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

(Pronounced in November & December 2016)

By Sunil Moti Lala, Advocate

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I. *Transfer Pricing*

a. *International transactions/ Associated Enterprise*

International transactions

1. The Tribunal held that where business relations between assessee and entities were so insignificant that export sales made to them were less than 5 per cent of its entire sales and there was no element of de facto control they could not be treated as AEs under section 92A.
Orchid Pharma Ltd. vs.DCIT [2016] 76 taxmann.com 63 (Chennai - Trib.) (IT APPEAL NO. 771 (CHENNAI) OF 2016)

2. The Tribunal remitted the issue relating to existence of international transaction of AMP expenses incurred by the assessee to the file of the TPO for fresh consideration considering the assessee's reliance on the decision of the Court in Maruti Suzuki which was not available before the TPO. It held that if the existence of international transaction was not proved, no TP addition would be called for, however, in case of existence of international transaction, the TPO must determine ALP in light of the relevant decisions of the Court on this issue. It directed the TPO to correctly classify the nature of expenditure and to exclude expenses directly incurred in connection with sales not leading to brand promotion and rejected the use of the Bright Line Test.
Bacardi India Pvt Ltd – TS-1052-ITAT-2016 (Del) - TP

3. The Tribunal 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 is an international transaction noting that the assessee incurred the expenditure for the promotion of brand Nike and the agreement between assessee and AE acknowledged that BCCI Agreement would provide suitable benefit for Nike brands in the territory. The payment of 50% of the cost paid to the BCCI born by the AE of the assessee is under conscious understanding and agreement between the parties to promote and enhance the brand value of NIKE which belongs to the AE of the assessee, because, as per Section 92B 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. 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]

Associated Enterprise

4. The Tribunal set aside the TPO's order holding the assessee and its overseas Distribution Partners ('DPs') as deemed associated enterprises in terms of Section 92A(2)(i) and deleted the consequent TP adjustment made by the TPO. It noted that the TPO had relied on the Income-tax Settlement Commission order in the assessee's own case to conclude that the assessee's overseas DPs would constitute its deemed AE on the ground that the DPs had an influence over the final sale price of the assessee's product sold through relevant distribution channels and that the assessee was entitled to get cost of goods sold plus 25 / 50 percent share in profit through distribution channels. The Tribunal observed that the sales to DP were less than 5 percent of the total exports and 6 percent of total sales and held that the scale of commercial relationship was no insignificant vis-à-vis the assessee's total business that there was no participation in control by one enterprise over the other so as to satisfy the mandate of Section 92A(1). It held that even though conditions under section 92A(2)(i) were fulfilled, in the absence of satisfaction of conditions set out in Section 92A(1) viz. participation in capital, management or control, the assessee and the DPs could not be treated as AEs. It held that control as stipulated under section 92A had to mean a dominant influence which leads to de facto control over the other enterprise rather than an influence simplictor as the liberal interpretation would lead to a situation where all transactions with negotiated prices would be hit by the provisions of Section 92A(2)(i).

Orchid Pharma v DCIT – TS-943-ITAT-2016 (Chny) – TP

5. The Tribunal held that in the case of public sector companies, even as all or majority of the shareholdings may be 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 [13/127/6-CL-VI and 1/1/76-LC-V] dated 19-5-1976 issued by the Ministry of Corporate Affiars clarified that for the purpose of section 370, 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 the Government 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 are to be treated as Associated Enterprise, the inter se transactions between all the public sector undertakings will be subject to arm's length price determination-something which is 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

b. ***Most Appropriate Method***

Comparable Uncontrolled Price Method

6. The Tribunal upheld the TPOs adoption of the CUP method over TNMM for benchmarking the stock broking services rendered by the assessee to its AE with respect to Clearing House Trades considering the high degree of comparability between the assessee and top 10 FII customers selected by the TPO as comparables. It held that since the terms and conditions of clearing house trade for the assessee and the FIIs were the same, there was no justification in adopting any other method.
RBS Equities India Ltd – TS-1020-ITAT-2016 (Mum) – TP

7. The Tribunal deleted the transfer pricing adjustment made on interest free advances given by assessee to its wholly owned subsidiary in USA whose capital stood completely eroded and who was suffering continuous losses, on the ground that finding a comparable uncontrolled transaction under the CUP method applied by the TPO by considering LIBOR plus rate for Exim loan as ALP for such a transaction was not practical or feasible CUP method. It further held that the question of benchmarking this transaction applying any of the methodology prescribed in Sec 92C(1) did not arise at all.
Ucal Fuel Systems Ltd [TS-930-ITAT-2016(CHNY)-TP] (I.T.A.No.688/Mds/2014, 723, 724 &725/Mds/2015)

8. The Tribunal upheld CUP Method adopted by TPO/DRP in preference to TNMM adopted by the assessee for benchmarking assessee's exports of various types of sewing threads to its AEs situated in 63 countries based on its decision in earlier years and agreed with the DRP finding that since assessee was catering to Asian countries, there was not much geographical difference between supplies made by it to AEs and Non-AEs.
Madura Coats Private Limited [TS-932-ITAT-2016(CHNY)-TP] (I.T.A. No.770/Mds/2014)

Resale Price Method

9. The Tribunal, relying on the order of the co-ordinate bench in the assessee;s own case for the subsequent year, deleted the TP adjustment made in respect of import of Liquefied Natural Gas by the assessee from its foreign AE and upheld the use of Resale Price Method as most appropriate method over the Revenue's adoption of CUP. It held that the TPO was incorrect in adopting the CUP method and comparing the price at which the assessee purchased LNG with the crude oil prices / Henry Hub Prices prevalent in the USA open market since the LNG was not purchased and sold in the open market by the assessee. Accordingly, it held that the assessee

was justified in using the RPM by adopting the gross profit margin per million British thermal unit, as the PLI and comparing the same with 2 comparable companies viz. Petronet LNG and Gas Authority of India Ltd.
Hazira LNG Pvt Ltd – TS-1053-ITAT-2016 (Ahd) - TP

Transactional Net Margin Method

10. The Tribunal allowed the assessee's appeal and held that the TNMM and not the CUP method (originally selected by assessee) was the most appropriate method for benchmarking the sale of engineering goods to AE in view of differences in products, market conditions, geographical features etc. It held that the requirement of law was that the most appropriate method suitable for determining ALP was to be adopted irrespective of the fact that the assessee had originally selected the CUP method in its transfer pricing study.
Euroflex Transmissions India P Ltd v ACIT – TS-958-ITAT-2016 (Hyd) - TP

11. The Tribunal held that where the sales made to Non-AEs was merely Rs.34 crore as compared to the sale to AEs viz. Rs.235 crore, the internal TNMM was not the most appropriate method since the sales to non-AEs was insignificant. It therefore upheld the use of external comparables for the purpose of benchmarking the international transactions of the assessee with its AEs.
FCI OEN Connectors Ltd v ACIT – (2016) 48 CCH 0295 Cochin Trib – ITA No 70 / Coch / 2016

12. Where the TPO for the succeeding assessment years viz. AY 2010-11 and AY 2012-13 had accepted TNMM as the most appropriate method to benchmark the assessee's international transaction but sought to apply the Cost Plus Method in the relevant year, the Tribunal held that since the TPO had accepted TNMM in the subsequent years, TNMM ought to have been accepted in the relevant year as well. Accordingly, it remitted the issue to the file of the TPO to benchmark the transactions applying TNMM.
GE BE Pvt Ltd – TS-916-ITAT-2016 (Bang) - TP

13. The Tribunal upheld TNMM, adopted by the assessee, as the most appropriate method for benchmarking the international transactions entered into by the assessee viz. payment of R&D and management fee, as opposed to the CUP method adopted by the TPO. It noted that the respective fees were paid on a cost-plus basis for which the AE had allocated costs to the assessee based on the ratio of head counts and sales which was rejected by the TPO on the ground that the method of allocation was skewed and unreasonable. It held that the transactions undertaken by the assessee was not purely independent transactions amenable to an independent analysis and in fact they were interconnected / closely linked with the rest of the transactions undertaken by the assessee and therefore upheld the application of TNMM. It further observed that the TPO was unable to identify a single uncontrolled comparable for benchmarking these transactions and accordingly held that the assessee could not be faulted in insisting that the TNMM method was to be accepted. Noting that the lower authorities having rejected TNMM had not verified the functional profile of the comparables selected by the assessee in its TP study, the Tribunal remitted the issue to the file of the TPO.
Durr India Pvt Ltd v ACIT – TS-1056-ITAT-2016 (Chny) - TP

14. The Court held that where the TPO had accepted the TNMM as the most appropriate method for all the international transactions, it was not open for him to subject only one element viz. the technical assistance fee paid by the assessee to its AE to an entirely different method – CUP. Accordingly, it directed the AO / TPO to apply the TNMM in respect of technical payment fee as well.
Magneti Marelli Powertrain India Pvt Ltd [TS-869-HC-2016(DEL)-TP] (ITA 350/2014)

General

15. The Tribunal held that it is the duty of the CIT(A) to examine the most appropriate method for determination of the ALP particularly when the assessee itself had challenged the method adopted by it in its TP study.
Euroflex Transmissions India P Ltd v ACIT – TS-958-ITAT-2016 (Hyd) - TP

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

Engineering Services

16. The Tribunal held that Mahindra Consulting Engineering Ltd engaged in providing engineering consultancy and other services were broadly comparable to the assessee engaged in providing engineering and allied services as well as support services for plant commissioning and therefore dismissed the plea of the assessee seeking for exclusion of the said company. It held that strict product or service similarity was not required under TNMM.
Further, it held that where the assessee failed to provide the annual report for 2 companies (viz.Desein Pvt Ltd and Blue Star Design and Engineering Ltd), the same were rightly excluded as comparable by the DRP / AO.
Saipem India Projects Ltd v DCIT – TS-974-ITAT-2016 (Chny) - TP

17. The Tribunal held that a company excluded as comparable on account of extra-ordinary event 2 years prior could not be excluded on the same ground in the year under review and therefore dismissed the assessee's reliance on the order of the Tribunal excluding the company 2 years prior. However, it noted that since the Tribunal in the said case did not adjudicate on merits, the issue of comparability of the company was to be remitted to the file of the TPO.
Further, it directed the TPO to consider the relevant segmental results of a comparable (viz. KLG Systel Ltd) as against the entity wide results while benchmarking the engineering services of the assessee.
General Motors India Pvt Ltd v JCIT – TS-939-ITAT-2016 (Ahd) - TP

ITES Sector / Software Development Services

18. The Tribunal held that the assessee, engaged in providing research and development support services to its AE could not be compared to Celestial Labs Ltd as the said company was engaged in the development of software products which was not functionally comparable to the assessee. Further, it held that the TCG Lifesciencs Ltd could not be considered as comparable since more than 35 percent of its revenues were derived from the sale of chemical compounds which was not comparable to the tested activities of the assessee.
Evonik Degussa India Pvt Ltd v DCIT – TS-936-ITAT-2016 (Mum) - TP

19. The Tribunal admitted assessee's additional ground for inclusion of two companies in the list of comparables for benchmarking the provision of IT enabled services by the assessee to its AEs. Noting that the assessee had submitted the additional ground before the Tribunal before the first time without producing it before the TPO it remitted the entire issue to the AO for examining inclusion or otherwise of the two comparables in accordance with the settled principles of comparability. It also directed the assessee to justify why these companies were not included in its TP Study originally.
Validor Capital India Pvt Ltd – TS-1050-ITAT-2016 (Del) - TP

20. The Tribunal held that the assessee a software developer exclusively engaged in gaming software development could not be compared with general software developers or service providers as the services it provided were unique in terms of technical manpower utilization etc. However, it rejected the assessee's claim for inclusion of international comparables and held that the TPO could only complete the transfer pricing study / scrutiny based on information available domestically as he could not call for information from international comparables.
Further, the Tribunal relying on the decision of the co-ordinate bench in Hyundai Motors Engineering Pvt Ltd accepted the application of the turnover filter and held that the size of an organization is an important factor while determining comparability and held that large business

have the benefit of economies of scale and therefore could not be compared to the smaller businesses.

Additionally, it rejected the assessee's contention seeking for exclusion of companies merely on the ground that they had a long business standing as compared to the assessee who was in its second year of operation.

Gameloft Software Pvt Ltd v DCIT – TS-972-ITAT-2016 (Hyd) - TP

21. The Tribunal characterized the services rendered by the assessee under the 'Research and Information services' segment as KPO services involving huge expertise and skills and rejected the assessee's plea that the services were BPO services, observing that the role of the assessee was to carry out research from internet based databases to compile data which was further customized in accordance with requirements and then organized into templates in Excel, Powerpoint etc and then transmitted outside India. Accordingly, it held that the assessee was making value addition to the data before exporting it. Further, it noted that deduction under section 10A of the Act was granted for the prior assessment year on the basis of the assessee's claim that it was making great value addition to the data before exporting it and that it could not switch back to contend that it was simply collecting data from databases before sending it to its group companies. Accordingly, it excluded 4 functionally dissimilar companies (viz. Aditya Birla Capital Advisors Pvt Ltd, Birla Sun Life Asset Management Co Ltd, ICRA Ltd and Ladderup Corporate Advisory Pvt Ltd) based on the aforesaid characterization.

    Further, it rejected the Revenue's argument for exclusion of 2 companies (viz. ICRA Management Consulting Ltd and IDC (India) Ltd) chosen by the TPO himself and held that once the TPO expressly accepted a company with low margin as comparable after due application of mind, then the DR could not be allowed to contend that the the TPO fell in error in accepting such comparability.

    With regard to the ITES segment, the Tribunal noted that there was an apparent conflict in the nature of services claimed by the assessee and what was prima facie coming out from record and therefore in the absence of material, it remitted the matter to the AO / TPO.

    McKinsey Knowledge Centre Pvt Ltd – TS-997-ITAT-2016 (Del) - TP

22. The Tribunal held that a company having a different financial year end viz. January to December as compared to the assessee viz. April to March could be selected as a comparable if the data for the financial year could be compiled from its audited accounts, considering the fact that it was functionally similar to the assessee. Accordingly, it directed the assessee to furnish the compiled data to the TPO for due verification.

    Further it held that companies having a low turnover of Rs.1 crore could not be compared to the assessee who had a turnover of Rs.317 crore and that companies developing and owning its own unique web based software by which they provided niche services to its customers could not be compared to the assessee who did not have any intangibles of its own.

    RR Donnelley India Outsource Pvt Ltd v DCIT – TS-956-ITAT-2016 (Chny) – TP

23. The Tribunal held that Fortune Infotech Ltd, Tricom India Ltd and Ultramarine & Pigments Ltd were to be excluded as comparable as they had extraordinary circumstances and abnormal trading results and were functionally dissimilar to the assessee who was engaged in providing IT enabled services. Further, it remitted the comparability of Goldstone Teleservices Ltd to the TPO directing him to determine whether the company had export turnover in excess of 25 percent of total turnover.

    It further held that Vishal Information Technologies and Allsec Technologies were to be excluded as comparable as they had a different business model of outsourcing most of its work and were loss making, respectively.

    Sutherland Healthcare Solutions Ltd v ITO – TS-947-ITAT-2016 (Hyd) – TP

24. The Tribunal allowed the assessee's appeal and directed exclusion of the four companies viz. Accentia Technologies, Eclerx Services Ltd, Infosys BPO Ltd and Cosmic Global Ltd from from the list of comparables on the ground of functional dissimilarities by relying on the decision of the Tribunal in e4e Business Solutions India, noting that the assessee and e4e Business Solutions performed similar functions i.e. BPO services.

Flextronics Technologies India Pvt Ltd v DCIT – TS-982-ITAT-2016 (Bang) - TP

25. The Tribunal held that the assessee, engaged in providing software development services to its AE and having a turnover of Rs.100 crore could not be compared to companies such as (i) Infosys Technologies Ltd having a turnover of Rs.20,000 crore since there was a substantial disparity in scale of operation, (ii) Kals Information System Ltd as the company was engaged in the sale of software products and therefore functionally different and (iii) Bodhtree Consulting Ltd on account of functional dissimilarity since it was engaged in providing software development, ITES and Sales Support Services to its AE. It held that SIP Technologies could not be excluded as comparable on the ground of persistent losses as it had earned a profit in one out of the last 3 years.

As regards the design engineering services provided by the assessee to its AE, the Tribunal held that (i) Coral Hubs could not be considered as comparable as the said company was engaged in e-publishing and therefore not functionally comparable, (ii) Cosmic Global being functionally different as it outsourced substantial operations could not be considered as comparable and (iii) Geneys International Corporation Ltd, engaged in the business of providing Geospatial Services could not be compared to the assessee.

John Deere India Pvt Ltd v DCIT – TS-927-ITAT-2016 (Pun) - TP

26. The Tribunal held that where the TPO proposed to apply the 75 percent services revenue filter, he was to apply it on the segmental results of the comparables as opposed to the entity level results. Accordingly, it remitted the issue to the file of the TPO and directed him to collect information from comparables and adopt the said filter with segmental information.

Palred Technologies Ltd – TS-981-ITAT-2016 (Hyd) - TP

27. The Tribunal held that E-Infochips Ltd was not comparable to the assessee, engaged in providing software development services to its AE, as apart from providing software development services it was also engaged in selling software products and the said company did not have relevant segmental data to facilitate comparison. Further, as regards Infosys Technologies Ltd, it held that since neither the TPO nor the assessee had applied the turnover filter during the search process, the said company could not be excluded on this basis as it would be inappropriate to apply the filter to a particular comparable without applying it across the entire spectrum of comparables. However, it held that the said company was also engaged in the production of software products and had a brand image incomparable to the assessee and therefore could not be compared to the assessee, a captive service provider. It further excluded Wipro Technologies Services Ltd on account of the related party transactions of the said comparable.

Ness Technologies India Pvt Ltd – TS-953-ITAT-2016 (Mum) - TP

28. Relying on the order of the co-ordinate bench for the prior year, the Tribunal remitted the issue of comparability to the file of the DRP with the following observations:

- Companies with extra-ordinary events such as merger / demerger etc impacting the financial results could not be treated as comparable
- Companies which were functionally dissimilar to the assessee engaged in providing IT enabled services to its AE, could not be taken as comparable
- Companies having outsourced its activity and acting merely as an intermediary could not be considered as comparable
- Companies whose directors were involved in fraud could not be taken as comparable as their financials would not be reliable

Equant Solutions India Pvt Ltd v DCIT – TS-975-ITAT-2016 (Del) - TP

29. The Tribunal held that the assessee, engaged in the business of software development could not be compared to (i) Bodhtree Consulting Ltd due to its erratic margins and growth over the years, (ii) Exensys Software Solutions Ltd as it operated in 3 business segments – software services, BPO services and software product development, (iii) Sankhya Infotech Ltd as it was functionally dissimilar, (iv) Foursoft Ltd as it was engaged in product development and owned its own products, (v) Tata Elxsi Ltd as its range of activities was substantially different, (vi) Infosys Technology Ltd on account of high turnover and brand name and (vii) Flextronics as it was also

selling software products (viii) Satyam Computers Ltd on account of non-reliability of financial data and (ix) Igate Global Solutions Ltd and L&T Infotech Ltd since the turnover of these companies (Rs. 405 crore and Rs.562 crore, respectively) was beyond the range of ten times the turnover of the assessee – Rs. 6.56 crore.

ACI Worldwide Solutions P Ltd – TS-984-ITAT-2016 (Bang) - TP

30. The Tribunal held that the assessee, providing medical transcription services viz. purely ITES services, could not be compared to companies such as Wipro BPO Ltd having high brand value, goodwill and high turnover. Further it held that companies not satisfying the export turnover to total turnover filter of 25 percent could not be considered as comparable as the conditions prevailing in the export and domestic market were different. It also held that Allsec Technologies Ltd and Mercury Outsourcing Ltd could not be excluded merely on the ground of abnormal profits / losses unless there was some evidence to show that the same was earned / incurred due to some special reasons.

It further held that Tricom India Ltd was to be considered as comparable as its annual report clearly indicated that it was wholly engaged in ITES and BPO services and there was no material on record to support the contention of the Revenue that the said company was engaged in software development. The Tribunal included Mapro Industries Ltd and Cosmic Global as comparable and held that it could not be excluded merely because it was loss making since it was not persistently loss making.

Acusis Software India Pvt Ltd v ITO – TS-940-ITAT-2016 (Bang) - TP

31. With respect to the IT segment and software services of the assessee, the Tribunal held that Accel Transmatics Ltd could not be considered as comparable since it had Related Party Transactions at 19.29 percent of its total transactions and its turnover was less than 1/10 of the assessee's turnover coupled with the fact that the company was not a pure software development service company as it was also engaged in 2D / 3D animation services. It also excluded 13 companies on the ground of functional differences and turnover filter. It also remitted the comparability of Megasoft Ltd to the file of the TPO to re-examine the RPT filter of the said company as the assessee claimed that its RPT filter was 20.33 percent i.e. in excess of the 15 percent filter applied by the TPO.

With regards to the ITES segment, the Tribunal excluded companies on account of extra-ordinary events during the year, RPT to total transactions filter exceeding 15 percent, companies having different financial year ending, companies functionally dissimilar to the assessee, companies under serious indictment in fraud cases, companies having low employee costs and outsourcing majority of its activities. Further, it rejected the assessee's contention to exclude a comparable on the basis of its RPT which was marginally higher than the benchmark of 15 percent viz. 15.72 percent.

Tesco Hindustan Service Centre Pvt Ltd v DCIT – TS-996-ITAT-2016 (Bang) - TP

32. The Tribunal allowed the assessee's appeal for exclusion of certain comparables selected by the TPO in respect of its IT and ITES segments and directed the exclusion of comparables (viz. Asit C Mehta Financial Services Ltd, Cosmic Global Ltd, Datamatics Financial Services Ltd, Infosys BPO Ltd, Wipro Ltd for the ITES segment and Accentia Tech Ltd, Acropetal Tech Ltd, Aditya Birla Minacs Worldwide Ltd, Crossdomain Solutions Ltd, Spanco Ltd and Allsec Tech Ltd for IT segment) having turnover of either less than 1/10th or more than 10 times the turnover of the assessee, following the decision of the Tribunal in McAfee Software India. Further, it excluded 4 comparables (viz. Persistent Systems Ltd, Quintegra Solutions Ltd, Tata Elxsi Ltd and Thirdware Solutions Ltd) in the IT segment and 5 comparables (Coral Hubs Ltd, Crossdomain Solutions Ltd, Eclerx Services Ltd, Genesys International Corpn Ltd and Mold Tek Technologies Ltd) in the ITES segment on functional dissimilarities vis-à-vis the assessee.

Tesco Hindustan Service Centre Pvt Ltd v DCIT – TS-985-ITAT-2016 (Bang) - TP

33. The Court admitted the Revenue's appeal against the order of the Tribunal wherein EDCIL India Ltd was accepted as a comparable to the assessee merely on the basis that it had been considered comparable in earlier years. However, it refused to interfere with the Tribunals

inclusion of ICRA Management Consulting Services Ltd observing that the Tribunal had accepted this comparable on examination of its functional profile.
Lloys TSB Global Services Pvt Ltd – TS-992-HC-2016 (Bom) - TP

34. The Tribunal held that Geodesic Information Systems Ltd could not be considered as a valid comparable as the said company was also engaged in the development of software product which led to an abnormal increase in income viz. 89 percent and in profits viz. 249 percent. Further, IT Micro Systems (India) ltd was excluded as comparable as it provided software development services and was also engaged in the hotel business. Further, Fortune Infotech Ltd was excluded as the said company was providing web centric application whereas the assessee was operating purely on IT services provided to its AE therefore functionally incomparable.
The Tribunal excluded 4 companies viz. Dynacons Systems & Solutions Ltd, Online Media Solutions, KCC Software Ltd and Bangalore Softsell Ltd as comparable since they had a low margin of below 5 percent as compared to the margin of the assessee viz. 27.94 percent.
Further, applying a turnover filter of Rs. 1 crore to Rs.25 crore, dismissed the contention of the Revenue for exclusion of Star Infotech Ltd on the basis that its turnover was Rs.22.9 crore as compared to that of the assessee viz. 7.66 crore. It also held that where the annual reports of a comparable for the year under review was duly furnished by the assessee, the Revenue was incorrect in seeking for its exclusion on the ground of non-availability of financials.
J&B Software India P Ltd v ACIT – TS-978-ITAT-2016 (Chny) - TP

35. The Tribunal relying on precedents held that R Systems International Ltd, being functionally comparable to the assessee could not be excluded as a comparable merely because it followed a different financial year compared to the assessee and that the data for the relevant year should be deduced and considered for determining the margin. Further it held that Ultramarine and Pigments Ltd could not be excluded as comparable on the ground that it did not satisfy the services income filter of 75 percent where the assessee had only considered the segmental data for ITES services. It excluded Accentia Technologies as comparable on the ground that it was a software product company which provided Software as a Service model to its clients including both software and hardware products without segmental data and that the said company possessed brand value and had undergone various amalgamations and acquisitions during the year.
It further excluded Fortune Infotech Ltd on the ground that the said company used web based software, unique technology and technical know-how imported from its business partner for providing services and therefore was not functionally comparable to the assessee engaged in providing back office outsourcing services to its AE.
Business Process Outsourcing (India) Pvt Ltd v ACIT – TS-925-ITAT-2016

36. The Tribunal held that the assessee, engaged in providing software development and testing services to its AE as a captive service provider could not be compared to (i) Bodhtree Consulting Ltd as the said company had erratic margins and growth as well as fluctuating salary cost ratio, (ii) Exensys Software Solutions Ltd as the company had abnormal profits and had undergone amalgamation during the year, (iii) Sankhya Ltd as it was also engaged in software products and training and (iv) Thirdware Solutions as it was engaged in product development.
Further, it excluded 5 companies as comparable since their turnover exceeded 10 times the assessee's turnover.
DCIT v Cypress Semiconductors Technology India Pvt Ltd – TS-1009-ITAT-2016 (Bang) - TP

37. The Tribunal admitted the additional ground of appeal raised by the assessee, engaged in the business of development and export of software as well as provision of IT services to its AE, for the exclusion of Kals Info Systems Ltd and Mega Soft Ltd which were initially selected by the assessee itself holding that there was no hurdle in admitting the additional ground. It excluded Infosys Technologies Ltd as comparable on the ground that the company earned huge revenues from software product development, it owned IPRs and was not a pure software service provider. Kals Systems was excluded as the company was engaged in development of software products and hence not comparable. Further, Persistent Systems Ltd and Tata Elsxi Ltd were excluded as comparable as the companies were engaged in product development. As regards, Megasoft

Ltd, the Tribunal relied on the earlier years order and included the same as comparable directing the TPO to correct the margin of the said company.
Broadcom India Pvt Ltd – TS-1010-ITAT-2016 (Bang) - TP

38. The Tribunal dismissed the appeal of the Revenue and upheld the exclusion of ICRA Techno Analytics Ltd, Persistent Systems Ltd and Infosys Ltd as they were functionally dissimilar owing to diversified activities, outsourcing of services and having high brand value / owning intangibles, respectively.
Further, it allowed the appeal of the assessee, a pure software development service provider and excluded (i) Kals Information Systems Ltd since the company was engaged in development of software products as well as software services and no segmental details were available (ii) Tata Elxsi Ltd since the said company's software development segment included diversified activities not comparable to the assessee..
It also rejected the plea of the assessee for the inclusion of Akshay Software Technologies Ltd and held that the DRP had rightly excluded the same from the list of comparables since it was engaged in onsite development of software which would result in different assets and risk profile.
CGI Information System & Management Consultant Pvt Ltd – TS-1016-ITAT-2016 (Bang) - TP

39. The Tribunal held that the assessee engaged in the business of developing, testing, customizing and maintaining high quality software could not be compared to the following:
- Companies earning revenue from software services as well as software products, not having segmental details
- Companies engaged in clinical research and manufacture of bio products, being functionally dissimilar
- Companies functionally different, being engaged in developing software products along with providing software development services
- Companies rendering product development services and high end technical services which come under the category of KPO services
- Companies engaged in the sale of software products / niche products
- Companies engaged in product engineering services
- Companies outsourcing work and therefore not satisfying the 25 percent employee cost filter
- Companies having turnover in excess of Rs. 200 crore.

Sharp Software Development India Pvt Ltd v DCIT – TS-987-ITAT-2016 (Bang) - TP

40. The Tribunal held that Accentia Technologies Ltd could not be considered as a comparable to the assessee as it was engaged in diversified KPO activities without segmental information and more so since it had undergone extra-ordinary events during the year (acquisition) which had led to an abnormal growth in profits.
It dismissed the contention of the assessee for the exclusion of Eclerx Services Ltd and held that the services provided by the assessee and Eclerx were similar in nature and supernormal profits could not be a basis for exclusion of a comparable.
As regards Microland Ltd and CSS Technology Ltd it held that the said comparable was rightly excluded by the DRP considering the fact that its turnover from ITES activities was extremely small as compared to the assessee.
Further, it held that R Systems International Ltd could not be excluded as comparable merely because of difference in financial year ending and held that it should have been accepted as a comparable since the results for the relevant financial year could be reasonably extrapolated from the data available on record.
Hyundai Motor Engineering Pvt Ltd v ITO – (2016) 48 CCH 0277 (Hyd-Trib) – ITA No 128 / Hyd 2016 & ITA No 216 / Hyd / 2016

41. The Tribunal held that the assessee, engaged in providing IT and ITES to its AEs could not be compared to (i) Mold Tek Technologies Ltd which was functionally different as it was engaged in providing engineering design services which were in the nature of KPO services (ii) Vishal

Information Technologies since it was subcontracting majority of its ITES work to third parties, (iii) Eclerx Services as it was providing high end services in the nature of KPO (iv) Maple Esolutions Ltd as its financials were unreliable owing to the fact that its directors were involved in fraud.
BA Continuum India Pvt Ltd v DCIT – TS-1005-ITAT-2016 (Hyd) – TP

42. The Court dismissed the revenue's appeal and upheld Tribunal's exclusion of 3 comparables for assessee providing ITES to AE on the ground that certain extraordinary events had occurred in these comparables during the previous periods viz. mergers, amalgamations and acquisitions, which distorted the profitability and thereby increased the margin. It further held that even if the figures of comparables were to be included, no adjustment would be permissible due to the fact that the margin of variation would be within the limits of the Safe Harbour Provision.
Ameriprise India Pvt Ltd [TS-875-HC-2016(DEL)-TP] (ITA 461/2016)

43. The Court held that in case of assessee-company rendering IT enabled services (ITES) to its AE, a company having high brand value and intangibles and a company which failed to satisfy filter of 25 per cent of export earnings, could not be accepted as comparables while determining ALP. It further held that, benefit of proviso to section 92C(2) could not be given as a standard deduction as the said benefit is restricted to cases where variation between arm's length price and price at which international transaction has actually taken place does not exceed 5 per cent.
Acusis Software India (P.) Ltd. vs. ITO [2016] 76 taxmann.com 121 (Bangalore - Trib.) (IT (TP) APPEAL NOS. 442, 444 & 445 (BANG.) OF 2011)

44. The Tribunal upheld DRP's characterization of assessee as market research service provider in respect of international transactions / service rendered to its AE and rejected revenue's contention that substantial chunk of work carried out by the assessee involved data processing with the help of computers, akin to ITES provider. It distinguished marketing services from ITES services on the basis that in market research, output is the product of collecting, collating and analysing information/data, which may involve use of technology, whereas in the case of ITE services, rendering of services is primarily driven by use of technology on the part of human resources.
Synovate India Pvt Ltd [TS-898-ITAT-2016(Mum)-TP] (ITA NO. 6572/MUM/2012)

45. Where the assessee was engaged in providing both software services and sale of software products, the Tribunal upheld DRP's exclusion of 3 comparables on the ground of non-availability of segmental data, turnover of less than 10% of the assessee and a wide gap in employee cost between the assessee and comparable company.
Wabco TVS Ltd [TS-889-ITAT-2016(CHNY)-TP] (I.T.A.No.883/Mds./2015)

46. The Tribunal allowed assessee's appeal and excluded 10 companies from the list of comparables for benchmarking software development services rendered by assessee to its AEs in UK and Australia 7 on the ground of functional dissimilarity and 3 as their related party transactions exceeded 15%. It noted that assessee's margin of 8.18% to be within 5% range of average margin of remaining comparables and thus directed TPO to re-compute ALP based on remaining 10 comparables after allowing +/-5% benefit.
CGI information Systems and Management Consultants Pvt Ltd [TS-849-ITAT-2016(Bang)-TP] (IT(TP)A No.1446IBang/2010)

47. The Apex Court admitted revenue's special leave petition against the decision of the High Court wherein it was held companies providing KPO services were not comparable to assessee engaged in providing voice call services to its AE and had held that entities would be comparable only if (a) the functions performed by the tested party and the selected comparable entity were similar including the assets used and the risks assumed and (b) the difference in services/products offered had no material bearing on the profitability and that BPO service provider could not be compared with KPO service provider.
Rampgreen Solutions Pvt Ltd [TS-937-SC-2016-TP] (SLP No.11117/2016)

48. Where the assessee is engaged in providing software development services and not in sale or development of software product, the Tribunal held that a company engaged in software development services and selling software products and having no segmental breakup, companies having substantially higher turnover and company having related party transactions could not be taken as comparable. It further held that where the assessee rendered services to its associated enterprises abroad for which it was compensated on a cost plus mark-up basis and also incurred out-of-pocket expenses, adhoc addition of 10% made by TPO was deleted.
Ness Technologies India Private Limited v DCIT - (2016) 48 CCH 0184 MumTrib (ITA No. 696/Mum/2016, IT(TP)A No. 1006/Mum/2016)

49. The Tribunal held that the assessee, engaged in providing IT enabled back office services to its AE could not be compared to the following companies:
- Accentia Technologies, on account of extra-ordinary event of merger / demerger which had a significant impact on the company's profitability
- Coral Hub Ltd, as it was functionally different, being engaged in e-publishing as well as document scanning and indexing
- Eclerx Services, as the company was engaged in providing KPO services and also since the company had undergone an extra-ordinary
- Mold Tek Technologies, since the company was a KPO service provider engaged in a host of engineering services
- Genesys International Corporation Ltd, as it was engaged in providing geographical information services.

BA Continuum India Pvt Ltd – TS-1023-ITAT-2016- Hyd- TP

Investment Advisory Services

50. The Court admitted the Revenue's appeal against the order of the Tribunal wherein the Tribunal had excluded certain companies as comparable on the ground that they were not functionally comparable with the assessee who was engaged in equity broking and investment banking and marketing support services in relation to investment banking. The questions urged before the Court were as follows (i) whether research and information services segment of comparables could be compared to advisory services and (ii) whether the Tribunal was justified in not considering the Segmental financial and advisory services segment as comparable to the assesse.
CIT v UBS Securities India Pvt Ltd – TS-951-HC-2016 (Bom) – TP

51. The Tribunal held that the assessee, engaged in providing non-binding investment advisory services to its AE could not be compared to Motilal Oswal Investment Advisors Pvt Ltd since it was engaged in merchant banking and therefore not functionally comparable to the assessee. Further, it held that IDFC Investment Advisors Ltd and ICRA Online Ltd could not be considered as comparable as the said companies were engaged in KPO / Information Services and portfolio management services, respectively. Accordingly, it allowed the assessee's appeal.
Arisaig Partners (India) Pvt Ltd v ACIT – TS-916-ITAT-2016 (Mum) – TP
Mount Kellet Capital Management India Pvt Ltd – TS-912-ITAT-2016 (Mum) - TP

52. The Court, relying on the decision of the High Court in CIT v Carlyle India Advisors Ltd and CIT v General Atlantic P Ltd, dismissed the appeal of the Revenue filed against the order of the Tribunal, wherein the Tribunal held that broking companies, asset management companies and merchant banking companies were not comparable with the assessee, who was engaged in providing investment advisory services.
CIT v Temasek Holdings Advisors India Pvt Ltd – TS-928-HC-2016 (Bom) - TP

Support Services

53. The Tribunal held that the assessee providing marketing support services to its AEs could not be compared to (i) Coral Hubs Ltd as it had outsourced its IT enabled services to third party vendors, (ii) Accentia Technologies Ltd as it had undergone an extra ordinary event (merger) which impacted its margins (iii) Acropetal Technologies Ltd as it was engaged in providing high end services of engineering design which were totally different from IT enabled services. As regards Crossdomain Solutions Ltd, it noted that the company was engaged in providing high end and KPO services, development of product suits and IT enabled services and therefore directed the TPO to restrict the inclusion of the said company to IT enabled services only.
Lubrizol Advanced Materials India Pvt Ltd v ACIT – TS-1025-ITAT-2016 (Ahd) - TP

54. The Tribunal excluded Allsec Tech Ltd from the list of comparables while benchmarking the transactions of the assessee providing support services to its AEs, since Allsec was in the business of HR outsourcing, mortgage processing, voice intelligence, financial processing and anti-money laundering which was completely different to the services provided by the assessee.
Watanmal India Pvt Ltd – TS-1015-ITAT-2016 (Chny) - TP

General

55. The Tribunal remitted the issue pertaining to application of employee cost filter while benchmarking the international transactions undertaken by the assessee, engaged in providing corporate information services. It held that the employee cost filter was one of the factors to be taken into consideration for the purpose of determining ALP. However, it agreed with the contention of the Department that the employee cost may vary wherever manpower was outsourced and accordingly held that the AO had to consider whether the assessee had employed its employees directly or outsourced its man power. Since these factors were not available on record with regard to the comparable companies and the assessee, the Tribunal remitted the entire issue to the file of the AO.
Williams Lea India Pvt Ltd – TS-979-ITAT-2016 (Chny) - TP

56. The Tribunal allowed the assessee's appeal against the DRP order directing the TPO to compute ALP under TNMM by considering only 2 comparables which were selected by both assessee and the TPO which led to an upward addition of Rs.2.98 crore and accepted the contention of the assessee that there were two additional comparables selected by the TPO, having margins of 11.12 percent and 9.18 percent respectively, which were not contested by the assessee and therefore those comparables ought to have been considered as well. Relying on the decision in the case of Fortune Infotech Ltd it held that the TNMM was an indirect method, requiring a reasonable set of comparables to arrive at the correct ALP.
Further, it admitted the assessee's additional ground for exclusion of Projects & Development Ltd which had been included by the assessee itself in its TP study, on the ground that the said company was a government company and had diversified activities. The Tribunal relying on the decision of the Bombay High Court in ThyssenKrupp Industries, wherein it was held that Public Sector Undertakings were not driven by profit motive alone but also had other considerations such as discharge of social obligations, directed the AO to exclude the said company from the list of comparables.
Worley Parsons India Pvt Ltd v DCIT – TS-1012-ITAT-2016 (Hyd) - TP

57. The Tribunal admitted the additional ground of the assessee for exclusion of Asian Business Exhibition & Conferences even though it was not contested before lower authorities, since the Tribunal in the case of Electronics for Imaging India P Ltd had excluded the said company on the ground of functionality. Accordingly, it held that the impugned company engaged in organizing exhibitions and events was not comparable to the assessee who provided support services. Further, where the AO / TPO did not give effect to the DRP directions which provided for exclusion of HCCA business Services as a comparable, it held that the assessee could approach the appropriate authorities for compliance of the directions.
Brocade Communication Systems Pvt Ltd v ACIT – TS-995-ITAT-2016 (Bang) - TP

58. 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-2016 (P&H) - TP

59. The Court confirmed the decision of the Tribunal allowing the assessee's plea for exclusion of two comparables though originally included in the TP study and upheld the finding of the Tribunal that the TP mechanism requires comparability analysis between like companies on the basis of FAR analysis and that an assessee was not barred from withdrawing a comparable if the same was included on account of mistake. It observed that the Tribunal, on facts found that the two companies were not comparable as they were in a different area i.e. wind energy and the assessee was in the field of solar energy.
Tata Power Solar Systems Ltd – TS-1007-HC-2016 (Bom) - TP

60. Where the DRP had included Anshuni Commercials Ltd as a comparable stating that it was functionally similar and held that the difference in turnover of Anshuni Commercials (Rs. 79.80 lakhs) and the assessee (Rs. 33.32 crore) was not a valid criteria to exclude a comparable, the Tribunal held that the Revenue was incorrect in seeking to exclude the said comparable on the ground of difference in turnover. Further, dealing with the contention of the Revenue that the Bombay High Court in Pentair had upheld the application of the turnover filter, it held that the Revenue was misplaced in raising this ground that it had not used the turnover filter uniformly on all comparables and was seeking to selectively apply the same only to Anshuni Commercials. Accordingly, it dismissed the appeal filed by the Revenue.
ACIT v Golawala Diamonds – TS-1008-ITAT-2016 (Mum) - TP

61. The Tribunal directed the TPO to follow the DRP's instructions to include 2 comparables viz. Thinksoft Global Services Ltd and FCS Software Solutions Ltd for the purpose of determining the ALP of the international transactions. It noted that the TPO had excluded these comparables on the basis that the impact of the working capital position on their operating margin was greater than 4 percent and held that the reasoning adopted by the TPO was incorrect.
Symbol Technologies India Pvt Ltd – TS-1001-ITAT-2016 (Bang) - TP

62. The Tribunal allowed assessee's appeal for selection of foreign AE as tested party for AYs 2003-04 and 2004-05 and directed the TPO to verify financial data of the foreign comparables as provided by assessee. The Assessee provided Express services within India for its Group companies, and contended that in the case of outbound consignments (which generated approximately 97% of overall revenue), assessee was acting as an entrepreneur whereas in respect of inbound consignments, it was acting as a mere service provider for delivery of the consignments to destinations within India. Thus, the assessee considered the Group companies as the tested party for outbound consignments and itself as the tested party for inbound consignments, and selected independent service providers from European and US region as foreign comparables. The Tribunal noted that that the Revenue did not place any arguments against assessee's contentions, and considering the lack of Indian comparable companies, it held that it was more appropriate to select foreign AE as the tested party.
TNT India Pvt Ltd [TS-920-ITAT-2016(Bang)-TP] (ITA No. 1443 & 1444/Bang/08)

63. Where the Tribunal had held that companies having related party transactions more than 15% could not be considered as comparable and had remitted the matter to AO without examining the materials on record, the Court held that the matter should have been considered on merits by the Tribunal itself and accordingly directed it to decide the matter afresh after taking into consideration the materials on record and submissions.
ICC India Pvt [TS-938-HC-2016(DEL)-TP*] (ITA 320/2016)*

64. The Tribunal held that the TPO was not justified in excluding two companies from the list of comparables merely because they had been consistently making losses since 2002 without looking into the FAR analysis of the two loss making companies. Accordingly, it directed the TPO to redo the entire exercise regarding these two comparables after affording adequate opportunity of hearing to the assessee.
Erhardt+ Leimer India Pvt Ltd – TS-1028-ITAT-2016 (Ahd) - TP

65. The Court dismissed Revenue's appeal against the order of the Tribunal treating assessee, engaged in sourcing of apparels from India for its AE, as a service provider as against a manufacturing company as contended by the Department. It noted that the Tribunal had rejected TPO's selection of comparables engaged in contract manufacturing and upheld assessee's cost plus model and that the Tribunal had listed at least 21 reasons to support its conclusion that assessee's PLI at 437% was much higher than 12.27% of the comparables which were engaged in activities similar to or identical with that of assessee. Accordingly, the Court held that the order of the Tribunal was not erroneous and dismissed the Revenue's appeal holding that no question of law arose for its consideration.
Pr CIT v Bestseller United India Pvt Ltd – TS-967-HC-2016 (Del) - TP

d. ***Computation / Adjustments***

66. The Court upheld the order of the Tribunal restricting TP adjustment only to international transactions with AEs and noted that the issue was concluded by the decisions of the Court in Hindustan Unilever Ltd, Tara Jewellers Exports Pvt Ltd, Petrol Araldite Pvt Ltd, Thyssen Krupp Industries Ltd, Sumit Diamond India and Alstom Projects India.
Bhansali & Co – TS-994-HC-2016 (Bom) – TP

67. The Court admitted the Revenue's appeal against the decision of the Tribunal wherein the TP-adjustment was deleted by considering segmental results for ALP determination without appreciating the objection of the TPO that complete evidence had not been submitted by the assessee. It noted the contention of the Revenue that the TPO had observed that the assessee had shown a loss of 30.66 percent in respect of its Non-AE transactions which was against the trend of the sector in which the assessee operated for which only selective bills and vouchers were submitted as a result of which he proceeded to benchmark the transactions on an entity level basis.
Tecnimont ICB Pvt Ltd [TS-929-HC-2016(BOM)-TP] (ITA No.963 OF 2014)

68. The Tribunal rejected the appeal of the Revenue wherein the Revenue contended that in the absence of debtors and inventory, the question of considering the advances received by the assessee from its AE as a part of trade payables did not arise. The Tribunal held that advance received from the AE partakes the character of trade payables which is to be adjusted against the future invoice as a result of which the necessity of borrowings from outside is reduced to that extent thereby reducing the cost of borrowings. It accepted the contention of the assessee that the presence of debtors / inventory were irrelevant for considering trade payables while working out the working capital adjustment.
CGI Information System & Management Consultant Pvt Ltd – TS-1016-ITAT-2016 (Bang) - TP

69. Where the assessee had incurred high depreciation costs (32.09 percent of total costs) which had an adverse impact on its margin and the TPO computed the PLI of the assessee as well as the comparables after considering depreciation, the Tribunal, following the decisions of the Court in BA Continuum India and that of the Tribunal in the assessee's own case directed the AO to compute the ALP before depreciation, both in case of the assessee as well as the comparable companies and workout the margins accordingly.
Further, the Tribunal also held that the reimbursement of expenditure could not be marked up by the AO by 5 percent while computing ALP and therefore allowed the assessee's appeal against the addition made by the TPO by charging a 5 percent markup on the reimbursement of expenses.
Cambridge Technology Enterprises Ltd v DCIT – TS-1004-ITAT-2016 (Hyd) - TP

70. The Tribunal upheld the directions of the DRP wherein the DRP directed the AO to verify whether or not the assessee had disallowed the expenses incurred by it, viz. upfront fee paid for

obtaining a loan for capital purpose, in its computation of income and if so, to exclude the same from the computation of operating cost.
Further, the Tribunal held that the DRP was justified in directing the TPO to treat provision for bad and doubtful debts as operating in nature since it was in relation to services rendered.
Hyundai Motor Engineering Pvt Ltd v ITO – (2016) 48 CCH 0277 (Hyd-Trib) – ITA No 128 / Hyd 2016 & ITA No 216 / Hyd / 2016

71. The Tribunal held that the loss on account of foreign exchange fluctuation arising out of realizable as well as non-realizable debts was to be considered as operating in nature.
ZF Wind Power Coimbatore Pvt Ltd v DCIT – TS-964-ITAT-2016 (Chny) - TP

72. The Tribunal held that the TP adjustment proposed by the TPO was to be restricted to international transactions with the AE and could not be made on the entire turnover. It also accepted the assessee's alternate plea that the difference of operating margin at which the international transaction had actually been undertaken fell within the tolerance range of +/- 5 percent of the ALP margin determined by the TPO and therefore deleted the TP adjustment.
Liquid Controls India Pvt Ltd v ACIT – TS-965-ITAT-2016 (Ahd) - TP

73. The Tribunal dismissed the Revenue's appeal against the CIT(A) order directing consideration of foreign exchange gain / loss as operating in nature. The Tribunal held that considering the assessee's nature of activities and revenues earned from software development activities rendered abroad, the forex gain could have been construed only as incidental to sales, payment to suppliers.
Electronics for Imaging India Pvt Ltd – TS-986-ITAT-2016 (Bang) - TP

74. Noting that the assessee had failed to produce any evidence to justify allocation of expenses on actual basis, the Tribunal remitted the issue of allocation of cost between AE and Non-AE transactions to the file of the TPO who had allocated the entity level costs to AE and Non-AE segments based on the revenue earned from respective segments instead of considering the actuals.
Further, the Tribunal held that the expenses incurred by the Bangalore unit of the assessee viz. personnel expenses, depreciation and other maintenance related expenses were to be considered as non-operating in nature since the Bangalore Unit had ceased operations and its employees had been retrenched.
Business Process Outsourcing (India) Pvt Ltd v ACIT – TS-925-ITAT-2016

75. The Tribunal held that where the DRP had directed the TPO to compute the operating margin of all comparables on a uniform basis i.e. by excluding sale of DEPB, duty draw back and interest from customers on account of it being non-operating, the order of the AO pursuant to the DRP directions, did not suffer from any infirmity.
Radiant Plastic Industries Pvt Ltd – TS-973-ITAT-2016 (Mum) - TP

76. The Tribunal allowed the assessee's appeal and held that for the purpose of computing the +/- 5 percent variation, the sum of all AE transactions was to be considered. It dismissed the contention of the Revenue that since there was a separate identifiable CUP for each international transaction, 5% tolerance was to be computed for each international transaction separately and where the transaction value was more than 5 percent the tolerance benefit was not to be allowed. Accordingly, it remitted the matter to the AO to re-compute the tolerance level.
DCIT v Ashok Leyland Ltd – TS-977-ITAT-2016 (Chny) - TP

77. The Tribunal noting that the assesse was in its second year of operation and had incurred very high cost of rent and electricity allowed the assessee's capacity utilization adjustment claim and remitted the issue to the AO / TPO to determine the underutilization and give an adjustment accordingly.
Further, it held that the TPO was incorrect in determining the ALP by aggregating both international and domestic transactions and therefore remitted the matter to the file of the TPO directing him to exclude the domestic transactions while determining ALP.

Gameloft Software Pvt Ltd v DCIT – TS-972-ITAT-2016 (Hyd) - TP

78. The Court disposed of the assessee's appeal against order of the Tribunal wherein the Tribunal had rejected exclusion of pass through costs from PLI under the Cost Plus Method, noting that the issue was academic, since the Tribunal had remanded the entire TP addition to the TPO with directions to use single year data and to use Gross Profit to total cost as the PLI, pursuant to which the TPO revised its order and there was no addition made. It held that since the ultimate outcome of the remand had resulted in no addition, the examination of the issue urged would be academic. However, it also held that if the findings of the Tribunal vis-à-vis the treatment of pass through costs were left undisturbed, it could constitute a barrier and work adversely against the assessee in subsequent years and therefore clarified that the said findings would not be considered as conclusive or binding on the assessee.
Fritidsresor Tours & Travels India Pvt Ltd v DCIT – TS-1011-HC-2016 (Del) - TP

79. The Tribunal rejected the assessee's contention that subcontracting charges incurred by the assessee were to be treated as pass through cost and therefore to be excluded from the operating profit / operating cost of the assessee while computing the ALP in respect of the software development services segment. It held that the assessee was not acting as an agent / distributor but was providing services on its own account and further held that when the margin on the cost of sub-contracting charges was part of the operating revenue of the assessee then only the cost of sub-contracting activity could not be excluded as pass through as it would artificially inflate the margins of the assessee on the other revenue from the services other than sub-contracting activity. It explained that pass through costs could be considered only when there was no value addition involved on the part of AE
Applied Materials India Pvt Ltd [TS-815-ITAT-2016(Bang)-TP]

80. Where the assessee did not include the actual reimbursement of expenses received by it from its AE in its P&L account contending that it did not have any impact on profits / gains and the ALP of the reimbursements had been accepted by the TPO, the Tribunal held that the genuineness of the transaction had been accepted and since it had no impact on the profit of the assessee it did not have a bearing on the computation of profit / income and accordingly deleted the disallowance under section 10A of the impugned expenses.
Value Momentum Software Services P Ltd – TS-957-ITAT-2016 (Hyd) - TP

81. The Tribunal, following the decision in the assessees' own case for the prior assessment year remitted the issue of exclusion of reimbursement receipts and payments from operating margin, directing the TPO to exclude the reimbursements.
Palred Technologies Ltd – TS-981-ITAT-2016 (Hyd) - TP

82. The Tribunal allowed the assessee's claim of adjustment for non-operating cost and remitted the issue to the CIT(A) for verification and re-adjudication. It held that for the purpose of allowing such adjustment, complete details had to be furnished and accordingly directed the CIT(A) to call for such details and examine the same.
Telelogic India Pvt Ltd – TS-971-ITAT-2016 (Bang) - TP

83. Where the assessee had set up new installed capacity for manufacture of 11520 machines and had only produced 4133 sets thereby utilizing merely 35 percent of its installed capacity, the Tribunal held that the assessee ought to have been granted a capacity utilization adjustment as capacity utilization / idle capacity was a factor affecting net profit margins as it resulted in higher per unit cost qua the utilized capacity which in turn would lower the profits of the assessee. It held that the capacity utilization adjustment was to be made only in the hands of the comparable entities instead of the tested party and directed the TPO to provide for such adjustment.
Erhardt+ Leimer India Pvt Ltd v ACIT – TS-1028-ITAT-2016 (Ahd) - TP

84. Where the asssessee had increased its fixed assets / plant and machinery to the tune of Rs.1435.98 lakhs which were eligible for depreciation as a result of which the net profits had declined, the Tribunal held that depreciation was to be excluded while computing the profit level indicator for conducting benchmarking under the TNMM. Consequently, the Tribunal remitted the issue to the TPO for fresh adjudication.
Erhardt+ Leimer India Pvt Ltd v ACIT – TS-1028-ITAT-2016 (Ahd) - TP

85. The Tribunal deleted the TP adjustment made on account of location savings and green environmental cost savings in respect of the assessee, an Indian contract manufacturer and held that there were no such provisions or guidelines in the existing TP provisions prescribing for such adjustment. It noted that the TPO made adjustments on the ground that assessee had not received any compensation from AE on account of location saving advantage because of lower cost of labour of its Indian manufacturing facility and that it also derived savings on account of 'green costs' owing to laxity in enforcement of environmental laws in India as compared to AE countries and held that where the assessee's international transactions had been analyzed under TNMM and its margin was found to be higher than average profit margin of comparables, any return or advantage towards location savings /environmental costs savings would be embedded in the margin of comparables and thus separate adjustment was not warranted. It rejected the TPO's method of making location saving adjustment by comparing the cost per employee globally with cost per employee in India and held that comparison of employees of AE working in economic conditions at AE's location were completely different and could not be the benchmarking factor.
Syngenta India Ltd v DCIT – TS-988-ITAT-2016 (Mum) - TP

86. Where the Court vide its earlier order dated 26 Aug, 2016 had upheld the Tribunals remand and refused to adjudicate on the question relating to adjustment of abnormal operating expenses arising due to strike that occurred in the assessee's company, pursuant to which the assessee filed a review application, the Court subsequently re-called its order to the limited extent of passing fresh decision and allowed adjustment in the profit margin of comparables on account of the strike that had taken place in the assessee company during AY 2006-07. Referring to Rules 10B(1)(e)(ii) and (iii), it opined that the Tribunal had rightly observed that adjustment on account of strike ought to have been made in profit margin of comparables and not that of assessee. Since the entire matter was already remanded to TPO, the Court directed the TPO to consider this question and decide on making appropriate adjustments after taking into account strike like situation.
Honda Motorcycle & Scooters India Pvt Ltd v ACIT – TS-1013-HC-2016 (P&H) - TP

Specific Transactions

Advertisement, Marketing and Promotion expenses / Brand expenses

87. The Tribunal upheld the TP adjustment in respect of brand promotion expenses incurred by the assessee for its Indonesian AE observing that there was no documentary evidence to prove that the assessee was the economic owner of the brand and that the Indonesian AE actually incurred brand promotion expenses lesser than what other manufacturers would have incurred implying that the deficit was incurred by the assessee on behalf of the Indonesian AE. It further noted that the benefit of the AMP expenses accrued to the AE and not the assessee and the since the AE was an independent distinct entity and the assessee could not claim benefit of the AE's business.
TVS Motor Company Ltd v ACIT – TS-963-ITAT-2016 (Chny) – TP

88. The Court admitted assessee's appeal against Tribunal's decision holding that Advertising, Marketing and Promotion (AMP) expenses incurred by assessee were subject to provisions under Chapter X.
Diageo India Pvt Ltd [TS-913-HC-2016(BOM)-TP] (609 OF 2014)

89. The Court upheld the order of the Tribunal wherein the Tribunal had remitted AMP transaction to AO/TPO consequent to Delhi HC ruling in Sony Ericsson case as it was unable to establish functional comparability regarding AMP functions of assessee and comparables or determine ALP of the AMP transaction on its own. However, the Court held that the finding of the Tribunal that the application of the RPM for determining ALP of AMP expenses would cast the AMP expenses outside the international transaction, was not conclusive and it noted the relevant observation in Sony Ericsson ruling that AMP was to be included as part of the ALP determination as component of the international transaction and also the issue of whether the CUP or RPM was the most appropriate method was to be left for application by the TPO, having regard to the peculiarities of the business module adopted by the assessee.
Haier Appliances India Ltd [TS-935-HC-2016(DEL)-TP] (ITA 711/2016)

90. The Court upheld the assessee's claim for deduction of advertisement and promotion expenses incurred towards enhancement of brands owned by its foreign parent-company as business expenditure. It noted that the AO had disallowed part of the expenditure on the ground that they were incurred for popularizing parent company's brand and thus were not incurred wholly and exclusively for assessee's business and held that even though all the brands owned by parent company were not made available in Indian market, the overseas brand owner did not set-up any other licensee (as a rival) at least in the area where the assessee operated and relying on Section 48 of the Trademarks Act held that 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 the ultimate analysis they might have enhanced the brand of the overseas owner.
Seagram Manufacturing Pvt Ltd – TS-1029-HC-2016- Del - TP

Loans / Receivables / Corporate Guarantee

91. The Tribunal, following its previous order in the assessee's own case, determined the ALP interest rate for interest free loan advanced by the assessee to its AE at LIBOR + 2 percent as against the PLR i.e. the rate adopted by the TPO in pursuance of the DRP directions.
SB&T International Ltd – TS-969-ITAT-2016 (Mum) - TP

92. The Tribunal held that the TPO was incorrect in adopting the domestic prime lending rate for benchmarking interest on loans given by the assessee to its AE and held that since the loans were given un US dollars, the interest was to be benchmarked by adopting LIBOR. Accordingly, it remitted the issue to the file of the TPO for fresh examination.
Sasken Communication Technologies Ltd – TS-1019-ITAT-2016 (Bang) – TP

93. Where the assessee paid interest on Fully Convertible Debentures issued in Indian currency to its AE at the rate of 10 percent and benchmarked the same against the interest paid by its comparables i.e. 12 percent thereby claiming its expenditure to be at ALP, the Tribunal held that the TPO was not justified in computing ALP by using CUP on the basis of LIBOR + 300 basis points. It held that since the currency in which loan had to be repaid was Indian currency, the Prime Lending Rate should have been considered by the TPO. Accordingly, it deleted the addition made.
Bacardi India Pvt Ltd – TS-1052-ITAT-2016 (Del) - TP

94. The Tribunal, following the earlier order in assessee's own case, determined the arm's length interest rate for interest free loan advanced by assessee to AE at LIBOR +2% and held that the TPO was incorrect in determining the ALP of interest by adopting internal cost of borrowing (12.56%) plus risk cover (3%) as an internal comparable.
SB&T International Ltd – TS-969-ITAT-2016 (Mum) - TP

95. Where the DRP deleted the TP adjustment made on interest payable on CCDs made by the TPO but disallowed an equal amount u/s 37(1) and 36(1)(iii) on the ground that the assessee had not utilized the funds for business purposes, without considering how the amount had been utilized

by the assessee, the Tribunal remitted the issue to the file of the AO to examine these facts and pass a fresh draft assessment order post such examination.
Epsillon Real Estate Pvt Ltd – TS-1038-ITAT-2016 (Bang) - TP

96. The Tribunal held that the transaction of providing loan / advance was clearly defined as an international transaction under section 92B of the Act and rejected the contention of the assessee that the said loan was a shareholders activity to protect investment interest and therefore should not be considered as an international transaction. Accordingly, it directed the AO / TPO to apply LIBOR + 2 percent as the interest rate and make suitable addition on account of interest on the impugned loan.
As regards the adjustment of interest on outstanding receivables from its AE relating to software development @ 10.5 percent, the Tribunal held that if the software development services were at ALP then there would be no question of separate adjustment of account of allowing credit period on receivables from the AE. It directed the AO / TPO to recalculate ALP of international transaction relating to software development services after considering a proper working capital adjustment.
Xchanging Solutions Ltd [TS-910-ITAT-2016(Bang)-TP] (I.T.(T.P) A. Nos.1294/Bang/2012 & 166/Bang/2014)

97. The Court dismissed revenue's appeal against the Tribunal order deleting transfer pricing adjustment on interest on loan advanced by assessee to its overseas subsidiary (AE) at 7% p.a and held that interest rate at LIBOR + 2.47 % was at arm's length. It also rejected revenue's stand that subsidiary loan should be treated as high risk loan subject to higher interest rate.
UFO Moviez India Ltd [TS-883-HC-2016(DEL)-TP] (ITA 623/2016 & C.M.30452/2016)

98. The Tribunal, relying on the its decision in assessee's own case for AY 2009-10 deleted TP addition of Rs. 12 lakhs on account of notional interest on continuing debit balances of AEs against software development services provided by assessee for AY 2010-11 and held that even if overdue receivables from AE constituted an 'international transaction' within the meaning of Sec 92B, assessee's margin calculated after reducing notional interest still compared favourably with the average margin of comparables and accordingly no addition was warranted.
Agilisys IT Services India Pvt Ltd – TS-908-ITAT-2016 (Mum) - TP

99. The Tribunal held that non-charging or undercharging of interest on excess credit period allowed to the AE for realization of invoices amounted to an international transaction and that such interest would not be subsumed in the working capital. It held that the international transaction covers a period starting with the termination of credit period under the agreement and that the TP adjustment on late realization of receivables had nothing to do with opening / closing balances with respect to which working capital adjustments were computed.
McKinsey Knowledge Centre Pvt Ltd – TS-997-ITAT-2016 (Del) - TP

100. The Tribunal held that the plea of the assessee viz. that no TP adjustment on account of notional interest on delayed receivables was to be made where the assessee did not charge interest from its Non-AEs as well, could be meaningfully addressed only after comparing the period of delay in the case of the AEs vis-à-vis that in the case of Non-AEs and therefore remanded the matter to the file of the AO / TPO to examine the factual aspects.
Shrenuj Gems & Jewellery Ltd – TS-954-ITAT-2016 (Mum) - TP

101. Where the assessee made payment of interest on overdue outstanding for the prior years in the year under consideration, which was contrary to the mercantile system of accounting, the Tribunal dismissed the contention of the assessee that the TPO could not nullify the transaction as long as it was for business purposes. It held whenever the assessee claimed any payment to the AE, the TPO was within jurisdiction to question the quantum of expenditure incurred. Further, it rejected the submission of the assessee that the impugned interest for the prior years was paid during the year under review in accordance with the directives of the European

Parliament and held that the said directives could not bind the assessee as the assessee was not situated in Europe.
ZF Wind Power Coimbatore Pvt Ltd v DCIT – TS-964-ITAT-2016 (Chny) – TP

102. The Court upheld the Tribunals order wherein the TP addition on account of notional interest on delayed realization of sale of diamonds from AEs was deleted on the ground that the assessee had not charged any interest from third parties / Non-AEs on delayed payments exceeding more than 300 to 400 days as well.
CIT v M/s Livingstones – TS-962-HC-2016 (Bom) - TP

103. The Tribunal, relying on the decisions of the Tribunal in the case of Bharti Airtel and Redington India Ltd, held that where the assessee provided corporate guarantee in respect of loan taken by its AE and extended a letter of credit for working capital facility availed by the AE for which it did not charge any fee, the same did not fall under the purview of international transactions in term of Section 92B of the Act and therefore deleted the adjustment made by the TPO by considering the ALP rate of corporate guarantee at 2 percent.
TVS Motor Company Ltd v ACIT – TS-963-ITAT-2016 (Chny) – TP

104. The Tribunal, following the decision in the assessees' own case for the prior assessment year remitted the issue of the applicability of transfer pricing provisions to corporate guarantee wherein it was held that corporate guarantee was within the scope and ambit of the definition of international transaction post the retrospective amendment to Section 92B of the Act and that the rate of 3.75 percent applicable to bank guarantees could not be applied to corporate guarantees. Accordingly, it directed the TPO to decide the issue following the directions of the Tribunal for the prior assessment year.
Palred Technologies Ltd – TS-981-ITAT-2016 (Hyd) - TP

105. The Tribunal rejected the contention of the assessee that providing corporate guarantee to its AE without charging any fee was not an international transaction and held that in case of a corporate guarantee given to a bank on behalf of the AE, the assessee creates a charge on its assets in favour of the bank / financial institution and to that extent providing a corporate guarantee had a bearing on the assets of the assessee as the assessee could not use those assets under charge for the purpose of availing further financial credit. Accordingly, relying on the decisions of the co-ordinate benches it determined ALP of guarantee fee at 0.5%.
Xchanging Solutions Ltd [TS-910-ITAT-2016(Bang)-TP] (I.T.(T.P) A. Nos.1294/Bang/2012 & 166/Bang/2014)

Royalty / Management fees / Intra Group services / Reimbursements

106. The Court upheld the order of the Tribunal allowing expenditure of Rs.1.25 crore towards legal and professional charges paid by the assessee to its UK based AE and dismissed the contention of the Revenue that the same was to be disallowed as the assessee was unable to establish that the services were actually rendered by the AE by noting that the assessee was able to achieve an incremental turnover of Rs.29 crore as a result of availing of such services. It further held that the said services would not necessarily be recorded in writing since advice, instructions would have been given orally.
CIT v Max India Ltd – TS-948-HC-2016 (P&H) – TP

107. The Tribunal held that the AO had no jurisdiction to nullify the transaction of intra group services when the expenditure was incurred for business purposes and the operating margin of the assessee after considering the impugned expenditure was higher than that of its comparables. However, it noted that the assessee failed to substantiate its claim of whether the services, which represented almost 55 percent of the total payment for services, were actually received and therefore remitted the matter to the AO for fresh consideration opining that the expenditure would be allowed if the assessee produced adequate particulars.
Control Techniques India Pvt Ltd – TS-1024 – ITAT-2016 (Chny) - TP

108. The Tribunal upheld the TP adjustment made by the TPO by determining the ALP of the management and support services fee paid by the assessee to its AE at Nil as the assessee had failed to establish that such services were actually rendered by the AE. It accepted the well settled position of law that the AO / TPO cannot question the necessity or benefits of expenditure incurred but observed that the onus to prove that the services were actually rendered was on the assessee. It noted that the assessee had only produced certain correspondences which did not prove the rendition of services and held that the failure to discharge the onus could lead to the presumption that the assessee had no evidence to establish that services of management support were rendered by the AE.
Volvo India Pvt Ltd – TS-993-ITAT-2016 (Bang) – TP

109. The Tribunal deleted transfer pricing adjustment on payment for technical services fees made by assessee to its AE in Sharjah and rejected revenue's contention that since Sharjah AE was located in a tax haven, the assessee had adopted a tax evasion strategy to make lesser tax payments. It held that ALP determination must be conducted irrespective of whether the AE is situated in high tax or low tax jurisdiction. Further, where revenue had compared Sharjah-fees transaction with royalty-free licensing of manufacturing process intangibles from German AE, the Tribunal rejected revenue's determination of Nil ALP since transaction with German AE was an intra-AE transaction & could not be considered as a valid internal CUP. It further held that any non-compliance with the scheme of Section 144C was fatal to the assessment itself and as a corollary thereto, when an issue was not raised in the draft assessment order, it could not be raised in the final assessment order either.
Woco Motherson Advanced Rubber Technologies Limited [TS-896-ITAT-2016(Rjt)-TP] (I.T.A. Nos.: 89 and 3208/Ahd/11)

110. The Court rejected the assessee's justification for payment of technical assistance fee over and above royalty (i.e. that as per the agreement it was under an obligation to make the impugned payment and that it led to subsequent profits) and held that the assessee's argument that the technology would not have been given to it but for the substantial fee, required a closer scrutiny as the initial burden to prove ALP was on the assessee. Accordingly, the Court upheld the remit directed by the Tribunal.
Magneti Marelli Powertrain India Pvt Ltd [TS-869-HC-2016(DEL)-TP] (ITA 350/2014)

111. The Tribunal confirmed the TP adjustment on agency commission paid @1.5 percent of invoice value and 5 percent of new exports, by the assessee to its AE for consolidation of fragmental requirements, noting that commission was paid only on items sold to group concerns and not to AEs and that the consolidation could have been done by the assessee itself and the assessee did not require the services of an AE. It held that where the assessee was unable to bring anything on record to provide reasoning for which the commission was paid the ALP was rightly determined at Nil. Agreeing with the contention of the assessee that it was not for the AO / TPO to question commercial expediency, it however held that the judgments in support of the aforesaid contention could not be extrapolated to mean that there rests no onus on the assessee to show the business purpose for which the payments were made.
Madura Coats Private Limited [TS-932-ITAT-2016(CHNY)-TP] (I.T.A. No.770/Mds/2014)

112. The Tribunal deleted the TP adjustment on reimbursement of expenses from AE and held that the TPO erred in imputing notional income towards adhoc mark-up of 10 percent. As per the material on record it noted that the entire transaction involving recovery of travel, accommodation, visa expenses and other day to day expenses it held that the reimbursements did not contain any profit element and noted that it was a standard practice in the IT industry to recover out of pocket costs incurred while providing services for clients, on a cost to cost basis.
Ness Technologies India Pvt Ltd – TS-953-ITAT-2016 (Mum) - TP

113. The Tribunal deleted disallowance under section 37 on payment towards support services and corporate cost allocation to AEs since the activities were routine activities and the said expenditure could not be disallowed on the ground that 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 mark-up of 18.8%. The Tribunal

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]

e. ***Miscellaneous***

Assessment/Reassessment

114. The Court dismissed the Revenue's appeal on transfer pricing issue by refusing to condone delay of 586 days in respect on filing of appeal as the reason cited by the Department viz Re-organisation of its panel of counsel and pendency of large number of appeals, could not be considered as sufficient cause to condone the delay.
CIT v Premier Exploration Services Pvt Ltd – TS-959-HC-2016 (Del) - TP

115. The Tribunal affirmed the CIT(A)'s order holding that the assessment order for AY 2008-09 proposing a TP addition was non-est in the eyes of the law as it was based on notice issued u/s 143(2) of the Act which was time barred. It noted that the assessee filed return of income on September 30, 2008 and therefore the time limit for issuing notice u/s 143(2) was September 30, 2009 whereas the notice was issued on August 23, 2010 and therefore the said notice was time barred. It further held that merely because the assessee continued to appear and co-operate in the on-going assessment, it would not validate an otherwise unauthorized action of the assessing authority.
Standard Chartered Finance Ltd – TS-960-ITAT-2016 (Mum) - TP

116. The Tribunal held that the DRP disposed off the assessee;s objection in a summary manner without proper appreiciation and therefore it remitted all issues i.e. selection of comparables, adjustment towards interest on delay in collection of receivables and granting of working capital adjustment to the DRP for fresh adjudication.
Doosan Power Systems India Pvt Ltd – TS-1002-ITAT-2016 (Chny) - TP

117. The Tribunal rejected DRP's interpretation based on the words 'first instance' appearing in section 144C i.e. that DRP will get jurisdiction only against original draft assessment order and not against draft assessment order passed as per direction of the Tribunal. It also noted that the TPO had passed his order by merely reproducing the directions of the Tribunal without giving assessee an opportunity to be heard, and accordingly it remitted the matter to TPO for fresh decision.
Fosroc Chemicals (India) Pvt. Ltd [TS-917-ITAT-2016(Bang)-TP] (IT(TP)A No.188lBang/2015, 87 & 881Bang/2016)

118. The Court dismissed the Revenue's appeal against the order of the Tribunal wherein the assessments made by the AO / TPO under section 153A of the Act pursuant to search and seizure operations was quashed since no new or incriminating material was found during search and seizure which took place in the assessee's premises after completion of scrutiny assessment under section 143(3). It noted that the AO had, based on existing material, referred the matter to the TPO who proposed a TP adjustment on interest free loans granted to the AE but since there was no incriminating material and the assessee had disclosed all materials during scrutiny assessments concluded earlier, the Court quashed the proceedings.
Baba Global Ltd – TS-1000-HC- 2017 (Del)-TP

119. The Court allowed the assessee's writ petition and quashed the reference made by the AO to the TPO for determination of the alleged specified domestic transaction without passing a speaking order on the objections raised by the assessee which was in contravention of Instruction No 3 / 2016 dated March 10, 2016. It observed that before making a reference to the TPO, assessee was required to be given an opportunity to show cause why the reference may not be made and thereafter a speaking order was to be passed by the AO. Consequently, it remitted the matter to the AO to pass a speaking order after considering the objections raised by the assessee.
Alpha Nipon Innovatives Ltd – TS-950-HC-2016 (Guj) - TP

120. The Tribunal rejected the assessee's contention that the assessment order passed under section 144(13) of the Act was barred by limitation despite the AO receiving the DRP order in April 2014, noting that Section 144(13) mandates the DRP to give directions to the AO whereas the DRP in the present case had only given directions to the TPO and therefore the instant proceedings had not reached the stage where provisions of Section 144(13) of the Act could be invoked.
L&T Thales Technology Services Pvt Ltd – TS-954-ITAT-2016 (Chny) - TP

121. The Court allowed the assessee's writ petition directing the Tribunal to decide the pending appeal filed by the assessee as expeditiously as possible, preferably within three months keeping in mind that the assessee was facing compulsory winding-up proceedings and there had been a delay in disposing of the appeal by the ITAT which prejudiced its winding-up proceedings.
Nortel Netwokrs Singapore Pte Ltd v DCIT– TS-961-HC-2016 (Del) -TP

122. The Tribunal allowed the assessee's appeal against the DRP order for AY 2011-12 wherein the assessee's objections were disposed of without giving it any opportunity of hearing and remitted all issues for fresh consideration. It observed that the assessee had two personal appearances before DRP 1 and thereafter the case was transferred to DRP 2 which disposed off the assessee's objection ex-parte. Further, it dismissed the stay application filed by the assessee as infructuous as appeal was allowed.
Delphi Connection Systems India P Ltd v ACIT – TS-952-ITAT-2016 (Coch) - TP

123. The Tribunal quashed the final assessment order passed without draft assessment order as mandated by Section 144C noting that the AO had passed the order along with demand notice and show-cause notice for levy of penalty which was contrary to the mandatory provisions of Section 144C. It dismissed the contention of the Revenue that the order was accompanied by a letter mentioning that it was a draft assessment order and held that in spirit the AO had finalized the assessment wherein demand was crystallized and demand notice was issued to the assessee and accordingly held that the AO had not followed the correct procedure as provided in the Statute.
Soktas India Pvt Ltd – TS-998-ITAT-2016 (Pun) - TP

124. The Tribunal held that there were two conditions precedent for the applicability of Section 144C which provides that the AO must pass a draft assessment order prior to final assessment order viz. (i) the assessee should be an eligible assessee and (ii) the AO must propose to make a variation in the income or loss returned by the assessee which is prejudicial to the interest of the assessee. Noting that in the instant case, the AO did not propose to make any variation in the income or loss returned by the assessee but merely determined the taxability at a different tax rate (as business profits as against capital gains), it held that the AO's action of directly issuing the assessment order without issuing a draft assessment order despite the assessee being an eligible assessee was valid.
Mosbacher India LLC – TS-944-ITAT-2016 (Chny) - TP

125. Where the assessee, a German company, had constituted a PE in India by virtue of its onsite projects in India in relation to supply of equipment under contract with a Korean company and the TPO had apportioned profit to its Indian PE on account of supervisory charges as well as supply and delivery of equipment on the basis of revenue attribution and rejected the assessee's argument that the German company and the Indian PE were in fact a single entity, the Tribunal held that the order of the DRP had merely confirmed the TPO order in a cryptic manner without considering every point of objection raised by the assessee and therefore it remitted the issue back to the file of the DRP.
Durr Systems Gmbh – TS-955-ITAT-2016 (Chny) - TP

126. The Tribunal refused to condone the delay of 1 year in filing appeal against the CIT(A) order confirming TP adjustment in respect of international transactions in the absence of proper explanation for delay. It rejected the contention of the assessee that although the CIT(A) dispatched the order in August 2008, the assessee could not find it in its record and held that

non-availability of the order of the CIT(A) in its record did not mean that the order of the CIT(A) was not communicated to him. It held that the assessee, being a private limited company duly represented by professionals should have been vigilant towards its right and interests and also noted that the assessee was delayed in filing the application for condonation of delay as well.
Molex India Tooling Pvt Ltd – TS-1018-ITAT-2016 (Bang) - TP

127. The Court dismissed the writ petition filed challenging the reference made by the AO to the TPO on the alleged ground that the said reference was without jurisdiction since the Dutch entity with whom the Petitioner had undertaken transactions was not an AE and therefore the impugned transaction did not constitute an international transaction. The Court held that Section 92CA of the Act does not require the AO to come to a definite finding that there is an international transaction before referring the matter to the TPO and all that was required was a prima facie finding. It further held that the determination of whether the impugned transaction was an international transaction or not was a factual issue and that the TPO was well equipped to deal with the same and noted that the Petitioner gets two opportunities to argue its case – once before TPO and then before AO / DRP. Accordingly, it refused to express any opinion on the merits of the case and directed the TPO to issue a fresh notice to the Petitioner to decide all points raised.
Price Water House v CIT & Lovelock & Lewes v CIT – TS- 976-HC-2016 (Cal) - TP

128. Where the assessee had filed a revised return increasing its mark-up from 8 percent to 13 percent offering more income as a suo moto adjustment and consequently claiming a higher deduction u/s 10A, but the AO ignoring the revised return proceeded on the basis of the original return, pursuant to which the assessee preferred Mutual Agreement Procedure and reached an acceptance with regard to ALP and agreed to withdraw its appeals relating to its TP issues, the Tribunal noted that the assessee had dropped all other grounds other than the ground in relation to acceptance of revised return for computing adjustment and held that it was incumbent on the assessee to withdraw the entire appeal since the adjustments were subject to MAP. Accordingly, it rejected the appeals filed by the assessee as the assessee had accepted the MAP procedure based on the assessment order in which only the original return was taken into consideration.
Deloitte Support Services India Pvt Ltd [TS-899-ITAT-2016(HYD)-TP] (ITA No1476/Hyd/2010)

129. The Tribunal dismissed the appeal filed by the Revenue on transfer pricing issues and deduction under section 10A as it was in violation of CBDT Circular No 21/2015 which provides for a monetary limit of Rs.10 lakh for preferring appeal by the Revenue before the Tribunal.
Curam Software International Pvt Ltd – TS-1037-ITAT-2016 (Bang)- TP

130. Where the assesee had raised *proper objections before DRP and the DRP failed to adjudicate on the matter*, the Tribunal restored the TP-issues back to AO/TPO in respect of international transaction of software development services provision for AY 2007-08 for fresh decision after affording adequate opportunity of being heard to the assessee.
Nvidia Graphics Pvt Ltd – TS-895-ITAT-2016 (Bang) – TP

131. The Tribunal restored TP-issues relating to transactions in assessee's manufacturing segment back to AO for AY 2006-07 noting that although the DRP noted the facts and objections raised by assessee, it decided the issue in one line by stating that "The panel is of the view that the filters adopted by the TPO are very reasonable and the objections of the assessee cannot be accepted". It held that the order of the DRP was very cryptic and without any reasoning and therefore, the entire issue was to be restored back to the file of the AO/TPO for fresh decision.
Tyco Electronics Corporation India Pvt Ltd – TS-894-ITAT-2016 (Bang) - TP

132. The Tribunal, relying on the decision of the co-ordinate bench in the assessee's own ase for the subsequent assessment year, remitted TP-issues relating to comparables selection, risk adjustment and depreciation adjustment back to AO/TPO. Noting that the assessee sought exclusion of Tata Elxsi Ltd., Flextronics Software Systems Ltd. (Seg.), R Systems International Ltd. (Seg.), Kals Information Systems Ltd.(Seg.), Infosys Ltd., Accel Transmatics, Megasoft and

Bodhtree Consulting Ltd as well as risk and depreciation adjustment, it relied on the decision of the Tribunal for the subsequent AY and restored the entire matter to the file of the AO/TPO for fresh decision after allowing adequate opportunity of being heard to the assessee.
Infineon Technologies India Pvt Ltd – TS-893-ITAT-2016 (Bang) – TP

133. The Tribunal dismissed the appeal filed by the assessee against order passed by AO pursuant to DRP's directions for AY 2011-12 on the ground that nobody appeared on assessee's behalf on November 22, 2016 (hearing date) even though the date of hearing was mentioned in the notice of hearing which had been issued and served on assessee by registered post with acknowledgement due and held that since the assessee was not interested in prosecuting its case the appeal was infructuous.
Karuturi Global Ltd – TS-934-ITAT-2016 (Bang) – TP

134. The Tribunal 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 filed its Form 3CEB along with return of income, making full disclosure of receipts from IT support services rendered to group companies. It held that if the AO chose to ignore the material filed by the assessee and later scanned documents of other concerns in the process of which he came across some information of the assessee which had already been disclosed by the assessee itself, such information could not partake the character of new tangible material.
Sanvik Information Technology AB [TS-1055-ITAT-2016 (PUN)-TP]

135. The Tribunal dismissed cross appeals of assessee and Revenue for AYs 2007-08 to 2010-11 as the TP issues were resolved under India-USA MAP. It noted that the assessee's US AE had applied for MAP with the competent authorities of USA in respect of TP adjustment which had been accepted by the assessee.
Symantec Software India Private Limited [TS-1054-ITAT-2016(PUN)-TP

Penalty

136. The Tribunal deleted penalty under section 271(1)(c) of the Act relating to TP adjustment on account of brand promotion expenses incurred by the assessee in India in respect of the brand name 'Panasonic' based on the 'bright line test' and held that the issue of whether the 'bright line test' could be applied to expenditure incurred in India was itself debatable and therefore the assessee could never have been deemed to have concealed income or furnished inaccurate particulars. It also referred to Explanation 7 to Section 271(1) and observed that the Revenue had not brought anything on record to show that the assessee had computed ALP in a manner which reflected absence of good faith and due diligence.
Panasonic India Pvt Ltd – TS-1003-ITAT-2016 (Chny) - TP

137. The Tribunal deleted the penalty imposed under section 271(1)(c) relating to TP adjustments made in respect of the assesssee's purchase / sale transactions with AEs on the basis of customs data available from other concerns dealing in the same products which was furnished itself in Form 3CEB. Noting that the assessee had submitted documents and evidences to explain the logic for adjustments made to customs data to arrive at ALP and explained the shortfall in transaction value which occurred due to foreign exchange fluctuations between the time of purchase order and actual export it held that the assessee had proved that the price charged / paid was computed in accordance with 92C in good faith and with due diligence and further all material facts had been disclosed before the TPO.
Del Monte Foods India Pvt Ltd v ACIT – TS-1017-ITAT-2016 (Mum) - TP

138. The Tribunal deleted the penalty levied by the TPO under section 271AA and held that the assessee had made sufficient compliance for maintaining the documents as required under section 92D read with rule 10D. It held that the assessee had furnished duly certified Form 3CEB along with agreements with AE regarding provision of brand license, technical assistance

and know-how and royalty agreement and that the order u/s 92CA(3) was made after due consideration of the documents and therefore penalty could not be levied.
Cadbury Schweppes Overseas Ltd – TS-949-ITAT-2016 (Mum)- TP

139. The Tribunal remitted the issue of levy of penalty under section 271AA in respect of alleged non reporting of international transactions of purchase from AE in Form 3CEB. It noted the assessee's claim that it had wrongly conceded to the non-reporting of transactions during its earlier proceedings and that the assessee submitted a reconciliation of transactions. The Tribunal held that the non-reporting of transactions in Form 3CEB was sufficient for levy of penalty and the fact that no TP adjustment was made on the unreported transactions was irrelevant. It further noted that there was no mention of the alleged unreported transactions either in the assessment or penalty order and question how the TPO found the relevant transactions in the first place. It also held that there were discrepancies in the reconciliation submitted by the assessee. Accordingly, it restored the matter back to the AO for limited purpose for determining if any part of the purchase transactions from AEs remained unreported in Form 3CEB.
Indian Additives Limited [TS-931-ITAT-2016(CHNY)-TP] (I T.A. No. 1454/Mds/2014)

140. The Tribunal upheld the order of the CIT(A) deleting penalty under section 271AA for non-maintenance of documentation under section 92D with 10D, noting that the Tribunal, in the quantum appeal, had held that the method employed by the Revenue as well as the assessee for the computation of ALP of product development expenses was erroneous and therefore had remitted the matter to the TPO for fresh consideration. It upheld the finding of the CIT(A) that in light of the matter being remitted for re-consideration, the penalty would not survive. Additionally, the Tribunal observed that the assessee had maintained records which were submitted before the TPO and that the AO had not pointed out any specific findings of failure.
Autoneum Nittoku Sound Proof Products India Pvt Ltd – TS-1021- ITAT-2016 (Chny) - TP

Stay of demand

141. The Tribunal extended the assessee's stay of demand for a period of one month noting that the appeals of the assessee for AY 2010-11 and 2011-12 had been heard and that the assessee had already paid Rs.50 crore out of the total demand of Rs. 101.47 crore constituting 49.27 percent of the total demand.
Google India Pvt Ltd v DCIT – TS-991-ITAT-2016 (Bang) - TP

142. The Tribunal granted stay of outstanding demand of Rs.1.69 crore subject to payment of Rs.40 lacs by the assessee in 2 instalments, since the assessee had a prima facie good case. It also accepted the assessees contention that available MAT credit should be adjusted against the demand. It also clarified that if the assessee sought adjournment, the stay granted would be automatically vacated.
Softtek India Pvt Ltd – TS-990-ITAT-2016 (Bang) - TP

143. The Tribunal dismissed the stay petition filed by the assessee in view of the disposal of the main appeal. It noted that the order of the Tribunal was already placed on record and therefore the stay petition was now infructuous.
Lenovo India Pvt Ltd v DCIT – TS-1006-ITAT-2016 (Bang) - TP

144. The Tribunal rejected extension of stay but granted early hearing in the case of the assessee and directed the TPO not to take coercive action till the next date of hearing. It noted that the assessee's appeal was fixed twice but could not be heard due to non-functioning of bench and clubbing of the matter with the Revenues appeal.
Faurecia Automotive Seating India P Ltd v ACIT – TS-983-ITAT-2016 (Bang) - TP

145. The Court allowed assessee's writ petition for grant of stay of demand. It accepted assessee's contention that the demand was per se unenforceable as AO had completed assessment by

adopting "Bright Line" Test favored in LG Electronics ruling which was later disapproved by co-ordinate bench in the case of Sony Ericsson Mobile Communications. It observed that the co-ordinate bench had categorically ruled against the adoption of the Bright Line Test and accordingly, held that the assessment and the order which resulted in substantial additions and the demand in question could not be enforced pending the assessee's appeal before the Tribunal and accordingly directed the revenue to keep the demand in abeyance and not take coercive measures till Tribunal's final order.
Bacardi India Pvt. Ltd [TS-884-HC-2016(DEL)-TP] (W.P.(C) 4221/2016)

146. The Tribunal declined extension of stay of demand granted earlier which was granted subject to two conditions viz that the assessee would not seek any adjournment till the date of final hearing of appeal and that the assessee would co-operate for expeditious disposal of appeal, on the ground that the assessee had requested for grant of adjournment 3 times.
Socomec Innovative Power Solutions Private Limited [TS-870-ITAT-2016(CHNY)-TP] (SP. No.220/Mds/2016)

147. The Apex Court admitted Revenue's SLP against the decision of the Punjab and Haryana High Court wherein the Court upheld the Tribunal's powers to grant stay beyond 365 days by noting that the stay was initially granted by Tribunal for a period of 365 days which was further extended for a period of six months or until the disposal of appeal as the appeal could not be decided by the Tribunal due to pressure of pendency of cases and the delay in disposal of the appeal was not attributable to the assessee in any manner, even though Section 245(2A) restricts the extension of stay beyond a period of 365 days. Accordingly, it directed issuance of notice to the assessee.
Carrier Air Conditioning and Refrigeration Ltd – TS-946-SC-2016 - TP

148. The Tribunal granted extension of stay of outstanding demand to the assessee for AY 2011-12 for a further period of 3 months from the date of order noting that after disposal of the earlier stay application, appeal was listed for hearing on 4.07.2016, but the hearing could not take place and was further adjourned to 14.07.2011 but due to non-functioning of the bench, the hearing was further adjourned to 23.11.2016. Stating that the assessee was not responsible for the delay in the disposal of the appeal, it held that the case of the assessee was a fit case for extending of the stay earlier granted. However, it clarified that the stay granted would be automatically vacated if the assessee sought adjournment on the next date of hearing i.e. 23.11.2016
The Himalaya Drug Co v DCIT – TS-918-ITAT-2016 (Bang) - TP

149. The Tribunal granted extension of stay of outstanding demand for AY 2009-10 for a further period of 3 months from the date of order or till disposal of appeal, whichever is earlier noting that the appeal was listed for hearing but was adjourned due to no fault of the assessee. However, it clarified that if assessee sought adjournment, the stay granted would automatically be vacated.
Business Process Outsourcing India Pvt Ltd – TS-989-ITAT-2016 (Bang) - TP

Others

150. Where in the previous assessment years, the issue of acceptance of a foreign tested party for the purpose of benchmarking international transactions of the assessee was favorably disposed of by the Tribunal on the ground that it was the least complex and the requisite information was available, the Tribunal in the instant case noted that the Revenue could not point out any distinction in the facts for the relevant year as compared to the previous year and set aside the issue to the TPO directing the TPO to conduct the benchmarking process in accordance with the prior years.
General Motors India Pvt Ltd – TS-939-ITAT-2016 (Ahd) - TP

151. The Tribunal upheld the TPO's rejection of the foreign AE as a tested party observing that for accepting a foreign AE as a tested party all necessary information about the tested party and foreign comparables adopted ought to be provided which was not done so in the instant case.

Sutherland Healthcare Solutions Ltd v ITO – TS-947-ITAT-2016 (Hyd) – TP

152. Where the assessee had converted its remuneration model from per diem basis to cost plus 15 percent, which led to a fall in profits in the current year as opposed to the earlier years, the Tribunal dismissed Revenue's contention that the assessee, who was eligible to claim deduction under section 10A till the prior year, had devised a scheme for tax avoidance in the current year (since it was no longer eligible to deduction under section 10A) by switching over to a remuneration model leading to lower profits. It held that there was no logic in the argument of the DR as notwithstanding the fact that the assessee earned more profit in the earlier year there could be no transfer pricing adjustment in a later year as long as the international transactions were at ALP. It held that allowing excess deduction under section 10A in the earlier years on the basis of exaggerated profits, if any, could not be a reason to disturb ALP of the international transaction of the current year.
McKinsey Knowledge Centre Pvt Ltd – TS-997-ITAT-2016 (Del) - TP

153. The Court allowed the appeal of the assessee against the order of the Tribunal wherein the issue relating to segregation of transactions vis-à-vis the transfer pricing exercise carried out by the TPO was remanded and held that while directing a remand of certain issue, the Tribunal should not have expressed its opinion distinctively on the issue. Accordingly, it directed the TPO to consider the issue of segregation or aggregation on merits having regard to the totality of facts and keeping in mind the decision of the Court in Sony Ericsson.
Agilent Technologies India Pvt Ltd – TS-891-HC-2016 (Del) - TP

154. The Court, relying on its decision in Sony Ericsson and Magnetti Marelli remitted the issue concerning aggregation v segregation of the transaction of payment of royalty / fees for technical services and import of raw material to the TPO for re-consideration. It held that the claim of the assessee i.e. that aggregation was essential in the given case and that the payment of royalty / fees for technical service had to be viewed along with all other expenses, was entirely dependent on the facts of the case and that there was no straight jacket formula in respect of aggregation or segregation. Noting that the Tribunal had upheld the segregation of the two transactions and upheld the CUP method adopted by the TPO, it refused to give a definite ruling on the issue of most appropriate method at this stage. Accordingly, it remitted the issue to the file of the TPO.
Gruner India Pvt Ltd – TS-1049-HC-2016 (Del) - TP

155. The Tribunal held that where conditions stipulated by Article 9(1) (Associated Enterprises article) of DTAA for application of arm's length standard are shown to exist, domestic TP law would apply since DTAAs contain no machinery provision for applying 'arm's length standard' envisaged in Article 9(1). It held that once it was undisputed that the arms length standards are to be applied in computation of taxable profits, as is the specific mandate of article 9, it is only axiomatic that since the manner in which arm's length standards are to be applied has not been defined by the treaties, the mechanism provided under the domestic law must hold good. It held that Article 9(1) is thus, in a way, an enabling provision, and the TP mechanism under the domestic law is the machinery provision. It further held that the provisions of article 9(1) permit ALP adjustment in all situations in which the arm's length standards require higher profits in the hands of any one of the enterprises and could not be read to confine the application of transfer pricing to domestic entities only. Accordingly, it dismissed appeals filed by assessee (a Dutch company and a non-resident) seeking relief from TP adjustment of Rs. 100 crores fees for technical services ('FTS') received from its Indian AEs, which were subject to tax @ 10% under India Netherlands DTAA and rejected the plea that Article 9 of the Indo-Dutch DTAA does not permit ALP adjustments in the hands of non-resident.
Shell Global Solutions International BV [TS-921-ITAT-2016(Ahd)-TP] (I.T.A. Nos.: 2933/Ahd/2011)

II. *International Tax*

a. ***Permanent Establishment***

156. The Tribunal held that the AO was incorrect in treating the assessee as an "assessee in default" under section 201 by considering the payment made by it to Precision Energy Associates LLC represented by its proprietor Joe Mitchell, a professional consultant. It held that the provisions of the India- US DTAA would override the provisions of the Act and therefore taxability of the services would have been governed either by Article 15 viz. independent personal services or Article 16 viz. dependent personal services. It noted that if the services provided by Joe Mitchell were considered as dependent personal services, the same would not be taxable under Article 16 since the period of stay of Joe Mitchell in India did not exceed 183 days. Alternatively, it held that if the services were to be treated as independent personal services, for the purpose of determining the number of days stay in India, either the date of arrival or the day of departure was to be excluded and since Joe Mitchell had made seven visits to India, a period of 7 days was to be excluded. Accordingly, the number of days stay in India of Mr Mitchell would amount to 86 days as opposed to the 93 days erroneously computed by the CIT(A) and therefore the payment to Joe Mitchell would not be taxable under the India-US DTAA.
Spectrum Power Generation Ltd v ACIT – (2016) 48 CCH 0261 (Hyd – Trib) (ITA No 1101 / Hyd / 2016)

157. The Tribunal held that the amount received by assessee (a Switzerland company) pursuant to NHPC project was taxable in India for AY 2008-09 as the assessee's Indian subsidiary ('CIWSPL') represented through its MD constituted it's fixed place PE in India. It noted that CIWSPL's MD was the project coordinator and represented the non-resident assessee at site and signed all the documents on behalf of assessee and that the assessee's business was conducted from the address of the project coordinator and all correspondences relating to prospecting of client, participation in bids, correspondence with customers, signing of contract document, execution of the project and closure of the project etc. were initiated or routed through such address. Therefore, it rejected the assessee's stand that since the project duration was only of 40 days, the assessee could not be said to have any PE in India in view of Article 5.2(j) of India-Swiss DTAA (which prescribes 182 days threshold for construction/installation/assembly PE). It observed that the "fixed place test" was positive for the assessee and it was not required to go for special inclusion for the purpose of determination of PE, more so since the contract was not related to a building site, construction, installation or assembly project and the work largely being in the nature of repair and supply of material.
Carpi Tech SA [TS-587-ITAT-2016(CHNY)]

158. Where the assessee a UK based company granted to Jaypee Sports, the right to host and promote Formula F1 Race at motor racing circuit owned by Jaypee and the assessee had full access to circuit and it could dictate as to who was authorized to access circuit and organising any other event on circuit was not permitted, the Court held that the said circuit, constituted permanent establishment of assessee in India. Further, it held that the sum received by the assessee from Jaypee Sports on the transfer of the right to host and promote 'Formula F1 Race to Jaypee Sports, would not amount to royalty as the use of rights by Jaypee had been strictly confined and limited to the promotion of the event and for no other purpose.
Formula One World Championship Ltd. vs. Commissioner of Income-tax, International Taxation [2016] 76 taxmann.com 6 (Delhi)

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

159. The Tribunal held that payments made by assessee (an Indian company engaged in software development) to Verizon USA for providing internet and bandwidth services and for providing equipment ('CPE') which was to be installed at the customers' premises for accessing network connection, did not amount to royalty. It rejected the Revenue's stand that payment was for use of scientific or commercial equipment within the meaning of 'royalty' under the Act and held that

the CPE was not a personalized/sophisticated modified equipment for specific and exclusive use of the assessee and therefore the payment could not be said to be for use of equipment.
Quaolcomm India Private Limited [TS-605-ITAT-2016(HYD)] (ITA Nos.1664 to 1667/Hyd/2011)

160. The Tribunal reversed the order of the DRP and held that the fees for technical services ('FTS') received by assessee (company incorporated in UAE) from its Indian counterpart was not chargeable to tax in India absent FTS article in India – UAE DTAA. It held that since the income derived by the assessee from providing services was its regular business activity, it could only be taxed as business income under Article 7 of the DTAA and in the absence of PE in India, the assessee was not chargeable to tax in India. It rejected the Revenue's plea that FTS income was taxable u/s 9(1)(vii) and held that once the income chargeable to tax as per the DTAA was categorized by excluding the Fees for Technical Services then the scope of taxing the said income cannot be expanded by importing the said provision from the Income Tax Act when it is excluded under the DTAA.
ABB FZ LLC [TS-589-ITAT-2016(Bang)] (I.T.(I.T) A. No.188/Bang/2016)

161. The Tribunal held that payment made to UK parent for provision of management services in relation to advise and guidance on key management decisions to explore the possibilities of acquisition of businesses was not taxable as fees for technical service under Article 13 of India-UK DTAA as the make available test contained in the DTAA was not satisfied.
Xansa India Ltd. [TS-597-ITAT-2016(DEL)]

162. The Tribunal held that payment by the assessee to various companies in USA, UK, Germany etc. for use of software licenses neither amounted to royalty, both under the Act and respective DTAAs, nor Fees for Technical Services ('FTS') as it could not be said that assessee was granted a right to utilize the copyright embedded in the software, but was only granted a right to use the software product. It further observed that assessee purchased end user software license packages which were used as tools in its software development activity, and held that it was a case of purchase of copyrighted article and not use of copyright itself.
Quaolcomm India Private Limited [TS-605-ITAT-2016(HYD)] (ITA Nos.1664 to 1667/Hyd/2011)

163. The Tribunal held that technical/consultancy service payments made by the assessee to a Switzerland based company, constituted fees for technical services under India-Swiss DTAA and it rejected the assessee's contention that by virtue of Protocol to the India-Swiss DTAA, the restrictive FTS provision in a subsequent DTAA between India and other OECD country should be read into the Indo-Swiss treaty and therefore the make available clause, though not present in Swiss treaty, but contained in India-Portuguese DTAA could be invoked as no technical knowhow was made available. It clarified that the Protocol only provided for re-negotiation of the clauses in India- Switzerland Treaty in case of more liberal subsequent agreements with other OECD countries, and thus, until it was actually re- negotiated and approved, the 'make available' limitation in India- Portugal DTAA treaty could not apply to Swiss remittances.
Torrent Pharmaceuticals Ltd. [TS-609-ITAT-2016(Ahd)] (ITA No.451/Ahd/2012)

C. ***Others***

164. The Apex Court dismissed the Revenue's SLP filed against the decision of the Delhi High Court in the case of Hyosung Corporation wherein the Court had allowed the assessee's writ petition against the AAR ruling rejecting application on the ground that issues were pending adjudication before AO since section 143(2) notices were already issued. The High Court had accepted assessee's contention that mere issuance of notice u/s 143(2) would not make the question raised in the AAR application 'pending' before IT authorities. Accordingly, the Apex Court dismissed the SLP as it held that there was no legal and valid ground for interference with the order of the High Court.

CIT v Hyosung Corporation & ANR – TS-668-SC-2016

165. Where the assessee, who executed projects in Saudi Arabia, income on which tax was levied in Saudi Arabia claimed benefit under section 91 of the Act including on the sums which were allowed as deduction under 80HHB and 35B, the Court upheld the decision of the Tribunal and held that since amounts claimed as deduction under section 80HHB and section 35B admittedly did not bear any tax in India, no relief could be granted under section 91 as there was no double taxation on such amounts.
Reliance Infrastructure Ltd. v. CIT, Mumbai [2016] 76 taxmann.com 257 (Bombay)

II. *Domestic Tax*

a. *Income*

166. Where the project receivable was not received for 11 years consequent to which the assessee had written it off as there was no chance of recovery, but however subsequently, the assessee recovered the higher amount due to difference in dollar value at the time of write off and year of recovery, the Court held that excess amount received by assessee on account of exchange fluctuation in relation to foreign projects receivable constituted a non-taxable capital receipt and not revenue receipt on the ground that non-recovery and blockage of funds had transformed it into capital investment.
SDB Infrastructure Private Ltd [TS-649-HC-2016(CAL)]

167. The Apex Court reversed the High Court ruling and held that the payment of subvention received by assessee from its German parent for recoupment of losses was a non-taxable capital receipt as they were voluntary contribution by parent to its loss making Indian company in order to protect the capital investment of the assessee company.
Siemens Public Communication Networks Ltd [TS-651-SC-2016] (SLP(C) NO. 8353/2014)

168. The Tribunal held that amounts shown as liabilities in the Balance Sheet could not be deemed to be cases of cessation of liability merely because the liabilities are outstanding for several years and the AO had to establish with evidence that there had been a cessation of liability with regard to the outstanding creditors.
ITO vs. Vikram A. Pradhan (ITAT Mumbai)

169. The Court held that overdue charges shall always be chargeable only on cash receipt basis and not on accrual basis. It further held that section 43D would only apply to public financial institutions which charge interest in relation to bad or doubtful debts and since assessee did not fall in the definition of public financial institution as defined under Companies Act, section 43D was not applicable. Therefore, the addition of overdue charges, charged to tax on receipt basis, was deleted.
CIT Vs. Shriram City Union Finance Ltd. (2016) 97 CCH 0124 ChenHC (Civil Miscellaneous Appeal No. 1422 of 2010)

b. *Income from House Property*

170. The Tribunal held that where the property in question did not belong to the assessee but belonged to the assessee's mother, the interest claimed by the assessee on house building advance was not allowable under section 24(b) of the Act.
Raj Sawhney v ITO – (2016) 48 CCH 0253 (Jaipur Trib) – ITA No 699 / JP / 2016

171. The Court held Section 23(1)(b) and (c) would apply only to those properties which were actually let out and for which rent was actually received or receivable by the assessee. These provisions deal with the concept of real income and not notional income. Therefore, the annual value of the properties which are more than one, owned by the assessee and which admittedly remained vacant throughout the previous year would not be assessed under Section 23(1)(c) but under Section 23(1)(a).
Susham Singla v. CIT, Patiala [2016] 76 taxmann.com 349 (Punjab & Haryana) (It Appeal Nos. 371 TO 377 OF 2015)

172. Where, vide a supplementary lease-deed, the assessee re-fixed and reduced the monthly rent charged to its sister concern to Rs.25,000 per month from Rs.5 lakhs per month, while negotiating interest free security deposit at Rs.25 crores, the Tribunal upheld the Revenue's determination of annual value ('ALV') of property let out by assessee to its sister concern, by adopting 'notional interest' on security deposit received by assessee and rejected the assessee's stand that on account of commercial expediencies the rent was reduced and that the AO did not have power to enhance the ALV on the basis of higher deposit. It observed that it was only on receipt of a substantial amount towards interest-free security deposit that the rent was reduced and therefore held that notional interest on security deposit was to be treated as income from house property.
Sobha Interiors Pvt. Ltd [TS-633-ITAT-2016(Bang)] (ITA Nos.1607 & 1692/Bang/2012)

173. The Court set aside the order of the Tribunal and held that 'reasonable' rent and not the lower actual rent received by assssee-individual was relevant for computing annual value of the property let out u/s 23(1) for AY 1996-97. It observed that assessee alongwith other co-owners had leased out a portion of the property at Re. 1/ per sq. ft. to the company in which they were directors, however, the AO assessed the annual value at Rs. 4 per sq,ft. on the basis of another portion of the same property leased out to other tenant considering the methodology prescribed u/s 23(1) and therefore held that the Tribunal erred in quashing the AO's action by holding that Sec 23(1) (which provides for computation of annual value of 'let out' property) could not be applied to present case as the co-owners themselves were the lessees. It held that the findings of the Tribunal could not be accepted for the reason that Section 23 did not exempt cases in which buildings have been let out by the owners to firms or companies in which they are interested. Accordingly, it held that Sec 23(1) would be applicable in all cases where annual value has to be estimated on let-out properties.
Dr. K. M. Mehaboob [TS-618-HC-2016(KER)] (ITA.No. 765 of 2009)

C. ***Business Income / loss***

174. The Court held that where assessee was engaged in the business of granting loans to its members for constructing houses as well as to build housing complexes and to sell the units, income from selling the constructed houses was taxable as income from business or profession.
Punjab State Co-operative Federation vs. CIT

175. The Tribunal held that for the purpose of taxing an amount under section 41 of the Act there had to be a remission or cessation of trading liability in the hands of the assessee and therefore held that that where the assessee received an advance for supply of goods but the transaction did not materialize, the amount outstanding in the books of accounts of the assessee could not be treated as deemed business income in the hands of the assessee since there was no cessation or remission of liability nor was there any benefit of accrual of income. It noted that the amounts remained unpaid and the other party had not made any efforts to collect the advances and that the assessee had not written the said amount in the books and therefore the provisions of section 41 read with section 28 of the Act would not apply.
Shabina Steels v ACIT – (2016) 48 CCH 0223 (Bang Trib)

176. The Court upheld the initiation of proceedings under section 263 of the Act, noting that the original order passed under section 143(3) of the Act, accepting the return filed by the assessee

wherein the assessee had claimed business losses to be carried forward, was erroneous as it was not in accordance with law and prejudicial to the interest of the revenue. It noted that the AO had not taken into account the fact that the assessee had not commenced any business activities during the year and therefore, the expenditure claimed by the assessee, which was ultimately carried forward could not be treated as business loss.

Zuari Management Services Limited vs.CIT(2016) 97 CCH 0164 MumHC (Tax Appeal No. 53 OF 2015)

177. The Apex Court dismissed the review petition filed by assessee-company G S Homes (engaged in real estate business) against its judgment dated August 9, 2016 wherein it had modified the decision of the High Court on the issue of taxability of amount received by assessee on account of share capital from various shareholders towards allotment of flats and held that such amount ought not to have been treated as business income

G. S. Homes and Hotels P. Ltd [TS-594-SC-2016]

178. The Court held that Interest income earned on amount of deposit kept with bank for purpose of opening letter of credit, which was made out of funds received (from NRI promoters) for purpose of plant and machinery would not be taxable as income from other sources and would be reduced from the cost of asset on the ground that any income earned on such deposit arose out of funds which were for the purpose of investment in plant and machinery and therefore was incidental to acquisition of assets for setting up of plant and machinery.

Steel Co Gujarat Ltd. vs. ITO (2016) 97 CCH 0096 GujHC (Tax Appeal No.893 of 2006)

179. Where the assessee made revision in pay scale and where 40% of the revised salaries were payable in the current financial year and remaining 60% of the salaries were payable in the next financial year, the Court upheld the order of Tribunal wherein it was held that the entire liability was incurred in the assessment year in question and had been estimated with reasonable certainty and therefore was not contingent in nature, thereby deleting the disallowance made by the CIT(A) viz. 60% of the salaries on the ground that the liability to that extent did not arise in that year, **PCIT vs. Haryana Warehousing Corporation (2016) 97 CCH 0090 PHHC (ITA No. 103 of 2016 (O&M))**

d. ***Deductions***

Section 32

180. Where the assessee had entered into lease agreement, which was not registered and paid security deposit and it had option to purchase leased property on expiry of 3 years from commencement of lease, the assessee claimed depreciation on improvements made, the Court upheld the view of the Tribunal that non-registration of agreement did not imply that benefit available under section 53A of The Transfer of Property Act, 1882 of being entitled to continued possession in part performance of agreement to sell, had to be denied and that deduction in respect of depreciation could be claimed by the person in whom the dominion over the building vests and one who uses the asset for his business or profession.

CIT vs. Bhushan Steels & Strips Ltd. (2016) 97 CCH 0145 Del HC (ITA 314/2003)

181. The Tribunal upheld depreciation disallowance on intangible asset i.e. 'distribution network' and other assets acquired by assessee pursuant to acquisition of colour television ('CTV') business on slump sale basis by invoking Explanation 3 to section 43(1, on the ground that transaction of acquiring business as a going concern was between two related parties and the seller had substantial 50% interest in assessee-company and assets already depreciated in the hands of seller were assigned higher values by assessee-company. It further observed that there was no transfer of any distribution network as seller was 50% stakeholder in assessee company and retained the brand name in company name and held that right to use distribution network does not result in creation of any intangible asset since none of the parties had paid any amount to the distributors.

Sanyo BPL Pvt Ltd [TS-620-ITAT-2016(Bang)] (ITA No.1395/Bang/2014)

Section 36

182. The Court held that Explanation to Section 36(1)(va) of the Act provides that the deduction shall be allowed in respect of the sum paid by Assessee to employees' account, in the relevant fund, on or before 'due date', i.e. the date by which Assessee (employer) is required to credit employees contribution in the relevant fund and if the Assessee (employer) pays such tax, duty, cess or fee even after closing of accounting year but before date of filing of Return under Section 139(1) of Act, 1961, the assessee would be entitled to deduction under Section 43B on actual payment basis and such deduction would be admissible for the accounting year.
Sagun Foundry Pvt. Ltd. vs. CIT(2016) 97 CCH 0160 AllHC (ITA No. 87 of 2006)

183. Where the assessee utilized borrowed capital for the payment of dividend and the interest on borrowed funds was disallowed, the Court held that where borrowed funds were utilized for the purpose of declaration of dividend, payment of interest on such borrowings would constitute expenditure for the purpose of business of assessee and was allowable deduction in terms of section 36(1)(iii)
CIT Vs.Sakthi Auto Components Ltd. (2016) 97 CCH 0078 ChenHC (Tax Case Appeal No.549 of 2016)

184. The Court upheld the order of the Tribunal and held that the AO was incorrect in denying the assessee deduction on account of bad debts written off on the alleged ground that the assessee had not discharged its onus to prove that that the debt had become bad as the issue had been settled by the Apex Court in TRF v CIT (2010) 323 ITR 397 (SC) wherein the Court allowed the assessee to write off a debt when it became irrecoverable. Further, it also relied on Circular No 12 / 2016 wherein it was provided that for the purpose of allowing deduction for the amount of any bad debt under section 36(1)(vii) of the Act it was enough if the bad debt was written off as irrecoverable in the books of accounts of the assessee.
CIT & Another vs. Modi Olivetti Ltd.(2016) 97 CCH 0086 AllHC (ITA No.140 of 2008)

Section 37

185. The Tribunal allowed deduction under section 37(1) for expenditure towards contribution made by assessee (CA Firm) to Pune branch of ICAI towards construction of administrative building of said branch, observing that by donating the amount to ICAI for better infrastructural facilities, the assessee was also able to attract good articled clerks and other professional persons who were the backbone of its professional practice and accordingly, the said payment satisfied the commercial expediency test as the contribution had a direct nexus with the carrying on of the profession. It further rejected revenue's argument that the payment was in the nature of donation, specific provision under section 80G will be applicable over general provision under section 37(1) and held that if the claim is allowable under section 37(1) itself there is no case for proceeding to Chapter VIA which applies to all assessees whether or not they are carrying on business or profession.
B. K. Khare And Company [TS-616-ITAT-2016(Mum)] (ITA No.4500/Mum/2014)

186. The Tribunal allowed assessee's claim for deduction under section 37 towards gift of subsidiary company's shares to a key employee for his contribution in setting up a super specialty hospital under another subsidiary company. It rejected revenue's contention that expenditure incurred was not eligible for deduction u/s. 37(1) absent business income earned by the assessee and held that setting up of subsidiaries wherein assessee has a 100% controlling interest engaged in healthcare business, tantamounts to carrying on business by the assessee company and therefore expenditure incurred in the course of the said business was also business expenditure eligible for deduction u/s. 37(1) of the Act irrespective of the income from such business. It further upheld assessee's claim for treatment of sum received from letting out plant and machinery as business income and not income from other sources on the ground that assessee's arrangement was that of contract manufacturing whereby the basic raw material for manufacture of the tyres was supplied by the lessee of such plant and machinery, and using the same the assessee manufactured tyres for lessee using its labour, fuel etc.
PTL Enterprises Ltd [TS-580-ITAT-2016(COCH)] (I.TA No.200/Coch/2015)

187. Where during assessment/investigation, it was observed that crop loans were raised in the names of 37 planters within the family and assessee alleged that those 37 persons had advanced loan to it, however, the loan application/transactions were handled by assessee and such loan amounts were not reflected in the returns of 37 persons and accordingly, additions were made by the revenue as it was case of name-lending, the Apex Court set aside the order of the High Court wherein it had remitted the matter to the AO observing that the 37 persons who advanced loan to assessee ought to have been given notice without which no addition could be made. The Apex Court held that in view of the categorical finding that the loan amounts were not reflected in the returns of the 37 persons in question, the High Court erred in taking the aforesaid view and in remanding the matter to the Assessing Officer.
Karn. Plamters Coffee Curing Work(P)Ltd [TS-593-SC-2016]

188. The Tribunal held that AO was bound to grant deduction if the R&D facility was approved by the competent authority and that he had no jurisdiction to sit in judgement over the approval. It held that the fact that the competent authority did not file the report with the department as prescribed was a technical lapse for which the assessee could not be held liable.
Efftronics Systems Pvt. Ltd vs. ACIT (ITAT Vizag)

Section 14A

189. Where the assessee had suo-motu offered expenses attributable to exempt income under section 14A, but the AO disallowed higher sum applying the provisions of Section 14A read with Rule 8D, the Court upheld disallowance under section 14A as computed by AO and rejected contention of the assessee that AO must expressly record his dissatisfaction with the assessee's working. It clarified that if the AO is confronted with the figure which, prima facie, is not in accordance with what should approximately be the figure on a fair working out of the provisions, then he is bound to reject it.
Indiabulls Financial Services Ltd [TS-643-HC-2016(DEL)] (ITA 470/2016)

190. The Tribunal held that exempt income from investment income made in subsidiary shall be included while computing disallowance under section 14A of the Act as section 14A of the Act does not grant any exemption to the strategic investments yielding exempt income.
DCIT vs. The Saraswat Co-operative Bank Limited (ITAT Mumbai)

191. Where the assessee, an NBFC, had suo-motu offered Rs. 25 lakhs as expenses attributable to exempt income u/s 14A, however, the AO, after carrying out an elaborate analysis of the provisions as well as Rule 8D, disallowed Rs. 3.87 cr u/s 14A without recording an express satisfaction, the Court upheld the disallowance u/s 14A of the Act as computed by AO. It held that the fact that the AO did not expressly record his dissatisfaction with the assessee's working did not mean that he could not make the disallowance where the order passed by him shows due application of mind to all aspects. It further held that Sec 14A read with Rule 8D leave**s** the AO with no choice, but to follow a particular methodology enacted therein, and thus if AO is confronted with a figure which, prima facie, was not in accord with what should approximately be the figure on a fair working out of the provisions, he was but bound to reject it.
Indiabulls Financial Services Ltd.vs.DCIT(2016) 97 CCH 0110 DelHC

Section 40(a)(ia)

192. The Tribunal held that provisions of section 40(a)(ia) were inapplicable to assessee-trust not engaged in any business activity and having exempt receipts where assessee-trust was constituted as an owners' association of a commercial building to maintain the building and to utilise its common facilities. It further held that even if assessee's income is considered as income from other sources, section 40(a)(ia) cannot be invoked. It restored the matter to the file of the AO with the direction to give findings whether assessee's income was covered by concept of mutuality.

Astral Height Owners Association [TS-604-ITAT-2016(HYD)] (I.T.A. No. 08/HYD/2016)

193. The Tribunal upheld disallowance under section 40(a)(ia) on year end provisions of commission expenses as tax was not deducted by assessee-individual and held that in case of mercantile liability, Section 40(a)(ia) clearly mandates that the expenditure cannot be allowed in the absence of corresponding TDS payment in Government treasury. It rejected assessee's stand that since the practice followed by him was accepted by Department in past year, making a provision on estimate basis was an allowable business expenditure and that he was not in a position to pay TDS as the exact names, amount of commission and TDS payable to each party was not known.
Hardik Jignishbhai Desai [TS-603-ITAT-2016(Ahd)] (ITA No 1084/Ahd/2013)

Section 40A(3)

194. The Tribunal upheld disallowance under section 40A(3) where assessee made cash payments in excess of prescribed limit of Rs.20,000 and rejected assessee's submission that (i) due to business exigencies, the monetary limit had exceeded and (ii) if genuineness of purchases was established, the disallowance was not warranted.
International Ships Stores Suppliers [TS-607-ITAT-2016(Mum)] (ITA No. 2502/MUM/2013)

Section 43B

195. The Court held that if employee and employer's contribution is paid after the due date under the Provident Fund Act but before the due date of filing return of income, the same shall be allowed.
CIT & Another vs. Dhampur Sugar Mills Ltd. (2016) 97 CCH 0098 AllHC (ITA No.564 of 2007)

196. The Tribunal upheld section 43B disallowance on unpaid service tax and rejected assessee's contention since service tax payable was not reflected in the profit and loss account and was only shown as liability in the balance sheet for tracking the tax payable and that since it was acting as mere collection agent, section 43B disallowance was not applicable. It clarified that section 43B in the nature of check by the statute to ensure that the assessee makes payment of the tax collected to the concerned department and if he is unable to do so the amount is added to its income.
Madhya Gujarat Viz. Co. Ltd. [TS-615-ITAT-2016(Ahd)] (ITA No. 2583/Ahd/2010)

Chapter 10A / Chapter VIA

197. The Tribunal held that assessee, engaged in the software development, was entitled to deduction under section 10A in respect of amounts disallowed under section 40(a)(ia) relying on the coordinate bench ruling in case of Planet Online Pvt.Ltd. wherein section 10B relief was allowed after considering section 43B disallowance.
Patni Telecom Solutions P. Ltd. [TS-634-ITAT-2016(HYD)] (ITA.No.1988/Hyd/2011)

198. The Apex Court dismissed Revenue's SLP against Madras HC ruling wherein it had allowed assessee's Sec. 80IA deduction claim on current year's profits for AY 2005-06 without setting off notionally carried forward unabsorbed depreciation or losses of earlier years before the first year of claim and that the initial AY for the purposes of Sec. 80IA could not be the year in which the undertaking commenced its operations, but the year in which assessee chose to claim the deduction u/s 80IA for the first time.
Velayudhaswamy Spinning Mills P. Ltd. [TS-591-SC-2016] (SLP No.33475/2012)

199. The Court upheld the decision of the Tribunal and allowed relief under section 10A to the assessee-branch (a 100% SEZ unit engaged in software development) on profits arising on

transfer of software to its foreign head office ('HO'). It dismissed the contention of the revenue that section 10A benefit was to be denied since there was 'no export' sale by assessee as the computer softwares were merely transmitted to HO and there was no sale to third party. Referring to inter-relationship between Sec 10(A)(7) and Sec 80-IA(8), the Court held that the legal fiction of treating an assessee as a separate entity vis-a-vis sale by it or transfer by it from an eligible business or to an eligible business has been recognized u/s 10-A(7) of the Act. Accordingly, it held that profits arising from the export of goods by the assessee to its HO was to be allowed under section 10A of the Act.
Virage Logic International [TS-602-HC-2016(DEL)]

200. The Court upheld the order of Tribunal that interest income was not eligible for deduction under section 80HHD of the Act and miscellaneous income would also be excluded for the purpose of section 80HHD.
Benaras Hotels Ltd. Vs. ACIT (2016) 97 CCH 0100 AllHC (Income Tax Appeal Defective No. - 155 of 2008)

201. The Court, relying on the decision of the Division Bench in The Punjab State Cooperative Federation of House Building Societies v CIT (ITA-17-2016) held that the Tribunal was correct in holding that the income earned from banks other than cooperative banks was taxable as income from other sources not eligible for deduction u/s 80P of the Act.
Punjab State Cooperative Federation v CIT – (2016) 97 CCH 0140 (P&H)

202. Where assessee co-operative credit society was providing credit facilities to its members alone and not to general public at large and it also did not receive monies by way of deposit from general public, the Court held that it could not be termed as co-operative bank and therefore was entitled to seek deduction under section 80P(2)(a)(i), which provided that interest income received from the members of a co-operative society (and not co-operative bank) would be allowed as a deduction.
CIT vs. Nilgiris Co-Operative Marketing Society Ltd.(2016) 97 CCH 0106 ChenHC (Appeal No.758 of 2016)

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

203. Where the assessee entered into an agreement for sale of land on March 31, 2008, under which the consideration was paid to the assessee only on December 15, 2008 and the agreement was registered only on January 10, 2011, the Court held that in view of the facts, the AO was correct in levying capital gains tax in the year AY 2011-12 as the transfer could not have been recognized in AY 2008-09.
As regards the alternative contention of the assessee, that since the AO adopted the stamp duty value (of AY 2011-12) which far exceeded the fair value of the land as on the date of sale deed AY 2008-09), the valuation was to be referred to the DVO under section 50C(2), the Court upheld the contention of the assessee and held that the AO was to refer to the valuation of land to the DVO as on the date of agreement.
Devendra J.Mehta vs. ACIT (2016) 48 CCH 0227 Rajkot Trib (ITA No. 55/RJT/2016)

204. The Court dismissed asssessee's writ challenging Chief Commissioner's order u/s 119(2) rejecting assessee's application for waiver of interest u/s 234A/B/C for non-payment of advance tax on capital gains arising during AY 1996-97. It noted that the assessee omitted to pay advance tax in anticipation of obtaining exemption u/s 54F, however coordinate bench while adjudicating on quantum proceedings restricted assessee's exemption claim u/s 54F proportionately to the amount invested in the new property. It dismissed the contention of the assessee that waiver of interest would be justified as its case clearly fell within the discretionary powers of clause 2(d) of CBDT order (dated May 23rd 1996) which provided for waiver of and / or reduction of interest on the ground that the non-payment of tax was on the basis of the decision of the jurisdictional High Court which was subsequently nullified by either retrospective

amendment of the law or by a Supreme Court decision. This was not so in the case of the assessee as assessee was unable to establish that non-payment of tax was due to unavoidable situations, the Court approved rejection of interest waiver application.
Humayun Suleman Merchant [TS-624-HC-2016(BOM)] (W.P. No.3184 of 2004)

205. Where assessee HUF paid sum to brothers for getting the premises vacated and claimed the same as cost of improvement for the purpose of computing long term capital gains under section 48 on sale of house property, the Tribunal upheld the assessee's claim on the ground that if the brothers had refused to vacate the house in which case the only resort left with the assessee would have been filing a suit for the possession and that would consume time and accordingly, the payments were made for improvement of title of the property and they are entitled to claim deduction of cost of payment.
Nanubhai Keshavlal Chokshi HUF [TS-622-ITAT-2016(Ahd)] (ITA.No.86/Ahd/2012)

206. Where the assessee had been subjected to payment of income-tax on capital gains accruing from sale of land and the dispute was on the computation of cost of acquisition, the Apex Court held that declaration in the return filed by the assessee under the Wealth Tax Act in respect of the cost of acquisition of the land would certainly be a relevant fact for determination of the cost of acquisition under section 55(2) of the Act and comparable sales made in subsequent in point of time for which appropriate adjustments could be made was also to be considered as relevant and which had been rightly considered by the Tribunal. Accordingly, it restored the order of Tribunal which it had been reversed by the High Court.
Ashok PrapannSharma vs. CIT & Anr. (2016) 97 CCH 0109 ISCC (Civil Appeal No. 2314/2007)

207. The Tribunal allowed exemption u/s 54 to assessee-doctor for investing net sale-consideration on sale of residential property during AY 2007-08 in construction of new residential house property. It noted that the assessee had computed capital gains by adopting sale consideration of 60 lakhs received by him, whereas AO applied Sec 50C and computed gains adopting stamp duty valuation of Rs. 82 lakhs and held that though the deeming fiction u/s 50C was applicable for the purposes of computing capital gains, it would not mean that assessee needed to invest the full value consideration u/s 50C in the new property for claiming Sec 54 exemption. It held that once the net sale consideration had been fully applied under the provisions of section 54 of the Act, then the deeming consideration as defined u/s 50C of the Act could not be brought into the provisions of section 54F of the Act.
Chalasani Mallikarjuna Rao [TS-574-ITAT-2016(VIZ)] (I.T.A.No.206/Vizag/2013)

208. The Tribunal deleted the addition of Rs. 5261.28 crore on account of alleged capital gains arising on hive-off of the assessee's telecom business. It held that where the assessee de-merged its telecom undertaking in Bihar to Idea Cellular Ltd.('Idea') without any consideration, pursuant to the Scheme of Arrangement approved by Gujarat and Bombay High Court, accordingly not paying capital gains tax, the Revenue was not justified in treating the revalued assets as 'full value of consideration' for the purposes of computing capital gains on transfer of undertaking to Idea. Relying on the decisions of the Apex Court in PNB Finance Ltd and the AAR in Dana Corportaion and Goodyear Tire and Rubber Co., it held that where the scheme of Arrangement specifically provided that no consideration shall be paid by ICL for telecom undertaking acquired, no capital gains would arise in the hands of the assessee, since no consideration accrued or was received by the assessee. It held that when one of the ingredients for computation for capital gain is absent (i.e sale consideration in this case), no capital gains could be levied due to failure of computation mechanism. It further observed that wherever considered appropriate, the legislature had inserted specific provisions for assumption of sale consideration for transfer of assets in specified cases, since the only two other sections (i.e. Sec 5OC and Sec 5OD), which provide for imputation of consideration were also not applicable to present case, no consideration could be imputed in the instant case.
Aditya Birla Telecom Limited [TS-608-ITAT-2016(Mum)] (ITA No.341/Mum/2014)

209. The Tribunal held that if the difference between the sale consideration of the property shown by the assessee and the FMV determined by the DVO under section 50C(2) was less than 10%, the AO was not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee and that unregistered sale agreements prior to 01.10.2009 were not subject to s. 50C as per CBDT Circular No.5/10 dated 03.06.2010
Krishna Enterprises vs. ACIT (ITAT Mumbai)

210. Where the assessee, sold shares held by it in a private limited company @ Rs.1,195 per share on which it did not offer any capital gains to tax as after considering the indexed cost of acquisition and the investment made in Government REC bonds u/s 54EC of the Act, as there was no surplus capital gains, the Tribunal held that the AO was incorrect in valuing the sale price per share at Rs. 202 per share and holding that the difference between the actual sale price and the value arrived at by the AO (Rs.1,195 – Rs. 202 per share) was to be taxed as unexplained cash credits. The Tribunal noted the fact that the sale price of Rs. 1,195 per share was agreed upon pursuant to an agreement between the assessee and the buyer and held that in valuing the shares of a privately held company, the enterprise valuation has to be taken by valuing even the assets held by subsidiaries of the said Company. It observed that it was common for the sellers to charge a controlling premium for the sale of such shares to enable restructuring and re-aligning the shareholding pattern and therefore the sale price was to be considered as genuine and bona fide. Accordingly, it held that the alleged excess consideration for the sale of the shares could not be treated as unexplained income.
Amritlal T. Shah vs. ITO - I.T.A. No.766/Mum/2012 (ITAT Mumbai)

211. The Court upheld the decision of the AAR, wherein it was held that at the time of conversion of a partnership firm into a company, there would be no capital gains tax liability notwithstanding the fact that the conditions stipulated in Section 47(xiii) were not fulfilled as shares allotted to the partners of the extinct firm consequential to the registration of the firm as a company would not give rise to any profit or gain and that by receiving such shares the value of which was nothing more than the value of the sum total of their interest in the firm or the worth of their shareholding in the firm, therefore no gain was made by the partners and that all the assets automatically vest in the newly registered company as per the statutory mandate contained in section 575, and therefore it could not be said that the partners had made any gain or received any profit, assuming that there was transfer of capital assets. Accordingly, the Court held that where there was no profit or gain arises at time of conversion of partnership firm into a company, in such a situation, notwithstanding non-compliance with clause (d) of proviso to section 47(xiii) by premature transfer of shares, transferee company was not liable to pay capital gains tax.
CIT v.Umicore Finance Luxemborg [2016] 76 taxmann.com 32 (Bombay) (Writ Petition No. 510 Of 2010)

212. Where the assessee had entered into slump sale transaction and the CIT(A) had held that the transaction was sham designed to avoid tax liability by artificially inflating assets value, however, in the case of buyer, the Tribunal held transaction was not sham, the Court held that unless there are exceptional facts to the contrary, the same finding had to be maintained in the case of the seller. **Triune Projects Private Limited vs. DCIT (2016) 97 CCH 0117 Del HC (ITA 448/2016)**

213. Where the assessee, an NBFC, engaged in the business of hire purchase, financing, leasing and investments, sold its holding in two companies to comply with the guidelines issued by the RBI (that companies should focus on their core activities) and the shares in the companies were sold for a value of Rs. 1 per share on account of the fact that the said companies were loss making / earned insignificant profits, resulting in a capital loss of Rs.3.98 crore, the Court held that while the AO was entitled to question the valuation, he could not reject the same without producing materials to disprove the justification offered by the assessee or to substantiate his doubts. Accordingly, it held that the AO was incorrect in questioning the capital loss and denying the assessee benefit of set off thereon.
CIT Vs. Sriram Investment Ltd. (2016) 97 CCH 0125 ChenHC (Civil Miscellaneous Appeal No. 1421 of 2010)

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

Assessment

214. Where the assessee, ceased to be a director of a Public Ltd company as the said company went into liquidation and the AO had issued a notice under section 179 of the Act asking the assessee to show cause why demand outstanding towards the company should not be recovered from the assessee and later confirmed the demand against the assessee, the Court dismissed the writ petition filed by the assessee and held that the plea of non-applicability of section 179 of the Act could be raised by the assessee in the alternate remedy under section 264 of the Act.
Dr. Ajay Magan v DCIT – (2016) 97 CCH 0131 (Uttarakhand) – Writ Petition No 3272 of 2016

215. The Court allowed the assessee's writ and quashed the order of the Income Tax Settlement Commission as it was barred by limitation. It negated the submission of the Revenue that the limitation provided for in Section 245D(4A) was directory and not mandatory and held that the word 'shall' used in the said section suggests that the timeline prescribed therein was in fact mandatory. It distinguished the Revenue's reliance on the decision of the Bombay High Court in Star Television News Ltd (which was affirmed by the Supreme Court) and held that only when the Settlement Commission was prevented from fulfilling its mandatory statutory duty due to any reason attributable to the applicant, the time limit for disposal of an application under section 245D(4A) will have to be read as 'may'.
RNS Infrastructure Ltd v ITSC – TS-665-HC-2016 (Kar)

216. Where the AO completed assessment under section 143(3) read with section 153A and allowed the assessee deduction under section 80HHC of the Act and then later proposed to reduce the deduction allowed by invoking the provisions of Section 154 of the Act, on the ground that excess deduction was granted as 90 percent of the interest receipts had not been reduced in terms of Explanation (baa) to Section 80HHC of the Act as opposed to view of the assessee that the net interest was excludible, the Tribunal held that section 154 of the Act could not be invoked where there were two views possible. Therefore, without going into the merits of the case, the Tribunal deleted the adjustment made by the AO.
Firestone Trading Pvt Ltd v DCIT – (2016) 48 CCH 0239 (Mum Trib)

217. The Court directed the expeditious processing of assessee's Rs 19 crores refund application for AY 2014-15 in accordance with law, despite the fact that notice under Section 143(2) had been issued. It considered the argument of the Revenue that the refund could not be processed in pending scrutiny cases in view of Sec. 143(1D) and CBDT Instruction no. 1/2015 and also in light of the constitutional challenge to Sec 143(1D) raised by the taxpayer, but accepted the taxpayer's plea that it would not press the constitutional challenge or the challenge to the CBDT Circular if the Court were to direct the processing of the refund application in the peculiar facts and circumstances of the case. Accordingly, it directed processing of tax refund within 2 weeks in accordance with law by observing that once the petitioner agreed to give up the constitutional challenge if the refund application was processed, the order directing issuance of refund would serve the ends of justice. However, it clarified that the present order was passed in the peculiar facts and circumstances of the petitioner's case and could not be treated as a precedent for any future case, further the larger challenge of constitutional validity was kept open
Aegis Ltd. [TS-646-HC-2016(BOM)] (W.P. No.1619 of 2016)

218. Where during the course of assessment proceedings, the AO without rejecting books of accounts, made reference to the Departmental Valuation Officer(DVO) to determine the cost of construction consequent to which the DVO valued the land at higher cost, the Court upheld the view of the Tribunal that before making a reference to the DVO under Section 142A of the Act, if the Assessing Officer had to reject the books of account and since the same had not been done, the reference under Section 142A of the Act itself was bad in law and consequently, DVO's report could not be the basis to make addition.

PCIT vs. Sanjay Hiralal Thakkar (2016) 97 CCH 0168 GujHC (Tax Appeal No. 832 of 2016, 837 of 2016)

219. Where the assessee, could have produced evidences for the claim of depreciation before CIT(A), the Court held that assessment order (wherein the claim of depreciation was reduced) cannot be assailed before High Court in the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, in view of an effective alternative remedy by way of appeal already being available to the Petitioner and that CIT(A) has extensive powers as are available to the AO and Court cannot undertake valuation exercise in writ.
ADC India Communications Limited vs.ACIT (2016) 97 CCH 0093 KarHC (WP No.18581/2016)

220. Where additions were made for unexplained income and the Tribunal remanded back the matter to the AO to decide the case afresh in light of additional evidence in accordance with the decision of CIT v Ravi Kumar, without making any conclusive findings itself, the Court held that if the Tribunal had made conclusive findings there would be no requirement for such remand findings and that the decision referred to by the Tribunal in its direction to the AO was not a well-founded reliance and therefore in the event of the remand, the AO would be empowered to consider other decisions on the issue as well.
PCIT Vs. Aggarwal Sales (2016) 97 CCH 0076 PHHC (ITA No. 316 of 2016 (O&M))

221. The Court held that the provisions of Section 139(9) contemplate that assessee might be given opportunity of removing defect in the return of income filed within 15 days, hence it was open to assessee to place such material and evidence before authority concerned that it might have to justify its claims and authority might thereafter, pass fresh orders.
Greater Noida Industrial Development Authorty Vs. ACIT (2016) 97 CCH 0095 AllHC (Writ Tax No. - 795 of 2016)

222. The Apex Court rejected the assessee's contention that CIT(A) had no jurisdiction under section 246A to examine the validity of the search operations carried out under section 132 and held that if the assessment order which was based on the search operations was under challenge, the validity of the search proceedings could be examined by CIT (A).
Ess Dee Aluminium Ltd and Etc [TS-625-SC-2016] (SLP 15734-15735/2016)

223. The Tribunal held that AO was justified in directly issuing assessment order u/s 143(3) without first issuing a draft order in case of an eligible assessee u/s 144C where AO did not intend to make any variations in total income returned by the assessee but only intended to make corrections in computation of tax liability done by the assessee by erroneously treating business income as capital gains.
Mosbacher India LLC v. Additional Director of Income-tax, International Taxation -I, Chennai[2016] 76 taxmann.com 31 (Chennai - Trib.) (IT APPEAL NO. 1085 (CHENNAI) OF 2015)

224. The Tribunal held that where Assessing Officer could not apply provisions of section 234A correctly in course of assessment, it constituted a mistake apparent from record which could be rectified by invoking provisions of section 154.
B. Subba Raov. ACIT, Central Circle-2, Visakhapatnam [2016] 75 taxmann.com 136 (Visakhapatnam - Trib.) (IT Appeal Nos. 518 To 520 (Vizag.) Of 2014)

225. The Court held that where an order under Section 127 (for transfer of case) was challenged, there are were two interests – that of the assessees who would invariably plead inconvenience and hardship and that of the revenue which would inevitably cite public interest. It was the Court's task to unravel whether in fact the revenue's contentions are correct and if so reject the assessee's contentions or if there was no real public interest and if there are no reasons even the briefest one, the order cannot be sustained.
Chaudhary Skin Trading Company & ORS. vs. PCIT & ORS.(2016) 97 CCH 0061 DelHC (W.P. (C) 3837/2016)

226. The Court held that where an order under Section 127 (for transfer of case) was challenged, there are were two interests – that of the assessees who would invariably plead inconvenience and hardship and that of the revenue which would inevitably cite public interest. It was the Court's task to unravel whether in fact the revenue's contentions are correct and if so reject the assessee's contentions or if there was no real public interest and if there are no reasons even the briefest one, the order cannot be sustained.
Chaudhary Skin Trading Company & ORS. vs. PCIT & ORS.(2016) 97 CCH 0061 DelHC (W.P. (C) 3837/2016)

227. Where the assessee, engaged in the business of construction and sale of buildings, had received on-money during AYs 1980-81 to 1987-88, which it offered to tax only in AY 1987-88 and 1988-89, consequent to search proceedings, stating that it was taxable only in those years as per the project completion method and the AO / CIT(A) rejected the contention of the assessee and held that the on-money was to be taxed in the respective years of receipt, which the assessee challenged before the Tribunal on various grounds, one of them being that if the AO / CIT(A)'s view was correct, the amount disclosed as taxable income by the assessee in the search proceedings was to be reduced and the Tribunal did not grant any relief to the assessee, the Court held that when an appeal from an assessment is brought before the Tribunal all questions arising there from, including questions which are incidental or consequential to such assessment, are open to be agitated before the Tribunal. Accordingly, it held that the miscellaneous application filed by the Petitioner seeking to rectify the order of the Tribunal, which ignored an alternative plea made by the assessee, was valid and directed the Tribunal to consider the alternative plea.
Parmanand Builders Pvt. Ltd. & Anr. vs.CIT & Anr (2016) 97 CCH 0075 MumHC (ITR NO. 5 OF 2002)

228. The Court quashed order passed by the Income Tax Settlement Commission ('ITSC') rectifying / reviewing the order passed u/s 145D(4) for AYs 1988-89 to 1994-95 based on Revenue's miscellaneous petition. It held that Section 245F (conferring powers on the ITSC) could not be read in isolation but was to be read in tandem with Sec. 245I, which provides that order passed by the ITSC shall be conclusive as to the matters stated therein, and that there is no power of review conferred on the Commission to reopen the proceedings. It further pointed out that the amendment to sub-section 6(B) of Sec 245D by Finance Act, 2011 provided for "rectification" and not "review" of order passed by the ITSC u/s 245D(4) and thus even as per the amendment, power of review was not conferred on the ITSC. It rejected Revenue's reliance on Apex Court ruling in Hindustan Bulk Carriers and Damani Bros to contend that a mistake apparent from the records had crept in the ITSC order, and held that subsequent developments of law cannot be a ground to exercise review jurisdiction.
R.VIJAYALAKSHMI [TS-606-HC-2016(MAD)] (W.P.Nos.5553 to 5558 of 2008)

229. The Court upheld the Single Judge order and set-aside the CBDT order rejecting assessee's condonation application u/s 119 with regards to a day's delay in filing return of income for AY 2010-11. It observed that the return filing due-date for relevant AY was extended for a period of 15 days owing to floods, yet assessee filed return belatedly by a day due to technical snags on Income tax website on last day and moved an application u/s 119(2)(b) before the CBDT seeking condonation of return filing delay which was rejected. The Court held that if the assessee had encountered certain hardship or difficulty in uploading his return, as alleged by him due to technical snags in the website of Income Tax department due to last hour of rush of filing of returns, the delay deserved to be condoned. Noting that the CBDT rejected the assessee's petition on the ground that assessee could have easily filed its return in the normal period running up to 30th September or at least any time up to the extended period of 15th October as there were no floods in the area where assessee was based, the Court opined that the application seeking condonation of delay could not be rejected for such reasons as are assigned by the Board and that the Board did not exercise its discretion properly in the matter. Accordingly, it condoned the delay and directed the AO to process the assessee's return.
Regen Infrastructure & Services Pvt. Ltd. [TS-592-HC-2016(MAD)] (Writ Appeal No.1314 of 2016)

230. The Court held that once an authority (i.e. CBDT) had been conferred discretion to condone delay in filing return, application seeking condonation of delay of one day could not be rejected, particularly when assessee encountered certain hardship / difficulty in uploading his return, due to technical snags in website of Income-tax Department due to last hour rush of filing of returns.
Central Board Of Direct Taxes & Ors. Vs.Regen Infrastructure & Services Pvt Ltd.(2016) 97 CCH 0057 ChenHC (Writ Appeal No. 1314 of 2016)

231. Where the assessee filed a petition challenging the Show Cause Notice issued by the ITO, calling upon the assessee to appear before him and show cause as to why the assessee's case should not be referred to the Principal CIT, for initiation of prosecution/proceedings u/s 276-C(1) on the alleged ground that assessee had willfully attempted to evade tax, interest chargeable, and penalty imposable under the Act, the Court held that the impugned proceedings, being only a Show Cause Notice, could not be interdicted at this stage (writ petition) , and whatever points, the assessee wanted to raise, could very well be raised before the ITO, by responding to the Show Cause Notice. Therefore, the prayer sought for in the Writ Petition to quash the impugned Show Cause Notice was rejected and the assessee was directed to appear before the ITO and submit their reply to the Show Cause Notice.
M.Radhakrishnan vs. ITO & Ors(2016) 97 CCH 0059 ChenHC (WP No. 38268 of 2016)

Reassessment

232. The Court dismissed the Revenue's appeal for AY 1982-83 and quashed reassessment proceedings initiated under section 147 for taxing interest earned on bank accounts in the UK and loan advanced out of undisclosed funds pursuant to information received from the UK tax authorities under the India-UK DTAA. Noting that the information was received from the UK authorities in 1989 based on the interview conducted for investigation in the case of the assessee's brother in law wherein the assessee was found to have admitted that he made deposits in his brother in laws accounts, and that the Revenue chose to wait three years to open the reassessment (as they issued a notice in December 1992 which incidentally was after the death of the assessee i.e. January 1992), the Court held that Revenue should have proceeded to act at the earliest opportunity as there could have been crucial leads related to bank accounts etc. It held that the lack of probe in this regard and exclusive reliance upon the UK Revenue information was not sufficient to conclude that the amount which was attributed to the assessee actually belonged to him. Further, it noted that the UK Revenue authorities had already taxed the amounts in the hands of the assessee's brother in law and therefore there could be no question of assessing the deceased assessee.
CIT v Late KM Bijli Thrul LR's – (2016) 97 CCH 0153 (Del HC)

233. Where the assessee had filed writ petition to quash the notice issued under section 148, the Court held that writ petition was premature as the petitioner had approached the Court after receipt of reasons for reopening, prior to filing objections. Accordingly, it directed the petitioner to submit its objections to the reasons for reopening as furnished by the first respondent within a period of 30 days from the receipt of a copy of this order and to raise all issues both factual as well as legal. It further directed the Respondent to consider the same, and on receipt of the submissions, without in any manner being influenced by the observations made in this order pass a speaking order and communicate the same to the Petitioner so as to enable them to evaluate their remedy available under the Income Tax Act.
Megatrends Inc Represented vs. ACIT & ORS (2016) 97 CCH 0102 ChenHC (W.P. No. 18870 of 2015)

234. The Court held that where notice under section 148 was issued to the Petitioner and the reasons for issuance of notice / initiation of proceeding had also been disclosed, required sanction which was also obtained from the competent authority, the said notice issued under section 148 was valid and rejected the contention of the Petitioner that the reassessment proceedings were bad in law since the Department had also initiated assessment proceedings by issuing notice under section 142(1) of the Act.

Maruti Nandan Sah v ITO – (2016) 97 CCH 0166 (UA HC) – Writ Petitioner (M/S) No 2804 of 2016)

235. Where Petitioner filed a petition before the Court seeking to quash notice issued under section 148, the Court as per the law laid down by the Apex Court in GKN Driveshafts (India) Ltd. Vs. ITO, first the Petitioner had to submit its objections to reasons for reopening and thereafter that the Respondent had to pass orders either accepting or rejecting objections so made and only then could the Petitioner approach the Court for writ remedy. Accordingly, it held that the question of quashing notice did not arise at the stage of providing reasons for the re-opening of assessment without the filing of any objections.
M. Gurusamy vs. ACIT (W.P. No. 38210 of 2016)

236. The Court held that where there was proof from Department of Post that dispatch of notice was made within the period of limitation, notice under section 148 was valid.
ABAB Offshore Ltd. vs. DCIT (2016) 97 CCH 0068 ChenHC (WP No. 29643 of 2015)

237. The Tribunal upheld the reassessment initiated pursuant to survey carried out under section 133A of the Act, wherein excess stock of gold jewellery was found in the premises of the assessee. It held that for the purpose of valuation of the additional jewellery, the AO had rightly adopted the rate prevailing as on the date of survey, in accordance with the norms of valuation in the cases where survey had been conducted for making proposed addition.
Ellore Jewel Palace v ITO – (2016) 48 CCH 0211 (Bang Trib) – ITA No 1646 / Bang / 2016

238. The Court dismissed the writ filed by the assessee for AY 2009-10 and upheld the reassessment proceedings initiated under section 147 of the Act for taxing excess share premium on issuance of compulsory convertible cumulative preference shares under section 68 of the Act. It noted that the assessee had issued preference shares at a high premium of Rs.240 per share despite having low net worth and that the Revenue had invoked reassessment u/s 147 on the ground that it had reason to believe that the transaction was not genuine. It took note of the assessee's plea that the premium received could be brought to tax only under section 56(2)(viib) which was introduced only w.e.f. April 1, 2013 and therefore inapplicable to the year under review and held that the expression reason to believe implied a cause or justification and could not be read to mean that the AO ought to have finally ascertained the fact by evidence or conclusion. Accordingly, it dismissed the writ leaving it open to the assessee to work out other remedies available under the Act.
Trans Corporate Advisory Services Pvt Ltd v ACIT – TS-669-HC-2016 (Mad)

239. The Apex Court set aside High Court judgments wherein the taxpayers writ petitions against notices issued under section 148 were dismissed as not maintainable by relying on the decision of the Apex Court in Chhabil Das Agarwal wherein it was held that no writ would lie where alternate remedy was available and held that aforesaid view was contrary to the law laid down by co-ordinate bench in case of Calcutta Discount Company Ltd [1961] 41 ITR 191 (SC). Accordingly, without making any observation on merits it remitted the cases to respective High Courts to decide the writ petitions on merits.
Jeans Knit Private Ltd. [TS-658-SC-2016]

240. Where the assessee had claimed normal business income as agricultural income, which had been accepted under scrutiny proceedings under section 143(3), and subsequently the AO issued notice under section 148 on the ground that such income had escaped assessment, the Court held that notice for re-opening the assessment was permissible only when it did not amount to change of opinion and was based on tangible material/evidence and therefore, where the claim had been examined by the AO in original assessment and no new tangible material had arisen, the reopening of assessment was invalid. Accordingly, it quashed the notice as well as the consequent proceedings emanating from such notice.

Technico Agri Sciences Ltd. vs. DCIT & ANR (2016) 97 CCH 0163 DelHC (W.P.(C) 2685/2016)

241. The Court upheld reassessment proceedings initiated under section 147/148 of the Act on account of assessee's failure to substantiate the genuineness of issue of shares, where based on the survey operations, certain adverse inferences were drawn viz. the share applicants were not involved in any substantial business activities, coupled with the fact that the assessee had not provided the bank details of the share applications. It further noted that the ITR forms of the shareholders showed that share applicants paid paltry amounts as income tax, while claiming to have invested crores of amounts in assessee company. It held that this amounted to tangible material for the purpose of re-opening assessment and also that neither was there was full disclosure of the material facts, nor did the assessee establish the genuineness of the transaction and therefore the notice issued u/s 148 of the Act was valid.
Aravali Infrapower Ltd. vs. DCIT (2016) 97 CCH 0130 Del HC (W.P. (C) 2385/2015)

242. Where the assessee's claim for provision for bad and doubtful debts was considered by AO in original assessment completed under section 143(3), the Court dismissed revenue's appeal and quashed reassessment proceedings initiated under section 147/148 to disallow the bad debts on the ground that as the reassessment was based on the reappraisal of existing materials.
Tata Power Delhi Distribution Ltd. [TS-638-HC-2016(DEL)] (ITA 689/2016)

243. The Court quashed reassessment under section 147 r.w.s 143(3) as no notice u/s 143(2) of the Act was issued to the assessee. It rejected Tribunal's view that reassessment was valid on the ground that it was clear case of suppression of income and since assessee participated in the re-assessment proceedings, absence of issuance of notice under section 143(2) would have no bearing and would stand condoned in view of section 292BB. It held that the issuance of statutory notice under section 143(2) was a mandatory requirement and not a mere procedural defect and that the AO could claim and avail the benefit under section 292BB only after a notice under section 143(2) had been validly issued.
Travancore Diagnostics (P) Ltd. [TS-583-HC-2016(KER)] (ITA.No. 221 of 2015)

244. The Tribunal held that the reasons for reopening assessment under section 147 cannot be based on mere doubts or with a view to verify basic facts. If the AO takes the view that the income referred to in the reasons has not escaped assessment, he loses jurisdiction to assess other escaped income that comes to his notice during reassessment.
Torm Shipping India Pvt Ltd vs. ITO I.T.A. No.1272 & 1273/Mum/2013 (ITAT Mumbai)

245. Where the AO made reassessment of income under section 147, however, the additions were made on the ground other than those covered in the reasons for the re-opening, the Tribunal held that the lower authorities were justified in making additions towards disallowance under section 40A(3) of the Act even though it was not a reason for reopening the assessment and no addition had been made on the basis of reasons for which assessment was reopened.
M. Baskarn vs ACIT (2016) 48 CCH 0177 ChenTrib (ITA No. 120/Mds/2016)

Revision

246. Where the CIT issued a show cause notice under section 263 of the Act proposing to revise assessment by disallowing the write off of expenses incurred on laying of transmission lines by treating it as a capital expenditure, the Tribunal held that the assessee had written off the expenses as the project was ultimately abandoned, which was supported by judicial precedents in favour and therefore there was no error in the order of the AO. Accordingly, the Tribunal quashed the order passed under section 263 of the Act.
Transmissioner Corporation of AP Ltd v DCIT – (2016) 48 CCH 0249 (Hyd Trib) – ITA No 538 / Hyd / 2016

247. Where the assessee had filed a revised return claiming depreciation on goodwill, as per the decision of the Apex Court in CIT v Smifs Securities Ltd, which was duly examined by the AO during scrutiny proceedings, pursuant to which an order under section 143(3) of the Act had been passed, the Tribunal held that the Pr CIT was not justified in invoking jurisdiction under section 263 of the Act to revise the order as the two conditions under Section 263 of the Act viz. order of the AO sought to be revised ought to be i) erroneous and ii). prejudicial to the interest of the revenue, were not fulfilled as the AO had accepted the assessee's claim of depreciation on goodwill after making enquiries, proper verification and application of mind.
Adani Gas Ltd v Pr CIT – (2016) 48 CCH 0215 (Ahd Trib) – ITA No 1252 / Ahd / 2016

248. The Tribunal held that when many of the issues that were raised in the notice issued u/s 263, were never considered in the assessment order, the CIT was justified in invoking his revisionary powers u/s 263 of the Act.
Delphi Connection Systems India Pvt. Ltd. Vs. ACIT (2016) 48 CCH 0196 CochinTrib (ITA No. 256/Coch/2016)

249. Where the Revenue had invoked section 263 on the ground that no investigation was carried out by AO in terms of section 68 to establish the genuineness/creditworthiness of actual subscribers to FCCB issued by assessee, but the assessee had adequately discharged its onus under section 68 with respect to identity, capacity and credit worthiness of lead manager of the issue from whom it had received the subscription amount and where the CIT contented that AO ignored CBDT instruction No. 3/2010 while allowing set-off of MTM losses arising on foreign exchange derivatives against taxable income, the Apex Court upheld the findings of the High Court and Tribunal had observed that CBDT instruction was issued much after the assessment order and accordingly, concluded that there was no failure on AO's part to make enquiries. Accordingly, the Apex Court dismissed Revenue's SLP against High Court's judgement upholding Tribunal's order of quashing revision proceedings under section 263.
Reliance Communication Ltd [TS-623-SC-2016] (SLP No 21779/2016
Search

250. The Court remitted the issue pertaining to addition made by the Department based on loose documents seized from the assessee's premises to the file of the Tribunal and held that where the AO tried to correlate the loose sheets seized from the premises of the assessee and the scribblings on them to the transaction of purchase of property and concluded that the assessee had some undisclosed income / investments, the Tribunal was incorrect in stating that the assessee had not discharged its onus, without considering the assessee's rebuttal against the allegations of the AO. Considering the fact that the purchase of property had taken place 1 year prior to the search and the assessee had rebutted all allegations of the AO viz. that the property purchased had no relation to the documents seized, which had not been considered by the Tribunal, it decided to remit the issue back to the Tribunal to consider this aspect with directions to decide the matter within 3 months from the date on which this order was served upon the Tribunal.
Jaswant Singh v ACIT – (2016) 97 CCH 0155 (All HC) – ITA No 200 of 2010

251. Where search was conducted at the premises of assessee and on the basis of material found, AO observed that investment in house property was made from profits earned from sale of shares and based on the inquires post search operations, he came to the conclusion that the transaction in shares was a sham transaction and was done to re-route the undisclosed money of the assessee by introducing the same in his regular books as capital gain receipts from sale of shares, the Court upheld the view of the Tribunal that additions were not made on the basis of the material/documents seized during the course of search but on the basis of inquiries conducted post search operations and accordingly, that the additions were not sustainable.
CIT vs. Dr. Shiv Kant Mishra (2016) 97 CCH 0119 All HC (ITA No.– 484 of 2008) (IT APPEAL NO. 1959 (AHD.) OF 2013)

252. The Tribunal held that making of an addition in an assessment under section 153A of the Act, without the backing of incriminating material, was unsustainable even in a case where the original assessment on the date of search stood completed under section 143(1) of the Act.

Accordingly, it held that in the absence of incriminating material, the issue of additional depreciation could not be examined by the AO in assessment proceedings under section 153A as it stood concluded with assessee's return being accepted under section 143(1).
Ujjal Transport Agency [TS-586-ITAT-2016(Kol)] (ITA(SS) No.58/Kol/2013)

253. The Tribunal held that an order under section 153C passed without obtaining the approval of the JCIT under section 153D was without jurisdiction and void in view of Calcutta Knitwears 362 ITR 673 (SC) and CBDT Circular No. 24/15 dated 31.12.2015.
HiKlass Moving Picture Pvt. Ltd vs. ACIT (ITAT Mumbai)

254. Where search and seizure operations were carried out by the AO in the premises of two individuals and a survey was also conducted in the premises under section 133A by the same AO and a notice was issued to the assessee under section 153C of the Act on the basis that the documents seized from the premises of the individuals "belonged" to the assessee pursuant to which assessments were concluded in the hands of the assessee, the Court held that the Tribunal erred in deleting the addition in the hands of the assessee based on the facts that the documents did not actually belong to the assessee, and held that the expression belonged in the notice could not have been interpreted so strictly and was to be interpreted to mean 'relating to'. Accordingly, it allowed the appeal of the Department.
PCIT Vs. Super Malls Pvt. Ltd. (2016) 97 CCH 0105 DelHC (ITA 449/2016)

g. ***Withholding tax***

255. The Tribunal held that the AO was incorrect in making disallowance under section 40(a)(ia) of the Act for non-deduction of tax under section 194C on payments made to contractors for carriage of goods by rail and in holding that the assessee was not entitled to the benefit of exception provided for in Section 194C (which excluded within its purview payments made for the purpose of rail carriage) on the ground that the payment was made to a contractor and not directly to the Railways. It held that if it was the intention of the legislature to ensure that payments were directly made to the Railways, the exception provided in Section 194C would be redundant as 194C of the Act dealt with payment to contractors and that even if payments were made to an Agent it would be exempt under section 194C as long as the payment was meant for meeting expenditure in the form of payment to the Railways. Therefore, it deleted the disallowance made and upheld the contention of the assessee that payments made to contractors for the purpose of railway travel were not within the purview of Section 194C of the Act.
Ras Polybuild Products P Ltd v DCIT – (2016) 48 CCH 0254 (Hyd Trib) – ITA No 221 / Hyd / 2016

256. The Tribunal held that where the assessee had paid a sum towards supply of machines and another amount towards product service contract without deducting tax at source under section 194C of the Act, the assessee could not be considered as an assessee in default for the purpose of making disallowance under section 40(a)(ia) in respect of the purchase of machinery as 194C was inapplicable to such payments. As regards, the payment towards product service contract, the assessee had fairly conceded that the disallowance was rightly made.
Yofoodies v ACIT – (2016) 48 CCH 0213 (Kol Trib) – ITA No 838 / Kol / 2016

257. The Court dismissed Revenue's appeal and held that domestic payments made by the assessee towards erection, testing, commissioning and trial operation of the equipment to contractors did not involve provision of professional / technical services within the meaning of Section 194J. It rejected the contention of the Revenue that the assessee was an assessee in default since section 194J was applicable on the impugned payment as against section 194C applied by the assessee. It noted that the agreement entered into between the assessee and the contractors was not for the supply of any technical services and that the inputs / services of the technical personnel were engaged entirely for an on behalf of the contractor and not on behalf of the assessee and therefore held that the deployment of personnel was not under a contract for supply of services / technical services but to ensure the due and proper execution of the work by the contractor.

Bharat Heavy Electrical Ltd – TS-666-HC-2016 (P&H)

258. The Court allowed the assessee's writ petition and held that even though no express time limitation for the purpose of issue of show-cause notice was provided for in Section 201 of the Act, the show-cause notice issued ought to have been issued within a reasonable time i.e.. 4 years. Accordingly, it quashed show-cause notices issued under section 201 of the Act in March 2011 and 2012 for default in payment of TDS on interconnect usage charges paid to non-resident in FYs 2001-02 and 2006-07 since the same were issued beyond reasonable time. It rejected the Revenue's argument that in the absence of any period of limitation prescribed in respect of non-residents, no time limit could be imported.
Bharati Airtel Ltd & Anr – TS-667-HC-2016 (Del)

h. ***Others***

Appeals

259. The Tribunal allowed assessee's rectification petition and altered the outcome of the earlier order (in the Department's appeal) to 'dismissed'. It held that in its earlier order, mistake was committed in adjudicating Departmental appeal on merits where the only substantive ground was that of violation of Rule 46A (for admitting additional evidence without providing the AO with the opportunity to provide comments).
Ajit Pulp & Paper Ltd v DCIT – TS-581-ITAT-2016 (Ahd) – IT(SS)A No 12 / Ahd / 2013)

260. Where the assessee could not file the Form 35A in original as the same was not received from Singapore (where assessee is located) in time and further, it failed to replace the scanned copy with the original one subsequently due to change in its authorized representative, the Tribunal quashed DRP's dismissal of assessee's application under section 144C(13) and held that such defect is curable under section 292B.
MSM Satellite (Singapore) Pte. Ltd. [TS-614-ITAT-2016(Mum)] (I.T.A. No.1929/M/2014)

Exempt Income / Income from Charitable Trust

261. The Tribunal granted exemption under section 11 to assessee trust despite the fact that the registration under section 12A was granted subsequently and held that the amendment made in first proviso to section 12A(2) (which provides for roll-back of registration for earlier years) is applicable retrospectively as the amendment made in section 12A(2) is curative in nature with the intention to remove hardship.
St. Jude's Convent School [TS-654-ITAT-2016(ASR)] (ITA No. 749/(Asr)/2013)

262. Where the Petitioners residing in Jonai Circle in Assam and earning salary income from Murkong Selek College, Jonai, filed a Petition claiming that both the aforesaid areas were included within the defined area notified by Assam Governor on 23-2-1951, and therefore their salary earnings were exempt under section 10(26) of the Act, and the AO denied benefit on the ground that the Murkong Selek area was declared to be Tribal Belt area under Assam Land Revenue Regulation, 1886 by a subsequent notification of 13-3-1951, and therefore was not an area mentioned in section 10(26) and accordingly directed the college Principal to deduct tax at source from salary of petitioners, the Court held that the AO had to verify whether the Petitioners were residing in / earning income from Tribal areas based on the areas specified in notification dated 23-2-1951 issued by Governor of Assam, without being influenced by the subsequent notification dated 13-3-1951. Accordingly, it remanded the issue to the AO for verification.
Hara Kanta Pegu & Ors. Vs.Union Of India & Ors.(2016) 97 CCH 0087 GauHC (Writ Petition (C) No. 4089/2013)

263. Where the assessee filed a revised return to claim exemption under section 10(10C) in respect of amount received under the early retirement scheme and where revenue objected that

assessee's revised return cannot be accepted as it was beyond the timeline stipulated under section 139(5),t he Court relying on SC ruling in S. Palaniappan [wherein it was held that a person who has opted for VRS shall be entitled to exemption u/s 10(10C)] and CBDT Circular dated April 13, 2016 (directing Revenue to grant relief to retirees of the ICICI Bank under VRS in view of the SC judgment) and), allowed writ filed by assessee and granted VRS exemption under section 10(10C) and held that the technicality should not stand in the way while giving effect to the order passed by the Hon'ble Supreme Court..

S. Sevugan Chettiar [TS-655-HC-2016(MAD)] (W.P. No.42385 of 2016)

264. The Apex Court revers**ing** the High Court ruling grant**ed** exemption under section 10(19A) to assessee-individual on rental income derived from letting out the portion of his palace to the defence ministry. It also rejected revenue's contention that exemption would not be available for the entire palace but be confined only to that portion of palace which was in the actual occupation by the ruler as residence. It observed that section 23 uses the term annual value of such house or part of the house, however, such distinction is absent in section 10(19A) and held that this significant departure of the said words in section 10(19A) of the Income-tax Act also suggest that the legislature did not intend to tax portion of the palace by splitting it in parts.

Maharao Bhim Singh [TS-641-SC-2016] (Civil Appeal No. 2812 of 2015)

265. Where the CIT – Exemptions had accepted the activities of the assessee, a charitable trust viz. providing education via a degree college, but he rejected the genuineness of the activities merely on the basis that the asseessee failed to submit the documents for the purchase of land for the establishment of degree college under section 12(1)(a), the Court held that since there was no other objection other than the non-filing of documents, non-granting of registration to assesse was not justified.

CIT Vs.Shivbachan Singh Samajothan Charitable Trust (2016) 97 CCH 0079 AllHC (ITA No.117 of 2016)

266. The Apex Court dismissed revenue's special leave petition challenging High Court order wherein the Court had held that in case of violation under section 11(5) and 13(1)(d), exemption granted to the assessee shall not be withdrawn for the entire income but only income arising from investment which is the subject matter of violation.

Karnataka Industrial Area, Development Board [TS-598-SC-2016] (SLP No.4568/2015)

267. The Tribunal reversed the order passed by the CIT(A) for AY 2010-11 and held that the provisions of Sec. 40(a)(ia), meant for computing business income, were inapplicable to the assessee-trust not engaged in any business activity and having exempt receipts. It held that even if assessee's income was to be considered as "income from other sources" ('IOS'), Section 40(a)(iia) and not Section 40(a)(ia) could be invoked.

Astral Height Owners Association [TS-604-ITAT-2016(HYD)]

268. The Court reversed Tribunal's order and granted exemption under section 11 to assessee, an educational trust running a school. It clarified that assessee charging higher fees compared to other schools would not establish that the school was running for profit making and the trust. In the course of running an educational institution, it was entitled to make a reasonable surplus and setting apart a surplus after expenditure incurred, by itself, would not mean that the purpose is profit making. It further rejected revenue's contention that vide lease-rentals and interest payments to trustees and their relatives, the assessee-trust diverted its income in favour of trustees in violation of Sec 13(1)(c) on the ground that revenue did not bring any evidence to suggest that assessee paid rentals /interest to trustees at the rate higher than the normal market rate.

Kamdar Education Trust [TS-599-HC-2016(GUJ)]

269. The Court allowed assessee's writ and quashed assessment order and demand notice passed by ITO (Exemptions), Muzaffarpur on the ground that there was absence of jurisdiction and order passed by ITO (Exemptions) was in violation of the CBDT Notification No.52/14 since he was only vested with the jurisdiction to make assessment u/s 11 and the assessee had neither claimed exemption under section 11 nor registered itself under section 12AA of the Act.

Gurukul [TS-596-HC-2016(PAT)]

270. The Court held that where concealment of income was discovered in the case of charitable trusts such as the assessee (in whose case large amounts of cash had been discovered), the Department was entitled to follow a logical procedure which involved providing the assessee an opportunity to offer an explanation against such allegations and in the event that such explanation was not found to be conclusive, to communicate the same to the approval granting authority for the purpose rescinding the approval granted resulting in the denial of exemption and imposition of penalty. However, it held that the procedure adopted by the Department would be subject to the assessee's statutory appeals remedies including remedy before the Court.
Jawaharlal Shanmugam Vs.Director General Of Income Tax (Investigation)(2016) 97 CCH 0058 ChenHC (W.P. No. 22955 of 2016)

Interest / Penalty

271. The Tribunal held that where the show-cause notice under section 274 of the Act was defective as it did not spell out grounds on which penalty was sought to be imposed, no penalty could be levied under section 271(1)(c) of the Act.
Flow & Fluid Control Centre v ITO – (2016) 48 CCH 0231 (Kol Trib) – ITA No 1051 / Kol / 2016

272. Where the AO levied penalty under section 271(1)(c) of the Act on the basis of disallowances of expenses amounting to Rs.98.90 lacs and the assessee had offered adequate explanation to prove that the expenses had actually been incurred and there was no falsity or inaccuracy that could be attributed to the claim of the assessee, the Court held that there could be no levy of penalty under section 271(1)(c) of the Act in the absence of any finding with regard to concealment of income or that the explanation offered by the assessee was false or mala fide.
JK Synthetics Ltd v CIT – (2016) 97 CCH 0147 (All HC) – ITA No 125 of 2002

273. Where the assessee had made an incorrect claim by reducing deferred tax from the book profits computed under MAT at the time of filing its return and subsequently a retrospective amendment had been introduced prohibiting such reduction, the Court held that penalty under section 271(1)(c) could not be levied on the assessee as there was no suppression of facts or deliberate misstatement by the assessee.
PCIT vs. A.B. Sugar Mills Ltd. (2016) 97 CCH 0139 PHHC (ITA-228-2016 (O&M))

274. Where the AO issued notice under section 274 for concealment of particulars of income but levied penalty for furnishing inaccurate particulars of income, the Tribunal held that the AO did not apply his mind when he issued notice to the assessee and therefore deleted the penalty wrongly levied.
Dr. Sarita Milind Davare vs. ACIT (ITAT Mumbai) (I.T.A. No. 2187/Mum/2014)

275. Where assessee had promoted a company which was acquired by another company in which he was appointed as the Executive Director pursuant to which he entered into a non-compete agreement with the acquirer co and the High Court had rejected assessee's stand of treating non-compete fees as capital receipt and had held that the non-compete fees to director amounted to salary income on which interest under section 234B/C would be leviable, the Apex Court held that in cases where receipt is by way of salary, TDS under section 192 is required to be made by employer and there can arise no question of payment of advance tax in cases of receipt by way of salary and accordingly, set aside the directions of High Court to the extent of levying interest under section 234B/C on assessee-director for non-payment of tax on non-compete fees which was assessed as salary income.
Ian Peter Morris [TS-664-SC-2016] (SLP No. 1196-1197/2013)

276. Where the assessee along with his CA had tempered with the document to show that higher taxes had been paid and where the revenue had filed a private complaint under section 200 of the Code of Criminal Procedure for offence punishable under section 276C(2)/277 against the

assessee as well his CA the Court dismissed the plea of the assessee that the error was committed by the CA's clerk and observed that section 277 of the Code of Criminal Procedure provides for prosecution if any person makes a false statement. It dismissed assessee's reliance on circular (which provides that no prosecution proceedings could be initiated where an attempt to evade tax is less than Rs. 25,000) and held that under no grounds the said circular could be read with regard to filing of a false declaration.
Magdum Dundappa Lokappa [TS-652-HC-2016(KAR)] (Criminal Petition No.100919 of 2016)

277. Where the assesssee had surrendered cash credit before the settlement commission for earlier years and immunity was granted for the same, however, for the year under consideration, the interest expenditure claimed on the cash credit was disallowed and penalty under section 271(1)(c) was imposed, the Court held that once the surrender of cash credit had been accepted by the Settlement Commission and the immunity had been granted, then the disallowance for claim of interest expenditure on the cash credit in the succeeding assessment years cannot straightaway give rise to penalty proceedings on the ground that making incorrect claim could not tantamount to furnishing incorrect particulars and it had to be shown that there had been concealment of particulars of income and incorrect particulars had been furnished.
Aashirbad Enterprises & ANR vs CIT & ANR (2016) 97 CCH 0156 PatHC (Tax Cases No. 28 of 1998, 29 of 1998)

278. The Tribunal held that when a return is filed for first time in response to notice issued under section 153A, provisions of section 234A(1)(a) are applicable and interest is chargeable for period commencing on date immediately following due date referred to under section 139 and ending on date of furnishing of return.
B. Subba Rao v. ACIT, Central Circle-2, Visakhapatnam [2016] 75 taxmann.com 136 (Visakhapatnam - Trib.) (IT Appeal Nos. 518 To 520 (Vizag.) Of 2014)

279. Where the assessee claimed a business loss in respect of sale of shares, which was disallowed by the AO (who held that the shares were held as investments) but allowed by the CIT(A) and Tribunal in the first round of appeal, and on further appeal by the Department to the High Court, the Court had remanded the matter for fresh adjudication to the Tribunal, pursuant to which the Tribunal changed its earlier view and held that the loss was a capital loss, no penalty under section 271(1)(c) of the Act could be levied.
PCIT Vs.Moderate Leasing And Capital Services Pvt. Ltd.(2016) 97 CCH 0084 DelHC (ITA 721/2016)

280. Where the AO had levied penalty under section 271(1)(c) on the assessee with respect to its claim for deduction under section 80IB / Section 80HHC which was subsequently put to rest by the Apex Court, the Court upheld the finding of the Tribunal that no penalty could be levied since the issue was a debatable issue and also noted that there was no allegation against the assessee that it had made any incorrect, erroneous or false details in his returns.
PCIT vs. Allahdad Tannery (2016) 97 CCH 0067 AllHC (ITA-17 of 2016)

281. Where the AO levied penalty u/s 271(1)(c) as the assessee had failed to declare income from capital gains and other sources on which TDS was withheld (as reflected in Form 26AS) in his return of income and such income was offered only by way of a revised computation of income filed during the assessment proceeding when the time for filing of revised return had expired, the Tribunal allowed the assessee's appeal challenging concealment penalty levied and held that the amount declared by the assessee in the revised computation of income was subject to TDS, the details of which were available with the Revenue in Form 26AS i.e. in the public domain and therefore it could not be held that the assessee had furnished inaccurate particulars of income, making the assessee liable for levy of penalty under section 271(1)(c) of the Act. It also noted that even after inclusion of the alleged concealed income in assessee's hands refund was allowed after verifying the details in Form 26AS and therefore deleted the penalty imposed.
Dhananjay Rajaram Gupte [TS-582-ITAT-2016(PUN)] (ITA No.1311/PN/2015)

282. The Court dismissed the Revenue's appeal and upheld the order of the Tribunal where it deleted the 271(1)(c) penalty for non-reporting of capital gains by the assessee on account of the assessee's bonafide belief that it was eligible for relief u/s 54G based on CA's advice.
Machintorg (India) Ltd. [TS-601-HC-2016(DEL)] (ITA 300/2016)

283. Where the assessee, a contractor, could not maintain adequate vouchers as a result of which it had estimated its income and the AO had also estimated the income by rejecting books of accounts, the Tribunal held that levy of penalty under section 271(1)(c) could not be sustained as it could not be said that the assessee had concealed the income. It further noted that the AO had nowhere alleged that the assessee had concealed or furnished inaccurate particulars of income and that even though AO had observed certain discrepancies but had not investigated the same and had merely proceeded on an estimate basis.
National Construction Co vs. DCIT (2016) 48 CCH 0179 (Amritsar Tribunal) (ITA No.462 (Asr)/2016)

284. The Tribunal held that pre-amended Explanation 5A to section 271(1)(c) applies to non-filer assessees where a ROI is not filed before search and undisclosed income is not offered in the ROI and the amended provision of Explanation 5A, which is applicable to both filers and non-filers of returns, does not apply to searches conducted pre 13.08.2009, therefore, penalty levied under section 271(1)(c) to cases which are covered by section 271AAA is void.
Nukala Ramakrishna Eluru v DCIT (ITAT Vizag)

285. Where the assessee became entitled to an exceptional/unanticipated income pursuant to favourable decision of the Apex Court relating to purchase tax benefits, the Court upheld levy of Section 234C interest and did not accept taxpayer's argument that deferment in payment of advance tax was beyond the control of assessee despite the fact that the assessee had already paid two instalments of advance tax within due date and there was deferment in payment of advance-tax liability due to unanticipated income. It held that once interest u/s 234C of the Act, was mandatory and automatic, then the reason, or the cause for the delay and justification for deferment of payment of advance tax, was immaterial and therefore the fact that an unanticipated income accrued in the relevant financial year, could not be a ground not to pay advance tax with regard to the returned income.
MRF ltd [TS-611-HC-2016(MAD)] (Tax Case (Appeal) No.234 of 2016)

286. Where Commissioner (Appeals) set aside levy of interest under section 234B, and no further appeal was filed by revenue against said order, the Court held that it was not open for the Assessing Officer to again levy interest under section 234B in rectification proceedings
CIT Vs. Amol Decalite Ltd. (2016) 97 CCH 0092 GujHC (Tax Appeal No.7 of 2007)

Minimum Alternate Tax

287. Where the assessee, who was subject to tax as per the provisions of Minimum Alternate Tax ('MAT'), filed its return and claimed exemption under section 54EC of the Act, which was denied by the AO stating that such exemptions were not to be accounted for while computing tax liability under MAT, the Court held that the of claim under section 54EC had to be seen in the context of the provisions of section 115JB which was a self-contained code of assessment and since sub-section (5) of section 115JB opens the assessment to the application of all other provisions contained in the Act except if specifically barred by that section itself, the assessee was entitled to relief under section 54EC for purpose of computation of tax under section 115JB as the relief under section 54EC was not specifically barred therein.
CIT Vs. Metal & Chromium Plater P.Ltd. (2016) 97 CCH 0080 ChenHC (TCA No. 359 of 2008)

Stay of demand

288. Where the AO had raised a demand of Rs.16.90 crore as against a loss declared of Rs.10.23 crore and rejected the assessee application of stay of demand, the Court held that it would be justified to adjust 15 percent of the total demand against the pending refunds of the assessee as

against the claim of the respondent Revenue that the full amount of refund should be adjusted against the demand as a condition for stay.
Andrew Telecommunications India Pvt Ltd v Pr CIT – (2016) 97 CCH 0129 (Bom)

Unexplained income / expenses / investments

289. The Tribunal held that the fact that the stock is thinly traded and there is unusually high gain is not sufficient to treat the long-term capital gains as bogus when all the paper work is in order. It held that the revenue had to bring material on record to support its finding that there has been collusion / connivance between the broker and the assessee for the introduction of its unaccounted money.
Dolarrai Hemani vs. ITO (ITAT Kolkata)

290. The Tribunal held that voluntary contributions/donations received by assessee from various companies for industrial dispute settlement having a direct nexus with negotiation and settlement arrived at between parties could not be treated as professional income and thus was exempt under section 10(24) of the Act.
Mumbai Mazdoor Sabha vs. ACIT[2016] 75 taxmann.com 134 (Mumbai - Trib.)

291. The Tribunal held that though Section 133(6) notices were returned unserved and the assessee could not produce the alleged bogus hawala suppliers, the entire purchases could not be added as undisclosed income and the addition had to be restricted by estimating Gross Profit ratio on the purchases from the alleged accommodation entry providers.
Ashwin Purshotam Bajaj vs. ITO (ITAT Mumbai)

292. The Tribunal held that conjoint reading of proviso to section 68 and section 56(2)(viib) divulges that where a closely held company receives, inter alia, some amount as share premium whose genuineness is not proved by the assessee company or its source etc. is not proved by the shareholder to the satisfaction of the AO, then the entire amount including the fair market value of the shares, is chargeable to tax under section 68 of the Act and if however, the genuineness of the amount is proved and the shareholder also proves his source, then the hurdle of section 68 stands crossed and the share premium, to the extent stipulated, is chargeable to tax under section 56(2)(viib) of the Act.
Royal Rich Developers Pvt. Ltd vs. DCIT - *I.T.A. No. 1835/Mum/2014* (ITAT Mumbai)

293. Where the assessee had taken loan and the amount was credited to bank account, which was not denied by department and there was no allegation of any fraudulent dealing made by the department, the Court held that provisions of section 69 would not apply.
CIT v. Mahavir Sahkari Awas Samiti Ltd. (2016) 97 CCH 0113 AllHC (ITA No.312 of 2008)

294. Where the assessee could not produce documents relating to agricultural land received as gift from his mother, the Tribunal held that it was not denied by the revenue that parents of assessee were owning agricultural land and therefore, it could not be completely brushed aside that there was no creditworthiness of the donor to make such gift. It observed that both parents of assessee had passed away and therefore, assessee might not be able to establish fact that the parents were cultivating land during their life. Therefore, taking in account the totality of facts and circumstances, it held that the gift could not be held to be non-genuine. Accordingly, the addition made by treating the gift to be non-genuine was deleted.
Anandasayanam P. JPillai vs. CIT (2016) 48 CCH 0187 (Mum Trib) (ITA No. 4905/Mum/2016)

Miscellaneous

295. The Court dismissed the assessee's petition challenging the order of transfer of jurisdiction from Moradabad to Delhi (where the assessee had its corporate office) with a view to centralize the

survey proceedings conducted at the assessee's premises. It held that no prejudice had been caused by such transfer and dismissed the contention of the assessee that only cases of search and seizure and not survey could be centralized.
PMC Fincorp Ltd v Pr CIT – (2016) 97 CCH 0135 (All HC)

296. The Court held that where there was uncertainty regarding applicability of section 206C to cotton waste and it was always open to buyers to seek refund by filing appropriate returns, Writ Petition to restrain mill owners from whom petitioners purchased goods, to stop collecting TCS on purchase of cotton waste would not be maintainable.
Amarjeet Beeton v. CIT (TDS), Chandigarh [2016] 76 taxmann.com 160 (Punjab & Haryana) (CWP NO. 17623/2016)

297. The Court held amounts of advance tax paid prior to the declaration made under the Kar Vivad Samadhan Scheme could not be adjusted while determining the tax arrears under the scheme noting that Explanation to Section 2(m) of the Finance Act (No.2) ipso facto excluded amounts paid prior to the declaration and that the entire unpaid amounts were to be treated as tax arrears.
Inter Craft & ANR vs CIT & ANR (2016) 97 CCH 0146 DelHC(W.P.(C) 1706/1999, W.P.(C) 1707/1999)

298. The Tribunal held that if the assessee manages his transactions of sale and purchase of shares in the cash and future segments as a composite business, the transactions cannot be segregated to arrive at profit or loss in each segment separately and the provisions of the Income-tax Act cannot be interpreted to the disadvantage of the assessee and to segregate the transactions in cash and future segment which will be against the spirit of the taxation law.
J. M. Financial Services Ltd vs. JCIT (ITAT Mumbai)

299. Where the assessee, a co-operative society formed for the manufacturing of salt and its by-products, took over the manufacturing rights of its members (over their individual pieces of land) and installed necessary plants and machinery to manufacture salt by way of which it produced and sold salt, the Court, referring to the bye laws of the society, held that the AO was incorrect in taxing the entire amount of sale consideration in the hands of the society when the society had rightly and in accordance with its bye laws, contributed a certain amount towards the individual members (as consideration for the manufacturing rights obtained by it) via contribution to a Distribution Pool Fund Account and offered the balance income to tax. It held that the income of the society could not go beyond the scope of its bye laws.
CIT v. Nagarbail Salt-Owners Co-operative Society Ltd. [2016] 76 taxmann.com 2 (Karnataka) (IT Appeal No. 100067 Of 2015)

300. The Court held that Income Tax Department could not claim any precedence over the secured creditor in proceedings against property for the purpose of recovery of the income tax arrears in the light of the law laid in the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016.
Edhayam Frozen Foods Pvt. Ltd. Vs.Tax Recovery Officer & Anr.(2016) 97 CCH 0115 ChenHC (WP No. 27240 of 2016)