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

(Pronounced in June 2017)

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Transfer Pricing	International Tax	Domestic Tax
<ul style="list-style-type: none"> ➤ Most Appropriate Method <ul style="list-style-type: none"> – Comparable Uncontrolled Price Method – Case 1 to 3 – Transactional Net Margin Method – Case 4 to 5 – Others – Case 6 Comparability – Inter and Intra Industry ➤ – ITES Sector / Software Development Services - Case 7 to 24 ➤ – Support Services - Case 25 to 27 <ul style="list-style-type: none"> – Investment Advisory Services - Case 28 – General - Cases 29 to 34 Computation / Adjustments <ul style="list-style-type: none"> – Capacity Utilization Adjustment – Case 35 to 36 ➤ – Profit Level Indicator - Case 37 to 41 <ul style="list-style-type: none"> – Risk Adjustment - Case 42 to 43 – Working Capital Adjustment - Case 44 – Others - Case 45 to 46 Specific Transactions <ul style="list-style-type: none"> – Advertisement, Marketing and Promotion / Brand Expenses – Case 47 to 48 ➤ – Loan / Receivables / Corporate Guarantee - Case 49 to 55 <ul style="list-style-type: none"> – Royalty /Management fees / Intra Group Services / Reimbursements – Case 56 to 62 Miscellaneous 	<ul style="list-style-type: none"> ➤ Capital Gains – Case 77 ➤ Salary – Case 78 ➤ Others – Case 79 	<ul style="list-style-type: none"> ➤ Income – Case 80 ➤ Deductions/ Disallowances <ul style="list-style-type: none"> – Section 32 / 32A – Case 81 to 82 – Section 35AB – Case 83 – Section 37 – Cases 84 to 90 – Section 40 – Case 91 – Section 43B – Case 92 to 94 – Section 14A – Case 95 to 96 – Section 10A / 10B / Chapter VIA – Case 97 to 98 ➤ Income from Capital Gains – Case 99 to 107 ➤ Assessment / Re-assessment / Revision / Search Proceedings <ul style="list-style-type: none"> – Assessment – Case 108 to 109 – Re-assessment – 110 to 115 – Search / Survey – Case 116 ➤ Withholding Tax – Case 117 ➤ Others <ul style="list-style-type: none"> – Appeals – Case 118 – Deemed Dividend – Case 119 – Income from charitable Trust – Case 120 to 121 – Interest / Penalty – Case 122 to 127

– Appeals – Case 63 to 65

➤ – Assessment / Reassessment
– Case 66 to 73

– MAP – Case 74

– Penalty – Case 75

– Stay – Case 76

– Minimum Alternate Tax –
Case 127

– Refund – Case 128

– Set off and carry forward of–
Case 129 to 130

– Miscellaneous – Case 131 to
133

I. Transfer Pricing

a. **Most Appropriate Method**

Comparable Uncontrolled Price

1. The Tribunal, following the decision of the coordinate bench in assessee's own case for AY 2011-12 accepted assessee's adoption of CUP method over TNMM for benchmarking medical transcription services for AY 2012-13. It noted that the Tribunal for the earlier AY had accepted assessee's reliance on the decision in the case of Ckar Systems Pvt. Ltd [TS-694-ITAT-2012(HYD)-TP] and had upheld the adoption of CUP method as the most appropriate method as assessee and Ckar were in the same line of business i.e. medical transcription services. The Tribunal in the case of Ckar Systems had held that if the comparables considered by assessee were not connected either to the assessee or its holding company, and all information/data relating to its transactions were available, the TPO was not justified in rejecting the computation of ALP made by the assessee by applying CUP method. Noting that there was no factual difference between earlier year and this year, it held that review of the earlier year order was not within the purview of the Tribunal.

iMedX Information Services Private Limited vs DCIT -TS-457-ITAT-2017(HYD)-TP-ITA No. 1716/hyd/2016 dated 28.04.2017

2. Noting that the services rendered by the assessee to AE were the same as those rendered by AE to independent enterprises, the Tribunal upheld the deletion of TP-adjustment in respect of back to back software development services rendered by the assessee to US-AE which were benchmarked by the assessee using services rendered by AE to independent customers as comparable under CUP. Rejecting Revenue's contention that there was difference in FAR between assessee and AE, it held that since the transaction was exactly the same, there could not be any occasion for the FAR of the transaction to be different. Further, it also disagreed with TPO's contention that where a more reliable method viz TNMM was available, then there was no need to adopt CUP especially when reliable data of the comparable cases were not available for ascertaining the man hourly charges for identical or near identical services in an uncontrolled transaction or by an independent enterprise. It observed that the distinction drawn by the TPO on the basis of FAR of the enterprise rather than the transaction was not tenable and perfect CUP inputs were available in the form of back to back transactions.

DCIT vs Calance Software Pvt Ltd-TS-451-ITAT-2017(DEL)-TP- ITA No.5023/Del/2012 dated 04.04.2017

3. The Tribunal upheld CIT(A)'s order deleting TP-adjustment on account of international transaction of royalty payment by assessee to its AE for AY 2011-12. The assessee had adopted TNMM as MAM with operating profit margin as the profit level indicator. The TPO rejected TNMM as MAM and made an adjustment to the arm's length by applying CUP method. The TPO contended that the assessee had not been able to justify the payment of royalty during the year on the sale of offset ink as well as gravure ink and thus made an adjustment as per the provisions of section 92CA of the Act. CIT(A) relying on the Tribunal's decision in the assessee's own case for AY 2007-08 and 2008-09 had held that products manufactured by assessee were developed from continuous technology support provided by AE and therefore deleted the royalty adjustment. The Tribunal held that the cost benefit test worked out by TPO was not based on proper appreciation of facts and thus held that the choice of CUP method was unjustified.

ACIT vs Sakata Inx (India) Ltd-TS-505-ITAT-2017(JPR)-TP-ITA No 1035/JP/2016 dated 24.04.2017

Transactional Net Margin Method

4. The Tribunal relying on the decision of the coordinate bench in the assessee's own case for AY 2006-07 [TS-915-ITAT-2016(BANG)-TP] and noting that that the TPO had applied TNMM in respect of sale of spare parts for the assessee in the earlier assessment year held that TNMM as selected by the assessee was the MAM as against Cost Plus Method adopted by TPO for AY 2008-09. Further, it directed AO/TPO to consider the working capital adjustment claimed by the assessee and held that when the issue of MAM had been decided in favour of the assessee then the issue of working capital was required to be reconsidered. However, it rejected assessee's plea for grant of risk adjustment as assessee had not furnished the computation and working of the risk adjustment by giving requisite details of level of risk and computation of quantification of risk adjustment for assessee vis-à-vis comparables.

GE BE Pvt Ltd vs DCIT -TS -373-ITAT-2017(Bang)-TP- dated 13.04.2017

5. The assessee had benchmarked its international transactions in the call centre segment adopting CUP as the most appropriate method. However, it had also conducted a supplementary analysis under TNMM. The TPO accepted the CUP method but benchmarked the transaction using the average rate charged by the assessee for 9 months as opposed to 12 months since the comparable company only had 9 months data. Noting that the rate charged by the assessee for 9 months (USD 1.63) was less than the CUP rate of USD 1.83, the TPO made an adjustment of Rs. 2.30 crore. The TPO rejected the assessee's plea that the difference in rate was due to the difference in credit period granted by the assessee vis-à-vis the comparable which required adjustment in respect of the rate of both the assessee as well as the comparable and held that as per Rule 10B no adjustment could be made to the value of international transactions of the assessee under CUP. CIT(A) upheld the adjustment. The Tribunal held that the price charged by the assessee from April, 2003 to March, 2004 (12 months) had to be taken into consideration for benchmarking its international transactions and opined that where the appropriate data was not available at the relevant point of time CUP could not be used. It further held that the MAM in the case of ITES services, ought to have been TNMM instead of CUP method as it encompasses the minor variation and also provides for suitable adjustment. Accordingly, it remitted the issue to TPO for fresh consideration and determination adopting TNMM as the Most appropriate method.

Dell International Services India Pvt Ltd vs ACIT [TS-443-ITAT-2017(Bang)-TP] dated 21.04.2017

Others

6. The Tribunal remitted the determination of ALP in respect of payments for technology support services, back end service charges, shared cost for co-located premises and loan processing fees by assessee engaged in the business of hire purchase and auto loans to the file of AO/TPO for fresh consideration. Relying on the decision in the case of Festo Control Private Limited [150 ITD 305], it rejected TPO's determination of ALP as nil under the CUP method and held that if CUP method is considered as MAM, the value could not be 'nil'. The assessee had for the purpose of benchmarking its international transaction relied on the principle that none of the methods for the purpose of computation of arm's length price as per the Act were applicable in the assessee's case and having regard to the economic and commercial factors, the payments were at arm's length. Relying on the decision in the case of Carraro India Ltd [120 TTJ 77], it rejected the assessee's contention that international transactions were at arm's length since they were accepted to be arm's length in the previous and succeeding AYs and held that since they were accepted to be at arm's length in one year, it is carried at arm's length in other assessment years as well. Noting that the assessee had done no exercise or documentation for benchmarking the international transactions as per the provisions of section 92D of the Act, it relied on the SB ruling in the case of Aztec Software and held that the onus was on the assessee to provide details for determination of MAM for international transactions. Accordingly, it remitted the issue back to TPO and directed the assessee to furnish all material and information/documents required to be maintained as per Rule 10D to the TPO determined the ALP afresh.

Citicorp Maruti Finance Ltd vs DCIT-TS-500-ITAT-2017(DEL)-TP-ITA No.4634/del/2010 dated 11.05.2017

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

ITES Sector/Software Development Services

7. The Tribunal held that the assessee engaged in the business of IT enabled services could not be compared to:-

- Infosys BPO Ltd. as it performed high end and integrated services and it had a huge brand value as a result of which it earned higher profits and was functionally dissimilar.
- Accentia Technologies Ltd. as it was engaged in diversified KPO services in the areas of health-care cycle management, legal process outsourcing and high-end software delivery.

Further, it included Microland since both the assessee as well as Revenue had pleaded for inclusion of this comparable as it satisfied the forex to sales filter applied by the TPO.

Global e-business Operations Pvt. Ltd vs DCIT- TS-445-ITAT-2017(Bang)-TP- IT(SS)A No.172 and 147/bang/2015 dated 21.04.2017

8. The Tribunal held that the assessee engaged in the provision of ITES to its AE could not be compared to:-

- Accentia Technologies Limited since an extraordinary event such as merger had taken place which had a significant impact on its profitability.
- Eclerx Services Limited as it was engaged in providing high end KPO services involving specialized knowledge and domain expertise in its field.

DCIT vs Goldman Sachs Service Pvt Ltd – TS-430-ITAT-2017(Bang)-TP- IT(TP)A No.66/bang/2014 dated 05.04.2017

9. The Tribunal upheld DRP's direction to exclude Infosys Technologies as a comparable while benchmarking the software development services provided by the assessee to the AE noting that it was a giant in the area of software development and had higher intangibles and goodwill and assumed all risks leading to higher profit which rendered it functionally dissimilar to the assessee. It relied on the decision in the case of NTT Data Global Delivery Services Ltd [TS-219-ITAT-2016(Bang)] wherein it was held that Infosys Technologies could not be compared to any other company as it had a huge brand influence.

ITO vs Symphony Marketing Solutions India – TS-370-ITAT-2017(BANG)-TP-IT(TP) Nos.233 and 809/bang/2015 dated 04.04.2017

10. The Tribunal held that the assessee engaged in the business of providing software development and application engineering services to its AE could not be compared to:-

- I Power Solutions Ltd. as it was dissimilar to the assessee on account of difference in revenue recognition policy as it was based on completed contract method while the assessee followed proportionate completion method. Further there was also difference in terms of salary cost, foreign exchange earnings and comparability in term of size and operation
- VMF Soft-tech Ltd having turnover of Rs. 2 cr. as it failed the turnover filter of 1/10th of the assessee's turnover i.e. 135 Cr.
- Xcel Vision Technologies Ltd. having turnover of Rs. 90 lakhs as it failed the turnover filter of 1/10th of assessee's software segment turnover of Rs. 135cr.

DCIT vs Robert Bosch Engineering & Business Solutions Ltd-TS-444-ITAT-2017(Bang)-TP- dated 21.04.2017

11. The Tribunal upheld DRP's exclusion of 6 companies having turnover more than Rs.200 crores while benchmarking software development services rendered by the assessee whose turnover was Rs 17.10 crores. It held that though Rs.200 crores turnover filter adopted by the DRP was not appropriate, even if the filter of 10 times of assessee's turnover was applied, the companies which had more than Rs.171 crores of turnover would be excluded i.e 10 times the assessee's of 17.10 cr. Vis-à-vis the assessee's claim for risk adjustment, relying on the decision in the case of Zyme Solutions Pvt. Ltd [IT(TP)A No. 465/bang/2015 it held that where the assessee had not

provided any computation for risk adjustment, the claim of the assessee was purely hypothetical in nature and accordingly set aside DRP directions allowing 1% risk adjustment.

ITO vs Solidcore Techsoft Systems (India) Pvt Ltd-TS-350-ITAT-2017(Bang)-TP- dated 28.04.2017

12. The Tribunal held that the assessee engaged in the business of providing software development services was not comparable to

- Flextronics Limited (seg), iGate Global Solutions Ltd, Infosys Limited, L&T Infotech Limited, Satyam Computers Limited having Turnover 457.45 cr, 406 cr, 6859.70 cr, 562.45 cr, 3464.20 cr respectively could not be compared to the assessee engaged in the business of software development services as it failed the turnover filter of 10 times the assessee's turnover of Rs.14.92 crores.
- Orient Information Technology Limited as it was engaged in providing BPO services.
- Bodhtree Consulting Limited as it was engaged in providing BPO services.
- Geometric Software Solutions as its RPT to sales was 19.47% which did not satisfy the RPT filter of 15% applied by TPO.

Further, in light of the SB ruling in case of Maersk Global Centres (India)(P.) Ltd [TS-74-ITAT-2014(Mum)], which held that in respect of companies having abnormally high profits, it was necessary to ascertain whether the high profit was the result of some abnormal conditions prevailing in the relevant year, it remitted to the file of CIT(A) the comparability of Exensys Software Solutions Limited (70.68%), Thirdware Solutions Ltd (66.09%), to consider the comparability of the companies vis-à-vis the assessee.

DCIT vs Alliance Semiconductors India Pvt Ltd IT(TP)A No. 618(bang) 2013 dated 21.03.2017

13. The Tribunal relying on the decision in the case of Symphony Marketing [TS-915-ITAT-2016(Bang)-TP] held that the assessee engaged in the business of providing software development services could not be compared to:-

- Infosys BPO as it was engaged in the business of providing BPO services and had huge brand value having significant influence on the pricing policy.
- Wipro Limited (BPO division) as it owned substantial intellectual property on software products.

GE BE Pvt Ltd vs DCIT – TS- 915-ITAT-2016(Bang)-TP dated 13.04.2017

14. The Tribunal held that the assessee engaged in the business of providing ITE services could not be compared to:-

- Infosys BPO Ltd having turnover of Rs 1312.42 crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 15.29 crores.
- TCS E-serve Ltd having turnover of Rs 1578.44 crores as it failed the turnover filter of 10 times the assessee's turnover of Rs. 15.29 crores.

Further, it remitted the comparability of BNR Udyog Ltd and Universal Print Systems Ltd to the file of AO/TPO to examine the afresh functional dissimilarity since the assessee contended that the two companies were engaged in the business of Medical transcription services and BPO services respectively and the DRP order had not considered the above contention.

Misys Software Solutions (India) Pvt Ltd vs DCIT-TS-492-ITAT-2017(BANG)-TP-IT(TP)A No.1560 (bang) 2016 dated 12.05.2017

15. Tribunal held that the assessee engaged in the business of rendering software development and localization services to its AE could not be compared to:-

- TCS E-serve Limited as it was engaged in the business of BPO services and also provided high end technology services such as software testing, verification and validation of software and did not maintain any segmental accounts also that it benefited from the use of TATA brand and
- Wipro Technology Services Ltd as it was engaged in providing technology software solutions and diversified activities comprising software related support services, primary information technology software solutions, maintenance and technology support which was functionally dissimilar to the assessee and no segmental information was available.

Lionbridge Technologies Pvt Ltd vs CIT -TS -468-ITAT-2017(MUM)-TP- dated 17.05.2017

16. The Tribunal remitted the issue of whether Coral Hubs Ltd (formerly known as Vishal Information Technologies Ltd.) could be selected as comparable while benchmarking the international transactions of the assessee (as ITES provider) noting that the said comparable outsourced major part of its work, incurring nominal employee cost as compared to assessee who incurred over 60% of its expenditure on salaries. Observing that the assessee placed reliance on the decision of the High Court in the case of Rampgreen Solutions Pvt. Ltd [TS-387-HC-2015(DEL)-TP] (wherein the comparable had been excluded), which was not available before the CIT(A) as it was subsequent to the date of passing the impugned order, it remitted the issue back to the file of AO to re-consider the inclusion/ exclusion of Coral Hubs in light of HC ruling.

Credit Pointe Services Pvt Ltd vs DCIT-TS-502-ITAT-2017(PUN)-TP dated 24.05.2017

17. The Tribunal held that the assessee, engaged in providing information technology related back office services to its AEs could not be compared to:

- Accentia Technologies Ltd as the company was engaged in the business of medical prescription services which was functionally not comparable to the assessee.
- Coral Hubs Ltd as the company had a very low employee cost of only 4.3% and had substantial vendor payments thereby outsourcing a large portion of its work.
- Cross Domain Solutions Ltd as the company was engaged in providing KPO services and was functionally dissimilar to the assessee.
- E4e Health Solutions as the company was engaged in the business of providing healthcare services which was a specialized of knowledge based services and thus functionally dissimilar to the assessee.
- Ace Software Exports Ltd as it was a loss-making company and also had an extra-ordinary event during the year i.e. it had restructured its business operations during the year.
- R Systems International Ltd as it followed a different financial year. It relied on the decision in the case of PTC Software (I) Pvt. Ltd [TS-788-HC-2016(BOM)-TP] wherein it was held that the data to be used for comparability analysis should be of the same financial year in which the international transactions were entered into by the tested party.
- Aditya Minacs Worldwide Ltd as it was engaged in providing KPO services.
- Informed Technologies India Ltd as it was engaged in providing KPO services.

Vishay Components Pvt. Ltd vs. ACIT - TS-491-ITAT-2017(PUN)-TP - ITA No.341/PUN/2013 dated 31.05.2017

18. The Tribunal held that the assessee engaged in the business of software development services could not be compared to:-

- Infosys BPO Ltd having turnover of Rs 33083 crores as it failed the turnover filter of 10 times the assessee's turnover of software development segment i.e Rs.198.65 crores.
- L&T Infotech Ltd having turnover of Rs 2959.55 crores as it failed the turnover filter of 10 times the assessee's turnover of software development segment i.e Rs 198.65 crores.

Further, it remitted the comparability of Persistent Systems Ltd, Thinksoft Global Services and Evoke Technologies Pvt Ltd to the file of AO/TPO to examine afresh functional dissimilarity since the assessee contended that the three companies in the business of and the DRP order had not considered the above contention.

Misys Software Solutions (India) Pvt Ltd vs DCIT-TS-492-ITAT-2017(BANG)-TP-IT(TP)A No. 1560 (bang) 2016 dated 12.05.2017

19. The Tribunal held that the assessee engaged in the business of software development services could not be compared to:-

- Virinchi Technologies Limited since as per the annual report, the company was engaged in R&D in software engineering technology and products. Further, the segmental data was unavailable.
- Thirdware Solutions Limited since the company was engaged in diversified activities such as software design and consultancy, trading and development of software, subscription contracts, sale of user license for which no segmental details were available.
- Gebbs Infotech Limited since the company provided software development services as well as BPO services and segmental operating margins were not available

- WTI Advanced Technology since the company reported income from technical services rendered, CAD (computer aided design) convergent drawings and software services and segmental details were not available.
- Transworld Infotech Limited as the company was engaged in software solutions and products as well as consultancy services and segmental details were unavailable.

Dell International Services India Pvt Ltd vs ACIT [TS-443-ITAT-2017(Bang)-TP] dated 21.04.2017

20. The Tribunal held that the assessee engaged in the business of providing software development services for administration of higher education institutions worldwide to its AEs could not be compared to

- Infosys Technologies Limited since it had a very high turnover of Rs. 9028 crores and also had high brand value.
- Bodhtree Consulting Limited as it had a RPT filter of 34.68% i.e, greater than 15% threshold applied by TPO.
- Flextronics Software Systems Limited (seg) since it was engaged in software products and thus was functionally dissimilar with pure software development services provider.
- Sankhya Infotech Limited since it was engaged in the business of development of software products and services as well as training and its segmental details were unavailable.
- Foursoft Limited since its RPT filter was at 19.89% which was greater than 15% threshold applied by TPO.
- Tata Elxsi Limited (seg) since it was engaged in the development of niche product and development services.
- Satyam Computer Services Limited since the financial data was unreliable owing to fraudulent activities by Directors of the company.
- Exensys Software Solutions Limited due to extraordinary event of amalgamation with Honloul India Ltd during the year and abnormal profits of more than 50%.

SunGard Solutions (India) (P.) Ltd vs ACIT [TS-351-ITAT-2017(BANG)-TP] dated 28.04.2017

21. The Tribunal held that the assessee engaged in the business of software development services could not be compared to:-

- Infosys Limited having a turnover of Rs 21,140 cr as it failed the turnover filter of 10 times the assessee's turnover i.e Rs 151.08 cr
- KALS Information Systems Ltd having a turnover of Rs 2.16 cr as it failed the turnover filter of 1/10th times the assessee's turnover.
- L&T Infotech Ltd having a turnover of Rs 1776.76 cr as it failed the turnover filter of 10 times the assessee's turnover.
- Persistent Systems Limited as the company was engaged diversified activities and earned revenue from various activities including licensing of products, royalty on sale of products as well as income from maintenance contract, outsource product development and its segmental results were unavailable.
- Tata Elxsi Limited as the company was engaged in diversified activities like product design services, innovation design, engineering services, visual computing labs etc. Further, it held that segmental details were unavailable.
- Accentia Technologies Ltd. as the company was engaged in the business of medical coding and providing in KPO services and its segmental details were unavailable.
- Icra Online Limited (seg.) as the company having 16% RPT failed the 15% RPT filter applied by the TPO.
- Infosys BPO Ltd. as the company having a turnover of Rs 1126.63 cr failed the turnover filter of 10 times the assessee's turnover of Rs 151.08 cr.

Further, it remitted the comparability of Nittani Outsourcing Services Ltd. to the TPO on the ground that the TPO had not initially selected the company as a comparable while issuing a show cause notice but without giving an opportunity to the assessee had included it in the final set of comparables. It also noted that the DRP had not entertained the assessee's objection vis-

à-vis the comparable. It accordingly set aside the issue to the file of the TPO for reconsideration of functional comparability.

Misys Software Solutions (India) Pvt. Ltd vs DCIT – TS-456-ITAT-2017(Bang)-TP dated 19.05.2017

22. The Tribunal held that the assessee engaged in the business of Software Development services could not be compared to:-

- Bodhtree Consulting Ltd as it was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology and was thus functionally dissimilar to the assessee.
- Tata Elxsi Limited as its software development segment constituted three sub-segments – product design services, engineering design services and visual computing labs and system integration services segment and no segmental breakup was available.
- Persistent System Ltd as it was engaged in product designing services.
- Infosys Technology Ltd as it was a giant company in the area of software and it assumed all risks leading to higher profits.
- L&T Infotech Limited as it was engaged in multifaceted activities including both software development services and products and also owned intangibles.
- Sasken Communication Technology Ltd as it earned revenue from 3 segments viz., software services, software products and other services for which segment wise operating margins and other relevant segmental data was unavailable.

Arcot R&D Software Pvt Ltd-TS-494-ITAT-2017(BANG)-TP-ITA No dated 17.03.2017

23. The Tribunal held that the assessee engaged in the business of providing software development services and ITeS to its AE could not be compared to:-

- Infosys BPO Ltd as it possessed high brand value and intangibles.
- Accentia Technologies India Ltd as the company had undergone an extra-ordinary event i.e. another company was amalgamated into the impugned company during the year and therefore the results of the company were incomparable due to such amalgamation.
- Cosmic Global Ltd as it outsourced/sub contracted its work and was therefore functionally dissimilar.
- E-clerx Services Ltd as it was providing high end services involving specialized knowledge and domain expertise.

Further, specifically vis-à-vis the software development services, it held that the assessee could not be compared to:-

- Tata Elxsi Ltd as it was engaged in product designing service.
- Persistent Systems Ltd as it was engaged in product development and product design services and segmental details were not available.
- Infosys Technologies Ltd on the ground of brand attributable profit margin and huge turnover from software products for which segmental details were not available.

Altair Engineering India Pvt Ltd vs DCIT-TS-514-ITAT-2017(BANG)-TP dated 03.05.2017

24. The Tribunal held that the assessee engaged in the business of software development services could not be compared to:-

- KALS Information Systems Ltd as the company having turnover of Rs. 2.14 crores failed the turnover filter of 1/10th of assessee's turnover of Rs.69.07 crores.
- Zylog Systems Ltd as the company having turnover of Rs failed the turnover filter of 10 times the assessee's turnover of Rs. 69.07 crores
- Mindtree Ltd as the company failed the turnover filter of 10 times the assessee's turnover of Rs. 69.07 crores
- Larsen & Toubro Infotech as the company failed the turnover filter of 10 times the assessee's turnover of Rs. 69.07 crores
- Infosys Ltd as the company having turnover of Rs. 20,264 crores failed the turnover filter of 10 times the assessee's turnover of Rs. 69.07 crores
- Bodhtree Consulting Ltd as the company engaged in the business of KPO services.
- Tata Elxsi Ltd as the company was engaged in the business of KPO services.

- Persistent Systems Ltd as the company was engaged in the business of software development services as well as product designing services.

Further, it remitted the comparability of Sasken Communications Technologies Ltd to the file of AO/TPO since the entire annual report was not available.

ITO vs Aris Global Software Private Ltd-TS-473-ITAT-2017(BANG)-TP-IT(TP)A No. 94 & 31/bang/2016 dated 28.04.2017

Support Services

25. The Tribunal held that the assessee engaged in the business of providing call centre services/ business process outsourcing services to its AE could not be compared to
- BNR Udyog Ltd as its RPT to sales was 359.35% which did not satisfy the RPT filter of less than 25% applied by TPO.
 - CMC Ltd (seg) as its RPT to sales was 59.14% which did not satisfy the RPT filter of less than 25% applied by TPO
 - Datamatics Technologies Ltd as its RPT to sales was 66.91% which did not satisfy the RPT filter of less than 25% applied by TPO.
 - MCS Ltd as it was engaged in Registrar and share transfer activities and thus functionally different from assessee.
 - TSR Darashaw Ltd as it was engaged in Registrar and share transfer and outsourcing activities.
 - Maple Esolutions Ltd as it was involved in fraud and business reputation had come under serious indictment.
 - Triton Corp Ltd as it was involved in fraud and its business reputation had come under serious indictment.
 - Wipro Ltd (BPO services segment) as the company had huge brand value.
 - Fortune Infotech Ltd as its RPT to sales was 99.96% which did not satisfy the RPT filter of less than 25% applied by TPO.
 - HCL Technologies as its RPT to sales was 66.90% which did not satisfy the RPT filter of less than 25% applied by TPO.

Oracle (OFSS) BPO Service vs DCIT – TS- 462-ITAT-2017(KOL)-TP- dated 02.06.2017

26. The Tribunal held that the assessee engaged in the business of providing customer support services to AE could not be compared to:-
- Eclerx Services Limited relying on the decision in the case of Tesco Hindustan [ITA NO. 1285/BANG/2011] wherein the company was excluded on account of abnormal profits and it was also engaged in KPO services
 - Coral Hubs as the it was primarily engaged into outsourcing and thus the business model was different than the assessee.
 - Mold Tek Technologies (seg) having employee cost of 7.6% of sales as it failed the employee cost filter of 25% applied by the TPO.

Further, it remitted Genesys International Corporation Ltd. to the file of CIT(A) with the direction to compare its profile with the profile of the assessee based on various documents/agreements entered by assessee and work done, technology used for the purpose of rendering the work to AE.

G.E India Exports Pvt. Ltd vs DCIT-TS-477-ITAT-2017(Bang)-TP- IT(TP)A No. dated 28.04.2017

27. The Tribunal held that the manufacturing segment of the assessee engaged in the business of handling sales, services and technical functions could not be compared to:-
- Rollatainers Limited as it had a different financial year and negative net worth for three consecutive assessment years.
 - Stovec Industries Limited as it had a different financial year compared to the assessee and as per Rule 10B(4), data used for comparability had to be of the same financial year in which international transactions were entered into by the tested party.

Investment Advisory Services

28. The Tribunal held that the assessee engaged in the business of providing non-binding investment advisory services could not be compared to :-
- Motilal Oswal Investment Advisors P. Ltd since it was engaged in providing a gamut of functions and activities as such as M&A, profit equity syndication and structured debt, advisory services related to corporate matters, merchant banking activities etc and which was functionally different from the investment advisory services provided by the assessee.
 - Integrated Capital Services Ltd as the company was engaged in the business of providing consultancy services in the field of business, M&A, etc. which was not comparable with investment advisory services.

Further, it accepted assessee's plea for inclusion of IDC India Limited as it was engaged in advisory and consultancy services.

Singulair Guff India Advisors Pvt Ltd vs DCIT- TS-448-ITAT-2017(MUM)-TP- ITA No. 403/Mum/2015 dated 21.04.2017

General

29. The Tribunal remitted the issue of comparability of ADCC Research & Computing Centre, Bodhtree Consulting and Onward Technologies for benchmarking the international transaction of the assessee i.e. software development services to the file of AO/TPO for fresh consideration. The assessee had appealed for the exclusion of said comparables on the ground of non-availability of data. Noting that the TPO had adopted data for different accounting year for 3 companies, it held that even if a concerned comparable was adopting a different accounting period as its accounting year then also, the data for relevant FY could be compiled on the basis of quarterly reports of the said company. Further, in respect of comparability of Satyam Computers vis-à-vis the assessee, relying on the decisions in the case of SAP Labs India Pvt. Ltd [TS-657-ITAT-2011(Bang)] and NTT Data Global [TS-219-ITAT-2016(Bang)-TP] wherein the Tribunal had given a finding that the company was alleged to have involved malpractice, it remitted to the file of AO/TPO, comparability of the said comparable to factually verify whether the accounts for subject AY 2003-04 were also falsified and if so, it directed AO/TPO to exclude the said comparable.

i2 Technologies Software Pvt Ltd vs CIT -TS-475-ITAT-2017(Bang)-TP- IT(TP)A Nos. 1207 and 274(B)2014 dated 06.04.2017

30. The Tribunal held that a related party filter of 15% was to be adopted as against CIT(A)'s 0% filter and TPO's 25% RPT filter. It held that the 0% related party transaction was an impossible situation and no comparables would be available if the said filter was applied. It explained that 15% RPT filter would be proper in ordinary circumstances when there was no difficulty of selecting comparable companies and only in extreme and exceptional circumstances when the comparable companies were not easily available the tolerance range could be relaxed upto 25%. It held that the Tribunal in a series of decisions had taken the view that a tolerance range of related party transaction could be considered from 5% to 25% depending upon the facts and circumstances of each case particularly the availability of the comparable companies. Further, Since neither the TPO nor the assessee had made out a case of exceptional difficulty in searching for comparables, it adopted the 15% RPT filter. Further, relying on the decision in the case of Maersk Global Centres (India) (P.) Ltd [TS-74-ITAT-2014(Mum)-TP] , it held that mere high profit margin or loss could not be considered as a parameter or criteria for selection/exclusion of comparable companies, and accordingly held that the CIT(A) erred in excluding Éxensys Solutions Ltd and Thirdware Solutions Ltd merely on the ground of high profit margin.

SunGard Solutions (India) (P.) Ltd vs ACIT [TS-351-ITAT-2017(BANG)-TP] dated 28.04.2017

31. The Court dismissing Revenue's appeal, confirmed Tribunal's order of exclusion of comparables in case of assessee rendering software development services (IT), IT Enabled Services (ITeS) for AY 2008-09. on the ground that having carefully examined the order of the Tribunal in light of Rule 10B(4) of Income Tax Rules, 1962, the Court was unable to be persuaded that the exclusion of comparables for reasons set out in the order of the Tribunal gave rise to any substantial question of law. The Tribunal had excluded comparables on grounds of functional dissimilarity on account of revenue from software products/KPO services, ownership of branded/proprietary products, RPT filter > 15% and absence of separate segmental reporting.
.Pr. CIT vs Avaya India Pvt Ltd – TS-452-HC-2017(DEL)-TP-ITA No.838/2016 dated 16.05.2017
32. The Tribunal remitted the comparability of Lucid Software Ltd and Bodhtree Consulting Ltd to the file of TPO for fresh consideration. These comparables were selected by TPO, but the assessee had not objected to their inclusion as the specific details of the financials were not available in the public domain. However, after filing appeal before Tribunal, the assessee noticed that the details were available in the public domain and the Tribunal in various cases had held that since these two companies were engaged in product development, and their financials did not have adequate segmental details, they were functionally dissimilar to the assessee engaged in software development. Accordingly, the Tribunal admitted assessee's additional ground contesting the exclusion of these two companies and held that it would be in the interest of justice to allow the assessee to take these objections.
Moong Controls India P Ltd vs ACIT-TS-483-2017(Bang)-TP-IT(TP)A No. 1519/bang/2012 dated 09.06.2017
33. The Tribunal partly allowed Revenue's appeal and directed the AO /TPO to retain inclusion of FCS Solutions and Thinksoft Global Services Limited as comparables after making working capital adjustment on actual basis for AY 2009-10. It noted that the AO/TPO had excluded these comparables on the basis that their working capital adjustment required was more than 4% and held that once a working capital adjustment was made, there was no reason to exclude any company for such reasons it is found that the company was comparable on all other grounds. Since no other reason was given for exclusion of these companies, the Tribunal held that the two companies were wrongly excluded by the AO / TPO.
DCIT vs Torry Harris Business Solutions Pvt Ltd – TS-463-ITAT-2017(Bang)-TP- IT(TP)A Nos 238/B/2014, 1495/B/2015 and 266/B/2016 dated 14.04.2017
34. The Tribunal held that the assessee engaged in the business of development and delivery of domain specific software for its AE was not comparable to Infosys Ltd, Larsen & Toubro Infotech Ltd, Mindtree Ltd, Persistent Systems Ltd having turnover Rs. 25385 crores, Rs. 2181 crores, Rs. 878 crores and Rs. 610 crores respectively as the said comparables failed the 10 times turnover filter of the assessee having turnover Rs. 41.13 crores.
Obopay Mobile Technology India Private Ltd vs DCIT-TS-493-ITAT-2017(Bang)-TP-IT(TP)A Nos 238 & 553/bang/2016 28.04.2017

c. **Computation / Adjustments**

Capacity Utilization Adjustment

35. The Tribunal remitted adjustment on account of underutilization in respect of extraordinary/non-recurring expenses (like high manufacturing cost, high personnel cost, high import content cost etc.) to operating cost while computing operating margin for assessee. The assessee was engaged in manufacture of programmable logic controllers, automation software and related automation products. The assessee contended that adjustment in respect of extraordinary expenses/of non-recurring expenses should be allowed since they were incurred keeping in view anticipated expenses of operation of the company and directly relatable to manufacturing activity of the company. The Tribunal held that though the law was quite settled that adjustment should

be made for unutilized capacity/manpower and that underutilization does impact operating margin, it held that onus was on the assessee to establish that there was underutilization of capacity which was more than the average underutilization in the industry. Stating that the assessee failed to demonstrate capacity underutilization and that its utilization was also not falling below average rate of utilization in the industry, it remitted the issue back to AO/TPO for adjudication. Further, it remanded the matter back to the file of the TPO for fresh adjudication on the assessee's additional grounds in respect of risk, working capital, entity vs. transaction level adjustments, exclusion of inventory write-off from operating cost and use of internal-CUP for benchmarking purchase of raw materials from AE as TPO had no occasion to adjudicate on the matter since the grounds were not raised before him earlier.

DCIT vs GE Intelligent Platform Pvt Ltd [TS-369-ITAT-2017(BANG)-TP] dated 04.04.2017

36. The Tribunal held that where the assessee had claimed adjustment for extra-ordinary costs (salary of employees not working on billable projects, recruitment and training costs, rent for unutilized space, business promotion expenses, travelling expenses, depreciation on capital expenditure etc) incurred due to ramp-up of its operations in its first two years of operations, the CIT(A) erred in denying the assessee adjustment vis-à-vis the rent for unutilized space, business promotion expenses, travelling expenses and depreciation. Noting that the CIT(A) had prepared a comparative chart of extra-ordinary expenses incurred in earlier and subsequent years based on which it had disallowed the claim of the assessee, the Tribunal held that only data for the relevant year under consideration was to be considered. It held that any abnormal or extra ordinary event had to be taken into account and wherever possible suitable and reasonable adjustment to such extra ordinary event or circumstances was to be made. Accordingly, it remitted the issue to the file of CIT(A) for fresh consideration.

Symphony Services India P. Ltd vs ACIT-TS-489-ITAT-2017(BANG)-TP- dated 28.04.2017

Profit Level Indicator

37. The assessee's AE had provided the assessee with fixed assets free of cost basis and had also provided the assessee's employees with stock options without charging the assessee any amount. Further, it also rendered administrative and management support (generally made available to the companies belonging to the Group) to the assessee, for which no amount was charged from the assessee. Noting that the assessee earned revenue at a mark-up of its total cost, the TPO alleged that the assessee had intentionally suppressed its cost by not making any payment for the aforesaid expenses and therefore, in-turn, suppressed its revenue. Accordingly, he proposed to include the amount representing the aforesaid expenditures (depreciation in the case of the fixed assets) in the value of total cost for the purpose of determining ALP which led to an adjustment of Rs 2 crores due to the corresponding increase in revenue. Vis-à-vis the stock options provided free of cost by the AE, the Tribunal relying on the decision of various co-ordinate benches, held that the value of such costs was not operating in nature and therefore it could not be included in computing the total cost of the assessee. With regard to the other costs i.e. depreciation on fixed assets free of cost and administrative and management support services, the Tribunal opined that since the assessee's revenue was earned as a mark-up of cost, the TPOs allegation i.e. that the assessee's costs had been suppressed required examination. Noting that the lower authorities had not examined the alleged suppression in costs, it remitted the issue to the file of the AO / TPO.

i2 Technologies Software Pvt Ltd vs CIT -TS-475-ITAT-2017(Bang)-TP- IT(TP)A Nos. 1207 and 274(B)2014 dated 06.04.2017

38. The Tribunal held that the for the purpose of computing the margins for the assessment year the gain or loss pertaining to exports made during the year under consideration had to be taken into account as operating revenue or cost. It held that if the foreign exchange gain/loss arising on account of fluctuation of foreign exchange rate was in respect of export realization then the same would be part of operating profit or cost as the case may be. Accordingly, it directed the AO/TPO to compute the operating margins of the assessee as well as comparable companies after considering forex fluctuation gain/loss on account of exports made during the year.

DCIT vs Goldman Sachs Service Pvt Ltd – TS-430-ITAT-2017(Bang)-TP- IT(TP)A No.66/bang/2014 dated 05.04.2017

39. The Tribunal relying on the decision in the case of SAP Labs [TS-61-ITAT-2010(Bang)-TP] held that foreign exchange loss/gain was to be considered as operating in nature and directed the DRP to consider them as part of operating income/expenses only to the extent pertaining to international transactions entered during the year under consideration.
Obopay Mobile Technology India Private Ltd vs DCIT-TS-493-ITAT-2017(Bang)-TP-IT(TP)A Nos. 238 & 553/bang/2016 dated 28.04.2017
40. The Tribunal upheld the DRP's view that forex fluctuation gain/loss is operating in nature and was to be considered for computing assessee and comparables margin while determining ALP. However, relying on the decision in the case of Synova Innovative Technologies Pvt Ltd [TS-1068-ITAT-2016(BANG)-TP], it also clarified that if the fluctuation of foreign exchange, either gain or loss, was on account of the sale proceeds booked in the earlier Financial Year, then the same could not be considered as part of the operating margin of the current assessment year. Accordingly, it held that since in the present case, the turnover of the earlier year had already been taken into consideration for benchmarking the profit margin of the earlier year, the foreign exchange gain resulting from such turnover could not be considered for calculation of operating margin of the current assessment year.
ACIT vs Swiss Re Shared Services (India) Pvt Ltd-TS-504-ITAT-2017(BANG)-TP-IT(TP)A No 630/bang/2016 dated 13.04.2017
41. The Tribunal, relying on the decision in the case of Techbooks International Pvt Ltd [TS-317-ITAT-2015(DEL)-TP] directed the TPO to treat the provision for doubtful debts in case of comparables viz. BVG India Ltd and Cameo Corporate Services Ltd as in operating nature. Noting that Revenue had not disputed that assessee's provision of doubtful debts was excessive and concurring with DRP's direction to have consistent treatment vis-à-vis the assessee and comparables, it held that provision for doubtful debts should be treated as operating. TPO had excluded provision for doubtful debts in case of these 2 comparables treating it as an extraordinary event on the basis that it appeared in their financials for the first time.
Adidas Technical Services Pvt Ltd vs DCIT-TS-507-ITAT-2017(DEL)-TP-ITA No.412/del/2017 dated 18.05.2017

Risk Adjustment

42. The Tribunal held that the grant of ad-hoc risk adjustment of 1 percent by the DRP, was unjustified in the absence of any detailed working submitted by assessee as it was without any basis and without any factual foundation and therefore could not be granted to the assessee.
Obopay Mobile Technology India Private Ltd vs DCIT-TS-493-ITAT-2017(Bang)-TP-IT(TP)A Nos. 238 & 553/bang/2016 dated 28.04.2017
43. The Tribunal allowed Revenue's appeal and held that the DRP erred in granting the assessee a risk adjustment at 1% without calculating the risk of the comparable companies. It noted that TPO had rejected assessee's general claim for risk adjustment on the premise that there is always a risk of going out of business when dealing with a single customer and opined that risk adjustment was required to be provided if accurate calculation was provided by the assessee during the assessment / proceedings or before the TPO at the relevant stage. Accordingly, it held that in the absence of the accurate projections it would be unfair for the DRP to provide a lump sum 1% risk adjustment to the assessee and therefore held that the claim of risk adjustment to the extent of 1%, was not maintainable.
ACIT vs Swiss Re Shared Services (India) Pvt Ltd-TS-504-ITAT-2017(BANG)-TP-IT(TP)A No 630/bang/2016 dated 13.04.2017

Working Capital Adjustment

44. The Tribunal directed the AO to re-compute working capital adjustment of comparable ICRA Management Consulting Services Ltd for benchmarking international transaction of assessee engaged in the business of providing support services with respect to footwear and apparels. The TPO had while computing working capital adjustment of ICRA, taken trade receivables figure at 'nil' which disturbed the entire adjustment calculation. Noting that the financials of ICRA had sufficient trade receivables during the AY under consideration, it set aside the issue and directed the TPO to re-compute working capital adjustment after taking into account the figure of trade receivables.

Adidas Technical Services Pvt Ltd vs DCIT-TS-507-ITAT-2017(DEL)-TP-ITA No.412/del/2017 dated 18.05.2017

Others

45. The Tribunal deleted TP-adjustment made at entity level in respect of international transactions entered into by assessee, engaged in manufacturing and trading of tractors/its parts, holding that the TP adjustments had to be made only with respect to international transactions with AEs and not at entity level. Noting that by working out proportionate adjustment on the basis of AE sales to total sales of tractor division, assessee had claimed that entity level transactions could be segregated into AE and non-AE segments, relying on the decision in the case of Bombay HC in the case of Alstom Projects India [TS-758-HC-2016(BOM)-TP], it held that the absence of segmental accounts did not warrant entity wise adjustment and that the absence of segmental data was not an insurmountable issue and proportionate basis could be adopted.

New Holland Fiat (India) Pvt Ltd vs DCIT- TS-356-ITAT-2017(Mum)-TP – I.T.A No. 7574/Mum/2012 dated 03.05.2017

46. The Tribunal directed the TPO to restrict TP-adjustment only in respect of assessee's international transaction of purchase of components from AE and not assessee's entire turnover for AY 2005-06.. The Tribunal held that the action of the TPO was illegal and arbitrary and the adjustment was to be made only in respect of international transaction of purchase of components from its AE and not the entire turnover. Further, it remitted the comparability of Remi Process Plant & Machinery Ltd to the file of TPO/AO for fresh consideration. The CIT(A) had excluded the comparable since its selling price was higher than 5% margin adopted by TPO. The assessee submitted that if the extraordinary item of late delivery charges was excluded from sales expenses, Remi Process would be comparable to the assessee. Accordingly, the Tribunal held that contention of the assessee required fresh examination and restored the matter to the file of AO/TPO for fresh adjudication.

IMA PG India Limited (Formerly known as Precision Gears Ltd) vs Addl.CIT-TS 517-ITAT-2017(Mum)-TP-ITA Nos. 6960 & 7650/M/2010 dated 26.04.2017

d. Specific Transactions

Advertisement, Marketing and Promotion expenses

47. The Tribunal following the principle of consistency, remitted the issue of AMP-adjustment back to the TPO to determine the existence of international transaction for AY 2012-13 in light of the decision of the coordinate bench in the assessee's own case of AY 2011-12. In AY 2011-12 the Tribunal remitted the 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. The TPO had applied bright line test to determine the routine advertising, marketing and promotional expenses and proposed transfer pricing adjustment using a markup 38.27% (assessee's gross profit rate) and calculated the same at Rs. 308.19 crores under cost plus method. The assessee relied on the decision in the case of Maruti Suzuki India Ltd [TS-595-HC-2016(DEL)-TP] and Whirlpool of India Ltd [TS-622-HC-2015(DEL)-TP] to contend that AMP expenses could not be considered as an international transaction. Observing that the TPO had benefit of only some High Court judgments while

passing its order, Tribunal held that several other judgements on the same issue had been delivered, thus the judicial position of the High Court was required to be applied to the facts of this case. Further, quoting Rule 10B(1)(c) containing the modus operandi for determining the ALP of an international transaction, it rejected TPO's approach of considering assessee's own gross profit rate (38.27%) instead of the comparables for TP adjustment under cost plus method. ***Perfetti Van Melle India Pvt Ltd vs DCIT -TS-432-ITAT-2017(DEL)-TP-ITA No.1073/del/2017 dated 24.05.2017***

48. The Tribunal relying on coordinate bench's ruling in assessee's own case for AY 2010-11, remitted TP-adjustment in respect of AMP expenses relating to selling and distribution activities. For AY 2010-11, the TPO had made an addition in respect of AMP expenses incurred by the assessee. The assessee had contended that all expenses incurred by it were in the nature of selling expenses and it was prohibited under the Drugs and Magic Remedies (Objectionable Advertisement) Act, 1954 from incurring any expenditure on advertisement, marketing and promotion. Further, it also placed reliance on the ruling in the case of CIT vs Whirlpool of India Ltd [(2015) 94 CCH 156 Delhi HC] to contend that AMP expenses could not be considered as an international transaction. The Revenue relying on the decisions in the case of Rayban Sun Optics India Ltd, Toshiba India Pvt Ltd and Bose Corporation contended that there was no blanket rule of AMP expenses as a non-international transaction and that the High Court had restored the issue for fresh consideration. Further, the Tribunal had in several cases restored the matter to the file of TPO to be decided in light of the decision in the case of Sony Ericson Mobile Communications (India) Pvt. Ltd in which the question as to whether AMP expenses was an international transaction had been restored to the file of TPO/AO for fresh determination. Accordingly, the Tribunal restored to the file of AO/TPO the issue relating to transfer pricing i.e. AMP expenses for fresh adjudication.

MSD Pharmaceuticals Pvt Ltd vs DCIT-TS-435-ITAT-2017(DEL)-TP-ITA Nos. 1383 & 1563/del/2016 dated 25.05.2017

Loans / Receivables / Corporate Guarantee

49. The Tribunal relying on the decision in assessee's own case for AY 2009-10 and 2010-11 rejected TPO's re-characterization of assessee's subscription of preference shares issued by its AE as a loan transaction for AY 2011-12 and 2012-13. It held that the transaction was clearly a case of investment in shares and it could not be given a different colour to expand the scope of transfer pricing adjustments by recharacterizing it as interest free loan and accordingly deleted the TP adjustment made by AO. The assessee had subscribed to redeemable preference shares of its AE and also redeemed some of these shares at par. The shares were non-cumulative and redeemable on par without dividend and the assessee had a running account with the AE, in terms of which monies were being advanced towards purchase of shares as and when need arose. Considering the nature and frequency of the transactions in the running account, the TPO held that the subscription and redemption of the shares was in the nature of loan and not subscription for investment in shares. The TPO applied arm's length rate of interest on the amount given to the AE, and proposed TP addition of Rs. 63.64 Cr which was confirmed by the DRP. The assessee contended that TPO could not re-characterize the subscription of preference shares to advancement of unsecured loan by terming it as exceptional circumstance, and could not question the commercial expediency of the transactions entered into by the assessee. It contended that the subscription to preference of shares was purely an investment in shares and could not be inferred as a loan. The Tribunal held that the TPO could not disregard the commercial expediency of the transaction unless there was evidence and circumstances to doubt. Further, it held that if in a third-party scenario, if the subscription of a share by the independent enterprise could not be characterized as loan, then this transaction also could not be inferred as loan. It accepted assessee's reliance on the coordinate bench's ruling in the case of Bexiskier Dhboal SA, ITA No. 776 of 2011 for the proposition that re-characterization of a transaction (i.e. re-characterization of subscription of share as loan) was not permissible in the

absence of any enabling provision to that effect in the Act) that subscription of shares cannot be characterized as loan and therefore no interest should be imputed treating it as a loan.

Aegis Limited vs ACIT-TS-450-ITAT-2015(MUM)-TP-IT(TP)A no. 962/mum/2016 and IT(TP)A No 1556/mum/2016 dated 12.05.2017

50. The assessee had borrowed Rs. 70 crores from its Associated Enterprise at an interest rate of 12.25% p.a. as against interest of 15% which was quoted by the Bank. Another AE of the assessee viz. M/s. Robert Bosch GmbH provided guarantee on behalf of the assessee in respect of the borrowings of Rs. 70 crores on which the assessee had paid guarantee fee @ 0.75%. The TPO held that the payment of guarantee commission / fee was not required as the assessee had sufficient reserves as well as assets to support the loan and accordingly made a TP adjustment. The Tribunal held that aggregating the interest on loan and the guarantee fee paid by the assessee, the total cost of borrowing was 13 percent which was still less than the 15 percent quote from the bank which was sufficient justification for the payment and therefore it deleted the adjustment made by the TPO. It also noted that even after the payment of guarantee fee, the operating margin of the assessee was at 18.21 percent which was much better than the average margin of comparables i.e. 10.36%.

ITO vs Bosch Rexroth (India) Ltd – TS-431-ITAT-2017(AHD)-TP- IT(TP)A No. 462/ahd/2016 dated 08.05.2017

51. Where the TPO had added income by imputing notional interest at the rate of 14% on the outstanding advance balance shown in the assessee's books, the Tribunal remitted the TP-adjustment to the file of AO/TPO for examination as to whether there was any agreement for charging interest on late payments or not from its AEs. It held that if there was no such agreement, then the TP-adjustment made was to be deleted. It relied on the decision in the assessee's own case [TS-572-ITAT-2015(BANG)-TP] and [TS-190-ITAT-2015(BANG)-TP] wherein it was accepted that TP-adjustment could not be made on hypothetical and notional basis until and unless there was some material on record that there had been under charging of real income.

Ingersoll Rand India Ltd vs DCIT [TS-449-ITAT-2017(BANG)-TP] dated 21.04.2017

52. The Tribunal for AY 2008-09 relying on the decision of Delhi HC in the case of Cotton Natural (I) Pvt Ltd [ITA No. 5855/del/2012] and Bombay HC ruling in Tata Auto Comp System [52 SOT 48 (Mum)], upheld deletion of TP-adjustment in respect of interest on loan given by assessee to AE for in foreign currency. The TPO benchmarked the international transaction by adopting as the ALP rate of interest at 14.12% (Domestic PLR). Noting that the loan was given in foreign currency at interest of 4% p.a., it held that where the transaction of loan between the AEs was in foreign currency, the international LIBOR rate should be applied and therefore domestic prime lending rate had no applicability. Since the rate charged by assessee was more than LIBOR it deleted the addition of the TPO.

DCIT vs M K Shah Exports Ltd – TS- 470- ITAT-2017(Kol)-TP- ITA No. 2149/kol/2014 dated 12.05.2017

53. The Tribunal upheld DRP's order directing AO to compute interest rate at LIBOR +200 points on advances given by assessee to US AE for AY 2010-11. Noting that the assessee had charged interest based on LIBOR on similar advances to Hong Kong AE but not charged interest on advances to US AE, it held that these were advances given to AEs and not for any capital investment for which there was no allotment of shares and therefore dismissed the plea of the assessee that it was a capital advance on which it received no income, not subject to the TP provisions. The Tribunal following the decision in the case of Transport Corporation directed the AO to compute interest rate at LIBOR +200 points. Further, relying on the decision in the case of Four Soft, it deleted the TP-addition in respect of corporate guarantee and held that providing corporate guarantee would not amount to an international transaction where no cost was incurred by the assessee. Further, relying on the decision in the case of Siro Clinpharm held that

the amendment to section 92B in respect of corporate guarantee was only prospective and applicable from AY 2013-14 and accordingly deleted the TP-addition.

Vivimed Labs Ltd vs DCIT-TS-498-ITAT-2017(HYD)-TP-ITA Nos 404 & 479/hyd/2015 dated 02.06.2017

54. The assessee had provided interest free loans to its wholly owned subsidiaries, which it benchmarked at cost plus zero percent mark-up contending that it did not bear any costs in the impugned transaction. However, the TPO held that in a comparable uncontrolled situation such advances would have been liable to interest and therefore levied interest at LIBOR plus 3%. The DRP considered the rate of interest at 14% p.a. as reasonable and representative of the market rate prevailing in India and enhanced the addition. The Tribunal rejected the assessee's contention that since there was a commercial consideration involved, no transfer pricing adjustment was justified and it held that interest free advances to wholly owned subsidiary were undoubtedly within the ambit of international transaction. Applying CUP method, it noted that interest on Bank FD for a term equivalent to the term of loan to AEs would be the safest comparable. However, for the purpose of maintaining the rule of consistency, as various benches of Tribunal had considered LIBOR in the past, it held that LIBOR plus 2% would be the appropriate interest rate for the unsecured loans (as also sans guarantee) to the AEs. The Court dismissed the appeal of the Revenue and upheld the order of the Tribunal observing that where there was a choice between the interest rate of a currency other than the currency in which transaction had taken place and the interest rate in respect of the currency in which transaction had taken place, the latter was to be adopted. Therefore, since the loan was in foreign currency, it held that the LIBOR rate would be considered to determine the Arm's Length interest and therefore upheld the order of the Tribunal..

CIT vs Aurionpro Solutions Ltd – TS-474-HC-2017(BOM)-TP-dated 09.06.2017

55. The Tribunal determined 0.25% as ALP of commission on corporate guarantee given by assessee (engaged in the business of fabrication, supply, erection and maintenance of telecom towers) to its AE in Afghanistan for AY 2010-11 and AY 2011-12. The DRP had computed the ALP of the guarantee commission at 6% of outstanding loan based on difference between bank loan given to AE at 12% and provisional interest rate in Afghanistan at 18%. It rejected DRP's computation of ALP and held that the parameter for obtaining loan at a particular interest rate was different from providing corporate guarantee and there was no basis for DRP's determination of ALP at 6%. Relying on the decision in the case of Asian Paints [41 taxmann.com 71] and the assessee's own case for AY 2006-07, it held that the difference in interest rate charged on the loan could not be considered as a guarantee commission fee.

Further, the assessee had also given a foreign currency loan to its subsidiary in Afghanistan and charged interest @8 percent. The TPO adopting 12.25% as the ALP made consequent TP addition which was reduced by the DRP who held that 8.25 percent was the ALP rate of interest. The Tribunal held that since the loan was given to an overseas subsidiary in foreign currency, LIBOR was to be taken as ALP and noting that the assessee had already charged interest @ 8 percent which was much higher than the LIBOR rate, it deleted the adjustment.

Aster Pvt. Ltd vs DCIT- TS-446-ITAT-2017(Hyd)-TP-ITA No. 220/hyd/2015 and 458/hyd/2016 dated 03.05.2017

Royalty / Management fees / Intra Group services / Reimbursements

56. The Tribunal upheld ALP adjustment made by the TPO in respect of payment of management fee by assessee (engaged in the business of manufacturing, trading and marketing) to its AE as the assessee had failed to provide proof of actual rendition of services by AE. The assessee had submitted transfer pricing study report adopting TNMM at entity level to justify ALP of all its transactions. Considering the fact that when no management fee was paid in the year 2004-05, the profit was 48% and that in FY 2005-06, after payment of management fee, the profit was 35.95%; the TPO accepted all other transactions except the transaction of management fee at

arm's length and considered it as a separate transaction. The TPO accordingly inferred that the above payment had not resulted in any tangible benefit or economic value to the assessee. Accordingly, held that the transaction was a sham transaction which could not be bundled with others and held that the arm's length price was 'nil'. Relying on the decision in the case of EKL Appliances Ltd [TS-206-HC-2012(DEL)-TP] and Volvo India Private Limited [TS-993-ITAT-2016(Bang)-TP], the Tribunal held that ALP of management services fee could not be determined at 'nil' by questioning the necessity or the benefits out of expenditure incurred, but the onus to furnish proof of actual receipt of services by appellant from its AE was on the assessee. It held that in the present case, it was not discernible that the appellant made any attempt to furnish the proof of rendition of services. In respect of additional evidence submitted by assessee in the form of email correspondence and EDP (Electronic data processing) screenshot, the Tribunal opined that the additional evidence could be admitted by the Tribunal at its discretion only in the event that the party submitting the additional evidence satisfied the Tribunal that it was prevented by sufficient cause from providing such evidence before lower authorities and this evidence would have a material bearing on the issue which was to be decided by the tribunal. In the present case, the appellant had not explained as to how it was prevented from furnishing the additional evidence before lower authorities and how it proved the rendition of services. Accordingly, it held that the TPO was justified in making ALP adjustment.

TaeguTec India Pvt Ltd vs DCIT -TS-454-ITAT-2017(Bang)-TP- IT(TP)A No.1337/bang/2010 dated 24.05.2017

57. The Tribunal rejecting TPO's 'nil' ALP determination for administrative and support services directed TPO to re-determine ALP applying TNMM. It rejected Revenue's contention that assessee had not received any services from AE and held that DRP had acknowledged receipt of services by the assessee and also dismissed the Revenue's contention regarding absence of agreement prior to 01.01.2010, holding that services could be availed the assessee from its AE even without agreement. Relying on the decision in the case of EKL Appliances and Knorr Bremse India P Ltd, it held that the assessee was required to establish benefit received from intra-group services. It held that when the services were being taken as per policy of the group company to avail the benefit of low cost, specialization and confidentiality and rendering and need of the services was proved from the details brought on record by the assessee. Further, it held that where the TPO accepted TNMM applied by assessee as most appropriate method in respect of other international transactions, he could not apply different standard or criteria to judge an international transaction of intragroup services and thus upheld the clubbing of intra-group services with other transactions for ALP determination. Accordingly, it directed the TPO to make fresh a TP analysis for benchmarking international transactions undertaken by assessee.

Corning SAS-India Branch-TS-439-ITAT-2017(DEL)-TP dated 29.05.2017

58. The Tribunal upheld the CIT(A)'s deletion of the disallowance of royalty paid (@ 5% on net sale of products manufactured) by assessee (engaged in the business of designing garments) to AE for use of technical know-how, designs, logos, trade names, and trade-marks for AY 2003-04. It noted that that for the previous AY i.e. AY 2002-03, royalty payment was accepted by TPO to be at ALP and the benefit derived by assessee under the royalty agreement was also accepted by AO and that the only dispute raised by AO in previous AY 2002-03 was whether royalty was capital or revenue expenditure, which was settled by the Tribunal holding it to be revenue expenditure. It stated that in the present case, royalty expenditure incurred by assessee was fully and exclusively incurred in regular course of business and after incurring this expenditure the assessee declared profit @ 19% which was still better than the gross profit rate of 12 & 16% declared by comparables. Observing that the Tribunal ruling for AY 2002-03 was not reversed by higher forum, keeping in view the principle of consistency, it held that the Id. CIT(A) was fully justified in deleting the addition made by the AO, particularly, when the benefit derived under the agreement was not doubted by the TPO and the assessee by using the technical know-how assistance and designs received under the said agreement was manufacturing the finished products which were sold to the AE as well as to the other parties.

DCIT vs Cornell (P) Ltd-TS-469-ITAT-2017(DEL)-TP-ITA No.2166/del/2011 dated 02.05.2017

59. The Tribunal upheld the CIT(A)'s order for AY 2007-08 and 2008-09 deleting adjustment in respect of royalty payments made by assessee (engaged in the business of manufacturing of auto parts and components) to its AE noting that the AO/TPO did not bring on record any comparable case to find out the rate of royalty in the assessee's line of business and also because there was no justification to determine the ALP at NIL on alleged the basis that no worthwhile recurring technology had been transferred. It also noted that the AO/TPO had accepted the ALP of such royalty payments in the earlier AY i.e AY 2005-06.

JCIT vs Progressive Tools & Components Pvt Ltd-TS-476-ITAT-2017(DEL)-TP-I.T.A No 530/del/2012 and I.T.A no 5962/del/2012 dated 15.05.2017

60. The Tribunal following its own case in the prior AY i.e. AY 2010-11 restored the TP-adjustment in respect of payment of technical and management service fee by assessee (engaged in manufacturing automobile seats) to its Korean AE to the file of the TPO for re-adjudication. The assessee had benchmarked the transaction under TNMM which was rejected by the TPO who adopting the CUP method determined the ALP at Nil. The Tribunal held that first of all, the TPO/AO was to ascertain whether Technical Management service expenses were at arm's length as compared to the actual sales achieved by the assessee and accordingly remitted the matter directing him to reconsider the issue afresh. It also noted the assessee's submission that in the set aside proceedings for AY 2010-11, TPO had allowed the issue as per Tribunal directions and no adjustment had been made.

Dymos Lear Automotive India Pvt Ltd vs ACIT-TS-487-ITAT-2017(CHNY)-TP-ITA no.3472/mds/2016 dated 31.05.2017

61. The Tribunal deleted TP-adjustment in respect of reimbursement received from AE for AY 2011-12. relying on the coordinate bench's ruling in the case of Cambridge Technologies and Mylan Laboratories, held that no ALP adjustments could be made to reimbursement of expenditure (viz. travel and miscellaneous expenses) received by the assessee on costs to cost basis without markup.

Aster Pvt. Ltd vs DCIT- TS-446-ITAT-2017(Hyd)-TP-ITA No. 220/hyd/2015 and 458/hyd/2016 dated 03.05.2017

62. The Tribunal following the ruling in assessee's own case for AY 2003-04 upheld TP-adjustment towards reimbursement of advertisement expenditure by assessee to its AE for AY 2006-07. In the earlier year, Tribunal noted that assessee was a contract manufacturer for its AE and was entitled to only markup on manufacturing costs incurred by it. Thus, it was not required to bear any risk associated with marketing and distribution of goods sold by AE worldwide. The Tribunal noting that the legal and economic ownership of the brand 'TITAN' in overseas market belonged to and was exploited by assessee's AE held that the benefit from advertisement expenditure was not derived by assessee. Further, it upheld the TP-adjustment in respect of interest on advertisement advance and held that non-charging of interest on such outstanding amounts attracted Transfer Pricing provisions and therefore interest at least LIBOR +2% was appropriate.

Titan Industries Ltd vs ACIT-TS-363-ITAT-2017(CHNY)-TP dated 03.04.2017

e. ***Miscellaneous***

Appeal

63. The Court held that the Tribunal was not justified in remanding the issues relating to inclusion/exclusion of comparables, determination of working capital and risk adjustments while benchmarking the assessee's Contract Software Development (CSD) services and Technical Support Services (TSS) segments for AY 2011-12 without giving any finding, and that the Tribunal **could** remand the matter to TPO only when it was absolutely necessary, i.e. due to lack of clarity on factual aspects or for consideration of facts which have emerged since the TPO's order which would have a bearing on outcome.. Noting that the Tribunal had remanded, it further held that the scope of remand should be clearly spelled out. Accordingly, it held that where all

relevant facts **were** already before the Tribunal and the parties had no new material to provide, simply remanding the issue to the TPO without rendering a finding would be an abdication of the functions of the appellate body. Thus, it directed the Tribunal to decide the 4 issues arising out of appeal viz, (i) exclusion of WAPCOS and Mahindra and Mahindra and inclusion of Kirloskar in TSS segment. (ii) Exclusion of Sasken in CSD segment, (iii) denial of working capital adjustment and risk capital adjustment and (iv) proportionate adjustment in TSS segment.

Alcatel Lucent India Pvt. Ltd vs DCIT -TS-437-HC-2017(DEL)-TP- ITA No. dated 21.05.2017

64. The Tribunal dismissed the assessee's direct appeal to Tribunal (in second round of proceedings) on grounds of maintainability for AY 2006-07 holding that remedy was available before CIT(A). It noted that in the first round of proceedings, Tribunal had remanded matter involving TP-adjustment and comparability of various companies back to AO/TPO for fresh adjudication after considering assessee's submissions. It held that the effect of remand order was not to restrict the jurisdiction of the Assessing Officer to just follow the findings of the Tribunal but it was kept open for fresh adjudication as per law and that when the Assessing Officer / TPO had discretion to take a decision on the issue then a proper remedy to challenge the said order was appealable before the CIT (Appeals) and not directly to the Tribunal. Holding that the present appeal was not maintainable, it dismissed the appeal and provided it liberty to file appeal before CIT(A) and held that the time consumed in filing and pendency of present appeal would be excluded for the purpose of limitation of filing appeal before CIT(A).

Mercedes Benz India Pvt Ltd vs DCIT – TS-901-ITAT-2016(PUN)-TP- IT(TP)A No. dated 06.06.2017

65. The Court, dismissed Revenue's appeal challenging Tribunal's decision wherein it had deleted the TP adjustment as the value of international transactions undertaken by the assessee was within +/- 5% range of ALP. The Revenue contended that section 92C(2) had not been properly considered by CIT(A) and Tribunal. It was argued that by mere mathematical calculation, the purchase ALP computed by TPO fell beyond the +/- 5% range. Noting that these grounds were not agitated before lower authorities it held that it could not be agitated in the present appeal. Accordingly, the appeal was dismissed.

CIT vs Mettler Toledo India Pvt Ltd – TS-478-HC-2017(BOM)-TP-ITA No. 980 of 2014 dated 07.06.2017

Assessment/Reassessment

66. The Tribunal relying on the decision in the case of Maximize Learning (P) Ltd [TS-43-ITAT-2015(PUN)-TP] held that the initiation of reassessment proceedings by the AO u/s 147/148 on the basis of adjustments made in TPO's order without initiation of scrutiny assessment u/s 143(2) was invalid as the AO was precluded from making a reference to the TPO u/s 92CA(1) of the Act for the purpose of computing arm's length price in relation to the international transaction where no assessment proceedings were pending in relation to the relevant assessment year.

Kimberly Clark Lever Private Limited vs ACIT- TS-378-ITAT-2017(PUN)-TP-ITA No.2480/PUN/2012 dated 05.05.2017

67. The Assessing Officer (AO) based on TPO order dated 29.10.2010 proposing TP adjustments of Rs.1.46 crores, issued notice u/s 148, which was served upon assessee on 24.11.2011. CIT(A) applying the second proviso to section 153(2), held that in respect of a notice served after 1.4.2011, the AO was required to complete assessment within 9 months from end of FY in which notice was served i.e. before 31.12.2011 order u/s 144c r.w.s 147 of the Act was passed on on 29.02.2012. The CIT(A) thus concluded that re-assessment order passed by AO was time barred. Tribunal upheld the order of CIT(A) wherein the CIT(A).

DCIT vs Menshen Ropa Plastic Pvt. Ltd-TS-466-ITAT-2017(PUN)-TP-ITA No. 1946/PUN/2014 dated 07.06.2017

68. The Tribunal rejected assessee's contention that AO's draft assessment order was a final assessment order (as it had computed tax liability in the said order and initiated penalty proceedings) and therefore bad in law. It held that assessee's reliance on the case of Vijay Television [107 DTR (Mad) 111] was not valid as in that case a corrigendum was passed by the AO in which it was stated that the order passed earlier as final assessment order had to be read and treated as draft assessment order. Accordingly, working out of tax liability did not make a draft order final and it was not a case of the assessee that demand notice was issued along with the draft assessment order

DICT vs Torry Harris Business Solutions Pvt Ltd-TS-463-ITAT-2017(BANG)-TP-IT(TP)A Nos 238/B/2014, 1495/B/2015 and 266/B/2016 dated 14.04.2017

69. The Tribunal quashed the assessment framed in the name of non-existent amalgamating company (Sapient Corporation Ltd) for AY 2011-12. It noted that pursuant to order of the Delhi High Court for merger (dated October 12, 2011 and January 6, 2012) the assessee stood dissolved without the process of winding up w.e.f April 1, 2011. Therefore it held that the notice issued by the AO under section 143(2) of the Act on M/s Sapient Corporation Ltd dated 17.09.2012. to initiate assessment proceedings for the assessment year 2011-12 was invalid as M/s Sapient Corporation Ltd had ceased to exist in the eyes of law and was non-existent on the date of initiation of assessment proceedings. Accordingly, relying on the decision of the Court in SPICE ENTERTAINMENT LTD [TS-830-HC-2011(DEL)-TP] it held that framing of assessment against a non-existing entity/person was a jurisdictional defect as there could not be any assessment against a 'dead person' and therefore held that the impugned assessment was bad in law and liable to be quashed being void ab initio. Since the assessment order was quashed being without valid jurisdiction, it held that other TP-issues raised by assessee were academic & infructuous. Accordingly, the issues were dismissed without deliberations on merits.

Sapient Consulting Pvt. Ltd (Successor in interest of Sapient Corporation Pvt. Ltd) vs JCIT-TS-484-ITAT-2017(DEL)-TP- ITA NO. 1082/DEL/2016 dated 02.05.2017

70. The Tribunal held that a reference made by AO to TPO in cases where international transaction as per Form 3CEB was less than Rs 15 cr could not be held to be bad in law as there was no provision in the Act to that effect. Noting that in the instant case of the assessee (whose international transactions were less than 15 crore), the TPO had returned back the reference made by the AO on the ground that the value of transactions was less than 15 crore, it held that the assessee was correct in challenging the validity of the order of the AO who had proceeded to make his own addition. Accordingly, the Tribunal restored the matter to the TPO, directing him to pass a requisite order as per law, after providing adequate opportunity of being heard to the assessee

Nirvana Business Solutions Pvt Ltd-TS-490-ITAT-2017(BANG)-TP-ITA No. 1623 & 1624 (bang)2014 dated 05.05.2017

71. The Court dismissed the assessee's writ petition challenging i) the DRP directions refusing to condone assessee's delay in filing objections before it and ii) the consequent final assessment order by AO making the TP-adjustment for AY 2012-13. The AO issued a draft assessment order dated 29.03.2016 confirming the TP addition on account of excess interest paid on CCDs, which was served on the assessee on the same day. The assessee filed objections before DRP on April 29, 2016, representing to the DRP that it had received the order only on 31.03.2016. The Court also observed that the assessee had deliberately submitted to the AO that it had filed the appeal/objection before DRP on 27.04.2016 (i.e. within time limit prescribed of 30 days from the day of service of Draft AO order), consequently preventing AO from passing the final assessment order u/s 144C(3). The DRP after receiving information from the AO rejected the objections on the basis that the assessee had filed the same beyond the specified period of 30 days (delay of 1 day) vide order dated 10.11.2016. Thereafter, AO passed a final assessment order on November 18, 2016 after incorporating the adjustment proposed by TPO. The Court rejected the assessee's contention that the final order of the AO was not in accordance with the provisions of Section 144C(13), since the DRP had not given any specific directions but had rejected assessee's objections on ground of delay and held that the dismissal or rejection of the objection and communication of the same was to be treated as a direction given by the DRP to

the Assessing Officer to complete the assessment as per draft order. It also held that the assessee was entitled to file an appeal before the Appellate Authorities as the AO's final order was well within the period of limitation.

Inno Estates Private Limited vs DRP/ITO- TS-479-HC-2017(MAD)-TP- dated 14.06.2017

72. The assessee had entered into an international transaction for import of raw material and semi finished products from its AE. While computing its operating margin, the assessee had made adjustments with regard to the excise duty, power related adjustment, long period credit, adjustment for depreciation and Forex loss treating the same as non-operating, which was rejected by the TPO as a result of which the margin of the assessee was less than the comparables. Accordingly, the TPO made an adjustment to the proportionate operating cost of the assessee pertaining to its international transactions. The DRP had issued directions to the AO to work out the ALP cost for total cost base of the assessee instead of restricting it to proportionate AE cost. The Tribunal held that as per Section 144C(8) of the Act, the DRP was empowered to confirm or reduce or enhance the variations proposed in the draft Order but was not vested with the power to set-aside or issue direction under Sub-section 5 for further enquiry. Accordingly, the Tribunal remitted the issue to the file of the DRP directing it to conduct the enquiries and determine the amount of ALP on its own and to issue necessary directions to the AO/TPO to make the adjustments.

Young Buhmwoo India Co Pvt Ltd vs ACIT-TS-465-ITAT-2017(CHNY)-TP-ITA No.3181/Mds/2016 dated 19.04.2017

73. The Tribunal set aside the TP- issues for AYs 2005-06 and 2008-09 and remitted the matter back to DRP for fresh adjudication. The TPO had proposed adjustment at entity level both vis-à-vis the marketing and distribution activities carried out by the assessee as well as item-wise adjustments towards AMP, product & brand development. In appeal, DRP confirmed AMP, product & brand development adjustment and directed TPO to exclude entity level adjustment. Consequently, TPO passed an order restricting item wise adjustments of AMP, product & brand development expenses but put a condition that in the event of deletion of any of the 3 adjustments, the entity level adjustment would be restored which was incorporated by the AO while passing the final assessment order. The Tribunal held that it was clear that the DRP had remitted the matter back to the file of TPO to make fresh assessment/determination of Transfer Pricing issues which was executed by the TPO and communicated to AO instead of referring the matter back to the DRP to give appropriate directions to the AO. Referring to Section 144C, it held that the DRP has no power to remit the matter back to the file of the TPO and the DRP alone was to determine the quantum of addition or relief and issue direction to the Assessing Officer. Accordingly, it remitted all the TP-issues back to DRP to decide afresh on merits. Separately, it clarified that foreign comparables could not be used for benchmarking assessee's contract manufacturing & distribution activities and held that the tested party i.e. Ford India Pvt Ltd., being a resident Indian Company, companies exclusively from India based on Indian data bases could be adopted as comparables.

Ford India Pvt Ltd vs DCIT-TS-509-ITAT-2017(CHNY)-TP-ITA No 2344 and 2345/Mds/2012 dated 12.05.2017

MAP

74. The Tribunal dismissed assessee's appeal for AY 2004-05 as the TP-issue pertaining to payment of engineering fees was AE resolved under MAP. Noting the assessee's submission that the TP-issue was resolved as per MAP order dated July 16, 2015 under Indo-Japan DTAA and since the assessee did not press the TP grounds and requested for it to be dismissed in view of MAP resolution, it held that the grounds were infructuous and therefore were dismissed.

Toyota Kirloskar Auto Parts Ltd vs DCIT-TS-496-ITAT-2017(Bang)-TP dated 03.05.2017

Penalty

75. The Court, considering the admission of quantum appeal, admitted the appeal filed by assessee challenging penalty u/s 271(1)(c) on disallowance of reimbursement of marketing cost and denial

of Sec. 10A benefit on such disallowance. In the quantum proceedings, noting that the assessee's role was mere provision of software services to its AE, the Tribunal held that there was no justification for reimbursement of marketing expenses when the assessee was not involved in marketing and was only involved in delivering software development services to its AE.

Deloitte Consulting India Pvt Ltd vs ACIT-TS-467-HC-2017(BOM)-TP-dated 09.06.2017

Stay

76. The Tribunal granted further extension of stay of demand to the assessee for AY 2011-12 for a period of 3 months or till disposal of appeal, whichever is earlier. Relying on the decision in the case of Pepsi Foods it held that if the delay in disposal of appeal was not attributable to the assessee, stay had to be extended. Further, it held that the stay was subject to the condition that assessee should not seek adjournment without any reasonable and just cause.

Huawei Technologies India Pvt Ltd vs DCIT-TS-516-ITAT-2017(Bang)-TP dated 19.05.2017

II. International Tax

a. Capital Gains

77. The assessee (Dutch company) sold its shares in an Indian company (engaged in the business of developing, maintaining and operating an industrial park) to a Singapore company. The assessee contended that Article 13(5) of India-Netherlands DTAA provides that the gains on alienation of any property not referred under any other clause would be taxable in Netherlands and therefore gains on sale of shares of Indian company were not taxable in India. Accordingly, it claimed refund of taxes deducted by the seller. The AO contended that the value of the shares was derived from the immovable properties in India and held that Article 13(1) which provides that gains on alienation of immovable property may be taxable in India would apply. It rejected the assessee's contention that Article 13(5) would apply since that was the residuary clause. Accordingly, it rejected the assessee's claim of refund of taxes deducted. The CIT(A) upheld the order of the AO. The Tribunal held that a share in a company could not be considered to be immovable property and accordingly, Article 13(1) would not apply. It accepted the assessee's contention that capital gains were not taxable in India as per Article 13(5). The Court approved the Tribunal's findings that alienation of shares by assessee did not fall under Article 13(1) of the DTAA and by virtue of residuary clause in Article 13(5), gains would be exempt from taxation in India.

Vanenburg Facilities BV [TS-246-HC-2017(AP)] I.T.T.A. NOS.55 AND 71 OF 2014 dated 16.06.2017

b. Salary

78. The assessee, a non-resident individual, was a Marine Engineer, employed as a master on a foreign bound ship with M/s. Wallem Ship Management Ltd. for which he received remuneration outside India in foreign currency. The remuneration was directly credited by the foreign company in his NRE bank account in India. The assessee claimed that the remuneration received was not taxable in India as the point of payment of the remuneration was outside India and that the mere transfer of the payments by the foreign company in his NRE account in India would not render the receipt to be "income received in India" as per section 5(2)(a). The AO contended that as per section 5(2)(a), irrespective of the residential status and whether or not the income was received in foreign currency or Indian currency, income received/deemed to be received in India was taxable in India. Accordingly, he taxed the income on the ground that the said income was received in India as per section 5(2)(a). The CIT(A) upheld the order of AO. The assessee contended before the Tribunal that as per CBDT Circular No. 3/2017 [which states that the salary accrued/accruing to a non-resident seafarer for services rendered outside India on a foreign going ship (with Indian flag or foreign flag) would not be included in the total income merely because the said salary was credited in the NRE account maintained with an Indian bank by the

seafarer], the remuneration received would not be taxable u/s 5(2)(a). The Tribunal observed that the salary credited to NRE A/c could be of two types, 1) Salary directly credited by employer to NRE A/c of seafarer maintained with an Indian Bank 2) Salary credited to the seafarer A/c maintained outside India and later on transferred to the NRE A/c in India. It further observed that the second situation was clearly outside the purview of provisions of section 5(2)(a), as it was a mere transfer of assessee's fund from one bank account to another which would not give rise to "Income". However, the Circular was unclear whether both or only the second type of situation was covered by it. Accordingly, it gave benefit of doubt to the assessee and held that the circular covered both type of situations. It relied on the Apex Court decision in the case of Commissioner of Customs vs Indian Oil Corporation Ltd 267 ITR 272 (SC) wherein it was held that the Revenue was bound by the CBDT circulars even though the circular was contrary to statute. Accordingly, it held that the remuneration received by the assessee would not be taxable in India.

Shyamak Gopal Chattopadhyay [TS-219-ITAT-2017(Kol)] I.T.A. No.67/Kol/2016 dated 02.06.2017

c. Others

79. The assessee (Dutch company) sold shares of an Indian company to the Singapore company. It received interest from the Singapore company for delay in payment of consideration. The assessee claimed that receipt of interest was in Netherlands and therefore it did not accrue or arise through or from any property in India or from any asset or source of income in India or through transfer of a capital asset situated in India and accordingly was not taxable in India. Accordingly, it claimed refund of taxes deducted by the Singapore company. The AO contended that the interest arose through a transaction involving sale of a capital asset situated in India and would therefore be deemed to have accrued or arisen in India under Section 9(1)(v) of the Act. Accordingly, it rejected the assessee's TDS refund claim. The CIT(A) upheld the order of the AO. The Tribunal observed that section 9(1)(v) of the Act had no applicability and therefore, the interest could not be said to accrue or arise or to have deemed to accrue or arise in India. It rejected the AO's contention that the interest was paid on account of a transaction involving the sale of a capital asset in India since the interest was paid to compensate for the delay in remitting the sale consideration. Accordingly, it held that the same was not taxable in India. The Court upheld the Tribunal's order and held that such interest was not taxable u/s. 9(1)(v) of the Act as there was no debt incurred or monies borrowed for any business purposes. Accordingly, it held that the same was not taxable in India as per Article 11(1) of India-Netherlands DTAA which provides that it would be taxable in Netherlands.

Vanenburg Facilities BV [TS-246-HC-2017(AP)] I.T.A. NOS.55 AND 71 OF 2014 dated 16.06.2017

II. Domestic Tax

a. Income

80. The assessee, following mercantile system of accounting had advanced loan to two parties. On request of the debtors, it agreed to waive interest on the loan advanced and since no interest was realized it did not offer the interest income to tax. However, the AO noting that the assessee continued to receive the principal amount from the debtors and that the loan advanced was not declared as bad debt and that the assessee was following mercantile system of accounting, taxed the interest income in the hands of the assessee. The CIT(A) and the Tribunal upheld the order of the AO. The Court relying on the Apex Court rulings in the case of Shoorji Vallabhdas [TS-1-SC-1962] and Poona Electric [TS-9-SC-1965] held that no tax could be levied on hypothetical income. Accordingly, it deleted the addition of interest made by the AO.

Shivlaxmi Exports Ltd. [TS-206-HC-2017(CAL)] ITA NO.134 OF 2001 dated 30.03.2017

b. Deductions

Section 32 / 32A

81. The Tribunal rejected assessee's depreciation claim u/s. 32 on intangible asset of 'Government Authorizations/Approvals' which it claimed to have acquired under a business transfer agreement ('BTA') in 2004 wherein it had taken over the business of sale of franking machine on a slump sale basis from a company viz. KOAL. It noted that prior to formation of assessee (a subsidiary of a US company, who manufactures franking machines), KOAL was merely authorized by assessee's US parent to sell / market franking machines to customers in India and observed that the assessee could not produce the Approval granted by the Department of Post or other regulatory authority to KOAL. It held that mere authorization to sell / market franking machines in India could not create any rights in favour of KOAL and that the right to sell the franking machines in India was a result of distribution rights granted by the US parent and not due to Government Approvals granted to KOAL. It held that the rulings of the Apex Court in Techno shares (2010) 327 ITR 323 and of the co-ordinate bench in ONGC Videsh Ltd (2009 – TIOL – 758 – ITAT-DEL) were wrongly relied on by the assessee as in both those cases, the rights of business or commercial nature were possessed by the assessees, whereas in the instant case, the approval / rights vested with the Parent company and not in KOAL and therefore the same could not have been acquired by the assessee by way of the slump sale.

Pitney Bowes India (P) Ltd. [TS-208-ITAT-2017(DEL)] ITA Nos. 289 to 293/Del/2013 dated 29.05.2017

82. The assessee had claimed depreciation on UPS systems and data drive @ 60%. However, the AO allowed depreciation on these items at the rate of 35% and 17.5% on the premise that these equipments were part of plant and machinery for depreciation purposes. He, therefore, disallowed the excess claim of depreciation on UPS system and Data Drive. The Id. CIT(A), after following the decision of Hon'ble jurisdictional High Court in the case of CIT vs. BSES Yamuna Power Ltd. (2010) TIOL 636 and CIT vs. Orient Ceramics & Industries Ltd. (2011) TIOL 6, wherein it was held that UPS and Data drive were to be treated as part and parcel of computer system and depreciation had to be allowed at higher rate as applicable to computer, allowed the assessee's claim. The Tribunal upheld the order of the CIT(A).

EASTMAN INDUSTRIES LTD. & ANR. vs. ACIT & ANR. (2017) 50 CCH 0122 DelTrib ITA No. 286/Del./2013, 45/Del./2013 ITA No. 286/Del./2013, 45/Del./2013 dated 09.06.2017

Section 35AB

83. The assessee had expended certain amounts for acquiring technical knowhow for the purpose of setting up new manufacturing unit of soda ash and it claimed 1/6th of such expenditure u/s 35AB (which provides deduction of the lumpsum payment made by the assessee by way of consideration for acquiring knowhow for the purpose of his business over six years from the year of initial expenditure). The AO disallowed the assessee's claim on the ground that the assessee had not yet started soda ash project and accordingly, it was not entitled to deduction u/s 35AB. The CIT(A) upheld the AO's order. The Tribunal held that the fact that the business was not started was of no consequence for claiming the deduction u/s 35AB. It held that the essential requirements for the deduction under the said section were that the assessee should have paid a lumpsum amount for acquiring technical knowhow and that such technical knowhow should be capable of being used for the purpose of business of the assessee. Accordingly, it allowed the assessee's claim of deduction. The Court observed that the assessee was engaged already in business of manufacturing soap and in order to set up soda ash manufacturing plant, assessee acquired technical knowhow by making lumpsum payment. It held that the setting up of manufacturing facility of soda ash was by way of extension of existing business of assessee of manufacturing soap and accordingly, the assessee was eligible for deduction u/s 35AB.

CIT vs. Nirma Ltd. (2017) 99 CCH 0038 Guj HC TAX APPEAL NO. 45 of 2007 dated 07.06.2017

Section 37

84. The assessee provided engineering & design service to its AE and in order to safeguard any foreign exchange fluctuation losses in sales invoices raised, it entered into 9 forward contracts with the Bank of America. It re-measured its forward contract on March 31, 2009 at the prevalent forward market exchange rate and claimed the resultant loss in its profit and loss account under the head 'exchange difference', which was disallowed by the AO on the ground that it was a notional loss and thus not deductible as a business loss for income tax purposes. The Tribunal dismissed the assessee's reliance on the Apex Court decision in Woodward Governor India (P.) Ltd. [TS-40-SC-2009] and held that in that case there was loan liability in balance sheet which increased due to increase in foreign currency rate for which loss was claimed by the assessee and that it was not the case of a forward contract. It held that in the instant case, the assessee had an option of measuring its exports receivables on the balance sheet date and claiming resultant losses, which would have been allowed as a revenue loss in light of the Apex Court decision, but it failed to do so. Noting that the assessee was not trading in forward exchange contracts it held that the loss could not be claimed as a trading liability and accordingly held that the loss claimed by assessee on account of fluctuation in foreign currency in respect of hedging forward contract was not allowable.

Bechtel India Pvt. Ltd [TS-210-ITAT-2017(DEL)] ITA No. 1224/Del/2017 dated 29.05.2017

85. The AO disallowed 30 percent of the operating expenses incurred by the assessee as being unverified, unreasonable and excessive as the assessee failed to furnish its books of accounts. On appeal the CIT(A) restricted the disallowance to 10% as a result of which both the assessee and the Revenue filed an appeal before the Tribunal. The Tribunal noted that the Revenue was deprived of the opportunity to verify the books of accounts because of the failure of the assessee to produce the same and observed that the assessee failed to furnish the books of accounts even before the CIT(A) or the Tribunal as an additional evidence. Accordingly, it set aside the order of the CIT(A) and restored the matter to the file of the AO for making denovo assessment as per law and directed the AO to provide the opportunity to the assessee to produce books of accounts and comply with the statutory requirements and make further verification/inquiry/investigation, etc. in accordance with law.

Aradhana Foods & Juices Pvt. Ltd. & Ors. vs. ITO & Ors. (2017) 50 CCH 0080 DelTrib ITA No. 2427/Del/2011, 2340/Del/2011, 3921/Del/2013, 3590/Del/2013, 3923/Del/2013, 4472/Del/2013, 4706/Del/2013, 3922/Del/2013, 3588/Del/2013 dated 05.06.2017

86. The assessee, in pursuance of an agreement, with Red Chillies Entertainment Pvt. Ltd. (RCEPL) made payment of 50% of the profits earned from the film 'Kaal' to RCEPL towards (i) grant of unlimited use of cinematographic equipments possessed by RCEPL (ii) creative, technical and marketing inputs provided by RCEPL (iii) RCEPL's contribution in the field of concept, characterization, dialogue, music, theme etc. and also for (iv) the performance by Shahrukh Khan in a song of the film and marketing assistance rendered by him. The AO contended that the assessee did not provide any evidence to substantiate its claim that any of the stated services were provided by RCEPL. Thus, it held that RCEPL had no role to play in the making of the film 'Kaal' and payments made to RCEPL were not for business purposes and accordingly, disallowed the same u/s 37(1). The AO further contended that the services were rendered by Mr. Shahrukh Khan and not by RCEPL. The CIT(A) upheld the AO's order. Noting that there was an agreement between the assessee and RCEPL pursuant to which the payment was made and that the existence of the agreement had not be doubted / disputed by the lower authorities, the Tribunal observed that the assessee had duly established that the payment was made as per agreement between the parties and for services provided by RCEPL and therefore held that it was allowable under Section 37(1) of the Act. Further, vis-à-vis the AO's allegation that services were provided by Mr. Shahrukh Khan and not RCEPL, the Tribunal noted that some of the services were creative in nature and demanded personal expertise and talent and therefore held that such services could be rendered by somebody on behalf of the company. It also noted that no separate payment was made or alleged to have been made to Mr. Shahrukh Khan for the services rendered. The Court upheld the Tribunal's order deleting the addition made by AO u/s 37(1) and held that it had been duly established that the payment made by the assessee was

made as per agreement between the parties and against the services provided by RCEPL and hence held that the same was allowable u/s 37(1) of the Act.

CIT vs. DHARMA PRODUCTIONS PVT. LTD. (2017) 99 CCH 0051 MumHC ITA NO. 1140 OF 2014 WITH 1144 OF 2014 dated 05.06.2017

87. The assessee had claimed expense on account of provision for doubtful debts u/s 36(1)(vii), which was denied by the AO on the ground that it was mere provision for doubtful advances and the amounts were not actually written off. The CIT(A) confirmed disallowance by the AO. Noting that the assessee had claimed the said expenditure under the head 'Provision for doubtful advances' and this provisions had been reduced from the figures of Advances recoverable in cash or in kind or for value to be received under the head Other current Assets, Loans & Advances in the Balance Sheet for impugned AY, the Tribunal held that the issue under dispute was not at all covered by the provisions of Section 36(i)(vii) as the section dealt with 'bad debts written off' by the assessee qua sundry debtors, which is not the case here as no write off had taken place. Therefore, it held that the admissibility of impugned expenditure was to be examined under the provisions of section 37(1) and further held that the prime condition to claim expenses u/s 37(1) was that the expenditure must have crystallized during impugned AY. Noting that the assessee had not produced any evidence to show that the parties refused to pay outstanding amount or denied their liability in any manner, it concluded that the liability had not crystallized during year and accordingly held that the impugned expenditure was a mere provision, not allowable as a deduction u/s 37(1) of the Act..

ELITE INTERNAIONAL PVT. LTD. vs. ACIT (2017) 50 CCH 0089 MumTrib ITA No.3079/Mum/2014 dated 07.06.2017

88. The assessee had claimed deduction for amount paid towards purchase of sales tax exemption certificates. The AO observed that the assessee had not credited the amount of sales tax exemption availed in its P&L A/c and had debited the amount incurred for purchase of the sales tax exemption certificates. Relying on the Mumbai Tribunal's decision in the case of Reliance Industries Ltd reported in 273 ITR 16(Trib) wherein it was held that subsidy from government for setting up industrial unit in backward area was treated as capital receipt. Accordingly, he treated the amount as capital expenditure and as such added the same to the total income of the assessee. The CIT(A) observed that the assessee had shown sales at the gross value including the exemption availed and had claimed the expenditure incurred for the purchase of certificates. Further, he observed that decision of Reliance Industries was not applicable to the facts of the assessee as in that case the assessee had received subsidy from government for setting up new industrial unit in the specified backward area whereas in the instant case the assessee did not get sales tax exemption due to setting up of any industrial unit or any investment etc and rather, it was a purely commercial transaction. Accordingly, he held that the expenditure was not a capital expenditure and allowed the claim of the assessee. The Tribunal upheld the order of the CIT(A).

DCIT vs. ORIENT PAPER & INDUSTRIES LTD. (2017) 50 CCH 0140 KoITrib ITA Nos. 1936 & 1937/KoI/2014

89. The assessee company was non-banking finance company (NBFC) duly registered with RBI and engaged in business of asset financing. At the time of granting of loans, it incurred certain expenses i.e. commission, cost incurred on arranging borrowings and on acquiring loan portfolio, which it amortized over the life of the loan in its books of accounts in accordance with the matching principle. However, for income tax purposes, the assessee claimed the full / upfront amount of expenses (amount amortized in the P&L as well as the balance sheet) incurred claiming that the said expenses accrued during the year. The AO only allowed the amount of expenses claimed in the P&L i.e. the amortized expenses stating that the excess could not be allowed as it violated the matching principle. The CIT(A) confirmed the impugned disallowance of expenses. The Tribunal held that accrual of upfront expenditure could not be disputed as AO himself had allowed part of expenditure that was debited in profit and loss account as a deduction. It observed that the AO had taxed the upfront income earned by the assessee in year of accrual itself thereby contradicting his stand on matching principle. Accordingly, it allowed the claim of the expense by the assessee.

MAGMA FINCORP LTD. vs. DCIT (2017) 50 CCH 0091 KoITrib ITA No. 514/Kol/2017 dated 07.06.2017

90. The assessee had paid commission to the directors for guarantee given by them for working capital loan obtained by the assessee. The AO disallowed the claim of the assessee on the ground that the assessee failed to submit any loan sanction documents of the Bank in support of its claim of personal guarantee given by the directors. The CIT(A) observed that the bank had insisted upon the personal guarantee of the directors. Accordingly, he allowed the claim of the assessee. The Tribunal however, observed that the CIT(A) had considered the only aspect that the personal guarantee of the directors was given by the assessee company on the instance of the Bank and had not addressed the core issue whether the commission paid to the directors in lieu of their personal guarantee was legally justified or not to qualify for deduction. It observed that as per the RBI Circular, no commission or remuneration was to be paid to the directors for the guarantee given except i) where the company is not performing well ii) where the guarantors are not connected with the management iii) where the personal guarantee of the guarantors is essential to continue iv) where the new management's guarantee is not available. It further observed that the assessee had not been able to provide the original documents of the loan obtained to verify whether the terms and conditions of the loan were in consonance with the guidelines of RBI. Accordingly, it restored the issue to the file of the AO to examine the original bank documentations to ascertain whether the requirement of non-payment of commission to the guarantors was incorporated in the terms and conditions of bank for sanctioning of credit limit in terms of RBI guidelines noted above.

EASTMAN INDUSTRIES LTD. & ANR. vs. ACIT & ANR. (2017) 50 CCH 0122 DelTrib ITA No. 286/Del./2013, 45/Del./2013 ITA No. 286/Del./2013, 45/Del./2013 dated 09.06.2017

Section 40

91. The assessee paid interest to NBFCs without deducting tax contending that as per section 194A(3)(a)(b), NBFCs fell in the exclusionary clause and accordingly no TDS was to be deducted. The AO disallowed the amount u/s. 40(a)(ia). CIT(A) upheld the order of the AO. Before the Tribunal, the assessee contended that in view of second proviso to section 40(a)(ia) no disallowance could be made when recipients of amount have offered the same as income and paid tax thereon. However, the Tribunal observed that the assessee did not file relevant material before the AO in this regard but the details were available with revenue regarding income offered by these NBFCs. Accordingly, it remitted the matter to the AO for verification of fact that recipient NBFCs had already taken into account amount of interest received by them for computing income in their return of income and in case the AO was satisfied then no disallowance was called for u/s. 40(a)(ia).

AZMAH ULLA vs. ACIT (2017) 50 CCH 0085 BangTrib ITA No. 144/Bang/2017 dated 07.06.2017

Section 43B

92. The assessee collected the VAT from the customers but did not deposit the same before the due date of filing ROI. The AO made addition u/s 43B despite the fact that VAT was not routed through P&L account and no deduction had been claimed by the assessee. The CIT(A) and the Tribunal deleted the addition made by the AO since the same was not claimed as deduction in the books of accounts. The Court upheld the Tribunal's order and deleted addition made u/s 43B since the VAT was not routed through P&L A/c and therefore, not claimed by the assessee.

Ganapati Motors [TS-254-HC-2017(CHAT)] ITA No. 30/2016 dated 25.04.2017

93. The assessee had claimed deduction of interest payable on government loans which were granted for payment to employees who opted to retire under VRS. The AO observed that the assessee had debited interest as payable to government loans, but had not paid the interest to the govt. account. Accordingly, he disallowed the same u/s 43B. The CIT (A) observed that

interest payable to govt. was not covered under section 43B and accordingly, deleted the disallowance. The Tribunal upheld the order of the CIT(A).

A.P. DAIRY DEVELOPMENT COOPERATIVE FEDERATION LTD. & ANR. vs. DCIT & ANR. (2017) 50 CCH 0120 HydTrib ITA No. 741 to 744/Hyd/2015, 1296 to 1298/Hyd/2015

94. During the assessment proceedings, the AO perused the audit report filed by the assessee wherein a sum of gratuity was shown as payable. The AO contended that only the sums which are actually paid by the assessee were allowable u/s 43B of the Act and since the gratuity was not paid, he disallowed the same. The assessee contended that provision for gratuity had not accrued during the relevant previous year and was opening balance brought forward and therefore, no disallowance could be made. However, the AO rejected the assessee's contention. The CIT(A) confirmed the AO's addition. The Tribunal held that if there was no claim of gratuity for the relevant A.Y, then the disallowance could not have been made. Accordingly, it remitted the matter to the AO to verify whether there was any claim of deduction for the relevant previous year.

VICEROY HOTELS LTD. vs. DCIT (2017) 50 CCH 0095 HydTrib ITA No. 292/Hyd/2016 dated 09.06.2017

Section 14A

95. The assessee company was eligible for deduction u/s 10A and had earned dividend income exempt from tax u/s 10(34) of the Act. The assessee contended before AO that it had made investment from its own funds and it had not incurred any expenditure for earning the dividend income. The AO not satisfied with the explanation of the assessee, made disallowance of expenditure u/s 14A r.w.Rule 8D(2)(iii) and also denied deduction u/s 10A on the enhanced income after making disallowance u/s 14A. The CIT(A) upheld the order of AO. The Tribunal noted that the assessee could not prove the nexus between the interest free funds and the investment that yielded exempt income. Accordingly, it held that the AO was left with no option but to adopt the methodology provided in Rule 8D r.w.s 14A after recording dissatisfaction regarding the claim of nil expenditure by the assessee. Accordingly, it upheld AO's disallowance of the expenditure u/s 14A r.w.Rule 8D(iii). However, it allowed the assessee's claim of deduction u/s 10A on the enhanced business income due to disallowance u/s 10A.

G.E. India Exports Pvt. Ltd. [TS-216-ITAT-2017(Bang)] ITA No. 840 and 1042/Bang/2013 dated 28.04.2017

96. The assessee earned dividend income which was exempt from tax and claimed that he did not incur expenditure to earn exempt dividend income. The AO disallowed part of expenditure u/s 14A applying rule 8D(iii). On appeal, the CIT(A) upheld such addition. The Tribunal rejected the assessee's contention that since no expenditure was incurred to earn exempt income disallowance u/s 14A r.w.Rule 8D(iii) was not warranted. Referring to Sec. 14A read with Rule 8D(iii), it held that even in a case where the assessee claims that no expenditure was incurred, the section provides for the disallowance of the expenditure. Accordingly, it upheld the order of CIT(A).

Mr. M. A. Alagappan [TS-244-ITAT-2017(CHNY)] /I.T.A.No.3280/Mds./2016 dated 03.04.2017

Section 10A / 10B / Chapter VIA

97. The Court ruled in favour of Revenue and denied deduction under section 80P(2)(d) [which permits deduction for whole of the income by way of interest or dividends derived by a cooperative society from its investments with any other co-operative society] to the assessee, co-operative society (engaged in agro-marketing) with respect to interest income earned on investments made in co-operative 'bank' for AYs 2007-2008 to 2011-2012. It denied the benefit to the assessee on the ground that interest income from co-operative 'bank' was not covered by Sec. 80P(2)(d) which covered interest from co-operative 'society'. It highlighted that words 'Co-operative Banks' are missing in clause (d) of Sec. 80P(2) and holds that a co-operative bank is distinct from co-operative society for the purposes of Sec 80P(2)(d). Further, it held that the

assessee was not even eligible to claim benefit under section 80P(2)(a) [which provides 100% deduction to a co-operative society where the income is earned by the co-operative society by carrying on the business of banking or providing credit facilities to its members or a cottage industry or the marketing of the agricultural produces grown by its members] as the interest income was taxable as 'income from other sources' and not 'business' income.

Pr. CIT vs The Totagars Co-operative Sale Society-TS-233-ITAT-HC-2017(KAR)-ITA No.100066/2016 dated 16.06.2017

98. The assessee had not made claim for deduction u/s 80IB(10) in its original return. However, during the course of assessment, the assessee filed details of project executed by it, based on which, it claimed deduction u/s 80IB (10). The AO denied the claim made by the assessee since the claim did not form part of original return filed by the assessee company. CIT(A) upheld the AO's order. The Tribunal observed that the relevant material for the claim was placed on record by the assessee during the assessment proceedings and therefore, it remitted the matter to the AO for fresh consideration. The Court held that the power of entertaining a new claim vests with the appellate authorities based on facts and circumstances of case and the failure to advert the claim in the original return or revised return could not denude the appellate authorities of their power to consider a new claim, if, relevant material was available on record and was otherwise tenable in law. Accordingly, it held that the Tribunal was correct in remitting the matter to the AO.
- CIT vs. ABHINITHA FOUNDATION PVT. LTD (2017) 99 CCH 0037 ChenHC T.C. (A) No.811 of 2016 dated 06.06.2017**

c. **Income from Capital Gains**

99. The assessee computed LTCG by treating the actual consideration received on the transfer of property as the FMV instead of adopting the stamp duty value (SDV) of the property since it was a distressed sale and the SDV was not reflective of the real FMV of the property. The assessee requested the AO to make the reference to the valuation officer u/s 50C(2) for determining the FMV of the property. However, rejecting the assessee's request, the AO adopted the SDV of the property u/s 50C(1) as the FMV since it was higher than the consideration actually received on transfer of property. The CIT(A) held that the assessment was bad in law and annulled the assessment. On Revenue's appeal, the Tribunal held that where the SDV of the property exceeded the FMV, the AO ought to have referred to the valuation officer u/s 50C(2) and the non-compliance of the provisions prescribed u/s 50C(2) was not justified. Accordingly, it upheld CIT(A)'s annulment of the assessment. It rejected the Revenue's contention that the matter should be set aside to the file of the AO for making reference to the valuation officer and held that setting aside could not be exercised so as to allow AO to cover up the deficiency in the case.
- Aditya Narain Verma (HUF) [TS-220-ITAT-2017(DEL)] ITA No. 4166/DEL/2013 dated 07.06.2017**
100. The assessee had acquired the property from his ancestors which was subject to mortgage. He had paid expenditure for cancellation of lease rights and taking possession of mortgaged property and claimed it as part of cost of acquisition of the property. The AO disallowed the same contending that the property was mortgaged by the previous owner and the impugned expenditure could not be allowed to be taken as part of cost of acquisition. The CIT(A) upheld the order of the AO. The Tribunal held that when the mortgage was created by the previous owner during his life time, the assessee obtained only mortgagor's interest in the property and by discharging the mortgage debt, he acquired mortgagee's interest in property. Therefore, it held that the amount paid to clear off mortgage was cost of acquisition of mortgagee's interest in property which was deductible as cost of acquisition u/s 48.
- MANIZA JUMBAHOY vs.ACIT (2017) 50 CCH 0123 HydTrib ITA No. 998/Hyd/2012 dated 02.06.2017**
101. The assessee owned plots of agricultural land which it converted to non-agricultural land and sold during the year. It offered to tax the LTCG arising on sale of land. The land was shown as

investment in the books and was subjected to wealth tax. The AO observed that the assessee had converted the agricultural land into non-agricultural land prior to its sale with the intention to fetch the competitive price and that the land was sold to real estate developer which shows that the same was in the nature of stock-in-trade and not capital asset. Accordingly, it treated the sale of land as adventure in the nature of trade taxable under the head 'business income'. On appeal, CIT (A) upheld the AO's order. The Tribunal noted that the assessee sold only few plots during the relevant AY and there was considerable time lag between the purchase and sale and that the land was shown as investment in the books of accounts of the assessee. With respect to conversion of land into non-agricultural prior to sale, the Tribunal held that such an act was to maximize the gain on sale of property. Further, it held that the intention at the time of acquisition of asset and not at the time of sale was to be seen to determine whether it was a business or a capital asset. Accordingly, it allowed the assessee's claim of treating profit on sale on plot/land as capital gains.

Hiteshkumar Ashokkumar Vaswani [TS-242-ITAT-2017(Ahd)] /I.T.A. No.1010/Ahd/2015 dated 17.05.2017

102. The shares of the assessee company were held by 3 families. The assessee company owned shares of M/s.R.S.Rekhchand Mohta Spinning and Weaving Mills Ltd. (RMSWML) and M/s. Vaibhav Textiles Mills Ltd. (VTML) Pursuant to family settlement between the shareholders family, the assessee company was required to transfer the shares of RMSWML and VTML to 2 shareholder families. The assessee contended that no capital gains was chargeable to tax since the transfer was in pursuance of family settlement which was not a transfer. The AO contended that the same was chargeable to tax as the family settlement was between the shareholders and the company being a separate legal entity could not have entered into family settlement. The CIT(A) held that family arrangement/settlement would only be applied to members of the family who were parties to the settlement and not to the assessee company even though it was under control and management of the members of the family. The Tribunal upheld the order of AO and the CIT(A). The Court held that share-transfer by the assessee-company pursuant to the family arrangement among the shareholders of the assessee-company was not exempt as the assessee-company was a separate legal entity and was not a party to the family settlement. Further, it rejected the assessee's contention to lift the corporate veil on the ground that it would deny the separate existence of the company.

B. A. Mohota Textiles Traders Pvt. Ltd. [TS-234-HC-2017(BOM)] ITA No 73 of 2002 dated 12.06.2017

103. The assessee-individual invested substantial amount of capital gains on sale of residential house in a flat (i.e under-construction property) before the due date of filing ROI and claimed deduction u/s 54. However, the possession was not handed over by the builder to the assessee. The AO denied the deduction u/s 54 on the ground that builder was not able to handover the possession of the flat to the assessee within the stipulated period of 3 years from the date of transfer of original asset. The CIT(A) upheld the order of the AO. The Tribunal observed that substantial amount of capital-gains was invested in new flat before the return filing due-date and the flat was also allotted to assessee, and held that the exemption could not be denied even if construction was not completed within specified period.

Bhavna Cuccria [TS-247-ITAT-2017(CHANDI)] ITA No.341/Chd/2017 dated 23/05/2017

104. The Tribunal dismissed the assessee-company's plea that since shares were deposited in Escrow account in terms of the Arbitration Award (pursuant to a family settlement), there was no transfer of shares as contemplated u/s. 2(47) and upheld the capital gains taxability on transfer of shares for AY 1996-97. It dismissed the argument of the assessee that there was no 'transfer' as the shares were deposited in an escrow account, noting that the issue was not raised by assessee in the original assessment proceedings and clarified that the same could not be raised for the first time in remand proceedings. It held that that the scope of assessment proceedings could not be widened in the remand proceedings.

Moreover, on merits, it held that shares deposited in an Escrow account in terms of the Arbitration Award amounted to cessation of control or possession of shares, thereby alienating the ownership of such shares, which amounts to transfer u/s. 2(47).

105. The Court set aside the Tribunal's order and denied the assessee capital-gains exemption benefit u/s. 47(xiv) upon take-over of assessee's proprietary concern by a company during AY 2001-02, as sub-clause (c) condition (of receiving consideration only by way of share allotment) was not met. It noted that the assessee-proprietor was allotted shares only to the tune of Rs. 1.52 cr out of the net assets worth Rs. 5.17 cr taken over by the company. Noting that there was clear deficit, which was never paid or satisfied in the form of shares as envisaged under Section 47(xiv)(c) of the Act, it rejected the Tribunal's reasoning that the 'deficit' was to be treated as 'loan' given by the proprietorship concern thereby reducing the net assets of the company for which shares were to be issued. Clarifying that "under no circumstances could a person borrow from himself", it emphasized that the 'proprietor' and 'proprietorship concern' are not two different entities. It held that whatever was pumped in by the 'proprietor' to his proprietorship, was nothing other than investment which formed part of the assets, which, when taken over by the Company, would have to be compensated [after deducting the liabilities] and that to claim benefit under section 47(xiv)(c), such compensation was to be discharged by the company only by allotting shares and in no other manner.

CIT vs Shri K.V. Mohammed Zakir-TS-235-HC-2017(KER)-ITA No.1797 of 2009 dated 10.04.2017

106. The Tribunal, relying on the decision of the High Court in Sri. Ved Prakash Rakhra (2015) 370 ITR 762 (Kar), held that for the purpose of determining the consideration arising from transfer of land by the assessee to a developer under a Joint-Development Agreement, the fair market value of the proposed construction as on the date of the agreement was to be adopted. Accordingly, it held that the AO had erred in considering the cost of construction as consideration accruing to the assessee on account of transfer.

Y. S. MYTHILY vs.INCOME TAX OFFICER (2017) 50 CCH 0107 BangTrib ITA No. 235/Bang/2016 ITA No. 235/Bang/2016 dated 09.06.2017

107. The assessee-company declared short term capital gain and long term capital gains. The AO treated the capital gains as business income considering the frequency of transactions of purchase and sale of shares (in light of the circular no 4/2007), and held that the main business of assessee was trading in shares. The CIT(A) held that profit on sale and purchase of shares was to be treated as capital gains as the assessee had been consistently showing capital gains and the same was accepted by the Revenue in the earlier years. The Tribunal held that there was nothing on record to demonstrate any change in facts and circumstances during year under consideration and there was no justification to support the findings of the AO that capital gain claimed by assessee was in nature of business income or that main business of assessee was that of share trading. Accordingly, it dismissed the appeal of the Revenue.

EASTMAN INDUSTRIES LTD. & ANR. vs. ACIT & ANR. (2017) 50 CCH 0122 DelTrib ITA No. 286/Del./2013, 45/Del./2013 dated 09.06.2017

Assessment / Re-assessment / Revision / Search

Assessment

108. The assessee had long-term capital gain on sale of land against which it set off the brought forward long term capital loss in its return of income. The AO enhanced the long term capital gain without setting off the long term capital loss of the assessee and passed the order on 31.02.2006. The AO's order was approved by the CIT(A). However, the Tribunal remanded the matter to AO to refer the matter to the valuation officer for determining the FMV of the property. The AO thereafter re-computed LTCG and passed the order on January 25, 2011. Thereafter the assessee filed the application u/s 154 stating that the AO had failed to setoff the brought forward capital loss against the long term capital gain. The AO however rejected the assessee's application on the ground that application was made after 4 years from the date of the original

order and accordingly, was time barred. The CIT(A) and the Tribunal dismissed the assessee's appeal that the time limit of 4 years would be from the AO's order dated 25.01.2011 and not original order. The Court observed that the AO had failed to consider the brought forward loss in the original order and the assessee had neither filed the rectification application u/s 154 at that time nor appealed before the CIT(A) and the Tribunal. It held that the remand by the Tribunal was only on the issue of determination of FMV and accordingly, the AO's order dated 25.01.2011 was only on that issue and issue of setoff was not subject matter of that order and therefore, the issue of setoff had attained finality. Therefore, it held that the period of 4 years would be considered from the date of original order and accordingly, the application was time barred.

Shri Nav Durga Bansal Cold Storage & Ice Factory [TS-236-HC-2017(ALL)] [ITA NO. 14 of 2014 dated 07.03.2017]

109. The assessee had computed book profits u/s 115JB. Explanation to Section 115JB provides that lower of brought forward business loss or unabsorbed depreciation as per the books of accounts can be reduced from the book profits u/s 115JB. Accordingly, the assessee reduced unabsorbed depreciation as per books of accounts (being lower than brought forward business loss) from book profits and paid Nil tax. The AO accepted the computation of the assessee and completed the assessment u/s 143(3). Later the AO observed that the assessee should have set off business loss as per Income-tax Act (being lower than unabsorbed depreciation as per the Act) from book profits u/s 115JB. Accordingly, it held that there was mistake apparent from record and rectified its order u/s 154. The CIT(A) upheld the order of the AO. The Tribunal observed that the AO did not dispute computation under section 115JB at the original assessment stage. Accordingly, it held that when the AO had considered the issue at the time of original assessment, he was not allowed to review the entire assessment order u/s 154.

CITY CLINIC PVT. LTD. vs. ACIT (2017) 50 CCH 0121 ChdTrib ITA No. 112/Chd/2017 dated 02.06.2017

Reassessment

110. The AO obtained information through AIR that the assessee had deposited cash of Rs. 63,27,996 in his bank A/c during the year on the basis of which he issued the letter of enquiry to the assessee to verify the genuineness and correctness of this AIR information. The assessee did not respond to the said information contending that since no proceedings were pending before the AO, the letter of enquiry was not valid in eyes of law and that, he was not under obligation to respond to this invalid letter. The AO in the absence of reply by the assessee formed the opinion for re-opening the assessment. He obtained information from the banks u/s 133(6) and calculated the peak of the bank accounts and made addition in the income from the business. The assessee contended before the CIT(A) that the deposits were only to the extent of Rs.41.15 Lakhs viz-a-vis AO's addition of Rs. 63,27,996 and accordingly, contended that the re-assessment initiated was not based on proper facts and was therefore bad in law. The CIT(A) accepted the contention of the assessee that the deposits were only to the extent of Rs.41.5 Lakhs, however, it dismissed the assessee's ground of appeal and directed the AO to compute the income of the assessee after giving credit of turnover already disclosed by the assessee. The Tribunal observed that the bank deposits considered by the AO were Rs. 63,27,996 whereas actually the bank deposits were only to the extent of Rs. 41.15 Lakhs and accordingly, held that the AO while recording the reasons for reopening of the assessment recorded incorrect facts. Accordingly, holding that reopening of the assessment u/s 147 was clearly invalid and bad in law. It quashed the re-opening of the assessment and deleted the additions made by the AO.

Tajendra Kumar Ghai vs. ITO (2017) 50 CCH 0088 DelTrib ITA Nos. 970,971/Del/2017 dated 07.06.2017

111. Where the AO based on the audit objections raised by the audit department of Income-tax, reopened the assessment of the Petitioner and passed the assessment order without disposing of the assessee's objections u/s 148, the Court set aside the impugned assessment order on the ground that the AO was acting under the dictate of the audit party and did not form his own judgment which was against the mandate of section 147. Further, it held that as per the Apex Court decision in the case of GKN Driveshafts (India) Ltd. v. ITO and Ors. reported in [2003] 259

ITR 90 (SC), the AO ought to have disposed off the objections of the assessee before proceeding further in the reassessment proceedings. Accordingly, it set aside the order of the AO.

MEHSANA DISTRICT CENTRAL CO-OP BANK LTD. vs. ACIT (2017) 99 CCH 0057 GujHC Special Civil Application No. 8343 of 2013 dated 19.06.2017

112. The Court allowed the assessee's [successor to India Cellular Towers Infrastructure Ltd. ('ICTIL'), a telecom company] writ and quashed reassessment proceedings for AY 2009-10 on the ground of delay in issuing notice u/s. 143(2) despite validly issued reopening notice u/s. 148. It noted that though Section 148 notice was issued in February, 2013 (i.e. within prescribed time-limit), the Revenue failed to issue notice u/s. 143(2) within prescribed time-limit (i.e. before September 30, 2013 i.e. within six months from the end of the Financial Year in which the return was furnished by an assessee) pursuant to return filed u/s. 148. Relying on the ruling of the Apex Court in the case of Hotel Blue Moon [TS-113-SC-2010] which was reiterated in Madhya Bharat Energy Corporation [TS-653-HC-2011(DEL)-O] and Jai Shiv Shankar Traders (P.) Ltd. [TS-5736-HC-2015(DELHI)-O], it held that the delay in issuing a notice u/s 143(2) would be fatal to the reassessment proceedings.

Indus Towers Limited vs DCIT-TS-213-HC-2017(DEL)-Writ petition (C) no. 1560 of 2014 dated 29.05.2017

113. The Court, relying on the decision of the Apex Court in GKN Driveshafts (India) Limited Vs. Income Tax Officer, (2003) 1 SCC 72, held that once the AO proceeded to re-open assessment by issuing notice under section 148 of the Act, the assessee / Petitioner was entitled to seek reasons for issuance of such notice, upon which the AO was bound to furnish the reasons within reasonable time. Noting that in the instant case, the AO had re-opened assessment but had failed to provide the Petitioner with the reasons for re-opening assessment, the Court held that the notice issued by the AO was bad in law. It further held that the AO had acted beyond the ambit of the provisions of Section 147 of the Act by taxing sale consideration arising from transfer of property situated in Kovalam as capital gains in the hands of the Petitioner, where all the details pertaining to such property had been submitted to the AO during original assessment proceedings wherein no addition was made. Accordingly, it held that the AO proceeded to initiate proceedings under section 147 of the Act on a mere change of opinion which was invalid.

S.M. KUTUBUDDIN vs. ACIT (2017) 99 CCH 0042 ChenHC W.P. Nos 12801 of 2016 and 11196 and 27344 of 2016 dated 02.06.2017

114. Where the AO initiated re-assessment proceedings based on certain information from the DG, Investigation Wing, Pune, alleging that the assessee had undertaken certain hawala transactions / bogus purchases, the Tribunal, relying on the decision in ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 291 ITR 500 held that the initiation of reassessment proceedings were justified where the original return of income filed by the assessee was processed under section 143(1) of the Act. On the merits of the case, it held that since the assessee failed to produce the suppliers from which it had made the impugned purchases and failed to maintain a stock register to prove that it had made sales from the impugned purchases, the AO was correct in making an addition on account of bogus purchases. However, it held that the GP rate of 20 percent on gross purchases adopted by the AO was not justified and it upheld the order of the CIT(A) restricting the addition to the GP rate of 10% on goods purchased from hawala dealers, over and above GP rate declared by assessee

RAJDEEP ENGINEERING SYSTEMS PUNE PVT. LTD. vs. DCIT (2017) 50 CCH 0147 PuneTrib ITA Nos. 972 to 974/PUN/2016 dated 02.06.2017

115. The Petitioner had claimed deduction u/s 10B which was allowed by the AO in the original assessment. The AO re-opened the assessment u/s 148 on the reason that the deduction u/s 10B was claimed without obtaining the approval from the Board. Rejecting the Petitioner's objection, he passed the order disallowing the assessee's claim u/s 10B. The Court observed that during the original assessment, the AO had asked for the details for the claim of deduction u/s 10B and only after being satisfied, the AO had allowed the deduction. Accordingly, it held that re-opening the case on this ground would amount to change of opinion and accordingly, there

was no reason to believe that income had escaped assessment. Accordingly, it set aside the order of the AO.

E-INFOCHIPS LIMITED vs. DCIT (2017) 99 CCH 0063 GujHC (Special Civil Application No. 2527 of 2017) dated 12.06.2017

Search / Survey

116. The Court, upheld Tribunal's order quashing block assessment u/s 158BC on the ground that no formal notice u/s 143(2) was issued to assessee. The assessee had filed a block return on July 12, 2004, 28 months after the issue of notice u/s 158BC on February 11, 2002. The relevant block assessment period was from 1990-2001. CIT(A) and Tribunal set aside assessment order made by AO on the ground that notice u/s 143(2) was not issued before rejecting returned income. Before the Court, the Revenue contended that return filed by the assessee was after a long delay and could be treated as invalid and non-est return due to which issue of notice u/s 143(2) was not required by AO to complete assessment. Referring to the provisions of section 143, the court held that assessment u/s 143(3) would be made by AO by issuing notice u/s 143(2) only when return had been filed u/s 139 or u/s 142(1) and if it was necessary to ensure that income had not been understated by assessee. Further, as per the provisions of section 144, it held that if the assessee had not filed return of income or if the return filed was held to be invalid or non-est, AO could have proceeded to frame assessment u/s 144. Accordingly, it held that though the assessee had filed a belated return, the AO based on the return filed framed an assessment assessing income higher than the returned income and therefore notice u/s 143(2) was necessary.

Pr.CIT vs Devendranath G Chaturvedi-TS-232-HC-2017(GUJ)-dated 12.06.2017

d. Withholding tax

117. The assessee had earned rental income and offered realized as well as unrealized rent under the head "income from house property". It claimed deduction of the amount of unrealized rent u/s 23(1) r.w.r 4 and claimed TDS credited on both, realized as well as unrealized rent. The AO restricted the TDS credit to the amount of rent received. The CIT(A) confirmed the action of AO. The Tribunal observed that the assessee offered the total rental income (realized as well as unrealized) and then claimed deduction of unrealized rent under section 23(1) r.w.r 4. It further observed that the taxes were duly deducted by the deductor and paid to the account of the Government and also the assessee had produced the TDS certificates for the tax deducted. Accordingly, it held that as total rental income (including unrealized rent) was duly offered to tax under head 'Income from House Property', corresponding TDS credit was to be allowed.

RANGJI REALTIES PVT. LTD. vs. ITO (2017) 50 CCH 0094 MumTrib ITA No. 6119/Mum/2016 dated 09.06.2017

e. Others

Appeals

118. Where the assessee had made petition before the Apex Court for withdrawal of SLP filed with the liberty to move the High Court in review petition and that the Apex Court dismissed the petition as withdrawn without stating anything in relation to whether the liberty for review petition was granted, the High Court held the review petition to be maintainable and not barred by SLP dismissed as withdrawn on the ground that once the Apex Court permitted the withdrawal of SLP without recording any reasons, it was as if no appeal was ever filed or entertained.

Kanoria Industries Limited & Ors [TS-222-HC-2017(DEL)] W.P.(C) 494/1991 dated 27.02.2017

Deemed Dividend

119. The assessee was a shareholder of two companies viz. SSP Developers Pvt. Ltd. (SSPD) and Vishnu Apartment Pvt. Ltd. (VAPL). VAPL sold commercial space to SSPD for Rs. 6.26 crore without the assessee's involvement. The AO added Rs.6.26 crore as deemed dividend u/s 2(22)(e) in the assessee's income on the ground that the assessee held 50% shares in SSPD and 18.33% shares in VAPL and the transaction of selling commercial space by VAPL to SSPD had indirectly benefitted the assessee. The CIT(A) observed that when the commercial space was sold by VAPL to SSPD, the assessee's shareholding in VAPL had been diluted to 5.5% and therefore accordingly held section 2(22)(e) which prescribes a minimum shareholder of 10% was not satisfied. Further, he observed that since the term "any payment" used in section 2(22)(e) [providing for any payment by way of advance or loan to a shareholder] was not defined under the Act, in the ordinary sense the said term would mean benefit in cash and since no cash payment was received by the assessee, the AO erred in taxing the alleged benefit u/s 2(22)(e) of the Act. The Tribunal also held that the given transaction did not benefit the assessee as no money was received by the assessee as also assessee did not hold controlling share in transferor company, it upheld the CIT(A)'s deletion of addition made by the AO u/s 2(22)(e).
Siddharth Gupta [TS-221-ITAT-2017(DEL)] I.T.A. No. 6206/DEL/2013 dated 30.05.2017

Income from Charitable Trust

120. The assessee-trust had claimed cost of the asset purchased towards application of income and had also claimed depreciation on the cost of the asset which was disallowed by the AO on the ground that double deduction could not have been claimed by the assessee. The CIT(A) relied on the decision of DIT(E) Vs. Al Ameen Charitable Fund Trust [(67 taxmann.com 160) (Karnataka)] wherein it was held that while acquiring the capital assets, what was allowed as exemption was the income out of which such acquisition of asset was made and when depreciation deduction was allowed in the subsequent years, it was for the losses or expenses representing the wear and tear of such capital amount that was incurred and further, the term 'income' u/s 11 would mean receipts net of expenses and depreciation being expenditure towards wear and tear of the asset would be allowed as deduction. Accordingly, he deleted the disallowance made by the AO and allowed the claim of the assessee. The Tribunal upheld the order of CIT(A) and allowed the claim of the assessee.

ACIT vs. Karnataka State Cricket Association (2017) 50 CCH 0077 BangTrib ITA No.1615/Bang/2016

121. The assessee, a charitable institution had applied for grant of registration u/s 12AA, which was rejected by CIT. It filed an appeal before the Tribunal after a delay of 1631 days along with application for condonation of delay. It submitted that the delay was due to the fact the CA of the assessee was not aware of the fact that an appeal could be filed against CIT's order rejecting assessee's registration application u/s. 12AA. The Tribunal refused to condone the delay since the delay was caused due to the negligence of the assessee. The Court observed that the CA engaged by the assessee was unaware of the fact that an appeal could be filed against CIT's order rejecting assessee's registration application u/s. 12AA and the assessee did not have the legal assistance. Accordingly, it set aside the Tribunal's order and condoned delay in filing the appeal by the assessee & remitted the matter back to the Tribunal for decision on merits on grant of registration u/s. 12AA to the assessee.

United Christmas Celebration [TS-250-HC-2017(MAD)] Tax Case Appeal No.886 of 2016 dated 07.03.2017

Interest / Penalty

122. Where the CIT(A) had deleted the penalty levied u/s 271(1)(c) by the AO on the ground that related quantum disallowance of head office expenditure had been deleted by the Tribunal, the Tribunal upheld the CIT(A)'s order and rejected the Revenue contention that the CIT(A) should

not have deleted the penalties since it had filed the appeal before the High Court against the Tribunal's order in quantum proceedings and was hopeful of succeeding before the High Court. The Tribunal held that even if the penalty u/s 271(1)(c) stood deleted, the Revenue could still impose the penalty under Section 275(1A), (which provides for the possibility of imposition of penalty while giving effect to the order of the appellate authority) if it succeeded in High Court.

Dalma Energy LLC [TS-211-ITAT-2017(Ahd)] ITA No. 2517 and 2518/ Ahd/ 2013 dated 31.05.2017

123. The AO after the completion of the assessment, noticed that the assessee had violated provisions of Sections 269SS, 269T and 285B by accepting and repaying loans/deposits otherwise than by way of account payee cheques and/or draft and by not filing statements regarding the film production carried on by it. Accordingly, he issued notices for imposing penalty u/s 271D, 271E and 272A (2)(C) [i.e. penalties for contravening Sec. 269SS/T for accepting / repaying loan in cash and for non-furnishing of statement by assessee-producers regarding film production carried on by them]. The assessee's appeal before CIT(A) was pending. The assessee filed a declaration under the Direct Tax Dispute Resolution Scheme, 2016(the Amnesty Scheme) by paying 25% of the minimum penalty levied as also the tax and interest payable on the total income finally determined. The assessee's declaration were not processed on the ground that for the Amnesty Scheme to be applicable penalty necessarily should be linked to total income finally determined under the assessment proceedings whereas in the assessee's case penalties imposed were not linked to any assessment proceedings. The Court allowed the assessee's writ petition and directed the Revenue to process assessee's declarations under the Direct Tax Dispute Resolution Scheme, 2016 ('DRS') with respect to penalties imposed under Sections 271D, 271E and 272A(2)(C) and held that there was no specific exclusion under the scheme for availing the scheme only for the penalties linked to the assessment.

GRIHALAKSHMI FILMS [TS-251-HC-2017(KER)] WP(C).No. 6417 of 2017 (B) dated 26.05.2017

124. The assessee was a registered society and as per the Societies Act, the auditors were to be appointed by Registrar of Societies. There was delay in appointing the auditor by the Registrar. Accordingly, the assessee filed return of income on the basis of provisional accounts audited by Chartered Accountant but did not file audited accounts. The AO issued notice u/s 271D for levy of penalty for non-filing of audit report. The CIT (A), confirmed the order of AO in levying penalty on the assessee. The Tribunal held that the assessee being Govt. organization and Registered Society, had to abide by rules framed under Societies Act and as per said Act, the auditors had to be appointed by Registrar of Societies. Thus, the alleged default in filing audit report was beyond control of assessee. Since the assessee was prevented by reasonable cause for not getting its accounts audited u/s 44AB within prescribed time, the Tribunal deleted the penalty levied by AO.

A.P. DAIRY DEVELOPMENT COOPERATIVE FEDERATION LTD. & ANR. vs. DCIT & ANR. (2017) 50 CCH 0120 HydTrib ITA No. 741 to 744/Hyd/2015, 1296 to 1298/Hyd/2015 dated 02.06.2017

125. Notice was issued to the assessee u/s 142(1) calling for certain details and thereafter further reminders for hearings were issued. Since the assessee did not comply with the statutory notices, show cause notices for levying penalty u/s 271(1)(b) read with section 274 were issued. In response to the penalty notices, the assessee challenged the legality of the same and claimed that no evidence as alleged was called for by the AO. The AO not being satisfied with the responses, levied the penalty for repetitive default by the assessee. The CIT(A) confirmed the AO's order of levying penalty. The Tribunal observed that the assessee's non-compliance of statutory notice was for more than 3 times in each A. Y. Accordingly, it upheld the CIT(A)'s order confirming the penalty.

MANISH PERIWAL vs. DCIT (2017) 50 CCH 0105 DelTrib ITA No. 5157-5162/Del/2014 dated 08.06.2017

126. The assessee was a public charitable trust with the object of providing education, relief to the poor. The DIT observed that during the A.Y 2001-02, the assessee had misapplied the donations received on account earthquake relief donations to its sister concerns. Accordingly, he held that the assessee was not engaged in charitable activities and therefore revoked the registration granted to the trust w.e.f 30.03.2004. The Tribunal held that the DIT was incorrect in withdrawing the registration w.e.f. 30.03.2004 merely on the basis of activities carried on by the assessee during A.Y. 2001-02 and restored the issue to the DIT directing him to consider the activities carried on by the trust in FY 2003-04 as well. The Court noting that the DIT had carried on detailed examination of the activities of the trust during the A.Y.2001-02, held that the Tribunal had erred in rejecting the DIT's order. It held that if the Tribunal was of the view that the findings of the DIT were incorrect, it should have disapproved the findings and that it was not justified in remanding the matter to the DIT to consider activities carried out in other years as well. It held that even if the subsequent year of the Trust was uneventful, it would not mean that the past misdeeds were to be ignored. Accordingly, it set aside the order of the Tribunal and restored the order of the DIT.

DIT vs. K. VARMA CHARITABLE TRUST (2017) 99 CCH 0046 GujHC dated 05.06.2017

Minimum Alternate Tax

127. The assessee had earned dividends and long term capital gains which were exempt u/s 10(34) and 10(38) respectively. The assessee paid MAT on book profits u/s 115JB. The AO observed that the assessee had claimed expenses against the exempt income and accordingly, disallowed the expenditure u/s 14A and added the same to the book profits. The CIT(A) observed that as per Explanation to Section 115JB(2) expenditure relatable to exempt income [other than income exempt u/s 10(38)] was to be added back to the book profits. Accordingly, he restricted the disallowance made by the AO only to the expenditure relatable to the dividend income u/s 10(34). The Tribunal observed that book profits were to be determined u/s 115JB(2) as per Company's act, 1956. It further observed that for applying the provisions of clause (f) of Explanation to section 115JB(2), there should be nexus between the amount of expenditure relatable to the income exempt u/s 10 of the Act and since no nexus was established with the dividend income, the expenditure could not have been disallowed under clause (f) of the Explanation. Relying on Delhi High Court ruling in the case of Pr. CIT V. Bhushan Steel Ltd ITA No.593/2015, it held that disallowance under section 14A read with Rule 8D could not be added while computing book profits as per section 115JB as Explanation to that section did not mention section 14A.

ACIT vs. VIREET INVESTMENT PVT. LTD. & ANR. (2017) 50 CCH 0145 DelTrib dated 16.06.2017

Refund

128. Despite the fact that the assessee, a co-operative bank was exempt from tax on income derived from securities by virtue of Section 80(P)(2)(a)(i) of the Act, certain Central, State organisations had wrongly deducted TDS on the assessee's interest income. Though there was a delay in filing of returns by the assessee, it made a claim of refund and interest on refund of the excess tax deducted (exceeding Rs. 1 Lakh) in its returns. The assessee also made a petition for the refund and interest on refund before the CBDT u/s 119(2)(b) (which was also delayed), wherein the CBDT condoned the delay in filing of return and allowed the refund to the assessee but denied the assessee interest on refund. The Court, relying on the Supreme Court ruling in Tata Chemicals Ltd (2014) 6 SCC 335 and P&H Court ruling in National Horticulture Board (2002) 125 Taxman 922 (P&H), held that the assessee was entitled to interest on refund under section 244A but held that the interest was to be allowed from the date of making petition to CBDT and not before. Further it rejected the assessee's compensation claim in the form of 'interest on interest', distinguishing its reliance on SC ruling in Sandvik Asia Ltd, it noted that the assessee therein was made to wait for refund of interest for decades and was hence greatly prejudiced for inordinate delay on the part of the Revenue and that in present case, the initial long delay in filing

returns and application to CBDT was attributable to the petitioners themselves. Therefore it held no interest on interest could be granted.

The Meghalaya Cooperative Apex Bank Ltd. & Anr [TS-228-HC-2017(SIK)] W.P. No. 317 of 2014 dated 31.05.2017

Set off and carry forward

129. During the relevant AY, AO ignored the manual return filed by assessee within section 139(1) due date and denied carry forward of losses on the ground that the return filed electronically was belated return. Relying on the decision in the case of Nicholas Applegate South East Asia Fund Ltd [117 ITD 299], the Tribunal allowed assessee's claim of carry forward and set-off of business losses and unabsorbed depreciations for AY 2011-12. It held that as the original return was filed within the due date u/s 139(1) of the Act, it was a valid return as per the provisions of section 292B of the Act. It rejected Revenue's stand that the assessee was mandatorily required to file return of income electronically and held that the claim for set off and carry forward of losses could not be denied on a too technical reason. Noting that the assessee was unable to file the return online due to problem of login password, it held that it was a curable defect.

Luxury Goods Retail Pvt. Ltd vs DCIT-TS-231-ITAT-2017(Mum)-ITA No. 3508/mum/2016 dated 05.05.2017

130. The assessee for A.Y. 1998-99 had claimed set off of unabsorbed depreciation after 8 years. The AO did not allow the set off beyond eight (8) years taking into consideration the amendment made in Finance (No.2) Act, 2006 introducing the time limit of 8 years. CIT(A) deleted the AO's disallowance following the decision of the Hon'ble Gujarat High Court in the case of General Motor (I) Pvt. Ltd 354 ITR 244 wherein it was held that if any unabsorbed depreciation or part therein could not be set off till AY 2002-03, it would be carried forward till the time of set off against profit and gains of subsequent years without any limit whatsoever. The Tribunal upheld the CIT(A)'s order.

DCIT vs. ORIENT PAPER & INDUSTRIES LTD – 50 CCH 0140 - ITA Nos. 1936 & 1937/Kol/2014 dated 09.06.2017

Miscellaneous

131. The Court, upheld Income Tax Settlement Commission's (ITSC) order accepting assessee's settlement application u/s 245D for AYs 2010-11 to 2014-15 and rejected the Revenue's contention that the further disclosures of Rs. 50 lakhs per AY made by the assessee represented a substantial rise from the original disclosure made in the settlement application, and that therefore the assessee's initial disclosures were not true and full. The assessee (i.e. multiple parties involved who had filed the application for settlement) in the settlement applications made additional disclosures of undisclosed income admitting receipt of money through sale of constructed properties. It was contended by the assessee that the unaccounted income would comprise of the profit element embedded in such sale of constructed properties and projected 15% profit on the turnover. On this basis, the assessee made disclosures of additional income which was accepted by Commission and immunity was granted to the assessee from prosecution and penalty. The Revenue contended that further inquiry was necessary as the 15% profit was on lower side compared to similar business. The Revenue relying on the decision in the case of Ajmera Housing Corporation [326 ITR 642 (SC)] and Nilkanth Developers [TS-6013-HC-2016(GUJ)-O] had contended that the since the assessee had after making initial disclosures, made further substantial disclosures, the initial disclosures were not true and full. Distinguishing the Apex Court's ruling in the case of Ajmera Housing Corporation [326 ITR 642 (SC)] it held that the facts of the case were different since in that case the assessee had at a belated stage, made fresh and further disclosures. Noting that the Commission had considered that assessee had made a voluntary disclosure of additional sum of Rs. 2 crores i.e 50 lakhs in case of each assessee to put an end to the issue, it held that both the cases relied upon by Revenue were not applicable in the said cases as there was a substantial and drastic difference in original disclosure made in the application compared to the further disclosures.

Principal Commissioner of Income Tax vs ITSC and others-TS-241-HC-2017(GUJ)-Special civil application no.1733 and 1736 of 2017 dated 13.06.2017

132. Where the Petitioner's case was transferred from Mumbai to Chennai u/s 127(2) without giving any reasons for the same, the Court remitted the matter back to the AO for passing fresh order u/s 127(2) after issuing notice to the Petitioner and after hearing the Petitioner.
ADITYA BIRLA MONEY LIMITED vs. PCIT & ANR (2017) 99 CCH 0043 ChenHC dated 05.06.2017
133. The assessee had adopted market value of the polished diamonds as the value of its opening and closing stock. However, since the assessee was not able to produce the stock records, the AO revalued the closing stock and made additions in the income of the assessee. The CIT(A) and the Tribunal upheld the AO's order. The assessee filed the rectification application before the Tribunal the assessee contending that when the methodology was changed for the closing stock, same should have been applied for the opening stock. However, the Tribunal rejected the assessee's application since the same was not raised at the time of hearing of the appeal. The Court held that when the Revenue modified the method of valuation of closing stock of the assessee in a particular year, the same methodology should have been applied for the purpose of computation of the opening stock for that year also. It further held that the Tribunal erred in rejecting the rectification application on the ground that no such issue was canvassed before the Tribunal at the time of hearing of original appeal. It held that the issue could have been adjudicated by the Tribunal on its own account while disposing of the Tax Appeal irrespective of whether it was argued by the assessee and more so when the assessee had applied for rectification. Accordingly, it granted the Petitioner's request for rectification of the Tribunal's order to the extent of providing direction to the AO that the valuation of the opening stock of polished diamonds was to be done on the same basis as applied for valuation of the closing stock.
VEERA EXPORTS vs. ACIT (2017) 99 CCH 0067 GujHC dated 05.06.2017

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