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

(Pronounced in April 2017)

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I. *Transfer Pricing*

a. ***Most Appropriate Method***

Comparable Uncontrolled Price Method

1. The assessee had purchased raw materials from its AE during AY 2012-13 and adopted the CUP method as the most appropriate method by considering the purchase price (of the said raw material) of the AE. It filed the invoice relating to its purchase from AE and the back to back invoice copies relating to AE purchasing from third party as comparable. However, TPO rejected CUP method used by assessee on the basis that assessee had not given any evidence to support the applicability of CUP method and adopted TNMM as MAM, which was upheld by the DRP. On appeal, the Tribunal held that assessee had not substantiated that **the** AE had not derived any benefit or mark up on the price charged by the vendor for supply of material to it (AE). It held that unless the assessee filed full details of financial statement to show that the assessee's AE had not derived any benefit, it was not possible to apply the CUP method." Thus, it remitted the issue regarding application of CUP vs. TNMM back to AO to see whether AE derived any benefit or mark up on the price charged by **its** vendor for supply of raw materials to assessee's AE, which it had sold to assessee.
Enfinity Solar Solutions Pvt. Ltd. vs. ACIT - TS-301-ITAT-2017(CHNY)-TP - I.T.A.No.208/Mds./2017 - 03-04-2017

2. The assessee was engaged in the business of rendering software development services to its Associated Enterprises (AEs) and non AEs and adopted the internal CUP to justify the price of its international transactions, which was rejected by the TPO, who adopted TNMM **and** selected 13 external comparables, 6 of which were rejected by the DRP as they had turnover in excess of Rs. 200 crore. Noting that the AO had not complied with the DRP's direction for exclusion of the 6 comparable and that neither the TPO nor DRP had assigned any reason as to why CUP was not most appropriate method. The Tribunal remitted the matter back to AO for de novo consideration of assessee's submissions after affording assessee due opportunity of being heard.

KMG Infotech Ltd. Vs DCIT - TS-312-ITAT-2017(Bang)-TP - IT(TP)A No.286/Bang/2016 dated 04/04/2017

Resale Price Method

3. The Tribunal held that Resale Price Method (RPM) was the Most Appropriate Method (MAM) for benchmarking international transactions in case of assessee performing distribution functions in respect of earth moving equipment for AY 2008-09. Relying on provisions of Rule 10B(1)(b), OECD Guidelines as well as decision of the Tribunal in Mattel Toys [TS-159-ITAT-2013(Mum)-TP], it observed that under RPM, focus was more on similar nature of properties / services rather than similarity of products. Noting that the assessee was performing the function of normal distributor and purchased goods were resold without any value addition, the Tribunal upheld the CIT(A) order's accepting RPM as MAM. It opined that the TPO, while rejecting RPM and adopting TNMM as MAM, had merely relied on OECD Guidelines which highlighted strengths and weaknesses of RPM, without analyzing the actual facts of the case and the FAR analysis vis-a -vis the comparables. Further, it also upheld the CIT(A)'s rejection of comparable selected by TPO viz. 'T&I Global Limited' noting that it was engaged in manufacturing machinery and thus incomparable with assessee performing purely distribution function. Accordingly, it dismissed the Revenue's appeal.
ACIT Vs Kobelco Construction Equipment India Limited - TS-299-ITAT-2017(DEL)-TP - ITA No.6401/Del/2012 dated 17.04.2017

4. The Tribunal held that the Resale Price Method (RPM) was the Most Appropriate Method (MAM) for benchmarking the transactions of the assessee, engaged in distribution of 'medical equipment' and 'automotive equipment' manufactured by its Japanese parent company in India as opposed to TNMM adopted by the TPO. Noting that the assessee was performing pure distribution function and was re-selling the finished goods manufactured by its AE without any value addition, the Tribunal accepted assessee's RPM, relying on Rule 10B(1)(b) as well as decision of the Tribunal in Mattel Toys [TS-159-ITAT-2013(Mum)-TP]. It rejected TPO/DRP's reasoning that assessee being a full-fledged/full-risk distributor performing a host of functions, RPM was not representative of the correct gross profit margin. It further held that the Revenue had also not brought any evidence on record to prove that the other comparables were not functionally comparable to the assessee. As regards Revenue's objection regarding huge variation in gross profit margin of the two products distributed by assessee, the Tribunal directed the TPO to examine assessee's submission that as per separate gross profit margin working for both items, assessee's margin was higher than that of comparables.
Horiba India Pvt. Ltd. Vs DCIT - TS-300-ITAT-2017(DEL)-TP - ITA No.-6638/Del/2015

5. The Tribunal upheld TPO/DRP's adoption of Berry Ratio (Gross Profit / Value Added Expenses) [any other method] for benchmarking assessee's import of goods from AE for resale in India for AY 2010-11 as against the RPM adopted by the assessee. It noted that TPO rejected RPM on the basis that assessee had not purchased all materials from AE but 50% of the materials such as battery and other related materials were purchased from the domestic market / independent enterprises. Rejecting assessee's submission that there was no purchase from the domestic market as it was contrary to findings of lower authorities, it rejected the assessee's reliance on the decisions of the Tribunal in Mattel Toys India [TS-159-ITAT-2013(Mum)-TP], Frigoglass India [TS-112-ITAT-2014(DEL)-TP] and Tupperwear India [TS-284-ITAT-2014(DEL)-TP] as it was not the case of the assessee that it had purchased all its materials from its A.E. Accordingly, it confirmed the application of Berry Ratio.
Socomec Innovative Power Solutions Pvt. Ltd. vs. DCIT - TS-359-ITAT-2017(CHNY)-TP - I.T.A.Nos.617/Mds./2015 dated 26-04-2017

Transactional Net Margin Method

6. The Tribunal, relying on its order for the earlier year [TS-650-ITAT-2015 (Mum) – TP], remitted the issue of benchmarking the export of finished goods by the assessee to its AEs to the file of the AO /TPO, since the CIT(A) failed to follow the mechanism laid down in the TP provisions to determine ALP. It also accepted the assessee's grievance that for benchmarking the export transactions, the TPO ought to have used TNMM as the most appropriate method as opposed to CUP. Accordingly, it directed the AO / TPO to conduct a fresh analysis under the TNMM method.
ACIT v Strides Acrolabs Ltd - TS-294-ITAT-2017(Mum)-TP - /I.T.A. No.6528/Mum/2010 dated 31/03/2017

7. The Tribunal rejected assessee's use of internal TNMM for benchmarking its international transactions in its CAT manufacturing segment (employing modern technology of the assessee's group) with the non-CAT manufacturing segment (comprising of products of erstwhile Hindustan Motors which had been acquired by it in 2011) as the two segments were not comparable due to differences in technology, marketing / R&D efforts, brand, procurement process and risk profile used in the two segments. It noted the findings of the TPO that i). the Non-CAT category used the old technology whereas the CAT category used the modern technology of Caterpillar Group, and even the types of machines used in both the categories were different with different specifications ii) the Non CAT segment had pre-existing marketing arrangements while CAT was a well-known global brand iii) the products manufactured in Non-CAT segment previously belonging to Hindustan Motors did not have the same brand value as the products in the CAT segment and therefore the Non-CAT segment had higher risks iv) materials were procured locally for Non-CAT, whereas for the CAT segment the raw materials were imported, and held

that the two segments could not be considered as internal comparables. Accordingly, it confirmed the addition made by the TPO adopting external TNMM.
Caterpillar India Pvt. Ltd vs. ACIT - TS-302-ITAT-2017(CHNY)-TP - ITA 204 & 365/12 dated 05.04.2017

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

ITES Sector / Software Development Services

8. The Tribunal held that the assessee engaged in the business of providing software development services and support services to its AEs could not be compared to:
- Infosys Technologies Ltd as it was functionally dissimilar, it owned significant intangibles, earned huge revenues from software products and segmental break-up of the company was not available
- KALS Information Systems Ltd as it was engaged in the development of software products and therefore not functionally comparable to the assessee
- Tata Elxsi Ltd as it was engaged in in product designing services and not a pure software development service provider
- Lucid Software Ltd as it was also into sale of software products and segmental break-up not available
- Accel Transmatic Ltd as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation

Further, it rejected the plea of the assessee for exclusion of comparables having Related Party transactions more than 15 percent (as against the 25 percent filter adopted by the TPO) as it noted that the assessee had not contested application of RPT filter of 25% by the TPO. Further, it observed that Tribunals had been consistently upholding TPO's decision to apply RPT filter in the range of 15% to 25%.
Citrix R&D India Pvt. Ltd vs. ITO - TS-242-ITAT-2017(Bang)-TP - IT(TP)A No.1373/Bang/2010 dated 24/03/2017

9. The Tribunal held that the assessee engaged in providing contract software development services to its AEs could not be compared to:
- Celestial Labs Ltd as the company was engaged in clinical research and manufacture of bio products
- E-Zest Solutions Ltd as it rendered product development services and high end technical services under KPO category
- Infosys Technologies Ltd as it owned significant intangible and had huge revenues from software products without any break-up of revenue from software services and software products is not available
- Kals Information Systems Ltd (seg) as it was engaged in providing software development services and development of software products.
- Lucid Software Ltd as the company is also involved in the development of software as compared to the assessee, which is only into software services
- Wipro Ltd (seg) as this company was engaged both in software development and product development services and it owned intellectual property in the form of registered patents and several pending applications for grant of patents
- Accel Transmatic Ltd (seg) as it was engaged in the services in the form of ACCEL IT and ACCEL animation services for 2D and 3D animation
- Avani Cimcon Technologies Ltd as the company was also into development of software product.
- Flextronics Software Systems Ltd (seg) as there was a clear contradiction between contents of annual report and information obtained u/s 133(6)

- Helios & Matheson Information Technology Ltd as the application software segment of the said concern is not comparable to the assessee's segment of IT services
- Ishir Infotech Ltd it was out-sourcing its work and, therefore, had not satisfied the 25% employee cost filter and thus had to be excluded from the list of comparables.
- Persistent Systems Ltd as this company was engaged in product development and product design services while the assessee was a software development services provider
- Sasken Communication Technologies Ltd as the company owned IPR, had branded products and it had undergone significant restructuring during the year
- Tata Elxsi Ltd (seg) as the company was predominantly engaged in product designing services and not purely software development services.
- Thirdware Solutions Ltd as the company was engaged in product development and earned revenue from sale of licenses and subscription, without segmental results
- Quintegra Solutions Ltd as it was engaged in in product engineering services, was developing proprietary software products and owned intangibles.

Thomson Reuters India Services P. Ltd (Formerly known as Thomson Corporation (International) P. Ltd) vs. Addl. CIT - TS-279-ITAT-2017(Bang)-TP - I.T (TP).A No.1206/Bang/2011 dated 06.04.2017

10. The Tribunal held that assesse engaged in the business of providing digital imaging services falling within the category of IT enabled Services (ITeS) to its AEs could not be compared to:
    - Accentia Technologies Ltd as an extraordinary event of merger and amalgamation took place during the year under consideration
    - Acropetal Technologies Ltd.(seg) as it was engaged in high end KPO type design engineering activities which cannot be equated with IT services
    - E-Clerx Services Ltd as it was a KPO mainly engaged in providing high-end services involving specialized knowledge and domain expertise in the field of retail, manufacturing and financial services; therefore not comparable with the assessee.
    - ICRA Online Ltd as it was not functionally comparable
    - Infosys BPO as it was a market leader, had huge brand value commanding premium pricing, had geographically diverse customers, owned intangible assets and was engaged in the business of software product apart from proving software services.

    Further, the Tribunal accepted the Revenue's contention that an application of turnover band of Rs.1 to Rs.200 crores was bereft of any rationality as the application of this filter does not enable comparison of a company with Rs.200 crores with another company having a turnover of Rs.201 crores. Accordingly, it held that turnover could not be a relevant criteria in a service sector where fixed overheads were nominal and the cost of service was in direct proportion to the services rendered.

    Scancafe Digital Solutions Pvt. Ltd. vs. ITO - TS-313-ITAT-2017(Bang)-TP - IT(TP)A Nos.502 & 450/Bang/2015 dated 12/04/2017

11. The Tribunal held that the assessee engaged in providing ITES to its AEs could not be compared to:
    - Bodhtree Consultancy Ltd as the company had only one segment viz. software development which cannot be compared to ITES segment.
    - e-clerx Services Ltd as the company was engaged in providing data analysis and process solutions and recognized as expert in market financial services, retail and manufacturing.
    - Infosys Ltd as the company was deriving revenue from the software products, had huge intangible assets apart from the brand value and being a leader in the market
    - Mold-tek Technology Ltd. (Seg.) as the company was providing highly technical and specialized engineering services and was also is engaged in producing design, drawing and structural engineering drawings of 2D and 3D software and hence, could not be compared with the assessee.
    - Vishal Information Technology Ltd as the company outsourced a considerable portion of its business and thus fails employee cost filter
    - Wipro Limited as the company was functionally dissimilar because of brand value, significant investment in acquiring new business, innovation activities of various fields including technology innovation and also it as it was engaged in R&D activities

- Apollo Health Street Ltd, Asit C Mehta Financial Services Ltd, HCL Comnet Systems & Services Ltd and Informed Technologies India Ltd as its RPT transactions exceeded the 15 percent filter applied by the TPO.

Thomson Reuters India Services P. Ltd (Formerly known as Thomson Corporation (International) P. Ltd) vs. Addl. CIT - TS-279-ITAT-2017(Bang)-TP - I.T (TP).A No.1206/Bang/2011 dated 06.04.2017

12. The Tribunal held that the assessee engaged in providing software development services to its Associated Enterprises (AE) 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 whereas the assessee was engaged in rendering only software development services
- Tata Elxsi Ltd as this company's software development and services segment constituted three sub-segments i) product design services; ii) engineering design services and iii) visual computing labs and system integration services segment and therefore functionally dissimilar
- Persistent Systems Ltd as the company was engaged in product designing services
- Infosys Technologies Ltd as the company was a giant company in the area of software and it assumed all risks leading to higher profits, whereas assessee company was a captive unit of the parent company and assumed only a limited risk.

Broadcom Communications Technologies Pvt. Ltd. vs. DCIT - TS-298-ITAT-2017(Bang)-TP - I,T.{T.P} A. No.145/Bang/2014 dated 17.03.2017.

13. The Tribunal held that the assessee, a captive service provider engaged in rendering software development research and other related services to its parent company could not be compared to:

- Infosys Ltd as the functional profile of the company was highly diversified and that it was full-fledged risk bearing entrepreneur having a turnover of above Rs. 21,000 crore and significant R&D, advertising expenses. Further, it held that the brand equity and intangibles of the company were more than Rs.1,00,000 crores which proved that the company derived substantial portion of its profits from its brand value and hence such a giant company could not be compared with the assessee which did not have any significant intangibles and is a risk mitigated entity.
- Wipro Technology Services Ltd, noting that the said company was part of the Citi Group, rendering services to various entities of the Citi Group worldwide and was acquired on January 20, 2009 by 'Wipro Ltd' and that there was pre-arrangement between Citi group and Wipro Ltd. for providing business of at least $500 million over a period of 6 years after acquisition as a result of which, all the revenue received by the company from Citi Group on account of such prior agreement or pre- arrangement amounted to a deemed international transaction and therefore the company did not satisfy the RPT filter of 25 percent adopted by the TPO as all its revenue was from the Citi Group.
- Persistent Systems Ltd as it was a leader in the world of outsource software product development and the break-up of income as to revenue from software services and products, both from exports and domestic was not available
- Thirdware Solutions Ltd as it was engaged in various activities like sale of licenses, software services and revenues from subscription and there was no segmental data to work out the separate margin from software services.

Open Solutions Software Services Pvt. Ltd. vs. DCIT - TS-305-ITAT-2017(DEL)-TP - ITA No. 7078/Del/2014 dated 17.04.2017

14. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:

- ICRA Techno Analytics Ltd as its revenue stream consisted of software Development, consultancy, engineering services, web development and hosting and no segmental results were available
- Infosys Technologies Ltd as it owned significant intangibles, earned Huge revenues from software products and there was no segment break-up of revenue from software services and software products
- Kals Info Systems Ltd as it was engaged in providing software development services and development of software products
- Tata Elxsi Ltd as it was engaged in product designing services and not purely software development services.

Further, it held that R S Software (India) Ltd was to be included as comparable and that the DRP erred in excluding the company on the basis that it was an onsite software development company as onsite revenue was not one of the filters adopted by TPO. It also held that Persistent Systems & Solutions Ltd was to be included as comparable and that the DRP had wrongly excluded the said company as comparable on the ground that no segmental information was available with regard to software services and software products as the said company was predominantly engaged in software development services and it derived income mainly from software services.

ACIT vs. Curam Software International P. Ltd - TS-244-ITAT-2017(Bang)-TP - IT(TP)A.499 & CO.136/Bang/2015 dated : 21.03.2017

15. The Tribunal held that the assessee engaged in providing core software service activities for its AE and independent customers, could not be compared to:
- Celestial Biolabs since it was functionally dissimilar
- Infosys Techologies Ltd since it was functionally dissimilar and owned significant intangibles and earned huge revenues from software products and no segmental information was available,
- Kals information Systems Ltd(Seg) since it was engaged in developing software development products and was not purely a software development service provider
- Tata Elxsi ltd(Seg) since it was engaged in product designing services and was not purely a software development services provider
- Wipro Ltd (Seg) since it had revenue from both software and product development services and no segmental bifurcation was available and it owned intellectual property
- E-Zest Solution ltd since it was engaged in rendering product developmental services and high end technical services which come under the category of KPO services
- Persistent Systems Ltd since it was engaged in product development and product design services and segmental information was not available
- Quintegra Solution Ltd since it was engaged in product engineering services and not purely providing software development services, it owned intangibles, had done substantial R&D activity and there was extraordinary event of acquisition
- Thirdware Solution Ltd since it was engaged in product development and had earned revenue from sale of licences and subscription which is different from software developmental services and no segmental information was available
- Lucid Software Ltd since it was engaged in development of software product
- Bodhtree Consulting Ltd as the company was not engaged in software development services and no segmental information was available.

  It however, rejected assessee's contention for exclusion of LGS Global in absence of any evidence filed by the assessee for exclusion of the same. Further, where the TPO had included Avani Cincom Technologies as comparable on the basis of information obtained u/s 133(6), it remitted comparability to AO/TPO for fresh adjudication after making information obtained u/s 133(6) available to the assessee.

Trianz Holdings Pvt Ltd [TS-249-ITAT-2017(Bang)-TP]

16. The Tribunal, relying on the decisions in the case of Pentair Water India Pvt Ltd [TS-566-HC-2015(BOM)-TP]and Agilent Technologies (International) Pvt. Ltd. [TS-593-HC-2015(P & H)-TP],

applied the turnover filter of 10 to 1/10 times the assessee's turnover (Rs. 71.37 crore) and excluded Universal Print Systems Limited, Informed Technologies India Limited, Infosys BPO Limited, Microgenetic Systems, TCS-E Serve Ltd and BNR Udyog Limited as comparables while benchmarking the IT enabled back office services viz. contract administration, claim administration and technical reinsurance accounting provided by the assessee to its AE.

Swiss Re Global Business Solutions India Pvt Ltd [Formerly known as Swiss Re Shared Services (India) Pvt Ltd] vs DCIT - TS-307-ITAT-2017(Bang)-TP - IT(TP)A No. 2315/Bang/2016 dated 13.04.2017

17. The Tribunal held that the assessee, engaged in providing engineering design services to its AE could not be compared to Kitco Ltd, Water & Power Consultancy Services (India) Ltd and Engineers as the said companies were public sector companies working as per the governmental policies and social obligations and therefore, their risk profile and functions were distinct and dissimilar to a captive service provider i.e. the assessee.

Behr India Limited [TS-320-ITAT-2017(PUN)-TP] - ITA No. 566/PUN/2013 dated 21.04.2017

18. The Tribunal held that the assessee engaged in rendering software development services to its AE could not be compared to:

- Bodhtree Consulting Ltd. as it was engaged in the business of software product and provided open and end to end web solutions, off shore data management, software consultancy and design and development of software using latest technology
- Persistent Systems Ltd. as the company was engaged in software development services and products and was also engaged in R&D activities and owned Intangibles.
- Infosys Ltd as it owned intangibles, had significant brand value and derived income from both software services and products without any segmental reporting.
- Larsen & Toubro Infotech Ltd. as the company was engaged in multi-faceted activities including both software development services and products and its turnover was more than 10 times the turnover of the assessee.

Broadcom India P. Ltd vs. DCIT - TS-243-ITAT-2017(Bang)-TP - LT (TP).A No.95/Bang/2014 dated : 17.03.2017

19. The Tribunal held that the assessee engaged in the business of providing contract software development services, back office support services, corporate IT support services and marketing support services to group entities could not be compared to:

- Larsen & Toubro Infotech Ltd since the said company carried out a variety of activities and the relevant segmental results were not available
- Persistent Systems Ltd. as it was engaged in providing outsourced software product development services and technology solutions to independent software vendors, it constantly invested in new IP solutions, derived significant revenue from export of software services and products and did not declare segmental results based on its services / products.

Electronic Arts Games (India) Pvt. Ltd vs. ACIT - TS-326-ITAT-2017(HYD)-TP - ITA No. 444/Hyd/2017 dated 28-04-2017

20. The Tribunal, relying on the decision of the Bombay HC in PTC Software (I) Pvt. Ltd [TS-788-HC-2016(BOM)-TP] held that Rolta India Ltd could not be accepted as a comparable while conducting the benchmarking exercise of the assesse (engaged in providing engineering design services) as its financial results pertained to a different accounting period.

Further, the Tribunal directed the AO to consider the segmental results of KLG Systems Ltd as against the entity level results of the said comparable. It held that the margins of comparable concerns which are functionally comparable are to be selected and applied and in case any concern is engaged in various activities, then the segmental details of the activity, which were functionally comparable to the assessee were to be applied in order to work out the margins of the said concern

Dover India Pvt. Ltd Vs ACIT - TS-318-ITAT-2017(PUN)-TP - ITA No.411/PUN/2014 dated 19.04.2017

Support Services

21. The Tribunal held that the assessee (non-resident company incorporated in Cayman Islands) who had entered into various international transactions with its associated enterprises (AEs) viz. joint acquisition and development of IT infrastructure and software, provision of support services, interest on loan, management services could not be compared to:
- Aptico Limited as it was engaged in skilled allotment, asset reconstruction and management services
- IBI Chemature Limited since the company was engaged in the business of high-end engineering services and had high R&D cost
- TSR Darshwa Limited as it was engaged in the business of providing registrar and share transfer agency services
- Dalkia Energy services Limited and Kirloskar Consultants Limited on the ground of non-availability of financial data in public domain.

It however held that Global Procurement Consultants Ltd could not be excluded merely because it was a Government owned company and held that the fact that the company was a Government company does not have any impact on the business model of the company. It held that Government companies, which are mostly public sector undertakings also operate with similar functions, risks and assets employed, therefore it could not be said that merely because a company is a government company, it should be excluded from comparability analysis.
BG Exploration & Production India Ltd [TS-317-ITAT-2017(DEL)-TP]

Others

22. The Tribunal held that the assessee, engaged in providing travel security services to its AEs could not be compared to:
- Apitco Ltd as the company was engaged in providing services in the nature of Project report preparation, Technical and economic studies, Feasibility studies, Micro enterprise development, Skill development, Project management consulting, Industrial cluster development, Environmental management consulting, Energy management consulting, Market and social research and Asset reconstruction management services without any segment-wise profitability data. Relying on the High Court ruling in Rampgreen Sales Pvt. Ltd. vs. CIT [TS-387-HC-2015(DEL)-TP], it dismissed the contention of the Revenue that the activities done by this company were mainly 'Business Services' and that differentiation of functions in the overall `Business services' umbrella was taken care of under the TNMM.
- TSR Darashaw Limited (TSRDL) as the company was one of India's leading BPO organizations engaged in payroll & employees' Trust Fund administration & management, Record management, providing registry related services, depository related services etc and had striking dissimilarities with the assessee's tourists' safety services.

Travel Security Services (India) Pvt. Ltd. vs. DCIT - TS-285-ITAT-2017(DEL)-TP - ITA No.6828/Del/2015

23. Where the assessee was engaged in the manufacture and export of tractors and the TPO rejected HMT Ltd as comparable on the ground that its turnover was Rs.248 crore as against the assessee's turnover of Rs.120 crore, the Tribunal observing that HMT Ltd. was engaged in the manufacturing of tractors and power tillers and was functionally similar to the assessee and held that the turnover of the company was only 2 times that of the assessee, included this company as a comparable.
SAME Deutz-Fahr India Pvt. Ltd. [TS-316-ITAT-2017(CHNY)-TP] - /ITA No.2666/Mds/2016 dated 22.02.2017

General

24. The Tribunal dismissed the assessee's appeal ex-parte since none appeared on behalf of assessee despite notice of hearing being served and acknowledgement available on record. It rejected the assessee claim for multiple year data and also rejected the assessee's ground against TPO's 'arbitrary' comparability analysis stating that it was general as assessee had not mentioned any specific comparable to be included / excluded on the basis of functionality. Further, it upheld the TPO/DRP's restriction of working capital adjustment to 1.63% for the reason that assessee had not quantified its claim before the lower authorities.
Salesforce.com India Pvt Ltd vs. DCIT - TS-255-ITAT-2017(Bang)-TP - IT (TP) A No.697 (Bang) 2016 dated 10-03-2017

25. The Court dismissed the Revenue's appeal against Tribunal order upholding TPO's inclusion of S.H. Kelkar and Company Limited as comparable for assessee engaged in the business of manufacturing industrial fragrance, flavours and chemical specialities. The Revenue contended that the Tribunal had not considered other instances where the said company was not held to be comparable. Expressing surprise that Revenue had filed an appeal against Tribunal order which was in its favour, the Court held that when the Tribunal held that the Transfer Pricing Officer was right in considering this company as comparable whereas some other instances wherein the said company was held to be not comparable were left out from consideration by the Tribunal, then, such findings and conclusion essentially on facts did not raise any substantial question of law.
CIT vs. Firmenich Aromatics India Pvt. Ltd - TS-286-HC-2017(BOM)-TP - INCOME TAX APPEAL NO. 2483 OF 2013 dated 22.02.2017

c. ***Computation / Adjustments***

Capacity Utilization Adjustment

26. The Tribunal denied the assessee's claim for idle capacity adjustment dismissing the claim of the assessee that it was in the initial stage of business and incurred huge fixed cost and that it could not achieve the optimum capacity utilization as its utilized capacity was only 34% against the comparable company's capacity utilization of 61.36%. It noted that that assessee was not a new or a startup company, and was existing prior to 2002 when it was manufacturing tractors along with Greaves. Accordingly, it held that since the company was reasonably old from the profile, justifiable reasons had to be explained for non-utilization of the capacity, fixed costs incurred from the year of inception, the installed capacity, utilized capacity and capacity of breakeven point. It further held that the assessee should have submitted detailed reasons with particular reference to the availability of raw materials, man power, machinery, capital resources, which have influenced the utilization of maximum capacity and for non-utilization of the installed capacity. Accordingly, since the aforesaid details had not been submitted, it rejected the assessee's idle capacity adjustment claim.
SAME Deutz-Fahr India Pvt. Ltd. Vs CIT - TS-316-ITAT-2017(CHNY)-TP - /ITA No.2666/Mds/2016 dated 22.02.2017

27. The assessee engaged in providing engineering design services had adopted TNMM as the MAM and selected a set of 4 comparables having an average operating profit to operating cost margin of 13.5% as against its operating profit to operating cost margin of 37.5% which was computed after making adjustment for idle capacity on the premise that it had only utilized capacity to the extent of 66.5% at its Chennai center. the TPO disallowed the claim for idle time adjustment noting that assessee had been in business since 2001 and annual reports of the assessee for various financial years demonstrated improved working with better volume of work load. The Tribunal noted that for computing the adjustment, the assessee considered the total capacity in terms of billing hours for its Chennai Region but considered capacity in terms of number of persons for its NDPC office. The Tribunal upheld the order of the TPO and denied the assessee's idle capacity adjustment and held that assessee had not been able to demonstrate how it worked out the capacity hours using a reliable method, as it itself had followed different

yardsticks for working out its capacity levels at Chennai and NDPC centers. It held that the assessee had even been unable to prove that idle capacity in service industry was not an across the industry feature, or the existence nor nonexistence of idle capacity for the various comparables selected by it.
Saipem India Projects Limited Vs DCIT - TS-308-ITAT-2017(CHNY)-TP - ITA Nos.985 & 1400, CO 79/2014 dated 05.04.2017

28. The Tribunal, reversing the order of the TPO and DRP and relying on the decision of Tasty Bite Eatables Ltd. Vs. ACIT (2015) 59 taxmann.com 437 (Pune-Trib.) allowed the assessee capacity under-utilization adjustment in its manufacturing segment noting that subject AY 2009-10 was its first complete year of operations and it was due to under-utilization of capacity and other unabsorbed expenses that the assessee had incurred losses during the year. It rejected the TPO's alternative stand that since assessee had received support payments from AE for low capacity utilization in the succeeding AY, assessee should have received similar payments in subject AY although such arrangement did not exist. Referring to Section 92B, it held that none of the limbs of section 92B of the Act or Explanation defining the expression 'international transaction' spoke of any hypothetical transaction and in the absence of the same, TPO could not pre-suppose an international transaction between the assessee and its AEs and determinate the TP adjustment on account thereof. Further, it held that even if there was a presumption of support payments from the AEs to the assessee, it did not get covered by the definition of international transaction and accordingly was beyond the scope of the TPO.
Dover India Pvt. Ltd Vs ACIT - TS-318-ITAT-2017(PUN)-TP - ITA No.411/PUN/2014 dated 19.04.2017

Profit Level Indicator

29. Where the Tribunal had upheld use of Berry Ratio (i.e. Gross Profit / Operating Cost) under TNMM for benchmarking international transactions of purchase of goods, provisions of services etc. undertaken by 'Soga Shosha' assessee, but remitted matter back to TPO to determine outcome in line with legal principles, the Court dismissed the Revenue's appeal against Tribunal order by relying on the decision of the co-ordinate bench of Court for a different AY, wherein the Court had declined to interfere with remand order in assessee's appeal. Accordingly, it held no substantial question of law arose.
CIT vs. Mitsubishi Corporation India (P) Ltd - TS-230-HC-2017(DEL)-TP - ITA 159/2017, CM APPL.6427/2017

30. The Tribunal, following the decision of Capital One Services India P. Ltd [TS-214-ITAT-2015(Bang)-TP], held that donation was to be treated as a non-operating item as it was not in nature of normal business activity.
ACIT vs. Curam Software International P. Ltd - TS-244-ITAT-2017(Bang)-TP - IT(TP)A.499 & CO.136/Bang/2015 dated : 21.03.2017

31. The Tribunal, relying on its decision in the case of Techbooks International Pvt Ltd (TS-317-ITAT-2015 (Del) – TP) dismissed the appeal of the Revenue challenging the order of the CIT(A) wherein the CIT(A) had accepted the assessee's claim of including the foreign exchange gains / loss while computing its PLI as well as while computing the PLI of comparable companies. It noted that the foreign exchange loss and gains were in respect of revenue items.
ITT Corporation India Pvt Ltd – TS-245-ITAT-2017 (Ahd) - TP - IT(TP)A No. 552/Ahd/2016 dated March 28, 2017

32. The assessee had suffered forex loss to the tune of Rs. 2.66 Cr on account of cancellation of forward contracts. The Revenue argued that assessee had entered into forward contracts to cover the loss that could arise, if payments were delayed, and since 88% of assessee's revenue was from AEs, the foreign exchange loss ought to have been considered as operational in nature. The Tribunal followed the decision in Pangea3 & Legal Database Systems Pvt. Ltd. [TS-148-ITAT-2017(Mum)-TP], and held that entering into forward contracts for covering the risks of

exchange rate fall was a normal business transaction, and further, extraordinary fluctuations could warrant an adjustment if it could be demonstrated that such a phenomena was absent for comparable cases. Since the assessee had not demonstrated extraordinary forex fluctuations on the basis of comparable cases, the Tribunal accepted the contention of the Revenue and considered the foreign exchange loss/gain as operating in nature.
Saipem India Projects Limited Vs DCIT - TS-308-ITAT-2017(CHNY)-TP - ITA Nos.985 & 1400, CO 79/2014 dated 05.04.2017

33. The Tribunal noted that the TPO included depreciation as part of operating cost while working out PLI for assessee, but excluded the same while working out comparables' margin. Relying on Bombay High Court decision in Welspun Zucchi Textiles Ltd [TS-9-HC-2017(BOM)-TP] it held that depreciation was required to be considered as part of operating cost for computing PLI and therefore directed the AO/TPO to recompute PLI of comparable companies after considering depreciation as part of operating costs.
Further, it noted that the TPO had excluded duty drawback of Rs. 73.17 lakhs and scrap sale f 23.04 lakhs from operating profit of the assessee while computing PLI. Relying on Welspun Zucchi HC (supra), the Tribunal held that duty drawback was to be considered as part of operating profits. Thus, it directed AO/TPO to recompute PLI of assessee as well as comparables by considering duty drawback and sale of scrap as part of operating profit.
Behr India Limited [TS-320-ITAT-2017(PUN)-TP] - ITA No. 566/PUN/2013 dated 21.04.2017

34. The Court dismissed the Revenue's appeal against the order of the Tribunal treating reimbursement received by assessee towards advertisement, marking and promotion expenses as operating in nature. It noted that the similar issue had arisen in AY 2002-03, wherein its co-ordinate bench had taken the same view and therefore held that no substantial question of law arose warranting any interference.
Pr. CIT vs. Samsung Electronics India Information & Telecommunications Ltd - TS-324-HC-2017(DEL)-TP - ITA 305/2017 dated 18.04.2017
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35. The Court upheld the order of the Tribunal directing the AO/TPO to exclude reimbursement of costs (without mark-up) from AE in respect of spare infrastructure capacity while working out assessee's PLI for AY 2011-12. It distinguished the decision of Cushman and Wakefield (India) (P.) Ltd [TS-150-HC-2014(DEL)-TP], which provided that the reimbursement was to be included while computing PLI as the said case pertained to reimbursement by an Indian entity for costs incurred by AE and not vice versa as in assessee's case. It also observed that there was no categorization of the reimbursement costs (with/without markup) in Cushman & Wakefield ruling as in instant case. Noting that the Tribunal had examined agreement with AE to come to a definite factual conclusion as regards reimbursement of the infrastructure costs without any mark up, it rejected the Revenue's general plea that order of the Tribunal was 'perverse and bad in law' as it had failed to consider reasons provided in TPO/DRP's order. Accordingly, it dismissed the Revenue's appeal absent any substantial question of law.
Pr. CIT vs. CPA Global Services Private Limited - TS-329-HC-2017(DEL)-TP - ITA 266/2017 dated 03.05.2017

36. The Tribunal accepted the plea of the assessee for exclusion of forex gain / loss from operating items, noting that the content of raw material imported was low in case of comparables because of which they were not impacted as much by currency fluctuations, and that in any case the impugned year was an extraordinary year of depreciating rupee.
Relying on the decision of the Tribunal in Motonic India Automotive, it opined that forex fluctuations gains / losses ought to be excluded from the operating incomes / expenses and thus remitted this ground to AO for fresh consideration.
Gates Unitta India company P Ltd. Vs DCIT TS-360-ITAT-2017(CHNY)-TP - /I.T.A.Nos.1041/Mds./2014 dated 26-04-2017

Others

37. The Arrow Group had set up a branch office in Singapore, namely, 'Arrow Electronics India Limited', exclusively to service the customers in India which immediately opened a liaison office (LO) in Bangalore in 1994 after obtaining approval from the RBI and later opened LOs in Hyderabad, Mumbai, New Delhi & Pune. In December 2002, the Arrow Group started a fully owned subsidiary of Arrow Asia Pac Limited in the name of 'Arrow Electronics India Private Limited' i.e. the assessee in December 2002. However, till July 2003, no effective operation was carried out by the assessee as the LO itself was taking care of the operations. Pursuant to a search operation conducted at the premises of the liaison office which was where the Indian subsidiary was also located, notices under section 148 of the Act were issued for which the assessee complied with the notices and filed the returns declaring income on the basis of cost + 6%. The AO noted that the LO had carried out income earning activities even though it was not supposed to and attributed 40 percent of the net profit of the Singapore and Indian LOs (based on Functions, Assets and Risks) to the Bangalore LO. The AO referred the international transactions of the to the TPO who proposed certain adjustments. On appeal, the CIT(A) gave the assessee part relief by holding that the percentage of ALP as determined by the TPO should have been applied only on 40% of the total sales. The Tribunal dismissed the appeal of the Revenue and held that there was no infirmity in the order of the CIT(A).
Arrow Electronics India Ltd vs. Addl. DIT - TS-261-ITAT-2017(Bang)-TP - IT(TP)A.209,210,617 to 619,COs.31 to 33/B/2011dated 31.03.2017

38. The assessee entered into a Market Development Agreement with Microsoft Operations Pte Ltd ('Microsoft Singapore') to provide marketing support services and product support services for Microsoft products in the territories of Bhutan, India, Maldives, Nepal and British Indian Ocean, for which it was entitled to remuneration on cost plus 15% mark-up basis. The TPO proposed an upward adjustment on account of difference in ALP and pursuant to the DRP's directions, the AO assessed total income at Rs. 2.13 Cr as against Rs. 1.76 Cr declared by the assessee. In the meanwhile, the Commissioner of Service Tax ('CST') raised a service tax demand of Rs. 256.07 Cr, rejecting assessee's contention that the services rendered under the Market Development Agreement qualified as 'export of services' and were thus exempt from service tax, pursuant to which the AO issued notice u/s 148 for reassessing assessee's income for AY 2009-10 on the ground that assessee was entitled to a 15% mark up on the service tax element and thus a sum of Rs. 38.41 Cr had escaped assessment, despite the fact that the CESTAT had ultimately held that the service tax demand raised did not hold good. The assessee filed a writ Petition which was allowed by the High Court. It allowed the assessee's writ and observed that the Agreement between assessee and Microsoft Singapore clearly indicated that the compensation payable to the assessee was exclusive of service tax, which would be the responsibility of Microsoft Singapore and therefore held that the reasons recorded by AO for reopening of the assessment viz.that assessee was entitled to 15% mark up on service tax, was clearly erroneous. It also observed that the AO, despite noting that CESTAT had rejected service tax liability on assessee's services, had held that the CESTAT order was likely to be appealed against and therefore observed that the AO had approached the entire matter with the pre-determined mind to raise a demand oblivious of the relevant facts. On further appeal by the Revenue before the Apex Court, the Apex Court issued a notice for the SLP and directed the assessee to file a counter affidavit, if any within four weeks.
DCIT and Anr. vs. Microsoft Corporation (I) Pvt. Ltd - TS-290-SC-2017-TP] - Petition(s) for Special Leave to Appeal (C)...../2017 CC No(s). 3936/2017 dated 07/04/2017

39. The Tribunal dismissed Revenue's appeal challenging reduction of TP-adjustment pursuant to DRP's direction to re-compute comparables' margin in respect of ITeS and software development services provided to AE after considering the the workings provided by the assessee for AY 2009-10. It noted that the TP-adjustment of Rs 8.54cr was proposed in the draft assessment order which was reduced to Rs 6.11cr by TPO (pursuant to DRP directions) recalculating comparables' margin based on OECD TP Guidelines. It held that it could not be said that the DRP had allowed any relief amounting to Rs.2,43,80,550/- (Rs.8,54,98,108 –

Rs.6,11,17,557) rather the TPO himself on being satisfied after proper verification worked the adjustment which has been made by the AO. Therefore, it held that the Revenue's appeal was without basis and not maintainable.
DCIT vs. Xchanging Technology Services India Pvt. Ltd - TS-291-ITAT-2017(DEL)-TP - ITA No. 991/Del/2014 dated 31.03.2017

40. The Tribunal, relying on the decision of the co-ordinate bench in in Motonic India Automotive allowed the assessee custom duty adjustment in principle in respect of assessee's manufacturing segment for AY 2009-10, noting the fact that the raw material import content of the assessee was 99% as against 30% import content for comparable companies. It held that custom duty was to be eliminated from the comparable price also to arrive at correct PLI in order to bring uniformity and therefore remitted the issue to AO for fresh consideration.
Gates Unitta India company P Ltd. Vs DCIT TS-360-ITAT-2017(CHNY)-TP - /I.T.A.Nos.1041/Mds./2014 dated 26-04-2017

41. The Tribunal dismissed the contention of the assessee that the TP adjustment was to be restricted to the international transactions of the assessee and held that the while determining the ALP, comparison was to be made between the PLI of assessee vis-à-vis arithmetic mean of the PLI of the uncontrollable comparables, and therefore it was to be presumed that every other factor was constant and that the difference had arisen only because of the international transactions. It held that, if this presumption was not made, no adjustment in any case could be made and the assessee could always take an argument that difference in PLI was not due to international transactions and that it was due to non-international transactions.
Caterpillar India Pvt. Ltd vs. ACIT - TS-302-ITAT-2017(CHNY)-TP - ITA 204 & 365/12 dated 05.04.2017

Specific Transactions

Advertisement, Marketing and Promotion expenses

42. The Tribunal remitted the issue of existence of 'international transaction' relating to AMP expenses in assessee's case for AY 2011-12 and directed fresh determination, despite the fact that the jurisdictional HC in assessee's own case [with the lead order in Sony Ericsson [TS-96-HC-2015(DEL)-TP]] had held that AMP expenses resulted in an international transaction, noting that a different view was taken in some later decisions of the Court viz. Maruti Suzuki India Ltd [TS-595-HC-2015(DEL)-TP], Whirlpool of India Ltd [TS-622-HC-2015(DEL)-TP] and that post the decision of Sony Ericsson, even the Tribunal was not consistent in its stand. Noting that TPO did not have the occasion to consider the ratio laid down in several judgments of the jurisdictional Court as well as the predominant view taken in several Tribunal orders including the recent order in case of Louis Vuitton India Retail P. Ltd, [TS-146-ITAT-2017(DEL)-TP], it restored the matter for fresh determination in light of relevant judgments of the HC and further held that no TP-addition would be called for if it is found that no international transaction existed.
Grohe India Private Ltd. Vs ACIT TS-280-ITAT-2017(DEL)-TP - ITA No.479/Del./2015
Nikon India Pvt. Ltd. vs. DCIT - TS-272-ITAT-2017(DEL)-TP - ITA No.719/Del./2017 dated 31.03.2017
Bose Corporation India Pvt. Ltd. vs. ITO - TS-337-ITAT-2017(DEL)-TP - ITA No.1509/Del./2014 dated 30.03.2017

43. The Tribunal remitted the TP-issue of Advertisement, Marketing and Promotion ("AMP") expenses incurred by assessee (distribution of watches in India) during AYs 2007-08 and 2008-09 to the AO / TPO and directed them to re-determine ALP in accordance with directions in Sony Ericsson ruling and not as per the Bright Line Test adopted by the TPO. However, it rejected assessee's contention that since its profit margin was favourable when compared with that of comparables, the AMP expenses stood subsumed in the overall profit and no TP-adjustment was

warranted, and held that that such an argument was contrary to the findings of the High Court. It stated that the examination of assessee's Distribution and AMP functions vis-a -vis probable comparables was sine qua non in the ALP determination process and held that if the assessee's argument was taken to a logical conclusion, it would make the AMP spend a non-international transaction, which, would not be appropriate. Considering the observations of the High Court with respect to bundling of transactions, it observed that the essence of the judgment was that the two international transactions of Distribution and AMP was to be examined as per transfer pricing provisions, but on an aggregate basis and clarified that the Distribution and AMP expenses, were being aggregated only for ALP determination purposes, and the same did not take away the separate character of the AMP transaction.

ACIT vs. Casio India Company Pvt. Ltd - TS-287-ITAT-2017(DEL)-TP - ITA No. 6135/Del/2012 dated 03/04/2017

44. The Apex Court admitted the SLP filed by the Revenue against the order of the High Court wherein the Court, relying on the decision of the coordinate bench in the case of Sony Ericsson upheld Tribunal's decision rejecting application of bright line test.

Toshiba India Pvt Ltd [TS-309-SC-2017-TP] - Petition(s) for Special Leave to Appeal (C)....CC No(s).8042/2017 dated 21/04/2017

45. The Tribunal remitted the issue of addition on account of AMP for AYs 2009-10 and 2010-11 and held that the contentions of the assessee viz. (a) whether incurrence of AMP expenses was an independent international transaction or not and (b) whether no separate adjustment was called for on account of AMP expenditure as its margin was much healthier than the margin of the comparables etc. had to be factually examined by the TPO. It directed the TPO to consider these issues in light of the findings given by the High Court in Sony Ericsson and Maruti Suzuki rulings.

RayBan Sun Optics India Ltd vs. DCIT - TS-239-ITAT-2017(DEL)-TP - ITA No.672/Del/2014 and ITA No.891/Del/2015 dated 24-03-2017

Loans / Receivables / Corporate Guarantee

46. Assessee had borrowed funds in India and advanced the same (without charging interest) to two AEs outside India, which were engaged in excavation of copper ore, a raw material used by the assessee for the manufacture of non-ferrous metals. Accordingly, the assessee claimed that the money had been advanced due to business expediency, which was disregarded by the TPO who made an addition of Rs. 2.13 crores on account of notional interest on advance given by assessee to AE. On appeal, the CIT(A) considering the plea of business expediency deleted the addition by relying on SC decision in S.A. Builders Ltd. [TS-30-SC-2006]. The Tribunal, noting the contention of the Revenue that by diverting the borrowed funds outside India, the assessee was diverting the taxable profit outside the jurisdiction, observed that the CIT(A) had not examined whether the advance made to foreign companies had resulted in shifting of profits. It also considered assessee's contention that the advance made to one of the AEs was made in earlier AY. Accordingly, it remitted the TP adjustment to AO/TPO for re-examining whether any advance was made to foreign company during the current year and whether such advance would amount to shifting of profit to other nation.

ACIT vs. Sterlite Industries (India) Ltd - TS-278-ITAT-2017(CHNY)-TP - ITA Nos.318 & 319/Mds/2008 dated 29.03.2017

47. The Tribunal accepted LIBOR + 2% as arm's length interest rate for benchmarking loan advanced by assessee to its 100% subsidiary. The TPO, contended that if the subsidiary was to obtain loan from bank, owing to its lower credit rating, it would have required a guarantee from assessee, and thus worked out effective borrowing rate of assessee at 8.7% i.e. LIBOR + 2% (bank's margin) + 2% (guarantee fees). The Tribunal rejected the additional 2% rate considered by TPO and held that the adjustment made by TPO on account of guarantee fees was invalid as no such guarantee had been given by assessee. Further relying on the decision of the co-ordinate bench in UFO Movies [TS-7-ITAT-2016(DEL)-TP] , the Tribunal held that the fiction of

assuming a corporate guarantee and then proceeding to benchmark the same was unsustainable in law. Further, even otherwise an adjustment due to assumption about lower credit rating of the subsidiary was not warranted. Noting that for the earlier AY, the TPO himself had adopted LIBOR + 2% which had been accepted by Tribunal, and there was no material change in facts and circumstances for the current year, the Tribunal allowed the assessee's appeal.

Soma Textiles & Industries Ltd. Vs ACIT - TS-295-ITAT-2017(Ahd)-TP - ITA No.472/Ahd/2014 dated 11.04.2017

48. The Tribunal upheld the TPO/DRP's determination of ALP in respect of interest on debit balance of advances given by assessee to AEs for AY 2006-07. It observed that though the assessee had incurred cost by availing credit facility, it had advanced interest free funds to its subsidiaries, and therefore held that it could be safely be concluded that a benefit had accrued to the subsidiaries on account of cost incurred on credit facility which had been shifted by the assessee to its subsidiaries. Further, stating that the principle of commercial expediency would not come into play under the present facts, it held that as the assessee had not charged interest on the outstanding receivables from the overseas subsidiaries, the ALP of the same had rightly been determined by the A.O/TPO. However, it directed the AO/ TPO to apply LIBOR+300 points to compute interest ALP, following co-ordinate bench ruling in assessee's own case in earlier year.

Strides Shasun Limited [Formerly known as Strides Acrolab Limited] vs. ACIT - TS-260-ITAT-2017(Mum)-TP - /I.T.A. No. 8540/Mum/2010 dated 31/03/2017

49. The assessee had extended a corporate guarantee in respect of loan of Rs. 101.48 Cr taken by its subsidiary Suzlon Energy BV Netherland for which it had not charged any guarantee fee, contending that the guarantee was granted in the course of its stewardship activities for its subsidiaries and that it did not constitute an international transaction under section 92B of the Act. The TPO, ignoring the alternate contention of the assessee that if the corporate guarantee was considered as an international transaction, a corporate guarantee fee of 0.75 percent was to be adopted as ALP under CUP, adopted 2 percent as the ALP fee and made a TP addition. The Tribunal, relying on the decisions of the Mumbai Tribunal in Micro Ink Ltd. [(2016) 176 TTJ (Ahd)].and Siro Clinpharm Pvt. Ltd [TS 144 ITAT (2016) TP], held that when the assessee had provided the guarantee in the course of its stewardship activities for its subsidiaries, it would not constitute an international transaction, and, as such, no ALP adjustment could be made in respect of the same. Accordingly, it deleted the addition made by the TPO.

Suzlon Energy Limited [TS-311-ITAT-2017(Ahd)-TP] - ITA No.1369/Ahd/2013 dated 21.04.2017

50. The assessee availed unsecured loan in foreign currency from its AEs as external commercial borrowing of USD 500 million until 2020, as unsecured loan for financing its oil and gas operation in India at the interest rate of US dollar Libor +2%. As a result of the 2008 crisis, the assessee availed additional loan amounting to USD 300 million and the interest rate was changed from floating rate of interest to a fixed rate of interest of 6.18% for 5 years as an amendment to the existing loan facility agreement. Consequently, the assessee paid interest at Libor + 2% for the period from 01/04/2009 to 21/10/2009 and at the rate of 6.18% for the period from 22/10/2009 to 31/03/2010. Though the TPO accepted CUP method adopted by assessee, he held that the assessee had not provided any documentary evidence or convincing argument for shift in the interest rates from floating rate of interest to fixed rate of interest mechanism and no independent party would have agreed to such an increase and opined that the interest paid at the rate of 6.18% was excessive, and determined effective rate at 2.33%, being the interest rate paid by assessee from 01/04/2009 to 21/10/2009. Accordingly, he proposed adjustment an of Rs. 42.72 Cr. The Tribunal disagreed with TPO's finding that there was no reason for assessee to increase the interest rate from 2.33% to 6.18% and noted that the assessee had given detailed rational behind its own decision for shifting from floating rate of interest regime to fixed rate of interest viz. it reduced the risk of changes in the interest rates. Based on the a well settled proposition of

law it held that the TPO was not supposed to question the business decision of the assessee, and further observed that assessee had given ample reasons for its business decision, even stating that most of the reported loans in that particular period were having a clause of fixed rate of interest. Accordingly, it held that it was beyond the authority of the TPO to question the wisdom of the assessee, and it was not the prerogative of revenue to direct assessee to conduct its business in a particular manner, despite heavy business risk. It also held that the TPO had not performed his duty of determining ALP of interest payment made by assessee, but had only analyzed and questioned the international transactions. It stated that the TPO was duty bound to apply one of the methods specified in Sec 92C to determine ALP and that it was not proper to benchmark both the transactions of payment of interest with respect to two different loans governed by two different agreements which has different terms and conditions as 'one transaction. Consequently, it remitted the matter to the TPO with a direction to examine ALP computation strictly in accordance with the provisions of Sec 92C considering the evidences placed by the assessee.

BG Exploration & Production India Ltd [TS-317-ITAT-2017(DEL)-TP]

51. The Tribunal, following the decision of the co-ordinate bench in Redington India [TS-208-ITAT-2014(CHNY)-TP] , upheld the DRP's order deleting TP-adjustment in respect of corporate guarantee transaction for AYs 2010-11 & 2011-12 and held that since no cost was involved in extending the corporate guarantee, it would not constitute an 'international transaction'. It refused to consider Revenue's submission hat since Redington India ruling had not been accepted by Revenue who preferred appeal before Madras High Court, the decision of the Mumbai Tribunal Everest Kanto Cylinders [TS-309-ITAT-2014(Mum)-TP] ought to have been followed and held that the principle of judicial discipline provides for consistency in proceedings and therefore where the decision of the very same co-ordinate Bench was available, it was to be followed instead of the decision of Mumbai Bench. Further, it held that as per the decision of the Apex Court Court in Vegetable Products (88 ITR 192)(SC), where there are two conflicting decisions, the decision in favour of the assessee is to be followed. Accordingly, it dismissed the appeal of the Revenue.

DCIT vs. Aban Offshore Ltd - TS-366-ITAT-2017(CHNY)-TP - /ITA No.1947/Mds/2015 dated 05.04.2017

Royalty / Management fees / Intra Group services / Reimbursements

52. The Tribunal held that an international transaction could be clubbed / aggregated with other international transactions if such transactions were closely connected with each other, and the onus to establish such justification was on assessee. Accordingly, where the assessee failed to discharge its onus of establishing the justification for clubbing and aggregating royalty transaction with other transactions, the Tribunal upheld the TP-adjustment made by the TPO on the royalty payment arrived at by benchmarking the royalty payment transaction under TNMM on standalone basis. It rejected the assessee's contention that when TNMM was applied at the entity level, there was no necessity of separate benchmarking in respect of royalty transaction.

Kaypee Electronics & Associates Pvt Ltd [TS-310-ITAT-2017(Bang)-TP] - IT (TP) A No. 159/Bang/2015 dated 21.04.2017

53. The Court dismissed Revenue's appeal and upheld the Tribunal order deleting TP-addition on account of royalty payment for technical knowhow and brand usage by assessee to its AE for AY 2006-07. Following the decision of the co-ordinate bench in AY 2002-03, it confirmed the Tribunal's view that TPO's restriction of royalty payment to 1% without giving reasons/ justification was arbitrary and adhoc and that TPO had not carried out ALP-determination exercise by following one of the prescribed methods in Section 92C.

Further, the with regard to the part disallowance of publicity and sales promotion expenses paid by the assessee to the AE, it upheld the finding of the Tribunal that the TPO was incorrect in making such disallowance on the ground that AE should have borne a part of such cost

considering it received higher royalty due to higher sales. It noted that the TPO had not determined ALP by following any of the methods prescribed u/s 92C(1) read with Rule 10B of the Income Tax Rules, 1962 and accordingly held that the adjustment had been rightly deleted. It stated the determination of the ALP had to be done only by following one of the methods prescribed under the Act and since the Revenue had not acted in accordance with the clear mandate of law, it held that the appeal of the Revenue did not give rise to any substantial question of law.

CIT (LTU) vs. Johnson & Johnson Ltd - TS-265-HC-2017(BOM)-TP - INCOME TAX APPEAL NO.1291 OF 2014

54. The Tribunal held that payment of royalty approved by RBI under automatic route or the approval granted by the FIPB would not be conclusive 'ALP' rates. It rejected the assessee's stand that royalty payment at 3% for AY 2012-13 was at ALP since it was within the rates approved by FIPB and held that the relevant FIPB approval was not a specific approval but it merely referred to rates prescribed under the automatic route and also noted that such rates pertained to payment under technology transfer whereas assessee's payment was on account of use of trademark/ brand name. Further, it noted that the Government of India, vide. Press Note No-8 (2009 series) dated December 16, 2009, had waived all the restrictions on payment of royalty under foreign technology collaboration and put the same under automatic route and therefore it held that under these circumstances the assessee could not be permitted to take this stand that since there were no restrictions on payment of royalty by the Government of India, any amount paid by assessee on account of royalty would ipso-facto be its ALP. It distinguished the ruling of the High Court in SGS India, noting that Press Note No-8 was not brought to the notice of Court / Tribunal. Stating that the rates allowed under the automatic route by the RBI or FIPB were meant to achieve objectives in different areas, it opined that independent ALP-determination needed to be done to find out ALP of royalty and accordingly remitted the issue to the file of AO / TPO.

A.W. Faber Castell (India) P. Ltd. vs. DCIT - TS-283-ITAT-2017(Mum)-TP - I.T.A. No. 1037/Mum/2017

55. The assessee made payments to its AE towards information management support at 10 percent mark-up of the costs allocated by the AE, which it benchmarked by adopting comparables in the IT sector. The TPO, contended that the services rendered by the AEs were more of infrastructure support than software development (since the software were procured from outside and distributed to the AEs) and rejected the mark-up of 10 percent and adopted a 3 percent mark-up as ALP. The Tribunal held that no specific comparables had been considered by the Revenue for the purpose of determining mark-up at 3 percent and that the TPO was incorrect in rejecting the comparables selected by the assessee merely because the AE was not developing the software on its own but was providing software obtained from outside vendors. Accordingly, it deleted the addition.

Sabic Innovative Plastics India Pvt Ltd – TS-234-ITAT-2017 (Ahd) - TP

56. The Tribunal deleted the TP adjustment with respect to the payment of intra-group management services made by the assessee to its AEs. The TPO had determined the ALP of the payment at Nil under the CUP method, contending that there were no services rendered by the AEs and that the benefit derived by the assessee was not commensurate with the payment. The Tribunal held that whether a particular expense on services received actually benefits an assessee was not even a consideration for determination of ALP and held that the ALP determination was to be made on the basis of a recognized method and not on the basis of subjective perceptions as done by the TPO. Noting that the TPO failed to bring anything on record to show that in an arm's length situation these services would be provided without any consideration, it deleted the ALP adjustments.

Sabic Innovative Plastics India Pvt Ltd – TS-234-ITAT-2017 (Ahd) – TP

57. The assessee availed support services / management services from its AEs for which it paid a fee and benchmarked the said payment under TNMM. The TPO adopting CUP method determined the ALP of the said services at Nil on the ground that the assessee was unable to substantiate its claim of expenditure. On submission of evidence by the assessee, the DRP reduced the addition from Rs.2.65 crore to Rs.2.26 crore and observed that many of the services were duplicative in nature as the assessee failed to explain how payments were made to its employees as well as its AEs for similar services. The Tribunal relying on the decision in the case of Control Techniques India Pvt. Ltd. [TS-1024-ITAT-2016(CHNY)-TP] and noting the assessee's submission that the assessing authorities had not considered the documentary evidence submitted in support of the services availed by it, remitted the issue to DRP with direction to provide the assessee with an opportunity to substantiate its claim with supporting the details of expenditure in the nature of management fees paid to the AEs.
Cook India Medical Devices Private Limited vs. JCIT - TS-306-ITAT-2017(CHNY)-TP - /ITA No.: 2546/Mds/2016 dated 30.03.2017

58. The Tribunal, noting that the assessee had not produced proper evidences for substantiating actual rendering of various services by foreign AE during AY 2012-13, remitted the matter to AO/TPO for fresh verification. The TPO had applied the CUP method and determined Nil ALP of the services contending that assessee had failed to substantiate actual receipt of the services or the benefit received from these services. It held that while evaluating the intra-group services availed by the assessee, the TPO was required to assess (a) need test, (b) benefit test, (c) rendition test, (d) duplication test and (e) shareholder activity test. Noting that the Tribunal in earlier years had held that the need/benefit test was satisfied for services rendered under the same agreement, it held that TPO was not right in questioning satisfaction of such tests. Further, it held that rendering of intragroup services was subject to determination for each AY independently based on the evidences for rendering of the services, and that assessee was required to demonstrate it with the credible evidence. Since the assessee had not filed proper evidences with respect to each class of services with corresponding manner of rendering of the services it directed the assessee to provide proper and credible evidence.
Avery Dennison (India) Pvt. Ltd. Vs DCIT - TS-282-ITAT-2017(DEL)-TP - ITA No. 5578/Del/2016 dated 31/03/2017

59. The assessee had provided management services to its AEs to the tune of Rs. 4.35 crores, and claimed the transaction to be at arm's length by assuming margin of 15% on cost. However, the TPO noted that the details of specific services provided by assessee were not available and further considering the proportion of the AE companies in terms of inventory, business size and value of assets, he concluded that the assessee should have received double the amount towards management consultancy fee from its AEs and made an adjustment of Rs. 4.35 crore which was deleted by the CIT(A). On appeal, after referring to the provisions of Rule 10C and considering the fact that the TPO had not considered third party comparable cases, and that the details of the actual services rendered by the assessee were not known, the Tribunal remitted the matter to the AO / TPO for re-examination and held that until the details of the actual services rendered by assessee to AEs were not brought on record, the business size of the AEs could not determine the comparability of services (as done by the TPO). It opined that it was obligatory on the part of TPO to bring on record the exact nature of services rendered by assessee and thereafter to compare the same with an uncontrolled transaction.
ACIT vs. Sterlite Industries (India) Ltd - TS-278-ITAT-2017(CHNY)-TP - ITA Nos.318 & 319/Mds/2008 dated 29.03.2017

60. The Tribunal remitted the benchmarking of the reimbursements paid by the assessee to its AEs to the file of the AO / TPO for verification. It noted that the assessee had reimbursed its AE for salary expenses relating to two expatriate employees seconded to it by its AEs, which were paid by AEs outside India for administrative convenience and subsequently reimbursed by the assessee. The Tribunal noted that for immediately preceding AY 2005-06, assessee had paid the AEs for the reimbursement of one of the employees, which had been assessed u/s 143(3) and no disallowance in respect of such reimbursement had been made by AO. Further, it noted

that the assessee in its TP report had benchmarked the reimbursement by applying CUP method, therefore, TPO's statement that assessee had not benchmarked these transactions was without basis. The remuneration had been agreed upon between two independent parties, i.e. the assessee and expatriate employees, and the same had actually been paid to the employees (initially by the AEs which were subsequently reimbursed by the assessee a). Accordingly, it held that the payment made by the assessee towards reimbursement of salary of seconded employees had to be accepted to be at arm's length. As regards TPO's finding that assessee had been unable to demonstrate that the salary paid to the expatriates was in line with the salary paid to its own senior management personnel, the Tribunal took note of assessee's submission that the employees were rightfully entitled to the same level of salary as they were earning in their country of origin.

Vis-à-vis the consultancy charges reimbursed by the assessee, it noted that the assessee had not claimed a deduction in respect of these charges and therefore the amount had been taxed twice in the hands of the assessee and accordingly directed the AO to make proper adjustment in respect of consultancy charges.

Mars International India Pvt. Ltd. Vs DCIT - TS-289-ITAT-2017(DEL)-TP - I.T.A .No. 160/DEL/2011 dated 29. 03.2017

61. Assessee made payment of Rs. 30.50 lacs towards management consultancy fees to its AE, Twin Star Holdings Ltd., Mauritius for which the TPO proposed a TP addition on the ground that the benefit received by the assessee from such services was not shown. The CIT(A) deleted the addition. Since the nature of services / consultancy provided to assessee was not known, the Tribunal remitted the issue to AO/TPO for examining the actual services rendered and then to re-determine ALP.

ACIT vs. Sterlite Industries (India) Ltd - TS-278-ITAT-2017(CHNY)-TP - ITA Nos.318 & 319/Mds/2008 dated 29.03.2017

62. The Tribunal dismissed assessee's appeal for AY 2008-09 as TP-issue relating to royalty paid by assessee to its AE (Matsushita Electric Works Ltd) was resolved under India-Japan MAP. It noted that this issue was referred by AE under India-Japan MAP pursuant to which order was passed wherein royalty payment was agreed to be allowable @ 1.15% and that the order giving effect to MAP was passed by the AO. Since the ground relating to royalty was not pressed by the assessee on account of them being infructuous as on date, the issue was dismissed by the Tribunal.

Anchor Electricals Pvt. Ltd vs. DCIT - TS-325-ITAT-2017(Mum)-TP - I.T.A.No.6930/Mum/2012 & I.T.A.No.326 /Mum/2012

Others

63. The Tribunal upheld the CIT(A)'s deletion of TP-addition on account of depreciation on purchase of trademarks by assessee from its AEs during AY 2005-06 and rejected the Revenue's objection that CIT(A)'s admission of documentary evidence furnished by assessee was contrary to the procedure contemplated under Rule 46A of the Income Tax Rules. It noted that the CIT(A), after perusing the copies of agreements, had deleted the addition considering the fact that assessee had paid the same price for brands/registrations as was paid by the AEs for acquiring the same from unrelated third party owners, which itself sufficiently proved that the acquisition of the brands/registrations was within ALP and that the CIT(A) had called for remand report from AO and had considered the latter's objections as regards the admission as well as reliability of the documents furnished by assessee (that the report of the Chartered Accountant relied on by the assessee was not reliable on account of the disclaimers contained therein). Accordingly, it held that the CIT(A) was justified in deleting the addition and also that he had acted in the true letter and spirit of law while exercising his powers u/s 250(4). Further, it also agreed with CIT(A)'s observation that the disclaimer incorporated in the certificate of the

Chartered Accountant was in the nature of a customary disclaimer, which is given in the reports/certificates to protect the interest of the individual professional issuing such certificate/s, and the same in no way can go to adversely hit the reliability of the same.
ACIT v Strides Acrolabs Ltd - TS-294-ITAT-2017(Mum)-TP - /I.T.A. No.6528/Mum/2010 dated 31/03/2017

64. The Tribunal deleted the TP adjustment, made in the case of the assessee, on account of 'deemed brand development' for three years viz. AY 2009-10, 2010-11 and 2011-12. The TPO made a transfer pricing addition on the ground that the assessee significantly contributed to the development of 'Hyundai' brand in the Indian market and Korean parent company (being the brand owner) benefited due to brand promotion activity carried out in India by way of sale of cars and therefore proposed an adjustment by contending that assessee should have received compensation from foreign AE for brand development. He computed the addition based on overall increase in Hyundai's global brand value in proportion to Indian sales and global sales, even though assessee contended that its AMP spend as percentage of sales was much lower than other Indian automotive comparables. The Tribunal held that the accretion of brand value, because of use of the brand name of foreign AE under the technology use agreement- which had been accepted to be an arrangement at an arm's length price, did not result in a separate international transaction to be benchmarked. Observing that trigger for ALP adjustment in Hyundai's case was mere fact of sale of cars by assessee, and not AMP expenses incurred because of conscious brand promotion, it held that the ratio of Special bench ruling in LG Electronics was not applicable. It explained that brand building which increased market in India was a subliminal exercise and a by-product of the economic activity of sales. However, acknowledging the incidental benefit to AE on account of visibility to trade name, it proceeded to analyze whether accretion to brand value was covered by definition of international transactions u/s 92B and explained that the present case dealt with increase in value of intangibles as a by-product of business model employed by assessee and AE, and not with 'purchase, sale or lease of intangibles'. Further, it held that the use of the 'Hyundai' brand was a "privilege, a marketing compulsion and of direct and substantial benefits to the assessee", and therefore could not fall under 'provision of service'. Also, it noted that accretion in brand value was not on account of costs incurred by the assessee, or even by its conscious efforts, and therefore was not a 'transaction having a bearing on profits, income, losses or assets'. Accordingly, it concluded that no international transaction existed in relation to accretion in brand value of the AE due to use of 'Hyundai' brand by assessee.
Hyundai Motor India Limited Vs DCIT - TS-322-ITAT-2017(CHNY)-TP - I.T.A. No. 853/Chny/2014 and 563/Chny/2015 dated 27.04.2017

d. ***Miscellaneous***

<u>Appeal</u>

65. The Tribunal dismissed the assessee's miscellaneous petition seeking to recall ex-parte Tribunal order on the basis that notice for hearing of stay petition was not served on assessee for AY 2010-11. It held that even if the notice was not served on the assessee, the assessee should have been vigilant to find out the date of hearing because in normal cases, the stay petition is fixed for hearing on the second Friday after filing of the stay petition. Further, it held that in any case, once assessee's stay petition was dismissed, a fresh stay petition could always be filed and therefore instead of recalling the ex-parte Tribunal order, the assessee may file a fresh stay petition which can be disposed of in regular course.
Logix Microsystem Ltd. Vs ACIT - TS-253-ITAT-2017(Bang)-TP - M.P No.134 (B)/2016 dated 21-03-2017

66. The Tribunal, in the case of the assessee, had directed the AO/TPO to apply the Court's decision in the case of Knorr Bremse on the issue of adoption of CUP method vs TNMM for determining ALP of assessee's international transaction of payment of management fees to AE. Assessee filed writ on the ground that AO had not applied the said decision in Knorr Bremse, therefore the

order was not in accordance with the Tribunal's directions. The Court agreeing with Revenue's contention held that effect giving orders could be challenged before the next fact finding authority, namely the First Appellate Authority, and that it was not inclined to entertain the writ petition as there was an alternative remedy. Noting that the AO had sought to distinguish the facts and circumstances of assessee's case with the case of Knorr Bremse, the Court stated that whether such distinction of the facts as done by the first respondent was correct or not, was for the next fact finding authority to consider and decide, as such exercise involved appreciation of the facts and circumstances of both the cases. Accordingly, it dismissed the writ petition filed by assessee challenging order passed by AO giving effect to Tribunal's directions for AYs 2010-11 and 2011-12, holding that the assesee could avail of alternative remedy before the First Appellate Authority.

Volex Interconnect India Private Limited Vs DCIT & Anr - TS-315-HC-2017(MAD)-TP - W.P.Nos.9199 & 9200 of 2017 dated 17.04.2017

67. The assessee filed a direct appeal to the CIT(A) (without filing objections before DRP) which was not entertained by the CIT(A) under the mistaken belief that the order passed by the AO under section 143(3) r.w.s. 144C of the Act was not appealable before the CIT(A) under section 246A of the Act. The Tribunal held that the said order was maintainable and accordingly directed the CIT(A) to admit the same. It held that it couldn't be proved that any draft assessment order was passed by AO or that objections were filed by assessee or that DRP had given any directions and therefore the CIT(A) was not justified in observing that the assessment order has been passed by the AO on the direction of the ld. DRP. Further, it considered CBDT Circular No. 5/2010 dated June 3, 2010 and corrected by Corrigendum dated September 30, 2010 and concluded that that in case the assessee did not file objections, the AO can pass the assessment order and thereafter the assessee can file an appeal against such assessment order before the ld. CIT(A). Further, it stated that it was the choice of the assessee as to whether to file an objection before the DRP or to pursue the normal channel of filing appeal against the assessment order before the ld. CIT(A). Accordingly, it remitted the matter to the file of the CIT(A).

Samsung Heavy Industries India Pvt. Ltd. vs. ACIT - TS-304-ITAT-2017(DEL)-TP - ITA No. 4544/Del/2016 dated 28.03.2017

68. The Tribunal allowed the assessee's miscellaneous petition against Tribunal's order on comparables selection for AY 2007-08 noting that it had directed exclusion of 'Geometric Software Solutions limited' as it had more than 15% RPT and 'Lucid Software Ltd' by relying on Meritor LVS India ruling; but had missed out on their exclusion in the concluding para. Accordingly, it held that there was an apparent mistake in the impugned order to the extent of not specifically passing the directions of the exclusion of these two companies from the set of comparables and therefore modified the order directing the AO/TPO to exclude these 2 companies apart from the 7 comparables already excluded.

Microchip Technology (India) Pvt. Ltd vs. ACIT - TS-257-ITAT-2017(Bang)-TP - M.P. No.3/Bang/2017 dated 08.03.2017.

<u>Assessment/Reassessment</u>

69. The Division bench of the Court stayed the order of the Single judge dismissed the writ petition filed by the assessee on the issue of jurisdiction of TPO to examine the existence of international transaction without the AO making a particular finding that there was an international transaction within the meaning of Section 92B before referring the matter to the TPO. The Single bench had upheld the AO's reference to the TPO, holding that Section 92CA(1) did not require the AO to first come to a definite finding that there was an 'international transaction' within the meaning of Sec 92B before referring the matter to TPO. On further appeal, the Division bench was prima facie satisfied with the contention of the assessee viz. the AO should have determined as to whether the transactions involved came within the ambit of the international transactions or not before making reference to the TPO. Accordingly, it proposed to hear the entire appeal and stayed the operation of the judgment of the single bench.

Price Waterhouse and Anr. Vs CIT, Lovelock & Lewes and Anr. Vs CIT - TS-284-HC-2017(CAL)-TP - APO NO.36 OF 2017 & APO NO.37 OF 2017

70. The Tribunal set aside the CIT(A)'s cryptic order with respect to the issue of selection of comparables and restored the matter to the CIT(A) for fresh decision by way of a speaking and reasoned order. It considered assessee's plea that various objections were raised before CIT(A) for exclusion of Bodhtree Consulting Ltd and Kals Information Systems Ltd but the CIT(A) had decided the matter only on the basis of assessee's objection that Bodhtree Consulting Ltd had abnormal profit margin. However, it rejected the assessee's contention that issue regarding exclusion of these two comparables on the ground that the issue was now covered by various Tribunal orders and held that it would do not like to promote a culture of not bringing on record all materials before the lower authorities.
VeriFone India Technology Pvt. Ltd. vs. ITO - TS-293-ITAT-2017(Bang)-TP - IT (TP) A No.300 (Bang) 2014 dated 17-03-2017

71. Where the DRP upheld CUP method as Most Appropriate Method (MAM) instead of TNMM adopted by TPO, but, the AO/TPO passed final order without giving effect to DRP directions, the Tribunal deleted the TP addition in case of the assessee for AY 2010-11 and held that the AO/TPO acted in clear defiance and disregard to the binding directions of the DRP. It held that when the directions of DRP were binding then the TPO/A.O. were bound to give the effect to the directions of DRP irrespective of the fact whether the same are acceptable or not to the department. It held that the remedy to file appeal against the DRP's directions was available to the department when a final order is passed in pursuant to the directions of the DRP.
DCIT Vs Lenovo India Pvt. Ltd - TS-259-ITAT-2017(Bang)-TP - I.T. (T.P) A. No.511 /Bang/2015 dated 31.03.2017.

Penalty

72. The AO levied penalty under section 271G of the Act, vis-à-vis the TP adjustment on management consultancy fees, which was deleted by the CIT(A). The Tribunal noted that CIT(A) had deleted the penalty since the primary reason on which the penalty had been levied i.e. TP adjustment on management consultancy fees had also been deleted by the CIT(A). Since the Tribunal had remitted the matter relating to management consultancy fees for ascertaining exact nature of services, it directed the AO to also decide afresh the issue relating to levy of penalty after bringing on record the failure of assessee to provide the exact information and documents.
ACIT vs. Sterlite Industries (India) Ltd - TS-278-ITAT-2017(CHNY)-TP - ITA Nos.318 & 319/Mds/2008 dated 29.03.2017

73. The Court confirmed the Tribunal's deletion of concealment penalty levied under section 271(1)(c) of the Act for AY 2007-08. It noted that in the quantum appeal, assessee had conceded to the mark-up of 32% on operational costs for the purpose of making TP-adjustment and upheld the order of the Tribunal wherein it held that penalty could not be imposed merely because the addition was accepted by assessee. It held that that there was no deliberate attempt by the assessee to conceal any income or to underpay tax and accordingly, it dismissed the Revenue's appeal.
Pr. CIT Vs Gap International Sourcing India Ltd - TS-323-HC-2017(DEL)-TP - ITA 185/2017 dated 24.04.2017

74. The Tribunal upheld levy of penalty under section 271BA of the Act in AY 2011-12 for assessee's failure in filing Form 3ECB in respect of its transaction of receipt of share capital / premium from its NRI director-shareholder. Relying on the decision of the co-ordinate bench in IL&FS Maritime Infrastructure Company Ltd. [TS-204-ITAT-2013(Mum)-TP], it held that share investment transactions fell within the purview of Sec 92B and the assessee was required to file audit report in Form 3CEB for such transactions, failure of which would attract Sec 271BA penalty. It distinguished the Bombay High Court ruling in Vodafone India on facts, stating that the present case was entirely different as AO had neither attempted to nor made any adjustment to the ALP

for issue of equity shares at a premium to its NRI Director and the issue was simply whether penalty u/s 271BA was attracted since assessee had not filed the Audit Report in Form 3CEB within the period warranted u/s 92E. Thus, concluding that since assessee had entered into an international transaction, failure on the part of the assessee to furnish the Audit Report in Form 3CEB from an Accountant in the prescribed proforma within the prescribed period, without reasonable cause, was a clear violation of the provisions of section 92E of the Act and therefore the levy of penalty under section 271BA of the Act was clearly warranted.
BNT Global Pvt. Ltd. vs. ITO - TS-319-ITAT-2017(Mum)-TP - ITA No. 4111/Mum/2016 dated 26.04.2017

Stay

75. The Tribunal granted stay of outstanding demand of Rs 22.17cr for AY 2012-13 for a period of 90 days or till disposal of appeal, whichever is earlier, subject to payment of Rs 2 crores on or before March 20, 2017. It noted that the demand arose due to TP-adjustment on account of AMP expenditure, and held that the issue was a highly debatable issue in view of various decisions on this point. Accordingly, it held that the assessee made out a prima facie good case for grant of stay subject to part payment. It clarified that if assessee sought adjournment without reasonable cause, stay granted would stand vacated.
Epson India Private Limited Vs ACITTS-258-ITAT-2017(Bang)-TP - P.No.31/Bang/2017 dated 10.03.2017.

76. The Tribunal granted stay of outstanding demand of Rs 5.23cr for a period of 180 days or till appeal disposal, whichever was earlier, subject to payment of Rs 1cr. It noted that that after making additional payment of Rs 1cr, the total demand deposited would be Rs 4.5cr (out of total demand of Rs 8.73cr) resulting in more than 50% demand deposited. It fixed an early appeal hearing and clarified that if assessee sought adjournment for unjustified reasons, stay order would get automatically vacated.
Misys Software Solutions (India) Pvt. Ltd. vs. DCIT - TS-273-ITAT-2017(Bang)-TP - S.P No.361Bang/2017 dated 3-3-2017

77. The Tribunal granted stay of outstanding demand of Rs 470 lakhs for AY 2011-12 up to June 30, 2017 or till disposal of appeal, whichever was earlier, considering the assessee's submission that it had a prima facie good case and out of the total disputed demand of Rs 932.03 lakhs (including interest of Rs 328.76 lakhs), assessee had already paid Rs 462.03 lakhs (including refund adjustment of Rs 162.03 lakhs). It held that it was a fit case for granting of stay and accordingly, it granted stay of the balance outstanding demand. Noting that appeal hearing was already fixed. It clarified that in the course of appeal hearing if the assessee sought adjournment without justifiable reasons, stay granted would get automatically vacated.
LG Soft India Pvt. Ltd. vs. DCIT - TS-275-ITAT-2017(Bang)-TP - S.P. No 49/ Bang/2017

78. The Tribunal granted stay of outstanding demand of Rs 9.39cr (including 3.45cr interest) for AY 2012-13 for a period of 3 months or till disposal of appeal, whichever was earlier, subject to payment of Rs 2cr. It noted the assessee's submission that it had filed a rectification petition u/s 154 which, if passed, would reduce the demand to Rs 2.40cr and held that the effect of the rectification petition could not be considered at the present stage because it was not clear as to whether the claims in this rectification petition were eligible to be considered u/s 154 or not. Considering assessee's willingness to make further payment of Rs 2cr, it granted conditional stay and fixed the appeal for early hearing, clarifying that if assessee sought adjournment without justifiable reasons, stay granted would get automatically vacated.
Outsource Partners International (P) Ltd. vs. ACIT - TS-292-ITAT-2017(Bang)-TP - S.P. No. 65/Bang/2017 dated 24.03.2017.

79. The Tribunal, following the co-ordinate bench ruling in SAP Labs India (wherein view was taken that Tribunal can grant the stay beyond 365 days if the delay in disposing of the appeal is not attributable to assessee) granted extension of stay of demand to the assessee beyond 365 days, considering the assessee's submission that appeal was heard on December 27, 2016 but subsequently the matter was released for fresh hearing. It noted that the original stay was granted vide order dated March 11, 2016 and thereafter extended for a period of 3 months vide order dated December 2, 2016. Accordingly, it held that the delay in disposing of the appeal was not attributable to the assessee and therefore in view of the decision of Hon'ble Delhi High Court in case of Pepsi Foods (P.) Ltd. Vs ACIT (supra), the assessee had made out a prima facie good case for extension of stay even beyond 365 days.
Novo Nordisk India Pvt. Ltd. vs. DCIT - TS-296-ITAT-2017(Bang)-TP - SP No. 61IBang/2017 dated 24.03.2017

80. The Tribunal granted further extension of stay of demand to the assessee till May 31, 2017, noting the assessee's submission that delay in appeal disposal was not attributable to assessee as issue involved in appeal was referred to Special Bench of Tribunal and Special Bench had not yet started hearing the issue. Accordingly, it held that the stay granted earlier should be extended if the delay in disposal of the appeal is not attributable to the assessee-company. It clarified that the assessee shall not seek adjournment from appeal hearing without just and reasonable cause.
Manipal Global Education Services Pvt. Ltd vs. DCIT - TS-297-ITAT-2017(Bang)-TP - SPNo.67 / Bang / 2017 dated 24.03.2017

81. The Tribunal granted the assessee extension of stay of outstanding demand for a period of 3 months or till disposal of appeal, whichever is earlier. It noted that after stay was granted on July 29, 2016, the appeal hearing was fixed for December 15, 2016 which was adjourned as AR of the assessee was travelling on that date due to prior commitments. It observed that the date of hearing fixed on 15.12.2016 was not fixed in course of hearing of stay or the appeal after ascertaining the availability of the AR of the assessee and accordingly held that under these facts, the request for adjournment was due to cogent reasons and therefore, it could not be said that the delay was attributable to the assessee. It clarified that the assessee should not seek adjournment during the course of appeal hearing without justifiable reasons and if assessee did so, the stay granted would get automatically vacated.
Outsourcepartners International Pvt. Ltd. vs. DCIT - TS-276-ITAT-2017(Bang)-TP - S.P. No 521Bang/2017 dated 17.03.2017

82. The Tribunal granted stay of outstanding demand of Rs 38.64cr for AY 2012-13 for a period of 3 months or till appeal disposal, whichever was earlier, subject to payment of Rs 2cr. Considering assessee's submission that a fresh payment of Rs 5.8cr recently had brought down the demand to Rs 32.84cr and it was willing to make a further payment of Rs 2cr as its financial position was not bad, it opined that it was a fit case for granting of stay subject to further payment of Rs. 2 Crores. It fixed early hearing for the appeal hearing and clarified that in the course of appeal hearing if the assessee sought adjournment without justifiable reasons, stay granted would be automatically vacated.
Cisco Systems (India) (P) Ltd vs. ACITTS-270-ITAT-2017(Bang)-TP - S.P. No 63/Bang/2017 dated 24.03.2017.

83. The Tribunal granted stay of outstanding demand of Rs 26.48cr to the assessee for a period of 3 months or till appeal disposal, whichever was earlier, subject to payment of Rs 4cr. It noted that out of the total disputed demand (as per rectification order) of Rs 64.68cr, assessee had already paid Rs 28.20cr resulting in 44% of demand being discharged and that the assessee was willing to make further payment of Rs 4cr as a result of which it held that it was a fit case for granting of stay, subject to further payment of Rs. 4 Crores. It fixed the early hearing for the appeal and clarified that if the assessee sought adjournment without justifiable reasons, stay granted would be automatically vacated.

Schneider Electric IT Business India (P) Ltd. (Formerly known as American Power Conversion (India) (P) Ltd) vs. JCIT - TS-269-ITAT-2017(Bang)-TP - S.P. No. 263/Bang/2016

84. The Tribunal, relying on the decision of the High Court in Verizon India (ITA No 460 / 2016) , granted the assessee full stay on recovery of Rs 1.14cr being penalty u/s 271(1)(c) on TP-additions made for AY 2010-11, for a period of 6 months or till disposal of appeal, whichever is earlier as in the absence of any overt act, which disclose conscience and material separation, invocation of Explanation 7 in a blanket manner could not only be injurious to the assessee but ultimately would be contrary to the purpose for which it was engrafted in the statute. It held that the mere fact that the assessing authority did not agree with the claim of the applicant would not lead to the conclusion beyond doubt that there was concealment of particulars of income or furnishing inaccurate particulars to attract penal provisions under section 271(1)(c) of the Act. Accordingly, it held that there was a prima facie case to justify assessee's request for stay of the disputed demand of penalty and restrained the Department to take coercive measures to recover disputed demand of penalty and fixed early hearing for the appeal.
Halcrow Consulting India Pvt. Ltd. vs. DCIT - TS-288-ITAT-2017(DEL)-TP – SP No 558 / Del / 2016 dated 30.03.2017

Others

85. The Tribunal following the decision of the co-ordinate bench in the assessee's own case in AY 2008-09 directed the AO/TPO to consider assessee's objections regarding comparables selected by the AO / TPO for the purpose of benchmarking the commission income received by the assessee from its AE with respect to sale of fixed income & derivative products on behalf of its AE i.e. that the comparables selected by the TPO did not have any derivate transactions, that the margin of the comparables were not correctly computed and that the some of the comparables had different functions and risks. It also directed TPO to apply arm's length margin only to operating costs related to AE transactions.
Societe Generale [TS-314-ITAT-2017 (Mum)-TP] - / ITA No.1854/Mum/2015 dated 19.04.2017

86. The assessee rendered call center / ITeS services to its AEs (which were benchmarked under TNMM) and also to non-AEs. Its international transaction of call center services were split into 'US operations' and 'UK operations'. For its US operations, the AE viz. Mphasis Corp (Mcorp) entered into contracts directly with ultimate customers and the assessee provided ITeS directly to the customers under a back to back arrangement with MCorp and as a return for the marketing activity carried on by MCorp, a selling commission of 7% was paid by AE while the entire revenue collected from ultimate customers in US was passed on to assessee. With respect to operations in Europe, Mphasis UK (AE), carried out marketing activity for a selling commission of 4%, however, in this case, assessee entered into contracts directly with the ultimate customers. In its TP study, assessee selected foreign AE's i. e Mphasis Corp,USA and Mphasis, UK as tested parties claiming them to be least complex as they were providing only marketing services. The cost of telecom equipment ownership and maintenance was reimbursed by assessee to the AEs on actual costs. The TPO accepting the ITES services to be at ALP, proceeded to determine the ALP of the selling commission, telecom cost, establishment charges and reimbursement of expenses paid at Nil alleging that there were no services provided by the AE.
With respect to reimbursement of expenses towards telecom cost, establishment charges and reimbursement of other expenses, assessee submitted that it had provided various additional documents to demonstrate that the reimbursements were actually at cost. The Tribunal opined that since the assessee had filed additional evidence to substantiate that reimbursement towards telecom cost, establishment charges and other expenses are only on cost basis, in the interest of justice, the matter required fresh adjudication/remand to the AO/TPO to examine additional evidence whether reimbursement of expenses towards telecom cost and establishment charges were actually on cost. It also opined that assessee's submissions regarding selection of AE as

tested party also required fresh consideration by TPO. Thus, it restored the entire TP-adjustment to the file of AO/TPO for fresh adjudication in accordance with law after affording due opportunity to the assessee.

MSource (I) Pvt. Ltd vs. ACIT - TS-248-ITAT-2017(Bang)-TP - IT(TP)A No.13/Bang/2012 dated 31/03/2017

II. *International Tax*

a. Permanent Establishment

87. The assessee i.e. Formula One World Championship ('FOWC'), a company incorporated under the laws of the United Kingdom, had entered into an agreement with FIA and Formula One Asset Management Ltd ('FOAM') (i.e. an associate company of FOWC) by way of which it was licensed all the commercial rights in the Championships for a period of 100 years. For the purpose of conducting a racing event i.e. the Formula one grand prix in India, FOWC entered into a Race Promotion Contract with Japyee Sports International Ltd ('Jaypee') granting it the right to host, stage and promote the Formula One event in Buddh International Circuit in India for a consideration of USD 40 million for a period of 5 years. Vide a separate agreement, Jaypee had to two associated companies of FOWC. The High Court had held that the consideration paid to FOWC was not royalty under Article 13 of the DTAA and that Buddh International Circuit constituted FOWC's fixed place PE India since FOWC and its employees had full access to the Buddh International Circuit and FOWC was granted access for a period of 6 weeks at a time during each season / each race and that the access was for a period of 5 years i.e. the duration of the Race Promotion Contract and Japyee's capacity to act was extremely limited. Accordingly, it held that FOWC carried on business in India within the meaning of expression under Article 5(1) of the DTAA. Referring to the arrangement between the assessee and its affiliates on one hand and Jaypee Sports on the other hand, the Apex Court observed that the arrangement clearly demonstrated that the entire event was taken over and controlled by FOWC and its affiliates and accordingly, rejected the assessee's stand that since the duration of the event was only 3 days, there was limited access granted which was not sufficient to constitute the degree of permanence necessary to establish a fixed place PE since for the entire period of race, the control was with FOWC. Further, it held that mere construction of the track by Japyee was of no consequence while determining whether FOWC had disposal over the track. Accordingly, it upheld the findings of the High Court and held that the tests laid down for constitution of a PE viz. stability, productivity and dependence were satisfied. It concluded that the Buddh International Circuit was the fixed place of business at the disposal of FOWC and that the taxable event i.e. earnings from the grand prix had taken place in India and therefore FOWC was liable to pay tax in India on such income earned by it. However, it clarified that TDS obligation of Jaypee u/s 195 on the payments made to FOWC was limited to the appropriate portion of income which is chargeable to tax in India and directed the AO to compute the same.

Formula One World Championship Ltd. [TS-161-SC-2017] [Civil Appeal No. 3849 OF 2017]

b. Royalty / Fees for technical services

88. The assessee credited the account of its Italian group company in its books of accounts in respect of royalty on technical know-how without deducting the tax u/s 195 since the actual payment of royalty was made in the subsequent year. The AO made a disallowance u/s 40(a)(i) due to non-deduction of TDS and held the assessee to be assessee in default u/s 201(1)/(1A). The Tribunal observed that as per Article 13 of India- Italy DTAA, taxability in the hands of the non-resident is triggered at the time of payment by the resident and accordingly, held that unless the actual payment took place, the taxability under article 13 of Indo Italian DTAA did not arise. Relying on the decision of the Apex Court in the case of GE Information Technology [2010] 327 ITR 456 (SC), it held that the tax was not deductible u/s 195 since the royalty was not taxable at

the time of credit as per the DTAA. With respect to the rate of tax, the Tribunal observed that Section 115A of the Act prescribed the tax-rate of 10% as against the tax-rate of 20% on royalties under Article 13(2) of DTAA and held that as per Sec. 90 of the Act, beneficial rate is to be applied i.e. 10% as per the Act, despite taxability being triggered as per the DTAA on the receipt basis.
Saira Asia Interiors Pvt. Ltd. [TS-134-ITAT-2017(Ahd)] [ITA No.673/Ahd/2014]

89. The Tribunal held that professional fees paid by the assessee-company to a US entity for rendering 'Strategic and Financial Counselling' services was not in the nature of royalty under Article 12(3) of India-US DTAA since the payment was made by the assessee towards rendition of (a) business promotion, (b) marketing, (c) publicity and (d) financial advisory services and not for the use of any information concerning industrial, commercial or scientific information in possession of the service provider. It clarified that the mere fact that the assessee had benefitted from rich experience of the service provider while availing of these services was wholly irrelevant. It further held that the payment did not constitute fees for included services under Article 12(4) of India-US DTAA as the 'make-available' test was not satisfied.
Marck Biosciences Ltd. [TS-128-ITAT-2017 (Ahd)] [ITA No. 203/Ahd/2014]

c. Foreign Tax Credit

90. The Tribunal set aside CIT(A)'s order disallowing foreign tax credit (FTC) claimed by the resident assessee (an individual) with respect to taxes withheld on dividend income earned in US. It directed the AO to compute the admissible tax credit after examining i) the residential status of the assessee under treaty (since for claiming treaty benefits, the assessee needs to be resident under the Act as well as under Article 4 of India-US DTAA), ii) whether amounts shown as dividends were actually in the nature of dividends, iii) whether tax deducted in US was in accordance with the provisions of Article 10 of the India-US DTAA and iv) whether the FTC claimed by the assessee was lower of tax withholding rates in US or Indian tax on such income (which was to be restricted to the rate specified under Article 10 of DTAA).
Bhavin A.Shah [TS-130-ITAT-2017(Ahd)] [ITA No.933/Ahd/2013]

91. Pursuant to search and seizure operation u/s 132, the AO made addition on account of undisclosed deposit u/s 153A based on the assessee's HSBC Swiss bank statement received through information under DTAA through Foreign Tax & Tax Research (FT & TR) division. The Tribunal noted that the bank statement obtained by the AOs did not have any signature of a bank official, name of the bank or place where the branch of the bank was situated and that the AO had not mentioned the same in his assessment order and instead had asked the assessee to furnish the bank statements of impugned account, the existence of which was denied by the assessee. It also noted that nothing was brought on the record to substantiate that the documents were obtained by the AO under any DTAA. Accordingly, it deleted the addition made denying the authenticity of the documents and accordingly, set aside the assessment order u/s 153A.
Shyam Sunder Jindal [TS-143-ITAT-2017(Del)] [ITA No. 5448/Del/2016]

92. The assessee had received dividend from its JV company in Oman which was exempt by virtue of Article 8(bis) of Omanian Tax Laws and it claimed tax credit in India as per Article 25(4) of India- Oman DTAA (which provides that credit would be granted for the tax which would have been payable in Oman but is not paid due to tax incentives granted in Oman to promote economic development). The same was allowed by the AO. However, CIT during the revisionary proceedings u/s 263 observed that the FTC would be allowed only if the tax was paid in Oman or where the tax was not payable due to the tax incentives granted in Oman to promote economic development and since under the Omani Tax Laws dividend was absolutely exempt, no tax was paid and it could not have been said that any specific exemption was granted for the purpose of tax incentives for economic development under Article 8(bis.) as the dividend was exempt across the board with no exception . The Tribunal allowed the FTC claim of the assessee which was upheld by the Court by relying on the letter of Oman Ministry of Finance wherein it was clarified

that Article 8(bis.) was inserted to promote economic development by attracting investments. Accordingly, it rejected the Revenue's contention that Article 8(bis) exemption could not be construed as an incentive granted under Oman's tax laws so as to qualify for the benefit under Article 25(4).

KRISHAK BHARATI COOPERATIVE LTD. [TS-160-HC-2017(DEL)] [ITA 578, 579/2016]

93. The assesssee had rendered certain technical services to its Chinese subsidiary, on which taxes were withheld in China as per Article 12 of India-China DTAA. However, since the assessee had failed to claim the foreign tax credit (FTC) in its return of income, it claimed the same before the AO. The AO relying on the Apex Court's decision in case of Goetze India [TS-21-SC-2006-O] rejected the claim of the FTC made by the assessee. The CIT(A) without examining the claim of FTC, rejected the AO's contention and directed the AO to grant FTC to the assessee. Relying on the jurisdictional High Court rulings in the case of UTI Bank Limited [ITA No. 382 to 384 of 2016] and Mitesh Impex [TS-5339-HC-2014(GUJARAT)-O], the Tribunal held that it would be permissible to raise the claim for the first time before the appellate authority or the Tribunal when facts necessary to examine such claim are already on record and accordingly, powers of the appellate authorities were not fettered by the Apex Court's decision in Goetze India. However, since the CIT(A) had not examined the claim of FTC, it remitted the matter back to CIT(A) to decide it afresh.

Suzlon Energy Limited [TS-159-ITAT-2017(Ahd)] [ITA No.1369/Ahd/2013]

94. The assessee had earned foreign incomes on which taxes were withheld in respective source countries (Rs. 55.61 lakhs) and it had claimed foreign tax credit (FTC) in India for the same. The AO had allowed FTC upto Rs. 3.10 lakhs and CIT(A) had confirmed the same but he allowed expense deduction u/s 37(1) for the balance amount not allowed as credit. The Tribunal reversed the CIT(A)'s order and denied the deduction u/s 37(1) of the Act for that portion of foreign taxes paid for which credit was not available u/s Sec. 90/91. The Revenue contended that tax expense cannot be allowed as deduction u/s 37(1) since the same would be hit by the bar u/s 40(a)(ii), however, the assessee contended that provisions of Section 40(a)(ii) applied only for tax as defined u/s 2(43) (i.e. Indian income-tax) and that it would not extend to the taxes paid abroad. The Tribunal observed that as per the explanation to Sec. 40(a) (ii), tax would also include any sum which is eligible for credit of tax u/s 90 / 90A/ 91 and accordingly, rejecting the assessee's contention, held that the same was covered by the scope of Sec 40(a) (ii). Relying on the Apex Court decision in the case of Smimthkline & French India Ltd it disallowed the deduction of foreign tax as an expense u/s 40(a)(ii).

Elitecore Technologies Private Limited [TS-129-ITAT-2017(Ahd)] [ITA No.508/Ahd/2016]

d. Withholding tax

95. The assessee had borrowed monies from Standard Chartered, Mauritius and HSBC, Mauritius and had paid interest on the same without deducting TDS u/s 195. The AO held that the tax was deductible at source since related agreements were signed in India, hence the income had accrued in India and thereby disallowed the interest expense u/s 40(a)(i). The Tribunal allowed the assessee's claim granting the treaty protection under Article 11 (relating to interest) which provides for taxability in Mauritius and not in India. It rejected the Revenue's contention that since the related agreements were signed in India and the Indian affiliates had stood as guarantors to the borrowings by the assessee, the interest income had accrued and was taxable in India. It observed that none of the 3 tests laid down in Article 5(1) of India-Mauritius DTAA for constitution of fixed place PE were satisfied in present case, viz 1) physical criterion 2) subjective criterion and 3) functionality criterion and as Articles 5 and Article 7 (relating to PE and its attribution) were not applicable, Article 11 would apply. It further clarified that mere presence of affiliates of Standard Chartered Mauritius and HSBC Mauritius in India and the occasional use of the office of Indian affiliate did not lead to a conclusion that Standard Chartered Mauritius and HSBC Mauritius had PE in India. Accordingly, it deleted the disallowance of interest expense u/s 40(a)(i) and held that interest was not subject to TDS u/s 195.

Hyundai Motor India Limited [TS-166-ITAT-2017(CHNY)] [I.T.A. No. 853/Chny/2014 and 563/Chny/2015]

96. Assessee, a non-resident, entered into a contract with Coal India Ltd. (CIL) in connection with development of a mine in India and it filed it's ROI declaring procurement fees received from CIL as income from rendering technical services on which tax @ 30% u/s 115A was paid by CIL. However, the AO held that the procurement fees was in the nature of commission and not technical fees and held it to be taxable @ 65% and also held that the tax paid by CIL on behalf of the assessee was income in the hands of the assessee which had to be grossed up. Accordingly, he levied interest u/s 234B for the default in payment of advance tax. CIT(A) held that held that since the assessee was a non-resident, the payer (i.e. CIL) was responsible to deduct tax at source in terms of section 195 and the liability of the assessee to pay advance tax had to be computed after giving credit to the tax deductible (whether actually deducted or not) and accordingly, the assessee could not be called upon to pay interest under section 234B and therefore, deleted the interest under section 234B. The Tribunal upheld the order of the CIT(A) and held that if the payer failed to deduct tax, the Revenue could take action against the payer u/s 201(1), however, in such a case, the question of paying advance tax by the non-resident would not arise and accordingly, interest u/s 234B would be inapplicable.
ADIT v. White Industries Australia Ltd. [2017] 81 taxmann.com 33 (Kolkata - Trib.) (ITA Nos. 477, 478 & 507 (KOL) OF 2010)

e. Others

97. Where the assessee, an Indian member of KPMG International (KPMGI), Switzerland, a mutual association, made payment towards reimbursement of cost to KPMGI, (as per the Membership Agreement) to enable it to discharge its function, the Tribunal held that the said payment was not taxable 1) on the grounds of 'mutuality' since, there was complete identity between the contributors and participators and further the actions of the participators and contributors were in furtherance of the mandate of the association and 2) in any case there was no profit element in the impugned transaction.
KPMG [TS-150-ITAT-2017(Mum)] [ITA No.2493/Mum/2012]

98. The assessee had incurred the expenditure for the purchase of advertisement space from Google Ireland on which it did not deduct tax contending that the said amount was not chargeable to tax. However, the AO disallowed the same u/s 40(a)(i) on the ground that the assessee constituted dependent agent PE of Google Ireland and the payment made was in the nature of royalty and he also made an ALP adjustment in respect of the same. While pursuing the remedy before the DRP, the assessee made an application for stay of outstanding demand before the AO which was declined by him and consequently, relying on the CBDT Memorandum dated 29.12.2016 (which provides that in case demand is disputed by the assessee before CIT(A), then AO shall grant stay subject to payment of 15% of demand by assessee) filed the stay application before the Tribunal contending that the payment of demand be restricted to 15%. The Tribunal held that the assessee failed to establish the prima-facie case for demand non-recovery and that, the expenditure was rightly disallowed by the AO treating the assessee as dependent agent PE. It also noted that the assessee had sound financial position to pay the demand. It further rejected the assessee's contention that the addition on account of royalty u/s 40(a)(i) would lead to double additions as the addition was also made for the same transaction while computing the ALP u/s 92C and held that the disallowance u/s 40(a)(i) and the computation of income from international transaction regarding to ALP under Chapter X of the Income-tax Act operated in two different fields and had no co-relation with each other. It further held that the assessee would not suffer any irreparable loss / injury if the stay was not granted as it could get full refund with interest if assessee's appeal was allowed on merits. Further, relying on Karnataka High Court ruling in case of Flipkart India [TS-97-HC-2017(KAR)], it held that CBDT Instruction dated 29.02.2016 (providing guidelines for stay of demand at first appeal stage) would not be applicable to proceeding before the Tribunal and the same applied only to the proceedings

pending before CIT(A). Accordingly, it directed the assessee to deposit 50% demand (20% within 7 days and balance in 6 monthly installment).
Google India Private Limited [TS-133-ITAT-2017(Bang)] [SP No. 45/Bang/2017]

II. *Domestic Tax*

a. ***Income***

99. Where mobilization advance given to the contractor by the assesse for the purpose of contract work of laying down the railway line and the same was intrinsically connected with the capital expenditure of the appellant prior to the commencement of its business, the Tribunal held that the interest income earned by the assessee on mobilization advance which was later adjusted against charges payable to the contractor and which had gone on to reduce the cost of construction, was rightly treated by the assessee as capital receipt and not income from other sources. Tribunal, accordingly, deleted the addition of the same and allowed appeal of the assessee.
Angul Sukinda Railway Ltd. V. Income Tax Officer - (2017) 49 CCH 0149 CuttackTrib (ITA No. 197/CTK/2016)

b. ***Income from Salary***

100. The Tribunal allowed deduction to assessee-employee with respect to notice pay recovered from his salary by previous employers. The Tribunal rejected Revenue's stand that no deduction for notice pay was available u/s. 16 of the Act and since salary was taxable on due basis, the entire salary due from previous employer was taxable. It held that this was a case of recovery of the salary, for which Sec 16 was not to be referred and that assessee had actually received the salary from his previous employers after deducting the notice period as per the job agreement with them and thus only the actual salary received by assessee was taxable.
Nandinho Rebello v. Deputy Commissioner of Income Tax - [2017] 80 taxmann.com 297 (Ahmedabad- Trib.) (ITA No. 2378 (Ahd.) of 2013)

c. ***Deductions***

Section 32 / 32A

101. Where assessee had installed plant and equipment at client's premises and had brought the same to the notice of Revenue by filing sample copies of some of the agreements whereby the assessee had agreed that monitoring equipments and pumps would be installed at the clients premises, the Tribunal held that it was clear that the installation of equipments in the client's premises was necessary and part and parcel of nature of business carried on by the assessee and therefore depreciation on the same should be allowed. The fact that the equipments were used in the business premises of the clients could not be the basis to disallow the claim of the assessee for deduction on account of depreciation. The Tribunal, accordingly, upheld order of CIT(A) deleting disallowance on depreciation.
Deputy Commissioner of Income Tax v. Nalco Water India Ltd -(2017) 49 CCH 0145 KolTrib (ITA No. 2111/Kol/2013)

Section 36

102. Where Assessing officer disallowed interest expenses on account of interest free loans advanced by the assessee, the Tribunal held that if the assessee was having its own interest free surplus funds and such funds were utilised as interest free advances even for non-business purpose, there could not be any disallowance of interest paid on interest bearing loans where

such loans were used for the purpose of business or profession. Accordingly, the Tribunal upheld CIT(A)'s order deleting the disallowance and dismissed appeal of the Revenue.
Deputy Commissioner of Income Tax v Escort Heart Institute & Research Centre ltd - (2017) 49 CCH 0175 DelTrib (ITA No. 6674/Del/2013)

Section 37

103. Where the assessee (partner) had borrowed funds and provided the same as interest free advance to the partnership firm, the Tribunal confirmed the disallowance of interest on borrowed funds in the hands of the assessee-partner to the extent relatable to share of profit derived from firm as the same was exempt u/s 10(2A), however remuneration and interest from firm was taxable as business income in the hands of assessee and therefore, interest in this regard could not be disallowed. Accordingly, it directed the assessing officer to recompute disallowance to the extent relatable to share of profit from firm.
Vineet Maini [TS-140-ITAT-2017(DEL)] (ITA No. 5240/Del/2016)

104. The Tribunal held that the manufacturing, selling and administrative expenses claimed by the assessee could not be allowed as business expenses as they were not incurred wholly and exclusively for purpose of business of assessee as there was no business carried on by assessee during previous year and there was also no possibility of carrying on business by assessee in near distant visible future keeping in view the severe and serious disability imposed by actions of secured lenders under SARFESI Act. Depreciation claimed by assessee was also not allowable as entire block of asset was not put to use by assessee. However, expenses like auditor fees, ROC fee etc. incurred by the assessee company were to be allowed as the said expenses were incurred for meeting with statutory compliances and obligations as imposed by law. Accordingly, order of the CIT(A) was set aside and the assessment order of the A.O. was confirmed subject to allowability of audit fee, ROC fee and other expenses incurred for undertaking and meeting statutory compliances.
Deputy Commissioner of Income Tax v. Ashik Wollen Mills Ltd - (2017) 49 CCH 0151 MumTrib (ITA No. 03/Mum/2014)

105. Where the assessee failed to furnish bills and vouchers in support of the expenses claimed on account of oil & fuel and repair & maintenance and most of the expenses were made in cash and assessee also could not bring any material on record to show that how the disallowance was excessive and where CIT(A) held that no credible explanation could be submitted for substantial increase of expenses in the face of drastic fall of turnover, the Tribunal held that the assessee failed to establish the correctness and genuineness of transaction in respect of expenses and thus upheld order of CIT(A) disallowing the said expenses.
Rajendra Kumar Saha v Income Tax Officer - (2017) 49 CCH 0150 Cuttack Trib (ITA No. 161/CTK/2015)

106. Assessee entered into an agreement for export of groundnuts with one Alimenta. Subsequently a dispute arose between the parties and an Award was passed in favour of Alimenta wherein the Court held that Alimenta would be entitled to interest from date of award till date of payment. The said interest was claimed as deduction by the assessee while claim of damages and interest thereon was also disputed by the assessee in the court of law, the Court held that a statutory liability is said to be incurred on the mere issuance of a notice of demand and the fact that the assessee may have raised a dispute against such a demand "did not ruin the incurring of liability". Also it could not be said that merely because there was a stay granted by the division bench of the court, order of the single judge imposing payment of interest had been wiped out from existence. Accordingly, order of the Tribunal was set aside and appeal of the assessee was allowed.
National Agricultural Cooperative Marketing Federation of India Ltd v. Commissioner of Income Tax [(2017) 98 CCH 0154 DelHC] (ITA No. 161/2016)

107. Where lease compensation charges claimed by the assessee u/s 37(1) were treated as capital expenditure by the AO, the Court held that while a new asset was acquired, it was for the purpose of the expansion of the existing business of the assessee and not for the development of a new line of business and thus the charges paid were consequently allowable u/s 37 of the Act being wholly revenue in nature. The Court, accordingly, upheld the order of Tribunal in favour of the assessee.
Commissioner of Income Tax v. Alankar Business Corporation Ltd - (2017) 98 CCH 0160 ChenHC (TCA No. 2695 of 2016)

Section 40A(2)

108. The Court reversing the Tribunal's order, deleted disallowance u/s 40A(2) with respect to professional remuneration paid by assessee-company to its Vice President (Marketing) who was a related party u/s 40A(2)(b) of the Act. The Court held that Tribunal failed to consider the reasonableness of the expenditure in relation to the prudent business practice from a fair and reasonable point of view. The Revenue without benchmarking VPs expertise with any other consultant proceeded on the assumption that the VP could not have performed multiple tasks for more than one concern. Such a stereotyped notion could not be justified in today's business world where consultants perform different tasks for several business entities.
Sigma Corporation India Ltd [TS-145-HC-2017(DEL)] (ITA No. 795/2016)

Section 14A

109. The Tribunal upheld deletion of Sec 14A disallowance in case of assessee (engaged in providing investment research advisory support, consultancy services to group companies). Noting that during relevant AYs assessee made strategic investments in group companies and no exempt income was earned on such investment and investments were made out of owned funds and there was no borrowing by assessee, the Tribunal held that as the assessee did not earn any tax free income, Sec. 14A was not applicable. Further, it noted that no administrative expenses were claimed as deduction in computation of total income and moreover the administrative and support expenses incurred on behalf of the group companies were recovered from them at cost and thus there was no question of any disallowance u/s 14A of the Act. Appeal of the Revenue was, accordingly, dismissed.
Morgan Stanley India Securities Pvt Ltd [TS-153-ITAT-2017(Mum)] - (ITA No. 114/Mum/2013)

Chapter VIA

110. Where assessee challenged the validity of Section 80A(5) and the fourth Proviso to Sec 10B(1) as violative of Article 14 of the Constitution , the Court held that Article 14 permits reasonable classification on fulfilment of two factors: (a) that the classification must be found on intelligible differentia which distinguishes persons grouped together from others who are left out of the group, and (b) that differentia must have a reasonable connection with the object sought to be achieved. The objective behind insertion of the impugned provisions was to defeat multiple claims of deductions and to ensure better tax compliance. It acknowledged the existence of persons owning 100% EOUs and seeked to limit their time to claim deductions under the Act. Further the parliament acted within its power to differentiate between a return of income filed under Section 139(1) and a belated return filed under Section 139(4) for the purposes of deductions claimed Section 10B(1). Thus there was no violation of Article 14 of the Constitution and accordingly, order of CIT(A) was upheld and writ petition of the assessee was dismissed.
Nath Brothers Exim International Ltd v Union of India - [2017] 80 taxmann.com 327 (Delhi) (WP(C) 12073 of 2015)

d. ***Income from Capital Gains***

111. Where Assessee converted the stock-in-trade of shares into investments and sold the same at a later stage, the Court held that profit arising from such sale of shares was deemed to be capital gains and not business income, and since the shares were held as long term capital asset, profit arising from such sale had to be exempt from tax u/s 10(38) of the Act. The appeal was, accordingly, disposed of in favour of the asssessee.
Deeplok Financial Services Ltd. V. Commissioner of Income Tax [2017] 80 taxmann.com 51 (Calcutta) (ITA No. 1 of 2017)

112. The Apex Court held that where assessee-company had sold its entire running business with all assets and liabilities in one go, it was a slump sale of a 'long term capital asset' and should be taxed accordingly. It rejected the revenue's stand of treating the gains as short term capital gain on transfer of depreciable assets u/s 50(2) and clarified that sec 50(2) would apply to a case where the assessee transfers one or more block of assets which he was using in running of his business and not when the assessee sold his entire business as a running concern. The appeal of the revenue was, accordingly, dismissed.
Commissioner of Income Tax v. Equinox Solution (P.) Ltd - [2017] 80 taxmann.com 277 (SC) (CA No. 4399 of 2010)

113. The Court confirmed Tribunal's order holding that value of broken bottles should not be reduced from written down value while computing short term capital gains u/s 50 of the Act (relating to depreciable assets) arising from sale of bottles, pursuant to transfer of assessee's entire soft drinks and beverage undertaking as the assessee had accounted for breakages and though the realization from the sale of broken bottles was offered to tax, loss from breakages were not claimed in computation of income.
Commissioner of Income Tax v. Alankar Business Corporation Ltd - (2017) 98 CCH 0160 ChenHC (TCA No. 2695 of 2016)

e. ***Assessment / Re-assessment / Revision / Search***

Assessment

114. Though Notice u/s 142(1) was issued and sent to the assessee , upon no reply being received, the Assessing officer completed the assessment proceedings exparte without sending notice u/s 143(2) of the Act to the assessee either on the address mentioned in the return of income or the address mentioned on the assessment order. The Tribunal held that the AO failed to issue notice u/s 143(2) which was mandatory and failed to comply with procedure laid down in section 143(2), during the entire assessment proceedings and consequently the assessment order in dispute was invalid, void ab intio, against the provisions of the law and not sustainable in the eyes of law. Accordingly, the Tribunal canceled the same by accepting the cross objection filed by the assessee and dismissed the appeal of the Revenue.
Assistant Commissioner of Income Tax & Anr vs. Ravnet Solutions Pvt Ltd & Anr - (2017) 49 CCH 0156 DelTrib (ITA No. 4889/Del/2011)

115. Where Assessee objected that A.O had not stated that accounts were being rejected u/s 145(2) of the Act, and that consequently the Tribunal was not justified in holding rejection u/s 145(2), the Court held that it was not mere mention of the provision but existence of substance of the intention deducible from reading the order which would determine the position of the accounts. Since there was a clear observation by the AO that showed that he was not satisfied that the accounts were complete and correct, assessee's appeal was rejected. Further, where assessee claimed exemption u/s 80HH & 80I of the Act, the Court held that in view of admission on part of assessee that it could not quantify actual amount of expenditure attributable to the new unit, wrong computation of profit of new unit was also evident, hence assessee could not have claimed deduction for the amount it had not correctly computed. Further, where assessee claimed deduction on account of commission paid to OECC, the Court held that it was an admitted position that such deduction was neither claimed by OECC nor paid by assessee and

hence the AO was correct in finding the amount as ingenuine, fictitious and inflated. Accordingly, appeal of the assessee was dismissed on all grounds.
Ema India Limited v. Deputy Commissioner of Income Tax & Ors - (2017) 98 CCH 0164 AllHC (ITA Nos. 481&482 of 2005, 694 of 2017, 258 of 2016)

Reassessment

116. Where re-assessment proceedings were initiated against the assessee and the assessee contended that notice u/s 148 was invalid as it was issued during pendency of proceedings before Tribunal (Banglore) and all issues raised were similar to original proceedings, the Tribunal observed that the current issue of undisclosed investment in land was entirely new based on survey conducted u/s 133A and was not subject matter of appeal. However it quashed the reassessment on the grounds that assessee's objection against issuance of notice u/s 148 was not dealt with by the AO, there was no nexus between AO's finding and the material bought into notice and that section 147/148 was not meant for reopening an already concluded assessment.
As regards the appeal for the subsequent Assessment Year, the Tribunal quashed the best judgement assessment u/s 144 by holding that since return was filed beyond the belated return filing due date, return was to be treated as 'invalid' and the AO could only issue notice u/s 148 based on information he had in order to complete the assessment.
Sri Jaswanth Kumar Kothari [TS-144-ITAT-2017 (Bang)] (ITA Nos. 788 & 1027/Bang/2013)

117. The Tribunal upheld order of CIT(A) and dismissed appeal of the assessee challenging the legality and validity of re-opening of assessment u/s 147 of the Act. The Tribunal notes that the Assessing officer had received information from DGIT(Inv), which was based on information received from Sales Tax Department which reflected that the assessee was beneficiary of bogus accommodation entry from 28 hawala dealers. It held that it was a tangible and material information sufficient for the purposes of re-opening of the assessment. Further as the said re-opening was done by the Assessing officer within four years from the end of the assessment year and no scrutiny assessment u/s 143(3) r.w.s. 143(2) of Act was framed originally by Revenue, first proviso to Section 147 of the Act was not applicable. Accordingly, the Tribunal held that re-opening of the assessment by the Assessing officer u/s 147 was valid and legal.
Ratnagiri Stainless Pvt Ltd v. Income Tax Officer - (2017) 49 CCH 0142 MumTrib (ITA No. 4463/Mum/2016)

118. Despite specific objection raised by the assessee-petitioner to the reopening of assessment u/s 147 of the Act, the assessing officer failed to pass a speaking order disposing those objections. Consequently, assessee filed a writ petition and contended that the impunged order was passed just one day prior to the last date for passing such assessment, as required under Section 153(2) of the Act and that the Court at any event could not extend the time period by giving an opportunity to the respondent to further reassess the income of the petitioner. The Court held that where the AO had passed the order of assessment within the prescribed period of limitation and thereafter, if such order was put to challenge before the Court of law and consequently, was set aside on some reason, which in the opinion of the Court was a curable defect, it was always open for the Court to remit the matter back to the AO for passing a fresh order of assessment after curing those defects, even though time prescribed under statute got expired by that time. Accordingly, the impugned order was set aside and the matter was remitted back to the AO to pass a speaking order on the objections raised by the petitioner, after giving an opportunity of hearing to them.
Home Finders Housing Limited v. Income Tax Officer - (2017) 98 CCH 0136 ChenHC (WP No. 1019 of 2017)

119. The assessee filed a writ petition challenging order u/s 147 of the Act passed by the AO, on the ground that the impugned order proceeded to tax sums received in form of share application amount, which was transferred to "forfeiture of share account", under head income from "profits and gains of business/profession", whereas, notice u/s 148 was issued on a different ground, which, ultimately, did not form part of impugned order. The Court held that section 147 of the Act

empowered an Assessing Officer to reopen the assessment, if, AO had reason to believe, that any income chargeable to tax has escaped assessment for the relevant year, "and also bring to tax", any other income, which may attract assessment, though, it was brought to AO's notice, subsequently, albeit, in the course of the reassessment proceedings. However, the purported income discovered subsequently, could be brought to tax, only, if the escaped income, which caused, in the first instance, the issuance of notice under Section 148 of the Act, was assessed to tax. Accordingly, the impugned order was set aside.
Martech Peripherals Pvt Ltd v. Deputy Commissioner of Income Tax & Anr - (2017) 98 CCH 0137 ChenHC (WP No. 10710 of 2014)

120. The Tribunal held that the initiation of the re-assessment proceedings by issuance of notice u/s 148 beyond 4 years, without recording reasons for reopening and without recording a finding that the escapement of income was due to the failure of the assessee to disclose fully and truly all material facts, was void ab initio as recording of the failure on part of the assessee was a condition precedent for initiation of proceedings u/s 147 of the Act. The assessee's appeal was, accordingly, allowed.
Kushal Kumar Kankaria v. Deputy Commissioner of Income Tax - (2017) 49 CCH 0148 HydTrib (ITA No. 134/HydTrib)

Revision

121. Where inquiry in respect of the requirement of disallowance of interest under section 14A r.w. rule 8D of the Rules was conducted by the AO in the assessment proceedings and he took a possible view after application of mind that no disallowance was called for on interest, ostensibly in respect of rule 8D(2)(ii) of the Rules and that disallowance was called for under rule 8D(2)(iii) of the Rules, the Tribunal held that mere fact that the CIT was not in agreement with the view adopted by the AO and had a different opinion on the same, would not render the order of assessment erroneous and prejudicial to the interest of Revenue. Thus CIT exceeded his jurisdiction u/s 263 of the Act in this case. Accordingly, order of CIT was set aside and appeal of the assessee was allowed.
Future Ideas Co. Ltd v. Principal Commissioner of Income Tax - (2017) 49 CCH 0157 MumTrib (ITA No. 3062/Mum/2016)

Search / Survey

122. Where upon survey u/s 133A, no incriminating material of whatsoever nature was found at the business premises of the appellant in the form of excess cash, evidence of unaccounted borrowings, investments etc. and the statements taken u/s.133A of the partner were later on retracted and the only evidence Revenue was harping upon was the duplicate set of books of accounts on which most of the entries, as admitted by the Accountant and the Consultant had been modified / re-arranged in order to prepare projected financial data to be provided to banks for getting sanctioned higher working capital credit limits, the Tribunal held that it was a well established judicial precedent that statement recorded u/s.133A of the Act had no evidentiary value for the reason that the Officer was not authorized to administer oath and take any sworn evidence which alone had evidentiary value as contemplated under law and thus in view of totality of facts, the Tribunal found no reason to interfere with the order of CIT(A) who had deleted the impugned addition u/s.68 of the Act and accordingly, dismissed the appeal of the Revenue.
Assistant Commissioner of Income Tax v. Shree Krishna Developers - (2017) 49 CCH 0143 AhdTrib (ITA Nos, 1177 & 1231/Ahd/2011)

123. Where the Assessing Officer had completed the assessment u/s. 153C of the Act and made the addition in dispute without any incriminating material found during the search and seizure operation and the addition was purely based on the material already available on record and where the perusal of the assessment order undisputedly indicated that no reference whatsoever

had been made to any material found/ seized during the course of search, the Tribunal held that completed assessments could be interfered with by the AO while making the assessment under Section 153 only on the basis of some incriminating material unearthed during the course of search and thus addition in this case was not sustainable in the eyes of law. Accordingly, the Tribunal deleted the addition and allowed assessee's appeal.
Global Realty Creations Ltd & Ors v. Deputy Commissioner of Income Tax
(2017) 49 CCH 0147 DelTrib

f. ***Withholding tax***

124. Where the assessee was aware of the fact that its employees had visited foreign countries by availing LTC/LTF concession and hence were not entitled for exemption of reimbursement of LTC u/s 10(5) of the Act (as section 10(5) exemption is available only in case of travelling within India), the Tribunal held that the assessee was under an obligation to deduct tax at source treating such an amount as not exempt and since the assessee failed to enforce its duty to deduct tax at source as envisaged u/s 192, it was an 'assessee in default' u/s 201(1) of the Act. The appeal of the assessee-bank was, accordingly, dismissed.
Syndicate Bank v. Assistant Commissioner of Income Tax (TDS) - [2017] 80 taxmann.com 179 (Bangalore-Trib.) (ITA Nos. 1398 to 1403 and 1435 to 1477 (Bang.) of 2016)

125. Where the assessee bank was held as assessee in default u/s 201(1) & 201(1A) of the Act due to late filing of TDS statements and failure to furnish necessary forms, the Tribunal held that assessee being a public sector bank , its TDS was automatically deducted as per provisions of the Act by a centralized core banking system and though there were some technical issues like non submission of declaration forms within due date, same could not be a valid ground for treating assessee as an assessee-in-default u/s 201(1), particularly when assessee had explained reasons for such mistakes and furnished all details and requested for one more opportunity to explain the case. The Tribunal, accordingly, remitted the matter back to the file of the Assessing officer.
State Bank of India v. Income-Tax Officer (TDS) - [2017] 80 taxmann.com 195 (Vishakhapatnam-Trib.) (ITA No. 444 (Vizag.) of 2016)

g. ***Others***

Appeals

126. Where the appellant assessee sought to raise an additional ground at the time of the hearing of the appeal (relating to claim u/s 80-IA), the Court held that an additional ground could be urged by the appellant assessee for the first time in appeal only if it was supported by evidence already on record for the year under consideration and the same was not on record in this case and the fact that claim had been allowed by the AO in a subsequent year was irrelevant. Besides, in the present case the additional ground was not a pure question of law, but was depended on the satisfaction of the authority as to the facts existing in the subject assessment year for allowing the benefit of Section 80IA of the Act. Accordingly, appeal was disposed off in favour of the Revenue.
Ultratech Cement Ltd vs. Additional Commissioner of Income Tax - (2017) 98 CCH 0157 MumHC (ITA No. 1060 of 2014)

127. Where CIT passed an order u/s 263 of the Act directing enquiry to be conducted in relation to raising of share capital at premium to the extent of Rs.21 Crores by the assessee-company, the Court held that the Commissioner had only outlined the manner in which the enquiry was to be carried out and that there was no specific direction in the order stipulating in what way the case was to be decided. The Assessing Officer had been directed to pass a speaking order after providing reasonable opportunity to the assessee and upon verifying the source of share capital including the share premium of all the subscribers so as to ascertain the true nature of

transaction. The Commissioner's order gave a guideline on how the Assessing Officer shall proceed with the enquiry and did not contain a mandate in which manner the assessing officer shall pass the order. Further, the court rejected the contention of the assessee that since the Board itself did not have the jurisdiction u/s 119 of the Act to pass an order of that nature, it had to be inferred that the Commissioner also lacked jurisdiction to direct the enquiry as contained in his order. It held that the said provision dealt with power and jurisdiction of the Board to issue instruction on subordinate authorities and did not relate to the power and jurisdiction of the Commissioner. The Stay petition and appeal of the assessee was, accordingly, dismissed.
Aim Fincon Pvt Ltd v. Commissioner of Income Tax - (2017) 98 CCH 0159 KolHC (GA No. 698 of 2016)

Income from Charitable Trust

128. The Tribunal granted exemption u/s 11 to the assessee (a Christian Religious Society) and held that publication and distribution of Christian literature & religious books amounted to a religious activity eligible for exemption u/s 11. It clarified that the dis-entitling provision u/s. 13(1)(b) (which denies Sec. 11 exemption to a charitable trust which benefits a particular religious community or caste) was not attracted as it talks about 'charitable institution' and not religious institutions and that a 'religious purpose' had wider meaning than 'charitable purpose'.
The Christian Literature Society [TS-163-ITAT-2017 (CHNY)]

Penalty

129. Where addition of Share Capital was made by the AO, as the name of the assessee company did not appear either in the 'schedule of investments' or in the loans and advances' of annual accounts of the shareholder (i.e the company to whom shares were issued by the assessee-compnay) and consequently penalty proceedings u/s 271(1)(c) were initiated for filing inaccurate particulars of income and penalty was imposed on the assessee-company, the Tribunal held that it could not be said that assessee had withheld any relevant information regarding receipts and income from AO as the amounts added back by AO were amounts disclosed by the assessee itself and the Apex Court had authoritatively laid down that making of claim by the assessee which was not sustainable would not tantamount to furnishing inaccurate particulars for the purpose of imposing penalty u/s 271(1)(c). Accordingly, the issue was restored to the file of the AO.
Gahoi Chemicals Pvt Ltd v Deputy Commissioner of Income Tax - (2017) 49 CCH 0178 DelTrib (ITA No. 1212, 1213/Del/2012)

130. Addition was made by the AO only on account of dispute pertaining to the value of closing stock of zip fasteners. The AO had taken the value at Rs.59.48 per meter whereas the assessee had offered Rs.33.56 per meter and the CIT(A) finally valued it at Rs.37.96 per meter. Subsequently penalty u/s 271(1)(c) was levied. The Tribunal held that no penalty u/s 271(1)(c) could be imposed with reference to additions made on an estimation basis where assessee had not furnished inaccurate particulars of income and there were no findings of the AO or CIT(A) that the details furnished by the assessee in his return were found to be erroneous or false. Accordingly, the Tribunal deleted the penalty in dispute and quashed the order of CIT(A), allowing appeal filed by the assessee.
Shruti Fastners Ltd vs. Deputy Commissioner of Income Tax - (2017) 49 CCH 0183 DelTrib (ITA No. 5374/Del/2012)

Method of Accounting

131. Where method of accounting followed by the Assessee was "Project Completion Method" as against "Percentage of Completion Method" reflected in the orders passed by the Assessing Officer, the Court held that the mere fact that there does exist a method of accounting for profits of each year was no justification for rejecting an equally recognized method of accounting whereby the profits of the project were determined when the whole project was completed. The

Assessing Officer having not drawn any finding that the accounts of assessee suffered from any defect nor that from the method of accounting followed by assessee, true/correct profits of assessee could not be deduced and the assessee having been following the "completed project" method consistently, which being recognized method of accounting, the assessee's method of accounting could not be rejected. The Court, accordingly, upheld order of the Tribunal and dismissed Rrevenue's appeal.
Principal Commissioner of Income Tax v. Santha Build-Tech India Pvt. Ltd - (2017) 98 CCH 0143 ChenHC (TCA Nos. 161 to 164 of 2017)

Set off and carry forward

132. The Tribunal allowed set-off of foreign exchange derivative loss against normal business profits of assessee-company and rejected Revenue's stand that since the contract was settled otherwise than through delivery, Sec. 43(5) was attracted, and accordingly loss was to be treated as speculative loss, which could not be set off against normal business income. The Tribunal noting that all the derivative transactions were specific hedging transactions against assessee's foreign exchange transactions and were integral part of assessee's business, held that Explanation 2 to Sec. 28, clarified that it was only when speculative transactions are of such a nature as to constitute business on standalone basis, the income and losses from such transactions were to be treated as distinct and separate from any other normal business and that speculative transactions which were incidental to assessee's main business could not be treated as speculation loss. It, accordingly, directed the AO to delete the disallowance and allow deduction u/s 37(1).
Soma Textiles & Industries Ltd [TS-151-ITAT-2017 (Ahd)] (ITA No. 472/Ahd/2014)

133. Where assessee suffered speculation loss and carried forward the same to succeeding A.Y for setting off against speculation profit and AO denied claim of assessee for impunged loss on ground that no prudent businessman would indulge in such loss, the Tribunal observed that the Revenue had not pointed out any defect in documents for purchase and sale of shares and the assessee was amalgamated in subsequent year and the impunged loss was not carried forward and thus had lapsed. Further, on similar facts, the Apex Court in Union of India v. Azadi Bachao Andolan had held that transaction of sale of shares could not be considered as sham or device to avoid tax. In view of the aforesaid facts the Tribunal reversed the order of CIT(A) and allowed the claim of the assessee.
Sudera Services Pvt Ltd v. Income Tax Officer - (2017) 49 CCH 0176 KolTrib (ITA No. 724/Kol/2015)

Unexplained income / expenses / investments

134. Where the assessee had failed to discharge onus cast upon it under section 68 of the Act, to prove the creditworthiness and genuineness of the cash credits (i.e share capital and share premium) and accordingly the assessing officer made an addition, the Tribunal observed that though the assessee had submitted the basic details of parties, it was apparent that none of them were shown to be creditworthy of depositing the sums in cash with the assessee and that how CIT (A) got satisfied with the existence of cash in the books of the companies when they are known entry providers was unknown. Also there was not a single word in the order of CIT (A) about the source of such cash and reasons for depositing them with the assessee at huge premium when they did not have any other sources of income. Tribunal not agreeing with the casual manner in which CIT(A) dealt with the whole issue when the nature of transactions, shareholders creditworthiness and genuineness of the share issued were of dubious nature, held that CIT(A) should have looked at the totality of the facts instead of deleting the addition on flimsy grounds and accordingly set aside the whole matter back to the file of the CIT (A).
Income Tax Officer v. Onflow Agro Pvt Ltd - (2017) 49 CCH 0152 DelTrib (ITA No. 5458/Del/2012)

Miscellaneous

135. Where the Assessee failed to pay full amount of 25% of tax payable on undisclosed income declared under the Income Declaration Scheme, 2016 on or before 30-11-2016 due to demonetization of Rs. 500 and Rs.1000 currency notes on 08-11-2016 and requested the Revenue to accept the balance amount of tax payable after the said due date, the Court held that there was no provision under the scheme which permitted the Authorities to accept part payment of tax after the specified date had passed. It further observed that the Scheme was optional, date of payment was known at the time of declaration and above all it was a facility made available to the parties who had failed to disclose their income under the Income Tax Act, 1961, to come clean. Hence, there was no reason for exercising extraordinary writ jurisdiction in these facts and accordingly assessee's writ was dismissed.
Nandu Atmaram Wajekar [TS-141-HC-2017 (BOM)] (WP No. 3578 of 2017)

136. The Court held that the Income-tax Department cannot reject an application for compounding of offences u/s 279(2) of the Act, either on the ground of limitation or on the ground that such application was not accompanied by compounding fees as prescribed by CBDT circular. The Court notes that Revenue levied 'compounding charges' of nearly Rs.70 lakhs for considering assessee's application and subsequently rejected it on ground of delayed filing of application. It held that the CBDT circular did not stipulate a limitation period and there was nothing in Sec. 279 or the Explanation thereunder to permit CBDT to prescribe such an onerous and irrational procedure of insisting an upfront compounding fee even before considering the compounding application on merits. Accordingly, the Court set aside CCIT's order and directed the Revenue to decide the application afresh on merits.
Vikram Singh [TS-148-HC-2017 (DEL)] (WP(C) 6825/2016)