

Recent Important Decisions

Bombay Chartered Accountant's Society

Rajan Vora

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Agenda for today...

- ✓ **Aarham Softronics (SC) – Section 80-IC**
- ✓ **NRA Iron & Steel (P.) Ltd. (SC) – Section 68 – (Primary Onus)**
- ✓ **Lionbridge Technologies (P.) Ltd. – Section 92C r.w.s. 144C**
- ✓ **Vodafone Mobile Services Limited – Writ filed for refund claim rejected**
- ✓ **Celerity Power LLP (Mum. ITAT SB) – Section 45 – section 48 and section 72**
- ✓ **Recent case laws on Capital Gains**
- ✓ **Recent case laws on section 56**
- ✓ **Recent case laws on section 68 and section 69A**
- ✓ **Judicial Decisions on Medical Council Regulations – Disallowance u/s 37**
- ✓ **Transfer Pricing:**
 - AMP**
 - Corporate Guarantee**
 - Interest on loan**

Recent Important Decisions



Aarham Softronics ...(1/4)

[2019] 102 taxmann.com 343 (SC) (Dated 20 February 2019)

Background

- ▶ The issue for consideration before the Supreme Court, in a group of cases, was as under:
- ▶ *“Whether an assessee who sets up a new industry of a kind mentioned in sub-section (2) of Section 80-IC of the Act and starts availing exemption of 100 per cent tax under sub-section (3) of Section 80-IC (which is admissible for five years) can start claiming the exemption at the same rate of 100% beyond the period of five years on the ground that the assessee has now carried out substantial expansion in its manufacturing unit?”*
- ▶ The Hon’ble Supreme Court in *Classic Binding Industries (2018) 407 ITR 429 (SC)* (2 member bench) had answered the above question in negative and observed that:

“If that is allowed it will amount to doing violence to the provisions of sub-section (3) read with sub-section (6) of Section 80-IC”. SC added that “A pragmatic and reasonable interpretation of Sec. 80- IC would be to hold that once the initial AY commences and an assessee, by virtue of fulfilling the conditions laid down in sub-section (2) of Sec. 80-IC, starts enjoying deduction, there cannot be another “Initial AY” for the purposes of Sec. 80-IC within the aforesaid period of 10 years, on the basis that it had carried substantial expansion in its unit.”

Aarham Softronics ...(2/4)

[2019] 102 taxmann.com 343 (SC) (Dated 20 February 2019)

- ▶ The SC in *Classic Binding* case held that after availing deduction for a period of 5 years @ 100% of such profits and gains from the 'units', the assessee would be entitled to deduction for remaining 5 AYs @ 25% (or 30% where the assessee is a company), as the case may be, and not @ 100%.

Background of the Miscellaneous Application against *Classic Binding*

- ▶ The decision in *Classic Binding* was decided without serving notices on number of respondents and their case remained unrepresented.
- ▶ Thus, these respondents had filed miscellaneous applications for recall of order. The applications were allowed and the earlier order in *Classic Binding* was recalled.
- ▶ Further, all the appeals filed was heard afresh.

SC Ruling

- ▶ Section 80-IC(8) – Clause (v) defines "*Initial assessment year*" means the assessment year relevant to the previous year in which the undertaking or the enterprise begins to manufacture or produce articles or things, or commences operation or completes substantial expansion
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Aarham Softronics ...(3/4)

[2019] 102 taxmann.com 343 (SC) (Dated 20 February 2019)

- ▶ The decision in *Classic Binding* was given upon an incorrect interpretation of section 80-IC [by considering the definition of 'initial assessment year' u/s 80-IB(14) which does not contain provision for substantial expansion]
- ▶ The SC noted that *"The benefit of Section 80-IC is, thus, admissible not only when an undertaking or enterprise sets up new unit and starts manufacturing or producing article or things but is also accrued to those existing units, if they carry out "substantial expansion" of their units by investing required capital, in the assessment year relevant to the previous year."*
- ▶ Regarding observation of division bench in *Classic Binding* case that if deduction @ 100% is allowed for the entire period of 10 years, it would be doing violence to the language of sub-section (6) of Section 80-IC, the Hon'ble SC remarked that *"... this observation came without noticing the definition of 'initial assessment year' contained in the same very provision."*
- ▶ The SC accepted that in deciding the *Classic Binding* case, there was a mistake in interpretation and the definition u/s 80-IC(8)(v) was ignored

Aarham Softronics ...(4/4)

[2019] 102 taxmann.com 343 (SC) (Dated 20 February 2019)

- ▶ The SC accepted the assessee's contention there can be another 'initial assessment year' on the fulfilment of the condition mentioned in the said definition, namely, completion of substantial expansion of the existing unit.
- ▶ Thus, there can be two 'initial assessment years' u/s 80-IC(8) subject to the maximum cap of 10 years provided u/s 80-IC(6)
- ▶ Example:

Substantial Expansion – in 6 th year itself – Rate of Deduction u/s 80-IC	Substantial Expansion – in 8 th year itself – Rate of Deduction u/s 80-IC
First 5 years – 100%	First 5 years – 100%
6 th year to 10 th year – 100%	6 th year and 7 th year – 25%/ 30% 8 th , 9 th and 10 th year – 100%

- ▶ Accordingly, the SC decided the issue in favour of the assessee

NRA Iron & Steel (P.) Ltd. ...(1/3)

[2019] 103 taxmann.com 48 (SC) (Dated 5 March 2019)

Facts

- ▶ The assessee company had received share premium. The AO doubted the share capital/premium were genuine transactions or not and called upon the details
- ▶ The Assessee inter alia submitted that the entire Share Capital had been received by the Assessee through normal banking channels by account payee cheques/demand drafts, and produced documents such as income tax return acknowledgments to establish the identity and genuineness of the transaction. It was submitted that the onus on the Assessee Company stood fully discharged and section 68 could not be invoked.
- ▶ The AO had issued summons to representatives of investor companies. None of the respondents appeared in person and submission were made through dak.
- ▶ The AO independently got field enquiries conducted with respect to the identity and credit-worthiness of the investor companies, and to examine the genuineness of the transaction.
- ▶ The detailed inquiry of the AO reveals that:
 - ▶ None of the investor companies could justify such high premium.
 - ▶ Some of the investor companies were non-existent.
 - ▶ Almost none of the Investor companies did not establish the source of funds
 - ▶ None of the investor companies appeared before the AO and merely sent written response through dak
- ▶ Thus, the share premium was added u/s 68.

NRA Iron & Steel (P.) Ltd. ...(2/3)

[2019] 103 taxmann.com 48 (SC) (Dated 5 March 2019)

- ▶ The Commissioner of Income Tax (Appeals)-I, New Delhi vide Order dated 11.04.2014 deleted the addition made by the A.O. on the ground that the Respondent had filed confirmations from the investor companies, their Income Tax Return, acknowledgments with PAN numbers, copies of their bank account to show that the entire amount had been paid through normal banking channels, and hence discharged the initial onus under Section 68 of the Act, for establishing the credibility and identity of the shareholders.
- ▶ On appeal to the ITAT, the Tribunal dismissed the appeal of the Revenue on the ground that the assessee had discharged the primary onus to establish the identity and credit –worthiness of the investors, especially when the investor companies had filed their returns and were being assessed
- ▶ On appeal to the High Court, the High Court dismissed the appeal and affirmed the decision of the Tribunal on the ground that the issues raised before it were urged on facts and the lower authorities had taken sufficient care to consider the relevant circumstances. Thus, no substantial question of law arose.

Issue

The issue for consideration before the Supreme Court is whether the assessee has discharged the primary onus to establish genuineness of the transaction u/s 68

NRA Iron & Steel (P.) Ltd. ...(3/3)

[2019] 103 taxmann.com 48 (SC) (Dated 5 March 2019)

Ruling of th Supreme Court

- ▶ The ruling of the Supreme Court discusses a number of judgments on the provisions
 - ▶ The principles for invoking section 68 for share capital/ premium, viz.:
 - ▶ Discharge of Primary Onus: The assessee is under a legal obligation to prove genuineness of the transaction, identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of AO
 - ▶ If enquiries and investigation reveal the identity of the creditors to be dubious / doubtful, or lack credit – worthiness, then genuineness would not be established
 - ▶ The detailed inquiry of the AO reveals that:
 - ▶ No material on record to prove that money was received from independent legal entities. Survey revealed some of the investor companies were non-existent.
 - ▶ The investor companies were filing returns with negligible taxable income and did not have financial capacity to invest funds for purchase of shares at a premium
 - ▶ No explanation was available for applying for shares at such high premium
 - ▶ Investor companies did not establish the source of funds
 - ▶ The lower authorities have ignored the detailed findings of the AO and had erroneously held that merely because the assessee had filed all the primary evidence, the onus on assessee stood discharged
 - ▶ On the facts of the present case, the assessee failed to discharge the onus casted u/s 68 and thus the AO was justified in making the additions
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Lionbridge Technologies (P.) Ltd.

[2018] 100 taxmann.com 413 (Bombay)

Issue of Corrigendum to modify final assessment order into draft assessment order beyond time limit is not tenable

- ▶ The time limit for passing the draft assessment order was 31st March, 2014. The AO passed a final assessment order dated 12th March, 2014. The AO vide a corrigendum dated 16th April, 2014 modified the final assessment order into a draft assessment order

Issue

Whether the draft assessment order was passed beyond time limit and thus untenable?

Ruling of the Tribunal

- ▶ The Tribunal noted that in terms of section 153(2A) the time limit for passing draft assessment order was 31st March, 2014.
- ▶ The Tribunal held that it was not permissible to pass the draft assessment order beyond time limit . As corrigendum issue beyond time limit was defective, it was ineffective.

Bombay HC

The HC held that the appeal of the Revenue did not give rise to any substantial question of law and thus was dismissed

Vodafone Mobile Services Ltd. ...(1/3)

[2018] 100 taxmann.com 310 (Delhi) (dated 14 December, 2018)

Writ filed for expeditious claim of refund rejected

- ▶ The assessee filed returns for assessment years 2014-15, 2015-16 and 2016-17 claiming huge amount of refunds. However, these returns had not been processed by the AO till date.
- ▶ The assessee requested the Department for expeditious processing of returns.
- ▶ The assessee filed a writ petition on account of inaction on the part of AO in processing income tax returns contending that same would result in issuance of huge refunds to the assessee. The petitioner assessee sought a direction upon the AO to expeditiously process the refund claim and issue refund under consideration as it was under financial stress.

Ruling of the High Court

- ▶ Under section 143(1D), processing of a return under Section 143(1)(a) is not necessary where a notice has been issued under Section 143(2) of the Act. This provision has now been amended by the Finance Act, 2016 (with effect from the AY 2017-18) to provide that if scrutiny notice is issued under Section 143(2), processing of return shall not be necessary before the expiry of one year from the end of the financial year in which return is submitted.

Vodafone Mobile Services Limited ...(2/3)

[2018] 100 taxmann.com 310 (Delhi) (dated 14 December, 2018)

▶ **Critical observations of the Delhi HC:**

- ▶ The AO has to apply his mind to consider whether the facts and circumstances of the case, warrant some or all of the refund of the assessee's amounts, or if all of it needs to be withheld, whenever the assessee presses for refund. This exercise should be undertaken promptly, keeping in mind the time limit under the normal provision of Section 143 (1) expires.
 - ▶ Decisions in *Tata Teleservices Ltd. 386 ITR 30 (Delhi)* and *Group M. Media India (P.) Ltd. [2017] 77 taxmann.com 106 (Bom.)* distinguished as a reasoned order is made by AO
 - ▶ Wholly inequitable for the Assessing Officer to merely sit over the petitioner's request for refund citing the availability of time up to the last date of framing the assessment under Section 143 (3). The proper interpretation of the statute and the situation is that the AO should take up an expeditious disposal of the question once the assessee requests for release of the refund
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- ▶ Section 143(1D) starts with a non-obstante clause and thus it overrides the one year period in section 143(1) to issue an intimation
 - ▶ The Revenue had relied on the order whereby the it was noted that pending special audit, it will be prejudicial to the interest of the Revenue to process the returns without completion of the pending scrutiny

Vodafone Mobile Services Limited ...(3/3)

[2018] 100 taxmann.com 310 (Delhi) (dated 14 December, 2018)

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- ▶ In the facts of the present case, for the AYs in consideration, for AY 2014-15, the petitioner has approached the AAR and for AYs 2015-16 and 2017-18, scrutiny assessments are pending before the AO. The AO has exercised discretion under Section 143(1D) not to process the returns considering the fact that substantial demand has been raised on completion of scrutiny assessment of earlier years.

 - ▶ Under section 143(1)(d), it is the discretion of AO to grant refund wherever the possibility of issue of notice u/s 143(2) exists

 - ▶ Thus, the writ petition of the assessee is dismissed

 - ▶ **Comments:**
 - ▶ The decision of the Hon'ble Delhi High Court was in light of the pending demand, special audit completion and completion of assessment. The High Court observed that section 143(1D) empowered the AO to not process the return pending issue of notice u/s 143(2). Further, the Delhi High Court had observed that Revenue had made out a case that processing of refunds and consequent issue of refund will be prejudicial to the interest of Revenue.

 - ▶ Notably, the High Court had noted that the AO should not sit over the refund of the assessee

 - ▶ Thus, the decision of the HC has considered detailed reasons for not issuing refund in the given facts and circumstances
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Celerity Power LLP

[2019] 174 ITD 433 (Mumbai - Trib.)(ITA No. 3637/Mum/2014 dated 16 November 2018) (Mum ITAT)

Conversion of company into LLP (not satisfying the conditions) results into 'transfer'

Issue

- ▶ Whether conversion of company into LLP without satisfying the conditions results into a transfer and capital gains is chargeable?

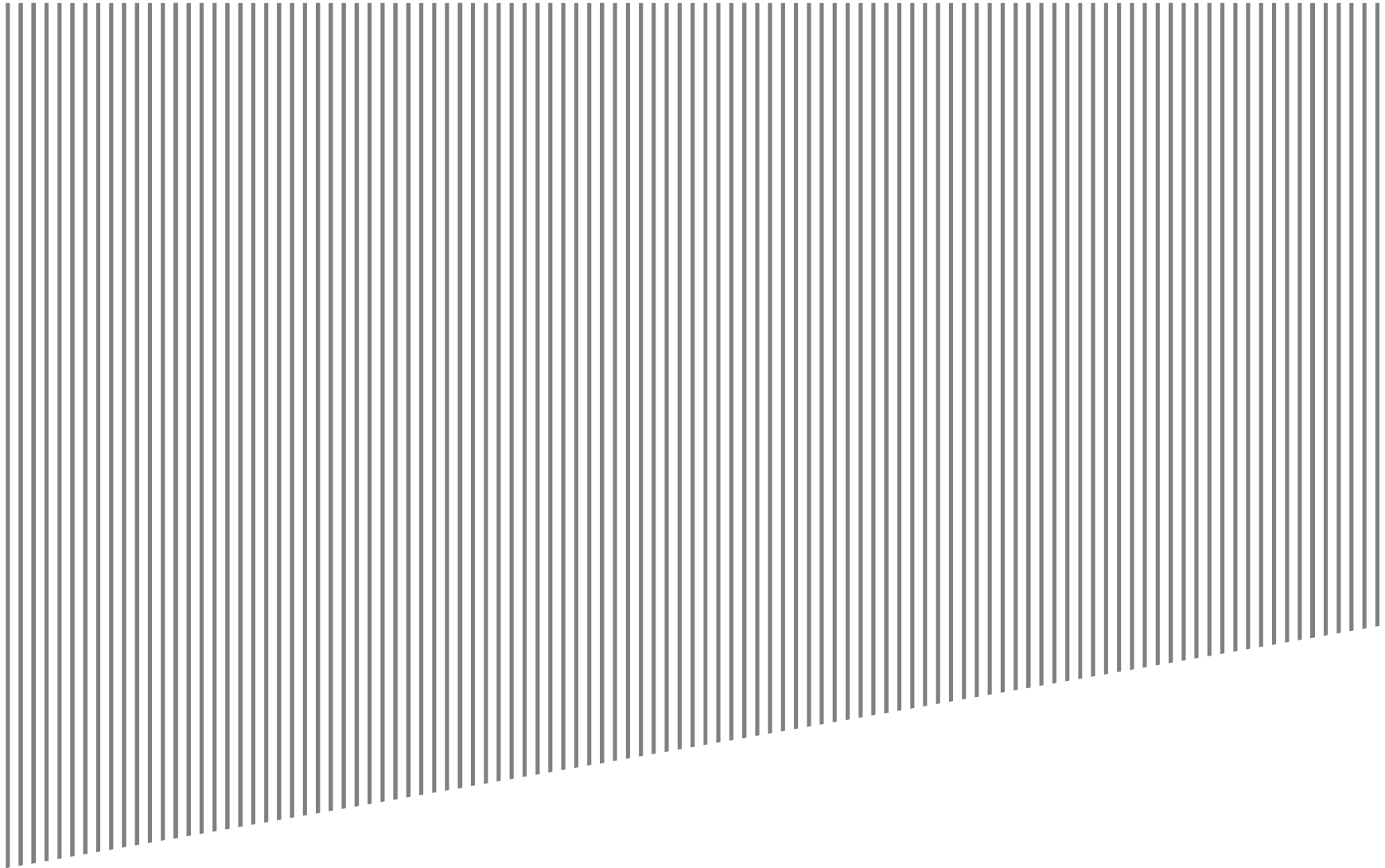
Ruling of the Tribunal

- ▶ The conversion of company into LLP amounts to 'transfer', if the conditions of section 47(xiib) are not satisfied
 - ▶ CIT v. Texspin Engg. & Mfg. Works [(2003) 263 ITR 345 (Bom)] and CIT v. Umicore Finance Luxmeborg [2016] 76 taxmann.com 32/244 Taxman 43 (Bom.) distinguished on facts – as decision on conversion of partnership firm into company
- ▶ Section 47(xiib) and section 47A cannot be invoked in the same year
- ▶ As the difference between the transfer value and cost of acquisition is Nil, provisions of computation on conversion of company into LLP is rendered unworkable and hence not taxable in the hands of the LLP
- ▶ Carry forward of losses cannot be allowed, as conditions u/s 47 are not met
- ▶ Deduction of claim u/s 80-IA is allowed as the deduction is allowed to the 'undertaking' and not 'the owner of the undertaking'

Issue-specific Case Laws



Capital Gains



Capital Gains

Sale of Unconstructed House eligible for exemption u/s 54F – Kalpana Hansraj - [2019] 102 taxmann.com 228 (Bombay)

- ▶ The assessee booked a flat in 1981. The flat was not constructed for a long time. The builder had failed to complete the construction and faced heavy legal disputes. The construction of the building was not complete up to Feb 2011. The assessee sold her property in 2005. The assessee purchased a residential house property and claimed exemption u/s 54F.
- ▶ The issue before the Tribunal was whether transfer of the aforementioned property is eligible for section 54F?
- ▶ The Tribunal held that in the peculiar facts of the case it cannot be said that the assessee transferred a 'long term capital asset in the nature of residential house'. Thus, the assessee would be eligible for deduction u/s 54F
- ▶ The High Court did not find error in the order of Tribunal and upheld the same

Date of Allotment – Letter of Allotment (DDA Property) – Vembu Vaidyananth [2019] 101 taxmann.com 436 (Bombay)

- ▶ The allotment letter was issue to the assessee in December, 2004. The agreement was executed in May, 2008. The flat was not constructed for a long time. The builder had failed to complete the construction and faced heavy legal disputes. The construction of the building was not complete up to Feb 2011. The assessee claimed the transfer as LTCG and thus eligible for exemption u/s 54F.
- ▶ The issue before the Tribunal was the date of acquisition (Date of execution of agreement or date of allotment).
- ▶ The Tribunal decided in favour of the assessee considering the date of allotment letter as date of acquisition.
- ▶ The HC dismissed the appeal of the Revenue to hold that the date of letter of allotment can be considered as the date of acquisition of the property relying on the CBDT Circular No.471 dated 15-10-1986 and Circular No.672 dated 16th December, 1993

Capital Gains

Liquidated Damages for failure to complete previous sale deed allowed as expenditure wholly and exclusively in connection to transfer – Kaushalya Devi - [2018] 92 taxmann.com 335 (Delhi)

- ▶ The assessee had entered into an agreement for sale and on failure to fulfil the same, the assessee paid liquidated damages and the sale was cancelled. On subsequent sale by assessee, the damages were claimed as an expenditure in connection with transfer
- ▶ The High Court held that the word 'connection' connotes a casual connect between the transfer and expenditure and 'wholly and exclusively' means if the expenditure was genuine and factually expended.
- ▶ Thus, the amount paid for liquidated damages was allowable u/s 48(i)

Conversion of CCPS into equity shares is not a 'transfer' – Periar Trading Company (P.) Ltd. - Periar Trading [2019] 174 ITD 137 (Mumbai - Trib.) / [2018] 100 taxmann.com 263 (Mumbai - Trib.)

Conversion of CCPS into equity shares is not 'exchange' and thus it will not amount to 'transfer' u/s 2(47). Reliance on *ITO v. Vijay M. Merchant [1986] 19 ITD 510 (Mum.)* and CBDT Circular F No. 12/1/64-IT(A) dated 12/05/1984.

Note: Section 47(xb) (inserted w.e.f. A.Y. 2018-19) excludes conversion of preference shares into equity shares as not transfer

Capital Gains

Transfer of Trademark, Goodwill, etc. – Allocation of consideration cannot be done by AO – Bisleri International (P.) Ltd. [2018] 94 taxmann.com 259 (Gujarat)

- ▶ The assessee transferred its trade mark, goodwill, technical knowhow and franchise rights under different agreements. The AO questioned the lower valuation of goodwill as trademark and other rights were valued at 20 times the goodwill.
- ▶ The CIT(A) decided in favour of the assessee as trademark, emblem, figure and even the reputation of the products of the company stood transferred, leaving very little by way of goodwill and the AO's contention was without any scientific backing.
- ▶ The Tribunal and High Court upheld the view of CIT(A) against revenue.

(Similar view has been taken by Hon'ble Bombay High Court in case of Parle Soft Drink (P) Ltd which is affirmed by Supreme Court)

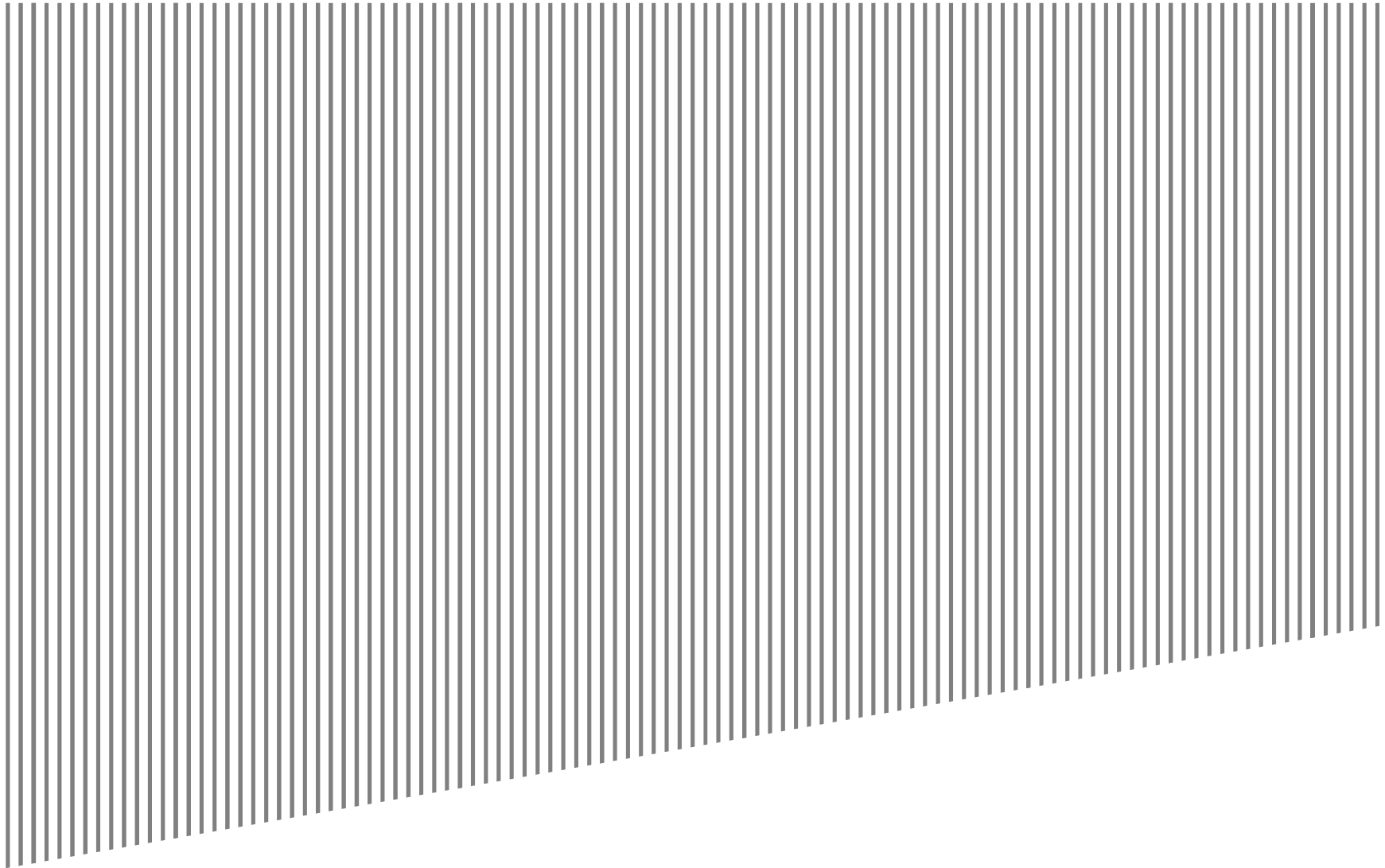
No FMV Substitution for Tenancy Rights – Dharmakumar C. Kapadia [2018] 96 taxmann.com 194 (Bombay)

- ▶ The assessee had inherited tenancy rights prior to 1981. On sale of the rights, the assessee claimed fair market value as on 1st April 1981 as the cost of acquisition.
- ▶ The Tribunal held that the tenancy rights would not be eligible for FMV substitution u/s 55(2)(a).
- ▶ The HC upheld the decision of the Tribunal and observed that section 55(2)(b) (provision for substitution of fair market value) does not apply to tenancy rights. In case of tenancy rights, section 55(2)(a) would apply (i.e. cost of acquisition would be the actual cost of purchase or Nil).

Consideration in lieu of right to sue is not a transfer of capital asset and thus not chargeable to capital gains – Bhojison Infrastructre P. Ltd. [2018] 99 taxmann.com 26 (Ahmedabad - Trib.)

- ▶ The assessee entered into a development agreement. The seller sold the land to another person. The seller and prospective purchaser paid consideration to assessee to avoid legal dispute. The assessee claimed that the receipt was not from 'transfer' of capital asset, thus not chargeable to capital gains.
- ▶ The Tribunal held that the 'right to sue' is a 'right in *personam*' and not a capital asset'. Thus, capital gains would not be chargeable

Section 56



Section 56

Proviso to section 56(2)(viiia) – Retrospective Applicability – Aamby Valley Ltd. [2019] 102 taxmann.com 385 (Delhi - Trib.)

- ▶ During F.Y. 2011-12, the subsidiary company of the assessee got amalgamated into the assessee company. The subsidiary company was holding shares of many closely held companies. Upon amalgamation, the assessee received shares held by the subsidiary company.
- ▶ As the assessee had paid no consideration for receipt of such shares, the AO considered the value of these shares as computed u/R 11UA as income u/s 56(2)(viiia).
- ▶ The proviso to section 56(2)(viiia) excluding receipt of shares under amalgamation was applicable with effect from Assessment Year 2013-14.
- ▶ The Tribunal held the amendment to be retrospective in nature and thus the income u/s 56(2)(viiia) was deleted

Rights Issue & Bonus Issue – Subhodh Menon (ITA No.2776/Mum/2015 dated 7/12/18)

The Mumbai Tribunal has reiterated the findings in *Sudhir Menon HUF (148 ITD 260) (Mum. ITAT)* upholding that provisions of section 56 would not apply as:

- ▶ Rights issue – shares did not exist prior to allotment, section 56(2)(vii) did not intend to cover rights issue, valuation date u/R 11U is date of receipt and shares are received on allotment
- ▶ Bonus issue – as it did not increase the wealth of the recipient shareholder

Section 56

Interpretation of section 56(2)(vii) and (viib) – Liberal Interpretation

Kumar Pappu Singh [2019] 101 taxmann.com 122 (Visakhapatnam - Trib.)

- ▶ The assessee was a shareholder in a company along with seven other relatives. The company had made a rights issue. The assessee was the only subscriber to the rights issue and shares were issued to him at less than fair market value. Additionally, due to the rights issue, the assessee's shareholding increased from 76% to 91%.
- ▶ The issue before the Tribunal was the taxability of the income arising on account of issue of shares at less than FMV u/s 56(2)(vii)
- ▶ The Tribunal observed that the provisions of section 56(2)(vii) are anti-abuse provisions and surrender of rights from relative is not covered u/s 56(2)(vii). Further, as all the shareholders are close relatives and the entire shareholding is continued to be held by close relatives, the provisions of section 56(2)(vii) would not apply.

Vaani Estates Pvt. Ltd. (172 ITD 629) (Chennai ITAT)

- ▶ The assessee company has only two shareholders (mother and daughter). The assessee company has issued shares at excessive premium.
- ▶ The issue before the Tribunal was the taxability of the excess premium u/s 56(2)(viib)
- ▶ The Tribunal has adopted liberal interpretation of section 56(2)(viib) to hold that the rationale behind introduction of the provisions of Sec. 56(2)(viib) by Finance Act, 2012 was only to deter generation and use of black money and therefore it was not justified to invoke the provision in case where the benefit of excess premium paid by one shareholder is enjoyed, only by her daughter being the only other shareholder in the company.

Section 56

Rejection of DCF valuation by AO possible in given facts – TUV Rheinland NIFE Private Limited (ITA No.3160/Bang/2018 dated 27/02/2019) [TS-92-ITAT-2019(Bang)]

- ▶ The assessee had issued shares at premium and the valuation was done under the Discounted Cash Flow method. The AO observed on examination of the Valuation Report that it relied only on values certified by Management. Thus, the computed the value as per NAV method as per Rule 11UA of IT Rules.
- ▶ On appeal, the CIT(A) considering all the facts and issues, passed a detailed order, upholding the addition made by the AO
- ▶ Before the Tribunal, the issue was regarding the rejection of the DCF valuation.
- ▶ The Tribunal upheld the order of the AO based on the detailed order of the AO and CIT(A). As regards the question raised on correctness or reasonableness of the valuation report, the Tribunal relied upon the decision of Agro Portfolio Pvt. Ltd., in ITA No.2189/Del/2018 dated 14.05.2018
- ▶ Thus, the Tribunal upheld the order of the AO.

Decisions where DCF method cannot be rejected

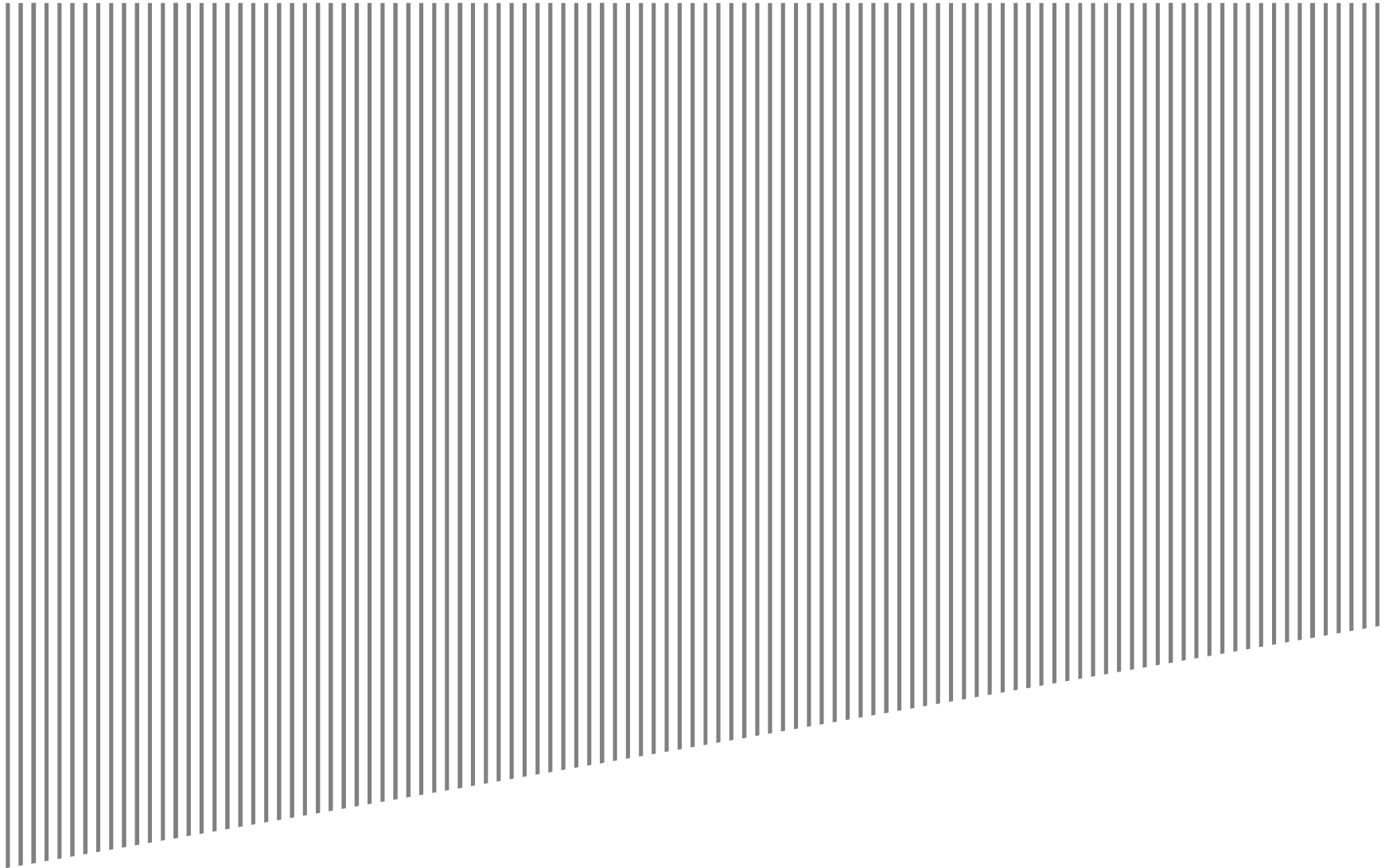
- ▶ Vodafone M-Pesa Ltd. vs. PCIT (2018) 92 Taxmann 73 (Bombay)
- ▶ DCIT vs. M/s. Ozoneland Agro Pvt.Ltd. (in ITA No. 4854/Mum/2016 vide order dated 02.05.2018)
- ▶ Medplus Health Services P. Ltd. Vs. ITO (2016) 158 ITD 105 (Trib. Hyd)
- ▶ Rameshwaram Strong Glass (P) Ltd. (in ITA No. 884/JP/2016 vide order dated 12.07.2018)

Section 56

Section 56(2)(viib) will apply to share application money received prior to 1/4/2012, where shares are allotted are after that date – Cimex Land and Housing Private Limited (ITA No. 5933/DEL/2018 dated 25/02/2019) [TS-93-ITAT-2019(DEL)]

- ▶ The assessee received share application money prior to 1st April, 2012. The shares were allotted after 1st April, 2012. The provisions of section 56(2)(viib) apply on or after 1st April, 2012
- ▶ The issue before the Tribunal was whether section 56(2)(viib) would apply in case where share premium is received before the date of applicability of the section (1st April, 2012)?
- ▶ The Tribunal noted that the provisions of section 56(2)(viib) apply upon allotment of shares.
- ▶ The Tribunal observed that the assessee is liable to justify the share premium by valuation report under Rule 11U and Rule 11UA. Thus, the Tribunal remanded back the matter to the AO to compute income as per valuation

Section 68 and 69A



Section 68

Allotment of shares in settlement of pre-existing liability could not be treated as unexplainable cash credits , as no cash was involved – V. R. Global Energy (P.) Ltd. [2018] 96 taxmann.com 647 (Madras)

- ▶ The assessee company had a liability due to a person. The assessee company had allotted shares in settlement of this pre-existing liability. The AO made an addition u/s 68 as the assessee did not offer satisfactory explanation. The CIT(A) and Tribunal upheld the findings of the AO.
- ▶ The High Court decided in favour of the assessee that section 68 would not apply, as no cash transaction was involved.

Addition u/s 68 upheld for huge loan received by assessee from company having no fixed assets and declaring very low income – Seema Jain [2018] 96 taxmann.com 307 (Delhi)

- ▶ The assessee received loan of Rs. 18. 45 crores from a company. The company had no tangible or intangible fixed assets and had declared income in thousands. Also, the company had issued shares at excessive premium.
- ▶ On the facts, the Tribunal noted that there was a doubt on the creditworthiness of the company. Further, the Tribunal had rejected the contention that loan was repaid, as it did not prove the genuineness.
- ▶ The High Court upheld the order of the Tribunal

Section 68

Section 56(2)(viib) and section 68 – In case of excessive premium, where addition u/s 68 not made due to satisfactory explanation, the addition u/s 56(2)(viib) could still be made – Sunrise Academy of Medical Specialities (India) (P.) Ltd. [2018] 96 taxmann.com 43 (Kerala)

- ▶ The assessee, a closely held company, had issued shares at excessive premium. The assessee proved the genuineness of the subscribers.
- ▶ The issue before the High Court was applicability of section 56(2)(viib) when addition u/s 68 was deleted.
- ▶ The High Court held that the section 56(2)(viib) would apply even if provisions of section 68 do not apply as satisfactory explanation was furnished

Issue – Reliance on Object being Anti-abuse provisions – Should the satisfactory explanation u/s 68 suffice non-applicability of provisions of section 56(2)(viib), as they are anti-abuse provisions? Dichotomy in decision in Vaani Estate and Kumar Pappu Singh?

Identity and Capacity of subscriber and Genuinness – Non-residents subscriber – Varsity Education Management Pvt. Ltd (ITA No. 6991/Mum/2016) dated 24/10/2018

- ▶ Compulsorily convertible preference shares issued by assessee to Mauritius company at excessive premium whereas equity shares were issued to other shareholders at face value. The AO sought to tax the difference between the issue price and price as per share valuation reported submitted to RBI under FEMA u/s 68.
- ▶ The CIT(A) deleted the addition made by the AO
- ▶ The issue before the Tribunal was regarding the addition u/s 68
- ▶ The ITAT noted that Hon'ble Bombay High Court in *Green Infra Ltd (392 ITR 7)(Bom)* and *Gagandeep Infrastructure Pvt Ltd (394 ITR 680) (Bom)* had held that no addition could be made u/s 68 of the Act in respect of Share premium, if the Assessee discharges its burden by proving the three essential ingredients, viz., identity of the subscriber, the capacity of the subscriber and the genuineness of the transaction. As the AO was satisfied will all, the ITAT deleted the addition

Note: The decision is for Assessment Year 2012-13. Post the amendment w.e.f. A.Y. 2013-14, the assessee would have prove the source of source for resident subscribers.

Section 69A

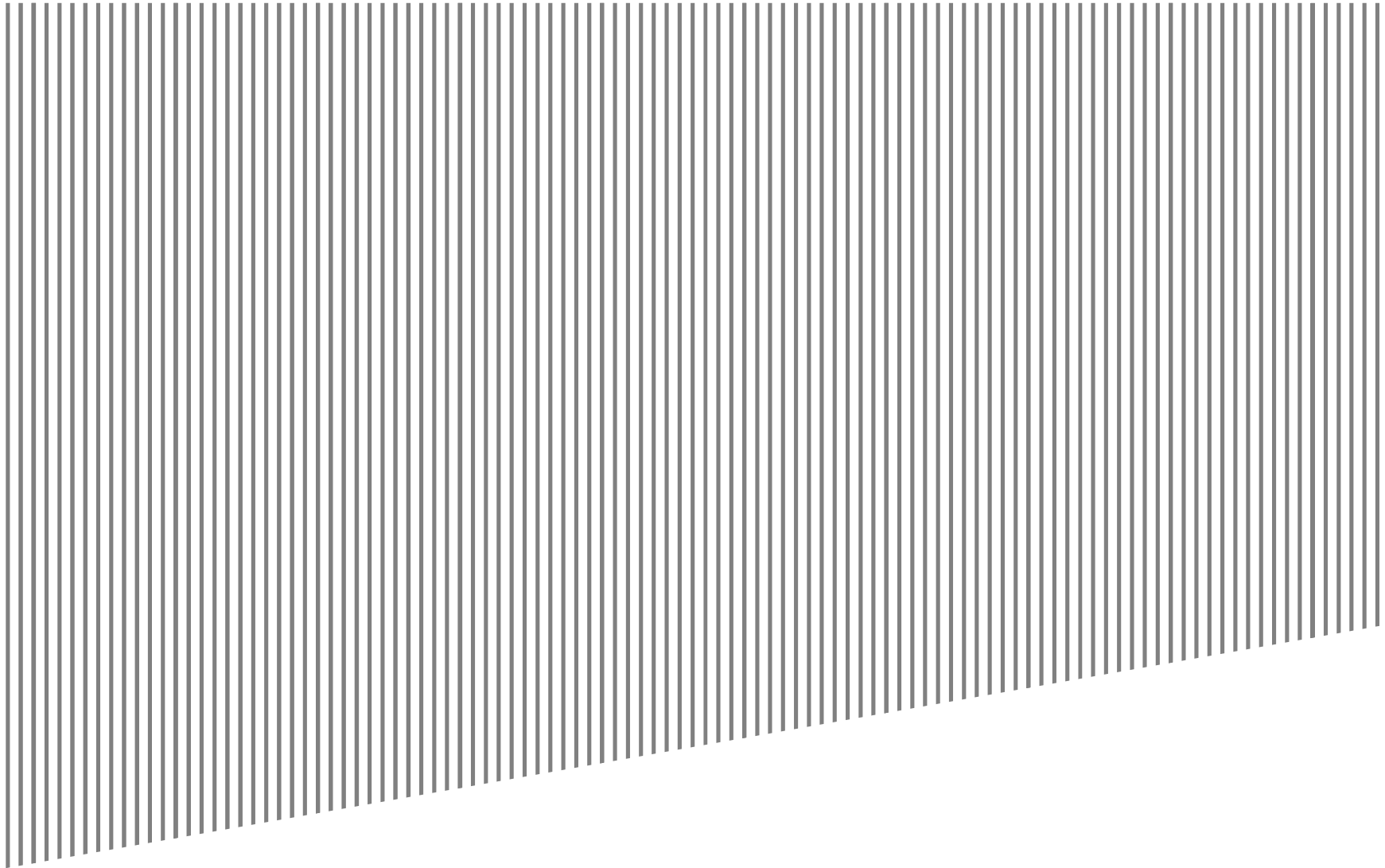
Unexplained Investment – HSBC paper leaks – Deepak B Shah (ITA No. 6065 and 6066/Mum/2014) dated 30/10/2018

- ▶ On receipt of 'Base Note' as part of Swiss leaks investigation, the AO conducted survey at the premises of the two individuals and carried out reassessments on the belief that foreign bank accounts were held by them. Addition was made under section 69A on account of deposit made in HSBC Bank which was partly confirmed by the CIT(A).
- ▶ **The issue before the Tribunal was the addition made u/s 69A.**

Ruling of the Tribunal

- ▶ The Tribunal noted that the facts on record revealed that a non-resident individual from UAE had created and constituted an overseas Discretionary Trust. The non-resident individual had also filed an affidavit and had sworn before the UAE authorities, that he had created the Trust with his initial contribution and none of the discretionary beneficiaries had contributed to the funds or received any funds as distribution.
- ▶ As the non-resident had held that HSBC Bank account was owned by him and no income deemed to accrue or arise in India from the said bank accounts and hence his foreign income could not be taxed in India. In view of the same, Tribunal held that the Department failed to show any linkage of the foreign bank account with Indian money or the taxpayers and hence addition made under section 69A of the Act by the AO was liable to be deleted.
- ▶ As the assessee was not the owner of the money, provisions of section 69A could not be invoked. Thus, the ITAT deleted the addition

Judicial Decisions on MCI Guidelines



Judicial Decisions on MCI Guidelines

MCI guidelines are not applicable to pharma companies

- ▶ Max Hospitals, Pitampura (WP 1334/2013) (Delhi HC)
- ▶ PHL Pharma (146 DTR 149) (Mum Tribunal)
- ▶ Solvay Pharma India Ltd. (169 ITD 13) (Mum Tribunal)
- ▶ Aristo Pharmaceuticals Pvt. Ltd (ITA No. 5563 & 6129/Mum-2014) dated 26 July 2018
- ▶ Novartis Healthcare Pvt Ltd (ITA 2786/M/2016) dated 21 December 2018
- ▶ India Metronic Pvt Ltd (ITA 1246/M/2016) dated 2 May 2018
- ▶ Synthes Medical Private Limited (ITA No. 1784/Mum/2016 dated 13 April 2018) (Mumbai Tribunal)

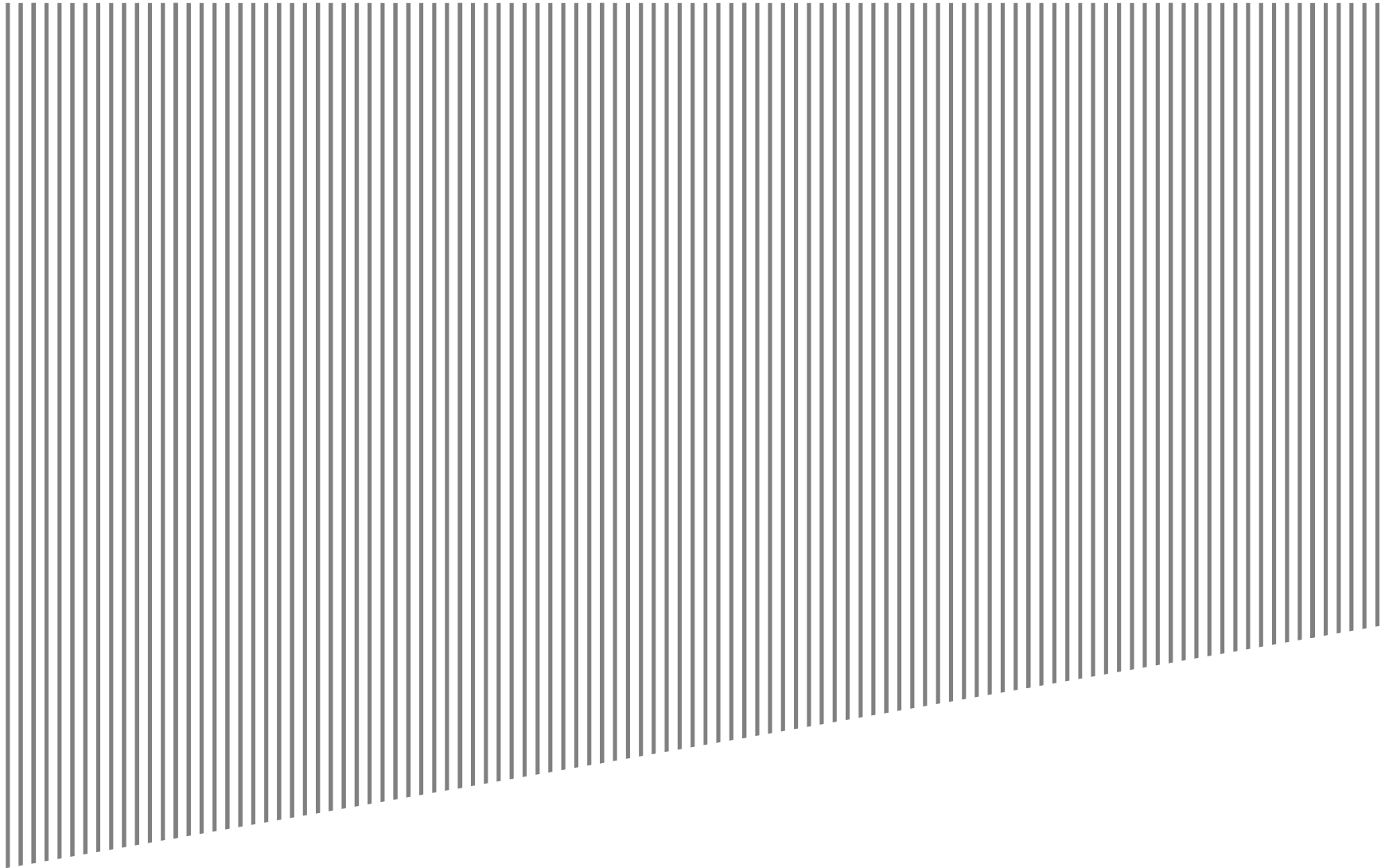
CBDT Circular 5/2012 dated 1 August 2012 is applicable prospectively

- ▶ Syncom formulation India Ltd (ITA 6429/M/2012)
- ▶ Macloeds Pharmaceutical Ltd (74 Taxmann.com 250)
- ▶ UCB India Pvt Ltd (ITA 6681/M/13) dated 18 May 2016

Disallowance confirmed in light of MCI guidelines

- ▶ Confederation of Indian Pharmaceutical Industry (SSI) (353 ITR 388) (Himachal Pradesh HC)
- ▶ Kap Scan and Diagnostic Centre (344 ITR 476) (Punjab & Haryana HC)
- ▶ Liva Health Care (181 TTJ 433) (Mumbai Tribunal)
- ▶ Ochoa Laboratories (Delhi ITAT) (166 ITD 508) (Delhi Tribunal)

Transfer Pricing



AMP adjustment

Principles laid down by Special Bench in case of LG Electronics Ltd (22 ITR 1)

- ▶ AMP is an international transaction and has to be benchmarked separately.
- ▶ Bright Line Test ('BLT') is appropriate for benchmarking the same although not prescribed under Indian laws.

The decision of LG has been overruled by Delhi HC in case of Sony Ericsson Mobile Communications India Pvt. Ltd. and Maruti Suzuki India Ltd.

Sony Ericsson Mobile Communications India Pvt. Ltd (374 ITR 118) (for traders)

- ▶ BLT is not appropriate and benchmarking was to be done under combined approach method.
- ▶ AMP to be aggregated and benchmarked along with other international transaction

Maruti Suzuki India Ltd. (381 ITR 117) (for manufacturers)

- ▶ AMP is not an international transaction.
- ▶ Various HC/ITATs in case of Heinz India Pvt. Ltd., L'oreal India Pvt. Ltd., Whirlpool India Ltd. (381 ITR 154), Bausch & Lomb Eyecare (Ind) Pvt. Ltd. (381 ITR 227) etc. have held that AMP is not an international transaction by following the ruling of Delhi HC in case of Maruti Suzuki.
- ▶ **SLP has been filed by the Revenue in the SC, which is pending for disposal.**

Luxotica India Eyewear (P) Ltd (187 TTJ 157)

- ▶ Intensity adjustment can be carried out to determined the ALP of AMP provided the same was done by AO/TPO

Note: Despite various rulings of HC/ITAT in favour of the Assessee holding AMP is not an international transaction, TPOs are still making adjustments by applying BLT by giving different names/terminology.

Issue of Corporate Guarantee & interest on loan given to AE

Transaction of providing corporate guarantee is an international transaction:

- ▶ Bharti Airtel Limited (ITA No.5816/Del/2012) dated 11 March 2014 (Delhi Tribunal)
- ▶ Marico Ltd 70 Taxmann.com 214 (Mum Trib)
- ▶ Siro Clinpharm Private Limited (46 CCH 485) (AY 2009-10) and (ITA. No. 1269 and 1493/Mum/2015) (AY 2010-11) dated 31 March 2016 (Mumbai Tribunal)
- ▶ Vivimed Labs Ltd(ITA No 404 and 479/Hyd/2015) dated 2 June 2017 (Hyderabad Tribunal)
- ▶ Dr Reddy's Laboratories Ltd (ITA.No.294/Hyd/2014 and ITA.No.458/Hyd/2015) dated 28 April 2017
- ▶ Rain Cements Ltd (ITA No 433/Hyd/2016) dated 26 April 2017.

ALP of guarantee fee should be at 0.5%

- ▶ Manugraph India Ltd. (ITA No. 454/2016) dated 19 November 2018 (Bombay HC)
- ▶ Everest Kanto Cylinder Ltd. vs. DCIT (ITA No. 542/Mum/2012) dated 23 November 2012 (Mumbai Tribunal) approved by Bombay High Court in Income-tax Appeal No 1165 of 2013 vide order dated 8 May 2015
- ▶ Everest Kanto Cylinder Ltd (ITA No. 435 of 2015) dated 18 July 2017 (Bom HC)
- ▶ Mahindra Intertrade Ltd (ITA No. 269/M/2014) dated 15 March 2017(Mumbai Tribunal)

Corporate guarantee cannot be compared to bank guarantee for determination of ALP

- ▶ Glenmark Pharmaceuticals Ltd (ITA 1302 of 2014) dated 2 February 2017 (Bom HC)
- ▶ Glenmark Pharmaceuticals Ltd (260 Taxman 249) (Bom HC)

Note: The SC in case of Glenmark Pharmaceuticals Ltd has dismissed the SLP filed by the Department

Issue of Interest on loan given to AE

LIBOR is appropriate benchmark for interest on loans given to AE::

- ▶ Manugraph India Ltd. (ITA No. 454/2016) dated 19 November 2018 (Bombay HC)
- ▶ Videocon Industries Ltd (ITA 1055 and 1178 of 2015) dated 21 March 2018 (Bom HC)
- ▶ Cotton Natural India Pvt. Ltd. (ITA No. 233/2014) dated 27th March 2015 (Delhi High Court)
- ▶ Tata Auto-comp Systems Limited (374 ITR 516) (Bombay HC)
- ▶ Aditya Birla Minacs Worldwide Limited Vs. DCIT (7033/Mum/2012) dated 25th March 2015 – Affirmed by Bombay HC in ITA No. 1132 of 2015 dated 25 April 2018
- ▶ Everest Kanto Cylinder Ltd. (ITA No. 294/2016) dated 20 July 2018 (Bombay HC)

Thank you