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

(Pronounced in August 2016)

By Sunil Moti Lala, Advocate

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I. Transfer Pricing

a. ***International transactions / Specified Domestic Transactions / Associated Enterprise***

1. The Court dismissed assessee's petition challenging AO's reference to TPO for AY 2013-14 and held that where there was prima facie material suggesting that the directors of the Petitioner company, in aggregate, held more than 20% of the shares in voting power in Writers & Publishers Pvt Ltd and the aggregate of transactions entered into by the assessee (expense, loan and interest, etc.) with such company exceeded Rs. 5 crores, the transfer pricing procedure adopted by the TPO was to be allowed. It rejected the contention of the assessee that since the individual shareholding of directors and their relatives in Writers & Publishers Pvt Ltd was less than 20 percent alleged AE did not constitute a related party under section 40A(2)(b) because the Petitioner company by itself held an aggregate shareholding of more than 20 percent. However the Court kept open legal issues relating to consideration of aggregate shareholding for applicability of Section 40A(2)(b) and whether AO can subsequently invoke basis of Section 40A(2)(b)
D B Corp Ltd vs DCIT [TS-607-HC-2016(GUJ)-TP] SPECIAL CIVIL APPLICATION NO. 5035 of 2016

2. The Tribunal partially rejected the miscellaneous application filed by the assessee, urging the Tribunal to rectify its order directing the assessee to furnish further comparables for adoption of CUP for benchmarking the cost to cost expenses reimbursement made by the assessee by holding that the said directions did not stand in the way of the assessee making a claim before the AO that one comparable would be sufficient to determine ALP of its International transactions. b). the direction passed in the aforesaid order, directing the use of multiple year data and adopting weighted average data of comparables was contrary to the statutory provisions and therefore amounted to a mistake apparent from record and was to be deleted.
Lee Hours Pomeroy Architects v DCIT – TS-644-ITAT-2016 (Kol) – TP I.T.A No. 382/Kol/2015

3. The Court set aside the order passed by the AO making a domestic TP assessment reference to the TPO stating that donations made by the assessee to a charitable institution were specified domestic transactions as the definition of specified domestic transaction contained in Section 92BA of the Act includes any transaction referred to 80A of the Act, on the ground that the AO had not considered the submissions filed by the assessee and had not applied his mind to the objections contained therein and failed to substantiate how exactly the said transaction fell under the definition of specified domestic transaction under section 92BA of the Act.
DSP Adiko Holdings Pvt Ltd v DCIT – TS-622-HC-2016 (Bom) – TP WRIT PETITION NO.1424 OF 2016 WITH WRIT PETITION NO.1573 OF 2016

4. The Tribunal remitted the matter to the file of the AO with the direction to determine whether the non-resident with whom the assessee had entered into international transactions was an AE of the assessee since the assessee had less than 26 percent interest in the said company and was not holding any controlling interest in management and finance and the DRP had incorrectly presumed that since the assessee was pricing the sale of material, it had controlling interest over the said non-resident.
Dun & Bradstreet Technologies & Data Services Pvt Ltd v ACIT – TS-524-ITAT-2016 (Chny) – TP I.T.A.No.760/Mds/2014

b. ***Most Appropriate Method***

<u>Comparable Uncontrolled Price Method</u>

5. Where the Assessee paid interest to its AEs @ 12% coupon rate on the CCDs and applied CUP method for benchmarking the same, but the TPO / DRP treated the CCDs as External Commercial Borrowing ("ECB") and made TP adjustment using 6 months LIBOR + 300 bps as

base and the Assessee contended that as per FIPB, RBI and FEMA guidelines CCDs are considered as FDI and not ECB, and also submitted analysis (as part of additional evidence) based on the BSE database which indicated that average coupon rate of comparable instruments issued during the year was 14.50% for Real Estate Industry and 12.39% for all instruments,the Tribunal remitted the issue to the AO/TPO to consider the additional evidence since the same went to the root of the matter and was very much relevant to resolve the issue as to whether or not the borrowing was an External Commercial Borrowing.
Brahma Center Development Pvt Ltd vs ITO [TS-522-ITAT-2016(DEL)-TP] ITA No. 373/Del/2016

6. The Tribunal deleted TP adjustment in respect of export of PCBs by assessee to its AE in Austria for further sale in Europe as distributor for AY 2011-12 on the ground that internal CUP should be preferred over external TNMM & the prices at which the assesse sold goods to its AE were equal to the prices at which they were sold by the AE to independent customers in Europe. Though the Tribunal rejected assessee's selection of foreign AE as tested party as its accounts were based on Austria GAAP and also rejected Revenue's adoption of entity level TNMM for benchmarking profit margin earned by the assesse it deleted the addition by adopting internal CUP.
AT & S India Pvt Ltd v DCIT [TS-539-ITAT-2016(Kol)-TP] ITA No.179/Kol/2016

7. The Tribunal held that where the assessee had acquired shares of a JV from its AE and immediately sold the shares to Jindal Group, the said income arising out of the transfer was to be treated as business income and not capital gains and held that the TPO was justified in applying the CUP method to benchmark the purchase of the said equity shares by adopting the per share purchase price paid by independent third parties and comparing the same with the price paid by the assessee. Since the price paid per share by the assessee was higher than the price paid per share by independent third parties, the TPO was justified in taking the lower price as the arm's length price and making consequent TP adjustments by treating the investment made by the assessee as excessive.
GDF Suc TSA Energy India Pvt Ltd v ACIT – TS-537-ITAT-2016 (Bang) – TP ITA.984 & 1030/Bang/2010

8. The Court held that the Tribunal was correct in remanding the issue of determination of ALP of the 12 international transactions undertaken by the assessee during the relevant year since, the assessee had adopted both the CUP method as well as TNMM to justify the ALP of the transactions but the TPO had discarded CUP for all the transactions without providing any cogent reasons and where one method for determination of ALP was being preferred over another, the selection of that method was to be justified with proper reasoning.
Honda Motorcyle& Scooters India Pvt Ltd v ACIT – TS-660-HC-2016 (P&H) – TP I. T. A. No. 345 of 2015

<u>Transactional Net Margin Method</u>

9. Where the TPO rejected the assessee's TNMM (based on cost plus 55% mark-up) to adopt the CUP method based on price agreed in supply agreement with another AE, pursuant to which he made an adjustment which was later deleted by the CIT(A), the Tribunal confirmed the deletion made by the CIT(A) on the ground that the price quoted in the assessee's supply agreement with overseas AE could not be adopted as 'comparable un-controlled transaction under CUP method.
ACIT v Bilag Industries Pvt Ltd – TS-603-ITAT-2016 (Ahd) – TP ITA Nos 1441 & 1670 /Ahd/2006 & 343/Ahd/2012

10. The Court held that where the assessee received a host of intra-group services from its AE via a consolidated agreement which were all intrinsically linked to the manufacturing activity of the assessee, the TPO was not justified in splitting up the agreement to determine the ALP of certain services separately on the ground that the services did not result in any benefit, while accepting the price of the other services.

Pr CIT v Avery Dennison (India) Pvt Ltd – TS-527-HC-2016 (Del) – TP ITA 386/2016 With ITA 392/2016

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

ITES Sector / Software Development Services

11. The Tribunal held that the assessee, engaged in providing software development and support services to its AE could not be compared to E Infochips Bangalore Ltd since the said company was engaged in providing both Software development services as well as ITES services and did not have segmental results, and therefore functionally different. Further, it held that Kals Information Systems Ltd, being engaged in development of software products as well as providing training facilities could not be considered as a comparable owing to the difference in functionality. Tata ElxsiLtd , engaged in complex activities such as product design services, innovation design engineering and visual computing was also excluded as comparable.
Oaktown Global Technology Services Centre (India) Pvt Ltd v ACIT – (2016) 47 CCH 0575 (HydTrib) ITA No. 434/Hyd/2015

12. The Tribunal held that while benchmarking the international transactions undertaken by the assessee, a software development service provider, comparables could not be excluded merely based on precedents and that comparability was to be judged every year based on the facts of that year. It held that Infosys Technologies Ltd, earning approximately 90 percent of its income from maintenance or enhancement of softwares could not be excluded merely because it was excluded in prior years. It however noted that the substantial brand value of the said company could be valid grounds to exclude it and therefore remitted the issue for determination. As regards Wipro, the Tribunal remanded the issue to the TPO and directed the assessee to furnish details demonstrating the ownership of brands in support of its plea that the said company was to be excluded since it incurred substantial expenditure on research and development.
Agnity India Technologies Pvt Ltd v DCIT – TS-573-ITAT-2016 (Del) – TP I.T.A .No.-6485/Del/2012

13. The Tribunal held that the assessee, providing ITES to its AE in the field of insurance could not be compared to a).companies earning substantial amounts from high end medical transcription services without segmental results b). companies providing high end engineering design services and c). companies having turnover of less than 1 crore since it failed to satisfy the turnover filter applied by the TPO himself.
Swiss Re Shared Services (India) P Ltd v ACIT – TS-598-ITAT-2016 (Bang) – TP - IT(TP)A.380/Bang/2016

14. The Court held that a comparable could not be excluded merely because it had a 0.55 percent deviation from the 75 percent export earnings filter applied by the TPO and held that there was nothing sacrosanct about the figure of 75 percent and noted that a deviation that did not affect the result was acceptable. Further, it held that companies having a different financial year ending could not be rejected as comparable if the data relating to the financial year in which the international transaction was entered into was directly available from the annual accounts of the comparable. Further, it held that where the assessee an ITES provider had a turnover of 59 crores, a company whose relevant segment had a turnover of 27.76 lacs could not be considered as comparable and it also excluded companies outsourcing a large portion of its activities.
Mercer Consulting (India) Pvt Ltd – TS-664-HC- 2016 (P&H) – TP Income Tax Appeal No. 101 of 2015

15. The Court declined to interfere with the Tribunal ruling on comparability analysis and held that Infosys BPO and Eclerx Services Ltd. (ESL) were not comparable with assessee company engaged in KPO services. The Court relying on its ruling in Rampgreen Solutions PvtLtd held

that while the Assesseewas catering to the capital and financial services markets, ESL worked in the area of sales, marketing and supporting financial services and that the financial profile of the two KPOs could not be said to be similar from the point of view of the type of businesses they were catering to.
PCIT vs Actis Global Services Pvt Ltd [TS-535-HC-2016(DEL)-TP] ITA 417/2016

Support Services

16. The Court held that where the Tribunal in the prior years for AY 2004-05 accepted the plea of the assessee that it was not into core R & D activities but actually into the provision of marketing support services which was also accepted by the AO in his remand report for the relevant year i.e. AY 2005-06 as well the DRP for AY 2007-08, the Tribunal was incorrect in concluding that the assessee was engaged in providing core R&D activities for the year under review.
Accordingly, it held that ITDC (a comparable selected by the assessee and affirmed by the DRP for AY 2007-08) was wrong excluded by the Tribunal on the ground of functional dissimilarity since the said company was also providing market support services akin to the assessee.
Honda (R&D) India Pvt Ltd v ACIT – TS-525-HC-2016 (Del) TP ITA 616/2015

17. The Court dismissed Revenue's appeal, and upheld Tribunal's exclusion of ICRA Online Ltd for assessee providing marketing support services to AE for AY 2007-08; Even though assesseehad initially included ICRA Online Ltd as a comparable in its TP-study and subsequently contended its exclusion during assessment proceedings on the basis of Director's Report which was not available when TP-study was carried out,the Court rejected the Revenue's contention that as per Rule 10D(4), information / document for TP-study should as far as possible be contemporaneous and should exist on the date specified in Sec 92 (f)(iv) and that fresh TP-study on the basis of the Director's Report of ICRA Online Ltd. could not be the basis of its exclusion by observing that the date specified in Sec 92(f)(iv) was the due date specified in Explanation 2 to Sec 139 of the Act i.e. November 30th of the AY and assessee's contention to exclude ICRA Online Ltd was based on Director's Report dated May 12, 2007 (before due-date), However, the Court admitted Revenue's appeal on the question whether ITAT was justified in directing inclusion of Machine Tools India Ltd. as a comparable
CIT v/s Haworth (India) Pvt Ltd. [TS-534-HC-2016(BOM)-TP] INCOME TAX APPEAL NO.233 OF 2014

Others

18. The Tribunal set aside the order of the AO with the direction that the TPO was to carry out a detailed FAR analysis in respect of the assessee's international transaction of providing ITES to its AE before embarking on the selection of comparable companies. It noted that the assessee's arguments for inclusion / exclusion of comparable companies arose solely on account of the fact that the foundational exercise of a proper FAR analysis of the assessee had not been done and also observed that while TNMM was robust enough to tolerate minor variation in the FAR analysis of comparables, the TPO was to conduct a FAR analysis on the basis of functions performed, assets available and risk assumed.
Copal Research India Pvt Ltd v DCIT – TS-624-ITAT-2016 (Del) – TP I.T.A .No.-7079/Del/2014 with I.T.A .No.-1113/Del/2016

19. The Tribunal held that the TPO was to be consistent in matters relating to selection of comparables and therefore if a comparable had been included or rejected in an earlier year, he was not entitled to take a different view in a later year if there was no change in circumstances.
Hyundai Rotem Company v ACIT – IT(TP) No 1772 / Del / 2015

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

20. The Tribunal held that where the assessee had received reimbursement of expenses incurred by it from its AE on a cost plus basis, for which it had incurred corresponding expenditure which was paid on its own account to its Indian-AEs and other independent units and not on behalf of its AE, the expenses incurred could not be treated as pass through costs and were to be included while computing the operating margin of the assessee.
Lason India Pvt Ltd [TS-488-ITAT-2016(CHNY)-TP] I.T.A.No.1026/Mds./2014

21. The Tribunal held that where the assessee had a fixed selling price of goods manufactured by it vis-à-vis its AE and the price of raw materials used by it for the manufacture of such goods increased extraordinarily, the assessee was entitled to an adjustment for such extraordinary cost of raw materials since the sale price being fixed, the margin of the assessee was bound to suffer, as opposed to the comparable companies who were not restricted by a fixed sale price.
ACIT v Summit India Water Treatment & Services Ltd – TS-655-ITAT-2016 (Ahd) – TP ITA. No: 377/AHD/2012

22. The Tribunal approved the assessee's stand of not allocating business development expenses to the AE segment of international transactions pertaining to technical support services based on the contention of the assessee that substantial business development expenditure and expenses incurred for securing independent contracts were incurred as an entrepreneur in the Non-AE segment. Further, it noted that the TPO had accepted the segmental break-up for the prior years and therefore applying the rule of consistency the same was to be accepted in the relevant year as well.
Stanley Consultants Pvt Ltd v DCIT – TS-610-ITAT-2016 (Del) – TP I.T.A. No.3336/Del/12

23. The Tribunal held that where losses on account foreign exchange arose during the normal course of business activities, the AO / TPO ought to have included the same as an operating item while computing the PLI of the assessee as well as the comparable companies.
Swiss Re Shared Services (India) P Ltd v ACIT – TS-598-ITAT-2016 (Bang) – TP - IT(TP)A.380/Bang/2016

e. ***Specific Transactions***

Advertisement, Marketing and Promotion expenses

24. The Tribunal remitted the issue of determination of ALP to the lower authorities to first determine the existence of an international transaction prior to making an adjustment on account of AMP expenses. It also directed the TPO to exclude from the ambit of AMP expenses, selling expenses directly incurred in connection with sales not leading to sale promotion.
LG Life Sciences India P Ltd v ACIT – (2016) 47 CCH 0551 (Del Trib) ITA No. 1818/Del/2015

25. The Court set aside the Tribunal order by holding that the Tribunal should decide the question regarding existence of international transaction involving advertisement, marketing and promotion ("AMP") expenses between assessee and its AE,instead of remanding the issue to any other authority for decision, where all the necessary material relevant to decide this issue is already on record. It further held that in case the question regarding existence of international transaction was answered by the Tribunal in the positive, the Tribunal should decide the further issues that arise in the appeal in accordance with law. It further, directed that in the eventuality that the first question is answered in the positive, it would be open to assessee to file further appeal before HC and raise relevant questions of law including relating to the jurisdiction and power of TPO to determine the existence of an international transaction even though it was not reported by assessee and also regarding the retrospective application of Sec 92CA(2B)
Daikin Airconditioning India Pvt Ltd v/s ACIT [TS-533-HC-2016(DEL)-TP] ITA 269/2016

Commission

26. The Tribunal held that the ALP of the commission expenses paid by the assessee, a joint venture between Venture, USA and Satyam India, to its promoter company could not be taken as Nil by the TPO by disallowing the payment under section 37(1) of the Act and that he ought to have determined the ALP of the transaction using one of the prescribed methods. Further, the Tribunal held that the TPO could not apply the CUP method without identifying any uncontrolled comparable transaction.
Satyam Venture Engineering Services Private Limited [TS-466-ITAT-2016(HYD)] 2004-05-1590/Hyd/2010; 2005-06-197/Hyd/2011; 2006-07- 354/Hyd/2011; 2007-08- 1905/Hyd/2011; 2008-09- 1138/Hyd/2013.

27. The Tribunal held that where the assessee had paid commission to its US AE at 10 percent and justified the same under the CUP method on the basis of similar commission paid (@ 8 percent) by the AE to unconnected parties who acted as selling agents, no addition could be sustained. Since the commission paid by the assessee to its AE was for services rendered in respect of sales in the US and the scope of services rendered by the AE was much wider than the scope of services rendered by the uncontrolled companies to whom the AE was making commission payments at the rate of 8 percent.
Paxar India Pvt Ltd v DCIT – TS-582-ITAT-2016 (Bang) – TP ITA No. 1788/B/2013

Loans / Receivables / Corporate Guarantee

28. The Court held that the TPO was incorrect in making a TP adjustment on account of corporate guarantee where in fact, the assessee did not furnish any corporate guarantee in favour of its AE. It noted that the assessee intended to provide guarantee to its AE by pledging shares for arranging a term loan from ICICI bank but could not proceed with doing so due to refusal of permission by the RBI. Accordingly, it held that there was no international transaction under section 92B.
Pr CIT v Adani Enterprises Ltd – TS-621-HC-2016 (Guj) - TP TAX APPEAL NO. 574 of 2016

29. The Tribunal rejected the TPO's ALP-determination of interest rate on ECB from AE, based on effective all in cost interest rate as per 'India's External Debt - Status Report - 2008'. It accepted the assessee's contention that the aforesaid rates were unadjusted industry averages which could not be treated as ALP. It also noted that the assessee's loan was based on EURIBOR, while the 3 comparables furnished by assessee had LIBOR based interest rates and since the assessee had not furnished all relevant data such as downloaded financials of the comparables, actual interest rates computed with reference to the interest burden and the loan outstanding for various periods, it remitted the matter back to TPO for fresh determination of ALP after assessee produces necessary evidence for finalization of comparables.
Winergy Drive Systems India Private Limited [TS-586-ITAT-2016(CHNY)-TP] I.T.A.No.1720/Mds/2014

30. The Tribunal held that the transaction of extending credit period to AEs was closely linked with the transaction of providing services to the AE and was not a separate transaction and therefore both transactions were to be aggregated for determination of ALP. It rejected the argument of the assessee that transaction of extending credit period to AEs could not be regarded as "international transaction" in the absence of any income arising therefrom was not acceptable and further held that the observations in Vodafone vs. UOI 368 ITR 1 (Bom) were in a different context.
Tally Solutions Pvt Ltd v ACIT – IT (TP) A No 1364 / Bang / 2011

Royalty / Management fees / Intra Group services

31. The Tribunal held that the RBI / FIPB approvals issued vis-à-vis royalty / technical know-how fee were not determinative of ALP and could not be considered as a valid CUP for benchmarking royalty payments to AEs for use of know-how, formulae and trademarks for the manufacture, packing, sale and distribution of 'Brylcreme'. It held that royalty was a separate international transaction and the onus to determine the ALP was on the assessee. It held that

the automatic route under which the FIPB / RBI approvals were granted were devised for ease of doing business and therefore could not be equated with the arm's length principle. Noting that the Revenue authorities had determined the ALP of the royalty paid at 1 percent (as opposed to the 5 percent made by the assessee), without properly appreciating the trademark agreement submitted by the assessee, it remitted the issue to the file of the AO and directed the assessee to benchmark royalty transactions with independent comparables.
Sara Lee TTK Ltd vs DCIT [TS-663-ITAT-2016(Mum)-TP] /ITA No.376/Mum/2012

32. The Tribunal held that where the assessee's AE had only charged salary and related costs of its employees toward the professional and management consultancy services provided to the assessee without any mark-up, the transfer pricing provisions would not apply to the payment made by the assessee since the expenses incurred by the assessee were paid to the third party employees of the AE and not to the AE itself. Further, noting that the assessee had achieved an increase in export turnover as well as gross margin, it concluded that the assessee benefited from the services rendered by the AE and therefore the TPO was incorrect in determining the ALP of the said transaction at Nil.
Knorr Bremse India Pvt Ltd – TS-661-ITAT-2016 (Del) – TP IT(TP)A No. 5886/Del/2012

33. The Court upheld the finding of the Tribunal that where no method under section 92C was applied to determine the ALP in respect of technical consultancy fee paid by the assessee to its AE and where no exercise was undertaken to benchmark the value of services received by the assessee no addition could be made on the basis that the assessee did not receive adequate benefit for the fee paid. Merely because the agreement entered into between the assessee and the AE provided for 12 categories of services out of which the assessee availed 3 services, the TPO was not correct in making an ad-hoc addition without carrying out any benchmarking exercise. It also upheld the finding of the Tribunal that the fee of Rs.1.57 crore was in respect of the assessee's right to avail and the AE's obligation to provide technical assistance in any of the 12 services enlisted in the agreement.
CIT v Merck Ltd – TS-608-HC-2016 (Bom) - TP INCOME TAX APPEAL NO. 272 OF 2014

f. ***Others***

34. The Tribunal deleted penalty imposed under section 271(1)(c) of the Act with respect to the TP adjustment confirmed by the Tribunal on procurement support services provided to AE and held that penalty could not be imposed merely because the addition accepted by the assessee with a view to buy peace and avoid protracted litigation and also noted that the assessee did not conduct its affairs with malafide intent
Gap International Sourcing India Pvt Ltd v DCIT – TS-611-ITAT-2016 (Del) – TP I.T.A .No.-6742 /Del/2013

35. The Tribunal upheld the CIT(A)'s deletion of concealment penalty u/s 271(1)(c) in relation to TP-adjustment on assessee's payment towards travel and salary costs of specialized technical personnel providing technical support during AY 2006-07 noting that in the quantum proceedings ITAT had confirmed TP-adjustment observing that assessee could not furnish any material or evidence with regard to rendering of services whereas the assessee had filed a debit note evidencing the services received. The Tribunal also accepted the assessee's contention that in quantum proceedings, ITAT had proceeded on an erroneous footing that the disallowance may have been made u/s 40(a)(i) or u/s 37, noting that the assessee had deducted TDS on entire payment @ 15.75% and filed a legible copy of the debit note. Further, it noted that the TPO / DRP erred in determining ALP at Nil without giving any analysis as to why such an adjustment was required to be made when TNMM had been applied and when overall profit margin and method had not been disturbed. Observing that no penalty was levied for non-furnishing of the information and documents as required u/s 92D(3), for which separate penal provision u/s 271G has been prescribed, the Tribunal concluded that no could can be made for the levy of penalty u/s 271(1)(c). It also deleted the penalty in respect of TP adjustment on imports since the entire matter had been set aside and remanded back for fresh adjudication and thus the penalty levied on the basis of impugned assessment order could not be sustained.

DCIT v Kodak Graphic Communication I Pvt Ltd – TS-649-ITAT-2016 (Mum) – TP ITA No. : 6762/Mum/2012

36. The Court held that where the assessee had imported pigments from its associated enterprise at a price lower than its fair value (in view of predatory pricing policy to capture the market), the contention of the Revenue that imports of pigments were to be benchmarked was misplaced since it would result in transfer pricing adjustment of allowing higher purchase price to the assessee which would reduce income taxable in India which was contrary to the provisions of Section 92(3) of the Act.
CIT v Merck Ltd – TS-608-HC-2016 (Bom) - TP INCOME TAX APPEAL NO. 272 OF 2014

37. The Court dismissed Revenue's appeal by upholding exclusion of 3 out of 9 comparables chosen by TPO which was confirmed by DRP for AY 2010-11. It rejected Revenue's contention that if 3 out of 9 comparables were to be excluded, then ITAT ought to have suomotu required the TP-adjustment exercise to be undertaken afresh by TPO since the TP-adjustment based on remaining 6 comparables (that were to some extent functionally dissimilar to the assessee) could not have reflected the correct ALP. It held that the statutory scheme during the relevant AY 2010-11 did not envisage permitting Revenue to appeal against the inclusion or exclusion of a comparable by the TPO which was affirmed by DRP and only assessee had a remedy of filing an objection before the ITAT. It also noted that though such a provision permitting the filing of cross objection by Revenue was introduced by Finance Act, 2012 but the same was removed by Finance Act, 2016.
Pr. CIT v/s Trend Micro India Pvt Ltd [TS-515-HC-2016(DEL)-TP ITA 447/2016

38. The Tribunal quashed CIT's order u/s 263 for AY 2008-09 wherein CIT invoked revisionary powers u/s 263 for the reason that AO had not referred ALP determination of international transactions to TPO as required under CBDT Instruction No. 3/2003, relying on Bombay HC decision in Vodafone India& concluding that CIT's reliance on Delhi HC decision in Sony India and ITAT Special Bench decision in Aztec was misplaced as these judgments were rendered in the context of Sec 92CA(4) as existing prior to the amendment in 2007.
Obulapuram Mining Company Pvt. Ltd vs DCIT [TS-512-ITAT-2016(Bang)-TP ITA No.545(Bang) 2012

39. The Court, prima facie, held that the notice issued by AO making reference to TPO and TPO's consequent notice to assessee for AY 2013-14 to be without jurisdiction. The notices proceeded on the basis that amount paid by assessee to cane growers was an expenditure which would be a specified domestic transaction u/s 92BA. However the Court held that the expenditure incurred by a sugar co-operative society would not be a 'specified domestic transaction' as it was not one of the entities referred to in Sec 40A(2)(b).***Satpuda Tapi Parisar Sahakari Sakhar Karkhana Ltd vs DCIT [TS-517-HC-2016(BOM)-TP] WRIT PETITION NO. 6158 OF 2016***

40. The Tribunal dismissed the miscellaneous petition by the assessee against the prior order of the Tribunal filed on the ground that the impugned order which related to transfer pricing issues was passed without arguments made by either party and held that the Tribunal, in the said order specifically mentioned that the 'rival submissions were considered' and the assessee had not even filed an affidavit of its officers / directors or authorized representatives who appeared before the Tribunal during appellate proceedings to contradict the finding of the Tribunal and therefore the contentions being unsupported were rejected.
M Modal Global Services Pvt Ltd v CIT – TS-606-ITAT-2016 (Bang) – TP (In IT(TP)A Nos.176 & 196(B.)/2012)

41. The Tribunal deleted the TP-adjustment holding that the order passed by the TPO was barred by limitation as per the provisions of Sec 92CA(3A) and therefore liable to be quashed. It arrived at an extended time limit as per Explanation 1 of Sec 153 and worked out a time limit for passing order by TPO as 60 days prior to the extended time limit i.e. on or before 29.11.2014, and since order was passed on 31.12.2014, it concluded that the order was barred by limitation by 31 days.

42. The Tribunal held that where the issue regarding selection of a non-resident entity as a tested party was pending before the High Court for final adjudication in the case of the assessee itself and there was no need to constitute a Special Bench for the same issue. Accordingly, it rejected the Revenue's contention for constitution of Special Bench.
General Motors India Pvt Ltd v ACIT – TS-640-ITAT-2016 (Ahd) – TP - I.T.A. Nos.: 1293/Ahd/2015 and1294/Ahd/2015

43. The Court dismissed Revenue's appeal, upheld Tribunal's rectification order deleting its alternate direction to use subsequent year data for determining ALP after discounting for inflation. It stated that Rule 10B(4) implicitly prohibits the data, of a subsequent year, being taking into consideration as the basis of comparison and further contended that the Tribunal had rightly corrected its order.***Trinity Advanced Software Labs Pvt Ltd [TS-651-HC-2016(AP)-TP] I.T.T.A.NO.421 OF 2015***

44. The Tribunal permitted assessee to withdraw appeal for AY 2010-11 in view of resolution of the TP-issue under Advance Pricing Agreement (APA). Since a) the assessee had submitted an APA application on March 30, 2013 for determination of ALP for its proposed international transactions covering AYs 2014-15 to 2018-19. b) thereafter also filed an application to include rollback for AYs 2010-11 to 2013-14; c)the APA was concluded on March 31, 2016, d) "assessee was obligated to file the modified return of income under section 92CD of the I.T. Act for the above-mentioned assessment years which included the year under appeal. e) Consequently, the assessee had to withdraw the appeal pending before the tribunal.
Broadridge Financial Solutions India P. Ltd vs DCIT [TS-528-ITAT-2016(HYD)-TP - ITA.No.228/Hyd/2015

45. The Tribunal dismissed the appeals filed by the assessee as well as the Revenue since the TP issues arising out of the said appeals were resolved through India-USA Mutual Agreement Procedure and therefore the grounds contained therein were now infructuous.
Yahoo Software Development India Pvt Ltd v DCIT – TS-531-ITAT-2016 (Bang) - TP - IT(TP)A.1046/B/2011, IT(TP)A.1651 & 1685/B/2013

II. International Tax

a. Permanent Establishment

46. The Tribunal held that the contract revenue arising to the assessee, a US based company engaged in the manufacture and sale of equipment used in the seismic industry from offshore supplies pursuant to a contract entered into with ONGC was not taxable in India since the title in the goods passed offshore and therefore no part of the consideration could be attributed to supplies in India. It rejected the finding of the AOI that the contract entered into by the assessee, which included supply of offshore supplies, equipment etc as well as installation and commissioning services, was a composite contract and held that the contract was divisible into different components, the consideration for which was separately contemplated. Further, since the Revenue failed to substantiate the presence of assessee's employees in India for more than 120 days (for providing training to ONGC), it held that the assessee did not have a installation PE in terms of Article 5(2)(j) / (k) of the India –US DTAA.
Ion Geophysical Corporation – TS-455-ITAT-2016 (Del) - ITA no. 1607/Del/2015

47. The Tribunal held that distribution revenue accruing to the assessee, a Mauritian company, by virtue of an agreement with Taj India was not taxable in India, absent a PE in India. It noted that Taj India, appointed as an exclusive distributor, was acting independently qua its distribution rights and that the agreement was ostensibly on principal to principal basis and

therefore Taj India did not constitute a Dependent Agent PE under Article 5(4) of the India-Mauritius DTAA.
ADIT (IT) v Taj TV Ltd – TS-428-ITAT-2016 (Mum) - ITA No. : 4678/Mum/2007, : 412/Mum/2008, 4176/Mum/2009

b. Royalty / Fees for technical services

48. The Tribunal held that payment made by the assessee to a US company for transponder charges and linking up charges could not be treated as consideration for use or right to use any copyright or the other various terms used in Article 12(3) of the India-US DTAA and was therefore not taxable as royalty. Further, as regards the contention of the revenue, that the amended definition of royalty under the Act was to be read into the DTAA, the Tribunal, relying on the decision of the Court in New Skies Satellite, held that the definition of royalty under domestic law would not have any impact on the DTAA.
ADIT (IT) v Taj TV Ltd – TS-428-ITAT-2016 (Mum) - ITA No. : 4678/Mum/2007, : 412/Mum/2008, 4176/Mum/2009

49. The Tribunal held that royalty income earned by the asssessee, an Italian company under technical collaboration and license agreement with an Indian company was taxable on gross basis @ 20 percent under Article 13 of the India-Italy DTAA and not as business income @ 41.82 percent by treating its Indian branch as its PE. It dismissed the contention of the Revenue that since the employees of the assessee's Indian branch were technically qualified, they assisted the assessee in providing such services and held that the Revenue did not show any material evidencing that services were provided by employees of the Indian branch. Further, it held that to connect royalty with a PE one has to evaluate the asset test which failed in the instant case.
Iveco Spa v ADIT – TS-450-ITAT-2016 (Del) - ITA No. 5447/Del/2010, ITA No. 5696/Del/2012

50. The Tribunal held that payment made by the assessee to an Israel based company under an annual maintenance contract was not taxable in India and accordingly there was no liability to deduct tax under section 195 of the Act since the payment towards AMC was in the nature of routine repairs and maintenance and not in the nature of fees for technical services absent managerial, technical or consultancy services provided to the assessee. Further, it rejected the contention of the Revenue that the services were rendered in India since as per the warranty agreement the equipment was sent outside India for repairs and re-imported in India and therefore it was incorrect to conclude that the entire services were rendered in India.
ACIT v HCL Comnet Ltd – TS-456-ITAT-2016 (Del) – ITA No 321/Del/2012, 5651/Del/2012, 6142/Del/2012

51. The Court reversed the decision of the AAR and held that the Most Favoured Nation clause contained in Article 7 of the Protocol between India and France was applicable to Fees for technical services under the India-France DTAA and therefore where the Protocol provided that where any convention / agreement / protocol was signed between India and a OECD member states which limits India's taxation at source on FTS to a lower rate or on the basis of a restricted meaning the benefit under the Protocol could not be denied. Accordingly, it held that the definition appearing in the India-UK DTAA was to be read as forming part of the India-France DTAA as well and therefore since the management fee paid by the assessee to a French company was not covered under the FTS clause of the India-UK DTAA, the same would not be taxable under the India-France DTAA.
Steria India Ltd – TS-416-HC-2016 (Del) - W.P.(C) 4793/2014 & CM APPL. 9551/2014

c. Income from Capital gains

52. The AAR held that the capital gains arising to the Applicant, a Mauritian company and wholly owned subsidiary of a Japanese Bank, on transfer of shares of an Indian asset management and trustee companies was not taxable under Article 13 of the India-Mauritius DTAA. It noted that the Applicant held more than 75 percent of the paid up capital of the asset management

and trustee companies and held a valid TRC and therefore the Revenue were incorrect in contending that the Applicant was merely a 'permitted transferee' just to claim the benefit of the India-Mauritius DTAA and that the Japanese parent company was in effective control of the transaction. Noting that the Applicant had a valid TRC, the AAR held that the beneficial provisions of the DTAA could not be denied to the Applicant.
Shinsei Investment Ltd – TS-473-AAR-2016 - A.A.R. No 1017 of 2010

53. The AAR, invoking the non-discrimination clause under Article 25(1) of the India-Italy DTAA, held that capital gains arising on amalgamation of a non-resident company having an Indian branch with its group company(an Italian based bank) was not taxable in light of the exemption provided in Section 47(vi) which is otherwise available only to Indian companies. It dismissed the contention of the Revenue that the applicants case fell under the exception carved out under Article 25(3) and clarified that the said exception only applied to personal allowances etc and would be in context of individuals and not companies. It further held that even if the amalgamation was considered as a transfer, since the shareholders of the applicant and not the applicant received consideration by virtue of shares of the amalgamated company, there would be no capital gains tax in the hands of the applicant since it did not receive any consideration. Further, the AAR also held that that the consideration received by the shareholders of the applicant was not chargeable to tax as capital gains in view of Article 14(5) of the India-Italy DTAA which provided that capital gains shall be taxable only in Italy.
Banca Sella SPA – TS-468-AAR-2016 – AAR No 1130 of 2011

d. Independent Personal Services

54. The Tribunal held that the amount received by the assessee, a US individual, for rendering software development services to an Indian entity was not taxable in view of Article 15 of India-US DTAA and rejected the AO's contention that the impugned services not being covered under Article 15 were taxable under Article 12 of the DTAA. It held that once a receipt was of a nature covered under Article 15, it would stand excluded from Article 12 by applying sub-clause 5 of Article 12. It further observed that software development services essentially required intellectual skill and was dependent on individual characteristics as a result of which it fell within the ambit of 'professional services under Article 15(2) and also noted that while dealing with the scope of services covered under Article 15, there could be overlapping effect of the scope of services covered under other Articles but as long as the services were rendered by an individual or a group of individuals, the rendition of services was covered by Article 15.
ITO v SusantoPurnamo – TS-438-ITAT-2016 (Ahd) - I.T.A. No.254/Ahd/2015

e. Withholding tax

55. The Tribunal held that the amount remitted by the assessee to its 100 percent Mauritian holding company under a share buy-back scheme was not taxable in India during the relevant assessment year viz AY 2011-12 (prior to the insertion of section 115QA of the Act) since the shareholders were liable to capital gains tax under section 46A and there being no capital gains tax in Mauritius, no tax was payable. Accordingly it held that Section 195 was not applicable to the said transaction. It further dismissed the contention of the Revenue that the buyback scheme was a colourable device to avoid payment of DDT under section 115O and held that the buyback was legitimate and in accordance with section 77A of the Companies Act.
Korn Ferry International Pvt Ltd – TS-439-ITAT-2016 (Mum) I.T.A. No. 7367/Mum/2014, I.T.A. No. 7139/Mum/2014

56. The Court held that the freight income earned by the assessee, a Singapore based company engaged in the shipping business, from the operation of ships was not taxable in India under Article 8 of the India-Singapore DTAA, despite the fact that the receipts were remitted to London and not Singapore, since the Inland Revenue Authority of Singapore issued a certificate stating that the entire freight income derived by the assessee would be assessable in Singapore on accrual basis without making any reference to the amount of income remitted or received in Singapore. The contention of the Revenue that the assessee was not entitled to the benefit of Article 8 by virtue of Article 24(1) (which provided that reliefs provided by the DTAA would only apply to income remitted to Singapore) was rejected by the Court on the

ground that the said clause did not provide that Article 8 would not apply to every case of non-remittance and moreover the income in the instant case was taxable in Singapore on the basis of accrual.
M.T. Maersk Mikage [TS-474-HC-2016(GUJ)] SPECIAL CIVIL APPLICATION NO. 9150 of 2014

57. The Tribunal held that the remittance of sales commission to non-resident agents was not taxable in India absent operations carried out in India and therefore it deleted the disallowance made under section 40(a)(i) of the Act. It held that even though Section 9(1)(i) of the Act was triggered in the instant case, it had no impact on the taxability in the hands of the commission agent because admittedly no business operations were carried out in India and by virtue of Explanation 1 to Section 9(1)(i) of the Act, the entire commission income was outside the ambit of income deemed to accrue or arise in India.
ITO v Excel Chemicals India Ltd – TS-417-ITAT-2016 (Ahd) - I.T.A. No.5/Ahd/16

III. Domestic Tax

a. ***Income***

58. The Court held that government grants received by the assessee for developing infrastructural facilities at tourist destinations were capital in nature and therefore not liable to tax since the grants were coupled with an underlying obligation to spend the amounts only on projects for which the grant was released and not for the purpose of day to day expenses.
CIT v Tamil Nadu Tourism Development Corporation Ltd – TS-431-HC-2016 (Mad) - T.C.A.Nos.321 and 322 of 2016

59. The Tribunal held that where assessee had proved that opening and closing balance of share premium money account was same for year under consideration and neither Assessing Officer nor First Appellate Authority had proved that share premium money was utilised by assessee for running its day today business, share premium could not have been treated as business receipt.
Credit Suisse Business Analysis (INDIA) (P) Ltd v. ACIT [2016] 72 taxmann.com 131 (Mumbai - Trib.) IT APPEAL NO. 993 (MUM.) OF 2015

60. The Tribunal held that the corpus fund received by the assessee from a developer on redevelopment was a non-taxable capital receipt and rejected the Revenue's stand that the cash compensation received by assessee was nothing but his share in profits earned by the developer which were essentially revenue in nature, on the ground that the corpus fund was received towards hardship caused to assessee on redevelopment and therefore, outside the ambit of income u/s 2(24), not taxable as a revenue receipt. However, it held that the corpus fund receipt was to be reduced from the cost of acquisition of the asset while computing capital gains on transfer on a subsequent date.
Jitendra Kumar Soneja [TS-459-ITAT-2016(Mum)] ITA. No. 291/Mum/2015

61. The Court reversed the Tribunal order and held that the amount received by assessee(individual) on account of professional/management consultancy was taxable in entirety on receipt basis. It rejected the contention of the assessee that since amount was received as advance on account of appointment as hospital/management consultant for five years, it was to be spread over the period of service i.e. five years in view of matching principle. The Court accepted the Revenue's contention that in absence of books of account maintained by assessee it has to be presumed that cash system of accounting was followed, hence concept of accrual would not arise, also accepts Revenue's argument that matching principle / AS-9 (dealing with principle of revenue recognition) were applicable only to companies and not to individuals.

AmanKhera [TS-447-HC-2016(DEL)] ITA Nos. 653 of 2012, 476 of 2014, 19 of 2015, 21 of 2015 & 326 of 2015

b. ***Income from House Property***

62. The Court allowed the appeal filed by the Revenue and dismissed the order of the Tribunal wherein it was held that sections 22 and 23 of the Act was not applicable to properties owned by the assessee and used by the assessee for its own business purposes. It held that the levy of income tax in the case of a person holding house property was not premised on whether the assessee carried on business as a landlord, but on ownership and relied on the decision of the Court in Ansal Housing Finance & Leasing Co Ltd wherein it was held that the capacity of being an owner was not diminished because the assessee carried on business of developing, building and selling flats.
CIT v Ansal Housing and Construction – TS-418-HC-2016 (Del) - ITA 442/2003

c. ***Business Income***

63. The Court reversed the decision of the Special Bench and held that the allotment of shares pursuant to application in a public issue did not amount to 'purchase' under Explanation to Section 73 of the Act which provides that assessees dealing in share transactions would be deemed to be carrying on the speculation business with respect to such transactions. It relied on the decision of the Apex Court in KhodayDistelleries Ltd wherein the Court, in the context of gift tax held that allotment of shares by way of application in a public issue did not amount to purchase. Accordingly, it held that the transaction of the assessee could not be deemed to be a speculative business.
AMP Spinning & Weaving Mills Pvt Ltd v ITO – TS-440-HC-2016 (Guj) - TAX APPEAL NO. 957 of 2006, TAX APPEAL NO. 1644 of 2008

64. The Tribunal held that the notional loss suffered on account of revaluation of securities held by the assessee as stock-in-trade in compliance with the Banking Regulation Act, at the end of the year was allowable as deduction in the computation of profits of the appellant.
Deccan Grameena Bank v DCIT – (2016) 47 CCH 0547 (HydTrib)- ITA No. 936/Hyd/2015, 889/Hyd/2015

65. Where the assessee had acquired shares of a joint venture from its parent company, owing to a fall out between the parent company and the other party to the venture and sold the shares to companies in the Jindal group on the very same day of the acquisition, The Tribunal held that the surplus arising in the hands of the assessee from the said sale of shares was taxable as business income and not capital gains since the assessee was merely an intermediary and contours of the transaction showed that the assessee never intended to hold on to the shares as an investment.
GDF Suc TSA Energy India Pvt Ltd v ACIT – TS-432-ITAT-2016 (Bang) - I.T(TP).A No.984/Bang/2010, I.T(TP).A No.1030/Bang/2010

66. The Tribunal held that where the assessee had made advances to three parties for supply of material and labourfrom whom the net amount of Rs.45.74 lacs was receivable, since the three parties were not traceable even after necessary efforts were made by the assessee, the assessee was justified in writing off their balances and treating the amount receivable as a business loss.
DCIT v Kalpataru Power Transmission Ltd – (2016) 47 CCH 0543 (AhdTrib) – ITA No 2077 / Ahd / 2011

67. The Apex Court held that where assesse company was having house property and its business was to lease out its property and to earn rent, income so earned as rent would be taxable as 'business income', and not as 'income from house property'.
Rayala Corporation (P) Ltd. v. ACIT (2016) 72 taxmann.com 149 (SC) Civil Appeal Nos. 6437 TO 6441 OF 2016

d. ***Deductions***

Section 32

68. The Tribunal held the procurement of technical know-how could not be equated with the mere rendering of services by a technical person and since the evidences were not placed before the AO, it restored the issue to the file of the AO to determine the genuineness of the procurement of technical know-how and the use of technical know-how in the assessee's manufacturing process to determine whether an intangible asset was created by making the payment for the said services and whether depreciation could be claimed on the same.
Transpek Industry Ltd. & ANR vs. ACIT & ANR (2016) 47 CCH 0621 AhdTrib. ITA No. 1838/ Ahd/2011, 1840/Ahd/2011

69. The Tribunal upheld the assessee's claim for depreciation on intellectual property rights and rejected the AO's stand that depreciation could not be granted as intellectual property was not registered with any government authority. Although the transaction in assessee's case was between two unrelated enterprises, the Tribunal applied the principles enunciated in OECD TP Guidelines (for multinational enterprises and tax administrations) and BEPS Action Plans 8-10 (aligning TP outcomes with value creation) which provides that an enterprise may, for sound business reasons, choose not to register patentable knowhow, which may nonetheless contribute substantially to the success of the enterprise. Getting the intellectual properties registered was within the domain of the assessee and the revenue cannot thrust the mandate of registration of the same and mere non-registration does not render the transaction in-genuine or sham.
Landis + Gyr Limited [TS-421-ITAT-2016(Kol)] I.T.A No. 37/Kol/2012 // I.T.A No. 1623/Kol/2012

Section 37

70. The Tribunal held that expenses on ESOPs granted to the employees of the assessee company being the difference between the market price and allotment price of the ESOPs was to be allowed as a deduction under section 37(1) of the Act.
Korn Ferry International Pvt Ltd – TS-439-ITAT-2016 (Mum) - I.T.A. No. 7367/Mum/2014, I.T.A. No. 7139/Mum/2014

71. The Tribunal held that where one of the employees of the assessee had embezzled a net amount of Rs.186 lacs and the assessee, failed to recover the said amount in spite of criminal and civil proceedings initiated against the employee, the loss on account of embezzlement, being in the course of its business was allowable as a business loss. However, it rejected the contention of the assessee that the same was allowable as bad debt since for claiming a deduction on account of bad debts, the conditions prescribed under section 36(2) of the Act were to be fulfilled.
SaravanaSelvarathnam Trading & manufacturing P Ltd v ACIT – (2016) 47 CCH 0620 (Chen Trib) – ITA No 2202 / Mds / 2015

72. The Court held that foreign exchange loss relating to purchase and sales transactions was not a "notional" or "speculation" loss and was allowable as a deduction in light of the decision of the Apex Court in Woodward Governer India Ltd. It held that the CBDT's Instruction No. 3 of 2010 which deals with foreign exchange derivative transactions (forward contracts) was not applicable to cases of losses in dealings with foreign exchange.
CIT v M/s Vinergy International Pvt Ltd – ITA No 376 of 2014 (Bom)

Section 40A

73. The Tribunal held that where the assessee, a retail vendor of Country Liquor had made part payment of cost of stock purchased, excise duty and bottling charges to a whole sale licensee appointed by the Government of India by depositing cash in excess of Rs.20,000 into the bank

account of the impugned wholesale licensee, disallowance under section 40A(3) of the Act could not be made since the payment was made to an agent of the State Government and therefore fell under the exception provided in Rule 6DD(k) of the Income-tax Rules.
RamnagarPachwai& CS Shop v ITO – (2016) 47 CCH 0576 (KolTrib) - ITA No. 148/Kol/2015, 185/Kol/2014, 186/Kol/2014

Section 43B

74. The Court held that the provisions of section 145A are not applicable to service tax billed on services rendered by the assessee and rejected the contention of the revenue that service tax was similar to excise duty, sales tax etc which were to be collected and paid over to the government. It held that the Revenue was incorrect in treating service tax as a trading receipt under section 145A(a)(i) and consequently disallowing the deduction invoking provisions of Section 43B on the ground that service tax was not paid to the Government before the due date for filing return since a). theassessee had not claimed any deduction of service tax in its computation of income and b). section 145A specifically dealt with taxes, cess duty or fee paid or incurred to bring goods to the place of location and condition as on the date of valuation of inventory.
CIT v Knight Frank (India) Pvt Ltd – TS-469-HC-2016 (Bom) - INCOME TAX APPEAL NO. 247 OF 2014, INCOME TAX APPEAL NO. 255 OF 2014

Section 14A

75. The Tribunal, relying on the decision of the Bombay High Court in the case of Godrej & Boyce Mfg Co Ltd v CIT, held that Rule 8D notified by the board on March 24, 2009 did not have retrospective application and was to be applied prospectively from AY 2008-09 onwards. Therefore for AY 2006-07, it held that the AO was incorrect in invoking the said rule and directed the AO to limit the disallowance under section 14A of the Act to 1 percent of the exempt income since it was fair and reasonable.
DCIT v Phillips Carbon Black Ltd – (2016) 47 CCH 0650 (KolTrib) – ITA No 2123 / Kol / 2013

76. The Court held that under section 14A of the Act, the AO must examine the accounts closely and determine if at all any expenditure could be ascribed to the tax exempt dividend/interest earned by the assessee. If the tax exempted income was earned without the interference of any employee the question of attributing any expenditure cannot arise at all.
Pradeep Khanna v ACIT – ITA No 953 / 2015 (Del)

Chapter VIA / 10AA

77. The Tribunal held that where the assessee, a cooperative society engaged in the banking business earned income from investments made during the course of its ordinary banking business, it was entitled to claim deduction under section 80P(2) in respect of such income. However, since the details pertaining to whether or not the income arose out of ordinary course of business were not on record, the Tribunal remanded the matter to the file of the AO.
ACIT v Purulia Central Cooperative Bank Ltd – (2016) 47 CCH 0586 (KolTrib) - I.T.A. No. 1885 /KOL/ 2014 & C.O. No. 102/KOL/2014

78. The Tribunal granted the assessee, a firm of advocates and solicitors, deduction under section 10B of the Act with respect to legal services rendered to overseas clients using legal electronic database. It rejected the stand of the Revenue that the rendering of legal services by the assessee to foreign clients through Internet / emails could not be termed as export of legal database from India and held that the requirements of Section 10B were fulfilled by the assessee and also observed that the CBDT recognized 'legal database' as one of the eligble information technology enabled services.
ACIT v Majmudar& Co – TS-454-ITAT-2016 (Mum) - ITA No. 6604/Mum/2012, ITA Nos. 3063 to 3067/Mum/2012

79. The Court dismissed the Department's appeal and upheld the Tribunals order wherein the Tribunal had allowed BSNL's tax holiday claim u/s 80IA(2A) in respect of other income (income of license fee reimbursement, provisions written back, etc)earned by BSNL, which was denied by the AO on the ground that these receipts were not derived from the eligible business, by concluding that the condition of first degree nexus / 'derived from' (present in subsections 1 and 2 of the impugned section) was not applicable for deduction to telecom business covered by sub-section 2A. The Court stated that section 80-IA (2A) treats a telecommunication service provider as a separate species warranting a separate treatment as is evident from the non-obstante clause with which it begins. It further clarified that even if the undertaking had other eligible business qualifying for deduction u/s 80IA(1), it would not disentitle its claim u/s 80IA(2A).
Bharat Sanchar Nigam Limited [TS-420-HC-2016(DEL)] ITA Nos. 476/2016, 477/2016, 478/2016, 479/2016, 481/2016, 482/2016, 483/2016 &490/2016

80. The Tribunal allowed the assessee deduction under section 80IB(10) on the entire housing project for AY 2010-11, despite the assesseeallotting multiple flats in the name of individual persons, violating conditions prescribed under section 80IB(10)(e) / (f) viz. that no deduction was allowable if more than one residential unit was allotted to the same person, since the condition was introduced vide amendment in finance Act 2009 with effect from April 1, 2010 and could not be applied to transactions completed before the insertion of the said amendment.
DCIT v Sai Drishti Constructions – TS-429-ITAT-2016 (Pun) - ITA No. 991/PN/2014

81. The Tribunal held that the AO was incorrect in applying the provisions of section 10AA(9) read with Section 80IA(10) in the case of the assessee, alleging that the assessee had earned extra-ordinary profits by comparing the profits with the profits earned by other companies in the similar business since the NP / GP ratios of other entities were not conclusive evidence of extra-ordinary profits earned by the assessee, especially when the data relied on by the AO in arriving at such conclusions was not provided to the assessee for cross verification. It held that the question of estimating the profit on the basis of comparable cases could only be relied on when the book results of the assessee were not capable of independent verification. It further held that the assessee had not arranged its affairs with its sister concern leading to higher profits, since there was nothing brought on record to prove the same. Accordingly, it deleted the addition made by the AO.
ITO v Pramukh International – (2016) 47 CCH 0653 (Ahd Trib) - ITA No. 68/Ahd/2011

82. The Tribunal held that where the assessee, engaged in manufacture and sale of life saving drugs, export of vaccines, biotech and pharma products, had received a sum from a US company for granting it exclusive marketing rights of its new products in North, Central and South America, it was not eligible to claim deduction under Section 10AA on these receipts since the receipts did not have a direct nexus with the sale of products and the pre-condition stipulated for claiming deduction under section 10AA was that the SEZ should have profits and gains derived from exports.
Serum Institute of India Ltd. [TS-457-ITAT-2016(PUN)] ITA No. 914/PN/2013

e. **Income from Capital Gains**

83. The Tribunal upheld the AO's invocation of Section 50C of the Act with respect to the alleged transfer of development rights in land by the assessee and rejected the assessee's stand that the gains were taxable as business income since the assessee was aware at the time of acquisition that the development of land and construction of building thereon was a long term project and therefore the assessee's intention was to always hold the land for a long period of time to earn gains by way of appreciation in the value of land. It further held that Section 50C was applicable to sale of development rights and that in the instant case the assessee had not only sold development rights in the land but also the entire land along with ownership rights in the land.
Dattani Development – TS-415-ITAT-2016 (Mum) - /I.T.A. No.5075/Mum/2010

84. The Tribunal allowed the assessee benefit under section 54F of the Act for investing long term capital gains arising on transfer of his property situated in Gurgaon in a new residential house and dismissed the contention of the Revenue that the assessee had two residential properties and therefore did not satisfy the conditions prescribed under section 54F of the Act since one of the premises owned by the assessee was used for its business purposes. It held that the registration of the said property with the municipality as a residential property was not determinative of whether the property was residential or not.
Sanjeev Puri v DCIT – TS-436-ITAT-2016 (Del)

85. The Tribunal held that where the assessee sold a property consisting of land and building, the AO was incorrect in treating the gains arising therefrom as short term capital gains under section 50 of the Act, treating the assets as depreciable assets, as opposed to long term capital gains as computed by the assessee, since land was not a depreciable asset and the assessee had not claimed any depreciation on the building sold.
Pyne Properties P Ltd v ITO – (2016) 47 CCH 0588 (Kol – Trib) – ITA No 5475 / Del / 2014, ITA No 2477 / Del / 2015

86. The Court allowed the assessee, an NRI, exemption under section 54F of the Act for investing her long term capital gains (arising out of sale of plot in India) in a residential house in the USA, noting that the amendment to Section 54F, providing for exemption only if the investment was made in a residential house in India, was brought about vide Finance Act, 2014 and therefore not applicable prior to such date. It held that prior to the amendment to Section 54F, the only condition stipulated was investment in a residential house.
Leena Jugalkishor Shah v ACIT – TS-419-HC-2016 (Guj) - TAX APPEAL NO. 483 of 2006

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

Assessment

87. The Court quashed the order passed by the Settlement Commission under section 254D(4) allowing the assessee's request of settlement on the ground that the assessee had declared an additional income of Rs.56 lacs during the course of the hearing of settlement application over and above what was already declared in the settlement application and that such disclosure was a substantial amount, exceeding 150 percent of the initial disclosure and therefore the application filed by the assessee did not comply with the statutory requirement of full and true disclosure contemplated under section 245C(1) of the Act.
Pr CIT v Nilkanth Developers – TS-470-HC-2016 (Guj) - SPECIAL CIVIL APPLICATION NO. 14239 of 2015

88. The Court dismissed the assessee's writ petition and upheld the rejection of application by the Settlement Commission on the ground that the additional income offered by the assessee in the application was prima facie not full and true. It observed that the assessee had filed a Nil return at the time of filing settlement application which was done during the pendency of block assessment proceedings wherein a huge sum of unaccounted assets were seized. It rejected the contention of the assessee that the determination of undisclosed income involved complexity of investigation as contemplated under section 245D and held that merely because there were a number of partners and several firms involved, it would not make the matter complex.
Dix Francis – TS-467-HC-2016 (Mad) - W.P.Nos.21757 & 21758, 23697 & 23698, 21997 to 21999, 22041 to 22043 of 2005

Reassessments

89. The Court held that where the AO had received a report from the DGIT based on which it had formulated its reasons to believe that the assessee was a beneficiary to accommodation entries passed by two brothers who were well known entry operators, the re-opening of assessment initiated was valid since the AO had a justifiable reason to believe income escaped assessment and while forming his belief he had applied his mind independently.

Peass Industrial Engineers Pvt Ltd v DCIT – (2016) 96 CCH 0109 (Guj HC) - SPECIAL CIVIL APPLICATION NO. 3249 of 2016

90. The Court held that where the assessee was earning income from licensing property and the said income had been charged to tax as business income, the AO was unjustified in re-opening assessment seeking to tax the impugned income as income from house property on the ground that the assessee had camouflaged its rental income under the head business and profession to claim higher deduction, since there was no new material / information on recordfor him to have initiated reassessment proceedings.
Agya Ram v CIT – (2016) 96 CCH 0103 (Del HC) - ITA 290/2004, 291/2004, 292/2004, 293/2004

91. The Tribunal held that where the assessee submitted details of prior period expenses and amount debited towards gratuity and leave encashment debited to its P&L along with its return of income, the AO was not justified in re-opening assessment beyond the period of 4 years when original assessment was completed under section 143(3) of the Act on the ground that the prior period expenses were not allowable and that the gratuity and leave encashment were partly allowable, since there was no failure on the part of the assessee to file return under section 139(1) or to disclose fully and truly all material facts relevant to that assessment year.
DCIT v Engineering Projects India Ltd – (2016) 47 CCH 0617 (Del Trib) - ITA Nos. 281/Del/2011, 2028/Del/2012 & 2651/Del/2012 (Cross Objection Nos.45/Del/2011, 239/Del/2012 & 279/Del/2012)

92. The Tribunal quashed reassessment proceedings initiated by the AO based on audit objections wherein the audit party had interpreted section 36(viiia) of the Act in a particular manner pursuant to which it concluded that income had escaped assessment. The Tribunal further noted that the assesse had submitted all relevant details during its regular assessment proceedings and therefore the reopening amounted to review or re-appraisal of facts which was not permissible under section 147 of the Act. It also held that such an observation made by the audit party was beyond its power as it was not empowered to interpret the law with regard to the facts of the case.
Yes Bank Ltd – TS-463-ITAT-2016 (Mum) - /ITA/1991/Mum/2015

Revision

93. The Tribunal, relying on its earlier decision in the case of SubhlakshmiVanijyaPvt Ltd v CIT, held that the revision order passed by the CIT under section 263 of the Act in respect of taxability of share capital received by the assessee under section 68, was valid and was to be upheld. It relied on the findings of its earlier order viz. that the CIT was empowered to direct the AO to examine / make an addition on account of receipt of share capital with or without premium before the amendment to section 68, inadequate inquiry conducted by the AO was as good as no inquiry being conducted.
Brotex Sales Pvt Ltd v CIT – (2016) 47 CCH 0587 (KolTrib) - ITA No.1030, 1031, 1088 & 1090/Kol/2016

Search

94. The Tribunal held that where the AO had made an addition in the hands of the assessee pursuant to a declaration made by the assessee's brother stating that the assesse had earned a commission of Rs. 10 lakhs which was not recoded in the books of accounts, without obtaining any further evidence supporting the said declaration, the addition could not be sustained. It held that in order to make a genuine and legally sustainable addition on the basis of surrender during search, it was sine qua non that some incriminating material must have been found to correlate the undisclosed income with such statements.
Ajay Gupta v DCIT – (2016) 47 CCH 0535 (Del Trib) - ITA Nos. 4144 & 4145/Del/2010, 1259 & 1260/Del/2014

g. **Withholding tax**

95. The Tribunal held that the Employees Providing Fund Organization governed by Employees Provident Fund, 1952 was liable to deduct tax under section 192 of the Act in respect of settlement / withdrawals of accumulated balances by employees within 5 years of rendering continuous service. It rejected the stand of the assesseethat it was covered under section 10(11) of the Act and therefore exempt since Section 10(11) of the Act covered only funds set up under the PF Act, 1925 or set up by the Central Government and the assessee was a recognized provident fund not covered under the said section. The Tribunal also dismissed the contention of the assessee that it did not have to deduct tax at source since Section 192A of the Act was introduced with effect from June 1, 2015 and held that section 192A merely clarified the liability to deduct tax which existed prior to its introduction.
Employees Provident Fund Organization v DCIT – TS-422-ITAT-2016 (Del) – ITA Nos 4214/Del/2015, 4215/Del/2015, 4216/Del/2015

96. The Apex Court dismissed the SLP filed against the order of the Court quashing the notice issued under section 201 of the Act on account of it being time barred since the revenue attempted to make use of the benefit of the amendment to Section 201(3) of the Act introduced vide Finance Act 2014, extending the time limit to issue notice to 7 years, by issuing a notice in January 2015 which was based on the same information in respect of which its original notice was issued. It held that the amendment to Section 201(3) of the Act was not retrospective and that since the original notice was time barred, the same could not be salvaged by issuance of a subsequent notice on the same grounds.
DCIT vOracle India Pvt Ltd – TS-446-SC-2016 - CC No.12701/2016

97. The Court reversed the Tribunal order and allowed deduction for contractor payments made by assessee without deducting TDS during AY 2005-06, since Section 40(a)(ia) was not applicable to subject AY viz AY 2005-06. It observed that clause (ia) received presidential assent on September 10th, 2004 hence the assessee could not have foreseen prior to the assent and that any amount paid to a contractor without deducting tax at source was likely to disallowed u/s 40. It further rejected Revenue's stand, that the amended Sec 40(a)(ia) was applicable from AY 2005-06, and held that though the amendment Act provided that law shall be deemed to have come into force on April 1, 2004 except as otherwise provided, Sec 11 of Finance Act, 2004 stated that that it shall become effective from April 1st , 2005 and any other interpretation would amount to punishing the assessee for no fault of his.
Piu Ghosh [TS-452-HC-2016(CAL)] - ITA 191 OF 2009

h. **Others**

Appeals

98. The Court held that an appeal wrongly filed before the AO and not CIT(A) was an unintentional lapse of the assessee and that the AO ought to have returned the appeal to enable the assessee to take corrective steps. The likelihood of error is inherent in human nature and therefore the power of condonation is in view of human fallibility and must be exercised in cases of bona fide lapses. Accordingly, it held that both the Tribunal and the CIT(A) were incorrect in rejecting the assessee's prayer for condonation of delay in filing appeal and dismissing the appeal of the assesse.
Prashanth Projects Ltd v DCIT – ITA No 192 of 2014 (Bom)

Charitable Trusts / Exempt Income

99. The Tribunal held that where the main objection of the Institution was charitable in nature, then the activities carried out towards the achievement of the said activities, being incidental or ancillary to the main object would be considered as charitable in nature even if it resulted in a profit and even if it was carried out with non-members. It therefore held that the assessee, a non-profit organization, set up for the purpose of promotion and protection of the Indian business Industry could not be denied exemption under section 2(15) of the Act merely because it had receipts from environment management centres, meetings, conferences and seminars organized for the promotion of the Indian business industry.

DCIT v Indian Chamber of Commerce – (2016) 47 CHH 0549 (KolTrib)- ITA Nos. 415 & 416/Kol/2016

100. The Apex Court dismissed the review petition filed by the assessee against its earlier order dated April 22, 2016 and denied exemption u/s 10(23C)(iiiab) to the assessee on the ground that it did not satisfy the condition of being an institution 'wholly or substantially financed by the Government' for AYs 2004-05 to 2009-10. It rejected the contention of the assessee that fees of all kinds collected from the Government must be regarded as receipts from the Government and held that funds received from the Government as contemplated under section 10(23c)(iiab) of the Act must be direct grants / contributions from governmental source and not fees collected under the statute. Further, it held that if collection of fees was understood to be Govt. funding then all such receipts by way of fees may become eligible to claim exemption under Section 10 (23c) (iiiab) and such an interpretation would render the provisions of Sec. 10 (23c) (iiiad)/ (vi) "nugatory".
Visvesvaraya Technological University vs ACIT [TS-465-SC-2016] - R.P.(C) NOS. 2968-2973/2016

Minimum Alternate Tax

101. The Tribunal held that provision made for liabilities incurred but not reported (IBNR) made by assessee as per regulations framed byInsurance Regulatory Development Authority (IRDA) based on a scientific calculation with a proper rationale could only be termed as ascertained liability and hence, the same need not be added back by treating the same as an unascertained liability while computing the book profits under section 115JB.
DCIT v. National Insurance Co. Ltd. [2016] 72 taxmann.com 116 (Kolkata - Trib.) IT APPEAL NOS. 674, 982 & 983 (KOL.) OF 2012

Penalty / Interest

102. The Court upheld the levy of penalty under section 272A(2)(k) for the assessee's failure to furnish e-TDS quarterly statements within the prescribed time limit for a period of 5 years in spite of the notices issued by the Department. It rejected the contention of the assessee that since TDS was deducted on a timely basis no penalty could be levied for non-filing TDS statements as it did not lead to a loss of revenue and held that the department could not accurately process the returns on whose behalf the tax had been deducted until such information was furnished by the assessee and that the filing of such statements not only increased the reach of the department but also enabled the creation of an audit trial which could be utilized effectively to combat tax evasion.
Raja Harpal Singh Inter College – TS-445-HC-2016 (All) - INCOME TAX APPEAL No. - 135 of 2016

103. Where AO while disallowing claim of depreciation had not considered exclusion of principle component of lease rental, the Tribunal held that penal provisions of s 271(1)(c) could not be attracted; and where the AO treated transaction as finance lease and consequently disallowed the claim of depreciation the same would not ipso facto lead to the conclusion that the assesse had furnished inaccurate particulars of income or concealed the particulars of income.
JCIT v. H P India Sales Pvt. Ltd. (2016) 47 CCH 0618 BangTrib. ITA No. 316/BANG/ 2014

104. The Tribunal allowed the assessee's appeal against levy of penalty u/s 271FA for delay in furnishing annual information return u/s 285BA and accepted the assessee's "bonafide ignorance" of relevant provisions as sufficient cause for non-compliance. It observed that tax laws are complex and complicated and that it was not possible for even a person specialising in this field, to claim that he knows what exactly the law is on a particular given day or period without making references to the history of the enactments. The Tribunal further noted that the penalty order did not speak as to how assessee gained by contravening the provisions of Section 285BA or how assessee's contravention resulted in Revenue's loss, therefore no malafides could be attributed to the assessee so as to invoke the penalty proceedings under section 271FA.

Malda District Central Co-op Bank Ltd. [TS-425-ITAT-2016(Kol)] I.T.A Nos. 956 & 957/Kol/2013

105. The Court reversed the Tribunal order and deleted the penalty levied u/s 271C for TDS default in respect of warehousing payments made, absent the deliberate failure on part of assessee for not deducting TDS u/s 194I. The Court rejected the Revenue's argument that assessee cannot plead ignorance of law in view of CBDT circulars of 1995,clarifying that the CBDT's circulars were at best the opinion of the CBDT and to the extent they were adverse to the assessee, they were not binding on the assessee. Thereby, the Court held that the assessee had reasonable cause for failure to deduct TDS u/s 194I u/s 273B.
Hindustan Coco Cola Beverages PvtLtd [TS-433-HC-2016(DEL)] ITA 194/2004

106. The Tribunal held that where the AO had initiated penalty on two grounds viz. commission income unearthed during search proceedings based on a statement made and on account of estimation of household expenses, the levy of penalty was unsustainable since a). the Tribunal had deleted the addition in respect of the commission income considering the merits of the case and b). no penalty could be levied on additions made on an estimate basis.
Ajay Gupta v DCIT – (2016) 47 CCH 0535 (Del Trib) – ITA Nos. 4144 & 4145/Del/2010, 1259 & 1260/Del/2014

107. The Tribunal held that where the assessee had filed its return claiming a loss of Rs.12.41 lakhs after claiming Prior period expenses and deferred taxes as expenses and the AO issued a show cause notice requesting the assessee to substantiate its claim, pursuant to which the assessee without responding to the aforesaid notice revised its return of income to reduce the loss claimed to Rs. 3.15 lakhs the AO was justified in invoking penalty under section 271(1)(c) read with Expalantion 1 thereto, considering the fact that the assessee did not furnish any explanation to prove the existence of itsbonafides before the AO.
KTM Textile Mills P Ltd v ITO – (2016) 47 CCH 0545 (AhdTrib) - ITA No. 2034/Ahd/2012

108. The Apex Court dismissed the appeal filed by the Revenue against the order of the Rajasthan High Court wherein penalty imposed under section 271DE and 271# of the Act (pertaining to Section 269SS / 269T default) was deleted on the ground that the penalty order was barred by limitation under Section 275(1)(c) which stipulated a time limit of 6 months. It rejected the Revenue's contention that the case would fall under clause (a) of 275(1) which provided for an extended period of limitation commensurate with completion of appellate proceedings and held that the said section dealt with the limitation period relating to assessment which was not applicable in the instant case as infringement of Section 269SS was independent of assessment proceedings.
Hissaria Brothers – TS-471-SC-2016 - CIVIL APPEAL NO.5254 OF 2008

109. The Court quashed the Commissioner's order directing withdrawal of interest on refund already granted to assessee in terms of Sec 244A(2). The assessee had received incentive subsidy which was erroneously offered to tax in its return, however, CIT(A) deleted such receipt resulting in refund claim. The AO withdrew interest on refund u/s 244A(2) on the ground that assessee raised a belated claim during assessment proceedings, which was affirmed by Commissioner. Quashing the Revenue's action, the Court held that the act of revising a return or raising a claim during the course of the assessment proceedings could not imply that the assessee was responsible for causing the delay in the proceedings resulting into refund and that in essence, the CIT(A) allowed a claim which in law was allowable.
AJANTA MANUFACTURING LIMITED [TS-453-HC-2016(GUJ)] SPECIAL CIVIL APPLICATION NO. 6830 of 2016 with 6832 of 2016

Miscellaneous

110. The Apex Court dismissed the SLP filed by the assessee against the decision of the Bombay High Court, wherein the Bombay High Court dismissed the petition filed by the assessee challenging the order passed under section 127 of the Act, transferring the case from Mumbai to Hyderabad, on the ground that the assessee had filed the petition only upon receipt of

reassessment notices issued by the DCIT Hyderabad whereas the transfer order could have been challenged at an earlier stage. It upheld the finding of the High Court that the assessee's conduct was indicative of having accepted the transfer order.
Patel KNR v CIT – TS-448-SC-2016 - (C) No(s).10247/2014

111. The Court held that AO was not justified in holding that CBDT's Circular F .No.201/21/84-ITA-II dated 09.10.1984 (regarding non-taxability of interest not received for three years) applies only to banking companies and not to co-operative banks on the following grounds viz a)The expression "banking company" has been defined under section 5(c) of the Banking Regulation Act, 1949(BR Act,1949) to mean any company which transacts the business of banking in India. b) Clause (a) of section 56 of the BR Act, 1949 provides that throughout the Act, unless the context otherwise requires, - references to a "banking company" or "the company" or "such company" shall be construed as references to a co-operativebank. c) Evidently therefore, the expression "banking company" would take within its sweep a co-operative bank.
Principal Commissioner of Income tax v. Shri MahilaSewaSahakari Bank Ltd.[2016]72taxmann.com 117 (Gujarat) TAX APPEAL NO. 531 OF 2015