CIT v. Pallabi Saboo(2015) 374 ITR 695 (P&H)(HC)
CIT v. Shri R.K. Saboo(2015) 374 ITR 695 (P&H)(HC)
CIT v. Anuradha Saboo(2015) 374 ITR 695 (P&H)(HC)
CIT v. Jai Vardhan Saboo(2015) 374 ITR 695 (P&H)(HC)
CIT v. Yaswardhan Saboo (2015) 374 ITR 695(P&H)(HC)

S. 45 : Capital gains-Business-Transactions in shares- Held to be investment-Question of fact. [S. 28(i), 260A]

The Assessing Officer held that the transaction in shares undertaken by the assessee was in the nature of a business transaction and not investment. The Commissioner (Appeals), after discussing the reasons as to why the transaction was in the nature of an investment held that the transaction was

really in the nature of an investment. The Tribunal agreed with the Commissioner (Appeals). On appeal :Held, dismissing the appeal, that the view taken by the Tribunal was also based on evidence and was a possible view. There was, as such, no reason to interfere.
CIT v. Bajranglal Chowdhury (2015) 371 ITR 17 (Cal.) (HC)

S. 45 : Capital gains-Transfer-Capital gains are levied in the year in which the possession of the asset and all other rights are transferred and not in the year in which the title of the asset gets transferred.[S. 2(47), Transfer of Property Act, 1953 S.53A]
The assessee entered into an agreement with the builder on 24-06-1999 to develop his land. After obtaining the map, the assessee entered into a supplementary agreement in which the possession of the land and all other rights excluding title were transferred. On 30-04-2005, the project was completed and the assessee handed over the title to the builder.
The AO held that since the title of land was handed over in FY 2005-06, the assessee was liable to pay capital gain in the relevant assessment year only. The CIT(A) upheld the order of the AO. On further appeal, the Tribunal reversed the order of the CIT(A). On the Revenue's further appeal, the Court held that under the terms and conditions of the agreement dated 24-06-1999, the transfer was effective from that day and not in AY 2006-07 and therefore confirms the order passed by the Tribunal.
CIT v. Ziauddin Ahmad (2015) 115 DTR 7 /229 Taxman 281 (All)(HC)

S. 45 : Capital gains - Non-compete fee- Sale of shares-Controlling interest-Assessable as capital gains and not as business income.[S.28(ii), 48]
Assessee along with his family members held shares in a company. The assesee sold shares with controlling interest to another company and entered into separate non-compete agreement with the company, as an individual received in exorbitant amount for the same. The asesee claimed entire non-compete fee of Rs.6.60 crores as a capital receipt and hence not eligible to tax. The AO invoked s. (28)(ii) of the IT Act and held that Rs.6.60 crores was ostensibily paid as non-compete fees and it was nothing but a colourable device and the tax treatment should not be accepted. CIT (A) upheld the findings of AO and dismissed it. Tribunal reversed the findings of AO & CIT (A) and held in favour of assessee. On further Revenues appeal in High Court, Hon'ble court held that a case wherein the sale consideration for transfer of shares was artificially and deceitfully bifurcated under a sham agreement documentation, which was unreal and not true record of the intension, amount received by the assessee was treated as consideration for sale of shares, taxable as capital gains, rather than a payment taxable u/s 28(ii).(AY.1995-96)
CIT v. Shiv Raj Gupta (2015) 372 ITR 337 / 273 CTR 353 (Delhi)(HC)

S. 45:Capital gains-Transfer-Transfer of title- Completion of project- Capital gain is not assessable on handing over of the title of property to the developer. [S. 2(47, 147, Transfer of Property Act, 1882, S. 53A]
Assessee entered into an agreement on 24-06-2009 with a builder for development of his land. After obtaining sanctioned map, parties entered into supplementary agreement in which assessee handed over possession of land except title to said builder. In relevant assessment year, on completion of project, assessee handed over said title of land to builder. On appeal by revenue the Court held that ; It is evident in the instant case that the partial possession was given in the year 1999. The title was transferred on 30-4-2005, so no capital gain could have been accrued on 30-4-2005 for the assessment year 2006-07, as wrongly claimed by the revenue. Since assessee had already transferred possession of land and all other rights except title, capital gain would not be levied in relevant assessment year in which title of land was transferred. Order of Tribunal was affirmed. (AY. 2006-07)
CIT v. Ziauddin Ahmad (2015) 229 Taxman 281 (All.)(HC)

S. 45 : Capital gains –Salary- Perquisites-Stock option-Amount received by assessee on redemption of Stock Appreciation Rights received under ESOP was to be taxed as capital gain and not as perquisite under section 17(2)(iii).[S. 17(2)(iii)]
The Assessing Officer made addition to assessee's income in respect of amount received on redemption of Stock Appreciation Rights received under ESOP as a perquisite under section

17(2)(iii).The Tribunal opined that stock options were capital assets and gain therefrom was liable to capital gain tax.
On revenue's appeal:
In the case of *CIT* v. *Infosys Technologies Ltd.* [2008] 297 ITR 167/166 Taxman 204 it is held by the Supreme Court that the revenue had erred in treating amount being difference in market value of shares on the date of exercise of option and total amount 'paid' by employees consequent upon exercise of the said options as perquisite value as during the lock-in period there was no cash inflow to employees to foresee future market value of shares and the benefit if any which arose on date when option stood exercised was only a notional benefit whose value was unascertainable.
In view of the above, the Tribunal was correct in treating the amount received on redemption of Stock Appreciation Rights as capital gain as against treated as perquisite under section 17(2)(iii) and in treating the amount received on exercising the option of Employee's Stock Option Plan (EOSP) as long term capital gains instead of treating the same as short term capital gains. However, the Tribunal was not justified in holding that capital gain arose to the assessee on redemption of Stock Appreciation Rights which were having no cost of acquisition. (AY. 1998-99 , 2002-03)
CIT v. Bharat V. Patel (2015) 229 Taxman 236 (Guj.)(HC)

S. 45: Capital gains –Part consideration was received by partners-Partner admitting receipt of consideration of Rs 65 lakhs the same is assessable in the assessment of firm .[S.48]
Assessee-firm sold joint property and declared sale consideration of Rs. 45 lakhs in sale deed . However, it was found that cheque was issued for Rs. 50 lakhs. Further, prior to sale and subsequent to sale, cheques had been issued to partners of assessees-firm .There was no material on record to show that it was paid back. One of partners admitted receipt of Rs. 65 lakh . Further, market value of said property as on date of sale was Rs. 62.38 lakhs .Sale consideration was to be considered as Rs. 65 lakhs . (AY. 2001-02)
Sri Saleswara Industries Mahajanahalli v. ITO (2015) 229 Taxman 195 (Karn.)(HC)

S. 45 : Capital gains-Capital asset-Agricultural land-Stadium land-in absence of documentary proof produced by assessees same would not be treated as agricultural and therefore, capital gain tax was to be leviable. [S. 2(14)]
Assessees claimed exemption of capital gains arising on sale of land on ground that said land was an agricultural land. Court held that none of assessees had declared any agricultural income in their return. Said land was also described by assessees in conveyance deed as stadium land, further immediately after land was handed over to purchaser, he constructed a commercial complex on said land, therefore in absence of documentary proof produced by assessees same would not be treated as agricultural and hence capital gain tax was to be leviable. (AY. 2008-09, 2009-10)
Kunhaysu .v. CIT (2015) 228 Taxman 343(Mag.) (Ker.)(HC)

S. 45 : Capital gains-Long-term capital gains-Allottee put in possession prior to 1-4-1981-Assessee entitled to adopt fair market value as on 1-4-1981 and benefit of indexation. [S.2(29B),54, Transfer of Property Act, 1882, S.53A]
When a party is put in possession of property in part performance of an agreement as contemplated under section 53A of the Transfer of Property Act, 1882, the person who is in possession in such capacity has to be treated as the owner from the date on which he was put in possession. Assessee entitled to adopt fair market value as on 1-04-1981.(AY. 2001-2002)
CIT .v. Ved Prakash Rakhra (2015) 370 ITR 762 (Karn.)(HC)

S.45:Capital gains-Accrual-Real income-Tripartite agreement-Even if gains have accrued on execution of the development agreement as per ChaturbhujDwarkadas, the subsequent modification/ supercession of the agreement means that gains are not taxable as per real income theory [S.145]
The assessee entered into a development agreement with Dipti Builders to develop a plot owned by the assessee for a consideration of Rs.16.11 crores and construction of 18,000 sq.ft of built up area free of cost. This was rescinded by a tripartite agreement dated was entered into between Dipti Builders, a new buyer and the assessee under which the plots were transferred to the new buyer For a

total consideration of Rs.29.11 crores. The assessee offered only Rs.16.11 crore to tax as capital gains. It contended that the consideration in the form of constructed area of 18000 sq.feet was neither received nor had accrued and no occasion to bring it to tax could arise. However, the AO &CIT(A) rejected the contention by relying on ChatrubhujDwarkadasKapadia vs. CIT(2003) 260 ITR 491 (Bom) and held that capital gains accrued on the execution of the development agreement. This was reversed by the Tribunal by relying on Kalpataru Construction Overseas P.Ltd v. Dy.CIT (2007) 13 SOT 194 (Mum)(Trib)and CIT vs. Shivsagar Estates(AOP) (1993) 204 ITR 1 (Bom)(HC);
HELD by the High Court dismissing the appeal
(i) In ChaturbhujDwarkadasKapadia, the issue was to determine the year in which the property was transferred for the purpose of capital gains. In this case the issue is what is the consideration received for the transfer of an asset. No income is accrued or received of the value of 18000 sq.feet of constructed area under the development agreement because the said agreement was not acted upon as it came to be uperseded/modified by the Tripartite agreement. This was the position when the return of income was filed. On the application of the real income theory, there would be neither accrual nor receipt of income to warrant bringing to tax to the constructed area of 18,000 sq.ft which has not been received by the assesse. (CIT vs. ShoorjiVallabhdas 46 ITR 144 (SC) followed).Appeal of revenue was dismissed. (AY. 2007-08)
CIT .v. Chemosyn Ltd.(2015) 371 ITR 427 (Bom.)(HC)

S. 45:Capital gains-Business income - Share investments-Borrowed money was not utilized-Shown as investment as capital asset- Assessable as capital gains and not as business income [S.28(i)]
Assessee filed its return declaring profit arising from sale of shares as capital gain. Assessing Officer opined that having regard to volume of transactions, period of holding etc, amount in question was to be taxed as business income . CIT(A) allowed the claim of assessee. On appeal by revenue , dismissing the appeal the Tribunal held that; the that assessee had not utilized borrowed funds for purchase of shares, there was also no dispute to fact that assessee had treated equity shares as investment, i.e., capital asset all along. Assessee had also valued shares at cost and thus given a particular treatment to shares held as investment . Appeal of revenue was dismissed. (AY. 2007-08)
ACITv. Kinnary Sanghavi (Mrs.)(2015) 68 SOT 268(URO) (Mum.) (Trib.)

S.45: Capital gains –Business income- Share investments- Assessable as capital gains and not as business income .[S.28(i)]
During relevant year, assessee filed her return declaring income arising from sale of shares as short-term capital gain. Assessing Officer brought said income to tax as business income . CIT(A)allowed the claim of assessee. On appeal by revenue, dismissing the appeal the Tribunal held that;It was noted that assessee had shown shares in question as investment in her books of account ,moreover, assessee had valued said shares on cost basis only. It was also found that transactions in question were delivery based transactions, in aforesaid circumstances, income arising from sale of shares was to be taxed as short-term capital gain. (AY. 2006-07).
ACIT v. Geeta Bhatia (Ms.) (2015) 68 SOT 50(URO) (Mum.) (Trib.)

S. 45:Capital gains-Transfer-Immovable property-Possession was to be delivered on date of registration-No Transfer –Not liable to capital gain.[S. 2(47)(v), 45]
Where assessee entered into an agreement for sale of property with a partnership firm in which possession of property to said firm was to be delivered on date of registration of sale deed and there was nothing to show that possession was ever delivered by assessee to purchaser in part performance of agreement for sale, there was no transfer within meaning of section 2(47)(v) . (AY.2006-07)
Abdul Wahab v. Dy.CIT (2015) 68 SOT 326(URO) (Bang.)(Trib.)

S. 45 : Capital gains-Conversion of stock-in-trade into capital asset- Conversion of stock in trade of shares into investment-Huge transaction- Accepted as short term capital gains and not as business income.[S.28(i); 45; 45(2)]

In preceding year, noticing tax benefit with respect to capital gains tax in view of amendment made to Act, assessee converted stock-in-trade of shares into investment which had been accepted by revenue. During current assessment year, assessee sold shares. Assessing Officer accepted long-term capital gain for shares held for more than 12 months but did not accept short-term capital gain for shares held for less than 12 months on ground that said conversion was just to take advantage of differential rate of tax on short-term capital gain. It was held by ITAT that there was no frequent purchases and sale of shares . Further, assessing Officer had not brought on record any material which would indicate that intention of assessee was to carry on business in shares .Mere huge volume of sale consideration itself could not be determinative of fact whether assessee was trading in shares or made an investment in shares. Hence assessee's claim of short term capital gains was to be accepted. (AY. 2006-07, 2007-08)

Sukarma Finance Ltd.v. ACIT (2014) 163 TTJ 7 / (2015) 67 SOT 220 (Delhi)(Trib.)

S. 45: Capital gains-Business income-Investment in shares- Accepted as capital gains in preceding three assessment years-Principle of consistency to be followed--Income to be considered as capital gains.[S.28(i)]

The assessee claimed income from sale of shares as capital gains. The Assessing Officer rejected the claim and treated it as business income. The Commissioner (Appeals) held that the income arising from transfer of shares was capital. On appeal : Held, dismissing the appeal, that in the preceding three consecutive assessment years, the profits from purchase and sale of shares were accepted as capital gains. Therefore, following the principle of consistency, the income accrued to the assessee from the purchase and sale of shares was to be treated as capital gains. (AY. 2007-2008, 2008-2009)

ITOv.Ashok Kumar (2015) 39 ITR 76(Delhi)(Trib.)

S. 45:Capital gains-Income from other sources-Share transactions-No incriminating material found during search to indicate bogus long-term capital gains arising out of sale of shares-Assessment of sale proceeds as income without considering details of purchase of shares produced by assessee-Additions were deleted on merits. [S. 56,132, 153A]

Held, allowing the appeal, (i) that admittedly, the search operation did not reveal any incriminating material to doubt about the veracity of the long-term capital gains declared by the assessees. The Assessing Officer had fully relied upon the statement given by Narendra R Shah to form the view that the assessees had introduced their unaccounted money by way of long-term capital gains. However, from the statement given by Narendra R Shah , without corroboration from other independent evidences, it was not possible to presume that the purchases of shares by the assessees were bogus purchases especially in the absence of a link between Narendra R Shah and Amizara Securities and Finance P. Ltd.

(ii) That the date of purchase of shares should be recognised as the date on which the broker had issued the contract notes, not the date on which the shares were credited to demat account. Admittedly, the assessees had opened the demat account only subsequent to the date of purchase of shares and there was no compulsion under any law that the shares should be held only in demat account form. The Assessing Officer did not address any evidence to show the purchase of shares in physical form was wrong.

(iii) That though the assessees had furnished the details of purchase of shares, the Assessing Officer had rejected without examining them. In addition, the authorities had assessed the sale proceeds arising on sale of other companies too as income from other sources. Thus the Assessing Officer had proceeded to assess the gross receipts realised on sale of shares as income from other sources only on presumptions and conjectures without bringing credible evidence on record to refute the claim of the assessees. There was no credible material with the Department to disprove the claim of long-term capital gains made by these assessees in their respective returns of income. Accordingly, the order of the Commissioner (Appeals) was to be set aside and the Assessing Officer was directed to delete the assessment of gross sale receipts as income from other sources in all the years under consideration. (AY. 2004-2005 to2006-2007)

Vasantraj Birawat v. CIT (2015) 39 ITR 450 (Mum.)(Trib.)

S.45:Capital gains-Business income-Share transactions- Consistency- Matter was remanded. [S.28(i)]

Assessee Company engaged in manufacturing of auto components earned a profit from purchase and sale of shares and showed same as short-term capital gain. Assessing Officer treated same as business income and Commissioner (Appeals) confirmed same. It was held that in view of assessee's own case for assessment year 2007-08 wherein identical issue was pending disposal, matter was to be restored to file of Commissioner (Appeals) for fresh adjudication. (AY. 2008-09)

Advik Hi tech (P.) Ltd. v. ACIT (2015) 67 SOT 158(URO) (Pune)(Trib.)

S.45:Capita gains-Transfer- Capital asset in to stock in trade-Even if possession is handed over to the developer, there is no "transfer" if the developer has only paid an interest-free advance to the assessee to meet expenses- Capital gain will be chargeable in the year of sale. [S.2(47)(v),2(47)(vi), 45(2), Transfer of Property Act, 1882, S.53A]

As per project development agreement, the possession was given for construction/development of project with certain conditions stipulated in the agreement. Whatever amount was received, it was simply interest free advance to meet certain expenses to be borne by the assessee in order to discharge certain responsibilities conferred upon it through the agreement. The said advance would be refundable at different phases stipulated in the agreement. The Assessing Officer has invoked the provisions of section 2(47)(v) of the Act and treated this handing over of the possession of vacant land to the second party i.e. M/s Arif Industries Ltd. for the purpose of construction of residential/commercial towers as a transfer of capital asset and computed the capital gain in the hands of the assessee. The provisions of section 2(47)(v) of the Act can only be invoked where absolute possession of capital asset was given to the buyer against certain consideration, but in the instant case no consideration was ever fixed for handing over the possession to the developer and whatever amount was received it was received as interest free advance to meet the expenses to be incurred in discharging certain responsibilities agreed upon in this agreement. Therefore, from any angle there is no transfer of asset as per provisions of section 2(47) of the Act and capital gain would only be chargeable in the years in which stock-in-trade would be sold.(AY. 2009-10)

ACIT v. Upper India paper Mills Co. Pvt. Ltd. (Lkw.)(Trib.); www.itatonline.org
Upper India Couper Paper Mills Company Pvt. Ltd. v. ACIT (Lkw.)(Trib.)www.itatonline.org

S. 45:Capital gains-Development agreement-Stock in trade- Short term capital gains-Business income-None can make profit by dealing him self-Valuation will be at cost or market value which ever is less- When right exercised in part or in full profit can be taxed- Additions confirmed by CIT(A) was deleted. [S 2(14),2(42B), 2(47)(v), 4, 5, 28(i),Transfer of Property Act, 1882,S.53A , 55A]

The assessee was engaged in the business as a builder and was the owner of a piece of land, which was held as stock in trade. The assessee entered into a development agreement with Menorah Realties Pvt Ltd (MRPT) under which MRPT was to construct a residential apartment building at its cost. In consideration of the land of the assessee being used for this project, MRPT was to give 40% of total saleable construed area, parking spaces and undivided interest in the said property. In effect, the assessee was to transfer entire land holding to this project, and, in consideration of the land being used for this housing project, receive 40% of total saleable area, parking space and undivided interest in the property. By way of a subsequent modification to this agreement, in consideration of delay in execution of project, the assessee was to get an additional 2% share in the constructed area, parking space and undivided interest in the property. The assessee claimed that even though the assessee had entered into a development agreement in the relevant previous year, no gains arose as a result of this agreement since the proposed building project was not even cleared by the regulatory bodies. It was pointed out that the licence to construct the building project was received in the subsequent previous year, and, therefore, no capital gains could be said to have been arisen in this year. However, the AO relied on CIT Vs Dr. T K Dayalu [(2011) 202 Taxman 531 (Kar)] and Chatubhuj Dwarkadas Kapaida Vs CIT [(2003) 260 ITR 491 (Bom)] and held that there is a transfer u/s 2(47)(v) and capital gains will arise in the year in which full control and possession of the land in question is given. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) Once the land is held to be a part of the stock in trade, it ceases to be a capital asset. The gains on the transfer of this land could only arise by the virtue of the increase of closing stock value in respect of the right to 42% share in the constructed building. Relevance of Section 55A of the Transfer of Property Act is only for the purpose of transfer under section 2(47) which, in turn, is relevant, only for the purposes of capital assets under the Income Tax Act. What holds good for transfer of a capital asset, for the purposes of triggering taxability of capital gains, is in the context of a specific legal fiction, which is introduced in the Act for a limited purpose, cannot be treated as omnibus in effect.
(ii) The business transaction entered into assessee is that the assessee contributed a trade asset consisting of a piece of land on which a group housing project was to be constructed, and what he got in consideration of this transfer is the right to sell 1,28,940.26 sq. ft. constructed area in this project. In his closing stock, even if he is to substitute the part ownership of the land transferred with the value of this right to sell 1,28,940.26 square feet constructed area, it would not make any difference to the profit figures because, as far as this assessee, is concerned the cost of acquiring this right is the same as the cost of giving up the right in the hand, and, as is the settled legal position, the closing stock can only be valued at cost price or market price-whichever is less. Obviously, the cost price of this right to sell 1,28,940.26 sq ft, which has been treated as a trading asset, is less than the market price of these rights, and, therefore, these rights can only be valued at cost in the accounts.
(iii) What the assessee has got today is only a right to sell the 1,28,940.26 fts of constructed area in the Alexandria project and the profits, howsoever certain they may appear to be, will only fructify and be realized, and can even be quantified, only when this right is exercised- in part or in full. That stage has not yet come, and until that stage comes, such profit cannot be taxed. Unlike in a case of a capital gain which arises on parting the capital asset at the first stage itself, it is a case of business transaction which is completed when the rights so acquired by the assessee are exercised; none can make profits by dealing with himself. (AY. 2010-11)
Dheeraj Amin v. ACIT (Bang.)(Trib.); www.itatonline.org

S. 45:Capital gains –Business income-Dealer and investor-Share broker-Shares held as investment could not be treated as business income.[S. 28(i)]
The assessee is already having investment in shares as established by the fact of earning dividend income and long term capital gains on sale of shares. All these facts are taken into consideration, it is found that there is no reason for the AO to treat the short-term capital gains as business income of the assessee. The AO. was prompted by the difference in the rate of tax as the rate of tax for short-term capital gains earned out of sale of shares is 10 per cent and the rate of tax for business income is 30 per cent. Tribunal held that short-term capital gains on sale of shares held as investment could not be treated as business income of assesse. (AY. 2007-2008)
Chona Financial Services Ltd. v. ACIT (2015) 153 ITD 119 (Chennai)(Trib.)

S. 45: Capital gains –Business income- Investment in shares- A person can have two portfolios- he can be an investor and a trader at the same time- Investment was held to be assessable as short term capital gains.[S. 28i)]
The assessee an individual was engaged in equity trading and offered that income under STCG and paid tax @10%, the AO while assessment made addition treating whole of these transactions being Business Income , the Appellate authorities separated very frequent equity transactions and cases where few transaction of equity trading undertaken and in the light of CBDT circulars on Equity Trading and partly allowed the treatment of STCG . Order of CIT(A) was affirmed. (AY.2007-08)
ACIT v.Sanjay M. Jhaveri (2015) 168 TTJ 751 (Mum.)(Trib.)

S. 45 :Capital gains- Transfer–Lease hold rights –Long term-Introduction of leasehold property as capital in consortium which effected in transferring the rights in the immovable property is assessable as long term capital gain.[S.2(47), 2(29B), 269UA]
A property was allotted to the assessee by KIADB under a lease - cum - sale deed constituted bundle of rights and therefore, there was a transfer within meaning of S. 2(47) when the property was introduced as capital in the consortium formed by it with another company for the development of property. Further, the property was allotted on 10/01/2001, though the lease deed was registered on

02/09/2003, it clearly shows that the assessee held the property for more than three years and therefore, capital gain is assessable as long term capital gain for A.Y 2005 – 06.(AY. 2005 - 06)
Andhra Networks Ltd .v. DCIT (2015) 167 TTJ 496/68 SOT 304 (URO) (Hyd)(Trib)

S.45:Capital gains-Short term gains-Business income-Investment in shares–Consistently showing the shares as investment- Assessment as short term gains was held to be justified.[S. 2(42C),28(i), 48]
The shares held as `Investment' or `Stock-in-trade' depends on a host of factors. There can be no single criteria to decide the nature of shares purchased. In fact, it is the cumulative effect of all the relevant factors, which is taken into consideration for reaching a conclusion as regards the nature of shares and the resultant income arising from their transfer. There may be some factors indicating the purchase of shares as investment, while others may point towards stock-in-trade. It is the holistic consideration of all such factors which is kept in view while deciding as to whether the shares purchased by the assessee constituted stock-in-trade or investment. On facts, the factors in favour of holding the purchase of shares as investment are:
(i) The argument of the DR that the assessee entered into such shares at a time when they were at the lowest price and hence there could be no possibility of making Investment, cannot be considered as decisive for holding such shares as stock-in-trade. A person may think of making investment in the shares of a company at a price which is quite low and, then, maintain position in it for a period by allowing it to prosper. There is no rule of purchasing shares as investment only when the price of shares of a company is at the peak.
(ii) The assessee firstly purchased all the shares of Satyam Computers over a period of time and, thereafter, started their disposal. There is no frequent in and out of these shares.
(iii) It is manifest that the assessee had the initial intention to hold these shares as `Investment' which is discernible from the fact that these were entered into the `Investment register' maintained u/s 372A(5) of the Companies Act, 1956 at the time of their purchase. This is another reason to show the assessee's intention of holding shares in Satyam Computers as investment ab initio.
(iv) Another factor which is of paramount importance is the assessee's contention that these shares were purchased out of the assessee's own funds without making any borrowing.
(v) It is an undisputed fact that the assessee took delivery of such shares after making full payment and it was not a case of settling the transaction of purchase and sale of such shares during the settlement period itself. This is another reason to indicate that the intention of the assessee to hold them as Investment.
(vi) Another factor which needs to be mentioned is that the assessee was consistently holding some other shares as investment over a period of time and was regularly earning income from their sale by declaring profit as 'Short-term capital gain' or 'Long-term capital gain' depending upon the period of their holding. There is no doubt that shares of Satyam Computers were not purchased or treated as Investment in any of the earlier years, but at least this factor shows that the assessee was also engaged in the purchase of shares as Investment and showing profit from their sale under the head `Capital gains'.
(vii) The immediately preceding assessment year in which there was 'Short-term capital gain' which has been accepted by the AO. Similarly, there is an order passed assessment year 2006-07 accepting that the assessee was engaged in the business as well as in investment of shares. It is manifest that there is no alteration in the character of income shown by the assessee. The principle of consistency in terms of the assessee holding shares as stock-in-trade as well as investment, cannot be lost sight of. Order of CIT (A) assessing the gains as short term gains was affirmed.(ITA No. 106/Del/2014, dt. 10.03.2015) (AY. 2010-11)
DCIT .v. Rajasthan Global Securities Ltd. (Delhi)(Trib.);www.itatonline.org

S. 45 : Capital gains-Business income – Sale of shares – Principle of consistency-Assessable as capital gains.[S.28(i)]
The assessee had shown long term capital gains at Rs.19,85,376/- in his capital account which had been claimed as exempt u/s 10(38). The assessee had also shown income from share trading at

Rs.12,24,202/-. The AO, taking into consideration the voluminous magnitude of transactions, treated income of Rs.19,85,376/- as business income.
On facts, it was observed that all the shares held in investment account during the year were having holding period of more than 12 months and in many cases even more than 2 to 3 years. Also, from the last so many years the assessee had been filing separate statements giving complete details as shares held by him in investment account and trading account on the basis of which the claim of the assessee had been consistently accepted by the department in the earlier assessment years and even in scrutiny assessment order passed under section 143(3) for assessment years 2002-03, 2003-04 & 2004-05. Though the principle of *res judicata*was not applicable to income tax proceedings but the principle of consistency requires that the view taken in one year should be followed in subsequent years unless the facts or the legal position justify departure there from. Therefore, the issue was decided in favour of the assessee. (ITA No. 1504/M/2012 dt. 14/01/2015)(AY.2006-07)
ITO .v. Ved Mitter N. Puri, (Mum.)(Trib.); www.ctconline.org

S. 45(2):Capital gains - Conversion of a capital asset in to stock-in-trade – On the basis of the evidence before lower authorities, it was clear that land was originally a capital asset and tax would be payable only in the year in which the Assessee ultimately sold the stock-in-trade. [S. 45]
The Assessee, engaged in the business of developing property and following project completion method, claimed that no sale was made during the year. The AO found that premises were sold. However, portion of such premises was originally a capital asset which was later on converted into stock-in-trade. The HC upheld the order of the Tribunal holding that land was originally a capital asset of the Assessee, and setting aside the matter to the AO to decide the year of conversion of land into stock-in-trade since income would be chargeable only at the time when the Assessee ultimately sells the stock-in-trade. (AY. 2003-04)
CIT v. Saffire Hotels (P) Ltd. (2015) 377 ITR 523/276 CTR 219 / 116 DTR 385 (Bom)(HC)

S. 45(4) : Capital gains-Transfer–Firm transformed into a company-Shares were issued-There was no physical distribution of assets or allocation of same to respective partners or even distributing monetary value thereof, section 45 would not be applied. [S.2(47)]
The assessee was a firm constituted under the Partnership Act. The entire assets and liabilities of the assessee were made over to the company. The respective partners were issued shares by the company corresponding to the value of their share in the firm. The AO took the view that there was transfer of assets from the assessee to the private limited company and thereby the capital gains tax under section 45 became payable. On appeal, the Commissioner (Appeals) allowed the appeal. He took the view that section 45(4) did not get attracted to the facts of the case. On appeal by revenue the court held that where assessee firm transformed into a company and partners were issued only shares by company, and there was no physical distribution of assets or allocation of same to respective partners or even distributing monetary value thereof, section 45 would not be applied. (AY. 1993-94)
CIT .v. United Fish Nets (2015) 228 Taxman 302 (AP)(HC)

S. 45(4) : Capital gains - Distribution of capital asset - Dissolution of firm-Transfer-Firm—Partner-Transfer of legal title in name of firm is not essential – Firm is liable to capital gain tax. [S. 2(14)]
Transfer of legal title in name of assessee-firm is not essential to hold that assessee-firm is owner of those assets if such assets are transferred by a partner of firm as capital and Firm had been showing said landed building in balance sheet and claiming depreciation on same. On dissolution of firm, said property was taken over by said partner. transaction was liable for capital gains. (AY. 2007-08)
M. Ahammedkutty v. ITO (2015) 67 SOT 353 (Cochin)(Trib.)

S. 45(5) : Capital gains –Compensation- Deemed income-Matter remanded. [S.45]
Assessee received certain sum as compensation .AO treated said compensation as deemed income by invoking section 45(5).On appeal Tribunal relied upon decision of Apex Court in case of CIT v. Hindustan Housing & Land Development Trust Ltd. [1986] 161 ITR 524 held that amount of compensation could not be brought within meaning of income under section 45(5).Since Apex Court

in case of CIT v. Ghanshyam (HUF) [2009] 315 ITR 1 distinguished its earlier decision which had been relied upon by Tribunal in impugned order, matter was to be remanded back.
CIT .v. Ravjibhai Harkhabhai Savalia (2015) 229 Taxman 94 (Guj.)(HC)

S. 47 : Capital gains –Sale of assets in favour of company-Liable to capital gain tax.[S.45, 47(xiii), 48]
Assessee-firm sold its assets in favour of a company and consideration was paid to partners of firm in form of allotment of shares in transferee-.Since said transaction did not fall into succession of firm; much less there was any exercise of corporatization or demutualization which were essential to attract section 47(xiii), assessee was liable to pay capital gains tax.(AY.1988-89 to 1997-98)
Ana Labs v. Dy. CIT (2015) 371 ITR 295 / 229 Taxman 210 (AP)(HC)

S.48:Capital gains-Deductions-Amount spent wholly and exclusively for purposes of transfer-Agreement for sale of shares-Separate agreement for obtaining higher price-Commission paid under separate agreement—Deductible.[S.45]
The assessee was a major shareholder of DDL. An agreement entered into between the shareholders of DDL and MIFL for sale of the shares in DDL clearly set out the pro rata of charges chargeable by each of the shareholders depending upon their shareholding. Prior to entering into the agreement the assessee had written a letter agreeing to pay an additional amount in the event MIFL got him a good price for his shares. The assessee got 72 cents extra per share when compared to other shareholders. In terms of the letter the assessee paid the extra charges to MIFL and claimed deduction thereof from capital gains. The claim was rejected by the Assessing Officer but allowed by the Tribunal. On appeal to the High Court :

Held, dismissing the appeal, that the payment of the additional sum to MIFL as their charges was not in dispute. Therefore, this was the amount which the assessee incurred as expenditure for sale of shares. That was the amount which is wholly and exclusively incurred by the assessee in connection with such transfer. It was deductible while computing capital gains. (AY.2005-2006)
CIT v. Venkata Rajendran (2015) 373 ITR 424 / 232 Taxman 660 (Karn.)(HC)

S. 48:Capital gains-Cost of acquisition-Computation-Valuation was accepted by other co-owners- Held to be justified.[S.45, 55]
Dismissing the appeal of assesse the Court held that; with reference to the assessment year 1990-91 the District Valuation Officer's report relied upon the sale of a similar property. The appellate authorities had not treated the report as binding but only as relevant evidence. In case the assessees felt and wanted to rely upon other sale instances, they could have produced the evidence before the Assessing Officer or before the appellate authorities including the Tribunal. Noticeably, no attempt was made to challenge the sale instance and the computation made by the Assessing Officer by filing other contemporaneous sale deeds. No other transaction was relied upon. The valuation or estimation has to be fair and reasonable and not based upon surmise and conjecture. The property was owned by several assessees. The other co-owners had accepted the valuation report. The assessment based on the District Valuation Officer's report was justified.(AY. 1990-1991)
Prabhu Dayal Rangwala v. CIT (2015) 373 ITR 596/ 231 Taxman 790 (Delhi) (HC)
Indulata Rangwala v. CIT (2015) 373 ITR 596 (Delhi) (HC)

S. 48 : Capital gains – Computation –Deductions under section 48(2) are required to be allowed before applying provisions of section 54E [S. 45, 54E]
While computing long term capital gains, deductions under section 48(2) are required to be allowed before applying provisions of section 54E.(AY. 1992-93)
Torrent Laboratories Ltd. v. Dy. CIT (2015) 229 Taxman 207 (Guj.)(HC)

S. 48 : Capital gains-Capital asset-Personal effect-To be excluded while computing cost of acquisition. [S.2(14),45]

At the time of computing cost of acquisition the assessee claimed deduction of amount spent on items like wooden temple, crockery, fans, light fittings etc. The AO rejected assessee's claim holding that aforesaid items were personal effects which were not covered under the head 'capital asset' as per the provisions of section 2(14).On appeal the Court held that the said items were primarily 'personal effect' excluded from definition of capital asset under section 2(14), therefore the assessee's claim deserved to be rejected. (AY. 2009-10)

Sachinder Mohan Mehta v. ACIT (2015) 228 Taxman 283 (Delhi)(HC)

S. 48:Capital gains-Computation-In computing "capital gains" the AO is not entitled to substitute the "market value" for the actual "consideration" received by the assessee. He also cannot disregard the valuation report without cogent material.[S.45]

(i) It is settled position of law that in the case of sale, the Assessing Officer has no power to replace the value of the consideration agreed between the parties. In this regard, we find strength from the above cited decision of Hon'ble Delhi High Court in the case of Nilofer Singh holding that the expression "full value of consideration" used in section 48 of the Act does not have any reference to market value (Nilofer Singh 309 ITR 233 (Delhi); George Handorson 66 ITR 622 (S.C); Gillanders Arbuthonot 87 ITR 407 (S.C) referred);

(ii) A report of a valuer is an important piece of evidence and the same cannot be discarded without there being any cogent material on record showing that the report of the valuer is not correct (S.K. Construction & Co. 167 Taxman 171 (Delhi) followed);

(iii) As the expression "full value of consideration" in section 48 of the Income-tax Act, 1961 does not have any reference to market value, the Assessing Officer was having no power to replace the value of the consideration agreed between the parties with any fair market value or estimation. Only because the Pioneer Ltd. had shown the book value of shares at the rate of Rs.3.50 per share, the Assessing Officer was not justified to ignore the price agreed between the parties and to doubt the genuineness of the claimed loss, even ignoring the valuation report.(ITA No. 5335/Del/2012, dt. 28.09.2015)(AY. 2009-10)

Venus Financial services Ltd. v. ACIT (Delhi) (Trib.); www.itatonline.org

S. 48:Capital gains-Cost of acquisition-Interest-Interest paid on moneys borrowed to acquire assets cannot be treated as the 'cost of acquisition' of the asset.[S.45]

The assessee has claimed the interest cost as a part of the cost of acquisition and/or improvement. On appeal Tribunal held that; The first question, therefore, that arises is as to how is the interest cost relating to borrowings made to finance the acquisition of a capital asset, could be considered as toward its acquisition, which is already complete on the passing of the property therein to its owner-holder. The question, as would be apparent, is broader, including within its ambit, all forms of capital assets. That is, how does it, in any manner, promote or is toward acquiring the asset/shares, which would be borrowing itself. The interest cost is toward the retention of the borrowing and, concomitantly, the retention or the holding of the asset under reference, i.e., is a function of the holding period. It is, thus, rightly described as a holding cost or a period cost, depending upon how one may look at it. This difference is again of relevance in-as-much as the asset may be sold/realized without the repayment of the debt, so that the interest cost continues independent of the asset. Again, the debt may be repaid/liquidated, extinguishing the interest cost, while the holding of the asset continues. That is, even the holding cost relationship is not automatic or follows as a natural corollary. The two, i.e., the interest cost and cost of the asset, are in any case independent of each other. So, however, it shall not be wrong to describe the interest cost as a period cost, chargeable against the income of the enterprise for the relevant period, against its income from the assets, including the asset under reference, deployed for its activity. Coming back to the acquisition, the said process or event is complete on the transfer of the relevant capital asset to the assessee. The interest cost for the post acquisition period, as would be apparent from the foregoing, does not in any manner contribute toward the same, which process stands completed on the transfer. The same is, at best, a holding cost of the asset and, therefore, revenue in nature, to be, as such, expensed as a period cost for the relevant period. That in fact is precisely what the assessee had done after acquiring the asset in the instant case as well. Appeal of assesse was dismissed. (ITA No. 47/Mum/2011, dt. 22.05.2015) (AY. 2007-08)

Natural Gas company Pvt. Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 48: Capital gains- Computation-Built up area receivable in future-Present value of constructed area as estimated by developer , and not fair market value of land , will constitute full value of consideration for purpose of capital gains.[S.45]

Assessee handed over possession of land to developer against consideration of 50 percent of constructed area . According to assesse the full value of the consideration should be a fair market value of the land to be transferred to the developer. Tribunal held that full value of in this case is the cost of construction incurred by the builder on the assessees's share of constructed area , because the assesse would receive constructed area in liew of the land share . Appeal of revenue was allowed and the cross objection of assesse was dismissed. (AY. 2007-08)

ITO .v. N.S. Nagaraj (2015) 152 ITD 262/118 DTR 163/ 170 TTJ 599 (Bang.)(Trib.)

S. 49: Capital gains- Amount paid to sisters as per family arrangement for permitting transfer of property is deductible [S.45, 48]

In view of the Will of late mother Smt. Moghe and thereafter Will of P.M. Moghe, three sisters had a right in property and without extinguishing it or without providing for its adjustment, the assessee could not have sold property. As such, the amount of Rs.45 lakh paid to three sisters is correctly found to be an expenditure incurred in connection with transfer of property. The arrangement worked out by three sisters and brothers as also three daughters of the deceased Shri P.M. Moghe, is bonafide one. The assessee and his three daughters were faced in a peculiar position. They resolved the situation and a family settlement was reduced into writing. It was agreed that at the time of sale, each sister shall be given Rs.15 lakh and each niece shall be given Rs. Five lakh. Accordingly, when the property was sold on 07.07.2006, this family settlement has been given effect to. It is, therefore, obvious that in the absence of such family settlement and payment, the sale of property on 07.07.2006 by the assessee could not have materialized. The sisters had a title in property and without their cooperation there could not have been any sale. As such, the amount of Rs.45 lakh paid to his sisters has been rightly accepted as expenditure in connection with transfer of property. (ITA No. 104 of 2013, dt. 04.09.2015)

ACIT v. Kamlakar Moghe (Bom.)(HC) ; www.itatonline.org

S. 49 : Capital gains –Indexed cost of acquisition - HUF-Partition in the year 1998- Property acquired by HUF prior to 1-4-1981-Capital gains is to be computed by taking cost inflation index for financial year 1981-82. [S. 45,47, 48]

The bigger HUF of the assessee owned the property before 1-4-1981.The full partition was made on 20-2-1995 which was accepted by the Assessing Officer on 19-2-1998. However, the assessee also got it by way of court decree on 19-5-1988.The Assessing Officer had himself accepted the claim of the assessee under section 49(1)(i) taking the cost of the previous owner as on 1-4-1981. However, the Assessing Officer had applied the Cost of Inflation Index for the year 1998-99 instead of 1981-82 and the assessment was completed.On appeal, the Commissioner (Appeals) deleted the additions made by the Assessing Officer on account of difference in Long Term Capital Gain.On second appeal, the Tribunal decided against the revenue.On appeal

Dismissing the appeal; the Court held that;where capital asset was property of HUF prior to 1-4-1981 and assessee acquired absolute ownership on 19-5-1998 after partition of said HUF property, in such circumstances, date of acquisition of property by HUF being prior to 1-4-1981 would entitle assessee to calculate capital gains tax by taking cost inflation index for financial year 1981-82, and not 1998-99.(AY. 2009-10)

DY.CIT .v. Sushil Kumar (2015) 231 Taxman 788 (P&H)(HC)

S. 49: Capital gains-Capital asset acquired by assessee by inheritance - Indexed cost of acquisition - To be with reference to year in which previous owner acquired asset and not year in which assessee acquired asset.[S2(42A), 45, 55(2(b)(ii)]

The cost of acquisition of capital asset at the option of the assessee is the fair market value of the asset on April 1, 1981. Any other interpretation will not only lead to absurd results and cause immense prejudice to the assessee. If the previous owner, that is to say, the mother had not died and if she

herself had sold the property in the year 2003, she would have got the benefit of indexation on the fair market value as at 1st April, 1981.(AY. 2004-2005)
CIT v. Mina Deogun (Smt.) (2015) 375 ITR 586 (Cal.)(HC)

S. 49 : Capital gains - Previous owner - Cost of acquisition –Inherited property land-Determination of fair market value by the Tribunal was affirmed.
The assessee inherited 51 cents of land as on 2-2-1981. He sold part of land to one 'H' on 16-9-2008 at the rate of Rs. 3.75 lakhs. In next year again he sold the remaining land to same 'H' at the same rate. While computing long-term capital gain assessee had adopted the fair market value at Rs. 47,410 per cent as on 1-4-1981 for the calculation of the indexed cost of acquisition of the property sold.The AO however, adopted the value of Rs. 300 per cent as per the details available in Sub-Registrar's record as on 1-4-1981, as against the value of Rs. 47,410 adopted by the assessee.On appeal, the Commissioner (Appeals) determined the fair market value at Rs. 1200 per cent. On second appeal, the Tribunal determined the fair market value of land at Rs. 5000 per cent. On appeal to the High Court: The Court held that there is absolutely no basis for the claim made by the assessee for determining the fair market value. The documents produced before the Assessing Officer clearly show that the guideline value as on 1-4-1981 is Rs. 300 per cent. Before the Commissioner (Appeals), the document of the year 1984 was submitted and based on that the Commissioner (Appeals) fixed the fair market value at Rs. 1,200 per cent. The Tribunal has fixed the same at Rs. 5,000 per cent, however, without any discussion. However the document dated 14-2-1984 in respect of nearby plot correctly shows the fair market value at Rs. 8,393 and the Tribunal after allowing certain deductions for the three year period, *i.e.*, the difference between the date of acquisition by the assessee, namely, 2-2-1981 and till the date of the noted document, came to a conclusion that Rs. 5,000 should be fair market price. Such a determination by the Tribunal does not warrant any further modification or interference. Hence, the appeals stand dismissed. (AY. 2009-10 ,2011-12)
S. H. Syed Sultan v. ITO (2015) 229 Taxman 529 (Mad.)(HC)

S. 49 : Capital gains - Cost with reference to certain modes of acquisition-indexation-Where acquisition of property was by way of Will and previous owner owned it prior to 1-4-1981, relevant year was to be accepted for purpose of indexation.[S.48]
Since the assessee became the owner of the property by way of a Will, therefore, the cost of the same shall relate back to the previous owner. Since the previous owner had owned the property prior to 1st April, 1981, therefore, the year 1980-81 adopted by the assessee for the purpose of indexation is in consonance with the provisions of the Act. (AY. 2008 – 2009)
Subhash Vinayak Supnekar v. ACIT (2013) 158 TTJ 237/ (2015) 152 ITD 389 (Pune)(Trib.)

S.50:Capital gains-Depreciable assets-Block of assets–Destruction of wind mill-Compensation-Not assessabale as capital gain or profits chargeable to tax u/s 41. [S. 2(11),45, 41]
Allowing the appeal the Court held that; compensation received from insurance company on account of destruction of wind mill is not taxable as capital gain under section 50, and also rovisions of section 41 cannot be invoked in such case. (AY. 1999-2000)
Gujarat Petrosynthese Ltd. v. Addl. CIT (2015) 230 Taxman 318 (Guj.)(HC)

S. 50B : Capital gains-Slump sale-Sale of business-Finding that it was a slump sale-No liability to tax. [S. 50].
The assessee was engaged in the business of manufacturing, sales, and distribution of pure carbon-di-oxide liquid and storage systems. It had transferred a part of the business as a going concern to P and the consideration received was not offered to tax. Notice under section 148 was issued to the assessee. In response to the notice, the assessee furnished the details as called for. The assessing authority found that the assessee had not sold all the assets. Some buildings, machinery, office equipment, computers, and vehicles had not been sold by the assessee and some cylinders had also been retained by the assessee even after the transfer of the business. Therefore, the assessing authority was of the view that the entire assets forming part of the business were not sold. The nomenclature used in the

agreement with P did not make the sale, a slump sale. The Assessing Officer proceeded to levy tax. The Commissioner (Appeals) and the Tribunal held that it was a slump sale. On appeal to the High Court :
Held, (i) that the appellate authorities on consideration of the entire material on record had concurrently held that the sale was a slump sale and while coming to the conclusion, they had relied on the orders passed by the Tribunal in connection with the sister concern of the assessee. They had also followed the judgment of the Supreme Court as well as this court. Under these circumstances, there was no merit in the appeals. The consideration received by the assessee from P was consideration received for a slump sale of a going concern for a slump price and could not be brought to tax under section, 50.
CICB – Chemicon P. Ltd. v. CIT (2015) 371 ITR 78 (Karn.)(HC)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Property with encumbrances-Stamp duty value could not be taken as theassessee was not owner of property.[S.45]
Where property held by assessee was encumbered and, thus, she was not absolute owner of property, while computing capital gain arising from transfer of such a property, market value of property as taken for purpose of payment of stamp duty could not be adopted as sale consideration by applying provisions of section 50C. Since the assessee had only limited rights over the property , which was also encumbered capital asset held by the assessee was neither land nor building as envisaged in sub section 50(1) of the Act. (AY.2009-10)
D. Anitha(Smt.)v. ITO (2015) 68 SOT 266 (Hyd.)(Trib.)

S. 50C : Capital gains - Depreciable assets – Provisions of section 50C would also apply in case of capital gain from depreciable assets- Rate applicable will be of long term capital gains. [S. 2(11), 45,48, 49]
The capital gain in case of the assessee had to be assessed as long-term capital gain as the flat had been held by the assessee for more than three years. Further, the provisions of section 50 deeming the capital gain as short-term capital gain is only for the purposes of sections 48 and 49 which relate to computation of capital gain. The deeming provisions has, therefore, to be restricted only to computation of capital gain and for the purpose of other provisions of the Act, the capital gain has to be treated as long-term capital gain. Provisions of s. 50C would also apply in case of computation of capital gain from depreciable assets. However, section 50 are to be extended only to stage of computation of capital gain and, therefore, capital gain resulting from transfer of depreciable asset which was held for more than three years would retain character of long-term capital gain for purposes of all other provisions of Act. The stamp duty value assessed by the stamp duty authorities is required to be adopted as sale consideration in case of sale of the flat. And for the purpose of computation of capital gain, the flat has to be treated as short-term capital asset under section 50C, but for the purpose of applicability of tax rate it has to be treated as long term capital asset if held for more than three years. (AY. 2006-07)
Smita Conductors Ltd. .v. Dy. CIT (2015) 152 ITD 417 (Mum.)(Trib.)

S. 50C: Capital gains-Special provision for computation of full value consideration –Land-When assesse objects for valuation , matter must be referred to Valuation Officer.[S.45]
When assessee had objected to stamp duty valuation adopted by AO matter must refer to Valuation Officer. (AY. 2008 – 2009)
Subhash Vinayak Supnekar .v.ACIT(2013) 158 TTJ 237/(2015) 152 ITD 389 (Pune)(Trib.)

S. 50C : Capital gains--Full value of consideration-Stamp valuation-Sale agreement subjected to valuation for purpose of stamp duty payment-Provision is applicable.[S.45]
Held, that the sale agreement of the flat was subjected to valuation for the purpose of stamp duty payment. Section 50C of the Act was applicable in the case because the agreement itself was subjected to valuation under stamp duty valuation authority(AY. 2005-2006)
Prakash Shantilal Parekh .v. ITO (2015) 37 ITR 119 (Mum.)(Trib.)

S. 50C : Capital gains-Full value of consideration-Stamp valuation-Registration-Execution-The consideration has to be determined on the basis of the circle-rate prevailing on the date of execution of sale deed and not on the basis of the circle-rate prevailing on the date of registration of the sale deed.[S. 2(47), 45]

Tribunal held that it is manifest that u/s 50C, the value adopted by the stamp-valuation authority is deemed as the consideration for computation of capital gain. However, such valuation adopted by the stamp-valuation authority should be in respect of the transfer by the assessee, of the capital assets. This enhancement was beyond the control of the assessee (seller). It is also not the case of the revenue, that the buyer has given more than the consideration that has been accepted by the parties where they executed the agreement to sale. Furthermore on facts of a case, the Hon'ble Apex court in SajnjeevLalv.CIT (2014) 365 ITR 389 (SC) held that registration of the transfer in accordance with the agreement to sale cannot be termed as the "date of transfer". Accordingly the Tribunal held that, The consideration has to be determined on the basis of the circle-rate prevailing on the date of execution of sale deed and not on the basis of the circle-rate prevailing on the date of registration of the sale deed**.**(AY. 2005-06) (ITA no. 2049/Del/2009, dt. 09/01/2015)

ITO .v. Modipon Ltd. (Delhi)(Trib.)www.itatonline.org

S. 54:Capital gains-Profit on sale of property used for residence - To constitute purchase of new house, a registered sale deed is not necessary. Suspicion, howsoever strong, cannot partake the character of evidence.[S.45, 54F]

In the present case, as pointed out by the CIT (A), the sale deed does show that what was purchased by the Appellant is an agricultural land. Khasra Girdawri also clarifies that while there is a kothi, i.e., house on Khasra No. 76 (purchased by the Assessee's father), the land in Khasra Nos. 75 and 90 purchased by the Assessee was used only for agricultural purpose. The explanation by the Assessee that only the rental income from letting out the constructed portion property was being shared between him and the father in the ratio of 15%: 85% appears to be a plausible one. Unless there is document to show that the Assessee was a co-owner of the said building to the extent of even 15%, there cannot be an inference in that regard. As explained by Umacharan Shaw & Bros v. CIT (1959) 37 ITR 271 (SC) suspicion howsoever strong cannot partake the character of evidence. The evidence produced by the Assessee showed that the house was purchased by him on 10th April 2007 within the time allowed under Section 54F of the Act, after making payment and by obtaining the possession thereof. A substantial part of the consideration of Rs. 2 crores was paid on the date of the agreement to sell itself. The balance payment of Rs. 22 lakhs was made on 17th April 2007 when the possession was handed over. The conclusion that the house was in fact purchased on 10th April 2007 within the time allowed under Section 54F of the Act stands supported by the documents placed on record by the Assessee. The Court is satisfied that the prior to 10th April 2007 the Assessee was not the owner of another residential house and therefore the exemption under Section 54 read with Section 54F of the Act could not be denied to him.(ITA No. 609/2014, dt. 11.09.2015)

CIT v. Kapil Nagpal (Delhi)(HC); www.itatonline.org

S. 54: Capital gains–Capital asset-Even booking rights or rights to purchase or rights to obtain title of property is also capital asset-Profit on sale of property used for residence-Expenses incurred to acquire another property-Amount spent towards cost of improvement-Provisional booking of property - Amounts to acquisition of a new capital asset - Entitled to exemption.[S. 2(14) 2(47), 45]

The assessee sold his half share in two residential properties. He claimed that he used a sum of Rs. 73,27,000 to acquire another property within the period stipulated in section 54 of the Act, that he had spent a sum of Rs.25,14,700 towards the cost of improvement. The Assessing Officer held that in the absence of an agreement to sell, the rights acquired by the provisional booking of the property did not meet the requirements spelt out under section 54, i.e., acquisition of the new capital asset. He also held that the cost of improvement was not deductible. The appellate authorities allowed the claim of the assessee. On appeal:

Held, dismissing the appeal, (i) that the question was not whether the assessee sold the booking rights and was, therefore, entitled to the benefit of capital gains. It was, rather, whether entering into the

transaction and acquiring a property for Rs. 73,27,000 (cost of acquisition) amounted to acquiring a capital asset. In the light of the definitions of "capital asset" under section 2(14) and "transfer" under section 2(47) there was no doubt that the assessee's contentions were acceptable.
(ii) That the Revenue did not dispute the acquisition of the second property, it had to necessarily follow that the cost of improvement was deductible.Even booking rights or rights to purchase or rights to obtain title of property is also capital asset.(AY. 2009-2010)
CIT v. Ram Gopal (2015) 372 ITR 498/ 230 Taxman 205 (Delhi)(HC)

S.54:Capital gains - Profit on sale of property used for residence - Acquisition of plot and substantial domain over new house-Requirements for claiming exemption complied with-Entitled to exemption.[S.45]
The assessee sold a property and the sale proceeds were used for construction of a new building. The Tribunal found that the assessee invested the entire net consideration within the stipulated period and in fact had even constructed the major portion of the residential property except some finishing making it fit for occupation. The Tribunal held that as the assessee had acquired substantial domain over the new house and had made substantial payment towards the cost of land and construction, within the period specified under section 54 the assessee could be said to have complied with the requirements for claiming the exemption under section 54. On appeal :
Held, dismissing the appeal, that when it was found on the facts that construction was completed within three years of sale of the property, the benefit would automatically follow. Referred,Circular No 667 dt .18-10-1993(1993) 204 ITR 103 (St.) (AY. 2007-2008)
CIT v. Venkata Laxmi (Smt.) (2015) 373 ITR 572 / 233 Taxman 207 (T&AP)(HC)

S. 54 : Capital gains - Sale of land appurtenant as well as residential building-Exemption is available in respect consideration from sale of land.[S.45]
Assessee sold residential building and land appurtenant thereto, earning short term capital gains from the former, and long term capital gains from the latter. AO denied the exemption. On appeal, the High Court held that since the legislative had used the word ‘or’, buildings and lands appurtenant thereto should be understood disjunctively. So long as the land was not used for any commercial or non-residential purpose, a person may choose to sell only the land on which he resides and claim the benefit as per s. 54(1). Since a distinction of the consideration was made between the two capital assets, benefit of exemption could also be determined accordingly. Thus when the sale of land is treated as long-term capital gain and building thereon as short term capital gain, exemption u/s 54 is allowable in respect of consideration from sale of land. (AY.1996-97)
C.N. Anantharam v. ACIT (2015) 114 DTR 417 / 230 Taxman 34 /275 CTR 329 (Karn.)(HC)

S.54:Capital gains-Profit on sale of property used for residence - Giving advance to builder constitutes "purchase" of new house even if construction is not completed and title to the property has not passed to the assessee within the prescribed period.[S.45]
The assessee declared sale of a residential property vide sale agreement dated 8/12/2009 for a total consideration of Rs.1,02,55,000/-. After considering the indexed cost of acquisition of Rs.14,17,904/-, the long term capital gain was computed at Rs.88,37,096/-. The relevant capital gain was claimed as exempt under section 54 of the Act on the strength of having acquired a new residential house. The investment in acquisition of the new residential house was claimed by the assessee based on an advance of Rs.1.00 crore given to the builder as booking advance through a cheque dated 6/2/2010. The AO denied the claim for exemption on the ground that the provisions of section 54 of the Act require the assessee to purchase a new residential house either within a period of one year before the date on which the transfer of original asset took place or two years after date on which such transfer take place. He held that as even after two years of the date of transfer of old house the construction of the new property was not completed and that assessee had not gained possession of the new premises also. He, therefore, held that assessee did not comply with the requirements of section 54 of the Act in as much as it could not be said that assessee had purchased a new residential house within the period prescribed therein. This was confirmed by the CIT(A). On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) It is not disputed by the Revenue that the sum of Rs.1.00 crore has been invested by the assessee towards acquiring new property. Of course, the legal title in the said property has not passed or transferred to the assessee within the specified period and it is also quite apparent that the new property was still under construction. So however, the allotment letter by the builder mentions the flat number and gives specific details of the property. The word 'purchase' used in Section 54 of the Act should be interpreted pragmatically. The intention behind Section 54 was to give relief to a person who had transferred his residential house and had purchased another residential house within two years of transfer or had purchased a residential house one year before transfer. It was only the excess amount not used for making purchase or construction of the property within the stipulated period, which was taxable as long term capital gain while on the amount spent, relief should be granted. Principle of purposive interpretation should be applied to sub-serve the object and more particularly when one was concerned with exemption from payment of tax.

(ii) The plea of the Revenue is that no purchase deed was executed by the builder and that there was only an allotment letter issued. As per the Revenue the advance could be returned at any time and, therefore, the assessee may lose the exemption under section 54 of the Act. In our considered opinion, the aforesaid does not militate against assessee's claim for exemption in the instant assessment year, as there is no evidence that the advance has been returned. In case, if it is found that the advance has been returned, it would certainly call for forfeiture of the assessee's claim under section 54 of the Act. In such a situation, the proviso below section 54(2) of the Act would apply whereby it is prescribed that such amount shall be charged under section 45 as income of the previous year, in which the period of three years from the date of the transfer of the original asset expires. The aforesaid provision also does not justify the action of the Assessing Officer in denying the claim of exemption under section 54 in the instant assessment year.(AY. 2010-11)

Hasmukh N. Gala v. ITO (Mum.)(Trib.); www.itatonline.org

S. 54 : Capital gains - Profit on sale of property used for residence-Purchase-Construction of new house-Booking of a flat which is going to be constructed by a builder, has to be considered as a case of "construction of flat" and not purchase-Not entitled deduction. [S.45]

The assessee sold a residential flat in October, 2005 for certain amount and claimed deduction under section 54 in respect of cost of new flat.

The Assessing Officer noticed that the assessee had booked a flat in a project in December, 2002 in the joint name of assessee and her relative and she obtained possession of the new flat in December, 2004.

The Assessing Officer did not accept the assessee's contention that the date of possession of new house should be taken as the date of purchase and rejected claim for deduction under section 54.On appeal, the Commissioner (Appeals) confirmed the decision of the Assessing Officer.

On second appeal it was held that :

In the instant case, the assessee along with her relative has entered into an agreement on 4-12-2002 with a builder. As per the registered sale agreement, the builder shall construct residential apartments on a piece of land and allot a specified flat to the assessee. As per the agreement, the builder constructed the residential apartments and finally handed over the possession on 4-12-2004.The ratio laid down in the several cases clearly show that the booking of a flat which is going to be constructed by a builder has to be considered as a case of "construction of flat". The deduction under section 54 is available only if the assessee constructs a new house within three years after the date of transfer. In the instant case, the assessee has constructed a house prior to the date of transfer of original house, in which case, the assessee is not entitled to claim deduction under section 54 in respect of the cost of new flat. In view of the foregoing discussion, the assessee has not fulfilled the conditions prescribed under section 54. Accordingly, the decision taken by the Commissioner (Appeals) was upheld. (AY. 2006-07)

Farida A. Dungerpurwala v. ITO (2014) 35 ITR 205 / (2015) 67 SOT 208 (Mum.)(Trib.)

S. 54:Capital gains-Profit on sale of property used for residence –Booking a flat- Construction-Booking a flat which is going to be constructed by the builder is a case of "construction" of the flat. If the flat is booked prior to the date of transfer of the old flat, deduction u/s 54 is not

available. The date of receiving possession of the new flat cannot be regarded as the date of "purchase" of the new flat.[S. 45]

The sold a flat on 27.03.2008 and generated Long term capital gain of Rs.1.55 crores thereon. The assessee claimed deduction u/s 54 of the Act pertaining to the cost of another flat. The assessee had booked the flat with M/s Life Style Property Venture in the year 2004 and the agreement was registered on 01-12-2004. He paid the consideration in instalments as per the agreement. He finally got the possession on 30th June, 2007. The assessee claimed that the date of possession of flat should be considered as the date of purchase of flat, whereas the AO took the view that the date of purchase should be considered as the date of entering of agreement, viz., 1.12.2004. Since the deduction u/s 54 of the Act could be availed, inter alia, only if the residential house was purchased within one year prior to the date of house giving rise to capital gain and since the date of purchase of flat, according to AO, fell beyond the period of one year, the AO rejected the claim for deduction u/s 54 of the Act. The CIT(A), however, agreed with the contentions of the assessee and accordingly allowed the deduction u/s 54 of the Act. On appeal by the department to the Tribunal HELD allowing the appeal:

The booking of a flat which is going to be constructed by a builder has to be considered as a case of "Construction of flat". Deduction u/s 54 is available only if the assessee constructs a new house within three years after the date of transfer. In the instant case, the assessee has constructed a house prior to the date of transfer of original house, in which case, the assessee is not entitled to claim deduction u/s 54 of the Act in respect of the cost of new flat. (AY. 2008-09)

ACIT v. Sagar Nitin Parikh (Mum) (Trib) ; www.itatonline.org

S. 54B : Capital gains - Transfer of land used for agricultural purposes –Land purchased in the joint name of his son- Entitled deduction.[S.45]

Assessee, a 75 years old agriculturist, sold a land which was in joint name of assessee and his son .He claimed deduction under section 54B. Deduction under section 54B was denied on the ground that new land was purchased in name of assessee's son. It was held that since son of assessee was also joint owner of land, which was sold and new land was purchased in name of son because of assessee's old age and other technical reason, assessee was entitled to deduction under section 54B. (AY. 2005-06, 2007-08)

Bant Singh v. ITO (2014) 34 ITR 679 / (2015) 67 SOT 205 (Chd.)(Trib.)

S. 54E : Capital gains - Investment in specified asset –Six months is to be reckoned from of transfer of long term capital asset and not from the date of final receipt of sale consideration.[S.45]

Assessee claimed deduction on basis of investment made in NRDB within six months from receipt of final instalment. Tribunal held that for purpose of allowing deduction under section 54E, stipulated period of six months is to be reckoned from date of transfer of long-term capital asset and not from date of final receipt of sale consideration. Order passed by Tribunal was justified. (AY. 1984-85)

Jyotindra H. Shodhan v. ITO (2015) 229 Taxman 299/ 120 DTR 30/278 CTR 98 (Guj.) (HC)

Editorial: Jyotindra H.Shodhan v.ITO (2003) 81 TTJ 1(SB) (Ahd)(Trib) is affirmed.

S. 54EC:Capital gains - Investment in bonds- If REC Bonds are not available during the prescribed period, time for investment has to be extended-Fact that NHAI Bonds were available is irrelevant. [S. 45]

Insofar as investment under Section 54EC of the Act is concerned, the assessee had received sale consideration on 07.07.2006 and period of six months available for such investment, therefore, expired on 06.01.2007. From that date onwards till 24.01.2007, REC Bonds were not available. Vide Cheque issued on 24.01.2007 REC Bonds were purchased on 27.01.2007. The availability of the bonds only for a limited period during this period cannot prejudice the assessee's right to exercise the same up to last date. The bonds were admittedly not available during the said period. The fact that the Bonds issued by the National Highway Authority of India were available and hence the assessee ought to have invested in those bonds within the stipulated period of six months is not acceptable. Section 54EC gives assessee an option to invest either in bonds of National Highway Authority of India or then in bonds of Rural Electrification Corporation Limited. The said provision does not stipulate that the investment has to be in any bond whichever is available. Both bonds carry different

benefits and hence deliberately the Parliament has given option to the assessee to invest in any one out of two as per his choice. In a given case, the assessee may choose to invest in both. However, discretion is conferred upon the assessee, who is the best judge of his own needs and interests. He cannot be forced to invest in the bond whichever is available because period of six months is about to expire. This option or discretion given by the Parliament to the assessee needs to be honoured here. If said option was available when period of six months was to expire and could have been expressed by the assessee when said period was about to expire, the situation would have been otherwise. In present matter, the REC Bonds became available in VIA issue on 22.01.2007 and, therefore, investment made therein cannot be said to be after an undue or unreasonable delay. The investment has been made at the earliest possible opportunity. (ITA No. 104 of 2013, dt. 04.09.2015)
ACIT .v. Kamlakar Moghe (Bom.)(HC); www.itatonline.org

S. 54EC : Capital gains-Investment in bonds - Investment falling under two financial years-Exemption could not be restricted to Rs 50 lakhs only-Amendment is prospective from AY. 2015-16. [S.45]
Held, the Assessing Officer was not justified in restricting the deduction to Rs. 50 lakhs stating that the intention of the Legislature was to limit the investment in long-term specified asset to Rs. 50 lakhs only. The assessee was entitled to exemption of Rs 50 lakhs each in two financial years. Ambiguity has been removed by the Legislature with effect from April 1, 2015,in relation to the assessment year 2015-16 and the subsequent year(AY .2009-2010)
CIT v. Coromandel Industries Ltd. (2015) 370 ITR 586/230 Taxman 548 (Mad) (HC)

S. 54EC : Capital gains - Investment in bonds –Depreciable asset-Land and Building- land and building was held for more than three years and capital gain on same was invested in NABARD bonds, assessee would be entitled for exemption [S. (2(12), 45,48, 49, 50]
S.50 apply in case of depreciable assets only, bifurcation of land and building into separate part for purpose of capital gain is permissible.S.50 does not convert a long term capital assets into short-term capital assets. Where land and building was held for more than three years and capital gain on same was invested in NABARD bonds, assessee would be entitled for exemption. (AY. 2001-02)
CIT .v. Cadbury India Ltd. (2015) 229 Taxman 5 (Bom.)(HC)

S. 54EC : Capital gains-Not to be charged on investment in certain bonds -Advance money-Investment part of advance money prior to actual sale-Would qualify for exemption.[S.45]
Assessee had invested part of advance money received on agreement to sell of property in specified bonds prior to actual sale, such investment would qualify for exemption under section 54EC.In view of Circular 359 dated 10-5-1983(1983) 143 ITR 1(St.)investment in specified bonds would qualify for exemption under section 54EC. (AY. 2008 – 2009)
Subhash Vinayak Supnekar .v. ACIT (2013) 158 TTJ 237/(2015) 152 ITD 389 (Pune)(Trib.)

S. 54EC : Capital gains-Investment in bonds-Firm-Partner- Property introduced by a partner into firm becomes the asset of the firm even if there is no registered deed. Though the asset is held by the firm as a depreciable asset and though the investment in s. 54EC bonds is made in the names of the partners, the firm is eligible for s. 54EC exemption;[S.45, Partnership Act, S.14, Indian Contract Act, S. 239]
(i) Under s. 239 of the Indian Contract Act and s. 14 of the Indian Partnership Act, for the purpose of bringing the separate properties of a partner into the stock of the firm it is not necessary to have recourse to any written document at all, that as soon as a partner intends that his separate properties should become partnership properties and they are treated as such, then by virtue of the provisions of the Contract Act and the Partnership Act, the properties become the properties of the firm and that this result is not prohibited by any provision in the Transfer of Property Act or the Indian Registration Act. The legal position, therefore, appears to be that no written or registered document is necessary for an individual to contribute any land or immovable property as a contribution against his share of the capital of a new partnership business. Consequently, the capital gains on sale of the property is assessable in the hands of the firm;

(ii) As regards the question whether the firm is eligible for exemption u/s 54EC for the investment made by two partners in their individual names, the assessee firm was on 02-04-2008 and before the dissolution the professional assets i.e. hospital building and land were sold out. As per the well settled law, partnership is not a legal entity in strict sense and in all the movable and immovable assets which are held by the partnership, there is an interest of every partner though not specifically defined in terms of their shares. On perusal of the language used in Sec. 54EC, it is provided that the assessee has to make the investment within a period of six months in the notified securities after the date of transferred of capital asset. The words used in Sec. 54EC are – "the assessee has invested the whole or any part of capital gains in the long-term specified asset". As we have held that the property which was sold out, it was property of the assessee firm and hence, the capital gain is taxable in the hands of the assessee firm. At the same time even though the bonds are purchased on the names of the two partners, it can be said that irrespective of the way, how the sale consideration was credited to the bank accounts of two partners, but the benefit of Sec. 54EC cannot be deprived to the assessee firm. As admittedly, even on the dissolution of the firm the assessee as a partner has a right to get back their capital as per the final valuation done on the date of dissolution or otherwise. In fact, for taking said view we get the support from the decision in the case of DIT (International Taxation) Vs. Mrs. Jennifer Bhide 252 CTR 444 (Kar).
(iii) The assessee firm has claimed depreciation on the hospital building and hence, Sec. 50 is applicable. In terms of Sec. 50 whatever Capital Gain is worked out on the depreciable asset then the same is treated as Short Term Capital Gain. The next question before us is whether the assessee firm can claim the benefit of Sec. 54EC which is specified for the benefit of Long Term Capital Gain. This issue is decided in favour of the assessee by the Hon'ble High Court of Bombay in the case ACe Builders (P) Ltd. 281 ITR 210. We, accordingly, hold that even though the assessee firm has claimed the depreciation on the hospital building but benefit of Sec. 54EC can be given following the legal principles laid down by the Hon'ble Bombay High Court in the case of ACe Builders (P) Ltd. (supra).(A Y. 2008-09)
Chakrabarty Medical Center .v. TRO(2015) 117 DTR 253/ 169 TTJ 745 (Pune)(Trib.); www.itatonline.org
ITO v. Mrinmay J.Chakrabarty (Dr.)(2015) 117 DTR 253/169 TTJ 745 (Pune)(Trib)
ITO v.Neela M.Chakrabarthy (Dr)(Mrs) (2015) 117 DTR 253 /167 TTJ 745(Pune)(Trib)

S. 54EC : Capital gains - Investment in bonds –Investment prior to transfer of property-Qualify for deduction.[S.45]
Where assessee had invested part of consideration received on sale of property in REC bond prior to transfer of property, said amount would qualify for deduction under section 54EC. (AY. 2009-10)
Hemant Kumar Nema .v. ACIT (2014) 52 taxmann.com 202 / (2015) 67 SOT 49 (Indore)(Trib.)

S. 54F:Capital gains-Investment in a residential house–Section does not require that the construction of the new residential house has to be completed, and the house be habitable, within 3 years of the transfer of the old asset-It is sufficient if the funds are invested in the new house property within the time limit-Beneficial must be interpreted liberally. [S.45]
Immediately after sale of the property on 06.10.2008, the assessee purchased another residential plot on 13.10.2008 and on 02.06.2010 she obtained approval of the building plan from the local authority and commenced the construction. However, it was not completed within 3 years i.e., on or before 05.10.2011. The assessing officer rejected the claim of the assessee for deduction u/s 54F towards the benefit of Long Term capital gain only on the ground that the construction has not been completed. The assessee produced photographs of the residential building which was under construction to demonstrate and establish that the consideration received on transfer has been invested by her in purchasing the residential plot and it is under construction. The CIT(A) and Tribunal followed the principles enunciated while interpreting Section 54F of the Act in Commissioner of Income Tax Vs Sambandam Udaykumar reported in (2012) 81 CCH 0151 whereunder it came to be held that said provision has to be construed liberally for achieving the purpose for which it was incorporated, allowed the appeal of assessee. On appeal by the department to the High Court HELD dismissing the appeal:

Section 54F of the Act is a beneficial provision which promotes for construction of residential house. Such provision has to be construed liberally for achieving the purpose for which it is incorporated in the statute. The intention of the legislature, as could be discerned from the reading of the provision, would clearly indicate that it was to encourage investments in the acquisition of a residential plot and completion of construction of a residential house in the plot so acquired. A bare perusal of said provision does not even remotely suggest that it intends to convey that such construction should be completed in all respects in three (3) years and/or make it habitable. The essence of said provision is to ensure that assessee who received capital gains would invest same by constructing a residential house and once it is established that consideration so received on transfer of his Long Term capital asset has invested in constructing a residential house, it would satisfy the ingredients of Section 54F If the assessee is able to establish that he had invested the entire net consideration within the stipulated period, it would meet the requirement of Section 54F and as such, assessee would be entitled to get the benefit of Section 54F of the Act. Though such construction of building may not be complete in all respect "that by itself would not disentitle the assessee to the benefit flowing from Section 54F".(ITA No. 165 of 2014, dt. 13.07.2015) (AY.2009-10)

CIT .v. B. S. Shantakumari (Karn.)(HC) ; www.itatonline.org

S. 54F : Capital gains - Investment in a residential house-Entire sale consideration in construction of a residential house within three years from date of transfer, he could not be denied exemption under section 54F on ground that he did not deposit said amount in capital gains account scheme before due date prescribed under section 139(1). [S.45, 139(1)]

The assessee sold certain converted lands to a trust for a consideration of Rs.2.87 crore. In the returns filed under section 153A, the assessee computed Long Term Capital Gains of Rs.2.87 crore before claiming exemption under sections 54B and 54F.During assessment proceedings the assessing authority disallowed assessee's claim for exemption under section 54F.On appeal, the Commissioner (Appeals) held that the assessee's investment in construction subsequent to the date of sale and investment in the eligible project even after the project of the house is started beyond one year will be eligible for exemption under section 54F. However, investment made prior to more than one year before the date of transfer was not eligible for exemption. Accordingly, he granted exemption.On revenue's appeal, the Tribunal affirmed the said order. On appeal by revenue , dismissing the appeal the Court held that; in terms of section 54F(1), all investment made in construction of residential house on said vacant site within a period of one year prior to sale of original asset would be eligible for exemption under section 54F(1).Further, assessee having invested entire sale consideration in construction of a residential house within three years from date of transfer, he could not be denied exemption under section 54F on ground that he did not deposit said amount in capital gains account scheme before due date prescribed under section 139(1).

CIT v. K Ramachandra Rao (2015) 277 CTR 522 / 230 Taxman 334/ 120 DTR 72 (Karn.)(HC)

S. 54F : Capital gains - Investment in a residential house- Amount spent on construction of house-Entitled exemption. [S.45, 263]

Assessee sold agricultural land and long-term capital gain arose to him. Amount was spent towards construction of house . The assessee filed his return of income which included capital gain. The Assessing Authority allowed the benefit under section 54F to the assessee.

The Commissioner invoked his powers under section 263 and reviewed the order.The Tribunal held that the benefit extended to the assessee was strictly in conformity with section 54F. There is no scope for the different interpretation as sought to be made out by the Revisional Authority and therefore, he allowed the appeal setting aside the order passed by the Revisional Authority. On appeal by revnue dismissing the appeal of revenue; the Court held that even before sale of agricultural land, assessee, with help of borrowed housing loan, had started construction on site belonging to him after sale of agricultural land amount spent towards said construction of house was more than consideration received by sale of agricultural land. Assessee was entitled to benefit of section 54F. (AY. 2004-05)

CIT v. Anandraj (2015) 230 Taxman 534 (Karn.)(HC)

S. 54F : Capital gains-Investment in a residential house –Computation-Assessee and his brothers demolishing residential building and handing over vacant space to developer - Not

entitled to exemption under section 54 but entitled to exemption under section 54F- Exchange value specified in project development to be taken as basis for computation of construction in joint development. [S.2(47), 45, 54, Transfer of Property Act 1882, S.53A]

Under the development agreement entered into between the parties, the assessee and his brothers had demolished their existing residential building and handed over the vacant space to the developer for construction of the apartment and, hence, they were not entitled to claim benefit under section 54 of the Act. At the most they were entitled to benefit under section 54F.Exchange value specified in project development to be taken as basis for computation of construction in joint development, cost incurred by developer need not necessarily represent cost of construction. (AY. 2001-2002)

CIT .v. Ved Prakash Rakhra (2015) 370 ITR 762 (Karn.)(HC)

S. 54F : Capital gains - Investment in a residential house – Transferable tenancy rights-Owner-Substantial rights giving assessee dominion, possession and control over said property with transferable rights, which were almost identical to that of an owner of property, assessee was entitled for exemption. [S. 45]

Assessee earned long-term capital gains on sale of shares. She claimed exemption under section 54F on plea that she had purchased a residential flat. Assessing Officer noted from transfer deed that assessee had "transferable tenancy rights" and "not ownership" of flat, therefore disallowed claim under said section. Where rights of assessee in flat were not mere tenancy rights but were substantial rights giving assessee dominion, possession and control over said property with transferable rights, which were almost identical to that of an owner of property, assessee was entitled for exemption. (AY. 2005-06)A.Y.2005-060

Archana Parasrampuriav. ITO (2015) 68 SOT 550 (Mum.)(Trib.)

S. 54F : Capital gains-investment in residential house-Farm house-Even where assessee purchased share in a property without right in land on which said property was constructed being transferred to assessee, was eligible for deduction.[S. 45]

The assessee earned long term capital gain on account of sale of shares and claimed deduction under section 54F for a sum which was invested out of the sale consideration for acquisition of rights in a property. The assessee had purchased 50 per cent of the share of a farmhouse (used for residential purposes) constructed on the land belonging to the members of the HUF, from one of the members, 'I'. Exemption was denied by the AO which was confirmed by CIT(A).On appeal , allowing the appeal Tribunal held that;

It is amply evident that the land is an independent and identifiable capital asset, which can be separate from superstructure built up on it. A person can be the owner of a superstructure and can earn income separately from such a superstructure, either in the form of rent or by gain on selling it. It is not necessary that the assessee should hold the exclusive right on the land while purchasing the house or vice versa. Such kind of arrangement always happen in the case of lease land. Therefore, the contention of the department that, simply because the property has been sold without the transferring the right in the land, the same cannot be held to be sale of property, is not to be agreed.

So far as the issue, whether the assessee can purchase fractional interest, that is, buying of share in the property and whether it can be held as purchase or not, it is found that this issue, in principle, is settled by the decision of the Supreme Court in the case of CIT v. T.N. Aravinda Reddy [1979] 120 ITR 46.(SC).Section 54F, per se, does not prohibit or bar that fractional interest or share in the property, which has been purchased, will not be entitled for deduction under section 54F. Thus, following the said proposition laid down by the Court, it is held that the assessee is eligible for deduction under section 54F on the amount spent on acquisition of rights in a property from the other members of the family or HUF. (AY. 2009-10)

Chandrakant S. Choksi HUFv. ACIT (2015) 67 SOT 311 (Mum.)(Trib.)

S. 54F : Capital gains -Investment in residential house –Matter seta side for verification.

Assessee earned long-term capital gain on sale of a property and invested a part of sale consideration in new residential property and claimed exemption u/s. 54F. Revenue authorities disallowed claim for want of documents in respect of investment and ownership of residential property. Assessee submitted

that he was in position to produce architect and also furnish details towards construction of property. Matter was remanded to examine assessee's claim. (A.Y. 2008 – 2009)
Subhash Vinayak Supnekar .v.ACIT(2013) 158 TTJ 237/(2015) 152 ITD 389 (Pune)(Trib.)

S. 54F : Capital gains - Investment in residential house-Invested in land before permission from Executive engineer, Municipality- Rejection of claim was not justified , when assesse constructed a house. [S.45]
Assessee received compensation towards acquisition of land by National Highway Authorities. Revenue authorities' negated claim of assessee to allow deduction u/s. 54F on amount invested in construction of building on ground that permission from Executive Engineer, Municipality had not been obtained before construction of building. It was noted that assessee had constructed house which was evident from copy of certificate of valuation by Municipal Engineer and moreover, assessee had requested A.O. to call for Engineer, who had given certificate. A.O. had not called any information from Municipality and disallowed claim. The matter was restoring back to AO. to verify genuineness of certificate, which he had not done and therefore, assessee's claim for deduction was to be allowed. (AY. 2003-04)
Harendra Kumar Das v. ITO (2015) 152 ITD 359 /170 TTJ 269(Cuttak)(Trib.)

S. 54F : Capital gains -Investment in residential house-Approval of building plan-There is no condition that building plan of residential house should be approved by Municipal Corporation or any other competent authority- Entitled exemption.[S. 45]
The assessee earned long-term capital gain on sale of shares. The assessee claimed deduction under section 54F in respect of construction of a new residential property. The revenue authorities rejected assessee's claim holding that since there was no approved plan for the new construction, the assessee was not entitled to claim exemption under section 54F. The provisions of section 54F mandate the construction of a residential house, within the period specified, however, there is no condition that the building plan of the residential house constructed should be approved by the Municipal Corporation or any other competent authority. If any person constructs a house without approval of building plan, he will be raising construction at his own risk and cost. As far as for availing exemption under section 54F, approval of building plan is not necessary. The approved building plan, certificate of occupation etc. are sought to substantiate the claim of new construction. In the present case, the fact that the assessee has raised new construction is evident from the interim order issued by the Municipal Corporation. (AY. 2006-07)
B. Sivasubramanian v. ITO (2015) 152 ITD 379/170 ITD 125 (Chennai)(Trib)

S. 54F : Capital gains - Investment in a residential house- Amount paid to builder for house is equivalent to amount spent by assessee for construction. Fact that only advance is given and construction is delayed beyond 3 years does not deprive assessee of exemption.[S.45]
Question before the Tribunal was whether the amount of consideration received on transfer invested by the assessee in a flat constructed within three years would amount to construction of a residential house within the time limit of three years. Tribunal held that we are of the opinion that a flat which is newly constructed by a builder on behalf of the assessee is in no way different from a house constructed. Section 54F being a beneficial provision has to be interpreted so as to give the benefit of residential unit viz., flat instead of house in the present state of affairs. Further, as already pointed out even if only advance is given the benefit still will be available for exemption u/s. 54F. (AY. 2009-10) (ITA no. 1520/Hyd/2013, dt. 31.12.2014)
Pradeep Kumar Chowdhry .v. DCIT (Hyd.)(Trib.) www.itatonlie.org

S. 54F : Capital gains - Investment in a residential house-Even if construction/ purchase of new house is not completed within stipulated period, deduction is admissible if investment is made- is a beneficial provision which has to be construed liberally. [S.45, 263]
Provision contained under section 54F being a beneficial provision has to be construed liberally. In various judicial precedents it has been held that the condition precedent for claiming benefit under section 54F is only that the capital gain realized from the sale of capital asset should be parted by the assessee and invested either in purchasing a residential house or in constructing a residential house. If

the assessee has invested the money in construction of residential house, merely because the construction was not complete in all respects and it was not in a fit condition to be occupied within the period stipulated, that would not disentitle the assessee from claiming the benefit under section 54F.Once the assessee demonstrates that the consideration received on transfer has been invested either in purchasing a residential house or in constructing a residential house, even though the transactions are not complete in all respects and as required under the law, that would not disentitle the assessee from availing benefit under section 54F. Even investment made in purchasing a plot of land for the purpose of construction of a residential house has been held to be an investment satisfying the conditions of section 54F. Though there cannot be any dispute with regard to the above said proposition of law, the assessee is required to prove the actual date of investment and the amount invested towards purchase/construction of the residential house with supporting evidence. (AY. 2006-07)

S. Uma Devi .v. CIT(2015) 117 DTR 151/169 TTJ 487 (Hyd.)(Trib.)
V.Shailaja v.CIT (2015) 117 DTR 151/169 TTJ 487 (Hyd)(Trib)

S. 54F : Capital gains-Investment in residential house-More than three houses- Two houses in the name of HUF- Matter remanded.[S.45]

The AO denied the exemption on the ground that assesse was having three houses .CIT (A) also confirmed the disallowance of exemption. On appeal the assesse contended that two of the three houses were owned by HUF and not by assesse in his individual capacity. Tribunal held that no clear finding regarding ownership of these two properties claimed to be belonging to HUF was recorded . Matter was remanded to the AO for re adjudication . (AY. 2008-09)

Dr Sunil Kumar Sharma .v.ITO (2014) 52 taxmann.com 437/(2015) 67 SOT 158 (Delhi)(Trib.)

S. 54G:Capital gains-Shifting of industrial undertaking from urban area – Section does not require that the machinery etc has to be acquired in the same Assessment Year in which the transfer takes place. It is sufficient if the capital gain is "utilized" towards purchase of P&M by giving advances to suppliers. Section 24 of the General Clauses Act applies also to 'omissions' along with `repeals' and saves rights given by subordinate legislation.[S.45, 54H, 280Y (d),280ZA, General Clauses Act, S 6, 6A, 24]

The assessee, a private limited company, had an industrial unit at Majiwada, Thane, which was a notified urban area. With a view to shift its industrial undertaking from an urban area to a non-urban area at Kurukumbh Village, Pune District, Maharashtra, it sold its land, building and plant and machinery situated at Majiwada, Thane to Shree Vardhman Trust for a consideration of Rs.1,20,00,000/-, and after deducting an amount of Rs.11,62,956/-, had earned a capital gain of Rs.1,08,33,044/-. Since it intended to shift its industrial undertaking from an urban area to a non-urban area, out of the capital gain so earned, the appellant paid by way of advances various amounts to different persons for purchase of land, plant and machinery, construction of factory building etc. Such advances amounted to Rs.1,11,42,973/- in the year 1991-1992. The appellant claimed exemption under Section 54G of the Income tax Act on the entire capital gain earned from the sale proceeds of its erstwhile industrial undertaking situate in Thane in view of the advances so made being more than the capital gain made by it. The AO & CIT(A) rejected the claim though the Tribunal upheld it. The High Court reversed the Tribunal and held that as the notification declaring Thane to be an urban area stood repealed with the repeal of the Section under which it was made, the appellant did not satisfy the basic condition necessary to attract Section 54G, namely that a transfer had to be made from an urban area to a non urban area. Further, the expression "purchase" in Section 54G cannot be equated with the expression "towards purchase" and, therefore, admittedly as land, plant and machinery had not been purchased in the assessment year in question, the exemption contained in Section 54G had to be denied. On appeal by the assessee HELD reversing the High Court:

(i) On a conjoint reading of the aforesaid Budget Speech, notes on clauses and memorandum explaining the Finance Bill of 1987, it becomes clear that the idea of omitting Section 280ZA and introducing on the same date Section 54G was to do away with the tax credit certificate scheme together with the prior approval required by the Board and to substitute the repealed provision with the new scheme contained in Section 54G. It is true that Section 280Y(d) was only omitted by the Finance Act, 1990 and was not omitted together with Section 280ZA. However, we agree with

learned counsel for the appellant that this would make no material difference inasmuch as Section 280Y(d) is a definition Section defining "urban area" for the purpose of Section 280ZA only and for no other purpose. It is clear that once Section 280ZA is omitted from the statute book, Section 280Y(d) having no independent existence would for all practical purposes also be "dead". Quite apart from this, Section 54G(1) by its explanation introduces the very definition contained in Section 280Y(d) in the same terms. Obviously, both provisions are not expected to be applied simultaneously and it is clear that the explanation to Section 54G(1) repeals by implication Section 280Y(d).
(ii) From a reading of the notes on clauses and the Memorandum of the Finance Bill, 1990, it is clear that Section 280Y(d) which was omitted with effect from 1.4.1990 was so omitted because it had become "redundant". It was redundant because it had no independent existence, apart from providing a definition of "urban area" for the purpose of Section 280ZA which had been omitted with effect from the very date that Section 54G was inserted, namely, 1.4.1988. We are, therefore, of the view that the High Court in not referring to Section 24 of the General Clauses Act has fallen into error.
(iii) It is clear that even an implied repeal of a statute would fall within the expression "repeal" in Section 6 of the General Clauses Act. This is for the reason given by the Constitution Bench in M.A. Tulloch & Co. that only the form of repeal differs but there is no difference in intent or substance. If even an implied repeal is covered by the expression "repeal", it is clear that repeals may take any form and so long as a statute or part of it is obliterated, such obliteration would be covered by the expression "repeal" in Section 6 of the General Clauses Act.
(iv) On omission of Section 280ZA and its re-enactment with modification in Section 54G, Section 24 of the General Clauses Act would apply, and the notification of 1967, declaring Thane to be an urban area, would be continued under and for the purposes of Section 54A.
(v) A reading of Section 54G makes it clear that the assessee is given a window of three years after the date on which transfer has taken place to "purchase" new machinery or plant or "acquire" building or land. We find that the High Court has completely missed the window of three years given to the assessee to purchase or acquire machinery and building or land. This is why the expression used in 54G(2) is "which is not utilized by him for all or any of the purposes aforesaid….". It is clear that for the assessment year in question all that is required for the assessee to avail of the exemption contained in the Section is to "utilize" the amount of capital gains for purchase and acquisition of new machinery or plant and building or land. It is undisputed that the entire amount claimed in the assessment year in question has been so "utilized" for purchase and/or acquisition of new machinery or plant and land or building.
(vi) The aforesaid construction by the High Court of Section 54G would render nugatory a vital part of the said Section so far as the assessee is concerned. Under sub-section (1), the assessee is given a period of three years after the date on which the transfer takes place to purchase new machinery or plant and acquire building or land or construct building for the purpose of his business in the said area. If the High Court is right, the assessee has to purchase and/or acquire machinery, plant, land and building within the same assessment year in which the transfer takes place. Further, the High Court has missed the key words "not utilized" in sub-section (2) which would show that it is enough that the capital gain made by the assessee should only be "utilized" by him in the assessment year in question for all or any of the purposes aforesaid, that is towards purchase and acquisition of plant and machinery, and land and building. Advances paid for the purpose of purchase and/or acquisition of the aforesaid assets would certainly amount to utilization by the assessee of the capital gains made by him for the purpose of purchasing and/or acquiring the aforesaid assets. We find therefore that on this ground also, the assessee is liable to succeed. (AY.1991-92)
Fibre Boards (P) Ltd. .v. CIT(2015) 279 CTR 89 (SC)

S. 55 : Capital gains - Cost of acquisition-Valuation of land- working out Fair Market Value of land - Indian Valuers Directory and Reference Book and Stamp Duty Ready Reckoner and by adopting annual rate of appreciation method is correct.[S.45, 48]
When no sale instance is available of same area for valuation of a property, relying upon an instance of nearby area or similar type of property cannot be flawed. where no sale instances was available of same area, CIT (A) right in working out Fair Market Value of land by relying upon rate mentioned in Indian Valuers Directory and Reference Book and Stamp Duty Ready Reckoner and annual rate of appreciation method. (AY. 2001 – 2002)

Pfizer Ltd. v. Dy. CIT (2015) 153 ITD 433 (Mum.)(Trib.)

S. 55A:Capital gains-Reference to Departmental Valuation Officer - Only where Assessing Officer of opinion that valuation made by registered valuer less than fair market value of property - Valuation made by registered valuer was on higher side - No occasion for Assessing Officer to make reference.[S.45]

Held, (i) that under clause (a) of section 55A, as it stood at the relevant point of time, the Assessing Officer could have made a reference provided he was of the opinion that the valuation made by the registered valuer was less than the fair market value of the property. When the valuation made by the registered valuer was on the higher side, there was no occasion for the Assessing Officer to refer the matter to the valuation officer under section 55A. Therefore, the valuation at a sum of Rs. 18,40,244 as on April 1, 1981, was correctly accepted by the Tribunal. (AY. 2004-2005)

CIT .v.Mina Deogun (Smt.) (2015) 375 ITR 586 (Cal.)(HC)

S. 55A : Capital gains - Reference to valuation officer –Valuation report by registered valuer-Not justified in making reference to Valuation Officer. (S.45)

The assessee acquired a property on 1-4-1981. The value of that property at that time was taken at Rs. 3.91 lakhs. The assessee sold the said property in the year 1994 for Rs. 9.51 lakhs.

The AO referred the matter to the Valuation Officer, who determined the value of the property as on the date of sale at Rs. 15.52 lakhs and fair market value of the property as on 1-4-1981 was determined at Rs 1.62 lakhs. Accordingly, the capital gain was computed by the AO.

On appeal, the CIT(A) upheld the order of the AO. On second appeal, the Tribunal allowed the appeal of the assessee holding that the AO before making a reference to the Valuation Officer had not brought anything on the record indicating that the assessee had disclosed lesser sale price and there was nothing on the record which could suggest to ignore the report of the registered valuer and to adopt the report of the Valuation Officer and, therefore, the AO ought not to have made a reference to the DVO for determination of the fair market value of the property in dispute.

On revenue's appeal to the High Court. Tribunal has given cogent and convincing reasons in arriving at the conclusion. Therefore, the appeal is dismissed.

CIT v. Manjulaben M. Unadkat (2015) 229 Taxman 531 (Guj.)(HC)

S.56: Income from other sources-Business Income –Lease of factory- Rental income is assessable as income from other sources and not as business income.[S.28(i)]

The assessee discontinued its manufacturing business and leased the entire factory building for a period of 11 months and had offered rental income as business income. While ruling against the assessee, Court observed that there was nothing on record to show that the assessee had only let out the factory building temporarily and intended to resume its business. Accordingly, the High Court ruled that lease income would be taxable as income from other sources and not as business Income.

CIT v. Venkateswara Rao, M. & Ors. (2015) 370 ITR 212 / 232 Taxman 123 / 119 DTR 189 (AP)(HC)

S. 56 : Income from other sources - Clubbing of income- Where assessee received cheques as gift in his individual name, but deposited same in HUF account, matter remanded for re adjudication for analysis of section 52(2)(vii) and section 64(2).[S.64]

The assessee received gifts from his son, wife, mother and daughter through cheques in name of individual and same had been subsequently deposited in the HUF account. The cheques, which were drawn in the name of the individual became blended with the property of HUF by way of journal entry. The AO invoked explanation to proviso of section 56(2)(vi) and held that the HUF would not come within the definition of relative and, therefore, added amount in name of HUF. The CIT(A) and Tribunal confirmed the order of AO.

The High Court observed that the assessee has invoked section 64(2) which has not considered the legal plea so raised and, therefore, prejudice is caused to the assessee in not considering this legal plea. The High Court held that since the issue raised by the assessee requires an in-depth analysis of both the provisions, *viz.*, section 56(2)(vii) and section 64(2),the matter requires to be considered by

the AO by way of de *novo*proceedings and hence, the matter is remanded back to AO for *de novo* consideration of the entire issue (AY. 2008-2009)
M. Veluswamy v. ITO (2015) 54 taxmann.com 221 / 113 DTR 257/273 CTR 543 (Mad) (HC)

S. 56 : Income from other sources–Co-operative society-Interest from fixed deposit-Assessable as income from other sources. [S.80P(2)(a)(i)]
Assessee, a co-operative society, engaged in providing credit facilities to its members, deposited surplus funds in fixed deposits and earned interest thereon, said interest would be assessable as 'income from other sources' and, thus, not eligible for deduction under section 80P(2)(a)(i). (AY.2008-09)
Mantola Co-Operative Thrift & Credit Society Ltd. v. CIT (2015) 229 Taxman 68 (Delhi)(HC)

S. 56 : Income from other sources - Compensatory interest– builder's failure to deliver flat by a specified date, compensatory interest received by assessee on refund of deposit amount was assessable as interest income- Lump sum awarded as compensation was held to be capital in nature .[S.2(28A, 4]
Assessee entered into an agreement with a builder for purchase of two residential flats. Flats booked were not delivered despite lapse of considerable time. Assessee received entire amount from builder along with interest at contracted rate besides another amount by way of compensation. Excess amount received by assessee under contract as interest at specified rate represented a compensation on non-performance of contract by a specified date and, thus, same being revenue receipt was assessable as interest income u/s. 56. Tribunal also held that lump sum amount awarded by common forum as compensation was on capital account. (AY. 2006 – 2007)
Kumarpal Mohanlal Jain .v. ITO(2015) 153 ITD 292 (Mum.)(Trib.)

S.56:Income from other sources-Company- Inter-corporate gifts-Book profit –Deemed dividend-Gift received by company- Company, if authorized by the memorandum of association and articles of association are competent to make and receive gifts. Natural love and affection is a not necessary requirement for a gift. The gift is neither taxable as income s. 56 (pre-amendment) nor as capital gain nor as income u/s.2(22)(e) – No adjustment was required to book profit declared by assesse u/s 115JB.[S.2(22)(e), 2(24), 4, 45, 115JB, Transfer of Property Act, 1882, S. 5, 122]]
Dismissing the appeal of revenue, the Tribunal held that ;(i) As per the provisions of law prevailing during the year under consideration, the gift received by one corporate body from another corporate bodies do not come under the ambit of income as contemplated u/s 2(24) of the Act or any other provisions of the Act. The gift received are a voluntary payments made by the donors to the assessee. Neither the assessee has any legal right to claim the gift from the donor nor donors have any legal or contractual obligations to give gift to the assessee. The gifts received by the assessee was a voluntary payments made by the donor, without consideration to the assessee. The gift received has nothing to do with the business of the assessee so as to constitute its income from business or a revenue receipt in the nature of income.
(ii) The suspicion of the AO that the transaction of gift is dubious and to bring into books any unaccounted money is contrary to the facts on record. Insofar as admittedly the gifts have been received on account of dividend by the donor companies from the Reliance Industries Limited. The Reliance Industries Ltd. have also paid dividend distribution tax, therefore, such money received by the assessee is not unaccounted money. The AO has not brought any evidence on record contrary to the claim of the assessee. Even during appellate proceeding, the CIT(A) has given opportunity to the AO, in the remand report also, the AO could not rebut the claim of the assessee on the basis of any contrary evidence on record. Hence, the claim of assessee cannot be rejected merely on the basis of doubt or suspicion.
(iii) With regard to AO‘s objection regarding motive behind the transaction, the A.O. has stated in para 8 of the assessment order that it could not ascertain the exact nature or motive behind the transaction because of limited time and resources available, whereas, the case was remanded to the

A.O. by CIT(A) and an opportunity was again given with the specific direction to find out the nature and motive behind these transactions or gifts, whereas, A.O. could not find out any other motive behind such transactions and merely stated in the remand report that assessee has not furnished any clear and distinctive motive with regard to these transactions and the exact nature and motive is best known to the assessee. But merely blaming the assessee that it is not furnishing the correct motive is putting the cart before the horse. Whereas case of the assessee is that it has received these amounts as gifts, therefore, it is for the AO to bring on record any other contrary motive and if he fails to do so then there is no alternative but to accept the claim of the assessee that these are gifts.

(iv) With regard to the AO's objection regarding gift deed, we found that the A.O. has held that these transactions cannot be treated as gifts because there are no gift deeds and because they have not been specifically accepted, whereas, there is no such legal requirement for making a gift. Even by simple delivery the gift can be made of an amount or cheque or other movable property. Whereas, in the case of the assessee, letters certifying the gifts with corresponding resolution of their board have been furnished before the A.O. During appellate proceedings before CIT(A), assessee has also filed affidavits from all the four donor companies, certifying the gifts. Assessee has also filed its affidavit for certifying the receipt of gifts. Receipt of gift as well as making of gift are authorized by respective Memorandum and Articles of Association of the companies and the assessee. Gifts have been accepted by the assessee by adopting a resolution by the Board of Directors. After sending all these documents to the AO, the CIT(A) had called a remand report from AO, therefore, this is no violation of rule 46A also. Thus, it cannot be said that these amounts are not gifts merely on the basis that there are no gift deeds or acceptance.

(v) The contention of AO that company cannot make a gift and that there is a lack of natural love and affection in case of gift by the company. This issue is squarely covered by the decision of the D.P. World Pvt. Ltd. vs. DCIT ITA No. 3627 and 3841/Mum/2012, Mumbai 'D' Bench, dated 12/10/12 and Redington (India) Limited, ITA No. 513/Mds/2014 in which held that, companies are competent to make and receive gifts and natural love and affection are not necessary requirement. Only requirement for company is to make gifts as per respective memorandum and article of association, which authorize the company for the same. Applying the proposition of law laid down in the above decision to the facts of the instant case, The tribunal found that the assessee and the donor companies are authorized in this regard for receiving and making gifts respectively as per their Memorandum and Articles of Association.

(vi) As per section 56(2)(viia) and 56(2)(viib), gift of certain kind of shares received by a company in which the public are not substantially interested are taxable and, therefore, it is clear that the Income-tax Act, itself provides that companies can receive gifts, of course, gifts of only shares of certain kind received by certain category of companies are taxable. (The provisions of section 56(2)(viia) and (viib) are applicable w.e.f. 1/6/10 and 1/4/13 respectively). Therefore, it cannot be said that the assessee could not have received such gifts from other companies. It is also clear from the Transfer of Property Act that companies can receive and make gifts and there is no requirement of any natural love and affection for making or receiving a gift by companies. Even the Income-tax Act by way of Section 56(2)(viia) and 56(2)(viib) provides that gifts of certain kind of shares are taxable in the hands of certain category of companies.

(vii) Three elements are essential in determining whether or not a gift has been made, a) delivery. b) donative intent,' and c) acceptance by the donee. All the essentials are duly been fulfilled by the assessee and all the four donor of gifts. With respect to delivery of gift, the dividend has actually been received by the assessee in its bank account which conclusively prove the delivery of the gift from donor to donee. With respect to intent of donor, all four donors have passed a resolution in the meeting of shareholders and board of Directors that they intend to transfer the dividend on shares of Reliance Industries held by them to the assesseedonee as gift. Thus, the donative intent to transfer the dividend as gift is clear from the resolution passed by the donors. With respect to acceptance by the donee, the assessee has duly passed a resolution in the meeting of shareholder and board of directors duly conveying their acceptance of the gift. Thus all the essential requisites of gifts stated by the AO in assessment order have been duly fulfilled by the assessee and no adverse conclusion can be drawn in the case of the assessee.

(viii) The AO has limited power of making increase or reduction as provided in the Explanation to the said Section. Furthermore, the Explanation to section 115JB of the Act is applicable only if the item

of expense or income is debited or credited to the Profit & Loss Account. However, when the item of expense or income is not debited or credited to the Profit & Loss Account, Explanation to section 115JB of the Act cannot apply and hence no adjustment is required under that section to the books profit,in the case of the assessee gift was received from corporate bodies were not credited to the Profit & Loss Account and hence no adjustment is required to the book profit declared by the assessee u/s 115JB of the Act. (AY. 2009-10)

DCIT .v. KDA Enterprises Pvt. Ltd. (2015) 39 ITR 657/120 DTR 163 /171 TTJ 1/ 68 SOT 349 (URO)(Mum.)(Trib.)

S. 56(2)(vi) : Income from other sources –Portfolio Management Scheme-Amount received under Power of Attorney from other party for investment and due to be return back along with income thereon, cannot be included as income of assessee.

The assessee, an individual received amount under General Power of Attorney from client for investment in Portfolio Management Scheme where such amount is stipulated to be returned back with income thereon. The assessee never became the beneficiary of the impugned amount, thus there is no question of making the addition u/s 56(2)(vi) of the Act. Even otherwise, the amount after liquidating the investment was returned back meaning thereby, the amount was returned back along with profit, consequently, the provision of section 56(2)(vi) is not applicable. (AY. 2008-09)

Sannidhi C. Patel (Miss) v.ITO(2015) 168 TTJ 244 / 114 DTR 300 (Mum.)(Trib.)

S. 56(2)(vi) : Income from other sources-Gift-Alimony-Amount received as alimony from ex-husband was held to be not taxable.

During the year, the assessee received an amount of Rs.73,60,787/- from her ex-husband Mr.Siguar Erich Zaun, a German citizen. The amount was claimed to have been received as alimony on divorce with her husband and the same was claimed as exempt. The AO, however, held that the said amount was taxable as income from other sources.

The CIT (A) upheld the addition on the ground that the German Court granted the divorce on 17.07.2001 but the alimony was paid after a gap of five years when there was no relationship between the assessee and Mr. Zaun and therefore the amount received from Mr. Zaun by the assessee in the normal course was chargeable under the provisions of section 56(2)(vi).

Held by the Tribunal, maintenance or alimony is paid by the husband to his wife in recognition of her pre-existing right, whether marriage relationship is still continuing or has been dissolved, does not bar the payment of alimony by the ex-husband to the divorced wife and under those circumstances, in the definition of spouse, ex-spouse is also included except where there is an evidence that the payment is not made as a gift or an alimony but for some other consideration or by virtue of some other transaction. In the absence of any such evidence, the payment of alimony amount by the ex-husband to his wife is nothing more than a gift and is exempt under the proviso to section 56(2)(vi) of the Act.(ITA No. 2109/M/2011 dt 13/02/2015) (AY. 2007-08**)**

Prema G. Sanghvi .v. ITO (Mum.)(Trib.) **www.ctconline.org**

S.57:Income from other sources-Deduction-Exempt income- Interest -Expenditure incurred on borrowings invested in shares could not be considered while computing income from other sources.[S. 14, 56]

Tribunal held that marginal note to S.14A clearly states that expenditure incurred in relation to income not 'includible' in total income which means that if income is not includible in total income whether it is actually earned or not, corresponding expenditure has to be disallowed u/s. 14A. where income from shares which is in form of dividend has to be excluded from total income, such income cannot be considered as income from other sources and, therefore, expenditure incurred on borrowings invested in shares could not be considered while computing income from other sources.(AY. 2008 – 2009)

Varsha R. Taurani (Mrs.) v. ACIT (2015) 153 ITD 533 (Mum.)(Trib.)

S. 57(iii) : Income from other sources - Deductions –Transaction to be considered as a whole-Interest paid was held to be allowable.

Assessee borrowed Rs. 3 crores from 'A' Ltd. at rate of 18.5 per cent per annum and invested said amount in Optionally Convertible Debentures of four companies, at rate of 12 per cent per annum till said OCDs were converted into shares. In return of income, assessee claimed deduction of excess interest paid over interest received during assessment year in question. Assessing Officer held that since assessee failed to establish that excessive interest was paid for earning income, claim raised could not be allowed under section 57(iii) .Tribunal upheld order of Assessing Officer. On appeal allowing the appeal the Court held that; since investment made by assessee in four companies were not loss making concern at relevant time, decision of assessee to borrow money at a higher rate of interest and to invest same in said four companies at rate of 12 per cent with a hope to get shares in future was made to earn income. Even otherwise, once primary transaction of lending, borrowing and payment of interest was found to be genuine, merely because it resulted into less or equal amount of income, would not become a colourable device and consequently earning any disqualification. Accordingly aaessee's claim was to be allowed .(AY. 1995-96)

Atir Textile Industries (P.) Ltd. v. Dy. CIT (2015) 230 Taxman 104/ 120 DTR 338 (Guj.)(HC)

S.61:Revocable transfer of assets-Obtaining concurrence of trustee for revocation does not make transfer irrevocable-Income chargeable to income-tax as income of transferor-Assessee not subjected to tax.[S. 63]

On appeal :Held, dismissing the appeal ;that the facts that concurrence of the trustee had to be obtained by the transferor for revocation would not make the trust an irrevocable transfer. Section 61 of the Act read with section 63 of the Act which mandated that income arising to a person by virtue of a revocable transfer of assets should be chargeable to income tax as income of the transferor would apply to the assessee's case and therefore the assessment in the hands of the transferee or representative assessee was not proper.(AY. 2008-2009, 2009-2010)

ITO v.India Advantage Fund-I(2015) 39 ITR 360(Bang.)(Trib.)

Dy.CIT .v. ICICI Econet Internet and Technology Fund (2015) 39 ITR 360(Bang.)(Trib.)

Dy.CIT v. ICICI Emerging Sectors Fund (2015) 39 ITR 360(Bang.)(Trib.)

S. 68 : Cash credits – Gifts- NRI- Where identity and relationship of donor was known, amount received by assessee by way of gift from said donor could not be treated as income from undisclosed source.

Where identity and relationship of donor was known, amount received by assessee by way of gift from said donor could not be treated as income from undisclosed source.

CIT .v. Ramesh Suri (2015) 231 Taxman 380 (Delhi)(HC)

S. 68:Cash credits-Failing to furnish further explanation-Tribunal not examining correctness of views expressed by Assessing Officer and Commissioner (Appeals) - No reasons disclosed by Tribunal why views expressed by them wrong - Tribunal's order deleting addition is held to be not sustainable.

Held, allowing the appeals, that the creditworthiness of the creditors and the source of the source are relevant enquiries. The Tribunal did not examine the correctness of the views expressed by the Assessing Officer and the Commissioner (Appeals). No reasons had been disclosed why the views expressed by the Commissioner (Appeals) and the Assessing Officer were wrong. Therefore, the order of the Tribunal deleting the addition could not be sustained.(AY. 2006-2007)

CIT .v. Mihir Kanti Hazra (2015) 375 ITR 555 (Cal.)(HC)

S. 68:Cash credits-Gift-Donors relatives of assessee-Gifts made out of love and affection-Details each donor's return produced before Assessing Officer-Donors income-tax assessees-Gifts reflected in books of account-Transfer of amounts voluntarily and by way of entries-Creditworthiness and genuineness of transactions proved-Gifts valid.

Held, all the donors were relatives of the assessee and the gifts were made out of love and affection. The details of each donor’s return were produced before the Assessing Officer, as all the donors were income-tax assessees. Thus, their creditworthiness was proved. The amount was reflected in the books of account. Thus, the identity of the donors had been proved. The transfer of the amount was voluntary and the amount was transferred by way of entries, so the genuineness of the transaction had

been proved. Hence, in the peculiar facts and circumstances of the case, the gifts were genuine. Also by looking to the amount involved, the gifts were genuine. All the ingredients of a valid gift had been proved.(AY. 2002-2003)
Radhey Shaym Bhatia .v. CIT (2015) 375 ITR 294 (All.)(HC)

S.68:Cash credits-Gift-Donor not known to assesse-Addition was held to be justified.
Dismissing the appeal of assesse the Court held that ;Assessee admitting that donor not known to him. Declaration that gift made out of love and affection incorrect. That gift emanated from bank account of donor not sufficient to prove genuineness. Provisions exempting certain gifts from gift-tax-is not relevant in determining genuineness of gift. (AY 1993-1994)
Pawan Kumar Aggarwal v. ITO (2015) 373 ITR 301 / 275 CTR 166 (Delhi)(HC)

S.68:Cash credits-Gift-Burden of proof on assessee-Tribunal finding that assessee had not proved that gift was genuine-Addition justified.
In the return the assessee had shown credit of Rs. 2.60 lakhs in the capital account under the narration "gift". The Assessing Officer disbelieved the claim and made an addition of the amount to the income as declared. The Commissioner (Appeals) deleted the addition. The Tribunal held that the assessee had failed to prove or establish a close relationship with the donor and had not been able to show the circumstances under which the gift was made. The donor was a stranger to the donee. The fact that the money had originated from a foreign bank account maintained by the donor was not sufficient to establish the genuineness of the gift. It restored the addition. On appeal to the High Court:
Held, dismissing the appeal, that the assessee had not been able to prove the genuineness of the gift and also the factum that the transaction was out of love and affection, a sine qua non to establish a genuine gift. The addition was justified.(AY 1994-1995)
Sarita Aggarwal v. CIT (2015) 373 ITR 586 / 231 Taxman 600 (Delhi)(HC)

S. 68: Cash credits–Peak credit-Benefit of peak credit would be available unless otherwise established by the Revenue that it was invested elsewhere.[S.69]
The Assessee accounted for certain purchases in the cash book on later dates than the date of bills. An addition u/s 69 was made by the AO on the same. On appeal, the HC held that items purchased were at short intervals, hence funds rotated and benefit of peak credit can be invoked and entire addition could not be made. If the AO comes to a finding that withdrawn amount was used or spent by assessee for any other investment or expenditure than the benefit of peak of such credit, in such circumstances, may not be available. (AY. 1994-95)
Sind Medical Stores v. CIT (2015) 117 DTR 78 (Raj.)(HC)

S.68:Cash credits-Evidence produced to produce creditworthiness-No addition could be made.
Assessee taking loans. Amount credited on previous day and cheques issued on next day. No legal bar for such transaction. Assessee producing evidence to prove creditworthiness and genuineness of transactions. Evidence produced showing assessee fulfilling requirements of provision. No addition could be made. (AY. 2006-2007)
CIT v. Mark Hospitals (P) Ltd. (2015) 373 ITR 115 / 232 Taxman 197 (Mad) (HC)

S. 68: Cash Credits –Gifts-Non-resident Indians-Unknown donors-Addition was held to be justified.
Where assessee proved identity and credibility of donors but could not explain receipt of huge amounts as gifts from two unknown donors, genuineness of transaction was not established. (AY. 2002-03)
Aalok Khanna v. CIT (2015) 229 Taxman 610 / 277 CTR 60 / 118 DTR 280 (MP)(HC)

S. 68: Cash credits - Income from undisclosed sources - No evidence to show loan repaid by further availing of loan from various parties - No material to show resolution passed to avail of such loan to discharge liability - Income treated as income from undisclosed sources.
Dismissing the appeal of assessee the Court held that; the assessee had not in any manner let in any evidence to show that the amount of Rs. 1 crore received from India Cements was repaid by further

availing of loan from various parties. The person who had taken the loan expired during the course of the assessment proceedings. Consequently, the names could not be furnished. Nevertheless it was a matter of record that the assessee had not produced any material by way of any resolution to avail of such loan to discharge the liability. Thus, in the absence of any material furnished by the assessee, the only other course available to the Assessing Officer was to consider this income as income from other sources. The reasoning was not faulty or illogical and the issue raised was a pure question of fact. (AY. 2009-2010)

Young Men's Christian Association v. JCIT (2015) 372 ITR 398 / 233 Taxman 201 (Mad.)(HC)

S. 68: Cash credits - Sale of agricultural land - Sale consideration deposited in bank and return filed voluntarily disclosing income - Assessing Officer without giving reasons discarding overwhelming evidence led by assessee and framing assessment- Deletion of addition by the Tribunal was held to be justified.

The Revenue received certain information that the assessee had deposited an amount of Rs. 1,08,32,752 in the bank and made enquiries and recorded statements of the assessee and the purchasers. The assessee stated that he had sold the agricultural land for a sum of Rs. 1.20 crores to Y and R. Both the purchasers denied in their statements to have purchased the land for a consideration of Rs. 1.20 crores from the assessee. They stated that they had purchased the land only for Rs. 22 lakhs. The sale deed was executed on the sale value of Rs. 22 lakhs. The surplus amount of Rs. 97,80,000 over the sale deed value was suspected to be income from undisclosed sources and the case was selected for scrutiny on which notice under section 143(2) of the Income-tax Act, 1961, was issued. On the queries served upon the assessee he filed copies of the khasra and khatauni (record of possession and title) in respect of the agricultural land holding, the debit and credit entries in his bank account and justification in respect of agricultural income along with other documentary evidence. The Assessing Officer rejected the submission of the assessee and substantially made the addition of Rs. 77,80,000 in the income of the assessee.

Held, the assessee, as an honest citizen not only made a complaint to the registering authority that the sale deed had been registered at a value much below the amount, which he had actually received, he deposited the entire amount in the bank and voluntarily filed the return. There was no material whatsoever or any circumstance, which could have suggested that this amount was received by him from any other source. The deposition of witnesses of the sale deed, the bank manager and the evidence filed with regard to the valuation of the property was more than sufficient to discharge the burden, which the Assessing Officer had unreasonably placed on the assessee. The Assessing Officer in disbelieving the evidence had not given any reasons whatsoever to discard the statement of the witnesses, deposit of the entire sale consideration in the bank and the deposition of the bank manager. The assessee had not only deposited the entire amount in the bank but also informed the registering authority of the deficiency of the stamp in the sale deed. In the case of one of the purchasers, the Assessing Officer had accepted that he was the owner of the money, i.e., Rs. 97,80,000 and, accordingly, an addition of Rs. 77,80,000 was made in his hands on substantive basis as his income during the year for which a copy of the assessment order was filed on record. Therefore, the Tribunal rightly directed the Assessing Officer to delete the addition made at Rs. 77,80,000 on account of income from undisclosed sources. (AY. 2008-2009)

CIT v. Intezar Ali(2014) 220 Taxman 72 (Mag)/ (2015) 372 ITR 651 (All.)(HC)

S. 68:Cash credits - Failure by creditors to participate in inquiry and furnish accounts - Does not mean that creditors lacked identity - No material to show that amounts advanced by creditors in reality represented money belonging to assessee - Sums cannot be treated as cash credits.

Dismissing the appeal of revenue the Court held that; omission on the part of the creditors to subject themselves to the enquiry initiated by the Revenue or their failure to furnish accounts would not lead to the conclusion that the creditors lacked identity, without any other contradiction of facts and particulars of the transactions between them furnished by the assessee being uncontroverted. The Tribunal while deleting the addition had held in substance with regard to each of those loan transactions, that the Revenue had failed to bring any other material on record to show that the

amounts advanced by the creditors were not in reality and in fact, money belonging to the assessee.(AY. 1994-1995)
CIT v. Chandela Trading Co. P. Ltd. (2015) 372 ITR 232/58 taxmann.com 45 (Cal.)(HC)

S. 68 : Cash credits –Diary-Highest Peak as increased by net profit of 5% was held to proper.
From material found during search at residence of assessee's brother it was found that assessee did not disclose certain amount . Assessing Officer made certain addition to income of assesse. Assessing Officer did not consider explanation tendered by assessee and did not assign any reason for not believing profit and loss account of unaccounted transactions of assessee to be true. He even overlooked working of peak based on seized diary. Tribunal allowed the claim on the basis of highest peak as increased by net profit of 5%. On appeal by revenue the dismissing the appeal Court held that; income from transactions recorded in seized diary was to be determined on basis of highest peak as increased by net profit of 5 per cent on receipts. (AY. 2004-05 to 2006-07)
CIT v. Tirupati Construction Co. (2015) 230 Taxman 198 (Guj.)(HC)

S. 68 : Cash credits – Cash receipts- Repayment of dues and sale of shares- Explanation was not satisfactory- Issuance of summons was not paryed- Addition was held to be justified.
Assessee had shown two cash receipts on account of alleged repayment of existing dues of assessee and on account of sale of shares. Assessee neither disclosed name of buyer of shares nor did he produce sold note issued by broker through whom shares were sold . Tribunal has deleted the addition. On appeal by revenue, allowing the appeal the Court held that; the assessee could have applied for issuance of summons both to broker and buyer as well as to debtor but he did not do so, therefore on facts assessee could not be said to have discharged his burden and Assessing Officer rightly added both amounts by invoking section 68.
CIT v. Sanjay Jain (2015)230 Taxman 550 (Cal.)(HC)

S. 68: Cash credits–Confirmation and balances sheet was filed-Deletion of addition was held to be justified.
Dismissing the appeal of revenue the Court held that; Appellate authorities after considering balance sheet of lender as well as confirmatory certificates in respect of advances given to assessee, deleted addition made by Assessing Officer, order so passed did not give rise to any substantial question of law. (AY. 2009-10)
CIT v. Avant Grade Carpets Ltd. (2015) 230 Taxman 165 (All.)(HC)

S. 68 : Cash credits –Share capital- Loans- Agriculturists- Matter remanded.
Assessee constructed and installed a cold storage during year.It was required to furnish details of investment in cold storage, source of share capital and genuineness of loans. Assessee submitted that shareholders/depositors were agriculturists having substantial land holdings for which evidence in form of Khasra Khatauni, and certificates from Gram Pradhan as well as Block Pramukh were submitted. AO being not satisfied with assessee's explanation, made addition. On appeal, Tribunal deleted addition in absence of departmental representative even though mystery pertaining to creditworthiness remained unsolved. On facts, matter was to be remanded to Tribunal for de novo adjudication . (AY. 2004-05)
CIT v. T.C. Ice & Cold Storage (P.)Ltd. (2015) 229 Taxman 464 (All.)(HC)

S. 68 : Cash credits –Identity established –Transaction was mad e through banking channel-Deletion of addition by Tribunal was held to be justified.
Where in respect of credit entries, assessee established identity of creditors by bringing on record their PAN and complete addresses and, moreover, transaction was made through proper banking channel, impugned addition was to be set aside . Appeal of revenue was dismieed.(AY. 2002-03)
CIT v. Anurag Agarwal (2015) 229 Taxman 532 (All.)(HC)

S. 68 : Cash credits-Failure to issue summons –Deletion of addition was held t be justified.
Asseseee having received and repaid the amount in question through banking channels and also furnished PAN of creditor, burden on assessee under s.68 stood discharged and AO having failed to

invoke s. 131 for summoning the creditor, Tribunal was justified in deleting addition. (AY. 2002-2003)

CIT v. Varinder Rawlley (2014) 366 ITR 232 / (2015) 114 DTR 367 / 274 CTR 392(P&H) (HC)

S. 68 : Cash credits-Burden on Revenue-No effort made by Revenue to show whether creditors were credit worthy--Loans taken from family members--Creditors genuine and amounts shown in their books of account--No addition could be made.

While the assessee was travelling from Delhi to Bareilly in a car, the car was intercepted by the customs authorities. The customs authorities recorded the statements of the driver and the assessee. In the statements, both stated that the assessee had gone to Delhi to sell gold and the seized cash was the consideration for the sale. The customs authorities observed that it was not established that the money was the sale proceeds of the smuggled gold. Later, before the income-tax authorities, the assessee stated that he had gone Delhi to purchase a plot but the deal was not finalised so he had to return to Bareilly with cash which was taken from the family members and the slip of each family member was attached on the bundle of currency notes. The Assessing Officer was not satisfied so he made an addition of Rs. 3.90 lakhs. However, the Commissioner (Appeals) deleted the addition observing that the assessee was involved in the gold business, so the profit might have been earned. Finally, he had made an addition of Rs. 40,000 deleting the remaining amount. The Tribunal restored the addition of Rs. 3.90 lakhs. On appeal :

Held, allowing the appeal, that all the creditors had shown the entries in their books of account, a few of them had given a meagre amount for which no entry was made. The order of the customs authorities was not before the Commissioner (Appeals), who had wrongly observed that the assessee was engaged in the business of gold. Especially when the customs authorities had observed that the assessee was not involved in the business of gold, the statements given by the assessee as well as the driver could not be relied upon. No attempt was made by the Department to examine the creditors. The identity of the creditors had been established. From the family members, loans for petty amounts can be taken in cash. Hence, the creditors were genuine. When credit was taken from the family members and the amount was petty or had been shown in the books of account, there was no occasion to make the addition. Therefore, all the orders of the lower authorities were set aside and the addition of Rs. 3.90 lakhs was to be deleted. The assessee would get the relief, accordingly, for the assessment year 1987-88.(AY. 1987-1988)

Radha Raman Agrawal v. ITO (2015) 371 ITR 435/ 229 Taxmman 502 (All) (HC)

S. 68 : Cash credits – details of creditors and amount due to each creditor under various heads not given – 10% of the total advances treated as unexplained cash credit reasonable.

The assessee furnished some particulars, but the detail of the parties as well as the amount due to the creditors under various heads was not given. AO therefore, treated 10% of the total advances as unexplained cash credit u/s 68. Held:

AO was justified in adding 10% of total advances as unexplained cash credit u/s 68. (AY 1997-98 to 1999-2000)

CIT v. Bellary Steel & Alloys Ltd. (2015) 370 ITR 226 / 114 DTR 287 / (2014) 223 Taxman 491 (Karn.)(HC)

S. 68:Cash credits-Business income–Calculation was made on scientific basis, assessee was justified in treating 39 per cent of total price as an amount for fulfillment of warranty conditions-Amounts was held to be not assessable as cash credtis.[S. 68, 145]

Assessee had undertaken liaisoning work of sale of medical equipments, etc., and had received certain commission. As assessee had future obligation of maintenance of medical equipments for next five years with spare parts and for another five years without spare parts, she had treated 39 per cent of said commission as maintenance contract income and offered same for tax in proportionate basis in 5 assessment years as corresponding or necessary expenditure would be incurred in said span of 5 years. AO held that bifurcation was not justified and made addition of said amount by invoking section 68. Court held that when assessee had future obligation of maintenance services and necessary

expenditure required therefore, and assessee's calculation was made on scientific basis, assessee was justified in treating 39 per cent of total price as an amount for fulfilment of warranty conditions.Amounts was held to be not assessable as cash credtis.(AY. 2007-08)
CIT .v. Paramjeet Luthra (Smt.) (2015) 371 ITR 306/ 228 Taxman 348 (Delhi)(HC)

S. 68 : Cash credits – Gifts- Non-resident-Finding of fact-Appellate Tribunal- Rectfication of mistake-Rejection of Miscellaneous application was held to be justified.[S. 254(2)]
Assessing Officer made addition in income of assessee as income from undisclosed sources holding that gifts received by assessee from one 'K' were not genuine.CIT(A) as well as Tribunal upheld findings of Assessing Officer. On rectification application, Tribunal held that there was no error apparent on record after recording that mere routing of a gift through a banking channel would not by itself establish that gift was genuine. On writ the Court held that finding of facts recorded by Tribunal could not be interfered with.(AY. 1995-96)
Naresh K. Pahuja v. ITAT (2015) 229 Taxman 252/277 CTR 289/116 DTR 390 (Bom.)(HC)

S. 68 : Cash credits – Sale of shares-DMAT account and contract note showed the credit details-Deletion of addition by Tribunal was held to be justified.
Assessee declared capital gain on sale of shares of two companies . Assessing Officer, observing that transaction was done through brokers at Calcutta and performance of concerned companies was not such as would justify increase in share prices, held said transaction as bogus and having been done to convert unaccounted money of assessee to accounted income and, therefore, made addition under section 68. On appeal, Tribunal deleted addition observing that DMAT account and contract note showed credit/details of share transactions; and that revenue had stopped inquiry at particular point and did not carry forward it to discharge basic onus. On facts, transactions in shares were rightly held to be genuine and addition made by Assessing Officer was rightly deleted. (AY. 2003-04 to 2006-07)
CIT v. Shyam R. Pawar (2015) 229 Taxman 256 (Bom.)(HC)

S. 68 :Cash credits –Loans from minors- Gift received from uncle-Addition was held to be justified.
where assessee claimed to have taken loans from his two minor sons and source of loan was stated to be gift received by assessee's sons from their uncle i.e., brother of assessee, since assessee's brother categorically stated that he had not given any gifts to anybody, impugned addition made by Assessing Officer in respect of loan amount was to be confirmed. (AY. 2001-02)
CIT v. VirendraBehari Agrawal (2015) 229 Taxman 193 (All.)(HC)

S. 68 :Cash credits –Transaction of purchase and sale of shares was held to be bogus-Addition was held to be justified.
Once transaction of purchase and sale of shares was found to be bogus then sale proceeds had to be added as income of assessee under section 68 as money received on basis of bogus transaction had been credited by assessee in his books of account which remained unexplained. (AY. 2005-06)
Chandan Gupta v. CIT (2015) 229 Taxman 173 (P&H)(HC)

S. 68: Cash credits-Share capital- Commission on account entry taken-Addition was confirmed-Assessment proceedings under the Income Tax Act are not a game of hide and seek. If AO does not conduct proper inquiry, the obligation to do so is on the CIT(A) & ITAT-Matter remanded. [S. 131,143 (3), 250]
(i) Assessment proceedings under the Income Tax Act are not a game of hide and seek. The inquiry in the wake of a notice under Section 148 is not an empty formality. It must be effective and with a sense of purpose. There is an elaborate procedure set out which requires scrupulous adherence and followed up on. In the hierarchy of the authorities, the AO is placed at the bottom rung. The two layers of appeals, before the matter engages the appellate jurisdiction of this court, are authorities vested with the jurisdiction, power and obligation to reach appropriate findings on facts. Noticeably, it is only the appeal to the High Court, under Section 260-A, which is restricted to consideration of "substantial question of law", if any arising. As would be seen from the discussion that follows, the obligation to

make proper inquiry and reach finding on facts does not end with the AO. This obligation moves upwards to CIT (Appeals), and also ITAT, should it come to their notice that there has been default in such respect on the part of the AO. In such event, it is they who are duty bound to either themselves properly inquire or cause such inquiry to be completed. If this were not to be done, the power under Section 148 would be rendered prone to abuse.

(ii) The authority to bring to tax unaccounted money by exercising the power given to the AO under Section 68 is of great importance. It is expected that the AO would resort to this provision with all requisite circumspection. Since the provision is generally invoked, as has been done in the case at hand, by recourse to the procedure of notice under Section 148 upon satisfaction under Section 147 that the income (purportedly represented by the unexplained sums found credited in the books of accounts), within the mischief of Section 68, it is inherent that the explanation of the assessee respecting such credit entries would be called for only with circumspection and solely upon some concrete material coming up to support the tentative impression about it being suspect.

(iii) Thus, when the AO sets about seeking explanation for the unaccounted credit entries in the books of accounts of the assessee in terms of Section 68, it is legitimately expected that the exercise would be taken to the logical end, in all fairness taking into account the material submitted by the assessee in support of his assertion that the person making the payment is real, and not non-existent, and that such other person was actually the source of the money forming the subject matter of the transaction as indeed that the transaction is real and genuine, same as it is represented to be. Having embarked upon such exercise, the AO is not expected to short-shrift the inquiry or ignore the material submitted by the assessee.

(iv) The provision of appeal, before the CIT (Appeals) and then before the ITAT, is made more as a check on the abuse of power and authority by the AO. Whilst it is true that it is the obligation of the AO to conduct proper scrutiny of the material, given the fact that the two appellate authorities above are also forums for fact-finding, in the event of AO failing to discharge his functions properly, the obligation to conduct proper inquiry on facts would naturally shift to the door of the said appellate authority.

(v) The AO here may have failed to discharge his obligation to conduct a proper inquiry to take the matter to logical conclusion. But CIT (Appeals), having noticed want of proper inquiry, could not have closed the chapter simply by allowing the appeal and deleting the additions made. It was also the obligation of the first appellate authority, as indeed of ITAT, to have ensured that effective inquiry was carried out, particularly in the face of the allegations of the Revenue that the account statements reveal a uniform pattern of cash deposits of equal amounts in the respective accounts preceding the transactions in question. This necessitated a detailed scrutiny of the material submitted by the assessee in response to the notice under Section 148 issued by the AO, as also the material submitted at the stage of appeals, if deemed proper by way of making or causing to be made a "further inquiry" in exercise of the power under Section 250(4). This approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld. Appeal of revenue was allowed, however the issue of reassessment was remanded to the CIT(A). (AY. 2004-05)

CIT v. Jansampark Advertising & Marketing (P) Ltd.(2015) 375 ITR 373/ 231 Taxman 384 (Delhi) (HC)

S. 68 : Cash credits-Finding that assessee had reasonable explanation for cash credits –Addition was deleted.

Held that during the course of appellate proceedings, the assessee was able to produce documents and the details of repayment made through cheque. Even the bank confirmations were filed by the assessee before the Commissioner (Appeals) showing that the cheques issued by the assessee were encashed by the respective parties. The assessee had also furnished identity of persons with complete details of addresses and the fixed deposit applications showing details. The addition under section 68 was not warranted.(AY. 2005-2006, 2006-2007)

CIT .v. ABT Ltd (2015) 370 ITR 159 (Mad.)(HC)

S. 68 : Cash credits –Once source of cash deposit in bank account is explained, subsequent withdrawal is not required to be explained-Addition cannot be made as cash credits.

Assessee explained cash deposit in bank account by submitting names of persons from whom unsecured loans were taken .Merely because assessee withdrew cash instead of sufficient cash balance available with him and subsequently redeposited same in bank account for his own use, no addition could be made.(AY. 2009-10)

CIT v. Manoj Indravadan Chokshi (2015) 229 Taxman 56 (Guj.)(HC)

S. 68 : Cash credits –Share application money-Share premium- Investors confirmed- Addition was held to be not justified.

Assessee received share application money and share premium money from four parties. AO treated said money as unexplained credit. However all four parties were limited companies and enquiries were made and received from four companies and all companies accepted their investment. Court held that where assessee had categorically established nature and source of said sum, addition of such subscription as unexplained credit was unwarranted . (AY. 2007-08)

CIT v. Pranav Foundations Ltd. (2015) 229 Taxman 58/117 DTR 227 (Mad.)(HC)

S. 68 : Cash credits –Share capital-No opportunity of cross examination- Transaction through account payee cheque- Deletion of addition was held to be justified.

AO made addition on account of amount received for share capital, its premium and amount paid as commission for arranging it on basis of statement made by third parties who were related to purchasing companies stating that these companies were engaged in providing accommodation entries in lieu of commission. However, said third party statement was made behind back of assessee and no opportunity of being heard or cross-examining third parties was provided to assessee. AO could not bring any material to disapprove genuineness of confirmation and affidavits filed by assessee. Further, all transaction were through account payee cheques, all these companies had PAN numbers and were regularly assessed to tax . Investor companies were registered under Companies Act and Form No. 2 for allotment was also filed. Deletion of addition by the appellate authorities was held to be justified.(AY. 2004-05)

CIT v. Supertech Diamond Tools (P.) Ltd. (2015) 229 Taxman 62 (Raj.)(HC)

S. 68 : Cash credits –Purchase and sale of gold- Addition was made as undisclosed source-Matter was set aside.

The assessee who started trading in gold, purchased first lot of gold from ICICI bank for Rs. 43.17 lakh which was sold for an aggregate sale consideration of Rs. 43.20 lakh. Thereafter, the assessee purchased another lot of gold for Rs. 43.76 lakh which was sold for Rs. 43.80 lakh.

For the purchase of the first lot of gold, the assessee claimed to have paid out of his own funds which were transferred from HDFC bank to ICICI bank.

The AO treated the entire deposit of cash of Rs. 87 lakh as the assessee's own money earned from undisclosed source.On appeal, the CIT(A) deleted the addition. On revenue's appeal, the Tribunal confirmed the deletion made by the Commissioner (Appeals) to the extent of Rs. 44 lakh only since this was the amount which was transferred by the assessee from his own account from HDFC bank to ICICI bank.

On appeal: the Court held that,it is primarily for the Tribunal to consider as to whether the invoking of section 68 was in order. It would be appropriate to restore the proceedings for a decision afresh by the Tribunal. (AY. 2008-09)

Amarnath Agarwal .v. ACIT (2015) 229 Taxman 54 (All.)(HC)

S. 68 : Cash credits–Expression 'any sum is found credited in books of assessee' means all entries on credit side as well as on debit side in books of account and not an entry only on credit side-On facts order of Tribunal deleting the addition was affirmed.

Assessee, engaged in business of Banarsisarees on commission basis, had shown a liability for supply of sarees .AO held that liabilities in balance sheet remained unexplained and added a part of outstanding amount to income of assessee as unexplained credit - Similar issue was raised in preceding assessment year in case of assessee and by a detailed order passed under section 264, Commissioner had deleted addition on account of unexplained liabilities. Since fact in relevant assessment year were same, addition made by AO was to be deleted. Court also held that Expression

'any sum is found credited in books of assessee' means all entries on credit side as well as on debit side in books of account and not an entry only on credit side.) (AY. 1999-2000)
CIT .v. Abdul Haseeb, Prop. M.S.J.B. Silk(2015) 228 Taxman 71(Mag.)(All.)(HC)

S. 68 :Cash credits–Share application money-Address and PAN Nos were not provided-Addition was held to be justified.
AO held that in respect of shares application money the assesssee has not provided the address and PAN,in case of some of share applicants, there were transactions of deposits and immediate withdrawals of money therefore assessed the amount as cash credits. Tribunal deleted the addition .On appeal by revenue allowing the appeal the Court held that provision of section 68 was rightly invoked by the AO. Appeal of revenue was allowed. (AY. 2002-03)
CIT .v. Focus Exports (P.) Ltd. (2015) 228 Taxman 88 (Mag.)(Delhi)(HC)

S. 68 : Cash credits-Peak credit-Unexplained cash deposits- Addition was held to be justified.
Assessee was a Railway employee, saving bank account showed certain cash deposits and withdrawals, which according to assessee, and represented interest-free loans taken from agriculturists. Assessee neither furnished purpose of loan nor proved creditworthiness of lenders. Made addition u/s. 68 holding land doesn't prove capacity and creditworthiness of lenders, unexplained cash deposits in bank account as income from other sources of assesse. however, only 'peak amount' for credit entries in bank account of assessee could be added to income of assesse. (AY. 2006–2007)
ITO v. Pawan Kumar (2015) 153 ITD 448 (Delhi)(Trib.)

S. 68 : Cash credits-Carried forward credit- Addition cannot be made as cash credits, however addition was held to be justified u/s. 41(1). [S.41(1)]
The assessee was not able to furnish the bank statement copy, however, the AO procured the bank statement from the bank and found certain discrepancies in the statement regarding payment to sundry creditors. And he made an addition of Rs.35,13,739/- in respect of outstanding creditors treating as cessation liability. However, CIT(A) called for remand report from the AO, and once again the AO called for details of sundry creditors and payment to them. The assessee failed to furnish the details in respect of sundry creditors. Tribunal held that, the assessee failed to establish the actual existence of the impugned disputed amount in the books of account of the assessee. The assessee has drawn its balance sheet based on its books of account, in which the above amount, were being claimed as liabilities due, to various parties, as at the end of the accounting year under dispute. However, the assessee failed to establish the genuineness of these liabilities by producing supporting evidence. Simply the liabilities being reflected against certain names in the books of account would not establish the genuineness of liabilities. Tribunal confirmed the addition u/s 41(1) of the Act. (AY.2007 – 2008)
Bharat Dana Bera v. ITO (2015) 39 ITR 632 / 153 ITD 421 / 169 TTJ 721 (Mum.)(Trib.)

S. 68 : Cash credits-Gift-Non-resident sister-in-law-Genuineness of transaction was proved-Addition was deleted.
The assessee received a gift of Rs. 48,61,232, from her late husband's sister, who was a non-resident Indian based in Hong Kong. The Assessing Officer treated the gift under section 68 of the Income-tax Act, 1961, as income of the assessee from undisclosed sources, on the ground that the financial capacity of the donor was not fully proved. The Commissioner (Appeals) confirmed the order of the Assessing Officer holding that gift from a younger sister-in-law without any reciprocity was hard to believe. On appeal :
Held, allowing the appeal, that the entire details of the gift transaction were fully explained through the bank statement of the assessee, remittance advice, bank statement of the donor and foreign remittance advice issued by the bank in Hong Kong. From the bank account of the family concern of the donor, it was evident that an amount of US $ 100,035 had been debited and credited to the bank account of the donor on February 5, 2009 and on the same date itself the amount had been remitted to the assessee's bank account in India. Thus, the genuineness of the transaction and the creditworthiness of the donor were proved and the customary relationship could not be the basis for confirming the addition. (AY. 2009-2010)

Ichudevi L Choraria(Smt.) v. ITO (2015) 39 ITR 57(Mum.)(Trib.)

S. 68:Cash credits-Charitable trust-Donation- Addition cannot be made as unexplained cash credits.[S.11, 12]

Donations received by charitable trust. Donors giving permanent account numbers and receipts. Assessee able to prove identity of donors and utilisation of donation towards construction of educational building. Addition cannot be made as unexplained cash credits. (AY. 2003-2004, 2004-2005, 2009-2010)

Dy.CIT v. Indo Global Education Foundation (2015) 39 ITR 489(Chad.)(Trib.)
Sukhdev Sigh v.Dy.CIT(2015) 39 ITR 489(Chad.)(Trib.)

S. 68:Cash credits- Profits chargeable to tax - Remission or cessation of trading liability- Bogus credits- Unclaimed liabilities to creditors, even if fictitious and bogus, cannot be assessed u/s 41(1) in the absence of a write-back. The bogus credits can be assessed u/s 68 only in the year the credits were made and not in the year they are found to be not payable.[S.41(1)]

(i) Having held that the sundry creditors are not payable and fictitious, the next question that comes up for our consideration is the year in which the amount is taxable under what provisions of law either under Section 41(1) or 68 of the Act. We are required to examine whether this amount should be brought to tax in the year in which credit was made first time in the books of account or in the year in which these are found not payable. An identical issue had come up for consideration before the Hon'ble Gujarat High Court in the case of CIT Vs Bhogilal Ramjibhai Atara in Tax Appeal No. 588 of 2013, dated 04.02.2013, in which it was held that that even if the debt itself is found to be non-genuine from the very inception there was no cessation or remission of liability and that therefore, the amount in question cannot be added back as a deemed income under section 41(1) of the Act. The Jurisdictional High Court in the case of CIT Vs. Shri Vardhman Overseas Ltd., (2012) 343 ITR 408 (Del), has dealt with the issues of taxability under section 41(1) of the Act in a case where long outstanding sundry creditors were treated as taxable. The High Court after referring to the decisions of Hon'ble Supreme Court in the cases of CIT(Chief) Vs. Kesaria Tea Co. Ltd., (2002) 254 ITR 434(SC) and CIT Vs. Sugauli Sugar Works P. Ltd (1999) 236 ITR 518 (SC, has held that such amounts cannot be brought to tax under Section 41(1) of the Act. The Hon'ble Supreme Court in the case of CIT Vs. Sugauli Sugar Works P. Ltd. (supra) held that a unilateral action cannot bring about a cessation or remission of the liability because a remission can be granted only by the creditor and a cessation of the liability can only occur either by reason of operation of law or the debtor unequivocally declaring his intention not to honour his liability when payment is demanded by the creditor, or by a contract between the parties, or by discharge of the debt.

(ii) Applying the ratio in the cases mentioned supra, the amount in question cannot be brought to tax in the year under appeal under the provisions of Section 41(1) of the Act. It is trite law that an addition under Section 68 can be made only in the year in which credit was made to the account of the creditors in the books of account maintained. Kindly refer to the Supreme Court in the case of Damodar Hansraj Vs. CIT, (1969) 71 ITR 427 (SC). Admittedly, in this case the credit to the account of creditors was made in the earlier years and therefore, the amount even cannot be brought to tax under Section 68 in the year under appeal. However, it is open to the Department to levy tax on such amount by resorting to the remedies available under the provisions of Act by duly following the procedure known to the law.(ITANo. 159/Del/2011, dt. 22.04.2015)(A.Y. 2007-08)

Perfect Paradise Emporium Pvt. Ltd. v. ITO (Delhi)(Trib.); www.itatonline.org

S. 68:Cash credits-Profits chargeable to tax- Remission or cessation of liabilities- Old liabilities-Capital accounts-Old liabilities, even if treated as genuine in earlier years and even if on capital account, are liable to be assessed as "income" in year of write-back if assessee is unable to provide confirmations and substantiate genuineness of liabilities.[S. 2(24), 28(i), 41(1), 56 (2)(v) to (vii), 59(1)]

(i) Vide sections 56(2)(v) to (vii), provisions recently introduced, provide for receipt without consideration from an unrelated party, except otherwise than in any specified condition, is statutorily presumed to bear the character of income. The same is the second exception to the rule of a capital receipt being not considered as income under the Act and, in that sense, is again a rule of evidence,

i.e., as S. 68, etc. The provision/s is harsh on genuine transfers, legislated in view of the propagation and proliferation of 'gifts' from unrelated parties. The same, however, is without prejudice to the generality of section 56(1). It would, therefore, be of little consequence even if section 56(2)(vi), the specific provision covering the period under reference, i.e., f.y. 2007-08, is considered as inapplicable in the facts of the case. In fact, section 56(2)(viib), inserted by Finance Act, 2012, duly incorporated in section 2(24) defining income, provides for treating the share premium in excess of the fair market value of the share as income. The apex court in T.V. Sundram Iyengar [1996] 222 ITR 344 (SC) opined in favour of the write back of trade advances as income, de hors the provision of section 56(2), applying the concept of income, consistent with section 2(24), in the facts of the case. The efflux of time, coupled with the write back, so that it was no longer payable, it opined, was sufficient to signify a qualitative change in the nature of the sum as one of receipt of business. The finding of it representing a trade surplus (and, therefore, assessable u/s.28), in view of the trading relationship between the parties, is, though relevant, secondary, in the larger context of the ratio/import of the decision. It may not be of much import in-as-much as it would only alter or impact the head of income under which the income stands to be assessed. The issue before us is not qua the head of income under which the impugned sum would stand to be assessed; it not being even the Revenue's case that the same is business income, assessing it as 'income from other sources' u/s. 56, but as to the nature of the receipt, i.e., if it at all is, or represents, the assessee's income.

(ii) Section 68 would hold even if the impugned sums represent, as contended by the Revenue, the assessee's liabilities, assumed in the past, on whatever count. The same no longer representing a liability, there is admittedly a qualitative change therein – its nature transforming from a liability (for goods, services, whatever – which could itself vary over different persons, and remains unspecified) to the assessee's own money, as signified by the credit to her capital account, which is a fresh credit/s during the year. Both sections 68 and 56(2)(vi) would apply. Qua the latter, the sum of money may have been received earlier, but there is a constructive receipt during the year in-as-much as it is received on own account, while the earlier 'receipt' was that by way of incurring a liability for value received (in kind) or even if in the form of money, only for being paid back and, as such, not without consideration. The second receipt, however, is without consideration. Section 68 shall also, as afore-referred, apply in-as-much as there is fresh credit/s in the assessee's books in the form of credit/s to the capital account. In our view, the particular section is not of much significance considering the amount to be no longer a liability, but accretion the capital during the year, so that even section 56(1) shall hold, quite in the same vein as the hon'ble apex court found the write back to be assessable u/s.28 as business income in the case of T.V. Sundram Iyengar [1996] 222 ITR 344 (SC).

(iii) When an amount, which is stated, claimed and accepted as a payable, is no longer so, the assessee gains to that extent. There is nothing unreal or notional about this gain. It can show that, even so, the same is not chargeable as income or no tax liability is attracted in-as-much as the benefit is not in the nature of income. The assessee offers no such explanation. What is admitted though is that there has been remission/cessation of liability in-as-much as these are no longer payable. Why? No reason is advanced. It is under these circumstances that the law permits the A.O. to draw an adverse inference of it as representing the assessee's income. As regards the year, there can again be little doubt in the matter. The impugned credit/s, which we have found as a fresh credit/s, is during the current year. The liability was accepted as genuine for and up to the immediately preceding year, while it is no longer payable as at the year-end. The taxable event, in terms of gain, thus, has taken place during the year, even if one considers the passing of the journal entry, recording so, on a particular (single) date in the books, to be a matter of convenience only. It is for these reasons that we find the impugned credit as corresponding and answering to the concept of income under section 2(24) and, further, as standing to fall to be assessed u/ss. 56(1) and 56(2), finding strong support in the decision in the case of T.V. Sundram Iyengar [1996] 222 ITR 344 (SC).(ITA No. 3596/Mum/2012, dt. 3.07.2015) (AY. 2008-09)
Panna S. Khatau v. ITO (Mum.)(Trib.); www.itatonline.org

S. 68 : Cash credits – Bank accounts –Acknowledgement for filing of return-Balance sheet-Sufficient to prove creditworthiness- Addition was not justified.

The assessee an individual was engaged in business. Unsecured loan appearing in books of the assessee added in the income of assessee bases on unproved creditworthiness of lender. Held Submission of respective bank account statements, copies of the acknowledgement of returns of

income filed,ba1ance-sheets etc., that all the transactions were found recorded in the contra Bank account statements of the assessee as well as of the respective creditors, that all those parties were filing their regular returns of income, that the confirmations and the related evidences furnished by the assessee were not disproved by the AO, that most of the credits pertained to the preceding assessment years, that the assessee had duly discharged his burden as required u/s.68 of the Act, that the confirmations filed by the assessee were not disproved by the AO, that no contrary evidences were brought on record to prove that the creditors were ingenuine or bogus, that the all the transaction were made through regular banking channels. These are sufficient evidences to prove creditworthiness in case of unsecured loans.(AY 2007-08)

ACIT v.Sanjay M. Jhaveri (2015) 168 TTJ 751(Mum.)(Trib.)

S. 68:Cash credits-Assessee dealing in resale of petroleum products-Creditors, mainly agriculturists, depositing cash to ensure regular supply of diesel-Deposits genuine-Addition is not justified.

The assessee received unsecured loans from 62 creditors. The Assessing Officer, on the view that the creditors were not of sufficient means to give interest-free loans, added the loan to the income of the assessee as income from undisclosed sources, on the ground that the assessee had failed to establish the creditworthiness of the creditors and the genuineness of the transaction. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :

Held, allowing the appeal, that the assessee was dealing in resale of petroleum products and the depositors, who were mainly agriculturists, made the deposits to ensure uninterrupted supply of diesel during the harvesting or sowing season. The assessee produced the depositors before the Assessing Officer, their statements were recorded and evidence of their landholding was produced. Therefore, the deposits in question were genuine and the addition was not justified.(AY. 2003-2004)

Pushpak Auto Centre v. ITO (2015) 38 ITR 447 (Delhi)(Trib.)

S. 68: Cash credits-Income from undisclosed sources--Cash deposits in bank--Cash surrendered on search and duly reflected in wealth-tax return and accepted--Cash cannot thereafter be treated as undisclosed income.

The assessee deposited a sum of Rs. 94,40,180 in his savings account. The Assessing Officer included the sum to the income of the assessee, on the ground that the assessee had failed to prove the source of the deposits. The assessee contended that the cash of Rs. 80 lakhs was available out of the surrender made during the search conducted in the year 2007 and the cash was duly reflected in the wealth-tax return. The Commissioner (Appeals) deleted the addition. On appeal by the Department :

Held, dismissing the appeal, that admittedly the assessee had disclosed a sum of Rs. 1.03 crores in the assessment year 2007-08, and a sum of Rs. 10 lakhs in the assessment year 2008-09. This amount was surrendered during the search and the tax had been duly paid and the assessed income was including the amount of surrender. The cash deposited had duly been reflected in the wealth-tax return. Once the fact was accepted by the Revenue in the wealth-tax assessment proceedings, it could not later challenge the existence of cash. There was no infirmity in the order of the Commissioner (Appeals). (AY. 2010-2011)

ACIT v. Joginder Paul (2015) 38 ITR 486 (Chd) (Trib)

S. 68: Cash credits-Share capital-Even if the issue share capital is bogus, no addition can be made in assessee's hands if identity of shareholder is established-Assessee is not required to show source of shareholder's funds.

Hon'ble Supreme Court of India in the case of CIT v. Lovely Export 299 ITR 261 (SC) which has confirmed the order of Hon'ble Delhi High Court has held that once the identity of the shareholder have been established, even if there is a case of bogus share capital, it cannot be added in the hands of company unless any adverse evidence is not on record. The documentary evidence filed by the assessee shows that the assessee has provided confirmations from all the parties as well as various evidences to establish the genuineness of the transaction. In Nemi Chand Kothari v.CIT 264 ITR 254 (Gauhati) (HC), it was held that it is a certain law that the assessee is to prove the genuineness of transaction as well as the creditworthiness of the creditor must remain confined to the transactions which have taken place between the assessee and the creditor. It is not the business of assessee to find

out the source of money of creditors. Similar observation has also been given in the case of Hastimal 49 ITR 273 (Madr) and DaulatramRawatmal (1973) 87 ITR 349 (SC). Accordingly order of CIT (A) deleting the addition as cash credits was confirmed. (ITA No. 2821/Del/2009, dt. 01.04.2015) (AY. 2006-07)

ITO v. NeelkanthFinbuild Ltd. (Delhi) (Trib.);www.itatonline.org

S. 68:Cash credits-Sale of shares- Despite documentary evidence and broker's confirmation, genuineness of penny stock transactions has to be determined on the basis of 'preponderance of human probabilities'. If assessee is unable to explain 'intriguing' facts and circumstances, genuineness of transaction cannot be accepted- Addition was confirmed as cash credits.

AO has made the addition as cash credits inresect of sale of shares treating the same as nongenuine. On appeal considering the various documents produced by the assesse deleted the addition . On appeal by revenue, allowing the appeal the Tribunal held that ;

(i) The issue is whether the documents furnished by the assessee, including averments made by him, or even his broker, satisfy the test of preponderance of human probabilities. The ITAT observed that if the assessee has reasonably explained the 'intriguing' facts and circumstances as pointed by the AO, and on the strength of which the genuineness is assailed by him, and which further agree with observed in the case of a penny stock company, no case for treating the transaction as not genuine shall arise. The onus u/s.68 though is on the assessee, so that his explanation would, however, require being substantiated or proved.

(ii) Firstly, documentary evidences, in the face of unusual events, as prevailing in the instant case, and without any corroborative or circumstantial evidence/s, cannot be regarded as conclusive. Two, the preponderance of probabilities only denotes the simultaneous existence of several 'facts', each probable in itself, albeit low, so as to cast a serious doubt on the truth of the reported 'facts', which together make up for a bizarre statement, leading to the inference of collusiveness or a device set up to conceal the truth, i.e., in the absence of credible and independent evidences. For a scrip to trade at nearly 50 times its' face value, only a few months after its issue, only implies, if not price manipulation, trail blazing performance and/or great business prospects (with of course proven management record, so as to be able to translate that into reality), while even as much as the company's business or industry or future program (all of which would be in public domain), is conspicuous by its absence, i.e., even years after the transaction/s. The company is, by all counts, a paper company, and its share transactions, managed. Accordingly, reversing the findings of the first appellate authority, confirm the assessment of the impugned sum u/s.68 of the Act. (AY. 2006-07)

ITO v. Shamim M. Bharwani (2015) 118 DTR 268/170 TTJ 238(Mum.)(Trib.)

S. 68 : Cash credits-Burden on assessee to prove genuineness and creditworthiness of transaction and identity of parties-Failure by assessee to prove genuineness of transaction to extent of Rs. 7 lakhs. Addition proper.

The assessee received a sum of Rs. 10 lakhs as loan from a non-resident Indian, from a non-resident external account. The Assessing Officer treated it as the assessee's income but the Commissioner (Appeals) accepted the genuineness of the transaction to the extent of Rs. 5 lakhs and deleted the addition and in the absence of evidence on record, confirmed the addition to the extent of Rs. 7 lakhs. On appeal:

Held, dismissing the appeal, that it was the duty of the assessee to prove the genuineness and creditworthiness of the transaction and the identity of the parties. The assessee had failed to prove the genuineness of the transaction to the extent of Rs. 7 lakhs. The Commissioner (Appeals) had rightly confirmed the addition.

The assessee claimed Rs. 5 lakhs as opening cash balance in the cash flow statement. Since the assessee could not substantiate the opening cash balance during the assessment proceedings, the AO disallowed the entire opening cash balance of the assessee and made an addition of Rs. 3,51,450. The Commissioner (Appeals) restricted the disallowance to Rs. 3,33,631. On appeal :

Held, dismissing the appeal, that though the assessee was engaged in purchase and sale of stamps, he did not maintain any proper books of account. Hence the claim of opening cash balance to the extent

of Rs. 5 lakhs was not justified. There was no infirmity in the order of the authorities. (A Y. 2003-2004 to 2009-2010)
K. Govinda Pillai .v. Dy. CIT (2015) 37 ITR 772 (Cochin)(Trib.)

S. 68 : Cash credits –Bank withdrawals-No full details were furnished –Addition was held to be justified.
AO noticed certain discrepancies in bank accounts . As the explanation was not satisfactory he made addition as cash credits. On appeal before the Tribunal the assessee took stand that its share broker had arranged fund from Andhra Bank, however, no such conclusive confirmation had been brought before Tribunal either from Andhra Bank or from broker. Tribunal held that explanations of assessee were full of discrepancies and contradictions and unsubstantiated hence addition made by revenue was justified.(AY. 1987-88 to 1990-91)
Dhanraj Mills (P.) Ltd. .v. ACIT (2015) 152 ITD 253 (Mum.)(Trib.)

S. 68 : Cash credits-Advance on account of sale of land- Identity and genuineness of transaction had been established –Addition was deleted.
The assesse received advance for sale of agricultural land .AO treated the said advance as cash credits. CIT (A) deleted the addition. On appeal by revenue Tribunal held that the assesse has produced documentary evidence like sale agreement mode of advance bank certificate certifying mode of payment by cheque and also declaration of creditors,thus,identity, and genuineness of transaction had been established addition on account of unexplained advances was rightly deleted by CIT (A) . Order of CIT (A) was affirmed . (AY. 2008-09)
Dr. Sunil Kumar Sharma .v. ITO (2014) 52 taxmann.com 437/(2015) 67 SOT 158 (Delhi)(Trib.)

S.69: Unexplained investments - ncome from undisclosed sources – Unaccounted sales-Sales accounted by sister concern- Double addition-Matter remanded. [S. 131]
In the statement recorded u/s 131 partners of the firm admitted excess stock . The Assessing Officer made the addition which was confirmed by CIT(A) and Tribunal. Appeal of assesse was dismissed by High Court. Before the Supreme Court the plea was raised of double addition. It was contended that the unaccounted sales was shown as income by its sister concern. Allowing the petition the Court held that if the unaccounted sales of the assesse have been shown as income by its sister concern on which tax has been paid by it ,the assessing authority to give an opportunity to the assesse to demonstrate as to whether the sister concern has already paid the tax on the income from the aforesaid sales and to accord benefit the assesse if that is shown. Matter was remanded.(AY. 1992-93, 1993-94)
Ashish Plastic Industries v. ACIT (2015) 373 ITR 45/ 278 CTR 107/ 120 DTR 235/231 Taxman 238 (SC)

S. 69 : Unexplained investments–Under invoicing of goods- Statement in the course of search-Addition was held to be justified.[S.132(4)]
A search was carried out at business premises of assessee-HUF in course of which it was found that cash deposits were made in bank accounts of HUF on day to day basis and subsequently, withdrawals were made for advancing loans to family members. Members of assessee-HUF made statements that said amount had been received on account of under-invoicing of sales and inflation of expenses. Assessing Officer, however, added amount in question to assessee's income by invoking provisions of section 69. Tribunal upheld said addition . On appeal dismissing the appeal of assessee the Court held that ; in absence of any evidence on record showing co-relation between under invoicing of goods and amount credited to bank accounts of assessee-HUF, impugned addition made by authorities below was to be confirmed.
Bhagwandas D. Vachhani .v. ACIT (2015) 231 Taxman 390 (Guj.)(HC)

S. 69 : Unexplained investments–Cost of construction- Addition on the basis of DVO was held to be not justified.
Assessing Officer made addition on difference between cost of construction of hotel building determined by DVO and as declared by assessee in his books of account. On appeal Tribunal found that assessee furnished valuation report from an approved valuer, whereas, DVO valued construction

at CPWD rates which were 30 per cent higher than market rate . Further, it was found that only 7.5 per cent of total valuation was allowed by DVO for personal supervision as against 15 per cent permissible under law and benefit of valuation of raw structure existing at site had not been allowed by DVO. On appeal by revenue dismissing the appeal the Court held that ;findings recorded by Tribunal were not found to be illegal or perverse hence deletion of addition was held to be justified.(AY. 2008-09)

CIT v. Rajesh Mahajan (2015) 231 Taxman 250 (P&H)(HC)

S. 69 : Unexplained investments –Purchase of property-No evidence to demonstrate that the assessee has paid more than the amount disclosed in the agreement- Addition on the basis of valuation report of AVO was held to be not justified. [S.132, 158BB]

Assessee purchased a property for a consideration of Rs. 3.70 lakh. During course of block assessment proceedings, Assessing Officer rejected transaction value and referred matter to AVO who in his report valued property at Rs. 10.65 lakh. Accordingly, addition of Rs. 6.95 lakh was made to assessee's income .Tribunal,set aside said addition. On appeal by revnue ; dismissing the appeal the Court held that; in absence of any incriminating evidence with respect to payment over and above reported amount, it could not be concluded that transaction relating to property in question was undervalued, and, therefore, impugned order deleting addition was to be confirmed .) (AY. 2001-02 to 2007-08)

CIT .v. Vivek Aggarwal (2015) 231 Taxman 392 (Delhi)(HC)

S.69: Unexplained investments-Income from undisclosed sources-Assessee purchasing shares and paying amount by cheque to share broker and amount credited to share broker - Bank account showing payment made to share broker after expiry of accounting year - Payment made by assessee fully supported by bank statement - Addition not sustainable.

Copies of the contract note, the ledger account of share broker, the letter from the Mumbai Stock Exchange and the bank statement had been furnished before the authorities. The assessee purchased 19000 shares of KD for Rs. 42,32,215 and 3100 shares of KD for Rs. 6,76,575. These amounts had been credited to the account of the share broker and debited to the share account in the books of the assessee on September 27, 1994, and September 30, 1994. These amounts had been paid by the assessee to the share broker on April 8, 1995. On verification of the bank account it was revealed that an amount of Rs. 49,08,825 had been debited to the assessee's account being withdrawn on April 8, 1995. It was, therefore, clear that the payment had been made to the share broker after the expiry of the accounting year, relevant to the assessment year 1994-95, that is, it had been paid in the month of April, 1995. There was no material on record to show that the amount had actually been paid by the assessee to the share broker at the end of the current year. The subsequent payment made in April, 1995, had not been found to be bogus or non-genuine. It was, therefore, clear that there was an outstanding liability of Rs. 49,08,825 on account of the amount payable against the purchase of shares. The Commissioner (Appeals) as well as the Assessing Officer had made the additions only on suspicion and surmises disbelieving the assessee's contention and presuming that no share broker would keep the amount outstanding for such a long time. The transaction of payment made by the assessee was fully supported by the bank statement. Thus, there was no reason to sustain the addition.(AY. 1994-1995)

CIT v. Chandela Trading Co. P. Ltd. (2015) 372 ITR 232(Cal.)(HC)

S. 69 : Unexplained investments-Income from undisclosed sources- Search and seizure-Finding based on evidence-No substantial question of law.[S.132, 260A]

Dismissing the appeal, the Court held that , the Tribunal based on the oral and documentary evidence had come to the conclusion that the addition of the amount to the income of the assessee was illegal and upheld the order of the Commissioner (Appeals) with elaborate discussion with reference to the evidence. Upon considering the order of the Tribunal it was clear that there was no perversity in appreciating the materials on record and in coming to the conclusion. The amount was not includible in the total income of the assessee.

CIT vs. Chandmal Sarawgi & Co. (2015) 373 ITR 309 (Gauhati)(HC)

S. 69 : Unexplained investments – Survey- Statement of vendor- Addition was held to be justified.[S.133A]

Assessee purchased a plot vide registered sale deed for consideration of Rs. 3.70 lakhs . During survey conducted under section 133A vendors declared sale consideration of said plot at Rs. 38 lakhs. On basis of sale consideration declared by vendors, location of plot and its possibility of usage as hotel, as well as auction rate disclosed by PUDA for similar plots, Assessing Officer opined that there was unexplained investment of Rs. 34.30 lakhs on part of assessee and made addition accordingly. On appeal dismissing the appeal of assesse the Court held that ;since statements of vendors, regarding higher sales consideration remained unrebutted and, moreover, assessee could not controvert findings recorded by Assessing Officer, impugned addition was to be confirmed.

Joginder Lal v. CIT (2015) 230 Taxman 552 (P&H)(HC)

S.69: Unexplained investments Jewellary-Explained source of jewellery in her possession being gifts received on occasion of her marriage from her father and father-in-law and Assessing Officer did not dispute same, invocation of section 69 was not justified.[S.158BB, 158BC]

A search was conducted upon the assessee. Consequent to the search, the assessee was called upon to explain the jewellery found in her possession.

The assessee had explained source of jewellery in her possession being gifts received on occasion of her marriage from her father and father-in-law.

The Assessing Officer did not accept the explanation and made an addition by invoking section 69.

On appeal, the Tribunal upheld the order of the Assessing Officer.

On appeal:

The explanation offered by the assessee to her possession of jewellery of Rs.6.57 lakhs was that the same was gifted to her on occasion of her marriage by her father and father-in-law. This explanation was not contested by the father and father-in-law. The authorities accepted the source of the jewellery in her possession. However, the Tribunal was not satisfied with the evidence produced by her father and father-in-law. This cannot be lead to be conclusion that the explanation offered by the assessee in respect of the jewellery in her possession is not satisfatory. In the normal course of human conduct, on occasions such as marriage the parents and parents-in-law of a bride do normally gift jewellery to the bride. On occasion such as this, it is not possible to expect the bride to ask for evidence of bills/invoices to support the purchase of the jewellery. One has to proceed on the basis that it is genuine. Thus her explanation that she received the jewellery as gifts from her father and father-in-law is sufficient explanation of the jewellery in her possession and the gifts are not denied by her father and father-in-law. Therefore, invocation of section 69 is completely unwarranted.

Komal Wazir (Mrs.) v. Dy. CIT (2015) 230 Taxman 563 (Bom.)(HC)

S.69: Unexplained investments –Assignment of right-No documentary evidence was filed-Addition was held to be justified.

Assessee an exporter was issued import licence under which it could import goods valued at Rs. 5 lakhs or it could assign same to others.Assessee claimed that aforesaid licence was assigned to UET, a partnership firm on receipt of a premium .However, since assessee failed to file necessary documentation before Chief Controller, Assessing Officer opined that assessee had sold imported goods in open market and earned unaccounted income and, hence, assessment was reopened. Where UET had not imported goods in question under any invoices and had in categorical terms, denied any import whatsoever, order of Tribunal sustaining additions in hands of assessee was justified.(AY. 1982-83)

Dalmia Cement (Bharat) Ltd. v. CIT (2015) 229 Taxman 170 (Delhi)(HC)

S. 69 : Unexplained investments –Reference to DVO- Assumption of order of Tribunal on assumption of DVO's report u/s 55A-Reference was made u/s 131 –Matter was set aside.[S.55A, 131]

Assessees had jointly purchased a property . AO made a reference under section 131 to DVO and on basis of his report, made addition under section 69. Tribunal held that report of Valuation Cell was binding on AO only CIT(A) had power to give relief. Assessee filed rectification application on ground that reference to DVO was made under section 131 and not under section 55A and, therefore,

it was not binding on AO. Court held that since entire premise and foundation of Tribunal's order was on assumption that DVO's report was under section 55A and once said premise and reasoning was erased, appeal before Tribunal required complete re-consideration and fresh hearing. Matter remanded. (AY. 1994-95)
Deepika Jain .v. ITAT (2015) 229 Taxman 53 (Delhi)(HC)

S. 69 :Unexplained investments–Jewellery-Search and seizure-Board circular- Since assessees had not offered any such explanation, Board Circular was not applicable and excess jewellery was rightly included as unexplained investment.[S.132, 153A]
AO made addition by treating excess jewellery found during search as unexplained investment. Assessees relied upon Board Instruction No. 1916 [F.No. 286/63/93-IT (INV.II)], dated 11-5-1994 for deletion of addition. Tribunal confirmed the addition. On appeal by assesse the Court held that ,clause (iii) of Board Instruction, dated 11-5-1994 which enables AO to exclude a larger quantity of jewellery and ornaments from seizure, will be applicable only if there are circumstances to come to conclusion that status of family and custom and practices of the community require holding of such jewellery. On the facts since assessees had not offered any such explanation, Board Circular was not applicable and excess jewellery was rightly included as unexplained investment. (AY. 2009-10)
V.G.P. Ravidas.v. ACIT (2015) 370 ITR 364/ 228 Taxman 93 (Mag.)(Mad.)(HC)
V.G.Selvaraj.v. ACIT (2015) 370 ITR 364/ 228 Taxman 93 (Mag.)(Mad.)(HC)

S.69:Unexplained investments-Income from undisclosed sources-Once gross profit rate applied, no further addition called for in respect of purchase and introduction of cash.
The assessee was found to have deposited cash in his bank account above the threshold limit, the Assessing Officer issued notice to the bank calling for a statement of the assessee's account. The Assessing Officer estimated the gross profit rate at 8 per cent. of the total receipts. The Assessing Officer also treated the initial investment of Rs. 5,00,000 as capital investment and added it to the total income of the assessee as unexplained investment in the business of steel rods. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal: it was held, allowing the appeal, (i) that the assessee himself accepted that the bank account was not disclosed to the Revenue and the credits in the bank account were turnover from sale of steel rods. In terms of that account, voluminous transactions had taken place. But the gross profit rate of 8 per cent. was on the higher side and it would be appropriate if it was restricted to 7 per cent. as against 8 per cent. (ii) That the addition of Rs. 5,00,000 made on account of initial investment was unwarranted and uncalled for, once the gross profit rate was applied. (AY. 2009-2010)
Amit Agarwal v. ITO (2015) 38 ITR 77(Raipur)(Trib.)

S.69:Unexplained investments-Bishop of church-Overriding title-Deposits in bank account in name of assessee belong to church-Account held in fiduciary capacity-Sums in account not taxable in his hands.[Indian Contract Act]
Held, dismissing the appeal, that the moment the assessee had executed the oath of affirmation, all movable and immovable properties, assets, bank deposits held by the assessee would belong to the church and not to him. When the assessee willingly executed an oath of affirmation in favour of the church it was binding on him as a contract under the Indian Contract Act and the assessee could not go beyond his oath of affirmation. Under the Indian Contract Act, this oath of affirmation can be enforced against the assessee by the Church. Therefore all landed properties, bank accounts, assets possessed by the assessee in his individual capacity would be the property of the church and the money received by him as bishop would go to the church by way of overriding title. If the money credited in the bank account of the assessee is not accounted in the books of account of the church or diocese addition could be made only in the hands of the church or diocese and not in the hands of the individual, who is the metropolitan/bishop of the church. Hence no part of the income would arise or accrue to the assessee. The Commissioner (Appeals) had rightly deleted the addition. (A Y. 2004-2005 to 2007-2008)
ITO v. Most Rev Dr. Joseph Marthoma (2015) 69 SOT 588 / 39 ITR 349(Cochin) (Trib.)

S. 69 :Unexplained investments-Cash deposit-Sale proceeds- Matter remanded.
Tribunal held that two documents , i.e. bank accounts of the assessee's proprietary concern and sale vouchers , were sufficient to show that the amount received was part of sale proceeds. The documents were not produced before the AO, CIT(A) or the Tribunal. Tribunal directed the assessee to produce documents and the Assessing Officer to examine documents and decide afresh .Matter remanded.(AY. 2009-2010)
ITO v. Bir Parkash Malhotra (2015) 39 ITR 536(Chad.)(Trib.)

S.69:Unexplained investments-Charitable Trust-Commission-No material to support-Addition was deleted.
Tribunal held that there is no material to support finding that commission paid to commission agent for arranging donations. No need for assessee to make payment by way of commission being charitable society. Addition made on basis of payment of commission to be deleted.(AY. 2003-2004, 2004-2005, 2009-2010)
Dy.CIT v. Indo Global Education Foundation (2015) 39 ITR 489(Chad.)(Trib.)
Sukhdev Sigh v.Dy.CIT(2015) 39 ITR 489(Chad)(Trib.)

S. 69 :Unexplained investments- Income from undisclosed sources--Cash deposits in bank-Source explained –Addition was held to be not justified.
Assessee recording remuneration received in cash in books of account and depositing it in bank. Amount cannot be considered as unaccounted money.(ITA No. 1388 to 1391/Mads/2008, dt. 26.09.2014) (AY. 2003-2004, to 2006-2007)
Dy.CIT .v. Yuvanshankar Raja (2015) 37 ITR 355 (Chennai) (Trib)

S.69: Unexplained investments--Difference between purchases as debited in trading account and in terms of certificates of tax collected at source--Failure by assessee to reconcile difference--Difference properly treated as unexplained investment.
The assessee, a trader in Indian made foreign liquor, debited an amount of Rs. 78,32,073 for purchase in its trading account. The certificates of tax collected at source showed that the assessee had made purchase for Rs. 92,63,349. Since the assessee did not reconcile or explain the difference, the Assessing Officer treated the amount of difference as unexplained investment under section 69 of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :
Held, dismissing the appeal, that admittedly, the assessee could not reconcile the difference between the purchases as debited in the trading account and that in terms of the certificates of tax collected at source before the Tribunal and the assessee himself admitted that he did not maintain any books of account. There was a clear cut difference between purchases and unaccounted purchases, which was not explained or accounted for. The Commissioner (Appeals) had rightly confirmed the addition as undisclosed purchases under section 69 of the Act. (AY. 2005-2006, 2006-2007)
Debasish Banerjee v. ITO (2015) 38 ITR 469 (Kol)(Trib)

S. 69 : Unexplained investments-Addition on account of bogus purchases-Assessee furnishing proof to substantiate purchases-Addition to be deleted.[S.143(3)
The assessee purchased certain materials from V. It produced all documents in the name of proprietor of V. The Assessing Officer rejected all documents and treated the purchases as bogus and added the sum in question to the income of the assessee. The Commissioner (Appeals) held that the assessee had produced all documentary evidence in support of the purchases from V and deleted the disallowance of bogus purchases. On appeal by the Department :
Held, dismissing the appeal, that the assessee furnished proof to substantiate the purchases made from V. Further the assessee contended that the entire purchases were made by bills and sales tax was paid. Even the payments to the party were made by account payee cheques as was evident from the copy of accounts of V in the books of account of the assessee. Therefore, the CIT(A) was right in deleting the addition. (AY. 2006-2007 to 2010-2011)
Dy.CIT .v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kolkata)(Trib.)

S. 69A: Unexplained money –Addition on the basis of email and seized documents was held to be not justified.[S.132, 158BB, Information Technology Act, 2000.S. 2(22AA), 2(*t*)]

A search was carried out at assessee's premises in course of which Assessing Officer seized certain letters/e-mail. On basis of said documents, Assessing Officer made addition to assessee's income on account of undisclosed salary.Commissioner (Appeals) as well as Tribunal deleted addition holding that in absence of any corroborative material to link such e-mail letter or its contents with assessee, inference that some additional income was earned by him by way of salary, was incorrectly drawn. Dismissing the appeal of revenue the Court held that; since document seized was both undated and unsigned and even taken at face value did not lead to further enquiry on behalf of Assessing Officer, impugned order of Tribunal deleting addition was to be confirmed . (AY. 2001-02 to 2007-08)

CIT .v. Vivek Aggarwal (2015) 231 Taxman 392 (Delhi)(HC)

S. 69A : Unexplained money–Survey-Retraction-After thought- Addition confirmed by the Tribunal was up held. [S. 132 (4), 133A]

The assessee was engaged in real estate and constructions activities. During the course of survey, the statement of one of its directors was recorded, wherein he disclosed that a sum of Rs.15 crores was an additional income outside the regular books of account and furnished details in this regard. Assessee did not disclose this income in his returns but declared it at time of survey. However, before Assessing Officer, assessee alleged that surrendered amounts were not voluntary and bona fide and in absence of any evidence or material in relation to surrender, surrender made during survey was also retracted. Howver the AO made addition on the basis of survey statement. On appeal, the Commissioner (Appeals) gave partial relief by taking into account the debit entries from the gross receipts, thus, reducing the total taxable income.On cross appeals the assessees appeal was rejected. On appeal dismissing the appeal the Court held that;

Instant Court opined that in the circumstances of the case, the approach of the Commissioner as affirmed by the Tribunal cannot be faulted. The discretion vested in the revenue authorities in content and character is not radically different in the case of a survey or in the case of search and seizure operations as is evident from a plain reading of sections 133A(3) and 132(4). Whereas the latter uses the expression 'may examine on oath', the former says that the authority 'may record statement which may be useful for, or relevant to' in proceedings under the Act. This provision, section 133A(3) had undergone further amendment inasmuch as the revenue is precluded from taking any action under section 133A(3)(*ia*) or section 133A(3)(*ii*), *i.e.*, from impounding and taking into custody any books of account, *etc.* or making an inventory of any cash, stock or other valuable item verified by him while acting under section 133 (2A) by the Finance Act 2 of 2014. The obvious inference, therefore, is that in respect of statement which fall in section 133A(3)(iii), the discretion to use it as a relevant material continues.

All that section 133A(3)(iii) enables to the authority concerned to do is to draw an adverse inference by relying upon materials which are seized, or dealt with in the course of the survey.

In the instant case, the admitted facts are that during the survey, a Director of the assessee - who was duly authorized to make a statement about the materials and the undisclosed income, did so on 20-11-2007. The Company did not retract it immediately or any time before the show-cause was issued to it. For the first time, in reply to the show-cause notice it faintly urged that the statement was not voluntary and sought to retract it. The reply, a copy of which has been placed on record, undoubtedly makes reference to some previous letter retracting the statement. The assessee urged that letter was written on 21-12-2007. However, the actual reply to the show-cause notice is silent as to the date. This itself casts doubt as to whether the retraction was in fact made or was claimed as an afterthought.

Furthermore, this Court is of the opinion that in the circumstances of the case both the Commissioner (Appeals) and Tribunal were correct in adding back the amount of Rs.63.33 lakhs after adjusting the expenditure indicated. The explanation given by the assessee, in the course of the appellate proceedings, that the surrender was in respect of a certain portion of the receipt which had remained undisclosed or that some parts of it were supported by the books, is nowhere borne out as a matter of fact, in any of the contentions raised by it before the lower authorities. For these reasons, this Court is of the opinion that no substantial question of law arises.

Raj Hans Towers (P.) Ltd. v. CIT (2015) 373 ITR 9 / 230 Taxman 567 (Delhi)(HC)

S. 69A : Unexplained money–Income-tax Officer cannot carry out functions of an authority under Central Excise Act and determine quantity of production or to utter a final word on intricacies of manufacturing process, that too, without referring to any reliable material – Deletion of addition by the Tribunal was upheld.[S. 145, 158BC]

Assessee was a manufacturer of Manganese alloys. Several registers were maintained and typical procedure was followed for manufacture of alloys. Said finished product was subjected to levy of excise duty. Assessing Officer doubted accuracy of figures mentioned in registers, and made addition. In appeal Tribunal deleted the addition. On appeal by revenue; dismissing the appeal the Court held that; An Income Tax Officer cannot carry out the functions of an authority under the Central Excise Act and arrogate to himself the power to determine the quantity of production, or to utter a final word on the intricacies of the manufacturing process, that too, without referring to any reliable material. The Assessing Officer, in the instant case, was totally unsuited for undertaking the activity of determining the exact production of the material, which itself involves very complicated procedures.

CIT v. Shri Girija Smelters (P.) Ltd. (2015) 230 Taxman 28 (AP)(HC)

S. 69A : Unexplained money–Search and seizure-Cash found- Reasobale- Deletition of addition was held to be justified.

Where Assessing Officer could not point out any defect or discrepancies in books of account and cash found during search with each member of family of assessee was reasonable, addition under section 69A on account of unexplained cash was not justified.(AY. 1999-2000 to 2005-06)

CIT v. Bimla Rani (Smt.) (2015) 230 Taxman 629 (P&H)(HC)

S. 69A : Unexplained money –Revision proceedings were dropped-Amount could not be taxed again.[S.263]

Where assessee had already discharged his tax liability in earlier year in respect of surrendered/recovered income and proceedings initiated under section 263 had admittedly been dropped, assessee could not be taxed once again for same income in relevant assessment year. Appeal is dismissed. (AY. 1989-90)

Dy. CIT v. Om Parkash Aggarwal (HUF) (2015) 228 Taxman 375 (Mag.)(P&H)(HC)

S.69A:Unexplained moneys-Bank deposits-Assessee failed to produce evidence in respect of source of amount found in saving bank account, addition was held to be justified.

AO found huge amount in saving bank account of assessees and accordingly, he made additions to their income. Assessee explained that they had collected money from friends and neighbours as advance for providing them different services of skilled workers for construction /renovation of building and that money was kept in saving bank account just to satisfy demand of their bankers. Even keeping amounts advanced by others was contended to be temporary adjustment, assessees had not withdrawn impugned amounts immediately after expiry of concerned financial year. The assesse failed to filed basic details even in respect of big amounts stated to have been received from others also not substantiate the that the amounts were received from whom and for what work they had promised to carry out. Addition made by the AO was confirmed.(AY. 2009 – 2010)

S. Muthukumar v. ITO (2015) 153 ITD 114 / 28 ITR 518 (Chennai)(Trib.)

S. 69B: Amounts of investments not fully disclosed in books of account–No cash element was involved in the sale of flat since the sale consideration as per the agreement was accepted by the appropriate authority.

The AO alleged that stamp duty paid by the Assessee on sale of flat was received in cash since in normally stamp duty was paid by the buyer in other sale transactions. The same was taxed as concealed income. The CIT(A) confirmed the addition and further held that the agreement value was Rs.2.11 crores whereas stamp duty value was Rs.2.44 crores. The Court held that there was no corroboration to the stand of the AO that there was cash element involved in the sale of flat. The value of sale consideration as per the agreement was accepted by the appropriate authority which issued the certificate of clearance under s. 269UL(3). (AY. 2003-04)

CIT v. Saffire Hotels (P) Ltd. (2015) 377 ITR 523/ 116 DTR 385 / 276 CTR 219 (Bom.)(HC)

S. 69B:Amounts of investments not fully disclosed in books of account-Investment-Cost of construction-Reference to Departmental Valuation Officer-Books of account furnished by assessee not rejected -Burden on Department to prove that there was understatement or concealment of income not discharged - Assessing Officer not empowered to refer matter to Departmental Valuation Officer.

The assessee constructed a multi-storeyed residential-cum-commercial complex and admitted a total cost of construction as Rs. 41,49,070. The Assessing Officer referred the matter to the Valuation Cell and the Department`s Valuer estimated the cost of construction of the complex at Rs. 58,09,000. The assessee's objections to the valuation report were considered by the Assessing Officer and, thereafter, the assessment order was passed treating the difference in valuation to the tune of Rs. 16,61,000. The Commissioner (Appeals) arrived at a cost of construction of Rs. 46,04,145, as against the estimate made by the Departmental Valuation Officer at Rs. 58,09,000. He directed the Assessing Officer to adopt Rs. 46,04,145 as the cost of construction and recompute the unexplained investment.

Held, allowing the appeal, that the books of account furnished by the assessee were never rejected. No explanation was called for from the assessee stating that there was concealment or understatement of amount in the books of account. The initial burden cast on the Department to prove that there was understatement or concealment of income had not been discharged and, therefore, the Assessing Officer was not empowered to refer the matter to the Departmental Valuation Officer or rely on such report. (AY. 1996-1997)

Family of SP S.S. SP. Subramanian Chettiar v. ITO (2015) 372 ITR 203/ 232 Taxman 723 (Mad.)(HC)

S. 69B : Amounts of investments not fully disclosed in books of account – Addition was held to be justified.

Assessee-company was dealing in medical equipments.Assessing Officer made addition on account of unexplained bank deposit in current account . On appeal dismissing the appeal of assesse the Court held that ; since amount in question had not been offered in original return as well as revised return, addition made by Assessing Officer was justified.(AY. 1996-97)

Kody Elcot Ltd. v. Jt.CIT (2015) 230 Taxman 420 (Mad.)(HC)

S.69B:Amounts of investments not fully disclosed in books of account-Additions made is allowed as deduction against the sale of property- Proviso of 69C cannot be applied to additions made under section 69B. [S.37(1), 69C, 142A]

Assessee-property developer filed valuation report of approved valuer in respect of construction cost of building at Rs. 1.13 crore while DVO valued same at Rs. 1.71crore. AO made addition on the basis of valuation Officer. On appeal, the Commissioner (Appeals) accepted the said valuation and held, the said difference in the amount was to be allowed as deduction under section 37(1).

On revenue's appeal, the Tribunal affirmed the findings of the Commissioner (Appeals) that any investment in a flat being stock-in-trade to the assessee was being held as capital account by the owner.On appeal dismissing the appeal of revenue the Court held that; Section 69C is not attracted to this case. The proviso to section 69C is confined to section 69C only. No such proviso is found in section 69B, therefore the proviso to section 69C cannot be read as proviso to section 69B. In terms of section 69B, the excess amount may be deemed to be the income of the assessee for such financial year. However, when the said excess amount is in the nature of the investment on building and the said building is sold to prospective purchaser, that investment is in the nature of expenditure. Therefore, that unexplained income has to be set off against the expenditure and the net tax could be '*nil*'. (AY. 2002-03)

CIT v. Suraj Towers, Vaishnavi Infrastructure (P.) Ltd. (2015) 230 Taxman 306 (Karn.)(HC)

S. 69B : Amount of investments not fully disclosed in books of account –Stock statement-Discrepancy- Addition was not justified.

Assessee-firm was engaged in business of export of silk. AO found that stock statement given by assessee to Bank and actual stock lying with it was not tallying, accordingly he made addition. Assessee produced all details of opening stock, purchase and sales made by it, etc. and same were neither disputed nor any discrepancy was found therein and apart from that AO did not produce any material to show that assessee had made purchases out of undisclosed income. Tribunal deleted the addition. On appeal by revenue the Court held that addition was not justified. Appeal of revenue was dismissed. (AY. 2004-05)

CIT v. Nangalia Impex (2015) 229 Taxman 460 (Guj.)(HC)

S. 69B :Amount of investments not fully disclosed in books of account –Addition was held to be justified.[S.158B]

In the search proceedings it was found that assessee-company advanced Rs. 17 lakh to its sister concern but said amount was not shown in balance sheet. Investment account of assessee's sister concern showed a different amount of Rs. 7.5 lakh. Advancing of Rs. 17 lakh came to light only from bank account of sister concern and material found during search and post search enquiry in block assessment, ,said advance was to be treated as unexplained investment .

Herald Publications (P.) Ltd. v. CIT (2015) 274 CTR 102 / 229 Taxman 103 (Bom.)(HC)

S. 69B :Amount of investments not fully disclosed in books of account-Parties cancelling agreement by marking cross on it--No proper identification of land-No evidence to prove payment in respect of purchased property-Suspicion cannot take place of legal proof-Addition based on cancelled document to be deleted.

Pursuant to a search and seizure operation a cancelled agreement pertaining to sale of a land was seized and the Assessing Officer held that the assessee purchased the land and made an addition under section 69B of the Income-tax Act, 1961. The Commissioner (Appeals) deleted the addition. On appeal:

Held, dismissing the appeal, that the copy of the agreement for sale seized during the course of search operation had been cancelled by the parties by marking a cross on it. The seized document did not have proper identification of the land proposed to be sold nor was there evidence to show that the document was acted upon by the concerned parties. The seller to the agreement for sale or the witnesses to it were not examined either by the search party or the Assessing Officer. The assessee admittedly was not a party to the agreement for sale and none of the persons related to the assessee was connected with the agreement. No evidence was found during the course of search to prove whether consideration was paid in respect of property purchased by the assessee. During the course of search also, no adverse material was found against the assessee to justify unaccounted investment made in property. The agreement was a cancelled document and did not relate to the assessee directly or indirectly. It was merely the suspicion of the Assessing Officer. Suspicion, whatsoever might be strong, could not take the place of legal proof. Therefore, the Commissioner (Appeals) was justified in deleting the addition. (AY. 2007-2008)

DY. CIT v. R. P. Import and Export P. Ltd. (2015) 38 ITR 436(Chd.)(Trib.)

S.69C:Unexplained expenditure–Bogus purchases-On facts addition was held to be justified.[S. 145]

Assessee-firm was engaged in business of zips for shoes etc. During assessment proceedings, Assessing Officer noted that assessee had made purchases from 'G' Enterprises. Proprietor of 'G' Enterprises admitted that he was running a dummy business and firm had not been functioning for last one year. Assessing Officer relying upon said statement, made addition to assessee's income under section 69C in respect of bogus purchases. Tribunal deleted the addition. On appeal by revenue ; allowing the appeal the Court held that ; In the present case, jugglery of book entries has been played. The order of Assessing Officer appears reasonable, where he has rightly made the additions pertaining to the bogus purchases. The impugned order passed by the Tribunal is set aside and the order passed by the Assessing Officer is restored. (AY. 2008-09, 2009-10)

ACIT v. Shanti Swarup Jain (2015) 230 Taxman 533 (All.)(HC)

S. 69C : Unexplained expenditure–Statement by additional private secretary- Addition was held to be not justified.

During the course of the assessment proceedings, on basis of a statement made by the Additional private secretary before enquiry officer. The AO made addition. On appeal, the CIT (A) allowed the appeal holding that the statements being relied upon by the revenue were not reliable.On revenue's appeal, the Tribunal upheld the order of the Commissioner (Appeals).On appeal:So far as alleged payment is concerned, the same on facts has been negatived by the CIT(A) and the Tribunal. The finding is not shown to be perverse as it is found that the findings of the CIT(A) and the Tribunal are based on evidence and the decision of the Delhi High Court in JMM MPs Bribery. The filing of charge-sheet by itself does not establish the payment by the assessee to 'S' and particularly when the proceedings itself resulted in acquittal of 'S' by the Trial Court. The State then preferred a revision application against the order of acquittal and the Delhi High Court in Criminal Revision Petition No. 33 of 2001 in *P.V. Narasimha Rao* v. *State* [2002] Crl. L J. 2401 dismissed the State's application. Thus, there being concurrent findings of fact which are not shown to be perverse, no substantial question of law arises. (AY. 1994-95)

CIT v. Videocon International Ltd. (2015) 229 Taxman 412/ 121 DTR 286 (Bom)(HC)

S. 69C : Unexplained expenditure –Revenue has not produced any documentary evidence-Deletion of addition was held to be justified.

In course of assessment proceedings, Assessing Officer noticed that assessee had taken certain loan in cash for purchase of property. He thus made addition in respect of interest paid on said loan in cash under section 69C .Tribunal set aside said addition .It was noted that revenue had not filed any document or material to show that in fact loan was taken and interest payment was made. Moreover, persons to whom interest was paid, their details and particulars were not ascertained verified and examined.in aforesaid circumstances, Tribunal was justified in deleting impugned addition. (AY. 2004-05)

CIT v. Home Developers (P.) Ltd. (2015)229 Taxman 254 (Delhi)(HC)

S. 69C :Unexplained expenditure-Unaccounted Sales-The entire unaccounted sales cannot be assessed as undisclosed income particularly if the purchases have been accounted for- Only the net profit on such unaccounted sales can be taken as income.[S.133A]

In a survey conducted under Section 133A, it was noticed that the assessee has not accounted some of the sales in the total turnover. In the statement recorded at the time of survey, the Director of the assessee declared a sum of Rs.35 lakhs should be offered to tax. However, thereafter, the assessee explained the statement on the basis that the director was not aware of the intricacies and implications of the statement made by him. The AO rejected the assessee's explanation and assessed Rs.35 lakhs. On appeal the CIT(A) held that the entire Rs. 35 lakhs cannot be assessed as income but only 4% thereof, being the profit earned on sales of Rs.35 lakhs, could be added to the net profit. This was upheld by the Tribunal. Before the High Court, the department relied on Section 69C and argued that the entire amount of undisclosed sales had to be brought to tax. HELD by the High Court dismissing the appeal:

We are unable to appreciate how Section 69C of the Act which speaks of unexplained expenditure is all at relevant for this appeal. We are not concerned with any unexplained expenditure in this case. In any view of the matter, the CIT(A) and Tribunal have came to the concurrent finding that the purchases have been recorded and only some of the sales are unaccounted. Thus, in the above view, both the authorities held that it is not the entire sales consideration which is to be brought to tax but only the profit attributable on the total unrecorded sales consideration which alone can be subject to income tax. The view taken by the authorities is a reasonable and a possible view. No substantial question of law arises.(ITA No. 303 of 2013, dt.4.02.2015)

CIT .v. HariramBhambhani (Bom.)(HC);www.itatonline.org

S. 69C : Unexplained expenditure – inflation of Salary and wages- Considering the facts addition was restricted to 8 lacs.

The Assessing Officer found amount of Rs. 86,57,239 as excess salary paid out of books and made addition of same.
On appeal, the Commissioner (Appeals) reduced the addition to Rs.43,69,886.
On second appealthe Tribunal held that the, assessee has successfully explained the existence of extra attendance cards in respect of the number of the cards found during the survey but however, at the same time if one consider the case of 26 persons who had left the job in the month of August and September 2008, full explanation is not available. Therefore, inflation of salary and wages cannot be ruled out totally. Considering overall explanation of the assessee and circumstances of the case, ends of justice would meet if a disallowance of Rs. 8 lakh is made in respect of inflation of salary and wages in this case.
Safari Bikes Ltd. v. JCIT (2014) 33 ITR 665 / 166 TTJ 216 / (2015) 67 SOT 257 (Chd.)(Trib.)

S. 69C:Unexplained expenditure-Bogus purchase-Hawala dealers-The expenditure on purchases could not be treated as unexplained, that the assessee was not given any opportunity to cross examine the parties despite the fact that assessee had specifically asked the same.[S.143(3)]
The AO had not doubted the genuineness of the purchase but had made the disallowance of Rs.1.37 crores invoking the provisions of 69C of the Act. AO made the addition as the supplier was declared a hawala dealer by the VAT Department. It was a good starting point for making further investigation and taken it to logical end. However, the addition is not sustainable as the purchases had been made through A/c payee cheques that were duly reflected in the bank statement of the assessee, the assessee had produced register of material purchased, copies of VAT returns, IT returns and confirmation of parties from whom the alleged purchases were supposed to have been made along with their MVAT reports, the assessee was engaged in the process of manufacturing equipment that required steel, the AO had at no stage countered the evidences produced by the assessee, he had not conducted any independent enquiry to establish that the purchases were not genuine, absence of delivery challan was not sufficient to prove non-genuineness of transaction. The assessee had produced the evidence of making payments from his bank account, the source of the said money was not doubted by the AO, the expenditure on purchases could not be treated as unexplained, that the assessee was not given any opportunity to cross examine the parties despite the fact that assessee had specifically asked the same. Appeal of revenue was dismissed. (ITA No. 5706/Mum/2013, dt. 13.05.2015) (AY. 2010-11)
ITO v. Paresh Arvind Gandhi (Mum.)(Trib); www.itatonline.org

S. 69C : Unexplained expenditure –Bogus purchases-Genuineness of Purchases - Addition based on assumptions and conjectures relying on statements of third parties u/s 133A, without affording an opportunity of cross - examination, is not sustainable in law. [S.37(1)]
Addition was made by the A.O by treating purchases of Rs. 24.73 Crs. As as bogus based on the statements of third parties recorded during survey proceedings u/s 133A. The CIT (A) issued a remand order to give opportunity to cross - examine the third parties, however, no opportunity was given for the same in remand proceedings. The CIT (A) and Tribunal held that in absence of any direct evidence showing the impugned purchases are not genuine, addition on the basis of a statement by third parties u/s 133A is not sustainable. (AY. 2006 - 07 , 2008 - 09)
Cannon Industries (P) Ltd .v. DCIT (2015) 167 TTJ 82 (Mum.)(Trib.)

S. 69C:Unexplained expenditure-Bogus purchases-Hawala dealers- Addition towards bogus purchases cannot be made solely on the basis of statements of seller before sales-tax authorities. The AO has to conduct own enquiries and give assessee opportunity to cross-examine the seller-Order of CIT(A) deleting the addition was confirmed.[S.143(3)]
The AO was not justified in making the addition on the basis of statements given by the third parties before the Sales Tax Department, without conducting any other investigation. In the instant case, the assessing officer has made the impugned addition on the basis of statements given by the parties before the Sales tax department. The CIT(A) has taken note of the fact that no sales could be effected without purchases. He has further placed reliance on the decision rendered by Hon'ble Gujarat High Court in the case of CIT Vs. M.K. Brothers (163 ITR 249). The decision rendered by the Tribunal in

the case of ITO Vs. Premanand (2008)(25 SOT 11)(Jodh), wherein it has been held that where the AO has made addition merely on the basis of observations made by the Sales tax dept and has not conducted any independent enquiries for making the addition especially in a case where the assessee has discharged its primary onus of showing books of account, payment by way of account payee cheque and producing vouchers for sale of goods, such an addition could not be sustained. The CIT(A) has appreciated the contentions of the assessee that he was not provided with an opportunity to cross examine the sellers, which is required to be given as per the decision of Hon'ble Kerala High Court in the case of Ponkunnam Traders (83 ITR 508 & 102 ITR 366). The CIT(A) has analysed the issue in all angles and applied the ratio laid down by the High Courts and Tribunals in deciding this issue. Therefore, the Hon'ble ITAT Appeal held that, of revenue was is not sustained correct. (ITA no. 5920/Mum/2013, dt. 17.03.2015) (AY. 2010-2011)
ITO v. Deepak Popatlal Gala (Mum.)(Trib.);www.itatonline.org

S.69C:Unexplained expenditure-Assessment- Bogus purchases-Hawala dealers-AO is not entitled to treat all purchases as bogus merely because sales-tax department has called the seller a "Hawala dealer". The AO ought to have verified the bank details of the assessee and the seller and other evidence before treating the purchases as bogus.[S.44D,143(3)]
The AO has made the addition as some of the suppliers of the assessee were declared Hawala dealer by the Sales tax Department. This may be a good reason for making further investigation but the AO did not make any further investigation and merely completed the assessment on suspicion. Once the assessee has brought on record the details of payments by account payee cheque, it was incumbent on the AO to have verified the payment details from the bank of the assessee and also from the bank of the suppliers to verify whether there was any immediate cash withdrawal from their account. No such exercise has been done. The CIT(A) has also confirmed the addition made by the AO by going on the suspicion and the belief that the suppliers of the assessee are Hawala traders. The Tribunal find find that no effort has been made to verify the work done by the assessee from the Municipal Corporation of Greater Mumbai. The submissions of the Counsel that if there were no purchases, the assessee would not have been in a position to complete the civil work. On civil contract receipts of Rs. 32.05 crores, the assessee has shown gross profit at 14.2% and net profit at 9.72%. Even if for the sake of argument, the books of accounts are rejected, the profit has to be computed on the sales made by the assessee U/s. 44AD of the Act, the presumptive profit in case of civil contractors is 8% and in case of a partnership firm, a further deduction is allowed in respect of salary and interest paid to the partners. The ratio analysis of the profitability is also in favour of the assessee. Hence the Honorable ITAT held that the purchases are supported by proper invoices duly reflected in the books of account. The payments have been made by account payee cheque which are duly reflected in the bank statement of the assessee. There is no evidence to show that the assessee has received cash back from the suppliers. The additions have been made merely on the report of the Sales tax Department but at the same time it cannot be said that purchases are bogus.(ITA No. 2959/Mum/2014, dt. 28.11.2014) (AY. 2010-11)
Ramesh Kumar & Co. v. ACIT (Mum.)(Trib.);www.itatonline.org

S. 69C : Unexplained expenditure-Bogus purchases-Hawala dealers- Fact that suppliers names appear in the list of hawala dealers of the sales-tax dept and that assessee is unable to produce them does not mean that the purchases are bogus if the payment is through banking channels & GP ratio becomes abnormally high. [S.143(3)
The Tribunal set out the finding of CIT(A) as under ; "I have also taken into consideration the decision of jurisdictional High Court and ITAT i.e. The CIT v. NikunjEximp Enterprises Pvt, Ltd. Appeal No ITA No. 5604 of 2010 (Hon. Mumbai High Court) and Balaji Textile Industries (P) Ltd. Vs Income Tax Officer (1994) 49 lTD (Bom) 177. While in the case of NikunjEximp Enterprises, the Hon'ble Bombay High Court in its latest judgment has held that once the Sales are accepted, the Purchases cannot be treated as ingenuine in those cases where the appellant had submitted all details of purchases and payments were made by cheques, merely because the sellers/suppliers could not be produced before the A.O. by the assessee. Further, I have also gone through the judgment in case Balaji Textile Industries (P) Ltd. Vs Income Tax Officer by Hon. ITAT, Mumbai (1994) 49 lTD (BOM) 177 which was made as long back as 1994 and which still holds good in which was held that- "Issuing printed bills for selling the textile goods to the assessee-company at Bhiwandi was not a

conclusive proof but it was a prima fade proof to arrive to a correct conclusion that the assessee purchased certain goods from certain parties at Bhiwandi. The assessee sold those goods to 'S' and adjusted the sale proceeds against the loan taken by it from that party. The assessee's books of account and the books of account of 'S' in which the entries of sale and adjustment were made, could not be discarded merely by saying that they were not genuine entries though neither the Assessing Officer nor the Commissioner (Appeals) opined anything in respect of those entries. Further, the purchase of the goods in the month of March 1985 did not make any difference. The assessee might not have carried on any business activities prior to March 1985, but that did not mean that the assessee was not entitled to carry on the business activity in March 1985. They could not be compelled to carry on the business activity throughout the year. There were no good reasons to disbelieve the sales made by the assessee to 'S'. No sales were likely to be effected if there were no purchases. A sale could be made if the goods were available with the seller. From all these facts on record, a reasonable and convincing inference which could be drawn, was that the assessee purchased the textile goods, sold them and adjusted the same towards the loan taken by it. Therefore, the assessee was entitled to get the entire deduction." I have also taken into consideration, the G.P Ratio/G.P. Margin of the appellant in the previous A.Y. as well as subsequent Assessment Year. If the addition made by the A.O. is accepted, then G.P. Ratio of the appellant during the present A.Y.will become abnormally high and therefore that is not acceptable because it onus of the A.O. by bringing adequate material on record to prove that such a high G.P. ratio exists in the nature of business carried out by the appellant. Further, it has to be appreciated that (i)Payments were through banking channel and by Cheque, (ii) Notices coming back, does not mean, those Parties are bogus, they are just denying their business to avoid sales tax/VAT etc, (iii) Statement by third parties cannot be concluded adversely in isolation and without corroborating evidences against appellant ,(iv) No cross examination has been offered by AO to the appellant to cross examine the relevant parties (who are deemed to be witness or approver being used by AO against the appellant) whose name appear in the website www.mahavat.gov.in and (v) Failure to produce parties cannot be treated adversely against appellant. "While observing the finding of the CIT(A) the Tribunal dismissed the appeal of revenue.(ITA No. 5246/Mum/2013, dt. 05.03.2015) (AY. 2010-11)

ACIT v. RamilaPravin Shah (Mum.)(Trib.); www.itatonline.org

S. 70 : Set off loss –One source against income from another source - Same head of income – Colourable device-Short term capital gains, capital loss claimed by assessee as against short term capital gains was to be disallowed.[S.45]

Assessee earned short-term capital gains from sale of shares in one transaction and in another transaction purchased shares of its subsidiary at premium in one breadth and sold them for a pittance rate of less than a paisa in other breadth, thereby incurring long-term capital loss . Transaction of subsidiary's share sale was entered on immediate next day of accruing short-term capital gains - Further, after sale of subsidiary's shares, assessee infused a capital of Rs. 95 crores into subsidiary claiming to meet subsidiary's RBI norms requirement. High Court by impugned order held that assessee's long-term capital loss claimed on sale of subsidiary's shares was a 'colourable device' to avoid tax on windfall short-term capital gains earned by assessee in earlier transaction and hence was to be disallowed. Appeal of revenue was allowed. (AY. 2000-01)

CIT .v.Wipro Ltd. (2014) 50 taxmann.com 421/ 227 Taxman 244 (Mag.) (Karn.)(HC)

Editorial: Special Leave Petition filed against impugned order is granted; Wipro Ltd. v. CIT (2015) 231 Taxman 228 (SC)

S.70 : Set off of loss - One source against income from another source - Same head of income - Though the LTCG on sale of equity shares (subject to STT) is exempt from tax u/s 10(38), the long-term capital loss on sale of such shares can be set-off against the taxable LTCG on sale of another asset.[S.10 (38),45, 71]

(i) The main issue is whether Long term capital loss on sale of equity shares can be set off against Long term capital gain arising on sale of land or not, as the income from Long term capital gain on sale of such shares are exempt u/s. 10(38). The nature of income here in this case is from sale of Long term capital asset, which are equity shares in a company and unit of an equity oriented fund which is chargeable to STT. First of all, Long term capital gain has been defined under section 2(39A), as

capital gains arising from transfer of a Long term capital asset. Section 2(14) defines "Capital asset" and various exceptions and exclusions have been provided which are not treated as capital asset. Section 45 is the charging section for any profits or gain arising from a transfer of a capital asset in the previous year i.e. taxability of capital gains. Section 47 enlists various exceptions and transactions which are not treated as transfer for the purpose of capital gain u/s. 45. The mode of computation to arrive at capital gain or loss has been enumerated from sections 48 to 55. Further sub section (3) of section 70 and section 71 provides for set off of loss in respect of capital gain.

(ii) The whole genre of income under the head capital gain on transfer of shares is a source, which is taxable under the Act. If the entire source is exempt or is considered as not to be included while computing the total income then in such a case, the profit or loss resulting from such a source do not enter into the computation at all. However, if a part of the source is exempt by virtue of particular "provision" of the Act for providing benefit to the assessee, then in our considered view it cannot be held that the entire source will not enter into computation of total income. In our view, the concept of income including loss will apply only when the entire source is exempt and not in the cases where only one particular stream of income falling within a source is falling within exempt provisions.

(iii) Section 10(38) provides exemption of income only from transfer of Long term equity shares and equity oriented fund and not only that, there are certain conditions stipulated for exempting such income i.e. payment of security transaction tax and whether the transaction on sale of such equity share or unit is entered into on or after the date on which chapter VII of Finance (No.2) Act 2004 comes into force. If such conditions are not fulfilled then exemption is not given. Thus, the income contemplated in section 10(38) is only a part of the source of capital gain on shares and only a limited portion of source is treated as exempt and not the entire capital gain (on sale of shares). If an equity share is sold within the period of twelve months then it is chargeable to tax and only if it falls within the definition of Long term capital asset and, further fulfils the conditions mentioned in subsection (38) of section 10 then only such portion of income is treated as exempt. There are further instances like debt oriented securities and equity shares where STT is not paid, then gain or profit from such shares are taxable.

(iv) Section 10 provides that certain income are not to be included while computing the total income of the assessee and in such a case the profit or loss resulting from such a source of income do not enter into computation at all. However, a distinction has been drawn where the entire source of income is exempt or only a part of source is exempt. Here it needs to be seen whether section 10(38) is source of income which does not enter into computation at all or is a part of the source, the income in respect of which is excluded in the computation of total income. For instance, if the assessee has income from Short term capital gain on sale of shares; Long term capital gain on debt funds; and Long term capital gain from sale of equity shares, then while computing the taxable income, the whole of income would be computed in the total income and only the portion of Long term capital gain on sale of equity shares would be removed from the taxable income as the same is exempt u/s 10(38). This precise issue had come up for consideration before the Hon'ble Calcutta High Court in Royal Calcutta Turf Club v. CIT (1983) 144 ITR 709 (Cal).

(v) Though in CIT vs. Hariprasad & Company Pvt. Ltd**.** (1975) 99 ITR 118 (SC), the Supreme Court opined that if loss was from the source or head of income not liable to tax or congenitally exempt from income tax, neither the assessee was required to show the same in the return nor was the Assessing Officer under any obligation to compute or assess it much less for the purpose of carry forward, the ratio and the principle laid down by the Apex Court would not apply here in this case, because the concept of income includes loss will apply only when entire source is exempt or is not liable to tax and not in the case where only one of the income falling within such source is treated as exempt. The Hon'ble Apex Court on the other hand, itself has stated that if loss from the source or head of income is not liable for tax or congenitally exempt from income tax, then it need not be computed or shown in the return and Assessing Officer also need not assess it. This distinction has to be kept in mind. Hon'ble Calcutta High Court in Royal Turf Club have discussed the aforesaid decision of the Hon'ble Supreme Court and held that the same will not apply in such cases.

(vi) Thus, we hold that section 10(38) excludes in expressed terms only the income arising from transfer of Long term capital asset being equity share or equity fund which is chargeable to STT and not entire source of income from capital gains arising from transfer of shares. It does not lead to exclusion of computation of capital gain of Long term capital asset or Short term capital asset being

shares. Accordingly, Long term capital loss on sale of shares would be allowed to be set off against Long term capital gain on sale of land in accordance with section 70(3).(ITA No. 3317/Mum/2009 & 1692/Mum/2010, dt. 10.06.2015.) (AY. 2007-08)
Raptakos Brett & Co. Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 71 : Set off of loss-Under same head- F&O loss – treated as short term capital loss–Fresh claim during assessment proceedings – set off against business income was held to be allowable though no revised return was filed.[S.139]
In the ROI, the Assessee claimed short term capital loss from Futures & Options (F&O) transactions. The AO treated the same as business loss as against short term capital loss disclosed by the assessee. The assessee claimed that, if at all, the department sought to treat F&O transaction as business income, then loss may be allowed to be adjusted against other income of same year u/s 71(1). The AO rejected the claim on the ground that the Assessee ought to have claimed the same by way of a revised return.
Before the Tribunal, the counsel for the Assessee submitted that the Assessee was not making any fresh claim, but it was a natural outcome, if the AO treated F&O losses as business loss, then he was required to give full effect and to give set off with the income from other heads of income of the current year as per the provisions of the Act. Allowing the claim of the assessee, the Tribunal held that it was the duty of the AO, while completing the assessment, to compute the income in accordance with the provisions of the Act, and if while computing the income there was a loss, which needs to be set off within the statutory provisions then the same had to be given effect to. Further held, that there was no reason that the Assessee could not be allowed to claim the set off of loss from F&O transaction with other heads of income, simply because he has not filed the revised return.(ITA No. 923/M/2012 dt. 26/11/2014) (AY. 2008-09)
ACIT .v. Shri Nadir B. Ajani (Mum.)(Trib.); www.ctconline.org

S. 71 : Set off of loss-One head against income from another - Futures & Options (F&O) loss– Treated as short term capital loss – Fresh claim during assessment proceedings – Set off against business income.[S. 143(3)]
In the ROI, the assessee claimed Rs.30,60,843 as short term capital loss from Futures & Options (F&O) transactions. The AO treated the same as business loss as against short term capital loss disclosed by the assessee. The assessee claimed that, if at all, the department sought to treat F&O transaction as business income, then loss of Rs.30,60,843 may be allowed to be adjusted against other income of same year u/s 71(1). The AO rejected the claim on the ground that the Assessee ought to have claimed the same by way of a revised return.
Before the Tribunal, the counsel for the Assessee submitted that the Assessee was not making any fresh claim, but it was a natural outcome, if the AO treated F&O losses as business loss, then he was required to give full effect and to give set off with the income from other heads of income of the current year as per the provisions of the Act. Allowing the claim of the assessee, the Tribunal held that it was the duty of the AO, while completing the assessment, to compute the income in accordance with the provisions of the Act, and if while computing the income there was a loss, which needs to be set off within the statutory provisions then the same had to be given effect to. Further held, that there was no reason that the Assessee could not be allowed to claim the set off of loss from F&O transaction with other heads of income, simply because he has not filed the revised return. (ITA No. 923/M/2012 dt. 26/11/2014,)(AY. 2008-09)
ACIT .v. Nadir B. Ajani, (Mum.)(Trib.) www.ctconline.org

S. 72 : Carry forward and set off of business losses--Interest income from the business of leasing , financing ets-Brought forward unabsorbed business loss and depreciation are to be set off against the assesses income.[S.28(i), 56]
Interest income earned by the assessee from the business of leasing , financing etc is taxable as business income notwith standing the fact that the RBI has refused to register the assessee as an NBFC and therefore , brought forward unabsorbed business loss and depreciation are to be set off against the assessed income.(AY. 2006-07)

Preimus Investment and finance Ltd. v. DCIT(2015) 171 TTJ 794 (Mum.)(Trib.)

S. 72 :Carry forward and set off of business losses -Genuineness of transactions-Failure to furnish evidence of non service of notice-Order was set aside and matter was to be remanded back.[S. 131]

Assessee Company was carrying out various business activities namely, insurance agency, marketing of products, and trading in various commodities. In relevant year, assessee claimed set off of loss incurred in trading activities of commodities against income earned from insurance and marketing activities. A.O. having found that notices issued to some of parties with whom assessee allegedly carried out trading transactions of commodities returned undelivered, opined that transactions in question were sham, rejected assessee's claim for set off of loss. The observation of authorities was premature with regard to the finding of non-existence of the parties because the transaction of assessee was through banking channel. The details of parties including telephone, PAN, TIN were available on record. A.O. did not furnish assessee any material of non-service of notice to various parties and in such a situation, no adverse inference could be drawn particularly having regard to fact that AO had option for calling attendance of those parties u/s. 131. Order passed by AO was set aside and remanded back for disposal afresh. (AY. 2009 – 2010)

Rajdeep Marketing (P.) Ltd. v. ITO (2015) 152 ITD 463 (Pune)(Trib.)

S. 73:Losses in speculation business-Share broker-Trading in derivatives-Loss could not be held as speculative in nature.[S. 43(5)]

Where assessee-company was engaged in broking and trading in stocks and securities, loss suffered by assessee on account of mis-deals on purchase and sale of shares by trading in derivatives in a recognized stock exchange could not be speculative loss and same was to be set off as business loss. (AY. 2008-09)

Anush Shares & Securities (P.) Ltd.v. ACIT (2015) 68 SOT 359 (URO)(Chennai)(Trib.)

S.73:Speculative transaction--Speculation loss-Loss on account of transactions in shares and transactions in futures and options segment-Explanation to section 73 deeming provision--Applicability of section 73 to proviso to section 43(5) to be examined-Matter remanded.[S. 43(5)]

The assessee incurred a loss in the cash segment of equity market and claimed set off against the profits earned in the futures and options segment. The Assessing Officer held that the Explanation to section 73 of the Act would override the proviso to section 43(5) of the Act and therefore, the loss incurred in the cash segment of share trading should be treated as "speculation loss" and thus rejected the claim of the assessee. The Commissioner (Appeals) confirmed this. On appeal:

Held, that the Explanation to section 73 of the Act was a deeming provision and hence, its applicability had to be examined. Therefore, the Assessing Officer was to examine the matter afresh.(AY. 2008-2009)

Centrum Broking Ltd. v. ACIT (2015) 39 ITR 23 (Mum.)(Trib.)

S. 73 :losses in speculation business-Derivatives- Brought forward loss from business of dealing in derivatives incurred in assessment years prior to 2006-07 can be set off against profit of the same business from AY. 2006-07 onwards.

During the assessment year 2008-09 the assesse earned profit from transactions carried out in derivatives being futures and options. The assesse claimed set off of loss of earlier years incurred on derivatives transactions out of profit of transactions of similar nature in the current year.AO held that forward contract speculation loss cannot be set off against profit of a non speculative business of current year. View of AO was confirmed by CIT (A). On appeal the Tribunal held that classification of business for limited purpose of set off of past losses , in to speculative and non-speculative is to be done on uniform basis and losses incurred in the same business in earlier year assessment years are to be treated as eligible for set off against profit of the same business in the subsequent years. Accordingly the claim of assessee was allowed.(ITA no 2295 /Mum/2012 dt 2-12-2014(AY. 2008-09)

Arvind Kanji Chheda .v.ACIT(2015) BCAJ –Feb- 21 (Mum.)(Trib.)

S. 74 : Losses under the haed Capital gains–Amalgamation and demerger- Benefit of set-off and carry forward of losses under head 'capital gains' in case of amalgamation and demerger is not available.[S. 72A]

Issue before the Tribunal was whether amalgamated company should be allowed to set-off and carry forward of the losses computed under the head "capital gains" which had arisen to the erstwhile amalgamating companies under the provisions of section 74. Tribunal held that From the perusal of section 74, it is seen that the loss under the head "capital gain" is allowable to an assessee alone. There is nothing mention about the situation and the condition under which such a loss is allowed to be set-off and carried forward in the case of amalgamation, that is, to allow loss or set off loss of one assessee which has merged with another assessee. Likewise, in section 72, the provisions of carried forward and set-off of losses computed under the head "profit and gains of business and profession" of an assessee has been given. Here also, there is no such provision relating to carried forward and set-off of business loss in the cases of amalgamation or demerger.

In order to cover such benefit of carried forward and set-off of accumulated losses under the head 'business income', specific provision was brought in the statute by Finance Act, 1977, by way of insertion of section 72A. Such a provision was brought to overcome the difficulty in the cases where, if a business carried on by one assessee is taken over by another, then the unabsorbed depreciation and business losses could not be set-off and carried forwarded under the scheme of amalgamation within the ambit of section 72. Therefore, the entire code of section 72A, was brought in the statute for extending or relaxing the provisions relating to carried forward and set-off of accumulated business losses and unabsorbed depreciation allowance in the case of amalgamation of companies. A complete code was enacted and certain terms and conditions were laid down under which such a benefit could be given under the scheme of amalgamation. The said provision of section 72A was amended from time to time so as to include certain more conditions or to relax such conditions. However, the entire code of section 72A was only restricted to carried forward of accumulated losses and unabsorbed depreciation which are to be set-off while computing the income under the head "profit and gain of business or profession" and not for any other head of income including losses computed under the head 'capital gains or speculation business'. Section 72A, envisages several terms and conditions and the circumstances under which the business loss or depreciation is allowed to be set-off or carried forward. Specific rule 9C under Income-tax Rules, 1962, has also been enacted for this purpose. Thus, once the legislature has enacted a different code all together for a specific purpose and intention, then such a code laying down the terms and conditions and the circumstances, cannot be imported or read into other general provisions or sections.

The intention of legislature for enacting a particular statute or provision has to be kept in mind while interpreting a particular provision of the Act. In the cases of amalgamation wherever the statute has provided certain conditions or benefits or restrictions, the same has been provided categorically. For *e.g.*, section 47, italic dealing with transactions not regarded as transfer, has provided specific clauses (vi) to (vid) for the cases of amalgamation and demerger. It is not the role of the courts specifically the Tribunal to read such a specific provisions into general provisions. The casus omissus cannot be supplied by the courts *i.e.*, the Tribunal is not empowered to read down the provision of section 72, by importing the provisions of section 72A, into the said section. What is apparent from the clear language of the section and intention of the legislature has to be inferred and is to be applied. Had the legislature intended to allow set-off and carry forward of loss of capital gains in the case of amalgamation or demerger, the legislature could have provided specifically. Thus, section 74 cannot be read or interpreted so as to give benefit of set-off and carried forward of losses under the head 'capital gains' in the case of amalgamation and demerger, *sans* any specific provision therein. No case laws to the contrary has been brought by the assessee. Thus, the view taken by the AO and confirmed by the CIT(A) is legally correct. (AY. 2006-07)

Clariant Chemicals (I) Ltd. .v. Addl.CIT (2015) 152 ITD 191 (Mum.)(Trib.)

S. 79 : Carry forward and set off losses - Change in share holdings - Companies which public are not substantial interested –Amalgamation-Where there was no change in shareholding pattern on date of allotment of shares, set off of business loss would be allowed.

Assessee-company claimed business loss pursuant to an amalgamation. However, Assessing Officer disallowed same by holding that there was a change in shareholding pattern of assessee-company.

Dismissing the appeal of revenue the Court held that; where there was no change in shareholding pattern on date of allotment of shares, set off of business loss would be allowed. (AY. 1990-91)
Dy.CIT v. Chemstar Organics (India) (P.) Ltd. (2015) 230 Taxman 197 (Guj.)(HC)

S. 80 : Return for losses–Return was filed after expiry of time extended by Assessing Officer-Not entitle to carry forward and set off business loss.[S.72, 73, 74, 139(4)]
Assessee filed returns declaring certain income after expiry of time extended by Assessing Officer for filing return. Assessments were, however, made at net loss. Assessee company was not entitled to carry forward and set off business loss determined and assessed by Assessing Officer.(AY.1985-86, 1986-87)
Peerless General Finance & Investment Co. Ltd. .v. CIT (2015) 231 Taxman 714 (Cal.)(HC)
Editorial: Refer Peerless General Finance & Investment Co. Ltd. v. CIT (2003) 85 ITD 215 (TM)(Kol.)(Trib.)

S.80G:Donation-Renewal-Objects religious in nature-Concession was provided to all persons irrespective of their caste, creed or religion- Entitled exemption.[S. 80G(5)]
Renewal of approval denied to institution on ground objects religious in nature. Tribunal finding training, medical care and concession provided to all persons irrespective of their caste, creed or religion. Findings not shown to be illegal or perverse in any manner. Assessee is entitled to exemption. (AY. 2012-2013)
CIT .v. Christian Medical College (2015) 374 ITR 17 (P&H) (HC)
Editorial: Order in Christian Medical College v. CIT (2013) 27 ITR 308 (Chd.)(Trib.) is affirmed.

S. 80G : Donation-It is mandatory that if application for approval under section 80G is not disposed off within six months from date on which application is made, Commissioner has no jurisdiction to pass an order either granting approval or rejecting it-Matter was seta side. [S. 2(15); 11AA]
The assessee-trust, running hostel for students was treated as a charitable purpose and was given section 80G benefit up to 31-3-2008.It filed application for renewal of the recognition granted under section 80G on 31-3-2008.The DIT(E) rejected the renewal on the ground that the trust's activity did not come within the scope of section 2(15) as amended from 1-4-2009.On appeal, the Tribunal upheld the order of the DIT (E).
On appeal to the High Court, the assessee contended that the order of the DIT (E) was passed beyond period prescribed under the law and, therefore, was invalid. On appeal allowing the appeal the Court held that; from the provisions of rule 11AA, it is clear that the Commissioner shall pass an order either granting the approval or rejecting the application within six months from the date on which such application was made. Therefore, it is mandatory that if the application is not disposed off within six months from the date on which the application is made, the Commissioner has no jurisdiction either to pass an order granting the approval or rejecting it. It is not in dispute that the Commissioner did not pass any order within the period prescribed. He has passed an order, beyond the period prescribed under the aforesaid rule. Therefore, on the date the order was passed, the Commissioner had no jurisdiction. Therefore, it is an order passed without jurisdiction.Therefore, the impugned orders passed by both the authorities are set-aside. However, liberty is reserved to the assessee to make a fresh application for benefit of section 80G. If such an application is made, the authority shall consider the said application on merits.(AY. 2009-10)
Maheshwari Foundation .v. DIT (2015) 231 Taxman 1 (Karn.)(HC)

S. 80G : Donation –At stage of registration, extent and nature of activities were not required to be examined, recognition under section 80G(5) was to be granted to assessee. [S.12AA, Form No 10G]
The assessee-Trust had made an application, in form No. 10G for approval u/s 80G(5). The main objects of the trust as per the trust deed are educational activities. In order to verify the application, the trust was asked to explain as to how its activities are in accordance with its objects.
It was submitted that the main activity of the trust was Arthik Unnati Scheme. On going through the details produced, it was seen that the trust was providing unskilled manpower, specially security

personals to some co-operative banks. The trust was asked to provide details of Arthik Unnati Scheme and to explain as to how that activity was a charitable activity. Thereafter, the trust had made written submissions on the issue. Thereafter, after considering the relevant material on record, the application made by the assessee trust seeking approval under section 80G(5), was rejected.
Against the said order, the assessee trust had preferred an appeal before the Tribunal which was allowed..On appeal by revenue , dismissing the appeal te Court held that; since at stage of registration, extent and nature of activities were not required to be examined, recognition under section 80G(5) was to be granted to assessee.
CIT v.Arvindbhai Maniar Charitable Foundation (2015) 231 Taxman 908 (Guj.)(HC)

S. 80G : Donation–At time of granting approval what is to be examined is object of trust- Order of Tribunal was affirmed.
Assessee-trust filed an application for recognition under section 80G(5). Revenue authorities rejected said application on ground that assessee failed to spend 85 per cent of amount received in earlier assessment years. Tribunal, however, allowed assessee's application On appeal the Court held that at time of granting approval under section 80G, what is to be examined is object of trust and so far as aspect of income is concerned, same can be very well examined by Assessing Officer at time of framing assessment, therefore, impugned order of Tribunal was to be confirmed .
CIT v. Pujya Shri Jalarambapa & Matushri Virbaima Charitable Trust (2015) 229 Taxman 534 (Guj.)(HC)

S. 80G :Donation-Conditions precedent – uplifment of Sikh community-Not entitled to approval.[S.80G(5)]
Assessee society was created only for upliftment of Sikh community by way of imparting various types of education. A non-Sikh could not become a member of General Council of assessee society.It was held that since assessee society was not doing any charitable work for upliftment of general community, it could not be entitled to approval under section 80G(5).
Sangat Sahib Bhai Pheru Sikh Educational Society v. CIT (2014) 103 DTR 316 / 162 TTJ 763 / (2015) 67 SOT 306 (Asr.)(Trib.)

S. 80G : Donation for charitable purpose-If objects charitable no right to deny approval--Registration under section 12AA is sufficient proof—Rejection of application for grant of approval was held to be not proper.[S.12AA]
The assessee, registered under the Andhra Pradesh Societies Registration Act, 2001, was granted registration under section 12AA of the Act. It filed an application in form 10G for approval under section 80G(5)(vi) of the Act. The DIT(E) noted that at the time of granting of registration, the assessee had stated that the society was in the process of acquiring land for establishing its activities but although the assessee had received corpus fund of Rs. 1.19 crores and of Rs. 10.80 crores towards advances for advertisement, no land had been registered in the name of the assessee. Therefore, the Director of Income-tax(E) refused to grant approval under section 80G(5)(vi). On appeal by the assessee:
Held, allowing the appeal, that there was absolutely no allegation by the Director of Income-tax(E) that the assessee had not fulfilled any of the conditions of clauses (i) to (v) of section 80G(5). Further, there was no dispute that the assessee was a charitable institution with charitable objects, as the Director of Income-tax (E) himself had granted registration to the assessee under section 12AA. Therefore, the Director of Income-tax (E) was not correct in rejecting the assessee`s application for grant of approval under section 80G(5). Moreover, the assessee submitted that the land had also been registered in the name of the society. Therefore, the order of the Director of Income-tax(E) was to be set aside.
Sri Ramanuja Sahasrabdi v. DIT (E) (2015) 37 ITR 303 / 68 SOT 320 (URO) (Hyd.)(Trib.)

S. 80GGB :Contributions given by compnies to political parties - Quantum of deduction-Restricted quantum of such deduction equal to 5 per cent of average profits of three immediately preceding financial years .[Companies Act, 1956, S. 293A, 349, 350]

During relevant year, assessee made donation to a political party, Amount donated was claimed as deduction in accordance with provision of chapter VIA. AO opined that donations to political parties were admissible as deduction u/s. 80GGB subject to provision of s. 293A of Companies Act, 1956 which restricted quantum of such deduction equal to 5 per cent of average profits of three immediately preceding financial years of a company. Accordingly, assessee's claim for deduction was denied to a substantial extent. In terms of Explanation to s. 80GGB provides that for the purpose of section, the word contribute with its grammatical variation has the meaning assigned to it u/s.293A of the Companies Act. The heading of S. 293A of the Companies Act clearly indicates that the section has been introduced to restrict the scope of contributions that can be made to political parties. As per proviso to the said section, in case of a company which has been in existence for not less than three financial years, the aggregate of the contribution made, directly or indirectly in any financial year shall not exceed five per cent of its average net profits determined in accordance with the prov. of s. 349 and 350 during the three immediately preceding financial years. Thus, section denotes the amount which a company can legally contribute to a political party or trade union. Consequently, the Explanation to sec.80GGB was intended to restrict the quantum of such contribution eligible for deduction only to the extent that is admissible under sec.293A of the Companies Act. Therefore, the contention of the assessee that the explanation provided to the said section which refers to S. 293A of the Companies Act, 1956 was limited to the grammatical meaning of the word used in the body of the section 'Contribute' and in no way defines the admissibility of deduction with reference to quantum of the contribution. (AY. 2009 – 2010)

Rajdeep Marketing (P.) Ltd. v. ITO (2015) 152 ITD 463 (Pune)(Trib.)

S.80HH:Newly established industrial undertakings--Manufacture of article-Assembling of cassettes from finished components amounts to manufacture-Entitled to deduction.[S.80I, 80IA]

Dismissing the appeal of revenue the Court held that; it was evident that both the Commissioner (Appeals) and the Tribunal carried out an elaborate factual analysis about the existence of manufacturing activity at the N and M units. Based on this analysis, they concurrently ruled in favour of the assessee. The fact that the assessee claimed and was granted modvat credit under rule 57H of the Central Excise Rules at the relevant time itself was indicative that for purposes of excise, the assembling of cassettes amounted to manufacture. The material in the form of factory register, employees' rolls, periodic sales tax and excise returns, evidence of electricity payments, etc., was decisive enough for both the Commissioner (Appeals) and Tribunal to be satisfied that in fact the two units in question functioned. The assessee was entitled to the special deduction under section 80HH, section 80-I and section80-IA. (AY. 1994-1995, 1995-1996)

CIT v. Tony Electronics Ltd. (2015) 375 ITR 431 (Delhi) (HC)

S. 80HH : Newly established industrial undertakings - Back ward areas- No bar to allow assessee separate relief under sections 80HH and 80I. [S. 80I]

There is no bar to allow assessee separate relief under sections 80HH and 80I. (AY. 1990-91 to 1994-95)

CIT v. Harsiddh Specific Family Trust (2015) 230 Taxman 613 (Guj.)(HC)

S. 80HH :Newly established industrial undertakings-Interest earned on deposits-Interest on deposit made in relation to business activity alone eligible for deduction.[S. 80I.]

The assessee was an exporter and carried on business domestically. it claimed deduction in respect of interest on deposits under sections 80HH and 80-I of the Act. On appeal : Held, dismissing the appeal, (i) that it was not clear whether the interest claimed by the assessee was on any specific deposit or otherwise. If the interest which was quantified at Rs. 1,68,466 was from any deposit made in relation to the business activity referred to under section 80-I it shall qualify for deduction and otherwise not. (AY. 1994-1995)

CIT v. Godavari Drugs Ltd. (2015) 371 ITR 379 (T & AP) (HC)

S. 80HH : Newly established industrial undertakings - Back ward areas –Failure to furnish certificate – Denial of deduction was held to be justified.[S.80I]

Where assessee claimed deductions under sections 80-HH and 80-I, but never submitted required certificates and particulars, no deduction could be allowed. (AY. 1985-86)

U.P. State Handloom Corpn. Ltd. v. CIT (2015) 229 Taxman 251 (All.)(HC)

S. 80HH : Newly established industrial undertakings - Back ward areas –Carry forward – Entitled to claim deduction under two distict provisionsof chapter VIA-TWO sections 80HH and 80-I independent of set off and carry forward provisions. [S.80AB, 80B 80I]

The assesse claimed deductions from the incomes covered by respective sections, separately. While in respect of one source of income it incurred losses, in respect of others it earned profits. The deductions sought to be made by the assessee were from the activity that yielded profits.

The AO combined income from both the categories and set off the loss against the profit of other. Claim of assessee was allowed by CIT(A) and Tribunal. On appeal High Court held that,

Both the provisions occur in heading C of Chapter VI-A. Section 80AB deals with deductions of that nature. Therefore, it needs to be seen as to whether section 80AB is suggestive of any mechanism for clubbing of the incomes of various sources covered by heading C. A close perusal of section 80AB discloses that, for the purpose of deduction under a particular section, it is only the income of the nature provided for only under that section, which shall be deemed to be income derived or received by the assessee. The provision does not mandate the clubbing of the incomes from different sources.

Be that as it may, this Court, as of now is faced with two precedents which cover the same factual background and similar legal, principles. Since both the precedents are from the Supreme Court, they are equally binding upon this Court. The only exercise that is to be undertaken is, to choose one of them, as per the settled principles of law.

CIT v. Premier Explosive Ltd. (2015) 373 ITR 177/ 273 CTR 441 / 228 Taxman 179 (Mag.) (AP.)(HC)

S. 80HH :Newly established industrial undertakings-Assessee granted deductions for prior years - Denial of deduction on ground no process of manufacturing involved in relevant assessment year - Not justified. [S.80I]

Held that for the assessment years 1989-90 and 1990-91, the Assessing Officer had allowed the deductions. However, for the assessment year 1992-93, the deduction could not be denied on the ground that no process of manufacturing was involved. (AY 1992-1993)

CIT .v. Shree Processors P. Ltd. (2015) 370 ITR 511/229 Taxman 633/116 DTR 206 (T & AP) (HC)

S. 80HH :Newly established industrial undertakings-Manufacture of cold rolled strips - Interest on belated payment - Part of consideration and partakes of the character of price - Interest earned from trade debtors to be treated as profits derived from industrial undertaking-Entitled to deduction.

The assessee, an industrial undertaking manufacturing cold rolled strips, it claimed the deduction under section 80HH of a sum representing interest on belated payment by purchasers of the product manufactured by it. The Assessing Officer disallowed the deduction treating it as not qualified under section 80HH. However, the appellate authorities allowed the claim under section 80HH. On appeal:

Held, interest earned from trade debtors on account of delayed payment should be treated as profits derived from the industrial undertaking of the assessee for the purpose of computing the relief under section 80HH.(AY. 1993-1994)

CIT .v. Surana Strips Ltd. (2015) 370 ITR469 (T & AP)(HC)

S. 80HH :Newly established industrial undertakings- Computation – S. 80HH and 80-I are independent-Entitled to deduction without suffering deduction u/s 80HH. [S.80HH(9), 80I]

The benefits under section 80HH and section 80-I are independent, and consequently, there is no question of giving effect to section 80HH(9) and, thereafter, proceeding to bring the balance amount for the purposes of tax or benefit under section 80I.Assessee is entitled to deduction without suffering deduction u/s 80HH.(AY. 1989-1990)

CIT .v. Unipatch Rubber Ltd. (2015) 370 ITR 685/114 DTR 81/ 232 Taxman 516 /274 CTR 25 (Delhi) (HC)

S.80HHC:Export business-Positive profit from export business-Loss from export business-Deduction is not allowable.[S.80AB]
Deduction is not available if the net result of export business is loss, to avail of the benefit there has to be positive income from the export business. (AY. 1987-88)
CIT v. Harrison Malayalam Ltd (2015) 373 ITR 162/ 278 CTR 175/ 120 DTR 233 (SC)
Editorial: CIT v. Harrisons Malayalam Ltd (2004)266 ITR 516 / 188 CTR 469 (Ker) (HC) , is reversed.

S.80HHC:Export business- Conditions under third and fourth provisos to S. 80HHC inserted by Taxation Laws (Second Amendment) Act, 2005 would not operate retrospectively and, for the period prior to that, cases of exporters having a turnover below Rs. 10 crore and those above Rs. 10 crore would be treated similarly. [S. 28(iiid) , 28(iiie)]
Amendment to S. 80HHC(3) was made by the Taxation Laws (Second Amendment) Act, 2005 with retrospective effect i.e. with effect from 1st April 1998 (AY 1998-99 onwards). By this amendment, benefit of deduction u/s. 80HHC was also extended to income taxable u/s. 28(iiid) and 28(iiie). Such benefit under the amendment was carved out for two categories of exporters, namely,

(i) those whose export turnover was less than Rs. 10 crores during the previous year and (ii) those whose export turnover was more than Rs.10 crores during the previous year. Insofar as entitlement of these benefits to exporters having turnover of more than Rs.10 crores was concerned, the amendment provided that deduction would be available only if the exporter had satisfied two conditions stipulated in the third and fourth proviso to the said amendment , i.e., the assessee has necessary and sufficient evidence to prove that:

a) he had an option to choose either the duty drawback or the Duty Entitlement Pass Book Scheme, being the Duty Remission Scheme; and
b) the rate of drawback credit attributable to the customs duty was higher than the rate of credit allowable under the Duty Entitlement Pass Book Scheme, being Duty Remission Scheme.

The assessee's, being exporters falling under the second category (i.e. whose exports were greater than 10 crore), filed a writ petition challenging the conditions mentioned in the third and fourth proviso to S. 80HHC(3) contending that these conditions are severable and therefore these two conditions should be declared ultra vires and severed. The High Court decided the issue in favour of the writ petitioners by concluding that the operation of the above stated conditions under third and fourth proviso to S. 80HHC could be given effect from the date of amendment and not in respect of earlier assessment years on the basis that, the retrospective amendment should not be detrimental to any of the assesses having an export turnover of more than 10 crore and whose assessments were still pending. On a special leave petition filed by the Department, the Supreme Court concurred with the judgment given by the High Court, and gave a direction that conditions stipulated in the third and fourth proviso to S. 80HHC would not operate retrospectively and cases of exporters having a turnover below Rs. 10 crore and those above Rs. 10 crores would be treated similarly during the period prior to the amendment (i.e. 1 April 2005).
CIT v. Avani Export (2015) 119 DTR 352/ 232 Taxman 357 / 232 Taxman 357 (SC)
Editorial: Avani Exports v.CIT (2012) 252 CTR 473/ 74 DTR 97 (Guj)(HC)

S. 80HHC:Export business-Losses in export business- Computation provision is not attracted-It is a pre-requisite that there must be profits from the export business-If the exports business has suffered a loss, deduction cannot be allowed from domestic business.
The Supreme Court had to consider two facets of s. 80HHC: (i) whether the view that deduction is permissible under Section 80HHC only when there are profits from the exports of the goods or merchandise is correct or it is open to the assessee to club the income from export business as well as domestic business and even if there are losses in the export business but after setting off those losses against the income/profits from the business in India, still there is net-profit of the business, the

benefit under Section 80HHC will be available? (ii) Whether, while applying the formula, we have to see what would comprise "total turnover"? HELD by the Supreme Court:
(i) It stands settled, on the co-joint reading of IPCA (2004) 12 SCC 742 and A.M. Moosa (2007) 9 SCR 831, that where there are losses in the export of one type of goods (for example self-manufactured goods) and profits from the export of other type of goods (for example trading goods) then both are to be clubbed together to arrive at net-profits or losses for the purpose of applying the provisions of Section 80HHC of the Act. If the net result was loss from the export business, then the deduction under the aforesaid Act is not permissible. As a fortiori, if there is net profit from the export business, after adjusting the losses from one type of export business from other type of export business, the benefit of the said provision would be granted.
(ii) In the assessee's case, in so far as export business is concerned, there are losses. The assessee's argument relying upon Section 80HHC(3)(b) to contend that the profits of the business as a whole i.e. including profits earned from the goods or merchandise within India will also be taken into consideration and that the losses in the export business, but profits of indigenous business outweigh those losses and the net result is that there is profit of the business, then the deduction under Section 80HHC should be given is not acceptable. From the scheme of Section 80HHC, it is clear that deduction is to be provided under sub-section (1) thereof which is "in respect of profits retained for export business". Therefore, in the first instance, it has to be satisfied that there are profits from the export business. That is the pre-requisite as held in IPCA and A.M. Moosa as well. Sub-section (3) comes into picture only for the purpose of computation of deduction. For such an eventuality, while computing the "total turnover", one may apply the formula stated in clause (b) of subsection (3) of Section 80HHC. However, that would not mean that even if there are losses in the export business but the profits in respect of business carried out within India are more than the export losses, benefit under Section 80HHC would still be available. In the present case, since there are losses in the export business, question of providing deduction under Section 80HHC does not arise and as a consequence, there is no question of computation of any such deduction in the manner(AY. 1989-90).
Jeyar Consultant & investment Pvt. Ltd. v. CIT (2015)373 ITR 87/ 117 DTR 369/276 CTR 225/231 Taxman 273(SC)

S.80HHC: Export business-Profit derived from export-Interest income-Income from other sources-Where the interest earned does not have direct and proximate nexus with the income from the business of export interest income cannot be deducted as income from export it has to be assessed under the head income from other sources-Earning of interest income from foreign exchange is not necessary. [S.56, 80HHC (3)(a)]
The assesse is a 100 percent export firm. It claimed deduction under section 80HHC on the interest income earned on the surplus funds. The AO disallowed the claim which was confirmed by the Tribunal. On appeal the court held that; where the interest earned does not have direct and proximate nexus with the income from the business of export interest income cannot be deducted as income from export it has to be assessed under the head income from other sources. The amendment in section 80HHC by way of insertion of sub S. (4B), excluding interest income for the purpose of deduction under section 80HHC will also affect the deduction of interest income under section 80HHC, for the period prior to the amendment , in as much as the applicability of the principle of direct and proximate nexus the business income, will apply both , to the provisions of the Act prior to and after the amendment , which came in to effect by the Finance Act, 1992, w.e.f 1st April 1992 . The earning of the income convertible from foreign exchange by way of interest is not necessary so long as the interest is derived from business of export, and has direct and proximate nexus, with the income earned out of the profits retained for export business. The earning of interest income from foreign exchange is not a test for determining as to whether deduction is allowable in respect of the income derived from the profits retained for export business. Questions were answered against the assesse.(AY. 1989-90)
Reliance Trading Corporation v. ITO (2015)376 ITR 53/ 278 CTR 113(FB)(Raj.)(HC)
Kirti Chand Dhadda v. UOI (2015) 376 ITR 53/ 278 CTR 113 (FB)(Raj.)(HC)
Pawan Enterprises v. ACIT (2015) 376 ITR 53/ 278 CTR 113 (FB)(Raj.)(HC)
Vallabh Das Khandelwal v. ACIT (2015) 376 ITR 53/ 278 CTR 113 (FB)(Raj.)(HC)

Editorial: Reliance Trading Corporation v. ITO (2001) 73 TTJ 851 (Jaipur) (Trib) is affirmed.

S.80HHC:Export business-Supporting manufacturer--Not necessary that exporter should have earned profit--Requisite certificate filed during assessment proceedings-Entitled to deduction.
The assessee exported rice to Cambodia through State Trading Corporation of India as a supporting manufacturer and, therefore, claimed deduction under section 80HHC of the Act. The assessee produced a letter dated November 28, 2003, from the State Trading Corporation to the effect that the Corporation had not claimed any export benefit on the exports. A certificate of disclaimer from the State Trading Corporation in the prescribed Form 10CCAB and the bill of lading were also filed before the Assessing Officer. The Assessing Officer disallowed the claim on the ground that the State Trading Corporation had declared loss. The Tribunal allowed the claim. On appeal to the High Court : Held, dismissing the appeal, (i) that the assessee was entitled to the special deduction under section 80HHC.
(ii) That the Tribunal was justified in granting the relief to the assessee relying upon the certificate produced in the course of the proceedings.(AY. 2003-2004)
CIT v. Shamanpur Kallappa and Sons (2015) 373 ITR 373 (Karn.)(HC)

S.80HHC:Export business-Washing and chipping would result in converting quartz and feldspar into processed minerals--Assessee entitled to special deduction- Effect of amendment of section 80HHC in 1991.
The assessee was an exporter of ores, quartz, feldspar, etc. It claimed deduction under section 80HHC in respect of profits retained for export business. The Assessing Officer, disallowed the special deduction on the ground that feldspar exported by the assessee and the consequent benefit under section 80HHC would be available only if such mineral is exported in the pulverised and micronised form. He rejected the assessee's plea that the goods exported would fall under item (x) of the Twelfth Schedule together with the Explanation as a cut and polished mineral. The Commissioner (Appeals) took the view that the assessee did not export feldspar in pulverised or micronised form but the nature of goods exported would fall under the definition as a mineral and would satisfy the requirement of processed mineral or ore as defined under item (x) of the Twelfth Schedule, namely, cut and polished mineral. He further held that quartz and feldspar are minerals and if one of the conditions of Twelfth Schedule is satisfied, the benefit of section 80HHC would automatically apply. This was upheld by the Tribunal. On appeal High Court also affirmed the order of Tribunal. (AY. 1991-1992 to 2001-2002)
CIT v. Kalpana Agencies (2015) 373 ITR 486 (Mad.)(HC)

S.80HHC: Export business-Computation-In determining business profits for the deduction under section 80HHC the unabsorbed business loss of earlier years under section 72 should be set off. [S. 72, 80AB]
Following the ratio in CIT v. Shirke Construction Equipment Ltd (2007) 291 ITR 380 (SC) , held that Section 80AB of the Act specified that profits are those as determined for the purpose of the Act, will apply for determining profits from export business for the porpose pf the deduction under Section 80HHC. In determing business profits for the deduction under section 80HHC the unabsorbed business loss of earlier years under section 72 should be set off.Appeal of revenue was allowed. (AY. 1990-91)
Dy.CIT v. Chemstar Organics (India) (P.) Ltd. (2015) 230 Taxman 197 (Guj.)(HC)

S. 80HHC : Export business - Amount received by assessee on sale of DEPB credit – Expenditure cannot be set off against income for purpose of calculating deduction under section 80HHC.
Expenditure cannot be set off against income for purpose of calculating deduction under section 80HHC.(AY. 1997-98)
United Phosphorus Ltd. v. Addl. CIT (2015) 230 Taxman 596 (Guj.)(HC)

S. 80HHC : Export business – Gross profit minus expenditure incurred for earning such profit which should be excluded.

When certain profit is to be excluded from claim of deduction under sections 80HH, 80-I and 80HHC, it is not gross profit but net thereof, that is, gross profit minus expenditure incurred for earning such profit which should be excluded .Appeal of revenue was dismissed.(AY. 1998-99)
CIT v. Nirma Ltd. (2015) 229 Taxman 535 (Guj.)(HC)

S. 80HHC : Export business –Interest from business debtors is to be included for purpose of calculation of deduction.[S. 80HH]
Interest from business debtors is to be included for purpose of calculation of deduction under sections 80HH and 80HHC . (AY. 1998-99)
CIT v. Nirma Ltd. (2015) 229 Taxman 535 (Guj.)(HC)

S. 80HHC : Export business –Total turnover of all business- Held in favour of revenue.
Word business means all businesses carried on by assessee and it is not limited to export-oriented unit only, and Assessing Officer was, therefore, justified in allowing deduction under section 80HHC by taking profit of business and total turnover of all businesses of assesse.
CIT v. Itarsi Oil & Flour Mills (2014) 270 CTR 318 / 229 Taxman 537 (Chhattisgarh)(HC)

S. 80HHC : Export business--Gains on account of fluctuations on account of exchange rates--Eligible for deduction--Import duty entitlement benefit partakes of the character of amounts covered by clause (iii) of section 28--Excludible from total turnover.[S. 28(iii)]
That by its very nature, the consideration for the exported goods is received in foreign exchange. The fluctuations on account of exchange rates would have their own impact on the income of the assessee. The resultant amount on account of the fluctuation of foreign exchange shall be treated as profit, that becomes eligible for deduction. Clause (b) of the Explanation to section 80HHC defines export turnover. It represents nothing more than the actual sale proceeds of exported goods. The incentives of duty exemption on imported goods could not be treated as sale consideration for the exported goods and could not become part of the export turnover. The amounts mentioned in the proviso could not be also added to the total turnover for the purpose of section 80HHC. The import duty entitlement benefit partakes of the character of the amounts covered by clause (iii) of section 28. By operation of the proviso to clause (ba) of the Explanation to section 80HHC it gets excluded from the total turnover. (AY. 1994-1995)
CIT v. Godavari Drugs Ltd. (2015) 371 ITR 379 (T & AP) (HC)

S. 80HHC : Export business-Gains on account of fluctuations on account of exchange rates-Eligible for deduction--Import duty entitlement benefit partakes of the character of amounts covered by clause (iii) of section 28-Excludible from total turnover.[S. 28(iii)]
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CIT v. Godavari Drugs Ltd. (2015) 371 ITR 379 (T & AP) (HC)

S. 80HHC : Export business –Interest –Income from other sources-LC opening assessable as business income.[S. 28(i),56]
Assessee company was engaged in business of export of iron ore, cashew kernels and marine products. Assessee carried out money market operation as one of its business activities. Assessee had received interest in respective previous years on FDR in banks and inter-corporate deposits .These deposits were utilized for providing security for obtaining short-term loans or as a deposit towards LC

opening. Interest received by assessee was having direct or proximate relationship with their main business activity and as such, same had to be treated as 'business income' eligible for deduction under section 80HHC. (AY. 1991-92 to 1995-96)
CIT .v. V.S. Dempo & Co. Ltd. (2015) 228 Taxman 191 (Mag.)(Bom.)(HC)

S. 80HHC : Export business- Computation - Pharmaceuticals company - Assessee processing raw materials supplied to it by other manufacturing companies and handing over end products to such companies - Conversion charges - Not deductible for purpose of determining "profits of the business".
The assessee manufactured drugs for being sold and used in India and also exported them outside India. In the ordinary course, it acquired raw materials, manufactured drugs according to its own expertise and marketed the products. In addition to such activity, it undertook to process the raw materials supplied to it by the other manufacturing companies and handed over the end products to such companies, and levied conversion charges. The Assessing Officer, for the assessment year 1992-93, deducted the conversion charges from the profits and gains of business or profession for the purpose of determining the profits of the business. This was confirmed by the appellate authorities. On a reference:
Held, that if the amount had anything to do with the activity of manufacturing though not of export goods, deduction thereof cannot be made. Otherwise, the proportion of the profit earned through export to the total profit would get disturbed. Therefore, the amounts that can be treated as falling in the category of brokerage, commission, interest, rent, charges occurring in clause (baa) of Explanation to section 80HHC are only those items, which are unrelated to, and other than the amounts forming part of the total turnover of the business carried on by the assessee occurring in section 80HHC(3). Since the conversion charges were earned through the activity of manufacturing though for the benefit of other customers, the question of deducting the conversion charges from the general profits, in the context of arriving at the profits from business under the clause did not arise. (1992-1993)
Aurobindo Pharma Ltd. v. CIT (2015) 370 ITR 216 (T & AP) (HC)

S. 80HHC : Export business-Industrial undertaking- Manufacture of gold jewellery on job work basis-Job workers undertaking work under supervision and control of assessee and direction-Constitute manufacturing activity-Entitled to deduction.
Held, dismissing the appeal, that the assessee was engaged in processing of goods or merchandise as the activity of converting raw gold into jewellery or ornaments amounted to processing, if not manufacture of goods or merchandise. Jewellery had distinctive name, character and use and was a different and new commercially saleable product. The factual findings of the Tribunal were that after buying gold from MMTC, it was handed over to the job workers with design and directions to make jewellery and ornaments. The work undertaken by the job workers was under the supervision and control of the assessee. The assessee had paid labour charges to the artisans. Thus, the factual finding recorded was that the assessee had handed over gold to the artisans and received the gold in the form of jewellery and ornaments as per the assessee's directions and instructions. Therefore, section 80HHC(3)(a) would be applicable in view of the factual finding recorded by the Tribunal that the work was undertaken by the job workers under the supervision and control of the assessee and under its directions. Therefore, assessee was entitled to section 80HHC deduction.(AY. 1998-1999)
CIT .v. Harig India Ltd. (2015) 370 ITR 424 / 230 Taxman 171 / 115 DTR 169 / 275 CTR 369 (Delhi) (HC)

S. 80HHC : Export business-Term deposit placed with bank as condition for availing of credit facility - Interest earned from deposit-Assessable as business income-Eligible deduction-Tribunal was directed to consider the document of bank produced before the Tribunal.[S. 28(i), 56]
The assessee, a 100% export oriented unit doing export business in cotton fabrics, placed a certain fixed deposit with the bank and treated the interest earned from the deposit as business income and claimed deduction under section 80HHC. The Assessing Officer excluded the interest earned out of the deposit from the head "Business income" and treated the interest under the head "Income from other sources" and recomputed the income under section 80HHC.

Held, allowing the appeal, that condition No. 6 as found in the bank`s letter made it absolutely necessary for the assessee to make a term deposit of Rs.15 lakhs for the purpose of availing of the credit facility. Therefore, for all purposes, the deposit made by the assessee should be deemed to be a deposit made for the purpose of business and the interest earned from such deposit should be treated as business income. However, the assessee did not pursue the matter sincerely before the Tribunal but remained ex parte. Therefore, the matter was remanded to the Tribunal for consideration afresh in the light of the document. (AY. 1994-1995)
Premier Enterprises v. DCIT (2015) 370 ITR 465 (Mad.)(HC)

S.80HHC:Export business- Sale proceeds of DEPB is eligible deduction.
Export incentives in form of sale proceeds of DEPB are eligible for deduction under section 80HHC. (AY 2003-04,2005-06)
Aditya Birla Nuvo Ltd. v. ACIT(2015) 68 SOT 403(Mum.)(Trib.)

S.80HHC:Export business-Unabsorbed depreciation is to be adjusted from current year's income from business or profession for purpose of calculating deduction.
Unabsorbed depreciation is to be adjusted from current year's income from business or profession for purpose of calculating deduction. (AY. 2003-04)
Aditya Birla Nuvo Ltd.v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S.80HHC:Export business- Deduction is to be allowed on profits from business or profession before allowing deduction under section 10B. [S.10B]
Deduction is to be allowed on profits from business or profession before allowing deduction under section 10B.(AY 2003-04,2005-06)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S. 80HHE : Export business - Computer software Total turn over-Entire business of assesse need not be taken only that particular unit was to be taken.
Term 'total turnover' as accruing in section refers only to business carried under section 80HHE and, therefore, while computing 'total turnover' for purpose of computation of deduction under section 80HHE, business profits of entire business of assessee need not be taken; only that of section 80HHE units should be taken .(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn)(HC)

S. 80HHE : Export business - Computer software –Export turn over-Total turn over-Expenditure due to exchange rate variation arising in foreign currency and exchange variation EEFC was not deductible either from export turnover or total turnover while computing deduction.
Expenditure due to exchange rate variation arising in foreign currency and exchange variation EEFC was not deductible either from export turnover or total turnover while computing deduction.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn)(HC)

S. 80HHE : Export business - Computer software –Actual expenses-Export turn over-Total turn over- Providing technical services outside India-Matter remanded.
Tribunal held that, while computing deduction , expenditure towards traveling as well as professional charges, maintenance allowance and other expenses in foreign currency was not deductible either from export turnover or total turnover .Court held that actual expenditure, if any, incurred in foreign exchange in providing technical services outside India should be excluded, if it is case of providing technical services outside India in connection with development of computer software. Matter remanded.(AY. 2001-02)
CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn)(HC)

S.80I:Industrial undertakings-Other income-Eligible deduction.
Court held that the Tribunal found from the details of the amounts under the head "details of

miscellaneous income" shown in the profit and loss account that the Assessing Officer had for the purpose of working out the deduction under section 80I of the Income-tax Act, 1961, in the next assessment year granted the benefit. The income had nexus with the industrial activity of the assessee. In the circumstances, the Assessing Officer was directed to consider these items under the head "Other income" and not to exclude them for the purpose of deduction under section 80I. Once the Assessing Officer had worked out the details on the basis of items disclosed in the profit and loss account, then the directions given to him and issued in terms of the Tribunal`s order did not raise any substantial question of law. Thus, the Tribunal was right in law in directing the Assessing Officer not to exclude from the profits and gains items of other income while working out the deduction under section 80I. (AY. 1986-1987, 1987-1988)

CIT v. Dharamsi Morarji Chemicals Co. Ltd. (2015) 373 ITR 545 (Bom.) (HC)

S. 80I :Industrial undertakings – Bajra seeds-Manufacture- Eligible deduction.

Where bajra seeds after treatment with poisonous chemicals got rendered unfit for human consumption and, was a different article or thing than raw bajra fit for human consumption, said activity would be an activity of manufacturing and production of seeds.)(AY. 1991-92 to 2005-06)

New Nandi Seeds Corporation v. CIT (2015) 230 Taxman 196 (Guj.)(HC)

S. 80I :Industrial undertakings –Advance licence-Pass book benefit-Profit on sale of import licence- Not derived from industrial undertaking- Not eligible deduction.[S.80IA]

Income from Advance License Benefit Receivable, Pass Book Benefit receivable and profit on sale of import license is not derived from industrial undertaking and thus not eligible for deduction under section 80I and 80IA. (AY. 1997-98)

United Phosphorus Ltd. v. Addl. CIT (2015) 230 Taxman 596 (Guj.)(HC)

S. 80I : Industrial undertakings-Interest received from customers due to late payment beyond credit period--Business income-Entitled to deduction.

Held that the assessee was entitled to the benefit under section 80-I on interest received from the customers due to late payment beyond the credit period. (AY. 1989-1990, 1990-1991)

CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 (Delhi) (HC)

S. 80I : Industrial undertakings-Interest on fixed deposits, bank guarantees, deposits and miscellaneous receipts Not entitled to deduction.

Held that the assessee was not entitled to the benefit on interest on fixed deposits, bank guarantees, deposits and miscellaneous receipts. The assessee would be entitled to claim a limited benefit of the expenditure of the net interest. The matter was remitted to the Assessing Officer to this limited extent to enable the assessee to prove the nexus. (AY. 1989-1990, 1990-1991)

CIT v. Kelvinator of India Ltd. (2015) 371 ITR 51 (Delhi) (HC)

S. 80I : Industrial undertakings – Deductions can be claimed in both sections. [S.80HH]

Section 80-I and Section 80HH are independent sections and therefore, deductions could be claimed under both the section on the gross total income. HC held that assessee was entitled to deduction under s.80I on the gross income without excluding/reducing deduction allowed under s. 80HH .[Jt. CIT v.. Mandideep Eng. & Pkg. Ind. (P) Ltd. (2007) 292 ITR 1 (SC) followed] (AY. 1989-90)

CIT v. Unipatch Rubber Ltd. (2015) 370 ITR 685 / 114 DTR 81/ 232 Taxman 516 (Delhi)(HC)

S. 80I : Industrial undertakings-Depreciation allowance and development rebate for past assessment years fully set off against total income for those assessment years--Not to be notionally carried forward and set off against income of current year.[S. 32 33,80B(5),80I(6),154]

The assessee was engaged in the business of manufacturing and selling of abrasives, refractories, grinding wheels, etc. The Assessing Officer, for the assessment year 1992-93, allowed the deduction under section 80-I. Subsequently, he passed an order of rectification under section 154 notionally carrying forward the losses of the earlier years and setting off the losses against the profits available during the assessment year 1992-93. Since the deduction under section 80-I was negatived for the

assessment year 1992-93, he withdrew the deduction for the assessment year 1993-94 also. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal held that the losses should be notionally carried forward and set off against the profit generated by the industrial undertaking during the relevant assessment year. On appeals :
Held, allowing the appeals, that the losses incurred by the industrial undertaking claiming deduction under section 80-I, which had been already set off against the profits of the industrial undertaking, should not be notionally carried forward and set off against the profit generated by the industrial undertaking during the relevant assessment year for determining the deduction under section80-I. Appeal of assesse was allowed on merits. (AY. 1992-1993)
Carborundum Universal Ltd v. JCIT (2015) 371 ITR 275 (Mad.) (HC)

S. 80IA:Industrial undertakings -Employment of specified number of employees - Contract workers - Assessee controlling not only work to be done by contract workers but also manner of doing work - Contract workers employees for purposes of section 80IA(2)(v)-Entitled to deduction.[S.80IA(2)(v)]
Out of twelve persons engaged in the unit of the assessee, six were on contract basis but they were working for the assessee under the direction of the assessee. In other words, the assessee was controlling not only the work to be done by these persons but also the manner of doing the work. Thus, these contract persons would have to be counted for the purpose of section 80IA(2)(v) and the assessee would get the benefit of deduction under section 80IA.(AY. 1997-1998)
Sai Computers P. Ltd..v. JCIT (2015) 375 ITR 285 (All.)(HC)

S. 80IA:Industrial undertakings–Backward area-Separate unit-Interest received from debtors for late payment of sale consideration- Eligible deduction. [S.80IA(10)]
Assessee-company claimed that its unit was located in industrially backward area, therefore, profits and gains of said unit would be eligible for 100 per cent deduction under section 80IA. AO has disallowed the claim. In appeal Tribunal allowed the claim of assessee. Appeal by revenue dismissing the appeal the Court held that; where assessee had maintained separate accounts for each unit and further Assessing Officer could not prove that business between eligible unit and other units of assessee were so arranged that business transaction between them produced more profit to eligible business, assessee would be entitled for deduction under section 80IA. Court also held that while computing deduction under section 80IA, interest received from trade debtors towards late payment of sale consideration was to be included in profits of industrial undertaking.(AY. 1996-97, 1997-98)
CIT .v. Translam Ltd. (2015) 231 Taxman 901 (All.)(HC)

S. 80IA : Industrial undertakings –Wind mill- Power generation- Initail assessment year-Loss was set off against other income of business enterprise- Profit earned during the year is eligible deduction.
Assessee was engaged in wind mill power generation. Assessee's claim for deduction under section 80IA was rejected by Assessing Officer by notionally adjusting the depreciation claim which was set off in earlier years against other income. Tribunal, however, allowed assessee's claim Dismissing the appeal of revenue the Court held that since losses incurred by assessee had already been set off against other income of business enterprise, profits earned by its industrial undertaking would fall within parameters of section 80IA,therefore, Tribunal was justified in allowing assessee's claim. (AY.2010-11)
CIT .v. R.Yuvaraj (2015) 231 Taxman 609 (Mad.)(HC)

S. 80IA:Industrial undertakings-Derived from-Import licence for procuring raw material for manufacturing finished products for exports- Sale of import licence has no nexus with business of manufacturing and sale of finished products-Not entitle to deduction.
Held, the profits derived from sale of the licence could be treated as incidental and not direct. It was not the case of the assessee that the sale of licences was its business. If the assessee had derived any profits or gains from the sale of licences, it could be treated as income from sources other than the actual conduct of the business and the sale of licences, in any case, could not be treated as a part of the

gross total income from business. The submission that the sale of licences had direct nexus or connection with the business of the undertaking must be rejected. Merely because the licences were obtained for procuring the raw material for manufacturing finished products for its exports, that did not mean that the sale of import licences had nexus with the business of manufacturing and sale of finished products.(AY. 1993-1994 to1996-1997)

Deccan Industrial Products .v. ACIT (2015) 375 ITR 256 (T & AP) (HC)

S.80IA:Industrial undertakings-Industrial park-Infrastructure facility-Competent authority certifying work completion and fitness for occupation-Central Board of Direct Taxes not an appellate authority to sit in judgment over certificates or their contents-Plot developed for composite use-Authority to see location of units and its industrial activity and whether that could qualify as industrial park and for which requisite certificate whether issued-Entitled to deduction.[S.80IA(4)(iii), Industrial Park Scheme, 2008, paras. 2(b), (h), 4(1)]

The petitioners` predecessor-in-title and others jointly were the owners possessing a landed property. They formed an association of persons and executed a declaration to develop the land. They constructed an information and technology park. The petitioners preferred an application for approval of the information technology park under the Industrial Park Scheme, 2008. The Central Board of Direct Taxes rejected the application of the petitioners on the ground that the petitioners had failed to comply with the condition of obtaining an occupation certificate. Therefore, the application under section 80IA(4)(iii) of the Actwas rejected. On a writ petition :

Held, allowing the petition, (i) that it was not disputed that the development of the nature carried out by the petitioners answered the definition of infrastructure facility. Thus, the development of and maintenance of an infra-structure facility known as an information technology park met the requirement of the definition and, therefore, deduction under section 80IA(4)(iii) was permissible.

(ii) That the intimation of disapproval was issued to the petitioners by the Municipal Corporation of Greater Mumbai, as had a commencement certificate which was based on the plans or approvals received from the Municipal Corporation of Greater Mumbai. That was the planning authority for the purpose of the present location of the industrial park and the area as a whole. Then, three occupation certificates had been issued. The licensed surveyor applied for permission to occupy the part completed and the sub-plot of the village and the land indicated therein. The Executive Engineer, Building Proposal of the Municipal Corporation of Greater Mumbai, considered the application and had certified the occupation of the development park, i.e., basement plus four floors, fourth floor and eighth/ninth floors of the building on the conditions indicated in the certificate. This was a part occupancy certificate. Thereafter, there were detailed certificates which were issued prior to the part occupancy certificate or commencement certificate and prior thereto the intimation of disapproval. It was not for the Board to sit in judgment over the certificates or the contents thereof as if it is an appellate authority.

(iii) That if the Board had taken care to peruse the letter from the Municipal Corporation of Greater Mumbai in its entirety, it would have been satisfied about the compliance with the condition in paragraph 4(1) of the 2008 Scheme. The letter indicated that it was an information sought by the petitioners. The Municipal Corporation of Greater Mumbai in response thereto replied that the occupation permission to the plot comprising basement plus stilt plus two level podium plus the first floor to the ninth upper floors were granted. The corporation had acknowledged that it had granted a part occupancy certificate and on various dates so that portions could be occupied. However, it was stated that the occupation permission to the entire building was granted since the entire building had been completed in all respects. That certificate to occupy had been granted was not disputed so also a completion certificate. Therefore, when the corporation construed the same as occupation certificate then it could not understand as to how in the order it had been held that rather than a completion or occupation certificate, the petitioners have provided a confirmation certificate and on that basis requested that they have complied with the conditions and, therefore, a notification be issued.

(iv) That if the project envisages any undertaking which develops, develops and operates or maintains and operates an industrial park, then it could not be seen how the industrial park and which locates the industrial units has to be understood as a project comprising buildings and which may or might not

house the park. If the definition of the term "industrial park" means a project in which developed space or built up space or a combination, with common facilities and quality infrastructure facilities is developed and made available to the units for the purpose of industrial activity or commercial activity in accordance with the 2008 Scheme, the insistence on the part of the authorities in calling upon the petitioners to produce a certificate which will indicate the entire project and development conceived of by the petitioners being completed was not justified. The petitioners may have in mind several projects or schemes of different nature in different buildings. There was a plot on which several buildings may be constructed. The plot could be developed for composite use and that was permissible. In such circumstances, what the authorities in this case were concerned with was the location of the units in which the industrial activity was carried out and whether that could qualify as an industrial park and for which the requisite certificate had been issued. This understanding was completely lost sight of.

(v) That there was a difference between the grant of certificates enabling the commencing of development and provided in section 347 of the Bombay Provincial Municipal Corporation Act, 1888. Thus, the development permission was sought under section 44 of the Maharashtra Regional Town Planning Act, 1966. Accordingly, it may be granted as contained in the certificate conditionally or unconditionally. Once such certificates were issued by a competent authority and certifying the work having been completed or the premises being fit to be occupied on the same being completed then it was not for anybody else to question the contents. They shall be under such circumstances taken as conclusive evidence of the commencement and completion of the work. The Board or the Commissioner could not question the contents. If they had a doubt about the genuineness or authenticity of such certificates, nothing prevented them from seeking clarifications from the municipal or planning authorities.

Techniplex v. CBDT (2015) 374 ITR 722 (Bom) (HC)

S.80IA: Industrial undertakings-Deeming provision-Power generation-Loss in year earlier to initial assessment year already absorbed against profit of other business-Not to be notionally brought forward and set off against profits in current year.

The business undertaking of the assessee was wind mill power generation /hosiery goods, etc., and it claimed the benefit of deduction under section 80IA for the assessment year 2010-11 and for the subsequent years as well. The Tribunal held that the assessee was entitled to deduction under section 80IA. On appeal ;Held, dismissing the appeal, that having exercised its option and its losses having been set off already against other income of the business enterprise, the assessee fell within the parameters of section 80IA. Therefore, the assessee was entitled to deduction under section 80IA. (AY. 2010-2011)

CIT v. Sunrise Knitting Mills (2015) 373 ITR 337 (Mad.) (HC)

CIT v. Mallow International (2015) 373 ITR 337 / 232 Taxman 281 (Mad.)(HC)

S.80IA:Industrial undertakings-Generation of power-windmills-Losses and other deductions set off against income of previous year—Entitled to deduction.

Held, dismissing the appeal, that all the business undertakings were windmills and they had claimed the benefit of deduction under section 80-IA of the Act for the assessment year 2010-11 and subsequent years as well. Having exercised their option and their losses having been set off already against other income of the business enterprise, the assessees fell within the parameters of section 80-IA. They were entitled to special deduction under section 80IA. (AY. 2010-2011)

CIT v. Poppy's Knitwear P. Ltd. (2015) 373 ITR 455 (Mad.)(HC)

S. 80IA :Industrial undertakings–Infrastructure development - for approval of information technology park an assessee can obtain occupation certificate phase wise or stage wise, based on completion of construction of industrial area.

The assessee executed a declaration with a view to develop land for constructing an Information and Technology Park. The assessee preferred an application under section 80-IA(4)(iii) for approval of the Information Technology Park under the Industrial Park Scheme, 2008 but the same was rejected on

the ground that assessee failed to obtain occupation certificate for the entire building from the competent authority.
The High Court observed that there was no legal position which prohibited grant of certificate phase wise or stage wise based on the completion of construction of areas. The High Court held that there was no other requirement which remained to be complied with and it was not for the Board to probe by whom the industrial park was going to be used, etc. and hence sent the matter back for fresh application of facts and details provided by the assessee.
Techniplex v. CBDT (2015) 374 ITR 722 / 232 Taxman 248 / 277 CTR 114 / 118 DTR 185 (Bom.)(HC)

S. 80IA :Industrial undertakings–Infrastructure development– Losses of assessment years before the initial assessment year already absorbed against profit of other business cannot be notionally brought forward and set off against profits of eligible business.
The High Court following the decision of Velayudhaswamy Spinning Mills Pvt. Ltd. v. ACIT (2010) 231 CTR 368 dismissed the appeal of the revenue and held that since the assessee had claimed the benefit of deduction u/s. 80-IA and their losses were set off already against other income of the business enterprise, the assessee fell within the parameters of section 80-IA and losses could not be notionally brought forward for set off against eligible business income.
CIT v. Sri Ranganathar Industries (P) Ltd. (2015) 118 DTR 285 (Mad.)(HC)

S. 80IA: Industrial undertakings -Losses and other deductions set off against income of earlier assessment year-Notional carry forward and adjusting the said loss against current years income was held to be not permissible. [S. 72, 80A,80I]
Once the losses and other deductions from eligible source of business have been set off against the income of an earlier assessment year, they should not be notionally carried forward again for the purpose of computation of the current year's income under section 80-I or section 80-IA and the assessee should not be denied the admissible deduction under section 80IA. (AY. 2010-2011)
CIT v. Eastman Spinning Mills P. Ltd. (2015) 372 ITR 88 / 231 Taxman 801 (Mad.)(HC)

S. 80IA : Industrial undertakings - Infrastructure development –Joint venture or special private venture- Entitle deduction.
Where total income of assessee includes any profit and gains from enterprises, i.e., Joint venture or special private venture, carrying on defined business of developing or operating or maintaining any infrastructure, it would be entitled to deduction under section 80IA(4). (AY. 2005-06)
CIT v. PNC Construction Co. Ltd. (2015) 230 Taxman 193 (All.)(HC)

S. 80IA : Industrial undertakings-Infrastructure development– Container Freight Station (CFS) is part of inland port- Eligible deduction.
Container Freight Station (CFS) is part of inland port and, therefore, is an infrastructure facility as defined in Explanation to section 80IA(4)(i). (AY. 2009-10)
CIT v. A. L. Logistics (P.) Ltd. (2015) 374 ITR 609 / 230 Taxman 194 / 279 CTR 317 (Mad.)(HC)

S. 80IA : Industrial undertakings-Deeming provision-Power generation-Loss in year earlier to initial assessment year already absorbed against profit of other business-Not to be notionally brought forward and set off against profits in current year.
The assessees were engaged in the business of generation of power. They claimed deduction in respect of profits derived from the operation of windmills under section 80-IA of the Act. The Assessing Officer disallowed the assessees` claim under section 80-IA on the ground that the carried forward loss of the earlier years should be set off before computing the profit for the current year. The Commissioner (Appeals) reversed the order of the Assessing Officer. The Tribunal, following the decision of the jurisdictional High Court confirmed the order of the Commissioner (Appeals) allowing the claims of the assessee. On appeals :
Held, dismissing the appeals, that the assessees having exercised their option and their losses having been set off already against other income of the business enterprise, the assessees in each of the

appeal fell within the parameters of section 80-IA. Followed,Velayudhaswamy Spinning Mills P. Ltd. v. ACIT [2012] 340 ITR 477 (Mad)(HC).
CIT v. Eastman Exports Global Clothing P. Ltd. (2015) 371 ITR 1 /229 Taxman 449(Mad) (HC)

S. 80IA : Industrial undertakings –Scrap-To be included for pupose of calculation of deduction.[S.80HH.]
Income on account of sale of various items of scrap is to be included for purpose of calculation of deduction under sections 80-IA and 80HH. (AY. 1998-99)
CIT v. Nirma Ltd. (2015) 229 Taxman 535 (Guj.)(HC)

S. 80IA :Industrial undertakings –Number of workers-Sweeper, peons, manager, clerk do not participate in manufacturing process, they need to be excluded from number of employees to find out eligibility.[S.158BC]
Since sweeper, peons, manager, clerk do not participate in manufacturing process, they need to be excluded from number of employees to find out eligibility in terms of section 80-IA..Denial of deduction was held to be justified.
Herald Publications (P.) Ltd. v. CIT (2015) 274 CTR 102 / 229 Taxman 103 (Bom.)(HC)

S. 80IA :Industrial undertakings–Lease agreement with port authorities-Entitled deduction even though assets were not transferred to Government-Circular was held to be applicable in respect of initial assessment year 2000-01- Eligible deduction.
Assessee was an inland storage facility provider. As per lease agreement with Port Trust Authorities, Port Trust could repossess entire infrastructure facility and assessee had an obligation to transfer facility on receiving such compensation as may be determined by Authorities. Assessee claimed deduction under section 80IA opting 2000-01 as initial assessment year .Assessing Officer accepted claim of assessee for assessment year 2000-01. However, he disallowed claim for current years on ground that assessee did not transfer assets to Government as required under section 80-IA(4). However Circular No.793 dated 23-6-2000 which stated that asset had to be transferred was applicable from assessment year 2001-02 onwards. Thereafter, CBDT issued Circular No. 10, dated 16-12-2005, withdrawing condition of transfer of assets to government or local authority. assessee would be entitled for deduction under section 80-IA for current years also .
CIT v. Suraj Agro Infrastructure (India) (P.) Ltd. (2015)229 Taxman 191 (Mad.)(HC)

S. 80IA : Industrial undertakings - Manufacture of article - Processing of plain glazed ceramic tiles, amounts to manufacture-Entitled to deduction.
Dismissing the appeal of revenue the Court held that, it was clear from the Excise Tariff Rules, that Parliament had recognised printing on glazed tiles as manufacturing activity. The whole industry set up by the assessee was for processing plain glazed ceramic tiles. The process included application of chemical and other materials like glazes, colours, mediums, glass, luster, etc., and burning at a very high degree of controlled temperature with the help of the kiln which employed the single fast fired technology, which was the latest development in the ceramic industry. Before that, designing and preparation of a photomechanical film, preparation of screens, colour recipe-formulation, automatic screen printing and spray application, three dimensional glass-embossing and single-fast-firing were undertaken and the object of this process of printing resulted in decorating or painting the glazed tiles which constituted a distinct and different article in the market. Entitled to deduction. ((AY. 2000-2001, 2001-2002, 2002-2003)
CIT .v. Murudeshwar Decor Ltd. (2015) 370 ITR 626 (Karn) (HC)

S.80IA:Industrial undertakings-Employment of 10 or more workers-Only skilled workers to be counted and not sweepers, clerks etc.
Court held that for calculating ,skilled and unskilled workers who work on machine or otherwise actually participate in manufacturing process need to be counted to find out the number of 10 or more workers, however sweepers, clerks , etc have to be excluded for the purpose of finding out 10 or more workers (AY. 1999-2000)
Herald Publications (P) Ltd..v. CIT (2015) 114 DTR 98 (Bom.)(HC)

S.80IA:Industrial undertakings-Infrastructure development–Wind mill-Power generated consumed by assesse-Income eligible for deduction.
Court held that the assessee was entitled to claim of deduction under section 80IA in respect of income relatable to power generated by its own wind mill that was consumed by assessee, by treating said income as income derived from eligible undertaking. (AY. 2005-06)
CIT .v. Cethar Ltd. (2015) 228 Taxman 139(Mag.)(Mad.)(HC)

S. 80IA :Industrial undertakings-Infrastructure development-Excise duty set off and sales tax set off-Not entitled deduction. [S.80HHC]
The assessee-company was a closely held company engaged in the business of manufacturing of dyes and chemicals. It claimed deduction in respect of export benefit, Central Excise set off, miscellaneous income, interest income and sales tax set off.AO disallowed the claim . On appeal CIT (A) allowed the claim. Tribunal held that the claim was not allowable.On appeal the Court held that the assessee would not be entitled to deduction under section 80IA in respect of Central Excise Duty set off as well as sales tax set off. (AY. 1994-95 to 1996-97)
ADCI Dye Chem (P.) Ltd. .v. Dy.CIT (2015) 370 ITR 408/ 228 Taxman 137(Mag.)(Guj.)(HC)

S. 80IA : Industrial undertakings-Income must directly emanate from eligible undertaking and must have direct nexus-Excess provision written back and late payment charges-Deduction is allowable-Interest, machines hire charges, sundry and rent receipts cannot be considered as income-No direct nexus with immediate source of income derived from eligible undertaking-Not eligible for deduction.
For the purposes of deduction under section 80IA of the Income-tax Act, 1961, the income of the eligible undertaking must be derived from a particular source and must have a direct and immediate nexus with such source. If an income is indirectly connected with the eligible undertaking, the income loses the direct nexus and cannot be considered as "derived from" the eligible undertaking.
Held, (i) that the excess provision written back was not an income but a reduced amount of eligible deduction in the computation of profits derived from eligible enterprise. (Appeals).
(ii) That the late payment charges were extra payment received by the assessee from its customers on account of late payment of their dues. Once deduction was obtained on sale consideration, there could be no reason to deny deduction on such late payment charges, which were part and parcel of sale consideration.
(iii) That interest received against advances to its employees for purchase of house building, machines hire charges, rent receipts and sundry receipts in the nature of electricity charges and guest house receipts could not be characterised as income derived from the eligible undertaking. There was no direct nexus with the eligible undertaking.(AY. 2008-2009, 2009-2010)
ACIT v. THDC India Ltd. (2015) 39 ITR 206(Delhi)(Trib.)

S. 80IA: Industrial undertakings-Construction of foot over bridges and bus shelters-Part of infrastructure facility-Entitled to deduction.
The assessee claimed deduction under section 80-IA of the Income-tax Act,
Held, that the contention raised by the Department was not the basis of disallowance by the Assessing Officer, subject matter before the Commissioner (Appeals) and the Tribunal. Therefore, the issue raised by the Department was a new one and could not to be adjudicated by the Tribunal. The bus shelters and foot overbridges should be considered as part of the infrastructure facility and therefore, the assessee was entitled to deduction under section 80IA of the Act.(AY. 2004-2005 to 2009-2010)
Dy. CIT v. Vantage Advertising P. Ltd. (2015) 39 ITR 240(Kol.)(Trib.)

S. 80IA : Industrial undertakings- Deduction to be allowed without adjustment of brought forward loss on notional basis.[S. 80IA(4)(iv)(a)]
Assessee claimed deduction under section 80IA(4)(iv)(a) not in year in which power generation commence but in a later year. It was held by ITAT that as per section 80IA(2), assessee has option to exercise choosing of initial assessment year out of fifteen years beginning with year in which its undertaking starts production. It was further held that deduction under section 80-IA(4)(iv)(a) was to

be allowed without deducting brought forward loss or unabsorbed depreciation prior to initial year on notional basis where depreciation and loss of those years had already been set off against other business income of those years.(AY. 2009-10)
Advik Hi tech (P.) Ltd. v. ACIT (2015) 67 SOT 158(URO) (Pune)(Trib.)

S.80IA:Industrial undertakings-Computation-Loss in year earlier to initial assessment year already absorbed cannot be notionally brought forward and set off against profits of eligible business for current year.
The assessee claimed deduction under section 80-IA of the Act,. The Assessing Officer rejected the claim and referring to section 80-IA(5), held that the profits and gains of an eligible business for the assessment year immediately succeeding the initial assessment year or any subsequent assessment year, i. e., in the case of the assessee for the assessment year 2009-10 onwards, should be computed as if the eligible business was the only source of income of the assessee, that the losses from windmill business for assessment years 2005-06 to 2007-08 had to be set off against the profits from the windmill business of the assessment year under consideration, i. e., assessment year 2010-11 and the balance alone was eligible for deduction under section 80-IA. The Commissioner (Appeals) held that though prior to the amendment to section 80-IA by the Finance Act, 1999 the initial assessment year was defined in the Act, after the amendment there was no definition in the Act for the initial assessment year and there was an option to the assessee in selection of the year of claiming relief under section 80-IA and that, therefore, there was no question of setting off notionally carried forward unabsorbed business loss against the profits of the eligible business and the assessee was entitled to claim deduction under section 80-IA on the current assessment year for the current year profit. On appeal by the Department :Held, that no interference was called for in the order of the Commissioner (Appeals). (AY. 2010-2011)
ACIT v. INTEX (2015) 38 ITR 496 (Chennai)(Trib.)

S. 80IA :Industrial undertakings – Infrastructure development - SSNNL is an instrumentality or agency of State - Deduction cannot be denied merely because the cost of project executed by the assessee was not fully funded by the assessee itself
SSNNL was formed with the objects to carry out Governmental functions and obligations of a water supply scheme to the assessee on turnkey basis whereby the assessee was required to conceptualize, design, manufacture etc. 20% of the project was funded by the assessee whereas 80% of the project was funded by SSNNL. Tribunal held that merely because the project was not fully funded by the assessee itself, it would not be proper to deny deduction u/s 80IA to the assesee.(AY. 2006 - 07)
Kirloskar Brothers Ltd .v. DCIT (2015) 167 TTJ 102(Pune)(Trib)

S. 80IA : Industrial undertakings-Unabsorbed Depreciation- Computation- Gross total income-Though u/s 80-IA(5), the profits of the eligible unit has to be computed on the 'stand alone' principle, in a case where the assessee also has non-business income, the brought forward unabsorbed depreciation u/s. 32(2) has to be set off against the eligible profits before computing S.80-IA deduction. [S.32(2), 72 (2), 80A, 80AB, 80B(5)]
(i) The assessee's manner of computing Gross Total Income, though mathematically leading to the same result, i.e., in terms of net taxable income, is incorrect and not in conformity with either the terms of the provisions or the scheme of the Act. There is, in fact, no scope for any vacillation; the same being basic to the scheme of the Act, with the apex court in Synco Industries Ltd v. AO (2008) 299 ITR 444 (SC) explaining the manner in which the GTI is to be computed, so that independent of the provision of s. 80-I(6) (or s. 80-IA(5)), all other applicable provisions, including ss. 32(2) & s. 72, would apply in computing such income. Rather, we observe a complete unanimity of judicial view;
(ii) What is the basis there-for? If not ridiculous or a travesty of the clear provisions of law, what is it? True, if the unabsorbed depreciation exceeds the business income of Rs.77.91 lacs, the same would stand to be set off against the income assessable u/s.22 and/or section 56 in-as-much as the same, per the deeming of section 32(2), forms part of the current years' depreciation, and is to be given effect to, save for a precedence to the provision of sections 72(2) & 73(3), which are inapplicable in the present case in-as much as there is no brought forward business loss. There is no occasion or need for the set off of unabsorbed deprecation against income assessable under other heads of income, i.e., under

Chapters IV-C and IV-F, as the assessee claims or does. How, for instance, s. 70 come into play without first determining the income assessable u/s. 28, and which would only be after giving effect to the provision of s. 32. The charge of depreciation u/s.32, it must be appreciated, is one, single charge, i.e., irrespective of the different sources of income where-under it may arise and, accordingly, would, in terms of section 32(1) r/w s. 32(2), allowable under the income assessable u/s.28, which per section 29 is to be computed in accordance with the provisions contained in sections 30 to 43D. (AY. 2007-08)

Deepi Arora .v. ITO (2015) 40 ITR 597(Mum.)(Trib.)

S. 80IA : Industrial undertakings-Deduction cannot be denied in succeeding years without disturbing relief granted for initial year.[S.80IA(5)]

Held, dismissing the appeal, that according to section 80-IA(5) the period of exemption of ten years will be counted from the initial assessment year which the enterprise or the undertaking will be allowed to choose. The concession has to be availed of within a span of 12 years beginning with the year of operation. This means that an enterprise or undertaking which chooses the fourth year of operation as the initial year will get deduction starting from that year. The Department can see the pre-requisite condition for allowance of deduction to an enterprise or an undertaking in the very first year the initial year of claim of deduction. In the present case, the assessee claimed deduction under section 80-IA of the Act in the assessment year 2004-05, i.e., that was the initial assessment year and in that year the claim of deduction had become final. Once the claim of deduction in respect to pre-requisite conditions for allowance of deduction had been satisfied, it could not be questioned in future years unless and until the Department disturbed the finding for the initial assessment year. (AY. 2006-2007 to 2010-2011)

Dy. CIT .v. Selvel Advertising P. Ltd. (2015) 37 ITR 611 (Kolkata)(Trib.)

S. 80IA : Industrial undertakings–Computation-Products were sold through C&F agents AO could not invoke provisions of section 8OIA (8) read with section 80IC (7). [S 80IA(5)80IA(8), 80IC(7), 80IA(10)].

The assessee-company was a manufacturer and trader of pharmaceutical goods, diagnostic kits, medical instruments etc. The assesse claimed deduction under section 80IA in respect of unit located in Baddi which was showing profit at the rate of 62 percent . AO held that the margin of profit shown by the assesssee as a whole was only to the extent of 10 percent , therefore he recomputed the profit of the unit by applying sub section 80IA (10) and restricted the profit of the unit to 10 percent only. On appeal Tribunal held that the assess has maintained separate books of account Baddi Unit ,there is no provision in the statute to segregate the income on the basis of turn over basis hence the working of the AO was not proper. Tribunal also held that where assessee claimed deduction of section 80-IA in respect of unit engaged in manufacturing of pharmaceutical products, in view of fact that said products were not routed through Head Office rather same were sold through C & F agents in market, AO could not invoke provisions of section 80-IA(8), read with section 80-IC(7) in order to segregate profits of eligible undertaking. (AY. 2006-07)

Cadila Healthcare Ltd. .v. Addl. CIT (2012) 21 taxmann.com 483 / (2015) 67 SOT 110 (URO) (Ahd.)(Trib.)

S.80IB:Industrial undertakings-Mercantile system of accounting-Appeal-New plea-Profits of business-Transport subsidy-Not direct source of profit-Assessee cannot raise a new plea that it had received part of subsidy and not the whole.[S. 145, 260A]

Dismissing the appeal of the assessee the Court held that the assessee had not obtained a certificate from the Corporation for the assessment year 2002-03. Apart from adopting the mercantile system of accounting it had chosen to take the benefit of section 80IB and sought exemption. It had never taken the plea before the authorities below which was now sought to be raised that it was only liable to be assessed to the tune of Rs. 5,17,123 which was actually received in the year concerned. The certificate was only obtained for the subsequent period and, therefore, it was never the case of the assessee that it could take the benefit of clause 6(vii) of the Transport Subsidy Scheme, 1971, on the ground that the actual freight paid would be the income. Once that was not the specific case before the assessing authority and the same material not having been placed before the Tribunal, the substantial question

of law sought to be raised on the strength of clause 6(vii) of the Scheme was not permissible. The substantial question of law would only be on the strength of documents which have been brought before the authorities below and also which was the subject matter of consideration before the Tribunal. Once the stand was contrary before the assessing authority at the initial stage, the argument now sought to be raised could not be addressed before the court. (AY. 2002-2003)
Maken Cement Industries .v. CIT (2015) 374 ITR 25 (P & H) (HC)

S.80IB:Industrial undertakings-Eligible business-In view of non obstante clause contained in sub-section (5) of section 80IA, while computing profits from eligible business for allowing deduction under section 80IB, losses set off against profits from other business is to be treated as losses being carried forward and after deducting said losses, profit prior to business is to be calculated.[S.80IA(5)]
In course of appellate proceedings, the Tribunal held that in view of provisions of section 80IA(5), while computing profits from the eligible business for allowing deduction under section 80IB, the deduction of losses set off against the profits from other business was to be taken into consideration.The assessee filed instant appeal contending that in view of order passed by the High Court of Madras in the case of Velayudhaswamy Spinning Mills (P.) Ltd. v. Asstt. CIT [2012] 340 ITR 477/ holding that once the set off was taken place in earlier year against the other income of the assessee, the revenue could not rework the set off amount and bring it notionally, impugned order passed by the Tribunal was not sustainable. The non obstante clause in sub-section (5) of section 80-IA overrides all the provisions of the Act. In the absence of non obstante clause, what the judgment of the Madras High Court states is the legal position, because of the non-obstante clause, the set off amount against other income of the assessee has to be ignored and because of the fiction created in the sub-section notionally, the set off losses is to be treated as 'losses being carried forward and after deducting the said losses, the profit prior to business is to be calculated', i.e., precisely what the Tribunal has decided. In view of above, there is no infirmity in the impugned order of the Tribunal and, thus, assessee's appeal has to be dismissed. (AY. 2005-06)
Microlabs Ltd. v. ACIT (2015) 230 Taxman 647 (Karn.)(HC)
Editorial: Ratio in ACIT v. Goldmine Shares and Finance (P) Ltd is affirmed and ratio in Velayudhaswamy Spinning Mills (P.) Ltd. v. Asstt. CIT [2012] 340 ITR 477 (Mad)(HC) dissented.

S. 80IB : Industrial undertakings -Term "employs ten or more workers in a manufacturing process" - works manager and supervisor who were also counted as worker.
Where assessee was engaged in manufacturing of certain items and employed 10 workers including works manager and supervisor who were also counted as worker under section 80IB(2)(iv) in said manufacturing process, she was eligible for 80-IB deduction. (AY. 1999-2000 to 2005-06)
CIT v. Bimla Rani (Smt.) (2015) 230 Taxman 629 (P&H)(HC)

S.80IB:Industrial undertakings-Profits derived from job work contract-Not falling under Explanation to sub-section (13) of section 80IA-Eentitled to deduction.[S.80IA(13)]
The assessee was engaged in the manufacture of automotive components made of aluminum castings. it claimed deduction under section 80IB of the Act,on income from works contracts. The Assessing Officer denied the claim on the ground that the nature of the activity of the assessee was job work and, therefore, the Explanation to sub-section (13) of section 80IA would operate in respect of such a claim. The Commissioner (Appeals) allowed the claim of the assessee taking into consideration that the assessee filed evidence in the form of flow charts, photographs of the various stages of manufacture, raw material used and final products which confirmed the fact that the end product was distinct from the raw material used. The Tribunal held that sub-section (13) of section 80IA, which is relatable to enterprises falling under sub-section (4) of section 80-IA, was not applicable to a claim under section 80IB.On appeal :
Held, dismissing the appeal, that even assuming that certain clauses of section 80IA were made applicable by virtue of sub-section (13) of section 80IB, the provision is applicable only in respect of sub-section (5) and sub-sections (7) to (12) of section 80IA and not in relation to sub-sections (4) and (13) of section 80IA. Therefore, as the claim of the assessee did not fall under the Explanation to sub-section (13) of section 80IA. (AY. 2002-2003 to 2004-2005)

CIT v. Light Alloy Products Ltd. (2015) 373 ITR 322 / 233 Taxman 405 (Mad.)(HC)

S. 80IB : Industrial undertakings-Manufacturing of cycle parts- Job work-Entitle deduction.
Assessee was engaged in business of manufacturing of cycle parts. Assessee was entitled to deduction under section 80-IB on income earned from job work carried out by assessee even if same did not form part of income derived from industrial undertaking. (AY. 2007-08)
CIT v. Saimbhi Cycles & Auto Industries (2015) 229 Taxman 552 (P&H)(HC)

S. 80IB: Industrial undertakings- Workers employed for less than four months- Condition was not satisfied- Deduction was held to be not allowable. [S.80IB(2)(iv)]

Most of the workers had only worked for three to four months during the entire year except the two employees/workers; therefore, the condition specified in section 80IB(2)(iv) requiring employment of ten or more workers in the process carried out could not be said to have been complied with.(AY. 2003-04)

CIT v. Indus Cosmeceuticals (2015) 273 CTR 168 / 229 Taxman 246 (HP)(HC)

S. 80IB:Industrial undertakings-Manufacture-Conversion of heena leaves into herbal heena powder amounts to manufacture.[S.80IB(4)]

Conversion of heena leaves into herbal heena powder amounts to manufacture as the end produce is different from the original raw material. Hence, deduction u/s. 80IB(4) is allowable.(AY. 2003-04)

CIT v. Indus Cosmeceuticals (2015) 273 CTR 168 / 229 Taxman 246 (HP)(HC)

S. 80IB :Industrial under takings –Conversion of heena leaves into herbal heena powder-Amounts manufacture-Eligible deduction-Conversion of heena leaves into herbal heena powder by process of mixing and grinding amounts to manufacture and therefore profits derived from such activity are eligible for deduction .
The assessee had been manufacturing herbal henna powder and for this purpose he had purchased plant and machinery.
The assessee first collected the raw material, then dried it with the use of mixture of various acids and thereafter grinded it by putting the definite quantity (in percentage) with the help of various specialized persons. Thus, the end product was the result of many transformations carried out with the help of various materials, manpower and machines and was commercially a different item.
However, the revenue argued that even after undergoing various process like drying, mixing, grinding etc., the same does not bring about a new or distinct produce. Therefore, these activities do not amount to manufacture and the assessee was therefore not entitle to the benefit of provisions of section 80-IB.
On appeal to High Court:
In order to manufacture heena powder, heena leaves only constitute about 40 per cent of the raw material which is dried with other raw-materials by using various acids and thereafter these raw materials are grinded by putting a definite quantity of mixture to get the resultant product, which is commercially known differently. The end product so manufactured has a different name and is identified by the buyer and seller as a different produce and is distinct in its form from the original raw-material.
Thus, the conversion of heena leaves into herbal heena powder by process of mixing and grinding amounts to manufacture and therefore the profits derived from such activity are liable for deduction under section 80-IB, accordingly this question is answered against the revenue and in favour of the assessee.
CIT v. Indus Cosmeceuticals (2015) 273 CTR 168 / 229 Taxman 246 (HP)(HC)

S.80IB:Industrial undertakings-Head office expenses- Deduction cannot be reduced by allocating head office expenses from eligible units.

Deduction under section 80IB cannot be reduced by allocating head office expenses to profits derived from eligible units.(AY.2003-04,2005-06)
Aditya Birla Nuvo Ltd. v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S. 80IB : Industrial undertakings- Initial assessment year-In order to claim SSI units eligibility continues for entire period of claim.[S.80IB(3)(ii)]
The AO and Commissioner (Appeals) rejected assessee's claim for deduction under section 80IB where assessee did not qualify to be a small scale industrial undertaking in previous year relevant to year under consideration as value of its plant and machinery exceeded Rs. 3 crores . On appeal it was held that in order to claim deduction under section 80IB(3)(ii), eligibility of being SSI unit continues for entire period of claim and not only in initial assessment year. (AY. 2008-09)
Advik Hi tech (P.) Ltd. v. ACIT (2015) 67 SOT 158 (URO) (Pune)(Trib.)

S. 80IB(9):Industrial undertakings- Commercial production of natural gas-The Explanation to Section 80-IB(9) inserted by Finance (No. 2) Act 2009 w.r.e.f. 1.4.2000 is ultra vires to Article 14 of the Constitution of India-Interpretation of taxing stautues-Rule against retrospectivity of provision. [S.80IA, Constitution of India ,Art 14]
The Gujarat High Court had to consider the following issues:
(i) Whether the insertion of the Explanation to Section 80-IB(9) of the Income Tax Act, 1961 by Finance (No.2) Act, 2009 with retrospective effect from 1.4.2000 explaining the meaning of the term "undertaking" is unconstitutional and ultra vires to Article 14 of the Constitution of India?
(ii) Whether the insertion of sub clause (iv) in Section 80-IB(9) of the Income Tax Act, 1961, by Finance (No.2) Act, 2009 conferring the benefit of the deduction under this Section to undertakings engaged in commercial production of natural gas in blocks licensed under VIIIth round of bidding provided such commercial production commenced on or after 1.4.2009 results in denial of the benefit of deduction under 80-IB(9) to undertakings engaged in commercial production of natural gas under contracts entered into prior to NELP VIII on an interpretation thereof that the term "mineral oil" would not include natural gas since the benefit was available only to undertakings engaged in commercial production of "mineral oil" rendered the newly added sub clause (iv) unconstitutional and ultra vires Article 14 of the Constitution of India?
(iii) Whether the Petitioner has any accrued or vested right?
HELD by the High Court:
In this backdrop, one has to now consider whether the insertion of Explanation by Finance (No.2) Act, 2009 with retrospective application from 1.4.2000 would be valid and sustainable in law. The above analysis would indicate that though the expression "Undertaking" has not been defined under the Act, it has acquired a well defined meaning through consistent judicial decisions commencing from Textile Machinery case. The expression 'Undertaking' is used in various provisions of the Act, while conferring the benefits under different schemes. It is clear that commercial production of mineral oil happens from every Development Area/Field consisting of a well or cluster of wells with a Development Plan being approved for every Development Area/Field thereby making every Development Area/Field as an independent economic unit. Every Development Area/Field is thus an "Undertaking". The Petitioner placed on record the decision of the ITAT rendered in their own case for the Assessment Year 2001-02. The Respondent contended that this matter is under challenge in appeals before the High Court which are pending. This decision, however, has not been stayed. Looking at the whole conspectus, it is clear that the term "Undertaking" has acquired a consistent statutory meaning. It is true that legislature is entitled to depart from this meaning and can define it the way it chooses to do so. While doing so, it has to resort to the process known to and approved by law. The explanation introduced by Finance Act (No.2) of 2009 is a departure from the settled interpretative meaning given by Courts to the expression 'Undertaking". Any departure, therefore, has to be through the process of validation which has to be notwithstanding any law or decision. The Explanation is not a non-obstante clause, notwithstanding any law or decision, it proceeds under the presumption that an existing ambiguity is sought to be clarified when, in reality, there is none. In fact, the usage of the expression "single" before the term 'undertaking' in the explanation evidences the legal understanding that the undertaking is not synonymous to assessee and an assessee can have more than one undertaking doing the same or distinct business as long as they are independent stand alone

units. When, clearly there can be separate commercial discoveries for every Development Area/Field which may consists of one well or cluster of wells which makes each Development Area an "Undertaking" and this is as per the Production Sharing Contract (PSC) entered into between the Petitioner and the Central Government, there does not exist any ambiguity under the Act.

Niko Resources Ltd. v. UOI(2015)374 ITR 369/ 276 CTR 273/ 231 Taxman 100 / 117 DTR 257 (Guj.)(HC);

Gujarat State Petroleum Corporation Ltd v. UOI (2015) 276 CTR 273 / 117 DTR 257 / 231 Taxman 100 (Guj.)(HC)

S. 80IB(10) : Housing projects-Restriction on extent of commercial area in "housing project" imposed w.e.f. 1.4.2005 does not apply to housing projects approved before 1.4.2005 even though completed Tthere after 1.4.2005.

The definition of "housing project" was amended w.e.f. 1.4.2005 to provide that the benefit of Section 80IB(10) would not be admissible to these assessees/developers in case the area utilised for shops and commercial establishment exceeded 5% of the aggregate built-up area of the housing project or 2000 sq. feet, whichever is less. The Bombay High Court held in CIT vs. M/s Brahma Associates 333 ITR 289 (Bom) that as this amendment is prospective and has come into effect from 01.04.2005, this condition would not apply to those housing projects which had been sanctioned and started earlier even if they finished after 01.04.2005. On appeal by the department to the Supreme Court, the Court had to consider "Whether Section 80IB(10)(d) of the Income Tax Act, 1961 applies to a housing project approved before 31.03.2005 but completed on or after 01.04.2005?" HELD by the Supreme Court dismissing the appeal:

(i) Before 01.04.2005, the legal position was that once the project is sanctioned by the local authority as 'housing project', the extent of area sanctioned for shops and commercial establishments in the said housing project was immaterial and had no bearing. Thus, irrespective of the said of area where shops and commercial establishments were permitted by the local authority in a housing project, it was still treated as housing project and further that while granting 100% deductions, the area covered by shops and commercial establishments was also includible. This position has changed with the insertion of clause (d) to sub-section (10). As per the amendment carried out and made effective from 01.04.2005, even if the local authority had sanctioned larger area for shops and commercial establishment, the benefit of Section 80IB(10) would not be admissible to these assessees/developers in case the area utilised for shops and commercial establishment exceeded 5% of the aggregate built-up area of the housing project or 2000 sq. feet, whichever is less;

(ii) What follows is that prior to 01.04.2005, these developers/assessees who had got their projects sanctioned from the local authorities as 'housing projects', even with commercial user, though limited to the extent permitted under the DC Rules, were convinced that they would be getting the benefit of 100% deduction of their income from such projects under Section 80IB of the Act. Their projects were sanctioned much before 01.04.2005. As per the permissible commercial user on which the project was sanctioned, they started the projects and the date of commencing such projects is also before 01.04.2005. All these assessees were made known of the provision by which these projects are to be completed as those dates have been specified from time to time by successive Finance Acts in the same provision Section 80IB. In these cases, completion dates were after 01.04.2005. Once they arrange their affairs in this manner, the Revenue cannot deny the benefit of this section applying the principle of retroactivity even when the provision has no retrospectivity. Take for example, a case where under the extant DC Rules, for shops and commercial activity construction permitted was, say, 10% and the project was also sanctioned allowing a particular assessee to construct 10% of the area for commercial purposes. The said developer started with its project much prior to 01.04.2005 with the aforesaid permissible use and the construction was at a very advanced stage as on 01.04.2005. Can it be argued by that Revenue that he is to demolish the extra coverage meant for commercial purpose and bring the same within the limits prescribed by the new provision if he wanted to avail the benefit of deduction under Section 80IB(10) of the Act, only because of the reason that the project was not complete as on 01.04.2005? As in such a case he filed his return for an assessment year after 01.04.2005 and for the purpose of assessment of the said return, law prevailing as on that date would be applicable? Answer has to be in the negative on the principle that with the aforesaid planning as per the law prevailing prior to 01.04.2005, these assessees acted and acquired vested right thereby

which cannot be taken away. It is ludicrous on the part of the Revenue authorities to expect the assessees to do something which is almost impossible;
(iii) Can it be said that in order to avail the benefit in the assessment years after 1.4.2005, balconies should be removed though these were permitted earlier? Holding so would lead to absurd results as one cannot expect an assessee to comply with a condition that was not a part of the statute when the housing project was approved. We, thus, find that the only way to resolve the issue would be to hold that clause (d) is to be treated as inextricably linked with the approval and construction of the housing project and an assessee cannot be called upon to comply with the said condition when it was not in contemplation either of the assessee or even the Legislature, when the housing project was accorded approval by the local authorities.
CIT v. Sarkar Builders (2015) 375 ITR 392/ 277 CTR 301/ 119 DTR 241 (SC)
Editorial: From the judgment in, ITA No 872 of 2010 dt 22-2-2011 and CIT v. Happy Home Enterprises & Ors ((2014) 110 DTR 49/ 271 CTR 524 (2015) 372 ITR 1 (Bom)(HC),impliedly affirmed.

S.80IB(10):Housing projects-Commercial project on a plot of land of 1.33 acres-Commencement of project on 1-10-1998 and completion on or before 31-3-2008-Project completion complied with in terms of section 80-IB(10)(d)-Area situated 25 kilometres from limits of Mumbai city-Eligibility for deduction of flat of size of 1,500 square feet approximately-Commercial establishment in project less than 2,000 square feet-Entitled to deduction.
Held, dismissing the appeals, that the assessee had complied with all the requirements of the provisions of section 80-IB(10) since it had undertaken to commence the development project on October 1, 1998, and completed the project on or before March 31, 2008. Furthermore, the project completion had been complied with by virtue of section 80-IB(10)(d) on a plot of land which was 1.33 acres. The criteria of the minimum area of 1 acre required under section 80-IB(10)(a) had been complied with. It also complied with section 80-IB(10)(c) since the area was situated within 25 kilometres from the limits of Mumbai city and, therefore, was eligible for deduction of the flat of the size of 1,500 square feet approximately. The Commissioner (Appeals) and the Tribunal also found that the commercial establishment in the project was less than 2,000 square feet. Hence, no fault could be found with the order of the Tribunal.(AY. 2005-2006, 2006-2007)
CIT .v. Suresh L. Wadhwa(HUF) (2015) 374 ITR 541 (Bom.)(HC)

S. 80IB(10):Housing projects-Developer-Land owned by co-operative society- Eligible deduction- Court criticised the approach of revenue and stated that the department is wasting pubic time and money.
The assessee, a developer, claimed deductionfor having constructed and developed a housing project.The Assessing Officer rejected such claim on the ground that the assessee was not the owner of land and development permission was also not granted to assessee but to a co-operative housing society who was owner of the said land.The Tribunal deleted disallowance made by the Assessing Officer in view of decision of High Court in CIT v. Radhe Developers [2012] 341 ITR 403 (Guj.)(HC).On appeal, the department contended that development agreement was vitally different from that in *Radhe Developers'* case (*supra*) as in that case land owners were individual but in instant case land was owned by a co-operative society
The distinction presented by the revenue was not even drawn by the Assessing Officer. In the order of assessment all that is recorded is that the department wishes to keep the issue open. Quite apart from not being convinced by any such distinction in law, the factual aspects which the Assessing Officer has not relied upon would not be enough to draw a distinction in a decided issue. All parameters appearing on record are identical to those appearing in *Radhe Developers'* case (*supra*). In the result, the appeal was dismissed.
Per Court : When Radhe group of appeals were taken for hearing, the Court had a fond hope that decision of this Court would give a quietus to large number of issues travelling to High Court and hopefully even before the Tribunal. Such hope has been completely belied by litigious approach of the department. Even after the decision of this Court in case of*Radhe Developers* (*supra*) and series of SLP being dismissed against the group of appeals, decided in the said judgment, fresh appeals keep coming before the Court on this very issue. Till the appeals were pending before the High Court or

even after the judgment was rendered, the department was further contemplating appeals before the Supreme Court, the Court could still appreciate the stand of the Assessing Officer to deny the benefits on the premise that the revenue has not accepted the finality of the view. However, when no further proceedings are available to the revenue, the Supreme Court having finally repelled all such challenges, it is rather unfortunate that even today the appeals still keep travelling before the Court. In fact, the Tribunal's judgment was rendered after the Court's judgment in *Radhe Developers'* case (*supra*). This appeal was filed long after the SLPs against such judgment came to be dismissed. In a recent judgment in case of CIT v. Excel Industries Ltd. [2013] 358 ITR 295 (SC) the Court severely criticised such litigious approach of the department, for wasting public time and money.

CIT .v. Swastik Associates (2015) 231 Taxman 893 (Guj.)(HC)

S. 80IB(10):Housing projects- If the project is approved by local authority as housing project with convenience shopping the assesse is entitled to deduction-Prior to 1-04-2005-Clause (d) inserted to Section 80IB(10) with effect from 1/4/2005 is prospective and not retrospective and hence cannot be applied for the period prior to 1/4/2005.

All these special leave petitions are filed by the Revenue/ Department of Income tax against the judgments rendered by various High Courts deciding identical issue which pertains to the deduction under Section 80IB(10) of the Income Tax Act, as applicable prior to 01.04.2005. We may mention at the outset that all the High Courts have taken identical view in all these cases holding that the deduction under the aforesaid provision would be admissible to a "housing project".

All the assessees had undertaken construction projects which were approved by the municipal authorities/ local authorities as housing projects. On that basis, they claimed deduction under Section 80IB(10) of the Act. This provision as it stood at that time, i.e., prior to 01.04.2005 reads as under: –

Section 80IB(10) [as it stood prior to 01.04.2005]

"(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if,

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998;

(b) the project is on the size of a plot of land which has a minimum area of one acre; and

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place."

However, the income tax authorities rejected the claim of deduction on the ground that the projects were not "housing project" inasmuch as some commercial activity was also undertaken in those projects. This contention of the Revenue is not accepted by the income tax Appellate Tribunal as well as the High Court in the impugned judgment. The High Court interpreted the expression "housing project" by giving grammatical meaning thereto as housing project is not defined under the Income Tax Act insofar as the aforesaid provision is concerned. Since sub-section (10) of Section 80IB very categorically mentioned that such a project which is undertaken as housing project is approved by a local authority, once the project is approved by the local authority it is to be treated as the housing project. We may also point out that the High Court had made observations in the context of Development Control Regulations (hereinafter referred to as 'DCRs' in short) under which the local authority sanctions the housing projects and noted that in these DCRs itself, an element of commercial activity is provided but the total project is still treated as housing project. On the basis of this discussion, after modifying some of the directions given by the ITAT, the conclusions which are arrived at by the High Court are as follows: –

"30. In the result, the questions raised in the appeal are answered thus: –

a) Upto 31/3/2005 (subject to fulfilling other conditions), deduction under Section 80IB(10) is allowable to housing projects approved by the local authority having residential units with commercial user to the extent permitted under DC Rules/ Regulations framed by the respective local authority.

b) In such a case, where the commercial user permitted by the local authority is within the limits prescribed under the DC Rules/ Regulation, the deduction under Section 80IB(10) upto 31/3/2005

would be allowable irrespective of the fact that the project is approved as 'housing project' or 'residential plus commercial'.
c) In the absence of any provisions under the Income Tax Act, the Tribunal was not justified in holding that upto 31/3/2005 deduction under Section 80IB(10) would be allowable to the projects approved by the local authority having residential building with commercial user upto 10% of the total built-up area of the plot.
d) Since deductions under Section 80IB(10) is on the profits derived from the housing projects approved by the local authority as a whole, the Tribunal was not justified in restricting Section 80IB(10) deduction only to a part of the project. However, in the present case, since the assessee has accepted the decision of the Tribunal in allowing Section 80IB(10) deduction to a part of the project, we do not disturb the findings of the Tribunal in that behalf.
e) Clause (d) inserted to Section 80IB(10) with effect from 1/4/2005 is prospective and not retrospective and hence cannot be applied for the period prior to 1/4/2005."
We are in agreement with the aforesaid answers given by the High Court to the various issues. We may only clarify that insofar as answer at para (a) is concerned, it would mean those projects which are approved by the local authorities as housing projects with commercial element therein.
There was much debate on the answer given in para (b) above. It was argued by Mr. Gurukrishna Kumar, learned senior counsel, that a project which is cleared as "residential plus commercial" project cannot be treated as housing project and therefore, this direction is contrary to the provisions of Section 80(I)(B)(10) of the Act. However, reading the direction in its entirety and particularly the first sentence thereof, we find that commercial user which is permitted is in the residential units and that too, as per DCR. Examples given before us by the learned counsel for the assessee was that such commercial user to some extent is permitted to the professionals like Doctors, Chartered Accountants, Advocates, etc., in the DCRs itself.
Therefore, we clarify that direction (b) is to be read in that context where the project is predominantly housing/ residential project but the commercial activity in the residential units is permitted. With the aforesaid clarification, we dispose of all these special leave petitions.(AY. 2004-05 to 2005-06)
CIT v. Veena Developers (2015) 377 ITR 297/ 119 DTR 237 (SC)
Editorial: From the judgment in ITA No. 2630 of 2010 dt 28-2-2011, others and in CIT v. Brahma Associates (2011) 333 ITR 289 (Bom)(HC) is approved.

S. 80IB(10) :Housing projects-Deduction available to assessee even where, after development of infrastructure facility project, the same is transferred to Government for consideration.
The assessee was engaged in the business of building and developing of housing projects and claimed exemption u/s. 80-IB(10) in respect of profits derived from two housing projects developed and executed for DDA and IRWO. The AO denied exemption on the ground that the assessee merely executed the contract work awarded to it by the principals, i.e., DDA and IRWO and there was, consequently, no development of building of housing project. The CIT(A) and the Tribunal held that ownership was not a pre-condition for claim of deduction and hence allowed the assessee's appeal.
The High Court dismissed the departmental appeal and observed that the mere circumstance that the Indian Railways or DDA paid for development of a housing project carried out by the assessee, did not mean that the assessee did not develop the residential complex. The High Court, accepting the stand of the Tribunal, held that the assessee had worked as a developer and not merely as a work contractor and since ownership of the project was not provided as a precondition for the claim of deduction u/s 80IB (10), the assessee was entitled to deduction u/s. 80IB(10).(AY. 2002-2003 to 2005-2006)
CIT v. VRM India Ltd. (2015) 375 ITR 414/ 118 DTR 225 /231 Taxman 675 (Delhi)(HC)

S. 80IB(10):Housing projects-Plot must have minimum area of one acre-Composite housing scheme consisting of six blocks in area exceeding one acre-Separate plan permits obtained for six blocks-Not ground for denial of deduction-Entitled to deduction. [S. 263]
the Assessing Officer disallowed the deduction granted earlier to the assesse in pursuance of order passed u/s. 263. The Commissioner (Appeals) upheld the findings of the Assessing Officer. The Tribunal held that the assessee had developed a project in a land measuring 1acre and 6.5 cents and

allotted 1.022 sq. ft. of undivided share of land to each of the 48 allottees and, hence, the assessee was entitled to the benefit of section 80-IB(10) as a composite scheme. On appeal :
Held, dismissing the appeal, that there was no dispute in the approval granted by the CMDA in respect of the composite housing scheme. When the Legislature introduced 100 per cent. deduction it was known that the local authorities could approve a housing project to the extent permitted under the Development Control Rules. When the project fulfilled the criteria for being approved as a housing project, the deduction could not be denied under section 80IB(10) merely because the assessee had obtained a separate plan permits for the six blocks. If the conditions specified under section 80IB are satisfied, then deduction is allowable on the entire project. Since the project was approved in accordance with the Development Control Rules, the assessee would be entitled to 100 per cent. deduction on the entire project approved by the local authority. The assessee constructed six blocks in a land measuring one acre and 6.5 cents which admittedly exceeded the required area specified in clause (a) sub-section (10) of section 80IB, viz., one acre. Therefore, the assessee was entitled to deduction. (AY. 2007-2008)
CIT v. Voora Property Developers P. Ltd. (2015) 373 ITR 317 (Mad.) (HC)

S. 80IB(10) : Housing projects-Land not owned by assesse- Eligible to deduction-Car parking area is not includible in the " built up area".
Dismissing the appeal of revenue the Court held that; for claiming deduction it is not necessary that the assesse , who is engaged in the business of developing and construction of housing project should be the owner of the land .Car park area is not includible in the "built –up area " of the residential unit for the purpose of determining the maximum built up –area under section 80IB(10) (AY. 2004-05)
CIT v. Subba Reddy (HUF) (2015) 373 ITR 103/ 278 CTR 252/ 231 Taxman 397 (Mad.)(HC)

S. 80IB(10) : Housing projects-Where petitioner barely raising infrastructural facilities was not entitled to deduction u/s. 80-IB(10) and could not have raised any substantial question of law.[S.260A]
The petitioner was a private limited company engaged in the business of real estate and construction of residential/housing projects only creating infrastructural development. The AO held that the petitioner was not entitled to claim deduction under section 80-IB (10) as they had not constructed residential flats on the plots. The CIT(A) and Tribunal upheld the order of AO. On further appeal, the High Court also dismissed the appeal of the petitioner. Thus, the petitioner sought review of the aforesaid judgment passed stating that the appeal filed by them raises substantial question of law.
The High Court held that the infrastructural development had been done by the petitioner, that also permitted deduction under the provisions contained under section 80-IB (10), which is not tenable since the entire controversy raised by the petitioner was factual in nature and does not contain any legal issue.(Review Petition No. 79 of 2014 dt-14-3-2014) (AY. 2008-2009)
Navratna Techbuild (P.) Ltd v. CIT (2014)224 Taxman 72 (Mag)/ (2015) 113 DTR 393 /274 CTR 270 (MP) (HC)

S. 80IB(10) : Housing projects-Filing of return on time - Condition mandatory-Deduction cannot be claimed.[S.80AC, 80IA, 80IC, 80ID, 80IE,139(1)]
The benefits under section 80-IB(10) can only be availed of in those cases where the return has been filed within the prescribed period. When the provision is that the benefit cannot be claimed if the return has not been filed on or before prescribed day, it is mandatory direction which prescribes the consequence of omission to file the file the return in time .The Courts cannot rewrite the law to do what is just according to them. Appeal of revenue is allowed. (AY. 2009-2010)
CIT .v. Shelcon Properties P. Ltd. (2015) 370 ITR 305 (Cal.)(HC)

S. 80IB(10) : Housing projects-Definition of built-up area with effect from 1-4-2005 not retrospective in operation - Super built-up area cannot be equated with built-up area-Entitled to exemption.
Dismissing the appeal of revenue the Court held that; the housing project does not include commercial premises. The concept of "super built-up area" was used by builders to get a higher price and included the common area of the stair-case and the balcony area. Since the super built-up area cannot be

equated with built-up area it could not be stated that the area of the flat was more than 1,500 sq. ft. The words "including projections and balconies" inserted with effect from April 1, 2005, by the Finance Act, 2004, would not apply to projects completed prior to April 1, 2005. There were no distinguishing features brought on record which called for any interference. The Tribunal's view was a well-reasoned and could not be said to be perverse. In the present set of facts, even if the definition of built-up area was considered it made no difference to the assessee`s case.(AY. 2006-2007)
CIT .v. Hermes Developers (2015) 370 ITR 38/274 CTR 113/ 113 DTR 100 / 56 taxmann.com 50 (Bom.)(HC)

S.80IB(10):Housing projects-Built up area-Balcony cannot be equated with built uparea-Words "including projections and balconies " in sub S .14(a) inserted w.e.f. 1st April, 2005,by the Finance Act, 2004 would not apply to such projects which are completed prior to 1st April, 2005-Entire project is more than oneacre area of plot on which the project constructed is less than 1 acre area-Exemption is eligible.
Dismissing the appeal of revenue the Court held that tribunal has correctly observed that the concept of "super built up rea' is used by builders to get higher price and the super built up rea cannot be equated with built up area, hence it cannot be stated that the rea of flat is more than 1500 sq.ft. words " including projections and balconies " in sub S. 14(a) inserted w.e.f 1st April , 2005 by the Finance Act, 2004 , would not apply to such projects which are completed prior to 1stApril, 2005. Further, there is no doubt that area of entire project is more than one acre and the area of flat is within limit of 1500 sqft , the Tribunal was justified in allowing deduction. (AY. 2006-07)
CIT .v. Hermes Developers (2015) 370 ITR 38/274 CTR 113/ 113 DTR 100 / 56 taxmann.com 50 (Bom.)(HC)

S. 80IB(10) : Housing projects-To be the "developer" of a housing project, the assessee has to undertake the entrepreneurship risk in execution of the project. He need not be the owner of the land-Entitle the deduction.
In order to answer the question as to whether the condition precedent for deduction under section 80IB has been satisfied inasmuch as whether or not the assessee is engaged in "developing and building housing projects", all that is material is whether assessee is taking the entrepreneurship risk in execution of such project. When profits or losses, as a result of execution of project as such, belong predominantly to the assessee, the assessee is obviously taking the entrepreneurship risk qua the project and is, accordingly, eligible for deduction under section 80IB(10) in respect of the same. The assumption of such an entrepreneurship risk is not dependent on ownership of the land. The business model of "developing and building housing projects" by buying, on outright basis, and constructing residential units thereon could probably be the simplest business models in this line of activity, but merely because there is an improvisation in the business model or because the assesse has adopted some other business models for the purpose of developing and building housing project does not vitiate fundamental character of the business activity as long as the risks and rewards of developing the housing project, in substance, remain with the assesse. It is difficult, if not altogether impossible, to visualize all the business models that an assessee may use in this dynamic commercial world even as, in substance, the fundamental character of the business remains the same, but certainly such modalities or complexities of business models cannot come in the way of eligibility for an incentive which is for the purpose of 'developing and building a housing project'. There is no justification, conceptual or legal, in restricting eligibility of deduction under section 80IB(10) to any particular business model that an entrepreneur adopts in the course of developing and constructing housing project. (AY. 2006-07)
ShriUmeya Corporation v. ITO (Ahd.)(Trib.); www.itatonline.org

S. 80IB(10) : Housing projects-Allotment of two residential units to one single individual-Amendment with effect from 1-4-2010 restricting allotment of more than one residential unit to same person-Housing units allotted to purchasers prior to amendment--Entitled to deduction .
The assessee was engaged in the business of development and construction of housing projects. The assessee claimed deduction under section 80-IB(10) of the Income-tax Act, 1961. The Assessing Officer rejected the claim of the assessee on the ground that the assessee had allotted two residential

units to one single individual in the housing project in violation of conditions prescribed under section 80-IB(10)(f)(iii) of the Act. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :
Held, allowing the appeal, that the amendment in section 80-IB(10)(e) and (f) of the Act, restricting allotment of more than one residential units in the housing project to the same person came into force with effect from April 1, 2010, inserted by the Finance (No. 2) Act, 2009. However, the payments towards allotted residential units had been made by way of cheques on September 2009 and October 2009 itself, except the amount of Rs. 3 lakhs which was paid on March 31, 2010. Therefore the payments were made even before the amendment came into force. The authorities were not justified in rejecting the claim of deduction under section 80-IB(10) of the Act on the basis of a condition created by a provision which came into force subsequent to the allotment of the residential units. (AY. 2010-2011, 2011-2012)
Patel Jashwantlal A v. ITO (2015) 38 ITR 135 (Ahd.)(Trib.)

S. 80IB(10) : Housing projects-Completion certificate- Deduction cannot be denied on the ground that the completion certificate has not been issued by the Municipality if the assessee has completed construction before the due date.
Tribunal held that , (ii) Explanation (ii) to section 80IB(10)(a) of the Act prescribes that the date of completion of construction of the housing project shall be taken to be the date on which the completion certificate in respect of such housing project is issued by the local authority. In the present case, the local authority, i.e. Pune Municipal Corporation has not issued the requisite completion certificate (to be understood as occupancy certificate in the context of the PMC) before the stipulated date. However, the assessee has countered the aforesaid objection by pointing out that in-fact it has completed the construction of the project on 04-12-2007 i.e. much before the stipulated date of completion contained in section 80IB(10)(a) of the Act, it had applied to the PMC for obtaining of the occupancy certificate based on the certificate of the architect and the other NOCs required for the said purpose. The CIT(A) has also called for information u/s.133(6) of the Act from the PMC and its response did not reveal any objection on the part of the PMC that the construction was not complete with respect to the sanctioned plans. Therefore, factually speaking, there is no controversion to the assertions of the assessee that it's project was otherwise complete as per the sanctioned plans within the stipulated date. In this background, in our view, the CIT(A) made no mistake in allowing the claim of the assessee and her approach is not only consistent with the decision of the Pune Bench of the Tribunal in the case of Satish Bora and Associates but it is also in line with the judgement of the Hon'ble Gujarat High Court in the case of CIT vs. Tarnetar Corporation, (2014) 362 ITR 174 (Guj). (AY. 2009-10) (ITA no. 598/PN/2013, dt. 31.12.2014)
Gera Development Pvt. Ltd. .v. JCIT (Pune)(Trib.); www.itatonline.org

S. 80IC : Special category States –Interest income from fixed deposits- Not eligible deduction-Profits and gains on sale of scrap is eligible for deduction.
Assessee-company deposited profits and gains of its undertaking and earned interest income from those fixed deposits. It claimed deduction under section 80IC in respect of said income. Claim Was rejected by the Tribunal .On appeal dismissing the appeal the Court held that; interest income earned by assessee would not be treated as income derived from business of manufacture or production of any article or thing by assessee's industrial undertaking for purpose of granting relief under section 80IC. Profits and gains from sale of scraps resulting in manufacturing process were eligible for deduction. (AY. 2007-08)
Reckitt Benckiser (India) Ltd. .v. Addl. CIT (2015) 231 Taxman 585 (Cal.)(HC)

S. 80IC : Special category States –Manufacture-paper insulated wires and strips of copper and aluminum- Entitled deduction.
Where paper insulated wires and strips of copper and aluminum being manufactured by assessees were commercially different from its raw material and further it was commercially known different in market, same was manufacture in terms of section 80IC and therefore assessees were entitled to deduction under said section.
CIT .v. Pawan Aggarwal (2014) 272 CTR 33/ (2015) 231 Taxman 652 (HP)(HC)

S. 80IC : Special category States –New unit- Purchase of some plant and machinery from old firm will not amount to reconstruction -–Entitled exemption.

In new partnership firm was formed by the same partners by splitting up the business of an existing partnership and which utilizes the infrastructure and employees of the existing firm, would be entitled to first year of deduction u/s 80 IC. The HC dismissed revenues appeal and held that assesees firm had different PAN, separate registration under HP state Industrial Development Corporation and department of industries as small scale industry, at different location on a different plot. New unit cannot be even presumed as reconstruction of the old existing up the existing undertaking shifting of the employees from the old firm would not affect the constitution of the new firm to avail the benefit u/s 80 IC.(A Y. 2007-08)

CIT v. Yash International Inc (2015) 273 CTR 38/231 Taxman 890 (HP)(HC)

S. 80IC : Special category States Industrial undertaking-LCD monitors-Description of information and communication technology devices-Assessing Officer without rejecting the accuracy of books of account or inspecting wages paid, electricity bills generated, nature of plant and machinery rejecting assessee's claim to deduction-Rejection of claim merely on doubts and surmises-Assessee entitled to deduction.

Held, dismissing the appeal, that the LCD monitors did answer the description of information and communication technology devices and, therefore, would attract the benefit of exemption under section 80-IC, provided other statutory conditions are fulfilled. The Assessing Officer had proceeded more on the basis of doubts entertained by him as to the genuineness of the claim rather than some concrete material. If he had any reasons to disbelieve the correctness of the claim about the manufacturing activity (on the basis of considerations such as wages paid, electricity bills generated, the nature of the plant and machinery, etc.), the least that he could have done was to have the manufacturing unit of the assessee inspected. For such purposes, he only had to have recourse to his statutory powers under the law. Without having undertaken any such exercise or rejecting the accuracy of the books of account, adverse conclusions on facts as reached could not have been drawn. The assessee was entitled to deduction under section 80-IC. (AY. 2009-2010)

CIT v. Tej Pal Singh Kohli (2015) 371 ITR 11/ (2015) 231 Taxman 399/ 122 DTR 269 (Delhi) (HC)

S. 80IC : Special category States-Air purification system-Even though assessee carrying out assembling and manufacturing of air purifiers by using simple tools and testing equipments, it would be entitled to deduction.

The assessee, engaged in business of manufacture of healthcare and surgical items, had set up a manufacturing unit for manufacture of air purification systems. It procured various parts/components of air purification system from different vendors and assembled the same at the facility. The assessee claimed deduction. The AO denied deduction holding that the aforesaid activities would not qualify as 'manufacturing activity,' as the assessee was merely a assembler and did not have requisite tools or machinery. On appeal, the CIT(A) allowed the assessee's claim. The Tribunal upheld the order of the CIT(A) On revenue's appeal to the High Court:

The finding of the appellate authorities including the Tribunal is that the product produced and sold by the assessee was air purification system. For manufacturing the said product, the assessee had purchased parts like base motors, filters, UV lights, etc., but the final product produced was entirely different from its constituents or parts. The product manufactured or produced, *i.e.*, the air purifier or air purification system, was completely a new and an entirely different commodity having distinct name, character and use. The assessee had filed a flow chart of the manufacturing process. The manufacturing unit stood registered with District Industries Centre, Roorkee, Pollution Control Department, Commercial Tax Department, Uttaranchal, etc. Order of Tribunal was up held. ((AY. 2006-07, 2008-09, 2009-10)

CIT v. Faith Biotech (P.) Ltd. (2015) 229 Taxman 451 (Delhi)(HC)

S. 80IC:Special category States-Initial assessment year-The benefit of "substantial expansion" is applicable to units which were in existence at the time of announcement of scheme i.e. in AY

2004-05. Assesses who installed new units during this period and are now going for substantial expansion are not eligible to claim deduction u/s.80IC.

Section 80IC was inserted by the Finance Act 2003 w.e.f. 01.04.2004 and provides that any undertaking or enterprise which has begun or beings to manufacture or produce any article or thing not being any article or thing, not being any article or thing specified in the 13th Schedule and undertakes substantial expansion during the period beginning 7th day of January 2003 and ending before the 1st day of April 2012 in the State of Himachal Pradesh shall be entitled to 100% of such profits and gains for five assessment years connecting with the initial assessment year and thereafter 25% (or 30% where the assessee is a company) of the profits and gains. The assessee's unit started commercial production from 17.1.2004. The assessee claimed deduction u/s 80IC on the products of this unit @ 100% from assessment years 2004-05 to 2008-09. Subsequently, during financial year 2008-09, the assessee undertook substantial expansion by way of addition to plant and machinery by more than the prescribed limit. On the basis of the substantial expansion, the assessee again started claiming deduction u/s 80IC from assessment year 2009-10 @ 100%. The AO held that since the assessee has already claimed 100% deduction for first five years upto assessment year 2008-09 from the date of setting up of the unit, the assessee was entitled only to 25% deduction from the eligible business profits from assessment years 2009-10 to 2013-14. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD dismissing the appeal:

(i) Liberal interpretation of an incentive provision is possible if there is any doubt. If the various sub sections of section 80IC are read carefully it leaves no doubt that deduction was meant only for new units or in case of old units if substantial expansion was carried out in such old units and deduction was available only for a period of 10 years. Therefore, there is no quest ion of giving any interpretation much less liberal interpretation to section 80IC when the reading of whole section makes the provision very clear. As observed in case of M/s Novapan India Ltd v Collector of Central Excise and Customs Appeal (Civil) 3356 of 1984 the burden was on the assessee to show under which clause he was entitled to the deduction but assessee is simply asserting before us that there is no restriction for deduct ion in case of substantial expansion of new units. In our opinion, that is not enough because absence of restriction does not mean that particular deduction was allowable.

(ii) If interpretation given by the assessee is to be accepted, the provision would become discriminatory for two classes of undertakings i .e. new units and old units. Because the old units would be entitled to 100% deduct ion on expansion for first five years and 25% thereafter whereas the new units would become entitled to deduction for 100% for first five years and again @ 100% on substantial expansion. Such discriminatory intention cannot be imputed to the Legislature.(ITA No. 798/Chd/2012, dt. 27.05.2015) (AY. 2009-10)

Harcron Electronics v. ITO (Chd.)(Trib.); www.itatonline.org
Stove Kraft India v.DCIT (Chd.)(Trib.);www.itat.online .org
Vanser Metallics v. ITO (Chd.)(Trib.)www.itatonline.org
Sansui Electronics v.DCIT (Chd.)(Trib.) www.itat.online.org
Lyon DC v.ITO (Chd.)(Trib.)www.itat.online.org
Cutting Edge Technogies v. ACIT (Chd.)(Trib.) www.itat.online.org
UPS Invertor .com v. ITO (Chd.)(Trib.) www.itat.online.org
Rakesh Verma v.ITO (Chd.)(Trib.) www.itat.online.org
Uska Electricals v. ITO (Chd.)(Trib.) www.itat.online.org
Digital Systems Inc v. ITO (Chd.)(Trib.) www.itat.online.org
Adamac Formulations v. ITO (Chd.)(Trib.) www.itat.online.org
Vipan Gupta v.ITO (Chd.)(Trib.) www.itat.online.org

S 80IC: Special category States - Subsidies such as transport and interest are part of business profits and gains from industrial undertaking-Deduction is allowable.

Held that subsidies such as transport and interest were received to be a part of the business profits and gains from the industrial undertaking in accordance with law. Deduction was to be allowed in respect thereof under section 80-IC of the Act. (AY. 2005-2006)

ACIT v. Manas Salt Iodisation Industries P. Ltd. (2015) 38 ITR 502 (Gau.)(Trib.)

S.80IC:Special Category States-Profits of undertaking--Subsidies such as transport, power, interest and insurance are part of business profits and gains from industrial undertaking--Deduction allowable.

Held, allowing the appeal, that subsidies such as transport, interest, insurance and power were received to be a part of the business profits and gains from the industrial undertaking in accordance with law. Deduction was to be allowed in respect thereof under section 80-IC of the Income-tax Act, 1961. (AY. 2008-2009, 2009-2010)

Meghalaya Mineral Products v. A CIT (2015) 38 ITR 186 (Guwahati) (Trib.)

S.80J:Industrial undertaking-Film production-Manufacturing activity- Entitled to deduction.

On reference held that the activities of production of a film amounted to manufacturing of an article or goods. The activities be treated as those of an industrial undertaking within the purview of section 80J. Even otherwise, film production had to be considered as a manufacturing activity and the undertaking as an industrial undertaking as the activity is considered under the excise law and other allied laws also. Whether the assessee satisfied the conditions of section 80J, as it then stood, had to be ascertained by the authorities. (AY. 1981-1982)

CIT v. Rupam Pictures P. Ltd. (2015) 374 ITR 450 (Bom.)(HC)

S. 80JJ : Dairy farming- Income derived from aftersale services was connected to that of sale proceeds of chicks-Eligible for deduction.

Assessee was a hatchery and sold one day old chicks to poultry farms .It also provided after sale services to purchasers in context of providing feed, administering medicines and taking various precautionary measures so that optimum result was procured. It claimed deduction in respect of income derived from sale of chicks as well as services rendered therefore. AO restricted benefit only to profit derived from sale of chicks. In appeal the claim of assesee was allowed by CIT(A) and Tribunal. On appeal by revenue the Court held that income derived from aftersale services was connected to that of sale proceeds of chicks and, therefore, assessee was eligible for deduction in respect of profits and gains derived from aftersale services as well. (AY. 1993-94 and 1994-95)

CIT v. Singh Poultry Ltd. (2015) 229 Taxman 543 (AP)(HC)

S. 80M : Inter corporate dividends –No expenditure was incurrd- No disallowance can be made on assumptions.

When no expenditure are shown to have been incurred by assessee for earning gross dividend income, deduction under section 80M cannot be curtailed to reduce amount qualifying for claim of deduction under section 80M by assuming amount of expenditure, which is assumed to have been incurred by assessee. (AY. 1997-98)

United Phosphorus Ltd. v. Addl.CIT (2015) 230 Taxman 596 (Guj.)(HC)

S. 80M : Inter corporate dividends – Deduction under S. 80M to be computed without reducing from the dividend income, the amount of deduction under S. 36(1)(viii). [S. 36(1)(viii)]

Assessee in its return of income claimed deduction as per s. 36(1)(viii) as well as s. 80M. The AO while computing the deduction under s. 80M, was of the opinion that once the deduction under s. 36(1)(viii) was allowed on income that included dividend income, the gross dividend should be reduced by 40% to compute the net dividend income for determining the deduction under s. 80M. On appeal, the High Court held that as per s. 80B(5) “gross total income” means total income computed as per provisions of the Act but before any deduction under Chapter VI-A. The gross total income would be income computed as per s. 28 after allowing deduction under s. 36(1)(viii) plus other incomes, on which deduction under s. 80M would be computed. The deduction allowed under s. 36(1)(viii) ceased to be a part of the gross total income, and hence there was no question of double deduction or multiple deduction of the same income, while computing the deduction under s. 80M. (AY. 1986-87)

CIT v. Industrial Finance Corporation of India Ltd. (2015) 114 DTR 407/ 231 Taxman 648 (Delhi)(HC)

S. 80O: Royalties - Foreign enterprises –Proof or evidence of use of patent by collaborators was not placed on record- Disallowance of claim was held to be justified.

Dismissing the appeal the Court held that , where beyond placing agreements with a party in Malaysia proof or evidence of use of patent by collaborators outside India was not placed before authorities, deduction under section 80-O was rightly denied. (AY. 1998-99)

Crompton Greaves Ltd. v. ACIT (2015) 230 Taxman 509 (Bom.)(HC)

S. 80O : Royalties - Foreign enterprises--Remuneration from foreign enterprise-Assessee conducting services for benefit of foreign companies-Services rendered "from India" and "in India"-Distinction-Report of survey submitted by assessee not utilised within India though received by foreign agency in India-Mere submission of report within India does not take assessee out of purview of benefit-Entitled deduction.

The assessee was an agency undertaking the activity of conducting services for the benefit of foreign companies or agencies. After conducting a survey on the assigned subject, the reports were submitted to the foreign agencies. The assessee, claimed deduction under section 80-O. The Assessing Officer denied the deduction on the ground that the survey report was submitted in India and thereby section 80-O was not attracted. However, the appellate authorities allowed the claim under section 80-O. On appeal :

1. Held, dismissing the appeal, that it was not the case of the Revenue that the report of survey submitted by the assessee was utilised within India, though it was received by the foreign agency within India. It is only when it was established that the survey report submitted to a foreign agency was, in fact, used or given effect to, in India, that the assessee becomes ineligible for deduction. The mere fact that the submission of the report was within India, did not take away the matter from the purview of section 80-O. If that was to be accepted, the very purpose of providing the Explanation becomes redundant. Thus, the assessee was entitled to deduction under section 80-O.(AY. 1994-1995)

CIT v. Peters and Prasad Association (2015) 371 ITR 206/ 232 Taxman 350/124 DTR 45 (T & AP) (HC)

S. 80O:Royalties-Foreign enterprises–Gross total income- Chapter VI-A deductions are not limited to the business profits but are available to the extent of the Gross total income.[S.80B(5)]

The AO determined the deduction u/s 80O at Rs. 1,29,41,830. However, though the gross total income was higher, he held that the deduction had to be confined to the extent of business income of Rs. 69,70,127. This was reversed by the Tribunal. On appeal by the department to the High Court HELD dismissing the appeal:

The only question sought to be canvassed is that out of these deductions the admissible deduction under section 80-O ought to be limited to the extent of Rs.69,70,127 which represents business income. In other words, the income from interest and dividend shall not form part of the gross total income as defined under section 80B(5) of the Act. The submission is misconceived. If one turns to the definition of the "gross total income" under section 80B(5), it reads as under:

"80B(5) "gross total income" means the total income computed in accordance with the provisions of this Act, before making any deduction under this Chapter."

Considering the definition of the gross total income, it is difficult to hold that the interest income and the dividend income would not form part of the gross total income computed in accordance with the provisions of the Act. The view taken by the Tribunal, in our considered view, is in consonance with what is stated herein. No substantial question of law is involved. In the result, appeal is dismissed in limine with no order as to costs.(ITA No. 3224 of 2009, dt. 18/10/2010)

CIT .v. J. B. Boda& Co. P. Ltd. (Bom.)(HC),www.itatonline.org

S.80P : Co-operative societies-Income from marketing of agricultural produce of members-Matter remanded.[S.80P(2)(a)(ii)]

In view of the order in Mohinda Co-operative Sugar Mills Ltd. v.CIT (2012) 253 CTR 225 (SC),matter is remanded to CIT(A) to ascertain whether production of sugar undertaken by the assesse Co-operative Sugar Mill from the sugar crane grown by its members amounts to

'manufacture' in order to decide whether the assesse is entitled to deduction under section 80P(2)(a)(iii).(AY.1993-94)
Dy.CIT v. Budhewal Co-Operative Sugar Mills Ltd.(2015) 373 ITR 35/ 278 CTR 103 (SC)

S.80P:Co-operative societies-Income from other sources - Deductions–Administrative and other expenses-Only net income could be brought to tax. [S.56, 57]
Assessee was a co-operative society engaged in business of marketing agricultural produce and was also providing credit facilities to its members. It claimed benefit of deduction under section 80P(2)(a)(i) in respect of interest, earned on deposits kept with scheduled banks, Indra Vikas Patra, NSC etc. Assessing Officer rejected assessee's claim and brought said interest income to tax under section 56 as 'Income from other sources' .Tribunal confirmed Assessing Officer's order. Assessee filed instant appeal seeking direction to pass fresh order by giving permissible deduction under section 57 . On facts, only net interest income, i.e., interest income reduced by administrative expenses and other proportionate expenses to earn said income had to be brought to tax under section 56 . (AY. 1991-92 to 1999-2000)
Totgars Co-Operative Sale Society Ltd. .v. ITO (2015) 231 Taxman 794 (Karn.)(HC)

S.80P:Co-operative societies- Providing credit facilities to members-Cannot be considered to be co-operative Bank for the purpose section 80P(4)-Entitle to the benefit of deduction under section 80P(2)(a)(i)]
Allowing the appeal of assesse the Court held that assesse co-operative society's principal business was not of accepting deposits from public and there was no bye law specifically prohibiting admission of any other co-operative society to its membership ; assesse cannot be considered to be a co-operative bank for the purpose of section 80P(4) , thus the assesse is entitled to the benefit of deduction under section 80P(2)(a)(i). (AY. 2008-09, 2009-10& 2011-12)
Quepem Urban Co-operative Credit Society Ltd.v. ACIT (2015) 377 ITR 272/278 CTR 48/ 232 Taxman 510 (Bom.)(HC)

S.80P : Co-operative societies–Amounts invested in banks- Interest so earned was attributable to carrying on business of banking and, therefore, it was entitled to be deduction.
Assessee a co-operative society was engaged in activity of carrying on business of providing credit facilities to its members. Amount not immediately required to be lent to members was invested in banks to earn interest. This amount was in nature of profits and gains and interest so earned was attributable to carrying on business of banking and, therefore, it was entitled to be deducted in terms of section 80P(1). (AY. 2009-10)
Tumkur Merchants Souharda Credit Cooperative Ltd. v. ITO (2015) 230 Taxman 309 (Karn.)(HC)

S. 80P : Co-operative societies – Assessee falls within definition of primary agricultural credit co-operative society – Deduction under s. 80P allowable.
Assessee is a multi-purpose co-operative society registered under the Karnataka Co-operative Societies Act. The AO did not allow deduction under s. 80P. On appeal, the High Court held that the assessee was covered under the definition of multi-purpose co-operative society as per the provisions of Karnataka Co-operative Societies Act as well as definition of primary agricultural credit co-operative society as per the Banking Regulations Act, 1949 and hence deduction under s. 80P is allowable. (AY. 2010-11)
Venugram Multipurpose Co-operative Credit Society Ltd. v. ITO (2015) 370 ITR 636 /276 CTR 84 / 114 DTR 388 /231 Taxman 646/ 276 CTR 84 (Karn)(HC)

S. 80P :Co-operative societies –Once notification is repealed it cannot stand in the eye of law-Notification issued 1922 Act was repealed, matter was remanded.[S.263, 279]
Assessee-co-operative society was engaged in business of supplying fertilizer, crude oil, sugar, oil seeds etc. to members and non-members .Assessee claimed exemption on entire income under Notification No. SRO/992 dated 22-12-1950. As said notification was of Income-tax Act, 1922 which

was repealed by Income-tax Act, 1961, income was not entirely exempt and issue was to be decided according to section 80P.Matter remanded.
CIT v. Shri Gopal Gram SevaSahakariMandli Ltd. (2015) 229 Taxman 166 (Guj.)(HC)

S. 80P : Co-operative societies –Individual members-Interest income from individual members-Entitled to deduction.
Assessee, a co-operative and federal society, earned interest income from individual members on which it claimed deduction under section 80P(2). AO disallowed said claim on ground that an individual could not be a member of federal society. However, according to definition of federal society as given in relevant co-operative Act, an individual could be admitted as a nominal member. An individual could be a nominal member both of a federal society and a co-operative society and hence if federal society extended credit facilities to such nominal members, income derived from such business would fall within preview of section 80P(2)(a)(i) and assessee would be entitled to benefit of deduction on said amount also. (AY. 2009-10)
CIT v. Karnataka State Co-Operative Housing Federation Ltd. (2015) 229 Taxman 95 (Karn.)(HC)

S. 80P :Co-operative societies–Interest income-Voluntary reserves in banks, bond and small scale Industrial corporation –Entitled exemption.
Court held that interest income received by assessee, a co-operative bank on its voluntary reserve in bank, bonds and small scale industrial corporation was exempted under section 80P. (AY. 1998-99)
Prime Co Op Bank Ltd. .v. ITO (2015) 228 Taxman 101(Mag.)(Guj.)(HC)

S.80P:Co-operative societies-Interest earned from deposits with bank entitled to deduction.[S. 80P(2)(a)(i)]
The assessee, engaged in the business of providing credit facilities to its members, claimed exemption under section 80P(2)(a)(i) of the Act. The Assessing Officer and CIT(A) treated the interest from deposits with the bank as income from other sources. On appeal : Held, allowing the appeal, that the interest earned on the deposits made by the assessee in any banking activity was entitled to exemption under section 80P of the Act. (AY. 2008-2009)
Shri Siddarsiri Pattin Suharada Sahakari Niyami v. ACIT(2015) 39 ITR 643 (Bang.)(Trib.)

S.80P:Co-operative societies-Acceptance of deposits from non-members would not prevent a co-operative society from claiming deduction under section 80P(2)(a)(i)-Deduction not allowable to extent of income from providing credit facilities to non-members.[S.80P(2)(a)(i)]
Held that the acceptance of deposits from non-members would not prevent a co-operative society from claiming deduction under section 80P(2)(a)(i) of the Act. Deduction not allowable to extent of income from providing credit facilities to non-members. (AY. 2008-2009, 2009-2010)
ACIT v. Rangareddy District Judicial Employees Mutually Aided Co-operative Credit Society Ltd. (2015) 39 ITR 198(Hyd.)(Trib.)

S.80P:Co-operative societies-Assessee providing credit facilities to its members-Assessee not co-operative bank-Entitled to deduction.[S. 80P(2)(a)(i)].
The assessee, a co-operative society, registered under the Andhra Pradesh Mutually Aided Co-operative Societies Act, 1995. The assessee claimed deduction under section 80P(2)(a)(i) of the Income-tax Act, 1961, on the income from providing credit facilities to its members. The Assessing Officer, relying on Circular No. 6 of 2010 dated September 20, 2010 ([2010] 328 ITR (St.) 63), rejected the claim. The Commissioner (Appeals) noticed that the subject matter in the circular was with reference to eligibility of regional rural banks for deduction under section 80P and did not apply to the assessee. He held that the assessee was a co-operative society and not a co-operative bank and the provisions of section 80P(4) would not apply and therefore it was entitled to deduction under section 80P(2)(a)(i) of the Act. On appeal the Tribunal affirmed the view of CIT(A).(AY. 2007-2008 to 2010-2011)

ACIT v. Metrocity Criminal Courts Employees Mutually Aided Cooperative Credit Society Ltd. (2015) 39 ITR 1(Hyd.)(Trib.)

S. 80P :Co-operative societies-Co-operative Bank-paid up share capital and reserve were 1 lakh or more-Did not permit admission of any other co-operative society as a member -Not entitled to exemption u/s. 80P(2)(a)(i).[S.80P(2)(a)(i)]

Assessee was a co-operative bank regarded as a primary co-operative bank if it satisfied three conditions, firstly that primary object or principle business transacted by it was a banking business, secondly, paid up share capital and reserve of which were 1 lakh or more and thirdly, bylaws of co-operative society did not permit admission of any other co-operative society as a member. Assessee was accepting deposits from persons who were not members it could not be said that assessee society was not carrying on banking business. Paid up share capital and reserves in case of assessee were more than Rs. 1 lakh. No by laws of society permitted admission of any other cooperative society to be member of impugned society. All three conditions in case of assessee for becoming primary cooperative bank stood complied with and it could be held that assessee was a primary cooperative bank and therefore hit by provisions of section 80P(4). Hence, the assesse not entitled to exemption u/s. 80P(2)(a)(i). (AY. 2009-10, 2010-11)

Shri Chandraprabhu Urban Co-Operative Credit Society Ltd. v ITO (2015) 152 ITD 477 (Panaji)(Trib.)

S. 80P : Co-operative societies-Cottage industry-Huge capital outlay, high turnover and large number of workers not reasons to deny exemption-No specific embargo under Act-Assessee entitled to benefit of section 80P. [S.80P(2)(a)(ii)]

The assessees, handloom weavers co-operative societies, functioning under the administrative control of the Commissioner of Handloom and Textiles, Government of Tamil Nadu, enjoyed exemption under section 80P(2)(a)(ii) of the Act, since their inception. the Department contended that since the assessees had huge capital outlay, high turnover and large number of workers they were not cottage industries and were not eligible for the benefits under section 80P(2)(a)(ii) of the Act : Held, dismissing the appeal, that the assessees received various concessions like subsidies and rebates in promoting the sale of their products. These concessions and facilities were given to protect the employment and interest of traditional workers and artisans in various cottage industries. The size of the industry and the large number of workers employed were not reasons to deny the benefit available to the assessee under section 80P of the Act, when there was no specific embargo imposed under the Act. As long as the assessees were cottage industries, they would be entitled to the benefit of section 80P of the Act. (A.Y. 2010-2011)

ACIT .v. Kalikkavalasu Primary Industrial WCS Ltd. (2015) 37 ITR 422 (Chennai)(Trib.)

S. 80RRA : Remuneration –Insurance consultant-Services rendered outside India – Remuneration was received in foreign currency-Eligible deduction even if services were also rendered from India.

Assessee, an insurance consultant, sought approval from Government of India under section 80RRA. Said application was rejected on ground that assessee did not render services outside India but rendered services from India. On writ allowing the petition the Court held that ; petitioner had gone abroad as an integral part of rendering his service as Insurance Consultant, moreover, remuneration had been received in foreign currency. Assessee submitted certificates from his employer indicating that his visit abroad was for purpose of rendering service outside India, therefore petitioner was entitled to be considered for benefit of section 80RRA. (AY. 2000-01, 2001-02)

Dr. Ramesh Dinkar Samarth .v. UOI (2015) 231 Taxman 423 (Bom.)(HC)

S. 88E : Rebate-Securities transaction tax – Computation – Set-off of business loss of earlier year – Average rate should be applied to income before set-off of brought forward business loss.

Assessee claimed rebate under s. 88E. The AO reduced the amount of rebate by taking into consideration the brought forward business losses instead of the income from taxable securities transaction while computing the amount of rebate. The High Court, on appeal, held that the clear language of s. 88E ought to be given effect to. If the conditions of s. 88E(1) are satisfied, the rebate

should be computed as per s. 88E(2) and there was no warrant to apply the average rate on the income after setting off of losses. (AY. 2008-09)
CIT v. Manish D. Innani (2015)) 370 ITR 679 / 114 DTR 370/274 CTR 193 (Bom.)(HC)

S. 88E : Rebate - Securities transactions tax - Trading in shares and investment - Assessee's total income in previous year including income arising from taxable securities transactions.
The assessee was engaged in the business of derivative trade in shares and investment. For the assessment year 2008-09, he declared a total income at Rs. 5,94,71,620 and claimed rebate under section 88E at Rs. 1,01,87,300 by applying the average rate before setting off business loss of earlier years. However, the AO held that the assessee was entitled to get the rebate under section 88E after setting off business loss of earlier years. Held, the Assessee was right in its working of computation of rebate. Appeal of the revenue was dismissed. (AY. 2008-2009)
CIT .v. Manish D. Innani (2015) 370 ITR 679 (Bom) (HC)

S. 92B: Transfer pricing-If assessee contends that it has not entered into an "international transaction" with an Associated enterprise the TPO has to counter that by furnishing relevant information. Failure to do so can be challenged by a Writ Petition. [S. 92A, 92C]
The only issue which falls for consideration in the facts and circumstances of the instant case is whether there has been any “international transaction” between the petitioner no. 1 on one hand and PricewaterhouseCoopers Services BV on the other, as defined under section 92B of the Income Tax Act, 1961.
(i) A plain reading of sub-section (1) of section 92B of the Income Tax Act, 1961 reveals that “international transaction” means a transaction between two or more “associated enterprises”. Meaning of “associated enterprise” (emphasis supplied) has been statutorily elaborated under section 92A of the Income Tax Act, 1961. Clause (a) under sub-section (1) of section 92A of the Income Tax Act, 1961, spells out that one of the three statutory requirements, i.e. management or control or capital are necessary to be fulfilled for an enterprise to be associated with another enterprise. The kind of management or control or capital required has been further elaborated in sub-section (2) of section 92A of the Income Tax Act, 1961.
(ii) In the facts of the instant case, it is noticed from the records that even after the writ petitioner no.1, by a letter dated 29th April, 2015, replied to the notice dated 24th March, 2015, issued by the Joint Commissioner of Income Tax (Transfer Pricing Officer), Kolkata, taking a specific point that the partnership firm had not entered into any “international transaction” within the meaning of section 92B of the Income Tax Act, during the assessment year 2012 – 2013 nor in any earlier assessment years, the Income Tax authorities have remained conspicuously silent by not furnishing relevant materials based on which it came to a conclusion that there has been an “international transaction” within the meaning of section 92B of the Income Tax Act, 1961. If there is no relevant material in the hands of the Income Tax authorities with which it has come to an incontrovertible conclusion that the petitioner no.1 is an “associated enterprise” of PricewaterhouseCoopers Services BV, within the meaning of section 92A of the Income Tax Act, 1961, the question of issuance of notice dated 24th March, 2015, would not arise. When the petitioner no.1 replied to the said notice by its letter dated 29th April, 2015, the concerned respondent authority ought to have given a reply by supplying such relevant materials with which it come to a conclusion that the petitioner no.1 was an “associated enterprise” of PricewaterhouseCoopers Services BV. The reason why furnishing of such relevant materials were singularly important is that if the petitioner no.1 was not an “associated enterprise” of PricewaterhouseCoopers Services BV, there cannot be any computation of income from “international transaction” having regard to arm’s length price as envisaged under section 92 of the Income tax Act, 1961.
(iii) Undoubtedly, in the facts and circumstances of the instant case, for reasons stated earlier, a prima facie case has been made out for an ad interim order in terms of prayer (g) of the petition. Such ad interim order shall continue until final disposal of the writ petition. (Hindalco Industries Ltd. Vs. Additional Commissioner of Income Tax 2012 211 Taxman 315 (Bom) distinguished) (WP No. 16340 (W) of 2015, dt. 06.08.2015)(AY.2012-13)
Price Waterhouse .v. CIT (Cal.)(HC); www.itatonline.org

S. 92B : Transfer pricing–Issue of shares-Capital account- Provisions of Chapter X would not apply.

Issue of equity shares by assessee-company to its AE located abroad is on capital account and provisions of Chapter X would not apply to such a transaction.

Equinox Business Parks (P.) Ltd. v. UOI (2015) 230 Taxman 191 (Bom.)(HC)

S. 92B : Transfer pricing – Issue of shares at premium- Does not give rise to any income from international transaction and, thus, there is no occasion to apply Chapter X in such a case.

Where assessee-company had issued shares at a premium to its non-resident holding company, it does not give rise to any income from international transaction and, thus, there is no occasion to apply Chapter X in such a case. (AY. 2009-10)

SKR BPO Services (P.) Ltd. v. ITO (2015)230 Taxman 192 (Bom.)(HC)

S. 92B : Transfer pricing –Equity shares-Difference between ALP at which equity shares had to be issued and prices at which equity shares had actually been issued did not give rise to any income from an admitted International transaction.

Difference between ALP at which equity shares had to be issued and prices at which equity shares had actually been issued did not give rise to any income from an admitted International transaction.)

S.G. Asia Holdings (India) (P.)Ltd. v. Dy. CIT (2015) 229 Taxman 452 (Bom.)(HC)

S. 92B : Transfer pricing –Notice-Writ- Control and exercise- Petition was dismissed.[S. 92CA, 92D]

Assessee, a non-resident company, made certain investment in shares of an Indian insurance company. AO issued a notice under section 92CA(1) and 92D(3) in respect of said transaction. Assessee filed instant petition for quashing of notice contending, that shareholding was so small that there could not be any reasonable opinion that Indian insurance company was an associated enterprises or that transaction of subscribing to its equity shares was an international transaction. Since it was not merely shareholding which was involved but also extent of control exercisable in terms of available materials which could amount to assessee's participation as an associated enterprise under section 92A, it was not a fit case for exercise of writ jurisdiction to quash impugned notice.

First American Securities (P.) Ltd. .v. Addl.CIT (2015) 228 Taxman 187(Mag.) (Delhi)(HC)

S. 92C :Transfer pricing- Arm's length price-Comparables-Principles for identifying comparables for benchmarking an international transaction & determining the ALP in the context of whether KPO services are comparable to BPO services- Whether for TNMM method, broad functionality is sufficient and whether supernormal profits indicate that there is functional dissimilarity.

The High Court had to consider the principal question whether a Knowledge Process Outsourcing Services (KPO Services) provider could be considered as a comparable for benchmarking international transactions entered into by an entity rendering voice call services – such as the Assessee –with its associated enterprise by using TNMM and taking operating profit margin as the PLI .The Tribunal held that the activities of Vishal and eClerx, entities engaged in KPO Services such as data processing and analytics services were functionally similar to those of eClerx. The Tribunal concluded that voice call services and KPO services were essentially ITeS and, therefore, entities rendering the aforesaid services could be considered as comparables for the purpose of benchmarking international transactions by using TNMM. The Tribunal held that further sub-division of ITeS was not permissible. The Tribunal followed its decision in Willis Processing Services (I) (P.) Ltd. v. Dy. CIT 30 ITR (Trib)129 (Mumbai) 2014. On appeal by the assessee to the High Court HELD reversing the ITAT:

(i) It is not disputed that voice call services are considered to be the lower-end of ITeS. KPO on the other hand are ITeS where the service providers have to employ advanced level of skills and knowledge. Notification No. SO2810(E) dated 18th September 2013 issued by the CBDT notifying Safe Harbour Rules also indicates the above. Rule 10TA(g) of the said Rules defines KPO Services. Whilst Voice Call Center represents the lower-end of ITeS, KPO represents services involving a

higher level of skills and knowledge. India has vast human resources and a large number of highly-skilled technical professionals. The expression "KPO" indicates the involvement of domain knowledge in providing ITeS. Typically, KPO includes involvement of advance skills; the services provided may include analytical services, market research, legal research, engineering and design services, intellectual management etc. On the other hand, Voice Call Centers are normally involved in customer support and processing of routine data. In the case of Maersk Global Centers (India) Pvt. Ltd. v. ACIT (supra) a Special Bench of the Tribunal had referred to a report prepared by National Skill Development Corporation (NSDC) on Human Resource and Skill Requirements in IT and ITES Sector (2022) and noted that the KPO sector has been described as "a value play". The said report also indicates that KPO services are likely to span activities such as "patent advisory, high-end research and analytics, online market research and legal advisory".

(ii) A Knowledge Process is understood as a high value added process chain wherein the processes are dependent on advanced skills, domain knowledge and the experience of the persons carrying on such processes. KPO services are understood as the higher-end of ITeS in terms of value addition.

(iii) While entities rendering Voice Call Center services for customer support and a KPO service provider may be employing IT-based delivery systems, the characteristics of services, the functional aspects, business environment, risks and the quality of human resource employed would be materially different. It plainly follows that benchmarking international transactions on the basis of comparing the PLI of high-end KPO service providers with the PLI of Voice Call Centers would be unreliable and possibly flawed.

(iv) In order to determine the ALP in relation to a controlled transaction, the analysis must include comparables which are similar in all aspects that have a material bearing on their profitability. Paragraph 1.36 of the "OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations" published in 2010 (hereafter 'OECD Guidelines') indicates the "comparability factors" which are important while considering the comparability of uncontrolled transactions/entities with the controlled transactions/entities. Sub-rule (2) of rule 10B of the Income Tax Rules, 1962 also mandates that the comparability of international transactions with uncontrolled transactions would be judged with reference to the factors indicated under clauses (a) to (d) of that sub-rule, which are similar to the comparability factors as indicated under the OECD Guidelines. These include characteristics of property or services transferred and functions performed.

(v) The Tribunal's view that "once a service falls under the category of ITeS, then there is no sub-classification of segment" is difficult to accept as it is contrary to the fundamental rationale of determining ALP by comparing controlled transactions/entities with similar uncontrolled transactions/entities. ITeS encompasses a wide spectrum of services that use Information Technology based delivery. Such services could include rendering highly technical services by qualified technical personnel, involving advanced skills and knowledge, such as engineering, design and support. While, on the other end of the spectrum ITeS would also include voice-based call centers that render routine customer support for their clients. Clearly, characteristics of the service rendered would be dissimilar. Further, both service providers cannot be considered to be functionally similar. Their business environment would be entirely different, the demand and supply for the services would be different, the assets and capital employed would differ, the competence required to operate the two services would be different. Each of the aforesaid factors would have a material bearing on the profitability of the two entities. Treating the said entities to be comparables only for the reason that they use Information Technology for the delivery of their services, would be erroneous.

(vi) Whilst the Tribunal in Willis Processing Services (India) Pvt. Ltd. v. DCIT (supra) held that no distinction could be made between KPO and BPO service providers, however, a contrary view had been taken by several benches of the Tribunal in other cases. In Capital IQ Information System India (P.) Ltd. v. Dy. CIT, (IT) [2013] 32 taxmann.com 21 and Lloyds TSB Global Services Pvt. Ltd. v. DCIT, (ITA No. 5928/Mum/2012 dated 21th November 2012), the Hyderabad and Mumbai Bench of the Tribunal respectively accepted the view that a BPO service provider could not be compared with a KPO service provider.

(vii) The Special Bench of the Tribunal in Maersk Global Centers (India) Pvt. Ltd. struck a different cord. The Special Bench of the Tribunal held that even though there appears to be a difference between BPO and KPO Services, the line of difference is very thin. The Tribunal was of the view that there could be a significant overlap in their activities and it may be difficult to classify services strictly

as falling under the category of either a BPO or a KPO. The Tribunal also observed that one of the key success factors of the BPO Industry is its ability to move up the value chain through KPO service offering. For the aforesaid reasons, the Special Bench of the Tribunal held that ITeS Services could not be bifurcated as BPO and KPO Services for the purpose of comparability analysis in the first instance. The Tribunal proceeded to hold that a relatively equal degree of comparability can be achieved by selecting potential comparables on a broad functional analysis at ITeS level and that the comparables so selected could be put to further test by comparing specific functions performed in the international transactions with uncontrolled transactions to attain relatively equal degree of comparability.

(viii) We have reservations as to the Tribunal's aforesaid view in Maersk Global Centers (India) Pvt. Ltd. (supra). As indicated above, the expression 'BPO' and 'KPO' are, plainly, understood in the sense that whereas, BPO does not necessarily involve advanced skills and knowledge; KPO, on the other hand, would involve employment of advanced skills and knowledge for providing services. Thus, the expression 'KPO' in common parlance is used to indicate an ITeS provider providing a completely different nature of service than any other BPO service provider. A KPO service provider would also be functionally different from other BPO service providers, inasmuch as the responsibilities undertaken, the activities performed, the quality of resources employed would be materially different. In the circumstances, we are unable to agree that broadly ITeS sector can be used for selecting comparables without making a conscious selection as to the quality and nature of the content of services. Rule 10B(2)(a) of the Income Tax Rules, 1962 mandates that the comparability of controlled and uncontrolled transactions be judged with reference to service/product characteristics. This factor cannot be undermined by using a broad classification of ITeS which takes within its fold various types of services with completely different content and value. Thus, where the tested party is not a KPO service provider, an entity rendering KPO services cannot be considered as a comparable for the purposes of Transfer Pricing analysis. The perception that a BPO service provider may have the ability to move up the value chain by offering KPO services cannot be a ground for assessing the transactions relating to services rendered by the BPO service provider by benchmarking it with the transactions of KPO services providers. The object is to ascertain the ALP of the service rendered and not of a service (higher in value chain) that may possibly be rendered subsequently.

(ix) The transfer pricing analysis must serve the broad object of benchmarking an international transaction for determining an ALP. The methodology necessitates that the comparables must be similar in material aspects. The comparability must be judged on factors such as product/service characteristics, functions undertaken, assets used, risks assumed. This is essential to ensure the efficacy of the exercise. There is sufficient flexibility available within the statutory framework to ensure a fair ALP. Applying the aforesaid principles to the facts of the present case, it is clear that both Vishal and eClerx could not be taken as comparables for determining the ALP.

(x) The Assessee had also sought the exclusion of eClerx and Vishal on the ground that both the companies had returned supernormal profits. Whereas the operating margins (operating margin over total cost) in case of Vishal and eClerx were 50.68% and 65.88% respectively, the PLIs of all other comparables were in the range of 2.2% to 24%. In our view, it would not be apposite to exclude comparables only for the reason that their profits are high, as the same is not provided for in the statutory framework. The OECD Guidelines suggest that a quartile method be adopted which excludes entities that fall in the extreme quartiles for comparability. However, neither Chapter X of the Act nor the Rules made by CBDT provide for exclusion for such statistical reason.

(xi) Having stated the same, it may be necessary to bear in mind that supernormal profits may in certain cases indicate a functional dissimilarity or dissimilarity with respect to a feature that has a material bearing on the profitability. In such circumstances, it would be necessary to undertake further analysis to eliminate the possibility of the high profits resulting on account of any material dissimilarity between the tested party and the chosen comparable. A wide deviation in the PLI amongst selected comparables could be indicative that the comparables selected are either materially dissimilar or the data used is not reliable. The Tribunal proceeded on the basis that an adjustment couldbe made only in cases where supernormal profits resulted from the factors indicated in Rule 10B of the Income Tax Rules, 1962. In our view, the factors mentioned in Rule 10B are not exhaustive. The principal object of benchmarking international transactions against uncontrolled transactions is to

impute an ALP to those transactions. This exercise would fail if a factor, which has a material bearing on the value or the profitability, as the case may be, depending on the method used, is ignored.
(xii) The Tribunal proceeded on the basis that while applying TNMM method, broad functionality is sufficient and it is not necessary that further effort be taken to find a comparable entity rendering services of similar characteristics as the tested entity. The DRP held that TNMM allows flexibility and tolerance in selection of comparables, as functional dissimilarities are subsumed at net margin levels, as compared to Resale Price Method or Comparable Uncontrolled Price Method and, therefore, the functional dissimilarities pointed out by the Assessee did not warrant rejection of eClerx and Vishal as comparables. In our view, the aforesaid approach would not be apposite. Insofar as identifying comparable transactions/entities is concerned, the same would not differ irrespective of the transfer pricing method adopted. In other words, the comparable transactions/entities must be selected on the basis of similarity with the controlled transaction/entity. Comparability of controlled and uncontrolled transactions has to be judged, inter alia, with reference to comparability factors as indicated under rule 10B(2) of the Income Tax Rules, 1962. Comparability analysis by TNMM method may be less sensitive to certain dissimilarities between the tested party and the comparables. However, that cannot be the consideration for diluting the standards of selecting comparable transactions/entities. A higher product and functional similarity would strengthen the efficacy of the method in ascertaining a reliable ALP. Therefore, as far as possible, the comparables must be selected keeping in view the comparability factors as specified. Wide deviations in PLI must trigger further investigations/analysis.
(xiii) Consideration for a transaction would reflect the functions performed, the significant activities undertaken, the assets or resources used/consumed, the risks assumed. Thus, comparison of activities undertaken/functions performed is important for determining the comparability between controlled and uncontrolled transactions/entity. It would not be apposite to ignore functional dissimilarity only for the reason that its impact may be reduced on account of using arithmetical mean of the PLI. The DRP had noted that eClerx was functionally dissimilar, but ignored the same relying on an assumption that the functional dissimilarity would be subsumed in the profit margin. As noted, the content of services provided by the Assessee and the entities in question were not similar. In addition, there were also functional dissimilarities between the Assessee and the two entities in question. In our view, these comparability factors could not be ignored by the Tribunal. While using TNMM, the search for comparables may be broadened by including comparables offering services/products which are not entirely similar to the controlled transaction/entity. However, this can be done only if (a) the functions performed by the tested party and the selected comparable entity are similar including the assets used and the risks assumed; and (b) the difference in services/products offered has no material bearing on the profitability.(ITA No. 102/2015,10.08.2015)(AY.2008-09)
Rampgreen Solutions Pvt. Ltd. v. CIT (Delhi)(HC); www.itatonline.org

S. 92C:Transfer pricing-Arm's length price - Failure by Transfer Pricing Officer to apply turnover filter at initial stage - Inconsistency not noticed by Dispute Resolution Panel - Tribunal correcting position holding Department could not take advantage particularly when turnover filter not a test even in respect of surviving comparable - Finding of fact.
The assessee was engaged in installation, maintenance, repairing, sales and supply of plant, equipment and apparatus for the purpose of communication of all kinds. The assessee submitted a transfer pricing report for the assessment years 2007-08 and 2008-09. The Transfer Pricing Officer accepted the arm's length price of all international transactions except that of marketing and after sales support services which it concluded was not at the arm's length. The assessee had entered into a service agreement for provision of marketing and after sales service on cost plus mark-up basis. The assessee provided marketing and after sales services to associated enterprises in relation to sale of telecommunication equipment, software and other information technology products to customers in India. The assessee adopted the transactional net margin method taking operating profit/operating cost as the profit level indicator. The Transfer Pricing Officer rejected its analysis so far as it related to interpretation of the comparables. The assessee had, in this context, relied upon the data relating to seven comparable enterprises whose average unadjusted profit margin worked to 11.5% The Transfer Pricing Officer determined that two out of these seven were not comparables. This determination, as it pertained to CME was accepted by the assessee. The other CT was held not to be a comparable on

account of its low revenue. The related party turnover in respect of this comparable exceeded 25% and was a diminishing revenue. The Assessing Officer incorporated the report and framed the final assessment order. The Dispute Resolution Panel accepted the Transfer Pricing Officer's reasoning that the segment turnover of the excluded company, i.e. CT was only Rs. 25 lakhs and constituted less than 2% of the total turnover of the company and, therefore, the assessee could not use its data. The Tribunal reversed the findings of the Transfer Pricing Officer with respect to the inclusion of CT as a comparable. On appeal:

Held, dismissing the appeal, that the Transfer Pricing Officer chose to apply that filter but used it to exclude the data pertaining to CT. This inconsistency went unnoticed even by the Dispute Resolution Panel. The Tribunal corrected the position and noticed that not having applied the turnover filter at the initial stage, the Revenue could not take advantage, in the facts of the case, particularly when the turnover filter was not a test even in respect of the surviving comparable. These were findings of fact.(AY. 2007-2008, 2008-2009)

CIT .v. Nortel Networks India P. Ltd. (2015) 375 ITR 183 (Del) (HC)

Editorial: Order in Nortel Networks India P. Ltd. v. Addl. CIT (2015) 40 ITR 102 (Delhi)(Trib) is affirmed.

S. 92C : Transfer pricing–Arm's length price–Corporate guarantee commission – No comparison can be made between guarantees issued by commercial banks as against a corporate guarantee issued by a holding company for benefit of its AE, for computing ALP of guarantee commission- No transfer pricing adjustment could be made in respect of commission charged.[S.92B]

The assessee provided a corporate guarantee for repayment of borrowings made by its AE from the bank for purchase of assets and inventories, for working capital and as a term loan. The assessee had charged guarantee commission at the rate of 0.5% from its AE. The TPO found that the guarantee fee charged was at a lower rate. He came to the conclusion that the banks and companies were charging at least 3% for providing guarantees and, therefore, the arm's length price for the guarantee given by the assessee to bank for the benefit of the AE was at 3% of the amount of guarantee. Accordingly, he made an adjustment for the differential 2.5%.

On appeal, the CIT(A) upheld the order of the TPO on the basis that the bank rate and guarantee of the relevant period was 6% whereas PLR was 10.5%, which showed that the return for bearing received was 4.5%. Therefore, the CIT(A) found that the return of 3% arrived at by the TPO was justified. Against the dismissal of appeal by the CIT(A), the assessee approached the Tribunal. The Tribunal reversed the order of the CIT(A) and deleted the adjustment.

On appeal by the Department before the High Court, the High Court upheld the order of the Tribunal on the basis that the considerations which apply for issuance of a corporate guarantee are distinct and separate from that of a bank guarantee and, accordingly, comparison cannot be made between guarantees issued by commercial banks as against corporate guarantees issued by holding companies for the benefit of its AE, a subsidiary company. (AY. 2007-08)

CIT v. Everest Kento Cylinders Ltd. (2015)378 ITR 57/119 DTR 394/ 232 Taxman 307 (Bom.)(HC)

S. 92C:Transfer pricing–Arm's length price-Comparables-High profits /losses-Mere fact that an entity makes extremely high profits/losses cannot lead to its exclusion from the list of comparables. Only if there are material differences in the functions, assets and risks between the assessee and the said entity which cannot be eliminated u/r. 10B(3), the entity can be excluded as a comparable- Multiple year data- While determining comparability of transactions, multiple year data can only be considered if conditions stated in R. 10B(4) are satisfied and, thus, the assessee cannot rely upon previous year's data as a general rule.

The assesse company entered into international transaction with its AEs for provision of advisory services. The TPO, rejecting the multiple year analysis carried out by the assessee in its TP study, made a TP adjustment to the said international transaction by including certain high profit making companies as comparables. On appeal, the CIT(A) and the Tribunal upheld the order of the TPO/ AO. On further appeal, the High Court observed that wide fluctuations in profit margins of the same entity

on a year-to-year basis would be offset by taking the arithmetic mean of all comparables for the assessment year in question. In any case, in the event that the volatility is on account of a materially different aspect incapable of being accounted for, the analysis under R. 10B(3) would exclude such an entity from being considered as a comparable. Accordingly, the High Court held that an enquiry u/r. 10B(3) ought to be carried out to determine whether material differences between the assessee and the high profit making entity can be eliminated. Unless such differences cannot be eliminated the entity has to be included as a comparable. With respect to the issue on consideration of multiple year data, the High Court held that, while determining the comparability of transactions, multiple year data can only be considered if the conditions provided in R. 10B(4) are satisfied and, thus, it is not open to the assessee to rely upon previous years' data as a general rule. (AY. 2008-09)

Chryscapital Investment Advisors (India) (P.) Ltd. v. DCIT (2015) 376 ITR 283 / 119 DTR 1 (Delhi) (HC)

S. 92C : Transfer pricing - Arms' length price – TPO cannot hold that a company undertook all crucial functions of its AE when TPO's findings cannot be proved.

The assessee provided agency services on behalf of its holding company and other group companies as well as coordinated for import and export of goods and services on behalf of its AE. The TPO noted that the assessee provided some services to its AEs which formed the basis of sourcing activities carried out by the AEs from or to India and that the assessee's functions to its AEs were not only confined to providing marketing support services but also in arranging for feasibility studies, industry analysis and project evaluation for potential projects identified by the AEs assessee assumed significant risks and thus, it should be compensated by its AEs and the Profit Split Method (PSM) had to be applied for determining the ALP of the international transactions. The Tribunal held that the findings of the TPO were without proof and hence could not be sustained.

The High Court observed that the TPO had discarded TNMM as the most appropriate method, holding that the assessee assumed significant risks, and relied on unique intangibles thus resulting in higher profits of the AE which should be attributed to it. The High Court further observed that TPO's observations vis-à-vis the AE's decisions being taken by the assessee were without any proof and thereby held that the TNMM was the most appropriate method and that the TPO had to make a fresh determination of the ALP of the disputed international transactions. (AY.2008-2009)

CIT v. Marubeni India (P) Ltd. (2015) 118 DTR 330 / 232 Taxman 318 / 277 CTR 189 (Delhi)(HC)

S. 92C: Transfer pricing-Shares at premium- Income deemed to accrue or arise in India-In view of order passed in case of Vodafone India Services (P.) Ltd. v. UOI [2014] 50 taxmann.com 300 (Bom.) shortfall in amounts received on issue of shares to non-resident AEs when compared to that receivable on basis of ALP, along with interest on above shortfall could not be brought to tax.[S.9(1)(i)]

The assessee had issued shares to its non-resident Associated Enterprise (AE) of the face value of Rs. 10 at the premium of Rs. 120 each per share.

The Assessing Officer referred the transaction declared in Form 3CEB to the TPO in terms of section 92CA(1) of the Act.

Before the TPO, the assessee contended that the issue of equity shares being on Capital Account does not give rise to any income. However, the TPO negatived the assessee's contention.

Further the TPO held that the Arm's Length Price (ALP) of the equity shares had to be Rs. 2315 per share as against Rs. 130 per share declared by the petitioner. Consequently, a Transfer Pricing Adjustment on account of undervaluation of shares was determined of Rs. 168.05 crores and deemed interest/compensation on non-receipt of the above amount at Rs. 2.79 crores, aggregating to Rs. 170.82 crores.In view of order passed in case of Vodafone India Services (P.) Ltd. v. UOI [2014] 50 taxmann.com 300 (Bom.) shortfall in amounts received on issue of shares to non-resident AEs when compared to that receivable on basis of ALP, along with interest on above shortfall could not be brought to tax.

Essar Projects (India) Ltd. v. UOI (2015) 229 Taxman 162 (Bom.)(HC)

S. 92C: Transfer pricing-Uncontrolled Price method(CUP)-London Interbank Offered Rate (LIBOR)-Euro Interbank Offered Rate (EURIBOR)- Arm' s length interest-Interest received on loan-Transfer pricing determination is not primarily undertaken to re-write the character and nature of the transaction- Arm's length interest applied by the TPO at 14% p.a. as against 4% interest received by the assesee was deleted by the Tribunal was affirmed -Appeal of revenue was dismissed.[S.92CA]

The assessee advanced a loan to its wholly-owned subsidiary in the USA. The assessee selected the Comparable Uncontrolled Price method (CUP) to benchmark the interest received on the loan and claimed that the interest received at the rate of 4% was comparable with the export packing credit rate obtained from independent banks in India. The TPO held that the arm's length interest rate should be taken as 14% p.a. This was reduced to 12.20% by the DRP by adopting the Prime Lending Rate fixed by the Reserve Bank of India. On appeal by the assessee, the Tribunal relied on Siva Industries and Holding, Tech Mahindra, Tata Autocomp Systems etc and upheld the assessee's claim. On appeal by the department to the High Court HELD dismissing the appeal:

(i) The reasoning recorded by the TPO suffers from a basic and fundamental fallacy. Transfer pricing determination is not primarily undertaken to re-write the character and nature of the transaction, though this is permissible under two exceptions. Chapter X and Transfer Pricing rules do not permit the Revenue authorities to step into the shoes of the assessee and decide whether or not a transaction should have been entered. It is for the assessed to take commercial decisions and decide how to conduct and carry on its business. Actual business transactions that are legitimate cannot be restructured. It is not uncommon for manufacturers cum exporters to enter into distribution and marketing agreements with third parties or incorporate subsidiaries in different countries for undertaking marketing and distribution of the products.

(ii) Two exceptions have been allowed to the aforesaid principle and they are (i) where the economic substance of a transaction differs from its form and (ii) where 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;

(iii) The assessee's act of incorporating a subsidiary in United States was done with the intention to expand and promote exports in the said country and was a legitimate business decision. The transaction of lending of money by the assessee to the subsidiary, should not be seen in isolation, but also for the purpose of maximising returns, propelling growth and expanding market presence. The reasoning of the TPO ignores the said objective facet. Transfer pricing rules treat the domestic AE and the foreign AE as two separate entities and profit centres, and the test applied is whether the compensation paid for the products and services is at arm's length, but it does not ignore that the two entities have a business and a commercial relationship. The terms and conditions of the commercial business relationship as agreed and undertaken are not to be rewritten or obliterated. Transfer pricing is a mechanism to undo an attempt to shift profits and correct any under or over payment in a controlled transaction by ascertaining the fair market price. This is done by computing the arm's length price. The purpose is to ascertain whether the transfer price is the same price which would have been agreed and paid for by unrelated enterprises transacting with each other, if the price is determined by market forces. The first step in this exercise is to ascertain the international transaction, which in the present case is payment of interest on the money lent. The next step is to ascertain the functions performed under the international transaction by the respective AEs. Thereafter, the comparables have to be selected by undertaking a comparability analysis. The comparability analysis should ensure that the functions performed by the comparables match with the functions being performed by the AE to whom payment is made for the services rendered.

(iv) Rules 10B and 10C of the Income Tax Rules, 1962 indicate factors that ought to be taken into account for selection of the comparables, which necessarily include the contractual terms of the transaction and how the risks, benefits and responsibilities are to be divided. The conditions prevailing in the market in which the respective parties to the transactions operate, including the geographical location and the size of the markets, the laws and Government orders in force, costs of labour and capital in the markets, overall economic development and level of competition, are all material and relevant aspects. If we keep the aforesaid aspects in mind, it would be delusive not to accept and agree that as per the prevalent practice, subsidiary AEs are often incorporated to carry on

distribution and marking function. This is not an unusual but common. Once this is accepted, then we cannot accept the reasoning given by the TPO that the transfer pricing adjustment could restructure the transaction to reflect maximum return that a party could have earned and this would be the yardstick or the benchmark for determining the interest payable by the subsidiary AE. This is not what Chapter X of the Act and Rules mandate and stipulate. The aforesaid provisions neither curtail the commercial freedom, nor do they bar or prohibit a legitimate transaction. They permit transfer pricing adjustment so as to bring to tax what would have been paid for the transaction in the same or similar comparable circumstances by an independent third party.

(v) This ratio and rationale, when applied to the facts of the present case, would mean that the transfer pricing determination would decide what an independent distributor and marketer, on the same contractual terms and having the same relationship, would have earned/paid as interest on the loan in question. What an independent party would have paid under the same or identical circumstances would be the arm's length price or rate of interest. What the assessed would have earned in case he would have entered into or gone ahead with a different transaction, say with a party in India, is not the criteria. What is permitted and made subject matter of the arm's length determination is the question of rate of interest and not re-classification or substitution of the transaction.

(vi) The comparison, therefore, has to be with comparables and not with what options or choices which were available to the assessed for earning income or maximizing returns. Importantly, the TPO, DRP and the Assessing Officer have all accepted that the respondent assessee had adopted and applied CUP Method for computing arm's length interest payable by the subsidiary AE. To this extent, there is no lis or dispute.

(vii) We express our inability to accept that commercial expediency and related benefits have no connection or relationship with the rate of interest. In terms of Clause (c) and (d) to Rule 10B (2), contractual relations or terms, and other material facts should be recognized. Having said so, we do accept the force of the alternative argument advanced that this fact could be of marginal significance and effect. It would be for the assesse to show and prove that a transaction separately benchmarked, included consideration for the lower interest rate being paid.

(viii) We do not agree with the finding recorded by the TPO that the comparable test to be applied is to ascertain what interest would have been earned by the assessed by advancing a loan to an unrelated party in India with a similar financial health as the taxpayer's subsidiary. The aforesaid reasoning is unacceptable and illogical as the loan to the subsidiary AE in the instant case is not granted in India and is not to be repaid in Indian Rupee. It is not a comparable transaction. The finding of the TPO that for this reason the interest rate should be computed at 14% per annum i.e. the average yield on unrated bonds for Financial Years (FY, for short) 2006-07, has to be rejected.

(ix) The question whether the interest rate prevailing in India should be applied, for the lender was an Indian company/assessee, or the lending rate prevalent in the United States should be applied, for the borrower was a resident and an assessee of the said country must be answered by adopting and applying a commonsensical and pragmatic reasoning. We have no hesitation in holding that the interest rate should be the market determined interest rate applicable to the currency concerned in which the loan has to be repaid. Interest rates should not be computed on the basis of interest payable on the currency or legal tender of the place or the country of residence of either party. Interest rates applicable to loans and deposits in the national currency of the borrower or the lender would vary and are dependent upon the fiscal policy of the Central bank, mandate of the Government and several other parameters. Interest rates payable on currency specific loans/ deposits are significantly universal and globally applicable. The currency in which the loan is to be re-paid normally determines the rate of return on the money lent, i.e. the rate of interest. (UN Model Double Taxation Convention Between Developed and Developing Countries & OECD Model Convention Commentary, Chapter 10 of the U.N. Transfer Pricing Manual etc considered.(AY. 2007-08))

CIT v. Cotton Naturals (I) Pvt. Ltd.(2015) 118 DTR 1/276 CTR 445 /231 Taxman 401 (Delhi)(HC)

S. 92C : Transfer pricing-The "bright line test" has no statutory mandate and a broad-brush approach is not mandated or prescribed. Parameters specified in paragraph 17.4 of Special Bench verdict in L. G. Electronics are not binding on the assessee or the Revenue-Matter remanded to the Tribunal for de novo consideration because the legal standards or ratio accepted and applied by the Tribunal was erroneous.

This High Court had to consider various issues arising from the judgement of the Special Bench of the Tribunal inL.G. Electronics India Pvt. Ltd. versus Assistant Commissioner of Income Tax, reported as (2013) 152 TTJ 273 (Del). The principal issue was whether advertisement, marketing and sale promotion expenditure ("AMP", for short) beyond and exceeding the "bright line" is a separate and independent international transaction undertaken by the resident Indian assessee towards brand building for the brand owner, i.e. the foreign Associated Enterprise ("AE", for short). There were several other core issues pertain to aspects of arm's length pricing of international transactions. HELD by the High Court remanding the issue to the Special Bench for reconsideration of the primary issue:
(i) In case of a distributor and marketing AE, the first step in transfer pricing is to ascertain and conduct detailed functional analysis, which would include AMP function/expenses.
(ii) The second step mandates ascertainment of comparables or comparable analysis. This would have reference to the method adopted which matches the functions and obligations performed by the tested party including AMP expenses.
(iii) A comparable is acceptable, if based upon comparison of conditions a controlled transaction is similar with the conditions in the transactions between independent enterprises. In other words, the economically relevant characteristics of the two transactions being compared must be sufficiently comparable. This entails and implies that difference, if any, between controlled and uncontrolled transaction, should not materially affect the conditions being examined given the methodology being adopted for determining the price or the margin. When this is not possible, it should be ascertained whether reasonably accurate adjustments can be made to eliminate the effect of such differences on the price or margin. Thus, identification of the potential comparables is the key to the transfer pricing analysis. As a sequitur, it follows that the choice of the most appropriate method would be dependent upon availability of potential comparable keeping in mind the comparability analysis including befitting adjustments which may be required. As the degree of the comparability increases, extent of potential differences which would render the analysis inaccurate necessarily decreases.
(iv) The assessed, i.e. the domestic AE must be compensated for the AMP expenses by the foreign AE. Such compensation may be included or subsumed in low purchase price or by not charging or charging lower royalty. Direct compensation can also be paid. The method selected and comparability analysis should be appropriated and reliable so as to include the AMP functions and costs.
(v) Where the Assessing Officer/TPO accepts the comparables adopted by the assessed, with or without making adjustments, as a bundled transaction, it would be illogical and improper to treat AMP expenses as a separate international transaction, for the simple reason that if the functions performed by the tested parties and the comparables match, with or without adjustments, AMP expenses are duly accounted for. It would be incongruous to accept the comparables and determine or accept the transfer price and still segregate AMP expenses as an international transaction.
(vi) The Assessing Officer/TPO can reject a method selected by the assessed for several reasons including want of reliability in the factual matrix or lack / non-availability of comparables. (see Section 92C(3) of the Act).
(vii) When the Assessing Officer/TPO rejects the method adopted by the assessed, he is entitled to select the most appropriate method, and undertake comparability analysis. Selection of the method and comparables should be as per the command and directive of the Act and Rules and justified by giving reasons.
(viii) Distribution and marketing are inter-connected and intertwined functions. Bunching of inter-connected and continuous transactions is permissible, provided the said transactions can be evaluated and adequately compared on aggregate basis. This would depend on the method adopted and comparability analysis and the most reliable means of determining arm's length price.
(ix) To assert and profess that brand building as equivalent or substantial attribute of advertisement and sale promotion would be largely incorrect. It represents a coordinated synergetic impact created by assortment largely representing reputation and quality. "Brand" has reference to a name, trademark or trade name and like "goodwill" is a value of attraction to customers arising from name and a reputation for skill, integrity, efficient business management or efficient service. Brand creation and value, therefore, depends upon a great number of facts relevant for a particular business. It reflects the reputation which the proprietor of the brand has gathered over a passage or period of time in the form of widespread popularity and universal approval and acceptance in the eyes of the customer. Brand

value depends upon the nature and quality of goods and services sold or dealt with. Quality control being the most important element, which can mar or enhance the value.
(x) Parameters specified in paragraph 17.4 of the order dated 23rd January, 2013 in the case of L.G. Electronics India Pvt Ltd (supra) are not binding on the assessed or the Revenue. The "bright line test" has no statutory mandate and a broad-brush approach is not mandated or prescribed. We disagree with the Revenue and do not accept the overbearing and orotund submission that the exercise to separate "routine" and "non-routine" AMP or brand building exercise by applying "bright line test" of non-comparables should be sanctioned and in all cases, costs or compensation paid for AMP expenses would be "NIL", or at best would mean the amount or compensation expressly paid for AMP expenses. It would be conspicuously wrong and incorrect to treat the segregated transactional value as "NIL" when in fact the two AEs had treated the international transactions as a package or a single one and contribution is attributed to the aggregate package. Unhesitatingly, we add that in a specific case this criteria and even zero attribution could be possible, but facts should so reveal and require. To this extent, we would disagree with the majority decision in L.G. Electronics India Pvt. Ltd. (supra). This would be necessary when the arm's length price of the controlled transaction cannot be adequately or reliably determined without segmentation of AMP expenses.
(xi) The Assessing Officer/TPO for good and sufficient reasons can de-bundle interconnected transactions, i.e. segregate distribution, marketing or AMP transactions. This may be necessary when bundled transactions cannot be adequately compared on aggregate basis.
(xii) When segmentation or segregation of a bundled transaction is required, the question of set off and apportionment must be examined realistically and with a pragmatic approach. Transfer pricing is an income allocating exercise to prevent artificial shifting of net incomes of controlled taxpayers and to place them on parity with uncontrolled, unrelated taxpayers. The exercise undertaken should not result in over or double taxation. Thus, the Assessing Officer/TPO can segregate AMP expenses as an independent international transaction, but only after elucidating grounds and reasons for not accepting the bunching adopted by the assessed, and examining and giving benefit of set off. Section 92(3) does not bar or prohibit set off.
(xiii) CP Method is a recognised and accepted method under Indian transfer pricing regulation. It can be applied by the Assessing Officer/TPO in case AMP expenses are treated as a separate international transaction, provided CP Method is the most appropriate and reliable method. Adoption of CP Method and computation of cost and gross profit margin comparable must be justified.
(xiv) The object and purpose of Transfer Pricing adjustment is to ensure that the controlled taxpayers are given tax parity with uncontrolled taxpayers by determining their true taxable income. Costs or expenses incurred for services provided or in respect of property transferred, when made subject matter of arm's length price by applying CP Method, cannot be again factored or included as a part of inter-connected international transaction and subjected to arm's length pricing. (AY. 2008-09)
Sony Ericsson Mobile Communication India Pvt. Ltd. .v. CIT (2015) 374 ITR118/ 276 CTR 97/117 DTR 105/231 Taxman 113(Delhi)(HC)
Discovery Communications India .v. Dy.CIT (Delhi)(HC); www.itatonline.org
Daikin Airconditioning India Pvt. Ltd. .v. Dy.CIT (Delhi)(HC); www.itatonline.org
Haier Appliances (India) P. Ltd .v. Dy.CIT (Delhi)(HC); www.itatonline.org
Reebok India Company Ltd. .v. Addl.CIT (Delhi)(HC); www.itatonline.org
Canon India Pvt. Ltd. .v. CIT(2015) 276 CTR 97/117 DTR 105 / 231 Taxman 113 (Delhi)(HC)
Casio India Co P. Ltd. .v. CIT(Delhi)(HC); www.itatonline.org

S. 92C : Transfer pricing - Arms' length price –Resale method is most appropriate method- Purchasing goods from AE and selling them to unrelated parties wiyhout any value addition, RPM is the most appropriate method for determination of ALP.
In case of distribution or marketing activities when goods are purchased from associated entities and sales are effected to unrelated parties without any further processing, RPM (resale price method) is most appropriate method to determine ALP of said transaction, i.e., international transaction of import of goods. Appeal of revenue was dismissed.(AY. 2003-04)
CIT .v. L'Oreal India (P.) Ltd. (2015) 228 Taxman 360/ 117 DTR 480/ 276 CTR 484 (Bom.)(HC)

S. 92C :Transfer pricing-Arms' length price–Comparable-Comparable cases cannot be ignored on the ground that loss suffered in some years.

Court held that that where the assesse based on computations made in comparable cases ,there was no justification for revenue to ignore comparable cases only on ground that assessee had sustained losses in some years. (AY. 2007-08)

Joy Alukkas India (P.) Ltd. .v. ACIT (2015) 228 Taxman 35 (Mag.)(Ker.)(HC)

S. 92C :Transfer pricing-Arms' length price-Export incentives-Comparable to be done by applying same formula.

The assessee made export sales to its AE.The TPO made TP adjustments to said transaction. The CIT(A) held that the TPO computed the difference of the operating margin by excluding export incentives but while evaluating the comparable instances, the export incentives were included by the TPO. In this background, the CIT(A) observed that for making any comparison, the same parameters will have to be adopted. Tribunal affirmed the view of CIT(A).On appeal by revenue the Court held that, while making a comparison of operating profit with other comparables, TPO is required to compute operating profit by treating case of assessee and comparable instances on same footing by applying same formula and he has no jurisdiction to apply a different formula to work out operating profit for comparables and for assessee .(AY. 2008-09)

CIT .v. Mirza International Ltd. (2015) 228 Taxman 34(Mag.)(All.)(HC)

S. 92C:Transfer pricing- Allotment of shares-The allotment of shares/ receipt of share application money by the assessee from the AE for a price less than the book value of the shares cannot be regarded as a "deemed loan" by the assessee to the AE and notional interest cannot be imputed thereon.[S.56(2)]

The assessee, a 100% Indian subsidiary of BHW Holding AG (BHW Germany), received Rs.53,30,96,400 towards "Receipt of share application money". On a reference made by the Assessing Officer (AO) to the TPO, the latter observed that the assessee demonstrated the international transaction of `Receipt of share application' at ALP by following the Comparable Uncontrolled Price (CUP) method as the most appropriate method. The TPO observed that the book value of each share of the assessee company at the beginning of the year stood at Rs. 11.98. The assessee was found to have received share application money against such shares from its AEs at the rate of Rs. 10 per share, equal to the face value, in full and final settlement of the issue of shares. Since the book value of the share was higher than the issued price, the TPO held it as a transaction of `transfer of assets of the company' to its AEs in the guise of issue of share capital. It was opined that such under-charging of the price of shares was in the nature of a deemed loan given by the assessee to its AEs without any consideration. He held that the assessee ought to have been compensated for such deemed loan with suitable interest. The TPO determined the arm's length value of shares issued by the assessee company on the basis of its Annual report at Rs. 11.98 per share. Applying this benchmark as arm's length price of the share capital, the TPO treated the differential amount of Rs.10,55,53,087/- as deemed loan given by the assessee to its AEs. It was thereafter noticed that the assessee ought to have charged interest on such loan of Rs. 10.55 crore from its AEs. By applying the benchmark interest rate of 17.26% on such deemed loan, the TPO worked out the arm's length value of interest received at Rs. 15,18,205. Since no interest was received by the assessee on such deemed loan, the TPO proposed transfer pricing adjustment of equal amount at Rs. 15.18 lac. The Assessing Officer made this addition, which came to be affirmed in the first appeal. On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) There can be no doubt about the transaction of issue of share capital by a company to its AEs being characterized as non-international transaction. Section 92B gives meaning to `International transaction'. Sub-section (1) of this section provides that: `For the purposes of this section and sections 92, 92C, 92D and 92E, "international transaction" means a transaction between two or more associated enterprises, either or both of whom are non-residents, in the nature of purchase, sale or ……. or any other transaction having a bearing on the profits, income, losses or assets of such enterprises……..'. It is apparent from the definition of `international transaction' that it encompasses a transaction between two associated enterprises which, inter alia, has a bearing on assets of such enterprises. As the issue of shares by a company has direct bearing, inter alia, on its assets in terms of

receipt of consideration, such transaction cannot be held to be anything other than an international transaction. The legislature has clarified this position beyond any pale of doubt by inserting clause (c) to the Explanation at the end of section 92B through the Finance Act, 2012, w.r.e.f. 1.4.2002, providing that the international transaction shall include : `(c) capital financing, including any type of long-term or short-term borrowing, lending or guarantee, purchase or sale of marketable securities or any type of advance, payments or deferred payment or receivable or any other debt arising during the course of business;'. This shows that the issue of share capital is an international transaction. Once there is an international transaction, the mandate of section 92C is triggered, which talks of computation of its arm's length price.

(ii) The moot question which arises for our consideration is whether the transaction of receipt of share application money leads to generation of any income chargeable to tax in the hands of the assessee company proposing to issue shares, warranting the substitution of such income with income determined on the basis of its ALP. An income is chargeable to tax, if it is either of a revenue character or of a capital nature having been specifically included in the ambit of income under the Act. The definition of income does not specifically include within its purview any capital receipt arising on issue of share capital. Thus it follows that the issue of shares at par or premium is a transaction on capital account, which does not affect the computation of total income of a company.

(iii) Here it is important to mention that the Finance Act, 2012 w.e.f. 01.04.2013 has inserted clause (viib) to section 56(2) of the Act, the relevant part of which provides as under: `(viib) where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:…….'. The above provision makes it explicit that where a company, not being a one in which public are substantially interested, receives consideration for issue of shares exceeding the fair market value of the shares, then the consideration received for such shares as exceeds the fair market value of the shares is considered as income under the head "Income from other sources". To put it simply, if a share with the face value of Rs.10 is issued for Rs.50 and the fair market value of such share is Rs.15, then the excess premium received amounting to Rs.35 (Rs.50 minus Rs. 15) shall be treated as the income of the company chargeable under this provision. It is further relevant to note that this provision is attracted only when the share capital is issued to any person being a resident. Au contraire, if the shareholder is a non-resident then the mandate of this provision does not apply. The position which ergo follows is that prior to the insertion w.e.f. 01.04.2013 there was no provision under the Act providing for charging excess share premium to tax. In our considered opinion, this provision has no application on the instant assessee for two reasons. First, we are dealing with the assessment year 2008-09 and it is obvious that section 56(2)(viib) has been inserted w.e.f. 1.4.2013 and further there is nothing to indicate that it has a retrospective operation. Second, the assessee company issued shares to its non-resident AEs and section 56(2)(viib) applies only when a shareholder is resident. Moreover, this provision operates only when the company issues shares at a price above the fair market value and not vice versa. On the other hand, we are confronted with a converse situation, in which the assessee company, as per the opinion of the authorities below, has received share application equal to the face value of share in full and final settlement at a price less than the fair market value. Once neither the amount of face value of the shares issued nor the expected share premium leads to the accrual of an income chargeable to tax in the hands of the issuing company, there can be no question of substituting the transacted value of the international transaction with its ALP.

(iv) Though the international transaction on capital account itself would not lead to generation of any income because of the transfer pricing adjustment, but the international transaction on capital account, which impacts income, such as, under reporting of interest or over reporting of interest paid or claiming of depreciation etc. is required to be adjusted to the ALP price, which is not a tax on the capital receipts. The effect of the judgment in Vodafone India Services Pvt. Ltd. Vs. Additional Commissioner of Income Tax, (2014) 368 ITR 1 (Bom.) on a holistic basis is that though the international transaction on capital account per se cannot call for any addition on account of transfer pricing adjustment because of the absence of any provision under the Act charging income from such transactions, but the transactions flowing out of such original transaction on capital account, having impact on the profitability of the assessee, would be required to pass the mandate of Chapter-X of the

Act. In other words, if such offshoot transactions of the original transaction on capital account, such as, interest or depreciation are not at arm's length price, then it is mandatory to determine their ALP and make addition, if any, on account of transfer pricing adjustment. It can be understood with the help of a simple example. Suppose an Indian company purchases some asset from its AE at a consideration of Rs.300 (the arm's length price of which is Rs.100), on which it claims depreciation of Rs.30 at the rate of 10% on such purchase consideration. Now the TPO can rightly determine the ALP of the international transaction of purchase of asset at Rs.100. Since the transaction of purchase of asset is on capital account, there can be no addition of Rs.200 (Rs.300 minus Rs.100), being the difference between the ALP and transacted value. However this international transaction of purchase of asset on capital account having impact on the income of the assessee by means of transaction of claim of depreciation is to be adjusted to the ALP price. Consequently, the TPO will be within his jurisdiction to determine the ALP of the transaction of claim of depreciation by reducing it to Rs.10 on the basis of the ALP of the international transaction on capital account, for which no addition of Rs.200 is maintainable. Similar is the position as regards the under reporting of interest on an international transaction on a capital account. (ITA No. 3072/Del/2013, dt.05.06.2015)(AY. 2008-09)
First Blue Home finance Ltd. .v. DCIT (Delhi)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length price-Comparable and adjustments-TPO rejected comparable selected by assessee without assigning any reason, ALP addition made by TPO was to be deleted.
Assessee was engaged in providing computer system consultancy services. It had rendered software services to its associated enterprise, assesse selected six comparables after comparability test and returned operating profit at rate of 4.15 crores. TPO followed other methods adopted by assessee to determine ALP, but rejected comparables selected by assessee and made his list of comparables and computed operating profit at rate of 8.73 crores. The addition of differential between profits determined and reported by assessee to assessee's income and determined ALP. No reasons for rejection of comparable selected by assessee was assigned. The ITAT held that in view of arbitrary selection of comparables by TPO and in absence of any failure on part of assessee, there was no basis to make ALP addition to assessee's income.(AY. 2003 – 2004, 2004 – 2005)
ACIT .v. SRA Systems Ltd.(2013) 22 ITR 205 / (2015)153 ITD 338 (Chennai)(Trib.)

S. 92C:Transfer pricing-Circumstances in which the Profit Split Method (PSM) has to be preferred over the TNMM for determining the ALP and method of allocation of profits between the assessee and the AE under the PSM.
The Tribunal had to consider whether the most appropriate method is the Profit Split Method (PSM) as claimed by the assessee or the TNMM as claimed by the AO, while working out the Arm's length value in respect of international transactions between Infogain India i.e. assessee and Infogain US i.e. parent company. HELD by the Tribunal:
(1)Rule 10B(1)(d) of the Income Tax Rules, 1962, defines the Profit Split Method. From the provisions contained in the said Rule 10B(1)(d), it is clear that "PSM" may be applicable in case where transaction involved transfer of unique, intangibles or any multiple transactions interrelated international transactions which cannot be evaluated separately for determining the Arm's Length Price of any one transaction. The Profit Split Method (PSM) first identifies the profit to be split for the associated enterprise from the controlled transactions in which the AEs are engaged. It then splits these profits between the AEs on an economically valid basis that approximates the division of the profit that would have been anticipated and reflected in an agreement, transaction or a residual profit intended to represent the profit that cannot readily be assigned to one of the parties. The contribution of each enterprise is based upon a functional analysis and valued to the extent possible by any available reliable standard market data. The functional analysis is an analysis of the functions performed (taking into account assets used and risk assumed) by each enterprise.
(ii) A perusal of the function of the assessee company reveals that the international transactions are highly integrated and interrelated and both the entities are contributing significantly to the value chain of provision of software services to the end customers. The Global Delivery Organization Group (GDO) in India is responsible for delivery of services to the customers globally. The primary objective of the group is to bring synergies amongst geographic groups and project, to make efficient

use of the available resources, to broaden areas of service offerings, to improve opportunity fulfilment ration, and to maximize customer satisfaction with each project execution. However, the TPO had not considered the role of the GDO. The assessee assigned weights to each activity keeping in view the relative importance in the entire value chain, based on interviews with the key management personnel and the functions in the value chain of software services provided by the Infogain Group to the customers based in the US were identified and weights were assigned to the functions having regard to their relative importance in the value chain. Both the parties i.e. Infogain India (assessee) and Infogain US are making contribution. Therefore, the Profit Split Method is the most appropriate method for determination of ALP. The decision as what is the most appropriate method does not depend on the fact as to whether an assessee is having loss or has a profit.

(iii) On the question as how the allocation is to be done for residuary profits under the Profit Split Method, it is well settled that as per the Rule 10D, the benchmarking should be done with the external uncontrolled transactions, however, in the present case, it is not possible to get a comparable. Therefore, such allocation can be done on the basis that how much each independent enterprise might have contributed. Therefore, relative contribution has to be determined, based on key value drivers because benchmarking is not practicable. In the present case, as the comparables having similar transactions would be difficult to find out, therefore, in such a situation, a harmonious interpretation of the provisions is required to make the rule workable, so as to achieve the desired result of the determination of the ALP.

(iv) Both the OECD Transfer Pricing Guidelines as well as the UN draft method of transfer pricing for developing countries, suggest that an allocation of residual profits under PSM should be done, based on contributions by each entity. In the present case, since the department has accepted in the preceding year and the succeeding year 40:60 ratio between the Infogain India and Infogain US and if the facts are similar for the year under consideration then no deviation is to be done. Appeal of assesse was allowed. (AY. 2008-09)

Infogain India Pvt. Ltd. .v. DCIT (Delhi)(Trib.); www.itatonline.org

S. 92C:Transfer pricing-Transactions of providing support services to "Sogo shosha" entities cannot be characterized as trading transaction for purposes of comparison and determining ALP and the cost of sales cannot be included

The assessee company is a wholly owned subsidiary of Mitsui & Co. Ltd., Japan. Mitsui & Co. Ltd., Japan is one of the leading sogo shosha establishment in Japan. Sogo shosha means general trading and these companies are general trading companies. These companies play an important role in linking buyers and sellers for wide range of products. The range is very wide that it includes grain and oil, machinery, equipment, etc. The assessee company being a subsidiary of the Mitsui & Co. Ltd., Japan provided support services to the various group entities of Mitsui & Co. Ltd., Japan. This support services is the main activity whereby it acts as a facilitator for the transactions entered into by Mitsui & Co. Ltd., Japan and other group entities of the Mitsui & Co. Ltd., Japan. The assessee used TNMM (Transactional Net Margin Method) as the most appropriate method and the Profit Level Indicator (PLI) selected was 'Berry Ratio' against operating expenses. The assessee claimed that the average berry ratio come out to 1.34 as against 1.09 computed on the basis of the 20 comparables set out in the transfer pricing study and hence the transactions entered into by the assessee company was at arm's length price. The TPO was also of the view that the way the assessee has computed arm's length price by using berry ratio as PLI, the entire international transactions relating to sales and services of the commodities have remained out of the PLI. He held that the cost of sale is to be included in the denominator of the PLI used. It was also held that as per the Income Tax Rules operating expenses cannot be the basis as these expenses do not include cost of sales. The TPO invoked Rule 10B(1)(e)(i) to hold that net profit margin realized by an assessee from an international transaction entered into with associated enterprises is to be computed in relation to costs incurred, sales effected or assets employed by the assessee. It was also held that as regards the support services provided by the assessee is concerned, the right course will be to treat such services as equivalent to trading and the income received by the assessee from such support services is to be considered as income from trading and comparison need to be made accordingly. This was upheld by the DRP. On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) The activities of purchase and sale i.e. trading involves risk and finance whereas in the activity of support services i.e. intending transactions the assessee has neither to incur any financial obligation nor carries any significant risk. The nature of two activities is absolutely different. The activities of trading i.e. purchase and sale are highly insignificant as compared to activity of support service which constitutes the core business activities of the assessee. The TPO and DRP are wrong in applying the trading margins ignoring the facts of the case that the assessee being a service provider the trading margins cannot be applied. Further, the TPO DRP have gone wrong in including the cost of sales in OP/TC ignoring the fact the value of the sale under no circumstances effects the activities of the assessee company, a service provider. For support services the correct method is the TNMM and the assessee has computed the same on the basis of OP/TC. The OECD guidelines also supports this contention that in TP study business transactions cannot be recharacterized. The support service or intending provided by the assessee company is nothing but a trading facilitation both in form and substance.

(ii) The trading activities are undertaken by Mitsui Japan not by Mitsui India. If it is import of goods for buyers in India, the Mitsui Japan has a contract with the Japanese suppliers and Mitsui Japan also enters into contract with the buyers in India. Similarly for exports from India, Mitsui Japan enters into a contract with Indian supplier directly for the purchase and sales transactions. Thus the role of Mitsui India, the assessee company is a mere facilitator, a mere service provider. Mitsui India does not take title or possession of the merchandise at any moment and bears no price risk. Mitsui India does not take inventory risk, it does not take warranty risk, it does not take credit risk. It does not employ its capital. In purchase and sale, inventory, advances, debtors, Mitsui India's main function is to maintain contact with the suppliers to ensure timely delivery of merchandise to the customers in the quality and grade desired, communicating with Mitsui India or its affiliates, gathering information on demand and supply conditions of the commodities. The above functions are entirely different than the trading business. In trading activities, one ventures himself. Buys and sells goods in its account. It takes price risk, inventory risk, it deploys capital in inventory, debtors. It takes risk in warranty, credit, etc. Thus the functions performed, assets deployed and risk assumed in trading are entirely different than that of business support services. The TPO has gone wrong in holding that margins earned in trading are in identical circumstances as while providing support services.

(iii) As regards the issue of inclusion of cost of sales in the denominator, the reasoning given by the TPO that compensation model in the case of the assessee should be expressed as a percentage of FOB price of goods serviced through the assessee is also wrong. The comparison model as a percentage of the value of the goods can be good where the service provider has knowledge of the product, knowledge of the quality, its usage and has developed competency. In this regard this model can't be applied to an entity which is just providing support services to an entity who in turn has core competency of that business, its product, design, etc. There is a difference in carrying on the business oneself and providing support service to the one who is doing the business. That reasoning given by the TPO for adding cost of goods sold while computing margin is not correct. Rule 10B(e)(i) specifically provides that net profit margin in relation to transaction entered into with an AE is computed in relation to costs incurred, or sales effected or assets employed or to be employed by the enterprise. The cost incurred here will mean the cost incurred by the enterprise which will in the case of the assessee mean the cost incurred in providing services. Since no sales have been effected by the assesseecompany it is not appropriate to take cost of sales for computing margin. Even otherwise the compensation model to determine the arm's length price based on a single rate of commission on total FOB value of all types of goods to be sold will not be appropriate. The percentage of brokerage or commission for procuring business in respect of luxury goods or commodities is higher as compared to the percentage of commission or brokerage for high value products like gold, bullion. Similarly the percentage of commission or brokerage for consumer products is always higher as compared to the industrial products. Thus even where commission rate based on value of goods sold to be applied the nature and type of product n respect of which such services have been rendered have to be taken into consideration and then a comparison needs to be made with the commission rate prevalent in respect of such product goods. In the present case the nature of products and items varies a lot. The TPO without even looking at any of these items details has in a most arbitrary manner considered trading as one and the same to support services and applied trading margin in different nature of the product and items to the support services taking turnover of the AE as the basis. The TPO was not justified in re-

characterizing the transaction of business support services as that into trading and applying the profit margin in the trading as the PLI ((A Y. 2007-08,2008-09)
Mitsui & Co. India Pvt. Ltd. .v. DCIT (Delhi)(Trib.); www.itatonline.org

S. 92C: Transfer pricing--Arm's length price-Transactional net margin method--Only companies having related party transactions of less than 15 per cent. can be considered-Companies with turnover more than Rs. 200 crores to be excluded-Functionally dissimilar companies to be excluded.
Assessee is in the business of Software development services. Tribunal held that; while selecting comparables, only companies having related party transactions of less than 15 per cent. can be considered. Companies with turnover more than Rs. 200 crores to be excluded.Functionally dissimilar companies to be excluded.(AY. 2006-2007)
Tektronix Engineering Devt. India P. Ltd. v. Dy.CIT (2015) 39 ITR 212(Bang.)(Trib.)

S. 92C:Transfer pricing-Arm's length price-Transactional net margin method-Selection of comparables-Working capital adjustment-Opening and closing working capital to be considered.
Assessee is in the business of processing information and data through electronic and information technology services. While determining the arm's length price,company earning major source of income from outsourcing whose major expenditure was data entry charges,cannot be considered comparable. Company functionally similar and not subject to extraordinary events such as acquisition is to be included as comparable. Companies having huge turnover and brand value is to be excluded as comparables. Opening and closing working capital to be considered for determining working capital deployed by any organization. Transfer Pricing Officer to allow working capital adjustment while determining profit margins of comparables.(AY. 2008-2009)
New River Software Services P. Ltd. v. ACIT (2015) 39 ITR 415(Delhi)(Trib.)

S.92C:Transfer pricing-Arm's length price-Determination—Information technology enabled services-Transactional net margin method-Selection of comparables.
Tribunal held that companies earning majority of income from outsourcing cannot be selected as comparable. Functionally dissimilar companies to be excluded. Companies which had suffered events like merger or demerger to be excluded. Companies consistently making losses to be excluded. Where assessee's financial year different from comparable company's compute Transfer Pricing Officer to compute figures relevant to financial year from audited accounts of comparable.(AY. 2009-2010)
Macquarie Global Services P. Ltd. v. Dy. CIT (2015) 39 ITR 390(Delhi)(Trib.)

S.92C:Transfer pricing-Arm's length price-Software development services-Selection of comparables-Functionally dissimilar companies to be excluded.
Tribunal held that Companies having related party transactions less than 15 per cent. alone can be considered. Companies with turnover more than Rs. 200 crores to be excluded. Functionally dissimilar companies to be excluded. Small company cannot be compared to giant company engaged in development of niche products. Difference between operating profit margin determined by Transfer Pricing Officer and by assessee within range of plus or minus five per centadjustment not warranted.(AY. 2006-2007)
Cypress Semiconductor Technology India P. Ltd. v. Dy. CIT (2015) 39 ITR 468(Bang.)(Trib.)

S.92C:Transfer pricing-Arm's length price-Software development services-Transactional net margin method-Selection of comparables- Functionally dissimilar company to be excluded-Adjustment of depreciation- Matter remanded.
Companies having related party transactions less than 15 per cent. can alone be considered as comparable. Company with turnover more than Rs. 200 crores to be excluded.-Functionally dissimilar company to be excluded. Adjustment for depreciation can be allowed only if there are operational differences affecting comparability.-Matter remanded.(AY. 2005-2006)
Dy.CIT v. Novell Software Development (India) P. Ltd. (2015) 39 ITR 331(Bang.)(Trib.)

S. 92C : Transfer pricing -Arm's length price-Company providing high-end services involving specialized knowledge and domain expertise in field could not be compared with assessee company which was mainly engaged in providing low-end services to group concerns.

It was held that a company providing high-end services involving specialized knowledge and domain expertise in field could not be compared with assessee company which was mainly engaged in providing low-end services to group concerns. Also where TPO rejected comparables without even examining as to whether they were functionally comparable or not, comparability analysis carried out by him was vitiated. (AY. 2009-10)

PTC Software (India) (P.) Ltd. v. Dy. DIT (2014) 36 ITR 578 / (2015) 67 SOT 138(URO) (Pune)(Trib.)

S. 92C : Transfer pricing - Arm's length price - company reflecting high margins in some year and low margin in some year cannot be taken as comparable.

It was held that where a company reflected high margins in certain years and very low in other years, being functionally not comparable, margins of said companies could not be applied as comparables while benchmarking international transactions of assessee in IT segments. (AY. 2009-10)

PTC Software (India) (P.) Ltd. v. Dy.DIT (2014) 36 ITR 578 / (2015) 67 SOT 138(URO) (Pune)(Trib.)

S.92C:Transfer pricing–Arm's length price-Only current year data is to be utilized for purpose of comparability.

It was held that only current year data is to be utilized for purpose of comparability. A company offering wide encompassing IT solutions and services cannot be compared with software service provider. It was further held that high turnover and abnormal high profit margin per se cannot be a reason for rejecting a company as comparable, unless there are other reasons which do not satisfy FAR analysis. Lastly it was held that comparable undergoing diminishing revenue/persistent losses cannot be selected as comparable. (AY. 2009-10)

Navisite India (P.) Ltd. v. ACIT (2015) 67 SOT 145(URO) (Delhi)(Trib.)

S. 92C : Transfer pricing-Arm's length price-Payment to third party on behalf of AE for custom clearance services on high value packagescould not be included in total costs of assessee for purpose of determining profit margin for bench marking arm's length price of assessee.

On appeal to the Tribunal it was held from the records, it is evident that for co-coordinating custom clearance services on high value packages, the assessee was not rendering any direct services to the AE, but was getting such services done through third party who had the requisite license. The assessee's role was confined to making the payments and to get the entire reimbursements of the costs. It is the Jeena company who had charged for its services and the assessee has merely pass through such cost. In other words, assessee has merely done co-ordinating services, rather than providing full fledged services. The department's allegations that it was monitoring Jeena's activity does not per se lead to any inference that the assessee was performing these services directly. All the activities and services have been rendered by Jeena who had received the payment as per their invoice. Under such a situation, it cannot be held that mark up of 9% should be applied on such costs incurred by the Jeena for benchmarking the arm's length price of the assessee vis-a-vis the transactions with AE. The net profit margin realized from the AE is to be computed only with reference to the cost incurred directly by the assessee itself and its profit margin cannot be computed on the cost incurred by the third party or unrelated parties so as to compute the net profit margin of the assessee with the transactions with the AE. The reason being, no direct cost of assessee is involved and assessee has not undertaken any FAR, i.e., performed any direct functions, deployed any or undertaken any assets risks. In our opinion, the payment made by the assessee to the third party for and on behalf of the AE which has been reimbursed by AE, cannot be included in the total costs of the assessee for the purpose of determining the profit margin.Thus,TP adjustment by applying 9% mark-up on the cost of customs clearance service rendering through 'J' cannot be made for benchmarking the ALP of the assessee and accordingly such adjustments stands deleted. (AY. 2009-10)

FedEx Express Transportation & Supply Chain Services India (P.) Ltd. v. DCIT (2015) 67 SOT 134(URO) (Mum.)(Trib.)

S. 92C : Transfer Pricing–Armslength price - Abnormal events - Amalgamation - where one of the comparables considered by TPO had changed business model due to amalgamation and due to which, functionality of said comparable changed, same was to be excluded from list of comparables during transfer pricing study of assessee.

The assessee was a captive contract service provider engaged in providing IT enabled back office services to AE.

In order to justify that the transaction was at arm's length, the assessee used Transactional Net Margin Method as the most appropriate method and Operating Profit/Operating Cost as the Profit Level Indicator as 11 comparable companies were taken by the assessee which were rejected by the Transfer Pricing Officer. The margin earned by the assessee at the entity level was 14.2 per cent. Considering the 10 comparables taken by the TPO who had disclosed 28.06 per cent mean margin as a result thereof adjustment was arrived at.

The assessee before the Commissioner (Appeals) succeeded in its alternate prayer without prejudice; the OP/OC margin of NNG was wrongly taken as 89.67 per cent and the correct margin ought to have been 48.64 per cent. However, on the argument that it was wrongly taken as a comparable the taxpayer failed to convince the Commissioner (Appeals).

On second appeal:

In the facts of the present case it is seen that the Co-ordinate Bench in the case of HSBC Electronic Data Processing India Ltd. v. Addl. CIT [2013] 38 taxmann.com 141 (Hyd.)(Trib.) for this specific year, i.e. 2006-07 assessment year has given a categoric finding that NNG has changed the business model of the company. The said finding on fact has not been canvassed to be a finding contrary to facts or upset by a decision of a higher forum. In these peculiar facts and circumstances there is no merit in the arguments of the Revenue to still restore the issue for verification when a Coordinate bench on facts pertaining to the very same assessment year has held that the business model for NNG has changed as a result of the amalgamation.

In view of the above, the sole issue agitated by the assessee praying for the exclusion of the NNG is allowed. (AY. 2006-07)

Ameriprise India (P.) Ltd. v. DCIT (2015) 67 SOT 136 (URO) (Del.)(Trib.)

S. 92C :Transfer pricing-Arms length price-Comparables and adjustments- reimbursement would form part of operating profit.

It was held that receipt on account of reimbursement of advertisement expenditure incurred by assessee for its AE would form a part of operating profit either by way of adding to income or otherwise expenditure has to be reduced from total advertisement expenditure to extent of reimbursement; and it should not be excluded while calculating PLI of assessee.(AY. 2003-04 ,2004-05)

Panasonic Consumer India (P.) Ltd. v.ACIT (2015) 67 SOT 283 (Delhi)(Trib.)

S. 92C :Transfer pricing-Arms length price-Comparables and adjustments- valuation by customs authorities.

It was held thatvaluation made by custom authorities should be guiding factor for TPO while making adjustment on account of arm's length price. It was further held that financial data to be used in analysing comparability of an uncontrolled transaction with an international transaction shall be data relating to financial year in which impugned uncontrolled transaction and comparable international transaction had been entered into.(AY. 2003-04,2004-05)

Panasonic Consumer India (P.) Ltd. v. ACIT (2015) 67 SOT 283 (Delhi)(Trib.)

S. 92C:Transfer pricing-Arm's length price–FAR analysis can only be used for segregation.

Assessee-company was a wholly owned subsidiary of a Japanese company. It had three divisions under which its business was organized, viz., Consumer Product Division (CPD), System Product Division (SPD) and Industrial Sales Division (ISD). Under CPD, assessee used to trade in /distribute household appliances and under SPD, it used to trade in /distribute office automation and telecommunication products and under ISD, it used to provide commission and marketing agency services with respect to electronic components, welding equipments, etc., sold by AEs to Indian

customers.TPO observed that aggregation of results of two divisions, CPD and SPD, was not proper as they were not closely interlinked because of differences in nature of products, target consumer group and marketing strategy. He redrew accounts of CPD and SPD divisions and on that basis, recommended two additions as TP adjustments. It was held that under Transfer Pricing Regulations in India only reason which can be used for segregation is FAR analysis as provided in rule 10B(2)(b); since in instant case in both divisions, i.e. CPD and SPD, trading functions had same FAR and had closely linked transactions, same had to be taken as a whole as was done in TP report submitted by assessee.(AY. 2003-04,2004-05)

Panasonic Consumer India (P.) Ltd. v.ACIT (2015) 67 SOT 283 (Delhi)(Trib.)

S.92C:Transfer pricing -Arm's length price-TP adjustment is to be made only in respect of purchases made from AE and not from unrelated parties.

Assessee company was engaged in business of manufacture and sale of textile machinery, related parts, automotive parts and trading material and handling equipments. Assessee had shown its margin at 6.15 per cent. TPO did not accept results shown by assessee. He determined mean margin of comparables at 13.32 per cent and made TP adjustment. Assessee claimed that while computing mean margin of comparables, TPO had included purchases made from unrelated parties and claimed that arithmetic mean of comparables fell within (+-) 5 per cent range provided in proviso to Section 92C and, thus, no adjustment was called for. It was held by ITAT that TP adjustment is to be made only in respect of purchases made from AE and not from unrelated parties and hence matter needed reconsideration.(AY. 2006-07)

Kirloskar Toyoda Textile Machinery (P.) Ltd. v.ACIT (2015) 170 TTJ 30 (UO) / 67 SOT 222(URO) (Bang.)(Trib.)

S. 92C:Transfer pricing-Arm's length price–Royalty on sale by AE- Matter remanded.

Assessee paid royalty in terms of technical know-how agreement for manufacture of finished products. Transfer Pricing Officer characterized assessee as a contract manufacturer and held that royalty paid as percentage of sale to AE was not at arm's length as it amounted to collecting royalty on sale to itself. It was held that where assessee claimed that agreement entered into by assessee with AE was similar to agreement entered into by sister concern with AE in as much as terms and conditions impacting issue were materially similar, TPO was to be directed to consider said claim of assessee after considering decision of co-ordinate Bench in case of sister concern in Hero Motor Corp Ltd. v. Asstt. CIT. [IT Appeal No. 5130 (Delhi) of 2010].(AY. 2008-09).

Honda Siel Power Products Ltd. .v. DCIT (2015) 67 SOT 225(URO) (Delhi)(Trib.)

S. 92C:Transfer pricing -Arm's length price – bright line test.

Assessee was engaged in business of manufacturing of portable generating sets, I.C. Engines etc. Assessee claimed AMP expenses. Transfer Pricing Officer considering 6 companies was of view that expenditure was in excess of bright line by 1.87 per cent which was considered to be for promotion of brand name which was owned by AE. Thus, assessee was required to be compensated by AE and accordingly a markup of 15 per cent was applied and same resulted in an adjustment. It was held by the ITAT that as in Asstt. CIT v. L.G. Electronics India (P.) Ltd. [2013] 35 taxmann.com 344/148 ITD 671 (Delhi) certain directions had been given on basis of which AMP was to be calculated, it would be appropriate to restore issue back to file to TPO.(AY. 2008-09)

Honda Siel Power Products Ltd. v. DCIT (2015) 67 SOT 225(URO) (Delhi)(Trib.)

S. 92C : Transfer pricing - Arm's length price –Additional ground-50:50 model of revenue split, after deducting transportation costs, is an industry norm in logistics and freight forwarding industry-Matter remanded to Assessing Officer.[S.254(1)].

Tribunal held that there is no dispute about the fact that 50:50 model of revenue split, after deducting transportation costs, is an industry norm so far as the logistics and freight forwarding industry, dealing with transportation of time sensitive consignments from destination in one country to another country, is recognized.

The insertion of Rule 10BA is required to be held as retrospective in effect. Going by this Rule, the 50:50 business model, as is said to have been adopted by the assessee, would meet arm's length test. It

thus appears to be free from doubt that 50:50 business model, as has been adopted by many assessees in logistics and freight forwarding industry is, as per the recent developments in the legislation and jurisprudence in the transfer pricing, a vital factor in determining the arm's length price of assessee's international transactions. The assessee had specifically taken up the issue of appreciation of this unique 50:50 business model before the DRP in the assessment years 2007-08 and 2008-09. As regards the assessment year 2006-07, it has been noted that the assessee's claim is that the assessee had pleaded for appreciation of this 50:50 business model, which is unique to the assessee's line of business activity, and when the Tribunal did not do so, the assessee even moved a miscellaneous petition under Section 254(2), whatever be the inherent limitations of this provision, on that point. That aspect of the matter is, however, academic because whether or not such a miscellaneous petition is accepted or whether or not even such a point was specifically taken up in the first round of proceedings, the assessee does indeed, have a right to raise that aspect of the matter in the second round of proceedings before the Tribunal.In view of the above discussions, as also bearing in mind entirety of the case, it is fit and proper to admit the additional ground of appeal in all these three appeal and the matter stand remitted at asessment stage.(AY. 2006 – 07 to 2008- 09)

Geodis Overseas (P.) Ltd.v. DCIT (2015) 67 SOT 220(URO) (Delhi)(Trib.)

S.92C:Transfer pricing-Arm's length price-Transactional net margin method-Functionally dissimilar companies to be excluded-Reimbursement of cost to be excluded from operating cost. [S.10A]

Assesee is providing software development services. Tribunal held that while computing arm’s length price by applying Transactional net margin method while selecting comparables, functionally dissimilar companies to be excluded. Reimbursement of cost to be excluded from operating cost.(AY. 2009-2010)

Dy. CIT v. HSBC Electronic Data Processing India P. Ltd. (2015) 39 ITR 83 (Hyd.)(Trib.)

S.92C:Transferpricing- Arms’ length price-Even if the loan to the 100% subsidiary is intended to be a long term investment in the subsidiary and it has a crucial role to play in the assessee's business plans, it cannot be treated as "quasi capital". The ALP of the loan has to be determined on the basis of LIBOR interest.[S.92CA(3)]

The assessee established a wholly owned subsidiary, by the name of Soma Textiles FZE, in the United Arab Emirates (UAE), and invested Rs 21,71,723 in share capital of Soma Textiles FZE and also advanced Rs 16,75,88,215 to this company. The AO and TPO held that these transactions are covered by the scope of ‘international transactions’, as defined under section 92CA(3) of the Act. The basic contention of the assessee that the entire amount of Rs 16.75 crore advanced to the Soma Textiles FZE was out of the foreign exchange proceeds of assessee’s Global Depository Receipts (GDRs) issue and that it was in nature of “contribution towards quasi capital of the said company” was rejected. It was held that commercial expediency of the transaction was not relevant inasmuch as what is to be examined, while ascertaining the arm’s length price, is the price at which such transactions would have been entered into by the parties if these parties were independent enterprises. As regards the claim for the advance being in the nature of quasi capital, the TPO relied upon the decision in the case of Perot Systems TSI v. DCIT [(2010) 130 TTJ 685 (Del)] where it was held that “the argument that the loans were in reality not loans but quasi capital cannot be accepted because the agreements show them to be loans and there is no special feature in the contract to treat them otherwise”. The TPO proceeded to treat LIBOR plus 2% as arm’s length price of this loan and made an adjustment in respect of the same. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD:

(i) The relevance of ‘quasi capital’, so far as ALP determination under the transfer pricing regulation is concerned, is from the point of view of comparability of a borrowing transaction between the associated enterprises.It is only elementary that when it comes to comparing the borrowing transaction between the associated enterprises, under the Comparable Uncontrolled Price (i.e. CUP) method, what is to be compared is a materially similar transaction, and the adjustments are to be made for the significant variations between the actual transaction with the AE and the transaction it is being compared with. Under Rule 10B(1)(a), as a first step, the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such

transactions, is identified, and then such price is adjusted to account for 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 price in the open market. Usually loan transactions are benchmarked on the basis of interest rate applicable on the loan transactions simplictor which, under the transfer pricing regulations, cannot be compared with a transaction which is something materially different than a loan simplictor, for example, a non-refundable loan which is to be converted into equity. It is in this context that the loans, which are in the nature of quasi capital, are treated differently than the normal loan transactions.

(ii) The expression 'quasi capital' is relevant from the point of view of highlighting that a quasi-capital loan or advance is not a routine loan transaction simplictor. The substantive reward for such a loan transaction is not interest but opportunity to own capital. As a corollary to this position, in the cases of quasi capital loans or advances, the comparison of the quasi capital loans is not with the commercial borrowings but with the loans or advances which are given in the same or similar situations. In all the decisions of the coordinate benches **(**Perot Systems TSI v. DCIT [(2010) 130 TTJ 685 (Del)]**.,** Micro Inks Ltd. v. ACIT [(2013) 157 TTJ 289 (Ahd)], Four Soft Pvt. Ltd. v. DCIT [(2014) 149 ITD 732 (Hyd)], Prithvi Information Solutions Pvt. Ltd. v. ACIT [(2014) 34 ITR (Tri) 429 (Hyd)], wherein references have been made to the advances being in the nature of 'quasi capital', these cases referred to the situations in which (a) advances were made as capital could not subscribed to due to regulatory issues and the advancing of loans was only for the period till the same could be converted into equity, and (b) advances were made for subscribing to the capital but the issuance of shares was delayed, even if not inordinately. Clearly, the advances in such circumstances were materially different than the loan transactions simplicitor and that is what was decisive so far as determination of the arm's length price of such transactions was concerned. The reward for time value of money in these cases was opportunity to subscribe to the capital, unlike in a normal loan transaction where reward is interest, which is measured as a percentage of the money loaned or advanced.

(iii) The assessee's contention that whenever it can be said that the loan transaction is in the nature of quasi capital, and the grant of loan was intended to be a long term investment in the subsidiary which has a crucial role to play in its business plans, its arm's length price should be 'nil' rate of interest is not acceptable. On a conceptual note, several types of debts, particularly long term unsecured debts, and revenue participation investments could be termed as 'quasi capital'. So far as arm's length price of such transactions are concerned, this cannot be 'nil' because, under the comparable uncontrolled price method, such other transactions between the independent enterprises cannot be at 'nil' consideration either. Nobody would advance loan, in arm's length situation, at a nil rate of interest. The comparable uncontrolled price of quasi capital loan, unless it is only for a transitory period and the de facto reward for this value of money is the opportunity for capital investment or such other benefit, cannot be nil. As for the intent of the assessee to treat this loan as investment, nothing turns on it either. Whether assessee wanted to treat this loan as an investment or not does not matter so far as determination of arm's length price of this loan is concerned; what really matters is whether such a loan transaction would have taken place, in an arm's length situation, without any interest being charged in respect of the same. As for the contention regarding crucial role being played by, or visualized for this AE, there is no material on record to demonstrate the same or to justify that even in an arm's length situation, a zero interest rate loan would have been justified to such an entity. A lot of emphasis has also been placed on the fact that the loan was out of the GDR funds and for this reason, the interest-free loan was justified. We are unable to see any logic in this explanation either. Even when the loan is given out of the GDR funds held abroad, the arm's length price of the loan is to be ascertained. The source of funds is immaterial in the present context. We have also noted that the assessee has not offered any assistance on the quantum of ALP adjustment in respect of this loan transaction, and that in the subsequent assessment years, the assessee himself has accepted ALP adjustment by adopting the LIBOR + 2% interest rate. In this view of the matter, no interference is warranted on the quantum of the ALP adjustment either. (AY. 2007-08)

Soma Textile & Industries Ltd. v. ACIT(Ahd.)(Trib.); www.itatonline.org

S. 92C:Transfer pricing- Libor -The transaction of allowing credit period to the AE on realisation of sale proceeds is not an independent transaction and has to be considered along with the main international transaction of sale of goods.[S.92B,92CA]

Dismissing the appeal of revenue the Tribunal held that; The sale transaction of the assessee with its A.E. has been accepted by the Transfer Pricing Officer at arm's length and no adjustment has been made in respect of the sale transaction. However, the Transfer Pricing Officer has made the adjustment on account of credit period provided by the assessee to the A.E. on realisation of sale proceeds. The first issue raised by the assessee is whether the aggregate period extended by the assessee to the AE which is more than the average credit period extended to the non-AE would constitute international transaction. We are of the view that after the insertion of explanation to section 92B(1), the payment or deferred payment or receivable or any debt arising during the course of business fall under the expression international transaction as per explanation. Therefore, in view of the expanded meaning of the international transaction as contemplated under clause (i) (e) of explanation to section 92B(1), the delay in realization of dues from the AE in comparison to non-AE would certainly falls in the ambit of international transaction. However, this transaction of allowing the credit period to AE on realization of sale proceeds is not an independent international transaction but it is a closely linked or continuous transaction along with sale transaction to the AE. The credit period allowed to the party depends upon various factors which also includes the price charged by the assessee from purchaser. Therefore, the credit period extended by the assessee to the AE cannot be examined independently but has to be considered along with the main international transaction being sale to the AE. As per Rule 10A(d) if a number of transactions are closely linked or continuous in nature and arising from a continuous transactions of supply of amenity or services the transactions is treated as closely linked transactions for the purpose of transfer pricing and, therefore, the aggregate and clubbing of closely linked transaction are permitted under said rule. This concept of aggregation of the transaction which is closely linked is also supported by OECD transfer pricing guidelines. In order to examine whether the number of transactions are closely linked or continuous so as to aggregate for the purpose of evaluation what is to be considered is that one transaction is follow-on of the earlier transaction and then the subsequent transaction is carried out and dependent wholly or substantially on the earlier transaction. In other words, if two Information Systems Resource Centre Private Limited transactions are so closely linked that determination of price of one transaction is dependent on the other transaction then for the purpose of determining the ALP, the closely linked transaction should be aggregated and clubbed together. When the transaction are influenced by each other and particularly in determining the price and profit involved in the transactions then those transactions can safely be regarded as closely linked transactions. In the case in hand the credit period extended to the AE is a direct result of sale transaction. Therefore no question of credit period allowed to the AE for realization of sale proceeds without having sale to AE. The credit period extended to the AE cannot be treated as a transaction stand alone without considering the main transaction of sale. The sale price of the product or service determined between the parties is always influenced by the credit period allowed by the seller. Therefore, the transaction of sale to the AE and credit period allowed in realization of sale proceeds are closely linked as they are inter linked and the terms and conditions of sale as well as the price are determined based on the totality of the transaction and not on individual and separate transaction. The approach of the TPO and DRP in analyzing the credit period allowed by the assessee to the AE without considering the main international transaction being sale to the AE will give distorted result by disregarding the price charged by the assessee from AE. Though extra period allowed for realization of sale proceeds from the AE is an international transaction, however, for the purpose of determining the ALP, the same has to be clubbed or aggregated with the sale transactions with the AE. Even by considering it as an independent transaction the same has to be compared with the internal CUP available in the shape of the credit allowed by the assessee to non AE. When the assessee is not making any difference for not charging the interest from AE as well as non-AE then the only difference between the two can be considered is the average period allowed along with outstanding amount. If the average period multiplied by the outstanding amount of the AE is at arm's length in comparison to the average period of realization and multiplied by the outstanding from non AEs then no adjustment can be made being the transaction is at arm's length. (AY. 2007-08)

ACIT v. Information Systems Resource Centre Pvt. Ltd (2015) 42 ITR 203 (Mum.) (Trib.)

S. 92C: Transfer pricing-Arm's length price-Transactional net margin method-Software non-development services-Selection of comparables- Use of multiple years' data-Held to be justified.
The assessee, a joint venture between MH of the U. S. A and the Tata group, published books for schools, colleges and professional markets and also sold MH products in India. It also provided back office support services in the nature of information technology enabled services, transaction processing and data processing services to its associated enterprises. During the previous year relevant to the assessment year 2007-08, the assessee entered into international transactions with MH of Singapore for rendering information technology support services. The assessee maintained books of account on an aggregate basis combining the publishing and back office support services segments, but for purposes of its transfer pricing analysis, it split its combined results of the two segments. In its transfer pricing analysis, the assessee adopted the transactional net margin method with the profit level indicator of operating profit to operating cost. It showed its profit level indicator at 22.67 per cent. under the publishing business segment and 10 per cent. in the back office support segment and selected certain companies as comparables. The Transfer Pricing Officer rejected this and selected 26 companies as comparables with an average margin of 25.96 per cent. and determined the arm's length price at Rs.59,14,548. On appeal : Tribunal held that ;Selection of comparables (i) Functionally similar companies to be included and others to be excluded--Companies undergoing merger and demerger, or having high turnover cannot be considered as comparables--Matter remanded for Transfer Pricing Officer to determine arm's length price of international transaction afresh. (ii) Use of multiple years' data--Failure of assessee to establish influence of multiple years' data on determination of transfer pricing--Transfer Pricing Officer justified in using current year's data. (AY. 2007-2008)
Tata McGraw Hill Education P. Ltd. v. ACIT (2015) 38 ITR 553 (Delhi) (Trib)

S. 92C:Transfer pricing-Arm's length price--Transactional net margin method--Software development services--Selection of comparables--Functionally different companies to be excluded--Working capital adjustment--Requiring verification by Transfer Pricing Officer--Matter remanded.
The assessee was a subsidiary of the I group of the U.S.A. and provided software development services to its associated enterprise. The assessee adopted the transactional net margin method as the most appropriate method for determining the arm's length price and filed its own transfer pricing report. The Transfer Pricing Officer held that the assessee did not use relevant data for the year and used multiple years' data and also found out certain deficiencies in the report. He rejected the transfer pricing report of the assessee. The Transfer Pricing Officer used certain filters and arrived at 20 companies as comparables. The Dispute Resolution Panel confirmed this. The assessee objected to six comparables selected by the Transfer Pricing Officer and exclusion of six comparables selected by the assessee. On appeal:
Held, (i) that the comparables A, K, M, T, I, FSL were functionally different from the assessee and not comparable to a pure software developer like the assessee. Therefore, they were to be rejected as comparables.
(ii) That since working capital adjustment required verification by the Transfer Pricing Officer, the matter was to be remanded to the Transfer Pricing Officer. (AY. 2006-2007)
NTT Data India Enterprise Application Services P. Ltd. v. ACIT (2015) 38 ITR 362 (Hyd) (Trib)

S. 92C:Transfer pricing-Arm's length price-Customer directly entering into contract with either assessee or its associated enterprises-Risk profiles of associated enterprises remain same in both contracts--Contracts directly with associated enterprises not governed by technical strengths of entities--Transfer pricing adjustments to be deleted.
The assessee was engaged in providing information technology services and with the marketing support of its associated enterprises, undertook customised software solution development, information technology facilities management and provided professional information technology services to several clients across the globe. The assessee had two wholly owned associated enterprises. The customers, based on their individual preferences and requirements, chose to enter into

contract with the associated enterprises or directly with the assessee. the Transfer Pricing Officer held that a 25 per cent. revenue split in favour of the associated enterprises in the case of contracts entered into directly by the assessee was excessive and the payment only up to a revenue split of 13 per cent. in the case of one associated enterprise and 15 per cent. in the case of the other was allowable and made adjustments in relation to payments on account of accounting management charges by the assessee to its associated enterprises. The Commissioner (Appeals) deleted the addition. On appeal.; Held, dismissing the appeal, that in both the business models, where the customer directly entered into contract with the assessee and where the customer directly entered into contract with its associated enterprises, the contract entered into with customers mentioned the expected standard of services to be provided for software development work. Under the second business model, if a customer raised a claim for non-performance of the non-administrative services, the associated enterprises would eventually pass on such risk to the assessee and the assessee had to bear such risk in accordance with the terms of the "master service agreement" entered into between the assessee and its associated enterprises. It was an internal arrangement between the assessee and the associated enterprises under which the marketing and the administrative functions were performed by the associated enterprises under both business models. The associated enterprises provided the marketing and the administrative services to the assessee and not to the clients. Thus, in both business models, the risk profiles of the associated enterprises remained the same. Further, in the course of negotiation of the contract and mapping of the scope of work, the customer was fully aware of the underlying delivery mechanism, since the technical capabilities of the assessee were always showcased and presented before the customer. Therefore the customers, based on their individual preferences and driven by considerations which were exclusively their own, chose to enter into contract with the associated enterprises or the assessee, which would not make an essential variation in the business model as a global organisation. Hence, the presumption of the Transfer Pricing Officer that the overseas customers` decision to enter into contracts directly with the associated enterprises was essentially governed by the technical strengths of these entities was inappropriate and without basis and therefore, the transfer pricing adjustments made by the Transfer Pricing Officer were to be deleted. (AY. 2005-2006, 2006-2007)
Dy. CIT v. ITC Infotech India Ltd. (2015) 38 ITR 401(Kol.)(Trib.)

S.92C:Transfer pricing-Arm's length price-Determination-Transactional net margin method-3D animation software services-Selection of comparables-Functionally different companies to be excluded. [S.92A(3)]
The assessee was a subsidiary of a company based in the U.S.A, and was engaged in the business of creating and providing 3D animation software to its associated enterprises. In its transfer pricing analysis, the assessee adopted the transactional net margin method with the profit level indicator of operating profit to total cost and selected six comparables. The Transfer Pricing Officer rejected the transfer pricing study of the assessee and selected 16 comparables (including 3 selected by the assessee and rejecting 3 comparables) with average margin of 21.03 per cent. The assessee objected to the comparable K selected by the Transfer Pricing Officer. The Dispute Resolution Panel, following the order of the Tribunal, excluded the comparable K from the list of comparables. On appeal by the Department:
Held, that the comparable K was engaged in development of software and software products and also running a training centre for training of software professionals. The comparable company offered a variety of software products in the area of web solutions, e-commerce, software consultants, content management ERP applications, etc. It was functionally different from the assessee and not comparable to a pure software developer like the assessee. Therefore, it was to be rejected as comparable. (AY. 2009-2010)
ITO v. Prana Studios P. Ltd. (2015) 38 ITR 21 (Mum.)(Trib.)

S.92C:Transfer pricing-Arm's length price-Software development services--Transactional net margin method--Selection of comparables--Functionally dissimilar companies to be excluded-Claim for risk adjustment at 0.85 per cent—Allowable.
The assessee was a subsidiary of a company based in the United States of America and was engaged in providing software development services to its associated enterprises. In its transfer pricing

analysis the assessee adopted the transactional net margin method with the profit level indicator of operating profit to operating cost and identified 18 comparable companies with an average profit margin of 16.97 per cent. on cost and worked out the operating profit margin at 8.19 per cent. The Transfer Pricing Officer did not approve the application of multiple years' data. After making certain inclusions and exclusions in or from the list of comparables, the Transfer Pricing Officer selected 17 companies as comparables with average margin of 26.59 per cent., determined a transfer pricing adjustment of Rs. 21,59,03,831, rejected the assessee's claim towards risk adjustment and recomputed the deduction claimed under section 10A of the Income-tax Act, 1961, by reducing the communication charges from the export turnover. The Commissioner (Appeals) confirmed this. On appeal by the assessee against wrong inclusion of eight comparables contending that their functional profiles were different and they were not a purely software development service provider. : Held, (i) that out of 17 comparable companies ESSL, SIL, FSL, TSL, TEL and ITL were functionally different and BCL failed the related party transactions filter criteria. Therefore, those companies were to be excluded from the list of comparables.
(ii) That the Transfer Pricing Officer himself had concluded that risk adjustment to the extent of 0.85 per cent. could be allowed. Therefore, the Transfer Pricing Officer was to allow risk adjustment to that extent. (AY. 2005-2006)
DE Shaw India Software P. Ltd. v. ACIT(2015) 38 ITR 276/54 taxman .com 407 (Hyd.)(Trib.)

S. 92C : Transfer pricing - Arms' length price – Bank guarantee Commission paid close to rate charged by ICICI Bank is at arm's length - Loan – Interest rate charged was higher than existing LIBOR Rates , said transaction was held to be at arm's length price.
The Assessee had provided corporate guarantees in respected of advances given to its A.E and had charged guarantee commission @ 0.5% p.a. from the AE. Assessee had an independent sanctioned LC arrangement where the Assessee paid 0.6% p.a. guarantee commission to ICICI Bank. It was held that the transaction was at arm's length and no adjustment was required.
Assessee had provided loan to Associated Enterprise and charged interest @ 7% p.a. The LIBOR rate for March 2008 was 2.6798 per cent. However the assessee had charged 7 per cent from its AE as per the internal CUP available. Since, the rate of interest charged was higher than LIBOR rates, it was held that the the said transaction of providing loan to AE is at arm's length. Additions made by the Assessing Officer were accordingly set aside. (AY. 2008-09)
Everest Kanto Cylinder Ltd. v. ACIT (2014) 52 taxmann.com 395/167 TTJ 204 (Mum.)(Trib.)

S. 92C : Transfer pricing - Arms' length price - Net gain or loss has to be considered for assessing tax liabilities and where the arms' length price has benefitted the assessee overall, there is no reason for making transfer pricing adjustment or doubting the transaction.
Assessee, engaged in business of transportation of packages, documents, cargo etc in international and domestic sectors, entered into international transactions of rendering express delivery & freight forwarding services, cost allocation expenses and reimbursement of costs with its AE. The ALP was benchmarked using TNMM method on 5 comparables based on three years data and weighted average Net Profit Margin was arrived at 0.07%, transaction with AEs being at arm's length. It was demonstrated that the assessee benefitted net consideration wise, if overall inbound and outbound services were taken into consideration. The TPO held that assessee's overall margin needed to be benchmarked under external TNMM with comparables at entity level for entire sales and therefore, an adjustment of Rs. 13.06 Crs was proposed. The DRP brought down the adjustment to Rs. 8.92 Crs. The Tribunal held that transfer pricing adjustments could be made only on international transactions with AE and not for entire sales at entity level. Further, where margins shown in freight and expenses segment were at arm's length margin, transfer pricing adjustment was to be deleted. (A.Y 2009 – 10)
Aramex India (P.) Ltd .v. DIT (2015) 167 TTJ 476 (Mum) (Trib).

S. 92C : Transfer pricing - Arms' length price - Comparables and adjustments - Hiring of equipments and dredgers from more than one AE - Aggregation of transaction was permitted only with respect to those which are between assessee and each AEs separately.
Assessee, a partnership firm incorporated in Netherland to undertake international dredging contract, had international transaction with its AEs with respect to hiring the dredger / vessels on lease and

consideration was paid to the AEs for the same. The TPO relied upon the OECD guidelines on transfer pricing and held that as the leasing of all equipments were done separately by the assessee and the transactions are neither linked or continuous, the transactions are required to be evaluated separately. The CIT (A) confirmed the action of the TPO. Tribunal directed the TPO to determine the ALP by aggregating the various transactions between the assessee and each associate enterprise separately and not by clubbing the transactions with all AEs. (AY. 2002-03)

Boskalis International Dredging International CV .v. DDIT (IT) (2014) 47 taxmann.com 150 / (2015) 67 SOT 118 (UO)/167 TTJ 737 (Mum.)(Trib.)

S.92C:Transfer pricing- Arm's length price-Profit level indicator- Cash profit margin on sales-Principle of consistency was followed.[S.92CA]

Tribunal held that following the principle of consistency as the AO has accepted the same method in earlirer years as wellas later year , PLI is to be arribed at by applying the same cash profit margin to sals ratio; filter representing NFA to sales ratio for selection of comparables cannot be applied as NFA to sales ratio has nothing to do with the cash profit margin generated by an assesse. Appeal of assesse was allowed.(AY.2005-06, 2006-07))

AT & S India Pvt. Ltd. .v. DCIT (2015) 118 DTR 171(Kol.)(Trib.)

S.92C:Transfer pricing-Transactional Net Margin Method-(TNMM)-Most Appropriate Method(MAM)-Notional interest-Receivable outstanding beyond 180 days-While an adjustment for working capital investment is required, the transaction of sale of goods and receivables arising therefrom can be aggregated. If the differential impact of working capital has been factored in the pricing of the transaction of sale, no further adjustment can be made-Appeal of assesse was allowed.

The Tribunal had to consider whether the AO/DRP is justified in enhancing the income of the assessee on account of notional interest charged on receivables outstanding beyond 180 days. HELD by the Tribunal:

(i) An uncontrolled entity will expect to earn a market rate of return on its working capital investment independent of the functions it performs or products it provides. However, the amount of capital required to support these functions varies greatly, because the level of inventories, debtors and creditors varies. High levels of working capital create costs either in the form of incurred interest or in the form of opportunity costs. Working capital yields a return resulting from a) higher sales price or b) lower cost of goods sold which would have a positive impact on the operational result. Higher sales prices acts as a return for the longer credit period granted to customers. Similarly in return for longer credit period granted, a firm should be willing to pay higher purchase price which adds to the cost of goods sold. Therefore, high levels accounts receivable and inventory tend to overstate the operating results while high levels of accounts payable tend to understate them thereby necessitating appropriate adjustment. The appropriate adjustments need to be considered to bring parity in the working capital investment of the assessee and the comparables rather than looking at the receivable independently. Such working capital adjustment takes into account the impact of outstanding receivables on the profitability.

(ii) The principle of aggregation is a well-established rule in the transfer pricing analysis. This principle seeks to combine all functionally similar transactions wherein arm's length price can be determined for a number of transactions taken together. The said principle is enshrined in the transfer pricing regulation itself and has also been advocated by the OECD Guidelines. As the assessee had earned significantly higher margin than the comparable companies (which have been accepted by the TPO) which more than compensates for the credit period extended to the AEs. Thus, the approach by the assessee of aggregating the international transactions pertaining to sale of goods to AE and receivables arising from such transactions which is undoubtedly inextricable connected is in accordance with established TP principles as well as ratio laid down by the Hon'ble jurisdictional High Court in the case of Sony Ericson Mobile Communication India Pvt. Ltd.

(iii) Any separate adjustment on the pretext of outstanding receivables while accepting the comparables and transfer price of underlying transaction i.e. sale of goods by application of TNMM is unjustified. The differential impact of working capital of the assesseevis-a-vis its comparables has already been factored in the pricing/ profitability of the assessee and therefore, any further adjustment

to the margins of the assessee on the pretext of outstanding receivables is unwarranted and wholly unjustified. (AY. 2010-11)
Kusum Healthcare Pvt. Ltd. .v. CIT (2015) 118 DTR 361/170 TTJ 411(Delhi)(Trib.)

S.92C: Transfer pricing-ALP of funds lent to AE should be as per LIBOR +2% as arm's interest- ALP of corporate guarantee to be at 0.5% as guarantee commission charges in respect of the guarantee provided by the assesee for obtaining the loan by the AE.
Tribunal held that; The ALP of loan granted by the assessee to its subsidiary, though from its internal accruals and without incurring any cost, has to be determined as per LIBOR and not the average yield rates considered by the TPO and the transaction of giving corporate guarantee to the bank, though held not to be an international transaction in Bharti Airtel Ltd (ITA No 5816/Del/2013) dated 11 March 2014, the arm's length guarantee commission charges can be considered at the rate of 0.5% as held by the Tribunal in a series of other decisions.(ITA No. 4761/Mum/2013, dt. 25.03.2015) (AY. 2008-09)
Manugraph India Ltd. .v. DCIT (Mum.)(Trib.);www.itatonline.org

S.92C:Transfer pricing-Share application money cannot be treated as loan amount merely because there is a delay in issuance of shares-Adjustment made by the TPO was deleted.
Though there was a delay in issuing the shares against the share application money given by the assesse to its AE, however, the assessee has duly explained the cause of delay and it was not a deliberate delay for using the money by subsidiary in the garb of share application money or by providing the fund by the assesse in the garb of share application money. The delay was due to obtaining necessary approval from the Securities and Exchange Commission, Philippines. Finally, the shares were issued as per the share certificate dated 25.05.2008 which has been produced by the assesse as additional evidence. Since the document of issuance of equity shares in the name of the assesse by the subsidiary/AE vide share certificate were not before the authorities below, therefore, to the extent of limited purpose of considering the said document, Tribunal set aside this issue to the record of AO/TPO to consider the same. As far as the re-characterization of the share application money as loan, the tribunal note that the Hon'ble Jurisdictional High Court in the case of DIT v. Besix Kier Dabhol S.A. dt. 30th August 2012 in ITA No. 776 of 2011 has considered an identical issue. Accordingly, the share application money cannot be treated as loan amount merely because there is a delay in issuance of shares by the subsidiary in the name of the assesse, which was duly explained by the assesse. (ITA No. 7033/Mum/2012, dt. 25.03.2015) (AY. 2007-08)
Aditya Birla Minacs Worldwide Ltd. .v. DCIT (Mum.)(Trib.);www.itatonline.org

S. 92C : Transfer pricing -Arm's length price-Proposed interest rate to be charged at rate of 8.9 per cent on interest - free loan advanced to its subsidiary company to determine ALP
Assessee had advanced interest free loan to its AE. It proposed interest at rate of 8.9 per cent to determine ALP of same transaction but DRP levied rate of 11.40 per cent on basis of BBB Bond yield. Since loan given to subsidiary had lower risk as assessee had indirect control on it and LIBOR + nominal adjustment, interest rate proposed by assessee was reasonable. (AY.2007 - 2008)
Glamour Enterprises (P.) Ltd. v. Dy. CIT (2015) 152 ITD 412 (Jaipur)(Trib.)

S. 92C : Transfer pricing-Arm's length price--Software development services-TNMM-Comparables- Service of replacement of spares to customers- Administrative and management support services- Matter remanded.[S.92CA]
The assessee was a subsidiary of a company based in Mauritius and was engaged in providing software development services to its parent company. In its transfer pricing analysis the assessee adopted the transactional net margin method as the most appropriate method for determining the arm's length price. TPO has rejected the comparables selected by assesseee. DRP confirmed the order of TPO. On appeal the Tribunal held that , the assessee adopted the operating profits to cost as the profit level indicator. Companies having export turnover less than 75 per cent. of total sales to be excluded. Functionally different companies cannot be treated as comparable. Functionally similar companies to be included. Matter remanded.
Service of replacement of spares to customers--Matter remanded to Transfer Pricing Officer to

determine arm's length price in light of directions of Tribunal for assessment year 2006-07. Administrative and management support services. Companies having related party transactions to extent of 88.23 per cent. cannot be considered as comparable. Functionally dissimilar companies excluded and functionally similar to be included. Foreign exchange gain to be included in operating income. Matter remanded to Transfer Pricing Officer to recompute arm's length price after affording opportunity of being heard. (AY. 2009-2010)
CISCO Systems (India) P. Ltd. .v. Dy. CIT (2015) 37 ITR 133 (Bang)(Trib.)

S. 92C : Transfer pricing-Arm's length price-Transactional net margin method-Computation of operational profit to total cost-Non-operative items of income and expenses to be excluded-Matter remanded.[S.92CA]
On appeal by revenue the Tribunal held that, the major item of "other income" of the assessee was interest, which deserved exclusion from the operating profit. The assessee took all the expenses, including the non-operating expenses, in the calculation of operating profit of E. If the items of non-operating income were excluded from the computation of operating profit, then the items of non-operating expense should also be excluded. The assessee had carried out a one-sided exercise to bring down the operating profit to total cost of E. The assessee included bank charges also in computing the operating profit. The bank interest also assumed same character of non-operating nature and therefore, was to be excluded. Similarly, there could be other non-operating expenses which were not excluded by the assessee. Hence, the operating profit to total cost of E calculated by the assessee was neither the operating profit nor the net profit and it lay somewhere between the two as it was the excess of operating income over total expenses. Therefore, the matter was remitted to the AO for de novo determination of operating profit to total cost of E. Matter remanded. (AY. 2004-2005)
Dy. CIT .v. Exxon Mobil Gas (India) (P.) Ltd. (2015) 152 ITD 220 / 37 ITR 22/118 DTR 387/ 170 TTJ 299 (Delhi)(Trib.)

S. 92C : Transfer pricing -Administrative support services fee-Matter remanded.
Failure by assessee to establish its claim of receiving services. Matter remanded to Transfer Pricing Officer for re adjudication. (AY. 2008-2009)
Cisco Systems Capital (India) P. Ltd. v. Add. CIT (2015) 37 ITR 343 (Bang.)(Trib.)

S. 92C : Transfer pricing-Arm's length price-Determination-Software development services-Selection of comparables-operational loss-Foreign exchange loss-Working capital-Provision for doubtful debts part of operating expenses-
The assessee was a subsidiary of a company based in the United States of America and was engaged in providing software services to its associated enterprises. On appeal Tribunal held that;
Functionally dissimilar companies to be excluded. Software product companies not comparable with companies rendering software services. Segmental information for associated and non-associated enterprises-.Transfer Pricing Officer to verify whether assessee maintained separate books of account which were audited by auditor. .Matter remanded.

Foreign exchange loss to be considered as operative in nature. Included in profit level indicator of assessee. Direction to Transfer Pricing Officer to consider only foreign exchange loss attributable to associated enterprises transactions. Matter remanded.
Working capital adjustment, requiring verification by Transfer Pricing Officer. Matter remanded.
Provision for doubtful debts part of operating expenses. Direction to Transfer Pricing Officer to re compute margins of comparable companies by including provision for bad and doubtful debts as operating expenses for computing profit and loss of comparable companies.. (AY. 2009-2010)
Kenexa Technologies P. Ltd. .v. Dy. CIT (2014) 51 taxmann.com 282/ (2015) 37 ITR 306 /67 SOT 195(URO) (Hyd.) (Trib.)

S. 92C : Transfer pricing-Arm's length price–Determination -Marketing support services-Engineering services rendered by five comparables, functionally different and not comparable-Matter remanded to Transfer Pricing Officer for decision afresh.

Held, that the services rendered by the assessee's associated enterprises were in the nature of market support services which were different from the set of services in the nature of engineering and consultancy services rendered by the five comparables. Therefore, those companies, being functionally different from the assessee, were to be excluded from comparables. Consequently, the Transfer Pricing Officer was to re compute the arm's length price of the international transaction of provision of market support services afresh by excluding these five comparables from the list of comparables after affording the assessee a reasonable opportunity of being heard. Matter remanded. (AY. 2006-2007)

Microsoft Corporation India P. Ltd. .v. Add. CIT (2015) 37 ITR 290/ 54 taxmann.com 167 (Delhi)(Trib.)

S. 92C : Transfer pricing-Arm's length price-TNMM-Corporate support and research and development services segments-Matter remanded. [S.92CA]

The assessee was a subsidiary of a company based in the U.S.A. and provided application support, analytical support and research and development services to its associated enterprises. The business activity of the assessee was in three segments. The research and development services division was engaged in providing research and development services to its group companies. For this purpose, the assessee had set up a research and development centre at Hyderabad. The corporate support services division was engaged in providing corporate support services (BPO services) to its group companies. Apart from these two divisions the assessee also had a trading division. In its transfer pricing analysis for the assessment year 2009-10, the assessee adopted the transactional net margin method as the most appropriate method for determining the arm's length price. The assessee adopted the operating profits to cost as the profit level indicator. It was the claim of the assessee that its international transactions were at arm's length. In the corporate support services segment, the Transfer Pricing Officer rejected 2 out of 7 comparables selected by the assessee and the arithmetic mean of the five companies being 28.58 per cent. against 10 per cent. shown by the assessee he determined the arm's length price at Rs. 4,78,98,219 against the price charged by the assessee at Rs. 4,09,76,856. In the research and development support segment, the Transfer Pricing Officer accepted two comparables in addition to the two companies selected by the assessee and the arithmetic mean of the four comparables being 32.4 per cent. he determined the arm's length price of the transactions at Rs. 8,32,46,264 against the price charged by the assessee at Rs. 6,91,62,304. The Dispute Resolution Panel confirmed this. Tribunal held that; Companies having related party transactions to extent of more than 25 per cent. cannot be treated as comparable. Companies having outsourcing activity, functional dissimilarity, diversified activities and element of brand value associated with them not comparable. Company earning substantial revenue from research and development activity to be treated as comparable. Risk or working capital adjustment. Requiring verification by Transfer Pricing Officer. Matter remanded.(AY. 2009-2010)

International Specialty Products (I) P. Ltd. .v. ITO (2015) 37 ITR 787 (Hyd.)(Trib.)

S. 92C : Transfer pricing-'risk' and 'location savings'-UN Manual, is basically view of Indian tax administration and is not binding on Appellate authorities. [S.92CA]

Tribunal has laid down following principles while determining the risk and location savings: (1)The risk adjustment upto 2.25% which is the difference between Bank Fixed deposit rate (which undertakes little more risk) and risk free government bond (which undertakes risks) should be allowed.

(ii) The assessee as well as the AE operates in a perfectly competitive market and the assessee does not have exclusive access to the factors that may result in the location specific advantages. As a result, there is no super profit that arises in the entire supply chain. Thus there is no unique advantage to the assessee over competitors. We are basing our opinion on the fact that the revenue authorities were not able to substantiate the adjustments made either from the present day scenario or any authenticated and globally material.

(iii) The comparables selected by the assessee to determine arm’s length price of transaction relating to contract manufacturing and contract research and development are local Indian comparables operating in similar economic circumstances as the assessee. This according to us are in line with the decision of coordinate bench of the ITAT, Delhi, in the case of GAP International Sourcing (India)

Pvt. Ltd. (supra), wherein the Tribunal held, "The arm's length principle requires benchmarking to be done with comparables in the jurisdiction of tested party and the location savings, if any, would be reflected in the profitability earned by comparables which are used for benchmarking the international transactions. Thus in our view, no separate/additional allocation is called for on account of location savings".
(iv) OECD and G20 in Action 8: Guidance on Transfer Pricing Aspects of Intangibles which is part of Base Erosion and Profit Shifting Project, has provided guidance on issue of location savings and concluded that where local market comparables are available specific adjustment for location saving is not required. All the G20 countries have give their concurrence to this position and India is part of G20 countries.
(v) The calculation based on location savings by TPO is also infirm, as it is based on assumptions and not in accordance with the provisions of the Income Tax Act, 1961, because for computing cost savings TPO has relied on an article published in year 2012 whereas assessee's case is for Financial Year 2008-09. Therefore interpolation cannot be taken into consideration, unless specified.
(vi) Once the TNMM method is accepted as method of considering assessee as a tested party then any benefit/advantage accruing to AE is irrelevant if the PLI is within the range of comparables.
(vii) We also take into consideration the reliance placed on UN TP Manual by the TPO, about which we are convinced was incorrect reliance, because UN Manual, is basically view of Indian tax administration and is not binding on Appellate authorities.
(viii) TPO has based his computation on a method, which is not ascribed by the provisions of the Act. No doubt, clause (f) of section 92C(1) says, "such other method as may be prescribed by the Board". For adoption of this method, the TPO has to take care that the method has to be prescribed by the Board, which can do so through relevant Rules. Even relevant Rules do not talk about the method adopted by the revenue authorities. This, in unison with the decision of the coordinate Bench on incorrect method of computation, we are of the view that the TPO/AO and DRP erred in making the adjustment on account of location savings. (AY.2009-10)
Watson Pharma Pvt. Ltd. .v. DCIT(2015) 38 ITR 97(Mum.)(Trib.)

S. 92C : Transfer pricing-Closely linked international transactions can be aggregated to determine the ALP. [S.92CA, R.10AB]
On a combined reading of Rule 10A(d) and 10B of the Rules, a number of transactions can be aggregated and construed as a single 'transaction' for the purposes of determining the ALP, provided of course that such transactions are 'closely linked'. Ostensibly the rationale of aggregating 'closely linked' transactions to facilitate determination of ALP envisaged a situation where it would be inappropriate to analyse the transactions individually. The proposition that a number of individual transactions can be aggregated and construed as a composite transaction in order to compute ALP also finds an echo in the OECD guidelines. As per an example noted by the Institute of Chartered Accountants of India ('ICAI') in its Guidance Notes on transfer pricing in para 13.7, it is stated that two or more transactions can be said to be 'closely linked', if they emanate from a common source, being an order or contract or an agreement or an arrangement, and the nature, characteristic and terms of such transactions substantially flow from the said common source;
On facts, the international transactions of import of spare parts, export of spare parts, IT support services, access to customized parts catalogue and amount received for warranty consideration are inter-related transactions, which were the sourcing activities of the assessee company and have to be aggregated in order to benchmark the international transactions. The assessee had benchmarked the arm's length price of all the transactions by comparing results of the comparable companies which were found to be at arm's length price.(AY. 2005-06)
Cummins India Ltd. .v. ACIT(2015) 119 DTR 182 (Pune)(Trib.)

S. 92C:Transfer pricing-ALP of interest on funds advanced to AEs has to computed on LIBOR and not as per domestic Prime Lending Rate (PLR)[S.92CA]
While benchmarking the international transactions what has to be seen is the comparison between related transactions i.e. where the assessee has advanced money to its associated enterprises and charged interest then the said transaction is to be compared with a transaction as to what rate the assessee would have charged, if it had extended the loan to the third party in foreign country. Once

there is a transaction between the assessee and its associated enterprises in foreign currency, then the transaction would have to be looked upon by applying the commercial principles with regard to the international transactions. In that case, the international rates fixed being LIBOR+ rates would have an application and the domestic prime lending rates would not be applicable. The assessee has further explained that it had raised the loan from Citi Bank on international rates for the purpose of investment in the share application money of its associated enterprises, which in turn was partly converted from capital into loan. Where the assessee had a comparable of borrowing loan on international rates and advancing to its associated enterprises, then the said comparable was to be applied for benchmarking the transaction of advancing the loan on interest to its associated enterprises. The assessee had charged interest rate of 4.75% on the loan advanced to the associated enterprises. The assessee on the other hand, claims that it had borrowed the money on LIBOR+ rates i.e. international rates, which were Japanese based LIBOR+ rates which were lower than the US based LIBOR+ rates. The plea of the assessee before us was that it had advanced the loan to its associated enterprises on LIBOR+ rates i.e. 4.75%. Where the assessee has the internal CUP of operating at international rates available and since the said loan raised by the assessee at international rates was advanced to its associated enterprises, we find no merit in the order of the TPO in applying the domestic loan rates i.e. BPLR rates for benchmarking transaction of charging of interest on the loans advanced to the associated enterprises by the assessee. Where the assessee had made the borrowings on LIBOR+ rates and advanced the same at LIBOR+ rates, then the said transaction is at arm's length price and there is no merit in any adjustment to be made on this account. (AY. 2008-09) (ITA no. 2482/PN/2012, dt.30.12.2014.)

Varroc Engineering Pvt. Ltd. .v. ACIT (Pune)(Trib.) www.itatonline.org

S. 92C:Transfer pricing- Comparables have to be excluded by the turnover filter without a FAR analysis being required to be conducted. The AO cannot rely on information obtained u/s 133(6). [S.92CA, 133(6)]

(i) In Genisys Integrating Systems (India) P. Ltd the Tribunal has held that turnover is an important filter which has to be adopted for determination of the ALP. The Tribunal has been consistently following the said decision. The FAR analysis would not alter the turnover of the company. In view of the same, we do not find it necessary to remand the issue of comparability of these companies to the AO/TPO for re-determination of the ALP. In view of the turnover being higher than Rs.200 crores in the case of the above companies, we direct the AO to exclude these companies from the list of comparables.

(ii) The TPO has drawn conclusions on the basis of information obtained by issue of notice u/s.133(6) of the Act. This information which was not available in public domain could not have been used by the TPO. (AY. 2006-07) (ITA no. 1129/Bang/2010, dt.31.12.2014.)

Yahoo software development India P. Ltd. .v. DCIT (Bang.)(Trib.)www.itatonline.org

S. 92C:Transfer pricing-To apply the "Cost Plus Method", there must be a "comparable uncontrolled transaction". The fact that the same product is sold by the assessee to its AEs as well as to third parties does not mean that the two sets of transactions are comparable if the business model, marketing, sales promotion etc is different.[S.92CA]

The assessee, an Indian company, manufactured chewing gum etc which were sold to the associated enterprises (AEs) and also to independent enterprises (non AEs).The distinction in respect of these transactions with AEs and non AEs is that while the transactions with the AEs are in the capacity as limited risk contract manufacturer, its transactions with the domestic independent enterprises is a business transaction with regular entrepreneurship risks. The assessee applied TNMM to claim that the transactions with the AEs are at arms' length (the TP study report has been criticized by the ITAT as reported here). The TPO rejected TNMM and adopted the "Cost Plus Method" with gross mark up on costs as the profit level indicator, and adopted the internal comparable as gross mark up realized on the domestic sales. In other words, the TPO held that the arm's length price of the products exported to the AEs can be arrived at by adopting the same mark up on costs of such products as was achieved on the domestic sales. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD:

(i) The fundamental input for application of CPM method, next only to ascertainment of historical costs, is ascertainment of the normal mark-up of profit over aggregate of such direct costs and indirect costs in respect of same or similar property or services in a "comparable uncontrolled transaction" or, of course, a number of such "comparable uncontrolled transactions". When compared with CUP method, as against the "price" of a comparable uncontrolled transaction, one has to find out "normal mark up of profit" in a comparable uncontrolled transaction. Whether it is "price" or "normal mark up of profit", the starting point of both these exercises in the CUP and the CPM is finding a "comparable uncontrolled transaction". In order for such comparisons to be useful, the economically relevant characteristics of the situations being compared must be sufficiently comparable. It is only elementary, as is also noted in the OECD Transfer Pricing Guidelines, that "to be comparable means that none of the differences (if any) between the situations being compared could materially affect the condition being examined in the methodology (e.g. price or margin), or that reasonably accurate adjustments can be made to eliminate the effect of any such differences";
(ii) The question that arises is whether the transactions with the AEs can be compared with the sales of similar product to distributors or other entities in the domestic market and particularly in a situation in which not only the market is geographically different but also entire business model is different vis -à-vis transactions with the AEs, inasmuch as the sales in domestic market necessitates substantial expenditure by the assessee for marketing support and sales promotion strategy. In other words, whether "export price of product simplictor, without any marketing support in the related market" can have a "comparable uncontrolled transaction" in "domestic sale price of a product in a situation in which entire marketing function and sales promotion is seller's responsibility". The answer has to be an emphatic 'No'. The two situations, i.e. sale simplictor of a FMCG product for an overseas AE without any costs being incurred on the marketing and sales promotion amongst the end users, and sale of a FMCG product to a domestic independent enterprises with full responsibilities for marketing and sales promotion amongst the end users, are not 'comparable transactions' in the sense that profitability in the latter cannot be a proper benchmark for profitability in the former. It is not only in the marketing and sales promotion that the difference lies, but it extends to the fundamental business model itself particularly as the sale is not to an end user, such as in the cases of plant and equipment etc, but to an intermediary who, in turn, has to sell it to, through yet another tier or tiers of intermediaries, the end user. The sale of products to the non-resident AEs is more akin to contract manufacturing arrangement, while the sale of products to independent enterprises domestically is a regular business entrepreneurial venture. Whether contract manufacturing or not, as long as the business models of sales to AEs and sales to non AEs are different, the transactions under these business models cannot be "comparable transactions" for the purposes of transfer pricing. In the first business model, creation of market in the end users is not the responsibility of the vendor, but in the second business model, it is job of the vendor to create and maintain the market of end users as well. The product may be the same but the FAR profile is materially different and it is this FAR profile which governs the profitability. The basic notions of transfer pricing recognize the impact of FAR profiling on the profitability. When profitability levels in two business situations, due to significant differences in FAR profiles of two situations, are expected to be different, such transactions cease to be comparable transactions for the purposes of transfer pricing analysis;
(iii) On facts, the comparability analysis has been confined to the first segment itself, i.e. characteristic of the property transferred. Undoubtedly, the product comparability is an important factor but its certainly not the sole or decisive factor. The assessee was producing the same products for its AEs as it was producing for independent enterprises but that was all so far as similarities were concerned. The FAR profile was not the same, the contract terms were not the same, the economic circumstances were not the same and the business strategies were not the same. Viewed thus, necessary precondition for application of CPM, i.e. finding normal mark up of profit in comparable uncontrolled transactions, could not have been fulfilled. When uncontrolled transactions were not comparable, the normal mark up on profit on such transactions could not have been relevant either. Accordingly, the authorities below were not justified in holding that the cost plus method was the most appropriate method on the facts of this case. One of the necessary ingredient for application of CPM, i.e. normal mark up of profit in the comparable uncontrolled transactions- whether internal or external, was not available as no comparable uncontrolled transactions were brought on record by the authorities below. What was brought on record as an internal comparable uncontrolled transaction, i.e.

manufacturing for the domestic independent enterprises, was uncomparable as the FAR profile was significantly different. Undoubtedly, direct methods of determining ALP, including cost plus method, have an inherent edge over the indirect methods, such as TNMM, but such a preference can come into play only when appropriate comparable uncontrolled transactions can be identified and analysed accordingly. That has not been done in the present case. There is, therefore, no good reason to disturb the TNMM method adopted by the assessee. (AY. 2003-04 to 2006-07) (ITA No. 5648,5649 and 5650/Del/2012, dt. 31.12.2014)

Wrigley India Pvt Ltd. v. ACIT (Delhi) (Trib)www.iatonline.org

S. 92C: Transfer pricing- Certification by CA-The Transfer pricing study and certification by the CA does not inspire any confidence. The level of professionalism is "pathetic". No purpose is served by relying on such reports.[S.92CA]

The transfer pricing reports with respect to the impugned determination of ALP leave a lot to be desired. Just because the action of the authorities below, in adopting cost plus method in the above manner, is legally unsustainable, the ALP determination by the assessee cannot be taken as correct. These TP reports as also certifications by the chartered accounts inspire no confidence and, quite to the contrary, raise doubts about efficacy of the built in checks and balances in transfer pricing regulations. It is somewhat fashionable to criticize the revenue authorities for their lack of objectivity or even inefficiency but what in the world can justify such a pathetic level of professional work relied upon by even the large corporate entities. If the tax judicial system is clogged by frivolous litigation today and if the tax finality still takes decades to reach, these saviours of taxpayers are as much to be blamed for this situation as anybody else. No purpose can be served in reporting by a chartered accountant when such reports do not even point out glaring infirmities in taxpayer's approach vis -à-vis the transfer regulation, in a comparison of budgeted profits margin with actual profit margins realized by the comparables which is stated to be ascertainment of ALP on the basis of the TNMM. It appears that in an alarming number cases, these audit reports, rather than painting a true and fair picture of the relevant facts, tend to epitomize the art of constant hedging and manoeuvring by the professionals so as they stay within the confines of permissible professional conduct and are yet able to sidestep the inconvenient realities. Of course, it will be much worse a situation if they are actually so naïve as to be oblivious of simple provisions of law, of their onerous responsibilities or of the legitimate public expectations. It is not to belittle the brilliant work being done by many a professionals but it is just to point out the dilemma of those who explore the possibilities of relying upon such audit reports and certifications, and also the inertia of those who can do something to salvage this situation and, to thus avoid an inevitable systemic rejection of the ritualistic certifications. We are particularly pained today as the financial period before us is mostly even more than a decade old and yet since the TP reports and certifications before us are, in our considered view, are so much devoid of credibility that, instead of deciding the things one way or the other, we have no choice except to remit the matter to the file of the TPO for fresh ascertainment of ALP on the basis of residuary method, i.e. TNMM. (AY. 2003-04,04-05,05-06) (ITA Nos,5648,5649 and 5650/Del/2012, dt. 31.12.2014)

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S. 92C: Transfer pricing-Transactions which are not closely linked cannot be aggregated for determining ALP. Cherry-picking is not allowed. If there are a number of comparable uncontrolled transactions, the average price has to be taken.

(i) The assessee's adoption of combined TNMM on an entity level in respect of six separate sets of distinct international transactions – Purchase of raw material, Purchase of plant & machinery, Commission expenses, Sale of finished goods, Commission income and Reimbursement of expenses – is not capable of acceptance. Section 92(1) provides that : 'Any income arising from an international transaction shall be computed having regard to the arm's length price.' The mandate of this section is to determine the ALP of 'an' international transaction. The term 'transaction' has been defined under rule 10A(d) to mean 'a number of closely linked transactions'. It follows that the ALP of more than one transaction can be determined as one unit, only if they are closely linked transactions. In such a case, the plural of international transactions shall be considered as a singular for the purposes of benchmarking as a single transaction. Reverting to the facts of the instant case, we find that all the six

sets of international transactions undertaken by the assessee can, by no standard, be considered as 'closely linked'.
(ii) As the assessee has no mechanism to determine the ALP of this international transaction under the TNMM in a separate manner and the further fact that the comparable uncontrolled data under the CUP method is available, we feel no difficulty in holding that the CUP is the most appropriate method for this transaction.
(iii) No side can be allowed cherry-picking. The best course in our considered opinion is to average the prices charged by the assessee from its non-AEs in the same quarter and then make its comparison with the price charged from the AE. When we consider the mandate of section 92C in conjunction with that of rule 10B, it transpires that if there is a single comparable uncontrolled transaction, then the price in such transaction is to be considered but if there are number of such comparable uncontrolled transactions, then the arithmetic mean of such prices charged or paid should be identified. Neither the Revenue can pick a single highest price from a number of comparable uncontrolled transactions, nor the assessee can argue for taking the lowest of such comparable uncontrolled transactions. It, therefore, follows that the average of the prices charged by the assessee from its non-AEs in the same quarter should be considered for identifying the benchmark price of the same product sold to AE in the same quarter. (AY. 2008-09) (ITA no. 521/Del/2013, dt. 30.01.2015)
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S.92C:Transfer pricing-Arms' length price–Selection of comparable-Functionally different-Huge turnover and abnormal profit.
Assessee, a wholly owned subsidiary of C3i Inc., USA was a technical help desk for end users. TPO opined that method adopted by assessee for selecting comparables suffered from defects and TPO selected 12 companies as comparables and made T.P. adjustment. Assessee objected to selection of six out of twelve comparables. It was found that, on similar facts, in earlier year, four entities had been directed to be excluded by Tribunal from list of final comparables, in view of fact that some of comparables were functionally different and some other comparables were having huge turnover and earning abnormal profits but claim of assessee for exclusion of other two entities had not been accepted .Tribunal held that on facts, said four entities had to be excluded from comparables list.
C3i Support Services (P.) Ltd. .v. Dy. CIT (2015) 152 ITD 279 (Hyd.)(Trib.)

S.92C:Transfer pricing - Arms' length price –Reimbursement of expenses- ALP adjustment was deleted.
The assessee was engaged in international trading of tyres, tubes and flaps through 'tyretech global division'.In transfer pricing proceedings, the TPO noticed that the assessee had reimbursed its AE, sales promotion expenses without any mark up.
The TPO was of the view that the assessee was not under any contractual obligation to perform marketing function and, as such, no such reimbursement would have been made in arm's length situation. While TPO did not dispute that the assessee may have benefited from said exercise, he was of the view that such a benefit was only incidental and such incidental benefits cannot be regarded as giving rise to an arm's length transaction. He thus proceeded to hold that this payment was not for intra group services, was purely for an incidental benefit and its arm's length price to the assessee was zero. Accordingly, an ALP adjustment of Rs 44.28 lakhs was proposed by the TPO.The DRP rejected objection raised by the assessee. On appeal Tribunal held that ,the question of incidental benefit to the assessee, for expenses incurred by the AE, would arise only when the expenses are incurred by the AE in its own right though for the common benefit of group as a whole. The impugned ALP adjustment is, therefore, devoid of legally sustainable basis on the facts of this case. Accordingly, the AO is directed to delete the same. (AY. 2006-07)
Apollo International Ltd. .v. Addl. CIT (2015) 152 ITD 229 (Delhi)(Trib.)

S. 92C :Transfer pricing - Arms' length price –Functionally different- Turnover filter- Wrong comparison taken in the transfer pricing report can be corrected and brought to the notice of Tribunal.

Companies engaged in software product development are functionally different and dissimilar to assessee company engaged in providing software development services and were, therefore, to be omitted from list of comparables while determining ALP of international transaction in question. Turnover filter is an important criteria in choosing comparables. Where turnover of assessee company was less than Rs.30 crores, companies having turnover of more than Rs. 200 crores could not be compared with assessee and had to be excluded from comparable Where in a company there was consistent change in operating margins, same had to be excluded Even if assessee had taken a company as comparable in its transfer pricing audit, still it was entitled to point out to Tribunal that said enterprise had wrongly been taken as a comparable. (AY. 2006-07 & 2009-10)
Aptean Software India (P.)Ltd. v. ITO (2015) 152 ITD 311 (Bang.)(Trib.)

S.92C:Transfer pricing -Arm's length price-ALP adjustments cannot be extend to transaction with non-AEs.
Tribunal held that ALP adjustments can only be made in respect of international transactions with AEs and cannot extend to transactions with non-AEs. (AY. 2003-04)
DY.CIT .v. Alcatel India Ltd. (2015) 152 ITD 289 (Delhi)(Trib.)

S. 92C :Transfer pricing-Arms' length price –Foreign exchange loss could not be adjusted.
Tribunal held that where assessee-company having purchased bearings and other products from its AE located abroad, sold said products to Indian customers, in absence of any documentary evidence to show that purchases and sales were made against pre-determined rates, foreign exchange fluctuation loss could not be adjusted in hands of assessee. (AY. 2009-10)
NSK India Sales Co. (P.) Ltd. .v. ACIT (2015) 152 ITD 239/ 119 DTR 107/170 TTJ 424 (Chennai)(Trib.)

S. 92C :Transfer pricing - Arms' length price –Items of non-operating income are excluded ,then items of non-operating expenses should also be excluded.
Tribunal held that, if items of non-operating incomes are excluded from computation of operating profit under TNMM, then items of non-operating expenses should also be excluded .(AY. 2004-05)
Dy. CIT .v. Exxon Mobil Gas (India) (P.) Ltd. (2015) 152 ITD 220 / 37 ITR 22 / 118 DTR 387 (Delhi)(Trib.)

S. 92C :Transfer pricing - Arms' length price –Allocation of expenses- Ratio of employee-Gross profit ratio-Ratio adopted by TPO was affirmed.
For allocation of expenses, assessee had adopted ratio of employee for rent, depreciation etc. .TPO was of firm belief that gross profit ratio would be appropriate to allocate various expenses .Tribunal held that since expenses like rent, depreciation, electricity, insurance charges, office maintenance and other miscellaneous expenses had no co-relation with number of employees and had a direct bearing to revenue generation, method adopted by TPO was slightly better than method adopted by assessee particularly when allocation by assessee was not supported by any certificate from management. Order of TPO was confirmed.(AY. 2008-09)
Varian India (P.) Ltd. .v. Addl. CIT (2015) 67 SOT 17 (URO)(Mum.)(Trib.)

S. 92C:Transfer pricing - Arms' length price –Transactions with each associated enterprises to be computed separately and not by clubbing with all AEs-Matter remanded.
Tribunal held that where for execution of project, assessee company had hired equipments and dredgers from more than one associated enterprise, in determining ALP, aggregation of transaction would be permitted only to extent of transactions or to extent of members of transactions with each associated enterprise separately and not by clubbing transactions with all AEs. Matter remanded. (AY. 2002-03)
Boskalis International Dredging International CV .v. Dy. DIT (2014) 47 taxmann.com 150 / (2015) 67 SOT 118 (URO) (Mum.)(Trib.)

S. 92C :Transfer pricing - Arms' length price –Lease rental-TPO has not brought on record any material to show that rent paid by assesse was in excess of comparable case- Matter remanded.

Assessee claimed to have paid lease rentals even for period beyond period of project i.e., for time spent on demobilization and transportation of dredger and vessel to port for re-delivery. Tribunal held that the Assessee had not produced any record to show that such payment was a standard practice in this field of business on other hand, TPO had not brought on record any material to show that rent paid by assessee was in excess of comparable case. Matter was to be readjudicated .Matter remanded. (AY. 2002-03)

Boskalis International Dredging International CV .v. Dy. DIT (2014) 47 taxmann.com 150 / (2015) 67 SOT 118 (URO)(Mum.)(Trib.)

S. 92C(3): Transfer pricing-TPO/ DRP's action of reducing the quantum of royalty paid to AE by applying the "benefit test" is surprising and improper.[S.37(1)]

(i) We are really surprised to see the reasoning of TPO in fixing the ALP of royalty payment at 2%. It is manifest from TPO's order he has rejected assessee's TP analysis under TNMM. Further, TPO has mentioned of undertaking an independent analysis under TNMM for selecting comparables and determining ALP. However, even after repeatedly scanning through his order, we failed to find any such analysis being done by him. Similarly, though in para 5.1.1, ld. DRP has observed that TPO has benchmarked intangible transactions by using CUP, but, the order passed by TPO does not support such conclusion. It is an accepted principle of law that TPO has to determine the ALP by adopting any one of the methods prescribed u/s 92C of the Act. Mode and manner of computation of ALP under different methods have been laid down in rule 10B. Even, assuming that TPO has followed CUP method for determining ALP of royalty payment, as held by ld. DRP, it needs to be examined if it is strictly in compliance with statutory provisions. Rule 10B(1)(a) lays down the procedure for determining ALP under CUP method. As per the said provision, TPO at first has to find out the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions. Thereafter, making necessary adjustments to such price, on account of differences between the international transaction and comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market, TPO will determine the ALP. It is patent and obvious from TPO's order, the determination of ALP at 2% is not at all in conformity with Rule 10B(1)(a). The TPO has not brought even a single comparable to justify arm's length percentage of royalty at 2% either under CUP or TNMM method. On the contrary, observations made by TPO gives ample scope to conclude that adoption of royalty at 2% is neither on the basis of any approved method nor any reasonable basis. Rather it is on adhoc or estimate basis, hence, not in accordance with statutory provisions. The approach of TPO in estimating royalty at 2% by applying the benefit test, in our view, is not only in complete violation of TP provisions but against the settled principles of law. ITAT, Mumbai Bench in case of M/s Castrol India Ltd. Vs. Additional CITY, ITA No. 1292/Mum/2007 dated 20/12/2013 while examining identical issue of determination of ALP at 'Nil' by applying the benefit test;

(ii) It needs reiteration that assessee has benchmarked the royalty payment by bringing comparables both under TNMM as well as CUP. Whereas, TPO has rejected the analysis done by assessee under both the methods without any reasonable basis nor has brought a single comparable to justify ALP of royalty at 2%. Unfortunately, ld. DRP has approached the entire issue in rather mechanical manner without examining whether approach of the TPO is in accordance with statutory mandate. Therefore, determination of ALP of royalty at 2% cannot be supported, hence, deserves to be struck down. Moreover, theory of benefit test applied by TPO also falls flat considering the fact that TPO does not question the necessity of paying royalty but only objects to the quantum. Further, quantum increase in sale with no apparent increase in production, minimal product recalls, low after sales maintenance cost certainly goes to prove assessee's claim that these could be achieved due to utilization of advanced technical know-how transferred by AE. The TPO has not been able disprove these facts with any sound argument. (AY. 2010-11)

R.A.K. Ceramics India Pvt.Ltd. v. DCIT(2015) 167 TTJ 759 / 42 ITR 368(Hyd.)(Trib.)

S. 92CA:Transfer pricing-Reference to TPO - Jurisdiction of AO to allow expenses u/s. 37 and TPO u/s 92CA is distinct and, therefore, a referral made by AO to TPO for determining ALP does not take away the power of AO to determine whether payment to AE for services received is an allowable u/s. 27(1) of the Act. Authority of TPO is to conduct a TP analysis to determine

ALP and not to determine whether there is a service or not from which the assessee benefits. [S.37(1)]

The assessee, an Indian company, was engaged in the business of rendering services connected to acquisition, sales and lease of real estate. During the relevant year, the assessee entered into international transactions relating to payment of referral fees and reimbursement of certain co-ordination and liaison costs to the AEs. The TPO disallowed the deduction of expenditure with respect to reimbursement of expenses on the ground that no services were provided, however, did not draw an adverse inference with respect to payment of referral fees. The AO, based on the TPO order, made a draft assessment order disallowing the reimbursement. The AO also disallowed the referral fees as deductible expenditure stating that no benefit was derived by the assessee from the referral fees paid to the AEs. The DRP concurred with the AO. On appeal, the Tribunal reversed the order of the AO in respect of both the issues.

On revenue's appeal with respect to reimbursement of costs, the High Court observed that, in the case of reimbursement made to AE, whether the cost itself is inflated or not (irrespective of the markup charged) is a matter to be tested under transfer pricing analysis. The High Court held that the TPO's authority is limited to determining the ALP of international transactions referred to him by the AO, rather than determining whether such services exist or benefit has accrued. The TPO can determine the ALP of a transaction at 'NIL' based on the consideration that an independent entity in a comparable transaction would not have paid any amount. However, the TPO cannot arrive at a 'NIL' ALP on the basis that the assessee did not benefit from such services. Furthermore, in reaching this conclusion neither the Revenue nor the Court must question the commercial wisdomof the assessee.

With respect to payment of referral fees, the Tribunal had reversed the finding on two grounds:

(i) AO, after having referred that matter to the TPO, could not re-open or re-examine the transaction (ii) On merits, the Tribunal held that the assessee had submitted ample evidence to support the expenditure. However, the High Court held that the jurisdiction of the AO u/s 37 and the TPO u/s 92CA were distinct; the TPO determines whether the stated transaction value represents the ALP or not (including whether the ALP is Nil), while the AO makes the decision as to the validity of the deduction u/s. 37. This means that the decision as to whether the expenditure was laid down 'wholly and exclusively for the purpose of business' is a fact to be determined or verified by the AO. Accordingly, the AO cannot reassess or draw adverse inference as to the quantum of payment; however, the AO may determine whether services were actually rendered.(AY.2006-07)

CIT v. Cushman and Wakefield (India) (P.) Ltd. (2015) 233 Taxman 250 / 277 CTR 368 / 119 DTR 261 (Delhi)(HC)

S. 94(7) : Transaction in securities –Dividend stripping-Loss-Set off-Loss arising in the course of a dividend stripping transaction before the insertion of S.94(7) w.e.f 1st April 2002 cannot be disallowed.

Loss arising in the course of a dividend stripping transaction before the insertion of S.94(7) w.e.f 1stApril 2002 cannot be disallowed. Followed CIT v. Walfort Share & Stock Brokers (P) Ltd (2010) 326 ITR 1 (SC)

CIT v. Globe Capital Market Ltd (2015) 373 ITR 58/ 278 CTR 264 / 120 DTR 311(SC)

S. 94A : Special measures in respect of transactions with persons located in notified jurisdictional area- Assessee filed writ petition assailing Notification No. 86/2013, dated 01-11-2013 whereby Cyprus had been declared as a notified jurisdictional area on the basis that the Government of Cyprus was not co-operating with Government of India and was not supplying information sought by Indian Government authorities. While exercising writ, jurisdiction Court should not proceed to look into as to whether information sought by Indian authorities was ever declined by the Government of Cyprus or if Government of Cyprus is ready and willing to supply information sought by the Indian authorities. Moreover, there being no valid reason to disbelieve satisfaction recorded by Indian authorities, no relief could be granted to the assessee.-DTAA- India-Cyprus[Art 28]

The assessee filed a writ petition assailing the notification dated 01-11-2013, mainly on the basis that "Cyprus" ought not to have been declared as a notified jurisdictional area in view of the international treaty between the Government of India and Government of Cyprus. The assessee contended that the very basis of issuing the impugned notification dated 01-11-2013 i.e. that the Government of Cyprus was not co-operating with the Government of India and, despite several requests, not supplying the information sought by the authorities of the Government of India, on the face of it, was wrong in view of the Press Release made by the Cyprus authorities that they had never denied any information and they had been ready and willing to supply the information sought by the Government of India.
The Court held that while exercising the writ jurisdiction under Article 226 of the Constitution of India, the Court ordinarily should not proceed to look into as to whether information sought by the Indian authorities was ever declined by the Government of Cyprus or if the Government of Cyprus is ready and willing to supply the information sought by the Indian authorities. Moreover, there seems to be no valid reason to disbelieve the satisfaction so recorded by the Indian authorities. Accordingly, the writ filed by the assessee was rejected.
Expro Gulf Ltd. v. UOI (2015) 230 Taxman 331 / 115 DTR 17 / 274 CTR 390 (Uttarakhand) HC)

S. 113 : Tax – Block assessment –Surcharge-Levy of surcharge was held to be not valid.[S.158BC]
Where pursuant to search proceedings, assessee filed return for block period declaring certain undisclosed income, following order passed by Supreme Court in case of CIT v. Vatika Township (P.) Ltd. (2014) 367 ITR 466, Tribunal was justified in deleting surcharge levied by Assessing Officer under provisions of Finance Acts, 1999 and 2000.
ACIT v. Uttamchand V. Sethiya (2015) 230 Taxman 566 (Guj.)(HC)

S. 113 :Tax-Block assessment-Surcharge-Law applicable-Period prior to amendment of section 113-Surcharge could be levied.
Held, that surcharge could be levied even before the amendment of section 113 in view of the Finance Act passed by Parliament in the respective assessment year. Therefore, the Commissioner (Appeals) was not justified in the deleting the surcharge levied by the Assessing Officer.
ACIT v. Sabarigiri Trust (2015) 152 ITD 637 / 170 TTJ 586 / 39 ITR 308 (Cochin)(Trib.)

S. 115BB : Rate of tax-Betting - Gambling –Losses from same source cannot be set off against such income- Taxable at rate of forty percent. [S 2(24)(ix), 58(4)]
Business losss from same source also could not be set-off from winnings from betting and gambling income, as they would be taxed on gross basis. (AY. 1998-99)
CIT v. Dr. M.A.M. Ramaswamy (No.1) (2015) 373 ITR 428 / 230 Taxman 494 (Mad.)(HC)
CIT v. Dr. M.A.M. Ramaswamy (No.2) (2015) 373 ITR 437 (Mad.)(HC)

S. 115E:Non-residents - Capital gains – Benefit of concessional rate of tax would not be available on short-term capital gains arising from sale of shares.[S. 2(24), 2(42B]
Assessee, a non-resident, earned short-term capital gain on sale of bonus shares. He paid tax at the concessional rate of 20%, claiming benefit of s. 115E, on the basis that the original shares were purchased in convertible foreign exchange. The AO held that concessional rate of tax was not available for short-term capital gains. The HC held that if the phrase “investment income” is interpreted to include all kinds of income defined in S. 2(24), then the phrase “income by way of long-term capital gain” would become redundant. Income derived from shares would normally include dividend income and not income from sale of shares, since in the case of latter rights over the shares are extinguished. Thus, income arising on sale of assets leading to short-term capital gains would not be investment income derived from foreign exchange asset and thus benefit of section 115E would not be available to short-term capital gains.(AY. 1992-93)
CIT v. Sham L. Chellaram (2015) 373 ITR 292 / 116 DTR 118 / 275 CTR 245 (Bom.)(HC)

S. 115J : Book profit-Profits or loss to be taken into account must relate to relevant previous year-Amount taxed earlier but shown in books-Not includible in book profits.

For the assessment year 1990-91, in its book profits, the assessee posted a sum of Rs. 4,28,17,995. This included a sum of Rs. 3,81,48,960 stated to be interest on intercorporate deposits for the four consecutive previous years, i.e., 1985-86 to 1988-89. A note was appended to the return with a request to exclude the amount of Rs. 3,81,48,960 from assessment stating that the amount was referable to the earlier assessment years and had also suffered tax. The Assessing Officer did not accept that plea. The Commissioner (Appeals) HAD partly allowed the appeal deleting the profits for the assessment years 1986-87 and 1987-88 on the ground that section 115J of the Act was not in force at the relevant point of time. However, he did not allow such deduction for the assessment years 1988-89 and 1989-90. The Tribunal accepted the conclusion of the assessee for all the four years.

The High Court held, dismissing the appeal, that the Assessing Officer did not doubt the plea of the assessee that the amount was referable to four assessment years and the corresponding break-up was also given. On the undisputed facts, those figures could not be said to be the income or book profit "for the relevant previous year". From a perusal of the Explanation to section 115J, it becomes clear that notwithstanding the freedom given to an assessee to state its book profit in its annual report submitted as part of its obligation under the Companies Act, 1956, it is kept under an obligation to be truthful. The book profit is liable to be increased or decreased, depending upon the factors that are mentioned in the Explanation. One central theme that runs through the provision, is that the profit and loss shall be with reference to the relevant previous year.(AY. 1990-1991)

CIT v. Nagarjuna Fertilizers and Chemicals Ltd. (2015) 373 ITR 252 / 231 Taxman 643 (T & AP)(HC)

S. 115J : Book profit-Depreciation- Accounts maintained as per companies Act- Adjustment by the AO was held to be not justified.[S.32, Companies Act, 1956, Parts II and III of Schedule VI]

Assessee provided the depreciation in its profit and loss account as per the books of account maintained in accordance with Parts II and III OF Schedule VI of Companies Act , 1956.AO recomputed the book profit and disallowed the depreciation claimed. On appeal Tribunal held that where accounts of assesse were certified by auditors as having maintained in accordance with provisions of Companies Act, AO could not contend that accounts were not properly maintained. Adjustments made by the AO was deleted.(ITA Nos 2104 & 1371(Mum) of 2011 dt 22-10-2014)(AY. 2007-08 , 2008-09)

Shree Nirmal Commercial Ltd. .v. Dy.CIT (2014) 52 taxman.com 78/(2015) 67 SOT 78 (Mum.)(Trib.)

S.115JA:Book profit- Non –compete fee- Consideration not brought to profit and loss account but taken as reserves to Balance sheet cannot be added to the "book profits". [S.28(va)]

On appeal by revenue , The High Court had to consider :

“Whether non-compete consideration taken as Reserves to the Balance sheet cannot be added to the Book Profit under Section 115JA of the Act even in terms of clause (b) of the Explanation thereto?”

HELD by the High Court:

For the Explanation to Section 115JA of the Act to be invoked it is necessary that the amount which has been carried to the reserves should have necessarily been first debited to the Profit and Loss account resulting in a reduction in the profit declared by the Assessee Company. In National Hydroelectric Power Corpn. Ltd. v.CIT (2010) 320 ITR 0374 it has been held that to invoke clause (b) of the Explanation below Section 115JB (identical to Section 115JA) of the Act, two conditions must be satisfied cumulatively viz. there must be a debit of the amount to the Profit and loss account and the amount so debited must be carried to Reserves. Admitted position in this case is that there is no debit to the Profit and loss account of the amount of Reserves. The impugned order has view of the self evident position taken that in the absence of the amount being debited to Profit and Loss account and taken directly to the reserve account in the balance sheet, the book profits as declared under the Profit and Loss account cannot be tampered with. (AY.1999-00)

CIT .v. Bisleri Sales Ltd. (2015) 377 ITR 144 (Bom.)(HC)

S. 115JA : Book profit –Bad and doubtful debts- Matter remanded. [S.115JB]

While computing book profits, where bad and doubtful debts is reduced from loan and advances from debtors, Explanation to section 115JA or section 115JB is not attracted - Held, yes - Whether since from material on record it was not possible to figured out whether bad and doubtful debts were reduced from loan and advances from debtors, matter was to be remanded back. (AY. 1999-2000)
CIT v. Syndicate Bank Syndicate House (2015) 229 Taxman 384 (Karn.)(HC)

S. 115JA : Book profit-Provision for bad and doubtful debts not deductible from book profits for assessment year 1998-99 .
Allowing the appeal of revenue the Court held that, the amount claimed as deduction of provision for bad and doubtful debts representing unascertained liability should not be deducted from the book profit for the purpose of determining the income, in view of the retrospective amendment by the insertion of clause (i) under Explanation (1) to section 115JA of the Income-tax Act, 1961, with effect from April 1, 1998.(AY. 1998-1999)
CIT .v. Tamil Nadu Small Industries Development Corporation Ltd. (2015) 370 ITR 449/ 231 Taxman 368 (Mad.)(HC)

S. 115JA :Book profit –Provision for debts and non performing assets –Addition was held to be justified.
The AO held that the assessee made the provision for debts and non performing assets. According to the AO the same was not covered by clause (c) of *Explanation* of sub-section (2) of section 115JA, so he made the addition of said amount.TheCIT(A)as well as the Tribunal deleted said addition.On revenue's appeal:
The Court held that while computing book profit of assessee-company under section 115JA, Assessing Officer was justified in making addition in respect of provision for debts and non-performing assets taking a view that same was not covered by clause (c) of Explanation to sub-section (2) of section 115JA. Appeal of revenue was allowed. (AY. 1998-99)
CIT .v. Kailash Auto Finance Ltd. (2015) 228 Taxman 39 (Mag.)(All.)(HC)

S. 115JB:Book profit- Sale of rights directly taken to balance sheet—Adjustment to book profit cannot be made, if auditors and ROC have not found fault with Accounts.
The assessee earned gross profit of Rs.1,68,95,500/- from sale of its rights in immovable property. This amount was not shown in the P&L Account but was taken directly to the balance sheet. The AO held that under sub-clause (xi) of clause-3 of Part-II of Schedule-VI, the assessee is required to show the amount of income earned from investment in the P&L Account, distinguishing between trade investments and other investments. He held that it was mandatory for the company to show profit/loss on sale of assets in the P&L Account and that the P/L account had not been prepared in accordance with Part-II and Part- III of Schedule-VI of the Companies Act. Assessing Officer on CIT vs. Veekaylal Investment Co. P. Ltd. (249 ITR 597 (Bom)(HC)) and made an adjustment to the "book profits" u/s 115JB. However, the Tribunal deleted the addition. On appeal by the department to the High Court HELD dismissing the appeal:
The observations of the Apex Court in Apollo Tyres Ltd. v/s CIT 255 ITR 273 concludes the issue by holding that the Assessing Officer does not have power to embark upon the fresh enquiry with regard to the entries made in the books of accounts of the Company when the accounts of an assessee Company is prepared in terms of Part II Schedule VI of the Companies Act scrutinized and certified by the statutory auditors, approved by the Company in general meeting and thereafter filed before the Registrar of Companies who has a statutory obligation also to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. If the grievance of the revenue is to be accepted, then the conclusiveness of accounts prepared and audited in terms of Section 115JB of the Companies Act would be set at naught. This without successfully impeaching the Auditor's certificate or without the Registrar of Companies holding that the accounts have not been prepared in accordance with the provisions of the Companies Act. There is no distinction between s. 115JA and 115JB and the principles laid down in Apollo Tyres applies to s. 115JB as well .(AY.2004-05)
CIT .v. Forver Diamonds Pvt. Ltd. (Bom.)(HC); www.itatonline.org

S. 115JB : Book profit –Brought forward losses- Unabsorbed depreciation-Whichever is less.
As per clause (iii) of Explanation 1 to section 115JB, book profit is to be reduced by amount of brought forward losses or unabsorbed depreciation, whichever is less. Appeal of assesse was dismissed. (AY. 2004-05)
Filatex India Ltd. v. CIT (2015) 229 Taxman 555 (Delhi)(HC)

S. 115JB : Book profit–Securities Transaction Tax (STT)-Tax remission under section 88E has to be and should be taken into consideration both under normal provisions as well as book profits [S.87, 88E]
While computing profit under section 115JB assessee claimed tax remission under section 88E.Tribunal allowed assessee's claim by following decision of Delhi High Court in CIT v. MBL & Co. Ltd. [2013] 358 ITR 1(Delhi)(HC) in which it was held that while computing tax payable under section 115JB, remission in form of Securities Transaction Tax (STT) in terms of section 88E, read with section 87 would be available to assesse. Tax remission under section 88E has to be and should be taken into consideration both under normal provisions as well as book profits computed under section 115JB and amount of remission under section 88E would get reduced from tax payable under both methods/manners of computing taxable income.(AY. 2007-08, 2008-09)
CIT v. CNB Finwiz Ltd. (2015) 229 Taxman 454 (Delhi)(HC)

S. 115JB : Book profit–Interest-Liable to pay interest. [S.115JB, 143(1), 234A,234C]
An assessee covered by provisions of sections 115JA and 115JB is under obligation to pay advance tax and delay or failure to pay said tax would result in levy of interest.(AY. 2001-02)
Fenoplast Ltd. v. Dy. CIT (2015) 229 Taxman 541 (AP)(HC)

S. 115JB : Book profit -The income and expenditure attributable to eligible undertaking under section 10A of the Act had to be allowed in the case of the assessee while computing the book profits-Amendment is w.e.f.1-4-2008. [S.10A, 10B]
Dismissing the appeal of revenue, prior to April 1, 2007, the Explanation to section 115JB referring to the term "book profits" included the expenditure and income relatable to any income to which section 10A or section 10B applied for the purpose of increase in the book profit and the income itself for the purpose of decreasing the book profit. Held accordingly, the income and expenditure attributable to eligible undertaking under section 10A of the Act had to be allowed in the case of the assessee while computing the book profits under section 115JB.(AY. 2006-2007)
CIT .v. ACE Software Exports Ltd. (2015) 370 ITR 21/230 Taxman 88 (Guj.)(HC)

S. 115JB:Book profit- Distinction between "reserve" & "provision" explained. Statutory reserve created u/s 45-IC of RBI Act is not a "diversion of income at source" and cannot be excluded from book profits.[Reserve Bank of India Act, 1934. S. 45-IC]
(i) Under clause (c) of Explanation (1) to Section 115JB of the Act, amount set aside to provisions made for meeting liabilities, other than ascertained liabilities, have to be added back while computing book profit. Thus, provisions for ascertained liabilities would be excluded and are not to be added to the book profit under Explanation (1) to Section 115JB of the Act. Unascertained provisions have to be added and included. It was for the assessee to explain and show that what was treated as a Debt Redemption Reserve was in fact a provision and that too for an ascertained liability. This explanation is missing and absent.
(ii) The term “provision” differs from “liability” because liability is certain and definite amount whereas a provision is an amount which is estimated (See Note 3 of Schedule III of the Companies Act, 2013, with reference to the term “current liabilities”). Reserves fall on the other end/side for they are associated with equity. Transfer of such reserves is appropriation of retained earnings rather than expenses. Contingent liability, however, is not a provision or liability. It is less certain than a provision as the possible obligation has not yet been confirmed and the assessee does not have control whether or when it will be confirmed or the amount cannot be measured with sufficient reliability. The potential obligation is so uncertain that it should not be recognized in the accounts. A provision, therefore, is somewhat between accrual and the contingent liability.

(iii) The argument in respect of Section 45-IC of the Reserve Bank of India Act, 1934 and diversion of income at source is misconceived. The decisions of different courts including the Supreme Court and the Delhi High Court in the case of Molasses Storage Fund are inapplicable. Diversion of income at source by way of overriding title as a principle is applicable when under a statutory or contractual obligation or under the provisions of Memorandum and Articles of Association, the earning is divested and the assessed has no title over a particular receipt. When such charge exists, the amount or income so charged must be excluded from income of the assessed as income never reaches his hands and in fact belongs to a third person. Thus, the income stands diverted at source. Diversion of income at source implies that income or the amount mentioned therein belongs to a third party and was not income of the assesse. Similar question arose before the Supreme Court in Associated Power Co. Ltd Vs. CIT (1996) 218 ITR 195.
(iv) The reserve, which is required to be created under Section 45-IC, is out of the profits earned by a non-banking financial institution. It is not an amount diverted at source by overriding title. The Reserve Bank of India Act, 1934 can permit appropriation in respect of the said reserve. The assessee can also ask for specific directions from the Central Government subject to proviso to sub-section (3) of the said Section.(AY. 2006-07, 2007-08)
Srei infrastructure finance Ltd. .v. ACIT(2015) 230 Taxman 1 (Delhi) (HC)

S. 115JB:Book profit-Provision for deferred tax is to be added back to book profit.
Provision for deferred tax is to be added back to book profit computed under section 115JB.(AY 2003-04,2005-06)
Aditya Birla Nuvo Ltd. .v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S. 115JB:Book profit-Transfer of development rights to subsidiary- (i) Even if an amount is credited to the P&L Account, the assessee can seek exclusion of that amount for purposes of "book profits" if a note to that effect is inserted in the Accounts. (ii) The exemption conferred by S. 115JB to sums exempt u/s 10 should be extended to all sums which are not chargeable to tax.[S. 2(24),10]
The assessee held a parcel of land admeasuring about 61,506 sq.mtr as its capital asset. The said land was attached with development rights/FSI. The assessee transferred development rights/FSI of 55,464.04 sq.mtr which was available on a portion of above said land to its wholly owned Indian subsidiary company. The said transfer generated Long Term Capital Gain (LTCG) of 300.68 crores. The assessee disclosed the same as "Extra Ordinary Income" in the profit and loss account. The said LTCG was not chargeable to tax u/s 47(iv) of the Act as it arose from the transfer of a capital asset by a company to its wholly owned Indian subsidiary. For purposes of computation of book profits u/s 115JB, the assessee inserted a note in the accounts stating that the said amount credited to the P&L A/c did not have the character of "income" and was not chargeable as "book profits". The AO & CIT(A) relied on the judgement of the Special Bench in Rain Commodities Ltd v/s DCIT (2010) (40 SOT 265; 131 TTJ 514) where it was held that if an amount, though not chargeable as capital gains u/s 47(iv), is credited to the P&L A/c, the same cannot be excluded from the book profits u/s 115JB. On appeal by the assessee to the Tribunal HELD allowing the appeal:
(1).The decision rendered by the Special Bench of Tribunal in Rain Commodities Ltd (40 SOT 265; 131 TTJ 514) is not applicable because in that case the capital gains had been included in the profit and loss account and it was accepted that the accounts have been prepared in accordance with the provisions of Part II and Part III of Schedule VI to the Companies Act. In the present case, it is clearly stated in the Notes forming part of accounts that the said profit is not includible for computing book profit u/s 115JB of the Act, even though it is credited to Profit and Loss account. The profit and loss account prepared in accordance with the provisions of Part II to Schedule VI of the Companies Act should be read along with the 'Notes forming part of accounts'. Hence the net profit shown in the Profit and loss account shall be first adjusted to take care of the qualifications given in the Notes.
(ii) As regards the contention that since the profit arising on transfer of a capital asset by a company to its wholly owned subsidiary company is not treated as income" u/s 2(24) of the Act and since it does not enter into computation provision at all under the normal provisions of the Act, the same should not be considered for the purpose of computing book profit u/s 115JB of the Act, it is pertinent to note that the provisions of sec. 10 lists out various types of income, which do not form

part of Total income. All those items of receipts shall otherwise fall under the definition of the term "income" as defined in sec. 2(24) of the Act, but they are not included in total income in view of the provisions of sec. 10 of the Act. Since they are considered as "incomes not included in total income" for some policy reasons, the legislature, in its wisdom, has decided not to subject them to tax u/s 115JB of the Act also, except otherwise specifically provided for. Clause (ii) of Explanation 1 to sec.115JB specifically provides that the amount of income to which any of the provisions of section 10 (other than the provisions contained in clause (38) thereof) is to be reduced from the Net profit, if they are credited to the Profit and Loss account. The logic of these provisions, in our view, is that an item of receipt which falls under the definition of "income", are excluded for the purpose of computing "Book Profit", since the said receipts are exempted u/s 10 of the Act while computing total income. Thus, it is seen that the legislature seeks to maintain parity between the computation of "total income" and "book profit", in respect of exempted category of income. If the said logic is extended further, an item of receipt which does not fall under the definition of "income" at all and hence falls outside the purview of the computation provisions of Income tax Act, cannot also be included in "book profit" u/s 115JB of the Act.

(iii) A careful perusal of the decision rendered by the Special bench in the case of Rain Commodities Ltd would show that the above said legal contentions were not considered by the Special bench. The Special bench considered cases where the Courts were dealing with the issue of inclusion of Capital gains in the computation of "Book Profits", but such capital gains were otherwise chargeable to capital gain tax u/s 45 of the Act under the normal provisions of the Act. However, here is the case that the profits and gains arising on transfer of capital is not falling under the definition of "transfer" and hence under the definition of "Capital gains chargeable u/s 45" and consequently, the same does not fall within the purview of the definition of "income" given u/s 2(24) of the Act. Further, the Special bench did not have occasion to consider the argument urged that the profits and gains arising on transfer of a capital asset by a holding company to its wholly owned Indian Company does not fall under the definition of "income" at all u/s 2(24) of the Act and hence the same does not enter into the computation provisions of the Act at all. (AY. 2009-10)

Shivalik Venture Pvt. Ltd. .v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 115JB:Book profit- Industrial undertaking-Dedcution allowed - Not to be adjusted for calculating book profit. [S.80IB]

Deduction under section 80IB is not to be adjusted for calculating book profit under section 115JB (AY. 2003-04).

Aditya Birla Nuvo Ltd. .v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S. 115JB: Book profit- Amount towards waiver of loan under OTSS, credited to "General Reserves" and not to the P&L Account cannot be added to "book profits".

The sole dispute raised is, whether the Assessing Officer could have made adjustment to the book profits for an amount of Rs. 3, 52, 78,000/-, which was on account of waiver of principal amount of loan, which has been credited by the assessee directly in the Balance Sheet in 'General Reserve' account, which according to the Assessing Officer should have been routed through profit and loss account and thus, would have been part of the book profit. The provisions relating to book profit u/s 115JB are absolutely clear that same is to be computed on the basis of profit and loss account prepared in accordance with the provision of Part-II and Part-III of Schedule-VI of the Companies Act and to such profit only certain adjustments as provided in Explanation 1 can be made. The Assessing Officer does not have the power to tinker with such accounts prepared as per Schedule VI and certified by the Auditors. Assessing Officer has also not specified categorically that as to how the Part II & III of Schedule VI has not been followed or is against the prescribed accounting standard there is a requirement of law that waiver of loan taken for utilizing capital expansion is to be routed only through profit and loss account and cannot be credited to the 'General Reserve', i.e. directly in the Balance sheet. Thus, the finding of the CIT(A) is purely in accordance with the provisions of the law and the principle laid down by the Hon'ble Supreme Court in the case of Apollo Tyres (supra). The Hon'ble Bombay High Court in the case of CIT vs Akshay Textiles Trading And Agencies (P) Ltd., reported in 304 ITR 401 and later on in the case of CIT vs Adbhut Trading Co. Pvt. Ltd., reported in 338 ITR 94, following the aforesaid decision of the Hon'ble Supreme Court held that accounts

prepared under the Companies Act and certified by the authorities under the said "Act" have to be accepted. (AY. 2007-08)
DCIT .v. Garware Polyester Ltd. (Mum.)(Trib.); www.itatonline.org

S. 115JB : Book profit-Income not includible in total income- Disallowed amount can be adopted while computing book profits- Provision for wealth tax liability-Matter remanded. [S. 14A]
Assessing Officer adding amount disallowed under section 14A to net profits. Failure by assessee to challenge quantum of expenditure disallowed under section 14A in computation of total income. Disallowed amount under section 14A can be adopted while arriving at book profits. 14A, 115JB(2), Expln. 1(f).
Tribunal also held, that wealth-tax liability provision was not covered under Explanation 1(a) to section 115JB(2) of the Act. Regarding applicability of Explanation 1(c) to section 115JB(2) of the Act, the matter to be remanded for fresh consideration to verify whether the provision for wealth-tax was based on the actual wealth-tax returns filed by the assessee and if so, then it could not be considered as unascertained liability. Matter remanded. (AY. 2009-2010)
Dy. CIT(LTU) v. Microlabs Ltd. (2015) 39 ITR 585 (Bang.)(Trib.)

S. 115JB : Book profit-Once it is concluded that assessee has set up business during year, profit and loss account has to be prepared in accordance with Part II & III of Schedule VI of Companies Act and has to be certified by auditor- Matter remanded.
The AO took the view that the assessee had commenced business of providing services and had operated along commercial lines in the impugned assessment year and therefore, the receipt being revenue in nature was liable for taxation. In appellate proceedings, the assessee did not challenge the finding of the AO. that the business had commenced during the impugned assessment year even though the assessee challenged the computation of the book profit u/s. 115JB. CIT (Appeals) reduced the amount of book profit after allowing certain deduction for various expenditure incurred by assessee. On appeal by revenue the Tribunal held that the assessee had not prepared any Profit and Loss account on the presumption that it has not commenced the business during the year. Once the assessee had set up the business during the year, the profit and loss account had to be prepared in accordance with Part II & III of Schedule VI of the Companies Act and has to be certified by the auditor. Matter remanded. (AY. 2005-06)
ACIT v. South West Port Ltd.(2015) 153 ITD 1 (Panaji)(Trib.)

S. 115JB : Book profit- Capital gains-In computing the "book profits" the entire capital gains have to be included without computing the benefits of indexation. [S. 10(38), 45]
During the year ending on 31.03.2009, the assessee company sold shares and thereby earned a surplus of Rs. 1,90,78,63,394 which was net of STT paid. This amount was credited to the Profit & loss account as on 31.03.2009. In the computation of book profit u/s. 115JB, the assessee had made a note stating that the Long term capital gain should be taken at Rs. 1,72,55,70,760, which is after indexation. The Tribunal had to consider whether while computing the book profit u/s. 115JB the income on account of Long term capital gain should include Rs. 1,90,39,06,630 i.e. net amount credited or the sum of Rs. 1,72,55,70,760 computed after indexation. HELD by the Tribunal:
For computing the profit and the taxability u/s. 115JB, it is mandatory for the assessee to compute profit as per Profit & loss account prepared under the relevant provisions of the Companies Act. The relevant Schedule under the Companies Act for the preparation of statement of Profit & loss account provides that in case of sale of investments, net gain/loss should be disclosed. The net gain/loss means sale minus purchase and other cost. The Companies Act does not speak about Long term/ Short term capital gain. From the harmonious reading of the relevant provision as discussed above, it is evident that firstly, the book profit shall be reduced by the amount of income to which provision of section 10 applies. However, income under the provisions contained in section 10(38) will not be reduced. Thus, the income arising from transfer of long term capital asset is to be included in the book profit. The book profits as contemplated in section 115JB means the net profit, which has been shown/credited in the profit & loss account as prepared under the relevant provisions of the Companies Act. The concept of indexation while computing the Long term capital gain cannot be imported to the computation of

book profit u/s. 115JB as per the expressed provisions of the said section itself which is a complete code in itself. Thus, in our opinion, the net amount on account of sale of shares of Rs. 1,90,39,06,630 will alone be taken into account in computation of book profit and not the amount of Long term capital gain of Rs. 1,72,55,70,760 after indexation.(AY. 2009-10)

Dharmayug investment Ltd. v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 115JB:Book Profit-State Electricity Board-Is owned by either Central or State Government-Provisions is not applicable.

The Assessing Officer took the view that no exemption to companies engaged in the generation and/or distribution of electricity had been granted under section 115JB but the Commissioner (Appeals) observed that the provisions of section 115JB were not applicable to the assessee. On appeal by the Department ;Held, that the Electricity Board or bodies which were totally owned by the Government, either State or Central, had no shareholders. Profits, if at all, made would be for the benefit of the entire body politic of the State. Therefore, the enquiry as to the mischief sought to be remedied by the amendment was irrelevant. Therefore, the fiction fixed under section 115JB could not be pressed into service against the Electricity Board while making the assessment of the tax payable under the Income-tax Act. (AY. 2008-2009)

ACIT v. Kerala State Electricity Board (2015) 38 ITR 458 (Cochin)(Trib.)

S. 115JB : Book profit- Exempt income- In the absence of exempt income, S.14A disallowance cannot be added to book profits even if assessee has accepted disallowance in the normal computation.[S.14A]

Tribunal held that the assessee may have accepted the disallowance under section 14A but once it is a settled legal position, in the light of the law laid down in CIT v. Holcim India Pvt. Ltd. (Del) that there cannot be any disallowance under section 14A unless there is corresponding exempt income and the assessee has no such exempt income, adjustment under clause (f) of Explanation to Section 115JB (2) cannot indeed be made. The adjustment has to meet the tests of law and what cannot be considered to be 'expenditure relatable to exempt income' under the law, cannot be subjected to the adjustment either. There is no estoppel against the law. The mere fact that the assessee has accepted this disallowance affects that disallowance only and nothing more than that; it does not clothe such an adjustment, in computation of book profit under section 115JB, with legality. (AY. 2009-10) (ITA No. 2974/Del/2013, dt. 09/01/2015)

Minda Sai Ltd. .v. ITO (Delhi)(Trib.); www.itatonline.org

S. 115VB : Shipping business-Tonnage tax scheme-Tonnage income-Non qualifying ships-Computation-Income from slot charter operations-Includible.[S.15VC, 115VD]

The assessee was a qualifying tonnage tax company which operated its qualifying ship and had also slot charter arrangements in other ships. The Department did not accepted its computation of shipping income. The Tribunal dismissed the assessee`s appeals against the orders of the Commissioner (Appeals) holding that in order to avail of the benefit of the provisions of Chapter XII-G in relation to slot charter arrangements, it was necessary to show that the ships in which the assessee had operations under slot charter arrangements were also qualifying ships and that such operation had to be evidenced by a valid certificate in terms of section 115VX(1)(b) in relation to each such ship. On appeals:

Held, allowing the appeals, (i) that under the Act and the Rules, the slots hired are converted into net tonnage. This is enjoined by providing a formula since slots are hired for a sector voyage or on long-term basis, all round the year, in different vessels and in varying numbers and thus cannot be converted to the net tonnage identifying the particular vessel on which the slot is hired. Therefore, the income derived from the slot charter operations of a tonnage tax company was not liable to be excluded while determining the tonnage income under the tonnage tax scheme on the ground that such operations were carried on in ships which were not qualifying ships in terms of the provisions of Chapter XII-G. The Assessing Officer was directed to modify the assessment orders in conformity with law.

(ii) That the order of the Commissioner in the suo motu proceedings would be binding on the Assessing Officer but would not bind the superior tribunals and courts when questions of law arise for

consideration ; more particularly, when such questions arise as a consequence of the proceedings following the Commissioner`s decision. Such decision of the Commissioner to the extent it is contrary to the findings would not stand.
Trans Asian Shipping Services P. Ltd. v. CIT (2015) 371 ITR 194 / 229 Taxman 455 (Ker.)(HC)

S.115W:Fringe benefits Employer and employee relationship is a pre –requisite for levy of fringe benefit tax-Subscription to Tata brand equity contribution under contractual agreement between assessee and group companies –Not liable to pay fringe benefit tax.[S.115WA]
Dismissing the appeal of revenue the Court held that, subscription to Tata brand equity contribution under contractual agreement between assessee and group companies is not liable to pay fringe benefit tax . Employer and employee relationship is a pre –requisite for levy of fringe benefit tax.(AY. 2007-2008)
CIT .v. Tata Consultancy Services Ltd. (2015) 374 ITR 112 (Bom.)(HC)

S. 115WA : Fringe benefits – Valuation-Tea company - Net profit and loss of business to be arrived at after deducting all expenses–40% of net profit and loss to be worked out chargeable to tax - Expenditure would be reduced to 40%. (S. 115WB, 115WE,ITRule.8)
Allowing the appeal of assesse Court held that; the expenditure incurred was both for the purpose of business and for the purpose of agriculture. The submission that the expenditure on account of fringe benefits had already been taken into account was not correct. The net profit and loss of the business had to be arrived at after deducting all the expenses. Once that was done 40% of the net profit and loss had to be worked out which shall be chargeable to tax. Once this was done the expenditure on account of fringe benefits would automatically stand reduced to 40%.
CIT v. Doom Dooma India Ltd. [2009] 310 ITR 392 (SC) applied.
Apeejay Tea Ltd v. CIT (2015) 370 ITR 775/ 120 DTR 379 (Cal.) (HC)

S.115WB : Fringe benefits - Perquisite – Uniform and washing allowance paid to employees is liable to FBT and is not taxable in the hands of the employees. [S. 17, 192]
The assessee, a government undertaking, made certain payments to employees being 'Conveyance and Maintenance Allowance' and 'Other (Taxable)' and 'Other (Non-taxable)' in the nature of uniform and washing allowance. During the course of survey, the AO observed that the Form 16 did not reflect the 'Other (Non-taxable)' amounts. During the course of the assessment proceedings, the assessee clarified that the payments were mere reimbursements and hence the same were being offered to FBT and were not taxable in the hands of the employees. The AO disagreed with the said contention, however, the CIT(A) and Tribunal partly allowed the assessee's appeal.
The High Court dismissed the departmental appeal and held that since the assessee was governed by the FBT provisions and the payment was rightly subject to FBT and the provisions of salary would not apply.(AY. 2006-2007 to 2009-2010)
CIT v. Oil & Natural Gas Corporation (India) Ltd. (2015) 118 DTR 96 (Guj.)(HC)

S. 115WB : Fringe benefits –Other amenities to employees free of cost can be Rs. 500 per employee and not more than that
Amount allowed towards perquisites in respect of free supply of gas, electricity, water, etc., and other amenities to employees free of cost can be Rs. 500 per employee and not more than that . (AY. 1998-88 & 1975-76)
CIT v. Coromandal Fertilisers Ltd. (2015) 228 Taxman 318 (Mag.)(AP)(HC)

S. 115WJ: Fringe benefits -Refund- Assessee paying tax in advance-Registration of assessee with retrospective effect upon registration under section 12AA - Effect - Assessee not liable to pay fringe benefit tax or to file such return at that time - Amount paid under a mistake by assessee not under any provision of Act - Assessee entitled for refund with interest - Revenue should not insist on any unnecessary formalities.[S.12AA]
The assessee, paid fringe benefit tax of Rs. 22,12,04,513 in advance under section 115WJ of the Act. Upon registration of the assessee under section 12AA with effect from April 1, 2005, the assessee ceased to be liable for fringe benefit tax with retrospective effect from April 1, 2005. On a writ

petition contending that it was entitled to the refund of the fringe benefit tax paid in advance together with statutory interest:
Held, allowing the petition, that the effect of the registration of the petitioner under section 12AA with retrospective effect was that at the point of time when the fringe benefit tax was paid by the assessee, it was not liable to pay such tax or to file such return. Therefore, the amount of Rs. 22 crores could be said to be money paid under a mistake by the assessee not under any provision of the Act. If money had been received by the Government on a mistake committed by the assessee it was liable to refund the sum. While making such refund it should not insist on unnecessary procedural formalities. (AY. 2006-2007)
Kolkata Port Trust v. Dy. DIT (E) (2015) 372 ITR 403 (Cal.)(HC)

S. 127: Transfer of case- Chairman of assessee-trust running institutions in Kerala in his individual capacity - Undisclosed income detected in hands of chairman - Transfer of assessee's case from Tamil Nadu to Kerala for making effective assessment and co-ordinated investigation- Held to be valid.
The assessee-trust ran several educational institutions in and around Kanyakumari District. The chairman of the trust in his individual capacity had several similar institutions in the Kerala State. The authorities detected an undisclosed income of Rs. 70,17,400 in the hands of the chairman. The assessee's case was transferred from Tamil Nadu to Kerala on the ground of co-ordinated investigation and inquiries. On a writ petition the single judge held that the transfer was not justified and ultimately quashed the order of transfer passed by the Commissioner. On appeal:
Held, allowing the appeal, that even though the chairman ran the institutions in his individual capacity, he received income from the institutions ran by the assessee-trust as well as from the institutions which were ran by him in his individual capacity. Thus, for making effective assessment and also for co-ordinate enquiry and investigation, such transfer was a must and would not create any prejudice to the assessee-trust. The entire proceeding was made under the provisions of section 127(2)(a) and the proceeding was nothing but a machinery provision. The only object of the Revenue was to have effective income-tax enquiry. Since section 127(2)(a) is nothing but a machinery provision and since no serious allegations had been levelled against the Revenue, the Commissioner had the power of transfer even without assigning any reason and, therefore, the order passed by him was perfectly valid in law and the order need not be quashed. The single judge without considering the powers mentioned in section 127(2)(a) and also without considering that no reason need be given for transfer, had erroneously quashed the order of transfer.
CIT .v. Noorul Islam Educational Trust (2015) 375 ITR 226/ 231 Taxman 407 (Mad) (HC)
Editorial:Order of the single judge in Noorul Islam Educational Trust v. CIT [2011] 332 ITR 97 (Mad) is set aside

S. 127:Transfer of case-Notice for transfer of assessee's case from Bengaluru to Hyderabad-Ten plots purchased at Hyderabad, two in the name of managing director of assessee and eight in the name of his wife - Consideration for all plots paid to purchaser from assessee's accounts and from account of firm and individual account of managing director and his wife - Centralisation of inquiry necessary - Transfer is held to be valid.
Allowing the petition of revenue the Court held that ; ten plots were purchased in Hyderabad, two in the name of the managing director of the assessee and eight in the name of his wife. The consideration for these ten plots was paid to the purchaser from the account of the assessee and from the account of the firm and the individual account of the managing director and his wife. Thus, it was necessary to centralise all the returns in order to find out the true nature of the transaction. The managing director was fully acquainted with all these facts. It was he who had given all the information and he had no difficulty in going to Hyderabad for being present during the assessment proceedings of his individual account and his wife's account. He would have no difficulty if the account of the company, of which he was the managing director, was also processed at the same time where his individual and his wife was processed. (Decision of the single judge in Span Design and Development (P) Ltd v.CIT (2013) 1 ITR –OL 322 (Karn) , set aside.) (AY. 2007-08 to 2009-10)s

CIT v. Span Design and Development (P) Ltd. (2015) 372 ITR 432 / 232 Taxman 633 (Karn.)(HC)

S. 127 : Power to transfer cases –Transfer of case without serving it a notice or affording an opportunity of hearing was held to be bad in law.

Where revenue authorities transferred assessee's jurisdiction from one place to another without serving it a notice or affording an opportunity of hearing, order so passed being in violation of provisions of section 127(2), deserved to be set aside.

Piyush Shelters India (P.) Ltd. v. CIT (2015) 230 Taxman 636 (P&H)(HC)

S. 127 :Power to transfer cases-Opportunity of being heard-Reasons specified in order transferring assessees cases to other jurisdiction were totally different from what was spelt out in show cause notices, impugned order was to be quashed.

The assessee filed writ Petition as he was aggrieved with the action of the action of the Departments whereby their cases were transferred to Chandigarh. Assessee's contention was that before their could have been ordered to be transferred, they were entitled to fair and proper hearing and principles of natural justice were required to be complied with and the adjudicating was under an obligation to furnish the relevant material which formed the basis of issuance of show- cause notices. This material was never disclosed either in the show cause notices or at the time of hearing and the same was disclosed only in the impugned order. Non disclosure of the same had caused serious prejudice to them. The HC allowed the Writ Petition and held that the reasons in the impugned order were totally different from what was spelt out in the show cause notices, impugned order was passed after taking into consideration the extraneous material which had never been brought to the notice of the assesee prior to passing of the impugned order, impugned order was hit by violation of principles of natural justice and was not sustainable.

Anand Chauhan v.CIT (2015) 273 CTR 296 / 231 Taxman 76(HP)(HC)
Virbhadra Singh v. CIT(2015)113 DTR 1/273 CTR 296 (HP)(HC)
Vikramaditya Singh v. CIT(2015)113 DTR 1/273 CTR 296 (HP)(HC)
Pratibha Singh v. CIT(2015)113 DTR 1 /273 CTR 296 (HP)(HC)
Aprajita Kumari v. CIT(2015)113 DTR 1/273 CTR 296 (HP)(HC)
Chunni Lal Chauhan v. CIT (2015)113 DTR 1/273 CTR 296 (HP)(HC)

S. 127 : Power to transfer cases –CBDT-Commissioner-circular or a direction or an order issued by CBDT under section 119 cannot mitigate powers of Director General or Chief Commissioner or Commissioner under section 127.[S.119]

Commissioner has jurisdiction to transfer cases only within his jurisdiction whereas, power of CBDT is wider and it can transfer cases from one jurisdiction of one Commissioner to another, therefore, a circular or a direction or an order issued by CBDT under section 119 cannot mitigate powers of Director General or Chief Commissioner or Commissioner under section 127. (AY. 2010-11)

C. Krishnan v. ITO (2015) 228 Taxman 163/ 274 CTR 371 (Mad.)(HC)

S. 127 : Power to transfer cases-Once authorities followed due process for transferring case from one city to another for purpose of effective investigation and completion of assessment-Transfer order cannot be challenged before Tribunal.[S. 132, 254(1)]

Search was conducted under section 132 at assessee's-company's premises and at premises of director of that company. For conducting consolidated enquiry/investigation assessments of assessees were transferred from Bangalore to Ernakulam. Transfer was made after giving due notice to assessees as required under section 127 which was not challenged by assessees. However, later on assessees challenged said order of transfer. It was held that once authorities followed due process for transferring case from one city to another for purpose of effective investigation and completion of assessment by one Assessing Officer, assessee could not challenge said order of transfer before Tribunal. (AY. 2007-08, 2008-09)

DCIT v. Damac Holdings (P.) Ltd. (2014) 33 ITR 331 / (2015) 67 SOT 148(URO) (Cochin)(Trib.)

S. 132 : Search and seizure- Satisfaction-While the revenue has to record reasons to show that "satisfaction" for the search was proper and the same is justiciable, the assessee is not entitled (till the start of the assessment proceedings) to inspect the documents or the reasons as it would be counter-productive and confer an unfair advantage on the assesse-Possibility of manipulation of records as found by the High Court cannot be accepted , authorisation could not be quashed. [R.112]

The finding of the High Court that as the satisfaction recorded is justiciable, the documents pertaining to such satisfaction can be allowed to be inspected by the assessee is plainly incorrect. The necessity of recording of reasons, despite the amendment of Rule 112 (2) with effect from 1st October, 1975, has been repeatedly stressed upon by this Court so as to ensure accountability and responsibility in the decision making process. The necessity of recording of reasons also acts as a cushion in the event of a legal challenge being made to the satisfaction reached. Reasons enable a proper judicial assessment of the decision taken by the Revenue. However, the above, by itself, would not confer in the assessee a right of inspection of the documents or to a communication of the reasons for the belief at the stage of issuing of the authorization. Any such view would be counter productive of the entire exercise contemplated by Section 132 of the Act. It is only at the stage of commencement of the assessment proceedings after completion of the search and seizure, if any, that the requisite material may have to be disclosed to the assessee (BP 2—4-05 -2009-10)

DCIT v. Spacewood Furnishers Pvt. Ltd (2015) 374 ITR 595/ 277 CTR 322/ 119 DTR 201/ 232 Taxman 131 (SC)

Editorial: Decision of the Nagpur Bench of Bombay High court inSpacewood Furnishers (P) Ltd v. DGI(Inv) (2012)340 ITR 393/ 246 CTR 313/ 65 DTR 281 (Bom)(HC), reversed .

S. 132 : Search and seizure –Disclosure of material or information to persons against whom action under section 132 is taken is not mandatoryand it is only where petitioner furnishes adequate and cogent material in support of his denial of a valid information that Court can justifiably call upon department to disclose information- Search action was held to be valid.[S.158BD]

Petitioners challenged search and seizure operations initiated against them by department under section 132 in consequence of a search warrant, which was not issued in their names. They also challenged seizure and attachment of their bank accounts and lockers based on aforesaid search on ground that no search warrant was issued relating to their lockers. Dismissing the petition the Court held that; since warrant of authorisation indicated premises where search and seizure operation was to be conducted and said premises had not been partitioned by metes and bounds, while searching said premises, search of portions occupied by petitioners in said premises was valid and proper, even though their names were not mentioned in authorisation of search and in such case provisions of section 158BD would be attracted .When information received on first date of search by itself caused a reasonable belief for issuance of warrant of authorisation against petitioners for search of their lockers, search and seizure of petitioners' lockers was perfectly valid.

Harbhajan Singh Chadha .v. DIT (2015) 231 Taxman 735 (All.)(HC)

S. 132 :Search and seizure-Unexplained investment-Gold jewellery-Central Board of Direct Taxes instructing that gold jewellery and ornaments to extent of 500 grams for a married lady need not be seized-Jewellery of 471 grams found during search can be treated as explained.

In a search and seizure conducted under section 132 of the Income-tax Act, 1961, gold jewellery and silver articles were found in the possession of the assessee. The assessee submitted that about 471 grams of gold were streedhan of his wife received on different occasions. The Assessing Officer treated the jewellery as unexplained and the Commissioner (Appeals) sustained the order of the Assessing Officer. On appeal :

Held, allowing the appeal, that the Central Board of Direct Taxes had laid down the guidelines that in the case of a person not assessed to wealth tax, gold jewellery and ornaments to the extent of 500 grams for a married lady need not be seized. Hence, the gold jewellery of 471 grams found during the course of search could reasonably be treated as explained and the addition was to be deleted. (2010-2011)

R. Umamaheswar v. Dy. CIT (2015) 38 ITR 790(Hyd.)(Trib.)

S. 132 : Search and seizure-Undisclosed income-Date of search falling with financial year 2005-06, relevant to assessment year 2006-07–Source can be examined only for assessment year 2006-07.

Date of search falling with financial year 2005-06 relevant to assessment year 2006-07.Source of income can be examined only for assessment year 2006-07. Regular transactions duly recorded in books of account and hence, there is no infirmity and addition deleted. (AY. 2003-2004, to 2006-2007)

Dy.CIT .v. Yuvanshankar Raja (2015) 37 ITR 355 (Chennai)(Trib.)

S.132(4):Search and seizure-Statement on oath-Undisclosed income-Estimation-Statement during search must be correlated to records which are discovered-Explanation of assessee must be taken into account- Deletion of addition by the Tribunal was held to be justified.[S. 132]

Dismissing the appeals the Court held that; that the Commissioner (Appeals) had after taking into account the statement of the assessee, in which it had surrendered the income, and having referred it to the books of account, disagreed with the quantum of the additions made by the assessing authority. The assessment made by the Commissioner (Appeals) was not found to be incorrect by the Tribunal. The decision of the Tribunal was justified. The statements made during search must be correlated with the records which are found, and if there is any ambiguity the explanation given by the assessee should be taken into consideration before making the assessment. (AY. 1989-1990)

CIT v. Jagdish Narain Ratan Kumar (2015) 373 ITR 394 (Raj) (HC)

S. 132(4):Search and seizure-Disclosure-Addition made solely on the basis of a disclosure and without any incriminating material is not sustainable if facts show that disclosure was under duress.-CBDT Instruction dated 10.03.2003 relied upon. [S. 133A, 143(3), 153A]

Pursuant to a search and seizure operation u/s 132, the assessee made a disclosure of unaccounted income of Rs. 20 crore. He later claimed that the disclosure was not voluntary but was because the assessee was under tremendous pressure and harassment in the form of repeated search action, survey and freezing of assets. It was also claimed that no incriminating material was found during the search. It was also claimed that the disclosure was “pro tem”, meaning tentative and subject to correction. The AO & CIT(A) rejected the claim. On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) Whether the disclosure was voluntary or given under coercive circumstances. Conclusion: The contentions raised by ld. Counsel for the assessee lead to a clear inference that the disclosure of the assessee cannot be regarded as voluntary. The pressure of restrained DDs. of 31.48 crs. against a disclosure tax liability of about 7 crs is palpable. It has the propensity to derail the business and creating enough pressure for businessmen to somehow avoid the pressure. Besides the chronology of events and attendant circumstances do not convince us that this summary disclosure was voluntary and on the scale of merit it can override the other facts. Consequently we have no hesitation in holding that the solely relied disclosure was involuntary. In these circumstances the desirability of additions is to be judged on other facts and circumstances. Reliance is placed on Hon’ble Rajasthan High Court in the case of CIT v. Ashok Kumar Soni 291 ITR 172 for the proposition that admission in statement during search proceedings is not conclusive proof. Besides Hon’ble Supreme Court in the case of Pullangode Rubber Produce Co.vs. State of Kerala 91 ITR 18 has also held so that such statement can be explained in the light of correct facts.

(ii) Whether in the light of CBDT instruction dt. 10-03-2003, search proceedings and assessment can be based incriminating material and not on such disclosures. Conclusion: A perusal of the CBDT instruction reveals that even Board is aware of such laconic disclosures and expects its officers to rely on incriminating evidence. Thus CBDT also is not in favor of search assessments being based only on such disclosures; it wants them to be based on incriminating material. In view the facts, circumstances, CBDT instruction and various case laws relied on by the assessee we are unable to uphold the additions solely on the basis of disclosure which doesn’t meet the eye and have been held by us to involuntary.

(iii) Whether the additions are based on any incriminating material discovered as a result of search in terms of sc. 153A. Conclusion: There is no reference to impugned additions being based on any worthwhile incriminating material or evidence except raising some suspicions. The sole basis of additions in both cases is proposed to be the disclosure. Consequently the additions made are not as a result of any material found during the course of search, in view thereof impugned additions cannot be sustained as they do not conform to mandate of sec. 153A.
(iv) Whether the assessees furnished proper explanation about the bank a/c and transactions. Conclusion: As the facts emerge the Corporation bank a/c belonged to Raghubir, the proceeds deposited therein came to him through banking channel on account of agreement to sell his share in ancestral land to G P Realtors not connected to assessees….. As the final disclosure remained at 20 crs., assesses to avoid the harassment agreed for its inclusion as it did not take the tax liability any further. Apropos departments contention that why assesses did not tell this in first blush assessee has demonstrated that they requested for some time to verify from parties who cooperated. The affidavits, bank certificates, documents relating to G P Realtors including compromise deed all corroborate the assesses contentions. Therefore no adverse inference or addition can be drawn against assesses in this behalf.
(v) Whether on merits the impugned additions can be made in a search assessment u/s 153A which is meant for assessment of undisclosed income consequent to search proceedings. Conclusion: By detailed observations we have held that neither any worthwhile incriminating material, information, and evidence was discovered as a result of impugned multiple search operations nor the additions sustained are based on any such material. The sole basis of additions is the disclosure which we have held to be involuntary. Consequently the additions do not conform to the mandate of sec. 153A.(ITA No. 534/JP/2012, 748 / JP/2012 dt. 29.05.2015) (AY. 2008-09)
Shri. Basant Bansal v. ACIT (Jaipur)(Trib) ; www.itatonline.org
Shri Roop Bansal v. ACIT (Jaipur) (Trib) ; www.itatonline.org

S. 132(4) : Search and seizure-Statement recorded during the course of a search and seizure-Part of seized material-Part of addition was held to be justified.
On the basis of statement part of addition was held to be justified and addition made for low withdrawal of housing expenses was held to be not proper. (AY. 2003-2004 to 2009-2010)
K. Govinda Pillai .v. Dy. CIT (2015) 37 ITR 772 (Cochin)(Trib.)

S. 132(4A):Search and seizure-Presumption- Seized paper did not reflect the name of assessee-Deletion of addition was held to be justified.[S. 132]
Tribunal found that though materials were seized in search, said materials did not reflect name of assessee .Most of cheques were stale and some other cheques were either blank or were in name of third parties,terefore, Tribunal held that revenue was not justified in drawing presumption under section 132(4A). Dismissing the appeal of revenue the Court held that since finding recorded by Tribunal could not be found fault with, same was to be upheld. (AY. 1998 - 99 , 2000 - 01 to 2003 - 04)
CIT .v.Blue Lines (2015) 231 Taxman 49 (Karn.)(HC)

S. 133(6) : Power to call for information- The AO can call for information u/s. 133(6) even if no proceedings are pending- Legislative powers- Constitutional validity- Greater latitude in tax matters.[Art 19(1)(g), Constitution of India]
The Assessee challenged the validity of notice u/s. 133(6) calling for information of its depositors against which no proceedings are pending.
The High Court held that by virtue of section 133(6) of the Income-tax Act, 1961, the Department has the power to call for information in relation to such points or matters which would be useful for, or relevant to any proceeding under the Act, from "any person" including a ”Banking Company" or "any Officer" thereon. Further, the amendment made by the Finance Act, 1995 whereby, the words "enquiry or" were inserted before the word "proceeding" in Section 133(6) widened its scope and therefore, even in a case where no proceeding was pending, such information could be called for as part of the enquiry.

Pattambi Service Co-operative Bank Ltd. v. UOI (2015)374 ITR 254/ 115 DTR 289/53 taxmann.com 453 (Ker)(HC)

S. 133A:Survey – Statement on oath-Retraction- Addition was held to be valid. [S. 132(4),245C, 245D]

Assessee was engaged in transport business. Department carried out a survey at business premises of assessee. Certain papers were impounded showing an investment outside books of account. Assessee gave his statement and surrendered certain amount for imposition of tax. Assessee approached Settlement Commission - Commission directed Assessing Officer to compute tax and charge penalty and interest. Based on the order Assessing Officer computed tax penalty and interest. The assessee challenged the said order of Settlement commission by filing writ petition and submitted that his statement under section 133A was not on oath and was liable to be rectified . Dismissing the petition the Court held that even though there was no provision to administer oath under section 133A, it did not mean that statement could be retracted at whim and fancy of assessee. (AY. 2007-08)

Sanjeev Agrawal .v. ITSC (2015) 231 Taxman 71 (All.)(HC)

S. 133A: Survey –Income from undisclosed source-Retraction of statement - No other evidence of suppression of income - Addition of income not justified.[S.69]

Dismissing the appeal of revenue , the Court held that; while making the additions in the hands of the partner as well as in the hands of the firm, the Assessing Officer solely relied upon the statement of the partner recorded at the time of search, which subsequently came to be retracted or explained within the period of 19 days. Except the statement recorded at the time of search which was subsequently retracted, there was no other material or corroborative material with the Assessing Officer, on which, the addition of Rs. 6 lakhs in the hands of the partner and Rs. 7,00,500 cash in hand and Rs. 25,50,320 as unexplained investment in stock in the hands of the firm could be justified. Under the circumstances, the deletion of the additions was justified. (AY. 2007-2008)

CIT v. M.P. Scrap Traders (2015) 372 ITR 507 (Guj.) (HC)

S. 133A : Survey - Statements recorded during survey - Evidentiary value - Assessment solely on basis of statements recorded during survey - Statements retracted - Specific plea that statements recorded from partners by applying pressure - Retracted statement cannot constitute the sole basis for fastening liability-Assessment was held to be not valid.[S.131,132(4), 143(3),Code of Criminal Procedure 1973, S.164]

Allowing the appeal of assesse the Court held that; the assessees specifically pleaded that the statements were recorded from them by applying pressure, till midnight, and that they had been denied access to outside society. The Assessing Officer made an effort to depict that the withdrawal or retraction on the part of the assessees was not genuine. On these undisputed facts of the case, there was absolutely no basis for the Assessing Officer to fasten the liability upon the assessees. The Circular dated March 10, 2003, issued by the Central Board of Direct Taxes took exception to the initiation of the proceedings on the basis of retracted statements. Assessment was held to be not valid.(AY. 1992-1993

Gajjam Chinna Yellappa v. ITO (2015) 370 ITR 671 (T & AP) (HC)
Gajjam Anjaiah v. ITO (2015) 370 ITR 671 (T & AP) (HC)
Gajjam Ramulu v. ITO (2015) 370 ITR 671 (T & AP) (HC)

S. 139:Return-Extension of due date-Strictures passed against CBDT for causing 'very unfair discrimination' between taxpayers by extending due date for filing ROI only for taxpayers in P&H and Gujarat and not for those in other States. [S.119]

(i) The present situation has arisen only in view of the delay on the part of CBDT in discharging its obligations of making available the ITR Form Nos. 3,4,5,6, and 7 in due time. Thus, the need to extend the due date. One more feature which was emphasized was that in case of ITR Forms 1,2,2A and 4S being non-audit cases, necessary forms were notified only on 22nd June, 2015 instead of 1st April, 2015 i.e. a delay of 83 days. The normal date of filing of return in such cases would be 31st July, 2015. However, the CBDT extended the same to 7th September, 2015 by an order dated 2nd September, 2015 under Section 119 of the Act. This on the ground that the delay in notifying the

forms would cause great hardship to the tax payers. We are unable to appreciate how a delay of 83 days in making the ITR Form Nos.1,2, 2A and 4S in case of non-audit will cause great prejudice and delay of 120 days in making ITR Form Nos.3,4,5,6 and 7 does not cause any prejudice. The Gujarat High Court noted that the Scheme of the Act indicates that ordinarily a period of 180 days is available to the assessee to file income tax return in case of E-filing of return of income in Form Nos.3, 4, 5, 6, and 7. Any curtailment of this period on account of non-availability of the necessary utility for filing a return online, does certainly cause prejudice to the assessee wholly on account of the delay on the part of the CBDT to notify the ITR Forms.

(ii) Taking into account the fact that the decision of the Gujarat High Court and Punjab and Haryana High Court have been accepted by the CBDT issuing orders under Section 119 of the Act but very unfairly in case of an all India Statute restricting its benefit to only two States and one Union Territory. This itself warrants an extension of due date to the same date as is available for the assessees in Gujarat, Punjab and Haryana to avoid any discrimination to the assessees elsewhere. Moreover, we find ourselves in agreement with the reasons given by the Gujarat High Court in All Gujarat Federation of Tax Consultants as also the decision of the Punjab and Haryana High Court in Vishal Garg.

Chamber of Tax Consultants .v. UOI (2015) 378 ITR 188 (Bom.)(HC)

S. 139:Return- Extension of date-CBDT directed to forthwith issue an order u/s 119 to extend the due date for filing ROI to 31.10.2015 [S.119]

The order has been dictated in the open Court which is in the process of being transcribed. However, due to urgency, we are issuing the following operative order:

(i) The Respondent No.2 i.e. CBDT is directed to forthwith issue the order/ notification under Section 119 of the Income Tax Act and extend the due date for E-filing of the Income Tax Returns in respect of the assessee who are required to file return of income by 30th September, 2015 to 31st October, 2015;

(ii) It is made clear that at this stage we have not opined any other issue except to the extent of the aforesaid directions. It is made clear that this order will not affect any other obligation that may arise under the Act.

Chamber of Tax Consultants v. UOI(2015) 378 ITR 188 (Bom.)(HC)

S.139:Return-Extension of date-Strictures passed against CBDT for being lax and delaying issuing of the Forms and then taking adamant stand by not extending due date for filing ROI. CBDT directed to issue order u/s 119 to extend due date for filing ROI to 31.10.2015 [S.119]

In relation to the assessment year 2015-16, the Department delayed notifying the ITR forms being ITR-1, ITR-2, ITR-2A, ITR-4S but extended the due date for filing the income tax returns in the case of such assessees to 31st August, 2015. The on-line forms in relation to assessees subject to tax audit and other assessees, viz., Forms ITR-3, ITR-4, ITR-5, ITR-6 and ITR-7 in relation to assessment year 2105-16 came to be notified on 29.7.2015 and the forms were enabled and were available on the e-filing website of the Department only from 7th August, 2015. Since the income tax returns in case of such assessees were to be filed on or before 30.09.2015, the petitioners claimed that the delay in making the form available caused utter confusion and chaos amongst the Chartered Accountants and the assessees. It is the case of the petitioners that the tax audit returns can only be filed electronically which requires an appropriate "utility/software" to be made available by the respondents to the assessees. However, the respondents failed to make available the utilities for assessment year 2015 - 16 until 07.08.2015, thereby creating a blackout of a period of more than four months making it impossible for assessees to file their return of incomes till 7th August, 2015 when the relevant forms were eenabled. In the aforesaid premises, several stake holders made several representations to the CBDT and the Central Government to extend the due date for filing the income tax returns from 30.09.2015 to 30.11.2015. However, the representations yielded no results, and the respondents did not grant extension of due date for filing the income tax returns. On the contrary by an announcement dated 9th September, 2015 the Government of India Ministry of Finance, it was stated that a decision had been taken that the last date of filing of returns due by 30th September, 2015 will not be extended. It is in these circumstances that the petitioners have approached the High Court seeking reliefs. HELD by the High Court:

(i) While it is true that the powers under section 119 of the Act are discretionary in nature and it is for the Board to exercise such powers as and when it deems fit. However, it is equally true that merely because such powers are discretionary, the Board cannot decline to exercise such powers even when the conditions for exercise of such powers are shown to exist. UCO Bank v. CIT, (1999) 4 SCC 599 (1999) 237 ITR 889. The power under section 119 of the Act is a beneficial power given to Board for proper administration of fiscal law so that undue hardship may not be caused to the assessee and the fiscal laws may be correctly applied. In the case at hand, as is evident from the facts noted hereinabove, in the normal course, assessees who are subject to audit as well as other categories of assessees referred to hereinabove, can file their returns of income from 1st April to 30th September of the year in question. In view of the provisions of rule 12 of the rules, whereby, the assessees who are subject to tax audit, as well as the assessees referred to hereinabove, are required to file the tax returns electronically, that is, online. However, for filing the tax returns, appropriate utility is required to be made available by the respondents to the assessees. Therefore, till such utility is provided by the respondents, it is not possible for the assessees to file their returns of income. Therefore, there is a duty cast upon the respondents to ensure that necessary utility for e-filing of the income tax returns is made available to various categories of assessees at the beginning of the assessment year so that the assessees can plan their tax matters accordingly. However, as noted hereinabove, the utilities for e-filing of returns have been made available only with effect from 7th August, 2015, thereby curtailing the time available for filing the income tax returns to a great extent. According to the petitioners, such curtailment of time causes immense hardship and prejudice to the petitioners and other assessees belonging to the above categories, whereas the respondent Board, on the other hand, has taken an adamant stand not to extend the time for e-filing of the returns despite the fact that the entire situation has arisen on account of default on the part of the Department and not the assessees.

(ii) It may be recalled that in relation to assessment year 2014-15, the respondent Board had extended the time for filing the tax audit reports, but had not extended the time for filing the returns and the petitioners were constrained to approach this court for extension of the due date for filing return of income. It may be noted that despite the fervent hope expressed by the court that the respondents in future may plan any change well in advance, a similar situation has prevailed in the present year also and the utilities for e-filing of income tax returns have been made available as late as on 7th August, 2015, leaving the petitioners and other assessees with less than one third of the time that is otherwise available under the statute. It may be noted that in the facts of the above case, there was a blackout for a period of one month, whereas in the year under consideration, the utility was not made available till 7th August, 2015. Thus, it was not possible for any of the assessees who are required to file returns in Forms No.ITR-3, ITR-4, ITR-5, ITR-6 and ITR-7, to file income tax returns before such date.

(iii) Another notable aspect of the matter is that non-filing of returns before the due date would result into the assessees being deprived of their right to file the revised return or claiming loss, whereas insofar as the revenue is concerned, no hardship or prejudice is likely to be caused, inasmuch as the interest of the revenue can be taken care of by providing that the due date shall stand extended for all purposes, except for the purposes of Explanation 1 to section 234A of the Act. Under the circumstances, when no prejudice is caused to the revenue and the assessees are put to great hardship on account of the short period within which the income tax returns are to be filed, it was expected of the Board to exercise the discretionary powers vested in it under section 119 of the Act to ameliorate the difficulties faced by the assessees on account of no default on their part, at least to a certain extent, by extending the due date for filing the income tax returns for a reasonable time. In the opinion of this court, the Board should not create a situation whereby the assessees are required to knock the doors of the court year after year, more so, when on account of the delay on the part of the respondents, it is the assessees who would have to face the consequences of not filing the returns in time. The contention that no prejudice is caused to the petitioners/assessees, therefore, does not merit acceptance.

(iv) Unfortunately, however, despite the aforesaid position, the Board has declined to exercise the discretion vested in it under section 119 of the Act to come to the rescue of the assessees and grant them some relief, leaving the court with no option but to direct the Board to extend the due date for filing the income tax returns under section 139 of the Act from 30th September, 2015 to 31st October, 2015 so as to alleviate to a certain extent, the hardships caused to the assessees on account of delay in providing the utilities.

(v) The Board while not extending the due date for filing return was also of the view that due date should not be extended just for the benefit of those who have remained lax till now for no valid reason in discharging their legal obligations. It may be noted that despite the fact that ordinarily the ITR Forms which should be prescribed and made available before the 1st of April of the assessment year, have in fact, been made available only on 7th August, 2015 and the assessees are given only seven weeks to file their tax returns. Therefore, laxity, if any, evidently is on the part of the authority which is responsible for the delay in making the utility for E-Filing the return being made available to the assessees. When the default lies at the end of the respondents, some grace could have been shown by the Board instead of taking a stand that such a trend may not be encouraged. Had it not been for the laxity on the part of the respondents in providing the utilities, there would not have been any cause for the petitioners to seek extension of the due date for filing tax returns.
(vi) In the light of the above discussion, the petition partly succeeds and is accordingly allowed to the following extent. The respondent Board is hereby directed to forthwith issue requisite notification under section 119 of the Act extending the due date for e-filing of the income tax returns in relation to the assessees who are required to file return of income by 30th September, 2015 to 31st October, 2015. The respondents shall henceforth, endeavour to ensure that the forms and utilities for e-filing of income tax returns are ordinarily made available on the 1st day of April of the assessment year. Rule is made absolute to the aforesaid extent with no order as to costs.(SCA No. 15075 of 2015, dt. 29.09.2015)

All Gujrat Federations of Tax Consultants v. CBDT (2015) 378 ITR 160 (Guj.)(HC)

S.139:Return- Extension-As the CBDT delayed the issue of Income-tax Return Forms, the due date for filing the returns is extended to 31.10.2015. CBDT is directed to issue an appropriate order u/s.119 [S.119]

The Press Release dated 9.9.2015 issued by the CBDT whereby the decision was taken not to extend the date for filing of returns due by 30.9.2015 for the assessment year 2015-16 for certain categories of assessees including companies, firms and individuals engaged in proprietary business/profession etc. whose accounts are required to be audited in terms of Section 44AB of the Income Tax Act, 1961 was challenged. It was submitted that it was only after 1.8.2015, 2.8.2015 and 7.8.2015 that the income tax return Forms No. 4, 5 and 6 respectively were available for downloading by the assessees and that in such circumstances, the last date fixed for e-filing of income tax return for the assessment year 2015-16 by the assessees, being 30.9.2015 is unreasonable and is liable to be extended. HELD by the High Court upholding the plea:
(i) Form Nos. 4, 5 and 6 were prescribed on 1st, 2nd and 7th of August 2015 respectively when the audited accounts were required to be appended for e-filing of the return under Sections 139C and 139D of the Act. Further, it has been admitted by the respondent department in the office memorandum dated 24.9.2015 that since returns in ITRs 4, 5 and 6 were mandatorily required to be e-filed, no assessees in these categories could have filed their returns of income for the assessment year 2015-16 before 1st, 2nd and 7th of August 2015 respectively. Under Section 119 of the Act, the Board has specific powers to pass general or special orders in respect of any class or class of cases by way of relaxation of any of the provisions of the Act which also includes Section 139 thereof. For avoiding the genuine hardship in any case or class of cases, the Board if considers desirable and expedient, by general or special order, it can issue such orders, instructions and direction for proper administration of this Act. All such authorities engaged in execution of the Act are expected to follow the same. The Board has not only to see the public interest for so doing but also for avoiding the genuine hardship in any particular case or class of cases when such powers can be exercised. It was not disputed by learned counsel for the revenue that the forms were not available on the very first day of the assessment year as required. Learned counsel for the revenue could not furnish any satisfactory explanation or justification for not prescribing Forms 4, 5 and 6 prior to 1st, 2nd and 7th August, 2015 respectively. The plea of the department that there were only minor changes in the forms is not justified. Thus, the period required for e-filing of the return is held to be not reasonable.
(ii) In view of the above, taking the totality of facts and circumstances of the case, it is considered appropriate to extend the due date for e-filing of returns upto 31st October 2015 for which the CBDT shall issue appropriate notification/instructions under Section 119 of the Act. Direction is also issued to the respondents to ensure that the forms etc. which are to be prescribed for the audit report and for

e-filing the returns should ordinarily be made available on the first day of April of the assessment year.
(Order dated 28.9.2015 passed by the Rajasthan High Court on a Public Interest Litigation in The Rajasthan Tax Consultants Association and another vs. The Union of India and another, D.B. Civil Writ (PIL) Petition No.11037 of 2015 and Order dated 21.9.2015 passed by the Delhi High Court in Avinash Gupta v. UOI (2015) 378 ITR 137 (Delhi)(HC) is dissented from
Vishal Garg .v. UOI (2015) 378 ITR 145 (P & H)(HC)

S.139:Return- Extension-Power to relax provisions of filing of return –Policy decision-High Court not to interfere siuch decision- CBDT is directed to make avialble forms for audit report and filing of returns on April 1 st of assessment year.[S.119]
Dismissing the writ petition the court held that ; Power to relax provisions of filing of return is policy decision of Governemnt hence the High Court not to interfere siuch decision, however the CBDT is directed to make available forms for audit report and filing of returns on April 1 st of assessment year .(AY. 2015-16]

Avinash Gupta v.UOI (2015) 378 ITR 137 (Delhi)(HC)

S. 139 : Return of income – Interest-Agent-Non-resident-Held not liable to pay interest-DTAA-India-UK. [S.90, 139(8), 163]
Order under sec. 163(2) treating assessee as agent was passed on 19th November, 1990 and hence there was no obligation on the assessee to file returns on behalf of the non resident for AY 1988-89 and 1989-90 for which the time of filing return had already expired. Therefore it was not liable to pay interest u/s 139(8). (A.Y. 1988-89 & 1989-90)
CIT v. Andhra Petrochemicals Ltd. (2015) 373 ITR 207/ 114 DTR 41 /230 Taxman 402 /275 CTR 58 (T&AP)(HC)
CIT v. Davy Mackee (London) Ltd(2015) 373 ITR 207 (T&AP)(HC)

S. 139 : Return of income –Revised return-Wrong legal advice-Claim in the course of assessment to withdraw the revised return- Claim of assesse was accepted.[S.11, 12]
Assessee foundation filed a return declaring nil income. Later on, assessee filed a revised return declaring income of certain amount. During course of assessment proceedings, assessee claimed that revised return be ignored and first return should be treated as correct and true return. AO held that assessee could not have filed revised computation and said claim could have been only made by way of a re-revised return. However, assessee stated that it proceeded on wrong legal advise and would like to withdraw revised return and would rely upon original return. Issue was to be decided in favour of assessee . (AY. 2006-07)
DIT .v. Ajay G. Piramal Foundation (2015) 228 Taxman 332 (Delhi)(HC)

S. 139 :Return of income –Audit report- Delay due to assessee not furnishing necessary statements to auditor- Rejection of application for condonation of delay was held to be justified.[S.44AB, 119(2)(b), Art. 226]
Dismissing the petition the Court held that where assessee society failed to file its return within due date on account of delay in getting audit report, in view of fact that said delay was attributable to assessee as it did not supply necessary statements to auditors in time, Commissioner was justified in rejecting application seeking condonation of delay filed under section 119(2)(b). (AY. 2006-07, 2008-09)
Travancore Cements Employees Co-Operative Bank Ltd. .v. CIT (2015) 228 Taxman 43(Mag.)(Ker.)(HC)

S. 140A : Self assessment – Penalty- Restricting the penalty to 25% was held to be justified. [S.221]

Assessee had paid the self-assessment tax before the issuance of show-cause notice by AO. Details of bank statements were submitted to prove that delay in payment of tax was due to financial hardship beyond the control of the assessee. AO levied penalty of 100% of the tax liability which was reduced by CIT(A), and upheld by the Tribunal, to 25% since the assessee did not intend to evade tax. On appeal, the High Court held that the CIT(A) and the Tribunal were justified

In restricting the penalty to 25 % based on cogent material and finding, more so when it is discretionary, as is clear from reading of s.221. It is not the legislative mandate to levy maximum penalty in all cases. (AY. 2009-10)

CIT v. Naresh Kumar Jaggi (2015) 370 ITR 401 / 114 DTR 401 (Delhi)(HC)

S.140A(3): Penalty –Self assessment tax-Non-payment of admitted tax - Finding that assessee had no intention to evade tax and paid entire tax - Reduction of quantum of penalty to 25%.- Held to be justified.

The assessee, declared an income of Rs.6,23,36,790, on which tax at Rs. 1,26,46,875 was due and payable after reducing the advance tax paid of Rs. 14,60,000. He had not paid the admitted tax under section 140A. In reply to a show-cause notice issued under section 140A(3), the assessee took the stand that he paid the admitted tax of Rs. 1,41,06,875 inasmuch as he had paid Rs. 14 lakhs as advance tax and he had paid the balance of Rs. 1,26,46,875 in the month of April, 2011.

Held, the discretion exercised by the Commissioner (Appeals) reducing the penalty to 25% was within the mandate of law and based on good, valid and cogent ground. The imposition of the maximum penalty in all cases is not the legislative mandate. Therefore, the restriction of the penalty to 25% by the appellate authorities was justified in the circumstances.(AY. 2009-2010)

CIT v. Naresh Kumar Jaggi (2015) 370 ITR 401 (Delhi) (HC)

S. 142(2A) : Special audit–Enquiry before assessment–Reasonable opportunity of being heard-Not granted an opportunity of being heard- Such defect could not be cured by reference to queries raised with respect to accounts that preceded show cause notice- Order was held to be nullity .

The Dy. CIT passed an order under section 142(2A) directing the petitioner to get its accounts audited from an auditor specified by him. The assessee was called upon to file a reply. The reply was filed but an opportunity of hearing, as required by the first proviso to section 142(2A) was not afforded to the petitioner much less, was the petitioner called upon to clarify averments in the reply. The assesse challenged the said notice by filing writ petition,: The question that calls for an answer, is whether section 142(2A) renders it imperative that before passing an order an Assessing Officer is required to afford a reasonable opportunity of being heard to an assessee. Allowing the petition the Court held that; the first proviso to section 142(2A) prohibits an Assessing Officer from directing such an audit unless the assessee has been afforded a 'reasonable opportunity of being heard'. The expression 'reasonable opportunity of being heard' inhers an obligation to afford a reasonable opportunity of being heard. The mere calling upon the assessee to file a reply would not fulfil the preemptory condition set out in the first proviso to section 142(A). The grant of a reasonable opportunity of being heard, is a statutory pre condition to the exercise of power under section 142(2A), and if an Assessing Officer fails to afford a reasonable opportunity of being heard, before passing an order under section 142(2A), such an order would be *null and void*. The absence of an opportunity of being heard, cannot be cured by reference to queries that preceded the show cause therefore, renders the impugned order, a nullity. (AY. 2011-12)

Isolux Corsan India Engineering & Construction (P.) Ltd. v. Dy. CIT (2015) 229 Taxman 507 (P&H)(HC)

S. 142A : Estimate by Valuation Officer –No defects in the books of account-Cost of construction-Addition was held to be not valid. [S. 69B]

The assessee-firm, engaged in the business of building construction work, filed return of income and showed the certain amount as value of cost of construction. The AO valued cost of construction relied on the report of valuation officer and made addition under section 69B.

On appeal, the CIT(A) deleted addition made by AO Officer holding that the cost of construction should be accepted as per the books of account.

On revenue's appeal, the Tribunal upheld the order of CIT(A).On appeal by revenue the Court held that the deletion of addition is concerned, the AO was not confronted with any defects in the books of account maintained by the assessee. The AO has not given any valid reasons for not accepting the cost shown by the assessee though he accepts that the method of accounting was mercantile. Hence, the deletion was justified.(AY. 1983-84)

ITO v. Chitalia Builders (2015) 229 Taxman 438 (Guj.)(HC)

S. 143(1A): Assessment- Additional tax-As the object of S. 143 (1A) is to prevent tax evasion, it can apply only to tax evaders and not to honest assessees. The burden of proving that the assessee stated a lesser amount in the return in an attempt to evade tax is on the revenue-Retrospective clarificatory amendment was held to be valid.

Section 143 (1A)(a) was substituted with retrospective effect by the Finance Act of 1993 from 1.4.1989 to provide that even a rduction of loss on account of a prima facie adjustment would entail levy of additional tax. The retrospective amendment was enacted to supercede the judgments of the Delhi High Court in Modi Cement Limited v. Union of India, (1992) 193 ITR 91 and JK Synthetics Limited v. Asstt. Commissioner of Income-Tax, (1993) 2000 ITR 594, and the Allahabad High Court in Indo Gulf Fertilizers & Chemicals Corpn. Ltd. v. Union of India, (1992) 195 ITR 485 which held that losses were not within the contemplation of Section 143(1A) prior to its amendment. The assessee challenged the retrospective amendment as being arbitrary and ultra vires. This was upheld by the Gauhati High Court. The High Court held that the retrospective effect given to the amendment would be arbitrary and unreasonable inasmuch as the provision, being a penal provision, would operate harshly on assessees who have made a loss instead of a profit, the difference between the loss showed in the return filed by the assessee and the loss assessed to income tax having to bear an additional income tax at the rate of 20%. On appeal by the department to the Supreme Court HELD reversing the High Court:

(i) The object of Section 143(1A) is the prevention of evasion of tax. By the introduction of this provision, persons who have filed returns in which they have sought to evade the tax properly payable by them is meant to have a deterrent effect and a hefty amount of 20% as additional income tax is payable on the difference between what is declared in the return and what is assessed to tax;

(ii) The definition of “income” in Section 2(24) of the Income Tax Act is an inclusive one. Further, it is settled law at least since 1975 that the word “income” would include within it both profits as well as losses. This is clear from Commissioner of Income Tax Central, Delhi v. Harprasad& Company Pvt. Ltd., (1975) 3 SCC 868;

(iii) Even on a reading of Section 143 (1)(a) which is referred to in Section 143 (1A), a loss is envisaged as being declared in a return made under Section 139. It is clear, therefore, that the retrospective amendment made in 1993 would only be clarificatory of the position that existed in 1989 itself. All assessees were put on notice in 1989 itself that the expression “income” contained in Section 143 (1A) would be wide enough to include losses also.

(iv) The object of Section 143 (1A) is the prevention of tax evasion. Read literally, both honest asessees and tax evaders are caught within its net, an example being Commissioner of Income Tax, Bhopal v. Hindustan Electro Graphites, Indore, (2000) 3 SCC 595. We feel that since the provision has the deterrent effect of preventing tax evasion, it should be made to apply only to tax evaders. In support of this proposition, we refer to the judgment in K.P. Varghese v. ITO, (1982) 1 SCR 629. Taking a cue from K.P. Varghese v. ITO, (1982) 1 SCR 629, we therefore, hold that Section 143 (1A) can only be invoked where it is found on facts that the lesser amount stated in the return filed by the assessee is a result of an attempt to evade tax lawfully payable by the assessee. The burden of proving that the assessee has so attempted to evade tax is on the revenue which may be discharged by the revenue by establishing facts and circumstances from which a reasonable inference can be drawn that the assessee has, in fact, attempted to evade tax lawfully payable by it. Subject to the aforesaid construction of Section 143 (1A), we uphold the retrospective clarificatory amendment of the said Section and allow the appeals. (AY. 1989-90, 1991-92)

CIT v. Sati Oil Udyog Ltd.(2015) 372 ITR 746/ 276 CTR 14 / 116 DTR 417/230 Taxman 521/AIR (2015) SC 3244 (SC)

S. 143(1)(a) : Assessment-Intimation-Prima facie adjustment-Only where facts are undisputed-Customs duty-Refund of substantial amount-Debatable issue-Assessing Officer determining nature of receipt as revenue receipt by prima facie adjustment—Impermissible.[S.4]

The assessee, claimed deduction of a sum representing refund of customs duty. The Assessing Officer made a prima facie adjustment under section 143(1)(a) treating it as a revenue receipt and disallowed the deduction. The Tribunal held that the determination as to the character of the amount could not have been done at the stage of prima facie adjustment. On appeal.

Held, dismissing the appeal, that the assessee claimed the deduction of a substantial amount which was in the form of refund of customs duty. A return, wherein such a deduction was claimed, could have been the subject matter of a prima facie adjustment under section 143(1)(a) only if the Assessing Officer accepted the version or the contention of the assessee. Once he had decided not to accept that contention, there was no occasion or basis for him to invoke section 143(1)(a) (AY. 1995-96).

CIT v. Nagarjuna Fertilizers and Chemicals Ltd (2015) 371 ITR 118/ 232 Taxman 349 (T& AP)(HC)

S. 143(1)(a):Assessment-Prima facie adjustment-AO denied claim for exemption u/s. 54F, he had overstepped his authority to deny claim of assessee beyond jurisdiction.[S.54F, 154]

Assessee had sold a property in Chennai and made investment in a residential property in United States of America. Return of income filed for assessment year 2009-10 by claiming exemption u/s. 54F. A.O. processed return u/s. 143(1)(a) and denied claim for exemption. Capital gain arose in hands of assessee was exempted or not was not a question in nature of mistake apparent from information in return, nor it was possible to say prima facie that claim made by assessee was incorrect. Therefore, the A.O. had overstepped his authority to deny claim of assessee beyond jurisdiction of s. 143(1)(a).(AY. 2009 – 2010)

Sushiela Natarajan (Ms.) .v. ITO(2013) 28 ITR237/(2015) 153 ITD 534 (Chennai)(Trib.)

S. 143(2) : Assessment – Notice- Order passed without issue of notice u/s 143(2) is held to be bad in law.[S. 143(3)]

Where no notice was issued under section 143(2), no assessment order under section 143(3) could passed and, therefore, assessment order passed under section 143(3) was void ab initio.

CIT v. Meenakshi Devi(Smt.) (2015) 229 Taxman 365 ((All.)(HC)

S. 143(2) : Assessment-Notice-Limitation-Service of notice within prescribed time limit mandatory-Assessment was held to be non est in law. [S.143(3)]

Dismissing the appeal of revenue , the Court held that; the section makes it clear that service of notice under section 143(2) of the Act within the time limit prescribed is mandatory and it is not a mere procedural requirement. Held, that the objection in relation to non-service of notice contemplated under section 143(2) of the Act was not an issue before the Assessing Officer and the Commissioner (Appeals) and was raised for the first time before the Tribunal. It was a legal plea which went to the root of the matter and, therefore, the assessee was entitled to raise it before the Tribunal. (AY. 2007-2008)

CIT v. Gitsons Engineering Co. (2015) 370 ITR 87/53 taxmann.com 108/231 Taxman 506 (Mad.)(HC)

S. 143(2):Assessment- Notice- Amalgamation- Notices issued in the name of the non-existent amalgamating company are void and render the assessment order null and void.[S.124(3),153C,292B]

Dismissing the appeal of revenue the Tribunal held that;(i) For making the assessment, it is absolutely essential that the person so to be assessed should be in existence at the time of making the assessment. In the present case the assessment has been framed by the AO on a date when the present assessee was not in existence therefore, the assessment framed by the AO vide assessment order dated 31.12.2010 was not valid. Moreover it is seen that on 26.10.2010 the assessee intimated to the Assessing Officer with regard to amalgamation of the assessee company with M/s Instronics Ltd. and also furnished a copy of the order of the Hon'ble Jurisdictional High Court. At that time the Assessing

Officer could have issued the notice under Section 153C in the name of the transferor company i.e. M/s Instronics Ltd. As the notice under section 143(2) of the Act was sent to the company which was not in existence on the date of the issue of notice. Similarly in the case of the assessee notice under Section 153C was issued in the name of M/s Computer Engineering Services (P) Ltd.. on 4.10.2010 when this company was not in existence. Therefore, the ratio of the decision of Hon'ble jurisdictional High Court in the case of M/s Spice Entertainment Ltd. (supra) would be squarely applicable to the issue of notice under Section 153C in the case of the assessee.

(ii) As regards the applicability of Section 292B of the Act, Section 292B, inter alia, prescribes that proceedings etc. initiated cannot be deemed invalid "merely by reason of mistake, defect or omission" in any return of income, assessment or notice. The revenue had argued that this provision neutralizes procedural defects in jurisdiction. In these circumstances, it was submitted, having regard to the assessee's omission to urge the so-called illegality at the threshold, the Court ought to interfere with the order of the ITAT. This question, too, has been dealt with – inCIT v. Dimension Apparels Pvt. Ltd. reported in (2015) 370 ITR 288. In that case, after noticing Section 292B, the Court discussed the ruling in Spice Entertainment (supra), wherein it had been held that since the assessment made in such cases is against an amalgamated company in respect of income of the amalgamating company for the period prior to the amalgamation, the income tax authorities are nevertheless under an obligation to substitute the successor in place of the amalgamated company. Thus, "such a defect cannot be treated as procedural defect". In any event, it is to be noted that the fact of amalgamation of the assessee with the transferee company had been intimated and disclosed in response to the notice under Section 153C on 22.11.2010. Accordingly, this ground, too, has no merit and is rejected. (ITA No. 5874 to 5878/Del/2013, dt. 29.05.2015) (AY. 2003-04 to 2007-08)

Computer Engineering service India (P) Ltd. v. ACIT (Delhi) (Trib.); www.itatonline.org
Foryu Overseas (P) Ltd. v. DCIT (Delhi)(Trib.) www.itatonline.org

S.143(3):Assessment –Benefit not defendant on treatment on facts by assessee- Estoppel does not apply against statute. [S.10A]

An assessee's treatment of facts in any given manner is not relevant for the putpose of determing liability under the Income-tax Act , 1961. If , on an application of the stutory provision, the party is entitled to the benefits under the Act , the mere cicumastances that for the last 5 to 7 years , or even 10 years , it did not claim such benefit would not preclude it from availing of it in the assessment year in question. What the assessee cannot resile frtom is the exercise of a given set of facts which it has not challenged earlier. Referred CIT v. C.Parikh and Co (India) Ltd (1956) 29 ITR 661 (SC), CIT v. V.Mr.P. Firm , Muar (1965) 56 ITR 67 (SC) (AY. 2005-06)

HCL Technologies .v. ACIT (2015)377 ITR 483/ 278 CTR 345 / 231 Taxman 895 (Delhi)(HC)

S.143(3):Assessment-Alleged suppression of sales-Finding by Commissioner (Appeals) and Tribunal that there was no suppression of sales-Deletion of addition was held to be justified.

Dismissing the appeal of revenue that the finding that there had been no suppression of sales was a finding of fact. The deletion of the addition on that account was justified. (AY. 1994-1995, 1995-1996)

CIT .v. Tony Electronics Ltd. (2015) 375 ITR 431 (Delhi)(HC)

S.143(3):Assessment-Undisclosed income-Agricultural income –Amnesty scheme-Addition as undisclosed income was held to be justified.[S.2(IA),69]

Assessee filed returns for assessment years 1984-85 to 1988-89 separately under Amnesty Scheme declaring agricultural income and paid tax. Affirming the reassessment proceedings all authorities gave concurrent finding and Tribunal held that agricultural income of Rs. 25.50 lakhs declared in Amnesty Scheme was, in fact, not agricultural income and entire income was required to be assessed in relevant years under consideration as undisclosed income.(AY. 1978 79 to 1986-87)

Mahnedara R. Patel (HUF) v. ITO (2015) 231 Taxman 445 (Guj.)(HC)

S.143(3):Assessment-Capital gains- Protective assessment – Assessment order could be assailed in appeal and, hence, extraordinary jurisdiction of High Court under Article 226 of Constitution could not be invoked bypassing effective alternative remedy. [Constitution of India , Art. 226]

In course of enquiry, statement made by petitioners was that sale transaction took place in year 2007-08 .Department, however, doubted said stand, therefore, assessment made was a protective assessment to find out taxable nature of transaction be either in 2007-08 or 2008-09 The assessee challenged the assessment order for the assessment year 2008-09 stating that this assessment was irregular as short-term capital gains, which was subject matter of assessment year 2008-09 on protective basis was not relatable to transaction, because transaction took place in year 2007-08. Dismissing the petition the Court held that assessment order for 2008-09 could be assailed in appeal and, hence, extraordinary jurisdiction of High Court under Article 226 of Constitution could not be invoked bypassing effective alternative remedy.(AY. 2007 – 08, 2008-09)

S. Balasubramanian Adityan .v. Dy.CIT (2015) 231 Taxman 56 (Mad.)(HC)

S. 143(3): Assessment - Death of original assessee and legal representative filing return for period up to date of death and paying tax - Trust as a legatee paying tax for subsequent period - Assessing Officer cannot levy tax for same period on testator also - Matter remanded to Assessing Officer on a limited aspect as directed by court.

The original assessee leased her building to the Telecommunications Department and after her death, the assessee, her legal representative, filed returns for the period between April 1, 1994, and September 16, 1994, and paid the tax. The original assessee had executed a registered will, bequeathing the property in favour of a trust. Accordingly, the trust received the rents and paid tax thereon filing returns for the period subsequent to September 17, 1994. In relation to some dispute as to the quantum of rent, the assessee as well as the trust filed appeals. The Assessing Officer levied tax on the deceased-assessee for the period subsequent to her death also. The Commissioner (Appeals) partly allowed the appeal on the question of quantum but did not address the justification for levy of tax on the deceased-assessee for the period subsequent to her death. The Tribunal dismissed the appeal filed by the assessee. On appeal:

Held, allowing the appeal, (i) that it was the specific case of the assessee that the rent for the premises was being paid at Rs. 10,000 per month for the structure and Rs. 3,500 per month for furniture and fittings ; and that the same amount was being taken into account year after year. The Assessing Officer had every right to verify the accuracy of the facts and figures furnished by the assessee. Occasions of that nature would arise, mostly when the premises were leased to private individuals. Where, however, the premises were leased to the Government or its organisations, the scope for an assessee to show the rent at a lower figure did not arise. Further, there did not exist any particular standard to fix the rent of any premises. Much would depend upon the location and condition of the building, on the one hand, and the demand in the locality, on the other. Where the lessee is a Government, the transaction is regulated by the fixed parameters. Even if the building has potential to fetch a higher rent, Government departments are not expected to pay such rent. In case the owner of the premises is willing to lease them to the Government or its agencies, for reasons of safety and security or assured payment of rent, the discretion of the Assessing Officer to determine the reasonable rent of his choice gets virtually restricted. He could not ignore the actual payments and fix an imaginary figure, based upon the alleged information or potential of the building. This was a rare case, in which proceedings under section 271C were initiated and on a close verification of the matter, they were dropped. The figure Rs. 2.83 per square feet, mentioned in the order of the Commissioner (Appeals) was imaginary. The figure was derived by dividing the rent of Rs. 13,500 with the carpet area and not the actual area of the building. The effort of the Telecommunications Department in addressing the letter was to resist the plea of the assessee for enhancement of the rent. Once the penalty proceedings were dropped, the suggested figure virtually lost its significance. Therefore, the rent for the premises must be taken at Rs. 13,500, unless there was any enhancement by the lessee itself, for any subsequent period.

(ii) That on the factual position there was absolutely no basis for the Assessing Officer to levy tax for the same period on the testator also. The Commissioner (Appeals) did not address this issue and the Tribunal refused to take that into account on the ground that it was not raised earlier. Being the last

authority on facts, the Tribunal was bound to deal with every aspect, that arose for consideration, uninhibited by any such restrictions. But for the fact that the will deed was not on record, the matter was remitted to the Assessing Officer on that limited aspect.(AY. 1995-1996)
A. Venkateswara Rao v. ACIT (2015) 372 ITR 136 (T & AP) (HC)

S. 143(3):Assessment-Joint venture - Project work done by one of assessee's constituents - Receipts for project work reflected in books of account and in return of constituent - Return accepted and assessment completed - Income cannot be taxed in hands of assessee.[S. 3].
The assessee was a joint venture. Tribunal found that the assessee did not execute the contract work and the work was done by one of its constituents, namely, SMS. The receipts for the project work were reflected in the books of account of SMS and in the return, SMS had disclosed that income. The return was accepted by the Assessing Officer in the assessment made under section 153A read with section 143(3). The Tribunal held that the same income could not have been taxed again in the hands of the assessee. On appeal:
Held, dismissing the appeal, that the assessee had filed the return of income of and claimed credit of the tax deduction at source. When a query was raised by the Assessing Officer about the receipts for the project work represented by the certificates of tax deduction at source certificate and the absence of any mention thereof in the profit and loss account of the assessee, it submitted that due to oversight and inadvertently the credit of the tax deduction at source was shown by it. It requested and sought leave to withdraw the claim of the tax deduction at source. If the tax deduction at source claim was not erroneous, the income could have been shown in the account of the assessee. If leave to withdraw was being sought with some ulterior motive, the income would have been reflected in the account of the assessee. The consideration either by the Assessing Officer or the appellate authorities did not show this position. On the other hand, the Assessing Officer had worked out income-tax at 3% of the contract value at the hands of the assessee. Such guess work would not have been essential, had the assessee actually received the amounts and those amounts would have been reflected in the books of account. The Department would have procured some material to show receipts by the assessee towards contract. There was no finding of receipt of any income by the assessee on account of the contract.
CIT v. SMSL UANRCL (JV) (2015) 372 ITR 429 / 233 Taxman 216 / 277 CTR 47 (Bom.)(HC)

S.143(3): Assessment-Limitation-Assessment order completed within time prescribed by Act-Department not dispatching assessment order to assessee - No indication that Assessing Officer revised order after completion - Assessment order served on assessee's representative when he visited Department - Assessment order not barred by limitation.[S. 153]
The assessment for the AY 2002-03 was completed on March 31, 2005, on the last date within the time prescribed by section 153 of the Income-tax Act, 1961. The Department made no attempt to despatch the order of the assessment. The assessee's representative filed an affidavit in which he had stated he was served with the assessment order on April 13, 2005, when he visited the office of the Income-tax Department. The Commissioner stated whatever records were available, he had produced, which record did not contain the despatch register. He opined that once the assessment order including the demand notice was served on the assessee on April 13, 2005, by hand, there was no question of any entry in the despatch register. The Tribunal held that the assessment order under section 143(3) dated March 31, 2005, received by the assessee on April 13, 2005, was barred by limitation. On appeal:
Held, allowing the appeal, that a representative of the assessee, on his own volition and without intimation to the Department, visited the office and found the assessment order ready to be served upon him. From the oral evidence of the Commissioner it was clear that all records were produced and the Department had not made any attempt to despatch the order for service on the assessee. On the facts there was no indication that the Assessing Officer revised the order after March 31, 2005. The probability of the order being made and ready to be collected by the representative of the assessee as on April 1, 2005, could not also be ruled out. Thus, the order of the Tribunal was set aside. (AY. 2002-2003)
CIT v. Binani Industries Ltd. (2015) 372 ITR 414 / 233 Taxman 14 (Cal.) (HC)

S. 143(3): Assessment-Additions to income-Benami transactions- Statement on oath-Retraction-Addition merely on the basis of statement was held to be not justified.[S. 132, 132(4)]

During search conducted at assessee's business premises, his statement was recorded under section 132(4) wherein he admitted that few benami concerns were being run by assessee in name of his employees,thereafter, during assessment proceeding, he retracted from said admission contending that it was made at mid night under pressure and coercion . Assessing Officer, however, made addition on basis of disclosure made by assessee in statement recorded under section 132(4). Tribunal deleted the addition . On appeal by revenue , dismissing the appeal the Court held that; merely on basis of admission that few benami concerns were being run by assessee, assessee could not be subjected to such addition when despite retraction revenue could not furnish any corroborative evidence in support of such admission. (AY. 1989-90 to 1991-92)

CIT v. Chandrakumar Jethmal Kochar (2015) 230 Taxman 78 (Guj.)(HC)

S. 143(3) : Assessment-Income from undisclosed sources-Suppressed sales-Rejection of accounts-Estimate of income-Estimate cannot be based solely on consumption of electricity-Deletion of addition by the Tribunal was held to be justified. [S.69]

The original assessment was completed by the Assessing Officer under section 143(3) of the Act, at an income of Rs. 13,46,201 making an addition of Rs. 12,95,975 on account of suppressed sale of finished goods. Later, the Commissioner cancelled the assessment under section 263 of the Act and directed the Assessing Officer to pass a fresh assessment order. The Assessing Officer framed assessment under section 143(3) of the Act at an income of Rs. 68,28,690 making further addition of Rs. 54,82,489 on account of suppressed production on the basis of consumption of electricity. In the present case, the sample of electricity consumption which was taken was for one hour and was of very small dimension. It was not carried out during the period relating to the assessment year in question whereas it was in respect of subsequent period for assessment year 2007-08. The Commissioner (Appeals) after considering the facts and circumstances and rejecting the books of account and taking into consideration the production results of comparable business turnover and specific circumstances of the assessee, adopted the gross profit rate of 23 per cent. and sustained the addition to that extent. The order was confirmed by the Tribunal after considering the facts. On appeal to the High Court :

Held, dismissing the appeal, that the findings recorded by the Commissioner (Appeals) and the Tribunal were not shown to be erroneous or perverse in any manner. The addition on the basis of the gross profit rate of 23 per cent.on the total turnover of Rs. 93,26,096 in the facts and circumstances of the present case could not be faulted. It was justified.(AY. 2005-2006)

CIT v. Ram Steel Industries (2015) 371 ITR 373 (P &H) (HC)

S. 143(3) : Assessment-Estimation of income-Contractor-Application of net profit at 8 percent-Pure finding of fact-Appeal of revenue was dismissed. [S.260A]

On appeal by revenue dismissing the appeal the Court held that ;the findings of the Tribunal were pure findings of fact. The court could not reappreciate and reappraise the factual findings. The Tribunal`s exercise in upholding the order of the Commissioner (Appeals) and his estimation could not be interfered with at the behest of the Revenue without any perversity being demonstrated. The Revenue`s estimation was on the higher side and based on the Assessing Officer`s order was rightly termed as abnormal and unreasonable. In these circumstances, the appeal did not raise any substantial question of law. Application of 8 percent of net profit was held to be justified.(AY. 2007-2008)

CIT v. Ratansingh M. Rathod (2015) 371 ITR 135 (Bom.) (HC)

S. 143(3) :Assessment-Extrapolation' principle-The AO is entitled to make an estimation based on guesswork-However, the estimate must not be arbitrary and should be based on material.[S.153A]

The ratio of the Hon'ble Supreme Court judgment in the case of CIT.v. HM Eusafali HM Abdulalli (1973) 90 ITR 271 (SC) has been explained in the later judgment of this Court in CIT v. Dr. M.K.E. Memon (2001)248 ITR 310 (Bom.). There also a professional has been dealt with and the Supreme Court's judgment in HM Eusafali HM Abdulala was followed. However, this Court cautioned as to how for a period of one year the estimation could not be made and it could be, therefore, arbitrary. An arbitrary method cannot be adopted. On facts, there is no arbitrariness. The

Tribunal found that the additions have been made in the assessment years 2000 – 2001 and 2001 – 2002, the benefit of set off may be given. So far as assessment year 2000-2001 is concerned, the addition is sustained to the extent of Rs.20,00,000/- which was the payment made by the assessee to Shri Doke. So far the addition on account of suppressed profession receipts of Rs.14,30,225/- the Tribunal relied on the admissions and which can be gathered from the maintenance of a parallel record. The modus operandi was admitted. The addition as made by the AO were not confirmed in the absence of direct evidence. In the circumstances, when the Tribunal relied on the decision of the Supreme Court to not uphold the entire addition as made by the Assessing Officer, but sustained it to the extent of 10%, then no substantial question of law arises for determination and consideration. In the matter before this Court in Commissioner of Income Tax vs. Dr. M.K.E. Memon (2001)248 ITR 310 (Bom.), the arbitrariness was writ large because there was a block assessment of ten years. The Supreme Court judgment must be read in the backdrop of the facts and that is clear. The finding of fact by this Court is that it is improbable that the rate of fees charged by a professional in 1983 would remain static for the entire block period of ten years. It is in these circumstances the proportionate amount of refund could not have been considered as static for ten years. With the other admitted facts and pertaining to the reduction of migration to Gulf countries on account of Gulf war that this Court found complete arbitrariness in the estimation by the assessee. At the same time, this Court held that it is open for the Assessing Officer to make an estimation and in that process there could be a certain guess work as well. That element cannot be discarded totally. Appeal of assesse was dismissed. (AY.2002-03)

Prakash K. Kankariya .v. JCIT(2015) 119 DTR 183 (Bom)(HC)

S. 143(3):Assessment–Notice–Within period of six months–Mandatory- defect cannot be cured by taking recourse to deeming fiction under section 292BB. [S.143(2), 292BB]

Dismissing the appeal of the revenue the Court held that where AO fails to issue a notice within period of six months as spelt out in proviso to clause (ii) of section 143(2), assumption of jurisdiction under section 143(3) would be invalid and this defect cannot be cured by taking recourse to deeming fiction under section 292BB. Applied the ratio in ACIT v. Hotel Blue Moon [2010] 321 ITR 362/188 Taxman 113 (SC) . (AY. 2008-09)

CIT .v. Salarpur Cold Storage (P.) Ltd. (2015) 228 Taxman 48(Mag.)(All.)(HC)

S. 143(3):Assessment- Admission of undisclosed income-Fact that assessee admitted undisclosed income for one year does not mean that AO can assume that similar undisclosed income is earned in earlier years as well- Deletion of addition was held to be justified.

The assessing officer estimated the professional income of the assessee for assessment years 2002-03 to 2007-08. The reasoning given by the AO is explained in brief. The excess cash found at the time of search was declared by the assessee as his income for the AY 2008-09. Accordingly, the assessee included the same in the professional receipts. Accordingly the professional receipts for AY 2008-09 was shown at Rs.328.70 lakhs. The AO took the total number of working days for that year as 300 and accordingly worked out the average collection per day as Rs.1,09,000/-. Then the AO presumed that the assessee would have earned professional collections in the same pattern in the earlier years also. Accordingly, he estimated the average daily collection at Rs.1,00,000/-, Rs.90,000/-, Rs.80,000/-, Rs.70,000/-, Rs.60,000/- and Rs.50,000/- respectively for assessment years 2007-08, 2006-07, 2005-06, 2004-05, 2003-04 and 2002-03. Accordingly the assessing officer worked out the gross receipts. Then the AO worked out the difference between the gross receipts declared by the assessee and that was worked out by him. Thereafter he applied the net profit rate declared by the assessee on the difference and accordingly worked out the additions. On appeal by the assessee the CIT(A) deleted the addition. On appeal by the department to the Tribunal HELD dismissing the appeal:

There is no dispute with regard to the fact that the revenue did not unearth any incriminating material, which could suggest that there was under billing or evasion of professional receipts. The revenue only stumbled with excess cash balance and the same was surrendered as income of the year in which the search took place. The assessee offered the same as his professional income. As observed by CIT(A), the unexplained cash is required to be assessed in the year in which it was found as per the deeming fiction of provisions of sec. 69A of the Act, which does not mean that the assessee would have earned the entire excess cash balance in one year. Hence, in our view also, the assessing officer misguided

himself by presuming that the entire undisclosed cash balance represents his professional fee collected during the financial year relevant to the assessment year 2008-09. Hence, in our view, the CIT(A) has rightly concluded that the assessing officer did not bring any material on record to support his case of estimation of professional receipts of earlier years. We also notice that the assessing offer has assessed the net profit on the alleged suppressed professional receipts, meaning thereby, the assessing officer has presumed that the assessee would have suppressed corresponding expenses also. Again it is only a guess work only, unsupported by any material. Similarly, the average daily collection estimated by the AO was also mere guess work. In effect, there is no material available with the AO to show that the assessee has suppressed professional receipts as well as expenses in order to substantiate the estimation made by him. During the course of hearing, the Ld D.R placed reliance on the decision rendered by Hon'ble Punjab & Haryana High Court in the case of Ved Prakash Vs. CIT (265 ITR 642) to support the estimation made by the assessing officer. However, we notice that the Hon'ble Punjab & Haryana High Court has considered a case, wherein materials were found during the course of search. However, in the instant case, no material relating to suppression of professional fee receipts was found.(ITA No. 711 to 715/Mum/2011, dt. 11.09.2015) (A Y. 2004-05 to 2008-09)
Uday C. Tamhankar .v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 143(3) : Assessment- Bogus sales and purchases-Natural justice-Reliance on statement of supplier who confesses to providing accommodation entries without giving assessee right of cross-examination violates principles of natural justice and the addition has to be deleted in toto- Sales made was not questioned- Addition was deleted. [S. 69,131]
(i) The assessment was reopened on the basis of the statement of Shri Hiten L. Rawal, the proprietor of M/s. Zalak Impex. In this statement recorded u/s 131 of the Act, ShriRawal confessed to have provided accommodation entries in the form of sales and purchases, to various parties. The assessee was stated to have obtained bills for non-existing parties, amounting to Rs. 4,09,12,718, during the year under consideration. It remains undisputed that the assessee was never provided any opportunity to cross examine Shri Hiten L. Rawal, though he specifically asked for such cross examination. On the other hand, the burden was sought to be shifted on the assessee by the A.O., by asking him to produce Shri Rawal, even though it was the A.O. who had relied on the statement of Shri Rawal, without either confronting this statement to the assessee, or providing opportunity to the assessee to cross examine Shri Rawal. Therefore, the reassessment order is as a result of violation of the natural principle of audialterampartem. A statement recorded at the back of a party cannot be used against such party without confronting such statement to the party. Hence, on this score alone, the reassessment order is unsustainable in the eye of law and we hereby cancel the same. As a consequence, the order of the ld. CIT(A) is also cancelled in toto.
(ii) Further, even otherwise, before the A.O., the assessee had contended that the assessee being in an export promotion zone, the movement of its goods is controlled and customs approved; that the purchases being approved purchases, there was no question of their being bogus purchases. The assessee enclosed the custom approved invoices in respect of purchases from Zalak Impex. As per these invoices, the goods purchased had been verified and approved by the Customs Authority. This clearly shows that the goods had actually been purchased and received by the assessee. As such, these purchases could not have, by any stretch of imagination, been treated as bogus purchases. It is also noteworthy that the payments made by the assessee to Zalak Impex were through account payee cheques only. Neither of the Taxing Authorities, however, took these invoices into consideration and wrongly held the assessee's purchases from Zalak Impex to be bogus purchases. Nothing has been brought on record to show that these invoices were self made or fabricated. Moreover, the comparative chart of purchases made during the year and the selling price has not been refuted and this also goes to prove the theory of bogus bills and accommodation entries to be wrong. Therefore, the order under appeal is a result of complete misreading and non-reading of cogent documentary evidence brought on record by the assessee. For this reason also, along with the reason that the sales made by the assessee were never questioned, the addition is deleted in toto. (AY. 2006-07)
ACIT v. Tristar Jewellery Exports Pvt. Ltd. (Mum.)(Trib.); www.itatonline.org

S.143(3) :Assessment-Disallowances made by Assessing Officer resulting in positive income-Denial of opportunity to claim exemption under section 10A-Claim made for first time before Commissioner (Appeals)-Duty ofAssessing Officer to grant exemption statutorily allowable to assessee-Matter remanded to Assessing Officer.[S.10A, 139(5)]

In an additional ground of appeal, the assessee claimed deduction under section 10A of the Act for the unit located in Special Economic Zone. The Commissioner (Appeals) rejected the claim on the ground that no deduction under section 10A was claimed by the assessee either in the return of income or during the assessment proceedings before the Assessing Officer and the time limit for filing the revised return under section 139(5) had already expired. On appeal, the assessee contended that there was net loss in the unit before the additions were made and the claim for deduction arose only when the Assessing Officer made various disallowances and additions in the assessment completed under section 143(3), and the business income had resulted in positive income and became eligible for deduction under section 10A of the Act :

Held, that the Assessing Officer had not allowed any opportunity to the assessee to claim exemption under section 10A of the Act, after computing the business income of the eligible undertaking at a positive figure for the first time. It was the duty of the Assessing Officer to compute the total income in terms of the provisions of the Act and the deductions/exemptions were statutorily allowable to the assessee. Matter remanded to the Assessing Officer to verify the claim of deduction under section 10A of the Act. (A Y. 2004-2005)

Himson International P. Ltd. v. Dy. CIT (2015) 38 ITR 218 (Ahd.)(Trib.)

S. 143(3):Assessment- Additions made solely on the basis of AIR information are not sustainable in the eyes of law if the Revenue has not made any enquires to find out whether the AIR information was correct or not.

Tribunal observed that addition has been made solely on the basis of AIR information and without any corroborative evidence regarding the receipt of any interest by the assessee from the said M/s. Essar Oil Ltd. The assessee has specifically denied the receipt of such an interest income. The Revenue has not made any enquires to find out whether the AIR information was correct or not. It has been held time and again by this Tribunal that the additions made solely on the basis of AIR information are not sustainable in the eyes of law. If the assessee denies that it is in receipt of income from a particular source, it is for the AO to prove that the assessee has received income as the assessee cannot prove the negative. In this respect the decision of the Tribunal in the case of "DCIT vs. Shree G. Selva Kumar" in ITA No.868/Bang/2009 and another case in the case of "Aarti Raman vs. DCIT" in ITA No.245/Bang/2012 decided on 05.10.12.(ITA No. 5125/M/2013, dt. 10.04.2015) (AY. 2009-10)

Kroner Investment limited v. DCIT (Mum.)(Trib.); www.itatonline.org

S.144:Method of accounting-Estimation-Application of net profit rate of 6 percent is held to be justified.

Held that in the preceding and following years a net profit rate of 6.75 per cent. and 5 per cent., respectively, was applied by the Assessing Officer and for the assessment year 2009-10 a net profit rate of 5 per cent. had been applied to the assessee. Therefore, the net profit rate of 6 per cent. was in consonance with the past history of the assessee. There was no error in the discretion exercised by the Tribunal in applying a net profit rate of 6 per cent. (AY. 2008-2009)

CIT .v. Rajinder Parshad Jain (2015) 374 ITR 545 (P & H) (HC)

S. 144:Best judgment assessment - Assessing Officer bringing cash deposits to tax as income from undisclosed sources - Commissioner (Appeals) quantifying net profit rate at 5% - Tribunal holding in favour of assessee but observing that its order would not be quoted as precedent - Tribunal not justified in holding addition unwarranted.[S. 44AF]

The assessee claimed the benefit of section 44AF and disclosed income of Rs.2,15,292. The Assessing Officer framed an assessment under section 144 since no response was forthcoming on the part of the assessee. He considered the source of a separate cash deposit of Rs. 31,29,880 and further amount of Rs. 16,07,240. After adding these amounts, he reassessed the income on regular basis bringing the amounts to tax under section 68 as the assessee's income from undisclosed sources. The

Commissioner (Appeals) on the basis of the facts of the assessment year 2008-09 quantified the net profit rate at 5% holding that the amount of Rs. 2,87,403 alone was assessable as income from undisclosed business. The Tribunal accepted the assessee's contention and rejected the Revenue's appeal. On appeal:
Held, allowing the appeal, that the Tribunal's decision had merely stated the Commissioner (Appeals)'s finding and did not contain any reasoning and was guided by the decision on the assessment of other years. Furthermore, the Tribunal was conscious of the fact that this decision favouring the assessee was perhaps unsupportable in law, which was evident from its observation that the order would not be quoted as a precedent. Therefore, the Tribunal was not correct in holding that the addition of Rs. 47,37,120 brought to tax by the Assessing Officer was unwarranted. (AY. 2005-2006)
CIT v. Chander Prakash Pabreja (2015) 372 ITR 472 (Delhi) (HC)

S. 144 : Best judgment assessment –Taxable income from business would be computed on net profit rate and not on the basis of gross profit rate.
While making best judgment assessment under section 144, assessee's taxable income from business would be computed on basis of net profit rate shown by assessee in immediate preceding year and not based on gross profit rate of said year.
ITO v. Om Silk Mills (2015) 230 Taxman 189 (Guj.)(HC)

S. 144: Best judgment assessment-If books are rejected and Gross Profit rate is estimated, separate disallowance of expenses cannot be made.[S.29 to 43D, 40(a)(ia),145(3), 194C]
The pattern of assessment under the IT Act is given by s.29/144 which states that the income from profits and gains of business shall be computed in accordance with the provisions contained in ss.30 to 43D. Sec. 40 provides for certain disallowance in certain cases notwithstanding that those amounts are allowed generally under other sections. The computation under s.29 is to be made under s. 145 on the basis of the books regularly maintained by the assessee. If those books are not correct or complete, the ITO may reject those books and estimate the income to the best of his judgement. When such an estimate is made it is in substitution of the income that is to be computed under s. 29. In other words, all the deductions which are referred to under s. 29 are deemed to have been taken into account while making such an estimate. This will also that the embargo placed in s. 40 also taken into account (Indwell Constructions vs. Commissioner of Income Tax (1998) 232 ITR 776 (AP) followed). (ITA No. 418/Chd/2015, dt. 12.08.2015) (AY. 2010-11)
CIT .v. Hind Agro Industries (Chd.)(Trib.); www.itatonline.org

S. 144 : Best judgment assessment-Rejection of accounts-Estimation of profit-Transport business-Estimation of income at 5 per cent. Reasonable-Cash credits-Estimation of income at figure higher than cash credit-No separate addition for sundry creditors warranted. [S.68]
The assessee derived income from transportation. the AO passed an order of assessment under section 144 of the Act making an addition of total income of Rs. 23,69,720. The CIT(A)partly allowing the appeal, directed the AO to take the assessee's business income at 6 per cent. of the turnover as against 8 per cent. and confirmed the addition regarding sundry creditors. On appeal by the assessee :
Held, (i) that keeping in view the assessee's turnover and the nature of business being transport business, the business income was estimated at 5 per cent. of the turnover of Rs. 1,87,25,469 as against 6 per cent. determined by the CIT(A).
(ii) That the gross receipts of the assessee were at Rs. 1,87,25,469, 5 per cent. of which would come to Rs. 9,36,273, which was more than the sundry creditors shown at Rs. 8,71,683. Further, since books of account were rejected, the detailed scrutiny of sundry creditors was not done. There was no other source of income earned by the assessee. Therefore, no separate addition regarding sundry creditors was warranted. (AY. 2008-2009)
Sahani Transport Corporation v. Dy. CIT (2015) 37 ITR 564 (Cuttack) (Trib.)

S. 144C : Reference to Dispute Resolution Panel - order passed by after expiry of one month is barred by limitation.

It was held that where Assessing Officer passed assessment order in assessee's case after expiry of one month from end of month in which direction of DRP was received, in terms of section 144C (13), said order was to be set aside being barred by limitation. (AY.2009-10)

Envestnet Asset Management (India) (P.) Ltd. v. ACIT (2015) 67 SOT 217 (URO) (Cochin)(Trib.)

S. 145 : Method of accounting –Work in progress- Income was offered in the year of completion of project- Deletion of addition was held to be justified.

During assessment proceedings, Assessing Officer made addition to assessee's income by rejecting certificate issued by Structural Engineer certifying value of work-in-progress of a particular project Tribunal finding that said project was completed subsequently and profit earned in respect of same had already been assessed, deleted addition made by Assessing Officer. On facts, impugned order passed by Tribunal did not require any interference. (AY. 2009-10)

Principal CIT v. Ashwin Kantilal Raval (2015) 231 Taxman 615 (Guj.)(HC)

S 145:Method of accounting- Accrual of income- Pending litigation-Interest income could not be treated as income accrued or received to assessee even though assessee was following mercantile system of accounting .[S. 4, 5 Code of Civil Procedure .S.34]

The assessee-company had taken legal action for recovery of residential housing loans given to seven co-operative housing societies. Pending the litigation, the same were considered good and no interest had been charged.However, the Assessing Officer held that the assessee was liable to tax for the interest income, which would accrue in future, as it was following the mercantile system of accounting.

On second appeal, the Tribunal held that in case of uncertainty of interest income from housing loans given to societies, which was sub-judice, it could not be treated as income accrued or received to the assessee with year under appeal. The Tribunal placed reliance on the provisions of section 34 of the Code of Civil Procedure and held that merely, because the assessee was following mercantile system of accounting, it cannot be said that the Tribunal was not justified in law and in facts in holding that the interest income, commission, loans to the seven societies could not be treated as income accrued or received by the assessee. On appeal by revenue , dismissing the appeal ,the High Court held that the Tribunal was justified in holding that the interest income from housing loans given by the assessee to the seven societies could not be treated as income accrued or received to the assessee.As regards the question of placing reliance on the provisions of section 34 of the Code of Civil Procedure, the assessee in the instant case was and had never decided to waive off any loan or interest, but, has filed suits and bad debts can be written-off in terms of section 37. Thus, in the case of H.P. Mineral & Ind. Development Corp. v. CIT [2008] 302 ITR 120 (HP), the decision to waive interest was taken at a much later stage, and therefore, the Court held against the assessee, therein. The facts of instant case, permitted the tribunal to interpret provisions of section 34 in its true spirit. The Assessing Officer as well as the Commissioner (Appeals) has mis-read the provisions of section 34 of the Code of Civil Procedure, which is made applicable to the interest. Therefore, no fault can be found with the Tribunal. (AY. 1991-92 to 1997-98)

JCIT .v. Parshwanath Housing Financing Corpn. Ltd. (2015) 231 Taxman 431 (Guj.)(HC)

S.145:Method of accounting-Business loss-Rejection of accounts-Accounts could not be rejected merely because trial production could not be proved--Allowance of loss was held to be justified-Question of fact.[S.28(1)]

Dismissing the appeal of revenue the Court held that the revenue had not pointed out either perversity or unreasonableness or that any of these findings were not based upon the inference that could not have been drawn in the circumstances of the case. Consequently, no substantial question of law arose. (AY. 1994-1995, 1995-1996)

CIT .v. Tony Electronics Ltd. (2015) 375 ITR 431 (Delhi) (HC)

S.145:Method of accounting-Gross profit rate-Estimation merely on basis of figure for preceding year-Quantitative tally of all raw materials consumed in making of final marketable product available on record-Matter remanded to Commissioner (Appeals) for fresh examination.[S.145 (2)]

On appeal by assessee allowing the appeal partly the Court held that;
Held, allowing the appeal partly, that the assessee categorically submitted that a quantitative tally of all the raw materials consumed in the preparation of the final marketable product was being maintained. Even though the Commissioner (Appeals) noticed the contention as a matter of fact, he did not render any finding. The Tribunal instead went by the findings of the lower authority and merely based its conclusion on the interpretation of section 145(2) of the Act. In fact, there was an assumption that the assessee did not maintain quantitative details of ingredients such as mixing gum, starch and oil. Having regard to the assessee's stand that such details were forthcoming both by way of books as well as through a quantitative tally, the Commissioner (Appeals) should have addressed himself to the issue and rendered clear findings. Failure to do so had prejudiced the assessee. Consequently, the order was set aside. The matter was remitted to the Commissioner (Appeals) for fresh examination of the books of account, specifically with regard to whether the quantitative tally was undertaken of the raw material used by the assessee in its business activities and if so, the inference is to be drawn from it and the other available material on the record. (AY. 2010-2011)

R.L. Traders .v. ITO (2015) 374 ITR 22 (Delhi) (HC)

S.145:Method of accounting-Work-in-progress-Concurrent finding that amount already taken into account in total cost of works and no addition is warranted.[S. 37]

Held that;the appellate authorities recorded a finding of fact that Rs.8,04,948 was added on account of work-in-progress, had already been taken into account in the total costs of the works and, therefore, the addition made by the Assessing Officer was not warranted. The Tribunal had recorded that the Revenue was unable to controvert the findings recorded by the Commissioner (Appeals) in respect thereof.(AY. 2008-2009)

CIT .v. Rajinder Parshad Jain (2015) 374 ITR 545 (P & H) (HC)

S. 145:Method of accounting - Valuation of stock - Scientific and no evasion of tax - Deletion of addition made on account of closing stock was held to be justified.

Held on an identical issue in the assessee's case the court held that the changed method of accounting was more scientific and did not result in any evasion of tax. Thus, deletion of the addition made on account of closing stock amounting was justified. (AY. 1991-1992)

CIT .v. Dhampur Sugar Mills P. Ltd. (2015) 373 ITR 296 (All.) (HC)

S. 145 : Method of accounting –Contract of construction of roads awarded by Government-Estimation at 5% of of gross receipts- Held to be proper.

Assessee-company was carrying out contract of construction of roads awarded by Government. Due to various discrepancies in books of account, Assessing Officer rejected same and estimated profit at 10 per cent of gross receipts. Tribunal relying upon profit rates of preceding three years, reduced profit earned during relevant year to 5 per cent of gross receipts. On appeal by revnue dismissing the appeal the court held that; since assessee had not done any private construction work during assessment years in question, impugned order passed by Tribunal did not require any interference. (AY. 2004-05 , 2005-06)

CIT .v. Target Construction Co. Ltd. (2015) 231 Taxman 55 (All.)(HC)

S. 145:Method of accounting - Rejection of accounts - Normal deductions allowable - Denial of deduction of salaries to partners and interest on financial charges - Not justified.[S.44AD 144]

Once a provision of the nature of sub-section (2) of section 44AD was not incorporated under sections 144 and 145 the contention of the Department that once the assessment was shown under section 145, it was deemed to be comprehensive and no other deductions were permissible could not be accepted. Once it was held that even where the assessment is done under section 145 normal deductions are to be allowed, the Assessing Officer could not have denied deduction of the salaries to the partners and

interest on financial charges. It was not even mentioned that the claims are not factually correct. (AY. 1994-1995)

CIT v. Inter Continental Constructions (2015) 372 ITR 141 (T & AP) (HC)

S. 145: Method of accounting - Rejection of books of account - Income from undisclosed sources - Additions on unaccounted purchases, unrecorded sales and embroidery charges –Deletion of addition by Tribunal was held to be justified. [S. 145(2)]

The assessee declared its total income at Rs. 1,19,370. The Assessing Officer rejected the assessee's books of account invoking section 145(2), and brought to tax a sum of Rs. 1,13,24,060. In doing so, he added (i) Rs. 83,25,768 due to unaccounted purchases, (ii) Rs. 20,93,098 due to unrecorded sales, and (iii) Rs.87,429 due to embroidery charges. A similar exercise had been conducted for the assessment year 1994-95 and he referred the assessee's accounts to the special auditor under section 142(2A). The Tribunal quashed the reference to the special auditor on technical grounds. The Commissioner (Appeals) granted substantial relief denying relief to the extent of Rs. 4,07,355 on unrecorded sales. The Tribunal granted the relief to the assessee as sought. On appeal:

Held, dismissing the appeal, (i) that the Commissioner (Appeals) and the Tribunal took note of the reasoning and the materials. Both the authorities were guided by the peculiar nature of the transactions involved where the assessee purchased raw and semi-finished products and thereafter sent them for embroidery and other work before the finished products were made available to it for sale. No fresh ground has been made out to show why the Tribunal's reasoning was unsustainable in law. The Tribunal confirmed the view of the Commissioner (Appeals) after an elaborate discussion, based on its own appreciation. No substantial question of law arose.

(ii) That the Tribunal recorded a finding that the undisclosed purchases and sales could not be attributed to the assessee without reliance on proper corroborative evidence. The gross profit disclosed by the assessee having been accepted, no specific instances of deficiency of sale or purchase having been pointed out in the account books and no proof of unrecorded purchases or sales having been brought on record there was no justification for the rejection of the books of the assessee. The Tribunal upheld the book results and the gross profit disclosed by the assessee as being satisfactory and held that no addition was called for. Consequently, the Tribunal deleted the additions in respect of the rejection of the books, estimation of sales and purchases and consequent estimation of the gross profit. (AY. 1996-1997)

CIT v. Zohra Emporium (2015) 372 ITR 381 / 232 Taxman 629 (Delhi)(HC)

S. 145 : Method of accounting –Accounts not rejected – Deletion of addition by Tribunal was held to be justified.

Assessee, engaged in business of displaying of hoarding and wall paintings, filed its return declaring net profit rate at 5.23 per cent. Assessing Officer having disallowed a part of expenses claimed, determined a gross profit rate of 60.49 per cent . Tribunal, however, allowed assessee's claim. On appeal by revenue , dismissing the appeal the Court held that; it was noted that net profit rate shown by assessee during relevant year was better than rate accepted in last year,moreover, account books submitted by assessee were not rejected by Assessing Officer.(AY. 2007-08)

CIT v. Kailash Grover (Smt.) (2015) 230 Taxman 303 (P&H)(HC)

S.145:Method of accounting-Rejection of accounts- Ad hoc addition of one per cent. of sales legally untenable.[S. 142(2A), 153A]

The assessee was engaged in processing of and trading in rice, pulses and food products. A search was carried out in its premises, after which a notice was issued to the assessee under section 153A of the Act. The Assessing Officer made a reference to the special auditor under section 142(2A) which lead to a report. After considering the materials on record he made an addition to the income for the assessment years 2002-03 to 2007-08 to the tune of Rs. 19,28,42,391. This included 1 per cent. of the sale of rice shown in books of account for each of the assessment years. The relative amounts, to the extent of 1 per cent. for various years were added on the ground that the quality-wise day-to-day stock of the rice traded by the assessee was not reflected. Since the assessments also concerned an element of transfer pricing and determination of the arm's length price the assessee's grievances were referred

to the Dispute Resolution Panel which upheld these additions. The Tribunal deleted the additions. On appeals :
Held, dismissing the appeals, that the Tribunal found that the assessee`s books of account were regularly maintained, audited and no discrepancies whatsoever had been indicated by the Assessing Officer in any material terms. All the books of account were found and seized and there was no quantitative tally in the account books. Therefore, the conclusion of the Assessing Officer in this behalf to reject the books was purely based on surmises and conjectures. Based on the surmises and conjectures, the ad hoc addition of 1 per cent. of sales had been made which was again guesswork based again on conjectures. Thus, the whole addition was nothing but an interplay of surmises and conjectures arrived at by the Assessing Officer to somehow make the addition. Having regard to the facts, the Assessing Officer's narrow basis for rejecting the books of account and addition of one per cent. of sales and bringing it to tax was legally untenable. (AY. 2002-2003 to 2007-2008
CIT v. Kohinoor Foods Ltd. (2015) 373 ITR 682 (Delhi) (HC)

S.145:Method of accounting-Hire purchase finance charges—Method adopted was accepted for earlier years and latter years – Method to be accepted for the relevant year.
Assessee maintaining equated monthly instalment method for income-tax purposes and sum of digits method for books of account. Equated monthly instalment method not showing suppression of income. Method followed by assessee for tax purposes accepted in earlier years and subsequent years. Allowing the appeal the Court held that the method of accounting to be accepted for relevant assessment year.(AY 1997-1998)
Integrated Finance Co. Ltd. v. JCIT (2015) 373 ITR 517 (Mad.)(HC)

S. 145:Method of accounting- Valuation of stock- Actual cost paid method-Accepted for sixteen years- Method could not be changed.
The assessee had been following the actual cost method paid method of valuation of stock for last sixteen years . The method of valuation of stock followed by the assesse was an accepted method and in consonance with law as well as the Accounting Standards .The Assessing Officer could not change the method.(AY.2005-06)
CIT v. Agarwal Enterprises (2015) 374 ITR 240/ 229 Taxman 525 (Bom.)(HC)

S. 145 : Method of accounting –Bank-Hybrid system of accounting- Prior to amendment with effect from 1-4-1997- Hybrid system was held to be valid.
Prior to amendment to section 145 with effect from 1-4-1997, assessee-bank was entitled to follow hybrid system of accounting and there was nothing wrong in accounting for sticky loans on cash basis while following mercantile system of accounting generally since recovery of even principal amount of these sticky loans was doubtful. (AY. 1989-90)
CIT v. United Bank of India (2015)229 Taxman 442 (Cal.)(HC)

S. 145 : Method of accounting –Sales to sister concern- Rate of sister concern was 30 percent-Application of gross rate at 20% was held to be not justified.
Assessing Officer made certain additions on account of sales to sister concern at lower rates as compared to non-related parties. On sales to sister concern AO applied gross profit at rate of 20 per cent. CIT(A) as well as Tribunal deleted same in respect of sales made to sister concern. CIT(A) as well as Tribunal had recorded that assessee-concern was entitled for deduction under section 80IB at rate of 25 per cent and, therefore, effective rate of taxation was 22.5 per cent . It was further noticed that in case of sister concern, rate of taxation was 30 per cent. It was also observed that in such circumstances, there was no incentive for assessee to make sales to sister concern at lower rate. On appeal by revenue the Court held that since said finding had not been shown to be perverse or erroneous in any manner being finding of fact, it did not call for any interference . (AY. 2007-08)
CIT v. Saimbhi Cycles & Auto Industries (2015) 229 Taxman 552 (P&H)(HC)

S. 145 : Method of accounting –Errors in vouchers- No plausible reason-Rejection of books of account was held to be justified.

Whether where no plausible reason was extended by assessee for errors in vouchers and in other account books, rejection of books of account by Assessing Officer and additions made thereon was justified. (AY. 2006-07)
CIT v. Mangilal Choudhary (2015) 229 Taxman 378 (Raj.)(HC)

S. 145 : Method of accounting -Provision made on obsolete stock has to be based upon cost price or market price, whichever is lower –Held to be allowable.
Provision made on obsolete stock has to be based upon cost price or market price, whichever is lower is held to be allowable. (AY. 2006-07, 2007-08 , 2008-09)
CIT v. Tupperware India (P.) Ltd. (2015) 229 Taxman 318 (Delhi)(HC)

S. 145 : Method of accounting --Rejection of accounts--Finding that there was no evidence that accounts were not reliable--Rejection of accounts was held to be not justified.
The Assessing Officer made an addition of Rs. 30,26,723 on account of trading addition by applying the gross profit rate of 52 per cent. instead of 51.7 per cent. shown by the assessee after rejecting the book results declared in the MDF division. The Commissioner (Appeals) deleted the addition and this was confirmed by the Tribunal. On appeals to the High Court, held that in deleting the addition by rejecting the accounts, the Commissioner (Appeals) and the Tribunal had followed the earlier decision in the case of the assessee for the assessment year 1993-94 which was not shown to have been upset by any higher court. The deletion of the addition was justified.(AY.1994-1995 to 1999-2000)
CIT v. Nuchem Ltd. (2015) 371 ITR 164 (P & H) (HC)

S. 145 : Method of accounting-Rejection of accounts—Civil contractor-Estimate of income--Estimate should be based on past history and comparative cases--No evidence to justify additions—Addition was held to be not justified.
The assessee carried on business as a civil contractor. It declared a net profit at the rate of 5.38 per cent. The Assessing Officer invoked the provisions of section 145. He disallowed expenses amounting to Rs. 1,17,75,202 and determined the net profit at 13.7 per cent. The Commissioner (Appeals) sustained an ad hoc addition of Rs. 10 lakhs. The Tribunal reduced the addition to Rs. 5 lakhs and deleted the addition of Rs. 1.12 crores. On appeal to the High Court :
Held, that in three out of the past five assessment years, i.e., 2004-05, 2005-06, 2006-07, the Tribunal had applied the rate of 5 per cent. For the assessment year in question though the contract receipts had sharply increased from Rs. 10.60 crores to Rs. 12.32 crores the net profit had increased from 5.02 per cent. to 5.38 per cent. or 5.78 per cent. with the addition of Rs. 5 lakhs. The Assessing Officer had merely disallowed 20 per cent. or 10 per cent., as the case may be, out of the various expenses, which was not proper and he had to bring on record justifiable basis or evidence for making an addition. As the Assessing Officer had failed to bring on record any comparable case so as to justify any estimation/addition, the addition had been rightly deleted by the Commissioner (Appeals) as well as the Tribunal.(AY. 2009-2010)
CIT v. Gupta, K.N. Construction Co. (2015) 371 ITR 325/116 DTR 377 (Raj.) (HC)

S. 145 : Method of accounting –Bogus purchase-where assessee recorded bogus purchases and, moreover, values of opening stock/closing stock were not open for verification, authorities below were justified in rejecting books of account and making addition to assessee's income by adopting higher GP rate. [S.143(3)]
The assessee was engaged in business of precious and semi-precious stones. The assessee purchased some goods from a party 'L' which was found to be non-genuine. It was also found that the assessee was not maintaining stock register at all and the entire valuation of the opening as well as closing of the stock was on mere estimation. The AO thus, *prima facie*, came to the conclusion that the books of account were to be rejected and a higher GP rate was to be applied. The CIT(A) and Tribunal confirmed the order of AO.
The High Court held that in so far as the issue on trading addition is concerned, all the three authorities *i.e.* the Tribunal, Commissioner (Appeal) as well as AO, have categorically arrived to a conclusion that provisions of section 145(3) are applicable and what should be a reasonable profit

on account of the trading transactions, is a finding of fact. The assessee has introduced and recorded bogus purchases and values of opening stock/closing stock were not open for verification in the books of account, thus the motive was to reduce its profits. The assessee has not been able to dispel this finding of fact recorded by all the three authorities who in consonance, have come to the aforesaid conclusion. Consequently, the instant appeal, being devoid of merit, stands dismissed in limine (AY. 2008-2009)

Vimal Singhvi v. ACIT (2015) 370 ITR 275 / 230 Taxman 73 / 113 DTR 157/273 CTR 322 (Raj.)(HC)

S. 145 : Method of accounting –Net profit rate must necessarily be exercised on the basis of relevant factors-Matter remanded.

The assessees were building contractors, whose account books were rejected for one reason or the other.

The Assessing Officer, the Commissioner and the Tribunal had applied different percentages of net profit.

On appeal: the Court held that ,discretion to determine a net profit rate must necessarily be exercised on basis of relevant factors, which are not exhaustive, past tax history of assessee, an appraisal of value of contract, prevailing economic conditions vis-a-vis assessees business, price of raw material, labour etc., rise in price index as notified by Central Government from time to time and if Assessing Officer proceeds to rely upon assessments of other assessees engaged in similar business to do so only after determining points of similarity etc. Matter remanded.

Telelinks .v. CIT (2015) 228 Taxman 373(Mag.) (P&H)(HC)

S. 145 :Method of accounting–Percentage completion method- Reversal of entry of amount received was held to be justified.

The assessee during the year, reversed in an amount of Rs.36,70,287 from the turnover of the year which represented the amount credited, but not received. The AO held that the reversal of income was not in accordance with the Principles of Accountancy. The earlier year income could not be reversed except for claiming under the head 'bad debts'. The reversal of income during the current year would result in the excess claim of deduction under section 80HHB to the earlier year to the tune of Rs. 18,35,144.Therefore, the AO disallowed the reversal of income and added said amount to assessee's income. On appeal ,the Tribunal held that if the amount was not realizable and had already been considered while estimating the income, then the same was to be allowed as deduction.On appeal by revenue, dismissing the appeal the Court held that, when once according to percentage completion method of accounting adopted by assessee, he is expected to declare revenue as well as profit even in respect of amounts which he has not received, merely because he claimed deduction under section 80HHB, he cannot be denied reversal of entry and deduction of amount which he did not receive, which was subject matter of earlier years return of income by claiming such deduction. Order of Tribunal was affirmed. (AY. 2000-01)

CIT .v. John Brown Technologies (India) (P.) Ltd. (2015) 228 Taxman 52(Mag.)(Karn.)(HC)

S. 145 :Method of accounting–Undisclosed receipts-Estimate of 2 percent of undisclosed receipts was held to be justified.[S.143(3)]

The assessee was engaged in business of sale of copra and coconuts. A search was carried out in the assessee's premises in the course of which assessee declared certain undisclosed trade receipts credited in his bank account. The AO treated the entire amount so credited as assessee's taxable income. The Tribunal relying upon the orders passed in subsequent assessment years, estimated gross profit rate of 2 per cent on trade receipts. On appeal by revenue, the Court also up held the order of Tribunal. (AY. 1-4-1996 to 30-03-1999)

CIT .v. Jayesh S. Mehta (2015) 228 Taxman 102(Mag.)(Karn.)(HC)

S.145:Method of accounting-Construction business- Recognition of income- Completion of development-Received 70-80 of sale proceeds- Recognizing the revenue only when the

registration of the sale ded has been done in favour of the buyer is not a recognized method, hence order of AO was affirmed. [AS.7,9]

Assessee was engaged in construction business. During relevant year assessee having completed construction of plot, sold same and received 80 per cent of sale proceeds. Assessee did not credit sale proceeds to profit and loss account contending that it was showing sales when registration of sale deed was carried out. Assessing Officer having rejected assessee's explanation, re-computed profit by crediting sale proceeds to profit and loss account in the ground that recognising revenue when sale deed had been registered by assessee in favour of buyer could not be regarded as either cash or mercantile system of accounting as mandated in provisions of section 145. In appeal CIT (A) held that AO has changed the method of accounting from completion method to percentage completion method, accordingly deleted the addition. On appeal by revenue allowing the appeal the Tribunal held that; percentage completion method is not linked with the consideration received by assessee from the intended buyer. The assessee has recognized the revenue only when the registration of the sale deed has been done in favour of the buyer. Under AS-7 this is not a recognized method of recognizing the revenue.This method is neither project completion method nor percentage of completion method. The method adopted bythe assessee therefore cannot be regarded tocomply with the ingredients as laid down under section 145. Section 145 makes it mandatory on the part of the assessee to follow either cash or mercantile system of accounting regularly. Recognizing the revenue when the sale deed had been registered by the assessee in favour of the buyer could not be regarded to be either cash or mercantile system of accounting , therefore the order of CIT(A) is set aside and the order of AO is restored. (AY.2009-10)

ACIT .v. Alcon Developers (2015) 68 SOT 299 (Panaji)(Trib.)

S.145:Method of accounting - Valuation of closing stock-MODVAT credit- No addition of MODVAT credit would be made in closing stock.

No addition of MODVAT credit would be made in closing stock.(AY. 2003-04,2005-06)

Aditya Birla Nuvo Ltd. .v. ACIT (2015) 68 SOT 403(Mum.)(Trib.)

S. 145 : Method of accounting-Rejection of accounts-Ad hoc estimation- Discrepancies-Once books of account produced before lower authorities-certain discrepancy - Authorities free to make addition to said extent of discrepancies - Rejection of books of account is not justified.

During the course of remand proceedings before AO the assessee produced the books of account. The AO also confirmed the examination of books of account and observed that the has not produced the bills in respect of conveyance expenses, general expense, motor car expenses, telephone expenses etc. Once the books of account of the assessee was produced before the lower authorities and if there is certain discrepancy the authorities were free to make addition to that extent of discrepancies noticed by the authorities and, authorities were precluded in rejecting the books of account of the assessee. The Honorable ITAT has taken view that rejection of books of account of the assessee is not justified. However, there is certain discrepancy noticed by the authorities in the course of first appellate proceedings, instead of adhoc estimation, it is inclined to sustain the disallowance in respect of expenses incurred in cash and no bills or vouchers were produced by the assessee for verification namely conveyance expenses, general expenses, motor car expenses, telephone expenses. (AY.2007 – 2008))

Bharat Dana Bera .v. ITO (2015) 39 ITR 632 / 153 ITD 421 / 169 TTJ 721 (Mum.)(Trib.)

S. 145 : Method of accounting - Valuation of stock- Survey-Stock found less than the stock shown in trading account-Addition as unaccounted sale was not justified.[S.133A]

Closing stock found during survey was found less than closing stock shown in trading account. This, according to Assessing Officer, proved shortage of stock and unaccounted sales. On facts addition made by Assessing Officer was totally uncalled for.

Safari Bikes Ltd. v. JCIT (2014) 33 ITR 665 / 166 TTJ 216 / (2015) 67 SOT 257 (Chd.)(Trib.)

S. 145 : Method of accounting-Assessee changing method of accounting-Change bona fide-Loss is allowable.[S.28(i)]

Deduction on account of loss on acquiring loans claimed in single year pursuant to change. Failure by Department to show change in method of accounting results in distortion of profits. Change in method bona fide. Deduction is allowable. (AY. 2005-2006)
ING Vysya Bank Ltd. v. ACIT (2015) 39 ITR 250 (Bang.)(Trib.)

S. 145 : Method of accounting-Rejection of accounts—Labour payable- Estimate of net profit at 8% was held to be reasonable. [S.145(3)]
The assessee was a contractor. Failure by assessee to verify genuineness of opening and closing balance of labour payable, failure to justify quantitative and qualitative details of closing stock and also failure to address queries raised and details called for by Assessing Officer. Rejection of books of account proper and estimate of net profit rate of 8 per cent was held to be reasonable. (AY. 2010-2011)
Ashok Kumar v. ITO (2015) 39 ITR 617 (Chd.)(Trib.)

S. 145 : Method of accounting - Estimation of income-Sales return- – Returned goods to extent of not re-sold were included in closing stock and to extent goods were re-sold were included in turnover- AO was not justified in making addition on account of sales return.
The sales returns were reflected either in the turnover or in the closing stock as on 31-3-2007 and therefore the observation of the AO that the returns goods were not included either in the turnover or in the closing stock of finished goods is contrary to the facts placed on record also could not be controverted by the revenue. Therefore the detailed reasoning given by the CIT(A) is no infirmity accordingly, the ground raised by the revenue was dismissed. (AY.2007-2008 to 2009 – 2010)
Balaji Amines Ltd. v. Addl. CIT (2015) 153 ITD 20 (Pune)(Trib.)

S. 145:Method of accounting-Assessment-Rejection of books of account-Survey- Stock found-Estimation of GP- Notice- Rejection of books of account was held to be valid.[S. 133A, 143(2)]
Tribunal after appreciating the evidence found that the notice was served by speed post and excess stock was found in the course of survey hence addition affirmed by the CIT(A) was affirmed. Appeal of assesse was dismissed.(ITA No. 401/JP/2012, dt. 27.05.2015) (AY. 2008-09)
Mundra woolen Mills (P) Ltd. v. ACIT (Jaipur)(Trib); www.itatonline.org

S.145: Method of Accounting--Rejection of accounts--Low gross profit rate as compared to previous year--Change in market causing change in gross profit rate--Deletion of disallowance was held to be proper.
The assessee was engaged in the business of manufacture and trading of textile machinery and spare parts. For the assessment year 2004-05, the assessee showed a gross profit at the rate of 9.05 per cent. The Assessing Officer estimated the gross profit taking the average of the last two years' profit and made an addition on the ground that the net profit rate was low as compared to the previous year. The Commissioner (Appeals) deleted the disallowance. On appeal by the Department,Held, dismissing the appeal, that the gross profit rate disclosed for the assessment year was 17.26 per cent. and not 9.05 per cent. The Assessing Officer had proceeded on a wrong assumption that the gross profit rate disclosed by the assessee during the year was low as compared to previous years. The market in which the assessee sold its goods in earlier years was different from the market in which the assessee sold its goods during the assessment year and the change in the market caused change in the gross profit rate. There was no infirmity in the order of the Commissioner (Appeals). (AY. 2004-2005)
Himson International P. Ltd. v. Dy. CIT (2015) 38 ITR 218 (Ahd.) (Trib.)

S. 145 : Method of accounting-Rejection of accounts-Rejection of books of account was held to be not justified- Ad hoc disallowance of 10 per cent. of expenditure not sustainable.
The assessee was incorporated under the laws of People`s Republic of China and set up its branch office in India in the year 2000. The principal business of the assessee was that of wholesale of food supplements and health care equipment, which it imported into India from its head office in China. The "food supplements" were imported into India in retail packaging and were primarily sold in bulk to its associated enterprises in India. Based on an information received by him, the AO made an addition on account of suppressed sales on the ground that it had mis-declared the retail sale price by

suppressing the actual maximum retail price. The AO also rejected the books of account of the assessee on the ground that the assessee had failed to produce them when called upon to do so for examination and also disallowed 10 per cent. of the total expenses claimed. The Dispute Resolution Panel held that the book results of the assessee regarding sales were unreliable and to be rejected and computed the amount of suppressed sale of Rs. 42.67 crores by multiplying the differential maximum retail price by the quantity of goods sold in accordance with the financial statement of the assessee and deleted the ad hoc disallowance of 10 per cent. of expenses claimed by the assessee. On appeal the Tribunal held that the rejection of books of account was held to be not justified- Ad hoc disallowance of 10 per cent. of expenditure not sustainable. (AY. 2009-2010)

Tianjin Tianshi Biological Development Co. Ltd. v. Dy. CIT (2015) 37 ITR 260/120 DTR 46 (Delhi)(Trib.)

S. 145 : Method of accounting-Builder- Project completition method- Method for allocation of common expenses to different WIP projects of a builder explained

The assessee being a builder and developer, Accounting Standard 7 (AS-7), issued by the ICAI, titled, 'Construction Contracts', would not apply, so that the prescription of AS-9 and AS-2, based on general principles that govern any business, would apply for the revenue recognition and inventory valuation respectively. Only costs incurred toward a particular project, or otherwise related to construction activity, would stand to be allocated and, thus, capitalized as a part of the project cost. 'Capitalized' here is not to be construed in the regular, classical sense of the relevant expenditure being not of revenue nature, but only in the sense of it being accumulated under a particular head of account (i.e., WIP), for being set off, under the matching principle, at the time the corresponding revenue is recognized.Indirect costs could therefore include only production/project overheads, and not general office and administrative expenses. The assessee has not specified the duties allotted to different employees or the functional responsibility of the directors. Identification of individual sites, besides work in relation to site preparation, clearances, project supervision or overseeing project execution, etc., would understandably form part of the director's duties. Further, we do not observe any employee costs in the expenses allocated to the various projects. Managerial and supervisory costs are necessary inputs to project execution. We, accordingly, consider 50% of the personnel costs, claimed at Rs.40.22 lacs, i.e., including director's remuneration, as liable for inclusion in the project cost, to be allocated on some systematic or rational basis which would capture project execution, which is a composite activity commencing with site identification to the construction in a deliverable state. No such proportion could be applied to rent, rates and taxes which constitutes the second major component of the impugned expenditure. The same would need to be examined with reference to the purpose for which each item comprising the same is incurred, to be decided accordingly. If not for any specific project, no part of the said cost could be capitalized. Rent for office premises, however, if forming part thereof, would stand to be allocated on the basis of the balance expenditure. Again, as no particulars in respect of these expenses stand specified; the account head describing only the nature of the expense and not its purpose or the activity in relation to which it is incurred, we consider 20% of such expenditure to be allocable to WIP toward project overhead cost, again on the same parameter as applied to the personnel costs.

Expenditure on architect & engineering fees, tender & survey expenses and other miscellaneous expenses incurred for a project that was not awarded to it cannot be allocated to any of the projects, work in respect of which is under execution as at the year-end. Similarly, advertisement, sponsorship and brand-building expenses are only in the nature of selling costs, i.e., of the construction business, and which would not therefore stand to be capitalized, in-as-much as the same could only be in respect of a direct cost which adds value to or otherwise adds to its cost of production to the assessee. As regards the argument of there being no corresponding income, or it being not relatable to any revenue stream, the same is to our mind of little consequence. As long as the assessee is carrying a particular business during the year, income there-from has to be computed u/s.28 of the Act, allowing it all permissible deductions, i.e., in accordance with the provisions of sections 30 to 43D (refer section 29). Whether the method of accounting followed by the assessee, i.e., the project completion method, is a correct method in accordance with the law, i.e., given that it follows mercantile method of accounting, is another matter altogether, which has not been impugned by the Revenue in any manner. (AY. 2009-10)

Vardhman Developers Ltd. .v. ITO(2015) 38 ITR 512 (Mum.)(Trib.)

S. 145A : Method of accounting – Valuation –Excise duty could not be included in opening and closing stock

While computing income of assessee-manufacturer, excise duty could not be included in opening and closing stock .

CIT .v. Avery Cycle Inds Ltd. (2015) 231 Taxman 814 (P&H)(HC)

S. 145A:Method of accounting–Change–Valuation of stock- Government company-Non-moving stores and spares-Write off on basis of deterioration of slow moving items of machinery-Justified.[S.145]

Held, the method of accounting had been altered with effect from the assessment year 2001-02. However, the facts revealed that the write off was on account of deterioration in the condition of the non-moving stores since the assessee's plants were located in remote places and near the sea. The non-moving stores and spares got corroded over a period of time due to wear and tear. The same method of accounting having been adopted in the earlier years, there was no reason for the Assessing Officer to disallow the claim on the ground that the accounting method had changed. The write off claimed was essentially on the basis of deterioration of various materials, including the raw materials and in particular slow moving items of machinery. (AY. 2002-2003 to2004-2005)

CIT .v.Indian Rare Earths Ltd. (2015) 375 ITR 276(Bom.)(HC)

S. 145A :Method of accounting–Valuation–Excise duty-Not includible in valuation of closing stock.[S.145]

The assessee-company was engaged in the business of manufacture and sale of alcohol and vanaspati. AO held that excise duly had not been included in the value of closing stock in compliance to the verdict of the Supreme Court in the case of CIT v. British Paints Ltd.[1991] 188 ITR 44(SC)Accordingly, an addition was made to income of the assessee-company on account of non-inclusion of excise duty in closing stock of finished products. The CIT(A) held that neither excise duty was paid nor the duty was incurred. Further, the duty had not been included and did not form part of the cost as it was not claimed in the profit and loss account. The CIT(A) therefore deleted the addition. The Tribunal confirmed said order. On appeal by revenue dismissing the appeal the Court held that,on last date of accounting year, goods were lying in bonded warehouse. Neither excise duty was paid nor duty was incurred. Further, duty had not been included and did not form part of cost as it was not claimed in profit and loss account. As the excise duty being payable at time of removal of goods and not at time of manufacture, duty would be payable only at time of unbonding and, thus, addition was to be deleted. Order of Tribunal was affirmed. (AY. 2004-05)

CIT .v. SVP Industries Ltd. (2015) 228 Taxman 104 (Mag.)(Delhi)(HC)

S. 145A: Method of Accounting - Valuation of stock—Matter remanded.

Tribunal held that there was failure by assessee to show "net profit" the same under both "inclusive method" and "exclusive method". Assessee to be given opportunity to demonstrate working and the Assessing Officer to adjust opening stock with correct amount that actually adjusted in closing stock of immediately preceding year if assessee fails to furnish workings ,amount adjusted in closing stock cannot be allowed as deduction. Matter remanded. (AY. 2006-2007)

Ciba India Ltd. v. Dy. CIT (2015) 38 ITR 474 (Mum.)(Trib.)

S.147:Reassessment-Change of opinion-Original assessment completed under section 143(1)-No question of change of opinion-Main issue not addressed by High Court--Order set aside and matter remanded to Tribunal. [S. 143(1), 148]

Notice was issued to the assessee for reassessment for the assessment year 1991-92 on the ground that capital gains chargeable to tax had escaped assessment in that year. Challenging the validity of this notice, the assessee preferred a writ petition which the High Court allowed, quashing the reassessment proceedings. Meanwhile pursuant to the notice, the Assessing Officer had passed an assessment order on the merits rejecting the contention of the assessee that the transaction in question did not amount to a sale in the assessment year in question and the assessee's appeal before the

Commissioner (Appeals) was dismissed. On further appeal, the Appellate Tribunal simply following the judgment of the High Court in the writ petition, allowed it. On appeal :
Held, allowing the appeal, that the main issue involved in the case had not been addressed by the High Court. The Department had taken a contention that since the assessee's return was accepted under section 143(1) of the Act, there was no question of "change of opinion" inasmuch as while accepting the return no opinion was formed and, therefore, on this basis, the notice issued was valid. The judgment of the High Court had to be set aside. Since the judgment of the High Court had been set aside, as a result, the order passed by the Appellate Tribunal also would stand set aside. Accordingly the matter is remanded to Tribunal for decision of appeal on the merits.(AY.1991-92)
CIT v. Zuari Estate Development and Investment Co. Ltd. (2015) 373 ITR 661 (SC)
Editorial: Decision in Zuari Estate Development and Investment Co. Pvt. Ltd. v. J. R. Kanekar, Dy.CIT [2004] 271 ITR 269 (Bom) set aside.

S. 147: Reassessment–After the expiry of four years-Revenue accepting all relevant facts pertaining to claim of depreciation were disclosed and produced at time of assessment - Reassessment not valid.
Held, allowing the petition, that when even according to the Revenue, all the relevant facts pertaining to the claim of depreciation were disclosed and produced at the time of the earlier assessment and when there was no non-disclosure of true and correct relevant material, the bar of four years, according to the first proviso to section 147 would apply and the action under section 147 of reopening the assessment could be said to be without jurisdiction and the action could not stand in the eye of law. (AY. 2008-2009)
Gujarat Eco Textile Park Ltd. v.ACIT (2015) 372 ITR 584 (Guj.)(HC)

S. 147:Reassessment-After the expiry of four years -Satisfaction of Chief Commissioner or Commissioner - No such permission was obtained before issuing notice-Change of opinion - Reassessment notice was held to be not valid.[S.148, 151]
The assessment for the AY. 2006-07 was reopened. The reasons accompanied a letter dated November 25, 2013, of the Department and stated that the assessee had claimed excess cost of acquisition and income from capital gains had been underassessed. The reasons were dated February 5, 2013. On a writ petition:
Held, allowing the petition, that there could be no formation of an opinion by the Commissioner to issue such a notice under section 148 on January 30, 2013, in the absence of cogent reasons, which were recorded later on February 5, 2013. The notice under section 148 was also dated February 5, 2013. A specific declaration in the notice that it was being issued after obtaining the necessary satisfaction of the Commissioner and the Chief Commissioner was scored out. Therefore, in the absence of reasons on January 30, 2013, the Commissioner could not have recorded satisfaction under section 151.
(ii) That the assessment was sought to be reopened on a mere change of opinion, the change of opinion being with regard to estimation of the indexed cost of acquisition on April 1, 1981. It had been declared in the formal reasons that the justification for reassessment was to be found the view of the Income-tax Officer, Chennai. On the face of the records the Department was acting on a change of opinion. The reasons dated February 5, 2013, had been sought to be improved in the affidavit-in-opposition which was not permissible. Therefore, the reassessment was not valid. (AY. 2006-2007)
Asiatic Oxygen Ltd.v. Dy. CIT (2015) 372 ITR 421 (Cal.) (HC)

S. 147:Reassessment-After the expiry of four years-Reopening only on the basis of information received that the assessee has introduced unaccounted money in the form of accommodation entries without showing in what manner the AO applied independent mind to the information renders the reopening is void.[S.148]
The AO reopened the assessment u/s 147 on the basis that there was specific information regarding the name of the entry provider, the date on which the entry was taken, the cheque details as well as the amount credited to the account of the Assessee. The revenue claimed that this by itself constituted

sufficient material for the AO to form an opinion that the "assessee company has introduced his own unaccounted money in its bank account by way of accommodation entries". However, the Tribunal quashed the reopening on the ground that the reasons recorded by the AO for the reopening of the assessment showed that apart from making a mere reference to information received from the investigation wing, the AO mechanically issued notice under Section 148 of the Act, without coming to an independent conclusion that he has reason to believe that the income has escaped assessment during the AY in question. On appeal by the department HELD dismissing the appeal:

(i) In Chhugamal Rajpal v. SP Chaliha (1971) 79 ITR 603, the Supreme Court was dealing with a case where the AO had received certain communications from the Commissioner of Income Tax showing that the alleged creditors of the Assessee were "name-lenders and the transactions are bogus." The AO came to the conclusion that there were reasons to believe that income of the Assessee had escaped assessment. The Supreme Court disagreed and observed that the AO "had not even come to a prima facie conclusion that the transactions to which he referred were not genuine transactions. He appeared to have had only a vague felling that they may be "bogus transactions". It was further explained by the Supreme Court that before issuing a notice under S. 148, the ITO must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under S. 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the ITO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of cl. (a) or cl. (b) of S. 147 are satisfied, the ITO has no jurisdiction to issue a notice under S. 148." The Supreme Court concluded that it was not satisfied that the ITO had any material before him which could satisfy the requirements under Section 147 and therefore could not have issued notice under Section 148.

(ii) In the present case, after setting out four entries, stated to have been received by the Assessee on a single date i.e. 10th February 2003, from four entities which were termed as accommodation entries, which information was given to him by the Directorate of Investigation, the AO stated: "I have also perused various materials and report from Investigation Wing and on that basis it is evident that the assessee company has introduced its own unaccounted money in its bank account by way of above accommodation entries." The above conclusion is unhelpful in understanding whether the AO applied his mind to the materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the AO, if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the Assessee, which must have been tendered along with the return, which was filed on 14th November 2004 and was processed under Section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for the AO to have simply concluded: "it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries". In the considered view of the Court, in light of the law explained with sufficient clarity by the Supreme Court in the decisions discussed hereinbefore, the basic requirement that the AO must apply his mind to the materials in order to have reasons to believe that the income of the Assessee escaped assessment is missing in the present case.

(iii) The fact that the CIT (A) discussed the materials produced during the hearing of the appeal is not relevant because it is in the nature of a post mortem exercise after the event of reopening of the assessment has taken place. While the CIT(A) may have proceeded on the basis that the reopening of the assessment was valid, this does not satisfy the requirement of law that prior to the reopening of the assessment, the AO has to, applying his mind to the materials, conclude that he has reason to believe that income of the Assessee has escaped assessment. Unless that basic jurisdictional requirement is satisfied a post mortem exercise of analysing materials produced subsequent to the reopening will not rescue an inherently defective reopening order from invalidity.(ITA No. 545/2015, dt. 8.10.15) (AY.2003-04)

Pr. CIT .v. G & g Pharma India Ltd. (Delhi)(HC) ; www.itatonline.org

S. 147:Reassessment- After the expiry of four years- Binding precedent- Capital or revenue- Law laid down in ALA Firm v. CIT (1991) 189 ITR 285 (SC) does not mean that an assessment can be reopened merely because the AO omitted to apply a binding judgement.[S.148]

The only reason for reopening the assessment was that the decision in Southern Switchgears Ltd. v. CIT(1998) 232 ITR 359 (SC) was omitted to be applied by the AO while making the assessment. The department placed reliance on the decision of the Supreme Court in ALA Firm v. CIT (1991) 189 ITR 285 (SC) to urge that in similar circumstances where the AO had overlooked a binding precedent on the issue, it was construed as a sufficient material to justify reopening of the assessment. HELD by the High Court:

(i) There are at least two reasons why the decision in ALA Firm (supra) would not be applicable in the facts of the present case. In the first place, it is apparent that the said decision was not in the context of reopening of assessment sought to be made four years after the expiry of the relevant assessment year of the original assessment. The reopening was done not very long after the initial assessment. Secondly, the decision was rendered in respect of Section 147 of the Act as it stood prior to its amendment with effect from 1st April 1989.

(ii) In light of the legal position after the amendment to Section 147 of the Act, as explained in CIT v. Kelvinator of India Ltd. (supra), the Court is of the view that, in a case where the assessment is sought to be reopened in 2009, four years after it was originally made, i.e. 2005, the mere fact that there was a judgment of the Supreme Court of 1997 which was not noticed by the AO when he framed the original assessment cannot per se constitute the only material on the basis of which the assessment could have been reopened. When on the same material, four years after the assessment year for which the original assessment is finalised, the AO seeks to reopen the assessment on the basis of a judicial precedent delivered more than eight years earlier, it would be a case of mere 'change of opinion', something clearly held impermissible by CIT v. Kelvinator of India Ltd. (supra), The threshold requirement of that the AO should, on the basis of some tangible material, conclude that there was escapement of income on account of the Assessee failing to disclose material particulars, is not fulfilled in the present case. Consequently, the reopening of the assessment was, in the facts of the present case, not justified.(ITA no. 557/2015, dt. 9.10.2015) (AY.2002-03)

Coperdion Ideal Private Limited v. CIT (Delhi)(HC); www.itatonline.org

S. 147:Reassessment-After the expiry of four years-Interest on securities- Deduction at source-Beneficial owner-Change in ownership- Reassessment was held to be bad in law. [S.4]

Assessee sold securitiesissued by R.B.I. to Hindustan Steel Ltd.,however, change of ownership was not recorded in R.B.I. records and resultantly R.B.I. paid half-yearly interest payable thereafter to assessee after deducting tax at source. Assessee paid gross amount of interest to beneficial owner, i.e., H and filed application for refund of TDS. On that basis, Assessing Officer reopened assessment on ground that interest chargeable to tax had escaped assessment. Allowing the Writ petition the court held that interest income belonged to H and not to assessee and, therefore, there was no occasion for assessee to disclose said receipt. As there was no failure on part of assessee to make a full and true disclosure for purposes of its assessment and, therefore, reopening of assessment after four years from relevant assessment year was held to bebad in law.(AY. 1997-98)

ICICI Securities Ltd. .v. ACIT (2015) 231 Taxman 460 (Bom.)(HC)

S. 147: Reassessment -After the expiry of four years- Reasons not showing any failure on part of assessee to disclose fully and truly all material facts - Notice based on assessment made in subsequent years- Reviewing earlier decision is not permissible- Notices and the orders were quashed. [S.148]

Held, the reasons for reopening the assessments which had already been concluded did not show that there was any failure on the part of the assessee to disclose fully and truly all the material facts and thus, it was merely a change of opinion and in view of the settled position of law, the assessee would be entitled to setting aside of the notices issued. The additional factor regarding the change of opinion by the Assessing Officer, would also be a valid ground for setting aside the notice issued. Further, the reason for reopening was merely a change of opinion on account of the assessment being made for the subsequent years would not give the Assessing Officer the jurisdiction to reopen as he would, thus, be

reviewing his earlier decision which has been held not to be permissible. Thus, the notices and the orders were accordingly, quashed.(AY. 2005-2006 to2007-2008)
State Bank of Patiala .v. CIT (2015) 375 ITR 109 (P & H) (HC)

S. 147:Reassessment-After the expiry of four years-Share premium amount-No lack of disclosure or suppression of any material facts - No tangible reasons in notice - Notice not valid.[S.148, 151]
Notices under section 148, were issued to the assessee on the ground that the assessee was in receipt of huge share premium amounting to Rs. 14,10,01,300 during the financial year 2007-08 relevant to the assessment year 2008-09. As scrutiny assessment under section 143(3) had not been done in this case for this year, the share premium received by the assessee had not been examined. The assessee was an unlisted company and the nature of the share application money received was not substantiated by any cogent evidence. Subsequently, an order of reassessment was passed rejecting the objections of the assessee challenging the validity of reassessment. On writ petitions:
Held, allowing the petitions, (i) that the transactions seemed to be entirely arm's length transactions. The subscribers were limited companies who were reportedly stated to be public limited companies. The assessee was a company in the hospitality sector and it could not be seen how the premium charged from the subscribers could be questioned without the Revenue providing valid reasons. Apart from being public limited companies, the subscribers included other infrastructure hospitality companies. There was no justification for the issuing of notices under section 148 on the facts of the case. There was no lack of disclosure or suppression of any material facts. All queries of the Assessing Officer had been answered by the assessee or the subscribers in question and all questionnaires addressed to subscribers were duly answered by the subscribers. The notice did not contain any tangible reasons for reopening the assessment. In fact, the very same Assessing Officer who had completed the assessment and issued an assessment order on March 22, 2014 had proceeded to issue the notice under section 148 within seven days of the assessment order. Therefore, the notices were not valid.
(ii) That although the assessee had relied upon the decision of the court and the Department had accepted the decision and decided not to challenging it by issuing a circular, all cases of share premium could not be equated as being covered by the judgment and circular. In a given case and the given fact situation, assessees may be required to be probed for valid reasons. (AYs. 2008-2009, 2009-2010)
Alliance Space P. Ltd. .v. ITO (2015) 375 ITR 473 (Bom.)(HC)

S. 147: Reassessment -After the expiry of four years-Assessee filing with return balance-sheet in which total value of plant and machinery certified - No omission or suppression on part of assessee of true and correct facts-Reassessment was held to be not valid. [S.80IB,148]
Held, along with the original return, the assessee had produced the balance-sheet in which the total value of the plant and machinery was shown. The Assessing Officer allowed the deduction under section 80IB and, therefore, it could not be said that there was any omission or suppression on the part of the assessee in disclosing the true and correct facts. Therefore, the reassessment proceedings for the were not permissible and were not legal and were bad in law. Under the circumstances, the Tribunal had rightly not considered the appeal preferred by the Revenue which was on the merits of deletion of disallowance under section 80IB. (AY.2003-2004)
CIT .v. Lincoln Pharmaceuticals Ltd. (2015) 375 ITR 561 (Guj.)(HC)
Editorial: Order in ACIT v. Lincoln Pharmaceuticals Ltd. (2014) 35 ITR 498 (Ahd)(Trib) is affirmed.

S. 147:Reassessment-After the expiry of four years -Income deemed to accrue or arise in India - Business connection–Software licence fee- Royalty- Change of opinion- Dedcution at source-Reassessment was held to be bad in law.[S.9(1)(i), 148, 195, OECD Convention,Art.12]
Assessee-company was engaged in IT enabled services and software development.It filed return declaring certain taxable income .Assessing Officer passed assessment order under section 143(3) accepting assessee's claim that payment of software license fee to foreign company was revenue in nature. Subsequently Assessing Officer reopened assessment taking a view that software license fee

paid to foreign company was in nature of royalty and, thus, assessee was required to deduct tax at source while making said payment. On writ allowing the petition the court held that ,since full particulars with respect to 'software license fee' paid by assessee to foreign companies were disclosed at time of assessment , initiation of reassessment proceedings merely on basis of change of opinion after expiry of four years from end of relevant year was not sustainable. (AY. 2007-08)
E-Infochips Ltd. .v. Dy.CIT (2015) 231 Taxman 838 (Guj.)(HC)

S.147:Reassessment-After the expiry of four years-Income deemed to accrue or arise in India-Business connection-Deduction at source-Non disclosure of facts- Reassessment was held to be valid. [S.9(1)(i), 148, 195 ,OECD Convention, Art.5]
For relevant year Assessing Officer initiated reassessment proceedings in case of assessee on ground that it had made payments to its parent company located in Korea without deducting tax at source and, thus, said payments were to be disallowed. Assessee raised an objection that in absence of any failure on its part to disclose truly and fully all material facts necessary for assessment, initiation of reassessment proceedings after expiry of four years from end of relevant year was not sustainable Dismissing the petition the Court held that in view of non-disclosure of fact qua assessee's parent company having a PE in India, there had not been full and true disclosure of all material facts which could have led Assessing Officer to examine as to whether tax was payable on remittances to non-resident Indian company or not. in such circumstances, validity of impugned reassessment proceedings was to be upheld.(AY. 2006-07)
Principal Officer, L.G. Electronics (P.) Ltd. .v. ACIT (2015) 231 Taxman 326 (All.)(HC)

S. 147 : Reassessment –After the expiry of four years-No failure to disclose material facts-Reassessment was held to be not valid.[S.143(3), 148]
Where Assessing Officer having completed assessment under section 143(3), initiated reassessment proceedings after expiry of four years from end of relevant assessment year, since it was not revenue's case that assessee had failed to disclose truly and fully all material facts necessary for assessment, impugned reassessment proceedings deserved to be set aside.
CIT v. Mirza International Ltd. (2015) 229 Taxman 443 (All.)HC)

S. 147 : Reassessment-After the expiry of four years-Capital gains disclosed in original assessment--Reassessment proceedings after four years to re-compute capital gains was held to be not valid.[S 45, 48, 148]
Allowing the petition the Court held that in relation to capital gains all relevant details including the date on which the property was acquired and the sale deed were submitted in the return for the assessment year 2008-09. The notice issued under section 148 seeking to re-compute the capital gains was not valid and was without jurisdiction. On the merits also it could not be said that there was any escapement of the income for assessment. The reassessment proceedings were not valid.Unless it is specifically found by the competent authority that there was failure on the part of the assessee to make a true and full disclosure of the material facts for assessment, the assessment already made cannot be reopened after a period of four years. (AY. 2008-2009)
Jagdishbhai Govindlal Patel v. ITO (2015) 371 ITR 419/ 232 Taxman 334 (Guj) (HC)

S. 147 : Reassessment-After the expiry of four years-Additional depreciation allowed in scrutiny assessment-No failure to disclose material facts necessary for assessment-Notice was held to be not valid.[S. 32, 148]
The assessee derived income from manufacturing and trading in steel tubes and pipes and in generation of electricity. For the assessment year, notice was issued to it under section 143(2) of the Income-tax Act, 1961. After making detailed inquiry, the Assessing Officer granted additional depreciation in respect of windmills. A notice was issued after four years for reopening the assessment on the ground that the assessee was not entitled to the additional depreciation. On a writ petition to quash the notice :
Held, allowing the petition, that a perusal of the record of the case revealed that the return of income filed by the assessee for the assessment year 2007-08 was accompanied by the requisite statements required to be furnished under the relevant statutory provisions. The statement of the depreciation

claimed by the assessee under the provisions of the Act contained separate columns in respect of the depreciation claimed by the assessee for building, plant and machinery, vehicles, windmills, etc. The statement clearly showed that the assessee had claimed depreciation at the rate of 80 per cent. and additional deprecation at the rate of 10 per cent. in respect of the windmill. The claim for depreciation had been allowed during the course of scrutiny assessment after verification of all the details. There was no failure to disclose material facts. Hence, the notice was not valid.(AY .2007-2008)
Rantnamani Metals and Tubes Ltd. v. Dy. CIT (2015) 371 ITR 301 (Guj)(HC)

S. 147 : Reassessment- After the expiry of four years-Assessing Officer in original assessment opining that assessee engaged in shipping and allowing deduction under section 33AC-Application of mind by Assessing Officer in original assessment-Reopening of assessment on basis of letter of Commissioner (Appeals) containing identical facts stated by assessee-Not valid. [S.33AC,148.]
Assessment was completed u/s 143(3) allowing the claim of deduction u/ s 33AC. The AO issued the notice for reassessment on the basis of letter of CIT(A) containing the identical facts. The assesse challenged the said notice by filing the writ petition .Allowing the petition the Court held that the reopening notice was issued by the Assessing Officer on the basis of the letter of the Commissioner (Appeals), wherein he had extracted the very information as furnished by the assessee in regard to the nature of its business in shipping. This disclosure was in fact identical to the disclosure as made by the assessee in response to the notice of the Assessing Officer under section 142(1) which raised various queries in the course of assessment proceedings for the assessment year 2000-01. Therefore, the Assessing Officer's attempt to reopen the assessee's assessment on the assessee`s own disclosure could in no manner be termed an appropriate exercise of his jurisdiction and authority under section 147 so to reopen the assessment beyond the period of four years as this could in no manner be said to be any failure on the part of the assessee to disclose fully and truly all the facts necessary for assessment. Hence, the notice was to be quashed and set aside.(AY. 2000-2001)
United Shippers Ltd. v. ACIT (2015) 371 ITR 441/ 230 Taxman 201/ 275 CTR 397/ 116 DTR 22 (Bom.)(HC)

S. 147 : Reassessment-After the expiry of four years- Export of computer-Reassessment was held to be bad in law.[S.80HHE, 143(3), 148]
When there was no failure on the part of the Assessee to fully and truly disclose all the material facts before the Assessing Officer during original scrutiny Assessment proceeding u/s 143(3), the re-opening of the completed assessment beyond four years is bad-in-law. (AY. 2003-04)
Donaldson India Filters (P) Ltd v. Dy. CIT(2015)371 ITR 87/ 274 CTR 73/ 229 Taxman 249(Delhi)(HC).

S. 147 : Reassessment-After the expiry of four years-Book profits-Alternative remedy no bar-Reassessment was held to be bad in law.[S. 115JA, 143(3),148]
There was no failure on the part of the assessee to disclose fully and truly all material facts in relation to determination of MAT liability under S.115JA. Also, such disclosed material facts were duly considered by the AO in making the assessment order under s.143(3). If all such circumstances are cumulatively considered, it is not appropriate to reject the present petition on the ground of availability of alternate remedy. Reopening of assessment was therefore not sustainable.
Crompton Greaves Ltd. v. ACIT (2015) 275 CTR 49 / 114 DTR 153 / 229 Taxman 545 (Bom)(HC)

S. 147: Reassessment- After the expiry of four years-Export business - Computer software-Reassessment was held to be not valid [S.80HHE, 148]
Assessing Officer issued notice under section 148 for reassessment regarding adoption of incorrect turnover by assessee-company while computing deduction under section 80HHE which resulted in excess claim. Where assessing authority had no fresh material and it was drawing conclusion and inferences from same material that had been scrutinized in original assessment proceedings, reopening of assessment after five years was not tenable .(AY. 2003-04)

Donaldson India Filters Systems (P.) Ltd. v. Dy. CIT (2015)371 ITR 87 / 274 CTR 73 / 229 Taxman 249/114 DTR 217 (Delhi)(HC)

S. 147 : Reassessment-After the expiry of four years- Income deemed to accrue or arise in India - Business connection- -DTAA-India- Australia.[S.9(1)(i), 148, Art. 11(2)]
Assessee was a tax resident of Australia. It declared interest income mainly from investment and offered same for taxation at rate of 15 per cent taking benefit of article 11(2). Revenue sought to reopen assessment after four years on ground that tax was to be levied at rate of 40 per cent. On writ the Court held that since there had been no failure on part of assessee to make a full and true disclosure for making assessment, notice under section 148 should be quashed . (AY. 2006-07)
Standard Chartered Grindlays (P.) Ltd. .v. Dy. DIT (2015)228 Taxman 199 (Mag.) (Delhi)(HC)

S. 147 : Reassessment - After the expiry of four years-Claim for deduction of royalty considered and partly allowed in original assessment-Reassessment proceedings to disallow entire expenditure –Reassessment was held to be not valid. [S.37(1), 148]
Allowing the petition the Court held that; during the original assessment proceedings, the assessee had clearly indicated the nature of the royalty payments. The Assessing Officer had specifically asked in his questionnaire as to the nature of the royalty payments and the assessee was asked to justify them. Upon further information provided by the assessee, the Assessing Officer considered the aspect of royalty payment and also noted the fact that the assessee had claimed it as revenue expenditure and disallowed a part. Hence, the reassessment proceedings after four years to disallow the entire claim were not valid and were set aside along with the consequential orders.(WP(C) NO 13896/09, CM NO 15790/09dt.25-9-2014) (AY. 2002-2003)
Oracle India P. Ltd. .v. DCIT (2015) 370 ITR 91/114 DTR 228 / 229 Taxman 177 /276 CTR 40 (Delhi)(HC)

S. 147 : Reassessment–After the expiry of four years- No failure on part of assessee to disclose fully and truly all material facts necessary for assessment- Reasons for reopening based on assessment records - Reopening of assessment contrary to law. [S.148]
Allowing the petition the Court held that; the reasons for reopening the assessment beyond the four years indicated that, according to the Assessing Officer, it was from a perusal of the assessment records it was revealed that during the previous year, the assessee had not carried out any manufacturing or trading activities and that the assessee had given its plant and machinery and land and building on lease, while claiming depreciation which, according to the Assessing Officer, was not allowable. There was not even an averment in the reasons to the effect that the assessee had failed to fully and truly disclose all material facts necessary for the assessment, it was evident that the reasons for reopening were based on the assessment records. Hence, there was no failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment, and hence, the jurisdictional condition for reopening an assessment beyond the four years had hence not been fulfilled. Hence, the notice was quashed and set aside.(AY. 2007-2008)
ACI Oils P. Ltd. .v. DCIT (2015) 370 ITR 561 (All.)(HC)

S. 147 : Reassessment–After the expiry of four years–Method of accounting-No failure on part of assessee - Assessing Officer disagreeing with audit objection yet issuing notice –Reassessment was held to be not valid.[S. 145,148]
Allowing the petition the Court held that; the assessee did not have any opening stock on April 1, 2005. By virtue of a business transfer agreement dated February 19, 2005, it received a stock valued at Rs. 19,90,92,944 from HM which became its initial stock in the year in question. There were additions to the stock and the difference between the initial stock and the closing stock at the end of the year, that is, on March 31, 2006, came to Rs. 5,76,42,819. This had been reflected in the profit and loss account as the sum had been reduced from the expenditure, the clear implication of which was that the income has been increased by the amount of Rs. 5,76,42,819. Therefore, there had been no failure on the part of the assessee to make a full and true disclosure of the material facts pertaining to the closing stock and that the allegation raised by the Revenue was not borne out by the record. Also, the Assessing Officer believed that no income had escaped assessment and he had disagreed with the

audit objection. Even then he went on to issue the notice under section 148. This could not be countenanced in law. Hence, the notice as well as the order were quashed. (AY.2006-2007)
AVTEC Ltd. .v. DCIT(2015) 370 ITR 611/ 229 Taxman 440/122 DTR 131 (Delhi)(HC)

S. 147 : Reassessment –After the expiry of four years - Notice on basis that disallowance of interest paid on borrowings for subsequent year - No indication in reasons that assessee failed to disclose truly and fully material facts necessary for assessment - Notices not valid.[S.36(1)(iii), 148]
Allowing the petitions, the Court held that; the notices were issued to the assessee beyond the period of four years and the reasons did not indicate even remotely any failure on the part of the assessee to disclose truly and fully material facts necessary for assessment. The reasons proceeded on the basis that for the subsequent assessment year, the Assessing Officer had held the interest paid on borrowings was capital in nature and, therefore, not allowable as expenditure and that consequently, income chargeable to tax had escaped assessment. However, the reasons nowhere indicated any failure on the part of the assessee to disclose truly and fully material facts necessary for assessment. Thus, the notices being without jurisdiction could not be sustained. (AY. 1998-1999, 1999-2000)
Business India .v. DCIT(2015) 370 ITR 154/299 Taxman 289 (Bom.) (HC)

S. 147 : Reassessment –After the expiry of four years -Interest payments allowed after enquiry in original assessment-Reassessment was held to be not valid.[S.40A(2),148]
Dismissing the appeal of revenue the Court held that; the Tribunal had specifically recorded the finding that the assessee did furnish the relevant information asked for by the Assessing Officer. The assessee had explained the reasons for the higher interest which had been accepted by the Assessing Officer during original assessment proceedings. The reassessment proceedings after four years were not valid.(AY 2003-2004)
CIT .v. Asia Tubes (2015) 370 ITR 414 /229 Taxman 294(Guj.) (HC)

S. 147 : Reassessment–After the expiry of four years-Depreciation- offshore platform-Plant and machinery-Reassessment was held to be not valid. [S.32, 148]
The assessee was a non-resident company deriving income from the business of exploration, prospecting, production and marketing of natural gas and mineral oil. In the original assessment proceedings the AO allowed depreciation at 25% on off shore plat form treating the same as Plant and machinery .Thereafter the Assessing Officer issued notice under section 148 seeking to reopen the assessment of the assessee on the ground depreciation is at the rate of 25 per cent on construction of "offshore platform" was valued though offshore platform was not a plant and machinery in itself and it could therefore, correctly be classified under the Block of assets "Building" on which depreciation at the rate of 10 per cent was allowable. On writ allowing the petition the Court held that ,where assessee disclosed full and complete facts and at time of original assessment all these details were examined, merely because there was some error earlier on part of Assessing Officer himself or because he chose not to opine on issue and interprets material or law otherwise than what was done by him, reassessment was held to be bad in law. In any case this being the reopening beyond the period of 4 years in absence of any material to indicate the failure on the part of the assessee to disclose fully and truly all material facts, when the assessee had discharged onus of having revealed the primary facts, on jurisdictional ground itself, notice must fail. Accordingly petition succeeds with all consequential relief. (AY. 2005-06)
Niko Resources Ltd. .v. ADIT (2015) 229 Taxman 86 (Guj.)(HC)

S.147:Reassessment-After the expiry of four years-Expenditure on advertisement-Failure to disclose all material facts was not mentioned in the recorded reasons-Reassessment was held to be not valid. [S.37(1)148]
Allowing the petition the Court held that; Reassessment was initiated after four years on the ground that advertisement expenses were wrongly allowed. The assesse challenged the reassessment proceedings .Allowing the petition the Court held that reasons supplied do not state that there was any failure on the part of the assesse to provide material particulars .Grounds that the assesse had failed to disclose all the relevant material was not incorporated in the reasons supplied to the assesse and

therefore the AO had no jurisdiction to proceed with the impugned reassessment proceedings .(AY. 2005-06).

Tao Publishing (P) Ltd..v. Dy.CIT (2015) 370 ITR 135/114 DTR 72/228 Taxman 371(Mag.)(Bom.)(HC)

S. 147:Reassessment-After the expiry of four years-Non application of mind-Change of mind-Capital or revenue-Management fee-The notice should not be in a standard format but indicate why reassessment has been resorted to. The term "failure to disclose material facts" has a specific legal connotation-Reassessment was quashed. [S.37(1)]

The assesse challenged the reassessment notice issued under section 148. Allowing the petition the court held that ☹i) We have noted, on several occasions, that notices of this nature are issued in a standard format and often the officers merely fill in the blanks or tick mark whatever is applicable. We would highly appreciate if the department draws a notice not in this format, but something by which it would be clear in indicating to the Assessee as to why section 147 of the IT Act has been resorted to.

(ii) We are sorry to see such non application of mind and which is apparent …. In the present case, when the Revenue alleges failure to make full and true disclosure of material facts, then, the term failure has some specific legal connotation. Here, material facts are pertaining to the expenses under the head “management fees”. It is apparent that the words employed are material facts. It is not just facts but material facts. The word “material” in the context means “important, essential, relevant, concerned with the matter, not the form of reasoning” (see Oxford Dictionary Concise Eighth Edition). Just as disclosure of every fact would not suffice but for proceeding under section 147 non disclosure ought to be of a material fact. The Assessee disclosed that loss under this head is derived from the acquisition of two centers. If that is known to the Revenue in this case, then, what further facts were expected to be disclosed so as to make the assessment has not been indicated. It is not enough to allege that there is a distortion of facts and as per the convenience of the Assessee. On facts the court held that there was no failure to disclose material facts the AO in the original assessment proceedings has applied his mind and allowed the expenditure as revenue in nature , hence reassessment was held to be invalid. (AY.2007-08)

Tata Business support Services Ltd. v. DCIT(2015) 121 DTR 222/ 232 Taxman 702 (Bom)(HC)

S.147:Reassessment-Business expenditure-Audit objection- Reapoening was held to be not justified. [S. 37(1), 148]

Assessing Officer reopened assessment only on objection raised by audit party regarding allowance of repairs on spare parts as revenue expenditure. Dismissing the appeal of revenue the Court held that , where Assessing Officer simply followed objections raised by audit party and did not record his independent satisfaction, reopening of assessment was unjustified. (AY. 2000-01 to 2002-03)

CIT .v. DRM Enterprises (2015)230 Taxman 61/ 120 DTR 401(Bom.)(HC)

S.147:Reassessment-Income from other sources Sworn statement was not furnished to the assessee before reassessment- Reassessment proceeding was quashed.[S.56, 148]

Assessing Officer initiated reassessment proceedings on ground that assessee purchased certain shares out of income that escaped assessment and same was liable to tax under head 'Income from other sources' . However, reassessment was initiated on basis of sworn statement given by a person regarding said transaction and copy of same was not furnished to assessee before reassessment. On writ the Court held that reassessment was held to be not justified. (AY. 2009-10)

Devichand Kothari (HUF) v.ITO (2015) 230 Taxman 301 (Karn.)(HC)

S.147:Reassessment-Export business–Supporting manufacturer- As the reassessment proceedings against manufacturer was quashed, reassessment proceedings against the assessee was also quashed. [S. 80HHC, 148]

Assessees were supporting manufacturer who supplied goods to 'A' for purpose of export. Benefits under section 80HHC was allowed to 'A' and also to assessees on basis of disclaimer certificate issued by 'A'. Notice under section 148 was issued to 'A' for denying benefit under section 80HHC on certain ground . Reopening notice was also issued in case of assessees on ground that in absence of

benefit of section 80HHC being available to 'A' it was not in position to issue a disclaimer certificate. However, notice issued in case of 'A' was set aside as being without jurisdiction . Allowing the petition the Court held that view of this fact, notices issued in case of assessees also did not survive. (AY.2000-01)

Frigorifico Allana Ltd. v. ITO (2015) 230 Taxman 435 (Bom.)(HC)

S.147:Reassessment-Export business –Supporting manufacturer-As the reassessment proceedings against manufacturer was quashed, reassessment proceedings against the assessee was also quashed. [S. 80HHC, 148]

Assessees supporting manufacturer supplied goods to one 'A' for purpose of export and claimed benefit under section 80HHC on basis of disclaimer certificate issued by 'A'. Assessing Officer issued notice under section 148 on ground that in absence of benefit of section 80HHC being available to 'A', assessees were not in a position to availed benefit of section 80HHC Where notice under section 148 issued to assessees on basis of re-opening notice issued to 'A' which was found to be without jurisdiction, impugned notice issued to assessees was to be set aside.(AY. 1999-2000)

Allana Cold Storage Ltd. v. ITO (2015) 230 Taxman 87 (Bom.)(HC)

S.147: Reassessment-Export business –Merger- Reassessment proceeding was quashed.[S. 80HHC]

Assessee, engaged in export of diverse commodities, claimed deduction of Rs. 5 crores under section 80HHC . Assessing Officer restricted benefit to Rs. 3.98 crores . On appeal, Commissioner (Appeals) granted certain relief which resulted in making available deduction of Rs. 4.83 crores under section 80HHC to assessee - Thereafter Assessing Officer without giving effect to order of Commissioner (Appeals) issued notice under section 148 to recompute deduction under section 80HHC on certain ground. On writ allowing the petition the Court held that ;as assessment order would stand merged/modified in/by order passed by Commissioner (Appeals), Assessing Officer ought to have considered modified figures of deduction while applying his mind to reach prima facie view that income chargeable to tax had escaped assessment. Even otherwise since very issue which formed reason for issuing notice was a subject-matter of consideration in assessment order, impugned notice was not sustainable.(AY. 1999-2000)

Allanasons Ltd. v. ACIT (2015) 230 Taxman 436 (Bom.)(HC)

S.147:Reassessment-Transfer-Reassessment on the basis of amendment was held to be invalid . [S.2(47)(v)]

Amendment with effect from 1-4-1988 by Finance Act, 1987 enlarging scope of word 'transfer' used in section 2(47)(v) was not retrospective in nature and, therefore, re-opening of assessment for assessment year 1977-78 on basis of said amendment was invalid.

Narayan Construction Co. v. ACIT (2015) 230 Taxman 316 (Guj.)(HC)

S. 147:Reassessment –Within four years-Reassessment order passed with a period of 4 weeks from the date of disposal of objection was liable to be quashed - Notice – At the time of issue of notice, AO must have only a prima facie view and not a final / concluded view. [S. 80IB, 148]

The AO sought to reopen on the ground that the claim u/s 80IB was incorrectly allowed since the audit certification in Form 10CCB was issued by an accountant other than the one who audited the accounts and the date of commencement of production mentioned was prior to the date of issue of Factory License by the competent authority. The Assessee had not declared during the course of original assessment that it had not received the factory license. Thereafter the AO passed the order u/s 143(3) r.w.s 147 within 4 weeks of passing of the order disposing of the objections raised by the Assessee against the reopening. Consequent to the writ filed by the Assessee, the HC quashed the reassessment order since the AO did not wait for a period of 4 weeks as stipulated by the Bombay HC in the case of Asian Paints Ltd. v. DCIT. However, the HC upheld the reopening notice since the AO had a prima facie view that the income had escaped assessment and date of commencement of production required further investigation. The AO was not required to have a final / concluded view at the time of issue of notice.(AY. 2005-06)

Raman & Weil (P) Ltd. v. DCIT (2015) 117 DTR 57 /231 Taxman 395 (Bom.)(HC)

S. 147: Reassessment - Change of opinion –Notice can be sustained only on grounds mentioned in recorded reasons-Bad debts allowed in original assessment after considering material on record-Reassessment proceedings to disallow the claim as capital loss –Held to be not valid.[S.36(2), 148]

Dismissing the appeal of revenue the court held that; during the original assessment proceedings itself the issue of bad debts was investigated by the Assessing Officer by raising a specific query with regard to the bad debts of Rs. 1.35 crores. Reassessment proceedings to consider the amount as a capital loss were not valid, as they were based on a mere change of opinion of the Assessing Officer. The power of reassessment is not a power to review an assessment order. At the time of passing the assessment order ,it is expected of the Assessing Officer that he will apply his mind and pass an order. If the Assessing Officer had considered and formed an opinion on the material in the original assessment itself he would be powerless to start the proceedings for reassessment. (AY. 2005-2006)

CIT v. Jet Speed Audio P. Ltd. (2015) 372 ITR 762 /230 Taxman 430 (Bom.)(HC)

S.147:Reassessment- Change of opinion-Depreciation- Non –compete fees- Intangible assets-Good will- - Reassessment was held to be not valid.[S. 32, 148]

Where assessee's claim of depreciation on non-compete fees was accepted by Assessing Officer in regular assessment after considering details furnished by assessee in response to queries raised by Assessing Officer, notice issued for reassessment on change of opinion was not sustainable.(AY. 2002-03)

Godrej Agrovet Ltd. v. CIT (2015) 230 Taxman 633 (Bom.)(HC)

S.147:Reassessment-Change of opinion–All particulars were before the AO in the original assessment proceedings–Reassessment was held to be not valid.[S. 10A,148]

Assessee company was engaged in the business of development and export of software. Assesesee Company claimed deduction u/s 10A of the Act for its units II & III without setting off losses of unit IV from the Profits derived by the eligible units. The assessment was completed u/s 143(3). The AO invoked provisions of s/147 of the Act as the income of Rs.5,14,12,534 was chargeable to tax has escaped assessment. Assessee filed Writ Petition challenging the order of the AO. The Hon'ble HC allowed the WP of the assesee and held that Respondent cannot justify the issuance of the notice u/s 148 by referring to details including of the claim of deduction u/s10A. All the particulars and profits were before the AO at the time of original assessment. A different opinion is now held by the respondents and for which they want to reopen the assessment. Such a course was clearly impermissible. **(**AY. 2007-08)

Capgemi India (P) Ltd.v.ACIT (2015) 232 Taxman 149 / 120 DTR 1 (Bom.)(HC)

S. 147 : Reassessment-Change of opinion—Capital gain-Re-compute capital gain was held to be not valid.[S.45, 48, 55, 148].

On appeal the Court held that , with reference to the assessment year 1989-90 the notice for reassessment simply relied upon the assessment order for the assessment year 1990-91 to observe that the cost of acquisition as shown by the assessees was wrong. In other words, the plea and stand of the Revenue was that erroneous and incorrect computation was made, relying upon the reasoning in the assessment orders for the assessment year 1990-91. This would fall in the category of "change of opinion" as the "reason to believe" proceeded on the premise that the opinion formed in the original assessment orders was wrong or erroneous. The reassessment proceedings were not valid.(AY. 1989-1990.)

Prabhu Dayal Rangwala v. CIT (2015) 373 ITR 596 / 231 Taxman 790 (Delhi) (HC)
Indulata Rangwala v. CIT (2015) 373 ITR 596 (Delhi) (HC)

S. 147: Reassessment - Time limit for notice –For a valid reopening, it is necessary that the notice is issued within the period of limitation, is served on the Assessee and reasons to believe were recorded and sanction was duly obtained by the AO. [S.148,149, 292B]

Three notices u/s 148 were issued by the AO, dated 24-03-2005, 28-03-2005 and 17-06-2005. The last date for issuance of notice u/s 148 was 31-03-2005. The HC quashed the reassessment proceedings on

the basis that the first notice was invalid because no reasons to believe were recorded nor sanction order was obtained by the AO. The second notice returned unserved and as per provisions of s. 148, service of notice is necessary for an AO to assume jurisdiction. The third notice was issued after the period of limitation and hence was not a valid notice. Reliance by the Tribunal that the notice dt.17-06-2005 was in fact a notice 28-03-2005, which was a curable defect u/s 292B is totally misplaced. S.292B has no application in the instant case. The notice dt.17-06-2005 could not be treated as notice dt.28-03-2005 or a notice in continuation of notice dt.28-03-2005. (AY. 1998-99)
Lal Chand Agarwal v. CIT (2015) 116 DTR 65 (All.)(HC)

S.147:Reassessment–Additional details sought or verification proposed to be done cannot be a substitute to reasons for re-opening. [S. 143(1),148]
The assessee is a private limited company and while filing its return of income, added back an amount being book value of shares transferred as gift to its business income. The AO accepted the returned income and losses carried forward u/s. 143(1). However subsequently it issued notice u/s. 147 and provided reasons recorded for reopening but did not give an opportunity to the assessee to file its objections. The assessee produced its objections which were rejected.
The High Court observed that the revenue did not state that any income had escaped assessment and all the revenue wanted to do was verify certain details pertaining to a gift. The High Court held that merely for verification of the value of shares and whether the computation was made at market rate, etc. the revenue could not resort to section 147. (AY. 2010-2011)
Nivi Trading Ltd. v.UOI (2015) 118 DTR 339 (Bom.)(HC)

S. 147 : Reassessment–Notice–Having participated in the proceedings not specifying the period in the notice will not viatiate the reassessment proceedings- Reassessment was held to be valid. [S.148, 292B]
The assessee was issued a notice under section 148 by the Assessing Officer for the assessment year 1997-98 .The said notice was issued after the expiry of four years from the end of relevant assessment year. In response, the assessee placed a letter on record stating that the return of income filed by him for the assessment year 2001-02, to be treated as the return of income filed for the assessment year 1997-98, hence, assessee did not file any separate/independent return of income.
Admittedly, in the notice, period was not specified for furnishing return of income and the same was not challenged by the assessee also. The assessee participated in the proceedings till the assessment order was passed by the Assessing Officer.
In appeal before the Commissioner (Appeals), the assessee did not raise this ground of limitation. The Commissioner (Appeals) dismissed the appeal on merits.
In the second appeal before the Tribunal, for the first time the assessee in the memorandum of appeal raised the ground that the condition precedent being absent, the reopening of assessment under section 148 was bad in law. The Tribunal held that the notice was bad in law since it did not specify the time within which the assessee was called upon to file return of income.
On appeal: Allowing the appeal of revenue the Court held that;In the instant case, as observed earlier, the assessee not only responded to the notice under section 148 within one month, but on the basis of the return filed earlier, participated in the proceedings till the matter reached the Commissioner (Appeals) and was disposed of. A glance at section 292B, shows that under this provision, certain Acts are not be treated as invalid, may be by reason of any mistake, defect or omissions, either in return of income, assessment, notice, summons or other proceedings. A notice cannot be invalidated by reason of any mistake, such as the one occurred in the present case, namely, the period of filing return of income was not specified as contemplated by section 148. If such a defect is not allowed to be cured, or treated as invalid so as to declare the notice invalid, despite the fact that assessee had taken that notice as valid and responded to it in letter and spirit and participated in the proceedings, the very purpose/objective of the provisions contained in section 292B would stand frustrated/defeated. The intent of the Legislature is clear from the language employed in this provision which states that a defective notice, such as the one in the instant case, cannot be declared invalid by reason of any mistake, defect or omission, if the notice in 'substance' and in 'effect' is in conformity with or according to the intent of purpose of this Act. The intent or purpose of issuing the notice is to call upon the assessee to file return, if the Assessing Officer finds that income has escaped the

assessment. It stands satisfied if the notice is responded within reasonable time, which in the instant case was 30 days, irrespective of the fact whether the period was specified or not in the notice for filing return of income. In the instant case, if the assessee had not responded to this notice at all and had raised such ground of challenge, perhaps, he would succeed. But having responded and participated in the proceedings, he cannot be allowed to turn around and raise objection for the first time before the Tribunal seeking invalidation of the proceedings initiated by issuing notice under section 148. In the circumstances, the instance appeal was allowed answering both the substantial question of law in favour of the revenue and against the assessee. (AY. 1997-98)

CIT .v. Sri Durga Enterprises (2015) 231 Taxman 886 (Karn.)(HC)

S. 147 : Reassessment-Alternative remedy-Issue raised by the assessee could also be urged by way of a reply notice and appeal, writ petition was held to be not maintainable. [S 2(47) 148, Art.226]

Assessing Officer issued notice dated 25-3-2013 called upon assessee intimating that assessable tax of year 2007-08 had escaped assessment within meaning of section 147. Petitioner challenged the notice by filing writ petition and contended that reassessment notice dated 25-3-2013 had been issued only on 9-4-2014 and, therefore, same was beyond limitation. Revenue, however, denied allegation made by petitioner submitting that notice was issued in time, but received belatedly by petitioner and, thus, there was no fault on part of department. Dismissing the petition the Court held that since issues raised by petitioner could also be urged by way of a reply to notice, writ petition should fail. .(AY. 2007 – 08)

S. Balasubramanian Adityan .v. Dy. CIT (2015) 231 Taxman 56 (Mad.)(HC)

S. 147 : Reassessment-Depreciation–Windmill-Change of opinion- Reassessment was held to be in valid. [S.32]

Assessing Officer in his assessment order examined petitioner's claim of depreciation on Windmill electric generator and granted 50 per cent depreciation . AO issued reassessment notice. On writ the court held that re-opening of assessment on ground of wrong charge of depreciation was a mere change of opinion and, hence, unjustified.(AY. 1998-99)

ICICI Bank Ltd. .v. Dr. Ramsingh, Dy. CIT (2015) 231 Taxman 796 (Bom.)(HC)

S.147:Reassessment-Change of opinion-Business expenditure-Royalty- Capital or revenue-Reassessment was held to be bad in law.[S.37(1)]

The assessee had made payment of royalty for technology transfer and patent license which was claimed entirely as revenue expenditure.

The Assessing Officer allowed the expenditure as claimed.

Subsequently, the Assessing Officer reopened assessment on the ground that in view of judgment of the Supreme Court, part of the royalty was to be treated as capital expenditure and, therefore, to that extent there was underassessment of income.On writ; allowing the petition the court held that; when it was established that Assessing Officer and Transfer Pricing Officer were not only aware of payment of royalty but had taken same into consideration at every stage and Assessing Officer infact expressly called for said information, reopening of assessment was clearly based on change of opinion which is not permissible in law . (AY. 2006-07)

Mitsubishi Electric Automotive India (P.) Ltd. .v. UOI (2015) 377 ITR 266 / 231 Taxman 343 (P&H)(HC)

S.147:Reassessment-Housing projects-Reassessment proceedings could not be initiated to re-examine assessee's claim afresh. [S.80IB(10)]

Assessing Officer allowed the deduction after making detailed enquiries .The Assessing Officer initiated reassessment proceedings.TheAssessee filed instant writ petition challenging initiation of reassessment proceedings. Allowing the petition the Court held that ; it was noted that assessee's claim of deduction came up for scrutiny by Assessing Officer in original assessment proceedings. Moreover, Assessing Officer had disallowed claim to extent he was convinced that same was exaggerated. In view of above, if Assessing Officer had any doubt about basis of claim itself, same

could have been examined at time of completion of assessment proceedings. therefore, reassessment proceedings could not be initiated to re-examine assessee's claim afresh. (AY. 2009-10)
Sarla Rajkumar Varma .v.ACIT (2015) 231 Taxman 889 (Guj.)(HC)

S 147:Reassessment-Industrial undertakings- Factory licence was issued after commencement of business- Reassessment was held to be justified. [S.80IB(4)]
The assessee-company had claimed deduction under section 80IB(4) for its two units situated at Daman. An assessment order was passed under section 143(3).It was found that in the 10CCB certificate, date of commencement of unit-II had been shown as 22-3-2004. However, the factory licence was issued on 22-4-2004 by the Chief Inspector of Factories, Daman.
Thereafter, the Assessing Officer sought to reopen the assessment by holding that the assessee's claim of deduction under section 80IB was not in order and had resulted in income escaping assessment within the meaning of section 147.The assessee contended that they had commenced manufacturing activity during the relevant previous year and in support thereof produced licence given by the Drug Authorities, registration with Excise Authorities, sales tax Authorities, etc. It was also contended that the impugned notice was on account of mere change of opinion.
The Assessing Officer rejected the assessee's objections to the reasons for reopening of the assessment.
On writ: dismissing the petition that initiation of re-assessment proceedings on basis of prima facie view that assessee might not have started manufacturing during relevant year which would disentitle assessee from claiming deduction, was justified. (AY. 2005-06)
Raman & Weil (P.) Ltd. .v. Dy.CIT (2015) 231 Taxman 395 (Bom.)(HC)

S. 147 : Reassessment –Objection- Assessing Officer cannot proceed with the reassessment proceedings without disposing the objection of assessee by passing speaking order.[S. 142,148]
Assessee-company filed return of income which was taken in scrutiny assessment and same was finalized. Assessing Officer issued notice for reopening assessment. Assessee raised his objections and contended that a speaking order needs to be passed before proceeding with assessment. Assessing Officer observed that such objections would be decided at time of assessment order. He initiated reassessment proceeding On writ since Assessing Officer continued with reassessment proceeding without disposing of assessee's objections by passing a speaking order, matter was to be relegated to Assessing Officer.(AY. 1999-2000)
Torrent Power SEC Ltd. .v. ACIT (2015) 231 Taxman 881 (Guj.)(HC)

S. 147:Reassessment-No information received by Assessing Officer during the course of reassessment proceedings regarding escapement of commission income - Assessing Officer could not have formed opinion it has escaped assessment - Reasons to believe did not record the factum of escapement of commission –Reassessment is not valid.[S.148]
Held, it was not the case of the Assessing Officer that during the course of proceedings under section 147, he came across any material relating to the payment of commission suggesting escapement of income under any of the heads. On the other hand, the Commissioner (Appeals) had given a categorical finding that the assessee had claimed as expenditure the commission of Rs. 58,59,913 in its trading and profit and loss account and this was available on the record. Consequently, in the absence of any information having been received by the Assessing Officer regarding the escapement of commission income during the course of proceedings under section 147 he could not have formed an opinion on this issue that it had escaped assessment. Further, the reasons to believe did not record the factum of escapement of commission. (AY. 1999-2000)
CIT .v. Barnala Steel Industries Ltd. (2015) 375 ITR 281 (All.)(HC)

S. 147:Reassessment-Survey report and other materials not indicating any income chargeable to tax has escaped assessment - Nothing before Assessing Officer to record belief that escapement has taken place - Reasons recorded prior and subsequent to survey not satisfying requirement of law - Notice is not valid. [S. 133A,148]
There was an allegation that there was a group of assessees engaged in whole sale trading of potato on commission basis. The authorities conducted a survey on the basis of the allegation that the group of

assessees were resorting to hoarding of potatoes and making huge profits by fluctuating the day-to-day price of potatoes in the market. The authorities physically verified the assessee's manual books of account, cash balance, stock, etc. and prepared inventory. The authorities impounded the back up of the books of account maintained on computer for further verification. The details of the group's bank accounts were obtained. Notices under section 148 were issued to the assessee for the assessment years 2009-10 to 2011-12. On writ petitions contending that there were no reasons much less leading to a belief that income chargeable to tax has escaped assessment, that the survey report was made the basis for reopening the assessment and for the assessment years 2009-10, 2010-11 and 2011-12, that the survey was stated to be of January 7, 2011, that in the circumstances, there was no satisfaction recorded that any income chargeable to tax had escaped assessment and as pointed out in the survey report or from such other relevant material and that, therefore, the notices were ex facie bad in law and the proceedings in pursuance thereof were totally without jurisdiction:

Held, allowing the petitions, that neither the survey report nor any other material indicated that any income chargeable to tax for the relevant assessment years had escaped assessment. The Assessing Officer, therefore, had nothing before him which would enable him to record his belief that any such escapement had taken place. Notice was held not valid.(AY. 2009-2010 to 2011-2012)

Hemant Traders v. ITO (2015) 375 ITR 167 (Bom.)(HC)

S. 147:Reassessment-Reason must be based on direct or circumstantial evidence – Reason to believe and not reason to suspect-Cash seized from assessee - Explanation for possession of cash accepted by income-tax authorities - Notice on ground that amount represented undisclosed income - Notice based on suspicion and surmise - Notice is not valid.[S. 148]

The assessee was a company registered under the Companies Act. According to the assessee, on January 5, 2012, Anil Kumar Dhir, one of the directors of the assessee, who was also a director of Krown Agro Foods Pvt Ltd was carrying Rs. 5 lakhs from Delhi to Ghaziabad. Both companies had separate factories at Ghaziabad and head offices in Delhi for payment of wages and other normal expenses on the factories. This amount allegedly consisted of withdrawals made on January 3, 4, 2012, of Rs. 4 lakhs, i.e. Rs. 2 lakhs from each of the bank accounts of the company in Delhi and Rs. 1 lakh from cash balance from the books of Krown Agro Foods Pvt Ltd. According to the assessee, in the beginning of February, 2012, elections were to be held for the U. P. State Assembly, the Election Commission had issued instructions that if cash of more than Rs. 2,50,000 was found with any person, the cash may be seized and enquiry made whether this cash was for distribution amongst the voters. Anil Kumar Dhir, was stopped by the U. P. Police on the border of Delhi and U. P. and as cash of Rs. 5 lakhs was found, this amount was seized. His statement was recorded by the Deputy Director of Income-tax (Investigation-I), Ghaziabad, before whom the relevant copies of the bank accounts and extract of cash books were produced. The authorities initiated proceedings under section 153C, for the assessment years 2006-07, 2007-08, 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13. However, during the assessment proceedings, it was noticed that the company was incorporated on July 18, 2008, and, therefore, proceedings under section 153C for the assessment years 2006-07, 2007-08 and 2008-09 were dropped. The proceedings were also dropped for the assessment years 2009-10, 2010-11 and 2011-12 as no incriminating information was received for proceeding under section 153C. Thereafter, a notice was issued under section 148 on Krown Agro Foods Pvt Ltd. on the ground that an amount of Rs. 2 lakhs had escaped assessment. On a writ petition to quash the notice:

Held, the reasons to believe recorded did not show on what basis the Assessing Officer had formed a reasonable belief that the amount of Rs. 2 lakhs had escaped assessment. It was apparent that the Assessing Officer suspected that the income had escaped assessment. The notice of reassessment was not valid and was liable to be quashed. The requirement of law is “reason to believe” and not reason to “suspect”. (AY. 2012-2013)

Krown Agro Foods P. Ltd. v. ACIT (2015) 375 ITR 460 (Delhi) (HC)

S. 147 : Reassessment-Recorded reasons must be furnished to the assesse- If Department behaves in an irresponsible manner and does not furnish the record reasons on the basis that the assessee was already aware of them, the assessment has to be quashed.[S. 143(1),148]

(i) It is axiomatic that power to reopen a completed assessment under the Act is an exceptional power and whenever revenue seeks to exercise such power, they must strictly comply with the prerequisite conditions viz. Reopening of reasons to indicate that the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment which would warrant the reopening of an assessment.
(ii) These recorded reasons as laid down by the Apex Court must be furnished to the assessee when sought for so as to enable the assessee to object to the same before the Assessing Officer. Thus in the absence of reasons being furnished, when sought for would make an order passed on reassessment bad in law. The recording of reasons (which has been done in this case) and furnishing of the same has to be strictly complied with as it is a jurisdictional issue. This requirement is very salutary as it not only ensures reopening notices are not lightly issued. Besides in case the same have been issued on some misunderstanding/ misconception, the assessee is given an opportunity to point out that the reasons to believe as recorded in the reasons do not warrant reopening before the reassessment proceedings are commenced. The Assessing Officer disposes of these objections and if satisfied with the objections, then the impugned reopening notice under Section 148 of the Act is dropped/withdrawn otherwise it is proceeded with further. In issues such as this, i.e. where jurisdictional issue is involved the same must be strictly complied with by the authority concerned and no question of knowledge being attributed on the basis of implication can arise. We also do not appreciate the stand of the revenue, that the respondent-assessee had asked for reasons recorded only once and therefore seeking to justify non-furnishing of reasons. We expect the state to act more responsibly.(ITA No. 1867 of 2013, dt. 16.09.15) (AY. 2008-09)
CIT .v. Trend Electronics (Bom.)(HC) ; www.itatonline.org

S. 147: Reassessment-Failure by AO to comply with the law in G. K. N. Driveshafts(India)Ltd..v.ITO (2003) 259 ITR 19 (SC), and pass order on objections renders assessment order void; Even assessment U/s.143(1) assessment cannot be reopened in the absence of new/ tangible material.[S. 40(a)(ia),143(1), 148]
(i) The Court is of the considered view that after having correctly understood the decision of the Supreme Court in G.K.N. Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC) as mandatorily requiring the AO to comply with the procedure laid down therein and to dispose of the objections to the reopening order with a speaking order, the CIT (A) committed an error in not quashing the reopening order and the consequent assessment;
(ii) Though only an assessment u/s 143(1) and not 143(3) was made, the reopening order of the AO only refers to the report of Statutory Auditor under Section 44AB of the Act which report was already enclosed with the return filed by the Assessee. Therefore, factually, there was no new material that the AO came across so as to have "reasons to believe that the income had escaped assessment".
(iii) The department's contention that the judgement in CIT vs. Orient Craft Ltd. (2013) 354 ITR 536 (Del) is contrary to the Full Bench verdict in CIT-VI v. Usha International Ltd. (2012) 348 ITR 485 and the issue should be referred to a larger Bench is not acceptable because the central issue examined in the decision of the Full Bench in Usha International Ltd. was as to what constituted a "change of opinion". The Court, therefore, does not consider the decision in Orient Craft Ltd. as being contrary to the decision in Usha International Ltd. In other words, there is no occasion for the Court to refer to a larger bench the question of the correctness of the decision in Orient Craft Ltd. which decision squarely applies to the facts of the present case. (ITA No. 415/2015, dt. 10.08.2015) (AY.2003-04)
Pr. CIT .v. Tupperware India Pvt. Ltd. (Delhi)(HC); www.itatonline.org

S. 147 : Reassessment-Audit objection—Notice was held to be not valid.[S. 148]
Allowing the petition, the Court held that the assessment was sought to be reopened at the instance of the audit party, solely on the ground of audit objections. It was also found that, the Assessing Officer tried to sustain his original assessment order and submitted to the audit party to drop the audit objections. The notice of reassessment was not valid..(SCA NO. 7140 dt. 30-7-2014) (AY. 2009- 10)
Raajratna Metal Industries Ltd. v. ACIT (2015) 371 ITR 222 (Guj.)(HC)

S. 147 : Reassessment–Change of opinion-Audit objection-Reassessment was held to be not justified.[S.40A, 44AB, 80HHC, 143(3),148]

Held that the belief has been borne only because of the primary facts (audit report) furnished by the assessee for the purpose of assessment of its income and other material information available on record. The details of payments made by the assessee to the persons specified in s.40A, audit report under s.44AB and the controversy in relation thereto were well within the knowledge of the AO who had passed the original order under s. 143(3) of the Act. The information regarding the assessee's claim under s. 80HHC was also filed along with the return of income in the form of CA certificate which was also referred by AO in his order under s.143(3) r/ws. 147 of the Act. By invoking the provisions of section 147, the successor AO has simply sat over the decision of the earlier AO passed u/s 143(3) in respect to issues sought to be covered u/s 147. Hence the CIT(A) was completely justified in annulling the reassessment order of successor AO. (TAl No. 343 of 2002 dt.5-12-2014)

Raymon Glues & Chemicals v. Dy.CIT (2015) 114 DTR27/ 231 Taxman 376 (Guj)(HC)

S. 147 : Reassessment – Recorded reasons-Where order disposing of objection raised by petitioner was beyond reasons recorded for reopening of assessment, Assessing Officer was to be directed to dispose of objections of petitioner to notice afresh keeping in mind reasons recorded for issuing notice under section 148.Matter remanded. [S. 143 (1), 148]

Return of income was processed under section 143(1). The Assessing Officer seeks to reopen the assessment.The petitioner objected to the reasons recorded for reopening of the assessment. In particular the petitioner sought information on the basis of which the Assessing Officer came to the conclusion that the purchases recorded by the petitioner were not genuine. The petitioner on facts submitted the purchases were genuine besides pointing out that there was no nexus between the information/material received by the Assessing Officer and the formation of belief that income chargeable to tax had escaped the assessment.

On writ petition:

In this case the order disposing of the objections refers to and relies upon investigation carried out by Sale Tax department, the information put up by Sales Tax department on it's website and the affidavit cum-declaration filed by the defaulting parties with the Sales Tax authorities. None of the above facts were even remotely adverted to in the grounds recorded for reopening the assessment. It is settled position in law that the validity of reopening of an assessment can only be tested by the reasons recorded at the time of issuing the notice for reopening an assessment. These grounds for reopening of assessment can neither be substituted and/or supplemented. The reopening of assessment will either stand or fall only upon the reasons recorded before issuing the impugned notice. Thus, the order disposing of the objection raised by assessee on relying on facts, which were not a part of the reasons recorded makes the same unsustainable in law.

Even when an assessment which had been earlier processed under section 143(1), the jurisdictional requirement for reopening an assessment is that the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment, must be satisfied. Besides where the proviso to section 147 is invoked, the additional requirement, viz., failure to disclose fully and truly all facts necessary for assessment should also be satisfied. Therefore, the decision relied upon by the revenue does not address the grievance of the petitioner. In view of the fact that the order disposing of the objections is beyond the reasons recorded for reopening the assessment. The order is set aside disposing of the objections. The Assessing Officer is directed to dispose of the objections of the petitioner to the impugned notice afresh keeping in mind the reasons, recorded for issuing the impugned notice. (AY. 2007-08)

Pransukhlal Bros. v. ITO (2015) 229 Taxman 444 (Bom.)(HC)

S. 147 : Reassessment-Enquiry before assessment – where in course of reassessment proceedings, AO sought certain details by issuing notice- Issue subject matter of appeal- Writ petition to stop the enquiry was held to be not maintainable. [S. 142(1), 143(3), 148]

For relevant assessment years, AO reopened the assessment in case of assessee. In course of reassessment proceedings, the AO issued a notice under section 142(1) seeking details on certain issues in dispute.The assessee filed instant writ petition contending that those issues were subject

matter of pending appeal from the original order of assessment under section 143(3) for the relevant assessment years. Therefore, in terms of the third proviso to section 147, the Assessing Officer could not enquire into the same during the reassessment proceedings.During the course of adjudication, the adjudicator is entitled to raise queries and it is open to the assessee as in this case to respond to the queries and point out it is not germane to adjudication and /or that it is not his jurisdiction to enquire into the aspects as suggested by the queries. The Assessing officer/Adjudicator is duty bound to consider the response and apply the law as it stands.There is no bar to the assessee pointing out all objections in writ petition to the AO and the AO would deal with them in the assessment order. However, it would not be proper that during the assessment/reassessment proceedings to stifle/restrict the scope of enquiry. The petitioner seeks that this court exercise its writ jurisdiction merely because according to the petitioner the enquiries raised by the Assessing Officer are without jurisdiction and that the Assessing Officer would not accept their submissions. During the course of assessment proceedings the AO is certainly entitled to ask questions which according to him are relevant and it is for the assessee to point out that the questions raised do not arise for consideration in the facts before him or they are without jurisdiction. The entire process of adjudication is to serve the above purpose. In view of the above, there is no reason to interfere at this stage with regard to impugned notice. Accordingly, the writ petitions is dismissed.(AY. 2007-08 to 2009-10)

HDFC Bank Ltd. v. ACIT (2015) 229 Taxman 458 (Bom.)(HC)

S. 147 : Reassessment-Business income – Notes forming part of subsequent year –Material information- Reassessment was held to be valid .[S.28(i), 148]

Assessee company commenced its business using asset of erstwhile company 'N', which was not available among material filed with return of income-tax of relevant assessment year. Subsequent to assessment, while perusing records for another year, Assessing Authority from notes forming part of account, found out this fact. These notes constituted material information for Assessing Officer as assessment was done without taking note of above facts and, thus, reassessment proceeding that was initiated was proper. Matter remanded.)

CIT v. Micron International Ltd. 229 Taxman 485 (Karn.)(HC)

S. 147:Reassessment - Confined to incomes which had escaped assessment - Other issues cannot be considered at the instance of Assessee.[S.143(3)]

A matter not agitated in the concluded original assessment proceedings cannot be permitted to be agitated in reassessment proceedings unless relatable to the item sought to be taxed as "escaped income". If the assessee cannot be allowed to convert the proceedings initiated under section 147 as revisional or review, the conversion of proceedings would also be not available to the Revenue. (AY. 1969-70)

J.K. Cotton Spinning and Weaving v. CIT (2015) 375 ITR 533 (All.)(HC)

S.147:Reassessment-Business income–Warranty services-Deferred revenue was not included in subsequent years- Reassessment was held to be valid-Availability of alternate remedy under Act would not be a bar for Court to examine notice issued under section 148 if it is challenged on ground of no jurisdiction.[S.28(i), 148, Constitution of India , Art.226]

Assessee offers warranty services to its customers and attributes revenue generated, proportionally over period of service contract and offers same to tax in subsequent assessment year when obligation to render services arose. Reassessment was initiated on ground that deferred revenue for assessment year 2009-10 was not admitted or included by assessee in assessment year 2010-11, or in any subsequent year/s. On writ dismissing the petition the court held that burden was on assessee to demonstrate that deferred revenue was offered to tax in assessment year 2010-11 or in any subsequent assessment year. In case of warranties, income may be spread over subsequent years as and when claim arises, but nothing prevented to place such material to establish that such deferred revenue had been actually included as its income in subsequent assessment years. Thus initiation of reassessment for examining tax implications of deferred revenue on warranty claims was justified. Court also held that availability of alternate remedy under Act would not be a bar for Court to examine notice issued under section 148 if it is challenged on ground of no jurisdiction, violation of principles of natural

justice, no authority of law and validity or vires of statutory provision being under challenge. (AY. 2009-10)
Dell India (P.) Ltd. .v. Jt. CIT (2015) 231 Taxman 680 (Karn.)(HC)

S.147:Reassessment-Bad debt–Reassessment was held to be justified. [S.36(1)(viia)]
Petitioner-bank claimed bad debts on basis of deduction originally claimed in earlier assessment years .It was observed that there was change in quantum of provisions created under section 36(1)(viia) for earlier assessment year. Petitioner was aware of such rectification order; however, it did not bring it to notice of Assessing Officer and continued to claim on basis of old figure . Since income had escaped assessment, initiation of reassessment proceedings was justified. (AY. 1998-99)
ICICI Bank Ltd. .v. Dr. Ramsingh, Dy. CIT (2015) 231 Taxman 796 (Bom.)(HC)

S. 147 : Reassessment--Reason to believe--Tangible material—Issue raised in second reassessment was part of original assessment hence second reassessment was held to be not valid. [S. 10(29), 148]
Original scrutiny assessment disallowing certain amounts including exemption under section 10(29) as well as certain categories of income and purchase. First reassessment was set aside in appeal and order attaining finality. AO issued second reassessment notice . Tribunal quashed the reassessment proceedings. On appeal by revenue the Court held that finding that material or explanation in respect of issues in second reassessment were part of original record hence second reassessment hence second reassessment was held to be not valid. (ITA NO 575/12 dt. 15-1-2015.) (AY. 2002-2003)
CIT v. Central Warehousing Corporation (2015) 371 ITR 81 (Delhi)(HC)

S. 147 : Reassessment-Deduction-Excessive--Notice on ground that deduction was found to be excessive-On similar circumstances for latter year the Tribunal holding that deduction was not excessive--Notice was held to be not valid.[S. 10A, 148]
AO issued the notice for reassessment on the ground that the assesse had claimed excess deduction under section 10A, based on his finding for the assessment year 2009-10. On a writ petition to quash the notice , the Court held that the Tribunal for the assessment year 2009-10lhad held that the Assessing Officer had simply treated high profit earned by the assessee as a reason to invoke sub-section (10), without even remotely demonstrating the existence of any "arrangement" between the assessee and its associated enterprises aimed at producing extraordinary profits in the hands of the assessee. The conclusion drawn by the authorities below in such circumstances could not be ex consequenti sustained. Consequently, the notice of reassessment was not valid. The court also observed that if the case were ultimately decided in favour of the Revenue in respect of the assessment year 2009-10, then the Revenue shall be entitled to revive its proceedings pursuant to the notice under section 148 and the assessee shall not take up the plea of limitation.(AY 2008-2009)
A. T. Kearney India Ltd. v.ITO (2015) 371 ITR 179 (Delhi)(HC)

S. 147 : Reassessment--Reasons recorded by Assessing Officer referring to facts already on file--No rational and tangible nexus between reasons and belief--Assessing Officer had no jurisdiction to initiate reassessment proceedings. [S. 143(1), 148]
The assessment was completed under section 143(1).The reassessment notice was issued on the ground that since the interest received is much less than interest paid resulting substantial business loss , it transpires that it is a case of diversion of business funds for non –business purposes The asessee challenged the reassessment proceedings by filing the Writ petition; allowing the petition the Court held that ; That sufficient or adequate material was not available with the Assessing Officer. This information or material was already available in the computation of income filed by the assessees in their returns. Nothing new had been received by way of information or otherwise by the Assessing Officer. The present was not a case of testing the sufficiency of material available but a case of absence of material. There was no direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation of his belief that there had been escapement of income of the assessees from the assessments in the particular years in question. There was no rational and tangible nexus between the reason and the belief and in the absence of material the Assessing Officer

had no jurisdiction to initiate the proceedings under section 147 / 148. Further the contention of the Department that the partners' entities were controlled and run by the family members/relatives of the assessees and that such firms were covered by the provisions contained under section 40A(2)(b) and, therefore, reassessment proceedings were justified was patently erroneous. This ground was taken by the Department while rejecting the objection of the assessees. Such fresh ground which was not part of the reasons to believe could not form the basis to initiate the reassessment proceedings under sections 147 / 148. Further, there was no material on record to indicate that the partnership entities were controlled and run by the family members or relatives of the assessees. In the absence of cogent evidence being brought on record, such ground could not be taken as a reason to reinitiate reassessment proceedings. There was no fresh material before the Assessing Officer to form a belief that income had escaped assessment. In the absence of material, the Assessing Officer had no jurisdiction to initiate the proceeding for reassessment. Therefore, the notice under section 148 for the assessment year 2006-07 was set aside.
(AY. 2006-2007)
Arun Gupta v. UOI (2015) 371 ITR 394 (All) (HC)
Ishwar Chandra v.UOI(2015) 371 ITR 394 (All) (HC)
Vineet Chandra v.UOI(2015) 371 ITR 394 (All) (HC)
Raghav Gupta v. UOI(2015) 371 ITR 394 (All) (HC)
Preem Chand Gupta v. UOI (2015) 371 ITR 394 (All) (HC)

S. 147 : Reassessment-Depreciation-Change of opinions - Where the assessee's claim of depreciation on non-compete fees was accepted by the AO in regular assessment after considering details submitted by the assessee in response to queries raised by the AO, notice issued for reassessment on change of opinion was not sustainable.[S.32, 148]
The assessee claimed depreciation on its intangible assets, such as goodwill and non-compete fees as a part of its block of intangible assets claiming depreciation at 25 per cent. The AO called upon the assessee to give detailed working of the claim for depreciation. The AO, satisfied with the assessee's response, accepted the assessee's claim on account of depreciation. The notice under section 148 was issued by the AO, seeking to re-open the assessment on the basis that the depreciation claimed on non-compete fees at 25 per cent could not be allowed the same is not mentioned among the intangible assets set out in the Appendix to the Income-tax Rules, 1962.
On a writ by the assessee, the Court observed that the assessee had supplied the necessary details and the AO passed an order under section 143(3) in the regular assessment proceedings allowing the claim for depreciation on non-compete fees. In fact, the order passed in the regular assessment proceedings specifically discussed the assessee's claim for depreciation and disallows the excess depreciation claimed on buildings at 10 per cent to the extent it is in excess of the prescribed 5 per cent. In view of the above the Court held that the reason recorded in support of the impugned notice seeking to deny depreciation on non-compete fees has been issued on account of a change of opinion and accordingly, allowed the writ filed by the assesse.
Godrej Agrovet Ltd. v. DCIT (2015) 115 DTR 257 56 taxmann.com 141 (Bom.)(HC)

S. 147 : Reassessment-Notice-Reassessment –Retrospective amendment to the statute –Quashing of reassessment was held to be not justified.[S. 143(2),148]
Tribunal was not justified in quashing assessment under s. 148 on the ground of non-issuing notice under s.143(2) within 12 months from the date of submission of return in the light of the retrospective amendment to the statute by the Finance Act, 2006. (AY. 1997-98)
CIT v. A.K Dutta (2015) 114 DTR 214 (MP) (HC)

S. 147 : Reassessment – Change of opinion-Once a query has been raised during the assessment proceedings and the assessee has responded to the query to the satisfaction of AO, it must apply that there is due application of mind by the AO to the issue raised-It is not open to the AO to improve upon the reasons recorded at the time of issuing the notice either by adding and/or substituting the reasons by affidavit or otherwise-Reassessment was quashed.[S.80IA, 80IB, 143(3), 148]

Once a query has been raised during the assessment proceedings and the assessee has responded to the query to the satisfaction of the AO as it is evident from the fact that the assessment order dated 9th March, 2005 accepts the assessee's claim for deduction under s. 80IA/80IB, it must follow that there is due application of mind by the AO to the issue raised; therefore as there is a change of opinion in issuing the impugned notice having regard to the opinion formed while passing the assessment order under s.143(3), the AO would cease to have any reason to believe. Tangible material i.e. communication dt. 15th Jan, 2007 received by the A.O. from Addl. CIT. who had assessed for A.Y. 2004 – 2005 could have undoubtedly been the basis for issuing the impugned notice and so recorded in the reasons in support of the impugned notice. Reopening notice has to stand or fall on the basis of the reasons recorded at the time of issuing the notice for reopening. It is not open to the AO to improve upon the reasons recorded at the time of issuing the notice either by adding and/or substituting the reasons by affidavit or otherwise. (AY. 2002-03)

GKN Sinter Metals Ltd. v. Ramapriya Raghavan (Ms.), ACIT (2015) 371 ITR 225 / 274 CTR 1 / 114 DTR 121/ 232 Taxman 386 (Bom.)(HC)

S. 147 : Reassessment – Long-term capital gains – Where assessee had rights on property as a lessee and got converted said property into free hold land and sold it within three years of such conversion, assessee would not be liable to short-term capital gain – Reassessment was quashed.[S.2(29A), 45, 148]

The assessee had obtained a lease deed dated 25-12-1953 and was in possession since then.The lease deed permitted transfer of succession, sale, assignment, etc. with the previous approval of the State Government. The petitioner applied for conversion of lease hold land into free hold land and, thereafter, a free hold sale deed was executed after the policy introduced by the State Government. The AO issued the notice u/s.148 indicating reasons that the petitioner after converting the lease land into free hold sold off the property within three years resulting into short-term capital gain.

On a Writ Petition by the assessee, the High Court observed that the assessee already had rights as owner of the property. The conversion of the rights of the lessee in the property from lease hold to free hold was only an improvement of the rights over the property.The High Court held that the difference between 'short-term capital asset' and 'long-term capital asset' is the period over which the property has been held by the assessee and nothing to do with the nature of the title over the property and since the property was held by the assessee for more than three years, short-term capital gains would not be applicable and consequently, the notice issued u/s.148 cannot be sustained and is quashed. (AY. 2000-2001).

Amar Nath Agrawal v. CIT (2014) 51 taxmann.com 120 / (2015) 113 DTR 313 (All)(HC).

S. 147 : Reassessment-Capital gains-Conversion of a capital asset in to stock-in-trade – Where industrial land converted into residential plots and sold, provisions of section 45(2) did not apply- Reassessment was held to be invalid.[S.45(2), 148]

The assessee company was declared sick by BIFR and with due approval of the government convert its industrial land in residential plots. The assessee sold a part of said land and declared certain amount as long term capital gain. The AO completed the assessment after accepting amount of long term capital gain. Subsequently, AO issued notice u/s. 148 after expiry of four years taking a view that assessee had understated taxable amount of long term capital gains and opined that assessee failed to disclose 'capital gain' u/s.45(2).

On a Writ Petition by the assessee, the High Court observed that the computation of the 'Long Term Capital Gain' was furnished during the course of the assessment proceeding along with computation chart and valuer's report and there was complete disclosure of material fact on the part of the assessee. It further observed that the assessment after making necessary scrutiny and enquiries and thereafter, 'Long Term Capital Gain' has been accepted, under section 45(1).The High Court held that there is no failure on the part of the assessee to disclose fully and truly all material facts, in the assessment of the relevant assessment year, exception to proviso to section 148 is not applicable and the notice issued u/s. 148 was barred by limitation and also invalid (AY. 2003-2004 to 2006-2007)

Amrit Corp. Ltd. v. ACIT (2014) 46 taxmann.com 32 / (2015) 113 DTR 436 (All) (HC)

S.147:Reassessment-Capital gains - Profit on sale of property used for residence –Reassessment proceedings were held to be not valid. [S.2(14),2(47), 45,54, 148]

For relevant assessment year, assessment in case of assessee was completed under section 143(3) wherein assessee's claim for deduction under section 54 was allowed. Subsequently, initiated reassessment proceedings on ground that property transferred by assessee was agriculture land and, therefore, capital gain arising out of its was not eligible for deduction under section 54 .It was noted that property sold was located in urban area and was subjected to property tax. Even otherwise, in case land had to be treated as agricultural land, then sale was not a sale of a capital asset within meaning of section 2(14) and thus, no capital gains tax would have been payable, in aforesaid circumstances, Assessing Officer was not justified in initiating reassessment proceedings.)

CIT v. Chintoo Tomar (2015) 229 Taxman 260 (Delhi)(HC)

S. 147: Reassessment-Capital gains –conversion of stock in trade to investment- Question of fact-Writ petition was dismissed.[S.45(2), 148]

For relevant assessment year assessee had offered certain amount on account of sale of land which during preceding assessment year had been converted into stock-in-trade from investment. Assessment was completed under section 143(3). Thereafter, Assessing Officer reopened assessment on ground that cost of said land taken by assessee was much more than fair market value computed under section 45(2) which had resulted in underassessment of income . Assessee challenged impugned notice by filing writ petition . Court held that the question of determining fair market value of property of assessee converted into stock-in-trade from investment was really a question of fact which could not be determined in writ jurisdiction and, therefore writ petition was to be dismissed .(AY. 2009-10)

Chandler Investment & Trading Company (P.) Ltd. v. ITO (2015) 229 Taxman 263 (Bom.)(HC)

S.147:Reassessment- Change of opinion-Within four years-Set off loss–Long term capital gains-Depreciation-Bad debt-If the recorded reasons show contradiction and inconsistency it means necessary satisfaction in terms of the statutory provision has not been recorded at all. The Court cannot be called upon to indulge in guess work or speculate as to which reason has enabled the AO to act –Reassessment was quashed. [S.32(2), 45,148]

(i) Though the power to reopen is much wider, but the interpretation that the words “reason to believe” must receive an interpretation which is in consonance with the scheme of the law. There cannot be arbitrary powers to the Assessing Officer to reopen assessment on the basis of mere change of opinion. The Assessing Officer has no power to review. He has only a power to reassess. In the garb of reopening the assessment review cannot take place.

(ii) If the assessee has not made full and true disclosure of income and its particulars in the return or during the assessment proceedings, then, we do not see how these figures have been derived by the Assessing officer. In one breath he says that he has perused the records and which reveals the above position. At the same time, he holds that the petitioner has not made full and true disclosure of income and its particulars in the return or during assessment proceedings. This contradiction and inconsistency in the reasons would indicate that the necessary satisfaction in terms of statutory provision has not been recorded at all. This would be further clear if one refers to the other reason viz. that the income has escaped assessment and also in view of sub-clause (I) of clause (c) of Explanation-2 to section 147 of the Act if income chargeable to tax has been underassessed. Such recording of reasons can never be termed as satisfactory. There is either a satisfaction based on the income escaping assessment by virtue of it being chargeable to tax and, therefore, reassessment and in terms of substantive provision is required. The satisfaction can also be said to be that the case is covered by the deeming fiction and the income chargeable to tax has escaped assessment by virtue of Explanation 2 clause (a), (b), (ba) and (c) and (d). However, if one refers to the failure on the part of the assessee to make full and true disclosure of income, then, what the Assessing Officer has in mind is the first proviso to section 147. That enables reassessment after expiry of four years from the end of the relevant assessment year if the income chargeable to tax has escaped assessment for such

assessment year by reason of failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. In the present case, both are referred viz. the first proviso to section 147 and Explanation 2 thereof. However, this is not a case where action under section 147 is taken after the expiry of four years from the end of the relevant assessment year but it is within four years period. Thus, this proviso cannot be of any assistance. At the same time, the Assessing Officer says that he has reason to believe that income has escaped assessment and also in view of sub-clause (1) of clause (c) of Explanation-2. The Court cannot be called upon to indulge in guess work or speculate as to which reason has enabled the Assessing Officer to act in terms of this section. If more than one reason is assigned as in this case then the Court can sustain the notice only if it is of the opinion that an erroneous reference to a statutory provision has been made but still there is an income chargeable to tax which has escaped assessment and on account of which issuance of notice is justified. Which ground is sufficient to sustain the notice is something which must be indicated in clear terms and should not be a matter of speculation or guess work. (AY. 2009-10)

Plus Paper food Pac Ltd. v. ITO(2015) 374 ITR 485/ 118 DTR 29/231 Taxman 747 (Bom.)(HC)

S. 147:Reassessment-Notice-Principal condition that income chargeable to tax has escaped assessment was not satisfied-Reassessment was held to be bad in law though original assessment was completed u/s 143(1)- Revenue cannot take a contrary stand than what was recorded in the recorded reasons.[S. 143(1),148]

The assessment was completed u/ s 143(1). The AO issued the notice u/148. The assesse challenged the notice by filing the writ petition. Allowing the petition the Court held that;(1). The assessee filed a return of income which could have been subjected to verification and scrutiny and in terms of the applicable law and sections in the Income Tax Act, 1961 itself. However, if this notice has been issued in the present case and on the footing that the income chargeable to tax has escaped assessment during the course of the assessment proceedings, then, we would not go by the stand taken by the Revenue and on affidavit. It is too late now to urge that there was no assessment and therefore no question arises of reopening thereof. In the light of the language of the notice itself, it would not be proper for us and to permit the Revenue to raise such a plea.

(ii) In the present case, the AO does not state that any income chargeable to tax has escaped assessment. All that the Revenue desires is verification of certain details and pertaining to the gift. That is not founded on the belief that any income which is chargeable to tax has escaped assessment and hence, such verification is necessary. That belief is not recorded and which alone would enable the Assessing Officer to proceed. Thus, the reasons must be founded on the satisfaction of the AO that income chargeable to tax has escaped assessment. Once that is not to be found, then, we are not in a position to sustain the impugned notice. Reassessment notice was quashed. (AY.2010-11)

Nivi Trading Limited v. UOI (2015) 375 ITR 308/ 278 CTR 219(Bom)(HC)

S. 147 : Reassessment- Unabsorbed depreciation - Carry forward and set off - Effect of amendment of section 32 by Finance Act of 2001 - No time limit for carry forward and set off from 1-4-2002-Reassessment was held to be not valid. [S.32(2)]

In the return for the assessment year 2008-09, the assessee claimed set-off of brought forward unabsorbed depreciation allowance of Rs. 4.26 crores pertaining to the period between the assessment years 1984-85 and 2007-08 against the assessee's income from long-term capital gains arising during the year under consideration. The return was taken in scrutiny of the Assessing Officer. The Assessing Officer did not disallow the set-off. Subsequently, a notice of reassessment was issued on the ground that there had been excess set-off of depreciation. Though no specific ground was mentioned why the Assessing Officer held a belief that the set-off claimed was irregular, his reference was to the provisions of section 32(2) of the Act and he objected to the loss being carried forward beyond eight years. On a writ petition :

Held, allowing the petition, that the very basis for the Assessing Officer to hold a belief that income chargeable to tax had escaped assessment lacked validity. The notice was invalid.(AY. 2008-2009)

Synbiotics Ltd. .v. ACIT (2015) 370 ITR 119 / 228 Taxman 256 (Mag.)(Guj.)(HC)

S. 147 : Reassessment-Change of opinion-Charitable trust - Accumulation accepted in scrutiny assessment - Subsequent notice on ground that accumulation not valid - Mere change of opinion-Reassessment was held to be not valid.[S.11, 148]

Allowing the petition the Court held that; with the return the assessee had produced Form 10 as well as the resolution of the trust setting apart such amount for a period of five years to be utilised for the purposes of the trust. It was after scrutinising the claim of deduction under section 11(2) of the Act that the Assessing Officer had framed the assessment. He had made no disallowance on such claim. Under the circumstances, the notice could be said to be based on a mere change of opinion on the part of the Assessing Officer. The notice was not valid and was quashed.(AY .2008-2009)

Friends of WWB .v. DCIT(E) (2015) 370 ITR 26 (Guj.)(HC)

S. 147 : Reassessment–Change of opinion-All information, documents or records relating to assessee available before Assessing Officer - Reasons for notice showing discovery of new facts from existing records-Reassessment was held to be not valid. [S.148]

Allowing the petition the Court held that ;(i) that during the proceedings for section 143(3) assessment, all information, documents and other records relating to the assessee for the relevant assessment year were before the Assessing Officer. The reasons which were advanced showed discovery of new facts from the existing records. So the Assessing Officer wanted to change his opinion regarding the assessment and to reopen it. Therefore, it could not be said that there was escapement of income or that there were reasons for believing that there was escapement of income."Escapement of income" should be given a strict construction. Not only should it not be used to justify a change of view, it should not be used to reopen an assessment on facts, information or documents which were before the Assessing Officer or could have been easily found by him while making the assessment. Otherwise, there would be no finality of assessment.(AY. 2009-2010)

Debashish Moulik .v. ACIT (2015) 370 ITR 660 (Cal.)(HC)

S. 147 : Reassessment- Set off brought forward losses against income from other sources-Cancellation of licence- No failure to disclose material facts necessary for assessment-Reassessment was held to be not valid. [S. 71, 148]

Allowing the petition the Court held that; for the assessment year 2005-06 with respect to the very assessee, the Assessing Officer initiated reassessment proceedings under section 147 of the Income-tax Act, 1961, on the same ground on which reassessment proceedings were initiated for the assessment years 2006-07 and 2007-08. For the present assessment year also reassessment proceedings were initiated after a period of four years from the end of the relevant assessment year. The court had quashed and set aside the initiation of reassessment proceedings with respect to the assessment year 2005-06 on the ground that there was no failure on the part of the assessee to disclose truly and fully all material facts. The court observed that the banking licence of the assessee had been cancelled by the Reserve Bank of India, which was disclosed in the original return itself. Hence, the notices for the assessment years 2006-07 and 2007-08 and consequent reassessments were not valid. (AY.2006-2007, 2007-2008)

Charotar Nagrik Sahakari Bank Ltd. (In liquidation) v. DCIT(2015) 370 ITR 30/230 Taxman 556 (Guj.)(HC)

S. 147 : Reassessment - Reasons to believe not indicating Assessing Officer's reason for re-examining documents - Materials placed in assessment not showing assessee unjustifiably suppressed valid or relevant information which was otherwise available - Assessing Officer's omission sole basis for issuing notice –Reassessment was held to be not valid.[S.148]

The assessee returned a total income of Rs. 58,73,098. During the course of finalisation of the assessment, a notice was issued seeking certain clarifications and the return was thus taken up for scrutiny. Eventually the assessment was made and a demand for Rs. 60,04,860 was raised by the Revenue. Thereafter, the assessee was issued notice proposing reassessment proceedings. The reason was that the assessee was allowed deduction of other provisions amounting to Rs. 1,28,18,673. As the provision towards an unascertained liability was not allowable under the Act, it should have been

disallowed and taxed. The omission resulted in underassessment of income by Rs. 1,28,18,673 with consequent tax effect of Rs. 56,95,490. The Revenue did not furnish any reason as to why the assessee's representation was rejected. On a writ petition:
Held, that the "reasons to believe" nowhere highlighted what, if at all, was the material which the Assessing Officer came upon or became aware of subsequent to the original assessment. In other words, what triggered the Assessing Officer's curiosity to impel him to re-examine the files and documents pertaining to a completed assessment was unknown. Nor did the materials placed in the assessment show that the assessee had unjustifiably suppressed valid or relevant information which was otherwise available. The advertence to the disallowance of a provision for an unascertained liability points to the Assessing Officer indulging in what amounted to nothing but a masked review. What appeared to have excited the Assessing Officer's mind was that the original assessment order was not framed properly as it overlooked certain materials which led to loss of revenue. The Assessing Officer in the first instance did not perform his job properly for which the assessee could not be faulted. The Assessing Officer's omission was the sole basis for issuing the reassessment notice and, consequently, proceeding to make the demand. Therefore, the notice and the demands arising consequent to the notice were quashed. (AY. 2007-2008)
Techman Buildwell P. Ltd. .v. ACIT (2015) 370 ITR 771 (Delhi)(HC)

S. 147:Reassessment-Assessment order is not a scrap of paper & AO is expected to have applied his mind. Reopening on ground of "oversight, inadvertence or mistake" is not permissible.[S.143(3)]
The assessee made a claim for deduction for bad debts which was allowed by the AO u/s 143(3). Subsequently, within four years from the end of the assessment year, the AO reopened the assessment u/s.148 on the ground that the amount written off as bad debts was a capital loss and could not allowed as a deduction. The Tribunal allowed the assessee’s appeal and quashed the reassessment proceedings. Before the High Court, the department urged that the reopening was valid because (a) the AO acted on an audit objection which constitutes “tangible material” and (b) as the AO had not dealt with the issue in the original assessment order, he had jurisdiction as held in KalyanjiMavji& Co 102 ITR 287 (SC), New Light Trading Co 256 ITR 391 (Del) and Dr. Amin’s Pathology Laboratory 252 ITR 673 (Bom). HELD by the High Court dismissing the appeal:
(i) The Tribunal has rendered a finding of fact that the AO raised a query with regard to the issue which was responded to by the assessee and on satisfaction of the same the AO passed the assessment order. Therefore, reopening of assessment on an issue in respect of which a query was raised and responded to by the assessee would amount to a change of opinion;
(ii) The argument that the tangible material is the audit objections received by the AO is not acceptable because there is no mention of any tangible material in the reasons recorded. A reopening notice can be sustained only on the basis of grounds mentioned in the reasons recorded. It is not open to the Revenue to add and/or supplement later the reasons recorded at the time of issuing reopening notice;
(iii) The argument that the AO has been careless in bringing to tax a particular amount which is chargeable to tax and that the Revenue should not be precluded from issuing notice u/s 148 overlooks the fact that power to reopen is not a power to review an assessment order. At the time of passing assessment order, it expected of the AO that he will apply mind and pass an order. An assessment order is not a mere scrap of paper. To accept the submission of the department would mean to negate the well settled position in law as stated by the Supreme Court in CIT Vs. Kelvinator of India Ltd 256 ITR 1 (Delhi)(FB) that the concept of ‘change of opinion’ brought in so as to have in built test to check abuse of power;
(iv) KalyanjiMavji& Co 102 ITR 287 (SC), where it was held that “oversight, inadvertence or mistake” in passing assessment order will give the AO jurisdiction to reopen the assessment, is not good law in view of the subsequent decision in Indian and Eastern Newspaper Society Vs. CIT 119 ITR 996. An error discovered on a reconsideration of the same material (and no more) does not give him that power. The aforesaid view on the above proportion has been reiterated by the Apex Court in A.L.A.Firm vs. CIT 183 ITR 285. New Light Trading Co 256 ITR 391 (Del) andDr. Amin’s Pathology Laboratory 252 ITR 673 (Bom) are also distinguishable on facts.(AY.2005-06)

CIT .v. Jet speed Audio Pvt. Ltd. (2015) 117 DTR 82(Bom.)(HC)

S. 147:Reassessment-Within four years-Tangible material-In the absence of "fresh tangible material" reassessment is not valid.[S.148,151]

(a) Thus, taking help from these judgments, relevant provisions of law, fixing obligations upon the AO for making mandatory compliances, in a step-wise manner, for valid assumption of jurisdiction for reopening and reframing of reassessment order, can be summarized as under:

(i) Availability of the new tangible material indicating escaped income of the assessee, which should have come into possession of the AO, after the passing of original assessment order, whether u/s 143(3) or 143(1),

(ii) Recording of the 'Reasons' by the AO: 'Reasons' recorded should not be based upon the change of opinion of the Assessing Officer. 'Reasons' should be such that any person of ordinary prudence should be in a position to make a belief about escapement of income on the basis of facts narrated and material referred to, in the 'Reasons' recorded. The 'Reasons' should show that, there is rational nexus and cause & effect relationship between the material sought be relied upon in the Reasons and belief sought to be formed by the AO about escapement of income.

(iii) In case reopening is sought to be done by the AO after expiry of four years from the end of the relevant assessment year and the original assessment was framed u/s 143(3) then reasons can be recorded only if there was failure on the part of the assessee in disclosure of material of facts, as has been envisaged in first proviso to section 147.

(iv) Before issuing notice u/s 148, the AO has to obtain, on the reasons recorded by him, sanction for reopening of the case, from the competent authority as envisaged u/s 151 viz. Additional Commissioner or the Commissioner of Income Tax, as the case may be. Before granting its sanction, the sanctioning authority is required to record its satisfaction based upon its independent application of mind, making out a case that as per the facts narrated and material referred to in the 'Reasons' recorded by the AO, a belief can be formed about escapement of income and case sought to be reopened is a fit case for reopening u/s 147.

(v) After obtaining the sanction, the AO is required to issue and serve notice u/s 148 upon the assessee, within the time limit as prescribed u/s 149, to enable him to assume jurisdiction to reopen the assessment.

(vi) The assessee is required to file to return of income, in response to notice u/s 148 and may request for the copy of reasons.

(vii) The AO is bound, as per law, to provide a certified and verbatim copy of Reasons to the assessee.

(viii) The assessee may file its objections before the AO, to the Reasons recorded, if any.

(ix) In pursuance to judgment of Hon'ble Supreme Court in the case of GKN Driveshafts 259 ITR 19 (SC), the AO is obliged to dispose of these objections and intimate the same to the assessee, before proceeding further with the reassessment proceedings.

(x) Thereafter, the AO is obliged under the law to issue and serve notice u/s.143(2) to enable him to make assessment of the return filed by the assessee in response to notice issued under section 148.

(xi) Framing of the re-assessment order by the AO u/s 147/143(3) after providing adequate opportunity of hearing to the assessee and considering replies and evidences of the assessee, and all other applicable provisions of the Act.

(b) Under these facts and circumstances, let us now examine settled position of law on this issue. It has been held in various judgments coming from various courts that availability of fresh tangible material in the possession of AO at the time of recording of impugned reasons is a sine qua none, before the AO can record reasons for reopening of the case. We begin with the judgment of Hon'ble Supreme Court in the case of CIT vs. Kelvinator India Ltd. 320 ITR 561 (SC), laying down that for reopening of the assessment, the AO should have in its possession 'tangible material'. The term 'tangible material' has been understood and explained by various courts subsequently. There has been unanimity of the courts on this issue that in absence of fresh material indicating escaped income, the AO cannot assume jurisdiction to reopen already concluded assessment.

(c) In the present case, it has already been discussed that admitted facts are that there was no fresh material coming into the possession of the AO, at the time of recording of the 'Reasons'. These facts have not been rebutted by Ld DR also. The case law relied upon by Ld DR in the case of Dr.

Amin's Pathology, supra is not applicable on the issue being decided here. The issue that in absence of any fresh material, whether AO can proceed to record Reasons, was not before Hon'ble High Court, therefore Hon'ble High court had decided the issue of Change of opinion in that case. In the case before us, as discussed above, we are not going into that issue. In our considered opinion, at this stage, we need not go into the other aspect i.e. whether there was change of opinion or not. This issue has been aptly clarified by Hon'ble High Court in the case of Madhukar Khosla, (supra), wherein it has been held by their lordships that external facts or material constitute the driver, or the key which enables the AO to legitimately reopen the completed assessment and in absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. Further, most importantly, it was held by the Hon'ble High Court that it is at the next stage when the question, whether the reopening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "new tangible materials", then there would be no "reasons to believe", and consequently reopening would be an impermissible review. Under these circumstances there would not arise any need to go the next stage to examine the next question, i.e., whether there was "review" or "change of opinion". The condition with respect to availability of "new tangible material" is step anterior to the condition of no "change of opinion" or "review". (ITA No. 2910/Mum/2013, dt. 22.09.2015) (AY. 2006-07)

Motilal R. Todi .v. ACIT (Mum)(Trib) ; www.itatonline.org

S. 147: Reassessment-Revenue audit-The revenue audit cannot perform functions of judicial supervision and a reopening based on the interpretation of the audit cannot be sustained. However, a reopening based on communication of the law or factual inaccuracy by the audit is valid- On facts reassessment was held to be valid. [S.148]

(i) The logic in not sustaining the initiation of reassessment on the basis of interpretation of law by the audit party is that the internal auditor cannot be allowed to perform functions of judicial supervision over the Income-tax authorities by suggesting to the Assessing Officer about how a provision should be interpreted and whether the interpretation so given by the AO to a particular provision of the Act is right or wrong. An interpretation to a provision given by the internal audit party cannot be construed as a declaration of law binding on the AO. When an internal audit party objects to the interpretation given by the AO to a provision and proposes substitution of such interpretation with the one it feels right, it crosses its jurisdiction and enters into the realm of judicial supervision, which it is not authorized to do. In such circumstances, the initiation of reassessment, based on the substituted interpretation of a provision by the internal audit party, cannot be sustained. It has been categorically held by the Hon'ble Supreme Court in Indian & Eastern Newspaper Society (1979)119 ITR 996 (SC) that the internal audit party of the IT Department 'performs essentially administrative or executive functions and cannot be attributed the powers of judicial supervision over the quasi-judicial acts of IT authorities. The IT Act does not contemplate such power in any internal audit organisation of the IT Department …. The statute supports the conclusion that an audit party can't pronounce on the law, and that such pronouncement does not amount to "information" within the meaning of s. 147(b) of the IT Act, 1961′. Having made the above observations in para 6 of its judgment, the Hon'ble Summit Court then made an exception in the same para to the effect that: `But although an audit party does not possess the power to so pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communicator of the law is carefully maintained, the confusion which often results in applying s. 147(b) may be avoided. While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by anyone. No authority is required for the purpose'. When we read the judgment in Indian & Eastern Newspaper Society (1979)119 ITR 996 (SC) in entirety, what unfolds is that albeit the audit party is not entitled to judicially interpret a provision, but at the same time, it can communicate the law to the AO, which he omitted to consider. This position has been aptly explained in CIT vs. First Leasing Co. of India Ltd. (2000) 241 ITR 248 (Mad) by holding that : `The Supreme Court in Indian and Eastern (supra), has made a distinction between the interpretation of the law and bringing to the attention of the ITO the relevant provision of law and if the audit party interpreted the law, then the report by the audit party cannot be regarded as "information" for the purpose of reopening an assessment under s. 147(b) of the Act. However, if the audit party has merely drawn the attention of the ITO to the existence of

the law, the opinion of the audit party would be regarded as information and the Supreme Court has made a distinction between the communication of law and interpretation of law.' That is how, the Hon'ble Madras High Court held that the audit report should be regarded as a communication of law and there is no interpretation of law involved in the matter. The tribunal order, holding that the audit party had interpreted the relevant provisions relating to the granting of extra depreciation allowance and thus the AO had no jurisdiction under s. 147(b) of the Act to reopen the assessment, was set aside.
(ii) It is discernible from a close look at the above three judgments rendered by the Hon'ble Apex Court that where the audit party interprets the provision of law in a manner contrary to what the AO had done, it does not lay down a valid foundation for the initiation of re-assessment proceedings. If however, the audit party does not offer its own interpretation to the provisions and simply communicates the existence of law to the AO or any other factual inaccuracy, then the initiation of reassessment proceedings on such basis cannot be faulted with. It can be seen that in the case of Indian and Eastern Newspapers Society (1979)119 ITR 996 (SC), the otherwise taxability of receipt from occupation of conference hall and rooms was not disputed. Whereas the AO held such amount to be taxable as 'Business income', the audit party held it to be taxable as 'Income from house property.' It was this adoption of a different interpretation by the internal audit party to the existing factual position, which was not approved by the Hon'ble Supreme Court as a good ground to initiate a valid re-assessment. Similarly, in the case of Lucas TVS Ltd. (supra), the AO allowed deduction u/s 35(2) for the amounts spent in this year as well as the earlier years and the internal audit party opined that only the amount spent during the year was allowable as deduction u/s 35(2). It is obvious that in both these cases, the AO's opinion on the interpretation of the relevant provision was overruled by the internal audit party. In contrast, in the case of PVS Beedis Pvt. Ltd. (supra), the assessee claimed deduction u/s 80G and the internal audit party pointed out that such deduction was not permissible because the registration of the trust to which contribution was made, had already expired. It is manifest that in the case of PVS Beedis Pvt. Ltd. (1999) 237 ITR 13 (SC), the audit party did not interpret section 80G in a different manner, but, simply drew the attention of the AO to the existence of law. The Hon'ble Supreme Court in Indian and Eastern Newspapers Society (supra) having held that the interpretation of the internal audit party on a point of law does not constitute 'information' u/s 147, drew a line of distinction between the cases of interpretation of law and communication of existence of law. If the audit party merely draws the attention of the AO to the existence of law, the opinion of the audit party can be regarded as 'information' leading to a valid initiation of reassessment. In a nutshell, whereas the initiation of re-assessment proceedings on the basis of an interpretation to the provisions of law by the audit party is forbidden, the communication of law or the factual inconsistencies by the internal audit party, do not operate as a hindrance in the initiation of re-assessment proceedings.(ITA No. 3134/Del/2010, dt. 06.08.2015) (AY. 2003-04)
Rollatainers Ltd. .v. ACIT (Delhi)(Trib.); www.itatonline.org

S. 147 : Reassessment-Agent of non-resident—Limitation- Reassessment was held to be valid-Fees for technical services-On merit matter remanded to CIT(A). [S.9(1)(vii), 115A. 148,149(3), 163].
For the assessment year 2005-06, ONGC filed the original return on October 19, 2005 and revised return on November 28, 2006, as the agent or representative-assessee of Foster Wheeler Energy Ltd , a non-resident. Notice under section 148 of the Income-tax Act, 1961 was issued on March 31, 2010. ONGC contended that the reassessment done on it as an agent under section 163 of the Act was beyond the time limit prescribed under section 149(3) of the Act. The Assessing Officer held that the notice dated March 31, 2010 having been issued in the name of the non-resident and not in the name of the agent, it was not barred by limitation of time. The Commissioner (Appeals) cancelled the reassessment on the ground that the notice under section 148 of the Act was beyond two years to an agent under section 163 of the Act. On appeal :
Held, allowing the appeal, that ONGC filed the original return and revised return as an agent of the non-resident and signed the return and several other documents for and on behalf of the non-resident. This liability was fastened on ONGC in accordance with clause 11 of the agreement between ONGC and the non-resident. Thus the act and conduct of ONGC showed that ONGC waived the benefit of privilege of opportunity of being heard available under section 163(2) of the Act. The facts and circumstances remained the same at the time of application for reassessment of non-resident through

the agent. As assessment includes reassessment, ONGC could not be permitted to contend that it was an agent for filing returns under section 139(1) and for regular assessment but not for reassessment. The provisions of section 149(3) of the Act and the time limit prescribed therein for the issuance of notice under section 148 of the Act had no application in the case and there was no necessity to pass an order in terms of section 163(2) of the Act. Therefore, the reassessment was valid. Held also, that as the reassessment was held to be valid, the question whether the income of the assessee was payment for services in the nature of technical services and taxable in accordance with the provisions of section 115A of the Act read with section 9(1)(vii) of the Act was remitted to the Commissioner (Appeals) for decision on the merits.(AY. 2005-2006)

ADIT(IT) v. Oil and Natural Gas Corporation Ltd. (2015) 39 ITR 11 (Delhi)(Trib.)

S. 147 : Reassessment–Change of opinion-Export oriented undertaking- No fresh tangible material- Reassessment was held to be not valid.[S. 10B,148]

For relevant year, Assessing Officer allowed assessee's claim for exemption under section 10B in respect of medicinal chemistry and clinical pharmacology - Subsequently, assessment was reopened only for reason that in scrutiny assessment deduction claimed on same basis had been denied - However, there was no fresh tangible material available before Assessing Officer- initiation of reassessment proceeding was not justified. (AY. 2006-07)

GVK Biosciences (P.) Ltd. v. Add.CIT (2014) 29 ITR 684 / (2015) 67 SOT 163 (URO) (Hyd.)(Trib.)

S.147:Reassessment-After the end of four years-No allegation of failure by assessee to disclose material facts truly and fully- Subsidy-Notice invalid.[S.148]

The original assessment was completed under section 143(3) of the Act. After a period of four years, the Assessing Officer issued a notice under section 148 of the Act, on the ground that the subsidy chargeable to tax had escaped assessment for the assessment year 1997-98. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal : Held, allowing the appeal, that the Assessing Officer had issued the notice under section 148 of the Act after a period of four years and it was not mentioned directly or indirectly that there was failure on the part of the assessee. The proviso to section 147 of the Act specifically mandates that notice after a period of four years should be based on the failure of the assessee. As there was no failure by the assessee to disclose material facts truly and fully, the notice issued by the Assessing Officer under section 148 of the Act was not valid.) (AY. 1997-1998)

Nezone Foods P. Ltd. v. ACIT (2015) 38 ITR 464 (Gauhati.)(Trib.)

S. 147 : Reassessment- After the expiry of four years-Notice was issued far outside prescribed period under section 149--Reasons for which second notice issued identical to reasons as in first notice under section 148--Initiation of reassessment proceedings was held to be bad in law-[S. 148, 149]

The assessee filed its return of income for the assessment year 2002-03 on October 31, 2002. The AO issued notice for assessment under section 148 of the Act,on April 2, 2007. The CIT(A)cancelled the reassessment proceedings. The AO issued another notice under section 148 on March 23, 2009. On appeal, the assessee contended that the grounds on which the second notice issued were identical to those in the first notice under section 148 of the Act:

Held, allowing the appeal, (i) that the notice had to be issued within a period of 4 years or 6 years from the end of the assessment year. The Assessing Officer issued the notice far outside the period prescribed under section 149. Hence, the notice issued on March 23, 2009 was bad in law. That there must be cogent reasons for reopening the assessment. The reasons recorded in the notice were the same in sum and substance and there was nothing new to initiate the proceedings. [The Tribunal cancelled the initiation of reassessment proceedings. (AY. 2002-2003)

GK AK Rathi HUF .v. ITO (2015) 37 ITR 501/ 68 SOT 300 (URO)(Mum) (Trib)

S. 147 : Reassessment reference to transfer pricing officer - reference to Transfer Pricing Officer, in absence of any proceedings pending before Assessing Officer, is unsustainable in law-Reassessment was held to be legally unsustainable. [S. 143(2), 92CA).

In the case of the Assessee, no notice u/s 143(2) was issued within the time limit i.e. 30-9-2008. It was only on 24-12-2009 that the Assessing Officer made a reference, under section 92CA(3), to the Transfer Pricing Officer for determination of arm's length price of the international transactions entered into by the assessee with its associated enterprise. This reference to the TPO, and the resultant proceedings before him, culminated in the order dated 15-10- 2010 proposing an arm's length price adjustment of Rs 2.81 crores. On the basis of TP Report, notices were issued u/s 147 reopening the case. The assessee objected to this initiation of re-assessment proceedings. It was contended that the time limit for issuance of notice under section 143(2) had expired. It was also pointed out that reference to the TPO was invalid as it was made before the initiation of re-assessment proceedings under section 147, at a time when no proceedings were pending before the Assessing Officer.

As held by the Karnataka High Court, in the case of the CIT v. SAP Labs (P.) Ltd. in [IT Appeal Nos. 842 of 2008] and 339 of 2010, dated 25-8-2014, unless an Income-tax return, in respect of which notice under section 143(2) can be issued, is pending before the Assessing Officer, a reference to the Transfer Pricing Officer cannot be made by the Assessing Officer.
Guidance can be found from the Bombay High Court's judgment in the case of CWT v. Sona Properties [2010] 327 ITR 592. That was a case in which the Assessing Officer had made a reference to the Departmental Valuation Officer after the end of the assessment proceedings and the reassessment proceedings were quashed for the short reason of illegality for reference
The assessee's case was rather reopening of assessment on the consequence of the report obtained as a result of the reference. The re-assessment proceedings were held to be legally unsustainable. (AY.2007-2008)
XL India Business Services (P.) Ltd.v ACIT (2014) 51 taxmann. com 549/ 67 SOT 117/167 TTJ 467 (Delhi)(Trib.)

S.147:Reassessment-Failure to comply with the procedure prescribed in G.K.N. Drive Shaft (India) Ltd. vs. ITO 259 ITR 19 (SC) renders the assessment order invalid & void ab initio.[S.148]
In the first round of the appeal, the ITAT set aside the matter to the file of the AO with the direction to dispose of the objections raised by the assessee to the jurisdiction of the AO for issuance of notice u/s. 148 of the Act first by passing a speaking order in view of the decision of the Hon'ble Supreme Court in G.K.N. Drive Shaft (India) Ltd. vs. ITO 259 ITR 19 (SC). However, though the assessee raised objection on the issue of jurisdiction for issuance of notice u/s 148 of the Act, the AO while disposing of the said objection also proceeded to pass the reassessment order instead of restricting itself for the disposal of the objection passing a separate order.
The Tribunal observed that the ratio of G.K.N. Drive Shaft (India) Ltd. vs. ITO 259 ITR 19 (SC) and General Motors India Pvt. Ltd vs. DCIT 353 ITR 244 (Guj) is that the Assessing Officer is mandated to decide the objection to the notice u/s 148 of the Act and supply or communicate it to the assessee. Thereafter, the assessee gets an opportunity to challenge the order in a writ petition. Thereafter, the AO may pass the reassessment order. It is not open to the AO to decide the objection raised against notice u/s 148 by a composite assessment order. Thus, the Assessing Officer was required to first decide the objection of the assessee filed u/s 148 and serve a copy of the order on assessee. And after giving some reasonable time to the assessee for challenging his order, it is open to him to pass an assessment order. Since such compliance has not been made by the Assessing Officer in the present case, therefore, the ITAT held that the impugned assessment order as not valid and the same is held as void ab initio.(ITA No. 3061/Del/2012, dt.13.03.2015) (AY. 1997-98)
Suresh Chandra v. ITO (Delhi)(Trib.);www.itatonline.org

S. 147: Reassessment- Recorded reasons- If the assessee does not ask for reasons and file objections before the AO, he is not entitled to challenge the reopening proceedings.[S.148, 149]
The Tribunal held that ; Law does not provide or mandate that the Assessing Officer shall suomotu shall supply the copy of those 'reasons to believe' to the assessee. It is for assessee and if assessee chooses to ask for reasons then he/she can file objection thereto. Only when such objections are filed, it becomes the duty of the Assessing Officer to dispose of all those objections first by passing a

speaking order and if the objections are rejected then it gives a cause to the assessee to challenge such order by filing an appropriate writ. This is the law laid down by Hon'ble Supreme Court inGKN Drive Shafts (India) Ltd. vs. ITO – 259 ITR 19. In the instant case, the assessee did not ask for reasons to believe. The assessee participated in the reassessment proceedings. The reassessment order was passed. The assessee felt aggrieved to such order and filed the appeal before the CIT (A). The CIT (A) has passed an appropriate order on this issue. Thus, the assessment was reopened by issuing a legal and valid notice u/s 148 of the Act. On the procedural aspect also, there is no infirmity in the notice. The notices u/s 143(2) and 143(1) were also properly served on the representative of the assessee.

(ii) Hon'ble Delhi High Court in the case of A.G. Holdings Pvt. Ltd. vs. ITO reported in 352 ITR 364 has held that there is no requirement in section 147 of the Act or section 148 or section 149 that the reasons recorded for reopening an assessment should also accompany the notice of reassessment issued u/s 148. The requirement in section 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 section 148(2) that the reasons recorded shall be served along with the notice of reopening the assessment. The requirement, which is mandatory, is only that before issuing the notice to reopen the assessment, the Assessing Officer shall record his reasons for doing so. Thus, the Assessing Officer is duty bound to supply the reasons recorded for reopening the assessment to the assessee, after the assessee files the return in response to the notice issued u/s 148 and on his making a request to the Assessing Officer to that effect. In the case under consideration, even the assessee has not made any request for supply of the reasons. (ITA No. 4328/Del/2011, dt. 11.03.2015) (AY. 2000-01)

Anil Kumar Chaudhary v. ITO (Delhi) (Trib.);www.itatonline.org

S. 147:Reassessment- Cash credits- Bank deposit-There must be something which indicates, even if not establishes, the escapement of income from assessment- Reopening an assessment on the ground that there is need of an inquiry which may result in detection of an income escaping assessment is not valid.[S. 68, 148]

(i) The important point is that even though reasons, as recorded, may not necessarily prove escapement of income at the stage of recording the reasons, such reasons must point out to an income escaping assessment and not merely need of an inquiry which may result in detection of an income escaping assessment. Undoubtedly, at the stage of recording the reasons for reopening the assessment, all that is necessary is the formation of prima facie belief that an income has escaped the assessment and it is not necessary that the fact of income having escaped assessment is proved to the hilt. What is, however, necessary is that there must be something which indicates, even if not establishes, the escapement of income from assessment. It is only on this basis that the Assessing Officer can form the belief that an income has escaped assessment. Merely because some further investigations have not been carried out, which, if made, could have led to detection to an income escaping assessment, cannot be reason enough to hold the view that income has escaped assessment. It is also important to bear in mind the subtle but important distinction between factors which indicate an income escaping the assessments and the factors which indicate a legitimate suspicion about income escaping the assessment. The former category consists of the facts which, if established to be correct, will have a cause and effect relationship with the income escaping the assessment. The latter category consists of the facts, which, if established to be correct, could legitimately lead to further inquiries which may lead to detection of an income which has escaped assessment. There has to be some kind of a cause and effect relationship between reasons recorded and the income escaping assessment (ITO VsLakhmaniMewal Das [(1976) 103 ITR 437] followed);

(ii) On facts, all that the reasons recorded for reopening indicate is that cash deposits have been made in the bank account of the assessee, but the mere fact that these deposits have been made in a bank account does not indicate that these deposits constitute an income which has escaped assessment. The reasons recorded for reopening the assessment donot make out a case that the assessee was engaged in some business and the income from such a business has not been returned by the assessee. As the Tribunal donot have the liberty to examine these reasons on the basis of any other material or fact, other than the facts set out in the reasons so recorded, it is not open to deal with the question as to whether the assessee could be said to be engaged in any business; all that is to be examined is whether

the fact of the deposits, per se, in the bank account of the assessee could be basis of holding the view that the income has escaped assessment. The answer, in our understanding, is in negative. The Assessing Officer has opined that an income has escaped assessment of income because the assessee has amont in his bank account but then such an opinion proceeds on the fallacious assumption that the bank deposits constitute undisclosed income, and overlooks the fact that the sources of deposit need not necessarily be income of the assessee. It may be desirable, from the point of view of revenue authorities, to examine the matter in detail, but then reassessment proceedings cannot be resorted to only to examine the facts of a case, no matter how desirable that be, unless there is a reason to believe, rather than suspect, that an income has escaped assessment. (AY. 2008-09)

BirBahadur Singh Sijwali.v. ITO(2015) 68 SOT 197(URO) (Delhi)(Trib.)

S. 147 : Reassessment-Purchase of property and entering into sale agreement--Failure by assessee to file return and disclose fully and truly all material facts-Reassessment was held to be valid.[S.148]

Failure by assessee to file return and disclose fully and truly all material facts necessary for assessment is a valid reason to believe income chargeable to tax escaped assessment .Reassessment was held to be valid (AY. 2005-2006)

Prakash Shantilal Parekh v. ITO (2015) 37 ITR 119 (Mum.)(Trib.)

S. 147 : Reassessment--Assessing Officer simply reproducing details received from Director of Income-tax without any verification and examination-Reassessment was held to be not valid. [S. 11, 12, 69, 148]

Allowing the appeal the Tribunal held that reasons recorded for issuance of notice under section 148 of the Act. The Assessing Officer had simply reproduced the details received from the Director of Income-tax, Investigation Wing, without any verification and examination of the information received. Notice under section 148 of the Act and all the subsequent proceedings were not sustainable. (AY. 2003-2004)

Monarch Educational Society .v. ITO (E) (2015) 37 ITR 512/ 68 SOT 315 (URO) (Delhi)(Trib.)

S. 147 : Reassessment- Allegation of bogus billing proved wrong – Reassessment was held to be bad in law.[S.132(4)]

Assessee's assessment was reopened after four years on the basis of statement of one Mr.Parag Mehta u/s 132(4) wherein the assessee was indicated as one of the beneficiaries of bogus bills. During the year, the assessee had received Rs. 5 crore from one of the alleged bogus bill provider.

On the issue of reopening, the assessee contended that it had no business dealings except for receipt of share allotment money, and hence, there was no question of bogus billing, and that till date shares are owned by that entity. Also, even in the statements, Mr.Parag Mehta and others did not allege that money invested in the assessee was bogus.

The Tribunal found that all material facts such as details of allotment of shares, application for allotment, company board resolution, return of allotment with ROC etc. had been filed, and when the very reasons which formed the basis of reopening were proved to be wrong, reassessment was not permissible. Furthermore, the reopening was done for suspected bogus billing which was different from the reason for actual addition i.e. share application money received i.e. unexplained cash credits. Therefore, even on this ground, reassessment had to be held bad in law.(ITA No. 2636/M/2013 dt. 06/02/2015)(AY. 2004-05)

Lark Chemicals P. Ltd. .v. ACIT (Mum.)(Trib.) www.ctconline.org)

S. 147 : Reassessment-Transfer pricing-Reference to TPO –Condition precedent-When no assessment was pending reference to TPO was held to be bad in law-Reassessment proceedings on the basis of TPO's order held to be bad in law.[S.92CA144C,,148]

The assesse filed the return of income on 29-10-2007, and the time limit for issuance of notice , under section 143(2) selecting for scrutiny assessment was expired o 30-09-2008. AO on 24-12-2009 made a reference under section 92CA(3) to TPO for determination of arm's length price of international transactions entered in to by assesse with its associated enterprise. TPO passed an order on 15-10-2010 proposing to arm's length adjustments. The AO initiated reassessment proceedings. Assessee

objected for reassessment however AO rejected the objection of assesse. On appeal DRP also up held the reassessment proceedings . On appeal to the Tribunal the Tribunal held that in the absence of any proceedings pending before the AO a reference to the TPO cannot be made by the AO. On the facts the AO made reference to TPO when no proceedings were pending and the limitation for issue of notice under section 143(2) has expired. Accordingly the reassessment proceedings was quashed (AY 2007-08)

XL India Business Services (P) Ltd .v. ACIT(2014) 51 taxmann.co. 549 (2015) 67 SOT 117 (Delhi)(Trib.)

S. 148 :Reassessment – Notice – Received by accountant-Held to be proper service-Assessment was held to be valid.[S.143(3), 147]

Court held that merely because notice under section 148(1) issued to assessee had been taken by authorized representative of assessee who was accountant of assessee, it could not be said that service of notice was not proper and, therefore, reassessment proceeding initiated would be held to be valid and legal. (AY. 1975-76 to 1977-78)

Modern Farm Services .v. CIT (2015) 228 Taxman 106(Mag.)(P&H)(HC)

S. 149 : Reassessment- Time limit -Where assessee did not have any asset outside India and, therefore, there was no question of having any income in relation to such an asset, notice issued u/s. 148 after expiry of six years was not sustainable.[S.147, 148]

For the assessment year 2006-07, a notice under section 148 was issued to assessee on 13-6-2013.

On a Writ Petition by the assessee, the High Court observed that it is evident from record that the assessee had taken the specific stand that it was an Indian company and that it has no foreign asset and no foreign income and that section 149(1)(c) had no application in the facts of the case. The High Court further observed that the very condition precedent for issuing a notice under section 148 read with section 149(1)(c) by invoking the extended period of limitation of sixteen years is that the income which has escaped assessment must have relation to any asset located outside India. This pre-condition is not satisfied. The High Court held that there is a complete bar to the issuance of such a notice beyond the period of four years and in view of the foregoing discussion, the impugned notice dated 13-6-2013, the impugned order dated 19-12-2013 and all proceedings pursuant to said notice are set aside (AY. 2006-2007)

Deccan Digital Networks (P.) Ltd. v. ITO (2014)50 taxmann.com 277 (2015) 113 DTR 147/274 CTR 202 (Delhi)(HC)

S. 150 :Assessment–Finding of Tribunal-Finding given by Tribunal could not enable Assessing Officer to extend period of limitation-Order barred by limitation.[S.158BC]

Tribunal in block assessment proceeding in assessee's case held that extent of claim for depreciation made by assessee would not be a subject matter of enquiry in block assessments but in regular assessment. In view of said decision, Assessing Officer sought to re-open assessment for relevant year after a period of nine years. There had been no failure on part of assessee to disclose truly and fully all material facts necessary for assessment. Moreover, no material was found to establish that claim for depreciation made was incorrect. Allowing the petition the Court held that finding given by Tribunal could not enable Assessing Officer to extend period of limitation as provided under section 150 for purpose of issuing notice in respect of assessment year 1993-94.(AY. 1993-94)

EskayK'n' IT (India) Ltd. v. Dy. CIT (2015) 229 Taxman 204 (Bom.)(HC)

S. 151 : Reassessment - Sanction for issue of notice –Recording of satisfaction in mechanical manner- Reassessment was held to be in valid. [S. 147,148]

Where Joint Commissioner recorded satisfaction in mechanical manner and without application of mind, in order to accord sanction for issuing notice under section 148, assumption of jurisdiction to reopen block assessment was invalid .

CIT .v. S. Goyanka Lime & Chemicals Ltd. (2015) 231 Taxman 73 (MP)(HC)

S. 151 : Reassessment –After the expiry of four years-Sanction for issue of notice – Order passed without following mandatory of sanction of sanction of Chief CIT OR CIT under the proviso is inherent lacuna which is not curable hence bad in law. [S. 147,148, 292B]

The assesse objected to the reassessment on the ground that required sanction of CIT was not taken .AO rejected the objection of the assesse on the ground that required sanction was not taken due to oversight . On writ allowing the petition the Court held that; order passed without following mandatory of sanction of sanction of Chief CIT OR CIT under the proviso is inherent lacuna which is not curable hence bad in law.(AY. 2007-08)

Dhadda Exports v. ITO (2015) 377 ITR 347/ 278 CTR 258 / 232 Taxman 407 (Raj.)(HC)

S. 151 : Reassessment - Sanction for issue of notice – After the expiry of four years-Depreciation-Sanction was given as suggested by Audit party- Reassessment was held to be invalid. [S.148]

Scrutiny assessment was completed.Notice u/s 148 was issued by the AO beyond the period of four years from the end of relevant assessment year on ground that excess depreciation was allowed to the assessee in the relevant assessment year. The assessee filed the writ petition against the notice and contended that since the Assessing Officer had not obtained approval from the Chief Commissioner or the Commissioner before issuing of such notice, same was invalid. Also, notice for reopening was issued at the instance of the Audit Party .Allowing the petition the Court held that, Certain aspects of matter in case of assessee were brought to notice by audit party and suggestions with respect to remedial measures were also made by them such approval could not be seen as substantial compliance of section 151(1) Under such circumstances, impugned notice was quashed. (AY. 2005-06)

Adani Ports And Special Economic Zone Ltd. .v. Dy. CIT (2015) 228 Taxman 114(Mag.)(Guj.)(HC)

S.151:Reassessment- Sanction for issue of notice-Approval of commissioner-Merely stating "Approved" is not sufficient sanction of CIT and renders reopening void.[S. 147,148]

A simple reading of the provisions of Sec. 151 (1) with the proviso clearly show that no such notice shall be issued unless the Commissioner is satisfied on the reasons recorded by the AO that it is a fit case for the issue of notice which means that the satisfaction of the Commissioner is paramount for which the least that is expected from the Commissioner is application of mind and due diligence before according sanction to the reasons recorded by the AO. In the present case, the order sheet which is placed on record show that the Commissioner has simply affixed “approved” at the bottom of the note sheet prepared by the ITO. Nowhere the CIT has recorded his satisfaction. In the case before the Hon’ble Supreme Court (supra) that on AO’s report the Commissioner against the question “whether the Commissioner is satisfied that it is a fit case for the issue of notice under section 148 merely noted ” Yes” and affixed his signature there under. On these facts, the Hon’ble Supreme Court observed that the important safeguards provided in sections 147 and 151 were lightly treated by the officer and the Commissioner. The Hon’ble Supreme Court further observed that the ITO could not have had reason to believe that income had escaped assessment by reasons of the appellant-firm’s failure to disclose material facts and if the Commissioner had read the report carefully he could not have come to the conclusion that this was a fit case for issuing a notice under section 148. The notice issued under section 148 was therefore, invalid (ITA No. 3545/Del/2010, dt. 25.02.2015) (AY. 2002-03)

Direct Sales Pvt. Ltd. .v. ITO (Delhi) (Trib.);www.itatonline.org

S. 151: Reassessment-Sanction for issue of notice-Sanction of CIT instead of JCIT renders reopening void-The error cannot be saved u/s. 292BB.[S. 50C,147,148, 292BB]

The Assessing Officer obtained sanction for issuance of notice under section 148 of the Income-tax Act, 1961 for reopening of assessment from the Commissioner of Income-tax instead of the Joint Commissioner of Income-tax (JCIT). Since the approval was not obtained from the competent authority, notice issued under section 148 of the Act is void ab-initio and the assessment framed consequent thereto is not a valid assessment. The error is fatal and cannot be saved under section 292BB. The assessment is annulled. (AY. 2003-04)

SardarBalbir Singh .v. ITO(2015) 39 ITR 574 (Lucknow)(Trib)

S. 151 : Reassessment- Sanction for issue of notice-Non mentioning in the reasons that approval has been obtained from the CIT vitiates the reopening.[S.147, 148]

Another major discrepancy noticed during the course of arguments is that there is no mention of authorization of a higher authority to initiate the current reassessment proceedings. Hon'ble Bombay High Court in the case of DSJ Communications vs DCIT, reported in 222 Taxman 129 (Bom), held that approval of CIT is mandatory. Since there is no mention of the approval sought from the CIT on the reasons, as recorded by the AO to initiate reassessment proceedings, the entire initiation has been vitiated and become bad in law. (AY. 2002-03)

GTL Limited v. ACIT(2015) 37 ITR 376 (Mum.)(Trib.)

S. 153:Assessment-Limitation Block assessment-Section 153(2A) is attracted to a block assessment framed in pursuance to an order under section 250 and Chapter XIVB.[S. 153(2A), 158BC, 250]

In the instant case, the assessment order for the block period was passed by the Assessing Authority on 30-9-1999. The Appellate Authority under section 250 had set aside the order by order dated 24-10-2000. The said order was communicated on 15-1-2001. The period prescribed under section 153(2A) is before the expiry of one year from the end of financial year in which order under section 250 is received by the Chief Commissioner or Commissioner as the case may be. The copy of the Appellate Authority was received on 15-1-2001, 31-3-2001 is the end of the financial year and 31-3-2002 is one year there from before which the fresh assessment order ought to have been passed. The fresh assessment order is passed on 28-3-2003, nearly one year after the expiry of the period of limitation. Therefore, it is barred by time. Thus, the said substantial question of law, whether, section 153(2A) is attracted to a block assessment framed in pursuance to an order under section 250 and Chapter XIV B is answered in favour of the assessee and againstthe revenue and accordingly appeal of revenue was dismissed.)

CIT .v. Paul Noel Rodrigues (2015) 231 Taxman 811 (Karn.)(HC)

S. 153 : Assessment – Reassessment – Limitation –Conclusion of Tribunal that the assessment order was passed after the period of limitation- Order of Tribunal was affirmed.[S.143(3)]

No evidence was produced by department to substantiate its claim that assessment order was made and same was dispatched along with notice of demand on or before last day of prescribed time period. However, on basis of available evidence appellate authorities came to conclusion that assessment order was passed after period of limitation. Tribunal was justified in setting aside said assessment order being barred by limitation.(AY. 2006-07)

CIT v. Sincere Construction (2015) 229 Taxman 186 (All.)(HC)

S. 153A:Assessment-Search or requisition – Addition cannot be made based on mere suspicion unless any material fact is brought on record.[S. 132]

Assessee and persons associated with it were subject to search and seizure operations u/s 132. Addition was made by AO on the basis that loans were taken and repaid in cash. HC upheld the order of the Tribunal in deleting the addition since it was based on a mere suspicion. Neither any material was filed on record to prove that loans were taken and repaid in cash, nor the details of persons to whom interest was paid was ascertained, verified and examined. (AY. 2004-05)

CIT v. Home Developers (P) Ltd. (2015) 117 DTR 248 / 229 Taxman 254 (Delhi)(HC)

S.153A:Assessment–Search-Unexplained investment-Tribunal finding no reliability could be placed on submissions made by assessee-Finding of fact- Addition was held to be justified. [S.153C, 260A]

Tribunal confirmed the addition on the ground that no realibility could be placed on submissions made by assessee. On appeal ; dismissing the appeal of assessee the Court held that (1) that this was a question of fact, which the assessee should have pursued before the original authority or before the Commissioner of Income-tax (Appeals). The Tribunal, after examining the issue threadbare, declined to interfere with the order of the Commissioner (Appeals) principally on the ground that no reliability

could be placed on the submissions made by the assessee, who had taken different stands before the authorities below. There was no reason to interfere with the order of the Tribunal.
(ii) That the mere statement of Vanaja saying that she did not pay money or receive money was of no avail, when she herself admitted that she signed on the back of the agreement having received the money on the cancellation of the sale agreement. Her statement threw more light on the present case that was was not a clear transaction. The entire transaction was shrouded in mystery and the Assessing Officer had correctly made additions.(AY 2004-2005)
P. Madhurajan (HUF) v. ACIT (2015) 373 ITR 630 (Mad.)(HC)

S.153A:Assessment-Search and seizure -Tribunal finding taxation of investment in closing stock as well as withdrawal from bank account not proper - Tribunal taking matter item-wise and addition-wise - Findings based on reflecting a possible view. [S. 132,260A].
Dismissing the appeal of revenue the Court held that; the Tribunal exhaustively noted the entire material together with the rival contentions. The Department was wrong in contending that relief had been granted to the assessee in relation to the grounds which were given up. The undisputed factual position had been noted by the Tribunal inasmuch as if there were no books of account and yet the Assessing Officer referred to the bank statements and details of the accounts, then the exercise carried out by him of bringing to tax investment in the closing stock as well as withdrawal from the bank account which was not proper. The Tribunal had extensively referred to the Assessing Officer's order and the exercise carried out by him. It had taken the matter item-wise/addition-wise and found that the Assessing Officer had before him the bank statements/the inflows into the bank account. He had in his order observed that he would consider the investment after the assessee had offered Rs. 10 crores as income. However, he had not considered the same. It found that when receipts in the bank account were taxed then the payment from that very bank account have nexus with the receipts, and the addition could not be sustained by the Commissioner (Appeals). With regard to the expenses relating to service apartment a similar exercise was carried out and the assessee`s contentions had been accepted. With regard to the expenditure on household items that aspect also had been considered and the Tribunal concluded that the declaration of income was more than sufficient to take care of the expenditure. This could not have been a matter and which was not covered by the disclosure. Every single item or addition had been considered and with extensive reference to the findings of the Assessing Officer and that of the Commissioner (Appeals). The materials in support of these claims or additions had also been noted. The finding of double taxation had been rendered after examining the matter in detail, namely, scrutiny of the bank accounts. Either the inflows had been explained with evidence and then the question of taxing the withdrawals would not arise or because there was no evidence, the taxing of the deposits in the bank was justified. The Tribunal held that both inflow and outflow could not be taxed. No substantial relief had been granted as complained by the Revenue particularly with regard to the items or grounds which had been given up before the Commissioner (Appeals). The findings of fact based thereon, therefore, reflected a possible view of the Tribunal. Such a view did not raise any substantial question of law particularly when it was not perverse as complained. (AY. 2006-2007)
CIT v. Jalaj Batra (2015) 372 ITR 622 (Bom.)(HC)

S. 153A : Assessment - Search or requisition –Additions need not be restricted or limited to incriminating material found during course of search[S. 115JB]
During assessment under section 153A, additions need not be restricted or limited to incriminating material found during course of search and, hence, argument of assessee that addition under section 115JB was not justified in order under section 153A as no incriminating material was found concerning said addition had to be rejected .Appeal of assesse was dismissed.(AY. 2004-05)
Filatex India Ltd. v. CIT (2015) 229 Taxman 555 (Delhi)(HC)

S. 153A: Assessment - Search or requisition - No addition can be made in respect of an unabated assessment which has become final if no incriminating material is found during the search-An ICD is an "infrastructural facility" for s. 80-IA(4)- Container freight station is entitled to deduction. [S.80IA, 132A]

Pursuant to the judgement of the Special Bench of the ITAT in All Cargo Global Logistics (2012) 137 ITD 287 (SB) (Mum) the Bombay High Court had to consider two issues: (i) whether scope of assessment u/s 153A in respect of completed assessments is limited to only undisclosed income and undisclosed assets detected during search and (ii) whether in view of the Circular of the CBDT No. 10/2005 the assessee was entitled to deduction u/s 80 IA(4). HELD by the High Court:
(i) On a plain reading of Section 153A of the Income-tax Act, it becomes clear that on initiation of the proceedings under Section 153A, it is only the assessment / reassessment proceedings that are pending on the date of conducting search under Section 132 or making requisition under Section 132A of the Act stand abated and not the assessments/reassessments already finalised for those assessment years covered under Section 153A of the Act. By a circular No. 8 of 2003 dated 18-9-2003 ((2003) 263 ITR (St) 61 at 107) the CBDT has clarified that on initiation of proceedings under Section 153A, the proceedings pending in appeal, revision or rectification proceedings against finalised assessment/reassessment shall not abate. It is only because, the finalised assessments/reassessments do not abate, the appeal revision or rectification pending against finalised assessment/reassessments would not abate. Therefore, the argument of the revenue, that on initiation of proceedings under Section 153A, the assessments/reassessments finalised for the assessment years covered under Section 153A of the Income-tax Act stand abated cannot be accepted. Similarly on annulment of assessment made under Section 153A (1) what stands revived is the pending assessment / reassessment proceedings which stood abated as per section 153A(1);
(ii) Once it is held that the assessment has attained finality, then the AO while passing the independent assessment order under Section 153A read with Section 143 (3) of the I.T. Act could not have disturbed the assessment / reassessment order which has attained finality, unless the materials gathered in the course of the proceedings under Section 153A of the Income-tax Act establish that the reliefs granted under the finalised assessment/ reassessment were contrary to the facts unearthed during the course of 153A proceedings. If there is nothing on record to suggest that any material was unearthed during the search or during the 153A proceedings, the AO while passing order under Section 153A read with Section 143(3) cannot disturb the assessment order;
(iii) A perusal of s. 80-IA(4) would indicate as to how the Legislature had in mind deduction in respect of profits and gains from industrial undertakings or enterprises engaged in the infrastructure development etc. We are concerned with sub-section (4) and as it read at the relevant time. It says that this section applies to any enterprise carrying on the business of developing or operating and maintaining any infrastructure facility which fulfills all the conditions, namely, it is owned by a company registered in India or by a consortium of such companies or by an authority or a board or a corporation or any other body established or constituted under any Central or State Act, it has entered into an agreement with the Central Government or a local authority or any other statutory body for developing or operating and maintaining or developing, operating and maintaining a new infrastructure facility and it has started or starts operating and maintaining the infrastructure facility on or after 1st day of April, 1995. The explanation defines the infrastructure facility to mean, inter alia, a port, airport, inland waterway, inland port or navigational channel in the sea. The word "inland port" was always there in clause (d). What was there prior to its substitution by Finance Act of 2007 with effect from 1st April, 2008, were the words "or inland port". Now the word "or" is deleted, but the words are "inland port or navigational channel in the sea". Thus, an "inland port" was always within the contemplation of the Legislature and it is treated specifically as a infrastructural facility (CIT v.. Murli Agro Products Ltd Income Tax Appeal No.36 of 2009 dt 29-10-2010 is followed; CIT v.Anil Kumar Bhatia (2013) 352 ITR 493 (Delhi)(HC) is distinguished (AY.2008-09)
CIT v. Continental Warehousing Corporation (2015) 374 ITR 645/ 120 DTR 89 (Bom) (HC)
CIT v. All Cargo Global Logistics Ltd(2015) 374 ITR 645/ 120 DTR 89 (Bom)(HC)
Editorial: Decision of Special Bench in All Cargo Global Logistics Ltd v. Dy.CIT (2012) 137 ITD 287 / 18 ITR 106 (SB)(Mum)(Trib) is affirmed.

S. 153A:Assessment – Search-Approval to the assessment order granted by the Addl. CIT in a casual and mechanical manner and without application of mind renders the assessment order void.[S. 153D].
The Addl.CIT granted approval u/s. 153D to the draft order u/s. 143(3) r.w.s. 153A by stating that "As per this office letter dated 20.12.2010, the Assessing Officers were asked to submit the draft orders for

approval u/s. 153D on or before 24.12.2010. However, this draft order has been submitted on 31.12.2010. Hence there is no much time left to analise the the issues of draft order on merit. Therefore, the draft order is being approved as it is submitted. Approval to the above said draft order is granted u/s. 153D of the I.T. Act, 1961." The assessee claimed that the said approval was not valid and vitiated the assessment order. HELD by the Tribunal accepting the claim:

(i) The Legislative intent is clear inasmuch as prior to the insertion of Sec.153D, there was no provision for taking approval in cases of assessment and reassessment in cases where search has been conducted. Thus, the legislature wanted the assessments/reassessments of search and seizure cases should be made with the prior approval of superior authorities which also means that the superior authorities should apply their minds on the materials on the basis of which the officer is making the assessment and after due application of mind and on the basis of seized materials, the superior authorities have to approve the assessment order.

(ii) On facts, the Addl. Commissioner has showed his inability to analyze the issues of draft order on merit clearly stating that no much time is left, inasmuch as the draft order was placed before him on 31.12.2010 and the approval was granted on the very same day. Considering the factual matrix of the approval letter, we have no hesitation to hold that the approval granted by the Addl. Commissioner is devoid of any application of mind, is mechanical and without considering the materials on record. The power vested in the Joint Commissioner/Addl Commissioner to grant or not to grant approval is coupled with a duty. The Addl Commissioner/Joint Commissioner is required to apply his mind to the proposals put up to him for approval in the light of the material relied upon by the AO. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case, there has been no application of mind by the Addl. Commissioner before granting the approval. Therefore, we have no hesitation to hold that the assessment order made u/s. 143(3) of the Act r.w. Sec. 153A of the Act is bad in law and deserves to be annulled.(ITA No. 4061/Mum/2012, dt. 19.08.2015)(A. Y. 2007-08)

Shreelekha Damani .v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 153A : Assessment- Search or requisition–Non mentioning of S.153A in order will not invalidate the order.[S.153C]

Originally assessment was made under section 153C, read with section 153A. However, assessment order was framed under section 153C only without mentioning of section 153A.It was held that order passed by Assessing Officer could not be treated as invalid, merely because there was an omission to mention relevant provision of law or wrong mentioning of provisions of law. (AY. 2007-08, 2008-09)

DCIT v. Damac Holdings (P.) Ltd. (2014) 33 ITR 331 / (2015) 67 SOT 148(URO) (Cochin)(Trib.)

S. 153A : Assessment-Search and seizure-Jurisdiction- Once search is initiated , even if no incriminating materials were found Assessing Officer gets jurisdiction for passing an order. [S. 132]

The Assessing Officer gets jurisdiction for passing orders under section 153A, once search action is initiated, whether or not any incriminating material is found during the course of search action.(AY. 2005-06 to 2008-09)

Rupesh Anand v. ACIT (2015) 67 SOT227(URO) (Bang.)(Trib.)

S. 153A : Assessment - Search or requisition-Notice-There is no requirement to issue a notice u/s 143(2) before making an assessment u/s.153A-Assessment is not null and void. [S. 143(2), 158BC]

The Third Member had to consider whether the issue of a notice u/s 143(2) was mandatory for the completion of an assessment u/s 153A and whether the non-issue of such a notice rendered the S. 153A assessment null and void. HELD by the third Member:

(i) There is no specific provision in the Act requiring the assessment made under section 153A to be after issue of notice under section 143(2) of the Act. Learned counsel for the assessee places heavy reliance on the judgment of the Hon'ble Supreme Court in ACIT v. Hotel Blue Moon v. DCIT(2010) 321 ITR 362 (SC) wherein it was held that the where an assessment has to be completed under section 143(3) read with section 158BC, notice under section 143 (2) must be issued and

omission to do so cannot be a procedural irregularity and the same is not curable. It is to be noted that the above said judgment was in the context of Section 158BC. Clause (b) of Section 158BC expressly provides that "the AO shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of Section 142, sub sections (2) and (3) of Section 143, Section 144 and Section 145 shall, so far as may be, apply. This is not the position under section 153A. The law laid down in Hotel Blue Moon, is thus not applicable to the facts of the present case.

(ii) It is also to be noted that Section 153A provides for the procedure for assessment in case of search or requisition. Sub section (1) starts with non-obstante clause stating that it was "notwithstanding" anything contained in sections 147, 148 and 149, etc. Clause (a) thereof provides for issuance of notice to the person searched under Section 132 or where documents etc are requisitioned under Section 132(A), to furnish a return of income. This clause nowhere prescribes for issuance of notice under Section 143(2). Learned counsel for the assessee/ appellant sought to contend that the words, "so far as may be applicable" made it mandatory for issuance of notice under Section 143(2) since the return filed in response to notice under Section 153A was to be treated as one under Section 139. The words "so far as may be" in clause (a) of sub section (1) of Section 153A could not be interpreted that the issue of notice under Section 143(2) was mandatory in case of assessment under Section 153A. The use of the words "so far as may be" cannot be stretched to the extent of mandatory issue of notice under Section 143(2). As is noted, a specific notice was required to be issued under Clause (a) of sub-section (1) of Section 153A calling upon the persons searched or requisitioned to file return. That being so, no further notice under Section 143(2) could be contemplated for assessment under Section 153A. Followed Ashok Chadha v. ITO (2011) 337 ITR 399 (Delhi)(HC). (AY. 1999 to 2000 to 2005-2006)

Sumanlata Bansal v. ACIT(TM) (Mum.)(Trib.); www.itatonline.org

S. 153A: Assessment - Income of any other person - Search and seizure –Recording of satisfaction by AO of searched persons is a necessary pre condition for initiation of proceedings-Assessment proceedings was quashed. [S. 153C]

Assessee submitted that AO of searched person has to record satisfaction that some documents belong to other persons and then hand over same to AO of such persons who again will record his satisfaction. It was submitted that first satisfaction by AO of searched persons has not been done in these cases and therefore assessment proceedings itself were not legal. The Tribunal held, copy of satisfaction note suggested that satisfaction note enclosed with letter was prepared by AO of other entities who had assumed jurisdiction by invoking provisions of Section 153C, recording of satisfaction by AO of searched persons is a necessary pre condition for initiation of proceedings u/s 153C which was not done in present appeals, hence assessment proceedings quashed being illegal. (AY. 2003-04 to 2008-09)

DCIT.v. Akash Arogya Mindir P.Ltd. (2015) 167 TTJ 578/ 114 DTR 61 (Delhi)(Trib.)

S. 153A: Assessment- Search and seizure-Retraction of statement- Undisclosed income-Modification to client code of client is not necessarily a mala fide act- Disclosure made in a statement recorded at unearthlyhours cannot be given credence-if a voluntary disclosure is retracted, the AO has to make addition on the basis of documentary evidence.[S.69A, 132(4)145(3)]

(i) The AO held the client code modifications to be malafide with the intention to transfer the profit to other person by modifying the client code so as to avoid the payment of tax. From the circular of the Commodity Exchange, it is evident that client code modification is permitted on the same day. Therefore, unable to find out any justification for the allegation of the Assessing Officer that the client code modification was with the malafide intention. When the client code was modified on the same day, there cannot be any malafide intention. Had client modification done after the transactions period when the price of the commodity has already changed, then perhaps there could have been some basis to presume that client code modification is intentional. However, when the client code modification is done on the same day, there was no basis or justification to hold the same to be malafide.

(ii) Moreover, the AO has computed the notional profit/loss till the transactions period and not till the period by which the client code modification took place. Even if the view of the Revenue is accepted

that the client code modification was with malafide intention, then the profit or loss accrued till the client code modification can be considered in the case of the assessee but by no stretch of imagination the profit/loss arising after the client code modification can be considered in the hands of the assessee.

(iii) In KailashbenManharlalChokshi vs. CIT (2010) 328 ITR 411 (Guj), the High Court held that if a statement is recorded at midnight, much credence cannot be given to such statement because the person would not be in a position to make any correct or conscious disclosure in a statement recorded at odd hours. The ratio of the above decision of the jurisdictional High Court would be squarely applicable to the facts of the assessee's case because the statement was recorded at the midnight of 25th and 26th March 2008.

(iii) In KailashbenManharlalChokshi the Hon'ble High Court has noticed that when during the course of assessment proceedings the assessee has given the proper explanation for investment in various properties, the addition cannot be made on the basis of statement made at odd hours. Similarly, in the case of Ratan Corporation(2005) 145 Taxman 503 (Guj.), the Hon'ble jurisdictional High Court reiterated that when the statement made during the course of search has been retracted, then it is duty of the Assessing Officer to make further inquiries. Similar view is expressed by their Lordships of Hon'ble Jurisdictional High Court in the case of Radhe Associates (2013) 37 taxmann.com 336 (Guj.), wherein the Assessing Officer has made the addition by mentioning that there were clinching documentary evidences with respect to receipt of on-money. However, these clinching documentary evidences were not specified. In the case under appeal. The ITAT find that the officer recording the statement of ShriNayanThakkar has mentioned that various defects and discrepancies have been observed from the papers and documents seized from the assessee's premises. However, any defects or discrepancies were not specified. Therefore the ITAT held that facts of the assessee's case the decisions of the Hon'ble Jurisdictional High Court in the cases of KailashbenManharlalChokshi, Ratan Corporation and Radhe Associates would be squarely applicable. (AY. 2006-07 to 2008-09)
ACIT v. Kunvarji Finance Pvt. Ltd. (2015) 119 DTR 1/ 40 ITR 64/170 TTJ 345 (Ahd.)(Trib.)

S. 153A : Assessment - Search or requisition - Assessments which have attained finality cannot be disturbed or varied if no incriminating material is found qua the addition made.
During the course of search and seizure action, no incriminating document, material or unaccounted assets were found from the assessee. Even for the year of search i.e. A.Y. 2008-09, no addition has been made. The assessing officer without there being any incriminating material found in the course of search relating to the deemed dividend has made the addition on the basis of information already available in the return of income. This is also evident from the copy of panchnama and statement on oath of the assessee recorded at the time of search, the copy of which have been placed in the paper book form pages 135 to 139. Even in the assessment order there is no whisper about any material or document found at the time of search relating to the transaction of deemed dividend. The Ld. AO he has noted the facts about receiving of the payments by the assessee from M/s. Lotus investment, which was a division of M/s. La-fin Financial Services Pvt. Ltd. in which the assessee held 50% of share, from the balance sheets and records already filed along with the return of income. Since the assessment for the A.Ys. 2002-03 & 2004-05 had attained finality before the date of search and does not get abated in view of second proviso to section 153A, therefore, without there being any incriminating material found at the time of search, no addition over and above the income which already stood assessed can be made. This proposition he said, is squarely covered by the decision ofAll Cargo Global Logistics Ltd. Vs. DCIT reported in (2012) 137 ITD 287 (SB) (Mum). Even the Hon'ble jurisdictional (Bombay) High Court in the case of CIT Vs. M/s. Murli Agro Products Ltd. ITA No. 36 of 2009 order dated 29.10.2010, has clearly held that, once the assessment has attained finality before the date of search and no material is found in the course of proceedings u/s 132(1), then no addition can be made in the proceedings u/s 153A. This proposition has been reiterated by Hon'ble Rajasthan High Court in the case of Jai Steel (India) Vs. ACITreported in (2013) 259 CTR (Raj) 281. Thus, the addition of deemed dividend made by the assessing officer is beyond the scope of assessment u/s 153A for the impugned assessment years. Satish L. Babladi Vs. DCIT passed in ITA Nos. 1732 & 2109 order dated 19.03.2013 distinguished(ITA No. 1553 & 3173/Mum/2010, dt. 13.02.2015) (A. Y. 2002-03 & 2004-05)

Jignesh P. Shah .v. DCIT (Mum.)(Trib.),www.itatonline.org

S. 153A : Assessment - Search or requisition –Limitation- period oflimitation should have commenced from 1/3/2007 when for all practical purposes the authorization issued by the department for search in the case of the assessee was executed and subsequent panchanama drawn on 28/4/2007 could not be considered as relevant- Assessment was held to be time barred.[S.132(3),143(3)]

A search and seizure action was conducted at the premises of the assessee on 28/2/2007 and a panchnama dated 1/3/2007 was drawn wherein cash amounting to Rs. 18 lacs and some loose papers were seized. On 1/3/2007, a prohibitory order under section 132(3) of the Act was also passed in respect of some articles. The search was recommenced on 28/4/2007 and concluded on the same day and as per the panchnama for this date, no articles were seized and prohibitory order u/s 132(3) was revoked. Finally, the assessments for the AY 2001-02 to 2006-07 was completed u/s 153A r.w.s 143(3) on 29/12/2009, which the assessee claimed to have been time barred in view of second proviso to section 153B(1).

Held that if on the date when such prohibitory orders are vacated, it would be relevant to see the action of the department and if no seizure is made on that date and nothing is done except lifting the prohibitory orders then the last punchnama drawn on that date would not be relevant to compute the limitation period for framing the assessment. Hence, period of limitation should have commenced from 1/3/2007 when for all practical purposes the authorization issued by the department for search in the case of the assessee was executed and subsequent panchanama drawn on 28/4/2007 could not be considered as relevant.

Since the period of limitation expired on 31/12/2008, the assessment orders passed on 31/3/2009 were held time barred.ITA Nos. 6437-42/Del/2012 & ITA Nos. 101-07/Del/2012 dt. 13/02/2015,(AY. 2008-09)

ACIT .v. Vijay Kumar Raichand (Delhi)(Trib.) www.ctconline.org

S. 153C:Assessment - Income of any other person - Search and seizure-General satisfaction recorded in the note is not enough- As there was no co-relation document wise- Order of Tribunal quashing the validity of order was held to be justified. [S.260A]

The assesse is an education institution. Before the Tribunal the assessee raised an additional ground stating that the satisfaction recorded by the AO was in general nature hence concluded assessment could not be disturbed. Tribunal allowed the appeal of the assessee. On appeal by revenue, dismissing the appeal the Court held that; Tribunal has found that incriminating material seized and stated to be pertaining to all six assessment years did not establish any co-relation document –wise with the assessment years in question and in the circumstances, the general satisfaction as recorded in the note is not enough; hence no substantial question of law arises out of Tribunal's order quashing notice under section 153C. (AY. 2001-02 to 2003-04)

CIT v. Sinhgad Technical Education Society (2015) 378 ITR 84/ 278 CTR 144 (Bom.)(HC)

Editorial : Sinhgad Technical Educational Society v. ACIT (2011) 140 TTJ 233 (Pune)(Trib) is affirmed.

S. 153C:Assessment - Income of any other person - Search and seizure- Even if the AO of the searched person and of the "other person" (i.e. the assessee) is the same, the proper satisfaction has to be recorded before assuming jurisdiction over the assessee. Failure to record satisfaction renders the assessment order null and void.[S. 153A,158BC, 158BD]

The High Court had to consider whether the assessment order passed u/s 153C could be quashed on the ground that the AO had not recorded his satisfaction even though the AO making the assessment of the searched person was himself having jurisdiction over such other person (i.e. the assessee). It also had to consider whether the law laid down in Manish Maheshwari vs. ACIT (2007) 289 ITR 341 and CIT vs. Calcutta Knitwears (2014)) 362 ITR 673 (SC), which were rendered in the context of section 158BD, were applicable to section 153C of the I.T. Act. HELD by the High Court:

(i) The dissimilarity of the form of two provisions of s. 158BC and s. 153C would make no difference to the purpose underlying. The power bestowed on the Assessing Officer having jurisdiction – be it under Section 153C or Section 158BD – is identical. The legal position as applicable to Section

158BD regarding satisfaction in the first instance of the first Assessing Officer forwarding the items to the Assessing Officer having jurisdiction; and in the second instance of the Assessing Officer having jurisdiction whilst sending notice to such other person (other than the person referred to in Section 153A), must apply proprio vigore. The fact that incidentally the Assessing Officer is common at both the stages would not extricate him from recording satisfaction at the respective stages. In that, the Assessing Officer is satisfied that the items referred to in Section 153C belongs or belong to a person (other than the person referred to in Section 153A), being sine qua non. He cannot assume jurisdiction to transmit those items to another file which incidentally is pending before him concerning other person (person other than the person referred to in Section 153A). The question as to whether that may influence the opinion of the Assessing Officer having jurisdiction over such other person, also cannot be the basis to take any other view. As a matter of fact, the other Assessing Officer to whom the items are handed over, before issuing notice must himself be satisfied after due verification of the items received and the disclosures made by the other person in the returns for the relevant period already filed by the other person before him. For the same reason, we must reject the argument of the Department that the discretion of the Assessing Officer having jurisdiction will be impaired in any manner, if he were to hold a different view. Similarly, as there is no provision either express or implied (in the Act) to dispense with the requirement of satisfaction, if the Assessing Officer happens to be the same, as in this case, the argument of the Department must be negatived.

(ii) After receipt of the materials, the Assessing Officer having jurisdiction is expected to conduct enquiry and due verification of the relevant facts; before forming his prima facie satisfaction. The Assessing Officer having jurisdiction will be well within his rights to form an independent view before issuing notice to the other person (person other than the person referred to in Section 153A) under his jurisdiction on the basis of his own enquiry. In our opinion, the view formed by the Assessing Officer after his own enquiry does not entail sitting in appeal over the satisfaction of the first Assessing Officer, who had handed over the items to him.

(iii) Accordingly, the condition precedent for resorting to action under Section 158BD delineated by the Supreme Court in the case of Manish Maheshwari vs. CIT (2007) 289 ITR 341 and in the recent case of CIT Vs. Calcutta Knitwears (2014) 362 ITR 673, would apply on all fours mandating satisfaction of the Assessing Officer(s) dealing with the case at the respective stages referred to in Section 153C. (AY. 2001-01 to 2006-07)

CIT v. Mechmen (MP)(HC); www.itatonline.org

S. 153C : Assessment - Income of any other person - Search and seizure - Tribunal is required to provide specific findings rather than a general finding to arrive at a conclusion vis-à-vis documents in connection with a search and seizure.

A search took place in the premises of a certain company and an individual. During the course of search proceedings, various documents were found indicating amounts received from members of the individual's association and hence notices u/s. 153C were issued to the assessees on the basis of the documents and statement made by the individual. The Tribunal held that merely documents found in the individuals possession could not be evidence enough to issue notices u/s. 153C and thereby allowed the assessee's appeal.

The High Court observed that the decision of the Tribunal was based on general nature of the documents and not the specific findings of the AO, being documents, statement of the individual and the circumstance that the figures tallied with the amounts with the department in pending proceedings. The High Court remitted the matter back to the Tribunal for fresh consideration and should proceed to hear the merits of the appeals in other grounds as well.

CIT v. Mohan Meakins Ltd. (2015) 118 DTR 275 (Delhi)(HC)

S.153C: Assessment-Income of any other person - Search and seizure-Assessment on the basis of documents seized - No specific finding regarding documents-Matter remanded.

A search took place in the premises of RK and one RKM, Secretary General of the Uttar Pradesh Distillery Association. In the course of these search proceedings, various documents including reports narrating amounts alleged to have been received or receivable from various members of the UPDA and the basis thereof were recovered. The Revenue also relied upon the statement of RKM. On the basis of these materials, notices were issued under section 153C to the assessees. The notice was

challenged by the respective assessees on the ground that the documents to the extent they reflected payments allegedly made or payable, could not constitute valid material since they did not "belong" to them.
Held, that the Tribunal had not rendered any specific findings on the status of such documents. For instance, if the production figures were in fact forwarded by the concerned unit under a letter or some other form connecting it with the material form seized, the inference would be of particular kind. Having regard to these factors, the Tribunal should render specific findings as to the status of the documents and in that sense, connect them with the concerned assessee's third parties who were issued notice under section 153C, and not merely the general nature of the documents in the form of production figures or amounts tabulated in a chart. This would give a clearer picture as to whether any documents material seized during the course of the proceedings belonged to any of the assessees. Matter remanded.
CITv. Mohan Meakins Ltd. (2015) 372 ITR 502 / 277 CTR 198 / 118 DTR 198 (Delhi)(HC)

S. 153C : Assessment- income of any other person - Search and Seizure –Wrong designation will not invalidate order.
Search was conducted in premises of 'H' who was director of assessee company. But in assessment order his designation was wrongly described as managing director. On said ground assessee challenged validity of assessment order. It was by ITAT that mere wrong description of designation could not be a reason to invalidate order of assessment.(AY. 2007-08,2008-09)
DCIT v. Damac Holdings (P.) Ltd. (2014) 33 ITR 331 / (2015) 67 SOT 148 (URO) (Cochin)(Trib.)

S. 153C : Assessment-income of any other person- Search and seizure –Recording of satisfaction by same assessing officer is not mandatory.
It was held that where same Assessing Officer had completed assessment proceeding of assessee-company and its director, recording of satisfaction may not be necessary because there was no necessity for Assessing Officer to handover document to another Assessing Officer. (AY.2007-08 ,2008-09)
DCIT v. Damac Holdings (P.) Ltd. (2015) 33 ITR 331 / 67 SOT 148(URO) (Cochin)(Trib.)

S. 153C : Assessment - Income of any other person - Search and seizure - Where satisfaction was not recorded by the AO of the searched person, the assessment proceedings are quashed being illegal. [S.153A]
Assessee obtained copies of letters under RTI from various files of assesses whose premises were searched u/s 153A of the Act. It was emerged no satisfaction note was recorded by the A.O of the searched person with respect to other entities. The Tribunal quashed the assessment proceedings u/s 153C as A.O of the searched person had not recorded the requisite satisfaction. (AY. 2003-04 TO 2008 - 09)
DCIT .v. Aakash Arogya Mindir (P) Ltd. (2015) 167 TTJ 578 (Delhi)(Trib.)

S. 153C : Assessment - Income of any other person - Search and seizure - No incriminating material belonging to assessee found during course of search - Proceedings under section 153C were held to be not valid.[S. 132A, 143(3)]
During the search conducted in the case of RD group, certain documents had been referred as 'relating to' the assessee, in the satisfaction note recorded by the Assessing Officer while initiating the proceedings under section 153C against the assessee.
It was held that the satisfaction of the Assessing Officer that the said documents 'belong to' the assessee is condition precedent to initiate proceedings under section 153C. In absence of such finding by the Assessing Officer, the notice issued under section 153C in the present case is held invalid. Besides there was no incriminating material found during the course of search and the assessment was not pending or abated to justify the assessment framed under section 132A, read with section 153C as well as section 143(3) against the assessee. The assessment in the question framed in furtherance to the said invalid notice and in absence of incriminating material is thus held as void. (AY.2004-2005)

DCIT v. Qualitron Commodities (P.) Ltd (2015) 54 Taxmann.com295/167 TTJ 553 (Delhi)(Trib.)

S. 153C : Assessment of third person--Limitation--Assessing Officer empowered to assess or reassess total income of six assessment years immediately preceding assessment year relevant to assessment year in which search conducted--Notice issued to assessee pursuant to search not come within preceding six years and to be quashed.[S.153A(1)(b)]

According to section 153A(1)(b) of the Act, the Assessing Officer is empowered to assess or reassess the total income of the six assessment years immediately preceding the assessment year relevant to the assessment year in which search is conducted. According to the proviso to section 153C of the Act, for the purpose of section 153C of the Act, the date of receiving the books of account or documents shall be considered as the date of search. Therefore, on a combined reading of the proviso to sections 153C and 153A(1)(b) of the Act, the Assessing Officer is empowered to take action under section 153C of the Act for the year in which the seized document is received by him and the preceding six years.

For the assessment years 2001-02 and 2002-03, search and seizure action under section 132 of the Income-tax Act, 1961 was carried out on the assessee's group on December 13, 2005 in which certain documents said to belong to the assessee were found. The seized material pertaining to the assessee was received on March 12, 2009 from the Assistant Commissioner and notice under section 153C of the Act was issued and served upon the assessee on March 24, 2009. On appeal by the assessee contending that issue of notice under section 153C of the Act was barred by limitation:

Held, allowing the appeal, that the seized material was received on March 12, 2009 from the Assistant Commissioner. Thus, the year in which the seized material was seized was the previous year 2008-09 relevant to the assessment year 2009-10. The preceding six years would be assessment years 2008-09, 2007-08, 2006-07, 2005-06, 2004-05 and 2003-04. Therefore, on the facts of the assessee`s case and a combined reading of section 153C and section 153A of the Act, the issue of notice under section 153C of the Act for the assessment years 2001-02 and 2002-03 was barred by limitation and was to be quashed and consequentially, the assessment order passed in pursuance to the notice issued under section 153C of the Act was also to be quashed as was the penalty levied under section 271F of the Act. (AY. 2000-2001, 2001-2002, 2002-2003)

R. L. Allied Industries v. ITO (2015) 37 ITR 507/54 Taxmann.com 222 (Delhi) (Trib.)

S. 154 : Rectification of mistake –Interest- When superior authority had already passed an order Assessing Officer could not pass suo motu order levying interest. [S.234B, 234C]

At time of completing assessment, Assessing Officer recorded a finding that interest under sections 234B and 234C could be charged as per rules. Commissioner (Appeals), however, allowed assessee's claim holding that no interest could be charged. Subsequently, Assessing Officer took a suo motu action and passed an order under section 154 levying interest under sections 234B and 234C. Commissioner (Appeals) as well as Tribunal cancelled order passed by Assessing Officer under section 154 . On appeal dismissing the appeal of revenue the Court held that; on facts, Assessing Officer could not pass order suo motu under section 154 when superior authority had already passed an order against levy of interest, accordingly impugned order of Tribunal deleting interest was to be confirmed. (AY. 1997-98)

CIT .v.Brinda Arjena (Smt.) (2015) 231 Taxman 74 (All.)(HC)

S.154:Rectification of mistake-Income from other sources –Interest income-Set off of business loss-Rectification order was held to be justified.[S.56,28(i)]

Assessee was engaged in business of share trading. It earned certain interest income which was declared as 'income from other sources' . Assessing Officer passed order, accepting assessee's view. The assessee filed rectification application claiming interest income as 'business income' which was eligible to be set off against business loss. .Assessing Officer allowed said application. Subsequently, Assessing Officer passed another rectification order, restoring his original order . Assessee raised an objection that facts being complex in nature, Assessing Officer could not pass subsequent rectification order. Court held; in respect of same issue in dispute, assessee could not take double standards and,

thus, his objection was to be set aside. Since assessee failed to bring any material on record to prove its case, order of Assessing Officer was justified . (AY. 1997-98)
Trade Apartment Ltd. v. CIT (2015) 231 Taxman 578 (Cal.)(HC)

S. 154:Rectification of mistake-Grant of deduction of interest under section 10B - Intimation under section 143(1) can be rectified in rectification proceedings.[S. 143(1)]
The return filed by the assessee was processed under section 143(1). Subsequently, the Assessing Officer found that the assessee had interest income of Rs. 11,27,629 from deposits with the Corporation Bank, the Electricity Board and from staff on loans. On that basis he concluded that since the interest was not derived from the business of the undertaking, the income was not eligible for exemption under section 10B. The Assessing Officer under section 154 excluded the interest of Rs. 11,27,629 holding that the income was not eligible for exemption under section 10B.
Held, dismissing the appeal, that the order passed by the Assessing Officer under section 154 was valid and had been rightly upheld by the Tribunal, as the true intent behind passing such a rectification order is to ensure that the law laid down by the Supreme Court in Pandian Chemicals Ltd v.CIT (2003) 262 ITR 278 (SC) is followed.(AY. 2000-2001)
International Components India Ltd.v. ACIT (2015) 372 ITR 190 (Mad.)(HC)

S.154:Rectification of mistake-Business income–Re computation of turnover- Debatable questions- Rejection of application was held to be justified.[S.29, 132]
Tribunal computed brokerage of assessee by applying rate of 0.6 per cent on total turnover and same attained finality. Assessee through application under section 154 sought recomputation of said turnover . High Court by impugned order held that said determination would not be confined to arithmetical or adding figures, rather explanation and answers would be required, therefore, recomputation could not be undertaken under section 154.
JRD Stock Brokers (P.) Ltd. v. CIT 2015) 231 Taxman 504 (Delhi)(HC)
Editorial: Special Leave Petition filed against impugned order was dismissed. SLA (C) No. 21014 of 2014 dt. 05-01-2015), JRD Stock Brokers (P.) Ltd. v. CIT (2015) 230 Taxman 272 (SC)

S. 154 : Rectification of mistake-Commission-Without allowing expenditure-Application should only be confined to rectify arithmetical errors and mistake apparent from record- Rejection of application was held to be justified.[S.132]
The assessee was subjected to search under section 132 for providing accommodation entries in the form of share loss or share gain by issuing bills for shares without actual sale and purchase by the party mentioned in the bills. The AO and the CIT(A) held that the assessee had earned commission at the rate of 1.5 per cent from the said transactions. On second appeal, the Tribunal by their order held that in the light of the material available on record, the provisions of Chapter XIV-B were rightly applied, as it was a case where the assessee had undisclosed income. The Tribunal directed that the commission/brokerage of the assessee should be computed by applying the rate of 0.6 per cent on the total turnover, which was not disputed and accepted as the sum total of all transactions. The AO passed the order giving effect in compliance to the direction of the Tribunal.
The assessee had filed an application under section 154 against the order giving effect to the Tribunals order passed by the AO stating that the gross rate of commission had been computed without allowing expenditure incurred to earn such commission and the figure of turnover should be reduced or excluded. The application was rejected by the AO observing that there was no dispute with regard to the turnover and this was confirmed in the earlier order of the Tribunal. Furthermore, there was no mistake apparent from the record and the issue being debatable was outside the ambit and scope of section 154. The Commissioner (Appeals) and the Tribunal dismissed the appeal of the assessee. The Court held that the Tribunal observed that during the entire appellate proceedings the assessee had not challenged the said turnover and had accepted this as true and correct. What the assessee wants and seeks, by way of rectification, is re-examination of the entire bank accounts and re-computation of the turnover. This will require detailed scrutiny, examination and verification of entries and details. There may be or may not be any error but the said determination would not be confined to arithmetical or adding figures, but explanation and answers would be required. In view of the above the High Court

held that the impugned order passed by the Tribunal, rejecting the application under section 154 was correct.

JRD Stockbrokers Pvt. Ltd. v.CIT(2015) 231 Taxman 504/115 DTR 244 / 276 CTR 362 (Delhi)(HC)

S. 154 : Rectification of mistake-Export business–Book profit-Debatable issue –Rectification was held to be not proper. [S. 80HHC, 115JB]

Assessee filed its return of income declaring taxable income of Rs.NIL under normal provisions and Rs. 2,429 crores under section 115JB.

During assessment, the AO disallowed the deduction under section 80HHC while computing the income under section 115JB.AO held that excess deduction was given to assessee under section 80HHC, by an order under section 154 AO made additions to book profits. CIT(A) confirmed same. Tribunal held that there was no mistake apparent on face of record to warrant passing of rectification order. On appeal high Court held that exercise of powers under section 154 is limited to rectify mistakes which are apparent from record and not to carry out exercise of rectification of debatable issues. (AY. 2002-03)

CIT .v. Reliance Industries Ltd. (2015) 228 Taxman 184 (Mag.) (Bom.)(HC)

S. 154 : Rectification of mistake-Depreciation-Vapour Absorption Machine, an energy saving device-Allowance of depreciation at 100% was held to be justified.[S.32]

AO found that depreciation on Vapour Absorption Machine, an energy saving device was to be allowed to assessee at rate of 100 per cent. Rectification of said order by merely stating that Vapour Absorption machine was a part of Centralized Air Conditioner and liable for depreciation at 25 per cent was not justified as same was counter to Para III, 3(iii)D(b) of Appendix-I to Income-tax Rules, 1962.(AY. 2000-01)

CIT v. New Woodlands Hotel (P.) Ltd. (2015) 228 Taxman 360 (Mag.)(Mad.)(HC)

S. 154 : Rectification of mistake - Debatable point of law - Not a mistake apparent from record - Doctrine of merger - Weighted deduction - Assessing Officer while implementing first appellate order not entitled to review his earlier order - Assessing Officer on basis of new facts cannot pass new order unless order of appellate order challenged or modified.[S.35C]

Allowing the appeal of assesse it was held that; a decision on a debatable point of law is not a mistake apparent on the record. After the implementation of the order passed by the Commissioner (Appeals), it was not appropriate on the part of the Assessing Officer to review the earlier order under the guise of rectification and arrive at new facts and pass a new order unless the order of the Commissioner (Appeals) was challenged or modified. The Tribunal had materially erred in upholding the erroneous finding of fact by the Commissioner (Appeals) and the Assessing Officer and the findings were not only perverse but also against the rules and the provisions of law and, therefore, they were to be set aside. (AY. 1983-1984)

Gujarat State Seeds Corporation Ltd. .v. ITO(OSD) (2015) 370 ITR 666 (Mad.)(HC)

S. 154 :Rectification of mistake–After completion of assessment-On facts the order of Tribunal was affirmed. [S. 147, 148, General Clauses Act, 21]

After completion of assessment, AO issued rectification notice for non-consideration of speculative income. CIT(A) and Tribunal set aside rectification order on ground that AO had no power to rectify assessment order under section 154. On appeal by revenue the Court held that, power of rectification can be exercised by AO to effect amendment in assessment order. However on facts the order purporting to be order of rectification was in fact order of reassessment, hence the order of Tribunal was affirmed.

CIT .v. Karjat Trade Place (P.) Ltd. (2015) 228 Taxman 119(Mag.)(Uttarakhand)(HC)

S.154 : Rectification of mistake-Supreme Court remanding appeal to Commissioner (Appeals)-Commissioner (Appeals) adjudicating issue never in dispute before any of authorities-Beyond jurisdiction-Order to be rectified.

The Assessing Officer treated the cost of two comber machines and one auto coner as capital expenditure. The Commissioner (Appeals) and the Tribunal accepted the claim of the assessee that the cost was revenue expenditure. The Department carried the matter to the High Court and to the Supreme Court. The Supreme Court remanded the appeal to the Commissioner (Appeals). Pursuant to the directions of the Supreme Court, the Commissioner (Appeals) adjudicated the issue that the cost of two comber machines and one auto coner was capital expenditure. The Commissioner (Appeals) also held that the cost of 339 units of yarn clearers was capital expenditure. The assessee filed a rectification petition under section 154 of the Act contending that the Supreme Court had directed the Commissioner (Appeals) only to consider whether the cost of two comber machines and one auto coner was capital or revenue expenditure and that the issue related to the cost of 339 units of yarn clearers was never in dispute before any of the authorities, as the Assessing Officer had already accepted that as revenue expenditure. The Commissioner (Appeals) rejected the rectification petition. On appeal :

Held, allowing the appeal, that the cost of 339 units of yarn clearers was not the issue before the Supreme Court. Since the issue did not arise out of the orders of any of the authorities originally, the order of the Commissioner (Appeals) was not only incorrect but also beyond his jurisdiction.(AY. 1997-1998)

Sri Vignesh Yarns P. Ltd. v. Dy. CIT (2015) 38 ITR 543 (Chennai)(Trib.)

S. 154 : Rectification of mistake-Self-assessment tax-Withdrawal of interest on refund-Debatable issue-Not a matter for rectification.[S. 244A]

For the assessment year 2008-09, pursuant to the assessment order, the assessee was granted refund with interest under section 244A of the Income-tax Act, 1961. The Assessing Officer rectified the assessment order under section 154 of the Act holding that no interest was payable to the assessee and withdrew the interest granted under section 244A of the Act. The Commissioner (Appeals) confirmed this. On appeal :

Held, that the jurisdictional High Court having held that the assessee was entitled to interest on refund under section 244A of the Act, in respect of self-assessment tax, the Assessing Officer erred in assuming jurisdiction under section 154 of the Act on a debatable issue. (AY. 2008-2009)

Otis Elevators Company (India) Ltd. v. Dy. CIT (2015) 38 ITR 631(Mum.)(Trib.)

S.154:Rectification of mistake-Cash credits-Credits of earlier year-Only credits received during the year can be assessed as unexplained cash credits. Credits of earlier years, even if unexplained, cannot be assessed.[S.68]

Section 68 stipulates that any unexplained sum found credited in the books of the assessee for any previous year, then the same may be taxed as income of the assessee for that previous year. Thus, section 68 can only be invoked if the loan has been taken or the sums have been credited in the books in the relevant previous year for which assessment is being made and not the loans taken in the earlier years. From the income tax records, it is evident that this loan is coming forward from last several years and is reflected in the balance sheet of the assessee filed for the earlier years along with the return of income. All these records are available with the assessing officer. The mistake apparent from record does not mean the assessment order itself but the records which are available with the assessing officer. Though the assessee could not furnish the confirmation of the loan and other evidences but such a loan could not have been added in the A.Y. 2005-06 as the same was taken in the earlier years and is being carried forward. In this year it is appearing balance of the current year. Thus, legally such an addition could not sustained in this year and therefore addition made by AO u/s 68 is a legal mistake, which can be rectified within the ambit and provisions of section 154.(ITA No. 1219/Mum/2013, dt. 25.03.2015) (AY. 2005-06)

Rita Stephen Pinto .v. ITO (Mum.)(Trib.); www.itatonline.org

S. 154 : Rectification of mistake -Business income -Capital gains – Rejection of claim of capital gains- Expenditure against business expenditure is to be allowed. [S.28(i), 45]

The claim of the Assessee of treating the income from sale of shares as capital gains was rejected by the AO and the CIT (A). Thereafter, the Assessee filed a rectification application before the CIT (A) for rectification of the order raising the ground that business expenditure should be allowed against

the business income. This rectification application was rejected by the CIT (A) on the ground that the matter involves a long drawn out process of reasoning, hence cannot be subject matter of rectification under section 154.
On further appeal, the Tribunal held that since the claim of the assessee regarding income from sale and purchase of short term capital gains has been rejected by the lower authorities and the same has been treated as business income, hence the assessee was obviously entitled to deduction of expenditure incurred against earning of the said business income. Hence, there was an error apparent on record. The application of the assessee was allowed and consequently the matter was restored to the AO for the purpose of verification of the expenditure claim of the assessee.*(*ITA No. 6979/M/2012 dt. 14/01/2015) (AY 2008-09)
Shri Uday Chander Khanna .v. DCIT, (Mum.)(Trib.) www.ctconline.org

S. 158B : Block assessment–NRI gifts-Where no incriminating material indicating undisclosed income was seized and NRI gifts which had already been reflected in original return, no addition could be made as undisclosed income. [S.132, 158BC]
Assessee in regular returns filed under section 139(1), had shown NRI gifts received by her and claimed exemption from payment of income tax. After search, Assessing Officer took view that these gifts were not genuine and, therefore, treating same as undisclosed income, assessed said amount to tax. Since in instant case, no incriminating material indicating undisclosed income was seized and NRI gifts detected in course of search had already been reflected in returns filed by assessee, same would not constitute undisclosed income.)(AY. 1988-89 to 1998-99)
CIT .v. Manisha A. Sadhwani (2015) 228 Taxman 121(Mag.)(Karn.)(HC)

S. 158BB:Block assessment–Computation-Undisclosed income– Return of income-Returns were on record of department- Income returned cannot be assessed as undisclosed. [S. 139(1), 158BC, 158BD]
Dismissing the appeal of revenue the Court held that; Tribunal was right in deleting addition as undisclosed income of assessee received from partnership firm on ground that assessee had filed return before search though beyond due date specified under section 139(1) and said returns were on record of department before date of search, said income could not be treated as undisclosed income of assessees in view of section 158BB.
ITO .v. Muktaben J. Patira (2015) 231 Taxman 502 (Guj.)(HC)

S. 158BB : Block assessment – Computation - Undisclosed income –Undisclosed income for block period would be reduced by aggregate of total income to extent such income does not exceed maximum exemption limit, subject to condition that such income is determined on basis of entries recorded in books of account and other documents made by assessee on or before date of search. [S. 158BC]
Consequent to the search, the Assessing Officer held that the assessee had a very high standard of living and estimated her personal expenses from the date she attained majority and also estimated expenses incurred on her engagement and marriage. Thereafter, total undisclosed income was determined.Being aggrieved, the assessee preferred an appeal to the Tribunal and contended that in determining the undisclosed income the maximum non-taxable limit for each year would not be included.
The Tribunal did not accept the submission of the assessee and upheld the order of the Assessing Officer.
On appeal:The amendment by Finance Act, 2002 replaced/substituted the original sub-section (c) of section 158BB(1) by a new sub-section (c) consisting of sub-sections (A), (B) and (ca). As a consequence of the aforesaid amendment with retrospective effect from 1995, where the due date of filing the return has expired and no return has been filed, yet the total undisclosed income for the block period would *inter alia* be reduced by aggregate of total income to the extent such income does not exceed the maximum amount not chargeable to tax or any previous year falling in the block period. However the same is subject to the condition that such income not chargeable to tax is determined on the basis of entries recorded in the books of account and other documents maintained in the normal course on or before the date of search. It is only when the appellant is able to satisfy the

condition precedent in section 158BB(1)(c)(B) would such income be reduced in determining the aggregate of the total undisclosed income for the block period. In the absence of there being any such entries in the books and/or memorandum the appellant's case would fall under the substituted sub-section (ca) of section 158BB(1) and no amount of income would be reduced on the above account to determine the aggregate of total undisclosed income. In the present facts, in view of the law as prevailing prior to the retrospective amendment of 2002 with effect from 1995, none of the authorities determined the issue whether the amount was arrived at on the basis of entries in the books of account and other documents maintained by the appellant before the search. Therefore though the retrospective amendment to section 158BB by the Finance Act, 2002 would be applicable in case of appellant, the benefit of the same would be available only on the appellant satisfying the authorities that the amount of Rs. 69,298 is duly supported by entries in books of account or such other memorandum. This exercise could be carried out by the Assessing Officer while giving effect to this order. It is only on satisfaction of the aforesaid condition precedent would the benefit be extended to the assessee resulting in reduction of total undisclosed income to the above extent.
The submission of revenue that the benefit of retrospective amendment will not be available prior to 1995 cannot be accepted. This for the reason that section 158BB came into the statute book as part of Chapter XIV-B only with effect from 1-7-1995. Consequently, the retrospective amendment by Finance Act, 2002 with effect from 1-7-1995 would also extend to undisclosed income covering the period of assessment years 1987-88 to 1995-96. In the above circumstances, the First Issue is decided in favour of the appellant, and the same is subject to the assessee satisfying the Assessing Officer that the amount which is sought to be reduced is arrived at on the basis of entires recorded in the books of account and/or other memorandum maintained in the normal course before the date of the search.
Komal Wazir (Mrs.) v. Dy.CIT (2015) 230 Taxman 563 (Bom.)(HC)

S. 158BB:Block assessment-Undisclosed income-Opening cash balance—Renovation expenses of house-Addition was held to be justified- Bad debt-Matter remanded.[S.36(2)], 158BC]
Determination of opening cash balance on basis of cash flow statement furnished by assesse addition was held to be justified.
Assessee claiming that sums paid gratis to him in kind by friends and relatives as a matter of goodwill. Onus on assessee to show how much he received in kind or in value. No material to substantiate thE claim. Amount treated as undisclosed income was held to be justified.
Assessing Officer treating as investment in money-lending in year of giving. Tribunal finding bad debt not taken into account in computing income in earlier year. Matter remanded to AO.(BP.1989-90 to 1999-2000)
R. Mani v. ITO (2015) 373 ITR 226 (Mad.)(HC)

S. 158BB : Block assessment - Undisclosed income - Cash credits against assessee reflected in books referable to concerned assessment years - Block assessment unsustainable.[S.132, 158BC]
Dismissing the appeal of revenue , the Court held that: the Tribunal recorded a categorical finding to the effect that all the items of cash credits alleged against the assessees were reflected in the books of account referable to the concerned assessment years. Therefore, the very justification for making the block assessment and thereby the passing of assessment order was unsustainable. The Tribunal had taken a correct view in the matter and based its conclusions on the relevant precedents. Therefore, there was no basis to interfere with the order of the Tribunal.)
CIT .v. Tharmandal Builders P. Ltd. (2015) 370 ITR 209/ 231 Taxman 75(T & AP) (HC)
CIT .v. J.S. Investments (P) Ltd. (2015) 370 ITR 209/55 taxman.com 20 (T &AP) (HC)
CIT .v. S.D. Investments (P) Ltd. (2015) 370 ITR 209/55 taxmann.com 20 (T & AP) (HC)

S.158BB:Block assessment-Computation- Investment was not disclosed in the books- Addition was held to be justified- Income of new unit was not disclosed in the books of account-Exemption was not allowable.[S.69B, 80IA,158BC, 158BD]
Investment was not disclosed in the books of account .There was mismatch in the accounts .The investment was discovered after the search and seizure action hence the addition confirmed by the Tribunal was held to be justified. Income of new unit could not be accepted as the income was not

found recorded in the books of account.Income of new unit was not disclosed in the books of account-Exemption was not allowable. (AY. 1999-2000)
Herald Publications (P) Ltd..v. CIT (2015) 114 DTR 98 (Bom.)(HC)

S. 158BB : Block assessment-Undisclosed income-Substantial addition was confirmed- Sale of books- Matter remanded. [S.158BC]
Held that no proper explanation regarding source of corpus fund was furnished .Additions of income was held to be justified. Assessee collecting monthly fees and term fees from students, there was no entry in books of account and receipts were discovered during search operation. Addition was held to be proper. Assessee receiving money on sale of books. Documents not available before Assessing Officer but filed before Commissioner (Appeals). Genuineness of trust not enquired into by Assessing Officer. Matter remanded.(BP. 1-4-1996-28-5-2002)
ACIT v. Sabarigiri Trust (2015) 152 ITD 637 / 39 ITR 308 / 170 TTJ 586 (Cochin)(Trib.)

S. 158BC:Block assessment–Valuation-Amounts of investments not fully disclosed in books of account-Addition cannot be made on the basis of District valuation officer. [S. 69B]
During search no material was collected with respect to undervaluation of property and it was during post-search block assessment proceedings, Assessing Officer doubting valuation referred matter to valuation cell and on basis of valuation report of District Valuation Officer made addition. Dismissing the appeal of revnue the Court held that: such addition could not sustain as it was not made on basis of material collected during search.
Dy. CIT .v. Ravi Builders (2015) 231 Taxman 62 (Guj.)(HC)

S. 158BC:Block assessment-Undisclosed income-Unexplained investment - Burden on assesseeto prove source of income - No satisfactory explanation regarding investment - Addition of value of investment in total income of assessee - Justified.[S. 69, 132]
Held, that undoubtedly the investment having been found to be in the name of the assessee and the assessee alone, that too in the course of search and seizure under section 132, the presumption could only be that they formed part of the unaccounted income of the assessee and the mere fact of producing an affidavit by the wife or mother of the assessee may not be treated by the Assessing Officer as sufficient explanation and neither the Assessing Officer nor the Tribunal had found them to establish the genuineness of the two transactions. The findings were purely findings of fact. The findings were not perverse. The additions were justified.(AY 1994-1995, 1995-1996)
Hemant Kumar Ghosh .v.ACIT (2015) 375 ITR 79 (Patna)(HC)

S.158BC:Block assessment--Undisclosed income-Participation by assessee in proceedings--Not a bar to challenging jurisdiction-Warrant of authorisation not containing name of assessee-Block assessment pursuant thereto not valid.[S. 132, 292CC]
In consequence of an appellate order, the Assessing Officer completed the block assessment under section 158BC of the Actagainst the assessee. When the appeal against the block assessment was pending before the Tribunal, the Tribunal permitted the assessee to raise additional grounds questioning the order passed under section 158BC read with section 254 as bad in law, invalid or untenable since it was not on the basis of a warrant authorising the search issued in the name of the assessee but on the basis of the warrant issued on the joint names as shown in the panchnama. The Tribunal initially permitted the additional ground. Thereafter, the Tribunal modified the reasons recorded. Part of the reasons recorded was modified but the ultimate additional grounds, which were so permitted, remained unaltered. The Revenue preferred a writ petition challenging the modification and the reasons recorded by the Tribunal but the court did not interfere with the order of the Tribunal. Thereafter, the Tribunal, on verification of the panchnama prepared by the Revenue at the time of the search, found that the warrant was issued in the joint names as shown in the panchnama and not on the name of the assessee, who was the appellant before the Tribunal. The Tribunal recorded that the name of the assessee did not appear in the authorisation or requisition. Hence, the Tribunal found that the proceedings under section 158BC against the assessee, who was the appellant before the Tribunal,

were void ab initio. Consequently, the Tribunal allowed the additional grounds raised by the assessee. On appeals :
Held, dismissing the appeals, (i) that participation by the assessee in the earlier round of litigation either before the Assessing Officer or before the Tribunal or consequently before the Assessing Officer could not operate as a bar to the assessee to challenge the jurisdictional authority of the Assessing Officer under section 158BC.
(ii) That in the initial order the Tribunal permitted the additional ground raised by the assessee which was unchallenged by the Revenue. The Revenue only sought rectification of the reasons recorded but not of any additional ground or the ultimate order for permitting the additional ground and the admission of such ground. The Revenue could not agitate such question on the aspects of availability of the additional ground before the Tribunal, which was so permitted. The Tribunal had considered the panchnama prepared by the Revenue. The contents of the panchnama including non-appearance of the name of the assessee in the authorisation or requisition, remained undisputed. Therefore, it could not be said that the Tribunal did not give any opportunity to the Revenue to meet the additional ground. If the condition precedent for block assessment under section 158BC is not satisfied, such would go to the root of the matter and the jurisdiction, which has not been expressly conferred by the statute, cannot be invested with the Assessing Officer for the block assessment. On the facts, admittedly, there was no warrant of authorisation in the name of the assessee and, hence, the Tribunal had found the assessment as ab initio void, which called for no interference.
CIT v. Jolly Fantasy World Ltd. (2015) 231 Taxman 668 / 373 ITR 530 (Guj.)(HC)

S.158BC:Block assessment- Search and seizure - Amalgamation - Assessee-company dissolved on amalgamation - Block assessment framed thereafter in assessee's name - Not valid - Assessment framed in name of non-existing company - Not a procedural irregularity to be cured [S. 292B, Companies Act, 391, 394]
Assessment on a company which had been dissolved by amalgamation under sections 391 and 394 of the Companies Act, 1956, was invalid. Once the assessment was framed in the name of the non-existing entity, it was not a procedural irregularity of the nature which could be cured by invoking the provisions of section 292B. (AY. 2003 04 to 2008-09)
CIT v. Micron Steels P. Ltd. (2015) 372 ITR 386 / 233 Taxman 120 (Delhi) (HC)
CIT v. Steels P.Ltd. (2015) 372 ITR 386 / 233 Taxman 120 (Delhi)(HC)

S.158BC:Block assessment- Search and seizure-Search could be premisesbased - Search of bank and discovery of accounts in names of four individuals - All four individuals claiming that amounts belonged to political party to which they belonged - No returns filed for relevant period by individuals - Tribunal wrong in holding that amounts could not be considered "undisclosed" within meaning of Chapter XIV-B - Matter remanded to Tribunal.[S. 147, 158BB,158BD]
Allowing the appeal of revenue the Court held that; there was a fundamental fallacy in the reasoning given by the Tribunal to hold that no addition could have been made in the block assessment proceedings for want of undisclosed income. The Tribunal ignored the position that the four individual assessees had not filed returns of income and, therefore, section 158BB(1) clause (ca) of the Act would be attracted. Clause (ca) has to be harmoniously read with section 158B(b) of the Act. Further, statements of the four individual assessees were recorded on March 14, 1996, March 19, 1996, but they had claimed that the money lying in the savings bank accounts and fixed deposit account belonged to JMM and did not belong to them. Thus, the factum that the details of savings bank accounts and the fixed deposit accounts were made available would not make any difference. The search undertaken had revealed incriminating material relating to the opening and operation of bank accounts and on how the money was utilised, etc. These details were relevant to examine and consider the contention of the individual assessees that the money did not belong to them but to the political party, JMM. It would be, therefore, incorrect or improper to state that the search did not reveal or unearth relevant material or evidence relating to undisclosed income as defined under section 158B(b). In the case of JMM notice under section 158BD read with section 158BC of the Act was issued and there was also a search of the premises of AJ and A, chartered accountants and auditor of JMM where books of account and other documents were found and seized. Subsequently, during

investigation, statements of different persons were recorded to ascertain and decipher whether the money deposited in the bank accounts had any connection or belonged to JMM or the money was undisclosed income of the individual assessees. Assessment in the hands of JMM was on a protective basis. The Tribunal had not considered or examined the evidence or gone into the question whether and if no addition could be made in the hands of the individual assessees, substantive addition on the basis of the evidence or material could be sustained in the hands of JMM. The court remanded the matter to the Tribunal making it clear that it would be open to the revenue to argue and contend that before the Tribunal in case certain additions cannot be made in the block assessment proceedings , liberty should be granted to make the addition by recourse to section 147 of the Act or the question whether the additions could be made in accordance with law in the regular proceedings should be left open.(BP. 1-4-1986 to 27-09-1996)

CIT v. Jharkhand Mukti Morcha (2015) 372 ITR 257 / 273 CTR 252 (Delhi)(HC)
CIT v. Shailendra Mahto (2015) 372 ITR 257/ 273 CTR 252 (Delhi)(HC)
CIT v. Shibu Soren (2015) 372 ITR 257/ 273 CTR 252 (Delhi)(HC)
CIT v. Suraj Mandal (2015) 372 ITR 257 (Delhi)(HC)
CIT v. Simon Marandi (2015) 372 ITR 257/ 273 CTR 252 (Delhi)(HC)

Editorial: Order in Shibu Soren v. Asst. CIT [2011] 12 ITR (Trib) 540 (Delhi) reversed and set aside.

S.158BC:Block assessment - Undisclosed income - Amounts covered by search proceedings included in declaration under Scheme - No immunity - Voluntary of Disclosure of Income Scheme, 1997 - Amounts subject matter of search liable to be dealt with Chapter XIV-B.[S. 132, Voluntary of Disclosure of Income Scheme, 1997.]

Held, allowing the appeals of revenue the Court held that; the amount which was the subject matter of search was liable to be dealt with under Chapter XIV-B notwithstanding the fact that it was mentioned in the declaration filed under the Voluntary of Disclosure of Income Scheme, 1997. The only difference would be that the assessees would be under obligation to pay the differential tax if any. The proceedings initiated under Chapter XIV-B do not get affected by the proceedings under the Scheme. When this is the disparity or complexity as to the understanding of the provisions of those enactments, the assessees could not be exposed to the obligation to pay penalty or interest.

CIT v. Anil Kumar (2015) 372 ITR 405 (T & AP) (HC)
CIT v. Kauslya Bai (Smt.) (2015) 372 ITR 405 (T & AP) (HC)
CIT v. Mahendra Kumar (2015) 372 ITR 405 (T & AP) (HC)
CIT v. Shankarlal (2015) 372 ITR 405 (T & AP) (HC)

S. 158BC : Block assessment – Without any search warrant or requisition notice issued and addition was made as undisclosed income –Deletion of addition by Tribunal was held tobe justified.[S. 132, 132A]

Police recovered certain sum of money from three persons. Said persons stated that money belonged to assessee. Matter was referred to Income-tax department.Department issued a notice under section 158BC to assessee and made addition as undisclosed income. However assessee was neither searched nor assets were requisitioned from him under section 132A further, there was no warrant of authorization in name of assessee,section 158BC was not applicable in assessee's case.Tribunal held that addition of undisclosed income was not justified .On appeal by revenue High Court dismissed the appeal of revenue.

CIT v. Anil Kumar Chadha (2015) 374 ITR 10 / 275 CTR 407 / 230 Taxman 89 / 116 DTR 200 (All.)(HC)

S. 158BC : Block assessment – Procedure- Validity of notice- Non mentioning of block period in notice issued would not invalidate notice nor vitiate the proceedings .

High Court by impugned order held that non-mentioning of block period in notice issued under section 158BC would not invalidate notice nor would vitiate proceedings as one without jurisdiction.

Basant Kumar Patil v. Dy.CIT (2014) 49 taxmann.com 430 (Karn.)(HC)

Editorial:SLP was dismissed . (S. L. A. (C) Nos. 21797-21798 of 2014 dt. 08-01-2015) Basant Kumar Patil v. Dy. CIT (2015) 230 Taxman 271 (SC)

S. 158BC :Block assessment –Survey-Unaccounted stock was found- Same cannot be subject matter of search and block assessment.[s. 132, 133A]

Where before commencement of search through survey, certain unaccounted stock was noticed, same could not be subject matter of a search again and consequently, could not be subject matter of block assessment proceedings. (ITA Nos. 155 of 2008 & 224 of 2007 dt. 10-06-2014)(AY. 2001-02)

CIT v. B. SudheerBaliga (2015) 53 taxmann.com 524 / 229 Taxman 185 (Kar.)(HC)

S. 158BC : Block assessment-Search and seizure--survey--No incriminating material found during search--Incriminating material found during income-tax survey but no evidence that it related to assessee--Amounts based on income-tax survey not includible in block assessment.[S. 132, 133A]

Held, dismissing the appeals, that on the basis of the incriminating material found in the course of survey mainly because the material was put to the assessee and his statement was recorded subsequent to the search, the material could not be held to be relatable to the assessee. Therefore, the appellate authorities were justified in holding that the material found in the course of survey can become the subject matter of regular assessment and it could not become the subject matter of block assessment. [BP 1-4-1996 to 129-2014)

CIT v. Sudheer Prasad Shetty (2015) 371 ITR 75 (Karn) (HC)

CIT v. Yashoda Shetty (2015) 371 ITR 75 (Karn)(HC)

S. 158BC : Block assessment-Undisclosed income-Deletion of non-genuine gifts on ground amount already included-Benefit given to certain amount as past savings-Allowing certain value of jewellery as stridhan of assessee's wife-Deletion of addition for unexplained jewellery on ground jewellery belonged to some one else--Pure findings of fact.[S. 260A]

A search was conducted in the assessee`s business premises, his house and various banks. The Assessing Officer, in the block assessment for the years 1987-88 to 1997-98, after considering the various transactions, jewellery and other documents added substantial amounts to the income of the assessee. The Tribunal confirmed a major part of the assessment order but deleted the addition of Rs. 4,92,325 on account of non-genuine gifts, granted the benefit of Rs. 4 lakhs as past savings, allowed the value of 400 grams of jewellery as stridhan of the assessee`s wife and deleted Rs. 8,29,936 added by the Assessing Officer on account of the unexplained jewellery holding that the jewellery belonged to one H. On appeal: The Court held that the Tribunal had, after appraising the affidavit and the statements, recorded a plausible finding. The Revenue was unable to point out any misreading of evidence or perversity in the process of reasoning as would enable the court to interfere with the findings of fact recorded by the Tribunal.(BP. 1987 to 1997-98)

CIT v. Naresh Kumar Kohli (2015) 371 ITR 201 (P & H) (HC)

S. 158BC : Block assessment-Undisclosed income-Statement on oath after one and half month after search-Block assessment was held to be not valid .[S. 132(4)

Dismissing the appeal of revenue the Court held that the statement of managing partner of assessee recorded one-and-half months after search, cannot be brought under purview of section 132(4).Neither Assessing Officer nor Commissioner (Appeals) recording any finding that assessee suppressed sale of steel referable to discrepancy. Block assessment just on basis of surmises.-Block assessment was held to be not valid. (BP 29-10-2014)

CIT v. Balaji Steel Profiles (2015) 371 ITR 265 (T & AP) (HC)

S. 158BC : Block assessment - Undisclosed income - Retraction of statement - Assessee cannot disown statement - Block assessment not based on exclusively upon statement but supported by other documents seized during search-Block assessment was held to be valid.[S. 132, 132(4)]

Dismissing the appeal of the assesse the Court held that; the relevant documents were shown to the assessee and he not only admitted the genuineness of those documents but also made it clear that the amount mentioned therein was unaccounted income. Assuming that the assessee hyphenated his statement with a plea that the contents thereof were subject to verification of the books of account, there was nothing on record to disclose that the amounts mentioned in the statement were explained in

any other manner. Once the questions were put to the assessee, on the basis of the seized documents, which in turn were assigned separate numbers, the assessee could not disown them. Further, this was not a case, where the block assessment was based exclusively upon the statement. It was supported by the other documents seized during the course of search. Therefore, the block assessment made by the Assessing Officer was valid.

Y. Ramachandra Reddy .v. Addl. CIT (2015) 370 ITR 557 (T & AP) (HC)

S. 158BC: Block assessment-'On-Money' received by a builder on sale of flats held as stock-in-trade is taxable only in the year of sale of the flats and not in the year of offer/ disclosure.[S. 2(47), 132, 132(4), 269UA(f)]

Pursuant to a search, the assessee admitted to having received 'on-money' of Rs. 3 crore for sale of flats. However, it claimed that as the assessee is engaged in the business of purchase of land and construction and the flats are shown as stock-in-trade, the said 'on money' was taxable only in the year in which the sale-deed or possession is handed over to the flat owners. The assessee placed reliance on CIT vs. Ashaland Corporation reported at 133 ITR 55(Guj.) where it was held that unless the title of the assessee was extinguished, the title of the purchaser could not arise. Both could not be the exclusive owners of the same property at the same time. So long as the assessee continued to be the owner, it could not be said that his title was divested and that the sale had resulted in any profit to him. Reliance was also placed on the judgement of the Hon'ble Gujarat High Court in CIT vs. Motilal C.Patel & Co. 173 ITR 666(Guj.) where it was held that the only right which the agreement for sale conferred was the right to obtain another document, namely, the sale deed. It was held that it was only on the completion of the sale that the amounts which the assessee had received in Samvat year 2027 and the balance of the sale price which it had received in Samvat year 2028 became the profit of the assessee. HELD by the Tribunal:

The assessee is engaged in the business of construction. The assessee has been showing the flats in question as stock-in-trade, therefore in view of the decision of the Coordinate Bench rendered in the case of ITO vs. Shri Siddharth S. Patel in ITA Nos.1852 & 1853/Ahd/2003(supra), the provisions of section 2(47) would not be applicable. The assessee has disclosed the 'on money' in the return of income in the year in which the sale-deed was executed. The Revenue has not rebutted this contention. Therefore, in the light of the judgement of Hon'ble Gujarat High Court rendered in the case of CIT vs. Motilal C.Patel and Co. reported at 173 ITR 666 (Guj.), such amount can be subjected to tax when sale-deed is actually executed. Since the Hon'ble Gujarat High Court has held that the amount would become for the assessment year in which the sale transaction is completed. In the case in hand, it is not disputed that sale deeds were executed in the year subsequent to the year under appeal. Therefore, in view of the binding precedent, we are of the considered view that the authorities below were not justified in taxing the amount including 'on money' during the year under appeal. Further, the assessee has submitted that it has offered for tax the amount including 'on money' in the year whenever sale-deed was executed. This fact is also not controverted by the Revenue by placing any contrary material on record. (AY. 1990-91 to 1999-2000 and period up to 29/10/1999)

DCIT v. Ohm Developers (Ahd.)(Trib.); www.itatonline.org
DCIT v. Ohm Organisers (Ahd.)(Trib.); www.itatonline.org

S. 158BC:Block assessment-Undisclosed income-Assets were disclosed under Voluntary disclosure Scheme-No incriminating material was fond- Addition was held to be not justified.[S.132]

Pursuant to a search in the premises of the assessee, certain documents were seized. In the block assessment proceedings, the Assessing Officer listed out the immovable properties purchased by the assessee and arrived at the value of undisclosed properties . On appeal CIT(A) deleted the addition. On appeal by Revenue the Tribunal held that;(i) Purchase of assets disclosed in declaration under Voluntary Disclosure Scheme and no evidence found in course of search of new information hence no addition permissible (ii) Depreciation-Valuation of vehicles-Where value taken at cost, depreciation to be allowed separately. Where value taken at written down value-,depreciation deemed to be allowed (iii) Valuation of stock-Mistake pointed out by assessee in valuation cannot be ignored-No other material to contradict stock valuation shown by assessee-Addition to be deleted (iv) Computation--Investments in gold and silver articles declared in Voluntary Disclosure of Income

Scheme-Value of gold and silver not includible in undisclosed income (v) Liability towards sundry creditors--Failure by Assessing Officer to produce material on record to disprove claim of assessee--Assessment was not justified.
ACIT v. Kandasamy Sah (2015) 38 ITR 392 (Chennai)(Trib.)

S. 158BD : Block assessment-Undisclosed income of any other person–Warrant issued against the loacker same could be brought with in the amobit of section 158BC- Lack of jurisdiction was not raised at the time of assessment hence could not be raised in appeal.[S. 158BC]
As a result of a search carried out on assessee's husband 'Y', a draft agreement to sell and carbon copy of a receipt were seized . Assessing Officer completed assessment and brought to tax certain amount in hands of assessee. In appeal, assessee contended that a search warrant as issued was limited to locker in her name which yielded nothing . No warrant was issued or panchnama was drawn in her name and hence entire assessment was without jurisdiction . It was found that panchnama drawn pursuant to warrant issued in respect of 'Y' concededly contained signature of assessee. Court held that ; since search warrant was issued in respect of assessee's locker same would brought her within ambit of section 158BC . Court also held that since assessee was informed of search and she had signed panchnama, impugned addition could not be considered unauthorized for not fulfilling conditions prescribed under section 158BD,further since question of lack of jurisdiction of Assessing Officer had never been agitated in first instance at time of assessment before Assessing Officer, that issue could not be raised later in appeal.
Niti Wadhawan .v. Dy.CIT (2015) 231 Taxman 879 (Delhi)(HC)

S. 158BD : Block assessment - Undisclosed income of any other person – Valid search –Addition on the basis of material found in the course of search was held to be valid .[S.132]
Dismissing the appeal of assessee the Court held that;since there is no such word/language used in section 158BD that there must be a legal or valid search under section 132, contention raised by assessee that in absence of any valid search, impugned notice issued to him under section 158BD on basis of material with respect to undisclosed income found against other persons during course of said search proceedings was not maintainable, deserved to be rejected .
Gunjan Girishbhai Mehta .v. DIT (2015) 231 Taxman 873 (Guj.)(HC)

S.158BD:Block assessment-Undisclosed income of any other person – Satisfaction- Order of Tribunal was seta-side to decide on the issue of satisfaction and on merits. [S.254(2)]
Tribunal by order, dated 29-12-2010 set aside assessment made under section 158BD in case of assessee on ground that no satisfaction under section 158BD was recorded by Assessing Officer of searched person in respect of assessee. While doing so Tribunal did not consider letter of Assessing Officer of searched person recording satisfaction of undisclosed income in case of assessee. On revenue's rectification application, Tribunal recalled order dated 29-12-10 and placed matter before regular bench for consideration by making observation that jurisdictional requirement to proceed against assessee was satisfied. The assessee challenged the said order by filing Writ petition , the Court held that; since there was an error apparent on record in Tribunal's order, dated 29-12-2010 as it did not consider communication recording satisfaction under section 158BD, Tribunal rightly recalled its order; however, while recalling its order it was impermissible for Tribunal to make observation on issue of jurisdiction and, therefore, such observation could not be upheld.
Gyan Construction Co. v. ITAT (2015) 231 Taxman 68 (Bom.)(HC)

S. 158BD : Block assessment - Undisclosed income of any other person –Satisfaction can be recorded even after completion of block assessment.[S.158BC]
Allowing the appeal of revenue the Court held that ; the Assessing Officer can record his satisfaction for issuing notice under section 158BD in case of person other than searched person even after completion of block assessment in case of searched person.
CIT .v. Raghubir Singh Garg (2015) 231 Taxman 673 (Delhi)(HC)

S.158BD:Block assessment-Undisclosed income of any other person-Limitation-Notice issued after lapse of enormous and unexplained delay-Proceedings initiated were vitiated.

Where the authorities conducted the search on August 24, 1998, and concluded the search on October 23, 1998 but issued intimation under section 158BD of the Act, on October 4, 2005 ; Held, that the proceedings initiated were vitiated by enormous and unexplained delay.
CIT .v. Apna Organics P. Ltd. (2015) 374 ITR 55 (Bom.)(HC)

S. 158BD:Block assessment – Undisclosed income of any other person-Undisclosed income discovered during search - Notice under section 158BD was held to be valid.[S. 132, 158BC]
A search was conducted under section 132 of the Act, in the case of the M group. The Assessing Officer formed an opinion that undisclosed income discovered during the search had been earned by and belonged to persons other than the person in respect of whom the search was conducted, which were persons other than those covered under section 132 of the Act and, therefore, he issued notices upon the respective assessees and others under section 158BD. On a writ petition to quash the notices:
Held, dismissing the petitions, that when the subjective satisfaction had been arrived at by the Assessing Officer for initiation of the proceedings under section 158BD on the basis of the material collected during the course of search/inquiry, it could not be said that the satisfaction arrived at by the Assessing Officer while initiating proceedings under section 158BD of the Act had been vitiated in any manner. There was ample material on record mentioned in the satisfaction note, against the respective assessees and others. The notices under section 158BD were valid.
Goyal Industries Ltd. v. ACIT(2015) 372 ITR 514 (Guj.)(HC)

S.158BD:Block assessment - Undisclosed income of any other person-Satisfaction note recorded five months after date of completion of searched person - Notice issued to assessee immediately after recording satisfaction note - Sufficient compliance-Matter remanded to Tribunal to decide on merits. [S. 132, 158BC].
On December 17, 1999, the Department conducted search operations in the premises of VKN. Based upon the materials obtained, he was issued notice under section 158BC. Subsequently, after considering the return for the block period April 1, 1989, to December 17, 1999, filed by him, the block assessment was completed on December 31, 2001. A satisfaction note was recorded on May 30, 2002, in the case of the assessee to the effect that the search proceedings in respect of VKN revealed that the assessee had invested in various properties which were undisclosed. The Tribunal held that there was inordinate delay in issuing the notice under section 158BD to the assessee. On appeal:
Held, allowing the appeal partly, (i) that the satisfaction note in the assessee's case met the requirements of law.
(ii) That it could not be held that there was any delay in recording the satisfaction note. The assessment of VKN was completed on December 31, 2001. The satisfaction note was recorded on May 30, 2002, i.e., just about five months after the date of completion of the searched person. Notice was issued on June 3, 2002, immediately after the satisfaction note was recorded, to the assessee. Matter remanded to Tribunal to decide on merits.
CIT v. V.K. Narang HUF (2015) 372 ITR 333 (Delhi)(HC)

S.158BD : Block assessment - Undisclosed income of any other person–Satisfaction- Notice was issued after expiry of five months from satisfaction- Block assessment is valid.[S. 132, 158BC]
where notice under section 158BD was issued to assessee after expiry of five months from satisfaction recorded by Assessing Officer of person searched, it could not be concluded that there was unreasonable delay in issuing said notice and same was fatal to block assessment proceedings initiated against assessee.
CIT v. Sudhir Dhingra (2015) 373 ITR 555 / 230 Taxman 183 (Delhi)(HC)
CIT v. Renu Verma (2015) 373 ITR 555 (Delhi)(HC)

S. 158BD : Block assessment--Assessment of third person--Undisclosed income--Assessing Officer satisfied that undisclosed income discovered during search belonged to third person--Notice under section 158BD to such third person—Valid.[S. 132, 158BC]
Notices were issued to the assessees under section 158BC. The reason recorded was that during the course of search in the firm B, it was found that the firm was providing bogus accommodation for purchase of jewellery on commission basis. One such entry related to the transaction conducted by the

assessees by receiving an amount of Rs. 21,07,861 from the firm B towards the sale consideration of jewellery. According to the Department, these amounts constituted undisclosed income of the assessees. On writ petitions to quash the notices :

Held, dismissing the petitions, that since entries were found in the books maintained by the firm where the search was conducted which even the assessees admitted in their writ petitions, the satisfaction of the Assessing Officer and the issuance of the notice were perfectly correct, and required no interference. (AY 1998-1999)

Gyanendra Kumar Jain v. ACIT (2015) 371 ITR 244/231 Taxman 877 (All) (HC)
Rama Jain (Smt) v. ACIT(2014) 50 taxmann.com 311/ (2015) 371 ITR 244 (All) (HC)
Sharad Jainv. ACIT(2014) 50 taxmann.com 311/ (2015) 371 ITR 244 (All) (HC)
Pallavi Jainv. ACIT(2014) 50 taxmann.com 311/ (2015) 371 ITR 244 (All) (HC)
Mukesh Chand Jain v. ACIT(2014) 50 taxmann.com 311/ (2015) 371 ITR 244 (All) (HC)
Manju Lata Jain (Smt)v. ACIT(2014) 50 taxmann.com 311/ (2015) 371 ITR 244 (All) (HC)

S. 158BD : Block assessment - Undisclosed income of any other person-Sale of gift articles to assessee by group companies reflected in their books of account--Not fictitious sales--Purchase of gift articles shown in assessee's books and return and accepted by Assessing Officer for relevant assessment--Block assessment treating cost of gift articles as undisclosed income of assessee--Not valid.[S.158BB]

There was no search conducted against the assessee. Proceedings under Chapter XIV-B were initiated against the assessee on the basis of the discoveries in the course of a search conducted in the premises of the M group of companies. The books of account of those companies revealed that gift articles worth Rs. 49,90,175 were sold to the assessee during the assessment year 1992-93. Thereafter, block assessment for the block period 1987-88 to 1997-98 was completed treating the cost of the gift articles as undisclosed income of the assessee and taxing it at sixty per cent. The Tribunal held in favour of the assessee. On appeal :

Held, dismissing the appeal, that the finding that there was suppression of the sale of gift articles by the M group of companies itself was not well-founded. In their books of account, the transactions were very much reflected. An inference was drawn to the effect that the transaction was fictitious, only on the ground that the sale was accommodative in nature. The assessee had shown the purchase of the gift articles not only in its books of account but also in the return. On verification of the relevant records, the Assessing Officer had framed the assessment accepting the purchase of gift articles. Hence, there did not exist any occasion or basis for the Department to initiate block assessment proceedings against the assessee.(BP. 1987-88 to 1997-98)

CIT v. Sunny Liquors P. Ltd. (2015) 371 ITR 45 (T & AP) (HC)

S. 158BD : Block assessment – Limitation –Income of any other person-Within two years as prescribed under the Act- Notice issued after limitation period was held go be bad in law.[S.158BC, 158BE, 263]

The issue of notice u/s158BD to any person other than the person searched should be issued within the period of two years as prescribed under the Act to complete the Block Assessment. Hence notice issued u/s 158BD after the limit prescribed u/s 158BE is void- ab -initio.(AY. 1991-92 to 2001-02)

CIT v. V.D. Muralidharan (2015) 373 ITR 445 / 274 CTR 142/53 taxmann.com 140/113 DTR 124 (Mad.)(HC).
CIT v. K.Venugopal(2015) 373 ITR 445 / 274 CTR 142//53 taxmann.com 140/113 DTR 124 (Mad)(HC)
CIT v. V.P.Ullas. (2015) 373 ITR 445 / 274 CTR 142/53 taxmann.com 140/113 DTR 124 (Mad)(HC)

S. 158BD : Block assessment - Undisclosed income of any other person-Limitation - Notice to be issued immediately after completion of assessment of persons in respect of whom search conducted - Notice issued to third person more than a year after completion of assessments of

persons in respect of whom search conducted – Notice was held to be not valid. [S. 132, 158BC]

Dismissing the appeal of revenue the Court held that ;the Revenue has to be vigilant in issuing notice to the third party under section 158BD, immediately after the completion of assessment of the person in respect of whom search was conducted.

The assessees were third parties, who were issued notices under section 158BD pursuant to search proceedings in respect of the M group. In all those cases, the search proceedings were conducted on August 3, 2000. Thereafter, notices were issued to them for block assessment calling upon them to file returns for the previous years in question. The assessment proceedings were completed on August 29, 2002. Thereafter, the notices were issued to the assessees under section 158BD. In each of the cases the satisfaction note was recorded almost or just short of or more than a year after the completion of assessment of the M group. Held, that the notices were not issued in conformity with the requirements of section 158BD and were unduly delayed. Ratio in CIT v. Calcutta Knitwers (2014) 362 ITR 673(SC) is applied, the Court observed that " where in it was indicated that the revenue has to be vigilant in issuing notice to the third party under section 158BD,immediately after the completion of assessment of the searched person, this court is of the opinion that a delay ranging bewtween 10 months of of one and half years cannot be considered contemporaneous to assessment proceedings. We are of the opinion that notices were not issued in conconfirmity with the requirements of section 158BD and were unduly delayed. The appeals of revenue accordingly fail and dismissed.

CIT .v. Bharat Bhushan Jain (2015) 370 ITR 695 (Delhi) (HC)

S. 158BD : Block assessment - Assessment of third person- Assessing Officer of person in respect of whom search conducted must record his satisfaction that undisclosed income belonged to such third person - Failure to record reasons - Notice under section 158BD not valid.[S.132,132A,158BC]

Dismissing the appeal pf revenue the Court held that;in order to make a block assessment under section 158BC, in relation to a third person, whenever search has been conducted under section 132 or the documents have been requisitioned under section 132A, the Assessing Officer of the person in respect of whom search was conducted needs to record his satisfaction that undisclosed income belongs to the person other than the person with respect to whom search was carried out under section 132. Held, dismissing the appeal, that since recording of reasons in the assessee's case was absent, the notice under section 158BD was not valid.

CIT .v. Champakbhai Mohanbhai Patel (2015) 370 ITR 700 (Guj.)(HC)

S. 158BD : Block assessment - Assessment of third person - Satisfaction of Assessing Officer of person searched that undisclosed income discovered during search belonged to third person - Opinion not formed in terms of section 158BB - Block assessment was held to be not valid. [S.132, 158BB, 158BC]

The revenue preferred an appeal to the Supreme Court .The Supreme Court remitted the matter directing the High Court to examine the limited question whether opinion was formed in terms of section 158BB and the time with in which it had to be recorded was complied with: Dismissing the appeal of revenue the Court held that ; after discussing the communication dated July 15, 2003, by the Assessing Officer of the searched person, who wrote to the Assessing Officer of the assessees, affirmed the findings of the Tribunal that the opinion formed in the letter dated July 15, 2003 was not tenable for the purpose of section 158BB. Followed CIT v. Radhe Shyam Bansal (2011) 337 ITR 217 (Delhi)(HC)

CIT .v. Manoj Bansal (2015) 370 ITR 704 (Delhi) (HC)

CIT .v. Radhey Shyam Bansal (2015) 370 ITR 704 (Delhi) (HC)

CIT .v. Sukesh Kumar Gupta (2015) 370 ITR 704 (Delhi) (HC)

S. 158BE : Block assessment - Time limit- Panchanama-The search ends, and the period of limitation begins, only on the drawing up of the formal panchnama to record the ending of the search. The argument that the search is concluded on the date of the search itself if nothing is seized thereafter is not acceptable- Period of limitation has to be reckoned from 31 st January

2000-Appeal was dismissed.[S.132, 132(3),132 (8A), 158BC, Code of Criminal Procedure . S.70]

A search u/s 132 of the Act was conducted on 8th December, 1999. The restraint order imposed on 8th December, 1999 was vacated on 31st January, 2000. The search party drew the panchnama dated 31st January, 2000 stating that the search commenced at 15:20 hours and was closed at 15:30 hours. The assessee claimed that the search was concluded on 8th December, 1999 and that the search dated 31st January, 2000 was only for the purpose of revocation of the restraint order dated 8th December, 1999 passed under Section 132 (3) of the Income-tax Act. The assessee contended that the period of limitation has to be reckoned from the search dated 8th December, 1999 and the period of limitation expired on 31st December, 2001, whereas the assessment order was passed on 31st January, 2002 which is out of the prescribed period of limitation. The assessee relied upon the judgement in the case of CIT vs. S. K. Katyal reported in (2009) 308 ITR 168 (Delhi) wherein it was held that the period of limitation has to be reckoned from the date when the search took place and not from the date when the keys were handed back to the assessee. HELD by the High Court rejecting the plea:
(i) The judgement in CIT vs. S. K. Katyal (2009) 308 ITR 168 (Delhi) does not in our opinion, lay down the correct law. In two earlier judgements of the Delhi High Court itself contrary views were taken. See M. B. Lal vs. CIT (2005) 279 ITR 298 (Delhi) and VLS Finance Ltd vs. CIT (2007) 289 ITR 286 (Delhi). Ordinarily an authorization for search is valid until the same has been executed. In order to avoid any controversy as to when was the authorization executed the legislature has provided in the aforesaid explanation that the authorization shall be deemed to have been executed on conclusion of search as recorded in the last panchnama. Therefore, the law insists upon a panchnama for the purpose of formal recording that the search is at an end. Without such recording the search once initiated does not come to an end. We are unable to find any justification for the view that search comes to an end immediately after the search has been concluded for the day. Such an argument may possibly have been advanced in the absence of the deeming provision contained in Explanation 2 (a) to Section 158BE. Law as we can see it is that a search initiated pursuant to a written authorization may be kept in suspended animation so long as the same is not formally brought to an end in writing in the presence of witnesses by drawing a panchnama which is bound to be the last panchnama.
(ii) A restraint order under Section 132(3) is in aid of search and is valid for sixty days u/s. 132(8A) unless revoked earlier. During continuance of the restraint order the search itself cannot be said to have come to end. It was contended that on 31st January 2000 no search took place only the restraint order was vacated. From the panchnama dated 31st January 2000 it appears that at 15:30 hours the search finally concluded. The admitted fact that the keys were made over and the restraint order under Section 132(3) was lifted corroborates the fact that the search finally came to an end. The search could not have been at an end on any day prior to 31st January, 2000. The object of withholding the keys was to resume the search if and when it was felt necessary. The return of the keys manifested the intention that the search was at an end. Since the law required formal recording of conclusion of search the panchnama dated 31st January 2000 was drawn up and the business transacted on the day was recorded.
(iii) It is to be noticed that the period of limitation for the purposes of Income Tax Act under Section 158BE is dependent on the conclusion of search and not on the conclusion of the investigation. Investigation includes examination of witnesses which can be done under Section 131 of the Income Tax Act. The Assessing Officer wanted to examine the assessee but he did not turn up after the conclusion of the search as would appear from the assessment order quoted above. Another pertinent question in accordance with Section 465(2) of CRPC shall be “whether by keeping the search pending till 31st January 2000 any failure of justice was occasioned?” Neither in the case of Katyal nor before us any such point was canvassed. The second pertinent question shall be “was the point of limitation raised at the earliest stage before the assessing officer? The assessee by his letter dated 28th January, 2002 addressed to the assessing officer contended that due to his preoccupation he was unable to appear before the latter to record his deposition. When the case of the assessee is that the time prescribed for assessment had expired on 31st December, 2001, he should have raised the point in his letter dated 28th January, 2002 which he did not do. Therefore prolongation of the search did not cause any prejudice to the assessee not to talk of occasioning any failure of justice. It appears from the assessment order that the assessee was served with a notice u/s 131 to appear for recording his

deposition. Time to do so was extended on four occasions. The assessee by his letter dated 28th January, 2002 evinced his intention not to appear. In those circumstances the assessment was completed on 31st January, 2002 which otherwise might have been completed on or before 31st December, 2001. (BP. 1990-91 to 2000-2001)
Navin kumar Agarwal v. CIT(2015) 278 CTR 206(Cal) (HC)

S. 158BFA:Block assessment – Penalty –Estimation-Levyable on all manners of determination of income, including an estimation.
The Assessee during search proceedings admitted that it earned income from share transactions as well as commission from providing accommodation entries. Tribunal had determined the income from commission on accommodating entries at 0.6% of the total turnover of the Assessee. Penalty was levied by the AO. The HC held that penalty was levyable on all manners of determination of income, including an estimation or voluntary declared by the Assessee.
JRD Stock Brokers (P) Ltd. v. CIT (2015) 117 DTR 241 (Delhi)(HC)

S.158BFA : Block assessment – Penalty – Tax paid along with interest- Deletion of penalty was held to be justified.[S. 132,158BC]
Search was conducted in case of assessee under section 132.- Thereupon, a notice was issued to him under section 158BC. Assessee filed its block return of income and his undisclosed income was computed . Assessing Officer found that assessee did not pay full amount of tax due and, thus, he passed penalty order under section 158BFA(2). Tribunal, deleted same on ground that assessee had paid balance amount of tax subsequently along with interest. On appeal by revenue, the Court held that the,Tribunal was right in law in deleting penalty imposed on assessee under section 158BFA(2).
ACIT v. Natubhai M. Makwana (2015) 230 Taxman 637 (Guj.)(HC)

S. 158BFA : Block assessment – Interest – Delay in supplying the copies of seized documents- No interest could be levied.[S.158BC]
There was delay in filing return as revenue had taken time to supply copies of seized documents, on basis of which return was to be filed .Since there was no delay on part of assessee, no interest could be levied on assesse.
CIT v. Gobind Ram (2015) 229 Taxman 491 (P&H)(HC)

S. 158BFA : Block assessment – Interest – Penalty -A notice to assessee is a must before any penalty is imposed.[S. 158BC]
The assessee filed returns in response to a notice under section 158BC admitting certain undisclosed income. However, block assessment was made on higher income and a penalty under section 158BFA was also imposed on assessee. On appeal, the Commissioner (Appeals) cancelled the penalty on the ground that the assessee had not been given reasonable opportunity of being heard as mandated by section 158BFA(3).The Tribunal upheld the order passed by the Commissioner (Appeals).On revenue's appeal to High Court:
The proviso to section 158BFA mandates that no order imposing penalty shall be made in respect of a person, if he satisfies the condition mentioned in the said proviso. Therefore, imposition of penalty is not automatic. If the assessee files returns declaring the undisclosed income and pays tax thereon and if the Assessing Authority accepts the said undisclosed income, then the question of imposing any penalty would not arise. Imposition of penalty would arise only if the undisclosed income determined by the assessing authority is in excess of the amount of undisclosed income shown in the returns filed by the assessee. Even then, sub-section (3) mandates that no order imposing penalty under sub-section (2) shall be made unless an assessee has been given a reasonable opportunity of being heard and a period of limitation is prescribed for imposition of such penalty under the said sub-section. Therefore, if the Assessing Authority intends to impose penalty under sub-section (2), he has to hear the assessee. It necessarily follows that a notice demanding the penalty or a notice calling upon the assessee to show-cause why penalty should not be imposed is to be issued. Then, sufficient opportunity should be given to the assessee to reply to such notice. It is only after hearing, the Assessing Authority can proceed to impose any penalty. Penalty proceedings are penal in nature and the said penalty being not automatic and the orders in such penalty proceedings is to be passed within

the time stimulating in sub-section (3) of section 158BFA and in absence of any express provision stating that no such notice is not required, it necessarily follows that a notice to the assessee is a must before any penalty is imposed under sub-section (3). The said letter is also not available on record. Therefore, in the facts of the case, the contention of the assessee that he has not been heard, no opportunity was provided to him and therefore, the mandatory requirements of sub-section (3) of section 158BFA are not complied with is fully justified. Both the Appellate Authorities were justified in setting aside the order of penalty.

CIT v. H.E. Distillery (P.)Ltd. (2015) 229 Taxman 447 (Karn.)(HC)

S. 161 : Liability of representative assessee-Association of persons-Beneficiaries not come together with object of carrying on investment in mezzanine funds-Test for association of persons not satisfied. [S.2(31)(v)]

On appeal :Held, dismissing the appeal ; that, the beneficiaries contributed their money to the assessee and a separate agreement was entered into between the assessee and each beneficiary. There was no inter se arrangement between one beneficiary and the other as each of them enter into separate contribution arrangement with the assessee. Therefore it was not a case where two or more beneficiaries had joined in a common purpose or common action and therefore the tests for considering the assessee as association of persons were not satisfied. The beneficiaries had not set up the trust. The beneficiaries were mere recipients of the income earned by the trust. They could not therefore be regarded as an association of persons. All trusts could not be considered as associations of persons. The charge to tax in the hands of the representative assessee was to be in accordance with section 161(1) of the Act and therefore the status of the assessee could not be that of association of persons. (AY. 2008-2009, 2009-2010)

ITO v. India Advantage Fund -I(2015) 39 ITR 360 / 67 SOT 5 (URO)/(Bang.)(Trib.)
Dy. CIT v. ICICI Econet Internet and Technology Fund (2015) 39 ITR 360 (Bang.)(Trib.)
Dy.CIT v. ICICI Emerging Sectors Fund (2015) 39 ITR 360 (Bang.)(Trib.)

S. 164:Representative assessee - Trustee - Assessment -Specific trust and discretionary trust - Some beneficiaries of specific trust being discretionary trusts - Trustee to be assessee under section 161 in respect of specific trust and under section 164 in respect of beneficiary discretionary trust- Whether or not a particular income is real income of the assessee under the terms and conditions of agreement is essentially question of fact.[S.161, Indian Trusts Act, 1882]

The court observed that the scheme of the Indian Trusts Act,1882 , shows that the creation of trust is recognized and the provisions of made for rights and liabilities of trustees and beneficiaries shows thatthere is a jural relationfor enforcement of such rights and liabilities between trustees of any trust and the beneficiaries of trust .Breach of trust by the trustees in respect any properties of the trust can be enforced by the beneficiaries against the trustees. Under the Income tax Act 1961 , if section 161 isread with section 164 of the Act, it appears that in a case where the individual share receivable by the beneficiary is indeterminable or unknown the charge of tax shall be at maximum marginal rate under section 164 but if the share of the beneficiary is determinable or afixed specific share on each beneficiary is provided, section 161 would be applicable and the tax chargeable would be at the normal rate provided.

Held, that the Tribunal after considering the terms of the agreement had recorded the finding of fact that as per the agreement, the income which had already accrued in favour of the assessee-trust during the completion of the accounting year could not be treated as no income merely because the respective societies sent notices after many years demanding refund of the amount. There was no evidence the agreement expressly provided for the refund of the amount already paid by way of remuneration nor was there any adjudication by any authority that the assessee was under obligation to refund the amount. Under these circumstances, when the Tribunal had recorded the ultimate finding of fact, the amount was assessable.

Neo Trust v. ITO (2015) 372 ITR 546 (Guj.)(HC)

S. 164 : Representative assessees - Charge of tax – Beneficiaries unknown- Rate applicable to highest slab rate.

Allowing the appeal of revenue the Court held that; income of trust could not be assessed otherwise than by uniform application of maximum marginal rate as contemplated in Explanation 2 to section 164 which means rate applicable in relation to highest slab of income provided for AOP in relevant Finance Act.

CIT v. Kantilal Harilal Family Trust (2015) 230 Taxman 317 (Guj.)(HC)

S. 164 : Representative assesse-Charge of tax – Beneficiaries unknown –Interest in foreign Bank-Specific order from CBDT- Can not be assessed an AOP.

The assessee trust was formed, jointly by the Government of India and Government of France based on the principle of reciprocity and parity, for research in India. Assessee suffered a loss, however, Assessing Officer held that interest in foreign bank account would be taxable at maximum marginal rate . Because of said finding, benefit of carry forward of loss to next assessment year was denied Tribunal has allowed the claim .On appeal by revenue ; dismissing the appeal the Court held that once it was found that exemption granted by specific order of CBDT in assessee's case would apply, section 164(2) would not be applicable so as to tax assessee as an AOP.(AY. 2008-09, 2009-10)

DIT v. Indo French Centre(2015) 229 Taxman 311 (Delhi)(HC)

S. 164 : Representative assessees-Charge of tax–Beneficiaries unknown-Trust-Income offered to tax directly by beneficiaries-Income cannot be brought to tax at maximum marginal rate. [S.164(1)]

On appeal :Held, dismissing the appeal that it was only when the trustees had discretion not to distribute income to beneficiaries, that the rigours of section 164 of the Act as amended by the Finance Act, 1970 would be attracted. Therefore, in the assessee's case, the income could not be brought at the maximum marginal rate.Income of assessee included in total income of beneficiaries and offered to tax directly by beneficiaries.Income cannot be brought at maximum marginal rate. (AY. 2008-2009, 2009-2010)

ITO v. India Advantage Fund–I(2015) 39 ITR 360 (Bang.)(Trib.)
Dy.CIT v. ICICI Econet Internet and Technology Fund (2015) 39 ITR 360 (Bang.)(Trib.)
Dy.CIT v. ICICI Emerging Sectors Fund (2015) 39 ITR 360 (Bang.)(Trib.)

S. 164 : Representative assessee-Trust-Identification of beneficiaries-Determination of shares-Shares capable of being determined sufficient- The beneficiaries were identifiable and the shares of the beneficiaries were determinable and hence, section 164 of the Act was not applicable.

On appeal : Held, dismissing the appeal ;that in the Central Board of Direct Taxes Circular No. 281 dated September 22, 1980 ([1981] 131 ITR (St.) 4), the provisions of Explanation 1 to section 164 of the Act regarding identification of beneficiaries was explained to the effect that for identification of beneficiaries it was not necessary that the beneficiary should be actually named in the order of the court or the instrument of trust or wakf deed. All that was necessary was that the beneficiary should be identifiable with reference to the order of the court or the instrument of trust or wakf deed on the date of such order, instrument or deed. The trust deed laid down that the beneficiaries meant the persons, each of whom had made or agreed to make contributions to the trust in accordance with the contribution agreement. That clause in the trust deed was sufficient to identify the beneficiaries. The trust deed specified the detailed share of each beneficiary. It was not the requirement of law that the trust deed should actually prescribe the percentage share of the beneficiary in order for the trust to be determinate. It was enough if the shares were capable of being determined based on the provisions of the trust deed. Therefore, in the assessee's case, the beneficiaries were identifiable and the shares of the beneficiaries were determinable and hence, section 164 of the Act was not applicable. (AY. 2008-2009, 2009-2010)

ITO v. India Advantage Fund -I(2015) 39 ITR 360(Bang.)(Trib.)
Dy.CIT v. ICICI Econet Internet and Technology Fund (2015) 39 ITR 360 (Bang.)(Trib.)
Dy.CIT v. ICICI Emerging Sectors Fund (2015) 39 ITR 360 (Bang.)(Trib.)

S. 170:Succession to business otherwise than on death-Amalgamation-Completion of assessment in name of non-existent amalgamated company would render it null and void.[S.153C, 292B]

Assessment u/s 153C was completed by the AO on the original assessee company though he was intimated that the company had amalgamated with another company. On appeal, the High Court held that completion of assessment in the name of a non-existent company would render it null and void. S.292B is not applicable to the facts of the present case. A jurisdictional defect such as nullity shakes the entire proceedings and does not render the order a mere irregularity. (AY. 2003-04 to 2008-09)
CIT v. Micron Steels (P) Ltd. (2015) 372 ITR 386 / 233 Taxman 120 / 117 DTR 89 (Delhi) (HC)
CIT v. Steels (P) Ltd. (2015) 117 DTR 89 (Delhi) (HC)

S. 171 : Partition–Assessment-Hindu undivided family -Family arrangement-Disposition in favour of six minor daughters of karta in form of fixed deposits--Interest cannot thereafter be treated as part of wealth of Hindu undivided family--Not taxable in hands of Hindu undivided family.[Transfer of Property Act, 1882, The Sale of Goods Act, 1932.]
The family arrangement of the assessee-Hindu undivided family provided for the allotment of a sum of Rs. 1,25,000, to each of the six minor daughters of the karta in the form of fixed deposits. The assessee, for the assessment year 1991-92, claimed deduction of the interest that accrued on the fixed deposit receipts. The Assessing Officer held that the document did not amount to partial partition and though it was a family arrangement, it did not have the effect of taking away the corresponding wealth from the purview of the Hindu undivided family, and, accordingly, he treated the interest as the income of the Hindu undivided family. The Commissioner (Appeals) allowed the claim of the assessee. The Tribunal set aside the order of the Commissioner (Appeals). On appeals : Held, allowing the appeals,
(i) that the family arrangement, wherever it exists and is proved, is a sui generis, i.e., a class by itself, with full legal enforceability, de hors the fact that it is not dealt with under any specific provision of an enactment. The settlement had to be given full effect and the legal consequences flowing therefrom could not be ignored, on the ground that they did not fit into any specific provision of law.
(ii) That once the Hindu undivided family had settled a sum of Rs.1,25,000, each, in favour of six minor daughters of the karta, the corresponding amount ceased to be the wealth or the assets of the Hindu undivided family. The amount could not be treated as part of the wealth of the Hindu undivided family even thereafter. The returns filed by the Hindu undivided family was not the avenue to examine the question as to how the amount so settled must be treated in the hands of the person on whom it was settled.
The Court also observed that the family arrangement is a typical legal phenomena that does not fit into those which are specifically recognised under law. Transfer of immovable or movable property, as the case may be, does take place under the arrangement but it is substantially different from the one that is contemplated under the Transfer of Property Act, 1882, or the Sale of Goods Act, 1932. No formal registered document is executed and the nature of consideration is not amenable to any legal analysis.
In the ordinary course of things, once an assessee which incidentally may be a Hindu undivided family, parts with a portion of its wealth towards another and the wealth is found to be true, that part of the wealth cannot be treated as continuing to be with the assessee. The mere fact that the transfer or settlement of such portion was in favour of one of the members of the Hindu undivided family, does not make much of difference. On being parted in favour of other persons, in a manner recognised under law, the corresponding amount ceases to be part of the wealth of the assessee. (AY.1991-1992 to 1996-1997)
P. Shankiaraiah Yadav (HUF) v. ITO (2015) 371 ITR 386 (T & AP) (HC)
Editorial : Order in ITO v. P. Shankaraiah Yadav [2005] 273 ITR 103 (AT) (Hyd) is reversed.

S. 172:Shipping business-Non-residents-Law laid down in CIT Vs. Orient (Goa)(P) Ltd 325 ITR 554 that S. 172 is applicable only to non-residents carrying on shipping business and not to residents and that the expenditure of demurrage charges cannot be allowed u/s 40(a)(i) in the absence of TDS does not appear to be correct and issue is referred to Full Bench.[S.40(a)(ia)]
The High Court had to consider whether its earlier decision in CIT Vs. Orient (Goa)(P) Ltd.( )325 ITR 554 in which it was held that Section 172 of the Act is applicable only in respect of a non-resident carrying on shipping business and not to residents and that the expenditure of demurrage

charges cannot be allowed in the absence of tax being deducted at source was correctly decided. HELD by the High Court:
(i) We are unable to agree with the above view of this Court in Orient (Goa)(P) Ltd. (supra). This is for the reason that the assessee placed reliance upon Section 172 of the Act in respect of payments made by it to a non-resident shipping company by way of demurrage charges. The tax which is deducted at source by the assessee company is on behalf of the recipient of the charges. The issue before the Court was whether demurrage charges which are paid by the assessee to a non-resident company would be allowed as an expenditure in the absence of deduction of tax at source in view of Section 40(a)(i) of the Act. Although the Court was concerned with the issue in an appeal concerning a resident company. The introduction of section 172 of the Act by the assessee was to determine whether in view thereof, was there any obligation to deduct tax at source by the payer-assessee. Section 172 of the Act has to be examined through the prism of the non-resident shipping company in respect of it's income. It is in the above view that Section 172 of the Act and Circular No. 723 issued by the CBDT was relied upon by the assessee to point out that as Section 172 of the Act provides a complete code itself for levy recovery of tax ship wise and journey wise. Thus there is no occasion to deduct tax under Chapter XVII of the Act.
(ii) It is a settled position under the law of precedents that, it is not open to us (Division Bench) to take a view contrary to the view taken by another Division Bench of this Court. In case, we are unable to agree with the view of the earlier Division Bench and it does not fall within the exclusionary categories of binding precedent by being contrary to and/or in conflict with a decision of the Apex Court or rendered per incurrim. In such a case it is best that the issue is resolved at the hands of a Larger Bench of this Court. Certainty of law is an important ingredient of Rule of Law.
(iii) As we do not agree with the view taken by this Court in Orient (Goa) (P) Ltd. (supra) and it does not fall with the exclusions mentioned in Paragraph 12 above, we direct the Registry to place papers and proceedings of the present two appeals before the Hon'ble The Chief Justice to obtain suitable directions to place the following question of law for the opinion of the Larger Bench of this Court as under:
Whether while dealing with the allowability of expenditure under Section 40(a)(i) of the Act, the status of a person making the expenditure has to be a non-resident before the provision to Section 172 of the Act can be invoked?(ITA No. 989 of 2015, dt. 08.09.2015)
CIT v. V.S. Dempo and Company Pvt. Ltd. (Bom.)(HC); www.itatonline.org

S. 172:Shipping business - Non-residents- Limitation benefits-Where the income is not remitted to, or received in Singapore- On facts entire freight income of assessee which is only from operation of ships in international traffic is taxable only in Singapore-DTAA- India-Singapore [Art. 24]
The assessee, i.e. GAC Shipping India Pvt. Ltd., filed a return in respect of MT Alabra, which is owned by Alabra Shipping Pte Ltd of Singapore (ASPL-S, in short) and the ASPL-S is freight beneficiary in respect of the same, as an agent of ASPL-S and under section 172(3) of the Act. The assessee claimed benefit of the India Singapore Double Taxation Avoidance Agreement, the funds were remitted to freight beneficiary's account with The Bank of Nova Scotia in London UK. The AO held that as the freight was remitted to a country other than Singapore and remittance to Singapore is a sine qua non for availing the benefits of the Indo-Singapore tax treaty, the assessee was not entitled to the benefits of the benefits of the India Singapore tax treaty in view of Article 24 thereof. The CIT(A) confirmed the same by relying on Abacus International Pvt Ltd Vs DDIT [ITA No. 1045/Mum/2008; order dated 31st May 2013; now reported as (2013) 34 taxmann.com 21 (Mumbai – Trib.)]. On appeal by the assessee to the Tribunal HELD allowing the appeal:
(a) As a plain reading of Article 24(1) would show, this LOB clauses comes into play when (i) income sourced in a contracting state is exempt from tax in that source state or is subject to tax at a reduced rate in that source state, (ii) the said income (i.e. income sourced in the contracting state) is subject to tax by reference to the amount remitted to, or received in, the other contracting state, rather than with reference to full amount of such income; and (iii) in such a situation, the treaty protection will be restricted to the amount which is taxed in that other contracting state. In simple words, the benefit of treaty protection is restricted to the amount of income which is eventually subject matter of taxation in the source country. This is all the more relevant for the reason that in a situation in which territorial

method of taxation is followed by a tax jurisdiction and the taxability for income from activities carried out outside the home jurisdiction is restricted to the income repatriated to such tax jurisdiction, as in the case of Singapore, the treaty protection must remain confined to the amount which is actually subjected to tax. Any other approach could result in a situation in which an income, which is not subject matter of taxation in the residence jurisdiction, will anyway be available for treaty protection in the source country. It is in this background that the scope of LOB provision in Article 24 needs to be appreciated;

(b) On facts, there is no dispute that the business is being carried on by the assessee in Singapore and that the assessee is tax resident of Singapore. By letter dated 31st December 2013 (Reference no. 200716495G), Inland Revenue Authority of Singapore has confirmed that, in the case of Albara Shipping Pte Ltd, "freight income has been regarded as Singapore sourced income and brought to tax on an accrual basis (and not remittance basis) in the year of assessment". The assessee has also filed a confirmation dated 4th December 2013 from its public accountant that the freight of US $ 6,71,366 earned on MT Albara's sailing from Sikka port has been included in the global income offered to tax by the company in Singapore. On these facts, the provisions of Article 24 cannot be put into service as this provision can only be triggered when twin conditions of treaty protection, by low or no taxability, in the source jurisdiction and taxability on receipt basis, in the residence jurisdiction, are fulfilled. There is nothing on the record to even vaguely suggest that the freight receipts of ASPL-S were taxation only on receipt basis in Singapore. Quite to the contrary, there is reasonable evidence to demonstrate that such an income was taxable, on accrual basis, in the hands of the assessee.

(c) As regards reliance of the authorities below on the decision of this Tribunal, in the case of Abacus International (supra), suffice to say that it was in the context of interest income of the assessee and there was nothing on record to suggest that such an income was to be taxed in Singapore on accrual basis, rather than on receipt basis. The Assessing Officer thus derives no advantage from this decision. Having said that we may add that we are in complete agreement with the coordinate bench that, in order to come out of the mischief of Article 24, the onus is on the assessee is to show that the amount is remitted to, or received in Singapore, but then such an onus is confined to the cases in which income in question is taxable in Singapore on limited receipt basis rather than on comprehensive accrual basis. However, in a case in which it can be demonstrated, as has been demonstrated in the case before us, that the related income is taxable in Singapore on accrual basis and not on remittance basis, such an onus does not get triggered. (ITA No. 392/RJT/2014, dt. 09.10.2014) (A Y. 2011-12)

Alabra Shipping Pte Ltd. .v. ITO (Rajkot)(Trib.); www.itatonline.org

S. 179 : Private company - Liability of directors Company was a public company and merely on basis of mentioning of wrong code number in return, company could not be treated as private company and, consequently, order under section 179 was invalid. [S. 139]

Recovery proceeding was initiated against petitioner in respect of tax due of company in which petitioner was a past director. Revenue treated company as a private company on basis of Code Number 13 mentioned in return of income as such code applied to private company . However, it was found that it was incorporated as a public limited company with Registrar of companies and, further, it came out with its public issue of equity shares . Allowing the petition the Court held that; company was a public company and merely on basis of mentioning of wrong code number in return, company could not be treated as private company and, consequently, order under section 179 was invalid. (AY. 1996-97)

Dhaval N. Patel .v. CIT (2015) 231 Taxman 500 (Guj.)(HC)

S. 179:Private company–Liability of directors-Public company - No material to show attempt was made to pierce corporate veil - No notice to company regarding such investigation-Recovery proceedings against director was held to be not valid.

Action u/s 179 can be taken against the directors of a public limited company by lifting the corporate veil. Held, that it was an undisputed position that the company was a limited company and not a private limited company. There was no attempt to lift the corporate veil. The order passed based on the lifting of the corporate veil even if it had taken place would be in breach of the principles of natural justice and, hence, could not be sustained. The order was liable to be quashed.

Ajay S. Patel .v. ITO (2015) 375 ITR 72/ 231 Taxman 64 (Guj.)(HC)

S. 179 : Private company - Liability of directors – Unless it was shown that it was not possible to recover tax due from said company, no liability could be fixed on assessee-director of said company to pay due tax-Matter remanded.

The Petitioners, who were directors of a Private Company were directed to pay the tax due relating to the said company.The Petitioners submitted that the impugned orders are contrary to section 179 inasmuch as no finding was recorded by Income-tax officer that the tax due could not be recovered from the company.On writ Petition.

Section 179 imposes a personal liability on the Directors of a Private Company in respect of the Tax due from the company in the circumstances referred to therein. As could be seen from the impugned orders, nowhere Income-tax officer has referred to any of the proceedings initiated against the company to show that it is not possible to recover the tax due from the company. In the absence of such a finding, no liability could be fixed on the Directors under section 179 to pay the tax due. Hence, the impugned orders and the consequent demand notices are liable to be set aside and are accordingly set aside. The matter is remitted to Income-tax officer for reconsideration in accordance with law after affording an opportunity of hearing to the petitioners.

A.S. Chinnaswamy Raju v. UOI (2015) 230 Taxman 177 (Karn.)(HC)

S. 179 : Recovery of tax - Private company - Recovery of tax from directors -Recovery proceedings on ground of non-filing of returns by company-Order was held to be not valid..

The first requirement to attract liability of the director of a private limited company u/s 179(1) is that the tax cannot be recovered from the company itself. However, such liability can be avoided if it is proved that the non-recovery cannot be attributed to the three factors of gross negligence, misfeasance or breach of duty on the part of the directors. The lack of gross negligence, misfeasance or breach of duty on the part of the directors is to be viewed in the context of non-recovery of the tax dues of the company. In other words, as long as the director establishes that the non-recovery of the tax cannot be attributed to his gross neglect, etc., his liability under section 179(1) of the Act would not arise. Here again the Legislature advisedly used the word "gross" neglect and not a mere neglect on his part.

Held, allowing the petition, that the sole ground on the basis of which the order under section 179 had been passed was that the directors were responsible for the non-filing of return of income and that the demand had been raised due to the inaction on the part of the directors. Clearly, therefore, the entire focus and discussion of the Income-tax Officer in the order was in respect of the directors' neglect in the functioning of the company when the company was functional. On a plain reading of the order, it was apparent that nothing had been stated therein regarding any gross negligence, misfeasance or breach of duty on the part of the directors due to which the tax dues of the company could not be recovered. The order under section 179 was not valid.(AY .2003-2004)

Ram Prakash Singeshwar Rungta .v. ITO (2015) 370 ITR 641 (Guj) (HC)

S. 185 : Firm –Registration- Deduction of interest - Salary –Instrument of change in partnership was filed in the course of assessmeny. [S.184]

The assessee-firm did not file certified copy of instrument of change in partnership deed along with return but same was duly produced before the Assessing Officer at the time of assessment.The Assessing Officer disallowed remuneration paid by the assessee to the partners holding that as per section 184(4) the assessee was required to submit certified copy of the partnership deed along with the return.On appeal, the Commissioner (Appeals) deleted the disallowance holding that mere omission to file the partnership deed with the return cannot and should not be treated as fatal, which was up held by the Tribunal. On appeal by revenue ; dismissing the appeal held that the Tribunal rightly held that omission to file certified copy of the instrument of change in the partnership deed along with the return was not fatal and, therefore, did not attract the consequences laid down in section 185.

CIT v. S.R. Batliboi & Associates (2015) 230 Taxman 438 (Cal.)(HC)

S. 189: Firm - Dissolved – Discontinued- Assessability of post-dissolution income-Documents found from third party- No addition can be made when the firm was dissolved and necessary information was furnished.

Assessee firm stood dissolved w.e.f. 31st March, 2002 and all necessary formalities for closure were completed. This is evident from the facts that the Asstt. Registrar of Firms has made changes in its records by making endorsement that the assessee-firm has been dissolved on 31st March, 2002. Assessee has taken a consistent stand before the AO as well as before the CIT(A) that no business was carried on after A.Y. 2002-2003 The Revenue also could not controvert the said factual submissions made by the assessee. The Tribunal held that as the assessee-firm having been dissolved w.e.f. 31st March, 2002 as evident from the endorsement made by the Asstt. Registrar of Firms in its records, the alleged unexplained income from the transaction found recorded in assessee's name in the month of December, 2003 in a document recorded from a third party cannot be brought to tax in the hands of the assessee in A.Y. 2004-2005.(AY.2004-2005)

Mantri Developers v. ITO (2015) 114 DTR 361 (Pune)(Trib.)

S. 192:Deduction at source-Doctors working in hospital-Different terms and conditions under which various doctors rendered services - Terms and conditions must be examined in each case to determine character of payment received- Doctors were not employees but independent professionals-Amounts paid to them did not amount to salary- Not liable to deduct tax at source.[S. 15, 16, 17,201(1), 201(IA)]

In the case of doctors working for hospitals, no absolute rule or general principle can be laid down to determine whether the payment received constitutes salary. In each case depending upon the attending facts and circumstances, the terms and conditions of the engagement, a finding can be arrived at as to whether there is a master-servant or an employer-employee relationship. It can be arrived at in case, where it is found by the income-tax authorities that though there is not a regular process of recruitment and appointment, the contract would indicate that the doctor/professional was appointed as an employee and on a regular basis.

Held, (i) that in the case of doctors with fixed pay and tenure there was no dispute. The amount paid to them constituted salaries.

(ii) That in relation to the second category of doctors drawing fixed plus variable pay with written contracts the terms and conditions had been referred to and the Tribunal concluded that neither of the doctors was entitled to provident fund or any terminal benefits. Both were free to carry on their private practice at their own clinic or outside hospitals but beyond the hospital timings. Both doctors treated their private patients from the hospitals premises. All of these could be seen as indicators that they were not employees but independent professionals. The amounts paid to them did not amount to salary.(AY. 2008-2009)

CIT (TDS) .v. Grant Medical Foundation (Ruby Hall Clinic) (2015) 375 ITR 49 (Bom.)(HC)

S. 192:Deduction at source-Remuneration to employees- Remuneration for professional services - Meanings of "employment" and "profession" - Assessee providing health services - Doctors working for assessee-Agreement that doctors would not work elsewhere-Not conclusive - Doctors were not employees of assessee-Not liable to deduct tax at source as salary. [S.194I,194J]

In order to decide the relationship of employer and employee whether the contract entered into between the parties is a "contract for service" or a "contract of service" has to be examined. There are multiple factor tests to decide this question. The independence test, control test, intention test are some of the tests normally adopted to distinguish between "contract for service" and "contract of service". Finally, it depends on the provisions of the contract. Intention also pays a role in deciding the factor of contract. The intention of the parties is also important.

Held, (i) that the terms of the contract ipso facto proved that the contract between the assessee-company and the doctors was of "contract for service" not a "contract of service". The remuneration paid to the doctors depended on the treatment of the patients. Consultancy charges were paid to the doctors towards rendering their professional skill and expertise which are purely in the nature of professional charges. The assessee-company had no control over the doctors engaged by them with regard to treatment of patients. The non-competition clause in the agreement would not invalidate the nature of the profession. It would not alter the nature of professional service rendered by the doctors.

The Tribunal also found that none of the doctors were entitled to gratuity, provident fund, leave travel allowance or other terminal benefits. The doctors had filed their returns of income for the relevant assessment years showing the income received from the assessee-company as professional income and this had been accepted by the Department. Section 192 was not applicable. Section 194J was applicable. AY. 2006-2007, 2007-2008)

CIT .v. Manipal health Systems P. Ltd. (2015) 375 ITR 509 (Karn.)(HC)

S. 192:Deduction at source-Salary-Diversion of income by overriding title - Salary or pension received by member of religious congregation - Rules of religious congregation obliging members to vow of poverty - Consequent handing over of amount to religious congregation - Obligation based on personal law - Religious congregation would not usually have legal right to receive amount - Amount not diverted at source - Direction to deduct tax at source on payments of salary or pension to member of religious congregation is held to be valid.[S.4]

The entrustment of the amounts received by the member to a religious congregation would tantamount only to an application of income by the member in favour of the congregation. It would not be a case of diversion of income by way of overriding title. Thus, while there may be instances where the receipt of fees or other earnings of members of religious congregations did get diverted by overriding title to the congregation, the proposition was by no means an absolute one applicable in all cases of earnings by a member of the religious congregation. The applicability of the concept would have to be tested on the facts of each case, by examining the nature of the receipt by the assessee. Viewed in that light, the instructions by the Income-tax Officers, in these cases to deduct tax at source from payments by way of salary and pension to the members of the religious congregations, could not be said to be contrary to the circulars and instructions issued by the CBDT. They were simply instructions issued in situations not covered by the CBDT circular/instructions. Further, the CBDT circulars/instructions cannot be treated as encompassing receipts by way of salary and pension, as that would render the circulars and instructions contrary to the law declared by the courts on the concept of diversion of income by way of overriding title. The payments accrued to the members of the religious congregations as their income and the subsequent diversion of that income of the religious congregation concerned was only a case of application of that income.

Fr. Sabu P. Thomas .v. UOI (2015) 375 ITR 352 (Ker.)(HC)

S. 192: Deduction at source–Salary- Tax is required to be deducted at source on salary / pension paid by government to teachers / members of a religious congregation.[S. 4, 15]

The High Court observed that salary / pension paid to members of a religious congregation was their income and subsequent diversion of that income to the congregation was only a case of diversion of that income. The High Court held that the department was correct in holding that the person responsible for making the payments to the members was required to deduct tax at source on such payments.

Fr. Sunny Jose v. UOI (2015) 233 Taxman 454 / 276 CTR 512 / 118 DTR 41 (Ker.)(HC)

S. 192 : Deduction at source- Salary- Perquisite- Uniform allowance paid to its employees could not be regarded as additional salary in form of allowance within meaning of section 17(1)(iv)- Not liable to deduct tax at source.[S.17(1)(iv)]

Court held that uniform allowance paid to its employees could not be regarded as additional salary in form of allowance within meaning of section 17(1)(iv) hence the assessee is not liable to deduct tax at source. (TA Nos. 16 to 19 of 2015 dt. 15-01-2015)

CIT v. Oil & Natural Gas Corpn. Ltd. (2015) 54 taxmann.com 381 / 229 Taxman 415 (Guj.)(HC)

S. 192 : Deduction at source – Salary –Housing loan in joint name- Employer not considering the interest while deducting the tax at source- Writ was held to be not maintainable .[S.80C(2)(xviii)]

Assessee, an employee of 'T' Ltd., availed loan from bank for construction of house . Assessee's employer deducted tax at source on entire amount paid to him by way of salary because eligibility of

assessee to claim deduction in terms of section 80C(2)(xviii) was held to be doubtful in view of fact that house constructed using loan was in joint names of assessee and his wife. Assessee thus filed instant writ petition seeking inter alia a direction to respondents to assess him for tax only after deducting monthly instalments recovered from salary towards housing loan repayment .
On facts, even if any amount had been deducted at source in excess from payments effected to assessee, he was not seriously aggrieved because he would get credit of same in his assessment under Act, therefore, relief sought in petition could not be granted .
K.S. Venugopalan, Operator, Travancore Cochin Chemicals Ltd. v. ITO (2015) 229 Taxman 222 (Ker.)(HC)

S. 192:Deduction at source-Salary–Fees for professional or technical services-Tests to determine whether there is an employer-employee relationship –Tax was to be deducted as fees for technical services and not as salary.[S.194J]
The assessee, a medical center, engaged the services of doctors. On payment to the doctors, the assessee deducted TDS u/s 194-J on the ground that it was paying "fees for professional services". However, the AO held that the said doctors were the "employees" of the assessee and that the assessee ought to have deducted TDS u/s 193. The CIT(A) ruled in favour of the assessee. On appeal, the Tribunal had to consider whether there is an employer-employee relation between the said consultant Doctors and the assessee. HELD by the Tribunal:
(i) Determination of the vexed questions as to whether a contract is a contract of service or contract for service and whether the employees concerned are employees of the contractors has never been an easy task. No decision of this Court has laid down any hard-and-fast rule nor is it possible to do so. The question in each case has to be answered having regard to the fact involved therein. No single test – be it control test, be it organisation or any other test – has been held to be the determinative factor for determining the jural relationship of employer and employee;
(ii) One of the points which were highlighted by the AO is that the doctor has to work for the assessee and cannot do any private practice. We cannot agree to this because of the simple fact that there is no prohibition for the said consultant doctors to do private practise and the only restriction is that the assessee hospital should be taken in to confidence before doing it. We find that in Para 15 of the AO's order itself he has taken note of the fact that the assessee hospital has granted permission to few doctors who desired to practise privately. And further we should point out that there is no prohibition in law to engage the services of a professional exclusively for a particular hospital. Merely because the doctors were exclusively engaged for three years, it does not mean that they are employees of the assessee hospital. As pointed out by the Sr. Counsel, the other factors such as PF, job assignments, working hours, direction and supervision are all the relevant factors which need to be considered to see the existence of employer and employee relationship. In the case before us, it is not in dispute that the consultant doctors in question are not in the roll of PF payments etc.
(iii) Admittedly, the working hours were flexible and determined mutually by the assessee and the doctor. The consultant doctors are free to come at their convenience and treat the patients. The agreement does not provide for any supervision or control over the doctor. The doctors at their own discretion treat the patients by making use of the infrastructural facilities and manpower available in the hospital. The doctors are governed by the rules and regulations of their regulatory body in their professional activity (MCA) and the assessee being a hospital they expected the doctors to conduct themselves as per its policy while discharging their profession. This expectation of the assessee is nothing but for maintaining discipline by the said consultant doctors by abiding to the code of conduct of assessee hospital, cannot be considered to be exercising control and supervision over the doctors in their independent professional activity. We find that clause dealing with indemnity insurance payable by the consultant in case of any liabilities for any act of medical malpractice arising under Consumer Protection Act clearly takes the assessee hospital out of any vicarious liability which again goes on to show that there is no master-servant relation between them. We find that consultants are not governed by the service rules and leave rules which are applicable to employees. Therefore, it is obvious that the, doctors are not considered to be employed by the assessee and they are rightly considered only as consultant professionals.
(iv) So, in our opinion, the agreement between the assessee and the doctors is one for providing professional services, and there is no element of employer and employee relationship existing.

Therefore, in our opinion, tax has to be deducted under s. 194J of the Act as fee for professional services and not as salary.(ITA No. 4718/Del/2013, dt. 15.05.2015) (A. Y. 2009-10)
DCIT v. Artemis Medicare Service Ltd. (Delhi)(Trib.); www.itatonline.org

S. 192 : Deduction at source-Salary-Consultant doctors employed on contract basis-No employer and employee relationship-Payments to doctors not salary-No liability to deduct tax at source-Orders treating assessee as in default and levying interest is not justified.[S.201(1); (201IA)]
The assessee was engaged in the business of providing teleradiology services to hospitals and imaging and diagnostic centres. The assessee engaged doctors under contract for medical consultation for clients of the assessee. The Assessing Officer treated the payments to the doctors as salary and passed orders under section 201(1) and (1A) of the Act. The Commissioner (Appeals) set aside the order of the Assessing Officer. On appeal by the Department :
Held, dismissing the appeal, that there was no employer and employee relationship between the assessee and the doctors. The assessee was not liable to deduct tax at source under section 192 of the Act considering the payment as salary and interest under section 201 and 201(1A) of the Act was not attracted. (AY. 2012-2013)
Teleradiology Solutions P. Ltd. v. ITO(TDS) (2015) 39 ITR 649 (Bang.)(Trib.)

S. 192: Deduction at source-Salary-Commission Payment to non-executive directors-No employer-employee relationship-No pecuniary benefits-Payment not salary-Commission could not be categorized as salary. S. 194J [S. 194J]
The assessee paid commission duly approved by the board of directors to its non-executive directors. The Assessing Officer held that those directors were actually employees of the assessee and salary was shown as commission to avoid withholding tax. The Commissioner (Appeals) held that payment of commission to those directors could not be categorised as salary. On appeal: Held, that the non-executive directors did not have an employer-employee relationship and did not receive pecuniary benefits. Therefore, the payment of commission to them could not be categorised as salary.
Dy. CIT (TDS) v. Zee Entertainment Enterprises Ltd. (2015) 38 ITR 636(Mum.)(Trib.)

S. 194A:Deduction at source-Interest-Chit fund - Amount paid by chit fund to its subscribers-Not interest-Tax not is deductible at source on such interest. [S.2(28A)].
The assessee ran a chit fund. The assessee had several chit groups which were formed by having 25 to 40 customers to make one chit group. The customers subscribed an equal amount, which depended upon the value of chits. There were two types of chits. One was the lottery system and the other was the auction system. In the lottery system the lucky winner got the chit amount and in the auction system the highest bidder got the chit amount. Under the scheme, the unsuccessful members in the auction chit would earn dividend and the successful bidders would be entitled to retain the face value till the stipulated period under the scheme. The Revenue took the view that when the successful bidder in an auction took the face value or the prize money earlier to the period to which he was entitled, he was liable to pay an amount to others who contributed to the prize money which was termed as interest and that this interest amount, which had been paid by the assessee to its members was liable for deduction of tax under section 2(28A) and section 194A.
Held, the amount paid by way of dividend could not be treated as interest. Further, section 194A of the Act had no application to such dividends and, therefore, there was no obligation on the part of the assessee to make any deduction under section 194A of the Act before such dividend was paid to its subscribers of the chit. (AY 2004-2005 to 2006-2007)
CIT .v. Avenue Super Chits P. Ltd. (2015) 375 ITR 76 (Karn.)(HC) CIT v. Panchajanya Chits P. Ltd. (2015) 375 ITR 76 (Karn.)(HC)

S. 194A: Deduction at source–Interest other than interest on securities–Payment of interest to notified institutions–With the issuance of notification u/s. 194A(3)(iii)(f) by the Central Government, provisions of S. 194A (1) automatically become inapplicable. [S. 201(1), 201(IA)]
The Revenue had initiated S. 201 (1)/201(1A) proceedings against the assessee company for non-deduction of tax while making interest disbursement for deposits made by certain societies. These

societies were wholly financed and controlled establishments of the Government. The Revenue's contention was that the assessee was required to apply for exemption from the Authorities under the Act in order to avail the benefit of S. 194A(3)(iii)(f) for non – deduction of tax. The Appellate authority noted that by virtue of sub. S. (3)(iii)(f), the provisions of 194A (1) for deduction of tax do not apply to societies notified by the Central Government in the Official Gazette. In terms of S. 194A, Central Government had issued a notification covering "any undertaking or body including a Society registered under the Societies Registration Act, 1860 financed wholly by the Government." Since the said societies were wholly financed by the Government, they were covered under the said notification and, accordingly, the Appellate authority held that no default was found on the assessee's part. On appeal by Revenue, the High Court held that, once a notification stands issued, it is not the requirement of the Act for the assessee to either apply or seek exemption from the Authorities under the Act or the Central Government. With the issuance of notification u/s. 194A (3)(iii)(f) by the Central Government, provisions of S. 194A(1) automatically become inapplicable. (AY 2009-10)
CIT v. State Bank of Patiala (2015) 119 DTR 110 (HP)(HC)

S. 194A : Deduction at source - Interest other than interest on securities –Interest paid to custodian- As per the order of Special Court assesse cannot be held to be liable to deduct tax at source.
Assessee took loan from one 'FFSL' against pledge of shares.FFSL illegally sold a part of shares and sub pledged rest. Government promulgated Special Court Order and a custodian was appointed for FFSL. Thereafter, assessee paid interest to custodian. Where Special Court conclusively held that provisions of TDS do not apply to alleged liability to pay interest to custodian by assessee, assessee would not be liable to deduct TDS. ((AY. 1996-97)
Ethnic Holdings (P.) Ltd. v. ITO (2015) 230 Taxman 77 (Guj.)(HC)

S. 194A : Deduction at source - Interest other than interest on securities –Bills discounting – Agent-Not liable to deduct tax at source.[S.2(28A), 40(a)ia)]
Assessee's bills were discounted by a party. Assessee claimed factoring charges but it showed it under head interest in its books of account. AO treated same as payment of interest and disallowed same under section 40(a)(ia) on account of non-deduction of TDS under section 194A. On appeal by revenue dismissing the appeal the Court held that discounting charges of Bill of Exchange or factoring charges of sale could not be termed as interest,further, since assessee was acting as an agent, it was not liable to deduct TDS. Before any amount paid is construed as interest, it has to be established that same is payable in respect of any money borrowed or debt incurred. (AY. 2007-08)
CIT .v. MKJ Enterprises Ltd. (2015) 228 Taxman 61 (Mag.)(Cal.)(HC)

S. 194B : Deduction at source - Winning from lottery - Cross word puzzle-Income–Horses races-Stake money-Club was not required to deduct tax at source under section 194B while paying stake money to horse owners. [2(24)(ix), 194BB, 201]
Assessee-club was engaged in activities of organising horse races. It paid certain amount as prize money or 'stake money' to horse owners whose horses won in a race. Court held that the stake money so paid to race horse owners did not form genus of words 'and other game of any sort' as found in Explanation (ii) to section 2(24)(ix),therefore, assessee-club was not required to deduct tax at source under section 194B while paying stake money to horse owners. (AY. 2006-07 to 2011-12)
Bangalore Turf Club Ltd. .v. UOI (2015) 228 Taxman 234/ 118 DTR 361/277 CTR 221 (Karn.)(HC)
Karnatka Race Horse Owners Association v. CIT(2015) 228 Taxman 234/ 118 DTR 361/227 CTR 221 (Karn.)(HC)
Mysore Race Club Ltd v.UOI (2015) 228 Taxman 234/ 118 DTR 361/227 CTR 221 (Karn.)(HC)

S. 194C:Deduction at source-Even if the supply contract is an integral part of a composite contract on single sale responsible basis, there is no obligation to deduct TDS- Service contracts, not being professional services, are not covered by S. 194J- Not liable to deduct tax at source.[S.194J]

The issue before the High Court was if on payment made against the supply of materials included in composite contracts for executing Turn key Projects, provisions under section 194C would attract or not. Dismissing the appeals of revenue the Court held that; (i) The clauses of the contract make it clear that three separate contracts have been entered into, but all the separate contracts were integral parts of a composite contract on single sale responsible basis. The invoices raised on the basis of the said composite contract separately mentioning the value of the material supplied, no deduction is permissible under Section 194C of the Act. Section 194C of the Act cannot be pressed into service to deduct tax at source. The whole object of introduction of that Section is to deduct tax in respect of payments made for works contract. No division is, therefore, permissible in respect of a contract for supply of materials for carrying out the work. It is in a case of distinct contracts. The contract for supply of material being a separate and distinct contract, no division is permissible under Section 194C of the Act. Section 194C has suffered an amendment also with effect from October 1, 2009 and the provision has been made very clear without any ambiguity.
(ii) Thus, we can conclude safely that if a person executing the work, purchases the materials from a person other than the customer, the same would not fall within the definition of 'work' under Section 194C of the Act.
(iii) As regards the issue whether the provisions of Section 194J or Section 194C would apply in respect of payments made by an assessee towards Bill Management Services, the services rendered by the agencies engaged by the assessees at Hospet, Bellary and Raichur are not professional services, and, therefore, Section 194J is not attracted. The demand towards the alleged short deduction of tax deducted at source and interest, therefore, was improper. The contract was rightly held to be a service contract by the Tribunal which should be covered under Section 194C of the Act.(ITA No. 92 of 2014)
CIT .v. Executive Engineer, GESCOM (Karn.)(HC); www.itatonline.org

S. 194C : Deduction at source–Manufacture and sell certain pharmaceutical and contact lens care products on a principal to principal basis- Contract for sale- Not liable to deduct tax at source.[S.201(1); 201(IA)]
Assessee was engaged in business of trading of ophthalmic products. It had entered into an agreement with PHL under which PHL had agreed to manufacture and sell to assessee certain pharmaceutical and contact lens care products on a principal to principal basis. Specifications had been given, according to which PHL had to manufacture and supply products. Property in goods passed on to assessee only on delivery. Raw materials required in manufacture of product were purchased by PHL itself and not from assessee . Dismissing the appeal of revenue the Court held that; on facts, contract entered into by assessee was contract of sale and not a contract for carrying on any work within meaning of section 194C.(AY. 2009-10 to 2011-12)
CIT .v. Allergan India (P.) Ltd. (2015) 231 Taxman 438 (Karn.)(HC)

S. 194C:Deduction at source - Operator of tourist taxis - Hiring of cabs from owners to carry on business - Hire charges paid to owners-Tax deductible- Matter remanded.[S.40(a)(ia)]
The assessee was engaged in the business of operation of tourist taxies. It hired taxies from the owners to carry on its business. It could be said that there was a contract to carry out work and, accordingly, the hire charges paid, were covered under the provisions of section 194C. Tribunal was not correct in holding that the assessee was not bound to deduct tax at source on the ground that the provision was not attracted as no agreement was entered in to by the assessee with other operators. The matter was remitted to the assessing authority to find out whether the tax deducted at source payment was with in time and the assessee was entitled to the deduction in accordance with law. (AY. 2005-2006)
CIT v. Janani Tours and Resorts (P) Ltd. (2015) 372 ITR 437 (Karn.)(HC)

S. 194C : Deduction at source – Contractors and sub-contractors Providing busses for giving pick-up and drop facilities- Rightly deducted tax at souce as contractor – Payment cannot be termed as rent hence provisions of section 194I cannot be applicable.[S.194I]
Assessee-company entered into contract with transporters for providing buses for giving pick-up and drop facilities to its employees. In terms of contract, possession of buses remained with transporters.

Further, transporters were contractually obliged to maintain buses in proper condition and drivers and conductors were also to be provided by them.Assessee deducted tax at source under section 194C whereas revenue authorities opined that tax was to be deducted under section 194-I while making payments to transporters. On facts, agreement between assessee and transporters was not akin to taking of any 'plant' or 'machinery' on lease or any other similar arrangement and, therefore, assessee had correctly deducted tax at source under section 194C. (AY. 2008-09, 2009-10)
CIT v. Bharat Electronics Ltd. (2015) 230 Taxman 651 (All.)(HC)

S. 194C : Deduction at source – Contractors and sub-contractors-Exhibition of films-Distribution of movies-Not liable to deduct tax at source. [S.201(1)(201(IA)]
The assessee-firm had an agreement with the distributor of certain movies for exhibiting films in the theatre owned by it. The distributor was to get part of the amount collected by the assessee by way of sale of tickets for those movies.
The Assessing Officer held that said payment would require deduction of tax at source as per section 194C. Since the same was not deducted it was treated to be in default of section 201(1) and 201(1A).
On appeal, the Commissioner (Appeals) held that since the ownership of the print never rests with the exhibitor it cannot be considered as 'any work' as stipulated in section 194C and thereby set aside the orders.
On appeal, the Tribunal held that no work was carried out by the distributor and set aside the order of Assessing Officer.
On appeal before the High Court:
Considering the facts and circumstances of the case, the Tribunal is justified in coming to the conclusion that the exhibition of film in the theatre has not been described in the*Explanation*, of 194C therefore, there is no case of the revenue, by which it can be held that the assessee was required to deduct tax at source from the payments made by it to the distributor of films. The Tribunal has rightly considered the agreement/arrangement between the parties and in detail discussed the same. Decision cited by Senior Counsel appearing for the revenue, however, the same shall not be applicable on the facts of the present case inasmuch as the distributor gets his share because he has acquired rights of the distribution of the films in the particular area and as no work is carried out by the distributor for which the payment is made. The finding of facts by the Tribunal was concurred.
Thus, the Tribunal has rightly reversed the findings given by Commissioner (Appeals) which was not borne out from the facts of the case and the decision of the Tribunal being correct interpretation of the provisions of Act. The question therefore which was framed is to be answered in the affirmative *i.e*. the Appellate Tribunal was right in law in holding that cinecasting/distribution of movies would be outside the purview of section 194C requiring tax deduction at source.
In view of the above, the question raised in the present appeals is answered in favour of the assessee and against the revenue.(AY. 2002-03 to 2004-05)
CIT v. City Gold Entertainment (P.) Ltd. (2015) 229 Taxman 215/ 118 DTR 139/276 CTR 539 (Guj.)(HC)

S. 194C : Deduction at source – Contractors and sub-contractors –Rent- Vehicles were hired by assessee for fixed tenure and for its exclusive usage-Tax rightly deducted as contract-Not liable to be deducted as rent .[S.194I]
Where buses/vehicles were hired by assessee for fixed tenure and for its exclusive usage, TDS on payment of hire charges would be deducted under section 194C and not under section 194-I. (AY. 2008-09)
CIT v. Freescale Semiconductor India (P.) Ltd. (2015) 229 Taxman 245 (All.)(HC)

S. 194C : Deduction at source – Contractors and sub-contractors – Interest- Extra cost-Delay in completion of work- Not liable to deduct tax at source. [S.40(a)(ia)]
Assessing Officer made addition on account of non-deduction of TDS by assessee sub-contractors on interest payment made to main contractor, namely, Unitech. Commissioner (Appeals) as well as Tribunal deleted addition by recording concurrent finding of fact that amount paid was not in nature of interest but it was on account of extra cost that Unitech had to incur due to delay in completion of

work taken by assessee on sub-contract. In the absence of any perversity being pointed out in finding recorded by Tribunal, deletion of disallowance was to be upheld. (AY. 2005-06)
CIT v. Karnavati Infrastructure (P.) Ltd. (2015) 229 Taxman 241 (Guj.)(HC)

S. 194C : Deduction at source–Distinction between works contractandsale-Assessee purchasing chassis and entrusting agency for building bus - Building bus bodies needs lot of expertise, experience and technical know-how - Activity undertaken by assessee not a works contract - No tax deduction at source is required.
The assessee purchased chassis suitable for its use from various manufacturers. Thereafter, the bodies of buses were built on the chassis. The process was not uniform. Buses of different varieties, such as deluxe, express and ordinary, were thus procured. Tenders were invited from eligible agencies duly indicating the specifications of buses. On finalising of the contract, the successful fabricator was handed over the chassis, with an understanding that after the body was built thereon, the bus, in its finished form was delivered to the assessee. The Assessing Officer treated it as a works contract and deduction of tax at source had to be effected. The Commissioner (Appeals) upholding the order passed by the Assessing Officer directed further verification of facts. The Tribunal held that section 194C had no application to the facts of the case. On appeal :
Held, dismissing the appeal, that building bus bodies needed lot of expertise, experience and technical know-how. Thus, the activity entrusted by the assessee to fabricators of a bus, amounted not to a work or works contract but was a sale and section 194C had no application.(AY. 1995-1996, 1996-1997)
CIT v. A.P. State Road Transport Corporation (2015) 370 ITR 621/122 DTR 178 (T & AP) (HC)

S. 194C : Deduction at source - Contractor - State Government undertaking to pay wages to leader of group of workmen - Leader of group whether contractor - Matter remanded.
The assessee, a State Government undertaking, took up rural development construction works directly by eliminating middlemen. It transferred the amounts earmarked for the projects to the account of the engineer who was in charge of such project, and was also an employee of the assessee. The engineer at the spot engaged the services of the workers. The responsibility was given to a person called a group leader who brought the labour force. He was also one among the workers who was engaged in executing the works. The payment was made to the group leader who in turn disbursed the amount to his co-employees. The Assessing Officer held that the group leaders were contractors. The nature and activity of the contractor were similar to that of the group leaders and, therefore, the provisions of section 194C were attracted. The Appellate Commissioner held that section 194C was not applicable but the Tribunal upheld the order of the Assessing Officer. On appeal to the High Court:
Held, that merely because the amount was calculated on the basis of the cubic meter, running meter and square meter on fixed price according to the Special Rules of the Public Works Department, no inference could be drawn that the relationship was that of an employer and a contractor. It was purely a question of fact and it could be seen from the order that the assessee had failed to produce evidence and, therefore, the assessing authority had drawn such an inference. It would be appropriate to send the matter back to the assessing authority reserving liberty to the assessee to produce such documents to substantiate its claim. The assessing authority, after taking into consideration all the material produced by the assessee, should record a finding whether the agreement with the workers was in the nature of a contract or the payments were made individually to the workers. Depending on the finding, application of section 194C to the case should be decided. Matter remanded.(AY. 2009-2010, 2010-2011, 2011-2012)
Karnataka Rural Infrastructure Development Ltd. v. ITO (2015) 370 ITR 222/51 taxmann.com 497 (Karn.)(HC)

S. 194C : Deduction at source - Contractors/sub-contractors –Publicity of brand or logo-Payments for Advertisement or subsidy-Liable to deduct tax at source.[S. 201(1), 271C .]
The assessee (Sahara India Commercial Corporation Ltd.) was engaged in the business of real estate development, construction and media activities etc. It had entered into a business arrangement with Sahara Airlines Ltd. (SAL) for publicizing its business. As per the agreement SAL was required to display the logo of the assessee on both sides of the aircraft, tickets, boarding passes, baggage tags,

newspapers, hoardings, etc. and that the brochures of the assessee provided by them would be distributed by SAL with its tickets.
The assessee made payment for such publicity to SAL without deduction of tax at source.
The Assessing Officer contended that the act of publicizing assessee's business would come under the preview of advertisement and, therefore, payment made for the same was to be subjected to TDS under section 194C. Consequently, the Assessing Officer treated assessee as an assessee-in-default under section 201(1) and levied penalty on it under section 271C.
On appeal, the Commissioner (Appeals) re-examined the issue in the light of various Circulars, relevant provisions, judgments referred to by the assessee and formed a view that 'advertisement' and 'publicity' are not the same and the payments made are not for the advertisement. Therefore, the assessee was not in default in respect of short/non-deduction of tax. On appeal to Tribunal it was held that:
From a careful perusal of the aforesaid judgments and the interpretation given in various dictionaries, it is evident that the 'advertisement' includes publicity, but vice versa may not be possible. But whenever publicity of a brand or logo brings commercial benefit either apparent or hidden, it will assume the character of 'advertisement'. It is unacceptable that a businessman would publicize his logo or brand without visualizing any commercial benefit out of it. In the instant case, if the agreement is read carefully, it is found that the parties to the agreement have agreed that it was executed to give extensive publicity to the activities of the assessee in order to promote their business and area of operation and for doing so SAL was required to display the logo of the assessee-company on both sides of the aircraft, tickets, boarding passes, baggage tags, newspapers, hoardings etc. Therefore, the only inference can be drawn from the agreement and the revised agreement that it was executed for the purpose of 'advertisement' of the logo of the assessee-company. This inference is also fortified by the treatment given by the assessee in its books of account. Therefore, it is evident that the assessee has agreed for advertisement of its logo for which it is required to deduct TDS under section 194C.(AY. 2007-08)
DCIT v. Sahara India Commercial Corporation Ltd. (2015) 67 SOT 318 / 169 TTJ 292 / 117 DTR 59 (Luck.)(Trib.)

S. 194C : Deduction at source- Contractors - No obligation to deduct TDS at stage of making provision for expenditure if payee cannot be identified. No obligation to deduct TDS if services (roaming charges) are rendered without human intervention and are not "technical services". [S.194J, 201(1), 201(IA)]
(i) The assessee, a telecom operator, made provision for site restoration expenses, however, TDS was not made. The provision was made for dismantling the towers and restoration of site to its original position after termination of the lease period. The lease period is normally 20 years and above. The assessee by placing reliance on the Accounting Standard – 29 claims that a provision would be made in respect of an obligation. In other words, the assessee had an obligation to incur the expenditure after termination of the lease period. The Revenue contended that due to misconception and ignorance of law and with an intention to circumvent the statutory provisions, the assessee made the provision. The fact remains that the payment was not made to anyone and it is not credited to the account of any party or individual. The account does not disclose the person to whom the amount is to be paid. The contractor who is supposed to be engaged for dismantling the tower and restore the site in its original position is not identified. As contended by the assessee, the assessee by itself engaging its own labourers may dismantle the towers and restore the site to its original position. In such a case, the question of deducting tax at source does not arise. The assessee has to pay only the salary to the respective employees. Suppose the work is entrusted to a contractor, then definitely the assessee has to deduct tax. In this case, the contractor would be identified after the expiry of lease period. Therefore, even if the assessee deducts tax, it cannot be paid to the credit of any individual. The assessee has to issue Form 16A prescribed under Rule 31(1)(b) of the Income-tax Rules, 1962 for the tax deducted at source. The assessee has to necessarily give the details of name and address of deductee, the PAN of deductee and amount or credited. In this case, the assessee could not identify the name and address of deductee and and his PAN. The assessee also may not be in a position to quantify the amount required for incurring the expenditure for dismantling and restoration of site to its

original position. In those circumstances, the provision which requires deduction of tax at source fails. Hence, the assessee cannot be faulted for non-deduction of tax at source while making a provision.
(ii) As regards the year-end provisions, the assessee made arrangement with other service provides for providing value added services. There may be justification with regard to the expenditure for availing the services of identification and verification for the last month of financial year, since the assessee may not have the exact details on verification done by the concerned persons and the amount required to be paid. However, in respect of the downloads and value added service, etc. the entire details may be available in the system. Therefore, wherever the particulars and details available and amount payable could be quantified, the assessee has to necessarily deduct tax. In respect of value added services like daily horoscopes, astrology, customer acquisition forms are all from specific service providers and these value added services are monitored by system. Therefore, even on the last day of financial year, the assessee could very well ascertain the actual quantification of the amount payable and the identity of the payee to whom the amount has to be paid. To that extent, the contention of the assessee that the payee may not be identified may not be justified. The Assessing Officer has to examine whether the payment to the party/payee is identifiable on the last day of financial year and whether the quantum payable by the assessee is also quantified on the last date of financial year. In case, the Assessing Officer finds that the payee could not be identified on the last day of financial year and the amount payable also could not be ascertained, the assessee may not require to deduct tax in respect of that provision. However, in case the payee is identified and quantum is also ascertainable on the last day of the financial year, the assessee has to necessarily deduct tax at source.
(iii) As regards roaming charges, the Supreme Court held in CIT v. Bharti Cellular Limited (330 ITR 239) that whenever there was a human intervention, it has to be considered as technical service. In the light of the above judgment of the Apex Court, the Department obtained an expert opinion from the Sub-Divisional Engineer of BSNL. The Sub-Divisional Engineer clarified that human intervention is required for establishing the physical connectivity between two operators for doing necessary system configurations. After necessary configuration for providing roaming services, human intervention is not required. Once human intervention is not required, as found by the Apex Court, the service provided by the other service provider cannot be considered to be a technical service. It is common knowledge that when one of the subscribers in the assessee's circle travels to the jurisdiction of another circle, the call gets connected automatically without any human intervention. It is due to configuration of software system in the respective service provider's place. The subscriber can make and receive calls, access and receive data and other service without any human intervention. Like any other machinery, whenever the system breakdown, to set right the same, human intervention is required. However, for connecting roaming call, no human intervention is required except initial configuration in system. Human intervention is necessary for routine maintenance of the system and machinery. However, no human intervention is required for connecting the roaming calls. Therefore, as held by the Apex Court in Bharti Cellular Limited (supra), the roaming connections are provided without any human intervention and therefore, no technical service is availed by the assessee. Therefore, TDS is not required to be made in respect of roaming charges paid to the other service providers. (AY. 2007-08 to 2011-12)
Dishnet Wireless Ltd. v. DCIT (Chennai)(Trib.); www.itatonline.org

S. 194C : Deduction at source – Contractors- Only payments "in pursuance of a contract" are subject to TDS. Payments made under a legal obligation are not covered.[S. 201(1), 201(IA)]
The appellant has made payments to Punjab Water Supply and Sewerage Board for execution of work relating to sewerage pipe lines and for treatment of polluted water of the city. However, such payments are out of legal obligations rather than contractual arrangements. It is only when payments are made "in pursuance of a contract" that the provisions of section 194C come into play. The contract may be oral or written, express or implied but there must be a contract nevertheless. In the present case, the payment is on account of legal obligation under section 24(1) of the Punjab Water Supply and Sewerage Board Act 1976. Accordingly, the provisions of section 194C did not come into play on the facts of this case. Therefore, the impugned demands under section 201(1) and 201(1A) r.w.s. 194C are wholly devoid of any legally sustainable merits. (AY. 2007-08 to 2010-11)
Executive Officer, Jalandhar Improvement trust v. ITO (2015) 171 TTJ 406 / 69 SOT 380 (Asr.)(Trib.)

S. 194C:Deduction at source-Professional fees-Payment to contractors-Payments for carriage to cable operators, production house, event management and hire charges-Work-Definition-Includes broadcasting and telecasting including production of programmes-Hire contract part of production of programme-Notification including event management within scope of professional service under section 194J prospective-Not applicable to assessee-Assessee not in default. S. 194J [S. 194J,201(1)]

The assessee made payments deducting tax at source under section 194C of the Income-tax Act, 1961 for services of a cable operator, for purchasing programmes from production houses, for event management and for hiring equipment, labour and operators for the production unit. According to the Assessing Officer, the assessee should have deducted tax at source under section 194J of the Act, as the payment made by the assessee was not for the work as defined in section 194C of the Act and therefore, the assessee committed a default under section 201(1) of the Act. The Commissioner (Appeals) held that as the assessee already deducted the tax under section 194C, the assessee was not in default under section 201(1) of the Act. On appeal :

Held, dismissing the appeal, that "work" in section 194C of the Act, included broadcasting, telecasting and production of programmes. The payment made by the assessee under hire contract was part of production of programmes. Therefore, for the payment of carriage fees to cable operators, production house and hire charges, tax could be deducted under section 194C of the Act. The Department relied on the Board notification dated August 21, 2008 for holding that tax at source on fee for event management was to be deducted under section 194J of the Act. The notification was prospective and it would not cover the payments made prior to the issue of notification and therefore, in the assessee's case, the tax at source could be deducted under section 194C of the Act. Therefore, the assessee was not in default under section 201(1) of the Act.

Dy. CIT (TDS) v. Zee Entertainment Enterprises Ltd. (2015) 38 ITR 636(Mum.)(Trib.)

S. 194H:Deduction at source-Commission-Discount allowed by assessee to distributors in respect of sale of starter packs and recharge coupons for its prepaid service constitute commission - Assessee is a person "responsible for paying" – Assessee is liable to deduct tax at source on such commission.

Held, the terms and conditions left no doubt that the relationship between the service provider and the assessee from the agreement was that of an agent and principal. The service provider had been employed to act on behalf of the assessee for the purpose of feeding the retailers and through them to sell the services to the consumers. The dealings and transactions between the assessee and the service provider were not on principal to principal basis. The assessee was a person responsible for paying commission and, therefore, the provisions of section 194H were attracted. (AY. 2004-2005)

Hutchison Telecom East Ltd..v. CIT (2015) 375 ITR 566 (Cal.)(HC)

S. 194H : Deduction at source-Commission or brokerage-Trade discount- Not liable to deduct tax at source.

In the absence of principal-agent relationship as per the Agreement entered into and when there is no primary responsibility of the assessee to deduct tax at source, Sec 194 H is not attracted. The trade discount allowed to the Assessee on the sale of recharge vouchers, prepaid cards and starter kits to its distributors does not amount to payment of commission. Thus, no violation of law. (AY. 2005- 06 to 2008-09)

Bharti Airtel Ltd. v. CIT (2015) 372 ITR 33 / 274 CTR 213 / 228 Taxman 219 (Mag.) (Karn)(HC)

Tata Teleservices Ltd .v. (2015) 274 CTR 213 (Karn.) (HC)

S. 194H : Deduction at source–Commission or brokerage - 'Commission' to bank on payments received from customers who had made purchases through credit cards is not liable to TDS.[S. 40(a)(ia)]

The assessee was engaged in the business of trading in readymade garments and paid "commission" to bank on payments received from customers who had made purchases through credit cards. The AO held that the amount earned by the acquiring bank, was in the nature of "commission" and same was

subjected to TDS u/s.194H and hence, disallowed amount u/s. 40(a)(ia). The CIT (A) confirmed the findings of the AO. The Tribunal, however, allowed the appeal.
Dismissing the departmental appeal, the High Court held that Section 194H would not be attracted in present case, as bank was not acting as an agent of the assessee. It further held that the amount retained by the bank is a fee charged by them for having rendered the banking services and cannot be treated as a commission or brokerage paid in course of use of any services by a person acting on behalf of another for buying or selling of goods.(A.Y. 2009-2010)
CIT v. JDS Apparels (P.) Ltd (2015) 370 ITR 454 / 53 taxmann.com 139 / 113 DTR 137 (Delhi)(HC)

S. 194H : Deduction at source – Commission or brokerage –Sale of SIM cards-Not liable to deduct tax at source.
The assessee was a Public Limited Company engaged in the business of telecom operations.In the course of its business, the assessee appointed distributors to purchase starter packs (SIM cards), refill packs (refill/re-charge slips, refill/recharge cards, etopup, etc.,), etc., in bulk and then, sold them to sub-dealers or retailers. After considering the terms and conditions stipulated in the agreement entered into between the assessee and the distributors, the assessing authority was of the view that the said agreement establishes a principal and agent relationship between the two parties and, therefore, any discount/commission made to such parties was liable for deduction of tax at source under section 194H.On appeal Court held that, Service can only be rendered and not sold, however, right to service can be sold. Sale of SIM by service provider to distributor involves sale of right to services, therefore, relationship between assessee and distributor would be that of principal and principal and not principal and agent, since SIM cards and prepaid recharge coupons were sold by assessee Telecom operators to distributors at discounted MRP, there was no payment of commission or brokerage to distributor, hence, TDS under section 194H was not attracted.
Bharti Airtel Ltd. v. CIT (2015) 372 ITR 33/ 114 DTR 253 / 228 Taxman 219 (Mag)/274 CTR 213 (Karn)(HC).
Vodafone Essar South Ltd. v. DCIT(2015) 372 ITR 33/ 114 DTR 253 / 228 Taxman 219 (Mag)/274 CTR 213 (Karn)(HC).
Tata Teleservices Ltd. v. DCIT (2015) 372 ITR 33/ 114 DTR 253 / 228 Taxman 219 (Mag)/274 CTR 213 (Karn)(HC).

S.194H: Deduction at source-Reimbursement of commission-Reimbursement not in nature of income-Tax deducted at source on commission-Deduction of tax at source on reimbursement results in double taxation. [S. 201(1)]
The assessee made reimbursements of dealer commission to Z, without deducting tax at source. The Assessing Officer held that the payment fell within the ambit of section 194H of the Act and since the assessee failed to deduct tax at source, the assessee committed default under section 201(1) of the Act. The Commissioner (Appeals) held that no tax was required to be deducted for reimbursement. On appeal :
Held, that since the reimbursements were not in the nature of income in the hands of Z, no tax was required to be deducted. Further, while paying the commission to its dealers and distributors, Z had deducted tax at source on the commission paid which was in turn reimbursed by the assessee. Deduction of tax at source again on the reimbursement would result in double taxation and therefore, the assessee was not a defaulter under section 201(1) of the Act.
Dy. CIT(TDS) v. Zee Entertainment Enterprises Ltd. (2015) 38 ITR 636(Mum)(Trib)

S. 194I: Deduction at source- Rent-In deciding whether a payment is for "use of land", the substance of the transaction has to be seen. If the payment is for a variety of services and the use of land is minor, the payment cannot be treated as "rent "- Charges for landing and take –off services as well as parking charges aircrafts paid by airlines to AAI are surcharges for various services and facilities hence such charges cannot be treated as rent-Not liable to deduct Tax at source.[S.194C, 201(1)]
The Supreme Court had to consider the conflict of judicial opinion between the Delhi High Court in CIT vs. Japan Airlines Co (2010) 325 ITR 298 (Del) and that of the Madras High Court in CIT vs.

Singapore Airlines Ltd (2013) 358 ITR 237 (Mad) on the question whether landing/ parking charges paid by an airline company to the AAI were payments for a contract of work under Section 194-C and not in the nature of 'rent' as defined in Section 194-I. The Delhi High Court decided the issue in favour of the department following its earlier decision in the case of United Airlines v. CIT (2006) 287 ITR 281. It took the view that the term 'rent' as defined in Section 194-I had a wider meaning than 'rent' in the common parlance as it included any agreement or arrangement for use of land. The High Court further observed that the use of land began when the wheels of an aircraft touched the surface of the airfield and similarly, there was use of land when the aircraft was parked at the airport. However, the Madras High Court dissented from the view of the Delhi High Court. HELD by the Supreme Court reversing the Delhi High Court and affirming the Madras High Court:

(i) From the reading of s. 194-I, it becomes clear that TDS is to be made on the 'rent'. The expression 'rent' is given much wider meaning under this provision than what is normally known in common parlance. In the first instance, it means any payment which is made under any lease, sub-lease, tenancy. Once the payment is made under lease, sub-lease or tenancy, the nomenclature which is given is inconsequential. Such payment under lease, sub-lease and/or tenancy would be treated as 'rent'. In the second place, such a payment made even under any other 'agreement or arrangement for the use of any land or any building' would also be treated as 'rent'. Whether or not such building is owned by the payee is not relevant. The expressions 'any payment', by whatever name called and 'any other agreement or arrangement' have the widest import. Likewise, payment made for the 'use of any land or any building' widens the scope of the proviso;

(ii) The charges which are fixed by the AAI for landing and take-off services as well as for parking of aircrafts are not for the 'use of the land'. That would be too simplistic an approach, ignoring other relevant details which would amply demonstrate that these charges are for services and facilites offered in connection with the aircraft operation at the airport. There are various international protocols which mandate all such authorities manning and managing these airports to construct the airports of desired standards which are stipulated in the protocols. The services which are required to be provided by these authorities, like AAI, are aimed at passengers' safety as well as on safe landing and parking of the aircrafts. Therefore, it is not mere 'use of the land'. On the contrary, it is the facilities, that are to be compulsorily offered by the AAI in tune with the requirements of the protocol, which is the primary focus;

(iii) When the airlines pay for these charges, treating such charges as charges for 'use of land' would be adopting a totally naïve and simplistic approach which is far away from the reality. We have to keep in mind the substance behind such charges. When matter is looked into from this angle, keeping in view the full and larger picture in mind, it becomes very clear that the charges are not for use of land per se and, therefore, it cannot be treated as 'rent' within the meaning of Section 194-I of the Act;

(iv) However, the reason given by the Madras High Court that the words 'any other agreement or arrangement for the use of any land or any building' have to be read ejusdem generic and it should take it colour from the earlier portion of the definition namely "lease, sub-lease and tenancy" and to thereby, limit the ambit of words 'any other agreement or arrangement' is clearly fallacious. A bare reading of the definition of 'rent' contained in explanation to Section 194-I would make it clear that in the first place, the payment, by whatever name called, under any lease, sub-lease, tenancy which is to be treated as 'rent'. That is rent in traditional sense. However, second part is independent of the first part which gives much wider scope to the term 'rent'. As per this whenever payment is made for use of any land or any building by any other agreement or arrangement, that is also to be treated as 'rent'. Once such a payment is made for use of land or building under any other agreement or arrangement, such agreement or arrangement gives the definition of rent of very wide connotation. To that extent, High Court of Delhi appears to be correct that the scope of definition of rent under this definition is very wide and not limited to what is understood as rent in common parlance. It is a different matter that the High Court of Delhi did not apply this definition correctly to the present case as it failed to notice that in substance the charges paid by these airlines are not for 'use of land' but for other facilities and services wherein use of the land was only minor and insignificant aspect. Thus it did not correctly appreciate the nature of charges that are paid by the airlines for landing and parking charges which is not, in substance, for use of land but for various other facilities extended by the AAI to the airlines. Use of land, in the process, become incidental. Once it is held that these charges are not

covered by Section 194-I of the Act, it is not necessary to go into the scope of Section 194-C of the Act. (AY. 1997-98 to 1999-2000)

Japan Airlines Co. Ltd. v. CIT (2015) 377 ITR 372/ 279 CTR 1(SC)

CIT v.Singapore Airlines (2015) 377 ITR 372 (SC)

Editorial: Observation in CIT v. Japan Airlines Co Ltd (2010) 325 ITR 298 (Delhi) (HC) is approved. CIT v. Singapore Air Lines Ltd (2013) 358 ITR 237 (Mad)(HC) , is disapproved .

S. 194I:Deduction at source-Rent-Providing medical services - Agreement vesting assessee with powers of management of premises used as hospital - Annual sum and payment of interest on loan taken by lessor and liability to repay loan - Annual sum amounted to rent - Tax deductible at source on such amount - Liability to pay interest and repay loan did not amount to rent-Not liable to deduct tax at source on such payment.

Held, the words "any other mode" and "whatever name called" occurring in section 194I and the definition of "rent" in the Explanation thereto, if applied to the present case, the consideration paid by the assessee in terms of the agreements dated April 1, 2005, and April 29, 2006, was in the nature of rent and the provisions of section 194I were squarely attracted. The agreement dated April 1, 2005, executed between the parties was amended by the agreement dated April 29, 2006. By virtue of the amendment to clause 2.1(b), the assessee-company was not liable to deduct tax at source on the interest and principal paid in respect of the loan outstanding from MRS to various banks and financial institutions for the assessment year 2007-08. However, the amount of Rs. 5 crores paid per annum to MRS squarely fell under section 194I of the Act and the assessee-company was liable to discharge the liability for deduction of tax at source for both the assessment years 2006-07 and 2007-08.(AY. 2006-2007, 2007-2008)

CIT .v. Manipal Health Systems P. Ltd. (2015) 375 ITR 509 (Karn.)(HC)

S. 194I : Deduction at source- Rent-Fees for technical services-Transmission & wheeling charges paid by electricity company is nether rent nor fees for technical services- Not liable to deduct tax at source-It will not be permissible for either the revenue or the assessee to take up the issues which were not raised before the Tribunal. [S.9(1)(vii), 194J, 201 201(IA), 260A]

(i) The argument of the revenue that Transmission charges and / or Wheeling charges amounts to "rent" for purposes of TDS u/s 194-I cannot be accepted. According to the Black's Law Dictionary, 'Rent' is defined as consideration paid for periodical use or occupancy of property. Various types of rent are contemplated such as ceiling rent, crop rent, ground rent, etc. Even taking the widest possible definition of rent, in our view the(Wheeling charges and/or Transmission charges (hearing after referred to " WT charges), WT charges cannot be considered as rent. It is well settled that the Court may in its discretion construe the legislative provisions so as giving effect to the intended use and applying the test of contextual interpretation. We are of the view that the expression 'rent' used in Section 194-I does not apply to WT charges or any other part thereof;

(ii) The expression rent would also entail an element of possession. In each of the instances contemplated by the explanation to Section 194-I, we see in them an element of possession, be it land, building (including factory building), land appertaining to a building, plant, equipment, furniture or fittings. The person using it has some degree of possessory control, at least momentarily, although it cannot entrust the user title to the subject matter of the charge. Even the mere right to "use" is vested with an element of possessory control over the subject matter. In the present case, WT charges are bereft of such possessory control and hence in our view, completely outside the purview of the Explanation to Section 194-I;

(iii) Though in the context of parking charges, the Delhi High Court has taken a view in favour of the revenue in United Airlines 287 ITR 281 (Delhi), the Madras High Court in C.I.T. V/s. Singapore Airlines (2013) 358 ITR 257 has taken a contrary view. We find ourselves in agreement with the view taken by the Madras High Court inasmuch as, the decision of United Airlines (supra) did not take into account the navigational services, etc. which go along with the landing of an aircraft and payment of charges for parking the aircraft thereof. Right from the moment a flight is permitted to land at a particular airport, a process is set into motion, to guide the aircraft to the runaway, for successful landing and after the aircraft had come to a halt it is led to a parking space allotted to it once again with the navigational help. It is only thereafter that the aircraft is said to be parked till it resumes its

flight. An example is the use of a toll road (instead of highway). If use of a toll road could be characterised as use of land, it would be an extreme view if we held that toll to be paid for use of a toll road would be subject to deduction of tax at source only because it could also be characterised as rent for use of land. Such an extreme view will not be justified under any circumstances;
(iv) The Hon'ble Supreme Court has also shown us some direction in this behalf. While interpreting the expression 'rent', the applicability of Section 194-I must be gathered from whether the WT charge draws its colour from the basic meaning of the expression 'rent'. It is seen that the meaning of 'rent' must be understood in the context in which they are used. In the present set of facts, it is not possible to equate WT charges payable MSETCL with rent;
(v) There is nothing on record to support the revenue's contention that the WT charges assumes the character of rent. The expression 'rent' must be conceptually understood. The concept of rent under the Income Tax Act does not encompass, in our view, the WT charges payable by the assessee especially when the assessee is discharging a public function. The expression of 'Transmission charges and / or "Wheeling charges' entails distribution of electricity in the area of the Corporation and they cannot be subjected to provisions of Section 194-I of the Act. We, however, clarify that this is restricted to the case of the assessee in view of the public function to be undertaken by it, as a result of the restructuring of the Maharashtra State Electricity Board.
(vi) The revenue's contention that if WT charges are not rent, it would amount to payment of fees for technical services is also not acceptable. The very concept of the charge for transmission of electricity and wheeling of electricity, as the case may be, is subject to the tariff that will be determined by the MERC in public interest. Hence it is incomprehensible that the tariff passes the test as fees for technical services. Once again applying the principles of conceptual interpretation to the tariff to be fixed for WT charges of electricity, it cannot be interpreted to mean fees for the providing technical services. Under the open access system, it is the MSEDCL which will be availing of the said transmission facility. No 'service' is being provided by the MSETCL or the STU. No doubt, MSEDCL as transmission licensee is required to provide superintendence, maintenance and repairs to the system. However, no such service is rendered by the MSETCL to MSEDCL. MSETCL is obliged to maintain the system by value of operation of law under the Electricity Act. MSEDCL accesses the STU and distributes electricity passing through the STU. Our views stand fortified by the very fact that the revenue itself is confused and unsure as to the nature of the charge. The focus of the revenue is only the requirement of deduction of tax whether under Section 194-I or Section 194-J. This approach is erroneous. The revenue contends that the WT charges could be rent or fees for technical services but in our view it is neither. Appeal of revenue was dismissed. Court also observed that ,it will not be permissible for either the revenue or the assessee to take up the issues which were not raised before the Tribunal**.**

CIT (TDS) v. Maharashtra State Electricity Distribution Co. Ltd(2015) 375 ITR 23/ 277 CTR 376/ 119 DTR 278/ 232 Taxman 373 (Bom)(HC)

S. 194I :Deduction at source – Rent –Use of plant and machinery on monthly basis –Not liable to deduct tax at source.

Assessee-company entered into an agreement with a factory to carry on re-rolling work . It paid to said factory an amount of Rs. 200 per ton on manufacturing of steel items . Assessing Officer treated said payment as rent for use of factory premises and disallowed same on account of non-deduction of TDS. From agreement, it was found that assessee made payment for use of plant and machinery on monthly production basis .On facts, assessee was not liable to deduct TDS under section 194-I.(AY. 1998-99)

CIT .v. R.H.L. Profiles Ltd. (2015) 229 Taxman 180 (All.)(HC)

S.194I: Deduction at source-Rent-Lease premium-Provision applies only to amounts paid for "use" of the land and not for amounts paid to "acquire" the rights-Distinction between "lease premium" and "rent" explained.

The revenue claimed that payment of lease premium by the assessee to MMRDA is in the nature of advance rent for 80 years and definition of the term "rent" u/s 194 I of the Act was wide enough to include such payments made. It was contended by the revenue that even after the execution of the lease deed the rights of the lessor did not extinguish in view of the provisions of obtaining the

additional premium from the assessee in case time limit for its commercial development was not adhered to. According to the revenue premium paid in the case of the assessee came within the purview of section 194 I of the Act. HELD by the Tribunal rejecting the plea:
(i) The terms of the lease deed leaves no manner of doubt that the lease premium of Rs.1041.42 crores was for acquisition of rights in the lease hold property rather than use of land. Therefore the provisions of section 194 I of the Act are not applicable in the case of the assessee. The purport of section 194 I of the Act is not to bring in its purview payments of any or every kind. Only those payments which are in the nature of "use" of land come within the ambit of section 194 I of the Act. The word "use" is therefore of prime importance for transactions where the consideration paid for the property would be termed as "rent". The term "use "according to us has to be interpreted keeping in mind the relationship between the landlord and the tenant. The same cannot be extended to bring within its purview exploitation of any kind with reference to the property by changing its identity for its own benefit and thereafter selling it for profit. If that be so and the word 'use' is given an extended meaning, there would be no difference between a sale transaction and a transaction between the landlord and the tenant. This would render the intention of the legislature in importing the word 'use' in section 194 I of the Act otiose. Landlord-tenant relationship does not contemplate such right being given to the tenant. However, there may be transactions of lease that may be identical to the transactions between a landlord and tenant and that is why the definition of the rent includes lease, sub-lease etc.
(ii) The amount paid by the assessee for lease premium has no connection with the market rent of the property leased to the assessee. Furthermore the term of lease deed is for a considerable period of 80 years which further supports the case of the assessee that the payment made was for the acquisition of rights in the land along with the right of possession, right of exploitation of property, its long term enjoyment, to mortgage the property, to sell the property etc. Also the entire lease premium of Rs.1041.42 crores has been paid before the execution of the lease deed and not after.(ITA No. 265/kol/2012, dt. 13.05.2015) (AY. 2008-09)
ITO v. Earnest tower (P) Ltd, (Kol.)(Trib.); www.itatonline.org

S. 194I : Deduction at source – Rent –Power distribution-Billing and transmission of electricity could not be considered as rent-Not liable to deduct tax at source. [S. 201,201(IA)]
The assessee-company, incorporated under provisions of the Electricity Act, 2003, purchased power from various sources and distributed and sold to the consumers. The power from the generation point to the customers was transmitted through the transmission network of Maharashtra State Electricity Transmission Company Ltd (MSETCL) and Power Grid Corporation of India Ltd (PGCIL). The AO held that whelling and transmission charges paid to MSETCL and PGCIL were liable to TDS under section 194-I and accordingly disallowed payment for failure to deduct TDS. The CIT(A) allowed appeal of the assessee holding that payments made for use of transmission lines or other infrastructure *i.e.* plant and machinery could not be termed as rent and further holding that transmission charges could not be considered as rent under the provision of section 194-I.On appeal by revenue it was contended that transmission charges should be considered as rent . The Tribunal held that billing and transmission charges paid to MSETCL and PGCIL for transmission of electricity could not be considered as rent under provision of section 194I. (AY. 2006-07 to 2009-10)
ACIT .v. Maharashtra State Electricity Distribution Co. Ltd. (2014) 51 taxmann.com 151 / (2015) 67 SOT 108 (Mum.)(Trib.)

S. 194J: Deduction at source - Fees for professional or technical services – Doctors receiving fixed or variable remuneration, with or without written contracts, are professionals and cannot be treated as employees as per their terms and conditions. [S. 192]
Payments were made by the Assessee, a charitable trust managing a hospital, to doctors. The payments were either fixed or variable, with or without written contract. The AO alleged that such doctors were employees of the assessee and tax ought to be deducted u/s 192 and not u/s 194J. It was held by the HC that the terms and conditions of the doctors would be crucial and material. The doctors drawing fixed or variable remuneration could not be treated as regular employees since benefits like provident fund, retirement benefit, etc. were not paid to them. They could not be considered to be employees merely because they were required to spend a fixed time at hospital, treat fixed number of

patients or attend them as indoor patients and out patients. The doctors were free to carry on their private practice but beyond hospital timings. (AY. 2008-09)
CIT v. Grant Medical Foundation (2015) 375 ITR 49 / 275 CTR 253 / 116 DTR 45 (Bom.)(HC)

S.194J : Deduction at source - Fees for professional or technical services –Stokists- Assessee received amount of sale price at rate fixed under agreement but had neither paid nor credited any amount to stockist, question of invoking section 194J against assessee did not arise.
Assessee-company was engaged in manufacture and distribution of drugs. It appointed one 'Z' as its superstockist. In terms of agreement, assessee sold its manufactured drugs to 'Z' for its onward distribution in open market .Assessing Officer concluded that 'Z' was manager of assessee and, therefore, assessee was liable to deduct tax under section 194J. Dismissing the appeal of revenue the Court held that ;since assessee had received amount of sale price at rate fixed under agreement but had neither paid nor credited any amount to stockist, question of invoking section 194J against assessee did not arise. (AY. 2007-08 to 2011-12)
CIT v. Piramal Healthcare Ltd. (2015) 230 Taxman 505 (Bom.)(HC)

S.194J: Deduction at source- Fees for professional or technical services-Independent personal services Work of agency-Liaisoning-Not liable to deduct tax at source-DTAA-India- UAE.[S. 9(1) (vii), 40(a)(i), 90, 195, Arts, 3,14, 22]
The assessee company made payments to two foreign companies . The AO held that as no tax was deducted while making the payment , he disallowed the expenditure by applying the provision of section 40(a)(i) of the Act. Tribunal held that the assessee was not liable to deduct tax at source. On appeal by revenue, dismissing the appeal, the Court held that;
(i) It is evident that “consultancy services” would mean something akin to advisory services provided by the non-resident, pursuant to deliberation between parties. Ordinarily, it would not involve instances where the non-resident is acting as a link between the resident and another party, facilitating the transaction between them, or where the non-resident is directly soliciting business for the resident and generating income out of such solicitation. Indeed, as held by this Court inDirector of Income Tax v. Panalfa Autoelektrik Ltd., (2014) 272 CTR 117, since Section 9 is a deeming provision, the interpretation cannot be overly broad in nature. In the case at hand, at the outset, this Court clarifies that the mere fact that CGS International confirmed that it received consultancy charges from the assessee would not be determinative of the issue. The actual nature of services rendered by CGS International and Marble Arts & Crafts needs to be examined for this purpose.
(ii) It is evident that in the transaction between the assessee and Marble Arts & Crafts, the former (non-resident) acted as an agent of the assessee for the purposes of the latter’s dealings with the Works Department, Abu Dhabi, which included coordinating with the authorities in the said department and handling invoices for the assessee. As far as CGS International is concerned, it acts as a liaisoning agent for the assessee, and receives its remuneration from each client that it successfully solicits for the assessee. Facially, such services cannot be said to be included within the meaning of “consultancy services”, as that would amount to unduly expanding the scope of the term “consultancy”. Therefore, this Court does not accept the revenue’s contention that the services provided were in the nature of “consultancy services”. Consequently, the remittances made by the assessee would not come within the scope of the phrase “fees for technical services” as employed in Section 9(1)(vii) of the Act.
(iii) This question involves a determination of whether the services provided by the UAE entities are in the nature of “independent personal services” defined in Article 14 of the DTAA. The two requirements for the applicability of Article 14, as applied in this case, are: a) income must be of a resident of the Contracting State (herein, UAE); and b) income must be in respect of professional services or other independent activities of a similar character. Article 4(1)(b) of the DTAA defines “resident of a contracting state” in the context of UAE to mean any person who under the laws of that State is liable to tax therein. Article 3(e) defines “person” to include a company. Therefore, the CIT(A) rightly rejected the revenue’s contention that Article 14 is inapplicable for the reason that the services in question were provided by companies, as opposed to individuals. Since the income of CGS International and Marble Arts & Crafts can only be classified under Article 14 or Article 22 of the DTAA – both of which provide that the income shall be taxable in the State of residence (UAE)–the

issue as to whether the services provided by the two UAE entities fall within the scope of "professional services" under Article 14 is irrelevant to the outcome of this case. Their incomes would necessarily be taxable in UAE, whether by virtue of Article 14 or Article 22. For this reason as well, the assessee was not obligated to deduct tax on the remittances made to CGS International and Marble Arts & Crafts. Work of agency or liaisoning bwetween assesse and its clients or customers cannot be included with in the meaning of consultancy services under section 9(1)(vii).(AY. 2004-05)
CIT v. Grup ISM P. Ltd. (2015) 276 CTR 194 (Delhi) (HC)

S. 194J : Deduction at source-Fees for professional or technical services -Royalty-Income deemed to accrue or arise in India – Payment made for live telecast of horse races not royalty as per Explanation 2 to section 9(1)(vi), hence no TDS was attracted. [S.9(1)(vi), 40(a)(ia)]
The assessee was engaged in the business of conducting horse races and had made payment to other clubs/centres on account of live telecast of races. The AO made a disallowance u/s. 40(a)(ia) on account of 'royalty paid to other centres' and on account of 'live telecast royalty' being royalties covered by section 194J as TDS was not deducted on said expenses. The CIT(A) upheld the assessment order however the Tribunal deleted the same.
On appeal by revenue, High Court observed that the in provision (v) the words 'in respect of any copyright in literary, artistic or scientific work' were read to, *inter alia*, hold that 'royalty' is payable only on 'transfer of all or any rights (including granting of licence) in respect of any copyright in literary, artistic or scientific work including films or video tapes for use in connection with television or tapes were used in connection with radio broadcasting but not including consideration for the sale, distribution or exhibition of cinematographic films'. The High Court held that the even by stretching the meaning, it is difficult to include a live broadcast within 'scientific work'. It further held that revenue contention that the live telecast, in this case, was accompanied by commentary, analysis etc is an issue of fact, which cannot be gone into or raised at this stage. and hence appeal filed is dismissed.(AY. 2007-2008 /2009-2010).
CIT v. Delhi Race Club (1940) Ltd (2014) 51 taxmann.com 550 / (2015) 113 DTR 420 (Delhi)(HC).

S. 194J : Deduction at source - Fees for professional or technical services –Providing assistance, coordination, supervision and facilitating working of co-operative sugar factories-Matter remanded. [S. 40(a)(ia)]
Assessee, a co-operative sugar Federation, was providing assistance, coordination, supervision and facilitating working of co-operative sugar factories. It received subscription from each factory to meet expenses on basis of sugar production but did not deduct TDS from said subscription.AO was of view that assessee provided financial advice and other services which were technical services under section 194J and, accordingly, made a disallowance under section 40(a)(ia) on ground that tax was not deducted at source CIT(A) had deleted disallowance .Court held that since no independent evaluation was carried out by CIT(A) as to whether said services were technical services or professional services, matter needed re-consideration. Matter remanded (AY. 2006-07)
CIT .v. Kisan Sahkari Chini Mill Ltd. (2015) 229 Taxman 81 (All.)(HC)

S. 194J : Deduction of tax at source - Fees for professional or technical services - Data Link Charges- Transmission of data via gadgets without any human intervention will not amount to technical services-Not liable to deduct tax at source.
Assessee-software company paid data link charges for utilizing standard facilities which were provided by telecom service providers by way of technical gadgets and there was no human intervention for transmitting data through such data links, same did not involve technical services.It was held that assessee was not liable for tax deduction at source under section 194J.(AY. 2007-08 to 2010-11)
iGATE Computer Systems Ltd. v. DCIT (2015) 67 SOT296 (Pune)(Trib.)

S. 194J : Deduction at source - Fees for professional or technical services -Income - Deemed to accrue or arise in India-Royalty-cinematographic films- Satellite rights of a film- Outside purview of section 194J. [S. 9(1)(v), 201, OECD Model Convention Art, 12].

Payment made by assessee to producers for acquiring satellite rights was towards outright sale, distribution or exhibition of cinematographic films, which were specifically excluded under clause (v) of Explanation 2 of section 9(1) from being treated as consideration paid towards royalty, payment was outside purview of section 194J.(AY. 2008-09)
ACIT v. Aishwaraya Arts Creations (P.) Ltd. (2015) 67 SOT 245 (Hyd.)(Trib.)

S.194J: Deduction at source- Technical services-Access charges- Rent-Rectification order passed by the AO cancelling the original demand- Appeal of revenue being academic the said appeals were dismissed.[S.9(1)(vii), 194I, 201(1)]
AO held that the "access charges" payment made by assesse to RCOM is for technical services falling under section 194 J of the Act. As the assesse failed to deduct tax at source was treated as assesse in default under section 201(1) of the Act. In appeal the CIT (A) held that the payment is nether fees for technical services nor rent hence the assesse was held not liable to deduct tax at source either under section 194J or under section 194I. Revenue has filed the against the said order of CIT (A). Before Tribunal the assesse contended that the AO has passed the rectification order u/s 154 read with section 201(1) wherein the demand raised by the AO was cancelled . Tribunal held that the appeal of revenue being academic the appeal of revenue was dismissed. (AY. 2007-08 to 2010-11)
DCIT v. Reliance Communication Infrastructure Ltd (2015) 120 DTR 329 (Mum.)(Trib.)

S. 195:Deduction at source-Retrospective amendments seeking to tax income of non-residents does not affect the "source rule". The amendment makes no any difference to the non-taxability of payments made to foreign companies if the income accrues abroad- Not liable to deduct tax at source.[S.9(1)(vii)(b), 201(1A]
AO held that the payment made by the assessee was fees for technical services as defined in Explanation 2 to section 9(1)(vii)(b) of the Act and therefore chargeable to tax on which tax should have been deducted u/s 195(1). AO rejected the assessee's plea that the payments for repairs were incurred for earning income from sources outside India and therefore the case fell within the exclusion clause of section 9(1)(vii)(b) . The AO also rejected the plea of the assessee that the business of aircraft leasing was carried on out side India . On appeal the Tribunal decided the issue in favour of assessee . Against the order of Tribunal on appeal by revenue dismissing the appeal the Court held that ;
(i) It is evident that Parliamentary endeavor – through the retrospective amendment (explanation to Section 9(2) was inserted by the Finance Act, 2007 with retrospective effect from 1.6.1976 and The Finance Act, 2010 substituted the same explanation with effect from 1.6.1976), was to target income of non-residents. But importantly, the condition spelt out for this purpose was explicit: "where income is deemed to accrue or arise in India under clauses (v), (vi) and (vii) of sub- section (1), such income shall be included in the total income of the non-resident… whether or not,- (ii) the non-resident has rendered services in India." The revenue urges that the fiction created by the said amendment is to do away with the requirement of the non-resident having a place of business, or business connection, irrespective of whether "..the non-resident has rendered services in India." Did this amendment make any difference to payments made to such companies – even in relation to income accruing abroad? The revenue grounds its arguments in the assumption that the later, 2010 retrospective amendment, overrides the effect of Section 9 (1) (vii) (b) exclusion. While no doubt, the explanation is deemed to be clarificatory and for a good measure retrospective at that, nevertheless there is nothing in its wording which overrides the exclusion of payments made under Section 9(1)(vii)(b). The Supreme Court clarified this in GVK Industries Ltd. v. ITO 371 ITR 453 Thus, it is evident that the "source" rule, i.e the purpose of the expenditure incurred, i.e for earning the income from a source in India, is applicable;
(ii) The source of income from wet-leasing aircraft to non-resident companies is outside India. Secondly, leasing revenue was received in convertible foreign exchange directly from foreign charterers through wired transfer in assessee‟s account denominated in foreign currency but maintained in India with the permission of the RBI and that the remittances to the foreign company for repairs had a direct nexus with the income. Payments to Technik for maintenance and repairs were essential and crucial for earnings from the wet-leasing activity. Articles 2 and 3 of the contract with LCAG clearly state that only when the latter informed the assessee in writing that it did not require a

certain capacity for a particular period, that the assessee could wet-lease the aircraft to others for that period. In all other periods, the assessee is committed to wet-lease the aircraft to LCAG, and the assessee's failure to do so would imply that LCAG was obliged to pay the rent for the minimum guaranteed block hours. The ITAT held that the overwhelming or predominant nature of the assessee's activity was to wet-lease the aircraft to LCAG, a foreign company. The operations were abroad, and the expenses towards maintenance and repairs payments were for the purpose of earning abroad. In these circumstances, the ITAT's factual findings cannot be faulted.(FY. 1998-99 to 1999-2000)

DIT v. Lufthansa Cargo India(2015) 375 ITR 85/278 CTR 1 (Delhi) (HC)

S. 195 : Deduction at source-Income deemed to accrue or arise in India - Business connection – Royalty- Down linking charges paid to foreign party could not be treated as royalty and, thus, same could not be liable to deduction of TDS. [S.9(1)(i)]

Down linking charges paid to foreign party could not be treated as royalty and, thus, same could not be liable to deduction of TDS(AY. 2001-02)

CIT v. Infosys Technologies Ltd. (2015) 229 Taxman 335 (Karn)(HC)

S. 195 : Deduction at source-Income deemed to accrue or arise in India - Business connection-Interest payment- Not liable to deduct tax at source.[S.9(1)(i)]

Interest payment made by Indian branch of assessee to its head office abroad was to be allowed as deduction in computing profits of assessee's branch in India. Assessee was not liable to pay any tax on said payment under section 195. (AY. 1995-96)

Bank of Tokyo Mitsubishi Ltd. .v. DIT (2015) 228 Taxman 337 (Mag.)(Cal.)(HC)

S. 195 : Deduction at source-Income - Deemed to accrue or arise in India-Settlement fund-Damages on account of alleged fraud- Authority of Advance Ruling determined that said amount was taxable in India and deducted tax at source prior to payment to beneficiaries-Authority had rendered its ruling based upon wrong premise that petitioner had accepted said receipts to be in nature of revenue receipts, ruling was to be set aside -Matter remanded. [S.9(1)(i)]

Certain shareholders of American Depository shares had filed suits against 'S' (Indian company) as well as against 'P' and 'P' LLP, USA claiming damages on account of the alleged admitted fraud in the representations to the Authority governing the Stock exchange under the Securities Exchange Act, 1934 and the Securities Act of 1933 (both USA Acts).

In those suits, a settlement was arrived at whereby said companies was required to pay damages to said shareholders. Shortly, after the settlement was arrived at as a condition of the settlement, an Advance Ruling was invited from the Authority for Advance Rulings with regard to the taxes to be with held in respect of the transfer of funds from India to USA.

While the matter was pending before the Authority for Advance Rulings, the entire funds available in the Segregated Account were transferred to the Initial Escrow Account in New York. However, thereafter the Authority for Advance Rulings determined that the said amount was taxable in India and, therefore, tax was to be deducted at source prior to the payment to the beneficiaries. Consequently, 30 per cent of the funds which had been transferred from the Segregated Account to the Initial Escrow Account were returned to India and they continue to be deposited with the revenue authorities.

On writ :The Court held that ,The Authority for Advance Rulings has rendered its ruling based upon the wrong premise that the petitioner had accepted the receipts to be in the nature of revenue receipts. Thus, the Ruling cannot stand. Consequently, the Ruling is set aside and remit the matter to the Authority for Advance Rulings to examine the position, first of all, in the light of whether the receipts were in the nature of capital receipts or revenue receipts and thereafter to determine as to whether those receipts were chargeable to income tax in India. (W. P. (C) Nos. 6167 & 7774 of 2012 dt. 18-09-2014)

Bernstein Litowitz Berger And Grossmann LLP .v. UOI (2015) 228 Taxman 334 (Mag.) (Delhi)(HC)

S. 195 : Deduction at source-Non-resident- Income deemed to accrue or arise in India-Interest-Payment to head office tax was not required to be deducted at source on principles of mutuality.[S.9(1)(v), 40(a)(i)]

Interest paid by Indian branch to Head Office/overseas branches was not taxable in India on principles of mutuality and, therefore, tax was not required to be deducted at source while making said payments.(AY. 2004-05)

Credit Agricole Corporate & Investment Bank v. ACIT, (IT) (2015) 67 SOT 208(URO) (Mum.)(Trib.)

S. 195 : Deduction at source - Non-resident--Income from immovable property- Capital gain was invested in another property-Not liable to deduction of tax at source. [S. 45,54, 201(IA), OECD Model Convention, Art. 6]

Assessee purchased a property from a non-resident, since assessee was aware of fact that capital gain arising from sale of said property was not taxable in hands of vendor as he had already invested amount in purchase of another residential property within time period prescribed under section 54, assessee was not required to deduct tax at source while making payment of sales consideration to non-resident vendor. (AY. 2012-13)

A. Mohiuddin v. ADIT (2015) 171 TTJ 138 / 67 SOT 251 (Bang.)(Trib.)

S. 195 : Deduction at source-Non –resident-Supervision charges –Fees for technical charges-Make available-If a sum cannot be assessed as "fees for technical services" under the "make available" clause of Article 13, it can still be assessed as "Independent personal services" under Article 15.-DTAA-India- Finland- Duration of stay of such individuals was not available the matter was set aside to the CIT(A). [S.4, 5, 9(1)(vii), 40(a)(i),90, Art 13, 15]

(i) The expression 'make available' in the context of 'fees for technical services' contemplates that the technical services should be of such a nature that the payer of the services comes to possess the technical knowledge so provided which enables it to utilize the same thereafter. The Hon'ble Karnatka High Court in the case of CIT &Ors. Vs. De Beers India Minerals Pvt. Ltd. [2012 (346 ITR 467) (Karn)] has dealt with the concept of 'make available' in the context of fees for technical services. It has been held that : "The expression 'make available' only means that the recipient of the service should be in a position to derive an enduring benefit and be in a position to utilise the knowledge or know-how in future on his own. By making available the technical skills or know- how, the recipient of the same will get equipped with that knowledge or expertise and be able to make use of it in future, independent of the service provider …….". From the above enunciation of law by the Hon'ble Karnataka High Court, it is palpable that the technical knowledge will be considered as `made available' when the person acquiring such knowledge is possessed of the same enabling him to apply it in future at his own. If the services are consumed in the provision without leaving anything tangible with the payer for use in future, then it will not be characterized as `making available' of the technical services, notwithstanding the fact that its benefit flowed directly and solely to the payer of the services,. The Special bench of the tribunal in Mahindra & Mahindra Ltd. VS. DCIT (2009) 122 TTJ (MUM)(SB) 577 has discussed the concept of `make available'. In that case, the lead managers had rendered technical, managerial or consultancy services in the GDR issue, which services were not made available to the assessee inasmuch as the payer only derived the benefit from the technical services provided by the lead managers without getting any technical knowledge, experience or skill in its possession for use in future. In that view of the mater, it was held that the `management and selling commission' could not be taxed in India as per the DTAA because nothing was made available to the payer. It follows that in order to be covered within the expression 'make available', what is necessary is that the service provider should transmit the technical knowledge etc. to the payer so that the payer may use such technical knowledge in future without involvement of the service provider.

(ii) On facts, the technical services provided by the non-resident are simply in the nature of supervisory services by the engineers for erection, commissioning of the plant of M/s Sterlite in Tuticorin. By rendering such services, nothing has been made available by the payee to the assessee/Sterlite, which could be used in future without involvement of such residents of Finland. Once the plant is erected and commissioned, the supervisory engineering services rendered by the Finland residents during the course of such erection and commissioning get consumed in the process

and there remains nothing capable of any use in future. Going by the scope of Article 13 vis-à-vis the nature of actual services provided by the payees, it is manifested that such technical services do not fall within the purview of the definition of 'fees for technical services' as given in para 4 of this Article, as nothing has been `made available' by the rendition of technical services for any future use. If the provisions of Article 13 of DTAA are exhausted and it is not the case of the AO that the amount be considered under any other Article of the DTAA, it would mean that albeit the amount is chargeable to tax in the hands of the non-residents as per section 9(1)(vii) read with section 5(2) of the Act, but, the chargeability will be waived because of the inapplicability of Article 13 of the DTAA, which is a more beneficial provision than section 9 read with section 5 of the Act. In that view of the matter, the assessment order considering payment of Rs.1.92 crore to M/s IPS Finland for technical services as violating the provisions of section 195, thereby resulting into disallowance u/s 40(a)(i), cannot be countenanced.

(iii) The assessee's contention that since the services contracted for the by the assessee with non-residents fall within the meaning of Article 13 but get excluded because of not `making available' any technical knowledge etc., then such services cannot be once again considered under Article 15 is not acceptable. The precise question is that which of the two Articles, namely, 13 or 15, should have primacy in the facts and circumstances as are instantly prevailing? In our considered opinion, the answer to this question is not too far to seek. Relevant part of Para 5 of Article 13, as reproduced above, unambiguously states that the definition of fees for technical services in paragraph 4 shall not include amounts paid `….. (e) to any individual …. for professional services as defined in Article 15″. When we read para 5 of Article 13 in conjunction with Article 15, there remains absolutely no doubt that the amount payable by the assessee to certain individual residents from Finland is covered only under Article 15 and not Article 13 of the DTAA.

(iv) Delving into the mandate of para 1 of Article 15 of the DTAA, we find that the income derived by a resident of Finland in respect of professional services or other independent activities of a similar character performed in India can be taxed in India if he is present in India for a period or periods aggregating to 90 days or more in the relevant fiscal year or has a fixed base regularly available to him in India for the purpose of performing his activities. It is noticed that the CIT(A) has computed the period of 90 days by considering the presence of these persons in India from 24.11.2008 to 24.4.2009. The AR contended that the CIT(A) has considered total period of stay of all the five persons taken together without considering it on individual basis. We find force in the submission of the ld. AR in this regard. Once it is held that five individuals from Finland were not representing IPS and, in fact, there was no valid agreement between the assessee and IPS, then, what remains to be examined is such five residents of Finland on individual basis. The amounts payable to each of such five persons satisfying the duration test on individual basis would enable the ultimate triggering of Article 15 of the DTAA. In other words, only those Finland residents out of such five persons who independently and individually satisfy the condition about their presence in India for a period of 90 days or more in the relevant fiscal year or having a fixed place regularly available to them in India for the purpose of performing the supervisory functions, can be brought within the purview of Article 15. If, however, this condition is found wanting qua some individuals, then the amount payable to such individual residents of Finland, would cease to be chargeable to tax in terms of Article 15 of the DTAA notwithstanding its taxability under section 9(1)(vii) read with section 5 of the Act.(AY. 2009-10)

Outotec India Pvt. Ltd. v. ACIT (Delhi)(Trib.); www.itatonline.org

S.195:Deduction at source-Non-resident-OECD Model Tax convention-Usance charges paid to a non resident through an intermediately bank- Liable to deduct tax at source..[S.2(28A),5(2)(b), 9(1)(v)(b),10(15(iv)(C), 40(a)(ia)

Assessee was engaged in manufacture of wooden doors, frames, furniture etc. Assessee paid usance charges on import purchase. AO viewed that the usance charges incurred by the assessee was the income arising to the non-resident reckoning within the meaning of provisions of s 5(2)(b) r.w.s. 9(1)(v)(b) and therefore the Assessee was liable to deduct TDS in accordance with the provisions of Sec. 195. Since the Assessee had not deducted the TDS, therefore, disallowances was made by the AO u/s 40(a)(ia) on account of non deduction of tax at source u/s 195(1) on usance charges paid to a non resident through an intermediately bank. The CIT (A) deleted the addition relying on the

explanation to s 10(15)(iv)(c). The Tribunal held that in the case CIT vs. Vijay Ship Breaking Corporation (Guj.High Court) had clearly held that usance interest paid by the Assessee was not any part of the purchase price and was interest within the meaning of the definition of the term 'interest' u/s 2(28A). The Supreme Court had not reversed the decision in the case of CIT vs. Vijay Ship Breaking Corporation on the finding that the usance charges were not interest u/s 2(28A) except where an undertaking was engaged in the business of ship breaking in view of explanation (2) to s 10(15)(iv)(c) inserted by the Taxation Laws (Amendment) Act, 2003 with retrospective effect. The decision of the Gujarat High Court had impliedly been approved by the Supreme Court in respect of Assessees who were engaged in the business of ship breaking, the order of CIT (A) set aside and revenue's appeal was allowed.(AY. 2008-09, 2009-10 , 2010-11)

ACIT .v. Indian Furniture Products Ltd (2015) 167 TTJ 668/ 114 DTR 25/67 SOT 433/38 ITR 174/53 taxmann.com 440 (Panaji)(Trib.)

S. 195:Deduction at source-Non-resident-Income deemed to accrue or arise in India - Commission paid to the foreign agent on export sales - not fall within definition of fee or Technical Services – no need to deduct tax at source while making payment[(S.9(1)(i) 49(a)(ia), Art.7 & 12 of Model OECD convention) I

The Hon'ble Appellate Tribunal held that the Commission paid by Assessee to its foreign agent on export sales made by it is not fall within definition of 'fee for technical services' and therefore, the Assessee is not liable to deduct tax at source under section 195 of the IT Act while making payment. Thus, disallowance made under section 40(a)(ia) of the Act is deleted. (AY. 2009-10)

ACIT v. Track Shoes (P.) Ltd.(2014) 52 taxmann.com 353 / (2015) 67 SOT 172 (URO) (Chennai) (Trib.)

S. 195 : Deduction at source - Non-resident-If recipient of income has no tax liability as per assessment framed u/s. 143(3) due to losses, then section 201 cannot be made applicable to assessee payee for non-deduction/delay in deposit of TDS. [S. 143(3), 197(1), 201(1), 201(IA)]

The assessee had entered into contracts for development of National Highway with Korean company. The deductee Korean company, obtained orders u/s. 197(1) from it's AO which entitled the deductee to receive payment from the assessee after being subjected to TDS provisions u/s. 195(1) at a marginal rate. The assessee had made certain payments to the deductee in pursuance of four contracts awarded by it to the deductee and withheld tax at lower rate on the payments by virtue of certificate for lower deduction. The assessee was subjected to provisions of section 201(1) and 201(1A). The income was determined at a loss. Thus, it is clear that recipient of income from the assessee is not required to pay any tax in view of its losses for current year. Once it is held that there is no tax liability on the recipient of income in respect of its entire income including the income paid by the assessee, there is no reason to treat the assessee in default under section 201(1) in respect of said payment. There was no reason to treat assessee as assessee-in-default for non-deduction of TDS in respect of said payment and, consequently, interest being charged under section 201(1A) for delay in payment of tax was inconsequential. Appeal of assesse was allowed. (AY. 2009-10)

National Highway Authority of India v. ACIT (2013) 158 TTJ 54 / (2015) 152 ITD 348(Jabalpur)(Trib.)

S. 195 : Deduction at source-Non –resident- Usance charges paid by the Assessee on import of raw material from foreign countries attracts tax in India- Failure to deduct tax at source-Amounts paid was held to be not deductible .[S 2(28A),5(2)(b), 9(1)(v)(b),10(15)(iv)(c), 40(a)(ia)]

Issue involved before the Tribunal was whether the assesse was bound to deduct TDS U/S 195(1) in respect of usance charges paid by assesse on import of raw material from countries like Japan, Belgium, Germany , USA etc. CIT (A) held that as per section 10(15)(iv) (c) interest payable outside India on the purchase of raw material /capital goods on delayed payment from 1-6-2001 is taxable in the hands of purchaser and liable to tax .On appeal by revenue reversing the order of CIT (A) The Tribunal held that; From reading the decisions of the Hon'ble Supreme Court in CIT vs. Vijay Ship Breaking Corporation as reported in 314 ITR 309 (SC) and the Hon'ble Gujarat High Court (reported in 261 ITR 113) it is apparent that the Hon'ble Supreme Court has not reversed the decision in the

case of CIT vs. Vijay Ship Breaking Corporation, 261 ITR 113 (supra) on the finding that the usance charges are not interest u/s 2(28A) except where an undertaking is engaged in the business of ship breaking in view of explanation (2) to Sec. 10(15)(iv)(c) inserted by the Taxation Laws (Amendment) Act, 2003 with retrospective effect. In our view, the decision of the Hon'ble Gujarat High Court has impliedly been approved by the Hon'ble Supreme Court in respect of Assessees who are engaged in the business of ship breaking. Consequently, the Assessee was bound to deduct TDS u/s 195(1) in respect of usance charges paid by the Assessee on import of raw material from countries outside India like Japan, Belgium, Germany, USA etc and failure to do so entails disallowance u/s 40(a)(i) . (AY. 2008-09 to 2010-11)

ACIT .v. Indian Furniture Products Limited; (2015) 38 ITR 174/ 67 SOT 433 / 167 TTJ 668 (Panaji)(Trib.)

S. 195 : Deduction at source-Non–resident-Reimbursement of expenditure under cost-sharing agreement does not constitute "income" and there is no obligation to deduct TDS.[S.9(1)(vii), 40 (a)(i)]

A perusal of the decision of the Supreme Court in Tejaji Farasram Kharawalla Limited (1967) 67 ITR 95 (SC) clearly shows that Supreme Court has categorically held that the reimbursement of the actual expenses would not be taxable in the hands of the person receiving the reimbursements. The Karnataka High Court in a recent judgment in the case of DIT v. Sun Microsystems India P. Ltd. (2014) 369 ITR 63 (Karn) exactly on the similar issue interpreting article 7 of the DTAA between India and Singapore, which is identically worded to article 7 of DTAA between India and Austria held that the parent company has not made available to the assessee the technology or the technological services which was required to provide the distribution, management and logistic services. We further noticed that in the said order the Tribunal has taken into consideration the decision of the Hon'ble Jurisdictional High Court in the case of CIT v Dunlop Rubber Co. Limited (1983) 142 ITR 493 (Cal) and in the similar circumstances that of the assessee to hold that the reimbursement of the expenditure does not generate any income in the hands of the recipient and consequently there was no requirement of deduction of TDS and consequently the provisions of section 40(a)(ia) could not be invoked. (AY.2005-06)

AT & S India Pvt. Ltd. .v. DCIT (2015) 118 DTR 171(Kol.)(Trib.)

S. 195 : Deduction at source-Consultancy service- Nonresident- Service rendered outside India-Not liable to deduct tax at source.[S. 9(1)(i),40 (a)(i)]

Assessee, providing consultancy services, made payment pertained to some support services rendered by non-resident in Qatar qua its Nigerian projects. Since fees was paid to non-resident abroad for services utilized in business carried outside India, same was not liable for any deduction of tax at source.(AY. 2003-04)

Dy.CIT .v. Hofincons Infotech & Industrial Services (P.) Ltd. (2015) 152 ITD 249 (Chennai)(Trib.)

S. 195 : Deduction at source-Commission-Non resident-Not liable to deduct tax at source. [S.9(1)(vii)]

Assessee made payment of commission to a non-resident foreign agent to procure orders from foreign buyers for assessee and same was not in nature of managerial services, payment was not taxable in India under section 9(1)(vii) and therefore, there was no requirement of TDS out of payment of commission .(AY. 2004-05)

ACIT .v. Karmin International (2015) 152 ITD 276 (Luck.)(Trib.)

S. 195 : Deduction at source - Non-resident –Retrospective amendment-Liability to deduct tax at source cannot be fastened on the basis of retrospective amendment with effect from 1-04-1961.[S.40(a)(ia)]

The assessee made payment to a US company for utilizing telecom voice services in USA and it claimed that the said payment did not constitute fee for technical services but was in the nature of business income of the non-resident. Since the non-resident did not have a Permanent Establishment in India, said income was not chargeable to tax in the hands of the non-resident in India and,

therefore, there was no obligation on the part of the assessee to deduct tax at source. The AO however, took the view that the said payment was in nature of fee for technical services and was, therefore, chargeable to tax in India in the hands of the non-resident. Since the assessee did not deduct TDS, the AO invoked the provisions of section 40(a)(i).On appeal, the CIT (A) deleted said addition. On appeal by revenue the Tribunal held that, ,payment made by assessee, an Indian company to a US company for utilizing telecom services in USA did not constitute fee for technical services as said payments were for use of bandwidth provided for down linking signals in US; and said payments were not in nature of managerial, consultancy or technical services nor was it for use of or right to use industrial, commercial or a scientific equipment. Order of CIT (A) was confirmed. Revenue relied rely upon the *Explanation* inserted as *Explanation* 2 to section 195 by the Finance Act of 2002 with retrospective effect from 1-4-1961. The aforesaid amendment lays down that even if the payment by a resident in India to a non-resident constitutes business income in the hands of the non-resident then irrespective of the existence or non-existence of a permanent establishment of the non-resident in India, tax is liable to be deducted at source by the resident in India making payment to non-resident. Admittedly, for the assessment year 2010-11, such provision did not exist. At the time when the assessee made payments to the non-resident, such a provision did not exist. It is not possible for the assessee to foresee an obligation to deduct tax at source by a retrospective amendment to the law. The amendment brought in by the Finance Act to section 195 with retrospective effect, which was passed in the year subsequent to the year under consideration, should not be considered for penalizing the assessee by way of disallowance under section 40(a)(i). (AY. 2010-11)

ITO .v. Clear Water Technology Services (P.)Ltd. (2014) 52 taxmann.com 115 / (2015) 67 SOT 15 (URO)(Bang.)(Trib.)

S. 198:Deduction at source- Assessment-Amount deducted at source not capable of being adjusted or counted towards tax payable - Amount is assessable as income.[S. 56, 145]

The assessee had given loans to two companies, AP and AT. The latter paid interest on the amount advanced by him regularly, whereas the former showed the accumulated interest in its account books without making actual payment. It was his case that even while showing the interest payable to him in the account books, AP deducted tax at source on the amount of interest payable and issued certificates, in relation thereto. In the returns filed by him, the assessee adopted a hybrid procedure. While in respect of his transaction with AP, he adopted the cash system, as regards the transaction with AT, he adopted the mercantile system. The result was that he did not pay the tax on the interest payable to him by AP, even while he enjoyed the entire benefit of tax deducted at source made in that behalf. There was no dispute about the interest paid by AT since the assessee had shown it as income and paid tax thereon. The Assessing Officer took objection to this and passed an order of assessment treating the interest payable by AP on transfer basis as income and levied tax. This was upheld by the Commissioner (Appeals) and the Tribunal. On appeal to the High Court: Held, that since the assessee had adopted the cash system and he did not receive the interest regarding which the tax was deducted at source, the tax deducted at source deserved to be treated as income in his hands. Whenever an amount deducted as tax at source becomes incapable of being adjusted or counted towards tax payable, it acquires the character of income. In such an event, it partakes of the character of any other income and is liable to be dealt with accordingly, in the order of assessment.

Y. Rathiesh v. CIT (2014)227 Taxman 202(Mag.)/(2015) 372 ITR 73 / 124 DTR 283 (T & AP)(HC)

S. 201:Deduction at source-Failure to deduct or pay –Burden is on the assessee to prove that payee has paid the tax on the amount received- Assessee was held liable. [S.191, 201(IA)]

In the instant appeal the assessee challenged the jurisdiction of the Assessing Officer to demand the amount of tax not deducted at source by an order passed under sub-sections (1) and (1A) of section 201.

The contention raised by assessee was that in view of *Explanation* to section 191 the assessee may be made liable provided the payee had not offered the money received by him for taxation and had, thus, failed to pay tax on that. It submitted that in the absence of a clear cut finding that the payee in this case had failed to offer the money received by him for taxation and had failed to pay tax thereon, the liability under section 191 could not have been foisted upon the assessee for omission on its part to

deduct tax at source The assesee relied on in Hindustan Coca Cola Beverage (P.) Ltd. v. CIT [2007] 293 ITR 226 (SC). Dismissing the appeal the Court held that ;This will not alter the liability to charge interest under section 201(1A) till the date of payment of taxes by the deductee-assessee or the liabily for penalty under section 271C. Even otherwise whether the payee has offered money for taxation or whether the payee has paid tax on that, is a defence which the assessee could have taken. If he takes the defence, it is for him to prove it. It cannot be suggested that it was the obligation of the Assessing Officer to first explore the possible defences and then to collect evidence in support thereof. Accordingly appeal was dismissed.

Nopany Marketing Co. (P.) Ltd. .v. CIT (2015) 231 Taxman 802 (Cal.)(HC)

S. 201: Deduction at source - Failure to deduct - Limitation - Proceedings initiated after four years from end of financial year - Barred by limitation.

Initiation of the proceedings under section 201 after four years from the end of the financial year was barred by limitation.(AY. 1999-2000 to 2001-2002)

CIT (TDS) v. C.J. International Hotels P. Ltd. (2015) 372 ITR 684/ 231 Taxman 818 (Delhi) (HC)

S. 201 : Deduction at source - Failure to deduct or pay-Processing charges to laboratories – Whether payee included amount received as income of relevant assessment year to be seen-Interest is to be computed on basis of tax in respect of which assessee treated as in default-Additional evidence admitted and matter remanded.[S.201(1)) 201(IA) 194C, 194I,194J]

The assessee, engaged in the business of production of films, made payments to GL. The Assessing Officer passed an order under section 201(1) of the Act, for failure by the assessee to deduct tax at source under section 194J of the Act. The assessee contended that GL had included the payment as its income and paid the taxes thereon. The Commissioner (Appeals) directed the Assessing Officer to verify whether the payee had offered the amount received by it as income of the relevant assessment year. On appeal ;Held, that there was no infirmity in the order of the Commissioner (Appeals).

The assessee challenged the demand raised under section 201(1) and (1A) of the Act in respect of professional and consultancy charges, contending that since some of the payments out of the professional and consultancy charges were less than Rs. 20,000, there was no requirement for deduction of tax at source. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal : Held, that since the evidence was produced by the assessee for first time before the Tribunal claiming that the assessee had deducted tax at source for the payments exceeding Rs. 20,000, the evidence required to be considered before deciding whether the assessee could be treated as in default. Matter remanded.

The Assessing Officer raised demand under section 201(1) and (1A) of the Act, on the ground that the assessee had incurred expenditure towards advertisement and publicity charges without deducting tax at source. The assessee contended that the distributor had made the payments towards advertising and publicity on behalf of the assessee and deducted the tax at source on such payments. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal; Held, that the additional evidence produced on behalf of the assessee regarding the issue was to be verified. Matter remanded.

The Assessing Officer issued a notice under section 201(1) and (1A) of the Act, on the ground that the assessee had made payments towards location rent to UKM without deducting tax at source. The assessee contended that since the location rent was paid on the basis of a composite contract between the parties including supply of manpower, food and lighting on a rate-contract basis for an agreed number of days, the payments would come within the purview of works contract under section 194C of the Act. The Commissioner (Appeals) directed the Assessing Officer to compute the deduction of tax at source in terms of section 194I of the Act treating the location rent as income from rent. On appeal :Held, that the exact nature of payment and the contract entered into between the parties was to be verified. Matter remanded. (AY. 2008-2009, 2009-2010)

Sowbhagya Media Ltd. v. ITO (2015) 39 ITR 404 (Hyd.)(Trib.)

S. 201 : Deduction at source-Failure to deduct or pay-Month-Delay in remitting deducted tax to Government-Interest to be computed taking period of thirty days-Not British calendar month.[S. 201IA)]

The interest payable under section 201(1A) of the Act for the delay in remitting tax deducted at source to the Government account is to be computed taking a period of thirty days as a month instead of the British calendar month. (AY. 2012-2013)

Navayuga Quazigund Expressway P. Ltd. v. Dy. CIT (2015) 39 ITR 612 (Hyd.)(Trib.)

S. 201(1) : Deduction at source - Failure to deduct or pay - Order was passed without giving an opportunity of hearing-Order levying interest was quashed. [S. 133A, 194C, 2O1(IA)]

The Petitioner was a cooperative Housing Society registered under the provisions of Co-op Societies Act with the object of providing and has in furtherance of that object, formed several layouts and proposed to distribute the sites to its members. The Petitioner in this regard has entered into an agreement with certain individuals and a party for development of the land so acquired and has undertaken the process of developing the land into house of sites. Survey was conducted in the premises of the assessee and his books of account was examined wherein they alleged assessee wherein they alleged assessee as assessee in default and he was liable to deduct TDS u/s 194C for the payment made to the developers. Demand was raised against the assesseeee and 7 days time was granted. The assesssee's greviance was that the said demand notice u/s 156 has curtailed the benefit of 30 days which the Petitioner has sought to appeal against the said order. The Department rejected the stay of demand of the impugned order. The assesee filed Writ petition challenging the order passed u/s 201(1) & 201(1A) and the consequent demand made the Petitioner is in writ action seeking quashing of the proceedings and the assesee also alleged that respondent has initiated coercive recovery action by attaching bank account of the Petitioner without giving the Petitioner a reasonable opportunity of being heard and without furnishing in detail the finding conducted u/s 133A of the Act. The HC allowed WP and held that though the Petitioner had submitted a submission note, the same has not been considered by the respondent with reference to the survey conducted u/s 133A nor he has referred to the documents produced by the Petitioner. Petitioner having produced information/ documents about the filing of the return of payee to claim benefit of proviso to S/201(1) which were not considered by the AO nor he provided an opportunity of hearing to the Petitioners order u/s 201(1) & 201(1A) were liable to be quashed.(AY. 2008 - 2009 to 2014 - 2015)

Remco (Bhel) house building Co-operative Soc. Ltd v.ITO (2015) 273 CTR 57/ 232 Taxman 355 (Karn)(HC)

S. 201(IA) : Deductionat source-Failure to deduct tax-Limitation-Action to be taken within reasonable period in absence of prescription of time limit-Four-year period reasonable-Notice after seven years was held to be not justified.

The assessee paid interest to its sister concerns on the loans taken by it year after year. However, for the three assessment years 1989-90, 1990-91 and 1991-92 it did not deduct any tax on the ground that it did not pay any interest at all. In the relevant assessment years, no action was taken against the assessee for non-deduction of tax at source. At a subsequent stage notice was issued proposing action under section 201. The assessee contended that it did not effect deduction since the creditors have acceded to its request to waive the interest on the ground that it incurred losses. The Assessing Officer and the Commissioner (Appeals) did not accept the contention of the assessee. The Tribunal, however, examined the matter from the point of view of limitation. It did take note of the fact that section 201 or other analogous provisions did not prescribe any limitation for recovery of the amount representing deduction of tax at source. However, it treated the four-year period as constituting limitation for initiating steps under that provision. On appeal :

Held, dismissing the appeal, that it was nearly seven years thereafter that a notice was issued to the assessee. For an assessee to be required to pay the amount, even if due, five or six years preceding the demand, would be a serious problem. Several developments take place over the period and the nature of relations undergoes change. Therefore, the Tribunal was justified in invoking the theory of reasonable period for passing the orders under section 201(1A) in the absence of a time limit being specified in the Act. The finding that the levy of interest under section 201(1A) could not be said to be within the reasonable time was legal and valid. (AY.1989-1990 to 1991-1992)

CIT v. U.B. Electronic Instruments Ltd. (2015) 371 ITR 314 (T & AP) (HC)
Editorial : Referred ,Raymond Woollen Mills Ltd v. ITO (1996) 57 ITD 536 (Bom.)(Trib.)

S. 206AA: Requirement to furnish Permanent Account Number Even in the absence of PAN payer not required to deduct TDS at 20% if case covered by DTAA-DTAA overrides the provisions of Income-tax Act. [S.90(2), 195, 201(IA]
The ITAT had to consider whether section 206AA of the Act was applicable in cases which are governed by the DTAAs and whether section 206AA of the Act would override section 90(2) of the Act and therefore the tax deduction was liable to be made @ 20% in absence of furnishing of PANs by the recipient non-residents. HELD by the ITAT:
Section 206AA of the Act prescribes that where PAN is not furnished to the person responsible for deducting tax at source then the tax deductor would be required to deduct tax at the higher of the following rates, namely, at the rate prescribed in the relevant provisions of this Act; or at the rate/rates in force; or at the rate of 20%. In the present case, assessee was responsible for deducting tax on payments made to non-residents on account of royalty and/or fee for technical services. The assessee deducted the tax at source at the rates prescribed in the respective DTAAs between India and the relevant country of the non-residents. The case of the Revenue is that in the absence of furnishing of PAN, assessee was under an obligation to deduct tax @ 20% following the provisions of section 206AA of the Act. Section 90(2) provides that the provisions of the DTAAs would override the provisions of the domestic Act in cases where the provisions of DTAAs are more beneficial to the assessee. It would be quite incorrect to say that though the charging section 4 of the Act and section 5 of the Act dealing with ascertainment of total income are subordinate to the principle enshrined in section 90(2) of the Act but the provisions of Chapter XVII-B governing tax deduction at source are not subordinate to section 90(2) of the Act. Section 206AA of the Act is not a charging section but is a part of a procedural provisions dealing with collection and deduction of tax at source. Therefore, where the tax has been deducted on the strength of the beneficial provisions of section DTAAs, the provisions of section 206AA of the Act cannot be invoked by the Assessing Officer to insist on the tax deduction @ 20%, having regard to the overriding nature of the provisions of section 90(2) of the Act . (AY. 2011-12)
DDIT v. Serum Institute of India Limited(2015) 118 DTR 157/ 170 TTJ 119/ 68 SOT 254/40 ITR 684 (Pune)(Trib.)

S. 206C:Collection at source–Trading-Forest produce–Provision will apply to import of timber as well as timber grown in India.[S.44AC)
The Petitioners were timber merchants, importing timber and selling them to registered dealers in India. They were not collecting tax at source u/s 206C from the purchasers/dealers to whom imported timber was sold. AO proceeded to treat the assessee as 'assessee-in-default' and charge interest u/s 206C(7). The Court held that the provisions of s. 206C did not draw a distinction between timber grown in India and timber imported from abroad. Chance of evading tax by the buyer weighed more in the mind of the law makers that they stipulated that seller shall effect the collection of tax at the time of sale at the prescribed rate. Import of timber would satisfy the term "obtained by any other mode" as envisaged under the relevant provisions.
Hillwood Furniture (P) Ltd. v. ITO (2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.)(HC)
Excel Timbers (P) Ltd. v. Dy. CIT (2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.)(HC)
Hilwood Timber v. Dy. CIT (2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.)(HC)
Excellent Timber Imports & Exports (P) Ltd. v. ITO (2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.)(HC)
Hillwood Imports & Exports (P) Ltd..v. DCIT(2015) 232 Taxman 763 / 275 CTR 429 / 116 DTR 257 (Ker.)(HC)

S.220:Collection and recovery-Assessee deemed in default– Interest- Settlement Commission-Interest for default in payment of tax-Application for settlement of case-Interest payable from date of default till date of admission of application for settlement of case.[S.245D(1), 245D(4)]

Interest under section 220(2) of the Act,is legally leviable from the date of default in payment of the demand by the assessee till the date of admission of the application of the assessee by the Settlement Commission under section 245D(1) and not till the final order of the Settlement Commission under section 245D(4).

CIT .v. Leonie M. Almeida(Smt.) (2015) 374 ITR 304 (Bom.)(HC)

S. 220:Collection and recovery–Assessee deemed in default- Stay- 25% of tax in dispute was directed to pay in two installments.

Assessee claimed that it was an investment company and during relevant assessment year, there was no trading of shares. However, Assessing Officer, without considering this fact, determined taxable turnover and demanded huge amount of tax. Pending appeal before Commissioner (Appeals), assessee filed application for stay of demand. Assessing Officer rejected stay application and directed assessee to pay 50 per cent of demand. On Writ the Court held that; it is discretion of authority regarding demand of percentage to be deposited; however, taking into consideration assessee's request that its business was not good and it was not in a position to pay 50 per cent of demand as directed by Assessing Officer, assessee was to be directed to pay 25 per cent of demand in two instalments. (AY. 2011-12)

Smart Professional Services (P.) Ltd. .v. Dy.CIT (2015) 231 Taxman 515 (Mad.)(HC)

S. 220 : Collection and recovery- Assessee deemed in default-Stay-Discretionary one and has to be exercised judicially based on relevant grounds- On facts the petition was dismissed.

Dismissing the petition the Court held that ; Power of stay governed by clause (c) of section 220 is a discretionary one which has to be exercised judiciously based on relevant grounds., therefore, where Assessing Officer, having examined relevant material on record, granted partial stay of demand to assessee during pendency of appellate proceedings, order so passed did not require any interference. (AY. 2010-11)

Jyothy Laboratories Ltd. .v. Dy.CIT (2015) 231 Taxman 65 (Mad.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Power of stay is a discretionary one-No reasonable grounds were made out to grant stay in respect of entire disputed outstanding demand-Petition was dismissed.

The AO during the course of appellate proceedings, granted a partial stay of demand to the assessee. The assessee in turn filed a writ petition contending that the AO should have granted stay of entire outstanding demand until the final disposal of appeal.

The High Court observed that the AO had been conferred with the power to treat the assessee as not being in default in respect of the amount in dispute in the appeal, however subject to conditions as he may think fit to impose. The word 'as he may think fit to impose' would definitely mean that the power vested in the authority is wide enough and can be exercised according to his discretion. The High Court held that the AO had not exercised his powers arbitrarily or capriciously and that no reasonable grounds were made out to grant stay in respect of entire disputed outstanding demand. (AY. 2010-11)

Jyothy Laboratories Ltd.v. Dy.CIT (2015) 231 Taxman 65 / 118 DTR 207 (Mad.)(HC)

S. 220: Collection and recovery- Stay application - Authority to prima facie consider merits and balance of convenience and irreparable injury - Authority to record reasons and then conclude whether stay should be granted and if so on what condition.

Held, the Revenue had not been able to show any reasons which had weighed the authority for passing the order rejecting the stay application. When the question of grant of stay against any demand of tax is to be considered, the authority may be required to prima facie consider the merits and balance of convenience and also irreparable injury. These had neither been examined nor considered. The authority was required to record the reasons and then reach an ultimate conclusion as to whether the stay should be granted and if so on what condition. In the absence of any reasons, the order rejecting the stay application could not be sustained. (AY. 2011-2012)

Hitech Outsourcing Services v. ITO (2015) 372 ITR 582/231 Taxman 413 (Guj.)(HC)

S. 220: Collection and recovery -Garnishee order-Appeal pending for more than a year before Commissioner (Appeals)-Stay application pending for four months-Recovery of sum from bank by garnishee notice-Not a case of sudden coercive action with suddenness-Department not entitled to adjust refund due to assessee without notice to it- Commissioner (Appeals) directed to dispose of appeal and stay application within six weeks.

Held, (i) assessee's appeal was pending for one year and a quarter. The stay application was pending before the Commissioner (Appeals) for four months. It could not be said that the assessee received coercive action from the Department with suddenness. Execution or recovery has to be made with promptitude. If a decree holder or the Revenue in income-tax cases sleeps over a demand there would be every likelihood of their being unable to realise the fruits of the decree or the demand.

(ii) That, however, the Income-tax Department could not unilaterally adjust the amount due on refund against a tax demand without giving a notice to the assessee. This was so because there was no appeal from set off orders. Therefore, if an amount of Rs. 42,96,720 was due to the assessee from the Revenue as refund and had been set off against the tax demand by the income-tax authorities without notice to the assessee they had acted contrary to the Division Bench judgment. If that was the case, the Department was to immediately remit that amount to the account of the assessee with the bank. The Commissioner (Appeals) was directed to dispose of the appeal and stay application pending before him within six weeks of communication of this order. It would be open to the Revenue to approach the Commissioner (Appeals) to pray for orders against the assessee to secure the tax due.(AY. 2010-2011)

Indian Chamber of Commerce v. DIT(E)(2015) 372 ITR 228 (Cal.)(HC)

S. 220 : Collection and recovery-Assessee deemed in default –Stay- Prima facie case-Unconditioanl stay must be granted by the CIT(A).[S. 11, 251, Constitution of India, Art. 289]

Assessee was statutory authority set up inter alia for purpose of planning, co-ordinating and supervising development of Mumbai Metropolitan Region and it was appointed as a special planning authority in place of CIDCO for notified areas. It claimed exemption under section 11 and alternatively claimed that it was an agent of State Government and, thus, was not chargeable to tax in view of decision of Tribunal in City & Industrial Development Corpn. of Maharashtra Ltd. v. Asstt. CIT [2012] 138 ITD 381 (Mum.)- Assessing Officer did not accept said claim and charged its income to tax. Pending disposal of appeal before Commissioner (Appeals), assessee sought for stay of demand but same was rejected on ground that above decision was inapplicable as in that case exemption under section 11 was not claimed . Court held that submission of being an agent of State was not based on any claim for exemption under any provision of Act but under article 289 of Constitution of India, therefore, decision of Tribunal in above case would prima facie apply to facts of assessee's case and, unconditional stay would be granted pending disposal of appeal before Commissioner (Appeals). (AY. 2011-12)

Mumbai Metropolitan Region Development Authority v. Dy. CIT (2015) 273 CTR 317 / 230 Taxman 178 (Bom.)(HC)

S. 220:Collection and recovery -Stay- Appeal pending before CIT(A)-CIT(A) is directed to dispose of application expeditiously.

Commissioner rejected the application to stay the demand. Assesses bank account s including cash credit accounts were attached by the income-tax authorities. Assesee filed the writ petition , allowing the petition the Court directed that the attachment with regard to cash credit account was discharged and the CIT(A) was directed to dispose the appeals with in th ree months. As regards other bank accounts of the assesse were continued to remain attached with a rider that the Department will not be able to appropriate any sum therefrom till the disposal of the appeal before the CIT(A).The continuation of attachment and operation of the bank accounts will abide by the order to be passed by Commissioner (Appeals). (AY 2011-2012)

P.C. Chandra and Sons (India) P. Ltd. v. Dy.CIT (2015) 373 ITR 223 (Cal.)(HC)

S. 220 : Collection and recovery-Assessee deemed in default –Interests-Petitioner was directed to file revision petition before Commissioner-[S. 234A, 234B, 234C,264]

Consequent to order passed by Settlement Commission, impugned proceedings were passed calling upon petitioner to pay interest under section 220(2). Petitioner contended that respondents had admitted that demand had been paid on various dates and was fully paid in July 2007; therefore, question of demanding interest consequent to order of Commission in 2008 did not arise. On writ dismissing the petition the Court held that since demand had been raised consequent to order passed by Settlement Commission, computation of period for purpose of levy of interest could not be adjudicated in a writ petition and, hence, petitioner was to be directed to file a revision before Commissioner under section 264.

Vaata Infra Ltd. v. ITO (2015) 229 Taxman 373/116 DTR 167 (Mad.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default – Appeals were pending-Stay-Revenue was not justified in calling upon to pay demand. [S. 220(6)]

Where assessee's appeals were pending before appellate authority in respect of assessment order and after filing of said appeals, assessee filed stay petition under section 220(6), revenue was not justified in calling upon assessee to pay demand. (AY. 2008-09 to 2012-13)

Viswakarma Mines & Building Materials (P.) Ltd. v. Dy. CIT (2015) 54 taxmann.com 65 / 229 Taxman 436 (Mad.)(HC)

S. 220 : Collection and recovery- Assessee deemed in default Waiver of interest-Assessee paying tax after 27 years of completion of assessment- Waiver application was considered and the assesse was made to pay fixed amount of interest as full and final settlement-Since the writ petition were admitted and pending for all these years, no interest shall be demanded from October, 2005 till date.[S.220(2)

Once the Assessee pays of the total tax demand along with the interest raised by the Department after 27 years of completion of Assessment i.e. up to 1990, in October. 2005, as per the notice of demand of 2004. Further, demand cannot be raised by the Department for the period up to 2005. However, the Assessee is liable to pay interest for the period of delay while making payment of the demand. The waiver application was considered and the Assessee was directed to pay a fixed amount as interest as full and final settlement.Since the writ petition were admitted and pending for all these years, no interest shall be demanded from October, 2005 till date.(AY. 1977-78 to 1998-9)

Christy Arockia Raj v. CIT (2015) 274 CTR 61/229 Taxman 549/114 DTR 55 (Mad.)(HC)

S. 220 : Collection and recovery-Assessee deemed in default– Interest-Interest has to be calculated from the period after expiry of 30 days as stated under sec. 220 (1) of the Act and not from the date on which the return has been filed.[S.156]

The assessee did not file the return of income. Consequently, a search was conducted in the premises of the assessee and then the AO, after making the assessment, raised a demand by issuing notice u/s 156 of the Act. Under the notice u/s 156, the demand has to be paid within the time specified u/s 220 (1) of the Act. Therefore, the contention of the assessee is that the interest on the demand has to be paid from the date commencing after the end of the period (30 days) as stated under sec. 220 of the Act. However, the contention of the Department is that the interest has to be paid from the date on which the return has been filed and therefore, the interest on the demand has to be paid from that date and not from the expiry of the period as stated in sec. 220 (2) of the Act.

On a writ filed by the assessee, the High Court held that the case is squarely covered under the Apex Courts judicial decision in Vikrant Tyres Ltd. Vs. Income-Tax Officer (2001) 247 ITR 821 in which it has been held that interest has to be calculated from the period after expiry of 30 days as stated under sec. 220 (1) of the Act and not from the date on which the return has been filed.

Govindachary v. TRO (2015) 115 DTR 122(Karn.)(HC)

S. 220 : Collection and recovery-Assessee deemed in default –Pendency of stay application-Bank account cannot be attached without issuing a notice.[S,226(3)]

The assessee filed an application for stay before the Assessing authority when the matter was pending before the Commissioner (Appeals). This application of stay was not disposed of by the Assessing Officer without any explanation for nearly two years.

During the pendency of that application, the authorities passed an order for attachment of bank account under section 226(3) in a hastily manner without giving any prior notice.
On writ:
The Court held that the division bench of the Bombay High Court rendered in Society of Franciscan (Hospitaller) Sisters v. Dy. DIT (Exemptions) [2013] 351 ITR 302(Bom)(HC)held that the authorities who are discharging quasi-judicial functions cannot keep the application for stay pending and on the other hand to proceed for recovery by taking recourse to section 226(3) of the said Act. The division bench in univocal term held that the application for stay is not a meaningless formality and the fairness on the part of the quasi-judicial authority is an intrinsic element of such functions.
In *Golam Momen* v. *Asstt. CIT* [2003] 263 ITR 69 (Cal.)(HC), it is held that mere filing an appeal does not tantamount to stay of the recovery proceedings. Section 226(3) contemplates the notice to be issued to the assessee but it does not say that prior notice before taking course to the aforesaid provision is required to the assessee.
While considering the unjust hardship which may be caused to the assessee, the Court shall also bear in mind the interest of the revenue as well. Out of the total demand a sum of Rs. 1 lakh have already been paid by the petitioner. To mitigate the situation and to render justice between the parties it is to be directed that the petitioner should pay a further sums of Rs. 1 lakh and Rs. 2 lakh on date fixed thereby. The bank shall allow the petitioner to operate the bank account, under attachment. Immediately upon the payment the order of attachment shall stand recalled/revoked/cancelled and permit the withdrawal of the other amounts therefrom.
Anil Kumar Banerjee .v. UOI 2015) 229 Taxman 75 (Cal.)(HC)

S. 220 : Collection and recovery- Assessee deemed in default –Stay-Stay was granted subject to certain conditions.
Assessee filed stay petition before Commissioner (Appeals) for stay of demand till disposal of appeals but same was rejected as assessee did not produce cash position so as to examine matter regarding assessee's financial constraint for non-payment of TDS. However though reasoning of Commissioner (Appeals) while rejecting stay petition could not be faulted in its entirety, but when order was passed, Commissioner (Appeals) ought to have noted that appeal arising out of earlier assessment orders in identical issue was pending before High Court and conditional order of stay had been granted .Therefore, assessee was to be granted stay order subject to certain conditions.(AY. 2012-13 to 2014-15)
Vodafone Cellular Ltd. .v. CIT (A) (2015)370 ITR 750/ 229 Taxman 91 /114 DTR 177(Mad.)(HC)

S. 220 : Collection and recovery–Settlement Commission-Waiver of interest-Settlement Commission has to exercise its discretion judicially and satisfy that three conditions laid down in the section-Matter remanded. [S.245D(4)]
A search was conducted at the residential and business premises of the assessee. The assessee filed return declaring certain undisclosed income for block period and block assessment was completed on 26-2-1997 on higher income.The assessee filed an application before the Settlement Commission on 10-2-1997 offering certain additional income and the Settlement Commission passed order under sub-section (4) of section 245D.
The assessee also filed a separate petition for waiver of interest levied under sub-section (2) of section 220. The Settlement Commission, merely relying on the decision of the Income-tax Settlement Commission (Special Bench) in the case of *Damani Brothers, In re* [1999] 238 ITR 36/104 Taxman 283 ordered that the interest levied on the assessee under sub-section (2) of section 220 for the period subsequent to 10-2-1997, being the date of filing the application before the Settlement Commission, be cancelled.
The revenue filed writ petition alleging that decision of the settlement commission was without considering as to whether the assessee fulfilled all the three conditions laid down in clauses (i), (ii) and (iii) of sub-section (2A) of section 220.Court held that, while passing an order under sub-section (2A) of section 220, Settlement Commission has to exercise its discretion judicially and satisfy that three conditions laid down under clauses (i), (ii) and (iii) of sub-section (2A) of section 220 have been fulfilled, before passing an order waiving interest. Matter remanded.

As the order passed by the settlement Commission does not satisfy the tests laid down by the Apex Court in the judgments referred supra, the said order, insofar as it pertains to wavier of interest levied on the assessee under sub-section (2) of section 220, for the period subsequent to 10-2-1997, being the date of filing of the application before the Settlement Commission under sub section (1) of section 245C is set aside.Therefore, the Settlement Commission is directed to consider the application filed by the assessee under sub-section (2A) of section 220 with regard to waiver of interest levied under sub-section (2) of section 220 afresh and pass a considered order in terms of the law laid down by the Apex Court. (AY. 1986-87 to 1996-97)

CIT .v. Addl. Commissioner (IT&WT) Settlement (2015) 229 Taxmnan 78 (Ker.)(HC)

S. 220 : Collection and recovery of tax -Assessee deemed-in-default-Interest- Original demand was not paid –Matter set-a-side-Interest is levy able from the initial demand. [S. 156, 220(2), 254]

For relevant year, assessment was completed in year 2003 wherein disallowance was made under section 14A . In appellate proceedings, Tribunal sustained said disallowance but remanded matter back to Assessing Officer for recomputation of amount of disallowance. In remand proceedings, Assessing Officer having redetermined amount of disallowance, issued a notice of demand levying interest under section 220(2). In appeal the assessee contended that in the notice of demand itself the assessee was directed to pay tax demand within 30 days of service of said notice,there was no occasion for the AO to impose interest u/s 220(2) in the notice of demand itself, since the occasion to levy the said interest could arise if and only if , the assessee defaulted in payment of the tax demand within 30 days of the issuance of the said notice. CIT (A) accepted the explanation of assessee and set aside the order of AO levying interest. On revenues appeal allowing the appeal the Tribunal; held that ,since the assessee had not satisfied initial demand raised in year 2003, it was required to pay interest under section 220(2). therefore impugned action taken by Assessing Officer did not require any interference. (AY. 2000-01)

ACIT .v. HCL Corporation Ltd. (2015) 68 SOT 272 (URO) (Delhi)(Trib.)

S. 221:Collection and recovery – Penalty - Tax in default-Penalty for failure to pay TDS in time can be levied even if the assessee voluntarily pays the TDS. Financial hardship, diverse locations and lack of computerization are not good excuses. The fact that CIT(A) decided in favour of the assessee & deleted the penalty does not necessarily mean that two views are possible- Levy of penalty was held to be justified- No bar to passing order under section 201 read with section 221 simultaneouly . [S.2(7), 201, 205]

The assessee deducted the tax at the time of making the payment of salaries, dividend, interest as also on payment made to contractors. However, it delayed depositing the amounts of tax deducted with the revenue. The quantum of tax deducted was deposited with the revenue alongwith the interest by the assessee on its own before any notice determining the amount or declaring the assessee to be in default was made by the revenue. The AO levied penalty u/s. 221 of the I.T. Act, 1961, for failure to pay tax deducted at source within the prescribed time. This was reversed by the CIT(A) but confirmed by the ITAT. On appeal by the assessee HELD dismissing the appeal:

(i) The contention that before an order levying penalty u/s 221 is passed, there should be an order u/s 201 holding the assessee to be in default is not acceptable. The fact that an appeal is provided under Section 246(i) of the Act from an order passed under Section 201 of the Act would not by itself require the passing of separate order under Section 201 of the Act prior to passing of an order under Section 221 of the Act. There is no bar in passing an order under Section 201 read with 221 of the Act simultaneously. The assessee's right of appeal is not affected by reason of the Assessing Officer passing a common order under Section 201 read with Section 221 of the Act. The assessee is still entitled to file appeal from orders passed under Sections 201 and 221 of the Act under Section 246(i) and (l) of the Act respectively. The requirement of a written order treating a person to be an assessee in default may not be necessary when it is admitted position between the parties that the assessee is in default.

(ii) The contention that penalty under Section 221 of the Act would be payable only when the same is in addition to the arrears of payment of tax deducted is not acceptable. Parliament has specifically provided for the words "in addition to the amount of arrears alongwith the amount of interest payable

be liable for penalty" only with a view of qualifying that payment of the amount of arrears and the interest payable would by itself not wipe away the liability to penalty under Section 221 of the Act. The aforesaid submission on behalf of the assessee also stands negatived by the Explanation added to Section 221(1) of the Act. This Explanation clarifies that an assessee shall continue to be liable to penalty even if the tax has been paid before levy of penalty.

(iii) The contention that in view of the proviso to Section 201(1) of the Act, invocation of Section 221 of the Act is barred where the Assessing Officer is satisfied that failure to deduct and pay tax was without good and sufficient reasons is also not acceptable. The words "failed to deduct and pay tax" of the proviso is contrasted with the words "fails to pay the tax as required by or under this Act" found in Section 201(1) as well as 201(1A) of the Act. In view of this difference in language, it is submitted that the proviso would have no application where an assessee has paid the tax even if the same is paid beyond the period provided under the Act. This contention is not acceptable because the proviso applies only in case of a person who has failed to satisfy both the condition therein i.e. fails to deduct and also fails to pay the tax. This interpretation is also supported by the words found in subsection (1) of Section 201 of the Act which provides "…. principal officer of the company does not deduct or after deducting fails to pay the tax as required by or under this Act". In this case, the tax has been deducted but there is a failure in depositing the tax with the revenue. Parliament treats a person who has deducted the tax and fails to pay it to revenue as a class different from a person who has not deducted the tax and also not deposited the tax with revenue. This is for the reason that in the first class of cases the assessee concerned after deducting the tax, keep the money so deducted which belongs to another person for its own use. In the second class of cases, the assessee concerned does not take any advantage as he pays the entire amount to the payee without deducting any tax and does not enrich itself at the cost of the government. Therefore, although penalty is also imposable in the second class of cases, yet in view of the proviso to Section 201(1) of the Act, it is open to such assessee to satisfy the Assessing Officer that as they have good and sufficient reasons no penalty is imposable. It is in the above view that in the first class of assessees the Parliament has provided for prosecution under Section 276B of the Act for failing the pay the tax deducted at source. Therefore the first class of assessee to which the assessee belongs would be liable for prosecution. Thus the proviso would only apply in respect of the second class of assessee i.e. such class of assessee who have not deducted the tax and consequently failed to pay the tax. Therefore, the proviso under Section 201 would have no application to the facts of the present case. The legislature did not provide for the words "by or under this Act" in the proviso as in the absence of deducting tax, the occasion to deposit it within time as provided in the Rules would not apply. This is so as the time begins to run from the date of the deducting of tax as is evident also from Section 200 of the Act which provides that any person deducting any sum shall pay it within the prescribed time, the sum so deducted to the Central Government.

(iv) The contention that the Explanation below Section 221 of the Act which clarifies that penalty will continue to be imposable even if the assessee has paid the tax before the levy of penalty would not apply to the present facts is also not acceptable. The contention that penalty would be imposable under Section 221 of the Act only if the assessee is in default at the time of initiation of penalty proceedings and not in acase where the amounts deducted have been deposited long before the notice for penalty under Section 221 of the Act was issued is not acceptable. The construction sought to be put on Section 221(1) of the Act commencing with the words "where an assessee is in default or is deemed to be in default" cannot stand in the face of the explanation which clarifies that merely because the tax has been paid/deposited before the levy of penalty, would also take in all acts, from the imposition of the charge upto/till the entire process of raising demand and collecting the same. The construction sought to be put on the explanation does not allow full amplitude to the words 'levy'. Besides purposive interpretation also supports the above view as otherwise the construction as suggested by the assessee would enable an assessee to deduct tax at source from the payment being made and not deposit it with the revenue within time prescribed. Therefore utilize the amount in effect till such time just before the notice under Section 221 of the Act is issued.

(v) It must be borne in mind that the assessee continues to be in default in case the tax has not been deposited with revenue within the time prescribed under the Act. Tax deposited thereafter but before penalty proceedings are initiated would not cleanse the assessee from being in default. The penalty is imposed upon the assesee under Section 221 of the Act for the default in not having paid the tax

deducted at source within the time provided under the Act. This default is not wiped away by the assessee depositing the tax after the prescribed time.
(vi) The contention that on facts, no penalty ought to have been imposed upon the assessee as there was good and sufficient reasons viz. financial hardship, diverse locations and lack of computerization is also not acceptable. The obligation to deduct and pay tax upon the assessee is unconditional under the Act. It is the responsibility of the assessee to deduct taxes and to pay to the revenue within the period provided under the Act. Financial stringency would not justify deducting tax from the amount paid to the payee and not paying it to the revenue. Otherwise it would amount to using somebody else's money for the purposes of one's business. In such circumstances, the question of financial stringency hardly gives rise to a good and sufficient reason for not depositing tax which was an amount otherwise payable to the payee or on behalf of the payee to the revenue. Moreover, the assessee has not produced any evidence to show that it was in financial difficulty. Similarly diverse locations and lack of computerization are hardly any reasons to justify the failure to pay under the Act. The assessee is entitled to do business in as many locations as it desires but that would not by itself justify not paying taxes which are due to the revenue. The obligation to pay taxes is absolute.
(vii) The contention that no penalty ought to have been imposed upon it in view of the fact that the CIT(A) had held while interpreting Section 221 of the Act that no penalty is imposable and that the interpretation by CIT(A) is a plausible one is also not acceptable because the interpretation put by the CIT(A) on Section 221 of the Act is in face of the explanation which provides that penalty would be imposable even if the tax has been paid before the levy of penalty. The explanation was ignored on the ground that it is confusing. The CIT(A) further construed the word "is" present in Section 221 of the Act which provides that when assessee is in default or deemed to be in default would only mean that the default should be continuous and also continuing when the penalty proceedings are initiated. Consequently the submission is not acceptable as it is not a case where there were two possible views of interpreting Section 221 of the Act. This is particularly so in view of explanation provided thereto.(AY. 1985-86, 1987-88)
Reliance Industries Ltd. v. CIT (2015) 377 ITR 74 / 279 CTR 128 (Bom.)(HC)

S. 221:Collection and recovery–Penalty-Tax in default–Matter remanded. [S. 14OA, 220]
Where Tribunal rightly held that assessee was liable to pay penalty for not depositing taxes before filing return but while doing so, arbitrarily and without assigning any reason reduced penalty, matter was to be remanded to reconsider same.Matter remanded.(ITA No. 134 of 2014 dt. 16-01-2015)(AY. 2008-09 & 2009-10)
Kudos Chemie Ltd. v. CIT (2015) 230 Taxman 174 (P&H)(HC)

S. 221 :Collection and recovery – Penalty - Tax in default –Interest- Since definition of 'tax' under section 2(43) did not include penalty or interest, penalty under section 221(1) could not be levied. [S.2(43), 221,234B, 234C]
Assessee-firm filed its return of income and had not deposited interest under sections 234B and 234C. AO treated it as an assessee in default and imposed penalty under section 221. In CIT v. P.B. Hathiramani [1994] 207 ITR 483/[1993] 68 Taxman 449 (Bom.), High Court held that penalty under section 221 was leviable only when assessee was in default or is deemed to be in default in making a payment of 'tax'. Since definition of 'tax' under section 2(43) did not include penalty or interest, penalty under section 221(1) could not be levied.(AY. 2004-05)
CIT .v. Great Value Food (2015) 228 Taxman 133(Mag.)(P&H)(HC)

S. 221: Collection and recovery–Penalty-Tax in default- Penalty cannot be levied for non-payment of S. A tax if the assessee has financial hardship.
The Tribunal held that;the assessee claimed that it was having meagre cash and current balances and was in financial constraints during the year under consideration. If there is financial hardship to the assessee it has to be considered as sufficient cause in which event penalty cannot be levied. The Revenue was unable to point out as to whether the assessee had sufficient cash/bank balance so as to meet the tax demand and also could not point out as to whether any funds were diverted for non-business purposes at the relevant point of time so as to say that an artificial financial scarcity was created by the assessee. Accordingly, penalty u/s 221(1) could not be levied (AY. 2010-11 ,2011-12)

DCIT v. Aanjaneya Life Care Ltd.(2015) 40 ITR 691 (Mum.)(Trib.)

S. 222 : Collection and recovery - Certificate to Tax Recovery Officer-TRO should have awaited disposal of assessee's appeal under rule 86 to IInd Schedule pending with JC before disposing of attachment proceedings-Matter remanded [Rule 86, Schedule II]

Revenue authorities attached property and bank accounts of assessee in order to recover tax dues payable by his late father - Assessee approached Jurisdictional Commissioner (JC) against said action . As there was no response, assessee approached CC (Chief Commissioner). CC directed JC to treat assessee's application as appeal under rule 86, Schedule II . In spite of said directions, JC did not consider assessee's objections and in meantime TRO passed an order holding that attachment of properties belonging to assessee was valid. On writ allowing the petition the Court held that; in view of directions issued by CC regarding disposal of assessee's objections, TRO should have awaited disposal of assessee's appeal under rule 86 to IInd Schedule pending with JC before disposing of attachment proceedings. Matter remanded.

Vinod K. Bhagat .v. TRO (2015) 231 Taxman 665 (Bom.)(HC)

S. 222 : Collection and recovery - Certificate to Tax Recovery Officer Power to arrest-In recovery proceedings initiated by SEBI petitioner failed to furnish proposal of payment of dues detention and arrest order passed by Tax Recovery Officer against petitioner was arbitrary and illegal. [S. 227, 228A, 229, 232,Rules, 73, 76 of Schedule 11, Securities and Exchange Board of India Act, 1992, S. 28A]

Petitioner was called upon by SEBI to pay certain dues .On failure of petitioner, SEBI initiated recovery proceedings under section 28A. Petitioner had appeared before Tax Recovery Officer in terms of notice under rule 73(1) and was advised to make payment towards dues and/or submit a proposal for payment of dues .On failure of petitioner to furnish any substantial proposal for payment of dues, by impugned order petitioner was arrested and sent to civil prison.

On writ allowing the petition the Court held that; order of arrest and detention by Tax Recovery Officer for not giving a proposal of repayment was a sheer abuse of power. In absence of finding that petitioner had means to pay, mere non-payment of dues did not constitute neglect or refusal to pay. Since authority of respondent had not arrived at a satisfaction that conditions specified in clauses (a) and (b) of rule 73(1) were satisfied and had further not complied with mandate of rule 73(1) of recording reasons of satisfaction in writing, detention and arrest order was patently illegal and arbitrary and, therefore, same was to be quashed. Rule 73 does not confer power on Tax Recovery Officer to arrest and detain defaulter for not giving a proposal for payment of dues.

Vinod Hingorani .v. SEBI (2015)230 Taxman 251/ 278 CTR 232 (Bom.)(HC)

S. 222 : Collection and recovery - Certificate to Tax Recovery Officer –Bank guarantee was produced-No justification for enforce recovery proceedings.

Petitioner was a company engaged in civil contract work registered under KVAT Act, 2003 .Commissioner of Income-tax (TDS) issued endorsement to petitioner demanding payment of tax of Rs. 1.24 crores as balance amount due .Petitioner replied stating that it had already furnished bank guarantee to secure payment of balance amount and requested respondents not to take any recovery action in terms of impugned order as it intended to prefer further appeal against said order. Since petitioner had already produced to satisfaction of Additional Commissioner of Income-tax that bank guarantee for balance amount was still in force, there was no justification for respondents to enforce recovery proceedings against petitioner.Petitioner had right of appeal, which it intended to file, thus petitioner was to be permitted to file appeal . (AY. 2006-07 to 2009-10)

Janatha Co-operative Bank .v. CIT (2015) 229 Taxman 74 (Karn.)(HC)

S. 225 :Collection and recovery-Stay–CIT(A) has granted stay with certain directions –No cause of action –No interference was called. [Art. 226]

While stay application in appeal against assessment order was pending, recoveries of amounts, in terms of order of assessment, were sought to be made from assessee.Assessee filed writ petition seeking direction to cancel/quash recovery proceedings.In meantime, Commissioner (Appeals) disposed of stay application giving certain directions. Once stay application along with appeal against

orders of assessment had been decided by Commissioner (Appeals), cause of action on which writ was founded ended and, hence, there was no reason to interfere in writ petition. (AY. 2005-06 , 2009-10)
Jahalani Trading Company v. ITO (2015) 228 Taxman 140(Mag.)(Raj.)(HC)

S.226:Collection and recovery–Mode of recovery–Garnishee proceeding-Mandatory to issue and forward a notice.[S.226(3)]
It is mandatory to issue and forward a notice to the Assessee before going ahead with the garnishee proceeding.(AY.2006-07)
Suntec Business Solutions (P) Ltd. v. UOI (2015) 232 Taxman 367 / 274 CTR 162 (Ker.)(HC)

S.226:Collection and recovery-Banks tenanting premises-Premises acquired by Income-tax Department-Income-tax Department unilaterally increasing rent-Coercive measures under section 226(3) to recover rent-Not valid.[S. 23(1)(a), Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982]
The petitioners were public sector banks, being Government of India undertakings, who were tenants of certain premises. The petitioners were regularly paying rent to the landlord and after the premises were taken over by the Income-tax Department by issuing notices dated July 28, 2014, under section 26(3) of the Income-tax Act, 1961, they had been paying rent to the Tax Recovery Officer. The Tax Recovery Officer sought to unilaterally enhance the rent payable by the petitioners manifold and to recover it from the respective accounts of the petitioners maintained by the Reserve Bank of India, pursuant to which notices were issued and action taken. On writ petitions :
Held, allowing the petitions, that the provisions of section 23(1)(a) of the Act relate to the determination of income from house property for the purpose of filing of income-tax return and assessment thereof and the same have no relevance at all so far as fixation of rent payable by the tenant to the landlord is concerned. Any such fixation of fair rent or higher rent can only be either on the basis of agreement between the parties or by the exercise of powers in areas covered by the provisions of the Bihar Buildings (Lease, Rent and Eviction) Control Act, 1982, by the competent authorities therein and not unilaterally by the Tax Recovery Officer or any other officer of the Income-tax Department. The entire action of the Tax Recovery Officer and the consequential action taken by the Reserve Bank of India, are de hors the powers conferred upon them by the law of the land and they are, accordingly, quashed. Any amount, which may have been recovered from the accounts of the petitioners should be refunded to the petitioners forthwith.
State Bank of Bikaner and Jaipur v. CIT (2015) 373 ITR 418 / 274 CTR 396 (Patna)(HC)
Union Bank of India v. TRO (2015) 373 ITR 418/232 Taxman 613 / 274 CTR 396 (Patna)(HC)

S. 234A:Interest-Advance tax-Return–Deduction at source-Selling property to developer - Developer deducting tax at source but failing to deposit amount into Government treasury - Assessee unable to upload return for failure by developer to deposit tax deducted at source - Developer depositing tax deduction at source with interest after assessee filing writ - Revenue stating that it would not charge any interest-Petition became infructuous and was dismissed as withdrawn.[S. 139, 234B, 234C]
The petitioners (non-resident Indians) sold their property to a developer. The developer, while paying consideration to the petitioners, deducted Rs.1.23 crores as tax at source but failed to deposit the amount into the Government treasury. The petitioners were unable to upload their return for the assessment year 2014-15 for the reason of non-deposit of tax deducted at source. When the petitioners brought this non-deposit of tax deducted at source to the notice of the Commissioner, he did not take any action against the developer. On a writ petition:
Held, that after the filing of the petition, the developer deposited the tax deducted at source along with interest. The Revenue stated that it would not charge any interest under section 234A for default in furnishing of return in time nor interest under sections 234B and 234C for default in payment of advance tax. Thus, the petition became infructuous and was dismissed as withdrawn.(AY 2014-2015)
Zulfikar Jeweanjee Moriswala .v. DCIT (TDS) (2015) 375 ITR 148 (Bom.)(HC)

S.234A:Interest- Method of accounting–Project completion method–Parking charges received is liable to tax and no relevance to project completion method- Liable to pay interest. [S. 145, 234B]

Assessee was engaged in business as builder and developer and was following project completion method for payment of taxes. Assessee received parking charges collected on vacant land belonged to him. However, he did not file return on ground that income earned on parking charges would be taxed when project would be complete. On appeal the Court held that since parking charges had nothing to do with assessee's project and was assessable to tax, assessee was obliged to pay advance tax, therefore, non-payment of same would levy interest under section 234A and 234B . (AY. 2000-01)

Sudhir G. Borgaonkar v. ACIT (2015) 375 ITR 322/ 230 Taxman 327/ 121 DTR 333 (Bom.)(HC)

S. 234B:Interest - Advance tax -Interest is automatic if conditions are met. Form I.T.N.S. 150 is a part of the assessment order and it is sufficient if the levy of interest is stated there even though the assessment order did not contain any direction to charge interest. [S.143 (3)]

The assessment order did not contain any direction for the payment of interest. The ITAT and the Delhi High Court held that since no direction had actually been given in the assessment order for payment of interest, the case was covered by the decision of the Supreme Court in 'Commissioner of Income Tax & Ors. v. Ranchi Club Ltd' [(2001) 247 ITR 209] which merely dismissed the appeal affirming the High Court judgment reported in 'Ranchi Club Ltd. v. Commissioner of Income Tax' [(1996) 217 ITR 72]. The Department claimed before the Supreme Court that in view of the decision in 'Kalyankumar Ray v. Commissioner of Income Tax, West Bengal-IV, Calcutta [1992 Supp (2) SCC 424] interest under Section 234B is part of Form I.T.N.S. 150 which is not only signed by the assessing officer but it is really part of the assessment order itself. HELD by the Supreme Court allowing the appeal:

It will be seen that under the provisions of Section 234B, the moment an assessee who is liable to pay advance tax has failed to pay such tax or where the advance tax paid by such an assessee is less than 90 per cent of the assessed tax, the assessee becomes liable to pay simple interest at the rate of one per cent for every month or part of the month. The levy of such interest is automatic when the conditions of Section 234B are met. The facts of the present case are squarely covered by the decision contained in Kalyankumar Ray's case inasmuch as it is undisputed that contained a calculation of interest payable on the tax assessed. This being the case, it is clear that as per the said judgment, this Form must be treated as part of the assessment order in the wider sense in which the expression has to be understood in the context of Section 143, which is referred to in Explanation 1 to Section 234B. This being the case, we set aside the judgment of the High Court and allow the appeal of the Revenue.

CIT .v. Bhagat Construction Co. Pvt. Ltd. (2015) 279 CTR 185 (SC)

CIT v. M.R.G.Plastic Technologies & Ors. (2015) 279 CTR 185 (SC)

S. 234B : Interest - Advance tax –Settlement Commission- Interest would be computed up to date of admission of application by Settlement Commission under section 245D(1) and not up to date of order of Settlement Commission under section 245D(4).[S.245D(1), 245D(4)]

Application was filed before settlement commission and order was passed. Question arose as to what would be terminal point of period for which interest under section 234B would be levied. Allowing the petition the Court held that interest under section 234B would be computed up to date of admission of application by Settlement Commission under section 245D(1) and not up to date of order of Settlement Commission under section 245D(4).

G. M. Foods .v. IT & WT SC (2015) 231 Taxman 793 (Cal.)(HC)

S. 234B: Interest-Advance tax–Interest cannot be waived when the Assessee was at fault for not declaring its full taxable income and addition was sustained by the appellate forum.[S. 148, 234B, 220(2)]

Assessee did not fully declare its taxable income in its original return of income as well return filed pursuant to notice issued under s. 148. An addition representing the difference between the declared cost of construction of hotel building as per books and as per the Department valuation officer, was made by the AO. Interest u/s 234A, 234B and 220(2) was also levied. The Petitioner Assessee applied for waiver of interest. It was held that interest cannot be waived as the addition sustained by the

appellate forum was the income on which the assessee ought to have paid tax at the very outset. Levy of interest was compensatory in nature and was meant to compensate the Department for the delay in getting the due tax. The Chief CIT has taken into account the relevant criteria prescribed in the Board orders issued on the subject, and has correctly applied the yardstick for determining whether the assessee was entitled for a waiver of the interest. (AY. 2005-06)
Deliza Residency v. CCIT (2015) 116 DTR 180 (Ker.)(HC)

S. 234B:Interest-Advance tax–Interest was held to be leviable though the same was not charged in the regular assessment.[S.143(3), 154]
Income of assessee in original assessment was determined at nil and, therefore, no interest was charged under section 234B. Later, assessee's income was modified on account of change in quantum of unabsorbed depreciation and business loss and, accordingly, Assessing Officer charged interest under section 234B. Court held that interest was rightly charged under section 234B(4) despite fact that no interest had been levied under section 234B(1) at time of framing regular assessment.(AY. 1996-97)
AIMS Oxygen Ltd. v. Addl.CIT (2015) 230 Taxman 300 (Guj.)(HC)

S. 234B : Interest - Advance tax – Book profit-liable to pay interest. [S. 115JA, 234C]
Assessee was liable to pay interest under section 234B and 234C in respect of tax determined on basis of book profit under sections 115JA. (AY. 1998-99)
Jt.CIT v. Sumit Industries Ltd. (2015) 229 Taxman 369 (Guj.)(HC)

S. 234B : Interest-Advance tax-Non–resident-Since the assessee's were non-resident companies entire tax was to be deducted at source on payments made by the payee to it and there was no question of payment of advance tax by the assessee's. Therefore, it would not be permissible for the Revenue to charge any interest under section 234B to the assessee. [S. 195, 209]
The assessee's, non-resident companies, were manufacturing equipment relating to oil and gas, energy, transportation and aviation for supply to customers in India. After a survey under section 133A at their liaison office, reassessment proceedings were initiated against the assessee's. The assessee's filed nil returns of income and thereafter, a final assessment order was passed wherein the AO held that the services provided by the Assessee are taxable in India. The AO further levied interest u/s. 234B of the Act. The CIT(A) deleted the interest under sec. 234B. The Tribunal upheld the order of the CIT(A).

On appeal the Court held that the implication of an absolute obligation upon the payer to deduct tax at source under section 195(1) is that it becomes the responsibility of the payer to determine the amount it ought to deduct from the remittance to be paid to the assessee, If an assessee files nil returns at the stage of assessment, and maintains that it is not liable to tax in India, the payer is obliged to apply to the AO to determine what portion, if any, of its remittance to the assessee is liable to be deducted at source towards tax. The view taken by the Tribunal was correct. The primary liability of deducting tax (for the period concerned, since the law has undergone a change after the Finance Act, 2012) is that of the payer.
DIT (E) .v. GE Packaged Power Inc. (2015) 373 ITR 65 / 115 DTR 70 / 275 CTR 20/230 Taxman 653 (Delhi)(HC)
DIT .v.GE Jenbacher Gmbh & Co. OHG (Delhi)(HC) www.itatonline.org.
DIT .v. GE NuovPignonesP.A.(Delhi) (HC) www.itatonline.org.
DIT .v.GE Engine Services Distribution LLC www.itatonline.org
DIT .v.GE Energy Parts Incwww.itatonline.org
DIT .v.GE Aircraft Engine Services Limited www.itatonline.org
DIT .v.GE Malaysia SDN BHD www.itatonline.org
DIT .v.GE Japan Ltd www.itatonline.org

S. 234B:Interest-Advance Tax- Not committing any default in payment of advance tax--Interest cannot be imposed under section 234B.

Held that where the assessee has not committed any default in payment of advance tax and there was no liability to pay interest under section 234B. (AY. 1998-1999 to 2000-2001)
Flag Telecom Group Ltd. v. Dy. CIT (2015) 38 ITR 665 / 119 DTR 115(Mum.)(Trib.)

S. 234B : Advance tax-Interest-Failure by payer to deduct tax at source-Interest cannot be imposed on assessee. [S. 234C]
Tribunal held that,since the assessee was a non-resident and tax was to be deducted at source by then Indian company interest was not chargeable under sections 234B and 234C of the Act. (AY. 2008-2009)
Fugro Geoteam AS v. Add. CIT (IT) (2015) 37 ITR 46 (Delhi)(Trib)

S. 234B : Advance tax-Interest-Assessee claiming to adjust advance tax payable out of cash seized-Question settled by High Court-Special leave petition pending before Supreme Court—AO is bound to follow decision of High Court.
During the course of search conducted at the premises of the assessee a certain amount of cash was seized and the AO charged interest under section 234B of the Act, refusing to allow credit for the amount seized. He also refused to follow the judgment of the Punjab and Haryana High Court on the ground that the Department had filed a special leave petition against the decision. The CIT(A)held that the fact that the Department had filed a special leave petition against the decision of the High Court did not mean that the said decision would not be law of land till confirmed by the Supreme Court and therefore the AO was to accept the application of the assessee to reduce the interest under section 234B of the Act. On appeal by the Department.
Held, dismissing the appeal, that it was not in dispute that the assessee made a request for adjustment of cash seized towards advance tax installments. The issue was settled by the Punjab and Haryana High Court in favour of the assessee in the case of CIT v. Arun Kapoor [2011] 334 ITR 351 (P & H). The judgment of the High Court merely could not be disregarded merely because the special leave petition of the Department was pending before the Supreme Court. Therefore, the AO was bound to follow the decision of the High Court and there was no infirmity in the order of the CIT(A) . (AY. 2008-2009)
ACIT v. Hans Raj Gandhi (2015) 37 ITR 418 (Chandigarh)(Trib.)

S. 234D : Interest on excess refund–Section did not operate retrospectively – Liable to pay interest.
Where section 234D was in force on date of assessment and did not operate retrospectively, assessee would be required to pay interest on excess refund from date on which section 234D came into force .
CIT .v. Avery Cycle Inds. Ltd. (2015) 231 Taxman 814 (P&H)(HC)

S. 234D : Refund - Interest on excess refund - Refund granted prior to 1-6-2003 but proceedings for assessment completed after 1-6-2003.
Tribunal was not justified in deleting interest leviable under section 234D on the excess refund paid to the company. (AY. 2003-2004)
CIT .v. Colgate Palmolive (I) Ltd. (2015) 370 ITR 728 (Bom.)(HC)

S. 234E: Fee-Default in furnishing the statements- Dedcution at source-Constitutional validity-The late filing of TDS returns by the deductor causes inconvenience to everyone and S. 234E levies a fee to regularize the said late filing. The fee is not in the guise of a tax nor is it onerous. The levy is constitutionally valid.[S. 200(3), 206C(3),Art. 14,226,227]
S. 234E of the Income-tax Act, 1961 inserted by the Finance Act, 2012 provides for levy of a fee of Rs. 200/- for each day's delay in filing the statement of Tax Deducted at Source (TDS) or Tax Collected at Source (TCS). A Writ Petition to challenge the validity of s. 234E has been filed in the Bombay High Court. The Petition claims that assessees who are deducting tax at source are discharging an administrative function of the department and that they are a "honorary agent" of the department. It is stated that this obligation is onerous in nature and that there are already numerous penalties prescribed for a default. It is stated that the fee now levied by s. 234E is "exponentially harsh and burdensome" and also "deceitful, atrocious and obnoxious". It is also claimed that

Parliament does not have the jurisdiction or competence to impose such a levy on tax-payers. HELD by the High Court dismissing the Petition:
(i) On a perusal of sub-section (1) of section 234E, it is clear that a fee is sought to be levied inter alia on a person who fails to deliver or cause to be delivered the TDS return/statements within the prescribed time in sub-section (3) of section 200. The fee prescribed is Rs.200/- for every day during which the failure continues. Sub-section (2) further stipulates that the amount of fee referred to in sub-section (1) shall not exceed the amount of tax deductible or collectible as the case may be;
(ii) It is not in dispute that as per the existing provisions, a person responsible for deduction of tax (the deductor) is required to furnish periodical quarterly statements containing the details of deduction of tax made during the quarter, by the prescribed due date. Undoubtedly, delay in furnishing of TDS return/statements has a cascading effect. Under the Income Tax Act, there is an obligation on the Income Tax Department to process the income tax returns within the specified period from the date of filing. The Department cannot accurately process the return on whose behalf tax has been deducted (the deductee) until information of such deductions is furnished by the deductor within the prescribed time. The timely processing of returns is the bedrock of an efficient tax administration system. If the income tax returns, especially having refund claims, are not processed in a timely manner, then (i) a delay occurs in the granting of credit of TDS to the person on whose behalf tax is deducted (the deductee) and consequently leads to delay in issuing refunds to the deductee, or raising of infructuous demands against the deductee; (ii) the confidence of a general taxpayer on the tax administration is eroded; (iii) the late payment of refund affects the Government financially as the Government has to pay interest for delay in granting the refunds; and (iv) the delay in receipt of refunds results into a cash flow crunch, especially for business entities;
(iii) The Legislature took note of the fact that a substantial number of deductors were not furnishing their TDS return/statements within the prescribed time frame which was absolutely essential. This led to an additional work burden upon the Department due to the fault of the deductor by not furnishing the information in time and which he was statutorily bound to furnish. It is in this light, and to compensate for the additional work burden forced upon the Department, that a fee was sought to be levied under section 234E of the Act. Looking at this from this perspective, we are clearly of the view that section 234E of the Act is not punitive in nature but a fee which is a fixed charge for the extra service which the Department has to provide due to the late filing of the TDS statements;
(iv) As stated earlier, the late submission of TDS statements means the Department is burdened with extra work which is otherwise not required if the TDS statements were furnished within the prescribed time. This fee is for the payment of the additional burden forced upon the Department. A person deducting the tax (the deductor), is allowed to file his TDS statement beyond the prescribed time provided he pays the fee as prescribed under section 234E of the Act. In other words, the late filing of the TDS return/statements is regularised upon payment of the fee as set out in section 234E. This is nothing but a privilege and a special service to the deductor allowing him to file the TDS return/statements beyond the time prescribed by the Act and/or the Rules. We therefore cannot agree with the argument of the Petitioners that the fee that is sought to be collected under section 234E of the Act is really nothing but a collection in the guise of a tax;
(v) We are therefore clearly of the view that the fee sought to be levied under section 234E of the Income Tax Act, 1961 is not in the guise of a tax that is sought to be levied on the deductor. We also do not find the provisions of section 234E as being onerous on the ground that the section does not empower the Assessing Officer to condone the delay in late filing of the TDS return/statements, or that no appeal is provided for from an arbitrary order passed under section 234E. It must be noted that a right of appeal is not a matter of right but is a creature of the statute, and if the Legislature deems it fit not to provide a remedy of appeal, so be it. Even in such a scenario it is not as if the aggrieved party is left remediless. Such aggrieved person can always approach this Court in its extra ordinary equitable jurisdiction under Article 226 / 227 of the Constitution of India, as the case may be. We therefore cannot agree with the argument of the Petitioners that simply because no remedy of appeal is provided for, the provisions of section 234E are onerous. Similarly, on the same parity of reasoning, we find the argument regarding condonation of delay also to be wholly without any merit.
RashimikantKundalia.v.UOI (2015) 373 ITR 268/ 275 CTR138(Bom.)(HC)

S. 234E : Fee-Default in furnishing the statements- Prior to the amendment to s. 200A w.e.f. 01.06.2015, the fee for default in filing TDS statements cannot be recovered from the assessee-deductor. [S.200A]

(i) Section 200A was amended by the Finance Act 2015 with effect from 1st June 2015 to provide that in the course of processing of a TDS statement and issuance of intimation under section 200A in respect thereof, an adjustment could also be made in respect of the fee computed in accordance with the provisions of section 234E. As the law stood prior to 1st June 2015, there was no enabling provision therein for raising a demand in respect of levy of fees under section 234E. While examining the correctness of the intimation under section 200A, we have to be guided by the limited mandate of Section 200A, which, at the relevant point of time, permitted computation of amount recoverable from, or payable to, the tax deductor after making the adjustments (a) on account of "arithmetical errors" and "incorrect claims apparent from any information in he statement" and (b) interest computed on the basis of sums deductible as computed in the statement. No other adjustments in the amount refundable to, or recoverable from, the tax deductor, were permissible in accordance with the law as it existed at that point of time. Accordingly, the adjustment in respect of levy of fees under section 234E was beyond the scope of permissible adjustments contemplated under section 200A.

(ii) This intimation is an appealable order under section 246A(a), and, therefore, the CIT(A) ought to have examined legality of the adjustment made under this intimation in the light of the scope of the section 200A. The CIT(A) has not done so. He has justified the levy of fees on the basis of the provisions of Section 234E. That is not the issue here. The issue is whether such a levy could be effected in the course of intimation under section 200A. The answer is clearly in negative. No other provision enabling a demand in respect of this levy has been pointed out to us and it is thus an admitted position that in the absence of the enabling provision under section 200A, no such levy could be effected. As intimation under section 200A, raising a demand or directing a refund to the tax deductor, can only be passed within one year from the end of the financial year within which the related TDS statement is filed, and as the related TDS statement was filed on 19th February 2014, such a levy could only have been made at best within 31st March 2015. That time has already elapsed and the defect is thus not curable even at this stage. In view of these discussions, as also bearing in mind entirety of the case, the impugned levy of fees under section 234 E is unsustainable in law. (AY. 2013-14)

Sibia Healthcare Pvt. Ltd. v. DCIT (Asr.)(Trib.); www.itatonline.org

S. 234E : Fee-Deduction at source-Default in furnishing the statements-Prior to the amendment to S. 200A w.e.f. 01.06.2015, the fee for default in filing TDS statements cannot be recovered from the assessee-deductor while processing the S. 200A statement. However, the AO is entitled to pass a separate order u/s 234E to levy the fee within the limitation period. [S.200A, IPC S. 396, 408.]

(i) The Assessing Officer cannot make any adjustment other than the one prescribed above in Section 200A of the Act. By Finance Act, 2015, with effect from 01.06.2015, the Parliament amended Section 200A by substituting sub-section (1) of clauses (c) to (e). It is obvious that prior to 01.06.2015, there was no enabling provision in Section 200A of the Act for making adjustment in respect of the statement filed by the assessee with regard to tax deducted at source by levying fee under Section 234E of the Act. Parliament for the first time enabled the Assessing Officer to make adjustment by levying fee under Section 234E of the Act with effect from 01.06.2015. Therefore, as rightly submitted by the counsel for the assessees, while processing statement under Section 200A of the Act, the Assessing Officer cannot make any adjustment by levying fee under Section 234E prior to 01.06.2015. In the case before us, the Assessing Officer levied fee under Section 234E of the Act while processing the statement of tax deducted at source under Section 200A of the Act. Therefore, this Tribunal is of the considered opinion that the fee levied by the Assessing Officer under Section 234E of the Act while processing the statement of tax deducted at source is beyond the scope of adjustment provided under Section 200A of the Act. Therefore, such adjustment cannot stand in the eye of law.

(ii) However, the contention of the assessee that as Section 234E of the Act says that the assessee "shall be liable to pay" by way of fee, therefore, the assessee has to voluntarily pay the fee and the Assessing Officer has no authority to levy fee has no substance. When Section 234E clearly says that

the assessee is liable to pay fee for the delay in delivery of the statement with regard to tax deducted at source, the assessee shall pay the fee as provided under Section 234E(1) of the Act before delivery of the statement under Section 200(3) of the Act. If the assessee fails to pay the fee for the periods of delay, then the assessing authority has all the powers to levy fee while processing the statement under Section 200A of the Act by making adjustment after 01.06.2015. However, prior to 01.06.2015, the Assessing Officer had every authority to pass an order separately levying fee under Section 234E of the Act. What is not permissible is that levy of fee under Section 234E of the Act while processing the statement of tax deducted at source and making adjustment before 01.06.2015. It does not mean that the Assessing Officer cannot pass a separate order under Section 234E of the Act levying fee for the delay in filing the statement as required under Section 200(3) of the Act.

(iii) The contention of the counsel that merely because the Parliament has used the language "he shall be liable to pay by way of fee", the assessee has to pay the fee voluntarily and the Assessing Officer has no authority to levy fee could not be accepted. No one would come forward to pay the fee voluntarily unless there is a compulsion under the statutory provision. The Parliament welcomes the citizens to come forward and comply with the provisions of the Act by paying the prescribed fee before filing the statement under Section 200(3) of the Act. However, if the assessee fails to pay the fee before filing the statement under Section 200(3) of the Act, the assessing authority is well within his limit in passing a separate order levying such a fee in addition to processing the statement under Section 200A of the Act. In other words, before 01.06.2015, the assessing authority could pass a separate order under Section 234E levying fee for delay in filing the statement under Section 200(3) of the Act. However, after 01.06.2015, the assessing authority is well within his limit to levy fee under Section 234E of the Act even while processing the statement under Section 200A and making adjustment.

(iv) In view of the above discussion, this Tribunal is of the considered opinion that the Assessing Officer has exceeded his jurisdiction in levying fee under Section 234E while processing the statement and make adjustment under Section 200A of the Act. Therefore, the impugned intimation of the lower authorities levying fee under Section 234E of the Act cannot be sustained in law. However, it is made clear that it is open to the Assessing Officer to pass a separate order under Section 234E of the Act levying fee provided the limitation for such a levy has not expired. Accordingly, the intimation under Section 200A as confirmed by the CIT(Appeals) in sofar as levy of fee under Section 234E is set aside and fee levied is deleted. However, the other adjustment made by the Assessing Officer in the impugned intimation shall stand as such. (AY. 2013-14)

G. Indhirani (Smt.) v. DCIT (2015) 172 TTJ 239 / 41 ITR 439 (Chennai)(Trib.)
Rajaguru Spinning Mills Ltd. v. DCIT (2015) 41 ITR 439 (Chennai)(Trib.)
A. Dhakshinamurty v. DCIT (2015) 41 ITR 439 (Chennai)(Trib.)
Padma Textiles v. DCIT (2015) 41 ITR 439 (Chennai)(Trib.);
Murty Lungi Co. v. DCIT(2015) 41 ITR 439 (Chennai)(Trib.)

S. 237:Refunds–Return filed was not processed-Department was to be directed to refund amount paid by assessee in excess-Since assessee did not pursue his claim timely, revenue would not be liable to pay any interest on said amount. [S.139,245]

Assessee had effected payment of advance tax in respect of a receipt that was not taxable in his hands. Department accepted said payment of tax without demur but Assessing Officer did not act upon return filed by assessee claiming refund of excess tax paid. Assessee filed writ petition. Court held tthat assessee could not have resorted procedure under sections 237 to 245 since there was no assessment and, consequently, no tax paid based on an assessment, howver the department was to be directed to refund amount paid by assessee in excess. Since assessee did not pursue his claim timely, revenue would not be liable to pay any interest on said amount.(AY. 2000-01)

C. Padmakumar .v.Dy.CIT (2015) 231 Taxman 410 (Ker.)(HC)

S. 244:Refund–Return of income-deduction at source-credit for refunds-Interest on refund – Department is directed to follow directions of Delhi High Court in Court on its own motion v. CIT(2013) 352 ITR 273 (Delhi)(HC) and to be vigilant and ensure that such mistakes do not occur. Department is also directed to set up a self-auditing vigilance cell to redress taxpayers' grievances.[S. 143(3), 201, 244A, 245]

The Petitioner filed a PIL to bring out the irregularities committed by the Income Tax Department. It was submitted that the Delhi High Court has also passed the strictures against the Income Tax Department in a similar Petition, which was filed in the Delhi High Court and which was disposed of by the order dated 14th March, 2013 (Court On Its Own Motion v. CIT(2013) 352 ITR 273). The Petitioner has invited attention to the said Judgment and Order passed by the Delhi High Court and took the Court through the various alleged mistakes committed by the Income Tax Department in issuing incorrect notices under Sections 244 and 245 of the Income Tax Act, thereby seeking recovery from number of income tax assessees. He brought to the Court's notice the immense hardships caused to all these income tax assessees as a result of the alleged mistakes committed by the Income Tax Department. It is submitted that the initial returns, which were taken by the Income Tax Department, were due to a technical error, which is rectified. It was alleged that there was a bug in the computer system. According to the Petitioner, this has been done deliberately. In reply, the department submitted that the directions given by the Delhi High Court have been followed in letter and spirit. HELD by the High Court:
The Income Tax authorities shall follow the directions given by the Delhi High Court in case of Court On Its Own Motion v. CIT (2013) 352 ITR 273 in other cities, including the city of Mumbai, in Maharashtra State. We hope and trust that the Income Tax Department will be more vigilant and ensure that such mistakes will not occur in future. We also direct the Income Tax Department to form a Vigilance Cell to ensure that there is a monitoring authority, which would monitor various policy decisions which are taken and a self auditing mechanism is required to be formulated to ensure that the income tax assessees are not made to run from pillar to post for the purpose of redressal of their grievances.(PIL No. 27 of 2014, dt. 28.08.2015)
Arun Ganesh Jodgeo .v. UOI (Bom.)(HC); www.itatonline.org

S. 244A:Refunds–Interest-Book profit-Priority first on adjustment of minimum alternate tax credit-Minimum alternate tax credit available should be allowed to be set off - Tax liability to be determined taking note of advance tax paid and tax deduction at source available - Refund not on minimum alternate tax credit received but on adjustment -Eligible for interest on refund [S.115JA,115JAA(4), 115JB]
As per provisions of section 115JAA(4), tax credit should be allowed set off in a year when tax becomes payable on the total income computed in accordance with the provisions of the Act other than section 115JA or section 115JB, as the case may be. Assessee was not expected to pay the advance tax to the extent of the minimum alternate tax credit brought forward from the preceding years. Only the balance tax liability remaining, if any, after such set off, was payable by the assessee as advance tax. If that is so, the minimum alternate tax credit that is available should be allowed to be set off and, thereafter, the tax liability has to be determined taking note of the advance tax paid and the tax deducted at source available. Priority should be given first on the adjustment of the minimum alternate tax credit. Therefore, the order of the Tribunal was in consonance with the statutory provision.(AY. 1998-1999)
CIT .v. Ambattur Clothing Ltd. (2015) 373 ITR 233 (Mad.)(HC)

S.244A:Refund-Interest-Delayed payment of interest-No amount over and above statutory interest payable to assessee--Matter remanded.[S. 154]
Allowing the appeal of revenue the Court held that;allowing the appeal partly, that the order of the Tribunal to the extent it directed payment of any sum over and above the interest payable under section 244A(1) to the assessee, could not be upheld. (AY. 1997-1998, 1998-1999)
CITv.Indian Farmer Fertilizer Co-operative Ltd. (2015) 374 ITR 56 (Delhi)(HC)

S. 244A:Refund–Interest on refunds- Interest on income-tax refund received by a non-resident is not effectively connected with the PE (Permanent Establishment) either on asset test or activity test. Accordingly such interest cannot be assessed as business profits but has to be assessed as "interest" under Article 11/ 12-DTAA-India-France.[Art. 11, 12]
The High Court had to consider whether the interest received u/s 244A is chargeable to tax at the rate prescribed in Article 12 of DTAA between India and France. The Tribunal restored the issue of the rate at which interest is to be charged to tax on income-tax refund received under Section 244A of the

Act to the Assessing Officer to be decided in the light of the Indo France DTAA and the decision of the Special Bench of the Tribunal in the matter of Assistant Commissioner of Income Tax vs. Clough Engineering Ltd. [130 ITD 137]. On appeal by the department HELD dismissing the appeal:
The decision of the Special Bench in Clough Engineering 130 ITD 137 had been followed by the Tribunal in M/s DHL Operations B.V., The Netherlands Vs. Dy. Director of Income Tax]. The issue before the Tribunal was the rate of tax on which Income tax refund is to be taxed i.e. on the basis of the Articles of DTAA or under the Act. The Tribunal on examination of the DTAA in the above case concluded that interest on income tax refund is not effectively connected with the PE (Permanent Establishment) either on asset test or activity test. Therefore, taxable under the Article 11(2) of Indo Netherlands tax treaty. The Revenue carried the aforesaid decision of M/s DHL Operations B.V.(supra) in appeal to this Court, being Income Tax Appeal No.431 of 2012. This Court by order dated 17 July 2014 refused to entertain the appeal. In the circumstances no fault can be found with the impugned order of the Tribunal in restoring the issue to the Assessing officer to determine / adopt the rate of tax on refund in the light of the relevant clauses of Indo France DTAA and the decision of Special Bench in Clough Engineering.(AY. 1997-98)
DIT v. Credit Agricole Indosuez (No.2)(2015) 377 ITR 102 (Bom.)(HC)

S. 244A : Refunds – Interest –Delay in granting refund- Entitle interest but not entitle further compensation by way of interest on such interest. [S. 214(2), 243(1)(b)]
Allowing the Writ the Court held that in case of delay in granting refund, assessee would be entitled to compensation and interest can be awarded by way of compensation, but assessee would not be entitled to further compensation by way of interest on such interest, which is awarded as compensation.
` Ltd. v. CIT (2015) 377 ITR 307/230 Taxman 298/118 DTR 317 (Guj.)(HC)

S. 244A : Refund – Interest on refunds – Excess tax paid on self assessment- Interest is payable on refund of such excess. [S.140A]
The Assessee claimed that interest u/s 244A was due to it on refund arising out of excess self-assessment tax paid by it to the Revenue. It was held that interest u/s 244A(1)(a) would not apply to refund arising out of excess payment of self-assessment tax. Interest u/s 244A(1)(b) would be liable only if tax is paid pursuant to a demand notice and not if paid voluntarily. There cannot be a general rule for payment of interest. Interest is payable if excess amount is paid due to erroneous assessment by the Revenue and not if Assessee is to be blamed for miscalculation. (AY. 2006-07)
CIT v. Engineers India Ltd. (2015) 373 ITR 377 / 116 DTR 242 / 232 Taxman 287 / 275 CTR 354 (Delhi)(HC)

S. 244A : Refunds – Interest –Interest on interest is not allowable.
Assessee cannot claim interest on interest on amount that are due to him by way of refund . (O. P. No. 14238 of 2012 dt. 28-10-2014)(AY. 1976-77)
Joseph Korah v. ITO (2015) 54 taxmann.com 314 / 229 Taxman 331 (Ker.)(HC)

S. 244A : Refunds - Self-assessment - Interest - Refund of tax paid on self-assessment - Interest payable on such refund. [S.14OA, 154]
It cannot be held that the assessee is only entitled to interest under section 244A(1)(b) on tax deducted at source or advance tax but not on self-assessment tax paid under section 140A of the Act which was found to be paid in excess. The assessee shall be entitled to interest under section 244A(1)(b) on the refund of self-assessment tax as well)(AY. 1989-1990)
CIT .v. Punjab Chemical and Crop. Protection Ltd. (2015) 370 ITR 481/ 231 Taxman 312/ 122 DTR 252/ 279 CTR 171 (P & H)(HC)

S. 244A : Refunds-Interest-Only where delay is on part of Department - Failure by assessee to furnish tax deduction at source certificates - Refund directed after filing of affidavit and indemnity bond with particulars by assessee- No interest was payable.

The occasion to pay interest would arise only if the delay to make the refund was on the part of the Department. If the delay in refund is attributable to the assessee, wholly or in part, the period of such delay shall be excluded from the period for which the interest is payable.
The assessee was an industrial undertaking involved in the business of conversion of steel scrap into ingots. From the payments due to the assessee, its customers had deducted tax at source, being Rs. 3,52,721 in the financial years 1991-92 and 1992-93. However, the relevant certificates were not issued to the assessee. The assessee made a claim for refund of the amount to the extent of tax deduction at source. The refund was made on June 12, 2001, for Rs. 3,52,721. The assessee submitted representations on June 24, 2001, and October 23, 2001, with a request to pay interest under section 244A(2) on the amount from the due date till the date of payment. The claim was rejected. On a writ petition :
Held, dismissing the petition, that the tax deduction at source from the assessee was, with reference to about 10 bills, spread over one year. The record did not disclose the nature of steps taken by the assessee for obtaining the tax deduction at source certificates, either from the concerned agencies or even from the Department. It was only in the year 2001, that the assessee filed an affidavit and an indemnity bond, furnishing particulars. Soon thereafter, refund was directed. It was not the case of the assessee that even after it had submitted the tax deduction at source certificates or the indemnity bond, there was any delay on the part of the Department in making the refund. The case was covered by sub-section (2) of section 244A.
L. Madanlal Steels Ltd. .v. Chief CIT (2015) 370 ITR 205 / 231 Taxman 413(T & AP)(HC)

S.244A:Refunds-Interest- Self assessment tax-From the payment till the date of refund. [S.140A , 264]
Assessee filed petition before the Commissioner under section 264 for grant of interest on refund of self assessment tax paid by the assesse. The petition was rejected by the Commissioner. On writ , allowing the claim of assesse ,the Court directed the revenue to pay interest from the date of payment on self assessment tax ie. 31-8-1994 till the date of refund i.e. 24-10- 1998 and pay the same within six weeks . (AY. 1994-95)
Stock Holding Corporation of India Ltd..v. N.C. Tewari (2015)373 ITR 282/ 113 DTR 297 / 229 Taxman 512/ 274 CTR 16(Bom.)(HC)

S. 244A : Refund-Interest on refund-Powers of Assessing Officer and Commissioner (Appeals)-No power to exclude period for purpose of grant of interest under section 244A(1)-Chief Commissioner or Commissioner alone to decide-Matter remanded.
For the assessment year 1995-96, the Commissioner (Appeals) granted tax benefit for amalgamation to the assessee and subsequently rectified his order and granted the tax benefit for the assessment year 1996-97. The Tribunal held that the benefit of tax credit was to be allowed to the assessee for the assessment year 1995-96 itself. While giving effect to the order of the Tribunal, the Assessing Officer denied the claim of the assessee to interest under section 244A of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed this. On appeal:
Held, that under the express provisions of section 244A(2) of the Act, the question of exclusion of period for the purpose of grant of interest under section 244A(1) of the Act was necessarily and mandatorily to be decided either by the Chief Commissioner or Commissioner. Neither the Assessing Officer nor the Commissioner (Appeals) were right in ordering exclusion of the period for computation of interest on refund under section 244A(1) of the Act as it was outside the ambit of their powers. The matter was to be restored to the Assessing Officer to refer the issue regarding exclusion of period in section 244A(2) of the Act either to the Chief Commissioner or Commissioner for determination. Matter remanded. (AY. 1995-1996)
MMTC Ltd. v. ACIT (2015) 39 ITR 36 (Delhi)(Trib.)

S. 245 : Refunds - Set off of refunds against tax remaining payable – Penalty-Adjustment made without giving an opportunity of hearing was set aside.
Revenue sought to adjust refund of certain sum of assessee against outstanding penalty demand. Where intimation under section 245 was issued and adjustment was made simultaneously on same

date and no opportunity of hearing was given to assessee before adjustment was made, impugned adjustment order was to be set aside. (AY. 2013-14)
Oriental Insurance Co. Ltd. v. Dy. CIT (2015) 229 Taxman 521 (Delhi)(HC)

S. 245A : Settlement Commission - Powers- Right to information - Access to information with respect to disposal and pendency of matters before Settlement Commission - Officers designated under Right to Information Act passing orders - Settlement Commission has no power by an administrative order to declare such orders as being void ab-initio - Remedy is to file appeal before Central Information Commission. [Right to Information Act, 2005, S. 18(1)(f)]
The petitioner filed an application under the Right to Information Act, 2005, seeking information with respect to disposal and pendency of matters before the Settlement Commission. The Central Public Information Officer furnished certain information to the petitioner. However, certain other information as sought in the application was denied. The petitioner preferred an appeal before the first appellate authority which was partly allowed. The Settlement Commission by an administrative order declared the orders passed by the two officers designated under the Right to Information Act, 2005, as being void ab initio. On a writ petition:
Held, allowing the petition, (i) that the orders passed by the Central Public Information Officer and the first appellate authority could not be nullified by an administrative order. Even if an order is a nullity, it would continue to be effective unless set aside by a competent body or court. The Chairman of the Settlement Commission is not authorised under the RTI Act to interfere with the orders passed under the RTI Act.
(ii) That the Central Information Commission would have the power to enquire into any complaint in respect of matters relating to access of information under the 2005 Act. However, the Chairman of the Settlement Commission had acted without authority of law in nullifying orders passed under the RTI Act. Thus, interference with the order was warranted in the writ proceedings.
R.K. Jain v. Chairman, ITSC (2015) 370 ITR 1 (Delhi) (HC)

S. 245C : Settlement Commission - Settlement of cases – Conditions -Procedure – Application – Order of the Settlement Commission calling for report under rule 9 cannot be quashed when the CIT has not rejected application made by assessee.
The assessee filed an application before the settlement commission post a search and seizure operation conducted in its premises. The Commission called for a report from the CIT to which the CIT responded that the assessment proceedings for a few of the years were pending before the apex and high court and hence the settlement commission should keep the proceedings in abeyance till the disposal of the appeals before the courts. However, the Commission proceeded to issue a notice to the CIT to furnish its report under rule 9 failing which it would initiate further proceedings.
The High Court dismissed the departmental appeal and held that the Department had not raised any objection at the time of admission of the case and if need be, the department could raise the contention during the proceedings before the Commission and hence the appeal of the department to quash the Commission's communication and order was invalid. (AY. 2007-2008 to 2014-2015)
CIT v. Asian Natural Resources India Ltd. (2015) 117 DTR 426 (MP)(HC)

S.245D:Settlement Commission-Full and true disclosure-Granting immunity against penalty and prosecution is held to be justified.[S.245H]
Dismissing the petition of revenue the Court held that merely by offering additional amounts , the original declaration by the assesse became one that of not full and true for the purpose of settlement cannot be accepted hence the order of the settlement commission granting immunity against penalty and prosecution is held to be justified.
CIT v. Mohammed Mazhar K.T.P (2015) 273 CTR 582 / 232 Taxman 385 (Ker.)(HC)

S. 245D : Settlement Commission - Procedure – Application – It was not permissible for assessee to revise application offering lesser income than disclosed in the original application. [S.245C, 245D(2D)]
Assessee filed application to Settlement Commission disclosing certain undisclosed income. Thereafter by a letter, he revised undisclosed income by substituting lesser income.Settlement

Commission admitted application and assessee paid tax as per revised disclosure. It was not permissible for assessee to revise application under section 245C and he was to pay additional tax in terms of original application. As there was non-compliance with provisions of section 245D(2D) and, therefore, proceedings before Settlement Commission stood abated.

Pukhraj Bhabhutmal Shah v. ITO (2015) 230 Taxman 40/ 118 DTR 239 (Guj.)(HC)

S. 245D : Settlement Commission - Procedure – Application – True and full disclosure–Petition of revenue was dismissed. [S.245C, 245D(4),245HA]

The revenue filed writ petition against order passed by the Settlement Commission ordering the settlement applications to be proceeded with further on the ground that the settlement applications were invalid as the assessee had not made true and full disclosure of all the material facts of its income and the manner in which the income was earned.

The assessee raised preliminary objection that entertaining said petition would result in the expiry of 18 months time-limit stipulated in section 245D(4A)(iii) which would result in abatement of settlement application. The revenue, on the other hand, argued that if writ petition was not entertained, then in proceedings under section 245D it might be contended by the assessee that the revenue had waived/given up the issue regarding 'true and full disclosure of income'. It further argued that if the Settlement Commission ultimately allowed settlement application, then the revenue would be without any remedy.

Having regard to the fact that the time - limit of 18 months stipulated in section 245D(4A)(iii) is going to expire on 30-11-2014; and that upon expiry of the said time-limit the settlement applications would abate as provided in section 245HA, this writ petition at this stage is not to be entertained. At the same time, in order to allay the apprehension of the revenue, interests of justice would be served if this writ petition is disposed of with the following clarifications:-

Disposal of this writ petition shall not come in the way of the Commissioner raising the contention at the hearing under section 245D(4) that the settlement applications do not make true and full disclosure of income and/or the manner in which the income was earned; and

In case the Settlement Commission allows the settlement applications at the hearing under section 245D(4), the operation of such order shall remain stayed for a period of 6 weeks from the date of passing of the order.

If the Settlement Commission allows the settlement applications under section 245D(4) and the Commissioner chooses to challenge such order in a fresh writ petition, he would not be estopped from challenging the finding of the Settlement Commission on all issues including the issue regarding true and full disclosure of income and the manner in which the income was earned. (AY. 2005-06 to 2012-13)

CIT v. Income Tax Settlement Commission (2015) 230 Taxman 311 (Bom.)(HC)

S.245D(2C):Settlement commission-Assessee depositing tax on admitting additional income-Required amount deposited within time when application admitted-Further tax liability determined after final order satisfied-Interest for period during pendency of application before Settlement Commission-Unwarranted.[S.158BC, 220(2), 245D(1)]

Consequent to search and seizure at the premises of a group, notice under section 158BC of the Act was served on the assessees. Even though they disclosed nil income, they approached the Settlement Commission and disclosed Rs. 10 lakhs in the hands of each of the three assessees. The Settlement Commission directed the Revenue to accept the offer of additional income of Rs.1,48,16,160 and rejected the waiver of interest. Consequently, interest under section 220(2) in terms of section 245D(2C) was directed to be recovered. While computing the amounts payable, the Assessing Officer made an addition of Rs. 13,03,211 as interest recoverable for the period between January 1, 2004, and March 26, 2010. The Commissioner (Appeals) held that section 245D(2C) could be invoked only if the assessee did not deposit the tax payable on income disclosed and admitted under section 245D(1). In the instant case, the assessee deposited Rs.6,12,000/- within the time prescribed under section 245D(2C) on the income of Rs. 10 lakhs in terms of the order under section 245D(1). This was confirmed by the Tribunal. On appeals:

Held, dismissing the appeals, that when the application was filed before the Settlement Commission, the assessee deposited the admitted tax liability. Soon, thereafter, when the application was admitted, the amount required was deposited within the time stipulated under section 245D(6A). The further tax liability determined was payable after the final decision. The records and the materials examined by the Commissioner (Appeals) and upheld by the Tribunal disclosed that even the tax liability finally determined was satisfied. In these circumstances, the addition of interest for the period during the pendency of the application before the Settlement Commission was entirely unwarranted.(BP. 1-4-1995 to 5-10-2001)

CIT v. Govind Lal (2015) 374 ITR 591 (Delhi) (HC)
CIT v. Ved Prakash (2015) 374 ITR 591 (Delhi) (HC)
CIT v. Vishan Das (2015) 374 ITR 591 (Delhi) (HC)

S.245HA:Settlement commission-Provision for abatement of proceedings where no order passed by cut-off date-Discrimination likely among applicants for factors not under their control-Provisions arbitrary-To be read down so that proceedings treated as abated only where failure owing to reasons attributable to applicant-Direction to proceed with applications as if not abated where delay not attributable to applicant-Supreme Court--No interference.[Constitution of India, Art. 14, 226]

On petitions challenging the validity of section 245HA(1)(iv) and (3) of the Income-tax Act, 1961, as amended by the Finance Act, 2007, the High Court found the provisions violative of article 14 of the Constitution, but did not invalidate the provisions, and instead, read them down, in particular, the provisions of section 245HA(1)(iv), so that only where the application could not be disposed of for any reasons attributable on the part of the applicant would proceedings abate under section 245HA(1)(iv). The court directed the Settlement Commission to consider whether the proceedings had been delayed on account of reasons attributable to the applicant and if they were not, to proceed with the application as if not abated. On appeal to the Supreme Court :

Held, affirming the decision of the High Court, that the judgment of the High Court was a well-considered one and did not call for any interference.

UOI v. Star Television News Ltd. (2015) 373 ITR 528/231 Taxman 341/ 124 DTR 225 (SC)
Editorial: Decision in Star Television News Ltd. v. UOI [2009] 317 ITR 66 (Bom.)is affirmed.

S. 245I : Settlement Commission - Order – Conclusive –Error of law and fact calculating penalty-Unless the order was proved to be perverse the said order cannot be challenged.[S. 245D(4), 271(1)(c),Constitution of India , Art. 226 ,]

High Court by impugned order held that even if there was an error of law or fact in calculating penalty by Settlement Commission, discretion exercised by it requires no interference unless exercise of power made by Settlement Commission was perverse requiring interference under article 226 of Constitution. Since there was no equity existence in favour of petitioner , order passee by Settlement Commission would attain finality under section 245-1. (AY. 2001-02 & 2002-03)

Arjun Singh Mohan Singh (HUF) v. CIT (2014) 47 taxmann.com 295 (All.)(HC)
Editorial:SLP was dismissed (S.L.A. (C) No. 19468 of 2014 dt. 04-12-2014)(AY. 2001-02 & 2002-03) Arjun Singh Mohan Singh (HUF) v. CIT (2015) 230 Taxman 273 (SC)

S. 245O : Authority for Advance rulings – Where a party seeks advance ruling, endeavour of Authority should be to decide case on merits and settle issue between parties in advance and Authority should not throw out application on mere technicalities. [S. 9, 195,R. 17]

Applicant, engaged in Telecommunication services, entered into agreement with telecom operators of Brazil to render Ring Back Tone services to customers in Brazil. It filed an application to seek advance ruling on applicability of withholding tax provisions to one-time premium paid by it to telecom operators in Brazil. Application had been admitted and heard; thereafter, Authority dismissed application on last date fixed for hearing for non-appearance of applicant. On writ the Court held that as per rule 17, Authority could not dismiss application particularly when non-appearance appeared to be for sufficient cause. where a party seeks advance ruling, endeavour of Authority should be to decide case on merits and settle issue between parties in advance and Authority should not throw out application on mere technicalities.

Onmobile Global Ltd. v. Chairman, Authority for Advance Rulings (2015) 230 Taxman 608/ 124 DTR 13 (Karn.)(HC)

S. 245R : Advance ruling–Procedure – Application–Deduction at source- Long term capital gain- Order was set aside as no reasoning was given-DTAA-India –Singapore.[Art. 13(4)]

Assessee, a Mauritius based company sold equity shares of Indian company to a company located in Singapore. Singapore based company at time of paying sale consideration deducted tax at source and paid same to credit of Government of India on long-term capital gain. Assessee filed an application seeking advance ruling on question as to whether it was liable to pay capital gain tax in India in terms of article 13(4) of India-Mauritius DTAA . AAR declined to entertain assessee's application holding that said application was in respect of a transaction designed prima facie for tax avoidance in terms of section 245R(2)(iii) . On writ allowing the petition the Court held that since impugned order had not given any reason as to why entire issue/transaction had been designed prima facie for purpose of avoiding tax, it was to be set aside and, matter was to be remanded back for de novo consideration.Matter remanded.

NEO Path Ltd. v. DIT (2015) 230 Taxman 554 (Bom.)(HC)

S.245R:Advance ruling- Ruling sought on questions relating to fees for technical services—Not a device to avoid tax-Income from royalty and interest declared in return and taxability conceded—DTAA-India-Belgium-Portugal-Application admitted.

The applicant raised questions about the taxability of the income generated by fees for technical services relying on the Double Taxation Avoidance Agreements between India and Belgium and between India and Portugal. The Department objected to admission of the application on the ground that after filing the application, the applicant had filed a return declaring, inter alia, income on account of royalty and interest on which tax had been charged and, therefore, in not seeking a ruling on any question pertaining to royalty or interest, the applicant had tried to avoid payment of income-tax. The Authority ruled :

That the three questions on which rulings were sought did not pertain to income on royalty or the income generated on account of earned interest. There was no statement in the application that the applicant did not have an income from royalty or from interest and the applicant conceded the taxability of the royalty and interest income. Therefore, this could not be seen as a device to avoid tax. The application was to be admitted.

Magotteaux International S.A. Belgium, in re (2015) 373 ITR 658(AAR)

S.245R: Advance ruling-Non-resident-Assessing Officer not informed of application before Authority-Application admitted.

Where the Department objected that after filing the application when the matter proceeded before the Assessing Officer on the basis of the return filed by the applicant the Assessing Officer was not informed about the applicant having filed the application before the Authority, the Authority ruled ,that admittedly, the applicant was a non-resident Indian. Considering that the applicant was not an Indian taxpayer the application was admitted.

Soregam S. A., Belgium, In re (2015) 373 ITR 660 (AAR)

S. 246 : Appeal – Common order-Assessing Officer passing common order- Assessees's right of appeal is not affected. [S. 201, 221]

The Court held that the fact an appeal is provided under section 246(1)(i) from an order passed under section 201 would not by itslf require the passing of a separate order under section 201 prior to the passing of an oder under section 221 . There is no bar in passing an order setion 201 read with section 221 simutaneously. The assess's right of appeal was not affected by reason of the Assessing Officer passing a common order under section 201 read with section 221 . The assessee was still entitled tofile an appeal from the orders passed under section 201 and section 221 under section 246(1)(i) and (I) , respectively . The grievance of the assessee was that in view of there being a common order under section 201 and section 221 m an opportunity to raise a fresh plea in the penalty proceedings which may may not be raised during the quantum proceedings was lost. Similarly , the

requirement of a written order treating a person to be an assessee in default may not be necessary when it was admitted bwetween the parties that the assesse was in default.(AY. 1985-86, 1987-88)
Reliance Industries Ltd. v. CIT(2015) 377 ITR 74 / 279 CTR 128 (Bom.)(HC)

S. 246A : Appeal-Commissioner(Appeals)-Competency of appeal-Agreed addition-Appeal maintainable only by aggrieved person-Assessee consenting to assessment-Subsequent penalty cancelled-Assessee was not an aggrieved person-Assessee not competent to appeal.[S.271(1)(c)]
The assessees were co-owners of an ancestral property which they sold for a total consideration of Rs. 7,36,07,624. The cost of acquisition was taken at Rs. 2,70,000 per bigha. The Assessing Officer found that the prescribed circle rate for agricultural land, as on April 1, 1981, in the area ranged from Rs.7,000 to 8,000 per bigha. There was no dispute that there was a communication in writing signifying the assent of the assessee to the cost being determined at Rs. 8,000 per bigha in place of Rs. 2,70,000 per bigha. According to the assessee, this was agreed to on the condition that there would be no penalty proceedings and it was for buying peace that the concession was made. However, proceedings were taken to impose penalty under section 271(1)(c). Thereupon, the assessees preferred appeals before the Commissioner (Appeals) under section 246A of the Act. There was delay in filing the appeals. The Commissioner took the view that there was no explanation for the delay and the assessees were not aggrieved persons. The Tribunal affirmed the orders of the Commissioner (Appeals). On further appeals to the High Court :
Held, dismissing the appeals, that the assessees had given in writing, their consent to the cost of the land being taken at Rs. 8,000 per bigha, as on the relevant date, for the purpose of calculation of capital gains. This was not a case which involved a concession of law. It was a case, where a pure question of fact as to what was the value of the land, was involved. It was also relevant to notice that the assessees did not choose to make available any evidence in support of their contentions. It was also important to notice that there was no dispute that, though penalty proceedings were taken, they had all ended in the penalty being cancelled. The assessees were not aggrieved persons and were not competent to appeal. The Court also observed that Section 246A of the Income-tax Act, 1961, provides a right of appeal only to a person who is aggrieved. Generally when an assessment is made on the basis of the consent of the parties, in view of the provision creating the right of appeal, namely, section 246A unless there is any grievance for the party as such that the concession was wrongly recorded or that he was coerced into making such concession the party cannot be treated as an aggrieved person.
Deep Kukreti v. CIT ((2015) 371 ITR 257 (Uttarakhand) (HC)
Sudhir Kukreti v. CIT (2015) 371 ITR 257 (Uttarakhand) (HC)

S.250:Appeal-Commissioner (Appeals)-Additional ground-Claim of export market development allowance was made first time before CIT(A) by filing letter- Fact reflected in printed annual report which contained balance-sheet-Authority directed to consider additional ground and evidence on the merits.[S. 250(5)]
The assessee failed to claim deduction on account of market development expenses in the return. This fact was reflected in the printed annual report, which contained the balance-sheet of the assessee-company. The assessee filed an appeal before the Commissioner (Appeals). After it filed the appeal in a letter to the Commissioner (Appeals) it sought to raise an additional ground and prayed that he determine the total income on the basis of the deduction as allowable under section 37(1) and stating that the omission was neither wilful nor unreasonable. The Commissioner of (Appeals), however, was of the view that the assessee had not explained that the omission was not wilful or unreasonable. The Tribunal upheld the order of the Commissioner (Appeals). On appeal :
Held, allowing the appeal, that the finding of the Commissioner (Appeals) was not in consonance with section 250(5). In terms of section 250(5), the duty is cast on the Commissioner (Appeals) to satisfy himself as to whether the omission to raise the additional grounds in the appeal was not wilful or unreasonable. If the assessee gives an explanation and supports that explanation with relevant material to state why the additional ground was not raised at the first instance, the Commissioner (Appeals) should go into the issue whether such a omission was wilful or unreasonable. The Commissioner (Appeals) had erroneously thrown the onus on the assessee to explain the omission as not wilful or unreasonable. The assessee had given certain reasons with records to show that it was a bona fide

claim but out of inadvertence it was not stated in the return. The failure to make the claim was not wilful and the additional ground raised by the assessee could not be termed as unreasonable. (AY 1987-1988)
Ramco Cements Ltd. v. Dy.CIT (2015) 373 ITR 146 (Mad.)(HC)

S. 250 : Appeal - Commissioner (Appeals)-Additional evidence- When the AO has asked further time to forward remand report, CIT(A) should not have proceeded further without providing a reasonable opportunity.[S.254(1)R. 46A]
when there was a bonafide reason that prevented the Assessing Officer to verify and produce the Remand Report and he asks further time, in the circumstances due to non-consideration of the bonafide reason by the CIT(A) & ITAT, proceeding further with the matter is erroneous.(ITA Nos. 6 to 19 of 2014 dt. 30-10-2014)(AY. 2003-04 to 2009-10)
CIT v. Essence Commodities Ltd (2015) 274 CTR 416/114 DTR 393(MP) (HC)

S. 250 : Appeal- Commissioner (Appeals)--Powers---Commissioner (Appeals) justified in spreading the addition over two years.[S. 69B,142A]
On appeal by revenue dismissing the appeals, the Court held that when the assessees themselves claimed that the construction was spread over two to three years, the finding of the Commissioner (Appeals) that addition, if any made, for the unexplained cost of construction, had to be spread over such years, was nothing but a finding which was necessary for disposal of the case. It was an issue directly involved in the appeals before him and such directions, were not beyond the powers of the Commissioner (Appeals).(AY. 2004-2005)
CIT v. Shivlal (2015) 371 ITR 109 / 229 Taxman 461(Mad.) (HC)

S. 250 : Appeal- Commissioner (Appeals)—Powers- Powers to conduct further inquiry- Matter was remanded.[S.68]
AO has held that the burder to prove identity of creditor its creditworthiness and genuiness transaction was not established, therefore addition was made under section 68. CIT(A) and Tribunal without conducting any proper enquiry deleted the addition.On appeal by revenue allowing the appeal the Court held that, this approach not having been adopted, the impugned order of ITAT, and consequently that of CIT (Appeals), cannot be approved or upheld. Appeal of revenue was allowed, however the issue of reassessment was remanded to the CIT(A).(AY. 2004-05)
CIT v. Jansampark Advertising & Marketing (P) Ltd.(2015) 375 ITR 373/ 231 Taxman 384 (Delhi) (HC)

S. 250 : Appeal-Commissioner (Appeals)-Binding precedent-Orders of the ITAT are binding on the lower authorities and should be followed unreservedly. Blatant failure to do so could attract contempt of court proceedings. [S. 80IB(10), 254 (1)]
The CIT(A), instead of following the order of the Tribunal, followed the order of his predecessor even though it had been set aside by the Tribunal. He also blatantly observed in the order that he cannot sit in judgment over the view taken by his predecessor. On appeal by the department to the Tribunal HELD allowing the appeal:
(i) The findings of the CIT (Appeals) clearly show that instead of deciding the appeal on merits and in compliance with the order of the Tribunal dated 23.11.2011, he preferred to follow the view and order passed by his predecessor. The CIT(A) has even gone to the extent of noting in the impugned order that the view taken by his predecessor was correct. Thus it is clear that the CIT (A) has shown disobedience to the order of the Tribunal by which the earlier order of the predecessor of the CIT (A) was set aside by the Tribunal in toto. The earlier order of the predecessor of the CIT (A) would not stand in the eyes of law;
(ii) It is a clear case of showing disrespect to the order of the Tribunal. Therefore, contempt proceedings could have been initiated against the CIT (A) for blatantly disobeying the order of the Tribunal. The Madhya Pradesh High Court in Agrawal Warehousing & Leasing Ltd. vs. CIT 257 ITR 235 held that the CIT (A) cannot refuse to follow the order of the Appellate Tribunal. The CIT (A) is a quasi – judicial authority and is subordinate in judicial hierarchy to the Tribunal. The orders passed by the Tribunal are binding on all the revenue authorities functioning under the jurisdiction of the

Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities **(**UOI v. Kamlakshi Finance Corporation AIR 1992 SC 711 referred);
(iii) The order of the CIT (A) cannot be sustained in law and is clearly in defiance of the order of the Tribunal. Since it is a first matter reported to us during the course of arguments by the D.R that the order of the CIT (A) shows complete defiance of the order of the Tribunal, therefore, we do not propose at the stage to initiate contempt proceedings against the CIT (A). However, we warn him to be careful in future in following the order of the Tribunal in accordance with law and should not show any defiance to the order of the Tribunal.(AY. 2007-08)
DCIT v. Sham Sunder Sharma (Chd.)(Trib.); www.itatonline.org

S.250:Appeal-Commissioner (Appeals)-Admission of fresh evidence-Failure by Department to list out fresh material brought for first time on record before Commissioner (Appeals)-No acceptance of fresh evidence to come to final conclusion except personal visit to premises.[S.251,R.46A.]
Held that the objection by the Department that there was violation of provisions of rule 46A of the Income-tax Rules, 1962 could not stand as the Department failed to list out the fresh material brought for the first time on record before the Commissioner (Appeals). The Commissioner (Appeals) did not accept fresh evidence to come to final conclusion except personal visit to the factory premises to have first hand information on research and development activities (AY. 2007-2008, 2008-2009)
ACIT v. Lakshmi Machine Works Ltd. (2015) 38 ITR 61/ 69 SOT 157 /167 TTJ 40(UO) (Chennai)(Trib.)

S. 251 : Appeal - Commissioner (Appeals) – Powers – Stay- Financial hardship is irrelevant-Prima facie case to be considered.
While disposing of stay application, authority, before considering financial situation of an applicant, has to first consider prima facie case pleaded by applicant and if same is covered against revenue in view of a decision of a superior forum, then question of considering issue of financial hardship is irrelevant. Stay application cannot be rejected on ground that issues raised in appeal and stay have already been dealt with in assessment order. (AY. 2011-12)
Mumbai Metropolitan Region Development Authority v. Dy.CIT (2015) 273 CTR 317 / 230 Taxman 178 (Bom.)(HC)

S. 251 : Appeal - Commissioner (Appeals) – Powers –Reference to valuation Officer- Valuation as on 1-04-81-Matterremanded.[S. 45, 55A, 250(4)]
Where Assessing Officer fails to make enquiry under section 55A while passing assessment order, Commissioner (Appeals) during appellate proceedings before him can make such an enquiry (by making reference to DVO) either himself or direct Assessing Officer to do so in terms of section 250(4). On Writ Court held that; however, before Commissioner (Appeals) makes such a reference to DVO in term of section 55A, he must be of opinion that value determined by Registered Valuer as FMV of property as on 1-4-1981 is less than its FMV.Matter remanded.c(AY. 2002-03)
Rallis India Ltd. v. CIT (2015) 374 ITR 462/ 276 CTR 351 / 230 Taxman 483 (Bom.)(HC)

S. 251 : Appeal-Commissioner (Appeals)–Powers-Additional evidence-Commissioner (Appeals) taking into account additional evidence and submission of Income-tax Department--Order valid. [IT R. 46A.]
Court held that under rule 46A, all depends upon the satisfaction of the Commissioner (Appeals) as to the admissibility of the documents and no adversarial exercise needs to be undertaken at that stage. Once the document is admitted as additional evidence, for the first time at the stage of appeal, the Department is entitled to put forward its own contention or objection vis-a-vis the same. Here again, two aspects become relevant. If the additional evidence is in the form of any document, the Department shall be entitled to examine or make its own scrutiny of the document. On the other hand, if the evidence is in the form of deposition of any witness, it shall be entitled to cross-examine him. The first is provided for under clause (a) and the second under clause (b) of sub-rule 3. Independently

the Department can adduce its own oral or documentary evidence to contradict or rebut the additional evidence that was adduced by a party, for the first time, at the stage of appeal.
Held, that the record did not disclose that the Department had raised any objection whatever, to the additional evidence that was produced by the assessee. On the other hand, arguments were advanced with reference to the additional evidence also and the Commissioner (Appeals) dealt with the additional evidence. In other words, the Commissioner (Appeals) took into account the additional evidence duly taking into account the plea of the Department. His order was valid.(AY 1998-1999)
CIT v. Unique Plastics P. Ltd. (2015) 373 ITR 201 (T & AP)(HC)

S. 251 : Appeal - Commissioner (Appeals) – Stay- 25 percent of demand was with revenue by way of refund , further demand of of 50 % of tax was held to be un reasonable .
Where 25 per cent of demand was already with revenue in form of an amount due by way of refund to assessee, condition of deposit of 50 per cent of demand imposed by AAC for grant of stay of assessment order pending disposal of appeal was not justified. (AY. 2011-12)
Sooriya Hospital v. CIT (2015) 229 Taxman 242 (Mad.)(HC)

S. 251 : Appeal - Commissioner (Appeals) – Powers –Enhancement-Notice is must.
If CIT(A) intends to enhance tax liability to detriment of assessee, that too in an appeal preferred by assessee, a notice under section 251(2) must be issued requiring assessee to show cause as to why such a course of action be not taken.(1990-91 to 1992-93)
Y Brahmiah v. ITO (2015) 229 Taxman 558 (AP)(HC)

S. 251 : Commissioner (Appeals)–Binding nature-Assessing Officer failed to give effect to directions issued by Commissioner (Appeals), it amounted to gross abuse of process of law and, in such a case, matter was to be brought to notice of Chairman CBDT so that necessary action could be taken for providing training/guidance in this respect to revenue officials. [S. 14A]
On the facts of the case the AO has failed to give effect to the order of Tribunal relating to computation of disallowance in terms of section 14A. On appeal CIT(A) directed the AO to give effect o the order of Tribunal . Against the said order the revenue filed an appeal before Tribunal . Dismissing the appeal of revenue the Court held that; Order of lower judicial authority merges with that of appellate authorities and lower authority is bound to give effect to order of higher /appellate authority unless it has been set a-side or modified , as the case may be by higher /highest court to said appellate authority. On the facts the Assessing Officer failed to give effect to directions issued by Commissioner (Appeals), it amounted to gross abuse of process of law and, in such a case, matter was to be brought to notice of Chairman CBDT so that necessary action could be taken for providing training/guidance in this respect to revenue officials**.** (AY.2006-07)
ACIT .v. S. Ganesh (2015) 68 SOT 110(URO) (Mum.)(Trib.)

S. 251 : Appeal - Commissioner (Appeals)-Revised computation-Claim can be made before appellate authorities even if not made before Assessing Officer.[S.10A]
At the time of filing its return, the assessee claimed 50 per cent. of deduction under section 10A of the Act. During the course of the assessment proceedings, the assessee filed a revised computation of income claiming 100 per cent. deduction. The Assessing Officer denied the claim on the ground that the claim made after the return, otherwise than by way of a revised return, could not be entertained. The Commissioner (Appeals) directed the Assessing Officer to allow deduction under section 10A of the Act at 100 per cent. On appeal :
Held, dismissing the appeal, that even if a claim was not made before the Assessing Officer, it could be made before the appellate authorities. Therefore, the claim made by the assessee before the Commissioner (Appeals) was allowable. (AY. 2010-2011)
ITO v. XS Cad India P. Ltd. (2015) 39 ITR 51 (Mum.)(Trib.)

S. 251 : Appeal - Commissioner (Appeals) – Powers- In an appeal against an order passed by the AO to give effect to the ITAT's order, the CIT(A) has no jurisdiction to enhance the assessment with respect to a new source of income or disallowance of expenditure.[S.40(a)(ia), 68, 254(1)]

The ITAT directed that the assessee be granted sufficient opportunity to rebut the evidence used by the Assessing Officer regarding the addition of Rs.89,39,92,188 made by the Assessing Officer on account of alleged short receipts declared in the profit and loss account violating the principles of natural justice. In compliance, the Assessing Officer made the assessment on the issue afresh under sec. 254 read with 143(3) of the Act making the addition of Rs.4,55,41,557 out of Rs.89,39,92,188 which was questioned before the CIT(Appeals). The CIT(Appeals) not only upheld the addition of Rs.04,55,41,557 made on account of short receipts declared in profit and loss account but enhanced the income by directing the Assessing Officer to disallow payments made by the assessee under sec. 40(a)(ia) of the Act. The assessee claimed that by directing the Assessing Officer to make the disallowance of payments made by the assessee under sec. 40(a)(ia) of the Act, the CIT(Appeals) has introduced in the assessment a new source of income, which is not allowed in an assessment which was made by the Assessing Officer strictly in compliance of the order of the ITAT for reconsideration of addition of Rs.89,39,92,188 after examining the evidence and upholding opportunity of being heard to the assessee. HELD by the Tribunal:

(i) The direction to the Assessing Officer by the CIT(Appeals) to disallow payments made by the assessee under sec. 40(a)(ia) of the Act was a question of taxability of income from a new source of income which has not been considered by the Assessing Officer, hence it was exceeding of jurisdiction by the CIT(Appeals) in a set aside matter by the ITAT in the present case. Though the CIT(Appeals) has co-terminus powers as of the Assessing Officer and is empowered to do what an Assessing Officer can do for the assessment, the directed disallowance was new source of income, which was not the subject matter of setting aside order by the ITAT, in compliance of which assessment under sec. 254 read with section 143(3) was framed.

(ii) The power of the CIT(Appeals) to set aside assessment, which does not involve a proposal for enhancement cannot be used for the purpose of expending the whenever the question of taxability of income from a new source of income is concerned, which had not been considered by the Assessing Officer, the jurisdiction to deal with the same in appropriate cases may be dealt with under sec. 147/148 of the Act and section 263 of the Act, if requisite conditions are fulfilled. It is inconceivable that in the presence of such specific provisions, a similar power is available to the appellate authority. AY. 2007-08)

Cheil India Pvt. Ltd. v. ITO (Delhi)(Trib.); www.itatonline.org

S. 251 : Appeal-Commissioner (Appeals)-Powers-Commissioner (Appeals) directing Assessing Officer to consider agricultural income for rate purpose--Not entitled to remit issue for further investigation.

Held, that in the first round of appeal, the CIT(A) observed that the Assessing Officer should carry out a detailed inspection in respect of agricultural operations, standing crops, trees and agricultural yield and also directed the Assessing Officer to consider the agricultural income as exempt in case of denial of exemption of the trust was treated as allowed in accordance with the provisions of the Act. Thus the Commissioner (Appeals) could not remit the issue for further investigation to the Assessing Officer. The CIT(A) ought to have called for a remand report, if it required reconsideration. The order of the Commissioner (Appeals) was not sustainable to that extent. However, the assessee could not be denied exemption on the basis of agricultural activity as the assessee produced a certificate from the Revenue authorities exhibiting the standing of mango, beetlenut and coconut trees and 108 acres of agricultural land which could generate incomes shown by the assessee. (AY. 2002-2003, 2005-2006, 2006-2007)

Dy. CIT v. R. N. Shetty Trust (2015) 37 ITR 584 (Bang.)(Trib.)

S. 253:Appellate Tribunal-Limitation–Delay of 754 days-No satisfactory explanation regarding delay - Delay could not be condoned.

Held, the material on record showed that in the case of the firm, the managing partner had been on medical treatment for a very short duration for an intermittent period. It would not have been difficult for the managing partner if really he had been diligent to file the appeal in time. Even assuming that he was on continuous medical treatment, the son or other partners should have been diligent in taking up the responsibility in filing the appeal in time. Therefore, when the conduct on the part of the

assessee exhibited gross negligence and a procrastinating attitude and incorrect grounds, the Tribunal rightly dismissed the petition to condone the delay of 754 days. (AY. 2007-2008)
Ajmeer Sheriff and Co. v. ITO (2015) 373 ITR 15 (Mad.)(HC)

S. 253 : Appellate Tribunal - Powers of Tribunal - Appeal not entertained on ground barred by limitation - Tribunal has no power to consider merits- Matters set a side.[S.254(1).
Section 253(5) of the Income-tax Act, 1961, mandates that an appeal should be admitted before an order is passed on the merits. Once the appeal itself is not entertained, the question of going into the merits of the matter does not arise.
Held, that the procedure adopted by the Tribunal was highly prejudicial to the interests of the assessee inasmuch as the Tribunal having decided not to proceed with the matter on the ground of condonation of delay could not unilaterally decide the appeals on the merits, especially when the assessee was not given proper opportunity to contest the matter in the main appeals on the merits. Matters were set aside to the Tribunal for reconsideration.(AY. 1995-1996 to 2000-2001)
Centre for Individual and Corporate Action (CICA) v. ACIT (2015) 370 ITR 35 (Mad)(HC)

S. 253:Appellate Tribunal –Department representative can only support the AO's order and cannot set up an altogether new case before the ITAT.[S. 43(3), 73]
The Departmental Representative has no jurisdiction to go beyond the order passed by the Assessing Officer. He cannot raise any point different from that considered by the Assessing Officer or the Commissioner of Income-tax (Appeals). His scope of arguments is confined to supporting or defending the impugned order. He cannot set up an altogether different case. Followed ACIT v.Aishwarya K. Rai (2010) 127 ITD 204 (Mum)(Trib)/ ITO v. Anant Y. Chavan (2009) 126 TTJ 984 (Pune)(Trib.)/ Mahindra and Mahindra (2009) 313 ITR 263 (SB)(Mum.)(Trib.) (ITA No. 2138/Mum/2010, dt. 07.08.2015) (2006-07)
DCIT .v. Envision Investment & Finance Pvt. Ltd. (Mum.)(Trib.); www.itatonline.org

S.253:Appellate Tribunal-No cross objection can be filed against the order of Commissioner under section 263. [S.263]
Tribunal held that provisions of the Act does not provide for filing of cross objection against the order u/s 263 hence the cross objection of revenue was dismissed. I.T.A. No. 1326/Hyd/14 C.O. No. 57/Hyd/14, dt. 07.08.2015) (AY. 2009-10)

Malineni Babulu (HUF) .v. ITO (Hyd.)(Trib.); www.itatonline.org

S.253:Appellate Tribunal-Strictures passed against the Department for 'mischievous adamancy to attempt to mislead the Tribunal', 'obduracy and adamancy in filing meritless appeal', 'travesty of justice', 'Mocking at the system by filing the appeals', 'grave assault on the trust and reputation of fair play enjoyed by the tax administration' etc
(1). We are pained to address the serious damage done by this deliberate, mischievous and selective reference to facts by such responsible persons which grievously damages the public faith and belief in the honest fair play of the tax administration. The conscious and selective reference to facts demonstrates that at the very stage of filing of the appeal its fate and conclusion was known for which specific purpose the facts were attempted to be obfuscated. The filing of present appeal with complete knowledge of its fate by the Revenue only reflects the mischievous adamancy to attempt to mislead the Tribunal and waste the time of the Court and the officers concerned. The present appeal as a part of a search cannot be a case of non-application of mind where the grounds presumably proposed by the AO have been approved carelessly. To our minds the present appeal is a prime example of meritless litigation for reasons best known to the few departmental officers having powers of directing authorization for filing appeals. This over confidence of the concerned Departmental officers in filing an appeal completely devoid of merit prima facie shows that these officers endowed with the onerous task of handling Department's actions in litigation matters have willfully and deliberately failed to exercise their powers mindfully as required of them as per law and thereby abused government machinery to initiate a litigation which entails financial costs and tarnishes the image of the Department and also strains the government resources.

(ii) This obduracy and adamancy of the concerned officers in filing a meritless appeal only because officially they are entitled/empowered to do so, strikes a blow to the blind faith reposed in them by the tax administration in always acting fairly as evident from the orders passed in the Remand proceedings and the order of the CIT(A) in the present appeals. However only because of the conduct of few Departmental officers who appear to be unconcerned or rather mock the sincere efforts made by CBDT with impunity unmindful of the consequences to the system by their sense of entitlement the reputation of the tax administration suffers, this needs to be addressed at the earliest. The entitlement of always believed to be acting in good faith cannot be abused by irresponsibly setting in motion the entire justice delivery system where admittedly there was no grievance to the AO. The Assessing Officer including all the officers in the tax administration are functionaries of "the State" exist for "the State" and perform the functions of "the State". For this specific purpose they are entrusted with vast powers to discharge "the State functions". In the discharge of their onerous duties and responsibilities these officers are armed with wide and sweeping powers.

(iii) The officers who have authorized the filing of the appeals and have filed the appeals have made a travesty of justice. Mocking at the system by filing the appeals and highlighting the apathy of the Department by issuing specific instructions from time to time that necessary due diligence and caution is not being exercised while granting authorization for filing appeals and to pursue litigation only in deserving cases. Filing of an appeal by an Assessing Officer is a right which is vested by the statue in the "State" herein the tax department i.e. the Assessing Officer as and when he is aggrieved by the order of the First Appellate Authority can file an appeal before the ITAT. However, where as in the present case, admittedly the Assessing Officer, consciously and carefully after due and proper enquiry carried out by issuance of notices u/s 133(6) to the concerned persons/parties and considering the material comes to the conclusion that he is satisfied by the claim of the assessee on verification, then in such a situation the filing of the present appeals cannot be justified and can only be termed as a farce. We are aware that the tax administration has put in place robust checks and balances to ensure that the filing of appeals is not done carelessly and as per the procedures set in place the grounds to be raised by the Assessing Officer have to be duly approved by a Senior Commissioner of Income Tax. The evidence that the said exercise in the facts of the present case has been done is on record. The said exercise in the facts of the present appeals has been reduced to a mere ritual cannot be ignored. Thus in the face of the above precedent where costs of Rs.10, 000/- have been awarded to the assessee by the Co-ordinate Bench having giving our serious consideration to the same in the facts of the present case where the Revenue has indulged in frivolous meritless litigation, we desist from awarding costs considering the statement of the Ld. CIT DR that due care shall be taken in future. It is our earnest hope and endeavour that having invited the attention of the Chairman, CBDT to this grave assault on the trust and reputation of fair play enjoyed by the tax administration the malaise is immediately addressed. We have taken cognizance of the fact that the present cases are group of appeals in a search case, however where the issue is given up by the AO in the remand proceedings in such an eventuality the mischievous manner of filing the appeals needs careful attention as the Revenue in the appeals before the ITAT cannot be allowed to waste the time of all concerned where the issue for all intents and purposes has been given up by him.(ITA No. 4688-4690/Del/2012, dt. 07.08.2015)(AY. 2004-05, 2006-07 ,2009-07)

ACIT .v. R.P.G Credit & Capital Ltd. (Delhi) (Trib.); www.itatonline.org

S. 253 : Appellate Tribunal -New issue not basis of disallowance by Assessing Officer cannot be adjudicated- Departmental representative cannot enlarge the scope of the revenue's appeal. [S.80IA, 254(1)]

The assessee claimed deduction under section 80IA of the Income-tax Act. Held, that the contention raised by the Department was not the basis of disallowance by the Assessing Officer, subject matter before the Commissioner (Appeals) and the Tribunal. Therefore, the issue raised by the Department was a new one and could not to be adjudicated by the Tribunal. Tribunal relied on the ratio of judgment in Kamal Kishore and Co v.CIT (1998) 232 ITR 668 (MP)(HC). The bus shelters and foot overbridges should be considered as part of the infrastructure facility and therefore, the assessee was entitled to deduction under section 80IA of the Act.(AY. 2004-2005 to 2009-2010)

Dy.CIT v. Vantage Advertising P. Ltd. (2015) 39 ITR 240 (Kol.) (Trib.)

S. 253 : Appellate Tribunal – Ex-parte dismissal- None was present dismissal was held to be justified.[ITAT Rule, 19(2)]

It was held that where none was present on behalf of assessee for hearing, neither any adjournment was sought, appeals filed by assessee was to be dismissed keeping in view provisions of rule 19(2) of Income-tax (Appellate Tribunal) Rules. (AY. 2001-02 to 2007-08)

Susham Singla .v. ACIT (2014) 33 ITR 449 / (2015) 154 ITD 310 / 67 SOT 236 (Chd.)(Trib.)

S. 253 : Appellate Tribunal- CIT(A)-Stay-Appeal in the ITAT can be filed against order of the CIT(A) on a stay application. Stay should be granted if relevant criteria of existence of prima facie arguable case, irreparable loss and financial position are not considered by the CIT(A).[S. 201(1), 250]

Considering the fact that the issue on merits is yet to be decided by the CIT(A) and being of the view that the findings arrived at in para 5 have not taken into consideration the relevant criteria for deciding the issue namely the existence of prima facie arguable case in favour of assessee or not; irreparable loss if any and the financial position of the assessee etc. as no reference to these settled legal parameters is found mentioned in the order. It also seen that the merits of the order of the Assessing Officer till date have not been tested by any Appellate Authority. Thus, in these peculiar facts and circumstances, we direct the Revenue authorities from refraining to take any co-ercive action against the assessee till the passing of the order of the CIT(A) on merits. In view of the same, the Ld. CIT(A) is directed to pass a speaking order in the appeals on merit after giving the assessee a reasonable opportunity of being heard. (AY. 2010 -11 to 2015-16)

Bharat Heavy Electrical Ltd. v. ITO(TDS) (Delhi)(Trib.); www.itatonline.org

S. 253: Appellate Tribunal-Limitation--Appeal filed after delay of 347 days-Assessee failing to show reasonable cause for delay--Onus on assessee to explain all events and be specific in dates--Affidavit given by chartered accountant remaining uncorroborated and unreliable-Delay cannot be condoned-Appeal was dismissed.[S.148]

In a survey conducted in the business premises of the assessee, the Assessing Officer found certain incriminating material indicating that the institution was being run with a profit motive and was not eligible for exemption. For the assessment years 2005-06 and 2006-07, the assessee had not filed returns and the Assessing Officer issued notice under section 148 of the Income-tax Act, 1961. The assessee did not file returns within the stipulated time, and the assessment was completed ex parte under section 144 of the Act. The Commissioner (Appeals) confirmed this. On appeal by the assessee :

Held, dismissing the appeal, that it was clear that the assessee had not explained the cause for condonation of the delay of 347 days in filing the appeal. The assessee had to explain all the events and be specific in the dates. The vague affidavit given by the chartered accountant remained uncorroborated and unreliable. Therefore, the delay of 347 days in filing the appeals could not be condoned. (AY. 2005-2006, 2006-2007)

K. G. N. M. M. W. Educational Research and Analysis Society v. ITO (2015) 38 ITR 623/ 68 SOT 247 (JP)(Trib.)

S.253: Appellate Tribunal-Appeal- Penalty-Annual information return- Appeal is maintainable before Tribunal and not before CIT(A).[S. 271FA]

The order under section 271FA was passed by DIT who is equivalent in rank with CIT(A).Therefore, order of DIT cannot be challenged or assailed by filing an appeal before an Officer i.e. CIT(A), who is equivalent in rank with DIT. Hence, Appeal could only be filed before a higher forum than forum whose order was to be challenged and higher forum was only ITAT and before it order of the Director of Income-tax could only be challenged by filing an appeal. Hence, Appeal by assessee had been rightly filed before the Tribunal and the Tribunal was competent to adjudicate appeal on merit, hence revenue's preliminary objection dismissed. (AY.2012-13).

Raibareilly District Co-Operative Bank Ltd. v. DIT(2015) 114 DTR 321/ 38 ITR 27 /168 TTJ 274 /54 taxmann.com 382 (Lucknow) (Trib.)

S. 253:Appellate Tribunal-Cross objection-Appeal by department-In a cross-objection, a new legal issue can be raised for the first time before the ITAT. [S.153A,253(4), 254(1), R.22, 36A]

In the appeal filed by the department, the assessee filed a cross-objection in which it raised the ground for the first time that the assessment order passed u/s 153A was not valid as satisfaction was not recorded, no incriminating material was recovered etc. The department objected to the cross-objection on the ground that the assessee was not permitted to raise issues before the Tribunal which were not raised before the lower authorities. HELD by the Tribunal rejecting the department's plea:

There is no difference between an appeal and a cross-objection. In a cross-objection, a legal issue which has not been raised before the lower authorities can be raised. The C.O. need not be confined to the points taken by the opposite party in the main appeal (DHL Operations 108 TTJ 152 (SB)(Mum) followed).(Cross Objections no. 138 to 142/Del/2014, dt. 23.09.2014) (AY. 2004-05 to 2007-08)

ITO v. Jasjit Singh (Delhi)(Trib.); www.itatonline.org

S. 253:Appellate Tribunal-Stay-An appeal can be filed before the Tribunal against an order of the CIT(A) rejecting the stay application.[S.201(1), 250]

During the pendency of an appeal before the CIT(A), the assessee filed a stay application. The CIT(A) dismissed the stay application. Against the said order, the assessee filed an appeal before the Tribunal. The Tribunal had to consider the preliminary point whether an appeal against a stay order of the CIT(A) is not maintainable. HELD by the Tribunal:

Section 253(1)(a) provides for an appeal to the Tribunal against an order passed by the CIT(A) under section 250 of the Act. The Act does not expressly provide power to the CIT(A) to grant stay of demand. However, it is well settled on the principle laid down in ITO Vs. M.K. Mohammad Kunhi 71 ITR 815 (SC) that the CIT(A) has inherent power to stay the demand when the appeal is pending for disposal before him. The term 'order' has not been defined under the Act. It is judicially understood that the word 'order' is a noun and has been held equivalent to or synonymous with the word 'decision'. Therefore, held that the CIT(A) has passed the order u/s 250 of the Act, in our opinion, the appeal is clearly maintainable under clause (a) of sub-section (1) of Section 253 of the Act.(ITAT Nos. 1766 to 1768/Del/2015, dt. 10.04.2015) (AY. 2011-12 to 2013-14)

Employees Provident Fund Organization .v. ACIT(2015) 39 ITR 607/153 ITD 642 (Delhi)(Trib.)

S. 253:Appellate Tribunal-There is no judicial impropriety in the CIT filing an appeal before the Tribunal against his own order as CIT(A) deciding the appeal in favour of the assessee-Proportionate deduction in respect of housing project was allowed.[S.80IB(10)]

The department filed an appeal before the Tribunal against the order of the CIT(A). The CIT, who sanctioned the filing of the appeal, happened to be the same CIT(A) who had allowed the assessee's appeal. The assessee filed a C.O. claiming that the appeal was not maintainable as there was a violation of judicial propriety. It was claimed that the CIT(A) who had allowed the appeal could not, on becoming CIT, sanction the filing of an appeal against his own order as it violate the principle of "no man can be a judge in his own cause". The Tribunal dismissthe cross-objection stating:

(i) The plea of the assessee that there was judicial impropriety in the case was not established because the present Commissioner of Income Tax Administration as Commissioner of Income Tax (Appeals) had passed the order and decided the issues on the basis of various case laws. However, when acting as Commissioner of Income Tax Administration and in view of the facts that there was no legal precedent by the Hon'ble Supreme Court or by the Hon'ble jurisdictional High Court on the said issue, directed the Assessing Officer to file appeal against the impugned order. It is not a case where the present person was setting in judgment of the earlier order passed by him but was acting in the capacity of administrator wherein the issues were put before higher forum to adjudicate the same.

(ii) The reliance by the Ld. AR for the assessee on the ratio laid down by the Allahabad High Court in the case of Mohd. Chand And Another (supra) is misplaced as in the facts before the Hon'ble High Court, the person who had passed the basic order was later sitting in appeal and was hearing the appeal against his own order. In such circumstances, the Hon'ble High Court held that the principles of natural justice that no man can be a judge in his own cause, was attracted. Further the Ld. AR for the assessee placed reliance on the ratio laid down by the Hon'ble Supreme Court in the case of Ashok Kumar Yadav and Others (supra) wherein also similar principle of jurisprudence that no man

can be a judge in his own cause was looked into and it was observed that where there was a reasonable likelihood of bias then such decision should not be taken. The Hon'ble Apex Court held that the basic principle underlying in this rule is that justice must not only be done but must also appear to be done and this rule has received wide recognition in several decisions of the Court. It is also important to note that this rule is not confined to cases where judicial power strictosensu is exercised. It is appropriately extended to all cases where an independent mind has to be applied to arrive at a fair and just decision between the rival claims of parties.
(iii) The principle propounded by the Hon'ble Supreme Court was in respect of a decision between rival claims of the parties. However, in the facts of the present case, the situation was at variance where the CIT(A) had passed the impugned assessment order and then as Commissioner of Income Tax Administration had directed the Assessing Officer to file an appeal before the Tribunal against the said order and the decision on the rival claims of the parties had to be taken by the Tribunal and not by the Commissioner of Income Tax Administration. On merits proportionate deduction allowed by the CIT(A) in respect of housing project was affirmed. (AY. 2007-08)
ITO .v. Paras Builders (2015) 40 ITR 507/ 69 SOT 82 (URO(Pune)(Trib)

S. 254(1) : Appellate Tribunal – Condonation of delay-Delay of four years- Ex parte order-Delay was not properly explained
Ex parte order was passed. Assessee could not explain the delay of four years. No sufficient reason for long delay occasioned in challenging ex parte order of Tribunal. (AY. 1999-2000, 2000-01 & 2002-03)
Kerala Tourism Infrastructure Ltd. v. ACIT (2015) 229 Taxman 551 (Ker.)(HC)

S.254(1):Appellate Tribunal--Condonation of delay--Delay of 1100 days--Tribunal declining to condone delay- Held to be justified.[S.254(2), Code of Civil Procedure, 1908, O. 41, r. 27]
Tribunal declined the condonation of delay of 1100 days. The assesse filed Miscellaneous petition seeking to furnish additional documents in the form medical certificate. Tribunal dismissed the petition. On appeal , dismissing the appeal the Court held that there was no material to show Tribunal refused to admit documents or assessees could not produce such documents before Tribunal. Certificate not showing assessee seriously ill and continuously hospitalised as pleaded, however no sufficient cause shown for condoning delay. Tribunal justified in not condoning inordinate delay.
EVP Estates and Properties Development Ltd. v. ACIT (2015) 373 ITR 464 (Mad.)(HC)
EVP Housing Chennai P. Ltd. v. ACIT (2015) 373 ITR 464 (Mad.)(HC)
E.V.Perumaisamy Reddy v. ACIT (2015) 373 ITR 464 (Mad.) (HC)
P.S. Rajeshwari(Mrs.) v. ACIT (2015) 373 ITR 464/231 Taxman 415 (Mad.)(HC)

S.254(1):Appellate Tribunal- Orders-Action of the ITAT in disregarding its own order without reason and remanding matter to AO for fresh consideration is "arbitrary" and "failure to perform basic judicial function" and a "lapse" which should not occur again- Order of Tribunal was set aside.[S.10A]
The issue before the Tribunal was regarding disallowance made on account of claim for deduction under Section 10A of the Act. This very issue was covered in favour of the Petitioner by the decision of the Tribunal for A.Y. 2005-2006 in the Petitioner's own case. The departmental representative before the Tribunal also accepted the position. Inspite of the agreed position between the parties, the Tribunal by the impugned order yet remands this very issue to the Assessing Officer for fresh examination/determination. This is without in any manner even attempting to indicate why and how its earlier decision will not apply to the facts for the subsequent Assessment year. The Tribunal should not completely disregard its earlier order without some reason. This is the minimum expected of any quasi judicial / judicial authority. If the Tribunal has failed to perform it's basic judicial functions in such arbitrary manner, the approach of the Tribunal must be corrected, so as to ensure that such lapses do not occur again.(AY.2009-10)
Hinduja Global solution Ltd. v. UOI (Bom.)(HC); www.itatonline.org

S.254(1):Appellate Tribunal0 Non speaking order-Reference to dispute resolution panel - Matter remanded.[S.144C]

Where Tribunal in course of appellate proceedings, did not consider assessee's objection in relation to non-compliance of provisions of section 144C by authorities below and passed an ex parte non-speaking order of remand, order so passed was to be set aside and, matter was to be remanded back for disposal afresh on merits.(AY. 2007-08)
India Trimmings (P.) Ltd. v. ACIT (2015) 230 Taxman 185 (Mad.)(HC)

S. 254(1):Appellate Tribunal – Orders –Settlement commission- Appeal withdrawn before Tribunal as the petition was filed before Settlement Commission- Petition was abated due to non payment of tax- Appeal filed before the Tribunal was restored.[S. 158BC,245D, 245HA]
Assessee filed appeal before Tribunal against order made by Assessing Officer under section 158BC . Subsequently, he withdrew proceedings before Tribunal as matter was pending before Settlement Commission .Proceedings before Settlement Commission abated due to non-deposit of additional tax. Assessee sought restoration of appeal before Tribunal. Allowing the petition the Court held that if appeal was not restored to Tribunal, same would cause immense prejudice to assessee inasmuch as assessment order made under section 158BC would attain finality and would be binding upon assesse, therefore, in interest of justice appeal filed by assessee before Tribunal should be restored.
Pukhraj Bhabhutmal Shah v. ITO (2015) 230 Taxman 40/118 DTR 239 (Guj.)(HC)

S. 254(1):Appellate Tribunal–Additional ground-Grounds not raised before the CIT(A) can also be raised before the Tribunal.[S.253, ITAT Rule, 11]
Assessee has right to raise additional ground before Tribunal and if same is beneficial to assessee, same should be considered by Tribunal even though said issue was not adjudicated before Commissioner (Appeals). (AY. 2002-03)
CIT v. Indian Bank (2015) 55 taxmann.com 372 / 230 Taxman 635 (Mad.)(HC)

S.254(1):Appellate Tribunal–Orders–Adjournment-Medical grounds- Refusal of adjournment was held to be not justified.
Allowing the petition the Court held that where Tribunal did not consider pray for adjournment sought on medical ground of assessee's advocate, order passed by Tribunal in absence of assessee was unjustified . Board of Trustees of Martyrs Memorial Trust v. UOI ((2012) 10 SCC 734 (Para 9)
Panchmukhi Builders v. ITO (2015) 230 Taxman 314 (Karn.)(HC)

S. 254(1) : Appellate Tribunal – Orders –Adjournment-Medical ground of assessee's advocate-Order of tribunal was set aside.
Allowing the petition the Court held that where Tribunal did not consider prayer for adjournment sought on medical ground of assessee's advocate there was denial of reasonable opportunity of hearing to assessee; thus, order passed by Tribunal in absence of assessee was unjustified. Referred Board of Trustees of Martyrs Memorial Trust v. UOI ((2012) 10 SCC 734 (Para 9). (AY. 2005-06 to 2007-08)
Jai Ganesh Builders & Developers .v. ITO (2015) 230 Taxman 555 (Karn.)(HC)

S. 254(1) : Appellate Tribunal--Precedent--Order of Special Bench--Binding—Appeal pending before High Court--Not a ground to direct Assessing Officer to redecide issue after disposal of appeal by High Court--Tribunal either to follow or not to follow Special Bench decision--Tribunal to decide matter afresh.
Where the appeal against the order of a Special Bench of the Tribunal was pending adjudication before the High Court and the Tribunal passed an order of remand for redecision of the case of the assessee after disposal of the appeal by the High Court :
Held, allowing the appeal, that until and unless the decision of the Special Bench was upset by this court, it would bind a smaller Bench and a co-ordinate Bench of the Tribunal. Thus, it was not open to the Tribunal to remand on the ground of pendency of an appeal on the same issue before the court, overlooking and overruling, by necessary implication, the decision of the Special Bench. It was not permissible under quasi-judicial discipline. Therefore, the order of the Tribunal was to be set aside and the matter restored to the Tribunal to decide the issue in accordance with law. It would be open to

the Tribunal either to follow the Special Bench decision or not to follow it. If the Special Bench decision was not followed, obviously the remedy lay elsewhere.
CIT v. Janapriya Engineers Syndicate (2015) 371 ITR 439/229 Taxman 366/274 CTR 71 (T & AP) (HC)

S.254(1):Appellate Tribunal-Orders-ITAT's practice of routinely consolidating appeals is "most unfortunate, disturbing and dangerous" and leads to "pile-up" of cases. Such "elementary mistakes" should not be committed in future. ITAT is expected not to sign judgments and decisions unless they are checked thoroughly after transcription. It may be a boring task but it has to be performed by none other than the decision makers. S. 253]
Revenue has filed appeal against the order of Tribunal , in the course of admission the Honourable Bombay High Court has made the following observations .
Para 6 " As far as question No. 5 is concerned , we find the factual situation the backdrop of which this question is raised to be most unfortunate, disturbing and dangerous to say the least. The Tribunal as a matter of routine goes on consolidating appeals. …" . " We really fail to understand as to any finding and stated to be factual and rendered for which year has been applied and followed for the latter years. If by settled principles and sheer common sense latest must follow the former or earlier than which is latest or later and which is former and earlier is not clear from these two paragraphs. However, the revenue has clearly conceded the position before the Tribunal. It must, therefore, suffer for having consented to the state of affairs and brought about by the Tribunal's orders and directions noted and reproduced above." In this regard, we cannot do anything better then invite the attention of all concerned to the judgment of the Hon'ble Supreme Court rendered in the case of M/s. Chitivalasa Jute Mills V/s. M/s. Jaypee Rewa Cementreported in A.I.R. 2004 Supreme Court, 1687. In the context of power of consolidation of suits, the Hon'ble Court held as under ….
(iii) Thus, what holds good for consolidation of Suits would equally apply to appeals. We are not persuaded by the sincere efforts of Mr. Tejveer Singh in this case and the request made by him to still entertain this appeal so that once and for all the Tribunal can be guided by this Court. We think that our observations made above are enough to guide the Tribunal and we hope that such mistakes and elementary in nature are not committed in future. We also expect the Tribunal not to sign judgments and decisions unless their checked thoroughly by them after their transcription. It may be a boring task but it has to be performed by none other than the decision makers. (AY.2001-02)
DIT v.Societe Generale (2015) 122 CTR 57 (Bom.)(HC)

S.254(1):Appellate Tribunal - Power to admit additional evidence - `Application for admission of additional evidence six years after assessment during penalty proceedings - No credible evidence and no explanation for delay in application - Rejection of application - Justified .[R.29]
Held, dismissing the appeal, that the application for permission to produce additional evidence in the form of certain documents so as to retract the statement was filed under rule 29 of the Income-tax (Appellate Tribunal) Rules, 1963, in 2012 after expiry of almost six years and that too during the course of the penalty proceedings at the stage of second appeal. The assessee had tried to produce affidavits of certain customers to show that it was their gold which was lying with the assessee. Further, through the additional evidence the stock of diamond jewellery lying with the assessee was sought to be established as belonging to suppliers. Not only these affidavits but also the statement of stock furnished by the suppliers were only a result of an afterthought. Even during the penalty proceedings before the Assessing Officer and the Commissioner (Appeals) there was nothing to show that the jewellery found at the premises of the assessee on October 27, 2006, was accounted money with the assessee. No satisfactory explanation had been furnished to demonstrate why the material sought to be produced now could not be produced earlier. Therefore, the Tribunal was justified in rejecting the application for admission of additional evidence filed by the assessee.(AY. 2007-2008)
JawaharLal Jain (HUF) v. CIT (2015) 370 ITR 712/118 DTR 177 (P & H) (HC)

S. 254(1):Appellate Tribunal- Order-Method of accounting –lesser gross profit-Tribunal reversed the finding of CIT(A) without giving any reasons-Matter remanded.[S. 145]
Assessing Officer held that the assessee claimed lesser gross profit as compared to its books of account and accordingly, made addition .CIT(A) deleted addition on ground that revenue had not

produced any relevant material in support of its claim. Tribunal reversed said findings of CIT(A) without assigning cogent reasons, matter was to be remanded back.**BhaktiprasadNagori Timber & Plywood (P.) Ltd. v. ACIT (2015) 229 Taxman 203 (Guj.)(HC)**

S. 254(1) :Appellate Tribunal –Delay of 715 days- No reasonable cause- Dismissal was held to be justified.[S. 253]

Whether where assessee filed appeal before Tribunal with a delay of 715 days taking a plea of death of his parents, in view of fact that assessee's parents died even before passing order of Commissioner (Appeals), Tribunal was justified in dismissing assessee's appeal being bared by limitation.(AY. 2005-06)

Amolak Singh Kumar & Sons v. CIT (2015) 229 Taxman 182 (P&H)(HC)

S. 254(1):Appellate Tribunal –Ex parte order-Set aside after imposing reasonable cost of Rs 5000, upon assesse.

The Tribunal passed an *ex parte* order dismissing assessee's appeal in absence of assessee at the time of hearing.

Thereafter, the assessee preferred Miscellaneous Application to set aside ex parte order and to hear the appeal on merits. However by the impugned order, the Tribunal dismissed the said application.

On writ: allowing the petition the court held that in absence of malafide intention on part of assesse to remain absent at the hearing of appeal ,impugned order passed by Tribunal dismissing assessee's appeal ex parte was set aside after imposing cost of Rs 5000

Vision Corporation Ltd. v. Jt. CIT (2015) 229 Taxman 184 (Guj.)(HC)

S. 254(1) : Appellate Tribunal - Tribunal's decision based on documents and evidence not presented to Assessing Officer or Commissioner (Appeals)-Matter remanded.

The Commissioner (Appeals) as well as the Assessing Officer did not have the benefit of checking any of the records which were produced before the Tribunal as a paper book. Some of the documents were part of the paper book produced before the Tribunal were placed before the High Court as additional documents by filing an interlocutory application. In the absence of these additional documents for consideration before the Assessing Officer and the Commissioner (Appeals), one could not conclude that the opinion of the Assessing Officer and the Commissioner (Appeals) were erroneous. Similarly, the Tribunal referred to several documents which persuaded reversal of the opinion of the Assessing Officer and the Commissioner (Appeals). Therefore, the matter was to be remanded to the Assessing Officer.(AY. 2006-07)

CIT v. Muthoot General Finance (2015) 370 ITR 543/ 232 Taxman 404 (Ker) (HC)

S. 254(1) : Appellate Tribunal-Natural justice-Advertisement - Sales Promotion expenses/Motor Car expenses- Order of Tribunal passed against assessee was in violation of natural justice and matter was to be remanded to decide issue afresh .[S. 37(3), 37(3A), 260A, 263]

CIT in revision proceedings set aside the order passed by the AO who ha s allowed the commission. Appeal of assessee was dismissed by the Tribunal. On appeal:

The Court held that perusal of the order passed by the Tribunal shows that the documents and the data produced by the assessee as mentioned have not been taken into consideration. Therefore, the order does not satisfy the requirements as enunciated by the Apex Court in *Kranti Associates Pvt. Ltd.* v. *Masood Ahmed Khan* [2010] 9 SCC 496. Thus, the substantial question of law is answered accordingly and after setting aside the order of the Tribunal which is passed in violation of the principles of natural justice as per the law laid down by the Apex Court as mentioned above, the matter is remanded to the Tribunal to decide afresh after affording an opportunity of hearing to the parties in accordance with law. As a result, the appeal stands disposed of.(AY. 2001-02)

Gurcharan Kaur (Smt.) .v. CIT (2015) 229 Taxman 71 (P&H)(HC)

S. 254(1) : Appellate Tribunal-Opportunity of hearing-Request by assessee by letter for adjournment-Record not showing whether assessee put on notice about the date of hearing - Tribunal ought not to have heard appeals ex parte-To dispose of appeals afresh. [ITAT Rules, R. 25]

The Assessing Officer did not allow the assessee's claim for certain deduction which the Commissioner (Appeals), allowed. On Revenue's appeal, the Tribunal set aside the orders passed by the Commissioner (Appeals). The assessee under rule 25 of the ITAT Rules, filed petitions to set aside the order passed by the Tribunal contending that after the request for adjournment was acceded to, the Tribunal did not intimate any other date for hearing and that for want of information, the assessee could not appear before the Tribunal. The Tribunal dismissed the petitions. On writ petitions :

Held, allowing the petitions, that though it was stated that the date of hearing was adjourned from July 4, 2001, to August 29, 2001, it was not clear as to whether the assessee was put on notice about the date of hearing. Had it been a case where the adjournment was sought by the counsel being present before the Tribunal and the date was given to him, the necessity to issue fresh notice may not arise. The request for adjournment was made through a letter. Valuable rights had accrued to the assessee on account of the order passed by the Commissioner (Appeals). Before such valuable right is taken away, the assessee deserves to be given an opportunity of placing its version before the Tribunal. The Tribunal shall hear the appeals afresh and dispose of the appeals in accordance with law. (AY. 1990-1991, 1991-1992, 1992-1993)

Ananda Nilayam .v. ITO (2015) 370ITR 370/ 121 DTR 311 (T & AP) (HC)

S. 254(1) : Appellate Tribunal- Housing projects-Dept's practice of filing appeals in a routine manner and without application of mind deprecated as it causes inconvenience to taxpayers-Appeal was filed by the revenue without even verifying the year which was mentioned in the ground of appeal-Appeal of revenue was dismissed. [S. 80IB (10),253]

As could be noticed from the order of the learned CIT(A), when there is a specific direction to the AO by the ITAT to follow the Special Bench decision of ITAT it has to be assumed that the direction is with reference to the issues which were originally objected to by the AO and the AO cannot take advantage of the order of ITAT for repeating the addition, defying the directions of the ITAT. At least the senior officer such as Commissioner of Income Tax should have carefully perused the record and CIT(A)'s order before granting authorisation. The very fact that the AO filed the appeals without even verifying the year, which was mentioned in the grounds of appeal, also indicates that the appeals were filed in a routine manner which causes lot of inconvenience to the tax payers and such a practice should be deprecated. (AY. 2005-06 to 2007-08)

DCIT v. Prescon Builders Pvt. Ltd(2015) 121 DTR 75/ 171 TTJ 788 (Mum.)(Trib.)

S. 254(1):Appellate Tribunal-Lack of preparation for hearing by departmental representatives-Departmental representative is duty bound to prepare the cases -Suggests guidelines to remedy the state of affairs.

The learned CIT-DR, Smt. Madhu Vani, requested for adjournment in all the cases listed for hearing before 'D' Bench on the ground that regular CIT-DR is on leave and several details are required to be submitted for effective representation of the cases. Having regard to the factual matrix of the case we refused to grant adjournment with a direction to the CIT-DR to be ready to present the case on the part of the Department. However, by the time the cases were called upon for hearing the CIT-DR left the court room without informing anybody. She was hardly present in the court for about 30 minutes, i.e. from 10.30 a.m. to 11.00 a.m. only to seek adjournment in all the cases assigned to her on the ground that though she had got the intimation on Friday itself that she has to appear before 'D' Bench but due to intervening holidays she could not prepare the cases. This cannot be a valid reason for seeking adjournment. The DR is duty bound to prepare the cases and only in exceptional circumstances could seek adjournment. It is for the Chief Commissioner to engage some experienced Department Representatives who are aware of the court procedures. In the recent past, it is noticed that some of the DRs had never had exposure to the functions of the Tribunal except the formal court observation as part of their training programme, which sometimes result in not supporting the stand of the Revenue effectively and in turn may affect a genuine case of the Revenue for want of proper prosecution. We would take this opportunity to suggest that any official, on being assigned the duty of DR, should be made to sit in the court room for observation at least for 15 days so that their services can be used effectively at a later stage. In the instant case it appears that on a temporary basis Department Representatives are posted; only in the previous week the fact of non-availability of DR

could be made known to the CCIT who has to make an alternative arrangement and then it is for the nominated DR, who is a 24 hour government servant, to collect the files from the office and go through the records properly to make an effective representation on Monday morning. Here is the situation where the CIT-DR sought adjournment in all the cases assigned to her on the ground that she was asked to represent the matters on Monday, only by sending intimation on Friday. It is for the Revenue to take appropriate steps in this regard for effective representation of the cases and it is not necessary for us to discuss more on this aspect. The fact is that none appeared on behalf of the Revenue. (AY. 2007-08 to 2010-11)

DCIT v. Reliance Communication Infrastructure Ltd(2015) 120 DTR 329 (Mum.)(Trib.)

S.254(1): Appellate Tribunal-Adjournment- Affidavit-Contempt –Chartered accountant-The severity of accusations and fury emerging from their language is highly derogatory, defamatory and contemptuous, sent with a scheme and clear intention to intimidate judicial officers to desist from passing an unfavorable order- Matter referred to High Court to initiate contempt proceedings- Cost levied [ITAT .R. 10,17A, 32A]

Tribunal held that;

(i) Without even waiting for the order Shri K C Moondra sent intimidating letters on 30-4-15 received on 1-5-15 & 2-5-15 received on 5-5-15, hurling all sorts of wild accusations about the presiding officer ld. JM and bench functioning. Such nasty and frivolous accusation can only be product of fit of furry. The barrage of indiscriminate allegations include misuse of official position, corruption, insulting him and son: colluding with retired income tax officers to harm his client so on and so forth. The severity of accusations and fury emerging from their language is highly derogatory, defamatory and contemptuous, sent with a scheme and clear intention to intimidate judicial officers to desist from passing an unfavorable order. The bench was taken aback at their venomous contents and decided to take suitable action on such baseless delinquent acts.

(ii) Without waiting for the order ld. Counsels prejudged the issues, though that bench may pass an adverse order; in order to salvage his professional interest to willy nilly win the case, by a hideous scheme he sent letter Dtd. 2-5-15 to Hon'ble President ITAT and Hon'ble Law Secretary Govt. of India and Asst. Registrar Jaipur making wild accusations of all sorts like corruption, collusion, insulting, bias, prejudice and what not. These contemptuous letters speak by themselves, frivolity of language, distorted contents and apparent self contradictory contents of his letter demonstrate that it is a crude attempt to influence independent judgment process for petty professional ends.

(iii) It shall be noteworthy that till 28-4-15 these professionals had no objection with the bench as no grievance whatsoever was raised. The casual way of adjournment against final chance shows their casual attitude of taking the judicial process for granted. The emphatic demand that – if other matters were adjourned, our appeal should also have been adjourned; amounts to dictating the terms to the court. It reflects their inaptitude in failing to appreciate the vital fact that thus adjournment was granted as a final chance which was agreed by them. "They keep 'holier than thou attitude'; if I commit wrong or disobey there is nothing wrong in it but if the bench doesn't conduct itself in my desired way then bench is by default wrong and I raise scandalous tirade against bench." To show their might they shoot frivolous complaints, file litany of motivated RTIs proclaiming to be RTI activist. These brazenly scandalous acts have been unleashed by them with swagger of impunity and recklessness without realizing that when the appeal is pending orders such threats construe contempt of court.

(iv) The bench has no objection on sending any complaint to higher authorities; it's the right of every person in free and democratic India. The most important question is propriety of sending intimidating complaints when their appeal i.e. a judicial matter is heard on merits and is pending for orders.

(v) A litigant or his representative cannot directly or indirectly; by overt or covert means attempt to influence the process of judicial decision making by shooting intimidating and derogatory letters or to pressurize the judicial officers while deciding a heard appeal.

(vi) Where is prejudice, bias or insult on the part of bench or the presiding officer. Everything is on record, proceedings are in open court witnessed by counsels from both sides. The facts and record are sufficient to demonstrate that bench was impartial and fair to the ld. Counsels and assessee. There is nothing to even remotely suggest any reason on the part of bench to show partiality, prejudice, bias or intention to insult Mr. K C Mundra or his son who are unknown to us as they come from a faraway

place ‘ Sumerpur’’ and are rarely seen in the ITAT proceedings. They were treated with deserving dignity by offering help and guidance in open court proceedings.
(vii) Perhaps they are enraged on their own professional ineptitude which became visible in open court proceedings, it requires self introspection and hard preparation of appeal; instead they have misdirected their self fury on the bench indiscriminately. Their own professional infirmities can be improved from their side by mending their unprofessional attitude. They cannot score brownie points by telling the world that they can get desired orders by threatening to harm judicial officers and their delinquent conduct is justified.
(viii) Mr. K C Moondra’s misadventure doesn’t stop here, camouflaging under the self proclaimed virtue of an RTI activist, motivated to bully the judicial officers, he deliberately filed various RTI applications asking for about 81 queries in respect of number of personal details about the judicial officers including their leave, HQ leaving permission, use of car, attendance in office, timings of holding courts, in whose case adjournments were granted or not granted, when officers go to Delhi, whom do they meet etc. etc. The above facts prove that RTI attack is not for any public purposes but to intimidate judicial officers, seized with his judicial matter. A trick to masquerade his blackmailing tactics for mean professional interest, to extract desired result in a sub-judice appeal. The RTI fiat unfolded by Mr. Moondra is an apparent colorable device, an attempt to influence/obstruct independent judicial process. The attempt amounts to a total misuse of professional position for dubious gains.
(ix) These acts amount to interfering and obstructing judicial process which apart from awarding of cost u/r 32A of ITAT rules is liable for appropriate contempt of court proceedings as well. Such attempts need to be seriously deplored, firmly tackled and suitably dealt with to send a message in professionals fraternity to behave properly and conduct themselves as ordained by ITAT rules and standing orders; court rules, ICAI instructions, professional ethics and etiquettes; Bar council of India guidelines in this behalf.
(x) In propriety they should have waited for the order to be pronounced instead of unfolding foul tactics to influence the pending judicial order. They started intimidating judicial officers to cover their professional inaptitude, misconduct and lapses. This type of intimidation amounts to interference in judicial proceedings which is emphatically forbidden to be exerted in direct or indirect manner.
(xi) It may be pertinent to mention that ld. Counsel Shri K C Moondra FCA and Mukul Moondra ACA, seem to be ignorant about filing a proper power of attorney, which is to be given on a NON JUDICIAL stamp paper. Whereas they have filed a plain printed paper with Rs. 10/- court fee stamp which is not a valid and prescribed power of attorney. Thus their appearance could have been lawfully denied by the bench. This again shows the lenient approach of the bench bellying his wild allegations. Furthermore the ICAI guidelines provide that every chartered accountant shall mention his registration no. on the power. Sadly both of them i.e. S/shri K C Moondra and Mukul Moondra have not mentioned their ICAI registration no. Making their power of attorney again defective, inadmissible and in violation of ICAI guidelines.
(xii) Under these facts and circumstances, we find that the ld. Counsel for the assessee Shri K.C. Moondra and his son Shri Mukul Moondra are liable for suitable proceedings for their professional misconduct, misbehavior, wasting the time of court and unlawfully attempting to interfere in the process of judicial dispensation.
(xiii) Considering all the facts, circumstances and material on record by invoking rule 32A of the ITAT Rules we hold that Shri K.C, Moondra and Shri Mukul Moondra are liable for levy of costs as prescribed by said rule 32A. Consequently, we impose cost of Rs. 25,000/- on Shri K.C. Moondra and Rs. 10,000/- on Shri Mukul Moondra for their delinquencies as mentioned above. Separate proposal under Contempt of Court Act will be duly forwarded to Hon’ble Rajasthan High Court. The cost is recoverable u/r 32A(2) of the ITAT Rules and shall be deposited in the ‘Prime Minister Relief Fund. Copy of this order to be sent by registry to Institute of Chartered Accountants of India to take appropriate disciplinary action against them in terms of ICAI rules and guidelines. The progress may be communicated to bench through registry. (ITA No. 401/JP/2012, dt. 27.05.2015) (A Y. 2008-09)
Mundra woolen Mills (P) Ltd. v. ACIT (Jaipur)(Trib.); www.itatonline.org

S. 254(1) :Appellate Tribunal-Condation of delay –Affidavit of the Chartered Accountant-The affidavit and cavalier conduct of CA in support of application for condonation of delay raises

serious questions on his professional competence and work ethics in giving such an affidavit which hides more than it explains

The assessee filed an application seeking condonation of delay of 347 days in filing the appeal. In support of the application, the CA filed an affidavit accepting responsibility for the delay on the ground that he had gone on a tax audit and the filing of the appeal had skipped his mind. Reliance was placed on Collector, Land Acquisition V. Mst. Katiji(1987) 167 ITR 471 (SC) and it was pleaded that the assessee should not be made to suffer for the mistake committed by the CA. HELD by the Tribunal dismissing the application for condonation of delay and the appeal:

(i) The assessee has only filed a vague and general affidavit from the CA which utterly lacks any specific contentions and fails to explain day to day delay in reasonable manner. The assessee has neither filed any evidence nor the affidavit of Shri Malik Parvej to corroborate the vague affidavit by the C.A.. It does not conform to general human conduct in such circumstances, preponderance of probabilities and surrounding circumstances which form sine qua non in the matters of condonation of delay;

(ii) It is unbelievable that an assessee, whose taxable income is claimed to be NIL is taxed for two years assessed at such a high income resulting in a huge tax and interest demand will not visit the C.A. office almost for a period of about one year to know about the filing of the appeals. There is no deposition in the affidavit that prior to TRO notice dated 02/3/2012, no other notice by way of telephone or writing was received either by assessee or the C.A. Thus, the depositions in affidavit remain vague, unsubstantiated and do not amount to explaining the sufficient cause;

(iii) The affidavit and cavalier conduct of ShriKaushalAgarwal, C.A. raises serious questions on his professional competence and work ethics in giving such an affidavit which hides more than it explains. The burden is on the assessee to reasonably explain day to day delay and establish that there existed reasonable and sufficient cause in delaying the filing of appeals for about 1 year. If the proper dates or occasions are not mentioned with proper facts then the delay cannot be condoned. The law helps diligent and not the indolent as well as the axiomatic delay defeats equity. In our considered view that the condonation petitions filed by the assessee and material available on the record, fail to invoke any confidence, fail to explain reasonable and sufficient cause for condonation of long delay of 347 days in filing these appeals . The assessee has to come clean with all the relevant facts, which happened in the period of one year. The assessee has to explain all the events and be specific in the dates. The depositions made in the C.A. affidavit remain uncorroborated and there is no affidavit from the said Shri Malik Parvej in support of the affidavit of C.A.. Thus, the vague affidavit given by the C.A. remains uncorroborated and unreliable. In the entirety of facts and circumstances of the case, we decline to condone the delay of 347 days in filing these appeals. (AY. 2005-06 ,2006-07)

K. G.N.M.M.W. Educational research &Analysisi Society .v. ITO(2015) 38 ITR 623/ 68 SOT 247 (Jaipur)(Trib.)

S.254(1) :Appellate Tribunal-Stay of proceedings-Collection and recovery-Transfer pricing-Recovery made by the AO contrary to the direction of Tribunal's order was directed to be refunded though the same was collected with the consent.[S 225,226]

Tribunal held that where AO collected additional taxes contrary to Tribunal's stay order with specific directions not to collect tax till disposal of appeal, same had to be refunded as neither assessee nor revenue had a right to flout decision of Tribunal . AO being an officer functioning under Government of India it was his obligation to follow directions of superior authority and even if there was consent he should not have collected amount. (AY. 2009-10)

Johnson & Johnson Ltd. .v. Addl. CIT (2014) 51 taxmann.com 1 / (2015) 67 SOT 127 (Mum.)(Trib.)

S. 254(2):Appellate Tribunal–Rectification of mistake-Gift- Statement-Tribunal limiting the scope of adjudication of rectification application to two issues is held to be justified.

The Tribunal dismissed the assessee's appeal filed against the order of the Commissioner (Appeals) upholding the order of the Assessing Officer for the assessment year 1995-96 holding, inter alia, that gifts of Rs. 13.25 lakhs received by the assessee from K were not genuine. The assessee filed an application for rectification under section 254(2), on the ground that the Tribunal had relied upon an

order of the Supreme Court in the order without having giving the assessee any notice thereof and also on the ground that the statement of the donor gifting Rs. 13.25 lakhs was not considered. The Tribunal dismissed the assessee's miscellaneous application on the ground that there was no mistake apparent on record warranting exercise of jurisdiction under section 254(2). On a writ petition the Tribunal was directed to decide it afresh after hearing the parties in accordance with law. Thereafter, the Tribunal dismissed the rectification application on the ground that there was no mistake apparent on record in the order warranting its rectification. On a writ petition once again the court allowed the petition and restored the assessee's application for rectification once again before the Tribunal with a direction. On the miscellaneous application for rectification being restored, the Tribunal held that the scope of examination in rectification application was confined only to considering the donor's statement and allowing an opportunity to the assessee to meet the reliance by the Tribunal on decision of the Supreme Court. The Tribunal after considering the statement of the donor and also the submissions of the assessee with regard to inapplicability of the decision of the Supreme Court concluded that it did not find any mistake apparent from the record warranting interference with the order passed by the Tribunal under section 254(2). On a writ petition:

Held, dismissing the petition, that the court only took a prima facie view that there appeared to be an error in the order of the Tribunal. However, the court did not give any conclusive finding with regard to there being any error apparent on record in the order and restored the miscellaneous application for consideration by the Tribunal on the two issues of which grievance was made by the assessee before the court. Therefore, the Tribunal had correctly understood and interpreted the orders of the court that the miscellaneous application for rectification was restored to the Tribunal only in respect of two issues, namely, the donor's statement and opportunity to meet the decision of the Supreme Court. Therefore, the Tribunal correctly limited the scope of adjudication of the rectification application only on the two issues.(AY. 1995-1996)

Naresh K. Pahuja .v. ITAT (2015) 375 ITR 526 (Bom.)(HC)

S. 254(2) : Appellate Tribunal–Rectification of mistake-while recalling its order and placing it before a regular bench to adjudicate/decide merits of appeal, Tribunal is not entitled to observe on merits of adjudication. [S. 158BD]

Tribunal by order, dated 29-12-2010 set aside assessment made under section 158BD in case of assessee on ground that no satisfaction under section 158BD was recorded by Assessing Officer of searched person in respect of assessee. While doing so Tribunal did not consider letter of Assessing Officer of searched person recording satisfaction of undisclosed income in case of assessee. On revenue's rectification application, Tribunal recalled order dated 29-12-10 and placed matter before regular bench for consideration by making observation that jurisdictional requirement to proceed against assessee was satisfied. The assessee challenged the said order by filing Writ petition, the Court held that; since there was an error apparent on record in Tribunal's order, dated 29-12-2010 as it did not consider communication recording satisfaction under section 158BD, Tribunal rightly recalled its order; however, while recalling its order it was impermissible for Tribunal to make observation on issue of jurisdiction and, therefore, such observation could not be upheld. Court also held that once an order is recalled and appeal is to be placed before regular Bench for fresh consideration, it restores status quo ante. therefore, while recalling its order and placing it before a regular bench to adjudicate/decide merits of appeal, Tribunal is not entitled to observe on merits of adjudication.

Gyan Construction Co. v.ITAT (2015) 231 Taxman 68 (Bom.)(HC)

S. 254(2):Appellate Tribunal - Power to rectify mistake - Second application on same grounds not maintainable - Tribunal not justified in considering second application and rectifying its order.

Held, when the first rectification application was rejected by the Tribunal, the second rectification application on the same issue was not maintainable at all. Under the circumstances, the Tribunal had materially erred in entertaining the second rectification application and passing the order recalling its earlier order in exercise of powers under section 254(2).

Also, the Tribunal had tried to consider the issue on the merits which had already been considered by the Tribunal earlier while deciding the appeal. Under the circumstances, even on the merits the

Tribunal had materially erred in exercise of the powers under section 254(2) by passing the order. Questions referred is answered in favour of revenue. (AY. 1984-1985)
CIT v. Vasantben H. Sheth (2014) 226 Taxman 83 (Mag.)/(2015) 372 ITR 536/273 CTR 48(Guj.) (HC)

S.254(2):Appellate Tribunal-Rectification of mistake-Partial revival of appeal held to be not justified-Directed to hear afresh on merits of deduction and also invoking the jurisdiction u/s 263 [S.263]
Allowing the appeal the Court held that while recalling of appeal for hearing afresh on merits, the Tribunal was not justified to ignore the hearing of the case on merits i.e. deduction u/s. 36(1)(viia) including the jurisdictional issue under section 263 by the CIT.(AY. 2006-07)
State Bank of India v. CIT(2015) 274 CTR 118 (Bom.)(HC)

S. 254(2) : Appellate Tribunal-Rectification of mistake-Second Rectification –Tribunal could not have considered the second rectification application-on merits, only when it is found that there was an error apparent on the face of the record, then and then only powers can be invoked.
When the 1st rectification application was rejected by the Tribunal, second rectification application on the same issue was not maintainable at all. Under the circumstances, the Tribunal has materially erred in entertaining the second rectification and passing the impugned order in exercise of powers u/s 254(2). Further, when the decision of the Tribunal on facts was against the assessee, thereafter, the Tribunal on facts was against the assessee thereafter, the Tribunal could not have considered the second rectification application, on merits, only when it is found that there was an error apparent on the face of the record, then and then only powers u/s 254(2) can be invoked. (A.Y. 1984 – 1985)
CIT v. Vasantben H. Sheth (Smt.)(2014) 48 taxmann.com 287 / (2015) 372 ITR 536 / 273 CTR 48 / 113 DTR 244 (Guj)(HC)

S. 254(2) : Appellate Tribunal-Rectification of mistake- Ex parte order- Members of association on strike- Matter was set aside. [R. 24]
The assesee's advocate remained to be present at the time of hearing due to Members of Association being on strike. An ex-parte order was passed by Tribunal. On Miscellaneous Application filed by the assessee, the Tribunal held that argument advanced by the counsel for the assesee that the members of the Association being on strike still passing order behind the back of the assessee' representatives is in violation of principles of natural justice was not convincing , matter was remanded back for rehearing. (A.Y. 2008-09)
Vimal Singhvi v. ACIT (2015) 370 ITR 275 / 230 Taxman 73 /113 DTR 157/273 CTR 322 (Raj.)(HC)

S. 254(2) : Appellate Tribunal –Rectification of mistake-Where Tribunal took its own time to dispose of miscellaneous petition filed by assessee for rectification order and passed said order after 4 years, was well within time limit as specified under section 254(2).
The assessee filed a miscellaneous petition praying to recall and rectify the order of the Tribunal. The Tribunal, after hearing the matter at length and relying upon the decision of the Supreme Court in *Surana Steels (P.) Ltd.* v. *Dy. CIT* [1999] 237 ITR 777 the Board Circular No. 68, dated 17-11-1971 passed the order that there had been apparent mistake in the order of the Tribunal and recalled the original order.
On revenue's appeal, the High Court allowed the appeal and held that order passed by the Appellate Tribunal was barred by limitation.
On further appeal, the Supreme Court restored the matter for fresh decision.
On revenue's appeal to the High Court:
The assessee took the matter on appeal before the Supreme Court. The Supreme Court was of the view that the miscellaneous petition filed by the assessee for rectification was well within the time limit prescribed under section 254(2). However, the Supreme Court observed that it was the Tribunal which took its own time to dispose of the miscellaneous petition and, therefore, this Court erred in

holding that the miscellaneous petition could not have been entertained by the Tribunal beyond four years.
In view of the above finding rendered by the Supreme Court, the question of law raised before this Court does not survive for its consideration.
It is found from the order passed by the Tribunal that the Tribunal was guided not only by the decision of the Supreme Court in *Apollo Tyres Ltd*. v. *CIT* [2002] 255 ITR 273 which was rendered subsequently at the time of disposal of the miscellaneous petition seeking rectification, but also followed the decision in *Surana Steels (P.) Ltd*. (*supra*) and the Board Circular No. 68, dated 17-11-1971.]
Therefore, the question of law raised by the revenue is based on a misconception of fact, as the Tribunal had not only relied upon the decision of the Supreme Court in *Apollo Tyres Ltd*. case but also relied on the decision of *Surana Steels (P.) Ltd*. , and the Board Circular No. 68, dated 17-11-1971, which were very much available before the Tribunal at the time of passing the rectification order.In such view of the matter, the substantial question of law was answered against the revenue. (AY. 1989-90)
CIT v. Sree Ayyanar Spinning & Weaving Mills Ltd. (2015) 229 Taxman 243 (Mad.)(HC)

S. 254(2):Appellate Tribunal- Rectification of mistakes-Power- Pendency of an appeal filed in the High Court is no bar to the maintainability of a rectification application before the Tribunal-Principle of judicial propriety has no application.[S. 260A]
The assessee filed an appeal u/s 260A to the High Court against the order of the Tribunal. During the pendency of the appeal, the assessee filed a Miscellaneous Application (MA) before the Tribunal u/s 254(2) to request it to rectify certain mistakes apparant from the record. The Tribunal dismissed the MA on the ground that "judicial propriety does not allow the assessee to seek efficacious remedy simultaneously before two authorities and in particular where the issue is seized by a higher judicial forum, even if pending admission". On a Writ Petition filed by the assessee to challenge the order of the Tribunal dismissing the MA, HELD by the High Court:
The least that can be said about the understanding of the legal provision by the Tribunal is that it is ex facie incorrect and erroneous. Merely because the assessee has challenged the order of the Tribunal in an Appeal under section 260A of the Income Tax Act, 1961 before the High Court does not mean that the power under section (2) of section 254 cannot be invoked either by the assessee or by the revenue/Assessing Officer. Such a power enables the Tribunal to rectify any mistake apparent from the record and make amendments. That in a given case would not only save precious judicial time of the Tribunal but even of the higher Court. Only when the assessee or the Assessing Officer calls upon the Tribunal to undertake an exercise which is not permissible within the meaning of section (2) of section 254 that the Tribunal can rely on the principle of judicial propriety or its reluctance or refusal to take upon itself the powers of the higher Court of Appeal. We can understand if the Tribunal had passed an order after considering the application made by the petitioner-assessee on its merits and in accordance with law. However, the refusal of the Tribunal to go ahead and reject the application only on the ground that the petitioner-assessee has invoked the appellate powers of higher Court cannot be sustained. That is contrary to the plain language of the two statutory provisions and which have been brought to our notice. Nothing contrary having been pointed out and such a view of the Tribunal may affect and prejudicially the interest of the revenue that all the more we cannot sustain the impugned order. The Writ Petition is allowed. The petitioner's misc. application seeking to invoke the powers under subsection (2) of section 254 of the Income Tax Act, 1961 shall now be heard by the Tribunal and it shall be decided in accordance with law. (AY. 2007-08)
R. W. Promotion P. Ltd. v. ITAT(2015) 376 ITR 126/119 DTR 134/ 277 CTR 401 (Bom.)(HC)

S.254(2):Appellate Tribunal-Duty of Tribunal-Rectification of mistake-Adminstration of justice-Presiding officers of Courts and Tribunals should refrain from making adverse comments and remarks on the coduct of parties or their representtaives or pleaders- Adverse reamrks against assesse and his representative and imposition of cost was held to be not justified.[S.254(1), 254 (2B)]
The Tribunal dismissed the Miscellaneous Application filed by the assessee with the remarks that "the learned counsel … proceeded to make stale and sterile submissions in an attempt to somehow support

and justify the miscellaneous applications filed by the assessees. This attempt, in our opinion, clearly amounts to misuse of process of Law. The filing of these frivolous miscellaneous applications by the assessees seeking rectification of the order of the Tribunal which is clearly beyond the scope of section 254(2) and the stale and sterile submissions made by the learned counsel for the assessee in support thereof thus have resulted in wastage of the precious time of the Tribunal which, in our opinion, justify imposition of cost on the assessee. We, therefore, dismiss these miscellaneous applications filed by the assessee being devoid of any merit and impose a cost of Rs. 5,000/- on each of the assessee." On a Writ Petition filed by the assessee HELD by the High Court:

(i) Repeatedly, the Hon'ble Supreme Court cautioned the Presiding Officer of the Courts and Tribunals from adversely commenting and remarking on the conduct of parties or their representatives or pleaders. If these comments and remarks, adversely affecting them are not required for the decision of a case and it could be justly and fairly reached on the basis of material produced and the arguments canvassed, then, the Courts and Tribunals should refrain from passing any adverse remarks or making harsh comments on the conduct of the parties. Sobriety and restraint in judicial conduct is of paramount importance. Even if the Presiding Officer, members of the Tribunal are agitated by prolong arguments and often needless, still they must not lose patience and to a extent as to comment upon the conduct of the Advocates or representatives. That must been avoided as it would be a reflection on the working of the Tribunal as a whole. While not making any further reference to the judgments of the Hon'ble Supreme Court, we would only invite attention of the members of the Income Tax Appellate Tribunal to the following observations in the judgment of the Hon'ble Supreme Court in the case of The State of Uttar Pradesh V/s. Mohammad Naim reported in A.I.R. 1964 Supreme Court, 703. These read as under ……

(ii) In the light of above, we delete and expunge all the remarks which have been made against the representative and the parties. Thus, the above reproduced passage or lines from the order particularly para 17 above shall stand expunged and deleted. This would also include deletion of the direction to pay costs. The imposition thereof is accordingly set aside.

Madhukar B. Thakoor v. ITAT (2015) 374 ITR 1/119 DTR 308 / 277 CTR 518(Bom.)(HC)
Sunita Samir Sao v. ITAT (2015) 374 ITR 1/ 119 DTR 308/ 277 CTR 518 (Bom.)(HC)
Mohan B.Thakoor v. ITAT (2015) 374 ITR 1/119 DTR 308/ 277 CTR 518 (Bom.)(HC).

S.254(2):Appellate Tribunal-Rectification of mistake-Strictures passed against ICAI By ITAT for alleged "deteriorating standards" and "losing its grip over the Income tax matters" toned down on the basis that they were made in the context of a "hypothetical situation" and were not "intended to criticize the functioning of the ICAI"

In Vijay V Meghani vs. DCIT, the ITAT Mumbai had passed severe strictures and lamented the alleged fall in standards in the CA profession. The Tribunal pointed out several factors which, according to it, show "*signs of deteriorating standards*" amongst Chartered Accountants. The Tribunal also expressed the fear that the CA profession is "*losing its grip over the Income tax matters*". The ITAT advised the ICAI to tackle the issues on a war footing so as to bring back the high standards, confidence, quality, prestige, reputation etc. enjoyed by the C.A. profession.

In response to the said order, the Council of the ICAI issued a statement that the comments made by the ITAT on the profession and functions of the ICAI are not warranted. It is also stated that the "*sweeping observations*" made by ITAT about the Institute and the profession of Chartered Accountancy in a matter relating to a particular tax payer, are out of context.

The ICAI filed a Miscellaneous Application u/s 254(2) before the Tribunal to seek expunging the aforesaid remarks made by the ITAT against the CA profession.

By an order dated 4th September 2015, the ITAT modified its earlier order and stated that they were made in the context of a "hypothetical situation" and were not "intended to criticize the functioning of the ICAI" (AY. 1994-95,1996-97)

Vijay V. Meghani v. ACIT (Mum.)(Tirb.); www.itatonline.org

Editorial: Vijay V. Meghani v. ACIT (Mum)(Tib) (2014) 35 ITR 320 / 165 TTJ 289 (2015)153 ITD 687 (Mum)(Trib.)

S. 254(2) :Appellate Tribunal-Rectification of mistake-Order of Tribunal pronounced beyond 60/90 days as prescribed in rule 34(5)(c) cannot validly be challenged in rectification petition. [IATA R. 34(5)(c)],

Powers of rectification Tribunal has no jurisdiction to recall or review its order passed on merits while dealing with an application u/s. 254(2) Appellant filed instant petition seeking recall of impugned order contending that impugned order suffered from certain mistakes which were apparent on record. Order of Tribunal pronounced beyond 60/90 days as prescribed in rule 34(5)(c) cannot validly be challenged in a petition. (AY.1993-94)

Times Guaranty Ltd. .v. ACIT(2015) 153 ITD 655 / 171 TTJ 387 (Mum.)(Trib.)

S.254(2):Appellate Tribunal-Rectification of mistake- Charitable purposes- Applicability of provisio-Matter referred to President to constitute a larger Bench.[S. 2(15) , 12A, 12AA]

Tribunal held that it has not decided the first ground of appeal against withdrawl of registration grnated under section 12A, for the reason that in its view whether the conditions preceent for withdrawl of registration under section 12AA(3) stand satisfied or not de hors section 2(15) , need to be determined first. It rstored the matter back to the DIT(E) as there were no fcats on records for determination of the said issue , therefore it is incorrect to say that the Tribunal proceeded to decide ground No 2. Without addressing the ground No 1.; however assesse authority having been incorporated with the principal object of development of Mumbai Metropolitan Region , same involves a number of interrelated activities from which it is generating revenue, and therefore assessee's activities are covered by the proviso to section 2(15) ; howver the issue of the legal consequence(s) of the applicability of proviso to section 2(15) on the registration of an entity as a charitable institution matter referred to the Honorable President for constituting a larger Bench to decide the issue. (A. Y. 2009-10)

Mumbai Metropolitan region Development Authority .v. DIT(E)(2015) 40 ITR 60 /119 DTR 393/ 170 TTJ 607(Mum.)(Trib.)

Editorial: Original order in ITA no 625 /M/2012 is reoorted in Mumbai Metropolitan region Development Authority .v. DIT(E) (2015) 170 TTJ 621 (Mum)(Trib)

S. 254(2) : Appellate Tribunal-Rectification of mistake-Lease of property- Rent received from leasing of business centre was treated as 'income from house property', claim for deduction of depreciation and administrative expenses against rental income could not be allowed-Rectification application was rejected.[S. 24, 32, 37(i)]

Dismissing the rectification applications of assesse the Tribunal held that; Rent received from leasing of business centre was treated as 'income from house property', claim for deduction of depreciation and administrative expenses against rental income could not be allowed.(AY.1999 – 2000 to 2004 – 2005)

Rolta Holding & Finance Corporation Ltd. v. Dy. CIT (2015) 153 ITD 6 (Mum.)(Trib.)

S. 254(2) : Appellate Tribunal –Rectification of mistake-Assessee could not point out any specific mistake in said order, petition was to be dismissed.

Rectification petition was filed by assessee against order of Tribunal. Assessee contended that while passing order Tribunal had not considered grounds raised by it in its entirety and further facts were also not considered in manner explained by assesse. Facts had already been summarized and considered by lower authorities, it was not necessary for Tribunal to reproduce each and every sentence in its order. Grounds raised by assessee in said petition were general in nature and assessee could not point out any specific mistake in said order of Tribunal. Grievance of assessee that decision of Tribunal was against it, was unjustified. Rectification application was dismissed. (AY. 1998 - 1999 to 2005 – 2006)

Mahaveerchand Jain v. Dy. CIT (2015) 153 ITD 108 (Chennai)(Trib.)

S.254(2):Appellate Tribunal-Rectification of mistake-Scientific research expenditure-Expenditure on research and development for production of new drugs—Mistake apparent – Non consideration or improper consideration of issue -Matter remanded.[S.35(3)]

Tribunal in revenue's appeal while rejecting the claim of assesse under section 35(1) failed to consider the applicability of section 35(3) even though not raised in appeal or cross objection by assesse, there was mistake apparent rectifiable under section 254(2).If any mistake pointed out or is found apparent from the record apparent from the record .If Tribunal has failed to give issue directions or failed to pass such orders as are required to be passed under section 254(1) then it shall amounts to a mistake apparent from the record and for rectifying such mistakes the Tribunal " shall make such amendments" in its orders as are necessary for correcting such mistake. Thus in view of the language adopted in sub cl .(2) it is mandatory obligation on the part of the Tribunal to amend its order if the mistake or error so requires. Matter was listed for further hearing on the limited issue of applicability of section 35(3) of the Act. (AY. 2006-2007, 2007-2008, 2008-2009)

Bharat Biotech International Ltd v. Dy.CIT(2014) 151 ITD 747/ (2015) 37 ITR 750/169 TTJ 148 (Hyd.)(Trib.)

S.254(2A):Appellate Tribunal-Order- Third proviso cannot be interpreted to mean that extension of stay of demand should be denied beyond 365 days even when the assesseee is not at fault. ITAT should make efforts to decide stay granted appeals expeditiously.

The Tribunal passed an order extending stay of recovery of demand beyond the period of 365 days. The department filed a Writ Petition to challenge the said order on the ground that in view of the third proviso to section 254(2A) of the Act, the Tribunal has no jurisdiction to extend the stay of demand beyond 365 days. HELD by the High Court dismissing the Petition:

(i) It is true that as per third proviso to section 254(2A) of the Act, if such appeal is not so disposed of within the period allowed under the first proviso i.e. within 180 days from the date of the stay order or the period or periods extended or allowed under the second proviso, which shall not, in any case, exceed three hundred and sixty-five days, the order of stay shall stand vacated after the expiry of such period or periods, even if the delay in disposing of the appeal is not attributable to the assessee. Therefore, as such, legislative intent seems to be very clear. However, the purpose and object of providing such time limit is required to be considered. The purpose and object of providing time limit as provided in section 254(2A) of the Act seems to be that after obtaining stay order, the assessee may not indulge into delay tactics and may not proceed further with the hearing of the appeal and may not misuse the grant of stay of demand. At the same time, duty is also cast upon the learned Tribunal to decide and dispose of such appeals in which there is a stay of demand, as early as possible and within the period prescribed under first proviso and second proviso to section 254(2A) of the Act of the Act i.e. within maximum period of 365 days. However, one cannot lost sight of the fact that there may be number of reasons due to which the learned Tribunal is not in a position to decide and dispose of the appeals within the maximum period of 365 days despite their best efforts. Some of the reasons due to which the learned Tribunal despite its best efforts is not in a position to dispose of the appeal/appeals at the earliest are stated herein above. There cannot be a legislative intent to punish a person/ assessee though there is no fault of the assessee and/or appellant. The purpose and object of section 254(2A) of the Act is stated herein above and more particularly with a view to see that in the cases where there is a stay of demand, appeals are heard at the earliest by the learned Tribunal and within stipulated time mentioned in section 254(2A) of the Act and the assessee in whose favour there is stay of demand may not take undue advantage of the same and may not adopt delay tactics and avoid hearing of the appeals. However, at the same time, all efforts shall be made by the learned Tribunal to see that in the cases where there is stay of demand, such appeals are heard, decided and disposed of at the earliest and periodically the position/ situation is monitored by the learned Tribunal and the stay is not extended mechanically.

(ii) By section 254(2A) of the Act, it cannot be inferred a legislative intent to curtail/withdraw powers of the Appellate Tribunal to extend stay of demand beyond the period of 365 days. However, the aforesaid extension of stay beyond the period of total 365 days from the date of grant of initial stay would always be subject to the subjective satisfaction by the Tribunal and on an application made by the assessee / appellant to extend stay and on being satisfied that the delay in disposing of the appeal within a period of 365 days from the date of grant of initial stay is not attributable to the appellant / assessee. For that purpose, on expiry of every 180 days, the appellant / assessee is required to make an application to extend stay granted earlier and satisfy the Appellate Tribunal that the delay in not disposing of the appeal is not attributable to him / it and the Appellate Tribunal is required to review

the matter after every 180 days and while disposing of such application of extension of stay, the Appellate Tribunal is required to pass a speaking order after having satisfied that the assessee / appellant has not indulged into any delay tactics and that the delay in disposing of the appeal within stipulated time is not attributable to the assessee / appellant. However, at the same time, it may not be construed that widest powers are given to the Appellate Tribunal to extend the stay indefinitely and that the Appellate Tribunal is not required to dispose of the appeals at the earliest. The object and purpose of section 35C(2A) of the Act particularly one of the object and purpose is to see that in a case where stay has been granted by the Tribunal, the Tribunal is required to dispose of the appeal within total period of 365 days, as ultimately revenue has not to suffer and all efforts should be made by the Tribunal to dispose of such appeals in which stay has been granted as far as possible within total period of 365 days from the date of grant of initial stay and the Tribunal shall grant priority to such appeals over appeals in which no stay is granted. For that even the Tribunal and/or registrar of the Tribunal is required to maintain separate register of the appeals in which stay has been granted fully and/or partially and the appeals in which no stay has been granted.

(iii) The Tribunal is also directed to see that the appeals of a particular assessee with respect same or similar issue involved in earlier years/with respect to respective years are clubbed together and heard and decided and dispose of together, may be with respect to a particular year, it is not a stay granted matter. The registry of the Tribunal to draw the attention of the learned Vice President of the Tribunal with respect to such appeals, so that all the appeals are clubbed together and decided and disposed of together, as it is reported that the powers of clubbing of the matters are only with the Vice President of the Tribunal. Registry also may insist that the paper books are filed by the assessee/department as early as possible and preferably within a period of three months from filing of the appeals so as to see that the purpose and object of section 254(2A) of the Act is achieved i.e. appeals in which the stay of demand has been granted by the Tribunal are decided and disposed of by the Tribunal at the earliest and within stipulated time and the Tribunal shall not grant unnecessary adjournments frequently due to non-availability of the advocate of the assessee and or the department's representative, unless strong case for adjournment is made out, more particularly in a case where there is stay of demand during the pendency of the appeal.

(iv) It is also observed and held that while disposing of the application for extension of stay granted earlier, the Tribunal is required to pass a speaking / reasoned order or not. As observed hereinabove, the Tribunal can extend the stay granted earlier beyond the period of 365 days from the date of grant of initial stay, however, on being subjectively satisfied by the Tribunal and on an application made by the assessee / appellant to extend stay and on being satisfied that the delay in disposing of the appeal within a period of 365 days from the date of grant of initial stay, is not attributable to the appellant / assessee and that the assessee is not at fault and therefore, while considering each application for extension of stay, the Tribunal is required to consider the facts of each case and arrive at subjective satisfaction in each case whether the delay in not disposing of the appeal within the period of 365 days from the date of initial grant of stay is attributable to the appellant – assessee or not and/or whether the assessee / appellant in whose favour stay has been granted, has cooperated in early disposal of the appeal or not and/or whether there is any delay tactics by such appellant / assessee in whose favour stay has been granted and/or whether such appellant is trying to get any undue advantage of stay in his favour or not. Therefore, while passing such order of extension of stay, Tribunal is required to pass a speaking order on each application and after giving an opportunity to the representative of the revenue – Department and record its satisfaction as stated hereinabove. Therefore, ultimately if the revenue – department is aggrieved by such extension in a particular case having of the view that in a particular case the assessee has not cooperated and/or has tried to take undue advantage of stay and despite the same the Tribunal has extended stay order, revenue can challenge the same before the higher forum / High Court. (AY. 2008-09, 2009-10)

DIT v. Vodafone Essar Gujrat Ltd. (2015) 376 ITR 23(Guj.)(HC)

S. 254(2A) : Appellate Tribunal- Stay-The Third Proviso which restricts the power of the ITAT to grant stay beyond 365 days "even if the delay in disposing of the appeal is not attributable to the assessee" is arbitrary, unreasonable and discriminatory. It is struck down as violative of Article 14. The ITAT has the power to extend stay even beyond 365 days.[Constitution of India , Art 14]

The third proviso to Section 254(2A) was amended by the Finance Act, 2008, with effect from 01.10.2008 to provide that the Tribunal shall not have the power to grant stay of demand for a period exceeding 365 days "even if the delay in disposing of the appeal is not attributable to the assessee". The said amendment was inserted to overcome the judgement of the Bombay High Court in Narang Overseas Private Limited v. ITAT 295 ITR 22. The Petitioners filed a Writ Petition to challenge the said amended third proviso to section 254(2A) on the ground that it is arbitrary and contrary to the provisions of the Article 14 of the Constitution of India. HELD by the High Court upholding the challenge:

(i) U/s 254, there are several conditions which have been stipulated with respect to the power of the Tribunal to grant stay of demand. First of all, as per the first proviso to Section 254(2A), a stay order could be passed for a period not exceeding 180 days and the Tribunal should dispose of the appeal within that period. The second proviso stipulates that in case the appeal is not disposed of within the period of 180 days, if the delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to extend the stay for a period not exceeding 365 days in aggregate. Once again, the Tribunal is directed to dispose of the appeal within the said period of stay. The third proviso, as it stands today, stipulates that if the appeal is not disposed of within the period of 365 days, then the order of stay shall stand vacated, even if the delay in disposing of the appeal is not attributable to the assessee. While it could be argued that the condition that the stay order could be extended beyond a period of 180 days only if the delay in disposing of the appeal was not attributable to the assessee was a reasonable condition on the power of the Tribunal to the grant an order of stay, it can, by no stretch of imagination, be argued that where the assessee is not responsible for the delay in the disposal of the appeal, yet the Tribunal has no power to extend the stay beyond the period of 365 days. The intention of the legislature, which has been made explicit by insertion of the words – 'even if the delay in disposing of the appeal is not attributable to the assessee'– renders the right of appeal granted to the assessee by the statute to be illusory for no fault on the part of the assessee. The stay, which was available to him prior to the 365 days having passed, is snatched away simply because the Tribunal has, for whatever reason, not attributable to the assessee, been unable to dispose of the appeal. Take the case of delay being caused in the disposal of the appeal on the part of the revenue. Even in that case, the stay would stand vacated on the expiry of 365 days. This is despite the fact that the stay was granted by the Tribunal, in the first instance, upon considering the prima facie merits of the case through a reasoned order;

(ii) The petitioners are correct in their submission that unequals have been treated equally. Assessees who, after having obtained stay orders and by their conduct delay the appeal proceedings, have been treated in the same manner in which assessees, who have not, in any way, delayed the proceedings in the appeal. The two classes of assessees are distinct and cannot be clubbed together. This clubbing together has led to hostile discrimination against the assessees to whom the delay is not attributable. It is for this reason that we find that the insertion of the expression – 'even if the delay in disposing of the appeal is not attributable to the assessee'– by virtue of the Finance Act, 2008, violates the non-discrimination clause of Article 14 of the Constitution of India. The object that appeals should be heard expeditiously and that assesses should not misuse the stay orders granted in their favour by adopting delaying tactics is not at all achieved by the provision as it stands. On the contrary, the clubbing together of 'well behaved' assesses and those who cause delay in the appeal proceedings is itself violative of Article 14 of the Constitution and has no nexus or connection with the object sought to be achieved. The said expression introduced by the Finance Act, 2008 is, therefore, struck down as being violative of Article 14 of the Constitution of India. This would revert us to the position of law as interpreted by the Bombay High Court in Narang Overseas (supra), with which we are in full agreement. Consequently, we hold that, where the delay in disposing of the appeal is not attributable to the assessee, the Tribunal has the power to grant extension of stay beyond 365 days in deserving cases .

Pepsi Foods Pvt. Ltd. v. ACIT(2015) 376 ITR 87/ 119 DTR 373/ 277 CTR 470/ 232 Taxman 78 (Delhi) (HC)

Pepsi Foods Pvt. Ltd. v. Dy.CIT(2015) 119 DTR 373/277 CTR 470 (Delhi) (HC)

Aspect Software Inc v.ACIT (2015) 119 DTR 373/ 277 CTR 470 (Delhi) (HC)

Ericsson AB v. ADIT (2015) 119 DTR 373/ 277 CTR 470(Delhi) (HC)

S.255:Appellate Tribunal-Powers of President to constitute Special Bench-The CBDT for seeking to constitute Special Bench for non-judicial reasons and on grounds of "political sensitivity"-The collection of tax and the adjudication must move unconcerned with political identity- It is also necessary to send a strong signal to all the litigants, including the State, to make no attempts to influence a judicial body by non judicial methods-Constitution of Special Bench on the recommendation of CBDT in other State was strongly condemned by the Court.[S.254(1), 255(3)]

(i) Having rejected the contention that the Regular Bench had recommended a special bench and that it constituted sufficient material for the president, we now come to the second material placed before the president, that is the recommendation of the Vice president.

(ii) This is the most distressing part. The president forwarded the letter of the Board to the Vice president for his comments. This was purely an internal movement of the file. It was not that the matter was judicially assigned to the Vice president and notified on his board. There was no indication for any litigant to know that the file was now before the Vice president. In spite of this position, the Special counsel who was to be engaged by the Revenue met the Vice president and explained him the need for a special bench. How the Special counsel knew that the file of the matter was before the Vice president, is a mystery. This was a private meeting and the Petitioner was not informed. The matter was seized before the regular bench and the revenue was a contesting party. The Petitioner was completely unaware that any such private meeting had taken place between the counsel and the Vice president. Permitting a party to the litigation to meet privately in absence of other side in respect of an ongoing litigation and then base an opinion on such meeting ,was most improper on the part of the Vice president. The Vice president did not even find it improper and he has proceeded to place the said private meeting on record as if nothing was wrong about the same. Not only holding such private meetings is opposed to judicial conduct, but not knowing that it is an improper judicial conduct, makes the matters worse.

(iii) The Vice president had played a major role in the decision making process to constitute the special bench. After he received the file from the president for his opinion, he suggested that the Regular Bench should give their opinion. He asked them to consider formation of a special bench and for that purpose hold a hearing, if necessary. When the opinion was received from the Regular Bench, he gave his own comment that the Bench had recommended a special bench, omitting to mention that the Bench had recommended a bench outside Andhra Pradesh. The Vice president, therefore, was an integral part and in fact played a major role in a decision to constitute a special bench.

(iv) It is true that the final order of the president is not a judicial order. Nevertheless, even when a judicial body acts in administrative capacity, in midst of the litigation, which order will have effect on the ultimate outcome, the judicial body, must act with fairness, and not allow itself to be influenced. This is a fundamental principle. We will be failing in our duty if we do not uphold this most important principle. No attempts to influence a judicial body by non judicial methods can be permitted and tolerated. If a litigant, be it the State, indulges in such acts, it shall not derive any benefit there from. Such tainted process must be obliterated and undertaken again. This course of action is necessary to retain the faith of litigants in the quality of justice rendered by the Tribunal. It is also necessary to send a strong signal to all the litigants, including the State, to make no attempts to influence a judicial body by non judicial methods.

(v) What is further troubling is that is the introduction of 'political sensitivity'.In fact, the request letter of the Board does not specifically invoke this concept. It is the Vice president who has introduced this concept. This concept is then carried forward by the Regular Bench and during the arguments before us. We fail to understand how 'political sensitivity' is relevant in tax litigation. Tax is levied and collected under the sovereign power of the State. The Revenue is entrusted with collecting the tax and employ all legitimate methods to bring the tax evaders to book. The Tribunal is established to adjudicate disputes arising from the application of the Act. In the scheme of the Act, political affiliation of an assessee is irrelevant. The Vice president thought the case was politically sensitive. This was after the private meeting with the representative of the Board. So are we to presume that politics was discussed in the meeting? The Vice president has sown a seed of an irrelevant and potentially dangerous concept in the income tax litigation. Consider a converse scenario. There could be situation where an assessee may send its representative to hold a private meeting to refer the entire matter to special bench because the result before regular bench may affect

his political career or that the issue in his case is politically sensitive. We therefore strongly deprecate the invocation of this criterion. The collection of tax and the adjudication must move unconcerned with political identity

Jagati Publication Ltd. .v.President, ITAT(2015) 279 CTR 271 (Bom.)(HC)

S.255(4):Appellate Tribunal- Third member-Binding precedent- Even if Third Member's verdict is shown to be "unsustainable in law and in complete disregard to binding judicial precedents", Division Bench has no choice but to give effect to it

On a question relating to the levy of penalty, there was a difference of opinion between the Judicial Member and the Accountant Member. The Third Member, to whom the difference was referred, agreed with the Accountant Member and confirmed the levy of penalty. At the stage of giving effect to the order of the Third Member, the assessee claimed that the said order could not be given effect to as it was "unsustainable in law and in complete disregard to binding judicial precedents". The assessee claimed that the matter of whether effect could be given to such an order was required to be referred to a Special Bench. HELD by the Tribunal:

(i) A larger bench decision binds the bench of a lesser strength because of the plurality in the decision making process and because of the collective application of mind. What three minds do together, even when the result is not unanimous, is treated as intellectually superior to what two minds do together, and, by the same logic, what two minds do together is considered to be intellectually superior to what a single mind does alone. Let us not forget that the dissenting judicial views on the division benches as also the views of the third member are from the same level in the judicial hierarchy and, therefore, the views of the third member cannot have any edge over views of the other members. Of course, when division benches itself also have conflicting views on the issues on which members of the division benches differ or when majority view is not possible as a result of a single member bench, such as in a situation in which one of the dissenting members has not stated his views on an aspect which is crucial and on which the other member has expressed his views, it is possible to constitute third member benches of more than one members. That precisely could be the reason as to why even while nominating the Third Member under section 255(4), Hon'ble President of this Tribunal has the power of referring the case "for hearing on such point or points (of difference) by one or more of the other members of the Appellate Tribunal". Viewed from this perspective the Third Member is bound by the decisions rendered by the benches of greater strength. That is the legal position so far as at least the jurisdiction of Hon'ble Gujarat High Court is concerned post CIT VsVallabhdasVithaldas [(2015) 56 taxmann.com 300 (Guj), but, even as hold so, the fact that Hon'ble Delhi High Court had, in the case of P C PuriVs CIT [(1985) 151 ITR 584 (Del)], expressed a contrary view on this issue which held the field till we had the benefit of guidance from Hon'ble jurisdictional High Court. The approach adopted by the learned Third Member was quite in consonance with the legal position so prevailing at that point of time.

(ii) At the time of giving effect to the majority view under section 255(4), it cannot normally be open to the Tribunal to go beyond the exercise of giving effect to the majority views, howsoever mechanical it may seem. In the case of dissenting situations on the division bench, the process of judicial adjudication is complete when the third member, nominated by Hon'ble President, resolves the impasse by expressing his views and thus enabling a majority view on the point or points of difference. What then remains for the division bench is simply identifying the majority view and dispose of the appeal on the basis of the majority views. In the course of this exercise, it is not open to the division bench to revisit the adjudication process and start examining the legal issues (B T Patil& Sons Belgaum Constructions Pvt. Ltd. Vs ACIT (ITA Nos, 1408 and 1409/PN/2003; order dated 28th February 2013 distinguished).(ITA no. 2850 and 2144/Ahd/2011, dt. 24.04.2015) (AY 1995-96 and 1996-97)

Juiter Corporation Service Ltd. .v. DCIT (Ahd.)(Trib.); www.itatonline.org

S. 256: Reference – Question of law-Legal inference to be drawn from facts –Question of law-Business expenditure- Commission.[S. 37 (1)]

The legal inference that should be dawn from the primary facts is eminently a question of law.

Premier Breweries Ltd. v.CIT (2015) 372 ITR 180/ 230 Taxman 575/ 116 DTR 233 (SC)

S. 256: Reference – Powers of High Court- Amortisation of preliminary expenses-Power to consider all aspects of questions referred.[S. 32,35D]

There is no limitation restricting a reference to those aspects of questions which were argued before the Tribunal or decided by the Tribunal and all aspects may be argued and considered where the question involves more than one aspect.(AY. 1980-81, 1981-82)

International Computers Indian Manufacture v. CIT(2015)374 ITR 243/ 276 CTR 57/ 117 DTR 24 // 230 Taxman 428(Bom.)(HC)

S. 260A:Appeal-High Court-Power of review-High Courts, being Courts of Record under Article 215, have the inherent power of review. There is nothing in s. 260A(7) to restrict the applicability of the provisions of the CPC to S. 260A appeals.[Constitution of India, Art. 215]

In an appeal under s. 260A, the Guwahati passed an order (332 ITR 91) in which it held that transport subsidies and other incentives were not eligible for relief u/s 80IB. The assessee filed a review petition (358 ITR 551) in which it contended that the High Court had gone on to answer the questions without first framing substantial questions of law. The High Court allowed the review petition and recalled the judgement. Thereafter, it passed a judgement (CIT .v. Meghalaya Steels Ltd. [2013] 356 ITR 235) in which it held that the said transport subsidies and other incentives were eligible for relief u/s 80-IB. The department argued before the Supreme Court that under section 260A (7), only those provisions of the Civil Procedure Code could be looked into for the purposes of Section 260A as were relevant to the disposal of appeals, and since the review provision contained in the Code of Civil Procedure is not so referred to, the High Court would have no jurisdiction under Section 260A to review such judgment. HELD by the Supreme Court dismissing the appeal:

High Courts being Courts of Record under Art. 215 of the Constitution of India, the power of review would in fact inhere in them. This was in fact so decided in a slightly different context while dealing with the power of review of writ petitions filed under Art.226 by a judgment reported in AIR 1963 SC 1909 5 (Shivdeo Singh & Ors. Vs. State of Punjab and Ors.). It is also clear that on a cursory reading of Section 260A (7), the said Section does not purport in any manner to curtail or restrict the application of the provisions of the Code of Civil Procedure. Section 260A(7) only states that all the provisions that would apply qua appeals in the Code of Civil Procedure would apply to appeals under Section 260A. That does not in any manner suggest either that the other provisions of the Code of Civil Procedure are necessarily excluded or that the High Court's inherent jurisdiction is in any manner affected.

CIT .v. Meghalaya steels Ltd(2015) 279 CTR 189 (SC)

Editorial: Meghalaya Steels Ltd v.CIT(2015) 279 CTR 193 (Gau)(HC) is affirmed.

S. 260A :Appeal- High Court-Instructions-Monetary limits-CBDT Instruction No. 3/2011 dated 9.2.2011 specifying monetary limits for filing appeals by the department applies only to appeals filed after that date and not to pending appeals.[S.253, 268]

The Supreme Court had to consider whether Instruction No. 3/2011 dated 9.2.2011 issued by the Central Board of Direct Taxes setting out limits for filing appeals to the ITAT and the High Courts applied even to appeals filed before the date of the Instruction. The High Court dismissed the appeals of the Department on the ground that the said Instruction applied even to appeals filed before that date. On appeal by the department to the Supreme Court HELD reversing the High Court:

The appeals and review petitions preferred by the department before the High Court, were disposed of on the basis of the instructions issued by the Central Board of Direct Taxes dated 9.2.2011. It is not a matter of dispute, that all the appeals were preferred prior to 2011, whereas, the instructions dated 9.2.2011 clearly indicate in paragraph 11 thereof, that they shall not govern cases which have been filed before 2011, and that, the same will govern only such cases which are filed after the issuance of the aforesaid instructions dated 9.2.2011. In view of the above, the instant appeals are allowed, the impugned orders passed by the High Court hereby set aside. The matters are remitted back to the High Court for re-adjudication of the appeals on merits, in accordance with law.(CA No. 4919-4920 of 2015, dt. 01.07.2015.)

CIT .v. Suman Dhamija (SC); www.itatonline.org

S. 260A : Appeal-High Court-Competency of appeal-Rule of consistency-Decision of Tribunal on identical issues relating to section 92B-No appeal from decisions-Presumption that decisions had been accepted-Appeal on similar issues to High Court-Not maintainable [S. 92B, 260A].
Held, dismissing the appeal, that the order of the Tribunal, inter alia, had followed the decisions of the Bombay Bench of the Tribunal to reach the conclusion that the arm's length price in the case of loans advanced to associate enterprises would be determined on the basis of the rate of interest being charged in the country where the loan is received/consumed. The Revenue had not preferred any appeal against those decisions of the Tribunal on the above issue. No reason had been shown as to why the Revenue sought to take a different view in the present case from that taken in those decisions of the Tribunal. The Revenue not having filed any appeal against those decisions, had in fact accepted the decisions of the Tribunal. The appeal was not maintainable. (AY. 2007-08)
CIT v. Tata Auto Comp Systems Ltd. (2015) 374 ITR 516 / 276 CTR 481 (Bom.)(HC)

S.260A:Appeal-High Court–Delay was not condoned due to contradictions in affidavits of director.
Where material contradictions were found in both affidavits filed by assessee-company for condonation of delay and director of assessee-company had not given true and correct facts about service of order of Tribunal, delay in filing appeal could not be condoned.
Director Sagar Maize Products Ltd. v. ITO (2015) 231 Taxman 417 (MP)(HC)

S. 260A:Appeal-High Court-Substantial question of law- Condonation of delay - Appeal filed beyond time by Revenue in 2010 - Matter coming up before court in 2015 - Revenue taking no steps and not pursuing matter seriously - No proof showing Revenue prevented any cause from preferring application - Delay should not be condoned.[Limitation Act, 1963, S.5]
The appeal filed by the Revenue was in the year 2010, was a still-born appeal because it was barred by limitation. The Revenue did not even make an application under section 5 of the Limitation Act, 1963, for condonation of delay. The matter came up before the court on April 9, 2015. Till then no steps were taken. The Revenue as a matter of fact woke up after counsel for the assessee was requested by the court on April 9, 2015, to give a notice to the advocate for the Revenue. Thereafter, copy of the application for condonation was served upon him. After consideration of the grounds for condonation, the ground in substance was that the Revenue did not pursue the matter seriously. There was no allegation far less any proof of the fact that the Revenue was prevented by any cause far less sufficient cause from preferring the appeal within the prescribed period of limitation. There was as such no reason why the delay should be condoned. The application for condonation of delay was, therefore, dismissed.(AY. 2005-2006)
CIT .v. Golden Corporation Services (2015) 375 ITR 581 (Cal.)(HC)

S.260A:Appeal-High Court-Rectification of order by Tribunal-Not an order passed in appeal-Not appealable.[S. 254(2)]
The Tribunal while passing an order in an appeal did not notice the decision of the Supreme Court. Hence, it corrected a mistake and recorded that the applicability of the decision could not be adjudicated under the provisions of section 254(2) of the Income-tax Act, 1961, as the issue was covered under section 254(1). The assessee agreed that as and when an order was ultimately passed under section 254(1) in accordance with the order under section 254(2), the order would be appealable under section 260A. The Revenue filed an appeal against the order under section 254(2) which was dismissed. On appeal :
Held, dismissing the appeal, that the Revenue was not without a remedy in the event of the order under section 254(1) being adverse to it. An appeal under section 260A was not maintainable against the order passed by the Tribunal under section 254(2).
CIT .v. Saroop Tanneries Ltd. (2015) 374 ITR 20 (P & H) (HC)

S.260A:Appeal-High Court-Monetary ceiling limits-Instructions mandatory and binding on Revenue-National Litigation Policy, 2011--Instruction No.3 apply pending cases also-No

cascading effect involved in appeal-Appeal only filed because tax effect above monetary limit-Appeal not maintainable. [S.119, 268A]

Dismissing the appeal of revenue the Court held that instruction No. 1979, dated 27-3-2000 and Instruction No. 3 of 2011, dated 9-2-2011 (2011) 332 ITR 1 (St.) is binding on revenue . If the issue involved does not have cascading effect appeal filed by the revenue is not maintainable only because the tax effect is above monetary limit.(AY. 1993-1994)

CIT .v. Shyam Biri Works (2015) 374 ITR 68/231 Taxman 543 (All.)(HC)

S.260A:Appeal–High Court-Lack of proper assistance to Court- It would be proper that the Revenue brief counsel in their panel across the board so as to ensure that the counsel have time to properly prepare themselves to render proper assistance to the court.

By the court : Unmindful of the fact that the petition was listed only to accommodate the Revenue, it was after about 5 to 7 minutes of calling out the petition shown as part-heard, that the counsel for the Revenue walked into the court and mentioned that he was busy in another court. Thereafter, we heard the Revenue. We find that the Revenue brief only a few selected counsel in all matters. This consequently results in the counsel briefed for the Revenue not being completely prepared as it is humanly impossible for a counsel to adequately prepare oneself in more than a couple of matters on an average per day. This results in lack of proper assistance to the court. It would be proper that the Revenue brief counsel in their panel across the board so as to ensure that the counsel have time to properly prepare themselves to render proper assistance to the court.

Rallis India Ltd..v. CIT (2015) 374 ITR 462/ 276 CTR 351/ 230 Taxman 483 (Bom.)(HC)

S. 260A : Appeal-High Court-Strictures passed regarding the "casual and callous" and "frivolous" manner in which senior officers of the dept authorize filing of appeals. Strictures also passed against counsel for acting as a "mouthpiece" of the Dept in persisting with unmeritorious appeals. CBDT directed to take appropriate action- Question decided by Tribunal based on concession by Department or on agreed position that questions covered by decision of Court –Appeals not to be filed in such matters. Registry is directed to forward the copy of the judgment to CBDT for necessary action and to provide an in- house committee of senior Officers of the revenue to review decisions taken in respect of appeals already filed and pending.[S. 10(15), 14A, 37(1), 44C, 244A]

The manner in which the appeal has been filed and prosecuted with regard to the proposed questions 1, 2 and 3 was casual and callous, as the following facts would demonstrate:

(i) In respect of Question No.1 the Revenue sought to agitate an issue contrary to its stand before the Tribunal. The Revenue's prayer before the Tribunal, was to declare that interest income earned on NOSTRO account is taxable. The impugned order of the Tribunal granted the Revenue's prayer and held that interest earned on NOSTRO account is taxable. Before us, the question framed/agitated was that the Tribunal erred in granting interest on NOSTRO account. It is beyond comprehension as to how a party can be aggrieved by an order that grants its prayer.

(ii) Question Nos.2 and 3 as framed, were conceded by the Revenue at the hearing before the Tribunal. Nevertheless, the Revenue sought to challenge what has not been contested before the Tribunal. This without even a whisper as to why the concession made before the Tribunal was not correct or that subsequent decisions of Court makes the concession before the Tribunal not sustainable in law.

(iii) The Appeal memo has been signed by a senior officer of the Revenue viz. Director of Income-tax (IT) and he has also directed the Asst. Director of Income-tax (IT)I(2), Mumbai to file this appeal. Either there is no application of mind to the order of the Tribunal before filing of this appeal or the Revenue is deliberately seeking to keep the pot boiling, so that uncertainty is kept alive. It shows the casual attitude of the Revenue in filing appeals. This is not the first of its kind. We had earlier also passed orders disapproving this conduct of the revenue, but there is no improvement. If filing of such appeals on questions (1), (2) and (3) by the Revenue without justification is unacceptable, the counsel for the Revenue persisting in arguing those questions of law taking valuable time of Court is further objectionable. Such frivolous appeals add to the burden of the Court and thoughtless prosecution of these takes time of the Court which could be utilised for more meritorious (debatable) cases.

(iv) The manner in which sometimes the unmeritorious appeals are persisted by the advocates for the Revenue reminds us of the famous observations of Mr.Justice Crampton in R v O'Connell (1844) 7 ILR 261 @ 312 "Another doctrine broached by another eminent counsel I cannot pass by without a comment. That learned counsel described the advocate as the mere mouthpiece of his client, he told us that the speech of the counsel was to be taken as that of the client; and thence seemed to conclude that the client only was answerable for its language and sentiments. Such, I do conceive, is not the office of an advocate. His office is a higher one. To consider him in that light is to degrade him. I would say of him as I would say of a member of the House of Commons – he is a representative, but not a delegate. He gives to his client the benefit of his learning, his talents and his judgment; but all through he never forgets what he owes to himself and to others. He will not knowingly misstate the law – he will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual, and retained and remunerated (often inadequately) for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice; and there is no Crown or other licence which in any case, or for any party or purpose, can discharge him from that primary and paramount retainer."
(Emphasis supplied)
(v) Undoubtedly, an Advocate has to fearlessly put forth his client's point of view, however the same has to be tempered /guided by truth and justice of the dispute. In matters of tax, justice requires that there must be certainty of law which presupposes equal application of law. Thus where the issue in controversy stands settled by decisions of this Court or the Tribunal in any other case and the Revenue has accepted that decision, then in that event the Revenue ought not to agitate the issue further unless there is some cogent justification such as change in law or some later decision of an higher forum etc. then in such cases appropriately the appeal memo itself must specify the reasons for preferring an appeal failing which at least before admission the officer concerned should file an affidavit pointing out the reasons for filing the appeal. It is only when the Court is satisfied with the reasons given, that the merits of the issue need be examined of purposes for admission.
(vi) Filing of appeal under Section 260A of the Act is a serious issue. The parties who seek to file such appeals (which are normally after two tires of appeal before the Authorities under the Act) must do so after due application of mind and not raise frivolous / concluded issues. This is certainly expected of the State.
The Registry has informed us that out of 4784 appeals from the order of the Tribunal filed in this Court during the period 01/01/2014 to 01/06/2014 the appeals filed by the Revenue are 3968 and only 816 by the class of Assessee as a whole.
(vii) We direct the Registry and also the Counsel appearing for the Revenue to forward a copy of this order to CBDT. What could possibly be done is to provide an in house committee of senior officers of the Revenue to review decisions taken in respect of appeals already filed and pending. If it is found that questions raised are covered by any decision of this Court or Apex Court or it relies upon an earlier decision of the Tribunal which has been accepted by the Revenue as no appeal there from has been filed then they could be separately classified. On completion of the above exercise such appeals could be either withdrawn and/or dismissed as not pressed.Question decided by Tribunal based on concession by Department or on agreed position that questions covered by decision of Court, appeals not to be filed in such matters.(AY.1997-98)
DIT v. Credit Agricole Indosuez(No.1) (2015) 377 ITR 102 (Bom.)(HC)

S. 260A : Appeal - High Court –Coercive proceedings against assessee would be kept in abeyance for a period of two weeks .
Allowing the petition the Court held that ; where assessee was willing to pursue remedy as provided in section 260A, coercive proceedings against assessee would be kept in abeyance for a period of two weeks on condition that assessee satisfied 1/3rd of balance liability. (AY. 2006-07 , 2007-08)
Thomas George Muthoot v. ACIT (2015) 230 Taxman 313 (Ker.)(HC)

S.260A:Appeal-High Court-Tax effect low-Case not falling within exceptions-Appeal dismissed.
The tax effect in the present appeals was less than Rs. 4 lakhs and that the assessee`s case did not fall within the exceptions specified in Instruction No.1979, dated March 27, 2000. Therefore, the appeals

were dismissed without going into the merits. Instruction No. 2 of 2005, dt.24-10-2005--Instruction No. 5 of 2007, dt.16-7-2007.
CIT v. Dr. C.T. Kiruba (2015) 373 ITR 507 (Mad.)(HC)

S.260A:Appeal-High Court- Search and seizure- Block assessment-Tribunal deleted the addition based on facts -No Substantial question of law.[S.69, 153A]
Dismissing the appeal of revenue , the Court held that on given the fact-intensive nature of the matter, and, as noted by the Commissioner (Appeals), the rare instance where cash transactions were indeed reflected in the books of one of the persons which had an intimate connection with the assessee, any further enquiry would involve more weighing of evidence rather than interpretation of law. Barring exceptional cases where the findings were based on no evidence or after overlooking material evidence, the scope of appeal under section 260A involves examination of substantial questions of law. There was none in respect of this transaction. Accordingly the order of Tribunal was confirmed.
CIT v. Tilak Raj Anand (2015) 373 ITR 1 / 232 Taxman 653 (Delhi)(HC)

S. 260A : Appeal - High Court- Appeal by department- Tribunal following the jurisdictional High Court- Must be accompanied by reasons for appeal-Counsel should review the appeal alredy filed on identical issues.
Tribunal following the decision of jurisdictional High Court in CIT v. Geoffery Manners and Co Ltd (2009) 315 ITR 134 (Bom)(HC) , held that expenses for production of television films and commercials is revenue expenditure. On appeal by the Department without indicating any reason why it was seeking to appeal against the order which was already concluded in favour of the assessee. Dismissing the appeal the Court held that;in all cases including where appeals are filed , the officers instructing the counsel should review whether the appeals are filed , the officers instructing the counsel should review whether the appeal should at all be pressed in view of the Revenue having accepted the jurisdictional High Court's order on an identical issue and take necessary instructions from the Commissioner to withdraw or not pressthe appeal. Alternatively, in case a conscious decision is taken to press the appeal, the memorandum of appeal should contain an averment to the effect theat either the case is distinguishable or an appeal has been preferred from the decision of the Court to the Supreme Court or a further affidavit in support should should be filed indicating the reasons . In the absence of the above , exemplary costs were to be personally paid by the jurisdictional Commissioner under whose jurisdiction , the appeal was being filed and passed in sipte of the issue being settled by the Court and the ruling having been accepted by the Revnue.
CIT v. Proctor & Gamble Home Products Ltd. (2015) 377 ITR 66/ 229 Taxman 383 (Bom.)(HC)

S. 260A : Appeal - High Court- Disallowance of deferred guarantee commission-Matter sent back- No substantial question of law. [S.254 (1)]
Dismissing the appeal of revenue the Court held that ,Tribunal having sent back the matter realting to disallowance of deferred

(ITA No . 1314 of 2013 dt 15-04-2015)(AY.2001-02)
DIT v.Societe Generale (2015) 122 CTR 57 (Bom.)(HC)

S. 260A : Appeal - High Court –Delay of four years- Appeal filed by revenue was dismissed.
If explanation for delay in filing appeal is found to be concocted or demonstrates thorough negligence in prosecuting cause, then it would be legitimate exercise of discretion not to condone delay . where revenue filed appeal after four years against order passed by Tribunal on ground that said order was not served and, thus, not within knowledge of revenue, and when that was found to be a false explanation, then, it was urged that order was known to revenue but it was never served and brought to knowledge of Director of International Taxation, explanation of revenue could not be held to be bona fide and, therefore, delay in filing appeal could not be condoned.(AY. 2003-04)
DIT v. Airlines Rotables Ltd. (2015) 229 Taxman 380 (Bom.)(HC)

S. 260A : Appeal - High Court-Cross-objections--No right to file cross-objection.[ITAT,R. 22,Civil Procedure Code, 1908., O.42, S.100, 108]

An appeal being a creature of a statute and a cross-objection in terms of rule 22 of the Income-tax Rules, 1962, being barred with an appeal, the implication or a right of cross-objection could not be read into either the provisions of Order 42 read with sections 100 and 108 of the Code of Civil Procedure, 1908, or under the provisions of sub-section (7) of section 260A of the IT Act.That the cross-objection was not maintainable under section 260A. Followed,Jyoti Kumari(Smt.) v. Asst. CIT [2012] 344 ITR 60 (Karn)(HC)

CICB – Chemicon P. Ltd. v. CIT (2015) 371 ITR 78 (Karn) (HC)

S. 260A:Appeal-High Court- Co-operative housing Society-Mutuality-Condonation of delay-limitation-Appeal after five years after favourable decision by jurisditiona High Court-Delay could not be condoned-Entire law on condonation of delay explained.[Indian Limitation Act, S.5]

(i) Having considered the rival submissions, the issue which falls for our consideration is whether the applicant has shown sufficient cause so as to become entitled for condonation of delay of five years in preferring the appeal against the order dated 31.10.2008 passed by the Tribunal. Admittedly at the relevant time the applicant had accepted the orders passed by the Tribunal on the ground that three Authorities have decided against it. The applicant was completely conscious of the fact that there was no decision of the Jurisdictional High Court in regard to the said issue. This was more a reason for the applicant to pursue the proceedings. The applicant, however, accepted the orders passed by the Tribunal and decided not to pursue the proceedings. In the meantime this Court had decided the same in favour of the applicant in the case of "Sind Cooperative Housing Society Ltd." 317 ITR 47 and "Mittal Co-operative Society Ltd."320 ITR 414. The Tribunal applying the law laid down in these decisions decided in favour of the applicant by an order dated 11.1.2013 passed for the Assessment Year 2007-08. In our opinion the Tribunal deciding in favour of the applicant for the subsequent years, applying the decisions of this Court, would not endure to the benefit of the applicant to reopen the issue concluded by the Orders dated 31.10.2008 passed by the Tribunal and accepted by the applicant. The delay is inordinate.

(ii) We are of the opinion that the reasons as shown by the applicant cannot fall within the parameters of sufficient cause so as to confer a benefit of condonation to the applicant. This is for the reason that the applicant had taken a well considered decision not to move further proceedings against the order dated 31.10.2008. Applying the test of a prudent litigant it cannot be held that once the applicant by his own volition had decided to accept a judicial order, the applicant can at any time assail the same may be for the reason that subsequently new decisions are rendered on that issue. Section 5 of the Limitation Act cannot be stretched to bring about a situation of unsettling judicial decisions which stood accepted by the parties. If the contention of the applicant is accepted, it would create a situation of chaos and unsettling various orders passed from time to time by the Tribunal as accepted by the parties. The legislative mandate in stipulating a limitation to file an appeal within the prescribed limitation cannot be permitted to be defeated when a litigant has taken a decision not to pursue further proceedings. A new ruling is no ground for reviewing a previous judgment. If this is permitted, the inevitable consequence is confusion, chaos, uncertainty and inconvenience as then no orders can ever attain finality though accepted by parties.

Somerset Place Co-operative Housing Society Ltd. .v.ITO(2015) 374 ITR 307/ 116 DTR 345/ 231 Taxman 806/ 279 CTR 146 (Bom.)(HC)

S.260A:Appeal–High Court- Rule of consistency-Transfer pricing-Department is not entitled to challenge the ITAT's decision to determine the interest rate ALP of funds advanced to AE as per Euribor if the earlier ITAT judgements relied upon by ITAT have not been challenged by the Department- Appeal of revenue was dismissed.[S. 92B,92C]

The assessee advanced funds to its wholly owned subsidiary in Germany on interest-free terms. The TPO held that the transaction was an "international transaction" and held that the assessee ought to have received interest at 10.25% being the lending rate charged by the banks in India (Arms length price). The DRP enhanced the rate of interest to 12%. On appeal, the Tribunal followed its earlier view in VVF Ltd. v. DCIT (ITA No.673/Mum/06) and DCIT .v. Tech Mahindra Ltd (46 SOT 141)

and held that as the amount was advanced to an AE in Germany, the ALP rate of the interest had to be determined by adopting the EURIBOR rate of interest i.e. rates prevailing in Europe. The Department challenged the said finding of the Tribunal in the High Court on the basis that the EURIBOR does not govern the monetary markets or interest rates in India, which is the residence country of assessee and EURIBOR rate is not applicable to the loans for which foreign currency has to be purchased by the Lender. HELD by the High Court dismissing the appeal:

We find that the impugned order of the Tribunal inter alia has followed the decisions of the Bombay Bench of the Tribunal in cases of "VVF Ltd. Vs. DCIT" (supra) and "DCIT v. Tech Mahindra Ltd."(2011) 46 SOT 141 (Mum)(Trib) to reach the conclusion that ALP in the case of loans advanced to Associate Enterprises would be determined on the basis of rate of interest being charged in the country where the loan is received/consumed. Mr.Suresh Kumar the learned counsel for the revenue informed us that the Revenue has not preferred any appeal against the decision of the Tribunal in "VVF Ltd. .v.DCIT" and "DCIT Vs. Tech Mahindra Ltd." on the above issue. No reason has been shown to us as to why the Revenue seeks to take a different view in respect of the impugned order from that taken in "VVF Ltd. v.. DCIT" and "DCIT .v. Tech Mahindra Ltd." The Revenue not having filed any appeal, has in fact accepted the decision of the Tribunal in "VVF Ltd. v. DCIT" and "DCIT v. Tech Mahindra Ltd.". In view of the above we see no reason to entertain the present appeal as in similar matters the Revenue has accepted the view of the Tribunal which has been relied upon by the impugned order.(AY. 2007-08)

CIT .v. Tata Autocomp Systems Ltd. (2015) 374 ITR 516/ 117 DTR 457/ 276 CTR 481/ 230 Taxman 649 (Bom.)(HC)

S. 260A:Appeal-High Court-Uniformity in treatment is the basic premise of rule of law. The Department cannot arbitrarily pick and choose which orders of the ITAT should be challenged in the High Court. If ITAT has followed an order which is not challenged by the Dept then an affidavit must be filed explaining the distinguishing features which warrants the different view.[S. 36(1)(viii) , 263]

When the Revenue challenges the order of the Tribunal which in turn relies upon another decision rendered by it on the same issue, then in cases where the Revenue has accepted the order by not preferring any Appeal against the earlier order, the Revenue should not challenge the subsequent order on the same issue. In case an appeal is preferred from the subsequent order, then the Memo of appeal must indicate the reasons as to why an appeal is being preferred in later case when no appeal was preferred from the earlier order of the Tribunal which has merely been followed in the later case. In any case, the Officer concerned must atleast file an Affidavit before the matter comes up for admission, pointing out distinguishing features in the present case from the earlier case, warranting a different view in case the appeal is being pressed. The absence of this being indicative of non-application of mind, does undoubtedly give an opportunity to the Revenue to arbitrarily pick and chose the orders of the Tribunal which they would challenge in the Appeal before the this Court. Uniformity in treatment at the hands of law is a basic premise of Rule of Law. We trust that the Revenue would take appropriate steps to ensure that the aforesaid directions be implemented in all subsequent matters which are pending Admissions before this Court. If this exercise is done by the Officers of the Revenue, precious time of all concerned would be saved.

CIT .v. State Bank of India(2015) 375 ITR 20 (Bom.)(HC)

S. 260A :Appeal-High Court–Interim order-Miscellaneous application-Appeal against interim order of Tribunal is not maintainable.[S.254(1), 254(2)]

It is apparently clear, that the words "an appeal shall lie to the High Court from every order passed in appeal" has to be given purposeful meaning. The words "passed in appeal" means an order finally deciding an appeal. An order passed by the Tribunal on a Miscellaneous Application is not an order passed in an appeal. Similarly, an order passed by the Tribunal deciding one ground in the appeal is not a final order and, consequently, the appeal is not maintainable against an interlocutory order.

The instant appeal against an interim order of the Tribunal is not maintainable under Section 260-A and is dismissed with the observation that it would be open to the assessee to question the interim order of the Tribunal in an appeal after final orders are passed by the Tribunal by raising it as a ground in the memo of appeal (AY. 2005-06)

Rajesh Agarwal HUF .v. CIT (2015) 228 Taxman 143(Mag.)(All.)(HC)

S.261:Appeal-Supreme Court—Company wound up and no person to pursue the appeal-Appeal dismissed. [S.260A]

Against the order of the High Court dismissing the assessee's appeal on the question of allowance of depreciation for the block period, holding that the Tribunal had arrived at findings of fact after appreciating the evidence on record, including material seized during the course of search and seizure proceedings, and no substantial question of law arose out of the order of the Tribunal, on appeal to the Supreme Court :

The Supreme Court, taking note of the information that the assessee-company had been wound up and there was nobody to pursue the appeals, dismissed the appeals.

Patira Food Products P. Ltd. v. ACIT (2015) 373 ITR 165 (SC)

Editorial: Refer Patira Food Products Pvt Ltd v. ACIT (2004) 267 ITR 621 (Guj.) (HC)

S.261:Appeal-Supreme Court-Assessment-Valuation Officer-Whether report of, called for by Assessing Officer, can be made basis for assessment--Appeal dismissed leaving question open.[S. 131(1)(d)]

Against the decision of the High Court dismissing the Department's appeal against the order of the Tribunal holding that the Assessing Officer could not have relied upon the report of the Valuation Officer called for on a commission under section 131(1)(d), the Department appealed to the Supreme Court : The Supreme Court dismissed the appeal in view of the meagreness of the amount involved in the appeal, keeping the question of law open.

CIT v. Om Prakash Bagadia (HUF) (2015) 373 ITR 670 / 267 CTR 621 / 233 Taxman 131 (SC)

S.261:Appeal-Supreme Court-Cash credit-Tax effect low and no substantial question of law. [S.68, 260A]

The Assessing Officer treated a sum claimed to be a loan as unexplained cash credit and the Commissioner (Appeals) upon examination of the documentary evidence sustained the addition and this was upheld by the Tribunal, and the High Court, holding that the finding of the Tribunal being based on cogent material could not be said to be perverse and no substantial question of law arose from the order of the Tribunal, on appeal to the Supreme Court : The Supreme Court dismissed the appeal, holding that the tax effect was very nominal and that even otherwise, there was no substantial question of law which arose for consideration. (AY 1998-1999)

Krishan Kumar Aggarwal v. Assessing Officer, Income tax (2015) 373 ITR 679 /124 DTR 288 (SC)

Editorial: Decision in Krishan Kumar Aggarwal v. AO [2004] 266 ITR 380 (Delhi) is affirmed.

S. 261 : Appeal–Supreme Court-Small tax effect- Matter has a cascading effect- Circular dt. 9th Feb, 2011 , should not be applied ipso facto- Liberty is given the department to move High Court.[S.260A]

Allowing the appeal of revenue the Court held that; where the matter has a cascading effect, there are cases in which common principle may be in volved in subsequent group matters or large number matters, in such cases attention of High Court has to be drawn. Circular dt 9 th Feb, 2011 (2011) 332 ITR 1 (St.), should not be applied ipso facto. Liberty is given the department to move High Court.

CIT v. Century Park (2015)373 ITR 32/278 CTR 110/120 DTR 308 (SC)

S.261:Appeal-Supreme Court-Depreciation—Studio-Plant-Low tax effect-Appeal not entertained. [S. 32]

The assessee, engaged in the production of cinematograph films, claimed higher depreciation on its studio which was situated in a big landscape. The building was designed in such a way that the wooden partitions could be removed for creating different settings or scenes. On the question whether a part of the studio building constituted plant, the High Court held that part of the studio building would come within the term "plant" entitled to depreciation at the rate applicable to plant and machinery. On appeal to the Supreme Court :

Having regard to the fact that the tax effect was minimal, the court refused to interfere with the appeals and dismissed them, leaving the question of law open. Refer CIT v. Navodaya [2004] 271 ITR 173 (Ker)(HC).
CIT v. Navodaya (2015) 373 ITR 637 (SC)

S.261:Appeal–Supreme Court-Business expenditure-Fines and penalties-Tax effect low- Appeal not entertained.[S.37(1)]
Penalty of Rs. 10,61,698 imposed on the assessee-bank by the Reserve Bank of India for committing violation of provisions of the Reserve Bank of India Act, 1934, and the Banking Regulation Act, 1949, was claimed as business expenditure by the assessee-bank in respect of the assessment years 1984-85 to 1991-92. The High Court allowed it. On appeal: The Supreme Court dismissed the appeals without going into the merits, having regard to the pettiness of the amount, but left the question of law open.(AY. 1984-1985 to 1991-92)
CIT v. Dhanalekshmi Bank Ltd. (2015) 373 ITR 526 / 124 DTR 228 (SC)

S. 261:Appeal–Supreme Court-Small tax effect-Appeal was dismissed solely on the ground that the tax effect thereof is Rs 422830/.[S. 260A, 268A]
Appeal filed by the assesse is not entertained and is entertained and is dismissed solely on the ground that the tax effect is Rs 422, 830/ only . The issue involved was taxability of capital gain in respect of sale of agricultural land. (AY. 1986-1987)
Alexander George v. CIT (2015) 373 ITR 49 / 278 CTR 112/120 DTR 310 (SC).
Editorial: Alexander George v.CIT (2003) 262 ITR 367 (Ker)(HC)

S.261:Appeal-Supreme Court-Intercorporate dividends—Estimated expenditure-Tax effect low and matter being old appeal was not entertained. [S.20, 80M.]
From the judgment of the High Court answering in favour of the assessee the question whether the Department was entitled to import the rule of proportionate expenditure and interest contemplated by section 20 of the Income-tax Act, 1961, as it then stood into section 80M of the Act, the Department appealed to the Supreme Court:
The Supreme Court refused to entertain the appeals holding that the tax effect was nominal and the matter was very old. (AY. 1970-71)
CIT v. Central Bank of India (2015) 373 ITR 524 (SC)
Editorial: Refer, CIT v. Central Bank of India [2003] 264 ITR 522 (Bom.)(HC)

S. 263:Commissioner-Revision of orders prejudicial to revenue- Claim that notional interest on funds placed by the S. 10A eligible unit with the H.O. is allowable as a deduction to the H.O. and is exempt in the hands of the S. 10A unit is an "unsustainable view" justifying revision action. [S.10A, 80HHC]
The Assessee credited interest on the surplus generated from its undertaking at NEPZ,NOIDA in the books of accounts maintained for that undertaking. Correspondingly, a contra entry was passed by the Assessee in the books of accounts maintained in respect of its Head Office. The Assessee included the notional interest as income in computation of profits and gains derived by its undertaking from export of articles or things, for the purposes of claiming deduction under Section 10A of the Act. The Assessing Officer did not reject the inclusion of such interest as the profits and gains of the undertaking, which were deducted by the Assessee from its total income for computing its taxable income. The CIT considered the assessment order passed by the AO to be erroneous as prejudicial to the interest of the Revenue. Consequently, the CIT passed orders under Section 263 of the Act, which were upheld by the Tribunal. On appeal by the assessee HELD dismissing the appeal:
(i) The claim of the Assessee for including notional interest as profit and gains derived from the eligible undertaking for the purposes of Section 10A of the Act is not sustainable in law. It follows from a plain reading of Section 10A(1) that only those profits and gains of an Assessee which have a direct nexus with an undertaking to which Section 10A of the Act applies would be excluded from the income of an Assessee. In the present case, the interest credited by the Assessee in the books of the eligible undertaking is notional and practically unconnected with the eligible undertaking; the interest has been credited on the surplus generated, which has been transferred from the accounts of the

eligible undertaking to the head office. Concededly, the interest credited does not represent any real inflow of funds to the Assessee. The Assessee merely reflects inflow of funds in separate books maintained with respect to the eligible undertaking with a corresponding outflow of funds in the books maintained with respect to the head office (i.e. non-eligible undertaking). In view of the aforesaid, the interest cannot be considered as profits and gains derived by the Assessee from the eligible undertaking as it does not bear a direct nexus with the activities of the eligible undertaking.
(ii) In the present case, the Assessee has not derived any interest income. Therefore, reducing such notional income – which has neither been accrued nor received – from the Assessee's total income is completely alien to the scheme of the Act. Such notional interest could never form a part of the Assessee's income and thus the Assessee's claim that the same is to be excluded under Section 10A of the Act is flawed and wholly unsustainable in law. The view as canvassed on behalf of the Assessee is not, even remotely, plausible and we find no infirmity with the CIT's exercise of jurisdiction under Section 263 of the Act.
(iii) We are also unable to accept the contention that since in the preceding year, no issue has been raised with regard to charging of interest by one unit to another, the same could not be picked up by the CIT under Section 263 of the Act. Merely because an issue remained unchecked in a preceding year does not mean that the CIT is estopped from exercising its powers under Section 263 of the Act. It is well established that the principles of res judicata do not apply to income tax proceedings and an error in the preceding year need not be repeated or ignored in the subsequent years. In the present case, the issue was not picked up in the preceding year. Further, the claim of the Assessee cannot be stated to be of a nature which has been consistently accepted in past several preceding years since the entry in relation to notional interest had been passed by the Assessee only in one preceding year and had remained undebated.(ITA No. 83/2003, dt. 09.10.2015). (AY..1991-92, 1992-93)
Thomson Press(India) Ltd. .v. CIT (Delhi)(HC); www.itatonline.org

S. 263 :Commissioner-Revision of orders prejudicial to revenue-Book profit–Provision made for diminution in value of investment-though amendment is retrospective, revenue could not have benefit of same because only that portion of law could be taken which stood as on date when assessment was done- Revision was held to be not proper.[S 115JB]
The Assessing Officer did not add back to book profit, the provision made by the assessee of Rs. 3.21 crore representing the provision for diminution in the value of investment, *viz*., shares/assets.
The Commissioner found the order passed by the assessing authority erroneous and prejudicial to the interest of the revenue because such add back was to be made as per clause (*c*) of the *Explanation* to section 115JB(2). He revised the order.
On appeal, the Tribunal held that the provisions which amounted to diminution in the value of asset could not be added back to the book profit.
In the instant appeal, the revenue contended that in view of the amendment to section 115JB by way of *Explanation* (*i*) which was brought into the statute book on 1-4-2001 by the Finance (No. 2) Act 2009 even if clause (*c*) was not attracted, clause (i) was attracted and the order of the Tribunal was erroneous.
Dismissing the appeal the Court held that ; in e CIT (Central) v. Max India Ltd. [2007] 295 ITR 282 (SC), the Supreme Court held that the revenue has to take into account the position of law as it stood on the date when the order was passed. Though the amendment is retrospective in this case, the revenue cannot have the benefit of the same while proceeding under section 263. Accordingly, without going to the substantial question of law, the appeal is dismissed. (AY. 2003-04)
CIT .v. Sasken Communication Technologies Ltd. (2015) 231 Taxman 47 (Kan.)(HC)

S. 263:Commissioner-Revision of orders prejudicial to revenue- Assessing Officer failing to make necessary enquiry - Creditworthiness of alleged lenders not investigated - Revision of order is held to be justified.
Held, the Commissioner had reason to hold that the creditworthiness of the alleged lenders was not enquired into. Mere examination of the bank pass book, profit and loss account and balance-sheet was not enough. When the requisite enquiry was not made, the order was bound to be erroneous and prejudicial to the interests of the Revenue. The order of revision was valid.
CIT .v. Maithan International (2015) 375 ITR 123 (Cal.) (HC)

S. 263:Commissioner-Revision of orders prejudicial to revenue- Method of bifurcation of expenses- Revision was held to be not valid.

Method of bifurcation of expenses in proportion in which agricultural and non-agricultural income bifurcated accepted in past years. Assessment order not showing non-application of mind. Commissioner not observing anything concrete about irrelevance of method or apportionment . Revision was held to be not valid. (AY. 2004-2005)

CIT .v. Forest Development Corporation of Maharashtra Ltd. (2015) 374 ITR 538 (Bom.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue-Merger-Order of revision to re-compute special deduction is held to be not valid. [S.80IB(10)]

Assessing Officer denied deduction. CIT(A) allowed the deduction in appeal. Commissioner passed the revision order, which was set a side by Tribunal. On appeal dismissing the appeal of revenue the court held that order of Assessing Officer merged in appellate order hence order of revision to re-compute special deduction is held to be not valid. (AY. 2007-2008)

CIT .v. Fortaleza Developers (2015) 374 ITR 510 (Bom.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue-Doctrine of merger-No power to decide matters considered and decided in appeal by Commissioner (Appeals)-Commissioner revising and revisiting matters very much part and parcel of Commissioner (Appeals) order and dealt with extensively therein—Impermissible. [R.9A]

On appeal :Held, dismissing the appeal, that not only did the Commissioner purport to revise the Assessing Officer`s order but he purported to deal with the same direction which was issued in the order of the Commissioner (Appeals) and which was given effect to by the Assessing Officer. Meaning thereby, the contents of the remand report, giving effect to the order of the Commissioner (Appeals), as submitted by the Assessing Officer, were reconsidered and revisited. In addition thereto, one more aspect of the sale of theatrical rights of the film to RGV was considered. Naturally, therefore, the doctrine of merger was invoked by the assessee and it was applied by the Tribunal to uphold the objection raised by the assessee. The claim of the cost of production of the film was a subject matter of appeal before the Commissioner (Appeals) and after consideration of the remand report of the Assessing Officer he gave his findings. Therefore, the order of the Assessing Officer undisputedly had merged with the order of the Commissioner (Appeals) as far as the claim of the cost of production of the film was concerned. Similarly, the Tribunal found that the question that the applicability of rule 9A was also very much before the authorities and even in relation thereto, it could not be said that the Assessing Officer at the time of making the assessment order did not consider the applicability of rule 9A vis-a-vis the claim of the assessee on the aspect of the cost of production of the film. Therefore, on both grounds, the order of the Commissioner was not valid.(AY. 2006-2007)

CIT .v.K. Sera Sera Productions Ltd. (2015) 374 ITR 0503 (Bom.) (HC)

S. 263: Commissioner - Revision of orders prejudicial to revenue – Inadequate inquiry by the AO which led him to believe incorrect facts was prejudicial to the Revenue.

The CIT held that the assessment made by the AO was prejudicial to the revenue since he had failed to consider the fact that creditors, from whom loans were obtained by the Assessee, were not credit worthy and the entries were accommodating in nature. The report of the Inspector deputed by the AO was preliminary in nature and did not look into the source of the deposits in the bank accounts of the creditors. The Tribunal quashed the order of the CIT. On appeal by the Revenue, it was held by the HC that mere inadequate inquiry did not make an order prejudicial to the revenue, but if it was proved that inadequate inquiry led the AO to assume incorrect facts, then the order was prejudicial to the revenue. The order of the CIT was upheld because the AO failed to look into the source of the apparent source which was a relevant enquiry and thus the AO failed to apply his mind properly. (A.Y. 2004-05)

CIT v. Maithan International (2015) 375 ITR 123 / 117 DTR 401 / 231 Taxman 381 / 277 CTR 65 (Cal.)(HC)

S. 263 :Commissioner-Revision of orders prejudicial to the interest of revenue-Merger- CIT (A)- Revision was held to be not valid.
CIT(A)'s order merges with AO's order and thereafter revisional jurisdiction of the CIT u/s 263 cannot be invoked on the issue decided in appeal by the CIT(A).(AY. 2009-10)
CIT v. K. Sera Sera Productions Ltd. (2015) 119 DTR 153 (Bom.)(HC)

S.263:Commissioner-Revision of orders prejudicial to revenue -Business loss-deductions –Claim was allowed by due verification- Revision order was set side.
Where AO accepted loss declared by the assessee on sale of non-convertible debentures after considering books of account and detailed reply submitted to questionnaire issued to the assessee, impugned revisional order passed on grounds that the loss in question was allowed without making proper enquiries, was to be set aside.
CIT v. Green Fields Commercial (P) Ltd. (2015) 119 DTR 303 (J&K)(HC)
CIT v. Rangers Commercial (P) Ltd. (2015) 119 DTR 303 (J&K)(HC)

S.263:Commissioner-Revision of orders prejudicial to revenue – Damages received by assessee for breach of agreement to purchase property could not be taxed as capital gains.[S. 4]
The assessee had entered into an oral agreement with 'ECL' to purchase factory premises to give it on lease and earn lease rent. At the time of finalizing the sale agreement, ECL backed out of said oral agreement. The assessee filed suit before Trial Court of 'specific performance' and to grant of damages for breach of said agreement. The Court passed consent decree, under which ECL agreed to pay 5 crores to assessee by way of damages. The AO held that said receipt of damages was not taxable in the hands of the appellant. The CIT exercising his powers under section 263 passed a revisional order and held that the compensation was chargeable to capital gains tax.
The High Court observed that there was enough doubt in the case and the legal position was not clear and hence the CIT could exercise his power u/s. 263. However, the High Court held that the agreement for sale of immovable property in itself did not create any right, title or interest in it but only created a right to obtain performance which was substituted by the Trial Court for compensation and hence no capital gains were attracted in the case of the assessee.(AY. 1995-1996)
Sterling Construction & Investments v. ACIT(Inv.) (2015) 374 ITR 474 / 118 DTR 265 / 232 Taxman 185 / 277 CTR 202 (Bom.)(HC)

S. 263:Commissioner - Revision of orders prejudicial to revenue - Assessing Officer during assessment proceedings seeking details in respect of expenditure incurred for building brand - After examining details holding part alone was of capital nature - Assessing Officer's order not erroneous and prejudicial to interests of Revenue - Revision on ground entire expenses for building brand capital in nature is held to be not justified.
The order of the Tribunal did record the fact that specific queries were made during the assessment proceedings with regard to the details of expenditure claimed under the head "miscellaneous expenses" aggregating to Rs. 2.94 crores. The assessee had responded to the queries and on consideration of its response, the Assessing Officer held that only an amount of Rs. 17.98 lakhs incurred on account of repairs and maintenance out of Rs. 2.94 crores was capital expenditure. This itself would be an indication of application of mind by the Assessing Officer while passing the order. The fact that the assessment order did not contain any discussion with regard to the balance amount of expenditure of Rs. 1.76 crores, i.e., Rs. 2.94 crores less Rs. 17.98 lakhs claimed as revenue expenditure would not by itself indicate non-application of mind to this issue by the Assessing Officer in view of the specific queries made during the assessment proceedings and the assessee's response to it. Moreover, from the nature of expenditure as explained by the assessee to the Assessing Officer during the assessment proceedings the view that the expenses were in the realm of revenue expenditure, was a possible view. Therefore, order was not erroneous and prejudicial to interests of revenue. (AY. 2006-2007)
CIT v. Fine Jewellery (India) Ltd. (2015) 372 ITR 303/230 Taxman 641(Bom.)(HC)

S. 263:Commissioner - Revision of orders prejudicial to revenue - Loss on purchase and sale of non-convertible portion of debentures - Assessee not only answering questionnaires but producing books of account and other records - Loss accepted after close scrutiny – Revision was not justified.[S. 143(3)]

The assessees were engaged in the business of purchase and sale of shares, debentures and other securities. They suffered loss on account of purchase and sale of non-convertible portion of debentures. The Assessing Officer did not accept the returns in a mechanical manner but took them up for close scrutiny. Notices were issued under section 143(2) / 142(1) with necessary questionnaires to the assessees. The assessees appeared before the Assessing Officer through their representatives and participated in the proceedings, stretching over a period of few years. The assessees not only answered the questionnaires but produced the books of account and other records before the Assessing Officer to reinforce their stand. The Assessing Officer accepted the loss suffered by the assessees. The Commissioner exercising the powers under section 263 set aside the assessment orders and directed the Assessing Officer to re-examine the matters and deal with the issues raised in his orders after giving the assessees reasonable opportunity to bring all relevant facts and evidence to the notice of the Assessing Officer. Revision was held to be invalid.

CIT v. Green Fields Commercial P. Ltd. (2015) 372 ITR 740 /231 Taxman 529 (J & K) (HC)
CIT v. Rangers Commercial P. Ltd. (2015) 372 ITR 740//231 Taxman 529 (J & K) (HC)

S. 263:Commissioner-Revision of orders prejudicial to revenue -Assessing Officer raising certain queries and assessee responding - Failure to discuss or mention this in assessment order - Revision on the ground Assessing Officer did not apply his mind or that he had not made inquiry on the subject was held to be not justified.

Once inquiry was made, a mere non-discussion or non-mention thereof in the assessment order could not lead to the assumption that the Assessing Officer did not apply his mind or that he had not made inquiry on the subject and this would not justify interference by the Commissioner by issuing notice under section 263.Revision was held to be not justified.(AY. 2008-2009)

CIT v. Krishna Capbox (P) Ltd. (2015) 372 ITR 310 (All) (HC)

S. 263:Commissioner - Revision of orders prejudicial to revenue -Where two views possible and Assessing Officer chooses one - No power to revise - Whether a particular unit can be used independently or in tandem with similar units - Question of fact-Revision was held to be not justified.[S.260A]

The Assessing Officer was satisfied with the claim of the assessee for depreciation on the cages meant to carry birds that were produced in the hatchery. The Commissioner issued notice under section 263 on the view that though the cost of each cage purchased by the assessee during the assessment year 1992-93 was less than Rs. 5,000, the cages were not put to use independently and they were utilised in fabrication of a bigger compartment with common facilities of lighting, feeding, watering, etc. Accordingly, he denied the depreciation. The Tribunal held in favour of the assessee. Held, dismissing the appeal, that where two views of a particular aspect are possible for an Income-tax Officer, and he has chosen one, the Commissioner cannot reopen the matter on the ground that another view is possible. The second ground where the power can be exercised is that the order passed by the assessing authority is patently illegal. The Revenue was not able to demonstrate as to how the order passed by the Tribunal was erroneous. At any rate, the question as to whether a particular unit can be used independently or in tandem with similar units, is a pure question of fact and the question cannot be dealt with in an appeal under section 260A. (AY .1992-1993)

CIT v. Srinivasa Hatcheries (P) Ltd. (2015) 372 ITR 378 (T & AP) (HC)

S. 263:Commissioner - Revision of orders prejudicial to revenue - Neither proper books of account produced before Assessing Officer nor examination and scrutiny of documents and papers carried out - Failure to show that there was wrong exercise of revisional powers - Sufficient material to conclude that Assessing Officer's order was erroneous and prejudicial to revenue.

The Assessing Officer accepted the return apparently without proper verification of the expenses stating that the expenses were unverifiable. He came to the conclusion that such unverifiable expenses

were inadmissible but without properly quantifying the expenses, disallowed only a paltry sum of Rs. 60,000 and that too without giving details and basis of the disallowances. Thereafter, a survey was conducted in the premises of the assessee wherein it was found that the books of account had not been maintained by the assessee in due course of business, and proceedings under section 263 were initiated.

Held, that in the order passed by the Assessing Officer under section 143(3) there was mention of examination of the books of account. When the entire attending facts were gone through, it transpired that the version of the Assessing Officer in his order that he had gone through the books of account of the assessee was factually incorrect and wrong and was not supported by any record. Had the books of accounts been made available to the Assessing Officer and had those been actually examined by him, such perfunctory assessment was not to follow. From the statement of the president of the assessee, recorded during the course of these survey proceedings, it was abundantly clear that every effort was made by the assessee to dodge the authorities. Though the assessee was ready to produce a copy of the audited accounts it was not at all interested to produce the account books. Instead of producing the books of account, the assessee surrendered a sum of Rs. 2 crores. The Commissioner had rightly come to a firm finding that the assessment framed by the Assessing Officer as also later under section 143(3) both were erroneous and prejudicial to the interests of the revenue as the Assessing Officer had not made requisite inquiry with regard to the aspect of maintenance of proper books of account while completing the assessment. There was no infirmity in the order of the Tribunal as well, as it had rightly rejected the appeal of the assessee.(AY. 2006-2007)

Mattewal Labour and Construction Co-op. Soc. Ltd.v. CIT (2015) 372 ITR 665 (P&H) (HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue -- Exempt income- Rule 8D being not applicable for the relevant assessment year revision order by the Commissioner was held to be not valid. [S. 14A , R. 8D]

Assessing Officer had made an addition under section 14A towards interest and administrative expenditure for earning exempt income.Commissioner invoked section 263 to hold that order passed by Assessing Officer was erroneous because rule 8D was not invoked. Tribunal allowed the appeal of revenue. On appeal by revenue dismissing the appeal of revenue the Court held that; Rule 8D being not applicable for relevant year, Commissioner was not justified to hold order passed by Assessing Officer to be erroneous and prejudicial to interest of revenue. (AY. 2006-07)

CIT v. Aura Securities (P.) Ltd. (2015) 230 Taxman 241 (Guj.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue–Deduction- Possible view-Principle of consistency-Revenue cannot pick and choose the orders of Tribunal to file appeals-Officer must file an affidavit before matter comes up for admission- Revision was held to be not valid.[S. 36(1)(viii), 260A]

The Assessing Officer granted deduction under section 36(1)(viii) of the Act to the assesse a Government bank . Commissioner revised the order. Tribunal held that there was no occasion for the Commissioner to exercise his power under section 263 on the question of deduction calimed under section 36(1)(vii).This conclusion was reached following its decision holding that the deduction under section 36(1)(vii) was to be allowed to Government banks even for the years prior to the assessment year 2007-08 and that the amendment in the assessment year 2007-08 included banking comoanies. On appeal: Held, dismissing the appeal that there was no occasion for the Commissioner to exercise his powers under section 263 as the view taken by the Assessing Officer was apossible view. This possible view was further fortified by the decision of the Tribunal which had also been accepted by the Revneue . Beisdes even under the Explantion to section 36(1)(vii) , as existing at the relevant time, afinacial corporation has been defined to include a public company and a Governemnt company. The assesee would be covered bu definition of financial corporation as stated in the Exlanation to section 36(1)(viii).Revenue cannot pick and choose the orders of Tribunal to file appeals-.Officer must file an affidavit before matter comes up for admission-.

CIT .v. State Bank of India(2015) 375 ITR 20 (Bom.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue –Search and seizure- Once proceedings is initiated under section 153A,Commissioner has no jurisdiction to initiate revision jurisdiction. [S. 132, 153A]

Once the proceeding initiated u/s 153A by virtue of search u/s 132, the Assessing Officer gets the jurisdiction to re-open and re-assessee the declared and undisclosed incomes and pass the orders accordingly. Hence, the CIT has no jurisdiction to initiate proceeding u/s 263.(AY. 2005-06 to 2008-09)

Canara Housing Development Company .v. Dy.CIT(2015) 274 CTR 122 (Karn)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue.-Revision was held to be not justified.[S.43(1)]

Assessment made after queries and satisfaction with assessee's reply regarding applicability of Explanation 3 to s. 43(1) could not be revised by CIT on the ground of lack of enquiry by AO. It was also held that it was an accepted position that explanation 4A to s.43(1) would not apply to the year in question as it was inserted by the Finance (No.2) Act, 1996, w.e.f 1st October, 1996. Tribunal was there right in its view that s. 263 was not applicable to the facts of the present case. (AY. 1995-95)

CIT v. SRF Ltd. (2015) 114 DTR 61 / 230 Taxman 422(Delhi)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue -Depressed sales and 60 per cent. discount offered on account of ongoing sealing drive conducted by municipal authorities--Insufficient to take a different view—Revision was held to be invalid.

The assessee's premises were subjected to survey and discrepancies noticed between its books of account, the stocks and the excess cash was surrendered by it. These were reflected in the books of account presented during the course of assessment. On the ground sales for the period March 24, 2006, and March 30, 2006, were depressed and stock was valued at Rs. 17 lakhs, but was ultimately sold for Rs. 1.37 lakhs, the Commissioner exercised his power of revision rejecting the assessee's explanation that the threat of ongoing sealing drive drove it to sell the stock at throwaway prices .Held, dismissing the appeal, that the Commissioner, in his order, cited an instance of goods worth Rs. 1,900 being sold for Rs. 200. Whilst a consistent behaviour, of disclosing a pattern, might justify a conclusion which warrants rejection of the books of account, the explanation of the assessee that but for such sales, the stocks would have been inaccessible for an inordinately long period of time, thus considerably risking its business, as against which it chose to liquidate its stocks, could not be characterised as unreasonable. Therefore, to seize upon this or the circumstance that a 60 per cent. discount was offered ipso facto was insufficient to take a different view. Thus, the revision was invalid.(AY. 2006-2007)

CIT v. Garg Cheap Cut Piece House (2015) 371 ITR 291 (Delhi) (HC)

S.263:Commissioner-Revision of orders prejudicial to the interest of revenue-Cash credits – Revision of order was held to be not justified.[S.68, 143(3)]

Where in assessment proceedings, assessee furnished confirmations from all debtors and creditors having balance in excess of Rs. One lakh in their bank account as directed and said fact was duly verified by Assessing Officer, Commissioner was not justified in passing revisional order setting aside assessment with a direction to consider issue of addition to be made under section 68 afresh in respect of amount received from aforesaid parties. (AY. 2008-09)

CIT v. Ankit Garments Manufacturing Co. (2015) 229 Taxman 258 (Delhi)(HC)

S. 263: Commissioner - Revision of orders prejudicial to revenue -Capital or revenue receipt - Capital gains - Business income -Termination of agency business - Assessing Officer wrongly treating receipt as capital gains and applying section 54EC to grant exemption - Consideration for transfer of goodwill received in nature of compensation - Taxable under head "Profits and gains of business or profession - Revision applying section 28(ii)(c) was held to be valid. [S.4, 28(ii)(c), 45,54 EC]

The assessee was a recipient of certain amount for holding an agency in India for the activities relating to the business of another company and it was only in connection with the termination of the agency, that the assessee received certain payment by transferring such rights covered by the sub-

agency to another party. Therefore, section 28(ii)(c) would come into play and the income received by the assessee had to be certainly treated as profits and gains of business. It could not partake of the character of transfer of capital asset, as what was transferred was the sub-agency and goodwill attached. If it was a case of transfer simpliciter of the asset, without reference to the sub-agency, the assessee would be entitled to invoke section 45. But, the impugned agreement would clearly fall within the ambit and scope of section 28(ii)(c). The Assessing Officer had not applied the correct provision of law and the Commissioner was justified in invoking section 263 to revise the erroneous order. In so far as prejudice to the interests of the Revenue was concerned, it was apparent on the face of the record that but for the application of section 28(ii)(c) of the Act, the assessee would be entitled to the benefit of claiming the receipt of the amount as capital gains under section 45 and the consequent exemption. Therefore, the claim of the assessee would certainly be prejudicial to the interests of the Revenue. Revision was held to be valid.(AY. 2001-2002)

Chakiat Agencies P. Ltd. v. ACIT (2015) 370 ITR 502/ 231 Taxman 773 (Mad.) (HC)

S. 263:Commissioner–Revision of orders prejudicial to revenue - cash credits-Assessment order showing non-application of mind by Assessing Officer - Assessment order erroneous and prejudicial to the interests of Revenue – Revision was held to be valid.[S.68]

The assessee received Rs. 61 lakhs in the form of loans. The Commissioner noted that whereas on the one hand loans were advanced to the assessee at or about a proximate point in time, gifts in similar amounts had also been advanced. The Commissioner observed that these loans were unquestioningly accepted by the Assessing Officer despite the fact that the identity and capacity of the persons to whom the loans had been given had not been established. Letters which were addressed to the lenders had been returned unserved and the assessee expressed his inability to furnish their current addresses. The Commissioner made a detailed enquiry and summarised the evidence which was gathered in the group of cases pertaining to the family of the assessee during the course of the order in the form of a tabulated statement. The Commissioner observed that the persons who were advancing the gifts or the interest-free loans were individuals with a marginally taxable income, whereas the assessees were persons with a high income and substantial assets. The ultimate conclusion was that the loans or gifts were orchestrated to deposit moneys in family concerns or for investment in property. The Commissioner made a reference to the entries in the bank accounts and noted that balances were built up mostly in the form of cash and were taken out instantaneously by cheques and drafts which was a symptom of a hawala transaction. The Commissioner held that the identity and capacity of as many as 12 lenders were not established and the Assessing Officer was directed to modify his order adding an amount of Rs. 61 lakhs obtained from the loans. The Tribunal set aside the revisional order holding that the Assessing Officer had conducted an enquiry and had taken a possible view in law and was satisfied with the quality of evidence produced by the assessee. On appeal:

Held, allowing the appeal, that the order of the Assessing Officer did not indicate that there had been an application of mind by the Assessing Officer. There was nothing to indicate from the order that the Assessing Officer had brought his mind to bear upon the identity and capacity of the alleged lenders who had furnished loans to the assessee in the amount of Rs. 61 lakhs. This, indeed, was a material circumstance which would have a bearing on the applicability of the provisions of section 68. It could not be deduced merely on the basis of the order-sheets of the Assessing Officer that there was a due and proper application of mind to the fundamental issue which had been raised by the Commissioner while exercising jurisdiction under section 263. Evidently, therefore, the requirement of section 263 has been established and the Commissioner was justified in coming to the conclusion that the order passed by the Assessing Officer without application of mind was both erroneous and prejudicial to the interests of the Revenue. The Tribunal has manifestly acted in excess of its jurisdiction in interfering with the order of the Commissioner. The Assessing Officer was directed to decide issue afresh. (AY. 2003-2004)

CIT v. Anand Kumar Jain (2015) 370 ITR 140 / 231 Taxman 534 (All.)(HC)

S. 263: Commissioner - Revision of orders prejudicial to revenue --Unaccounted purchases and sales - Addition by Commissioner on basis of statement before excise authorities in context of levy of excise duty on unaccounted production - Excise authority deleting addition and deletion affirmed by Tribunal- Revision was held to be not valid.

Held, that the addition was sought to be made by the Income-tax Department on the basis of the statement made by the director before the Central excise authorities in the context of levy of excise duty on unaccounted production. The Central Excise Department had deleted the addition of excise duty levied and this had been upheld by the CESTAT which had held that there was no evidence to show that there was clandestine manufacture and clearance of the ingots. The Income-tax Department had not collected any independent material to arrive at the conclusion that there were unexplained sales or purchases made by the assessee. It was only on the basis of the statement of the director before the excise authorities in which the Tribunal had noticed various contradictions and gaps. In the facts and circumstances, on the basis of the statement made by the director before the excise authorities alone which did not find corroboration from any other material, no addition could have been validly made. Revision was held to be not valid.(AY. 2005-2006)

CIT v. Arora Alloys Ltd. (2015) 370 ITR 732 (P & H) (HC)

S. 263:Commissioner - Revision of orders prejudicial to revenue - Recording of satisfaction before issuing notice - Commissioner signing on order-sheet for putting up draft notice under section 263 as well as issuing notice - Sufficient compliance in the matter of calling for, examining records of assessment to consider necessity of issuing notice- Revision was held to be valid.

Held, affirming the decision of the single judge, that having put the signature of the Commissioner in approval of the draft notice put up with the file and having issued the show-cause notice there was sufficient compliance by the Commissioner. He had complied with the provisions contained in section 263 in the matter of calling for, examining the records of the assessment proceedings to consider the necessity of issuing such show-cause notice. The assessee had challenged the issuance of the show-cause notice itself before "making of the order". It is only upon "making of the order" the assessee might, from the face of it, show whether there was consideration or not.

Zigma Commodities P. Ltd. .v. ITO (2015) 370 ITR 318/ 232 Taxman 356 (Cal) (HC)

Editorial: Zigma Commodities P. Ltd. .v. ITO (2014) 365 ITR 276 (Cal)(HC) is affirmed.

S. 263: Commissioner-Revision of orders prejudicial to revenue- Fact that assessment order is silent on a point does not mean that there is no application of mind by AO if he has raised a query during the assessment proceedings and assessee has replied.[S.143(3)]

The Tribunal records the fact that specific queries were made during the assessment proceedings with regard to details of expenditure claimed under the head “miscellaneous expenses” aggregating to Rs.2.94 crores. The assessee responded to the same and on consideration of response of the assessee, the AO held that of an amount of Rs.17.98 lakhs incurred on account of repairs and maintenance out of Rs.2.94 cores is capital expenditure. This itself would be indication of application of mind by the AO while passing the impugned order. The fact that the assessment order itself does not contain any discussion with regard to the balance amount of expenditure of Rs.1.76 crores i.e. Rs.2.94 crores less Rs.17.98 lakhs claimed as revenue expenditure would not by itself indicate non application of mind to this issue by the AO in view of specific queries made during the assessment proceedings and the assessee’s response to it. In fact this Court in the case of “Idea Cellular Ltd. Vs. Deputy Commissioner of Income Tax &Ors., [(2008) 301 ITR 407 (Bom.)]” has held that if a query is raised during assessment proceedings and responded to by the assessee, the mere fact that it is not dealt with in the assessment Order would not lead to a conclusion that no mind had been applied to it. (ITA No. 296 of 2013, dt.3.02.2015.)

CIT .v. Fine Jewellery (India) Ltd. (Bom.)(HC);www.itatonline.org

S.263:Commissioner-Revision of orders prejudicial to revenue -Free trade zone-Export turn over-Telecommunication charges-Direction of Tribunal to follow the law laid down by special Bench of Tribunal and Jurisdictional High Court-Direction was held to be valid.

Commissioner, while exercising jurisdiction under section 263, set aside assessment order with a direction to Assessing Officer to re compute deduction under section 10A, by excluding telecommunication charges from 'export turnover'. On appeal, Tribunal upheld exercise of jurisdiction by Commissioner but sent matter back to him to modify his direction in light of decisions of its Special Bench and division bench of jurisdictional High Court.On appeal by revenue dismissing the

appeal the Court held that Tribunal had done nothing but inviting attention of Commissioner to principles of law laid down in its Special Bench decision and equally division bench of jurisdictional High Court, merits of claim could not be and need not be considered. (AY. 2004-05)
CIT .v. Larsen & Toubro Infotech Ltd. (2015) 228 Taxman 65(Mag.)(Bom.)(HC)

S.263: Commissioner-Revision of orders prejudicial to revenue –Cash credits-Business income-Income from other Sources-Revision was held to be not justified.[S.28(i), 68,143(3)]
Assessee businessman received an unsecured loan.Assessee could not give satisfactory explanation regarding source of creditor.AO made addition invoking section 68 under head 'business income'. However, Commissioner opined that it should have been assessed under head 'income from other sources' and, thus, revised assessment. Tribunal has quashed the revision order .On appeal by revenue the Court held that view of AO was a possible view and, hence, there was no reason for Commissioner to invoke section 263 so as to arrive at a different findings. (AY. 2005-06)
CIT .v. P.D. Abraham (2015) 228 Taxman 67(Mag.)(Ker.)(HC)
Editorail: SLP of revenue is dismissed. (SLA(C) Nos. 18130/31 of 2014 dt 17-11-2014) CIT v. P.D.Abraham (2015) 232 Taxman 336 (SC)

S.263:Commissioner - Revision of orders prejudicial to revenue – Currency loss-Speculative transactions –loss incurred by assessee in currency swap contract cannot be denied to be set off against other heads of income- Currency swap loss was allowable as business loss- Revision was held to be not valid. [S. 37(1),43(5), 73]
Allowing the appeal of assessee the Tribunal held that provisions of section 43(5) do not apply to currencies and, therefore, loss incurred by assessee in currency swap contract cannot be denied to be set off against other heads of income taking it as speculative loss . Similarly where assessee company had entered into currency swap contracts for working capital loans which was pre-requisite for its business of export and import of commodities, loss incurred in said contract being in respect of circulating/working capital was to be allowed. Revisional order passed by the Commissioner was set aside.(AY.2008-09)
Adani Enterprises Ltd. .v. Ad.CIT (2015) 68 SOT 129(Ahd.)(Trib.)

S. 263:Commissioner- Revision of orders prejudicial to revenue - Amounts not deductible-Deduction at source- If payer obtains declarations in Form 15G/ 15H, tax is not deductible at source. Failure to furnish such declarations to CIT may attract penalty u/s 272A (2)(f). However, disallowance u/s 40(a)(ia) cannot be made-Order of revision was quashed.[S. 40(a)(ia), 40A(3) 194A, 197A(IA), 272A(2)(f), Form 15G/15H]
The assessee has received such Forms as prescribed from those persons to whom interest was paid/being paid and accordingly no deduction of tax was to be made in such cases. The default for non-furnishing of the declarations to the Commissioner of Income-tax as prescribed may result in invoking penalty provisions under section 272A (2)(f), for which separate provision/procedure was prescribed under the Act. However, once Form 15G/ Form 15H was received by the person responsible for deducting tax, there is no liability to deduct tax. Once there is no liability to deduct tax, it cannot be considered that tax is deductible at source under Chapter XVII-B as prescribed under section 40(a)(ia) (I.T.A. No. 1326/Hyd/14 C.O. No. 57/Hyd/14, dt. 07.08.2015) (AY. 2009-10)
Malineni Babulu (HUF) .v. ITO (Hyd.)(Trib.); www.itatonline.org

S. 263 : Commissioner - Revision of orders prejudicial to revenue – Loss under the head income from other sources- Set off against heads of income- Order is not prejudicial to revenue.[S.71]
Assessee using part of loan for making deposits in bank. Assessing Officer allowing deduction of interest on entire loan. Interest on borrowings for deposits allowable as expenditure against interest earned on fixed deposits. Commissioner revised the order. On appeal Tribunal held that Loss under head "Income from other sources" to be set off against income from other heads of income hence the order of Assessing officer is not prejudicial to revenue. (AY. 2009-2010)
S. Rajagopal v. ITO (2015) 68 SOT 318 / 39 ITR 624 (Chennai)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - In a case where there is inadequate inquiry but not lack of inquiry, the CIT must conduct inquiry and verification and record the finding how the assessment order is erroneous. He cannot simply remand the matter to the AO for verification.[S. 24(b),143(3), 153]

In cases where there is inadequate inquiry but not lack of inquiry, the CIT must give and record a finding that the order/inquiry made is erroneous. This can happen if inquiry and verification is conducted by the CIT and he is able to establish and show the error and mistake made by the AO, making the order unsustainable in law. In some cases possibly though rarely, the CIT can also show and establish that the facts on record or inferences drawn from facts on record per se justified and mandated further enquiry or investigation but the Assessing Officer had erroneously not undertaken the same. In this situation, the said finding must be clear, unambiguous and not debatable. The matter cannot be remitted for a fresh decision to the Assessing Officer to conduct further inquiry without a finding that the order is erroneous. The distinction must be kept in mind by the CIT while exercising judgment under Section 263 of the Act and in absence of the finding that the order is erroneous and prejudicial to the interest of revenue, the exercise of jurisdiction under said section is not sustainable. The finding that the order is erroneous is the condition or requirement which must be satisfied for exercise of jurisdiction u/s 263 of the Act. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean that the CIT has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question. In the most of the cases of alleged inadequate investigation, it would be difficult to hold that the order of the AO, who had conducted inquiries and had acted as an investigator is erroneous without CIT conducting verification/inquiry. It was also laid down that the CIT can direct reconsideration of assessment on this ground but only when the order is erroneous and an order of remit cannot be passed by the CIT to ask the AO to decide whether the order was erroneous and such order is not permissible under the provisions of section 263 of the Act. The jurisdictional pre-condition for invoking section 263 of the Act is that the CIT must come to the conclusion that the order is erroneous and is unsustainable in law. (AY. 2009-10)

Maya Gupta v. CIT (Delhi)(Trib.); www.itatonline.org

S. 263 : Commissioner - Revision of orders prejudicial to revenue -Special Economic Zones-Foreign exchange fluctuation losses- Revision on ground that assessee had not fulfilled eligibility conditions as SEZ was unjustified where it was found that assessee was duly granted approval by SEZ authorities to set up SEZ unit, it was recognized as an entrepreneur under SEZ Act and was also granted renewal of approval for trading by competent authority under SEZ Act-Foreign exchange fluctuation loss was correctly allowed by the AO.[S. 10AA, 37(i), The Special Economic Zone Act, 2005, S.2(z)]

Assessee in its SEZ unit was engaged in carrying on business of trading in gold, platinum and diamond jewellery. SEZ unit imported goods from supplier of Dubai and re-exported it. AO allowed assessee's claim for deduction under section 10AA. CIT(A) revised said order on ground that assessee had not fulfilled conditions for eligibility namely, import for purposes of re-export and had not earned any foreign exchange and denied exemption. It was found that assessee was duly granted approval by SEZ authorities to set up SEZ unit and assessee was recognized as an entrepreneur under SEZ Act and was also granted renewal of approval for trading by competent authority under SEZ Act. Annual performance report submitted by assessee before SEZ authorities showed that net foreign exchange earnings was in accordance with SEZ Act and SEZ Rules and, thus, assessee complied with SEZ Act and SEZ Rules. Therefore the ITAT held that views taken by AO was one of possible views and, thus, revision was unjustified. As regards foreign exchange fluctuation was allowed by the AO considering the number of documents hence the revision order of the CIT was set aside. (AY. 2009 - 2010 & 2010 – 2011)

Zaveri& Co. (P.) Ltd. v. CIT(2014) 32 ITR250/ (2015) 153 ITD 85 (Ahd.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue Depreciation –Windmill, generated wind power and sold it to state electricity board prior to 30th September of year, income from which was taxed, depreciation was to be allowed at full rate-Revision order was set aside.[S.32]

The assesse was in the business of power through windmill. The assessment was completed u/s 143(3). Depreciation loss of 80% on the cost of a new wind mill was allowed. In revision proceedings under section 263, Commissioner held that erection invoices showed that the wind mill erection was completed on 30-9-2007 hence he directed to restrict the depreciation to 40%. On appeal the Tribunal held that ,the assessee's wind mill was erected and generated power before 30-9-2007. The same was sold to state electricity board and sale proceeds were being offered for taxation. Department had not questioned certificate issued by State Electricity Board, it could not be said that assessee had not erected wind mill on or before 30-9-2007,hence allowance of depreciation at 80% was held to be justified. Order of Commissioner was quashed. (AY. 2008 – 2009)

D.M. Kathir Anand v. ACIT (2014) 29 ITR 753 / (2015) 153 ITD 115 (Chennai)(Trib.)

S. 263: Commissioner - Revision of orders prejudicial to revenue -Property held for charitable purposes- Before any activity can be branded as being in the nature of trade or commerce, the AO has to demonstrate the intention of parties backed with facts and figures of carrying out activities with profit motive. Mere surplus from any activity which has been undertaken to achieve the dominant object does not imply that the same is run with profit motive. The intention has to be gathered from circumstances which compelled the carrying on the activity- Revision was order held to be not justified. [S. 2(15), 11]

The AO completed the assessment u/s 143(3) accepting the nil income shown by the assesse. DIT (E) was of the opinion that the principle of mutuality was wrongly applied by the AO, after examining the bye laws he held that the order was prejudicial to the interest of revenue . He accordingly passed the order setting a side the order of AO. On appeal ,allowing the appeal of assesse against the order u/s 263 , the Tribunal held that; (i) The third proviso to section 143(3), requiring the AO to examine the applicability of proviso to section 2(15) in case of institutions notified u/s 10(23C)(iv) in view of insertion of 17th proviso to section 10(23C), was not on statute book at the time when assessment order was passed and since the notification remained in force the invocation of section 263 by DIT(E) was not justified in view of the decision of Hon'ble Supreme Court in the case of Max India Ltd.

(ii) From the detailed submissions of assessee, reproduced earlier, which have not been controverted by department, we fail to understand as to how these activities can be said to have an iota of commercial/ trade colour. The dominant object of the assessee is definitely for the well being of public at large by organizing various seminars for the welfare of people by disseminating knowledge in various fields in order to uplift the social consciousness of the society at large. (The composition of membership clearly exemplifies the real intention of assessee. We fail to understand as to how the hostel accommodation provided to various invitees could be considered as a commercial activity. Before any activity can be branded as being in the nature of trade or commerce, the AO has to demonstrate the intention of parties Backed with facts and figures of carrying out activities with profit motive. Mere surplus from any activity, which undisputedly has been undertaken to achieve the dominant object, does not imply that the same is run with profit motive. The intention has to be gathered from circumstances which compelled the carrying on an activity. In the present case, ld. counsel has clearly demonstrated that surplus was generated from interest income and not from catering or hostel activities. Therefore, the objection of ld. DIT(E) does not survive on this count also.

(iii) The primary object of insertion of proviso to section 2(15) was to curb the practice of earning income by way of carrying on of trade or commerce and claiming the same as exempt in the garb of pursuing the alleged charitable object of general public utility. This proviso never meant to deny the exemption to those institutions, where the predominant object is undeniably a charitable object and in order to achieve the same incidental activities, essential in the given circumstances, are carried on. Revision order was quashed.(ITA No 3124 /Del/2014 11-05-2015) .(AY. 2009-10)

India International Centre v. ADIT (Delhi)(Trib.); www.itatonline.org

S. 263:Commissioner - Revision of orders prejudicial to revenue Property held for charitable purposes –Mutuality- Revision order was set aside.[S. 2(15), 11]

The assessment was completed u/ 143(3), accepting the nil income shown by the assesse. DIT(E) passed the order under section 263 set aside the order of AO on the ground that the assesse had the consultancy income which is in the nature of trade and commerce .He accordingly set aside the order passed by the AO. On appeal allowing the appeal of the assesse , the Tribunal held that; (i) The

expressions “trade”, “commerce” and “business”, as occurring in the first proviso to section 2(15) of the Act, must be read in the context of the intent and purport of section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in an organized manner. The purpose and the dominant object for which an institution carries on its activities is material to determine whether the same is business or not. The purport of the first proviso to section 2(15) of the Act is not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee. The object of introducing the first proviso is to exclude organizations which are carrying on regular business from the scope of “charitable purpose”. The expressions “business”, “trade” or “commerce” as used in the first proviso must, thus, be interpreted restrictively and where the dominant object of an organization is charitable any incidental activity for furtherance of the object would not fall within the expressions “business”, “trade” or “commerce”.

(ii) After going through the objects and activities of the assessee association it is clear that the assessee association did not carry on any “business”, “trade” or “commerce” with the main object of earning profit. The activity of imparting support services to State Road Transport Undertakings without any profit motive are being conducted in furtherance of the object for which assessee association had not constituted by the Government of India. The activities of providing laboratory test services and consultancy to the State Road Transport Undertakings of all over India cannot be held to be “trade”, “business” or “commerce” merely because some fee or charges are being received by the assessee association. Accordingly, even if some fees or charges are being charged by the assessee association for providing laboratory test services and consultancy services in accordance with its charitable objects, the activities cannot be held to be rendered in relation to any “trade” , “commerce” or “business” as such activities are undertaken by the assessee association in furtherance of its main objects which are undisputedly of charitable nature and which is not an activity of “trade”, “commerce” or “business” with main object of earning profit.

(iii) The first proviso to section 2(15) of the Act carves out and exception which excludes advancement of any object of general public utility from the scope of charitable purpose to the extent that it involves carrying on any activity in the nature of “Trade”, “Commerce” or “business” or any activity of rendering certain services in relation to any “trade”, “commerce” or “business” for a cess or fee or any other consideration, irrespective of the nature of the use or obligation or retention of income from such activity. Their lordship also held that the expression “trade”, “commerce” or “business”, as occurring in the first proviso of section 2(15) of the Act, must be read in the context of the intent in purported of Section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in an organized manner. Explaining the dominant of object of newly inserted proviso to section 2(15) of the Act, speaking for Jurisdictional High Court of Delhi, their lordship also held that the first proviso to section 2(15) of the act does not purported to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee and the object of introducing first proviso is to exclude organizations which are carrying on regular business from the scope of charitable purpose. It was also held that expression “business” “trade” or “commerce” as used in first proviso must, thus, we interpreted restrictively and where the dominant object and organization is charitable any incidental activity for furtherance of the object would not fall within the expression “business”, “trade” or “commerce”. Appeal of assesse was allowed.(ITA No . 3271 /Del/2014 dt 8-5-2015)(AY. 2009-10)

Association of state Road transport v. CIT(Delhi)(Trib.); www.itatonline.org

S.263 : Commissioner-Revision of orders Prejudicial to revenue-Commissioner cannot pass final orders on subjects in revision- Revision is not valid.[S.80IB(4), 80IC]

The assessee, engaged in the business of manufacture of iodized salt, claimed exemption under section 80-IB(4) of the Act. The Assessing Officer held that the subsidies received by the assessee were not eligible business profits for claiming deduction under section 80-IC of the Act. The Commissioner exercised his jurisdiction under section 263 of the Act, holding that the order of the Assessing Officer was erroneous and prejudicial to the interests of the Revenue on the ground that the activity of processing common salt to crush iodized salt could not be termed as manufacture or production of an article and that the second unit was established by the splitting up of an existing unit and that thus the conditions under sections 80-IB and 80-IC of the Act were not fulfilled. On appeal :

Held, that the Commissioner could only set aside the order and direct the Assessing Officer for making fresh assessment. He was not entitled to pass final orders by himself. The Commissioner had decided two issues instead of remitting them to the Assessing Officer holding that the assessee was not engaged in the manufacturing and that the second unit was established by the splitting up of its existing business. The Commissioner had left no option for the Assessing Officer to decide the issue on the merits. Thus, the order passed under section 263 of the Act was invalid. (AY. 2005-2006)
ACIT v. Manas Salt Iodisation Industries P. Ltd. (2015) 38 ITR 502 (Gau.)(Trib.)

S.263:Commissioner-Revision of orders prejudicial to revenue- Grant of higher depreciation on furniture-Revision was held to be proper- Revision with regard to corpus receipts to be set aside.
The assessee was an educational society running a medical college and hospital. The AO in the original proceedings has allowed depreciation on furniture at 40 % as against applicable rate of 10%. Commissioner has held that the AO has passed the order without proper enquiry . On appeal the revision order was up held . As regards corpus donation, the revision was held to be not justified. (AY. 2004-2005 to 2010-2011)
Prathima Educational Society v. Dy. CIT (2015) 38 ITR 306 / 69 SOT 84 (URO)(Hyd.)(Trib.)

S. 263:Commissioner - Revision of orders prejudicial to revenue Deduction of tax at source--Credit for tax deducted-Credit not to be denied on ground income not chargeable to tax in that year- Revision was held to be not justified. [S. 194J, 199]
The assessee procured contracts for erection of thermal power stations and sub-contracted the work to other contractors. While making payment to the assesse tax was deducted at source under section 194J of the Act, treating it as fees paid for professional and technical services. The Assessing Officer allowed the assessee credit of tax at source deducted .The Commissioner held that the allowance of credit for the tax deducted at source from the payment made on account of mobilisation advance was in violation of section 199 of the Act and erroneous and prejudicial to the interests of the Revenue, since the amount of mobilisation advance was not chargeable to tax in the hands of the assessee as income in the year. On appeal :
Held, allowing the appeal, that once the tax was deducted at source and paid to the Central Government, credit therefor should be given to the assessee in the year of deduction of tax at source. The view taken by the Assessing Officer while allowing credit for the tax deducted at source from mobilisation advance was a possible view and the Commissioner was not justified in substituting his own view for such possible view taken by the Assessing Officer. (A.Y. 2006-2007)
Zelan Projects P. Ltd. v. Dy. CIT (2015) 38 ITR 41(Hyd.)(Trib.)

S. 263:Commissioner-Revision of orders prejudicial to revenue -Revision on grounds different from those set down in show cause notice-Not permissible-Revision on ground of lack of proper enquiry by Assessing Officer-Not valid.
The assessee was a railway contractor. The assessee's return was subjected to scrutiny assessment proceedings and the Assessing Officer finally assessed the income of the assessee. The Commissioner issued notice for revision listing out certain allowances and deductions granted in the assessment which he felt were inadmissible. The Commissioner in his order of revision held that the order passed by the Assessing Officer was erroneous and prejudicial to the interests of the Revenue on the ground that the order was passed without proper consideration of facts, without following the law and without making requisite and proper enquiries. On appeal: Held, that the Commissioner set out one reason for revising the order, but actually revised the order on some other ground. That was not permissible under the scheme of the law. Lack of proper inquiries, which an Assessing Officer ought to have conducted on the facts of the case, was altogether a different reason from inadmissibility of a claim to deduction or an income which ought to have been brought to tax. Therefore, the revision order was contrary to the scheme of law and should be quashed. (AY. 2007-2008)
B. S. Sangwan v. ITO (2015) 38 ITR 11(Delhi)(Trib.)

S. 263 : Commissioner-Revision of orders prejudicial to interest of revenue –Lack of proper enquiry- Revision was held to be justified.[S.54F]

AO has passed cryptic and non –speaking order , CIT was justified in assuming jurisdiction ,however on merit Tribunal allowed the exemption under section 54F.(AY. 2006-07)
S. Uma Devi v. CIT(2015) 117 DTR 151 (Hyd.)(Trib.)
V.Shailaja v.CIT (2015) 117 DTR 151 (Hyd)(Trib)

S. 263 : Commissioner-Revision of orders prejudicial to interest of revenue-Before taking any action under section 263, Commissioner must record his satisfaction; issuance of notice on basis of proposal made by ITO is void ab-initio.
Tribunal held that The CIT had not applied his mind but the matter was referred by the AO for initiating the proceeding under s. 263 of the Act. it is noticed that the notice under s. 263 of the Act was issued only on receipt of the proposal under s. 263 of the Act from the ITO. and the assessee explained, vide written submission which has been reproduced. It is well-settled that the learned CIT while exercising the revisionary powers under s. 263 of the Act may call for and examine the records of any proceedings and thereafter if he considers that any order passed therein is erroneous insofar as it is prejudicial to the interest of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify. Therefore, before taking any action, learned CIT himself shall apply his mind after examining the record of any proceedings and his satisfaction is must. However, the satisfaction was of the AO who proposed action under s. 263 of the Act, but not of the learned CIT. Therefore, issuance of notice under s. 263 of the Act on the basis of the proposal made by the ITO was void ab initio; therefore, the matter was set aside. (AY. 2008 – 2009)
Dharmendra Kumar Bansal .v. CIT(2014) 161 TTJ 801/ (2015) 152 ITD 406 (Jaipur)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue -Assessing Officer including receipt from sale of carbon credits as eligible profits--Order not prejudicial to Revenue.[S.80IA, 143(3)].
The assessee was in the line of power generation business. The assessee had undertaken a hydroelectric power project allotted by the Government. The assessee claimed deduction under section 80-IA of the Act. The AO allowed the deduction. The CIT held that the order of the AO was erroneous and prejudicial to the Revenue as the assessee's income derived from the sale of carbon credits, was not derived from the eligible business and would not qualify grant of deduction under section 80-IA of the Act. On appeal:
Held, allowing the appeal, that the action under section 263 would not be justified if the twin conditions were not fulfilled. In the assessee's case, the Commissioner felt that the receipts from sale of carbon credits were not derived from the industrial undertaking so as to be eligible for grant of deduction and the Assessing Officer committed an error in including the receipt in the eligible profits. It was to be seen whether the receipt was of capital or of revenue nature. Even if the order of the Commissioner was upheld, it would affect the computation of income. Ultimately because the receipt would not be taxable, it would not come under the ambit of computation of income and simultaneously it would be excluded from the deduction under section 80-IA of the Act as well as of the total income. The result would be revenue neutral. Therefore, the second condition for taking action under section 263 of the Act did not exist. The assessment order was not prejudicial to the interests of the Revenue. (AY. 2009-2010)
Subhash Kabini Power Corporation Ltd. .v. CIT (2015) 37 ITR 106 (Bang.) (Trib.)

S. 263 : Commissioner-Revision of orders prejudicial to revenue-Lack of enquiry –Revision was held to be valid-Depreciation on electrical equipment functional test to be applied-Matter remanded.
AO allowing excess depreciation on windmill. Assessee accepting claim as typographical error during revision proceedings. AO accepting claim of assessee without giving reason. Setting aside of assessment order proper. As regards depreciation for electrical equipment on windmill. Functional test whether equipment an integral part of windmill-Failure by AO and Commissioner to carry out functional test. Assessee entitled to depreciation at higher rate if electrical equipment is specially designed to suit need of windmills. Matter remanded. (AY. 2009-2010)
Bhima Jewellery .v. Dy. CIT (2015) 37 ITR 408 (Cochin)(Trib.)

S. 263 : Commissioner- Revision of orders prejudicial to revenue - Initial assessment year--Period of ten years to be reckoned from date assessee's business started functioning-Revision was held to be justified. [S.80IA]

The assessee, engaged in hotel business, claimed deduction under section 80-IA of the Act. The AO allowed the claim of the assessee, but the Commissioner revised the order of the AO holding that the assessee was not eligible for exemption under section 80-IA of the Act, on the ground that the initial assessment year for claiming deduction under section 80-IA was 1999-2000, during the year in which the assessee's hotel started functioning and, therefore, the ten assessment years expired by the assessment year 2008-09. On appeal, the assessee contended that the initial assessment year was the year in which the approval was granted by the Director General of Income-tax (E) and not the assessment year in which the assessee started functioning :

Held, dismissing the appeal, that the assessee was eligible for deduction under section 80-IA of the Act for ten assessment years from the initial assessment year. Though the approval of the Director General of Income-tax(E) was a pre-condition, the initial assessment year would be the year in which the assessee's hotel started functioning for the purpose of computing ten assessment years for grant of deduction under section 80-IA of the Act. The Commissioner had rightly exercised revisional jurisdiction holding that grant of deduction under section 80-IA of the Act was erroneous and prejudicial to the interests of the Revenue. (AY. 2009-2010)

Escapade Resorts P. Ltd. .v. ACIT (2015) 37 ITR 766 / 54 taxmann.com 197 (Cochin)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue –Depreciation-Intangible-Share application money-Unsecured loan-Failure of the Commissioner to prove that view taken by Assessing Officer contrary to law and facts- Revision was held to be not valid.[S. 32, 68]

AO in the course of assessing proceedings conducted the enquiry and allowed the depreciation. The Tribunal held that the Commissioner is not permitted to invoke the jurisdiction merely because he does not agree with the view of the AO. AO called the details and allowed the share application money and unsecured loan .Tribunal held that commissioner failed to prove that view taken by the AO was contrary to law and facts. The revision order of Commissioner was held to be beyond jurisdiction. (AY. 2009-10)

Elder IT Solutions P. Ltd .v. CIT (2015) 37 ITR 443 (Mum.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue –Business income-Partner-Remuneration-Income from other sources- Rate of exchange - Foreign currency AO has raised the query in the original assessment proceedings- Revision order passed by the Commissioner was quashed .[S 28(v), 40(b), 43A, 56]

Assessee claimed deduction under section 28(v) in respect of remuneration received in terms of an agreement with firm in which it was a partner. Said claim was allowed in scrutiny . Subsequently, Commissioner sought to initiate revision proceedings taking view that said amount was to be treated as income from other sources. However, it was found that during course of assessment proceedings, AO raised query in respect of said deduction and sought explanation from assessee to which assessee furnished replies. On appeal the Tribunal held that since no material was brought on record to demonstrate that view taken by AO was an impermissible view and was contrary to law or was upon erroneous application of legal principles, revision was not required

Assessee claimed expenses of Rs. 5.66 lakh as "exchange rate flucutation loss". AO raised query with respect to said loss .Assessee submitted its reply which was found to be acceptable by AO because no addition on account of exchange rate fluctuation was made by AO. CIT revised the order under section 263 Tribunal held that since no material was brought on record to demonstrate that view taken by AO was an impermissible view and was contrary to law or was upon erroneous application of legal principles, revision proceedings could not be initiated. (AY. 2006-07, 2008-09)

Cadila Healthcare Ltd. .v. CIT (2014) 51 taxmann.com 255 / 67 SOT 188 (Ahd.)(Trib.)

S. 264 : Commissioner - Revision of other orders-Best judgment- After filing his return and giving a particular address therein, assessee made himself unavailable at that address; nor did he inform revenue of address where communication related to his new address-Rejection of revision application was held to be justified.[S.144]

In his return of income, the assessee had disclosed his address. The Assessing Officer, with a view to complete the assessment, sought to serve notices upon the assessee. All said notices were returned unserved by the postal authorities with the remark 'not known'. Subsequently, the Inspector, on making enquiry, learnt that the assessee had left India. In view of the above, the Assessing Officer, passed a best judgment assessment order on 19-3-1993 under section 144 for said assessment year.
The assessee stated that sometime in October, 2003, he learnt from the Tax Recovery Officer that an assessment order had been passed. It was stated that on approaching the Tax Recovery Officer, he received a copy of the order dated 19-3-1993 passed under section 144 on 5-1-2004.
Thereafter on 28-7-2004, the assessee filed a revision application under section 264 before the Commissioner challenging the assessment order. The revision application, stated that the assessment order dated 19-3-1993 was received by him only on 5-1-2004. Therefore, the revision application was filed within the time of one year provided under section 264.
The Commissioner, refused to entertain said application on the ground that the same was time barred i.e. beyond the period of one year from the date of communication of order dated 19-3-1991. This was because, the impugned order dated 30-3-2006 recorded a finding of fact that the assessee was served with a copy of the order dated 19-3-1993 on 1-4-1993. In support, a xerox copy of the acknowledgement received from the postal authorities was also annexed to the impugned order.
On writ:
The issue before the Commissioner was whether or not the revision application filed against the order dated 19-3-1993 was within time. The averments of the petition that he received the order dated 19-3-1993 only on 5-1-2004, is in the face of the xerox copy of the postal acknowledgement given by the postal authorities, evidencing the receipt of the order by the assessee on 1-4-1993. Thus, on the face of it, the revision application as filed, is hopelessly time barred. Although the assessee's submission that the issue of jurisdiction can be raised at any time cannot be disputed, the issue of examining the correctness of the order dated 19-3-1993 does not arise as the revision application fails in the threshold requirement of the time within which it may be filed. The assessee made much song and dance about the assessment order dated 19-3-1993 being passed without any notice being served upon him. The assessee after filing his return of income and giving a particular address there in makes himself unavailable at that address. Nor does the assessee inform the revenue of the address where communication relating to his return of income could be sent. On the aforesaid facts, it ill comes from the assessee that the absence of notice being served upon him, the entire proceedings are bad in law.
In the instant facts, the impugned order dated 30-3-2006 of the Commissioner is not perverse or suffering from any flaw in the decision making process. In these circumstances, petition is dismissed. (AY. 1990-91)
Rajan R.Sippy v. CIT (2015) 230 Taxman 656 (Bom.)(HC)

S. 268A : Appeal-High Court--Monetary ceiling limits--Revenue audit objection--No document to support--Tribunal finding appeal not maintainable on ground tax effect much less than prescribed limit--Justified-.[S. 254(1)]
The Commissioner (Appeals) deleted the addition of Rs. 2,52,000 made by the Assessing Officer disallowing the remuneration paid to the directors. The Tribunal categorically held that even if the reopening of the assessment was held to be valid, the addition effected by the Assessing Officer was only Rs. 2,52,000, which was much less than Rs. 3 lakhs and the tax component was well below Rs. 2 lakhs and, placing reliance upon the Central Board of Direct Taxes Instruction No. 3 of 2011, dated February 9, 2011 (2011) 332 ITR 1 (St.)held that the appeal was not maintainable. On appeal :
Held, dismissing the appeal, that the Revenue contended that there was a revenue audit objection in so far as the particular transaction was concerned, and the issue would fall well within sub-clause (c) of clause 8 of Instruction No. 3 of 2011, dated February 9, 20111. However, there was no document relating to the revenue audit objection available in the typed set of documents filed along with the appeal. There was no reference to any document filed by the Department before the Tribunal, in so far as the revenue audit objection in relation to the transaction was concerned. Therefore, the view taken by the Tribunal was entirely justified. (AY. 2003-2004)
CIT v. Shri Shanthinath Benefit Fund Ltd. (2015) 371 ITR 271 (Mad) (HC)

S. 268A : Appeal- Tribunal- Monetary limits –Instructions –Apply to pending cases.[S.253]

It was held that Instruction No. 5 of 2014, F. No. 279/Misc. 142/2007-ITJ (Pt), dated 10-7-2014, revising monetary limit to Rs. 4 lakh for filing appeal before Tribunal on income-tax matters will apply to pending appeals also. (AY. 2007-08)
ITO v. Arati Jana (Smt.) (2014) 109 DTR 228 / 165 TTJ 559 / (2015) 67 SOT 229 (Kol.)(Trib.)

S. 268A : Appellate Tribunal-Monetary limit—Instruction no 5 of 2014 is held to be applicable to pending cases-Failure by Department to point out exceptional circumstances for filing appeal despite monetary limit--Appeal to be dismissed in limine. [S.254(1)
Held, that Instruction No. 5 of 2014 issued by the Central Board of Direct Taxes on July 10, 2014 which prescribed a monetary limit of a tax effect of Rs. 4 lakhs for filing appeals to the Tribunal was applicable to the pending appeals. In the assessee's case, since the tax effect was below the prescribed limit in accordance with the instruction of Central Board of Direct Taxes and the Department had failed to point out exceptional circumstances for filing the appeal despite the monetary limit being below the prescribed limit, the appeal was liable to be dismissed in limine. (AY. 2002-2003)
Dy. CIT .v. Chetan Prakash Mittal (2015) 37 ITR 28(Delhi)(Trib)

S. 268A :Appellate Tribunal-Monetary limits-Appeals by Department--CBDT instruction is applicable to pending appeals.
Held, dismissing the appeal in limine, that Instruction No. 5 of 2014 issued by the Central Board of Direct Taxes on July 10, 2014, revising the monetary limits for filing of appeals by the Department before the Tribunal was applicable to pending appeals and therefore, the appeal filed by the Department on May 18, 2012 in which the tax effect was below the prescribed limit, was not maintainable. (AY. 1995-1996 to 1999-2000)
ITO v. Gurudayal Sontosh Kumar (2015) 38 ITR 735(Kol.)(Trib.)

S. 268A : Appellate Tribunal-Monetary limit—Instruction no 5 of 2014 is held to be applicable to pending cases.
Instruction No. 5 of 2014 revising monetary limits is applicable to pending cases-.Tax effect is less than 4 lakhs prescribed limit. Appeal not maintainable. (AY. 2003-2004)
Dy. CIT .v. Piyush Apartment P. Ltd. v. (2015) 37 ITR 340 (Delhi)(Trib)

S. 268A : Appellate Tribunal--Monetary limits for appeals by Department--Instruction No. 5 of 2014, dated July 10, 2014 revising monetary limits--Applicable to pending appeals--Failure by Department to point out exceptions provided in Circular--Appeal not maintainable.
Held, dismissing the appeal in limine, that the main objective of Instruction No. 5 of 2014 issued by the Central Board of Direct Taxes (CBDT) on July 10, 2014 was to reduce pending litigations, where the tax effect was considerably low. Hence, the instruction revising the monetary limit for filing appeals before the Tribunal was applicable to pending appeals retrospectively. The Department having failed to point out exceptions provided in the Circular, the appeal in question filed on September 8, 2011 and pending before the Tribunal for the assessment year 2007-08 was not competent. (AY. 2007-2008)
ITO .v. Santo Stores (2015) 37 ITR 665 (Kolkata)(Trib.)

S. 269SS : Acceptance of loans and deposits - Otherwise than by account payee cheque or account payee bank draft-Deletion of penalty was held to be justified.[S.269T]
In the course of assessment proceedings, the Assessing Officer noticed that assessee had taken certain loan in cash for purchase of property.
The Assessing Officer taking a view that it was a case of violation of section 269SS, passed a penalty order under section 269T.
The Tribunal taking a view that there was no evidence on record showing that loan was in fact taken in cash, set aside addition made under section 69C as well as penalty order passed under section 269T.
On revenue's appeal:
It was noted that Tribunal has recorded a finding that the allegation that loans/deposits must have been taken in cash was a mere suspicion, which could have been a cause for further verification and

investigation, but mere suspicion cannot be a ground to hold that loan/deposits were received in cash. The findings of the Tribunal were not perverse.
Further, the revenue has not filed any document or material to show that in fact loan was taken and interest payment was made. The persons to whom allegedly interest was paid, their details and particulars were not ascertained, verified and examined.
The findings of the Tribunal are factual. The reasoning refers to several factual aspects and different assumptions drawn by the Assessing Officer. The said findings are not shown to be perverse, or contrary to facts, evidence or material. Consequently, the revenue's appeal is dismissed. (AY. 2004-05)
CIT v. Home Developers (P.) Ltd. (2015) 229 Taxman 254 (Delhi)(HC)

S. 269SS: Acceptance of loans and deposits - Otherwise than by account payee cheque or account payee bank draft-Firm-Partners- Transaction of loan between a firm and its partner does not attract s. 269SS. If other High Courts have taken a consistent view, that should be followed even if opposite view is possible.[S.271D, 273B]
(i) The question raised is whether in a transaction between the firm and the partner the provision of Section 269SS would be attracted and if we hold that Section 269SS was attracted and therefore violated, whether the assessee would be entitled to benefit of Section 273B of the Act. The position that emerges is that there are three different High Courts in (2013) 354 ITR 9 (Mad), Commissioner of Income Tax Vs. V.Sivakumar, (2008) 304 ITR 172 (Raj),Commissioner of Income Tax Vs. Lokhpat Film Exchange (Cinema) and (2005) 277 ITR 420 (P&H),Commissioner of Income Tax Vs. Saini Medical Store which have held that Section 269SS would not be violative when money is exchanged inter-se between the partners and partnership firm in spite of the fact that the partnership firm and individual partners are separate assessees. We appreciate and understand that the opposite view is possible. Keeping in view that three different High Courts have taken a consistent view on the facts, which are similar to the facts in the present case, which includes the judgment of the Madras High Court as late as in the year 2013, we respectfully follow the same line of reasoning given by the Madras High Court in the case of V. Sivakumar (2013) 354 ITR 9;
(ii) Having said that, it is clear that any interest, salary, bonus, commission or remuneration paid by a firm to any of its partners should be regarded as a mode of adjusting the amount that must have been taken to have been contributed to the partnership assets by a partner, who can really contribute in kind as well as in money. Applying this principle, we are of the view that the transaction effected in these cases cannot partake the colour of loan or deposit and as such, Section 269-SS nor Section 271-D of the Act would come into play.
(iii) It is an undisputed fact that the money was brought by the partners of the assessee-firms. The source of money has also not been doubted by the revenue. The transaction was bona fide and not aimed to avoid any tax liability. Creditworthiness of the partners and genuineness of the transactions coupled with the relationship between the “two persons” and two different legal interpretations put forward could constitute a reasonable cause in a given case for not invoking Section 271-D and 271-E of the Act. Section 273B of the Act would come to the aid and help of the assessee.
CIT .v.Muthoot Financiers(2015)371 ITR 408/275 CTR 501/ 230 Taxmann 95/116 DTR 292(Delhi)(HC)
CIT v. Muthoot M.George Bankers (2015)/ 371 ITR 408/ 275 CTR 501/230 Taxman 95/116 DTR 292 (Delhi)(HC)
CIT v. Muthoot Bankers (2015) 371 ITR 408/275 CTR 50/230 Taxman 95/116 DTR 292 (Delhi)(HC)

S. 269SS : Acceptance of loans and deposits - Otherwise than by account payee cheque or account payee bank draft -Penalty –Journal entries-Section does not apply to non-monetary book entry transactions of loans and advances. [S. 271D]
Section 269SS indicates that it applies to a transaction where a deposit or a loan is accepted by an assessee, otherwise than by an account payee cheque or an account payee draft. The ambit of the Section is clearly restricted to transaction involving acceptance of money and not intended to affect cases where a debit or a liability arises on account of book entries. The object of the Section is to prevent transactions in currency. This is also clearly explicit from clause (iii) of the explanation to

Section 269SS of the Act which defines loan or deposit to mean "loan or deposit of money". The liability recorded in the books of accounts by way of journal entries, i.e. crediting the account of a party to whom monies are payable or debiting the account of a party from whom monies are receivable in the books of accounts, is clearly outside the ambit of the provision of Section 269SS of the Act, because passing such entries does not involve acceptance of any loan or deposit of money. (AY. 2007-08)

CIT v. Mahagun Technologies Pvt. Ltd. (Delhi)(Trib.); www.itatonline.org

S. 271(1)(a) : Penalty - For late filing of return- Neither Form no 6 seeking extension of time was filed nor satisfactorily explained cause for delay- Levy of penalty was held to be justified.

Assessee, a Government contractor, filed his return after a delay of 23 months. Assessing Officer imposed penalty for delay.Assessee had not filed Form No. 6 seeking extension of time nor had he justified and satisfactorily explained cause for delay. Imposition of penalty was justified. (AY. 1984 - 85)

Bharat Furnishing Co. .v. CIT (2015) 231 Taxman 510 (Delhi)(HC)

S. 271(1)(c) : Penalty–Concealment–Incorrect claim of expenditure would not amount to giving inaccurate particulars of income and merely because initially claim was made under incorrect head, it may not be termed as furnishing inaccurate particulars. [S. 35AB, 37(1)]

In return of income, the assessee had claimed technical know-how license fees as revenue expenses.When the Assessing Officer observed that the claim of expenses of technical know-how by the assessee under section 37(1) was not allowable, the assessee had made an alternative claim under section 35AB.Accordingly, one-sixth of such expenses was allowed. Consequently, the penalty proceedings were initiated and penalty for concealment was imposed by the Assessing Officer.

In the opinion of the Commissioner (Appeals), the assessee knowingly committed the default of furnishing inaccurate particulars of income and concealment of income by claiming technical know-how expenditure and he upheld the order passed by Assessing Officer.

The Tribunal held that there was nothing to attract any of the ingredients of section 271(1)(c).

On appeal dismissing the appeal the Court held that;there was no reason to interfere with the order impugned as the Tribunal was right in interpreting that the incorrect claim of expenditure would not amount to giving inaccurate particulars of income and merely because initially the claim was made under incorrect head, it may not be termed as furnishing inaccurate particulars. It is a matter of record that later on during the course of proceedings, the assessee had corrected the same, and accordingly, the same was disallowed. With nothing to indicate of any furnishing of inaccurate particulars with regard to income of the assessee, making of the unsustainable claim under the law simply could not be a ground warranting any interference.

CIT .v. Amol Dicalite Ltd. (2015) 231 Taxman 663 (Guj.)(HC)

S.271(1)(c):Penalty–Concealment–Agricultural income-Income from undisclosed sources-Levy of penalty was held to be not justified.

Where revenue accepted income tax and wealth tax from appellants-assessee for relevant years and after ten years, took matter under review for levying penalty for concealment, same could not be upheld, though the quantum of addition was up held. (AY. 1978 79 to 1986-87)

Mahnedara R. Patel (HUF) .v. ITO (2015) 231 Taxman 445 (Guj.)(HC)

S. 271(1)(c):Penalty-Concealment-Depreciation- Depreciable asset-Penalty ought not to have been imposed without satisfying concealment or submission of inaccurate particulars. [S.32, 50, 147, 148]

The assessee, a State co-operative society, sold a dal mill in the year previous to the assessment year but did not declare any profits or short-term capital gains on the sale. The assessment was reopened and the amount was assessed as short term capital gain and the addition was confirmed by CIT(A) and Tribunal. The AO levied the penalty which was affirmed by Tribunal.On appeal

Held, allowing the appeal, that the prime factors required to be considered while imposing penalty under section 271(1)(c) are concealment of particulars of income or submission of inaccurate particulars of such income. There was no dispute that the assessee had disclosed all details about its

income including the fact of sale of the dal mill for a consideration. Depreciation was claimed by it treating the asset as a depreciable asset. The written down value too was referred to but the error crept in treating the transaction as long-term capital gains. The error committed by the assessee could not be treated as concealment of particulars of its income or furnishing inaccurate particulars of income. Penalty could not have been imposed under section 271(1)(a) or (c) without satisfying the concealment or the submission of inaccurate particulars of income on the part of the assessee. Such satisfaction must be reflected in the order of assessment as penalty under the provision was not automatic. Thus, the Tribunal was not justified in confirming the penalty imposed on the assessee under section 271(1)(c) when the claim of the assessee was a debatable one and there was no specific finding that the assessee had submitted false or incorrect accounts.

Anoopgarh Kraya Vikraya Sahakari Samiti Ltd. .v.ACIT (2015) 374 ITR 558 (Raj.)(HC)

S.271(1)(c):Penalty-Concealment- Foreign exchange-Net of preoperative expenses Wrong deduction-No concealment of particulars-No inaccuracy in particulars of income-Not to be equated with concealment-Penalty not to be imposed- Penalty can be imposed when the income assessed is less.[Explanation 4].

The assessee debited a sum of Rs. 26,63,283 comprised of foreign exchange, job work, sale of components, sale of scrap, and sale of miscellaneous scrap out of the total pre-operative expenses of Rs. 7,57,43,555 and claimed the net pre-operative expenses as Rs. 7,30,84,272. The Tribunal found that deduction was not correct and the amount of Rs.26,63,283 ought to have been treated as income earned during April 1, 1999, to May 31, 1999, for the purpose of assessment. The Additional Commissioner imposed penalty under section 271(1)(c) of the Act, stating that since there was a wrong deduction claimed by the assessee from the income, it amounts to furnishing inaccurate particulars of income. This was reversed by the Tribunal and the penalty was deleted. On appeal: Held, allowing the appeal partly, (i) that the Additional Commissioner did not find any concealment of particulars of income but a wrong deduction. There was no inaccuracy in particulars of income furnished by the assessee. Out of various receipts, the assessee wrongly deducted the amount from his total pre-operative expenses while making computation of income. Wrong deduction of an amount for computation of income in the return submitted by the assessee could not be equated with concealment of income or furnishing of inaccurate particulars of income so as to attract penalty under section 271(1)(c). The appellate authorities recorded a concurrent finding holding that there was no concealment of particulars of income by the assessee. Therefore, penalty under section 271(1)(c) was not attracted.

(ii) That the assessing authority is not required to mention in the assessment order that penal proceedings must be initiated but he is obliged to record existence of ingredients attracting penal provisions so as to justify penal proceedings.

(iii) That Explanation 4 to section 271(1)(c) is clarificatory and not substantive.

(iv) That penalty under section 271(1)(c) is imposable when the assessed figure is less.

(v) That the view taken by the Tribunal was unsustainable to the extent the Tribunal had allowed the cross objection filed by the assessee.

CIT .v. Hongo India P. Ltd. (2015) 374 ITR 48 (All) (HC)

S.271(1)(c):Penalty-Concealment-The rigors of penalty provisions cannot be diluted only because a small number of cases are picked up for scrutiny. No penalty can be levied unless if assessee's conduct is "dishonest, malafide and amounting concealment of facts". The AO must render the "conclusive finding" that there was "active concealment" or "deliberate furnishing of inaccurate particulars" [S.143(1)]

(i) Section 271(1)(c) of the Act lays down that the penalty can be imposed if the authority is satisfied that any person has concealed particulars of his income or furnished inaccurate particulars of such income. The Apex Court in Commissioner of Income Tax v. Reliance Petroproducts Pvt. Ltd. [2010] 322 ITR 158 (SC) applied the test of strict interpretation. It held that the plain language of the

provision shows that, in order to be covered by this provision there has to be concealment and that the assessee must have furnished inaccurate particulars. The Apex Court held that by no stretch of imagination making an incorrect claim in law, would amount to furnishing inaccurate particulars.
(ii) Thus, conditions under Section 271(1)(c) must exist before the penalty can be imposed. Mr.Chhotaray tried to widen the scope of the appeal by submitting that the decision of the Apex Court should be interpreted in such a manner that there is no scope of misuse especially since minuscule number of cases are picked up for scrutiny. Because small number of cases are picked up for scrutiny does not mean that rigors of the provision are diluted. Whether a particular person has concealed income or has deliberately furnished inaccurate particulars, would depend on facts of each case. In the present case we are concerned only with the finding that there has been no concealment and furnishing of incorrect particulars by the present assessee.
(iii) Though the Assessee had given interest free advances to it's sister concerns and that it was disallowed by the Assessing Officer, the Assessee had challenged the same by instituting the proceedings which were taken up to the Tribunal. The Tribunal had set aside the order of the Assessing Officer and restored the same back to the Assessing Officer. Therefore, the interpretation placed by Assessee on the provisions of law, while taking the actions in question, cannot be considered to be dishonest, malafide and amounting concealment of facts. Even the Assessing Officer in the order imposing penalty has noted that commercial expediency was not proved beyond doubt. The Assessing Officer while imposing penalty has not rendered a conclusive finding that there was an active concealment or deliberate furnishing of inaccurate particulars. These parameters had to be fulfilled before imposing penalty on the Assessee.
(iv) The case of Commissioner of Income Tax v. Zoom Communications P.Ltd. [2010] 327 ITR 510 (Delhi) is clearly distinguishable on facts. In that case the Assessee had conceded before Assessing Officer that it's action of claiming revenue deductions was not correct at all. It was not the case of the Assessee therein, throughout the proceedings, that the deductions carried out by the Assessee was a debatable issue. The Delhi High Court noted that even before it the Assessee could not explain the circumstances and it's conduct. Appeal of revenue was dismissed. (AY.2003-04)
CIT v. Dalmia Dyechem Industries Ltd (2015) 377 ITR 133 (Bom.)(HC)
Editorial: CIT v. Zoom Communication P.Ltd (2010) 327 ITR 510 (Delhi)(HC) is considered and distinguished.

S. 271(1)(c) : Penalty-Concealment-Additional Evidence-After accepting block assessment and paying taxes, assessee cannot produce additional evidence to explain undisclosed income and penalty would sustain. [ITAT. R.29]
The assessee was engaged in the business of jewellery. During the course of search proceedings, certain undisclosed cash and jewellery were seized and the AO required the assessee to file returns of income for the preceding six years. The assessee filed returns of income, however declaring a lower income as compared to what was found during the search and filed written submissions in this connection. Subsequently a revised return was filed declaring the entire income found during search, however, after the due date had expired. The AO did not accept the said revised return and passed an Order which was accepted by the assessee. However penalty proceedings were contested before the appellate authorities. The Tribunal refused to admit additional evidence in the matter on the ground that the material sought to be admitted could have been produced easily before the lower authorities and the assessee was not able to produce satisfactory explanation with respect to the same.
The High Court observed that immunity to penalty would be available if the income was surrendered during search and the manner of earning such income was also disclosed. The High Court further observed that the revised return was submitted by the assessee only when it was completely cornered during the assessment proceedings. The High Court dismissed the assessee's appeal and held that it was a clear case of concealment and penalty had been rightly levied and the Order of the Tribunal had no infirmity in it. (AY. 2007-2008)
Jawahar Lal Jain (HUF) v. CIT (2015) 370 ITR 712 / 276 CTR 487 / 118 DTR 177 (P&H)(HC)

S. 271(1)(c) : Penalty–Concealment–Addition on estimate basis- Levy of penalty was not justified .[S.145]

During search excess stock was found on physical verification as against book stock worked out as on date of search . Assessee did not file return of income for relevant year in which search had been conducted. Assessing Officer completed assessment for relevant assessment year on basis of materials available with him. Penalty proceedings were initiated for concealing particulars of income. Dismissing the appeal of revenue the Court held that.;since no income had been filed by assessee and income was assessed on estimate basis by revenue, no penalty under section 271(1)(c) could be levied for concealment of income.

ITO v. Bombaywala Readymade Stores (2015) 230 Taxman 313 (Guj.)(HC)

S. 271(1)(c) : Penalty – Concealment –Set off of long term capital loss from short term capital gain- Deletion of penalty was held to be justified.

Assessee claimed set off of long term capital loss from short term capital gain. However, same was disallowed by Assessing Officer. Assessee's claim was based on law which was in force in previous year. Dismissing the appeal of revenue the Court held that; once changed law was brought to notice of assessee and assessee accordingly paid tax on capital gain arose, there was no suppression of income for evading tax and no penalty could be levied.(AY. 2004-05)

CIT v. Chandrasekaran (2015) 230 Taxman 658 (Karn.)(HC)

S. 271(1)(c) : Penalty – Concealment – Income from business of property income- Deletion of penalty was held to be justified. [S. 22, 28(i), 32]

Assessee let out his premises and treated income from same as his business income and claimed depreciation on it.However, Assessing Officer rejected assessee's claim and treated said income as income from house property. Dismissing the appeal of revenue the Court held that ; once mistake was brought to notice of assessee and he paid tax on said income and there was no suppression of income, no penalty could be levied. (ITA No. 61 of 2009 dt. 28-10-2014)(AY. 2004-05)

CIT v. Chandrasekaran (2015) 230 Taxman 658 (Karn.)(HC)

S. 271(1)(c):Penalty-Concealment-Royalty payment was claimed as deduction twice- Levy of penalty was held to be justified.

Royalty payment claimed and allowed during preceding assessment year. Assessee claimed royalty claimed for second time in subsequent year. The error of computation unearthed during assessment proceedings. On appeal; dismissing the appeal, the Court held that ,the plea taken by the assessee was cursory and did not give any acceptable explanation for the wrong computation, as the error was detected by the authority during the proceedings under section 143(3) and a categorical finding was recorded that the assessee suppressed the income by making a wrong claim to deduction of royalty payment, which actually pertained to earlier assessment years, which was claimed and allowed. Therefore, the levy of penalty under section 271(1)(c) was proper.(AY 2002-2003)

Lanxess India P. Ltd. v. ACIT (2015) 373 ITR 346 (Mad.)(HC)

S. 271(1)(c) : Penalty – Concealment –Investment of shares-Stock in trade-Capital gains-Business income- Levy of penalty was not justified.[S. 28(i), 45]

The assessee was engaged in the investment of shares and securities cum business of shares and securities and other related activities. In the return of income, the assessee disclosed certain short-term capital gains on account of sale of shares. However, the AO held that the aforesaid sale and purchase was not in the nature of investment but transactions relating to trading in shares and, accordingly, treated it as business income. The reasons given by the AO to treat the shares in question as stock-in-trade were that the broker notes did not indicate whether the shares were procured as investment or as stock-in-trade and the physical delivery of shares was not taken.The AO also levied penalty under section 271(1)(c) holding that the assessee did not disclose full and necessary particulars. On appeal, the CIT(A) deleted the penalty observing that all particulars relating to capital gains were duly disclosed in the return as well as in the balance sheet which indicated that the assessee was maintaining a clear demarcation between the shares which were treated as investment and shares held as stock-in-trade for business.

On revenue's appeal, the Tribunal affirmed the finding of the CIT(A).On appeal to the High Court. In the written submission filed before the Commissioner (Appeals) it was stated that the details of shares held as investments were duly mentioned in the balance sheet and in note forming part of the balance sheet, detail of transactions which were treated as business was clearly reflected. Further, the shares which were sold and treated as short-term capital gains were not accounted for in the opening balance nor in the closing balance. In the books of account also, the shares in question were shown under the head 'investment' and in the profit and loss account, short-term capital gains was duly credited. The aforesaid finding of the Commissioner (Appeals) was affirmed by the Tribunal in the impugned order. Thus, the finding of the Assessing Officer that material facts were not duly disclosed by the assessee is not correct. No document or material has been filed to support or contend that the finding of the appellate authorities including the Tribunal is perverse or factual incorrect. In view of the aforesaid position, no substantial question of law arises for consideration in this appeal. The appeal is dismissed.(AY. 2001-02)

CIT v. Anant Overseas (P.) Ltd. (2015) 229 Taxman 433/ 117 DTR 45 (Delhi) (HC)

S. 271(1)(c) : Penalty – Concealment –Bogus loan and interest- Detection by investigation wing- Revised return- Levy of penalty was held to be justified.[S. 147,148]

After assessment of assessee had been completed, Investigation Wing detected money laundering racket, in which assessee was also found involved .In response to notice under section 148 assessee filed return of income declaring bogus loan of Rs. 10 lakh and interest thereon as additional income .Assessing Officer completed reassessment and also levied penalty under section 271(1)(c) on assesse. On facts, concealment of income came to be established and penalty under section 271(1)(c) was rightly levied upon assesse. (AY. 2001-02)

Bharatkumar G. Rajani v. Dy. CIT (2015) 229 Taxman 565 (Guj.)(HC)

S. 271(1)(c) : Penalty – Concealment – Income estimate by applying the net profit rate of 8 per cent- Deletion of penalty was held to be justified. [S.40A(3), 44AD]

Assessee carried on construction business. It had issued large number of bearer cheques to small suppliers of building material. In response to notice issued by Assessing Officer seeking to disallow said payments under section 40A(3), assessee offered that its income might be computed by applying net profit rate of 8 per cent of gross receipts. Assessing Officer having accepted assessee's offer, made addition in terms of section 44AD. He also passed a penalty order under section 271(1)(c). Tribunal, however, set aside said penalty order. Court held that since at time of initiating penalty proceedings Assessing Officer did not have any material on record showing that payments made to suppliers were bogus, he could not have merely on basis of assessee's offer to be taxed on estimate basis, concluded that assessee had provided inaccurate particulars in its return, therefore, Tribunal was justified in setting aside impugned penalty order.(AY. 2004-05)

CIT v. Vatika Construction (P.) Ltd. (2015) 229 Taxman 562 (Delhi)(HC)

S. 271(1)(c) : Penalty—Concealment- Survey-No satisfactory explanation as regards failure by assessee to disclose in original return gifts from non-resident Indians--Disclosure in revised return only after survey operation in business premises--Genuineness of gifts not proved--Levy of penalty justified.[S. 133A, 148, Explanation 1(B)]

The assessee, a proprietary concern carrying on business in cloth and readymade garments, did not disclose in his return gifts received from non-resident Indians. In response to the notice under section 148, he filed the return admitting the same income as was declared originally. Subsequently, he filed a revised return showing a total income of Rs. 10,86,060 which included the gifts from the non-resident Indians. On the ground that the assessee had concealed income in the original return, the Assessing Officer initiated penalty proceedings under section 271(1)(c) of the Act by issuing notice to the assessee. In response to the notice, the assessee, in order to buy peace, offered the whole amount of gifts as income and since the assessee was not able to prove the genuineness of the non-resident Indian gifts, he agreed to offer the amount as income for the assessment year 1995-96. Hence, the Assessing Officer completed the assessment under section 143(3) read with section 147 accepting the income disclosed in the return filed subsequently and levied penalty under section 271(1)(c). The Commissioner (Appeals) cancelled the penalty proceedings holding that the Assessing Officer

because of the surrender made by the assessee in the course of survey, did not consider it necessary to make further enquiry to establish whether the gifts claimed were not genuine or false to establish the fact that the assessee had actually concealed facts or particulars of its income or that it had furnished inaccurate particulars of its income. The Tribunal restored the penalty proceedings initiated by the Assessing Officer holding that when the assessee had admitted the income only after being questioned during the course of survey, the onus was on the assessee to establish that the assessee had not concealed any income. On appeal :
Held, dismissing the appeal, that the assessee had agreed to offer the gifts as income only after survey was conducted in the premises of the assessee. But for the survey, the assessee would not have offered the gifts as income. Hence, the onus was on the assessee to substantiate the gifts. When the assessee was not able to prove the genuineness of the gifts, the Tribunal was justified in confirming the order of the Assessing Officer.(AY. 1995-96)
R.Padmanabhan v. Dy. CIT (2015) 371 ITR 211 (Mad.) (HC)

S. 271(1)(c) : Penalty—Concealment-Search and seizure-Voluntary disclosure-Assessee filing return but not disclosing amount surrendered voluntarily-Penalty leviable. [S. 132, 132(4),271(1)(c), Explanation, 5A(a), (b).]
A search under section 132 of the Act was conducted at the premises of the assessee on February 3, 2009. In the course of search, the assessee made a voluntary disclosure under section 132(4) disclosing a sum of Rs. 6 crores, even though no incriminating document suggesting any such undisclosed income was found. No concealed income was established from any of the papers and documents found in the course of search in the panchnama of the assessee or in other panchnamas. The entire disclosure was made voluntarily and in good faith. On the basis of the disclosure, the assessee filed a return, offering a sum of Rs. 70,000 for taxation earned during the assessment year 2008-09. Since the assessee for the assessment year 2008-09 had earlier filed his return in which the sum of Rs. 70,000 was not disclosed, the Assessing Officer imposed a penalty under section 271(1)(c). The Commissioner (Appeals) confirmed the levy of penalty. The Tribunal cancelled the penalty. On appeals :

Held, allowing the appeal, that clause (b) of Explanation 5A to section 271(1) was not applicable to the case of the assessee for the reason that it was not the case of the assessee that he had not filed the return for the assessment year 2008-09. Clause (b) was not applicable to those cases where the assessee had filed a return but did not disclose the income, as the present assessee. His case was covered by clause (a). The assessee was not entitled to get the benefit of immunity under clause (b). Stress was laid by the Tribunal on the expression "voluntary" but the meaning of the expression "voluntary" in the context is that the statement made by him was not extorted from him by applying force. It is in that sense a voluntary disclosure which had been clarified by the assessee by stating that he had not given any statement under pressure and he did not want to rectify or modify the statement made by him. Levy of penalty was held to be justified.(AY. 2008-2009)
CIT v. Prasanna Dugar (2015) 371 ITR 19/ 122 DTR 182 (Cal) (HC)
Editorial:SLP of assesse was dismissed.(SLA.No. 12767 of 2015 dt 1-5-2015) Prasanna Dugar v.CIT (2015) 373 ITR 681 (SC)

S.271(1)(C) : Penalty- Concealment –Non production of bills- Levy of penalty was held to be justified.
When the Assessing Officer asking for the Bills for 9 alleged items, non-production Bills for 6 items amounts to furnishing of inaccurate particulars hence, the levy of penalty is justified. (AY. 2003-04)
Clariant Chemicals India Ltd v. ACIT. (2015) 274 CTR 353 (Bom) (HC)

S. 271 (1)(c) : Penalty-Concealment- Cash credits-Merely because additions are made in the quantum proceedings, penalty cannot be imposed mechanically.[S.68]
The assessee is engaged in the business of boring of tube-wells for farmers. The assessee filed its return of income for the AY 1986-87. Pursuant thereto, some additions were made u/s 68 and accordingly penalty u/s 271 (1) (c) was imposed on the basis that the assessee had failed to disclose its

income truly and correctly. Being aggrieved, the assessee filed an appeal to the CIT(A), who dismissed the appeal. The Tribunal also upheld the CIT(A)'s order.

On appeal to the Court, it held that the AO cannot impose penalty in the case of an assessee mechanically, merely on the basis of addition of a certain amount, over and above the amount already declared by the assessee. The AO has to record reasons specifying that there was either concealment of income or supplying of untrue particulars of taxable income for the relevant year which the AO failed to do.

Amrut Tubwell Company .v. ACIT (2015) 115 DTR 1 (Guj.)(HC)

S. 271(1)(c) : Penalty – Concealment – Satisfaction-Whether intention or satisfaction to initiate penalty proceedings u/s.271(1)(c) was not evident from order of assessment, penalty proceedings could not be initiated

The assessee-company involved in the activity of construction. An assessment order was passed by the AO by making certain additions in course of survey and income-tax imposed on same was paid by assessee. Subsequently, AO initiated penalty proceedings u/s. 271(1)(c). The CIT(A) allowed the appeal and Tribunal dismissed the appeal filed by revenue.

On appeal by the department, the High Court observed that section 271(1) itself indicates that the satisfaction or decision to initiate proceedings must arise in the course of the proceedings. It further observed that sub-section (1)(b) of section 271 mandates that the intention or satisfaction to initiate proceedings must be evident from the order of assessment itself, meaning thereby that such satisfaction need not be supported with other reasons. No such satisfaction was recorded.Accordingly, the High Court held that the nature of satisfaction of assessee need not be in writing, though the factum of satisfaction must be in writing and the Tribunal has taken the correct view of the matter and therefore, cannot interfere with and hence the appeal is dismissed.**CIT v. Lotus Constructions (2015) 55 taxmann.com 182 / 113 DTR 388 (AP) (HC)**

S. 271(1)(c) : Penalty-Concealment-Consultancy service- Shown as exempt-Full material fact was disclosed in the return - Amount disclosed and tax paid- Levy of penalty was held to be not valid. [S. 10(8A), 132(4), Explanation 5.]

Assessee is a NR, received certain amount under a contract with Asian Development Bank (ADB), for providing consultancy service. In the return the aforesaid amount was claimed as exempt from tax in view of the specific recital in the agreement that the government has agreed and affirmed to provide and make available to the assessee free of charges several facilities and that the Government shall exempt or bear cost of any taxes etc in India. Assesee was under a bonafide belief that the receipt was exempt on the basis of the clauses in the agreement referring to the obligation of the Government referring to the obligation of the Government of India. Application for claiming exemption under S/10(8A) was moved subsequently on the advice given by the Tax Consultants. AO imposed penalty and held that certain amount was not exempt income added to the return of income. The penalty was confirmed by both CIT (A) and Tribunal. On further appeal in HC, HC held that there was not finding at any stage of the proceedings the acquisition of the seized gold was during any earlier Assessment Year. Statement was recorded from the assesee u/s 132(4). Return having been filed within time showing income and there being payment of tax, the assessee was entitled to the benefit of Explanation 5 to S/271(1) (c) and penalty imposed by the AO was set aside. (ITA No. 17 of 2014 dt. 03/09/2014)(AY. 2005-06)

Lea International Ltd v. ADIT (2015) 230 Taxman 245 / 273 CTR 515/2015) 55 taxmann.com 407 / 113 DTR 210 (Delhi)(HC)

S.271(1)(C):Penalty-concealment- Scientific research –Bills not produced –Levy of penalty was held to be justified. [S.35(2AB)]

Where out of 9 items in respect of capital expenditure of research and development, bills or supporting documents in relation to 6 items had not been produced by assessee, imposition of penalty under section 271(1)(c) after disallowance of said expenditure was justified . (AY. 2003-04)

Clariant Chemicals (India) Ltd. v. ACIT (2015) 229 Taxman 267/ 115 DTR 65 (Bom.)(HC)

S. 271(1)(c):Penalty-Concealment-Immunity against penalty under Explanation 5 is available even in return is not filed provided a statement is made during the search, explaining the manner of deriving the income and due tax & interest thereon is paid.[S.132(4), 153A, Explanation 5]

Against the judgement of the Third Member of the Tribunal in **ACIT vs. Kirit Dahyabhai Patel** [2009] 121 ITD 159 (AHD.) (TM), the High Court had to consider the following question of law: "Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in restoring the penalty imposed under Section 271(1)(c) of the Act holding that benefit under explanation 5 to Section 271(1)(c) of the Act would be available only for period where due date for filing the return under Section 139(1) of the Act had not expired?" HELD by the High Court reversing the Third Member:

In order to get the benefit of immunity under clause(2) of explanation5 to Section 271(1)(c) of the Income Tax Act, it is not necessary to file the return before the due date provided that the assessee had made a statement, during the search and explained the manner in which the surrendered amount was derived, and paid tax as well as interest on the surrendered amount. It is not relevant whether any return of income was filed by the assessee prior to the date of search and whether any income was undisclosed in that return of income. In view of specific provision of Section 153A of the I.T. Act, the return of income filed in response to notice under Section 153(a) of the I.T. Act is to be considered as return filed under Section 139 of the Act, as the Assessing Officer has made assessment on the said return and therefore, the return is to be considered for the purpose of penalty under Section 271(1)(c) of the I.T. Act and the penalty is to be levied on the income assessed over and above the income returned under Section 153A, if any. (AY. 2002-03)

Kirit Dayabhai Patel v. ACIT (2015) 121 DTR 337 (Guj) (HC)

S. 271(1)(c):Penalty – Concealment- Book profit-Assessment under section 115JB on book profits basis - Search by excise authorities revealing concealment of income - Additions to income -Tax liability not changing - Penalty could not be imposed- Explanation 4.[S.115JB]

The assessee declared a total income as "nil", after claiming deduction under section 80-IB of the Income-tax Act, 1961, and depreciation available. The assessee's book profits under section 115JB worked out to Rs. 3,78,87,230. In the scrutiny assessment, the Assessing Officer found that a search had been carried out at the premises of the dealers of the assessee by the excise authorities. Statements of the representatives of the dealers were recorded. Statements of the representatives of the assessee were also recorded. On the basis of such materials, the Assessing Officer came to the conclusion that during the previous years relevant to the assessment years 2003-04, 2004-05 and 2005-06 up to July 13, 2005 (i.e., the date of the search), the assessee had received a sum of Rs. 64,95,365 in cash. For the assessment year under consideration, the Assessing Officer apportioned a sum of Rs. 46,78,545 out of the cash receipts. He, accordingly, added this amount to the income of the assessee, both for normal computation as well as for computing book profit under section 115JB. In his order of assessment the Assessing Officer ordered initiation of penalty proceedings. He imposed penalty. This was upheld by the Commissioner (Appeals) but the Tribunal held that even after the additions had been made during the course of the assessment proceedings, the income of the assessee remained "nil" and the assessee was liable to pay tax on the book profits under section 115JB. Hence, the Tribunal deleted the penalty. On appeal to the High Court :

The order in effect was that the addition for the normal computation was sustained but for the purpose of computation of the book profits, it was deleted. When the assessee's tax liability did not change despite unearthing of concealed income, no penalty could have been levied. The deletion of penalty was justified.(AY. 2005-2006)

CIT v. Citi Tiles Ltd.(2014) 46 taxmann.com 344/ (2015) 370 ITR 127/ 122 DTR 74/ 278 CTR 245 (Guj.)(HC)

S. 271(1)(c): Penalty–Concealment-Nature of satisfaction of Assessing Officer - Must be evident from assessment order itself - Nature of satisfaction need not be in writing but factum of satisfaction must be in writing.

The AO imposed the penalty for concealment. Appellate authorities deleted the penalty on the ground that there was no endorsement in the order of assessment to the effect that penalty proceedings of the

Act would be initiated. Dismissing the appeal of revenue the Court held that the nature of satisfaction need not be in writing, though the factum of satisfaction must be in writing.(AY. 1995-1996)
CIT v. Lotus Constructions (2015) 370 ITR 475 /273 CTR 538/55 taxmann.com 182 (T & AP) (HC)

S. 271(1)(c): Penalty – Concealment- Furnishing inaccurate particulars - Claim of loss on sale of fixed assets in profit and loss account - Claim incorrect and contrary to principles of primary accountancy - Revised return not filed voluntarily or before issue of notice for penalty - Order of penalty sustainable.[Explantion .1]
The claim of loss on accounts of sale plant and machinery was contrary to the elementary and well-known basic principles of accountancy. The case was not a case of a debatable issue and was a capital loss. Also, the assessee had not filed a revised return voluntarily but after the Assessing Officer confronted the assessee and it was asked to explain how and why the loss on account of sale of fixed assets was claimed in the profit and loss account. The loss, capital in nature and could not have been claimed in the profit and loss account. Therefore, the levy of penalty under section 271(1)(c) was justified.(AY. 2006-2007)
CIT v. NG Technologies Ltd. (2015) 370 ITR 7/118 DTR 256 (Delhi)(HC)

S. 271(1)(c): Penalty – Concealment-Search and seizure - Discrepancy in accounts noted in search proceedings - Surrender of amount- Levy of penalty was held to be valid.[S. 153A]
The assessee was carrying on jewellery business. There was a search under section 132 of the Income-tax Act, 1961, in its premises. Discrepancies were found in its accounts. Notice was issued under section 142(1) for the preceding six years, namely, with effect from the assessment year 2001-02 onwards. Notice under section 153A of the Act was issued requiring the assessee to file the return of income in consequence of the search proceedings. In pursuance thereof, the assessee filed a return of income dated July 31, 2007 disclosing Rs.1,06,48,173 comprising the amount from regular sources of income amounting to Rs. 48,27,928 and the balance amount of Rs. 58,20,245 attributable to the discrepancies found and after reconciling with the corroborative material facts containing material particulars. Subsequently, a revised return of income was filed declaring an income of Rs. 2,98,41,628 which included the amount of Rs. 48,41,628 from regular sources of income and additionally Rs. 2.50 crores attributable to discrepancies. The assessment was completed under section 143(3) read with section 153A. The assessment order was accepted and the tax was paid. Penalty was levied and this was confirmed by the Commissioner (Appeals). The Tribunal upheld the levy of penalty under section 271(1)(c) rejecting the prayer for admission of additional evidence. On appeal to the High Court : That no error or perversity could be pointed out in the findings recorded by the Assessing Officer, the Commissioner (Appeals) and the Tribunal which might call for interference. The levy of penalty was valid. (AY. 2007-2008)
JawaharLal Jain (HUF) v. CIT (2015) 370 ITR 712 / 118 DTR 177 (P & H) (HC)

S. 271(1)(c) : Penalty – Concealment-Matter remanded.[S.2(22)(e)]
Assessing Officer made addition inter alia on account of unexplained investment and deemed dividend. He levied penalty under section 271(1)(c) in respect of unexplained investment. In respect of addition on account of deemed dividend, penalty proceedings were kept in abeyance in view of pendency of an appeal. On dismissal of that appeal subsequently, penalty was levied in respect of this addition also. On appeal, Commissioner (Appeals) and Tribunal upheld penalty . On appeal the Court held that since both appellate authorities went into merits of explanation offered by assessee on penalty and not on issue whether original authority had reserved his right to proceed under section 271(1)(c) relating to deemed dividend, matter was to be remanded to Tribunal to consider scope of second penalty order. Matter remanded.(AY. 2005-06)
S. Sathyanarayanan v. ACIT (2015) 229 Taxman 168 (Mad.)(HC)

S. 271(1)(c) : Penalty-Concealment-Capital or revenue receipt-Complete disclosure of facts - Law laid down in CIT v. Zoom Communication P. Ltd. (2010) 327 ITR 510 (Delhi)(HC) does not apply if claim of assessee is bona fide and not in defiance of the law.

There has been a complete disclosure of all facts by the assessee. Besides the claim made by the assessee of not being taxable was not found to be not bonafide. As held by the Supreme Court in CIT v. Reliance Petroproducts Pvt. Ltd. (2010)322 ITR 158 (SC), making of an incorrect claim would not tantamount to furnishing inaccurate particulars of income. In this case, the assessee bonafide believed that the difference of Rs.1.65 Crores and Rs.55 Lakhs is not chargeable to tax and had so stated before the Assessing Officer. The fact that the explanation of assessee is not accepted in quantum proceedings would not ipso facto visit the assessee with penalty in the absence of the claim being held to be not bonafide. The decision of the Delhi High Court in CIT v.Zoom Communication P. Ltd(2010)327 ITR 510 (Delhi)(HC), is not applicable in the present facts for the reason that in this case, the stand taken by the assessee cannot be said to be in defiance of law and thus not bonafide. In this case it is not the case of revenue that the claim made by the assessee was not on the basis of bonafide view.(ITA No. 412 of 2013, dt. 3/03/2015)

CIT .v. S. M. Construction (Bom.)(HC); www.itatonline.org

S. 271(1)(c):Penalty-Concealment-If the notice does not clearly specify whether the penalty is initiated for "concealment" or for "filing inaccurate particulars", it is invalid. Mere fact that assessee has surrendered income does not justify penalty if his explanation is not found to be false/not bona fide.[S.274]

(i) The notice issued by the AO u/s 274 read with section 271 of the Act at the time of initiation of penalty proceedings states that it is issued for "concealment of particulars of income or furnishing of inaccurate particulars of income". The assessing officer has not specified that as to which limb the notice was issued, i.e., whether it is issued for concealment of particulars of income or furnishing of inaccurate particulars of income. The assessing officer should be clear about the charge at the time of issuing the notice and the assessee should be made aware of the charge. The penalty order is liable to be quashed as the AO has not correctly specified the charge (decision dated 11.10.2013 in Shri Samson Perinchery in ITA No.4625 to 4630/M/2013 and CIT Vs. Manjunatha Cotton & Ginning Factory (2013)(35 Taxmann.com 250)(Kar.) dated 13.12.2012) followed)

(ii) Surrender of commission expenditure would not automatically lead to the malafides of the assessee as presumed by the assessing officer, since the assessing officer has not afforded an opportunity to the assessee to contradict the documents that were relied upon by the AO. If we examine the explanations furnished by the assessee in terms of Explanation 1 to sec. 271 of the Act, we notice that the assessee has offered an explanation and the same has not been found to be false. It is pertinent to note that the revenue was having only suspicion about the genuineness of the payments at the time of search proceedings on the basis of enquiries conducted by them. However, the assessee has all through maintained that the payments were genuine. In support of the same, the assessee has stated that the payments were made by way of cheque, TDS were deducted and the service tax was also paid. Hence, in our view, it cannot be said that the explanation of the assessee was found to be false. Though the AO has expressed the view that the admission of the assessee proves malafides, we are of the view that the explanation of the assessee was not proved to be not bonafide one. It is not the case of the assessing officer that the assessee has failed to furnish all facts and material relating to computation of income. Accordingly, we are of the view the deeming provisions of Explanation-1 shall also not apply to the assessee.(ITA No. 6222/6223/Mum/2013, dt. 02.09.2015) (AY.2007-08,2008-09)

Hafeez S. Contractor .v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 271(1)(c):Penalty-Concealment-The deeming provision of Explanation 1 to S. 271(1)(c) applies only to a case of "concealment of income" and not to a case of "furnishing inaccurate particulars of income"

(i) In the assessment order passed u/s.143(3), the AO initiated penalty for concealing the particulars of income. However, at the time of passing penalty order the AO levied penalty for filing of inaccurate particulars of income under the virtue of Explanation 1 to Section 271(1)(c) of the Act. From a reading of Explanation 1 to Section 271(1)(c) of the Act, it is apparent that, if the AO in the course of assessment proceedings is satisfied that, any person has concealed the particulars of income or furnished inaccurate particulars of such income, then he may levy penalty on the assessee. Thus, there are two different charges i.e. concealment of particulars of income or furnishing of inaccurate

particulars of income. The penalty can be imposed only for a specific charge. Furnishing inaccurate particulars of income means, when the assessee has not disclosed the particulars correctly or the particulars disclosed by the assessee are found to be incorrect whereas, concealment of particulars of income means, when the assessee has concealed the income and has not shown the income in its return or in its books of accounts. Explanation 1 is a deeming provision and is applicable when an amount is added or disallowed in computation of total income which is deemed to represent the income in respect of which particulars have been concealed. Explanation 1 cannot be applied in a case where the assessee furnishes inaccurate particulars of income.

(ii) In the present case, the AO initiated penalty proceeding u/s 271(1)(c) on the basis that the assessee has concealed the particulars of income and the penalty ultimately levied on the assessee has been for furnishing inaccurate particulars by observing that the case of the assessee is covered by the Explanation 1 to Section 271(1)(c).

(iii) It is also observed that mistake of the assessee was bonafide which has been corrected by filing revised return before completion of assessment. Merely because there were some discrepancies, it cannot be held that the assessee intended to evade tax. The assessee had rectified the same and had accepted the mistake before the AO. The assessee also chose not to prefer appeal before the first appellate authority, itself shows that the mistakes were not wilfull (ITA No. 1457/Del/2010, dt. 07.09.2015) (AY. 2006-07)

Tristar Intech (P) Ltd. .v. ACIT (Delhi)(Trib.); www.itatonline.org

S. 271(1)(c):Penalty-Concealment-Capital gains-Failure to apply s. 50C and offer capital gains as per the stamp value does not constitute concealment/ furnishing of inaccurate particulars of income for levy of penalty.[S.50C]

(i) As can be seen from the facts and materials on record, while the assessee computed capital gain on the basis of sale consideration mentioned in the registered sale deed, the A.O. computed the capital gain by invoking the provisions of section 50C of the Act as the registering authority of the State Government has valued the property for the purpose of stamp duty at Rs.2.55 crores. Though, it may be a fact that the ITAT while deciding assessee's quantum appeal has upheld application of section 50C of the Act for the purpose of computation of capital gain but that itself will not lead to the conclusion that assessee either has furnished inaccurate particulars of income or concealed the particulars of income. As can be seen from the language of section 50C it is a deeming provision. In a case where A.O. finds that the value determined by the stamp duty authority for the purpose of stamp duty is more than the consideration claimed to have been received by the party, then the value adopted by the SRO shall be deemed to be the consideration received by the assessee for the purpose of computation of capital gain.

(ii) Thus, for application of section 50C of the Act, it is not necessary for the A.O. to examine whether actually assessee has received anything over and above the amount mentioned in the sale deed as he simply has to go by the valuation adopted by the SRO. However, as far as imposition of penalty is concerned, there must be positive evidence before the A.O. to conclude that assesseehas received the amount as valued by SRO for stamp duty purpose. Unless there are positive evidence to indicate receipt of on money to the extent of valuation made by SRO by the assessee, penalty under section 271(1)(c) cannot be imposed. Further,in the present case as is evident from the materials on record, the assessee in the course of assessment proceeding has furnished all necessary and relevant documents relating to the transaction of the property in question including registered sale deed. The assessee has not suppressed any material fact from the notice of the A.O. In these circumstances, the imposition of penalty under section 271(1)(c) of the Act alleging furnishing of inaccurate particulars of income or concealment of income, in our view, is not appropriate.(ITA No. 565/Hyd/2015, dt. 04.09.2015) (AY. 2008-09)

Bhavy Anant Udeshi .v. ITO(Hyd.)(Trib.); www.itatonline.org

S. 271(1)(c):Penalty–Concealment-Claim that interest income is eligible for S. 10B exemption, though upheld by the ITAT for an earlier year, is so implausible that it attracts penalty for concealment/ furnishing inaccurate particulars of income- Penalty was confirmed. [S.10B]

The assessee claimed benefit u/s.10B on the interest income following the decisions in the case of CIT vs. Paramount Premises (P.) Ltd. [1991] 190 ITR 259 (Bom.) and CIT vs. Nagpur Engineering Co.

Ltd. [2000] 245 ITR 806 (Bom.). The claim was rejected by following the subsequent judgement of the apex court in Liberty India. The AO levied penalty u/s 271(1) (c). This was deleted by the CIT (A). On appeal by the department HELD allowing the appeal:
(i) As regards the decisions by the Hon'ble jurisdictional High Court relied upon, in our clear view, the same would be of no assistance to the assessee. As unequivocally clarified in Paramount Premises (P.) Ltd. (supra), the decision upholding the assessment of interest as business income is based squarely on the factual finding by the tribunal to the effect that the interest income sprang from the business activity of the assessee-respondent, and did not arise out of the any independent activity. There is clearly little scope for the application of the said decision in the facts of the present case, given the clear finding of no connection between the assessee's business activity and the deposits yielding interest income. In fact, even assessment as business income, as observed during hearing, would not by itself suffice in-as-much as it would require a further satisfaction of the condition of section 10B, i.e., of it being derived from such business, toward which we find no contention, much less basis, being, as apparent, with the deposits per se. The decision in the case of Nagpur Engineering Co. Ltd. (supra) is only by following the decision in Paramount Premises (P.) Ltd. (supra). It is well settled that what is binding and has precedent value, is the ratio decendi of a decision. The said decision, rendered following the decision in Paramount Premises (P.) Ltd. (supra), thus, cannot be said to lay down any proposition independent and apart from that stated in Paramount Premises (P.) Ltd. (supra), and which we find as no different from that stated by the Hon'ble Apex Court in Govinda Choudhary and Sons (supra). That is, that it all depends on the facts of the case. The Hon'ble High Court, therefore, presumably and inferably, in the latter decision, i.e., Nagpur Engineering Co. Ltd. (supra), again found a direct nexus between the assessee's business and the interest income, leading it to being assessed as business income and, further, of the said nexus as being of first degree, as explained as far back as in Raja Bahadur Kamakhya Narayan Singh (supra), so that 8 ITA Nos. 3655 to 3657/M/06 & 2358 to 2360/ M/06 (A.Y s.1997-98, 1998-99 & 1999-2000) Cybertech Systems & Software P. Ltd. the primary condition of 'derived from', as against incidental or attributable to, as is again well settled, stands satisfied in the facts and circumstances of the case, as found by the tribunal. That is, its decision again rests on the edifice of the factual findings by the tribunal, the final fact finding authority. The said decisions, thus, on the contrary, support the Revenues' case. The finding by the tribunal in the instant case, as apparent, is of it being a fit case for the impugned claim being disallowed in view of the decision in Liberty India (supra), so that there was no relation of first degree between the assessee's business, which it found as qualifying for deduction u/s.10B, and the interest bearing deposit/s. The decision in the case of Liberty India (supra), it needs to be appreciated, is only in line and tandem with the earlier decisions, cited supra, by the Hon'ble apex court, which listing is again not exhaustive, so that the apex court does not thereby lay down any new law. Rather, the decisions by the Hon'ble jurisdictional high court relied upon by the assessee are not inconsistent with the decision in Liberty India (supra) and, in fact, in consonance with the decision by the Hon'ble Apex Court in Govinda Choudhary and Sons (supra). Further, the assessee also has nowhere contested any of the several decisions relied upon by the Revenue, including by the hon'ble apex court and the jurisdictional high court cited supra, many of which are prior to the dates of the filing of the returns in the instant case, so that they represented the well settled/ established law of the land; there being in fact a complete unanimity between the different high courts on the subject, i.e., both with the regard to the nature of the receipt by way of interest, as explained in Govinda Choudhary and Sons (supra), as well as qua the scope of the words 'derived from'.
(ii) We, in view of the foregoing, find no merit in the assessee's case. It, to our mind, has not adduced any explanation, much less substantiated it, except for a bald assertion (i.e., of the said interest income as being a part of the assessee's business income). The reliance on the decisions by the Hon'ble jurisdictional high court, which we have found to be in fact supportive of the Revenue's case, with the law in the matter being, in fact, well settled, is only a false plea or a ruse. Reliance on the decision by the tribunal for a subsequent year (AY 2000-01) is, under the circumstances, again, completely misplaced. A plausible explanation towards its' claim/s saves penalty u/s. 271(1)(c), in view of, again, the settled law in the matter which though is completely missing in the present case.(ITA Nos. 3655 to 3657/M/06 & 2358 to 2360/M/06, dt. 07.08.2015) (AY.1997-98, 1998-99 & 1999-2000)

DCIT .v. Cybertech Systems & Software P. Ltd. (Mum.)(Trib.); www.itatonline.org

S. 271(1)(c):Penalty- Concealment-If the notice does not clearly specify whether the penalty is initiated for "concealment" or for "filing inaccurate particulars", it is invalid- Change of head of income- Levy of penalty was held to be not valid- Penalty should not be imposed merely because the income has been offered to tax in a later year and not in the present year.[S. 274]

The assessee contented that the penalty notice issued u/s 274 of the Act is ambiguous to the extent for which the penalties are initiated. The said notice does not specify where the present penalty is being levied for concealment of income or for furnishing of inaccurate particulars of income. CIT (A) did not strike of the irrelevant limb mentioned in the notice u/s 274 of the Act. CIT (A) is not clear as to the relevant limb of the provisions of section 271(1)(c) of the Act for which penalty should be levied. Further, in the quantum order u/s 250 of the Act, the CIT (A) initiated penalty for assessee's failure in furnishing inaccurate particulars in respect of estimated cost of future expenditure resulted in suppression of income. In the penalty order of the CIT (A), penalty was levied for "concealment of particulars of income" in respect of the change in estimated cost. By all these variations, the CIT (A) is not clear as to whether the penalties are levied for "concealment of income" or "furnishing of inaccurate particulars of income". Further, Ld Counsel for the assessee brought our attention to various decisions of the Tribunal to support his argument that the penalty should not be levied when the CIT (A) is not clear in reasons for levying the penalty. Ld Counsel for the assessee also mentioned that the CIT (A) cannot initiate penalty for one reason and levy for other reasons. In this regard, Ld Counsel for the assessee relied on the judgment of the Hon'ble Karnataka High Court in the case of Manjunatha Cotton & Ginning Factory (92 DTR 111) (Kar. HC) and the coordinate Bench decision in the case of Shri Samson Perinchery (ITA Nos. 4625 to 4630/M/2013), dated 11.10.2013, wherein one of us (AM) is a party to the said order of the Tribunal (supra). He also relied on the following decisions viz (i) M/s. Ittina Properties Pvt Ltd (ITA No.36/Bang/2014), dated 21.11.2014 (Bang); (ii) Dharini Developers (ITA No.1848 to 1851/M/2012), dated 7.1.2015 (Mum) and others. All these general arguments relevant for all the 4 segments of the penalties discussed above. Per contra, no contrary judgments are brought to our notice by the Ld DR. HELD by the Tribunal:

The concealment penalty was levied by the CIT (A) in this case on the issues which are not free from debate. In our opinion, the assessee would have got relief in most of issues relating to additions based on the estimations, change of method of accounting, preponement of taxable income to AY 2009-2010 etc. Taxation of interest receipt with or without netting is under the head "profit and gains from business or profession" or "income from other sources" is also a debatable issue. Therefore, the concealment penalty in the case is not sustainable on such addition / issues. Further, the decision in the case of Manjunatha Cotton & Ginning Factory (supra) helps the assessee considering the lack of clarity in the mind of the CIT (A), at the time when notice u/s 274 was issued. Further also, it is demonstrated beyond doubt that there are no adverse tax implications to the Revenue if the profits are finally taxed in AY 2012-2013, the year of completion. Therefore, we are of the opinion that this is not a fit case for levy of penalty u/s 271(1)(c) of the Act. Accordingly, all Grounds raised by the assessee are allowed.(ITA No. 6772/M/2013, dt. 11.09.2015)(AY. 2009-10)

Parinee Developers Pvt. Ltd. .v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 271(1)(c) : Penalty-Concealment-Furnishing inaccurate particulars-Claim to deduction of expenses and depreciation allowance against income from house property-Claim positively incorrect and contrary to provisions of Income-tax Act-Assessee knowingly making wrong claim- Levy of penalty is held to be justified.

The assessee was a builder and promoter. During the year no business activity was carried on by the assessee and it earned rental income and interest on fixed deposits. The assessee declared rental income under the head "Income from house property" and claimed deduction of depreciation, building maintenance expenses, commission under section 24 of the Act. The Assessing Officer held that the expenses were not separately allowable as deduction because they were covered under the composite deduction allowable under the head "Income from house property". Therefore, he computed the total income by assessing the rental income under the head "Income from house property" as declared by the assessee without allowing any separate deduction for the expenses and imposed penalty in respect of the disallowance of deductions claimed by the assessee against the income under the head "Income

from house property". The Commissioner (Appeals) confirmed this. On appeal : Held, that the provisions of Chapter IV-C do not allow any deduction for expenses of the nature claimed by the assessee within its ambit. As the assessee knowingly made a wrong claim to deduction of expenses and depreciation against income from house property which was patently inadmissible, the levy of penalty under section 271(1)(c) was justified. (AY. 2001-2002)
Tera Construction P. Ltd. v. ITO (2015) 39 ITR 646 (Delhi)(Trib.)

S. 271(1)(c) : Penalty—Concealment-Search and seizure-Seized materials found during search belonging to proprietary business of assessee's father in which assessee having no interest-Assessee offering additional income in his own hands to avoid litigation and to save aged father from harassment--No material to show seized material belonged to assessee or his statement false-Penalty cannot be levied.[S. 132, 153A]
In a search and seizure operation conducted under section 132(1) of the Act, certain documents were found and seized from the premises of the assessee's father. The assessee contended that all the seized documents belonged to his father and his proprietary business in which the assessee had no connection or interest. During the course of the assessment proceedings that ensued after notice under section 153A of the Act, the assessee had offered additional income worked out on the basis of seized documents in his own hands to avoid protracted litigation and to save his aged father from harassment. The Assessing Officer invoked Explanation 5 to section 271(1)(c) of the Act and levied penalty for furnishing inaccurate particulars of income. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal :
Held, allowing the appeal, that admittedly, the seized materials found at the time of search belonged to the proprietary concern of the assessee's father in which the assessee had no interest. The seized documents revealed that nothing belonged to the assessee but his father. The offer of additional income was only to buy peace and to save his aged father from protracted litigation. The explanation of the assessee that no material was found from his possession had not been rebutted by the authorities at any stage. Not only that, it was evident from the explanation submitted before the Assessing Officer that the assessee had reconciled the income and explained each and every entry. Hence penalty could not be levied under section 271(1)(c) and Explanation 5 would not apply for the reason that the assessee had not been found to be in possession of any money, bullion, jewellery or other valuable articles. The penalty was to be deleted. (AY. 2002-2003 to 2005-2006)
Joseph A. Pattathu v. ACIT (2015) 39 ITR 548 (Mum.)(Trib.)

S. 271(1)(c) : Penalty—Concealment-Revised return beyond time-Assessment was done just to validate in valid revised return –Levy of penalty was not justified.[S 132,147, 148, 153C].
Tribunal held that no escapement of income was detected during the original assessment proceedings and no proceedings were initiated against the assessee, though it was found that the chartered accountant was operating bogus firms, pursuant to search action. The assessee had suomotu offered the additional income. The assessment proceedings under section 147 of the Act were carried out just to validate the invalid revised return and not on account of detection of escapement of income. Therefore, it was not a fit case for levy of penalty under section 271(1)(c) of the Act. (AY. 1998-1999 to 2000-2001)
Ravi Sud v. ACIT (2015) 39 ITR 356 (Mum.)(Trib.)
Ranjana Sud v. ACIT (2015) 39 ITR 356 (Mum.)(Trib.)

S. 271(1)(c) : Penalty - concealment of income-Disallowance of claim-Short-term capital gain on sale of land was wrongly claimed as long-term capital gain by substituting year of acquisition-Levy of penalty was held to be justified. [S.54B]
The assessee filed the return of income claiming the year of acquisition of the asset as 1999 instead of the correct year as 2004. Even though the period of holding of the asset sold was far less than 36 months and, therefore, the income did not fall within the long-term capital gain, the assessee never filed any revised return before the issue of notice under section 143(2). Therefore where short-term capital gain on sale of land was wrongly claimed by assessee as long-term capital gain by substituting year of acquisition as 1999 instead of 2004 and said mistake was not brought to notice of AO suomotu

before it was detected by department for which assessee had to finally surrender addition. Penalty was held to be justified. Appeal of revenue was allowed.(AY. 2007 – 2008)
ACIT v. Vinay A. Joneja (2014) 163 TTJ 652 / (2015) 153 ITD 109 (Pune)(Trib.)

S. 271(1)(c) : Penalty-Concealment- Validity of assessment can be objected in penalty proceedings- Satisfaction was recorded of person searched-Donation was not disclosed in the original return- Belated return was filed- Revised return was held to be not valid-Levy of penalty was held to be justified. [S.32(4), 139(5), 153C, 158BD]
(i) The argument that the satisfaction ought to have been recorded by the AO of the searched person and copy of such satisfaction should be available in the record of searched person is not acceptable because the AO of the searched person as well as of the assessee is a common authority. The same AO has jurisdiction over both the assessees. He has recorded the satisfaction for satisfying himself that money belonged to the assessee was found at the premises of the assessee. His action is being challenged that he has recorded the satisfaction while taking cases of the present assessee i.e. when he took cases of such other persons, whereas he should have recorded satisfaction in the capacity of AO of searched person. There is built-in fallacy in the arguments of the assessee. The fallacy became evident if the argument if tested by envisioning to the facts of the present case. There is no dispute that notice under section 153C was issued by the AO after recording the satisfaction extracted supra. The AO is the same AO who has jurisdiction over the searched person as well as the other person i.e. the assessee. Let us take a situation, the AO was examining the file of Shri Bhaskar Ghosh. On perusal of his statement recorded under section 132(4) coupled with the fact of cash found during the course of search and buttressed by the Managing Director (Finance) of the KPC Group of companies, visualized that cash belonged to the assessee, he immediately took a piece of paper and recorded his satisfaction that the money belongs to the assessee, therefore notice under section 153C is to be issued in the case of assessee. The question is, where this paper was placed by him? Whether in the order sheet entries of Shri Bhaskar Ghosh's assessment proceedings; in a separate file or in cupboard available in his room. There is no dispute that this satisfaction was not recorded within the stages contemplated by the Hon'ble Supreme Court in the case of CIT vs. Calcutta Knitwears 362 ITR 673. The attempt at the end of the assessee is that there should be a straight jacket system, whereby the satisfaction recorded even by the same AO then, that should be placed in the file of searched person and if it is placed in some other cupboard in his room by the AO then, there cannot be any satisfaction, we fail to appreciate that technical approach at the end of the assessee. The law does not require the manner and the procedure of keeping the files. The section only requires that a satisfaction be recorded and it should be during the period propounded by Hon'ble S.C. in CIT vs. Calcutta Knitwears 362 ITR 673, that has been recorded in the present case. The second scenario can also happen that seized material of KPC group might be kept in a common bundle, wrapped in a cloth where all the files are emanating from search and survey are being placed. If the above satisfaction note was found to be tagged with other file would it be held that no satisfaction was recorded. In our understanding the reply will be that satisfaction was recorded
(ii) The most important feature of section 271(1)(c) is deeming provisions regarding concealment of income. The section not only covered the situation in which the assessee has concealed the income or furnished inaccurate particulars, in certain situation, even without there being anything to indicate so, statutory deeming fiction for concealment of income comes into play. This deeming fiction, by way of Explanation I to section 271(1)(c) postulates two situations; (a) first whether in respect of any facts material to the computation of the total income under the provisions of the Act, the assessee fails to offer an explanation or the explanation offered by the assessee is found to be false by the Assessing Officer or CIT(Appeal); and, (b) where in respect of any fact, material to the computation of total income under the provisions of the Act, the assessee is not able to substantiate the explanation and the assessee fails, to prove that such explanation is bona fide and that the assessee had disclosed all the facts relating to the same and material to the computation of the total income. Under first situation, the deeming fiction would come to play if the assessee failed to give any explanation with respect to any fact material to the computation of total income or by action of the Assessing Officer or the Learned CIT(Appeals) by giving a categorical finding to the effect that explanation given by the assessee is false. In the second situation, the deeming fiction would come to play by the failure of the assessee to substantiate his explanation in respect of any fact material to the computation of total income and in

addition to this the assessee is not able to prove that such explanation was given bona fide and all the facts relating to the same and material to the computation of the total income have been disclosed by the assessee. These two situations provided in Explanation 1 appended to section 271(1)(c) makes it clear that that when this deeming fiction comes into play in the above two situations then the related addition or disallowance in computing the total income of the assessee for the purpose of section 271(1)(c) would be deemed to be representing the income in respect of which inaccurate particulars have been furnished. On examination of the facts, we find that firstly, there is no explanation at the end of assessee, why it has not disclosed these donations in the original return(s)? There is no bona fide in the alleged explanation of the assessee that it had received the money through account payee cheque and, therefore, harbored a belief that donations are genuine. This explanation is wholly for the sake of explanation. The assessee failed to spell out specific facts and circumstances or reason which operated in the minds of its managing director, finance while preparing the return and treating these donations as genuine. Looking to the facts of these five donors, no prudentmanwould, however, harbor a belief that such companies can give donation. It is pertinent to note that it cannot be a co-incidence or a chance that five companies managed by a common director, having assets of less than Rs.1 lac, not done any business but would give donations of Rs.33 crores. These circumstances in itself suggest a well designed scheme at the behest of the assessee, because it is the assessee who is ultimately getting the benefit. Therefore, there was no explanation at the end of assessee for not showing these donations as its income in the original return(s) or in the return(s) filed in response to notice under section 153C. The CIT(A) has rightly confirmed the penalty upon the assessee. (AY. 2007-08 to 2009-10)

KPC Medical college & Hospital v. DCIT (Kol.)(Trib.); www.itatonline.org

S. 271(1)(c) : Penalty – Concealment - Where Explanation 1 is simply relied by A.O while levying penalty, without actually pointing out any specific charge, the basis of levy of penalty is not in accordance with law.[Explanation 1]

Assessment proceedings u/s 143(3) was completed by A.O by making an addition of Rs. 60.17 Lakhs on account of bad debts. Subsequently, A.O initiated penalty proceedings u/s 271(1)(c) without mentioning whether the penalty has been initiated for concealment of particulars of income or furnishing inaccurate particulars of income. However, the A.O imposed and levied by simply relying on Exp. 1 to S. 271(1)(c) for furnishing inaccurate particulars. The Tribunal held that Explanation 1 is not applicable in a case of furnishing inaccurate particulars of income. Therefore, the basis of levy of penalty itself is not correct and deserves to be quashed. (ITA No. 683 (IND) of 2013) dt. 13/10/2014) (AY. 2003 - 04)

DCIT.v. Nepa Ltd (2015) 167 TTJ 124 (Ind.)(Trib.)

S.271(1)(c):Penalty-Concealment-Search and seizure--Commissioner (Appeals) examining levy on basis of different provision--Matter remanded(S. 271AA),

During the previous year relevant to the assessment year 2009-10, a search and seizure action under section 132 of the Income-tax Act, 1961, in respect of the P group of companies, of which the assessee was a part, led to a disclosure of undisclosed income by the assessee. The assessment was completed determining the total income of the assessee at a figure higher than that declared in the return. The Assessing Officer imposed penalty under section 271AAA of the Income-tax, Act, 1961. The Commissioner (Appeals) deleted the penalty. On appeal : Held, that while deciding the case, the Commissioner (Appeals) recorded the ingredients of Explanation 5 to section 271(1)(c) of the Act, instead of section 271AAA of the Act. Even the decision relied upon by him was in the context of section 271(1)(c) of the Act. The two sections 271(1)(c) and 271AAA of the Act were not only worded differently, but also with different scopes and mandated to operate exclusively. Therefore, as the Commissioner (Appeals) examined the levy on the basis and anvil of a different provision, the matter required to be examined afresh by him. Matter remanded. (AY. 2009-2010)

ACIT .v. Prakash Steelage Ltd.(2015) 153 ITD 493 / 169 TTJ 137 / 38 ITR 582 (Mum.)(Trib.)

S. 271(1)(c) :Penalty—Concealment-Claim under section 80-IC based on High Court decision-Reversal of High Court by Supreme Court a few days before return was filed-Short gap between publication of decision and filing of return-Not everybody aware of decision-Filing of

return on advice of chartered accountants under bona fide belief-Issue debatable at time of making return-Penalty cannot be levied-No concealment of income or furnishing of inaccurate particulars.[S. 80IC]

The assessee filed its return of income on September 30, 2009 claiming deduction on account of export incentive under section 80-IC of the Act.The Assessing Officer rejected the claim of the assessee and levied penalty under section 271(1)(c) of the Act on the ground of furnishing inaccurate particulars as the claim was against the decision of the Supreme Court. The Commissioner (Appeals) confirmed this. On appeal :

Held, allowing the appeal, that the decision rendered by the High Court on February 19, 2008 was favourable to the assessee and according to the High Court decision the assessee had a right to claim the deduction. The issue was decided against the assessee by the Supreme Court on August 31, 2009 and published for the first time on September 17, 2009. It was not necessary that every body would became aware of a new decision. There was only short gap between publication of the decision and filing of the return. It was also possible that the return might have been finalised before publication of the decision. Therefore, at the time of filing the return the issue was debatable and penalty could not have been levied. Once proper disclosures were made penalty was not attracted. Further the return was filed on the basis of a certificate issued by a chartered accountant and even if it was a mistake on the part of the chartered accountant, the assessee could always take the shelter that deduction was claimed on the basis of advice under a bona fide belief. Therefore, this was not a fit case for levy of penalty. (AY. 2009-2010)

S. S. Foods Industries v. A CIT (2015) 38 ITR 90 (Chd.)(Trib.)

S. 271(1)(c) : Penalty – Concealment - Disallowance of claim of deduction - Bona fide claim was made for deduction u/s 80IB with complete disclosure of facts-Penalty is rightly deleted. [S.80IB]

Assessment proceedings u/s 143(3) was completed by A.O by making an addition of Rs. 60.17 Lakhs. Subsequently, A.O initiated penalty proceedings u/s 271(1)(c) as it was observed the assessee did not qualify as small scale industry as the investment in plant and machinery was more than monetary limit prescribed. Tribunal held that the assessee made a bona fide claim of deduction u/s 80IB as it was a small scale industry. Therefore, it is not a case of filing of inaccurate particulars of income or concealment of particulars of income and hence, penalty is not leviable.(AY. 2008 - 09)

DCIT.v. Parabolic Drugs Ltd (2015) 167 TTJ 683 / 37 ITR 16 (Chd)(Trib)

S.271(1)(c):Penalty –Concealment-Disallowance of expenditure for failure to deduct TDS does not attract penalty.[S.40)(a)(ia), 194C]

In this case, the penalty has been levied for disallowance of expenditure u/s.40(a)(ia) of the Act. It is not a case of furnishing of inaccurate particulars of income or concealment of income. The failure to deduct the TDS on the part of the assessee has resulted in disallowance of expenditure. The assessee had not furnished any inaccurate particulars of income or expenditure. The assessee has already faced the consequences by way of disallowance of expenditure for non-deduction of TDS as per the provisions of section 194C of the Act. It is not the case of the Revenue that the assessee had not incurred the expenditure claimed or that the claim of expenditure was bogus or incorrect. The disallowance of expenditure was attracted due to non-deduction of TDS and it cannot be said to be a case of concealment of income or furnishing of inaccurate particulars of income. The levy of penalty u/s.271(1)(c) of the Act is not attracted. (ITA No. 6684/Mum/2012, dt. 4.03.2015) (AY. 2007-08)

Rushi Builders and Development v. ACIT (Mum.)(Trib.);www.itatonline.org

S. 271(1)(c):Penalty–Concealment-Rental income-Income from house property–Business income-Disclosing income but classifying it under a wrong head amounts to furnishing inaccurate particulars and attracts penalty.[S. 22, 28(i)]

The assessee's argument supra of the same being only a differential treatment of the very same, i.e., rental, income, so that there has been thus neither any concealment nor furnishing of inaccurate particulars of income, though appealing, is misconceived. The reason is simple. Yes, the assessee has apparently stated the quantum and nature of the income correctly. However, penalty u/s 271(1)(c) is not only qua the misstatement of fact/s but also of law. When the law is clear and well settled, as in

the facts of the present case, the so called 'differential treatment', which the law does not admit of, i.e., qua the admitted nature of the income, is only admittedly a wrong claim in law. Income has to be necessarily computed under separate, mutually exclusive heads of income, allowing deductions as per the computational provisions of the respective head of income, and toward which the Assessing Officer has relied on United Commercial Bank Ltd. vs. CIT [1957] 32 ITR 688 (SC) and CIT vs. Chugandas and Co. [1965] 55 ITR 17 (SC). In fact, the 'differential treatment' would be rendered as of no consequence, so that no penalty could be levied, where it carries the same or a similar tax burden; the whole premise thereof being only a lesser tax liability, so that whole issue therefore boils down to whether it is the case of tax avoidance, which is legally permissible, or of tax evasion, which the law seeks to penalize, and which therefore has to be adjudged on the basis or edifice of the assessee's explanation for its adopted treatment. The term 'differential treatment', which is thus to be examined on the touchstone of the validity or plausibility, or otherwise, of the legal claim, carries no legal meaning in itself. How could, one may ask, the assessee justify its' claim of the declared nature of the income as 'rent', when it declares as it as 'business income', claiming all expenses there-against? That is, could it be said that the assessee has furnished accurate particulars of income when it, de hors settled law, claims all regular, business expenditure, including depreciation on building, there-against, so that the assessee's claim of having stated 'fact/s' correctly is also highly suspect.(ITA No. 258/Mum/2011, dt.13.03.2015) (AY. 2005-06)

Shubhamangal Portfolio Pvt. Ltd. v. CIT (Mum.)(Trib.);www.itatonline.org

S.271(1)(C) : Penalty–Concealment-Deemed income–Loans or advances- Deposit-Deeming provision and has to be strictly construed. Assessee can discharge onus by pointing to 'preponderance of probability' and If explanation is not found to be false then, even if amounts are assessed as 'deemed dividend', penalty cannot be levied. [S.2(22)(e),271(1)(c), Explanation 1.]

Dismissing the appeal of revenue , the Tribunal held that ;

(i) It is an undisputed fact that assessee is major shareholder in M/s. Exim Multi Media P. Ltd.; M/s. Edge Fine Print P. Ltd. and M/s. Shipping Times (I) Pvt. Ltd. From these companies, the assessee has received money which has been contended to be in the form of refundable security deposits for letting the properties owned by the assessee to these companies for their business purpose. List of properties owned by the assessee and given for use to these company were filed before the authorities during the quantum proceedings. Along with these details, the assessee had also filed internal bank payment voucher by these companies which show that amount has been given as "deposit" for the use of the property. These bank vouchers mentions the cheque number, name of the assessee, the amount of deposits given and the detail of the property. All these evidences though filed in the course of the quantum proceedings, have not been taken into cognizance by any of the appellate authorities. It has been brought to our notice by the learned counsel that, assessee has not received any rent from these companies, instead she had received only security deposits.

(ii) In light of these facts, it cannot be conclusively held that the amounts given by these companies are in the form of loan or advance. This fact is further corroborated by the fact that, neither there is any entry of loan in the books of the assessee nor in the books of these companies. How such an amount received by the assessee is considered in the nature of loan is not borne out from the records. Be it that as may be, it is well settled proposition of law that the finding given in the quantum proceedings are quite relevant and have a provative value, but such a finding alone may not justify the imposition of penalty, because the considerations that arise in the penalty proceedings are separate and distinct from those in the assessment proceedings. Even though matter has been concluded in the quantum assessment proceedings, then also, they are not conclusive so far as penalty proceedings are concerned. The matter in the penalty proceedings has to be examined afresh from the angle whether the assessee is guilty of concealment of income or furnishing of inaccurate particulars of income. The assessee may adduce fresh evidence in the penalty proceedings to establish that the material and relevant facts goes to prove the bona fide of the claim or take a different plea upon the same existing material that there is no concealment of income or furnishing of inaccurate particulars. The degree of proof necessary under the Explanation-1 to section 271(1)(c) can be discharged by the assessee by pointing out the factors and the material in his favour, because explanation merely raises a rebuttal presumption to which assessee can always discharge his onus by pointing out the factors relating to

pre-ponderence of probability. In this case, the assessee's explanation that the money received from these companies were in the nature of refundable security deposits received by the assessee in lieu of letting of the properties owned by her has not been found to be false and in fact has been substantiated by the evidence in the form of internal bank vouchers and the entries in the books of account of the assessee as well as of the companies. The revenue has no material to rebut such an evidence or that the assessee's explanation is false based on material on record. The assessee's onus in the penalty proceedings stands fully discharged. Once, it has been shown that the amount has been received not as loan but as deposits, the deeming fiction of 2(22)(e) cannot be stretched to hold that the payment made by a company to a shareholder by way of deposit in lieu of usage of property for its business purpose is in the nature of loan. It is a trite law that the deeming fiction has to be strictly construed and such legal fiction cannot be extended for any kind of payment by a company to its shareholder. Therefore, deleting the penalty is legally and factually correct. (ITA No. 3767/mum/2012, dt. 25.03.2015) AY. 2006-07)

ITO v. Dipti Nikhil Modi (Mum.)(Trib.); www.itatonline.org

S. 271(1)(c):Penalty–Concealment-Amounts not deductible-Mistake in claiming deduction of interest expenditure-Levy of penalty was justified. [S.43B]

(i) Theassessee's case rests on its' claim being an inadvertent mistake, and which stood corrected in the first instance. However, as pointed out by the Revenue authorities, the same cannot be said to be voluntary, but only on the Revenue making a specific enquiry in the matter. Further, the assessee's contention of being constrained for want of necessary or relevant information is without substantiation. Why would not the bank give or share the relevant information with the assessee? It would rather be a contradiction in terms to suggest that while the assessee is in the know of the amount of the interest charged by the bank for the year, and for both its accounts, duly reflected as interest accrued and due in its balance-sheet as at the relevant year-end, it does not know if, or to the extent, the same is paid up;

(ii) The assessee is a regular assessee, well serviced by tax and audit professionals. The latter issuing a disclaimer for being unable to state the amount disallowable u/s.43B in the absence of the relevant information, defeats its case of it being an inadvertent mistake. On what basis, then, one may ask, was the deduction claimed? The only course, in the absence of the information, was that the assessee seek leave to revise its' return, which the law even otherwise extends, i.e., where subsequently it discovers a claim as arising in the facts of its case. A legal claim, in fact, could be pressed at any stage of the assessment proceedings;

(iii) The assessee's plea of no loss to the Revenue is of no consequence in view of the clear provision of law defining the term 'tax sought to be evaded', under Explanation 4 thereto, and therefore, with reference to which the penalty is levied and confirmed. (ITA No. 8125/Mum/2010, dt. 25.03.2015) (AY. 2003-04)

Trans Polyurethane Pvt. Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

S.271(1)(c):Penalty-Concealment-Surrender of income after questionnaire does not mean it is not voluntary. If surrender is on condition of no penalty and assessment is based only on surrender and not on evidence, penalty cannot be levied.[S.69A, 132(4)]

From the record found that at the very first instance share application money was surrendered by assessee with a request not to initiate any penalty proceedings. The AO passed order u/s.143(3) adding surrendered amount u/s.69A on the plea that assessee has surrendered amount only after issue of notice. It is not disputed by the department that sum which was added u/s.69A was one which was surrendered by the assessee itself. Neither there was any detection nor there was any information in the possession of the department except for the amount surrendered by the assessee and in these circumstances it cannot be said that there was any concealment. In case of CIT vs. Suresh Chandra Mittal 251 ITR 9 (SC), Hon'ble Supreme Court observed that if the assessee has offered the additional income to buy peace of mind and to avoid litigation penalty u/s.271(1)(c) of the Act cannot be levied. In the instant case, there was no malafide intention on the part of the assessee and the AO had not brought any evidence on record to prove that there was concealment of income. At the time of surrender itself contention of not initiating any penalty proceedings was there. No additional matter was discovered to prove that there was concealment of income. The AO has included the amount of

share capital in the total income of assessee merely on the basis of assessee's declaration/surrender. The AO did not point out or refer any evidence or material to show that the amount of share capital received by the assessee was bogus. It is also not the case of the revenue that material was found at the assessee's premises to indicate that share application money received was an arranged affair to accommodate assessee's unaccounted money. Thus there was no detection by the AO that share capital was not genuine. The surrender of share capital after issue of the notice u/s.143(2) could not lead to any inference that it was not voluntary. Admittedly the assessee has offered the amount of share capital for taxation voluntarily and it was not the case of revenue that the same was done after its detection by the department. It is quite clear from the record that this entire transaction was not detection of the AO that the share capital was not genuine and that the assessee had offered the amount without any specific query. Even surrender of amount by the assessee after receipt of questionnaire could not be lead to any inference that it was not voluntary, in the absence of any material on record to suggest that it was bogus or untrue. The contention that in every case where surrender is made inference of concealment of income must be drawn under S.58 of Evidence Act, cannot be accepted in view of the decision of Punjan& Haryana High Court in the case of Careers Education &Infotech (P) Ltd., (2011) 336 ITR 257 (P&H). When no concealment was ever detected by the AO, no penalty was impossible. The decision of Hon'ble Supreme Court in the case of Union of India &Ors. vs. Dharamendra Textile Processors &Ors. (2008) 306 ITR (SC) 277 that the judgment of Hon'ble Supreme Court in the case of Dharmendra Textiles cannot be read as laying down that in every case where particulars of income are inaccurate, penalty must follow. What has been laid down is that qualitative difference between criminal liability under s. 276C and penalty under s. 271(1)(c) had to be kept in mind and approach adopted to the trial of a criminal case need not be adopted while considering the levy of penalty. The concept of penalty has not undergone change by virtue of the said judgment. It was categorically observed that penalty should be imposed only when there is some element of deliberate default and not a mere mistake. Hon'ble Supreme Court in the case of CIT vs. Suresh Chandra Mittal 251 ITR 9 (SC) observed that where assessee has surrendered the income after persistence queries by the AO and where revised return has been regularized by the Revenue, explanation of the assessee that he has declared additional income to buy peach of mind and to come out of waxed litigation could be treated as bona fide, accordingly levy of penalty under s. 271(1)(c) was held to be not justified.(ITA No. 2292/Mum/2013 ,dt. 08.04.2015) (AY. 200910)

Heranba Industries Ltd. v. DCT (Mum.)(Trib.); www.itatonline.org

S. 271(1)(c) : Penalty-Concealment-Denying the exemption of Small scale industry-Levy of penalty was held to be not justified. [S.80IB]

The assessee was engaged in the manufacture of bulk drugs and fine chemicals. The AO held that the assessee did not qualify as a small-scale industry as the investment in plant and machinery was more than the monetary limit prescribed by the Ministry of Industries for small-scale industries. On the ground that the assessee had made a wrong claim of deduction under section 80IB(3) he levied penalty under section 271(1)(c) of the Act. The CIT(A) held that the assessee had disclosed all material facts and that there was neither any concealment of income nor furnishing of inaccurate particulars of income so as to attract penalty under section 271(1)(c). On appeal by the Dept :Held, that the assessee had disclosed complete particulars of its claim to deduction under section 80-IB in its return which was accompanied by the audit report. It had made a bona fide claim to deduction according to the notification issued lastly which covered small-scale units up to Rs. 5 crores though there might be some restrictions. Therefore, it was not a case of filing of inaccurate particulars of income or concealment of income. There was no warrant for levy of penalty under section 271(1)(c) of the Act. (ITA No. 1091/Chd/2013, Dt. 18.11.2014) (AY. 2005-2006)

Dy. CIT v. Parabolic Drugs Ltd. (2015) 37 ITR 16 (Chandigarh) (Trib)

S. 271(1)(c) : Penalty-Concealment-Estimated addition- Penalty cannot be levied on estimated addition.[S.80IC]

Tribunal held that penal action could not be taken on the basis of estimated additions. The levy of penalty under section 271(1)(c) of the Act was not justified. (AY. 2005-2006)

Octave Exports v. Dy. CIT (2015) 37 ITR 100 (Chandigarh)(Trib.)

S. 271(1)(c) : Penalty-Concealment-Allowances in form of reimbursement cannot be treated as income in hands of assessee-No concealment of income-Penalty cannot be levied.

On appeal by assesse, allowing the appeal, the Tribunal held that; the letter issued by the engineering college mentioned that the allowances were in the nature of reimbursement towards hospitality allowances and telephone allowances. As the amounts were reimbursement, they could not be treated as income in the hands of the assessee. Consequently, non-inclusion of the amount in the assessee`s return could not be treated as concealment of income. Therefore, the penalty was to be deleted. (AY. 2005-2006)

Soumya Prakash Pattnaik .v. ACIT (2015) 37 ITR 35 (Cuttack)(Trib.)

S. 271(1)(c) : Penalty-Concealment-Penalty based on addition to income-High Court admitting substantial question of law on question of addition-Penalty cannot be imposed on debatable question.[S.260A]

Held, allowing the appeal, that when the jurisdictional High Court had admitted a substantial question of law on the question of an addition, the addition made became debatable. Therefore, the penalty imposed under section 271(1)(c) of the Income-tax Act, 1961, on the basis of the addition could not survive. If at any stage, the order of the Tribunal on the quantum addition was upheld by the High Court, the Department was free to proceed in accordance with law on penalty proceedings. (AY. 2004-2005)

Schrader Duncan Ltd. v. add. CIT (2015) 37 ITR 674 (Mum.)(Trib.)

S. 271(1)(c) : Penalty-Concealment-Revised ROI filed after issue of s. 143(2) notice amounts to voluntary disclosure if AO has not sought specific particulars in the notice[S.139, 143(2)]

Even though the assessed filed the revised return of income after the receipt of notice u/s 143(2) of the Act, yet the admitted fact remains that the assessing officer did not seek any type of particulars in that notice. Hence the mistake in the Long term Capital gain could not have come to the notice of the AO at that point of time, meaning thereby, it should be construed that the assessee has declared the higher amount of Long term capital gain voluntarily upon its detection. Hence, we are unable to agree with the view of the tax authorities that the revised return of income was not voluntary one, but the assessee was constrained to enhance the Long term capital gain only upon the receipt of notice u/s 143(2) of the Act. Accordingly, we delete the penalty levied (ACIT Vs. Ashok Raj Nath (2013)(33 taxmann.com 588 followed) (ITA No. 8653/Mum/2011, dt. 07.01.2015.) (AY. 2004-05)

Prema Gopal Rao .v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 271(1)(c) : Penalty –Concealment-Excess claim of depreciation on plant machinery –Levy of penalty was held to be not justified- Excess Claim of depreciation on land-Penalty was held to be justified.

The assessee claimed depreciation on plant and machinery @ 40% instead of the correct 25%. Similarly, depreciation @ 10% was claimed on land as well. The AO made the adjustments in the assessment order and levied penalty for the same in penalty proceedings.

The assessee explained that a depreciation chart of the current year was prepared through the computer system by adopting the relevant figures from the immediately preceding year. However, the rate of depreciation relating to the plant and machinery was inadvertently omitted to be modified to 25% from 40% and the said error came to be noticed only when the AO pointed out the same. Accordingly it was submitted that the mistake has occurred due to inadvertence. The Tribunal found it to be undisputed that the assessee was eligible to claim higher rate of depreciation @ 40% in the immediately preceding year and that it was quite natural in the computer era to prepare depreciation chart by downloading the relevant figures from the chart of the immediately preceding year. The Tribunal accepted the explanation of the assessee on the ground that it was quite possible that the depreciation rate may escape the attention while preparing the depreciation chart. Hence, penalty on this issue was deleted.

However, the Tribunal found that the assessee had given no explanation as regards claim of depreciation on land and that the same was a wrong claim even in the immediately preceding year. Therefore, penalty on this ground was upheld.(ITA No. 6510/M/2012 dt. 18/02/2015) (AY. 2004-05)

Bunge India Pvt. Ltd. v. JCIT (Mum.)(Trib.) www.ctconline.org

S.271AAA:Penalty - Search initiated on or after 1st June, 2007 – Amount disclosed in the statement- Manner of undisclosed income was derived -Levy of penalty was held to be not justified [S.132(4)]

The assessee has disclosed the income in the statement u/s 132(4) of the Act and also paid the tax together with interest of the undisclosed income. AO and CIT(A) held that the assesssee has not disclosed /substantiated the manner in which the undisclosed income was derived hence confirmed the levy of penalty. On appeal following the Cuttack Bench in Ashok Kumar Sharma v. DCIT (2012) 149 TTJ 33 (URO)(CTK) and Nagpur Bench Tribunal in Concrete Developers v. ACIT in ITA NO .381 /Nag/2012 dt. 20-03-2013 ,deleted the levy of penalty.(ITA No. 711 to 715/Mum/2011, dt. 11.09.2015) (AY. 2004-05 to 2008-09)

Uday C. Tamhankar v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 271AAA : Penalty-Search initiated on or after 1st June, 2007 -Undisclosed income-"dumb" document- Surrender of income- Levy of penalty was held to be not justified. [S. 132(4),292C]

(i) Undisclosed income means "any income represented by any documents" found during the course of search, which are not recorded in the books of accounts of the assessee. In the instant case, the additions of cash expenses and payments of Rs.71,90,623 is the result of cash available out of the disclosed cash of Rs.6.84 crores which was included in the disclosure petition. Further, addition of Rs.15 lakh on account of alleged cash receipts from Sampoorna Logistics, which was alleged to be reimbursement, it is clear that expenditure recorded in the books of accounts can be held to be undisclosed income of the assessee if the said expenditure is found to be false. It is the Department on whom, onus of proving that expenditure recorded in the books is bogus or false based on documentary evidences found in the course of search. Here in the present case, no documentary evidences establishing the falsity of claim of transportation charges paid to Sampoorna Logistics was found in the course of search. According to us the said expenditure cannot be held to be undisclosed income of the assessee for the purpose of levying penalty u/s. 271AAA of the Act;

(ii)A charge can be levied on the basis of document only when the document is a speaking one. The document should speak either out of itself or in the company of other material found on investigation and/or in the search. The document should be clear and unambiguous in respect of all the four components of the charge of tax. If it is not so, the document is only a dumb document. No charge can be levied on the basis of a dumb document. A document found during the course of a search must be a speaking one and without any second interpretation, must reflect all the details about the transaction of the assessee in the relevant assessment year. Any gap in the various components for the charge of tax must be filled up by the Assessing Officer through investigations and correlations with other material found either during the course of the search or on investigations. A document was bereft of necessary details about the year of transaction, ownership, nature of transaction, necessary code for deciphering the figures cannot be relied upon;

(iii) Penalty cannot be levied merely on the admission of the assessee and there must be some conclusive evidence before the AO that entry made in the seized documents, represents undisclosed income of the assessee. Where the assessee for one reason or the other agrees or surrenders certain amounts for assessment, the imposition of penalty solely on the basis of the assessee's surrender will not be well-founded. (AY. 2008-09)

SPS Steel & Power Ltd. v. ACIT (2015) 171 TTJ 749(Kol.)(Trib.)
Dy.CIT v. Concast Steel & Power Ltd (2015) 171 TTJ 749 (Kol.)(Trib.)

S. 271AAA : Penalty – Assessee having surrendered certain income in course of search -Amount was duly disclosed and taxes were paid-Sufficient compliance-Penalty order deserved to be set aside.[S. 132(4)]

If the assessee during the course of search admits certain undisclosed income and pays taxes on the same then penalty cannot be levied in terms of sub-section (1) of this section. In the instant case, the amount of Rs. 4 crore which was surrendered during search has been declared by the assessee in the return and taxes have been paid accordingly. Therefore the assessee is normally entitled for the immunity provided in section 271AAA itself. The assessee has disclosed the manner in which income has been earned. Thus, impugned penalty order deserve to be set aside. (AY. 2010 – 2011)

ACIT v. Munish Kumar Goyal (2015) 152 ITD 453 (Chandigarh)(Trib.)

S. 271AAA : Penalty-Search and seizure-Assessee cannot be expected to further substantiate manner of earning of income if no questioning done under section 132(4)-Penalty cannot be levied. [S.132(4)]

Pursuant to search operations the assessee surrendered an amount to tax. The income was assessed on returned income after considering surrendered income and the Assessing Officer imposed penalty under section 271AAA of the Act on the ground that the assessee had not substantiated the manner in which the income was earned or furnished details of commission or of the transaction or property in respect of which income was earned. The CIT(A)confirmed this. On appeal by the assessee contending that no questions were asked regarding the manner of earning income :

Held, allowing the appeal, that if no question was asked during the statement recorded under section 132(4) of the Act, the assessee could not be expected to further substantiate the manner of earning of income. Since taxes were already paid, penalty could not be levied. (AY. 2009-2010, 2010-2011)

Sunil Kumar Bansal .v. Dy.CIT (2015) 37 ITR 576 (Chandigarh)(Trib.)

S. 271AAA : Penalty-Concealment-Law on applicability of s. 271AAA penalty in the context of a voluntary disclosure u/s 132(4) explained. Difference between s. 271(1)(c) and 271AAA also explained- Matter was reamanded to CIT(A).[S.132(4), 271(1)(c)]

(i) Firstly, any income to be subject to penalty u/s.271AAA should be an 'undisclosed income', as defined vide Explanation below sub-subsection (4) the said section. The penalty in the instant case, however, has been levied on the income of Rs.3,46,632/-, which, as it would appear to us on a reading of the assessment and penalty order, is only on account of a difference in the valuation of stock. Thus a finding as to the impugned incomes being undisclosed incomes is a pre-requisite for the application of the provision. Further, each of the three ingredients as specified u/s. 271AAA(2) would need to be separately examined for their satisfaction by the assessee if the penalty there-under is not to be levied and, thus, sustained. While this may seem axiomatic and, therefore, superfluous for us to be stating so, liable to be construed as an expression of over anxiety, we do so as we observe a gross overlooking of this vital aspect of the matter. As we observe, the undisclosed income of Rs.562.62 lacs relating to stock was declared by the assessee, i.e., for the first time, only per its return of income filed on 29.11.2009, and not per the declaration vide a statement/deposition u/s.132(4) of the Act; the disclosure following search extending only to an income of Rs.99.13 lacs, i.e., by way of interest. The only finding by the ld. CIT(A) in the matter is that vide para 6.5.5 of his order, which states of tax and interest having been paid on the incomes offered u/s. 132(4), and which find due reflection in the return of income. The only income, of the three incomes under reference, which satisfies this requirement, is the interest income, i.e., presuming that the manner of its derivation stands also specified. The admission u/s.132(4) is to specify the undisclosed income, or at least the manner in which it is to be arrived at; the whole premise for extending immunity from the penalty, statutorily mandated, being that the assessee commits himself, providing the necessary details under a condition of oath. Further, surprisingly again, we observe no finding by the ld. CIT(A) in respect of substantiation of the manner of deriving the undisclosed income, which stipulation, while missing in section 271(1)(c), stands incorporated in section 271AAA. The A.O. clearly records a finding, both in respect of the assessee having failed to specify the manner in which the undisclosed income is derived as well as of the assessee having failed to substantiate the same, and which in fact the ld. CIT(A) notes vide para 6.5.2 of his order. Clearly, these findings of fact would need to be addressed by the ld. CIT(A), either endorsing or reversing or otherwise modifying the same, i.e., based on his reappraisal of the materials found from the possession of, or otherwise furnished by, the assessee, or even the evidences led by it before him for the first time, of-course by and upon observing the due process of law (refer r. 46A). The onus to satisfy the conditions of the provision though, would only be on the assessee. In fact, all this would precisely be the purview of the first appellate authority in the set aside proceedings.

(ii) Coming to the decision in the case of Mahendra C. Shah [2008] 299 ITR 305 (Guj), relied upon by the ld. CIT(A), the same, as afore-stated, is firstly in respect of section 271(1)(c), the parameters as well as ingredients of which are different from that of section 271AAA. While the former provision is applicable in the case of concealment of or furnishing inaccurate, particulars of income, considering

the deeming provisions in its respect under the section, s. 271AAA provides for a mandatory levy of penalty except where the assessee satisfies the conditions of section 271AAA(2). Even the saving upon proving a reasonable clause, as provided under section 273B, is not applicable for a penalty imposable u/s.271AAA, which is only in respect of undisclosed income, so that what alone is relevant is the applicability of the provision in the facts of the case. It is apparent from the reading of the said decision that the environmental conditions existing at the time of the search, including the manner in which the statement u/s.132(4) is generally recorded, prevailed with the hon'ble court in holding of a substantial compliance in the facts of the case, i.e., qua the condition of admission of undisclosed income and the statement of the manner in which it is derived, also provided u/Expl.5 to s. 271(1)(c), saving penalty. As explained by it, this is as the assessee had no occasion to state or make averments in the manner as required by or under the law. Its prescription is therefore to be read contextually. The legal proposition that thus arises from the said judgment is that the satisfaction of the conditions must be considered in the background and the context of the obtaining facts and circumstances of the case. In the instant case, the statement u/s.132(4), which is by ShriPrakash C. Kanugo, a director of the assessee-company, was recorded only on 06.03.2009 (copy on record), i.e., nearly a month after the search. The assessee cannot be said to be constrained for want of time – which was ample, to deliberate in the matter, as well as seek legal advice. In fact, the statement was made only in the presence of its counsel, ShriVinayDoshi, CA, and itself makes a plea for grant of condonation from the levy of penalty (in answer to Q.11). Could it be therefore be said that the assessee had no occasion to aver with regard to the manner of deriving the income being disclosed? A company acts through the human agency of its management, which alone could depose qua the manner in which its undisclosed income stood earned/derived, being rather in its exclusive knowledge? All that the law postulates is a honest disclosure qua the said income. A finding as to the satisfaction or otherwise of the said condition, or for that matter its' substantiation, i.e., of the manner in which the undisclosed income was derived, it needs to be appreciated, are pure findings of fact. The hon'ble high courts can interfere with such a finding/s only where it is in its view either perverse or without evidence or based on irrelevant material, or which is partly relevant and partly irrelevant [refer, inter alia, CIT v. Daulat Ram Rawatmull [1973] 87 ITR 349 (SC)]. Further, even where so, the province of the Hon'ble court is to restore the matter back to the tribunal, stating its reasons, as clarified by the Hon'ble court in Janatha Contract Co. v. CIT [1976] 105 ITR 627 (Ker), following the binding decisions by the apex court in CIT v. Greaves Cotton & Co. Ltd. [1968] 68 ITR 200 (SC) and CIT v. Indian Mollasses & Co. (P.) Ltd. [1970] 78 ITR 474 (SC). The authorities on the law in the matter could in fact be multiplied. Then, again, we wonder, rather than reading down the provision, so as to operate to negate the mandatory requirement of the section, defeating the legislative intent, which, as explained by the hon'ble courts as well as the official pronouncements explaining the provision, is of plugging the generation of undisclosed income and the consequent leakage of revenue for future, why could the same be not read so as to allow the assessee the latitude for providing the necessary details subsequently, i.e., where the disclosure u/s.132(4) is made under excruciating or difficult circumstances. The same of course would be under oath, making it a part of and refer to the earlier statement u/s. 132(4), complying thus substantially and effectively, with the substantive provision of law. Further, the further condition of 'substantiation', as provided u/s. 271AAA(2)(ii), which was not there in the case, being u/s. 271(1)(c), before the hon'ble court in Mahendra C. Shah (supra), could only be interpreted to mean of the law casting a further obligation on the assessee to demonstrate the manner of deriving the undisclosed income, as specified per the statement u/s.132(4), as valid and true, i.e., stands validated and is on a firm basis; the presumption as to the truth of the materials found being already provided for u/s. 292C. The said decision would thus be of little assistance to the assessee. (AY. 2009-10)

ACIT .v. Prakash Steelage Ltd.(2015) 153 ITD 493/ 169 TTJ 137/ 38 ITR 582 (Mum.)(Trib.)

S. 271B : Penalty-Tax audit report-At time of filing its e-return - inadvertently filled details of audit u/s. 44AB wrongly as 'No' - No penalty would be leviable.[S. 44AB]

Assessee company, at time of filing of e-return had wrongly answered a question regarding whether it is liable for audit under section 44AB as 'No' and, consequently, did not furnish details related to auditor. The copy of said e-return had duly furnished all details under 'Part A -01' of said return of

income. The assessee had inadvertently filled relevant column wrongly as 'No' penalty u/s. 271B would not be leviable. (AY. 2009 – 2010)
Sujata Trading (P.) Ltd. .v. ITO (2015) 152 ITD 492/118 DTR 372/ 170 TTJ 396 (Mum)(Trib.)

S. 271C : Penalty-Failure to deduct tax at source- Publicity of a brand or logo-Reasonable cause- Deletion of penalty was held to be justified. [S. 194C, 201(1)].
The assessee made payment for such publicity to SAL without deduction of tax at source.
The Assessing Officer contended that the act of publicizing assessee's business would come under the preview of advertisement and, therefore, payment made for the same was to be subjected to TDS under section 194C. Consequently, the Assessing Officer treated assessee as an assessee-in-default under section 201(1) and levied penalty on it under section 271C.
On appeal, the Commissioner (Appeals) deleted the penalty levied under section 271C for the reason that assessee was not liable to deduct TDS under section 194C.
On appeal to Tribunal:
It was held that the assessee/appellant has not deducted TDS on the impugned payments under the bona fide belief that the payments made by it is in the nature of publicity and not for advertisement for which he was required to deduct tax under section 194C. It is also an undisputed fact that the payments were made to the group concern of the assessee i.e. SAL, whose financial position might be known to the assessee. It was emphatically argued that recipient/deductee suffered huge losses, therefore, they had filed all its returns for these years declaring loss in all the impugned assessment years and no tax liability has ever fastened on them on account of these payments and there was no revenue loss on non-deduction of TDS. If all these facts are clubbed together, it can safely be held that the assessee had a bona fide belief or reasonable cause for non-deduction of TDS for which penalty under section 271C cannot be levied. Though in foregoing appeals the matter has been restored to the file of the Assessing Officer for verification of the facts whether the recipients/deductee had filed all its returns for these years declaring loss in all the impugned assessment years and there was no loss to the revenue, but this direction is not required in this case as the existence of the reasonable cause for non deduction of TDS is there. Therefore, under these circumstances, it can be held that the assessee had a reasonable cause for non-deduction of TDS and thus the penalty levied under section 271C is not leviable in the eyes of law. Accordingly the order of the Commissioner (Appeals) deleting the penalty is confirmed. (AY. 2007-08)
DCIT v. Sahara India Commercial Corporation Ltd. (2015) 67 SOT 318 / 169 TTJ 292 / 117 DTR 59 (Luck.)(Trib.)

S. 271C : Penalty-Deduction of tax at source-Rent- Hiring busses- Not a rent –Penalty cannot be levied. [S.194C, 194I, 201]
Payments to contractors for hiring buses is payment for carriage of goods and passengers by any mode of transport other than railways is covered under section 194C and not "rent" for hire of plant and machinery under section 194-I.Penalty cannot be levied. (AY. 2008-2009, 2009-2010)
Regional Manager, UPSRTC (Ghaziabad Depot) v. Dy. CIT (TDS) (2015) 37 ITR 487/ 68 SOT 316 (URO) (Delhi)(Trib.)

S. 271D : Penalty - Accepts any loan or deposit – Making book adjustment of funds will not amount to violation or constravention of section 269SS and 269T-Levy of penalty was not justified. [269SS, 269T, 271E]
A notice was issued to assessee-firm proposing to levy penalty on ground that certain receipts/payments exceeding ceiling limit were made in cash to/from sister concern and to one 'S' . Assessee submitted that there were only book adjustments of funds with sister concern and no cash was paid . As regard payment to 'S', it was stated that same was paid to 'S' on death of her husband who was legal advisor of company. Allowing the appeal the Court held that ;there was no violation or contravention of section 269SS and section 269T. (AY. 1992-93,1993-94)
Gururaj Mini Roller Flour Mills .v. Addl.CIT (2015) 231 Taxman 662 (AP & T) (HC)

S. 271D:Penalty-Accepts any loan or deposit-No explanation offered-Not a bona fide transaction - Sufficient opportunities given by Assessing Officer- Levy of penalty is held to be valid. [S. 269SS, 269T,271E, 273B]

Held, the entire transactions took place in Pondicherry, a major city and there was no reason why the assessee should not have repaid the amount by cheque or demand draft through the bank, assuming he had received the loan in cash. The entire transaction between the assessee, a financier and the financier who was also financing a large number of persons, was apparently to evade tax, which came to light after a survey was conducted and some documents and records were seized. Therefore, it was a case of infraction of law and could not be said to be a mere technical or venial breach. Indeed, it was a clear case of prejudice caused to the Revenue because the nature of transactions conducted by the financier with the assessee and third parties were clearly not in accordance with the provisions of the Act. In one statement the financier clearly stated that he used to conduct money-lending business in the names of third parties. The assessee on his part had repeatedly, for every assessment year, conducted the business in the same manner receiving and repaying the loan amount in cash. Hence, these could not be called bona fide transactions and there was no reasonable cause. The conduct of the parties is important to exercise the discretion under section 273B. As the assessee had not passed the test of reasonable cause showing his bona fides, the provisions of section 273B were not attracted, especially since no explanation had been offered in spite of repeated chances therefor having been afforded. On the facts, there was no justification to claim the benefit of section 273B.

(ii) That the Assessing Officer, after giving repeated reasonable opportunities, finding no explanation whatsoever, was unable to exercise his discretion under section 273B and, accordingly, imposed the penalty under sections 271D and 271E. This finding had been affirmed by both the appellate authority and the Tribunal. When the finding of facts had been reached by all the authorities below, taking note of the conduct of the assessee, who was given sufficient opportunities by the Assessing Officer, the prayer for remanding the matter to any of the authorities below could not be accepted.

(iii) That after taking repeated adjournments before the assessing authority, the assessee neither came forward to file any reply nor bothered to take part in the enquiry to explain the genuineness of the transaction. In addition thereto, as the financier had been carrying on money-lending business for 30 years giving and taking back loans in cash, there had been a huge revenue loss to the Exchequer. It was not a case of business exigency. Hence, the contention that there was no revenue loss to the Exchequer was not tenable plea. Therefore, the penalty orders passed by the assessing authority were in consonance with law.(AY. 2008-2009 to 2012-2013)

Muthukaruppan (P) Ltd..v. JCIT (2015) 375 ITR 243 (Mad.)(HC)

S. 271D :Penalty - Acceptance any loan or deposit –Not shown the urgency to avail cash loan-Levy of penalty was held to be justified.[S.269SS]

The assessee availed a loan in cash in excess of Rs. 20,000. The AO levied penalty u/s. 271D for contravening the provision of S. 269SS of the Act. The CIT(A) and Tribunal upheld the order of the AO. On an appeal by the assessee the High Court, the High Court confirmed the order of the lower authorities since the assessee was unable to show any urgency to avail the loan in cash. (AY. 1998-99)

Nandhi Dhall Mills .v. CIT (2015) 373 ITR 510/ 119 DTR 232 (Mad.)(HC)

S. 271D: Penalty-Loans in cash exceeding prescribed limit –Business exigency-Reasonable explanation- Levy of penalty was not justified.[S.269SS, 269T, 271E,273B)

Held, dismissing the appeals, that the assessee had shown the receipt of cash and repayment thereof due to business exigency and that would amount to reasonable cause. The genuineness of the transaction to meet the immediate necessity was accepted by the Tribunal in the quantum appeal and that would amount to reasonable cause in terms of section 273B. The deletion of penalties under section 271D and section 271E was justified. (AY 2006-2007)

CIT v.T.Perumal (Indl.)(2015) 370 ITR 313/ 53 taxmann.com 17 (Mad) (HC)

S. 271D: Penalty-Accepts any loan or deposit- Book adjustment of funds by assessee to its sister concern – Not a loan or deposit - No identification of loanee or depositor- Penalty could not be imposed.[S. 269SS, 269T, 271D, 271E)

Held, allowing the appeal, that except making reference to the relevant provisions of the Act and the allegation contained in the show-cause notices, the Assessing Officer did not indicate the method of payment. It was simply mentioned that everything was done in cash. The very fact that from the same agencies, amounts were said to have been received and repaid, as reflected in the books, disclosed that it was nothing but book adjustment. Making book adjustment of the funds by a firm vis-a-vis its sister concern, could not be said to be violation or contravention of section 269SS and section 269T. Levy of penalty was deleted.(AY. 1992-1993, 1993-94)

Gururaj Mini Roller Flour Mills v. Addl. CIT (2015) 370 ITR 50 /118 DTR 218/ 277 CTR 53/ 231 ITR 662 (T & AP) (HC)

S. 271D :Penalty - Accepts any loan or deposit-Cash received from wife for purchase of house property-Levy of penalty was deleted. [S.269 SS]

Tribunal held that the cash received from wife for purpose of acquisition of property jointly which was eventually returned to her for the reason that the deal could not materialize. It cannot be said to be a loan or advance covered under section 269SS and therefore penalty under section 271D is not leviable.) (AY. 2007-08 , 2008-09)

ACIT v. Inderpal Singh Wadhawan (2015) 168 TTJ 561 (Delhi)(Trib.)

S. 271D : Penalty - Accepts any loan or deposit –Journal entry- Penalty was deleted- Firm accepting cash from partners-Cancellation of penalty was justifies-Acceptance of cash by husband from his wife- Cancellation of penalty was held to be justified.[269SS, 271E]

Revenue has filed the appeal and the Tribunal confirmed the order of the CIT(A) deleting the penalty by giving following reasoning:-

1. There is only journal entry in the books of the assessee debiting the account of some other party and crediting the account of the creditor, it cannot be said that the assessee has accepted loan or deposits from the creditor in violation of section 269SS attracting penalty under section 271E.
2. When repayment is made through a pay order by writing the word only after the name of the payee then there is no violation of the provisions of section 269T and penalty under section 271E is not leviable.
3. It cannot be said that the firm has taken a loan or deposit from the partner when a cash receipt is credited in the account of a partner in the books of the firm. There is no contravention of section 269SS and penalty under section 271D is not leviable.
4. Payment for allotment of shares as share application money cannot be said to be repayment of loan or advance so as to violate provisions of section 269T and therefore penalty under section 271E is not leviable. (AY. 2007-08, 2008-09)

ACIT v. Vardaan Fashion (2015) 168 TTJ 561/ 38 ITR 247 (Delhi)(Trib.)

S. 271D : Penalty - Accepts any loan or deposit- Cash loans from husband carrying on another proprietorship business on account of business exigencies for making payments to labourers and lenders -No violation of provision of 269SS – penalty was set aside.[S. 269SS]

Assessee carried on proprietor business. Her husband was also carrying on a proprietor business in different name. Assessee had accepted cash loans from her husband on account of business exigencies for making payments to labourers and lenders. It was also undisputed that transactions in question were genuine and element of black money was totally ruled out. Since these transactions are genuine, element of black money is totally ruled out. The assessee has given an explanation and is based on business exigencies also for payments to labourers and lenders. Under these circumstances, the transactions being genuine and the assessee having offered reasonable explanation justifying these cash transactions, hence, penalty u/s 271D is not leviable. (AY. 2006 – 2007)

Kusum Dhamani (Smt.) .v. Addl.CIT (2015) 152 ITD 481(Jaipur)(Trib.)

S. 271D : Penalty - Accepts any loan or deposit-Share application money cannot be termed as loan or deposit for purpose of S. 269SS-Levy of penalty was not justified. [S. 269SS]

The assessee has received some cash payments which have been initially credited to the current account of various directors and later on transferred to the share application money account. The account of director clearly shows that money has not come only through cash but through cheques also on various dates. Money has been credited to the current accounts. the money has been transferred at the end of the every year to share application account which only shows that intention was very clear that the money contributed by the various directors and their relatives were to be treated as share capital. The applicability of s. 27ID has to be seen at the precise moment of receipt even then the money has gone into current account. The money coming into current account also cannot be called loan or deposit. As per Companies (Acceptance and Deposit) Rules, 1975 deposit would not include any amount received from the director or, shareholder of the company, therefore, this amount cannot be termed as loan or deposit for the purpose of s. 269SS r/w s. 27ID and therefore, penalty could not have been imposed. There is no default because the share application money or deposit in the current account cannot be included in the definition of deposit. The Assessee Company was constructing a hotel for which bank loans were not sanctioned and, therefore, directors had to contribute the money towards construction of the hotel. The payment was generally required for labour payments and other cash items. Money coming into current account cannot be called loan or deposit. , if money is accepted as share application money, same cannot be construed as loan or deposit for purpose of s. 269SS. (AY.2003 - 2004 & 2005 - 2006 to 2007 – 2008)

Eqbal Inn & Hotels Ltd. v. Jt. CIT (2015) 152 ITD 455 / (2014) 161 TTJ 359 (Chandigarh)(Trib.)

S.271E:Penalty-Repayment of loans or deposits otherwise than by account payee cheque or draft-Repayment by cheque mentioned as cash payment due to clerical mistake-No violation of section 269T-Order deleting penalty justified.[S. 269 T)

The assessee availed of loan from two individuals to purchase land and repaid the loan. The Director of Income-tax (Exemptions) imposed penalty under section 271E of the Income-tax Act, 1961, on the ground that the assessee had repaid the loan in cash instead of account payee cheque and violated the provisions of section 269T of the Act. The assessee contended that the loan was actually repaid by account payee cheque but due to clerical mistake it was wrongly shown as cash payment in the audited books of account. The Commissioner (Appeals) deleted the penalty. On appeal by the Department :

Held, dismissing the appeal, that the bank statements had established that the cheques in question was credited to the respective bank accounts of the two individuals from whom the assessee had taken the loan and admittedly, the repayments through cheques were wrongly mentioned in the books of account as cash payments as a result of clerical mistake. Hence, there was no violation of section 269T of the Act, attracting the penal provision of section 271E. There was no infirmity in the order of the Commissioner (Appeals) in deleting the penalty. (AY. 2008-2009)

DIT(E) v. Social Action for Rural Education, Health and Loving Life of Abundance Society (2015) 38 ITR 784(Hyd.)(Trib.)

S. 271FA:Penalty - Annual information return-Failure to furnish– Appeal is maintainable before Tribunal and CIT(A).[S.253]

Assessee had preferred appeal against order of DIT passed u/s 271FA before Tribunal. The revenue had raised preliminary objection on ground that appeal against an order passed under section 271FA can only be filed before CIT(A) and the Tribunal had no jurisdiction to entertain same. The Tribunal held, as per clauses (d) and (e) of section 253(1), if AO had passed an order with approval of the Principal commissioner or Commissioner or pursuant to directions of the Dispute Resolution Panel, which comprises of Officers in the rank of Commissioner, same can only be challenged before Tribunal. Though there was no specific reference of order passed under section 271FA of the Act by the Director of Income-tax in section 253(1) of the Act for the purpose of filing an appeal against the said order, but an analogy drawn from reading of section 253(1) of the Act is that the order passed by CIT or an Officer who is equal in rank can only be challenged before the Tribunal, which is higher in rank. The Tribunal further pointed out that, as per definition of appellate jurisdiction, appeals are to be filed before a forum which is higher in rank than forum which passed the impugned order. The order under section 271FA was passed by DIT who is equivalent in rank with CIT(A).Therefore, order of

DIT cannot be challenged or assailed by filing an appeal before an Officer i.e. CIT(A), who is equivalent in rank with DIT. Hence, Appeal could only be filed before a higher forum than forum whose order was to be challenged and higher forum was only ITAT and before it order of the Director of Income-tax could only be challenged by filing an appeal. Hence, Appeal by assessee had been rightly filed before the Tribunal and the Tribunal was competent to adjudicate appeal on merit, hence revenue's preliminary objection dismissed. (AY.2012-13)**.**

Raibareilly District Co-Operative Bank ltd. v. DIT(2015) 114 DTR 321/ 38 ITR 27/168 TTJ 274 /54 taxmann.com 382 (Lucknow) (Trib.)

S.271G:Penalty – Documents - International transaction - Transfer pricing-No mandate or affirmative direction in the order of TPO that penalty shall be imposed by AO- Levy of penalty was not justified.

In the absence of mandate or affirmative direction that penalty shall be imposed by the Assessing Officer for failure of particulars to be furnished within a stipulated period of issuing notice. Penalty is not sustainable.(AY. 2005-06)

CIT v. Bumi Hiway (I) (P) Ltd. (2015) 273 CTR 11(Delhi)(HC)

S. 271G : Penalty-Documents - International transaction - Transfer pricing.[S. 92D]

Assessing Officer imposed penalty on assessee on ground that assessee had not filed rule 10D documentation as desired by Transfer Pricing Officer within prescribed time-limit. CIT(A) and Tribunal specifically recorded a finding that documentation was submitted by assessee within extended period of 30 days, i.e., within 60 days, and hence, no penalty was leviable. On appeal by revenue the High Court affirmed the order of Tribunal.

CIT v. Johnson Matthey India (P.) Ltd. (2015) 229 Taxman 453 (Delhi)(HC)

S. 271G : Penalty-Documents-International transaction-Transfer pricing-Failure by Transfer Pricing Officer to indicate specific allegation--Penalty not leviable.[S. 92D]

Held, that during the transfer pricing proceedings no intimation was given to the assessee alleging any delayed filing of the transfer pricing report. There was no allegation of any specific non-compliance. The assessee on receipt of the show cause notice, got back to the Transfer Pricing Officer asking for details of its alleged non-compliance. In reply, the Transfer Pricing Officer, instead of detailing the nature of the allegations, again made a vague assertion that the assessee`s case was liable for penalty under section 271G of the Act. From the record, the exact nature of the assessee's non-compliance was not apparent. It is trite law that in penalty proceedings, the assessee needs to be made aware of the exact nature of the charge which is levelled against him. This is so because the assessee has to give a reply on the specific and not assumed allegation. In the absence of specific allegations, the penalty proceedings were not sustainable. (AY. 2006-2007)

Gillette India Ltd. v. CIT (2015) 39 ITR 62 / 168 TTJ 392 (Jaipur)(Trib.)

S. 271G : Penalty–Documents-International transaction-Transfer pricing- No allegation of any specific non-compliance-Levy of penalty was held to be not justified. [S. 92D]

The assessee filed all the details in December, 08 but the copy of transfer pricing document were not filed and the same was filed as late as 20th July, 2009. For this default the Assessing Officer initiated penalty proceedings under section 271G of the Act. The CIT(A) deleted the penalty and the Revenue filed the appeal before Tribunal. The Tribunal followed the decision of Hon'ble Delhi High Court in the case of CIT v. Bumi Hiway (I) (P) Ltd. (2014) 110 DTR 321 (Delhi) and held that the penalty was rightly deleted by the CIT(A) as the documents were filed later on or not, there is no discussion on this aspect in the order passed by the Assessing Officer, imposing penalty.The assessee filed cross objection that the penalty proceedings are time barred. The Tribunal held that this question was not raised before the CIT(A) not the assessee has filed the appeal in the Tribunal. The appeal filed by the revenue and the cross objection filed by the assessee both dismissed by the Tribunal. (AY. 2006-07)

ACIT v. Gillette India Ltd. (2015) 168 TTJ 392/115 DTR 121/ 54 taxmann.com 313 / 39 ITR 62 (Jaipur)(Trib.)

S. 272A : Penalty - Failure to answer questions - Sign statements - Furnish information-Where assessee, a State Government undertaking, did not furnish half yearly return in Form No. 27EC well in time, it was not a mere technical mistake and, thus, impugned penalty order passed by authorities was to be upheld. [S. 206C(5A)]

The assessee was a State of UP undertaking and was under obligation as per section 206C(5A), read with rules 37E of the Income-Tax Rules, 1962 to prepare and furnish Form No. 27EC for the period 1-4-1994 to 30-9-1994 and submit the half yearly report. The assessee had not filed half yearly return well in time and there was an extraordinary delay, so the Assessing Officer levied the penalty under section 272A(2)(c) which was sustained not only by the First Appellate Authority but also by the Tribunal.

On appeal:

It is the mandatory provision to furnish half yearly return in all the cases. The returns were furnished on 12-6-1996. It is not a procedural or technical mistake. The D.D.O. is responsible for furnishing the return, so the plea taken by the assessee, that it was supposed to be furnished by the Headquarters cannot be accepted. It is the duty of the D.D.O. to furnish the return. It shows gross negligence on the part of the D.D.O., who has not furnished the return in Form No. 27EC well in time. It is not a technical mistake. The liability cannot be shifted on the Chartered Accountant or Headquarters. Such plea is not sufficient to make out the reasonable cause. When it is so, there is no reason to interfere with the impugned order passed by the Tribunal. In the result, appeal filed by the assessee is dismissed.

Divisional Logging Manager v. CIT (2015) 229 Taxman 432 (All.)(HC)

S. 272A(2)(k):Penalty-Deduction of tax at source-Delay in filing return of tax deduction at source-Assessee not aware that return to be filed at branch level-Reasonable cause--No loss of revenue on account of late filing of return-Penalty to be deleted .[S. 273B]

The person responsible to file quarterly tax deduction at source return for the assessee failed to file it by due date. The Assessing Officer levied penalty under section 272A(2)(k) of the Income-tax Act, 1961. The Commissioner (Appeals) confirmed this. On appeal :

Held, allowing the appeal, that according to section 273B of the Act, if reasonable cause for the failure to file the return of tax deducted at source was proved, penalty was not imposable. In the assessee's case, the assessee explained that it was not aware of the fact that a return was to be filed at the branch level. Thus there was reasonable cause for failure to comply with the requirement. The tax was deducted on time and paid to the Department and the necessary return was also filed. Therefore, no loss of revenue had occurred on account of late filing of the return. Thus, the penalty was merely technical in nature and since levy of penalty was not mandatory, depending upon the facts of the case, the penalty was to be deleted. (AY. 2011-2012)

State Bank of Bikaner and Jaipur v. Add. CIT (2015) 38 ITR 535 (Chd.)(Trib.)

S. 272B : Penalty - Permanent account number-Reasonable cause-Levy of penalty was not justified.[S.139A]

Failure to quote the permanent account number due to ignorance and not with any mala fide intention. Levy of penalty was deleted. (AY. 2006-2007)

Halimaben Jamalbhai Momin v. ACIT (2015) 39 ITR 556 (Ahd.)(Trib.)

S. 273 : Penalty - Advance tax - False estimate - Failure to pay –The assessee's plea of ignorance could have been accepted, if petitioner would offered an explanation before Assessing Officer, since it was not so done, orders passed by Assessing Officer or revisional authority suffered from no error. [S.80J(3)]

Assessing Officer observed that assessee was partner of a firm entitled to one half shares . Firm filed return but assessee did not file his return . Thus, Assessing Officer issued notice to assessee for imposing penalty. Assessee did not attend nor submitted reply-Assessing Officer held that since assessee had without reasonable cause failed to furnish his return within time, penalty should be imposed. In writ, petitioner submitted that, as in assessment year 1979-80, petitioner was not liable to file return with respect to income, in accordance with section 80J(3) and imposition of penalty was not warranted. Though section 80J(3) was introduced by Finance Act No. 2 of 1980 with

retrospective effect from 1-4-1972, petitioner was of a bonafide belief that in view of pendency of challenge to vires of section 80J before High Court, he was not required to file a return and, thus, penalty and interest might be waived. Dismissing the petition the Court held that ; the assessee's plea of ignorance could have been accepted, if petitioner would offered an explanation before Assessing Officer, since it was not so done, orders passed by Assessing Officer or revisional authority suffered from no error. (AY. 1979-80)

Lajpat Rai (HUF) .v. CIT (2015) 231 Taxman 656 (P&H)(HC)

S. 275 : Penalty - Bar of limitation-Penalty-Concealment-Period of limitation within six months from the end of the financial year in which the order is received by the Commissioner-Challenge by assessee to validity of penalty order entertained in Dept's appeal despite lack of Cross objection or cross-appeal by assesse- Penalty order was held to be barred by limitation. [S.271 (1)(c)]

On a combined reading of Section 275(1)(a) along with its proviso it becomes clear that main section 275(1)(a) talks of a period of six months from the date on which the order is received by commissioner and main section also talks of orders passed by commissioner appeals as well as by tribunal talk whereas the proviso which is applicable from 01.06.2003 talks about orders passed by Commissioner Appeals only and here, the period of limitation for passing penalty order is one year from the date Commissioner receives Tribunal order. We find that in the present case quantum proceedings travelled up to Hon'ble ITAT and therefore, main section 275(1)(a) will be applicable wherein the period of limitation has been mentioned as six months from the end of financial year in which order is received by Commissioner. The proviso to section 275(1)(a) will not be applicable. Proviso talks about orders passed by Commissioner (Appeals) only. Admittedly, the quantum order in the present case was received on or before 11.05.2007 as noted in reply to RTI application and therefore, penalty order should have been passed on or before 30th Nov., 2007 whereas, the penalty order has been passed on 10.01.2008 which is beyond the limitation period of six months. In view of above, as the penalty order has not been passed within six months from the end of month in which order was received by Commissioner, the penalty order passed by A.O. is bad in law and is therefore, quashed. (AY. 2001-02)

ITO v. Pandit Vijay Kant Sharma (Delhi) (Trib.); www.itatonline.org

S. 275: **Penalty - Bar of limitation - For penalty proceedings initiated on issues unrelated to assessment of income (such as for s. 269SS/ 269T & TDS defaults), time limit runs from date of initiation of penalty proceedings and not from date of CIT(A)'s order- Penalty order was held to be time barred.[S. 143(3), 269SS, 269T,271E]**

The AO initiated penalty proceedings as per assessment order passed u/s 143(3) dated 28.12.2007. The AO passed a penalty order u/s 271E dated 20.03.2012. The AO held that the time limit for passing of the penalty order had to be reckoned from the date of the passing of the order of the CIT(A) in the quantum appeal. The assessee claimed that the order of the CIT(A) was on a totally different issue and had no bearing on the issue on which penalty u/s 271E was imposed. The CIT(A) accepted the assessee's claim and held that the penalty order should have been passed within the financial year itself in which the penalty proceedings were initiated or within six months from the end of the month in which the penalty proceedings were initiated, whichever period expires later, and in the present case the penalty order could have been passed on or before 30.06.2008. He held that the penalty order passed u/s 271E on 20.03.2012 is barred by limitation and deserves to be quashed on this ground alone. The Tribunal HELD that:

In the present case, the penalty sought to be imposed on the assessee is for alleged violation of Section 269SS/ 269T of the Act. It is well settled that a penalty under this provision is independent of the assessment. The action inviting imposition of penalty is granting of loans above the prescribed limit otherwise than through banking channels and as such infringement of Section 269SS of the Act is not related to the income that may be assessed or finally adjudicated. In this view Section 275(1)(a) of the Act would not be applicable and the provisions of Section 275(1)(c) would be attracted. Since penalty proceedings for default in not having transactions through the bank as required under sections 269SS and 269T are not related to the assessment proceeding but are independent of it, therefore, the completion of appellate proceedings arising out of the assessment proceedings or the other

proceedings during which the penalty proceedings under sections 271D and 271E may have been initiated has no relevance for sustaining or not sustaining the penalty proceedings and, therefore, clause (a) of sub-section (1) of section 275 cannot be attracted to such proceedings. Section 275(1) would be redundant because otherwise as a matter of fact every penalty proceeding is usually initiated when during some proceedings such default is noticed, though the final fact finding in this proceeding may not have any bearing on the issues relating to establishing default e.g. penalty for not deducting tax at source while making payment to employees, or contractor, or for that matter not making payment through cheque or demand draft where it is so required to be made. Either of the contingencies does not affect the computation of taxable income and levy of correct tax on chargeable income; if clause (a) was to be invoked, no necessity of clause (c) would arise therefore, ITAT held the that penalty levied by the A.O. is barred by limitations and need to be quashed. (ITA no. 5443/Del/2013, dt. 27.03.2015) (AY. 2005-06)

ITO .v. JKD Capital&Finlease Ltd. (Delhi)(Trib.); www.itatonline.org

S. 276C: Offences and prosecution - False verification in return - Conviction and sentence confirmed - Liberty to Department to consider application for compounding offence.[S.277]

The trial court convicted the assessee under sections 276C and 277 of Income-tax Act and sentenced him accordingly. The conviction and sentence of the trial court were confirmed by the appellate court. On a criminal revision petition :

Held, dismissing the petition, (i) that the complaint showed that it was only after getting proper sanction that the complaint had been lodged against the assessee and was taken cognizance of by the trial court.

(ii) That the court left it open to the Department to consider the application of the assessee for compounding the offence if made by the assessee within a period of ninety days. The court gave a further direction that the court's revision order shall be given effect to by the Income-tax Officer, after a finality was reached in the assessee's writ petition pending before the court. (AY .1996-1997, 1997-1998)

B. Gopi.v. G. Thiyagarajan, ITO (2015) 370 ITR 353 (Mad) (HC)

S. 277A : Offences and prosecutions - Falsification of books –False TDS certificate-Tax practitioner-Refund on the basis of TDS certificates- Respondent had no role in preparing TDS certificates- ITO could not initiate criminal proceedings for commission of offences punishable under IPC. [IPC, S. 378 (4), 418, 465, 471]

Respondent-accused, an advocate, was a tax practitioner .Main assessee, a Railway contractor, had engaged him for purpose of submission of his returns and supplied him requisite documents, including TDS certificates.Respondent filed return on behalf of main assessee and claimed a refund on basis of TDS certificates. Complainant-ITO opined that TDS certificates were not genuine and refund was wrongly claimed. He thus filed complaint against respondent-accused for commission of offences punishable under sections 418, 465, 468 and 471 of IPC. Trial Court dismissed said complaint . On appeal to High Court dismissing the appeal of revenue the Court held that ; since complainant ITO had miserably failed to point out that respondent was liable for preparing false documents which were rather supplied to him by main assessee, Trial court was justified in dismissing complaint filed against him. (AY. 1988-89)

T.D. Gandhi, ITO v. Sudesh Sharma (2015) 230 Taxman 572 (P&H)(HC)

S. 279: Offences and prosecutions – Sanction - Chief Commissioner – Commissioner-Where the assessee had already furnished all relevant details in reply to show cause notice u/s. 142(1), revenue cannot initiate criminal prosecution u/s. 279 against the assessee for non-compliance of said notice.[S. 142 (1)]

The assessee had a foreign bank account which existed with the HSBC Private Bank, Geneva, Switzerland. The peak amount lying in the account during the relevant year was around US $1.3 million. The account was closed in the year 2007. The notice u/s. 142(1) was issued to the assessee to furnish details of its bank accounts, in reply to which the assessee furnished the same. The Revenue authorities, however, rejected details submitted by the assessee. Thereupon, on the basis of sanction

issued by the Commissioner on account of non-compliance of S. 142(1), the respondent launched criminal prosecution u/s. 279.
On a writ filed by the assessee, the High Court quashed the order passed in Criminal prosecution and remanded back the matter for disposal afresh after considering the assessee's reply to the notice u/s. 142(1).
Shravan Gupta v. ACIT (2015) 277 CTR 360 / 119 DTR 80 (Delhi) (HC)

S. 282 : Service of notice- The postal authorities are the agent of the recipient. There is a presumption that handing over notice to the postal department means that it has been served on the assesse.[S. 143 (2), 147,148, CPC, order V Rule 19A]
The provisions of Section 282 of the Act with regard to the service of notice have been duly complied with by the Revenue. Since the notice u/s 143(2) of the Act has not been received back unserved within thirty days of its issuance, there would be presumption under the law that notice has been duly served upon the assessee. The notice was under transmission by handing over to the postal authority who acted as an agent of the recipient. The speed post notice has not been returned mentioning the address as wrong or undelivered which is a standard practice of the postal Department. Assessee's AR in the initial hearings never indicated that 148 notice was not properly served. The lame objection is taken at the fag end of assessment, which clearly smack of a design. (AY. 2003-04)
ITO v. Shubhashri Panicker (Jaipur)(Trib.); www.itatonline.org

S. 292B: Return of income not to be invalid on certain grounds Assessment - Amalgamation of companies - Effect - Amalgamating company ceases to exist - Order of assessment on amalgamating company - Not valid - Not a procedural irregularity to be cured by section 292B.[S. 159,170, 176]
Section 170(2) of the Income-tax Act, 1961, makes it clear that in the case of amalgamation, the assessment must be made on the successor (i.e., the amalgamated company). Section 176 which contains provisions pertaining to a discontinuation of business, does not apply to a case of amalgamation. The language of section 159 evidently only applies to natural persons and cannot be extended through a legal fiction, to the dissolution of companies. Once it is found that assessment is framed in the name of non-existing entity it does not remain a procedural irregularity of the nature which could be cured by invoking the provisions of section 292B. Participation by the amalgamated company in assessment proceedings would not cure the defect because "there can be no estoppel against law". Held, dismissing the appeals, that the orders of assessment were invalid. (AY. 2003-2004 to 2008-2009)
CIT .v. Dimension Apparels P. Ltd.(2014) 52 taxmann.com 356/ (2015) 370 ITR 288 (Delhi)(HC)

S. 292BB : Notice of demand to be valid in certain circumstances – Notice- After expiry of prescribed limitation period- Assessment was held to be bad in law.[S.143(2)]
For relevant year assessee filed its return declaring certain income.AO having issued notice under section 143(2), made certain additions to assessee's taxable income .On appeal, assessee raised an objection that notice under section 143(2) had been issued after expiry of prescribed period of twelve months. CIT(A) held that objections raised by assessee was not tenable as per provisions of section 292BB. Tribunal, however, set aside impugned addition holding that section 292BB was not applicable to assessee's case. Since provision of section 292BB was inserted by Finance Act, 2008, with effect from 1-4-2008, it was not applicable to assessment year in question,therefore, impugned order of Tribunal was to be upheld. (AY. 2007-08)
CIT v. Mohammad Khaleeq Commercial Taxes (2015) 229 Taxman 566 (All.)(HC)

S. 292BB : Notice of demand to be valid in certain circumstances - Reassessment- Dead person- Issue of notice in the name of the deceased person renders the assessment order null and void even if the order is passed in the name of the legal heir. The fact that the legal heir attended the proceedings does not make it a curable defect u/s 292BB.[S. 69, 143(2), 147, 148]
The AO recorded the reasons for issuing the notice u/s 148 of the Act in the name of the deceased assessee and got the approval of the Addl. CIT also in the same name. The AO issued notice dated 31.03.2010 u/s 148 of the Act in the name of the deceased assessee and also mentioned in the body of

the assessment order that the notice u/s 148 of the Act was issued and served upon the assessee by Post within the statutory time period prescribed. Though the legal heir of the deceased assessee informed the AO that the assessee had expired and the return in the name of deceased assessee was filed by the legal heir, the AO did not issue any notice u/s 148 of the Act or 143(2) of the Act in the name of the legal heir. Therefore, the assessment framed by the AO on the basis of the notice issued u/s 148 of the Act in the name of the deceased assessee was invalid and void ab initio.(AY. 2003-04)
ITO v. Late Som Nath Malhotra (Delhi)(Trib.); www.itatonline.org

S.295:Power to make rules-Higher depreciation- Vires of Notification No 10 of 2009 dt 19-1-2009-Constitutionally valid . [Constitution of India, Art. 14]
If the clause of higher depreciation @ 50% on the acquisition of new commercial vehicles was extended by Government of India vide its notification No. 37 of 2009 dated 21.04.2009 as well as notification No. 10 of 2009 dated 19.01.2009, for or specific period of time, the same should not be viewed from a partisan angle or violative of the right of the Assessee under Article 14 of the Constitution as the law related to economic activities should command greater value than the civil law. (AY. 2010-11)
R. Surendran v. UOI (2014) 369 ITR 536 / (2015) 274 CTR 43 / 230 Taxman 590 (Ker.)(HC)

Gift-tax Act, 1958
S. 4 : Deemed gift-Firm-Dissolution-Accrual of property to partner, as a result of partition or dissolution of a firm cannot be treated as a gift [S.2(xii)]
The assessee, his brother and their mother jointly owned a building. In addition, two brothers also held an open land in common. Further they constituted partnership and said properties were made asset of firm. Subsequently, the firm was dissolved. Accordingly, building was allotted towards share of the mother, open land to one of the sons and the assessee was allotted some liquid assets. He showed a value of building at Rs. 6.21 lakhs in his returns.
The AO took view a that a transaction of gift had taken place from the assessee to his mother to extent of his 1/3rd share in house. Therefore, he assessed value of house at Rs. 20.28 lakhs through method of capitalization.
The CIT(A) as well as the Tribunal upheld order of the AO. On appeal to High Court:
A firm is not a recognised legal personality and no partner can hold any item of the assets, exclusively for himself. To put it in positive terms, each partner can be said to have held the entire assets, but to the extent of his share. Here again, the actual entitlement of the partner comes to be translated if only the dissolution takes place and the item of property is allotted to his share. The occasion for the member of a joint family or a co-owner or a partner to make a gift would arise only after his share is determined in the process of partition or dissolution, as the case may be. What has accrued as a result of partition or dissolution does not amount to any transfer at all. The Assessing Authority proposed to treat the accrual of the property to the mother of the applicant, as a result of partition or dissolution of firm; as a gift. This is contrary to the unequivocal law, laid down by the Supreme Court in Jagatram Ahuja v.CGT (2000) 246 ITR 609(SC),/CIT v. Keshavlal Lallubhai Patel (1965) 55 ITR 637 (SC))
Rajkumar .v. CGT (2015) 228 Taxman 338(Mag.) (AP)(HC)

Kar Vivad Samadhan Scheme,1988- Finance Act, 1988-

S. 87(m) : Tax arrears-Disputed tax-Amount of tax was payable at 30% and not 50%- Petition was allowed.[S.88]
The Writ Petition involves the interpretation of some of the provisions of KVSS, 1998. The Petitioner was an individual assesee working in construction for Indian Railways. He submitted IT return declaring certain income which AO made certain addition. On appeal before CIT (A), the taxable income was marginally reduced .Aggrieved by the relief; the Petitioner approached the ITAT by filing a further appeal. The scheme came into operation when the appeal was pending before ITAT. Therefore the Petitioner submitted an application prescribed form claiming benefit thereunder. The contention of the Petitioner in writ Petition was that though an application was filed in the prescribed form and the stipulated amount was paid, the 1st Respondent passed the impugned order, contrary to

the provisions of the scheme. Revenues' contention was that Petitioner was under an obligation to pay the amount at 50% of the arrears of tax, under Cl.(a)(iv) of S.88 of the Finance Act 1998. It was further stated that when doubt arose in this behalf, clarification was given, and the impugned order was passed in accordance with the same. The HC allowed the Writ Petition and held that that once the case falls under cla(a)(iii) of S.88 , the amount is payable at 30% of the disputed income. To determine this, one has to fall back upon the disputed tax, which in the instinct case is Rs 1,05,977. If this figure is multiplied by 100/40, the figure representing the disputed income would emerge, being Rs 2,64,940. Assesee rightly deposited 30% thereof at Ts 79,483. CIT (A) was not justified in holding that the assesee was liable to pay 50% of all the three components of tax, interest and penalty.(AY.1996-97)

R. Damodar Reddy v. CIT (2015) 273 CTR 99(AP)(HC)

Kar Vivad Samadhan Scheme, 1998 - Finance (No. 2) Act, 1998

S.87:Arrears of tax - Scope of expression - Additional tax imposed is not a tax but a penalty - Revenue prohibited from adding the element of additional tax for purposes of Scheme . [S. 143(1)(a)].

The levy of additional tax bears all the characteristics of a penalty. When additional tax has the imprint of penalty, the levy of additional tax is not automatic under section 143(1)(a) of the Income-tax Act, 1961. If additional tax could be levied, it will amount to punishing the assessee for no fault of his and this cannot be the legislative intent.

The assessee, for the assessment years 1994-95 and 1995-96, submitted a declaration under the Kar Vivad Samadhan Scheme, 1998, promulgated by the Finance (No. 2) Act, 1998. The Assessing Officer added additional tax levied under section 143(1)(a) of the Act to the declaration made by the assessee. On a writ petition, the single judge held that additional tax was also part of the tax as payable and imposed under section 147 and, therefore, no error had been committed by the Revenue in adding the additional tax while assessing the income of the assessee for the assessment years 1994-95 and 1995-96 under the 1998 Scheme. On appeal:

Held, the imposition of additional tax in the facts and circumstances of the case as done was not permissible. The additional tax levied under the 1998 Scheme was to be deleted and the matter was remanded to the Assessing Officer for proceeding to assess the matter afresh. CIT v. Hindustan Electro Graphites Ltd. [2000] 243 ITR 48 (SC) followed.(AY. 1994-1995, 1995-1996)

Namrita Cboudhary (Mrs.) v. CIT (2015) 372 ITR 418 (MP)(HC)

Editorial: Decision of the single judge in H.L. Taneja v. CIT [2008] 300 ITR 384 (MP) reversed.

Wealth-tax Act, 1957,

S. 2(ea)(b) : Asset- Agricultural land-With in municipal limit.

Though the land situated within the municipal limits but still it is an agricultural land, on which construction is not permissible without the permission of the Municipality Corporation Building Bye-Law and Town and Country Planning Act. Thus, the land does not fall within the ambit of Sec 2(ea)(b) to carry out construction.

Amin Chand Mehta v.CWT (2015) 274 CTR 150(HP)(HC)

S. 4(1)(a)(i) : Net wealth-Transfer of assets-Wife of assessee purchasing residential house and jewellery out of interest-free cash loan given by assessee-Cash loan not "asset"-No transfer of asset-Amount cannot be added to net wealth of assessee. [S. IT Act, S. 64, 2(ea)]

On appeal by assessee:

Held, allowing the appeal, that according to the provisions of the Act, extending a cash loan, to the wife, by the assessee would not come within the definition of "asset". Also, cash was not included in "capital asset", "tangible asset" and "intangible asset" defined in the Income-tax Act, 1961. Therefore, there was no "transfer of asset" by the assessee, rather, an asset was purchased in the form of a residential house after taking an interest-free cash loan from the assessee. The assessee was not the owner of the asset which was transferred to the wife, rather out of the interest-free loan, the wife of the assessee purchased "new asset" in her own name from the third parties. As there was no "transfer",

section 64 of the 1961 Act was also not attracted. The assessee had given a loan to his wife and it having been duly declared, this was not a case of tax avoidance. The wife of the assessee had an independent source of income, filed her return and even subsequently repaid part of the loan taken from the (AY. 2006-2007)

Shah Rukh Khan v. ACWT (2014) 52 taxmann.com/(2015) 67 SOT 390/ 167 TTJ 79/37 ITR 1 (Mum.)(Trib.)

S. 7:Valuation of property-Vacant land subject to the Land Ceiling Act- Excess land would have to be valued at Rs 2 lakh for valuation of wealth tax. [S. 2(e), 2(m), 2(q), 3,Urban Land Ceiling Act, 1962, S. 6,11(6), 20]

The Supreme Court had to consider whether for the purposes of Wealth Tax Act, the market value of the vacant land belonging to the assessee should be taken at the price which is the maximum compensation payable to the assessee under the Urban Land Ceiling Act, 1962?

The factual position is as follows:

(i) The Assessment Years in respect of which question was to be determined were 1977-1978 to 1986-1987.

(ii) Ceiling Act had come into force w.e.f. 17.02.1976 and was in operation during the aforesaid Assessment Years.

(iii) The Competent Authority under the Ceiling Act had passed orders to the effect that as per Section 11(6) of the Ceiling Act, the maximum compensation that could be received by the assessee was Rs.2 lakhs. In accordance with Section 30 of the Ceiling Act, the declaration dates back to 17.02.1976 on which date the Ceiling Act was promulgated in Karnataka.

(iv) The order of the Competent Authority was challenged by the assessee by filing appeal before the Karnataka Appellate Tribunal. This appeal was, however, dismissed on 15.07.1998.

Against that order, writ petition was filed wherein provisions of the Ceiling Act were also challenged. Because of the pendency of these proceedings or due to some other reason, notification under Section 10(1) of the Ceiling Act was not passed.

(v) In the year 1999, Ceiling Act was repealed. At that stage, the writ petition filed by the assessee was still pending. The effect of this Repealing Act was that the Property in question remained with the assessee and was not taken over by the Government.

HELD by the Supreme Court:

(i) It is clear that the valuation of the asset in question has to be in the manner provided under Section 7 of the Act. Such a valuation has to be on the valuation date which has reference to the last day of the previous year as defined under Section 3 of the Income Tax Act if an assessment was to be made under that Act for that year. In other words, it is 31st March immediately preceding the assessment year. The valuation arrived at as on that date of the asset is the valuation on which wealth tax is assessable. It is clear from the reading of Section 7 of the Act that the Assessing Officer has to keep hypothetical situation in mind, namely, if the asset in question is to be sold in the open market, what price it would fetch. Assessing Officer has to form an opinion about the estimation of such a price that is likely to be received if the property were to be sold. There is no actual sale and only a hypothetical situation of a sale is to be contemplated by the Assessing Officer.

(ii) Thus, the Tax Officer has to form an opinion about the estimated price if the asset were to be sold in the assumed market and the estimated price would be the one which an assumed willing purchaser would pay for it. On these reckoning, the asset has to be valued in the ordinary way.

(iii) The High Court has accepted, and rightly so, that since the Property in question came within the mischief of the Ceiling Act it would have depressing effect insofar as the price which the assumed willing purchaser would pay for such property. However, the question is as to what price the willing purchaser would offer in such a scenario?

(iv) The combined effect of the aforesaid provisions, in the context of instant appeals, is that the vacant land in excess of ceiling limit was not acquired by the State Government as notification under Section 10(1) of the Ceiling Act had not been issued. However, the process had started as the assessee had filed statement in the prescribed form as per the provisions of Section 6(1) of the Ceiling Act and the Competent Authority had also prepared a draft statement under Section 8 which was duly served upon the assessee. Fact remains that so long as the Act was operative, by virtue of Section 3 the assessee was not entitled to hold any vacant land in excess of the ceiling limit. Order was also passed

to the effect that the maximum compensation payable was Rs.2 lakhs. Let us keep these factors in mind and on that basis apply the provisions of Section 7 of the Wealth Tax Act.
(v) One has to assume that the property in question is saleable in the open market and estimate the price which the assumed willing purchaser would pay for such a property. When the asset is under the clutches of the Ceiling Act and in respect of the said asset/vacant land, the Competent Authority under the Ceiling Act had already determined the maximum compensation of Rs.2 lakhs, how much price such a property would fetch if sold in the open market? We have to keep in mind what a reasonably assumed buyer would pay for such a property if he were to buy the same. Such a property which is going to be taken over by the Government and is awaiting notification under Section 10 of the Act for this purpose, would not fetch more than Rs.2 lakhs as the assumed buyer knows that the moment this property is taken over by the Government, he will receive the compensation of Rs.2 lakhs only. We are not oblivious of those categories of buyers who may buy "disputed properties" by taking risks with the hope that legal proceedings may ultimately be decided in favour of the assessee and in such a eventuality they are going to get much higher value. However, as stated above, hypothetical presumptions of such sales are to be discarded as we have to keep in mind the conduct of a reasonable person and "ordinary way" of the presumptuous sale. When such a presumed buyer is not going to offer more than Rs.2 lakhs, obvious answer is that the estimated price which such asset would fetch if sold in the open market on the valuation date(s) would not be more than Rs.2 lakhs. Having said so, one aspect needs to be pointed out, which was missed by the Commissioner (Appeals) and the Tribunal as well while deciding the case in favour of the assessee. The compensation of Rs.2 lakhs is in respect of only the "excess land" which is covered by Sections 3 and 4 of the Ceiling Act. The total vacant land for the purpose of Wealth Tax Act is not only excess land but other part of the land which would have remained with the assessee in any case. Therefore, the valuation of the excess land, which is the subject matter of Ceiling Act, would be Rs.2 lakhs. To that market value of the remaining land will have to be added for the purpose of arriving at the valuation for payment of Wealth Tax. (AY. 1977-78 to 1986-87)
S. N. Wadiyar (Dead) Through LR .v. CWT(2015) 378 ITR 9 (SC)

S.18B : Penalty - Reduction/Waiver of –while considering prayer for reduction/waiver of penalty, Commissioner shall consider such factors as are enumerated in section 18B and no other factor- Matter was set aside.
Assessment years 1977 to 1985 - Petitioner/assessee filed returns for assessment years under consideration collectively and voluntarily.Assessing Officer passed orders imposing penalty. Assessee's application under section 18B for reduction/waiver of penalty was rejected by Commissioner without considering factors set out for exercise of jurisdiction of section 18B. On writ the Court held that while considering prayer for reduction/waiver of penalty, Commissioner shall consider such factors as are enumerated in section 18B and no other factor. Therefore, writ petition of assessee was to be allowed and matter was to be remitted to Commissioner to decide petition in accordance with law . (AY. 1977 to 1985)
Hans Raj (HUF) v. CWT (2015) 229 Taxman 567 (P&H)(HC)

S. 34A : Refunds –Interest- Assessee would be entitled to interest on refund of wealth-tax where return was filed on self assessment. [S. 16]
Dismissing the writ appeals the Court held that ,with respect to refund and interest payable on refund, nature of assessment is not relevant, therefore, an assessee would be entitled to interest on refund of wealth-tax where return was filed on self assessment.
CWT v. Nazim Zacheria (2015) 230 Taxman 64 (Ker.)(HC)

S.35(1)(e):Appellate Tribunal—Rectification of mistake--No jurisdiction to recall final order passed on merits- Mere oral concession by one or other counsel is also no ground for recalling the order- Recall of order to bring asset to tax--Not permissible. [S. 2(ea), E254 (2)]
On miscellaneous petitions filed by the Revenue, the Tribunal held that prima facie there was a mistake in the order passed by the Tribunal. Therefore, the Tribunal recalled its earlier decision and again reinstated in the rolls of the Tribunal for fresh hearing and disposal. Thereafter, the Tribunal took up the appeals for re-hearing and decided the issue against the assessee. On appeals :

Held, allowing the appeals, (i) that the Tribunal in the first instance had given benefit to the assessee and, thereafter, the Department filed miscellaneous petitions to recall the order on the legal plea that the benefit of exclusion of asset would not apply in terms of section 2(ea). This issue was a legal issue, which the Department, if aggrieved would have to canvass in appeal. The Department could not be allowed to raise this issue in a petition filed for rectification that was not raised in the appeal. The Tribunal exceeded its jurisdiction in invoking the power under section 35(1)(e) to recall the final order in the guise of rectification. The Tribunal can only exercise its jurisdiction under section 35(1)(e) in the manner indicated in the provision and de hors the provisions in the Act, it has no jurisdiction to recall its final order passed on the merits of the case.

Vyline Glass Works Ltd.v. CWT (2015) 373 ITR 355 / 231 Taxman 535 (Mad.) (HC)

Wealth-tax, 1957- Finance Act, 1983.

Wealth-tax Act , 1957 -40 of the Finance Act, 1983.

Land obtained on lease for ninety-nine years - Building constructed on land and sub-leased to bank - Value of land and building assessable.

In the present case, the building had been leased out to Central Bank of India for which rent was being collected by the assessee. It, therefore, followed that the building constructed by the assessee would fall within the definition of specified asset for the purpose of determining the net wealth of the assessee liable to wealth-tax. The value adopted by the Tribunal at Rs. 82 lakhs for the purpose of computation of net wealth was just and proper and called for no interference, as the value of the building alone was taken as composite value for the purpose of computation of the value of the land and building.

South India Structural Corporation Ltd v. Dy. CWT (20150 375 ITR 445 (Mad) (HC)

S.40(3)(vi):Company-Exemption--Building used for business-Used by subsidiary- Not exempt.

Portion of factory building used by subsidiary of assessee for carrying out job work for assesse. Assessee charging subsidiary licence fee and subsidiary charging assessee for work done. Independent entities--Portion of building used by subsidiary not used by assessee for purpose of its business. Dismissing the appeal the Court held that user must be by assessee for purposes of its business hence on facts the assesse is not entitle to claim exemption.(AY. 1984-1985)

Kapri International (P) Ltd. v. CWT (2015) 373 ITR 50 / 231 Taxman 34 / 277 CTR 463 / 277 CTR 463/ 231 Taxman 34 (SC)

Editorial: Decision in Kapri International (P) Ltd. v. CWT (2002) 258 ITR 656 (Delhi)(HC) is affirmed.

Companies (Profits) Surtax Act, 1964

S.24AA:Exemption- Agreement with foreign company- Mineral Oils-Scope of exemption cannot be expanded by a judicial pronouncement-Principles of interpretation of a law conferring an exemption or concession.

The Supreme Court had to consider the scope of Notification bearing No.GSR 307(E) dated 31.03.1983 issued under Section 24AA of the Surtax Act by which exemption was granted in respect of surtax in favour of foreign companies with whom the Central Government has entered into agreements for association or participation of that Government or any authorized person in the business of prospecting or extraction or production of mineral oils. ONGC was notified as the "authorized person". The question was whether the exemption could be extended to agreements entered into by ONGC with different foreign companies for services or facilities or for supply of ship, aircraft, machinery and plant, as may be, all of which were to be used in connection with the prospecting or extraction or production of mineral oils. Such agreements did not contemplate a direct association or participation of ONGC in the prospecting or extraction or production of mineral oils but involved the taking of services and facilities or use of plant or machinery which is connected with the business of prospecting or extraction or production of mineral oils. HELD by the Supreme Court:

(i) The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption.
(ii) Section 24-AA of the Surtax Act was brought into the statute book by Act 16 of 1981 i.e. Finance Act, 1981 with effect from 1.4.1981. The explanatory notes on the provisions of Finance Act [Paragraph 11(4) and 26(1)] clearly goes to show that the legislative intent behind inclusion of Section 24-AA is to encourage foreign companies to enter into participating contracts with the Union Government in the business of oil exploration or production. The further legislative intent was to seek greater participation of foreign companies in the matter of providing services including supply of ships, aircrafts, machinery or plant in connection with business of extraction or production of mineral oils. The aforesaid legislative intent which is two-fold is manifested by the two limbs of sub-section 2 of Section 24AA of the Surtax Act to which the power of exemption was intended to operate i.e. sub-section 2(a) and 2(b) of Section 24AA. If out of the two limbs where the power of exemption was intended to operate, the repository of the power i.e. Central Government, had consciously chosen to grant exemption in one particular field i.e. foreign companies covered by sub-section 2(a) of Section 24-AA, the scope of the grant cannot be enhanced or expanded by a judicial pronouncement which is what the arguments made on behalf of the appellants intend to achieve. Any such interpretation must, therefore, be avoided. Consequently, we see no reason to depart from the basic principles of interpretation, as already noticed, that should govern the present issue. We, accordingly, do not find any merit in any of the appeals under consideration.(AY. 1986-87)
Oil & Natural Gas Corporation Limited v. CIT(2015) 377 ITR 117/ 121 DTR 302/ 278 CTR 166 (SC)

Interest- tax Act, 1974
S.13:Penalty–Concealment- chargeable interest-Bona fide belief that interest under Banks Bill Re-discounting Scheme not assessable under Interest-tax Act- Penalty could not be imposed. Difference between section 13 of the Interest –Tax Act and section 271(1)(c) of the Income-tax Act. [S.271(1)(c)]
Section 13 of the Interest-tax Act, 1974, stipulates that penalty can be imposed when an assessee has furnished inaccurate particulars of interest or concealed particulars of chargeable interest. The section does not use the word "deliberately", "wilful" or "wilfully". However, the section does not have any Explanation as in the case of section 271(1)(c) of the Income-tax Act, 1961. To this extent the two provisions are not in pari materia. The net effect is that in the absence of an Explanation the onus will not shift to the assessee. When two legal interpretations are plausible and there is an honest and bona fide difference of opinion, penalty for concealment or furnishing of inaccurate particulars, should not and cannot be imposed. If the view taken by the assessee requires consideration and is reasonably arguable, he should not be penalised for taking the position. Taxing statutes are complex and there can be a bona fide difference of opinion on legal interpretation and understanding of a provision. (AY 1992-1993)
CIT v. Oriental Insurance Co. Ltd. (2015) 372 ITR 100 (Delhi) (HC)
Editorial : Order in Asst. CIT v. Oriental Insurance Co. Ltd. (2014) 35 ITR 474 (Delhi)(Trib.) affirmed.

Remittances of Foreign Exchange and Investment in Foreign Exchange Bonds (Immunities and Exemptions) Act, 1991,

S.6:Income from undisclosed sources - Foreign remittances - India Development Bonds - Bond holder - Immunities - Immunity against disclosure of nature and source of investment in bonds

to non-resident Indian or overseas corporate body owning bonds and to Indian resident to whom gift of such bonds made by non-resident Indian or overseas corporate body - Only on full satisfaction of requirements.[S. 69A, 7,India Development Bonds Scheme, 1991,S. 5]

The immunity provided by the Remittances of Foreign Exchange and Investment in Foreign Exchange Bonds (Immunities and Exemptions) Act, 1991, must fulfil the requirements of section 6(1). Under clause (a) of sub-section (1) of section 6 of the 1991 Act, the immunity would extend only against the disclosure of the nature and source of the investment in the bonds. The immunity would be available to a non-resident Indian or overseas corporate body who or which owns the bonds on the one hand and, on the other hand, to a resident of India to whom a gift of such bonds has been made by a non-resident Indian or overseas corporate body. Where this requirement of section 6(1)(a) is not fulfilled, the immunity will not be attracted. The judgment of the Division Bench would have to be read down so as to confer an immunity only on compliance with the conditions of section 6 and to the extent legislated. CIT v. Smt. Usha Omer [2011] 338 ITR 448 (All) modified (AY. 1997-1998)

Rajendra Kumar Gupta v. CIT (2015) 372 ITR 730/276 CTR 408/118 DTR 88 / 231 Taxman 820(FB) (All.)(HC)

Usha Omer v. CIT (2015) 372 ITR 730/276 CTR 408/118 DTR 88(FB) (All.)(HC)

Anupam Kumar Gupta v. CIT (2015) 372 ITR 730/276 CTR 408 /118 DTR 88(FB) (All.)(HC)

Karnataka Agricultural Income-tax Act, 1957- Retrospective amendment made to section 26(4) of Karnataka Agriculrural Income-tax Act is constitutionally valid- Interpretation of taxing statutes.

Interpretation of taxing statues- Legislative powers-Retrospective legislation-Recovery of tax-Firm-Dissolution-Recovery in respect of income earned prior to dissolution of firm but received after dissolution - Legislature cannot directly overrule the decision but Legislature cannot directly overrule the decision but they have power to amend the law retrospectively-legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same. [Karnataka Agricultural Income-tax Act, 1957 [S. 26(4), 27]

The Supreme Court had to consider the validity of an Explanation added retrospectively to Section 26(4) of the Karnataka Agricultural Income Tax Act. The said Explanation was inserted to supercede the judgement in L. P. Cardoza and others v. Agricultural Income Tax Officer and others [(1997) 227 ITR 421. On the validity of the retrospective amendment, the High Court held, following the judgment in D. Cawasji and Co., Mysore v. State of Mysore and another [1984 (Supp) SCC 490], that the amending Act of 1997 suffered from the vice that was found in Cawasji's case, namely that it interfered directly with the judgment of a High Court and would therefore, have to be struck down as unconstitutional on this score alone. This the Division Bench found, because in the statement of objects and reasons for the 1997 amendment, it was held that the object of the amendment was to undo the judgment of the High Court of Karnataka in Cardoza's case. On appeal by the revenue to the Supreme Court HELD reversing the High Court:

(i) In exercising legislative power, the legislature by mere declaration, without anything more, cannot directly overrule, revise or override a judicial decision. It can render judicial decision ineffective by enacting valid law on the topic within its legislative field fundamentally altering or changing its character retrospectively. The changed or altered conditions are such that the previous decision would not have been rendered by the court, if those conditions had existed at the time of declaring the law as invalid. It is also empowered to give effect to retrospective legislation with a deeming date or with effect from a particular date. The legislature can change the character of the tax or duty from impermissible to permissible tax but the tax or levy should answer such character and the legislature is competent to recover the invalid tax validating such a tax on removing the invalid base for recovery from the subject or render the recovery from the State ineffectual. It is competent for the legislature to enact the law with retrospective effect and authorise its agencies to levy and collect the tax on that basis, make the imposition of levy collected and recovery of the tax made valid, notwithstanding the declaration by the court or the direction given for recovery thereof.

(ii) The consistent thread that runs through all the decisions of this Court is that the legislature cannot directly overrule the decision or make a direction as not binding on it but has power to make the decision ineffective by removing the base on which the decision was rendered, consistent with the law of the Constitution and the legislature must have competence to do the same.(Civil Appeal No. 8617-8635 of 2003, dt. 17.03.2015)

ACIT of Agricultural Income-tax Act v. Netley "B" Estate (2015) 372 ITR 590 / 276 CTR 27 / 117 DTR 65/ 231 Taxman 760(SC)

Editorial : Refer **,** Nettley "B" Estate vs. ACIT Ag. IT Act (2002) 257 ITR 532 (Karn.)(HC)

Interpretation of taxing Statues .

Interpretation of taxing statutes- Exemptions –Strict interpretation- Scope of exemption cannot be enhanced by Court- Companies (Profits) Sur tax Act, 1964

If out of two limbs where the power of exemption was intended to operate , the repository of the power, i.e. the Central Government , had consciously chosen to grant exemption in one particular filed i.e. foreign companies covered by sub section 2(a) of section 24AA, the scope of grant cannot be enhanced or expanded by a judicial prnouncement. Any such interpretation must, therefore, be avoided.

Oil & Natural Gas Corporation Limited v. CIT(2015) 377 ITR 117/ 121 DTR 302/ 278 CTR 166 (SC)

Interpretaation- Income –tax –General principles-Law as on first day of assessment year-Not absolute , exeption by express or necessary implication is possible.

The cardinal principle of tax law that law has to be the law in forece in the assessment year is qualified by exception when it is provided other wise expressly or by implication .That the law which is in force in the assessment year would prevail is not an absolute principle and exception can be either express or implied by necessary implication. It is the cardinal principle of interpretation that a construction resulting in unreasonably harsh and absorbed results must be avoided.(CA No.4476 of 2015, dt. 15.05.2015)

CIT v. Sarkar Builders (2015) 375 ITR 392/ 277 CTR 301/ 119 DTR 241 (SC)

Interpretation of taxing Statues- Principle of equity.

The plain or literal interpretation of a statutory provision is not to be adopted if it produces manifestly unjust results or absurdly unreasonable consequences which could never have been intended. To obviate injustice flowing from mechanical interpretation and to bring about rationality , it is permissible , even in the field of taxation , to prefer such construction as results in equity over such literal meaning as is unjust.

CIT v. Suresh Nanda (2015) 375 ITR 172 (Delhi) (HC)

Interpretation of taxing statutes--Word "may" used in sub-section (2) of section 145 cannot be read as "shall". [S. 145(2).

That the word "may" normally indicates that the provision is not mandatory. It is also true that the word "may" can also be used in the sense "shall" or "must" by the Legislature. The intent of the Legislature, however, will have to be gathered from the scheme of the relevant provision, Chapter or the relevant statute and also judicial pronouncements dealing with the relevant provision. Having regard to the provisions contained in section 145 the word "may" used in sub-section (2) thereof cannot be read as "shall". Merely because the Central Government has not notified in the Official Gazette "accounting standards" to be followed by any class of assessees or in respect of any class of income, it could not be stated that the "accounting standards" prescribed by the Institute of Chartered Accountants of India or the accounting standards reflected in the "guidance note" cannot be adopted as an accounting method by an assessee . (AY. 1996-1997 to 1999-2000)

Chandana Leaphin Finance Ltd v. CIT (2015) 374 ITR 681 (T & AP) (HC)

Pact Securities and Financial Ltd v. CIT (2015) 374 ITR 681 (T&P)(HC)

Interpretation of taxing statutes-Amendments in taxing statute-Prospective unless a different legislative intention is clearly expressed.

Amendments in the taxing statute, unless a different legislative intention is clearly expressed, shall operate prospectively.(AY. 2009-2010)

CIT .v.Nitish Rameshchandra Chordia (2015) 374 ITR 531 (Bom.) (HC)

interpretation of taxing statutes-Provision in another statute not relevant.

The provisions made in the Wealth-tax Act, 1957 , will not in any manner influence the interpretation of section 250(4).

Rallis India Ltd..v. CIT (2015) 374 ITR 462/ 276 CTR 351/ 230 Taxman 483 (Bom.)(HC)

Interpretation of taxing statutes-Precedent--Two judgments of same High Court holding contrary opinions--High Court deciding similar case--Entitled to follow either decision.

Held that if a High Court is faced with two precedents rendered by itself, one in conflict with the other, it has every right to choose between the two and by doing so, it does not do any violence to the other. At the most, it may be an occasion for the superior court to resolve the rule on ostensible conflict. (AY. 1995-1996)

CIT v. Live Well Home Finance P. Ltd. (2015) 373 ITR 188 / 231 Taxman 643 / (T & AP)(HC)

Interpretation of taxing statues-General principles-No taxation without specific sanction.

One of the cardinal principles of taxation is that no amount shall be brought under the purview of taxation, unless there is specific legislative sanction for it. If one takes into account the complex and complicated scheme under the Income-tax Act, 1961, it is evident that Parliament has taken every precaution to ensure that no amount is subjected to taxation twice, unless the relevant provision specifically permits it. There is nothing in the Act which permits interest on corporate deposits, to be taxedtwice.

CIT v. Nagarjuna Fertilizers and Chemicals Ltd. (2015) 373 ITR 252 (T & AP)(HC)

Interpretation of taxing statutes--Interpretation upholding validity of provision. [S.234E, Constitution of India ,Art, 226,227]

It is now well-settled that even though the court exercising jurisdiction under article 226 of the Constitution of India has the power to declare a statute (or any provision thereof) unconstitutional, it should exercise great restraint before exercising such a power. It is equally well-settled that a statute relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, freedom of religion, etc. As regards economic and other regulatory legislation, it is imperative that the court exercises judicial restraint and grants greater latitude to the Legislature whilst judging the constitutional validity of such a statute. This is for the simple reason that the court does not consist of economic and administrative experts and has no expertise in these matters.

Rashmikant Kundalia v. UOI (2015) 373 ITR 268 /278 CTR 138 (Bom.) (HC)

Interpretation of taxing statues- Precedent- Judgement of a non-jurisdictional High Court has to be preferred over the judgement of a Special Bench of the ITAT

There is a conflict of opinion between the judgement of the ITAT Special Bench in DCIT Vs Times Guaranty Limited (2010) 4 ITR (Trib) 210 Mum (SB) and that of the Gujarat High Court in General Motors India Pvt. Ltd Vs DCIT [(2013) 354 ITR 244 (Guj) on the question whether unabsorbed depreciation for the assessment years prior to the amendment made to s. 32(2) w.e.f. AY 2002-03 can be treated as “current depreciation” and set-off against non-business income and be available for carry forward indefinitely. A judgement of the non-jurisdictional High Court binds the Tribunal benches as held in CIT Vs Godavaridevi Saraf (1978) 113 ITR 589 (Bom) and has to be followed over a judgement of the Special Bench. AY. 2009-10) (ITA No. 2974/Del/2013, dt. 09/01/2015)

Minda Sai Ltd. .v. ITO (Delhi)(Trib.); www.itatonline.org

Allied laws.

Admission by counsel-Client is not bound by the statement or admission.

The Supreme Court had to inter alia consider the following issues:

(a) whether the counsel appearing for an appellant-Society could make concession for or on behalf of the appellant-Society without any express instructions/ authorisation in that regard by the Society?

(b) Whether such a concession would bind the appellant-Society and its members?

(c) Since the subject matter of the concession made by the counsel was not the issue before the Writ Court, whether the same would bind the appellant-Society and its members?

The Supreme Court held that the client is not bound by a statement or admission which he or his lawyer was not authorised to make. The Lawyer generally has no implied or apparent authority to make an admission or statement which would directly surrender or conclude the substantial legal rights of the client unless such an admission or statement is clearly a proper step in accomplishing the purpose for which the lawyer was employed.(Civil Appeal No. 4360-4361 of 2015, dt. 29.04.2015.)

Himalayan Cooperative Group Housing Society v. Balwan Singh (SC); www.itatonline.org

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Central Excise and Salt Act, 1944

S. 11 : Legal representatives- Adead person's property, in the form of his or her estate, cannot be taxed without the necessary machinery provisions in a tax statute-There is no machinery provision similar to Income –Tax Act, 1961 - [S.11A, Income tax Act 1961,S. 159, 168 , General Clauses Act, S. 3(42)]

The Supreme Court had to consider whether a dead person's property, in the form of his or her estate, can be taxed without the necessary machinery provisions in a tax statute. The question was whether an assessment proceeding under the Central Excise and Salt Act, 1944, can continue against the legal representatives/estate of a sole proprietor/manufacturer after he is dead. HELD by the Supreme Court:

(i) The individual assessee has ordinarily to be a living person and there can be no assessment on a dead person and the assessment is a charge in respect of the income of the previous year and not a charge in respect of the income of the year of assessment as measured by the income of the previous year. Wallace Brothers & Co. Ltd. v Commissioner of Income-tax. By section 24B of the Income-tax Act the legal representatives have, by fiction of law, become assessees as provided in that section but that fiction cannot be extended beyond the object for which it was enacted. As was observed by this Court in Bengal Immunity Co. Ltd. v. State of Bihar legal fictions are only for a definite purpose and they are limited to the purpose for which they are created and should not be extended beyond that legitimate field. In the Income-tax Act the fiction is limited to the cases provided in the three sub sections of section 24B and cannot be extended further than the liability for the income received in the previous year.

(ii) A reading of Sections 2(f), (3), Section 4(3)(a), Section 11 and 11A as they stood at the relevant time would show that unlike the provisions of the Income-tax Act, there is no machinery provision in the Central Excises and Salt Act for continuing assessment proceedings against a dead individual. An assessee under the said Act means "the person" who is liable to pay the duty of excise under this Act and further stressed the fact that in cases of short levy, such duty can only be recovered from a person who is chargeable with the duty that has been short levied. Under the Central Excise Rules and Rules 2(3) and 7 in particular, there is no machinery provision contained either in the Act or in the Rules to proceed against a dead person's legal heirs.(Civil Appeal No. 5802 of 2005, dt. 29.07.2015)

Shabina Abraham & Ors v. Collector of Central Excise (SC); www.itatonline.org

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Constitution of India

Art. 14: Service Matters – Action of respondents of not regularizing services was arbitrary and vilative of article 14 of the Constitution of India. [Art. 15]

Petitioner was engaged to work as driver by fourth respondent i.e. Director (Intelligence) initially on a contingent basis but further on regular basis pursuant to internal communication dated 8-8-2000 - He had been paid salary out of expenditure as per proceedings of Director of Income-tax (Intelligence)

dated 28-10-2014. There was correspondence between Additional Director of Income-tax and Chief Commissioner of Income-tax (respondent nos. 4 and 5) vide, letter dated 15-11-2007 with regard to regularization of service of daily wage workers and names of four persons were forwarded. Petitioner submitted that out of four persons services of only two persons had been regularized since they had completed 10 years of service. Allowing the petition in view of fact that from date of initial engagement, petitioner had put in more than 14 years of service, impugned action of respondents of not regularising his services was arbitrary and violative of articles 14 and 15 of Constitution of India .
Shrikanth .v. UOI (2015) 231 Taxman 419 (Karn.)(HC)

Constitution of India -Central Administrative Tribunal-Promotion-Central Administrative Tribunal-Writ is not maintainable.[.S. 120, Art 226 , Constitution of India]
Where petitioners working on different posts with respondent/CBDT, raised a grievance with regard to their promotions, they were required to approach Central Administrative Tribunal (CAT) in first instance and, thus, writ petition filed by them straightaway in High Court after bypassing forum of Tribunal was not maintainable.
Sanjay Pandey v. CBDT (2015) 229 Taxman 323 (Delhi)(HC)

Companies Act , 1956
S.232: Amalgamation- Protective assessment-Initiation- Regional Director is entitled to vice his doubt /apprension before Court at time Court considers grant of sanction to scheme-Scheme of amalgamation as proposed is sanctioned subject to the certain conditions.[S. 394. I.T. Act, S. 139(5) 143(3)]
Court held that if Regional Director nurtures any doubt qua any of clauses in a scheme of amalgamation, including date chosen as appointed date, and finds that same is contrary to law or apprehends that on strength of such a clause contained in scheme, company, after obtaining sanction from Court, may use or misuse same for contravention of any law including provisions of Income-tax, he is entitled to voice his doubt/apprehension before Court, at time Court considers grant of sanction to scheme and it is always open to Court to consider doubt/apprehension expressed by Regional Director and pass necessary orders either rejecting scheme or sanctioning same with/or without necessary clarifications. Since Court is required to ensure that a scheme of amalgamation does not contravene any provision of law, Regional Director is not only entitled to but is duty bound to bring to attention of Court any provision in scheme which may contravene/circumvent provisions of any law including law pertaining to Income-tax . legislature intended that Regional Director will examine a scheme from all aspects and place his observations and views before Court and Court will consider same before sanctioning scheme. Merely because a protective assessment is made, it does not mean that Income-tax Department has accepted a scheme of amalgamation .The Regional Director prays that the petitions ought to be dismissed on the ground of suppression alone. According to him, a party should not be shown any latitude and indulgence in such matters. Ordinarily, one would have agreed with the Regional Director. However, in the facts of the present case and particularly in view of the final order instead of dismissing the Petitions on this ground, imposition of costs on each of the petitioners will meet the ends of justice.In the circumstances, the scheme of amalgamation as proposed is sanctioned subject to the certain conditions.
Casby CFS (P.) Ltd., In re (2015) 231 Taxman 89 (Bom.)(HC)

Companies Act, 1956-

S.391:Company-Capital gains-Recovery of tax-Scheme of arrangement between group companies for transfer of infrastructure assets-Sanction of scheme-Supreme Court-Rights of Income-tax Department to recover tax due from transferor or transferee company or any person under law not to be affected.[S. 394]
A scheme of arrangement proposed by the respondent-company provided for transfer of passive infrastructure assets of the transferor companies to the transferee company without consideration as the transfer was within companies belonging to one group. The Income-tax Department objected to

the scheme and the single judge refused to sanction the scheme under sections 391 and 394 of the Companies Act, 1956. On appeal the Division Bench granted sanction to the scheme of arrangement while protecting the right of the Income-tax Department to recover the dues in accordance with law irrespective of the sanction of the scheme. On a petition by the Department for special leave to appeal against the decision of the High Court, The Supreme Court dismissed the special leave petitions but stated that the Income-tax Department was entitled to take out appropriate proceedings for recovery of any tax statutorily due from the transferor or transferee company or any other person liable for payment of such tax due.

Dept. of Income tax v. Vodafone Essar Gujarat Ltd. (2015) 373 ITR 525 (SC)

Editorial: Decision in Vodafone Essar Gujarat Ltd. v. Department of Income-tax [2013] 353 ITR 222 (Guj) affirmed.

Contempt of Courts Act, 1971.

S.15 :Making allegations of fraud against Dept's Counsel and claiming that they deliberately presented weak case seeks to prejudice and interfere with due course of judicial proceedings & prima facie constitutes criminal contempt of court

On 15.01.2015, the Court noted by its order that Sh. Rakesh Kumar Gupta's intervention application was rejected. He, however, sent an e-mail to counsel appearing on behalf of the Revenue, levelling several allegations which were shown to the Court. In the course of hearing, the Court pointed this out to Sh. Rakesh Kumar Gupta, who stated that he would be withdrawing the allegations levelled against the Revenue's counsel. However, after the conclusion of hearing, on 09.02.2015, Sh. Gupta filed yet another affidavit titled as "Intervener Affidavit". In the affidavit, after stating that the intervener informed this Court in the hearing that the Income Tax Department had "deliberately presented weak case", and quoting the order dated 16.10.2014, other averments were made including that the "To help the tax payer, terms was used incomplete assignment instead of illegal assignment". When Sh. Gupta was asked whether he wishes to unconditionally withdraw the affidavit and the allegations, to which he agreed conditionally. The condition proposed by him was that even whilst he was willing to withdraw the affidavit and the allegations with respect to the Standing Counsel and the conduct of the case before this Court, he would feel free to press those allegations elsewhere. He also stated that he had no desire and did not wish to withdraw any other allegations against the officers or the officials of the Income Tax Department, the CIT (Appeals) and the department generally, and that the allegations of fraud etc. against the assessees should remain as a matter of record. HELD by the Court:

(i) The Court is of the opinion that given the nature of the conduct displayed by Sh. Gupta, i.e. preferring an application for intervention which was rejected; thereafter engaging in e-mail communications with the Standing Counsel and leveling allegations against them; addressing e-mails directly to this Court and finally, placing on record an affidavit detailing the allegations even while stating that he would withdraw some of them vis-a-vis the Standing Counsel, but would nevertheless press those allegations against the same individuals elsewhere, prima facie amounts to criminal contempt punishable in accordance with law. This Court has been informed that two of the Standing Counsels – Sh. Balbir Singh and Sh. Rohit Madan, who had previously appeared, have already recused themselves from the matter. The behaviour outlined above amounts to seeking to prejudice and interfere or tending to interfere with the due course of proceedings in the present appeals;

(ii) The Court is of the opinion that consequently appropriate action and further proceedings under Section 15 of the Contempt of Courts Act, 1971 is warranted. In the circumstances, Sh. Rakesh Kumar Gupta is issued with Show Cause Notice, returnable on 09.04.2015 to give his explanation why he should not be proceeded with under Section 15 of the Contempt of Courts Act, 1971 in respect of the above allegations. The notice shall also annex a copy of this order and the copy of the Intervener Affidavit filed by him. The Registry is directed to register a separate criminal contempt proceeding and file the originals of the Intervener Affidavit which is part of the record in ITA No.1428/2006 in the said criminal contempt proceedings. Besides, the Registry shall place on record a copy of the e-mail and fax communication numbering 100 pages which was addressed by Sh. Rakesh Kumar Gupta directly to this Court. These shall be annexed along with the Show Cause Notice to be served upon Sh. Rakesh Kumar Gupta on the next returnable date, i.e. 09.04.2015. Sh. Rakesh Kumar Gupta is present in Court and has been apprised of this order.(ITA No. 1428/2006. Dt. 12.022015.)

CIT .v. Escorts Limited (Delhi)(HC) ; www.itatonline.org
CIT .v. Big Apple Clothing Ltd (Delhi)(HC)www.itatonline.org.

Criminal Procedure Code ,
Law Commission and the Bar Council of India should consider whether Advocates should be tested for fitness and competence to argue matters
In the Uber rape trial case, the accused claimed that his counsel representing him earlier was incompetent, being a novice and that he is entitled to recall all the prosecution witnesses now that he has engaged a new counsel. The trial court rejected the plea on the ground that the competence of a Lawyer is subjective and the date of his enrolment with the Bar Council can certainly not be said to be a yardstick to measure his competence. It was also stated that the submission that the earlier advocate was not competent to appear as an Advocate inasmuch as he had not even undergone screening test as required by Bar Council of Delhi Rules and was not issued practice certificate was not fortified by any record. However, the High Court reversed the trial court and directed re-examination of some of the witnesses. On appeal by the State to the Supreme Court HELD reversing the High Court:
(i) While advancement of justice remains the prime object of law, it cannot be understood that recall can be allowed for the asking or reasons related to mere convenience. It has normally to be presumed that the counsel conducting a case is competent particularly when a counsel is appointed by choice of a litigant. Taken to its logical end, the principle that a retrial must follow on every change of a counsel, can have serious consequences on conduct of trials and the criminal justice system. Witnesses cannot be expected to face the hardship of appearing in court repeatedly, particularly in sensitive cases such as the present one. It can result in undue hardship for victims, especially so, of heinous crimes, if they are required to repeatedly appear in court to face cross-examination.
(ii) The interest of justice may suffer if the counsel conducting the trial is physically or mentally unfit on account of any disability. The interest of the society is paramount and instead of trials being conducted again on account of unfitness of the counsel, reform may appear to be necessary so that such a situation does not arise. Perhaps time has come to review the Advocates Act and the relevant Rules to examine the continued fitness of an advocate to conduct a criminal trial on account of advanced age or other mental or physical infirmity, to avoid grievance that an Advocate who conducted trial was unfit or incompetent. This is an aspect which needs to be looked into by the concerned authorities including the Law Commission and the Bar Council of India.(CrA Nos. 1187-1188 of 2015, dt. 10.09.2015)
AG .v. Shiv Kumar Yadav (SC); www.itatonline.org

Right of Information Act, 2005

S.8(1):Disclosure of information –Return of income- Individual and unincorporated assesses-Corporate assesse-Exemption-All records cannot be made available to informer.[S.138, I.T. Act.]
The respondent, who was stated to be an informer to the department, filed an application under the Right to Information Act, 2005 with the PIO *inter alia* seeking information and all the records available with the department in respect of assessees for various assessment years.
Since the information sought by the respondent was third party information, the Deputy Commissioner issued separate notices under section 11(2) of the 2005 Act to the assessees. The assessees objected to the inspection and furnishing of the information. PIO considered the objections of the assessees and rejected the RTI application of the respondent, on the ground that the respondent failed to substantiate the public interest involved in disclosing the information relating to third parties.
The respondent preferred an appeal before the CIC. By the impugned order, the CIC allowed the appeal and directed PIO to provide inspection of the records and also other information sought for by the respondent.
On petition: the Court held that ,return of income filed by assessee and information necessary to support same, would be exempt under section 8(1)(j) of 2005 Act in respect of individual and unincorporated assesses. In case of widely held companies though most information relating to their income and expenditure would be in public domain yet their confidential information would be

exempt from disclosure under section 8(1)(d) of 2005 Act. however, information furnished by corporate assessees that neither relates to another party nor is exempt under section 8(1)(d) of 2005 Act, can be disclosed.
Where respondent, an informer to department, sought information relating to assessee available with department, since respondent wanted to process information to assist and support role of an Assessing Officer and it had a propensity of interfering in assessment proceedings, same could not be considered to be in larger public interest and, thus, respondent's prayer was to be rejected .Accordingly, the petitions are allowed and the impugned order is set aside.
NareshTrehan .v. Rakesh Kumar Gupta (2015) 228 Taxman 119 (Delhi)(HC)

S.8(1)(j):Return- Disclosure of income-tax returns of a politician on the ground that it is necessary for "purity of elections" and "probity in public life" is not possible as it is not in "public interest"[S.6, 11]
(i) In Girish Ramchandra Deshpande Vs. Central Information Commission & Ors(2013) 1 Supreme Court Cases 212 it was held that that the details disclosed by a person in his Income Tax Returns is personal information which has been exempted from disclosure under clause (j) of Section 8(1) of the said Act, unless involved a larger public and the CPIO and or State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information;
(ii) What flows from the Judgments of the Apex Court is that the Income Tax Returns constitute personal information and are exempted from disclosure under Section 8(1)(j) and that the said personal information can only be divulged if the CPIO or the State Public Information Officer reaches a conclusion that it would be in the larger public interest to reveal such information. In the instant case, the reason set forth in the first application filed by the Petitioner before the Public Information Officer hardly makes out a case for the information to be disclosed on the ground of public interest. In so far as the ground made out in the Appeal filed before the First Appellate Authority is concerned, the Petitioner has sought to make a general statement which does not specifically relate to the Respondent No.3. The Petitioner has also sought to justify the information sought on the ground that the Income Tax authorities do not check the Income Tax Returns of those who are elected with their declared affidavits filed at the time of standing for elections. The said ground also does not make out any case of there being any public interest involved in the disclosure of the information sought by the Petitioner by way of the Income Tax Returns of the Respondent No.3 for the preceding three years. The Petitioner is in fact seeking the information by questioning the manner in which the Income Tax Department functions. Since the Petitioner is seeking information relating to the Respondent No.3 the Petitioner was required to demonstrate as to how the disclosure of the information relating to the Respondent No.3 would serve public interest. As indicated above, the Petitioner has made a general and sweeping statement which can hardly be said to satisfy the test of disclosure being made in public interest.
Shailesh Gandhi v. CIC & Ajit Pawar (Bom.)(HC); www.itatonline.org

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Prevention of Corruption Act, 1988

S. 17: Investigation - Persons authorised to investigate -Invalidity of investigation does not vitiate result unless a miscarriage of justice has been caused thereby .
Sub-Inspector, CBI on basis of permission accorded by Magistrate proceeded with investigation and finally submitted charge-sheet. Thereafter, said order of Magistrate was challenged by respondent by filing a criminal petition in High Court stating that order passed by Magistrate permitting Sub-Inspector of Police to investigate case was without jurisdiction and against mandatory provisions of section 17 ,However, respondent had not made out a case that by reason of investigation conducted by Sub-Inspector a serious prejudice and miscarriage of justice had been caused. Court held that since no case of prejudice or miscarriage of justice by reason of investigation by Sub-Inspector of Police was made out, order of High Court setting aside permission granted by Magistrate to investigate matter by Sub-inspector could not be sustained in law .Appeal was allowed and the order of High Court was seta side. (C. A. Nos. 2512-2513 of 2014 dt. 01-12-2014)

UOI v. T. Nathamuni (2015) 54 taxmann.com 136 / 229 Taxman 129 (SC)

Prevention of Corruption Act, 1988

S. 13 : Criminal misconduct by public servant- Where public servant had given testimony about amounts received by him and same had been duly intimated and reflected in IT returns , there was no violation of section 13- The appellant was to be acquitted-Expression 'known sources of income' [Madhya Pradesh Civil Services (Conduct) Rules, 1965 R. 14, 17, 19]

The appellant joined the services of Public Health Engineering Department of the State of Madhya Pradesh as Assistant Engineer and served in various capacities.According to the prosecution, during the period of 15-7-1978 to 9-2-1994, the appellant had earned total amount of Rs. 3,86,966 as public servant but he was found to be in possession of assets worth Rs. 7,97,243 at the end of that period and as such he was in possession of assets disproportionate to his known sources of income to the tune of Rs. 4,08,077.

Accordingly, crime was registered by the Special Police Establishment, Lokayukta Sanghthan for the offence punishable under section 13(1)(e), read with section 13(2).After conducting appropriate investigation, chargesheet was filed and the appellant was accordingly charged and tried.

The appellant had intimated the department on every occasion that he received any advance or gifts or share in partition or entitlement by way of bequest. These facts were spoken to by various prosecution witnesses. Moreover, the appellant had filed his Income-tax Return on 28-9-1992, which clearly reflected the details of the loan transactions and the amounts that he had received. High Court affiremed the view taken by the Trial Court and confirmed the sentence. On appeal allowing the petition the Court held that :Since amounts in question were duly reflected in Income-tax return, there was no violation of section 13(1)(e), read with section 13(2) and appellant was to be acquitted .

Kedari Lal .v. State of M. P. (2015) 231 Taxman 264 (SC)

Prevention of Corruption Act 1988.

S.7. Mere possession and recovery of currency notes from an accused is not sufficient to establish an offense under the Prevention of Corruption Act. Proof of demand of illegal gratification is essential. Its absence is fatal to the complaint.[S. 13,20]

The prosecution claimed that a complaint was lodged against the accused (then the Assistant Director, Commissionerate of Technical Education), that he demanded illegal gratification Rs. 1000 for renewing of the recognition of the complainant's typing institute. A trap was laid pursuant to which phenolphthalein powder was applied on currency notes which were handed over by the complainant to the accused. The accused was intercepted and apprehended with the money in his hands. The currency notes tallied with those which had been decided to be used in the trap operation. The fingers of the hands of the accused, when dipped in the sodium carbonate solution, also turned pink. The pocket of the shirt of the accused also turned pink when rinsed in sodium carbonate solution. The trail court and the High Court convicted the accused. Before the Supreme Court the accused claimed that even assuming without admitting that the recovery of the tainted notes from the appellant had been established, sans the proof of demand which is a sine qua non for an offence both under Sections 7 and 13 of the Act, the appellant's conviction is unsustainable. HELD by the Supreme Court allowing the appeal:

(i) The statutory prescription of Sections 7 and 13(1)(d) of the Prevention of Corruption Act 1988 is that the prosecution has to prove the charge there under beyond reasonable doubt like any other criminal offence and that the accused should be considered to be innocent till it is established otherwise by proper proof of demand and acceptance of illegal gratification, which are vital ingredients necessary to be proved to record a conviction. The mere recovery by itself, would not prove the charge against the accused and in absence of any evidence to prove payment of bribe or to show that the accused had voluntarily accepted the money knowing it to be bribe, conviction cannot be sustained.

(ii) Mere possession and recovery of currency notes from an accused without proof of demand would not establish an offence under Sections 7 as well as 13(1)(d)(i)&(ii) of the Act. In the absence of any

proof of demand for illegal gratification, the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be proved. The proof of demand is an indispensable essentiality and of permeating mandate for an offence under Sections 7 and 13 of the Act. Qua Section 20 of the Act, which permits a presumption as envisaged therein, it has been held that while it is extendable only to an offence under Section 7 and not to those under Section 13(1)(d) (i)&(ii) of the Act, it is contingent as well on the proof of acceptance of illegal gratification for doing or forbearing to do any official act. Such proof of acceptance of illegal gratification, it was emphasized, could follow only if there was proof of demand. Axiomatically, in absence of proof of demand, such legal presumption under Section 20 of the Act would also not arise.
(iii) The proof of demand of illegal gratification, thus, is the gravamen of the offence under Sections 7 and 13(1) (d)(i)&(ii) of the Act and in absence thereof, unmistakably the charge therefore, would fail. Mere acceptance of any amount allegedly by way of illegal gratification or recovery thereof, dehors the proof of demand, ipso facto, would thus not be sufficient to bring home the charge under these two sections of the Act.
(iv) As a corollary, failure of the prosecution to prove the demand for illegal gratification would be fatal and mere recovery of the amount from the person accused of the offence under Sections 7 or 13 of the Act would not entail his conviction thereunder.
(v) On facts, qua the aspect of demand, when the complainant did hand over to the appellant the renewal application, the latter enquired from the complainant as to whether he had brought the amount which he directed him to bring on the previous day, whereupon the complainant took out Rs. 500/- from the pocket of his shirt and handed over the same to the appellant. Though, a very spirited endeavour has been made by the learned counsel for the State to co-relate this statement of PW1- S to the attendant facts and circumstances including the recovery of this amount from the possession of the appellant by the trap team, identification of the currency notes used in the trap operation and also the chemical reaction of the sodium carbonate solution qua the appellant, we are left unpersuaded to return a finding that the prosecution in the instant case has been able to prove the factum of demand beyond reasonable doubt. Even if the evidence of PW1- S. Udaya Bhaskar is accepted on the face value, it falls short of the quality and decisiveness of the proof of demand of illegal gratification as enjoined by law to hold that the offence under Section 7 or 13(1)(d)(i)&(ii) of the Act has been proved (Criminal Appeal No. 31 of 2009, dt. 14.09.2015)
P. Satyanarayana Murthy v. Dist. Inspector of Police (SC); www.itatonline.org

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Service tax-Finance Act 1994

Export of services – Rendering of services to foreign clients paying consideration in convertible foreign exchange would not attract service tax liability.
The Assessee was a steamer agent to its overseas clients, receiving consideration in convertible foreign exchange. Notification no. 6 of 1999 dt. 19-04-1999 exempted services receiving consideration in convertible foreign exchange from service tax. This exemption was withdrawn under Notification dt. 01-04-2003 and was reinstated under Notification No. 21 of 2003 dt. 20-11-2003. The Service-tax authority sought to recover service tax along with interest and penalty for the interim period when service tax was levyable. It was held that service tax could not be levied on services rendered to foreign clients paying consideration in convertible foreign exchange since service tax was a destination based consumption tax. Further, reliance was placed on circular dt. 25-04-2003 which clarified that exemption in respect of export of services would continue even after withdrawal of original notification.
CST v. Maersk India (P) Ltd. (2015) 116 DTR 353 / 38 STR 1121 / 51 GST 247 (Bom.)(HC)

S.65:Levy of service tax on Advocates-Interim stay of the operation and implementation of the judgement of the Bombay High Court upholding the constitutional validity of service-tax on lawyers granted. [S. 66, 66B]
In P. C. Joshi vs. UOI, a Writ Petition was filed in the Bombay High Court to challenge the levy of service-tax on advocates. It was claimed that an advocate renders services which cannot be said to be commercial or business like. They cannot be equated with the service providers mentioned in the

Finance Act 1994. It was also contended that advocacy is not a business but a profession and a noble one. An advocate is a part and parcel of the administration of justice and which is a sovereign or regal function and hence providing for a Service Tax on advocates would mean that their services will no longer be available or accessible to those seeking justice from a Court of law. That would defeat the constitutional guarantee of free, fair and impartial justice. The High Court dismissed the Petition and held that levy of service-tax on lawyers is valid. On appeal to the Supreme Court HELD by an interim order (SLP No. 13944/2015, dt. 10.08.2015)

Bombay Bar Association v. UOI (SC) ; www.itatonline.org

Editorial: Refer P.C.Joshi v.UOI (2015) 273 CTR 113/ 113 DTR 41 (Bom)(HC)/ Advocates Association of Western India v.UOI (2015) 273 CTR 113/ 113 DTR 41 (Bom)(HC) / Bombay Bar Association v.UOI (2015) 273 CTR 113/ 113 DTR 41 (Bom)(HC)

S.65(105)(n):Taxable service-Tour operator services-valuation – Liable to service tax.[S. 65(115),67]

Amount received for supplementary services is transport services also to be included in the gross amount received and therefore, for entire amount is liable for service tax.

Touraids (I) Travel Services v. CCE (2014) 47 GST 300 / (2015) 273 CTR 200 (All.)(HC)

S. 84 : Revision-Penalty- Adjudicating authority had correctly granted to the assessee the benefit of the provisions of S/80 by deleting the penalty. Exercise of revisional jurisdiction under S/84 by the CCE was not in accordance with law.[S. 73, 77,78,80&84]

The question of law before the HC was applicability of S/80 vis –a vis proviso to S/73(1) where the Tribunal has dismissed the appeal filed by the assessee against the order of CCE, Meerut-I passed in exercise of the revisional power conferred by S/84 of the Finance Act, 1994 imposing penalties on the assesee u/s 76, 77 & 78 of the Finance Act, 1994. The HC allowed the writ Petition and held that proviso in S/80 overrides S/78 as well by virtue of the non obstante clause. Non – obstante provision of S/80 must obviously be given a meaning .If the view of the revenue, which was accepted by the Tribunal, were to be affirmed, that would render the non-obstante provision of S/80 otiose. Consequently, the Tribunal was in error on coming to the conclusion that there would be no occasion to establish period of limitation had been validly invoked under the proviso to s/73(1). Adjudicating authority had correctly granted to the assesee the benefit of the provisions of S/80 by deleting the penalty. Exercise of revisional jurisdiction under S/84 by the CCE was not in accordance with law.

Daurala organics Ltd. v. CET (2015) 273 CTR 192(All)(HC)

West Bengal Taxation Laws (Second Amendment) Act, 1989.

Validating provisions--Refund--Interest--Rural employment cess and education cess- Charging provisions declared void by court. Retrospective substitution by Amendment Act with validation provision. No refund of cess paid for period before amendment notwithstanding interim order or final judgment of court to contrary. Judgment upholding validity of amended provisions. Interest on cess payable chargeable from date of assessment. [West Bengal Rural Employment and Production Act, 1976, S.4B--West Bengal Primary Education Act, 1973 S. 78C]

The charging sections of the West Bengal Rural Employment and Production Act, 1976, and the West Bengal Primary Education Act, 1973, which were struck down by the court in Buxa Dooars Tea Co. Ltd. v. State of West Bengal [1989] 179 ITR 91 (SC) as invalid being violative of article 301 of the Constitution were substituted with retrospective effect by the West Bengal Taxation Laws (Second Amendment) Act, 1989, which was subsequently held valid in Goodricke Group Ltd. v. State of West Bengal [1995] 98 STC 32 (SC). The High Court, based on interim orders passed in both cases, held that for the period prior to the Amendment Act, 1989, the assessee was entitled to a refund of the cess paid by it together with interest at 12 per cent. per annum, and that in so far as the interest payable after the Amendment Act was concerned, such interest would only be payable after the assessment orders were passed. On appeal by the Department contending that the interim order in Buxa Dooars Tea Co. Ltd.'s case [1989] 179 ITR 91 (SC) to the effect that if the assessee succeeded in the writ

petition, the State would refund the amount of cess collected with interest thereon at 12 per cent. per annum from the date of collection, did not survive and had no independent existence as it was substituted by the final order in which there was no separate order as to payment of interest :
Held, (i) that the interim order in Buxa Dooars Tea Co. Ltd.'s case [1989] 179 ITR 91 (SC) was self-operative. The final order in that case did not say anything to the contrary, and when both the judgments and the interim orders were read together, it was clear that the refund would have to be made together with 12 per cent. interest. However, in view of section 4B of the West Bengal Rural Employment and Production Act and section 78C of the West Bengal Primary Education Act, whatever might have been the subject-matter of Buxa Dooars Tea Co. Ltd.'s case [1989] 179 ITR 91 (SC), i.e, the subject-matter of the two Acts as originally enacted, would now, notwithstanding the interim order or the final judgment in that case, be deemed to have been validly levied, collected and paid as rural employment cess and education cess under the Amendment Act, 1989. Therefore, sections 4B and 78C had changed the basis of the law as it existed when Buxa Dooars Tea Co. Ltd.'s case [1989] 179 ITR 91 (SC) was decided and consequentially, the judgment and interim order passed in that case, would cease to have any effect. Also, what would have been payable under the Act as unamended, was now payable only under the 1989 Amendment Act which had come into force with retrospective effect.
(ii) That the High Court was right in holding that by virtue of Goodricke Group Ltd.'s case [1995] 98 STC 32 (SC), the interest on the amount of cess payable would only be payable from the respective dates of assessment for the various relevant periods till recovery. Goodricke Group Ltd.'s case [1995] 98 STC 32 (SC) made it clear that the assessee shall pay cesses stayed by an order of the court along with interest at 12 per cent. per annum. The expression "cesses stayed" had reference to the interim order in Goodricke Group Ltd.'s case [1995] 98 STC 32 (SC) which had stated that there would be no enforcement of demand under the Act or Rules and in the meanwhile, assessment might be made. The assessments were made with effect from July, 1993, onwards and consequential demands had been made with effect from 1995 onwards. On the facts, no question arose as to whether interest would become payable from the date of demand or from the date of the assessments inasmuch as the assessee supported the judgment of the High Court in question on this score and was not aggrieved thereby.
[Interest paid by the assessee from time to time to the State would be adjusted against any sum that would become payable as a result of the judgment.]
Appeal from the judgment and order dated May 8, 2003 of the Calcutta High Court in WPTT No. 3 of 2003.
Agricultural Income tax Officer .v. Goodricke Group Ltd. (2015) 373 ITR 166 (SC)

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