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

(Pronounced in January, February & March 2017)

By Sunil Moti Lala, Advocate

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I. Transfer Pricing

a. ***International transactions/ Associated Enterprise***

<u>International transactions</u>

1. The Tribunal, relied on the decision of the co-ordinate bench in the case of the assessee for the earlier year and held that AMP expenditure could not be held to be an international transaction on the basis of probable incidental benefit to the AE absent an agreement for sharing AMP expenditure. It held that the Revenue had to show that there existed an agreement or arrangement or understanding between the assessee and its AE whereby the assessee was obliged to spend excessively on AMP in order to promote the brand of the AE in absence of which the impugned transaction could not be considered as an international transaction under section 92B of the Act.
   Thomas Cook (India) Ltd v DCIT – TS-63-ITAT-2017 (Mum) - TP

2. The Tribunal, relying on the provisions of section 92B which provides that even an arrangement, understanding or an action in concert having a bearing on the profit income, losses or assets of the enterprises would qualify as international transaction, held that the sharing of cost between Nike India (assessee) and its AE in respect of contract with BCCI for promotion and brand building of Nike was an international transaction noting that the assessee had incurred the expenditure for the promotion of brand Nike since the agreement between brands in the territory enhanced the brand value of NIKE which belonged to the AE of the assessee. In respect of other local AMP expenses the tribunal held that such expenditure cannot be regarded as an independent international transaction as there was no agreement or arrangement in writing or otherwise with the AE.
   Nike India Pvt Ltd - TS-1034-ITAT-2016 (Bang)- TP

3. The Court considering assessee's reliance on Maruti Suzuki HC ruling and other judgments which were not available before TPO, remitted to the file of the TPO the issue relating to existence of international transaction of AMP expenses for fresh consideration
   Bacardi India Pvt Ltd-TS-1052-ITAT-2016 (Del)-TP

4. The Court relying on the decision in Sony Ericsson Mobile Communications India Pvt. Ltd [TS-543-HC-2016(DEL)-TP] (wherein it was held that unilateral incurring of AMP expenses does not constitute an international transaction and benefit to AE is incidental only) remitted the AMP issue for comprehensive decision by Tribunal on whether AMP expenditure with regard to the assessee's outbound travel business constituted an international transaction for AY 2009-10 and AY 2010-11 on ground that the Tribunal should have first decided whether in the circumstances of the case, the nature of the AMP reported could lead to the conclusion that there was an international transaction. The Court noting that the LG Electronics [TS-11-ITAT-2013(Del)-TP] Ruling approving the Bright Line Test had been overruled by the Delhi HC in the case of Sony Ericsson Mobile Communications India Pvt Ltd, it further held that every endeavour should not be made to conclude that all transactions reporting AMPs were to be treated as international transactions, the facts of each case would have to be examined for some deliberations. Accordingly, it directed the tribunal to decide whether the reporting of the AMP in regard to the outbound business constituted and international transaction.
   LE Passage to India Tour & Travels (p) Ltd & ANR - (2017) 98 CCH 009 (Del)

5. The Tribunal upheld the applicability of provisions of Chapter X on the international transactions entered into by assessee (engaged in production & telecasting of Common Wealth Games 2010) viz. services received from its AE, reimbursement of expenses paid to its AE, availing of equipment on hire and inter-company receivable from its AE. It rejected the assessee's plea that Chapter X provisions were inapplicable to these transactions as no deduction for expenses were claimed as expenses as it followed the cash system of accounting and therefore there was no impact of these transactions on its profit, losses, income or expenses. It concluded that the assessee's transactions with its AEs relating to availing of services, reimbursement of services, availing equipment on hire and Inter-company receivables fell within the categories of "provision of services", "lease of tangible assets" and "borrowing / lending of money" u/s 92B(1) and that the condition of 'bearing on profit, income and loss' of the assessee only applies to the last category of

transactions i.e. “Other transactions”. It observed that if the contention of the assessee was to be accepted, then under the cash accounting system, income on interest free advances to AEs would never get recognised any point. It distinguished the following cases relied upon by the assessee viz. Bombay High Court decision in Vodafone India Services Private Limited [TS-308-HC-2014(BOM)-TP] as well as coordinate bench decisions in Bharti Airtel [TS-76-ITAT-2014(DEL)-TP] and Topsgrup Electronic Systems [TS-61-ITAT-2016(Mum)-TP], noting that those cases dealt with transactions falling in "other transaction category" to which condition of impact on profit, Income, loss or assets was relevant.

SIS Live vs. ACIT - TS-149-ITAT-2017(DEL)-TP ITA No.1313/Del/2015 dated 13.02.2017

Associated Enterprise

6. The Tribunal held that in the case of public sector companies, even if all or majority of the shareholdings are by the union or state governments, these companies for that reason alone cannot be said to be associated enterprises for the purpose of section 92A. Circular No. 9/76 dated 19-5-1976 issued by the Ministry of Corporate Affiars clarified that for the purpose of section 370 of Companies Act 2013, Companies will not be deemed to be under the same management as the President or the Governor does not hold shares and exercises or controls voting rights as an individual in Govt. Companies. The scope of section 370 (1B), in the Companies Act in force at that point of time, was with respect to the expression 'individual' as against 'person' in the present case, but then the same position, for the detailed reasons set out above, holds good in the present context, i.e. in the context of 'person', as well. If all public sector undertakings were to be treated as Associated Enterprise, the inter se transactions between all the public sector undertakings would be subject to arm's length price determination-something which was seemingly quite incongruous and contrary to the scheme of the transfer pricing legislation. Therefore, PSUs cannot be said to be associated enterprises.

Hazira LNG Private Limited – TS-1027-ITAT-2016 (Ahd) – TP

7. The Court relying on the decisions in Orchid Pharma and Page Industries, held that assessee (an Indian partnership firm) and the Belgian entity (shares of which were held by partners’ brother and relatives) were not associated enterprises (AEs), as the conditions of section 92A(2) are not fulfilled. The Court, applying the provisions of section 92A(2), held that mere fact of participation of one enterprise in management or control or capital of other enterprise would not make them AEs. While a certain degree of control may actually be exercised by these enterprises over each other, due to relationships of the persons owning these enterprises, that itself was not sufficient to hold the relationship between the two enterprises as ‘associated enterprises’.

Veer Gems TS-7-ITAT-2017 (Ahd)-TP

8. The Tribunal upheld CIT(A)’s order considering 3 companies namely Multitrade Overseas INC, Harris Freeman & Co. LP and Southern Tea LLC as associate enterprise of the assessee, since all the three companies were being controlled and managed by the same shareholders and persons and therefore the condition provided under section 92A(2)b, 92A(2)(j) & 92A(2)(h) were satisfied.

General Commodities Ltd -[TS-1061-ITAT-2016(Bang)-TP

9. The Tribunal upheld the order of the TPO and held that the assessee, engaged in manufacture and selling of generic injectable drugs) had an AE relationship with 2 entities viz. Apotex Corp and Apotex Inc US under section 92A(2)(i) since 20 percent of the assessee’s sales were to these 2 entities. It agreed with the ruling of the co-ordinate bench in Orchard Pharma viz. that the term ‘influence’ used in Section 92A(2)(i) means dominant influence leading to de facto control and held that a person who purchased more than $1/5^{th}$ of the total sales of the assessee would have a distinctly dominant influence on the pricing and could exercise de facto control and therefore was to be considered as an AE.

Hospira Healthcare India Pvt Ltd – TS-147-ITAT-2017 (CHNY) – TP dated 28.02.2017

b. ***Most Appropriate Method***

Comparable Uncontrolled Price Method

10. The Tribunal allowed the appeal of the assessee and upheld the application of CUP as the Most appropriate method for benchmarking the medical transcription services, as against TNMM proposed by the TPO who rejected the CUP method on the ground that the assessee was also involved in development of software for the purpose of medical transcription and therefore the entire activity of the assessee was to be aggregated and benchmarked under TNMM. The Tribunal relying on the decision of the co-ordinate bench in Ckar Systems Pvt Ltd (TS-694-ITAT-2012 (Hyd) – TP), wherein the application of CUP was upheld as the most appropriate method. Therefore, it held that CUP was to be adopted for analyzing the ALP of medical transcription transactions and TNMM for the software development services, for which no objection was raised by the assessee. Accordingly, it remitted the matter to the AO / TPO to redo the benchmarking exercise on the basis of the CUP method.
iMedX Information Services Pvt Ltd v ITO – TS-36-ITAT-2017 (Hyd) – TP

11. The Tribunal upheld TNMM over CUP for benchmarking software development services rendered to AEs during AY 2008-09 on the ground that assessee (specializing in providing quality and customized IT solutions to several entities in the marketing, Financial Services and Insurance (BFSI) domain) had not provided the total volume of transactions of related parties (both onsite and offshore) for applying CUP method. Further, it held that since assessee's transactions with Citi Group (used as a comparable in CUP method) fell in the same class although software features may not have been identical, TNMM was more appropriate than CUP.
Polaris Consulting & Services Ltd -TS-2-ITAT-2017(CHNY)-TP

12. Where the assessee had applied CUP method on the basis of the gross margin earned from availing similar services from third parties but the TPO rejected CUP Method on the ground that assessee had failed to justify similarities between services availed from AEs and non-AEs, and applied TNMM on entity level which was upheld by the CIT(A),the Tribunal remitted transfer pricing issues related to benchmarking of freight & forwarding services availed by the assessee from its AEs during AY 2009-10 for fresh adjudication on the ground that CIT(A) had not adjudicated issues related to application of most appropriate method (MAM).
Will Loesch India Private Limited - TS-4-ITAT-2017(Mum)-TP

13. The Tribunal upheld the application of the CUP method adopted by the assessee in benchmarking its transactions in relation to provision of medical transcription services by relying on the decision of the Tribunal in ACIT v Ckar Systems Pvt Ltd as the assessee in that case was in the same line of business as the assessee in the instant case. It rejected the TPOs rejection of the CUP method and adoption of TNMM whereby he aggregated the medical transcription services with the software development services. Consequently, the Tribunal remitted the matter to the AO / TPO for redoing the benchmarking exercise afresh on the basis of CUP method.
iMedX Information Services Pvt Ltd v ITO – TS-36-ITAT-2017 (Hyd) – TP ITA No. 577/Hyd/2016 ITA No.617/Hyd/2016 dated 18.01.2017

14. Where the assessee, a cigarette manufacturer, had benchmarked its transaction of paymentfor purchase of tobacco leaf paid to its AE under CUP by comparing the AE price with third party quotes and the TPO out rightly rejected the quote and applied TNMM by selecting two comparables and making an upward addition of Rs.12.46 crore, the Tribunal held that the TPO erred in applying TNMM as the comparable companies were not functionally comparable, the cost figures of the comparables taken by the TPO did not match with their financials, the TPO had erred in considering the total costs of the assessee without restricting it to the AE related costs. Also, since the TPO had not examined the contentions of the assessee on the application of the CUP method, it remitted the matter to the TPO for fresh consideration.
JT International (India) vs DCIT – TS-107-ITAT-2017 (Hyd) – TP I.T.A. No. 422/HYD/2014 dated 17.02.2017

15. Where during the assessment proceedings, the assessee had adopted the CPM as the MAM and the TPO had proposed an upward adjustment by rejecting the adjustments claimed by the assessee to the cost and sale price of unrelated party transactions and subsequently, during the appellate proceedings, the assessee proposed to change the MAM to CUP due to availability of data not previously available, which was accepted by the CIT(A), the Tribunal dismissed the

appeal of the Revenue and held that if at the time of TPO study, details were not available with the assessee to apply the CUP method, there was no restriction on the assessee for re-computing ALP by applying CUP, if during the course of assessment / appellate proceedings, the relevant data came in its possession of the assessee.

ACIT v Sudarshan Chemical Industries Ltd – TS-1078-ITAT-2016 (Pun) – TP ITA No.1313/Del/2015 dated 25.11.2016

16. The Tribunal held that the TPO was incorrect in rejecting the assessee's TP study and making an independent search of comparable transactions under CUP to benchmark the export of freeze dried shrimps by the assessee to its AE as the comparable selected by the TPO (based on which he made an upward addition) was an AE of the assessee as well as they had a common shareholder, holding more than 25 percent share capital. It held that transactions between two AEs could not be used as a CUP for benchmarking the assessee's transaction as the same would not be 'uncontolled'. It accepted the assessee's contention that the transaction should have been benchmarked under TNMM and remitted the issue to the file of the TPO for computation of ALP under TNMM.

HIC ABF Special Foods P Ltd v ACIT -TS-100-ITAT-2017 (Coch) – TP - /I.T.A. No. 115 / Coch/2016 dated 07.02.2017

<u>Resale Price Method</u>

17. The Tribunal rejected the application of the CUP method as the MAM adopted by the assessee in relation to its international transaction viz. import of crystal and crystal components from its AEs by adopting the sales made by it to its group companies as an internal comparable, observing that the import transactions consisted of two things viz. Crystal goods and Crystal components which were aggregated and shown as one international transaction but the sale transactions used as comparable only pertained to Crystal components. It held that functional similarity was a sine qua non for adopting CUP method and if the goods in the international transactions do not exactly match with the goods in comparable uncontrolled transactions then the method was inapplicable. Therefore, it upheld the TPO's rejection of the CUP method.

As regards, the application of TNMM, as adopted by the TPO, it held that the same was incorrect noting that the TPO had taken Swarovski Korea and Swarovski Singapore as comparable when these parties were AEs of the assessee itself and could not be considered as comparable uncontrolled transactions. It also held that the balance 19 companies selected by the TPO were not good comparables being foreign companies operating in different lines of business and that the computation of PLI was also faulted as the TPO had averaged the PLI of comparables by taking gross margins in the case of few companies and net margins in the case of the balance. Accordingly, it rejected the application of TNMM as well. Referring to Rule 10B(1)(b), the Tribunal observed that RPM was the MAM as it was applicable where a property was purchased from an AE and resold as such without any value addition and the assessee in the instant case sold the Crystal components imported from its AEs without any value addition. It accordingly remitted the matter to the TPO to benchmark the transactions as per RPM.

Swarovski India Pvt Ltd v ACIT – TS-94-ITAT-2017 (Del) – TP -ITA No.5621/Del/2014 dated 10.02.2017

Swarovski India Pvt Ltd v ACIT – TS-91-ITAT-2017 (Del) – TP - ITA No.5622/Del/2014 & ITA No.5497/Del/2014 dated 10.02.2017

18. The Tribunal, relying on ITAT decisions in Mattel Toys [TS-159-ITAT-2013(Mum)-TP], Luxottica India Eyeware [TS-375-ITAT-2014(DEL)-TP], (which was upheld by jurisdictional HC [TS-532-HC-2015(DEL)-TP]), and OSI Systems [TS-396-ITAT-2015(HYD)-TP] applied the Resale Price Method (RPM) as the most appropriate method (MAM) in case of assessee engaged in reselling liquor, perfumes, confectionary, tobacco etc. in the duty free shops set up at Delhi Airport. It held that where there was no dispute on the fact that the assessee was purchasing finished products from the AEs for the purpose of reselling to unrelated parties without any value addition, under normal circumstances, the most appropriate method to bench mark the arm's length price of such transaction in terms of 10B was the RPM and that the TPO was not justified in rejecting the RPM method and applying TNMM on the ground that the gross profit margin computation of comparables was not produced by assessee. It concluded that the TPO should have made an

effort to bench mark the transaction under RPM instead of rejecting it on flimsy grounds and straight away proceeding to apply TNMM. Accordingly, it directed AO/TPO to examine assessee's benchmarking under RPM in an objective way, leaving it open to the AO/TPO to call for necessary / relevant information relating to gross profit margin of comparables from assessee, or to independently proceed for selection of comparables under RPM after obtaining the information.
Airport Retail P. Ltd. (formerly known as Alpha Future Airport Retail P. Ltd.) vs JCIT - TS-118-ITAT-2017(Mum)-TP - ITA no. 158/Mum./2014 & ITA no. 1762/Mum./2014 dated 17.01.2017

19. For benchmarking assessee-distributor's international transaction of purchase of finished cosmetic goods for AYs 2009-10 to 2011-12 Modi Care Ltd had been selected as a standalone comparable under Resale Price Method (RPM). Referring to Rule 10B(1)(b), the Tribunal stated that though product comparability was less decisive while using RPM (as opposed to CUP method), wherever the gross margins were demonstrated to be impacted either with incomparable activities; functions; accounting practices; product dissimilarities; etc. necessary adjustments ought to be made. Accordingly, noting that Modi Care Ltd had advertising spend, franchisee income, different product mix, different accounting policies and Revenue recognition policies, higher discounts and rebates, etc, the Tribunal directed the TPO to look into claim of adjustments required to be made to consider Modi Care Ltd.
Oriflame India Pvt. Ltd vs. ACIT- TS-236-ITAT-2017(DEL)-TP- I.T.A .No.-960/Del/2014, 184/Del/2016 & 271/Del/2016 dated 24.03.2017

<u>Transactional Net Margin Method</u>

20. The Tribunal deleted the TP addition in the case of the assessee, engaged in the business of manufacture and sale of tea and held that the functions assets and risks of the two segments in which the assessee operated viz. private sales and auction sales, were incomparable as in the private sales the assessee was a mere facilitator assuming minimal risks and in the auction sales it performed significant functions and bore all associated risks. Thus, it rejected the approach of the TPO in aggregating all the AE related transactions of the assessee viz. AE related private and AE related auction sales and comparing it with the margin of Non-AE auction sales. Accordingly, since the benchmarking adopted by the assessee at first i.e. entity level comparison with other comparable companies engaged in the tea business, was at ALP, the Tribunal deleted the adjustment made by the TPO.
Tata Global Beverages Ltd v DCIT – TS-48-ITAT-2017 (Kol) – TP I.T.A No.511/Kol/2010 I.T.A No.2105/Kol/2010 dated 03.02.2017

21. The Tribunal, relying on its own order in the assesse's own case for a prior AY, rejected the CUP applied by the assesseewhile benchmarking its international transactions of 'export of polyester films' to AE's in UK and US by comparing it with Non-AE transactions in Asia, Africa Middle East etc. It held that CUP could not be applied due to difference in geography and other economical factors associated with AEs in a developed market (US and UK) vis-a-vis Non-AEs in developing markets(Asia, Africa, Middle-East etc) and therefore rejected the assessee's approach of benchmarking AE transactions based on price charged to Non-AE customers in India as well as TPO's approach of comparing the same with average Non-AE price on exports to countries in Asia, Latin America. Thus, it held that TNMM was the most appropriate method and remitted matter to TPO for carrying out benchmarking analysis under TNMM.
Garware Polyester Ltd v DCIT – TS-34-ITAT-2017 (Mum) – TP - I.T.A. No. 6169/Mum/2011 I.T.A. No. 6541/Mum/2011 dated 18.01.2017

22. The Tribunal rejected the TPO's CUP as well as assessee's TNMM for benchmarking assessee's international transaction i.e. manufacture and sale of drugs to AEs in contract manufacturing segment for AY 2012-13 and set aside Rs. 55 Cr TP-adjustment remitting the issue back to TPO for fresh consideration.
It held that the data used by the TPO under CUP (retail prices of products in CIMS database) was not appropriate as (i) such data related to different year (FY 2015-16), (ii) there was a lack of details of the products sold by assessee and comparable products used for benchmarking (iii) the TPO only considered one price despite wide fluctuation in the prices charged for the same product by different manufacturers (iv) that the CIMS data related to full-fledged manufacturers as against

the assessee which was a contract manufacturer. Further it noted that the TPO had scaled down the retail prices arrived at from the CIMS data using a factor of 39.6% in order to arrive at ex-factory price, taking assistance from the pricing policy of Organization of Pharmaceutical Producers, whereas such policy was only applicable to prices charged for products sold in India whereas assessee exported products to its foreign AEs. Accordingly, it held that the CUP method as applied by the TPO was not appropriate.
It also rejected the assessee's benchmarking under TNMM, noting significant difference in sales price charged to different AEs for similar product despite cost of production being more or less similar and held that the 4 comparables selected by the assessee could not be selected as comparable as they were full-fledged manufacturers whereas the assessee was engaged in contract manufacturing. Accordingly, it remitted the issue to the file of the TPO for the purpose of carrying out a fresh benchmarking exercise under TNMM by selecting comparables engaged in contract manufacturing.
Tevapharm India Pvt. Ltd vs Addl CIT – TS-151-ITAT-2017 (Del) – TP ITA No.6707/Del/2016 dated 06.03.2017

23. The Tribunal allowed assessee's appeal and directed the TPO to consider assessee's claim for application of internal TNMM for benchmarking its AE transactions, noting that the TPO had applied external TNMM which was upheld by DRP, rejecting Internal TNMM without considering that the assessee had substantial transactions with unrelated parties and that the OP/OC of its transactions with AE was in the range of 17.93% and 20.35% as against 9.76% for transactions with unrelated parties, thereby warranting no TP-adjustment. Accordingly, it restored the issue to the file of TPO for fresh consideration.
Xchanging Solutions Ltd vs DCIT - TS-87-ITAT-2017(Bang)-TP - IT (TP) A No.1385 (Bang) 2011 dated 11-01-2017

24. Where the assessee had purchased cotton bales from various factories in India and sold the same to its Associated Enterprises (AEs) as well as to Non-AEs in the domestic market and the TPO had applied internal TNMM to benchmark the international transaction as opposed to the external TNMM adopted by the assessee (wherein the assessee had selected 2 comparable transactions) and made an addition of Rs. 10.8 crore as the margin from AE transactions was -11.91 percent as opposed to the 4.32 percent earned from Non-AE transactions, the Tribunal held that held that since it was an undisputed fact that an internal uncontrolled comparable price was available in the assessee's case, preference was to be given to Internal TNMM as the comparison was more reliable. It dismissed the submission of the assessee that it had entered into forward contract for purchase of cotton bale from domestic market and sale to AE at pre-determined price but due to default on the part of the vendors, it had to purchase cotton bales from local market as per the prevailing market to supply to AE at lower rates agreed between the parties as per the forward contract and that the loss suffered on account of default of forward purchase contract was extraordinary in nature. It observed that the concept of a forward contract was to hedge the future price fluctuations on the basis of a pre-agreed price when parties were dealing independently without any mutual interest and since the assessee had entered into forward contract with its AE, it held that the such agreement did not serve the very purpose of entering into a forward contract because a loss to either of the party would not be a gain to the other party. Further, it held that that even if assessee had purchased cotton bales from market at a higher price, the sale price to the AE at a lower rate and that too lower than the sale price to the non-AE clearly manifested the internal arrangements of the related party to supply the cotton bales to the AE at a price which was lower than the purchase price of the assessee. Accordingly, it upheld the TPO's addition.
Dhanya Agroindustrial Pvt. Ltd. Vs DCIT - TS-168-ITAT-2017(Bang)-TP- I.T.(T.P) A. No.161/Bang/2016 dated 08.03.2017

25. Where, for the purpose of benchmarking the international transactions of the assessee viz. export of internal combustion ('IC') engines by the assessee to its AEs, the TPO applied internal TNMM by taking the transactions with domestic parties as comparable, to which the assessee objected stating that there could be no comparison between IC engines sold in domestic market and those exported by assessee outside India due to functional differences in the products sold under both segments and also due to variance in the gross margins between the 2 segments, the Tribunal

relying on its decision for a prior year held that since the assessee failed to demonstrate material variation in the margins of each product type its plea that the two were functionally different could not be accepted. It also observed that unless the assessee demonstrated, with relevant facts, as to why it earned lower profits while exporting to AEs, the assessee's argument on this ground could not be considered. Further, it held that comparing of gross margins as done by the TPO was not envisaged under the IT Rules and that net profit of controlled transactions had to be compared with net profit of uncontrolled transactions. Accordingly, it directed the AO to re-compute the adjustment based on differences in the net profit margins between sales to AEs and sales in domestic market.
Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017

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

<u>Engineering Services / Consultancy services</u>

26. The Tribunal rejected assessee's contention for use of multiple year data for benchmarking engineering design services for AY-2006-07 on the ground that the mix of initial and later stage project would remain the same in all years except for first few years of operations. The assessee had justified use of multiple year data stating that engineering projects are divided into 2 phases i.e (i) Basic engineering (initial phase) and, (ii) detail and production engineering phase (later) phase and this resulted in profit fluctuation as less number of man hours were required in initial phase as compared to the later phase of the project. Further, the Tribunal observed that since the assessee had not provided bifurcation as to hours spent on initial stage project and later stage project, it could not be held that the different phases of the projects had an overall impact on the profitability from year to year.
Flour Daniel India Pvt Ltd - TS-20-ITAT-2017-(Del)-TP

27. The Tribunal held that in Transfer Pricing proceedings, a company performing similar functions could not be rejected as a comparable on the ground that it had higher proportion of material cost in total operating cost. It further held that a company rendering consultancy services in the field of Marine infrastructure, Industrial infrastructure, renewable energy etc. could be accepted as comparable on account of functional similarity with the assessee rendering engineering services in various industries such as oil and gas, environment, infrastructure and marine terminal.
Saipem India Project Ltd - [2017] 77 taxmann.com 17 (Chennai - Trib.)

28. The Tribunal held that the assessee engaged in providing application engineering services was comparable to Ace Software Exports Ltd considering that the company was held to be functionally comparable to the assessee in the preceding year and that the Revenue had failed to show change in functionality in the present year and that its operating margins did not reflect it to be persistently loss making concern.
It dismissed the contention of the assessee for the exclusion of Vardan Projects Ltd on ground of higher margins of 96.33%, stating that assessee had failed to prove that there was any functional dissimilarity between the assessee and the said company or that the high profit margins did not reflect the normal business condition.
Honeywell Turbo Technologies (India) Pvt. Ltd - TS-84-ITAT-2017(PUN)-TP ITA No.2584/PUN/2012 dated 10.02.2017

<u>ITES Sector / Software Development Services</u>

29. The Tribunal held that the software development segment of the assessee was not comparable to the following companies viz. a). Avani Cimcon Technologies Ltd as it was a software product company having IP and not providing software development services and therefore not functionally comparable to the assessee, b). Celestial Labs Ltd as it was a software product company engaged in development of software products in the diverse filed of bio informatics and also it owned intangibles and undertook R&D activities, c). Infosys Ltd as it was a market leader, engaged in diverse activities including software products and also it owned intangibles and had high brand value d). Kals Information Systems Ltd as it was engaged both in software services and software

products e). Wipro Ltd as the company was engaged in both software development and software development services and also it owned intangibles and undertook R&D unlike the assessee.
Comverse Network Systems India v ACIT – TS-33-ITAT-2017 (Del) - TP

30. The Tribunal held that the assessee, engaged in the business of software services was not comparable to a). Exensys Software Solutions Ltd as the company had undertaken an extraordinary event (amalgamation) during the year under review, b). Thirdware Solution as the company was engaged in trading and development of software products hence functionally different c). Foursoft as it was engaged in developing innovative software products and providing consultancy services without segmental details d). Flextronics as it was an end to end provider of communication products, services and solutions and incurred significant R&D expenses e). Compulink as the company provided a wide range of services and did not have segmental results f). Sankhya and Geomertic Software Solutions as they were functionally not comparable and g). Infosys and Satyam Computer Services by following the decision of Intoto Software India Ltd and Textron Global Technology Centre P Ltd.
Ad CIT v CA India Technologies Pvt Ltd – TS-39-ITAT-2017 (Mum) - TP

31. The Tribunal relying on Delhi HC's decision in Chryscapital Investment Advisors admitted assessee's additional ground for inclusion of two companies (i.e CG-VAK and Microgenetics Systems Ltd engaged in the business of rendering IT enabled services) in the list of comparables for benchmarking provision of IT enabled services provided by assessee to its AEs during AY 2009-10. It remitted the entire issue to AO/TPO for examining inclusion or otherwise of two comparables in accordance with the settled principles of comparability and also directed the assessee to justify before AO/TPO as to why these companies were not included in its TP study report originally and to demonstrate comparability of FAR of these comparables.
Vaildor Capital India Pvt Ltd - TS-1050-ITAT-2016- (Del)-TP

32. The Court upheld the order of the Tribunal wherein two companies viz. Nucleus Netsoft & GIS (India) Ltd and Vishal Information Technologies Ltd were excluded on the ground that a substantial part (more than 40 percent) of their business was outsourced and therefore not functionally comparable to the assessee.
IHG IT Services (India) Pvt Ltd – TS-968-HC-2017 (P&H) - TP

33. The Tribunal held that in case of assessee-company rendering software development services to its AE, (a).a company engaged in animation services,(b).a company developing its own software products,(c).a company having abnormal growth rate,(d).a company rendering KPO services, (e) a company involved in research activities could not be accepted as comparables while determining ALP. Incase of the assessee-company rendering IT enabled services (ITES) to its AE, a company in whose case extraordinary event of amalgamation took place, a company having related party transactions in excess of 15 per cent of total sales and a company providing data analytics, operations, management and audit services, could not be accepted as comparables while determining ALP.
Tesco Hindustan Service Centre (P.) Ltd –(2017) 77 taxmann.com 48 (Bangalore - Trib.)

34. The Tribunal excluded 8 comparables on the grounds of functional dissimilarity with the assessee (engaged in the business of rendering software development services) following decision in case of LSI Technologies India Pvt Ltd [TS-296-ITAT-2015(Bang)-TP] whose functional profile was similar to that of the assessee and 2 comparables viz. Flextronics Software Ltd and Persistent Systems Ltd (on account of non-availability of segmental results and amalgamation in the year of comparability) relying on Agnity India [TS-573-ITAT-2016(Del)-TP].
NovellSoftware Development (Ind.) Pvt Ltd - TS-1044-ITAT-2016(Bang)-TP

35. The Tribunal directed exclusion of 8 companies from the final list of comparables while benchmarking software development services rendered by the assessee to its AEs during AY 2009-10 by following the decision in McAfee Software (India) Pvt Ltd [TS-136-ITAT-2016(Bang)] on the grounds of high turnover. Further, It also excluded Bodhtree Consulting (engaged in providing open & end to end web solutions, software consultancy, design & development of software using

latest technology) as functionally dissimilar to assessee rendering pure software development services.
Metric Stream Infotech -TS-1065-ITAT-2016(Bang)-TP

36. The Tribunal rejected the assessee's ground for adoption of internal TNMM for benchmarking routine low end ITeS services to AEs during AY 2011-12 on the ground that assessee's non-AE business had been sold during the year, therefore comparison for same period was not available. However, it accepted the ground for exclusion of 3 comparables viz. Accentia Technologies (engaged in diversified activity of medical transcription), Acropetal Technologies Ltd (engaged in providing engineering design services and information technology services (KPO)) and Infosys BPO Ltd (functionally different as it is a market leader, enjoying goodwill and huge brand value with huge economies of scale) on the ground of functional dissimilarity following decisions in assessee's own cases for earlier years.
e4e Business Solutions India Pvt Ltd - TS-13-ITAT-2017(Bang)-TP

37. Where the Assessee was engaged in the business of software development and providing IT enables services, the Tribunal accepted assessee's contention to exclude 3 comparables in the software development segment viz Infosys Technologies Ltd (giant risk taking company with huge intangibles), KALS Information System Ltd (engaged in executing end to end software development projects through entire value chain of software development cycle) and Tata Elxsi Ltd (engaged in providing integrated hardware and package software solutions) and 3 comparables in the ITeS segment viz. Coral Hub Ltd (outsources its work), Triton Corporation Ltd (financial irregularities committed by directors) and Maple eSolutions Ltd (financial irregularities) on the ground of functional dissimilarity, outsourcing of work, turnover of intangibles, unreliable financials, etc. Further, it observed that while computing working capital adjustment for software development services and ITeS, TPO had considered sundry debtors, creditors, inventory at consolidated entity level and held that TPO should have taken relevant standalone balances only and remitted the matter for deciding afresh by providing an opportunity of being heard to the assessee.
Ut Starcom Inc (India Branch) - TS-1063-ITAT-2016(DEL)-TP

38. The Tribunal upheld CIT(A)'s exclusion of Mold Tech Technologies Ltd from the list of comparables for benchmarking IT enabled services (ITeS) rendered by the assessee to its AEs on the ground that the company was having extraordinary profits in ITeS segment (213% in present AY) and was not functionally similar as it was dealing in engineering design and detailing services, website design services etc.
Evaluesserve.com Pvt Ltd - TS-1060-ITAT-2016(DEL)-TP

39. The Tribunal upheld the exclusion of Onward Technologies Limited as comparable for benchmarking design engineering and IT enabled services (ITeS), on the ground that it could be considered as a consistent loss making company for AY 2010-11. It noted that a company is considered to be a loss-making company if it has incurred losses in three consecutive financial years including relevant financial year. Since, the said company had suffered losses in FYs 2007-08, 2008-09 and 2009-10, it was held to be loss making company.
Carraro Technologies India Pvt Ltd -TS-1058-ITAT-2016(PUN)-TP

40. The Tribunal rejected assessee's plea for exclusion of 2 comparables on grounds of extraordinary event and functional dissimilarity while benchmarking provision of KPO/Engineering services/IT enabled services (ITeS) to AEs during AY 2011-12. It held that winding up of dormant subsidiary of Eclerx Services was not an extraordinary event having impact on operating results, also, retained Crossdomain Solutions since the assessee's objections that the said company was functionally dissimilar was based on website info and not annual report.
Hyundai Motor India Engineering Private Limited - TS-1057-ITAT-2016(HYD)-TP

41. The Tribunal rejected assessee's use of data relating to past 2 years in case of comparables due to assessee's failure to give a valid reason in light of provisions of section 10B(4). The Tribunal further, allowed assessee's ground for exclusion of 9 comparables on grounds of functional dissimilarity as engaged in software product development, failed 25% employee cost filter and KPO services and 8 comparables on applying Rs 1200 cr Turnover filter relying on the ground that the guidance note of ICAI on Transfer Pricing states that a transaction entered into by a Rs.1000

crores company cannot be compared with the transaction entered into by a Rs.10 crores company. It also remitted to the file of the TPO the comparability of one company for verification of extraordinary events by way of amalgamation during the year.

Polaris Consulting & Services Ltd -TS-2-ITAT-2017(CHNY)-TP

42. The Tribunal following precedent excluded 5 comparables on grounds of functional dissimilarity, ownership of intangibles, extraordinary event during the year affecting profitability and non-availability of segmental data. Further, it also remitted to the file of the TPO the calculation of working capital adjustment considering assessee's claim about incorrect average receivables adopted by the TPO.

BA Continuum India Private Limited -TS-1023-ITAT-2016(HYD)-TP

43. The Tribunal held that the assessee, engaged in the business of providing ITES, including data processing and call centre services in the insurance and financial sectors to its AEs could not be compared to:

AY 2009-10

- Accentia Technologies Ltd as the said company was engaged in providing health care management services
- Eclerx Services Ltd as it was providing high end and complex KPO Services

It remanded the comparibility of Infosys BPO and Cosmis Global to the file of the TPO noting that the assessee had not raised an additional ground for exclusion of the said companies and that the only objection that was raised before the CIT(A) was that of turnover filter.

AY 2008-09

It further held that the assessee could not be compared to the following companies:

- Acropetal Technologies Ltd, Asit C Mehta Financial Services, Cosmic Global LTd, Datamatics Financial Services Ltd, I Services India Pvt Ltd, Jindal IntellicomPvt Ltd, Mold Tek Technologies Ltd and R Systems Interantional Ltd as the said companies did not satisfy the lower turnover filter of $1/10^{th}$ times of the assessee's turnover
- Accentia Technologies Ltd as it had undergone an abnormal activity during the year (viz. acquisition of other Indian and foreign companies)
- Crossdomain Solutions Ltd as the company was engaged in the business of providing re-engineered payroll services and product development
- Eclerx Services Ltd as it was providing high end and complex KPO Services
- Genesys International Corporation as it was providing specialized services requiring highly skilled employees
- WIPRO Ltd as it owned substantial intellectual property and had high brand value

AXA Business Services Pvt Ltd – TS-1032-ITAT-2016 (Bang) – TP - I.T. (T.P) A. No.334/Bang/2013, I.T. (T.P) A. No.484/Bang/2013 & IT. (T.P) A. No.965/Bang/2014 dated 29.11.2016

44. The Tribunal held that the assessee, engaged in software development services could not be compared to:

- Kals Information Ltd & Persistent Systems Ltd as the said companies derived revenue from software services and software products and did not have segmental bifurcation
- Tata Elxsi Ltd &AccelTransmatic Ltd as the said companies were functionally dissimilar
- Bodhtree Consulting Ltd as the company suffered drastic variations in the profit margins.

Valtech India Systems Pvt Ltd v DCIT – TS-70-ITAT-2017 (Bang) – TP - I.T. (T.P) A. No.1496/Bang/2010 dated 13.01.2017

45. The Tribunal held that the assessee, engaged in providing software development services to its US based AE could not be compared to Kals Information Systems Ltd as the said company was engaged in development of software development products. It held that it was a well settled principle that software development companies could not be compared with companies engaged in development of software products.

DCIT v Sterling Commerce Solutions India Pvt Ltd – TS-86-ITAT-2017 (Bang) – TP - IT(TP)A No.439/Bang/2015 IT(TP)A No.546/Bang/2015 dated 20.01.2017

46. The Tribunal in the second round of litigation held that the assessee, engaged in the business of software development and provision of software services to its AEs could not be compared to Aftek Infosys Ltd as it had a different business model as compared to the assessee considering that the said company had Intellectual Property Rights whereas the assessee did not have any IPRs in its fixed assets.
Further, it held that where the DRP, in its directions had excluded 3 companies viz. Mphasis BFL LTd, Visual Soft Technologies Ltd and Blue Star Infotech Ltd, originally selected by the TPO, the AO was incorrect in considering the said 3 companies as comparable while giving effect to the DRP directions as it was not open for him to do so. Accordingly, it directed for the exclusion of these companies.
Philips India Ltd v DCIT – TS-67-ITAT-2017 (Kol) – TP - I.T.A No. 1068/Kol/2015 dated 8.02.2017

47. The Tribunal held that the assessee, engaged in providing contract software development services to its AE could not be compared to:
- Infosys Technologies Ltd as it was a market leader in software development activities, had huge brand value, dealt in both software and software products owned substantial intangibles and incurred huge R&D expenses
- Kals Information System Ltd & Persistent Systems Ltd as they were engaged in the development of software products
- SaskenComm Technologies as it was engaged in both software development services and development of software products without segmental results.

It also accepted ICRA techno Analytics Ltd (seg), Larsen & Toubro Infotech Ltd, Mindtree Ltd (seg) and Thinksoft Global Services Ltd as comparable.
IDS Software Solutions India Pvt Ltd v ITO – TS-1072-ITAT-2016 (Bang) – TP IT(TP)A No.l541Bang/2015 dated 28.11.2016

48. The Tribunal held that the assessee, engaged in providing contract software development services to its AE could not be compared CelestrialBiolabs as the said company was engaged in the development of products in the field of bio technology and pharma and thus functionally dissimilar to the assessee.
DCIT v IDS Software Solutions India Pvt Ltd – TS-1085-ITAT-2016 - IT(TP)A No.214 IBang/20 14 IT(TP)A 179/Bang/2014 dated 16.12.2016

49. The Tribunal held that the assessee engaged in the business of providing ITES and Support Services could not be compared to Infosys BPO Ltd due to its high turnover, high brand value and presence of intangibles.
Further it rejected the assessee's contentions and held that the following companies were to be included as comparable:
- Aditya Birla Minacs Worldwide Ltd as the said company was functionally comparable and satisfied all filters chosen by the TPO
- Accentia Technologies Ltd as the company, as contended by the assessee, was not engaged in software development and in fact was into ITES.
- Cosmic Global Ltd as the company, as contended by the assessee, did not outsource majority of its services considering that the salaries and wages account for 21.31% of its expenses and no expenditure was shown towards outsourcing of work

It remanded the comparability of Eclerx Services as there was no finding on record enabling the Tribunal to determine whether the company was a KPO or ITES company. It held that if it was found to be a KPO company it ought to be excluded.
Control Component India Pvt Ltd v DCIT – TS-1043-ITAT-2016 (Bang)- TP - IT(P)A No.4/Bang/2014 dated 09.11.2016

50. The Tribunal held that the assessee, engaged in IT Enabled services to its group companies could not be compared with:
- Accentia Technologies Ltd as it was engaged in high onsite operations in different geographic zones and had undertaken extra-ordinary events (merger), which resulted in higher profits
- Asit C Mehta Financial Services as the said company had low employee costs
- Bodhtree Consulting Ltd as it was engaged in software development
- Eclerx Services Ltd as it was engaged in KPO services and reported extra-ordinarily high profits
- Mold Tek Technologies as it was engaged in providing structural engineering consultancy services under the KPO division and reported supernormal profits
- Vishal Information Technologies as it outsourced substantial work to third party vendors as a result of which it had low employee cost
- HCL Comnet, Infosys BPO and Wipro Ltd as there were differences in the FAR profile and the companies had huge brand value and owned significant intangible assets.

TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) –TP I.T.A. No. 1927/HYD/2011 dated 06.01.2017

51. The Tribunal held that the assessee, engaged in providing data processing and IT enabled services could not be compared to:
- Accentia Technologies Ltd as it had undergone extra-ordinary events during the year (merger / acquisition) and had had low employee cost
- Asit C Mehta Financial Services Ltd as it was engaged in product development and outsourced a substantial portion of its work
- Bodhtree Consulting Ltd as it owned intangibles, had fluctuating margins and was functionally different
- Eclerx Services Ltd as it was engaged in providing KPO services
- HCL Comnet Systems and Services Ltd as it was functionally different and followed the June year ending
- Informed Technologies as it was functionally different and had abnormal growth
- Infosys BPO Ltd as it was a market leader and provided diversified services
- Maple eSolutions Ltd as it had unreliable financial results since its director was involved in fraud
- Mold TekTechnolgoies as it was functionally different and had abnormal growth patterns
- Spanco Ltd as it had low employee cost and was functionally different
- Triton Corp Ltd as it had unreliable financial results since its Director was involved in fraud and also since it was functionally different and had undergone an extra-ordinary event (merger)
- Vishal Information Technologies Ltd as it had low employee cost
- Wipro Ltd as it was a market leader and owned intangibles

Global e-Business Operations P Ltd v DCIT -TS-35-ITAT-2017 (Bang) – TP - I.T(TP).A No.1092/Bang/2011 dated 16.01.2017

52. The Tribunal held that the assessee, engaged in the business of providing ITES to its AEs was not comparable to:
- Accentia Technologies Ltd as it had undertaken an extra-ordinary event (amalgamation) during the year, owned substantial intangibles and provided medical transcription services, medical coding, billing and receivable management to the healthcare industry
- TCS e-serve International Ltd as it was functionally dissimilar and the segmental information relating to ITES and software development services were unavailable and it also had substantial intangibles
- TCS e-Serve Ltd as it was involved in transaction processing and technology services and owned huge intangibles

Exl Service.com (India) Pvt Ltd v DCIT – TS-104-ITAT-2017 (Del) – TP ITA No. 302/Del/2015 ITA No. 615/Del/2015 dated 03.01.2017

53. The Tribunal held that the assessee, a captive service provider engaged in the business of rendering software development services to its AEs could not be compared to:
- Infosys Technologies as it owned intangible assets, had huge brand value and provided diversified services

- L&T Infotech Ltd as it earned revenues from both software products as well as software development services and did not have any segmental information
- ICRA Techno Analytics Ltd as it was engaged in diversified activities
- Kals Information Systems Ltd as it was engaged in the software product business
- Persistent Systems Ltd as it earned revenue from various activities including licencing of products and the segmental data was not available
- Tata Elxsi Ltd as it was engaged in diversified activities
- Sasken Communications Technologies Ltd as it earned revenue from 3 segments but the segmental margins were unavailable.

Cerner Healthcare Solutions P Ltd v ITO – TS-28-ITAT-2017 (Bang) – TP I.T(TP).A No.44/Bang/2015 I.T (TP).A No.69/Bang/2015 dated 16.01.2017

54. The Tribunla held that the assessee, engaged in the business of providing ITES services relating to back office operation to its AEs was not comparable to:

- Eclerx Services Ltd as it was engaged in providing KPO / high end services involving specialized knowledge and domain expertise in the field of retail, manufacturing and financial services
- Infosys BPO Ltd as it was a market leader, had huge brand value commanding premium pricing, owned substantial intangible assets and was engaged in the business of software products and software services
- Vishal Information Technologies as it had a different business model considering it outsourced a substantial portion of its work
- Wipro Ltd as it owned substantial IP on software products
- Acropetal Technologies as it was engaged in high end KPO type design engineering activities which could not be equated with IT Services.

Further, it remitted the comparability of the following companies to the file of the TPO:

- Accentia Technologies Ltd & Mold Tek Technologies Ltd to verify whether an extra-ordinary event had taken place in the ITES segment of the company
- Genesys International Corp Ltd to verify the nature of services provided by the company
- Crossdomain Solutions to verify the functional comparability of the company.

Siemens Technology & Services Pvt Ltd v ACIT – TS-1080-ITAT-2016 (Bang) – TP I.T.{T.P} A. No.1601/Bang/2012 dated 16.12.2016

55. The Tribunal held that the assessee providing IT enabled back office support services to its AE was not comparable to:

- Accentia Technologies as it had undertaken extra-ordinary events (merger and demerger) during the year which impacted its financial results and also since there was a wide gap between employee costs of the company vis-à-vis the assessee
- Bodthree Consulting Ltd as it was engaged in the business of software products and software services and did not have a segmental break-up
- Eclerx Services Ltd as the company was engaged in KPO and high end services involving specialized knowledge and domain expertise in the field of retail, manufacturing and financial services
- HCL Comnet Systems & Services Ltd as its RPT (18.72%) exceeded the 15 percent RPT filter applied by the assessee
- Informed Technologies Ltd as its employee cost / sales ratio (21.77%) was less than the filter of 25 percent applied
- Infosys BPO Ltd as it owned substantial intangible assets, undertook research development and carried on diverse business activities
- Vishal Information Technologies Ltd as it was a KPO engaged in high end services requiring employees with advanced levels of skills and knowledge.
- Wipro LTd as it was a giant entity with difference as regards risk profile, nature of services, ownership of IP rights etc.

H&S Software Development v ACIT – TS-31-ITAT-2017 (Del) – TP - ITA No.6455/Del./2012 – 18.01.2016

56. The Tribunal held that the assessee, engaged in providing software development services to its AE could not be compared to:
- Bodhtree Consulting Ltd as it was functionally dissimilar to the assessee being engaged in the business of software product and provided open and end to end web solutions, offshore data management, software consultancy and design services
- Infosys Technologies Ltd as it owned intangibles and derived income from both software services and products without any segmental reporting
- Persistent Systems Ltd as it was engaged in software development services and products and also engaged in R&D activities and owned intangible assets
- Larsen & Turbo Infotech LTd as it carried out various activities including both software development services as well as products, had a huge turnover in excess of 10 times that of the assessee and it also owned intangible assets

Broadcom India Research Pvt Ltd v DCIT – TS-1036-ITAT-2016 (Bang) – TP IT(TP)A No.621Bang/2014 IT(TP)A No.46 /Bang/2014 dated 03.11.2016

57. The Tribunal excluded the following companies from the list of comparables while benchmarking the international transactions of the assessee, engaged in providing software development services to its AEs:
- Kals Information System Ltd as it was engaged in development and sale of software products
- Thirdware Solutions Ltd as it was engaged in software development, trading of software licenses and training implementation activities and it earned supernormal profits.

Approva Systems Pvt Ltd v DCIT – TS-40-ITAT-2017 (Pun) – TP - ITA No.1921/PUN/2014 dated 25.01.2017

58. The Tribunal remitted the issue of comparability of the following companies vis-à-vis the assessee, engaged in the business of development of software and indenting sale of industrial software
- Aztec Software & Technology Ltd to verify the export revenue to sales ratio of the company (the assessee had contended that the comparable was erroneously rejected by the TPO since its export to sales ratio was 89.44 percent which satisfied the filter of the TPO)
- Larsen & Toubro Infotech Ltd to verify whether the assessee was correct in contending that the TPO had erroneously rejected the company on the basis of the RPT filter whereas the company's RPT filter was 19.97% i.e. less than the 25% filter adopted by the TPO
- SIP Technologies & Exports Ltd to verify whether the assessee's contention that the TPO had wrongly excluded the company on the ground of extra-ordinary event, when the extra-ordinary event had taken place in prior years, was correct.

NXP Semi Conductors India P Ltd v DCIT – TS-1081-ITAT-2016 (Bang) – TP I.T(TP).A No.1560/Bang/2012 dated 25.01.2017

59. The Tribunal held that the international transactions of the assessee viz. provision of software research, development and support services could not be compared to
- Infosys Ltd and FCS Software Ltd as the companies were product companies.
- Kals Information Systems Ltd as the company was engaged in development and sale of software products
- Thirdware Solutions Ltd as the company was engaged in software development, trading of software licenses and training implementation activities
- Acropetal Technologies LTd as the company was engaged in design engineering activites

Further, it held that E-Zest Solutions Ltd, Evoke Technologies Ltd and E-Infochips Ltd, being functionally comparable ought to have been included.

TIBCO Software India Pvt Ltd – TS-49-ITAT-2017 (Pun) – TP - ITA No.276/PUN/2015 dated 31.01.2017

60. The Tribunal in the second round of litigation held that the assessee engaged in providing software development services could not be compared to:
- Kals Info Systems Ltd as it was engaged in development of software products and training
- AccelTransmatics as it was functionally different

As regards Megasoft ltd, the Tribunal directed the AO / TPO to consider only the software development services segment of the company for the purpose of benchmarking.

Yodlee Infotech Pvt Ltd – TS-1082-ITAT-2016 (Bang) – TP - I.T. (T.P) A. No.131/Bang/2016 dated 29.11.2016

61. The Tribunal excluded the following companies from the list of comparables while benchmarking the ITES and software development services rendered by the assessee:
    - Accentia Technologies Ltd as it acquired a new business during the year which impacted its financial results
    - Acropetal Technologies Ltd as it was functionally different and did not have adequate segmental results
    - Cosmis Global Ltd as the company earned only Rs.27.76 lakhs in the BPO segment and also incurred huge costs by way of translation charges which had an inbuilt margin included in the cost
    - Eclerx Services Ltd since the company was involved in a diverse nature of services without segmental data and more so since it was engaged in KPO services
    - Genesys International Corporation ltd as it was functionally different.

    ADP Pvt Ltd v DCIT – TS-32-ITAT-2017 (Hyd) – TP ITA No. 191/Hyd/2014 ITA No. 134/Hyd/2014 dated 18.01.2017

62. The Tribunal held that the assessee, engaged in providing software development services could not be compared to:
    - E Infochips Bangalore Ltd as it was engaged in both software development as well as ITES and no segmental information was available
    - Persistent Systems Ltd as it had a high turnover of Rs.509 crore as against Rs.29.53 crore of the assessee and also since it was engaged in sale of software products

    Further, it received the contention of the assessee and held that Comp-U-Learn Tech India Ltd was to be included as a comparable as its receipts were only from software development services and there was no sale of products, that the extra-ordinary events did not have an impact on the profitability of the company and more so since the company was accepted as comparable in many cases for the same AY i.e. 2010-11.

    ITO v Intoto Software (India) Pvt Ltd – TS-42-ITAT-2017 (Hyd) – TP ITA No. 1921/Hyd/14 ITA No. 25/Hyd/15 dated 31.01.2017

63. The Tribunal allowed the appeal of the Revenue and held that the CIT(A) was incorrect in applying a RPT filter of 0% and a turnover filter of Rs. 1-200 crore. It remitted the matter to the CIT(A)directing him to apply the RPT filter of 15 percent and a turnover filter of 10 times the turnover of the assessee and pass fresh orders.

    DCIT v Shipara Technologies Ltd – TS-1041-ITAT-2016 (Bang) – TP IT (TP) A No.591 (Bang) 2012 dated 03.11.2016

64. The Tribunal dismissed the appeal of the assessee wherein it sought the exclusion of Bodhtree consulting Ltd by relying on the decision of Infinera India Pvt Ltd and held that Infinera India was engaged in providing end to end web solutions, software consultancy as well as design and development of software whereas the assessee and Bodhtreewere engaged in mere software development services and therefore the reliance was misplaced. Further, it noted that Bodhtree had been accepted as comparable in the prior years as well for which the assessee had not raised any objection.

    Narus Networks Pvt Ltd v DCIT – TS-55-ITAT-2017 (Bang) – TP IT(TP)A No.1631/Bang/2014 dated 31.01.2017

65. The Tribunal held that the assessee, a software development service provider, could not be compared to:
    - Infosys Technologies Ltd on account of the huge difference in turnover
    - Kals Information Systems Ltd as it was engaged in both software development service as well as products
    - Sasken Communication Technologies as it was engaged in both software development services as well as in products

- Tata Elxsi Ltd as its software service segment contained income from product design, innovation design and engineering design
- Persistent Systems Ltd as it was engaged in diversified activities including licensing of products, providing maintenance services and earning income by way of royalty on sale of products.

Target Corporation of India Pvt Ltd v DCIT – TS -1083-ITAT-2016 (Bang) – TP IT. (T.P) A. No.343/Bang/2015 dated 29.12.2016

66. The Tribunal directed exclusion of 9 companies viz. Aziec Software & Technology Ltd, Infosys Technologies Ltd, Mindtree Consulting Ltd, Persistent Systems Ltd, Sasken Communication Technologies Ltd, Tata Elxi Limited, Flextronics Software Systems Ltd, iGate Global Solutions Ltd and Lucid Software Ltd following the Tribunal ruling of Maxim India Integrated Circuit [TS-265-ITAT-2016(Bang)-TP],wherein the Tribunal had upheld turnover filter at certain number of times of assessee's turnover as against fixed slab from Rs. 1 crore to Rs. 200 crore.

Further, it accepted assessee's contention to exclude KALS Infosystem and AccelTransmatics as they were functional dissimilar as they were engaged in development of software products whereas the assessee was engaged in providing software development services.

IPASS India Pvt Ltd v ITO TS-1073-ITAT-2016 (Bang) – TP .IT(TP)A No. 1367 /Bang/2010 dated 29.11.2016

67. The Tribunal held that the assessee engaged in providing IT and IT Enabled Services to its AE could not be compared to:
    - Continental Controls Ltd as it failed to satisfy the turnover filter as its software segment turnover was only Rs.29 lakhs and also since it earned a huge profit of 222.22 percent
    - Tanla Solutions as it was engaged in product development, it had acquired two companies during the year which had an impact on its financial results
    - Geodesic Information Systems Ltd as over and above the software services it was engaged in product development and no segmental results of the company were available
    - Trident Infotech Corporation Ltd as its RPT to sales percent was 89.53 which far exceeded the filter applied
    - Ultramarine & Pigments since it did not satisfy the RPT filter and also since it was engaged in providing engineering services
    - Vishal Information Technologies Ltd as its asset base was Rs.2.54 crore as against Rs.10.93 crore of the assessee.

DCIT v PTC Software India Pvt Ltd – TS-1071-ITAT-2016 (Pun) – TP ITA No. 945/PN/2013 dated 14.12.2016

68. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to:
    - Sankhya Infotech Ltd as it was engaged in the development of software products and services and providing training for the transport and aviation industry
    - Visual Soft Technologies Ltd as it was engaged in substantial R & D activities, which entitled it to command premium return
    - Exensys Software Solutions Ltd as it was engaged in diversified operations visa-vis assessee
    - Thirdware Solutions Ltd as it was engaged in diversified activities such as sale and purchase of licenses, ERP, purchase of AMCs etc
    - Tata Elxsi Ltd as the company was engaged in development of niche product and development services
    - Flextronics Software Systems Ltd since it was engaged in development of software products and incurred R&D expenditure for development of such products
    - Satyam Computer Services Ltd since its data and information was unreliable owing to the financial scam
    - Infosys Technologies Ltd as it was engaged in diversified activities owned intangibles, had high turnover and brand value

Thomson Reuters India Services Pvt. Ltd. v ACIT – TS-1084-ITAT-2016 (Bang) – TP I.T.{T.P} A. No.1097/Bang/2011 I.T.(T.P} A. No.1115/Bang/2011 dated 09.12.2016

69. The Tribunal held that the assessee, engaged in providing IT enabled BPO services and receivable management services to its AEs could not be compared to:
- Accentia Technologies Ltd as it had undertaken an extra-ordinary event during the year (merger) which impacted its profitability
- Cosmic Global Ltd as it outsourced a substantial portion of its work and therefore had a different business model
- Infosys BPO Ltd as it was engaged in providing high end integrated services, had a significantly large scale of operations and high brand value
- R Systems International Ltd as it had a different financial year ending i.e. 31/12/2009 whereas assessee's financial year ended on 31/3/2010

Aegis Ltd v DCIT – TS-66-ITAT-2017 (Mum) – TP ITA No.7694/Mum/2014 ITA No.1209/Mum/2015 dated 08.02.2017

70. The Tribunal held that the assessee operating as an offshore processing centre could not be compared to:
- Accentia Technologies Ltd as it was engaged in healthcare management, it owned IPRs which facilitated premium pricing and it had undertaken an extra-ordinary event during the year (acquisition and amalgation) which impacted its profitability
- Fortune Infotech Ltd as it was engaged in product development, owned IPRs and did not satisfy the RPT filter of 25 percent
- ICRA Online Ltd as it was providing KPO Services including financial research and analysis.

Outsource Partners International P Ltd vs. DCIT – TS-57-ITAT-2017 (Bang) – TP I.T(TP).A No.337/Bang/2015 dated 06.02.2017

71. The Tribunal rejected the claim of the assessee for exclusion of Persistent Systems & Solutions on the ground of turnover and held that where the assessee had not applied a turnover filter itself it would not be justified in excluding one comparable based on turnover without applying the filter to all the comparable companies. However, considering that the said company was not only rendering software development services, but was also in sale of products and carried out R&D in life sciences, products lifecycle services, medical research, chemistry, bio-informatics, it held that the company was not functionally comparable to the assessee and therefore excluded it. Further it held that the assessee, providing software development services and global call centre services to its AE could not be compared to:
- Sonata Software Ltd as it had related party transaction (RPTs) of more than 25% of its total revenue which did not satisfy the filter applied by the TPO himself
- Igate Global Solutions Ltd as it operated in one single segment with respect to both product and services and was engaged in ITE Services
- Bodhtree Consulting Ltd as it earned abnormally high margins which did not reflect a normal business condition.
- Genesys International Corporation Ltdas it was a geospatial service and content provider, specializing in land based technologies
- FCS Software Solutions Ltd as the company operated in diverse segments, including Infrastructure Management outsourcing centre for hardware requirements of its customers, imparting internet based E-learning and IT consulting services, and its segmental reporting was based on geographies and not as per different activities undertaken by it.

Further, it held that CG Vak Software and Exports Ltd was to be included as a comparable relying on the decision in Yodlee Infotech Pvt. Ltd wherein it was held that this company was a good comparable to benchmark software development services for same AY 2009-10.

Dialogic Networks India Pvt Ltd v DCIT – TS-2-ITAT-2017 (Mum) – TP IT(TP)A No.1324/Mum/2014 dated 31.01.2017

72. The Tribunal held that the ITES services provided by the assessee could not be compared to Wipro BPO Solutions Ltd as the said company owned substantial intangibles as well as huge goodwill and brand value.

Thomson Reuters India Services Pvt. Ltd. v ACIT – TS-1084-ITAT-2016 (Bang) – TP I.T.{T.P} A. No.1097/Bang/2011 I.T.(T.P} A. No.1115/Bang/2011 dated 09.12.2016

73. The Tribunal, pursuant to a miscellaneous petition filed by the assessee, adjudicated on the assessee's ground relating to selection of comparables and held that:
    - AvaniTransmatic Ltd, Celestrial Labs Ltd, Infosys Technologies Ltd, Kals Information Systems Ltd, Lucid Software Ltd, Tata ElxsiLtd, Flextronics Software Systems Ltd and Wipro Ltd were to be excluded as comparable as they were not functionally comparable with the assessee in light of the decision of the Co-ordinate bench in NXP Semiconductors India Pvt Ltd.
    - Geometric Ltd and Ishir Infotech be rejected as their RPT was in excess of 15 percent.

    Accordingly, it excluded 10 companies from the list of comparables.

    Open Silicon Research PVt Ltd v ITO – TS-85-ITAT-2017 (Bang) – TP IT(TP)A No.1128IBang/2011) dated 09.01.2017

74. The Tribunal held that the assessee, engaged in providing software development services to its AEs could not be compared to:
    - AccelTransmatics Ltd as it had abnormally high growth rates, fluctuating margins, failed the 75 percent software revenue filter and was functionally different
    - AvaniCimcon Technologies Ltd, Celestial Labs Ltd, Ezest Solutions Ltd, Inshir Infotech Ltd, Kals Information Systems Ltd, Lucid Software Ltd, Persistent Systems Ltd & Tata Elxi Ltd as they were functionally dissimilar
    - Flextronics Software Systems Ltd as it did not satisfy the upper turnover filter
    - Helios & Matheson Information Technology Ltd as it had undergone abnormal fluctuations in margins and was functionally dissimilar
    - Infosys Ltd as it had a huge brand name, earned high margins, was functionally different and was the industry leader
    - Megasoft Ltd as it was functionally dissimilar and had abnormally high margins
    - Wipro Ltd as it owned substantial intangible assets and was an industry leader

    As regards Akshay Software Technologies Ltd and VJIL Consulting Ltd, it held that the DRP erred in excluding the said companies on the ground of onsite services as the onsite filter was not a valid ground for exclusion.

    CAPCO IT Services India Pvt. Ltd. vs. ITO – TS-1079-ITAT-2016 (Bang) – TP ITA No. 1340 IBang/2011 dated 09.12.2016

75. The Tribunal held that the Software Consultancy Services provided by the assessee could not be benchmarked with Persistent Systems Ltd, Wipro Technologies Ltd and Infosys Technologies Ltd as the assessee's turnover in software segment was only Rs. 81 crore as against the turnover of Infosys Technologies and Persistent Systems was very huge (in excess of Rs. 200 crore)

    As regards the BPO services provided by the assessee, it held that the following companies could not be considered as comparable:
    - Accentia Technologies Ltd as it operated in KPO segment
    - Acropetal Technologies Ltd as it was engaged in providing design engineering activities which was more akin to KPO

    ITO vs. Systime Global Solutions Ltd - TS-54-ITAT-2017(PUN)-TP ITA No.336/PUN/2015 dated 31.01.2017

76. The Tribunal held that the assessee, engaged in providing IT enabled & marketing support services could not be compared to:
    - Genesys International Corporation Ltd as it was functionally different and had abnormally high profits
    - Accentia Technologies Limited as it had undertaken an extra ordinary event during the year viz. acquisition of IQ group of companies
    - Eclerx Services Ltd as the company had been excluded as comparable in the assessee's own case for AY 2009-10 on account of functional difference.

Cummins Turbo Technologies Limited vs DCIT - TS-1094-ITAT-2016(PUN)-TP ITA No. 593/PUN/2015 dated 28.12.2016

77. The Tribunal held that Infosys, having a huge turnover as compared to the assessee could not be compared to the assessee, a limited risk software development service provider. Accordingly, it directed for the exclusion of the said comparable.
ACIT v Amberpoint Technology India Pvt Ltd – TS-124-ITAT-2017 (Pun) – TP ITA No.266/PUN/2012 ITA No.1862/PUN/2012 dated 15.02.2017

78. The Tribunal held that the following companies could not be included in the list of comparable companies while benchmarking the international transactions carried out by the assessee viz. provision of software development services to its AEs:
- AvaniCincom Technologies, Celestial Biolabs Ltd, e-Zest Solutions Ltd, Infosys Ltd, Kals Information Systems Ltd, Persistent Systems Ltd, Tata Elxsi Ltd and Wirpo Ltd as they were functionally dissimilar as held in the decision of the Tribunal in Infineon Technologies India Pvt. Ltd. [TS-549-ITAT-2015(Bang)-TP]
- Flextronics Software Systems Ltd, iGate Global Solutiosn Ltd, Sasken Communication Technologies Ltd as their turnover exceeded 10 times the turnover of the assessee.

Further, it held that Softsol India Ltd was incorrectly rejected as comparable by the CIT(A) on the ground that it did not satisfy the 15 percent RPT Filter as the RPT filter was not a water tight compartment and the RPT percentage of 15 to 20% had been accepted in many cases. Considering the fact that the RPT of the said company was 18.3% (within the range of 15-20%), it held that the said company was to be considered as a comparable.
ITO vs. Ketera Software India Pvt. Ltd TS-139-ITAT-2017(Bang)-TP IT(TP)A No.460/Bang/2013 dated 22.02.2017

79. The Tribunal held that the assessee, providing software development services to its AE could not be compared to:
- Infosys Technolgies Limited as it incurred substantial R&D expenses, owned intangibles, had a higher risk profile, provided diversified services, owned proprietary products, earned more than half of its income from outsourcing activities, had huge brand value and had a large number of employees
- Tata Consultancy Services Ltd as it was engaged in IT infrastructure services, engineering and industrial services, earned huge profits, sold equipment and software license, incurred substantial R&D expenses
- Tata Elxsi limited as its software development services segment also included design and development of hardware
- Thirdwave Solutions Lt as it earned revenue from various business segments such as sale of license, software services and subscription and lacked segmental details

St-Ericsson India Private Limited vs Addl CIT - TS-119-ITAT-2017(DEL)-TP ITA No.1672/Del./2014 dated 22.02.2017

80. The Tribunal held that the assessee, providing IT enabled Services to its AEs could not be compared to the following companies:
- Cosmic Global as it outsourced a substantial portion of its activities as a result of which its employee cost was only 25 percent of its total cost.
- Infosys BPO Ltd as it had a huge turnover of Rs. 850 crores which exceeded the turnover of the assessee by more than 10 times.

Observing that the assessee had itself selected Cosmic Global Ltd in its TP study, relying on the decision of the Special Bench in Quark Systems [TS-23-ITAT-2009(CHANDI)-TP] (which was upheld by P&H HC [TS-448-HC-2011(P & H)-TP]), the Tribunal held that the assessee could not be estopped from seeking exclusion of a comparable which was on its own list.
Visual Graphics Computing Services India Private Limited Vs ACIT - TS-129-ITAT-2017(CHNY)-TP /I.T.A. No.2340/Mds/2012 dated 10-02-2017

81. The Tribunal held that the assessee, engaged in the business of rendering I.T. enabled services to its AEs could not be compared to the following companies:
- Mindtree Ltd (Seg), Sasken Technologies, Tata Elxsi, Zylog Systems and Persistent Systems Ltd as the turnover of these companies was more than 12 times of assessee's turnover (Rs. 25 Crores) and they were functionally dissimilar
- Comp-U-Learn Tech India Ltd as it was engaged in internet based solution, education and training, e-commerce solutions, software design/development, web designing/development
- E-Zest Solutions Ltd &Kals Information Systems Ltd as they were engaged in product engineering services
- Infosys Technologies Ltd & L&T Infotech Ltd as they earned super profits and had very high turnover

Wissen Infotech Private Limited vs. DCIT - TS-142-ITAT-2017(HYD)-TP ITA No.99/Hyd/2015 ITA No.311/Hyd/2015 dated 28.02.2017

82. The Tribunal held that the assessee, engaged in providing software development services could not be compared to:
- Bodhtree Consulting Ltd as it was Functionally dissimilar
- Celestial Labs as it was engaged in product development in the field of biotech and pharmaceuticals, and had R&D expenditure more than 3% of its sales
- Persistent Systems Ltd as it was functionally dissimilar since it was engaged in software development and analytics services and did not have the required segmental data
- Quintegra Solution Ltd as it was engaged in R&D activities, product engineering services and also owned IPR
- Tata Elxsi Ltd as its software segment comprised activity of product designing services, it had significant intangible and R&D expenditure and also failed the onsite filter of more than 75%
- Thirdware Solutions Ltd as it was engaged in the business of software development products as well as software development, it acquired intangible assets and derived revenue based on sales of licenses, and did not have any segmental data.
- Wipro Ltd as it was an industry leader and owned IPR, and had also undertaken an amalgamation during the year.
- Indus Networks Ltd as it outsourced its activities which was indicated by its very low employee cost

DCIT Vs Cypress Semiconductors Technology Pvt. Ltd. - TS-144-ITAT-2017(Bang)-TP] IT (TP) A No.463 (Bang) 2013 dated 07-02-2017

83. The Tribunal, noting that the assessee was rendering its IT enabled services i.e. legal data base and other administrative services, through highly skilled and professionally qualified lawyers, agreed with the contention of the Revenue that the assessee could not be regarded as providing simple BPO or low-end ITES.

With regard to benchmarking the international transactions of the assessee it held that:
- R-Systems International Ltd, which had been rejected as a comparable on the ground that it had a different year ending (Calendar year as opposed to the financial year adopted by the assessee), was to be included as a comparable as it was possible to reasonably determine the financial results of the company for the relevant period with the information available in the public domain
- Mircoland Ltd was incorrectly rejected as comparable by the TPO who contended that the assessee was precluded from considering a comparable at a later stage when the same was not considered earlier in its TP Study. It held that once the TPO has rejected most of the comparables and asked the assessee to furnish fresh comparables, then TPO is bound to consider the comparables as submitted by the assessee. It also rejected the contention of the Revenue that the company ought to have been excluded since it had incurred a loss during the year and held that loss incurred was in the normal course of business unless certain peculiar factors were pointed out, which was not done so by the Revenue.
- Omega Healthcare Management Services Pvt Ltd as the financials of the company were now available in the public domain

Further, it held that Acropetal Technologies Ltd could not be considered as comparable to the assessee as it was engaged in providing a broad spectrum of services in the nature of software

development under its 'Engineering Design Services' segment and also since it had undergone an extra-ordinary event (acquisition) which impacted its PLI.

Additionally, it remitted the issue of comparability of the following companies to the file of the TPO:

- Accentia Technologies Ltd - for verifying the impact of the M&As undertaken by the said company on the trading results and profit margins of the company by comparing the same with earlier financial years and if no major impact was found then to include the said company as comparable
- Eclerx Services Ltd to examine the outsourcing activities of the said company vis-à-vis that of the assessee with a direction to exclude the company if there was a substantial difference
- Allsec Technologies to determine whether the loss incurred by the company was in the normal course of business or if it arose specifically due to the merger undertaken during the relevant year.
- Jindal Intellicom Pvt Ltd to verify whether financials after 31st December 2008 were available and whether based on the data for next year, the turnover as well as proportionate margin could be worked out and if so to include the company as comparable.

Pangea3 & Legal Database Systems Pvt Ltd – TS-148-ITAT-2017 (Mum) – TP dated 06.03.2017

84. The Tribunal held that the assessee, engaged in providing software services could not be compared to:
    - Bodhtree Consultancy Ltd as it was functionally different since it was engaged in both software products and services, providing ITES Data activities, data management and data warehousing activities and its margins were fluctuating over a period of 3 years
    - CIP Technologies and Export Ltd as there was an abnormality of profits and losses as the 3 years average margin of the comparable included two years of losses
    - VMS Software Technology Ltd as it had a turnover of merely Rs.85 lakhs which was below the turnover filter of one crore applied by the TPO
    - FCS Software Solutions Ltd as it was functionally different, had fluctuating margins and did not have any segmental details
    - CAT Technologies Ltd as no relevant information of the said company had been provided.

    GE Converteam EDC Pvt Ltd v ACIT - TS-98-ITAT-2017(CHNY)-TP] - I.T.A. No. 973/Mds/2014 dated 25.01.2017

85. The Tribunal held that the assessee, engaged providing software development and technical support services to its AE could not be compared to:
    - Acropetal Technologies Ltd as it was engaged in development of computer software
    - E-Zest Solutions Limited as it was engaged in product engineering services in the nature of High end knowledge process outsourcing and having expertise in emerging technologies cloud Saas, business Intelligence and mobility
    - Persistent Systems as it was engaged in software product development and product design services, it earned income from product licensing and did not have any segmental details
    - Sasken Communications Limited as it was engaged in multimedia products.

    Symantec Software and Services India Private Limited vs. DCIT - TS-96-ITAT-2017(CHNY)-TP - I.T.A. No. 614/Mds/2016 dated 20.01.2017

86. The Tribunal dismissed the contention of the Revenue viz. that the assessee was a high end software development service provider and upheld the TPO's characterization of the assessee as a captive service provider, who only worked based on the specifications provided by its AEs. It held that the contention of the Revenue had not been taken before lower authorities and therefore it could not be considered at this stage i.e. before the Tribunal. With regard to the benchmarking of international transactions of the assessee, it excluded the following companies as comparable:
    - Infosys Technologies Ltd it had substantial R&D, significant intangibles, high risk profile, owned proprietary products, providing onsite services, had a huge brand value and had a high number of employees vis-à-vis the employees of the assessee

- Tata Consultancy Services as it was engaged in IT infrastructure services, ITES, engineering and BPO services, it sold equipment and software licenses and had a high risk profile
- Tata Elxsi Ltd as it was functionally dissimilar as its software development services segment also included design and development of hardware
- Thirdware Solutions Ltd as it earned revenue from various business segments such as sale of license, software services and subscription and did not have segmental data

Further, it held that SIP Technologies & Exports Ltd was to be considered as comparable as it passed both the employee cost filter and export revenue filter, It held that the mere fact that its turnover was low could not be the sole factor for its exclusion.

St-Ericsson India Private Limited vs Addl CIT – TS-119-ITAT-2017 (Del) – TP - ITA No.1672/Del./2014 dated 22.02.2017

87. The Tribunal held that the assessee, engaged in providing IT enabled services could not be compared to:

- Fortune Infotech Ltd, ICRA Online Ltd and Sundaram Business Services Ltd as their RPT to Sales transactions was 25 percent, 19.6 percent and 29.44 percent, respectively i.e. in excess of the 15 percent filter applied
- E-clerx Services Ltd. as it was engaged in providing complete business solutions in the nature of high end services
- Infosys BPO Ltd as it has the benefit of market value as well as brand value, and also enjoys the benefits of scale and market leadership
- Accentia Technologies Ltd, relying on Equant Solutions India Pvt. Ltd. [TS-28-ITAT-2016(DEL)-TP]and Interwoven Software Services (India) Pvt. Ltd. [TS-723-ITAT-2016(Bang)-TP], wherein it was excluded as comparable as it was functionally dissimilar to a captive service provider
- Acropetal Technologies Ltd. (Seg.), relying on Kodiak Networks (India) Pvt. Ltd. [TS-369-ITAT-2015(Bang)-TP], wherein it was excluded as comparable as it was functionally dissimilar to a captive service provider

DCIT vs. Tesco Hindustan Service Centre Pvt. Ltd - TS-80-ITAT-2017(Bang)-TP - I.T.(T.P} A. No.191/Bang/2015 dated 25.01.2017.

88. The Tribunal, following the decision of the co-ordinate bench in Airbus India Operations Pvt. Ltd [TS-446-ITAT-2014(Bang)-TP] excluded 2 companies viz. Infosys Technologies Ltd. and Bodhtree Consulting Ltd from the list of comparables for the purpose of benchmarking software development services provided by the assessee to its AEs during AY 2009-10, noting that the Revenue could not point out any difference in the facts vis-à-vis the said decision. As regards assessee's plea for exclusion of 'Thirdware Solutions Ltd', it noted that segmental data of this company was available with respect to revenue from software services and therefore remanded the comparability of this company to TPO with direction to consider only relevant segmental data for the purpose of computing the margin of the company.

Intuit Technology Services Private Limited Vs CIT(A) - TS-140-ITAT-2017(Bang)-TP - IT(TP)A No.1665/Bang/20 14 dated 31.1.2017

89. The Tribunal held that the assessee engaged in providing software development services to its AEs could not be compared with:
- Avani Cimcon Technologies Ltd as it earned revenue from software product sales apart from rendering of software services and no segmental data was available and also since it earned abnormally high profits during the relevant year which represented abnormal circumstances
- Celestial Labs Ltd as it was mainly into clinical research and manufacture of bio- products and other pharma related activities and it also owned Intellectual property
- E-Zest Solutions Ltd as it rendered product development consulting and other high-end IT enabled services normally categorised as KPO-type services
- Helios & Matheson Information Technology Ltd as it was functionally dis-similar
- Infosys Technologies Ltd as it was functionally dis-similar, it owned significant intangibles, had huge revenue from software products, incurred substantial R&D and segmental details for its software services and software products were not available

- Ishir Infotech Ltd as it out-sourced its work and therefore did not satisfy the 25% employee cost filter
- Lucid Software Ltd as it was engaged in development of software in addition to software services as opposed to assessee who was only into software development services
- KALS Information Systems Ltd as it was functionally dis-similar as it was engaged in developing software products as well as services
- Persistent Systems Ltd as it engaged in product development and software designing and segmental details were not available.
- Thirdware Solutions Ltd as it was engaged in product development, it earned revenue from sale of licenses and subscriptions in addition to software development services and segmental details for software development services and product development were not available
- Wipro Ltd as it owned substantial IP and intangibles, was engaged in both software development and product development services and its segmental details were not available
- R-Systems International as it followed a different financial year
- Flexotronics Software Systems as its financial data was only for 9 month period and segment data reconciliation was not available.

ST Microelectronics Pvt. Ltd. vs. DCIT TS-82-ITAT-2017(Bang)-TP - IT(TP)A No.949lBang/2011 dated 06.01.2017

90. The Tribunal held that the assessee engaged in providing software development services and market support services to its AEs could not be compared to:
    - KALS Infosystems Ltd. as it was engaged in sale of software products apart from provision of software development services
    - Tata Elxsi Ltd as it was engaged in product development, undertook diverse activities such as industrial design, engineering design and visual computing and also carried out R&D resulting in IP
    - Accel Transmatics Ltd as it was engaged in provision of ACCEL Animation Services for 2D and 3D Animation etc. apart from software development service
    - Infosys Technologies Ltd on account of its huge Brand value, substantial IPs, diversified operations including product development and also since it engaged in R&D activity
    - Flextronics Software System Ltd as it was engaged in R&D and also acquires IP
    - Lucid Software Ltd as it was involved in development of software product apart from software development services and its segmental details were not available
    - Further, applying a turnover filter of 10 times the turnover of the assessee (Rs.19.39 crore), it also held that Flextronic Software Systems Ltd, having turnover of Rs. Rs.595.12 crores, ought to be excluded from the list of comparables.

    Netscout Systems Software India Pvt. Ltd. (Formerly Network General Software India Pvt. Ltd.) vs DCIT - TS-185-ITAT-2017(Bang)-TP - I.T.{T.P} A. No.1479/Bang/2010 dated 15.02.2017

91. Where the Revenue by relying on the decision of Intoto Software India Pvt Ltd V ACIT [TS-141-ITAT-2013(HYD)-TP], contended that out of the 24 companies (selected by the TPO) excluded by the CIT(A) 8 companies (viz. E-Zest Solutions Ltd, Igate Global Solutions Ltd, Persistent Systems Ltd, Helios & Atheson Information, LGS Global Ltd, Quinteqra Solutions Ltd, RS Software India Ltd and Thirdware Software Solution Ltd) were not covered in the impugned decision and therefore were to be included and out of the above the assessee only argued for the exclusion of 4 of the companies relying on the decision Society General Global Solution Centre Pvt. Ltd [TS-323-ITAT-2016(Bang)-TP], the Tribunal remitted the comparability of all 8 comparables contested by Revenue to TPO for fresh consideration.

    Xilinx India Technology Services Pvt. Ltd. Vs. DCIT -TS-225-ITAT-2017(HYD)-TP - ITA No. 1051/Hyd/2014 dated 24.03.2017

92. The Tribunal, relying on the decision of the coordinate bench in Citrix Research & Development India Pvt. Ltd [TS-90-ITAT-2016(Bang)-TP] dismissed the appeal of the Revenue and upheld the order of the CIT(A) wherein Infosys Ltd had been excluded as a comparable. It observed that Infosys Ltd was a giant company, market leader, owned substantial intangibles, had substantial revenue from software products and had incurred huge expenditure on research and development and therefore could not be compared to the assessee, a captive service provider.

DCIT vs. Informatica Business Pvt. Ltd - TS-212-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1285/Bang/2014 dated : 17.03.2017.

93. The Tribunal held that the software development services provided by the assessee to its AEs could not be benchmarked with the following comparables:
- KALS Information System Ltd as it was engaged in development of software products and was not a pure software development service provider
- Bodhtree Consulting Ltd. as it provided end to end web solutions, off-shoring data management and data warehousing, it was more of a software product company and due to its different revenue recognition model whereby expense may have been booked in one year and revenue may have been recognized in earlier or subsequent year, it had fluctuating margins
- Tata Elxsi Ltd as its software development and services segment constituted 3 sub-segments namely product design, engineering design and visual computing labs
- Persistent Systems Ltd as it was engaged in product designing services and software product development.
- Larsen & Toubro Infotech Ltd as it was a global IT service and solutions provider.
- Sasken Communications Services Ltd as it owned products, IPRs etc.

Further, it held that insignificant 'other income' (interest, foreign exchange gain) could not affect the operating margins and therefore the comparability of an other-wise comparable company and thereby included F C S Software Solutions Ltd & Thinksoft Global Services Ltd as comparable.
Huawei Technologies India P. Ltd. Vs. ITO - TS-157-ITAT-2017(Bang)-TP – IT(TP) A No 265 / Bang / 2014 dated 17.02.2017

94. The Tribunal accepted assessee's application of turnover filter at 10 times the assessee's turnover noting that it was a relevant factor in the selection of comparables and accordingly excluded the following companies on the basis that their turnover was either more than Rs. 560 crores or less than Rs. 5.6 crores considering that assessee's turnover was Rs. 56 crores.
(i) KALS Information System Ltd. (ii) Zylog System Ltd. (iii) Mindtree Limited (Seg.) (iv) L& T Infotech Ltd & (v) Infosys Limited.
It also held that the following companies could not be compared to:
- Bodhtree Consulting Ltd as it was Software product company and not a software development services company
- Tata Elxsi Ltd as it was engaged in different activities including embedded product design, industrial design, engineering services and visual computing laboratory and segmental details in respect of software services activity was not available.
- Persistent Systems Ltd as it was engaged in product designing services and software product development

Evry India Pvt. Ltd vs DCIT - TS-76-ITAT-2017(Bang)-TP - LT. (T.P)A. No.I09/Bang/2014 dated 25.01.2017

95. The Tribunal held that the assessee, engaged in providing software development and consultancy services could not be compared to:
- Bodhtree Consulting Ltd as it had undergone drastic fluctuations in profit margins due to revenue recognition method followed by the company
- KALS Information Systems Ltd as the company was engaged in development of software products and was also excluded in the prior years
- Sasken Communication Technology Ltd as based on the application of the 10 Times turnover filter, it would not satisfy the said filter considering that its turnover of the company was Rs.479 Crores in comparison to assessee's turnover of Rs. 25.44 crores

Logix Microsystems Ltd. vs. DCIT - TS-181-ITAT-2017(Bang)-TP - IT. {T.P} A. No.280/Bang/2014 dated 22.02.2017.

96. The Tribunal held that the assessee, engaged in the business of software development was not functionally comparable to**:**

- Bodhtree Consulting Ltd, KALS Information Systems Ltd & E-zest Solutions Ltd as they earned income from both software product development as well as ITES and had no segmental break-up
- Akshay Software Technologies Ltd, Maars Software International Ltd & RS Software (India) Ltd as they were onsite services providers and the assessee was an offsite service provider
- Quintegra Solutions Ltd as the company owned substantial intangibles

Further, it excluded Indium Software (India) Ltd as comparable as its export turnover was less than the 75 percent filter applied and S I P Technologies and Exports Ltd as the company had shown a loss of -33.20 percent.
Applying the turnover filter Rs. 1-200 crore, it directed the exclusion of Helios and Matheson Information Technology Ltd with a turnover of Rs. 213.39 crores on the ground of failing Rs.200cr turnover filter.
Further, rejecting the contention of the assessee that E-Infochips Ltd was to be excluded as it was engaged in the sale of software products, the Tribunal noting that the turnover from software products was merely 4 percent of total turnover, directed for the inclusion of the said company.
MSC Software Corporation India Pvt. Ltd vs. ACIT - TS-226-ITAT-2017(PUN)-TP - ITA No.46/PUN/2013 dated 22.03.2017

97. The Tribunal held that the assessee, engaged in providing software development services to its AE could not be compared to:
- Bodhtree Consulting Limitedas it provided e-paper solutions, data cleansing software, website development and other customised software and had RPT transactions in excess of 25%.
- Geometric Software Solutions Limited as it was a product based company and segmental details of its service income were not available
- Tata Elxsi Limited due to the diverse nature of business it carried out and that its software development service segment also comprised 3 sub-services namely product design, design engineering and visual computing labs
- Sankhya Infotech Ltd as engaged in the development of software products & services and training, for transport and aviation industry and segmental information was not available
- Four Soft Ltd as it was Functionally dis-similar.

As regards the IT enabled services provided by the assessee, it held that it could not be compared to:
- Vishal Information as it had a low employee cost of 1.25% of operating revenue as against IT/ITes industry average of 46.1%, it was engaged in call centre services and its operating margin at 50.68% could not be considered to be normal
- Nucleus Netsoft& GIS Ltd as it had outsourced a considerable portion of its business,

Google India Pvt. Ltd. Vs. DCIT - TS-154-ITAT-2017(Bang)-TP - IT(TP)A No.1298/Bang/2013 dated 03.03.2017

98. The Tribunal held that Compucom Software and Sterling International Enterprise Ltd could not be compared to the assesee engaged in the business of software development as they failed to satisfy the RPT filter of 25 percent and had a different financial year ending, respectively.
Tieto Software Technologies LTD. vs. DCIT - TS-155-ITAT-2017(PUN)-TP - ITA No.986/PUN/2013 dated 03.03.2017

99. The Tribunal held that for the purpose of benchmarking the international transactions of the assessee, the following companies could not be considered as comparable:
- KALS Information Systems Ltd. as it was in the field of consultancy, information provider and general insurance sector
- 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
- Tata Elxsi Ltd. (seg) as the 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.
- Persistent System Ltd as the company was in 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.
- Sasken Communication Tech Ltd being functionally dis-similar as it owned IPR and had branded products, and also since it had undergone significant restructuring during the year

Sandisk India Device Design Centre Pvt. Ltd. Vs. DCIT- TS-183-ITAT-2017(Bang)-TP - IT(TP)A No. 126lBang/20 14 dated 15.02.2017

100. The Tribunal dismissed the order of the CIT(A) wherein the CIT(A) had adopted 0% RPT filter noting that various benches of Tribunal had been accepting 15% RPT filter. Noting the contention of the assessee that if the 15% RPT filter was applied, various comparables rejected by CIT(A) would get reinstated and thereafter those comparables would have to be examined on other aspects such as functional similarity etc, it remitted the matter to the file of the CIT(A) for reconsideration.

Misys Software Solutions India Private Ltd vs DCIT - TS-81-ITAT-2017(Bang)-TP - IT (TP) A No.552 (Bang) 2012 dated 31.01.2017

101. The Tribunal held that the assessee, engaged in providing software development services to its AEs could not be compared to:
- Infosys Tech. Ltd as it was a giant company in the area of development of software and it assumed higher risks leading to higher profits
- Persistent Systems Ltd as it was engaged in product designing and software product development
- Tata Elxsi Ltd as it was engaged in provision of product design, engineering design and visual computing labs
- Kals Information Systems Ltd. as it operated in the field of consultancy, information provider and general insurance sector
- Bodhtree Consulting Ltd as it was engaged in the business of software product and end-to-end web solutions software consultancy

Noting the contentions of the assessee that Sasken Communications Services Ltd's margin was incorrectly computed and that Larson & Toubro Infotech Ltd had a good volume of transactions relating to securities trading and that its margins were incorrectly computed, it held that the issue was to be remitted to the TPO for fresh consideration.

With regard to the assessee's plea for inclusion of certain comparable companies it remitted the issue to the file of the AO / TPO to determine:
- Whether Azlecsoft Ltd & Quintegra Solutions Ltd satisfied the 75 percent export earning filter
- Whether CG-VAK Software and Exports Ltd was functionally comparable and if it would satisfy the 25 percent employee cost filter on inclusion of contribution to PF, gratuity etc were also included in cost
- Whether Goldstone Technologies Ltd was functionally comparable to the assessee

Magma Design Automation India P. Ltd. Vs. DCIT - TS-141-ITAT-2017(Bang)-TP - I.T(TP).A No.1279/Bang/2014 dated 28.02.2017

102. The Tribunal held that the assessee engaged in providing software development services to its AE could not be compared to the following companies:
- Bodhtree Consulting Ltd as the company was engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology.
- Tata Elxsi Ltd. (Seg) as its 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
- Persistent Systems Ltd as it was engaged in product designing services
- Sasken Communications Technology Ltd as this company owned IPR, had branded products, and had undergone significant restructuring during the year.

Further it rejected the assessee's claim for exclusion ofZylong Systems Ltd and Mindtree Ltd. (Seg.) on the ground that they did not satisfy the turnover filter of Rs. 2-200 Cr, holding that the correct turnover filter to be applied was more than of 10 times the turnover of the assessee (Rs.100 crore) and since the revised upper turnover filter was Rs.1,000 crore, these companies could not be excluded as their turnover fell within the said upper filter.

VMware Software India Pvt. Ltd. Vs DCITTS-71-ITAT-2017(Bang)-TP -LT. (T.P}A. No.1311/Bang/2014 dated 6.1.2017

103. The Tribunal dismissed the appeal of the Revenue and held that the following companies could not be included in the list of comparables for benchmarking the assessee's software service transactions with its AE:
    - Bodhtree Consulting Ltd as it was engaged in ITeS and software development while its segmental details were absent
    - Celestial Biolabs as the company was functionally different from that of software development company as it was engaged in clinical research and manufacture of other bio products (Reliance was placed on the decision of 3DPLM Software Solutions Ltd [TS-359-ITAT-2013(Bang)-TP]).
    - Lucid Software Ltd as the company was engaged in product development rather than services (Reliance was placed on the decision of 3DPLM Software Solutions Ltd [TS-359-ITAT-2013(Bang)-TP])

    Sunquest Information Systems India Pvt. Ltd vs. JCIT - TS-176-ITAT-2017(Bang)-TP - IT(TP)A No. 79/Bang/2013 dated 17 .03.2017

104. The Tribunal held that the following companies could not be compared to the assessee:
    - ICRA Techno Analytics Ltd and Larsen & Toubro Infotech Ltd as their RPT transactions exceeded the 15 percent filter applied
    - Acropetal Technologies Ltd. (Seg) as it failed the filter of 75% IT revenue applied by the TPO itself
    - e – Zest Solutions Ltd as it was engaged in KPO Services
    - Infosys Ltd as it had high brand value, intangibles and huge turnover
    - Persistent Systems & Solutions Ltd, Persistent Systems Ltd & Sasken Communication Technologies Ltd as it was functionally dissimilar
    - Tata Elxsi Ltd as it failed the export revenue filter of 75%
    - E – Infochips Ltd as it had revenue from software products and segmental details unavailable

    Commscope Networks (India) Private Ltd. (Earlier known as Airvana Networks (India) Private Ltd.) Vs ITO - TS-161-ITAT-2017(Bang)-TP - IT (TP) A No.166 (Bang) 2016 dated 22.02.2017

105. The Tribunal held that the assessee, engaged in providing software development services to its AEs could not be compared to:
    - Kals Information Systems Ltd as it was engaged in the development of software and sale of software products
    - ICRA Techno Analytics Ltd (seg) as its service segment comprises of various services such as software development, software consultancy, engineering services, web development, web hosting, etc and no further segmental results were available
    - Persistent Systems & Solutions Ltd as no segmental results were available

    Further, rejecting the RPT filter of 0 percent adopted by the DRP and applying the filter of 15 percent, the Tribunal held that RS Software (India) Ltd and Thinksoft Global Services Ltd were now to be considered as comparable as they had RPT of 0.96 and 11.09 percent, respectively. Further, following the decision of the co-ordinate bench in Obopay Mobile Technolgy India P Ltd [TS-20-ITAT-2016(Bang)-TP], excluded 6 comparables Infosys Ltd (Rs. 21,140 crore), Larsen & Turbo Infotech Ltd (Rs. 1,777 crore), Mindtree Ltd (seg) (Rs. 698 crore), Persistent Systems Ltd (Rs. 504 crore), Sasken Communication Technologies(Rs. 402 crore) and Tata Elxsi Ltd (seg) (Rs.

376.37 crore) on the ground of turnover and size of the said comparables (as compared to the assessee's turnover of Rs. 13.23 crores)

Logitech Engineering & Design India P. Ltd vs DCIT - TS-145-ITAT-2017(Bang)-TP - I.T(TP).A No.287/Bang/2015 & I.T(TP).A No.127/Bang/2015 dated 03.03.2017

Investment Advisory Services

106. The Tribunal excluded two comparables viz. Motilal Oswal Investment Advisory Pvt Ltd. (engaged in rendering services of investment banking and corporate banking and advisory)and Brescon Corporate Advisors Pvt Ltd. (engaged in rendering the services of Merchant Banker)on grounds of functional dissimilarity with the assessee rendering investment advisory services during AY 2009-10. It further held that the DRP was not justified in stating that the comparables selected by the TPO for the earlier year would be valid for the under appeal. It reasoned that each and every year was a separate and independent unit and process of identifying comparables was not merely a formality, and that the procedure laid down in the Act and Rules could not be deviated from.

Blackstone Advisors India Private Limited - TS-5-ITAT-2017 (Mum) – TP

107. The Tribunal held that the assessee, engaged in rendering investment advisory services to its AE could not be compared with:
- Crisil Ltd (segment Research Service) as it was Functionally different, its RPT filter was more than 25% and its advisory segment had been transferred to its wholly owned subsidiary
- ICRA Ltd as it was functionally incomparable
- SBI Fund Management Ltd as it was an 'Asset manager' whose main source of income was by way of management fees, while its income from advisory fees was negligible.
- Sundaram Asset Management Ltd as it was an asset management company whose main source of income was by way of 'Investment management fees'
- Deutsehe Asset Management India Ltd as it was functional incomparable and had substantial RPT

It also included the following companies that were excluded by the TPO:
- Future Capital Holding, KPIT Cummins Global Business Solution Ltd as the said companies were not persistently loss making companies though they had incurred losses during the year.
- ICRA Management Consulting Services Ltd as the TPO had incorrectly rejected this company on the ground of RPT and persistent losses whereas its RPT was 14 percent (below the 25 percent threshold applied by the TPO) and it was not a persistently loss making company.
- IDC India Ltd as the company was selected as comparable in the preceding year and there had been no change in its functionality since then.

TPG Capital India Private Limited Vs DCIT - TS-101-ITAT-2017(Mum)-TP ITA. No. 7594/Mum/2014 dated 08.02.2017

108. The Tribunal held that for AY 2008-09, the assessee, engaged in providing investment advisory services to its AE could not be compared to:
- ICRA Ltd as it was not functionally comparable having almost all its income from credit rating services
- Deutsche Asset Management India Ltd as it earned significant revenue from investment management services and had no segmental details in respect of income from other activities
- Sriyam Broking Intermediary Ltd as the company was into share broking services
- 21st Century Share and Securities Ltd as significant amount of its income were from share broking services
- SBI Fund Management Pvt Ltd as most of its income was from asset management services

Further, it included IDC India Ltd as comparable observing that the company operates in the single segment of market research and management consulting which was held to be comparable to an investment advisory service provider in various precedents of. Hon'ble Bombay High Court in General Atlantic Pvt Ltd, Temasek Holding Advisory India Pvt Ltd and Sandstone Capital Advisors Pvt Ltd.

Further, for AY 2009-10, the Tribunal held that the assessee could not be compared to:

- Integrated Capital Services Ltd as the company was engaged in providing investment banking banking services, advisory in mergers and acquisitions and re–construction of business
- MotilalOswal Investment Advisors Pvt Ltd as the company was into merchant banking services

It included ICRA Management Consulting Services Ltd as comparable as it was engaged in consulting services to various types of industries through investment advisory, which was held similar to assessee's business.

Warburg Pincus India Pvt. Ltd. vs. ACIT – TS-44-ITAT-2017 (Mum) – TP ITA no. 6981/Mum./2012 / ITA no. 1717/Mum./2014 dated 13.01.2017

109. The Tribunal held that the assessee, engaged in providing non-binding investment advisory services' to its AE could not be compared to:
    - Centrum Capital Limited as it was engaged in 'merchant banking' activities having its main income from syndication fees, brokerage and commission and trading in bonds
    - Keynote Corporate Services Limited as it was engaged in providing merchant banking activities involving lead managing IPOs, right offer, buyback of shares and takeover, corporate finance and M & A advisory
    - SREI Capital Markets Limited as it carries out full scale investment banking, corporate advisory and project management consulting firm, and primary income is from merchant banking activities and it operated under a single segment, i.e., Project consultancy, merchant banking and underwriter services
    - Sumedha Fiscal Services Limited as it was engaged in providing merchant banking activities involving loan syndication and project consultancy services

    JP Morgan Advisors India Private Limited Vs DCIT - TS-170-ITAT-2017(Mum)-TP - ITA No.7979/MUM/2010 dated :16.03.2017

110. The Tribunal held that the assessee, engaged in providing non-binding investment advisory services could not be compared to Motilal Oswal Investment Advisers Pvt. Ltd as it was a merchant banker and therefore not functionally comparable
    Further, it held that ICRA Management Consulting Services Ltd & IDC India Ltd were to be accepted as comparables as they had been accepted as comparables by the Tribunal in the assessee's own case for prior assessment years.
    Warburg Pincus India Pvt. Ltd. vs DCIT - TS-238-ITAT-2017(Mum)-TP-I.T.A.No.1612/Mum/2015 dated 29.03.2017

<u>Support Services</u>

111. The Tribunal held that the assessee, engaged in the business of research and development of telecommunication software & Sales and providing marketing and customer support services could not be compared to a). Persistent Systems since the company was engaged in the sale of products, R&D in life sciences, product lifecycle services, medical research etc, b). Sonata Software ltd as the company had Related Party Transactions of more than 25 percent of its total revenue, c). Igate Global Solutions Ltd since it was engaged in both IT products and services without any segmental break-up, d). Bodhtree Consulting Ltd on the ground that the said company had an abnormal margin of 64.89 percent which was indicative of the fact that the company did not reflect a normal business connection e). Genesys International Corporation Ltd as it was functionally not comparable since it was engaged in providing geospatial services and specialized in land based technology f). FCS Software Solutions Ltd since it operated in diverse activiites viz. infrastructure management outsourcing for hardware requirements, imparting internet based e-learning and IT consulting services without any segmental break-up.
    Noting that the TPO had not applied the turnover filter, it rejected the assessee's contention for excluding a single comparable viz. Persistent Systems (though excluded on other reasons) based on the turnover filter.
    Dialogic Networks (India) Pvt Ltd v DCIT – TS-2-ITAT-2017 (Mum) - TP

112. The Tribunal held that the international transaction of the assessee viz Provision of global call centre services could not be benchmarked by considering the following companies as comparable

viz. Informed Technologies Ltd as the company was operating as an IT enabled knowledge based Back office processing centre, which was functionally different, Rev IT Systems Ltd as its RPT transactions were in excess of 25 percent of its total revenue. Further, it held that Allsec Technologies Ltd could not be excluded as comparable merely because it incurred losses as it was not a persistently loss making concern.
Dialogic Networks (India) Pvt Ltd v DCIT – TS-2-ITAT-2017 (Mum) – TP

113. The Tribunal held that assessee, engaged in rendering ITES to its group companies could not be compared to the following companies viz. a). Accentia Technologies as it was engaged in high on-site operations in different geographical zones and it had undertaken extra-ordinary events (merger) during the year which resulted in higher profits b). Asit C Mehta as it had abnormally low employee cost c). Bodhtree Consulting Ltd as it was engaged in software development therefore functionally different, d). Eclerx Services Ltd as it was a KPO service provider and it reported extraordinary high profits e). Mold Tek Technologies Ltd as it was engaged in providing structural engineering consulting services under the KPO division f). Vishal Information Technologies since it outsourced a large portion of its work to third party vendors and g). HCL Comnet Systems and Services Ltd, Infosys BPO Ltd, Wipro Ltd on account of functional difference, high brand value and premium pricing.
TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) - TP

114. The Tribunal held that the sales and support services segment of the assessee was not comparable to the following companies viz. a). Aplhageo India Ltd since the said company was engaged in seismic research activities such as 2D and 3D seismic services for design; b). Mahindra Consulting Engineers Ltd as the company was engaged providing consultancy services in the infrastructure sector; c). Kirloskar Consultants Ltd as it was providing engineering consultancy, project management services and architectural consultancy, d). Stup Consultant Pvt Ltf as it was engaged in the profession of civil engineering and architectural consultancy; and e). Semac Pvt Ltd as it was engaged in providing engineering consultancy services
Comverse Network Systems India v ACIT – TS-33-ITAT-2017 (Del) – TP

115. The Tribunal noted that the TPO was incorrect in categorizing the services provided by the assessee as technical support services and maintenance services and held that in light of the TP study report, it was clear that the assessee merely acted as an interface between the AEs and customers in India and therefore the services provided by the assessee were mediation services and income therefrom was to be characterized as income from mediation rather than income from technical and maintenance services. It further held that the following companies could not be compared to the assessee:
- Apitco Ltd as the said company was functionally dissimilar and did not have segmental results
- Choksi Lab Ltd as the company was engaged in providing testing services and services in the field of pollution control, not functionally similar to the assesse
- WapcosLTd as the company was engaged in infrastructure development projects

Fujitsu India Ltd v DCIT – TS-56-ITAT-2017 (Del) – TP - ITA No.6280/Del/2012 dated 02.02.2017

116. The Tribunal held that the assessee, engaged in the business of rendering marketing & sales support services to its AE could not be compared to:

- Asian Business Exhibition and Conference Ltd as the company was engaged in the sale / leasing out of stall place in exhibitions and events and it underwent wide fluctuations in margins during the year under consideration vis-à-vis previous years
- Cyber Media (India) Ltd and Asian Industry & Information Services Ltd as they were functionally dissimilar to the assessee
- Crystal Hues Ltd as sufficient details to establish the margins and functional similarity had not been submitted by the assessee
- Hansa Vision Pvt Ltd, Denave India Pvt Ltd and Sadhna Media Pvt Ltd as the P&L account of these companies were not available.

TIBCO Software India Pvt Ltd – TS-49-ITAT-2017 (Pun) – TP ITA No.276/PUN/2015 ITA No.334/PUN/2015 dated 31.01.2017

117. The Tribunal held that the assessee, engaged in the business of providing software development, quality assurance and support services to its AEs could not be compared with:
- E Infochips Bangalore Ltd as it was engaged in the business of software and ITES without adequate segmental data
- Kals Info Systems Lt d as it was engaged in the development of software products
- Tata Elxsi as it had high turnover, was engaged in complex activities and did not have segmental data.

Invensys Development Centre India Pvt Ltd v DCIT – TS-125-ITAT-2017 (Hyd) – TP ITA No.329/Hyd/2015 ITA No.318/Hyd/2015 dated 23.02.2017

118. The Tribunal held that for the purpose of benchmarking the call centre services provided by the assessee to its AEs, the following companies could not be considered as comparable:

AY 2008-09
- Accentia Technologies Ltd at it had undertaken an extra-ordinary event of acquisition during the year and it earned revenue from software development and implementation as well
- Coral Hub (earlier Vishal Information Technologies Ltd.) as it outsourced a substantial amount of its services
- Eclerx Services Ltd as it had undergone an extraordinary event of merger which resulted in increased profitability and also since it was functionally different as it provided specialized services in the nature of a Knowledge Process Outsourcing (KPO) such as data analytics, data process solution, tailored outsourcing process and management services including multitude of data aggregation, mining and maintenance services

AY 2009-10
- Coral Hub as it outsourced a substantial amount of its services and also since it had a huge inventory of POD publishing titles
- Eclerx Services Ltd due to the functional differences based on which it was excluded in the immediately preceding assessment year

AY 2010-11
- Accentia technologies Ltd as it had undergone an extraordinary event of merger and acquisition and also since the company had shown income from medical transcription, billing and coding, and software development and implementation for which no segmental data in respect of ITES services was available
- TCS E-serve limited as it was engaged in providing high-end transaction processing, technical services involving software testing, verification and validation at the time of implementation, data centre management activities and also used the 'TATA' Brand which impacted its profitability
- TCS E-serve international Ltd as the company was engaged in providing technical services such as software testing, verification and validation of software at the time of implementation and data centre management activities and no segmental information was available to bifurcate ITES services and technical services.

AY 2011-12
- TCS E-serve limited & E clerx service Ltd based on the findings for the earlier years as there was no material change in facts

Corporate Executive Board India Pvt. Ltd. (now known as CEB India Pvt. Ltd) vs. ACIT - TS-220-ITAT-2017(DEL)-TP - ITA No. 6328/Del/2012, ITA No. 1088/Del/2014, ITA No. 963/Del/2015, ITA No. 6683/Del/2015 dated 17.03.2017

119. The Tribunal held that the assessee, engaged in marketing support services to its AEs could not be compared to:
- ICRA Techno Analytics Ltd (seg) as its service segment comprised of various services such as software development, software consultancy, engineering services, web development, web hosting, etc

- Persistent Systems & Solutions Ltd as the segmental details of software services were not available

Logitech Engineering & Design India P. Ltd vs DCIT - TS-145-ITAT-2017(Bang)-TP - I.T(TP).A No.287/Bang/2015 & I.T(TP).A No.127/Bang/2015 dated 03.03.2017

120. The Tribunal held that the assessee, engaged in providing software development services to its AE could not be compared to Infosys Ltd as it owned significant intangibles, had huge revenues from software products and segmental details of software services were not available
Further, it remitted the issue of comparability of LGS Global Limited back to the file of the CIT(A), noting that instead of deciding the issue itself, the CIT(A) had remitted the matter to the file of the TPO, which was not in accordance with the provisions of Section 251 of the Act.
Samsung R&D Institute India Bangalore Pvt. Ltd. Vs. DCIT - TS-156-ITAT-2017(Bang)-TP - IT(TP)A No.55//Bang/2015 dated 03-03-2017

121. The Tribunal held that the assessee, engaged in providing customer support services to its AEs could not be compared to:
- Eclerx Services Ltd as it was involved in diverse services (business consultancy etc) in the nature of KPO services and there was lack of segmental data
- Accentia Technologies Ltd., (Seg.) as it operated a different business strategy i.e acquiring other companies for growth
- Cosmic Global Ltd as it was functionally dissimilar considering the fact that its segment revenue from BPO services was very low
- Informed Technologies Ltd as it had diverse operations, lack of segmental data, was engaged trading of securities
- Infosys BPO Ltd as it was a market leader and a giant company, had significant brand value, incurred large amount of marketing expenses.

Magma Design Automation India P. Ltd. Vs. DCIT - TS-141-ITAT-2017(Bang)-TP - I.T(TP).A No.1279/Bang/2014 dated 28.02.2017

122. The Tribunal allowed the grounds of the appeal of the Revenue wherein it contended that the CIT(A) was unjustified in 1) reducing lower limit of sales turnover filter from Rs. 1Cr to Rs. 0.50 Cr without assigning any reason 2) rejecting the wage/sales ratio of 25-50 percent where the assessee's wage/sales ratio was 37% 3) including Astro Bio Systems (Margin: -18.26%) as comparable even when the assessee itself had eliminated comparables having margin less than 0.05%. It noted the submission of the assessee that even if the grounds of the Revenue were accepted, it would be at ALP. Accordingly, it remitted the matter to the file of AO/TPO to examine the veracity of the submissions made by the assessee.
However, it dismissed the Revenue's plea against exclusion of Four Soft, and upheld CIT(A)'s exclusion of the company citing presence of extra ordinary events i.e. merger/amalgamation.
DCIT vs. Aircom International India Pvt. Ltd - TS-162-ITAT-2017(DEL)-TP - ITA No.4836/Del./2009 dated 28.02.2017

123. The Tribunal held that the assessee, engaged in providing software development could not be compared to:
- Vishalsoft Technologies Ltd as 56% of its expenses had been incurred in respect of onsite software development as against assessee who is a captive service provider and it also incurred R&D expenses to the extent of 4.96 percent of its sales and therefore operated a different business model
- Infosys Technologies Ltd & Satyam Computer Services Ltd as they were functionally not comparable to the assessee a captive service provider.
- L&T Infotech Ltd as the TPO/AO had accepted the exclusion of this company in remand report dt.8.1.2010 for the case of Vishal Web Solution Ltd and therefore could not take a different stand in this appeal
- Geometric Software Solution Co. Ltd as its Related Party transactions (16.40 percent) exceeded the 15 percent filter applied.

DCIT vs. Novell Software Development (India) Pvt. Ltd - TS-190-ITAT-2017(Bang)-TP - I.T.{T.P} A. No.1313 / Bang / 2012 dated 10.02.2017.

124. The Tribunal held that the assessee engaged in in provision of software development and marketing support services to its AEs could not be compared to:
- Exensys Software Solutions as it was a product development company and a BPO and had also earned abnormal profits due to amalgamation (extra-ordinary event)
- Satyam Computers Ltd as the financial results of the company were unreliable
- Thirdware Solutions as it was engaged in the business of information services, consulting and outsourcing company and also derived income from sale of licenses.
- Infosys Technology Ltd on account of its high brand value
- Flextronics Software Systems Ltd as it incurred substantial R&D expenses
- Tata Elxsi as it was engaged in diverse activities which were dissimilar to those rendered by the assessee
- Bodhtree Consulting as it was engaged in provision of niche IT services and it had fluctuating margins year-on-year since it followed different revenue recognition policies

Further, it held that L&T Infotech Ltd & iGate Global Solutions Ltd, which were excluded as comparable by the CIT(A) on the ground that their turnover exceeded Rs.200 crore, were to be considered as comparable as turnover was not a relevant criterion for the purpose of deciding the comparability as Rule 10B(2) does not specify turnover as one of the factors for deciding comparability.

Electronics for Imaging India Pvt. Ltd vs. DCIT - TS-169-ITAT-2017(Bang)-TP - IT(TP)A No.462/Bang/2013 dated 10.03.2017

125. The Tribunal held that the assessee, engaged in providing representation and logistics/marketing support services and cost reimbursement could not be compared to the following companies:
- IDC India Ltd as it was a KPO and could not be compared with the back office support services carried out by the assessee
- Empire Industries Ltd as it was engaged in the trading and indenting of industrial and medical equipment and machine tools

Further, it held that Agrima Consultants International Ltd engaged in the activities of preparation of feasibility report in respect of cement grinding plant, akin to the market support services provided by the assessee could not be excluded merely because there was a negative trend in the economy of the company.

Philip Morris Services India SA Vs. ADIT - TS-224-ITAT-2017(DEL)-TP - ITA No. 5301/Del/2011 dated 15.03.2017

126. The Tribunal held that the assessee, engaged in providing business support services and supply based development services and information technologies to its AE could not be compared to the following companies:
- TSR Darashaw Ltd as it was engaged in organizing events with various kinds of sponsors therefore functionally different
- Access India Advisors Ltd as it had deviating margins from year to year.

It dismissed the contention of the Assessee for the exclusion of ICRA Online Ltd and held that the said company ought to have been considered as comparable as it was also providing certain services of conducting research and preparing reports which were provided to its customers and more so since the assessee had selected this comparable in instant and preceding years.

Though it ultimately excluded Access India Advisors Ltd as comparable, it held that the assessee was incorrect in seeking its exclusion merely on the basis of super normal profit margins.

Honeywell Turbo Technologies (India) Pvt. Ltd - TS-84-ITAT-2017(PUN)-TP ITA No.2584/PUN/2012 dated 10.02.2017

<u>Others</u>

127. The Tribunal held that the following companies could not be included in the list of comparable companies while benchmarking the R&D services provided by the assessee:

- Sankhya Infotech Ltd as it was engaged in the business of software products, services and training for transport and aviation industry without any segmental data
- Thidware Solutions Ltd as it was engaged in the sale of software license and related services
- Exensys Software as it had undergone an amalgamation during the year which led to abnormal profits
- Four Soft Ltd as it was functionally different and had RPT in excess of 15 percent (19.89%)

Further, it held that LGS Global Ltd could not be excluded as comparable merely because it had a lesser margin as compared to the assessee.

DCIT v Nvidia Graphics Pvt Ltd – TS-1089-ITAT-2016 (Bang) – TP IT(TP)A No.1211/Bang/2011 dated 23.11.2016

128. The Tribunal held that the assessee, engaged in contract research and development services could not be compared to:
    - Celestial Biolabs Ltd as it was engaged in providing host of IT Services and some trading activity and also owned IPRs
    - IDC India Ltd as it was engaged in providing market research and survey services
    - Oil Field Instrumentations Ltd as the nature of assets employed and the activities performed indicate that the company was functionally different

    Further, it dismissed the contention of the assessee for exclusion of TCG Lifesciences on the ground that its income from R&D services was 74.5 percent which was less than the filter of 75 percent adopted by the TPO. It held that a difference of 0.1 to 0.9 percent could not be considered as a substantial difference for the purpose of exclusion.

    Apotex Research Pvt Ltd v ITO – TS-1035-ITAT-2016 (Bang) – TP IT(TP)A No.40/Bang/2014 dated 04.11.2016

129. The Tribunal held that Astra Microwave Component Ltd (AMCL) could not be considered as comparable to the assessee, engaged in the manufacturing and export of microwave components as the assessee was a captive unit as against AMCL, a full-fledged manufacturing and marketing company. Further, it also held that theassessee was not a complete manufacturer of the final product, but was only making value addition on behalf of the AE and therefore, it excluded the same company.

    Akon Electronics India Pvt. Ltd vs. DCIT – TS-105-ITAT-2017 (Del) – TP ITA No.4804/Del/2009 ITA No.4837/Del/2009 dated 15.02.2017

130. The Tribunal held that the assessee engaged in the business of manufacture and sale of train components could not be compared to:
    - Shanthi Gears Ltd as it was engaged in the manufacturing of gears and geared boxes used in textile machinery, power sector etc whereas assessee operated in the automotive sector
    - International Combustion (India) Ltd as it was engaged in the manufacture and sale of premium quality equipments, it has three business divisions i.e. heavy engineering, polymer and bauer and catered to a different industry.

    Spicer India Limited Vs ACIT - TS-99-ITAT-2017(PUN)-TP - ITA No.251/PUN/2014 dated 10 .02.2017

131. The Tribunal remitted the issue of comparability of Lotus Labs to the file of the TPO noting that the assessee, a clinical trial coordinator, contended that it was not a good comparable on account of its significant RPT transactions and lack of segmental information in respect of the clinical trial segment of the said company.

    Astra Zeneca Pharma India Ltd v DCIT – TS-1074-ITAT-2016 (Bang) – TP I.T(TP).A NO.107/Bang/2014 dated 27.12.2016

132. Where the comparable selected for benchmarking the assessee's international transactions in the crop protection segment operated in two segments viz. crop protection segment and pharmaceuticals segment, the Court upheld the order of the Tribunal and held that the relevant

segmental results of the comparable were to be considered (segmental results of the crop protection segment) as opposed to the entity level results of the company.
E.I Dupont India Pvt Ltd vs CIT - TS-179-HC-2017(DEL)-TP - ITA 40/2017, C.M. APPL.2421/2017 dated 01.03.2017

133. The Tribunal held that the assessee engaged in providing cargo handling and freight forwarding services could not be compared to Gordon Woodfree Logistics Ltd and that the said company was rightly rejected by the TPO as it was a persistent loss making company. It noted that the company made losses in the prior and relevant year and only earned a small profit in the subsequent year and therefore upheld the TPO's exclusion of the comparable.
As regards the TPO's selection of NR International Ltd and Natura Hue Chem Ltd, the Tribunal noted that though the said companies were engaged in various other businesses, the TPO had only considered the relevant segment viz. cargo handling segment for comparability and therefore upheld their selection.
Further, noting that the TPO had excluded Hindustan Cargo Ltd and Tiger Logistice (India) Ltd on the ground of non-availability of financial data for the relevant year, the Tribunal remitted the issue to the file of the TPO directing the assessee to furnish data for the relevant year for verification of comparability.
Ahlers India Pvt. Ltd. Vs DCIT - TS-150-ITAT-2017(CHNY)-TP - I.T.A.No.1071/Mds./2016 dated 03.03.2017

134. The Tribunal, relied on the decision of the co-ordinate bench in the case of the assessee for the earlier year and held that the assessee engaged in the business of rendering travel and financial services was comparable to Crown Tours Ltd, Tamarind Tours Pvt Ltd, Balmer Lawrie & Co Ltd and Trade Wings Ltd as they were also engaged in the business of Tours and travel.
Thomas Cook (India) Ltd v DCIT – TS-63-ITAT-2017 (Mum) - TP

135. The Court, relying on the decision of Sumitomo Corporation India Pvt. Ltd., [TS-202-HC-2015(DEL)-TP] upheld the Tribunal's order rejecting TPO's approach of benchmarking commission from trading activities on the basis of commission rate for indenting business and vice versa on the ground that indenting transactions are different from trading transactions.
Sojitz India Private Limited [TS-177-HC-2017(Del)-TP] [ITA 28/2017]

General

136. The Tribunal held that the margin approved in MAP proceedings for provision of ITES to US AEs could be adopted for benchmarking international transactions with non-US AEs as well. Reliance was placed on the orders of the co-ordinate bench for earlier years where the assessee's claim was accepted on identical facts.
JP Morgan Services India Pvt Ltd – TS-64-ITAT-2017 (Mum) - TP

137. The Court dismissed Revenue's appeal against Tribunal's order directing inclusion of two loss making comparables and considering DEPB (Duty Entitlement Passbook) benefits and depreciation while computing assessee's margin for AY 2008-09 since the Revenue itself accepted the comparables in the earlier AY, and as such there was no dispute regarding their comparability. Further, the parameters set out in Rule 10B(2) or judging comparability with international transaction are exhaustive and the rule does not require exclusion of a company only because it had suffered a loss in a particular year.
Welspun Zucchi Textiles Ltd -TS-9-HC-2017(BOM)-TP

138. The Tribunal held that where the disputed companies viz. Gujarat Poly Avx Electronics and Keltron Group companies were not simply loss making concerns but persistently loss making concerns, their margins could not be adopted in order to benchmark the international transactions of assessee which was making supplies to AEs and was a market dominant concern.
Accordingly, ITAT directed AO to verify the claim of assessee and exclude the comparables if found to be persistent loss making concerns.

Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No.1712/PUN/2011 dated 10.02.2017

139. The Tribunal remitted TP issues related to import of components and rejected exclusion of two comparables merely on the ground that they had been consistently loss making since 2002 holding that the TPO had neither looked into the FAR analysis of the two entities nor conducted the exercise provided in Rule 10B(4) for use of prior period data. Further, it also allowed assessee's plea for adopting PBDIT/Sales as PLI under TNMM i.e after excluding depreciation noting that the assessee had increased its fixed assets eligible for depreciation which resulted in decline in net profits. It also agreed with assessee's arguments in principle that difference in sale price of cloth guiders involving AEs and third parties was on account of huge volume of sales to its AEs and warranties provided to its local purchasers and directed the TPO to make appropriate adjustments. However, it upheld TP Adjustment of commission income since the assessee was unable to dispute that the German unrelated party was a valid comparable under CUP method.
Erdhardt+Leimer India Private Limited - TS-1059-ITAT-2016(AHD)-TP

140. The Tribunal rejected TPO's approach of making adhoc adjustment of 3% which was enhanced to 8% by the DRP towards differences between assessee's contract manufacturing activity for AE and sales made to Non-AEs under internal TNMM, on the ground that adhoc adjustment without giving reasons was against the basic concept of transfer pricing. The Tribunal further observed that DRP, after rejecting internal TNMM, should have deliberated upon the issue of determination of ALP in a more rational manner. As regards DRPs rejection of loss-making comparable on the ground that assessee being a contract manufacturer, could never incur a loss, the court observed that the eliminated comparable had not suffered losses after losses and only a persistent loss making comparable could be excluded.
ASB International Pvt Ltd - TS-6-ITAT-2017(Mum)-TP

141. The Tribunal remitted comparability of foreign companies to CIT(A) for fresh adjudication on the ground that CIT(A) had not called for remand report from AO/TPO to examine circumstances in which foreign comparables were considered in subsequent years vis-a-vis the circumstances in which foreign comparables were excluded by AO/TPO in the present year. Tribunal agreed with Revenue's contention that geographical locations, different markets & the prevailing laws and government orders, cost of labour and capital, overall economic development, size of the markets etc. also played an important role in the test of comparables and accordingly held that if common foreign comparables were considered in subsequent years under identical facts and circumstances and having similar FAR analysis, then assessee deserved relief on this issue, provided this fact was duly demonstrated.
Timex Watches India Pvt Ltd - TS-1064-ITAT-2016(Del)-TP

142. The Tribunal upheld 15% RPT filter as proper in assessee's case on the ground that ideally the RPT should be nil, however in case of non-availability of enough comparables by applying 0% filter, RPT Filter of 15 or 25% may be acceptable on case to case basis.
NovellSoftware Development (Ind.) Pvt Ltd - TS-1044-ITAT-2016(Bang)-TP

143. The Tribunal held that the assessee engaged in the business of manufacturing and trading of packaging equipment and reconditioning of packaging equipment and machines could not be compared to Rollatainers Ltd as the said company had significant related party transactions (48.57%), it was a sick company and it followed a different financial year ending. It rejected the Revenue's argument that the said company could not be excluded as it was included as comparable in the TP study by the assessee itself and relying on the ruling of Barclays Technology Centre India Pvt Ltd TS-41-ITAT-2015 (Pun) – TP, held that where an assessee subsequently points out that a company is not comparable due to justifiable reasons, the plea of the assessee could not be rejected merely because the said company was initially adopted by it as a comparable in its TP study.
Bobst India Pvt Ltd v ACIT – TS-90-ITAT-2017 (Pun) – TP - ITANo.2090/PUN/2012 dated 03.02.2017

144. The Tribunal held that where a reasonable number of comparable companies were available (29 in this case) the RPT filter could not allowed to be the extreme limit of 25 percent of revenue. Accordingly, it directed the application of 15 percent RPT filter, which led to the exclusion of 3 comparables viz. Aztec Software Ltd, Lanco Global Solutions Ltd and Geometric Software Ltd.
As regards the turnover filter applied by the AO/TPO viz. Rs. 1 crore to Rs. 200 Crore, the Tribunal observed that there was an inherent difficulty in applying such a turnover slab as it gave unrealistic results i.e. an entity having Rs. 1 Cr turnover could be compared with a concern having turnover of Rs. 200 Cr, but an entity having Rs. 200 Cr turnover could not be compared with an entity having 201 Cr turnover. Accordingly, it held that such classification of comparables on the basis of companies selected on turnover basis is not appropriate and acceptable and adopted the multiple of 10 times of turnover. Since the assessee's turnover was Rs. 31.33 Cr, it directed the exclusion of companies having turnover less than Rs. 3.1 Cr and more than Rs. 313 Cr. As a result, following 4 comparables were excluded IGate Global Solutions Ltd. (Rs.527.91 Cr), Infosys Ltd. (Rs.9,028 Cr), Mindtree Ltd. (Rs.448.79 Cr) and Flextronic Software System Ltd. (Rs.595.1 Cr)
Valtech India Systems Pvt Ltd v DCIT – TS-70-ITAT-2017 (Bang) – TP - IT. (T.P) A. No.1496/Bang/2010 dated 13.01.2017.

145. The Tribunal held that the CIT(A) was not justified in applying the RPT filter of 0 percent and relying on the decision of ITO v Net Devices India Pvt Ltd (TS-354-ITAT-2016 (Bang) – TP, ordered the adoption of 15 percent as the RPT filter. Accordingly, companies having RPT below 15 percent were considered and included / excluded based on functionality of the companies.
Thomson Reuters India Services Pvt Ltd v ACIT – TS-1084-ITAT-2016 (Bang) – TP - I.T.{T.P} A. No.1097/Bang/2011 I.T.(T.P} A. No.1115/Bang/2011 dated 09.12.2016.

146. The Tribunal set aside the DRP's direction adopting 0% RTP filter and directed the TPO to adopt 15% RPT filter and restored the entire TP issue to the files of AO/TPO noting that several comparables rejected due to adoption of 0% RPT filter would have to be considered afresh for comparability. Accordingly, it directed the AO/TPO to decide the matter afresh after allowing adequate opportunity of being heard to the assessee.
Net Devices India Pvt. Ltd. Vs. ITO - TS-216-ITAT-2017(Bang)-TP - IT(TP)A No.435/Bang/2012 dated 23/02/2017

147. The Tribunal held that the CIT(A) was incorrect in applying a 0% RPT filter as it was an impossible situation and held that a reasonable range of RPT to sales had to be considered for selecting uncontrolled comparables. Noting that the Tribunal, in a series of orders, accepted a tolerance range of 5% to 25% of total revenue depending upon availability of comparables, it held that when a good number of comparables were available, the threshold limit of RPT should not be more than 15% of total revenue. Accordingly, it opined that the RPT filter of 15% was proper in assessee's case and directed AO/TPO to apply the same.
DCIT vs. Novell Software Development (India) Pvt. Ltd - TS-190-ITAT-2017(Bang)-TP - I.T.{T.P} A. No.1313 / Bang / 2012 dated 10.02.2017.

148. The Tribunal held that companies following different accounting years could not be considered as comparable unless it was possible to draw financials for the period corresponding to assessee's accounting year. Further, it directed the AO/TPO to examine assessee's contentions regarding inclusion of provisions write back & miscellaneous income as part of assessee's operating income. Also, admitted assessee's additional grounds relating to selection of comparables and working capital adjustment on the ground that companies included in earlier years as comparables could not be excluded without demonstrating any functional dissimilarity. Noting similar treatment in APA in earlier year, it directed the AO to consider foreign exchange gains as part of operating profits.
RBS India Development Centre Pvt Ltd - TS-18-ITAT-2017(Del)-TP

149. The Tribunal, observing that the assessee followed financial year (April to March) for accounting its income, whereas Bosch Chassis and Escorts Ltd followed the calendar year (January to December) and year ending September 2007, respectively, held that since the accounting year adopted by the said comparables were at variance with the financial year adopted by the

assessee, the said companies were to be excluded from the final list of comparables, in order to benchmark the international transactions undertaken by the assessee.
Endurance Systems (India) Pvt. Ltd. vs ACIT - TS-114-ITAT-2017(PUN)-TP - TS-114-ITAT-2017(PUN)-TP ITA No.2567/PUN/2012 dated 15.02.2017

150. Where the assessee, in the manufacturing segment, had applied TNMM to benchmark its international transactions and claimed them to be at arm's length price based on certain select comparables but the TPO conducted a fresh search and selected certain other companies also, one of which was Tibrewala Electronics Ltd, which was added in the data base on 25.03.2008 i.e. beyond the due date of compliance, the Tribunal held that the assessee was incorrect in contending that the said company could not be used for benchmarking its international transactions based on the fact that it was selected on a later date. It held that data collected by the TPO could not be called non-contemporaneous, where the comparable companies selected by the TPO were functionally comparable to the assessee, observing that TPO has the power to use data gathered by him so long as (a) it was available in public domain (b) it related to the year under consideration (c) assessee had been given an opportunity to explain before the said data is used against him.
Accordingly, itupheld TPO's action in selecting the said concern and dismissed assessee's grounds.
Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No.1712/PUN/2011 dated 10.02.2017

151. The Tribunal relying on its decision for the prior year held that for the purpose of benchmarking, the TPO was correct in adopting the single year data as the assessee had failed to demonstrate any peculiarities in the data that would justify invoking proviso to Rule 10B(4) permitting use of multiple year data. In this regard it held that the multiple year data in the case of a comparable could be used only to understand its peculiar circumstances and not to work out PLI of comparable and that the proviso to Rule 10B (4) provides that multiple year data can be invoked only if assessee demonstrates any Qualitative peculiarities in the data which reveal facts that are potent to justify invoking the proviso.
Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No. 1712/PUN/2011 dated 10.02.2017

152. The Tribunal excluded 10 companies viz. Visual Soft Technologies Ltd, Infosys Technologies Ltd, Satyam Computer Services Ltd, Geometric Software Solutions Co Ltd, Tata Elxsi Ltd, RS Sofware Ltd, Sasken Communication Technologies Ltd, Flextronics Software Systems Ltd, iGate Global Solutions Ltd & L&T Infotech Ltd by applying the turnover filter of 10 times the turnover of the assessee i.e. Rs.4.95 crores. Accordingly, these companies having turnover ranging between 81.69 crore to Rs.6859.66 crore were excluded.
DCIT v Nvidia Graphics Pvt Ltd – TS-1089-ITAT-2016 (Bang) – TP - IT(TP)A No.1211/Bang/2011 dated 23.11.2016

153. The Tribunal applied a turnover filter of 1/10th times to 10 times of the assessee's turnover (Rs. 90 crore) and accordingly held that:
AvaniCimcon Technologies (Rs.2.93 crore), e-zest Solutions Ltd (Rs.7.66 crore), Flextronics (Rs.954.42 crore), Infosys Ltd (Rs.15,672 crore), Kals Information Systems Ltd (Rs.2.05 crore)., Lucid Software Ltd (Rs.2.35 crore) could not be considered as comparable to the assessee engaged in providing software development services and thatiGate Global Solution Ltd, Mindtree Ltd and Sasken Communication Technologies Ltd which were previously excluded on the turnover filter of Rs.1 – 200 crore were to be included as they satisfied the 1/10th to 10 times filter.
DCIT Vs Cypress Semiconductors Technology Pvt. Ltd. - TS-144-ITAT-2017(Bang)-TP - IT (TP) A No.463 (Bang) 2013 dated 07/02/2017.

154. The Tribunal directed the TPO to consider turnover filter while selecting comparables for the purpose of benchmarking, noting that the turnover of the company was very vital for determining

the ALP since it would have a substantial impact on the financial results. It noted the contention of the assessee viz. that TPO erred in selecting comparables with turnover ranging from Rs. 3 crores to Rs. 730 against it's turnover of Rs. 148 crores the fact that the issue was not adjudicated by CIT(A) and accordingly remitted the selection of comparables back to the file of TPO for fresh examination on the basis of turnover. However, it directed the assessee to submit specific and necessary information on how the comparables were not comparable instead of giving generalized grounds like huge turnover.

Venture Power Systems India Pvt. Ltd. Vs. DCIT - TS-123-ITAT-2017(CHNY)-TP - ITA No.1703/Mds/2011 dated 13.01.2017

155. The Tribunal, referring to Rule 10B(1)(e)(ii) noted that net profit margin realized could be benchmarked from one or more comparable uncontrolled transactions and therefore rejected the Revenue's argument that consideration of one comparable company could not be taken for benchmarking ALP of a party. It further explained that although more than one comparable was desirable to get appropriate arm's length results, there was no mandate in the law that one may choose more than one comparable only.
However, it clarified that on consideration of only one comparable, the tolerance range of +/- 5% (or 3%) as envisaged in the second proviso to Sec 92C would not be applicable. Accordingly, considering the Tribunal eliminated 4 out of 5 companies on functionality, it directed the TPO to benchmark assessee's margin with only one comparable.

JP Morgan Advisors India Private Limited Vs DCIT - TS-170-ITAT-2017(Mum)-TP - ITA No.7979/MUM/2010 dated 16.03.2017

156. The Tribunal, noting that the DRP had adopted turnover filter of RS.200 crores and RPT filter of 0%, held that as per recent trend the Tribunals were now adopting turnover filter of 10 times the assessee's turnover and 15% RPT filter, which if had to be applied to the case of the assessee would result in some comparables originally excluded on the basis of the DRPs filters being now included. It held that these comparables which would be now included based on the new filters would have to be examined on other aspects. Further, as regards assessee's claim for working capital adjustment and risk adjustment, it noted that the DRP rejected the same on the ground that it had negative impact, and held that whether the impact of an adjustment was negative or positive was not relevant to decide as to whether any adjustment was to be made or not. Accordingly, it remitted all TP issues to AO/TPO for applying proper turnover and RPT filter and for deciding issues regarding working capital and risk adjustment afresh.

ITO Vs Open Silicon Research Pvt. Ltd - TS-205-ITAT-2017(Bang)-TP - IT(TP)A No.3491Bang/20 15 dated 22.02.2017

157. The Tribunal agreeing that turnover was a relevant factor to be taken into account, held that there should be some proper and reasonable parameter to apply turnover filter which may be a multiple in the range of 'x' number of times rather than a fixed slab. Noting that many Tribunals have been applying a turnover filter of 10 times of assessee's turnover on both sides, it directed the TPO to apply turnover filter of 10 times of assessee's turnover, which was Rs. 100 Cr in the software development services segment, thereby arriving at tolerance range of Rs. 10 Cr to Rs. 1000 Cr. Accordingly, it noted that 2 companies viz.KALS Information System Ltd. (Rs. 2.5 Cr turnover) and Infosys Technologies Ltd. (turnover of Rs. 20,000 Cr) were to be excluded on account of turnover.

VMware Software India Pvt. Ltd. Vs DCITTS-71-ITAT-2017(Bang)-TP -LT. (T.P}A. No.1311/Bang/2014 dated 6.1.2017

158. Where the TPO had applied the export revenue filter of 75% while benchmarking the software development segment but did not apply the same in ITES Segment, the Tribunal dismissed the appeal of the Revenue against the CIT(A)'s direction to apply the filter in ITES Segment (on thr ground that the assessee had not objected on this issue before TPO) and held that since the international transactions either in the software development or in ITES Segment were 100% export sales, it was justified to compare them with the uncontrolled unrelated price of comparable with at least 75% of export sale. Thus, it concurred with CIT(A)'s direction in principle and stated

that CIT(A) had co-terminus power of the A.O. and could take up an issue for adjudication even if assessee had not raised any objection earlier.
Further, it held that the employee cost filter was a relevant criteria for selection of comparables as it showed the business model of a particular company and noting that the assessee's employee cost was much more than 25 percent of total revenue, it held that an employee cost filter of 25 percent was not incorrect. Accordingly, the Tribunal set aside the issue to TPO and added that assessee was at liberty to raise the objections of functional comparability if the need arose.
As regards the assessee claim for inclusion of comparables with a different financial year ending, the Tribunal noted that FAR analysis had to be done by considering the contemporaneous financial data of the assessee as well as comparables and held that such companies could not be considered as good comparable for want of necessary data.
The Tribunal also held that the turnover filter of < Rs. 1 crore could not be applied and upheld the 10 times turnover filter as applied by various Tribunals.
Further, noting that the TPO's eliminated Thinksoft Global Services Ltd. and FCS Software Solutions Ltd. on ground that these companies were having borrowed funds and the working capital impact was more than 4% on company profits which would distort the profit margin, the Tribunal opined that the limit of working capital was relevant for adjustment in the price and not for inclusion/exclusion of comparables. Accordingly, the Tribunal directed AO/TPO to include the functionally similar comparables.

DCIT vs. Informatica Business Pvt. Ltd - TS-212-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1285/Bang/2014 dated : 17.03.2017.

159. The Tribunal remitted the TP issue relating to selection of comparables for benchmarking software development services rendered by the assessee to its AE noting that the both the assessee and the Revenue made various contradictory submissions regarding the inclusion / exclusion of comparables. Accordingly, it directed the TPO to re-work the ALP adjustment after conducting a fresh search of comparbales by applying requisite filters and provided the assessee liberty to submit a fresh list of comparables.
eGain Communications Pvt Ltd v ITO – TS-51-ITAT-2017 (Pun) – TP - ITA No.1579/PUN/2013 dated 31.01.2017.

160. The Tribunal relying on the decision of Quark System wherein it was held that merely because the assessee had wrongly added in the list of comparables, it would not bar the assessee to take objection against the functional dissimilarity of a company dismissed petition filed by the assessee seeking rectification of mistake in the order of Tribunal for AY 2010-11 in respect of comparability of ICRA Techno Analysis Ltd on the ground that the company had been selected as a comparable by both the assessee and TPO, and the assessee had not raised any objection before lower authorities.
Aptean Software India Pvt Ltd - TS-1076-ITAT-2016(Bang)-TP

161. Where the assessee, engaged in the manufacture and sale of internal combustion (IC) engines for power generation and industrial applications in the domestic market as well as for export outside India entered into various international transactions relating to export of IC engines, payment of royalty and technical know-how fees to associate enterprises ('AEs'), rendering of procurement support services and receipt of commission from AEs as well as transactions relating to interest on extended credit period allowed to AEs and other transactions and, benchmarked the same under TNMM by aggregating the said transactions, which was rejected by the TPO who proceeded to benchmark the transactions on a stand-alone basis and made an upward addition of Rs.40.64 crore, the Tribunal relying on Rule 10A(d) and 10B of the Rules as well as OECD Guidelines, held that, in appropriate circumstances, where there was existence of closely linked transactions, the same could be grouped and constituted as one composite transaction for the purpose of determining ALP. With regard to the facts of the case, it noted that, where the assessee's primary activity was to manufacture and sell IC engines and components, then the activities of importing engine parts and components, payment of royalty against receipt of know-how, provision of procurement support services to the AEs to help the sourcing of components, receipt of IT support services, design services and payment of technical knowhow fees, etc. were closely linked to the export of manufactured IC engines. Accordingly, it directed TPO to aggregate the various activities

undertaken by assessee under the head of 'manufacturing activities' for the purpose of benchmarking.
Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017

162. Where the TPO neither gave reasons for rejection of 2 comparables nor provided details of search process adopted for selection of 14 new comparables and even the DRP had not fully addressed assessee's contentions in this regard, the Tribunal taking note of sizeable increase in quantum of addition due to margin proposed by TPO (8.53%) being substantial as against assessee's margin (1.47%), it directed the TPO to provide reasons for rejecting existing comparable as well as the search criteria for selection of new comparables and decide the issue afresh after giving assessee an opportunity of being heard.
Woosu Automotive India Private Vs ACIT - TS-74-ITAT-2017(CHNY)-TP - ITA No.870/Mds/2016 dated 13.01.2017

d. ***Computation / Adjustments***

<u>Capacity Utilization Adjustment</u>

163. The Court dismissed the appeal of the assessee against the order of the Tribunal, wherein the Tribunal rejected the assessee's claim for adjustment towards abnormal expenses arising on account of lower capacity utilization since the assessee had not brought any material on record relating to the capacity utilization of the comparable companies. It upheld the finding of the Tribunal that capacity utilization was a relative feature and therefore unless the capacity utilization figures of comparables were known, no adjustment could be granted to the assessee. Further, noting that the assessee was engaged in jewellery manufacturing, it held that it was very difficult to standardize capacity in case of such companies as it involved several items with a wide variation in the consumption of time and labour.
Royal Star Jewellery Pvt Ltd v ACIT – TS-43-HC-2017 (Bom) – TP - INCOME TAX APPEAL NO. 2463 OF 2013 dated 30.01.2017

164. Where the assessee claimed a capacity utilization adjustment on the ground that it went through shutdowns and lockout for a longer period of time which hampered production which was rejected by the DRP on the ground that the labour unrest did not adversely impact assessee's margins and that the assessee had failed to furnish actual details for loss caused by labour problems, the Tribunal after referring to the tabular statement filed by assessee containing details of power and fuel, salary and wages and capacity utilization in last 3 years and present AY, opined that that prima facie, there was under-utilization of installed capacity towards which suitable adjustments were required to be made. Since the assessee had not furnished all details before DRP, the Tribunal directed the DRP to consider under-utilization of installed capacity and grant suitable deduction in TP-adjustment, if any.
Bailey Hydropower (P) Ltd. vs. ACIT - TS-122-ITAT-2017(CHNY)-TP- /I.T.A.No.2605/Mds./2014 dated 17.02.2017

165. Where the assessee claimed capacity utilization adjustment on the ground that this being its initial year of operation, it was operating only at 28% capacity, thereby incurring substantial amount of idle capacity costs and significant under recovery of cost resulting in lower margins, whereas comparables were in the mature stage of their economic life cycle and were operating at average capacity of 71%, the Tribunal held that idle capacity was one of the factors which could influence margins substantially and observed that the reasons for non-utilization of capacity were required to be verified with respect to resources available and functions performed by comparable companies. Noting that the assessee was engaged in manufacturing and trading while comparables were engaged only in manufacturing activity, it remitted the issue and directed AO to make necessary adjustments for idle capacity after considering all the factors.
Nippon Paint India Pvt Ltd v ACIT– TS-102-ITAT-2017 (Chny) – TP - ITA No.779/Mds/2016 dated 10.02.2017

166. The Tribunal allowed assessee's appeal with regard to the issue of grant of capacity utilization adjustment and working capital adjustment for AY 2005-06, observing that the Tribunal, in the assessee's own case for succeeding AY 2006-07, had examined the issue in light of the ruling in Claas India (ITA No.1783/Del/2011) and remitted the matter to AO/TPO for granting capacity utilization and working capital adjustment. It held that since the Tribunal had taken a view in assessee's own case in the succeeding year, there was no justification to take contrary view in this appeal and accordingly set aside the CIT(A) order and remitted the matter to AO/TPO to re-adjudicate the issue of lower capacity utilization and working capital adjustment in light of decision in assessee's own case for AY 2006-07.
Molex India Tooling Pvt Ltd v ACIT – TS-92-ITAT-2017 (Bang) – TP – IT(TP)A No.770/Bang/2012 dated 25.01.2017

167. The Tribunal, noting that the assessee was incorporated as a subsidiary of Japanese parent company in March 2007, and that AY 2009-10 was its first year of operation, wherein it had actually utilized only 35.70% of capacity for actual production, remitted the matter to AO/TPO for consideration of capacity utilization issue while selecting comparables.
Yutaka Auto Parts India Pvt. Ltd. Vs DCIT – TS-1096-ITAT-2016 (Del) – TP – ITA No 1120 / Del / 2014 dated 09.12.2016

168. The Tribunal, dismissed the Revenue's appeal and upheld the order of the CIT(A) granting idle capacity adjustment to the assessee engaged in purchase and sale of components of refrigeration, industrial controls, frequency converters, etc. for AY 2004-05. Noting the assessee's contention that its utilized capacity for AY 2004-05 was only 200 units as against installed capacity of 7200 units and that its margin after idle capacity adjustment was 11.77% as against ALP of 7.16% as determined by the TPO, it dismissed the Revenue's contention that the assessee had not demonstrated idle capacity and capacity utilization.
DCIT Vs Danfoss Industries Pvt. Ltd.- TS-164-ITAT-2017(CHNY)-TP - ITA Nos.1131, 1132 & 1582/Mds/2016 dated 23.02.2017

<u>Depreciation Adjustment</u>

169. The Tribunal, relying on the decision passed by the co-ordinate bench in the assessee's own case for AY 2003-04 [TS-441-ITAT-2014(DEL)-TP] held that depreciation adjustment was to be made to the operating profit margin of comparable companies if there was a difference in the rates of depreciation charged by assessee vi-a-vis comparables.
Exl Service.com (India) Pvt Ltd v DCIT – TS-104-ITAT-2017 (Del) – TP - ITA No. 302/Del/2015 & ITA No. 615/Del/2015 dated 03.01.2017

170. Where the assessee depreciated its assets at higher rates than those prescribed by Schedule XIV of the Companies Act, 1956 and most of the comparable companies considered by the TPO followed the rates prescribed under Companies Act, 1956, thereby charging a lower rate of depreciation, the Tribunal accepted the plea of the assessee and relying on the Tribunal judgments in ExlService.com India Private Limited [TS-441-ITAT-2014(DEL)-TP] and Worldwide Solutions Private [TS-176-ITAT-2015(Bang)-TP], wherein depreciation adjustment had been granted, remitted the matter to TPO for re-examination and re-adjudication in accordance with aforesaid Tribunal decisions.
Outsource Partners International P Ltd vs. DCIT - TS-57-ITAT-2017(Bang)-TP - I.T(TP).A No.337/Bang/2015 dated 06.02.2017

171. The Tribunal dismissed Revenue's appeal against granting adjustment for accelerated depreciation and exclusion of VoltAmp Transformers from the comparable list on the ground that with respect to the accelerated depreciation adjustment, the Tribunal had decided the issue in favour of the assessee for AY 2008-09 and in respect of exclusion of VoltAmp Transformers as a comparable it held that the Tribunal had regarded it as not a good comparable for AY 2003-04.
Advance Power Display Systems Limited - TS-14-ITAT-2017(Mum)-TP

172. The Tribunal noting that the assessee had provided for higher depreciation on certain assets whereas comparables were following depreciation rates as per the Companies Act and relying on the ruling of Welspun Zucchi Textiles Ltd [TS-9-HC-2017(BOM)-TP] held that depreciation was to be considered as part of operating cost and thus there was no merit in assessee's claim for depreciation adjustment. The Tribunal, however, noted that, in case the assessee was able to establish material differences in depreciation between itself and the comparable, then a suitable adjustment could be accorded in the hands of the comparable after due verification by the TPO.
Tieto Software Technologies LTD. vs. DCIT - TS-155-ITAT-2017(PUN)-TP - ITA No.986/PUN/2013 dated 03.03.2017

173. The Tribunal held that a depreciation adjustment could not be granted in isolation, without taking into consideration the repair and maintenance cost as well as lease rentals for hiring plant and machinery. It observed that depreciation would be higher in a case of newly installed plant and machinery, but corresponding expenditure on maintenance and repairs would be higher in case of old plant and machinery. Noting that the assessee did not produce comparative details of depreciation rates charged by assessee vis-à-vis comparables, it directed the TPO/AO to grant appropriate adjustment if any in respect of difference of depreciation charged by assessee in comparison to comparable companies after taking into consideration corresponding expenditure on repairs and maintenance as well as lease rentals if any.
DCIT vs. Novell Software Development (India) Pvt. Ltd - TS-190-ITAT-2017(Bang)-TP - I.T.{T.P} A. No.1313 / Bang / 2012 dated 10.02.2017.

<u>Profit Level Indicator</u>

174. The Tribunal rejected the assessee's contention for exclusion of expenses reimbursement in operating cost / revenue and held that the relevant expenses were incurred by the assessee in connection with providing services to its AE and therefore ought to have been included while computing operating cost / revenue irrespective of the fact that no mark-up had been charged.
AXA Business Services Pvt Ltd – TS-1032-ITAT-2016 (Bang) - TP

175. The Tribunal rejected the contention of the assessee i.e. that Rs. 17.13 lacs incurred on outsourced maintenance services to third party vendors should be excluded from the computation of total costs since no value added functions were provided by the assessee on such costs. It noted that in the instant case the costs were incurred qua third parties and ultimately was incurred towards rendering of services by assessee to its AE which fetched contracted revenue and also that they were not recovered as such from AE. Therefore, it held that pass through costs pre-supposed specific and identifiable recovery as such from its AE without any profit element and if such cost was not separately recoverable from AE and formed part of the overall contracted value, then, it would shed the character of pass through costs.
Fujitsu India Ltd v DCIT – TS-56-ITAT-2017 (Del) – TP -I.T. (T.P) A. No.334/Bang/2013, IT. (T.P) A. No.484/Bang/2013, IT. (T.P) A. No.96S/Bang/2014, I.T. (T.P) A. No.91/Bang/2014 dated 29.11.2016.

176. The assessee, a wholly owned subsidiary of Mitsubishi Corporation Japan, one of the leading Sogo Shosha establishments in Japan, carried out transaction of provision of services, purchase of goods and various other transactions and used the Berry Ratio to benchmark its transactions. The TPO rejected use of Berry ratio (Gross Profit / Operating Cost)adopted by the assessee contending that the assessee performed all the critical functions, assumed significant risks and used both tangible and unique intangibles developed by it over a period of time and applied the ratio of Operating Profit / Total Cost of comparables (around 2.49%) to the FOB value of goods sourced from India & finally made a TP adjustment. The Court dismissed the appeal of the Revenue and upheld the order of the Tribunal wherein it accepted the assessee's contention that the Berry Ratio was appropriate for benchmarking its transactions (as the assessee neither assumed any major inventory risk nor committed any significant assets for the same and as there was no value addition or involvement of unique intangibles) and remitted the issue of the TPO to benchmark the assessee's transactions accordingly.
Mitsubishi Corporation India P Ltd. [TS-230-HC-2017(DEL)-TP - ITA 159/2017, CM APPL.6427/2017 dated 22.03.2017

177. The Tribunal directed the AO / TPO to exclude the pre-operative expenses incurred by the assessee such as rent, employee cost and administrative expenses from the computation of PLI noting that the assessee had entered into an agreement with its AE for provision of software development services on 1.04.2005 while it was granted STPI registration with effect from 30.06.2005 and therefore expenses incurred prior to the registration were to be considered as expenses for establishment of business and not for rendering services and therefore could not be considered as operating in nature.
ACIT v Amberpoint Technology India Pvt Ltd – TS-124-ITAT-2017 (Pun) – TP - ITA No.266/PUN/2012, ITA No.1862/PUN/2012 dated 15.02.2017

178. The Tribunal rejected assessee's plea to consider operating profit before depreciation, interest and tax (PBDIT) as PLI. It held that in an asset intensive industry where revenues were driven by assets, exclusion of depreciation from profits would distort the comparability analysis. However, it directed the AO/TPO to grant a suitable adjustment in hands of comparables if assessee was able to establish that its depreciation rates were higher than that of its comparables.
Vishay Components Pvt Ltd v ACIT – TS-73-ITAT-2017 (Pun) – TP - ITA No.1712/PUN/2011 dated 10.02.2017

179. The Tribunal, relying on ruling in Welspun Zucchi Textiles Ltd. Vs. ACIT[TS-6-ITAT-2013(Mum)-TP], upheld the claim of assessee and held that export incentives were to be considered as operating income for computation of operating margins of the assessee as well as the comparable.
Carraro India Pvt Ltd v ACIT – TS-26-ITAT-2017 (Pun) – TP - ITA No.1629/PUN/2013, ITA No.1673/PUN/2013 dated 19.01.2017

180. The Tribunal accepted the assessee's contention to consider 'contract termination fee' received from AEs as part of operating revenue for AY 2010-11 and held that the contract termination fee was in effect compensating the assessee for the expenses incurred by it for executing the contract partially and therefore was to be considered as operating revenue. It observed that the assessee, on execution of contract for rendering software development services, would have received full consideration from AE, whereas contract termination fee was paid on similar lines, but proportionately owing to premature contract termination.
Invensys Development Centre India Pvt Ltd v DCIT – TS-125-ITAT-2017 (Hyd) – TP - ITA No.329/Hyd/2015, ITA No.318/Hyd/2015 dated 23.02.2017

181. The Tribunal held that provision for bad and doubtful debts was to be considered as operating expenses and accordingly remitted the issue of the AO to re-compute the margins of the assessee and comparables treating the same as operating expenses.
ITO v Intoto Software (India) Pvt Ltd – TS-42-ITAT-2017 (Hyd) – TP – ITA No 1921/Hyd/14, ITA No 25/Hyd/15 dated 31-01-2017

182. The Tribunal upheld the CIT(A)'s approach of considering cost of raw-material obtained from its AE as pass through cost and directed its exclusion from operating cost as well as operating revenue for computing GP margin under Cost Plus Method (CPM), observing that AE had supplied raw material kits which were to be re-exported to AE after assembling and partial testing and that there was a prior binding obligation on part of the assessee for returning the same raw kits in their finished form to the AEs. Thus, it held that assessee's duty was confined only to rendering services (testing etc.) on the raw kits and that there was no profit element involved. It also took note of method of accounting followed by assessee whereby purchase price of kits received from AE was recorded separately, and though no separate amount was paid to the AE, the same was ultimately adjusted against export price receivable from AE on re-export.
Akon Electronics India Pvt. Ltd vs. DCIT – TS-105-ITAT-2017 (Del) – TP - ITA No.4804/Del/2009, ITA No.4837/Del/2009 dated 15.02.2017

183. The Tribunal dismissed the contention of the Revenue that foreign exchange loss was to be considered as non-operating expense relying on Safe Harbour Rules, wherein foreign exchange loss and income had been excluded from the calculation of operating expense and income respectively and relying on the ruling of Westfalia Separator India (P.) Ltd. vs. ACIT [TS-220-ITAT-

2014(DEL)-TP], held that the safe harbor rules were notified on 18.09.2013, and hence were not applicable to the subject AY and accordingly held that foreign exchange loss was required to be treated as operating in nature.
St-Ericsson India Private Limited vs Addl CIT - TS-119-ITAT-2017(DEL)-TP - ITA No.1672/Del./2014 dated 22.02.2017

184. The Tribunal held that the foreign exchange loss arising due to reinstatement of foreign currency in accordance with accounting standards was to be treated as operating in nature. It placed reliance on the ruling of CIT Vs. Pentasoft Technologies Ltd [TS-123-HC-2010(MAD)] wherein it was held that Section 10A benefit would be granted in respect of foreign exchange gain as the gain arose on account of export operations of the assessee, and accordingly held that foreign exchange loss was operating in nature.
Infac India P. Ltd vs DCIT - TS-120-ITAT-2017(CHNY)-TP- I.T.A.No.3182/Mds./2016 dated 17.02.2017

185. The Tribunal, allowing Revenue's appeal set aside DRP's order directing the inclusion of forex gain/loss in operating income on the ground that the DRP had erred in including forex gain/loss as operating in nature without ascertaining the nexus with assessee's business activity. Further, it accepted Revenue's argument that the DRP had erred in granting risk adjustment arbitrarily without appreciating the facts of the case and the comparables and directed the AO to pass a reasoned order with respect to granting of risk adjustment bringing out the facts of the case and giving due regard to to its comparables. The Tribunal found merit in assessee's argument that the DRP had erred in law and on facts in application of inappropriate qualitative filters such as rejection of comparable companies having related party transactions greater than 25% of the sales and inconsistent comparability criteria (i.e using current year data for some comparables and using multiple year data for others) and therefore set aside the ground to the file of the TPO to apply appropriate filters and redo the assessment in accordance with law.
Symbol Technologies India Private Limited - TS-19-ITAT-2017(Bang)-TP

186. The Tribunal partly allowed Revenue's appeal for AY 2004-05 and AY 2005-06 on the ground that foreign exchange gain was no doubt part of operating profit if it was related to collection of sale proceeds, however, it could not be considered if it arose on account of turnover of earlier year. Further, it accepted revenue's contention of not allowing 5% standard deduction as the price charged by the assessee fell beyond 5% in view of the subsequent amendment in the provisions of section 92C.
Synova Innovative Technologies Pvt Ltd - TS-1068-ITAT-2016(Bang)-TP

187. The Tribunal allowed the adjustment in the PLI of the assessee i.e. tested party, towards the abnormal loss of Rs.2.22 crore arising out of cancellation of forward contracts due to sharp decline in the value of the Indian rupee vis-à-vis the US Dollar. It held that the material difference had arisen due to an abnormal feature qua the assessee which was absent in the case of comparables and since there is no provision in Rule 10B requiring comparability adjustments to be made only to the PLI of comparables, it directed for the adjustment to be made in the PLI of the assessee / tested party. Considering the fact that there was a difficulty in ascertaining the foreign exchange loss / gain of the comparable companies as the information available in the public domain was not complete, it held that making an adjustment of comparable margins with partial information would lead to absurdity / unscientific analysis. Though it agreed with the in-principle contention of the Revenue, that the hedging loss arising in the normal course of business was to be given the same treatment as the loss or gain in underlying transactions i.e. to be included in operating cost, it held that in the absence of evidence demonstrating similar kind of loss in the hands of the comparable companies it was to be treated as an abnormal loss and therefore was to be excluded from the PLI of the assessee.
Pangea3 & Legal Database Systems Pvt Ltd – TS-148-ITAT-2017 (Mum) – TP dated 06.03.2017

188. The Tribunal agreed with the contention of the assessee that foreign exchange losses were to be treated operating expenses and rejected the Revenues contention that as per the Safe Harbour Rules, foreign exchange loss and income was to be excluded from the calculation of operating

expense and income respectively. Relying on the decision of Westfalia Separator India (P.) Ltd. vs. ACIT [TS-220-ITAT-2014(DEL)-TP], it held that since the safe harbor rules were notified on 18.09.2013, they were not applicable to the subject AY and accordingly, the foreign exchange loss was required to be treated as operating in nature.
St-Ericsson India Private Limited vs Addl CIT – TS-119-ITAT-2017 (Del) – TP - ITA No.1672/Del./2014 dated 22.02.2017

189. The Tribunal remitted the issue regarding treatment of abnormal loss on account of cancellation of orders as extraordinary cost under Cost Plus Method (CPM) for AY 2006-07 to the TPO / AO and held that the assessee (an exporter of ready-made garments) had failed to prove actual loss incurred on the basis of concrete evidences. Noting the contention of the assessee that in January 2005, export orders from one of its biggest buyers were cancelled because of the buyer going bankrupt, which led to loss of Rs. 2.4 Cr on account of revaluation of raw material inventory at present realisable scrap value, it held that extraordinary costs which were beyond assessee's control and unrelated to sale of goods, were to be excluded from direct / indirect cost, however it observed that assessee had neither shown such extraordinary expenditure in its P&L A/c / schedules as specifically required by accounting standard nor had it furnished details regarding cancellation of order, realisable value of materials or how valuation loss of Rs. 2.4 Cr was determined. It also noted that the assessee was also supplying goods not only to that buyer but also to 3 other AEs, whereas it was not proved whether raw material was purchased for supply to that buyer only. Accordingly, it directed the assessee to furnish all this information to justify its claim and also to show the nature and extent of extraordinary loss incurred by the assessee with evidences.
Cornell Overseas P Ltd Vs DCIT - TS-1092-ITAT-2016(DEL)-TP - ITA No.1158/Del/2014 dated 24.10.2016

190. The Tribunal held that foreign exchange fluctuation gain or loss arising from realization of sales made during the year would be considered as operating in nature. Accordingly, it remitted the issue to AO/TPO for verify the source of such gains / losses.
Dhanya Agroindustrial Pvt. Ltd. Vs DCIT - TS-168-ITAT-2017(Bang)-TP- I.T.(T.P) A. No.161/Bang/2016 dated 08.03.2017

191. The Tribunal accepted the contention of the Revenue and held that only foreign exchange fluctuation gains/losses in respect of the sale proceeds of the current year could be considered as operating in nature and not on account of realization of sale of earlier years. Accordingly, it set aside the issue to the record of AO/TPO for re-computing the margins.
Logix Microsystems Ltd. vs. DCIT - TS-181-ITAT-2017(Bang)-TP - IT. {T.P} A. No.280/Bang/2014 dated 22.02.2017.
ACIT v Bateman Engineering Pvt Ltd – TS-192-ITAT-2017 (Bang) – TP - IT (TP) A No.495 (Bang) 2015 dated 17-02-2017

192. The Tribunal held that foreign exchange fluctuation gains arising out of earlier years turnover was to be excluded from the operating profit while computing the PLI as it would be absurd to include the same if the related turnover was not included in the denominator. Accordingly, in the absence of details as to whether the gain arose on account of current year's turnover of earlier year's turnover, it remitted the issue to the file of the AO / TPO for verification.
Commscope Networks (India) Private Ltd. (Earlier known as Airvana Networks (India) Private Ltd.) Vs ITO - TS-161-ITAT-2017(Bang)-TP - IT (TP) A No.166 (Bang) 2016 dated 22.02.2017

193. The Tribunal, held that foreign exchange loss / gain arising on account of realization of sales / exports was operating in nature but noting the contention of the Revenue it held that the issue required verification as to whether such gain or loss pertained to the sales made during the year under consideration or earlier year and accordingly, set aside the issue for verification.

DCIT vs. Informatica Business Pvt. Ltd - TS-212-ITAT-2017(Bang)-TP - I.T.(T.P) A. No.1285/Bang/2014 dated : 17.03.2017.

194. The Tribunal held that for the purpose of computing profit margin under Rule 10B(1)(e) there could be any denominator such as cost incurred or sales effected or assets employed, however the numerator ought to be the net operating profit as against the net profit adopted by the TPO as the net profit would factor in non-operating expenses as well.
ACIT vs. Progressive Tools & Components Pvt. Ltd - TS-200-ITAT-2017(DEL)-TP -

195. The Tribunal, noting that the assessee had debited provision of doubtful debts to the P&L A/c and had also claimed the same in its computation of income on the basis of amount written-off during the year, dismissed the contention of the assessee that the provision for doubtful advances debited to P&L A/c was a non-operating expense which ought to be excluded while computing the operating cost. It held that once the amount was allowed as a written off claim, then it would be part of the operating cost. Noting that the TPO had excluded provision for doubtful debts from the operating margins of comparables, it held that the exclusion of doubtful debts in the case of comparables would also depend on whether the amount was actually written off and claimed as an allowable revenue expenditure u/s 36(1)(vii). Accordingly, it remitted this issue to AO/TPO for verification of relevant facts and directed exclusion of this expenditure from operating cost in the case of both the assessee as well as the comparables only if it was found to be only a provision and not a write-off.
VMware Software India Pvt. Ltd. Vs DCITTS-71-ITAT-2017(Bang)-TP -LT. (T.P}A. No.1311/Bang/2014 dated 6.1.2017

196. The Tribunal upheld the directions of the DRP excluding assessee's Solar Test (ST) activity costs from operating costs while computing the PLI as they were extra-ordinary in nature. It noted that the assessee had undertaken trial runs for production of solar receiver tubes during AY 2010-11, and subsequently, the economic conditions had turned unviable creating uncertainty in demand, owing to which, assessee had stopped the production of tubes and that the solar test trails, carried out by assessee during the period 09.10.2009 to 23.11.2009, were an exception to its regular business of producing tubes for pharmaceutical packaging. Accordingly, it held that the costs incurred on the impugned activity could not be treated as operating in nature. Further, it held that the provision of Rs. 13.9 Cr for impairment of assets used in the t rial made by the assessee as per AS-28 was also to be considered as an extra-ordinary cost.
ITO vs. Schott Glass India Pvt. Ltd. - TS-166-ITAT-2017(Mum)-TP - I.T.A./1867/Mum/2015 dated 08.03.2017

197. The Apex Court admitted the Revenue's SLP against order of the Delhi High Court wherein the High Court had held that for the purpose of computing PLI of OP/TC, the denominator had to be total costs incurred by assessee and not the FOB value of goods sourced through the assessee as the Act did not authorize broadening of the cost base in such circumstances and dismissed the appeal of the Revenue holding that no question of law arose. Since the same issue had arisen in earlier years as well, the Apex Court directed that this case would be heard along with earlier year appeal and other connected matters.
Pr. CIT vs. Li and Fung (India) Pvt Ltd - TS-223-SC-2017-TP - Petition(s) for Special Leave to Appeal (C).....CC No. 5274/2017 dated 24.03.2017

198. Where the assessee was allowed working capital adjustment, the Tribunal held that the CIT(A) was justified in not considering interest received on delayed payments from AE as operating income.
Syniverse Teledata Systems Pvt. Ltd (Formerly known as MACHTeledata systems Pvt. Ltd) vs. DCIT - TS-217-ITAT-2017(Bang)-TP - IT (TP) A No.1363 (Bang) 2014 dated 15.02.2017

199. The assessee, a wholly owned subsidiary of Mitsui & Company Pvt Ltd., Japan engaged in providing sales support services and liasoning services to its Associated Enterprises ("AEs") with regard to the exports and imports of the commodities from its AE to / from India used TNMM as the MAM for determining ALP of its international transactions and adopted the Berry Ratio i.e. Gross Profit / Operating Cost as PLI but the TPO re-characterized the service and commission activities of the assessee as its trading segment and also rejected the comparables selected by assessee thereby inflating the assessee's total cost by Rs 4,541cr in AY 2009-10 and Rs 5,924cr in AY

2010-11 by including the value of sale / purchases on which it earned commission income, ignoring the fact said value was recorded as sale / purchase by AEs and was never a cost to assessee. The Tribunal, relying on the decision of the co-ordinate bench, in assessee's own case for AY 2007-08 and 2008-09 rejected the TPO's recharacterisation and held that the computation of the operating profit margin by increasing the cost led to an arbitrary adjustment of assessee's income and was contrary to the Rules and the provisions of the Act. The Court upheld the order of the Tribunal. Further, noting that the Tribunal had observed that when the value of the goods on which commission/ service income was earned was not to be added to the cost base, the assessee's international transactions computed by using TNMM as MAM and Berry Ratio (Gross Profit / Operating Cost) as PLI was at arm's length, the Court dismissed the appeal of the Revenue and held that no substantial question of law arose.
Mitsui & India Pvt. Ltd. [TS-174-HC-2017(Del)-TP] [ITA 788 & 789/2016]

Risk Adjustment

200. The Tribunal accepted the assessee's contention for granting market risk adjustment noting that comparable uncontrolled companies assumed significant business risks visa-vis a captive service provider such as the assessee, thus warranting an adjustment to account for differences in comparability.
DCIT v IDS Software Solutions India Pvt Ltd – TS-1085-ITAT-2016- IT(TP)A No.214 IBang/2014, IT(TP)A 179/Bang/2014 dated 16.12.2016

201. The Tribunal, relying on its earlier year's order held that foreign exchange gain / loss was to be considered as part of operating revenue / operating cost, respectively.
Mercedes Benz Research & Development India Pvt Ltd v DCIT – TS-1075-ITAT-2016 (Bang) – TP - IT (TP) A No.120 (Bang) 2014 dated 11.11.2016

202. The Tribunal accepted the assessee's claim for risk adjustment and held that where the comparableswere independent risk bearing entities visa-vis the assesse who, being a captive service provider, was a risk free entity, compensated on a Cost plus basis regardless of the result of its operations, the assessee was entitled to a risk adjustment to account for the differences in risk (and consequent margins) between the assesse and the comparable company.
IDS Software Solutions India Pvt Ltd v ITO – TS-1072-ITAT-2016 (Bang) – TP - IT(TP)A No. 154 / Bang/2015 dated 28.11.2016

203. The Tribunal concurred with the assessee's submissions viz. that it was captive service provider devoid of any significant risks relating to its business operations and provided mere services based on the requirements of AEs in return for a fixed mark up on cost incurred and that all significant risks were borne by AE as all intangibles were owned by its AE as a result of which it was entitled to a risk adjustment. Accordingly, it directed the TPO to make appropriate risk adjustment.
Outsource Partners International P Ltd vs. DCIT - TS-57-ITAT-2017(Bang)-TP - IT(TP).A No.337/Bang/2015 dated 06.02.2017

204. Where the assessee claimed a risk adjustment contending that being a captive service provider, its operations (which were remunerated by a fixed mark up on cost) were devoid of any significant risks and that all the valuable intellectual property rights and other commercial and marketing intangibles were owned by its AE as compared to the independent comparable companies which worked under uncontrolled conditions and bore numerous risks during the course of their business operations, the Tribunal, relying on the decision of the Delhi High Court in Chryscapital Investment Advisors India Pvt. Ltd. [TS-173-HC-2015(DEL)-TP] held that appropriate adjustments should be carried out in situations where there were differences between the tested parties and comparables and in case the differences in the comparables could not be eliminated on account of adjustments

or otherwise, then such comparables were to be rejected. Accordingly, it directed TPO to work out an appropriate risk adjustment.
CAPCO IT Services India Pvt. Ltd. v. ITO – TS-1079-ITAT-2016 (Bang) – TP - ITA No. 1340 IBang/2011 dated 09.12.2016

205. Where the assessee, a contract manufacturer claimed risk adjustment contending that its comparables were entrepreneur companies bearing significantly higher risks, the Tribunal held that there was no thumb rule for risk adjustments in accordance with Rule 10C(2)(e), and stated that assessee had to identify and quantify the level of risk involved for the assessee as well as the comparables while undertaking analysis in its TP documents. Despite observing that the assessee did not discharge its initial onus as it failed to provide requisite information pertained to the claim, considering the high degree of risk involved with the comparables, it allowed a risk adjustment at 2% on adhoc basis.
KOB Medical Textiles Pvt Ltd. Vs. DCIT - TS-211-ITAT-2017(CHNY)-TP - I.T.A.No.855/Mds./2015 dated 09-03-2017

206. The Tribunal denied the claim for risk adjustment made by the assessee wherein the assessee contended that since it was a captive service provider it had risk of single customer as compared to uncontrollable comparables, as the assessee had not provided any scientific working justifying its claim.
Syniverse Teledata Systems Pvt. Ltd (Formerly known as MACHTeledata systems Pvt. Ltd) vs. DCIT - TS-217-ITAT-2017(Bang)-TP - IT (TP) A No.1363 (Bang) 2014 dated 15.02.2017

Working Capital Adjustment

207. The Tribunal upheld the order of the DRP and directed the TPO to allow working capital adjustment based on the actual figures of the comparables without restricting it to 1.71 percent being the average cost of capital of comparables selected.
DCIT v Brocade Communications Systems Pvt Ltd – TS-1031-ITAT-2016 (Bang) – TP - IT. (T.P) A. No.71/Bang/2014 dated 9.11.2016

208. Where the TPO computed working capital adjustment at 5% for software development services and 4.64% for ITeS based on actuals but restricted the adjustment to 1.71% for software development services and 0.91% for ITeS on the basis of the average cost of capital of the comparables, the Tribunal, relying on the decision of ARM Embedded Technologies Pvt. Ltd. [TS-466-ITAT-2015 (Bang)-TP], held that working capital adjustment was to be made on actual basis.
EMC Software and Services India P Ltd [TS-1077-ITAT-2016(Bang)-TP - I. T(TP).A No.324/Bang/20 14, I.T(TP).A No.319/Bang/2014 dated 09.12.2016

209. Where the DRP had given the AO a specific direction to verify the working capital position between the assessee and the comparables, and the AO did not consider working capital adjustment for advances from customers recoverable in cash or kind from 4 companies, viz. Sparsh BPO Service Ltd, Aditya Birla Minacs Worldwide Ltd, Professional Management Consultants Pvt Ltd and Sundaram Business Services Ltd., on the ground that break up was not available from the downloaded financials of the 4 companies, the Tribunal observing that the breakup of advance recoverable in cash or kind were part of the Audited accounts and annual report of these 4 companies, directed the AO/TPO to rework the working capital adjustment after considering the value of advance and deposits recoverable in cash or kind or for the value to be receivable from the 4 companies as well.
Visual Graphics Computing Services India Private Limited Vs ACIT - TS-129-ITAT-2017(CHNY)-TP - I.T.A. No.2340/Mds/2012 dated 10.02.2017

210. The Tribunal observed that the TPO / DRP was not justified in denying working capital adjustment to the assessee on the ground that the figures given by the assessee did not match with the financials and that working capital adjustments were to be granted only to manufacturers and not service providers and held that the TPO should have corrected the errors himself rather than denying the adjustment altogether. As regards working capital adjustments vis-à-vis service

providers, it relied on the decision of Mercer Consulting (TS-170-ITAT-2014 (Del) – TP, wherein it was held that working capital could not be restricted to manufacturers or traders alone and that in case of a service provider working capital adjustments were warranted for higher / lower trade receivables or payables. Accordingly, it set aside the finding of the TPO / DRP and remitted the matter to the file of the TPO directing him to examine the assessee's claim for working capital adjustment.
Comverse Network Systems India v ACIT – TS-33-ITAT-2017 (Del) - TP

211. Where the assessee claimed a working capital adjustment which was denied by the Revenue on the grounds that (a) inventory and accounts payables were absent in case of assessee and that (b) working capital was computed on the basis of daily or monthly averages and not on year end balances, the Tribunal relying on the rulings in the case of United Health Group Information Services (P) Ltd [TS-255-ITAT-2014(DEL)-TP] and Marubeni-Itochu Steel India[TS-56-ITAT-2016(DEL)-TP], accepted the assessee's claim and held that the adjustment was to be granted in order to bring the assessee and the comparables at par. However, it noted that the assessee was to furnish complete details of working capital deployed to identify the differences in margins earned by assessee vis-a-vis comparables and accordingly remitted the issue to the file of TPO for fresh consideration.
St-Ericsson India Private Limited vs Addl CIT – TS-119-ITAT-2017 (Del) – TP - ITA No.1672/Del./2014 dated 22.02.2017

212. Where the TPO restricted working capital adjustment to 1.71% (based on the average cost of capital of comparables), instead of considering the actual figures in respect of each and every comparable companies, the Tribunal, relying on the decision in ARM Embedded Technologies Pvt. Ltd. [TS-466-ITAT-2015(Bang)-TP], observed that there was no provision under FAR analysis to restrict the working capital adjustment arbitrarily. Accordingly, it directed the AO/TPO to re-compute working capital adjustment on actual basis without any upper limit.
VMware Software India Pvt. Ltd. Vs DCITTS-71-ITAT-2017(Bang)-TP -LT. (T.P}A. No.1311/Bang/2014 dated 6.1.2017
DCIT vs. AMD India Pvt. Ltd - TS-250-ITAT-2017(Bang)-TP - IT(TP)A No.92/Bang/2014 dated 08.03.2017

<u>Others</u>

213. The Tribunal, relying on its earlier and subsequent year's orders in the case of the assessee, held that where the assessee had maintained segmental profits that were used for the purpose of claiming deduction under section 10A, the TPO erred in computing TP adjustment on the entire turnover of the assessee which included transactions with non-AEs. Accordingly, it directed the AO / TPO to make adjustments only to the extent of transactions with AE and exclude the adjustment on transactions with non-AEs.
TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) -TP - I.T.A. No. 1927/HYD/2011 dated 06-01-2017

214. The Tribunal held that the TPO erred in making adjustment under TNMM on the entire turnover of the assessee and that the adjustment should only be made on the international transactions undertaken by the assessee. Further, it held that movement in Work-in-Progress was to be considered for computing the operating margin of the assessee. Accordingly, it directed the AO / TPO to make adjustments only to the extent of transactions with the AE and exclude the adjustment on transactions with Non-AEs and to re-compute the correct margin**.**
TNS India Pvt Ltd v ACIT – TS-45-ITAT-2017 (Hyd) – TP

215. The Tribunal upheld the CIT(A)s restriction of the TP addition exclusively to AE transactions relating to purchase of raw material and components. However, it observed that the while segregating the purchases made from AEs from the entity level transactions, the CIT(A) had also included the value of international transaction relating to purchase of machinery / spares, against which no TP-addition had been made. Accordingly, it suggested two options for segregation – i) apportioning the total operating profit in the ratio of `utilized raw material purchased from the AEs' and `utilized raw material purchased from non-AEs' (Opening stock of raw material + Purchases–

Closing stock) or ii) Deducing the share of operating profit from the `utilized raw material purchased from AEs' by dividing the amount of `utilized raw material purchased from AEs' with overall amount of `utilized raw material purchased from AEs and non-AEs and remitted the matter to the file of the AO / TPO for re-computation of AE transactions in line with its suggestions.
Hi Lex India Pvt Ltd – TS-152-ITAT-2017 (Del) – TP - ITA No.2036/Del/2014 dated 03.03.2017

216. The Tribunal, relying on the decision of the Bombay High Court in CIT Vs Hindustan Unilever Limited [TS-538-HC-2016(BOM)-TP]held that transfer pricing adjustments ought to be restricted to the international transactions only and it could not be applied to uncontrolled transactions. Accordingly, it directed the AO/TPO to restrict adjustment on account of ALP to the extent of the transactions with AE only.
Cornell Overseas P Ltd Vs DCIT - TS-1092-ITAT-2016(DEL)-TP - ITA No.1158/Del/2014 dated 24.10.2016

217. Where the assessee applied the generally accepted Costing Principles to allocate expenses between its various segments but the TPO rejected the assessee's approach, without giving any basis or reason and proceeded to re-allocate the subject expenses on the basis of sales ratio and thus, re-worked the cost used for determination of operating margins, the Tribunal noting that certain expenses i.e. depreciation, rent, rates, repairs & maintenance, taxes and other expenses had not been allocated at all to the export division by the assessee for the reason that they were already included in cost of goods sold and non-allocation if any, did not affect cost, held that the there was no merit in re-allocation of administrative expenses and selling & distribution expenses by TPO.
Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017

218. Where, for the purpose of computing the margin of its software development service segment, the assessee had allocated a sum of Rs. 7.92 crore as administrative & other expenses and the TPO considered the same to be Rs. 17.61 crore, the Tribunal upheld the assessee's allocation noting that the difference of approximately Rs.10 crore was not included for the purpose of computing the margin since the expenditure was incurred for a specific purpose and not attributable to the software development services. Accordingly, it remitted the issue to the file of the TPO for re-computation with a direction that if the margin of 31.69% as computed by the assessee was found to be correct, no TP adjustment would survive.
Altair Engineering India Pvt. Ltd. Vs DCIT - TS-206-ITAT-2017(Bang)-TP - LT. (T.P}A. No.279/Bang/2015 dated 22.02.2017.

219. The Tribunal rejected the assessee's apportionment of un-allocable costs among assessee's 3 segments (viz. marketing support services, trading segment and domestic segment which included both services and trading) in the ratio of headcounts and held that that such an allocation without considering staff positions, etc would give distorted results as a well-qualified technician could not be compared to a helper or assistant. It also disagreed with the TPO's allocation based on gross revenue noting that 'trading segment' would have higher revenue than 'service segment' as it would also include cost of goods sold. Accordingly, it held that allocation based on gross profit margin would be more logical and realistic method. However, in the absence of details of un-allocable costs, it remitted the matter to AO/TPO with a direction to examine the same and exclude costs which were directly identifiable to specific segment from the un-allocable costs.
Fujitsu India Ltd v DCIT – TS-56-ITAT-2017 (Del)– TP - ITA No.6280/Del/2012 dated 02.02.2017

220. The Tribunal rejected assessee's claim for adjustment of extra ordinary expenses on account of 1). abnormal wastage of materials to the tune of Rs. 1.43 crore which arose due to high material cost and learning curve of operators considering that the the assessee started a new knitting division during the year and 2). depreciation, (as the assessee had revised the estimated economic life of its fixed assets based on a technical study resulting in excess depreciation by Rs. 99.94 lakhs) and held that since the assessee's pricing pattern was cost plus mark-up, which had been raised from 5% to 9.5% on the goods procured by it and later revised to 7%, any loss on account of wastage /

increased depreciation suffered by assessee would be taken care of by mark-up prices as the same would be included in the cost base while computing the mark-up.
KOB Medical Textiles Pvt Ltd. Vs. DCIT- TS-211-ITAT-2017(CHNY)-TP - /I.T.A.No.855/Mds./2015 dated 09.03.2017

221. The Tribunal allowed the assessee's claim towards adjustment of extraordinary expenditure relating to employee cost and consultancy charges incurred for future project requirement while computing operating margin for AY 2012-13. Noting that manpower was one of the main costs for assessee rendering software development services, it considered the assessee's submission that it maintained more than 10% of its manpower requirement in anticipation of new job orders due to difficulty in recruiting trained software personnel. It held that lack of mention of the fact of such extraordinary event having material impact on profitability in its financials, could not be reason for rejection of assessee's claim. It also observed that these expenses did not relate to the project executed and billed in the subject AY and that assessee was only in the 2nd year of operations, and therefore the impugned expenses could not be considered as intangible assets as the assessee had not exercised sufficient control over the expected future benefits arising from a team of skilled staff and from training so as to consider the expenses as intangible assets. Accordingly, it held that business module could not be straightway compared with other comparables, unless the extraordinary item of expenditure were excluded so as to arrive at correct margin of profit and since the assessee's PLI after adjustment was higher than that of comparables, it deleted the TP adjustment of Rs. 2.64 Cr.
Saggezza India P Ltd. Vs. DCIT - TS-240-ITAT-2017(CHNY)-TP - /I.T.A.No.3323/Mds./2016 dated 22 -03-2017

222. The Tribunal allowed the assessee adjustment on account of extraordinary expenditure incurred by assessee relating to ex-gratia paid to the family of employee on his death as it was a non-recurring expense and also towards extraordinary expenses pertaining to merger (i.e. press meet expenses and rent for vacated old premises as they had a direct connection with the process of merger). However, it refused adjustment towards extra salary paid for duplicate post of CEO/CFO and held that such expenses / salary paid to existing staff could not be treated as extraordinary expenditure. Further it rejected the assessee's claim of extra-ordinary cost adjustment towards salary cost of 5,128 man hours due to the merger, which was claimed without establishing how the assessee's business was impacted because of the acquisition.
Valtech India Systems Pvt Ltd v DCIT – TS-70-ITAT-2017 (Bang) – TP - IT. (T.P) A. No.1496/Bang/2010 dated 13.01.2017.

223. During the relevant AY, the assessee suffered an abnormal increase in the price of some of its raw – materials, mainly gold, owing to unexpected increase in price of gold (20 percent increase in price of gold) as a result of which it reduced this cost from the operating cost while arriving at the PLI margin of gross profit to sales, contending that, as the change in gold market did not coincide with the conditions prevailing when the agreement for sale of goods was entered into with the customers, it had not been able to pass on the increased cost to its customers including its AE. The aforesaid reduction in cost was denied by the TPO and on appeal restricted by the CIT(A) to 5 percent as opposed to 20 percent (as claimed by the asssessee). The Tribunal, observing that the CIT (A) had not examined the sales price charged to AE in the present and preceding year, remitted the issue to the file of the CIT (A) with directions to examine the details submitted by assessee in this regard.
Molex Mafatlal Micron Pvt Ltd (now merged with Molex India Ltd) vs DCIT - TS-191-ITAT-2017(Bang)-TP – 1170/ Ahd/2010, 1197/Ahd/2010 etc dated 10.01.2017

224. Where the AO, dismissing the contention of the assessee(that for sales made to AEs the warranty cost thereon was incurred by the AE itself as the assessee had allegedly failed to bring any evidence on record), made an adjustment in the hands of the assessee on the ground that the assessee had included the cost of warranty on sale of cloth guiders in the sale consideration to Non-AEs while it did not do so in the case of its AE, the Tribunal relying on the decision in the assessee's own case for AY 2007-08 and 2008-09 (TS-1059-ITAT-2016 (Ahd) – TP) remitted the

issue back to the AO for decided the matter afresh after giving adequate opportunity of being heard to the assessee.
Erhardt + Leimr (India) Pvt Ltd v DCIT – TS-72-ITAT-2017 (Ahd) – TP -ITA No. 352/Ahd/2015 dated 06.02.2017

225. The Tribunal rejected the CIT(A)'s ALP computation based on a 'contemporary' resale price method (RPM) for benchmarking Engineering Drawing & design Services rendered to AE for AY 2005-06 and directed AO/TPO to re-compute ALP considering AE's audited financials for March ending furnished as additional evidence. It held that the CIT(A) erred in arriving at a hypothetical ALP figure based on contemporary RPM by trying to correlate AE's sale price for March ending with cost price for December ending arriving at the computation of ALP due to the alleged non-availability of financial figures of AE for period of Jan-Mar period (without giving assessee an opportunity to furnish it). Since the CIT(A) had (i) ignored provisions of Rule 10B(1)(b), (ii) applied contemporary RPM stating that it was internationally recognized, without bringing evidence and citation on record, the Tribunal noted that that audited financial data for March ending was now available and therefore directed the TPO/AO to consider the same for ALP determination. Referring to the working submitted by the assessee before it during the hearing, it clarified that if AE's financial figures were found to be true and correct, assessee's computation should be accepted.
DCIT v Development Consultants Ltd – TS-117-ITAT-2017 (Kol) – TP - ITA No.1591/Kol/2010 dated 15/02/2017

226. Where the assessee claimed adjustment on account of custom duty on imports stating that due to stringent quality norms, imports were necessitated in the initial stages and the non-cenvatable basic custom duty constituted additional cost for the assessee and the TPO disregarded the claim of the assessee stating that no evidence had been provided and that the comparable companies in the industry to which the assessee belonged also incurred import duties for sourcing material, the Tribunal remitted the matter to the TPO for examination of the assessee's claim and to eliminate the difference, if any.
Doowon Automotive Systems India Pvt Ltd v DCIT – TS-97-ITAT-2017 (Chny) – TP- / I.T.A. No. 692/Mds/2016 dated 25.01.2017

227. The Tribunal accepted assessee's claim for adjustment towards difference in Lube oil price and Zinc tolling fee while benchmarking international transactions of assessee engaged in manufacture and sale of lubricant additives, noting that the comparable company viz. Lubrizol India P Ltd enjoyed better discount from IOCL (one of the JV partner for Lubrizol) in respect of price of Lube Oil and hence, cost of raw material was lower in its case as compared to the assessee and that the cost of zinc for Lubrizol was lower as it had an in-house manufacturing facility as opposed to the assessee, who had entered into sub-contracting arrangement with a third party for manufacture of zinc. Accordingly, it remitted both the issues to TPO for re-consideration with directions to work out the PLI after considering these adjustments. It also stated that the adjustment for difference in cost of zinc could be granted only if Lubrizol's cost details were made available.
Indian Additives Ltd. Vs. DCIT TS-121-ITAT-2017(CHNY)-TP - /I.T.A.No.2579/Mds./2016 dated 17.02.2017

228. The Tribunal dismissed the Revenue's appeal challenging DRP's deletion of Rs. 7.47 Cr TP addition for AY 2011-12 and upheld the allowability of benefit of 5% variation as per proviso to Sec 92C in case of the assessee, an authorized foreign exchange dealer, rejecting the Revenue's contention that proviso to Sec 92C, which allows +/-5% range to assessee, could not be applied in case of assessee having transactions on account of trading in foreign exchange, which were benchmarked using RBI rates. Following the decision in assessee's own case for preceding AY 2010-11, it held that RBI rates of foreign exchange were based on averaging and therefore, benefit was available under the proviso to Sec 92C.
UAE Exchange and Financial Services Ltd. Vs DCIT - TS-116-ITAT-2017(Bang)-TP - IT (TP)A No.299 (Bang) 2016 dated 07.02.2017

229. The Tribunal rejected TPO's allocation of 100% loan syndication fee to the assessee (an Indian company) following the preceding year ruling where the Tribunal had restored the allocation of loan syndication fee between the assessee and its AE to the TPO/AO with direction that the issue should be decided based on the ruling of Calyon Bank [TS-106-ITAT-2014-(Mum)-TP] and Credit Lyonnais [TS-180-ITAT-2014(Mum)], where 20% allocation was held as just and proper.
RBS Financial Services India Private Limited - TS-24-ITAT-(Mum)-TP

230. The assessee was engaged in providing contract manufacturing services including audit and inspection of the contract manufacturing carried out by third parties for assessee's AE and the said services were benchmarked separately under TNMM for which the assessee made a voluntary upward adjustment of Rs. 10 lakhs. The TPO held that the subject services were similar to the services of 'Business development & Procurement' and 'Support Services' (which were also provided by the assessee to its AEs). Consequently, he aggregated all the services and proceeded to benchmark it under TNMM. The Tribunal held that the TPO was incorrect in ignoring the Rs. 10 lakh voluntary adjustment made by the assessee as income of the assessee. Accordingly, it remitted the issue to the file of the TPO directing him to consider Rs. 29 lakh (Rs.19 lakh considered by the TPO + Rs. 10 lakh offered by the assessee) as the income of the assessee for the purpose of benchmarking the transactions.
Tevapharm India Pvt. Ltd vs Addl CIT – TS-151-ITAT-2017 (Del) – TP ITA No.6707/Del/2016 dated 06.03.2017

e. ***Specific Transactions***

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

231. The Tribunal deleted TP adjustment of Rs. 14.11 Cr on account of Advertising, Marketing and Promotion (AMP) expenses incurred by assessee for alleged promotion of the brand 'Nippon' in India as it was not an international transaction u/s 92B since the Revenue had failed to demonstrate existence of an agreement with AE (legal owner of the brand) to promote the 'Nippon' brand in India and had also failed to prove that benefits of AMP expenses were for improving the brand in India. It held that the AMP spend was not obligated by AE, but was incurred by assessee as sales promotion expenses for its own cause.
Nippon Paint India Pvt Ltd v ACIT– TS-102-ITAT-2017 (Chny) – TP - /ITA No.779/Mds/2016 dated 10.02.2017

232. The Apex Court admitted Revenue's SLP against Delhi High Court judgment dated 6.5.2016 in case of Bausch and Lomb Eyecare (India) (assessee engaged in distribution activities) wherein marketing intangibles adjustment was deleted absent existence of an international transaction involving AMP expenses between assessee and foreign AE and tagged it with the case of Canon India Private Limited Vs DCIT.
Pr CIT v Bausch and Lomb Eyecare India Pvt Ltd – TS-69-SC-2017 – TP - Special Leave to Appeal (C)...../2017 (CC No.3014/2017) dated 10.02.2017

233. The Tribunal held that the payment towards Advertising, Marketing and Promotion (AMP) made by assessee (manufacturer & distributor of digital hearing aids) to domestic parties during AY 2011-12 was not an international transaction. It observed that AMP spend had been treated as international transaction by the Revenue merely because it was found to be benefiting the AE which was owner of brand, whereas there was no finding of any arrangement between assessee and AE obliging assessee to incur AMP expenditure on behalf of the AE. Accordingly, it concluded that the payment made by assessee under AMP head to domestic parties could not be termed as an international transaction and that no imaginary price could be be attributed by allocating AMP costs and then adjusting the same by applying TP provisions. Consequently, the Tribunal concluded that

the TPO had wrongly invoked Chapter X provisions, and deleted TP-addition of Rs. 4.59 Cr on AMP spend.
Widex India Pvt Ltd vs. ACIT – TS-60-ITAT-2017 (Chand) – TP - ITA No.117/Chd/2016 dated 06.02.2017

234. The Court refused to admit Revenue's appeal challenging Tribunal's deletion of TP-adjustment on account of Advertising, Marketing and Promotion (AMP) expenses in the case of Goodyear India for AYs 2007-08 to 2009-10, which had been deleted by the Tribunal by following HC decisions in Maruti Suzuki [TS-595-HC-2015(DEL)-TP] and Honda Siel[TS-627-HC-2015(DEL)-TP]. Since the AMP expenditure was not subjected to adjustments in all the previous years, although it had been part of the Transfer Pricing exercise, it refused to admit the appeal. However, it admitted question of law raised by Revenue against Tribunal's deletion of TP-addition on payment of trademark fee to AE and application of TNMM over CUP method for benchmarking the trademark fee paid.
Pr. CIT vs. Goodyear India Limited – TS-115-HC-2017 (Del) – TP - ITA 77/2017 & CM Nos. 3072-73/2017 + ITA 78/2017 & CM Nos. 3074-75/2017 + ITA 79/2017 & CM No. 3076/2017 dated 13.02.2017

235. The Apex Court admitted the SLP filed by the Revenue against the order of the Delhi High Court in Maruti Suzuki Ltd wherein the High Court, distinguished the judgment passed by the co-ordinate bench in Sony Ericsson Mobile Communications India P. Ltd [TS-543-HC-2016(DEL)-TP] (on the ground that the impugned judgment was rendered in the context of distributors and not manufacturers and the assessee in the instant case was a manufacturer) had held that AMP expenses incurred by Maruti Suzuki did not qualify as an international transaction under Section 92B of the Act.
CIT v Maruti Suzuki India Ltd – TS-159-SC-2017- TP - PETITION(S) FOR SPECIAL LEAVE TO APPEAL (C) NO(S). 22181/2016 dated March 10, 2017

236. 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 following 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.
Reebok India Company vs. DCIT - TS-219-ITAT-2017(DEL)-TP - ITA No. 954/Del/2016 dated 20.03.2017

237. The Tribunal, following the decision in assessee's own case for earlier AY 2007-08 (wherein Tribunal, relying on the decision of Johnson & Johnson Limited [TS-19-ITAT-2016(Mum)-TP] and by Delhi HC in the case of Perfetti Van Melle IndiaPvt Ltd. [TS-246-ITAT-2015(DEL)-TP] had restored the matter to AO as the AO had made TP additions on account of the Bright Line Test which was no longer valid), remanded the issue of benchmarking the reimbursement of AMP expenses received by the assessee (engaged in marketing Cobra brand of products in India) for AYs 2008-09 and 2009-10.
Molson Coors Cobra India Private Limited (erstwhile Cobra Indian Beer Pvt. Ltd.) Vs DCIT - TS-213-ITAT-2017(Mum)-TP - /I.T.A./7576/Mum/2013 & I.T.A./4306/Mum/2015 dated 15.03.2017

238. Where during the assessment proceedings, the TPO applying the bright line test held that AMP expenses incurred by the assessee were subject to TP adjustment which was confirmed by DRP and on appeal by the assessee, the Tribunal remitted the matter to TPO for reconsideration, the Court, relying on the decision in the case of Passage to India Tour & Travels (P.) Ltd. v. DCIT [TS-15-HC-2017(DEL)-TP], directed the Tribunal to decide whether AMP expenditure constituted an

international transaction requiring TP adjustment by applying the ratio laid down in Sony Ericsson Mobile Communications case [TS-96-HC-2015(DEL)-TP].
Pepsico India Holding Pvt. Ltd [TS-178-HC-2017 (Del)-TP] [ITA 100/2017]

239. The Court upheld the Tribunal's order deleting the adjustment on account of AMP expenses by relying on the decision of jurisdictional High Court in the assessee's own case wherein it was held that AMP expenses unilaterally incurred by the assessee could not be construed as an international transaction.
Honda Siel Power Product Ltd. [TS-182-HC-2017(DEL)-TP]

240. The Tribunal remitted AMP-issue in the case of the assessee (engaged in trading of all kinds of leather bags, fashion apparels and accessories etc). for AYs 2009-10 and 2010-11, observing that the TPO/DRP had proposed AMP-adjustment by applying Bright Line Test which was overruled by Delhi HC in Sony Ericsson's case. Noting that neither TPO nor DRP had benefit of Sony Ericsson HC ruling, it set-aside the issue relating to the adjustment on account of AMP to the file of TPO/AO to decide the issue afresh and in accordance with law.
Christian Dior Trading India Pvt. Ltd. vs. DCIT - TS-233-ITAT-2017(Mum)-TP- ITA No.1045/Mum/2014 dated 22.03.2017

<u>Loans / Receivables / Corporate Guarantee</u>

241. The Court deleted the adjustment in respect of interest paid on fully convertible debentures (FCDs) since the assessee's interest rate was within the range of prime lending rate and the TPO's ALP determination by relying on HC ruling in Cotton Naturals India was not tenable as the FCDs were issued in Indian currency.
Bacardi India Pvt Ltd - TS-1052-ITAT-2016 (Del)-TP

242. The Tribunal deleted TP-addition on account of interest paid on Compulsorily Convertble Debentures (CCDs) issued by assessee to its AE on the ground that TPO had wrongly treated issuance of CCDs as external commercial borrowing without appreciating that the CCD is hybrid instrument basically categorized as equity in nature and as per Govt and RBI policy, issue of CCD is part of FDI being quasi-equity in nature. Further, it rejected LIBOR+2% benchmark adopted by the TPO on the ground that assessee had justified 12% interest rate on the basis of SBI PLR and also data from NSDL website.
ADAMA India Private Limited - TS-16-ITAT-2017(HYD)-TP

243. The Tribunal directed TPO to adopt arm's length interest rate of LIBOR +2% or 7%, whichever is higher, for benchmarking interest received by assessee on loans advanced to subsidiaries during AY 2007-08 and 2008-09 relying on the decision in the assessee's own case for AY 2006-07 as facts and circumstances were similar. Further, it rejected assessee's contention for considering RBI approvals for investment in subsidiaries as benchmark, stating that RBI approvals were on a different criteria and for different purposes. Also, Although RBI approvals maybe one of the aspects considered for ALP determination, it could not by itself be considered as benchmark or ALP.
Dr Reddy's Laboratories Limited - TS-8-ITAT-2017(HYD)-TP

244. The Tribunal remitted to the file of the AO issue relating to disallowance made by DRP for AY 2011-12 on account of interest payable on Compulsorily Convertible Debentures (CCDs) issued by assessee in FY 2007-08, on the ground that though there was no evidence to suggest that the money received from convertible debentures was used for the purpose of business, the DRP had not considered as to how the amount received on issue of convertible debenture in FY 2007-08 was used by the assessee. The Tribunal observed that in the subsequent year, there was waiver of interest by debenture holders and the assessee had written back the interest and offered the same for tax. Further, it rejected assessee's contention that DRP had no power to make such disallowance relying on provisions of sub section 5 and explanation below sub section 8 of section 144C as per which the DRP has powers to issue directions as it thinks fit.
Epsillon Real Estate Private Limited - TS-1038-ITAT-2016(Bang)-TP

245. Where the assessee, a promoter of Haldia Petrochemicals Ltd ('HPL') had made interest free advances to HPL, and the AO, noting that on the one hand the assessee had been suffering interest liability on loans taken by it and on the other hand it was providing interest free loans to HPL, made an addition of notional interest income @ 12 percent of the amounts advanced, the Tribunal taking into consideration the submissions of the assessee viz. that notional income could not be brought to tax and that the interest free loans were to be adjusted against the equity contribution, relied on the order passed by its co-ordinate bench in the case of the assessee for another AY and set aside the matter to the file of the AO with direction to decide the same afresh in accordance with law.
Tata Global Beverages Ltd v DCIT – TS-48-ITAT-2017 (Kol) - TP - I.T.A No.511/Kol/2010, I.T.A No.2105/Kol/2010 dated 03.02.2017

246. Where the assessee had advanced interest free loans to its AE and benchmarked the same under TNMM along with its other transactions as the loan was to ensure supply of raw materials to the assessee by the AE and the AO rejecting the benchmarking adopted by the assessee computed interest at the rate of LIBOR + 2 percent, the Tribunal accepted the additional evidence sought to be filed by the assesseei.e. the letter given to SBI in respect of remittance of funds to its AE with a view to demonstrate that the funds were advanced to the AE to avail economies of scale and remitted the matter to the TPO to decide the issue afresh considering the additional evidence filed as well. It dismissed the Revenue's contention that additional evidence could not be filed and held that the letters, being filed with the SBI assumed a regulatory character.
Rubamin Ltd vs ITO – TS-113-ITAT-2017 (Ahd) - TP - ITA Nos. 664/Ahd/2012, ITA Nos. 665/Ahd/2012, ITA Nos. 795/Ahd/2012 dated 17.02.2017

247. The Tribunal, relying on its order in the case of the assessee for the prior years, held that where the assessee had provided interest free loans to its AE as a temporary advance to facilitate the AE in meeting operational requirements and the same was given out of own funds, no adjustment could be made without identification of comparable transactions. Accordingly, it directed the TPO to follow the directions issued for the earlier years**.**
Wipro Ltd v DCIT – TS-126-ITAT-2017 (Bang) – TP - I.T. (T.P)A. No.1665/Bang/2012 dated 04.01.2017.

248. The Tribunal deleted the TP-adjustment towards interest on optionally convertible loans given by the assessee to its Irish subsidiary during AY 2009-10, whereby the assessee lender had either the option for repayment (in which case the cumulative interest payable by the borrower was LIBOR plus 290 basis points) or for conversion of loan into equity at par at any time during the 5 year tenure of the loan. It held that the assessee's transaction was quasi capital in the nature and could not be characterized as debt and the true reward of this loan was not interest simplictor but the opportunity and privilege to own the borrower's capital (by way of conversion into equity) on certain favourable terms and therefore could not be compared with a simple loan transaction where the sole motivation and consideration for the lender was interest on loans and that the right comparable for this transaction was a loan transaction with a similar option to convert the loan into capital and granting similar privilege and opportunity to the lender. Noting that it was not the case of lower authorities that no independent enterprise would have given an interest free loans even if there was an option, coupled with such a deal, to subscribe to the AE's capital on the terms as offered to the assessee, it held that there was not even a prima facie case made out for ALP adjustment. It also noted that on lapse of assessee's right to exercise the option of converting the loan into equity, the assessee was entitled to interest on the commercial rates, and that it was not the case of lower authorities that interest so charged by the assessee was not at ALP. Consequently, it deleted the TP adjustment on the optionally convertible loan granted to the AEs.
Cadila Healthcare Limited Vs ACIT - TS-241-ITAT-2017(Ahd)-TP - IT (TP) No. 898/Ahd/2014 and 694/Ahd/2015 dated 03.03.2017

249. The Tribunal, following the decisions in Cotton Naturals (I) P. Ltd [TS-117-HC-2015(DEL)-TP] and TTK Prestige [TS-242-ITAT-2014(Bang)-TP], dismissed the Revenue's appeal and confirmed the CIT(A)'s and held that the Prime Lending Rate (PLR) could not be considered for benchmarking

interest on foreign currency loan. Accordingly, where the assessee advanced foreign currency loans to its subsidiaries in China & Japan at 4% & 3% rate of interest respectively using LIBOR, it held that the TPO was incorrect in making an adjustment of Rs. 35.01 lakhs by considering PLR as benchmark and it rejected the Revenue's submission that since the assessee was the tested party, interest rate prevailing in the Indian market i.e PLR was to be taken as comparable and not LIBOR.
DCIT vs. Steer Engineering Pvt. Ltd – TS-1087-ITAT-2016 (Bang) – TP – IT. (T.P) A. No.965/Bang/2015 dated 09.12.2016.

250. The assessee had issued inter corporate convertible debentures to its AE on which interest was payable at 10.5 percent and the TPO while benchmarking the interest rate adopted the interest rate of 0.5 percent paid by TPG Wholesale Pvt Ltd as comparable and made a consequent adjustment. The Tribunal noting the assessee's contention that the correct interest rate paid by the said company, as per the audited financials, was 50 percent, held that the question of comparability of the assessee with TPG Wholesale Pvt Ltd required fresh consideration as both the rates viz. 0.5% and 50% appeared to be prima facie incorrect unless there were other conditions which constrained the company from paying interest at normal market rates. Accordingly, it remitted the issue to the file of the TPO for fresh consideration.
Hospira Healthcare India Pvt Ltd – TS-147-ITAT-2017 (CHNY) – TP dated 28.02.2017

251. Where the assessee had paid interest to its AE on fully convertible debentures ('FCD') and external commercial borrowings ('ECB') at the rate of 4% and 5.94% respectively and benchmarked it against LIBOR/SIBOR + 500 basis points ('bps') claiming it to be at arm's length, the Tribunal dismissed the Revenue's appeal against DRP order deleting TP-adjustment on interest paid on ECB/FCD for AY 2011-12 made by the TPO by adopting the rate of LIBOR + 200 bps as ALP. It rejected the contention of the Revenue that 200 bps had to adopted as per various judicial pronouncements viz. Four Soft Ltd [TS-518-ITAT-2011(HYD)-TP], Aurobindo Pharma Ltd [TS-23-ITAT-2014(HYD)-TP] and Dr. Reddy's Laboratories Ltd [TS-332-ITAT-2013(HYD)-TP] and held that that 200 bps could not be adopted as a universal rate for all types of loan. It further observed that the spread could differ according to terms, risk, etc of international loans and since the RBI in its prudential norms had allowed a spread of 500 bps for a term loan beyond 5 years, it held that there was no infirmity in the directions issued by the DRP.
DCIT vs. Devgen Seeds & Crop Technology Pvt. Ltd - TS-222-ITAT-2017(HYD)-TP - ITA No. 399/Hyd/2016 dated 24-03-2017

252. Where the assessee had advanced interest-free loans and share application money to its AEs out of proceeds of zero coupon convertible bonds, the Tribunal rejected the TPO's benchmarking of the said transaction on the basis of net margin on borrowing costs of assessee. It applied the ratio of the decision of Bombay High Court in CIT vs. Tata Autocomp Systems Limited [TS-45-HC-2015(BOM)-TP] wherein it was held that where taxpayer advances loans to its AE in Germany, the rate of interest for TP purposes would be applied based upon rates prevailing in Germany (where loans were consumed). Accordingly, it remitted the matter to the AO for de-novo ALP determination in light of Tata Autocomp ruling, and directed the assessee to produce all necessary and relevant evidences and explanations before the AO to substantiate its claim.
Geodesic Limited Vs DCIT - TS-131-ITAT-2017(Mum)-TP - I.T.A. No. 1234/Mum/2014 dated 27-02-2017

253. The Tribunal, applying the provisions of section 92C read with section 92B held that since after factoring in notional interest calculated with respect to overdue receivables from associated enterprises, the reduced margin of the assessee was more than average margin of comparables selected, no further adjustment was required to be made to the stated transactions.
Agilisys IT Services India (P.) Ltd - [2017] 77 taxmann.com 16 (Mumbai - Trib.)

254. The TPO made an ALP adjustment on account of outstanding receivables from AE beyond a period of 60 days by re-characterizing outstanding receivables as unsecured loans advanced by assessee to its AEs and imputing notional interest based on SBI PLR + 300 basis points. The Tribunal noting the submission of the assessee (- that it had made a factual mistake in TP study that it was receiving payments from AE in Indian currency though actually the same was received in foreign currency), held that the LIBOR rate should be applied and not SBI PLR, opined that this

fact required verification and therefore remitted the issue to AO for fresh consideration. As regards the assessee's contention that its average days of realization period of receivables was 206.95 days as compared to the average realization period of 446.71 days of the comparables companies, it held that this aspect also required verification and therefore directed the AO / TPO to verify this as well.

Target Sourcing Services India Pvt. Ltd. Vs ACIT - TS-237-ITAT-2017(DEL)-TP - ITA No.6040/Del/2016 dated 24-03-2017

255. The Tribunal dismissed the assessee's appeal challenging TP-adjustment towards notional interest on receivables outstanding from AE beyond 90 days and rejected the arguments of the assessee that it was a debt free company and profit margin from provision of software development services was much higher than comparables, not warranting any adjustment on account of notional interest. It distinguished the ruling of the Court in Bechtel India relied on by the assessee, stating that credit period in that case was 60 days while for assessee it was 1 year and rejected the assessee's contention that there was no benefit to AE since it immediately remitted the amount on receipt from its customers and held that assessee could not be a party for delayed payment by AE customers. Observing that the assessee was financing its AE by accommodating the delayed remittance and that the huge funds so parked with AE, if repatriated, could have been invested to earn better profits for assessee, the Tribunal concluded that this potential loss was a factor for consideration while evaluating financial impact of this transaction. Accordingly, it upheld the addition made by the TPO.

Professional Access Software Development Pvt Ltd v DCIT – TS-103-ITAT-2017 (Chny) – TP - I.T.A.No.3305/Mds./2016 dated 09.02.2017

256. The Tribunal, relying on the decisions of the coordinate bench in Goldstar Jewellery [TS-14-ITAT-2015(Mum)-TP] and Avnet India [TS-629-ITAT-2015(Bang)-TP], deleted TP adjustment on account of notional interest on overdue receivables, computed @17.22 percent by the TPO and held that the transaction of non-realization of dues from AEs was not an independent transaction and had to be considered along with main transaction viz. sales, as it was an integral part of sales transaction to AE.

Millipore (India) Ltd. Vs ACIT – TS-83-ITAT-2017 (Bang) – TP - IT(TP)A No.327/Bang/2015 dated 07.03.2017

257. Where the assessee had provided extended credit period facility to its AEs for amounts due against export of IC engines and had charged interest at LIBOR + 290 basis points in case of USD billing and LIBOR + 280 basis points in case of billing in GB pounds and the credit period was extended by 80 days over the original credit period of 90 days allowed to AEs pursuant to which the TPO rejected assessee's application of the rates of packing credit in foreign currency for the purpose of benchmarking and adopting the Prime Lending Rate as ALP, made an adjustment of Rs. 1.41 crores on account of differential interest amount, the Tribunal noted that a similar issue was considered before Pune Tribunal in iGATE Computer Systems Ltd. [TS-250-ITAT-2015(PUN)-TP], wherein the use of LIBOR + rates had been upheld by Tribunal. Thus, it applied the ratio laid down in this ruling to uphold the use of LIBOR + rates for amounts (in foreign currency) due from AEs for the extended period of credit.

Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017

258. Where the assessee had remittances outstanding from its AEs, which was in the nature of continuing debit balance and the TPO, noting a time lag in recovery of the same, which was more than the agreed period between parties the (i.e. 90 days), proceeded to re-characterize the delay in the receipt of these receivables as unsecured loans advanced to the AE, and imputed a notional interest on the delay in receipt of receivable @ 14.75% (based on SBI's average base rate of 11.75% + 3% markup), the Tribunal, observing that the exact nature of the receivables viz. as to whether they represented lending or guarantee or whether they were against sales or advance or represented deferred payments was unclear, and accordingly remitted the issue back to the file of

the AO/TPO for fresh adjudication after affording assessee a reasonable opportunity of being heard and after considering various decisions cited by both the parties.
Exl Service.com (India) Pvt Ltd v DCIT – TS-104-ITAT-2017 (Del) – TP - ITA No. 302/Del/2015, ITA No. 615/Del/2015 dated 03.01.2017

259. The Tribunal adopted ALP of 0.50% for benchmarking corporate guarantee / letter of undertaking given by the assessee in respect of credit facilities availed by its AEs for AY 2011-12 while refusing to enter into semantics of whether corporate guarantee was an 'international transaction' as the assessee's argument was mainly restricted to the commission rate. It noted that the security for loans was primarily covered by pledged securities, hypothecation of debtors' balances and other assets of AE, which indicated that entire security of loan was not based only on corporate guarantee and after considering bank guarantee commission rate at 0.875% after 50% concession given to assessee by SBI and after evaluating various factors like country risk, currency risk and entity risk etc, it determined arm's length rate at 0.50% as it constituted an internal CUP available to the assessee. Noting that the assessee had recovered corporate guarantee at 0.25 percent, the Tribunal directed AO/TPO to make TP adjustment applying 0.50% rate of corporate guarantee commission as against the 3% rate applied by the AO / TPO.
Videocon Industries Ltd Vs. DCIT - TS-127-ITAT-2017(Mum)-TP - ITA No.1310/M/2016 dated 24.02.2017

260. Where during the year under consideration, the assessee provided guarantee to banks on behalf of its AEs worth Rs. 670.57 Cr without treating the corporate guarantee as an international transaction within the meaning of Sec 92B and the TPO disregarded this approach and held that assessee ought to have charged corporate guarantee fee from its AEs thereby adopting the guarantee fee at 4.43 percent which was reduced by the DRP to 3 percent, the Tribunal noting the assessees submission that it had recovered guarantee fee @1% of outstanding guaranteed amount from its AEs which had been recognized in the financial statements, followed the decision in assessee's own case for AY 2009-10 and directed the AO/TPO to benchmark the guarantee fee by adopting the rate at 1% of the outstanding guaranteed amount for maintaining consistency with the precedent in the assessee's own case.
Aegis Limited v DCIT – TS-66-ITAT-2017 (Mum) – TP - ITA No.7694/Mum/2014 dated 08.02.2017

261. The Tribunal, relying on the ruling of Micro Inks Limited vs. ACIT [TS-568-ITAT-2015(Ahd)-TP], held that as issuance of corporate guarantee did not have bearing on profits, income, losses or assets it did not constitute an international transaction under section 92B. It further held that issuance of guarantees could be said to be in the nature of shareholder activities and hence could not be included in the "provision of services" under the definition of 'international transaction under section 92B.
Rubamin Ltd vs ITO – TS-113-ITAT-2017 (Ahd) – TP - ITA Nos. 664/Ahd/2012 , ITA Nos. 665/Ahd/2012, ITA Nos. 795/Ahd/2012 dated 17.02.2017

262. Where the assessee issued a corporate guarantee on behalf of its subsidiary in Thailand, in order to enable the subsidiary to avail financing from Bank of India, despite not being very credit worthy and the TPO applied external CUP and considering 1% guarantee fee charged by banks in India, proposed TP adjustment of US$ 16000 equivalent to approximately Rs.6.4 lacs, the Tribunal relying on the decision of the co-ordinate bench in the case of Manugraph India Ltd [TS-113-ITAT-2015(Mum)-TP] (wherein the rate of 0.5% was accepted to be at ALP) and directed the AO to apply the rate of 0.5% as the charges for providing the impugned guarantee to the AE and to restrict TP addition accordingly.
Endurance Systems (India) Pvt. Ltd. vs ACIT - TS-114-ITAT-2017(PUN)-TP - ITA No.2567/PUN/2012 dated 15.02.2017

263. The Court, relying on the decision of co-ordinate bench in Everest Kanto Cylinders Ltd, dismissed the appeal of the Revenue and held that that the guarantee commission fee charged by the assessee to its AE @ 0.53 percent in relation to bank loans and @ 1.47 percent in relation to L/C facilities was at ALP. It upheld the finding of the Tribunal that guarantee commissions rates could not be compared to the rates of bank guarantee.

CIT v Glenmark Pharmaceuticals Ltd – TS-61-HC-2017 (Bom) – TP - INCOME TAX APPEAL NO.1302 OF 2014 dated 02.02.2017

264. The assessee provided certain corporate guarantees to the bankers, in respect of borrowings by its AEs, and on 2 corporate guarantees issued to ICICI Bank in respect of Zydus Netherlands BV and Bank of Baroda in respect of Zydus Inc USA, it did not charge any guarantee fees, as the loans had been availed by AEs for strategic acquisitions in furtherance of Cadila's inorganic expansion strategy, which had benefited Cadila itself rather than the AEs. The Tribunal, observing that that the issue was covered by the coordinate bench ruling of the Tribunal in case of Micro Ink [TS-568-ITAT-2015(Ahd)-TP], wherein it was held that corporate guarantees issued in nature of 'shareholder activities' / 'quasi capital' could not be included within ambit of 'provision for services' under definition of 'international transaction' u/s 92B, as they did not have "bearing on profits, income, losses or assets" deleted the addition made by the DRP who had adopted a corporate guarantee fee of 1 percent to be at ALP.
Cadila Healthcare Limited Vs ACIT - TS-241-ITAT-2017(Ahd)-TP - IT (TP) No. 898/Ahd/2014 and 694/Ahd/2015 dated 03.03.2017

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

265. The assessee had entered into an international transaction with its Sharjah AE for payment of technical fees for achieving operational and technical competencies, relating to the know-how and technology licensed to the assessee by Woco Germany. The TPO comparing the transaction of Sharjah AE with the transaction of royalty-free licensing of manufacturing process intangibles by German AE, determined the ALP as Nil, ignoring the contention of the assessee that the services provided by Woco Sharjah and Germany were distinct. (as the technical services agreement with Woco Sharjah was for achieving operational and technical competencies, whereas Woco Germany had granted the assessee a non-exclusive license to manufacture, use, exercise or sell licensed products/use its know-how and inventions). The Tribunal noted that the Revenue's comparison of technical fees to Woco Sharjah with royalty free licensing of manufacturing process intangibles from German AE was not valid since transaction with the German AE was an intra-AE transaction, rejected the TPO's Nil ALP determination and deleted the TP addition. However, the Court admitted the appeal of the Revenue against the impugned Tribunal order.
Woco Motherson Advanced Rubber Technologies Limited [TS-173-HC-2017(GUJ)-TP] (Tax Appeal No. 129 of 2017)

266. Where the assessee had availed services from its AE in respect of only 5 areas out of 11 mentioned in the agreement, consequent to which the TPO made proportionate disallowance for services not availed by the assessee and the Tribunal following its earlier year's decision in the assessee's own case, deleted the TP addition since the TPO had made disallowance without applying the method prescribed under TP Regulations, the Court, following its earlier order in the case of assessee, dismissed the Revenue's appeal as neither any specific TP-method was applied nor was any benchmarking with comparables carried out.
Merck Ltd [TS-130-HC-2017(BOM)-TP] [ITA No. 909 of 2014]

267. The Court dismissed the Revenue's appeal challenging the Tribunal's order of deleting TP adjustment made on royalty payment to AE since the Tribunal had correctly relied on the decision of EKL Appliances [TS-133-ITAT-2016(DEL)-TP] and held that TPO had erred in determining the ALP at Nil by judging commercial and business expediency of the expenditure. Also, the assessee's adoption of combined transactions approach under TNMM was upheld as against TPO's adoption of CUP method as no comparable transaction was brought on record by the AO/DRP.
Frigoglass India Pvt Ltd [TS-180-HC-2017(Del)-TP] [ITA 123/2017]

268. Where the TPO had arbitrarily restricted royalty payment for technical know-how from 2% to 1%, the Court upheld the Tribunal's finding that TPO's restriction was arbitrary and adhoc and that the TPO had not carried out the exercise to determine the ALP by following one of the methods prescribed under Section 92C. Further, where the assessee had entered into agreement to pay royalty @1% on brand usage for the period 1st July, 2001 – 31st March, 2002 which was executed on 14th March, 2002 and where the TPO had allowed the royalty paid on brand usage, but the

CIT(A) disallowed the said payment for the period 1st July, 2001-14th March, 2002 as the assessee had failed to produce minutes of its board meeting recording the decision to make the payment of royalty w.e.f. 1st July, 2001, the Court upheld the Tribunal's order of allowing the royalty payment since the assessee had entered into commercial agreement with its AE which was also approved by RBI.
Johnson & Johnson Ltd [TS-171-HC-2017(BOM)-TP] [ITA No. 1030 of 2014]

269. The Court admitted Revenue's appeal against the Tribunal's order in the case where the TPO disallowed the tax borne by the assessee on the royalty paid on brand usage & technical know-how since there was no specific provision in the agreement providing that the assessee was to bear the taxes, but, the same was allowed by the Tribunal on the ground that the agreement entered into by the assessee mentioned that the royalty was to be remitted net of taxes and for which requisite RBI approval was obtained and accordingly, deleted the disallowance of tax made by the TPO on royalty paid.
Johnson & Johnson Ltd [TS-171-HC-2017(BOM)-TP] [ITA No. 1030 of 2014]

270. Where the assessee had made payments of management fee and IT support fee ('SAP') to its AE in accordance with an agreement at a mark-up of 1% for management fees (mainly in respect of deputation of personnel whose salaries were paid byassessee) and 5% for SAP fee and TPO considered the ALP as NIL contending that assessee failed to demonstrate benefit derived there from, the Tribunal upheld the contention of theassessee that the TPO's analysis on benefit test and determination of NIL ALP could not be accepted. In this regard, it held that the Revenue could not question the reasonableness of expenditure incurred by assessee. Since the benchmarking of the other transactions undertaken by the assessee were being remitted to the TPO for reconsideration, the Tribunal remitted this issue to the file of the TPO as well.
JT International (India) vs DCIT – TS-107-ITAT-2017 (Hyd) – TP - I.T.A. No. 422/HYD/2014 dated 17.02.2017

271. Where the assessee had entered into a Drive Shaft Technology Licensing Agreement and Technology License Agreement with its AE, under which it was granted license, patents and design information in respect of drive shafts for which it paid royalty at 2.85% of the net sales of license products, which had been approved by the Secretariat of Industrial Approval, Ministry of Industry, Government of India (SIA), vide letter dated 28/31.01.2003. and royalty was being paid for AY's 2005-06 to 2008-09, which was considered to be at arm's length by the authorities, the Tribunal noting that the AEs were supporting the assessee in technology upgradation by bringing the latest technology in drive train systems to India and that assessee had submitted the required documentation in support of the payment and relying on the rulings of ACIT Vs. Dow Agrosciences India Pvt. Ltd [TS-489-ITAT-2016(Mum)-TP] and Bombay HC ruling of CIT Vs. SGS India Pvt. Ltd [TS-569-HC-2015(BOM)-TP], held that where the royalty was approved by the RBI and the SIA, the same constituted CUP data and thus, the royalty could be considered to be at arm's-length. Further, it held that the jurisdiction and power of TPO was to determine arm's length price of royalty and the order of TPO holding that the assessee had not derived any benefit under the said agreement was beyond the scope of TPO
Spicer India Limited Vs ACIT - TS-99-ITAT-2017(PUN)-TP - ITA No.251/PUN/2014 dated 10 .02.2017

272. Where the assessee had made a payment of technical know- how fee to its AE and the TPO observed that it had availed services from AE in respect of only 5 areas out of 11 mentioned in the agreement with AE, against which he made a proportionate disallowance by taking the ALP for services not availed by assessee at Nil, the Court, following its own order for AY 2003-04, held that assessee could have availed all or any one of the services listed in the agreement as per its business needs and it need not have necessarily availed all services. Accordingly, it rejected the Revenue's plea for disallowing proportionate technical knowhow fee paid by assessee to AE during AY 2006-07.

CIT vs. Merck Ltd - TS-130-HC-2017(BOM)-TP - INCOME TAX APPEAL NO. 909 OF 2014 dated 22.02.2017

273. Where the assessee paid a sum of around Rs. 2 crores as technical service fees toward various services rendered by the AE viz. machinery expansion and sourcing support, test work support, quality support, preparation of response cost sheet for new order procurement, ECB Loan related work etc out of which, the TPO / DRP only accepted the sum paid towards ECB loan related work and determined the ALP for rest of the services as NIL on the ground that (a) no specific services were provided by AE (b) there was lack of details and evidence in support of the subject services c) the payments were beyond the scope of the agreement which only provided for royalty and fees for technical services, the Tribunal relying on an earlier ruling in the assessee's own case [TS-454-ITAT-2016(CHNY)-TP] , remitted the issue to the TPO after observing that that the issue had not been examined with respect to the correct factual matrix. It held that when the assessee made payments to its parent company, it had to establish and justify the nature of payment and the nature of service received for the purpose of determining Arm's length price in Transfer pricing matters and just because the operating cost incurred by the assessee company was less than the operating cost of the comparable companies, the claim of expenses incurred could not be justified. Therefore, it remitted the issue to TPO for fresh consideration.
Infac India P. Ltd vs DCIT - TS-120-ITAT-2017(CHNY)-TP - I.T.A.No.3182/Mds./2016 dated 17.02.2017

274. The Court confirmed the Tribunal ruling wherein the TP adjustment on royalty paid to AE was deleted. It held that that the TPO was unjustified in reducing the royalty rate from 3% to 2%, on the ground that the increase in sales of assessee was attributable to marketing efforts and that the assessee failed to demonstrate the benefit derived from royalty payment, without substantiating it with an appropriate alternate TP analysis. Relying on the decision of the Apex Court in Walchand and Co.Pvt Ltd [1967]65ITR 381 (SC), it held that once the assessee claimed that it had benefited from royalty agreement in the form of quantum increase in sales with no apparent increase in production, minimal product recalls and low after sales maintenance cost, it was not for the TPO to determine as to what could be the other reasons for increase in the assessee's sales and profit (alleged to be increased marketing expenditure in this case). Thus, categorizing the TPO's approach as an arbitrary and unbridled exercise of power, the Court dismissed the appeal holding that no question of law arises for its consideration.
RAK Ceramics India PvtLtd – TS-1091-HC-2016 (AP) – TP - I.T.T.A.NO.595 OF 2016 dated 23.12.2016

275. Where the assessee had entered into a license and assistance agreement with its Associated Enterprise (AE)for access to license and technical know-how for the purpose of manufacture of power components, pursuant to which it paid a royalty at 5% of net sales and the TPO had determined the ALP of royalty as NIL, the Tribunal noting that that the power components, in turn, were sold to the AE and that the royalty was considered as part of operating cost for the purpose of benchmarking other international transactions of the assessee, the ALP of which had been accepted by the TPO and relying on the decision of Luwa India Pvt. Ltd. [TS-687-ITAT-2016(Bang)-TP] deleted the addition made by the TPO.
It noted that the assessee had produced the agreement under which it was granted technical know-how belonging to AE for the purpose of manufacturing activity and that the alleged royalty was paid in accordance with this agreement and held that ideally the royalty payment should have been benchmarked with reference to uncontrolled comparable price (CUP) but since neither assessee nor TPO had been able locate appropriate CUPs and the royalty transaction had been aggregated along with other related international transactions of the assessee and benchmarked under TNMM, the ALP of which was accepted by the TPO, no addition could be made.
Siemens VDO Automotive Ltd vs DCIT - TS-79-ITAT-2017(Bang)-TP - I,T.{T.P} A. No.923/Bang/2012 dated 25.01.2017.

276. The Tribunal remitted the issue relating to TP-adjustment of Rs. 6.19 Crore on payment made by assessee to its AEs towards management fee for AY 2007-08 for which TPO had determined ALP at 'Nil' and accepted the assessee's contention that certain evidence filed by it was not examined

by the TPO while determining the ALP. It followed the decision for earlier AY 2006-07 in the case of the assessee wherein it was held that the AO could not disallow entire management fee expenditure on the ground that assessee has not proved the commercial benefit from such payment. Consequently, it remitted matter to AO/TPO to re-examine the evidence filed by the assessee and to re-determine ALP after analyzing the same.
Safran Engineering Services India Pvt. Ltd. (formerly Safran Aerospace India Pvt. Ltd.) Vs DCIT – TS-93-ITAT-2017 (Bang) – TP - IT(TP)A No.1169/Bang/2011 dated 25.01.2017

277. The Tribunal remitted the determination of ALP of intra-group services paid by the assessee to its AE, which was benchmarked by the assessee by aggregating the intra-group services with other international transactions under its manufacturing segment which was rejected by the TPO who determined the ALP at Nil on the ground that the assessee could not furnish evidence relating to services received from the AEs. Relying on the decision in the assessee's own case for earlier years, it directed the TPO to find out whether the assessee received any service from the AE from which assessee had derived any benefit.
SKF Technologies India Pvt Ltd – TS-52-ITAT-2017 (Bang) - TP

278. Where the TPO made an adjustment of Rs.6.34 crore on the corporate service charges paid by the assessee to its AE, by adopting the CUP method and by considering man hours of the services rendered by the AE, which was confirmed by the DRP vide a non-speaking order, the Tribunal remitted the issue to the file of the DRP for re-adjudication, directing it to pass a reasoned order.
Huntsman International India Pvt Ltd – TS-65-ITAT-2017 (Mum) – TP

279. Where the assessee had reimbursed certain technical and commercial administrative expenses to its AE at actuals in respect of which TPO made an addition of Rs. 2.67 crores by determining the ALP of the said payments at Nil under the CUP method on the ground that there was no proof of assessee having received any service and also there was no benefit derived therefrom the Tribunal observed that the assessee had not provided any evidence either before TPO or DRP in support of the service having been rendered by the AE and accordingly remitted the issue back to the file of TPO to examine (i) whether any service was actually rendered by the AE and (ii) to ascertain whether the reimbursement was at actuals without involving any profit element and (iii) also whether the same was incurred for the purpose of business only.
Trianz Holdings Pvt. Ltd. vs. DCIT - TS-204-ITAT-2017(Bang)-TP - IT(TP)A No.415 / Bang/2016 dated 23. 02. 2017

280. The Tribunal deleted disallowance of payment made towards support services and corporate cost allocation to AEs since the activities were routine in nature and the said expenditure could not be disallowed on the ground that the assessee had failed to provide documentary proof to evidence receipt of benefits of corporate functions. Also, the entire cost incurred by the assessee was recovered from the AE with a markup of 18.8%. The Court further observed that if the AO's action was upheld it would lead to disallowance of cost on one hand and taxation of markup on the recovery on the other hand.
Eaton Industries Manufacturing GmbH -TS-1051-ITAT-2016(PUN)-TP

281. The Court dismissed Revenue's appeal against deletion of TP-adjustment on reimbursement of 20% of advertisement expenditure incurred by assessee's AE in respect of new products on the ground that sharing of expenditure with AE was a strategy to develop assessee's business which could result in improving brand image and higher profit due to higher sales. It held that it was not part of the TPO jurisdiction to consider whether or not the expenditure which had been incurred by the respondent assessee passed the test of Section 37, the jurisdiction of the TPO was specific and limited i.e to determine the ALP of an International transaction. It further held that as neither the most appropriate method nor the choice of comparable had been disputed by TPO, adhoc disallowance of expenditure could not be allowed and thus, concluded that no substantial question of law arose for its determination.
Lever India Exports Ltd - TS-23-HC-2017-(Bom)-TP

282. The Tribunal remitted the matter to the DRP to re-adjudicate the issue relating to the computation of ALP of the international transactions of the assessee's payment of corporate service charges (legal services, treasury and credit, purchasing, transportation and logistics, travel co-ordination services, internal audit, human resources services, etc) to the AEs, on which the TPO made an addition by rejecting the TNMM adopted by the assessee and applying CUP, by considering man hours of various services rendered by the AE. Observing that the DRP had not passed a speaking / reasoned order, the Tribunal directed the DRP to re-adjudicate the issue after allowing assessee opportunity of being heard.
Huntsman International (India) Private Limited vs DCIT – TS-65-ITAT-2017 (Mum) – TP - ITA No.5637/Mum/2015, ITA No.382/Mum/2016 dated 31.01.2017

283. Where the TPO had rejected assessee's approach of aggregating intra-group services paid by it to its AE with other international transactions under its manufacturing segment and determined its ALP at NIL contending that assessee could not furnish evidence relating to services received from AEs, the Tribunal, relying upon the ruling in assessee's own case for AYs 2006-07 & 2007-08, remanded the matter back to TPO for fresh consideration, observing that assessee ought to establish receipt of benefits on account of services rendered by its AEs and thereafter the TPO was to determine ALP of such services with reference to similar payments made by independent enterprise in uncontrolled transactions.
SKF Technologies India Pvt. Ltd vs. ACIT – TS-52-ITAT-2017 (Bang) – TP - IT(TP)A No.1563/Bang/2012 dated 31.1.2017

284. The Tribunal deleted the TP-adjustments for AYs 2009-10 and 2011-12 on account of payment made by assessee to its AEs on account of intra-group management services. It rejected the TPO/DRP's determination of ALP at Nil under the CUP and held that whether a particular expense on services received actually benefitted an assessee, could not have any role in determining ALP of that service. Observing the nature of services rendered on random sample basis, it concluded that there was reasonable evidence of rendition of services and held the ALP could not be determined at Nil based on subjective perceptions, without anything on record to show that the ALP of the services were in fact Nil.
Further, noting that that no specific comparables had been considered by Revenue, it also deleted the TP-adjustment on payment towards information management support made by TPO by applying 3% mark-up on costs vis-a-vis the 10% mark-up applied by assessee. It rejected the reasoning of the TPO i.e. that the services rendered by AE was more of infrastructure support than software development, because the software was being procured from outside and distributed to AEs and held that the variation in the mark-up proposed by the TPO was based on the perceptions of the TPO and not any cogent material.
Sabic Innovative Plastics India Pvt Ltd [TS-234-ITAT-2017(Ahd)-TP] - ITA No. 1125/Ahd/ 2014 and IT (TP) No. 427/Ahd/16 dated 17.03.2017

285. The Tribunal, relying on the ruling of Tecnimount ICB (P.) Ltd [TS-557-ITAT-2012(Mum)], and held that an internal comparable having related party transactions was unacceptable for ALP computation and therefore deleted the adjustment made by the TPO on the commission on sale of imported DG sets, earned by the assessee from one of its AEs by comparing the same with the commission earned by the assessee from another AE. Accordingly, it directed AO to delete the adjustment.
Cummins India Limited vs. DCIT - TS-165-ITAT-2017(PUN)-TP - ITA No.115/PUN/2011 dated 03.03.2017

286. The Tribunal allowed assessee's appeal for AY 2008-09, (wherein the CIT(A) applied the CUP method to benchmark payment of management fees) by noting that the Tribunal in the prior AY [TS-503-ITAT-2016(Bang)-TP] had considered the identical issue in the assessee's own case and had accepted the benchmarking of management fees along with ITES, on a composite transaction basis, under TNMM. It also noted that the Department had accepted the management fees on the basis of TNMM along with other servicesunder the Advance Pricing Agreement.

AXA Technologies Shared Services Pvt. Ltd (formerly known as AXA Technology Services India Pvt. Ltd) vs. DCIT - TS-210-ITAT-2017(Bang)-TP - IT(TP)A No.12/Bang/2013 dated 15.03.2017

287. Where the assessee manufactured products in line with AE specification, which were then first registered in his name and thereafter, the ownership of the same was passed on to the AE, for which it recovered the registration fees (Rs. 1.3 crores) paid by it from the AE at cost without any mark-up, the Tribunal held that the TPO erred in rejecting this approach of the assessee and in applying a markup of 14.26% (being the mark up charged in contract manufacturing segment) to such expenses. It held that as this cost was incurred by the assessee for and on behalf of its AE and the same was recovered without rendering any service qua the payment of registration fees, the assessee was justified in not charging a mark–up on the same.
Tevapharm India Pvt. Ltd vs Addl CIT – TS-151-ITAT-2017 (Del) – TP ITA No.6707/Del/2016 dated 06.03.2017

<u>Share capital / share issue / share transactions</u>

288. The Tribunal deleted the addition on account of alleged under charged premium on shares issued to its overseas holding company and corresponding interest imputed on the same by following the decision of the co-ordinate bench in the assessee's own case for the earlier AY wherein the Tribunal had decided the identical issue in favour of the assessee by following the decision of the Bombay High Court in the case of Vodafone. It was held that Transfer pricing provisions would not apply to capital transactions viz. issue of equity shares as it was not in the nature of income.
MSC Crewing Services Pvt Ltd – TS-38-ITAT-2017 (Mum) _ TP

289. The Tribunal upheld CIT(A)'s order deleting TP adjustment on buy back of equity shares by the assessee's wholly owned subsidiary in US (on the ground that where assessee-company received certain amount from its wholly owned foreign subsidiary on account of buy-back of shares), since the assessee had given ample justification of buy back price by pointing out NAV of investee company on date of buy-back, which was much lower than buy-back price and therefore the TPO was not justified in considering aforesaid transaction as sham and making addition of notional interest on amount in question. It further held that it was a trite law that the transfer pricing proceedings do not envisage empowering of transfer pricing officer to re-characterize the transactions on the basis of his own whims and fancies.
Patel Engineering Ltd - TS-12-ITAT-2017(Mum)-TP

290. Where the assessee subscribed to 1,85,03,468 redeemable preference shares of Essar Services Mauritius (AE) and also redeemed 1,81,00,000 of such shares at par and the shares were non-cumulative and redeemable on par without dividend and also had a running account with the AE, the TPO considering the nature and frequency of the transactions in the running account, re-characterized the subscription and redemption of the shares as a loan and computed notional interest on the alleged loan, the Tribunal following the decision in assessee's own case for AY 2009-10 held that the TPO could not disregard an apparent transaction and substitute it with a transaction as per his own perception. Accordingly, it set aside the addition made.
Aegis Limited v DCIT – TS-66-ITAT-2017 (Mum) – TP- ITA No.7694/Mum/2014, ITA No.1209/Mum/2015 dated 08.02.2017

291. The Tribunal held that the assessee's remittance to subsidiary for subscription of equity shares constituted an international transaction u/s 92B considering extraordinary delay in allotment of shares as the transaction had a direct bearing on the profit /loss as well as the assets of the enterprise. Noting that the assessee had remitted the amount during the year and no shares were allotted till the end of the financial year i.e 31.03.2009, it held that in such a case, share application money loses its character as the money was available to AE for utilization but it agreed with the assessee's contention that ordinarily share application money would not constitute international transaction when allotment of shares was made within reasonable time as the funds would remain in a separate bank account and would not be available to allotting company for utilization. Further,

it accepted assessee's alternative plea to apply LIBOR rate for determining the arm's length interest as the remittance was made in foreign currency but however disallowedits claim for grace period of 180 days from date of remittance for computing interest.
Logix Microsystems Ltd. vs. DCIT - TS-181-ITAT-2017(Bang)-TP - IT. {T.P} A. No.280/Bang/2014 dated 22.02.2017.

Others

292. The Tribunal deleted TP-addition of Rs. 5.53 Crore on purchase of intangible assets (Trademarks, Customer lists and Goodwill) by assessee consequent to acquisition of credit card processing and merchant banking acquisition business of HSBC India during AY 2007-08. As regards the Goodwill and Customer List, it noted that no deduction or depreciation was claimed on the consideration paid for it while computing taxable income and applied the decision of Bombay HC in Vodafone India Services and held that Chapter X provisions could only be invoked only when "income arises from international transaction" and there being no income from the said transaction, the provisions of Chapter X could not be applied. With regard to acquisition of Trademark, which had been capitalized and depreciated by assessee, the Tribunal approved the justification of ALP adopted by the assessee viz. on the basis of report of independent valuer, where weightage had been assigned considering various factors, including the potential of generating business in future wherein a higher weightage was given to the India territory and rejected the TPO's contention that lower weightage should have been given to Indian business as credit card business was much more advanced in other countries. Accordingly, it rejected TPO's conclusion that assessee has paid 25% extra for trademark acquisition and deleted the TP addition.
Global Payments Asia Pacific (India) vs. DCIT – TS-112-ITAT-2017 (Mum) – TP ITA NO. 5345/MUM/2012 dated 25.01.2017

f. ***Miscellaneous***

Appeal

293. The Tribunal allowed the miscellaneous petition filed by assessee challenging its previous order dated 26.08.2016 for AY 2011-12 relating to selection of comparables for benchmarking technical and marketing support services rendered to AEs.It agreed that the assessee's ground for inclusion of 'Indus Technical and Financial Consultants' as comparable was not decided by the Tribunal and also that although it had decided assessee's ground for inclusion of 'United Vander Horst Ltd' and 'Yashmun engineers Ltd.' it had not considered the aspects of consistency. Further it accepted that the Tribunal had also not considered and decided on the issue regarding benefit of cost of living index adjustment to comparables for technical support services segment. Accordingly, it concluded that there was apparent mistake in the Tribunal order on these three grounds, and it recalled the order for the limited purpose of deciding these grounds.
EADS India Pvt. Ltd v ACIT – TS-27-ITAT-2017 (Bang) – TP - IT(TP)A No.95 (Bang)/2016) dated 06.01.2017

294. The Tribunal allowed the assessee's miscellaneous petition challenging its order for AY 2008-09 dated 30/8/2016, accepting that certain mistakes had crept in its ITAT decision. Accordingly, it recalled the appeal for fresh hearing.
Microchip Technology (India) Pvt. Ltd. Vs ACIT – TS-110-ITAT-2017 (Bang) – TP IT(TP)A No.l586lBang/2012 dated 10.01.2017

295. Where the Tribunal, relying on its order for the previous year in the case of the assessee, remitted the issue of determination of the ALP of technical fees paid by the assessee to its AEs to the AO / TPO and made further observations / directions viz. that since the transaction was an expense transaction, profit method could not be the Most Appropriate Method and that the CUP method was to be considered, the Court held that once a finding was recorded to remand the issue with a particular direction, the Tribunal should refrain itself from making any observation with regard to the mode and the manner in which the direction is to be complied with. Therefore, it held that the

order passed by the Tribunal making observation exceeding the direction given in the case of the assessee for the Assessment Year 2007-08 would no more operate and directed the TPO/AO to consider the matter in the same manner as was considered earlier viz. AY 2007-08.
Forsoc Chemicals India Pvt Ltd v DCIT – TS-158-HC-2017 (Kar) – TP – ITA No 15 / 2016 dated January 24, 2017

296. The Tribunal allowed the assessee's miscellaneous application against its order dated August 28, 2016 noting that it had wrongly stated the name of M/s Accentia Technologies Ltd for exclusion from the list of comparables as opposed to the correct name of M.s Acropetal Tech Ltd. Further, it noted that in Para 28 of its order it had incorrectly excluded M/s Accentia Technologies Ltd from the list of comparables wherein the correct name of the comparable was M/s Asian Busienss Exhibition and Conference Ltd and that in Para 6 of the order it had wrongly mentioned that the Revenue had filed an appeal for the inclusion of Infosys BPO and that the order was to be read after omitting the said name. Accordingly, it held that the Tribunal order dated August 28, 2016 was to be read with the aforesaid corrections without any change in the final conclusion.
Interwoven Software Services Ind. Pvt. Ltd. Vs ITO - TS-136-ITAT-2017(Bang)-TP] -M.P No.119 (B)/2016 dated 06-01-2017

297. The Tribunal allowed assessee's miscellaneous petition seeking rectification of mistake in the order for AY 2010-11, accepting assessee's claim that the TP issues pertaining to the ALP determination of both 'service charges' and 'royalty' were adjudicated during appeal but final conclusions referred to only 'royalty' and not 'service charges'. It held that both issues were identical and were adjudicated along similar lines, observing that, similar to royalty, the ALP of service charges also could not be treated as NIL and accordingly rectified its order to set aside ALP determination of both royalty and service charges to TPO for fresh consideration.
Inteva Products India Automotive Pvt Ltd vs. DCITTS-78-ITAT-2017(Bang)-TP - M.P. No.125/Bang/2016 dated 20.01.2017.

298. The Court disposed the writ petition filed by assessee, challenging the TPO's show cause notice determining the ALP of management fees paid by assessee at Nil in the second round of proceedings for AY 2007-08, observing that no interference was called for at this stage. However it directed the TPO to consider assessee's submissions in their entirety. It noted that in the first round of proceedings, the Tribunal had observed that although assessee had claimed TNMM as MAM, the TPO had not discussed most appropriate method and simply concluded that management fees payment was not justified since there was no improvement in revenue as a result of which the Tribunal had remitted the matter to AO/TPO holding that TPO / DRP were expected to compare the payment with that of the comparable companies in India on the basis of method prescribed under Rule 10B.
AB Mauri India Pvt Ltd v DCIT – TS-1097-HC-2016 (Mad) – TP - W.P. No.43204 of 2016 dated 12.12.2016

299. Where the assessee had applied RPM in respect of international transaction of goods imported for distribution which was rejected by the TPO who applied TNMM as the MAM, the Tribunal upheld the TPOs order and rejected RPM considering the huge selling and distribution expenses incurred by assessee which was not the case for comparables and held that the precedent relied on by assessee was not applicable as no such expenditure was incurred therein. The Tribunal dismissed the assessee's miscellaneous petition seeking rectification of its order for AY 2007-08 on the ground of non-consideration of judicial precedent relied upon. It held that the that review of existing evidence was not permissible u/s 254(2) as the issue was decided on merit after consideration of facts and law and accordingly dismissed the petition.
Abott Medical Optics Private Limited vs. DCIT - TS-75-ITAT-2017(Bang)-TP - M.P. No.130/Bang/2016 dated 25.01.2017.

300. The Tribunal allowed the assessee's miscellaneous petition seeking rectification of Tribunal order for AY 2010-11 dated 24.6.2016, wherein it had rejected assessee's plea for exclusion of 'Infosys Ltd' from the list of comparables, observing that it was selected by assessee in its TP study and no separate ground was raised before Tribunal whereas the assessee pointed out that it had objected

to inclusion of this company before TPO itself, and also submitted that it had selected this company in its TP study by adopting CUP method, whereas TPO had applied TNMM for benchmarking. Referring to the order passed by AO/TPO which recorded assessee's objection against inclusion of this company, the Tribunal concluded that since its observation was without considering the fact of objection raised by assessee before TPO, there was a mistake apparent on record of ITAT order. Accordingly, it directed the Registry to fix the appeal in normal course for hearing for adjudication of the issue of functional comparability of 'Infosys Limited'.
Mercedes-Benz Research & Development Pvt. Ltd. vs. ACIT - TS-77-ITAT-2017(Bang)-TP - M.P. No.133/Bang/2016 dated 23.01.2017

301. Where in the original order passed by the Tribunal, it had set aside comparability of one company viz. Jeevan Scientific Technology Ltd. for considering only segmental turnover of 'BPO operations' and the assessee vide a miscellaneous application sought to rectify the said order to the effect that earnings from 'BPO segment' should be considered as against 'BPO operations', the Tribunal dismissed the miscellaneous petition observing that it had in its previous order specifically mentioned that segmental revenue from BPO operations stated at Rs. 71.219 lacs required verification and therefore there was no apparent mistake rectifiable u/s 254(2).
Swiss Re Global Business Solutions India Pvt. Ltd. (Formerly M/s. Swiss Re Shared Services (India) Pvt. Ltd.) vs. ACIT - TS-186-ITAT-2017(Bang)-TP - M.P. No.7/Bang/2017

302. The Tribunal admitted additional evidence filed by the assessee with regard to TP-adjustment on management fees paid by assessee to its AE the ALP of which was determined at Nil by the TPO TPO who held that assessee had neither received services nor derived benefit from the said payment. Noting that the TPO had also held that the assessee had failed to produce supporting evidence and that the expenses were actually in the nature of stewardship, the Tribunal remitted the issue to TPO for fresh decision in light of additional evidence submitted by assessee after giving assessee an adequate opportunity of being heard. It also clarified that it had not expressed any opinion on the merits of the case.
Flowserve India Controls Pvt.Ltd vs DCIT - TS-195-ITAT-2017(Bang)-TP - IT(TP)A No.1366/Bang/2010 dated 23/02/2017

303. The Tribunal, concurring with the assessee's submission, held that since the CIT(A) order on the inclusion / exclusion comparables was very cryptic and not a speaking / reasoned order, restored the matter back to CIT(A) for fresh decision with a direction to pass speaking and reasoned order after affording adequate opportunity of being heard to both sides.
Syniverse Teledata Systems Pvt. Ltd (Formerly known as MACHTeledata systems Pvt. Ltd) vs. DCIT - TS-217-ITAT-2017(Bang)-TP - IT (TP) A No.1363 (Bang) 2014 dated 15.02.2017

304. Where the Tribunal had directed inclusion of 3 comparables and had remitted comparability of 8 comparables to TPO for reconsideration, the Court held that though remittance of the issue by the Tribunal was justified, however, the lack of reasoning by the authorities for inclusion of the comparables would mean that the matter would be open for the assessee and it had right to contend that the inclusion of comparables was not in accordance with law for whatever grounds it choose to urge. Accordingly, it remitted the matter back to TPO.
Agnity India Technologiers P. Ltd. [TS-175-HC-2017(Del)-TP] [ITA 99/2017]

<u>Assessment/Reassessment</u>

305. The Tribunal allowed the appeal of the Revenue against the directions of the DRP wherein the DRP had directed the TPO to decide the percentage of risk adjustment to be calculated and held that the DRP had no power to do so. Referring to the provisions of Section 144C(7) and (8) it held that the DRP had no authority either to direct the AO or the TPO to make further enquiry and decide the matter and that at best the DRP could call for a remand report from the AO / TPO or make further enquiry itself. Accordingly, it set aside the order passed by the DRP and directed it to decide the issue afresh after considering the relevant material on record.
India Trimmings Pvt Ltd – TS-62-ITAT-2017 (Chny) - TP

306. Where the TPO in remand proceedings for the subsequent year, had accepted the ALP of SAP implementation / IT / SAP service charges on identical facts but had determined the ALP of such payment at Nil in the relevant year, the Tribunal set aside the assessment order for the relevant year directing the AO / TPO to conduct a fresh exercise for determining ALP in light of the remand report of the succeeding year.
Kennametal India Ltd – TS-30-ITAT-2017 (Bang) – TP

307. The Tribunal allowed the assessee's miscellaneous application for restoration of the assessee's appeal which was dismissed ex-parte as none appeared on behalf of the assessee. It noted that there was a delay in engaging counsel before the Tribunal and that the non-appearance was neither deliberate nor intentional, which amounted to reasonable cause. Accordingly, it recalled the ex-parte order and re-fixed the hearing.
Merck Life Science Pvt Ltd – TS-46-ITAT-2017 (Bang) - TP

308. The Tribunal quashed the reassessment proceedings initiated against the assessee and the consequent orders for AYs 1998-99, 1999-00, 2000-01 and 2001-02 which were initiated on the assumption that the assessee had suppressed its profits from its transactions with Indian companies as a result of which the provisions of Section 92 were applicable. With respect to AYs 1998-99 and 1999-00, for which reopening was initiated beyond 4 years, it upheld the contention of the assessee that there was no allegation regarding failure to disclose materials facts and therefore reopening was invalid. Further, in respect of all years, it noted that during the original assessment proceedings, the AO realizing the non-applicability of section 92 had accepted the justifications provided by the assessee and dropped the ground which formed the basis of reopening.
Coca Cola India Inv v DCIT – TS-59-ITAT-2017 (Del) – TP

309. The Tribunal dismissed cross appeals of assessee (engaged in providing software development/research and development services to foreign AEs) and Revenue for AYs 2007-08 to 2010-11 as the TP issues were resolved under India-USA MAP.
Symantec Software India Private Limited - TS-1054-ITAT-2016(PUN)-TP

310. The Tribunal, by applying the provisions of section 144C read with section 143, held that where the Assessing Officer passed final assessment order under section 143(3) making certain adjustments to the assessee's ALP without passing draft assessment order which was against the provisions of the Act and hence, the same was invalid in law. It held that the compliance of section 144C was mandatory in all such cases where the TPO proposed variation in the income or loss returned, which was prejudicial to interest of the assessee.
Soktas India (P.) Ltd - [2017] 77 taxmann.com 19 (Pune - Trib.)

311. The Court held that the reassessment proceedings initiated by AO u/s 147 for AY 2005-06 on the basis of Form 3CEB furnished by group company of assessee, were without jurisdiction and unsustainable as the AO had no new information or tangible material to conclude that there was escapement of income since the assessee had also filed Form 3CEB along with return of income, making full disclosure of receipts from IT support services rendered to group company and claiming the same to be reimbursement of expenditure and not income.
Sanvik Information Technology AB - TS-1055-ITAT-2016 (PUN)-TP

312. The Court admitted assessee's writ petition challenging reopening notice under section 148 for AY 2009-10 issued beyond 4 years from the end of the relevant AY to disallow ESOP costs on the ground that prime face on the date of issuing of the impugned notice, the assessing officer could not have had any reason to believe that income had escaped assessment. Further, the Court observed that the assessee had given the complete manner of accounting as well as taxation of ESOP cost in its return of income and had also disclosed the relevant details in its form 3CEB. Therefore, the provisions of explanation 1 to section 147 was not applicable.
DSP Merrill Lynch Ltd - TS-21-HC-2017-(Bom)-TP

313. The Tribunal deleted the TP adjustment made in assessment order passed under section 153A for AY 2005-06 pursuant to search and seizure operations on the ground that completed assessment under section 143(3) could not be interfered with by AO/TPO in the absence of incriminating

material during search, and that the assessee had not suppressed international transactions during assessment proceedings under section 143(3).
Baba Global Limited - TS-1070-ITAT-2016(DEL)-TP

314. Where the AO disallowed section 10AA benefit while passing the final assessment order which was not proposed in the draft assessment order, the Court held that while passing the final assessment order, the AO cannot go beyond what is proposed in the draft assessment order as it will lead to breach of principle of natural justice as no opportunity would be given to the assessee to file its objection before DRP and accordingly, it confirmed Tribunal's order of deletion of disallowance of section 10AA benefit.
Woco Motherson Advanced Rubber Technologies Limited [TS-173-HC-2017(GUJ)-TP] (Tax Appeal No. 129 of 2017)

315. The Court admitted Revenue's appeal against the order passed by the Tribunal quashing the assessment framed on the amalgamating company after incorporating the TP addition for excess royalty paid by it by virtue of the provisions of section 170(2) as per which assessment should be framed on the amalgamated company and not amalgamating company.
Maruti Suzuki India Ltd. [TS-172-HC-2017(DEL)-TP] [ITA 65/2017]

316. The Tribunal admitted assessee's additional grounds for consideration of 7 companies as comparable for its international transaction relating to software development/content development services for AY 2010-11 and remitted the matter to the file of the AO/TPO on the ground that comparable companies submitted by assessee needed further examination for determination of ALP of international transaction. Further, it held that it would be open to assessee to furnish objection in which case DRP would consider the matter afresh in accordance with provisions of section 144C.
Harland Clarke Holdings Software India Private Limited - TS-1062-ITAT-2016-(CHNY)-TP

317. The Tribunal dismissed revenue's appeal for AY 2009-10 on transfer pricing issues and deductions under section 10A on the ground that the appeal filed by revenue was in violation of CBDT Circular No 21/2015, prescribing pecuniary limit for preferring appeal by Revenue before ITAT as beyond Rs 10 Lakhs.
Curam Software International Pvt Ltd - TS-1037-ITAT-2016(Bang)-TP

318. With respect to service fees paid by the assessee (a US entity) to GEIIPL, an Indian entity, the Tribunal rejected the plea of the assessee,that since the transfer pricing analysis of the said services was accepted in the hands of GEIIPL, there were no further profits to be attributed to GEIIPL in the capacity of the PE of the assessee and that there was no reason to believe that income had escaped assessment. It noted that the ALP of marketing support services offered by GEIIPL to all the group entities was determined on the basis of the Global Service agreement entered into between GEIIPL and a US based Group company viz. GEIOC Inc, but the reassessment proceedings were initiated based on a survey conducted at the premises of GEIOC's liaison office in India, which revealed that the actual activities carried out in India were far in excess of the services provided in the Agreement and therefore the proceedings were to be upheld as valid. Therefore, it held that since the transfer pricing analysis did not reflect the services provided beyond the scope of the Agreement, there was a need to attribute profits to the PE for those additional functions / risks**.**
GE Energy Parts Inc v ADIT – TS-22-ITAT-2017 (Del) – TP

319. The Court dismissed writ petition filed by MagnetiMarelli (assessee) challenging notice u/s 147/148 of the Act reopening assessment for AY 2010-11. The Court dismissed the writ petition filed by the Petitioner and noted that AO in the 'reasons to believe', indicated the possibility of escapement on the ground that an identical transaction relating to payment to AE for technical know-how had resulted in TP addition for the earlier AY 2009-10 and that, assessment had been completed after framing of assessment u/s 143(1).It rejected assessee's submission for quashing section 148 notice on the ground that revenue's stand for AY 2009-10 had been rejected by the Court and held that the validity of the notice was based on the facts available on the record on the date when the

notice was issued.However, it directed the AO to consider the assessee's submissions with respect to the matters covered by HC judgment for AY 2009-10 in light of the said judgment
MagnettiMarelliPowertain India Pvt Ltd v DCIT – TS-68-HC-2017 (Del) – TP - W.P. (C) 8760/2014 dated 06.02.2017

320. The Tribunal remitted TP-issues to DRP for passing fresh direction in case of assessee rendering software development services to its AEs during AY 2007-08, noting that the DRP had upheld TPO's application of filters while selecting appropriate comparables for benchmarking, and had rejected assessee's objections with respect to 'secret data' u/s 133(6) used by TPO. It held that the order passed by TPO was cryptic and non-speaking and that no proper reasoning was given by DRP while dismissing assessee's objections. Accordingly, it remanded the matter stating that DRP had not given proper reasons while issuing directions which it ought to have done.
ABB Global Industries & Services Ltd. Vs DCIT - TS-137-ITAT-2017(Bang)-TP - IT(TP)A No.1142//Bang/2011 dated 07.02.2017

321. Where the assessee contended that the transactions entered into it were at ALP in light of the fact that it had entered into advance pricing agreement (APA) under section 92CC of the Act with CBDT on 24th November 2015, wherein, the arm's length price of international transaction relating to investment advisory services provided to AE had been accepted at operating profit margin of not less than 20% and the DRP and TPO had in AY 2006-07 and AY 2007-08, accepted the margin of the assessee at cost plus 17% and 17.5%, respectively, the Tribunal held that though no conclusive finding on the binding nature of APAs was required in light of its decision on comparables (assessee succeeded in excluding and including certain comparables post which it was at ALP), it held that the the APA entered into by the assessee was of persuasive value while determining ALP of the relevant year.
Warburg Pincus India Pvt. Ltd. vs. ACIT - TS-44-ITAT-2017(Mum)-TP -ITA no. 6981/Mum./2012 dated 13.01.2017

322. Where the AO failed to issue a notice under section 143(2) of the Act within the time limit prescribed as a result of which the regular assessment came to an end and the matter had reached its finality, and then subsequently he made a reference to the TPO wherein the TPO made an upward addition of Rs.85.63 lakh, the Tribunal held that the AO erred in issuing a notice under section 148 of the Act on the basis of the order of the TPO contending that income of the assessee had escaped assessment as the reference made by the AO to the TPO was bad in law in the first place as at the time of reference no proceedings were pending. Accordingly, it held that the order of the TPO based on such incorrect reference was void-ab-initio and therefore could not be a valid material to entertain a belief on part of the AO that income chargeable to tax has escaped assessment.
ITO vs. Magic Software Enterprises India Pvt. Ltd - TS-53-ITAT-2017(PUN)-TP- ITA No.1801/PUN/2013 dated 31.01.2017

323. Noting that the assessee placed a copy of MAP order before the Tribunal, it dismissed assessee's transfer pricing grounds as withdrawn in view of MAP order under Article 27 of the relevant DTAA for AY 2009-10.
DCIT v Hewlett Packard (India) Software Operation Pvt Ltd – TS-1039-ITAT-2016 (Bang) – TP - IT(TP)A No.213lBang/2014 IT(TP)A No.2881Bang/2014 dated 04.11.2016

324. The Tribunal dismissed the assessee's appeal for AY 2009-10 as well as transfer pricing grounds raised in Revenue's appeal as TP-issues raised therein were resolved as per MAP order under Article 25 of the Indo-US DTAA and the MAP order had also passed by AO/TPO.
Northern Operating Services Pvt. Ltd. vs. DCIT – TS-1086-ITAT-2016 (Bang) – TP - I.T.(TP)A. No.261/Bang/2014 dated 13.12.2016

325. Relying on the decision of the coordinate bench in the assessee's own case for the prior AY, the Tribunal remitted the TP grounds raised by assessee (contract manufacturer / distributor of medical equipment) to the file of DRP for re-adjudication, noting that identical TP issues involving additions with respect to royalty, distribution / trading, trademark and interest had been remitted

back by ITAT for AYs 2006-07 to 2010-11since both TPO and DRP had failed to consider detailed submissions made by assessee, which was so in the instant case as well.
Wipro GE Health Care Pvt Ltd v ACIT – TS-109-ITAT-2017 (Bang) – TP - ITA No. 406lBang/2016 dated 09.01.2017

326. The Tribunal adjudicated on 2 grounds not considered in original order which was recalled pursuant to miscellaneous petition filed by assessee for AY 2008-09 and held that since assessee's claim [(i) TP-adjustment exceeded the AE's share of revenue (approximately Rs. 7.7 crores as against TP adjustment of Rs. 16 crores) and that reverse analysis could have been done by making the AE as the tested party and(ii) TPO failed to recognize that the compensation ratio between AE and assessee was commensurate with the FAR analysis of both parties] were not raised before DRP and the TPO and the issues involved were not properly addressed by authorities in earlier proceedings the same ought to have been remitted to the TPO to re-consider the issue after the assessee furnished requisite details.
Synechron Technologies Pvt Ltd v ACIT – TS-50-ITAT-2017 (Pun) – TP - ITA No. 2518/PUN/2012 dated 01.12.2017

327. The Tribunal allowed the miscellaneous petition filed by assessee seeking correction of its previous order wherein the Tribunal set aside the order of the CIT(A) and directed for the selection of 2 comparables viz. Exensis Software Solutions and Thirdwave software Solutions on ground that they could not be excluded merely because of their high profit margin, noting that the assessee sought their exclusion on the ground of functional dissimilarity. Accordingly, it recalled the earlier order to consider assessee's claim for comparable exclusion on ground of functional dissimilarity and scheduled hearing on 23.02.2017.
Maxim India Integrated Circuit Design Pvt. Ltd vs ITO - TS-108-ITAT-2017(Bang)-TP - M.P. No.10S/Bang/2016 dated 13.01.2017

328. The Tribunal set aside the order of the CIT(A) wherein he had directed the AO to exclude 3 functionally dissimilar companies viz. Exensys Software Solutions Ltd, Four Soft Ltd and Geometric Software Solutions Co Ltd from the list of comparables. The Tribunal held that as per the provisions of Section 251 of the Act the CIT(A) has the power to confirm / reduce / enhance or annul the assessee but does not have the power to remand the matter for fresh consideration. It held that the CIT(A) should not have remanded the matter to the AO and instead ought to have exercised his power under the Act to complete the assessment by excluding companies which were functionally dissimilar. Accordingly, it directed the AO to examine the comparability of the 3 companies on the basis of the submission made by the assessee and to find out whether these companies were functionally dissimilar to that of the assessee or not while making the ALP adjustment.
ITO Vs Crimsonlogic India Pvt. Ltd.- TS-143-ITAT-2017 (Bang) – TP - IT(TP)A No.1666lBang/2013 dated 31.01.2017

329. The Tribunal accepted the Revenue's contention that CIT(A)'s direction to exclude certain functionally dissimilar companies in light of guidelines laid down by Delhi Tribunal in Actis Advisers Pvt. Ltd. Vs DCIT, was beyond the mandate of Sec 251(1)(a) and held that the CIT(A) should not have restored the matter to the file of the AO with certain directions and that he ought to have decided the issue himself. Accordingly, it remitted the TP-issues raised vide both the assessee'sand Revenue's appeals for AYs 2004-05 and 2005-06 to the file of CIT(A) for fresh adjudication.
DCIT vs. AOL Online India Pvt Ltd - TS-134-ITAT-2017(Bang)-TP - IT (TP)A Nos.1669 & 1670(Bang} 2013 dated 25-01-2017
DCIT vs. E4E Business Solutions Pvt. Ltd - TS-221-ITAT-2017(Bang)-TP - 1763/Bang/2013 (2004-05), 1781/Bang/2013 (2004-05) 1764/Bang/2013 (2005-06) 1782/Bang/2013 (Asst. Year 2005-06) dated 17-3-2017

330. The Tribunal upheld the jurisdiction of the TPO in determining ALP of the alleged international transactions relating to AMP expenses which were not reported as an international transaction by the assessee (re-seller of Louis Vuitton Group products in India) in its Form 3CEB. Relying on the

decision of the co-ordinate bench in Nikon India Pvt Ltd – TS-469-ITAT-2016(Del)- TP, it rejected the assessee's contention that as per CBDT Instruction No 3/ 2016, the AO ought to have first provided the assessee an opportunity of being heard before recording satisfaction in respect of AMP transaction and that the TPO could not have proceeded to undertake ALP determination without providing such opportunity and held that since in the instant case, it was not the AO who formulated his view on AMP expenses as an international transaction, the said Instruction was not applicable. As regards the contention of the assessee that as per Para 4.1 of the impugned Instruction, the TPO could proceed to determine the ALP of only those transactions which were referred to him, the Tribunal held that though the original jurisdiction of the TPO was confined to the international transactions referred to him by the AO for determination of ALP, such jurisdiction was extendable to other international transactions which came to his notice during the course of proceedings before him and that it was nowhere mentioned that the power of the TPO to determine the ALP of international transactions was restricted to only those transactions referred by the AO alone. Accordingly, it held that there was no lack of jurisdiction in the instant case.

On the issue of whether the AMP expenses constituted an international transaction, the Tribunal, noted that the order of the TPO had been passed before several other judgments of the Court on this issue and thus remitted the matter to the file of the TPO for fresh determination in accordance with the principles set out in those judgements.

Louis Vuitton India Retail P Ltd v DCIT – TS-146-ITAT-2017 (Del) – TP dated 01.03.2017

331. The Court, relying on the decision in CIT vs. Kabul Chawla [TS-494-HC-2015(DEL)], dismissed the Revenue's appeal against the decision of the Tribunal wherein it had quashed assessments made by AO/TPO u/s 153A for AY 2008-09 pursuant to search and seizure operations, despite the fact that no new or incriminating material had been found during search and seizure proceedings [which took place in assessee's premises after completion of scrutiny assessment u/s 143(3)] and that the AO based upon existing material, referred the matter to TPO, who proposed TP adjustment on interest-free loans granted to AE. The Court observed that the scrutiny assessments concluded earlier were based upon queries, and assessee had disclosed all the materials which came to be reviewed subsequently in Sec 153A proceedings. Accordingly, it upheld the order of the Tribunal quashing the assessments.

Pr. CIT Vs Baba Global Ltd – TS-1098-HC-2016 (Del) – TP - ITA 938/2016, CM APPL.47139-47140/2016 dated 23.12.2016

332. Where pursuant to the order passed by the TPO, the AO passed draft assessment order dated 07-02-2014 making TP-addition of Rs. 24.37 Cr and along with the impugned assessment order, the AO also issued notice of demand u/s 156 and show cause notice for levy of penalty u/s 271(1(c), after recording satisfaction for initiating penalty proceedings u/s. 271(1)(c) r.w.s Explanation 7, the DRP refused to exercise its jurisdiction, holding that the draft assessment order was final order for all intent and purposes as it was issued along with demand and penalty notices. The Tribunal held that as per the provisions of Sec 144C, it was incumbent upon the AO to forward a draft assessment order to the assessee in the first instance, so as to enable the assessee to file objections before the DRP and that it was only after receipt of directions from the DRP, that the AO could pass the final assessment order and record satisfaction for initiating penalty proceedings. Noting that the AO issued demand notice u/s 156 and show cause notice for levy of penalty u/s. 271(1)(c) while passing the draft assessment order itself, the Tribunal held that in spirit the draft assessment order was the final assessment order and therefore quashed the assessment order dated 07.02.2014, and held that the subsequent proceedings arising there from were vitiated and null and void.

Can-Pack India Private Limited vs. DCIT - TS-167-ITAT-2017(PUN)-TP - / ITA No. 285/PUN/2015 dated 08.03.2017

333. The Tribunal set aside the order of the DRP for AY 2008-09 on TP-issues viz. regarding non - exclusion of certain comparables, non-inclusion of comparables, risk adjustment, ALP of Management fees, RPT Filter, Employee cost filter etcby holding the same to be cryptic, non-speaking and non-reasoned and thus remitted the issues to TPO for fresh decision after affording assessee adequate opportunity of being heard.

UL India Private Ltd vs DCIT - TS-207-ITAT-2017(Bang)-TP- IT(TP)A No. 1564(Bang) 2012 dated 03.03.2017
UL India Pvt Ltd vs DCIT - - TS-209-ITAT-2017(Bang)-TP - IT(TP)A No.1240//Bang/2011 dated 23.02.2017

334. Where the AO passed the final assessment order without issuing a draft assessment order as provided in section 144(C)(1), the Tribunal accepted the assessee's contention that, in view of the provisions u/s 144C(1), he ought to have been given an opportunity to present its objections before DRP on the basis of a draft assessment order, failing which the final order issued by AO was void-ab-initio. Relying on the decision of Zuari Cement Ltd. [TS-271-HC-2013(AP)-TP] wherein it was held that AO is mandated to first pass a draft assessment order, communicate it to the assessee, hear his objection and then compete assessment, it held that the final order of the assessment was clearly contrary to section 144C of the Act.
Molex Mafatlal Micron Pvt Ltd (now merged with Molex India Ltd) vs DCIT - TS-191-ITAT-2017(Bang)-TP – 1170/ Ahd/2010, 1197/Ahd/2010 etc dated 10.01.2017

335. The Tribunal held that where the due date for issuing the final assessment order as provided in section 144(C)(4) was February 28, 2011 (within one month from the end of the month in which either (a) the acceptance of the assessee is received or (b) the period of filing of objections under sub-section (2) expires and the assessee does not file such objections) but the order was actually issued on March 25, 2011, the order passed by AO was contrary to law and void –ab-initio.
Molex Mafatlal Micron Pvt Ltd (now merged with Molex India Ltd) vs DCIT - TS-191-ITAT-2017(Bang)-TP – 1170/ Ahd/2010, 1197/Ahd/2010 etc dated 10.01.2017

336. The Court allowed assessee's writ and quashed the show cause notice issued to Li & Fung India (assessee) for AY 2007-08 pursuant to remand by Tribunal, proposing to reject comparables selected by the assessee in its TP-study noting that the Tribunal, relying on HC decision in assessee's own case for AY 2006-07, had directed TPO to determine ALP afresh by considering 'total cost' as cost base and not FOB value of goods sourced through assessee. The Court observed that when there was a remand on the basis of a specific finding (in this case, the untenability of shifting of the OP/TC to FOB) the TPO could not have travelled beyond it, given that there was no controversy ever about the inclusion of any comparable.
Li & Fung India Pvt. Ltd. Vs ACIT - TS-228-HC-2017(DEL)-TP - W.P. (C) 11596/2016, CM APPL.45660-61/2016 dated 08.03.2017

337. Where the assessee had filed a letter on 3/3/2015 intimating change in address in respect of appeal for AY 2005-06 but had not filed a separate letter intimating address change in respect of appeal for subject AY 2009-10, the Tribunal allowed the assessee's miscellaneous petition, and recalled its ex-parte order dated 7/10/2016 for AY 2009-10, opining that not filing of separate letter about the change of address in respect of present appeal being in IT(TP)A No.2871Bang/20 14 for assessment year 2009-10 was an inadvertent mistake and hence, there was a reasonable cause for non-appearance of assessee on the date of hearing. Accordingly, as per Rule 24 of Income-tax Appellate Tribunal Rules 1963, it recalled its earlier order and fixed the appeal for hearing on May 24, 2017.
Maxim India Integrated Circuit Design Pvt. Ltd. vs. DCIT - TS-262-ITAT-2017(Bang)-TP - M.P No.35lBang/2017 dated 10-3-2017

338. The Court dismissed Revenue's appeal against Tribunal's order remitting the inclusion of 6 comparables to TPO as the TPO failed to conduct the FAR analysis which was a prerequisite for selection of comparables. It considered the Revenue's submission that both the DRP and TPO had given reasons and sent notices as to why the six comparables had to be included for purposes of ALP determination and held that the Revenue was not prejudiced in the present matter as it was at liberty to argue all the submissions not foreclosed by the Tribunal. Thus, in absence of substantial question of law, it dismissed the appeals of the Revenue
Copal Research India Pvt Ltd [TS-229-HC-2017(DEL)-TP]

<u>Penalty</u>

339. The Tribunal remitted the issue of imposition of penalty under section 271AA of the Act (for non-maintenance of documentation required under TP regulations)to the file of the AO, noting that the subject matter of appeal was already adjudicated in the quantum appeal by the Tribunal wherein the matter was remitted to the file of the TPO for fresh consideration of comparables by considering comparables who sold garments outside India as opposed to the comparables selected by the assessee i.e. companies who sold garments within India. Accordingly, since the Tribunal had remitted the matter in in the quantum appeal, it remitted the issue to the file of the AO directing him to determine the penalty issue after determining the quantum appeal.
Greenland Exports Pvt Ltd v ACIT – TS-25-ITAT-2017 (Chny) – TP - I.T.A.No.2633/Mds./2016 dated 25.01.2017

340. The Tribunal deleted penalty imposed u/s 271G for non-filing of documents and held that penalty proceedings were invalid absent issue of notice to assessee u/s 92D(3) requiring the assessee to furnish such information or documents. Reliance was placed on the Tribunal ruling in Cargill India Pvt Ltd wherein it was held that the AO had to issue a notice u/s 92D(3), requiring assessee to furnish any information or documents and only on the failure of assessee to furnish the same, proceedings u/s 271G could be initiated.
Transport Corporation of India Ltd v ACIT – TS-41-ITAT-2017 (Hyd) – TP -ITA No.188/Hyd/2016 dated 11.01.2017

341. Where the assessee engaged in the business of trading, carried on manufacturing for the first time in consequence of entering into business agreement with its AE and adopted TNMM as the most appropriate method and the TPO adopting CUP method determined the ALP as Nil, which resulted in reduction of losses of the assesse consequent to which, penalty u/s 271(1)(c) was levied, the Court confirmed the Tribunal's order deleting penalty levied u/s 271(1)(c) in relation to TP addition made since the assessee had satisfied conditions of good faith & due diligence as stipulated in Explanation 7 to sec 271(1)(c).
Mitsui Prime Advanced Composites India Pvt. Ltd [TS-135-HC-2017(DEL)-TP] (ITA 913/2016)

Stay

342. The Tribunal granted extension of stay of outstanding demand for AY 2011-12 for a further period of 3 months from the date of order subject to the condition that assessee does not seek adjournment on the date of hearing. It agreed with the assessee that the delay in disposal of the appeal was not attributable to the assessee, and there was no change of circumstances from the day of earlier stay i.e. 11 March, 2016.
NovoNordisk India Pvt. Ltd v DCIT [TS-1046-ITAT-2016(Bang)-TP] - S.P.No.188(BNG.)2016 dated 02.12.2016

343. The Tribunal granted stay of outstanding demand of Rs. 58.92 lakhs arising out of TP issues for AY 2012-12, subject to further payment of RS. 10 lakhs by assessee observing that out of total demand of Rs.69.31 lakhs, assessee had already paid 15% i.e. Rs. 10.39 lakhs. It also noted that some of the companies included in the set of comparables may be excluded on functional dissimilarity, and held that the assessee had made out good case for grant of stay. It directed the assessee to deposit further sum of Rs. 10 lakhs on or before 15 February, 2017and granted stay of balance demand for 180 days or till disposal of appeal whichever is earlier and fixed an out of turn hearing on 7 March, 2017.
UEI Electronics Pvt Ltd v DCIT – TS-111-ITAT-2017 (Bang) – TP - S.P.No.3/Bang/2017dated 20.01.2017

344. The Tribunal granted stay of outstanding demand of Rs. 81.24 Cr for AY 2012-13 arising out of TP adjustment on account of AMP expenditure and royalty payment, subject to payment of Rs. 15 Cr on or before 15.07.2017. Further, for AY 2009-10; noting that that the assessment order had been challenged on serious grounds, namely, limitation u/s 143(2) and approval u/s 151, it granted absolute stay of outstanding demand of Rs. 56.32 Cr.

The Himalayan Drug Co v ACIT – TS-88-ITAT-2017 (Bang) – TP - SP Nos.258 & 260/Bang/2016 dated 13.01.2017

345. The Tribunal extended stay granted to the assessee for AYs 2009-10 to 2011-12 by 3 months, noting that the issues involved in all 3 years were identical to issues in appeal for AY 2008-09 which was already heard by the Tribunal and for which the order was awaited. Further, it noted that the delay in disposal of appeal was not attributable to the assessee and that there was no change in circumstances from the earlier stay order and therefore granted extension on the condition that assessee would not seek adjournment without just and reasonable cause.
Google India Private Limited Vs DCIT – TS-1045-ITAT-2016 (Bang) – TP - Stay Petition Nos.194 to 1961Bang/2016 dated 02.12.2017

346. The Tribunal granted partial stay of demand to the assessee till the disposal of appeal or 30.04.2017 whichever is earlier subject to the payment of Rs. 20 lakhs as against outstanding tax liability of Rs. 1.83 Cr (which was agreed upon by the assessee). It clarified thatstay would stand automatically withdrawn if assessee sought adjournment.
Mindteck (India) Limited Vs DCIT – TS-1088-ITAT-2016 (Bang) – TP - SP No. 176/Bang/2016 dated 23.12.2016

347. The Tribunal granted stay of outstanding demand of Rs 45 lakhs to the assessee for AY 2009-10 till disposal of appeal observing that 50% of the disputed demand was already paid by assessee in the past and that the demand arose on account of TP adjustment which mainly revolved around the issue of comparable selection and in respect of which most of the issues of comparableswere covered in favour of the assessee. It listed the appeal for hearing on 19.01.2017 clarifying that assesseewas not entitled to seek further adjournment.
Arrow Electronics India Pvt Ltd v DCIT – TS-1042-ITAT-2016 (Bang) – TP - Stay Petition No.186/Bang/2016 dated 02.12.2016

348. The Tribunal granted the assessee stay of balance outstanding demand of Rs. 1.16 Cr for AY 2012-13 for a period of 180 days or till disposal of appeal whichever is earlier, subject to payment of Rs. 25 lacs by assessee on or before 28 February 2017, stating that assessee had a good prima facie case. It directed the assessee not to seek adjournment without justifiable reasons, failing which, stay granted would be vacated automatically and fixed the appeal for hearing on 23 March 2017.
Kaypee Electronics Associates Pvt. Ltd. Vs ACIT - S-138-ITAT-2017(Bang)-TP - S.P. No 6/Bang/2017 dated 03.12.2017

349. The Tribunal granted stay of outstanding demand of Rs. 6 Cr for AY 2012-13 to the assessee viz. ISG Novasoft Tech Ltd till 17.03.2017 or till disposal of appeal whichever was earlier, noting the argument of the assessee that it had a prima facie good case. It held that no injustice would be caused to the revenue if the appeal was fixed for hearing on 06-03-2017 and the stay was granted till 17-03-2017 or till the disposal of the appeal whichever was earlier. However, it clarified that if the assessee sought adjournment without justifiable reasons, stay granted would be vacated automatically.
ISG Novasoft Tech.Ltd. Vs. ACIT - TS-189-ITAT-2017(Bang)-TP - S.P. No.24 / Bang / 17 dated 03-03-2017.

350. The Tribunal granted stay on collection of outstanding demand of Rs. 17.3 Cr for AY 2012-13 subject to further payment of Rs. 2 Cr by assessee on or before 28.2.2017 for a period of 6 months or disposal of appeal whichever is earlier. It fixed the appeal for hearing on 3.4.2017 and clarified that if the assessee sought adjournment without justifiable reasons, stay granted would be vacated automatically.
Cisco Systems capital (India) Pvt. Ltd. Vs ACIT TS-193-ITAT-2017(Bang)-TP - S.P. No. 16/Bang/2017

351. The Tribunal noted that the demand of Rs.11.85 crore in the hands of the assessee arose on account of TP adjustment of Rs. 21.64 Cr in respect of software development and marketing support services transactions out of which an amount of Rs. 4 Cr was already paid while a refund

of Rs. 33 lakhs for AY 2004-05 was to be adjusted, which in total amounted to 37% of original demand and granted the assessee stay of outstanding demand of Rs. 7.85 Cr for AY 2011-12 subject to payment of Rs. 1 Cr on or before 15.3.2017 and directed the assessee not to seek adjournment without just and reasonable cause.
Misys Software Solutions (India) Pvt. Ltd. Vs ACIT TS-197-ITAT-2017(Bang)-TP - SP No.35/Bang/2017 dated 27/02/2017

352. Where the assessee''s appeal for AY 2009-10 had already heard by the Tribunal and the order was awaited, the Tribunal rejected the assessee's application seeking stay till the order was served. However, it directed the Revenue not to put any pressure on the assessee for collection of demand till Tribunal order was served. For AY 2010-11, noting that assessee had made a payment of more than 90% of tax demand excluding interest, the Tribunal granted stay without any further payment; and scheduled hearing of appeal on 8.03.2017 clarifying that if assessee sought adjournment, stay granted would be vacated automatically.
Misys Software Solutions (India) Pvt. Ltd vs. DCIT - TS-215-ITAT-2017(Bang)-TP - S.P. No 33 & 34 / Bang / 2017 dated 03.03.2017.

353. The Tribunal granted the assessee partial stay of outstanding demand of Rs. 2.47 crores for AY 2012-13 noting the submission of the assessee viz. that out of total demand of Rs. 2.91 Cr arising from TP adjustment, it had already deposited Rs. 44 lakhs and that if its contention of excluding only one comparable 'Persistent Systems Limited' was accepted, no TP-adjustment would survive. It directed the assessee to pay further amount of Rs.25 lakhs on or before 28.2.2017 and fixes the appeal for out of turn hearing on 5.4.2017, clarifying that the assessee should not seek adjournment without reasonable cause.
Curam Software International Pvt. Ltd vs. ITO - TS-187-ITAT-2017(Bang)-TP - S.P. No.19/Bang/2017 dated 17.02.2017.

354. The Tribunal granted the assessee stay of outstanding demand of Rs. 1.8 Cr for AY 2012-13 for 6 months or till disposal of appeal whichever was earlier, subject to further payment of Rs. 18 lakhs after appreciating the assessee's submission that out of total demand of Rs. 2.12 Cr arising from TP adjustment, it had already deposited an amount of Rs. 32 lakhs and that out of the two comparables the assessee sought to exclude viz. Infosys BPO Ltd. and TCS E-Service Limited in the appeal, even if TCS e-Service was excluded, no TP-adjustment would survive.It fixed the appeal for out of turn hearing on 4.4.2017 and directed the assessee not to seek adjournment without reasonable cause.
State Street Services India Pvt. Ltd Vs DCIT - TS-201-ITAT-2017(Bang)-TP - S.P. No.204/Bang/2016 dated 17.02.2017.

355. The Tribunal granted the stay of outstanding demand of Rs. 4.24 Cr arising out of TP adjustment for AY 2012-13, subject to payment of Rs. 1 Cr by assessee by 31.3.2017. Considering rival submissions made by parties (assessee contended that it had a prima facie good case as its case was fully covered by the order of the Tribunal in its own case for a prior year and the Department contended that arguments on merit could not be considered during a stay application and since the assessee did not have any financial constraints no stay was to be granted), it held that adjudication of the issues on merit could only be done while disposing the appeal.Further, noting that nothing had been placed on record regarding financial constraint of the assessee, it opined that stay could only be granted subject to payment of certain outstanding demands and accordingly directed the Revenue not to enforce recovery of outstanding demand for 6 months or till disposal of appeal whichever is earlier.
Fosroc Chemicals India Pvt. Ltd. Vs. ITO - TS-196-ITAT-2017(Bang)-TP - [SP No. 23/ B/2017 dated 03.03.2017

356. The Tribunal extended the stay granted to the assessee viz. Outsource Partners.Ltd, noting the assessee's submission that the subject appeal hearing could not take place on two earlier occasions due to non-functioning of the bench on one occasion, and adjournment sought by assessee due to counsel's non-availability on the other. Noting assessee's submission that it would not seek adjournment on the next date of hearing viz. 27.02.2017, it extended the stay till 28.02.2017.

Outsource Partners International P. Ltd. Vs DCIT - TS-214-ITAT-2017(Bang)-TP - Stay Petn. No.15/Bang/2017 dated 10.02.2017

357. The Tribunal, noting the settled position that stay would be extended when delay was not attributable to the assessee as per the rulings of Peps Foods (P) Ltd 376 ITR 87 (Del), Narang Overseas Private Limited 295 ITR 22) (Bom.) and SAP Labs India Pvt. Ltd (67 taxmann.com 78), extended the stay granted to the assessee viz. GE Intelligent Platform Pvt. Ltd for a further period of 6 months or till disposal of appeal whichever is earlier, noting that the appeal was already heard on 18.01.2017 and delay in disposal was not on assessee's account.
GE Intelligent Platform Pvt. Ltd. Vs DCIT - TS-208-ITAT-2017(Bang)-TP - Stay Petn.No.7/Bang/2017 dated 03.03.2017

358. The Tribunal extended the stay granted to the assessee viz. Manipal Global Education Services Pvt. Ltd. for a further period of 2 months for AY 2010-11, noting that the appeal in question had already been posted for hearing on 25.10.2017 and there was no change of circumstances from the date of the stay granted earlier on 22.08.2016 and 21.11.2016. Further, it noted that the delay in disposal of appeal was not attributable to the assessee except on one occasion. It also directed the assessee not to seek any adjournment without just and reasonable cause.
Manipal Global Education Services Pvt. Ltd. Vs DCITTS-198-ITAT-2017(Bang)-TP - SP NO.8/B/2017 dated 25/01/2017

359. The Tribunal granted the assessee stay of demand arising from TP-addition on account of AMP expenditure for AY 2012-13, noting that a large portion of the demand in question was attributable to addition on account of AMP expenditure which was covered in favour of assessee vide Tribunal order for the earlier years. However, for the balance demand of Rs. 1.6 crores which was attributable to other additions i.e. disallowance u/s 14A and marked-to-market losses, the Tribunal stayed the same subject to payment of Rs.80 lakhs (50% of balance demand) on or before 22/03/2017. It granted the assessee an early hearing on 12/04/2017 and added that the assessee could not seek adjournment without reasonable cause.
Essilor India Pvt. Ltd vs. DCIT TS-203-ITAT-2017(Bang)-TP - SP No.39/Bang/2017 dated 03.03.2017

360. The Tribunal rejected assessee's request to restrict partial payment to 15% for grant of stay of outstanding demand of Rs. 486 Cr for AY 2012-13 and directed it to deposit 50% demand (20% within 7 days and balance in 6 monthly instalments. Relying on the decision of the High Court in Flipkart India [TS-97-HC-2017(KAR)] , the Tribunal held that if the CBDT Instruction dated February 29, 2016 (providing guidelines for stay of demand at first appeal stage) was made applicable to pending Tribunal proceedings, then the Tribunal would be considered equivalent to CIT(A) which would lead to absurd result as administrative Pr. CIT/CIT would be redressing grievances against Tribunal orders. Further, noting that the assessee had sound financial position to pay the demand and that it failed to establish prima-facie case for demand non-recovery or to show that demand was not payable, and that it had not filed a paper-book, it held that the prima facie case of assessee could not be examined. It dismissed the assessee's contention that since the AO made a disallowance of royalty u/s 40(a)(i) as well as an ALP adjustment it would lead to double addition and held that disallowance u/s 40(a)(i) and computation of income from international transaction regarding to ALP under Chapter X of the Income-tax Act operates in two different fields and the computation of income under Chapter X had no co-relation with disallowances under sec 40(a)(i). It further stated that assessee would not suffer any irreparable loss / injury if stay was not granted as it could get full refund with interest if assessee's appeal was allowed on merits.
Google India Private Limited vs. ACIT - TS-251-ITAT-2017(Bang)-TP - SP No. 45/Bang/20 17 dated 22.03.2017

361. The Tribunal granted extension of stay of demand to Business Process Outsourcing (India) for AY 2009-10, observing that after granting stay of demand on November 4, 2016, appeal was listed for hearing but unfortunately the Bench did not function on that date. Accordingly, since the assessee could not be held responsible for the delay in disposal of the appeal and the facts and circumstances under which the stay was granted, remained the same, it extended the stay upto 30.04.2017 as the appeal was listed for hearing on 10.04.2017.

Business Process Outsourcing (India) Pvt. Ltd vs. DCIT - TS-266-ITAT-2017(Bang)-TP - [SP No. 20/B/2017 dated 03/03/2017

362. The Tribunal granted stay of outstanding demand of Rs 2.58cr to the assessee for AY 2012-13, subject to payment of Rs 25 lakhs on or before March 20, 2017. It considered the assessee's submissions that it had made part payment of demand of Rs 64.52 lakhs on February 27, 2017 and was willing to make further payment of Rs 25 lakhs by March 20, 2017 and accordingly granted conditional stay till June 30, 2017 or till disposal of appeal, whichever was earlier, observing that is was a fit case for granting of stay. It fixed the appeal hearing for April 10, 2017 and clarified that if assessee sought adjournment without justifiable reasons, stay granted would get vacated automatically.
Alten Calsoft Labs (India) Pvt. Ltd. Vs ACIT - TS-264-ITAT-2017(Bang)-TP – SP No 48/Bang/2017 dated :10.03. 2017.

363. The Tribunal granted stay of outstanding demand of Rs 1.30cr (arising out of TP adjustment on account of disputed comparables) for a period of 6 months to the assessee Marvel India for AY 2010-11, subject to payment of Rs 10 lakhs on or before March 31, 2017, considering the fact that assessee had already paid Rs 1cr out of the original demand of Rs 2.3cr and refund of Rs 5 lakhs was due to assessee for AY 2011-12. However, it rejected the assessee's contention that there was a prima-facie case in assessee's favour, and stated that the TP adjustment was made on facts of the case and that it is trite law that in the stay proceedings, appellate authorities cannot embark upon detailed inquiry into the facts / merits of the case. It fixed the appeal hearing for May 9, 2017 and clarified that the stay order would cease to operate if assessee sought adjournment without just and reasonable cause.
Marvell India Pvt. Ltd Vs ACIT -TS-263-ITAT-2017(Bang)-TP - SP No.75/Bang/2017 dated 22/03/2017

<u>Others</u>

364. The Tribunal reversed CIT(A) order directing aggregated approach for benchmarking of off shore software consultancy service during AY 2005-06, relying on its order in the assessee's case for AY 2004-05 directing AO to independently benchmark the two transactions.
SAS Research & Development India Pvt Ltd - TS-1069-ITAT-2016(Pun)-TP

365. The Tribunal relying on the decision of HC in the case of Knorr Bremse India Private Ltd [TS-558-HC-2015(P&H)-TP] (wherein it was held that closely linked transaction can be components of a single transaction) and decision in the case of Sony Erricson Mobile Communication India Pvt Ltd [TS-96-HC-2015(Del)-TP] (wherein the HC held that CUP method, RP method and CUP method could be applied to a transaction or closely linked or continuous transactions), deleted TP adjustment of Rs 1.12 crores on sale of chemical product by assessee to its non-AEs for AY 2006-07 permitting aggregation of transactions under CUP method. The TPO had made adjustment considering highest sale price to non-AE against average price adopted by the assessee based on aggregation of transaction. It also relied on the Apex Court ruling in Radhasoami Satsang [TS-12-SC-1991], wherein it was held that there was no good reason to take a different stand now and claim that aggregation of transactions could not be permitted in the current assessment year when the same was accepted in the earlier assessment years.
Gulbrandsen Chemicals Pvt Ltd - TS-1026-ITAT-2016(Ahd)-TP

366. The Tribunal allowed selection of foreign AEs (engaged in sales and distribution activities or secondary manufacturing) as tested party, being the least complex entity, while benchmarking assessee's international transactions drawing support from assessee's Advance Pricing Agreement (APA) signed with CBDT for AY 2014-15, wherein the CBDT had approved selection of foreign AEs as tested party with TNMM as the most appropriate method. The Tribunal further observed that the assesse's functional, assets & risk (FAR) analysis as well as international transactions for APA year as well as year under appeal were identical and adequate financial data for comparison on region basis/country were available. Further, even though no separate books of accounts were maintained for the units, the Tribunal also allowed the section 80IB/80IC deduction claim for AY 2008-09 on the ground that Sec 80IA(7) only provided that accounts of the eligible

undertaking should be audited by an accountant and it did not talk about maintenance of 'separate books of accounts'.
Ranbaxy Laboratories Ltd - TS-707-ITAT-2016 (Del)

367. Where the assessee had made sales of cloth guiders to its AE as well as to Non-AEs but offered a discount of 15% as bulk discount to sales made to its AEs stating that the discount offered to the AE could not be compared to Non-AEs as there was no other customer who purchased the similar volume of cloth guiders (185 purchased by AE, Non-AEs purchased less than 50 each) and the AO rejected the contention of the assesseestating that no evidence / agreements had been brought on record to substantiate this fact, the Tribunal relying on the decision in the assessee's own case for AY 2007-08 and 2008-09 (TS-1059-ITAT-2016 (Ahd) – TP) remitted the issue back to the AO to decide the matter afresh after giving adequate opportunity of being heard to the assessee.
Erhardt + Leimr (India) Pvt Ltd v DCIT – TS-72-ITAT-2017 (Ahd) – TP - ITA No. 352/Ahd/2015 dated 06.02.2017

368. Where the assessee had declared two entities viz. Star Brands Ltd and Dynamic Technologies Ltd to be AEs in its Form 3CEB and subsequently during assessment proceedings contended that the disclosure in Form 3CEB was incorrect as the said parties were not its AEs due to change in the shareholding patterns and directors, the Tribunal observed that the assessee had not explained as to why it had not filed a confirmation or certification from the auditors who signed the 3CEB stating that the two companies were erroneously included in the list of AEs and therefore rejected the plea of the assessee. Noting that the assessee had benchmarked its transactions by applying CPM with mark-up on salary and rent (and not other expenses) in accordance with the agreement with its AE, which was objected to by the TPO, it remitted the matter to the TPO for further verification observing that if the assessee had not incurred other costs, they could not be considered for computing mark-up.
Techsource Services Pvt Ltd v ITO – TS-29-ITAT-2017 (Mum) – TP - ITA No.6966/Mum/2014 dated 04.01.2017

369. The Tribunal upheld the CIT(A)'s order deleting TP adjustment on the advertisement segment (benchmarked individually) and held that the aggregation of 'advertisement sale' and 'channel distribution' segments for benchmarking was justified as the advertisement revenue was directly co-related to channel viewership and sale of advertisement airtime increased with number of cricketing events and therefore the two segments were closely linked. It rejected Revenue's argument that the assessee had merged two segments with a view to conceal loss incurred in the 'advertisement sale' segment for the instant year and upheld the assessee's contention that, in the earlier years, it was only acting as a commission agent, thereby soliciting advertisements for its AE for fixed commission, whereas in the instant and subsequent years, it had shifted to a distribution model pursuant to relaxation of foreign exchange regulations. Accordingly, it held that both the activities viz. distribution of channels and aired advertisement were interrelated and inextricably connected and therefore were to be aggregated and since the operating margin of the aggregate transactions exceeded the margin of comparables, it held no addition was warranted.
ACIT v ESPN Software India Ltd – TS-128-ITAT-2017 (Del) – TP - ITA No. 2059/Del/2012 ITA No. 3457/Del/2013 dated 08.12.2017

370. The Tribunal admitted the additional ground raised by assessee objecting to TP adjustment made/confirmed by TPO/DRP when assessee was claiming exemption u/s 10A. However, it dismissed the argument of the assessee that since all of its income was exempt from tax in India, there was no intention to shift profit outside India as AEs were located in USA where tax rates were higher than in India based on the decision of Mumbai Tribunal in case of Tata Consultancy Services Ltd [TS-521-ITAT-2015(Mum)-TP, and held that the decision of Tata Consultancy Services was held inapplicable in case of Gruner India Pvt. Ltd[TS-202-ITAT-2016(DEL)-TP] wherein it was held that assessee's eligibility to claim deduction did not operate as a bar on determining ALP of the international transactions undertaken, and enhancement of income due to TP-addition could not be considered for allowing deduction benefit.
Wissen Infotech Private Limited vs. DCIT - TS-142-ITAT-2017(HYD)-TP - ITA No.99/Hyd/2015 ITA No.311/Hyd/2015 dated 28.02.2017

371. The Tribunal upheld the assessee's selection of foreign AE as tested party for benchmarking international transaction of provision of IT/IT enabled services for AY 2010-11, rejecting the Revenue's contention that reliable data was not available in respect of foreign comparables. Relying on the decisions of the Tribunal in Ranbaxy Laboratories[TS-173-ITAT-2016(DEL)-TP], General Motors [TS-215-ITAT-2013(Ahd)-TP] and Development Consultants [TS-3-ITAT-2008(Kol)], it held that there was no bar in treating foreign AE as tested party merely because data of comparable companies were not available so long as the following two conditions were fulfilled i.e. i) data should be available in public domain and ii) assessee has furnished all relevant data to tax administration. Noting that both these conditions were fulfilled as the relevant data from Global Symposium database used by assessee was available in public domain and had also been furnished to the TPO including entire detail of search process, business description and P&L accounts, the Tribunal held that the Revenue could have accessed the said sources and conducted comparability analysis. It also observed inconsistencies in TPO's approach noting that the foreign AE had been accepted as tested party in preceding year as well as in the current year for benchmarking marketing support services. Accordingly, it allowed the assessee's appeal.
IDS Infotech Ltd. Vs DCIT - TS-184-ITAT-2017(CHANDI)-TP - ITA No.130/Chd/2016 dated 09.03.2017

372. The Tribunal set aside the order of the CIT(A) deleting TP addition in respect of assessee's international transaction pertaining to `Purchase of material' for AY 2005-06 as all the points taken note of by the ld. CIT(A) in deleting the transfer pricing addition lacked valid reasoning and sufferred from certain inconsistencies viz.
1). The CIT(A) had held that TP adjustment cannot be made on the entire transactions of the assessee including transactions other than the international transactions whereas the TPO had computed the TP-addition not on entity level but only for a sum of Rs. 74.70 lac in respect of that part of the excess profit relating to the international transaction of purchase of raw material from AEs
2). The CIT(A) excluded 5 companies having turnover ranging between Rs.176 to Rs. 598 Cr as against assessee's turnover of Rs.27.71 Cr, which in the view of the Tribunal was contrary to the direct HC judgment in the case of Chryscapital Investment Advisors (India) P. Ltd [TS-173-HC-2015(DEL)-TP], wherein it was held that high or low turnover was not a criteria for excluding an otherwise comparable company.
3). The CIT(A) erred in considering the net profit margin only of Unit 2 of the assessee contending that both its units earned job work receipts
4) For the purpose of benchmarking the transactions of the assessee, the CIT(A) considered the AE as a comparable.
Further, noting that the assessee had not applied any method for ALP determination on the contention that no comparable was available, the Tribunal observed that assessee's TP study report was absolutely devoid of relevant information required to be mandatorily maintained as per Sec 92D r.w. Rule 10D. It also rebuked CIT(A)'s observation that there was no intent to avoid tax absent any unrecorded transactions or undisclosed facts, as such reasoning was completely extraneous with respect to ALP determination. Accordingly, it remitted the issue to the file of the AO / TPO for reconsideration.
ACIT vs. Progressive Tools & Components Pvt. Ltd - TS-200-ITAT-2017(DEL)-TP –

373. Where the assessee had already withdrawn appeal filed by it before the Tribunal with regard to the Transfer pricing issues arising for the relevant year on the ground that the issues had been resolved under the MAP proceedings which had been accepted by the Tribunal in its earlier order, the Tribunal dismissed the Revenue's appeal for the same year holding that its appeal had become infructuous as the issues had already been resolved.
Symantec Software India Pvt. Ltd vs ACIT - TS-163-ITAT-2017(PUN)-TP- ITA No. 538/PUN/2015 dated 06.03.2017

374. The Tribunal applied a mark-up of 17.5% approved in MAP with USA and Canada on assessee's IT services transactions with AEs in UK and Australia for AY 2007-08 following the decision of the

co-ordinate bench in J. P. Morgan Services (P) Ltd. vs. DCIT [TS-578-ITAT-2015(Mum)-TP] wherein the Tribunal held that the mark-up of 17.5% which was adopted for USA and Canada in MAP proceedings, should be adopted in respect of other countries if there was no distinction in facts. Observing that the assessee had entered into international transactions with its AE in four countries i.e. 1) USA, 2) Canada, 3) UK and 4) Australia, out of which as per MAP with USA and Canada (covering 96 percent of the transactions), a mark-up of 17.5% was agreed,the Tribunal held that since there was no distinction in facts, then the impugned margin determined would be applied to the remaining 4% transactions as well. Accordingly, applying same margin of 17.5% on transactions with UK and Australia AEs, it held that no separate adjudication was called for in respect of TP grounds raised by assessee

CGI Information Systems Management Consultants Pvt. Ltd. Vs DCIT - TS-199-ITAT-2017(Bang)-TP - IT(TP)A No. 1117 (Bang) 2011 dated 15.02.2017

375. The assessee, an Indian branch of Calyon Bank (that provided ECB loans to Indian borrowers) provided financial analysis of the borrowers, general market conditions and regulatory environment to its Head office. The TPO had made an adjustment of 25 percent of the interest and commission received by the foreign head office from its Indian customer, treating the same as profit attributable to the Indian branch, which was restricted to 20 percent by the CIT(A). The Court upheld the order of the Tribunal wherein the Tribunal held that the interest earned by the foreign branch was not to be included for the purpose of attributing income to the Indian branch as it had not contributed to the loan amount which had been provided by the foreign branch. Accordingly, it dismissed the appeal of the Revenue and held that the Tribunal was justified in directing the AO/TPO to make TP adjustment at 20% of fees & other charges earned by assessee for arranging foreign currency loans for its existing clients.

DIT vs. Calyon Bank - TS-231-HC-2017(BOM)-TP - INCOME TAX APPEAL NO. 1781 OF 2014 dated 23.03.2017

DIT vs. Caylon Bank [TS-252-HC-2017(BOM)-TP]

II. International Tax

a. Royalty / Fees for technical services

Royalty

376. The Tribunal held that payment towards IT support services by assessee (an Indian company) to its associated enterprise ('AE') in Canada would not be taxable as royalty under domestic law [u/s 9(1)(vi)] as also under Article 12(3) of the India-Canada DTAA, the payments were in the nature of reimbursements of expenses incurred by the payee on assessee's behalf without any income element embedded therein, also there were specific cost allocations which were borne by the assesse. Rejecting Revenue's contention that payment was taxable as royalties being consideration towards "use or right to use any industrial, commercial or scientific equipment'' held that although service may involve use of equipment but that did not vest right in the assessee to use the equipment.

Bombardier Transportation India Pvt. Ltd. [TS-6-ITAT-2017(Ahd)]

377. The Tribunal rejecting the revenue's contention that charges paid by the assessee on account of the use and hire of a ship amounted to royalty within the meaning of section 9(1)(vi) and article 12 of the respective tax treaties since ship is an equipment, held that on perusal of time charter agreement, the captain/master of the vessel crew and other staff of the ship were controlled by the FSC and not the assesse, further, repairs, maintenance and insurance related expenses of the ship were borne by the Foreign Shipping Companies (FSC) . Therefore payment of hire charges by the assessee to foreign shipping companies (FSC) for transportation on time charter basis could not be regarded as royalty within the meaning of section 9(1)(vi).

Sical Logisticts Ltd. [TS-701-ITAT-2016(CHNY)

378. The Court rejecting the Revenue's stand that software was a 'copyright' in terms of Explanation 2(v) to Sec 9(1)(vi) of the Act and also under Article 12(3) of India-China DTAA, held that the consideration received by assessee (a Chinese telecom company) for supply of software to Indian companies, could not be regarded as royalty since the supply of software was in the nature of sale of goods i.e transfer of copyrighted article and not transfer of copyright itself. The software was an integral part of the telecom equipment supplied by the assessee. Further, the supplies made (of the software) enabled the use of hardware sold, without the software the hardware was not possible.
ZTE Corporation [TS-33-HC-2017(Del)]

379. The Court held that where assessee had entered into agreement with US company for use of software owned by US company and said agreement specifically forbade assessee from decompiling, reverse engineering or disassembling software and it provided that assessee would use software only for internal business operation and would not sub-license or modify same, consideration payable by assessee was for use of copyrighted article and not for use of copyright and, hence, could not be considered as royalty within meaning of article 12(4) of India-US DTAA.
First Advantage (P) Ltd. [2017] 77 taxmann.com 195 (Mumbai Tri.)

380. The Tribunal held that payments received from an Indian bank for data processing support services provided by the assessee through a network of computer systems in Hong Kong was not taxable as royalty under section 9(1)(vi) since the infrastructure facilities provided by the assessee (in the form of data centre, storage facility, etc. for payer's banking operations) were merely to ensure quality, standard and safeguards, adopted in the course of data processing and there was no transfer or application of technology to the payer. It further observed that there was no use or income from leasing of equipment as provided in Explanation 2(iva) to section 9(1)(vi). It also held that payments received by the assessee would not qualify as fees for technical services as the assessee had provided only standard facility for data processing without any human intervention.
Atos Information Technology HK Ltd. [TS-54-ITAT-2017(Mum)] (ITA NO. 237,238,239 &240/MUM/2016)

381. The Tribunal held that payment by the assessee (an Indian outbound call centre) to US Entities towards International Private Leased Circuit (IPLC) and connectivity charges for use of dedicated private bandwidth in underwater sea cable was neither royalty nor FTS under the Act as well as India-USA DTAA and accordingly no TDS u/s 195 was deductible. It held that since there was no human intervention involved and the "make available test" was not satisfied under DTAA, it was not in the nature of FTS. It further held that since, the payment made to US entities was for transmission of call data and did not involve use or right to use any industrial commercial or scientific equipment and since, the control of equipment was also with the non-resident parties and not leased to the assessee, the non-resident parties did not provide use of any 'process' to the assessee, which were of patentable nature having exclusive ownership rights. Consequently, the payments did not amount to royalty under Act as well as **the** DTAA.
Geo Connect Ltd. [TS-39-ITAT-2017(DEL)]

382. The Tribunal held that software embedded in an equipment cannot be regarded as giving any independent right to use software and accordingly, consideration is paid for purchase for 'copyrighted article' which cannot be treated as royalty.
HITT Holland Institute of Traffic Technology B.V. v. DDIT [2017] 78 taxmann.com 101 (Kolkata - Trib.) (IT APPEAL NO. 574 (KOL.) OF 2014)

383. The Tribunal held that software payments by the assessee to a Singaporean company was not royalty as per Article 12(3) of India-Singapore DTAA since the software license agreement provided assessee the right to use the computer software and not right to use copyright in the computer software. It observed that Article 12(3) covers 'use of/right to use of any copyright of literary….' and not right to use software unlike Explanation 4 to section 9(1)(vi). As per section 90(2), the assessee could be governed by beneficial DTAA provisions and accordingly, the payment made did not fall under the definition of royalty as per Article 12(3). It further held that though computer software would be recognized as literary work as per Copyright Act but to constitute royalty as per Article 12(3) of DTAA, the consideration should have been paid for the use or right to use copyright in the literary work and not the right to use the literary work itself.

I.T.C. Limited [TS-81-ITAT-2017(Kol)] (I.T.A No. 673/Kol/2013)

Fees for technical services

384. The Tribunal rejecting Revenue's contention that commission payments constitute 'fees for technical service' (FTS) held that commission paid to non-resident export commission agents by assessee (an Indian company engaged in manufacturing steel pipes) was not taxable in India for AY 2010-11 & Section 195 TDS was not applicable. To analyze TDS applicability, the tribunal listed down three categories based on agent's tax residency jurisdictions:-
(a) Jurisdictions with which India has tax treaties but DTAA does not have specific FTS article (i.e. Thailand, UAE)
(b) Jurisdictions with which India has tax treaty and such DTAAs further have a specific FTS clause [on lines similar to domestic FTS provision u/s 9(1)(vii)] and
(c) Jurisdictions with which India does not have any tax treaty.
With respect to the first category the court held that payment was not taxable in India since there was no specific FTS article in respective DTAAs and further the NRs do not have PE in India. Rejecting the Revenue's contention receipt could be taxed under other income article of the treaty held that when a particular nature of income is dealt with in the treaty provisions, and its taxability fails because of the conditions precedent to such taxability and as specified in that provision are not satisfied, that is the end of the road for taxability in the source state. With respect to category (b) and (c) held that taxability in these cases had to be decided on the basis of the provisions of domestic law. Rejecting Revenue's reliance on AAR ruling in SKF Boilers & Driers Pvt. Ltd. wherein commission paid to non-residents was held as taxable u/s 9(1)(i) read with Sec 5(2)(b) on the grounds that the right to receive the commission arose in India, the court opined that when no operations of commission agent's business were carried on in India, Explanation 1 to Sec 9(1)(i) takes the entire commission income outside the ambit of deeming fiction u/s 9(1)(i) r.w. 5(2)(b). Analyzing the scope of scope of managerial, consultancy and technical services to lead to taxability as FTS u/s 9(1)(vii), and held that unless there was a specific and identifiable consideration for the rendition of technical services, taxability u/s 9(1)(vii) would not get triggered.
Welspun Corporation Limited [TS-7-ITAT-2017(Ahd)]

385. Where the Indian company provided marketing and sales support services to assessee (Dutch Company) for the NetApp products, the Tribunal held that support services rendered by **the** assessee to customers in India **did** not amount to FTS as it fail**ed** the 'make-available' test under DTAA.
Net App BV [TS-40-ITAT-2017(DEL)] (ITA No. 4781/Del/2013)

386. The Tribunal held that income earned by Linklaters (UK based LLP engaged in providing legal/consultancy services) in respect of services rendered in India was neither FTS nor Independent Personal Service. It rejected the revenue's stand that the assessee had made available knowledge to its clients and that the entire receipts were FTS on the ground that mere rendition of services did not fall within the gamut of the expression 'make available' unless the recipient was in a position to deploy similar skills or technology or techniques in future without the aid or assistance of service provider and consequently, the legal advisory services provided by the assessee failed the make available test. It further held that Article 15 – Independent Personal Service applies only to individuals and not partnership firms. It observed that the assessee had service PE in India on account of its personnel staying in India for more than 90 days and remitted the matter back to AO for examination with respect to taxability as business income. Further, relying on co-ordinate bench ruling in the assessee's own case, it rejected stand of revenue that the assesee was not eligible for treaty benefit being **a** fiscally transparent entity.
Linklaters LLP [TS-36-ITAT-2017(Mum)] (I.T.A. No.1690/Mum/2015)

387. The Apex Court held that sum received by the Assessee by way of reimbursement of cost of the global telecommunication facility provided to its agents cannot be treated as FTS. Further, relying on decision of Kotak Securities Ltd. (2016) 383 ITR 1 (SC), it held that this was a common facility provided by assessee to its agents to enable them to discharge their role more effectively, which was an integral part of shipping business and accordingly, it could not be treated as fees for technical services. It further observed that since there was no profit element embedded in the

payments which was accepted by the TPO to be in the nature of reimbursements and at arm's length, it could not be income chargeable to tax.
A.P. Moller Maersk A/S [TS-70-SC-2017] (Civil Appeal No.8040/2015)

388. The Tribunal held that the payment received by the assessee (Swiss company engaged in providing operations and management services to airports) from Bangalore International Airport Authority Ltd. ('BIAL') for secondment of skilled personnel constituted FTS under the Act as well as under India-Swiss DTAA as all the secondees had expertise in the field of management and were holding very high managerial position. It observed that secondees were under the employment of the assessee and not with BIAL and accordingly, it rejected assessee's contention that payments were salary reimbursements as the seconded personnel worked under the direct control and supervision of BIAL, satisfying the employer-employee test.
Flughafen Zurich AG [TS-96-ITAT-2017(Bang)] (I.T.(I.T) A. No.1525/Bang/ 2010)

389. The Tribunal held that payment made to Singaporean entity for rendering post production services was not FTS under Article 12 of India-Singapore DTAA as no technology or skill was made available to the assessee. It further held that in absence of the work carried out through non-resident's PE in India, the payment could not be taxed as business profits under Article 7 of DTAA.
Red Chillies Entertainment Pvt Ltd [TS-86-ITAT-2017 (Mum)]

390. Where the assessee entered into an agreement with ICC pursuant to which the assessee was granted 'promotional, advertising, marketing and other commercial rights' on a worldwide basis in connection with ICC events and was designated as the 'Official Partner of ICC' and also was allowed to use ICC logo, marks etc., the Tribunal held that 'Right fees' paid by the assessee was exclusively for use of Marks of ICC for purposes of promotion and advertisement and not for manufacture and sale of licensed products and no part of 'Rights fee' was attributable to the use of marks for the manufacture and sale of licensed product (which was separately covered in the agreement). Accordingly, it held that the payment was not in the nature of royalty u/s 9(1)(vi) or FTS u/s 9(1)(vii) and consequently, TDS u/s 195 was not applicable.
Reebok India Company vs. DCIT [2017] 79 taxmann.com 271 (Delhi - Trib.)

b. Permanent Establishment

391. Where the Indian company provided marketing and sales support services to assessee (Dutch Company) for the NetApp products, the Tribunal held that the Indian company did not constitute PE of assessee. It rejected the revenue's stand that the Indian company constituted assessee's fixed place PE in India on the ground that I Co. was carrying on its own business as commission agent of assessee and held that there needs to be a clear-cut distinction between the business of the assessee as well as the business carried on by the Indian company itself for its own purposes. It further rejected the revenue's stand that the Indian company's local 'sales outlets' constituted fixed place PE in India under the Article 5(2)(h) of DTAA and observed that offices were only providing marketing support function and were not making any sales. It also rejected the revenue's stand that Indian company constituted assessee's dependent agent PE as the Indian company had the authority to conclude contracts by virtue of common directors who are eligible to sign contracts on behalf of foreign company as well as Indian agent on the ground that common director does not amount to constitution of PE. It further held that Indian company was legally and economically independent and was compensated at arm's-length basis by the assessee in terms of the agreement entered into between them.
Net App BV [TS-40-ITAT-2017(DEL)] (ITA No. 4781/Del/2013)

392. The Tribunal held that project office(PO) in India of the assessee (Dutch company) did not constitute PE of assessee in India under Article 5 of India-Netherlands DTAA since the PO was for establishing Traffic Service system and no part of the contract execution was carried out through the PO in India and it was used only to collect money and pay certain expenses on behalf of the assessee. It further held thatPO did not constitute installation PE in India since no installation activity were undertaken during the relevant AY and only maintenance services were undertaken (through a contractor in India). Consequently, the profits arising out of off-shore supply of equipments were also not taxable in India

HITT Holland Institute of Traffic Technology B.V [TS-48-ITAT-2017(Kol)] (IT APPEAL NO. 574 (KOL.) OF 2014)

393. The Tribunal attributed 30% of profits to Indian branch of Singapore-based assessee in respect of direct sales in India by the head-office on the ground that the assessee had booked all expenses incurred on marketing activity for direct sale without receiving any corresponding income. It rejected the assessee's argument that AO had applied 'force of attraction rule' and held that where the Indian branch office renders some services in respect of the direct sales made by the head office, the determination of income for such services, cannot be brought within the ambit of force of attraction rule and that the AO had applied 'profit attribution' principle by confining income computation only to the extent of contribution of marketing services rendered by the Indian branch. Relying on the provisions of section 44BB and 44BBB, it directed computation of assessee's profit @ 10% of total sales in India and attributes 30% of such profits to Indian PE i.e. at 3% (30% of 10%) relying on various decisions.
Nipro Asia Pte Ltd. [TS-66-ITAT-2017(DEL)] (ITA No.4078/Del/2013)

394. Where the assessee (PE of foreign bank) had paid interest on foreign currency loan availed from its UK HO, the Tribunal denied the deduction of interest paid on the ground that as per Article 7(5) r.w.Article 7(7) of India-UK DTAA, the interest deduction would be subject to domestic tax law and as per the Income-tax Act, interest paid by the branch to HO is not deductible, being payment made to self.
Standard Chartered Grindlays Pty Ltd. [TS-113-ITAT-2017(DEL)]

c. Capital gains

395. The Tribunal confirmed capital gains tax on Cairn UK Holdings over sale of its shareholding in Cairn India Holdings Ltd. (resident of USA) to Cairn India Ltd as shares of Cairn India Holdings Ltd. derived their value solely from the assets located in India as per Section 9(1)(i) of the Act. It observed that the assessee by virtue of being holding company of Cairn India Holdings Ltd. had held rights in control and management of shares of nine Indian subsidiary companies of Cairn India Holdings Ltd. which controlled Oil & Gas sector in India and accordingly, it categorized these rights as 'property' as defined under Explanation to section 2(14) of the Act. Accordingly, it rejected assessee's arguments that the transaction was genuine group restructuring as a result of which management and control remained in the same hands and accordingly, conditions stipulated in the definition of the term 'property' were not satisfied. It further rejected assessee's contention that no real income had accrued to the assessee on the ground that the financial statements of the assessee reflected that the assessee had earned substantial gain on sale of shares and on account of taxes not paid by it due to exemption claimed on capital gains. It also rejected assessee's contention that this was transfer by way of exchange and not sale and accordingly, FMV of the asset received in consideration for the assets transferred should be taken as full value of consideration and cost of acquisition should be stepped up to the fair value of the shares of Cairn India Holding Ltd. on the date of acquisition and upheld AO's computation of capital gain by deducting from full value of consideration, the actual cost of acquisition incurred by the assessee for acquisition of the property i.e. original cost of shares.
Cairn UK Holdings Limited [TS-89-ITAT-2017 (Del)] [ITA No. 1669 /Del/2016]

396. The Tribunal rejected the assessee's contention that since Indo-UK DTAA notified in the year 1994 provided for taxation of capital gains tax as per domestic tax laws of the contracting state, the domestic law prevailing in 1994 should be applied and held that provision in the DTAA cannot make the domestic law static and such article in DTAA also cannot limit the boundaries of domestic tax laws.
Cairn UK Holdings Limited [TS-89-ITAT-2017 (Del)] [ITA No. 1669 /Del/2016]

397. Where during A.Y. 2011-12, the assessee bought back its shares from its 99% holding company in Mauritius and claimed exemption for the capital gains under Article 13(4) of India-Mauritius DTAA and the AO treating the buy-back as colourable device to transfer the accumulated profits, treated the same as dividend u/s 2(22)(d) liable to DDT u/s 115-O, the Tribunal held that buy-back payment to the extent of fair market price (FMP) would not be treated as colourable device and

accordingly, capital gains benefit under Article 13(4) of India-Mauritius DTAA would be available. Further, relying on CBDT circular 3/2016, it held that buy-back of shares pre-2013 would be taxable as capital gains as per the provisions of sec 46A of the Act and could not be recharacterized as dividend. However, it held that in case the buy back price was not based on the real valuation and was artificially inflated by the parties then it was certainly a device for transfer of the reserves and surplus to the holding company by avoiding the payment of tax and it would be treated as colourable device and accordingly, the payment over and above FMP would fall within the ambit of section 2(22)(d) subject to DDT. Accordingly, it remitted the matter to the AO to determine the FMP of the shares as on the date of buy back.
Fidelity Business Services India Pvt. Ltd. [TS-110-ITAT-2017(Bang)]

d. Independent Personal Services

398. The Tribunal deleted addition under section 40(a)(i) for TDS default on payments made by assessee company to NR individuals for providing engineering services on the ground that services provided by both the individuals fell under the ambit of independent personal services (IPS) and their stay in India was less than 183 days. The Tribunal further observed that even when payments within the purview of IPS were treated as FTS, such payments would be taxed under the article governing IPS and not FTS under the relevant clauses of DTAA.
ABC Bearing Ltd [TS-23-ITAT-2017(Mum)]

399. Where the assessee paid professional fees to its independent director and did not deduct tax since the director had not stayed in India for more than 90 days in view of Article 15 of India-UK DTAA, however, the AO treated the amount as taxable in India as per Article 17 of India-UK DTAA (Director Fees) and disallowed the fees paid as tax was not deducted, the Tribunal held that Article 17 was not applicable since the payment to the director was on account of professional services rendered by him and not in the capacity as a member of Board of Director of company and accordingly, held that the payment was not liable to be taxed in India in view of Article 15 of India-UK DTAA.
Nagpur Power & Industries Ltd. vs. DCIT (2017) 49 CCH 0113 Mum Trib (ITA No. 5808/Mum/2013 & 6468/Mum/2014

e. Withholding tax

400. The Tribunal held that the treaty provisions by virtue of section 90(2) which override the charging provision of domestic law would also override the provision of section 206AA irrespective of non-obstante clause contained therein and that accordingly, section 206AA cannot override the beneficial DTAA rates. Drawing analogy from Karnataka HC ruling in case of Kaushallaya Bai & others (W.P. NOS. 12780 - 12782 OF 2010, it held that section 206AA would not apply to non-residents who were not required to obtain PAN. It further observed that unlike GAAR provisions which override treaties, there was no such provision to give overriding effect to the provisions of section 206AA over tax treaties.
Nagarjuna Fertilizers [TS-67-ITAT-2017(HYD)]

401. The assessee entered into a secondment agreement with its holding company whereby certain employees were placed by the holding company at the disposal and control of the assessee and the assessee had made remittances to its holding company in respect of reimbursement of payroll costs without deducting any tax at source as the payments were simple reimbursements without involving any profit element taxable in the hands of holding company and that the tax was duly deducted on the salaries paid to the employees. However, the AO contended that since the employees were of holding company, the payment was for services rendered by these employees and also work done by the employees had resulted in creation of a service PE and that the entire amount paid to the holding company was attributable to PE, taxable on gross basis @ 40% in absence of details of expenditure and accordingly, raised demand u/s 201 r.w.s. 195. The Tribunal held that payment made to holding company consisted of income chargeable to tax under the head 'income from salaries' and accordingly, there were no withholding tax obligations u/s 195 and that the assessee had already discharged the TDS obligations on salary payments and accordingly, withholding tax demand u/s 201 r.w.s 195 was not sustainable. . It further held that the payments undisputedly were in the nature of the reimbursements, and, the income embedded in these

payments had already been brought to tax in India in the hands of ultimate beneficiaries- i.e. the seconded employees, and accordingly, there could not have been any tax withholding obligations under section 195.As regards, AO's contention of existence of service PE, it held that whatever had been paid to the holding company was, in turn, paid by it to its employees seconded to the assessee and accordingly, there could not have been any profits in the hands of the service PE, and what wa taxable in the hands of the PE under article 7(1) of India-USA DTAA was not the gross receipt but the profits attributable to the PE.
Burt Hill Design (P.) Ltd. v. DDIT [2017] 79 taxmann.com 459 (Ahmedabad - Trib

f. Others

402. The Tribunal allowed foreign tax credit ('FTC') claimed by assessee (an Indian company engaged in software development) in respect of taxes withheld in Singapore and Indonesia on receipt from software license sale and annual maintenance contract (AMC). It noted that the assessee claimed FTC by taking into consideration gross receipts & adjusted the same against its MAT liability and that the Revenue restricted FTC claim only to the extent of corresponding 'income' that had suffered tax in India. It computed the said tax as the actual MAT liability divided in the same ratio as the corresponding foreign receipts bore to the overall turnover of the assessee. The Tribunal, noting the language in the DTAAs and the UN and OECD Conventions, held that the expression used in the FTC Articles was 'income', which essentially implied 'income' embedded in the gross receipt, and not the 'gross receipt' itself, held that, in principle the assessee's argument that 'gross receipts' were to be considered for computing FTC could not be accepted. However, since the facts of the case of the assessee were unique i.e. vis-à-vis software license sale / income (i.e.its main business was carried on in India and only some isolated transactions leading to the impugned income had taken place in Singapore and Indonesia which did not require any activity on the part of the assessee and therefore had no associated costs i.e. in the nature of passive earnings) it held that no part of the costs incurred in India was to be allocated to earnings from Singapore and Indonesia. Further, as regards the income from AMC, the Tribunal held that the assessee had allocated the costs corresponding to this income on a proportionate basis and since no defects were pointed out by the Revenue it rejected the AO's approach of allocating costs in proportion of turnover. It also held that the actual tax attributable to such income was to be determined by apportioning the actual tax paid under MAT provisions in the same ratio that the doubly taxed profit bore to the overall profits. Accordingly, the appeal of the assessee was partly allowed.
Elitecore Technologies Private Limited [TS-4-ITAT-2017 (Ahd)]

403. Where the assessee, a Singapore based company, engaged in the business of operation of ships in international waters, sought the benefit of Article 8 of India-Singapore DTAA for its gross freight earnings collected from India and the Revenue denied the treaty benefit in view of Article 24 (Limitation of Relief) as the assessee could not show that freight income was remitted to Singapore, the Tribunal observed that the entire income was disclosed by the assessee in the return of income in Singapore, further, as per Singaporean income-tax law, such income was regarded as Singapore sourced income and assessed to tax in Singapore on accrual basis and not on remittance basis and accordingly held that Article 24(1) would not be applicable and allowed the treaty benefit to the assessee. It further held that it cannot be said that the shipping income earned from India is to be treated as exempt from tax or taxed at reduced rate, which is a condition precedent for applicability of Article 24 since India at the threshold does not have the jurisdiction to tax the shipping income of the non-resident entity.
APL Co. Pte Ltd. [TS-65-ITAT-2017(Mum)] (IT APPEAL NO. 4435 (MUM.) OF 2013)

404. The Tribunal relying on the Co-ordinate Bench ruling in the case of Essar Oil Ltd [TS-6680-ITAT-2013(MUMBAI)-O] and considering the term 'may be taxed in that other state' in Article 6(1) of India-UAE DTAA, held that income from Dubai Villa of the assessee was liable to be tax in India to the extent includible in the return of income and the credit of the taxes paid would be allowed in the other contracting state.
Shah Rukh Khan [TS-109-ITAT-2017(Mum)] [ITA No.623 & 4763/Mum/2013]

405. The Tribunal, relying on decision in the case of ESPN Star Sports [TS-164-HC-2016(DEL)] and Honda Cars Ltd. [TS-5110-HC-2016(DELHI)-O], quashed draft as well as final assessment order passed by the AO as the assessee was not an 'eligible assessee' as defined u/s 144C(15) and since the assessee was an AOP between two Japanese companies it could not be treated as a foreign company. It further rejected Revenue's stand that since the project was erected in earlier years and the assessee's business was discontinued, set-off of losses u/s 72 should have been denied since the expenditure incurred by the assessee in preceeding years was directly connected with earning of income received in current AY. Accordingly, the Tribunal allowed the carry forward of loss.
Mitsui Marubeni Corporation [TS-85-ITAT-2017(DEL)] (I.T.A. No. 5658/Del/2010)

406. The Apex Court dismissed Revenue's SLP against Delhi High Court judgment where the Court had quashed the AAR order rejecting assessee's application for advance ruling u/s 245R on the alleged ground that the questions for which reference was made, were part of the pending proceeding since notice was issued u/s 143(2) and further held that notice issued u/s 143(2) did not address itself to any specific question and that the issue of notice would be insufficient to attract automatic rejection of said application under proviso to section 245R(2). The High Court had directed AAR to process assessee's application and independently deal with it on merits in accordance with law.
Sage Publications Ltd. [TS-108-SC-2017] (SLP No. 3174/2017)

407. Where the reason recorded by the AO for issuing notice u/s 148 to the non-resident assessee proceeded on the assumption that assessee had business connection in India since large withdrawls were made from NRO bank account and return of income was not filed despite assessee having accrued interest income from NRO A/c, the Court held that the same could not form reasonable belief that income had escaped assessment and that the assessee was not required to file return as per section 115G. Accordingly, it quashed the notice issued u/s 148 as the same was without jurisdiction and bad in law.
Mr. Cyrus Kersi Vandrevala [TS-91-HC-2017(BOM)] (W.P. No. 2551 of 2016)

III. Domestic Tax

a. *Income*

408. The Court held that the transport subsidy received by the assesse could not be regarded as a revenue receipt since the same was to encourage investment in difficult and far-flung states, stimulate industrial activity in backward region, generate employment opportunities, bring about development in the N.E states and was not for providing higher profits to the assesse. Applying the purpose test the court observed that there could be no straightjacket formula for distinguishing a capital receipt from a revenue receipt and the answer had to be decided on the circumstances of each case.
Shiv Shakti Flour Mills (P) Ltd [TS-694-HC-2016(GAUH)]

409. The Court dismissed Revenue's appeal in respect of taxability of non-interest bearing refundable security deposit received by assessee as a revenue receipt since the security deposit recovered from the members at the time of their enrollment as a club member was refundable on occurrence of contingencies mentioned in the Rules, Regulations and Byelaws. Further, merely because the security deposit was not kept apart and/or subsequently the amount of security deposit was utilized for other purposes such as construction and providing amenities at the club, the same would not lose the 'character of deposit'.
Gulmohar Green Golf and Country Club Ltd [TS-691-HC-2016(GUJ)

410. The Tribunal dismissed appeal of the Revenue and held that the amount received by the assessee on forfeiture of share warrant application money was a capital receipt and not a revenue receipt as it was not earned from regular business activities carried on by the assessee and hence it could not be included in the total income of the assessee.

Deputy Commissioner of Income Tax Vs. Mahalaxmi Rubtech Ltd (2017) 49 CCH 0070 AhdTrib (ITA No. 1190/Ahd/2014)

b. ***Income from Salary***

411. The Tribunal held that HRA exemption claimed by the assessee could not be allowed u/s 10(13A) as it was based on sham rent payments supported only by rent receipts from parent and the assessee produced no evidence arising in the normal course of transactions of hiring premises such as leave & license agreement, letter to society, payments through bank, electricity and water bill payments or any other correspondence and further even the assessee's parent's ITR did not reflect rent received from the assessee. The appeal filed by the assessee was, thus, dismissed.
Meena Vaswani v. Assistant Commissioner of Income Tax, Mumbai - [2017] 80 taxmann.com 2 (Mumbai-Trib.) (IT(A) Nos. 1983 to 1985 (Mum.) of 2015)

c. ***Business Income***

412. The Tribunal held that the assessee engaged in providing consultancy services could not be covered under section 44BBB of the Income Tax Act,1961, since the said provisions mainly dealt with turnkey projects.
SMEC International (P.) Ltd 2017] 77 taxmann.com 4 (Delhi - Trib.)

413. The Court held that the Assessing officer could not reject the assesse's claim and assess it at presumptive rate of 10% on the grounds that it had accounted projects as per Accounting Standard 7, where the foreign company engaged in erection, testing and commissioning of turnkey projects having project office in India prepared accounts and got them audited in accordance with Companies Act and section 44AB and claimed its profits to be lower than the 10% presumptive rate under section 44BBB(1). In terms of Companies Act, AS-7 will apply to a foreign company having project office in India.
Shandong Tiejun Electric Power Engineering Co. Ltd. [2017] 77 taxmann.com 266 (AHD Tri.)

414. The Tribunal held that income from hiring of vessels (i.e tug boat) earned by assessee (a UAE company) is eligible for taxation on presumptive basis under section 44BB (special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils) on the ground that assessee was engaged in the business of providing facilities and/or services in connection with prospecting for or extraction or production of mineral oils and thus hiring of barge was in its course of business. Further,it observed that, the phraseology of Sec. 44BB does not envisage only direct use of the plant and machinery in the prospecting for or extraction or production of mineral oils, thus the factum of the vessel being used for the business of operation of prospecting for or extraction or production of mineral oils was enough to cover it within the scope of Sec. 44BB.
Valentine Maritime (Gulf) LLC [TS-29-ITAT-2017(Mum)]

415. Where the assessee had disclosed income from sale of mutual funds / shares as short term capital gains and long term capital gains in its return but the AO taxed the income as income from business, the Court considering the material on record i.e. number of transactions, holding period, the disclosure of the impugned shares / mutual funds as investments in the balance sheet and the fact that in the earlier years, similar income had been treated as income from capital gains and not income from business income, allowed the appeal of the assessee and held that the AO was incorrect in treating the income from sale of such investments as business income.
Pr CIT v Jayantibhai M Patel – (2017) 98 CCH 0067 (Guj) HC – Tax Appeal No 38 of 2017, 76 of 2017

416. The Court dismissed Revenue's appeal against the order of the Tribunal, wherein the Tribunal held that the gains on sale of certified emission reductions (CERs) could only be taxed at the point of time when they were actually transferred to the foreign entity and not when they are merely receivable. Applying the 'accrual' principles laid down by the Apex court in the case of Excel

Industries Ltd [TS-506-SC-2013], the Court upheld the Tribunal's order holding that as neither the carbon receipts were sold nor transferred in favour of the foreign company in the year under consideration, the same could not be included as receipt/income in that year.
Kalpataru Power Transmission Ltd. [TS-100-HC-2017 (GUJ)] (ITA No. 141/2017) dated 02/03/2017.

417. The Tribunal upheld CIT(A)'s order deleting the addition made by the Assessing officer u/s 28(iv) of the Act with respect to share application money written back in the books of account of the assessee. It held that amount received by assessee on account of share application money which was subsequently written back in books of account, could not be treated as income of the assessee either u/s 41(1) as it had never been claimed it as a deduction in any of the years or u/s 28(iv) as the amount received was not in the course of a trading transaction but was a capital receipt. Revenue's appeal was, accordingly, dismissed.
Deputy Commissioner of Income-tax, Mumbai v. Nalwa Chrome (P.) Ltd [2017] 79 taxmann.com 413 (Mumbai-Trib.) (ITA Nos. 238 & 299 (Mum.) of 2015)

418. Where the Revenue disallowed expenditure incurred by the assessee involved in planning and building Mass Transit System, the Tribunal held that infrastructure projects took time to be completed and the assessee could operate the Metro Rail System only after the infrastructure was built and where the assessee had acquired land, paid compensation to the displaced land owners, floated tenders and awarded contract for building infrastructure. The assessee had already started its business of planning the mass transit system and since the Revenue had not disallowed the business expenditure claimed in the earlier two years, Tribunal held that the said expenditure was allowable as business expenditure. It further held that where assessee earned interest on its business receipts which were temporarily not required for business, and were parked in banks for earning of interest in order to reduce cost, the same attained nature of business income and not income from other sources.
Hyderabad Metro Rail Limited Vs. Deputy Commissioner of Income Tax (2017) 49 CCH 0112 HydTrib (ITA Nos. 402 & 403/Hyd/2016)

419. Where the Assessing Officer made an addition u/s 41(1) on the grounds that the assessee had not filed the confirmation from the creditor, the Tribunal after noting that the matter with the creditor was in dispute and sub-judice, deleted the addition by holding that the assessing officer had not brought on record any cogent material to prove that the liability had ceased to exist.
Income Tax Officer vs Alfa Distilleries Pvt Ltd. (2017) 49 CCH 0068 MumTrib (ITA No. 1582/Mum/2015

420. The Court dismissed appeal of the Revenue wherein the Revenue contended to value closing stock of sugar of the manufacturer assessee at the rates applied for levy free sugar instead of levy sugar. The Court upheld the valuation made by the assessee which was duly certified by the Tax Auditor and held that the stock of levy sugar could not have been valued at free sale sugar price in view of the fact that there was a legal obligation on the assesse to supply such stock of sugar at controlled levy price through public distribution system.
Principal Commissioner of Income Tax vs. Kishan Sahkari Chini Mills Ltd. (2017) 98 CCH 0090 All HC (ITA No. 35 of 2016)

d. ***Deductions***

Section 32 / 32A

421. The Court held that if the statute permitting depreciation at a particular rate itself had been amended and such amendment was applicable to disputed period of assessment, it was a substantial question of law and could be raised before the court. Further, since it would involve some factual investigation, the Court remanded the matter to the Tribunal to look into this aspect and pass a fresh order in accordance with law.
Principal Commissioner of Income tax vs U.P. State Bridge Corporation Ltd. [(2017) 98 CCH 0013 ALLHC]

422. A partnership firm viz. Mother Hospital had constructed a hospital building on land owned by it and for the purpose of operation of the hospital incorporated the assessee company to whom it handed over possession of the building on completion, on the condition that the entire cost of construction of the building was to be borne by the assessee. The said land was given on lease to the company and the assessee company claimed depreciation on the building. The Apex Court upheld the order of the High Court wherein it was held that the depreciation claimed by the assessee could not be allowed as it was not the owner of the property as the title in the said immovable property could not pass when its value was more than Rs.100/- unless it was executed on a proper stamp paper, duly registered with the sub-Registrar, which was not done in the instant case. Further, it dismissed the alternate contention of the assessee that it was the lessee of the property and was entitled to depreciation as per Explanation 1 to Section 32(1) of the Act and held that the construction was actually done by the firm and not by the assessee himself, which was the precondition to avail the benefit of the said Explanation.
Mother Hospital Pvt Ltd vs. Commissioner of Income Tax [2017] 79 taxmann.com 375 (SC)

423. Relying on Apex court ruling in the case of Shaan Finance (P.) Ltd wherein it was held that where the business of the asseesee consisted of hiring out machinery or where the income derived by the assessee from the hiring of any machinery was business income, the assessee must be considered as having used the machinery for the purpose of its business, the Court allowed assessee's claim of investment allowance under section 32A on the value of the plant and machinery leased out. Further, relying on Madras HC ruling in First Leasing Co. of India Ltd, the Court granted additional depreciation under section 32(1)(iia) on assets leased out by the assessee.
Industrial Credit & Investments Corpn. [TS-11-HC-2017(BOM)]

424. Where the assessee had incurred civil, interior works expenditure, electrical works expenditure & other repair expenses on premises taken on lease for the purpose of running a business centre and the Revenue contended that in terms of Explanation 1 to Sec 32(1)(iia), such expenses were to be considered as a capital expenditure subject to depreciation allowance, the Tribunal rejected the contention of the Revenue and held that Explanation 1 to Section 32(1)(iia) does not intend to lay down that whenever expenditure is incurred on premises not owned by assessee for construction of any structure/renovation or improvement to the building, such expenditure has to be mandatorily treated as capital expenditure. Unless there was a capital expenditure incurred by the assessee the provisions of explanation(1) to section 32(1) would not be attracted. Thus the Tribunal remitted the matter back to the AO with a direction to examine the nature of the expenses incurred and examine the applicability of Explanation 1. Further, it held that the expenses incurred on the consumables which were necessary for the purpose of running of the restaurant could not be termed as capital in nature and therefore deleted the disallowance made by the AO.
DCIT vs. Vatika Hospitality Pvt. Ltd. TS-75-ITAT-2017(DEL) ITA No.2331/Del/2012 dated 13/02/2017

425. The Tribunal held that the process of generation of electricity through windmill amounted to manufacture or production of article or thing as mentioned u/s 32(1)(iia) and therefore allowed assessee's additional depreciation claim on windmills for AYs 2011-12 & 2012-13. The third member dissented with the accountant member's view that in light of 'substantive' amendment made by Finance Act 2012 to extend & include activity of 'generation of power' under the ambit of sec 32(1)(iia) with effect from April 1,2013, benefit of initial depreciation/additional depreciation could not be extended to windmills acquired prior to AY 2013-14,and agreed with the view of the judicial member that the amendment brought to Section 32(1)(iia) was clarificatory and not 'substantive' in nature, and therefore had to be given retrospective application.
Giriraj Enterprises vs. DCIT TS-74-ITAT-2017-(PUN) ITA No.s.1469&1470/PUN/2015 dated 23.02.2017

426. The Court allowed the assessee depreciation on assets forming part of 'block of assets' in respect of it's unit which was sold and ceased to exist during relevant AY and rejected Revenue's stand that since the assets pertained to discontinued unit, depreciation u/s 32 could not be allowed as the assessee was neither the owner of assets nor assets were put to use in assessee's business. It held that despite the unit being hived-off, 'block of assets' did not come to an end and assessee

was entitled to claim depreciation thereon. It accepted the assessee's reliance on Oswal Agro Mills Ltd.[TS-4-HC-2010(DEL)] and Ansal Properties [TS-267-HC-2012(DEL)] and Infrastructure Ltd. rulings wherein the co-ordinate bench took note of legislative changes brought in Sec 50, special provision for capital gains computation on depreciable assets dealing inter-alia with a situation where any 'block of assets' ceases to exist on account of block being transferred which provided that where an assessee maintains a block of capital assets , the nature and the tax treatment of the same is independent of the existence of the capital asset in whole or in part or whether sold-off or transferred and allowed depreciation on assets of closed unit on the basis that they form part of 'block of assets'.
Sony India Pvt. Ltd. vs. CIT TS-46-HC-2017(DEL) ITA No. 13/2012 ITA 14/2012 dated 24.01.2017

427. The Court held that in terms of section 32(1)(iia), assessee could claim balance additional depreciation in assessment year which followed the assessment year in which machinery had been bought and used for less than 180 days. It held that the Revenue was incorrect in reading the amendment to Section 32(1) vide Finance Act 2015 (which specifically provides that balance depreciation on assets used for less than 180 days in a relevant assessment year could be claimed in the subsequent assessment year) as a prospective amendment and held that the same was clarificatory in nature. Accordingly, it upheld allowed the asseesee's claim of additional depreciation.
Commissioner of Income Tax v T.P. Textiles Private Limited - (2017) 98 CCH 0102 ChenHC (T.C.(A) No. 157 of 2017)

428. The Court dismissed the Revenue's appeal and upheld order of the Tribunal granting depreciation on 'Jetty' at 100% under the head 'Building Temporary Structure' instead of 25% under the head 'Plant' by holding that the Jetty/loading platform, in this case, was erected by the Assessee, in order to effectuate its business under the contract, entered into with MMTC, which was tenure based and upon completion of the contract, the Assessee was required to dismantle it, and that the jetty therefore, could not have been treated as anything else, but a temporary erection. The fact that the Jetty had other contraptions attached to it, such as, a conveyor belt, to facilitate the process of loading, could not convert such a structure into a plant.
Commissioner of Income Tax vs Anand Transport(2017) 98 CCH 0099 ChenHC (T.C.(A) No. 82 of 2017)

Section 37

429. Where the Tribunal upheld disallowance of commission expenditure u/s 37(1) incurred by the assessee, without considering the entire material / facts of the case but merely proceeded on the basis of the fact that the agent receiving the said commission did not appear before the AO in the first instance and that he did not produce documentary evidence to establish nature and value of services rendered to the assessee when he appeared before the AO during remand proceedings, the Court remitted the issue back to the file of the Tribunal noting that the Tribunal decided the issue, as if it were examining the case of that Agent and not of the assessee , since it failed to examine the material evidences in shape of agreements for sale, and failed to appreciate the fact that the payments were made through banking channel, on which TDS was deducted.
Brijbasi Hi-Tech Udyog Ltd Vs. Commissioner of Income Tax- (2017) 98 CCH 0101 All HC (ITA No. 186 of 2013)

430. The Court upheld order of the Tribunal deleting disallowance of expenditure, claimed by the Assessee qua legal fee and Professional Indemnity Insurance, notwithstanding the fact that the legal fee paid was more than the compensation received by the Assessee and the expense incurred towards Provisional Indemnity Insurance was required to be made by the third party. The Court held that the fact that a particular expense does not result in a profit for the Assessee in the immediate proximity cannot form the basis of its disallowance. Business decisions should be best left to the wisdom of those who run and manage the business and hence, as long as an expense is incurred, wholly and exclusively for the purpose of the business carried on by the Assessee, it ought to be, ordinarily, allowed under Section 37 of the Act.

Principal Commissioner Of Income Tax Vs.Managed Information Services Pvt. Ltd. (2017) 98 CCH 0113 ChenHC (T.C.(A) No. 137 of 2017)

431. The Court held that whether a particular payment made towards technical know-how fee or royalty to a foreign company in lieu of an agreement would be capital expenditure or revenue expenditure would depend on facts of individual case, and in particular, various terms of agreement involved therein. Accordingly, it held that where on termination of agreement, which was for a period of 5 years, assessee was to return all relevant material related to know-how acquired through the agreement, in such a case, payment towards royalty would be revenue expenditure and not capital.
UPCOM Cables Ltd [(2017) 98 CCH 0024 AllHC

432. The Court upheld assessee's claim for deduction of advertisement and promotion expenses incurred towards enhancement of brands owned by its foreign parent-company as business expenditure on the ground that even though all the brands owned by the parent company were not made available in Indian market, the overseas brand owner had not set up any other license (as a rival) at least in the area where the assessee operated. Referring to section 48 of Trademarks Act, it held that as long as the arrangement existed, the assessee who was a licensee of the products, was entitled to claim them as business expenditure though in ultimate analysis they might have enhanced the brand of the overseas owner. It concluded that disallowing a certain proportion on an entirely artificial and notional basis from the expense otherwise deductible, was unjustified.
Seagram Manufacturing Pvt Ltd [TS-695-HC-2016(DEL)]

433. The Apex court dismissed the assessee's SLP against Karnataka HC ruling denying deduction under section 37 for guarantee commission paid by the assessee to its Chairman cum Managing Director ('MD') Vijay Mallya on the ground that Mr. Mallya's net worth was much lower than the amount of guarantee and the bankers did not obtain details of assets and liabilities of MD in India and outside India. The Court remarked that it was a ploy to divert the income of the companies under his management as a means to pay remuneration to the MD for which he was otherwise not entitled and to overcome the RBI directions and statutory provisions under section 309 of Companies Act which was unlawful.
United Breweries Ltd. [TS-9-SC-2017]

434. The Tribunal held that where the assessee made payments for offences committed by its employees under Motor Vehicles Act, 1988, which were not compensatory in nature and for which assessee was vicariously liable, deduction in respect of the same was not allowable u/s 37(1) of the Act. Further, where assessee claimed deduction of cash destroyed by fire, the Tribnal held that the Assessing Officer could not disallow said claim without making proper enquiries from persons from whom cash was alleged to have been received. Accordingly, the Assessing officer was directed to allow deduction claimed by the assessee. Hence, appeal made by the assessee was partly allowed.
Aparna Agency Ltd. V. Income Tax Officer, Kolkata [2017] 79 taxmann.com 240 (Kolkata-Trib.) (ITA No. 1010 (Kol.) of 2014)

435. The Tribunal allowing the deduction under section 37 to the assessee (Pharma Company) in respect of freebies given to doctors held that since the MCI Regulation 2002 provides limitation/curb/prohibition only for medical practitioners and not for pharmaceutical companies, the payments were not made in violation of MCI regulations. Nowhere the regulation or the notification mentions that such a regulation or code of conduct will cover pharmaceutical companies or health care sector in any manner.
PHL Pharma P ltd [TS-12-ITAT-2017(Mum)]

436. The Apex Court dismissed the Revenue's Special SLP against Karnataka HC ruling wherein it was held that payments for domestic customer database and transfer of human skills amounted to revenue expenditure as the payment was made for the use and not for acquisition of the database.
CIT vs. IBM Global Services India Private Ltd. TS-49-SC-2017 SLP 19012/2014 dated 10.02.2017

437. The Apex Court dismissed the SLP filed by the Revenue against the order of the High Court, wherein the High Court allowed the assessee's claim for expense deduction while computing 'income from business', despite entire project for construction of dam, canal not being complete during relevant years and rejected Revenue's stand that only on completion of work of entire canal, assessee's business can be said to have been set-up and only thereafter assessee qualified for deduction. The Court also held that in a project like the Sardar Sarovar, there were bound to be different stages where different activities which were integral part of the business took place and where the project was phase-wise, the assessee could not be deprived of the benefits of fiscal legislation in disregard of the well settled principles on the issue.
Joint Commissioner Of Income Tax vs. Sardar Saravor Narmada Nigam Limited TS-69-SC-2017
SLP No. 3018/2017 dated 10.02.2017

Section 35D

438. The Court allowed the assessee's (a public limited company) claim of amortization of expenditure incurred in connection with rights issue of shares u/s 35D(2)(c)(iv) and rejected the Revenue's contention that assessee's claim ought not to be allowed as rights issue was confined only to a section of public (i.e. existing shareholders) and that to qualify for deduction, shares must be issued for public subscription. The Court held, that as per section 67 of Companies Act, a section of public holding shares in a company would also be treated as public.
Nitta Gelatine India Limited [TS-2-HC-2017 (KER)]

Section 14A

439. Considering that the investments made by the assessee were from common pool of funds but was less than available interest free fund, the Tribunal, relying on the High Court ruling in the case of UTI Bank Ltd and Bombay High Court ruling in Reliance Utilities, on the presumption even though assessee had raised a loan at the same time, investments were made from interest free funds, deleted the disallowance under section 14A read with rule 8D.
Shreno Limited [TS-696-ITAT-2016 (Ahd)]

440. The Court applying the provisions of section 14A read with rule 8D upheld the disallowance under section 14A despite non-recording of requisite satisfaction by Assessing officer, since, section 14A read with Rule 8D(i) mandated a particular methodology and hence should be followed. However, the interest disallowance under section 14A was restricted to calculations submitted by assessee in appeal.
Delhi Towers Ltd. [TS-14-ITAT-2017(Del)]

441. The Court rejecting the claim of the Assessee that no expense has been incurred for the purpose of earning exempt income upheld the disallowance made u/s 14A and held that the AO had recorded sufficient satisfaction (that it would be reasonable to presume that huge investment portfolio would require the deployment of the Assessee's intellectual, physical and financial resources) before invoking Rule 8D for ascertaining disallowance u/s 14A.
Punjab Tractors Ltd. vs. CIT (2017) 78 taxmann.com 65 (P&H) (ITA No. 458 of 2015 dated 03.02.2017)

442. The Tribunal prelying on the decision of the Court in Cheminvest Ltd. held that since the assessee had not made any claim of exempt income in its return of income i.e. where no exempt income was claimed by the assessee, there was no justification for making disallowance u/s 14A of the Act.
Bharat Serums and Vaccines Ltd. vs. ACIT TS-72-ITAT-2017(Mum) ITA NO.3091/Mum/2012 dated 15/02/2017

443. The Tribunal upheld section 14A disallowance made in respect of the strategic investments made by assessee company in its subsidiary companies for business purpose on the ground that the holding of the asset/property either as an investment or as stock-in-trade was an irrelevant consideration as the disallowance was independent of the head of income or the nature of the income and that the only thing relevant consideration was if the income was tax-exempt.

Accordingly it rejected the assessee's contention that investment in subsidiary companies being held for the purpose of its business would not be subject to Sec 14A. It also rejected the contention of the assessee that no expenditure was increased for making strategic investments and held that since the investments had business implication, it would definitely entail cost.
Voltech Engineers Pvt. Ltd. vs. DCIT TS-73-ITAT-2017(CHNY) ITA No.s.1801&1765/Mds/2016 dated 20.02.2017

444. Where the assessee was dealing in shares and bonds as trader and earned business income from purchase & sale of securities, the Court held that Sec.14A would only apply to shares held as investments and not as stock-in-trade. Since the assessee did not retain shares with the intention of earning dividend income and the dividend income was incidental to the business of sale of shares it would not be covered u/s 14A. It further clarified that the expenditure incurred in acquiring the shares could not be apportioned to the extent of dividend income and disallowed u/s 14A. Further it held that the word used u/s 14A was investment and not stock in trade and therefore the charging section could not be read to include stock.
CIT vs. State Bank Of Patiala TS-50-HC-2017(P&H) ITA No.244 of 2016(O&M) dated 30.01.2017

445. The Court held that Rule 8D of the Income-tax Rules would not apply to shares that were held as stock in trade and not as investments and accordingly deleted the addition made by the AO under Rule 8D(ii) and 8D(iii). Further, it noted that the AO had assessed the gain on sale of shares as income from business and had accepted the treatment of the shares as stock in trade of the assessee and therefore dismissed the appeal of the Revenue holding that no substantial question of law arose.
CIT v GKK Capital Markets P Ltd – (2017) 98 CCH 0059 Kol HC – GA No 1150 of 2015 and ITA No 52 of 2015

446. Where for AY 2006-07, the assessee had made a suo moto disallowance of expenses incurred for the purpose of earning exempt income at the rate of 1 percent of exempt income under Section 14A of the Act, the Court, considering the fact that Rule 8D introduced with effect from AY 2008-09 could not apply retrospectively, upheld the order of the Tribunal wherein 1 percent had been accepted as a reasonable disallowance, in accordance with the standard procedure adopted in various similar cases viz. Himtaj Consultants v ITO (ITA No 721/Kol/ 2007), CHNHS Association v ACIT (ITA No 74 / Kol / 2008), ITO v SPS Securities P Ltd (ITA No 12 / Kol / 2010), CIT v National Insurance Company (ITA 77 of 2014) and CIT v Greenfield Hotels and Estates Pvt Ltd (2016) 389 ITR 68 (Bom). Accordingly, it dismissed the appeal of the Revenue.
Pr CIT v National Insurance Company LTd - (2017) 98 CCH 0071 Kol HC – GA 3331 of 2016 and ITA 406 of 2016

447. Where during the relevant year, the assessee earned exempt dividend income and long term capital gains and suo moto disallowed Rs. 1.09 crores relating to interest expenditure and Rs. one lakh for dividend collection charges and AO while accepting the interest disallowance made by the assessee, opined that Rs. one lakh, incurred as dividend collection charges were disproportionate to the dividend income of Rs. 14.76 crores and therefore proceeded to make disallowance under rule 8D(2)(iii) of 1962 Rules including disallowance of administrative expenses, the Tribunal held that the application of Rule 8D was not automatic, and it was only when Assessing Officer recorded his satisfaction under sec. 14A(2) that the disallowance offered by assessee was unsatisfactory, could the procedure for computing disallowance under Rule 8D be initiated. It followed the decision of the Tribunal in the assessee's own case for a prior AY where on similar facts it had restricted the disallowance under section 14A of the Act to Rs. 10 lakh and held that the same was to be followed for the relevant year as well.
Shapoorji Pallonji & Co. Ltd. Vs. Deputy Commissioner of Income Tax- [2017] 79 taxmann.com 39 (Mumbai – Trib.) dated 03/03/2017

448. Where the assessee-company engaged in the business of share trading earned dividend income and offered the same for tax without disallowing expenses u/s 14A of the Act, the Tribunal held that provisions of Sec 14A could be invoked to make a disallowance on account of expenditure incurred in relation to exempt income in form of dividend even on shares held as stock in trade as the

dividend earned on shares held as stock in trade was an incidental income of the assessee and was very much exempt from tax u/s 10(34) of the Act. It further observed that it was the duty of the revenue to exclude those items of income from taxable income which are not chargeable to tax in spite of the fact that the assessee had offered the same to tax.
Kalyani Barter (P.) Ltd v. Income-tax Officer [2017] 79 taaxmann.com 457 (Kolkata – Trib.) (ITA Nos 681 & 824 (Kol.) of 2015)

Section 10A / 10B / Chapter VIA

449. The Court dismissed Revenue's appeal and granted deduction under section 10B to the assessee (EOU) on exports made through its sister concern, on the ground that the condition spelt out in section 10B(3), could not be limited or restricted to only actual receipts by the assessee. Further,it dismissed revenue's objection that the sister concern not being a status holder/ an exporter in terms of the Exim Policy, the benefit of deduction under section 10B could not be extended to the assessee.
Earth Stone Group [TS-692-HC-2016(DEL)]

450. The Apex Court ruled in favour of the revenue and granted Special Leave Petition against order of the High Court wherein the Court held that where asssesseee-company provided recruitment services to its foreign client using information technology, it would be entitled to benefit under section 10A.
Commissioner of Income Tax-6, New Delhi v. M.L.Outsourcing Services (P.) Ltd - [2017] 79 taxmann.com 255 (SC)

451. The court held that the assessee had fulfilled all the conditions laid down in clauses (i) to (v) of sub 80G and therefore was entitled to exemption under section 11. It observed that there was no violation of provisions contained in section 13, as there was no material change from facts of the earlier years in order to come to the conclusion that the assessee was not carrying out activity of charitable nature. It was clear that the word education utilized in the section stands independently on its own and to suggest that word might be confined either to rich or poor or any other strata of society was not acceptable.
CIT v Dr.Virendra Swaroop Educational Foundation (2017) 98 CCH 0003 AllHC

452. The Tribunal denying section 80JJAA deduction to the assessee company (engaged in manufacture & export of computer software) for AY 2001-02 & 2002-03, as the new workmen employed by the assessee failed the regular workmen test as envisaged on the explanation (ii)(c) to section 80JJAA. The assessee had argued that in view of the Memorandum explaining provisions of Finance No.2 Bill 1998, the condition of 300 days of employment during the previous year should be read as 300 days in a year and hence the year must be counted from the date of employment and not in the previous year. The court noted the ambiguity involved in the language used in the explanation and in the memorandum and held that, though the language used in the provision appeared to militate with the intention of the legislature as expressed in the memorandum as well as against the very object and scheme of the provision of providing incentive for generating more employment. However, this may be an omission in the provision which can be supplied only by an act of legislature through proper amendment.
Texas Instruments (India) P. Ltd [TS-703-ITAT-2016(Bang)]

453. The Tribunal denied the assessee deduction u/s 80IB(10) of Act and held that the assessee was engaged in construction business as a work contractor and not as a developer which was a sine qua non for claiming Sec. 80IB(10) deduction. Noting that the assessee's work as a contractor did not include designing and selling of the project, it held that the role of a developer was much wider than that of a contractor. It held that the assessee was engaged in the construction work of the buildings as a contractor and only included controlling and directing the work of building construction as per plan and design provided by the landlord post which it handed over the constructed flats on behalf of the landlord to the eligible flat owners who had registered undivided rights in the property.

M/s Arihant Heirloom vs. The Income Tax Officer TS-44-ITAT-2017(CHNY) ITA No.214/Mds/2016 dated 25.01.2017

454. Where, as per Section 80IB(7)(c) an Assessee would be eligible for deduction u/s 80IB(7)(a) (50 percent of eligible income) if the Assessee had obtained approval from Director General, Income Tax (Exemptions), who has to act upon with concurrence of Director General in the Directorate of Tourism, Government of India and the Assessee who had set up a hotel after getting approval of project of Hotel from Department of Tourism, had submitted application to claim deduction under section 80-IB(7)(*a*) before Director, General, Income tax (Exemptions) which was pending before the said authority and during such pendency the Assessee filed a return claiming deduction under section 80-IB, which was rejected by the AO on the ground that the Assessee was not granted approval by Director, General, Income tax (Exemptions) which was affirmed by the CIT(A) who allowed a lower deduction under section 80IB(7)(b) [30 percent of eligible income] [which required approval only from Director General in the Directorate of Tourism, Government of India], the Court held that for lethargy or inaction on the part of an officer of Income-tax Department, a deduction which otherwise may be available to the Assessee, could not be denied since it was not a case where Assessee was disqualified being ineligible for such deduction but only on the ground that approval was pending before Competent Authority.
As regards the contention of the Revenue that no that exemption could have been allowed under section 80IB(7)(b) since the Assessee had claimed deduction under section 80IB(7)(a) in its return of income and that as per Section 80A no claim of deduction could be allowed unless claimed in the return of income, the Court held that deduction under section 80-IB(7) to a hotel was common and a difference in clauses (*a*) and (*b*) was with regard to percentage, which is 50 per cent and 30 per cent respectively and therefore it could not be held that the Assessee did not claim deduction under section 80-IB(7). Even otherwise, it held that section 80-IB(7)(a) provided a deduction of higher amount and therefore would cover deduction under clause (*b*) as well if existing facts justify that Assessee would be entitled for same. Accordingly, it allowed the appeal of the Assessee and held that if approval was granted, the Assessee would be eligible to deduction under section 80IB(7)(a) and if not, the Assessee would be entitled to the 80Ib(7)(b) deduction provided by the CIT(A).

Shrikar Hotels Pvt. Ltd & Ors. vs. CIT (2017) 98 CCH 0066 All HC (ITA No. 20 of 2014 dated 02.02.2017)

455. The Court, relying on the decision of the Madras High Court Madras Motors Ltd 257 ITR 60 (Mad) allowed the appeal of the assessee and held that for the purpose of computing the deduction under section 80HHC of the Act the term 'total turnover' used therein would mean the total turnover arising out of export of goods covered under the section and not on the total turnover of the entire business of the assessee. It held that the term total turnover of the business meant the business relating to the goods to which the section applied. As regards the attribution of indirect costs while computing the profits eligible for deduction under section 80HHC, it held that the term 'indirect costs' used in the section had to be read in conjunction with sub-section 3(c)(ii) of the said section which provides that the profits would be reduced by direct and indirect costs attributable to the export of trading goods and therefore held that the indirect costs had to have nexus with the export turnover of the assessee. Accordingly, it reversed the order of the Tribunal wherein the Tribunal had considered the indirect costs of the entire business of the assessee while computing the profits. Further, where the assesse had written back its liabilities but had not established the nexus between the write back of liabilities and the export income earned by it, the Court held that the Revenue was justified in excluding the same while computing the income eligible for deduction under section 80HHC of the Act
Rollatainers Ltd v CIT – (2017) 98 CCH 0062 Del HC – ITA 166 / 2014

456. The Apex court dismissed Revenue's Special Leave Petition against Allahabad High Court ruling wherein the Court allowed Sec 80-IB benefit on additional income declared in return filed u/s 153A pursuant to search, despite assessee's failure to file audit report along with the return. It opined that the requirement of furnishing audit report u/s 80-IA(7) along with the return of income is only directory and since the audit report for the enhanced claim was furnished during the course of assessment proceedings, provisions of Sec. 80-IA(7) stood complied.
Surya Merchants Ltd [TS-94-SC-2017] (CC No. 4760/2017) dated 10/03/2017

e. ***Income from Capital Gains***

457. The Court rejecting the assessing officer's contention, held that since the assessee's major income consisted of income from sports endorsement, the entire investment in shares was made out of his own funds and investment in shares with Portfolio Managers was a meagre percentage of aseessee's total investments, income on sale of shares and mutual funds was taxable under the head capital gains and not business income.
Sachin R Tendulkar [2017] 77 taxmann.com 305 (Mumbai Tri.)]

458. The Court held that the property in question being an ancestral agricultural land could not be treated as 'capital asset' u/s 2(14)(iii) of the Act and accordingly the gains on sale of such land was exempt from capital gains tax. The Court observed that the assessee carried out agricultural activities and used the agricultural produce for his personal and family consumption and thus the said land could not be treated as a non-agricultural land merely because it was located near the sea or that the asssessee was not doing any regular agricultural activity or that the assessee did not show any agricultural income.
Shankar Dalal & Ors vs. Commissioner of Income Tax & Ors - (2017) 98 CCH 0117 MumHC (Tax Appeal Nos : 1,2,10,12,16 of 2015 and 80,81,82,83,84,85,86 of 2014)

459. The Tribunal held that the assessee who had entered into an agreement for sale of his flat was not subjected to capital gains tax during the year under review despite the fact that he received an advance of the sale consideration and the agreement was registered during the year, since the possession of the flat was not handed over during the year and was only handed over in the subsequent year in which the assessee had offered the capital gains to tax. It held that the flat came into full and exclusive control of new purchaser only after possession of the same was handed over by the assessee.
Ashok M Seth v DCIT – (2017) 49 CCH 046 Mum Trib – ITA No 187 & 188 / Mum / 2015

460. The Court reversed the decision of the Tribunal which held that life interest held by the assessee in Neville Wadia Trust received on account of relinquishment by his father would come within the purview of gift as stipulated by section 49(1)(ii) and, therefore, cost to the previous owner would be deemed to be the cost of the Assessee and accordingly capital gains upon sale of lift interest should be calculated in the hands of the Assessee. The Court held that relinquishment of life interest in Neville Wadia Trust by the Father of the Assessee would not tantamount to a gift to the Asssessee as Gift under the Transfer Property Act as well as the Gift Tax Act presupposes a transfer from one person to another person which was not so in the instant case viz. relinquishment. The Court following the decision of the division bench in the case of CIT vs. Neville N. Wadia (90 ITR 155) (Father of the Assessee) (in which it was held that surrendering of life interest in the Trust would not amount to transfer as stipulated by section 16(3)(iv) of IT Act, 1922) held that unilateral act of relinquishment by Father of the Assessee of Life Interest in the Trust would not tantamount to a transfer and, therefore, the same could not be treated as a Gift in the hands of the Assesee and COA could not be deemed as Cost to the previous owner.

Nusli N. Wadia vs. CIT (2017) 98 CCH 0105 Bom HC (ITR No. 55 of 2000 dated March 10, 2017)

461. Where the assessee sold its office unit, which was claimed to be a long term capital asset, and offered to tax the applicable gain as long term capital gain, but the AO contending that the assessee had merely received the allotment letter for the office 36 months prior to the date of transfer and had actually registered the agreement (for purchase of the office) within the 36-month period, treated the asset as a short term capital asset and taxed the gain as short term capital gain, the Tribunal held that the holding period should be computed from the date of issue of allotment letter and that since the allotment letter was issued more than 36 months prior to the date of sale of the office unit, the office unit was a long term capital asset and the gains on sale were rightly offered to tax as long term capital gains by the assessee.
Anita D Kanjani v ACIT – (2017) 49 CCH 0043 Mum Trib – ITA No 2291 / Mum / 2015

462. The Court dismissed appeal of the Revenue against order of the Tribunal wherein the Tribunal accepted the indexed cost of acquisition calculated by the assessee (for computing capital gains) by adopting the fair market value of the land & building as on 01/04/1981. The Court held that while calculating the indexed cost of acquisition, the assessing officer wrongly substituted the fair market value of the said property with the guideline value provided to him by the Sub-Registrar since the guideline value was only one of the indicators to arrive and not the only indicator to arrive at fair market value, especially when the assessee had provided relevant material in the form of agreement for sale qua similar and comparable properties.
Commissioner of Income Tax vs. K.A.Fathima (2017) 98 CCH 0107 Chen HC (TCA No. 171 of 2017)

463. The Court dismissed the appeal of the Revenue and held that the fair market value of the property cannot be substituted for the full value consideration u/s 48 for the purpose of computing capital gains arising on transfer of land/building the assessee to its group concern, thereby rejecting the stand of the revenue to adopt market value. It held that the expression full value of consideration u/s 48 could not be construed as the market value but was to be taken as the price bargained for by the parties to the sale. Accordingly, it held that there was no occasion for the AO to make references to the DVO u/s 55A of the Act as there was no requirement to determine FMV & therefore the reference made was without jurisdiction. Further, it rejected the Revenue's invocation of Section 50C to have the FMV determined and clarified that even if Section 50C was invoked, the stamp duty valuation would prevail and not the market value. Thus, it ruled in favour of the assessee.
Pr.CIT vs. M/s Quark Media House India Pvt. Ltd. TS-38-HC-2017(P&H) ITA No.110/2016 dated 24.01.2017

464. The Tribunal held that consideration received by the assessee company on assignment of developed patent of a medicine would be taxable as capital gains and would be subject to applicability of Sec.55(2) which states that cost of acquisition for self-generated goodwill, right to manufacture etc. shall be taken 'nil' and did not accept the contention of the assessee that the amount was non taxable capital receipt as no cost was incurred for developing of the patent. It held that for developing a patent of medicine, the assessee had to carry out research analysis and experimentation, and conduct clinical tests and administering drugs to the patients and therefore the claim that no cost was incurred was not acceptable. It held that the assessee's case fell under the ambit of 'right to manufacture/produce/process any article or thing' as envisaged u/s 55(2)(a). Accordingly it held that the CIT(A) had rightly invoked Section 55 and taxed proceeds as income from capital gains.
Bharat Serums and Vaccines Ltd. vs. ACIT TS-72-ITAT-2017(Mum) ITA NO.3091/Mum/2012 dated 15.02.2017

465. The Court held that where it was not case of Assessing Officer that assessee received a consideration more than what was mentioned in sale deed, there was no necessity for computing fair market value and accordingly Assessing Officer could not have referred matter to D.V.O. under section 55A. The Assessing Officer was only concerned with amounts actually received by the assessee. The amount recieved was admittedly the amount mentioned in the sale agreement.
Quark Media House India (P) Ltd [2017] 77 taxmann.com 301 (Punjab & Haryana)

466. The Tribunal observing that the consideration received by the assessee on sale of plot was not assessed by a stamp valuation authority as no sale deed or agreement was registered, rejected the Revenue's application of Sec 50C on an unregistered document & allowed assessee 's claim of long term capital loss by treating the sales consideration @ Rs. 26 lakhs as opposed to Section 50C value of 81lacs on transfer of plot to his nephews during 2009-10, holding that the provisions

of 50C 0f the Act would not be applicable. It further held that the amendment in Sec 50C inserting the word 'assessable' w.e.f. October 1, 2009 was prospective in nature and hence was not applicable to subject AY.
Shri Ramesh Verma vs. DCIT TS-59-ITAT-2017(Chandi) ITA No. 394/CHD/2015 dated 05.01.2017

467. The Tribunal held that the benefit under section 54F was available to HUF despite the fact that the property was purchased in the name of individual co-parcener even though HUF was an independent assessable unit under Act, as, under common law , HUF cannot be considered as a legal entity and has to be represented by any one of the coparceners. It held that when the nucleus of the HUF fund was used for purchase of property in the name of any one coparcener, the property belonged to the HUF. It further rejected Revenue's contention that since the assessee used borrowed funds and did not utilize the sale proceeds on transfer of a capital asset to invest in new property, deduction should be denied and held that "where the assessee borrowed funds and utilized it in purchasing the capital asset and thereafter used the sale proceeds or capital gain for repaying the loan borrowed, it would amount to sufficient compliance of the requirement of Section 54F of the Act.
Shri Puranchand & Family vs. Income Tax Officer TS-52-ITAT-2017(CHNY) ITA No.2974/Mds/2016 dated 31.01.2017

468. Where the assessee had sold its erstwhile flat and shares and claimed deduction under section 54 and 54F of the Act by making investments in residential property, but the AO contending that the assessee had made investment in two flats by registering two separate sale agreements, allowed deduction only with respect to one flat, the Tribunal upheld the order of the CIT(A) and held that when the assessee acquired a flat, with the intention to use it as one residential unit, it would not make any distinction whether the flats were constructed as such by builder or same was altered or combined into one at instance of assessee. It also held that in case of beneficial provisions it was a well-accepted rule of interpretation that a liberal view had to be accepted and therefore where the assessee had made compliance of the provisions of sections in substance then, the benefit could not be denied on irrelevant considerations or for the reasons which were not material to the issue involved.
Assistant Commissioner of Income Tax [(2017) 49 CCH 007 MumTrib]

469. The Tribunal upheld Sec 54F (capital gains exemption) benefit to assessee-individual for AY 2009-10. Noting that the assessee entered into a joint development agreement with a builder and leased the building so constructed to an educational society (which used the premises for the purpose of accommodation of students) , the Tribunal held that the flats were constructed for residential purpose and had to be considered as residential house for the purpose of exemption u/s 54F as the assessee furnished copy of plan sanctioned by municipal authorities which clearly showed that apartments constructed by builder were residential houses and merely because the house was leased out to an educational socity, it could not be said that the property in question was a commercial property, which was not entitled for exemption u/s 54F. The appeal of the revenue was, accordingly, dismissed.
Income Tax Officer & Ors vs. Ravuri Sai Chaitanya & Ors. (2017) 49 CCH 0128 Vishakapatnam Trib. (ITA No. 498,499,500/Vizag/2013)

470. The Court noting the finding of the Tribunal that the Assessee had not even started construction during the period specified u/s 54F, denied the benefit u/s 54F claimed by the Assessee by purchasing a plot of land for construction of residential flat from sale proceeds arising from transfer of his share in ancestral land and held that mere payment of development charges to the builder by the Assessee would not mean that the Assessee has satisfied the primary ingredients / condition of section 54F (construction of residential house or purchase of residential house within specified period).
Ajay Kumar vs. ITO (2017) 98 CCH 0041 All HC (ITA No. 161 of 2011 dated 02.02.2017)

471. The Court ruled in favour of taxpayer and upheld Sec 54F (capital gains exemption) benefit to assessee-individual for AY 2012-13. Noting that the assessee alongwith his sons (in the capacity

of land-owners) entered into joint development agreement ('JDA') with a builder for construction of flats for which assessee received 15 flats as consideration, it rejected the Revenue's stand that 15 flats did not qualify as 'a residential house' under in Sec 54F as the flats were in different blocks and not in the same block. Relying on the decision of the coordinate bench in V.R.Karpagam ([TS-529-HC-2014(MAD)-O], it followed the interpretation of the phrase 'a residential house' provided therein i.e. as covering more than one flat/apartment as long as the same was in the same location/address and dismissed the appeal of the Revenue. Further, it clarified that the amendment to Section 54F vide Finance (No.2) Act, 2014 substituting 'a residential house' with 'one residential house', was prospective in nature, and hence not applicable to subject AY
Shri Gumanmal Jain [TS-102-HC-2017 (MAD)] (TCA No. 33 OF 2017) dated 03/03/2017.

f. ***Income from Other Sources***

472. Where the assessee had taken loans in foreign exchange for construction of plant and realized a foreign exchange gain on revaluation of loan liability for capital expenditure. The Tribunal relying on the Delhi HC ruling in the case of CIT vs. Jagajit Industries Limited [TS-5787-HC-2009(DELHI)-O] held that the entire gain due to the fluctuation in foreign exchange when the source of funds was for capital expenditure was a capital receipt. Accordingly, it upheld the order of the CIT(A) whereas such addition was deleted.
ACIT vs. L.S.Cable India Pvt Ltd. TS-58-ITAT-2017(DEL) ITA No.1257/Del/2012 dated 09.02.2017.

473. The Tribunal dismissed Revenue's appeal for AY 2008-09 & held that pre-operative expenses towards audit fees, salaries, legal and professional charges, financial and bank charges were allowable u/s 57(iii) since such expenditure was essential for retaining assessee's corporate entity status. It noted that the AO had not questioned genuineness of expenses, but disallowed them on the ground that the assessee had only acquired land and manufacturing facilities during the subject year and thus its business was not set up and accepted assessee's reliance on plethora of judicial precedents wherein it was held that where a "company had to file various statements and returns and perform various functions to retain its status as a company for which it had to incur certain expenditure , such expenditure was allowable as deduction under section 57(iii) of the Act.
ACIT vs. L.S.Cable India Pvt Ltd. TS-58-ITAT-2017(DEL) ITA No.1257/Del/2012 dated 09.02.2017

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

Assessment

474. The Court rejecting the assessee's claim that CIT, being a mere adjudicating authority under the act could not challenge the order passed by Settlement Commission, being a statutory authority under the Act set aside the order of Settlement Commission's final order passed under section 245D. The finality of settlement commission order cannot oust the jurisdiction of a High Court under Articles 226/227 of the Constitution.
The Settlement Commission [TS-17-HC-2017(KER)]

475. The Apex court granted immunity to the assessee from prosecution under section 245H despite tax & interest payments made beyond the time specified by settlement commission vide its final order under section 245D(4) since he had made all payments before filing the SLP
Sandeep Singh [TS-26-SC-2017]

476. The Court, following the decision of division bench in the case of Andrew Communications India Ltd. (W.P. No. 1021 of 2016), quashed the notices issued by the Revenue u/s 226(3) and held that Revenue was not justified in attaching the bank accounts of the Assessee since, admittedly, 15% of the disputed demand had been already recovered.

SESA Resources Ltd. vs. ACIT (2017) 98 CCH 0069 – Bom HC (W.P. No. 117/2017 dated 02.02.2017)

477. The Court dismissed the appeal of the Revenue on the ground that the Counsel for the Revenue could not dispute that questions raised before the Court in connection to whether Tribunal erred in facts in restoring the turnover recorded in the BOA of Assessee instead of turnover estimated by the AO were merely questions of facts and not of law. The Court clarified that ordinarily in two situations only inference on the basis of facts is possible viz a) when material which has not been considered would have led to opposite conclusion than the one already taken and b) a finding of fact has been given by a lower authority by placing reliance on an inadmissible evidence, exclusion of which would have led to an opposite conclusion.
ITO vs. Shri. Ram Lallan Shukla (2017) 98 CCH 0043 All HC (ITA No. 78 of 2015 dated 03.02.2017)

478. Where the assessee had filed its return of income on November 20, 2006 mentioning its address as Mittal Court, Nariman Point and subsequently on November 23, 2006 informed the AO vide a letter that its address had been changed to Ruby House, Dadar and the AO on November 28, 2007 issued a notice under section 143(2) of the Act to the Nariman Point address of the assessee, which remained unserved and then subsequently issued a notice on December 12, 2007 to the correct address of the assessee, the Court upheld the order of the Tribunal wherein it was held that the notice issued under section 143(2) was invalid as it was time barred since the last date for issuance of such notice for the relevant AY was November 30, 2007 and the consequent order passed under section 143(3) read with Section 144C(13) was also invalid. The Court noted that the assessee had objected to the proceedings at the very first instance and therefore the assessment proceedings were not curable under section 292BB of the Act. Further, it placed reliance on Section 27 of the General Clauses Act where the expression “serve”, “given” or sent would be deemed to be effected by proper addressing, prepaying and posting which was not satisfied in the instant case.
CIT v Abacus Distribution Systems (India) Pvt Ltd – (2017) 98 CCH 0058 Mum HC ITA No 1382 of 2014

479. The Court upholding order of the Tribunal held, that period of limitation u/s 154(7) would commence from March 31, 2006 being the date of passing of Assessment order u/s 143(3) and not from the date of passing of order pursuant to remand by Tribunal being December 31, 2009 or from the date of suo moto rectification order passed by the AO of such order being January 25, 2011 and, therefore, the application made by the Assessee dated May 9, 2011 u/s 154 was beyond period of limitation. The Court noted that the issue on which application u/s 154 was filed, being set off of brought forward capital loss, was not agitated by the Assessee before any of the lower authorities and, therefore, the same attained finality as on the date of the assessment order being March 31, 2006 and that the same did not merge with the order of the CIT(A) which subsequently merged with the order of the Tribunal. The Court further noted that the IT Act has recognised ‘Doctrine of Partial Merger’ u/s 263(1) which states that the power of Commissioner shall extend to only such matters which has not been considered and decided in an appeal.
The Court further differed from the decision of the Delhi High Court in the case of CIT vs. Tony Electronics Ltd (320 ITR 378), relied **upon** by the Assessee, (which held that period of limitation should commence form the date of rectification order as from the said **date** the original order ceased to operate) by holding that the decision of the Hon’ble Supreme Court in the case of Hind Wire Industries Ltd. vs. CIT (212 ITR 639), relied on by the Delhi High Court, stated that order u/s 154 can be any order including amended and rectified order and, therefore, the observations made by the Delhi High Court that it includes only rectified or amended order are much more than what has been actually said in the order of the Hon’ble Supreme Court.
Shree New Durga Bansal Cold Storage & Ice Factory vs. CIT (2017) 98 CCH 0114 – All HC (ITA No. 14 of 2014 dated March 7, 2017)

480. The Larger bench of the Court held that words ‘the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner’ occurring in Sec 260A(2)(a) (relating to limitation period for filing appeal before HC) is not limited only to 'jurisdictional' Principal or Chief Commissioner of Income-tax (‘CIT’) and it would include any CIT including the CIT (Judicial). The Court rejected

Revenue's stand that unless the concerned CIT having jurisdiction over Assessee receives a certified copy of ITAT order, the limitation of 120 days within which an appeal has to be filed does not commence and held that in absence of a qualifying prefix 'concerned', the receipt of ITAT order copy by any of the officers (designated as CIT), including the CIT (Judicial) will trigger the period of limitation.

Further, the Court distinguished Revenue's reliance on division bench rulings in CIT vs. Arvind Construction Co. (193 ITR 330) and CIT vs. ITAT (245 ITR 659) by holding that they were rendered in the context of Sec. 256 (Reference to HC) and not in context of sec. 260 .

CIT vs. Odeon Builders Pvt. Ltd. [TS-117-HC-2017(Del)] (ITA No. 52/2015 dated March 24, 2017)

481. The Court dismissed Petitioner-Director's writ petition and upheld order u/s 179 lifting the corporate veil and holding Petitioner in default for income-tax dues of the public company in which he was a director. The Court rejected Petitioner's contention that Sec 179 is applicable only to a private company by observing that the company partook the character of a private company as public was not invited to subscribe the share capital and there was no remote public involvement and that for the purpose of sec 179 the company could be treated as a 'de facto' private company. The Court noted that substantial accommodation entries were made during the petitioner's tenure and after his resignation the company was left with huge liabilities and the activities carried out by the company were ultra-vires the memorandum. The court further held that a director with a sizable amount of holding in the company could not be allowed to keep himself away from his responsibilities and that lifting of the corporate veil was necessary.
Ajay Surendra Patel Vs. DCIT [TS-79-HC-2017 (GUJ)] (C/SCA/6580/2016) dated 02/03/2017

482. Where deposit of unutilised capital gains was made by the assessee in the Capital gains Account scheme within time limit provided for filing return u/s 139(5) and not u/s 139(1), the Tribunal held that section 139(5) was a part of section 139(1) and hence deposit made within time limit u/s 139(5) would also be entitled for exemption u/s 54G of the Act. The appeal of the Revenue was, accordingly, dismissed.
Deputy Commissioner of Income Tax v. Kilburn Engineering Ltd[2017] 79 taxmann.com 250 (Kolkata- Trib.) (ITA No 1987 (Kol.) of 2013)

Reassessment

483. The Court, dismissing Revenue's appeal upheld the quashing of reassessment proceeding by holding that the exercise of recording reasons appeared to be ritualistic and formal rather than meaningful. Section 151 of the act clearly stipulated that the CIT a competent authority to authorize the reassessment notice, had to apply his mind and form an opinion. The mere appending of the expression approved said nothing and reasons had to be recorded to agree with the noting put up.
N.C Cables Ltd (2017) [98 CCH 0010 DelHC]

484. The Apex Court dismissed the Assessee's SLP against the High Court's ruling which held that where the Assessee claimed land sold to be an agricultural land on the basis of certificate which was subsequently found to be fake by the AO, reopening u/s 148 of the Act was valid.
Thakorbhai Maganbhai Patel vs. ITO (2017) 78 taxmann.com 201 (SC) (SL (C) 188 of 2017 dated 03.02.2017)

485. The Court set aside the order of the Tribunal wherein the assessee's ground challenging the reassessment proceedings was dismissed ex-parte (after the Tribunal denied the assessee's application of adjournment) on the ground that no material and evidence had not been adduced by the assessee in support of its ground on reassessment and that the said issue did not emanate from the order of the CIT(A). The Court noted that the assessee had categorically challenged the said ground before CIT(A) who had dismissed in in Para 3 of his order. Further it held that the assessee specifically raised the ground of challenging the reassessment before the Tribunal and that it was for the Tribunal to call for such records and examine whether the initiation of reassessment proceedings was valid or not as the issue of initiation of reassessment proceedings was a jurisdictional issue. Accordingly, it remanded the issue back to the file of the Tribunal.
Dr. Javed Akhtar & Anr vs. CIT (2017) 98 CCH 0094 All HC (ITA No. 499 of 2007 dated March 1, 2017)

486. Where the assessee was accused of being involved in illegal mining and accordingly notices u/s 148 of the Act were issued on the ground that assessee was involved in under invoicing in iron-ore, the Court held that 'under invoicing' was a 'sufficient reason' to believe that there was escapement of assessment and accordingly dismissed the assessee's writ petition and upheld initiation of reassessment proceedings u/s 147/148. The Court also clarified that the sufficiency of reasons and examination of invoices which were relied upon by the Revenue for exercising jurisdiction u/s 147/148 could not be decided in a writ proceeding as these were factual issues.
Prasanna Ghotage vs Dy.CIT [TS-709-HC-2016(KAR)] (W.P.Nos 109810 to 109811 of 2016) dated 16/12/2016.

487. The Court held that the disallowance of payment of privilege fee under the Karnataka Excise Act 1956, paid by the assessee to the State Government, by the Assessing Officer was without jurisdiction and also ultravires to his powers under the Act. The Assessing officer had no authority or competence to hold that the privilege fee was not having character of statutory fee or that the State legislature in exercise of its power could not decide the quantum of fee or percentage of revenue on the income earned from the business.
Commissioner of Income Tax Bang. Vs. Karnataka State Beverages Corporation Ltd. [2017] 79 taxmann.com 125 (Karnataka) dated 03/03/2017.

488. Where the Petitioner, a principal member of an AOP formed with his brothers, filed a writ petition requesting the Court to issue a writ of Certiorari quashing the notice issued by the AO under section 148 of the Act on the ground that the AO issued a query / notice to the Petitioner in its individual capacity alleging that income of the AOP had escaped assessment whereas the query / notice was to be issued to the Petitioner in the capacity of member of the AOP, the Court noting that since it was not able cull out whether any separate query / notice was sent to the Petitioner in his capacity of a member of AOP as the relevant documents were not furnished in the Writ Petition, it held that it could not interfere under Article 226 in the facts of these cases. Accordingly, it left it open to the Petitioner to raise all contentions available to them under the law before the statutory authority
Maruti Nandan Sah & Anr Vs. Income Tax Officer & Anr. (2017) 98 CCH 0108 UAHC (Special Appeal No. 29 of 2017, 30 of 2017)

489. The Court allowed the petition of the assessee and held that where an assessing officer had completed assessment u/s 143(3) by making addition to assessee's income in respect of unexplained investment in immovable property on the basis of valuation of property by stamp duty authorities, he could not reopen the said assessment for enhancement of the said addition merely on basis of report of the District Valuation Officer.
Akshar Infrastructure (P.) Ltd. V Income-tax Officer [2017] 79 taxmann.com 239 (Gujarat) (SCA No. 16481 of 2010)

490. The Court allowed petition of the assessee and held that in absence of any tangible material available to prima facie show that assessee had received any money in cash on account of sale consideration of land, re-opening notice merely on the basis of one Sauda Chitthi seized from a third party, was unjustified, specially when the concerned persons who signed the sauda chitthi were not owners of the land sold and neither the assessee nor the person who purchased the land were signatory to the sauda chitthi and also the sauda chitthi was not acted upon. Accordingly, the impugned proceedings for re-opening of assessment and the impugned notice was quashed and set aside.
Chintan Jadavbhai Patel V. Income-tax Officer [2017] 79 taxmann.com 302 (Gujarat)

Revision

491. The Tribunal quashed revision order under section 263 directing AO to initiate penalty under section 271(1)c in respect of assesse's erroneous deduction claim under section 10B for AY 2010-11 on the ground that the CIT could not, after the conclusion of the assessment proceedings, make up his mind or arrive at the required affirmative conclusion towards initiation of penalty proceedings in substitution of the lapse committed by the AO.
Easy Transcription & Software Pvt Ltd [TS-15-ITAT-2017(Ahd)]

492. The Tribunal quashed section 263 proceedings by holding that where the AO had applied its mind and conducted inquiry, CIT was not justified in assuming jurisdiction under section 263.The provisons of section 263 were not recourse for roving enquries. The issues raised by CIT were already examined by AO and only after considering assessee's explanation. Merely because the AO had failed to give any reasons in the assessment order, it could not be said that there was no application of mind.
IBM India Pvt. Ltd vs CIT [TS-16-ITAT-2017(Bang)]

493. The Court allowed the assessee's writ & directed the CIT to consider assessee's revision petition u/s 264 for AY 2013-14. It noted that the assessee received intimation u/s 143(1) wherein certain deduction was not allowed, consequent to which a revised return was filed by assessee which was not considered by AO and the CIT also declined to entertain assessee's revision petition u/s 264, and held that even though a mere intimation did not amount to an order which could be revised u/s 264 considering that CIT's revisionary powers were very wide, if there was a failure on part of taxpayer in making a claim for deduction, the CIT was empowered to grant the assessee opportunity. It further held that independent of the notice issued u/s 143(1)(a), when the Petitioner had filed a revised return and sought for interference by the Commissioner, necessarily the claim had to be considered in accordance with law.
Agarwal Yuva Mandal vs. Union Of India and Pr.CIT TS-30-HC-2017(KER)
W.P.(C) No. 26779 OF 2016(V) dated 10.01.2017

494. Where the assessee, engaged in the construction business had reported its transactions in its return of income viz. provision of maintenance services, which had been accepted by the AO without any disallowance and subsequently, the CIT issued notice under section 263 of the Act alleging that the assessee, by changing its method of accounting as per AS 7, had shown income amounting to Rs.11.98 crore as deferred revenue income, the Court held that the invocation of Section 263 of the Act was not warranted in the circumstances of the case since the method of accounting adopted by the assessee was subject to scrutiny by the AO and also since the method was a known, recognised method of accounting and therefore there was no error on the part of the AO.
Pr CIT v A2Z Maintenance & Engineering Services Ltd – (2017) 98 CCH 0055 Del HC – ITA 452 / 2016 CM Appl 26465 / 2016

495. The Tribunal quashed the CIT's revisionary order u/s 263, and rejected the curtailment of deduction u/s 10A for assessee's engineering design services division applying provisions of Sec. 10A(7) r.w.s. 80IA(10). The CIT proceeded to invoke Section 10A(7) rws 80IA(10) on the ground that the assessee had shown disproportionately high profit margin on engineering design and development Services (270%) as against business support services (7.39%). The Tribunal noted that the margin of 270% was relevant only when the engineering design services were benchmarked under TNMM, but in the instant case they were benchmarked under CUP method and accepted by TPO, pursuant to which AO himself had adopted the said profit margins, and after verification had allowed the deduction under section 10A. Relying on Honeywell Automation India Limited [TS-71-ITAT-2015(PUN)-TP], it held that the onus to prove that there existed an arrangement between parties which resulted into higher profits was upon the department and there was nothing on record in the instant case to prove so. Further, with regard to the validity of the proceedings under section 263 of the Act, the Tribunal held that in order to invoke the provisions of section 263, the order of the AO must be both erroneous and prejudicial to the interest of Revenue and a mere disagreement with the view of the AO could not be the basis/justification for invoking the provisions of section 263. It also held that order of CIT passed u/s 263 lacked jurisdiction for not coming to a conclusion and directing the AO to make enquiries and carry out fresh search, if necessary.
Eaton Industries Private Limited vs. CIT - TS-227-ITAT-2017(PUN)-TP - ITA No.1148/PUN/2012 dated 24.03.2017

496. The CIT believing that order passed by the assessing officer assessing net loss of the assessee was prejudicial to interest of Revenue, issued show cause notice to assessee, subsequent to which the details of expenses incurred (which were also furnished to the AO)to the CIT. However, the CIT without specifying which particular document or evidence the assessee was expected to

produce but had failed to do so made only a general assertion that despite opportunity the assessee did not produce evidence. The Tribunal held that once assessee had met CIT's objections in SCN by furnishing explanation and details, then onus was on CIT to prove with cogent material that explanations put forth were not proper and assessment was erroneous and prejudicial to interest of Revenue. Accordingly, the Tribunal cancelled CIT's impunged order passed u/s 263 and AO's order u/s 143(3) was restored.
Riverbank Developers Pvt Ltd. Vs Commissioner of Income Tax (2017) 49 CCH 0136 KolTrib (ITA No. 1329/Kol/2016)

Search

497. The Court held that the Petitioner was entitled to avail remedy under Pradhan Mantri Garib Kalyan Yojana Deposit scheme with respect to Rs.30 lakhs cash seized by police officials and handed over to Income Tax officials. Noting the Petitioner's submission that the cash amount seized was sale proceeds of old jewellery belonging to him, his wife and mother, which was sold by him to one of the broker post demonetization. The Court affirmed the action of police officials in enquiring the petitioner prayer for directing unconditional return of the seize amount. However, it examined petitioner's eligibility under PMGKY Scheme and observing that the possession of undisclosed income in cash was not any offence under Indian Penal Code, moreover no FIR was registered against petitioner with respect to amount seized, held that the petitioner was eligible for availing the PMGKY Scheme. Accordingly, it directed any declaration of undisclosed income under the PMGKY Scheme, it directed IT Dept. to consider the same and pass appropriate order thereon.
Vishal jain vs. State of Punjab & Others TS-56-HC-2017(P&H) CWP No. 1072 of 2017 dated 23.01.2017

498. The Court, dismissing the Revenue's appeal, held that where the Revenue could not, in any manner, show that **the** findings rendered by the Tribunal viz incriminating materials seized during the course of search conducted on Mr. Dilip Dhrai did not belong to the Assessee were perverse and since proceedings u/s 153C, as it stood prior to 1st June, 2015, could only be initiated against the Assessee if documents seized during the course of search conducted on another party belonged to the Assessee the proceedings initiated u/s 153C were bad in law.
CIT vs. Arpit Land Pvt. Ltd. and Anr. (2017) 98 CCH 0063 – Bom HC (ITA No. 83 of 2014 dated 07.02.2017)

499. Where search proceedings were carried on in the premises of the Director of the assessee as a result of which a sum of Rs.2 crore of cash had been seized and the director had given a statement that a portion of the cash belonged to the assessee, pursuant to which, the assessee was served a notice under section 153C of the Act, the Court held that the said notice could not be considered as a defective notice as it was issued based on the statement of the director which constituted sufficient material for initiation of proceedings.
Pr CIT v Nau Nidh Overseas Pvt Ltd – (2017) 98 CCH 0072 Del HC – ITA 58, 59, 82, 83 /2017 & CM Appl 2767, 3614 & 3615 / 2017

500. The Court, relying on the decision of the Division bench in Pr CIT v Devangi Alias Rupa (Tax Appeal No 54 / 2017) upheld the order of the Tribunal wherein it was held that the scope of Section 153A of the Act was limited to assessing only search related income and not other allegedly escaped income which comes to the notice to the AO. It held that the assessment made under section 153A had to have relation to the search / requisition and should be connected with something found therein. If in relation to any assessment year, no incriminating material was found, no addition or disallowance could be made in respect of that assessment year.
Pr CIT v Dipak J Panchal – (2017) 98 CCH 0074 Guj HC – Tax Appeal No 134 of 2017

501. Where pursuant to a search operation the Assessing Officer made additions to the total income of the Assessee, the Tribunal held that the additions so made were beyond the scope of section 153A of the Act, because no incriminating material or evidence had been found during the course of search so as to doubt the transactions of the assessee and as on the date of search no assessment proceedings were pending for the year under consideration. It further held that the Assessing officer was not justified in disturbing the concluded assessment without there being any

incriminating material being found in search. It was held that the action of the assessing officer was based on conjectures and surmises and hence the said additions were deleted.
Shape Builders (P) Ltd. Vs. Deputy Commissioner of Income Tax (2017) 49 CCH 0114 Del Trib (ITA No. 2406/DEL/2014)

502. Notice u/s 132 of the Act issued in name of a dead person was duly received by Petitioner as the legal heir of that dead person and he also participated in assessment proceedings u/s 158BC of the Act. Subsequently notice u/s 158BD was issued to the Petitioner on the basis of information coming to light in course of search which was challenged by the Petitioner. The Apex court held that as the issue of invalidity of the search warrant was not raised at any time prior to issue of notice u/s 158BD and the fact that the petitioner had participated in assessment proceedings, notice u/s 158BD could not be challenged. The Apex Court, accordingly, dismissed the Special Leave Petition filed by the assessee.
Gunjan Girishbhai Mehta v. Director of Investigation [2017] 80 taxmann.com 23 (SC) (SLA No. 30282 of 2015

503. Where the AO initiated search proceedings at the premises of the assessee on 10.02.2006 wherein the Department seized certain incriminating material pertaining to AY 2004-05 onward, consequent to which the AO made an addition in the hands of the assessee for AYs 2000-01 to 2004-05 treating the capital gains claimed by the assessee as business income, the Court held that since the incriminating material pertained to AY 2004-05 onward, no addition could be made for the AYs 2000-01 to 2003-04 as no such material was found with regard to these years. Accordingly, it upheld the order of the Tribunal deleting the addition and dismissed the appeal filed by the Revenue.
Pr CIT v Devangi Alias Rupa – (2017) 98 CCH 0051 Guj HC – Tax Appeal No 54, 55, 56, 57 0f 2017

504. The Apex Court dismissed the assessee's SLP against the order of the Gujarat High Court wherein the block assessment proceedings under section 158BD of the Act were held to be valid. Noting that in the instant case, though the search warrant under section 132 of the Act was issued on a dead person, the assessee, in the capacity of legal heir participated in the block assessment proceedings under section 158BC of the Act, the Court dismissed the contention of the assessee challenging the subsequent issue of notice under section 158BD of the Act, in the name of a deceased was invalid as the assessee had participated in the assessment proceedings under section 158BC and had not raised the issue of invalidity of search warrant at any time prior to the issue of notice under section 158BD.
Gunjan Girishbhai Mehta v Director of Investigation – TS-123-SC-2017 dated March 21, 2017

505. The Court while dismissing the Revenue's appeal held that the AO had jurisdiction to make additions under block assessment only on the basis of the material found during the course of search and not as a result of other documents/ materials which come to his possession subsequent to the conclusion of the search operation unless and until such material has relation or connection with martial / evidence found during the course of search. The Court noted in respect of additions pertaining to cash credit, foreign travelling expenditure, professional receipts, suppressed rents and gifts, the AO had not found any material during the course of search operation and that the additions were made either on the basis of conjecture or surmises or the same were already disclosed by the Assessee in the ROI and, therefore, did not constitute any material relatable to evidence found during the course of search.
The Court further rejected the contention of the Revenue that the Third Member should not have gone into the issue of jurisdiction of the AO to make additions under block assessment as the Third Member could not have gone beyond the five issues referred to him which did not contain the issue on jurisdiction and held that Tribunal could not be denied to decide upon a foundational issue because of certain perceived procedural issue as the same would expose the legal system to insurmountable barriers – most fundamental of that being the litigant would always have to approach Superior Courts to decide upon the issue of jurisdiction. The Court further held that the Tribunal rightly decided the issue with regard to the jurisdiction of the AO to make an addition under block assessment as the same was mandated by provisions of section 254 (1) and (2) r.w. section 255 (4).

CIT vs. Pinaki Misra & Anr. (2017) 98 CCH 0088 – Del HC (ITA No. 119/2004 & 423/2004 dated March 7, 2017)

506. Where the Assessee engaged in execution of construction contracts, filed return of income consequent to notice u/s 153A in which it did not exclude from its income the amounts retained by its customers till completion of defect liability period as the amount could not be quantified in the short time but it did file a note along with its return seeking appropriate deduction when completing the assessments, the Court held that the claim was made in principle even though not quantified and thus was to be allowed. It further noted that even if the claim was considered to be a fresh claim and could not be entertained by the assessing officer, there was no bar/impediment in raising the claim before the Appellate Authorities under the Act for consideration. The Revenue's appeal was, accordingly, dismissed.
Commissioner of Income Tax, Pune v. B.G. Shirke Construction Technology (P.) Ltd [2017] 79 taxmann.com 306 (Bombay) (ITA Nos. 1392 & 1531 of 2014)

507. During search operations conducted in case of the assessee (medical practitioner), cash and jewellery were found, which the assessee claimed to belong to his family members. The AO observing that the assessee's family members did not have any source of income to justify discovery of such large amounts of cash found, made additions in the hands of the assessee on account of undisclosed income, which was deleted by the Tribunal on the ground that lack of the capacity to possess cash could not be a reason to discard the ownership. The Court held that such finding of Tribunal was erroneous as there was a complete lack of any plausible explanation as to the source of acquisition of money by the assessee's family members.
Commissioner of Income Tax Vs. Dr.G.G.Dhir (2017) 98 CCH 0127 AllHC (ITA No. 55 of 2010)

h. ***Withholding tax***

508. The Tribunal noted that CUTE i.e Common Utility Terminal Charges paid by the assessee (a Foreign Airline Compnay) were for providing the airline with technical infrastructure, telecommunication facilities and telecommunication infrastructure and held that the said payments made by the assessee, constituted a payment for 'facility' and not fees for technical service (FTS), hence TDS u/s 194J was not applicable. Further, relying on SC ruling in Japan Airlines, it held that charges paid for Passenger Service Fees (PSF) were not in nature of rent and thus TDS u/s 194I was also not applicable.
Singapore Airlines Ltd. [TS-697-ITAT-2016(Mum)]

509. The Court dismissed Revenue's appeal for AY 2011-12 and held that domestic software purchase payments by assessee (an Indian Company engaged in buying and selling software) was a case of outright purchase and hence did not amount to royalty. Consequently, section 194J would not be applicable. The transaction was one of purchase and sale of a product and nothing more. The provisions of section 9(1)(vi) would get attracted in the case of sale of copyright and not in a transaction of sale of copyrighted article.
Vinzas Solutions India Private Limited [TS-28-HC-2017(MAD)]

510. Where the assessee bank had made interest payments to Vishveshvaraya Technological university during AY's 2011-12 to 2015-16 without deducting TDS u/s 194A in light of the fact that, VTU was granted Section 12AA registration for AY 2016-17 and that it had applied to CBDT u/s 119(2)(b) praying for retrospective recognition of registration u/s12AA, which was pending , the Tribunal directed the AO to await the CBDT's decision on it in respect of application filed u/s 119, before initiating proceedings, u/s 201(1)/(1A), since, if the CBDT accepted VTU's application, the assessee's liability to deduct TPS would efface. In the event CBDT doesn't consider VTU's application favorably, the Tribunal directed the AO to re-adjudicate the impact of form 26A furnished by VTU and also held that interest u/s 201(1A) would be computed from the date which tax was deductible to the date of filing of return by deductee-VTU. Accordingly, it restored the matter back to the file of AO.
State Bank Of Mysore vs. The Income Tax Officer(TDS) TS-61-ITAT-2017(PAN) ITA NO. 207-210/PAN/2016 ITA NO. 211-215/PAN/2016 dated 03.02.2017

511. The Apex Court dismissed the SLP filed by the Revenue against the judgement of Delhi High Court wherein the Court had quashed section 201(1)/(1A) proceedings initiated against the assessee in respect of TDS default on pre-paid cards payments by rejecting the Revenue's action of invoking extended time limit u/s 153(3)(ii) for giving effects to findings/ directions issued by Court for issuing notice u/s 201. The High court had also accepted assessee's contention that the proviso to Section 201(3) has to be read in consistency with the law laid down by Delhi HC ruling in NHK Japan Broadcasting Corporation and that prior to March 31, 2011, the Department was not permitted to initiate Section 201 proceedings for a period more than four years.
ACIT vs. M/s Tata Teleservices TS-42-SC-2017 SLP 2420/2017 dated 06.02.2017

512. The Tribunal deleted interest u/s 201(1A) levied for alleged short deduction of TDS u/s 194A on interest payments made by assessee-company during AY's 2008-09 and 2009-10 noting that the parties to whom assessee paid interest had obtained lower tax deduction certificates u/s 197 from their respective AO's. It rejected the Revenue's view that the lower TDS rate specified in the certificate u/s 197 was valid only in respect of the amount specified in the certificate and the assessee ought to have deducted TDS at the normal applicable rate in respect of the remaining sum and referring to Section 197(2) along with relevant Rule 28AA(2), clarified that once the certificate u/s 197(2) is issued for lesser/no TDS deduction, the person making the payment is at liberty to deduct tax at rates specified in the certificate and that it did not make any reference to any income specified in such certificate, it held Section 197 was "person specific" and cannot be extended to the amounts specified by the recipient of the payment while making an application for grant of certificate u/s 197 of the Act.
Twenty First Century Securities Ltd. vs. I.T.O. TS-43-ITAT-2017(Kol) ITA No.s 464 & 465/Kol/2014 dated 03.02.2017

513. The Court held that no TDS u/s 194 I had to be deducted on lease premiums, bi-annual or annual for limited/ specific period, paid towards the acquisition of lease hold rights as the same **were** capital in nature. The Court noted that amounts constituting annual lease rents (generally 1% of the total consideration) were in the nature of rent and TDS had to be deducted u/s 194 I and Interest on overdue payments or other such amounts could not be treated as capital in nature and TDS had to be deducted on the same.
The **C**ourt, further rejected the plea of GNOIDA **i.e.** GNOIDA is a Municipal Authority and eligible for benefit of section 10(20)] and held that GNOIDA **was** not a Municipal Authority as defined u/s 10(20) since it did not have a "self-governing structure" as mandated by Article 243P and 243Q of the Constitution of India.
Rajesh Projects (India) (P.) Ltd. vs. CIT (2017) 78 taxmann.com 263 (Delhi) (W.P (C.) Nos. 8085 of 2014 dated 16.02.2017)

514. The Tribunal held that the Assessee could not be treated as Assessee in deafut for non -deduction of tax on retrenchment payment. The Tribunal noted that the Assessee had retrenched 69 employees out of those 69 employees five employees approached the Assessee for out of court settlement, that an MOU was entered into with the said employees, however, it was not acted upon by the Assessee since approval of HO was not obtained, that said five employees then filed an application before Regional Labour Commissioner ("RLC"), that the matter, thereafter, travelled to the Hon'ble Bombay High Court and the Hon'ble Bombay High Court directed the RLC to decide the matter on merits, that the RLC, subsequently, decided the issue in favour of the ex-employees and issued a certificate of recovery to the Collector Mumbai for recovery of the dues as land revenue dues and that pursuant to such order the bank account of the Assessee was attached and the money was forcefully recovered. The Tribunal based on such facts held that there was no employer employee relationship in between the Assessee and its ex-employees. The Tribunal noted that the Assessee was under a bonafide belief that such payments are capital receipts in the hands of the ex-employees and no TDS deduction was required and that the said ex-employees had paid due taxes on the same. The Tribunal further, by following the decision of Arun Bhai R. Naik (379 ITR 511), held that there was no obligation cast upon the employer to make retrenchment payments and the same would not fall within the purview of 17(3)(i) (i.e. profit in lieu of salary) since ex-employees had no vested right to receive the said payments.
ITO vs. Kuwait Airways Corporation (2017) 78 taxmann.com 187 (Mum. Trib.) (ITA No. 3303/Mum/2012 dated 15.02.2017)

515. The Tribunal, following the decision of the Apex Court in the case of ITC Ltd. (384 ITR 14), held that since the contract of employment was not the proximate cause of receipts of TIPS by the employees from a customer, no TDS was to be deducted u/s 192 by the Assessee (Hotel Employer) while disbursing to TIPS its employees since TIPS were collected from the customer**s** in a fiduciary capacity.
EIH Ltd. vs. ITO (2017) 78 taxmann.com 242 (Del. Trib.) (ITA No. 2642-2645/Del/2015 dated 14.02.2017)

516. The Tribunal, following the order of the Hon'ble Bombay High Court in Yashpal Sahni (165 Taxman 144), held that the Assessee could not be made to pay a tax upon denial of credit of TDS on the ground that TDS was not getting reflected in Form 26AS. The Tribunal noted that the Assessee received lease rentals net of TDS which was discernible from its Bank Statements, which implied that tax had been duly deducted and, therefore, when TDS had been already deducted, though not paid to the credit of the **C**entral **G**overnment, the Assesse could not be held liable to pay tax and credit of such TDS had to be allowed to the Assessee in view of section 205. The Tribunal further noted that recovery could be initiated against the person who had deducted the TDS but not paid the same to the credit of the government.
Shetbro Hotels and Resorts Pvt. Ltd. vs. ITO (2017) 49 CCH 0048 Mum Trib (ITA No. 2205/Mum/2016 dated 15.02.2017)

517. The Court reversed the order of the Tribunal for AY1996-97 and deleted the disallowance made u/s 40(a)(i) towards non-deduction of TDS on interest paid by assessee (a domestic company) on machinery imported from supplier based in Canada, pursuant to benefit u/s 10(15)(iv)(c) [which provides that interest payable by an industrial undertaking in India on moneys borrowed/ debt incurred by it in a foreign country in respect of purchase outside India of raw materials / capital plant and machinery, etc to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Govt. in this behalf, having regard to the terms of the loan or debt and its repayment is exempt], considering the fact that the Department of Economic Affairs which was part of the Central Government had approved the interest rate at which the transaction took place in 1995. It held that the Department of Economic Affairs was also a part of the Central government and also noted that the interest rate at which the transaction was undertaken was also subsequently approved by the Department of Revenue in 1999.
Tej Quebcor Printing Ltd v JCIT – (2017) 98 CCH 0053 Del HC – ITA 385 / 2004

518. The Court dismissed assessee-company's writ, holding that TDS under the Income Tax Act,1961 cannot be adjusted against the tax payable on the undisclosed income declared by the assessee under the Voluntary Disclosure of Income Tax Scheme of 1997 (VDIS) as VDIS is a part of the Finance Act,1997 and is a self- contained code and is different and distinct from the 1961 Act and hence TDS and/or any other mode of payment of tax under the 1961 Act cannot be used to discharge the obligation to pay Tax under the scheme of 1997 Act on undisclosed income.
Earnest Business Pvt. Ltd v CIT [TS-93-HC-2017(BOM)] (WP No. 616 of 1998) dated 10/03/2017

i. ***Others***

Appeals

519. The Court set aside the order of the Tribunal passed u/s 254(2) (dated 30th September, 2016) of the Act dismissing assessee's application for rectification of order passed u/s 254(1) (dated Feb. 3,2016) in light of the subsequent decisions of the Court passed in favour of the assessee, noting that the order which was subject to rectification was passed beyond a period of 90 days after the hearing of the appeal was concluded (i.e. Sep.20, 2015) which amounted to breach of Rule 34(5)(c) of the Income Tax Appellate Tribunal Rules, 1963 (Tribunal Rules). It relied on the coordinate bench ruling in Shivsagar Veg. Restaurant wherein the coordinate bench after referring to various decisions of the Apex Court directed the President of the Tribunal to frame guidelines to prevent delay in delivery of orders/judgments. In view of the fact that the order u/s 254(2) dated September 30, 2016, rejecting rectification application, did not consider the aforesaid Rules and the binding decisions of this Court, it held that the order was not sustainable on that ground

alone. So far the second issue i.e. rectification of the order passed under Section 254(1) of the Act on the basis of a subsequent decision of the jurisdictional High Court was concerned, it held that since in any case, the order was being set aside on the first issue itself, this issue would be considered by the Tribunal while disposing of the rectification application. Thus it restored assessee's miscellaneous application to the ITAT for fresh consideration.
Otters Club [TS-19-HC-2017(BOM)]

520. Where the Revenue had preferred SLP before the Hon'ble Supreme Court against the order of the Court rejecting the review petition of the Revenue (in which it was contended that the appeal filed was maintainable as the tax effect of the impugned appeal was above Rs. 4,00,000/- and that the CBDT Circular No. 5/2008 dated 15/5/2008 was not applicable) and the Hon'ble Supreme Court directed the Court to re-hear the review petition and if required, the appeal again on merits, the Court, considering the subsequent CBDT Circular No. 21/2015 (which stated that appeals filed by the Revenue having tax effect lower than Rs. 20,00,000/- were to be withdrawn) which was applicable to pending appeals, held that even assuming that the tax effect was more than Rs. 4,00,000/- the same was covered by the subsequent CBDT Circular in light of which the review petition was liable to be dismissed at the threshold itself as the tax effect was less than Rs. 20,00,000/-. Accordingly, it held that the question of deciding appeals on merits would not arise.
CIT vs. Velingkar Brothers (2017) 98 CCH 0103 Bom HC [Civil Application (Review) No. 8 of 2011 & Tax Appeal No. 16 of 2007 dated March 15, 2017

521. Where appeal was filed by the Assessee-Charitable institution against order of CIT(A) after 1631 days and the Chartered Accountant engaged in the matter was unaware of the fact that appeal could be filed against order of CIT, post amendment made in Sec 253(1)(c), the Court held that in petitions for condoning delay not only the period of delay had to be taken into account but also the quality of explanation, the legal assistance, if any, sought and rendered to the litigant and the detriment that the condonation of delay would cause to the other party had to be looked into and since in this case the assessee did not receive the best legal assistance and there was nothing on record to suggest that Revenue refuted this averment made in petition and no detriment was caused to the Revenue, the delay was condoned and the matter was remitted back to the Tribunal for taking decision on merits.
United Christmas Celebration Committee Charitable Trust vs. Income Tax Officer - (2017) 98 CCH 0126 Chen HC (TCA No. 886 of 2016)

522. Where appeal was filed by the Assessee-Charitable institution against order of CIT rejecting registration u/s 12AA, after 1902 days and the Chartered Accountant engaged in the matter was unaware of the fact that appeal could be filed against order of CIT, post amendment made in Sec 253(1)(c), the Court held that in petitions for condoning delay not only the period of delay had to be taken into account but also the quality of explanation, the legal assistance, if any, sought and rendered to the litigant and the detriment that the condonation of delay would cause to the other party had to be looked into and since in this case the assessee did not receive the best legal assistance and there was nothing on record to suggest that Revenue refuted this averment made in petition and no detriment was caused to the Revenue, the delay was condoned and the matter was remitted back to the Tribunal for taking decision on merits.
Hosanna Ministries vs. Income Tax Officer (2017) 98 CCH 0126 Chen HC (TCA No. 886 of 2016)

523. The revenue filed an appeal against order of the Tribunal wherein the Tribunal recalled its order passed in miscellaneous petitions preferred by the Assessee. The Court held that the Tribunal was right in recalling the said order as that order was passed suo motu by the Tribunal without giving an opportunity of being heard to the affected party, that is, the Assessee and that the order was beyond the jurisdiction of the Tribunal in view of the fact that it was passed well beyond the period of limitation u/s 254(2) of the Act. Hence, it was held that even if suo motu powers were exercised by the Tribunal, they could not have been exercised beyond the period of limitation prescribed u/s 254(2) of the Act and accordingly, the appeal of the Revenue was dismissed.
Commissioner of Income Tax vs. Indian Overseas Bank (2017) 98 CCH 0125 ChenHC (TCA Nos. 879 to 882 of 2016)

Deemed Dividend

524. The Supreme Court by applying the provisions of Explanation 3 to Section 2(22)(e) upheld deemed dividend addition in hands of the assessee HUF in respect of loans/advances received from one concern (in which it beneficially held more than 10% share-capital) since the shareholder (i.e Karta in this case) was a member of the said HUF and had substantial interest in the HUF (being its karta). Rejecting the assessee's reliance on the co-ordinate bench ruling in C.P. Sarathy Mudaliar wherein it was held that HUF cannot be a shareholder of a company, the Apex court remarked that Mudaliar judgment was rendered in context of Sec 2(6A)(e) of the erstwhile Income Tax Act, 1922 wherein there was no provision like Explanation 3 to section 2(22)(e). Further, observing that in the audited return of the company, the assessee-HUF was shown as the registered and beneficial shareholder despite share certificate issued in the name of the Karta and also the money towards shareholding in the company was paid by assessee-HUF. The Apex court held that it was not even necessary to determine as to whether HUF can, in law, be beneficial shareholder or registered shareholder in a Company.
Gopal & Sons (HUF) [TS-1-SC-2017]

Exempt Income / Income from Charitable Trust

525. The Court quashed the order of Director of Income Tax denying exemption u/s 10(23) to the assessee by holding that only when it was found that the assessee had been carrying on its activities for the purpose of profit, contrary to its objects of providing education and medical care, the prescribed authority would be justified in rejecting the application for approval of exemption u/s 10(23C)(vi) of the Act. Merely because the assessee charged fees for educational courses or that it entered into arrangements with other charitable institutions to set up satellite centres to give medical treatment etc, would not justify rejection of its application. Accordingly, it directed the Revenue to consider the petitioner's application, process it and pass necessary orders in accordance with the law.
Venu Charitable Society and Anr. Vs. Director of Income Tax (2017) 98 CCH 0100 DelHC (W.P.(C) No. 7147/2012)

526. The Court granted exemption u/s 10(10B) on VRS payment receivable by employees of Hindustan Photo Film Manufacturing company Ltd. ('HPF')] and accordingly held that the payment was not subject to TDS. It noted that HPF, a wholly owned company of the Central Government, was declared sick and a decision was taken to close down the company in 2013, and, to overcome the financial crisis of the employees, the Cabinet sanctioned the VRS package for HPF employees as a non-plan budgetary support vide Govt. notification dated March 20, 2014 and rejected the Revenue's stand that since it was a VRS package, it would fall within Sec. 10(10C)(viii) ambit and accordingly, taxable if the receipt exceeded the exempted limit, observing that the nomenclature of the package was irrelevant, but what had to be considered was the purpose for which the package has been sanctioned. It noted that the VRS package was specially designed for the benefit of HPF employees and therefore as the purpose of the Scheme was to rehabilitate the employees, the monetary benefit accruing to the employees was in the nature of compensation and it undoubtedly fell within the parameters laid down under sub-section (10B) of Section 10 of the Income Tax Act. Further, it held that the exemption was not subject to ceiling of Rs. 5 lakhs under clause (2) of the first proviso to Section 10(10B) as the compensation would fall under second proviso to Sec. 10(10B) according to which no such ceiling would apply in respect of any scheme approved by Government having regards to need for extending special protection to workmen.
Hindustan Photo Film Workers' Welfare Centre vs. UOI and others - TS-121-HC-2017(MAD) - WP.Nos.18566, 18788, 18608 to 18610, 18789 of 2015 dated 17.03.2017

527. Where pursuant to closure of a Government company, Central Government sanctioned a scheme for payment of compensation to its employees for their rehabilitation, the Court held that since it was a severance package and not a VRS package rolled out by company itself, amount of compensation would fall within the parameters of section 10(10B) and, thus, would be exempt from deduction of tax. The Writ petition filed by the assessee was thus allowed.

Hindustan Photo Film Workers v. Governemnt of India, New Delhi - [2017] 79 taxmann.com 298 (Madras) (WP Nos. 18566, 18788, 18608 to 18610, 18789 of 2015)

528. The Court allowed Revenue's appeal against grant of exemption under section 11 on the ground that after the amendment of section 12A and introduction of section 12AA w.e.f 01.04.1997, grant of registration was a condition necessary to avail exemption under section 11 and trust and societies. Until and unless registration was granted no exemption could be claimed on the basis that application had been submitted for registration. In the present case, despite the fact that admittedly no registration certificate had been issued to Respondent till date, still exemption had been granted by authorities below. This was not consistent with requirement of Section 12A(1), as was applicable for relevant assessment year.
Maharishi Institute of Creative Intelligence U.P [(2017) 98 CCH 0012 ALLHC]

529. Where assessee, a charitable trust, made repayment of loan to its trustee, the Court held that the Assessing officer without bringing any relevant material and evidence on record, could not draw an adverse inference that it was a case of transfer of funds to trustee in violation of provisions of Section 13(1)(c). The matter was, accordingly, remanded back to the Assessing Officer for fresh adjudication.
Devi Kamal Trust Estate V. Director of Income-Tax (Exemption) , Kolkata - [2017] 79 taxmann.com 212 (Calcutta) (ITAT No. 181 of 2016)

530. The Court upheld the Tribunal's decision of allowing deduction of depreciation to the assessee Trust and dismissed the Revenue's contention that the entire cost of capital expenditure had already been allowed as deduction u/s 11 of the Act in the AYs 2006-07, 07-08 & 08-09 and that consequently allowing depreciation as expenditure would amount to double deduction. The Court observed that the income of the assessee was exempt u/s 11 and hence assessee was not claiming any deduction and thus when depreciation was claimed, assessee in effect was claiming that the depreciation should be reduced from the income for determining percentage of funds which had to be applied for the purpose of trust. It further clarified that the amendment to Section 11 by inserting sub-section (6) which provided that. 'income shall be determined without any deduction or allowance by way of depreciation' vide Finance Act (No.2) Act,2014, was prospective in nature and not applicable to the subject AYs.
Commissioner of Income Tax & Ors. Vs Seth Anandram Jaipuria Edu. Society Contonment & Ors. (2107) 98 CCH 0106 AllHC (ITA No. 102 of 2015, 94 of 2015, 41 of 2016)

531. Where the assessee was carrying out activities in relation to 'propagation of yoga' and had claimed exemption of its activities being in the nature of medical relief, education & relief to the poor, the Tribunal held that the assessee's activities qualified as providing 'medical relief 'and 'imparting of education', thus falling under the definition of charitable purpose u/s 2(15). It further held that voluntary contributions made with specific directions viz. donations received from Divya Yog Mandir Trust for construction of Patanjali Yogpeeth-II, in relation to Vanaprastha Ashram, disaster relief fund and in the University of Patanjali did not constitute the trust's income as it was to be treated as part of the corpus. Further, with respect to corpus donation received in the form of immovable property, it rejected Revenue's action of adding the market value of such property as the same did not constitute income of the assessee.
Patanjali Yogpeeth vs. ADIT TS-57-ITAT-2017(DEL) ITA No.2267/Del/2013 dated 09.02.2017

Interest / Penalty

Interest

532. The Court relying on Bombay HC ruling in the case of Rashmikant Kundalia wherein it was held that delay in filing of TDS return has a cascading effect and results in additional burden upon the department with respect to processing deductee's tax status, dismissed assessee dedcutor's writ challenging the constitutional validity of section 234E (levying mandatory fee for delay in filing TDS returns)

Sree Narayana Guru Smaraka Sangam Upper Primary School. [TS-704-HC-2016(KER)]

Penalty

533. Where the assessee had incorrectly claimed set-off of its brought forward business losses against its income based on a legal opinion received from a CA firm, The Court upheld the order of the Tribunal deleting penalty u/s 271(1)(c) wherein the Tribunal noted that there was nothing clandestine in the manner in which the opinion was sought. It held that the rejection of the patently wrong claim of the assessee of setting off of brought forward business loss in its return of income would not amount to furnishing of inaccurate particulars of income/concealment of income and would not be liable for penalty.
Atotech India Ltd. [TS-699-HC-2016(P & H)]

534. Where assessee had availed benefit of the KVVS Scheme, 1998 and paid requisite tax thereunder and where u/s 91 of the Scheme, a designated authority was empowered to grant waiver from imposition of penalty and interest in respect of income, which was subject matter of declaration, the Court held that in such a case the Revenue was wrong in levying penalty on a transaction which was subject matter of the scheme and where arrears of tax had already been settled and paid under the Scheme. Accordingly, the orders imposing penalty and interest on the Petitioner were quashed.
S.Narayanan v. Commissioner of Income Tax [2017] 80 taxmann.com (Madras) (WP No. 10791 of 2014)

535. During search operation it was found that assessee had purchased a software but assessing officer held that the assessee had infact taken bogus bills to inflate their expenditure and consequently disallowed 20% depreciation on cost of software. On CIT(A) confirming the disallowance, the assessing officer started penalty proceedings. The Tribunal noting that as no incriminating material was unearthed during search and no independent enquiry and examination had taken place during assessment proceedings and only post search enquires were made basis of entire penalty proceedings, held that penalty proceedings are independent of assessment proceedings and mere confirmation of addition could not be sole ground to levy penalty. The Assessing Officer was thus directed to delete the penalties and Assessee's appeal was, accordingly, allowed.
Chintels India Ltd vs. Assistant Commissioner of Income Tax (2017) 49 CCH 0134 DelTrib (ITA Nos. 3791,3792,3793/Del/2016)

536. The Apex Court dismissed assessee's SLP against Rajasthan HC judgment upholding the levy of penalty under section 271D for section 269SS violation, wherein the assessee (engaged in cement manufacturing) had during AYs 1992-93 and 1993-94 accepted unsecured loans from its chairman cum managing director in cash.
Chandra Cement Ltd [TS-8-SC-2017]

537. Where the assessee after realising that the travel expenditure claimed by her u/s 57 of the Act was not tenable and she could not produce evidence of such expenditure due to absence of her accountant, offered the amounts expended to be added to her income and, accordingly, paid the requisite tax and interest upon the same, the Court held that this did not amount to concealment of income or furnishing of inaccurate particulars by the assessee and accordingly dismissed the Revenue's appeal against Tribunal's judgment deleting penalty levied u/s 271(1)(c) of the Act.
Commissioner of Income Tax vs. Anita Kumaran. (2017) 98 CCH 0089 (Madras HC) T.C.(A) Nos. 139 to 141 of 2017.

538. Where the appellant-assessee engaged in shipping business debited its foreign exchange fluctuation loss arising from its Tonnage business to compute its Non Tonnage income, the Court held that there was a deliberate attempt on the part of the assessee to furnish inaccurate particulars so as to reduce its taxable income and thus the Court upheld the imposition of penalty u/s 271(1)(c) of the Act. Assessee's argument that it had made a mistake and that it had voluntarily declared the same to the assessing officer was not accepted as the so called disclosure was made by the assesse only after it received notices u/s 142(1) & 143(2) of the Act.

Samaon Maritime Ltd vs. Commissioner of Income Tax (2017) 98 CCH 0111 MumHC (ITA No. 1718 of 2014)

539. The Tribunal upheld concealment penalty u/s 271(1)(c) on the assessee company for failure to pay MAT on book profit u/s 115JB noting that the assessee had filed MAT computation despite normal income being higher in the earlier years but failed to do so in the current year. It rejected assessee's contention that it advertently lost sight of amendment which requires addition to book profit for long term capital gains exempt u/s 10(38) and also observed that the assessee did not adhere to the statutory requirements of filing Form 29B. Further, it held that it was surprising to observe that on one hand assessee accepted the error committed by it and on the other hand it had not taken any pain to revise the return and to comply with the statutory requirements of filing form 29B r.w.s. 115JB of the Act which clearly raised doubts about its bonafideness.
Indian Chronicle Ltd. vs. ITO TS-55-ITAT-2017(AHD) ITA No.1275/AHD/2012 dated 09.02.2017

540. The Tribunal held that the AO had rightly levied the concealment penalty u/s 271(1)(c) on the assessee for not disclosing income on account of director's sitting fee and short term capital gains on redemption of mutual fund in the return of income rejecting assessee's stand that he had inadvertently missed the disclosure of the two incomes. The Tribunal also held that the AO recorded detailed well-reasoned satisfaction before invoking penalty in the assessment order rejected the assessee's legal plea that notice issued u/s 274 did not specify the charge under which penalty proceedings were initiated stating that it was not the case wherein the AO had framed charge under one limb of Section 271(1)(c) of the Act and levied the penalty under second limb of Section 271(1)(c) of the Act
***Shri Mahesh Gandhi vs. ACIT TS-77-ITAT-2017 ITA No. 2976/Mum/2016dated 27.02.*2017**

541. The Tribunal, deleting the penalty u/s 271(1)(c), held that the Assessee (software engineer) had not deliberately furnished inaccurate particulars in respect of interest income. The Tribunal noted that the explanation of the Assessee was bonafide that as the Assessee was out of India and the Assessee's father who suffered stroke and thereby lost his memory had filed the return of income based on Form No.16 and that by mistake he omitted to include therein the interest on savings and fixed deposits.
Sachidanand Padgaonkar vs. ITO (2017) 49 CCH 0030 Mum Trib (ITA No. 6020/Mum/2014 dated 03.02.2017)

542. Where the assessee had filed an original return under section 139(1) of the Act and then pursuant to search proceedings conducted in its premises filed a return under section 153A(1) declaring a higher income which had been accepted by the AO, the Court held that the AO was not justified in levying penalty under section 271(1)(c) on the ground that without the search proceedings, it would not have disclosed such additional income. The Court further held that as the return filed under section 153A would render the original return under section 139 of the Act would become non est and therefore there was no concealment of income as the return filed under section 153A had been accepted by the AO.
Pr CIT v Shri Neeraj Jindal – (2017) 98 CCH 0061 Del HC – ITA 463 / 2016

Minimum Alternate Tax

543. The Tribunal held that the assessee's share of income from association of persons even though credited to Profit and Loss account was to be reduced while calculating book profits for the purpose of MAT calculation on the ground that relief under clause (iic) to explanation 1 to Sec 115JB introduced vide Finance Act 2015 was to be applied retrospectively. Observing that there was already a deduction under Explanation 1 to Section 115JB for exclusion of share of partners income credited to P&L a/c, the Tribunal held that the intention of the legislature was to provide similar remedy to share of AOP as well. Further, clarifying that the purpose of Sec 115JB was not to tax any income which is otherwise not taxable, it held that it was a settled proposition that an explanatory Act which was curative in nature or any remedial statute was brought in the statute either to remedy unintended consequence or to provide benefit which was applicable to particular

class of assessee and was extended to other class of assessee, was to be declared retrospective in operation .

Goldberg Finance Pvt. Ltd. vs. ACIT TS-45-ITAT-2017(Mum) ITA No.7496/Mum/2013 dated 19/01/2017

544. The Tribunal held that waiver of amount of loan **credited to the P/L A/c was** not be included for calculation of 'Book Profit' on the ground that surplus resulting in the books of accounts of the Assessee Company upon waiver of a loan **was** not required to be credited to the profit and loss account of the Assessee and in any case the same **could not** be treated as working result of the Assessee during the period covered by the Accounts, so as to treat it as part of the 'Book Profit' of the Assessee. The Tribunal clarified that the object of enacting of section 115J, 115JA & 115JB was never to fasten any tax liability in respect of something which was not an income at all or even if it was income but was not taxable under the normal provisions of the Act. **Further**, the provisions of section 115JB **could not** be so interpreted so as to require accounting of what in substance **was** capital in nature to the credit of the profit & loss account and get indirectly taxed **as** book profit. The Tribunal relied on the ruling of the Special Bench in the case of Sutlej Cotton Mills Ltd. (45 ITD 22). The Tribunal **further** held that waiver of interest on loan as well could not be included for the purpose of determining 'Book Profit' since it was not taxable u/s 41(1) as the Assessee had never claimed a deduction of the said interest in view of the provisions of section 43B nor was it a remission of trading liability. Further, the Tribunal clarified that waiver of interest dues was a capital surplus item and following the same analogy for waiver of loan it could not be included for determining 'Book Profit'. Also, 41(1) is a deeming fiction and the same could not be extended to section 115JB. The Tribunal further rejected the contention of the Department (that the Assessee itself had included the said amounts while computing 'Book Profits', therefore, the same cannot be tinkered with) on the ground that the Assessee had specifically given a caveat with the computation of income that out of abundant caution it had included the said amounts in 'Book Profit', that the Assessee had reserved the right to exclude the said sums and contest **the same** during the assessment proceedings.

JSW Steel Ltd. vs. ACIT [TS-76-ITAT-2017(Mum)] (ITA No. 923/Bang/2009 dated 13.01.2017)

Set off of losses

545. Where assessee ventured into the business of banking and money lending and advanced loans to various parties , without having a banking licence and the RBI asked assessee to wind up its business and permitted it to continue it only for the purpose of realization of its assets, the Court, rejected the Tribunal's view (that since during relevant AYs, assessee did not advance any loans and it continued its existence only for the purpose of winding up, its income should be considered as income from other sources) and held that the moneys received by the assessee during the relevant AYs were fruits of the activity of money lending and that since the assessee was engaged in advancing moneys in an organised manner it ought to be categorised as a business activity. Accordingly, set-off of business losses of earlier years was also allowed as deduction in the relevant A.Y.

Central Provinces Manganese Ore Company Ltd Vs CIT [TS-111-HC-2017 (BOM)] (ITR Nos. 4 to 6/02, 7/95 & 18/98) dated 08/03/2017.

Stay of demand

546. The Court taking into consideration the provisions of section 35C(2A) of the Central Excise Act, 1944 which is pari materia to section 245(2A) of the Income tax Act, relying on the decision of the Court in the case of Commissioner of Central Excise Rohtak vs M/s Voice Telesystem held that where the appeal could not be decided by tribunal due to pressure of pendency of cases and delay in disposal of appeal was not attributable to the assesseee in any manner, the interim stay would continue beyond 365 days in deserving cases.

Sun Life Service Centre Pvt. Ltd [(2017) 98 CCH 0007 PHHC]

547. The Tribunal granted stay to the assessee for AY 2013-14 beyond a period of 365 days on the ground that if the delay in disposal of the appeal was not attributable to the assessee, then, further

extension could be granted beyond one year. Further, the court observed that against the total demand of Rs 129.42 Cr including interest, assessee had already made payment of Rs 70 cr. It was also submitted that after expiry of stay in Nov 2015, the department agreed for not enforcing the demand in view of the pending appeal, however, as per letter dated 10.11.2016, the AO again forced recovery. Accordingly, the court granted extension of stay for a period of three months or till disposal of appeal whichever is earlier.
Google India Private Limited [TS-21-ITAT-2017(Bang)]

548. The AO had granted the assessee 85 percent stay of demand subject to pre-deposit of 15 percent (Rs. 63 crore) in accordance with CBDT Instruction in its office Memorandum dated 29.2.2016. The assessee filed a writ petition before the Court contending that the condition of 15 percent pre-deposit could be relaxed as 1) the AO had not considered a credit adjustment 2) license fee adjustment on account of the Apex Court ruling in the 2G spectrum case was treated as capital and 3) there was a refund due to the extent of Rs.27 crore. The Court remitted the matter to the AO to evaluate the same, pursuant to which the AO considered the issue afresh and directed the assessee to pay Rs. 203 crore, The assessee filed second writ petition wherein the Court held that once the matter was remitted to the AO, he had to confine the focus of his inquiry only and only to whether to grant relied in excess of 85 percent exemption was possible and that he could not revisit the merits of the matter. It held that the scope of remand by a higher authority limits and circumscribes the jurisdiction of the lower authority. Accordingly, it directed the assessee to deposit 15 percent demand subject to adjustment of refund.
Telenor (India) Communications Pvt Ltd – TS-124-HC-2017 (Del) - W.P.(C) 2539/2017, C.M. APPL.10957-10958/2017 dated 29.3.2017

549. The Tribunal dismissed assessee's Stay petition on collection of income tax demand as the assessee directly approached the Tribunal without exhausting alternate remedies available. Taking note of assessee's plea that since it was the end of Financial Year there was considerable pressure on the Revenue to achieve their annual revenue collection target and that it was not practical to approach all administrative authorities, the Tribunal observed that it was a harsh reality that sometimes the income tax authorities behave in such a high handed manner so as to, in effect, render the right to seek remedies against recovery of such demands nugatory and infructuous. Thus, striking a balance between procedural requirements and assessee's substantive legal rights, the Tribunal directed the assessee to approach the Pr. CIT and instructed the Pr.CIT to consider assessee's request in a judicious manner.
Sun Pharmaceutical Industries Ltd. [TS-99-ITAT-2017 (Ahd)] (S.P No. 58/Ahd/17) dated 02/03/2017.

550. The Court allowed assessee's writ by setting aside order of the Assessing Officer and the Pr. CIT refusing to stay collection of demand and directing the assesse to deposit 15% of the total disputed demand. The Court observed that in the review petition against the stay order of the AO, the Pr. CIT failed to consider whether the assessment order suffered from being unreasonably high pitched or whether any genuine hardship was likely to be caused to the assessee in case it was required to deposit 15% of the disputed demand in spite of assessee's submission that it had suffered loss from the very inception of the business. Accordingly, the Court directed Pr.CIT to re-decide the review petition filed by the assessee.
Flipkart India Private Limited [TS-97-HC-2017(KAR)] (W.P.Nos 1339-1342 of 2017) dated 23/02/2017.

Unexplained income / expenses / investments

551. The Court directed fresh investigation into Kalaignar TV's 2G matter involving Rs 200 cr 'unexplained cash credit' addition under section 68, where the assessee had submitted that it received 25 cr towards share application money from Cineyug Media Entertainment Rs. 175 cr towards inter-corporate deposits ('ICDs') from the same concern, and despite producing supporting documents, Revenue had disbelieved the same and made addition u/s 68 based on CBI investigation in 2G spectrum case; ITAT observes that lower authorities simply relied on CBI charge sheets /Enforcement Directorate report in 2G case and failed to examine the officials from Cineyug and the signatories to the share application/ICDs agreements; Similarly, ITAT observes that instead of examining the bank statements of Cineyug, AO simply relied on the assessment

done on Cineyug to hold that they had no sufficient funds for giving credits to assessee, further limited time was given to assessee for producing voluminous details. ITAT remarked that ‘‘No doubt the assessee can always say that it need not prove source of source”, however this cannot be so extrapolated to mean that source cannot be a farce. The onus is always on the assessee to show the genuineness of transactions and AO can always go into trail of transactions for accepting/rejecting claim of genuineness.
Kalaignar TV Pvt. Ltd [TS-689-ITAT-2016 (CHNY)

552. The Court upheld Tribunal’s order deleting unexplained cash credit addition u/s 68 of the Act with respect to share premium received by the assessee during A.Y 2008-09. The Court held that the assessee had satisfied the three essential tests under the pre-amended sec.68, namely genuineness of the transaction, identity and capacity of the investor. It further held that the Revenue wrongly invoked proviso to Sec.68 inserted vide Finance Act,2012 and disbelieved assessee’s justification (being future business prospects) for charging share premium as the said proviso was prospective in nature.
Gagandeep Infrastructure Pvt. Ltd. [TS-132-HC-2017 (BOM)] (ITA No. 1613 of 2014)

553. The HC of Madras set aside the writ petition on the grounds that since no opportunity was given to the assessee to explain as to how the amount stood to his credit with Indusind bank
Lakshmanan Magendrian [(2017) 98 CCH 0015 Chen HC]

554. Where the AO treated the amount received by the assessee from Singapore based viz. Biometrix Marketing Pvt. Ltd as consideration for issue of CCPS as unexplained cash credit u/s 68 and subsequently in his remand report conceded that the source of Biometrix investment was loan from ICICI bank, the Tribunal rejected the claim of the Revenue that Biometrix was a shell company and deleted the addition made in the hands of the assessee. It further held that the subsequent sale of CCPS by Biometrix at lower than market value disclosed to ICICI Bank was not relevant for determining source, nature and genuineness of transaction.
Dy.CIT vs. Reliance Utilities Ltd. TS-41-ITAT-2017(Mum) ITA No.223 & 224/Mum/2016 dated 03.02.2017

555. The Court, upholding the order of the Tribunal, upheld the order of the Commissioner u/s 263 directing the AO to carry out thorough and detailed enquiry about the various layers through which the share capital had been rotated to the Assessee (source of source), even without going into the question as to the retroactivity of the proviso to section 68 inserted by Finance Act 2012. The Court followed the decision of the division bench in the case of Rajmandir Estrate Pvt. Ltd. vs. PCIT (GA No. 509 of 2016) wherein the Court rejected the argument of the Assesse that no further enquiry is required as the sum was received on capital account and held that the unamended section 68 of was wide enough and the AO was not precluded from making enquiries as to the true nature and source even if the sum was credited share application money. The Court further held that though the Tribunal had decided that proviso to section 68 is retrospective in nature and held against the Assessee the said question need not be decided upon in view of the division bench decision of Rajmandir Estate.
Pragati Financial Management Pvt. Ltd. & Ors. vs. CIT (2017) 98 CCH 0109 – Cal HC (ITA No. 178 of 2016 dated March 7, 2017)

556. The Tribunal upheld addition u/s 68 made in the hands of the assessee-company with respect to unexplained share application money. The Tribunal rejected assessee’s claim that it had discharged the initial burden cast upon it u/s 68 by providing name and addresses of share applicants, on the ground that the assessee received cheques from the same cheque book which was impossible seeing that there were different applicants residing in different villages. Also the fact that the alleged share applicants who were agriculturists were not going to derive any benefits in the future by appreciation in the market value of shares of an unlisted company, made it clear that the said money was nothing but the unaccounted income of the assessee.
Deepak Petrochem Ltd. [TS-101-ITAT-2017 (Ahd)] (ITA No: 739/AHD/2011) dated 02/03/2017

557. The Court, reversing the Tribunal's order, upheld addition u/s 68 made in the hands of the assessee-company with respect to unexplained credits from its sister concern in Nepal. The Court observed that the three conditions required to be established by the assessee u/s 68 viz i) the identity of the creditor ii) genuineness of the transactions and iii) credit worthiness of the creditor were not examined by the Tribunal and that the Tribunal had erroneously assumed that the assessee had produced audited accounts (where it actually had not). Further, it held that the mere fact that the transactions were routed through a bank account was not conclusive proof of the genuineness of a transaction and the Tribunal was not correct in concluding so. Thus the Court concluded that the Tribunal erroneously deleted addition u/s 68 by putting the burden of proof entirely on the Revenue.
Universal Empire Educational Society [TS-104-HC-2017 (KER)] (ITA No. 104 of 2013) dated 25/01/2017.

Miscellaneous

558. The Apex court dismissed petition filed by Shanti Bhusan & Prashant Bhushan, seeking constitution of special investigation team to direct investigation of the alleged incriminating material seized in CBI/Tax departments raid conducted on Birla & Sahara group of companies on the ground that entries in loose papers/sheets were irrelevant and not admissible. Further, **it held that** entries in books of accounts alone would not constitute sufficient evidence to implicate a person since the same was only corroborative evidence.
Common Cause (A Registered Society) [TS-22-SC 2017]

559. The Court allowed assessee's writ and sets-aside Chief Commissioner's order refusing to consider assessee's compounding application u/s 279(2) filed pursuant to prosecution launched u/s 276B for failure to deposit TDS amount deducted from contractor payments. Noting that the assessee's compounding application was rejected by Revenue on the ground that compounding was not permissible in view of CBDT guidelines of 2014, considering the ongoing CBI investigations of the assessee, the Court held that the power to grant or refuse compounding was essentially discretionary. Considering that the assessee was faced with genuine difficulties (i.e seizure of books of accounts and documents etc. by CBI) which prevented assessee from making necessary TDS payment, the Court directed the Chief Commissioner to consider assessee's application in light of relevant facts.
Sport Infratech pvt Ltd [TS-25-HC-2017(Del)]

560. Where, during the relevant year, the Assessee-Trust, settled by IL&FS Trust Co. Ltd, filed its return of income declaring total income at Nil, showing interest income of Rs. 21,49,72,486/-, from Yes Bank on behalf of 7 mutual funds to whom it had issued pass through certificates which was disclosed under the head "other income" and also reflected a deduction of the same amount on account of Distribution to the mutual funds / Beneficiaries and the AO sought to bring this interest income to tax in the Assessee's hands contending that the Assessee was not a genuine Trust as the contributor and the beneficiaries were the same, hence Sec 160/161(1) was not applicable & 2) Assessee's activity was in the nature of business and therefore Sec 161(1A) was attracted, pursuant to which Assessee was assessable as AOP and taxed at maximum marginal rate, the Tribunal held that the Assessee was a valid trust as all the necessary ingredients for the formation and existence of the trust were fulfilled and further the securitization process was carried out in accordance with RBI Guidelines. It also accepted the contention of the Assessee that interest received from Yes Bank was for and on behalf of the MFs [whose income is exempt u/s 10(23D)] and hence was not chargeable to tax in Assessee's hands in terms of provisions of Sec 160(1)(iv)/161(1) which was applicable to a trustee as a representative Assessee. Further noting that the Assessee-Trust was a revocable Trust, it held that the income would be taxed in the hands of the beneficiaries, i.e. MFs who purchased PTCs from the Assessee Trust and further that irrespective of whether the Assessee was regarded as a 'Trust' or an 'AOP', the doctrine of "diversion at source by overriding title" would apply so as to render the amount not taxable as Assessee's income as even before the money was to flow to the Assessee, it was always clearly intended to be passed on to and only to the beneficiaries, i.e., the PTC holders in proportion to their interest in the receivables (underlying assets). Accordingly, it ruled in favour of the Assessee.

Indian Corporate Loan Securitisation vs. ITO [TS-71-ITAT-2017(Mum)] (ITA No. 3986/Mum/2013 dated 17.02.2017)

561. Where the AO, pursuant to search proceedings conducted in the premises of the assessee and its group concerns, concluded that the payments by the assessee and other concerns to its other group concern viz. M/s Swastic Corporation as commission was sham, the Court noting that the assessee had explained that the group had streamlined its activities and appointed Swastic Corporation Ltd as the sole selling agent for the group and had provided several communications to establish that the customers had placed orders on Swastic Corporation, held that the AO was unjustified in making a disallowance of the payments. It held that the AO had merely proceeded on the basis of suspicion and had not brought any material on record to prove that the transaction was in fact sham.
CIT v L Parameswari – (2017) 98 CCH 0073 Chen HC – TCA Nos 700, 701, 702

562. The Court allowing assessee-company's writ, directed the Revenue to grant credit of advance tax paid and TDS deducted against the tax payable under the Income Declaration Scheme, 2016 (IDS). The Court accepted that IDS had to be interpreted on a stand-alone basis but held that there was nothing in the IDS Scheme which provided that such past amounts were not to be reckoned for the purpose of payments under IDS.
Kumudam Publications (P.) Ltd. V. Central Board of Direct Taxes [2017] 79 taxmann.com 466 (Delhi) (WP (C) No. 11216 of 2016)