Digest Of Important Judgments On Transfer Pricing, International Tax And Domestic Tax

(Pronounced in May 2017)

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I. *Transfer Pricing*

a. ***Most Appropriate Method***

Transactional Net Margin Method

1. Assessee received a sum of Rs. 79.35 crores as proceeds against the export/sale of TV programmes and films to its AE i.e. ATL and benchmarked the international transaction by applying Transaction Net Margin Method (TNMM), with Profit Level Indicator (PLI) of operating profit/operating cost (OP/OC) which was determined at 56.36%. Since the margin of selected comparables was 0.13%, assessee claimed its transaction to be at arm's length price. The TPO rejected TNMM and selected Resale Price Method (RPM) as most appropriate method (MAM). Selecting ATL as the tested party he attributed 90% of its gross profits to assessee and made consequent adjustment. The Tribunal, noting that the transactions of ATL were with its 100% subsidiaries Zee TV-USA and Asia TV-UK, it held that since the comparable transactions adopted by the TPO were not between unrelated parties and hence could not be considered as uncontrolled transactions. It held that Rule 10B(1)(b)(i) provides that price under RPM refers to the price at which the property purchased by the enterprise from an AE is re-sold or provided to an 'unrelated enterprise' or in other words an independent entity and since the comparable transactions adopted by the TPO were with related enterprises, it held that the action of the TPO in selecting RPM as MAM was wholly inappropriate and wrong. Accordingly, it deleted the TP addition.
   Zee Entertainment Enterprises Ltd vs ACIT -TS-382-ITAT-2017(Mum)-TP ITA No.3406/Mum/2014 dated 05.05.2017

2. The Tribunal following the co-ordinate bench ruling in assessee's own case in AY 2006-07 & 2008-09 upheld the DRP's order accepting assessee's selection of TNMM as MAM over TPO's selection of CUP method for benchmarking imports and exports from AE for AY 2010-11. It held that once net margin of assessee was higher than the net margins of its comparable, all international transactions of assessee were at ALP. Accordingly, it dismissed the Revenue's appeal.
   Amphenol Interconnect (I) Pvt Ltd vs DCIT- TS-393-ITAT-2017(PUN)-TP ITA No.477/PUN/2015 dated 12.05.2017

3. The Tribunal set aside DRP's order rejecting internal TNMM as most appropriate method for benchmarking import/export transactions of assessee engaged in the manufacture of studded jewellery for AY 2011-12. It held that the TPO/DRP had arrived at hollow and unsubstantiated observations without any concrete material or irrefutable reasoning for rejecting assessee's segmental accounts. It further rejected DRP's conclusion regarding difference in FAR of Non-AE segment pertaining to the local sales in India and held that the assessee itself had specifically categorized and earmarked such Non-AE segment pertaining to local sales in India as 'uncomparable' and had conducted the analysis based on the Non – AE segment pertaining to export sales.
   S.B.&T Designs Ltd vs ACIT [TS-404-ITAT-2017(MUM)-TP- ITA No. 5189/MUM/2015 dated 03.05.2017

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

ITES Sector/Software Development Services

4. The Tribunal held that the assesse rendering software development services and Marketing support services for AY 2011-12 could not be compared to
   - Acropetal Technologies Ltd as it was functionally different **since it was engaged in both** software services and product and segmental information between software

services and software products was unavailable and also since it failed the employee cost filter of 9.8% of sale

- E-Zest Solutions Ltd as it was engaged in KPO activity.
- E-Inforchips Ltd as the company earned revenue from software products and segmental details were not available.
- ICRA Techno Analytics Ltd as it was functionally dissimilar since it was engaged into software development, engineering services, web development & hosting, business analytics & BPO and had substantial RPT i.e. 22.37% of sales.
- Infosys Technologies as it had huge brand value, intangibles and huge turnover.
- Larsen & Toubro Infotech Ltd as the RPT exceeded 15% and it was engaged in sale of software products.
- Tata Elxsi (Seg) as it was functionally dissimilar since its software development and services consisted of embedded product design, industrial design and visual computing labs and it failed the 75% export earning filter as it had an export revenue of 73.30%.
- Persistent Systems & Solutions Ltd and Persistent Systems ltd on the ground that they were functionally dissimilar as there were engaged in diversified activities and earned revenue from various activities.
- Sasken Communication Technologies as it was not functionally comparable due to lack of segmental data

Further, the Tribunal accepted inclusion of 3 companies on the following grounds

- Evoke Technologies, Mindtree Ltd and RS Software (India) Ltd as the assessee did not specifically reject these comparables.

AMD India P Ltd vs ACIT [TS-362-ITAT-2017(Bang)-TP I.T (TP).A No.1487/Bang/2015 dated 06.04.2017

5. The Tribunal held that the following companies could not be considered as comparable while benchmarking the International transaction of the development and design services:

- Accel Transmatic Ltd as the business activities were functionally different from that of the assessee it was engaged in design, development and manufacture of multi function kiosks queue management system, ticket vending system and services for 2D/3D animation.
- Avani Cimcon technologies ltd was it was engaged in the business of software products as well as software services and segmental details were unavailable.
- Celestial Labs Ltd as it was mainly engaged in clinical research and manufacture of software products.
- KALS Information Systems Ltd as it was engaged in the business of development of software products as well as providing training, and thus functionally not comparable.
- E-Zest Solutions as it was engaged in product development and high end technical services under the category of KPO services.
- Helios & Matheson Information Technology Limited relying on coordinate bench ruling in the case of NXP Semiconductors India Pvt Ltd [TS-427-ITAT-2014(Bang)-TP] wherein it was held that it was functionally incomparable.
- Ishir Infotech Limited as it outsourced its work and did not satisfy the 25% employee-cost filter.
- Lucid Software Limited as it was engaged in the business of development of software products and was thus functionally incomparable.
- Tata Elxsi Ltd as the company had significant R&D activity, brand value etc.
- Thirdware Solutions Ltd as it was engaged in product development and earned revenue from selling licenses subscription **and** no segmental details were available.
- Wipro Limited as it owned a large amount of intellectual property.
- Infosys Technologies Ltd as it owned significant intangibles and had earned huge revenues from software products with no segmental breakup available.
- Persistent Systems Ltd as it was engaged in product development and segmental details were unavailable.

FCG Software Services (India) Pvt Ltd [TS-409-ITAT-2017(Bang)-TP IT(TP)A No. 994 /bang/2011 dated 21.04.2017

6. The Tribunal allowed assessee's plea for exclusion of 4 comparables while benchmarking **the** provision of software R&D services to AEs during AY 2012-13 **and** held that the assessee could not be compared to the following companies:
    - Infosys Limited, Larsen and Toubro Infotech Limited and Persistent Systems Limited on account of turnover filter. It held that the 3 companies failed the turnover filter of 1/10th and 10 times of assessee's turnover i.e 18.45 crores as they had very high turnover i.e.31253 cr, 2960 cr and 810 cr respectively.
    - Genesys International Corporation Limited on the ground of functional dissimilarity as the company was engaged in development of cutting edge applications by developing state of the art GIS technologies and allied spatial data acquisition, processing and integration techniques to meet the demand of the consumers.

    UEI Electronics Pvt. Ltd Vs DCIT [TS-274-ITAT-2017(Bang)-TP –IT(TP)A No.2005 (Bang)/2016 dated 10.03.2017

7. The Tribunal allowed assessee's plea for exclusion of 3 comparables while benchmarking the provision of software development services to its AE for AY 2010-11 and held that the assessee could not be compared to the following companies:
    - E Infochips Bangalore Ltd as it was engaged in software development ITES and also derived income from consultancy charges **and** the segmental information was not available.
    - Sasken Communication Technologies Ltd as it was functionally dissimilar as it was also engaged in sale of products and no segmental details were available.
    - Infosys Technologies Ltd as it was functionally dissimilar as it was a giant company in the area of development of software and it assumed all risks leading to higher profits.

    Broadcom Communications Technologies Pvt Ltd vs DCIT- TS-254-ITAT-2017(Bang)-TP – I.T.(TP) A. No. 145/bang/2014 dated 17.03.2017

8. The Tribunal held that the assessee engaged in the business of software development services and marketing support services could not be compared to
    - Foursoft Ltd as it was engaged in the sale of products and had substantial selling and marketing expenses and related party transactions greater than 0%
    - Geometric Software Solutions Co Ltd as it rendered services in the nature of design and engineering services, the related party transactions were greater than 0% and it owned intellectual property.
    - Sankya Infotech as it was engaged in the sale of products and had substantial selling and marketing expenses, extreme high profit company and owned intellectual property.
    - Sasken Network System on the ground that it had substantial selling and marketing expenses.
    - Sasken Communication Technologies Ltd as it was engaged in the sale of products and had substantial marketing and selling expenses.
    - Tata Elxsi Ltd as it rendered services in the nature of product and engineering and design services.
    - Flextronics Software Services Pvt Ltd as its profitability was extremely high and the related party transactions were greater than 0%.
    - Exclusion of Exensys Software Solutions Limited, Thirdware Solutions Limited and Bodhtree Consulting Limited was admitted by the Tribunal as additional ground by relying on the decision of Quark Systems India P Ltd [TS-448-HC-2011 (P&H)-TP and remitted the matter to the AO/TPO to decide on comparability.

    Infineon Technologies India Pvt Ltd vs ACIT [TS-340-ITAT-2017(Bang)-TP - IT(TP)A No.657/Bang/20 11 dated 06.01.2017

9. The Tribunal held that the assessee, a captive service provider of ITES could not be compared to:
    - Accentia Technologies as an extraordinary event took place during the year under consideration
    - eClerx Services as it was a KPO mainly engaged in providing high-end KPO services

    Goldman Sachs Service Pvt Ltd [TS-430-ITAT-2017(Bang)-TP] IT(TP)A No. 66lBang/2014

10. The Tribunal relying on the co-ordinate bench ruling in the case of Trilogy E-Business Software India Pvt ltd [TS-410-ITAT-2016(Bang)-TP] held that for AY 2008-09 the assessee engaged in providing software development to AE for AY 2008-09 could not be compared to
    - Avani Cincom Technologies Ltd as it was functionally dissimilar to software development service provider and segmental details were unavailable.
    - Bodhtree Consulting Ltd due to fluctuating margin and different functional profile.
    - Celestial Biolabs Ltd as it was engaged in product development in the field of biotech and pharmaceuticals which was functionally dissimilar to assessee.
    - KALS Information Systems Ltd as it was engaged in development of software products as well as provision of training services.
    - Infosys Technologies Limited as it owned significant intangibles and segmental breakup was unavailable.
    - Wipro Limited as it owned IPR and intangibles and engaged in both software development and sale of product without segmental bifurcation.
    - Tata Elxsi Ltd as it was engaged in product designing services.
    - E-Zest Solutions Ltd as it was engaged in rendering product development services and KPO services which is functionally dissimilar.
    - Third ware Solutions Ltd as it derived revenue from sale of software product licenses.
    - Lucid Software Ltd as it was engaged in development of software products.
    - Persistent Systems Ltd as it was engaged in product development and product design services and segmental data was not available.
    - Quintegra Solutions Limited as it was engaged in product engineering services.
    - Softsol India Ltd as its Related party transactions were greater than 15% limit applied

    Verifone India Technology Private Limited vs DCIT TS-345-ITAT-2017(Bang)-TP-IT(TP)A No.1 Bang/2014 dated 24.03.2017

11. The Tribunal held that the assessee engaged in providing software development services to its AE for AY 2011-12 could not be compared to
    - E-Zest Solutions Ltd as it was engaged in the activity of KPO
    - Persistent Systems Ltd as it was engaged in diversified activities and earned revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract etc.
    - Sasken Communication Technologies Ltd as the company had a turnover of Rs 394cr and failed the turnover tolerance range of 10 times of assessee's turnover.
    - Akshay Software Technology Ltd as it was engaged in both software services and products and lacked adequate segmental results.
    - Acropetal Technologies Ltd on the ground that it did not satisfy the filter of 75% of income from information technology, revenue applied by the TPO itself.
    - ICRA Techno Analytic Ltd relying on the decision in the case of Electronics for Imaging wherein it was held that this company was functionally incomparable with pure software development service provider as its service segment comprised of software development, software consultancy, engineering services, web development, web hosting for which segmental details were unavailable. Also, it had RPT greater than 15%.
    - Infosys Technologies Ltd as it failed the turnover tolerance range of 10 times of assessee's turnover
    - L&T Infotech Ltd failed the turnover tolerance range of 10 times of assessee's turnover. Further, it had RPT greater than 15%
    - Tata Elxsi Ltd on the ground that the export revenue of the company was less than 75% applied by the TPO
    - E-Infochips Limited due to absence of segmental data.
    - Mindtree Ltd as it failed the turnover tolerance range of 10 times of assessee's turnover.
    - R S Software as it failed the turnover tolerance range of 10 times of assessee's turnover.

    Further, LGS Global Ltd was remitted to the file of the AO to verify relevant facts to ascertain the employee cost and then decide the functional comparability.

GT Nexus Software Pvt Ltd vs Dy.CIT -TS-335-ITAT-2017(BANG)-TP- I.T.A No.409/Bang/2016 dated 18.04.2017

12. The Tribunal relying on the decision of Cisco Systems India excluded 2 companies viz. Kals Information Systems ltd and Bodhtree Consulting Ltd from the list of comparables while benchmarking the international transactions i.e. provision of software development services to its AEs on the ground of functional dissimilarity noting that both Kals Information Sytems ltd and Bodhtree Consulting ltd were involved in software products.
Sonim Technologies (India) Pvt Ltd vs Dy CIT - TS-341-ITAT-2017(Bang)-TP- IT (TP) A No.2S2 (Bang) 2014 dated 24.03.2017

13. The Tribunal remitted TP-adjustment made in respect of tele-calling BPO services rendered by the assesse to AE for AY 2007-08 & 2008-09 on the ground that the TPO had committed certain factual errors in calculating operating costs by considering cost of whole business instead of cost relevant for international transactions and that he had selected filters/comparables irrelevant to the assessee. Further, ITAT excluded 6 comparables in respect of ITES rendered by the assessee to AE on the following grounds:
    - Infosys BPO Ltd as it was a giant company had a huge brand influence.
    - Genesys International Ltd as it was engaged in software development as well as geospatial services which involved the services relating to the relative position of things on the earth's surface. These basically include 3D mapping, Navigation maps, Image processing, Cadastral mapping, etc.
    - Exlerx Services Limited as it was engaged in high end KPO services and segmental data was unavailable.
    - Cosmic Global Ltd as the revenue from BPO services was negligible i.e Rs 27.76 lakhs.
    - Acropetal Technologies Ltd as it was engaged in provision of high end engineering design services and sophisticated delivery system
    - Accentia Tech as acquisition of various companies, being an extraordinary event which had an impact on the profit.

Monster.com India Pvt Ltd vs DCIT [TS-247-ITAT-2017(HYD)-TP-1762/H/11,1697/H/11,49/H/13, 69/H/13, 1333/H/14, 872/H/14, dated 15.05.2017

14. The Tribunal relying on the decision of the coordinate bench in the case of Thomson Reuters India Services Pvt. Ltd. [TS-1084-ITAT-2016(Bang)-TP] held that Vishal Information technology ltd was functionally dissimilar as it provided agency services by way of outsourcing to third party vendors and acted as an intermediary between final customer and vendor and directed the AO/TPO to re-adjudicate the issue relating to comparability of Vishal Information Technology Ltd. in respect of assessee's IT enabled back office services for AY 2005-06. Further, it also upheld Revenue's adoption of RPT filter of 15% rejecting CIT(A)'s 0% RPT filter noting that the Tribunal had, in a series of decisions, held that the tolerance range of RPT in normal circumstances was 15% and in extreme cases it could be extended upto 25%. Also, relying on the decision in the case of Wipro BPO Solution Ltd., directed TPO to apply turnover filter of 10 times of assessee's turnover on both sides since it was a consistent view that the if turnover was within range of $1/10^{th}$ of the turnover or upto 10 times, then the comparable was considered to be a good comparable. Accordingly, it remitted the issue to the file of the AO/TPO to carry out the search afresh pursuant to its directions.
Sykes Enterprises (India) Pvt Ltd [TS-410-ITAT-2017(Bang)-TP] - IT(TP)A No.1034//Bang/2011 dated 28.04.2017

15. The Tribunal excluded Alphageo (India) Ltd engaged in seismic data analysis and Celestial Lab engaged in development of tailor made software packages as comparable on the ground of functional dissimilarity.
Sabic Research and Technology Pvt Ltd TS-327-ITAT-2017(Ahd)-TP ITANo.1065 dated 01.05.2017

16. The Court, dismissed Revenue's appeal challenging Tribunal's exclusion of TCS E-Serve Limited from the list of comparables for benchmarking the provision of ITES by the assesse to its AE on

the ground that the Tribunal relying on the decision in the case of Ameriprise India Pvt. Ltd [ITA No. 7014/del/2014] had excluded TCS E-Serve Limited as it was engaged in both transaction processing and technical services. It held that considering the profile of the assessee, (engaged only in BPO services) the size and scale of TCS's operations made it an inapposite comparable vis-à-vis the assessee.

Pr. CIT vs Actis Global Service Pvt Ltd [TS-417-HC-2017(DEL)-TP- ITA No.94 of 2017 dated 15.05.2017

17. The Tribunal following the ruling in McAfee India excluded 3 companies viz. L&T Infotech Ltd (turnover of 2959.55 cr). Persistent Systems Ltd (turnover of 810.36 cr.) and Mindtree Ltd (Turnover of 1255.80cr) from the list of comparables while benchmarking the international transaction of the assesse engaged in the business of software development services as the said companies failed to satisfy the turnover filter of 10 times the assessee's turnover i.e 38.07 cr.

Aptean Software India Pvt Ltd vs DCIT [TS-332-ITAT-2017(Bang)-TP- I.T(TP).A No.1826/Bang/2016 dated 15.05.2017

18. The Tribunal held that it excluded 5 comparables for ITes on the following grounds:
    - Accentia Technologies Ltd as it involved an extraordinary event of merger/demerger.
    - Coral Hub Ltd as it was engaged in e-publishing business and segmental details were not available.
    - Eclerx Services Ltd as it was engaged in providing KPO services.
    - Mold-Tek Solutions Ltd as it was engaged in providing engineering services and was classified as a KPO service provider.
    - Genesys International Corporation Limited as it was engaged in providing geographical information services and also carried out R&D services.

BA Continuum India Private Limited vs Addl CIT [TS-396-ITAT-2017(HYD)-TP-ITA-1144/HYD/2014 dated 28.04.2017

19. With regard to the assessee engaged in providing data processing services to its AE, the Tribunal:
    - remitted back to the TPO/DRP to evaluate the profile of the comparable i.e. Accentia Technologies Ltd vis-à-vis the assessee by relying on the ruling in the case of Swiss Re Shared Services India Pvt Ltd [TS-598-ITAT-2016(BANG)-TP] wherein it was held that in the absence of any document showing the kind of service being rendered by the comparable company, it was difficult to compare the functions/profile.
    - Remanded to TPO to verify assessee's claim that RPT of ICRA Online Ltd was 22.77% (i.e. >15%) and directed it to exclude it if it failed 15% threshold.
    - Rejected Jeevan Scientific Technology Ltd, Mindtree Ltd and iGate Solutions Ltd as comparable as they failed the 10 times turnover following the ruling in case of Mcfee Software India Pvt. Ltd [TS-136-ITAT-2016(BANG)-TP].
    - included two companies on the following grounds-Acropetal Technologies as the assessee itself had selected these companies and had neither challenged it. Infosys BPO as the assessee itself had selected these companies and had neither challenged it before DRP nor Tribunal.

    Zyme Solutions Pvt Ltd TS-353-ITAT-2017(Bang)-TP - IT(TP)A No.85/Bang/2016 dated 28.04.2017

20. The Tribunal ruled on selection of companies for assessee engaged in design and development of software used in rendering the services to the shipping industry and rejected its appeal for exclusion of the following companies on the following grounds:
    - Mindtree (IT Services segment), L&T Infotech Ltd. And Persistent Systems Ltd. on the ground that even though the turnover of these 3 companies was more than Rs 800 cr compared to assessee's turnover of Rs 22 cr, Rule 10B provided that, turnover and brand-value were not a criteria for selection of comparable. Further, it rejected

assessee's reliance on High Court decision in the case of Pentair Water India Pvt. Ltd [TS-566-HC-2015(BOM)-TP] since Pentair was engaged in manufacturing industry and volumes/turnover were relevant factors to meet huge capital investment and service charges, whereas assessee was engaged in service sector where cost of service was proportionate to services rendered.

- Spry Resources Pvt. Ltd as the assessee failed to provide any functional dissimilarity, assets deployed and impact on margins and held that the company could not be excluded merely because it was engaged in Government projects.

Further, it held that the assessee could not be compared to:

- Acropetal Technologies Ltd as it was engaged primarily in Engineering design services.
- Kals Information Systems as it was functionally dissimilar and segmental data with regard to software products, training income, translation fee.
- Goldstone Technologies Ltd. as it was functionally dissimilar and engaged only in IT segment and not in software development. As the assessee failed to rebut the DRP findings, Tribunal upheld exclusion of this company.
- CG-VAK Software Systems Ltd as it was a persistent loss making company and accordingly could not be compared to the assessee. Reliance was placed on the decision in the case of Tibco Software India Pvt. Ltd.
- Sankhya Infotech Ltd on the ground of functional dissimilarity, ownership of intangibles and lack of complete segmental data

Shipnet Software Solutions India Pvt Ltd vs DCIT-TS-427-ITAT-2017(CHNY)-TP-ITA No.3404/Mds/2016 dated 28.04.2017

21. The Tribunal ruled on selection of comparables for assessee providing ITES to AEs in the field of insurance on the following grounds

- Tricom India Private Ltd was rejected as it had developed unique in-house software for providing specialized services.
- Wipro BPO Solutions Ltd was rejected as it had the influence of 'WIPRO' brand and intangibles.
- Fortune Infotech Ltd was rejected as it was functionally dissimilar was it used unique technology/technical knowhow and had developed its own software.
- Vishal Information Technology ltd as it had outsourced its work.
- Ultramarine & Pigments Ltd was rejected as it had abnormal trading results and was a super profit company.
- Air Line Financial Support Services India Ltd was remitted back to TPO for reexamination and re-adjudication as the company was essentially a captive service provider.
- Nucleus Netsoft & Gis India Ltd- remitted to the AO/TPO for re-examination and re-computation of the margin.

Swiss Re Shared Services (India) P Ltd vs DCIT-TS-352-ITAT-2017(Bang)-TP I.T(TP).A.No.1139/bang/2011 dated 03.05.2017

22. The Revenue filed an appeal challenging the order of the Tribunal on two grounds i.e. i) Whether Vishal Information Technology was rightly excluded on the ground of difference in business model and ii) whether the Tribunal was justified in holding that KPOs could not be compared to the BPO assessee. The Court, relying on the decision of the High Court in Rampgreen, dismissed the appeal of the Revenue stating that no substantial question of law arose therein and held that the Tribunal's order did not suffer from any infirmity.
EXL Services.com India Pvt. Ltd TS-411-HC-2017(DEL)-TP- ITA 329/2017 dated 15.05.2017

<u>Support Services</u>

23. The Tribunal ruled on selection of comparables in case of assessee providing customer support services to AE for AY 2007-08. Noting that assessee was providing high end technical services with engineering inputs and architecture applications to its AE with engineering inputs and architecture, it ruled that the assessee could not be compared to

- Mold Tek Technologies Limited, relying on the decision of Tesco Hindustan Service Centre Pvt Ltd [TS-996-ITAT-2016(Bang)-TP] wherein this company was excluded on acoount of abnormal profits and it failed employee cost filter
- eClerx Services Limited on the ground of abnormal profits.
- Vishal Information Technologies Ltd as it was engaged into outsourcing and thus had a different business model than the assessee.
- Infosys BPO Ltd on account of difference in size of operations.

G.E India Exports Pvt. Ltd (Formerly GE Power Controls India (P) ltd) Vs DCIT TS-348-ITAT- 2017(Bang)-TP IT(TP)A No.987/Bang/2011 dated 28.04.2017

General

24. The Tribunal noting that for trading segment ALP determination, TPO had considered gross profit margin of a compatable- Advanced Micronic Devices Ltd at entity level, set aside CIT(A) order deleting TP-adjustment on international transaction in trading segment and held that if the comparable had more than one segment, then only the trading segment of the said company had to be compared with the assessee. Further, it held that the CIT(A) had violated the principles of natural justice by carrying out ALP determination exercise on its own without calling for remand report from AO/TPO and directed AO/TPO to consider the matter afresh in light of above observations.
DCIT vs Wipro GE Medical Systems Pvt Ltd-TS-429-ITAT-2017(BANG)-TP-IT(TP)A.No.40/bang/2011/ & 1647/bang/2013 dated 21.04.2017

25. The Court dismissed Revenue's appeal against Tribunal's decision wherein it included comparables having negative net-worth and held that when the FAR was comparable, it could not be said that the company was non-comparable unless it was shown how the negative net-worth of the company had impacted the profitability.
Pr. CIT vs Gillette Diversified Operation Pvt Ltd [TS-441-ITAT-2017(DEL)-TP] dated 02.05.2017

26. The Tribunal upheld the application of the turnover filter of 10 and 1/10th times assessee's turnover and also directed the TPO to adopt a 15% related party transaction filter in view of the fact that there were adequate number of comparable companies. It observed that the entire TP-issue required fresh examination and consideration at AO/TPO's level as the comparability of the entire set of comparables had to be decided by applying the appropriate filters. Accordingly, it set aside the transfer pricing issue for AY 2008-09 including the issue of selection of comparables to TPO for fresh consideration after giving opportunity of being heard to assessee.
Microchip Technology (India) Pvt. Ltd v ACIT - TS-384-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1586/Bang/2012 dated 03.05.2017.

27. The Tribunal directed the DRP to consider the correctness of margins of various comaparbles chosen by the TPO and decide on their inclusion/exclusion. It noted that the TPO in its original order had considered 9 comparables with the average margin of 25.90%. Thereafter, TPO passed a rectification order finalizing a set of 7 comparables with average margin of 24.12%. The Tribunal opined that a change in profit level margins of comparables would have a considerable effect on the TP study since assessee's margin had to be compared with the average PLI of comparables. The Tribunal thus remitted the matter to DRP for fresh consideration.
Extreme Networks India Pvt. Ltd vs DCIT TS-367-ITAT-2017(CHNY)-TP – I.T.A.No.434/mds/2015 and I.T.A,No.449/mds/2015 dated 07.04.2017

28. Tribunal admitted additional evidence filed by assessee in respect of its international transaction of providing software development services to AE for AY 2006-07. Relying on the decision in the assessee's own case wherein the coordinate bench had restored the matter back to the CIT(A) with directions to consider the additional evidence submitted by the assessee relating to

segmental accounts and provide a reasonable opportunity of being heard, it restored the matter back to CIT(A) to adjudicate the issue afresh.
RMSI Pvt Ltd vs ACIT -TS-321-ITAT(DEL)-TP ITA No.3478/del/2012 dated 21.04.2017

29. The Tribunal relying on the decision in the case of Thyssen Krupp Industries (P) Ltd [TS-46-ITAT-2013(MUM)-TP] (Confirmed by Bombay High Court [TS-134-HC-2016(BOM)-TP] held that the assessee engaged in the business of providing Engineering Consultancy services in the field of chemicals, petrochemicals, fertilizers, cement, pharmaceuticals and allied industries could not be compared to:-
    - Engineers India Ltd and Water and Power Consultancy Ltd **as** they were Government companies and the contracts between Public Sector Undertakings were not driven by profit motive alone by other consideration also, such as discharge of social obligations.

    Further, it directed the AO to exclude infrastructure and overhead recoveries in the case of L&T Sargent & Lundy Limited, as they were mere reimbursement of expenses incurred by a group concern on behalf of the assessee and hence should not be considered as a commercial transaction involving profit element while computing the percentage of related party transactions. Relying on the decision in the case of McAfee Software India P Ltd [TS-136-ITAT-2016(Bang)] it held that the co-ordinate bench had consistently accepted the turnover filter at $1/10^{th}$ to 10 times of turnover and the adoption by TPO of filter of $1/4^{th}$ to 4 times the assessee's turnover was arbitrary in nature. Accordingly it directed the AO/TPO to adopt a filter of $1/10^{th}$ to 10 times of the turnover of the assessee. It accepted assessee's argument that Telecommunications Consultants India Ltd was functionally similar to the assessee and held that since it had been accepted as a comparable in the earlier year and subsequent year in the assessee's own case, the TPO was not justified in rejecting the same during the year under consideration and accordingly restored the issue to the file of the AO with the direction to finalize the comparables.
    Jacobs Engineering India Private Limited vs DCIT-TS-428-ITAT-2017(MUM)-TP-I.T.A.No.7194/Mum/2012 dated 17.05.2017

30. The Tribunal upheld the exclusion of Mecon Limited from the list of comparables due to (i) unavailability of current year data, (ii) persistent losses, (iii) unavailability of segmental data and (iv) functional dissimilarity as it was a Government owned company.
    Sunway Construction India Pvt Ltd-TS-342-ITAT-2017(Bang)-TP-IT(TP)A No.1190(bang) dated 23.05.2017

31. Noting that the TPO had conducted the benchmarking analysis of the assesse, a captive service provider, merely on the basis of the TP study, the Tribunal remitted the entire TP issue to the file of the TPO and held that it was incumbent upon the TPO to examine the assesse's agreement with its AE so as to ascertain its exact profile and that he could not merely rely on TP study or profile given in the audited accounts.
    GE India Exports Pvt. Ltd vs DCIT-TS-426-ITAT-2017(BANG)-TP- IT(TP)A No.117/Bang/2014 dated 05.05.2017

32. The Tribunal upheld DRP's inclusion of FCS Software Solutions and Thinksoft Global Services Limited and held that the comparables were wrongly excluded by the TPO merely because their impact on working capital adjustment exceeded 4%. Further, relying on the decision in the case of Mercer Consulting (India) Pvt. Ltd [TS-664-HC-2016(P&H)-TP, it upheld assessee's claim for inclusion of R Systems having different accounting years noting that data for quarter ended 31/3/2008 and 2009 was available in public domain so as to reliably arrive at data for FY ended 31/03/2009.
    G.E India Exports Pvt. Ltd vs DCIT-TS-426-ITAT-2017(Bang)-TP- IT(TP)A No.117/Bang/2014 dated 05.05.2017

33. The Tribunal allowed Revenue's appeal and set aside CIT(A)'s order on application of filters for comparables selection for AY 2005-06 stating that the order of the CIT(A) was very cryptic and erroneous as he had adopted 0% RPT filter as opposed to 15% RPT filter adopted by a number of Tribunals. It noted that, once 15% RPT filter had been adopted instead of 0% RPT filter, several comparables which were rejected by the CIT(A) would come back and be required to be

re-examined on functional comparability aspect. Thus, it restored the matter to the file of Ld CIT(A) fresh consideration.
Novellus Systems (Ind) Pvt ltd [TS-391-ITAT-2017(Bang)-TP- In IT(TP)A No.1101(bang)/2011

34. Tribunal allowed assessee's appeal and held that the AO/TPO was incorrect in considering the 2 related parties as comparable for determining ALP of its royalty payment at 4% of net sales to AE. It held that for determination of ALP, price to be taken into account was the price charged or paid in the same or similar uncontrolled transaction with or between two non-related parties and therefore held that the comparable adopted by TPO was invalid.
Praxair India Private Limited vs DCIT-TS-388-ITAT-2017(Bang)-TP-IT(TP)A No.315/bang/2014 dated 15.05.2017

35. In case of the assessee providing investment advisory and support services to its AE, the Tribunal had disagreed with assessee's contention that it was merely a non-binding investment advisory service provider and affirmed characterization of the assessee by the TPO as a merchant banker / fee based investment and financial advisory service provider. Further, as regards AE receivables the Tribunal had restored the computation of the notional interest on outstanding receivables to the TPO with directions to compute interest for receivables on day to day basis and apply the LIBOR rate of interest as against PLR used by the TPO. The Court admitted assessee's appeal challenging Tribunal's order and framed 3 questions for determination viz.(i) characterization of assessee's function as a merchant banker (ii) inclusion of certain comparables selected by the TPO considering assessee's business profile (iii) whether the Tribunal erred in upholding addition of notional interest on outstanding receivables from AE.
Avenue Asia Advisors Pvt. Ltd vs DCIT-TS-415-HC-2017(DEL)-TP-ITA 350/2016 dated 26.04.2017

36. The Tribunal upheld DRP's order and held that,
    - Pfizer ltd was to be excluded from its list of comparables as its related party transactions were about 95% which did not satisfy the RPT Filter applied and the said company had a different accounting year. It relied on the decision in the case of PTC Software (I) Pvt Ltd [TS-788-HC-2016(BOM)-TP] it held that to ensure comparability the accounting period of the comparable and the assessee had to be same.
    - Celestial lab limited could not be considered as comparable due to difference in functional profile as it was engaged in software development and services and derived revenue from sale of products and services.

Tevapharm India Pvt Ltd vs DCIT (formerly known as Ratio Pharm India pvt ltd [TS-387-ITAT-2017(Mum)-TP] dated 12.05.2017

37. The Tribunal excluded Nitin Fire Protection Industries Ltd from the set of comparables on the ground that its major income was from project related activity.
R Stahl Private Limited [TS-377-ITAT-2017(CHNY)-TP] I.T.A No.2745/Mds/2016 dated 19.04.2017

c. ***Computation / Adjustments***

<u>Depreciation Adjustment</u>

38. The Tribunal noting that the assessee providing contract research and development services to its AE in the field of petrochemicals and polymers, had adopted SLM for the purpose of computing depreciation as against WDV method adopted by the comparables and noting that the assessee's asset turnover ratio ranged from 17% to 29% for the relevant years AY 2004-05 to 2008-09 while that of the comparables ranged between 71% and 177.8%, directed that depreciation cost be excluded from operating cost for computing PLI. Accordingly held that the issue of allowance of depreciation adjustment claimed by the assessee was academic. Further, relying on Pole to Win India Ruling it held that expenses disallowed as deduction by the

assessee in its computation of income could not be included in operating cost for computing operating margin.
Sabic Research and Technology Pvt Ltd TS-327-ITAT-2017(Ahd)-TP ITANo.1065 dated 01.05.2017

Profit Level Indicator

39. The Tribunal directed the consideration of foreign exchange gain arising out of current year's turnover as part of operating revenue for AY 2005-06 and directed the assessee to furnish complete details before CIT(A) regarding sale against which forex gain had been received. Further, the Revenue had argued that CIT(A) had erred in considering assessee's nature of business as construction activity when the assessee was actually providing managerial support services. Referring to the order of CIT(A), the Tribunal observed that the CIT(A) had decided the issue considering the assessee to be engaged in the provision of management and supervisory services and thus the Revenue had filed the appeal in the wrong impression that the CIT(A) had considered the assessee as engaged in construction activity**.**
Sunway Construction India Pvt Ltd-TS-342-ITAT-2017(Bang)-TP-IT(TP)A No.1190(bang) dated 23.05.2017

40. The Tribunal rejected Revenue's contention that the CIT(A) had erred in holding foreign exchange loss or gain, amortization expenses of pre-operative and preliminary expenses, forex losses, bad debts written off and fixed assets written off etc. as part of operating cost, when TPO had excluded it from the comparables. CIT(A) had held that such expenses were in the natural course of business and therefore their exclusion for the purpose of calculation of operating profits would not be in line with audited accounts. While upholding the order of the CIT(A), the Tribunal remitted the matter to the AO/TPO to reexamine as to whether there was any calculation error adopted by the CIT(A)/TPO in applying the principles and make suitable correction after affording due opportunity to the assessee.
Swiss Re Shared Services (India) P Ltd vs DCIT-TS-352-ITAT-2017(Bang)-TP I.T(TP).A.No.1139/bang/2011 dated 03.05.2017

41. The Tribunal, relying on the decision in the case of Fiserv India Pvt Ltd [TS-437-HC-2016(DEL)-TP], held that the exchange gain/loss arising on account of realizing sales, payment to suppliers was to be treated as part of operating revenue/operating cost. It noted that nothing was brought on record to establish that the foreign exchange loss was on account of revenue items and therefore remanded the matter back to the AO/TPO directing him to examine whether loss was arising on account of revenue items, and if so, directed him to treat it as part of operating cost for the purpose of computing the operating margins of the company.
FCG Software Services (India) Pvt Ltd [TS-409-ITAT-2017(Bang)-TP IT(TP)A No. 994 /bang/2011 dated 21.04.2017

42. The Tribunal directed the AO to exclude recovery of advance written off from operating profit for comparing ALP, relying on the decision in the case of Logica Private Ltd (Bang)-TP- ITA No.1129/bang/2011. Further, it remitted the issue of non-allowance of adjustment in respect of extraordinary forex loss suffered by the assessee as against comparables by relying on the decision in the case of Motonic India Automotive (P.) Ltd and held that exchange rate was subject to fluctuation due to economic conditions and while determining the ALP, such factors had to be considered. Further, it also excluded Nitin Fire Protection Industries Ltd from the set of comparables on the ground that its major income was from project related activity.
R Stahl Private Limited [TS-377-ITAT-2017(CHNY)-TP] I.T.A No.2745/Mds/2016 dated 19.04.2017

43. The Tribunal, relying on the decision in the case of Motonic India Automotive, allowed custom duty adjustment in principle in respect of assessee's manufacturing segment for AY 2009-10, noting the fact that the raw material import content of the assessee was 99% as against 30% import content for comparable companies. It held that the custom duty was to be eliminated from

comparable price also to arrive at the correct PLI in order to arrive at correct PLI in order to bring uniformity and therefore remitted the issue to AO for fresh consideration. Further, it excluded one company from list of comparables noting that it used raw material re-cycled from worn out tyres and tread peelings and thus had an inferior product compared to that of the assessee.
Gates Unitta India Company P Ltd -TS-360-ITAT-2017(CHNY)-TP-.ITA Nos 1041/Mds./2014 dated 11.05.2017

44. The Tribunal held that foreign exchange gain/loss arising during the year on account of fluctuation of foreign exchange rate in respect of export realization would form part of operating revenue or cost as the case may be.
Goldman Sachs Service Pvt Ltd [TS-430-ITAT-2017(Bang)-TP] IT(TP)A No. 66lBang/2014

Working Capital Adjustment

45. The Tribunal remitted issue of working capital adjustment to the AO with the direction to examine facts with relevance to the decision in the case of Mobis India Ltd ITA No.2212/Mds/2011 wherein it held that adjustment had to be granted for eliminating material effects, if any, arising from out of difference in working capital between tested party and comparables. and allow suitable working capital adjustment to the assessee. It also directed the assessee to furnish the pricing models of AE as well as assessee to verify whether the working capital margin of interest was included in the sales price of the product. Further, noting that the assessee was not a start-up company as it was established in 2008, it rejected assessee's claim for unutilized capacity adjustment to the extent of 46.54% since adjustments relating to unutilized capacity were allowed in the case of startup companies to cover the initial deficiencies and financial implications.
Shipnet Software Solutions India Pvt Ltd vs DCIT-TS-427-ITAT-2017(CHNY)-TP-ITA No.3404/Mds/2016 dated 28.04.2017

46. The Tribunal relying on the decision of ARM Embedded Technologies Private Limited [TS-466-ITAT-2015(Bang)-TP] wherein it was held that there was no rationality in fixing cap on the actual working capital adjustment, dismissed Revenue's ground challenging DRP direction to carry out working capital adjustment in respect of software development services as per actual figures without putting any cap on the same. Further, it allowed assessee's plea for inclusion of Think Sodt Global Services Limited which was originally selected by the TPO, but subsequently **excluded** as working capital adjustment exceeded 4% of profits.
Genisys Information Systems India Pvt Ltd -TS-267-2017(Bang)-TP-IT(TP)ANo.59/bang/2014 dated 16.05.2017

Others

47. The Tribunal upheld CIT(A) order deleting TP adjustment made by TPO on the basis of reallocation of direct and indirect costs to assessee's three segments (marketing support services, trading functions and AMC of local sales) in proportion to segment turnover. **It held** that allocation **could** be made only in respect of indirect costs **and therefore the** action of TPO in allocating direct as well as indirect costs in ratio of turnover of each segment was not proper and justified.
3D Networks PTE Ltd vs ACIT [TS-372-ITAT-2017(Bang)-TP IT(TP)A No. 544/Bang/2011 dated 18.05.2017

48. The Tribunal rejected assessee's claim for benefit of +/- 5% range mentioned in proviso to section 92C(2) considering retrospective amendment vide Finance Act 2012, held that the benefit was not allowable as ALP in the present case was in excess of assessee's margin by more than 5%. It rejected reliance on Tribunal decisions in assessee's own case for earlier AY on the ground that they were pronounced prior to the relevant amendment and accordingly dismissed the appeal.

Insilica Semiconductors India Pvt Ltd [TS-346-ITAT-2017(Bang)-TP- ITA No. Dated 15.03.2017

49. The Tribunal, relying on coordinate bench's decision in assessee's own case for AYs 2006-07 and 2007-08 deleted adjustment **made on alleged** excess payment made by assessee in procuring raw material from AE on the ground that payment of higher price to AE as compared to non-AE was justified considering there were minimum order quantity restrictions on Non-AE purchases. Further, relying on coordinate bench's ruling in assessee's own case it accepted assessee's contention that the commission was paid for the purpose of business wholly and exclusively based on turnover and remitted issue of ALP determination in respect of sales commission paid to AE at 5% of net exports to the file of the Assessing officer to decide the matter afresh on the basis available supporting material and evidence and after providing an opportunity to the assessee to substantiate its claim.
Intimate Fashions India Pvt. Ltd vsDCIT-TS-424-ITAT-2017(CHNY)-TP-I.T.A.No.1163/Mds/2014 dated 10.04.2017

50. The Tribunal relying on the coordinate bench ruling in the case of UCB India [TS-8-ITAT-2009(MUM)-TP] and Tej Diam [TS-54-ITAT-2010(MUM)] and considering transaction level margins over entity level approach, upheld the CIT(A)'s order deleting Rs. 10.83 Cr TP-adjustment made by TPO in respect of sale of silk fabrics by assessee to its US subsidiary during AY 2007-08. It held that as per the statutory provision in Rule 10B(e)(i) to (iii) it was only the international transaction that had to be compared with uncontrolled transaction and not the transactions undertaken by the entity as a whole. Noting that the profit margin earned by the assessee from controlled international transaction i.e. sale of silk fabrics was higher than average net profit margin earned by the comparables selected by assessee as well as by TPO **it** dismissed Revenue's appeal.
J.J Exporters Ltd [TS-392-ITAT-2017(Kol)-TP – ITA No.201/kol/2012 dated 12.05.2017

51. Tribunal following the co-ordinate bench ruling in the assessee's own case in AY 2006-07 (wherein the issue regarding allocation of various costs between AE and non-AE was restored back to the AO for de-novo consideration after holding that such allocation, consideration of cost records was necessary), directed the AO to verify cost records and ensure reconciliation with books of accounts before passing the order **for AY 2003-04 and 2004-05.**
Otto Blitz India Pvt Ltd [TS-344-ITAT-2017(Bang)-TP] IT(TP)A Nos.1388 & 1389/bang/2012 dated 12.05.2017

d. ***Specific Transactions***

<u>Advertisement, Marketing and Promotion expenses</u>

52. The Tribunal remitted AMP adjustment back to the TPO to determine whether incurrence of AMP expenditure was an international transaction for assessee engaged in the business of manufacturing confectionary products. It noted that the TPO presumed existence of international transaction of AMP by adopting bright line test by relying on special bench ruling in LG Electronics. It observed that while considering AMP expenses as an international transaction, the TPO did not have the benefit of judicial precedents now available for consideration, whereas some judgments consider the transaction of AMP expenses as an international transaction, and some others have held otherwise. Referring to recent HC rulings in Rayban Sun Optics India, Toshiba India and Bose Corporation, it restored the matter to the file of TPO/AO for fresh consideration.
Perfetti Van Melle India Pvt Ltd -TS-403-ITAT-2017(DEL)-TP-I.T.A.No.789/DEL/2016 dated 28.04.2017

53. The Tribunal, upheld deletion of TP-adjustment on account of brand promotion expenses incurred by assessee engaged in blending, bottling and trading of Indian Made Foreign Liquor

('IMFL') on the ground that if the product manufactured and sold by the assessee was India specific then it could not be said that any benefit could have accrued to the AE on account of AMP spend in India in respect of such brands. Further, it rejected Revenue's plea for remanding the issue in view of Delhi HC decisions on this issue, clarifying that its adjudication on AMP issue was specific to present case and should not be enunciated as a legal principle or precedent.
Pernod Ricard India Pvt. Ltd (formerly known as Seagram India Pvt Ltd) Vs DCIT TS-354-ITAT-2017(DEL)-TP ITA No.3525/Del/2009 and ITA No. 2770/del/2011 dated 02.05.2017

54. The Court, relied on the decision in the case of Sony Ericsson Mobile Communications India Pvt. Ltd [TS-96-HC-2015(DEL)-TP] and held that where the facts pertaining to existence of international transactions of AMP expenses had already been analyzed and considered by the Tribunal and no new facts had emerged, the Tribunal could not remand the matter back to the TPO. It accordingly set aside Tribunal's order remitting issue regarding existence of international transaction of AMP expenses incurred by the assessee (engaged in the business of manufacturing, distribution, selling and marketing of alcoholic beverages in India) and restored the matter back to it to decide the issue on merits.
Bacardi India Pvt. Ltd vs DCIT-TS-418-HC-2017(DEL)-TP-I.T.No.417/2017 dated 24.05.2017

55. The Court, directed the AO/TPO to decide AMP issue in case of the assessee for AY 2009-10 in conformity with the High Court decision in the case of Sony Ericsson Mobile Communications 374 ITR 118 and not Special Bench decision in LG Electronics [152 TTJ (del) (SB)] as the opinion in the case of LG Electronics was no longer good in law.
Ray Ban Sun Optics India Ltd [TS-423-HC-2017(DEL)-TP] ITA No.942/2016 dated 15.05.2017

56. The Court, relying on the decision in assessee's own case [TS-627-HC-2016(DEL)-TP] dismissed Revenue's appeal challenging Tribunal's order in respect of TP-adjustment on advertising, marketing and promotion (AMP) expenses. It held that the Revenue had been unable to demonstrate with any tangible material the existence of an international transaction. Mere existence of technical collaboration agreement whereby license granted to Honda for use of brand name would not imply arrangement with the foreign AE for promoting brand of foreign AE.
Pr.CIT vs Honda Seil Power Products Ltd-TS-421-HC-2017(DEL)-TP-ITA 291/2017 dated 16.05.2017

57. The Court, relying on the decision in the case of Bausch & Lomb Eyecare (India) Pvt Ltd [381 ITR 227 (Del)] dismissed Revenue's appeal challenging deletion of Rs 75.40 Crores TP-adjustment on account of Advertising, Marketing and Sales Promotion Expenses (AMP expenses) on the ground that since the issue was covered by earlier High Court decisions, there was no substantial question of law involved in the issue.
Amadeus India Private Ltd vs Pr.CIT-TS-422-HC-2017(DEL)-TP-ITA-154/2017 dated 26.04.2017

Loans / Receivables / Corporate Guarantee

58. The assessee had subcontracted EPC contracts to its AE viz. Lanco International Pte. Ltd (LIPL) and paid mobilization/ material advance for the execution of projects. The TPO considered these as loans and advances granted/ receivables and treated them as international transaction. The TPO made an addition of Rs 145Ccr towards the advances at 12.25%. Aggrieved, the assessee filed an appeal before Tribunal. The Tribunal deleted the adjustment of Rs 145 cr towards interest on mobilization advances. It noted that mobilization of advances was a well-known practice in the construction industry and there was complete uniformity in assessee's act in not charging interest from both AE and Non-AE and also not paying interest on advances received. Further, it deleted TP adjustment on account of interest received on loans observing that the assessee had received interest at 6.37% which was more than average Singapore PLR of 5.38% relying on the decision in the case of Tata Autocomp Systems ltd [TS-45-HC-2015(BOM)-TP] and Cotton Naturals India Pvt. Ltd [TS-117-HC-2015(DEL)-TP]. The Tribunal also rejected

assessee's contention that provision of corporate guarantee did not fall within the scope of International Transaction as per section 92B. However, considering Asian Paints Ltd [TS-868-HC-2016(BOM)-TP] case, it directed the AO/TPO to consider only 0.27% as the guarantee commission on the amount involved and clarified that if any of the corporate guarantees were provided in earlier year, they would not be subjected to transfer pricing during the year under consideration. Accordingly directed the AO/TPO to appropriately quantify the guarantee commission after considering those in earlier year or withdrawn during the year.

Lanco Infratech Limited vs DCIT –TS-328-ITAT-2017(HYD)-TP ITA No. 404/hyd/2016 dated 03.05.2017

59. The Court, upheld Tribunal's deletion of notional interest adjustment on delayed AE-receivables in the hands of the assessee on the ground that the since assessee had earned significantly higher margin than its comparables, it compensated for credit period extended to its AEs and thus the TP-adjustment on receivables outstanding from AE beyond the stipulated credit period of 180 days was unwarranted and wholly unjustified. Further, it held that the inclusion in the explanation to section 92B of the Act, the expression 'receivables' would not mean that de hors the context every item of 'receivables' appearing in the accounts of an entity which may have dealings with foreign AEs would automatically be characterized as an international transaction. It observed that, assessee had already factored in the impact of receivables on working capital and thereby on its pricing/profitability vis-a-vis that of comparables, and adjustment purely on the basis of outstanding receivables would amount to re-characterizing the transaction which was impermissible as per High Court ruling in the case of EKL Appliances [TS-206-HC-2012(DEL)-TP].

Kusum Helath Care Pvt. Ltd [TS-412-HC-2017(DEL)-TP- I.T.A.No.765/2016 dated 25.04.2017

60. The assessee had not charged any fee or commission for providing corporate guarantee as collateral for the aforesaid borrowing on behalf of its AE. Considering it as an international transaction, TPO worked out addition of Rs. 1.63 crores being 3% of the average amount of loan outstanding during the year. The CIT(A) affirmed the order. The Tribunal noted that the assessee had issued corporate guarantee on behalf of its AE for loan facility availed by it from the bank. It opined that TPO's approach to determine ALP based on fees charged by the bank was inconsistent with Bombay High Court ruling in Everest Kanto Cylinders Ltd [TS-200-HC-2015(BOM)-TP]. Accordingly, it upheld the rate of 0.50% for the purposes of determining arm's length rate of corporate guarantee commission/fee. The Tribunal rejected assessee's plea for guarantee commission rate below 0.5% (on the basis that the loan raised by AE had adequate primary security in the shape of the net worth of the AE itself and therefore the risk of devolvement on assessee was minimal) on the ground that the it was not a peculiar situation so as to warrant a rate lower than 0.50%. ATL Mauritius had availed credit facilities from Barclays Bank.

Zee Entertainment Enterprises Ltd vs ACIT -TS-382-ITAT-2017(Mum)-TP ITA No.3406/Mum/2014 dated 05.05.2017

61. The Tribunal deleted TP-adjustment towards corporate guarantee commission for AY 2009-10 and 2010-11 on the ground that corporate guarantee was outside the ambit of definition of international transaction under section 92B. It relied on the coordinate bench's ruling in the case of Bharti Airtel Limited [TS-76-ITAT-2014(DEL)-TP] and Siro Clinpharm Ltd [TS-144-ITAT-2016(Mum)-TP] and held that explanation to section92B could not be applied retrospectively for the years under consideration **and since** the assessee **had** not incurred any costs in providing corporate guarantee, **it** would not constitute an international transaction within the meaning of section 92B. Further, relying on coordinate bench's ruling in assessee's own case directed the TPO to compute ALP based on LIBOR rate applicable for the years under consideration + 200 basis points.

Dr Reddy's Laboratories Limited – ACIT TS-331-ITAT-2017(HYD)-TP- TA.No.294/Hyd/2014 dated 28.04.2017

62. The Tribunal relying on the ratio laid down in Siro Clinpharm [TS-144-ITAT-2016(MUM)-TP] held that corporate guarantee provided by the assesse (engaged in the business of manufacturing

and trading of cement, calcined petroleum coke (CPC) and generation of electricity) on behalf of its AEs in USA during AY 2011-12 were not international transactions as the amendment to the definition of international transaction under section 92B was applicable prospectively. Further, relying on the decision in the case of Four soft Limited and Siva Industries & Holdings Ltd upheld the adoption of LIBOR+200 basis points as arm's length rate for benchmarking interest on loans provided to its US subsidiary.

Rain Cements Ltd vs DCIT -TS-330-ITAT-2017(HYD)-TP–222/Hyd/2014, 309/hyd/2015, 344/hyd/2015, 259/hyd/2016, 260/hyd/2016, 315/hyd/2015, 433/hyd/2016, 434/hyd/2016 dated 26.04.2017

63. The Tribunal rejected Revenue's request for constituting Special Bench to decide the issue relating to TP-adjustment on corporate guarantee fees for AY 2007-08 noting that the issue was admitted in appeal by Gujarat HC. The Tribunal remitted the matter to AO with a direction to consider it afresh after the HC decision. The assessee had given corporate guarantee to banks on behalf of its AEs without charging any commission/fee. Noting that the legislature had inserted Explanation to section 92B vide Finance Act, 2012 with retrospective effect, it held that the assessee could not benchmark its transaction retrospectively**.** Further, with respect to interest free advances given by the assessee to its AEs, the AO made an addition of notional interest @ LIBOR + 2 percent which was confirmed by the CIT(A). The Tribunal noted that in the immediately preceding assessment year in the assessee's own case where the CIT(A) had adopted LIBOR + 0.25 percent to benchmark the impugned transaction, it had held that only the LIBOR rate without any mark-up, was to be considered while making the addition. Accordingly, the Tribunal, following its previous order held that the addition made by the AO / CIT(A) was to be made only on the basis of LIBOR without any mark-up.

Sun Pharmaceutical Industries Ltd [TS-357-ITAT-2017(AHD)-TP- ITA 2076 & 2067/AHD/2013 dated 27.04.2017

64. The Apex Court admitted Revenue's SLP challenging Gujarat High Court's decision in respect of deletion of TP-adjustment on corporate guarantee absent actual pledging of shares in favor of the AE. Assessee's AE, Adani Global Pvt. Ltd Singapore had raised a term loan from ICICI Bank for which assessee had intended to provide guarantee by way of by pledging 23.5% shareholding of Mundra Port and SE2 Limited (owned by the assessee), subject to RBI approval. Since the RBI denied the assessee the approval, the guarantee was not provided and consequently the assessee did not charge any guarantee fee from its AE. The TPO applied CUP method and proposed TP adjustment of Rs. 3.65 cr based on market rate of 2% of guarantee fees. The TPO rejected assessee's submission that it had intended to provide a guarantee by pledging of shares and that since the same was not approved by RBI, no guarantee had been provided to the AE. The TPO held that RBI letter was regarding pledging of shares in favor of IDBI Trusteeship Services Ltd and therefore may have been referring to some other transaction. CIT(A) reversed AO's decision observing that IDBI Trusteeship Ltd was security trustee of ICICI Bank Limited, Singapore and thus, RBI's letter refusing permission for pledge of the shares pertained to the same transaction. The Tribunal confirmed the decision of CIT(A) and held that since the assessee had not furnished guarantee to AE, no adjustment was warranted. The High Court upheld Tribunal's order.

Adani Enterprises Ltd [TS-408-SC-2017-TP] –CC No.6814/2017 dated 07.04.2017

<u>Royalty / Management fees / Intra Group services / Reimbursements</u>

65. The Assesse engaged in the business of manufacturing and marketing of paints, special chemicals and starch, entered into a service level agreement (SLA) with another Akzo Nobel Group company whereby it was to receive services relating to (i) Advice/support in the area of human resources to attain functional excellence, (ii) Advice and assistance on operation relating to plant, (iii) advice and support on strategies to optimize cost structures in purchasing, (iv) wide range of market support services (v) information technology, (vi) advice and assistance on

reporting/accounting, financial control and planning activities and (vii) other ancillary **business** support **functions** including public affairs advise or public relations. The Tribunal rejected **the TPO's** classification of support services received from its AE as stewardship services. It relied on OECD Guidelines and US regulations to observe that co-ordination activities qualified as services unless a particular subsidiary did not need the activity and would not be willing to pay an unrelated party to perform it. Accordingly it deleted the TP addition relating to support services. The Tribunal further upheld the deletion of TP adjustment on account of SAP implementation services received from another AE on the ground that the TPO had erroneously construed these services as stewardship services without considering the plethora of facts, justifications and details. It observed that the assessee had submitted documentary evidence such as sample evidences of communications, training manuals and other relevant documents with TPO showing valuable commercial services received. Observing that SAP implementation leads to improved productivity and reduce costs through flexibility as well as increased profitability, improved financial control as well as optimization of IT spending, it noted that the asseesee had used SAP software for integrating the process at varied locations for the business. The manner of allocation of cost was scientific and correct. It accordingly concluded that the transaction was at ALP and dismissed Revenue's appeal.

Akzo Nobel India Limited [TS-379-ITAT-2017(Kol)-TP I.T.A No. 335/Kol/2014 dated 03.05.2017

66. The Tribunal, relying on co-ordinate bench ruling in the assessee own case for AY 2007-08 allowed payment for intra group services to the extent cost was substantiated and upheld DRP's order for AY 2011-12 that intra-group managerial services rendered by the AE to the assessee were at ALP. It rejected Revenue's contention that the assessee could not establish that services were rendered by AE against which assessee had made payment.

Essentra India Pvt Ltd [TS-368-ITAT-2017(Bang)-TP- I.T.(TP).A No.311/BANG/2016 dated 31.03.2017

67. The assessee under a cost sharing arrangement had paid management fees to its French parent company and applied TNMM as the most appropriate method. However, the TPO determined ALP of management fees at NIL contending that the assessee had failed to justify the payment on the basis of receipt and benefit test and that the services were in the nature of stewardship or shareholder activities and the same should not have been charged by the AE. Accordingly, he made TP addition. The CIT(A) upheld the AO's TP addition on the ground that the assessee had not provided details regarding the experts/professionals who had actually rendered the specific services. The Tribunal deleted the TP adjustment on the ground that TPO had not adopted any permissible method for determining ALP at NIL. It further observed that the assessee had submitted evidence for the visits by representatives of AE for rendition of services and had also furnished cost allocation agreement. Accordingly, it held that it was not open for TPO to bother about the business expediency and held that for the purpose of determining ALP at NIL, the TPO had to demonstrate that the said services were available for NIL consideration in an uncontrolled situation. As the TPO failed to do so, it deleted the TP addition made by the TPO.

Schneider Electric India Pvt Ltd [TS-433-ITAT-2017(Ahd)-TP] ITA No. 209/Ahd/2015

68. The Tribunal, relying on the coordinate bench's ruling in assessee's own case [TS-18-ITAT(Bang)-2016-TP] held that reimbursement of paid/ received expenditure could not to be treated as part of operating cost or operating revenue, and remanded the matter back to the file of AO to examine whether any profit element was involved in the reimbursement transaction and whether it was in the nature of pure reimbursement of expenditure.

FCG Software Services (India) Pvt Ltd [TS-409-ITAT-2017(Bang)-TP IT(TP)A No. 994 /bang/2011 dated 21.04.2017

69. The Court, upheld the Tribunal order deleting TP-addition on account of royalty payment for technical know-how made by assessee to AE for AY 2008-09. It followed coordinate bench ruling in assessee's own case and held that TPO's restriction of royalty payment from 2% to 1% without giving reasons or justification was arbitrary and adhoc. It noted that the TPO had not

carried out exercise to determine the ALP by following one of the methods of section 92C. However, it admitted Revenue's appeal on deletion of adjustments on brand usage royalty and royalty payment on traded finished goods and deletion of disallowances of withholding taxes, R&D cess and service tax on royalty payments to consider whether on facts and in circumstances of the case and in law, Tribunal was justified in deleting the addition on account of tax on brand usage royalty without appreciating the fact that approval taken from RBI cannot be taken to be augmenting the terms of agreement with the principals.
Johnson & Johnson Ltd TS-397-HC-2017(BOM)-TP- ITA No.1671 of 2014 dated 03.04.2017

70. The Tribunal upheld TPO/DRP's NIL ALP in respect of administrative service fees and royalty payment by assessee to AE for AY 2006-07 and 2007-08 on the ground that the assessee had only described the nature of technical knowhow and administrative services received without conclusively proving their use in the manufacturing. It held that although Delhi High Court ruling in the case of EKL Appliances stressed that TPO/AO cannot question the necessity of incurring the expenditure or the benefits of the expenditure incurred, the onus lied on the assessee to prove that the actual services for which administrative services fess were paid were actually rendered.
Herbalife International India Pvt Ltd [TS-364-ITAT-2017(Bang)-TP- IT(TP)A No.1406(bang)/2010 and IT(TP)A No. 924/bang/2012 dated 17.04.2017

71. The Tribunal relying on the decision in the case of Toyota Kirloskar Motors Private Limited [TS-650-ITAT-2016(BANG)-TP] held that where no comparable had been found in respect of royalty payment made by the assessee to its AE, the ALP may be determined by considering the royalty as part of operating cost for the purpose of computing the margin in the trading segment. Accordingly, it remitted the issue back to the file of AO/TPO for fresh consideration.
DCIT vs Wipro GE Medical Systems Pvt Ltd-TS-429-ITAT-2017(BANG)-TP-IT(TP)A.No.40/bang/2011 & 1647/bang/2013 dated 21.04.2017

72. The Tribunal deleted Rs 7.5 cr. adhoc adjustment made by the AO in respect of royalty payment as the assessee had undertaken a similar transaction for succeeding AY 2010-11 which was accepted at arm's length. Relying on the decision in the case of Spicer India Limited [TS-569-HC-2015(BOM)-TP, it held that the Revenue had failed to show difference between the two transactions and the procedure laid down under the transfer pricing provisions had not been followed because it made an adhoc adjustment which was not as per law. Further, it noted that the no addition on account of royalty had been made in the TPO's order and that AO had made the addition on account of royalty on the basis of the show cause notice of the TPO. Additionally, the Tribunal relying on the ruling in the case of SGS India Pvt Ltd wherein rate of royalty approved by SIA/RBI was upheld as CUP data and Spicer India Limited [TS-99-ITAT-2017(PUN)-TP] wherein rate of royalty lesser than 3% was considered to be at arm's length as it was as per RBI approved rate, held that since royalty payment in the instant case was also less than 3%, the same could be considered to be at ALP.
John Deere India Pvt Ltd [TS-398-ITAT-2017(PUN)-TP- ITA No.828/PUN/2014 dated 17.05.2017

e. ***Miscellaneous***

Appeal

73. The Tribunal, relying on the decisions in the case of Nortel Networks India P. Ltd and Roche Products (India) Private Limited, allowed assessee's additional ground on admission of fresh evidence which was declined by CIT(A) for AY 2003-04. The assessee further submitted that Choksi Laboratories (engaged in engineering activities and chemical testing services) was functionally dissimilar to assessee providing contract testing and other services to AE. However, considering the admission of additional evidence, the Tribunal remitted the matter to the file of CIT(A), without adjudicating on the issue of comparability.
UL India Pvt Ltd [TS-343-ITAT-2017(Bang)-TP IT (TP) A No .180/bang/2012 dated 22.03.2017

74. The Tribunal, relying on Apex Court's ruling in the case of NTPC Ltd admitted software developer assessee's additional grounds challenging CIT(A)'s modification of filters in respect of comparables selection for AY 2007-08 and held that since issues raised in the additional grounds were in respect of the filters applied by the CIT (A), it did not require any investigation and examination of new facts.
PMC Sierra India Pvt Ltd vs DCIT [TS-371-ITAT-2017(Bang)-TP-IT(TP)ANo.1308/BANG/2012 dated 13.04.2017

75. The Tribunal, referring to the provisions of section 144C, allowed Revenue's appeal challenging DRP's direction to remit working capital adjustment back to AO. It held that the DRP had no power to remit a matter back to the AO and had to determine the adjustment on its own. Accordingly it remitted the matter back to DRP to work out the correct amount of working capital adjustment and then issue necessary directions to AO/TPO. In respect of assessee's plea against inclusion of Dynamic Technologies Ltd as a comparable, following the ruling in assessee's own case, it remitted the matter to the file of AO/TPO for selection of comparables with similar functional profile.
Myunghwa Automotive India Pvt Ltd [TS-401-ITAT-2017(CHNY)-TP ITA No. 1186/Mds/2016 & CO no.179/Mds/2016 dated 12.04.2017

76. The Court, refusing to condone extraordinary delay of 505 days in refiling appeal, dismissed Revenue's appeal challenging Tribunal's decision on transfer pricing issues on the ground that change in counsel could not explain a delay of 505 days in curing defects and refiling the appeal. Noting Revenue's explanation that appeal was initially filed on 9.10.2014, but was placed under objections by registry owing to drastic increase in Court fees, digitization (e-filing), it held that the Court registry had conducted orientation sessions to enable lawyers to familiarize themselves with e-filing process and that the increase in court fees had come into force much before filing of present appeal. Accordingly, it dismissed the appeal of the Revenue.
Pr. CIT vs Iqor India Services (P) Ltd [TS-419-HC-2017(DEL)-TP- ITA 314/2017 & CM No. 14730/2017 dated 19.04.2017

77. Tribunal remitted TP-issue of exclusion of comparables for AY 2010-11 to the DRP for fresh consideration considering the correctness of margins of various comparables chosen by TPO and decide on their inclusion/exclusion as a change in profit level margins of comparables would have a considerable effect on the TP study. It directed the AO to pass a fresh order based on the directions of DRP.
Extreme Networks India Pvt Ltd [TS-367-ITAT-2017(CHNY)-TP ITA No 449/Mds/2015 dated 26.04.2017

78. The Court, dismissed Revenue's appeal for AY 2006-07 challenging Tribunal's order on exclusion of comparables without proper discussion. It held that previous precedents had been relied by the Tribunal and it was incorrect to say that it had not taken into account the factors that weighed with it for excluding the said comparables.
Pr. CIT vs Mentor Graphics (India) P Ltd-TS-420-HC-2017(DEL)-TP-ITA 318/2017 dated 02.05.2017.

79. The Court, admitted assessee's appeal and framed 2 questions for determination (i)pertaining to exclusion of 'Advanced Micronic Devices Ltd' as a comparable and (ii) restricting the ALP-adjustment to the value of international transactions instead of the assesses's entire turnover. Further, it also permitted the parties to file additional documents/papers which were part of assessment record filed before Tribunal within 8 weeks.
Becton Dickinson India Pvt. Ltd vs Pr. CIT - TS-416-HC-2017(DEL)-TP-ITA 289/2017 dated 16.05.2017

80. The Tribunal reprimanded the assessee for contesting inclusion of 2 comparables initially selected in TP study in the second round of proceedings before Tribunal in 2017 i.e. 11 years after filing return of income for AY 2006-07. It admitted the additional grounds while clarifying that

Special Bench in the case of Quark Systems had not laid down a law that anytime and every time assessee could resile from a comparable selected by it. It further observed that the assessee in the present had not pointed out any specific functional dissimilarity vis-à-vis the comparable.

Further, it adjudicated the dispute on functional profile of the assessee in the backdrop of the decision in the assessee's own case for subsequent AY 2007-08 classifying assessee as low end ITES provider as against decision for earlier AY 2005-06 wherein it was held that the assessee was a high end ITES provider on the basis of TP study report. It observed that the coordinate bench, while deciding the case for AY 2007-08, had not considered the AY 2005-06 findings which held assessee to be a high end ITES services provider (based on TP study report) as it was conducting research activity and knowledge management services and noted that the for the relevant year the TPO had neither classified assesse as high end or low end ITES provider. Accordingly, it remitted the entire issue of TP-Adjustment to AO/TPO for correct ascertainment of assessee's functional profile, carrying out comparability analysis and then determining ALP. In sum and substance, the Tribunal admitted additional ground only on the premise that the assessment year involved in Quark Systems was very near to the assessment year involved in the present case i.e AY 2006-07 being initial years of transfer pricing.

Evalueserve.com Pvt Ltd TS-390-ITAT-2017(DEL)-TP- ITA 4001/DEL/2013 dated 11.05.2017

Assessment/Reassessment

81. The Tribunal set aside the order of the CIT(A) in the case of the assessee engaged in providing software service and directed the CIT(A) to re-adjudicate issues relating to functional comparability and application of filters in light of various tribunal rulings, noting that the CIT(A) had simply remanded the issues in light of Delhi Tribunal ruling in Actis Advisers P. Ltd. Vs. DCIT 20 ITR (Trib) 138. It observed that the findings reproduced by the CIT (Appeals) were only a broad guideline but not the factual finding on the comparability of the comparables selected by the TPO and contested by the assessee. Further, it held that the CIT(A) had no jurisdiction to remand the issue to AO/TPO and held that he was to decide it himself and that if he needed further verification of fact, a remand report could have been sought from the TPO.

Athena Semiconductors Pvt. Ltd. (merged with Broadcom India Pvt. Ltd.) Vs DCIT - TS-383-ITAT-2017(Bang)-TP - IT(TP)A No.1630/Bang/2013 dated 05.05.2017

82. Tribunal rejected assessee's ground seeking to treat assessment order for AY 2008-09 passed in the name of amalgamated company as invalid for the reason that PAN mentioned in the order was that of the amalgamating company. The assessee submitted that on merger, the identity of Transferor company was lost and it seized to exist in the eyes of law, rendering the assessment made in the name of non-existent company invalid. It observed that on bringing the fact of amalgamation to AO's notice, the case was transferred to the jurisdiction of AO under whom the amalgamated company's registered office was located. Further, it observed that mention of PAN was only to differentiate between amalgamated and amalgamation company.

BA Continuum India Private Limited vs Addl CIT [TS-396-ITAT-2017(HYD)-TP] ITA-1144/HYD/2014 dated 28.04.2017

83. The Court allowed assessee's writ for AY 2007-08 and 2008-09 and set aside final assessment order passed by AO without first issuing draft assessment order as mandated by section 144C(1). It observed that the Tribunal had remanded TP issues in respect of assessee to the file of the AO who without passing a draft assessment order, issued a final assessment order under section 143(3) and issued demand and penalty notices. The Court relying on the decision in the case of Vijay Television Pvt Ltd [TS-172-HC-2014(MAD)-TP] and ESPN Star Sports Mauritius S.N.C.ET Compagnie [TS-130-HC-2016(DEL)-TP], held that the failure by the AO to adhere to the mandatory requirement of section 144C(1) and first pass a draft assessment order would result in invalidation of final assessment order and the consequent demand notices and penalty proceedings. It rejected Revenue's contention that the failure to adhere to section144C(1) requirement was a curable defect and that the matter should be remanded for passing draft

assessment order. Accordingly the Tribunal set aside the demand notices issued by AO and penalty proceedings initiated by the AO.
Turner International India Pvt Ltd vs DCIT [TS-400-HC-2017(DEL)- 4269/2015-TP dated 17.05.2017

MAP

84. The assessee had entered into international transactions with its AE in four countries i.e USA, Canada, UK and Australia. During the pendency of the cross appeals before CIT(A), **the** competent authorities of India and USA arrived at a resolution under MAP resolving the TP adjustment issue arising in the appeal. Assessee withdrew its appeal before the Tribunal insofar as it related to software development services provided by assessee to its AE in USA and Canada as the said issue was covered under MAP. The assessee contended that the markup of 17.5% for USA and Canada should also be applied in case of UK and Australia also. The Tribunal noted that the TPO had determined the ALP of transactions undertaken by the assessee with all AEs together and not considered ALP of different transactions for AEs of different countries. The Tribunal relying on the ruling in the case of JP Morgan Services (P.) Ltd [TS-578-ITAT-2015(Mum)-TP held that whatever margin had been applied through MAP with respect to major transactions, should also be applied for the remaining similar transactions not covered under MAP and therefore, applied the markup of 17.5% approved in MAP with USA and Canada on assessee's IT services transactions with AEs in UK and Australia.
CGI Information System and Management Consultants Pvt Ltd vs DCIT TS-333-ITAT-2017(Bang)-TP- IT(TP)A No.439/Bang/2011 dated 21.04.2017

85. The Tribunal dismissed assessee's appeal for AY 2008-09 as the TP issue relating to royalty paid by assessee to AE was resolved under India-Japan MAP, wherein royalty payment was agreed to be allowable at 1.15% and since the appeal had become infructuous as on date, they were dismissed as not pressed.
Anchor Electricals Pvt Ltd [TS-325-ITAT-2017(Mum)-TP I.T.A.No.6930/mum/2012 and I.T.A.No. 326/mum/2012 dated 26.04.2017

86. The Tribunal dismissed assessee's and Revenue's cross appeals for AY 2008-09 as the TP issues were already resolved under MAP proceedings as per which relief of Rs 48.20 lakhs was allowed from TP adjustment.
Agile Software Enterprises Private Limited vs ITO [TS-395-ITAT-2017(Bang)-TP-IT(TP)ANo.1342/B/2013 dated 11.04.2017

Penalty

87. The Tribunal for AY 2011-12 upheld levy of penalty under section 271BA for assessee's failure in filing Form 3CEB in respect of transaction of receipt from its NRI director shareholder towards share capital premium. It relied on the co-ordinate bench ruling in the case of IL&FS Maritime Infrastructure Company Ltd [TS-2014-ITAT-2013(Mum)-TP] and held that share investment transactions fell within the purview of section 92B and the assessee was required to file audit report in Form 3CEB for such transactions. Further, it distinguished Bombay HC ruling in the case of Vodafone India on facts, noting that the present case was entirely different as the AO had neither attempted to nor made any adjustments to the ALP for issue of equity shares at a premium to its NRI Director and the issue was simply whether penalty u/s 271BA was attracted since the assessee had not filed the audit report in form 3CEB within the period warranted u/s 92E.
BNT Global Pvt Ltd vs ITO - TS-319-ITAT-2017(Mum)-TP-ITA No 4111/Mum/2016 dated 26.04.2017

88. Assessee, incorporated in India, was a wholly owned subsidiary of GAP International Sourcing Inc, USA and operated as a procurement support service company whereby it facilitated sourcing of apparel merchandise from India for its AE, for which it was remunerated at total operating costs plus a 15% mark-up thereon. The TPO accepted TNMM as the most appropriate

method, however, re-characterized the assessee as a 'significant risk bearing' entity having intangibles as opposed to a low risk service provider. In quantum proceedings, the Tribunal noting that the assessee was entitled to a cost plus mark-up on total operating cost of Gap International Sourcing India Ltd. (and not the value of goods sourced by GAP US), rejected the TPO's recharacterization of the assessee as a significant risk bearing service provider but did not accept assessee's mark-up of 15% and instead relying on the Delhi Tribunal's decision in the case of Li & Fung's [TS-583-ITAT-2011(DEL)-TP] substituted the mark-up of 32% (i.e. the maximum operating margin adopted in Li & Fung decision), which the assessee accepted. As there was no deliberate attempt by the assessee to conceal any income, the Court upheld the Tribunal's order wherein penalty under section 271(1)(c) of the Act was deleted on the ground that the assessee had accepted the TP adjustment merely to buy peace of mind.

Gap International Sourcing India Ltd –TS -323-HC-2017(DEL)-TP-ITA 185/207 dated 02.05.2017

Pr. CIT vs Gap International Sourcing India Ltd-TS-425-HC-2017(DEL)-TP- ITA 185/2017 dated 24.04.2017

89. The Court, quashed CIT(A)'s enhancement of concealment penalty under section 271(1)(c) on TP addition on import of raw material which was proposed by TPO but not made by AO in final assessment and held that once the addition had been made/confirmed in the quantum proceedings, then subject matter of penalty proceedings under section 271(1)(c) was strictly circumscribed to such addition only. The TPO had proposed additions on import of capital goods and raw materials, of which only the addition in respect of capital goods import was incorporated in final order, however, the CIT(A) while confirming concealment penalty levied by AO, also enhanced penalty on account of TP-addition on raw material import. The Tribunal held that the CIT(A) was unjustified in law and on facts to levy or enhance a penalty on an addition which was not arising out of assessment order or any appellate order in the quantum proceedings or from the penalty order passed by the AO. It also deleted penalty levied on TP addition on import of capital goods, disagreeing with the TPO's approach of benchmarking the transaction by considering foreign AE as tested party and then selecting local comparables on Indian Data System, which operated under different geographical, economical and market environment, to benchmark AE's margin.

JRK Auto Parts Pvt. Ltd [TS-434-ITAT-2017(DEL)-TP- ITA No.3458/del.2014 dated 31.05.2017

Stay

90. The Tribunal extended stay of outstanding demand of Rs.1029.21 crores to Infosys Limited for AY 2012-13 on the ground that the assessee had agreed to make a further payment of 300 crores and had a good prima facie case on some issues and thus granted stay for a period of 6 months till disposal or appeal whichever is earlier.

Infosys Limited vs ACIT-TS-389-ITAT-2017(Bang)-TP-IT(TP)ANo.718/BANG/2017 dated 15.05.2017

91. The Tribunal granted stay of outstanding demand of Rs 1.53cr to the assessee for AY 2012-13 for a period of 3 months subject to payment of Rs 10 lakhs on or before 30th April 2017. **It observed** that the first stay order was vacated by **the** Tribunal as **the assessee had sought** adjournment **at the time of** appeal hearing considering that it was compelled to seek adjournment as its counsel was to appear in another stay granted matter before Tribunal in Cochin.

Transitions Optical Distribution Pvt Ltd TS-381-ITAT-2017(Bang)-TP IT(TP)A No.2208/bang/2016 dated 21.04.2017

92. The Tribunal granted stay of outstanding demand of Rs. 3.18 crore to E4e Business Solutions India for AY 2012-13 for a period of 180 days or till disposal of appeal, whichever was earlier subject to payment of Rs 75 lakhs in 2 installments noting that the asseessee had already paid Rs 36 Lakhs. Further, it considered the fact that the assessee was seeking credit adjustment for

earlier year in which tribunal had already decided the matter but no refund was worked out by the AO yet.
E4e Business Solutions India Pvt Ltd vs ITO [TS-374-ITAT-2017(Bang)-TP-S.P No.79/bang/2017 dated 21.04.2017

93. The Tribunal granted stay of outstanding demand to the assessee for AY 2012-13 for a period of 180 days or till appeal disposal, whichever is earlier, subject to payment of Rs 50 lakhs on or before May 15, 2017 considering the fact that out of a demand of Rs 3.02 cr on account of TP-adjustment assessee had already paid Rs 1 Cr (25% of demand).
Biesse Manufacturing Company Pvt Ltd vs DCIT [TS-394-ITAT-2017(Bang)-TP-S.P No.81/bang/2017 dated 21.04.2017

Others

94. The Tribunal rejected assessee's contention that since Chapter X has not been referred to in section 4 & 5 TP adjustment could not be subjected to tax. It held that as per section 4 of Income tax Act, 1961, income tax is chargeable on Total Income and as per section 5, total income includes all income received or deemed to be received in India or income that accrues or arises or is deemed to accrue or arise in India. It held that unless it is shown that the International transaction is not liable to tax, no dispute could be raised about the applicability of Chapter X because section 5 provides that subject to the provisions of the Act, the Total Income includes various types of incomes and since Chapter X is part of the Act, the same has to be applied wherever applicable. Noting that Chapter X provides for the manner of computation of income from an international transaction, it held that there was no merit in the submission of the assessee.
Insilica Semiconductors India Pvt Ltd [TS-346-ITAT-2017(Bang)-TP- ITA No. Dated 15.03.2017

II. *International Tax*

a. ***Royalty / Fees for technical services***

95. The assessee was engaged in the business of manufacture and sale of motorcycles using technology licensed by Honda Motor Co. Ltd., Japan ('HMCL') for which it had entered into a License and Technical Assistance Agreement ('LTAA') which prohibited the use of know-how for the purpose of exports. Subsequently, a separate Export Agreement ('EA') was also entered into whereby HMCL accorded consent to assessee to export specific models of two wheelers to certain countries on payment of export commission @ 5% of the FOB value of such exports. The AO recharacterized the export commission as royalty, considering the EA as an extension of the LTAA and disallowed the payment made under section 40(a)(i) since no tax had been deducted at source. The Court, observing that the EA and LTAA were two distinct agreements upheld the order of the Tribunal wherein it was held that the said payment could not be considered as royalty or FTS as HMCL had neither transferred or permitted the assessee to use any patent, invention, model, design or secret formula, nor had HMCL rendered any managerial, technical or consultancy services. The Court also observed that the attempt at re-characterizing the transaction as one involving payment of royalty overlooked the fact that the payment under the LTAA was treated by the assessee itself as royalty. Accordingly, it dismissed the appeal of the Revenue.
CIT vs. Hero Motocorp Limited - TS-180-HC-2017(DEL) - ITA 923/2015 dated 08.05.2017

96. The Tribunal held that payment made by ONGC (as representative assessee) to a Canadian university ('Non-resident' or 'NR') for collaborative research, participation, training and maintenance services of air injection equipment (used for increasing the recovery of oil)

constituted FTS under Article 12 of India-Canada DTAA for AYs 2010-11 and 2011-12. It rejected the NR's stand that know-how/technology was not made available to ONGC and observed that the service agreement not only contemplated participation but also provided for training and collaborative research between the personnel of NR and ONGC, pursuant to which know-how was shared with ONGC personnel; Further, it rejected NR's alternate stand that even if the receipts were taxable, the same were to be taxed under section 44BB (special provision for oil exploration companies) since the services were directly associated with extraction and production of mineral oil by holding that Section 44BB was applicable only in cases where consideration was received for services relating to exploration activity which were not in the nature of technical services. Also, it accepted Revenue's plea that since the NR itself was not involved in extraction or production of mineral oil, Section 44BB was not applicable.

ONGC as representative assessee for M/s University of Calgary, Alberta, Canada [TS-175-ITAT-2017(DEL)] - ITA No.4877/Del/2013 and 1327/Del/2016 dated 28/04/2017

97. Assessee, a joint venture between Marks and Spencer and Reliance retail, entered into an agreement with M&S whereby the assessee was provided personnel to carry out the functions in the area of management, setting up of business, property selection and retail operation, product and merchandise selection and setting up merchandise team, for which it reimbursed the salary expenditure of 4 employees deputed to it. AO held that the sum was chargeable to tax as fees for technical services and therefore passed an order u/s 201 by treating the assessee as 'assessee in default'. The Court upheld the order of the Tribunal wherein the Tribunal held that i) the impugned payment was not FTS since the technology was not 'made available' by payee to the assessee, that ii) the payment was a reimbursement of expenses and therefore in the absence of profit element in the said payment no tax was to be deducted and that iii) that TDS u/s 195 was not applicable on reimbursement as it was actually a payment made to the employees deputed in India under seconded agreement but routed through M&S. It also upheld the finding of the Tribunal that since the said payments were already subject to tax in India in the hands of the employees as it was a clear case of deputation of officials / employees, there was no question of treating the assessee in default for non-deduction of tax..

DIT (International Taxation) vs. Marks & Spencer Reliance India Pvt. Ltd - TS-178-HC-2017(BOM) - INCOME TAX APPEAL NO. 893 OF 2014 dated 03.05.2017

98. The assessee, a non-resident company incorporated in USA was engaged in grading and certification of diamonds. It entered into a training and technical service agreement with GIA India for training the employees of GIA India and providing technical services for the implementation of grading policies, procedures and processes for which it raised separate debit notes for 'fee for training and technical services' (FTS) rendered by it to GIA India (on which tax had been paid) and also on account of reimbursement of travel expenses, group health insurance and other minor incidental expenses incurred by it pertaining to the same. The AO held the impugned sum as part of FTS and made an addition of the same, which was upheld by the CIT(A). The Tribunal referred to the agreement entered into between the parties and observed that assessee was entitled to receive only amount incurred by way of "cost to employ" the individuals with a markup of 6.5% and held that expression cost to 'employ' individuals is different from the expression cost incurred to 'depute' a person. It held that cost of employment would clearly mean and include only internal costs that were incurred by assessee to employ an individual and that any costs incurred over and above that to depute an individual for a particular assignment which was not assessee's internal assignment would be an external cost borne or paid by it on behalf of GIA India and could not be treated as a service. Further, noting that there was no profit element in the reimbursement made, it held that the payment could not be chargeable to tax in India.

Gemological Institute International Inc vs. DCIT - TS-189-ITAT-2017(Mum) - ITA No.4659/Mum/2014 & ITA No.385/Mum/2016 dated 09 .05.2017

b. Others

99. The Tribunal allowed the assessee's appeal by allowing its claim of deduction in respect of profit shared with DRL, Switzerland ('DRL, SA') for AY 2009-10. Pursuant to tripartite 'out of court' settlement of patent infringement dispute with GlaxoSmithKline (GSK) regarding manufacturing

of certain generic drug, assessee had entered into an agreement with DRL SA whereby DRL SA undertook liability insurance and Shelf Stock Adjustment ('SSA') risk and also agreed for sharing assessee's R&D and legal costs for which the assessee agreed to share 50% of its profits arising from marketing the product in the US with DRL SA. The AO observed that the agreement between the assessee and the DRL SA was not reported properly in 3CEB report or in T.P. documentation to show that the same was within arms length range and therefore contended that the transaction between DRL, India and DRL, USA was an arrangement of profit shifting from India to Switzerland. Against this, DRP concluded that, 25% of the total profit paid to DRL Swiss, by DRL USA, was taxable profit in the hands of the assessee and was diverted to Switzerland. Noting the above agreement Tribunal rejected the Revenue's stand that the transaction between assessee and DRL SA was a colourable device to shift profit from India to Switzerland and held that if there was no such arrangement, the assessee would have borne the entire costs towards SSA which, in the instant case, was borne by DRL SA. It held that the the agreement between DRL India and DRL SA could not be doubted and further stated that the Revenue was not entitled to analyse the business decision taken by assessee for sharing profits.
Dr. Reddy's Laboratories Limited. vs. Add. CIT - TS-186-ITAT-2017(HYD) - ITA.No.294/Hyd/2014 dated 28.04.2017

II. *Domestic Tax*

a. *Income from House Property*

100. The Apex Court, upholding the decision of the Bombay High Court, dismissed assessee's appeal and held that rental income arising to assessee-firm from sub-licensing of shopping centre was taxable as 'house property' income and not business income for AY 2000-01. It noted that the assessee was allotted a plot of land by BMC on monthly license basis under auction whereby assessee constructed the market area (i.e. Shopping Centre) thereupon and gave the same to various persons on sub-licensing basis. It held that based on the circumstances under which BMC auctioned the market area to assessee i.e. permitting assessee to carry out additions and alterations and allowing sub-letting of the shops and stalls, the High Court had rightly held the assessee to be a 'deemed owner' of the premises in terms of Sec 27(iiib) read with Sec. 269UA(f) of the Act and accordingly correctly assessed income as house property income. It distinguished the co-ordinate bench rulings in Chennai Properties [TS-238-SC-2015] and Rayala Corporation Pvt. Ltd [TS-437-SC-2016] on the ground that in those rulings the assessees were in the business of letting out of properties and derived entire income from letting out of properties whereas in the instant case, the assessee could not substantiate that its entire income or substantial income was from letting out of the property which was its principal business activity. It held that a mere entry in the object clause of the partnership deed of the assessee stating that the assessee is engaged in sub-letting of properties would not be a conclusive factor.
Raj Dadarkar & Associates vs. ACIT - TS-183-SC-2017 - CIVIL APPEAL NOS. 6455-6460 OF 2017 dated 09.05.2017

b. *Deductions*

Section 32 / 32A

101. The assessee, who had closed its line of business, claimed write off of the value of capital assets which had no realizable value as loss under section 32(iii) of the Act. Section 32(iii) provides for deduction in case of any building, machinery, plant or furniture in respect of which depreciation was claimed and allowed under sub-clause (i) of the Act and is sold, discarded etc for an amount which was less than the written down value of the assets. The Court upheld the order of the Tribunal and noted that the provisions of Section 32(iii) of the Act were only applicable to assessees falling under Section 32(i) of the Act i.e. assessees engaged in the business of generation and / or distribution of power and since the assessee in the instant case was engaged

in the business of pharmaceuticals it would not be eligible to claim such loss. Accordingly, it upheld the order of the Tribunal / AO and confirmed the addition.
CIT v Brawn Pharmaceuticals Ltd – (2017) 99 CCH 0004 (Del HC) – ITA 926 / 2015 dated 04.05.2017

Section 36

102. The Court set-aside the order of the Special bench of the Tribunal, wherein the Tribunal denied the assessee claim of interest payable on account of disputed arbitration award for AYs 2001-02 & 2002-03 on the ground that the liability to pay interest was not legally enforceable at the end of relevant AYs as the assessee had contested the issue before higher authorities and stay was granted by the Court. Rejecting the view of the Tribunal, the Court held that once an arbitral award was made by the Court, mere stay of the decree by higher authorities would not relieve assessee of its obligation to pay interest in terms thereof and held that the liability to pay interest under arbitral award commenced in the year in which such decree was passed. It clarified that passing of stay order did not mean that the arbitral award was wiped out from existence. Accordingly, relying on a plethora of Supreme Court rulings including Shree Chamundi Mopeds Ltd., Haji Lal Mohd. Biri Works , Kedarnath Jute Mfg. Co. Ltd, Kanoria Chemicals & Industries Limited, Central India Electric Supply Company, it allowed the claim of the assessee.
National Agricultural Cooperative Marketing Federation of India Ltd. TS-169-HC-2017(DEL) - ITA 161/2016 dated 19.04.2017

Section 37

103. The assessee acquired media rights from BCCI on payment of US $ 17.5 million, out of which US$ 10 million was adjusted against two matches played and the balance was kept as deposit (to be adjusted against last series). However, owing to a dispute, the contract was terminated and the deposit was forfeited by BCCI during relevant AY 2008-09, which was claimed as a deduction under section 37. The Tribunal allowed the assessee claim with respect to write-off of advance given to BCCI and rejected the Revenue's stand that it represented a capital loss as it was in relation to acquisition of media rights (which is a capital asset). The Tribunal held that the agreement with BCCI for acquiring the media rights was pursuant to assessee's normal business activity (of broadcasting and distribution of TV programmes) and US$ 10 million which was adjusted in earlier year was offered to tax by assessee. It further rejected the Revenue's submission that the write-off was premature as the assessee did not fully explore the possibility of its recovery. Accordingly, it deleted the addition made by the AO.
Zee Entertainment Enterprises Ltd – TS-181-ITAT-207 (Mum) - ITA No.3406/Mum/2014 dated 05/05/2017

104. The Tribunal granted the assessee (a partnership firm engaged in real estate business) deduction with respect to compensation damages (determined under arbitration award in August, 2005) for failure to deliver the property within time-frame stipulated in the JDA even though the same was quantified in the subsequent year. It rejected Revenue's stand that since the time period for delivery of the constructed area was to expire only on March 10, 2006, the liability was not crystallized as on March 31, 2005 and held that the case relates to transfer of constructed area and not sale of goods. It also clarified that even though the event of determining final amount of compensation happened after closing of AY 2005-06, as per Accounting Standard 4 (AS 4) on 'Contingencies and Events Occurring after the Balance Sheet Date' as well as the prudent and conservative accounting principle such contingencies ought to be taken into account. It distinguished Revenue's reliance on Kerala High Court ruling in Asuma Cashew Company wherein the assessee had denied its liability to pay damages and held that in the present case assessee had not denied the liability towards damages in the event of failure to honour its obligation. Thus, the Tribunal concluded that the liability to pay compensation was crystallized when assessee accepted its failure to perform its part under the agreement and thus determination of compensation after the balance sheet date had to be taken into account in view of the principle of prudence and conservatism as well as per AS-4.

Canara Housing Development Company vs. JCIT - TS-185-ITAT-2017(Bang) - I.T. A. No.193/Bang/2014 dated 12.05.2017.

105. The Tribunal held that where the assessee had incurred expenses on foreign travel of its directors and related persons on which fringe benefit tax had been paid, the AO erred in making an ad hoc disallowance of 50 percent of such foreign travel expenses more so when the assessee earned handsome commission from export.
Empire Industries Ltd v Add CIT - (2017) 50 CCH 0036 MumTrib - ITA No. 4065/Mum/2013 dated May 17, 2017

106. Assessee acquired certain licenses to use SAP software and made payments towards licensing, installation and testing of software, training expense etc. during the year which were incurred to ensure smooth conduct of business and to improve operational efficiency. The AO / CIT(A) concluded that assessee was entitled for full deduction against the annual expenses incurred and 60% depreciation on balance amount as it being capital in nature. The Tribunal held that even if the software expenses incurred by assessee resulted into an enduring benefit to assessee, the same could not be treated as capital expenditure and real intent and purpose of same had to be looked into. On examination of the details of the expenses, it held that the same were for obtaining license, implementation, set-up fees, AMC Charges which were incurred to ensure smooth conduct of business and to improve operational efficiency and therefore they were revenue in nature and fully allowable as a deduction.
Empire Industries Ltd v Add CIT - (2017) 50 CCH 0036 MumTrib - ITA No. 4065/Mum/2013 dated May 17, 2017

107. The AO made adhoc disallowance in respect of sales promotion expenses and travelling expenses incurred by the assessee on the ground that such expenses were not related to the business of the assessee. The Tribunal upheld the order of CIT(A) deleting the disallowance of the expenses on the ground that no specific instance or any evidence was brought by the AO on record to support the disallowances.
ITO vs. Vishal Khosla (2017) 50 CCH 0060 DelTrib ITA No. 881/DEL/2013

Section 14A

108. The Tribunal held that investments in debentures could not be included in 'investments' for the purpose of calculating disallowance under section 14A of the Act as the assessee had earned taxable interest income from such debentures. Further, it directed the AO to verify the claim of the assessee that no interest bearing funds had been used to invest in the shares which earned exempt income and that the investment made was actually out of advances received by the assessee for booking of flats (normal course of business).
Capricorn Reality Ltd v DCIT – (2017) 50 CCH 0033 (Mum Trib) – ITA no 6448 / Mum / 2014 dated 17.05.2017

109. The Apex Court held that the phrase "income which does not form part of total income under this Act" appearing in section 14A included within its scope dividend income on shares in respect of which tax was payable under section 115O of the Act and income on units of mutual funds on which tax was payable under section 115R.
Further, it held that Sub-sections (2) and (3) of Section 14A of the Act read with Rule 8D of the Rules merely prescribe a formula for determination of expenditure incurred in relation to income which does not form part of the total income under the Act in a situation where the Assessing Officer is not satisfied with the claim of the assessee. It held that the AO could resort to the computation mechanism in Rule 8D only when he records satisfaction that having regard to the accounts of the assessee, as placed before him, it is not possible to generate the requisite satisfaction with regard to the correctness of the claim of the assessee. Therefore, it held that the AO was unjustified in rejecting the claim of the assessee that no expenses had been incurred towards the earning of exempt income as the AO failed to disclose any basis establishing a reasonable nexus between the expenditure disallowed and the dividend income received.
Godrej & Boyce Manufacturing Company Ltd v DCIT - [2017] 81 taxmann.com 111 (SC) - CIVIL APPEAL NO. 7020 OF 2011 dated 08.05.2017

110. The Tribunal held that no disallowance under section 14A of the Act could be made in the absence of exempt income. It dismissed the contention of the AO that disallowance under section 14A could be made in accordance with CBDT Circular No 5 of 2014 which provides for disallowance even if no exempt income is earned.
Karvy Stock Broking Ltd v DCIT – (2017) 50 CCH 0017 (Hyd Trib) – ITA No 1397 / Hyd / 2016 dated 09.05.2017

Section 10A / 10B / Chapter VIA

111. The Tribunal, relying on the decision of the Madras High Court in Elgi Ultra Industries Limited [TS-658-HC-2012(MAD)] granted the assessee exemption under Section 10A of the Act with respect to software exported by assessee. It rejected Revenue's stand that assessee was not the manufacturer / developer of the software and that it merely exported the software that was purchased from a third party. The Tribunal noted that the assessee engaged a third party for coding or writing program under its instruction, control and supervision of and accepted the assessee's stand that the mere fact that it outsourced the development of software, would not dis-entitle assessee from claiming Section 10A exemption. It held that the software was developed under the direct supervision of the assessee by investing its own funds and therefore, it could be concluded that the assessee itself was developing the software.
DCIT vs. Mahati Infotech Pvt. Ltd - TS-188-ITAT-2017(CHNY) - /ITA No. 1943 & 1944/Mds/2016 dated 31.01.2017

112. The Court upheld the order of the Tribunal allowing Sec. 10A deduction to the assessee, a 100% EOU engaged in rendering ITeS data processing services to Amadeus Spain. It noted that the assessee's sole activity was to provide software connectivity for providing access to Amadeus Computer Reservation System ('CRS') facility to travel agents for which it received income from Amadeus Spain and rejected Revenue's contention no real export of services took place since the beneficiaries of assessee's activities were located in India. It took note of the Tribunal's categorical finding based on STPI and Export Promotion Council's ('ESC') reports that assessee 'manufactured, produced and exported software' and that it could claim exemption under any of the three provisions viz., Sec. 80HHE / 10A / 10B of the Act.
PCIT vs. Amadeus India Pvt. Ltd - TS-197-HC-2017(DEL) - ITA 154/2017 dated 22.05.2017

113. The Tribunal held that the intention of legislature in Section 10B was to provide benefit of deduction to enterprises which are not simply engaged in manufacture or produce any article or thing, but even to those assesses whose end product is any customized electronics data. Therefore, it held that the benefit of deduction u/s 10B of the Act, was also available on rendering of any of the services as notified by the Board like the item (ii) in the notification (supra) wherein even call centers, animation, etc. which are brought in the sweep of any product or services stated in clause (b) of item (i) Explanation 2 to Section 10B". Accordingly, it held that assesse's whose end product was customized electronics data would also be entitled for exemption u/s. 10A.
ITO v WNS Mortgage Service P Ltd – (2017) 50 CCH 0056 Del Trib - ITA No. 2571/Del/2012, 2716/Del/2012 dated 26.05.2017

114. The Tribunal denied the assessee builder deduction under section 80IB(10) for AY 2011-12 on account of violation of condition under clause (f) i.e. allotment of more than one residential unit to same individuals/family members. It noted that clause (f) was inserted vide Finance (No.2) Act, 2009 with effect from 19/08/2009 and therefore would be applicable to all allotment of residential units occurring after the said date. It held that the object behind insertion of clause (f) was to build affordable housing for low middle income groups and noted that since the assessee could not prove that allotments were made prior to the insertion, the deduction could not be allowed. It also noted that the assessee had violated clause (c) of Section 80IB(10) (which provides a limit on the area of residential units limiting it to 1500 sq ft) by constructing duplex flats exceeding prescribed limit of 1500 sq.ft.
Shri Syed Aleemullah [TS-187-ITAT-2017(Bang)] - ITA No.389/Bang/2016 dated 04/04/2017

115. The Court upheld the order of the Tribunal and held that while computing 'eligible profit' for allowing deduction u/s 80HHD(1) available to companies running hotels, losses from ineligible units/hotels could not to be deducted. It rejected the Revenue's stand that the expressions 'business profits' and 'total receipts' used in Section 80HHD(3) [prescribing formula for computing 'eligible profits' - (Deduction = Business Profits x Eligible receipts / Total Receipts)], should take into account the gains/losses of ineligible entities as well. Observing that Section 80HHD is a 'beneficial provision', it held that full benefit of the provision was to be extended to an eligible assessee without there being an attempt to whittle down the same. It held that sub-section (3) which provides for the mechanism of computation of deduction was to be read along with sub-section (1) and on a joint reading it was evident that the formula should relate solely to the receipts/profits/income of the eligible unit alone and none other. It also relied on the decision of the Karnataka HC ruling in ITC Hotels Ltd [TS-5737-HC-2009(KARNATAKA)-O], wherein it was held that the deduction was to be granted qua eligible unit/units only.
Adyar Gate Hotel Ltd – TS-191-HC-2017 (Mad) - TAX CASE (APPEAL) No.770 of 2007 dated 21.04.2017

116. The assessee, engaged in the sale of fertilisers to its members, deposited a portion of its income derived in Nationalised Banks and treated the same as income attributable to the profits and gains of business, eligible for deduction u/s 80P(2)(a). However, the AO treated the interest income as income from other sources not eligible for deduction. The Court affirmed assessee's contention that the expression "attributable to" contained in the said section was wider in scope than the expression "derived from". It noted that the investments made by the assessee was out of its own monies and noted that if the assessee had invested those amounts in fixed deposits in other Co-operative Societies or in the construction of godowns and warehouses, the respondents would have granted the benefit of deduction under Clause (d) or (e), as the case may be. Therefore, it allowed the assessee deduction under section 80P(2)(a) and further held that the original source of the investments made by the assessee in nationalised Banks was admittedly the income that the petitioners derived from the activities listed in sub Clauses (i) to (vii) of Clause (a) of Section 80P(2) (which lists down the activities eligible for deduction under section 80P) and therefore observed that the character of such income i.e. business income, would not be lost, especially when the statute uses the expression "attributable to" and not anyone of the two expressions, namely, "derived from" or "directly attributable to".
Vavveru Co-Operative Rural Bank Ltd. [TS-202-HC-2017(AP)] - W.P.Nos.12727 and 12767 of 2016 & W.P.Nos.2518, 2571, 2576 and 2581 of 2017

c. ***Income from Capital Gains***

117. The Tribunal held that the gains arising on sale of land by the assessee was exigible to capital gains tax for AY 2012-13. It characterized the assessee-individual's land (inherited from his father) as non-agricultural, despite the fact that it was purchased by his father as 'agricultural land' falling beyond 8 kms of the municipal limit and classified as agricultural lands in revenue records. Relying on the decision of the Gujarat High Court in Sarifabibi Mohamed Ibrahim [TS-5290-HC-1981(GUJARAT)-O], it held that classification of land as agricultural in revenue records is not conclusively proof of the nature of land sold by the assessee. The mere fact that the land in question was used for the purpose of agriculture in the past was not the deciding factor as to its characterization. It noted that no agricultural activities were carried out on the land in the recent past because of urbanization and real estate development that took place in that area. It also rejected the assessee's stand that at the time of sale, it had been carrying agricultural operation by way of growing Eucalyptus trees and observed that the said trees were not grown by any integrated activity involving human skill and labour. It held that there was no economic utilization of the land for earning income by carrying on agricultural operations. Accordingly, it held that the capital gains arising out of transfer of the said land was subject to capital gains taxation.
ITO vs. Shri Vijay Shah - TS-182-ITAT-2017(CHNY) - /ITA No. 2496/Mds/2016 dated 26.04.2017

118. The Assessee HUF filed its return of income (which was processed under section 143(1) of the Act) admitting loss which included short term capital loss on account of demolition of its capital assets. The AO was of view that since demolition of asset did not constitute transfer of capital asset, prima facie loss was not allowable and income chargeable to tax had escaped assessment within meaning of section 147 of the Act and therefore reopened assessment and disallowed short term capital loss. The Tribunal, noting that the impugned asset formed part of a block of assets held that once an asset was a depreciable asset and formed a part of a Block and such block of assets had ceased to exist at end of previous year, provisions of section 50 would apply and therefore where the block of assets ceased to exist, the difference between written down value and salvage money received ought to have been treated as short term capital gain or short term capital loss, as the case may be. Accordingly, it held that the action of AO in adding back short term capital loss of amount to income of assessee was erroneous and was not in accordance with law and therefore deleted the addition made
Sidamshetty Ramesh v ITO – (2017) 50 CCH 0029 (Hyd Trib) – ITA 1421 / Hyd / 2016 dated 12.05.2017

Assessment / Re-assessment / Revision / Search

Assessment

119. The AO, vide order dated 17.2.2006, directed the assessee to get its accounts audited under section 142(2A), which was to be completed within 35 days but was extended to 07.07.2006 on applications made by the assessee. Subsequently, the AO suo moto extended the time limit to 17.07.2016. Accordingly, the AO passed the final assessment order on 14.09.2006 as opposed to 06.09.2006. The Court dismissed the appeal of the Revenue and held that the Tribunal had rightly concluded that the assessment made by the AO was time barred and was to be quashed since the period covering the suo moto extension of time limit by AO to complete audit could not be excluded for the purpose of determining the time limit for completion of assessment under section 153 of the Act. It held that it was only after 2008 that the said period could be excluded by virtue of Proviso to Section 142 (2C) and since the instant case pertained to AY 2003-04 the same would not apply.
Pr CIT v Jindal Dyechem Industries Pvt Ltd – (2017) 99 CCH 0007 (Del HC) – ITA 668 / 2016 dated 05.05.2017

120. During search proceedings, the AO held that the assessee had failed to furnish necessary books of accounts at the time of survey operation which was also admitted to by the assessee by way of a statement under section 133A. Accordingly, the AO rejected the books of accounts of the assessee and made an estimation of professional income and added the same in the hands of the assessee. Subsequently, the assessee retracted his statement and contended that the AO was incorrect in rejecting the books of accounts and making such addition. The Tribunal noted that Section 133A empowered the authority to merely record the statement of a person but did not permit the authority to take a sworn statement on oath which was only provided for in section 132(4) of the Act. Accordingly, it held that no addition could be made on the basis of a statement subsequently retracted and moreso when the lower authorities had not pointed out any specific defect in the books of accounts which were duly audited.
Dr. Subrata Kundu v ACIT – (2017) 50 CCH 0026 (Kol Trib) – ITA No 815 / Kol / 2014 dated 12.05.2017

Reassessment

121. The Court held that where the AO in this reasons, based on information received from Director of Income Tax, (Investigation)alleged that the assessee had received a sum of money by way of accommodation entries for the purpose of converting its unaccounted cash but there was no link established by the AO between the information received by the him and the conclusions reached

by him, the Tribunal was justified in concluding that the proceedings under section 147 and 148 of the Act did not satisfy the requirement of law. It held that the reasons to believe contained not the reasons but the conclusions of the AO one after the other and that there was no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has escaped assessment. The Court held that the conclusions of the AO were at best a reproduction of the conclusion in the investigation report and therefore amounted to a 'borrowed satisfaction', which could not be the basis for re-opening of assessment.
Pr CIT v Meenakshi Overseas Pvt Ltd (2017) 99 CCH 0028 DelHC - ITA 692/2016 dated 26.05.2017

122. Where the AO had initiated block assessment proceedings under section 158BC of the Act, the Court held that the AO was not justified in issuing notices under section 148 of the Act seeking to reopen assessment for the same years covered under the block assessment proceedings as it would result in parallel proceedings. Accordingly, it quashed the notice issued under section 148 of the Act.
South Asian Enterprises Ltd v CIT – (2017) 99 CH 0029 (Del HC) – WP C 4623 / 2001 dated 25.05.2017

123. The AO initiated reassessment proceedings under section by issuing notice under section 148 of the Act 4 years after the end of the assessment year alleging that the assessee had wrongly claimed deduction of interest income earned under section 80IC of the Act whereas the said amount ought to have been taxed under the head income from other sources. The Court noted that the claim under section 80IC of the Act had been verified by the AO during the original assessment proceedings and therefore held that though the notice states that the assessee had failed to fully and truly disclose material particulars, it did not bring out how the disclosure made by the assessee was not full and true especially when the AO in its original assessment order had specifically mentioned that the deduction under section 80IC was provided for “after verification”. Accordingly, it held that where the conditions provided for in the first proviso to Section 147 of the Act were not fulfilled, the reassessment proceedings initiated were invalid and it set aside the notice issued and order passed by the AO dismissing the objections filed by the assessee.
Akum Drugs and Pharmaceuticals Ltd v ITO – (2017) 99 CCH 0022 (Del HC) – WP C 6448 / 2016 dated 22.05.2017

124. AO had issued notice under section 148 of the Act which was stayed by the High Court on 18.03.2013 and the final order of the Court (dismissing the assessee’s writ petition) was passed on 29.07.2013. The AO passed his final assessment order on 26.02.2014 after extending the period of limitation by the time taken for communication of order of the Court. The Court held that the period for communication of the order passed by the Court to the AO could not be considered while determining the period for limitation under section 153 of the Act. It held that the AO could claim extension of the period for the period for which the proceedings were stayed by the High Court but could not claim benefit of the period taken for communication of order to the AO and accordingly held that the order passed by the AO was time barred. Further, it appreciated the contention of the assessee that the AO was well aware of the proceedings occurring in the Court as the DR was present in Court during the hearings and detailed affidavits were also filed by the Department. Accordingly, it upheld the order of the Tribunal annulling the reassessment order passed.
ACIT v Sun Pharmaceutical Industries Ltd – (2017) 50 CCH 0009 Ahd Trib – ITA No 1688 / Ahd / 2015 – 05.05.2017

125. The original assessment of the assessee was concluded under section 143(3) of the Act. The AO based on information received from the Investigation Wing proceeded to reopen assessment after a period of 4 years from the end of the relevant assessment year stating that income of the assessee had escaped assessment on account of unexplained share application money received by it. The Tribunal noted that the issue had already been examined by the AO during the original assessment proceedings and held that the case had been reopened by the AO only

on the basis of the information gathered from DIT(Inv.), New Delhi and not by applying his own mind and accordingly held that the notice under section 148 of the Act was invalid.
Additionally, it noted that the sanction for reopening of assessment beyond 4 years had been done by obtaining approval from Addl. Commissioner and not from the Commissioner or Pr. Commissioner or Pr. Chief Commissioner, which was the pre-requisite provided in Section 151 of the Act and therefore held that the initiation of the proceedings u/s 148 of the Act was also invalid for lack of requisite sanction.
Hi Gain Investment Pvt Ltd v ITO – (2017) 50 CCH 0034 (Del Trib)

126. The AO sought to reopen the assessment of the assessee under section 148 read with section 147 of the Act beyond a period of four years from the end of the relevant assessment year contending that the assessee had failed to deduct tax on the lease rent paid to the Development Authority. The Court held that for reopening of assessment beyond a period of 4 years two conditions had to be fulfilled – i) the AO must have reason to believe that income escaped assessment in a particular assessment year and ii) the AO must have reason to believe that such escapement of income occurred on account of omission on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. It noted that the AO had not satisfied the second condition as the assessee had submitted complete details of lease rent paid to the Development Authority during the financial year and the fact that no tax had been deducted was clearly evident from such details. Accordingly, it allowed the writ Petition filed by the assessee and held that no notice under section 148 of the Act could have been issued and the notice erroneously issued by the AO stood vitiated due to non-compliance of the preconditions for issue of such notice.
Noida Power Company Ltd v CIT – (2017) 99 CCH 0010 All HC – Writ Tax No 139 of 2016 dated 02.05.2017

127. Assessee's original assessment proceedings were concluded under section 143(3) of the Act. Subsequently, the Director General of Central Excise as well as the Income-tax authorities had examined on oath one of creditors from whom the assessee had claimed to have borrowed funds from, pursuant to which the creditor had stated that it had not given any loan to the assessee. It was also noted that neither was the loan accounted for in the creditors accounts nor was the assessee reflected as a debtor therein. Accordingly, based on this information, the AO sought to initiate reassessment proceedings by issuing notice under section 148 of the Act. The Tribunal held that since the basis for reassessment i.e. the information from the Director General of Central Excise and the Income tax authorities was fresh information and the assessment had been reopened within 4 years from the end of the relevant assessment year, the notice issued by the AO under section 148 was valid.
Bintal D Baxi v ITO – (2017) 50 CCH 0001 (Ahd Trib) – ITA No 920, 921 and 922 / Ahd / 2014 dated 1.05.2017

128. Where during the original assessment proceedings, the AO had issued a detailed questionnaire covering the payments received by the UK based assessee on account of operation and maintenance of power plant projects and no addition was made therein, the Court held that the AO was not justified in reopening assessment and passing order under section 147 of the Act taxing the receipts as fees for technical services as it amounted to a mere change of opinion. It held that there was no new material brought on record and noted that the assessee had discharged its burden of disclosing fully and truly all material facts before the AO during the original assessment proceedings. Accordingly, it held that the assumption of jurisdiction under section 148 of the Act was not valid.
DIT (IT) v Rolls Royce Industrial Power India Ltd – (2017) 99 CCH 0019 (Del HC) – ITA 1058, 1061 & 1063 / 2011 dated 18.05.2017

129. The assessee company had entered into a joint venture agreement with M/s. Parsvnath Developers Ltd and received 7,02,54,000/- for which it handed over possession of land as well as development rights which was shown as a liability in the balance sheet. It had filed return of income, which was processed u/s 143(1) of the Act. Subsequently, the AO reopened

assessment by issuing notice u/s 148 contending that that there was failure on part of assessee to disclose fully and truly such facts for framing assessment as the assessee had failed to offer the consideration received by it to tax under the head income from capital gains. The Tribunal dismissed the claim of the assessee that there was no fresh material to re-open assessment and held that the AO had jurisdiction to issue notice u/s 148 for bringing to tax income escaping assessment in intimation u/s 143(1)(a) as the assessee's claim that the said consideration was not taxable was not acceptable. It held that failure to take steps u/s 143(3) of the Act would not render AO powerless to initiate reassessment proceedings when intimation u/s 143(1) had been issued. Further vis-à-vis assessee's contention that no reasons had been provided by the AO, the Tribunal held that there was no material on record to suggest that assessee had asked for reasons for reopening after filing return of income in response to notice issued u/s 148. It held that there was no written request made by the assessee after filing return of income asking for reasons recorded for reopening and noted that the assessee had also participated in the re-assessment proceedings. Therefore, it held that the assessee could not now raise that ground. Accordingly, it upheld the validity of the order passed under section 147 read with section 148 of the Act.

SUMERU SOFT P. LTD. & ANR. vs.INCOME TAX OFFICER & ANR - (2017) 50 CCH 0020 ChenTrib - ITA No. 2101/Mds/2016, 2484/Mds/2016 dated 08.05.2017

Revision

130. Assessee was served with a notice u/s. 153C of the Act in connection with search and seizure proceedings in the case of M/s. MBS Jewellers Pvt. Ltd. and its group cases pursuant to which it filed its return of income declaring an income of Rs. 85,000/- and the AO completed assessment u/s. 143(3) r.w.s. 153C of the Act accepting the returned income resulting in NIL demand. The CIT issued a show cause notice under section 263 of the Act alleging that the AO failed to examine certain information in the seized material (with respect to certain sale deeds executed by the assessee which were subsequently cancelled) and since the said notice was not served on the assessee by the AO as the assessee's address was unknown, the CIT set aside the original order passed by the AO with a direction to re-examine and pass appropriate assessment orders. The Tribunal held that the CIT was incorrect in concluding that the AO had not verified the issue and held that the AO had certainly verified this aspect as it was very basis for assessment proceedings. It further noted that the original order passed by the AO was also approved by Jt. Commissioner, being assessment consequent to search and seizure proceedings and in those circumstances, it could not be stated that AO had not verified issue. It alos held that without giving proper opportunity to assessee, revision proceedings u/s. 263 could not be finalized as provisions of Section 263 mandated that CIT may pass such orders after giving opportunity of being heard and since the mandatory requirement of opportunity of being heard had not been provided to assessee, it held that the order passed by the CIT was void ab-initio. Accordingly, it held that the CIT erred on both fronts i.e. concluding that there was an error in the order of the AO due to non-examination of facts and in proceeding to pass order under section 263 of the Act without affording the assessee an opportunity of being heard.

Anthi Reddy Yamireddy v DCIT - (2017) 50 CCH 0046 HydTrib - ITA No. 96/HYD/2017 dated 23.05.2017

131. The assessee had sold its unit in a slump sale and declared capital gains tax which had been accepted by the AO in scrutiny assessment after examination of the issue by issuing notices under section 142(1) and 143(2) of the Act. The CIT having jurisdiction of the AO issued notice under section 263 stating that the AO failed to examine sale of other assets during the year, failed to obtained form 3CEA and failed to examine whether the assets added by the assessee during the year qualified for benefit under section 50B of the Act. The Tribunal held that it was settled law that the twin conditions i.e. AO's order was erroneous and prejudicial to interest of revenue was sine qua non for assumption of revisionary jurisdiction by CIT. It held that every loss of revenue as consequence of order of assessment order could not be treated as prejudicial to interest of revenue. It held that since the AO had made enquiries into slump sale transaction which took place in relevant assessment year and action of AO in accepting claim of assessee that transaction in question was slump sale after detailed enquiry was plausible view, the twin conditions required for exercising

jurisdiction u/s 263 were found missing/ existing/absent. Accordingly, the order passed u/s 263 of the Act was quashed by the Tribunal.
Ambo Agro Products Ltd v Pr CIT - (2017) 50 CCH 0042 KolTrib – ITA No. 676/Kol/2016 dated 19.05.2017

132. The assessee had declared income derived from sale of shares as short term capital gains, which had been accepted by the AO in his order passed under section 143(3) and subsequently in his order under section 143(3) rws 153A (wherein the AO disallowed professional tax paid) and the same had also been accepted in prior assessment years. In the opinion of CIT, the gains should have been declared as business income instead of short term capital gains and be charged at maximum marginal rate. Accordingly he issued notice under section 263 of the Act. The Tribunal noted that evidences for above assessment years were filed before AO in proceedings u/s 143(3) r.ws. 153 A Act which were verified by AO and therefore it could not be said that the said view was erroneous and prejudicial to interest of revenue so as to be covered under mandate of Section 263. Accordingly, it held that the assumption of jurisdiction under section 263 was invalid.
Anand Jain v CIT – (2017) 50 CCH 0013 (Mum – Trib) – ITA 3895 / Mum / 2013 dated 05.05.2017

133. The assessee individual had sold agricultural land (which had been acquired prior to 1981) during the year and adopted the Fair market value as on 1.4.1981 as the cost of acquisition (@ Rs.290 per square meter) which was derived by way of a valuation report. For the purpose of arriving at such value, the valuer used the Jantri rate (a rate prescribed for computing fair market value of argircultural land) as on 2006 stating that no other rate was available. The AO accepted the valuation and the consequent capital gains computation as provided by the assessee. Subsequently, the CIT having jurisdiction over the assessee called for the assessment records and noted that the Jantri rate for 1999 was available and as per that rate the value of land adopted as cost of acquisition was lower than declared by the assessee resulting in a higher income from capital gains. Accordingly, he issued a notice under section 263 for revision of the order of the AO. The Tribunal held that for the invocation of Section 263 two conditions had to be satisfied – i) the order of the AO had to be erroneous and ii) the order of the AO ought to have been prejudicial to the interest of the Revenue. It held that since the AO had conducted adequate enquiry and the observations of the AO were clearly mentioned in the body of the order and the view taken by him was permissible in law, such order could not be erroneous or prejudicial to the interest of the Revenue. Accordingly, it held that the CIT had wrongly assumed jurisdiction under section 263 of the Act and held that the notice issued by him was liable to be quashed.
Vipul T Joshi v DCIT – (2017) 50 CCH 0032 Ahd Trib – ITA No 1710 / Ahd / 2014 dated 15.05.2017

Search / Survey

134. The AO of the assessee, also the AO of another group of companies viz. Jagat Group had carried out a search in the premises of the Jagat Group and documents belonging to the assessee were found and seized from the above premises. Accordingly, the AO issued notices under section 153C of the Act to the assessee and conducted consequent assessment proceedings making an addition in the hands of the assessee under section 68 of the Act on account of share capital / premium received by the assessee during the year under review. The Tribunal held that as per Section 153C of the Act, the satisfaction of the AO of the searched person (i.e. the Jagat Group) was a must for assuming jurisdiction under section 153C of the Act in case of a person other than the searched person (the assessee). It noted that the AO did not record any satisfaction in the proceedings of the searched person and therefore held that the proceedings initiated against the assessee would not survive. Accordingly, it upheld the order of the CIT(A) deleting the addition and dismissed the appeal of the Department.
Victory Accommodation Pvt Ltd v ACIT – (2017) 50 CCH 0044 (Del Trib) – ITA Nos 6216 & 6217 / Del / 2014 dated 19.05.2017

135. The AO had undertaken a search in the premises of a third party wherein certain documents belonging to the assessee had been found. As the AO had jurisdiction over the assessee as well, he recorded his satisfaction regarding the documents seized and proceeded to initiate

search proceedings by issuing notice under section 153C of the Act. The Court dismissed the Petition filed by the assessee and held that merely because the AO did not record that the documents seized did not belong to the third party at whose premises the search was undertaken, the initiation of proceedings could not be declared void as the AO had recorded the fact that these documents belonged to the assessee.
Ganpati Fincap Services Pvt Ltd v CIT – (2017) 99 CCH 0027 (Del HC) – W.P.(C) 525/2015, 527/2015, 529/2015, 2220/2015, 2221/2015, 2224/2015, 2225/2015, 2226/2015, 2227/2015, 2228/2015, 2229/2015, 2245/2015, 2246/2015, 2247/2015, 2248/2015 dated 25.05.2017

136. The Court upheld the order of the Tribunal wherein the Tribunal had deleted the addition made by the AO on account of unexplained investments on the basis of a document found in the premises of a broker during search proceedings conducted in the premises of the broker since the AO failed to prove how the document belonged to the assessee. The Revenue claimed that the said document seemed to suggest that assessee purchased land at Rs.32.85 crore whereas the assessee had only declared Rs.16.42 crore as a purchase in its books of accounts and therefore the balance amount of Rs.16 crore was unexplained investments taxable in the hands of the assessee. It held since the document did not 'belong to' the assessee, the AO was incorrect in proceeding to make addition in the hands of the assessee and it held that the Revenue could not seek to point out that the document 'pertained to' or 'related to' the assessee.
Pr CIT v Vinita Chaurasia – (2017) 99 CCH 0020 Del HC – ITA 1004 and 1005 / 2015 dated 18.05.2017

137. A search had been carried out in the premises of the maternal uncle (the Nanda Group in whose case incriminating material had been found) of the Petitioner wherein a key to a locker belonging to the Petitioner deceased maternal grandmother, (which had been handed down to the Petitioner), had been found. The authorities on the presumption that the Petitioners locker may contain such cash, jewellery, FDRs or other important documents which could represent undisclosed income, issued a warrant of search authorization to search the Petitioner's locker. Subsequently, notice under section 153A of the Act was issued requiring the Petitioner to furnish returns of total and undisclosed income post which notices under section 142(1) of the Act were also issued to the Petitioner in response to which the Petitioner filed objections which were unanswered. The Court, in the writ proceedings, quashed the authorization warrant and the subsequent notices issued and noted that there was no incriminating material linking the Petitioner to the activities of the Nanda Group. It held that it was only when the Revenue authorities had investigated the issue and gathered some credible evidence supporting the alleged link between the Petitioner and the Nanda Group that they could issue a search warrant and proceed further and since that was not done so in the instant case, they were unjustified in initiating search proceedings against the Petitioner.
Ameeta Mehra v Addnl DIT- (2017) 99 CCH 0015 (Del HC) – WP C 1471 / 2013 dated 16.05.2017

138. Search was undertaken on various premises of the Bindal Group (consisting of 10 companies) to which the 4 Petitioners belonged, pursuant to which returns were filed by all the companies in response to notices under section 153A of the Act. While the assessments were pending, applications were filed by the 10 companies comprising the Bindal Group before the Settlement Commission under Section 245 C (1) of the Act, where undisclosed income of the companies on account of cash, jewellery and other valuables seized during the search as well as the details of the documents seized during the search as well as non-genuine share capital and non- genuine unsecured loans introduced were now disclosed. Subsequently, the Pr CIT filed a report covering all 10 companies and specifically mentioned that the Bindal Group had filed a consolidated cash flow statement which did not cover fully the income of the 4 Petitioners as a result of which only 50 percent of the income that should have been declared had been declared. Accordingly, though the Settlement Commission admitted the application of 6 companies, it declined to entertain the applications filed by the 4 Petitioners. The Court noting that the 4 Petitioners formed part of the Bindal Group consisting 10 companies (the applications for the balance 6 being accepted by the Settlement Commission), held that it was not possible to examine the state of affairs of any one company of the group in isolation of the entire group. It

noted that the applications filed by the Petitioners showed the manner of deriving the unexplained income and held that if as contended by the Revenue, there was no full and true disclosure of facts by all ten companies, then the Respondent ought to have challenged the order of the ITSC permitting the applications of the six other companies to be proceeded with, which it failed to do. It held that merely because the consolidated cash flow was not in respect of four Petitioners could not mean that they had not disclosed the manner of earned undisclosed income. Accordingly, the Court held that the order of the Settlement Commission rejecting the application of the Petitioners was invalid and directed the Commission to entertain the applications of the Petitioners along with the other 6 applications filed by the Group.
Bindlas Duplux Ltd & Ors v Pr CIT – (2017) 99 CCH 0017 Del HC – W.P.(C) 5424/2016, 5425/2016, 5427/2016, 5428/2016 & CM 22583/2016, 22585/2016, 22589/2016, 22591/2016 dated May 17, 2017

139. During the search and seizure operations conducted u/s 132 at the assessee's premises during A.Y. 2006-07, various documents as well as cash, jewellery and other valuables belonging to the assessee were seized. The assessee made disclosure of Rs. 110 Lakhs on account of change in the method of accounting of franchisee fees and undisclosed franchise fees for the A.Y. 2006-07 (i.e. the year in which search was conducted). On this basis, the AO initiated the assessment u/s 153A for the year of search as well as 6 years prior to A.Y. of search and contended that since the modus operandi of the business of the assessee for the earlier A.Ys (6 years prior to A.Y. of search) was same as the A.Y. in which search was conducted, there would have been such undisclosed income in the earlier A.Ys as well. Accordingly, he estimated the undisclosed income at a certain percentage of the amount of disclosure made by the assessee and made the additions for AY 2000-01 to 2004-05. The CIT(A) held the additions to be unsustainable as they were merely based on suspicion that the assessee must have earned undisclosed income in the earlier A.Ys. and deleted the addition. The Tribunal upheld the order of CIT(A). The Court observed that the disclosure of Rs. 110 Lakhs by the assessee was made only for the year of search and not for the relevant years and accordingly, there was no incriminating material on the basis of which the franchisee commission could have been added for the earlier A.Ys. Relying on the decision of this Court in the case of CIT v. Kabul Chawla (2016) 380 ITR 573(Del.), it held that invocation of assessment u/s 153A without any incriminating material for each of the earlier A.Ys was bad in law and additions made by the AO were not justified. Accordingly, it confirmed the deletion of additions made by the AO in respect of franchisee fees.
PCIT & ORS. vs. Meeta Gutgutia Prop. Ferns 'N' Patels & ORS. (2017) 99 CCH 0024 DelHC ITA 306-310/2017

140. During the course of search proceedings for A.Y. 2011-12 u/s 132, cash was found and seized from the premises and bank lockers of the assessee. The assessee offered the cash seized as his undisclosed income for A.Y. 2005-06 to A.Y. 2011-12 and requested the AO for adjustment of seized cash against his tax liability arising on account of the offered income. The AO levied interest u/s 234B up to the date of issue of orders u/s 143(3) r.w.s 153A for non-payment of advance tax in respect of undisclosed income and then adjusted the cash seized against the tax liability including interest u/s 234B. Before the CIT(A), the assessee contended that interest u/s 234B should have been restricted till the date when the assessee requested for adjustment of cash seized against the tax liability and not till the date of passing the order of AO. CIT(A) rejected the assessee's contention on the ground that the only at the time of passing the assessment order u/s 153A/153C, the AO could arrive at the conclusion that the cash seized belonged to the assessee and then only he could adjust the cash seized against the tax liability. He further held that advance tax instalments had already expired and accordingly, the cash seized could not have been adjusted against the advance tax liability. Further, he held that the Explanation to 2 to Section 132B also excludes advance tax from the term 'existing tax liability'. The Tribunal observed that Explanation 2 to section 132B which excludes advance tax from the ambit of existing liability was effective from 1st June, 2013 and was not applicable to the assessment years involved in the appeal and accordingly held that the assessee was entitled to adjustment of cash seized against the tax liability including advance tax arising on undisclosed income. Accordingly, it deleted the interest levied u/s 234B by the AO.
N. Venkatanathan vs.DCIT (2017) 50 CCH 0065 MumTrib ITA Nos. 7378 to 7383/Mum./2014

d. ***Withholding tax***

141. The Apex Court held that the disallowance under section 40(a)(ia) could be made on any amounts paid or payable during the year without deduction of tax at source and dismissed the contention of the assessee that it would apply merely to amounts which were left 'payable' at the end of the year. Therefore, it held that where the assessee had made payments to sub-contractors for transportation of LPG without deduction of tax under section 194C of the Act, the disallowance under section 40(a)(ia) was rightly made by the AO.
Palam Gas Service v CIT – (2017) 81 taxmann.com 43 (SC) – Civil Appeal No 5512 of 2017 dated 03.05.2017

142. Assessee was responsible for executing the contract of transportation/carriage of goods on behalf of the Principals and besides using its own trucks and lorries, it also hired trucks and lorries from other owners or directly from the drivers available in the market or through brokers on random basis as and when required, on freight to freight basis. The AO made an addition observing that Section 194-C was applicable in case in hand on the ground that the Assessee was a Transporter and failed to deduct tax at source u/s.194-C. The Court upheld the order of the CIT(A) and Tribunal and held that the payments made to lorry hire charges by assessee was direct expense which was allowable under Section 28 and no disallowance under section 40(a)(ia) could be made especially when there was no contract between the assessee and the persons from whom it hired trucks and lorries. It held that in the absence of any evidence to prove contentions of AO on which the addition was based, even if, there was regular pattern and continuous transportation, it could not be said that those individual truck owners/drivers of transporters were contractors or sub-contractor of assessee company.
CIT v Shark Roadways Pvt Ltd - (2017) 99 CCH 0018 AllHC - INCOME TAX APPEAL No. 9 of 2013 dated 01.05.2017

e. ***Others***

Appeals

143. In the first round of proceedings, the Court had remitted the matter to the Tribunal for fresh adjudication. However, the Tribunal in its order merely reproduced the orders of the lower authority without assigning any reasoning or expressing its views on the findings of the lower authority. On second appeal to the Court, the Court held that the Tribunal was to consider the matter afresh and discuss the issue and the contentions raised before it. It noted that the Tribunal had failed to do so and had simply incorporated the passages, words and phrases of the lower authorities without enumerating its reasoning. Accordingly, it set-aside the order of the Tribunal and restored the issue to the file of the Tribunal for the second time.
Shri Arun Malhotra v Pr CIT – (2017) 99 CCH 0021 (Del HC) – ITA 303 / 2017 dated 17.05.2017

Clubbing of income

144. The assessee had constructed building by obtaining loan from a trust. The assessee and her husband were trustees of the trust and their 3 children were beneficiaries of the trust. While computing the income from the property (building), the assessee deducted the interest on loan taken from trust. The AO contended that interest earned by the trust from the assessee pertained to the beneficiaries i.e. the 3 children of the assessee and accordingly, clubbed income of 2 minor children in the hands of the assessee u/s 64(1A). The same was confirmed by the CIT(A) and the Tribunal. The Court restored the matter to AO for further verification so as to verify whether deduction of interest claimed by the assessee was offered by the trust as its income and directed the AO to club the income in the hands of the assessee if the same was not offered to tax by the trust. As per the order of Court, during the second round of proceedings, the AO, observed that the trust had not offered equivalent interest on loan to tax as was claimed by the assessee as deduction. Accordingly, he clubbed the interest income relating to minor

beneficiaries in the hands of the assessee which was confirmed by CIT(A). The Tribunal held that since the assessee could not establish that the interest income was offered by the trust to tax, the addition made by the AO was justified.
Dr. Anwar Basith vs. ACIT (2017) 50 CCH 0059 BangTrib ITA No. 495 & 496/Bang/2017

Income from Charitable Trust

145. The assessee was set up as a charitable society (duly registered under Section 12A of the Act) engaged in ensuring time supply of prescribed textbooks at fair prices to school students and to improve the quality of primary and secondary education in schools. The AO denied the assessee benefit under section 11 of the Act observing that the assessee earned huge profit margins of 35.15 percent and that the activity of publishing and selling books could not be considered as a charitable activity. The Tribunal set aside the order of the CIT(A) who provided relief to the assessee and upheld the order of the AO. On appeal the Court noted that the textbooks provided by the assessee to its students were at a subsidized rate and some study material was being distributed free of cost as well and held that the preparation and distribution of books certainly contributed to the process of training and development of mind and character of the students. It also held that the Tribunal had failed to notice that the surplus amounts realized by the assessee was ploughed back into the main activity of education and accordingly held that the Tribunal was incorrect in denying exemption to the assessee under section 11 and 12 of the Act. It also held that the Tribunal erred in upholding the order of the AO and concluding that the activites carried out by the assessee fell under the 4th limb of Section 2(15) i.e. advancement of any other object of general public utility as it was clear that the activities of the assessee were solely for the purpose of education.
Delhi Bureau of Text Books v DIT – (2017) 99 CCH 0005 (Del HC) – ITA 807, 810, 811, 812 / 2015 dated 03.05.2017

146. The Court held that the assessee viz. Vishwa Hindu Parishad (assessee, 'VHP') was eligible to claim exemption under section 11 of the Act despite its failure to comply with mandatory condition u/s. 12A(b) of filing of audit report. It noted that pursuant to demolition of Babri Masjid in 1992, the assessee was declared as an unlawful organisation under the Unlawful Activities (Prevention) Act, 1967 ('UAPA'), and thus, its books of accounts were seized as a result of which it could neither file its income tax return nor its audit report. It further noted that the assessee filed the audit report along with revised return in March 1996 (after completion of assessment) once the ban imposed under UAPA was lifted in June, 1995. Accordingly, it distinguished Revenue's reliance on co-ordinate bench rulings in Indian National Congress [TS-152-HC-2016(DEL)] and Janata Party [TS-151-HC-2016(DEL)], wherein exemption u/s. 13A was denied for flouting the mandatory condition of filing audit report alongwith return of income and observed that the delay in filing of audit report in the instant case was for bonafide reasons. It also observed that the assessee's audited accounts were not doubted. Accordingly, it held that there was no failure to comply with mandatory condition u/s. 12A(b) of the Act.
Further, it also rejected the Revenue's ground for rejection of exemption on the ground that the assessee was not registered u/s. 12A and noted that for relevant AY, the condition as to registration was not mandatory and mere filing of application for registration was sufficient which was done so by the assessee in 1973.
DIT(E) vs. Vishwa Hindu Parishad - TS-184-HC-2017(DEL) - ITA 14/2004 dated 08.05.2017

147. Assessee company was formed with charitable objects and was registered u/s 8 of the Companies Act, 2013 (corresponding to Section 25 of the Companies Act, 1956). The ld. CIT (Exemption) had granted registration u/s 12AA(1)(b) of the Act to the assessee company. However, it denied deduction u/s 80G(5)(vi) pointing out that the assessee primarily intended to carry out the activities outside India and Section 80G(5)(vi) only provided deduction with respect to donations to any charitable institutions or funds if it was established in India, unless approval had been received under section 11(1)(c)(i) of the Act, which was not so in the instant case. Further the CIT (Exemption) also contended that the applicant had simply collected funds and had not carried out any significant charitable activities and therefore was not eligible for deduction u/s 80G. The Tribunal concurred with the view of the CIT(E) and held that since the

activities of the institution included activities intended to be carried outside of India, its income would be liable to inclusion in its total income under the provisions of sections 11 and 12 of the Act unless it had the necessary approval obtained under section 11(1)(c) of the Act. Since the assessee had not obtained the requisite approval, the Tribunal held that it was not entitled to deduction under section 80G.
Barefoot College International v CIT - (2017) 50 CCH 0024 JaipurTrib - ITA No. 795/JP/2016 dated 11.05.2017

Interest / Penalty

148. The Court dismissed the assessee's writ petition against the CIT's rejection of interest waiver application u/s 220(2A) for want of 'genuine hardship'. It observed that CIT's rejection of 'genuine hardship' plea was not an erroneous exercise of discretion by the CIT and held that the mere fact that the interest u/s. 220(2) was 1.5 times the tax by itself did not have any relevance for determining whether the Assessee was suffering from any genuine hardship. It rejected assessee's contention that the mere fact that it was part of the global conglomerate 'DuPont', which made profits did not mean that it did not suffer any 'genuine hardship' and noted that it had earned operating profits of USD 6.253 billion and that the amount paid by it towards interest u/s. 220 (2) was merely $0.004 billion (approx). Accordingly, it concluded that the view taken by the CIT was a plausible view and did not call for any interference.
Pioneer Overseas Corporation USA [TS-194-HC-2017(DEL)] - W.P.(C) 5423/2016 dated 17.05.2017

149. The Tribunal upheld levy of penalty u/s 271(1)(c) on false depreciation claim made by assessee company on a furnace for AY 2004-05. The assessee had argued that the machinery (i.e furnace) was subject to trial run (i.e., at the supplier's premises) in the presence of assessee's engineers and hence it was put-to-use. It held that the test running at supplier's premises was only to confirm if the plant being delivered was in a 'OK' state and could not be regarded as commissioning of it's plant by the assessee. Further it held that even assuming constructive delivery at the sellers' premises, so that the plant stands acquired, it would enter the block of assets only upon being put to use. Since the assessee could not prove that the furnace was delivered / installed at its premises before March 31 of the relevant AY, the Tribunal held that the provisions of section 271(1)(c) were clearly applicable.
Sundaram Fasteners Ltd. vs. ADIT - TS-179-ITAT-2017(CHNY) - /ITA No. 590/Mds/2012 dated 26.04.2017

150. AO observed that assesee had incurred expenditure on foreign travel of one of its Directors and not filed any evidence to prove purpose of foreign travel to justify assessee's claim expenses as business expenses. The AO also observed that the assessee had shown unsecured loan received from X and failed to prove identity and creditworthiness of party and genuineness of transactions, but only filed confirmation letter purportedly signed by the lender person. Accordingly, the AO levied penalty under section 271(1)(c) of the Act. The Tribunal held that since no other evidence or material was filed to prove genuineness either at assessment stage, appellate stage and during penalty proceedings, the levy of penalty under section 271(1)(c) was justified.
Sharsh finance & investment co. Pvt. Ltd. Vs.ACIT - (2017) 50 CCH 0015 DelTrib - ITA No. 878/Del/2012 – 05.05.2017

Refund

151. The Department recovered interest due from the Petitioner under section 220(2) of the Act by appropriating the amounts from the property of the Petitioner which had been attached and from the refunds due to the Petitioner. However, subsequently, the CCIT had waived of all the interest payable by the Petitioner pursuant to which the Petitioner filed an application to the AO for refund of the amount wrongly claimed and interest on such refund. The same was denied by the AO on the ground that the refund arising to the Petitioner by way of waiver of interest under section 220(2) was due to discretion exercised by the CCIT and not due to the fact that the tax paid by the Petitioner exceeded the demand. The Court held that the language contained in section 244A(b) (providing for refund of interest in any other case) was to be read along with the

expression 'refund of any amount becomes due' occurring in Section 244A of the Act. Therefore, it held that interest on refund would be payable even where the refund arose out of waiver of interest by the CCIT.
Preeti N Aggarwala v CCIT – (2017) 99 CCH 0001 (Del HC) – WP C 1011, 1012, 1183 / 2016

Set off and carry forward

152. The Court reversed the order of the Tribunal and held that the assessee had rightly characterized the loss arising on sale of foreign cars as business loss which was eligible to be set off against business income. The AO held that the foreign cars being capital assets would be covered under section 50 of the Act and therefore the loss arising from its sale would be capital loss which could only be set off against capital gains and not against income from any other head of income. On appeal, the CIT(A) reversed the order of AO and held that since the assessee had not claimed any depreciation on the foreign cars they would not fall under a block of assets and section 50 of the Act would not apply. He also affirmed the fact that assessee used cars in his business. On further appeal, the Tribunal reversed the order of CIT(A) on the basis that assessee was not a dealer in foreign cars. The Court held that Section 50 of the Act applies to capital assets forming part of block of assets w.r.t. which depreciation is allowed. However, the Court observed that, in the given transaction the foreign cars did not form part of a block of assets due to which depreciation was not claimed on them for the given period and therefore Section 50 was inapplicable. Accordingly, it upheld the CIT(A)'s view and concluded that the loss on sale of foreign cars amounting to Rs 5 lakhs was rightly claimed as business loss by the assessee.
K D Madan vs. ITO- TS-177-HC-2017(MAD) - T.C.A.Nos.613 and 614 of 2008 dated 27.04.2017

153. Assessee had incurred short term capital loss on sale of shares in the prior assessment year which it had carried forward to the relevant year and set off the same against short term capital gains earned during the relevant year which was chargeable to tax at 30 percent. Noting that the assessee had also earned short term capital gains chargeable to tax at 10 percent, the AO contended that the assessee ought to have set off the brought forward losses against the STCG chargeable to tax at 10 percent as opposed to 30 percent as done by the assessee. The Tribunal held that there was no provision providing for the sequence in which different categories of short term capital gains had to be adjusted while setting of brought forward losses and therefore held that the preference of assessee would prevail. Accordingly, it allowed the appeal of the assessee.
Action Financial Services India Ltd v ACIT – (2017) 50 CCH 0008 (Mum Trib) – ITA NO 1823 / Mum / 2012 dated 03.05.2017

Stay of Demand

154. The Court held that the AO erred in rejecting the stay application filed by the Petitioner on the ground that the Petitioner had not deposited 15 percent of the disputed demand as a pre-deposit before his application for stay. It held that the AO's interpretation for reasons of rejection was made absolutely on misconception and/or misreading of the modified instructions dated February 29, 2016. Accordingly, it set aside the order of the AO, rejecting the stay application without looking into the merits contained therein for want of 15 percent deposit.
Jagdish Gandabhai Shah v Pr CIT – TS-171-HC-2017(GUJ) - SPECIAL CIVIL APPLICATION No. 5679 of 2017 dated 28.03.2017

155. Assessee's assessment proceedings were reopened on the basis of information gathered about Praveen Kumar Jain group ('PKJ Group') which was said to be operating a web of shell entities providing various kind of accommodation entries for bogus loans, bogus share capital and bogus sales. During the reassessment proceedings, the AO found that the assessee had sold shares of Rs. 10 each, to six shell companies (which were part of PKJ group), at a premium of Rs. 140 each and all these shares were eventually sold at Rs. 10 each to Nityanand Industries Limited, and the directors and majority shareholders of the assessee were also directors and majority shareholders of Nityanand Industries Ltd. Both the transactions took place on the same day. The Tribunal dismissed the stay application filed and noted that the assessee did not have such a

strong prima facie case to deserve to jump the queue of other litigants and be granted an out of turn hearing. It opined that the whole situation cannot be a case of a mere coincidence, and accordingly held that such cases of financial manoeuvrings, with the help of shell companies, deserve no sympathy from the judicial forums and should not, as a matter of course, be allowed to jump the queue of ordinary litigants.
Gujarat Infrapipes Private Limited - TS-201-ITAT-2017(Ahd) - SP No.101/Ahd/17 dated 26.05.2017

Unexplained income / expenses / investments

156. The AO made an addition in the hands of the assessee under section 69C of the Act contesting that the assessee had made payment to American Express Banking Corporation [AEBC] against credit card payment which was not reflected in the books of accounts. The Tribunal, noting that the discrepancy in the payment occurred due to erroneous reporting by AEBC which had been subsequently confirmed by AEBC, deleted the addition made under section 69C stating that the assessee had discharged its obligation and there was no basis for such addition.
Empire Industries Ltd v Add CIT - (2017) 50 CCH 0036 MumTrib - ITA No. 4065/Mum/2013 dated May 17, 2017

157. Where the assessee made purchases made from parties other than those mentioned in books of account and the assessee failed to prove with adequate evidence that the purchases were made from those parties, the Tribunal held that the AO was justified in making an addition on account of bogus purchases but could not make addition of the entire purchase price but only to the extent of the profit element embedded in such purchases. Accordingly, it directed the AO to make an addition at the rate of 12 percent of the value of purchases from these parties.
ITO v Manish Kanji Patel & Anr – (2017) 50 CCH 0037 (Mum Trib) – ITA NOS. 7299/Mum/2014, 7154/Mum/2012 & 7300/Mum/2014, 7627/Mum/2014 dated 18.05.2017

158. The assessee had disclosed long term capital gains exempt under section 10(38) of the Act in its return of income. The AO alleged that the said long term capital gains was merely a fall out of an accommodation entry taken by the assessee from the share broker for converting unaccounted funds into accounted funds and therefore treated the long term capital gains as income from unexplained and undisclosed sources under section 68 which he assessed under the head 'Income from Other Sources'. The Tribunal noting that the assessee had submitted documentary evidence reporting the entire chain of events of purchase and sale which was not rebutted by the AO on the basis of any concrete evidence held that the assessee had discharged its onus. Accordingly it held that the adverse inferences drawn by the lower authorities could not be accepted to dislodge the genuineness of the transaction and therefore deleted the addition made by the AO / CIT(A).
Kamala Devi Doshi v ITO – (2017) 50 CCH 0053 (Mum Trib) – ITA No 1957 / Mum / 2015, 3018 / Mum / 2015, 3019 / Mum 2015 dated 22.05.2017

159. The Tribunal confirmed the addition made by the AO under section 68 where the assessee received unsecured loans, but could not produce lenders for verification. It held that since the said lenders were found to be shell companies, said loan transactions could not be said to be genuine merely because assessee filed loan confirmations, copies of ledger account and other supporting evidences to justify transactions at fag end of assessment proceedings.
Pavankumar M Sanghvi v ITO [2017] 81 taxmann.com 308 (Ahmedabad - Trib.) - IT APPEAL NO. 2447 OF (AHD.) 2016 dated May 17, 2017

160. The assessee had obtained an unsecured loan of Rs. 23 Lakhs from 3 parties but could not furnish any proof except ITR and statement of affairs of only 1 creditor (pertaining to loan of Rs. 10 Lakhs) and accordingly, the AO treated these loans as unexplained cash credit. The Tribunal held that to the extent of loan of Rs. 13 Lakhs, genuineness of the loans could not be established since the loans were neither reflected in the return of the donor nor in the return of the assessee. However, in respect of loan of Rs. 10 Lakhs, where the ITR and statement of affairs of creditor was produced, the Tribunal deleted the addition on the ground that these documents were

sufficient to establish the genuineness of the transaction and the creditworthiness of the loan creditor.

Vimal Kumar vs. ITO (2017) 50 CCH 0066 Del Trib ITA No. 2839/DEL/2012

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