Digest Of Important Judgments on Transfer Pricing, International Tax and Domestic Tax

(Pronounced in July 2016)

By Sunil Moti Lala, Advocate

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– Loan / Corporate Guarantee - Cases 22 to 25

– Royalty / Management fees – Case 26 to 32

– Share Application money / Investment in share capital – Case 33

– Others - Cases 34 to 35

- **Others**

  Cases 36 to 42

- **Withholding tax –** Case 81

- **Others**

  – Appeals – Cases 82 to 83

  – Exempt Income / Charitable Trusts – Cases 84 to 85

  – Deemed Dividend – Case 86

  – Method of Accounting – Cases 87

  – Penalty / Interest – Cases 88 to 91

  – Stay – Cases 92 to 93

  – Tax Collected at Source – Case 94

  – Unexplained Cash Credits – Case 95

  – Miscellaneous– Case 96 to 100

I. Transfer Pricing

a. ***International transactions***

1. The Court held that where the assessee sold its imaging business to another Indian company during the year under review and the holding companies of both the assessee and the buyer Indian company had entered into a global agreement for the sale of business, as per Section 92B(2) prevalent during the relevant assessment year, the transaction would not fall within the definition of deemed international transaction. Since the global agreement did not control the terms and conditions of the actual transaction between the assessee and the buyer.
CIT v M/s Kodak India Pvt Ltd – TS-471-HC-2016 (Bom) – TP – ITA NO.15 OF 2014

b. ***Most Appropriate Method***

Transactional Net Margin Method

2. The Tribunal held TNMM to be the MAM for the following reasons, viz (i) the assessee was only a custodian of the goods imported till they were delivered to the client or customer of its parent company on its directions and therefore since the assessee could not be held to be a trader or distributor of the goods the resale price method was not applicable. (ii) The other methods i.e. cost plus method which is applicable to the transactions relating to manufacture and sale of goods and Profit Split Method which is applicable mainly in international transactions involving transfer of unique intangibles or in multiple international transactions which are so inter-related that they cannot be evaluated separately for the purpose of determining the ALP of any one transaction were also applicable to the facts of the given case.
DCIT vs. CISCO Systems (India) Pvt. Ltd - (2016) 47 CCH 0464 (Bang Trib) - IT.(T.P) A No. 1447/Bang/2013

3. The Tribunal held that the TPO was correct in adopting TNMM over the Resale Price Method as the Most appropriate method, since the assessee had incurred huge expenditure on account of selling, distribution and promotion in respect of the trading of the goods imported from the AE as the assessee had closed its manufacturing operations during the subject AY and therefore the business model of the assessee was not comparable with that of the comparable companies who did not incur such expenditure. It held that the RPM could be considered as MAM in case the distribution of goods was without any value addition but since the assessee had incurred substantial expenses on selling and promotion, TNMM was to be considered. It also held that appropriate adjustment was to be allowed while determining ALP under TNMM if abnormal expenditure was incurred on advertisement, marketing and promotion on account of the commencement of a new distribution activity.
Abott Medical Optics Pvt Ltd v DCIT – TS-443-ITAT-2016 (Bang) – TP - I.T.(T.P) A. No.1116/Bang/2011

4. The HC dismissed Revenue's appeal due to delay in filing of appeal wherein the Tribunal had held that TPO was not justified in rejecting internal TNMM based on non- AE transactions merely because segmental results were not audited.
Lummus Technology Heat Transfer BV – ITA 441 / 2016 (Del) [For the Tribunal order see – TS-48-ITAT-2014 (Del) – TP (I.T.A. No.: 6227/Del/2012)]

5. The Tribunal held that the issue of comparability should be decided on the basis of facts on record and not on the basis of precedents as there cannot be an exact identical comparable and that, it was for this very purpose that TNMM was often resorted to as the minor differences, if any, were typically addressed by comparing net profitability of the comparables.
Virage Logic International India TS-480-ITAT-2016(DEL)-TP - I.T.A .No.-6918/Del/2014

c. ***Comparability – Inter and Intra Industry***

ITES Sector / Software Development Services

6. The Tribunal held that the assessee was incorrect in seeking exclusion of a company on the ground that it was engaged in the business of software products because the company did not have any inventory of software products and the said company was engaged in providing software development services akin to the services provided by the assessee.
With regard to the exclusion of Infosys and Wipro on the grounds of brand value possessed by the two companies, the Tribunal remitted the matter to the TPO to determine the impact of the brand on the profitability of the companies.
Additionally, it held that the assessee was incorrect in seeking to exclude companies on the basis of them having revenues from software products, where 96 percent of their operating revenues were derived from software development services.
Further, it held that where the TPO used the segmental data of companies obtained under section 133(6) of the Act to determine comparability of the companies with the assessee, the TPO was obligated to afford the assessee an opportunity to cross examine the data.
Agnity India Technologies Pvt Ltd v DCIT – (2016) 47 CCH 0475 Del Trib - I.T.A .No.-6485/Del/2012

7. The Court upheld the order of the Tribunal wherein it was held that the assessee, engaged in providing software development and maintenance services to its AE could not be compared to companies engaged in software development programmes, huge companies such as Infosys, companies failing the Related Party to sales filter, companies having undergone business restructuring directly affecting the profitability.
Pr CIT v Fiserv India Pvt Ltd – TS-437-HC-2016 (Del) – TP - ITA 17/2016

8. In respect of assessee's financial and accounting support services segment which was a high-end KPO segment, the Tribunal rejected reliance on jurisdictional HC ruling in Rampgreen Solutions to contend exclusion of 2 comparables since in the said precedent the assessee's profile was taken as low end ITeS and not a high end KPO as in the case at hand.
Bechtel India Pvt Ltd [TS-499-ITAT-2016(DEL)-TP] - I.T.A .No.-6779/Del/2015

Support Services

9. The Tribunal held that the assesee engaged in providing marketing support services such as liaison of potential new customers, hosting conferences and sales events to promote the LinkedIn product in the local market, could not be compared to a) non-profit companies mainly earning subscription fees from its members, b) companies engaged in the process of building its own brand and therefore expending huge advertising expenses, c) companies owning valuable online portals through which it earned service fees from third party customers.
It further held that the assessee was incorrect in contending that companies engaged in a wide range of services including advertising, interior decoration and event management were to be included as comparable.
LinkedIn Technology Information Pvt Ltd v ACIT – TS-435-ITAT-2016 (Del) – TP - I.T.A. No.706/Del/2016

10. The Tribunal held that the assessee engaged in providing support services / BPO Services including customer care and technical support services could not be compared to companies rendering KPO services involving specialized knowledge and domain expertise and companies providing high end services.

Daksh Business Process Services Pvt Ltd v DCIT – TS-455-ITAT-2016 (Del) – TP - ITA No.-2666/Del/2014

11. As regards to the assessee's infrastructure support service segment the Tribunal held that Infosys Ltd could not be taken as a comparable due to its owernership of brands and proprietary products which results in its bargaining power for higher profits.
Bechtel India Pvt Ltd [TS-499-ITAT-2016(DEL)-TP] - I.T.A .No.-6779/Del/2015

Others

12. The Tribunal held that government related, protected/affiliated/ favoured companies rendering "Certification/Inspection" services etc. cannot be taken as comparables and similarly companies trading in products and goods or providing vocational training as government affiliates cannot be said to be functionally similar to assessee's engineering design segment.
Bechtel India Pvt Ltd. vs. DCIT [TS-499-ITAT-2016(DEL)-TP] - I.T.A .No.-6779/Del/2015

13. The Court rejected Revenue's contention that companies could not be selected as comparable since they had a different financial year ending as compared to the assessee, by holding that if a comparable was functionally similar to the assessee and the results of the remaining part of the financial year could be reasonably extrapolated from the available data, then companies could not be eliminated on the ground of having a different financial year. Further, it dismissed the Revenue's plea for exclusion of companies having turnover less than Rs 1 crore and held that if the said filter was to be applied, then companies with higher turnover also should have been rejected.
It also held that the Revenue had erroneously excluded a company on the ground that it was in a negative phase of growth since the annual reports of the company exhibited a considerable rise in income over the past year.
CIT v McKinsey Knowledge Centre India Pvt Ltd – TS-672-HC-2015 (Del) - TP - ITA 217/2014

14. The Tribunal held that the assessee having accepted the filters is fully within its right to insist upon the exclusion of a comparable which has remained in the list of comparables accepted if subsequent information/data available in the public domain shows that the said comparable has become incomparable as its very profitability is impacted by its peculiar mix of its functionality or asset base or risk analysis. Neither the acceptance nor the retention or for that matter lack of objection at the first instance makes an incomparable a comparable. The Tribunal further held that a comparable could not be foisted upon an assessee merely because it was proposed by the assessee, or was not objected to by the assessee in the earlier years or at the initial stages in the year under consideration.
Virage Logic International India [TS-480-ITAT-2016(DEL)-TP] - I.T.A .No.-6918/Del/2014

d. ***Computation / Calculations / Adjustments***

Profit Level Indicator

15. The Court upheld the order of the Tribunal wherein it was foreign exchange gains / losses were to be considered as operating in nature. It held that the Safe Harbor Rules introduced in 2013 which stipulate exclusion of foreign exchange gains / losses from operating income / expenses were applicable only with prospective effect and therefore would not apply to the relevant AY i.e. AY 2009-10.
Pr CIT v Fiserv India Pvt Ltd – TS-437-HC-2016 (Del) – TP ITA 17/2016

16. The Court held that though Rule 10B(1)(e)(i) of the Rules do not prohibit the use of Berry Ratio as PLI for applying TNMM, it can be used effectively only in cases where the value of goods have no role to play in the profits earned by an Assessee and the profits earned are directly linked with the operating expenditure incurred by the Assessee. It further held that it would not

be an appropriate PLI in cases where an Assessee uses intangibles as a part of its business or in cases of Assessees who have substantial fixed assets since the value added by such assets would not be captured in Berry ratio which can only be applied where the value of the goods are not directly linked to the quantum of profits and the profits are mainly dependent on expenses incurred. Thus Berry ratio can effectively be applied only in cases of stripped down distributors; that is, distributors that have no financial exposure and risk in respect of the goods distributed by them.
Sumitomo Corporation India (P) Ltd. v. CIT – (2016) 71 taxmann.com 290 (Del) – IT APPEAL NOS. 381,382 OF 2013 & 702 OF 2014 AND 738 OF 2015

Capacity Utilization Adjustment

17. After noting that there were serious issues with respect to assessee's products and a fall in production by over 64% evidenced that there was substantial underutilization of capacity, the Tribunal upheld assessee's claim for capacity underutilization adjustment, in principle, but remited the issue back to AO for fresh quantification of adjustment by making necessary changes in the figures of comparables and not the tested party.
Frigoglass India Pvt Ltd [TS-500-ITAT-2016(DEL)-TP] - I.T.A. No.784/Del/16

18. The Tribunal remitted the issue of capacity utilization adjustment for manufacturer and exporter of jewellery for AY 2008-09 to the file of the TPO by holding that an assessee who starts business in a particular year cannot be compared with the assessees who are doing business for many a years.
Radhashir Jewellery Co Pvt Ltd [TS-459-ITAT-2016(Mum)-TP] - I.T.A./7066/Mum/2013

Working Capital and Risk Adjustment

19. The Tribunal remitted the issues of working capital and risk adjustment to the file of the TPO with the direction that if it all any working capital adjustments or risk adjustments in the comparables proposed by the TPO was warranted the taxpayer would have to support its claim by way of justifying the extent of adjustments requested as the law contemplates and support it further by way of placing necessary justification in support of its prayer.
Bechtel India Pvt Ltd [TS-499-ITAT-2016(DEL)-TP] I.T.A .No.-6779/Del/2015

e. ***Specific Transactions***

Advertisement, Marketing and Promotion expenses

20. The Tribunal deleted TP adjustment on account of AMP expenses in **the** case of assessee engaged in manufacture and sale of toy products in India for AY 2008-09 by holding that a perceived / notional indirect benefit to the AE , due to incurring of certain expenditure by assessee in India was not covered by the TP provisions. Further, noting that the lower authorities tried to incorporate ingredients of Section 37 while dealing with TP adjustment on account of higher expenditure in respect of AMP, the Tribunal held that the lower authorities had adopted a totally incorrect approach without appreciating that there was a fundamental and basic distinction between the provisions of Section 37 and Section 92 of the Act as the first is expense oriented and the second is pricing oriented.
DCIT v Mattel Toys (India) Pvt Ltd – TS-466- ITAT-2016 (Mum) – TP - ITA/4350/Mum/2014 ITA/4415/Mum/2014 ITA/84/Mum/2015

21. The Apex Court granted leave to the Departments SLP against High Court's ruling that mere existence of an agreement whereby a license has been granted to assessee to use brand name would not ipso facto imply any further understanding or arrangement between assessee and its foreign AE regarding AMP expense for promoting brand of foreign AE to infer an international transaction.
DCIT v. Honda Siel Power Products Ltd – (2016) 71 taxmann.com 181 (SC) - SPECIAL LEAVE TO APPEAL (C) NO. 10667 OF 2016

Loans / Receivables / Corporate Guarantee

22. The Tribunal held that commercial expediency of a loan to a subsidiary company was not relevant in the ascertaining the arm's length interest on such a loan and that there was no bar on anyone advancing an interest free **loan** to anyone but when such transactions are covered by the international transactions between associated enterprises, Section 92 of the Act mandates that the income from such transactions is to be computed on the basis of arm's length price. It rejected the contention of the assessee that when no income was reported from a particular transaction, then computing ALP on the same was not warranted. Further the Tribunal distinguished the decision of the Court in Vodafone India Services Pvt Ltd v UOI – (2014) 50 taxmann.com 300 and held that the said decision dealt with international transactions which were inherently incapable of producing income chargeable to tax since it was in the capital field. Therefore, it was held that even if no income was reported in respect of an item in the nature of income, such as interest, but the substitution of transaction price by arms length price results in an income, it can be very well be brought to tax under Section 92.
Instrumentarium Corporation Ltd v ADIT(IT) – (2016) 71 taxmann.com 193 (Kol – Trib) (SB) - IT APPEAL NOS. 1548 & 1549 (KOL.) OF 2009

23. The Tribunal deleted the notional interest adjustment made by the TPO by re-characterizing the advance paid by the assessee to its AE on account of purchase of machinery from its AE. It held that the TPO did not bring any material on record to suggest that the transaction was sham or bogus or that it was a loan and therefore he was incorrect in treating it as a loan and imputing notional interest on the same.
Essar Steel Orissa Ltd v ACIT – TS-442-ITAT-2016 (Mum) - TP - I.TA No. 2289/Mum/2014

24. The Tribunal held that for the purpose of benchmarking the interest on loan given by the assessee to its US based AE, LIBOR was the safest tool since the loan was denominated in foreign currency and rejected the approach of the CIT(A) in adopting the rate of interest stipulated in the RBI Master Circular No 7 / 2006-07 dealing with External Commercial Borrowings.
Marico Ltd v ACIT – TS-411-ITAT-2016 (Mum) – TP - I.T.A./8858/Mum/2011 I.T.A./8713/Mum/2011

Corporate Guarantee

25. With respect to corporate guarantee granted by the assessee on behalf of its AEs, the Tribunal relying on its decision in Siro Clinpharm, held that the amendment to Section 92B introducing corporate guarantees as international transactions could not be given retrospective effect and therefore the corporate guarantee given by the assessee could not be considered as an international transaction. Consequently, it deleted the TP addition.
Marico Ltd v ACIT – TS-411-ITAT-2016 (Mum) – TP - I.T.A./8858/Mum/2011 I.T.A./8713/Mum/2011

Royalty / Management fees / Intra Group services

26. The Tribunal deleted the TP addition made by the TPO / CIT(A) on royalty charged by the assessee from its AE viz. MBL by benchmarking it with the higher rate of royalty charged **by the assesse** from its other AE viz MME. It held that the TPO was incorrect in considering another controlled transaction for the purpose of comparability and also **further** highlighted that there was a geographical difference and difference in respect of the brands and products used.
Marico Ltd v ACIT – TS-411-ITAT-2016 (Mum) - TP I.T.A./8858/Mum/2011 I.T.A./8713/Mum/2011

27. The Tribunal held the AO was not empowered to disallow the royalty expense incurred by the assessee on the basis that the benefit test was not satisfied. It held that where the expenditure or payment by the assessee was demonstrated to have been incurred for the purposes of business, the AO / TPO was not empowered to disallow the same on extraneous reasoning / on the basis of commercial rationale. It observed that the assessee was neither obligated to show that a legitimate expenditure was incurred out of necessity, nor to prove that a certain expenditure has actually resulted in income or profit in the same year or in subsequent years.
It further held that where TNMM was applied to the assessee's transactions as a whole, it covered within its ambit, the royalty transactions as well and therefore the Department was incorrect in seeking to use the CUP method to benchmark the royalty paid on a standalone basis.
Daksh Business Process Services Pvt Ltd v DCIT – TS-455-ITAT-2016 (Del) – TP- ITA No.-2666/Del/2014

28. The Tribunal held that where the assessee submitted adequate evidence to prove that it had actually received intra-group services from its AE, the TPO was incorrect in disregarding the receipt of services by simply stating that they were not needed or that were duplicative in nature or that the assessee did not benefit from the same. It therefore held that the TPO was unjustified in determining the ALP of the intra-group services at Nil.
GE Money Financial Services Pvt Ltd – TS-457-ITAT-2016 (Del) – TP - ITA No.440/Del/2014

29. Where the assessee merely changed the basis of computation of royalty payment to its AE (which was initially paid on the basis of Indian Published Price (IPP) / list price and subsequently on the basis of actual sales) which led to an increase in the rate in terms of the percentage, restriction of royalty payment to the prior year's rate was unwarranted since the rate of royalty in prior years was computed on a different basis, especially since when computed on the same basis the rate in earlier years was in fact more than the rate in the relevant year.
CIT v Oracle India Pvt Ltd – TS-472-HC-2016 (Del) – TP - ITA 334/2016

30. The Tribunal deleted TP-adjustment in respect of management fees and royalty payment by following co-ordinate bench ruling in assessee's own case in AY 2010-11; wherein it was held that CUP can be chosen over TNMM only when a comparable product or service is available, and when no such comparable is available, as in the given case, there cannot be any occasion to resort to CUP, and, as such, in such a situation, CUP cannot be accepted as MAM over the TNMM.
Frigoglass India Pvt Ltd [TS-500-ITAT-2016(DEL)-TP] - I.T.A. No.784/Del/16

31. The Tribunal held that without giving a finding that the assessee has also incurred expenditure in respect of the same services over and above the management fees paid to the AE it cannot be said that the assessee has not received the alleged management services. The Tribuanal further held that even though APA was not applicable for the subject year, making a separate adjustment by TPO by determining ALP of management fees at Nil was contrary to the stand of the department itself while agreeing to APA. However, as TPO had not examined the matter by considering management fees as part of operating cost for the purpose of testing assessee's ITES transactions separately as per Sec 92, the Tribunal set aside the matter back to AO/TPO for reconsideration.
AXA Technologies Shared Services Pvt Ltd [TS-503-ITAT-2016(Bang)-TP] - I.T.(T.P)A. No.659/Bang/2012

32. Where the Assessee was engaged in rendering IT Enabled services ("ITeS") to its AE during AY 2011-12 at cost plus 20% markup, and also availed management support services from its AE, which formed part of cost base for calculating markup; and the DRP deleted TP adjustment on ITeS but upheld the adjustment on management support services by holding the ALP of the

same to be Nil, the Tribunal deleted the addition by holding that since management support services availed by the assessee were forming part of cost base for calculating 20 percent markup on ITES services rendered by the assessee to its AE, consideration of ALP of the same at Nil would lead to reduction of cost base by Rs.8.41 crore with corresponding reduction in markup @20 percent of 8.41 crore. It further held that the ALP adjustment of Rs. 8.41 crore by the revenue authorities on account of management support fees would be required to be coupled with a corresponding revenue reduction of Rs. 10.09 crores leading to erosion of tax base, rather than augmenting it. Therefore the Tribunal concluded that the TP provisions could not be invoked in view of specific prohibition under section 92(3) as for every rupee of ALP adjustment in intragroup service (management support service), assessee's revenue would stand reduced by one and one fifth times of the ALP adjustment.
Mercer Consulting India Pvt Ltd. vs. DCIT [TS-495-ITAT-2016(DEL)-TP] - I.T.A. No.1085/Del/2016

Share Application money / Investment in share capital

33. The Tribunal deleted the TP addition made on account notional interest on interest free loan granted by the assessee to its AE in Cyprus, converted into equity within 3 months as the Revenue had neither brought anything on record to justify the re-characterization of quasi equity into a loan nor demonstrated that the transaction was bogus or sham. It held that the mere disclosure of interest free loan in Form 3CEB would not neither act as an estoppel nor forclose the assessee from claiming the same as not being an international transaction. Further, it held that where the assessee advanced the funds as a shareholder activity, it was not within the domain of the tax authorities to insist that the aim of enhancing the global reach of the portfolio should be attained through a pure loan and not by way of shareholding activity.
DLF Hotel Holdings Ltd v DCIT – TS-418-ITAT-2016 (Del) - TP - I.T.A .No.-6336/Del/2012

Others

34. The Tribunal held that the double addition made by the AO as well as TPO on account of management consultancy and business auxiliary service fee paid by the assessee to its AE on the ground that the assessee did not produce any submissions in support of the claim could not be sustained since in the MAP proceedings, initiated by the assessee pursuant to the order of the AO, the Competent Authorities deleted the TP addition and accepted the assessee's methodology, allocation key and 5 percent mark-up on cost and allowed the amount paid to the extent of the 5 percent mark-up. Based on the outcome of the MAP proceedings, the Tribunal held that the addition made by the AO was to be deleted as well, and held that MAP proceedings were albeit restricted to transfer pricing adjustments but in the instant case it threw light on the actual availing of services along with proper allocation.
GKN Driveline (India) Ltd v ACIT – TS-439-ITAT-2016 (Del) - TP - ITA No.5923/Del/2012

35. The Tribunal deleted the ad hoc section 40A(2) disallowance made by the TPO in respect of payments made by the assessee to its AE towards data processing and database charges since neither did the TPO / CIT(A) disputed the fact of the rendition of services nor did they use any comparative data or carry out any exercise to arrive at fair market value. It held that even if the payments were excessive or unreasonable, such arbitrary and baseless disallowances could not be upheld. Further, since both the assessee as well as the AE were assessed at maximum marginal rate of tax it held that the transaction was tax neutral and the payment could not be considered to be made with the intention of tax evasion.
AMserve Consultants Ltd – TS-436-ITAT-2016 (Del) - TP - ITA No. 6059/Del/2013

f. ***Others***

36. The Court held that the where the DRP had passed its directions ignoring the request of the assessee to adjourn the matter since the assessee was unable to retrieve records relevant to the hearing on account of a flood in its factory, the said directions were in violation of the principles of natural justice. It held that in the instant case, the availability of an alternate

remedy was not a bar to approach the Court and that since no adequate, effective and reasonable opportunity of being heard was granted to the assessee, the directions of the DRP were to be set aside.

Gamea Renewable Pvt Ltd v ACIT – (2016) 96 CCH 0086 (Chen) - W.P.Nos.5499 and 9629 of 2016 and W.M.P.Nos.4840, 11713, 8658 and 11712 of 2016

37. The Tribunal held that where the assessee was assigned a contract for execution of works contract with respect to the designing, engineering, construction, operation and maintenance of a highway in Andhra Pradesh, for which the assessee entered into an agreement with its AE engaging it as a Project Advisor, the TPO was incorrect in determining the ALP of the payment made to the AE as Nil on the ground that the assessee had subcontracted a certain portion of the work to another contractor thereby contending that the payment made to the AE was a sham transaction, since the assessee was responsible for the design and suitability of the project and therefore required the said services of its AE. The Tribunal noted that the entire work had not been assigned by the assessee to the sub-contractor and the most important work of design and engineering work had been retained by the assessee and that as per the agreement between the assessee and its AE, the assessee had employed the services of its AE in relation to the designing and engineering of the project. It further noted that since the employees of the AE had visited India and rendered services required, the allegation of the AO that the transaction was a sham transaction was baseless.

IWM Constructions P Ltd v ACIT – TS-494-ITAT-2016 (Hyd) - TP - ITA Nos.457/Hyd/2007 & 1658/Hyd/2008

38. The Tribunal upheld the TPO's jurisdiction in determining the ALP of the alleged international transaction relating to AMP expenses not reported by the assessee in Form 3CEB and rejected the assessee's reliance on Instruction No 3 / 2016 to argue that AO must have first provided an opportunity of being heard to the assessee before recording a satisfaction in respect of AMP transaction. It held that the said instruction was not applicable to the assessee since in the current situation it was not was the AO who formulated his view on AMP expenses as an international transaction and then required determination of its ALP by the TPO. It noted that as per the Instruction, it becomes palpable that though the original jurisdiction of the TPO was confined to the international transactions referred to him by the AO, such jurisdiction was extendable to other international transactions which come to his notice during the course of proceedings before him.

Further, it rejected the contention of the assessee that the Instruction, being curative in nature should have retrospective application since it would render several earlier assessment orders containing transfer pricing additions null and void.

Nikon India Pvt Ltd v DCIT – TS-469-ITAT-2016 (Del) – TP - ITA No.6314/Del/2015

39. The Tribunal remitted the issue pertaining to whether price fixed under MAP concluded with USA in respect of call centre and share services transactions with US-AEs could be adopted in case of transactions with Non-US AEs in the absence of any attempt from the assessee to bring out similarities of the factors that influenced the price between the US and Non-US transaction. The Tribunal directed the TPO to undertake FAR analysis of non-US transactions with a view to find out whether there was any distinction in factors influencing price between the US and Non-US transactions.

Dell International Services India Pvt Ltd v DCIT – TS-498-ITAT-2016 (Bang) - TP - IT(TP)A No.1302/Bang/2010

40. The Tribunal rejected the adoption of a foreign AE as a tested party for the purpose of benchmarking the intra group services received by the assessee from its AE. It held that under the TNMM, the profit margin realized by the Indian assessee from the transaction with its foreign AE was to be compared with the margin earned by the comparable companies and that there was no question of substituting the profit realized by the Indian enterprise with the profit realized by the foreign AE and that the assessee's methodology of adopting the foreign AE as the tested party was a patently unacceptable position having no sanction under the TP laws of

India. Further, on examination of the search process adopted by the assessee it held that the foreign comparable companies selected by the assessee were completely lacking comparability and therefore held that apart from contending that the foreign AE should have been considered as a tested party, there was no material to substantiate the same since the data chosen by the assessee was neither relevant nor reliable.
GE Money Financial Services Pvt Ltd – TS-457-ITAT-2016 (Del) – TP - ITA No.440/Del/2014

41. The Court noted that though the assessee had not challenged before the lower authorities the re-opening on the ground that the notice violated the provisions 92CA(2C) of the Act, (which provides that the AO is not empowered to assess / reassess under section 147 or pass an order enhancing the liability of the assessee under section 154 of the Act, for proceedings which have been completed before July 1, 2012). Since the objection went to the root of the matter, it directed the AO to consider the petitioner's objections in respect to Section 92CA(2C) of the Act and dispose of the same within a period of 4 weeks from the date of filing. Additionally, the Court stayed the impugned notice for a further period of ten weeks from the date of the order (a) so as to enable the petitioner to challenge the order disposing of the objections in respect of Section 92CA of the Act (b) taking into account the decision of the Jurisdictional Court in the case of Asian Paints 296 ITR 90 (Bom) which directs the AO not to commence reassessment proceedings for a period of 4 weeks from the disposal of objections.
Amore Jewels Pvt Ltd v Pr CIT – TS-470-HC-2016 (Bom) – TP - WRIT PETITION NO.800 OF 2016

42. The Court set aside references made by AO to TPO for AYs 2011-12 to 2013-14 without giving assessee an opportunity of being heard as required by law despite assessee's objection that the impugned transaction were not associated enterprises as contemplated in Sec 92A. It further held that satisfaction to be arrived at by the AO regarding the existence of the international transaction or specified domestic transaction, even prima facie, is a sine qua non for making the reference to the TPO.
Indorama Synthetics India Ltd [TS-501-HC-2016(DEL)-TP] - W.P.(C) 6422/2013 W.P.(C) 4558/2014

II. International Tax

a. Permanent Establishment

43. The Tribunal held that the company engaged in manufacturing products developed by the assessee as well as marketing the products manufactured by the assessee, in which the assessee held 50 percent share capital, did not constitute a PE of the assessee under Article 5 of the India-USA DTAA, since the said company did not have the right to conclude contracts on behalf of the assessee, the assessee did not have access to the premises of the said company and the final decision of pricing of the product along with the term / conditions therein were taken by the assessee.
DDIT (IT) v Lubrizol Corporation USA – (2016) 47 CCH 0435 (Mum – Trib) - ITA No. 1247/Mum/2014

44. The Apex court granted leave to the departments SLP against High Court's ruling that where assessee, a Mauritius based telecaster of TV channels, carried out entire activities from Mauritius, its affiliates/agents in India who were remunerated on arm's length basis for carrying out only routine functions in India, did not constitute assessee's PE in India.
DIT v. B4U International Holdings Ltd – (2016) 71 taxmann.com 182 (SC) - SPECIAL LEAVE TO APPEAL (C) NO. 10482 OF 2016

b. Royalty / Fees for technical services

45. The Tribunal held that the amount received by Baan Global BV, a Dutch company, for supply of 'off the shelf' software to its Indian distributor for onward supply to Indian customers was not taxable as royalty under the India-Netherlands DTAA since what was supplied was only copyrighted products and there was no transfer of right to use copyright in computer software since the agreement between the assessee and ultimate customers forbade customers from decompiling, modifying, reverse engineering or disassembling the software. It rejected the contention of the DRP that sharing of source code of software amounted to the use of 'process' and held that the customers were only permitted to use the source code for internal computing operations and therefore was subject to riders and limitations. It also rejected the contention of the Revenue that the retrospective amendment to the Act was to be read into the DTAA and held that in the absence of a corresponding negotiation between the two sovereign nations to amend the specific provision of royalty in the DTAA, the amendment in the Act could not be read into the DTAA.
ADIT v Baan Global BV – TS-351-ITAT-2016 (Mum) - ITA No 7048/Mum/2010

46. The Court held that consideration received by assessee on sale of pre packaged software was not royalty. It further held that there is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle the Court held that a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of USA DTAA.
CIT & ANR vs. Halliburtion Export Inc. & ANR – (2016) 96 CCH 0060 (Del HC) - ITA 363/2016, 365/2016

47. The Tribunal held that where in course of business carried on by assessee-company as a stock broker, foreign subsidiaries rendered services which were in nature of simple marketing services of introducing foreign institutional investors to invest in capital markets in India, but no technical service was being made available, payments made to subsidiaries would not fall within definition of 'fees for technical services' taxable in India.
Batlivala & Karani Securities (India) (P) Ltd v. DCIT – (2016) 71 taxmann.com 142 (Kolkata – Trib) - IT APPEAL NOS. 1234 AND 1235 (KOL.) OF 2013

c. Income from Capital Gains

48. The Tribunal held that where the assessee was resident of both India and Sri Lanka, as per Article 13 of the India-Sri Lanka DTAA, capital gains arising from the transfer of immovable property situated in Sri Lanka would be taxable only in Sri Lanka. However, it held that the same was also income chargeable to tax in India under the provisions of the Act and therefore to avoid double taxation relief i.e. credit for tax paid in Sri Lanka would be granted to the asssessee in accordance with Notification No 91 of 2008 read with the DTAA.
Shalini Seekond v ITO – (2016) 47 CCH 0398 (Mum – Trib) - I.T.A. No. 3877/Mum/2012

49. The Court held that the situs of an intangible asset was the situs of the owner of such asset and that an intangible asset does not have any physical form at any particular location and therefore could not presumed to be situated in India when its owner was outside India. It held that the legislature could have, through a deeming fiction, provided for the location of an intangible capital asset but it had not done so insofar India in concerned. Citing the deeming fiction introduced for the situs of shares in an indirect transfer, it held that since there was no like provision for intangible assets, the well accepted principle of 'mobilia sequuntur personam', which provides that the situs of the owner of an intangible asset would be the closest approximation of the situs of an intangible asset, was to be followed. Accordingly, since the assessee / owner of the intangible asset was not in India at the time of transfer of intellectual property rights to another company viz. SAB Miller, no income accrued to the Petitioner in India.

CUB Pty Ltd v UOI – TS-401-HC-2016 (Del) - WP(C) 6902/2008

d. Withholding tax

50. The Tribunal deleted Sec 40(a)(i) disallowance for non-deduction of Sec 195 TDS on payment of technical know-how fees to AVL Austria, since under old DTAA provision of 1963 between India and Austria which existed till September, 2001, payment made by Indian entity to Austrian resident for rendering services in Austria was not taxable in India.
LML Ltd - TS 392 ITAT 2016 (MUM) ITA No. : 3668/Mum/2004

III. Domestic Tax

a. ***Business Income***

51. The Tribunal held that forfeiture of share application money pursuant to a "Settlement and Clean Break Agreement" (SCB) with foreign collaborator was not taxable u/s 41(1) for AY 2000-01 despite the fact that share application money were disclosed under the head "unsecured loan" in assessee's Balance Sheet on the ground that as per RBI certificate regarding relevant foreign remittance, the receipt was towards share capital and it could not be treated as loan merely based on accounting treatment in assessee's books. The Tribunal further held that compensation received on account of various restrictive covenants imposed on assessee upon termination of JV was a non-taxable capital receipt for AY 2000-01 (i.e pre-Sec 28(va) insertion) since the entire trading structure of assessee's business was adversely affected.
LML Ltd - TS 392 ITAT 2016 (MUM) - ITA No. : 3668/Mum/2004

b. ***Deductions***

Section 36

52. The Tribunal, relying on the decision of the Court in the case of State Bank of Patiala v CIT (2005) 198 CTR 0407 (Punjab & Haryana), held that as per section 36(1)(viia) of the Act, the claim for bad debts was to be limited to the provision created by the assessee and could not exceed the same and therefore limited the allowance to the provision existing in the books of the assessee.
UCO Bank v DCIT – (2016) 47 CCH 0399 (Kol) - ITA No. 585 & 911/Kol /2013

Section 37

53. The Court held that where the assessee made payment to the Pollution Control Board on account of failure to comply with the order of the Board with respect to its obligation of installing pollution control equipment before the prescribed time limit, the said payment could not be disallowed under Explanation 1 to Section 37 since the assessee did not carry out any illegal business and the payment was made for the purpose of business and was in consequence of business carried on by the assessee.
Shyam SEL Ltd v DCIT – (2016) 96 CCH 0085 (Kol) - ITA NO. 850 OF 2008

54. The Tribunal allowed deduction u/s 37(1) for advertisement expenses incurred by assessee (engaged in portfolio management and advisory services) in capacity as a 'sponsor' of Quantum Mutual Fund ('QMF') for promoting various mutual-fund schemes and rejected the Revenue's stand that deduction should be denied as advertisement expenses were incurred for the benefit of third party (i.e QMF) and that there was no nexus between expenses incurred with the advisory business undertaken by assessee. It observed that assessee-company besides being a sponsor, was also holding entire 100% shareholding in QMF's asset

management company ('QAMC') through which assessee was earning management fees and held that the purport of the expenditure was to increase assessee's own earnings in as much as the Management fee which the assessee was entitled to earn from QAMC was also dependent on the level of average assets of the Fund managed by QAMC.
Quantum Advisors Pvt Ltd - TS 389 ITAT 2016 (Mum) - ITA No. 3418/MUM/2015

55. The Court held that expenditure incurred by assessee-corporation to maintain Thiruvalluvar statue at kanya kumari, was revenue expenditure allowable under section 37(1) since the said statute was neither on the asset side of the assessee-corporation now owned by it. Also the expenses incurred in maintaining of the statue, was an expense incurred in consonance with the activities of the business of assessee ,conducting tours, operation of hotels and exhibition, etc corporation and such activity could not at any stretch of imagination be termed as capital expenditure.
CIT v. Tamil Nadu Tourism Development Corporation Ltd – (2016) 71 taxmann.com 333 (Mad) - TC APPEAL NOS. 321 & 322 OF 2016

56. The Tribunal deleted disallowance of technical fees paid by the assessee to it associated enterprise in Japan ('AE') u/s 37(1) as the subject payment was held to be at arm's length price ('ALP') by the Transfer Pricing Officer ('TPO') on the ground that AO cannot disregard ALP determined by the TPO in view of Sec. 92CA(4) which provides that on receipt of order u/s 92CA(3) the AO shall compute assessee's total income having regard to ALP determined by the TPO. It rejected the Revenue's contention that payment of technical fees ought to be disallowed on the ground that services were not rendered by holding that it cannot be open for the AO to say that even though transaction value is held to be an at ALP by the TPO, the ALP can be reduced on account of actual rendition, or non-rendition, of services.
YKK India Pvt Ltd - TS-404-ITAT-2016(DEL) - I.T.A. No.238/Del/16

57. Where the assessee, engaged in the business of selling mobile handsets and other electronic items and accessories and operating in highly competitive market wherein specific brand was necessarily to be advertised and made known to public at large, had incurred expenditure on sales promotion schemes for advertisement of its products in newspapers, electronics media, neon signs and banners etc, the Tribunal held that the expenses were incurred wholly and exclusively for business of assessee and were neither capital in nature nor incurred for personal purposes and therefore the AO was incorrect in disallowing 25 percent of such expenses without any reasoning.
DCIT v Spice Distribution Ltd – (2016) 47 CCH 0364 (Del – Trib) - ITA No. 4281/Del/2013

Section 40

58. The Tribunal held that the Section 40(a)(ia) disallowance were not only applicable to amounts show as payable on the last date of the balance sheet and would also apply to expenditure which becomes payable at any time during the relevant previous year. Therefore it confirmed the order of the CIT(A) disallowing the expenses incurred by the assessee in relation to hiring of trucks since the assessee failed to deduct tax on the said payment.
Ayub Abdul Khandar Tamatgar v JCIT – (2016) 47 CCH 0520 (Bang Trib) - ITA No. 854/Bang/2015

59. The Tribunal deleted the disallowance of expense under section 40(a)(ia) of the Act for AY 2010-11 allowing the retrospective benefit of the second proviso to section 40(a)(ia) inserted vide Finance Act, 2012, which provides that the disallowance would not be attracted where the payee had paid tax on the said amount. Relying on the decision of the Apex Court in Vegetable Products Ltd, it held that where there were two views of two non-jurisdictional High Courts, in the absence of the decision of the jurisdictional High Court, the view favourable to the assessee was to be followed.
RKP Company – TS-357 –ITAT-2016 (Raipur) - I.T.A. No.: 106/RPR/2016

Section 43B

60. The Court held that although the technical reading of section 43B and the provisions of sub-section (2) of section 24(x) read with section 36(1)(va) creates the impression that the employees contribution and employers contribution were to be treated differently but on a broader reading of the amendments made to section 43B and the intention of the Parliament, there appeared to be sufficient justification for taking the view that the employees and employers contribution ought to be treated in the same manner and therefore the benefit of section 43B was to be allowed to the employees contribution as well.
Bihar State Warehousing Corporation Ltd v CIT – (2016) 71 taxmann.com 247 (Patna) - MISC. APPEAL NO. 302 OF 2008

61. The Court allowed deduction (for period prior to enactment of Sec. 43B) towards excess of sales price collected by assessee (a drug manufacturer) over the price fixed by the Drug Price Control Order, 1979 ('DPCO') on the ground that as per Drug Price Control Order assessee was required to deposit the excess amount so collected with the Government.
Hoechst India Limited - TS 391 HC 2016 (BOM) - Income tax reference No 364 of 1997

62. Where interest was paid to financial institutions during assessment year in question by issuing non-convertible debentures to such institutions and assessee claimed deduction under section 43B in its computation of income, the Court held that the Issue of debentures to fund the interest liability does not amount to "actual payment" of the interest so as to qualify for deduction under Explanation 3C to Section 43-B.
CIT v MM Aqua Technologies Ltd – (2016) 96 CCH 0081 (Del) - REV. PET.308/2015 IN ITA 110/2005

Section 14A

63. The Tribunal, held that where the assessee was a dealer in shares / securities and held the same as stock in trade, no disallowance under section 14A of the Act could be made on expenditure incurred since the assessee did not retain the shares with the intention of earning dividend income and the dividend income was merely incidental to the business of sale of shares.
UCO Bank v DCIT – (2016) 47 CCH 0399 (Kol)- ITA No. 585 & 911/Kol /2013

Section 10A / 10AA / 10B

64. The Tribunal held that if an item of expenditure (expenditure incurred in foreign currency) is excluded from the export turnover, the same should also be reduced from the total turnover to maintain parity between numerator and denominator while calculating deduction u/s 10A.
DCIT vs. CISCO Systems (India) Pvt. Ltd (2016) 47 CCH 0464 (Bang Trib) - IT.(T.P) A No. 1447/Bang/2013

Chapter VIA

65. The Court dismissed Revenue's appeal and granted Sec 80IA(4) deduction (available on maintaining an infrastructure facility) to assessee (maintaining a Container Freight station) relying on co-ordinate bench ruling in assessee's own case for AY 2009-10 and Delhi HC ruling in Container Corporation of India Limited. It Rejected Revenue's stand that since the coordinate bench and Delhi HC rulings were under challenge before SC, the present appeal should be entertained and kept pending till the SC passes appropriate orders in the pending matters, clarifies that even in cases where Revenue challenges orders before SC.
AL Logistics P Ltd - TS 376 HC 2016 (MAD) - Tax Case Appeal No.405 of 2016

66. The Court held that where the assessee, a cooperative society engaged in carrying on business of banking / providing credit facilities to its members, earned interest on investments

which were made to enable it to pay off the interest due to its members, such interest earned was eligible for deduction under section 80P of the Act since it was attributable to the activities of the assessee.
CIT v South Eastern Railway Employees Co-Op Credit Society Ltd – (2016) 96 CCH 0083 (Kol) - ITA 484 OF 2007

67. The Court held that Section 80IB grants deductions to eligible industries and has nothing to do with export of a product and if industry eligible for deduction u/s 80IB also exports product, DEPB benefits would be seen in addition to and not as having been derived by industry out of its eligible business and consequently the deduction under sec 80 IB would not be available in respect of the same.
Banpal Oilchem Pvt. Ltd. V ACIT - [2016] 96 CCH 0050 (Guj) - TAX APPEAL NO. 188 of 2011

68. The Tribunal held that where the assessee had commenced a new business unit by purchasing new land, construction of new building, purchase and installation of new plant and building and manufacturing items it was eligible for deduction u/s 80-IC and the AO was incorrect in denying the same on the ground that the new business was commenced out of the transfer of an old business, especially when there was nothing brought on record to prove so.
ITO v Bonsai Pharmachem – (2016) 47 CCH 0403 (Ahd – Trib) - ITA No. 19/Ahd/2012

c. **Income from Capital Gains**

69. The Tribunal held section 54F relief cannot be denied to assessee when he has invested entire sales consideration in purchase of residential house but he is unable to get possession of flat, which is under construction, due to fault of the builder.
Rajeev B. Shah v ITO – (2016) 71 taxmann.com 198 (Mumbai – Trib) - I.T. APPEAL NO. 262 (MUM.) OF 2015

70. The Tribunal held that sale consideration on transfer of property was not taxable in AY 2008-09 since the sale deed was registered in April 2008 (revelant to AY 2009-10). It further outlined the conditions which have to be cumulatively satisfied in order to tax income on transfer, namely (i) registration of sale deed, (ii) assessee should have acquired a legal right to receive consideration and (iii) property's possession must be handed-over to the buyer.
Prakash V. Kittur - TS-49-ITAT-2015(PAN) - ITA No. 186/PNJ/2015

71. The Tribunal directed apportionment of total consideration of Rs. 450 cr received by assessee in the ratio of value of trade-marks pre-1981 (31.55%) and post-1981 (68.45%) based on valuation by M/s. RSM & Co., for the purposes of computing capital gains on sale of rights in trademarks under the name and style of 'Nirma' and 'Nima' during AY 2001-02. It held that for trademarks/brands developed by assessee post-1981 (i.e self-generated assets), the cost of acquisition could not be ascertained and hence capital gains could not be computed in view of the Apex court ruling in B C Srinivasa Shetty. For the purposes of computing capital gains for pre-1981 brand category, the Tribunal accepted valuation report of M/s. RSM & Co. ascertaining fair market value of the brands as on 01.04.1981 which was treated as cost of acquisition and held that RSM & Co. report is pragmatic and scientific.
Nirma Chemical Works Pvt. Ltd. [TS-403-ITAT-2016(Ahd)] - ITA. No: 1706/AHD/2009

72. The Tribunal held that whether the income arising out of sale of scrips held by the assessee was chargeable to tax under the head income from business or income from capital gains was to be determined after ascertaining the intention of the assessee at the time of acquiring the shares by taking to consideration viz. how the transactions were recorded and reflected in the balance sheet, the volume of the transactions, period of holding, use of borrowed funds etc. The Tribunal held that in the instant case since the income arising out of sale was more in the

nature of capital gains which was also accepted in the earlier years. Consequently it held that the Department was incorrect in treating it as income from business.
Nathulal Pannalal Lavti v Add CIT – (2016) 47 CCH 0497 (Rajkot – Trib) - ITA No. 1259/RJT/2010

73. The Tribunal upheld capital gains addition in respect of sale of various lands held by assessee (an individual engaged in buying / selling of immovable properties) during AY 2007-08 and rejected the assessee's claim of exemption of the land being agricultural land and falling under exclusion clause (iii) to Sec 2(14) (which defines 'capital asset') on the ground that land was converted from agricultural to non-agricultural prior to sale with the sole purpose and intent to sell the land for industrial purpose. It also noted that the assessee was a chartered accountant by profession and not an agriculturist. In absence of 'agricultural land' definition under the Act, the Tribunal refered to the criteria laid down by SC in cases of Raja Binoy Kumar Sahas Roy and Smt. Sarifabibi Mohmed Ibrahim and Bombay HC in cases of V. A Trivedi and Gopal C. Sharma **and** ruled that the scheme and object of exempting agricultural land from the definition of capital asset is to encourage cultivation of land and agricultural operations and that therefore, for the purpose of granting exemption, a restricted meaning had to be given to the expression 'agricultural land' and merely showing the land as agriculture in the land record and the use for agriculture purpose in remote past are not the decisive factors but the future use of the land for non-agricultural purpose would change the character of the land from agriculture to non-agricultural at the time of sale.
B Sudhakar Pai [TS-360-ITAT-2016(Bang)] - I.T. A. No.708/Bang/2011

d. **Assessment / Re-assessment**

Assessment

74. The Court held that where the order issued by it quashing the special audit initiated by the AO was passed on September 9, 2002, considering the period of exclusion available to the AO which amounted to 17 days, the assessment should have been completed by September 26, 2002. It further held that even if the contention of the AO was to be considered viz. that he was informed of the order dated September 9, 2002 on November 25, 2002, the assessment should have been completed within 17 days of that date which was not so in the instant case, since the assessment was completed March 31, 2003. Therefore, the Court held that the assessment was time barred under section 153 and the order was liable to be quashed
CIT v Bata India Ltd – (2016) 96 CCH 0051 (Kol) G.A.NO.824 OF 2011 & ITAT 77 OF 2011

Reassessments

75. Where the revenue had initiated reassessment on the grounds of (i) non-payment of interest to partners on borrowed capital as stipulated under the partnership deed and (ii) purchase of gold from sister concern/ partner at a rate lower than the prevailing market rate, the **Court** quashed reassessment proceedings initiated u/s 147/148 beyond the period of 4 years absent failure on assessee's part to truly and fully disclose material facts and **also because** the issue was examined by the AO during original assessment.
Adani Exports - TS 378 HC 2016 (GUJ) SPECIAL CIVIL APPLICATION NO. 3595 of 2016

WITH SPECIAL CIVIL APPLICATION NO. 3596 of 2016

76. The Court, relying on the decision of the Apex Court in CIT v PVS Beedies Pvt Ltd [237 ITR 13 (SC)], upheld the reassessment initiated by the AO on the ground of the audit party's opinion in regard to interpretation of the provisions of Section 80IA of the Act.
Eagle Press Pvt Ltd v ACIT – (2016) 96 CCH 0072 (Chen) T.C.A. Nos. 881 to 884 of 2007

77. The HC allowed assessee-petitioners' writ and directed the Settlement Commission to consider its application in respect of undisclosed foreign income and assets for AYs 2005-06 to 2014–15 which was rejected by Settlement Commission on the **ground** that it lacked jurisdiction to deal with issue relating to undisclosed foreign income and asset after legislation of Black Money Act.

The court noted that CBDT has clarified that the Black Money (Undisclosed Foreign Income Tax and Assets) and Imposition of Tax Act, 2015 came into effect from July 1, 2015. Since the date of filing return of income and issuance of Sec 148 notice in the case of the Petitioner was prior to provisions of the Black Money Act coming into effect, the Court held that the settlement applications were maintainable.
Arun Mammen and Another - TS 373 HC 2016 (MAD) - W.P.Nos.22216 to 22219 of 2015

78. Where the AO sought to reopen assessment on ground that assessee under-allocated weighted deduction for R&D expenses to unit claiming Sec. 80IA benefit and that deduction u/s 80HHC should be based on profits of business computed after reducing unabsorbed depreciation, the Court upheld the Tribunal order for AYs 2000-01 & 2001-02 quashing the assessee's reassessment proceedings on the ground that reopening was based on mere change of opinion. Regarding AO's ground for reopening that assessee intentionally submitted voluminous details in a complicated manner so as to make it difficult for the Revenue to comprehend them, the Court ruled that the successor AO could not be permitted to take this ground when the predecessor AO did not find the facts to be difficult while completing the original assessment. It further held that since claim u/s 80IA/80HHC were processed by the earlier AO at length, mere fact that such claim were not examined from a particular angle could not be a ground for reassessment.
Sun Pharmaceutical Industries Ltd. [TS-388-HC-2016(GUJ)] - TAX APPEAL NO. 128 of 2016 WITH TAX APPEAL NO. 129 of 2016

79. The Tribunal held that no notice u/s 148 could be issued after a period of 4 years from the end of the relevant assessment year wherein the original assessment order was passed under section 143(3) unless it was established that income chargeable to tax had escaped assessment on account of failure of assessee to disclose all material facts fully and truly, and since the assessee had submitted statutory audited accounts under the Companies Act as well as audit report in Form No.3CA and 3CD along with its return as well all other details called for by AO, the AO was incorrect in alleging that income had escaped assessment as the assessee failed to deduct tax on interest paid to a non-resident. Accordingly, the assessment order was quashed.
ACIT v Nova Petrochemicals Ltd – (2016) 47 CCH 0368 (Ahd Trib) - ITA No. 1154/Ahd/2012

Revision

80. Where the AO had taken one of possible views by duly appreciating contentions of assessee that advance received had already been taxed in earlier years and he had rightly not brought same to tax in assessment even though same was framed u/s 144 the Tribunal held that the order passed by AO was neither erroneous nor prejudicial to interests of revenue and was not required to be interfered with. Accordingly, it quashed the order passed by the CIT under section 263 of the Act.
Juoti Ranjan Roy v CIT – (2016) 47 CCH 0356 (Kol- Trib) - ITA No. 1251/Kol/2013

e. **Withholding tax**

81. The Court deleted Sec.40(a)(ia) disallowance in respect of non-deduction of tax at source u/s 194C on freight charges reimbursed to the suppliers on the ground that the supplier was bound to pay the freight charges to the goods transport agency under the contract of sale.
Hightension Switchgears Pvt. Ltd - TS 375 HC 2016 (Cal) - ITA 8 of 2011

f. **Others**

Appeals

82. The Court held that where the assessee had exercised the option to file an appeal before the CIT(A) against the assessment order wherein the AO had denied the assessee exemption under section 11 / 10(23C), it was not open for the assessee to seek remedy vide filing of a petition before the Court since the assessee had the option to exercise an equally efficacious alternative remedy.
Prathyusha Educational Trust v ACIT – (2016) 96 CCH 0052 (Chen) -W.P. Nos. 23341 & 23342 of 2015

83. The Apex Court allowed Revenue's appeal and set aside Allahabad HC order which had allowed assessee's application for recall of its earlier order exercising jurisdiction u/s 260A(7) of the Income Tax Act, 1961 read with Order XLI Rule 21 of the Code of Civil Procedure, 1908 (which provides for power of recall in case of an exparte order) on the ground that the order recalled was not an exparte order as contemplated by the provisions of the Code of Civil Procedure, 1908. It further rejected assessee's contention that as the discretionary power vested in the High Court has been exercised in favour of the assessee, SC should not interfere with the same in the exercise of jurisdiction under Article 136 of the Constitution of India.
Subrata Roy - TS 374 SC 2016 - ITA NO. 60/2006

Charitable Trusts / Exempt Income

84. The Court held that where the assessee had purchased a plot of land for the purpose of starting a medical college and old age home but due to the inability to obtain requisite approvals, the assessee sold the same and earned a substantial income out of the sale, the AO was incorrect in denying benefit under Section 11 of the Act, by treating the income as business income / income from commercial activity and alleging that the assessee had motive to earn profits from the said transaction, thereby not satisfying the requirements of Section 2(15). The Court held that mere sale of an immovable property of the trust could not be the sole factor to conclude that the income earned should be taxed as business income and that in the case of a trust whose predominant activity was not business, incidental activity of sales, carried out in furtherance of and to achieve the main objectives of the trust could not be construed as business activity.
CIT v Magunta Raghava Reddy Charitable Trust – (2016) 96 CCH 0082 (Chen) - T.C.A.Nos.451 and 452 of 2016 & C.M.P.No.9327 of 2016

85. The Tribunal denied Sec 11 exemption to assessee (an educational trust) with respect to income earned from renting of auditorium hall during AY 2010-11, by holding that even though exemption u/s 11(4) is available on income derived from business held under trust and the words 'property held under trust' includes business undertaking but the auditorium business was not held under trust, and it was commenced/carried on by assessee subsequent to the formation of the trust. It further held that merely carrying on the business for and on behalf of trust and applying profits for the object of trust would not entitle assessee for exemption u/s 11(4), unless the business was incidental to the attainment of the objects of the Trust.
Suguna Charitable Trust [TS-364-ITAT-2016(CHNY)] - I.T.A.No.2172/Mds./2014

Deemed Dividend

86. The Tribunal upheld deemed dividend addition u/s 2(22)(e) in the hands of assessee-shareholder in respect of loan given by closely-held companies to a concern in which assessee held substantial interest by relying on Bombay HC ruling in Universal Medicare (P) Ltd and Mumbai ITAT ruling in Bhaumik Colour (P). Ltd. It Rejected assessee's stand that since the loans were repaid during relevant year itself with interest, addition should not be made by relying on the Apex court rulings in Navnit Lal C. Javeri and Tarulata Shyam. Also it rejected assessee's reliance on SC ruling in Mukundray K. Shah for the proposition that since no benefit was derived by assessee as a result of loan, no addition u/s 2(22)(e) was warranted by holding that in the said case, applicability of a different limb of Sec 2(22)(e) (i.e any payment made by a company for the benefit of a shareholder) was examined which had not been invoked in

assessee's case. The Tribunal also rejected assessee's argument that it was a case of inter corporate deposit ('ICD') and not loan in absence of any evidence.
Namita V. Samant - TS-393-ITAT-2016(Mum) - I.T.A. No. 1065/Mum/2016

Method of Accounting

87. The Tribunal held that where assessee had been maintaining a mercantile system of accounting expenditure incurred by assessee on replacement of tools was to be allowed as revenue expenditure in accordance with revised Accounting Standard (AS) 2 and (AS) 10.
Ucal Machine Tools (P) Ltd v ITO – (2016) 71 taxmann.com 230 (Chennai – Trib) - IT APPEAL NOS. 797 & 798 (MDS.) OF 2016

Penalty / Interest

88. The Tribunal held that interest u/s 234B(1) was leviable from first day of assessment year (AY) till the date of processing u/s. 143(1) and then, enhanced interest would be levied u/s 234B(3) pursuant to recomputation u/s 153A **(**for AYs 2005-06, 2008-09 & 2009-10**)**. It explained that interest u/s. 234B(1) is calculated on the shortfall from first day of AY till the completion of/processing of return for the first time, further in case of re-assessment or re-determination of income either u/s. 147 or u/s. 153A, the Statute provides for further levy of interest u/s 234B(3) from the date of first order to the date of revised order. Further it clarified that Sec 143(1) order is to be considered as 'assessment' for the purposes of Explanation 2, hence the period considered in an intimation u/s. 143(1) shall be excluded while calculating interest u/s. 234B(3).
MBG Commodities (P) Ltd - TS 390 ITAT 2016 HYD - ITA 1321/Hyd/2015 ITA

1322/Hyd/2015 ITA 1323/Hyd/2015

89. The Apex court dismissed Revenue's SLP against Karnataka HC judgement laying down law on 'penalty levy' for AY 2003-04 wherein the HC had held that notice u/s 274 must specifically state ground for initiation of proceedings (whether concealment or filing inaccurate particulars) and that mere sending of printed form with all grounds mentioned was not sufficient compliance of law.
Veerbhadrappa Sangappa & Co - TS 381 SC 2016 - ITA NO. 5020/2009

90. The Tribunal upheld penalty levy u/s 271(1)(c) for assessee's excessive claim of unabsorbed depreciation in terms of Explanation to Sec 115JB while computing book profits for AY 2006-07 even though it was fully set off against reserves (i.e. accumulated profits) on the ground that language of relevant provision was very clear and without any ambiguity so as to admit interpretation sought by assessee.
SBI DFHI Limited - TS 380 ITAT 2016 (MUM) - I.T.A. No. 7433/Mum/2013

91. The Court for AYs 1994-95 and 1995-96 referring to the ruling of the Special Bench **of** the Tribunal in the assessee's case for earlier years, held that interest earned by the assessee on deposits (out of surplus funds) with the Steel Authority of India Ltd. (SAIL) did not qualify as 'interest' u/s 2 (7) of the Interest Tax Act, 1974 ('ITA') which uses the word "means" which indicates the definition to be exhaustive and further also expressly includes two other categories (i.e. commitment charges and discount on promissory notes/bills of exchange) and excludes two additional categories. It rejected the Revenue's contention that the expression "interest on loan and advances" occurring in Sec. 2(7) should include interest on deposits as well.
Housing and Urban Development Corp Ltd - TS-402-HC-2016(DEL) - ITA 348/2003

Stay

92. The Court relying on its earlier decision, held that where the CBDT had classified the assessee society as an association, the authorities were incorrect in denying the assessee benefit under

section 10(21) on the ground of that it was an institution and not an association and accordingly granted the assessee a stay of recovery proceedings pending disposal of appeal by the CIT(A).
International Institute of Bio Technology & Toxicology v DCIT – (2016) 96 CCH 0056

(Chen) Writ Petition No.18336 of 2016 and W.M.P.No.16043 of 2016

93. The Court granted stay of demands on the ground that the cardinal principles which have to be taken note of while granting interim order viz (i) prima facie case (ii) balance of convenience and (iii) irreparable hardship were fulfilled in the case of the assessee since the CIT (A) in one of the years had accepted the stand of the assessee on merits.
Kalapet Primary Agricultural Co-op Credit Society Ltd. vs. ITO - [2016] 96 CCH 0065

(Chen HC) - W.P. No. 23163 of 2016

Tax collected at source

94. The Court upheld the Tribunal order, deleting addition made u/s. 206C(1) on account of non-collection of tax at source ('TCS') on sale of scrap by assessee-seller, despite buyers declaration in Form 27C furnished belatedly on the ground that as per Sec 206C(1A) the seller is not liable to collect TCS in a case where the buyer purchases goods in retail sale for personal consumption and he furnishes a declaration in writing to that effect in prescribed Form 27C to the seller notwithstanding that the fact that the same is filed belatedly so long as the genuineness of the same is not doubted.
Siyaram Metal Udyog (P) Ltd - TS-400-HC-2016(GUJ) - Tax Appeal No. 519 of 2016

Unexplained expenses / income / investments

95. Where the assessee received a loan from an HUF via account payee cheque, the source of which was the repayment of loan received by the HUF from another third party which was reflected in the HUFs bank statements, the Tribunal held that the creditworthiness and genuineness of loan had duly been proved on record by assessee and that the CIT(A) had rightly deleted addition u/s 68.
ITO v Subosh Nemlekar – (2016) 47 CCH 0426 (Mum Trib)- ITA No. 6260 & 6453 /M/13

Miscellaneous

96. The Apex court held that Income derived from slot charter operations of a Tonnage Tax Company being deemed tonnage tax is liable to be included while determining Tonnage Income under tonnage tax scheme even if such operations are carried on in ships which are not qualifying ships in terms of provisions of Chapter XIIG without valid certificate since there would not be any possibility of producing a certificate because identification of vessel for slot charter cannot be done as entire ship is not chartered and arrangement pertains only to purchase of slots, slot charter and an arrangement of sharing of break-bulk vessel.
CIT v. Trans Asian Shipping Services (P) Ltd – TS-361-SC-2016 - CIVIL APPEAL NO. 5869 OF 2016

97. The Court laid down the following guidance for the Department;
    a. Department must have in place a system of keeping a record of questions of law which have been admitted or dismissed by Court as it would enable a consistent stand being taken by the revenue when a similar question arises before the same or different Bench of Court.
    b. Framing of a substantial question of law needs legal acumen and experience in drafting to bring out the controversy appropriately and therefore, framing of question of law has be done by the counsel briefed to draft the appeal, no doubt with aid/assistance of officers of Revenue involved in the matter.

c. Quality of advocate would be best judged by his performance and not in result of litigation and this evaluation can take place only when Advocate is seen in action and that one of criteria mentioned in Instruction No. 3/2012, dated 11-4-2012 relating to renewal of appointment of counsel on basis of number of cases won by counsel for department was not justified.
d. There is a need to appoint more number of Advocates on panel and distribute work amongst them in an equitable manner as it would at least give an opportunity to Advocate to prepare properly for appropriate representation.

CIT v. TCL India Holdings (P) Ltd – (2016) 71 taxmann.com 216 (Bom) - IT APPEAL NO. 2287 OF 2013

98. The Division Bench of Madras HC dismissed assessee's writ challenging Single Judge order declining to entertain its writ petition on the ground of lack of territorial jurisdiction wherein the writ petition had sought for a mandamus directing tax authorities not to take any coercive action against assessee who was under BIFR proceedings. On perusal of Article 226 of the Constitution of India the Madras HC noted that HC is empowered to issue certain writs if the "cause of action" wholly/ partly arises within its territory. However since the a) assessee's principal office was in Gurgaon, b) Revenue(i.e. ACIT, Delhi) had held assessee as defaulter for non-deposit of TDS, c) assessee had obtained TAN number in Delhi jurisdiction, the Madras HC held that cause of action in assessee's case was at Delhi, and not at Madras.

Tecpro Systems Limited [TS-405-HC-2016(MAD)] - WRIT APPEAL No.250 of 2016 and C.M.P. No.4260 of 2016

99. The Court held that notice issued under section 13(2) of the SARFAESI Act operates as an attachment / injunction, restraining the borrower from disposing of the secured assets and therefore such notice was not a mere show cause notice and where the same was issued prior to the section 281 order issued by the income tax department, it could not be overruled by the said order.

Suresh Kumar Goyal v CCIT – (2016) 96 CCH 0068 (Del) - W.P.(C) 3430/2016 & CM No. 14665/2016

100. The Court allowed assessee's writ and quashed recovery notice u/s 226(3) issued to Allahabad Bank with respect to assessee's tax-arrears for AY 2011-12 on the ground that assessee was holding cash credit and term loan account with Allahabad Bank to enable assessee to borrow money from bank for the purpose of its business, whereas power u/s 226(3) would be available "when there is person from whom money is due or may become due to the assessee.

Kaneria Granito Ltd - TS-406-HC-2016(GUJ) - SPECIAL CIVIL APPLICATION NO. 14497 of 2014